THE

Grand Abridgment

OF THE

LAW

Continued.

OR,

A Collection of the Principal Cases and

Points of the COMMON-LAW of *England*, contained in all the REPORTS Extant, From the First of *Elizabeth*, to this present time, by way of Common-Place.

A Work very usefull for all Students

and Practitioners in the LAW.

WITH

Two *Tables*, The one containing the

Names of the *Cases*: The other, Of the Matter of every of the said *Cases*.

Published in the Twelfth Year of the Reign of Our Soveraign Lord Charls *the Second, King of* England, Scotland, France, *and* Ireland, *&c.*

By *WILLIAM HUGHES* of *Grayes-Inne*, Esquire.

LONDON,

Printed by *J. S.* for *Henry Twyford*, *George Sawbridge*, *Thomas Dring*, and *John Place*, and are to be sold at their Shops in Vine-Court in the Middle-Temple, at the *Bible* on Ludgate-Hill, at the *George* in Fleet-street, and at *Furnivalls-Inne* Gate in *Holborn*, 1660.

The Grand Abridgment of the LAW

1543: 10

To the Right Honourable,

The Lord Chief Juſtice of his *Majeſtie's* Court of *Kings-Bench*;

The Lord Chief Juſtice of his *Majeſtie's* Court of *Common-Pleas*;

The Lord Chief Baron of his *Maieſtie's* Court of *Exchequer*;

And the reſt of the Honourable Juſtices of the ſaid ſeverall COURTS.

My Lords,

ALthough this work being onely a Collection of all the Principall Caſes and Points of Law, from the beginning of the Reign of the late Queen Elizabeth, *to this preſent Time, which have been Reported and publiſhed in the Books of the moſt Reverend and Learned Judges and Sages of the Law, (reduced under the general Titles of Law, and their Diviſions) needeth not any further approbation: Yet becauſe I well know, That the Cenſure of a Work of this nature, doth moſt properly belong unto your Lordſhips; the ſubject matter thereof ſuiting to your Lordſhips Judicious Gravities; Who are the Pillars, Supporters, and Diſpenſors of the* Common-Lawes *of the Kingdom; And becauſe I humbly conceive, That there is not a Caſe therein which your*

your Lordſhips do not know, or remember; And alſo be cauſe this Work was undertaken by me (at the Importunity of ſome Friends) for the good, eaſe, and benefit of all Practicers and Students of the Common-Lawes, *and other his Majeſty's Subjects. I have preſumed (in all humility) to tender it to your Honours. I ſhall not ſay any thing for the Work it ſelf, I hope it will ſpeak for it ſelf; and find ſuch acceptance with your Lordſhips, as will engage me to finiſh the whole work (if God give me life) in a ſhort time, ſome further part of it being now ready for the* Preſs. *In the mean time, deſiring that your Lordſhips would be pleaſed to accept of theſe my Pains and Endeavours for the propagating ſo neceſſary a Work, and to honour it with your Lordſhips Protections and Approbations, I preſent and ſubmit it to your Lordſhips moſt grave and judicious Cenſures.*

From my Study in *Grayes*-Inn, the 28. of *June*, 1660.

Your Lordſhips in all Duty and Service,

William Hughes.

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Errata.

Errata.

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Abatement

Abatement *of Writ.* See *Writ.*

1. IN an Action of Detinue of a Chain; It was found by a Speciall Verdict, That the Bishop of *Cork* in *Ireland*, granted Letters of Administration of goods in *Ireland*, here in *London*: and it was moved, Whether the Jury here might find things, or a matter done in Ireland, out of this Realm? Or whether the Writ brought here should abate? And it was holden clearly, *per totam Curiam*, That upon a general Issue here, the Jury might find a forreign matter as a thing done out of the Realm; and it should not abate the Writ, if it be not matter of substance, and not pleaded before. Pasch. 27 Eliz. in Co. B. *Carter* and *Crosis* Case. *Godbolt.* 34.

2. In all Actions where the thing in demand cannot be had, or the person against whom the thing is demanded, cannot yield the thing in demand, the Writ shall abate. As if a Writ of Annuity be brought by the Grantee of an Annuity for years, and the term expireth, the Writ shall abate. So where Tenant in speciall tail brings Waste, and, pendant his Writ, his Issue dyeth, the Writ shall abate. 30 Eliz. in B. R. *Wadt* and *Preestballs* Case. *Leo* 329.

3. A Writ of Waste was brought (by two Coparceners, and the heir of the third Coparcener, who were the daughters of Sir *Roger Lewknor*; the third Coparcener being dead, and her husband Tenant by the Curtesie;) against *Ford*; and the Writ was, *Quod fecit Vastum in terris, quas* Sir *Roger Lewknor* the Father, *cujus hæres ipse sunt demisit defendenti*; whereas it was said, It should have been, *Cujus hæredes de Corpore ipsa sunt*; and further the Writ was, *quod tenuerunt*, which (as was objected) shall be *tenuerunt* joyntly; whereas they were Tenants in Common: But notwithstanding these Exceptions, the Writ did not abate, but was holden good: and because there is no other form of Writ, then *quod tenuerunt*, the Writ was holden good: and so also the Writ was good; without naming the Tenant by the Curtesie. Quære that, 29 Eliz. in Co. B. Sir *Roger Lewknor's* and *Ford's* Case. *Godbolt.* 114.

4. The Father and the Son were bound in a Statute Merchant joyntly, The Defendant sued Execution; and their Lands severally were extended: They brought a Joynt *Audita Querela*; It was adjudged, That the Writ should abate; for they ought to have had several *Audita Querela*; because their grievance by the Execution was severall. Pasch. 38 Eliz. in Co. B. *Worsley* and *Charnock's* Case. *Owen* 106. See P. 36 Eliz. in B.R. *Curtise* and *Overscott* Case. *Owen.* ibid. acc.

5. A Writ of Errour was brought to reverse a Judgment in an Action of Trover and Conversion, at *Launceston* in Cornwall, upon a *Nihil dicit.* The Errour assigned was, That the Record was returned by the Mayor, Aldermen, and Deputy-Recorder. Whereas the Writ of Errour was to return a Record before the Mayor, Aldermen, and Recorder. The Writ of Errour was abated by Judgment of the Court. Hill. 1649. *Spry* and *Mills* Case. *Styles.* 203.

6. If a Writ of Covenant to levy a Fine be directed to *A.* Sheriff of the County of *B.* whereas the said *A.* the Sheriff is one of Defforceants to the Fine; the Writ is abateable: although it be but a summons, and the Sheriff may summon him; but in such case, If the Writ be directed to the Coroners, the same is good, and shall stand good. Trin. 8 Car. Rott. 1310. B. R. *Smithier* and Sir *Rich. Danes* Case, *Cro.* 1. Part. 300.

7. A Formedon was brought in the Common-Pleas, and a Verdict found, and Judgment given against the Plaintiff for a fault in the Writ; and he brought a Writ of Errour in B. R. and it was said by *Popham*, Chief Justice, If there be no Writ, It is not holpen by the Statute of 18 Eliz. but a Writ insufficient in form, and sufficient in matter, is holpen by the said Statute. M. 31 Eliz. *Downall* and *Catesbyes* Case. *Goldesbr.* 126.

8. A *Scire facias* upon a Recognisance against *M.* as Terr-Tenant; the Defendant pleaded, That *B.* was seized in Fee, of three Acres of the Land not named in the Writ; and so prayed, the Writ might abate. The Jury found, That *B.* and *J. S.* were Joynt-Tenants of the three Acres; It was holden, That the Writ should not abate. Trinit. 30 Eliz. The Lady *Grisham* and *Man's* Case. *Goldesbr.* 160.

9. The Earl *Rivers* was arrested at the Suit of *More* by a Bill of Middlesex in a Plea of Debt; and being not able to put in bayl, he was committed to the Custody of the Marshall of the Mar-

 shalsie

ſhalſie of the Upper-Bench. The Earl brought his *Habeas Corpus*, and pleaded his Priviledge of Peerage: and that he ought not to be arreſted; and prayes the Writ might be abated. And upon Demurrer it was holden by the Juſtices, He ought to have prayed, That the Writ might be abated before he was turned over to the Marſhall; but now it was too late to abate the Writ; and any body that had cauſe of Action, might now declare againſt him. Trinit. 1649. B. R. *More* and the Earl *Rivers* Caſe. *Styles* 222.

10. A Writ of Errour was brought to reverſe a Judgment given in a Writ of Dower: and the Writ of Errour was returnable *Coram cuſtodibus Libertatis, &c. apud Weſtm.* whereas it ought to have been *Coram Cuſtodibus ubicunq;* for they are not fixed at Weſtm. Quære, If the Writ of Errour ſhall abate; for the Court doubted of it, and it was not adjudged. Mich. 1650. B. R. *Fairfax* and *Fairfax* Caſe. *Styles.* 236.

11. Error brought to Reverſe a Judgment in an Inferiour Court; The Error aſſigned was, That the Judgment was *Quod recuperare debent*, where it ought to be *recuperare debet*; ſo there is no Judgment given, and ſo no Writ of Error lyes; the Writ was abated, *Paſc.* 1651. Rott. 211. B. R. *Shedlock*, and *Pa Peres* Caſe. *Styles* 265.

12. Treſpaſſe, *Quare filiam et heredem rapuit et maritavit*; and the Writ doth not ſay, *cujus maritagium ad ipſum pertinet*; and for that cauſe, I was prayed the Writ might Abate; But adjudged the Writ was good; for if it may be either wayes, as the Writ is, or with the other words, *cujus*, &c. for of right the Father ought to have the Marriage of his Son. M. 1651. B. R. *Wood* and *Topham's* Caſe. *Styles* 303.

13. No Appeal ſhall be abated if the Appealor declare in certain: 1. The Fact. 2. In what place of the body. 3. The year. 4. The Day. 5. The Hour. 6. The time of the thing. 7. The Town or place where the Deed was done. 8. With what weapon he was ſlain; but if all theſe be not certainly expreſſed in the Declaration, then there can be no proceeding upon the Appeal, but the Appeal ſhall be abated; And therefore where the hour is not certainly expreſſed, but is ſaid to be *circa horam undecimam, ante meridiem ejuſdem diei*; and *circa horam predictam*; an appeal of Murder was Abated. And ſo an Appeal ſhall be abated for falſe Latine, Omiſſion, or other matter of Form, *in favorem vitæ*. See *Egerton*, and *Morgan's* Caſe. M. 8. Jac. B. R. Botſtr. part. 1. from fol. 69. to fol. 84. where divers Caſes are mentioned: for what cauſes an Appeal ſhall Abate, and for what not.

14. The diſcontinuee of a Meſſuage had other Lands by good Title adjoyning to it; and abated the Meſſuage, and built another which was larger, ſo as part of it extended upon his own land, to which he had good Title; The heir brought a *Sur Cui in vita*, and demanded the houſe by the name of a meſſuage, whereas part was built upon the Land to which he had no right, and ſo found by Verdict: It was moved that the Writ ſhould abate, for if the defendant ſhall have Judgment according to his Writ, it ſhould be *Quod recuperet Meſſuagium*; and that would be erronious, for it appeareth that the Defendant hath not Title to part of it; But the Writ was awarded to be good, and a ſpeciall Judgment given, viz. That *Querens recuperet Meſſuagium predict.* viz. ſo many feet in length, and ſo many in breadth, according as it was found by the Verdict. *Trin.* 31. Eliz. C. B. *Frayes* and *Allens* Caſe, *Leon.* 152.

15. A. makes B. his Executor, and dyes, B. makes C. his Executor, and dyes: If C. as Executor to B. brings an Action of Debt, for a Debt due to A. the firſt Teſtatour, the Writ ſhall abate. Trinit. 32. Eliz. C. B. *Ivory* and *Fryes* Caſe. *Leon.* 155.

16. Husband and Wife, were Tenants for life, their Remainder in Fee to an Infant: and then all three bring a Writ of Error to reverſe the Fine; the Writ ſhall not abate, but ſtand good, and the Fine ſhall be Reverſed as to the Infant onely. *Leon.* 1. part. Mich. 31. Eliz. in B. R. 137.

17. Husband and Wife brought an Aſſize of Freſh-force againſt A. B. and C. his Wife, and 11. others, the Defendants appeared, and pleaded by Attorney, and pleaded in abatement of the Writ, that there were never ſuch perſon, C. Wife of B. in *rerum natura*, as is ſuppoſed by the Plaint; upon which the Plaintiff did demur; and it was adjudged that the Plea did not abate, the Plaint againſt all the Defendants; but againſt that party onely, and that the Plaint did ſtand good againſt the other defendants. See *Pollard* and *Jekells* Caſe. *Plowden* 9.

Where the Writ ſhall abate by Death of one of the parties, Plaintiff or Defendant; where not.

1. AN Attaint was brought againſt the Jurors, upon a Verdict againſt *Ingrove*, given in an Aſſize; and depending the Writ, *Ingrave* dyed; and yet it was adjudged, That the Writ ſhould not abate. 3 *Ma. Dyer.* 131. *Heydon's* Caſe.

2. In a Replevin; the Parties were at Iſſue; which was found for the Plaintiff: It was moved by

by the Defendants Counſel, That after the laſt Continuance, one of the Defendants dyed; and the Plaintiff prayed his Judgment notwithſtanding his death. The opinion of the Court was, That the Writ ſhould not abate: and Judgment was entred for the Plaintiff, 2 Eliz. *Dyer.* 175. *Sackvil's* Caſe.

3. The next Avoidance of the Church is granted to two; and they bring a *Quare impedit* upon a diſturbance; and hanging the Writ, one of them dyeth. It was holden the Writ ſhould abate. 11 Eliz. *Dyer.* 279.

4. In a Writ of Entry upon a Diſſeiſin, he in the reverſion was received upon the default of Tenant for life; and pleaded to Iſſue; which at the Aſſizes was found for him; and before the day in Bank the Tenant for life dyed. 9 Eliz. *Dyer.* 258. in the Earl of *Suſſex* Caſe it is a Quære, if the Writ ſhall abate.

5. In an Original Writ, the death of one of the Parties doth abate the Writ. As if the Huſband & Wife bring a *Scire Facias* upon a Judgment in an Action of debt, and pendant the Writ, the Husband dyeth, the *Scire facias* ſhall abate; for it is now in the nature of an Original Writ, to revive the firſt Judgment. *Norton* and *Sym's* Caſe. 11 Jac. in Co. B. *Brownlow.* 64. b.

6. A Writ of Errour was brought againſt two, upon a Recovery in a *Precipe quod reddat*; and one of them dyed: the Queſtion was, Whether the Writ ſhould abate? It was ſaid, That a Writ of Errour was but a Commiſſion to Examine the Record, and the party ſhould recover nothing thereby: and therefore the Writ ſhould not abate. It was ſaid by the Juſtices, That if the Recovery were in a perſonal Action, the Writ, to reverſe the Judgment, ſhould not abate: but contrary, if it were in a reall action, for the Writ ſhould abate; for that he ſhould be reſtored to the Land. 29 Eliz. in B. R. *Godbold.* 66. and *ibid.* 68. Sir *Edward Hobbie's* Caſe.

7. Debt was brought againſt three Executors, and one of the Executors dyed pendant the Writ; It was ſaid, That here the plural number remains, *viz.* two Executors; and it is not like where the Writ is brought againſt two Executors, and one dyeth. But the whole Court was clear of opinion, That by the death of one of the Executors, the Writ ſhould abate. Mich. 29 Eliz. C. B. *Knight's* Caſe. *Leon.* 44.

8. If one be condemned in an Action upon the Caſe; or Treſpaſs, upon *Nihil dicit*, or Demurrer, and a Writ of Enquiry of Damages iſſueth; and before the Return of it, the Defendant dyeth; By *Dyer* and *Manwood* the Writ ſhould not at all abate. And in a Writ of Accompt, If the Defendant account, and be found in Arrearages, and dyeth, the Writ ſhall not abate; but the Executors ſhall be charged: and yet an Account doth not lye againſt them. 19 Eliz. in C. B. *Leon.* 263.

9. A Writ of Right of Advowſon was brought againſt three, as Coparceners; and after the Darrein Continuance, and before the Terminer, one of them dyed; which was pleaded in abatement of the Writ. It was adjudged, That the Writ ſhould abate: For all the Court agreed, That were they Coparceners or Joynts, that by the death of one of them, the Writ ſhould abate, being in a Real Action: and it is not like the Caſe of an Aſſiſe of *Novel Diſſeiſin.* Or Aſſiſe of Mortdanceſtor, where the death of one of the Tenants ſhall not abate the Writ as long as there is a Tenant living; for that every of them is Tenant of the Free-hold. And upon a Writ of Errour brought, the Judgment was affirmed. Hill. 15 Car. in B. R. The King, and *Byden*, and others Caſe. *Cro.* 1. Part. 415. and 423. See *Goldſc.* 98. acc. 30 Eliz.

10. An Action was brought againſt the Huſband, and *Eliz.* his Wife, as daughter and heir of Sir *Thomas Watſon*; and pendant the Writ the husband dyed; and becauſe the writ is brought againſt the wife as heir; where the Land is Aſſets, in which the husband had nothing. The opinion of *Hobart*, Chief Juſtice, was, That the Writ ſhould not abate. Mich. 22 Jac. in Co. B. *Holman* and Sir *Tho. Pope's* Caſe. *Winch.* 102.

11. In an *Ejectione Firmæ* againſt two, after Verdict found for the Plaintiff, and before Judgment given, one of the Defendants dyed; yet adjudged the Writ ſhould ſtand good againſt the other. M. 30 Eliz. *Cleyton* and *Lawſell's* Caſe. *Gold.* 80.

12. In Treſpaſſe *Quare clauſum fregit* againſt Husband and Wife, after Verdict found for the Plaintiff, the husband dyed betwixt the day of *Niſi Prius*, and the day in Bank. It was holden by the Court, That although Husband and Wife be one perſon in Law; yet by the death of the Husband, the Writ ſhall abate. But yet it was holden, That the Wife ſurviving ſhould be chargeable for the Treſpaſſe. 14 Car. in B. R. Cro. 1. Part. 366.

13. An Action upon the Caſe for Slanderous words, was brought by husband and wife; againſt the husband and wife: the Defendants husband dyed, the wife took another husband depending the Writ; the Writ was abated *per Curiam.* 24 Car. B. R. *White*, and *Whorewoods* Caſe. *Styles.* 138.

14. Errour brought upon a Judgment in the Kings-Bench; and one of the parties dyed, hanging the Writ: It is an abatement of the Writ, and

ſhalſie of the Upper-Bench. The Earl brought his *Habeas Corpus*, and pleaded his Priviledge of Peerage: and that he ought not to be arreſted; and prayes the Writ might be abated. And upon Demurrer it was holden by the Juſtices, He ought to have prayed, That the Writ might be abated before he was turned over to the Marſhall; but now it was too late to abate the Writ; and any body that had cauſe of Action, might now declare againſt him. Trinit. 1649. B. R. *More* and the Earl *Rivers* Caſe. *Styles* 222.

10. A Writ of Errour was brought to reverſe a Judgment given in a Writ of Dower: and the Writ of Errour was returnable *Coram cuſtodibus Libertatis, &c. apud Weſtm.* whereas it ought to have been *Coram Cuſtodibus ubicunq;* for they are not fixed at Weſtm. Quære, If the Writ of Errour ſhall abate; for the Court doubted of it, and it was not adjudged. Mich. 1650. B. R. *Fairfax* and *Fairfax* Caſe. *Styles.* 236.

11. Error brought to Reverſe a Judgment in an Inferiour Court; The Error aſſigned was, That the Judgment was *Quod recuperare debent*, where it ought to be *recuperare debet*; ſo there is no Judgment given, and ſo no Writ of Error lyes; the Writ was abated, *Paſc.* 1651. Rott. 211. B. R. *Shedlock*, and *Pa Peres* Caſe. *Styles* 265.

12. Treſpaſſe, *Quare filiam et heredem rapuit et maritavit*; and the Writ doth not ſay, *cujus maritagium ad ipſum pertinet*; and for that cauſe, I was prayed the Writ might Abate; But adjudged the Writ was good; for if it may be either wayes, as the Writ is, or with the other words, *cujus*, &c. for of right the Father ought to have the Marriage of his Son. M. 1651. B. R. *Wood* and *Topham's* Caſe. *Styles* 303.

13. No Appeal ſhall be abated if the Appealor declare in certain: 1. The Fact. 2. In what place of the body. 3. The year. 4. The Day. 5. The Hour. 6. The time of the thing. 7. The Town or place where the Deed was done. 8. With what weapon he was ſlain; but if all theſe be not certainly expreſſed in the Declaration, then there can be no proceeding upon the Appeal, but the Appeal ſhall be abated; And therefore where the hour is not certainly expreſſed, but is ſaid to be *Circa horam undecimam, ante meridiem ejuſdem diei*; and *circa horam predictam*; an appeal of Murder was Abated. And ſo an Appeal ſhall be abated for falſe Latine, Omiſſion, or other matter of Form, *in favorem vitæ*. See *Egerton*, and *Morgan's* Caſe. M. 8. Jac. B. R. Botſtr. part. 1. from fol. 69. to fol. 84. where divers Caſes are mentioned: for what cauſes an Appeal ſhall Abate, and for what not.

14. The diſcontinuee of a Meſſuage had other Lands by good Title adjoyning to it; and abated the Meſſuage, and built another which was larger, ſo as part of it extended upon his own land, to which he had good Title; The heir brought a *Sur Cui in vita*, and demanded the houſe by the name of a meſſuage, whereas part was built upon the Land to which he had no right, and ſo found by Verdict: It was moved that the Writ ſhould abate, for if the defendant ſhall have Judgment according to his Writ, it ſhould be *Quod recuperet Meſſuagium*; and that would be erronious, for it appeareth that the Defendant hath not Title to part of it; But the Writ was awarded to be good, and a ſpeciall Judgment given, viz. That *Querens recuperet Meſſuagium predict.* viz. ſo many feet in length, and ſo many in breadth, according as it was found by the Verdict. *Trin.* 31. Eliz. C. B. *Frayes* and *Allens* Caſe, *Leon.* 152.

15. A. makes B. his Executor, and dyes, B. makes C. his Executor, and dyes: If C. as Executor to B. brings an Action of Debt, for a Debt due to A. the firſt Teſtatour, the Writ ſhall abate. Trinit. 32. Eliz. C. B. *Ivory* and *Fryes* Caſe. *Leon.* 155.

16. Husband and Wife, were Tenants for life, their Remainder in Fee to an Infant: and then all three bring a Writ of Error to reverſe the Fine; the Writ ſhall not abate, but ſtand good, and the Fine ſhall be Reverſed as to the Infant onely. *Leon.* 1. part. Mich. 31. Eliz. in B. R. 137.

17. Husband and Wife brought an Aſſize of Freſh-force againſt A. B. and C. his Wife, and 11. others, the Defendants appeared, and pleaded by Attorney, and pleaded in abatement of the Writ, that there were never ſuch perſon, C. Wife of B. in *rerum natura*, as is ſuppoſed by the Plaint; upon which the Plaintiff did demur; and it was adjudged that the Plea did not abate, the Plaint againſt all the Defendants; but againſt that party onely, and that the Plaint did ſtand good againſt the other defendants. See *Pollard* and *Jekells* Caſe. *Plowden* 9.

Where the Writ ſhall abate by Death of one of the parties, Plaintiff or Defendant; where not.

1. AN Attaint was brought againſt the Jurors, upon a Verdict againſt *Ibgrove*, given in an Aſſize; and depending the Writ, *Ibgrave* dyed; and yet it was adjudged, That the Writ ſhould not abate. 3 *Ma. Dyer.* 131. *Heydon's* Caſe.

2. In a Replevin; the Parties were at Iſſue; which was found for the Plaintiff: It was moved by

by the Defendants Counſel, That after the laſt Continuance, one of the Defendants dyed; and the Plaintiff prayed his Judgment notwithſtanding his death. The opinion of the Court was, That the Writ ſhould not abate: and Judgment was entred for the Plaintiff, 2 Eliz. *Dyer.* 175. *Sackvil's* Caſe.

3. The next Avoidance of the Church is granted to two; and they bring a *Quare Impedit* upon a diſturbance; and hanging the Writ, one of them dyeth. It was holden the Writ ſhould abate. 11 Eliz, *Dyer.* 279.

4. In a Writ of Entry upon a Diſſeiſin, he in the reverſion was received upon the default of Tenant for life; and pleaded to Iſſue; which at the Aſſizes was found for him; and before the day in Bank the Tenant for life dyed. 9 Eliz. *Dyer.* 258. in the Earl of *Suſſex* Caſe it is a Quære, if the Writ ſhall abate.

5. In an Original Writ, the death of one of the Parties doth abate the Writ. As if the Huſband & Wife bring a *Scire Facias* upon a Judgment in an Action of debt, and pendant the Writ, the Husband dyeth, the *Scire facias* ſhall abate; for it is now in the nature of an Original Writ, to revive the firſt Judgment. *Norton* and *Sym's* Caſe. 11 Jac. in Co. B. *Brownlow.* 64. b.

6. A Writ of Errour was brought againſt two, upon a Recovery in a *Precipe quod reddat*; and one of them dyed: the Queſtion was, Whether the Writ ſhould abate? It was ſaid, That a Writ of Errour was but a Commiſſion to Examine the Record, and the party ſhould recover nothing thereby: and therefore the Writ ſhould not abate. It was ſaid by the Juſtices, That if the Recovery were in a perſonal Action, the Writ, to reverſe the Judgment, ſhould not abate: but contrary, if it were in a reall action, for the Writ ſhould abate; for that he ſhould be reſtored to the Land. 29 Eliz. in B. R. *Godbold.* 66. and *ibid.* 68. Sir *Edward Hobbie's* Caſe.

7. Debt was brought againſt three Executors, and one of the Executors dyed pendant the Writ; It was ſaid, That here the plural number remains, *viz.* two Executors; and it is not like where the Writ is brought againſt two Executors, and one dyeth. But the whole Court was clear of opinion, That by the death of one of the Executors, the Writ ſhould abate. Mich. 29 Eliz. C. B. *Knight's* Caſe. *Leon.* 44.

8. If one be condemned in an Action upon the Caſe; or Treſpaſs, upon *Nihil dicit*, or Demurrer, and a Writ of Enquiry of Damages iſſueth; and before the Return of it, the Defendant dyeth; By *Dyer* and *Manwood* the Writ ſhould not at all abate. And in a Writ of Accompt, If the Defendant account, and be found in Arrearages, and dyeth, the Writ ſhall not abate; but the Executors ſhall be charged: and yet an Account doth not lye againſt them. 19 Eliz. in C. B. *Leon.* 263.

9. A Writ of Right of Advowſon was brought againſt three, as Coparceners; and after the Darrein Continuance, and before the Terminer, one of them dyed; which was pleaded in abatement of the Writ. It was adjudged, That the Writ ſhould abate: For all the Court agreed, That were they Coparceners or Joynts, that by the death of one of them, the Writ ſhould abate, being in a Real Action: and it is not like the Caſe of an Aſſiſe of *Novel Diſſeiſin.* Or Aſſiſe of Mortdanceſtor, where the death of one of the Tenants ſhall not abate the Writ as long as there is a Tenant living; for that every of them is Tenant of the Free-hold. And upon a Writ of Errour brought, the Judgment was affirmed. Hill. 15 Car. in B. R. The King, and *Byden*, and others Caſe. *Cro.* 1. Part. 415. and 423. See *Goldſc.* 98. acc. 30 Eliz.

10. An Action was brought againſt the Huſband, and *Eliz.* his Wife, as daughter and heir of Sir *Thomas Watſon*; and pendant the Writ the husband dyed; and becauſe the writ is brought againſt the wife as heir; where the Land is Aſſets, in which the husband had nothing. The opinion of *Hobart*, Chief Juſtice, was, That the Writ ſhould not abate. Mich. 22 Jac. in Co. B. *Holman* and Sir *Tho. Pope's* Caſe. *Winch.* 102.

11. In an *Ejectione Firmæ* againſt two, after Verdict found for the Plaintiff, and before Judgment given, one of the Defendants dyed; yet adjudged the Writ ſhould ſtand good againſt the other. M. 30 Eliz. *Cleyton* and *Lawſell's* Caſe. *Gold.* 80.

12. In Treſpaſſe *Quare clauſum fregit* againſt Husband and Wife, after Verdict found for the Plaintiff, the husband dyed betwixt the day of *Niſi Prius*, and the day in Bank. It was holden by the Court, That although Husband and Wife be one perſon in Law; yet by the death of the Husband, the Writ ſhall abate. But yet it was holden, That the Wife ſurviving ſhould be chargeable for the Treſpaſſe. 14 Car. in B. R. Cro. 1. Part. 366.

13. An Action upon the Caſe for ſlanderous words, was brought by husband and wife; againſt the husband and wife: the Defendants husband dyed, the wife took another husband depending the Writ; the Writ was abated *per Curiam.* 24 Car. B. R. *White*, and *Whorewoods* Caſe. *Styles.* 138.

14. Errour brought upon a Judgment in the Kings-Bench; and one of the parties dyed, hanging the Writ: It is an abatement of the Writ, and

he ought to have a new Writ. Pasc. 30 Eliz. *Goldesb.* 98.

15. *Hughson* brought Debt against *B.* as Administrator of *F.* and declared upon a simple Contract made by the Intestate; the Defendant pleaded *plene administravit*; which was found against him. The Court *ex Officio* abated the Writ, because an Executor or Administrator cannot be charged upon a simple Contract. P. 30 Eliz. C. B. Rott. 421. *Hughsons* Case. *Goldesbr.* 107. See C. 9. Part 86. *Pinchins* Case adjudged, That an Action upon the Case will lye against Executors, for a debt due by the Testator upon a simple Contract.

16. If a Writ of Covenant be brought against three, and one of them dyes, the Writ is abated onely against him; but is not abated to the rest, but onely abateable. Trinit. 1654. B. R. *Jones* and *Graves* Case. *Styles.* 421.

17. In an Action of Account, if the Plaintiff dye before the second Judgment, the Writ shall abate, and no *Scire facias* lyeth for the Executor, if the Defendant dye before the second Judgment. *Brownlow.* 25. Ac.

18. If Two be adjudged to Account, and process issueth out against them, and one of them appears, and the other is Outlawed; he who appears shall account alone: For the Writ is determined, and shall abate as against the other. *Brownlow.* 25.

19. A Recovered against *B.* 300 l. debt in Co. *B.* and made *E.* his Executrix, who dyed before Execution Intestate: took administration of the goods of *A.* and married *J. D.* the Husband and Wife brought three several *Scire facias* against the Terr-Tenants in severall Counties; which Writs were returned; and before any Execution done, the Husband dyed: The Question was, Whether all the Writs should abate as well against all the Terr-Tenants; as against such of the Terr-Tenants who appeared, and Judgment was against them? And the better opinion of the Court was, The Writ should abate against them all. But Quære; for it was not Resolved. Trin. 17 Jac. Co. B. *Whittingham*, and the Terr-Tenants of the Earl of *Darbyes* Case. *Hob.* 287.

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3. *Where the Writ shall abate, for false Latine, Misnosmer of the Town or Person, omission of matter, surplusage, or other default of form; and where not.*

1. A Note was delivered to the Cursitor, to make an Original against *J. S.* Knight; and he made the Original against *J. S.* Gent. and in the Exigent, Count; and other Process he was named Knight. It was adjudged, That by the Common-Law, an Original was not amendable in the case of a common person; but now by the Statutes of 8 H. 6. and 18 Eliz. such a Misprision of the Clerk is amendable. And there it was holden, That if a Writ be false Latine; or if it be defective for want of a Letter or Syllable; as *Hos bre.* for *Hoc Brevet*, the Writ shall abate: But if a word which is not Latine, be written for a Latine word, the Writ shall not abate, but shall be amended: as, *Imaginavit*, for *Imaginatus est.* 8 Jac. *Blackamors* Case. C. 8. part.

2. A Writ was *Ad respondendum* J. S. *et Fidei uxoricius*, and the Defendant pleaded in abatement of the Writ, because the Wifes name was *Faith*, in English: and yet adjudged, the Writ should not abate. And *Rodes*, Justice, said, He knew a woman who was called *Troth*, in English; and in Latine she was called *Trothia*; and good. Pasc. 30 Eliz. in C. B. *Goldesb.* 86.

3. If a man brings a Formedon in the Reverter, or Remainder, as heir, if there be Omission of an Eldest Son which survived his Father in the Pedegree on the part of the Donor, or of him in the Remainder, it shall abate the Writ: But the Demandant needs not to name any of the Issues of the Donee in the Clause, *Qua post mortem*; but to say generally, That *post mortem* of the Donee, *ad ipsum reverti debet*, because the Donee dyed without Issue, because the Demandant is a stranger to the Pedigree of the Donee; and therefore such an Omission shall not abate his Writ. See *Blackamors* Case. C. 8. Part. 88.

4. An Action was laid in *Launceston*; and the Writ *de venire facias*, was awarded *de Vicineto de Launceston.* And it was holden, That the *Venire* was mis-awarded, and should abate: And so was it adjudged, 10 Jac. in *Procter* and *Cliffords* Case; Where the *Venire facias* was, *de Vicineto Civitatis Coventrie*; where it should have been, *de Civitate Coventrie.* 3 Car. in B. R. *Godbolt.* 382.

5. A Writ of Errour was brought, to reverse a Judgment given at *York*: and the Errour was, That the *Venire facias* was *de ballino suo*; whereas it ought to be *de corpore Comitatus*: and for that cause, the *Venire facias* was adjudged not good. Mich. 22 Car. *Dickenson* and *Prestons* Case. *Styles.* 7.

6. If a Writ of Trespasse be brought against divers persons, if it abate for default against one, it shall abate against all; but if it be for matter of fact onely, as *Misnosmer* of one Defendant, it shall abate against him onely: so omission, or addition, which doth not alter the form of the Writ, shall not abate the Writ; but the Writ shall be amended.

amended. See *Blackamors* Caſe. C. 8. Part. acc.

7. A Writ of Errour ſhall not abate for falſe Latine, and an Omiſſion or Addition of the party therein, is not material, adjudged. Mich. 11 Jac. in Sir *Chriſtopher Heydon* and *Godſoles* Caſe. *Bulſt.* 2. Part. 165.

8. Husband and Wife, Joyntts of a Mannor, and to the heirs of the body of the husband, the remainder to *B.* in tail; a common Recovery is had againſt the husband alone, in the life of the wife with voucher; he in the remainder is attainted of Treaſon; the husband dyeth without Iſſue of his body; the wife dyeth: It was adjudged, That although as well the Husband, as the Vouchee, might have abated the Writ, becauſe the Wife was joyntly ſeized, and not named in the Writ: Yet when the Vouchee enters generally into the Warranty, he admits the Writ good, and ſo the Recovery ſhall be a good barr for one moyety; and ſhall not abate for the whole. 25 Eliz. C. 3. part. 1. The Marquiſs of *Winchester*'s Caſe.

9. Where a Writ abates by the act or default of the Demandant himſelf, as Miſnoſmer of the Tenant, or of the Town; there the Demandant ſhall not have a new Writ by Journeys accompts, but where it abates for Miſpriſion of the Clerk, falſe Latine, &c. or other matter of Form, there the demandant ſhall have a new Writ. C. 6. Part. 45 Eliz. *Spencer*'s Caſe. in Co. B. 9.

10. If the Plaintiff in a *Quare Impedit* after appearance, be Nonſuit, diſcontinue; or be made a Knight; this is his own act, and ſhall abate the Writ; and is peremptory: otherwiſe if it abate for want of Form, Miſnoſmer. 40 Eliz. Sir *Hugh Portman*'s Caſe. C. 7. Part. 27. See *Blackamor*'s Caſe. acc.

11. *Dethick* was by the Kings Letters Patents created King of Armis, and that he ſhould be called *Principalis Rex Armorum*: and becauſe the ſame was a name of Dignity, and by his Juſtallation was parcel of his Name; becauſe he was not named in the Writ by his Name according to his Office and the Kings Letters Patents; the Writ was abated. Hill. 29 Eliz. *Clarentius* and *Dethicks* Caſe. *Owen.* 61.

12. A Writ of Covenant to levy a Fine bare Teſte the 24th of April; returnable 15. Paſch. which in truth was 15th of April; yet the Writ did not abate, but was amended: becauſe a Common Recovery was a Common Aſſurance, and had by conſent of parties; but ſuch defects in other Writs ſhall abate the Writ. 41 Eliz. B.R. *Gage*'s Caſe. C. 6. Part.

13. A *Quare Impedit* was brought, and the Writ was *ſuam ſpectat donationem*: and the word (*Ad*) was omitted; the Writ did not abate, but was amended. Hill. 30 Eliz. *Brockſby*'s Caſe *Goldeſb.* 78.

14. A *Quod Ei Deforceat* was brought in *Wales* in the Nature of a Writ of Right, of 20 Acres of *Pampna, et Erueria*; It was moved, That the Writ ſhould abate, becauſe of the generality, and the particular Quantity and nature of them is not ſet forth in the Writ, But it was adjudged, the Writ was well enough; for that *Pampna* and *Bruera*, are not intended Lands of ſeverall ſorts, but of one and the ſame Land. Hill. 5 Car. *Griffith* and *Jenkins* Caſe. *Cro.* 1. Part. 128.

15. *Quare Impedit* brought againſt the Patron *Richard* Biſhop of *Lincoln*, Ordinary and Incumbant; the Incumbant pleaded, That at the day of the Writ brought, there was no ſuch *Richard* Biſhop of *Lincola* in *rerum natura*. It was holden a good Plea, to abate the Writ. Trinit. 16 Jac. in Co. B. *Coppledick* and *Tanſeys* Caſe. *Hutton.* 31.

16. A man hath Title to preſent to an Avoydance of the Church in the right of his Wife: The Husband and Wife bring a *Quare Impedit*; and after Iſſue joyned, and before the *Venire facias* returned to try the Iſſue, the Wife dyeth: It was holden, The *Quare Impedit* did not abate, nor the *Venire*, by the death of the wife; becauſe the Avoidance was a Chattel veſted in the husband in the life of his wife. 22 Jac. in C. B. *Blunt* and *Hutchinſon*'s Caſe. *Winch.* 73.

17. A man brought Treſpaſſe againſt a Parſon, for taking away his Tythe-Corn, which he claimed as a Portion in the Right of his Wife; and layed the Treſpaſſe to be done the 27th of Aug. 29 Eliz. And it appeared upon the Evidence, That the Plaintiff delivered to the Defendant a Licenſe to be married, dated 28. Aug. 29 Eliz. and that he was married the ſame day; It was adjudged, That the matter ſhewed did not abate the Writ; becauſe it appears, that at the time of the Treſpaſſe aſſigned, the Plaintiff had no title to the Tythe-Corn. Paſc. 30 Eliz. B. R. *Pawlet* and *Lawrence*'s Caſe. *Leon.* 104.

18. A *Quare Impedit* was brought againſt the Biſhop of *Bath* and *Wells*, and *T. N.* Clerk, for diſturbing him to preſent to the Viccarage of *W.* It was Reſolved, That the Writ ſhould abate, becauſe the Patron was not named in the Writ, for ſo the Patronage might be recovered againſt him that had nothing in it; and it is no reaſon the Patron ſhould be outſted of his Patronage, when he is no party to the Writ. 31 Eliz. C. 7. Part. *Hal*'s Caſe. 25.

19. If the Plaintiff in a *Quare Impedit* after appearance, be Nonſuit or diſcontinue, or be made a Knight, pendant the Writ; the Writ ſhall abate, becauſe it is his own Act: Otherwiſe, if it

it abate for want of Form or Miſnoſmer, for that may be the default of the Clerk. 40 Eliz. Sir *Hugh Portman*'s Caſe. C. 7. Part. 27.

Where the Writ ſhall abate by the Demiſe of the King.

1. IF an Original Writ be purchaſed in the time of one King, and he dyeth before the Return of it; the Original is gone, and cannot be returned in the time of another King. But all proceſs made upon any Original depending in any Court of Record, may be executed and returned in the time of the new King, by the Statute of 1 Ed. 6. Cap. 7. 1 Eliz. *Dyer.* 165.

2. A Writ of Extent upon a Statute, was executed in the time of Queen *Mary*, returnable *Quind Martini*; before which, the Queen dyed; yet the Writ was returned, and a Liberate granted in the time of the new Queen. 4 Eliz. *Dyer.* 206.

3. All Suits depending in Inferiour Courts, are out of the Statute of 1 E. 6. Cap. 7. and if the King dyeth after an Information is preferred by him, all the proceedings are loſt; but the Information it ſelf, which being a Record, for the King, ſhall not abate. 1 Jacob. C. 7. Part. 29.

4. An Information was upon the Statute of 23 Eliz. for not coming to Church; by an Informer, *tam pro Domino Rege quam pro ſe ipſo*, the Defendant demurred upon the Declaration; and then the King dyed: It was adjudged, That the Action was not abated by the death of the King: for that the Action was at the Suit of the party, for he might be Non-ſuited; and when the Jury come again to deliver their Verdict, the King cannot diſcharge them and be Non-ſuit, and the King cannot diſcharge the Action. Trinit. 22 Car. Rott. 446. in B. R. *Farrington* and *Arrundel*'s Caſe. *Hutton.* 82.

Where the Writ ſhall abate of the Plaintiff's own ſhewing.

1. NOte. If the Plaintiff will in any Action diſcover to the Court, any thing whereby it may appear, that he had no cauſe of Action when he begun his Suit, his Writ ſhall abate. And therefore where the Plaintiff brought a *Quare Impedit* againſt the Biſhop of *York*, and A. C. for diſturbing him to preſent to the Church of L. which belonged to him; and the Biſhop pleaded, that J. S. the Incumbant dyed. 1 Janu. 12 Jac. and the Church remained void, and he preſented J.S. for Lapps; and claimed nothing but as Ordinary: and the Incumbant confeſſed the Plaintiffs Title, and pleaded the Collation of the Biſhop of him to the Church. The Plaintiff by his Replication ſhewed, That after the death of J. S. and before the firſt day of Jan. 12. *viz.* 29 May, 1615, he preſented J. D. to the Church, and the Biſhop refuſed him; and that afterwards the Biſhop did Collate A. C. to the Church: now upon his own ſhewing, he hath abated his Writ, becauſe the Action was brought before the cauſe of Action: and no diſturbance can be before an Action brought. Mich. 15 Jac. C. B. *Birkhead* and the Biſhop of York's Caſe. *Hob.* 197. 198. 199.

2. J. S. did Covenant with J. D. that he would ſatisfie him all ſuch ſums of money as his ſon the Plaintiffs Apprentice ſhould imbeſil from him, within three moneths after Requeſt; and the deed was within three moneths after Requeſt and due proof made, And in an Action of Covenant brought, and found for the Plaintiff. But becauſe the proof was to be made in a Court which was not done; It was adjudged, That the Action of Covenant brought before cauſe of Action was given, ſhould abate. Hill. 15 Jac. Co. B. Rott. 2001. *Crookhay* and *Woodward*'s Caſe. *Hob.* 217.

3. An Adminiſtrator brought an Action of Debt againſt J. S. and after Iſſue joyned, and found for the Plaintiff, It was moved, that the Action was brought 2. April. 16 Jac. and the Adminiſtration was in the Declaration ſaid to be the 11th of May after; and that being before any cauſe of action, the Writ was to be abated: and the Judgment was ſtayd, it being upon his own ſhewing. Trinit. 16 Jac. Rott. 843. C. B. *Birkford* and *Birkford*'s Caſe. *Hob.* 245.

Where the Writ ſhall abate for Variance; where not.

1. LAnds were given to *Eliz. Coxton*, and the heirs of her body, the remainder to *John Piſing* and his heirs; and in a Formedon in the Remainder: the Writ was, *Que poſt mortem pradict. Eliz. et Johan. Piſing: Johan. Freak, et*

et Mabel fil. et hered. Johan. Piſing remanere debent per formam doni, eo quod praedict. Eliz. obiit ſine herede de Corpore, &c. Whereas by the form of the Regiſter, it ought to be *Poſt mortem praedict. Eliz. & Johan. praſat. Johan. Freak et Mabell ut conſanguin. et hered. praedic. Johan. Piſing remanere debeo per formam*, &c. But it was holden, That the Writ ſhould not abate for ſuch variance, though it agree not with the Regiſter, in regard it is equivalent. *Freak* and *Bruford*'s Caſe. Hill. 11 Jac. Rott. 30. Co. B. *Hob.* 52. See Sir *Roger Lewknor*'s Caſe. Abatement of Writ. here. pl. 3. acc.

2. In Debt, the Plaintiff declared, That the Defendant ſtood bound to him in [Septingent. et quinquagint. libris, and upon Oyer, the words were [Septuagent. et Quinquagint libris]; and upon a Demurrer, adjudged, Such Variance no cauſe to abate the Writ. T. 44 Eliz. Rott. 1031. *Walter* and *Pigotts* Caſe. *Hob.* 116. See the like Caſe, where the Writ was *Octoginta*, and the Obligation was *Octinginta*; *Fitz-Hughes* Caſe. 3 & 4 Eliz. Rott. 1350. C. B. *Hob.* 19.

3. Treſpaſſe, againſt J. S. of Debt; and he brought Attaint, by the name of J. S. Knight; and notwithſtanding the Variance, the Writ was good; becauſe it is a new Original. 28 H. 8. *Dyer.* 25.

4. A Writ of Errour to remove a Record, was, [de loquela quæ fuit in Curia noſtra coram Juſticiariis noſtris per breve noſtrum;] whereas the Judgment was given in the time of King H. 8. the Writ did not abate, but was amended. 2 Ma. *Dy.* 105. See C. 8. Part. *Blackamors* Caſe. Acc.

5. A Writ of Errour was brought againſt B. upon Errour in a Writ of Covenant, where in the Writ of Covenant B. was named Aſſignee of C. and the Writ did not abate for the Variance, becauſe there is the full name of the Plaintiff. 19 Eliz. *Dyer.* 356.

6. Debt was brought by an Adminiſtrator 2 April, 16 Jac. and in the Plaintiffs Declaration, the Adminiſtration was ſaid to be granted the 11th of May after: the ſame did abate the Writ; Judgment was ſtayd. Tr. 16 Jac. Rott. 843. *Bickfords* Caſe. *Hob.* 245.

7. In Ejectione Firme, the Original bore date 24. Jan. 6 Car. returnable Craſtin. Purificationis. After Verdict found for the Plaintiff, and Judgment Entred, It was adjudged [per Curiam] That the Judgment was Erronious, becauſe the Original was taken out, before there was cauſe of Action, which is not helped by any Statute. Hill. 8 Car. rott. 243. *Johns* and *Staynes* Caſe. *Cro.* 1. Part. 198. & 205. See 34 Eliz. B. R. Co. 5. Part. 37. *Biſhops* Caſe, acc.

8. In an Action of Waſte, the Plaintiff aſſigned the Waſte to be in the Towns of Burginham, Flaxbridge and Appleby: and in his Declaration, he aſſigned alſo Waſte to be in a Town called Langton; which was not named in the Writ: and it was adjudged, That the aſſignment of Waſte in a Town not mentioned in the Writ, was a fault incurable; and therefore the Writ was abated for the Variance from the Original. 10 Jac. The Earl of Cumberland's Caſe. *Hob.* 38.

9. An Action of Beating his Servant, by reaſon whereof he loſt his Service; and declares, That the Battery was done 19. Jan. 16 Jac. and that he loſt his Service, viz. for the ſpace of ſix moneths then next following. It was objected, That the Original did bear date before the end of the ſix moneths; and therefore the Writ was to be abated. But it was adjudged for the Plaintiff; and the Writ did not abate; for that in the Original was more then was needfull. Tri. 17 Jac. B. R. rott. 944. *Hunt* and *Lawrings* Caſe. *Hob.* 284.

10. In Treſpaſſe upon the Caſe; the Writ was *ad damnum* 40 l. and the Declaration was 60 l. and this was ſhewed after Verdict in Arreſt of Judgment; but it was not allowed: but it was holden, That the Plaintiff ſhould not have more damages then in the Writ; but the Writ was not abated for that cauſe. M. 3 Jac. B. R. rott. 1315. *Starling* and *Lones* Caſe. And Trinit. 3 Jac. in B. R. rott. 1812. *Church* and *Finches* Caſe. *Cro.* 2. Part. 128.

Where the Writ ſhall abate by Entry into part, or into all, and where not: or by recovery of part; and where not.

1. THE Office of Keeper of *Clipſon* Park, was granted by Q. *Eliz.* to *Markham* for life; King *James* reciting the Grant to *Markham* by his Letters Patents, grants to the Earl of Rutland for life, the Office of Keeper of the ſaid Park, to begin upon the death, forfeit, ſurrender of *Markham*. Afterwards King *James* grants the Reverſion of the Manner and of the Park in Fee to the Lord *Mountjoy*, who grants the ſame to the Earl of Shrewſbury. *Markham* dyed; the Earl of Rutland entred; The Earl of Shrewsbury entred upon him: upon which, the Earl of Rutland brought an Aſſiſe, and had Judgment in the Common-Pleas: And it was aſſigned for Errour, upon a Writ of Errour brought in the Kings-Bench. That mean after the Verdict, and before the Judgment, the Plaintiff in the Aſſiſe did enter into the Park, and

did

did there hunt, and kill a Stag, and did take the Shoulder of it for his Fee, and whether ſuch Entry ſhould abate his Writ, was the queſtion; and it was holden by the better opinion of the Juſtices; that ſuch Entry did not abate the Writ. See 7 Jac. the Earl of *Shrewesbury*, and Earl of *Rutland*'s Caſe. *Eatſt.* 1. part. 5. 6. 7. 8. &c. *Brownlow.* 232. 233. the ſame Caſe.

2. An Aſſize of Freſh-force; It was holden, in the Parſon of Hony-Lanes Caſe, that the Entry into a Celler, hanging the Aſſize, to view the Antiquity of the Cellar, did not abate the Writ. *Plow. Cond.* 92.

3. A Leaſe is made for years, rendring Rent, with Clauſe of Re-Entry, for non-payment, the Rent is arrear, the Seſſor brings an Action of debt for the Rent, and depending the Suit, Re-enters into the Land; Adjudged, That the Writ once abated by the Plaintiffs Entry, pending the Writ, is not revived. Paſc. 1651. B. R. *Web* and *Wilmers* Caſe. *Styles* 260.

Abeyance.

1. IF the Keeper of a Park may preſcribe to have *tonſuram prati*, or other profit of the Land, was doubted; and it was the better opinion, that he could not, being an Officer for life; for if he might ſo do, great inconvenience would follow, viz. That after the death of the Officer, and untill another Officer was appointed, and put into the place, the Free-hold and profit of the Land ſhould be in abeyance; if the Office do not diſcend to an Heir, or to a man who hath perpetuall ſucceſſion by the Common-Law, for that in no caſe; except in the Caſe of a Parſon of the Church, a Free-hold can be in abeyance. 6 E. 6. D. 7. 7. 3. *Iſhams* Caſe. See 10 Car. B. R. *Ward* and *Peiſers* Caſe. 1 *Cro.* 263. The Freehold in him who hath *primam Tonſuram*.

2. The Reverſion upon a Term for years is granted to the uſe of the grantor for life, and after his deceaſe, to the uſe of his Executors and Aſſigns, for 21 years, the Remainder over Intail; afterwards the Grantor is attainted of Treaſon, and dyeth inteſtate without any Aſſignment made, although it was ſaid, That the eſtate to take *in futuro*, in the grantor; was in Abeyance, and ſo could not be forfeited; yet it was the better opinion of the Court, and ſo afterwards adjudged; That the Terme is ſuch an intereſt in the Grantor, which might ſtand in him, notwithſtanding his eſtate for life; and that by his Attainder, the Queen ſhould have the Term as forfeited to her; and to that purpoſe that the Term for years is in *eſſe*. 4 Eliz. *Dyer.* 309.

3. After the Statute of 27 *H.* 8. of uſes; a man made a Feoffment to divers perſons, to the uſe of his Wife for her life, and if the Feoffer did ſurvive his Wife, then to the uſe of the Feoffer, and of ſuch perſon as he ſhould marry for the Term of their lives, for the Joynter of the Wife for her life, the Remainder over to a ſtranger, afterwards, he in the remainder, and the Feoffees, with the privity of the Feoffee, levy a Fine accordingly, the firſt Wife dyeth, the Husband takes another Wife, and dyeth, the Opinion of *Mouſon* and *Harper* Juſtices, was that the future uſe was in Abeyance, and in the cuſtody of the Law, and was not deſtroyed by the Feoffment of the Feoffees; and ſo the Feoffment was void. But the opinion of *Manwood*, and the Lord *Dyer* was, that the uſe was drowned; and although the Feoffment had taken away the Entry of the firſt Feoffees, yet they had a mean intereſt in regard of the dormant uſe, which was conveyed by the Feoffment: 17 Eliz. *Dyer.* 340. C. 1. part, *Shelleys* Caſe, 101. Co. 1. part 128. *Chadleigh's* Caſe.

4. Before the Statute of 27 *H.* 8. a man enfeoffed J. S. to the uſe of B. and his Heirs; afterwards the Feoffee, enfeoffed J. N. to the uſe of B. and his Wife, and the heirs of B: B. dyed, living his Wife, having a Son; It was holden, that the Son ſhould be in Ward, during the life of the Wife, for that the Ancient uſe was not gone, but was preſerved in the Cuſtody of the Law, but onely for ſo much as it was altered in, ſo as it was a Reverſion in the Son, and not a new Remainder. 39 H. 8. *Dyer.* 10, 11. 12. *Bockenhams* Caſe.

Tenant in *Capite*, levied a Fine with a render to himſelf, Intaile the Remainder to King *Henry* the 7th. and his Heirs Males, the Remainder to his own right Heirs, afterwards he dyed without Iſſue, *Henry* the 7th dyeth, having no Iſſue Male living; the Queſtion was if the right Heir of the Conuſor ſhould be in Ward to Queen *Mary*: It was holden that the Fee-ſimple of the Seignory was in Abeyance in conſideration of the Law, and that the Queen ſhould have the Wardſhip of the generall Heir by the reviving of the Seignory in an Inſtant, which was before ſuſpended. 2. *Mi. Dyer.* 102. the Marqueſſe *Barkly*'s Caſe.

6. Note, When the Right of Fee-ſimple is perpetually by Judgmen of Law, in Abeyance, without any expectation to come in *eſſe*; in ſuch caſe. he who hath the qualified Fee, may charge it, as in the Caſe of Parſon or Vicear, when the Patron and Ordinary joyn with him in the Charge, or Grant; But where the Fee-ſimple is an Abeyance, albeit, it may every day come by poſſibility, come

in

in *esse*, yet it is incertain when, and whether ever it may happen; and in such Case the Fee-Simple cannot be charged, or Alienes; as if a Lease be made for life, the Remainder to the right Heirs of J. S. the Fee-simple cannot be charged before J. S. be dead, in case J. S. dye, living the Tenant for life; but if the Tenant for life do dye before J. S. then is the Remainder vanished, because it cannot rest immediately after the death of Tenant for life. See 1. *Coo. Instit.* 343. and 378. acc.

7. A Tenant for life, the Remainder to B. In-tail, the Remainder in Fee to B. and his Heirs expectant, B. levyes a Fine to C. and D. and to the Heirs of C. to the use of them and their Heirs, and hath Issue, and dyeth before all the Proclamations were past, the Issue then being beyond Sea, the Proclamations passe: It was Resolved in that Case, that the State Tail which passed by the Fine, was not absolutely determined by the death of Tenant Intail; but that it was in the Election of the Issue, to make it voidable, or void; and where *Littleton* saith that the Grantee of Tenant in tail hath not an estate but for the life of Tenant in tail; the meaning of *Littleton* was not, that the estate tail, was by the death of the Tenant in tail determined; for that it was in Abeyance; but that the Grantee had not any fixed or perdurable estate, but for the life of Tenant in tail; but that the issue after his death, might determine the same at his Election. 1 *Co.* 3. part. 44 Eliz. 84. in the Case of *Fines.*

8. By the Providence and Wisdome of the Law, the Fee-Simple of the Parsonage and Vicarage, are said to be in Abeyance, for that the Parson and Vicar have *Curam animarum*, and were bound to celebrate Divine Service, and therefore no Act of the Predecessour could make a discontinuance, to take away the Entry of the Successour, and to drive him to a real Action, whereby he should be destitute of maintenance in the mean time. *Co. Instit.* 344. a.

9. Lands were devised to the father for life, the Remainder to the next Heir male of the Father, and to the Heirs Males of his body; the Devisor dyed; and afterwards the Father made a Feoffment to J. S. with Warrant; It was the better opinion of the Court in this Case, although that the Remainder was in Abeyance, yet the Feoffment of the Father with Warranty, did bind the Remainder. 10 Eliz. *Co.* 1. part. 66. *Archers* Case.

10. Note, the Law will not preserve Estates which are in Abeyance, so that they may not be destroyed; nor contingent estates: and therefore it was Resolved, That if Tenant in tail be the Remainder to the right Heirs of J. S. if Tenant in tail suffer a common Recovery, the Remainder which is in Abeyance, is barred. *Co.* 6. part. 3. Jac. Sir *Anthony Mildmayes* Case, fol. 40. 41. See C. 1. part. *Corbets* Case, acc. See C. 1. part. *Chadleighs* Case. acc.

Abettors.

IN an Appeal brought of the death of his Brother, against five Principals, and three as Accessaries; and some of the principals pleaded Not Guilty; and others were Nonsuit; and some discharged upon Demurrer; and damages assessed: and one who was as accessorie came in upon the Exigent, and was acquitted: upon the Acquittal of all the principals, and damages found to 200 l. and that the Plaintiff was insufficient, and the Party prayed that the Abettors might be enquired of; and six more were Abettors *ex malitia*; and a *Scire facias* was awarded against the Abettors; and Exception was taken to the *Scire facias*, because there was no mention made of the acquittal of the principals: and some of the Abettors pleaded, they did not abett: and others justified by a common fame; and both being for him, he recovered his damages against the Abettors. 3 Ma. *Dyer* 131. *Reads* Case.

Abridgment.

1. NOte, It was agreed by the Chief Justice, and Chief Baron, in an Assise where the plaint was of one Messuage, and four Acres of Lands in East-Malling in Kent, That the Plaintiff might abridge his Plaint of the Messuage, because the Jurors had the View but of the Land. Pasch. 38 H. 8. *Dyer.* 61. *Pennington* and *Morses* Case.

2. In an Assise, the Plaint was of 53 s. 4 d. of Rent; and afterward the Plaint was abridged to 20 s. and it was the opinion of the Court, The same was Errour, because that a Rent is an entire thing, and cannot be abridged, as Land and the like may be. Pasch. 38 H. 8. *Dyer.* 61.

3. An Assise of Novel Disseisin was brought against three; and the Plaint was of six Acres of Land, the Defendants pleaded *Nul. tort.* &c. and the Recognitors found, That one of the three named at the time of the Writ brought, was sole Tenant of two Acres; and shewed which; and of one of them disseised the Plaintiff; and of the other that he did not disseise him; and so of the second; and as to the

third, That at the time of the Writ brought, he was sole Tenant of the two Acres residue, and disseised the Plaintiff, and dyed pendant the Writ; and after Verdict, the Plaintiff abridged his Plaint of all that, of which no disseisin is found in the hands of the two. Query, if the Plaintiff shall recover that of which he who dyed seised was Tenant. 7 E. 6. *Dyer*. 88.

4. An Assise was brought against three, and they all appeared, and pleaded by Attorney *nul Franktenant nosme* in the Writ; And if, &c. *nul tort, Nat. dissin.* and the Jury appeared, and afterwards the Plaintiff was abridged; and the Jurors found Special Verdict, That A. was seised in Fee, and that the Surveyors of the said A. granted by Indenture the Tenement, with the appurtenances, to one of the Defendants Tenants; who entred, and found, that the Plaintiff was seised of the Tenements in Fee, until by all the Defendants disseised: and there nothing was moved, but that the Abridgment of the Plaint was well enough. 3 and 4 Ma. *Dyer*. 132.

5. Waste was brought and assigned, in taking down a Leaden Copper which was fixed to the house by the Lessee for years; the Defendant pleaded in bar a devise of it by the Termor, and that he took it down, and removed it with the assent of the Executors: and Issue was joyned, and a *Venire facias* awarded. It was holden by the Court in this Case, That if the Grant be assigned in domibus, the Plaintiff cannot so abridge the Waste in domibus et boscis: for if he doth so, his Writ shall abate. 10 Eliz. *Dyer*. 272. The Lord of Abargavenny's Case.

6. In an Ejectione Custodiæ terræ et hæredes, they were at Issue upon the tenure; which was found for the Plaintiff, and damages assessed. It was moved in Arrest of Judgment, That Ejectione Custodiæ did not lye of the body. In that case the Writ did not abate. But because the damages and costs were assessed for both, the Plaintiff relinquished his damages, and had Judgment for the Ejectment of the Land only. 22 Eliz. *Dyer*. 369. *Clifford's* Case. And see C. 11. Part. 12 Jac. 56. *Benham's* Case, That if Damages or Costs are not well assessed by the Jury, the Plaintiff may Release them, and have his Judgment.

Acceptance.

1. THe Queen was seised of a Mannor, and her Steward granted Copy-hold Lands to one by Coppy in Fee: Afterwards the Queen under her Exchequer Seal, made a Lease of the same Lands to another for 21 years: who granted the same term to the Copy-holder. It was Resolved, That the estate of the Copy-holder was determined by the Acceptance of the Lease for years: for that the acceptance was his own act. 29 Eliz. *Lane's* Case, Co. 2. Part. 16. 17.

2. Husband and Wife make a Lease for years by Indenture rendring Rent, the Lessor enters; the husband dyeth before any day of payment of the Rent; the Wife takes a second husband who accepts the Rent, and afterwards dyes. It was holden *per Curiam*, that the Wife might avoid the Lease, notwithstanding the Acceptance of the husband; for that the acceptance of the new Lease, was a surrender of the first Lease. 4 Ma. *Dyer*. 141. *Goughs* Case. See 5 Ma. *Dyer*. 159. acc. by three Justices.

3. Tenant in tail makes a Lease for years, rendring 20 s. Rent; and afterwards releases 19 s. of the Rent, and dyeth, and the Issue in tail accepteth of the 12 d. Rent. It was a Question if he might distrain for the 19 s. The Court was divided in opinion. But I conceive the better opinion to be, That the acceptance of the Rent doth make good the Lease; and then he may not distrain for the 19 s. 14 Eliz. *Dy.* 304.

4. Debt brought upon an Obligation, the Condition of which was, That if the Defendant should make Composition with A. for Lands, &c. that then he should pay to the Plaintiff 40 l. The Defendant pleaded, he made no Composition. The Plaintiff replyed, That A. did grant to him a Rent-Charge in satisfaction of his Title; and so he made a Composition, and that the Defendant accepted of the said Rent: The Defendant said, he did not accept it in satisfaction: and it was holden to be a good Plea; for it is no Composition without consent which depends upon acceptance: and the acceptance is denyed. *Hob.* 178. *Earl* and *Yark's* Case. Hill. 14 Jac.

5. If a Lease be made rendring Rent upon Condition of Re-entry, and the Lessee payes his Rent to the Lessor, and he accepts of it, and puts it in his purse; and afterwards he finds that he hath

hath received counterfeit money, and refuſeth to carry the money away; but enters for the Condition broken. It was adjudged in ſuch caſe, That his Entry was not lawfull; for when he had accepted of the money, the ſame was at his perill; and after allowance once of it, he cannot take any Exception to it; but is barred by his firſt acceptance. Tr. 43 Eliz. rott. 406. C. B. *Wade's* Caſe. C. 5. Part. 113. *Vane* and *Studleys* Caſe. ibid.

6. A Copy-holder committed Waſte, by which a Forfeiture accrued to the Lord, who afterward accepted the Rent: the Queſtion was, Whether the Lord by the Acceptance of the Rent was concluded to enter for the forfeiture? And the opinion of the Court was, That he was not: for that the Copy-hold was in him preſently by the very forfeiture: And it is not like the caſe, where a Leaſe is made upon Condition, That the Leſſee ſhall do no Waſte, and he commits Waſte, and then the Leſſor accepts the Rent; there he cannot enter: But if the Condition had been, That if he do Waſte, that his eſtate ſhall ceaſe; there no Acceptance of the Rent can make the Leaſe good. M. 29 Eliz. in B. R. *Godb.* 47.

7. *A.* ſeiſed of Lands in Fee by Indenture, 14. Nov. 14 Jac. demiſed the Land to J. S. rendring 20 s. Rent, to commence from the Annunciation which ſhould be 1619. And afterwards by another Indenture dat. 3. December, 15 Jac. demiſed the ſame Lands for 99. years to the Lady *Perpoynt*, to begin from the Annunciation laſt paſt. And afterwards by another Indenture dat. 16 Jac. to commence from 17. No. 1619. demiſed the ſame Land to the ſaid J. S. for 41 years, who accepted of it: The Queſtion was, If the Acceptance of the ſecond Leaſe by J. S. had extinguiſhed the former Leaſe? And it was adjudged, That it had not; becauſe that by the Leaſe made to the Lady *Perpoynt*, the Leſſor had but a Reverſion, and could not contract afterwards with J. S. to give any Intereſt unto him. But it was holden, That the taking of the ſecond Leaſe, had been a ſurrender of the former, were it not by reaſon of the Leaſe for 99 years, which diſables the Leſſor to contract for the 41 years. Hill. 3 Car. Rott. 1302. B. R. *Watt.* and *Maidwell's* Caſe. *Hutton.* 104.

8. Lord and Tenant, the Rent is behind for many years, and the Tenant makes a Feoffment in Fee, If the Lord accept of the Rent, or Services of the Feoffee due in his time, he ſhall loſe the arrerages due in the time of the Feoffer, for after ſuch acceptance, he ſhall not avow upon the Feoffer, nor upon the Feoffee, for the Arrerages incurred in the time of the Feoffer, C. 3. part. 65. 66. *Pennant's* Caſe, C. *Litt.* 269. acc.

9. In debt brought for Rent due, the Defendant pleaded in bar, that after the Leaſe made to *him*, and before the Action brought, he aſſigned over his Leaſe to J. S. and that after the Aſſignment for Rent which afterwards grew due, the Leſſor had received the Rent of the Aſſignee; The queſtion was whether this acceptance of the Rent of the Aſſignee, having no particular notice given to him of the aſſignment, ſhall be ſaid to be an acceptance of him as his Rent, or as the Rent of the firſt Leſſee, by his hands, and as his Bayliff, or Servant, and whether the acceptance of the Rent of J. S. be not a ſufficient notice of the Aſſignment; And it was adjudged, that as this Caſe is, no ſpeciall Notice ought to be given to the Plaintiff of the Aſſignment, but the acceptance of the Rent of J. S. was a ſufficient notice of the Aſſignment, and the Plaintiff could not reſort to the firſt Leſſee to recover his Rent behind, againſt him, and Judgment was given for the Defendant; *Marſh* and *Bracers* Caſe, M. 11. Jac. in B. R. *Bolſtr.* 2. part. 151. See C. 3. part. *Walkers* Caſe, 24. See there. *Marrow* and *Turpins* Caſe. P. 41. Eliz. in *Co.* B. rott. 2485. Debt brought againſt an Adminiſtrator of a Termor, who pleaded an Aſſignment of his Terme, of which the Plaintiff had notice, and accepted the Rent by the hands of the Aſſignee; and adjudged that by the death of the Leſſee, the privity of Contract was determined; and ſo the Action would not lye againſt the Adminiſtrators.

10. The Priviledg not to be impeached for Waſte, is a thing which is annexed to the eſtate of the Tenant, but if the Tenant do accept of a Confirmation of a greater eſtate; or if he aſſign over his eſtate, the Priviledge is gone and deſtroyed; See *Co.* 11. part. in *Lewis Bowles's* Caſe, *in fine.*

11. Debt upon a Bond, the Defendant pleaded, That it was agreed between the Plaintiff, and divers of the Creditors of the Defendant; That the Defendant by Indenture of Bargain and Sale, ſhould aſſure divers Lands in the County of *Lincoln*, to certain of the Creditors to be ſold by them, and the money to be paid amongſt them; and that he aſſigned to them a leaſe for years of the Cuſtomes of Wines, and certain other Sums of Money, which the Creditors by the ſaid Indenture accepted of; and ſayes *de facto*, that by the ſaid Indenture, he ſold the ſaid Lands to the ſaid perſons; and made them a Letter of Attorney, to receive the Sums of Money; it was reſolved, foraſmuch as the Indenture ſounds in the nature of a Covenant, it ſhall not be adjudged to be accepted of in ſatisfaction, nor pleaded in ſatisfaction in the Action; And farther, admit it had been in ſatisfaction, if performed, yet being not performed, it is no bar to the Action, although the ſaid Indenture was accepted of by the Creditors. Hill. 3. Car. 3. Rott. 378. in B. R. *Simonds* and *Medeſworth's* Caſe. *Cro.* 1. part. 139.

12. A Woman was Copyholder for life, her Husband by Indenture made a Leaſe for one year of the Land; and the ſame day and year made a ſecond Leaſe to the ſame perſon, for a year, and to begin two dayes after the end of the firſt Leaſe; and ſo he made a third Leaſe, each Leaſe two dayes betwixt the beginning of the new Leaſe, and the end of the former; afterwards the Husband ſurrendred the Copy-hold to the Lord, who entred, and let the Lands to the Defendant for 40 years; The queſtion in this Caſe was, Admitting that the making of the Leaſes as before, be a Forfeiture, yet whether the Lords acceptance of the Surrender, not knowing of the forfeiture, be a diſpenſation thereof; And it was holden by the Court, that the acceptance of the ſurrender by the Lord, was no diſpenſation of the forfeiture; and that there the Leaſe made by the Lord for 40 years was a good Leaſe; and his Leſſee had a good eſtate againſt the Copyholder, and his Leſſee. Hill. 4 Car. rott. 496. in B. R. *Matthews* and *Whettons* Caſe. *Cro.* 1. part. 169.

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2. *Where Acceptance of one thing ſhall be a good barre to demand another thing*; et è contra.

1. A Man was bound in an Obligation, to make an Accompt before the Feaſt of Mich. of all the Rents and Profits of the Mannor of D. In an Action of Debt brought upon the Obligation. The Defendant pleaded in Barr, That in ſatisfaction of all Accompts before Mich. he made a Leaſe of certain Lands to the Plaintiff for certain years; which he accepted of. And it was holden no Plea: for that where the Condition of the Bond is collateral, there acceptance of another thing is no barre: but if the Condition had been for the payment of money; then the Acceptance had been a good barre of the Action. 4 H. 8. *Dyer.* 1.

2. A man was bounden in an Obligation, That B. ſhould at ſuch a day pay unto the Obligee 20 l. In an Action of Debt brought upon the Obligation, the Defendant pleaded, That before the day B. gave to the Obligee a Horſe in ſatisfaction of the 20 l. which he accepted of; and *per Curiam* holden a good Plea; and the Bond thereby is diſcharged. But it was holden, That if the payment had been to a ſtranger to the Obligation, the ſame had not been good. 35 H. 8. *Dyer.* 56.

3. In an Ejectione Firmæ brought againſt three, one of the Defendants pleaded in barre, That there was an Agreement betwixt the parties, that one of the Defendants ſhould pay unto the Plaintiff 10 l. in ſatisfaction of the Treſpaſſe and Ejectment, and ſhould give a Bond for the ſame; which he had performed, and the Plaintiff had accepted of. And it was holden to be a good Plea. 9 Jac. *Henry Peyſers* caſe. C. 9. Part. 77. And it was there Reſolved, That when the Condition in a Deed is to do a collateral act, there an Agreement with execution for money, or other thing, is no Plea to ſave the forfeiture; but when the Condition in a Deed by the Original Contract is to pay money, there by agreement any other thing may be given in ſatisfaction of the money, becauſe Nummus eſt menſura rerum commutandarum.

4. If a man be bounden in 200 Quarters of Corn, upon Condition to pay 20 l. the Obligor by Agreement may give to the Obligee a Horſe or other thing, in ſatisfaction of the 20 l. although that Mony be collateral to the Bond: But if a man be bounden in 100 Quarters of Corn, to pay 50 Quarters, or any other thing in ſatisfaction of it, there he can not give money or other thing in ſatisfaction of it, becauſe the Contract was not made for money, but for a Collateral thing; and therefore, Acceptance thereof, is no barre of the Bond in Debt brought. *Henry Peyſers* Caſe. Co. ibid. and ſee there. 28 H. 8. in Co. B. vouched to be adjudged accordingly.

5. An Action upon the Caſe was brought againſt Husband and Wife; and the Plaintiff declared, That the Wife whileſt ſhe was ſole, in Conſideration that the Plaintiff had expended 1500 l. about the Suits of the Wife whileſt ſhe was ſole, did promiſe to pay the Plaintiff the ſaid 1500 l. and more. The Defendants pleaded, That the Plaintiff did not expend above 10 l. &c. and that the heir in recompence of her Dower, concluded to make a Leaſe for years to the Wife, to begin after her death; which Leaſe ſhe cauſed to be made over to the Plaintiff, to the uſe of the Wife; and that after the marriage the husband agreed, That in ſatisfaction of his Travell and the ſaid expences, that he ſhould retain the ſaid Leaſe to his own uſe; which he accepted of. Upon which there was a Demurrer by the Plaintiff. And the better Opinion of the Court was, Becauſe that the agreement for acceptance of the Leaſe, ad diem futurum, was but executory, and not executed; the acceptance of the ſaid Recompence, was not material to make the agreement good; as the acceptance of one Mannor for another, or of the one Quantity or value; upon a Condition to be performed, in debt brought upon a Bond is not good: and therefore it was adjudged, That the Plea in barr was inſufficient. Paſch. 19 Eliz. *Onely* and the Earl of *Rivers* Caſe. *Dyer.* 356.

6. In an Action upon the Caſe, upon a Promiſe

bought

brought by an Executrix; the Plaintiff declared, That in Conſideration of two Weighs of Corn delivered by the Teſtator to the Defendant, he promiſed to pay the Plaintiff 10 l. The Defendant ſaid, That after the promiſe, the Plaintiff in Conſideration that the ſaid two Weighs of Corn were drowned; and that in conſideration of every of the ſaid 20 s. of the ſaid 10 l. he would pay him 3 s. 4 d. *in toto*, 33 s. 4 d. he would diſcharge the Defendant of the ſaid promiſe; and added, he was ready to pay the 33 s. 4d. upon which there was a Demurrer: And the opinion of the Court was for the Plaintiff; becauſe that by this New Agreement (and acceptance thereof if ſuch had been) no profit but damages was to come to the Plaintiff; and the Defendant was not put to any charge by it; and therefore it was Reſolved, It was not ſuch Agreement as ſhould bind the Plaintiff. Paſch. 26 Eliz. in B. R. rott. 72. *Richards* and *Bartlet's* Caſe. *Leon.* 19.

7. The Husband, ſeiſed of Lands in the Right of his Wife, made a Feoffment to the uſe of himſelf for life without improvement of Waſte, & afterwards to the uſe of his Wife for her life, for her Joynture, upon condition ſhe ſhould perform his laſt Will: the Husband dyed, the Wife entred and agreed to the eſtate; and afterwards brought Dower. It was Reſolved, That a Right or a Title which a woman had to an eſtate of Inheritance, could not be barred by Acceptance of any collateral ſatisfaction or Recompence: For Accord or Agreement is no Plea in real Actions, but onely in perſonal Actions; And therefore ſuch Collateral ſatisfaction or recompence did not barre her of Dower at the Common Law. Mich. 15 Eliz. in Co. B. *Vernons* Caſe. C. 4. Part. 1.

8. If the Lord accept a Rent or Service by the hands of the Feoffee, the ſame ſhall not barre the Lord of his Releiſe after due: for that Releiſe is no Service, nor debt will not lye for it. *Pennants* caſe. C. 3. Part. 66.

9. In Debt brought upon an Obligation, the Defendant pleaded, That the Plaintiff after the day of payment, and before the Writ brought, had accepted a Statute-Staple for the ſame debt, and in ſatisfaction of the Obligation. It was adjudged no good Plea; for although that the Statute be of Record, yet it is but an Obligation recorded; and the Obligation did remain yet in force, and it is in the Election of the Plaintiff, to take his remedy upon the one, or the other. 2 Jac. in C. B. *Braithwait* and *Cornwall's* caſe. vouch. in *Higgens* Caſe. C. 6. Part. 44.

10. If the Lord be entituled to have a Writ of Eſcheat, and he doth accept the Homage of the Tenant, he ſhall not have a Writ of Eſcheat afterwards againſt him, becauſe he hath accepted him for his Tenant; the like if he accept Fealty of him. C. 3. Part. 66.

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3. *Where Acceptance of the Rent ſhall make the Leaſe good; and where ſuch acceptance ſhall barr the Party to claim the Land, or other thing.*

1. *Compton* purchaſed a Copy-hold of the Lord *Audley*, to him and his Wife, &c. for life; the Lord *Audley* Leaſed the Free-hold by Indenture to B. reſerving Rent, and made Livery; and afterwards he levied a Fine to *Compton* of the ſame Land, and *Compton* accepted of the Rent of B. The Queſtion was, Whether the Copy-hold was extinct? Quære. But there reſolved, That if a diſſeiſor makes a Leaſe for life rendring Rent, and afterwards grants the Reverſion to the diſſeiſee, and he accepts of the Rent of the Leſſee, that he ſhall not avoid the Leaſe. 28 H. 8. *Compton* and *Brent's* Caſe. *Dyer.* 30. b.

2. A Biſhop made a Leaſe to two for years, rendring Rent, afterwards he made a new Leaſe to one of them, which was confirmed by the Dean and Chapter: the Biſhop dyed: In the principal caſe it was holden, That the Leaſe was void in the whole; and the acceptance of the Rent did not make the Leaſe good; the ſame being in prejudice of the ſecond Leaſe: otherwiſe it is, if the ſecond Leaſe had not been made. And ſo it is, If an Abbot, or Tenant in tail had made a Leaſe, the acceptance of the Rent had made the Leaſe good. But if a Parſon, or Tenant for life, make a Leaſe for years, there no Acceptance can make the Leaſe good; becauſe the Leaſe is void by their death. 32 H. 8. *Dyer.* 46. See *Pennants* Caſe. C 3. Part. acc.

3. Note: It was agreed by the Juſtices, If before the Statute of 32 H. 8. the Husband and Wife make a Leaſe by word, rendring Rent; and the husband dyeth, and the Wife accepts the Rent, that the ſame doth not make the Leaſe good, becauſe her aſſent ought to be to the making of the Leaſe, which cannot be without Deed. But Quære that Caſe: for 36 Eliz. It was adjudged contrary; and M. 33 Eliz. in *Moſley* and *Gilbert's* caſe, It was adjudged, That her aſſent by word was good enough. 1 Mr. *Dyer.* 91. See Co. 4. Part, *Vernon's* caſe. See *Villers* caſe. *Dyer.* 46.

4. Sir *Thomas Wiat*, Tenant in tail to him and the heirs males of his body, made a Leaſe for 30 years to *Auſtin*, rendring Rent to him, his heirs, and aſſigns; and dyed, having Iſſue, Sir *Tho.* his ſon,

ſon, who accepted the Rent of *Auſtin*; and afterwards was attainted of Treaſon, and executed, having Iſſue alive, and the King afterwards accepted the Rent; Yet it was adjudged in the Exchequer upon an Information of Intruſion, That the Lands being in the Kings hands by the Attainder, and not in point of Reverter, that the acceptance of the Rent, did not make the Leaſe good. 3 Ma. *Dyer*. 115. But ſee C. 7. Part. 18. in the Earl of *Bedford*'s Caſe; That becauſe in this Caſe the King avoided the Leaſe that is to his primer ſeiſin, and that after Livery made, it is in the Election of the Iſſue in tail, by Acceptance of the Rent, to make the Leaſe good; becauſe the Leaſe was avoided by the King but for part of the Term. See *Hob*. 314. acc.

5. The Provoſt of *Wells* Parſon Impersonee of the Parſonage of *W.* Leaſed the Tythes for 50 years rendring Rent, which was confirmed by the Dean and Chapter, but not by the Patron or Ordinary, the Provoſtſhip was united unto the ſaid Deanery; the Provoſt dyed, the Dean accepted the Rent; it was adjudged, That by the Acceptance the Leaſe was not affirmed; for the Leaſe of the Provoſt was void by his death; and in this caſe the Acceptance of the Rent is to no purpoſe, for the Reverſion is detained, and the name of the Succeſſors altered: And ſo is it, If Tenant in Dower, or other particular Tenant had made a Leaſe, and dyed; and he in the Reverſion or Remainder had accepted the Rent, the Leaſe had not been affirmed. *Hodgeſly*'s and *Tucker*'s Caſe. 2 Eliz. *Dyer*. 239, See C. 7. Part. the Earl of *Bedford*'s Caſe. 8. See before, Sect. 2.

6. Tenant for life, the remainder in tail, a ſtranger levies a Fine with proclamations to him in the Remainder. who renders the Land to the Conuſor, rendring Rent, and dyeth; proclamations paſſe, Tenant for life dyeth; the Iſſue in tail accepts the Rent: It was holden, That by the Fine, and the Acceptance of the Rent, the Leaſe was affirmed. 11 Eliz. *Dyer*, 299. See *Smith* and *Stapleton*'s Caſe. *Plow*. Com. 418. acc. But by *Manwood*, If Tenant in taile makes a Leaſe for years to begin after his death, rendring Rent, the acceptance of the Rent ſhall not barre the Iſſue, becauſe the Leaſe takes not effect in his life. *ibid*.

7. A Parſon 28 H. 8. made a Leaſe for life of Lands, which were given to him and his Succeſſors, to find Lights, the Rent is imployed to that purpoſe, after the Statute of 1 E. 6. of Chauntryes; the Parſon dyeth, his Succeſſour accepteth the Rent, the King after the Statute, grants the Lands to a ſtranger; It was the opinion of the Court, that the Patentee might enter, and avoid the Leaſe, for that the acceptance of the Rent was void, as to make the Leaſe good. 16 Eliz. *Dyer* 337. See before, the Provoſt of *Wells* Caſe. Sect. 5. acc. and ſee C. 3. part. 8. the Earl of *Bedfords* Caſe, acc.

8. A man made a Leaſe for years, rendring rent at the Feaſt of our Lady, &c. with Clauſe of Reentry for non-payment; the rent is behind at the Day; afterwards the Leſſor accepted of the rent, and then entred for the condition broken; It was holden that his Entry was Lawfull, for the rent was due before the condition broken; but if the Leſſor accepts the next quarters rent, then he hath loſt the benefit of his re-entry, for thereby he admits the Leſſee to be his Tenant; and ſo it is if the Leſſor diſtrain for his rent after the forfeiture, he cannot after re-enter for the forfeiture; and ſo if he make an Acquittance for the rent as a rent. 18 Eliz. in B. R. *Greens* Caſe, *Leon*. 262.

9. The Maſter and Fellows of *Magdalen* Colledg grant Lands unto the Queen in Fee, rendring rent, upon condition to grant it over, which is done accordingly, the grantor levies a Fine with Proclamations of the Land; the Maſter dyeth, the Succeſſor accepts the Rent of the Conuſor of the Fine, and makes an acquittance thereof, under his hand, without a Seal, and afterwards he dieth, It was adjudged, That the acceptance of the rent doth not bar the Colledg, being a body aggregate of many, and alſo the acceptance of the Maſter ſole, doth not likewiſe barr them, and ſo much the rather, being without deed; but that they may well enter, notwithſtanding the Fine, and acceptance of the Rent. 13 Jac. *Co*. 11. part. *Magdalen* Colledge Caſe, 60.

10. A man makes a Leaſe for years upon Condition that he ſhall not alien nor aſſigne without the aſſent of the Leſſor; and if he do aſſign the ſame or any part of the Land, that the Leſſor ſhall re-enter, the Leſſee aſſignes part of the Land without the aſſent of the Leſſor, and before notice thereof or re-entry, the Leſſor accepts the Rent, and after enters for the Condition broken, and adjudged his entry is lawfull, for the condition being collaterall, it might be ſo ſecretly contrived, that it is not poſſible to come to the knowledge of it, and in caſe of a condition annexed to the rent; as if a man make a Leaſe for years, rendring rent upon condition, if the rent be not paid, to re-enter; If the Leſſor demand the rent, and it be not paid, if after he accept the rent (before re-entry) at another day he hath diſpenſed with the condition, for there the condition is annexed to the rent; and he well knew the condition was broken. But in the principal Caſe, although he accept the rent, yet he may re-enter, for aſwell before as after, he may have debt for the rent. *Pennants* Caſe. *Co*. 3. part 65. See 40. Eliz. *Co*. B. rott. 1302. *Mich* and *Curties* Caſe, vouch in *Pennants* Caſe acc.

Accompt.

1. IF Lands be ſeized into the Kings hand by Commiſſion, by reaſon of the Lunacy of J. S. and the King granteth the Cuſtody of the Lunatique, ſine Computo reddendo; yet the Lunatique ſhall have an account of the profits of the Lands when he becomes of ſane memory. But if it be of an Idiot, *à Nativitate*, there it is otherwiſe; becauſe in ſuch caſe, the King, as alſo his Pattentee, ſhall have the profits to their own uſe. Hill. 28 H. 8. *Dyer.* 25.

2. Note: It was the opinion of the Juſtices, That where a man deviſeth, That his Executors ſhall ſell his Lands; and out of the ſums of money ariſing by ſuch ſale, ſhall pay certain portions to his daughters: Suit for theſe ſums of money ſhall not be in the Spiritual Court; for that the ſame are not Teſtamentary: But in ſuch caſe, the party is to have his remedy at the Common-Law by Action of Accompt; becauſe the money is a charge riſing out of the Lands. Mich. 3 & 4 Ma. *Dyer.* 151, 152.

3. A man delivered money to deliver over; and afterwards he brought an Action of Accompt againſt the Bayliff, upon a baylment by his own hands: the Defendant pleaded, That he never was his Receiver to render an Account; and gave the matter before in Evidence. It was held by the Juſtices, That the ſame was no good Evidence; for that he was his Receiver conditionally; viz. if he had not delivered it over: but in ſuch caſe he ought to have pleaded the ſpecial matter in barre of the Account. Hill. 3 Eliz. *Dyer.* 196. *Hungerfords* Caſe.

4. If one be charged as a Receiver by Indenture, he ſhall not be admitted to plead, that he was not Receiver. *Brownlow.* 1. Part. 25.

5. If two be adjudged to Accompt, and a Capias, and Exigent iſſue, and the one appeareth, and the other is Outlawed; he that appeareth ſhall account alone; for the Plaintiff's Proceſs is detained as againſt the other: and ſo if the one dyeth, the other ſhall accompt alone. *Brownlow.* 25. 1. Part.

6. An Action of Accompt was brought againſt one as his Bayliff, to his damage of 100. l. The Defendant pleaded, he never was his Bayliff; which was found againſt him: and Judgment was given, That he ſhould render an Account: And at the day the Defendant made default. Wherefore the Court gave Judgment, That the Plaintiff ſhould recover againſt the Defendant 40 l. The Defendant upon that brought a Writ of Errour: aſſigned for Errour, That the Court gave Judgment of the value, without inquiring of the value. And the Opinion of the Court was, That the Judgment ought to have been given to the value the Plaintiff had counted of. Whereupon the Judgment was reverſed. *Altham*, Baron, ſaid, It was adjudged Hill. 43 Eliz. B. R. That the Court in diſcretion might give a leſſer ſum. Paſch. 19 Jac. B. R. *White* and *Williams* Caſe. *Winch.* 5.

7. In an Account, a Receiver by the hands of the Plaintiff, the Defendant waged his Law; and at the day, he would have confeſſed his Action for part, and have waged his Law for the reſidue. And the Opinion of the Court was, That the Confeſſion ſhould not be received. 10 Eliz. *Dyer.* 265.

8. An Action of Accompt was brought as Receiver of the Plantiffs mony, The Defendant pleaded that he never was Receiver, whereas he hath a Releaſe of the Plaintiff: It was holden *per Curiam*, that he ſhall loſe the benefit of his Releaſe, and that he cannot give the ſame in evidence upon that Iſſue. *Willoughby* and *Smales* Caſe. *Brownlow* 1. Part. 24.

9. Note. Where the Defendant is charged to Accompt for moneys received from the hands of the Plaintiff, there he may wage his Law; and likewiſe for goods delivered to be ſold. But it is otherwiſe where the Receipt is by the hands of a Teſtator, or of any other then the Plaintiff. *Brownlow.* 1. Part. 25.

10. A man did buy certain Fiſhes, viz. Carps, Tenches, and Trouts, and did put them into his Pond for ſtore; and afterwards dyed, his heir within age; and the Guardianſhip was granted to J. S. The Queſtion was, Whether the Guardian in Socage, ſhould anſwer for the Fiſh upon an Account? It was not reſolved: But it was ſaid, and 5 R 2. Waſte. 97. vouched for it, That an Action of Waſte doth lye againſt Guardian in Chivalry, for taking Fiſh out of a Pool, by the Statute of *Magna Charta*. *Greys* Caſe. 37 Eliz. B. R. rott. 25. *Owen* 20.

11. Note. It was agreed by the whole Court, and affirmed by all the Prothonotaris the Courſe to be, That if in Actions, the Defendant be adjudged to account, and be taken by a *Capias ad Computandum*, and bailed pendant the Action before the Auditors, and doth not keep his day before them; that a new *Capias ad Computandum* ſhall iſſue forth againſt him. Mich. 30. Eliz. in Co. B. *Leon.* 87.

12. In Debt upon Surpluſage upon an Account, It was agreed by *Periam* and *Anderſon*, Juſtices, That

That if I make J. S. my Auditor-general, to take Accompts of all my Bayliffs and Receivers, he is not a ſufficient Auditor without a Patent; for when he is made an Auditor generally, he is an Officer; and that he cannot be without a Deed. But if a Bayliff or Receiver be accountable to me, I may appoint one to be my Auditor, to take the Account of him by word *pro hac vice*: and if afterwards he take an Account by colour of the ſaid Warrant, without my Commandment, he is not a ſufficient Auditor to ſuch intent, either to take the Account, or to aſſeſſe the Arrearages, if the Accountant be found in Arrearage; Or to make allowance to him if he be in Surpluſage. And if one be Bayliff to me of his own wrong without my appointment, he is accountable to me; but I am not compellable to make him Allowances for his expences. Mich. 33 Eliz. in Co. B. *Gauton* and the Lord *Dacres* Caſe. *Leon.* 219.

13. In an Action of Account, the Plaintiff charged the Defendant as Bayliff of his Shop, *Curam habens et adminiſtrationem bonorum*; The Defendant anſwered to the goods onely, and not to the Shop. The Queſtion was, Whether the ſame were good, or not? And the better Opinion of the Court was, That it was not good; but that he ought to anſwer to all. And note in that Caſe, this difference was taken to be Law, That if one chargeth me as Bayliff of his goods *ad Merchizandum*, that in ſuch caſe I ſhall anſwer for the Encreaſe, and ſhall be puniſhed for my negligence: But if he chargeth me as his Receiver *ad Computandum*, I ſhall not be anſwerable but for the bare money, or the thing which was delivered. Mich. 29 Eliz. in B. R. *Gomerſall* and *Gomerſall*'s Caſe. *Godb.* 55, 56.

14. An Action of Account was brought for that the Defendant occupied as Guardian of J. D. for 9 years, Lands which were granted to W. D. Father of the ſaid J. D. by Copy of Court-Roll, *tenendum ſecundum conſuetudinem Manerii de B.* who entred and dyed ſeiſed thereof, which diſcended to the ſaid J. D. and that J. D. dyed, and the Plaintiff as his Adminiſtrator brought the Action. Iſſue was joyned, That he did not receive the profits as Guardian: which was found for the Plaintiff. It was moved, That it doth not appear, that the Lands were Free-hold, but Copy-hold, and then an Action doth not lye againſt a perſon who Occupieth Copy-hold Lands. But it was adjudged for the Plaintiff: For although it be mentioned, that the Land was granted by Copy; It is not ſaid, *Tenendum ad voluntatem Domini*: and ſo it may be intended a Free-hold; and many Freeholds have been granted by Coppy, and by the Rodd. Mich. 7 Car. in B. R. *Hughes* and *Harris*'s Caſe. *Cro.* 1. Part. 166.

15. In an Action of Account, the Caſe was thus; The Defendant by his Deed did acknowledge the Receipt of 100 l. from the Plaintiff, to be imployed by him in Merchandize. And Covenanted, at his return, to give him a ſufficient account of it. Upon his Return, the Plaintiff brought an Action of Account. The Defendant pleaded, That at his Return, he returned an Account to the Plaintiff; which he refuſed. It was holden by the Court in this Caſe, That although there is no word of Account here, Yet upon the Defendants Receipt, the Plaintiff may well have an Action of Accompt; for that the Covenant doth not take away the Action of Accompt. Mich. 12 Jac. in B. R. *Rawlins* and *Parkers* Caſe. *Bolſtr.* 2. Part. 256.

16. It was Reſolved by all the Juſtices, That after the firſt Judgment given, *Quod Computet*; that before the ſecond Judgment be given, that a Writ of Errour doth not lye: For that the firſt Judgment is no other then an Award, and no finall Judgment untill he hath Accounted before Auditors; and the death of any of the parties before the ſecond Judgment, ſhall abate the Writ: and thus Judgment doth not determine the Originall: and the Plaintiff may be Non-ſuited before the ſecond Judgment. Mich. 12 Jac. in B. R. *Cro.* 2. Part. 356. *Metcalf* and *Wood*'s Caſe. See C. 11. Part. *Metcalf*'s Caſe. acc.

17. An Account was brought by the Husband and Wife Executrix of J. S. that he render him Account as Bayliff to J. S. *ex quacunq; cauſa ac contractu ad eum utilitatem* of J. S. and one W. P. *de Quibuſdam Merchandizis* of the ſaid J. S. of the third part of 38 Tunne of Wine: which Merchandize the ſaid J. S. and W. P. the Defendant had occupied to their common profit, and which were committed to the Defendants hands by the aſſent of the ſaid J. S. and W. P. for their common profit. The Defendant pleaded, he was never his Receiver; which was found againſt him. In Arreſt of Judgment it was moved, becauſe the demand was againſt him as a general Baylie: whereas the Plaintiff ſhewes, That he was Baylie *ex quacunq; cauſa ad utilitam* of him and W. P. and ſo he ought not to have demanded it as in general, but ſpecially. 2. Becauſe he demands an Account of the third part of ſuch goods; whereas in the Account, the other ought to have been joyned: But the Opinion of the Court was in both points againſt the Defendant; for that he might demand an Account of the third part, for that it might be, that he ſolely committed the third part: And for the other point, it was adjudged, That he might have the Account alone, without joyning his Companion in the Writ. And therefore that the Accompt brought by the husband and Wife as Executrix, was well brought. Mich. 14 Jac. in the Kings-

Kings-Bench. Dr. *Hackwell* and *Eastmans* Case. *Cro.* 2 Part. 410.

18. An Accompt was brought against the Defendant upon a Receipt of money by the hands of one J.S. for 200 l. The Defendant pleaded, That he was not Receiver to render an Accompt. Upon a Special Verdict, the Jury found, That J.S. was indebted to the Plaintiff in 200 l. and the Plaintiff required the Defendant to receive the said 200 l. and that the Defendant required J. S. to pay it; and J. S. upon request to him made, desired the Defendant to borrow 200 l. of any person, and to pay the Plaintiff; and he accordingly borrowed 200 l. of one *B.* and received it of him, to pay over to the Plaintiff: and J. S. gave Bond to *B.* for the payment of it: and the Defendant appointed his Wife to pay it over to the Plaintiff. It was adjudged in this Case by the whole Court, That the Action was well brought against the Defendant; for that the Defendant took upon him to be Servant as well to the Plaintiff to ask and Receive the 200 l. of J. S. as to J. S, to borrow where he could the 200 l. and that not onely with an intent to pay it over to the Plaintiff, but with an expresse Commission to pay it over: So that although *B.* lent the money to be paid over to the Plaintiff, yet it is found, that the Defendant received it as Lent to J. S. whereby it became J.S. his money; and the rather, when he had given Bond for it. And so Judgment was given, That the Defendant was a Receiver. And in that case, it was agreed for Law by the Justices, That if *A.* deliver money over to *B.* to deliver and pay over to *C.* That in such case *B.* is answerable to two Actions of Accompt conditionally. Hill. 10 Jac. in Co. B. rott. 3230. *Harrington* and *Deanes* Case. *Hob.* 36. See *Brown.* 1. Part. 26. acc. the same case.

19. Note: It was holden by *Rolls*, Chief Justice, That Rent alone lyeth not in Accompt; because a Rent is a certain thing; and also it is in the Realty: But if a Rent be mixed with other things, then an Accompt will lye of it. And it was holden, That if one receiveth money due to me upon an Obligation, I shall have either an Action of Debt, or an Action of Accompt against him; So, if a man receiveth my Rents without my Consent. Trinit. 1651. in B.R. *Hamond* and *Ward*'s Case, rott. 58. *Styles.* 287.

20. Note; It was holden by all the Justices, That the King shall have an Accompt against Executors, because the Law maketh a privity; It being found by matter of Record, that the Testator was indebted to the King; which Record cannot be denyed: But in the Case of a common person, an Accompt will not lye against Executors for want of privity. And the Accompt which the King brings, is *ad Computandum ad Dominum Regem*, without setting forth how the person came liable to Accompt: but a common person in his accompt ought to shew that the party was Receiver, Bayliff, &c. See Sir *Edward Coke*'s Case, Pasch. 21 Jac. in the Court of Wards. *Godbolt.* 289. See C. 11 Part 89, the Earl of *Devonshire*'s Case. The Master of the Ordnance pretending, That the old broken Ordnance and unserviceable did belong to him by reason of his Office, procured a Privy Seal, &c. and afterwards disposed of them to his own use, and dyed; his Executor was forced to Accompt for them. See 37 & 38 Eliz. Rott. 312. in the Exchequer, Sir *Walter Mildmayes* Case, adjudged accordingly. See C. 11. Part. 90. 91. there vouched.

21. One Executor sued another by way of Bill, in the Court of Requests, to Accompt there. And it was moved to have a Prohibition; for that before the Statute of *Westm.* 2. an Executor at the Common-Law, could not have an Accompt for want of privity, but now since that Statute, he might have an Accompt; but then it ought to be sued by Writ, and not by Bill in that Court: and further, for that they had given damages, where no damages ought to be given in an Accompt; and also they had there sequestred the Lands against Law. It was holden, That if the truth of the Case was such, That a Prohibition should be granted. But upon the View of the Bill, it appeared, That it was not an Accompt, but a Bill onely of discovery against Trustees, who went about to defeat an Infant; and that it was for a meer breach of Trust, and for a Confederacy and Combination: and therefore the Prohibition was denyed. Trinit. 17 Jac. in B.R. But in that case, It was agreed *per Curiam*, That a Bill lyeth for an Attorney of the Court, or of the Common-Pleas, or Exchequer, for an Accompt: and also it was clearly adjudged, That in an Accompt, a man should recover damages upon the second Judgment given.

22. Where a man is indebted unto another for Wares, and the Debt is super-annuated according to the Statute of 21 Jac. and afterwards the parties Accompt together, and the party is found to be Indebted unto the other party in so much money for such Wares; It was agreed in that case, although the party was without remedy before; yet now he shall have Debt upon an Accompt: and it is sufficient to say, That the Defendant was Indebted to him upon Accompt *pro diversis Mercimoniis.* Trin. 17 Car. in Co. B. *White* and *Grubbs* Case, adjudged accordingly.

2. *Where an Account lyeth, and where not; and by whom, and againſt whom it lyeth: and where not.*

1. A Man received 20 l. to bear an Adventure to *Roan*, and there to beſtow the ſame in Merchandizes: afterwards he dyed Inteſtate, and Adminiſtration was committed of his goods to J. S. The Queſtion was, Whether Debt, or Accompt lay againſt the Adminiſtrator: and it was adjudged, That an Action of Debt did lye, and not an Accompt; and that an Accompt did not lye againſt an Executor or an Adminiſtrator. But if a man bayle money, to bayle over, if he doth not deliver it over according to the Condition; there no Action of Debt lyeth, but an Account; for he receiveth the money, not to detain it: but preſently when he doth not deliver it over, he is accomptable to the bailour. So if a man deliver goods to Merchandize, if he doth not beſtow the money, an Accompt lyeth preſently; and that as well for the profits and encreaſe which he hath gained; as what he might have gotten by the Occupation of the money. Trinit. 28 H. 8. *Dyer. Core* and *Woodyes* Caſe. 20. 21.

2. A man brought an Accompt as Adminiſtrator of J. S. againſt Huſband and Wife; and the Writ was, That the Wife was Adminiſtrator; and declared of a Receipt by the Wife *dum ſola fuit*. The Defendant pleaded in barr, That the Huſband made his Will, and made J. D. his Executor, who proved the Will; and that afterwards the ſaid Executor made his Will, and made his Wife his Executrix, and dyed, and that ſhe proved the Will, and adminiſtred as well the goods of the firſt Teſtator, as of the ſecond Teſtator; and demanded Judgment of the Writ, without taking any traverſe to the dying Inteſtate: upon which the Plaintiff did Demur in Law. See Paſch. 3 Eliz. rott. 1085. *Dyer.* 202. *Cleeres* Caſe.

3. Leſſee for years deviſed his Terme for his life, the remainder over to another, and made the Deviſee his Executor, and dyed; the Deviſee proved the Will, and Entred, and made his Will, and dyed; and the Executor entred and took the profits for a year: and he in the Remainder brought an Action of Accompt againſt him as Bayliff. And the Opinion of the whole Court was, That the Action did not lye; for although, that the Deviſe be good to him in the Remainder, as an Executory deviſe (as it was adjudged, C. 8. Part. *M. Maxings* Caſe); yet becauſe he never was in poſſeſſion of the Land, nor took the profits of it, for want of privity, an Accompt did not lye againſt the Defendant: and the Entry of the Defendant in this caſe ſhall be adjudged as Executor, and then an Accompt will not lye againſt an Executor for want of privity. Trinit. 10 Eliz. *Dyer.* 277. See 22 Eliz. *Dyer.* 367. and Co. 10. Part. in *Campitts* Caſe.

4. In an Action of Accompt the caſe was; A man deviſed a ſumme of money to a Feme Covert, the Huſband and Wife made a Letter of Atturney to receive the money of the Executor, who received it to the uſe of the Wife: after, the husband and wife both dyed, and the Adminiſtrator of the Huſband brought an Accompt for the money. And the Opinion of the whole Court was, That the Accompt did lye: and it was holden, If the Huſband ſole, had made the Letter of Attorney, the Action would have lyen. And it was alſo there agreed, That when money is delivered to deliver over to another, the other ſhall have an Action of Accompt; albeit before he had not any propriety in it. And ſo if a debt be due to a ſingle woman upon an Obligation, if ſhe take huſband, and the husband ſole make a Letter of Attorney to receive the money, and he receive it; the husband alone ſhall have an Accompt. See M. 31 Eliz. in C. B. *Huntley* and *Griffs* Caſe. *Goldeſbr.* 158.

5. Note: By *Fennor*, Juſtice, That an Action of Accompt ſhall be maintainable againſt a Servant; but not againſt an Apprentice. Mich. 31 Eliz. *Goldeſbr.* 161. See C. 11. Part. 89. acc.

6. In an Accompt the Defendant pleaded, That he never was his Bayliff to render an Accompt: the Caſe was thus; The Plaintiff had a Leaſe of a Parſonage, and the Defendant not clayming any Intereſt, took the Tythes being ſet forth, and carried them away. The Queſtion was, If the Leſſee might have an Accompt againſt ſuch Treſpaſſor? It was adjudged, That in ſuch caſe an accompt would not lye, becauſe there is no privity; and wrongs are alwayes without privity. Alſo it was agreed, That an Abator or an Intruder ſhall not be charged in Accompt, becauſe they pretend to be Owners. And it hath been adjudged, Where one under colour of a Deviſe did occupy Lands in *London* for 20. years, and the Will was afterwards made void, and he that had Right thereupon brought an accompt. But it was adjudged, That it would not lye. But *Dyer* ſaid, That in the principal Caſe, the Leſſee might have an Action of Treſpaſſe for the Tythes; becauſe they were immediately in him upon the ſetting forth. Or he might have an *Ejectione Firmæ* of them. But an Accompt would not lye in the Caſe. Mich. 14. and

and 15 Eliz. in Co. B. *Tottenham* and *Bodiegfield's* Caſe. *Owen.* 35.

7. In an Accompt brought by the heir of a Copy holder, for the profits of his Copy-hold taken during his Non-age, The Defendant pleaded, That by the Cuſtome of the Mannor, the Lord might aſſign one to take the profits of the Copy-hold deſcended to the Infant to his own uſe, without rendring an Accompt. It was holden to be a good Cuſtome: yet it was adjudged, That the Action of Accompt doth not lye; for the Defendant hath not entred and taken the profits as *Prochyn-Amy*; in which caſe he is chargeable; but claymeth by the Cuſtome and Grant of the Lord of the Mannor, and not in the Right of the Heir. And it hath been adjudged, That if one Entreth into Land claiming by Deviſe; whereas in truth the Land deviſed is entailed, that he ſhall not be charged in an Accompt. In the principal caſe it was adjudged againſt the Plaintiff. 20 Eliz. in Co. B. *Leon.* 266.

8. A man charged two men in an Accompt as his Receivers; and the Queſtion was, Whether one of them might plead, *Ne unq; ſon* Receiver, without traverſing, that he and his Companion were his Receivers. And the Opinion of *Clenche* and *Suit*, Juſtices, was, That it was well without traverſe; and vouched, 10 E. 4. 8. Where an Accompt was brought againſt one, ſuppoſing the Receipt of 200 marks, by the hands of A. B. and C. D. The Defendant as to one 100 marks pleaded, That he received it by the hands of A. B. onely, without that that he received it by the hands of A. B. and C. D. And as to the other 100 marks, he received them by the hands of C. D. onely; without that that he received them by the hands of A. B. and C. D. and there it is doubted, Whether it be a good Plea or not. Quære. For it ſeems by *Fitzh.* Accompt 14. If an Accompt be brought againſt two; and one ſaith he was his ſole Receiver, and hath accompted before ſuch an Auditor, that if the Plaintiff doth anſwer to the Barre, he ſhall abate his Writ, becauſe the Receipt is ſuppoſed to be a Joynt Receipt. Mich. 28 & 29 Eliz. B. R. *Godbolt.* 43.

6. If two men be Partners of Merchandizes in one Ship; and one of them makes a Factor of all his Merchandizes. It was the Opinion of the Juſtices, That both of them may have ſeveral Writs of Accompt againſt the Factor, or they may joyn in one Writ of Accompt if they pleaſe. Mich. 29 Eliz. in B. R. *Godb.* 90.

10. Note. It was ſaid by *Coke*, Chief Juſtice, and agreed by the whole Court, That if a man delivereth money unto J. S. to my uſe; that I may have an Action of Debt, or an Accompt againſt him for the ſame at my Election. See M. 11 Jac in Co. B. *Clark's* Caſe. *Godbold.* 210.

11. It was a Queſtion, At what age of the Infant, he might have an accompt againſt his Guardian for the profits of his Lands received during his minority? And that doubt did ariſe upon the Statute of *Marlbridg*; which gives the accompt againſt the Guardian. But it was Reſolved by the Juſtices, That the heir after his age of 14 years, ſhould have an Accompt againſt his Guardian in Socage, at what time he pleaſed. Paſch. 16 Eliz. in Co. B. Rott. 436. See accompt. C. *Inſtitut.* 1. Part. 89. acc. and ſee there, that the Guardian in Socage ſhall render an accompt of his Marriage-money to the heir, or his Executors. And *Legitima ætas*, of an heir in ſuch caſe, is 14 years. See *ibid.*

12. Note. That an Action of Accompt lyeth againſt a Guardian in Socage; and the Defendant cannot therein wage his Law. But an Action of an accompt doth not lye againſt the Executors of a Guardian in Socage, for want of privity.

13. If two Joynt Merchants occupy their ſtock, goods, and Merchandizes in Common, to their common profit, one of them naming himſelf a Merchant, ſhall have an Accompt againſt the other, naming him alſo a Merchant, and ſhall charge him as *Receptor Denariorum ex quacunq; cauſa ad Communem utilitatem ipſorum.* See Co. 1. Part, *Inſtitut.* 172. acc.

14. Note: It was admitted *per Curiam*, That an Infant was admitted to ſue an Accompt againſt his Guardian in Socage, for the profits received after the Infant had accompliſhed his age of 14. years: and the Action was brought againſt him as Bayliff. Mich. 6 Jac. in B. R. *Cro.* 2. Part 219.

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3. *What ſhall be ſaid a good Plea in Barr of an Accompt*, et è contra: *And where Pleas before Auditors are good*, et è contra.

1. ONe brought an Accompt for Tynn delivered by him to the Defendant for to render an Accompt. The Defendant pleaded in Barr, That he had ſold it, and taken an Obligation for it. It was holden *per Curiam*, That it was no good Plea, in Barr of the Accompt; but that it was a good Plea for his diſcharge before Auditors. 28 *H.* 8. *Dyer.* 29.

2. An Information was for the Queen Exhibited in the Kings-Bench by the Attorney-General, againſt *Wiſe*, a Receiver of *Ireland*, for the Debt of 2000 l. arrearages of his Accompt adjudged before Auditors aſſigned by Commiſſion. The Defendant pleaded *Nihil debet per Patriam*: and it was holden a good Plea: but he cannot wage his Law; In debt brought for Arrearages before Auditors. 3 & 4 Ma. *Dyer.* 145. *Wiſe*'s Caſe.

3. In accompt, the Defendant ſaid, That for the Receipt of the money, he made to the Plaintiff a Bill, and demanded Judgment of the Action: and adjudged, It was no Plea; becauſe it was but a Teſtimony of the Accompt. 28 H 8. *Dyer.* 20. 1 H. 6. there vouched. So if a man be found in arrearages before Auditors, and he make a Bond for them; the ſame is no barre of the Accompt 11 H. 6. vouched. 28 H. 8. *Dyer.* 21.

4. In an Accompt brought, the Plaintiff declared of a Receipt of moneys by the hands of a ſtranger. The Defendant pleaded in Barre a gift of the ſame money afterwards to him. It was holden by *Warburton*, Juſtice, That it was a good Plea; for that by the gift, it is become his own money. But without all doubt, it is a good diſcharge before Auditors. See 28 H. 6. 7. there cited. Paſch. 19 Jac. in C. B. *Harrington* and *Harrington*'s Caſe. *Winch.* 9.

5. In Debt brought for the Arrearages upon an Accompt; the Defendant pleaded, That before the Accompt, the Plaintiff of his own wrong did Impriſon the Defendant, and aſſigned Auditors to him being in priſon, and ſo the Accompt was made by dureſſe of Impriſonment. And it was holden by all the Juſtices of both the Benches, That it was a good Plea in Barre; and Judgment was given accordingly. Hill. 25 Eliz. in B. R. The Earl of *Northumberland*'s Caſe. *Leon.* 13.

6. In an Accompt, the Defendant pleaded, That he never was his Receiver to render Accompt: which was found againſt him, and he adjudged to accompt before Auditors: and he pleaded, That before the Action brought, he had put himſelf in Arbitrament of all Debts, Accompts, Actions, &c. and the Arbitrators awarded, That he ſhould pay 10 l. onely in diſcharge of all debts, accompts, &c. which he had paid. It was adjudged, That this Arbitrament ought to have been pleaded in barr of the Action; which being omitted, the party hath loſt the advantage of it; and that he ſhould not now plead it before the Auditors in diſcharge of his Accompt. Trin. 4 Car. in Co. B. *Taylor* and *Pages* Caſe. *Cro.* 1. Part. 82.

7. In an Accompt the Caſe was; *A.* depoſited 200 l. in the hands of *B.* laid upon a Horſe-Race, to be delivered to the party that ſhould win, according to Articles made betwixt the Plaintiff and another: *A.* ſuppoſing he had won the money, demands it of *B.* who had delivered it over to another whom he ſuppoſed had won the Wager. The Defendant as to one hundred pound, pleads, That he was never Receiver: upon which Plea, he was adjudged to accompt before Auditors: and before Auditors, he pleads that in diſcharge of the Accompt, That he had delivered the money over to another that had won. The Plaintiff replyed, There was falſe play uſed by the other party. The Queſtion was, If the ſame were a good Plea in diſcharge of the Accompt before Auditors? It was Reſolved and adjudged by the Court, That the ſame had been a good Plea in barre of the accompt; but it was not a good Plea in diſcharge before Auditors: For where matter may be pleaded in barr, the party ſhall not be compelled to come before Auditors, for that were reaſonable. The undoubtenely here is, If there be apparent matter to the Court to hinder the Plaintiff from Judgment: And the Opinion of the Court was, That the Articles ſhould be interpreted fairly, and that there ought not to be foul play, according to common Intendment, and that it was material to ſhew, that there was foul play in the Replication; and ſo the Iſſue being well joyned, Judgment ought to be for the Plaintiff: and accordingly Judgment was given for him. Mich. 1651. in B. R. Entratur. Trinit. 1651. rott. 574. *Boynton* and *Cheeks* Caſe. *Styles.* 353, 354.

8. If a man doth recover againſt J. S. in a perſonal Action, and hath Judgment, the ſaid recovery is a good Barre in an Accompt afterwards brought for the ſame thing. C. 6. Part. *Ferrers* Caſe, acc.

9. In an Accompt the Defendant pleaded. *Ne unq; Receptor.* It was found for the Plaintiff, and the Defendant adjudged to Accompt before Auditors: and before the Auditors, the Defendant pleaded, That he had delivered over part of the money: The Plaintiff Demurred; for that it was contrary to the Verdict: for that is, That he ſhould accompt for all; and he would accompt but for part. It was ſaid, It was lately adjudged in this Court, in *Boynton*'s Caſe, That it was no good Plea before Auditors; for it would be miſchievous, if it ſhould be otherwiſe, in Reſerving ſuch matter to be tryed again. And of that Opinion was the whole Court; and therefore Judgment was given according to the Opinion delivered in *Boynton*'s Caſe. Trinit. 1654. in B. R. rott. 723. *Pendarves* and St. *Aubin*'s Caſe. *Styles.* 410. See *Boynton* and *Cheeks* Caſe before. Sect. 7. acc.

10. In

10. In an Action of Accompt, the Defendant pleaded, *Ne unq; Receptor*: A Verdict was for the Plaintiff: and Auditors aſſigned, and before the Auditors he pleaded, That he received the money of the Plaintiff to deliver over; and accordingly he had delivered it over. It was moved, If it were a good Plea before Auditors in diſcharge? The Opinion of *Rolls*, Chief Juſtice, was, If he plead, That it was paid by his conſent, it is a good Plea before the Auditors. But it is clear, It is a good Plea in barr, if the money were paid accordingly: It was adjudged for the Plaintiff. Hill. 1653. rott. 579. B. R. *Kirk* and *Lucas*'s Caſe, *Siyles*. 430.

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4. *The Proceſs in an Accompt.*

1. THe Proceſs in an Accompt is Summous, Pone, and Diſtreſſe; and upon a Nichel returned upon the Summons, Pone, or Diſtreſſe, the Outlawry lyes; and the Proceſs is returned from 15. dayes, to 15 dayes; and an Eſſoine lyes, 15 Jacob. in the Common-Pleas. *Brownlow*. 1. Part. 24.

2. In an Action upon Accompt there are two Judgments; the firſt Judgment is, That the Defendant ſhall accompt; becauſe he hath not accompted before. In this firſt Judgment, the Plaintiff ſhall not recover Coſts, or Damages; but a *Capias ad Computandum* ſhall iſſue; and if a *Non eſt inventus* ſhall be returned thereupon, then an Exigent: and when the Defendant is by rigour of Law Impriſoned; yet the Court in Favour of him, doth take baile; for he ſhall Accompt before Auditors which the Court ſhall appoint; and he ſhall appear from day to day before the Auditors, untill the Accompt ſhall be determined: and before the Auditors the Plaintiff or Defendant may joyn Iſſue; or Demur upon the Plea pleaded before the Auditors: and if any of the parties ſhall make default, and ſhall not appear; then if after appearance the Defendant ſhall not plead, or if he ſhall joyn Iſſue, or joyn in Demurrer, the Auditors ſhall certifie that to the Court, and the Court ſhall proceed to tryall of the Iſſue, if the Iſſue be joyned; or by Arguing the Demurrer, as the cauſe ſhall require: And if the Plaintiff ſhall make default, or ſhall not proſecute; or, if the Defendant ſhall not anſwer, the Court may commit him to the Fleet: and if Verdict paſſe for the Plaintiff, Coſts and Damages ſhall be recovered; and the Plaintiff ſhall recover his goods or moneys demanded, with his Coſts and Damages, and a *Fieri facias*, *Elegit*, or *Capias ad ſatisfaciendum* ſhall be awarded; And if a *Non eſt Inventus* be returned, Then an Outlawrie after Judgment. 15 Jac. in Co. B. See *Brownlow*. 1. Part. 24 & 25. acc.

Accord *and* Concord.

1. IN an Action upon the Caſe, the Plaintiff declared, That for 20 l. whereof the moyety was paid, and the reſt agreed to be paid at a certain time; the Defendant promiſed to deliver to the Plaintiff 400 l. of Wax at ſuch a day: and that at the day he delivered to him 200 l. of ill Wax. The Defendant pleaded an Accord between them afterwards for the ſaid 200 l. which was inſufficient; which Agreement he had perfomed. It was agreed by the Court, That the Barr was good; becauſe a Concord executed, is a good barr where damages are onely to be recovered. 6 E. 6. *Dyer*. 75. *Andrews* Caſe.

2. A man brought an Action of Covenant againſt an Aſſignee, for not repairing of a houſe. The Defendant pleaded in barr, an Accord betwixt them, and execution of it in ſatisfaction of the Reparation. 1. It was Objected, That when an Action is grounded upon a Wrong, (as in this caſe) that an Accord with ſatisfaction is no plea in barre of the Action. 2. It was Objected, That where the Action is founded upon a Deed, (as it was in that caſe, an Action of Covenant) there it could not be diſcharged without a Deed; by any accord or agreement in *Pais*. But it was Reſolved by the whole Court, That the Plea in barre was good: For when a duty accrues by the deed in certainty; as by Covenant, Bill, or Bond, to pay a ſum of money there, becauſe it takes his eſſence by writing, it ought to be avoided by matter of as high nature; there an Accord without writing is no ſatisfaction. But where no certain duty accrueth by the Deed, but a wrong is done ſubſequent to the deed for which damages is onely recoverable; there an Accord with ſatisfaction is a good Plea. C. 6. Part. 43. *Blakes* Caſe.

3. When a Treſpaſſe is done, and an Action is brought upon it; there an Accord executory is no Plea in barr; becauſe thereby the wrong is confeſſed, and yet there is no Recompence given in fact for the ſame. But in ſuch caſe, an Accord or Arbitrament is a good Plea in barr of an Action brought, if upon the Arbitrament a certain

tain ſum of money is to be paid at a certain day, becauſe there he hath a remedy for it C. 6. Part. *ibid.*

4. In an Action of Forgery of falſe deeds brought, the Defendant pleaded an Arbitrament made, That the Defendant ſhould be Nonſuit in an Action which he had againſt the Plaintiff: and it was adjudged to be no Plea, becauſe a Non-ſuit could be no ſatisfaction; and he could not compell him to be Nonſuit, which was in an Aſſiſe which he had brought againſt the Plaintiff. See *Plo.* Com. 11. acc.

5. An *Ejectione Firme* was brought againſt three Defendants. They pleaded, That, after the Treſpaſſe and Ejectment done, there was an agreement between the Plaintiff and the Defendants, That one of the Defendants ſhould pay unto the Plaintiff 10 l. in ſatisfaction thereof; and ſhould give his Bond to the Plaintiff for the ſame, which he had performed. And in this caſe, it was Reſolved by all the Juſtices, That the Plea was good. And it was Reſolved, That in all Actions which ſuppoſe a wrong to be done *Vi et armis*, where a *Capias*, or an Exigent lyeth at the Common-Law; that there in ſuch caſe Accord is a good Plea for Redemption of his body from Impriſonment; and that an Ejectione Firme includes in it ſelf, an Action of Treſpaſſe, as it appeareth by the Writ; for the Writ is, *Vi et armis*, and alſo the Entry of an Ejectione Firme is, *In plainto tranſpectionis, et Ejectionis Firme.* And it was agreed and Reſolved likewiſe by the Juſtices, That the beſt way of pleading an Accord is, To plead the ſame by way of Satisfaction, and not by way of Accord. Mich. 9 Jacobi. in the Common-Pleas. Intrator. Trinit. 9 Jac. Rott. 1151. *Peto* and *Chery*, and *Sherman's* Caſe. C. 9. Part. 77.

6. Note: By all the Juſtices, That in all theſe Actions, an Accord is a good Plea. 1. In a Raviſhment of Ward, upon the Statute of *Weſt.* 2. Cap. 35. 2. In a *Quare Ejectm infra terminum*, becauſe therein a Chattel onely is to be recovered. 3. In Writ brought againſt Leſſee for years. 4. In Detinue of Charters, although they concern the Free-hold. 5. In Detinue of a Horſe, or other goods perſonal 6. In Debt upon a Leaſe for term of years, although there be a certainty demanded: and ſo in Covenant for want of Reparations, becauſe the ſame is mixed with a wrong in which Damages are to be recovered. Co. 9. Part. *ibid.* See *Eaten* and *Blake's* Caſe. C. 6. Part. 43. devant. Sect. 2.

7. Note. It was Reſolved by all the Juſtices, That at the Common-Law, a Right or Title of a Free hold cannot be barred by an Acceptance of a Collateral Satisfaction, or a Collateral recompence; as, if a Diſſeiſor of the Mannor of *D.* gives to the Defendant the Mannor of *S.* in ſatisfaction of all his Right: And it is agreed in all our Books, That an Accord with ſatisfaction is a good Plea in a perſonal action where damages onely are to be recovered; but not in a Reall Action: and there. Where in a Writ of Dower brought, It was alledged, That the woman had agreed and accepted of an Eſtate in *Pais* upon a Condition, in ſatisfaction of her Dower; that ſuch an Accord or agreement was no barre of her Dower. C. 4. Part. 14 & 15. *Vernon's* Caſe.

Action *upon the Caſe.*

1. NOte: It was ſaid by *Fitzherbert* and *Shelley*, That if a man hath a Dogg which killeth Sheep; and the Maſter is ignorant of the Condition of the Dogg; that an Action upon the Caſe will not lye againſt the Maſter. 28 H. 8. 20. & 25. But Quære of it. For ſome are of opinion, That the *Sciens ipſum eſſe conſuetum ad mordendum*, is not material.

2. A man brought an Action upon the Caſe, That in Conſideration of 20 l. whereof the moyety was paid, and the reſt agreed to be paid at a day certain: The Defendant promiſed to deliver 400 pound of Wax to the Plaintiff ſuch a day: and at the day he delivered him 372 pound of ill Wax, and warranted it to be good and Merchantable, by which he was damnified, &c. The Defendant pleaded an Agreement made betwixt them; as well for the naughtineſſe of the Wax, as for the reſt not delivered, which the Plaintiff accepted of. And it was holden a good barre; and that the deceit was not material to be anſwered, becauſe the warranty of the ſufficiency, was after the Contract. 6 E. 6. *Dyer.* 75. See C. 6. Part. 41. *Blages* Caſe. acc.

3. A man who had a Free-hold in a Mill, brought an Action upon the Caſe againſt one, who had the Free-hold in a Meadow; and ſuppoſed by his Writ, that the Defendant *d vertit, multos Curſus aquarum*; ſo as where the Mill uſed to grinde two Quarters a day, that now by the Defendants turning of the water, he could now grind but one Quarter. 8 Eliz. *Dyer.* 248. It is a Quære, Whether the Action lyeth, or an Aſſiſe: but ſee C. 4. Part. *Lutterells* Caſe: agreed, the action doth lye. See 13 Eliz. M. rott. 1168. *Wicks* and *Seatles* Caſe; an Aſſiſe of Nuſance was brought; and

and Judgment given for the Plaintiff: but upon the ſame, a Writ of Errour was brought. See M. 8. Jac. B. R. Sir *William Wrey*, and *Veſper's* Caſe. *Cro.* 2. Part. 263.

4. An Action upon the Caſe was brought for the malitious miſ-turning of part of a Courſe of Water of a Conduit, which ran from a Fountain in *Clarkenwell*, to the Plaintiffs houſe: and upon the Evidence it appeared, that the diverſion was of a Pipe, out of which the husband made a Quill with a Cock, to ſerve his houſe with water; and that the husband dyed; It was holden, That the Action brought againſt the wife after the death of the husband did lye; becauſe every opening of the Cock is a new diverſion. Mich. 15 Eliz. *Dyer.* 319. *More* and the Lady *Brown's* Caſe.

5. An Action upon the Caſe was brought againſt *Joyce*, an Inne-keeper of the *Bell* at *M.* in *Kent*, for not ſcowring of a Ditch which ran betwixt the houſe of the Defendant and another man: and Judgment was given for the Plaintiff, That the Action did not lye: but upon a Writ of Errour brought, and for divers Errours aſſigned in the Declaration, the Judgment was reverſed. Mich. 29 Eliz. in B. R. *Joyce's* Caſe. *Godbold*, 54. See the caſe there at large.

6. An Action upon the Caſe was brought againſt a Common Hoſtler; and the Iſſue was, If the goods were ſtollen by the Defendants default? And it was given in Evidence, That the Houſe was full, and that therefore he refuſed the Plaintiff; and he ſaid he would make ſhift. And it was holden by the Court, That if the cauſe be falſe, an action lyeth againſt the Hoſtler for the refuſal. 5 Ma. *Dyer.* 158. See *Co.* 8. Part. *Caleyes* Caſe: and ſee 10 Eliz. *Dyer.* 266. acc.

7. An Action upon the Caſe brought, for ſtopping up of the Plaintiffs way: and he declared, That *J. S.* was Lord of the Mannor of *M.* and of two acres of Cuſtomary Land, and that the Lord for himſelf and his Cuſtomary Tenants of the ſaid two acres, had a way in, by, and thorow, &c. and that the Lord granted the Two acres to the Plaintiff, and that the Defendant had erected a Ditch and Hedge, by reaſon whereof he loſt the Benefit of his way. It was found for the Plaintiff: and becauſe it did not appear in the Declaration, to what Village the way led, the Judgment was reverſed. But if it had been a Common way, it had been good, *Alyns* and *Sparks* Caſe. Trin. 8 Jac. in Co. B. rott. 1606. *Brownlow.* 1. Part. 6.

8. Note: It was holden *per Curiam*, If a man will encourage one that was robbed, to cauſe the Felon to be Indicted, and to that purpoſe do accompany him to the Aſſizes; the ſame is Lawfull, without the incurring the damage of an Action upon the Caſe upon Conſpiracy: but if he knew, that he was not robbed, then the Action upon the Caſe lyeth. *Stone* and *Bates* Caſe. Paſc. 12 Jac. in Co. B. *Brownlow.* 1. Part. 9.

9. A man brought an Action upon the Caſe, For that the Defendant ſued forth a *Fieri Facias* upon a Judgment which he had againſt the Plaintiff; upon which Judgment the Defendant had before ſued out a *Fieri Facias*, and the Sheriff of *O.* thereupon had returned, That he had levied the debt and damages, and that they Remained in his hands for want of buyers; and notwithſtanding that he knew this, yet he proſecuted another *Fieri facias*; and thereupon the Sheriff had levied the debt and damages, and paid the ſame to the Plaintiff. It was adjudged, That although the *Fieri facias* was an Act in Law, yet the Action was well brought. *Warter* and *Freeman's* Caſe. M. 15 Jac. in Co. B. rott. 1941. *Brownlow.* 12.

10. Note, by *Popham*, Chief Juſtice, If a man agrees with me, that I ſhall ſet the Outer-Wall of my houſe upon his Land, and I do it accordingly; and afterwards the party that grants me the Licenſe, breaketh it down; if the grant were by Deed, I ſhall have an Action of Covenant for it; but if it be by word, yet I ſhall have an Action upon the Caſe againſt him. Paſch. 33 Eliz. Rott. 1308. in Co. B. *Hayes* and *Allen's* Caſe. *Popham.* 13. & 15.

11. In an Action upon the Caſe; the caſe was, The Defendant being a Goldſmith in *London*, and having Counterfeit Jewels, knowing them to be counterfeit, ſent his Servant *J. S.* with them to the Plaintiff, being a Merchant in Barbary, to make ſale of the Jewels to the King of Barbary, to whom the Plaintiff ſold them for 800 l. *J. S.* having received the money, went from thence. The Jewels afterwards being diſcovered to be counterfeit, the Plaintiff by Impriſonment was enforced to make Reſtitution to the King. It was agreed in this Caſe, That although the Defendant did not command his Servant to make uſe of the Plaintiff; and that the Jewels were of ſome value, viz. of 80 l. Yet the Action did well lye; and that the Maſter ſhould anſwer for his Servant. And there it was ſaid by *Doderidge*, Juſtice, That 22 Eliz. an Action upon the Caſe was brought in the Common-Pleas by a Clothier; That whereas he had gained great Reputation by making of his Cloath, and had great benefit thereby, and had uſed to ſet his mark to his Cloath; That another Clothier perceiving it, uſed the ſame mark to his ill Cloath on purpoſe to deceive him; and thereupon he brought his Action upon the Caſe againſt him: And it was Reſolved, That the Action did well lye. *Southern* and *Howes* Caſe. Trinit. 16 Jac. in B. R. *Popham.* 143. *Cro.* 2. Part. 468. acc.

12. A man being ſeiſed of ſuch a Meſſuage in ſuch a Pariſh in *London*, let to the Plaintiff the Cellar

tain ſum of money is to be paid at a certain day, becauſe there he hath a remedy for it C. 6. Part. *ibid.*

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5. An *Ejectione Firme* was brought againſt three Defendants. They pleaded, That, after the Treſpaſſe and Ejectment done, there was an agreement between the Plaintiff and the Defendants, That one of the Defendants ſhould pay unto the Plaintiff 10 l. in ſatisfaction thereof; and ſhould give his Bond to the Plaintiff for the ſame, which he had performed. And in this caſe, it was Reſolved by all the Juſtices, That the Plea was good. And it was Reſolved, That in all Actions which ſuppoſe a wrong to be done *Vi et armis*, where a *Capias*, or an Exigent lyeth at the Common-Law; that there in ſuch caſe Accord is a good Plea for Redemption of his body from Impriſonment; and that an Ejectione Firme includes in it ſelf, an Action of Treſpaſſe, as it appeareth by the Writ; for the Writ is, *Vi et armis*, and alſo the Entry of an Ejectione Firme is, *In placito tranſpectionis, et Ejectionis Firme.* And it was agreed and Reſolved likewiſe by the Juſtices, That the beſt way of pleading an Accord is, To plead the ſame by way of Satisfaction, and not by way of Accord. Mich. 9 Jacobi. in the Common-Pleas. Intrator. Trinit. 9 Jac. Rott. 1151. *Peto* and *Chery*, and *Sherman's* Caſe. C. 9. Part. 77.

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Action *upon the Caſe.*

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and Judgment given for the Plaintiff: but upon the same, a Writ of Errour was brought. See M. 8. Jac. B. R. Sir *William Wrey*, and *Vesper's* Case. *Cro.* 2. Part. 263.

4. An Action upon the Case was brought for the malitious mis-turning of part of a Course of Water of a Conduit, which ran from a Fountain in *Clarkenwell*, to the Plaintiffs house: and upon the Evidence it appeared, that the diversion was of a Pipe, out of which the husband made a Quill with a Cock, to serve his house with water; and that the husband dyed; It was holden, That the Action brought against the wife after the death of the husband did lye; because every opening of the Cock is a new diversion. Mich. 15 Eliz. *Dyer.* 319. *More* and the Lady *Brown's* Case.

5. An Action upon the Case was brought against *Joyce*, an Inne-keeper of the *Bell* at *M.* in *Kent*, for not scowring of a Ditch which ran betwixt the house of the Defendant and another man: and Judgment was given for the Plaintiff, That the Action did not lye: but upon a Writ of Errour brought, and for divers Errours assigned in the Declaration, the Judgment was reversed. Mich. 29 Eliz. in B. R. *Joyce's* Case. *Godbold*, 54. See the case there at large.

6. An Action upon the Case was brought against a Common Hostler; and the Issue was, If the goods were stollen by the Defendants default? And it was given in Evidence, That the House was full, and that therefore he refused the Plaintiff; and he said he would make shift. And it was holden by the Court, That if the cause be false, an action lyeth against the Hostler for the refusal. 5 Ma. *Dyer.* 158. See *Co.* 8. Part. *Calcyes* Case: and see 10 Eliz. *Dyer.* 266. acc.

7. An Action upon the Case brought, for stopping up of the Plaintiffs way: and he declared, That *J. S.* was Lord of the Mannor of *M.* and of two acres of Customary Land, and that the Lord for himself and his Customary Tenants of the said two acres, had a way in, by, and thorow, &c. and that the Lord granted the Two acres to the Plaintiff, and that the Defendant had erected a Ditch and Hedge, by reason whereof he lost the Benefit of his way. It was found for the Plaintiff: and because it did not appear in the Declaration, to what Village the way led, the Judgment was reversed. But if it had been a Common way, it had been good, *Alyns* and *Sparks* Case. Trin. 8 Jac. in Co. B. rott. 1606. *Brownlow.* 1. Part. 6.

8. Note: It was holden *per Curiam*, If a man will encourage one that was robbed, to cause the Felon to be Indicted, and to that purpose do accompany him to the Assizes; the same is Lawfull, without the incurring the damage of an Action upon the Case upon Conspiracy: but if he knew, that he was not robbed, then the Action upon the Case lyeth. *Stone* and *Bates* Case. Pasc. 12 Jac. in Co. B. *Brownlow.* 1. Part. 9.

9. A man brought an Action upon the Case, For that the Defendant sued forth a *Fieri Facias* upon a Judgment which he had against the Plaintiff; upon which Judgment the Defendant had before sued out a *Fieri Facias*, and the Sheriff of *O.* thereupon had returned, That he had levied the debt and damages, and that they Remained in his hands for want of buyers; and notwithstanding that he knew this, yet he prosecuted another *Fieri facias*; and thereupon the Sheriff had levied the debt and damages, and paid the same to the Plaintiff. It was adjudged, That although the *Fieri facias* was an Act in Law, yet the Action was well brought. *Warter* and *Freeman's* Case. M. 15 Jac. in Co. B. rott. 1941. *Brownlow.* 12.

10. Note, by *Popham*, Chief Justice, If a man agrees with me, that I shall set the Outer-Wall of my house upon his Land, and I do it accordingly; and afterwards the party that grants me the License, breaketh it down; if the grant were by Deed, I shall have an Action of Covenant for it; but if it be by word, yet I shall have an Action upon the Case against him. Pasch. 33 Eliz. Rott. 1308. in Co. B. *Hayes* and *Allen's* Case. *Popham.* 13. & 15.

11. In an Action upon the Case; the case was, The Defendant being a Goldsmith in *London*, and having Counterfeit Jewels, knowing them to be counterfeit, sent his Servant *J. S.* with them to the Plaintiff, being a Merchant in Barbary, to make sale of the Jewels to the King of Barbary, to whom the Plaintiff sold them for 800 l. *J. S.* having received the money, went from thence. The Jewels afterwards being discovered to be counterfeit, the Plaintiff by Imprisonment was enforced to make Restitution to the King. It was agreed in this Case, That although the Defendant did not command his Servant to make use of the Plaintiff; and that the Jewels were of some value, viz. of 80 l. Yet the Action did well lye; and that the Master should answer for his Servant. And there it was said by *Doderidge*, Justice, That 22 Eliz. an Action upon the Case was brought in the Common-Pleas by a Clothier; That whereas he had gained great Reputation by making of his Cloath, and had great benefit thereby, and had used to set his mark to his Cloath; That another Clothier perceiving it, used the same mark to his ill Cloth on purpose to deceive him; and thereupon he brought his Action upon the Case against him: And it was Resolved, That the Action did well lye. *Southern* and *Howes* Case. Trinit. 16 Jac. in B. R. *Popham.* 143. *Cro.* 2. Part. 468. acc.

12. A man being seised of such a Messuage in such a Parish in *London*, let to the Plaintiff the Cellar

Cellar of the ſaid Houſe from Week to Week at ſuch a Rent, ſo long as the parties ſhould pleaſe. The Plaintiff entred and was poſſeſſed; and the Defendant was poſſeſſed of a Ware-houſe over the ſaid Cellar; and the Plaintiff having three Butts of Sack in the Cellar, the Defendant put ſuch a Quantity and burthen of Merchandizes into the Ware-houſe, that by the force and weight of the burthen, the floor thereof was broken, and fell into the ſaid Cellar upon the Plaintiff's Wines, that the Wine did fly out of the Veſſels, and became of no value. The Defendant ſaid, That the Floor of the ſaid Ware-houſe ſuſtained as great a burthen of Merchandizes as that was; and for want of Reparations by them to whom the Ware-houſe did belong, it was ſo ruinous, that the poſts of the Cellar brake ſuddenly. It was Reſolved by all the Juſtices, That the Action did lye. Whereupon a Writ of Errour was brought, and the Judgment was affirmed: for that the Plaintiff had alledged, That the floor brake by the weight of the merchandizes put upon it; and that it did bear more weight before, is but an anſwer by Argument. And it was ſaid by the Court, That he that takes a ruinous houſe, ought to mind well what weight he puts upon it, at his perill. Paſch. 36 Eliz. *Edwards* and *Halinders* Caſe. *Popham.* 46. & 47. See *Leon.* 2. Part. acc. the ſame Caſe.

13. A man brought an Action upon the Caſe, for ſtopping his Water-Courſe; and declared, That 22 Jac. he was poſſeſſed of the Rectory of *M.* of which a Curtilage was parcel: and that in this Curtilage, is, and hath been time out of mind, a Water-Courſe, for the watering of the Cattel of the Plaintiffs and others, and for other neceſſary uſes: and that a certain Water-Courſe time out of mind flowed from *Medford* ſtream, to the Curtilage, and filled the Pond; and that the Defendant knowing this, intending to damm up the ſaid Water-Courſe, had built a Stone-Wall thereupon, whereby the Water-courſe was ſtopt up, to his damage: and laid it to be with a *Continuando*, That King *Henry* the Eighth was ſeiſed of the ſaid Mannor and Rectory in Fee, and of a piece of ground lying between the Water-houſe and the ſaid Stream; and by Letters Patents granted, they came to one *Box*, which by mean conveyance came to the Defendant, who was ſeiſed, and juſtified the filling up of the ſaid Water-courſe. And the onely Queſtion was, Whether the Unity of poſſeſſion had extinguiſhed the Water-courſe, or not? And upon long Argument, wherein many Caſes were vouched, [which ſee there] It was adjudged That the Action did well lye; and that the Water-courſe was not extinguiſhed by the Unity of poſſeſſion, and that the preſcription was not gone. *Sury* and *Pigotts* Caſe. Hill. 1 Car. Rott. 124. *Popham.* 166.

14. In an Action upon the Caſe, the Plaintiff declared, That he was ſeiſed of certain Lands; and that the Defendant had ſtopped a Water-Courſe, by which his Land was drowned. It was found for the Plaintiff: and moved in Arreſt of Judgment, That it appeareth upon the Plaintiffs own ſhewing, that he had the Free-hold, and therefore he ought to have had an Aſſiſe. But the Exception was not allowed, and the Plaintiff had Judgment. Trinit. 32 Eliz. B. R. rott. 314. *Sly* and *Mordants* Caſe. *Leonard.* 217.

15. In an Action upon the Caſe, the Plaintiff declared, That *J. S.* was ſeiſed of a houſe in *A.* and that he and all thoſe whoſe eſtate, &c. time out of mind have had a way over certain Lands of the Defendants called *C. pro quibuſdam averiis ſuis*: and that the Defendant had ſtopt his Way. It was found for the Plaintiff. In arreſt of Judgment it was moved, That the Title to the Way was not certainly ſet forth: for it is *pro quibuſdam averii ſuis*, which is uncertain: And of that Opinion was the whole Court. But yet *Gawdy*, Chief Juſtice, ſaid, The ſame was no cauſe to ſtay Judgment: for it appeareth, the Plaintiff hath cauſe of Action: and although the matter be incertainly alledged; yet the Defendant hath loſt his advantage of it, in ſurceaſing his pleading to it: and therefore Judgment was entred for the Plaintiff. M. 33 Eliz. in B. R. *Martingal* and *Andrews* Caſe. *Leonard.* 236.

16. In an Action upon the Caſe; The Plaintiff declared, That whereas he brought an Action upon the Caſe againſt one *Lerding*; the Defendant at the Tryall being produced as a Witneſſe for the Defendant, gave Evidence upon his Oath to the Jury, That the Plaintiff was a common Lyer, and ſo recorded in the Starr-Chamber: by reaſon whereof, though the Jury found for the Plaintiff; yet they gave but ſmall damages to the Plaintiff. It was found for the Plaintiff: And upon a Motion in Arreſt of Judgment, It was adjudged by the whole Court, That the Action doth not lye, and that this is a new Invention; and it is impoſſible to be known, Whether the Jury gave the leſſer damages for that: And if ſuch Actions ſhould be allowed, Every Witneſſe upon ſuch a ſurmiſe, might be charged in an Action upon the Caſe. Alſo it is not averred, that the Plaintiff was not a common lyer; or that he was not recorded for a common lyer in the Starr-Chamber. Mich. 11 Jac. in Co. B. *Harding* and *Bodman's* Caſe. *Hutton.* 11.

17. In an Action upon the Caſe, the Plaintiff declared, That whereas *J. S.* brought an Action againſt him for 30 l. and thereupon a *Non prof.* was entred, and coſts aſſeſſed for the now Plaintiff: the Defendant being Attorney for the ſaid *J. S.* having

having notice thereof, unduly and malitiouſly cauſed Judgment to be entred for the ſaid *J. S.* againſt the Plaintiff; by reaſon whereof he was impriſoned, untill he was delivered by a *Superſedeas*. It was adjudged, the Action did lye; 1. Becauſe that by the procurement of the ſaid Judgment for *J. S.* although the Judgment was Erronious, yet the Plaintiff was Impriſoned thereby, which is good cauſe of Action. And, 2. admitting there was never a Judgment of *Non proſ.* yet when the Defendant procured him to be taken in Execution, the ſame is ſufficient cauſe of Action. Mich. 10 Car. B. R. *Knight* and *Coppings* Caſe. *Hutton.* 225.

18. A man ſells Sheep, and Warrants that they are ſound, and ſhall be ſound for a year: upon which Warranty, an Action upon the Caſe was brought. It was moved, That the Warranty is impoſſible to be performed, becauſe it is onely the Act of God to make them ſound for a year. But the Court was clear of a contrary Opinion; for it is not Impoſſible: no more then to warrant, That ſuch a Ship ſhall return ſafe to *London*: which is an uſuall Warranty amongſt Merchants. Mich. 39 Eliz. in C. B. *King* and *Braines* Caſe. *Owen*, 60.

19 An Action upon the Caſe was brought; for that the Defendant to take away the Plaintiffs good name, did malitiouſly prefer a Bill of Indictment at the Seſſions of the Peace againſt the Plaintiff, containing, That the Plaintiff had ſtollen two bundels of Fetches, and did entice *J. S.* to give in Evidence, that the Indictment was true, by which the Plaintiff was bound to anſwer it at the next Aſſizes; and there he was acquitted. It was ſaid, That this Action did not lye, but a Writ of Conſpiracy. But it was holden by *Hobart*, Chief Juſtice, and others, That although it was not ſhewed in the Declaration, that the Bill was found; yet it was a great Scandall, to give this matter in evidence to the Jury: And as the Courſe of Juſtice ought not to be ſtopt, by hindring the preferring of a Bill; ſo a mans good name in things which concern his life, ought not to be taken away without good cauſe. Hill. 19 Jac. in Co. B. *Wright* and *Blacks* Caſe. *Winch.* 28. See Hill. 10 Jac. B. R. rott. 921. *Woorewood* and *Cordery's* Caſe. Where, in an Action upon the Caſe, the Plaintiff declared, That the Defendant intending to take away his good name, preferred a Bill of Indictment; and did charge and give in Evidence to the Jury, That the Plaintiff had raviſhed *Dorothy Cave*; and the Jury found an *Ignoramus*; and yet adjudged, That the Action did lye: and upon a Writ of Errour brought, the Judgment affirmed. See *Winch.* 54.

20. One man ſhall not have an Action upon the Caſe, for a Common Nuſance done upon the High-way: but the ſame is puniſhable in other places in the Leet by Preſentment. But if any one particular perſon have more particular damage by it, than another, he may have a particular Action upon the Caſe, for his particular Injury. 37 Eliz. B. R. *Williams* Caſe. C. 5. Part. 72.

21. In an Action upon the Caſe; the Caſe was, That a Copy-holder in Fee did preſcribe to have Common in *B.* and alledged, That the Defendant put his Cattel into the Common; and that they did deſtroy the Common, ſo as *Communiam habere non potuit, ſed totam proficuum ſuum amiſit.* It was adjudged, becauſe it did not appear that any other had Common there, That the Action did lye: and although the Cattel did eſcape into the Common, yet the Action would lye. 10 Jac. C. 9. Part. 111. *Mayes* Caſe.

22. In an Action upon the Caſe, The Plaintiff declared, That the Defendant *tam negligenter et improvidè cuſtodivit ignem ſuum, quod domus combuſta fuit*; upon a Leaſe of a houſe at Will: upon Not guilty pleaded, it was found, he was but Tenant at Will. It was adjudged, That for permiſſive Waſte, no Action lyeth againſt Tenant for years, or at Will, by the Common-Law. But if a Tenant at Will commit voluntary Waſte, as, pulling down of houſes, cutting of Trees; and where a confidence is put in the partie, there an Action of the Caſe will lye, although the Defendant cometh to the poſſeſſion by the act of the party. 43 Eliz. B. R. C. 5. Part. The Counteſſe of *Salops* Caſe. 13.

23. *A.* recovered againſt *B.* 20 l. in the Common-Pleas, and dyed. *C.* upon that Judgment, in the name of *A.* Outlawed *B.* in the Huſtings of *London*; and thereupon *B.* was taken in the County of *N.* and there Impriſoned: and thereupon he brought an Action upon the Caſe againſt *C.* It was Objected, That the *Capias utlagatum* was erronious. But it was adjudged, That the Defendant ſhould not take advantage of that, having wrongfully purſued the Plaintiff: and therefore becauſe the Plaintiff was impriſoned and moleſted by ſuch Suit, the Action upon the Caſe did lye againſt the Defendant. 27 Eliz. C. 7. Part. 4. *Balwer's* Caſe.

24. In an Action upon the Caſe, The Plaintiff declared, That the Defendant malitiouſly intending to deprive the Plaintiff of the profits and caſements of his houſe; Erected a Wood-pile ſo nigh the Hall and Parlour of the Plaintiff, that he was barred of his Light: and alſo erected a Hogſtie ſo near his Hall and Parlour, that by the ſtink of them, he could not endure his houſe. And it was adjudged, That the Action was maintainable: and Trin. 29 Eliz. in B. R. *Moſley* and *Blands* Caſe was

 reverſed:

Vouched: where a man preſcribed, that he and all thoſe whoſe eſtate he had in a houſe, had uſed to have Windows; by which Windowes they uſed to have divers wholeſome eaſements and commodities: and that the Defendant to deprive him of the eaſements, &c. *et obſtruere Meſſuagium predict. horridâ tenebritate*, erected a building upon a piece of ground near the ſaid houſe; by which he loſt his ſaid Eaſements, *et maxima pars Meſſuagii predict. horrida tenebritate obſtructa fuit*: and it was adjudged, That for the ſtopping of the proſpect, which is onely a matter of delight, and not of Neceſſity, the Action did lye. 8 Jac. C. 9. Part. *Aldred's* Caſe. 57. See *Hughes* and *Kymiſh* Caſe. Trinit. 7 Jac. B. R. rott. 1490. acc. *Bolſtr.* 1. Part. 115. See *Symonds* and *Seabourns* Caſe. Paſch. 8 Car. B. R. *Cro.* 1. Part. 237. acc. See Hill. 12 Jac. B. R. rott. 123. *Rippon* and *Rowleys* Caſe. *Cro.* 2. Part. 373. *ad idem.* And Quære, if it lyeth againſt Leſſee for years, who continueth the ſtopping of the Lights.

25. In an Action upon the Caſe, for erecting of a Mill; a Cuſtome was laid to be by the Lord of Mannor, That all and every the Reſiants and Inhabitants within his ſaid Mannor of *D.* had uſed to come and grind at his Mill; and ſhewed, That the Defendant being an Inhabitant and a Reſiant within the ſaid Mannor, had erected a Mill contrary to the Cuſtome. It was Objected, That the Cuſtome was not good, being too generall Alledged againſt all and every the Inhabitants. But the Cuſtome was adjudged to be good; and ſuch a preſcription, by way of Tenure, to grind all his Corn at his &ill, is good; and if it be good by way of Tenure *à fortiori* by Preſcription and Cuſtome: and ſo by the Opinion of the whole Court, it was adjudged, That the Action did well lye. Hill. 11 Jac. B. R. *Hix* and *Gardiners* Caſe. *Bolſtr.* 2. Part. 195.

26. In a Special Action upon the Caſe, The Plaintiff declared, That the Defendant being a common Chirurgion, had undertaken the Cure of his Servant, being hurt with a Cart-wheel; and ſhewed, That he was not onely careleſſe of the Cure, but he had alſo applyed unwholeſome Medicines, which put him to more pain *per quod ſervitium amiſit per ſpacium* of one whole year; *unde actio.* The Defendant pleaded, That he had applyed wholeſoever Medicines. The Opinion of the whole Court was, That the Action did well lye by reaſon of the Defendants undertaking of the Cure: and alſo that the Action doth well lye by the Maſter. Hill. 12 Jac. in B. R. *Everard* and *Hopkins* Caſe. Caſe. *Bolſtr.* 2. Part. 332.

27. The Cuſtome of a Mannor was laid to be, That every Copy-holder might nominate one to his Copy-hold eſtate, who upon tender of his Fine to the Lord in Court, ought by him to be admitted; and the Plaintiff layed it, That he being nominated to the Copy-hold eſtate, did tender his Fine to the Lord in Court, and prayed to be admitted; and the Lord refuſed to do it: and for his refuſal, he brought his Action upon the Caſe. And upon a long debate, It was Reſolved, That the Action did not lye, becauſe he might have his remedy by *Subpœna* in the Chancery; no more then an Action upon the Caſe doth lye againſt Feoffees in Truſt, who refuſe to perform the Truſt repoſed in them; becauſe they may compell them to it by *Subpœna* in the Chancery. Hill. 12 Jac. in B. R. *Forde* and *Hopkins* Caſe. *Bolſtr.* 2. Part, 336. See *Cro.* 2. Part. 368. Caſe.

28. A man brought an Action upon the Caſe againſt divers; for that they had falſly accuſed him of Treaſon at *D.* in the County of *N.* and had cauſed him to be apprehended by a Conſtable, and brought before a Juſtice of Peace, who committed him to the Goal, and at the next Aſſizes malitiouſly exhibited a Bill of Indictment of Treaſon againſt him, and falſly affirmed it to be true. It was found for the Plaintiff. And moved in Arreſt of Judgment, That the Action lyes not, becauſe there was never any Preſident ſeen of any ſuch Action brought: for the miſchief that might enſue to the State, if men ſhould be deterred for diſcovering Treaſon. But it was reſolved by the whole Court, That the Action did lye; and the Defendants are not to be excuſed of ſuch falſities; when the Plaintiff was diſcharged by Proclamation; and the Law will not ſuffer the Defendants to go unpuniſhed. M. 1 Car. B. R. *Smith* and *Crawſhaw* and others Caſe. *Cro* 1. Part. 11. See Sect. 19 before. See alſo *Mills* and *Mills* Caſe. Mich. 7 Car. B. R. *Cro.* 1. Part. 173. *ad idem.* See Mich. 12 Jac. B. R. *Lovett* and *Fawkners* Caſe. *Cro.* 2. Part. 357. contr.

29. The Lady *Cavendiſh* by her Steward bought certain Cattel of the Defendants for 80 l. paying 20 l. in hand, and 60 l. reſidue at the end of a moneth: the Steward paid down 20 l. and at the end of the moneth paid likewiſe the 60 l. to the Defendant. The Steward dyed; The Defendant afterwards demanded of the Lady the 60 l. affirming, the ſame was not paid; and the *fidem adhibens* to his aſſertion paid him the 60 l. whereas *revera* he had received it before: and for this deceit, ſhe brought an Action upon the Caſe againſt the Defendant. It was moved, That the Action did not lye, becauſe ſhe ought to have an Action of Accompt. But all the Court agreed, That the Action did well lye. Mich. 4 Car. B. R. The Lady *Cavendiſh* and *Middleton's* Caſe. *Cro.* 1. Part. 100.

30. In an Action upon the Case; The Plaintiff declared, Whereas the Defendant kept a Maſtiff, *Sciens*, that he was *aſſuetus ad mordendum porcos*; and that the Plaintiff was poſſeſſed of a Sow great with Piggs; and that the ſaid Maſtiff did bite the ſaid Sow, ſo as ſhe dyed of the biting. It was ſaid, That the biting of Hoggs was neceſſary; and it is not like to the keeping of a Dogg which uſually bites Sheep. And therefore the Court was of Opinion, That the Action did well lye. Paſch. 8 Car. B. R. *Boulton* and *Banks* Caſe. *Cro.* 1. Part. 184.

31. An Action upon the Caſe was brought againſt the Defendant; For that he being an Apparator, falſly and malitiouſly, without cauſe or colour of Suſpition *ex Officio*, upon pretence of Incontinency of the Plaintiff with one *E.* cited him to the Eccleſiaſtical Court, where he was charged, untill cleared upon Sentence. Upon Not Guilty pleaded, It was found for the Plaintiff. It was ſaid, That the Action did not lye, becauſe he did nothing but by vertue of his Office. But it was adjudged *per Curiam*, becauſe it was malitiouſly done, and of his own head, to gain to himſelf, and not upon pretence of Common Fame, that the Action did lye. And Judgment was given for the Plaintiff. Hill. 7 Car. B. R. rott. 1147. *Cadion* and *Hill*'s Caſe *Cro.* 1. Part. 212. See Paſch. 10 Jac. rott. 628. B. R. *Powel* and *Godfrey*'s Caſe. *Cro.* 2. Part. 351. acc. and *Weald* and *Peaſe* Caſe. *ibid.* 355. acc.

32. An Inne-keeper brought an Action upon the Caſe againſt the Defendant; For that the Defendant erected a Tallow Furnace, and therein malitiouſly boyled much ſtinking Tallow, to the great annoyance of him and his gueſts, and layed it, That by reaſon of ſuch ſtench, many of his Gueſts left his houſe, and many of his Family became unhealthful. Upon Non-Guilty, It was found for the Plaintiff. And although it was moved, That a Tallow-Chandler ought to uſe his Trade, which cannot be ſaid to be a Nuſance; Yet it was holden by the Court, That the Action was maintainable; for every one ought *ſic uti ſuo, ut alienum non ladat*: And ſuch erection of a Furnace in *Denmark*-Street in the *Strand* was found to be a Nuſance, upon an Indictment in *Tobyes* Caſe, and was removed. Trin. 14 Car. rott. 539. B. R. *Morley* and *Pragnell*'s Caſe. *Cro.* 1. Part. 367.

33. A man was ſeiſed of a Wood adjoyning to a Common; where the Copy-holders of the Manor had Common; and he maintained Conies in the ſaid Wood, which ran out thereof into the Common, and did eat up the Common: whereupon the Copy-holder brought an Action upon the Caſe: But becauſe, although the Commoner hath loſſe; yet becauſe it is without Injury done by the Defendant; and for that when the Conies are out of the Wood, the owner hath no property in them, they being *feræ naturæ*; and the Commoner is at no miſchief, for that he may kill the Conies; I was adjudged, That the Action would not lye againſt the Defendant. Hill. 8 Car. B. R. rott. 302. *Hinſley* and *Wilkinſon*'s Caſe. *Cro.* 1. Part. 282.

34. A man ſued forth a *Fieri facias* upon a Judgment, and delivered it to the Sheriff; who by vertue thereof took goods of the Plaintiff's, and ſo made his Return; and that the goods remained in the Sheriff's hands *pro defectu emptoris*: and afterwards the ſame party well knowing the ſame to vex and double-charge the Plaintiff, ſued forth another *Fieri facias* to the ſame Sheriff, who levied other money of the Plaintiff's goods, and paid it to the Defendant. And for ſuing forth this double Execution, the Plaintiff brought his Action upon the Caſe; and it was adjudged, That the Action did well lye. And it was there Reſolved, That if a man ſueth me in a proper Court, yet if his Suit be utterly without ground of Truth, and that known to himſelf, an Action of the Caſe lyeth againſt him for the undue vexation and damage which he putteth me unto by his ill practice; although the Suit in it ſelf be legal. So, if a man charge me with a Crime in a Court who hath not Juriſdiction of the cauſe; I ſhall have an Action the Caſe for it, C. 4. Part. 14. And therefore it was Reſolved, That in no cauſe, a new Action muſt be brought before the firſt is determined; becauſe till then, it cannot appear to be juſt. Mich. 15 Jac. Co. B. rott. 1941. *Waterer* and *Freeman*'s Caſe. *Hob.* 205. 266.

35. In an Action upon the Caſe, The Plaintiff declared, That 20. Jan. 9 Jac. he delivered to the Defendant, who was a common Hoy-man, and uſed to carry goods by water for hire from *London* to *Milton* in *Kent*, a Port-manteau with 50*l.* in it, to be carried; for which, the ſame day, he gave him 2 d. and that the Defendant had ſuffered the ſame goods to be loſt. The Defendant pleaded, That the 21. day of the ſame January, the Plaintiff diſcharged him of keeping them. Which the Plaintiff traverſed; Upon which the Defendant did Demur in Law. And it was adjudged for the Plaintiff; for that by the Demurrer in Law, he confeſſeth there was no diſcharge of the carrying; and then by the Common Law the Action lyeth. And upon a Writ of Errour brought in the Exchequer, the Judgment was affirmed. Trin. 12 Jac. B. R. rott 1543. *Rich* and *Kneeland*'s Caſe. *Hob.* 17, & 18. *Cro.* 2. Part. 330. the ſame caſe.

36. A man brought an Action upon the Caſe againſt an Inne-keeper for goods imbeſtiled out of

his Inne; It was found for the Plaintiff. It was moved in Arreſt of Judgment, That he had not alledged it to be in *Communi Hoſpitio*: Yet becauſe the Declaration laid the Cuſtome to be ſo common Innes; and then layed, That he was *Hoſpitatus in Hoſpitio*; But it was adjudged for the Plaintiff: for it ſhall be intended *Domus non Hoſpitium*, if it be not *Commune*. Trin. 16 Jac. Rott. 1725. C. B. *Maſon* and *Graſſon's* Caſe *Hob.* 245. See *Coo.* 4. Part. 8. in *Southcotes* Caſe. C. 8. Part. *Calyrs* Caſe, acc.

37. Note; It was agreed, That if the Ordinary do admit a Clark contrary to the Verdict in a *Jure Patronatus*, the Patron after a Recovery had againſt the Uſurper and his Incumbent, may have an Action upon the Caſe againſt the Ordinary, for his wilfull wrong, delay and trouble that he hath put him to; and he ſhall recover his damages and coſts againſt him: But the Patron ſhall not have any Action upon the Caſe, before he hath tryed his Title in a proper Action, and againſt the proper perſons. Paſch. 17 Jac. C. B. rott. 877. in Sir *William Elvis* and the Biſhop of *York's* Caſe. *Hob.* 315. 317. 318.

38. Note; It was Reſolved by the Juſtices, That if one be bounden by Preſcription or otherwiſe, to Repair a Wall or Sea-Bank, if any default be in him, and the danger is not inevitable, but he himſelf may well repair it, The Commiſſioners of Sewers may charge him onely to repair it; and if by his default, the danger become inevitable, or that he is not able to repair it, by reaſon whereof others are charged; in ſuch caſe each of them may have an Action upon the Caſe againſt him who ought to Repair the Wall or Sea-Bank, and recover their damage according to their loſſe. *Reighley's* Caſe. *Coo.* 10. Part. 7 Jac. in Co. B. 139. 140.

39. The Defendant being a Goldſmith, and having skill in Jewels and precious Stones, had a Stone which he affirmed to be a Bezars Stone; and ſold it to the Plaintiff for 100 l. whereas *revera* it was not a Bezars ſtone; for which deceit, the Plaintiff brought an Action upon the Caſe. It was holden in the Exchequer-Chamber by all the Juſtices, That the bare affirmation of it to be a Bezars ſtone, without warranting of it to be ſo, was no cauſe of Action. But, *Anderſon*, Chief Juſtice, was of Opinion, That the Deceit for ſelling it for a Bezar, whereas it was not ſo, was a good cauſe of Action. But notwithſtanding it was otherwiſe adjudged. Paſch. 1 Jac. in Exchequer-Chamber, *Chandler* and *Lopus* Caſe. *Cro.* 2. Part. 4. See *Cro.* 2. Part. 196. *Roſwell* and *Vaughan's* caſe, acc.

40. In an Action upon the Caſe, the Plaintiff ſuppoſed, that he was ſeiſed in Fee of the Mannor of *H.* and of a Fair to be held there every Aſcenſion day; and that the Defendant diſturbed him to take Toll. Upon Not Guilty, found for the Plaintiff; It was moved, That he doth not ſhew a Title to the Fair by Grant or preſcription; and ſo no cauſe of Action: but it was adjudged for the Plaintiff, becauſe the ſame is but Conveyance to the Action, and is not any claim as to the Right; and therefore the Declaration is good, without a ſpecial title comprized in it. Paſch. 2 Jac. B. R. *Dent* and *Olivers* Caſe. *Cro.* 2. Part. 43. and *ibid.* 122. acc.

41. In an Action upon the Caſe; againſt an Inne-keeper: the caſe was; That the Plaintiff left his goods with the Defendant, being Gueſt of the Defendant, ſaying, he would return within two or three dayes. He returned within three dayes, and in the Interim, the goods were ſtolne when he was abſent. And whether the Inne-keeper ſhould be charged without any ſpecial promiſe for the ſafe keeping of them, was the Queſtion. It was adjudged, That where the party leaves his goods to keep, whereof the Inne-keeper hath not any benefit, and goeth from thence for two or three dayes, although he ſaith he will return, he is at his liberty, and therefore is not any Gueſt at that time; and in ſuch caſe the Inne-keeper is not chargeable if the goods be ſtollen, unleſſe he make a ſpecial promiſe for the ſafe keeping of them. And it is not like to Sir *Edwin Sands* Caſe, who came to an Inne, and lodged there, and went out in the morning, and left his Cloak-bagg there, intending to return at night, and returned accordingly: and in the Interim, his Cloak-bagg was ſtollen, for there he is ſtill a Gueſt: and in ſuch caſe the Action lyeth againſt the Inne-keeper, if the goods be ſtollen. Paſch. 4 Jac. in B.R. rott 234. *Gelley* and *Clark's* Caſe. *Cro.* 2. Part. 188. 189. See Sect. 36.

42. An Action upon the Caſe was brought, for a diſturbance and uſing a *Way*. The Plaintiff ſhewed, That the Defendant was ſeiſed in Fee of Land over which the Way is; and by Indenture of Bargain and Sale, ſold the Land to J. S. in Fee, with a Way over his Land; and that J. S. let the Land to the Plaintiff for years; and the Defendant did diſturb him: It was moved for ſtay of Judgment, becauſe he doth not ſhew the Deed of Leaſe; and becauſe a Leaſe is pleaded of Land, without expreſſe words of a Way. But for that point, the Court held the Declaration good; for when Land is granted with a Way, it is *quaſi* appendant to it, and a thing of neceſſity; and therefore it paſſeth without expreſſed in the Deed; and Land cannot be uſed without a Way. But upon view of the Record it appeared, That there was not any grant of the Way in the Indenture; but onely a ſale of the Land, and of a Way out of other Land: for nothing

thing but the uſe paſſed by the Deed; and there cannot be an uſe of a thing which is not in eſſe, as a Way common, &c. which are newly created; and no uſe paſſed by the Indenture untill they were created; and of that Opinion was the whole Court: and that for this cauſe; the Plaintiff had not ſhewed any good title. Mich. 5 Jac. B. R. *Beaudely* and *Brooks* Caſe. B. R. *Cro.* 2. Part. 190.

43. If the Servant be lodged in a Common Inne with the goods of his Maſter, and the goods being in the Inne, by default of the Inne-keeper or his Servants, be took and carried away: It was adjudged, That the Maſter may have an Action upon the Caſe againſt the Inne-keeper; and ſo was affirmed upon a Writ of Errour brought in the Exchequer: It was alledged, That the Judgment was, That he ſhould be in *miſericordia*; where it ought to have been *Capiatur*: but, the Exception was not allowed; for that it is not ſuch a Contempt for which the King ſhall have a Fine, as it is in Actions which are *Contra pacem*. Trinit. 7 Jac. rott. 1535. B. R. *Beedle* and *Morris*'s Caſe. *Cro.* 2. Part. 224. See *Cook.* Entries. 347. the ſame caſe.

44. Note; *per Curiam*, where a Nuſance is made to the Land of two Tenants in Common, they ſhall joyn in the Action upon the Caſe, as they ſhall joyn in Treſpaſſe; and for a Nuſance done in the time of the Deviſor, and continued, (as the principal caſe was) the Deviſee ſhall joyn in the Action; for the Continuance is the new erecting of ſuch a Nuſance. Mich. 7 Jac. B. R. *Some* and *Bauſhes* Caſe. *Cro.* 2. Part. 231.

45. In an Action upon the Caſe, upon a Reſcous, The Plaintiff declared, That J. S. was indebted to him in 300 l. and that he ſued a Latitate out of B. R. directed to the Sheriff of *Nott.* to arreſt him, and delivered the Writ to J. D. the Sheriff, who made a Warrant to the Bayliff of the Kings Liberty of *Newark* to execute it; which Warrant was delivered to one J. G. Deputy of the Lord *Burleigh* the Kings Bayliff of his Wapentake of *Newark*; who arreſted the ſaid J. S. and that the Defendant did reſcous him, ſo as he eſcaped, whereby he loſt his Debt. It was found for the Plaintiff, to his damage of 180 l. Whereupon Errour was brought; and it was aſſigned for Errour, that it is ſhewed, That he was reſcouſed from the Deputy of the Bayliff: whereas it ought to have been, That he was reſcued from the Bayliff himſelf, or from the Sheriff. But the Errour was not allowed: for there is a difference where it is an Action upon the Caſe, wherein he ſhall ſhew the truth *rei veritate* as it is; and upon returns of Reſcous, or Indictments; and ſo was it holden. Paſch. 31 Eliz. rott. 248. in *Burgh* and *Appletons* Caſe; That the Bayliff of a Liberty arreſted the party, and delivered the party to the Sheriffs Deputy. And the party Defendant reſcued him from the Sheriff's Deputy: And in an Action upon the Caſe, Judgment was given for the Plaintiff. 2. It was ſaid, That the King could not have the Liberties, for that they were extinct in his hands: But that alſo was diſallowed; for the King may have Liberties, by the ſuppreſſion of Abbies, and ſuch Liberties ſhall not be extinct but in *Eſſe*, unleſſe it be ſhewed to the contrary. The Judgment was affirmed. Paſc. 9 Jac. in B.R. *Kent* and *Elvis* Caſe. *Cro.* 2. Part. 241.

46. A man brought an Action upon the Caſe: for that the Plaintiff tore off the ſeal of a Deed, whereby J. S. granted unto him *unum annuale reditum ſive annuitatem* of 10. l. during his life: It was found upon not-Guilty, for the Plaintiff; and although it was not ſhewed, that whether it was an Annuity, or a Rent iſſuing out of Land; Nor that it was the Seal of the Grantor; for it is *Sigillum eidem annexat.* and he doth not ſay the Seal of the ſame Deed; or that he thereby loſt his Annuity: notwithſtanding theſe matters were moved to ſtay Judgment; yet it was adjudged for the Plaintiff. Mich. 8 Jac. B. R. *Aſh* and *Bradnell*'s Caſe. *Cro.* 2. Part. 255.

47. The Plaintiff being a Merchant of *London*, 20 May. 32 Eliz. went beyond the Sea to merchandize: and the ſame 20 May at *London* did truſt and appoint the Defendant as his Servant, to receive in his abſence all Merchandizes of the Plaintiff, to the Plaintiff's own uſe, or which were conſigned unto him, and to pay the Cuſtoms and Subſidies for them due and payable; and to diſpoſe and convert them to the Plaintiff's uſe. That in the Plaintiff's abſence, 20 Pieces of Velvet, of the value of 800 l. were conſigned by one *Martin Billingſley* his Factour in *Stoade* beyond Sea; which by way of Merchandize were brought into *England* in a Ship, to a Port in *London*: That the Defendant having Notice thereof, and that Subſidy was due to the Queen for the ſame, to deceive the Queen of her Subſidy, and yet to deduct from the Plaintiff ſo much as ſhould be due for the Subſidy, as if it had been paid, cauſed the ſaid goods to be unladen, and put aſhoare, the ſubſidy due for them not being paid, nor the Collector agreed with; whereby the goods were forfeited, and ſeiſed; and upon an Information in the Exchequer, adjudged to be forfeited. For which matter the Plaintiff brought his Action upon the Caſe againſt the Defendant, who pleaded Not Guilty, and found for the Plaintiff. It was adjudged, That in regard the Defendant was put in truſt with all the goods to merchandize and diſpoſe to his Maſters profit; therefore it ſhall be intended he had means to pay the Cuſtome; for he muſt agree for the Cuſtome, and then ſell the goods, and pay the Cuſtome. Alſo

ſo he is chargeable, becauſe he cauſed the goods to be taken out of the Ship not being Cuſtomed; and he might have left them there, & not have meddled with them; wherefore if he had been a ſtranger, for this cauſe he had bin chargeable, *à fortiori* being a Servant, and doing it by colour of authority: and ſo was it holden by all the Barons in the Exchequer; and that this Special Action upon the Caſe here did well lye againſt the Defendant. Mich. 8 Jac. in Exchequer. *Lewſon* and *Kirks* Caſe. *Cro.* 2. Part. 265.

48. Note; It was ſaid, That no Conſpiracy, nor Action upon the Caſe in the nature of Conſpiracy lyeth, for procuring one to be Indicted of Treaſon; for every man is bounden to diſcover Treaſon, and ought not to conceal it for the leaſt time, becauſe it is againſt the ſtate of the Common-wealth: But an Action upon the Caſe hath been maintained, for procuring one to be Indicted of Felony. Mich. 12 Jac. B. R. *Lovett* and *Fawknor's* Caſe. *Cro.* 2. Part. 357. *Bolſtrod.* 2. Part. 270. the ſame caſe.

49. *A.* was arreſted upon a *Latitat* by J.S. the Old Sheriff; and returned *Languidus*, &c. and afterwards *in exitu ab Officio ſuo*, the Old Sheriff, delivered *A.* to Sir *Euſebie Andrews* the New Sheriff, who ſuffered him to go at large, and eſcape. An Action upon the Caſe for the Eſcape was brought againſt Sir *Euſebie*; and adjudged, the Action did lye; although it was found, the other Sheriff returned *Languidus*. Tr. 12 Jac. B. R. rott. 1371. *King* and Sir *Euſebie Andrews* Caſe. *Cro.* 2. Part. 380.

50. An Action upon the Caſe was brought, for laying Loggs in the High-way, whereby the way was ſtraightned; and the Plaintiff riding in the Way in the Evening, his Horſe ſtumbled upon the Loggs, and much hurt him. The Defendant did preſcribe, That the Inhabitants of ſuch a Town had time out of mind uſed to lay Loggs in waſte places of the Way before their doors for their fuel, leaving ſufficient paſſage for Carts, Horſe and foot; and that the Plaintiff riding improvidently upon the Way, turned his horſe upon the blocks and fell. It was adjudged, That the Plaintiff having a ſpeciall damage, the Action did lye, although the Nuſance was a common Nuſance; according to *Co.* 5. Part. 77. *Williams* Caſe. And 2. The Preſcription to make a Nuſance is not good, Trinit. 15 Jac. B.R. rott. 426. *Fowler* and *Sanders* Caſe. *Cro.* 2. Part. 446.

51. If a man ſelleth unto J. S. goods falſly and deceitfully, affirming, that they are his own goods; whereas *revera*, they are the goods of another man: the very ſale of them is an Offence, for which an Action upon the Caſe lyeth preſently by the Vendee: for if he ſhould ſtay till the goods were taken from him by the lawful Owner, it might be perhaps miſchievous to him. Paſch. 16 Jac. B. R. *Furnice* and *Leiceſter's* Caſe. *Cro.* 2. Part. 474.

52. Leſſee for years would not permit him in the Reverſion to enter into the houſe, and View if Waſte were done; for which cauſe he brought an Action upon the Caſe againſt the Leſſee. Upon Not-guilty pleaded, It was found for the Plaintiff. It was moved, That it was not ſhewed, what Waſte was done, and it was never ſeen, that ſuch Action before was brought, therefore not now to be allowed. But it was adjudged, the Action did well lye; for that the Law preſumes, he cannot aſſign what the Waſte is, unleſſe he may enter and have the View. And 2. the Law gives him a Liberty to enter, to ſee if there be Waſte; and if he be diſturbed of his Entrance and View, the Law will not leave him without his remedy. Adjudged for the Plaintiff. Paſc. 16 Jac. B. R. *Hunt* and *Downam's* Caſe. *Cro.* 2 Part. 478.

53. In an Action upon the Caſe; The Plaintiff declared, That he was a Free-Maſon, and uſed to ſell ſtones, and to make ſtone-Buildings: And that he was poſſeſſed for years of a ſtonepit in *H.* in the County of *O.* and digged Stones there as well to ſell, as to build withall: And that the Defendant to diſcredit him, and deprive him of the Commodity of the Mine, impoſed ſo many threats upon his Work-men, and diſturbed all Commers, threatning to maym them, and vex them with ſuits if they bought any Stones; whereupon they all deſiſted from buying, and others from working. After Judgment by *nihil dicit*: It was moved that the Action did not lye; for that nothing is alleadged but Words, and no Act done; and cauſeleſs ſuits for fear, are no Cauſe of Action. But it was adjudged, that the threatning of Maim, and Suits whereby they durſt not work or buy, was great damage to the Plaintiff, and the loſſe of his Quarries a good cauſe of Action: And Judgment was entred for the Plaintiff *Hill.* 17 *Jac. B. R. Garrett* and *Taylor's* Caſe. *Cro.* 2. Part. 567.

54. *A.* recovered againſt *B.* 127 l. in the Common-Pleas; and took out a *Capias ad ſatisfaciendum*, to the Sheriffs of *Glouceſt.* who took *B.* in Execution, who *in exitu ab eorum officio*, delivered him over to the new Sheriffs, by vertue of which he was in Execution under the new Sheriffs, and upon a *Habeas Corpus* he was delivered to the Marſhal in Execution, who ſuffered him to eſcape, for which *A.* brought his Action upon the Caſe againſt the Marſhal. The Defendant demurred upon the Declaration, becauſe it was not ſhewed in it, that the old Sheriffs delivered him in execution to the new Sheriff, with the Cauſes of his impriſonment: For it might be, that he was delivered by

Indenture

Indenture for ſome other Cauſe, and not for that Cauſe, and then it is no eſcape in the Marſhal, but in him: and although it was ſaid, *virtute cujus*, he was in Execution under the new Sheriffs. Yet that doth not help it; and if he was not in Execution before the *virtute cujus* will not ſerve: The better opinion of the Court ſeemed to be, That he was not in Execution under the new Sheriffs; And ſo the Action did not lye againſt the Marſhal. Quære *Dowſewel*, and Sir *George Reynals* Caſe. *Cro.* 2. Part. 587. 18 *Jac.* B. R.

55. Action upon the Caſe: *Quare filium & hæredem ſuum rapuit & maritavit.* It was moved in arreſt of Judgment; that it ought to be, *Cujus maritagium ad ipſum pertinet*: 2. he doth not ſay *filium ſuum apparentem*; and 3. it is not expreſſed that the heir was *infra ætatem*, and 4. he doth not ſay *in Cuſtodia ſua*, and therefore the Declaration was void for Incertainties: But the better opinion of the Court was, that the Writ did lye, and the Declaration was well enough: and a man ſhall have this Action; Though he be not within age; and the Father hath the marriage of his Son, though he hath no Land to leave him. *Paſc.* 1649. *Wood* and *Topham's* Caſe. *Styles* 216. 236.

56. Action upon the Caſe. The Plaintiff declared, That the Defendant did ſell him a Gelding, and upon the ſale did falſly affirm, That the Gelding was his own, and that he bred him of a Colt; whereas in truth, it was another mans Gelding, and he did not breed him of a Colt. The Defendant pleaded, That the Defendant made no warranty of it; and therefore the Action did not lye. But it was holden *per Curiam*, the words were ſufficient to imply a deceit; for the words are, *falſo et fraudulenter*. And it was adjudged for the Plaintiff. Mich. 1651. *Harding* and *Freeman's* Caſe. B. R. *Styles*. 310.

57. Action upon the Caſe was brought for a Reſcous, and a Verdict for the Plaintiff; for ſtay of Judgment it was moved, That it is not ſhewed that the party was in the Cuſtody of the Serjeant from whom he was reſcued, nor before whom the Plaint was. But it was reſolved, the Action did lye, notwithſtanding the Exceptions. And it was ſaid by the Court, That it is in the Election of the the party in ſuch caſe to have an Action upon the Caſe, or an Action of Treſpaſs. And if one be arreſted at my Suit, I have an Intereſt in the body, and therefore I may well maintain the Action. Mich. 1652. *Gough* and *Cann's* Caſe. *Styles*. 342.

58. An Action upon the Caſe was brought; for ſelling to the Plaintiff falſe Bills of Publique Faith to the value of 800 l. knowing them to be falſe, with an intent to deceive him: It was Objected, That it was an Aſſignment of Papers, which is not aſſignable, being a thing in action. 2. That the Commiſſioners in the Ordinance ought to be named by their Chriſtian names; which they are not. But it was adjudged the Declaration was good, and the Action did lye; for the deceit is, in aſſigning of falſe Bills, affirming them to be true; and the Ordinance of Parliament doth give authority to aſſign Papers, and the Commiſſioners need not be named by their Chriſtian names. Mich. 1652. *Fowke* and *Boyles* Caſe. *Styles*. 348.

59. Action upon the Caſe, for not paying moneys upon the Receipt of a Bill of Exchange, according to the Cuſtome of Merchants: It was found for the Plaintiff. It was moved; It doth not appear, that there was a demand of the money, whether according to the old ſtyle, or according to the new ſtyle. But it was adjudged, That if the Bill of Exchange be accepted, there is no neceſſity to alledg any demand. And it was ſaid, That if there be two Merchants that have a Joynt-Trade, if one of them accept of a Bill of Exchange, and doth not pay the money, an Action upon the Caſe lyes againſt the other. Paſch. 1653. *Styles*. 370.

60. An Action upon the Caſe was brought againſt the Defendant, for cauſing a falſe preſentment to be made againſt the Plaintiff before the Conſervators of the River of *Thames*, for ſuffering 8. Loads of Earth to fall in to the River: After Verdict for the Plaintiff, It was moved, What authority the Conſervators had to take the Preſentment? But it was holden, Though the Conſervators had no Authority, yet the Action did lye for the malitious proſecutions and the unjuſt vexation of the Plaintiff. And *Rolls*, Chief Juſtice, ſaid, That an Action upon the Caſe doth lye, for bringing an Appeal againſt one in the Common-Pleas, though it be *Coram non-judice*; by reaſon of the unjuſt vexation. Trin. 1653. *Atwood* and *Monger's* Caſe. *Styles*. 378.

61. Note; By *Rolls*, Chief Juſtice, an Action upon the Caſe doth not lye againſt one, for cauſing another to be Indicted of Treſpaſs; but for cauſing one to be Indicted for a thing which deſerves corporal puniſhment, or a thing which ſounds in ſcandal of the party Indicted, an Action upon the Caſe will lye. *Quod nota*. Trinit. 1654. B. R. *Styles*. 424.

62. An Action upon the Caſe was brought by the Plaintiff againſt his Attorney, for delivering a *Fieri facias* againſt him in a Suit wherein he was Attorney for him to the Under-Sheriff, and his procuring of it to be executed, contrary to the truſt repoſed in him. It was moved, after Verdict, on the part of the Defendant; that there being a Judgment, the Suit is determined; and ſo the truſt alſo was determined. But the Opinion of the Court

was,

was, That the Defendant did not onely deliver the Writ to the Sheriff, but did procure it to be executed; which ſhews a Combination againſt him: and the Warrant of Attorney is not determined by the Judgment; for that the Attorney after the Judgment is called to ſay, why there ſhould not be execution againſt his Clyent? Judgment was given for the Plaintiff. Mich. 1654. *Lawrence* and *Harriſon*'s Caſe. *Styles.* 426.

63. Note; By *Rolls*, Chief Juſtice, an Action upon the Caſe will lye againſt one who brings Vexatious Actions againſt another; Or for entring Actions of a great value to force the party to put in great Bail, where he hath but ſmall cauſe of Action. Paſch. 1655. B. R. *Styles.* 451.

64. In an Action upon the Caſe, for diverting a Water-Courſe. The Preſcription for the Water-courſe being laid to be in one Pariſh, to have a Water-Cloſe to his houſe in another Pariſh. Upon Not-Guilty pleaded, The *Venire facias* was for a Jury of both the Pariſhes; which was ſaid, ought not to have been, but of one Pariſh, in which the diverting is laid to be. But it was the Opinion of the Court, That the ground of the Action here is the Preſcription; and Not-guilty being pleaded, it goeth to all before alledged; and therefore the *Venire facias* for tryal ought to be from both Pariſhes; where the Preſcription is in Iſſue, upon Not Guilty pleaded: But if the parties be upon a ſpecial Iſſue, that he did not divert the ſame, then the *Venire facias* is to be from that place where the diverting is ſaid to be. It was adjudged, That the Declaration in the principal Caſe was good, and the *Venire facias* well awarded: Adjudged for the Plaintiff. Mich. 13 Jac. B. R. *Moore* and *Salter*'s Caſe. *Bolſtr.* 3. Part. 79.

65. Action upon the Caſe, for ſtopping of a Way which the Plaintiff claimed by Preſcription; upon Iſſue joyned upon the place where the diſturbance was laid to be: a Verdict was for the Plaintiff. It was moved in arreſt of Judgment, That the Declaration was not good; becauſe it is ſhewed, That *A.* was ſeiſed of the Houſe in *S.* and that he and all thoſe who, &c. time out of mind have uſed to have a Way; without ſhewing that it was *Antiquum Meſſuagium.* 2. It is not ſhewed certain where the Way is, nor how it goeth. 3. Becauſe not layed in what Town this Way is. 4. Becauſe not ſhewed, what manner of Way it was, whether Appendant or, &c. But the Opinion of the Court was, That the Declaration was good, notwithſtanding the Exceptions: For the difference is where a thing is claimed as Appendent, and Incident; for there it ought to be pleaded, That the houſe is *Antiquum Meſſuagium*, elſe it is not good: But the ſame is not ſo here, being onely, That he hath had a Way; ſo as this Way is not claimed as an Incident to the houſe, but the houſe is onely *Terminus à Quo*; and therefore he ought not to plead, that it was *Antiquum Meſſuagium.* 2. Here the Jury have found this Way for the Plaintiff, and ſo the Verdict hath helped all the other Imperfections: and the Plaintiff had good cauſe of Action for the wrong done to him; and having a Verdict, he ought to have Judgment. And afterwards Judgment was entred for the Plaintiff. Trin. 1 Car. in B. R. *Harriſon* and *Rock*'s Caſe. *Bolſtr.* 3. Part 334.

Action upon the Caſe: *For Slanderous words, where lyeth; and where not.*

1. HIll. 28 H. 9. *Dyer.* 26. I will abide by it, That *Chriſtopher Ruſſel* was and is a falſe Theef, and was at my door in the Seſſions-day at Night between one and two of the Clock after midnight, and would have robbed me, and did break open my doors, and put me in jeopardy of my life; adjudged Actionable. *Ruſſel*'s Caſe.

2. Mich. 6 Ed. 6. *Dyer.* 117. in B. R. *William Kempe* will be within theſe two daies a Bankrupt. Upon a Demurrer, adjudged, The Action will lye. Mich. 2 E. 6. *Dyer.* 72.

3. Paſch. 3 Mar. *Dyer.* 118. Action brought for theſe words, viz. Men cannot have their Cattle go upon the Common, But *Babor* and his children will kill them with *Babor*'s Dogs; and the words being found by Verdict, and Judgment thereupon for the Plaintiff in the Common-Pleas. Upon a Writ of Errour brought in B.R. the Judgment was reverſed; becauſe the words will not bear an Action.

4. Mich. 6 Ed. 6. *Dyer.* 75. Action for theſe words; There is a great neſt of Theeves at *Pirton*, and *John Burgis* is the maintainer of them, and is a ſtrong Theef himſelf. Adjudged, the Action would lye for theſe words. *Burgis* and *Wartenfords* Caſe.

5. Mich. 7 Eliz. *Dyer.* 236. An Action was brought, for calling the Plaintiff Murderer and Theef. The Defendant juſtified the word, Murtherer, becauſe the Plaintiff was Indicted of Murther at *Cheſter*; whereas the Plaintiff was acquitted, ſhewed by Exemplification under the great Seal. And [Theef] the Defendant juſtified, becauſe a Robbery was done; and common fame was, it was done by the Plaintiff. But it was adjudged, That none of the Juſtifications were good, and the Action did well lye.

6. Mich.

6. Mich. 15 Eliz. *Dyer.* 317. Action brought for theſe words, viz. Mr. *Halley* (meaning the Plaintiff) is infected of the Robbery and Murther lately committed; and doth ſmell of it. Adjudged the words actionable, by reaſon of the word [infected] *Halley* and *Sidenham*'s Caſe.

7. 27 Eliz. *Co.* 4. Part. 15. Theſe words were ſpoken of Mr. *Stanhop*, Surveyor of the Dutchy, and a Juſtice of Peace, viz. Mr. *Stanhop* hath but one Mannor, and that he hath gotten by ſwearing and forſwearing: Adjudged, the words are too general and uncertain; and he doth not charge the Plaintiff with direct ſwearing; and he might get a Mannor by ſwearing, &c. and yet not to be procuring or aſſenting to it: and therefore adjudged, That the Action doth not lye. 2. To charge a man generally, that he hath forſworn himſelf, is not actionable; becauſe it may be in uſual communication: and *benignior ſententia in verbis dubiis eſt præferenda.* *Stanhop* and *Blubes* Caſe.

8. 27 Eliz. *Coo.* 4. Part. 15. Action for theſe words; For my Grounds in *Allerton*, *H. Hext* ſeeks my life; and if I could find out *J. H.* I do not doubt but in two dayes to arreſt *Hext* for ſuſpition of Felony. Reſolved the Action doth not lye, 1. Becauſe he may ſeek his life for juſt cauſe, and his Lands may be holden of him. 2. Seeking is too general; and for ſeeking onely, no puniſhment can be inflicted by the Law. *Hext* and *Yeomans* Caſe.

9. 34 Eliz. *C.* 4. Part. 14. Sir *Richard Buckley* was charged in a Bill in the Star-Chamber by *Wood*; That he was a maintainer of Pyrats and Murtherers, and a procurer of Pyrats: adjudged, that the Action doth lye for thoſe words in the Bill; for that the matter of Murther and Piracy was not examinable there; and the Defendant there cannot purge himſelf of the Crimes, by anſwer to an Engliſh Bill: But becauſe he ſaid the words in the County of S. *in auditu quamplurimorum*, that his Bill was true, and the Action was thereupon brought, without expreſſing the matter in particular. Upon a Writ of Errour brought, the Judgment was reverſed. Sir *Richard Buckley* and *Wood*'s Caſe.

10. 28 Eliz. *Co.* 4. Part. 16. In an Action upon the Caſe; the Caſe was, That the Defendant ſaid to *B.* (a Clerk of the Kings-Bench, ſworn to deal without corruption) You are known to be a corrupt man, and to deal corruptly. Adjudged, becauſe the words ſcandalize him in the duty of his Profeſſion, that the Action will lye; and the words *ex cauſa Dicendi*, imply, That he dealt corruptly in his Profeſſion. But if the precedent ſpeech had been, That *B.* was a Uſurer, &c. and upon that the Defendant had ſpoken the words, then no Action will lye. *Birchley*'s Caſe.

11. 45 Eliz. *Co.* 4. Part. 16. The Defendant ſaid of the Plaintiff; Mr. *Stukley* (being a Juſtice of Peace) covereth and hideth Felonies, and is not worthy to be a Juſtice of Peace. And becauſe this is againſt his Office and Oath, and for which he may be Indicted and Fined, and put out of Commiſſion, It was adjudged, That the Action would lye for the words. *Stuckley* and *Bulbeads* Caſe.

12. 39 Eliz. C. 4. Part. 16. The Defendant ſaid of the Plaintiff; Thou haſt killed my Wife, and art a Traytor: And it appeared in the Declaration, that the Wife was then alive; and therefore adjudged, That the words were vain, and no ſcandal: and an Action would not lye contrary, if the Wife had been then dead. *Snagg* and *Gees* Caſe.

13. 40 Eliz. C. 4. Part. 16. Action brought for theſe words, viz. He is a Brabler, and a Quarreller, for he gave his Champion to make a Deed of his goods to kill me, and then to flye out of the Country; but God preſerved me. Adjudged, That the Action will not lye: becauſe a purpoſe without an act, is not puniſhable. *Eaton* and *Allen*'s Caſe.

14. 35 Eliz. C. 4. Part. 16, The Defendant ſaid to one *Anthony Alcock*; (who was a Suitor to the Plaintiff, and with whom there was near an Agreement of Marriage) I know *Davies* daughter well, ſhe did dwell in Cheap-ſide, and a Grocer did get her with child. And the Plaintiff declared, That by reaſon of thoſe words, *Alcock* refuſed to take her to Wife. Adjudged, That the Action would lye at the Common Law for the words, and the Suit was not to be in the Spiritual Court for defamation; but at the Common-Law, for that ſhe is prejudiced in that which ſhould be her Temporal advancement; and the ground of the Action is temporal: And ſee there, That to ſay of a Woman who is an Inne-holder, that ſhe hath a great infectious diſeaſe; that an Action will lye. *Anne Davies* and *Gardiner*'s Caſe. See this Caſe, in *Popham*'s Reports. 36. a.

15. 28 Eliz. C. 4. Part. 14. If a man exhibit Articles to a Juſtice of Peace againſt another, containing great abuſes and miſdemeanors, to the end to bind him to the good Behaviour; In ſuch caſe, the party ſhall not have any Action upon the Caſe, becauſe he hath purſued the ordinary courſe of Juſtice. *Cutler* and *Dixons* Caſe. See before, Sir *Richard Buckley*'s Caſe. Sect. 9.

16. 41 Eliz. C. 4. Part. 18. The Plaintiff brought an Action in *London*, for calling the Wife of the Plaintiff Whore: The Defendant removed it out of *London* by *Habeas Corpus*; a *Procedendo* was prayed, becauſe the Action was maintainable in *London* by Cuſtome. Adjudged, That no *Procedendo*

cedendo was prayed, becauſe the Action was maintainable in *London* by Cuſtome. Adjudged, That no *Procedendo* ſhould be; for that a Cuſtome to maintain brabling words, is againſt Law. *Oxford* and *Croſſe*'s Caſe.

17. 45 Eliz. C. 4. Part. 19. *Britteridge*'s Caſe. The words were, *Britteridge* is a perjured old Knave, and that is proved by a ſtake parting the Land of A. and B. Adjudged, 1. the words are Actionable, though adjective words: eſpecially when they preſume an Act committed as in this caſe. Or when they ſcandalize a man in his Office, Function or Trades, by which he gets his Living: See there, 25 Eliz. *Philips* and *Bradbery*'s Caſe: An Action brought by a Batchelour of Divinity, for ſaying theſe words; viz. Thou haſt made a Seditious Sermon, and moved the people to Sedition this day, becauſe, that although the firſt words were meer adjective words; yet becauſe they ſcandalized him in his Function, the Action did lye. 44 Eliz. *Milton*'s Caſe: So to ſay of a Merchant, He is a Bankruptly Knave, or a Bankrupt Knave. 2. Reſolved, That in the principal Caſe, No Action would lye upon all the words put together, for that the laſt words explain his intent to be, of no Judicial perjury: and a Stake cannot prove a man to be perjured. But if the truth of the caſe had been ſet forth in the Declaration, then the Action would have lyen; for the truth was, there was a Controverſie betwixt two, Whether the ſtake ſtood upon the Land of the one or the other, and the Plaintiff as a witneſſe depoſed; and by the Defendants pretence perjured himſelf in his Depoſition.

18. Mich. 45 Eliz. in B. R. C. 4. Part. 20 Action for theſe words, Mr. *Barham* did burn my Barn (*inuendo* a Barn with Corn) with his own hands, and none but he. Adjudged, the words not Actionable; for it is not Felony to burn a Barn, if it be not parcel of a Manſion-houſe, Or full of Corn: and the *Inuendo* will not ſerve, when the words in themſelves are not ſcandalous. *Barham*'s Caſe.

19. 25 Eliz. C. 4. Part. 20. Touching Defamation; for which, Suit is in the Eccleſiaſtical Court. Reſolved, The matter muſt be meer ſpiritual and determinable onely there; for if it concern any matter which is determinable at the Common Law, the ſpiritual Judge ſhall not have Conuſans of it. *Palmer* and *Thorp*'s Caſe.

20. Hill. 1 Jac. rott. 1372. *Smaile* and *Bele*'s Caſe. *Brown.* Reports. 6. An Action brought againſt Huſband and Wife, becauſe the Wife called the Plaintiff, Mainſworn Thief. The Defendants pleaded Not Guilty; and it was found for the Plaintiff: but no Judgment was given, becauſe the Defendants ſhould have pleaded, That the Wife onely was not guilty: and ſo in effect there was no Iſſue joyned. See *Hob.* 126. the ſame Caſe. And See *Hob.* Trinit. 14 Jac. rott. 1953. *Slater* and *Franks* Caſe. *Hobert.* Reports. The words were, viz. Thou art a Mainſworn, and a Bankrupt Lad; and it was not added in the Declaration, That he was a Merchant, and ſo the word Bankrupt of no force: But for the word Mainſworn; yet becauſe in the North it was a Word which was underſtood to be as much as perjured, Judgment was given for the Plaintiff, though it was not added, It was ſpoken in the preſence of thoſe who underſtood the word. Hill. 10 Jac. Rott. 1783. *Morton* and *Leedall*'s Caſe. *Brown.* 4. acc.

21. Hill. 14 Jac. rott. 1506. *Male* and *Ketts* Caſe. *Hob.* Reports. *Popham* 129. *idem. William Male* did ſteal my Corn out of my Barn: Adjudged, That the Action d'd lye for the words, for that it is ſelony; though not Capital. See the ſame Caſe. *Brownlow*'s Reports. fo. 2.

22. Hill. 10 Jac. Rott. 3176. *Cowle* and *Gilbert*'s Caſe. *Hob.* 77. Thou art a Thief, and haſt ſtollen a Tree. Adjudged, No Action lyeth: for although they come under the general word (*And*) which is in common ſenſe to be underſtood to be but the making good the word which is general (Thief) yet the word Tree, ſhall be taken rather a Tree ſtanding, then Woods felled. See *Brownlow.* fo. 2. b. the ſame Caſe.

23. Trinit. 14 Jac. rott. 541. *Scarlet* and *Style*'s Caſe. *Hob.* 192. Action for theſe words, Thou didſt ſteal a Sack, and a Curricomb: and thou didſt ſteal my Fathers wood, and didſt give it to a Whore. The Defendant did juſtifie, That ſuch a day the goods was ſtollen, and the common fame was, the Defendant had ſtollen them: and upon that Report, the Plaintiff did ſay the Defendant had ſtollen them: and complaining thereof to a Juſtice of the Peace, informing him of the premiſſes he did ſpeak the words; Thou didſt ſteal, &c. And upon Demurrer, It was a good cauſe to arreſt one if a Felony be committed; but not to ſpeak words to defame one. See *Brownlow.* pag. 2, the ſame Caſe.

24. Mich. 15 Jac. rott. 635. *Roberts* Caſe. *Brown.* pag. 2. See *Hutton.* 13. *idem.* For theſe words, viz. Thou art a Witch and an Inchanter, and thou haſt bewitched *Strong*'s Children; no Action lyes. But, Thou art a Witch, and haſt bewitched Children, and they were waſted and deſtroyed; are Actionable. See *Creely* and *Hopkins* Caſe. 13 Car. *Cro.* 1. Part. 341. acc.

25. Paſch. 30 Eliz. in B. R. Action for theſe words, Thou didſt ſubborn, procure, and bring in falſe Witneſſes in ſuch a Court at *Weſtminſter*; It was found he did procure and bring in falſe Witneſſes, but was acquitted of the ſubborning. Adjudged,

judged the Action will lye; for the words ſhall be taken in *malam partem*, and cannot be ſpoken of an honeſt man. *Bowſe* and *Cary*'s Caſe. *Leon.* 101.

26. Hill. 31 Eliz. rott. 796. in B. R. Thou waſt forſworn in the Court of the Requeſts, and I will make thee ſtand upon a ſtage for it. Adjudged, the Action will lye; for it cannot be meant but in a Court of Juſtice; and before the Judges there *Juri-dice*, and the ſubſequent words found ſo much, viz. I will make thee ſtand upon a Stage for it. *Brook* and *Dowlyes* Caſe. *Leon.* 13. See Tr. 28 Eliz. Rott. 882. *Foſter* and *Thorns* Caſe. *idem.*

27. Hill. 31 Eliz. Rott. 434. *Pierce* hath taken a falſe Oath in the Court of the Conſiſtory of the Biſhop of *Exeter*. It was objected, That for matters in the Spiritual Court, an Action will not lye; and the Stat. of 5 Eliz. of Perjury, doth not extend to thoſe Courts. But it was Reſolved, That the Action did lye for thoſe words; and that the Statute doth extend to ſuch and the like Courts; as the Court of Star-Chamber, &c. and the words, That he hath taken a falſe Oath; ſhall be intended actively, and ſhall amount to theſe words, He is forſworn. *Pierce* and *Howes* Caſe. *Leon.* 131.

28. Trinit. 31 Eliz. in B. R. The Caſe was, That the Defendant being a Juſtice of Peace, and the Plaintiff a man of good fame; the Defendant directed his Warrant to divers Bayliffs and Conſtables to arreſt the Plaintiff: and it was alledged in the Warrant, That the Plaintiff was accuſed before him for ſtealing the horſe of *A.* the Plaintiff was arreſted, and kept in durance untill he entred Bond for his appearance. Whereas the Plaintiff was never accuſed thereof, nor ſtole any horſe; and the Defendant himſelf knew he was guiltleſs. It was adjudged, That although a Juſtice of Peace may direct his Warrant to arreſt a man upon an Accuſation of Felony before him, though the Accuſation be falſe: Yet if in truth the party was never accuſed, and ſuch Warrant is directed by a Juſtice of Peace, and the party arreſted; it is otherwiſe: and therefore adjudged in the principal caſe, the Action did lye: and the Lord *Lumley* and *Ford*'s Caſe was agreed: Where *Ford* in a Letter written by him, had written, It is reported the Lord *Lumley* ſeeketh my life. And the Truth was, It was not reported. *Windham* and Sir *Ed. Cleers* Caſe. *Leon.* 187.

29. Trinit. 32 Eliz. in B. R. An Action was brought for theſe words ſpoken by the Defendant to the Servant of the Plaintiff: viz. It is well known that I am a true Subject; but thou (*inuendo* the Servant) ſerveſt no true Subject, and thine own Conſcience may accuſe thee thereof. Note, The Plaintiff was a Juſtice of Peace, Sheriff of the County, and Captain of a Troop of Horſe, to attend the preſervation of the Queens Perſon. It was adjudged, That to touch, reproach, and ſlander a man in the duty of a Subject; or in the duty of his Office, or courſe of life; the words are Actionable: And in the principal Caſe Judgment was given for the Plaintiff. And the Quality of the Perſon addeth much to the Action. To call one Papiſt, no Action will lye: But if one call the Archbiſhop of *Canterbury* Papiſt, an Action will lye; for that he is the Governour of the Church. *Walgrave* and *Agar*'s Caſe. *Leon.* 335.

30. Trinit. 11 Jac. *Stephens* and *Batters* Caſe. *Brown.* 3. The words were, viz. Thou haſt cozened Mr. *Windſor* of his Fee, and I will ſue thee for it in the Star-Chamber, for that thou didſt not come for *Windſor*. Adjudged, the Action did lye.

31. Trinit. 11 Jac. B. R. Action for theſe words, Thou art a Whoremaſter, for thou haſt layen with *Brown*'s Wife, and hadſt to do with her againſt a Chair. And the Plaintiff ſet forth, That by reaſon of theſe words, he loſt his Marriage. It was Objected, That the matter was tryable in the Eccleſiaſtical Court. Adjudged, That the words were actionable, and tryable at the Common-Law, in regard of the Circumſtances; and loſſe of Marriage extends as well to a man as a woman. See in *Davies* Caſe. *Matthew* and *Croſſes* Caſe, *Bol.* 2. Part. 90.

32. Paſch. 11 Jac. rott. 307. Action for theſe words, viz. His Son *Brooks* hath deceived me in a Reckoning for Wares: and his Debt-book which he keepeth for ſale of his Wares in his Shop, is a falſe Debt-book; and I will make him aſhamed of his Calling. Adjudged, the words will bear no Action. *Brook* and *Clark*'s Caſe. *Brown.* 4. See *Godbolt.* 243. the ſame caſe.

33. Paſch. 11 Jac. rott. 352. C. B. *Thomas* and *Alworth*'s Caſe. *Hob.* 2. Action for theſe words; This is *John Thomas* his writing (*inuendo* the Plaintiff); and he hath forged this Warrant, meaning a certain Warrant made by Sir *Richard Butler*, Knight, then Sheriff of the County of, &c. upon a *Caſias* iſſued out of the Common-Pleas by *M. H.* to the ſaid Sheriff directed. It was adjudged, That the *Inuendo* ſhould not ſupport the Action; nor the Action inlarged, or made certain, by the *Inuendo*. And, Mich. 11 Jac. rott. 1252. C. B. *Brown.* 6. *Tardly* and *Ellits* Caſe was vouched to be adjudged accordingly. See *Brown.* 4. the ſame Caſe. 6. acc.

34. Trinit. 13 Jac. Rott. 1994 C. B. Action for theſe words; Thou art a Cozening Knave, and thou haſt Cozened me in ſelling falſe meaſure in my Barley; and the Country is bound to curſe thee for ſelling with falſe meaſure, and I will prove it;

it; and thou haſt changed my Barley which I bought of thee; and the Plaintiff was Bayliſt to J. S. for three years, and had the ſelling of Corn and Grain growing upon the Land. Adjudged the Action would not lye; becauſe it doth not appear that the words were ſpoken of the ſale of the Grain whileſt he was Bayliff; nor that it was his Maſters Corn, nor to the damage of his Maſter. But if a man be a common Badger, and he is charged with ſelling by falſe meaſure; ſuch words will bear an Action. *Bray* and *Hayes* Caſe. *Hob. 6. Brown.* 4. acc.

15. Paſch. 13 Jac. Rott. 234. C. B. Action for theſe words, *Brown* is a good Attorney, but he will play on both ſides: Adjudged Actionable. But becauſe the Plaintiff did not ſhew in his Declaration that the words were ſpoken of himſelf, No Judgment was entred. *Brown* and *Hoales* Caſe. *Brown.* 5.

36. Mich. 11 Jac Rott. 1291. C. B. Action for theſe words, Thou didſt keep and ſell by falſe Weights, and in 24 s. beſtowing, thy Weights were falſe two Ounces, and thy man will be a witneſſe againſt thee, and I will prove it: Adjudged, the words were Actionable. *Stober* and *Green*'s Caſe. *Brown.* 5.

37. 14 Jac. C. B. *Box* an Attorney brought an Action againſt *Barnaby* for theſe words; Thou art a common maintainer of Suits, and a Champertor, and I will have thee thrown over the Barr next Term. Adjudged, the Action lyes for the word Champertor; for it is a ſlander of him in his Vocation. *Box* and *Barnaby*'s Caſe. *Hob.* 117. See *Brownlow.* 17. acc. the ſame Caſe.

38. Hill. 35 Eliz. in B. R. Action for theſe words; *William Crow* is forſworn and perjured, in ſwearing at the Common-Pleas Barr, upon the Deeds which he then had in his hands. Adjudged, the words Actionable. *Crow* and *Carter*'s Caſe. *Owen.* 13.

39. Mich. 37 Eliz. C. B. *Palmer* and *Bowyer*'s Caſe. *Owen.* 17. The Defendant ſaid to J. S. in diſcourſe of the Plaintiff, who was a Barriſtor and Steward of his Court, theſe words, viz. I marvail you will have ſuch a paultry Lawyer, for your Steward, for he hath as much Law as a Jack-an-apes. And the Plaintiff layed in his Declaration, that by reaſon of them he was diſcharged of his Stewardſhip. Adjudged that the Action will lye for the words. See *Goldeſb.* 126. acc.

40. Trinit. 30 Eliz. B. R. the words were; Thou art a Thief, and haſt forged a Deed. Adjudged, for Thief, generally, Action will not lye: But for the words, Thou haſt forged a Deed; an Action will lye, though it be not alledged what manner of Deed it was. *Moſſe* and *Read*'s Caſe. *Owen.* 47.

41. Hill. 37 Eliz. B. R. Action for theſe words; Thou haſt ſtollen half an Acre of Corn, (*inuendo*) Corn ſevered. Adjudged, the words are not Actionable; for the *inuendo* cannot alter the precedent words: and no man can think, that half an Acre of Corn, was Corn ſevered: But if it had been ſo many Loads, or ſo many Buſhells, then the Action maintainable. *Caſtleman* and *Hobbs*'s Caſe. *Owen.* 57.

42. Hill. 38 Eliz. Rott. 944. B. R. for theſe words: He was perjured, and I will prove him ſo by two Witneſſes: Adjudged for the Plaintiff, That the words are Actionable. And upon a Writ of Errour brought, the Judgment was affirmed in the Exchequer. *Rainer* and *Grimſton*'s Caſe. *Owen.* 62.

43. Mich. 39 & 40 Eliz. B. R. *Martin*, Attorney, brought an Action for theſe words, viz. Is *Martin* your Attorney? he is the fooliſheſt and ſimpleſt Attorney towards the Law; and if he do not overthrow your Cauſe, I will give you my Ears. He is a Fool and an Aſſe, and ſo I will prove him. Adjudged, the words are Actionable. And *Popham* ſaid, To ſay, That an Attorney will overthrow his Clyents Cauſe, is actionable. *Martin* and *Burlings* Caſe. *Goldeſb.* 128.

44. 39 & 40 Eliz. in B. R. *Parlor* brought an Action againſt J. S. for theſe words, viz. *Parlor* was in priſon in a Jayl, for ſtealing of Mr. *Piggotts* Beaſts. It was Objected, That it is onely by Implication that he ſtole them. But Judgment was given for the Plaintiff; for here is a direct affirmance of ſtealing; and a man cannot be Impriſoned for ſtealing, if he do not ſteal. *Parlor*'s Caſe. *Goldeſb.* 130

45. 40 Eliz. in B. R. *Redfrein* brought an Action for theſe words againſt J. S. viz. I was robbed, and you were privy thereunto, and had part of the money. Adjudged, that the Action would lye. *Redfrein*'s Caſe. *Goldeſb.* 138. See *Halley*'s Caſe. 15 Eliz. *Dyer.* before, Sect. 6. acc.

46. 40 Eliz. in B. R. *Pollard* and his Wife brought an Action againſt *Armſhaw* for theſe words, viz. Thou art a Whore, for J. S. Goldſmith hath the uſe of thy body, and the Cart is too good for thee. *Per Curiam*, the Action will not lye; for the Common-Law cannot define who is a Whore: But if one keep a Victualling-houſe: and one ſay, She keeps a houſe of Bawdry; an Action will lye. *Pollard* and *Armſhaw*'s Caſe. *Goldeſb.* 172. See *Anne Davies* Caſe. Part. 14.

47. 14 Jac. in B. R. *Hob.* 126. 15 Jac. rott. 1634. *Gibbs* and *Jenkins* Caſe. *Hob.* 191. In the Exchequer, Action was brought, for calling the Plaintiff *Idonor*, in the Welſh-Tongue, with an averment, that it was ſpoken before them who underſtood the Welſh: And upon information by Welſh-

Welſhmen, that it was meant in Engliſh, Perjured. Adjudged, the Action did lye: and the like was, for a ſlander in Welſh words. Trinit. 43 Eliz. *Gillam Verch Howell*, and *George Evans* Caſe, *ibid.* and 6 Jac. in Co. B. in *Tucks* Caſe. an Action was brought for theſe words; Thou art a healer of Felons; becauſe it was taken for a concealer of Felons. 6 Jac. in B. R. *More*'s Caſe. *ibid.*

48. Mich. 13 Jac. Rott. 1134. B. R. Action for theſe words; The Devil appears unto thee every night in the likeneſſe of a black man riding upon a black Horſe, and thou converreſt with him; and whatſoever thou doeſt ask, he doth give it thee: and that is the reaſon thou haſt ſo much money. Adjudged, the words Actionable; and Judgment was given for the Plaintiff. *Marſhal* and *Steward*'s Caſe, *Hob.* 129.

49. Mich. 13 Jac. rott. 347. B R. In an Action for words; Theſe words were found by the Jury, viz. I think in my Conſcience, if Sir *John Sidenham* might have his Will, he would kill all the Subjects in *England*, and the King too; and he is a maintainer of Papiſtry and Rebellious perſons. Adjudged, that the words would bear an Action. Sir *John Sidenham* and *Mayes* Caſe. *Hob.* 180.

50. 16 Jac. in B.R. A man brought an Action againſt another, for ſaying, That he had caught the French Pox, and had carried them home to his Wife. Adjudged, the Action did lye. *Crittall* and *Horner*'s Caſe. *Hob.* 219.

51. Hill. 16 Jac. Rott. 890. Action for theſe words, viz. He hath forſworn himſelf before the Councel of the Marches, (meaning his Majeſties Councel in the Marches of *Wales*) in a Suit I had againſt him there; and I will ſue him for Perjury there. It was adjudged for the Plaintiff, and 10 l. damages given. *Adams* and *Flemmings* Caſe. *Hob.* 283.

52. Paſch. 19 Jac. in C. B. an Action for theſe words; Thou haſt ſtollen Hay from Mr. *Bell*'s Ricks. Adjudged, the Action will lye for the words; for where a man is charged with Petty-Larceny, to ſteal under the Value of 12 d. yet an Action will lye, for the diſcredit is not in the value, but in taking of it with a Felonious intent. See before, *Male* and *Ketts* Caſe. Sect. 21. acc. But ſee *ibid. Winch.* 15. An Action was brought, for theſe words, viz. He (*innendo* the Plaintiff) ſtole the Tobacco out of his Maſters Shop: there, becauſe he ſaid (the Tobacco) in his Maſters Shop, and did not aver, That there was Tobacco there; the Action did not lye: But if he had ſaid, That he ſtole two or three pound out of his Maſters Shop, there the Action would have lyen. *Wetherly* and *Wells* Caſe. *Winch.* 6.

53. Mich. 20 Jac. in C. B. *Winch.* 41. An Action brought for theſe words; The Plaintiff did load a Ship of my Fathers with Barley, and did ſteal, and cozened ſeven Quarters thereof in meaſure. It was adjudged, That notwithſtanding the word Cozened, be joyned with the word Stole; yet the Action will lye. See *Crompton* and *Philpott*'s Caſe. 22 Eliz. in C. B. *Winch.* 102.

54. Trinit. 20. Jac. in C. B. Auditor *Curle* brought an Action againſt *Turk*; and ſet forth, That he was an Auditor ſworn of the Court of Wards, and that the Defendant, having communication with the Plaintiff concerning his behaviour in his Office, ſaid to him theſe words, *viz.* you have taken mony for ingroſſing Feodaries, *Inuendo*, Accompts; you are a Cozener, and live by Cozenage, and I will prove that to be Cozenage: It was objected; that the words, *viz.* for the taking of mony for the Ingroſſing of Feodaries are inſenſible, and the *Inuendo* will not help it. 2. The word Cozener is not applyed to his Office: But it was adjudged that the Action would ly; for although it be ſhewed that 2 s. was due for the Ingroſſing of Feodaries; yet it ſhall be intended that he took more then his due, and this is extortion; and Sir *Miles Fleetwoods* Caſe, who was a receivor of the Court of Wards, was remembred by the Court, Where one ſaid to him Mr. Deceivor hath cozened the King, and delt deceitfully with him. M. 20. Eliz. in C. B. Auditor *Curle* and *Turk*'s Caſe. Winch. 33. & 40.

55. Hill. 12. Jac. in C. B. The Defendant ſpake theſe words of Sir *Robert Hitcham*, the King's Serjeant at Law; *viz.* I doubt not to prove, He (*inuendo* Sir *Robert Hitcham*) hath ſpoken Treaſon: It was found for the Plaintiff. It was moved in Arreſt of Judgement, that the words are no direct affirmation that he ſpake Treaſon, and it might be in his Infancy; nor was there any conference before had of the King, and the ſpeech of Treaſon but when there is an intent to commit it: On the other ſide it was ſaid, that this is more then a bare affirmation, for he ſaid, he doubted not but to prove that: and to that purpoſe *Whoorwood*'s Caſe was cited, *viz.* So ſure as you believe God rules the world, and the King rules the Kingdom, ſo ſure did *Whoorwood* ſteal ſuch goods; and adjudged actionable: But it was adjudged that where words may be taken in a double ſenſe, the beſt ſenſe ſhall be taken; and therefore it ſhall be intended, that he ſpake Treaſon in putting of a Caſe, or in ſpeaking that after another: and ſo not offended; and therefore *Quære* for the principall Caſe was not adjudged. See *Hutton* 79. It was adjudged for the Plaintiff. Hill. 22. Jac. in C. B. Sir *Robert Hitcham* and *Brooke* Caſe. Winch 123, 324. See 5 Jac. *Godb.* 153. acc. *Hutton* 75. the ſame Caſe.

9 Jac.

9 Jac. Thou haſt ſpoken Treaſon and I will hang thee for it, actionable. *Hutton.* ibid. *Johnſon* and *Atwoods* Caſe. And ſee *Powell* and *Vaud ſſe's* Caſe. 9 Jac. ibid. M. 12. Jac. B. R. *Bolſt.* 2 part 271. If one call one Traitor, action lyeth.

56. Trinit. 6. Car. B. R. Rott. 385. The Defendant ſpake theſe words of the Plantiff, being an Attorney of the Common Pleas, *viz.* He is a common Barretor a Judas and a Promoter: and at another day; He is a common Barretor, a Cheator, I will make him to be barred of his practice. For the firſt words, The Defendant was found guilty; but not for the laſt: Yet it was adjudged the Action did lye, for it is a great ſlander to an Attorney to be called a common Barretor, who is a maintainer of Brables and Quarrels; and words ſhall be conſtrued *ſecundum conditionem Perſonæ* of whom they are ſpoken, See ibid. 166. the like Caſe. Vi. *Reginalds* Caſe. 15 Car. in B. R. Cro. 1 part. 406. acc. Trinit. 6. Jac. B. R. *Tayon* and *Starkeys* Caſe. Cro. 1. part. 139. *Hutton* 104.

57. Hill. 7. Car. Rot. 765. Action for theſe words; She is a Bawd, and hath bewitched him by Witchcraft and Sorcery: found for the Plantiff, and upon a Writ of Error; for the laſt words, And hath bewitched him, &c. adjudged the Action did lye; but for the firſt words, Shee is a Bawd, it was doubted: the Judgment was affirmed. *Hixe* and *Hollingſhids* Caſe. Cro. 1. part. 189. See *Godb.* 341. acc.

58. Trinit. 7 Car. in B. R. Action brought for theſe words, which the Defendant ſpake of the Plantiff, an Attorney of the common Pleas, and of the Sheriffs Court in *London*: He (*inuendo* the Plantiff) is a Cozener and cozens his Clyents in the Sheriffs Court of *London*, and was for that cauſe diſcharged of that Court; Found for the Plantiff and Judgment given: and upon Error brought, the Judgment was affirmed, for that they were ſcandalous, and touched the Plantiff in his profeſſion. *Mead* and *Perkins* Caſe. Cro. 1. part. 190.

49. Paſc. 12. Car. in C. B. The Plantiff declared, That he was and had been an Attorney of the common Pleas 15 years, and that one *Style* reteyned him as his Atturney, to proſecute a ſuit againſt *I. D*; And the Defendant, having communication with *Style*, to ſcandalize the Plantiff in his Profeſſion, and to diſſwade others from reteyning him; ſaid of the Plantiff theſe words: I marvail you will imploy ſuch a Knave as *Nicholls*, meaning the Plantiff; You will have but diſgrace and diſcredit by imploying him: he is a proclaimed Knave in a Market: It was found for the Plaintiff and Judgment given: and in Error brought in B. R. It was objected, To call an Atturney Knave is but a word of Heat, and, proclaimed in a Market is but an aggravation of the word Knave: But it was adjudged the words are actionable; for it is not intendable, but that he ſpake them of him as an ill dealer in his profeſſion, to which they have relation; and the firſt Judgment was affirmed. *Nicholls* and *Webbs* Caſe. *Cro.* 1. Part. 331.

60. Paſc. 2. Car. in C. B. The Plantiff was a Citizen of *Glouceſter*: and uſed the Trade of a Shoomaker, and the Defendant ſpake theſe words, of him; He is a Bankrupt Rogue: It was ſaid Bankrupt is but an adjective to Rogue, and ſo the word extenuated; and a Shoomaker lives not by buying and ſelling, but, as a Husbandman, by his manual labour: But it was adjudged the Addition, of Rogue to Bankrupt doth aggravate the words: And a Shoomaker is a perſon within the Statute of Bankrupts and gets his living by buying and ſelling: and ſo the Action doth lye. *Hutton* 52. So of a Corn Baker. *Cramp* and *Bornes* Caſe. *Cro.* 1. Part. 21. See M. 2. Car. B. R. *Barker* and *Ring-Roſe* Caſe. acc. *Poph.* 184. Trin. 20. Jac. *Hawkins* and *Cuts* Caſe.

61. 7. Car. in B. R. The Plantiff was a Midwife divers years, and thereby got her living; and the Defendant ſpake theſe words of her: Many have periſhed for her want of skill; adjudged the words are actionable, for ſhe hath gain by that function: and therefore may be prejudiced by ſuch words. *Flowers* Caſe. *Cro.* 1. Part. 153.

62. Trin. 8. Car. in B. R. The Defendant having communication with one *Harris*, of the Plantiff who was a Merchant, and uſed the Trade of a Merchant: He (*inuendo* the plantiff) is not worth a groat, he is 100 l. worſe then Nought; *per Curiam*: theſe words ſpoken of a Merchant, who lies upon his credit which is the principall means of his gain, are ſcandalous; and do tant. amount as if he had called him Bankrupt. See *Leycroft* and *Dankers* Caſe. Paſ. 9. Car. Rot. 152. *Cro.* 1. Part. 231. acc. *Goodyear* and *5 ſhops* Caſe. *Cro.* 1. Part. 193. See Trin. 10. Car. *Daw* and *Palmers* Caſe. *Hutton* 125. acc.

63. 7. Car. in B. R. The Plantiff was a Dr. of Phyſick in the Univerſity of *Cambridge* according to the Courſe of the Univerſity, and practiſed Phyſick, and miniſtred Phyſick to Noble men and others for many years: and the Defendant, to ſcandalize the Plantiff with his Patients and to withdraw them from medling with him; ſaid, of and to the Plantiff, Thou art a drunken fool and an Aſſe, Thou never went Schollar, and art not worthy to ſpeak to a Schollar, and that I will prove and juſtify; It was moved that the firſt words be but words of ſcorn; and the other wards touch him in ſchollarſhip onely, and not in his Art; But it was adjudged, that for theſe words the Action did lye. *Cawdry* and *Highleys* Caſe. Cro. 1. Part. 196. *Godb.* 441. the ſame Caſe.

64. Trin.

64. Trin. 9. Car. B. R. an Action for theſe words: Thou art a long-ſhag-haired murthering Rogue: It was ſaid the words are adjectively ſpoken and do not directly charge him with the Murther of any perſon: But it was adjudged that the words were actionable; and ſo likewiſe was it adjudged. H. 7. Car. Rot. 728. in *Co.* 1. B. in *Wilſon* and *Maſons* Caſe. for theſe words: Thou art a murthring Knave. *Green* and *Lincolns* Caſe. *Cro.* 1. Part. 232.

65. M. 10. Car. B. R. The Plantiff was a Barriſter of the Middle Temple, and gave Counſel to divers, and practiſed the Law, and married the daughter of *I. S.* and the Defendant having ſpeech with *I. S.* concerning the Plantiff and the marriage of his daughter; ſaid of the Plantiff: He is a Dunce and will get little by the Law. To which words, *I. S.* anſwering, That others have a better opinion of him; he replyed: He was never accounted but a Dunce in the Middle Temple. It was moved; That *Dunce* was a great man, and he was compared to him, and then no diſcredit: But the opinion of the Court was that the Action would lye for thoſe words; for the words are to be taken according to common intendment and ſpeech: and Dunce in common ſpeech is taken for one of dull Capacity and not fit for a Lawyer; and the words were ſpoken maliciouſly, and ſo found to the intent to ſlander him in his profeſſion; and the words; That he will not get much by the Law; are to be taken: He will not diſerve to gain, &c. and Judgement was given for the Plaintiff. *Peard* and *Johnes* Caſe. *Cro.* 1. Part. 278.

66. 14. Car. in C. B. The Defendant ſpake theſe words of an Attorney, maintaining himſelf, his Wife, and Children by his practiſe: He is a very baſe Rogue and a cheating Knave, and doth maintain himſelf, his Wife, and Children by his cheating. The Court held the words actionable, for that it touched him in his profeſſion: and adjudged cording, and the Judgment affirmed in a Writ of Error brought in B. R. See the like Caſe: for the like words ſpoken of a Tayler; for ſlandering him in his Trade. Trin. 15. Car. Rot. 1181. A Writ of Error brought in B. R. upon a Judgment given in Bath. *Cro.* 1. Part. 371. Trin. 15. Car. *Ireland* and *Blockwells* Caſe. *Cro.* 1. Part. 412.

67. Mich. 4. Car. in B. R. Action for theſe words: Thou art a Witch, and didſt bewitch my Mothers drink: and being deſired to know why ſhe called her Witch; She anſwered, If I called her Witch, we will prove her a Witch, and anſwer what we have done: *per Curiam* the Action will lye for theſe words; and Judgment was for the Plantiff. *Hugh* and *Farrers* Caſe. *Cro.* 1. Part. 100.

68. Paſc. 4. Car. in B. R. Action for theſe words: The Defendant ſaid *John Lewkner* (meaning the Plantiff) and *John Smith* (meaning one *John Smith*) knowing that one *I. S.* a Gold-ſmith did carry with him a great deal of Plate, did lye in wait to robb him, and ſet upon him by the Highway, but he raiſing the Country, they fled away and *Lewkner* loſt his horſe, and both of them were driven to ride away upon one horſe; It was moved, that there was not any Felony committed, and it was but an intent, and charged but as a Miſdemeanor, as a Ryot. But the Court were all of opinion that the Action did lye for the words; for although he chargeth him with an act which is not Felony; yet he chargeth him not only with the Intention, which is as near Felony as may be; and with more then Riot, and for which Fine and Impriſonment are due; wherefore it was adjudged for the Plantiff. *Lewkner* and *Cruchleys* Caſe. *Cro.* 1. Part. 99. See *Meredith* and *Bonill* Caſe. H. 10. Jac. *Hutton* 58. acc.

69. Mich. 7 Car. B. R. Action for theſe words; The Defendant ſaid of the Plaintiff, being a Merchant, Thou art a Rogue and a beggerly fellow, and I will prove thee a Bankrupt before the next Term: And at another time he ſaid to one *Harris* of the Plaintiff, Truſt him not, for he will be thy undoing. Adjudged, That the words though ſpoken at ſeveral times, were Actionable; and the words at the ſecond time aggravates the firſt. Judgment for the Plaintiff. *Jaxon* and *Tanner's* Caſe. *Cro.* 1. Part. 171. See 11 Jac. B. R. *Selby* and *Cayes* Caſe. Bankrupt Knave, actionable. *Bolſtr.* 2. Part. 218.

70. Mich. 8 Car. B. R. rott. 1405. The Defendant malitiouſly ſpake theſe words of the Plaintiff, who uſed to buy and ſell Cattel, and made it his Trade; He, meaning the Plaintiff, was arraigned at *Warwick* for ſtealing of 12 Hoggs, and if he had not made good friends, it had gone hard with him: Whereas *revera* he the Plaintiff never was arraigned nor queſtioned. It was found for the Plaintiff. It was Objected, To ſay he was arraigned of Felony, is no cauſe of Action, as 31 Eliz. it was Reſolved in *Nott's* Caſe, You were cooped up for forging of Writs. And 34 Eliz. in C. B. *Bayly* and *Chevington's* Caſe, Thou wert arraigned for two Bullocks: for an honeſt man may be ſuſpected or arraigned: But in the principal Caſe it was adjudged, That the Action did lye for the words; for that they were ſpoken falſly and maliciouſly, and ſpoken in diſgrace that none ſhould truſt him; and eſpecially by reaſon of the averment, That he never was arraigned nor queſtioned for Felony: And ſo was it adjudged. 8 Jac. in B. R. in *Hayns* and *Spratt's* Caſe, Thou wert in *Norwich* Goal for a Robbery committed upon J. S. where an Averment was, he never was in any Goal for any Felony. And adjudged for the Plaintiff.

Trinit.

Trinit. 8 Car. in B. R. *Hally* and *Stanton*'s Caſe. *Cro.* 1. Part. 195.

71. Mich. 9 Car. in B. R. The Plaintiff put in his Anſwer, to which he was ſworn to a Bill exhibited againſt him by one *Chriſtmas*, in the Chancery; and the Defendant ſpake theſe words of the Plaintiff; He (*inuendo* the Plaintiff) is forſworn in his Anſwer to *Chriſtmas*'s Bill. It was ſaid, That the Action did not lye; for that he did not ſhew in what point he was perjured. But it was adjudged, That the Action did lye for the words; and there need not any averment, that it ſhall not be preſumed, there was any other Bill and Anſwer in any other place. Judgment was for the Plaintiff. Sir *Rich. Snowdes* Caſe. *Cro.* 1. Part. 234.

72. Mich. 9 Car. B. R. The Plaintiff being a Widow after the death of her former husband, was in Communication with one *Cowley* for a Marriage betwixt them: and the Defendant to hinder her of the Marriage, ſpake theſe words of the Plaintiff, *She is a Whore*, and her Children which ſhe had by *Brian* her late Husband, are *Frambiſh*'s Baſtards; meaning one *Nicholas Frambiſh*. It was ſaid, That *Whore* is not actionable; and her children by her former husband, are *Frambiſh*'s Baſtards, is repugnant in it ſelf; for they cannot be Baſtards who are born in marriage. But adjudged, the Action lyes: For it is a great diſcredit to ſay of a Widow, ſhe played the Whore in her former husbands time, and is the cauſe of loſſe of her marriage: and for the later words, though they are not Baſtards in Law, yet they are in reputation. Adjudged for the Plaintiff. *Brian* and *Cockman*'s Caſe. *Cro.* 1. Part. 234.

73. Trinit. 9 Car. B. R. Action for theſe words; Thou haſt forged a Privy Seal and a Commiſſion; Why doſt thou not break open thy Commiſſion? It was Objected, That he did not ſay, the Kings Privy-Seal; nor what Privy Seal he meant: and the word, Thy Commiſſion; ſhall be intended a Commiſſion made by the Plaintiff himſelf, But it was adjudged *per Curiam*, That the Action did lye: For it being alledged in the Declaration, that he ſpake the words to ſcandalize him, in forging of a Commiſſion, and of the Privy Seal, It ſhall be conſtrued, according to the vulgar Interpretation, The Kings Privy Seal; the Counterfeiting of which, is Treaſon. And the words, a Commiſſion, ſhall be intended the Kings Commiſſion under the Privy Seal. Judgment was given for the Plaintiff. *Bial* and *Beggerley*'s Caſe. *Cro.* 1. Part 257.

74. Mich. 9 Car. B. R. *Perſon* and *Goodayes* Caſe. *Cro.* 1. Part. 238. Action for theſe words; Thou haſt taken out of my pocket 40 l. of my money, and I will cauſe thee to be Indicted at the Seſſions of the Peace, and to hold up thy hand at the Barr for it; and *ex ulteriori malitia*, at another day he ſaid, He hath picked out of my pocket Silver and Gold. It was Objected, the words are not Actionable, being ſpoken at ſeveral times; and becauſe, damages are given intire. But it was adjudged, 1. That in this caſe, the firſt words are Actionable; for that he directly charges him with Felonious taking, when he averred, He would cauſe him to be Indicted, and hold up his hand for that cauſe. 2. That the laſt words, being laid to be ſpoken *ex ulteriori malitia*, ſhall have reference to the firſt; and ſo charging him with that Felony. See Paſch. 12 Jac. B. R. *Gilpin* and *Shiues* Caſe. *Bolſt.* 2. Part. 227. He would have robbed me of my dagger, and took it from me. Adjudged Actionable.

75. Trinit. 9 Car. B. R. The Defendant ſpake theſe words of the Plaintiff's Wife; (the Plaintiff being allowed to keep an Ale-houſe by the Juſtices of the Peace) Hang thee Bawd: thou art worſe then a Bawd, Thou keepeſt an houſe (meaning the ſaid houſe) worſe then a Bawdy-houſe, and thou keepeſt a Whore in thy houſe to pull out my Throat. Adjudged, the words are Actionable: and Judgment for the Plaintiff. *Perſon* and *Gooddays* Caſe *Cro.* 1. Part. 234. See Sect. 14. acc.

76. Mich. 9 Car. B. R. Action for theſe words; Thou haſt gotten J. S. 9 l. for forſwearing himſelf in the Chancery; and, Thou haſt hired him to forge a Bond. Adjudged, the Action doth lye for the words. *Cro.* 1. Part. 245.

77. Mich. 10 Car. B. R. The Plaintiff made Oath before Juſtice *Whitlock*, upon Articles of the good Behaviour exhibited againſt the Defendant, of the truth of them: and the Defendant ſpake theſe words of the Plaintiff, viz. He (meaning the Plaintiff) made a falſe Oath before the Judge, and I have that in my houſe can prove it. Adjudged, this is a ſcandalous ſpeech, and charges him with perjury; for that the Oath is taken in a Court of Record. *Robodham* and *Venſecks* Caſe. *Cro.* 1. Part. 275.

78. Mich. 11 Car. B. R. The Defendant ſpake theſe words at *Burton Lazars* of the Plaintiff Dr. *Sibthorp*; viz. See, Dr. *Sibthorp* is robbing the Church. And at another day, The Plaintiff Dr. *Sibthorp* hath robbed the Church (*inuendo* the Church at *Burton Lazars*). It was Objected, It was but an Intent, and an Attempting, and no Act done. Adjudged, That for both ſpeeches an Action doth lye; and the words ſhall be taken in the worſer ſenſe, being ſpoken malitiouſly to ſlander him. And ſo for ſaying, Such a one is robbing a man; or is Raviſhing a woman, an Action lyes. See there. 5 Jac. *Benſon* and *Morley*'s Caſe, Thou haſt robbed the Church; meaning the Church of *Alphage*;

Alphage; an Action lyes. Dr. *Sibthorp's* Caſe. *Cro.* 1. Part. 301.

79. Trinit. 13 Car. B. R. Thou art a Rogue and a Raſcal, and haſt killed thy Wife, (meaning the Wife of the Plaintiff) and the Declaration is *Naper* his Wife. Adjudged, the firſt words, Rogue, and Raſcal, are not actionable: But for the later words, Thou haſt killed thy Wife; they ſhall be intended according to the uſuall ſpeaking, that he killed her voluntarily: and by the word *Naper*, it ſhall be intended ſhe is dead; and ſhall not have a forrein conſtruction, that they were divorced. *Wilner* and *Hold's* Caſe. *Cro.* 1. Part. 352.

80. Trinit. 14 Car. rott. 1499. Thou and thy Wife *Agnes* are both Witches, and have bewitched my Mare, (meaning the Plaintiff's Mare). Adjudged, the Action doth lye for the words. Though it was Objected, That two cannot commit one Witchcraft. But adjudged, the words ſhall be referred as they were ſpoken; and ſhall be as much as if ſeverally they had committed the offence. *Smiths* and *Cooks* Caſe. *Cro.* 1. Part. 368. See Sect. 67. acc.

81. Trinit. 15 Car. B. R. The Defendant ſaid of the Plaintiff being a Merchant, He was a Cheating Knave, and had cheated his Father by returning 20 l. for Wares. Adjudged Actionable, becauſe it touched him in his Profeſſion. *Arundell* and *Mares* Caſe. *Cro.* 1. Part. 398.

82. Hill. 15 Car. B. R. Action for theſe words; He hath ſtollen a Tree formerly cut down, which is Felony, and I will cauſe him to be Indicted for it. Judgment was for the Plaintiff: and upon Errour brought, the Judgment was affirmed. *Brian* and *Wikes* Caſe. *Cro.* 1. Part 413.

83. Paſch. 15 Jac. B. R. *Waterman* and Thou, (meaning the Plaintiff) haſt killed thy Maſters Cook. It was ſaid, the words are uncertain; and ſhall not be made good by *Inuendo*: nor doth it appear who was his Maſter; or that his Maſter had a Cook. Adjudged, that the words are Actionable, and import he had a Maſter; and his Maſter, a Cook. *Cooper* and *Smith's* Caſe. *Popham* 128. See *Longs* Caſe. *Styles* 65. acc. Thou haſt ſacrificed thy Child to the Devil; are words actionable. *ibid.*

84. Hill. 17 Jac. B. R. I arreſt you for Felony; but doth not ſay he committed Felony: Yet adjudged the words actionable; and Judgment was given for the Plaintiff. *Serle* and *Mandes* Caſe. *Popham.* 150.

85. Hill. 1 Car. B. R. Thou art a Knave of Record, and a forgering Knave. Quære, if the Action will lye, for the incertainty of underſtanding of the word, Forgering. But ſee there, 28 Eliz. for theſe words, Thou haſt forged my Fathers Will, an Action will lye. *Debborn* and *Martin's* Caſe. *Popham.* 177.

86. Trin. 2 Car. B. R. Sir *William Barton*, a Juſtice of Peace, brought an Action for theſe words; Sir *William Barton's* men have ſtollen Sheep, and he ſpake to me that I ſhould not proſecute them, Adjudged the Action doth not lye; becauſe it is not averred, That Sir *William* is a Juſtice of the Peace; and for that it doth not appear in what County the Felony was done. Sir *William Barton's* Caſe. *Popham.* 180.

87. Trinit. 2 Car. B. R. Action for theſe words; *Rayner* is a baſe Gentleman, he hath four Children by his ſervant *Agnes*, and he hath killed them all, or cauſed them to be killed. Adjudged, That all the words joyned together, are Actionable; and that by reaſon of the averment, that he is not Guilty, or Incontinent. *Reynor* and *Hallett's* Caſe. *Popham.* 187.

88. Trinit. 2 Car. B. R. An Action for theſe words; You a Counſellour? A Fool, an Aſſe, a Hangman; a Counſellour of Law, a Fool in the profeſſion; the words adjudged actionable. *Cary's* Caſe. *Popham* 207. See Sect. 65. *Peard's* Caſe, acc.

89. Hill. 16 Jac. B. R. Thou art *Luſcomb's* Hackney, a Pockey Whore, and a Theeviſh Whore; and I will prove thee to be ſo. Not Actionable; *Quia verba accipienda ſunt in mitiori ſenſu.* *Cullford's* Caſe. *Godb.* 278. See *Kings* Caſe, 24 Car. *Styles.* 100. acc. See *Cro.* 2. Part. 514. the ſame Caſe.

90. Hill. 16 Jac. in B. R. Theſe words ſpoken of a Mathematitian, a Meaſurer of Land, and a Surveyor of Land, viz. Thou art a Cozener and a Cheating Knave, and that I can prove; are Actionable, *per Curiam.* And, a Geometrician, or a Mathematician is an Art or Faculty; and ſo it is a ſcandalizing in his Profeſſion. *Gold.* 278.

91. Mich. 15 Jac. in B. R. Theſe words were ſpoken of Sir *William Bronker* a Knight, and one of the Gent. of his Majeſties Privy Chamber; Sir *William Bronker* is a Cozening Knave, and lives by Coſenage. Adjudged, the words not actionable. Sir *William Bronker's* Caſe. *Godb.* 284. See *Cro.* 2. Part. 427. acc.

92. Paſch. 21 Jac. B. R. Action for theſe words, viz. Thou (meaning the Plaintiff) haſt raviſhed a woman twice, and I will make thee ſtand in a white ſheet for it. Adjudged, the words are actionable. Quære. *Bridges* and *Mills* Caſe. *Godb.* 287.

93. Paſch. 8 Jac. C. B. Action for theſe words; Thou mayeſt well be richer then I; for thou haſt coyned 30 s. in one day, thou art a

Coyner of money. Adjudged not actionable; for he might Coyn by Authority; as the men who work in the Mint are called Coyners; *et verba accipienda ſunt in mitiori ſenſu.* *Ward* and *Pool*'s Caſe. *Godb.* 167. See 3 Car. B. R. *Syms* Caſe. *Godb.* 391. acc. Trinit. 3 Car. B.R. *Mills* Caſe. acc. *Godb.* 375.

94. Trinit. 21 Jac. B.R. A Midwife brought an Action for theſe words, Thou art a Witch, and wert the death of ſuch a ones Child, at whoſe Birth thou wert Midwife. Adjudged, the Action would lye; for that puniſhment is to be inflicted upon a Witch, by the Statute of 1 Jac. But ſee the ſame Term, Thou art a Witch, and haſt bewitched my Child; Judgment was ſtayed, becauſe the words ſhall be taken *in mitiori ſenſu.* *Shooter* and *Emetts* Caſe. *Godb.* 341. See *Long*'s Caſe. *Styles.* 66. acc. Trin. 21 Jac. *Mellon* and *Horns* Caſe. *ibid.* See Hill. 12 Car. *Souſer* and *Burton*'s Caſe. *Hutton.* 132. acc. See 23 Car. *Helena*'s Caſe. *Stylts* 11. acc.

95. Trinit. 8 Car. in B. R. Action for theſe words; Theſe *Jones's* are proper Witneſſes, they will ſwear any thing; They have already forſworn themſelves in the Chancery, and the Lord Keeper committed them for it. Adjudged, the Action would lye for the words: and the addition (in the Chancery) is as much as if he was perjured there. And *Hemſies* Caſe was put, Where one ſaid of a Witneſſe preſently after a Tryal at the Guild-Hall, *London*; You have forſworn your ſelf: and adjudged actionable. *Jones* and *Ballard*'s Caſe. *Godb.* 444.

96. Paſch. 13 Car. in B. R. A man was heir to his Father, and alſo to his younger brother; And the Defendant, to bring him in diſgrace with them, and make the Father and Brother give their Lands from him; ſaid to the Plaintiff, Thou art a Baſtard; in the preſence of the Father and younger brother; by reaſon of which they do give their Lands from the Plaintiff: And adjudged, the words were actionable, and Judgment given accordingly. *Humphreys* and *Studfields* Caſe. *Godb.* 451.

97. Coſening Knave, no Action, 26 Eliz. *Hutt.* 13. *Gittings* Caſe. 30 Eliz. *George* and *Witlock*'s Caſe, *Hutt.* 14.

Falſe Knave, No Action, 30 Eliz. *Walcott* and *Hind*'s Caſe. *Hutt.* 14. 37 Eliz. *Brook*'s Caſe. *Hutt.* 14

Pilfring Merchant, not Actionable, 38 Eliz. *Charter* and *Hunter*'s Caſe. *Hutt.* 14. 35. *Bradſham* and *Walker*'s Caſe.

Bankrupt Knave, Traytor Knave, Actionable, *Hutt.* 13. & 14. See 11 Jac. B. R. *Bulſt.* 2. Part 218.

Perjured Knave, actionable. H. 23 Car. *Styles.* 17. *White*'s Caſe.

98. Hill. 17 Jac. An Attorney brought an Action for ſaying of him, That he had forged the Will of J. S. Upon Not-Guilty, found for the Plaintiff, and adjudged Actionable. *Cardinals* Caſe. C. B. *Hutt.* 29.

99. Paſch. 19 Jac. Thou art a falſe forſworn Knave, and didſt take a falſe Oath againſt me at a Commiſſion at *Eccleſall*, *innuendo* a Commiſſion out of the High-Commiſſion. Adjudged, the words not actionable; and no *innuendo* will ſupply matter which gives not cauſe of Action; but the words muſt contain ſcandall in themſelves. *King* and *Bowen*'s Caſe. *Hutt.* 44. C. B.

100. Mich. 19 Jac. *A.* Gent. merchandized for Lead in the County of *Derby*, and thereby got money towards his livelihood; and the Defendant ſaid of him; He is a Bankrupt, and is not able to pay his debts, but will run the Country. Adjudged, the Action would lye for the words. *Allen* and *Smith*'s Caſe. *Hutt.* 46.

101. Mich. 8 Car. B. R. Thou art a Thief, and haſt cozened my Coſin *Baldwin* of his Lands; not Actionable. *Herbert* and *Angells* Caſe. *Hutton.* 113.

102. Mich. 8 Car. B. R. A man went to a Juſtice of Peace for a Warrant againſt the Plaintiff; and ſaid before the Juſtice of the Plaintiff, Sir, I will charge him with flat Felony for ſtealing my Hops from my Shop. Adjudged, the words not actionable. *Ram* and *Lumley*'s Caſe. *Hutton.* 113.

103. Paſch. 9 Car. C. B. Theſe words were ſpoken of an Attorney, Town-Clerk of *Southampton*, who kept the Rolls and Certificates of the proceedings there; Thou haſt made many falſe Certificates to the Mayor and Burgeſſes; and the more thou ſtirreſt in it, the more it will ſtink. It was adjudged, the Action would not lye for theſe cauſes; becauſe, 1. It is not alledged, that there was ſpeech of his Office. 2. Nor that the making of Certificates did belong to his Office. 3. It is not averred, That he knew them to be falſe; or that he made them falſe malitiouſly. *Smith* and *Cornelius*'s Caſe. *Hutton.* 123.

104. Mich. 14 Car. *Harriſon*, a Batchelour of Divinity, came to the Common-Pleas, Juſtice *Hutton* ſitting there, and giving Rules, &c. and ſaid; I accuſe Mr. Juſtice *Hutton* of High Treaſon. And Juſtice *Hutton* brought his Action for the words, and recovered 10000 l. damages. Juſtice *Hutton* and *Harriſon*'s Caſe. *Hutton.* 131. See Sir *Robert Hitcham*'s Caſe. Sect. 55.

105. Mich. 9 Jac. B. R. rott. 285. Theſe words were ſpoken of a Merchant, being an Alien born,

born, and a ſtranger, who traded here; *Tirſot* the Plaintiff is a Brankrupt. Adjudged, the words actionable: and an Action lyeth for them by an Alien. *Tirſot*'s and *Mern*'s Caſe. *Bulſt.* 134. 1. Part.

106. Mich. 8 Jac. rott. 702. B. R. Theſe words ſpoken of the Plaintiff, viz. He is not worthy to bear Office in ſuch a place; For he keeps a Bawdy-houſe in *London*. The words are actionable; and Judgment was for the Plaintiff. *Simpſon* and *Brooks* Caſe. *Bolſt.* 138. 1. Part.

107. Mich. 11 Jac. B. R. Action for theſe words, viz. The Deed which Sir *George Reynell* ſhewed forth before Sir *John Tindall*, was forged, and made under a hedge: adjudged, the words conjoyned, are actionable; and Judgment was for the Plaintiff. Sir *George Reynel* and *Sackfields* Caſe. *Bolſt.* 2. Part. 132.

108. Mich. 11 Jac. B. R. Action for theſe words; viz. Thy Father is a Theef, and hath ſtollen more goods then I am worth; and there is no averment, that he was worth ſo much in goods, and that he had ſuch goods. But adjudged, the words are actionable, without any averment: and ſee there the difference, between the words, *For*, and *And*; where in the one caſe an averment muſt be, but not in the other. *Painter* and *Warns* Caſe. *Bolſt.* 2. Part. 140.

109. Mich. 11 Jac. B. R. Action for theſe words, Thou art a Sheep-Theef; ſpoken in *Weſtmerland*, where ſuch ſpeech is taken for a ſtealer of Sheep; actionable. So the words, Thou art an Out-putter; there commonly known for a Horſe-ſtealer. So the words, Thou haſt ſtreined a Mare, are actionable; becauſe by Cuſtome of the Country, they are taken for, ſtealing a Mare. *Stetneman* and *Richardſon*'s Caſe. *Bolſt.* 2. Part. 145.

110. Trinit. 12 Jac. B. R. Action for theſe words, viz. Mr. *Crook* came into *Cornwall* with a blew Coat on his back; and hath now gotten a great quantity of wealth by Trading with Pyrats, cozening in the tale of Pilchers; and by extortion: Adjudged *per Curiam*, the words are too general, and not actionable: and words which are actionable, ought to be expreſly ſcandalous, and not by Implication. *Crook* and *Avery*'s Caſe. *Bolſt.* 2. Part. 226.

111. Paſch. 23 Car. B. R. Theſe words were ſpoken of the Plaintiff, being a Juſtice of Peace; Mr. *Hamond* did put in of his own head, theſe words taken in an Examination by him, viz. J. S. did ſteal 20 Sheep of ſuch a mans: and for theſe words; Mr. *Hamond* was adebauched man, and not fit to be a Juſtice of Peace. Adjudged, the firſt words are actionable; but for the ſecond words, *Curia adviſare vult*. *Hamond* and *Kingſmells* Caſe. *Styles.* 22.

112. Hill. 23 Car. B. R. Action for theſe words, viz. *Margaret Whitacres* is a Theef, and did ſteal my Wood, and I will ſend her to Bride-well. Quære, if actionable; for the Court was divided in Opinion. Hill 22 Car. rott. 1318. *Drake* and *Whitacres* Caſe. *Styles.* 24.

113. Mich. 23 Car. B. R. Action for theſe words; Your ſon ſtole a horſe, and ſold him for 10 l. Judgment was given for the Plaintiff. *Perſon* and *Dawſon*'s Caſe. *Styles.* 46.

114. Mich. 23 Car. B. R. *Mary Yates* is a Sorcerer and a Witch, and a white Witch, ſhe can bewitch and unwitch: Adjudged, not actionable. But the ſame Term, *Turner*'s Caſe; She is a Witch, and I will take my Oath of it. Quære; for Judgment was not given, but reſpited. *Yates* and *Lindens* Caſe. *Styles.* 47. Mich. 23 Car. B. R. *Turner*'s Caſe. *Styles.* 47.

115. M. 23 Car. B. R. Thou art a Witch, and haſt bewitched my Cow; It was ſaid that it is not averred that the Cow was hurt or deſtroyed by the bewitching. It was adjudged the Action doth lye; and the words, Thou haſt bewitched, implyes hurt done to the thing bewitched. See Sect. 67. *Sawyer* and *Ruſſel*'s Caſe. *Styles* 59. See *Long*'s Caſe, ib. d 65. ibid.

116. M. 23. Car. B. R. The Defendant ſpake thus of the Plaintiff, to the Conſtable; viz. There he is, take him, for I charge him with flat Felony; and Mr. *Nevill* hath taken my ſheep with a felonious intent: It was ſaid, That it is not ſaid, the words were ſpoken falſly or malitiouſly; Yet Judgment was given for the Plaintiff; for where the words appear to be ſcandalous, the Action lyeth; though not ſaid to be malitiouſly ſpoken. *Nevill* and *Mott*'s Caſe. *Styles* 59.

117. Trin. 23. Car. B. R. Rot. 1078. An Innkeeper brought an Action for theſe words; Col. *Egerton* had the French Pox, and hath ſet it in the houſe; and the Plaintiff and his wife have it, and you all: It was ſaid, to ſet the Pox in the houſe is impoſſible, for the houſe cannot have the Pox, and the words [*Smith* and his wife have it] ſhall not be meant they have the Pox, but the houſe; and the Husband onely brings the Action. It was adjudged, That if an Action be brought for words, and ſome of them are actionable and ſome not, the Action lyes for them that are actionable; and the words here are actionable: and the Husband may bring the Action for damages to himſelf. *Smith* and *Hobſon*'s Caſe. *Styles* 112.

118. Trin. 9. Jac. B. R. Action for theſe words; Mr. *Long* was robbed of 40 l. and of ſo much Plate, and that *Long* and *King* have the ſame, and for which (by God) they will be hanged; *per Curiam*, the words are actionable; for theſe words are ſpoken, whereby the life of a man may be taken away, they are actionable; and the latter words do much aggravate the former; and the words

are ſpoken adviſedly, and import defamation; and the fame of a man is more precious then riches, nay then life it ſelf: adjudged for the Plaintiff. *King, Long* and *Lorking*'s Caſe. *Bolſt.* 1. Part. 147.

119. Paſc. 10. Jac. B. R. Theſe words were ſpoken of the Plaintiff, That he had harboured and received his Son into his houſe having notice of him before, that he was a ſeminary Prieſt; *per Curiam*, the words are actionable in a high meaſure, for that the ſame offence is Felony by the Statute of 27 Eliz. Cap. 2. *Smith* and *Flint*'s Caſe. *Bolſt.* 1. Part. 181.

120. Trin. 1650. B. R. Action for theſe words, Thou wentſt to the Wells to be cured of the Pox: adjudged actionable. *Hobſon* and *Hadſons* Caſe, *Styles.* 219.

121. M. 1650. Theſe words were ſpoken of *Gibbs* a Barreſtor and Practizer of *Lincolns* Inn, viz. *William Gibbs* hath done falſly with me being his Client, and hath joyned with my adverſary; upon averment that he is a Practicer; the Action lyeth. *Gibbs* and *Price*'s Caſe. *Styles* 283.

122. Trin. 1651. Action for theſe words; viz. Thou art a Baſtard-getting Rogue, and hadſt a Baſtard at *Oxford*, and art a pocky Rogue, and for ought I know, thou haſt filled my bed full of the French Pox, and no ſuch pockey Rogue ſhall lye with me. Verdict found for the Plaintiff; and the words adjudged actionable. *Elyot* and *Blagues* Caſe, *Styles.* 283.

123. Trinit. 1652. B. R. The Plaintiff as a Witneſſe before a Juſtice of Peace appeared; and to weaken his Teſtimony, the Defendant ſpake theſe words of him, viz. Thou haſt been a Contentious man this 30 years, and a breeder of ſtrife, and haſt taken a falſe Oath againſt my brother and ſiſter in a matter of Incontinency, and haſt taken 20 s. for it, and I will ſhew it upon Record. Adjudged, That the words taken together, are actionable; and they are ſaid to be *falſo et malitioſe*; Judgment was given for the Plaintiff. *Heard* and *Read*'s Caſe. *Styles.* 335.

124. Trinit. 1653. B. R. Action for theſe words; He (meaning the Plaintiff) got *Mary Nab* with Child, and the Child is his, and I have tryed it with a Sieve and a pair of Shears. It was moved, The laſt words were inſenſible. But it was adjudged, the firſt words were actionable and ſcandalous; and the ſubſequent words are not material: and he put confidence in the Sieve and the Shears; and it matters not whether his confidence be true or falſe. *Shercroft* and *Weeks* Caſe. *Styles* 379.

125. Trinit. 1653. B. R. rott. 743. *Townſend* and *Barker* had been Copartners in Trade; and *Townſend* brought an Action for theſe words ſpoken of him by *Barker*, viz. You are a Cozening Knave, and did cozen me of 1200 l. at one time, and that was in making an Accompt in the year 1648. Adjudged, whether the Partnerſhip continued or not, yet the words are ſcandalous: and although an Accompt be a private thing; yet the Plaintiff is thereby diſgraced: for none will deal with him that will cozen his own Partner. Adjudged for the Plaintiff. *Townſend* and *Barker*'s Caſe. *Styles.* 388.

126. Trinit. 1654. rott. 1384. Action brought for theſe words, viz. You have cozened the State of 20000 l. and I will prove it; for you have received 25000 l. profits of the Office, and not compounded for it; and have foiſted in words in the Order of your Commiſſion. Adjudged, the words are actionable; becauſe they bring the Plaintiff in compaſſe of Sequeſtration, and becauſe they inſtance in what he cozened the State: and foiſting in, ſhall be taken for falſifying the Committees Order: and the Plaintiff was Officer; and there needs no averment, That Mr. *Whitwick* is alive; during whoſe life he claims the Office. Judgment was given for the Plaintiff. *Henley* and Sir *Ed. Boynton*'s Caſe. *Styles.* 436.

127. Action for theſe words ſpoken of the Plaintiff, Mich. 2 Jac. B.R. Thou art a Theef, and haſt ſtollen my Corn: Adjudged actionable; and ſtealing Corn, ſhall be intended Corn reaped in the worſt ſenſe. *Kellam* and *Maneſby*'s Caſe. *Cro.* 2. Part. 39.

128. Hill. 2 Jac. B. R. Action for theſe words ſpoken of a Juſtice of Peace; I am in danger of my life, my bloud is ſought, and I was like to have been murdered; I was at Sir *Johns Harper*'s houſe, and *John Harper*, ſon of the Plaintiff, drew me forth to ſee a Gelding in the Stable; and then *Tho. Beaumont*, Sir *Henry Beaumont*'s ſon, did throw his Dagger at me twice, and thruſt me through the Breeches twice with his Rapier to have killed me; all this was done by the Inſtigation of Sir *John Harper*, and I can prove it. It was moved, There is no charge laid of Felony, but an Inſtigation: but it was adjudged, That Inſtigation by a Juſtice of Peace to do an Outragious act, is againſt his Oath and miſdemeanour; for which he ſhall be put out of the Commiſſion; and all the words laid together, being falſe and ſlanderous; the Action doth lye. Sir *John Harper* and *Beaumont*'s Caſe. *Cro.* 2. Part. 56.

129. Paſch. 3. Jac. B. R. A Commiſſion was directed to the Plaintiff and others, to examine Witneſſes in a Suit betwixt the Defendant and one *King*. And the Defendant ſaid of the Plaintiff, one of the Commiſſioners, Si *George More* is a corrupt man, and hath taken bribes of *King* for executing that Commiſſion. And further; *King* hath ſet Sir *George More* on Horſeback with his bribes, to pervert

vert Juſtice and Equity. It was moved, He was but a voluntary Commiſſioner, by aſſent of the parties, and but as an Arbitrator, and not a Judge. But it was adjudged, that though he was not ſworn a Commiſſioner; yet having the Kings Commiſſion to execute, it is a Truſt repoſed in him; and if he take bribes for it, it is an Offence for which he is puniſhable in the Star-Chamber; and therefore the Action doth lye. Sir *George More* and *Foſter's* Caſe. *Cro.* 2. Part. 65.

130. Mich. 3 Jac. B.R. The Defendant ſpake theſe words of a Juſtice of Peace, viz. Mr. *Kemp* is a Basket Juſtice, a Partial Juſtice, I will give 5 l. every year for his gifts for Juſtice matters. Adjudged, Partial Juſtice, toucheth him in his Office; and therefore actionable. *Kemp* and *Houſegoes* Caſe. *Cro.* 2. Part. 90.

131. Paſch. 3 Jac. rott. 906. Action for theſe words; He, (meaning the Plaintiff) and one *Allen* are perjured Knaves. Moved, That [He,] cannot be referred to two perſosn: and the words [are perjured Knaves] cannot be referred to one perſon. But the Court held it good enough; although it be falſe Engliſh: and it is not like where one ſaith, That J. S. and J. D. is perjured: for that is void for incertainty. *Turner* and Sir *Ed. Davies* Caſe. *Cro.* 2. Part. 102.

132. Hill. 3 Jac. B. R. The Defendant ſpake of the Plaintiff being his natural brother; My Brother (meaning the Plaintiff) is perjured: It was found for the Plaintiff. It was moved, The Action doth not lye for the incertainty; what Brother he intended: for it might be, that he had divers brothers; and when words do not Import a certain ſlander, an *Innendo* will not help them. But it was adjudged, It doth not appear to the Court, that there were more brothers then one: and it is averred by the Plaintiff, That he ſpake of him, and is ſo found by the Verdict; and therefore *per Curiam*, adjudged, the Action did well lye. *Wiſeman* and *Wiſeman's* Caſe. *Cro.* 2. Part. 107.

133. Hill. 3 Jac. B. R. Thou art a Theef, and haſt ſtollen Mr. *St. George's* Tree. Adjudged, the firſt words, Thou art a Theef, actionable; and the other words, though diſtinct, are not a diminution, but an addition to them. *Minors* and *Letford's* Caſe. *Cro.* 1. Part. 114.

134. Hill. 4 Jac. B. R. The Defendant ſpake theſe words of the Plaintiff, being a Juſtice of Peace, viz. You are a ſweet Juſtice; you ſent your Warrant for J. S. to be brought before you for ſuſpition of Felony; and afterwards ſent J. D. unto him, to give him warning thereof, that he might abſent himſelf. Adjudged the words actionable; for that it toucheth him in his Office. *Burton* and *Token's* Caſe. *Cro.* 2. Part. 413.

135. Hill. 4 Jac. Action for theſe words; Thou art a Leprous Knave: adjudged actionable; for they be as if he had ſaid, Thou waſt layed of the Pox. *Taylor* and *Perkins's* Caſe. *Cro.* 2. Part. 144.

136. Hill. 4 Jac. Action for theſe words; Thou art a Witch, and I will prove thee a Witch: *per Curiam*, they are actionable, being ſpoken againſt the Statute, which makes Witchcraft Felony. *Edwards* and *Ouſley's* Caſe. *Cro.* 2. Part. 150.

137. Mich. 4 Jac. Thou haſt robbed the Church, (meaning the Church of St. *Alphage*) and thou haſt ſtollen the Lead off from the Church, (meaning the Church of St. *Alphage*). Adjudged the words Actionable; for they ſhall be taken to be ſpoken according to the worſt ſenſe, according to common underſtanding: and the latter words are an addition of further aggravation. *Benſon* and *Morley's* Caſe. *Cro.* 2. Part. 153.

138. Paſch. 4 Jac. Thou haſt been in the Goal for ſtealing of a Pan. Adjudged actionable. *Showell* and *Hamans* Caſe. *Cro.* 2. Part. 154.

139. Paſch. 5 Jac. B. R. Action for theſe words; Thou haſt procured one *Smith* to come 30 miles to commit perjury before my Lord of *Wincheſter*, and haſt given him 10 l. for that purpoſe; Adjudged actionable. *Harris* and *Dixons* Caſe. *Cro.* 2. Part. 158.

140. Hill. 4 Jac. rott. 1153. B. R. The Plaintiff was in ſpeech of a Marriage with the Earl of *Kent*; and the Defendant ſpake theſe words of her; *Arſcot* hath reported, That he had the uſe of her body; (*inuendo* that he had carnal copulation with her) whereas he never made any ſuch report: by reaſon whereof the Earl deſiſted his Suit. Adjudged, the words ſhall be taken in the worſt ſenſe, according to the common ſenſe of them, which is ſcandalous to a Lady of ſuch Reputation; and therefore actionable. The Lady *Morſon* and *Cades* Caſe. *Cro.* 2. Part. 162.

141. Trinit. 4 Jac. rott. 353. B. R. Thou haſt ſtollen my Wood: It ſhall be intended Wood cut down. Adjudged actionable. *Lo:* and *Sanders* Caſe. *Cro.* 2. Part. 166.

142. Hill. 5 Jac. B. R. Action for theſe words; *Arthur Colome* is a forſworn man, and hath taken a falſe Oath in his Depoſition at *Tiverton*, where he waged his Law againſt me. Adjudged, the words actionable. *Colomes* Caſe. *Cro.* 2. Part. 204.

143. Mich. Jac. B. R. The Defendant ſpake theſe words of the Plaintiff being a Juſtice of the Peace; He (meaning the Plaintiff) for malice and ſpleen, did many times wreſt the Law, and pervert Juſtice, to ſerve his own turn. It was moved, it is not alledged, That there was communication with

with any other of the Plaintiff, or that it was about the Execution of his Office. And then the words, [He did &c.] *Non conſtat*, whether the ſtanders by knew they were ſpoken of the Plaintiff: and the words [That he did many times wreſt the Law &c.] might be ſpoken long before he was a Juſtice: But adjudged, the Action doth lye; the declaration being that he *de præfato Thomâ dixit*: and 2ly. The words ſhall be taken in the worſt ſenſe, to ſcandalize him in his Office. Sir *Tho. Beaumont* and Sir *Hen. Haſtings* Caſe. *Cro.* 2. Part. 240.

44. Hill. 7. Jac. B. R. The Defendant at *W.* in the County of *G.* in the hearing of diverſe, ſpake theſe words of the Plaintiff, being a Counſellour at Law: You are a Paultry Lawyer, and uſe to play on both hands; and at another time, before the Chancellor of the Biſhop of *Glouceſter*, for he ſpake to the Chancellor of the Plantiff: I hope you will not believe Mr. *Rich*, for he (*innuendo* Mr. *Rich*) is the ſurtherer and maintainer of Felonies: Adjudged the firſt words not actionable: but the laſt words, *viz.* That he was a furtherer of Felonies, were actionable; and ſo was it adjudged in Sir *Hen. Leas* Caſe. *Rich* and *Holt*'s Caſe. *Cro.* 2. Part. 266.

145. Paſc. 9. Jac. B. R. Action for theſe words, *Mr. Berisford* (meaning the Plaintiff) hath ſpoken Treaſon, and that I will prove: moved, The words are not actionable, 1. Becauſe there is no expreſs affirmation that the Plaintiff is a Traytor. 2. The words, That I will prove, is *quaſi* by way of Argument, which is not to be taken in ill part: But the Opinion of 3 of the Juſtices was, that the words ſhall not be taken *argumentativè*, but *affirmativè*; and Judgment was given for the Plaintiff. *Berisford* and *Weſſe*'s Caſe. *Cro.* 2. Part. 275.

146. M. 11. Jac. B. R. The Defendant ſpeaking of one *Alice Dunſcomb* Widdow, concerning the death of her Husband, ſaid; *Tooſe* his wife (meaning the Pliantiff) killed thy Husband, (meaning *John Dunſcomb*) her Husband being lately dead: It was moved; That ſhe is not accuſed thereby of Felony, for ſhe might kill him by Phyſick, or other means: But *per Curiam* the Action lyes; for it ſhall be intended, he ſpake them in the worſt part; and in ſlander of the Plaintiff. *Tooſe*'s Caſe. *Cro.* 2. Part. 306.

147. Paſc. 12. Jac B.R. Action for theſe words: Thou art a Bankrupt Knave; adjudged the words actionable, being two Subſtantives; Otherwiſe, if the words had been adjectively ſpoken: Bankruptly Knave. *Selby* and *Carvier*'s Caſe. *Cro.* 2. Part. 345.

148. Trin. 14. Jac. B. R. Rott. 39. An Action for theſe words: The 12 of *December* 13. Jac. That *John Piers* did ſay, That *John Lewis* (meaning the Plaintiff) did ſay: That there is no Prince in *England*, whereas *re vera John Piers* never ſpake any ſuch words; and the Plaintiff adds that the King and his Son, Prince *Charles*, were then in *England*: It was moved, 1. That it was but the report of another and not his own ſpeech: 2. It is not ſhewed when the words were uſed, for it might be in the time of Q. Eliz. But it was adjudged, That the Action lyes, for it ſhall be taken He ſpake them in the worſt ſenſe to draw him in queſtion for his life; and they touch him in his loyalty, which is a capitall offence if true; and he adds, the words were never ſpoken, wherefore he cannot ſhew any time of ſpeaking of that which was never ſpoken. *Lewis* and *Walter*'s Caſe. *Cro.* 2. Part. 406, & 413.

149. Paſc. 15 Jac. B. R. There was a communication betwixt the Plaintiff and one *Mary Syvedale* of a Marriage, and he was offered in Marriage with her 600 l. and the Defendant, to ſcandalize him, and hinder him in his ſaid Marriage, having ſpeech with *I. S.* of the Plaintiff, ſaid theſe words of the Plaintiff, Hath that baſtard *Brian Nelſon* cauſed you to be arreſted? Is that all the ſpight the ſaid baſtard can do you? by reaſon of which words he loſt his marriage. The words were adjudged actionable; notwithſtanding they were ſpoken by way of Interrogation. *Nelſon* and *Staff*'s Caſe. *Cro.* 2. Part. 422.

150. Paſc. 14. Jac. B. R. Action for theſe words; Thou haſt killed thy Maſter's Cook, (meaning *John Yarrington* Servant to Mr. *Dingly*) who was murthered: Moved, the words are uncertain becauſe he doth not ſhew who was the Plaintiff's Maſter; nor Mr. *Dingly* Maſter to him who was ſlain: adjudged, actionable becauſe the words themſelvs import ſlander. *Cooper* and *Smith*'s Caſe. *Cro.* 2. Part. 423.

151. Hill. 9 Jac. Rott. 832. B, R. Action for theſe words; Thou art a Bankrupt Rogue, and accounted a common Knave; and thou art a Thief, and haſt ſtolen my Corn: Adjudged, the firſt words were not actionable; but the ſecond were: But becauſe the Judgment was intire, and the damages intire; the Judgment was reverſed upon a Writ of Erour brought. *Loyd* and *Pearſe*'s Caſe. *Cro.* 2. Part. 424.

152. Paſc. 15. Jac. B. R. Action for theſe words; Thou haſt committed Treaſon beyond Seas, and haſt run away from thy Captain: adjudged, actionable; for there is a violent Intendment, that he committed Treaſon to the State here, and it is tryable here, and the latter words do not detract from the former. *Lewis* and *Cook*'s Caſe. *Cro.* 2. Part. 424.

153. Trin. 15. Jac. B. R. Action by Husband and Wife for theſe words; *Mrs. Miller* is a Whore and hath had the Pox, and hath holes one may turn his finger in them; Mr. *King* the Apothecary gave her a drink for it, and therefore take heed how

how you drink with her: But adjudged *per Curiam* the words are actionable. *Miller*'s Caſe. *Cro.* 2. Part. 430. See Sect. 135. acc.

154. Mich. 15. Jac. The Plaintiff's Husband dyed by the viſitation of God, 1. *Febr.* 13 Jac. and 2. *Feb.* 13 Jac. The Defendant ſaid to the Plaintiff, Thou haſt poyſoned thy Husband, (meaning *George* the Plaintiff's Husband) and I will juſtifie it; and afterwards ſhe ſaid to another, Goodwife *Gardiner* hath poyſoned her Husband, and I will juſtify it, and have told her ſo much to her face: It was adjudged the words are actionable; for when it was ſhewed the Plaintiff's Husband was lately dead, and the Defendant ſaid, The Plaintiff had poyſoned him, it is a great ſcandal; and ſhe chargeth her with poyſoning to death. *Gardiner* and *Spurdents* Caſe. *Cro.* 2. Part. 438.

155. M. 16. Jac. B. R. The Plaintiff was a Surveyor and Meaſurer of Lands, and the Defendant having ſpeech with him about meaſuring of Lands, ſpake of him theſe words; Thou art a Coſening and a ſhifting Knave, and a cheating Knave: adjudged, That in regard a Surveyor is an Officer of skill, theſe words, touching him in his profeſſion, and taking from him his means of living, are actionable; adjuded for the Plaintiff. *Blunden* and *Euſtace* Caſe. *Cro.* 2. Part. 504. See Sect. 90.

156. Trin. 17 Jac. B. R. Action for theſe words Thou waſt in *Launceſton* Goal for coining: The Plaintiff Replyes, If I was there, I anſwered well enough. Yea, ſaid the Defendant, you were burnt in the hand for it. It was ſaid, It is no affirmation, that he did coyn; and he doth not ſay, falſe Coyning. Adjudged, the words malitious, and ſhew his intent to accuſe him for being impriſoned for Coyning: and the latter words exaggravate the former. *Gainford* and *Tukes* Caſe. *Cro.* 2. Part. 536.

157. Paſch. 18 Jac. B. R. Action for theſe words; Have you brought home the 40 l. you ſtole? Adjudged, the words actionable, though they be not ſpoken affirmatively, but by way of Interrogation: and the Judgment affirmed upon a Writ of Errour brought. *May* and *Gibbons* Caſe. *Cro.* 2. Part. 568. See Sect. 449. acc.

158. Trinit. 18 Jac. B. R. Action for theſe words; The Plaintiff alledged, That 1. April 17. Jac. he was a Merchant, and the ſaid, 1. April. 17 Jac. the Defendant ſpake theſe words of the Plaintiff; He is a Bankrupt ſlave. The Defendant juſtifies, becauſe, 1. April, 17 Jac. the Plaintiff became Bankrupt. But adjudged, the words actionable; and the Defendants Barr inſufficient, becauſe he doth not alledge, he continueth ſtill a Bankrupt: For it may be he afterwards recovered himſelf, and became a good Merchant. Judgment was for the Plaintiff. *Uſher* and *Batts* Caſe. *Cro.* 2. Part. 578.

159. Trinit. 19 Jac. B. R. Husband and Wife brought an Action for theſe words ſpoken of the Wife; Thou perjured beaſt, I will make thee ſtand upon a Scaffold in the Star-Chamber. Adjudged Actionable: and the laſt words do not mitigate the former words. *Benſon* and *Hall*'s Caſe. *Cro.* 2. Part. 613.

160. Mich. Jac. B. R. Action for theſe words; That he was a Theef, and had ſtollen his Gold. It was ſaid, It is uncertain; for it is not ſaid when they were ſpoken: and it may be before the general Pardon; or in the time of Queen Eliz. But it was adjudged, the words are actionable: for although a pardon may diſcharge him of the puniſhment; yet the ſcandal of the offence remains. Adjudged for the Plaintiff. *Boſton* and *Tatam*'s Caſe. *Cro.* 2. Part. 622.

161. Hill. 9 Jac. B. R. Whereas Sir *William Ayliff* was robbed of divers goods by perſons unknown, the Defendant to ſcandalize the Plaintiff, being ſervant to Sir *William Ayliff*, ſpake theſe words; Thou art a maintainer of Theeves, to ſteal my Maſters goods (meaning the goods of Sir *William Ayliff*): Adjudged, That the words ſhall be taken in the worſt part, and moſt ſcandalous part as he ſpake them. *Bennet* and *Tabram*'s Caſe. *Cro.* 2. Part. 629.

162. Trinit. 20 Jac. B. R. Action for theſe words; *Chriſtian Munn* (the Plaintiff's Wife) is a Witch, and hath bewitched two of the Servants of J. S. to death. It was ſaid, That there is no averment, that any perſon is dead, nor in what matter ſhe is a Witch. Adjudged, That the words That ſhe is a Witch, are actionable. *Munn* and *Porters* Caſe. *Cro.* 2. Part. 639.

163. Mich. 20 Jac. B. R. Action for theſe words; Whereas the Defendant was arreſted by a Warrant made upon a *Latitat* directed to the Sheriff of *Middleſex*, The Defendant ſpake theſe words of the Plaintiff; This is a Counterfeit Warrant made by Mr. *Stone*; (meaning, the Plaintiff had counterfeited the Warrant). It was moved, It is not alledged, that he had forged any Warrant; nor is it any forging within the Statute of 5 Eliz. But, *per Curiam*, the Action lyes; For ſaying, It was a Counterfeited Warrant made by him; It is intended to be counterfeit by him, and a great ſlander. *Stone* and *Smalecomb*'s Caſe. *Cro.* 2. Part. 648.

164. Mich. 21 Jac. Action for theſe words; The Defendant having ſpeech with one *Chapman* of the Plaintiff, ſpake theſe words; She (meaning the Plaintiff) is a Theef to you, and to me, and hath ſtollen 20 l. from me, and 40 l. from you. The Defendant juſtified, That ſhe was a Theef, and ſtole two Hens from her ſuch a day and year Feloniouſly. The Plaintiff Demurred upon the Juſtification,

fication, becauſe it is not a Juſtification of all the words, or of any part of the laſt words. Adjudged, the Juſtification was not good; and therefore the Plea vitious: and Judgment was given for the Plaintiff. *Hilſden* and *Mercer*'s Caſe. *Cro.* 2. Part. 676.

165. Trinit. 22 Jac. in C.B. Action for theſe words; Thou art as arrant a Theef as is any in *England*; for thou haſt broken up J. S. his Cheſt, and taken away 40 l. Adjudged, The firſt words without any averment, will not maintain an Action; and the words do not prove any Felony committed; and the money may be taken away, and the Cheſt broken open upon pretence of Title, and in midday, in the preſence of divers; and then it is no Felony. Judgment was for the Defendant. *Foſter* and *Browning*'s Caſe. *Cro.* 2. Part. 687.

166. The Plaintiff being an Attorney in B. R. for one *Ecombridge*, proſecuted for him a *Latitat* againſt *Lord*, which he delivered to the Sheriff; upon which *Lord* was arreſted. The Defendant having ſpeeches with *Ecombridg* concerning the Plaintiff and his honeſty as an Attorney, and concerning the ſaid *Latitat*; *ex malitia præcogitata*, ſaid theſe words of the Plaintiff; Go tell your Lawyer *Roberts*, That I ſay, he is a baſe Raſcall, and I will make him loſe his ears; and I will teach him, or any Lawyer of them all, to have a Writ ſerved on me. Upon Not-guilty, it was found for the Plaintiff. And upon Debate between the Judges, It was Reſolved, That the words were Actionable. Trinit. 3 Car. Rott. 1170. in B. R. *Roberts* and *Lord*'s Caſe. *Ly.* 70.

167. Action for theſe words, viz. Old *Apthorp* is a perjured Knave; for he did ſwear at the Aſſizes, That ſuch a Wood was worth 40 s. whereas it was dear at a mark. It was holden, That the Plaintiff ought to have ſaid in his Declaration, that it was not worth a mark: and here it is ſaid, It is dear at a mark: for a man may pay 40 s. for it, and yet it may be dear at a mark; and that which is alledged in the Declaration, is but by way of Argument. Mich. 13 Jac. B. R. *Apthorp* and *Cockerell*'s Caſe. *Bolſtr.* 3. Part. 147. 150.

168. Action for words; The Plaintiff declared, That one named *Carolus* being of good fame and name; The Defendant ſaid, *de præfato Carolo*; Where is this *Baker*? (*Innuendo*, *Carolus Baker*) He hath taken a falſe Oath, and I could make him look through the Pillory. It was moved, That the *Innuendo* will not make it good, there being no *Baker* ſpoken of before. But the Opinion of the Court was, The Declaration was good. And if one ſay of a Counſellour, Where is this Counſellour, *Innuendo*, ſuch a one, it is good. Adjudged for the Plaintiff. Trinit. 13 Jac. in B. R. *Baker*'s Caſe. *Bolſtr.* 3. Part. 72.

169. Action brought for theſe words; Sir *Herbert Croſts* keepeth men to rob me, (the Truth was, that the Defendant was robbed by two of Sir *Herbert Croſts* men) and upon this the Defendant ſpake the words: but the Defendant doth not ſay, That he did keep them ſo to do. It was agreed by *Coke*, Chief Juſtice, and all the Court, That the Action would not lye for theſe words; for that there is done; and it is to be intended his keeping of them to be lawful; and the words [to rob me] this is but an intent, and no act; and an Intent without an Act, is not puniſhable. And Hill. 39 Eliz. in C.B. *Snag* and *Gets* Caſe was vouched by *Coke*; Where the words were, Thou haſt killed my Wife: and it appeared, the Wife was then living. Adjudged, the words not actionable; In the principal Caſe, it being found for the Plaintiff. The Judgment was arreſted, becauſe the words were not actionable. Paſch. 14 Jac. in B.R. Sir *Herbert Croſts* and *Brown*'s Caſe. *Bolſtr.* 3. Part. 161.

170. In Action upon the Caſe for words; it was found, upon Not-Guilty, for the Plaintiff: The words ſpoken by the Defendant to the Plaintiff, were theſe, viz. Thou haſt forged Writings, for which thou ſhouldeſt loſe thy ears. It was layed in the Declaration, That the Plaintiff was a Practitioner, a Sollicitor, and a Steward of a Manor. The Court was divided in Opinion: For *Mountague*, Chief Juſtices and *Crook* were of Opinion, That the words were actionable; for although the firſt words of themſelves are not actionable; yet the ſubſequent words added to them, make them actionable. Like the Caſe, If one ſaith, Thou haſt ſtollen, no Action will lye for the words: but if he doth adde theſe words, viz. for which thou ſhouldſt be hanged; then an Action upon the Caſe will lye: and the precedent words are to receive conſtruction by the ſubſequent words. *Haughton* and *Doddridge*, The Action will not lye; for the words here are uncertain, what manner of writings they were; and they may be frivolous writings, for which he ought not to be called in Queſtion; and no Indictment will lye for this forgery; and then if he be not in danger of his Ears, and ſo no Action will lye for the words. *Curia aviſare vult.* for ſearch of Preſidents. And afterwards the Caſe was not moved again, but was ended by agreement between the parties. Paſch. 14 Jac. in B. R. *Froſt* and *Ayres* Caſe. *Bolſtr.* 3. Part. 265. 266.

171. Action brought for theſe words, viz. Thou art a falſe forſworn Knave, and thou haſt been Indicted for perjury by 12 men, and haſt compounded for the ſame. It was moved, That theſe words are not actionable, being too general; and for that an Indictment is but an Accuſation, and

and the ſame may be compounded upon a juſt cauſe. But the Opinion of the whole Court was, That the words were ſcandalous and actionable; becauſe an Indictment is an Accuſation upon Record; the Indictment being the Kings Declaration; and the additional words, viz. (and haſt compounded for this) is a Confeſſion of the matter of the Indictment to be true, for *fatetur facinus, qui Judicium fugit.* It was adjudged for the Plaintiff. Mich. 1 Car. in B. R. *Gibert* and *Reddes* Caſe. *Bolſtr.* 3. Part. 304.

172. In an Action upon the Caſe for words: It was found for the Plaintiff. It was layed in the Declaration, *Cum quidem malefactores ignoti* had felloniouſly ſhorn the ſheep of J. S; upon a Communication had between the Defendant and another touching the ſhearing of theſe ſheep, the Defendant ſpake theſe words; I do know who did ſhear the Sheep; (*prædict. J. S. innuendo*) the other deſired of her who this was? She anſwered, It was the Plaintiff and *M.* that did ſhear them, (*Innuendo, Felonicè.*) It was, upon Motion for ſtay of Judgment, adjudged, That the words were not actionable; and that the general words ſhall not be reſtrained to particulars: and the *Innuendo* will not help it: and in the Declaration it is layed, there was Communication betwixt the Defendant and another concerning the ſhearing of the ſheep (but not concerning the Felony) and it is not ſaid, That ſhe did know who did ſhear the ſheep felonioufly; but who did ſhear them generally; and the ſcandal grows out of an inference onely; which ought not to be, to make words Actionable; but the words themſelves ought to be directly ſcandalous. Judgment was Arreſted. Mich. 13 Jac. B. R. *Helly* and *Henders* Caſe. *Bolſtr.* 3. Part. 83.

173. Action upon the Caſe for words. Upon Not-Guilty, found for the Plaintiff: It was moved, in Arreſt of Judgment, the words were not Actionable. The words were theſe, viz. The Defendant ſaid, That one J. S. did ſay, That Mr. *Lewes* the Plantiff (being a Juſtice of Peace) did ſay, That there was no Prince in *England*; whereas *revera*, the Plaintiff did never ſpeak theſe words. It was ſaid, That the words ſhall be taken by a favourable Conſtruction; viz. That the Prince might be in another Realm, and *non conſtat certeine de perſona*, of what Prince they are ſpoken: for that all Dukes, and Earls of *England* are Princes in their degrees, becauſe they wear Crowns: and alſo there is no time expreſſed certain when the words were ſpoken; and it is but a Report, which he had from the Hear-ſay of another. And the words here are ſpoken ſuddenly; no Communication being of the Prince; alſo the Prince might then be in *Scotland*. And for one to ſay, That the Prince is not in *England*; and, There is no Prince in *England*, is all one. But it was Reſolved, That the words were Actionable: and it doth not reſt here upon the *Innuendo*, but upon the declaration of the perſon. And when ſpeech is of the Prince, by this is meant the moſt eminent, where in *England* he ſpeaks generally of the Prince; and is to be underſtood of the eldeſt ſon of the King. And, if one will ſay to us, That there is no Prince; he ought for ſo ſaying, preſently to be committed: and theſe words ſpoken, are ſuch, as ſhall make the party ſpeaking them, in danger of his head and life. And words ſcandalouſly ſpoken of a Subject, ſhall be taken *in mitiori ſenſu*: but when they are ſpoken of the King or Prince, and are touching matter of Allegiance, they ſhall alwayes be taken *in graviori ſenſu*: and the words here were ſpoken of the Plaintiff *malitioſè*, to cauſe him to be ſuſpected in point of Allegiance. And though it be ſaid, That he ſpake them by the Report of another, or upon a hear-ſay; yet being malitiouſly ſpoken, the words are Actionable. Like the Caſe of the Lady *Moriſon* and *Lane.* 5 Jac. in B. R. and 41 Eliz. the Lord *North* and *Coapes* Caſe, Caſes of a Hear-ſay: and adjudged, That the Action did well lye; the Lady *Moriſon*'s Caſe being affirmed upon a Writ of Errour in the Exchequer Chamber. Trinit. 14 Jac. in B.R. rott. 39. *Lewes* and *Walter*'s Caſe. *Bolſtr.* 3. Part. 225. 226. 227.

174. An Action for theſe words; viz. Mr. *Lowes* is a Witch, and I will prove it; for I have ſeen him add his Imps, and evil ſpirits, appear unto me in my Chamber, and put me in fear of my life: and he ſaid, Come, they will never be at quiet, till we have killed him. And he did bewitch a Child of mine. It was adjudged, That the words were actionable in the Kings-Bench. And if one ſaith of J. S. That he hath Conference with evil ſpirits, the words will bear Action. But for one to ſay, That ſuch a one is a Witch, in anger, the words are not actionable. Judgment was for the Plaintiff. Trinit. 13 Jac. in B. R rott. 114. & 130. *Lowes* Caſe. But yet afterwards a Writ of Errour was brought upon this Judgment in the Exchequer-Chamber, and there holden by the Judges, The words were not actionable; and the firſt Judgment was reverſed. Trinit. 13 Jac. *Bolſtr.* 3. Part. 74.

175. In an Action upon the Caſe for words; The Plaintiff in his Declaration ſet forth, That there was a Communication betwixt the Father of the plaintiff and the Defendant; who ſaid to him, That *Taylor* did ſteal the Mare of J. S. and thy ſon was conſenting to it. Being found for the Plaintiff, It was moved, That the Declaration was not good; becauſe he doth not aver, (as he ought to

have done in this Case) That his Father had no more Sons but onely this who was Plaintiff. It was Objected, That there needs no such averment, because the Law doth not presume a plurality of sons. But the Opinion of the whole Court was, That without such averment, the Action would not lye, and that for want of such averment, the Declaration was not good; and the Judgment was stayed. Trinit. 14 Jac. in B. R. rott. 41. *Lenkner* and *Godman*'s Case. *Bolstr.* 3. Part. 249.

176. Action upon the Case for words spoken at several times; the first time layed to be spoken of the Plaintiff, these words; viz. That perjured Knave, (*innuendo* the Plaintiff, speech being had of him) stands perjured upon Record at the Guild-Hall, *London*, and I will prove it. At another time layed, That he spake to the Plaintiff himself; viz. Thou art a perjured Knave, and stands perjured upon Record, for denying of thy hand, and I will prove it; and being found for the Plaintiff, intire damages was given to him. It was moved to stay Judgment, because it is not shewed in what Court this perjury is recorded, there being two Courts there, one of Record, the other not; and the latter words do extenuate the former. It was the Clear Opinion of the Court, That it must of necessity be intended the Court of Record; for it is *oppositum in Objecto*, to say, To stand perjured upon Record, if it was not a Court of Record: And for the latter words, they are actionable without colour of defence, and the Damages well given by the Jury. Hill. 14 Jac. B. R. *Mesflyne* and *Farrenden*'s Case. *Bolstr.* 3. Part 283.

177. Note; It was agreed by the whole Court, That if a man doth speak these words of another, viz. Thou art a Sheep-stealer; or, Thou art a Horse-stealer; although they be general words, yet an Action lyeth for them: And so it was adjudged, Mich. 1 Car. in B. R. in *Parret* and *Payne*'s Case. *Bolstr.* 3. Part. 303.

178. See Sir *James Sydenham* and *Ray*'s Case, reported at large, Mich. 13 Jac. rott. 347. in B. R. *Bolstrod.* 3. part 260. See before, Sect. . . for the same Case.

Where an Action upon the Case *lyeth for slandering the Plaintiff's Title; and where not.*

1. *Waldmay* brought an Action upon the Case against *Standish*, for saying, That Lands were lawfully assured to *Jo. Talbott* for 1600 years, and that he was thereof lawfully possessed; whereas in truth the Lands were not lawfully assured for the said term nor the said *John Talbott* possessed of the Interest thereof. It was adjudged, That although *Talbott* had a Limitation of the Land by Will, which was the reason why the Defendant affirmed the words; Yet because he took upon him the Notice of the Law, and meddled in a matter which did not concern him; Judgment was given for the Plaintiff. *Mildmay*'s Case. 24 Eliz. *C.* 4. Part. 175.

2. In an Action upon the Case; the Plaintiff declared, That he was in Communication with *A. B.* for to demise to him the Mannor of *D.* and the Defendant, *præmissorum non ignorans*, said; I have a Lease for 99 years of the said Mannor, and shewed a demise of one L. *Audley*, Grandfather, &c. from whom the Plaintiff claimed; whereas in truth, the Defendant knew this to be counterfeit; by reason of which *A. B.* did not proceed, &c. It was Resolved, That in regard the Defendant knew of the Communication, and that the Lease was forged, and yet published it, by which the Plaintiff lost his bargain; that the Action did lye. Sir *Gilbert Gerard* and *Dickenson*'s Case. 33 Eliz. *Co.* 4. Part. 18.

3. In an Action upon the Case for slandering the Plaintiff's Title; The Plaintiff declared, That he was seised in Fee as a Copy-holder of Lands in *D.* within Jurisdiction of the Defendants Court; and that the Defendant said, He had not any Title to those Lands: It was found for the Plaintiff: and upon a Writ of Errour brought, the Judgment was reversed; because the Plaintiff did not shew, that by Occasion of those words, he had any prejudice; as by any bargain of the Inheritance or Lease of the Land; and an Action upon the Case is not maintainable, without shewing a special prejudice. Mich. 3 Car. B. R. *Lowe* and *Harwood*'s Case. *Cro.* 1 Part. 99.

4. In an Action upon the Case, for slandering the Plaintiff's Title; The Plaintiff declared, That *Henry* Earl of *Arrundell* was seised in Fee of the Mannor of *D.* and gave it to the Plaintiff in tail; and that the Defendant was a Customary Tenant for life of a Messuage parcel of the said Mannor; and the Plaintiff was in Communication with J. S. to make a Lease for years to him of the Land, to begin after the estate of the Defendant for life was determined, for which J. S. agreed to give him 500 l. That the Defendant intending to hinder that bargain, and to slander his Title, spake these words; The late Earl of *Arrundell* Lord of the Mannor of *D.* did make a Lease of my Tenement to one *J. D.* for 60 years, to begin after my Customary estate ended, and the same is a good Lease. Whereas the said Earl did not make such Lease: by reason whereof, neither J. S. nor any other person, would give him 10 l. for the Lease.

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The Defendant juſtifies; for that *Henry* Earl of *Arrundell* before the gift made to the Plaintiff, made ſuch a Leaſe to J. S. for 60 years, and that J. S. conveyed the Leaſe to him. It was Objected, That the words import not any ſlander; nor is it alledged when the Earl made the Leaſe. But the Opinion of the Court was, That the words ſhall be taken in the worſt ſenſe according to his Intent which he ſpake, when he ſaid it to be a good Leaſe: and the words themſelves imply, That he ſpake them to countenance the Title of a ſtranger; which is not lawfull: and now he cannot excuſe himſelf, by intituling of himſelf, when at the firſt the words did not import as much; and now he cometh too late to Juſtifie. Mich. 4 Jac. B. R. The Earl of *Northumberland* and *Byrs*'s Caſe. *Cro.* 2. Part. 163.

5. In an Action upon the Caſe, the Plaintiff declared, That his brother was ſeiſed of Lands in Fee, and dyed ſeiſed without Iſſue, and the Land diſcended to him as heir, and that he had a purpoſe and intent to aſſure part of it upon his Son, and to make Leaſes of part: and to fruſtrate his Intent, the Defendant uſed theſe words; The Plaintiff hath no more Right to the Land then a Stranger. And becauſe he did not ſhew any ſufficient cauſe of loſſe; for it is not ſhewed, that he was in communication of any Leaſe or Aſſurance for his ſon, but had an intent onely, which might be ſecret. It was adjudged, That the Action did not lye. Paſch. 14 Jac. B.R. *Smead* and *Badley*'s Caſe. *Cro.* 2. Part. 397.

6. In an Action upon the Caſe, the Plaintiff declared, That whereas he was Son and heir of *J. M.* and *A.* his Wife, daughter and heir of *J. S.* and had divers Lands by diſcent from them of the value of 200 l. *per annum.* The Defendant envying his eſtate, ſpeaking of the Plaintiff and his Wife, ſaid, Shall *Elborow* his Wife ſit above my Wife? He is but a Baſtard. By reaſon of which words he was much ſcandalized in his eſtate, and forced to great expences to defend his Title. It was Objected, The words are not actionable, becauſe it is not ſhewed, That there was any ſpeech about his eſtate, or that he was about ſelling, or Leaſing the Lands. But the Court held, the words in themſelves were ſcandalous and dangerous, to cauſe his Inheritance to be Queſtioned; and ſo the Plaintiff layed it in his Declaration: and Judgment was given for the Plaintiff. Mich. 20 Jac. B. R. *Elborow* and *Allen*'s Caſe. *Cro.* 2. Part. 642.

Action upon the Caſe *in nature of Conſpiracy.*

1. IF a man be acquitted upon a general Pardon by Parliament, and he doth not plead it, but puts himſelf upon tryal, and is acquitted; he ſhall not have an Action in the nature of a Conſpiracy, againſt the Indictors of him, becauſe he was not lawfully acquitted, for that the Juſtices ought to have allowed him his pardon without pleading of it. 28. H. 8. *Dyer.* 28. and E. 6. *Dyer* 85.

2. If a man be acquitted by Verdict, or by confeſſion upon inſufficient Indictment, and no Judgment be given upon it; he cannot have an Action in the nature of Conſpiracy againſt the Parties who indicted him; becauſe he may again be indicted and arraigned for the ſame felony, and his life was never in jeopardy; and when the Law ſaies, that *Autorfoits* acquit is a good plea, it ſhall be intended of a lawfull Acquittall. *C.* 4. Part. 41. 33. Eliz. *Vaux* Caſe.

3. Three men conſpired betwixt themſelvs to charge *I. S.* with a Robbery, and to procure him to be indicted, and procured diverſe Warrants from Juſtices of Peace, by which I. S. was apprehended and examined; and at the Aſſizes a Bill of Indictment was preferred againſt him by them; and thereupon an Ignoramus found: It was reſolved that in that Caſe an Action, in the nature of Conſpiracy, did lye againſt them; or the Conſpirators might be puniſhed for the ſame in the Star-Chamber; and it was alſo reſolved, That ſuch Conſpiracy ſhall be puniſhed, although nothing be put in Execution: and it was farther reſolved, That every Conſpiracy, before it be executed, ought to be malitious for an unjuſt revenge, againſt an innocent; and alſo ought to be done voluntarily out of Court. *Coo.* 9. Part. 55. The Poulters Caſe.

4. A man brought a Bill of Conſpiracy againſt *H.* and others, and divers of the Jury, for that they had indicted him of Perjury: and it was reſolved by the whole Court in the Star-Chamber, that the Bill did not lye, before the Indictment be traverſed or otherwiſe reverſed by Error, becauſe it ſhould be a means to quaſh the tryal at the Common Law, and ſhall prevent it; and it was alſo reſolved, that before a man be acquitted, that an Action of the na-

ture of Conſpiracy will not lye againſt the Law. Paſ. 29. Eliz. in *Cam. Stellat. Haiſtone* and *Glaſcor's* Caſe. *Goldeſbr.* 51.

5. A man brought an Action upon the Caſe a gainſt another, becauſe he cauſed him to be indicted and arraigned of a Robbery, and the Plaintiff did not ſhew in his Declaration that he was *Legitimo modo acquietatus*; It was holden the Declaration was not good, and the Court ſaid that a man ſhall not have an Action without a Cauſe, and if he were not convicted, then there is no Cauſe of Action, and he hath not ſhewed that he was either convicted or acquitted; and it was there holden, that the difference betwixt an Action in the nature of Conſpiracy, and a Writ of Conſpiracy was this, That a Writ of Conſpiracy ought to be brought againſt two at the leaſt, but an Action upon the Caſe may lye againſt one, and that in both he ought to ſhew, that he was *Legitimo modo acquietatus*. M. 29. Eliz. in B. R. *Shotbold's* Caſe. *Godb.* 76. See Sect. 1. and 2. M. 7. Car. B. R. *Mills* and *Mills* Caſe. *Cro.* 1. Part. 173. acc.

6. Note, It was ſaid by the two Chief Juſtices and *Egerton* Lord Chancellor in the Star-Chamber; That a Conſpiracy ought not to be only falſe but malitiouſly contrived, otherwiſe it will not be a Conſpiracy and ſuch malice ought to be proved: For if a poor man, travailing upon the High-way, be robbed by another man, and he knowes not the party; If afterwards he doth accuſe ſuch a one of the Robbery, and the party accuſed be found not guilty, he ſhall not have an Action of Conſpiracy againſt the Accuſer, for although he was falſly accuſed, yet he was not malitiouſly accuſed, and it might be he took him to be the offender, becauſe he was like to him that robbed him. M. 11. Jac. in *Cam. Stellat.* in *Reginalds and Baſſet's* Caſe. *Godb.* 206. See Paſc. 22. Jac. C. B. *Mankleton* and *Allen's* Caſe. *Hutton* 73. acc.

7. It was reſolved by *Popham* and *Cook* Chief Juſtices, and the Chief Baron, and *Egerton* Lord Chancellour, in the Court of Star-Chamber; That when the Grand-Jury indicts one of Murther or Felony, and after the Party is acquitted, That no Conſpiracy lyeth for him who is acquitted, againſt the Indictors, for that they are returned by the Sheriff, to make Enquiry of offences upon their Oath and it is for the ſervice of the King and the Common-wealth, and there Indictment or Verdict is matter of Record, and no attaint lyes, for the Law will not ſuppoſe any un-indifferent when he is ſworn to ſerve the King: But otherwiſe, It is of a Witneſſe, for if he conſpire out of Court and afterwards ſwear in Court, his Oath ſhall not excuſe him for his Conſpiracy before; for he is a private perſon, and not returned by the Sheriff. But if a Jury hath acquitted a Felon or a Traitor againſt manifeſt proof, they may be charged in the Star-chamber for their partiality, in finding a man feſt Offender Not Guilty. 2. Reſolved, That although the offender upon the Indictment be acquitted yet the Judg, be he Judge of Aſſiſe, or Judge by commiſſion of Record, or Juſtice of Peace, or other perſon ſworn to do Juſtice, cannot be charged in Conſpiracy for that which he did in open Court as Judge or Juſtice of of Peace, but if he hath conſpired before out of Court, the ſame is extra-judicial; and he may be puniſhed for it. P. 5. Jac. Cam. Stell. *Rice ap Evan* and *Barkers* Caſe. *Co.* 12. Part. 23. 24.

8. In an Action upon the Caſe in the nature of Conſpiracy againſt the Mayor, Town-Clerk, and Goaler of *B.* the Plaintiff declared, that where he had affirmed a Plaint of Debt in the Town-Court, before the Mayor, &c. againſt *I. S.* and thereupon had cauſed him to be arreſted, the Defendants did conſpire together to delay him in his ſuit, and in peril of his debt, had let *I. S.* goe at large without Bail; It was objected that the Action did not lye; becauſe the not taking of Bail, was a judiciall Act, for which they ſhall not be impeached: But the Opinion of the Court was, That the Action did well lye, for that the taking of Bail is not the cauſe of the Action, but the Conſpiracy. M. 31. Eliz. in C. B. *Cockſhel* and the Mayor of *Boultons* Caſe. *Leon.* 189.

9. An Action upon the Caſe was brought againſt Husband and Wife, and one *Dorothy Cox*, for a malitious Conſpiracy of chargeing the Plaintiff with the felonious Rape of the ſaid *Dorothy Cox*, and that they procured him to be examined before a Juſtice of Peace, who bound him by Recognizance to appear at the next generall Seſſions of the Peace for the County; and from thence to the next Aſſizes: and there before the Juſtices of Aſſize, of their malice aforeſaid, preferred a Bill of Indictment againſt him, and by the procurement of the Husband and Wife, the ſaid *Dorothy* gave evidence to the Jury, but the Jury finding and perceiving the malice and falſity did not find the Bill; It was found, after Not Guilty pleaded for the Plaintiff, and a Writ of Error brought, and the Judgement affirmed. Hill. 19. Jac. B. R. *Hord* and *Cordery's* Caſe. *Hulton* 49. See 5. Jac. B. R. *Dogata* and *Lamy's* Caſe. *Cro.* 1. Part. 199. acc.

10. An Action was brought, The Plaintiff declared, that the Defendants falſly procured him to be indicted of ſuch a Felony, *Et in priſona detineri quousque*, before ſuch Juſtices, *legitimo modo fuit acquietatus*; It was moved in arreſt of Judgment, becauſe it is not alledged *quòd fuit inde acquietatus*: But upon view of the Regiſter and *Fitz. N. B.* where, in ſome of the Writs, the word [*inde*] is omitted, the Court held the Declaration to be well enough; for when it is alledged they procured him falſly

falſly to be indicted, and to be detained in priſon *quouſq;* he was acquitted; it cannot be intended that he ſhould be acquitted for any other matter, but of that whereof he was indicted. M. 7. Jac. B. R. *Bell* and *Fox*'s Caſe. *Cro.* 2. Part. 230.

11. An Action upon the Caſe was brought in the nature of a Conſpiracy, for that the Defendant *ex malitiâ* upon the Plaintiff's Wife, *crimen Felonie impoſuit*, and cauſed her to be brought before a Juſtice, and *falſò & malitioſè* ſaid before him, *ad tunc & ibidem*, that he charged her with Felony, whereupon ſhe was forced to find ſureties for her appearance at the Aſſizes: It was moved in arreſt of Judgment that the Action lyes not; becauſe they do not ſay the Defendant impoſed upon her *falſò* the crime of Felony; and do not ſhew the day and place whither he cauſed her to be brought: and 3. becauſe they joyn Action for words, and in the Nature of Conſpiracy together. But all the Exceptions were diſallowed by the Court; for when they ſay, The Defendant *ex malitia* impoſed *Crimen Felonie*, that implyes *falſò*; and when they ſay he brought her before a Juſtice of Peace, that is coupled with the other, and ſhall be intended at the ſame time and place, eſpecially when he ſaith, *ad tunc et ibidem*. It was adjudged for the Plaintiff, Mich. 8 Car. B. R. *Manning* and *Fitzherbert*'s Caſe. *Cro.* 1. Part. 197.

12. In an Action of Conſpiracy brought, for conſpiring to Indict the Plaintiff for the ſuppoſed counterfeiting of a Letter, and for malitious proſecuting the ſame at the Aſſizes, and that he was acquitted; The Defendant made a ſpecial Juſtification, and ſhewed, That a ſtranger, who was unknown to him, brought him a Letter from one of his friends, the which was a counterfeit Letter; and with this Letter, had cozened him of 30 l. that the Plaintiff and he who brought the Letter, were both unknown to him, but very like; and when this Letter was brought him, three other were preſent, and did ſee the delivery of the Letter, and ſaid, If they did ſee the party again, and could hear him ſpeak, they ſhould know him again: and afterwards they with him did ſee the Plaintiff; and conceiving him in all likelihood to be the ſame party, they all agreeing in this, he complained to a Juſtice of Peace, who ſent for him, and examining him, and finding cauſe of ſuſpition, bound him to appear at the Aſſizes; which he did, and there he came and ſhewed all his matter to the Jury, who did acquit him; and ſo juſtifies his proceedings: And whether this be a good Juſtification, was the Queſtion. And the Opinion of *Williams*, *Croke*, and *Flemming*, Chief Juſtice, was, That the Juſtification was not good; and that the Plaintiff hath good cauſe of Action; for that the proſecution is not upon the Defendant's own ſuſpition, but upon the ſuſpition of others: and his proſecution and juſtification ought to be upon good probabilities, and not upon the ſuſpition of others. H. 11. 8 Jac. in B. R. *Wale* and *Hill*'s Caſe. rott. 1142. *Bolſtrod.* 1. Part. 149. See the Poulterers Caſe. *Cook* 9. Part: and *Co.* 9. Part. The Abbot of *Strata Mercella*'s Caſe. 26. And See Hill. 5 Jac. B. R. rott. 857. *Cox* and *Worrell*'s Caſe.

13. Note, by *Rolls*, Chief Juſtice; An Action upon the Caſe doth not lye againſt one, for cauſing another to be Indicted of a Treſpaſs; but for cauſing one to be Indicted of a thing which cauſes a corporal puniſhment, or which ſounds in ſcandall of the party Indicted; an Action upon the Caſe doth lye. Mich. 1654. B. R. *Stevens* and *Aſhes* Caſe. *Styles* 424.

14. A man brought a Bill of Conſpiracy againſt *Hurleſtone* and others, and divers of the Jury, for that they had Indicted him of Perjury, before the Indictment traverſed, or avoyded by Errour; and the Opinion of the Court was, That the Bill did not lye, becauſe this ſhould quaſh and prevent the Tryal at the Common-Law: and before a man be acquitted, an Action upon the Caſe for a Conſpiracy will not lye. See Paſch. 25 Eliz. C. B. *Goldeſb.* 51.

15. An Action upon the Caſe for Conſpiracy was brought for Conſpiring to Indict the Plaintiff for ſpeaking Treaſonable words. After Not-Guilty pleaded, and a Verdict for the Plaintiff; It was moved in Arreſt of Judgment, That the Action did not lye, being for matter of high Treaſon. But after a long Debate, It was adjudged, That the Action did well lye: And the Court ſaid, That as to this, there was no difference between the caſe of Treaſon, and of Felony. Mich. 1 Car. B. R. *Smith* and *Crawſhawes* Caſe. *Bolſtr.* 2. Part. 271, 272.

16. Note: It was holden by the Juſtices, That an Action upon the Caſe lyeth for procuring one to be Indicted, although the party himſelf do not do it; and one may exhibit a Bill of Indictment to the Grand-Jury without Oath: and therefore in the principal Caſe at Barr, which was, for preferring of a Bill of Indictment againſt the Plaintiff for ſtealing a Mare; and the Jury found *Ignoramus*; for as much as the Action might be as well grounded upon the ſcandal which grew to the party who was Indicted, as upon the trouble which might befall him by reaſon of preferring of the Bill; the Court held, That the Action might well lye. Paſch. 23 Car. B. R. *Style's* 10. and 11.

17. A man brought an Action upon the Caſe in Nature of a Conſpiracy, for cauſing him to be Indicted of Felony, as acceſſory for ſuffering a Priſoner to eſcape that was convicted. Judgment was for

for the Plaintiff. And upon a Writ of Errour, it was aſſigned for Errour, That the party was Indicted for a matter which was but Treſpaſs. And ſo the Action upon the Caſe did not lye. But the Court anſwered, That the charge of the Indictment is Felony: although the matter he is charged withall is not Felony, and a Scandall lay upon him by it; and therefore the Action lyes. Mich. 1649. B. R. *Gardiner* and *Follyes* Caſe. *Styles.* 157.

18. An Action upon the Caſe was brought in nature of Conſpiracy; for that the Defendant procured the Plaintiff to be Indicted as a common Barretor before J. S. and J. D. Juſtices of the Peace; *necnon ad diverſas felonias*, &c. *audiend. et terminand. aſſign*: and layed, That he was acquitted. In the Record, they are mentioned as Juſtices of the Peace onely: and ſo there was a failer of the Record. But becauſe the Juſtices of Peace have authority to Enquire and hear it without any Commiſſion of *Oyer* and *Terminer*; therefore the Court was of Opinion, That there was no failer of the Record: and that the Action did well lye. Trinit. 2 Jac. B. R. *Barnes* and *Conſtantine's* Caſe. *Cro.* 2. Part. 32.

19. In an Action upon the Caſe in nature of a Conſpiracy; The Caſe was, The daughter complained to her father, that ſhe was raviſhed by the Plaintiff: the Father ſhewed it to a Juſtice of Peace, who convented the Plaintiff before him, and examined him, and bound him over to the next Goal-delivery; and alſo bound the Defendant to prefer a Bill of Indictment; which he did: upon which the Plaintiff was arraigned and acquitted. It was Reſolved in this Caſe, That an Action upon the Caſe lyes where one ſole *falſo et malitioſe*, procures another to be Indicted. 2. It was Reſolved in the principal Caſe; In as much as the Father did prefer the Indictment upon his daughters complaint, to whom by nature he is conpaſſionate; although the matter had not been a good cauſe of Arreſt for ſuſpition of Felony; (no felony being committed) yet it is a good cauſe of Excuſe of his cauſe of complaint to the Father, who binding them both over, the one to appear, and the other to prefer a Bill, is a good cauſe to excuſe him from a malitious procuring of the Indictment: and ſo the Court took it for a good cauſe of Excuſe; and that the Action brought by the Plaintiff did not lye. Hill. 4 Jac. B.R. rott. 856. *Cox* and *Wirrall's* Caſe. *Cro.* 2. Part. 193.

20. Note: It was agreed by the Juſtices, That a Conſpiracy, nor a Writ in the nature of Conſpiracy, will not lye, if the Plaintiff be not *legitimo modo acquietatus*: But yet if one proſecute another to be Indicted and Impriſoned *falſo et malitioſe*, he ſhall have an Action upon the Caſe for the ſlander and vexation, though that he be never acquitted, and that by reaſon of the words, *falſo et malitioſe*. Paſch. 3 Jac. in B.R. rott. 372. *Marſham* and *Peſcod's* Caſe.

Actions *upon the* Caſe *upon Aſſumpſit, and Promiſe.*

1. IF the ſervant buyeth Wares for the uſe of his Maſter, and maketh a Bill, which is not ſealed, in which he bindeth himſelf to pay the debt: Debt lyeth not againſt the Maſter; but an Action upon the Caſe lyeth againſt the Servant. 6 Eliz. *Dyer.* 230. *Alford's* Caſe.

2. The Servant of *A.* being arreſted, and bayled in the Abſence of the Maſter by two of his friends; the Maſter for their friendſhip promiſed to ſave them harmleſſe of all Damages and Coſts: they after are ſued; and brought an Action upon the Caſe againſt the Maſter. It was adjudged, That the Action did not lye, for want of Conſideration; for the baylment was of their own heads, and executed before the promiſe. 10 Eliz. *Dyer.* 272. *Hunt* and *Baker's* Caſe. See 12 Eliz. in C. B. *Sidenham* and *Worlington's* Caſe. *Godb.* 33. acc.

3. In an Action upon the Caſe upon Aſſumpſit; the Caſe was; That the Defendant being poſſeſſed of a Term as Executor to J. S. who was indebted to the Plaintiff: In conſideration that the Plaintiff would not moleſt him, but would defer the payment untill Michaelmas, that he would pay him the money, or aſſign to him the Land at Michaelmas. It was moved, upon Judgment for the Plaintiff, and Errour brought, That the Plaintiff had not averred, the Defendant had Aſſetts. But notwithſtanding, it was adjudged, the Action did lye, and the Law preſumes he hath Aſſetts; and that the Teſtator would not leave a greater charge upon his Executors, then he had Aſſetts to diſcharge. 9 Jac. B. R. *C.* 9. Part. *Banes* Caſe.

4. *A.* made a Leaſe for years to *B.* and aſſumed, that *B.* the Leſſee ſhould peaceably and quietly have and enjoy, during the Term, without Eviction or Interruption of any perſon, &c. the Father of *A.* entred upon *B.* the Leſſee; whereupon he brought his Action upon the Caſe againſt *A.* It was found for the Plaintiff. It was moved, That the

the Action did not lye, becauſe he might have his remedy againſt the Father by Action of Treſpaſſe; But it was adjudged for the Plaintiff, becauſe it was an expreſs promiſe that he ſhould not be interrupted or moleſted. Mich. 16. Eliz. *Dyer.* 328. *Mountford* and *Catesby*'s Caſe.

5. A. Widdow had divers buſineſſes, ſuits, and quarrels depending; and at her requeſt *I. S.* had been at great travell, and expended upon her buſineſs, and ſuits, 1500 l. and ſhe, in conſideration thereof, did aſſume and promiſe, that ſhe would bear and pay all the charges and expences which he had born and expended upon requeſt, whereupon he brought an Action upon the Caſe, and layed it That *licet* he had expended and paid 1500 l. *circa negotia & ſuites* of the Defendant, yet ſhe did not pay him the 1500 l. and the Opinion of *Dyer* was, that it was a good conſideration, and charitable to aid and eaſe a Feme in her Widdow-hood in her ſuits; and therefore the Action did well lye. Paſch. 19. Eliz. *Dyer.* 356 *Ouly*'s Caſe.

6. An Infant is indebted to *I. S.* upon a contract and dyeth, his Executor aſſumeth to pay the mony; In an Aſſumpſit againſt the Executor, he pleaded the Non-age of the Infant: It was objected, If the Infant had aſſumed the payment at his full age, it had been good: and it was vouched, that where the Lord *Grey*, as Heir to his Father, was not bound to pay his Father's debts, due upon ſimple contract, yet in regard he did aſſume to pay them, he was chargeable; But the Opinion of the whole Court was, that the conſideration was not good, and the Contract was void; and it was ſaid in that caſe, That the conſideration is the ground of every Action upon the Caſe, and it muſt be either a charge to the Plaintiff or a benefit to the Defendant; And therefore if one promiſeth, that in conſideration that the Plaintiff will not ſue him, that he will pay: the ſame is a good conſideration. Trinit. 30. Eliz. *Stone* and *Whitepool*'s Caſe. *Owen* 94. See *Leon* 113. *Idem.*

7. Aſſumpſit: The Plaintiff declared that *I. S.* was indebted to him 100 l. for which he had pawned to the Plaintiff goods to the value of 200 l. and the Defendant promiſed the Plaintiff to pay the debt if he would deliver the Pawn; The doubt was if this were a ſufficient conſideration, to maintain Aſſumpſit, and the Opinion of the Court was that it was a good conſideration: for he who hath goods in Pawn hath a property in them, and may uſe them in ſuch a manner as the Owner would; It was adjudged for the Plaintiff. Mich. 7. Jac. in C. B. *More* and *Conhom*'s Caſe. *Owen* 123.

8. Aſſumpſit: The Caſe was; A Woman was Executrix, and had Aſſets to pay all Debts and Legacies, the Woman dyed, and the goods remayned in the hands of the Husband; the Plaintiff demanded the Legacy of the Husband, who ſaid, Forbear till Michelmas, and I will pay you; Adjudged, It was no good conſideration to ground an Aſſumpſit upon: becauſe the Husband could not be ſued for the Legacy. *Smith* and *Jones* Caſe. *Owen.* 133.

9. Aſſumpſit: The Plaintiff declared, that *I. S.* was indebted to *A.* 60 l. for which he was arreſted; and the Plaintiff was his Bail; *A.* recovered the Debt againſt him, and ſued a *Scire facias* againſt the Bail: Whereupon *A.* in conſideration that the Plaintiff the Bail would pay him the 60 l. promiſed to aſſigne over to him the firſt Bond in which *I. S.* was bounden to him, and ſaid that he had paid the 60 l. to the Defendant *A.* and that he had not aſſigned over the Bond; It was holden a good conſideration by the Court, and Judgment was given for the Plaintiff. Trin. 30. Eliz. *Dixon* and *Adam's* Caſe. *Goldeſb.* 156.

10. An Enfant and another were bound in an Obligation for the Debt of the Enfant; the Enfant at full Age did aſſume to ſave the other harmleſſe againſt the Bond; It was reſolved by all the Juſtices, that upon this Aſſumpſit an Action upon the Caſe would lye againſt the Executors of the Enfant. M. 27. Eliz. B. R. *Burton* and *Edmonds* Caſe. *God.* 138.

11. Aſſumpſit: The Plaintiff declared, that A. was Leſſee for years of Lands, the Inheritance of which was in the Plaintiff's Wife, upon which Leaſe a Rent was reſerved; and that the Defendant in conſideration that the Plaintiff would procure A. to aſſigne the Leaſe to the Defendant, promiſed to pay the Rent to the Plaintiff for all the reſidue of the Term: It was Objected, the Action did not lye becauſe the Plaintiff might have had a higher remedy for the Rent, *viz.* an Action of Debt, or might diſtrein for it: But *per Curiam* the Action did well lye, for that upon the promiſe, an Action for the Rent is given to the Husband alone, whereas the Rent was not due to the Husband, but in the Right of his Wife, and before it was payable upon the Land, but now it is payable to the perſon of the Husband. M. 29. Eliz. C. B. *Carter*'s Caſe *Leon.* 43. See Trinit. 32. Eliz. C. B. *Read* and *Johnſon*'s Caſe. acc.

12. Aſſumpſit: The Plaintiff declared, That the Defendant was indebted to the Plaintiff in a certain ſum of mony, and ſhewed how the Defendant in conſideration that the Plaintiff *per parvum tempus deferret diem ſolutionis*, did promiſe to pay &c. found for the Plaintiff. Moved in arreſt of Judgment, that there was no conſideration, for that the time limited for forbearance was uncertain, and *parvum tempus* may be but *punctum temporis.* But the Exception was not allowed; for that the Debt in it ſelf is a ſufficient conſideration. Paſ. 29. Eliz. C. B. *Gill* and *Harewood*'s Caſe. *Leon.* 61. 155. b.

13. Aſſumpſit

13. Aſſumpſit: The Plaintiff declared, That he delivered goods to the Brother of the Defendant who made the Defendant his Executor and dyed, and the Plaintiff came to the Defendant and ſpake of him concerning the goods; upon which ſpeech, the Defendant promiſed the Plaintiff that if the Plaintiff could prove that the goods were delivered to the Teſtator, he would pay the value of them to the Plaintiff, and averred the goods came to the Teſtator's hands: Upon *Non Aſſumpſit*; It was found and adjudged for the Plaintiff; Whereupon Error was brought; and two Errors aſſigned, The firſt, that the Plaintiff had not averred that he had proved the delivery of the goods to the Teſtator, for the words of the promiſe are *ſi probare potuiſſet*, 2. That here was not any conſideration; for that the Defendant had no profit nor advantage by the Bailment of the goods to the brother of the Defendant, and alſo it is a thing before executed, and not depending upon the promiſe, nor the promiſe upon it, and to that purpoſe; *Hudſon*'s Caſe in B. R. was vouched, *viz.* The Defendant in conſideration that he was natural Son and adminiſtrator to the Inteſtate, and that the goods of his Father came to his hands, promiſed to pay the debt to the Plaintiff, and it was found that no goods came to his hands; and there it was holden, That the conſideration, that he was Adminiſtrator and Son of the Teſtator was not of any force; to maintain the Action. But notwithſtanding theſe cauſes; in the principal Caſe; the Judgment was affirmed: and in that caſe, It was ſaid, That if an Action be brought upon an Aſſumpſit of the Teſtator, Judgment ſhall be of the goods of the Teſtator: but if of the promiſe of the Executor, then of his own goods. Hill. 30. Eliz. in B. R. *Mowel* and *Trivaman*'s Caſe. *Leon.* 93. 94.

14. In Aſſumpſit: the Caſe was, The Defendant leaſed Lands to the Plaintiff rendring Rent, and, after ſome years expired, The Leſſor in conſideration that the Leſſee had occupied the Land and had paid his Rent, promiſed the Plaintiff to ſave him harmleſſe againſt all perſons, for the Occupation of the Lands of the time paſt, and alſo to come: Afterwards *I. S.* diſtrained the Plaintiff's Cattle upon the Land; upon which the Plaintiff brought Aſſumpſit againſt the Defendant; It was Objected, that the payment of the Rent is no conſideration, for he hath the profit of the Lands for it; and alſo the conſideration is paſt: But it was adjudged, the Action did well lye, for that the Occupation, which is the conſideration, continues: like a gift in Frank-Marriage, after the eſpouſals, lyeth, and yet the Marriage is paſt, but the bond continues: and here the payment of the Rent is executory every year, and if the Leſſee be ſaved harmleſſe for his Occupation he will pay the Rent the better; Adjudged for the Plaintiff. Paſch. 30. Eliz. *Pearl* and *Edwards* Caſe. *Leon.* 102.

15. Aſſumpſit: The Plaintiff declared, That where the Defendant pretended that one *R.* made his Will, and thereby gave Legacies to the Defendant; and the Plaintiff ſued in the Prerogative Court to diſprove the Will, and if he *proſecutus fuiſſet*, he might have diſproved the Will, and ſo defeated the Defendant of his Legacies: That the Defendant, in conſideration, that the Plaintiff *ultra non procederet*, promiſed to give the Plaintiff 100 l. and the Plaintiff averred that he ſurceaſed his ſuit, and farther declared *licèt* the Defendant *ad hoc requiſitus tali die*: It was ſaid, that here is not any conſideration, for the Defendant hath not any means to compell the Plaintiff to ſurceaſe his ſuit, and if he do once ſurceaſe his ſuit, yet he may begin again; and then for the Plaintiff to have ſhewed a releaſe or diſcharge of it. But it was reſolved that the Action did well lye: and Trin. 28. Eliz. Rott. 523. *Smith* and *Smith*'s Caſe was vouched to prove it: Where, in an Aſſumpſit, upon conſideration that the Plaintiff ſhould not implead the Defendant upon a Bond, the Plaintiff had Judgment to recover; and alſo in the principal Caſe: the Requeſt generally lyes; *licèt requiſitus* was well layed. Trin. 30 Eliz. B. R. *Rivett* and *Rivet*'s Caſe. *Leon.* 118.

16. Aſſumpſit: The Plaintiff declared; That the Defendant did aſſume to perform the award of *I. S.* and alſo aſſumed that he would not ſue execution upon a Judgment which he had obtained againſt the Plaintiff, in an Action; and ſhewed, the award was made (which award in Law was void) and that the Defendant had not performed that award, and alſo that he had ſued execution againſt the Plaintiff. Upon *Non aſſumpſit*, It was found for the Plaintiff: and thereupon Error was brought in the Exchequer-Chamber; and the Error aſſigned was, That the Plaintiff had declared upon two breaches, whereas for one there was no cauſe of Action; and the Jury had aſſeſſed damages intirely for both breaches; and ſo the Verdict was void, and then the Judgment given upon it was erroneous. *Manwood* Chief Baron ſaid that the Verdict was well enough, for that there was but one Iſſue upon the whole Aſſumpſit, but if ſeverall Iſſues had been joyned, and both had been found for the Plaintiff, and damages intire aſſeſſed for both, the Judgment had been erroneous; for that being ſeverall Iſſues, they might had ſevered the damages: But after a long debate, becauſe the Jury had aſſeſſed Damages intirely for both; the Opinion of the Court was, that the Judgment ſhould be reverſed. M. 31. Eliz. in Exchequer. *Bedell* and *More*'s Caſe. *Leon.* 170. 172.

17. Aſſumpſit:

17. Aſſumpſit: The Plaintiff declared, the Defendant was indebted to him, 19 *Maii* 29 Eliz. The Defendant, in conſideration that the Plaintiff would forbear to ſue him until ſuch a day after, promiſed at the ſaid day to pay the debt: The Defendant pleaded, That 29 *Maii* 29 Eliz. he was indebted to the Plaintiff in the ſaid ſum, for aſſurance of which afterwards, he acknowledged a Statute to the Plaintiff, upon which he had execution, and levyed the mony *abſque hoc* that he was indebted to the Plaintiff, *antea vel poſt*, the ſaid day *aliquo modo*. It was holden by the Court, that the cauſe of the Action is the Aſſumpſion; and there the conſideration is not traverſeable; and alwaies the ground of the Action is traverſeable; and the Aſſumpſit in this caſe is the ground of the Action, and not the debt. Judgment was for the Plaintiff. Trinit. 33. Eliz. in B. R. *Smith* and *Hitchcock*'s Caſe. *Leon.* 252. 253.

18. Aſſumpſit: The Caſe was, A woman ſeiſed of a Rent charge for life took Husband, the Rent was arrear, the Wife dyed; The Tenant of the Land charged with the Rent in conſideration the Rent was behind, promiſed to pay the Rent; It was moved, It was a Rent payable by deed, and therefore this Action did not lye; no more then a promiſe to pay a debt due upon an Obligation. But it was holden by the whole Court, and adjudged for the Plaintiff. M. 27. Eliz. C. B. *Leon.* 293. See 16. Jac. *Green* and *Hanyngdon*'s Caſe. *Hutton* 34. acc.

19. Aſſumpſit: The Caſe was; A. was indebted to B. in 20 l. and C. was endebted to A. in 30 l. A. in ſatisfaction of the debt which he owed to B. aſſigned the debt of 30 l. which C. owed him, and made a Letter of Attorney to ſue in his Name: A. and B. acquainted C. with this agreement, who promiſed to B. in conſideration that he would forbear him till ſuch a day, that he would pay the mony: Upon *Non aſſumpſit*, It was found for the Plaintiff: It was moved in arreſt of Judgment, that the conſideration was not ſufficient, and ſuch was the Opinion of the whole Court: For that B. hath had only an authority to ſue, and that is at all times countermandable by A. Paſch. 19. Jac. in B. R. *Potter* and *Turner*'s Caſe. *Winch.* 7 & 8.

20. Aſſumpſit: The Plaintiff declared that the Defendant was Rector of the Rectory of *D.* and that he and all his predeceſſors had uſed to have all manner of Tythes, and that the Plaintiff occupied 100 Acres of Land in the Pariſh; and that the Defendant promiſed to the Plaintiff, in conſideration, that he would plant his Land with Hopps, and ſo make the Tythes to be the better, that he would allow him towards every Acre he ſhould ſo plant 40 s. towards the charge in planting them; and ſhewed that he had planted one Acre at the requeſt of the Defendant; and ſo &c. It was moved whether this be a good conſideration, becauſe the Tythes are not bettered by the planting; but by the growing and encreaſe of them: and it is not averred that the Tythes were of better value then they were before; The Court doubted of it: But the Court ſaid, that if the Plaintiff had ſhewed in his Declaration that he might have made more benefit of his Land by other wayes then by the planting of it with Hopps, the Tythes alſo being bettered, the Caſe had been clear. Paſch. 22. Jac. *Co.* B. *Summers* and *Dug*'s Caſe. *Winch.* 80.

21. Aſſumpſit: The Plaintiff declared, That in conſideration of 20 l. paid, the Defendant did promiſe 1. *Martii* to pay and deliver the Plaintiff 20 Quarters of Barly, the next ſeed time. Upon *Non aſſumpſit*, It was found for the Plaintiff: It was moved that the Plaintiff ought to have ſhewed in his Declaration when the ſeed time was, which he hath not done. But it was reſolved *per Curiam* that he need not do, becauſe the Action is brought half a year after the promiſe, for not payment and delivery of the ſame at ſeed time, which was betwixt the Promiſe and the Aſſumpſit; and here it appears the Action was brought at Michaelmas, by which it appears ſufficiently that the ſeed time was paſt: Adjudged for the Plaintiff. Trin. 21. Jac. B. R. *Totnam* and *Hopkin*'s Caſe. *Godb.* 350.

22. Aſſumpſit brought by Husband and Wife againſt J. S. Executor of T. S. The Plaintiff declared that there was a Communication had of a Marriage between the Wife the Plaintiff, and the ſaid T. S. that the ſaid T. S. in conſideration, that the ſaid Wife the Plaintiff would take him to her Husband, he promiſed, that if after the Marriage he, the ſaid T. S. dyed, living the ſaid Wife, that he would leave her worth 100 l. and averrs that ſhe did marry him; who died and did not leave her worth 100 l. Upon *Non aſſumpſit* it was found for the Plaintiff: It was moved, That by the Inter-Marriage the Action was extinguiſhed, and thereby the Promiſe was releaſed, and of that Opinion was *Hobart* Juſtice; But *Winch* and *Hutton* held the contrary; for that the Law will not work a releaſe contrary to the intent of the parties, and that the marriage will not deſtroy that which it ſelf creates. Hill. 15 Jac. C. B. Rott. 906. *Smith* and *Stafford*'s Caſe. *Hutton.* 17.

23. Aſſumpſit: The Plaintiff declared, That whereas the Defendant was poſſeſſed of a Houſe and Land in *M.* in the County of *L.* for 21. years of Sir *John W.* and whereas one J. D. was in ſpeech of buying the ſaid Leaſe, and the Defendant could not ſell it without the conſent of Sir *John W.* The Defendant, in conſideration that the Plaintiff would procure Licence of the ſaid Sir *John*, promiſed to

pay him ſo much as he ſhould diſburſe and deſerve therefore: And added, he did procure a Licence, and diſburſed ſuch a ſum, and deſerved for his labour ſuch a ſum. The Defendant demurred upon the Declaration: The Queſtion was, If that were a good conſideration or no? for that it did not appear that there was any reſtraint upon him from making any Aſſignment: But it was adjudged a good conſideration, for it appears there was privity betwixt them: and it may be he had promiſed that he would not aſſign it without his Licence; and it was at his Inſtance and for his ſatisfaction: Adjudged for the Plaintiff. Trin. 18. Jac. *Hall* and *Woollen*'s Caſe. *Hutton* 39.

24. Aſſumpſit. The Plaintiff declared, Whereas one was indebted to the Plaintiff in 100 l. by Bond; The Defendant, in conſideration that the Plaintiff at his requeſt would forbear to ſue the ſaid party; and if he did not pay it, the Defendant would. It was moved, That it was no conſideration, for the incertainty; for if he forbare for an hour, or a day, it is a forbearance. But the Court was of Opinion for the Plaintiff; and this difference was taken; when the promiſe appears to be ſuch, that it ſhall not be any benefit to the party in whoſe behalf it is requeſted, as forbearance for an hour, or a like time; there it is not good. But where it is general, and not limited to any time, there it ſhall be a totall forbearance, or at leaſt, a forbearance for a convenient time. It was adjudged for the Plaintiff. Mich. 19 Jac. C. B. *Mayes* and Sir *Iſaac Sidley*'s Caſe. *Hutton*. 46. *Cro.* 2. Part. 683. acc. See Mich. 2 Car. *Beven* and *Cowling*'s Caſe. *Popham*. 183. acc. See *Smith* and *Smith*'s Caſe. 29 Eliz. Sect. acc.

25. Aſſumpſit. The Caſe was; *A.* promiſed *B.* That if he would marry his daughter, he would give with her a Childs part; and at the time of his death, he would give her as much as to any of his Children, excepting his eldeſt ſon; and made his Executors, and dyed. *B.* brought an Action againſt the Executors, and ſhewed, That the Executor had not given her a Childs part, and that ſuch a younger ſon of the Teſtator had 100 l. given him. It was adjudged, That the promiſe of a Childs part was incertain; but being as much as any of his Children had, and ſhewing, That a younger ſon had 100 l. it was certain enough. Adjudged for the Plaintiff. Trin. 17 Jac. B. R. *Silveſter*'s Caſe. *Popham*. 48. See *Arnold* and *Dickſon*'s Caſe. 17 Jac. *Popham*. 183. acc.

26. Aſſumpſit. The Caſe was; That in caſe the Plaintiff would diſcharge *B.* of an Execution, the Defendant promiſed to pay him 10 l. In an Aſſumpſit, the Plaintiff ſhewed *quod exoneravit illam de Executione*, generally; and the diſcharge was by word, and not by writing. It was moved, That the conſideration was layed to be too general. But it was Reſolved by the Court, That the Declaration was well enough; and he need not plead, the ſame was by Writing; for the diſcharge by word was a ſufficient diſcharge. 2 Car. in B. R. *Popham*. 206.

27. Aſſumpſit. The Caſe was, The Defendant requeſted the Plaintiff to give his credit for one J. S. to J. D. for two Tunns of Wine value 50 l. the Plaintiff gave Bond to J. D. of 100 l. for the payment thereof: upon which he was ſued, and forced to pay 30 l. In Conſideration of which the Defendant promiſed to pay the 50 l. at ſuch a day, and did not pay it; for which the Action was brought. It was moved, The Conſideration was not ſufficient, becauſe it was upon a Conſideration paſt. But becauſe J. S. had credit given him by J. D. at the Defendants requeſt upon the Plaintiff's undertaking; the Court held the Conſideration to be ſufficient, and not paſt. Adjudged for the Plaintiff. Mich. 1 Jac. *Boſden* and Sir *John Thinns* Caſe. *Cro.* 2. Part. 18. See Trinit. 9 Jac. B. R. *Somerſell* and *Barneby*'s Caſe. *Cro.* 2. Part. 297.

28. An Executor having Aſſetts in his hands ſufficient to pay all the Debts and Legacies of his Teſtator; and the Teſtator was indebted to the Plaintiff upon a ſingle Contract: and the Executor aſſumed to the Plaintiff, That if he would forbear to ſue him till ſuch a time, he would pay the Debt. It was adjudged by the Court, the ſame was a ſufficient Conſideration; and that in ſuch caſe Aſſumpſit did lye againſt the Executor. Mich. 2 Jac. B. R. *Fiſher* and *Richardſon*'s Caſe. *Cro.* 2. Part. 47. See Paſch. 19 Jac. B. R. *Bothe* and *Crampton*'s Caſe. *Cro.* 2. Part. 613. the like Caſe.

29. In Aſſumpſit, the Caſe was; An Executor ſued forth an *Elegit* to the Sheriff; the Defendant *ut animus Executoris*, promiſed the Sheriff, the Plaintiff, if he would execute the Writ, and for 6. d. given by the Plaintiff, to give to the Plaintiff 6 l. which not paid, the Plaintiff brought his Action It was adjudged not to be a ſufficient Conſideration, to ground an Aſſumpſit upon; for that the Sheriff by duty of his Office, ought to execute the Writ; and a promiſe of conſideration to execute it is not lawful, but *quaſi Extortion*; and the giving of the 6. d. was no ſufficient Conſideration, being joyned with the other which was unlawfull. Mich. 3 Jac. B. R. *Bridge* and *Cage*'s Caſe. *Cro.* 2. Part. 103.

30. Aſſumpſit: The Plaintiff declared, That the Defendant in Conſideration of a ſum of money paid to him, promiſed him to aſſure ſuch Copy-hold Lands to him in ſuch a manner as J. D. ſhould

ſhould adviſe, who adviſed, That the Defendant ſhould at the next Court ſurrender the Land to the uſe of the Plaintiff and his heirs, and ſhould enter into a Bond of 40 l. for the doing of it. It was found for the Plaintiff: But it was adjudged by the Court, That the alledging of the breach in not entring into the Bond was not good; for that it was out of the Aſſumpſit: and alſo becauſe that damages were intirely given, as well for not entring into the Bond, as not ſurrendring the Land: for the one of which, there was no cauſe of Action. It was adjudged for the Defendant. Paſch. 4 Jac. B. R. *Staynroyde* and *Locotke*'s Caſe. *Cro.* 2. Part. 115.

31. Aſſumpſit. The Plaintiff declared, That he was an Inne-keeper, and a Commiſſion iſſued in a Suit betwixt the Defendant and others, to examine Witneſſes; which Commiſſion was to be ſet upon, in the Plaintiff's houſe, being an Inne; and in Conſideration that the Plaintiff did promiſe to find Horſe-meat and Mans-meat for the Defendant and his Company during the ſitting of the Commiſſion, the Defendant promiſed to pay all ſuch ſummes as the dyet and Horſe-meat ſhould amount unto, when he ſhould be requeſted; and the Plaintiff alledged *in facto*, that he found the ſaid Horſe-meat and mans-meat during all the time of three dayes the Commiſſion there was ſet upon, which came to 5 l. which the Defendant *Licet requiſitus* had not paid. Upon Non-Aſſumpſit, found for the Plaintiff; It was moved, That the promiſe being to pay upon requeſt, the year, day, and place ought to be expreſſed. And of that Opinion was the whole Court: For when the Defendant is chargeable upon a Collateral promiſe, there ought to be a preciſe requeſt alledged; and *Licet ſæpius requiſitus* is inſufficient: and therefore in the principal Caſe, the Judgment was ſtayed. Mich. 5 Jac. B. R. *Selman* and *King*'s Caſe. *Cro.* 2. Part. 183. See Hill. 16 Jac. B. R *Hill* and *Waldes* Caſe. *Cro.* 2. Part. 523. adjudged accordingly.

32. Aſſumpſit. The Plaintiff declared, That the Defendant promiſed the Wife of the Plaintiff in her Widow-hood, That if ſhe would marry J. S. he would pay her yearly after the death of J. S. during her life, 40 s. and afterwards ſhe married J. S. and after his death married the Plaintiff; and for Non payment of the 40 s. yearly after the death of J. S. the Plaintiff brought the Action. The Defendant pleaded a Releaſe of J. S. of all Action and Demands: And by the Court, it is no Plea, for being a promiſe to perform a payment after the death of J. S. there was no any poſſibility it could be demanded by him, and therefore the Releaſe void in Law; and the Action well brought by the now Plaintiff. Trin. 6 Jac. B.R. *Belcher* and *Hudſon*'s Caſe. rott. 132. *Cro.* 2. Part. 222.

33. Aſſumpſit. The Defendant in conſideration the Plaintiff would marry his Cozen, promiſed he would give him 100 l. The Plaintiff alledged, he married her ſuch a day and place: And upon Non Aſſumpſit found for the Plaintiff; It was moved in Arreſt of Judgment, That he had not given the Defendant Notice of the Marriage, and therefore the Declaration was not good. But it was Reſolved, that it was good enough; for it is a neceſſary intendment, That when after the marriage he requeſted the money, that notice was given of the Marriage: and ſo was it adjudged in *Morley* and *Hodges* Caſe in the Exchequer-Chamber. Mich. 7 Jac. in B. R. *Bradley* and *Todei*'s Caſe. *Cro.* 2. Part. 228.

34. Aſſumpſit. The Plaintiff declared, Whereas the Defendant 10. Febr. 7 Jac. was indebted to the Plaintiff in *diverſis denariorum ſummis*, in 40 l. promiſed to pay to the Plaintiff the ſaid 40 l. *ante inceptionem proximis itineris* of the Plaintiff to *London*; and the Plaintiff alledged *in facto*, that upon the 23. Febr. following, *incepit iter ſuum* to *London*, and came thither the 29. of the ſame moneth. Which being found for the Plaintiff; Upon Arreſt of Judgment, becauſe he did not ſhew in his Declaration, that it was his *proximum iter* to *London*, (although it was alledged it ſhould be ſo intended, being in ſo ſhort a time after the bargain) Yet it was ruled by the Court, That the Declaration was not good; for that the Plaintiff to enable him to the Action, ought to ſhew the commencement of his next Journey to *London*. It was adjudged for the Defendant. Trinit. 8 Jac. B. R. *Rook* and *Rook*'s Caſe. *Cro.* 2. Part. 245.

35. Aſſumpſit. The Plaintiff declared; Whereas the Lord *Burgh*, 1. Apr. 39 Eliz. poſſeſſed of goods of the value of 500 l. pawned them the ſame day and year to the Plaintiff; and was alſo indebted to the Plaintiff for ſilver plate delivered to the Wife of the Lord *Burgh* 25 l. That the Defendant 9. *May*, 40 Eliz. in Conſideration the Plaintiff would at the Defendant's requeſt deliver to the ſaid Lady *Burgh* being then a Widow, the ſaid goods then being of the value of 500 l. pawned to him for 403 l. 6 s. 8 d. by the Defendant to be payed, promiſed he would pay to the Plaintiff the 25 l. when he ſhould be required. And the Plaintiff alledged in his Declaration, That 9. *May*, 40 Eliz. at the Defendant's requeſt, upon the payment of the 403 l. 6 s. 8 d. he delivered to the Lody *Burgh* the goods pawned to him. And *Licet* ſuch a day he requeſted, the Defendant had not paid to him the 25 l. Upon Non Aſſumpſit, being found for the Plaintiff; It was moved in ſtay

of Judgment, That the Conſideration was not good; becauſe it is not averred, That the Lord *Burgh* agreed, for the Plaintiff ſold and delivered to his Wife; and alſo for that it is not averred, That the goods were of the value of 500 l. at the time of delivery of them to the Lady *Burgh*; but theſe Exceptions were not allowed of: For the firſt is to be neceſſarily intended: and for the ſecond; the ſame being delivered the ſame day the Aſſumpſit was made, the goods ſhall be intended to be of the ſame value of 500 l. And 3. It was holden, That the pleading of the goods being for 400 l. and the goods alledged to be of the value of 500 l. the delivery of them for 400 l. was holden to be a good Conſideration. Mich. 8 Jac. B. R. *Barreclock* and *Michell*'s Caſe. *Cro.* 2. Part. 256.

36. Note: If a man delivers goods to a common Carrier, to be delivered at ſuch a place certain and ſign in *London*; and undertakes *rationabiliter* to content him for his carriage, and the Carrier promiſeth to deliver them at the place aforeſaid, but doth not do it: It was holden *per Curiam*, That the Conſideration that he would *rationabiliter* content him for the Carriage, not promiſing any ſum certain, is a ſufficient Conſideration to ground an Aſſumpſit. And it was adjudged, That upon ſuch a Promiſe, the Action did lye in the principal Caſe. Mich. 8 Jac. in B.R. *Rogers* and *Heads* Caſe. *Cro.* 2. Part. 262.

37. *A.* was indebted to the Plaintiff in 60 l. and made his Wife his Executrix, and entreated her to pay that debt, and dyed: ſhe proved the Will; and *pretextu predict. Teſtament.* was poſſeſſed of a Leaſe for years; In conſideration the Plaintiff would not moleſt her, but would give her a Quarters day, viz. till Michaelmas next, ſhe promiſed to pay the 60 l. It was moved, That no Action lay againſt the Executrix, being upon a Contract; and alſo, becauſe it is not averred in the Declaration, That ſhe had Aſſetts in her hands; for the Allegation, that ſhe was poſſeſſed of a Term *pretextu Teſtament.* doth not imply ſhe hath Aſſetts. But it was adjudged for the Plaintiff; For the Loan implyes a promiſe, and the Action is grounded upon her promiſe; and being alledged, that ſhe had the Term, It ſhall be intended ſhe had it as Aſſetts, and his forbearance of Suit is a good cauſe of Action. Paſch. 9 Jac. B.R. *Bond* and *Payne*'s Caſe. *Cro.* 2. Part. 273.

38. Aſſumpſit. The Plaintiff declared, That at the Defendant's requeſt he was bound in a Recognizance for the Defendant's appearing before the Juſtices of the Goal-delivery at the next Aſſizes, he obtained a *Certiorari* out of the Kings-Bench, directed to the Juſtices of Goal-Delivery of the ſaid County: and that 10 *Martii An.* 8. the Writ was delivered to the Juſtices of Aſſize there, and was allowed. It was adjudged, That that did not excuſe him of his appearance; for he ought to have had his appearance recorded; and, that not being done, he had broken his promiſe: and alſo the plea is not good, becauſe it is not alledged, That he delivered the Writ, which is Iſſuable; and ſo the Plea not good: and the Action maintainable. And it was adjudged for the Plaintiff. Trinit. 9 Jac. B. R. *Roſſe* and *Pyes* Caſe. *Cro.* 9. Part. 281.

39. Aſſumpſit. The Plaintiff declared, That in conſideration of 10 l. paid by him to the Defendant, he promiſed to make him a Leaſe for 21 years, 11 April. 9 Jac. and the Defendant being poſſeſſed of a houſe adjoyning, whereof a Shop was parcel, promiſed the Plaintiff he would not ſuffer the Trade of a Joyner to be uſed in the ſaid Shop during the Term: and alledged that he paid him the 10 l. and that the ſame day the Defendant *demiſit tenementa predict.* for 21 years in *forma predict.* and 10 Aprilis, 10 Jac. he permitted J. S. to uſe the Trade of a Joyner *in Shoppa parcell Meſſuagii predict. contra formam aſſumptionis predict.* It was moved, the Declaration was not good, becauſe he doth not ſay in *Shoppa predict.* nor that it was parcel of the houſe *tempore aſſumptionis*; nor that the promiſe was made during the Term: But all theſe Exceptions were diſallowed of by the Court, and Judgment was entred for the Plaintiff. Mich. 11 Jac. B. R. *Rogers* and *Parry*'s Caſe. *Cro.* 2. Part. 326.

40. In Aſſumpſit; the Plaintiff declared, That in conſideration the Plaintiff paid the Defendant a ſum of money, the Defendant promiſed to take his ſon to be his Apprentice for ſeven years in ſuch a Trade, and to find him meat, drink, and apparel *durante termino predict.* and aſſigns breach, for that he did not find him meat, drink, and apparel; but doth not aver in his Declaration, That he put him as an Apprentice, or that the other accepted him: And for theſe cauſes the Court held the Declaration not to be good. And although it was ſaid, That it ſhall be intended, the breach being aſſigned, in not finding him meat, &c. *durante termino Apprenticii*; yet in regard the Plaintiff had not ſufficiently intituled himſelf to the Action, and the Defeddant pleaded Non-Aſſumpſit, which is found againſt him; yet it was adjudged for the Defendant. Mich. 14 Jac. B. R. *Talkarn* and *Wigg*'s Caſe. *Cro.* 2. Part. 406.

41. Aſſumpſit. The Plaintiff declared; Whereas J. S. was in Execution for 40 l. the Defendant ſaid; Deliver J. S. out of Execution; and what it coſts you, I will repay: whereupon the Plaintiff diſcharged J. S. The Defendant ſaid, That after the Aſſumpſit, and before any thing was done in it, he

he forbad the Plaintiff to meddle therein, and that he would not ſtand to his promiſe. It was adjudged for the Plaintiff upon a Demurrer. For a man may diſcharge an Aſſumpſit made to himſelf; but not an Aſſumpſit made by himſelf. It was adjudged for the Plaintiff. Mich. 13 Jac. rott. 543, B. R. *Hunford* and *Piles* Caſe. *Cro.* 2. Part. 483. See Paſch. 19 Jac. B. R. *Triſwaller* and *Reynes* Caſe. *Cro.* 2. Part. 619. acc.

42. In an Aſſumpſit brought by an Executor; he declared, That the Defendant in conſideration the Teſtator would buy and pay for the Defendant 23 yards of Velvet, and three yards of Broad-Cloath, and make him a Cloak, promiſed the Teſtator he would pay ſuch moneys as he ſhould pay for the Wares, and would alſo pay him ſo much as he ſhould deſerve for the making of the ſaid Cloak: and alſo declared, That the Defendant was indebted to the Teſtator in 27 l. for a doublet and pair of Hoſe of Velvet made for him; and that he had not paid the moneys. The Defendant pleaded, That at the time of the ſeverall Promiſes he was within age. And it was adjudged for the Defendant, in regard it doth not appear, that this Cloak, Doublet, and Hoſe were for the Defendant himſelf: and alſo if it had been ſo averred, and for his own wearing; yet becauſe it was not averred, they were neceſſary and convenient for him to wear according to his eſtate and degree; therefore the promiſe did not bind him. Hill. 17 Jac. B. R. *Ive* and *Cheſter*'s Caſe. *Cro.* 2. Part. 560. See *Stone* and *Withypoles* Caſe. Sect.

43. In Aſſumpſit; The Plaintiff declared, That in conſideration he would marry the Teſtator, promiſed he would leave her worth 500 l. and the Plaintiff alledged *in facto* he did not leave her worth 500 l. It was moved, an Aſſumpſit doth not lye againſt an Executor upon a Collateral promiſe of the Teſtator, and that the perſonal contract was determined by the Inter-marriage. But it was otherwiſe adjudged; and if a Releaſe had been made, the debt had not been determined; for it never was a duty in the Husband, nor could be releaſed by him. Wherefore it was adjudged for the Plaintiff; and the Judgment affirmed in a Writ of Errour, That the Action will lye againſt the Executors of the Husband. Hill. 17 Jac. B. R. rott. 1123. *Clark* and *Tompſon*'s Caſe. *Cro.* 2. Part. 571. See before, *Belcher*'s Caſe. Sect. 32.

44. Aſſumpſit. The Plaintiff declared; Whereas the Defendant's Teſtator was indebted to him 33 l. In conſideration the Plaintiff would forbear to ſue the Defendant untill he had execution upon ſuch a Judgment, the Defendant promiſed to pay the ſaid 33 l. upon Requeſt after he had obtained Execution of ſuch Judgment; and alledged, he had obtained execution of the ſaid Judgment, *et licet ſæpius requiſitus*, &c. It was moved, It did not appear how he was indebted, nor that the Defendant had Aſſetts. But adjudged for the Plaintiff, becauſe it is an Action grounded upon his own promiſe, and it ſhall be intended he was indebted, otherwiſe he would not have promiſed. Mich. 18 Jac. B. R. *Davies* and *Warner*'s Caſe. *Cro.* 2. Part. 590. See Mich. 18 Jac. B. R. *Bard* and *Bard*'s Caſe. *Cro.* 2. Part. 602. acc. See Mich. 18 Jac. B. R. *Evans* and *Warren*'s Caſe. *Cro.* 2. Part. 604. acc.

45. Aſſumpſit. The Plaintiff declared, That the Defendant was a Mercer, and kept a Shop in *N.* and had his Shop furniſhed with old ſullied Wares: and the Plaintiff had a Shop there furniſhed with new and freſh Wares; And in conſideration that the Plaintiff would buy of him his Wares in his Shop, and pay for them ſuch prizes as he paid when he firſt bought them, The Defendant promiſed he would not any longer keep any Shop at *N.* and the Plaintiff declared, That he bought the Defendant's ſaid Wares, and paid 300 l. for them, the price the Defendant bought them at; whereas the Wares were not worth then 100 l. and yet the Defendant contrary his promiſe, kept his ſaid Shop there, and furniſhed it with new Wares, to the Plaintiff's damage of 500 l. It was moved, in Arreſt of Judgment, it being upon Non-Aſſumpſit found for the Plaintiff, That the Aſſumpſit was againſt Law, being to reſtrain the uſe of a lawful Trade. But all the Juſtices held, It was a good Aſſumpſit, for it is voluntary: and that a man upon a valuable conſideration may reſtrain himſelf that he will not uſe his Trade in ſuch a Town; which is uſual in *London*: and *volenti non fit injuria*; and it is not like the caſe of 2 *H.* the Caſe of the Dyer, for there he was compelled to enter into Bond, not to uſe the Trade of a Dyer: and yet in that caſe the Defendant durſt not demur; and upon the matter it is but the ſelling of his Cuſtome; and leaving another to gain it: and a Preſcription to reſtrain one to uſe a Trade in ſuch a place, is good. And Paſch. 18 Jac. *Bragg* and *Tanner*'s Caſe was agreed, where one for 10 s. promiſed to pay 100 l. if he thence forward kept any Draper's Shop in Newgate-Market; that the Aſſumpſit was good: And in the principal Caſe, upon a Writ of Errour in the Exchequer-Chamber, the Judgment was affirmed by all the Juſtices. Hil. 17 Jac. rott. 1265. B. R. *Broad* and *Follet*'s Caſe. *Cro.* 2. Part. 596.

46. Aſſumpſit. The Plaintiff declared, That he let the Defendant a Ware-houſe in *D.* and the Defendant promiſed to pay to him 9 s. for every

Week

Week that he occupied it; and alledged, that he occupied it 27 Weeks; and for not payment upon Requeſt, he brought the Action. It was moved, That this was a Leaſe at Will of the Ware-houſe, and the 8 s. weekly was in the nature of a Rent; and ſo Aſſumpſit did not lye for it. The Court agreed, That for a Rent reſerved upon a Leaſe, Aſſumpſit did not lye: But ſaid, This was but a Promiſe, and not a Leaſe, and that it is not any Rent, but meerly a Promiſe in conſideration of occupying; and therefore the Action did well lye. Adjudged for the Plaintiff. Mich. 18 Jac. B. R. *Dorrill* and *Morgan*'s Caſe. *Cro.* 2. Part. 596. See Hill. 20 Jac. B. R. *Slack* and *Bowſal*'s Caſe. *Cro.* 2. Part. 668. Aſſumpſit to pay a Rent is admitted to be good.

47. Aſſumpſit. The Plaintiff declared; In conſideration the Plaintiff would lend to the Defendant 7 l. and would accept of a Bond of 80 l. of J. S. and a Letter of Attorney to ſue it; and would promiſe to releaſe the Defendant of all Actions and Demands; The Defendant aſſumed, That if the Plaintiff could not recover from J. S. 40 l. within ſuch a time, he would pay that 40 l. to him upon Requeſt: and he alledged the payment of the 7 l. and the acceptance of the Bond of 80 l, and the Letter of Attorney; and that he releaſed to the Defendant all Actions and Demands; and that the Defendant had not according to his promiſe paid him the 40 l. *licet requiſitus*: (although he could not receive from J. S. the 40 l. *licet requiſitus*). Upon Non Aſſumpſit, It was moved, That the Releaſe had extinguiſhed the Action upon the Plaintiff's own ſhewing. But the Court held the Action maintainable, for that the Releaſe is part of the Conſideration; and though it be a Releaſe of all Actions and Demands, it doth not diſcharge what is future, according to *Hoes* Caſe. *C.* 5. Part. 7. and Hill. 4 Jac. B. R. rott. 377. *Heycock* and *Field*'s Caſe. Mich. 29 Jac. B. R. *Porter* and *Philips* Caſe. *Cro.* 2. Part. 623.

48. Aſſumpſit. The Plaintiff declared; Whereas the Defendant had a *Fieri facias* for 61 l. of the goods of J. S. and delivered that Writ to the Sheriff to whom it was directed; and affirmed to the Plaintiff, That the Woollen Cloath in the Shop of C. S. were the Wares of J. S. lyable to the execution, and required the Plaintiff to execute it. That the Defendant then and there in conſideration the Plaintiff would ſeize the ſaid Cloath for the ſaid Execution, promiſed the Plaintiff he would enter Bond to the Sheriff when he ſhould be required in any reaſonable ſum, to ſave the Sheriff and the Plaintiff harmleſſe againſt all perſons, for entring the ſaid Shop, and taking the ſaid goods in Execution; and the Plaintiff giving credit to his promiſe, entred the Shop, and took the ſaid goods in execution; for which C. S. ſued him in Treſpaſs, and recovered againſt him 17 l. and the Defendant *Licet requiſitus* had not entred Bond to the Sheriff. Upon Non-Aſſumpſit, It was found for the Plaintiff. It was moved, That the promiſe was upon a Conſideration againſt Law, to take Execution of goods which were not the Defendants, and to ſave him harmleſs againſt all perſons. But it was adjudged, the Conſideration was good, and requiring the Sheriff to do execution, it is reaſonable he ſhould ſave him harmleſſe; and the promiſe to give a Bond in a reaſonable penalty, is good enough; though not agreed what the penalty ſhould be: and Judgment was given for the Plaintiff. Mich. 20 Jac. B. R. *Arundel* and *Gardiner*'s Caſe. *Cro.* 2. Part. 652 See Sect. 41.

49. Aſſumpſit. The Plaintiff declared, That whereas he at the Defendant's requeſt demiſed to one J. S. his houſe in *L.* rendring 5 s. Quarterly; The Defendant promiſed, That if J. S. did not pay the Rent, that he would pay it; and alledged J. S. *virtute dimiſſionis* entred; and was poſſeſſed, and had not paid the Rent. The Defendant pleaded Non-Aſſumpſit; and found againſt him, and Judgment given; and he brought Errour in the Exchequer-Chamber, and aſſigned, the entry is alledged before the Term began; and ſo it is a diſſeiſin, and no Rent due; but the Court held the Rent to be due upon the contract; and the promiſe is the cauſe of the Action. It was adjudged for the Plaintiff. Hill. 21 Jac. B. R. *Brookbank* and *Taylor*'s Caſe. *Cro.* 2. Part. 684.

50. Note: It was Reſolved, That every Contract executory impoſes in it ſelf an Aſſumpſit: For when one doth agree to pay mony, or to deliver any thing, by that he doth aſſume or promiſe to pay or deliver the thing, and therefore when he ſelleth any goods to another, and agreeth to deliver them at a day to come, and the other in conſideration thereof, agreeth to pay ſo much money at ſuch a day; in this caſe both parties may have an Action of Debt, or an Action upon the Caſe upon an Aſſumpſit; for the mutual executory agreement of both parties, impoſes in themſelves as well a Reciprocal Action upon the Caſe, as an Action of Debt; and a barre in an Action of Debt, is a good barre in an Action upon the Caſe, upon an Aſſumpſit brought upon the ſame Contract. 44 Eliz. *C.* 4 Part. 92. *Slades* Caſe.

51. Aſſumpſit. The Plaintiff declared, That at the requeſt of *B.* he made a Gown for the ſaid *A.* which lay by him, becauſe it was not paid for: And the Defendant in conſideration the Plaintiff would deliver the ſaid Gown to the ſaid *A.* promiſed to the Plaintiff, that he would pay as much as the Gown was worth: and *ie facto* ſaid, That upon that promiſe he delivered the Gown to *A.* and that

that it was worth 15 l. and he requested the Defendant to pay it, and he refused. Upon Assumpsit brought, and found for the Plaintiff, and Judgment given, Errour was brought. It was assigned, It is uncertain to whom the money should be paid. 2. That the Consideration was not good, because the Defendant had no benefit by the delivery of the Gown to *A*; and also the delivery to *A*. is not said to be to her own use. But notwithstanding these, It was Resolved by all the Justices, That the Declaration was good; and the promise to pay, shall be intended to the Plaintiff; otherwise the promise should be idle; and also the delivery of the Gown out of his hands at the Defendant's request, is a sufficient Consideration. And it is usually to lay down an incertainty, viz. *tantum quantum meruit*; The Judgment was affirmed. Trinit. 3 Car. in the Exchequer. *Roberts* and *Sharp*'s Case. *Cro.* 1. Part. 55.

52. Note: It was Resolved by all the Justices, That an Action upon the Case upon an Assumpsit, lyes not upon a general Assumpsit to pay a Rent: But if the Consideration be, That he should forbear the Rent untill such a day, or upon such a special Consideration, there the Action doth lye. Hill. 9 Car. B. R. *Brett* and *Read*'s Case. *Cro.* 1. Part. 250.

53. A man promised to go such a Voyage in such a Ship before August following; and in an Assumpsit brought for non-performance, The Defendant pleaded, That before any breach, the Plaintiff at such a place *exoneravit cum*; It was said, The pleading of this discharge was not good, without shewing how. But the Court was of Opinion, That in as much as it was a Promise which was grounded upon word, it might be discharged by word before any breach; for *eodem modo quæ oritur, eodem modo dissolvitur*. Mich. 10 Car. B. R. *Langden* and *Stokes* Case. *Cro.* 1. Part. 279.

54. In Assumpsit; the Case was, *A*. by Will devised 60 l. to the Plaintiff, to be paid to him at his age of 21 years, and made his wife his Executrix, and left Assets; the Wife took to Husband the Defendant, the Plaintiff came of Age, and the Husband and Wife paid the Plaintiff 53 l. who gave the Defendant and his Wife a generall Release: The Defendant afterwards, in consideration that the Plaintiff at the Defendant's request had made the generall Release, promised the Plaintiff, that if his Wife did not pay the 7 l. residue of the Legacy in her life time, that he would pay it him after his Wives death; and the Wife did not pay it in her life time, *per quod Actio accrevit*: The Defendant demurrs upon the declaration: It was said, here is not a continuing consideration, but *nudum pactum unde non oritur Actio*. But the Opinion of the Court was, It was a good Promise; for if it had bin made at the time of the Release, it had been clearly good: and though it be after the Release, yet in regard it was made at the Defendant's request, and the Defendant hath the benefit of the continuance of the Release, upon this consideration it is good enough. H. 11. Car. Rot. 774. *Townsend* and *Hunt*'s Case. *Cro.* 1. Part. 295.

55. In Assumpsit: The Plaintiff declared, that at the Defendant's request he amended such a Boat and diverse Boats of the Defendant's, and that the Defendant promised to pay him for his labour and charges about the amendment of the said Boats, *tantum quantum meruit*, and he alledges *quod meruit* 30 l. Upon *Non Assumpsit* found for the Plaintiff, It was moved that the Declaration was not good for the Intricacy, and the Defendant cannot know how much to pay: like *Playter*'s Case. *C.* 2. Part. 34. But it was adjudged that the Declaration was good enough; and the Defendant (at whose request the Boats were amended) might well take conusance what Boats he desired to have repaired: and Judgment was given for the Plaintiff. Mich. 15 Car. B. R. rott. 132. *Conway* and *Aldwyt*'s Case. *Cro.* 1. Part. 414.

56. Assumpsit. The Case was; The Defendant promised the Plaintiff, That if the Plaintiff at the Defendant's instance would marry the Defendant's daughter, he would pay unto him 20 l. and give him 20 French pieces, which amounts to 6 l. It was moved, The Declaration was not good, for that the promise was ceremonial, if he *ad instantiam*, &c. and he doth not say, That he married her *ad instantiam Defendentis*, which he ought to have added. But the Court agreed, That he marrying her, It shall be intended *ad instantiam Defendentis*. It was also agreed, That the 20 French pieces, shall be French Crowns, which are the common Coyn of France here known. It was adjudged for the Plaintiff. Trinit. 6 Car. B. R. *Poynter* and *Poynter*'s Case. *Cro.* 1. Part. 141.

57. Assumpsit. The consideration was; Whereas the Defendant was indebted to the Plaintiff in such a sum; that the Plaintiff *pro aliquo tempore* should forbear; he promised. It was adjudged, That *pro aliquo tempore* is so short a time, that it is no Consideration, no more then *per Paululum tempus*. Trinit. 11 Car. B. R. rott. 687. *Tolson* and *Clerk*'s Case. *Cro.* 1. Part. 316.

58. Assumpsit. The Plaintiff declared, That the Defendant promised him, in Consideration that he would procure J. S. to be presented and instituted to the Chappel of the Tower, it being a Donative in the King's gift, to pay him 20 l. upon request: and layes *in facto*, that by his means the King presented him, and he was Instituted and Inducted:

Inducted: and upon Non Assumpsit, Judgment was for the Plaintiff; and thereupon a Writ of Errour brought, It was moved, That the Consideration was good, for that it is for his sollicitation and labour in procuring him to be presented, which in it self is no Simony, nor cause to avoid the Contract; and also it is a spiritual offence, of which the Common-Law takes no Notice. But the Court held the Consideration to be illegal; for the consideration is to have mony to procure him to be Rector of the Church, which is a Simoniacal Contract; and the Common Law doth take Notice of such Simoniacal Contracts. Also the Declaration is not good, for the promise is to pay after that he is Rector: and he shewes, he was Rector by his procurement upon this promise; which cannot be, for he never was Rector, but a person disabled by the Simoniacal Contract: the Judgment was reversed. Mich. 9 Car. in B. R. *Muskaller* and *Toddetick*'s Case. *Cro.* 1. Part. 263.

59. Assumpsit. The Plaintiff declared, That he being an Attorney, Mich. 14 Jac. prosecuted an Attachment of Priviledge against the Testator returnable in Hillary Term; and the Testator knowing of it, In consideration that at his request the Plaintiff would forbear to prosecute the said Writ any further against the Testator, the Testator did promise to pay him 50 l. After Verdict, it was moved, That the Action would not lye against an Executor. 2. It is not averred, the Plaintiff had good cause of Action. But it was adjudged for the Plaintiff; for Suits are not presumed to be causeless, and, the promise argues he desired to stay the Suit: And though it did not discharge the Action, yet it was a losse of the Writ, and a delay of the Suit, which was both a benefit to the one, and a losse to the other. Hill. 15 Jac. rott. 1765. *Bidwell* and *Cotton*'s Case. *Hob.* 216.

60. Assumpsit was made to the Mother, in Consideration that she would give her consent to the marriage of her daughter with the Defendant, the Defendant promised to give her 100 l. Upon Assumpsit brought, It was found for the Plaintiff; It was moved in arrest of Judgment, That this was no Consideration; for there is nothing to be done on the Plaintiff's part either of travel or charge, but to give a naked consent, which is not necessary to a marriage; nor is she her heir, or in her power as Guardian by Nature, or otherwise. But the Court held it a good Consideration, for that the Mother by the Law of Nature, and in the affection of the daughter, bare a special stroke to encline the daughters mind one way or other in her marriage, and the desire of her consent, and the working of it, shews it; and therefore it shall be presumed to be of importance to have her consent, which being had at the Plaintiff's request, shall be accounted a good Consideration to ground an Assumpsit upon. Hill. 11 Jac. rott. 1866. C. B. *Grisley* and *Lother*'s Case. *Hob.* 10.

61. Assumpsit. In consideration, that the Plaintiff promised to deliver to the Defendant to his own use a Cow; the Defendant promised to deliver to him 50 s. In Assumpsit brought, it was adjudged for the Plaintiff, and that the Plaintiff need not deliver the delivery of the Cowe, because it is a promise for a promise. But Note; the promises must be at one time, or else they will be both *Nuda pacta*. Hill. 12 Jac. rott. 131. *Nicholls* and *Reinbreds* Case. *Hob.* 80.

62. Assumpsit. The Plaintiff declared, In Consideration he should dye divers Devonshire Kersies into several Colours, naming so many as amounted in the whole to be 60; the Testator did promise to pay him a certain sum of money for the dying of every several Cloath: and the Plaintiff averrs, he dyed the said Cloathes, amounting to 59 *in toto*: whereas indeed they were 60; and that the money came to 19 l. Found and adjudged for the Plaintiff: It was said, It appeares he should have dyed 60, and he dyed but 59; and so the summ aforesaid not due: and also the Jury hath assessed dumages *occasione debiti prædict.* whereas it should have been *occasione non performationis Assumptionis*. But after Errour brought, the Court affirmed the Judgment; for that it was first averred, he dyed All; which appeared to be 60: and the other was but a misnumbring: and, 2. It was a debt, and a promise implyed upon it. Trinit. 12 Jac. Rott. 1599. *Boyle* and *Gird*'s Case. *Hob.* 89.

63. Note: It was agreed by all the Justices, That a meer voluntary Courtesie will not carry a Consideration to uphold an Assumpsit: But if that Courtesie be moved by Suit or request of the party that gives the Assumpsit, it will bind; for the promise although it followes, yet is not naked, but couples with the Suit before, and the merits of the party procured by the Suit; and therefore in the Case, where the Defendant requested the Plaintiff, that he would labour and endeavour to obtain his pardon for a Felony: and the Plaintiff doth his endeavour by riding and journeying at his own charges from *London* to *Royston*, and back again to the King to obtain his pardon; and in consideration thereof, the Defendant doth promise to pay the Plaintiff 100 l. though it did not appear that he did any thing towards the obtaining of the Defendant's pardon but riding up and down: Yet the same was holden a good Consideration to bring an Assumpsit upon. Mich. 13 Jac. in C. B. rott. 712. *Lampleigh* and *Brathwait*'s Case. *Hob.* 105.

64. An

64. An Aſſumpſit: The Plaintiff declared, That the husband of the Teſtator was indebted to the Plaintiff in 200 l. and the Defendant her ſelf was likewiſe indebted to the Plaintiff in 70 l. and upon an Accompt, the Defendant promiſed the payment of the moneys, which ſhe did not pay: whereupon the Plaintiff brought one Action of Aſſumpſit againſt the Defendant. And the Opinion of the Court was, That the Defendant was to be charged by two ſeveral Actions, becauſe ſhe was charged in two manners, one in her own Right, and the other as Adminiſtratrix; and therefore the Judgment given upon One Aſſumpſit brought, was reverſed *per Curiam* upon a Writ of Errour. Hill. 12 Jac. C. B. rott. 912. *Herenden* and *Palmer's* Caſe. *Hob.* 88. See Hill. 1655. rott. 2511. B. R. *Conge* and *Lawes* Caſe. acc. *Styles.* 472.

65. In Aſſumpſit: the Plaintiff declared, That the Defendant promiſed to deliver ſo many Oats to the Plaintiff, as, according to the rate of 10 s. 9 d. the Quarter, did amount to 52 l. to be delivered at ſuch a time; which money the Plaintiff promiſed to pay at ſuch a time; and that the ſaid Oats at ſuch a Rate came to 96 Quarters and 6 buſhels, which the Defendant had not delivered to him. Upon Non-Aſſumpſit, it was found for the Plaintiff. Errour was brought, and Errour aſſigned, That 96 Quarters and 6 buſhels at the rate aforeſaid, came to 52 l. 3 farthings; and ſo no breach. But the Judgment was affirmed, becauſe it was not certain, whether it amounted to any more; and becauſe it was not poſſible in effect to mince the Meaſure, ſo that it hit the juſt ſum, *et de minimis non curat Lex.* Hill. 11 Jac. C. B. *Laſtlow* and *Tomlinſon's* Caſe. *Hob.* 88.

66. *A.* promiſeth *B.* That if *B.* will pay 50 l. to *C.* his ſon, who was married to *D.* the daughter of *A.* at ſuch a time, that he will pay 100 l. to *D.* his daughter at ſuch a time. *B.* payes the 50 l. to *C.* *A.* fails to pay the 100 l. *B.* dyes Inteſtate, his Adminiſtrator brings an Action upon the Caſe upon the promiſe againſt *A.* And adjudged, the Action maintainable, though the Adminiſtrator receive no benefit by it if he recover. Hill. 21 Car. *Styles.* 6.

67. The Defendant promiſed the Plaintiff, That if he would forbear his Suit againſt one who had aſſaulted and beaten him, that he would pay to the Plaintiff ſo much money as he was damnified by the Aſſault and Battery. After Verdict, It was moved, It did not appear, that the Plaintiff had any Intention to ſue the party for the battery, ſo it is no Conſideration; and alſo he doth not ſet forth, he gave Notice what damages he ſuſtained. But the Court ſaid, The Defendant took Notice of it, when he made the Aſſumpſit; and the requeſt to perform the Aſſumpſit, implyes Notice. Adjudged for the Plaintiff. Mich. 23 Car. B. R. *Finer* and *Jeffery's* Caſe. *Styles.* 57.

68. In the caſe of an Aſſumpſit it was holden *per Curiam*, That if one promiſeth to ſave another harmleſs from any thing, he that made the promiſe ought to do it at his perill without requeſt; and the requeſt is not material, although the promiſe ſay, upon Requeſt: But if he be damnified, If I do recompence him upon requeſt made, the promiſe is not broken. Mich. 24 Car. B. R. *Smithſon* and *Wells* Caſe. *Styles.* 141.

69. It was Reſolved by the Court, in an Action upon the Caſe upon an Aſſumpſit brought againſt an Executor, That an Executor may be charged upon a Collateral promiſe, if there were a breach of it in the life of the Teſtator. Mich. 1649. *Chriſtopher* and *Howes* Caſe. *Styles.* 158.

70. Aſſumpſit. The Plaintiff declared, That the Defendant in conſideration that the Plaintiff would deliver to the Defendant's ſon ſuch Wares as his ſon ſhould deſire, did promiſe the Plaintiff, That he would pay the Plaintiff for them; and averrs, he delivered certain Wares to the ſon, and the Defendant did refuſe to pay for them. It was moved, That it doth not appear the ſon of the Defendant did deſire the Wares, and the Declaration ought to ſet forth an Actual deſire. But the Opinion of the Court was, That the Acceptance of the Wares was an actual deſire, and that is more then a verbal deſire. Adjudged for the Plaintiff. Mich. 1649. *Johnſon* and *Abington's* Caſe. *Styles.* 163.

71. *A.* and *B.* brought Aſſumpſit againſt J. S. and declared, That the Defendant in conſideration of 10 l. paid by the Plaintiffs to the Defendant, promiſed to the Plaintiffs, to procure certain Cattel of the Plaintiffs taken from them by a third perſon, to be redelivered to them ſuch a day; and for not performance, they brought their Action: And being found for the Plaintiffs, The Defendant moved, That the Plaintiffs ought to have ſeveral Actions, and not one Joynt Action, in regard the promiſe upon which the Action was brought, was not one promiſe, but ſeveral promiſes made to each Plaintiff. But the better Opinion of the Court was, and ſo the Jury found, That the promiſe was made to them both, and not ſeveral: and the Conſideration given is intire, and cannot be divided, and there is no inconvenience in joyning in the Action in this caſe: but if one had brought the Action alone, it might have been queſtionable: and Judgment was given for the Plaintiffs. Hill. 1649. B. R. *Vaux* and *Draper's* Caſe. *Styles.* 203.

72. An Executor brought an Action upon the Caſe againſt an Adminiſtratrix; and declared,

In conſideration that he would forbear Suit till ſhe had taken out Letters of Adminiſtration, ſhe did promiſe to pay the Plaintiff a certain ſum of money owing to him by the Inteſtate. Judgment was for the Plaintiff. And upon Errour brought, it was adjudged, the ſame was no good conſideration; for that the Defendant was not lyable to be ſued as Adminiſtratrix, untill ſhe had taken out Letters of Adminiſtration, except there were a Cauſe depending, as here there was not; and it doth not appear that ſhe did intermeddle with the goods; nor is the Defendant compellable to take Letters of Adminiſtration, for they may be granted to the next of Kin by the Ordinary: the Judgment was reverſed. Hill. 1650. Rott. 100. *Roſier* and *Langdale*'s Caſe. *Styles*. 248. See Hill. 1653. B.R. *Boyle* and *Scarborough*'s Caſe. *Styles*. 395. acc.

73. Aſſumpſit. The Plaintiff declared; That in conſideration that the Plaintiff would ſurrender to the Defendant and his heirs a Copy-hold according to the Cuſtome of the Mannor, The Defendant did promiſe to pay the Plaintiff 500 l. A Verdict was for the Plaintiff. The Defendant moved, The Conſideration on the Plaintiff's part was not performed; for the Conſideration was, to ſurrender to the Plaintiff and his heirs; and he hath ſet forth the ſurrender, to be to the hands of a Copy-hold Tenant to the uſe of the Defendant, which is no ſurrender, untill it be preſented in Court. And of that Opinion was *Rolls*, Chief Juſtice; for it is not an effectual ſurrender, untill it be preſented in Court, though it be expreſſed to be *ſecundum Conſuetudinem Mariti*. Paſch. 1651. B. R. *Shame* and *Sham*'s Caſe. *Styles*. 256. 257. 280.

74. Aſſumpſit. The Plaintiff declared, That the Defendant in conſideration that ſhe the Plaintiff would leave her Father's houſe, and come to the houſe of the Defendant at ſuch a place, did promiſe unto her, that he would marry her; and ſets forth, that thereupon ſhe did leave her Father's houſe, and did come to the Defendant's houſe *et obtulit ſe in maritagium conjungi*. Upon Verdict for the Plaintiff, It was moved, That ſhe did not ſhew When ſhe left her Father's houſe; nor that ſhe gave him notice of it. The Queſtion was, Whether the words, *Obtulit ſe*, implyed Notice. It was ſaid, That if the thing be to be done by the party himſelf, Notice ought to be; otherwiſe, if it be to be done by a ſtranger. *Jerman*, Juſtice, ſaid, There is no tender of Marriage, if the other party be not there. It was adjudged for the Plaintiff. Paſch. 1651. B. R. *Peck* and *Ingram*'s Caſe. *Styles*. 263. & 273.

75. Note: It was agreed by the Court, That if a man doth promiſe to a Feme-Covert, That if ſhe will procure her husband to levy a Fine of ſuch Land, that he will give her a Riding-Suit; That the Husband and Wife cannot joyn in an Action for breach of this promiſe. So if a Promiſe be made to the Husband, to pay a Legacy which was given to his Wife; the Action muſt not be brought in the names of the Husband and Wife, but in the husband's name onely; and ſo it was adjudged, in an Aſſumpſit. Mich. 1651. B.R. in *Cottrell* and *Theobalds* Caſe. *Styles*. 297.

76. Aſſumpſit. The Plaintiff declared; Whereas there was a ſpeech of a Marriage betwixt her and the Defendant: In conſideration that the Plaintiff would marry the Defendant; the Defendant did promiſe to her, that he would marry her; and afterwards the Defendant in conſideration that the Plaintiff would diſcharge the Defendant of his promiſe, did promiſe that he would pay to the Plaintiff 1000 l. and ſhe ſets forth, ſhe did diſcharge the Defendant of his promiſe of Marriage. Upon Non-Aſſumpſit and Verdict for the Plaintiff, It was moved, That here are two promiſes, and it is incertain to which the Declaration doth relate. And, 2. the promiſe is to diſſolve a Contract of Marriage, which is a thing illegal, and ſo no Conſideration. But *per Curiam*, here is a mutual promiſe made by both parties, and divers Actions have of late been brought for this cauſe, and have been adjudged good; and the Engagement to marry is not meerly a ſpiritual matter; and this Action is not to compell the Marriage upon the Contract, but to recover damages, and here is temporal loſſe; and therefore the Action doth well lye; and Judgment was given for the Plaintiff: and it ſhall be intended, that the diſ-engagement was to the party himſelf. Trinit. 1651. B. R. *Baker* and *Smith*'s Caſe. *Styles*. 295. & 303. 304.

77. Note; It was ſaid by *Rolls*, Chief Juſtice, If one make a Leaſe for years of Land rendring Rent; and afterwards the Leſſee promiſeth the Leſſor to pay the Rent, an Action will lye upon this Promiſe, if the promiſe be made at the time of the Leaſe made, but in the Action the promiſe muſt be expreſly averred to be ſo. Mich. 1653. B. R. *Styles*. 400.

78. Aſſumpſit. The Plaintiff declared; That the Defendant in conſideration that the Plaintiff would forbear to proteſt a Bill of Exchange drawn upon the Defendant, did promiſe he would pay the moneys when he ſhould next come to *London*. It was moved upon a Verdict for the Plaintiff, That there was no Conſideration to ground the promiſe upon; for he doth not ſhew, that he came to *London*, but dyed at *Plymouth*. *Per Curiam*, the coming to *London* is not material; for the payment of the money was a duty; and the moneys to be paid were received beyond Sea; and ſo there is a

duty

duty and a good conſideration. Judgment for the Plaintiff. Hill. 1654. *Pinchard* and *Fowk*'s Caſe. *Styles* 416.

79. The Debtee accepted of the Debtor 100 l. for his debt of 400 l. the Defendant upon payment of the mony, had a generall Releaſe; and afterwards promiſed, in conſideration that he would make a generall Releaſe, he would pay him the reſidue of the debt when he ſhould be able: The Debtor became able, and the Debtee ſued him for the reſidue upon that promiſe; The Debtor pleaded the Statute of 21. Jac. of Limitation of Actions, and that was to a Bill exhibited in Equity for the reſidue of the debt; It was moved for a Prohibition to the Court of Equity, which was denyed. 1. Becauſe there is no remedy but in Equity, for the Aſſumpſit made before the Releaſe was diſcharged by the Releaſe; and the Aſſumpſit made after, void for want of conſideration, the debt being releaſed before; and it is not within the Statute of Limitation of Actions becauſe it is onely a Truſt repoſed in the Debtor, that he will pay the reſidue when he is able. Hill. 17. Car. in B. R. adjunged.

80. In an Action upon the Caſe, for the payment of a Marriage portion; The Caſe was, That the Father promiſed to pay the Marriage-portion *ad diem Maritagii* or *infra* 10. *dies poſt Maritagium*: and in an Aſſumpſit brought, upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff: It was moved in ſtay of Judgment, That in the Declaration it is not expreſſed, That Notice thereof was given by the Plaintiff to the Defendant, of the day of Marriage; It was adjudged that in this Caſe no Notice was to be given, the Promiſe being made by the Father, for the Law preſumes he had Notice of it, and Notice here is no part of the promiſe, and the requeſt onely implies a Notice; Wherefore it was agreed, that the Declaration was good; and a difference was taken where the payment is to be made to the party, and where to a ſtranger upon requeſt. See *Coo.* 6. Part. *Boothe*'s Caſe. & *Coo.* 8. Part. *Frances* Caſe: and the Caſe was ſo adjudged this Term, as it was ſaid by *Hitcham* Serjeant; wherefore Judgment was entred for the Plaintiff. Trin. 1. Car. *Alſrey* and *Blackamore*'s Caſe. *Bolſtr.* 3. Part. 326. 327.

81. Action upon Aſſumpſit againſt an Executor upon a promiſe made by the Teſtator for a Marriage-portion: Upon *Non Aſſumpſit*, It was found for the Plaintiff: It was moved 1. That this is matter matrimoniall for which an Executor ſhall not be charged, if it were not by deed, and 45. E. 3. 24. and diverſe other books vouched to that purpoſe: Alſo, Trin. 13. Jac. in B. R. *Sanders* and *Eſtabie*'s Caſe, and *Herban* and *Eliot*'s Caſe in the Exchequer was vouched, where in the like Caſe Judgment being given in B. R. for the Plaintiff; The matter now alledged, was alledged there for Error, in the one Caſe where the promiſe was made by the Teſtator for a Marriage portion; and the other, where promiſe was made by the Teſtator, that if he married his Kinſwoman he promiſed to give him ſo much, and it was holden in the Exchequer; that the Executor was not to be charged with this promiſe of the Teſtator, the promiſe being to pay 60 l. and 10 l. Quarterly *in Maritagium*. 2. It was ſaid that here was no notice given of the day of Marriage; and if a man be bounden to pay another ſo much mony at the Marriage day of J. S. he ought to give notice to him of this. But it was the Opinion of the whole Court, and ſo reſolved, That the Action did well lye againſt the Executor upon the Aſſumpſit of the Teſtator: 2. It was holden, That no notice was requiſite to be given of the Marriage, although part of the mony was to be paid upon the Marriage day, for that the promiſe makes it a debt which ſtill continues; and two Preſidents were ſhewed, one Trin. 44. Eliz. in B. R. Rott. 238. *Hodges* and *Waveley*'s Caſe: where the matter demanded is become a debt no notice is to be given. And the other Trin. 7 Jac. in B. R. Rot. 705. *Bradley* and *Cobb*'s Caſe: where Judgment was given upon ſuch a promiſe without any Notice given; and a difference was taken, where a collateral thing is to be done upon a Marriage day; and where payment of mony and a due debt to the party himſelf, and where it was objected, that the Action did not lye againſt the Executor, being for a thing which it was impoſſible for the Teſtator himſelf to perform, it being a Marriage-portion to be paid upon promiſe after his death; It was anſwered, That 37 Eliz. Judgment was given here in ſuch Caſe before *Slade*'s Caſe was reported. *Co.* 4. Part. 92. That an Action lyeth againſt an Executor upon an *Indebitatus Aſſumpſit*; and in this Caſe it is not to pay after his death, but it is to be paid *tempore mortis*: and if the Teſtator, upon a good conſideration, make promiſe to pay ſuch a ſum a year after his death, his Executor ſhal be charged with it: It was adjudged for the Plaintiff. Mich. 14. Jac. in B. R. *Berisford* and *Gooddenſh*'s Caſe. *Bolſtr.* 3. Part. 235. 236. 237.

82. Upon Aſſumpſit, The Caſe was: Goods were pawned to a man by J. S. who ſaid in the preſence of the Defendant, That if J. S. would not pay him his mony, he would then ſell the pawn to raiſe the mony; whereupon the Defendant ſaid, Keep the goods untill ſuch a day by you, and if he do not then pay you, I will pay you the meny and take the goods. Upon this the Plaintiff kept the goods by him without ſale; and the Defendant not paying the mony, the Plaintiff brought his Action; It was agreed *per Curiam*, That this was a good conditionall bargain and ſale of goods, and that in

th's Caſe there was a good conſideration to raiſe a promiſe. Trinit. 13. Jac. in B. R. *Copper* and *Dickenſon*'s Caſe. *Bolſtr.* 3. Part. 70.

83. In Aſſumpſit: The Caſe was, The Defendant was a Suiter to a young maid who did ſojourn in the Plaintiff's houſe; afterwards the Defendant did marry her, and did then deſire the Plaintiff that his Wife might ſtill continue to ſojourn with him for a year longer, to which the Plaintiff agreed; and afterwards, which was about the middle of the year, the Defendant did promiſe, that in conſideration that he would ſuffer his Wife to continue there as a ſojourner for the whole year, that he would pay him for the whole year, as well for that which was paſt as for that which was to come; It was objected, that Aſſumpſit did not lye being grounded upon a conſideration which was paſt, See 10. Eliz. *Dyer* 272. But it was agreed by the whole Court, that the conſideration was good to raiſe the promiſe; for although the Plaintiff had agreed to ſojourn the Defendant's Wife for a year, yet there was no certain ſum agreed upon to be paid for the ſame, and therefore it was in his election to keep her till the end of the year or not, and therefore if the Defendant had not made him this promiſe, in the middle of the year, to pay him ſo much, he would not have ſojourned his Wife till the end of the year: It was adjudged for the Plaintiff. Trin. 17. Jac. in B. R. *Cotten* and *Weſcot*'s Caſe. *Bolſtr.* 3. Part. 187.

84. In Aſſumpſit: The Caſe was, A friend of the Defendant coming to the Plaintiff's houſe being an Inn-keeper in *Ciceſter*; and there ſick, the Defendant came thither, and hearing of it, ſaid to the Plaintiff, the Inn-keeper; Provide for him ſuch neceſſaries as he ſhall want, *& pro omnibus talibus neceſſariis*, did promiſe to him *benè ſolvere*: and the Plaintiff in his Declaration ſhewed that he found him neceſſaries amounting to ſuch a ſum: It was moved, The Declaration was not good becauſe he did not ſhew what neceſſaries in particular he provided for him: But it was the Opinion of the whole Court, that the Declaration was good, and that the generall Allegation, [That he had provided him neceſſaries] amounting to 15 l. was good: It was adjudged for the Plaintiff. Paſc. 13. Jac. in B. R. *Cryps* and Sir *Hen. Boynton*'s Caſe. *Bolſtr.* 3 Part. 31.

85. In Aſſumpſit: The Caſe was, The Plaintiff delivered certain Cloaths to the Defendant for ſo much, *& ſic indebitatus fuit*, to him in ſo much, The Defendant, *poſtea in conſideratione indè*, did promiſe to pay this a year after; Upon *Non Aſſumpſit*, It was found for the Plaintiff: It was moved in ſtay of Judgment, that this promiſe ſhould not bind him, (it being ſaid, *poſtea in conſideratione indè*, he promiſed), which promiſe is grounded upon a conſideration paſt: But it was reſolved *per Curiam*, that the promiſe here was grounded upon a good conſideration; for that the debt there remained, and no diſcharge could be made of it, but by payment. Mich. 14. Jac. in B. R. *Hodge* and *Vavior*'s Caſe. *Bolſtr.* 3. Part. 222.

86. In Aſſumpſit: The Caſe was, The Defendant being to account with the Plaintiff *pro diverſis debitis, in ſimul computaverunt*; and found upon the account, to be in arrearages in ſuch a ſum, *& in conſideratione indè*, the ſame day, the Defendant did promiſe to pay this at a certain day to come; at which time he failed to pay the ſame; and being found for the Plaintiff: upon *Non Aſſumpſit*, It was moved in ſtay of Judgment, That the Declaration was not good, becauſe it was not ſhewed the promiſe to be made in conſideration of forbearance, but in *conſideratione indè*: But the Opinion of the whole Court was, That *in conſideratione indè*, was a good conſideration without ſhewing any forbearance; for here is a duty preſently to be paid, or afterwards by promiſe to pay this. Trin. 14. Jac. in B. R. *Johnſon* and *Cullamor*'s Caſe. *Bolſtr.* 3. Part. 208.

87. In an Action upon the Caſe upon a Promiſe for a Horſe, The Plaintiff declared, That the Defendant made him a promiſe in this manner, *viz.* That if the Plaintiff would make him a Leaſe of 21 years, of certain Land for 10 l. yearly Rent, he, in conſideration thereof, did promiſe to give him a Horſe, and ſets forth that he made a Leaſe to him of the Land; and he had not given him the Horſe: It being found for the Plaintiff, It was moved in arreſt of Judgment that the Plaintiff had not intituled himſelf to the Action; having ſet forth generally that he made him a Leaſe, making no mention of any Rent reſerved: It was the opinion of the whole Court, That by this Leaſe, thus made, without any Rent reſerved, he had not purſued the contract, and ſo by conſequence the Action was not maintainable for the Horſe; It was adjudged againſt the Plaintiff. Paſc. 13. Jac. in B. R. *Lea* and *Adam*'s Caſe. *Bolſtr.* 3. Part. 35. 36.

88. In Aſſumpſit: The Caſe was, That J. S. being indebted to the Plaintiff in ſuch a ſum, for which the Plaintiff purpoſed to ſue him; for the preventing the ſuit, the Defendant came to the Plaintiff and deſired him to forbear him for a reaſonable time, and if he did not then pay the Plaintiff, the Defendant promiſed to pay the ſame to the Plaintiff; and the Plaintiff ſets forth, that upon this promiſe he did forbear to ſue him, and that J. S. did not pay him; It was moved that the Declaration was not good, becauſe it is not ſhewed therein, how J. S. became firſt indebted to the Plaintiff, & alſo becauſe it doth not ſhew certainly what time it ſhould be that he ought to forbear him: The Opinion of the whole Court was, That the

judge

Declaration was good, without ſhewing how *indebitatus fuit*; and alſo becauſe the Court ſhall judge what ſhall be ſaid to be a reaſonable time; and it appeared to the Court, that the Plaintiff did forbear him for 8 years, which is a reaſonable time. Trin. 14. Jac. in B. R. *Lingen* and *Broughton*'s Caſe. *Bolſt.* 3. Part. 206.

89. In Aſſumpſit: the Caſe was, In conſideration of 40 l. given by the Plaintiff to the Defendant, the Defendant did promiſe to take the Son of the Plaintiff for his Apprentice for 9 years, and to teach him his Trade, and to find him, during all that time, with Meat, Drink, and Apparell; The Plaintiff ſets forth in his Declaration that he had paid him the 40 l. and that the Defendant, according to his promiſe, had not found his Son with Meat, Drink, and Apparell. Upon *Non Aſſumpſit*, It was found for the Plaintiff; It was moved in arreſt of Judgment, That the Declaration was not good, becauſe he hath not ſhewed therein that the Defendant had taken his Son to be his Apprentice, and if he never was Apprentice, then there could never be breach of promiſe. For the Plaintiff it was ſaid, That there were ſeverall conſiderations layed, the one not depending upon the other; and the Plaintiff hath layed the breach of one of them, *viz.* the not finding him with Meat, Drink, and Apparell: But the Opinion of the whole Court was, That the Declaration was not good. For if he hath not taken him his Apprentice, then the Term is not begun: for when he is Apprentice, he is to find him with Meat, &c. and the Plaintiff ought to have averred in his Declaration, that he had taken him for his Apprentice, and for want of ſuch averment, the Declaration is not good; and the Plaintiff is to do the firſt Act, *viz.* He is to put his Son to the Defendant to be his Apprentice: Adjudged againſt the Plaintiff. Mich. 14. Jac. in B. R. *Talton* and *Wright*'s Caſe. *Bolſt.* 3. Part. 221.

Actions *upon* Statutes.

1. NOte: Upon Aſſembly of all the Juſtices upon the King's Commandment, A Queſtion was moved, That if an Offence be made by a Statute, which was no offence at the Common-Law, and a penalty is appointed by the Act, to be recovered in money in any of the King's Courts of Record by Action of Debt; If this Offence and the penalty may be determined and Recovered by a Commiſſion of *Oyer* and *Terminer* in the Country? And the better Opinion of the Juſtices was, That it could not, but onely in the four Ordinary Courts of Record at *Weſtminſter*: But if no Court be appointed, it is otherwiſe: For then the King ſhall have his Prerogative to ſue in what Court he pleaſeth. Mich. 6 and 7 Eliz. *Dyer.* 236.

2. Two men being robbed of a Joynt ſum of money in the Hundred of *W.* brought a joynt Action againſt the Inhabitants of the ſaid Hundred, upon the Statute of *Wincheſter*. The Defendants pleaded, That they had purſued the Felons by three Towns, naming them in the ſaid Hundred, to the Town of *A.* in the ſaid Hundred next adjacent, and there levied Hue-and-Cry of the Inhabitants; It was adjudged to be no Plea; for that the Statute is not ſatisfied without apprehending of the parties, or of the Defendant's knowing their names, that ſo they might be Indicted and Outlawed. 22 Eliz. *Dyer.* 370. See now, the Statute of 27 Eliz.

3. In Debt brought upon the Statute of 5 E. 6. of Uſury; the Plaintiff in his Writ did miſ-recite the Statute, to be made 5 E. 6. The Plaintiff declared of a Loan of 85 l. for a moneth, for two marks of Intereſt and Uſury: and that the Defendant had and received the ſaid Uſury. The Defendant pleaded, *Quod non habuit, nec recepit* for the Loane of the ſaid ſum of 85 l. the ſaid two marks *ultra* the ſaid 85 l. It was holden by the Court, That the ſame was a Confeſſion of the Contract, which is within the Statute; and then the Court *ex Officio* ought to take Notice of it, and give Judgment accordingly; and the Statute provides for the puniſhment of Uſurers, viz. the Lenders, and not the Borrowers; and the Intent and hope of the gain, is within the Statute; although the party doth not receive the money hoped for: And if one promiſe to maintain, although he doth not maintain in fact; yet he is within the Statute of maintenance. See 1 Ma. *Dyer.* 95. *Whitton*'s Caſe.

4. An Action upon the Statute of 1 & 2 Ma. cap. 12. was brought for leading of a diſtreſſe into a Forrain County; and becauſe the Statute giveth 4 l. and treble damages; therefore it was adjudged, That the Plaintiff ſhould not have Coſts, although they were aſſeſſed by the Jury. Hill. 2 Eliz. *Dyer.* 177. See upon the ſame Statute, If an Action be brought upon the ſecond branch of the ſaid Statute of impounding on intire diſtreſſe in ſeveral Pounds; there the place is not material: but it is otherwiſe in the firſt branch; for that there the diſtance of the place is the Offence. 7 Eliz. *Dyer.* 338.

5. A man who holdeth Lands of ſeveral Lords by Heriot-Cuſtome, to defraud one of the Lords of his Heriot, makes a fraudulent guift of all his Cattel heriotable, which are 20 horſes; upon an Action brought upon the Statute of 13 Eliz. cap.

cap. 5. of fraudulent Conveyances; It was holden, That the Action did well lye, by the intendment of the Statute; for the value of the 20 horſes. *Manwood contra*, Becauſe the Statute did never intend to recompence a man more then he was grieved and endamaged; and he was endamaged, but in not having one of the horſes for his Heriot. Trinit. 18 Eliz. in C. B. *Dyer.* 351.

6. Debt was brought upon the Statute of 32 H. 8. Cap. 9. of Maintenance and buying of Titles, againſt two; and the Plaintiff declared, That the Defendants had bargained, granted, demiſed, and to Farm lett, for years to *A.* and *B.* a Meſſuage, and 11 Acres of Land belonging to it, of the value of 80 l. *per annum.* Of which Lands and Tenements, the Defendants themſelves, nor any of their Auncеſtors, nor they by whom the Defendants claimed the ſaid Tenements, were in poſſeſſion of them, nor of the Reverſion, nor Remainder of them, nor took the Rents or profits of them, by the ſpace of a whole year next before the ſaid Bargain, grant, and demiſe thereof made; for which the Action was brought: and the Defendants did demur upon the Declaration: divers Exceptions were taken to the pleadings: all which were not agreed by the Juſtices. The matters in Law agreed by the Juſtices, were theſe: 1. That this Statute, being a penal Law, ſhould not be taken by Equity. 2. That a Leaſe or promiſe for years made againſt the form of the Statute, was within the Statute as well as a Leaſe for life, or an eſtate in tail, or in Fee. But they held, That every Leaſe for years, where the Leſſor hath not been in poſſeſſion, nor received the profits by a year, was not within the danger of the Statute: As if a man recovereth in a Formedon or other Action, or entreth by Mortmane, they may leaſe the Lands for years, notwithſtanding that they have not been in poſſeſſion a whole year before: but a pretended Right or Title within the Statute is, where one is in poſſeſſion of Lands or Tenements, and another who is out of poſſeſſion, claims the ſame, or ſueth for the ſame: It was Agreed and Reſolved, That in the principal Caſe, the Plaintiff ought to have ſhewed, That the Defendants promiſed to Leaſe the ſame Lands, of which they were out of poſſeſſion, or ought to have averred, That the Leaſe was made for maintenance; which he hath not ſhewed nor averred. And therefore the Court was clear of Opinion, That it ſhall be intended, That the Defendants were in poſſeſſion; becauſe it is ſhewed, That they made the Leaſe; and he who makes a Leaſe, ſhall be intended in poſſeſſion: and if he be ſo, although it be but poſſeſſion for an hour, it is out of the Statute: and ſo it was adjudged for the Defendants. See *Partridge* and *Strange*, and *Croker's* Caſe. Hill. 7 E. 6. *Plow.* Com. 78. And ſee 6 E. 6. *Dyer.* 74. the ſame Caſe.

7. Note: Upon the ſaid Statute of 32 H. 8. Cap. 9. of Maintenance and buying of Title, theſe Points have been reſolved: 1. If *A.* be owner of Land in poſſeſſion, and *B.* who hath no Right to it, contracteth with another for the Land, although the Grant be meerly void, yet the Grantor and Grantee are both within the Intent of the Statute. 2. If the Diſſeiſee (being out of poſſeſſion) contracteth with another for the Land, he thereby makes his good Right, a pretended Right, and the Grantor and Grantee are both within the Statute. 3. Whoſoever hath the abſolute Ownerſhip of the Land, ſuch an Owner may at his pleaſure bargain or contract for the Land, and needs not ſtay a year before he make a Sale or Contract for it; and therefore the Mortgagee who hath redeemed his Land, may ſell it within the year; and if the Diſſeiſee doth Releaſe to the diſſeiſor, the diſſeiſor may ſell the Land within the year, and the ſame is out of the Statute. 4. If the Diſſeiſee, diſſeiſeth the heir of the diſſeiſor, although that he hath an ancient Right; yet for as much as his poſſeſſion is not lawfull, if he bargaineth the Land before he hath been in poſſeſſion by a year, he is within the Statute, becauſe that the heir of the diſſeiſor hath right to the poſſeſſion. 5. The buying of a Leaſe for years is within the Statute, and the Offender ſhall forfeit the value of the Land: But if a man maketh a Leaſe for years to try a Title in an *Ejectione Firmæ*, the ſame is out of the Statute, becauſe it is in courſe of Law; but if he maketh it to a Great Man, or to any other to ſway, or countenance the cauſe, the ſame is within the Statute. 6. A Cuſtomary Right, or a pretence unto it is within the Statute. 7. If there be Tenant for life the Remainder in Fee by good title, he in the Remainder may obtain the pretended Right or Title of another, becauſe the ſame is a means to extinguiſh Suits and troubles, and it cannot prejudice any one. 8. If a Diſſeiſor maketh a Leaſe for life or years, the Remainder for life, in Tail, or in Fee; he in the Remainder cannot take any promiſe or covenant, that when the Diſſeiſee hath entred upon the Land, and recovered the ſame, that then he ſhall convey the Land to him in the Remainder, to avoid the particular eſtate, becauſe the ſame is not a lawfull and reaſonable means. See *Co. Inſtitut.* 1. Part. 369. a

8. *A.* ſeiſed of Land, Covenanted with his eldeſt ſon and two others, to ſtand ſeiſed to the uſe of himſelf for life the Remainder to his eldeſt ſon in tail, remainder to *B.* his baſtard ſon in tail; and if any of them in Reverſion ſhould make any diſcon-

diſcontinuance, or do any other prejudice to any in the Remainder, that his eſtate ſhould ceaſe, and that then they would ſtand ſeiſed to the uſe of ſuch next in the remainder, according to the limitation of the deed: *A.* afterwards granted all his eſtate to his eldeſt ſon, who levied a Fine with proclamations of the Land, and 5 years paſſed; the Baſtard ſon ſuppoſing that he had title without any entry, made a Leaſe to try the title; and afterwards an Information was exhibited upon the Statute of 32 H.8. Cap. 9. of pretenſed titles againſt the Baſtard. And the Opinion of all the Juſtices was; 1. That that was a Leaſe within the Statute. 2. That no uſe upon the Deed could ariſe to the Baſtard, without an expreſſe Conſideration; becauſe he was not *de Sanguine Patris*, but in Law a ſtranger. 3. That if the Baſtard had any Title, it was barred by the Fine; and alſo he was not the next in the Remainder, to enter for the forfeiture, living the Father: who had a new Title devolved to him. Mich. 23 Eliz. *Dyer.* 374. *Worſley's* Caſe.

9. Debt was brought by Sir *Rich. Buckley* againſt the Sheriff of *A.* upon the Statute of 23 H.6. Cap. 13. concerning Elections of Knights to the Parliament. And the Plaintiff recited a great part of the Statute of 27 H. 8. Of the uniting of *Wales* to *England*; and of the Statute of 34 and 35 H. 8. That every County of *Wales* ſhould find a Burgeſſe to the Parliament of *England*, and that a Writ was directed to the Defendant Sheriff of *A.* to make Election of a Knight, &c. and *Licet* the Plaintiff was *electus et nominatus*, Knight for the County of *A.* to come for the ſame County to the Parliament, *per majorem numerum Gentium* within the ſaid County of *A.* by proteſtation that the ſaid Sheriff returned no Indenture of the ſaid Election; he *in facto* ſaid, he did not return the Plaintiff to be Knight for the ſaid County, but returned the ſaid Writ; and that one *B.* was elected Knight to come for the ſaid Parliament; for which he brought his Action for 100 l. And it was adjudged, That the Action did well lye: for they ſaid, Although the Statute of 27 H. 8. doth not make mention of the Return of Knights choſen to the Parliament; nor of the penalty againſt the Sheriff for his falſe Return; yet the Plaintiff ſhall have benefit of it, becauſe they of *Wales* ſhall have all ſuch Rights and Priviledges and Lawes within this Realm, as other the Subjects of the King of *England* ſhould have: And it was holden, That the *Licèt electus fuit per majorem numerum Gentium* was good and certain enough, without expreſſing the number of the Freeholders who made the Election. Trinit. 1 & 2 Ma. *Plowden.* Comment. 118. Sir *Rich. Buckley's* Caſe.

10. In Action upon the Statute 13 E. 1. of *Winchester*, Of Hue and Cry: The Caſe was, That the Plaintiff received monyes of the Lady *Rich*, and when he had this monie he was robbed of it, and the mony taken from him; and the Queſtion was, Whether the Plaintiff, who was the Servant and the Receivor, or the Lady, ſhould bring the Action againſt the Hundred? and the Opinion of the Juſtices was, that the Action brought by the Servant, the Receivor of the mony, was well brought againſt the Hundred; and *Rodes*, Juſtice, ſaid, That if my Servant be poſſeſſed of my goods, and be robbed, he ſhall have an Appeal. Trin. 28. Eliz. in C. B. *Tirret's* Caſe. *Goldeſb.* 24. See *Croſtwayt* and the Hundred of *London's* Caſe. Hill. 1651. *Styles.* 318. acc.

11. It was reſolved upon the Statute of 13 E. 1. of *Wincheſter*, That if a man be robbed in the day in his Houſe, or in the night, the Hundred ſhall not be charged; for every one ought to defend his own Houſe at his perill: and ſuch a Robbery for which the Country ſhall be charged, ought to be done openly, ſo that the Country themſelvs may take notice of it: 27. Eliz. in C. B. *C.* 7 Part. 6. *Sendit's* Caſe, See *Aſhpook's* Caſe. *C.* 7. Part. ibid. acc. and there it was reſolved that where a man was robbed in *January* after Sun ſetting, and yet during day light, that the Hundred ſhould anſwer for it, for it is a convenient time for men to travel, or to be about their buſineſſe: But if a Robbery be done *ante Lucem*, there the Hundred ſhall not be charged. 29. Eliz. in th: Co. Pleas. *Co.* 7. Part. 6. *Milborn's* Caſe. See Paſc. 29. Eliz. *Leon.* 57. acc. See Paſc. 3. Car. *May* and the Hundred of *Morley's* Caſe. Rott. 139. *Cro.* 2. Part. 106. acc.

12. In an Information upon the Statute of 5. E. 6. cap. 15. of Regrators, &c. for buying of Wheat-meal, and converting it into Starch: It was reſolved by all the Juſtices, That the ſame was not within the Statute; But it was agreed by them, that if one bought Corn, and thereof made Meal, or Oatmeal, and ſold it, that this was within the Statute, for it is no alteration; but Starch is altred by a Trade, which is a Myſtery, and ſo it is not the ſame thing that was ſold. Trin. 9. Jac. in C. B. *Weſt's* Caſe. *Owen* 135. Note, *Cook*, Chief Juſtice, ſaid in the ſame Caſe, That it was adjudged Mich. 40. Eliz. in B. R. in *Frenklingham's* Caſe. Where one bought Barley, and made it in the houſe of another that it was within the Statute: and 42 Eliz. It was adjudged, If a Miller buyes Corn and grinds it and ſells it within his own houſe, it is within the Statute. ibid. 135.

13. It was referred to the Juſtices to certify to the Star-Chamber, Whether by the Statute of 3 H. 7. cap. 2, the taking of any Woman againſt her Will,

Will, and the marrying or deflowring of her, be Felony? Or only of ſuch a Woman who hath ſubſtance, or goods, or lands, or otherwiſe be an Heir apparant; the Act being generall: It was reſolved, that the body of the Act ſhall have relation to the Preamble; and that is, *viz.* Maid, Widdow, or Wife having ſubſtance, and to an Heir apparant, and no other: and ſo was it adjudged. 10. Jac. in *Baker* and *Hale*'s Caſe. Trin. 15 Jac. *Hutton* 2.

14. A Writ *de rationabili parte Bonorum* was brought, and the Plaintiff declared of the Cuſtom of the County of *N.* and ſhewed that the Defendant deteined particular goods of the Plaintiff's, which did appertain to him as his part and portion. The Defendant pleaded *Non detinet*, and it was found by Verdict that the Plaintiff was intituled to this Action many years before the Statute of 21 Jac. of Limitation of Actions, and that he had not brought his Action within the time limited by the ſaid Statute, and Judgment was given for the Plaintiff, for that this Action is an originall Writ not mentioned in the Act, and although the Iſſue be *Non detinet*, yet it is no Action of Detinue, for Detinue lyes not for mony unleſſe it be in Bags, but *rationabili parte bonorum* lyes *de pecuniis numeratis*; and becauſe Statutes are not made to extend to thoſe Caſes which ſeldome or never happen, as this Caſe is; and this Statute of 21, Jac. ſhall not be extended to Equity. Trinit. 6. Car. *Sherwin* and *Cartwright*'s Caſe. *Hutton*. 109.

15. In an Action brought againſt an Hundred upon the Statute of Hue and Cry: the poynt was, If one be aſſaulted to be robbed in one Hundred and he eſcape and flee into another Hundred, and the Thieves inſtantly purſue him and robb him there, if the Hundred in which he was robbed ſhould be onely charged: and the Opinion of the whole Court was, that it ſhould. Mich. 10. Car. *Dean*'s Caſe. *Hutton* 125.

16. Note, That it was agreed and reſolved by all the Juſtices of *England*, at a meeting at Serjeants Inn in Fleet-ſtreet and upon peruſall and conſideration had of the Statute of 5. Eliz. cap. 4. concerning Aliens: That all Aliens and Denizens are reſtreined by the ſaid Statute of 5 Eliz. That they may not uſe any Handycraft mentioned in the ſaid Statute, unleſſe they have ſerved 7 years as Apprentices within the Realm according to the proviſion of the ſaid Statute. Trinit. 12. Car. *Hutton* 132.

17. An Executor brought an Action of Debt upon the Statute of 32 H. 8. for Arrearages of Rents; for the Arrearages of diverſe Rents as well Copy-hold Rents, as Free-hold Rents perteining to the Mannor whereof the Teſtator was ſeiſed and died ſeiſed; and ſhewed that the Rents were not paid to the Teſtator in his life time, and that they belonged to him as Executor: It was holden by the whole Court, That the Action did not lye for the Arrearages of Rents of Copy-hold Land for that the Statute doth not extend to them, but onely to Rents going out of Free-hold: It was alſo reſolved, That in this Caſe the Action did not lye for the Free-hold Rents; for that the Plaintiff hath not ſhewed, that the Defendant had attorned to the Teſtator in his life time; and when the Rent of Free-hold comes in debate, it behoves both the Owner of the Mannor and his Executor, that demands the Rent, to convey a privity betwixt the Tenant and the Lord, which ought to be by Attornment. Mich. 6. Jac. in C. B. *Apleton*'s and *Baily*'s Caſe. *Brownl.* 1 Part. 102.

18. *A.* ſeiſed of a Mannor by deed indented, enfeoffed thereof J. S. and his Heirs, rendring Rent to *A.* his Heirs and Aſſigns; *A.* dyed ſeiſed, the Rent diſcended to his Son and Heir, who dyed inteſtate; his Adminiſtrators diſtreined and avowed for the Rent: It was reſolved upon the Statute of 32 H. 8. cap. 37. which giveth diſtreſſe to an Executor or Adminiſtrator, in like manner and form as the Teſtator might or ought to have done, &c. and upon another clauſe of the ſaid Statute, That the Adminiſtrators were not driven in their Avowry, for the ſaid Rent, to alledge any ſeiſin within 40 years; for in caſe of Reſervation, or grant of a Rent, the deed is the Title, and the commencement of it appeareth to be within time of memory, and no encrochment in ſuch caſe ſhall hurt, nor any ſeiſin is materiall, but he ſhall avoid the ſame in Avowry: and the Statute of *Magna Charta cap.* 10. upon which *Ne injuſte vivet* is grounded, doth not extend to Tenant in Tail, Leſſee for life, or to Grantee of a Rent charge. 6. Jac. C. B. Part. 64. Sir *William Foſter*'s Caſe.

10. An Action upon the Statute of 5 Eliz. cap. 9. was brought againſt Husband and Wife for the penalty of 10 l. againſt him that is ſerved with proceſs *ad teſtificandum*, and doth not appear; and the Plaintiff ſhewed, that proceſs was ſerved upon the Defendant's Wife, and ſufficient charges left and tendred to her according to her degree, and the diſtance of the place, and ſhe did not appear; It was found for the Plaintiff: and in arreſt of Judgment it was moved, That a Feme Covert was not within the Statute; and alſo that he hath not ſhewed how the Plaintiff was damnified; and alſo that the tender ought to have been to the Husband: But it was reſolved, That although the party be not damnified, yet the penalty is forfeited; and 2. That a Feme covert is within the Statute, otherwiſe it might be a great miſchief, for ſhe might be the onely Witneſs: and 3. The Wife ought to appear, and therefore the tender is to be to her: It was adjudged for the Plaintiff. Trin. 30 Eliz.

B. R.

B. R. *Hawkblont* and *Harris*'s Caſe. *Leon.* 112.

20. In Treſpaſſe upon the Statute of 8 H. 6. of Forcible Entry, It was found for the Plaintiff, and damages aſſeſſed by the Jury, and Coſts of Suit alſo; and alſo Coſts *de incremento* were adjudged; all which were trebled *quæ quidem damna in toto ſe attingunt ad, &c.* It was Objected, Where Damages are trebled, no Coſts ſhall be adjudged. But it was adjudged *per Curiam*, That not onely the Coſts which were aſſeſſed by the Jury; but thoſe alſo which were adjudged *de Incremento*, ſhould be trebled; and ſo were all the Books and Preſidents. Paſch. 28 Eliz. in C. B. *Rolſtone* and *Chamber*'s Caſe. *Leon.* 282.

21. In an Action upon the Statute of 27 Eliz. of Hue-and-Cry, the Caſe was, Money was delivered to a Carrier, who put the ſame in his Cart, and ſent his boy with the Cart, and before he could get to the Cart, it was robbed, and the money carried away. The Boy made Hue-and-Cry, and came before a Juſtice, and prayed he would examine him, who would not; but the Carrier would not go to the Juſtice to be examined: but the Plaintiff went to him, and was examined; and afterwards brought his Action againſt the Hundred: It was holden by the Court, That the Plaintiff had failed in his Action, for want of ſufficient examination: for the Servant who was robbed, ought to be examined; and the Examination of the Maſter, or of the Owner of the goods, was to no purpoſe. It was then moved, If an Action upon the Caſe framed upon the Statute, did lye againſt the Juſtice of Peace who refuſed to examine the Boy? And the better Opinion of the Court was, That it did; for that the Examination is to be before him by the Statute, not as a Judge, but as a Miniſter appointed by the Statute. Trin. 31 Eliz. C. B. *Green* and the Hundred of *Buckle-Churches* Caſe. *Leonard.* 323.

22. A man brought his Action upon the Statute of 27 Eliz. of Hue-and-Cry; for that he was robbed of 70 l. and made Hue-and Cry, and amends was not made, nor any of the Robbers taken; and that he took his Oath before J. S. Juſtice of the Peace within the ſaid County, and Inhabiting within the Hundred within 20 dayes before the Writ brought, That he was robbed, and did not know the parties according to the Statute of 27 Eliz. The Oath was taken before J. S. at his Chamber in the Middle-Temple, *London*. It was Objected, That a Juſtice of Peace could not exerciſe any Juriſdict on but within the County, where he was a Juſtice of the Peace. But it was Reſolved by all the Juſtices of both Benches, That the examination taken at *London* by a Juſtice of the County, Inhabiting with his Family in the Hundred, was good enough. And *Charen* and *Barns* Caſe. 27 Eliz. in C. B. was agreed, That a Biſhop in *Ireland* being in *England* committed Adminiſtration of goods of one who dyed in *Ireland* Inteſtate within his Dioceſs; and the ſame was adjudged good. Paſch. 6 Car. B. R. rott. 233. *Helies* and the Hundred of *Benhurſt*'s Caſe. *Cro.* 1. Part. 153.

23. Note: If a Carrier's man or ſon conſpire to rob him, and accordingly do it, the Carrier not being privy to it; The Carrier may bring an Action againſt the Hundred upon the Statute of *winchester* of Hue-and-Cry, for this Robbery: but then the Conſpiracy may be urged in mitigation of Damages. Mich. 1654. B.R. *Matthew* and the Hundred of *Goldalming*'s Caſe in *Surry*. *Styles.* 427.

24. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. It was found by Special Verdict, That the Lands whereof the Tythes were demanded, were parcel of the Poſſeſſions of the Templers, who were diſſolved temps, E. 2. and their Lands annexed to the Priory of St. *Johns*; and that the Templers had a ſpecial Priviledge to be diſcharged of thoſe Lands which *propriis manibus excolunt*; and by a ſpecial Act of Parliament 32 H. 8. the poſſeſſions of the Priory of *St. John*, were given to the King by general words, of all Lands, &c. *in tam amplis modo*, &c. as the Abbot held them: and from the King the Lands came to the Defendant. It was Reſolved, That the Defendant ſhould not have the Priviledg to be diſcharged; for by the Common-Law, a Lay-perſon was not capable of ſuch a Priviledge; and the King ſhould not have the Benefit of the Priviledge, untill the Statute of 31 H. 8. and by the Statute of 31 H. 8. Monaſteries, Abbies, &c. which had before, or after ſhould come to the King by ſuppreſſion, ſurrender, &c. the King ſhould have them diſcharged of payment of Tythes, as the Abbots, &c. But the ſaid Statute extends onely to ſuch poſſeſſions as came to the King by ſurrender, and ſhould be veſted in him by that Act, and doth not extend to poſſeſſions which are veſted in him by another Act of Parliament: and theſe Lands were given to the King by a ſpecial Act of Parliament; and therefore not diſcharged of Tythes. Judgment was for the Plaintiff. Hill. 44 Eliz. Rott. 994. *Cowdlis* and *Spurling*'s Caſe. *Cro.* 2. Part. 57.

25. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. The Plaintiff ſet forth, That two parts of the Tythes belonged to the Rectory, and a third part to the Vicaridge; and that he had a Leaſe for years of the Rectory, and another Leaſe of the Vicaridge, and demanded the treble value. Upon *Non debet*, It was found for the Plaintiff. It was Objected, That he ſhould have brought ſeveral Actions, his cauſe of Action

being upon ſeveral Leaſes. But the Court held, The Action was well brought, in regard he hath both Titles in him, and he is to have the entire Tythes; and the Action is brought upon this wrong, That he did not ſet them forth. Hill. 2 Jac. Sir *Rich. Champernon* and *Hill*'s Caſe. *Cro.* 2. Part. 68.

26. An Information was upon the Statute of 5 Eliz. of Apprentices; becauſe he uſed the Trade of a Spurrier in *London*, not having been Apprentice in that Trade by ſeven years. After Verdict, It was the Opinion of three of the Juſtices of B. R. That by the Statute of 31 Eliz. the Information ought to be before the Juſtices of the Peace where the offence was committed; and not in this Court. Quære. 3 Car. B. R. *Kenn* and *Drake*'s Caſe. *Cro.* 2. Part. 85.

27. Debt upon the Statute of 37 H. 8. of Uſury. The Writ was, That he *corruptivè* lent 40 l. againſt the form of the Statute; and that he ſuch a day lent 20 l. againſt the Statute, and doth not ſay *corruptivè*. Adjudged, the Action was good for part; and being for ſeveral ſums, it is in the Nature of two ſeveral Actions: ſo that although void for the one, it is good for the other. And if the Defendant had demurred upon the Declaration, it had been good for the one; and the Plaintiff ſhould have had Judgment for the other. 3 Jac. in B. R. *Woody*'s Caſe. *Cro.* 2. Part. 104.

28. In an Information upon the Statute of 27 Eliz. of Fraudulent Conveyances; It was adjudged, Where one after marriage voluntarily aſſigned a Leaſe of years *quaſi* in Joynture for his Wife, and took the profits, and afterwards ſold it to one who had not any Notice of this Conveyance, That this was within the Statute, although at firſt it was not made upon truſt to be revoked, nor any Clauſe of Recompence therein; becauſe it was a voluntary Conveyance at firſt, which ſhall be intended fraudulent. But if at the time of the Marriage, or after by reaſon of a Portion given by his Wives friends in Recompence thereof, and for a proviſion for the maintenance of the Wife, he had made an Aſſignment of ſuch a Leaſe, and had afterwards taken the profits, and then had ſold that term, it had not been within the Statute. Paſch. 5 Jac. *Colvate* and *Parker*'s Caſe. *Cro.* 2. Part. 158.

29. An Information in the Exchequer, for exerciſing the Trade of a Brewer, contrary to the Statute of 5 Eliz. Cap. 4. of Apprentices; not having been brought up ſeven years an Apprentice. It was Objected, That the Art of a Brewer is not within the Statute. 2. That by the Statute of 31 Eliz. Cap. 5. that the Offence is maintainable onely in the Seſſions of the Peace. But it was adjudged, That a Brewer is within the Statute: and for the ſecond point, and the Statute of 31 Eliz. Cap. 5. it is not in the Negative, and this being a Suit for the King, and in this Court proper for him; the Information is maintainable here. Mich. 4 Jac. rott. 87. *Shoyle* and *Taylor*'s Caſe. *Cro.* 2. Part. 178. See Sect. 26. acc.

30. An Action upon the Statute of *Winton.* and Stat. 27 Eliz. of Hue-and-Cry, The Plaintiff Counts upon the ſaid Statute: and in his Count ſhews alſo, how that within 40 dayes before the Action brought, he was ſworn before a Juſtice of the Peace; that he was robbed of ſo much, and did not know any of the Felons: and concludes, That the Defendants had not taken any of the Felons, nor ſatisfied him, *contr. formam Statut. predict.* It was moved, That the Concluſion was not good. But it was Reſolved by the Court, upon View of Preſidents, that the Concluſion was good, and the beſt form: and not to conclude, *contr. formam Statutorum predict.* becauſe the Action was grounded upon the Statute of *Winton*: which gives onely the penalty and remedy: and the other Statute ſhews only how the Examination ſhall be, but gives not any Action. And *Statuti predict.* refers onely to the Statute of *Winton.* It was adjudged for the Plaintiff. Trinit. 5 Jac. B. R. *Andrew* and the Inhabitants of *Lewknor*'s Caſe. *Cro.* 2. Part. 187.

31. In an Information upon the Statute of 5 Eliz. for Ingroſſing of Apples, being dead Victual; It was adjudged in the Exchequer, and affirmed in a Writ of Errour brought in the Exchequer-Chamber, That it is out of the Statute; and it is not ſuch a Victual as the Law intends. *Cook* ſaid, Every thing prohibited within the Statute had a Proviſo: but there was no Proviſo for Apples, therefore it was never intended to be reſtrained. Mich. 6 Jac. in Scaccario. *Braddon*, and *Bower*'s Caſe. *Cro.* 2. Part. 214.

32. In Debt, upon the Statute of 2 E. 6. for not ſetting forth of Tythes, the Caſe was; A man being poſſeſſed of Leaſe of Tythes in the Right of his Wife, as Executrix of her former husband's grants *totum jus titulum, et intereſſe ſuum de et in decimis predictis.* It was found for the Plaintiff. It was moved, That the Plaintiff had not ſet forth any good Title to himſelf. But it was Reſolved, That the grant was good, and the Leaſe which he had of the Tythes in the Right of his Wife did thereby paſſe: for the word, *ſuum*, doth import a proprie y in poſſeſſion. It was then Objected, That this was a Leaſe made by an Abbot within the year before the Diſſolution, and therefore void. It was anſwered, That the Iſſue here onely was, Whether he were diſcharged of Tythes: and the Jury hath given their Verdict, That at the time of Diſſolution, there was no diſcharge of Tythes:

Tythes: and this Leaſe being but an Inducement to the Title of the Plaintiff: and therefore the Iſſue is well enough. Hill. 10 Jac. B. R. *Arnold* and *Bidgoods* Caſe. Hill. 10 Jac. Rott. 166. *Cro.* 2. Part. 308.

33. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. The Plaintiff declared, That he was Leſſee of the Rectory for ſeven years, and the Defendant was an Occupier of Lands within the Pariſh for ſix moneths by a Demiſe made 10 *Martii* 10 Jac. and that the Defendant 27 of Auguſt the ſame year, did cut his Corn there growing; and 10. Sept. following, did carry it away, not ſetting out the Tythes: It was moved, That Plaintiff had no cauſe of Action; for that upon his own ſhewing, the Defendant's Intereſt in the Land was determined before the Tythes were carried away. But the Court held, That though his Intereſt in the Land was determined; yet he remained Owner of the Corn: For if Corn be cut down, though a ſtranger take it away before ſeverance, yet an Action will lye againſt him by the Statute. Mich. 11 Jac. B.R. *Kipping* and *Swayn*'s Caſe. *Cro.* 2. Part 324.

34. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. The Plaintiff declared, That J. S. Parſon of the Rectory of S. let him the Rectory for ſix years, if he lived ſo long, and continued Parſon there; and that the Defendant being an Occupier of Lands, within the Pariſh, ſowed with Wheat, reaped and carried away the ſame, the Tythes not ſet forth, and averred the life of J. S. and that he continued Parſon. It was found by Verdict, That the Parſon made the Leaſe for ſix years, if he lived ſo long: and that the words, *If he continued Parſon*, were not within the Leaſe. It was the Opinion of all the Juſtices, That the Variance betwixt the Leaſe in the Declaration, and the Leaſe found, was not any prejudice; for it is all one in ſubſtance, and the addition in the Declaration, *If he ſo long continue Parſon*, is no more then what the Law *tacitè* implyes: Alſo the Leaſe is not the ground of the Action, but the taking away of the Tythes; and for remedy of the wrong, the Action is; and the Allegation of the Leaſe is but an Inducement to the Action. But if Debt had been brought upon the Leaſe for years, perhaps ſuch variance would have been material, becauſe the Leaſe is the ground of the Action. Mich. 11 Jac. in B. R. *Wheeler* and *Heydon*'s Caſe. *Cro.* 2. Part. 328.

35. In Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. It was Reſolved by the Juſtices, That if a man will buy Corn which is ſtanding of a Proprietor of a Rectory, if he hath not ſpeciall words of Diſcharge, he ought to pay Tythes; and the carrying away of ſuch Corn, without ſetting out the Tythes, is an Offence within the Statute. Mich. 10 Jac. rott. 171. B.R. *Moyle* and *Ewers* Caſe. *Cro.* 2. Part. 361.

36. In an Action upon the Statute of *Winton* of Hue-and-Cry. It was Reſolved by the Juſtices, That if one be robbed upon the Sunday in the time of Divine Service, and makes Hue-and-Cry; and none of the Robbers be apprehended, That the Hundred ſhall be charged: For the Hundred are to provide, That Robberies be not committed; and the Statute is made for the Peace of the Realm, and the Advancement of Juſtice; and the purſuing of Felons upon the Sabbath day, is no Offence, but an act of Mercy and Charity: And many perſons are neceſſitated to travel upon the Sabbath day: as Phyſitians, Midwives, &c. And if an Inſurrection be upon the Sabbath day, if it be not ſuppreſſed immediately (as it was in the Earl of *Eſſex*'s Caſe) the Officers are Finable. And Miniſterial acts done upon the Sunday are good; but not Judicial acts. *C.* 9. Part. *Machally*'s Caſe. And therefore in the principal caſe it was adjudged for the Plaintiff. Mich. 12 Jac. *Waite* and the Hundred of *Stoke*'s Caſe. *Cro.* 2. Part. 496.

37. In an Action of Debt, upon the Statute of 2 E. 6. for not ſetting forth of Tythes, for the treble value: The Plaintiff in his Declaration did demand leſſe then the treble value did amount unto, or that the due debt was by the Statute, and did not ſhew ſatisfaction of the reſt; and for that cauſe, It was moved, That the Declaration was not good. But *per Curiam*, it is good enough: For there is a difference when the Action is grounded upon a Specialty or a Contract, which is a certain ſumme; and upon a Statute which gives a certain ſumm for the penalty; for there he may not vary from the Specialty. But when the demand is of no ſum certain, but onely of ſo much as ſhall be given by a Jury, although he varies in his Declaration from the firſt valuation, it is not material; for he ſhall not recover according to his demand in the Declaration, but according to the Verdict. It was adjudged for the Plaintiff. Trin. 16 Jac. rott. 270. *Pemberton* and *Shelton*'s Caſe. *Cro.* 2. Part. 498. 499.

38. In an Action upon the Statute of Hue-and-Cry; It was, That he was robbed in ſuch a High-way *in Diviſis Hundredorum*; and that he gave Notice to the Inhabitants of the Hundred, next to the place he was robbed. It was moved, That the Notice ought to have been given to both Hundreds. But it was adjudged, That if Notice be given to the Inhabitants of either of the Hundreds, it ſufficeth. Adjudged for the Plaintiff. Paſch. 31 Jac. rott. 488. *Foſter* and the Hundred of *Iſlleworth*'s Caſe. *Cro.* 2. Part. 675.

39. In an Information upon the Statute of

Uſury; *Qui ſequitur tam pro Domina Regina quàm pro ſeipſo.* The Queens Attorney entred upon it, *Non vult ulteriùs Proſequi*; and the ſame was pleaded in barr againſt the Informer. And it was adjudged *per Curiam*, That the Entry by the Attorney-General was no Barr, *quoad* the Informer: and ſo it is if the Queen be Non-ſuit; and *Wray* ſaid, That ſo was the Opinion of the Lord *Anderſon* and *Gawdy*, Juſtices. Trin. 30 Eliz. in B.R. *Stretton* and *Taylor*'s Caſe. *Leon.* 119.

Actions.

1. *Where* Actions *are to be brought and laid in the County; where the Cauſe of Action ariſeth; and where not; at the Election of the Party.*

1. A Man brought an Action upon the Caſe in the County of *N.* and declared, That *A.* recovered againſt him 20 l. in the Court of Common-Pleas; and after Judgment, and before Execution, *A.* dyed, and that the Defendant knowing it, and malitiouſly to Out-law the Plaintiff, brought in the name of *A.* in the County of *Middleſex* a *Capias* directed to the Sheriffs of *London*; and there alſo ſued an *Exigent*, and took forth a *Capias utlagatum*, directed to the Sheriff of *Norfolk*, by which he was taken and impriſoned in the County of *Norfolk*; and the Plaintiff layed his Action againſt the Defendant in the County of *Norfolk*. Upon which the Defendant did demur in Law, becauſe that the Action ought to have been brought in that County where the wrong did begin, and that was the County of *Middleſex*; for there the *Capias*, *Exigent*, and *Capias utlagatum*, were firſt ſued. But it was Reſolved by the Court, That the Action was well brought in the County of *Norfolk*, for the viſible wrong was in the County of *Norfolk*, for there the Plaintiff was impriſoned; and when matter in fact is mixt with matter of Record, and the matter in one County doth depend on the matter in another County; there the Plaintiff may chooſe in what County he will bring his Action. 27 Eliz. *Co.* 7. Part. 1. *Bullwers* Caſe.

2. *A.* brought an Appeal of Robbery againſt *B.* and *C.* as Acceſſories; and the Appeal was brought in the County of *W.* and the Plaintiff declared, That J. S. and others who were attainted, robbed him of certain Jewels; and that the ſaid *B.* and *C.* at *London*, in the Pariſh of S. *Dunſtan*, did incite, abett, and procure the ſaid J. S. and others to the Felony aforeſaid. It was adjudged in that caſe, That the Appeal ſhould be brought in *London* where the procurement was, and the Tryall ſhould be there; for that it is a maxim in Law, That Tryals ſhall be there where the beſt notice may be of the matter in fact; and where the wrong begins: and becauſe the Abetment began and was in *London*; the Appeal ought to have been brought in *London*. 28 H. 8. *Dyer.* 39. See *Co.* 7. Part. *Bullwer*'s Caſe. acc.

3. If a Leaſe be made of Lands in one County, and the Land lyeth in another County, the Action of Waſte ſhall be brought where the Land lyeth, and not where the Leaſe was made. But if a man brings an Action of Debt, and Count of a Leaſe for years in one County, of Land in another County; there he muſt bring his Action in the County where the Leaſe was made, and not in the County where the Land lyes; becauſe the Contract is the ground of the Leaſe, and the Cauſe of the Action. 27 Eliz. *C.* 7. Part. *Bullwers* Caſe, acc. And ſee divers Books there to that purpoſe.

4. A man brought a Writ of Raviſhment of Ward in the County of *York*; and ſuppoſed by his Writ, that the Raviſhment was in the County of *D.* and that he brought the heir into the County of *York*. It was the Opinion of the whole Court, upon a Writ of Errour brought, That the Original Writ of Raviſhment was to be brought in the County of D. where the wrong began; and not in the County of *York* where he brought the heir. 12 Eliz. *Dyer.* 289. *Fitzherbert*'s Caſe.

5. The Biſhop of *Coventry* and *Lichfield* was Patron of two Prebends, and granted the next Avoidence *alterius eorum primo vacant.* to J. S. which was confirmed by the Dean and Chapter; the Biſhop dyed, and then one of the Prebends became void; and the ſucceſſor Biſhop did preſent J. D. to the ſaid Avoidance; whereupon the ſaid J. S. within the ſix moneths brought a *Quare Impedit* againſt the Biſhop Patron and the Incumbent. It was adjudged in that caſe, That the *Quare Impedit* muſt be brought, where the Church is, and not where the body of the Prebend is. 3 Eliz. *Dyer.* 194.

6. In Debt, the Plaintiff declared upon a Recognizance taken before the Lord *Hobart*, Lord Chief Juſtice of the Common-Pleas, in *Fleet-ſtreet* in *Serjeants*-Inne, out of Term, and laid his Action in *London*: The Queſtion was, Whether the Action ought to be brought in *Middleſex* where the Recognizance is recorded, or in *London*, becauſe the Entry of the Record is, That the Recognizance was acknowledged before the Lord *Hobart, ut ſupra*. And in this caſe it was agreed,

1. That

1. That the ſeveral Judges may take Recognizances out of Term in any part of *England*. 2. That though it was not a perfect Record before it was entred upon the Roll; yet when it is entred, It is a Recognizance from the firſt acknowledgment, and binds the perſon as a Recognizance from that time. 3. That it might be in *London*, as the firſt and more worthy part of the Act; and it was Reſolved by all the Protonotories, That a *Scire facias* upon ſuch a Recognizance, ſhall be directed to the Sheriff of *London*, and not to the Sheriff of *Middleſex*. And a Preſident was cited, That upon a Judgment given in the Common-Pleas at *Hertford* Term, and the Records brought to *Weſtminſter*; yet the *Scire facias* went to the Sheriff of *Hertford*, not to the Sheriff of *Middleſex*, becauſe by the Record it appeared, the Judgment was given at *Hertford*: But if the Entry of the Record were general, that the Record was taken before the Lord *Hobart*, then it ſhould be underſtood it was in Court, and then the Action was to be brought in *Middleſex*. 14 Jac. in Co. B. *Hall* and *Winchfield*'s Caſe, *Hob.* 195.

7. *A.* brought an Action upon the Caſe againſt *B.* That whereas he lent the Defendant a Mare to plough his ground by two dayes, The Defendant at *Dale* promiſed, That he would deliver her ſafe at the end of the two dayes; and he did, during thoſe two dayes, exceſſively labour the Mare, that ſhe dyed thereof. And being found for the Plaintiff, the Judgment was ſtayed, becauſe there was no place in the Declaration ſet, where the Labouring was, which is put in Iſſue, and ought to be tryed: But if the promiſe had been layed to be in one place, and the labouring in another, the Plaintiff might, at his Election, layed and brought his Action in either place. Trin. 15 Jac. B. R. rott. 559. *Rives* and *Moxham*'s Caſe, *Hob.* 187, 188.

8. An Action upon the Caſe was brought againſt Inne-Keeper, upon the Cuſtome of *England*, for the ſafe keeping of the goods of his Gueſts; and he brought the Action in another County then where the Inne was. It was the Opinion of *Clench*, and other the Juſtices, That if it were an Action upon the Caſe upon a Contract, or for words ſpoken, or ſuch tranſitory things, that it might be brought in any County; but in the principall Caſe they conceived, It ought to be brought in the County where the Inne was. Mich. 29 Eliz. in B. R. *Godbold*.

9. *Audita Querela* was brought by three, to avoid a Judgment againſt the ſaid three in B. R. in Treſpaſs; whereas onely one of them was taken in Execution upon the Judgment; and the ſurmiſe in the *Audita Querela* was; Whereas one J. S. was ſued in the Common-Bench for a Battery, to be done in *London*; by Verdict, the Plaintiff had Judgment for 30 l. damages and Coſts, and J. S. was taken in Execution for thoſe Coſts; and afterwards he, and the other Defendants were ſued in this Court for the ſame battery, ſuppoſed to be done in the County of *Hertford*; and all three were condemned by Judgment in this Court: and it appeared, that this Action, and the Action in the Common-Pleas were for one and the ſame Battery; and that the then Plaintiff had acknowledged ſatisfaction of the ſaid Judgment; and yet had ſued to have Execution of the ſaid Judgment, where he was ſatisfied for the ſame Treſpaſs. It was Excepted to the Writ and Declaration, 1. That it ought to have been brought onely by him who was in Execution; and the other who were not grieved, ought not to joyn with him: But that Exception was diſallowed; becauſe, for the other were parties to the Judgment, and liable to the Execution; and although it was never ſued againſt him, yet for their indempnity, they might joyn with him in *Audita Querela*, who was taken in Execution. 2. The Surmiſe was excepted unto, becauſe one Recovery being in *London*, and the other in *Hertford*, it cannot be intended for one and the ſame Battery. But that alſo was diſallowed; For the Action being Tranſitory may be layd in what County the Plaintiff will, and it being averred by the Record to be one and the ſame Treſpaſſe, and not divers; and that confeſſed by the Demurrer, the Plaintiff's are not ſtrangers to the Record, but they may have benefit of the ſatisfaction by the Record: And therefore it was adjudged the ſurmiſe was good; and adjudged for the Plaintiff. Hill. 11 Car. in B. R. *Corbett* and *Bates* Caſe. *Cro.* 1. Part. 320.

10. It was holden by the Court, That a Conſtable cannot be ſued out of the County where he is Conſtable, for a thing done by him in the Execution of his Office; but for other things he may. Mich, 1653. B. R. *Styles*. 393.

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2. *Where* Actions *muſt be joynt, where ſeverall; Where the Husband and Wife are to joyn in them,* et è contrà. *And where the Party ſhall have his Election to bring what Action he will; where not.*

1. *A.* brought an Action upon the Caſe againſt *B.* for procuring a Commiſſion of Bankrupts againſt him; by vertue of which he broke open his Shop, and took away his goods and Shop-books, whereby he was diſcredited in his Trade. The

The Defendant pleaded, That the Plaintiff heretofore did bring his Action of Treſpaſſe againſt him for breaking of his Shop, and taking away of his goods, and in that Action recovered damages him; and that a Recovery in one perſonal Action is a barr in all perſonal Actions touching the ſame thing; and in this Action there appears no malice in the party in that fact, (as muſt be in all Actions upon the Caſe) for what was done before, was by a lawfull authority to warrant the fact; *ſcilicet*, by virtue of a Condition of Bankrupts: But it was Reſolved by the Court, That the Action was well brought; for this Action is brought for the damage he ſuſtained in his Trade, and hindrance in his Trade, and ſo diſparaging in his reputation; and though the breaking up of the ſhop, and taking of his goods be named in this Action, yet it is but by way of inducement, and not to recover damages for that wrong: and although he might have brought this Action at the firſt; yet he was not compellable thereunto, for he hath his Election as the birth-right of a Subject to bring what Action firſt he will. Hill. 20 Car. B. R. *Watſon* and *Norbury's* Caſe. *Styles.* 3. and 4.

2. *A.* brought an Action upon the Caſe againſt *B.* upon a Paroll Aſſumpſit, to find him meat, drink, lodging, and to teach him the Trade of a Mercer: which Agreement was after put in writing. The Plaintiff had a Verdict upon the Parol, Agreement, and Judgment. The Defendant brought Errour, and aſſigned, There was no Aſſumpſit declared upon, or proved to warrant the Judgment, becauſe by reducing the agreement to writing, the Parol Aſſumpſit became void, and no Action could be brought upon it. The Court inclined for that cauſe, to reverſe the Judgment; and a Rule of the Court was entred to ſhew cauſe, Wherefore the Judgment ſhould not be reverſed. Mich. 22 Car. B. R. rott. 433. *Curtice* and *Columbine's* Caſe. *Styles.* 19.

3. In an Action of Covenant, the Plaintiff declared, That the Defendant Covenanted with him, to pay him ſo much money as he ſhould expend for Repairing and Victualling a Ship for him; and he averrs, He expended 300 l. in it, and gave notice to the Defendant; and for non-payment of the money, he brought the Action. It was Objected, The Plaintiff ſhould have brought Debt, and not Covenant. But it was ruled by the Court, That the Action was well enough; for that it was in the Election of the Plaintiff to bring either Debt or Covenant; and it hath been doubted, Whether in ſuch caſe Debt doth lye; but never doubted that Covenant did lye: and in Debt, a demand is neceſſary; but not in Covenant. Trin. 3 Car. in B. R. *Styles.* 31. See Mich. 1654. *Jones* and *Graves* Caſe. acc. *Styles.* 427.

4. The Plaintiff brought Treſpaſſe *vi & armis* againſt the Defendant, for reſcuing a Priſoner out of his poſſeſſion, and had a Verdict; The Defendant in arreſt of Judgment ſaid, The Plaintiff ought to have had an Action of Treſpaſſe upon the Caſe, and not Treſpaſſe *vi & armis*: But it was ruled by the Court, that he might have the one Action or the other at his election. Paſc. 21. Car. B. R. *Styles* 99. 100. See M. 1652. *Gough* and *Cann's* Caſe. acc. *Styles* 341.

5. *A.* brought an Action upon the Caſe againſt *B.* for ſurcharging of a Common, and treeding the graſſe; and obtained Judgment: It was moved, That an Action upon the Caſe doth not lye in ſuch caſe, but an Aſſize: But the Opinion of *Rolls* Chief Juſtice was, That the Plaintiff might have an Action upon the Caſe, or an Aſſize at his election, although there be a diſturbance of the Plaintiff's Free-hold, though the old Books ſay the contrary. M. 1649. B. R. *Ayre* and *Pnicomb's* Caſe. *Styles* 164.

6. An Action of debt was brought againſt the Defendant, upon an *In ſimul computaverunt*, and a Verdict and Judgment for the Plaintiff: And Error brought, and the Error aſſigned was, That the Action was brought againſt him for Rent, as Tenant of the Land and not as Receivor: It was ruled by the Court, That Rent alone lyes not in accompt, becauſe it is certain and in the realty, but if it be mixed with other things, an Account will lye of it; and if one receive mony due to me upon an Obligation, I may have either an Action of Debt or an Account againſt him, at my election. Trin. 1651. Paſc. rott. 58. B. R. *Hamond* and *Ward's* Caſe. *Styles* 287. See to Account Sect.

7. In an Action of Treſpaſſe, for breaking his Cloſet and carrying away 250 l. againſt B. The Caſe was upon a ſpeciall Verdict thus; B. did felonioufly break the Plaintiff's houſe, and carry away 250 l. and was indicted for it, and found guilty and burnt in the hand for it; and the Queſtion was, If after, for this fact, an Action of Treſpaſſe &c. would lye againſt the party, for breaking the houſe and carrying away the mony, by the party robbed, againſt him who robbed him or not; It was objected, That the Action is brought for which the party is tryed, and it is unreaſonable he ſhould be doubly troubled for it, and if an Action ſhould lye againſt him, a great inconvenience would come to the Common-wealth, if in ſuch caſe the Plaintiff might have his election, to have his Action, or to indict the party. But the Opinion of the Court was, That the Action did well lye, and the eſpeci-

all

all matter is no Barr to the Action; and it is in the Election of the party to bring his Action; and the party was indicted at the ſuit of the Common-wealth, and not at the proſecution of the party, and ſo he hath not made his election till now; and the ſpeciall Verdict doth not find that any evidence was given againſt the Defendant, by the Plaintiff, to this Action upon the Plaintiff's Indictment, but for the State onely; and the inconvenience would be much the greater, if the Felon ſhould take advantage of his own wrong; and ſince the Plaintiff could not have his remedy before, he ſhall now have it. And ſo it was adjudged, That the Action was well brought; and Judgment given for the Plaintiff. Hill. 1650. rott. 653. B. R. *Dawes* and *Coverlighs* Caſe. *Styles.* 346. 347.

8. Note: It was ſaid by the Court, That if an Obligation be made to the Husband and Wife, that the husband may bring the Action upon this Obligation in his own name, or he may bring it in the name of him and his Wife, joyntly: and ſo in an Action upon the Caſe upon a promiſe made to the husband and wife during the Coverture. See *Dyer.* 91. Paſch. 23 Car. in B. R. *Hellior's* Caſe. *Styles.* 9.

9. Treſpaſſe of Aſſault and Battery was brought by Husband and Wife, for aſſaulting and beating of the Wife. In Arreſt of Judgment, being found for the Plaintiffs, It was moved, That they ought not to joyn in the Action; but the Husband ought to bring the Action alone, becauſe the damages ſhall go onely to the Husband. See 9 E. 4. 51. The Judgment was ſtayed, till the Plaintiffs ſhould move. Mich. 23 Car. B.R. *Styles* 52. See Trinit. 23 Car. rott. 1078. *Smith* and *Hobſon's* Caſe. acc. *Styles.* 112, 113. See Sect. 8. See Mich. 24 Car. in B. R. *Stradling* and *Boreman's* Caſe. *Styles* 129. acc.

10. Husband and Wife brought an Action upon the Caſe upon an Aſſumpſit, againſt *B.* and declared, That the Defendant in conſideration the Plaintiff would marry *A.* that is now the Plaintiff's Wife, he did promiſe to the Plaintiff, to make good a Legacy given her by her Fathers Will, and would alſo give her 40 l. more out of his own part given him by the ſaid Will, at her age of 18 years. Upon Non Aſſumpſit and Verdict for the Pliantiffs; It was moved, and ſo at laſt Reſolved by the Court, That the Wife ought not to joyn in the Action with her husband, becauſe the promiſe was made to the Husband alone; and the ſole Conſideration of the promiſe doth ariſe from the husband by marrying the woman: and though the money be to be paid to both, yet it were inconvenient to entitle the wife to it; and it was the folly of the husband to joyn his Wife in the Action; for he hath alledged the promiſe to be made to him alone. It was adjudged, the Action did not lye, being brought by them both. Mich. 1651. B. R. *Cotterell* and *Theobalds* Caſe. *Styles.* 297, 313, 314.

11. The Father and Son were bound in a Statute-Merchant to *C.* who ſued Execution againſt them, and their Lands were ſeverally extended; and becauſe they ſuppoſed the Statute was not ſealed with both their Seals, they brought a Joynt *Audita Querela*; And the Opinion of the Court was, That the Action was not well brought; for it ought to be brought according to its cauſe of wrong; and the wrong begun in the ſuing of the Execution, and that was ſeveral, and therefore the *Audita Querela* ought to be ſeveral alſo. It was adjudged, they ought to have ſeveral Writs. Paſch. 38 Eliz. in C. B. *Worſley* and *Charnock's* Caſe. *Owen* 106.

12. If three Coparceners be, and a ſtranger purchaſeth part of one of them; he and the other cannot joyn in a Writ *de Partitione faciendâ* againſt the third, neither by the Common-Law, nor by the Statute of 32 H. 8. Cap. 32. becauſe the one may have his Writ at the Common-Law, and the other by the Statute-Law, and ſo they have ſeveral Remedies, therefore they ſhall not joyn. See 3 Ma. *Dyer.* 128. 8 Eliz. *Dyer.* 243. See *Coo. Litt.* 174. And Mich. 8 Eliz. *Wootton* and *Cook's* Caſe in *Bendloes* Reports there vouched.

13. In Treſpaſſe for an Aſſault and Battery againſt two, the Plaintiff declared againſt one for the Battery, and againſt the other for the taking away of the goods; and had Judgment againſt them both for joynt damages. It was the Opinion of the Court, That the two Defendants cannot be joyned in one Action, becauſe they are Treſpaſſers of ſeveral Natures: therefore Judgment was againſt the Plaintiff. Mich. 24 Car. B. R. *Cuſworth's* Caſe. *Styles.* 153.

14. Note, for a Rule in Law, That for all things which are Intire, Tenants in common ſhall joyn in Actions; but for things which are ſeverable and Reall, they ſhall have ſeveral Actions realls, but they ſhall joyn in Actions perſonals. *Coo.* 5. Part. 21. *Coo. Inſtitut.* 196.

15. *A.* and *B.* brought an Action upon the Caſe againſt J. S. upon Aſſumpſit, and the Caſe was; That the ſeverall Cattel of the Plaintiff's were diſtrained; and the Defendant upon Conſideration of 10 l. paid to him by the Plaintiffs, did promiſe to them, to procure the Cattel to be redelivered to them: and becauſe they were not redelivered, they brought their Action joyntly. It was ſaid by *Rolls*, Chief Juſtice, That the promiſe here is intire; for the Conſideration is intire:

and

and ſo he conceived the Action might be joyntly brought: and ſuch after was the Opinion of the Court; and ſo Judgment was entred for the Plaintiffs. Mich. 1649. *Vane* and *Stewards* Caſe, B. R. *Styles*. 157. and 203.

16. A Judgment was given againſt divers; where ſome were found Guilty in the Action brought, and others were acquitted. And it was moved to the Court, Whether in ſuch caſe a Writ of Errour did not lye for ſome of them. It was Objected, That another Writ may be abated againſt one perſon, and ſtand good againſt another: but a Writ of Errour is abated in all: But the Opinion of the Court was, That Privies in Record may joyn in a Writ of Errour; and ſo in the principal Caſe, and an Inconvenience may come to all the parties by the Judgment, although ſome of the parties againſt whom the Action was brought, are found guilty; and others acquitted: and therefore it was adjudged, that they might all joyn in the Writ of Errour. Trin. 1649. rott. 791. B. R. *Barnwall* and *Grant*'s Caſe. *Styles* 190.

17. The Caſe was thus; One promiſed to the Father, That in Conſideration he would ſurrender a Copy-hold to the Defendant, that he would give to his two Daughters 20 l. a piece. In an Action upon the Caſe, after Verdict, it was found for the Plaintiff. It was moved to ſtay Judgment, That the Plaintiff declared upon a joynt promiſe made, which concerned another, with the Plaintiff; and yet the Action is brought but by one of them, where they ought to have joyned in the Action. But the Court ſaid, the parties have diſtinct Intereſts, and ſo any one of them may bring an Action; and the Law doth diſtinguiſh their Intereſts, though the Declaration be general; and the Action is brought but for one 20 l. due to one of the Daughters. It was adjudged for the Plaintiff. *Thomas*'s Caſe. Mich. 1655. B. R. *Styles*. 461.

18. A Pariſhioner brought an Action againſt one being Parſon of *L.* and declared, That he at the Pariſh of *L.* had layed out the Parſon 15. Cheeſes for his Tythes; and the Defendant ſuffered them to remain in the houſe of the Plaintiff for ſuch a time, and did not take them away, to his damage. It was ſaid in this Caſe, That when an Occupier of Land ſets forth Tythes, the property is altered, and is in the Parſon; and then if he ſuffer it to remain upon the Lands of the Pariſhioner; an Action lyeth upon the Caſe againſt the Parſon for it. Paſch. 20 Jac. Rott. 286. in B. R. *Wiſeman* and *Denham*'s Caſe. *Ley*. 69.

3. *Where one ſhall be ſaid to be well entituled to his* Action; *and where not. And where* Actions *ſhall be well brought; and where not.*

1. IN an Action upon the Caſe againſt the Defendant for ſtopping of a Way in a Meadow, called *Madbrook* in *R.* in C. B. Upon Not-guilty, after Verdict, it was found for the Plaintiff. It was moved in arreſt of Judgment, That the Plaintiff, a Leſſee to the Company of Haberdaſhers of *London*, claimed to have a Way for them; whereas they having let the ſame, cannot have the Way, but the Leſſee; and the preſcription is not rightly applyed; for it ought to have been for them to have the Way *pro tenentibus et occupatoribus ſuis*. But upon View of the Record, It appeared not who the Occupier or Tenant the Plaintiff was, but onely by way of Argument: And the Court ſaid, They muſt not take things by Intendment; and here is a failer in the very laying of the Action; for the Plaintiff hath not entituled himſelf to the Action, for he hath no Intereſt; and it doth not appear, how he is Occupator; nor doth he ſay that he is *Occupator ſuus*: and as he hath layed it in the Declaration, the Company ought to have the Action. And for theſe cauſes, It was adjudged againſt the Plaintiff. Mich. 1651. B. R. *Cautrill* and *Stephens* Caſe. *Styles* 300.

2. In an Action upon the Caſe, the Plaintiff declared, That the Defendant in Conſideration the Plaintiff would marry his Siſter, promiſed he would give his Siſter 300 l. for her Marriage-Portion, upon his marriage with her: and for this breach, the Plaintiff brings his Action, and hath a Verdict. The Defendant in arreſt of Judgment moved, The breach is not well aſſigned in the Declaration; for that it recites another promiſe then upon which the Plaintiff had declared: for he declares of a promiſe to give 300 l. in marriage to the Plaintiff with his Siſter, and aſſigns the breach, in not paying the 300 l. to the Plaintiff; ſo the breach doth not anſwer the promiſe: for if the money be paid to the Wife, the promiſe is not broken. But the Opinion of the Court was, That the breach is well aſſigned; for the Husband is to give the Acquittance for the money, and the moneys are to be paid to the Husband, which the Jury hath found are not paid: and it is all one, as if the Plaintiff had ſaid, That the Defendant had

not

marriage; and ſo the husband is well entituled to the Action. Mich. 1653. B. R. *Bedall* and *Fennick*'s Caſe. *Styles* 393. See Hill. 1655. rott. 1511. B. R. *Conye* and *Lawes* Caſe accords. *Styles*. 472, 473.

3. In an Action upon the Statute of *Winchester* of Hue-and-Cry brought againſt a Hundred; It was moved in Arreſt of Judgment, That the Hundred was ſued by Bill; whereas it ought to be ſued by Original. But the Court Over-ruled the Exception, and ſaid, There are many Preſidents to prove, That ſuch Actions may be ſued and brought as well by Bill as by Original. Paſch. 1649. B. R. *Styles*. 215. See Trin. 1653. B. R. *Hill* and *Dechairs* Caſe, Debt in the Nature of an Information brought for 3 l. for ſelling of Wine without Licenſe contrary to the Statute. It was Objected, That by the Statute of 18 Eliz. it ought to be by Original, and not by Bill. But the Court held the Information to be an Original Action; and it was not the meaning of the Statute to take away the Juriſdiction of this Court, but to exclude inferiour Courts. And an Original Action may be by Bill, and the party being in *Cuſtodia Marſhalli*, may be ſued by Bill.

4. In an Action upon the Statute of 5 Eliz. for uſing the Trade of a Draper. Upon Not-Guilty, and a Verdict for the Plaintiff; It was moved to the Court, That the Action was not well layd; for that it ought to be brought in the County where the Offence was committed, and not in this Court: and of that Opinion was the Court, for that the Statute is not ſatisfied; for it ſayes, the party ſhall not be compelled to appear out of the County, and here he is compelled ſo to do; and this is not helped by the Verdict. Hill. 23 Car. B. R. rott. 611. *Naylor* and *Aſhes* Caſe. *Styles* 223.

5. In Trover and Converſion of three Cart-Loads of Oats, Barley, and Peaſe; The Defendant pleaded, That the Land where the Trover was ſuppoſed to be, is 5 Acres of Lands lying in *W.* within the County Palatine of *Cheſter*, and that he held the Lands for years, by virtue whereof he did ſowe and take the Corn there growing, and traverſeth the Converſion out of the County Palatine; and averrs, There are Courts of Juſtice holden within the County Palatine; ſo that Juſtice may be done there, and ſayes, He ought to be ſued in the County Palatine, and not elſewhere, and ſo pleads to the Juriſdiction of the Court. Upon which Plea, the Plaintiff demurred; and for cauſe ſhewed, that the Action being for a Tranſitory matter, may be tryed out of the County Palatine, as well as within it; and the party here hath pleaded Not-guilty, which may be tryed any where. It was Anſwered, That the Action here by the pleading is made real; and all Actions perſonal and reall within *Cheſter* are triable there: and much was ſaid of Tryal in the ſaid County Palatine. And after many long Arguments on both ſides, It was Reſolved by all the Juſtices, That the Plea of the Defendant was not good; for that it appears not, Whether the Cuſtome extends to *W.* where the Trover was, becauſe it appears not, whether *W.* lye within the County Palatine of *Cheſter*, or no; and the Plea cannot be good in part, and void in part; and if a Plea be naught, the other party ſhall not be ſaid to confeſſe any thing by Demurrer upon it; and here the Defendant hath pleaded a Plea in barr, *viz.* Not-guilty; and hath alſo pleaded to the Juriſdiction of the Court, which cannot be; and the Court is not to examine the Juriſdiction, but the pleading: and the Court is not bound to take notice of the Cuſtome of *Cheſter*, otherwiſe then it is pleaded: and for this cauſe, the Plaintiff hath well entituled him to his Action; and therefore it was ruled, That the Defendant ſhould plead in Chief. Paſch. 1652. rott. 354. in B. R. *Rogers* and *Bones* Caſe. *Styles*. 331, 332, 333.

6. An Action upon the Caſe was brought for words againſt Husband and Wife. The Jury found, That the husband was guilty, and the wife was not guilty. It was moved in Arreſt of Judgment, becauſe the Action was Joynt, and one of them is found not guilty: and the ſpeaking of the words cannot be a joynt act as they are laid in the Declaration, but they are ſeveral acts, and ſeveral offences. And the Opinion of the Court was, That the Declaration was not well layd; for it cannot be a Joynt ſpeaking of the words by the husband and the wife, and therefore they ought not to be joyned in the Action, and ſo there ought to be ſeveral Judgments and damages, if the Plaintiff will recover. But yet the Court held, That the matter was here helped by the Verdict; for here is not a Verdict againſt them both, but onely a diſcharge; and here might have been a Releaſe of the damages as to the Wife, if both had been found guilty: but here in effect is but a Judgment againſt one of the Defendants. And ſo Judgment was given for the Plaintiff; for that he hath well entituled himſelf to the Action. Mich. 1652. B. R. *Butcher* and *Orchards* Caſe. *Styles*. 349, 350.

7. An Action upon the Statute of 5 Eliz. for uſing a Trade, not having ſerved therein an Apprentiſhip in the Town of *Newberry*: and Judgment thereupon. And upon a Writ of Errour brought, the Judgment was reverſed; for that the Action ought not to be brought there, but it ought to be brought in ſome of the Courts here at *Weſt-*

minſter. Trinit. 1653. B. R. *Hodges* Caſe. *Styles* 383. See Trin. 1654. B. R. *Styles* 424. *Childs* Caſe. acc.

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4. Actions; *by whom, and againſt whom they may be brought; and where, and when not. And what ſhall be a good barr to them*; et è contra.

1. THe Caſe was, That a Copy-holder was a Lunatique, and the Lord committed the Copy-hold of his Land to one, who brought an Action of Treſpaſſe; and whether the Action ought to be brought by him, or by the Lunatique, was the Queſtion. And the Opinion of the Court was, That the Committee was but a Bayliff, and hath no Intereſt, but for the profit of the Lunatique, and as his Servant; and it is contrary to the nature of his authority, to give an Action to him in his own name: and ſee *C.* 4. Part. *Beverley's* Caſe. A Lunatique ſhall have a *Quare Impedit* in his own name. And it was alſo agreed by the Court, That the Lord of a Mannor hath not power to commit or diſpoſe of the Copy-hold of a Lunatique without ſpecial Cuſtome. Paſch. 16 Jac. in C. B. *Hutton.* 16.

2. *A.* Feme Covert in the abſence of her husband (he being beyond the Sea) brought an Action of Treſpaſſe for an Aſſault and Battery made upon her; and the Action was brought in her own name, and in the Name of her abſent husband. And the Opinion of the Court was, That the Action was well brought. And further, the Opinion of the Court was, That in the abſence of her husband beyond Sea, ſhe may well bring ſuch an Action in her name, and without her husband, but ſhe cannot be ſued by another without her husband, nor by any before her husband doth return again. Trin. 9 Jac. in B. R. *Bolſtr.* 1. Part. 140, 141.

3. In *Ejectione Firmæ*, the Caſe was; *A.* Copy-holder in Fee married *B.* There was a Cuſtome within the Mannor, that the Wife ſhould have the Copy-hold as of Free-bench during her Widowhood, Si *tam diu caſta viveret*; and this had uſed always to be challenged, and alſo be granted by the Lord. The husband *A.* dyed, and *B.* his Wife after his death came into Court, and challenged her Free-bench; and prayed to be admitted; which the Steward refuſed her: whereupon ſhe entred, and made a Leaſe to try the Title to the Plaintiff for one year, and he being ouſted, brought an *Ejectione Firmæ*. And it was Reſolved by the Court, That the Action did well lye; for that this eſtate ariſeth out of the eſtate of the husband, and buddeth forth of the firſt eſtate; and the Admittance of the Tenant for life is the Admittance of him in the Remainder: and if an Admittance had been neceſſary in this caſe, ſhe hath done all that ſhe could do, and that amounts to an admittance in Law, to an eſtate created by Cuſtome. It was adjudged for the Plaintiff. Trin. 6 Jac. in C. B. *Jurden* and *Stones* Caſe. *Hutton.* 18.

4. In Debt for Rent, upon a Leaſe for a year, and ſo from year to year, the Caſe was; *A.* ſeiſed of Lands, deviſed them to his daughter and her heirs when ſhe came to her age of 18 years, and that his Wife ſhould take the profits of the Lands to her uſe, without any Accompt to be made, untill the daughter come to her age of 18 years, and made his Wife his Executor, and dyed. It was provided, that the Wife ſhould pay the old Rent, and find the daughter untill ſhe could write and read Engliſh; the Wife proves the Will, takes husband, and dyes; the husband aſſigns the Term to the Leſſor, who brought the Action. And it was found, That all the Conditions was performed, and that the daughter was within the age of 18. years. The Queſtion was, Whether it be a Term for years in the Wife? and whether the husband ſhall have it after the death of the Wife? And the Opinion of the Court was, That it being by Will, it was a good Leaſe, and that the Husband ſhould have the Term; and that it was not a truſt only in the Wife for ſo long as ſhe ſhould educate the daughter, and find her at School: And therefore it was adjudged, That the Action brought by the Aſſignee for the Rent was maintainable. 17 Jac. in C. B. *Blackburn's* Caſe. *Hutton.* 36.

5. The Plaintiff, being an Alien born, brought an Action upon the Caſe againſt the Defendant, for ſaying, That he was a Bankrupt: and being found for the Plaintiff, It was moved, That he was *alienigena ſub legiantia* of another, *et extra legiantiam Domini Regis*; and ſuch an Alien may have an Action here, if the ſame be for his Merchandize, and he may have a houſe here; and the Law doth give him power to maintain a perſonal Action for the ſame; but he cannot maintain a perſonal Action at Law for defaming him, by any words ſpoken of him; and it is a good plea in barr, (according to *Litt.* 198.) to ſay, The Plaintiff is an Alien born. But the Court was clear of Opinion, That the Action was well maintainable; for Merchants ſtrangers are enabled to Trade here; and Merchants ſtrangers, they are enabled by the Law, to have here all Actions perſonals whatſoever, as Debt, and the like; and an Alien born may well have here an Action for an Aſſault and

Battery

Battery done upon himſelf: Wherefore the Rule of the Court was, That Judgment ſhould be entred for the Plaintiff. Trinit. 9 Jac. in B. R. *Tirlat* and *Morris*'s Caſe. *Bolſtr.* 1. Part. 134.

6. *A.* brought an Action of Covenant againſt *B.* and declared, That the Defendant by his Deed Covenanted with him, That he would ſatisfie all ſuch ſumms of money as *J.* his Son, the Plaintiff's Apprentice, ſhould imbezel, within three moneths after the Requeſt: and the Covenant upon the Deed was in *hæc verba*, To ſatisfie within three moneths after requeſt, and due proof made of ſuch Imbezelling. Upon which, Iſſue was taken by the Defendant, That *J.* did not imbezel: and being found for the Plaintiff, It was moved in ſtay of Judgment, That the Plaintiff ought not to have brought his Action untill after the three moneths were encurred, as well after the proof, as after the Requeſt; and the Plaintiff hath averred no proof made in his Declaration: and this matter appearing upon the Record, It was adjudged againſt the Plaintiff: for the proof intended in the Covenant, is Judicial proof, which ought to be ſet down in the Plea, with all the Circumſtances, ſo as the Court may judge of it: and becauſe in the principal Caſe, becauſe the word proof is at large, and may be made in Court Judicially in an Action brought againſt the Apprentice, before the Action brought upon the Covenant made by another. The Court was of Opinion, That the Plaintiff upon his own ſhewing had brought this Action before he had cauſe of Action. And Note: It was ſaid in this caſe, That a *Warrantia Charte*, or a Writ of Meſne may be brought before the party take loſſe, but yet he hath cauſe of Action when he brings it, and the Action is but Proviſionall: But in the Caſe at Barr, the Action is remediall; the Court muſt judge, Whether the proof be ſufficient, or not? and therefore it being brought before due proof made, It was adjudged againſt the Plantiff. Hill. 15 Jac. in C. B. Rott. 2001. *Crookhay* and *Woodward*'s Caſe. See before.

7. In an Action of Battery the Defendant pleaded Not-Guilty, which was entred; afterwards the Defendant would have confeſſed the Action: and although all the Protonotaries ſaid, That they had never ſeen a Confeſſion refuſed, if it were offered before the *Niſi Prius* ſealed; yet the Court, as alſo the Plaintiff, refuſed to admit of the Confeſſion, of the Plaintiff to accept of the ſame; for that they conceived it came too late, and for that the Battery was very grievous. Paſch. 16 Jac. C. B. Rott. 2313. *Claſebrook* and *Livſey*'s Caſe. *Hob.* 220.

8. In Treſpaſſe, upon Not-guilty, the Jury found a Special Verdict, That *A.* was ſeiſed of the Lands in Queſtion, and held the ſame of the Manor of *D.* which is Ancient Demeſne; and that *C.* recovered againſt him 40 l. in the Court of Common-Pleas; and took out an *Elegit*, by force of which the Sheriff delivered the Lands in Queſtion to *C.* upon whom *A.* entred; and the Queſtion was, Whether Lands in Ancient Demeſne might be delivered in Execution by the Sheriff upon an *Elegit* out of the King's Court. And it was Reſolved by the Juſtices, That it might. Another Queſtion was, If a new Action be given by Statute which lyeth in the Kings Courts, and not in Ancient Demeſne, Whether the party ſhall loſe his Action, rather than have it in the Kings Court to the prejudice of Ancient Demeſne? As to the firſt Point, It was Reſolved, Though the poſſeſſion of the Lands be gained by the Sheriff's acts; yet the Land was never put in plea directly in the King's Courts. And it appears by our books, that the Conizee of a Statute having Lands in Ancient Demeſne in Execution, had an Aſſiſe of it in the King's Court. And in an Action of Debt brought againſt the Heir in the King's Court, Lands in Ancient Demeſne have been liable to Execution: And ſince the Judgment was good, That *C.* ſhould recover the Debt in the King's Court, and the *Elegit* did warrant the extending of half his Land, and Ancient Demeſne is his Land, as well as other, that the Sheriff had ſufficient warrant to deliver it; and neither the Sheriff nor he that receives it, are ſubject to an Action of Treſpaſſe: but if any Relief be, it is by *Audita Querela*, becauſe there was no time to plead it before. As to the ſecond Point, It was Reſolved, That Actions at Common-Law upon which no remedy could be had in Ancient Demeſne, do lye in the King's Courts, though they ſtirr the poſſeſſion: As a *Quare Impedit*, becauſe they there cannot write to the Biſhop; and becauſe the Common-Law being as ancient as their Priviledges, cannot endure, that there be a failer of Original Right: But of new rights or remedies brought in by Statutes, (which are not preſumed to intend their prejudice) it is otherwiſe: and we ſee they are ſubject to all Statutes which do not concern their Free-hold. It was adjudged in the principal Caſe for the Plaintiff. Hill 10 Jac. Rott. 2541. *Cox* and *Barnſley*'s Caſe. *Hob.* 47, 48.

9. *A.* Executor of J. S. Grantee of the next Preſentation to the Arch-deaconry of *L.* brought a *Quare Impedit*, and declared of a preſentment and diſturbance *in vitâ Teſtatoris, et quod Eccleſia vacavit, et vacua eſt.* It was queſtioned, Whether a *Quare Impedit* will lye for an Executor for a diſturbance *in vitâ Teſtatoris.* It was Objected, That Executors were not within the Statute of 4 E. 3. for that extends to things onely available

to the Teſtator; and this doth not: for it ſhall not be Aſſetts to the Executors. But it was Reſolved, That the Action would lye; for the Statute ſaith, they ſhall have an Action of Treſpaſſe, for taking of goods *in vitâ Teſtatoris*; and that is put by way of reſemblance, and not that they ſhall have an Action for taking goods onely: And an Advowſon in the hands of Executors ſhall be Aſſetts. Paſch. 31 Eliz. C. B. *Sale* and the Biſhop of *Lichfield*'s Caſe. *Owen*. 99.

10. Note: It was holden by the Juſtices, That if a man hath Judgment in Debt upon an Obligation, and no Execution; that he may begin another Action upon the ſame Obligation, but it is otherwiſe of a Contract. Trin. 30 Eliz. in C. B. in Viſcount *Bindon*'s Caſe. *Owen*. 37.

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5. Actions *and Things Reall and Perſonal; and Poſſeſſory: where extinct, ſuſpended, and revived, and dye with the perſon: and where not.*

1. NOte: It was adjudged by all the Juſtices, in the Caſe of Proxies in *Ireland*, That All Reall Actions are extinguiſhed by unity of poſſeſſion: The Caſe there was this; The Biſhop of *M.* before the Statute of Diſſolution had two ſeveral Proxies of 15 s. and 20 s. yearly paid unto him out of a Commaundry, parcel of the poſſeſſions of the Hoſpital of St. *Jobus* of *Jeruſalem* in *Ireland*, and out of the Rectory of *S.* parcel of the poſſeſſions of the Abbot of *T.* in the County of *D.* 33 H. 8. the Hoſpital and Abbey were diſſolved, and all the poſſeſſions veſted in the Crown by Act of Parliament, ſaving Proxies to all Biſhops and their Succeſſors. The Biſhop by Deed 36 H. 8. granted Proxies to the King, the King then being in actuall poſſeſſion of the Commandry and Rectory, out of which the Proxies was paid. Queen Eliz. *Anno* 33. of her Reign, demiſed the Commaundry and Rectory to J. S. rendring rent without any Reſervation of Proxies, and afterwards the Proxies were behind: In this caſe were theſe points; 1. If the Proxies were extinct by the ſuppreſſion and diſſolution of the Hoſpital and Abby, notwithſtanding the ſaving in the Act. 2. If they were extinct by the unity of poſſeſſion in the hands of the King. For the firſt point, It was Reſolved, That although the Religious houſes were diſſolved, yet the certain ſums of moneys which came in lieu of the Proxies, which were in *Eſſe*, were not extinct.

2. That they were not extinguiſhed in the hands of the King; but ſuſpended onely, untill the King by his grant had ſevered the one of them from the other: and yet it was Reſolved, That things which have their original beginning out of Land, and are due in reſpect of the Land onely, if they be parcel of the profits of the Land, are extinguiſhed by Unity of poſſeſſion; for there is *Reſolutio ad primam materiam*, and all reall Actions concerning the ſame are extinguiſhed by ſuch unity of poſſeſſion. *Davis* Reports in the Caſe of Proxies.

2. *A.* Parſon had common Appendant to his Parſonage, out of the Lands of an Abby; afterwards the Abbot had the Parſonage appropriate to him and his Succeſſours: the Queſtion was, Whether the Common was Extinct? It was ſaid, It was, becauſe he had as high an eſtate in the Common, as he had in the Land. But the better Opinion of the Court was, That it was not extinct; for that the Parſonage may be diſappropriate, and then he ſhall have the Common again; and although he hath as high an eſtate, yet he hath not as perdurable an eſtate: and this caſe was vouched out of 21 E. 3. 2. An Aſſiſe of Nuſance was brought for ſtreightning of a Way; which the Plaintiff ought to have to his Mill. The Defendant did alledge unity of poſſeſſion of the Land and of the Mill in *W.* and demanded Judgment if, &c. The Plaintiff ſaid, That *W.* had two Daughters, and dyed ſeiſed, and the Mill was allotted to one of them in partition, and the Land to the other, and the Way was reſerved to her who had the Mill, and the Aſſiſe was awarded; and ſo by the partition, the Way was revived, and appendant as it was before; and yet *W.* the Father had as high an eſtate in the Land, as he had in the Way. Hill. 23 Eliz. in C. B. *Godbold*. 4.

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6. *Where a Right of* Action, *and other Right ſhall ſurvive; Where forfeited by Attainder or otherwiſe*; et è contrà: *Or where given away by generall words; or in the Livery if the Land: where not.*

1. IN an *Ejectione Firmæ*; upon a Speciall Verdict found, the Caſe was; *A.* was poſſeſſed of a Leaſe of Lands for 31 years, and married J. S. The Husband and Wife mortgaged their Intereſt and Term to *B.* for the payment of money at a day: and before the day of payment, *A.* the Wife dyed; the husband paid the money

money at the day, in redemption of the Mortgage, and entred, and made his Wife his Executrix. J. D. takes Letters of Administration of the goods of *A.* and entred upon the Leſſee of the Executrix of J. S. the husband. It was adjudged in this caſe, That though the Leaſe was firſt the Leaſe of the Wife, and that the husband was poſſeſſed thereof in her right; yet by the Enter-marriage he had full power to alien it; and when he ſurvives his Wife, the Condition ſurvives with him, and reſtores him to the Leaſe, in ſuch ſtate as it ſhould have been, if it had not been alliened: and the rather, becauſe the husband paid all the money after the death of the Wife. See *Shelley's* Caſe, *C.* 1. Part. there, 9 H. 7. 25. If a man make a Feoffment of Lands upon condition, That if the Feoffor or his heirs pay 10 l. that he may re-enter, and dyes, leaving a daughter who payes the money and enters; and then a Son is born; yet the daughter ſhall retain the Land. Paſch. 11 Jac. in C. B. rott. 1515. *Young* and *Radford's* Caſe. *Hob.* 3.

2. *A.* enfeoffed *B.* to the uſe of *A.* for life, and afterwards to the uſe of *B.* in Taile, and after to the uſe of *C.* in Fee, with Proviſo and liberty to revoke the uſes, and to limit new uſes if *A.* ſurvive *B*; and afterwards *A.* maketh a Feoffment, and *B.* dyeth; and whether *A.* might limit new uſes againſt his own Feoffment, was the Queſtion? It was Reſolved by the Juſtices, That, by the Feoffment as well his power to Revoke, as to limit new uſes, was gone and determined: For a Livery is of ſuch a force, that it giveth and excludeth the Feoffer not onely of all his preſent Rights, but of all future Rights and Titles. See *Plow.* Com. *Delamar's* Caſe, a Future uſe ſhall be given away and extinguiſhed by the Livery of the Land. *Co.* 1. Part. 111. *Albanies* Caſe.

3. In a *Monſtrans de Droit*, the Caſe was this; In 17 E. 2. *John de malo Lacu*, gave to *Peter de malo Lacu*, and the heirs of his body, the Caſtle and Mannor of *Mulgrave*; which came to Sir *Ralph Bigod*: Sir *Ralph*, 6 H. 8. made thereof a Feoffment in Fee to *W.* and others, to the uſe of his laſt Will, and dyed; the Right of the Land, together with the entail and the uſe, diſcended to Sir *Fr. Bigod.* 21 H. 8. Sir *Francis* made a Feoffment to J. S. and others, to the uſe of himſelf and *Katherine* his Wife, and the heirs of their two bodies; and had Iſſue *Ralph Bigod*, and *Dorothy*. 26 H. 8. the Statute of forfeiture for Treaſon was made: 29 H. 8. Sir *Francis* was attainted of Treaſon, and executed, and *Katherine* ſurvived him: 31 H. 8. a ſpecial Act was made of his Attainder and forfeiture. 6 Eliz. *Ralph Bigod*, ſon of Sir *Francis* and *Katherine* were reſtored in blood by Parliament, and dyed without Iſſue; *Dorothy* married *Roger Ratcliff*, and they had iſſue *Francis Ratcliff*. 8 Eliz. *Katherine* dyed, *Francis* entred. 33 Eliz. all this was found by Office. 34 Eliz. *Francis Ratcliff* dyed, having iſſue *Roger Ratcliff*. 34 Eliz. the Queen granted the Caſtle and Mannor, &c. to *Edmund* Lord *Sheffeild*, and the heirs males of his body: *Roger Ratcliff* brought his *Monſtrans de Droit*, and had Judgment. Whereupon, Errour was brought in the Exchequer-Chamber. There were two Queſtions in the Caſe; the firſt, Whether *Francis Bigod* who had an eſtate in ſpecial tail in poſſeſſion, had alſo any right of the old intaile in him at the time of his Atrainder? or whether it were in Abeyance, in reſpect of the Feoffment made by him 21 H. 8? And the Opinion of the Court was, That the Feoffment gives away all the eſtate the Tenant in taile the Feoffer had concerning himſelf, or any benefit that he might receive thereby; but as concerning his iſſue inheritable to that Intaile, and to him in the Reverſion, and for their good, there remained ſtill in him a Right of that Intail by force of the Statute of *Weſt.* 2. for the good of thoſe that are ſaved by that Statute: but whether it be in the Feoffer himſelf, ſleeping till there be an heir of the Taile, or in Abeyance or conſideration of the Law, is the Queſtion? 2. It was Reſolved, That this old right of the eſtate Taile was forfeited to the Crown, by the Statute of 26 H. 8. for that there was an actual eſtate in taile in the perſon a tainted, at the time of his Attainder. 3. It was Reſolved, That their Rights were bound by the expreſs words of the Statute, there being no ſaving therein for them. 4. That when the Office was found, the Iſſue in taile was barred, notwithſtanding any Remitter in the Caſe: And therefore Judgment was given for the King and the Lord *Sheffeild*, that the former Judgment given ſhould be reverſed. 13 Jac. in the Exchequer. rott. 96. The Lord *Sheffeild* and *Ratcliff's* Caſe. *Hob.* 334. *Godbolt.* 314. the ſame Caſe.

4. *Henry Savell* Leſſor for years of the Mannor of *D.* granted the ſaid Mannor *Habendum*, for ſo many years ſhould be to come after his death to *Cordall* Maſter of the Rolls, if *Dorothy* his wife ſhould live ſo long. Afterwards *Henry Savell*, and he in the Reverſion levied a Fine; In this caſe one point was; If by the Fine levied, the poſſibility as well as the right in poſſeſſion in certain did paſs. It was, 1. Reſolved, That by Deed a man might grant a Poſſibility to come; as 9 H. 7. where a man ſeiſed in the right of his Wife, made a Feoffment in Fee, and took back an eſtate to him and his Wife in Fee, and afterwards they had Iſſue, and the Wife dyed, he ſhould not be Tenant by the Curteſie, and yet his Wife was remitted: And if a man hath cauſe to have a Writ of Errour; if he entreth upon the Land, and makes a Feoffment, the

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Writ of Errour is gone for ever: and in the principal Caſe, It was holden, That if *Cordall* had entred and made a Feoffment in Fee, the poſſibility which he had to have the Terms, had been drowned Trin. 26 Eliz. in B. R. *Sævell* and *Cordall*'s Caſe.

Action *upon the* Caſe, *of* Trover *and* Converſion.

1. *Of what things* Trover *and* Converſion *will lye; and of what not. And by whom, and againſt whom it lyeth;* et è contra.

1. NOte: It was adjudged by *Cook*, Chief Juſtice, and the whole Court, That an Action of Trover and Converſion lyeth of money, although it be not in baggs; but not an Action of Detinue. Mich. 11 Jac. in C. B. *Clark*'s Caſe. *Godb.* 210.

2. In an Action upon Trover and Converſion of divers goods *et inter alia*, of 190 l. *in pecuniis numeratis*. Upon Not-guilty, it was found for the Plaintiff, and Judgment given, and entire damages. Whereupon Errour was brought; and the Errour aſſigned, was, Becauſe Trover and Converſion cannot be of money out of baggs. But all the Juſtices and Barons agreed, That the Action did well lye, it being found, that he converted the Plaintiff's money, (for the loſing is but a ſurmiſe, not material; for the Defendant may take it in the preſence of the Plaintiff, or any other,) and though he take it as a Treſpaſſer, yet the Plaintiff may charge him in an Action upon the Caſe, if he will: Wherefore the firſt Judgment was affirmed: And all the Juſtices and Barons held, That Trover and Converſion lyes as well of moneys out of bags, as of Coin which cannot be known. Hill. 2 Car. rott. 850. in the Exchequer-Chamber. *Kinaſton* and *More*'s Caſe. *Cro.* 1. Part. 63.

3. An Action of Trover and Converſion was brought of 100 Muſk-Catts, and 60 Monkeys; and found for the Plaintiff. It was moved, That the Action lay not, Becauſe it is not ſhewed, that they were tame or reclaimed. See 14 Eliz. *Dyer*. But it was adjudged, That the Action did lye, for that they were Merchandizes, and valuable. Mich. 8 Jac. in B. R. *Grimes* and *Shack*'s Caſe. *Cro.* 2. Part. 262. See *Bolſtrod.* 1. Part. 95. the ſame caſe.

4. In Trover and Converſion of 300 *Todas Lanæ*; upon Not-guilty pleaded, It was found for the Plaintiff, and Judgment given: and Errour was brought; and the Errour aſſigned was, Becauſe *Todas* is no Latine word; *Anglicè vocat.* Todds: but the Errour was not allowed of by the Court; for that it is a framed word to that purpoſe, to ſhew the intent of the parties, although it be not a proper Latine word: and in the Regiſter, there is *Pipam vini, Barrel cervisiæ*: and a Preſident was ſhewed of 12 H. 7. of *Toddas Lanæ*, and Judgment there was given for the Plaintiff: and ſo in the Principal Caſe it was adjudged for the Plaintiff. Mich. 10 Jac. in B. R. *Cliſon* and *Proctor*'s Caſe. *Cro.* 2. Part. 307.

5. Action of Trover brought of a Hatband ſet with Diamonds; and adjudged the Action maintainable. Hill. 7 Jac. B. R. rott. 1217. Sir *John Ratcliff* and *Davies* Caſe. *Cro.* 2. Part. 244. See Trin. 23 Car. B. R. *Vincent* and *Fuſſys* Caſe. *Sty'es.* 44. acc.

6. An Action of Trover and Converſion was brought of divers goods *et inter alia, de uno Riſco. Anglicè*, a Trunk full of Fine Linnen, to the value of 20 l. *et de una pixid', Anglicè* a Box full of Bands and Cuffs, and Shirts, to the value of 10 l. and of divers parcels of other goods. Upon Not-Guilty, It was found for the Plaintiff, and damages entire aſſeſſed to 80 l. It was moved, That *Riſcus* is but a Trunk only; and *Anglicè* full of fine Linnen, to the value of 20 l. is uncertain; and it differs from *Co.* 10. Part. 130. *Oſborn*'s Caſe, *Fulcrum lecti*; for that may be underſtood of all which appertains to the Furniture of a Bed: but *Riſcus*, cannot be referred to Linnen. But the Court held it to be good, and that the damages ſhall be intended to be given for the Trunk onely: wherefore it was adjudged for the Plaintiff; And upon a Writ of Errour brought, the Judgment was affirmed. Hill. 19 Jac. in B. R. rott. 963. *Bantroſt* and *Cooes* Caſe. *Cro.* 2. Part. 664. See *Co.* 10. Part 130. *Oſborn*'s Caſe, there the Action was an Action upon the Caſe upon Aſſumpſit; and adjudged according to the Opinion of the Court here in this caſe.

7. Action of Trover and Converſion was brought; for that the Plaintiff 9. *Martii* 18 Jac. at *Chelmſford* was poſſeſſed of a Writing Obligatory, wherein *A.* and *B.* were bounden to the Plaintiff in 60 l. ſealed with the ſeals of the ſaid *A.* and *B.* as of their proper Bond; and 12 *Martii.* 18 Jac. loſt it, and that 13 *Martii* 18 Jac. it came to the Defendant's hand by Trover, and that 20 *Martii* he converted it to his own uſe. The Defendant demurred

demurred upon the Declaration, becauſe the date of the Bond was not mentioned, nor that it was delivered as their Deed: But Judgment was given for the Plaintiff; for he needs not ſhew the date of it, becauſe it was loſt; and the Defendant hath eſſoyned it; and alſo the Plaintiff is not to recover the debt, but damages therefore. And it was Reſolved, That the allegation, That it was *Scriptum Obligatorium*, wherein they were obliged, hath ſufficient intendment, that they delivered it as their Deed. It was adjudged for the Plaintiff. Paſch. 20 Jac. in B. R. *Upchard* and *Tatam's* Caſe. *Cro.* 2. Part. 637. See Trin. 8 Car. in B. R. *Wilſon* and *Chambers* Caſe. *Cro.* 1. Part. 190. acc.

8. In Trover and Converſion, the Caſe was; That Lands whereupon Beans grew, were the Lands of a Lunatique, and Copy-hold Lands; and the Lord granted to one the Cuſtody of the Land, by whoſe leave the Plaintiff did ſowe the Lands. The Queſtion was, In whoſe name the Action ſhould be brought. And it was the Opinion of the Court? That the Action was to be brought in the Name of the Lunatique; for that there was no Intereſt gained in his Lands by the Commitment; and the Lord hath not power over the Lunatique's Land without a Cuſtome. Hill. 15 Jac. C. B. *Cocks* and *Darſon's* Caſe. *Hob.* 215.

9. In an Action of Trover of divers goods, and Converting of them, the Defendant pleaded Not guilty; which was found againſt him, and damages aſſeſſed to 40 l. It was moved for ſtay of Judgment, That the Action was brought by an Adminiſtrator of goods of the Inteſtate, and that parcell of the goods were things annexed to the Free-hold, and as parcel thereof, for which the Action did not lye; and divers of them were inſenſibly alledged, and alſo the damages being intire, there ought not to be any Judgment: For the Declaration is, That he was poſſeſſed *de duobus Arctis, vocat.* Portal *cum ſuſpenſis, vocat.* hinges. *de uno Molendino, vocat.* a hand-Mill: *de uno plumbo, voc t.* a Lead: *de uno Avevolo, vocat.* a Waſh-fat; which things appear to be fixed to the houſe. But the Exception was diſallowed by the Court; for that the Declaration is, That he was poſſeſſed of them *ut de bonis propriis*, and it may be that thoſe things were ſevered from the Free-hold, and lying by; and ſo ſhall be intended when the Plaintiff ſo declares: and the contrary appears not to the Court by the Defendant's Plea. Another Exception was taken to the Declaration, becauſe he declared *de uno Spadone cum equa precii* 53 s. 4 d. ſo there is not any price at all for the Gelding. But upon View of the Roll in Court, although the Record of *Niſi Prius* was ſo, yet the Roll is *de uno Spadone, et una equa precii* 53 s. 4 d. ſo as the price extends to both: And therefore it was adjudged for the Plaintiff. Mich. 4 Jac. in B. R. *Wood* and *Smith's* Caſe. *Cro.* 2. Part. 129.

10. The Lord *Mountegle* brought an Action of Trover and Converſion againſt the Counteſs of *Worceſter*; and ſuppoſed by his Writ and Declaration, That whereas he was poſſeſſed of a Chain of Gold of the price of 100 l. and ſo poſſeſſed the ſame, ſuch a day at *London*, in ſuch a Pariſh, &c. he caſually loſt it, which came to the Defendant's hands; and the Defendant knowing that Chain to be the Plaintiff's Chain, intending to defraud him, ſold it to divers perſons unknown. The Defendant traverſed, That he did not ſell it *modo et forma*; and demanded Judgment if Action. Upon which Plea the Plaintiff did demur in Law; becauſe it is but Not-guilty by Argument; and alſo becauſe he ought to have concluded *et de hoc ponit ſe ſuper Patriam*. It was holden by the Lord *Dyer*, and the better Opinion of the Court, That the Declaration was not good; for that it is impoſſible, that *poſſeſſionatus amiſit*, and the Plantiff ſuppoſeth a fraud, where there was neither privity, nor Conſideracte; but it appears, the Defendant came to the Chain by Trover: and alſo that in this caſe an Action upon the Caſe doth not lye, becauſe the Plaintiff had his remedy by Detinue; for he hath not ſhewed the ſale to be in Market, or to change the property: And for theſe cauſes it was adjudged againſt the Plaintiff. 3 Ma. *Dyer.* 121. The Lord *Mountegle* and the Counteſs of *Worceſters* Caſe.

11. In Trover and Converſion the Caſe was this; *Fines* loſt a Hawk, and J. S. found it, and ſold it to *A.* and he gave it to Sir *John Spencer*, who ſold it over, and though he knew the Hawk. Yet it was holden by the Court, That he was not chargeable in an Action of Trover: And it was holden in that caſe, that he ought to declare, That it was a tame Hawk, and reclaimed. Yet *Southcote*, Juſtice, ſaid, That the words were, That he was poſſeſſed of it *ut de bonis propriis*; and that implyed it was a Reclaimed Hawk. 14 Eliz. *Dyer.* 307. *Fines* Caſe.

12. In an Action of Trover and Converſion of a Hawk, Judgment was for the Plaintiff. It was moved in Arreſt of Judgment, becauſe it was not ſaid in the Declaration, That it was a tame Hawk; for the words were *Accipitem ſuam, vocat.* a Ramiſh Hawk; which is as much as to ſay, *Inter ramos agens*. It was agreed by the whole Court, That the Judgment ſhould be ſtayed, becauſe that a Hawk is *feræ naturæ*; and although it be tamed, yet if it fly away and hath not *animum revertendi*, *occupanti conceditur*; and although the Declaration

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tion was *de bonis ſuis propriis*, yet that doth not mend the caſe; for the party had but a Right of poſſeſſion, and not of property: and if it be, it is but a Qualified property. See *Cook* 7. Part. 17. b. And it was agreed, That if a man hath a Wild Hawk in his poſſeſſion, and another man takes it out of his poſſeſſion, that an Action of Treſpaſſe will lye: but if it fly away, then *Capiat qui Capere poteſt*. The Judgment was ſtayd. Paſch. 15 Car. in B. R. *Liſter* and *Hones* Caſe.

13. Note: In an Action of Trover and Converſion of goods, the Opinion of the whole Court was clear, That no other place is to be expreſſed in the Declaration, but onely the place where the goods came to the Defendant's hands. Paſch. 10 Jac. B. R. *Atkins* and *Wheeler*'s Caſe, *Cro.* 1. Part. 206.

14. In Trover and Converſion: The Plaintiff declared of a Trover and Converſion *de decem arboribus*; Whereas the Trees were Timber Trees which were felled. It was Objected, That *Arbor* ſignifies a Tree that groweth; and ſo Trover cannot be brought *de arbore*. But the Court ruled it to be good enough. Mich. 1650. B. R. *Pepham* and *White*'s Caſe. *Styles.* 235.

15. Note: It was Reſolved by all the Juſtices, That Trover and Converſion lyes for goods found and converted, although they come afterwards to the hands of the party that loſt them. Paſch. 1651. B. R. *Gowe*'s Caſe. *Styles.* 361.

16. An Adminiſtrator may bring an Action of Trover and Converſion for the goods of the Inteſtates, taken by one before the Letters of Adminiſtration be granted to him; becauſe the Letters of Adminiſtration do relate to the time of the death of the Inteſtate; and not to the time of the granting of them. Mich. 1652. *Imag* and *Hebbs* Caſe in B.R. *Styles.* 341.

17. In Trover and Converſion, the Plaintiff declared, Of a Trunk with Writings; alſo of a great Beam, Scales and Weights; and alſo of a pair of Hangings. It was moved for the Defendant in Arreſt of Judgment, it being found for the Plaintiff, That the Declaration was incertain. It was holden by the Court, That for the firſt, *viz.* a Trunk with Writings, the ſame was good enough: and ſo it hath been adjudged, where an Action upon the Caſe was brought for two Trunks of Cloathes, without expreſſing what Cloathes. But for the other two, *viz.* a great Beam, and Weights and Scales, and alſo for two pair of Hangings, the Court conceived the ſame to be incertain: Although it was ſaid, as to the firſt, That it appeareth by the Regiſter, that Treſpaſs was brought *pro carruca cum apparatu*, & adjudged to be good; where the Court moved the Defendant, that the Plaintiff might amend his Declaration, and he to plead *de novo*, and to conſent to a new Tryal. Hill. 1652. *Webb* and *Waſhborn*'s Caſe. B. R. *Styles.* 361.

18. In an Action of Trover and Converſion of divers goods and houſhold-ſtuff; amongſt other, the Plaintiff declared of a Trover and Converſion of 6. Tunns. The Court was of Opinion, That it is incertain what the Plaintiff doth mean by the words, ſix Tuns: and this Caſe is not like to *Oſborn*'s Caſe, where *Fulcrum Lecti*, ſignifies a Bedſted with Curtains and Vallens; and the word *Anglicè* is added: but here the word *Tun*, ſignifies divers things; and it is incertain what it doth ſignifie here: and therefore it was adjudged againſt the Plaintiff, Mich. 1655. *Clark* and *Fitz-Williams* Caſe. *Styles.* 482.

19. In an Action of Trover and Converſion of goods, brought by two, the Defendant pleaded, That, dependant the Writ, one of the Plaintiffs dyed; and this was moved in Arreſt of Judgment. But the Court was of Opinion, the ſame was no cauſe to ſtay Judgment for being the goods of them both, by the death of one of them the Action ſurvives to the other: and therefore Judgment was given for the Plaintiff. Mich. 12 Jac. in B. R. *Spring* and *Garret*'s Caſe. *Bolſt.* 2. Part. 262.

20. If goods be delivered to a Bargeman or Boatman, by him to be carried to *Graveſend* by water; and by a ſudden ſtorm which doth ariſe, the paſſengers in the Barge or Boat be in danger of their lives, and for ſaving of the lives of them which are in the Barge, the Bargeman or Boatman for lightning of the Barge, doth caſt the goods over board: It was the clear Opinion of the Court, that this being the act of God, this ſudden ſtorm which occaſioned the Barge-man or Boat-man for the throwing over of the goods, which could not otherwiſe be avoided, ſhall not be any cauſe to charge the Barge-man, with Action of Trover and Converſion, of the goods delivered, miſcarried by him, Mich. 12 Jac. in B. C. *Bird* and *Alſtock*'s Caſe. *Bolſt.* 2. Part. 280.

21. An Action of Trover and Converſion was brought againſt the Husband and Wife, of ſheaves of Corn; and declared, That they did convert thoſe ſheaves *ad uſum ipſorum*, *viz.* of the Husband and the Wife. It was Ruled by the Court, 1. That the Declaration was not good, being of two ſheaves of Corn, being incertain, not expreſſing the Certainty what Corn it was; and Declarations ought to comprehend certainty. And, 2. That the Declaration was not good, being layd, That the Converſion was *ad inſorum uſum*, for that the Wife hath no property in them, during the life of her husband. Quære: for *Jones*, Juſtice, ſaid, That there may be a Converſion by the Wife to her own

uſe,

uſe; as, if ſhe bake the Corn into bread, and eat. But for the firſt point, the whole Court was of Opinion, That it was not good for the Incertainty: and therefore Judgment was for the Defendant. Mich. 14 Car. in B. R. *Hodges* and *Simpſon*'s Caſe.

22. In Trover and Converſion of goods, and *inter alia*, of 60 l. in money, brought againſt husband and wife, ſuppoſing they converted them to their proper uſe. It was found againſt them for the 60 l. and Judgment againſt them, and that they ſhould be *in miſericordia*. Whereupon Errour was brought in the Exchequer Chamber: and the Opinion of all the Juſtices of the Common-Pleas, and of the Barons was, That the Judgment ſhould be reverſed; for that it is the Converſion of the husband onely, and that they are onely to his uſe: and ſo it was adjudged, Paſch. 19 Jac. in *Harriſon* and *Bradford*'s Caſe, That the Action did not lye againſt the husband and wife. It was then moved, That the Judgment might be reverſed onely *quoad* the wife; but that was not allowed But the Judgment as to them both was reverſed. Hill. 20 Jac. in the Exchequer Chamber. *Terry* and *Nays* Caſe. *Cro.* 2. Part. 661. See Trin. 13 Car. B. R. rott. 402. *Perry* and *Diggs* Caſe. acc. *Cro.* 1. Part. 355. See Trin. 32 Eliz. in C. B. *Maſhes* Caſe. *Leon.* 312. adjudged contrary; That the Trover and Converſion lyeth againſt the husband and Wife.

23. In Trover, the Caſe was; The Defendant's Bayliff ſeiſed the Plaintiff's beaſts for a Heriot, whereas there was not any due: whereto the Defendant agreed and converted them. The onely Queſtion was, Whether the Plaintiff ought to have this Action, or an Action of Treſpaſſe. It was the Opinion of the Court, That it was in the Plaintiff's Election, whether he will admit himſelf to be out of poſſeſſion or not; for he might have had a Replevin if he would: and in this Action the Trover is not traverſeable, but the Converſion onely. And therefore it was the Opinion of the Court, That he had Election to bring either Trover or Treſpaſs at his pleaſure. Wherefore it was adjudged for the Plaintiff. Paſch. 42 Eliz. in C. B. rott. 730. *Biſhop* and Viſcount *Mountagu*'s Caſe. *Cro.* 2. Part. 50.

2. *What ſhall make a Converſion, and what not; where it ſhall be juſtifiable, and and where not; and what ſhall be a a good Barr in* Trover and Converſion; et è contra.

1. IN Trover and Converſion of certain goods brought by an Executor, It was found by a Special Verdict, That the Teſtator was poſſeſſed of divers goods, and loſt them; and the Defendant found them, and knowing them to be the goods of the Teſtator, upon demand denyed to deliver them: and, If this denyal to deliver the goods, was a Converſion of them, was the Queſtion. And the Opinion of the whole Court was, That the denyal to deliver them, was a Converſion; for the requeſt and denyal makes a Converſion: and, as the keeping of goods by an Executor ſhall be accounted as an Adminiſtration; by the ſame reaſon, the denyal of them in the principal Caſe ſhall be a Converſion. Hill. 43 Eliz. in C. B. *Liſt* and *Newman*'s Caſe. *Goldeſbr.* 152.

2. An Action upon the Caſe was brought of Trover and Converſion of a Cow at the Caſtle of *York*. The Defendant pleaded in barr, that the Biſhop of *D.* was ſeiſed of the Town of *B.* in the County of *D.* and did preſcribe to have a Fair there, and Toll; and for not payment thereof, the Cow was taken by the Defendant as ſervant to the Biſhop, *Abſq; hoc*, that he was guilty at the Caſtle of *York*, or elſewhere; and becauſe the Defendant had not confeſſed the Converſion (for that is the ground of the Action, and ought to be traverſed, or confeſſed and avoided) and the Defendant did not claim any property; It was adjudged for the Plaintiff: and in that caſe it was holden, That if a man hath goods of mine by Trover or Bailment, yet when I require them of him, he can no longer withhold them; and therefore when he ſtill detaineth them from me, it argueth he claimeth them as his own, and ſo to uſe them: and alſo in that caſe it was ſaid, That a Diſtreſſe was no Converſion: but becauſe he did not anſwer to the point of the Action, it was adjudged for the Plaintiff. Mich. 11 Jac. in C. B rott. 318. *Agar* and *Liſle*'s Caſe. *Hutton* 10. See *Hob.* 187. the ſame Caſe. See *Co.* 10. Part. 46, 47.

3. In Trover and Converſion, the Plaintiff declared, That he was poſſeſſed of 27 Ells of Linnen Cloath as of his own goods; and that the goods came to the Defendant's hands by Trover; and

that he knowing them to be the Plaintiff's goods, ſold them to perſons unknown, and converted the money to his own uſe. The Defendant as to 24 Els, ſaid, That long before the loſing, J. S. was poſſeſſed thereof *ut de bonis ſuis propriis*, and ſold them to the Defendant, who before notice that they were the Plaintiff's goods, and before requeſt, ſold them to perſons unknown; and as to the three other Els, he was ready to deliver them to the Plaintiff: and upon theſe Pleas the Plaintiff did demur in Law: and it was adjudged for the Plaintiff: for the Defendant confeſſeth the Converſion, but hath not conveyed a ſufficient title to himſelf to the goods, by which he might juſtifie the Converſion: for the Plaintiff declares of a Converſion of his own goods; and the Defendant juſtifies, becauſe the property of the goods was in J. S. who ſold them to him; which cannot be a good title for him without a Traverſe, unleſſe he had ſhewed he had bought them in Market Overt: and alſo the Defendant's Plea might be true, and yet the Defendant is guilty; for, it may be the Defendant himſelf ſold them to the Plaintiff, or to another who ſold them to the Plaintiff, and afterwards the Defendant found them; and here the Converſion is confeſſed, and not avoided by a ſufficient Juſtification. And as to the latter Plea, it is not ſufficient; for it amounteth but to Not-guilty; and alſo the ſale in the firſt Plea is not good, That it was made to perſons unknown; for it cannot be, but that he muſt have Notice of the buyers, and therefore he ought to have expreſſed their names. And therefore for the inſufficiency of the Defendant's Plea, It was adjudged for the Plaintiff. Mich. 33 Eliz. in C. B. *Vandrink* and *Archer*'s Caſe. *Leon.* 221, 222.

4. In Trover and Converſion, the Caſe was; *A.* Sheriff, upon a *Fieri facias* ſeiſed goods into his hands to the value of the debt; and payed part of the debt; and the goods not being ſold, nor the Writ returned, he is diſcharged of his Office, and afterward he ſells the goods without any Writ of *Venditioni Exponas*. It was Reſolved, It was a good Sale, though he was diſcharged of his Office; for that the *Fieri Facias* gives him power to ſell them without any Writ: and therefore adjudged, That the Action of Trover and Converſion brought by the Plaintiff, would not lye againſt him. Trin. 13 Jac. in B. R. *Style* and *Hearing*'s Caſe. *Cro.* 2. Part. 73.

5. In an Action upon Trover and Converſion, the Defendant pleaded, That as Bayliff of the King for a Diſtreſſe upon a Plaint, he took the goods, and ſold them. It was adjudged to be no Plea; for upon a diſtreſſe, the goods ſhall not be ſold, although it be in the caſe of the King: and therefore adjudged the Action did lye againſt the Defendant. Mich. 8 Jac. B. R. *Somerſall* and *Waits* Caſe. *Cro.* 2. Part. 255.

6. In Trover and Converſion for converting of goods, the Defendant pleaded a Sale in Market Overt, and ſo juſtified the Converſion; and *per Curiam* it was holden to be no Plea; for that it amounted but to the general Iſſue. Trin. 5 Jac. B. R. *Johns* and *Williams* Caſe. *Cro.* 2. Part, 165.

7. In an Action of Trover of certain Plate, the Defendant pleaded, That at another time the Plaintiff had brought his Action againſt J. S. for the ſame Plate, ſuppoſing the Converſion to have been by him, and in that Action he had recovered damages. It was adjudged, That it was a good plea in barr: and in caſe, one have cauſe of Action againſt two, and he obtaineth a Judgment againſt one, he ſhall not have remedy againſt the other; although it was ſaid, That the parties taking or being in Execution, is no ſatisfaction, if the money be not paid. It was adjudged for the Defendant. Trinit. 3 Jac. in B. R. rott. 1099. *Brown* and *Wotton*'s Caſe. *Cro.* 2. Part. 73.

8. Upon Trover and Converſion of goods, the Plaintiff ſuppoſeth; That 3 *Maii*, 14 Jac. he was poſſeſſed of the ſame goods, and the ſame day loſt them; and that 4. *Maii*, *Anno ſupradict.* they came to the Defendant's hand by Trover; and that *poſtea*, viz. 1. *Maii Anno ſupradict.* he converted them. It was found for the Plaintiff: and moved in ſtay of Judgment, That the Declaration was not good, becauſe the Converſion is alledged before the Trover, which cannot be. But it was adjudged, That *poſtea convertit* is ſufficient, and the *Scilicet* was void: Whereupon it was adjudged for the Plaintiff. Trin. 15 Jac. rott. 199. B. R. *Teſmond* and *Johnſon*'s Caſe. *Cro.* 2. Part. 428.

9. Trover was brought in the County of certain Corn, for a tryall of a Title of Land in the County of *B.* and the parties being at Iſſue, and the Jury ready at the Barr, the Defendant pleaded, That the Enqueſt might not be taken, becauſe after the laſt Continuance, and before the Iſſue joyned, the Plaintiff was Excomenge; and brought the Letters of the Biſhop of *L.* Ordinary, where the Excomengement was; which bare date 3 Jac. reciting, he was Excomenge for Recuſancy: whereupon the Plaintiff demurred. 1. Becauſe he doth not ſhew in the Letters when he was Excomenge, and every Plea dilatory, or in abatement, ought to be certain; 2. Becauſe it is not averred, That the Plaintiff, and he named in the Excomengement be one and the ſame perſon, The Court held the Letters of Excomengement not ſufficient, becauſe they were after the demurrer, and becauſe the day of Excom-

Excommengement was not certain ſhewed to the Court: wherefore the Jury was taken, who found for the Plaintiff. Mich. 3 Jac. B.R. *Baker* and *Goughs* Caſe. *Cro.* 1. Part. 13.

10. In Trover, of a Silk Quilt, a Teſtern of a Bed, 5. Curtains, a Petticoat and a Cloak; the Defendant to all but the two laſt, pleaded Not-guilty: and as to the Petticoat and Cloak, ſaid, That *London* is an ancient City, and within the ſame is a Market every day for all goods to be ſold in every part of the City, ſo as one of the Contractors be a Freeman; and that he being a Freeman of the Company of Mercers, bought thoſe things in his open Shop, wherein he long time uſed to buy Wares, of one J. S. for a ſum of money; and ſo Juſtifies the Converſion. Upon which Plea, the Plaintiff did demur. And it was adjudged the plea was not good; for that the Cuſtome is too general, for every Freeman to buy all manner of Wares in every Shop; for then a Scrivener might buy plate in his Shop: and for that he being a Mercer, to buy Petticoats and Cloaks, is not agreeable to his Trade. It was adjudged for the Plaintiff. Trin. 2 Jac. B.R. *Taylor* and *Chambers* Caſe. *Cro.* 1. Part. 68.

11. In Trover of 5. Kine; upon a Speciall Verdict, the Caſe was; *A.* was poſſeſſed of thoſe Kine, and put them to paſture with the Defendant, and agreed to pay to him 12 d. for every Cow weekly as long as they remained with him at paſture. Afterwards *A.* ſold them to the Plaintiff, who required them of the Defendant; who refuſed to deliver them, unleſſe he would pay for the Paſturage, which amounted to 10 l. Afterwards J. D. paid the 10 l. by the appointment of *A.* and the Defendant delivered to him the Cattel. It was adjudged by the Court, That this denyall of them upon demand, and delivery of them to J. D. was a Converſion; and that the Defendant might not detain the Cattel againſt the Plaintiff who bought them, untill the 10 l. were paid; but for that, the Defendant is put to his Action againſt him, who put them to him to paſturage. It was adjudged for the Plaintiff. Hill. 7 Car. in B.R. *Chapman* and *Allen's* Caſe. *Cro.* 1. Part. 197.

12. In Trover and Converſion of 200 Loads of Timber, and 200 Loads of Stackwood, the Caſe was; Tenant for life without Impeachment of Waſte, except voluntary Waſte, he in the Reverſion ſold the Timber Trees growing upon the Land to the Plaintiff; Tenant for life cut down the Trees and ſold them to the Defendant, who ſold them to J. S. And whether the Bargainee of the Trees ſhould have an Action of Trover againſt the Vendee of the Tenant for life, the Tenant for life being alive, was the Queſtion. The Caſe was not reſolved. See *Co.* 11. Part. *Bowles* Caſe And ſee *Co.* 11. Part. *Richard Lyſords* Caſe, for the Reſolution of this Caſe.

13. Upon Trover and Converſion of a Bond of 100 l. conditioned to pay 50 l. at ſuch a day; which came to the Defendant's hands: and he being required ſuch a day to deliver it, refuſed, and converted it to his own uſe. Upon Not-Guilty, It was found, and Judgment for the Plaintiff; and Errour brought, becauſe no date of the Bond is mentioned, and the day and place of the Converſion not alledged. But the Exceptions were overruled by the Court; for being loſt and converted, peradventure he did not know the certain date of it; and if he ſhould recite a date, and miſ-recite it, it might be a failer of his Action; and the denying to deliver the Bond upon requeſt, is a Converſion; and the aſſignment of the place of it, is not material, when there is a ſufficient Converſion. Trin. 8 Car. B. R. *Wilſon* and *Chambers* Caſe. *Cro.* 1. Part. 190.

14. In Trover and Converſion of goods; The Writ was, That ſuch a day, *apud A. in Com. S.* he was poſſeſſed, &c. and loſt them; and the Defendant found them, and converted them; and in the Declaration, the Plaintiff ſhewed the Trover and Converſion to be *apud A. predict.* Exception was taken to the Writ, becauſe the place of the Converſion was not ſhewed in it; and 3 H. 6. vouched to that purpoſe. But the Court Reſolved the Writ to be good; for the poſſeſſion ſuppoſed to be at *A.* and the loſſe, Trover, and Converſion being all conjoyned with a Copulative, all ſhall be intended to be at one place at *A.* The Judgment was affirmed. Paſch. 14 Car. B. R. rott. 365. *White* and *Hanbies* Caſe. *Cro.* 1. Part. 376.

15. In Trover and Converſion of a Bagg of money; upon Special Verdict, the Caſe was; *A.* recovered againſt *B.* 40 l. in the County Court. A *Capias* iſſued againſt *B.* and *Non eſt inventus* returned by the Defendant, Serjeant at Mace. A *Fieri Facias* iſſued againſt *W.* one of the Pledges of *B.* and upon this, 3. Butts of *W.* his goods were taken in Execution. The Plaintiff being preſent to ſtay the ſale of the goods taken ſo in execution, pawned the ſaid bagg of money, and left it in the hands of the Defendant, to the end he ſhould keep the ſame, till the next Court day; and this onely as a pledge for the redelivery of the goods to the Defendant upon his requeſt, if *W.* in the interim did not obtain from *A.* the ſparing of the Execution; and the Jury found no requeſt made, nor *W.* had procured the ſtay of the Execution; but found the Requeſt of the Plaintiff to the Defendant, to deliver the bagg of money; and his Refuſal to do it. The Opinion of the whole Court was, That this being upon a Bailment; and the Writ of

Execution being expired, and the time paſt limited to the Defendant by the Writ to ſell the goods, there it was impoſſible for the Defendant to have the goods again; but he is to have the bag of money which was pledged for them: and therefore he was to keep the ſame for his ſatisfaction; and this retainer of the bagg of money, though upon requeſt, in this Caſe was no Converſion. And ſo in the principal Caſe Judgment was given for the Defendant againſt the Plaintiff. Trin. 11 Jac. B. R. rott. 1100. *Iſaac* and *Clarks* Caſe. *Bolſtr.* 2. Part. 307. 308. 309. to 314.

16. In Trover and Converſion of ſo many Hogſheads of Cider in *London*; The Defendant pleaded bailment of them to him, to redeliver to another *in Com. Oxon.* to be ſpent in his houſe, *abſq; hoc*, that he converted them at *London, aut alibi extra Com. Oxon.* It was holden by the Court to be no good Plea, becauſe it is no more but Not-guilty, the general Iſſue; and a difference was taken, where one doth juſtifie in another County, and ſhews a ſpecial Cauſe of Juſtification, as by reaſon of a Special Warrant of a Juſtice of the Peace, there ſuch traverſe may be taken: but not where the thing is meerly perſonal and tranſitory, as in this caſe, Judgment was entred for the Plaintiff. Trin. 14 Jac. in B. R. *Phillips* and *Wicks* Caſe. *Bolſtr.* 3. Part. 209.

17. In Trover and Converſion, the Caſe was; The Defendant keeping a Common Inne, a ſtranger brought the Plaintiff's horſe to the Inne, and there ſet him for ſome time; afterwards he went away, leaving the Plaintiff's horſe there for a pledge for his meat. The Defendant not being paid for the horſe-meat, detained the Horſe; the Plaintiff demanded the horſe: which the Defendant refuſed to deliver to him: whereupon he brought the Action; and the Defendant pleaded the ſpecial matter aforeſaid: upon which the Plaintiff demurred in Law. It was the Opinion of the Court, That the Demurrer was not good; but the Defendant's Plea was good; and Reſolved, That an Inne-keeper may retain and keep a Horſe left in his Inne for his meat, although it be the horſe of a ſtranger: for otherwiſe it might be a fine trick for the Plaintiff to have his horſe kept, and to give the Inne-keeper nothing for the ſame; but inſtead of payment of him for his meat, to pay him with an Action: and ſo it was adjudged, Mich. 6 Jac. in B.R. in *Harlew* and *Wood*'s Caſe. See *Cook* 8. Part. 146. the 6. Carpenters Caſe: and 5 E. 4. 2. there cited. See Trin. 9 Jac. in B. R. *Skipwith*'s Caſe, acc. See Trin. 10 Jac. in B. R. *Bolſtr.* 1. Part. 107. *Moſſe* and *Townſends* Caſe, acc. Mich. 14 Jac. in B. R. *Robinſon* and *Walter*'s Caſe. *Bolſtr.* 3. Part. 269. See the like Caſe, Hill. 14 Jac. rott. 650. in B. R. *Stirt* and *Drungold*'s Caſe; For a horſe left at the Sword and Buckler, being a Common Inne in *Holborn*, where, upon the like Plea by the Defendant, and the Plaintiff's Demurrer upon it, It was adjudged, That the Defendant's plea was good, and the Plaintiff had no cauſe of Demurrer. *Bolſtr.* 3. Part. 289.

Acts.

1. *Where the Law looketh upon, and hath a reſpect to the Original* Act; et è contra.

1. WHen divers things are requiſite to the Conſummation of a thing, the Law hath more reſpect to the Original Cauſe, & act then any thing elſe; And therefore if a man be preſented to the Church of another man in the time of Warr, and the Preſentee is Admitted, Inſtituted and Inducted in the time of Peace, the Law looks upon the Original Act; *ſcil.* the Preſentment which was done in the time of Warr, and the Admiſſion, Inſtitution, and Induction, although they were in time of Peace, ſhall be void. *Coo.* 1. Part. 106. *Shelly*'s Caſe.

2. The Caſe was this; There was *Robert Bingham* the Grandfather, *Robert* the Father, and *Richard* the Son. The Grandfather held the Mannor of *Binghams* by Knights-Service of Sir *John Horſey*, as of his Mannor of *Horſey's Melcam*, and levied a Fine of the Mannor of *Bingham's Melcam*, unto the uſe of himſelf and his Wife, and the heirs of *Robert* the Grandfather; and afterwards he levied another Fine of the ſaid Mannor to the uſe of himſelf for life, and after to the uſe of *Robert* the Father being heir in taile, the Remainder to the right heirs of the Grandfather. *Robert* the Father dyed; *Richard* his Son and heir being within age, by which the Remainder diſcended to him: Sir *John Horſey* ſuffered a Common Recovery of his Mannor of *Horſeys Melcum* unto the uſe of himſelf, and *Dorothy* his Wife in taile, and afterwards to the uſe of Sir *Ralph Horſey* and his Wife in taile; the Remainder to the right heirs of Sir *John*: Sir *John Horſey* and *Dorothy* dyed without Iſſue, Sir *Ralph Horſey* entred into the Mannor of *Horſeys Melcum*. Afterwards *Robert Bingham* the Grandfather dyed, by which the Reverſion of that Mannor diſcended to *Richard*

Bingham.

Bingham. Afterwards *Jane* the Wife of *Robert Bingham* the Father dyed, *Richard Bingham* within age entred into the Mannor of *Binghams Melcam*, & made a Leaſe to J.S. of part of the Demeans thereof for 7. years, who demiſed it to J.D. who entred; Upon whom Sir *Ralph Horſey* entred, and J.D. brought againſt him *Ejectione Firmæ* of the Demeans of the Mannor of *Binghams Melcam*. It was Reſolved by the whole Court in this Caſe, That Sir *Ralph Horſey* the Defendant ſhould not have the Wardſhip of *Richard Bingham*, becauſe *Robert Bingham* the Father held not of him, nor any of his, nor any of his Anceſtors at the time of his death; nor was the Land within the Fee and Seigniory of Sir *Ralph Horſey* at the time of the death of *Robert Bingham* the Father; and a man ſhall never have the Wardſhip of the heir, when the Land was not in his Fee or Seignory at the time of the death of the Tenant: and it was ſaid, That in the principal Caſe, the Law ſhall look back to the death of him in the Remainder, and the diſcent from him to one within age, which is the Original Cauſe of Wardſhip, then to the death of the Tenant for life, viz. *Robert* the Grandfather, which is but the *cauſa ſine qua non*; and rather a Removal of the Impediment; then a cauſe of the Wardſhip. *Cook*. 2. Part 9. *Bingham's* Caſe.

3. The Baroneſs of *Mounteagle* in her Widowhood, retained J. S. to be her Chaplain, according to the Statute of 21 H. 8. who had a Benefice of the value of 8 l. *per annum*. The Baroneſs married the Lord *Compton*. Afterwards J. S. having obtained a Diſpenſation, was Admitted, Inſtituted and Inducted into a ſecond Benefice. It was Reſolved, That in this caſe, That J. S. after the marriage might have a Diſpenſation, and thereupon a ſecond Benefice; for that the Law in this caſe looks back upon the Original Act, which was the Retainer of the Chaplain by the Baroneſs in her Widowhood, which had a good beginning; and therefore ſo long as the Baroneſs continued a Baroneſs, ſhe had power to retain two Chaplains: and ſuch Chaplains might have a Plurality; and in this caſe ſhe continued a Baroneſſe, and the Priviledge was not loſt by her Inter-marriage with the Lord *Compton*. *Cook*. 4. Part. 117, 118. *Alton's* Caſe.

4. *A.* brought a Writ of Covenant againſt *B.* for not repairing a houſe; The Defendant pleaded an Accord between him and the Plaintiff, and execution of it in ſatisfaction of the default of Repairing. In this caſe it was Objected, That this Action of Covenant was founded upon the Deed, and ſo could not be diſcharged but by matter of as high a nature, and not by matter of Accord *in Pais*. Yet it was Reſolved, becauſe the duty did accrue not meerly by the Deed, but by matter ſubſequent together with the Deed: For there is a difference, when a duty accrues by the Deed inter tainty *tempore Confectionis*, as by Covenant, Bill, Obligation; there this duty takes his eſſence and operation originally from the Deed, Bill, or Obligation; and muſt be avoided by matter of as high Nature, viz. by Writing: But when no certainty accrues by the Deed, but a wrong or a ſubſequent default do give an Action to recover damages, which are onely in the perſonalty, there for ſuch wrong or default, Accord with ſatisfaction is a good Plea. See *Cook*. 6. Part. 41. *Blake's* Caſe.

5. If a man make a Feoffment in Fee upon Condition, That the Feoffee before ſuch a day ſhall re-enfeoffe the Feoffor, and the Feoffee taketh a Wife, or entreth into Religion and is profeſt; in theſe Caſes the Feoffer may enter preſently before the day: albeit that before the day the Wife dyeth, or the Feoffee be deraigned or take back the eſtate; becauſe the Law looks upon the Original Act, the diſability in the Feoffee: for once diſabled, he is diſabled for ever. But if a man maketh a Feoffment upon Condition, That if the Feoffor or his heirs pay a ſum of money before ſuch a day, and the Feoffor commits Treaſon, and is Attainted and executed, now there is a diſability on the part of the Feoffor, for he hath no heir; but if the heir be reſtored before the day, he may perform the Condition: And ſo it was adjudged, 18 Eliz. in C.B. in Sir *Thomas Wiat's* Caſe: otherwiſe it is, if ſuch diſability had been on the part of the Feoffee; and the reaſon of the difference is, becauſe that the eſtate of the Land did originally flow from the the Feoffor, ſo as there remains a kind of Right to have the Land again: and ſo it is in caſe the Feoffor enters into Religion and is profeſt, and before the day is deraigned, in ſuch caſe he may perform the Condition for the cauſe aforeſaid. See *Cook*. 1. Part. *Inſtitutes*. 221. acc.

2. *Where a man may not do an Act to himſelf*, et è contrà: *and what Acts may be ſo done. And where a man may do an Act; and take by the ſame act: where not.*

1. *Roſſe* was bound in a Recogniſance of 1000 l. to *A.* and *B.* Afterwards *Roſſe* and his Wife gave part of the Mannors of *Dale* and *Sale* in the County of *York*, to the Conuſees: *A.* one of the Conuſees, ſued execution of the ſaid Recogniſance againſt *Roſſe* in *London*; and he was taken in Execution: and afterwards he ſuppoſing the giving of the Lands unto the Conuſees, had diſcharged the ſaid Recogniſance, brought an *Audita Querela*. It was Reſolved in that caſe, That the *Audita Querela* did not lye, becauſe in that caſe, the Land was not the debtor, but the body of the Conuſor remained the debtor; and the Land was not chargeable with the debt, but at the Election of the Conuſees: But yet in that caſe it was holden, That if the Conuſor doth enfeoffe the Conuſee of part of the Land, and a ſtranger of another part of it, and reſerve a part in his own hands; that in that caſe the Conuſee ſhall not have Execution againſt the ſtranger: For if the Conuſee himſelf be one of the Feoffees, the Lands in the hands of the other Feoffees ſhall not be chargeable with the Execution; for that the Conuſee himſelf cannot be contributary with them, (for his part towards the ſatisfying of the charge) becauſe he cannot contribute to himſelf, nor can he be contributary for a perſonal thing due to himſelf: Howbeit againſt the Conuſor himſelf the Conuſee ſhall have execution againſt him for the part of the Lands which remaineth in his hands. 5 *E.* 6. *Plow.* Comment. 72. *Roſſe* and *Pope*'s Caſe.

2. If there be Lord and Tenant, and the Lord releaſeth to his Tenant the Seignory, the ſame of neceſſity muſt enure by way of Extinguiſhment; for that the Tenant cannot have Service to be taken of himſelf; nor can one and the ſame man be Lord and Tenant; and ſo it is if a Rent-Charge be granted out of Land, and the grantee Releaſeth, or granteth the Rent to the Tenant of the Land, the ſame muſt needs enure by way of Extinguiſhment; for that a man cannot have Land and a Rent iſſuing out of the ſame Land at one time. See *Litt.* 479, 480. See *Cook. Inſtitutes* 1. Part. 307. acc.

3. Sir *Ralph Howlet* Knight, ſeiſed in taile of the Mannor of *Gorham Bury*, the remainder in tail, the remainder in Fee to Sir *Ralph*; ſuffered a common Recovery thereof in a Writ of Entry, he being then Sheriff of the County of *Hertford*, where the Mannor was; and therefore becauſe he was Sheriff of the County, and could not ſue himſelf, or ſummon himſelf. It was deviſed, that a Writ of Errour ſhould be brought againſt him; wherein a Releaſe of all Errours made by him ſhould be pleaded, thereby intending to barre the Iſſue: which was done accordingly. But notwithſtanding this; In that caſe it was adjudged, That the Iſſue in taile was not barred, nor he in the Remainder by the ſame Recovery, but might avoid the ſame in a Writ of Errour brought by them: for that the firſt Recovery was void, in that Sir *Ralph Howlet* being Sheriff, could not do an act to himſelf, viz. ſummon himſelf upon the Writ of Entry brought. 3 *Eliz. Dyer.* 188. Sir *Ralph Howlet*'s Caſe.

4. The younger brother diſſeiſed the eldeſt brother, who was barred in an Aſſiſe by falſe oath. The younger brother charged the Land, and dyed without Iſſue, and the Land diſcended to the eldeſt. It was adjudged, That he was without remedy to avoid the Charge, becauſe he could not be remitted againſt the Record, and there was none (but himſelf) againſt whom he could bring his Action; and he could not bring the Action againſt himſelf. 25 H. 8. *Dyer.* 5. See *C.* 3. Part. in the Marqueſs of *Winchester*'s Caſe, acc.

5. Note: It was agreed by the Juſtices, That if a Parſon of a Church purchaſe a Mannor within his Pariſh, that by this purchaſe and unity of poſſeſſion, the Mannor is diſcharged of Tythes in the hands of the Parſon, which was chargeable before, becauſe the Parſon cannot pay Tythes to himſelf; but if afterwards he leaſeth the Mannor to a ſtranger, there he himſelf ſhall pay Tythes. But it was holden, If a Parſon Leaſe his Glebe, rendring Rent, there the Leſſee ſhall pay Tythes. 30 H. 8. *Dyer.* 105. See *Coo.* 1. Part. *Albanie*'s Caſe. *Coo.* 2. Part. Biſhop of *Canterburies* Caſe: and *Coo.* 11. Part. 13. in *Pridle* and *Nappon*'s Caſe.

6. It was holden by the Juſtices, That if a woman be Guardian of the *Fleet*, and one who is there impriſoned marrieth the Woman Guardian; the ſame ſhall be adjudged an eſcape in the woman, and the Law ſhall adjudge the priſoner to be at large, becauſe he cannot be in priſon under the Cuſtody of his Wife. And ſo if the Warden of the *Fleet* who hath the Office in Fee-ſimple, dyeth ſeiſed of the Office, his ſon and heir then being in priſon, the Law ſhall adjudge him to be out of priſon;

priſon; although he hath fetters upon his leggs: becauſe he cannot keep himſelf in priſon, or be a priſoner to himſelf: and there ore in ſuch caſe, It ſhall be intended an Eſcape. Paſch. 4 E. 6. *Plow.* Com. *Plate* and the Sheriff of *London*'s Caſe, 37.

7. A Recognizance was made to Sir *Nicholas Bacon* Knight, Keeper of the Great Seal, and two others: and it was taken before the ſaid Sir *Nicholas Bacon*; and if it were good, or not, was the Queſtion. And the Opinion of the Juſtices was, That as to Sir *Nicholas Bacon* it was void; for that he could not take a Recognizance to himſelf; but as to the two others, it was good. Paſch. 5 Eliz. *Dyer.* 220. Sir *Nicholas Bacon*'s Caſe.

8. In a *Quare Impedit*, the Caſe was, That the next Avoidance of the Church was granted to three, *Habendum* to them *et uni eorum conjunctim et diviſim*: the two firſt named in the Grant, preſented the third, who was Admitted, Inſtituted, and Inducted: and it was adjudged to be good. But it was holden, If the Biſhop had refuſed his Preſentment alone; then the *Quare Impedit* would not have layen: becauſe the ſeverance in the *Habendum* was void in Law; and ſo he could not preſent himſelf. 14 Eliz. *Dyer.* 302.

9. If the Advowſon of the Church of *D.* be granted to the Parſon of *D.* and his Succeſſors; It is void as to the Succeſſors, becauſe that the Succeſſor cannot take it, nor can have any benefit of it by way of preſentation, becauſe he cannot preſent himſelf to the ſame. *Cook.* 2. Part. 51. in Sir *Hugh Cholmley*'s Caſe.

10. Excommunication is a ſpiritual act; and if it be pleaded in diſability of the party in the King's Temporal Courts, it muſt be certified to the Court by the Biſhop himſelf, for that none can certifie an Excomengement to the Court, but he who is immediate Officer to the Court, and an Excomengement certified by his Commiſſary, is not good: and ſuch Certificate made by the Biſhop of an Excomengement ſhall be good. But yet if a Biſhop be Defendant in an Action brought againſt him, an Excomengement of the Plaintiff in that Action being certified by him in his own Court, ſhall not be allowed by the Judges of the Common Law, to be any diſability of the Plaintiff in the Action; for that the Biſhop ſhall not be Judge in his own cauſe; and the Temporal Judges ſhall intend it to be in the ſame cauſe. Mich. 6 Jac. in the Exchequer. *Coo.* 8. Part. 68. in *Trollop*'s Caſe.

11. In an Action of Debt brought upon an Obligation, the Caſe was; Two were bound to a Third perſon joyntly and ſeverally; The Obligee made the Wife of one of the Obligors his Executrix, and dyed, who adminiſtred: The Husband the Obliger made her alſo his Executrix, and dyed, leaving Aſſetts to pay the debt, then ſhe dyed. The Plaintiff took Letters of Adminiſtration of the goods and Chattels of the Obligee, not adminiſtred; who brought Debt againſt the Defendant being the ſurviving Obligor: and in this Caſe it was adjudged by the whole Court, That the Action would not lye; For that when the Obligor made the Executrix of the Obligor his Executrix, and left Aſſetts, the Executrix could not ſue her ſelf, but the debt was forthwith ſatisfied by way of Retainer; and being a perſonal Action, once ſuſpended, it was for ever extinct, and ſo no new Action could be brought for that debt. Hill. 11 Jac. in C. B. rott. 1999. *Fryer* and *Gildridges* Caſe. *Hob.* 10.

12. In Treſpaſſe for taking away a Bag of Nutmegs, the Defendant pleaded, That the City of *London* is an Ancient City time out of mind, and that the Mayor, Citizens, and Comminalty had been a Body politique time out of mind, and ſeiſed of a Wharf in *London* called Queen-Hithe; and by all that time had uſed to take for goods layd upon the ſaid Wharf, to be conveyed from thence, of perſons not lawfully diſcharged Wharfage, *ſcil.* 1 d. for every Porter's burthen; and for not payment, to diſtrein for ſuch Wharfage upon the ſaid Wharf: and ſhewed, that two Porters burthens of the Plaintiff's goods, being no perſon diſcharged, (whereof the Bag of Nutmegs was part) was brought and layed upon the Wharf, to be conveyed by Water; and the Defendant being the Collector, demanded the Wharfage; and becauſe the ſame was not paid, he diſtrained the bagg of Nutmegs. The Plaintiff by Replication ſaid, That within the ſame City there was, and time out of mind had been a Cuſtome, That all the Free-men of the ſaid City had been, and ought to be diſcharged of the ſaid payment of Wharfage; and averred, he was a Freeman of the City, &c. The Defendant ſaid, There was no ſuch Cuſtome within the ſaid City. And then ſayes, That within the City there is, and time out of mind hath been a Cuſtome, That when any Iſſue, &c. upon any Cuſtome of the ſaid City is joyned, though the Mayor, Comminalty, and Citizens be parties to the Action; The Mayor and Aldermen of the City have uſed to certifie to the Juſtices the truth of the Cuſtome. The Plaintiff ſaid, That the ſaid Iſſue ought to be tryed by Jury, and not by Certificate; and that the Cuſtome for the tryal by Certificate was againſt Law: upon which the Defendant demurred in Law. The Queſtion only was, Whether the Cuſtome alledged in this ſpecial Caſe, were good or not? that the Mayor and Aldermen ſhould certifie a Cuſtome which concerned the Intereſt of the Corporation, whereof they were a part. And in that

that Caſe, It was adjudged by the whole (amongſt other points) That it was againſt Right and Juſtice, and againſt natural Equity, to allow them their Certificate, wherein they are to try and judge their own cauſe. And although in the pleading it was confeſſed, That the Cuſtome of Certificate of the Cuſtomes of *London* is confirmed by Parliament; yet it made no change in the caſe againſt natural Equity, becauſe it is none of the Cuſtomes intended, but a kind of Preſcription, or in the nature of a Preſcription, and ſo not within their Cuſtomes. And an Act of Parliament made againſt natural Equity, to make a man Judge in his own cauſe, is void in it ſelf. And therefore it was Reſolved, That the Tryal in the principal caſe ſhould be by Jury, and not by the Certificate. Trin. 12 Jac. in C.B. rott. 619. *Day* and *Savage's* Caſe. *Hob.* 85.

13. If there be Lord and Tenant, and the Tenant make a Leaſe to a man for the Term of his life; ſaving the Reverſion to himſelf: If the Lord grant the Seignory to the Tenant for life in Fee, (although as to all things concerning the right, the Seignory hath its being) yet as to the poſſeſſion during the particular eſtate, the Grantee ſhall take no benefit of the Seignory, and during that time he ſhall have no Rent, Service, Wardſhip or the like, becauſe thoſe duties belong to the poſſeſſion; and he cannot do or pay them to himſelf. *Cos.* 1. Part. *Inſtitutes.* 314. acc.

14. Note: A man cannot preſent himſelf unto a Benefice by way of Preſentation: But yet in ſome caſes a man ſhall do an Act by the ſufferance of the Law, to himſelf; as, a man may vouch himſelf for to ſave the tail, or pray in ayd of himſelf, or a man may pay himſelf by way of Retainer; but a man cannot give a thing to himſelf; no more then the husband can give to the Wife, becauſe they are one perſon in Law. See 13 H.8. 13. *Heckey's* Caſe.

15. The Lord of a Mannor did preſcribe, That he had uſed to diſtrain the Cattle, which were upon the demeans of his Mannor for damage feaſant, and to detain the diſtreſſe untill a Fine were paid to him for damages at his Will, and the Preſcription was adjudged void, becauſe it was againſt a Rule in Law, that no man ſhould be Judge in his own cauſe. See *Cook.* 1. Part. *Inſtitutes*, 141. And ſee, That a Cuſtome, that the Lord ſhall ſeize for a Heriot, the beaſt of a ſtranger levant and couchant upon the Land of the Tenant; is a void Cuſtome; for ſo he ſhould be his own Judge. See *Dyer.* 3 Eliz. *Dyer.* 199. See *Davis* Reports in the Caſe of *Tanaſtrie*, acc. Hill. 17 Car. in B.R. in *Thorn* and *Tyes* Caſe, by *Brampton*, Juſtice, the Cuſtome to diſtrain the Cattle of a ſtranger for a Heriot, is good, becauſe the diſtreſs is onely a pledge, and a means to get the Heriot.

Acts of God, of the Law, and of the Party.

And where they ſhall bind; Where not. And where ſuch Acts ſhall ſtand good; Where not.

1. WHen the Law preſcribeth a means to perfect or ſettle any right or eſtate, if by the Act of God this means in ſome circumſtance come impoſſible; yet no party who was to have received benefit if the means had been withall circumſtances performed, ſhall not receive any prejudice for not executing thereof in ſuch circumſtance, which becomes impoſſible by the act of God, if all be done without Lacheſſe that the parties might do: and therefore the Rule of Law is, That a man ſhall not be Tenant by the Curteſie without actual ſeiſin: Yea of a Rent, or of an Advowſon, if the Wife dye before the Rent due, or before the Avoidance, he ſhall be Tenant by the Curteſie; becauſe it was impoſſible for him by the Act of God to have Actual poſſeſſion. So if Leſſee for the Term of another man's life be diſſeiſed of Lands, and the diſſeiſor takes the profits: the means which the Law preſcribes for the Recovery of the mean profits is, that the Tenant for life make his re-entry, and ſo bring an Action of Treſpaſſe. But if the means become impoſſible by the Act of God, *ſcil.* by the death of *Ceſtuy que vie*, in ſuch caſe he ſhall have an Action of Treſpaſſe without any re-entry. See *Cook.* 1. Part. 97. in *Shelly's* Caſe.

2. *Edward Shelley* Leaſed Lands for years, and afterwards Covenanted to ſuffer a Common Recovery, which ſhould be to the uſe of himſelf, and after to the uſe of *A.* for 24 years, and afterwards to the heirs males of the body of *Ed. Shelley*, and the heirs males of the body of the ſaid heirs males. *Ed. Shelley* 9. October, the firſt day of the Term in the morning betwixt 5. and 6. of the Clock dyed, the Recovery paſſeth the ſame day, and an *Habere facias ſeiſinam* was awarded, but the Recovery was not executed untill 19. of October: the 4th of December

ember the Wife of the Eldeſt ſon (before dead) of *Ed. Shelley* was delivered of a ſon, named *Henry Shelley*. It was adjudged in this caſe, when *Ed. Shelley* dyeth the morning of the ſame day that the Judgment was given, and immediately upon the Judgment, the Recoverers ſue forth Execution by *Habere facias ſiſinam*, ſo as there was no *Laheſſe* in the party, but it became impoſſible by the Act of God, that Execution ſhould be ſued in the life of *Ed. Shelley*. It was adjudged, That the ſame ſhould not prejudice the ſon that was after born, who at that time was in *utero Matris*. *Cook.* 1. Part. 98. *Shelley's* Caſe.

3. Two men are condemned in Debt, the one was taken and dyed in Execution. It was Reſolved by the whole Court, That the taking of the other in Execution was lawfull; and an *Audita Querela* brought by him did not lye: and it was Reſolved, That if the party dyeth in Execution, that the Plaintiff may have a New Execution by *Elegitor Fieri facias*, becauſe the Act of God, *viz.* the death of the party ſhall not tend to the prejudice of any man; and ſo likewiſe it is of the Act of the Law. 39 Eliz. in B.R. rott. 259. *Cook.* 5. Part. 86. *Blunfield's* Caſe. See Trin. 10 Jac. rott. 38. C.B. *Foſter* and *Jackſon's* Caſe. *Hob.* 52. adjudged, That a man dying in Execution, his Heirs or Executors are no further Chargeable: contrary to the Judgment in *Blunfield's* Caſe. And ſee Paſch. 43 Eliz. *Williams* and *Cutteryes* Caſe there vouched, adjudged accordingly.

4. Tenant in *Capite* dyed, his heir of full age, who tendered his Livery, and was admitted to it, and within the time given him for the proſecution of his Livery, he bargained and ſold part of the Lands to another in Fee, and within that time alſo dyed. It was adjudged in that caſe, That when the heir at his full age tendered his Livery, the ſame was as much as he could do, then when he dyed within the time for the proſecution of his Livery, ſo as the ſuing out of it was become impoſſible by the Act of God, the Intereſt which the King had, was determined by the death of the heir, and the bargainee might entet and occupy the Land without any *Monſtrans de droit*, or *Amoveas manum*. *Cook.* 8. Part. 172. *Hales* Caſe.

5. If the Grantee of a Rent-Charge purchaſeth parcel of the Land; he cannot afterwards maintain a Writ of Annuity, becauſe the Rent is extinct by his own act; But if the Rent determineth by the Act of God, or by the Act of the Law, there he ſhall have a Writ of Annuity; *quia Actus Legis non facit injuriam*. *Cook.* 2. Part. 36. *Fulwood* and *Ward's* Caſe.

6. Note; That a man by his own Act cannot alter the nature of his Action: As in Waſte, If the Leſſor releaſe Actions reall, he cannot have an Action perſonal, nor *è contra*; but by the Act of Law, the nature of an Action may be changed: As if Leſſee for the life of another man committeth Waſte, and *Ceſtuy que vie* dyeth, an Action of Waſte lyeth onely for the damages in the perſonalty, becauſe the Action real is determined by the Act of God, and of the Law. See *Coo.* 1. Part. *Inſtitutes*, 285. acc.

7. A Woman Copy-holder of certain Land *durante viduitate ſua*, according to the Cuſtome of the Mannor ſowed the Land; and before ſeverance of the Corn ſowed, ſhe took a husband: and the Queſtion was, Whether the Husband, or the Lord of the Mannor ſhould have the Corn ſowed? And it was adjudged, That the Lord of the Mannor ſhould have it; for although at the time of the ſowing, the eſtate of the Wife was incertain; and although her eſtate be ended by Limitation, and not by Condition either in Fact, or in Law; yet becauſe it determineth by the Act of the Leſſee herſelf, the Lord ſhall have the Corn, and not the Husband. Hill. 37 Eliz. rott. 924. in B.R. *Coo.* 5. Part. 116. *Oland's* Caſe.

8. In a Prohibition, the Caſe was, *Tho.* Lord *de la Ware* was ſeiſed of 140 Acres of Land in *Cowfield*, parcel of an Ancient Park repleniſhed with Deer; and preſcribed, That all the Farmers and Occupiers thereof time out of mind had uſed to pay to the Vicar of *Cowfield* 2 s. a year, and a ſhoulder of every third Deer which ſhould be felled in the Park, in full ſatisfaction of all Tythes remaining upon the ſaid 140 Acres of Land. The Vicar by proteſtation denying the preſcription, ſaid, That the Deer in the ſaid Park were utterly deſtroyed by the Owners and Occupiers of the ſaid 140 Acres of Land, and the Lands converted into arrable; and ſo prayed Tythe in kind of the Lands. It was holden in this Caſe, by *Hobart*, Chief Juſtice, That if all the Deer dye of ſome diſeaſe by the Act of God; yet the Owner is not bound to repleniſh the Park with Deer to maintain the *modus Decimandi*: and yet he held, That the *modus* did continue, becauſe the Act of God ſhould not prejudice the party in their preſcription. Mich. 10 Jac. C. B. *Cooper* and *Andrews* Caſe. *Hob.* 40.

9. In a Writ of Errour brought to reverſe a Judgment given in an Inferiour Court, the Error aſſigned was, That it is ſaid in the Style of the Court, that the Court was holden *per Conſuetudinem, et per Literas Patentes*: And the Opinion of the Court was, That the ſame was a good Cauſe to reverſe the Judgment: For it was agreed, That if a Court be holden by Cuſtome, and afterwards a Patent be purchaſed to hold it, and they hold it after by the Letters Patents: That, becauſe this is

by the Act of the parties who have the Court; the Cuſtome to hold the Court, is utterly deſtroyed. Mich. 24 Car. in B. R. *Tompkins* and *Fourdon's* Caſe. *Styles.* 131.

10. *A.* ſingle Woman, who was Tenant for life, made a Leaſe at Will rendring Rent; and afterwards ſhe took a husband: It was a Queſtion, Whether by this intermarriage of the Wife with the Husband, it being her act, had determined the eſtate at Will, or not? And in this Caſe it was Reſolved, 1. That by the Intermarrying, the Leaſe at Will was not determined, becauſe of the ſpecial prejudice which might come to the husband; and the Wife by no act of hers could prejudice the husband: for if ſhe might, the husband ſhould loſe the Rent reſerved; and therefore the Eſtate at Will could not be determined but by an expreſſe act done after the Intermarriage, by the husband himſelf. 2. It was Reſolved, That after the marriage the Wife her ſelf could not determine the Leaſe at Will, becauſe by the Entermarriage ſhe had ſubmitted her ſelf and her whole Will unto the Will of her husband. See Mich. 37 Eliz. in C. B. rott. 1634. *Cook.* 5. Part. 10. *Henſtead's* Caſe.

11. The Caſe was; There was Husband and Wife, and the Wife declared the uſes of a Fine, That it ſhould be to the uſe of her ſelf for life, and after to the uſe of the Conuſees; and after the husband by another Indenture without the aſſent of the Wife, declared the uſe of the ſame Land to be to the uſe of the husband and wife for their lives, without Impeachment of Waſte, and afterwards to the uſe of the Conuſees: and afterwards the Fine was levyed by the husband and wife. In this caſe it was adjudged, That both the Limitations and the Declarations of the uſes were void. But in that caſe, It was Reſolved, That each of them might diſpoſe of the uſe of the Land according to the eſtate they had in the Land. 27 Eliz. *Cook.* 2. Part. 59. *Beckwiths* Caſe.

12. It is a Rule in Law, That a Feme Covert cannot do an Act to her husband, or give any thing to her husband; nor the man during the Coverture to his Wife: and therefore in Debt brought againſt a woman Executrix, ſhe pleaded, That ſhe had fully adminiſtred; and it was found, that ſhe had taken the Obligor to husband, and that the husband was dead. It was holden, That this was no Releaſe in Law, nor that the Debt was thereby extinct, but ſuſpended onely during the Coverture; for ſhe could not by taking him to husband, releaſe to him the debt. Mich. 31 Eliz. *Cook.* 8. Part. 136. Sir *John Nordhom's* Caſe. But yet ſee in ſome caſe, the husband by a Secondary means may give Lands to his Wife: and therefore a Copy-holder may ſurrender his Land to the uſe of his Wife, and the ſurrender ſhall be good; becauſe the husband doth it not immediately to his Wife, but by means, *viz.* by ſurrender to the Lord to the uſe of his Wife; and by the admittance of the Lord according to the ſurrender, the Wife takes the eſtate. *Cook.* 4. Part. 29. *Bunting's* Caſe.

13. The Law will never adjudge by parcels in ſubverſion of the intents and agreements of the parties; but when all Acts are done in performance of an Original Contract and Agreement of the parties, the Law will judge upon them all as executed at one time. As, if a man make a Leaſe for life by Indenture of Land in ſeveral Counties, and makes Livery of the Land in one County; and many dayes after, makes Livery in the other County; yet one intire Rent ſhall iſſue out of the Lands in both Counties: So if a man makes a Charter of Feoffment with warranty, and delivers the Deed to the Feoffee; and afterwards at another time he makes Livery *ſecundum formam Charta*, now the Warranty is good; and yet when the Deed was delivered, no eſtate paſſed to which the Warranty might be annexed. See *Cook.* 2. Part. in the Lord *Cromwell's* Caſe. acc.

14. *A.* brought an Action of Debt upon an Obligation of 60 l. againſt *B.* for the payment of 30 l. at *Coventry*; Iſſue was taken, that the money was paid at *Coventry*: Afterwards by the act and conſent of the parties, and a paper Rule of the Court, the Iſſue was tryed in *London*, and found for the Plaintiff, and Judgment thereupon given. Upon which Judgment, a Writ of Errour was brought in the Exchequer Chamber, and there by all the Juſtices, the Judgment was reverſed; for that it was holden, That the parties by their Acts, or by their Conſents could not change the Law concerning the tryal of the Iſſue. Paſch. 7 Jac. in the Exchequer, rott. 47. *Crow* and *Edwards's* Caſe. *Hob.* 5.

15. In an Action upon an Obligation for not performance of Covenants, the caſe was; Sir *Daniel Norton* Knight, Sheriff of the County of *B.* made *Chamberlain* his Under-Sheriff at his Will; and amongſt other Covenants, there was a Covenant or Proviſo, That *Chamberlain* the Under-Sheriff, ſhould not execute any Extent, Liberate, Elegit, or other execution, for any ſum above the ſum of 20 l. before he had made it firſt known to Sir *Daniel* the High Sheriff. It was holden by all the Juſtices, That ſuch Covenant or Proviſo was void in Law; being againſt the Law and Juſtice: and in that caſe it was holden, Though it was in the Election and power of Sir *Daniel Norton*, whether he would make an under-Sheriff at all or not. Yet it was adjudged, that by any Act, Proviſo, or Covenant, he could not leave him to

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be Under-Sheriff, and yet abridge him of the power which the Law gave unto him; for the doing and ſerving of Executions according to the Law. Paſc. 11 Jac. in C. B. Sir *Daniel Norton* and *Simmes* Caſe. *Hob.* 12. 13.

16. If one Tenant in Common entreth into the whole Land, and claims all the Land expreſly, he cannot by this his Act and entry diſpoſſeſſe his Companion; for the poſſeſſion is the ſame as well before his entry and claim, as it is after: and hence it is, That a Coparcener or a Joynt, or a Tenant in Common can never be diſſeiſed by his Companion: and for the ſame reaſon it is, That if a Tenant in Common do alone bring an Action of Treſpaſſe againſt a ſtranger, his Action ſhall be abated, by pleading him to be Tenant in Common with another, although his entry were generally and expreſly into all. Trinit. 12 Jac. in C. B. rott. 2141. *Smales* and *Dales* Caſe. *Hob.* 120.

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2. *What ſhall be an Act executed within the Statutes of* 32 *and* 34 Hen. 8. *of Wills.*

1. *A.* Seiſed of Lands holden in *Capite*, in Conſideration of money to him paid, being parcel of the Marriage-Portion of *M.* his Sons Wife; for the better maintenance and livelihood of the ſaid *M.* during her life, and for the advancement of the Iſſue males of the ſaid *M.* by his ſon begotten; Conveys Lands to *B.* and *C* and their heirs during the life of the ſaid *Margaret*, and after to the uſe of *A.* during his life, and after to the uſe of *H.* ſon and heir of his ſaid ſon, and *M.* in tail; which Conveyance to *B.* and *C.* and their heirs was in truſt, for the profit and benefit of the ſaid *M.* The ſaid *A.* dyeth, his ſon being his next heir of full age. It was Reſolved by the Chief Juſtices and Chief Baron in the Court of Wards, That the ſaid Conveyance to *B.* and *C.* and their heirs during the life of the ſaid *M.* was an Act executed within the Statutes of 32 & 34 H. of Wills, and that his ſaid ſon is Child within the ſaid Statute; and the Conveyance in Truſt to others for *M.* is all one, as if it had been to her ſelf to her own uſe. Mich. 9 Jac. in Court of Wards. *Cleer's* Caſe. *Ley.* 44.

A. by Indenture 43 Eliz. did Convey Lands holden in *Capite* to *B.* and *C.* and their heirs, to the uſe of *A.* for life, and after to the uſe of ſuch perſons as the ſaid *A.* by his laſt Will ſhould appoint during the minority of *D.* his Grandchild, and after to his ſaid Grandchild in taile, the Remainder to the right heirs of the body of *J. C.* his ſon. *A.* afterwards by his Will, appointed that the Lands which were upon the ſaid Conveyance ſhall come to *D.* his Grandchild, and ſhould with the profits of the ſame during his minority be imployed by his Executors, the one moyety for the bringing up of his ſaid Grandchild; and the other moyety for the payment of his debts and other uſes. *A.* made his Wife his Executrix, and dyed; *D.* his Grandchild within the age of 21 years. It was Reſolved, That as concerning the Moyety of the ſaid Lands, the profits of which were appointed to be taken by the Wife Executrix; and for the bringing up of his ſaid Grandchild was no Act executed in the life of *A.* within the Statutes of 32 and 34 H. 8. of Wills; for that the Grandchild in the life of his father was no Child of the Grandfather within the meaning of the ſaid Statutes; but as for the other moyety appointed for the payment of his debts. It was Reſolved, That the ſaid Conveyance and Will, were Acts executed within the ſaid Statutes. Mich. 9 Jac. in the Court of Wards. Sir *Edward Cleeres* Caſe. *Ley.* 44.

Acts *of Parliament.* *See* Parliament.

1. Acts *of* Parliament; *When, and from whence they ſhall be ſaid to take effect; and When and Where they ſhall relate; & è contra.*

1. IN Debt brought by an Informer *tam pro Domino Rege, quàm pro ſeipſo*, upon the Statute made *Anno* 5 E. 6. of Uſury, the Writ was, *Ad reſpondendum Domino Regi quam parti de placito quod reddat tam Domino Regi, quam parti, &c. quas præfato Domino Regi et præfato Querent. debet et injuſtè detinet ratione cujuſdam attempt. contra formam Statuti in Parliamento Domini Regis nunc tent. apud Weſtm. Anno Regni ſui ſexto contra eos qui*; and declared, That the Parliament was holden 23 *die Januarii Anno quinto*, and continued uſq; 15 *Aprilis Anno ſexto*. The Defendant pleaded, *Quod non recep. contra formam Statuti*, &c. which was found againſt the Defendant. It was moved in Arreſt of Judgment, That the Statute was miſ-recited. But it was the Opinion of the Court, That though it

was true, becauſe the Act hath relation to the firſt day of the Seſſion; yet the miſ-recital of the Statute in the Action was not material; and the words, *ratione cujuſdam attempt.* &c. were void, and ſurpluſage; and ſo Judgment was for the Plaintiff. See 1 Ma. *Dyer.* 95. *Whitton* and *Morrice's* Caſe.

2. An Action of Treſpaſſe of Aſſault, Battery, and Impriſonment, was brought againſt a Conſtable: The Defendant pleaded Not guilty; and juſtified the Impriſonment, by reaſon of a Warrant directed to him by a Juſtice of Peace, for the taking and Impriſoning the Plaintiff, for keeping of an Ale-houſe contrary to to the Statute of 12. Feb. 5 Eliz. whereas the Statute was made 12. Febr. 5 Ed. 6. and the matter being found by Special Verdict; It was holden by All the Juſtices, That the miſ-recital of the Act was not material; for it being a general Act, the Juſtice ought to take notice of it: And it was there holden, That a man cannot plead *Nul tiel* Record againſt an Act of Parliament; although in truth the Record be imbezeled, if it be a general Act, becauſe every man is party to it. Mich. 8 Jac. in C.B. *Folly Woollſey's* Caſe. *Godbolt.* 178.

3. The Act of Parliament of General Pardon, doth Pardon All Felony, &c. In which Act, Burglary was excepted. It was a Queſtion, Whether the Attainder of one for a Burglary was Excepted? It was Objected, That by the Attainder and Judgment the offence of Burglary which was but matter in fact, was altered by the Judgment, and become of Record, and thereby the Offence utterly Extinct; and then it was not by the name of Burglary excepted, and ſo by conſequence he, who was ſo Attainted, ſhould be pardoned. But the Opinion of All the Judges of *England* was, That when Burglary was excepted out of the general Pardon, that the Attainder of Burglary was excepted; for that the Offence remained after the Judgment, and was the foundation of it. 19 Eliz. *Cook.* The Caſe of general Pardon. 14.

4. *A.* Parſon of *B.* was deprived *Anno* 12 Eliz. for committing Adultery, and afterwards by the general Act of Parliament, *Anno* 13 Eliz. the Offence of Adultery, (*inter alia*) was pardoned before 14. Febr. then laſt paſt. It was ſaid, That before the pardon, That before the *crimen Adulterii prædict. tranſivit in rem judicatam*, and therefore the ſentence ſhould remain in force, and therefore untill the ſentence was repealed, the Deprivation ſhould remain in force: But it was Reſolved, That *A.* by virtue of the ſaid Pardon ſhould become Parſon again without any ſentence declaring the Deprivation to be void, for by the Pardon, the Adultery, which was the Cauſe of the ſentence, was diſcharged, and by conſequence all that which did depend upon the ſame foundation, was alſo diſcharged. 20 Eliz. *Dyer.* vouched in *Cook.* 6. Part. in the Caſe of Pardons. 14.

5. *A.* five years before the general Act of Pardon, 35 Eliz. exhibited his Bill in the Star-Chamber againſt *B.* for Riots, Rowts, &c. and then came the General Pardon of 19 Feb. 35 Eliz. and therein was excepted, All Penalties, forfeitures, now due accrued or grown, or which ſhall or may accrue or grow to the Queen, by reaſon of any Offence, miſdemeanor or contempt, whereof, and for which any Action, Bill, Plaint, or Information at any time within 8. years next before the laſt day of this preſent Seſſion of Parliament hath been or ſhall be exhibited, and that be there the laſt day of this preſent Seſſion of Parliament depending or remaining to be proſecuted; And alſo excepted, All Offences, diſcords, Covins, Frauds and miſdemeanors, whereof and for which any Suit, Bill, or Plaint within 4 years next before the laſt day of this Seſſion of Parliament ſhould be commenced or exhibited. In this caſe it was Reſolved, That the Fine due to the Queen was excepted; but the Impriſonment, and all the Corporal puniſhment was pardoned; for in the firſt Exception, the Offence it ſelf is not excepted, but the forfeiture and penalty due to the Queen is not excepted; for it is not included within the words, Forfeiture, penalty, or profit. But if the Bill had been exhibited within the 4. years, then the Offence it ſelf being excepted, all Incidents or dependents to it, as well corporal as pecuniary, had been excepted; and therefore it was Reſolved, in ſuch caſe nothing was pardoned. Mich. 36 Eliz. *in Cam. Stell. Co.* 5. Part. 46. 47. *Frankyn's* Caſe.

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2. *Where it is a Parliament, and where not; and where an* Action *will lye: though no Act be for not returning a Burgeſs. And who ſhall be a Peer of Parliament.*

1. NOte: It was ſaid by the Court, That the Intended Parliament of 10 Jac. if it might or ought to be judged by the Journal book, was a large and well occupied Parliament. But becauſe no Act paſſed by it, nor no Record is of it, therefore it was Reſolved by all the Judges, to be No Parliament; In the *King* and Lord *Hunſdon's* Caſe,

Caſe, and the Counteſs of *Arundell*. Trin. 14 Jac. in the Chancery. *Hob.* 611.

2. An Action of Debt was brought againſt the Defendant Bayliff of *S.* upon the Statute of 21 H. 6. for not returning him Burgeſs of the Town of *S.* for the laſt Intended Parliament: and where the words of the Statute are, That the Sheriff ſhall ſend his Precept to the Mayor; if there be no Mayor, then to the Bayliff. The Plaintiff declared, That the Sheriff had made his Precept to the Bayliff, without averring, There was no Mayor: and after a Verdict, the ſame was moved in Arreſt of Judgment. But the Opinion of the Court was, That it was good: for the Court ſhall not intend, That there is a Mayor, except it be ſhewed; and if there was one, it ſhould properly come on the other ſide: And although the Parliament was none, becauſe there was no Act nor Record of it: Yet it was adjudged, That the Action did lye; for that there was a Return of the Writs; and there were many ſittings in the houſes. Hill. 10 Jac. *Saint-John*, and *St. Johns* Caſe. *Hob.* 78.

3. In an Information brought upon the Statute of 5 Eliz. Cap. 4. for uſing the Trade of an Upholſter, in which he was not brought up; The Defendant pleaded the Cuſtome of *London*, and ſhewed, that he was a Free-man; and ſo enabled to uſe any Trade: And ſaid, That the Cuſtome was confirmed *per Regem in Parliamento*; And whether this Cuſtome was layed to be well confirmed, or not, was a Queſtion. It was ſaid and agreed, That three things were requiſite to make a perfect Act of Parliament; 1. To have the aſſent and conſent of the Lords. 2. To have the aſſent of the Commons. 3. The aſſent of the King; and without theſe Conſents, there can be no good Act of Parliament: and this appears by 33 H. 6. 13. 22 E. 3. 3. 4 H. 7. 18. *Plow.* Com. 79. in Partridge and *Crooker's* Caſe. But yet it was holden, That divers Acts of Parliament are in force, although theſe three Aſſents are not ſpecified within the ſame; but onely it is *Dominus Rex Statuit* *Cook.* 8. Part. 20. in the Prince's Caſe, *Dominus Rex in Parliamento ſuo, Statuta edidit*; and *Dominus Rex de Communi Concilio Statuit*: and *Dominus Rex in Parliamento Statuit*; and all theſe by uſe are good: But yet, when the party will plead an Act of Parliament for his benefit, then he ought to plead it according to Law, and to ſet forth all the Aſſents aforeſaid; and ſo it remained a Quære, Whether the pleading of the Confirmation of the Cuſtome were well or not; which point was not Reſolved in the caſe by the Juſtices. Mich. 11 Jac. in B. R. *Allen* and *Tooley's* Caſe; rott. 23. *Bolſtr.* 2. Part. 186, 187, 188.

4. Note; That upon a private Conference by the Judges with *Yelverton* the King's Solicitor, upon the diſſolving of the Parliament, which was in this Term ſuddenly diſſolved, and ſo nothing done; *Cook*, Chief Juſtice, ſaid, It appears by 33 H. 8. *Brooks* Caſe. 52. *Plowdens* Comment. 79. in *Partridges* Caſe, What ſhall be ſaid to be a Seſſion of Parliament; and what not: and that every Seſſion in which the King doth ſign Bills, is a day and Parliament by it ſelf; and that there can be no Roul without a Seſſion; No Parliament without a Roul; Nor no Seſſion without the Royal aſſent. *Bolſtr.* 2. Part. 235.

5. In a Writ of Errour in Parliament, to diſſolve a Judgment in an Aſſiſe, the Parliament being diſſolved; It was moved in the Court of Kings-Beach, to have Execution of the former Judgment. In that Caſe it was ſaid by *Cook*, Chief Juſtice, That this was no Parliament, becauſe that, No Bill paſſed, nor any Royal Aſſent; This was onely but an Inception of a Parliament; but if any aſſent or diſ-aſſent had been to any Bill, then this ſhould have been ſaid to be a Seſſion; and then a Roul of this was to be made. Alſo it is not to be tryed by a Jury, Whether there was a Parliament or not: And in the principal caſe, this being a Judgment in an Aſſiſe, is *feſtinum remedium*, and there it ought not to be now delayed, but that execution ought to be granted; for the Record was never Removed: And execution was granted accordingly. Trinit. 12 Jac. Sir *Chriſtopher Heydon* and *Godſole's* Caſe. *Bolſtr.* 2. Part. 237.

6. Note; Upon an Aſſembly of All the Juſtices, to take Conſideration of the Statute of 35 Eliz. Cap. 1. for abjuration of Sectaries, Whether the ſaid Statute was in force, or not? theſe Points were Reſolved; 1. If a Parliament be aſſembled, and divers Orders made, and a Writ of Errour be brought, and the Record delivered to the Upper-Houſe, and divers Bills are agreed, but no Bills ſigned; That this is but a Convention, and no Parliament, or Seſſion: as it was *Anno* 12 Jac. in which (as it was affirmed by them which had ſeen the Roll) it is entred, That it is not any Seſſion, or Parliament, becauſe that no Bill was ſigned: But every Seſſion in which the King ſigns Bills, is a Parliament. 2. It was agreed, That if divers Statutes be continued untill the next Parliament, or Seſſion, and there is a Parliament, or Seſſion, and nothing done therein as to continuance; all the ſaid Statutes are diſcontinued and gone. 3. It was agreed, That that Statute was diſcontinued, and that every Parliament is a Seſſion, but not *è converſo*, for one Parliament may have divers Seſſions; as the Parliament of 1 Jac. had 4. Seſſions, and ended 7 Jac. 4. That the Proviſo was not to any purpoſe, but to continue their proceedings in the ſame Eſtate, as if the Act had not been made, and if the Proviſo had not been; that the Statute had been

been diſcontinued by the Act of Subſidie; and when this ends and is determined, then is the Seſſion ended. Hill. 20 Jac. *Hutton.* 61.

7. *Edward Nevil*, the Father of *Edward* Lord of *Aburgaveny*, 2 and & 3 *Mary*, was called by Writ to Parliament, and dyed before the Parliament: and if he were a Baron, or no, and ſo ought to be called, was the Queſtion. And it was Reſolved by the Lord Chancelor, and all the Juſtices, That the direction and delivery of the Writ, did not make him a Baron or Noble, untill he did come to the Parliament, and there ſit according to the Commandment of the Writ: for untill that, the Writ did not take effect; and he cannot be called a Peer of Parliament, untill he ſit in Parliament; and he cannot ſit and be of Parliament, untill the Parliament begin: But if the King create any Baron by Letters Patents to him and his heirs, or the heirs of his body, or for life, there he is a Noble-man preſently; which cannot be countermanded (as a Baron by Writ may be, before he ſit in Parliament): and he ought to have a Writ of Summons to Parliament, of Right, and of Courſe; and ſhall be tryed by his Peers, if he be arraigned before any Parliament; but ſo ſhall not he who is called by Writ. Trin. 8 Jac. the Lord *Aburgavenies* Caſe. *Cook.* 12. Part. 70.

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3. *Where, and of what Acts of* Parliament, *the Court and Judges ſhall take notice of* Ex Officio; et è contra: *And what Acts ſhall bind the King*; et è contra.

1. THe Lord *Cromwell* brought an Action *de Scandalis Magnatum*, againſt *Denny* Vicar of *N. tam pro Domino Rege, quam pro ſe ipſo*; and declared upon the Statute of 2 R. 2. Cap. 5. That if any Contrive *aliqua falſa nuncia de Prælatis, Ducibus. Comitibus, et aliis Baronibus et Magnatibus Angliæ*: by which, debate may ariſe betwixt the Lords and Commons, by which danger, and deſtruction may happen to the whole Realm, *et quicunq; contra fecerit*, ſhall incur the penalty of the Statute of *weſt.* 1. Cap. 33. and charged the Defendant, that he ſaid to the Plaintiff then a Baron of the Realm, It is no marvel you like not me, for you like thoſe who maintain Sedition againſt the Queens proceedings. The Defendant juſtified the words; upon which the Plaintiff did demur; and the Barr was holden inſufficient. The Defendant moved in Arreſt of Judgment, That the Declaration was inſufficient, becauſe the ſaid Act of 2 R. 2. was miſ-recited. And it was Objected, That the Act was a private Act concerning the Prelates, Nobles, and certain great Officers of the Court; Of which the Judges ſhall not take Notice *ex Officio*: But it was Reſolved by the whole Court, That it was ſuch an Act whereof the Judges ought to take Notice; and ſo much the rather, becauſe the ſame by a mean doth concern the King himſelf. And of All Statutes which concern the King, the Judges ought to take Notice of them. *Cook.* 4. Part. 12. Trin. 20 Eliz. in B. R. The Lord *Cromwell's* Caſe.

2. A man was Inducted into a Benefice with Cure of Souls, of the value of 8 l. and accepted another Benefice, and afterwards he was nominated and Created a Biſhop; and before his Creation and Inſtallation, the King by his Letters Patents granted him a Plurality, and that he might hold both his Benefices, above his Biſhoprick: and afterwards the Preſentee of the King pretending the Letters Patents to be void, Libelled in the Spiritual Court againſt the Leſſee of the Biſhop; and ſet forth the matter aforeſaid upon a Conſultation, granted after a Prohibition, but made no mention in his Plea, of the Statute of 21 H. 8. cap. 13. which made the acceptance of the ſecond Benefice, to be an Avoidance of the Church: In this Caſe it was Reſolved by the Court, That the Act of 21 H. 8. Cap. 13. was ſo general an Act, That the Judges, although it be not ſet forth in the pleading by the party, ought to take Notice of it *ex Officio*: For the Rule of Law is, That of general Statutes the Judges ought to take Notice, although they be not pleaded; but otherwiſe of ſpecial, or peculiar Statutes. Trin. 39 Eliz. in B. R. *Coo.* 4. Part. 75. *Holland's* Caſe.

3. *A.* Biſhop, after the Statute of 1 Eliz. made a Leaſe for years, and afterwards ouſted the Leſſee, and made a Leaſe for 3. Lives, rendring the Ancient and accuſtomed Rent; In this Caſe it was Reſolved, That the Leaſe was voidable by the Succeſſor, 1. Becauſe the Statute of 1 Eliz. is in the disjunctive, for 21 years or 3. Lives. 2. Becauſe the Rent was not payable within the meaning of the Statute; for the Statute was made to maintain Hoſpitality, and to avoid Delapidations; and that cannot be, but by a continual annual Revenue payable; and if this Leaſe for 3. Lives ſhould be good, the Leſſee ſhould have the Rent reſerved upon the Leaſe for years; and if they ſurvived the Leaſe, then the Biſhop and his Succeſſors ſhould have remedy for the Rent and arrearages reſerved upon the Leaſe for life. But in the principal Caſe, Judgment was given againſt the Biſhop, becauſe he did not plead the Statute of

1 Eliz.

1 Eliz. for it was ſaid, That the Act becauſe it concerned Biſhops onely, was a ſpecial and private Act; of which the Judges were not to take Notice, if it were not pleaded. 30 Eliz. in B. R. *Cook.* 5. Part. 2. *Elms* and *Gales* Caſe. But where an Act is general, and doth concern all the ſpiritualty, as the Statute of 21 H. 8. Cap. 13. is, there the Judges ought to take Notice of it, without pleading of it. See before, *Holland*'s Caſe, *Cook.* 4. Part. 75.

4. *A.* being a Priſoner in *Ludgate* upon a *Capias utlagatum in Detinue*, J. S. the Gaoler took an Obligation of him, and two Sureties, with Condition to ſave him harmleſs, and for to diſcharge his Fees, and to render his body alwayes upon Summons, &c. In Debt brought upon the Obligation againſt one of the Sureties, he pleaded Coditions performed: But the chief Queſtion in the Caſe was, If the Court *ex Officio* be bound to take Notice of the Statute of 23 H. 8. cap. 10. the ſame not being pleaded by the party; and to ſtay Judgment thereupon: The Opinion of the Lord *Dyer* was, That the Statute of 23 H. 8. cap. 10. was but a private Act, which extended onely to Sheriffs: and that the Court was not bounden to take Notice of it, if it were not pleaded by the party. 3 Mar. *Dyer.* 119.

5. Acts of Parliament concerning Myſteries or Trades, are general Acts; But an Act of Parliament concerning the Trade of Grocery, is a ſpecial Act. See 28 H. 8. *Dyer.* 27. becauſe the Trade of Grocers containeth under it but *Individuums*, or ſingular perſons; The Statute of *Marlbridge*, Cap. 3. *Non ideo puniatur Dominus per redemptionem*, is a general Act; for the word [Seignior] is a general word: But an Act concerning all the Nobility, or Lords of the Parliament, or all the Biſhops of *England*, or all Corporations made by ſuch a King, are but ſpeciall and particular Acts, of which the Judges are not to take Notice, if not pleaded: But yet of every Act, although it concern *Individua*, or ſingle things; yet if they touch the King, the Judges *ex Officio* are to take knowledge of them. See *Plow. Com.* Lord *Berkley*'s Caſe. And *Wimbiſh* and *Talbot*'s Caſe, 53. See before, *C.* 4. Part, 75. in *Holland*'s Caſe, &c.

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4. *Where one* Act *of* Parliament *ſhall be repealed by another* Act; *et è contra. And where an* Act *of Parliament ſhall be erronious in part, or in all; Where not.*

1. IN a Writ of Intruſion againſt *John Porter*, upon a Special Verdict, the Caſe was found to be, *J. G.* was ſeiſed of a Wharf and houſe holden in *Burgage* in Fee; and by his Will, 32 H. 8. deviſed the ſame to *A.* his Wife, and her heirs, upon Condition, That his Wife, with advice of Counſel, ſhould with all ſpeed after his deceaſe, give and aſſure all his Lands for to maintain a Free-School, and Alms-men and Alms-women for ever, and that his Wife ſhould have the Iſſues and profits of them during her life, bearing the charges of the ſaid School, &c. and made his Wife his Executrix, and dyed: ſhe entred, and was ſeiſed accordingly, and afterwards made a Leaſe of the Lands for years; which Term came to the Defendant. The heir of *J. G.* entred into the Houſe and Wharf, and conveyed the ſame to the Queen her heirs and Succeſſors; by force of which the Queen was ſeiſed: upon whom the Defendant entred, claiming his Term. And whether his Entry was lawfull, or not, was the Queſtion. It was Objected, That the uſes appointed by the Will, were void by the Act of 23 H. 8. Cap. 10. But it was Reſolved by all the Juſtices, That the Act of 23 H. 8. did not extend to take away good and charitable uſes; (ſuch as the uſes were in the Caſe at Barr) for the ſaid Statute took away onely ſuperſtitious uſes; as other Statutes, *viz.* the Statute of 26 & 28 H. 8. and the Statute of 31 and 37 H. 8. did. And it was ſaid by the Statute of 1 E. 6. Education of Youth in Virtue and Piety at Grammer-Schools; Or for augmentation of the Univerſities; ſuch uſes, are called good uſes: and therefore it ſhall not be intended, That ſuch goodly uſes were void by the Act of 23 H. 8. And ſo it was adjudged in 6 E. 6. as appeareth in *Bendloes* Reports, That a Feoffment to the uſe of Poor people was not within the ſaid Statute. And ſo alſo it was adjudged 35 Eliz. In the Kings-Bench, in *Gibbons* Caſe. 2. It was Reſolved, That the Statute of 32 and 34 H. 8. of Wills, did take away the force of the ſaid Act of 32 H. 8. And ſo it was adjudged, That a deviſe made 4 & 5 Mar. to the Maſters and Schollers of *Trinity*-Colledg in *Cambridge*,

bridge, for to find a Grammer-School and poor Schollers, was good, by the Statute of 1 & 2 Ma. which enabled a Device to ſpiritual Corporations. *Et leges poſteriores priores contrarias abrogant.* *Cook* 1. Part. 23. 24. *Porter's* Caſe.

2. King *Henry* the 8th by his Letters Patents erected a Colledge of Phyſitians in *London*; and by the ſame Letters Patents granted to them, That none ſhould exerciſe the Art of Phyſick within the of City *London*, or 7. miles from it, unleſſe he were allowed by the Preſident and others of the ſaid Colledge: And by the ſaid Letters Patents granted to them, That there ſhould be 4. Cenſors or Governours yearly choſen by them, who ſhould have the tryal and examination of all Phyſitians which practiſed Phyſick within the ſaid City, or 7. miles of it. And further, by the ſaid Letters Patents granted to them, That they ſhould have the punihment of all thoſe who practiſed Phyſick within the ſaid City *pro delictis ſuis in non bene exequendo, faciendo, et utendo facultate Medicinæ per fines, amerciament et impriſonmen', corporum eorum.* The ſaid Charter was confirmed by Act of Parliament, 14 H. 8. By which Act it was further enacted, That no perſon ſhould be ſuffered to practiſe Phyſick through *England*, untill he be examined at *London* by the Preſident and 3. of the Cenſors, Except he be a Graduate of *Oxford* or *Cambridge*. And afterwards by an Act of 1 Ma. the ſaid Letters Patents were alſo Confirmed; and by the ſame Act it was Enacted, That whenſoever the Preſident, or ſuch as the Colledge ſhould yearly authorize, ſhould ſend or commit any ſuch Offender for any offence or diſobedience contrary to any Article of the ſaid Grant, to any Goal or Priſon, That the Gaoler or Keeper ſhould receive ſuch perſon, and ſhould keep them without bayl or mainprize. *Bonham*, who was a Graduate, *ſcil.* a Doctor of Phyſick in the Univerſity of *Cambridge*, practiſed Phyſick in *London*, and was ſummoned to appear before the Preſident and Cenſors, for practiſing Phyſick in *London*, contrary to the ſaid Letters Patents, and Acts of Parliament; and he did not come to them: Wherefore it was awarded by them, That for his diſobedience he ſhould be amerced 10 l. and that he ſhould be arreſted and committed to priſon. And *Bonham* ſaid, That he had practiſed Phyſick, and would practiſe Phyſick in *London*, *nullâ de Collegio petitâ veniâ*: and affirmed, That neither the Preſident nor the Cenſors had any authority over them who were Doctors of the Univerſities. Afterwards he was committed to priſon by them; and *Bonham* brought his Writ of Falſe Impriſonment againſt them; and had Judgment given for him. And in this Caſe it was Reſolved by all the Juſtices, (amongſt other Points) That the Act of 1 Mar. did not enlarge the power of the Cenſors, to Fine or Impriſon any for any cauſe for which they ought not to be fined by the Act of 14 H. 8. For the words of the Act of 1. Ma. are according to the Tenor and meaning of the ſaid Act: But in the Caſe at Barr, *Bonham* did not any act which appeared within the Record contrary to any Article or Clauſe within the Letters Patents, or the ſaid Act of 14 H. 8. 2. It was Reſolved in this Caſe, Foraſmuch as the Phyſitians had not any Court granted to them by the Letters Patents, they could not by any authority implicite granted to them, or for any miſdemeanor done by *Bonham*, commit him to priſon without bayl and mainprize, untill he ſhould be delivered by the Commandment of the Preſident and Cenſors; as they did in this caſe: And for proof thereof, the Caſe of the Mayor, and Comminalty of the City of *London*, 38 Eliz. in a *Quo Warranto* was remembred, A Grant was made to the Mayor and Comminalty, That the Mayor for the time being ſhould have *plenam et integram Scrutiniam, gubernationem, et correctionem, omnium et ſingulorum Myſteriorum*, without granting to them any Court; in which there ſhould be any legal proceedings; That the ſame was good for to ſearch, by which a diſcovery might be made of ſuch Offences, which by the Law might be puniſhed in any Court; but the ſame did not give them any abſolute or irregular power to puniſh any Subjects of the Realm at their pleaſure. And it was agreed by the Court in the principal Caſe, That when an Act of Parliament is againſt Common right and reaſon, and repugnant and impoſſible to be performed, that the Common-Law doth adjudge ſuch an Act to be void. See 14 Eliz. *Dyer*. 13. The Statute of 1 E. 6. cap. 14. gave Chauntries to the King, ſaving to Donor all ſuch Rents and Services; The Common-Law ſhall adjudge it void as to the Services: for it ſhould be againſt right and reaſon, that the King ſhould hold of any, or ſhould do any ſervice to any of his Subjects. Hill. 7 Jac. in C. B. *Cook* 8. Part. 94. 95. Doctor *Bonham's* Caſe.

5. How

5. *How an* Act *or Ordinance is to be Interpreted; And when it ſhall be ſaid to be in force; when not.*

1. IN an *Ejectione Firmæ*; It was found by Special Verdict, That Sir *Tho. Morgan* was ſeiſed in Fee of the Mannor of *C.* and 13 Car. he made a ſettlement of the ſame to himſelf for life, the Remainder to *Mary* his daughter for life, the remainder to the heirs of the firſt Tenant for life, with a power of Revocation to alter all or any part of the ſettlement at any time during his life: That in the year 1645, There was an Ordinance of Parliament made, That Sir *Tho. Morgan* ſhould forfeit all his Lands and Eſtate which he was then ſeiſed of, or poſſeſſed of, or had been ſeiſed or poſſeſſed of from the year 1641: And by the ſaid Ordinance, the Lands in Queſtion were given to Mr. *Pymm*; who entred by virtue of the Ordinance, and was ſeiſed, and dyed ſo ſeiſed: After whoſe death his heir entred, and made the Leaſe to the Plaintiff. Sir *Thomas Morgan* dyed; *Mary* his daughter entred, claiming the Remainder by the Conveyance; and the Plaintiff, the Leſſee of Mr. *Pymm*, brought the Action. The Queſtion was, Whether by the Ordinance made 1645, yet looking back to 1641; the remainder of the Lands limited to *Mary*, were forfeited. It was Objected, That it was forfeited, becauſe the ſettlement was with a Proviſo of Revocation, ſo as at the time of the Ordinance, the Eſtate was in *Morgan* to diſpoſe of: and the Ordinance gave all the Eſtate of *Morgan* to *Pymm*, and the children of *Morgan* were excepted out of the Proviſoes in the Ordinance: alſo it was ſaid, *Morgan* was a Recuſant, and the ſettlement was no real ſettlement, but by way of ſubtilty onely, to prevent a forfeiture. But the better Opinion of the Court was, That the Eſtate of *Mary* was not forfeited, nor given away by the Ordinance of 1645; for both the grounds of the Ordinance, *viz.* the deſerts of *Pymm*, and the Offence of *Morgan* can extend no further then the year 1641; and not to the time of the ſettlement, which was 13 Car. 2. no man can forfeit a thing which he hath not; and *Morgan* had not then the Eſtate, and therefore he could not forfeit it; the Eſtate being ſettled before 41, to which the Ordinance particularly referreth: and notwithſtanding the power of Revocation; yet the Eſtate was not given to *Pymm*: for the Ordinance was made by the Houſe of Commons; and the Proviſo was put in by the Houſe of Lords. Hill. 1649. in B. R. 24 Car. rott. 1082. *Banbur* and *Baſely*'s Caſe. *Styles.* 160. 161. 195. 196 197.

2. Captain *Streater* was committed to priſon by an Order of Parliament, for publiſhing Scandalous and Seditious Books; and afterwards the the Parliament being diſſolved, He was brought by *Habeas Corpus* to the Upper-Bench; and prayed that he might be bayled; becauſe the Order by which he was committed, was of no force now the Parliament being diſſolved. It was Objected, That the Parliament was not diſſolved; for that by the Law, a Parliament ought to be every year; and ſo this in effect was but an Adjournment, and not a Diſſolution. It was Anſwered and Reſolved by the Court, That although the Authority of Parliament ceaſeth not, yet a Particular Parliament might be diſſolved, as this was: and by the Diſſolution of this Parliament, the Order is determined; and ſo it would have done by Prorogation of the Parliament, becauſe that is another Seſſion, and a New Parliament hath not reference to an old: but it is a new Court created upon a new Summons: and if one committed by Order of Parliament cannot be delivered untill another Parliament, the Liberty of the Subject will be loſt: and this Order is not like an Act which continues after the Parliament: and it was the Opinion alſo of the Court, That the Return was too general, for that it doth not appear in what the Books were ſcandalous, for the publiſhing whereof he was committed. And ſo by the Rule of the Court, the Defendant Captain *Streater* was bayled. Hill. 1654. The Proector and Captain *Streater*'s Caſe. *Styles.* 415. and 416.

6. *Where an* Act *of Parliament ſhall make an Eſtate void as to one perſon; and yet it ſhall ſtand good to another perſon. And where an* Act *of Parliament ſhall extend to a Copy-hold eſtate; where not.*

1. NOte: If Lands be given to husband and wife, and to the heirs of their two bodies lawfully begotten: and the husband levieth a Fine with Proclamation, and dyeth: Now this Fine by the Act of Parliament of 32 H. 8. cap. 36. ſhall barre the Iſſue in tayle; but it ſhall not bind the Wife, and ſo in reſpect of the one, it is a good barr; and in reſpect of the other, it is no barr.

See 18 H. 8. *Dyer.* 351. *Cook* 1. Part. 87. *Corbet's* Case. *Cook* 6. Part. 41. &c.

2. If a man hath title to Lands in tail, and afterwards the same Land is given to him by Act of Parliament, the heir shall not be remitted; for by the Act of Parliament all Titles are excluded for ever: and when Land is given to any person by name by Act of Parliament, he nor his heirs shall have any other estate but that which is given him by the Act. 29 H. 8. Br. Parliament. 73.

3. When an Act of Parliament alters the Service Tenure, Interest of the Estate, or other thing in prejudice of the Lord, or the Custome of the Mannor, or of the Tenant; there the general words of an Act of Parliament doth not extend to Copy-holds. But when an Act is generally made for the publique, and no prejudice can accrew by reason of any Interest, Service Tenure, or Custome, their Customary and Copy-hold Estates are within the preview of such Acts of Parliament. *Cook* 3. Part. 9. in *Heydon's* Case.

See more of Acts of Parliament, in the Title *Statutes*, after.

Addition.

1. THe husband was Indicted of the Murther of his Wife; and it was thus, *Quod Eliz. fuit in pace, quousq; &c. prædict. A. vir præfat. Eliz. de H. in Com. prædict. Yeoman*: It was holden by the Justices, The Addition Yeoman, although *Eliz.* be the next precedent, shall be referred to the husband; because a Woman may not be a Yeoman; contrary of Spinster, 30 H. 8. *Dyer.* 47.

2. A Writ of Partition was brought by *R. H.* Esquire, and the Lady *Anne Powes* his Wife; and the Writ was abated, because the word, Lady, was in the Writ, and the party was driven to bring a new Writ, and to leave out the word, Lady. 7 E. 6. *Dyer.* 79.

3. An Appeal of Murther was brought by a woman, of the death of her husband, against *Margaret Old-Castle*, Spinster; whereas she was a Gentlewoman: It was holden by the Court to be no good Addition: but she was estopped to plead the same in abatement of the Writ; because upon such Writ she purchased a *supersedeas*. 7 E. 6. *Dyer.* 88.

4. An Accompt was brought by *Ed. Cleere*, as Administrator of Sir *John Cleere*, Knight, who dyed Intestate, against *Richard Bartue* Esquire, and *Katherine* his Wife, who was Dutchess of *Suffolk*; but she was not so named in the Writ, nor was *Bartue* named of any place, as he ought to have been in this Case, where proces of Outlawry lyeth: And therefore the Opinion of the Court was, That the Writ was abateable: But because no Exception was taken to it, the Writ did stand. 3 *Eliz. Dyer.* 202.

5. *Nicholas Davie*, an Attorney of the Common-Pleas, was sued by the Addition of Husbandman; and thereupon condemned in an Action of Debt: and being arrested, he was brought to the Court by a *Habeas Corpus*; and for that cause was discharged. 7 Eliz. *Dyer.* 244.

6. The Statute of 1 E. 5. is, That it ought to be named of what Town, Hamlet, or place the party is. Yet it was agreed by the Justices, That if an Action be brought against such a One, Chancellor of the University of *Oxford*, though it be not of the Town of *Oxford*; it is well enough. Mich. 36 Eliz. in B. R. in *Burton* and *Wrightman's* Case. *Popham* 56. & 57.

7. Note: It was agreed by the two Chief Justices, and by the whole Court of Star-Chamber, That whereas there was a Bill preferred in the Star-Chamber against Justice *Crook*, by the name of Sir *George Crook* onely, without the Addition of his Office and dignity of a Judge; that the Bill should be abated. Trin. 16 Car. *in Cam. Stellat.* Justice *Crook's* Case.

8. In an Action brought against Sir *Edmund Plowden*, the Plaintiff declared against him by the name of Sir *Edmund Plowden* Knight; whereas he by Creation, is Count Palatine of *Nova Albion*; and therefore he by his Counsel prayed a day to plead a special Plea: But the Court Resolved, That a Count Palatine of *Nova Albion*, or a Count of *Ireland*, are not Additions in *England*, nor is the same part of his name, and therefore Ruled him peremptorily to plead within a Week. Mich. 1649. B. R. *Weston* and *Plowden's* Case. *Styles.* 173.

9. In an Indictment of Forcible Entry; because there was no Addition of the County where the party dwelt, who made the forcible Entry; Nor no County expressed from whence the Issue should come: and without such Addition, no proces of Outlawry lyes against the party by the Statute of 1 H. 5. Cap. 5. the Indictment was quashed. Trin. 23 Car. in B. R. *Styles.* 26.

10. An Indictment of one Indicted, for refusing to serve in the Office of a Headborough, was quashed, because it did not shew that he was chosen to the Office; and because the party Indicted, wanted an Addition. Mich. 1654. B. R. *Styles.* 394.

11. Errour was brought of a Judgment in an Assumpsit;

Aſſumpſit: The Errour aſſigned was, That the Plaintiff brought his Action againſt the Defendant Sir *Francis Forteſcue*, who was the Knight of the *Bath*, and Baronet; by the name of Knight of the *Bath* onely, and not by the name of Knight and Baronet: But becauſe he appeared to that name, and pleaded thereunto, the Opinion of the Court was, That he was concluded; and the Judgment was affirmed. Paſch. 12 Jac. rott. 147. B. Sir *Francis Forteſcue* and *Markham*'s Caſe, *Cro.* 1. Part. 482.

2. *Where a New* Addition *to a Grant, or Leaſe, ſhall make the whole Grant, or Leaſe void; and where not.*

IN a Replevin the Caſe was, That the Predeceſſor of the Biſhop of *Chicheſter* ſeiſed of a Park in the right of his Biſhoprick by Deed 44 Eliz. granted a Leaſe of keeping of the Park, and all profits appertaining to it, to *John Freeland* the Defendant, for life; *Et ulterius* granted *pro executione Officii prædict.* 5 marks, with clauſe of diſtreſs, *una cum* a Livery, and 13 s. 4 d. *necnon paſturam pro duobus equis*, together with the Windfalls, which was confirmed in the life-time of the Biſhop by the Dean and Chapter: and the Defendant in his Avowry ſhewed, That the ſaid Park had been anciently granted with the Fee of 5 marks: and for arrears of the Fee, the Defendant did avow the taking of the Cattel. The Plaintiff pleaded the Statute of 1 Eliz. cap. 25. and ſaid, That this Paſtorage was a larger Fee then was ever granted before. Upon which the Avowant did demur: And the Queſtion was, If this new Addition of the Paſtorage to the Grant of the Office of Keeper, made the Grant void: The Court was divided in their Opinions. But it ſeemed the better Opinion to be, That this Augmentation of Paſtorage, did not make the Grant void in all, but for the Augmentation onely; and that it was ſeveral *in ſpecie* from the 5 marks; and that this was out of the Statute of 1 Eliz. and the things are ſeveral, and may ſeverally be recovered as diſtinct things in their nature in the intent of the Grantor: and therefore that the Grant was void *quoad* the paſtorage; but not to make the Grant of the Office with the Fee of 5 marks, void. Paſch. 1 Car. in C. B. The Biſhop of *Chicheſter* and *Freeland*'s Caſe. *Ley.* 71.

Adjournment.

1. WHere the Term ſhall be adjourned in part, or in all; and the manner of Adjournment of it, 2 Eliz. *Dyer.* 186. See 5 and 6 Eliz. *Dyer* 225. 1 Car. *Cro.* 1. Part. 19. Mich. 6 Car. 3 Returns of Michaelmas Term adjourned, and the manner of Adjournment of them, Mich. 6 Car. *Cro.* 1. Part. 145. Trinity Term adjourned from *Tres Trin.* to *Octabis Trin.* by reaſon of the Peſtilence. *Cro.* 1. Part. 331, 335.

2. The Statute of 1 Ma. Cap. 7. is, That all Fines levied or to be levied before the Juſtices of the Court of Common-Pleas, with Proclamations upon Adjournment of the Term, ſhall ſtand good: It was Reſolved, 2 Eliz. *Dyer.* 186. That if part of the Term be adjourned; the ſame is alſo helped by the Statute as to the Proclamations; becauſe the Statute is general, and ſhall be taken by Equity. 2 Eliz. *Dyer.* 186. acc.

3. Note: Aſſizes adjourned into the Common-Pleas were without day for the not coming of the Juſtices, notwithſtanding the Adjournment of the Term; although that they were not diſcontinued, by reaſon of the Statute of 1 E. 6. and the Plaintiffs are to ſue Re-attachments againſt the Defendant; and Re-Summons, or *Habeas corpus* againſt the Recognitors returnable the next Aſſizes. 6 Eliz. *Dyer.* 226.

4. It was agreed by all the Juſtices, That the Original Writs for Fines and Recoveries of that Term might be made returnable ſafely after, in *Octab. Sancti Hill.* at *Weſtm.* and *non in Quindena Hillarii vel Craſtin. Purific. apud Caſtrum Hereford.* becauſe the Adjournment was made 20 Jan. from *Weſtm.* to *Hertford*, and between that day and any of the 3. Returns there are not 15 dayes, and yet the Fine ſhall be, *Hac eſt finalis Concordia fact. in Curia. Reg. apud Hertford.* 6 Eliz. *Dyer.* 227.

5. A Writ of Errour was brought in the Common-Pleas, upon a Judgment given before the Juſtices of Aſſize in the County of *Monmouth*. The Defendant demurred to the Juriſdiction of the Court, to hold Plea of Errour upon a Judgment in an Aſſize before Juſtices made by the King's Letters Patents. And although divers books and Caſes were vouched, *viz.* 8 E. 2. Aſſize 396. 242. 19 H. 6. 19. 8. Aſs. 8. and di-

vers other Records, That the Court of Common-Pleas had Jurisdiction to hold Plea of Errour or Attaints upon a false Oath in Inferiour Courts, and used to write to Inferiour Courts, to have the Record certified to try the thing before them: Yet it was the Opinion of all the Justices of the Common-Pleas, That the Writ of Errour brought in the Common-Pleas for an Erronious Judgment in an Assize did not lye. And to that purpose, see *Britton. Lib.* 1. Cap. 1. 8 Eliz. *Dyer.* 250.

6. J. S. in 8 Eliz. brought an Assize against divers Tenants of E. and recovered by Verdict. Afterwards they brought a Writ of Errour in the King's Bench; and assigned for Errours in it, That the Justices did adjourn the Assize into a Forraign County for pleading; and there it was pleaded to the Assise; and the Assise passed for J. S. the Plaintiff, without any Writ of Re-Summons of the Assize before awarded; and also because that no place was in the Teste of the Writ of *Hab. Corpora*: and notwithstanding those Errours, the Judgment in the Assise was affirmed in the King's Bench: and now they brought a Writ of Errour in Parliament, of the Judgment given in the Kings-Bench: And the Chief Justice brought the Record in Parliament, and also the Transcript; and after the same was there examined, the Record was sent back, and the Transcript remained, upon which *Scire facias* was awarded: The Errours assigned in the King's Bench were, Because the parties were adjourned into a forrein County to plead, &c. and as before. Note, There was no Judgment given in the Case, 23 Eliz. *Dyer.* 375.

7. *Roger* Earl of *Rutland* brought an Assise of *Nouel Disseisin* against *Gilbert* Earl of *Shrewsbury*, and others; and complained himself to be disseised of his Freehold in *Clipson* in the County of *Nottingham*; and his Complaint was, That he was disseised of the Office of Keeper of the Park: The Assise for matter of difficulty was removed in the Court of Common-Pleas, upon points of Law, viz. upon the point, Whether the Grant of the King of the Herbage and Pannage were good or not? Which Point was Resolved by the Justices of the Common-Pleas, That the Grant was good upon a Special Verdict there found. But thereupon a Writ of Errour was brought in the Kings-Bench: and there one Errour assigned was, That the Assise was not brought in the proper County, as it ought to have been, by the Statute of Statute of *Magna Charta*: and for that, and other Errours assigned in the Record, in which the Justices of the Kings-Bench were not agreed, the Judgment as to those Errours onely was reversed; but as for the principal matter of Law, upon the points of the King's Grants to the Earl of *Pembroke*, which were adjudged in the Court of Common-Pleas; the Judgment given there was affirmed. And afterwards a New Assise was brought before *Warburton* and *Fosser* in the County of *Derby*, Justices of Assise; and the Plaintiff there had a general Verdict according to the Resolution of All the Justices, at the same Assizes; and execution was thereupon awarded accordingly. Mich. 6 Jac. in C. B. The Earl of *Rutland*'s Case.

8. Note: The Statute of *West.* 2. Cap. 25. made 25 E. 1. gave Certificate of Assise, but gave No Adjournment of it; But Adjournment is taken by the Equity of the Statute of *Magna Charta*, made 9 H. 3. *Cook.* 4. Part. 4. in *Vernon*'s Case.

Ad Quod Damnum.

1. IT appeareth by the Register, and by *Fitzherbert* in his *Natura Brevium*, That in Ancient Times, upon every Grant, Lease, Release, Confirmation or Licence, to be made to the King; That before any such Grant or Patent passed, That a Writ of *Ad Quod Damnum* was awarded to enquire of the whole truth, and of every circumstance thereof, and what damage and prejudice the King should have by the same: and upon such Inquisition certified and Returned, the King used to make such Grants, Releases, Confirmations, or Licences. *Fitz. Na. Brevium.* acc.

2. If one Abbot will give Lands or Tenements in Mortmain to another Abbot or Prior, or Body politique, he ought to have the Kings License so to do, because of the words of the Statute of Mortmain; and there he ought to sue for a Writ of *Ad Quod Damnum*, to enquire as aforesaid. But now the Common Experience is, That they will not sue the Writ of *Ad Quod Damnum*, when they purchase leave to alien in Mortmain; but the use is, to have these words in the end of the Patent, viz. That this be without suing any Writ of *Ad Quod Damnum*, or any other Writs or Inquisitions or Mandates thereupon to be had, made, or prosecuted. But the Opinion of Mr. *Fitzherbert* was, That such Patents are dubious whether they be good or not, if it be evidently proved, that such Patents are unto the damage of others who are the Kings Tenants: and therefore he conceived it the best course to sue forth Writs of *Ad Quod Damnum*, to enquire of such Licences in Mortmain, so as the King be not deceived in his Grant. See 16 E. 3. and *Fitz. Na. Brevium.* 223. and 226.

3. A Man held a Menalty of the King *in Capite*, and the Tenant held certain Lands of the Meane

Meaſne in Knights-Service; and alſo held other Lands of the Dutchy of *Cornwall* in Knights Service; the King granted his Dutchy to his eldeſt ſon, *ſimul cum Wardis et Maritagiis non obſtante Prerogativa regia*, the Meaſne dyed, and his heir in Ward to the King, the Tenant dyed his heir within age. It was holden, That the King ſhould have the prerogative of the Ward of the body and marriage, becauſe of the Ward, and that the general words of the Kings Letters Patents, ſhall not have ſuch a ſpecial intendment to paſſe away the ſame, 10 Eliz. *Dyer* 269. Yet ſee there many Caſes vouched, where the King's Grant is *ex certa ſcientia ſpeciali gratiâ et mero motu*, That it ſhall be beneficially expounded for the Grantee: and therefore where one was ſeiſed of a Leaſe holden of the King in Burgage, and he granted Licenſe to his Tenant *quod poſsit dare illud Meſſuagium ad manum Mortuam*, without ſuch, *quod de vobis tenetur*, that ſuch a Grant was good, and ſhould bind the King; and that in that Caſe the Writ of *Ad Quod Damnum* needed not to be awardep, becauſe the Grant was *ex ſpeciali gra.* Mich. 10 Eliz. *Dyer*. 299. a.

4. King *Henry* the 8th was ſeiſed of the Manor of *Torrington* in the County of *Devon*, and of a Market within the ſaid Manor every Week; and of a Fair holden there *in vigilia, Feſto, et Craſtino St. Mich.* Queen *Mary* did Incorporate the Town by the name of Mayor, Aldermen, and Burgeſſes, and doth not grant to them *feriam ſuam*, or *Nundinas ſuas*, but grants to them *de gra. ſpeciali, &c. quod ipſi et ſucceſſores ſui poſsint habere et tenere unum Mercatum quolibet die Sabati et duas Nundinas ibidem annuatim una in vigilia, Feſto et craſtino Sancti Mich. et unam in feſto Sancti Georgii Martyris, niſi Mercatum et Nundinæ illæ eſſent ad Nocumentum vicinorum Mercatorum et vicinarum Nundinarum.* It was adjudged, That the Grant was void, becauſe the Queens intent appeared by her Grant to create a Fair in *Vigilia feſto et craſtino Michaelis niſi ſit ad Nocumentum*: and although it was ſaid, That the Patent being *ex certa ſcientia ſpeciali gra. et mero motu* ſhould paſſe the old Fair; yet it was adjudged, It did not paſſe, againſt the intent and purpoſe of the Grant; although in the caſe of a common perſon, it would have paſſed: and although there was in the Letters Patents, *Non obſtante*; *aliquo brevi*; *De Ad Quod Damnum*, was in the Letters Patents. See 10 Eliz. *Dyer*. 276. *Baſſet's* Caſe. and *Cook* 1. Part. *Altonwoods* Caſe. 49. acc.

5. The King by his Letters Patents Licenſed his Tenant to alien to two Chaplains and their heirs; and afterwards it appeared by a Fine in the Treaſury, that he who alienel, had but an eſtate in taile, the Reverſion to the King. It was adjudged, That the Licenſe was void, and ſhould not enure to alien ſo much as he might lawfully alien; *ſcil.* to them and their heirs during his life; becauſe the King was deceived, and was not conuſant of his own eſtate, when he granted the Licenſe unto them to alien to them and their heirs. See *C.* 4. Part. 44. in *Alton-Woods* Caſe.

6. Upon the Statute of 23 H. 8. Cap. 5. of Sewers, The Commiſſioners decreed, That a new River ſhould be made out of the River of *Owſe* through the main Land by 7. miles, to another part of the ſame River; and taxed 9. ſeverall Towns in the County of *C.* and the Inhabitants for the ſame. And it was Reſolved by the Juſtices, That if an old Ditch or Trench be coming from the Sea, to a Town by which Boats and Veſſels paſſe to the Town, If the ſame be ſtopped by Outrage of the Sea, if a man would have a new Ditch or Trench, and ſtop the old Ditch or Trench, he ought firſt to ſue *Ad Quod Damnum*, to know what damage it ſhall be to the King or others; and no new Ditch or River which runneth to the Sea, can be made without the Writ of *Ad Quod Damnum*, and thereupon obtain the King's leave to do it. For if Commiſſioners of Sewers might *ex officio* do it, great inconvenience would follow thereupon to private men, as well as to the Common-wealth, for ſtopping of Havens, and particular prejudice alſo to private men, in drowning of their Lands. And therefore in the principal Caſe it was adjudged, That the ſaid New River could not be made without the Kings Licenſe, and ſuing forth *Ad Quod Damnum*; and therefore that the tax in that caſe was not warranted by their Commiſſion. The Caſe of the Iſle of *Ely*. *Cook* 10. Part. 142, 143.

7. In an Information, for ſtopping of a High-way; It was ſet forth, That time out of mind there was a Common High-way, for horſe, foot, and Carriages, in ſuch a Lane leading to divers Market-Towns, and that the Defendant with hedges and ditches ſtopped it, and encloſed it, and ſo held it. The Defendants confeſſe the old way; but ſay, it was ſo foul and ſurrounded with water and dirt, that paſſengers could not paſſe it; and that for the profit and eaſe of the paſſengers, J.S ſeiſed of a Cloſe adjoyning, layed out another Way more commodious for the people: and before the laying out of it, A Writ of *Ad Quod Damnum* iſſued to Enquire, Whether it were to the damage of, &c. if the King ſhould grant ſuch a Licenſe to the Defendants: and that an Inquiſition was taken, That it was not to the damage, &c. It was holden by the Court, That the Plea was naught both in matter and form, becauſe in the Plea it did not appear by what Authority J. S. did it, for it

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is but at his pleasure, and he may stop it when he will: and by that laying out, the Subjects have not any Interest therein; nor is it such a Way as Inhabitants are bound to watch in, or to make amends if a Robbery be done in it: and the pleading of the *Ad Quod Dammum*, and the Inquisition upon it is to no purpose, when he doth not plead, that he obtained the Kings License. Trin. 8 Car. in B.R. The King and *Wards* Case. *Cro.* 1. Part. 193.

Admiral, *and* Admiralty.

The Antiquity and Jurisdiction of the Admiral, *and Court of* Admiralty; *and where Suit may be in that Court, and where not; and for what things.*

1. IN ancient time, the Jurisdiction of the Admiral was called *Maritima Angliæ*, sometimes *Marina Angliæ*; which signifies Admiralship or Marinship of *England*; and from *Almarah*, comes Admiral; and so *Archigubernus*, signifies the Admiral, or Chief Governour, or Chief Captain of Mariners: Admiral of the Fleet, and Admiral of the Ships, are *Synonima*. Hill. 8 Jac. *Co.* 12. Part. 19.

2. The Jurisdiction of the Admiralty is more Ancient then the Time of *Edward* the Third; for it appeareth, That many Grants were made by the King, of the Office of Admiralty, before the time of Ed. the 3d. As 6 H. 3. *Rott. Patentium*: The King granted *Galfrido de Lacy Maritimam Angliæ custodiendam quamdiu placuerit. Anno* 9 H. 3. The King granted *Ricardo Agnillum Marinam Guardian Norf. et Suff. cum omnibus pertinenciis. Anno* 15 H. 3. *Petrus de Rivall, habeat. ad totam vitam suum Custodiam omnium Portuum et totius Costeræ Maris Angliæ, cum omnibus Libertatibus et Consuetudinibus, &c. Anno* 25 1. 1. *Pars. Patent. Johannes Botoret Custos Regis Portuum Maritimorum. Anno* 10 E. 2. *Pars. Patent. Nicholas Kirkill. Constituitur Admirals del Fleete.* And see the Book-Case. temps E. 1. Avowry 192. A Replevin of a Ship taken upon the Coast of *Scarborough* upon the Sea, and carried into the County of *Norfolk*: Because the Coast contained 4. Leagues upon the Sea, the Jurisdiction did belong to the Admiralty. And there, out of the Book, these 4. things are collected: 1. That of things done upon the Sea, certain Judgment is given to Mariners, that is, to Admirals; and doth not belong to the Kings Courts: But of a thing in any Town or place from whence a Jury may come, there the Admiral hath not Jurisdiction. 2. That so long as there hath been Trade and Traffique, (which is the life of every Island) there was Marine Jurisdiction to redresse, Depredations, Piracies, and other Offences upon the Sea. 3. If part of a matter be done upon the Sea, and other part in a County, the Common Law shall have the Jurisdiction. 4. The Sea within the Admiral's Jurisdiction, is out of any County: And the Admiral hath Jurisdiction where the Common-Law cannot give Remedy, *Cook* 12. Part. *ibid.* 80. See *Cook* 4. part. 47. *Dowdall's* Case. 31 Eliz. and 28 Eliz. *ibid. Constantine* and *Gyans* Case.

3. Note; It was said by *Cook*, Chief Justice, That it was adjudged in *Wright's* Case, That a thing made at *Constantinople*, should not be tryed in the Admiralty; for it ought to be made upon the deep Sea; otherwise the Admiral Court shall have no tryal of it: And if a man be slain or murdered beyond Sea, the Offender shall not be punished in the Admiralty, And *Walmesley* and *Warburton*, Justices, agreed; That if a thing be done beyond Sea, and may be tryed by the Common-Law, the Admiral Court shall have no Jurisdiction: But if an Obligation bear date beyond Sea, or be so Local, that it cannot be tryed by the Common-Law, the Admiral may hold Plea of it; for it is no prejudice to the King, or the Common-Law. 8 Jac. in C. B. *Brownlow.* 16. 17.

4. It was agreed by the Justices, That the Court of Admiralty may cause the party to enter into a Bond which is in the nature of a Caution or Stipulation, and is in the Nature of a Bail at the Common Law; and the words (*hæredes*) are necessary in such Caution or Stipulation; for that for the most part the Sureties were strangers, and the Civil Law doth not take Notice of the (Executors) and therefore the word *hæredes*, is used in it, which extends to Executors, as also to Administrators; and if the party render his body, the Sureties are discharged; and Execution is to be of the goods; for the Ship is onely Arrested: and the Libel ought to be onely against the Ship, and not against the party. But yet it was agreed, they may take the body in Execution, which are for the most part Masters of Ships, and Merchants, who are transiants; and therefore if they could not arrest their bodies, they might perhaps lose the benefit of their Suits: but in no case they might take forth Execution upon Lands. And in that case it was agreed, That all the Ports and Havens within *England* are *infra Corpus Comitatus*; and that Court of

of Admiralty cannot hold Jurisdiction of any thing done in them: and that appeareth in *Holland*'s Case, 30 H. 6. who was Earl of *Exeter*, and Admiral of *England*; and because he held Plea in the Admiralty of a thing done *infra Portum de Hull*, damages were recovered against him of 2000 l. Mich. 19 Jac. in C. B. *Greenway* and *Barker*'s Case. *Goldb.* 260. 261.

5. In an Action of Debt brought for Suing in the Court of Admiralty, contrary to the Statutes of 13 & 15 R. 2. upon a Special Verdict, the Case was; That a Charter part was made betwixt J. S. and the Plaintiff at *Dunkirk*; and the Defendant as Attorney of J. S. by force of a Letter of Attorney, did prosecute a Suit in the Admiral Court against the now Plaintiff: And in this case there were two points; 1. Upon the Jurisdiction of the Admiralty; the Contract being made at *Dunkirk*. 2. If the Defendant being an Attorney onely by Letter of Attorney, be such a Prosecutor as is within the said Statutes. It was holden, 1. That if all the matter were to be done at *Dunkirk*, then all were a Marine Cause, and the Admiral should have Jurisdiction; but if part were to be done in *England*, then it is otherwise. 2. It was holden, That the Attorney is not such a person as might prosecute within the Statute; and therefore the Action did lye against him. But Quære; for the point was not resolved. Pasch. 3 Car. in the Kings-Bench. *Cremer* and *Tookley*'s Case. *Godbolt.* 385. See *Pool* and *Tryans* Case. Mich. 1655. B. R. *Styles.* 470. acc.

6. A Bargain was made between two Merchants in *France*, and for not performance of the bargain, the one Libelled against the other in the Admiral Court: and it appeared upon the Libel, That the bargain was made at *Marcelles* in *France*, and so not upon the Sea: And *Flemming*, Chief Justice, would not grant a Prohibition, although the Admiralty hath nothing to do in the matter, because this Court cannot hold Plea of the Contract: But *Yelverton* and *Williams*, Justices, said, The Contract might be layed to be made at *Marcelles* in *Kent*, or in *Norfolk*. Mich. 8 Jac. C. B. *Brownlow.* 2. Part. 11. See Sect. 2. and 4.

7. A Bill was sued against the Defendant upon the Statute of 2 H. 4. Cap. 11. for suing in the Admiral Court, upon a Contract made on the Land at *New England*, and not *super altum Mare*; where the Defendant had obtained a Judgment in the Admiral Court, and taken the party in Execution for 112 l. But in regard that he was returned to be *in Custodia Marischalli*, although the Suit were by Bill, and not by Original Writ; and for that being at *New-England*, it was not alledged to be *in partibus transmarinis*; The Court held, it was out of the Admiral's Jurisdiction, and that he had no Authority to entermeddle therewith. Wherefore it was adjudged for the Plaintiff; and the party being returned in Execution for this cause onely, which was held *Coram non Judice*, he was discharged by the Court. Pasch. 16 Car. B. R. *Ball* and *Trelawny*'s Case. *Cro.* 1. Part. 438.

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2. *In what Cases, and for what Causes, a Prohibition shall be granted to stay a Suit in the* Admiral *Court; and for what not.*

1. THE Case was this; *A.* Master of a Ship, gave money to *B.* to buy Saylors Cloaths for him, who bought such Cloathes of J. S. in the Parish of S. *Katherines* near the Tower of *London*. J. S. delivered the Cloaths in his Ship which was in the River of *Thames* adjoyning to S. *Katherines*; and because the money was not paid, J. S. sued *A.* in the Admiral Court; and in this Case a Prohibition was granted by the Court, because the Contract was made in the Land *et infra Corpus Comitatus*, and because the Admiral hath not Jurisdiction but of Contracts made *super altum mare*: And it was said, That the Admiral should not have Jurisdiction where a man may see from one side to the other; but the Coroner of the County should enquire of Felonies there. And their difference is, where the place is covered with Salt-water out of any County, there it is *altum mare*: but where it is within any County, it is not *altum mare*: and for Criminal Offences, the Statute of 25 H. 8. Cap. 15. extends to such onely as are done *super altum mare*; and not in any Creek or Place where the Admiral hath no Jurisdiction. Mich. 7 Jac. C. B. *Leigh* and *Burley*'s Case. *Owen.* 122. 123.

2. It was Resolved *per totam Curiam*, That if one be sued in the Admiral Court for a thing alledged to be done *super altum mare*, and the Defendant plead to it, and confesse the thing to be done, and Sentence is given, that upon a surmise against his own confession, that it was done, the Court will not grant a Prohibition, unless it be made appear to the Court by matter in writing, or other good matter, that it was made upon the Land; for although the admittance of the party cannot give Jurisdiction to a Court, where it of right hath none; yet when the Court shall be advised, that this Suit is meerly for delay and vexation, and after a Sentence, unless upon good matter shewed

to

to the Court, the Court will not grant a Prohibition. Mich. 8 Jac. in C. B. *Cook* 12. Part. 79. See Mich. 9 Jac. in C.B. *Jennings* and *Audley*'s Case *Brownlow*. 30. acc.

3. *A.* Libelled in the Admiral Court, for an Agreement made at Sea, for well transporting of Sugars againſt *B.* and that the Agreement was put in writing in *Barbary*, and that the Sugars were ſpoyled at Sea; and hereupon a Prohibition was granted: but if the writing had not been at Land under Seal, but a ſimple remembrance of the agreement, it had been otherwiſe. Mich. 9 Jac. in C. B. *Palmer* and *Pope*'s Caſe. *Hob.* 79. and in the like caſe, a Prohibition was granted, upon a Contract made at *Malaga*, within the Streights of *Gibralter infra juriſdictionem maritimam*, becauſe it appeared the Contract was made at the Iſland of *Malaga*. Mich. 9 Jac. *Hob. ibid.* 79.

4. *Don Alonſo de Valaſco*, Embaſſadour for the King of *Spain*, Libelled in the Admiral Court againſt one *Cornereo*, declaring, That he being a Subject of the King of *Spain*, had committed divers crimes againſt the King, for which his goods were confiſcated, and that he was come into *England*, and had brought with him 3000 l. weight of Tobacco, to the value of 800 l. and afterwards attached them in the hands of Sir *John Watts*: *Watts* moved for a Prohibition, who had bought them of *Cornereo*; and the Prohibition was granted: For if any Subject bring goods into his Kingdome, though they were confiſcated before; the property here ſhall be tryed onely at the Common-Law. Mich. 9 Jac. C.B. *Don Alonſo de Valaſco* and *Cornereo*'s Caſe. *Hob.* 212.

5. Sir *Julius Cæſar*, Judge of the Admiralty, put a Bill *ex Officio Judicis* into the Admiral Court againſt *Nicholas*, an Officer of the Mayor of *London*, for meaſuring of Coals at a Wharf in the Pariſh of St. *Dunſtan* in the Eaſt, *London*, upon the River of *Thames*; and a Prohibition was prayed, grounded upon the Statutes of 13 and 15 R. 2. becauſe the meaſuring of Coals had alwayes appertained to the Mayor of *London*: And it was ſaid, That this meaſuring was in the body of the County. It was ſaid by *Wray*, Chief Juſtice, It was hard, that Sir *Julius Cæſar* ſhould be both Plaintiff and Judge, and that his Juriſdiction ſhould be tryed by himſelf. *Egerton*, who was of Councel for *Cæſar*, ſaid, He had ſpoken with the Lord Admiral, who told him, That the Mayor of *London* uſed to take a Fine for meaſurage, and made it an Office; and that he conceived it to be Extortion, being made upon the Water, and ſo puniſhable in that Court. But the Juſtices ſaid, If it be Extortion in the Mayor, there is no remedy for it in the Court of Admiralty; but in the King's Court: and it ſhall be redreſſed in a *Quo Warranto*: And a Prohibition was granted, Paſch. 30 Eliz. in B.R. Sir *Julius Cæſar*'s Caſe. *Leon.* 106, 107.

6. *A.* Libelled in the Court of Admiralty againſt *B.* for a Ship lying at Anchor at *Lymehouſe*. The Libel was in the nature of a *Detinue* at the Common-Law: and becauſe it was in *Corpore Comitatus*, and not within the Admiral's Juriſdiction, a Prohibition was granted. Mich. 16 Jac. B. R. *Violet*, and *Bagues* Caſe. *Cro.* 2. Part. 514. And the like Prohibition was granted, 13 Jac. where a Ship lying at Anchor at *Blackwall*, was broken by another Ship; and Suit was commenced for the ſame in the Admiral Court. *Cro. ibid.*

7. The Caſe was this; An Engliſh-man came into *Spain*, and there within the Dominions of the King of *Spain*, he did fell down and carry away many Loads of Braſil wood, for which *Don Diego Servient Deacuno*, Embaſſadour of the King of *Spain*, did Libel againſt him in the Court of Admiralty here. And it was clearly Reſolved by the whole Court, That the Admiral Court had not Juriſdiction to try the ſame there; but the ſame may be layed to be done at any place here in *England*, and ſo be here tryed. And *Cook*, Chief Juſtice, ſaid, That the Admiral here is but like to *Neptune*; and by the Statute of 15 R. 2. his power is limited, which he is not to exceed, and he is to have Juriſdiction of matters done onely *ſuper altum mare*. Hill. 12 Jac. in B. R. *Don Diego Servient. Deacuno*, and *Bruntiſhes* Caſe, *Bolſtr.* 322, 323.

8. The King was ſeiſed of the Mannor and Fee of *Holderneſs* in *Com. York*, and granted the ſaid Mannor and Fee, with wreck of Sea within the ſaid Mannor and Fee, to the Earl of *Northumberland* in Fee; and it was found, that divers goods were wreck, and caſt *ſuper arenas aqua ſalſa minimè coopertas manerii de D. infra fluxum & refluxum maris in Manerio de Dale*; and that *Dale* was parcel of the Fee of *Holderneſs*, and that the ſaid goods were floting *ſuper aquis Maris refluentes ex arenis ejuſdem Manerii de* D. *infra fluxum & refluxum Maris*. It was adjudged in this Caſe, That nothing ſhall be ſaid *Wreccam Maris*, but that which is left upon the Land, or caſt upon it by the Sea; And that the Admiral ſhall not have Conuſans or Juriſdiction of Wreck of the Sea: But of *Flotſam maris*, *Jetſam maris*, and *Ligan*, which is, where goods are ſunk, and tyed by a Buoy to diſcover where they lye; the Admiral Court ſhall have the Juriſdiction. Alſo it was Reſolved, That the Lord of a Mannor may have Wreck of Sea by preſcription; and that the ſoile upon which the Sea doth flow and reflow, *ſcil.* between the high-water mark, and the Low-water mark, may be parcel of a Man-

a Mannor. And alſo Reſolved, That *ad plenitudinem Maris*, the Admiral ſhall have Juriſdiction of every thing done upon the Water between the High-water and the Low-water-mark. 43 Eliz. in B. R. *C.* 5. part. 106. Sir *Henry Conſtable's* Caſe.

9. Concerning the Juriſdiction of the Admiralty, theſe points were Reſolved by All the Juſtices of both the Benches; 1. If Suits be commenced in the Admiralty upon Contracts, or other perſonal things done beyond Sea, or upon the Sea, no Prohibition is to be awarded. 2. If Suit be there for Freight, or Mariners Wages, or for breach of Charter-parties, though the Charter-party happen to be made within the Realm, ſo as the Penalty be not demanded; no Prohibition is to be granted. 3. If Suit be there for building, amending, ſaving, or neceſſary victualling of a Ship, againſt a Ship, and not againſt the party by name; No Prohibition lyes, though it be done within the Realm. 4. Although of ſome Cauſes ariſing upon the *Thames*, the King's Courts have Conuſans; yet the Admiralty hath alſo Juriſdiction there in the point ſpecially mentioned in the Statute of 15 R. 2. and by Equity thereof may enquire of, and redreſſe all Annoyances and Obſtructions in thoſe Rivers that are any impediment to Navigation, or paſſage to and from the Sea. Hill. 8 Jac. *Cro.* 1. Part. 216.

10. A *Frenchman* had his Ship taken by a *Dunkirk* upon the Sea; and before it was brought *infra præſidia* of the King of *Spain*, It was driven into *Weymouth* in England, and there the *Dunkirk* ſold the Ship and the goods. The Frenchman having notice of it, Libelled in the Court of Admiralty *pro intereſſe ſuo* againſt the Vendee, ſhewing it was taken by Pyracy, and not by Letters of Mart, as was pretended; and prayed a Prohibition. And it was agreed by the Juſtices, That if a Ship be taken by Piracy, or by Letters of Mart, and be not brought *infra præſidia* of that King by whoſe Subject it was taken, that it is no lawfull Prize, and the property is not altered: and ſuch was ſaid to be the Law of the Court of Admiralty. And therefore the Court would not grant a Prohibition. Trin. 17 Car. in B. R.

11. One *Kent* was indebted to J. S. in a ſum of money upon an Agreement made *ſuper altum mare*; *Kent* dyed, J. S. attached certain goods of Kents in the hands of J. D. and upon ſummons and tender of Caution to redeliver the goods attached, if the Debt were diſproved within the year, the goods were to be delivered to him; which the ſaid J. D. would not deliver; for which he was impriſoned in the Court of Admiralty: whereupon he brought his *Habeas Corpus*; and this matter was ſhewed to the Court upon the Return: and it was adjudged, That J. D. ſhould be diſcharged, becauſe the Cuſtome to attach goods after th death of the party, is not good; and the Action in the Spiritual Court ought to be againſt the perſon, and not the goods: and by their Law, the death of the party did abate the Action. Paſch. 18 Car. in B. R. *Heamans* Caſe.

12. One was arreſted in the Admiral Court, for reſcuing one out of the hands of a Meſſenger, who was taken by him by the Warrant of the Court, in a Suit there depending betwixt him and another: And the Opinion of the Juſtices was, That if the Cauſe were Maritime which was depending there, the Court may examine a Contempt to the Court in that cauſe; but they cannot proceed criminally againſt the party that reſcued him that did the contempt. Mich. 1649. B. R. *Styles* 171. *Tench* and *Harriſons* Caſe. See *Styles. ibid.* 340. acc.

13. Note; It was adjudged, That when the Court of Admiralty, or other Court is prohibited by Statute to hold Plea of certain cauſes, If one be ſued there contrary to the Statute, he may not onely have a *Superſedeas* in the nature of a Prohibition, to cauſe the Judge to ceaſe his proceedings, but he may have an Action alſo upon the Statute againſt the party that ſues contrary to the Statute; although the words of the Statute do not give expreſly ſuch Action to the party; for the ſame Releife is implyed in every Statute. *Co.* 10. Part. 75. in the Caſe of the Marſhalſee.

Adminiſtrators, *and* Adminiſtration.

1. AN Adminiſtratrix ſued the Defendant in the Court of Chancery; the Defendant ſhewed, that before the Adminiſtration was committed to the Plaintiff, he had put in a Caveat in the Spiritual Court, hanging which Caveat, the Plaintiff obtained Letters of Adminiſtration, of which he demanded Judgment pendant the Appeal. It was ſaid, That the ſame was a good cauſe to ſtay the Suit, untill the Appeal ſhould be determined; and that the ſame was not like unto a Writ of Errour; for by the purchaſing of a Writ of Errour, the Judgment is not impeached untill the Record be Reverſed: But the very bringing of an Appeal is a ſuſpenſion of the firſt Judgment for the principal matter. Mich. 42 Eliz. *Willoughby* and *Willoughby's* Caſe. *Goldeſb.* 119.

2. If Adminiſtration be committed to the Ob-

ligor, the ſame doth not extinguiſh the Debt. But if the Obligee makes the Obligor his Executor, the ſame is a Releaſe in Law of the debt, becauſe it is the Act of the Obligee himſelf: But if a woman who is an Executrix takes the debtor to husband, and the husband dyeth, the ſame is no Releaſe of the debt, becauſe it was onely ſo ſuſpended during the Coverture. *Co.* 8. Part. 135. in Sir *John Needham's* Caſe.

3. An Adminiſtrator brought an Action of Debt for Rent, which was found for the Plaintiff, and Judgment given. Exception was taken, that the Plaintiff had not ſhewed by whom the Letters of Adminiſtration were granted to him: But the Opinion of the Court was, That it was now too late to ſhew that after Verdict: for that the Jury have found, that the Adminiſtration was duly granted. And it was ſaid by the Court, That in a Declaration it is not neceſſary to ſhew by whom the Letters of Adminiſtration are granted; or to ſay, that they were granted by him *cui pertinuit*, or *per loci illius Ordinarium*. Trin. 1651. in B.R. *Marſhall* and *Ledſham's* Caſe. *Styles* 282. See 1 Jac. in Exchequer Chamber. *Wade* and *Atkinſon's* Caſe, adjudged contrary. *Cro.* 2. Part. 10.

4. Note; It was ſaid by *Glyn*, Chief Juſtice, That if an Adminiſtrator bring an Action againſt an Adminiſtrator; It is not neceſſary for the Plaintiff to ſhew by whom the Letters were granted to the Defendant; but he muſt ſhew by whom the Letters of Adminiſtration were granted to himſelf to entitle him to the Action; for if it appear not to the Court, that he is Adminiſtrator, he cannot ſue. Mich. 1655. in B. R. *Ingram* and *Fawſett's* Caſe. *Styles.* 463.

5. A man was poſſeſſed of Cattel, Corn, moveable goods, and of a Leaſe for years of Lands, and made his Will, and thereby made his Wife Executrix of all his Cattel, Corn, and moveable goods, not mentioning what ſhould be done concerning the Reſidue of his eſtate, and made no other Executor. The Wife proved the Will, and Adminiſtration was committed to her *omnium bonorum jurium et creditorum prædict.* (her husband) *et ejus Teſtamentum qualitercunq; concernent.* The Queſtion was, Whether this be a general Adminiſtration committed, or onely an Adminiſtration of the goods of which ſhe was made Executrix. *Berkley*, Juſtice, held, That it was but a ſpeciall Adminiſtration, becauſe it is *bonorum, jurium, et Creditorum prædict* (the husband) *et predict. Teſtamentum concernent.* But the greater Opinion of the Court was, That it was a general Adminiſtration committed; for *Jurium et Creditorum*, are general words; and the word (*Et*) ſhould be expounded as (*aut*) and it cannot be tyed onely to the Teſtament, for there be not any words of debts, as *Creditorum* imports. Trin. 7. Car. in B. R. rott. 497. *Roſe* and *Bartlet's* Caſe. *Cro.* 1. Part. 213.

6. If an Executor in an Action brought by him recovereth, and afterwards dyeth Inteſtate, and Adminiſtration of the Goods of the firſt Teſtator be committed to J. S. J.S. ſhall not ſue forth Execution upon ſuch a Recovery; becauſe the Adminiſtrator comes in paramount, and claims immediately from the firſt Inteſtate. Trin. 11 Car. in B. R. *Cleve* and *Veers* Caſe, *Cro.* 1. Part. 325. & 329. See *C.* 5. Part. 9. *Bynſtell's* Caſe, acc. See *Cro.* 2. Part. 1 Jac. B. R. *Yate* and *Gaugh's* Caſe, acc.

7. If an Adminiſtrator doth compound with one who hath a Judgment of 100 l. for 40 l. this under-hand Compoſition ſhall not prejudice any other Creditor who is a ſtranger to it: For every Adminiſtrator ought to execute his Office lawfully, in paying Debts, Duties, and Legacies in ſuch precedency as the Law requires: and an Agreement made between them and others ſhall not be to the prejudice of a third perſon. 8 Jac. *C.* 8. Part. 132. *Turner's* Caſe.

8. The Executor of *A.* brought Debt upon a Bond againſt *B.* the Executor of J. D. The Defendant pleaded, That J. D. dyed Inteſtate, and that before the Writ brought, Adminiſtration of his goods were committed to J. N. who adminiſtred, and yet doth. The Plaintiff Replyed, That J. D. dyed Inteſtate, and before the Adminiſtration granted, divers goods of his came to the Defendant's hands, which the Defendant as Executor of the ſaid J. D. adminiſtred *ſeu aliter ad ſuum proprium uſum diſpoſuit.* Whereupon Iſſue being joyned, It was found for the Plaintiff: for ſince there was an Executor before the Adminiſtration granted, the Plaintiff had cauſe of Action veſted in him, which ſhall not be taken away by an Adminiſtration afterwards granted, though it be before the Action brought; and ſo much the rather, becauſe the goods taken by wrong before the Adminiſtration, ſhall not be Aſſetts in the hands of the Adminiſtrator, till they be recovered, or damages for them. Trin. 12 Jac. in C.B. rott. 4087. *Kebit* and *Oſbaſton's* Caſe. *Hob.* 49.

9. *A.* had a Judgment againſt J. S. in an Action of Debt. J. S. dyed Inteſtate, J. D. took Adminiſtration of his goods; againſt whom *A.* took forth a *Scire facias* with a *Fieri facias* to enquire of the goods of J. S. in the hands of the Adminiſtrator, and to take them in Execution. The Defendant appeared to the *Scire Facias*, and pleaded, fully adminiſtred: upon which *A.* did demur; for that he ſhould have pleaded *Non Devaſtavit*, and not fully adminiſtred: But it was ſaid by the Court,

That

That this being a *Scire facias* with a *Fieri facias*, It ſhould be dangerous to plead *non Devaſtavit*; and it hath been a good Plea, and ſo before adjudged, to plead fully adminiſtred. For all ſuch proces of *Scire facias*, is but to make the Defendant to anſwer; and this Plea is a good anſwer. Mich. 23 Car. in B.R. *Fitchett* and *Wolſton*'s Caſe. *Styles* 56. 57.

10. An Action of Debt was brought againſt J. S. as Adminiſtrator of J. D. The Defendant pleaded, That the Inteſtate was Outlawed at the Suit of J. N. after Judgment; and ſo being Outlawed, dyed Inteſtate. It was Reſolved, That the Plea was not good; for it is but a Plea, by Implication, that he hath not any goods; and ſo but argumentative. See 37 H. 6. 27. by *Priſot.* acc. And Trinit. 37 Eliz. in C. B. rott. 2954. *Woolley* and *Bradwell*'s Caſe, was vouched to be adjudged accordingly: and therefore the Court upon the View of the Record in *Woolleys* Caſe, gave Judgment, That in the principal Caſe it was no Plea. Mich. 20 Jac. in C. B. *Bullen* and *Gervis* Caſe. *Hutton.* 53.

11. An Action of Trover and Converſion was brought by an Adminiſtrator of the Inteſtate's goods; and the time of the Converſion was ſuppoſed to be after the adminiſtration committed; and it was found againſt the Plaintiff. It was Reſolved, That in this caſe the Plaintiff ſhould pay Coſts to the Defendant, the Action being grounded upon a Converſion in his own time, and not in the time of the Inteſtate. Trin. 5 Car. in B.R. *Atkey* and *Heard*'s Caſe. *Cro.* 1. Part. 159.

12. In Trover and Converſion, the Caſe was; A man dyed Inteſtate, and the Ordinary committed Adminiſtration to a ſtranger; and afterwards the next of Kinn of the Inteſtate ſued a Citation in the Spiritual Court to have it repealed; and *pendente lite*, the Adminiſtrator ſold the goods of the deceaſed to defeat the Plaintiff; and afterwards the Letters of Adminiſtration were Revoked by Sentence, and the firſt Sentence annulled and made void, and new Adminiſtration granted to the Plaintiff. In this caſe it was Reſolved, That the Action did not lye; and in this caſe, the difference was holden between a Suit by Citation, for to countermand or revoke the former Adminiſtration; and an Appeal, which is alwayes a Reſerving of a former Sentence: for an Appeal doth ſuſpend the former Sentence; otherwiſe of a Citation: And in this Caſe, becauſe the firſt Adminiſtrator had the abſolute property of the goods in him, he might ſell them to whom he would; and although the Adminiſtration be afterwards revoked, the ſame ſhall not make void the ſale. 37 Eliz. in B.R. *Cook* 6. part. 28. *Pathman*'s Caſe.

13. The Commiſſary of the Biſhop of *London* committed the Adminiſtration of goods by Word, and gave an Oath to the Adminiſtrator, which was entred in the Acts of the Commiſſary; but there were no Letters of Adminiſtration, either in the name of the Commiſſary or Ordinary; and whether this was a good Adminiſtration granted by word, was a Queſtion? It was not Reſolved, but the better Opinion ſeemed to be, That it was not. See 21 H. 6. 29. 21 E. 4. 50. It cannot be without Deed. See *Cook.* 8. Part. 31. acc.

14. If divers perſons be made Executors, and ſome of them refuſe at one time, and ſome at another, before the Ordinary, they may afterwards adminiſter the goods of the Teſtator; but if they all refuſe before the Ordinary, and the Ordinary commits the Adminiſtration of the goods to another; afterwards they cannot prove the Will. *Cook* 9. part. 39. *Henſloes* Caſe.

15. The Probate of Teſtaments did belong to Ordinaries, but of later times, *de Conſuetudine Angliæ et non de Communi jure*: and the Power to grant Adminiſtration, was granted to the Ordinary by the Statute of 31 E. 3. cap. 11. and before that time, the King was accuſtomed to ſeize the goods of the Inteſtate, to the intent they might be beſtowed for the burial of the dead, and the payment of the Inteſtate's debts, and the advancement of his Wife and Children; and the Ordinary himſelf hath not power to ſell the goods of the Inteſtate, though they be in danger of periſhing; nor Releaſe a debt due to the Inteſtate; by the Statute of 31 E. 3. *Cook.* 9. Part. *ibid. Henſloe* Caſe.

16. The Commiſſary of the Biſhop of the Diocеſs granted Letters *ad Colligend. et ad vendend. ea quæ peritura eſſent, et inde compotum reddere*; the Grantee ſold goods which would not keep, but periſhed; and an Action of Debt was brought againſt him as Executor in his own wrong: and it was adjudged maintainable, becauſe the Ordinary himſelf had not ſuch power; and therefore he could not give it to another. 9 Eliz. *Dyer.* 256.

17. A Teſtament is diſproved in the Spiritual Court, and the party appeals to the Metropolitan, and it is there diſproved: and afterwards there is an Appeal to the Court of *Delegates*, and it is there diſproved alſo: and at laſt the party Appealed to the Queen in Chancery, by the Statute of 25 H. 8. and there alſo it was diſproved before the Commiſſioners: And, If the Queen *ex authoritate ſua regali* might grant Letters of Adminiſtration, was the Queſtion. And the Opinion of the Juſtices of the Common-Pleas, was, That ſhe might, becauſe the ſaid Court of Chancery is the higheſt Court; and the matter being once there, it cannot be determined in any Inferiour Court: and then the

party may ſhew in his Declaration generally the matter, and that Adminiſtration was granted to him by the Queen *ex ſua regal's authoritate*, under the Seal of her Court of Delegates. Mich. 14 Eliz. in C. B. *Godbolt*. See after, 10 Jac. in B. R. *Stevenſon's* Caſe contrary, That the Court of Delegates cannot grant Letters of Adminiſtration.

18. In Debt brought againſt an Adminiſtrator It was the Opinion of all the Juſtices, That an Adminiſtrator might retain moneys in his own hands of the Inteſtates, to ſatisfie a debt due to himſelf: But an Executor of his own wrong ſhould not retain to ſatisfie his own debt. Mich. 11 Jac. in C. B. *Bond* and *Green's* Caſe. *Godb.* 216. See *Cook.* 5. Part. *Coulters* Caſe.

19. An Adminiſtratrix, *durante minore ætate* of an Executrix made divers Obligations unto the Creditors of the Teſtator, and afterwards took husband: and the Opinion of the Court was, That ſo much of the goods of the Teſtators as amounted unto the value of the debts paid, and undertaken for, the husband might retain as his own. Mich. 15 Jac. in C. B. *Briers* and *Goddard's* Caſe. *Hob.* 250.

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2. *Where Adminiſtration of goods ſhall be good, and where not; And what things ſhall be put into the Inventory, and what not.*

1. THE Caſe was; J. S. had a Wife called *Bridget*, who dyed; he afterwards took another Wife called alſo *Bridget*, and then dyed Inteſtate. The ſecond Wife took Letters of Adminiſtration of the goods of her husband; the Son ſued in the Prerogative Court to repeal thoſe Letters of Adminiſtration, upon pretence *Bridget* the firſt Wife was living. It was adjudged *per Curiam*, That where the Ordinary hath granted Letters of Adminiſtration to one who ought to have them, that in ſuch caſe they ought not to be repealed by the Ordinary. Paſch. 23 Car. in B. R. *Beteſworth* and *Beteſworths* Caſe. *Styles* 10.

2. The Lady *Cromwell* was poſſeſſed of divers Leaſes, and conveyed them in truſt; and and afterwards married with Sir *John* Saint *John*; the Lady received the money upon the Leaſes, and with part of the money ſhe bought Jewels; and other part of the money ſhe left: and afterwards dyed: Sir *John St. John* took Letters of Adminiſtration of the goods of his Wife; and in a Suit in the Eccleſiaſticall Court; the Court would have compelled him to have given an Accompt of the Jewels and for the money, to have put them into the Inventory. But the Opinion of the whole Court of B. R. was, That he ſhould not put them into the Inventory; becauſe the property of the Jewels was abſolutely in him as husband, and he had them not as Adminiſtrator; But of ſuch things as be in action, as he ſhall have as Adminiſtrator, he ſhall be accomptable for, and they ſhall be put into the Inventory: and for the moneys received upon truſt, It was Reſolved, that the ſame was the moneys of the Truſtees, and the Wife had no remedy for it, but in Equity, and therefore the husband ſhould have it as Adminiſtrator: and in that caſe, It was Reſolved, That if a woman do Convey a Leaſe in truſt for her uſe, and afterwards marrieth, that in ſuch caſe it lyes not in the power of the husband to diſpoſe of it: and if the Wife dye, the husband ſhall not have it, but the Executor of the Wife. Trin. 15 Car. in B.R. Sir *John St. John's* Caſe.

3. A man dyed Inteſtate, and there being a Controverſie between the Widow of the Inteſtate, and one of the next of Kinn, about the Adminiſtration: It was agreed, the Widow ſhould have the Adminiſtration, and ſhould enter Bond in the Prerogative Office, to make an equal diſtribution of the goods of the Inteſtate amongſt the Kindred; and ſhe entred Bond again, and had adminiſtration; and afterwards the Bond was ſued againſt her in the Spiritual Court. It was ſaid, That in regard the Adminiſtration was granted to one to whom the Ordinary was not bound to grant it, that ſuch a Bond taken for equal diſtribution was good. But it was Reſolved, That the taking of the Bond was not lawfull; for when the Ordinary hath once commited the Adminiſtration to the party, his power is determined: and he cannot grant Letters of Adminiſtration upon a Condition: And in the principal Caſe a Prohibition was granted to ſtay the proceedings upon the Bond in the Spirituall Court. Paſch. 1655. in B. R. *Davies* and *Mathewes* Caſe. *Styles.* 456.

3. *Where.*

3. *Where the Letters of Adminiſtration may be revoked and repealed, and where not; and what ſhall be a ſufficient Revocation or Repeal of them; et è contra.*

1. AN Adminiſtration may be granted upon Condition; and ſuch an Adminiſtration, if the Condition be not performed, may be revoked or Repealed: But if ſuch an Adminiſtrator, before the Condition be broken, giveth away the goods; yet ſuch a guift is good. *Cook* 6. Part. 19. in *Packman*'s Caſe.

2. In an Action upon the Caſe, the Caſe was; A man dyed Inteſtate, and the Ordinary granted Adminiſtration to a ſtranger; the next of Kindred ſued a Citation out of the Spiritual Court, to have the Adminiſtration repealed: and, depending the Suit, the Adminiſtrator ſold the goods of the Inteſtate; and afterwards the Letters of Adminiſtration were Revoked by Sentence; and afterwards brought the Action. It was adjudged, the Action would not lye: and the difference was taken between a Suit by Citation to Revoke a former adminiſtration; and an Appeal: for an Appeal doth but ſuſpend the Sentence; otherwiſe of a Citation: and in the principal caſe, becauſe the firſt Adminiſtrator had the abſolute property of the goods in him, the ſale of them was good, although that the adminiſtration was afterwards revoked: But if ſuch ſale had been by Covin, it had been void againſt Creditors, by the Statute of 13 Eliz. *Co.* 6. Part. 18. *Packman*'s Caſe.

3. Letters of Adminiſtration were granted to J. S. and he releaſed all Actions; and afterwards the adminiſtration was revoked, and declared to be null and void by Sentence. It was adjudged, That in that caſe the Releaſe was void. Mich. 9 Jac. rott. 2304. in C B. *Throgmorton* and *Hobby*'s Caſe. *Brown.* 1. Part. 51.

4. Note: An Adminiſtration cannot be revoked, for the not bringing in of the Inventory and the Accompt by the Adminiſtrator: and the Ordinary upon an Adminiſtration granted, hath not power to make any diſtribution of the ſurpluſage, nor to take any Bond for to anſwer the ſurpluſage, by the true meaning of the Statute of 21 H. 8. which Intends a benefit to the Adminiſtrator, and not an unprofitable burthen. Mich. 15 Jac. in C. B. *Tooker* and *Loanes* Caſe. *Hob.* 190. See *Styles*, Paſch. 24 Car. B.R. *Hill* and *Bird*'s Caſe, acc. See Hill. 16 Car. in C.B. Merſh. 93. the Ordinary hath not power to make diſtribution of the goods, becauſe there may be a debt which was unknown; and if he might diſtribute, then the Adminiſtrator ſhould be charged with the debt of his own goods. See *Brierley*'s Caſe. *Brown.* 1. Part. 31. acc.

4. *Where, and what Actions will lye brought by Adminiſtrators; and what Actions lye againſt them: And what Pleas they may plead; and what not.*

1. LEſſee for years dyed Inteſtate, J. S. took Adminiſtration of his goods; and for Rent arrear, in the time of the Adminiſtrator after the death of the Inteſtate, the Leſſee brought an Action of Debt againſt the adminiſtration in the *debet et Detinet*: And it was adjudged, That the Action was maintainable. *Cook.* 5. Part 31. *Hargraves* Caſe. Quære. For I have ſeen a Report, Hill. 43 Eliz. That *Hargraves* Caſe was reverſed in the Exchequer Chamber; and then adjudged, That the Action ought to have been brought in the *Detinet* only: But in all Caſes and Actions brought by Executors, as Executors, the Writ ſhall be in the *Detinet tantum*, although the duty doth accrue in his own time; becauſe the thing recovered ſhall be Aſſets: And ſo it was adjudged, Paſc. 7 Jac. in B. R. in the Lord *Rich* and *Franks* Caſe: and in 43 Eliz. in the Kings-Bench, in *Sparks* Caſe.

2. The Caſe was; *A.* promiſed to *B.* that if *B.* would pay 50 l. to *C.* his ſon, who was married to *D.* the daughter of *J.* that he would pay 100 l. to *D.* his Daughter at ſuch a time. *B.* paid the 50 l. to *C. J.* failed of payment of the 100 l. *B.* dyed Inteſtate, *E.* his Executor brought an Action upon the Caſe upon Aſſumpſit, upon the promiſe made to *B.* the Teſtator: and it was adjudged, That the Action did well lye by the Adminiſtrator, although he ſhould have no benefit by it, if he did recover. Mich. 22 Car. in B. R. *Styles*, 6.

3. Note: It was ſaid by *Rolls*, Chief Juſtice, That Letters of Adminiſtration do relate to the time of the death of the Inteſtate, and not to the time of the granting of them; and therefore an Adminiſtrator may bring an Action of Treſpaſſe, or a Trover and Converſion for goods taken by one before the Letters granted to him; otherwiſe there would be no remedy of the wrong done. Mich. 1652. in B.R. *Long* and *Hebbs* Caſe. *Styles.* 341.

4. In

4. In an Action of Debt the Caſe was; A man dyed Inteſtate, and a ſtranger poſſeſſed himſelf of the Inteſtate's goods, after Letters were granted to a Creditor of the Inteſtate, who brought an Action of debt againſt the ſtranger for the debt due to him by the Inteſtate, as Executor of his own wrong. The Queſtion was, Whether the Creditor by taking the Letters of Adminiſtration, had not ſuſpended his Action for the time that he ſhould continue to be Adminiſtrator. The Opinion of the Court was, That the Action was not ſuſpended; for here is but a Right to Aſſetts in the Adminiſtrator; and no Aſſetts in his hands to charge him withall: and the granting unto him Letters of Adminiſtration, hinders him not from bringing his Action, becauſe the goods were not taken away after the Adminiſtration granted, but before; and if they had been taken after the Adminiſtration, he might have had a Trover and Converſion, or an Action of Treſpaſs, for the taking of them. Mich. 1652. rott. 686. in B. R. *Aſhby* and *Childs* Caſe. *Styles* 384.

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5. *To whom Letters of Adminiſtration muſt be granted; and by whom; And where they ſhall be granted by the Ordinance, and where by the Metropolitan; et è contra.*

1. IT was Reſolved by all the Juſtices, againſt the Statute of 5 E. 6. That the Father and the Mother are the next to whom adminiſtration ſhall be granted, of the goods of the Son or Daughter who dye Inteſtate, 34 Eliz. *C.* 3. Part. in *Ratcliff's* Caſe.

2. If an Enfant be made Executor, Adminiſtration, during the minority of the Enfant, may be committed to the Mother; and the ſame ſhall ceaſe and be void, when the Enfant is of the age of 14 years: But ſuch Adminiſtrator cannot ſell the goods of the Teſtator, unleſſe it be for neceſſity of payment of Debts, becauſe he hath the Office of Adminiſtrator, onely *pro bono et Commodo* of the Enfant, and not to its prejudice. *Coo.* 5. Part. *Prince's* Caſe. 29.

3. One had goods ſolely in an Inferiour Dioceſſe, and the Metropolitan of the Province pretending that he had *bona Notabilia* in divers Dioceſſes; committed the Adminiſtration of the goods. It was Reſolved, That ſuch adminiſtration granted by the Metroplitan, was not void, but voidable by Sentence, becauſe the Metropolitan hath Juriſdiction of all places within his Province. But if the Ordinary of one Dioceſſe committeth Adminiſtration of goods when the party hath *Bona notabilia*, in divers Dioceſſes, the Adminiſtration is void as well for his goods within the Dioceſs as without, 22 Eliz. in C. B. *Vere* and *Jeffey's* Caſe. *Co.* 5. Part. 29.

4. A Merchant of *Ireland* by an Obligation made in *Ireland*, became bounden to J. D. of *London*; which bond was in *London*, and there remained: J. D. dyed inteſtate *in Com. B.* in *England*, the Biſhop of *Ireland* committed Adminiſtration to the ſon of J. D. who releaſed the Debt. The Archbiſhop of *Canterbury* committed the Adminiſtration to the Wife of J. D. and ſhe brought an Action of Debt againſt the Obligor; and adjudged, the Action was maintainable; for that the Adminiſtration ſhall be committed by the Ordinary of the place where the Obligation is, and not where the debt firſt did ariſe; becauſe it is not locall. 14 Eliz. *Dyer* 303. *Lukars* Caſe.

5. The Caſe was; One dyed Inteſtate in the County of *York*; and a ſtranger prayed Letters of Adminiſtration to be granted to him, which was Repealed by the Delegates at *York*; there was an Appeal to the Court of Delegates in the Chancery, who did repeal the former ſentence at *York*; and adjudged, that the party made no Will; and granted Letters of Adminiſtration to him who appealed to them: The Archbiſhop of *Canterbury* granted adminiſtration to a ſecond perſon; and the Archbiſhop of *York*, to a third perſon, who made a Releaſe unto the debtor of the Inteſtate; upon which Releaſe, Debt was brought by the firſt Adminiſtrator, againſt the Defendant, who pleaded the Releaſe made to him: and whether this grant of Letters of Adminiſtration by the Judges Delegates were good, or not, was the Queſtion. But the better Opinion of the Court was, That the Letters of Adminiſtration which were granted by the Judges Delegates, was not good; but there being *bona Notabilia*, the Adminiſtration was to be granted by the Archbiſhop: and it was ſaid, That if the party who dyed Inteſtate had goods in ſeveral Provinces, both the Archbiſhops there having a Peculiar, might grant Letters of Adminiſtration; and although the King be Supream Ordinary, and by Delegates may do many acts; yet the Court of Delegates cannot do this, nor have they power to prove any Wills: For the power of the Judges Delegates, is *poteſtas Delegata, corrigere, non exequi*, to examine, and not to correct: And the Court ſaid, That it was adjudged in one *Brakenburies* Caſe, That the Judges Delegates had not power to grant any Letters of Adminiſtration. Mich. 10 Jac. in B.R. *Stevenſon* and *Wood's* Caſe, *Bolſtr.* 2. Part. 3. & 4.

6. In an Aſſumpſit brought by Husband and Wife, Adminiſtrators of the goods of J. S. the Defendant

Defendant did impale; and afterwards demanded Oyer of the Letters of Adminiſtration. And it appeared, That the Letters of Adminiſtration were granted to the Plaintiffs by one *Tho: Taylor*, Batchelour of Law, Commiſſary of the Biſhop of *London*. The Defendant pleaded after the Darrien continuance, That adminiſtration was granted to him under the Seal of the Vicar-general; and alſo pleaded the Statute of 37 H. 8. which ſayes, It ſhall be lawfull for any perſon, being a Doctor of Law to be Commiſſary, and exerciſe Eccleſiaſtical Juriſdiction; and then ſhewes, that the ſaid *Tho: Taylor* was a meer Lay-man, and not Doctor *Legis Civilis nec Miniſter allocatus*; whereby he had no power to commit adminiſtration: But it was adjudged by the whole Court, That the adminiſtration granted to the Plaintiffs, was a good Adminiſtration, being under the Seal of the Officer, untill it be avoided by Sentence; and yet ſuch an Avoidance ſhall not make a mans act to be void; no more then if a Lay-man be preſented to a Benefice, albeit it be a nullity in our Law: yet the Church ſhall not be void by our Law, but from the time of the Deprivation, of which, Notice ought to the given to the Patrone; and if it ſhould be otherwiſe in the principal Caſe, an infinite number of Adminiſtrations might be drawn into Queſtion, upon ſuch an averment, That he who granted them was a Lay-perſon: Which is not to be ſuffered, for the Inconveniencies which might happen. 2. It was Reſolved, the pleading of the Adminiſtration to the Defendant was not good, becauſe it appeareth by the date of it, it was after the laſt continuance; and therefore could not be pleaded, untill a new Continuance after. Hill. 36 Eliz. in B. R. *Stoakes* Caſe. *Popham*. 37.

7. In Debt brought by an Adminiſtratrix, upon an Adminiſtration granted by the Biſhop of *R.* the Defendant pleaded an Adminiſtration committed to him by the Dean and Chapter of *Canterbury, ſede vacante*, becauſe the Inteſtate had *bona Notabilia*. The Plaintiff replyed, That the ſaid Adminiſtration was repealed: and it was adjudged for the Plaintiff; 1. Becauſe the Defendant did not ſhew what *bona Notabilia* the Inteſtate had in certain: and it ſhall be intended he had not *bona Notabilia*; and ſuch Adminiſtration is but voidable. 2. Becauſe, before the Repeal of the Adminiſtration committed by the Metropolitan, the Inferiour Ordinary may commit adminiſtration: and when the Defendant's adminiſtration is Repealed, it is void *ab initio*; and in the Principal caſe, It was alſo Reſolved, That whereas the Adminiſtration was committed to the Obligor, that the debt was not extinct, becauſe it is in another right: Otherwiſe it is, If the Obligee himſelf make the Obligor his Executor. 8 Jac. *Coo.* 8. Part. Sir *John Needham's* Caſe. fo. 135.

8. In *Detinue* brought by an Adminiſtrator of a Chain, of which the Inteſtate dyed poſſeſſed, and which after came to the Defendant's hands: the Caſe was, upon a Special Verdict, That the Adminiſtration was committed to the Defendant in *London* by the Biſhop of *Cork* being in *London*; but they did not find, that the Defendant was poſſeſſed of the Chain in *London*: and in this caſe, theſe Points were Reſolved; 1. That a Biſhop of *Ireland* being in *England*, might commit Adminiſtration of things in *Ireland*, becauſe it is but a power and authority which followes his perſon whereſoever it is. 2. That an Adminiſtrator made by a Biſhop of *Ireland*, could not bring an Action here as adminiſtrator, becauſe of the Letters of adminiſtration granted in Ireland, there could be no tryall here. 3. That an Adminiſtrator might declare of his own poſſeſſion, although he was never poſſeſſed, if the Inteſtate at the time of his death was poſſeſſed, for that the Law caſts a poſſeſſion upon him. 4. That upon a general Iſſue pleaded, the Jury might find a forrein matter, as a thing done out of *England*. 5. It was Reſolved, That in the principal Caſe, the ſubſtance of it was the poſſeſſion, and not the Adminiſtration. It was adjudged for the Plaintiff. Paſch. 27 Eliz. in C. B. *Carter* and *Croſts* Caſe. *Godbold*. 33. See *Dyer*. 304.

9. Note: It was Reſolved *per Curiam*, That an Adminiſtration *durante minore ætate* of an Executrix was not within the Statute of 21 H. 8. of neceſſity to be granted to the Widow of the Teſtator, becauſe there is an Executor all the while; otherwiſe, if the Executor were made from a time to come. Mich. 15 Jac. C. B. *Briers* and *Goddard's* Caſe. *Hob*. 250.

10. In the Caſe of a Prohibition granted to the Eccleſiaſtical Court, for granting Letters of Adminiſtration to a ſiſter of the half blood, when there was a brother of the whole blood, who ſued for them. It was agreed by the Court, That it is in the power of the Ordinary, to grant adminiſtration either to the brother of the whole blood, or to the Siſter of the half blood, at his Election, becauſe they are in equal degree of kindred to the Inteſtate. But if adminiſtration be granted to the husband and wife where the husband is not of kinn to the Inteſtate, but a ſtranger; in ſuch caſe, if he ſurvive his wife, he ſhould have all the goods, and the kindred be defrauded, which is not reaſonable; and therefore ſuch adminiſtration ſhall be void. Mich. 23 Car. in B. R. *Styles* 74, 75. See Paſch. 24 Car. in B. R. *Hill* and *Bird's* Caſe. *Styles* 102. acc.

6. Who

6. *Who ſhall be ſaid to be an Adminiſtrator of his own wrong: and what act ſhall make him to be ſo*; et è contra.

A Woman who is an Executrix, taketh a husband; afterwards ſhe and her husband are divorced upon a precontract; the wife appeals to the Delegates, and, pendant the Appeal, the husband adminiſtreth the goods: and then the man dyeth: It was a Quære in 2 Mary, *Dyer* 105. 106. If the husband ſhould be ſaid to be an Executor of his own wrong. But ſee 2 Jac. *C.* 5. Part. *Read's* Caſe. 33. That when a man dyeth Inteſtate, and a ſtranger taketh the goods of the Inteſtate, and uſeth them, or ſells them, he is an Executor of his own wrong; for thoſe to whom the deceaſed was Indebted have not any other againſt whom they can bring their Actions for the Recovery of their debts: and ſo note, that the very ſeizure of goods will make one an adminiſtrator of his own wrong. 2 Ma. *Dyer.* 106. and *C.* 5. Part. 33. See *Porter's* Caſe, 1 Eliz. *Dyer.* 166. acc.

7. *Where Adminiſtration* Durante minori ætate *of an Enfant Executor ſhall be good; and what Acts done by ſuch an Adminiſtrator ſhall be good; and when ſuch Adminiſtration ſhall ceaſe and determine*, et è contra.

1. AN Enfant was made Executor; and Adminiſtration was granted to another *durante minore ætate* of the Enfant, who brought debt for money due to the Inteſtate, and had the Defendant in Execution, and then the Executor came of full age. It was moved, That the Defendant might be diſcharged out of Execution, becauſe the authority of the Adminiſtrator was determined, and he cannot acknowledge ſatisfaction: And it was ſaid, That he was rather a Bayliff to the Enfant, then an Adminiſtrator. But the Judgment of the Court was, That though the authority of the Adminiſtrator was determined; yet the Recovery and Judgment did remain. Mich. 29 Eliz, in C. B. *Goldb.* 104.

2. One was bounden to pay a certain ſum of money to the Obligee his Heirs, Executors, or Aſſigns? The Obligee made an Enfant his Executor, and adminiſtration was committed to another during his minority, and the Obligor paid the money to the Adminiſtrator. It was a Quære, 28 Eliz. in C. B. as *Rodes*, Juſtice, ſaid, if the ſame were a ſufficient payment to excuſe him, or not? But the better Opinion was, That it was: but it was not Reſolved.

3. Upon an Aſſignment of Bonds to the Queen, a *Scire facias* was brought againſt an Enfant, who pleaded, That Adminiſtration of the goods were granted to two other perſons during his minority. It was holden by the Court, That the ſame was no Plea: by which Caſe the Court conceived, That the Adminiſtrator, *durante minore ætate*, had not any power of, or Intereſt in, the eſtate. Hill. 33 Eliz. in the Exchequer. *Miller* and *Gores* Caſe. *Godbold.* 104.

4. In an Accompt brought by an Adminiſtrator *durante minore ætate* againſt the Defendant as Bayliff of ſuch a Mannor: It was found for the Plaintiff. It was moved in ſtay of Judgment, That it is not ſhewed, that the Executor the Enfant was within the age of 17 years; and it might be he was above the age of 17 years, and yet under age. But the Opinion of the Court was, That it ſhall not be ſo Intended, unleſſe it be ſhewed, that he was above 17 years; and eſpecially when the Defendant had admitted him to bring the Action, and had pleaded to Iſſue. Mich. 7 Car. in B.R. *Wells* and *Somes* Caſe. *Cro.* 1. Part. 174. See Mich. 9 Car. rott. 373. *Dorcheſter* and *Wells* Caſe. acc. *Cro.* 1. Part. 271.

Admittance. *See* Copy-holder.

1. A Woman Copy-holder for life took a husband; the Reverſion of the ſaid Copy-hold was granted to three, *viz. A. B. & C. cum acciderit poſt mortem*, ſurrender or forfeiture for their Lives ſucceſſively according to the Cuſtome. The husband ſurrendred to the uſe of *A.* for life; To whom the Lord granted a Copy-hold for the life of *A.* *B.* dyed; and the Opinion of the Court was, That *C.* ſhould not be admitted, for that after the death of the husband, the Wife might enter, or have her plaint in

in the nature of a *Cui in vita*; and during the life of the husband, the Lord ſhould have it in nature of an Occupancy. 9 Eliz. *Dyer*. 264.

2. *A.* Copy-holder in Fee had iſſue two daughters by ſeveral women, and dyed; the daughters entred, and the eldeſt daughter dyed before Admittance. It was holden by the Court, That the poſſeſſion of the eldeſt daughter ſhould be ſuch a *poſſeſſio fratris*, as ſhould make her Collateral heir inheritable. 13 Eliz. *Dyer*. 291. See *Co*. 4. Part. 21. acc.

3. *A.* Copy-holder in Fee by Licence made a Leaſe for years, the Leſſee entred; the Copy-holder having iſſue a ſon and a daughter by one woman, and a ſon by another, dyed, the Eldeſt ſon dyed before Admittance. In this caſe theſe points were Reſolved and adjudged; 1. That the Land ſhould diſcend to the daughter of the whole blood. 2. That where the Cuſtomary Inheritance diſcendeth to the heir before Admittance, that he may enter and take the profits; and that there ſhall be a *poſſeſſio fratris* before admittance upon an actual poſſeſſion, but not to prejudice the Lord of his Fine. 3. That the admittance of Tenant for life, is the Admittance of him in the Remainder, but ſhall not barr the Lord, of the Fine he ought to have by the Cuſtome. 4. That after the admittance, the heir may in pleading alledge it as a grant, and that as well upon a diſcent, as upon a ſurrender. But the heir cannot plead, that his Father was ſeiſed in Fee at the will of the Lord according to the Cuſtome of the Mannor, and dyed ſeiſed, and that the Copy-hold diſcended to him; though he hath an Intereſt in Law diſcendible, becauſe he is Tenant at Will according to the Cuſtome of the Mannor. Mich. 23 & 24 Eliz. in C. B, *Cook* 4. Part. 21. *Brown*'s Caſe.

4. The heir of a Copy-holder may enter, and have an Action of Treſpaſs before Admittance; and ſo, if the heir dye before Admiſſion, his heir may enter and take the profits. See Trin. 20 Eliz. in B. R. *Clark* and *Pennyfathers* Caſe. *Co*. 4. Part. 24. See *Brown*'s Caſe. acc.

5. Note: It was adjudged, That where a Copy-holder ſurrendred his Copy-hold Lands into the hands of Tenants, That before the preſentment be preſented in Court, That the heir of the ſurrenderor might take the profits againſt the ſurrenderee, for that none can have right to a Copy-hold, but by admittance of the Lord: But it was agreed, That if the Lord taketh notice of the ſurrender, and accepts of the Cuſtomary Rent, as Rent due from the Tenant, as being admitted, the ſame ſhall amount to an Admittance; but otherwiſe, if he accept of it as a duty generally. Mich. 14 Jac. in C. B. *Treſwell* and *Welches* Caſe. *Godbold*. 269.

6. *A.* Copy-holder in Fee of divers Lands ſurrendred the ſame into the hands of the Lord, unto the uſe of *W.* her ſon and his heirs in Fee, at the next Court holden for the Mannor, the Entry in the Court-Roll was to this effect; *Ad hanc curiam venerunt W. et Johan. uxor ejus. et ceperunt de Domino Tenementa prædict. cum pertinenciis in quibus, &c. præfat. W. et Johan. uxori ejus Tenend. ejuſd cm W. et Johann. et hæredibus ſuis*: *W.* dyed, *Johan* ſurvived, and ſurrendred the Tenements to the uſe of the Defendants, who entred; upon whom the heirs of *W.* entred: the Defendants re-entred, and the heir of *W.* brought Treſpaſs: And in this Caſe it was Reſolved by the Court, 1. When *A.* ſurrendred the Land to the uſe of *W.* the Lord by the Cuſtome hath but a Cuſtomary power to make admittance according to the form and effect of the ſurrender; and although the Lord granteth the Land over to another by Copy, all is without warrant; for notwithſtanding that the Lord may make Admittance according to the ſurrender, and where a Copy-holder ſurrendreth to the uſe of another for life, and the Lord admitteth him to hold to him and his heirs; yet he who is admitted, hath but an eſtate for life, for he is in after the admittance by force of the ſurrender: and ſo it was adjudged, 27 Eliz. in *Bunting*'s Caſe. Trin. 33 Eliz. in B. R. *Weſtwick* and *Weyers* Caſe. *C*. 4. Part. 28.

7. Upon a Special Verdict, the Caſe was this; J. B. did contract Matrimony with *A. Adingſhall*. Afterwards the ſaid *A. Adingſhall* took to husband *T*: *J. B.* Libelled in the ſpiritual Court againſt *A.* upon the ſaid Contract: and it was decreed, That ſhe ſhould marry *J. B.* and the marriage with *T.* declared to be null and void: *J.* and *A.* intermarry, and had Iſſue the Plaintiff; *J. B.* dyed, *R. B.* a Copy-holder in Fee of Lands holden of the Mannor of *G.* out of Court according to the Cuſtome of the Mannor, did ſurrender them to the Lord, to the uſe of *M.* Wife of *Robert* his younger ſon, and dyed; the ſurrender was preſented, the Lord of the Mannor thereupon gave admittance and ſeiſin to *M.* and *Robert*, and the heirs of *Robert*: *M.* dyed, *Robert* ſurvived, and ſurrendred the Land to the uſe of *E.* his Wife, and dyed: *C. B.* Couzen and heir of *R. B.* viz. ſon and heir of *J.* ſon and heir of *R.* entred upon *E.* upon whom *E.* re-entred. And in this Caſe, It was Reſolved, 1. When *R. B.* did ſurrender into the hands of the Lord to the uſe of the ſaid *M.* and *Robert*, without limiting of any eſtate; that they had but an eſtate for their Lives. 2. When the Lord made an Admittance and delivered ſeiſin to *M.* and *Robert*, and to the heirs of *Robert*, the ſame was an Admittance to them onely for their Lives, the Reverſion over to the ſurrenderor, becauſe the Lord

was but an Inſtrument to paſſe the eſtate; and when he hath made the Admittance, nothing remained in him. 3. Where he to whom the ſurrender was made dyeth before Admittance, yet his heir ſhall be admitted: as it was Reſolved in *Weſtwick*'s Caſe, Mich. 28 Eliz. *Bunting* and *Lepingwell*'s Caſe, *Co.* 4. Part. 29.

8. The Lord of a Mannor may admit a Copyholder out of the Mannor; but the Steward of the Court cannot make a Grant or an Admittance out of the Mannor, becauſe the Court ought to be holden within the Mannor: But by Cuſtome, the Court may be holden out of the Mannor, and then Grants and Admittances there ſhall be good. Mich. 28 Eliz. in B. R. *Clifton* and *Molineux* Caſe. *C.* 4. Part. 27. *Melwiches* Caſe. Trin. 30 Eliz. *Co.* 4. Part. 26. acc.

9. If Diſſeiſor, the Feoffee of a Diſſeiſor, or any other who hath a tortious and defeſible eſtate or Intereſt ſubject to Action or entry of another, holdeth Court, and make any voluntary Grant upon an Eſcheat or forfeiture of a Copy-hold; ſuch voluntary Grant ſhall not bind him who hath Right, when he hath recontinued the Mannor by Action or entry: But if ſuch a Lord who hath ſuch a tortious and defeſible eſtate, makes admittance unto any upon the ſurrender of another; or admits the heir upon a diſcent, ſuch acts are lawful and good; which by a Court of Equity he may be compelled to do; and ſuch acts ſhall bind him who hath right. Paſch. 29 Eliz. *Rous* and *Archers* Caſe. *Co.* 4. Part. 24. in *Penwyſathers* Caſe acc. *C.* 1. Part. *Chadleigh*'s Caſe acc.

10. The Father Copyholder in Fee, made a ſurrender to the uſe of himſelf for life, and afterwards to the uſe of his ſon for life, and after to the uſe of his laſt Will. The Father was admitted, and dyed: The Lord pretending a forfeiture, granted the Copy-hold to a ſtranger. It was Reſolved in this Caſe, That the admittance of the Tenant for life, was the admittance of him in the Remainder: and alſo that the Fee-ſimple being limited to the uſe of his Will, remained in the Copy-holder, and not on the Lord. Paſch. 36 Eliz. B. R. *Fitzh.* and *Huckley*'s Caſe. *Co.* 4. Part. 23. See *Browns* Caſe, before.

11. The Caſe was this; A Copy-holder in Fee of a Mannor of the Dean and Chapter of *Weſtm.* ſurrendred the Copy-hold Lands out of Court by the hands of Tenants, according to the Cuſtome of the Mannor, to the uſe of another and his heirs, upon certain Conditions; at the next Court the ſurrender was preſented, but in the preſentment the Conditions were omitted; He to whom the ſurrender was made being dead, the Lord by his Steward according to the Cuſtome admitted his daughters and heirs who entred; he who made the ſurrender by his Deed, Releaſed to the daughters being in poſſeſſion: In this Caſe (amongſt other points) It was Reſolved, That the Releaſe in the Caſe at Barr had extinguiſhed the Right of the Copy-holder, becauſe that he to whom the Releaſe was made, was admitted to the Tenements, and ſo Copy-holder in poſſeſſion, ſo as the Releaſe of the Cuſtomary right did enure unto them; and thereby the Lord was not at any prejudice, becauſe he had his Fine upon the Admittance; and they to whom the Releaſe was made, were in by Title, *ſcil.* by admittance of the Lord, and ſo the Releaſe did enure by way of extinguiſhment. Paſch. 31 Eliz. B. R. *Kiſt* and *Quinton*'s Caſe. *Co.* 4. Part. 25.

12. Note: It was Reſolved by the Court, That there is no Fine due to the Lord of a Copyholder before Admittance; and if after admittance the Fine be denyed, the ſame is a forfeiture of the Copy-hold eſtate. *C.* 4. Part. 28. *Sands* Caſe, vouched in *Hubbard* and *Hamond*'s Caſe. Mich. 43 Eliz. B. R. *C.* 4. Part. 28.

13. *A.* Copy-holder in Fee deviſed his Copyhold to his Wife for life, the remainder to *William* his ſon in Fee, and made a ſurrender to thoſe uſes, and dyed, the Wife was generally admitted: It was ſaid, That this was no Admittance of him in the Remainder: for it is not like the Caſe of a Diſcent where the Reverſion ſhould have diſcended, becauſe in this Caſe *William* cannot ſurrender before Admittance: But it was ſaid, That one who hath it by diſcent, might ſurrender before Admittance; but when it is by purchaſe, it cannot be ſurrendred. But the contrary was holden by the Court; for the Remainder veſts when the particular eſtate veſts, or elſe it ſhall never veſt; and it is executed, when the particular eſtate is executed: and it is like to the Caſe, 7 R. 2. *Scire facias* 3. where Tenant for life ſueth Execution, it is an execution for him in the Remainder. And ſee *Fitzh. N. B.* 201. where one deviſeth for life the Remainder in taile, and an *Ex gravi Querela* was ſued, the ſame ſhall ſerve as well for him in the Remainder, as for the Tenant for life: and ſee *Plow. Com. Weldon*'s Caſe, An aſſent to the deviſee for life, is an execution of the deviſee to him in the Remainder. Trinit. 30 Eliz. in B. R. *John Kippings* Caſe. *Goldeſbr.* 95.

14. In an *Ejectione Firme* brought, This was one Queſtion which was ſtirred up and moved to the Court; Whether the Cuſtome, That a Copy-holder for life might name to the Lord of the Mannor who ſhould ſucceed him in the Copy-hold, were a good Cuſtome? And, 2. If ſuch a Copy-holder for life might cut down Trees? And for the firſt point it was holden, That a Copy-holder by Cuſtome may name his Succeſſour: and if

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in ſuch Caſe, the Lord ſhall refuſe to admit ſuch perſon, the Homage by Cuſtome may ſet a Reaſonable Fine, and ſo the party ſhall be admitted. And for the ſecond point, It was holden, That if a Copy-holder who hath this Priviledge, doth cut down Trees, It is no forfeiture of his Copy-hold; for that he hath a greater eſtate then a ſole Tenant for life, becauſe he ſhall name his Succeſſour. Hill. 6 Jac. in C. B. rott. 2613. *Rolles* and *Maſon*'s Caſe. *Brown.* 1. Part. 132.

15. In an *Ejectione Firme* the Caſe was this; A man was ſeiſed of a Copyhold Tenement in the right of his Wife in Demeaſne as of Fee, and the Husband ſurrendred the ſame by himſelf, without his Wife, to the uſe of a ſtranger in Fee, who was admitted by the Lord: the husband dyed, then the wife dyed; the heir of the wife without any Admittance entred upon the ſtranger, and made a Leaſe to the Plaintiff; the Defendant in the right of him to whom the ſurrender was made, re-entred; and the Plaintiff brought the Action. It was adjudged, That the Plaintiff ought to recover: and that the ſurrender of the husband was not a diſcontinuance againſt the Wife, to put the heir to his Plaint in the Nature of a *Sur Cui in vita*; and here it ſhall be taken as if the Grant had been made by the husband, which paſſed but his eſtate, which he might lawfully grant, without prejudice to the wife. 2. It was adjudged in this caſe, That the heir notwithſtanſtaning that he was not admitted; yet he might enter and take the profits, and make a Leaſe according to the Cuſtome; or bring Treſpaſs againſt him who diſturbs him: But if the Lord require his Fine, or Service, if he refuſe to do them, it may be a cauſe of forfeiture of his Copy-hold; but untill lawfull ſeizure made by the Lord, he may entermeddle with the poſſeſſion, albeit he be not admitted by the Lord, where it is an eſtate of Inheritance by Cuſtome. Hill. 36 Eliz. in B. R. *Bullock* and *Dibler*'s Caſe. *Poph.* 39.

16. In *Ejectione Firme*, the Caſe was; *A.* Copy-holder in Fee ſurrendred his Lands into the hands of the Lord, by the hands of Tenants, according to the Cuſtome, without ſaying to whoſe uſe the ſurrender ſhould be. At the next Court, *A.* was admitted *Habendum* to him and his wife in tail, the Remainder to the right heirs of *A.* It was Objected, 1. That the ſurrender was void, becauſe no uſe was limited; and therefore by conſtruction of Law ſhould be to the uſe of the Lord. And, 2. That the Admittance was not available to paſſe any eſtate to the Wife, becauſe ſhe was not named in the premiſſes, but onely in the *Habendum.* But it was Reſolved by the whole Court, That the ſubſequent act ſhall explain the ſurrender; for when *abeſt Proviſio partis, adeſt Proviſio Legis.* And when the Copy-holder accepts a new Admittance, the Law intends the ſurrender generally made, to be to ſuch as is ſpecified in the Admittance, and the Lord is onely an Inſtrument to convey the eſtate, and, as it were, put in truſt to make Admittance, as he who ſurrenders will have him to make. 2. It was Reſolved, That the Wife ſhould take by the Admittance, albeit ſhe was not named in the premiſſes, but in the *Habendum*; and they agreed, That in Feoffments and Grants the party that is not named in the premiſſes, ſhall not take by the *Habendum*, according to *Throgmorton* and *Tracies* Caſe, *Plow. Com.* But this caſe of a Copy-hold, is like to the caſe of a Will, or the caſe of Frankmarriage, in which it is ſufficient to paſſe an eſtate, if the party be named in the *Habendum* onely. Trinit. 15 Jac. in B. R. which began Hill. 15. Rott. 194. *Brook* and *Brook*'s Caſe. *Popham* 125.

17. Note; That it was ſaid by *Popham*, in the Argument of *Dillon* and *Fraines* Caſe, *C.* 1. Part. 20. *Chadleigh*'s Caſe, That it was agreed by all the Juſtices, in the Caſe of the Mannor of *Haſelbury Brian*, between the Earl of *Arundell*, and the Earl of *Northumberland*, That Admittance upon ſurrender of a Copy-holder in Fee to the uſe of another; Or of an heir in caſe of Diſcent of a Copy-hold, was good, although being made by a Diſſeiſor of a Mannor, or any other who hath it by wrong, becauſe the ſame is an act of neceſſity, and for the benefit of a ſtranger, *viz.* of him who is to have the Land by the ſurrender, or of the heir. See *Popham.* 71.

18. Note: After long Arguments on both ſides, It was adjudged by the whole Court, That where the Cuſtome of a Copyhold Mannor was to admit for life, and in the Remainder for life at any time when there was but one Copyholder for life in poſſeſſion: That during the minority of the heir within the age of 14 years, the Guardian in Socage in his own name did admit a Copyholder in Remainder for life, That the ſame was a good Admittance according to the Cuſtome: although it was Objected, The Guardian in Socage is but *Servus*, and not *Dominus.* But becauſe it was agreed, That he had a lawfull Intereſt, the Admittance was adjudged good. Trin. 1 Jac. rott. 854. in C. B. *Sapland* and *Ridlers* Caſe. *Godbold.* 143. *Cro.* 2. Part. 98. the ſame Caſe.

19. In an *Ejectione Firme*, It was holden by the Court, That if Copyhold did diſcend to the Younger ſon by Cuſtome, and he entreth, and Leaſeth it to another who takes the profits, and after is Ejected, That he ſhall have an *Ejectione Firme* without any Admittance of his Leſſor, or preſentment, that he is heir. Paſch. 30 Eliz. in B. R. *Rumney* and *Evet* Caſe. *Leon.* 100.

20. *A.* Copyholder in Fee had iſſue 3. ſons, *B. C. D.* and ſurrendred his Lands to the uſe of his Will, and thereby deviſed the ſame to *F.* his wife for life, the remainder to *C.* and the heirs males of his body. *F.* dyed, after Admittance *C.* dyed without iſſue, and the Lord granted the Copy-land to *D.* and his heirs, who ſurrendred it to the uſe of the Defendant for life, and afterwards dyed without iſſue. *B.* eldeſt ſon of *A.* entred; and the Opinion of the Court was, That his entry was Lawfull, and that Admittance for him was not neceſſary: for that, If a Copy-holder ſurrendreth to the uſe of one for life, and dyeth: he in the Reverſion or Remainder may enter without any new Admittance: and ſo Judgment was given for the Plaintiff. Hill. 31 Eliz. in B. R. *Bullein* and *Grannis* Caſe. *Leon.* 174.

21. *A.* Copyholder, with Licenſe of the Lord, Leaſed his Copyhold for years, and afterwards ſurrendred the Reverſion, with the Rent, to the uſe of a Stranger, who was admitted. It was moved, If in this caſe there needed any Attornment either to ſettle the Reverſion, or to create a privity? And the Opinion of the Juſtices was, That the ſurrender and admittance were in the nature of an Inrollment; and ſo amounted to an Attornment, or at the leaſt do ſupply the want of it. Hill. 28 Eliz. in the Common-Pleas. *Leon.* 397.

22. The Caſe was; *A.* Copy-holder deviſed his Copy-hold Lands to *F.* and *R.* his two ſons, and to the heirs of their two bodies begotten; and Wills, That each of them ſhall enter at their ſeverall ages of 21 years, and that his Executors ſhall take the profits of the Lands, untill they come to their ſeverall ages of 21 years. *F.* comes to his full age, enters and ſeals an Ejectment Leaſe. It was agreed by the Court, That the ſons of the Copy-holder cannot have the profits of the Lands to them deviſed, untill they do both of them come to the age of 21 years; but the Executors are to have the ſame in the mean time, to perform the Will: But in this Caſe it was agreed, That if Copy-hold Land doth diſcend to one, he may make a Leaſe before Admittance; and the poſſeſſion of a Termor for years, is the poſſeſſion of him in the Remainder; and he in the Remainder may make a Leaſe before Admittance, and the admittance of his Termor ſhall be good enough to this purpoſe for him in the Remainder; and a Copy-holder may have an Action of Treſpaſs, and may take the profits of the Copy-hold Lands before Admittance, upon a diſcent to him. Mich. 8 Jac. in B. R. *Eyſe* and *Chopley*'s Caſe. *Bolſtr.* 1. Part. 42.

23. Note: It was holden by the Juſtices; and therewith agreeth *Co.* 11. Part. Sir *Henry Nevil*'s Caſe, That there may be a Cuſtomary Manor, and held by Copy; and that ſuch a Cuſtomary Lord may hold Courts, and grant Coppies; and that ſuch Cuſtomary Manor may paſſe by ſurrender and Admittance; and that Fines ſhall be paid upon Admittance, as well upon alienation, as upon diſcent: And the Manor of *Aylſham* in *Norfolk* is holden by Coppy of Court-Roll: The *King* and *Stafferton*'s Caſe of *Quo Warranto.* Mich. 8 Jac. in B. R. *Bolſtr.* 1. Part. 57. & 58.

24. *Didicote* ſeiſed of Cuſtomary Lands, ſurrendred the ſame, to the intent the Lord ſhould grant the ſame *de novo*, to the uſe of himſelf for his life, and after to the uſe of *F.* his wife, during the Non-age of his ſon and heir, and after to the uſe of the ſon and heir in taile. *Didicote* before any Admittance dyed, the Lord granted the Cuſtomary Lands to the wife to have during the Non-age of the heir, the Remainder over accordingly, the ſon being then but of the age of 5 years, ſo as the Wife had a Term in the Lands for 16. years. The Wife took Husband, and dyed. It was the Opinion of the whole Court, That the husband ſhould have the Land during the Non-age of the heir: But the Queſtion was, Whether in that caſe, the Husband ought to be admitted to the Land? But the Opinion of *Weſton*, Juſtice, was, That in that caſe there needed no Admittance, for that preſently by the Marriage he was Tenant to the Lord, and he is in of the ſame eſtate to which the Wife was admitted: and yet he ſaid, That Executors of the Leſſee ought to be admitted; for in ſuch caſe the Lord doth not know his Tenant and therefore the ſame ought to be made certain by Admittance; but here in this caſe the Lord knew his Tenant, and who ſhould be Tenant after the death of the wife. 7 Eliz. in C. B. *Didicote*'s Caſe.

25. Note: It was holden by the whole Court in the Kings-Bench, That if a Copy-holder doth ſurrender his Copy-hold Lands to the uſe of a ſtranger for ever, and the Lord admits the ſurrenderee To have and to hold the Lands to him and his heirs, That if the ſurrender was made to the uſe of his Will, and in his Will it is deviſed, that the Deviſee ſhall have his Lands for ever; that in ſuch caſe the Copy-holder ſhall have a Fee-ſimple in the Copy-hold. But if the ſurrender be to a ſtranger for ever, without having any relation to any deviſe of the Lands by his Will, or that the ſurrender be not to the uſe of his Will; That in that caſe, if the Lord do admit the ſurrenderee To hold the Land to him and his heirs for ever, that ſuch admittance ſhall not be good to give an eſtate in Fee to him. Mich. 29 Eliz. in B. R. *Poſſhals* Caſe.

26. Note: It was holden by the Court in this Caſe, That where the Cuſtome of a Manor was, That after the death of the husband, the Wife ſhould

ſhould have Free-bench *quam diu caſtè viveret*, that if ſhe liveth incontinently, of which the Lord of the Mannor hath not Notice, and afterwards the Lord doth admit her to her Free-bench; that ſuch his admittance ſhall bind the Lord, and he ſhall not take advantage of the Cuſtome, although he had not Notice of it. Hill. 3 Jac. in C. B. *Wheeler's* Caſe.

27. The Lord of a Mannor ſeized a Copy-hold without cauſe, and granted it to another in Fee, the Grantee dyed ſeiſed, and his heir is admitted; the firſt Copy-holder dyed, his heir entred, and ſurrendred to the uſe of a ſtranger. It was Reſolved in this caſe, That a diſcent of a Copy-holder ſhould not take away the entry of another Copyholder who had right; and that the heir entring without admittance, his entire was lawful; and, being his ſurrender, was good. Trin. 2 Jac. B.R. *Joyner* and *Lamberts* Caſe. *Cro.* 2. Part. 26.

28. Two Joynt Copy-holders in Fee, one of them ſurrendred into the hands of two Tenants, to the uſe of his laſt Will, and made his Will of his Lands, and dyed; and the ſurrender was preſented, and the party to whom the deviſe was made, was admitted accordingly. It was Reſolved by the whole Court, That the ſaid ſurrender & admittance ſhould bind the Survivor; for that it ſhall relate to the time of the firſt ſurrender. Mich. 3 Jac. in B.R. *Porter* and *Porter's* Caſe. *Cro.* 2. Part. 100.

29. The Caſe was; A Copy-holder had ſix ſons, the Land was of the nature of Borough Engliſh as well for the Brother, as the ſon; the 6th and youngeſt ſon was admitted, the 5th ſon went beyond Sea; the 6th ſon dyed without Iſſue, the 4th brother was admitted, upon a pretence that the 5th was dead without iſſue, and afterwards ſurrendred into the Stewards hands to the uſe of another in Fee: The Lord informed, That the 5th ſon was alive; and it being ſo preſented, 3. Proclamations were made for his coming to be admitted. The 5th ſon beyond Sea did Releaſe to a Copy-holder; After the Lord ſeized the Copy-holder as forfeit, for not coming of the 5th ſon. There were 3. Queſtions in this Caſe, 1. Whether the Releaſe made by him who had Right to a Copyholder who came in by Admittance of the Lord, was good? 2. Whether the Non-claym ſhould bind him who was beyond Sea? 3. Whether the Lord by Admittance of the 4th ſon as heir, and acceptance of his ſurrender to the uſe of another, and admittance of another, did bind the Lord, or not? The Opinion of the Court for the ſecond point was, That the Non-claym, and not coming to be admitted and take up the Copy-hold did not bind him who was beyond the Sea: And for the other points, there was no Opinion delivered by the Court. But I conceive, That the Releaſe to the Copy-holder is good; and alſo, that the acceptance of the ſurrender, and admittance of the ſtranger to the Copy-holder by the Lord, ſhall bind the Lord: for I find it afterwards to have been ſo adjudged: Paſch. 3 Jac. C.B. rott. 164. *Whitton* and *Williams* Caſe. *Cro.* 2. Part. 101. See *Godbolt's* Reports for this Caſe, acc. See Trin. 7 Jac. rott. 1274. in B. R. *Underhill* and *Kelſey's* Caſe. *Cro.* 2. Part. 226, adjudged according.

30. Upon a Demurrer, It was Reſolved by the Court, That if one plead the ſeiſin of a Copy-holder in Fee, and claims under him, he ought to ſhew, of whoſe Grant; yet if he ſhew the Admittance of the laſt heir, it is ſufficient; for that ſhall be in the nature of a Grant, and may be pleaded by way of Grant. Trin. 3 Jac. in C. B. rott. 341. *Piſter* and *Hemling's* Caſe. *Cro.* 2. Part. 103.

31. A Copy-holder in Fee makes a Leaſe for years by Licenſe rendring Rent to him, his heirs, and aſſigns at Michaelmas and the Annunciation, and he is admitted; and for not payment of the Rent, and at the day, a Re-entry is; He ſurrenders over to the Leſſor of the Plaintiff in Fee, who being alſo admitted, at the day demands the Rent, and for non-payment, enters. The Queſtion was; Whether he who hath the Reverſion of a Copy-hold by way of ſurrender, might take advantage of the Condition within the Equity of 32 H. 8. And it was holden, That he could not, neither by the Common-Law, nor by the Statute of 10 Jac. B. R. *Beal* and *Brafier's* Caſe. *Cro.* 2. Part. 305.

32. The Cuſtome of a Mannor was, That a Copy-holder for life might nominate his Succeſſour to have the Copyhold for life, and that ſuch a perſon ſhould compound with the Lord for his Fine; and if he would not compound, then he ſhould give ſuch Fine as the Homage ſhould aſſeſs, and he ſhould be admitted: and ſaid *in facto*, that his Father, Copyholder, named him his Succeſſour to have for life, and dyed, and that he tendered his Compoſition, which would not be accepted; and thereupon the Homage aſſeſſed 40 s. for the Fine, which he tendered to the Lord, and he would not accept of it, nor admit him: and for not ſo doing, he brought his Action upon the Caſe againſt the Lord. And the Opinion of the Court was, That the Action would not lye: for that he hath no remedy to compell the Lord to admit him, but by Order in Chancery: and he hath not any Intereſt in the Copyhold before admittance. Paſc. 12 Jac. in B. R. *Ford* and *Hoskins* Caſe. *Cro.* 2. Part. 368.

33. There was a Copy-hold Meſſuage called *Symonds*, whereunto divers Copy-hold Lands were

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appertaining: the ſaid Meſſuage called *Symons cum pertinentiis* were ſurrendred to the Lord to the uſe of J. S. who was admitted to it. The Queſtion was, Whether all his right in the other Lands did paſs by the ſurrender, or not? And the Opinion of the Court was, That they did not paſſe, but onely the Meſſuage and the Curtilage, Orchards and Yards. Another Queſtion was; If there be husband and wife Copy-holder in the Right of the wife, and they ſurrender out of Court into the hands of the Steward, and the Wife is examined by him, it not being proved that he was Steward by Patent, nor any Cuſtome to warrant it, and upon ſuch ſurrender the party is admitted; whether the ſame be good, or not? and it was Reſolved, That it was good: and ſo it hath been often adjudged. Paſch. 17 Jac. in B. R. *Smithſon* and *Gages* Caſe.

34. The Cuſtome of a Manior was, to admit for life and in remainder for life, at any time when there was but one Copy-holder in poſſeſſion; and during the minority of the heir within 14 years, the Guardian in Socage in his own name did admit a Copy-holder in Remainder for life. And after long Arguments at the Barr, It was adjudged, That the Admittance was good, and according to the Cuſtome; and that the Guardian was a good *Dominus pro tempore* to that purpoſe: although it was Objected by *Walmeſley*, That the Guardian is but *Servus*, and not *Dominus*. But becauſe it was agreed, he had a lawfull Intereſt, the admittance was good. Trin. 1 Jac. in C. B. rott. 854. *Sapland* and *Ridler's* Caſe. *Godbolt.* 143.

Advowſon. *See Quare Impedit.*

1. *Of* Advowſons *in general; The Original of them, How they firſt began in England; and in whom the Patronage of Advowſons were firſt ſettled.*

1. AFter the Diviſion of the Iſlands of *England* and *Ireland* into Counties, which was in the *Saxons* times; in whoſe time the Chriſtian Faith was firſt planted in thoſe Iſlands; The Kings of theſe Iſlands did begin to erect Cathedral Churches, create Biſhops, and erect Biſhopricks, Abbies, Monaſteries, Priories, and other Religious Houſes and Churches: And after, in imitation of the ſaid Kings, Particular Lords of Grand Seignories and Lordſhips, did upon ſome parcel of their Demeans erect and found particular Churches, endowed them with Lands and with other profits and immunities; Reſerving to the ſaid Founders of Abbyes, Priories, and Church, a Right and power to confer and beſtow the ſame upon ſuch as were fit perſons, To be holden to them, and their Succeſſours for ever. *Coke.* 2. Part. *Inſtitutes.* *Dodd. Treatiſe of Advowſons.*

2. The word (Advowſon) was not applyed to a Church onely: for although it was ſaid by *Perring*, in 7 E. 3. f. *Quare Impedit* 19. That by Grant of the Church the Advowſon paſſed; and *Herle*, That *Long* a man did not know what an Advowſon was: But when a man gave an Advowſon, he ſaid onely, That he gave *Eccleſiam*: Yet I find by old Books, That the word Advowſon, was not applyed onely to a Church, but to Priories, Monaſteries, and other Eccleſiaſticall Foundations: For, *John de Boys* brought a *Quare Impedit* againſt the Biſhop of *London*: And Counted, that he was ſeiſed of the Advowſon of the Priory of *W.* to which the Biſhop had diſturbed him to Preſent. See 24 E. 3. *Quare Impedit.* 17 6 E. 3. *Quare Imp.* 38. 11 E. 3. *Quare Imp.* 157. *ibid.*

3. An Advowſon in general then, is a Right of Preſentation, which the Founder of any Monaſtery, Abby, Priory, Church, or Chappel, reſerved unto himſelf, his heirs, or Succeſſours, upon the Foundation thereof, to confer and beſtow the ſame ſo often as the ſame ſhould happen to become void; and may aptly be applyed to any thing of which a man might have had a *Quare Impedit*, if he were diſturbed in the Donation, or Preſentation to the ſame: And to this purpoſe, ſee theſe authorities of the Old books following; If he were diſturbed of his Preſentation to an Abby, 22 H. 6. 25. 25 E. 3. *Quare Imp.* 16. 10 E. 3. 32. 11 R. 2. *Bre.* 643. 29 E. 3. *Quare Imp.* 190. To a Prebendary, 7 R. 2. *Quare Imp.* 21. 13 R. 2. *Bre.* 643. To a Vicaridge, 5 E. 3. *Quare Imp.* To a Provoſtry, 17 E. 3. *Quare Imp.* 70. To a Deanery, 21 & 29 E. 3. *Quare Imp.* 26. & 18. To a Chappell, 17 E. 3. 12. To a Chauntry, which is a Donative, *Fitzh. Na. Bre.* 38.

2. *The Definition of an Advowſon; What it is by the Civil and Canon-Law; and what by the Common Law of the Realm.*

1. AN Advowſon, or Patronage by the Canon or Civil Law, is a Right of Preſentation, or a Right to preſent to the Biſhop a fit perſon to be admitted and Inſtituted into any Eccleſiaſticall Living, when the ſame ſhall become void. It is called *Advocatio*, ſometimes, *ſcil.* an avowing, and taking into Protection; ſometimes, *Patronatus*: *Jus Patronatus, eſt Jus præſentandi Clericum ad Eccleſiam vacantem, ex gratiæ conceſſum, qui conſentiente Epiſcopo vel Inſtruxit vel dotavit Eccleſiam.* Cowell title *Patronus*.

2. *Advocatus eſt ad quem pertinet jus Advocationis alicujus Eccleſiæ ut ad Eccleſiam nomine proprio non alieno poſſit præſentare*; and they are called *Advocati*, becauſe they do defend the Church; and the Cauſes of the Church, from the word *Patrocinio*; and alſo becauſe they were the firſt Founders and Benefactors of the Church. *Bracton. Lib.* 4. 240. *Cook. Inſtitut.* 17. acc.

3. *Patronus* (according to the Canoniſts and Civilian) *tenetur protegere Eccleſiam ſi minitetur ruinam, et de bono Sacerdot. providere.* Hence cometh that old Verſe, *Patronum faciunt Dos, Ædificatio, Fundus. Dodd. Lib. de Advocatione.*

4. The Right of Patronage by the Common-Law, is a real Right fixed in the Patron or Founder of the Church, wherein he hath as abſolute a property and ownerſhip, as any other man hath to his Lands and Tenements whatſoever. See 8. Aſſ. 29. 13 Aſſ. 22. 11 H. 4. 84. which is further proved by theſe two Caſes following; A man was Patron of the Priory of *Spalding*; And by Deed Indented betwixt *A.* and *B.* Prior, It was Covenanted, That, at every Avoidance of the Priory, they ſhould not have any thing in the Priory at the vacancy thereof, but only to chooſe their Prior, who ſhould be maintained out of the Priory: Saving unto *A.* and his heirs All Preſentations unto Churches which ſhould fall void. In a *Quare Impedit* brought againſt the ſub-Prior and Covent by *A.* of a Preſentation to the Church annexed to the Priory. It was adjudged, That by the Saving, The Advowſon of the Church did remain to *A.* and his heirs. And upon the acknowledgment of the Deed aforeſaid, *A.* had a Writ to the Biſhop, to admit his Clerk to the Church. Paſch. 9 E. 3. *Quare Imp.* 30. *Cook* 2. Part. *Inſtitutes*. acc.

5. The King founded the Chappel of *P.* and endowed it with two Hides of Land: The King was Patron; and although afterwards the Chappel and Lands came to the hands of a Prior; which Priory, after the guift, was founded by the Biſhop; and the King after the foundation of the ſaid Priory, did grant to the Prior and Covent, *quod transferre, et retinere poſsint Eccleſiam*; and did alſo grant the two Hides of Lands, *Canonicis, quos Epiſcopus poſuit*: Yet becauſe the King by his Charter did not grant the Patronage by expreſſo words; It was adjudged, That the King remained Patron; and although the Prior after the Foundation had preſented time out of mind to the Chappel; Yet it was adjudged, The ſame did not take away the King's title of Patronage. 38 Aſſ. 22. the Prior of *Plympton's* Caſe, *Cook.* 2. Part. *Inſtitutes*. acc.

3. *That Advowſon, or the Right of the Patron to preſent, is a Temporal, and not a Spiritual Inheritance; and the reaſons to prove it to be ſo.*

1. AN Advowſon or the Right of the Patron to preſent, may be Appendant unto, and parcel of a Mannor, which is a Temporall Inheritance; and when a Mannor was firſt created, and Lands given to build or erect a Church upon it, the Advowſon of that Church became Appendant to the Mannor, which was a Temporal thing; and by the Grant of the Mannor *cum pertinentiis*, the Advowſon of the Church paſſed: and if a man be ſeiſed of a Mannor, to which an Advowſon is appendant, and the Diſſeiſee doth enter into the Mannor, the ſaid entry ſhall veſt the Advowſon again in the Diſſeiſee, becauſe the Advowſon is parcel of, and appendant to the Mannor. 9 E. 439. 33 H. 6. 33.

2. If the King be ſeiſed of the Mannor of *D.* to which an Advowſon is Appendant, and Lets the Mannor to *J. D.* for years, Excepting the Advowſon; and afterwards the King by his Letters Patents granted *totum illud Manerium de D. cum pertinentiis* to J. D. in Fee (*exceptis, quæ in iiſdem Literis patentibus excipiuntur*) and further grants, *Manerium prædict. ac nomina et ſingula præmiſſa adeo plene et integre, et in tam ampliſs modo et forma prout præmiſſa ad manus noſtras devenerunt*; It was adjudged in that caſe, That by the Grant of the Mannor, without making mention of the Advowſon, that the Advowſon paſſed, becauſe it was parcel of, and appendant to the Mannor. *Cook.* 10 Part.

10. Part. *Whiſler*'s Caſe. See acc. Trin. 8 Jac. in C. B. *Walter* and *Bould*'s Caſe. *Dolſtr.* 1. Part. 32. 33. 34.

3. An Advowſon is a Temporal Inheritance; for that it lyeth in Tenure, and may be holden either of the King, or of a Common perſon; of the King in *Capite*, or of Knights Service. See 12 H. 17. 19. See 21 E. 3. 5. Where a *Quare Impedit* was brought againſt the Abbot of the *Webbaik*; and the Plaintiff here Counted, that the ſaid Abbot held the ſaid Advowſon of him by Homage, Fealty and Eſcuage.

4. A Writ of Annuity was brought by the Prior of *Caſtle-Acre*, againſt the Prior of *Butley*; The Defendant pleaded, That he was ſeiſed of the Church of *Aſpall* in the County of *Suffex, ut de feodo et jure Monaſterii ſui de Butley*; and that he held the Advowſon of the Priory of *Caſtle-Acre* by the Service of Fealty, and 2 s. 8 d. *per annum*: In that caſe it was agreed, That an Advowſon doth lye in Tenure; and that the Lord might diſtrein in the Glebe Lands for the Rents and Services, the Cattle of the Patron, if he found any there upon the Land; but not the Cattel of a ſtranger.

5. A Writ of *Ceſſavit* lyeth of an Advowſon. See for that, 22 E. 3. 3. a. A Writ of *Ceſſavit* was brought againſt *John de Gremeſby*, Parſon of the Church; Where the Tenant demanded the View; and was Ouſted of the View, becauſe it was of his own Ceſſer, and afterwards he prayed in Ayd of the Patron and Ordinary, and the ayd was granted.

6. In a Writ of Right of Advowſon, the Tenant ſhall be ſummoned in the Glebe of his Church. And ſo it is in a *Quare Impedit*, the Summons ſhall be in the Church. 24 E. 3. 46. a.

7. A Writ of Right of Advowſon lyeth for him who hath an eſtate in the Advowſon in Fee-ſimple, or Right of an eſtate to him and his heirs in Fee-ſimple; and the Writ lyeth as well of the moyety, third, or fourth part of the Advowſon, as of the whole Advowſon; and the Writ doth ſuppoſe a Tenure; for that the words of the Writ are; *Quod clamat tenere de te*, 15 H. 8. by All the Juſtices. See alſo *Fitzh. N. Br.* title *Droit de Advowſon.* acc.

8. An Advowſon is a Temporal Inheritance, becauſe a *Precipe Quod Reddat* lyeth of it; as it is adjudged, 20 E. 4. 15. And a Writ of Entry *ſur diſſeiſin* in the Poſt was brought of an Advowſon: whereupon a Common Recovery was ſuffered of an Advowſon: and it was adjudged, the Writ did well lye; and that the Recovery ſuffered, was a good Recovery; 35 Eliz. in C. B. *Crother* and *Dormer*'s Caſe. *Popham* 22. See *Cook.* 5. Part. 40. acc. the ſame Caſe. See *Cook.* 2. part. 74. and *Co.* 1. Part. 56. acc.

9. An Advowſon is a Temporal Inheritance, becauſe it may be forfeited by Attainder of Treaſon or Felony, and alſo be loſt, by uſurpation, and 6. moneths plenarty, by Recuſancy, by Outlawry, by Negligence and Lacheſſe of preſentment by Tranſlation, or Ceſſer, and given away, in Mortmain. See 9 H. 6. 57. *Cook.* 10. Part. 55. in the Chancellor of *Oxford*'s Caſe.

10. It is a Temporal Inheritance; For the Wife ſhall be endowed of it, and ſhe ſhall have the third preſentment; and the husband ſhall be Tenant by the Curteſie of it; and it may be divided betwixt Coparceners either by word or writing, and the eldeſt Siſter ſhall have the firſt preſentment; Or it may be given in exchange for other Temporal Inheritances; and though it be not valuable in it ſelf after the Church is once void, and ſo not accomptable by Guardian in Socage; yet it is valuable to the Incumbent: and by grant of all Lands and Tenements, an Advowſon will paſſe, if not by Livery, yet by Deed it is transferable as other Temporal Inheritances are. See *Hughes* Parſons Law, 39 & 40; and ſee the Authorities there vouched, to prove the points aforeſaid.

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4. *Advowſons, Appendants, or in Groſſe, to what they ſhall be appendant, and to what not: And by what acts they ſhall become diſappendant.*

1. ADvowſons, are either Appendants, or in Groſſe; and Appendancy is ever by preſcription; and Advowſons for the moſt part paſſe with the Mannors and Lands to which they are Appendant, unleſſe they be ſevered from the ſame by Grant, by Deed, or by Partition, or by ſome other legal Act. *Coo. Inſtitutes*, 1. Part.

2. If a man bring a *Quare Impedit* for diſturbing him to preſent to an Advowſon appendant to a Mannor; he needs in his Count ſhew how the Plainff's turn to preſent doth commence; for that being Appendant, it is apparant, that the ſame is by preſcription, 13 Eliz. *Dyer.* 299. in *Eveleigh*'s Caſe.

3. Things which are Appendants, muſt be Appendants to things of a ſuperiour nature, and which may have a perpetual ſubſiſtance and continuance: and therefore Advowſons which are Inheritances incorporeal, cannot be Appendants to Offices, Fairs, Services, and other Inheritances which are Incorporeal: But Advowſons may be Appendants to the Demeaſnes of a Mannor, or unto

unto Honours, Caſtles, or other Lands, or other things Corporeall, which may have a continuall being or ſubſiſtance. *Cook Inſtitutes*, 1. Part. 122. 5 Eliz. *Dyer*. 70. *Plow. Comment*. 169. 170. *Co*. 4. Part, *Terringham's* Caſe, 37.

4. An Advowſon cannot properly, and Originally, in ſtrictneſſe of Law, be ſaid to be appendant to a houſe for habitation: And yet in 7 E. 4. 20. in a *Quare Impedit* brought, for diſturbing the Plaintiff to preſent his Clerk to the Church: The Defendant did plead, That one J. was ſeiſed of a houſe, unto which the ſaid Advowſon was Appendant, in his demeaſne as of Fee, and gave the ſame houſe, with the appurtenances, unto the Anceſtor of the Deſendant in taile. But I conceive the Plea there muſt have this Conſtruction, That the Advowſon was appendant to the Land upon which the houſe was builded; and not to the houſe, *quatenus* a houſe for habitation: But by a ſecondary means, an Advowſon may be ſaid to be appendant to a houſe, and not otherwiſe: For if a man be ſeiſed of a houſe to which an Advowſon is appendant, and afterwards the houſe doth fall down; now the party ſhall have the Advowſon by reaſon of the ſoile; and the Advowſon ſhall be ſaid to be Appendant to the Land upon which the houſe ſtood: and herewith agrees 10 H. 7. 13. *Keble*.

5. If Tenant in taile, or the husband be ſeiſed in the Right of his Wife, of a Mannor to which an Advowſon is appendant, and makes a Feoffment in Fee of the Mannor, or of part thereof, with the Advowſon; The Advowſon at leaſt after preſentment ſhall paſſe as Appendant to the Mannor, or to part of the Mannor, and not to the eſtate of the Land; for that the eſtate of the Land is diſcontinued by the Feoffment. *Cook* 1. Part. 122. in *Chudleigh's* Caſe.

6. A man was ſeiſed of the Advowſon of a Vicaridge, which was appendant to the Rectory of Weſt *Bodwin*, and was attainted of Felony, which was concealed from the Crown in the time of King E. 6. The Queen afterwards granted the Rectory *et omnia tenementa parcel ſpectant. dict. Rectoriæ*, to J. S. In that caſe it was holden by the Juſtices, That a Vicaridge might be appendant to a Rectory; and that by the Grant of the Rectory by the words aforeſaid, the Advowſon of the Vicaridge did paſſe to the Grantee, 18 Eliz. *Dyer*. 350. 351.

7. If an Advowſon be Appendant to a Mannor which diſcendeth to divers Coparceners, and the Coparceners make Partition of the Mannor to which, &c. without ſpeaking of the Advowſon; the Advowſon notwithſtanding the diviſion and ſeverance from the Mannor to which, &c. doth remain appendant, *Cook*. 8. Part. 8. in *Wiat Wilds* Caſe.

8. If a man be ſeiſed of a Mannor, to which an Advowſon is appendant, and by Deed granteth one Acre belonging to the Mannor *una cum advocatione Eccleſiæ*; and further by the ſame Deed giveth and granteth the ſaid Advowſon; the Queſtion in that caſe was, Whether the Advowſon did paſſe as appendant to the Acre; or as an Advowſon in Groſſe? And the better Opinion of the Book is, That by that Grant the Advowſon was ſevered from the Mannor, and was become in Groſſe; for the Deed ſhall be taken moſt beneficiall for the Grantee to have the Advowſon in groſſe then appendant to the Acre. But in that caſe it was agreed, If the whole Mannor had been granted, then the Advowſon had paſſed as appendant, and not in groſſe. 33 H. 8. *Dyer*. 48.

9. If a man grant the Mannor of *D.* to which an Advowſon is appendant, and by the ſame Deed he grants the Advowſon of the Church of *D.* ſo as it is named in groſſe; yet it ſhall paſſe as appendant; by the Opinion of *Finchden*, in 48 E. 3.

10. If a man doth bargain, ſell, give and grant a Mannor, with an Advowſon to one, and afterwards levieth a Fine, or enrolleth the Deed: It was holden by the Lord *Dyer*, that the Advowſon doth paſſe by the bargain and ſale as in Groſſe, before the Inrollment of the Deed. But Quære: For it hath been holden, That the Advowſon cannot paſſe, unleſſe the Deed be Inrolled; and then it ſhall paſſe as appendant, and not in groſſe, by reaſon of the Intent of the parties. 14 Eliz. *Dyer*. 311.

11. Two Coparceners of two Mannors, to one of which an Advowſon is appendant, they make Partition, and the one hath the one Mannor, and the other the other Mannor, and they make compoſition to preſent by Turns; as to one of them, the Mannor is appendant; and as to the other, in groſſe: So if a Mannor be divided betwixt two Coparceners, and every one of them hath a part of the Mannor allotted unto them, without ſaying any thing of the Advowſon, the Advowſon remains in Coparcenary, and in groſſe; and yet in every of their turns it is appendant to that part of the Mannor which they have. See 13 E. 3. *Quare Imp*. 58. 45 E. 3. 35. *Cook*. 1. Part. *Inſtitutes*. 122. a.

12. *A.* was ſeiſed in Fee of a Capital Meſſuage, and 100 Acres of Lands known time out of mind, by the name of the Mannor of *F.* to which the Advowſon was appendant; which by meſne conveyance came to J. S. who without Deed did enfeoffe J. D. of the Mannor, and made Livery and Seiſin upon the Demeaſnes: J. D. by Deed made a Grant of the Advowſons, and afterwards the Tenement attorned to J. D. It was the Opinion of

10. Part. *Whiſler's* Caſe. See acc. Trin. 8 Jac. in C. B. *Walter* and *Boulds* Caſe. *Bolſtr.* 1. Part. 32. 33. 34.

3. An Advowſon is a Temporal Inheritance; for that it lyeth in Tenure, and may be holden either of the King, or of a Common perſon; of the King in *Capite*, or of Knights Service. See 12 H. 17. 19. See 21 E. 3. 5. Where a *Quare Impedit* was brought againſt the Abbot of the *Webbath*; and the Plaintiff here Counted, that the ſaid Abbot held the ſaid Advowſon of him by Homage, Fealty and Eſcuage.

4. A Writ of Annuity was brought by the Prior of *Caſtle-Acre*, againſt the Prior of *Butley*; The Defendant pleaded, That he was ſeiſed of the Church of *Aſpall* in the County of *Suffex*, *ut de feodo et jure Monaſterii ſui de Butley*; and that he held the Advowſon of the Priory of *Caſtle-Acre* by the Service of Fealty, and 2 s. 8 d. *per annum*: In that caſe it was agreed, That an Advowſon doth lye in Tenure; and that the Lord might diſtrein in the Glebe Lands for the Rents and Services, the Cattle of the Patron, if he found any there upon the Land; but not the Cattel of a ſtranger.

5. A Writ of *Ceſſavit* lyeth of an Advowſon. See for that, 22 E. 3. 3. a. A Writ of *Ceſſavit* was brought againſt *John de Gremeſley*, Parſon of the Church; Where the Tenant demanded the View; and was Ouſted of the View, becauſe it was of his own Ceſſer, and afterwards he prayed in Ayd of the Patron and Ordinary, and the ayd was granted.

6. In a Writ of Right of Advowſon, the Tenant ſhall be ſummoned in the Glebe of his Church. And ſo it is in a *Quare Impedit*, the Summons ſhall be in the Church. 24 E. 3. 46. a.

7. A Writ of Right of Advowſon lyeth for him who hath an eſtate in the Advowſon in Fee-ſimple, or Right of an eſtate to him and his heirs in Fee-ſimple; and the Writ lyeth as well of the moyety, third, or fourth part of the Advowſon, as of the whole Advowſon; and the Writ doth ſuppoſe a Tenure; for that the words of the Writ are; *Quod clamat tenere de te*, 15 H. 8. by All the Juſtices. See alſo *Fitzh. N. Br.* title *Droit de Advowſon.* acc.

8. An Advowſon is a Temporal Inheritance, becauſe a *Precipe Quod Reddat* lyeth of it; as it is adjudged, 20 E. 4. 15. And a Writ of Entry *ſur diſſeiſin* in the Poſt was brought of an Advowſon: whereupon a Common Recovery was ſuffered of an Advowſon: and it was adjudged, the Writ did well lye; and that the Recovery ſuffered, was a good Recovery, 35 Eliz. in C. B. *Crocker* and *Dorme's* Caſe. *Popham* 22. See *Cook.* 5. Part. 40. acc. the ſame Caſe. See *Cook.* 2. part. 74. and *Co.* 1. Part. 56. acc.

9. An Advowſon is a Temporal Inheritance, becauſe it may be forfeited by Attainder of Treaſon or Felony, and alſo be loſt, by uſurpation, and 6. moneths plenarty, by Recuſancy, by Outlawry, by Negligence and Lacheſſe of preſentment by Tranſlation, or Ceſſer, and given away, in Mortmain. See 9 H. 6. 57. *Cook.* 10. Part. 55. in the Chancellor of *Oxford's* Caſe.

10. It is a Temporal Inheritance; For the Wife ſhall be endowed of it, and ſhe ſhall have the third preſentment; and the husband ſhall be Tenant by the Curteſie of it; and it may be divided betwixt Coparceners either by word or writing, and the eldeſt Siſter ſhall have the firſt preſentment; Or it may be given in exchange for other Temporal Inheritances; and though it be not valuable in it ſelf after the Church is once void, and ſo not accomptable by Guardian in Socage; yet it is valuable to the Incumbent: and by grant of all Lands and Tenements, an Advowſon will paſſe, if not by Livery, yet by Deed it is transferable as other Temporal Inheritances are. See *Hughes* Parſons Law, 39 & 40; and ſee the Authorities there vouched, to prove the points aforeſaid.

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4. *Advowſons, Appendants, or in Groſſe, to what they ſhall be appendant, and to what not: And by what acts they ſhall become diſappendant.*

1. *Advowſons*, are either Appendants, or in Groſſe; and Appendancy is ever by preſcription; and Advowſons for the moſt part paſſe with the Mannors and Lands to which they are Appendant, unleſſe they be ſevered from the ſame by Grant, by Deed, or by Partition, or by ſome other legal Act. *Coo. Inſtitutes*, 1. Part.

2. If a man bring a *Quare Impedit* for diſturbing him to preſent to an Advowſon appendant to a Mannor; he needs in his Count ſhew how the Plainff's turn to preſent doth commence; for that being Appendant, it is apparant, that the ſame is by preſcription, 13 Eliz. *Dyer.* 299. in *Evileigh's* Caſe.

3. Things which are Appendants, muſt be Appendants to things of a ſuperiour nature, and which may have a perpetual ſubſiſtance and continuance: and therefore Advowſons which are Inheritances incorporeal, cannot be Appendants to Offices, Fairs, Services, and other Inheritances which are Incorporeal: But Advowſons may be Appendants to the Demeaſnes of a Mannor, or unto

unto Honours, Caſtles, or other Lands, or other things Corporeall, which may have a continuall being or ſubſiſtance. *Cook Inſtitutes*, 1. Part. 122. 5 Eliz. *Dyer*. 70. *Plow. Comment*. 169. 170. *Co.* 4. Part, *Terringham's* Caſe, 37.

4. An Advowſon cannot properly, and Originally, in ſtrictneſſe of Law, be ſaid to be appendant to a houſe for habitation: And yet in 7 E. 4. 20. in a *Quare Impedit* brought, for diſturbing the Plaintiff to preſent his Clerk to the Church: The Defendant did plead, That one J. was ſeiſed of a houſe, unto which the ſaid Advowſon was Appendant, in his demeaſne as of Fee, and gave the ſame houſe, with the appurtenances, unto the Anceſtor of the Defendant in taile. But I conceive the Plea there muſt have this Conſtruction, That the Advowſon was appendant to the Land upon which the houſe ſtood, *quatenus* a houſe for habitation: But by a ſecondary means, an Advowſon may be ſaid to be appendant to a houſe, and not otherwiſe: For if a man be ſeiſed of a houſe to which an Advowſon is appendant, and afterwards the houſe doth fall down; now the party ſhall have the Advowſon by reaſon of the ſoile; and the Advowſon ſhall be ſaid to be Appendant to the Land upon which the houſe ſtood: and herewith agrees 10 H. 7. 13. *Keble*.

5. If Tenant in taile, or the husband be ſeiſed in the Right of his Wife, of a Mannor to which an Advowſon is appendant, and makes a Feoffment in Fee of the Mannor, or of part thereof, with the Advowſon; The Advowſon at leaſt after preſentment ſhall paſſe as Appendant to the Mannor, or to part of the Mannor, and not to the eſtate of the Land; for that the eſtate of the Land is diſcontinued by the Feoffment. *Cook* 1. Part. 122. in *Chudleigh's* Caſe.

6. A man was ſeiſed of the Advowſon of a Vicaridge, which was appendant to the Rectory of Weſt *Bodwin*, and was attainted of Felony, which was concealed from the Crown in the time of King E. 6. The Queen afterwards granted the Rectory *et omnia tenementa parcel ſpectant. dict. Rectoriæ*, to J. S. In that caſe it was holden by the Juſtices, That a Vicaridge might be appendant to a Rectory; and that by the Grant of the Rectory by the words aforeſaid, the Advowſon of the Vicaridge did paſſe to the Grantee, 18 Eliz. *Dyer*. 350. 351.

7. If an Advowſon be Appendant to a Mannor which diſcendeth to divers Coparceners, and the Coparceners make Partition of the Mannor to which, &c. without ſpeaking of the Advowſon; the Advowſon notwithſtanding the diviſion and ſeverance from the Mannor to which, &c. doth remain appendant. *Cook*. 8. Part. 8. in *Wiat Wilds* Caſe.

8. If a man be ſeiſed of a Mannor, to which an Advowſon is appendant, and by Deed granteth one Acre belonging to the Mannor *una cum advocatione Eccleſiæ*; and further by the ſame Deed giveth and granteth the ſaid Advowſon; the Queſtion in that caſe was, Whether the Advowſon did paſſe as appendant to the Acre; or as an Advowſon in Groſſe? And the better Opinion of the Book is, That by that Grant the Advowſon was ſevered from the Mannor, and was become in Groſſe; for the Deed ſhall be taken moſt beneficiall for the Grantee to have the Advowſon in groſſe then appendant to the Acre. But in that caſe it was agreed, If the whole Mannor had been granted, then the Advowſon had paſſed as appendant, and not in groſſe. 33 H. 8. *Dyer*. 48.

9. If a man grant the Mannor of *D.* to which an Advowſon is appendant, and by the ſame Deed he grants the Advowſon of the Church of *D.* ſo as it is named in groſſe; yet it ſhall paſſe as appendant; by the Opinion of *Finchden*, in 48 E. 3.

10. If a man doth bargain, ſell, give and grant a Mannor, with an Advowſon to one, and afterwards levieth a Fine, or enrolleth the Deed: It was holden by the Lord *Dyer*, that the Advowſon doth paſſe by the bargain and ſale as in Groſſe, before the Inrollment of the Deed. But Quære: For it hath been holden, That the Advowſon cannot paſſe, unleſſe the Deed be Inrolled; and then it ſhall paſſe as appendant, and not in groſſe, by reaſon of the Intent of the parties. 14 Eliz. *Dyer*. 311.

11. Two Coparceners of two Mannors, to one of which an Advowſon is appendant, they make Partition, and the one hath the one Mannor, and the other the other Mannor, and they make compoſition to preſent by Turns; as to one of them, the Mannor is appendant; and as to the other, in groſſe: So if a Mannor be divided betwixt two Coparceners, and every one of them hath a part of the Mannor allotted unto them, without ſaying any thing of the Advowſon, the Advowſon remains in Coparcenary, and in groſſe; and yet in every of their turns it is appendant to that part of the Mannor which they have. See 13 E. 3. *Quare Imp.* 58. 45 E. 3. 35. *Cook*. 1. Part. *Inſtitutes*. 122. a.

12. *A.* was ſeiſed in Fee of a Capital Meſſuage, and 100 Acres of Lands known time out of mind, by the name of the Mannor of *F.* to which the Advowſon was appendant; which by meſne conveyance came to J. S. who without Deed did enfeoffe J. D. of the Mannor, and made Livery and Seiſin upon the Demeaſnes: J. D. by Deed made a Grant of the Advowſons, and afterwards the Tenement attorned to J. D. It was the Opinion of

all the Juſtices, That the Advowſon was appendant to all the Manner, but moſt properly to the Demeaſnes out of which it was at the beginning derived; and that the Attornment afterwards ſhould have relation to the Livery, the Advowſon ſhould paſſe inclusive in the Livery; and that the Grant of the Advowſon made Meſne between the Livery and Attornment, was void. Mich. 33 Eliz. in C. B. *Long* and *Hemmings* Caſe. *Leon.* 207, 208.

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5. *By what, and whoſe Act an* Advowſon *which is appendant, may become diſappendant, and in Groſſe; and where they ſhall be Appendant again.*

1. A Man was ſeiſed of 4. Mannors, to one of which an Advowſon was appendant, and had Iſſue 4 daughters, and dyed: The daughters made Partition of the Mannors, without making mention of the Advowſon; and the Mannor to which the Advowſon was Appendant, was allotted to the youngeſt daughter for her part. It was Reſolved in that Caſe, upon a long debate, That the Advowſon upon the Partition was ſevered, and did remain in groſſe: and yet in that caſe it was holden, That if all the other Siſters did dye, but ſhe to whom the Advowſon appendant was allotted, that the Advowſon became again appendant to that Mannor: But becauſe in the firſt caſe upon the Partition made, there was an expreſſe Exception made of the Advowſon, it was ſaid, That Advowſon remained in Coparcener in groſſe. 2 H. 7. 5. But Quære of that caſe; For 19 E. 3. *Quare Imp.* 59. there a *Quare Impedit* was brought: and the Plaintiff Counted, That *A.* was ſeiſed of a Mannor to which an Advowſon was appendant, and preſented and dyed, and that after the Mannor diſcended to his two daughters, who made partition of the Mannor, and that he had the eſtate of the eldeſt daughter, and that the Church was void by the death of *A.* ſo as he having the eſtate of the Eldeſt daughter, ought to preſent, but made no mention of any agreement to preſent by Turns: and there *Skipwith* took exception to the Count, becauſe the Plaintiff did ſuppoſe, that the Advowſon was appendant to the Mannor: and the Exception was diſallowed by the Court, becauſe the Advowſon did remain appendant as it did before. And note, The reaſon of the difference betwixt thoſe caſes might be, becauſe in this later caſe there was no particular exception made, as there was in the firſt caſe. See *Cook.* 9. Part. in the Caſe of the Abbot of *Strata Marcella.* acc.

2. If the King maketh a Leaſe for life of a Mannor, to which an Advowſon is appendant, without ſpeaking of the Advowſon; the Advowſon doth remain in the King as in groſſe; as was granted by the Juſtices; and it was ſaid by them, That in ſuch caſe by grant of the Reverſion, *Habendum* the Reverſion with the Advowſon, the Advowſon ſhall not paſſe to the Patentee, for that the Advowſon was ſevered, and became in groſſe as to the Fee. *Cook* 11. Part. 47. in *Liford's* Caſe.

3. It was found before Commiſſioners, That *A.* was ſeiſed of a Mannor to which an Advowſon was appendant, and was a Recuſant convict; whereupon two parts of the Mannor were ſeiſed into the Kings hands, who Leaſed the Mannor, with Appurtenances, and all profits and Commodities, and hereditaments to the ſame belonging, to J. S. for 21 years, if *A.* &c. and afterwards the Church became void: It was holden in that Caſe, That although there was no mention in the ſeizure of the Advowſon; yet the preſentment did belong to the King, and that the King alone ſhould preſent. And, 2. That there were no words in the Kings Grant to J. S. to carry away the Advowſon from the King, and that notwithſtanding that Grant, the Advowſon remained ſtill Appendant to the Mannor, Mich. 14 Jac. in C. B. rott. 651. The Chancellor of *Cambridge* and *Walgroves* Caſe. *Hob.* 127.

4. In a *Quare Impedit*, the Caſe was this; *A.* was ſeiſed of the Prebend of *N.* in the Collegiate Church of St. *Mary of S.* to which the Advowſon of the Vicaridge of *S.* was appendant, and did belong: *A.* made a Leaſe of ſeveral parts of the Prebend; in the Concluſion of which Leaſe, were theſe words, *viz. cum omnibus Commoditatibus, emolumentis, proficuis, et advantagiis cum pertinentiis eidem Prebend. ſpectant. ſeu aliquo modo pertinent*: And the Queſtion in this Caſe was, Whether the Advowſon of the Vicaridge did paſſe, by this Leaſe. And it was adjudged, That the Advowſon of the Vicaridge did not paſſe; for all the words do imply things gainfull; which is contrary to the nature of an Advowſon; and the words in Grants ſhall not be conſtrued to a ſtrained and unuſual and unreaſonable ſenſe; as an Appropriation will not paſſe by the name of an Advowſon: And ſo where the King grants, that Monks ſhall have all their poſſeſſions of the Abby in the time of vacation for their ſuſtentation: yet it was Ruled, 39 H. 6. that they ſhould not have the Advowſon, becauſe no ſuſtentation did ariſe from them. Note and obſerve in the principal Caſe, two points Reſolved, 1. That the Advowſon of a Vicaridge may be appendant to a Prebend, 2. That it

If an Advowſon be once appendant, it will not paſs without ſpeciall words of grant of it, Mich. 16 Jac. in C. B. rott. 1877. *John London*; and the Collegiate Church of St. *Mary Southwell*'s Caſe. *Hob.* 303. 304.

5. The King ſeiſed of a Mannor to which an Advowſon was appendant, granted the Mannor to J. S. for life, and then granted the Mannor to J. D. after the death of J. S. *Habendum cum advocatione*; and then by Parliament the King reciting both the Grants, confirmed them by Parliament: Yet it was adjudged in that caſe, That the Advowſon did not paſſe. 33 H. 6. 33. vouched in *Colt* and the Biſhop of *Coventry* and *Lichfield*'s Caſe. Mich. 10 Jac. in C. B. Rott. 2642. *Hob.* 160.

6. If an Advowſon be appurtenant to a Mannor, by the Grant of the Mannor *cum pertinenciis*, the Advowſon paſſeth: but by the Grant of an Acre of Land parcel of the Mannor *cum pertinenciis*, the Advowſon doth not paſſe: and if Tenant in taile be of a Mannor to which an Advowſon is appendant, the Church being full, and he grants *proximam advocationem*, and then dyes; by his death, the Grant is meerly void. Trin. 8 Jac. in B. R. *Walter* and *Boulds* Caſe. *Bolſtrod.* 1. Part. 35.

7. As Advowſons by Conveyance and Exception, may be made to be diſappendant and in groſs, ſo they may be ſevered and divided by tortious acts; as by Diſcontinuance of the Mannor or Lands, to which they were appendants, by diſſeiſins and by uſurpations; in which caſes, although the Church doth become void, yet the Rightfull Patron ſhall not preſent to the Avoidance, untill he hath recontinued the Mannor or Lands; and in ſome other caſes, the Patron ſhall preſent without any entry made, or Recontinuance of the Mannors or Lands to which they were appendants. 24 H. 8. *Dyer* 9. *Cook* 1. Part. *Inſtitutes.* 122. *Cook.* 3. Part. The Marqueſs of *Winton*'s Caſe.

8. If a man be ſeiſed of a Mannor to which an Advowſon is appendant, If he be diſſeiſed of the Mannor, and then the Church doth become void, if he enter into the Mannor, he may preſent unto the Avoidance; becauſe by the entry, the poſſeſſion of the diſſeiſor is defeated; and every eſtate which he made of the Advowſon, which was appendant to the Mannor, is defeated: and ſo if a man be diſſeiſed of a Mannor to which an Advowſon is appendant, after the Church becomes void, he may preſent to the Avoydance before his entry into the Mannor; for the Advowſon is ſeverable from the Mannor, 21 H. 6. 19. 31 H. 6. 33. But if the diſſeiſor dye ſeiſed of the Mannor, and then the Church doth become void, the Diſſeiſee ſhall not preſent to the Avoidance before he hath entred into the Mannor; for that it is a Rule in Law, That a man ſhall never be admitted to the acceſſary or Appendant, where he hath no Right to the Principal, and his right in that caſe is bound by the diſcent: ſo, The Iſſue in taile ſhall not be remitted to an Inheritance regardant or Appendant upon a diſcent had before he hath recovered the Mannor or thing to which it was Appendant, or Regardant. *Cook* 8. Part. *Inſtitut.* 3. 49.

9. If a Number ſeiſed of an Advowſon Appendant, and is diſſeiſed of the Mannor to which the Advowſon is appendant, and the diſſeiſor preſents, and afterwards the Diſſeiſee doth enter upon the Diſſeiſor, and then the Church doth become void again, and the Diſſeiſor doth diſturb him to preſent, he may have a *Quare Impedit* againſt him: But otherwiſe it is, of an Advowſon in Groſſe; for if he were diſturbed of his Advowſon in Groſſe, he hath no remedy but a Writ of Right: and the Diſſeiſee of a Mannor to which the Advowſon is appendant, cannot preſent after a diſcent, untill he hath recontinued the Mannor to which the Advowſon is appendant; but before a diſcent, his entry is wageable. See 24 H. 8. *Dyer* 4. *Cook* 3. Part. Marqueſs of *Winton*'s Caſe, &c.

10. If the Patron of an Advowſon be outlawed, and the Church doth become void, and a ſtranger doth uſurp, and preſents his Clerk to the Avoidance, and 6. moneths do paſſe, and afterwards the King being inſtituted to the Avoidance by reaſon of the Outlawry, brings a *Quare Impedit* againſt the Incumbent who is in by wrong, and removes him: By this means, the Advowſon is recontinued again to the rightful Patron, of which he was ouſted by the uſurpation; and if he doth reverſe the Outlawry, and the Church do become void again, he ſhall preſent. *Cook* 1. Part. *Inſtitutes*, 363.

11. If a man have three Avoidances granted to him of one Church at one time, and by one Deed, and the Church doth become void; and the Grantor uſurps upon the Grantee, and preſents his Clerk to the Biſhop, who is admitted, Inſtituted, and Inducted; and afterwards the Church doth become void again, the Grantee ſhall preſent to the ſecond Avoidance, becauſe the firſt preſentation made by the Grantor, did not put the Grantee out of poſſeſſion of all the Avoidances. Mich. 18 Eliz. in C. B. adjudged accordingly.

6. Of Preſentation and Collation unto the Avoidance of a Church, or an Advowſon; and the difference betwixt them: and of Nomination, and who ſhall be accounted the Patron of the Church, or Benefice.

1. PReſentation is the Nomination of a Fit and able perſon to the Biſhop or Ordinary of the Dioceſs where the Church is void, to be admitted and Inſtituted by him unto the Benefice which is void. Collation is, when the perſon is admitted to the Church or Benefice by the Biſhop or other perſon Eccleſiaſtical, who is Patron of the Benefice; Or when the Biſhop or Ordinary hath right to preſent for Lapſe of the Patron.

2. Preſentation and Nomination, and Collation are commonly taken for one thing in ſubſtance, though ſometimes they be diſtinguiſhed, 14 H. 7. 22. by *Kingsmill*.

3. In a *Quare Impedit* brought by the Chapter againſt the Dean of *Lincoln*, They Counted, that they were ſeiſed of an Advowſon, and made a Collation and Induction of their Clerk. Exception was taken to the Count, becauſe it was ſaid, of their Collation; and the Writ of *Quare Impedit* was of a Preſentation; and therefore Judgment was prayed of their Count: But the Exception was diſallowed by the Court; for that Collation and Preſentation were in ſubſtance one and the ſame thing. 17 E. 3. 64.

4. It hath been a Queſtion, If one hath the Nomination, and another the Preſentation, Which of them ſhall be ſaid to be the very Patron? But it hath always been taken to be the better Opinion, That he who hath the Nomination, is Patron of the Church; and may maintain a *Quare Impedit* in his own Name; *Quare Impedit præſentare ad Eccleſiam*. But Quære, if the Writ be *Quod permittat ipſum Nominare ad Eccleſiam*, if the Writ ſhall not abate; for ſo it was holden in 14 H. 4. 31.

5. If an Abbot hath the Preſentation, and another the Nomination, and the Abby is ſurrendred to the King; he that hath the Nomination, ſhall now have all; for the King ſhall not preſent for him, it being a thing undecent for the King, 1 Car. in B. R. *Dickenſon* and *Greenhowes* Caſe. *Popham*. 158.

6. If I have Right to have the Nomination of a Clerk to a Benefice, and another diſturbs me, I cannot have *Quare Impedit ipſum Nominare ad Eccleſiam*, but the Writ ſhall be *Quod permittat ipſum præſentare*: and the Count ſhall be, That I of Right ought to name a Clerk to ſuch a one who ought to preſent him to the Biſhop, and that a ſtranger doth diſturb me of my Nomination; and in caſe I do recover, the Judgment ſhall be *Quod Epiſcopus admittat Clericum ad Nominationem meam*. 21 H. 6. 17. by *Fulthorp*.

7. In a *Quare Impedit*, the Opinion of the Juſtices was, That if a man grant to me, that I ſhall name a Clerk to him to the Church when it is void; and that he ſhall preſent my Clerk to the Biſhop; In that caſe the preſentment is in me, and I ſhall have a *Quare Impedit*; for all the profit is in me: and the grant of the Nomination and Preſentation, is all one. But if I grant to one, that he ſhall nominate to me two Clerks, and I ſhall preſent one of them; In that caſe, The Preſentation is not given to the Grantee, becauſe it is in my Election which of them ſhall have the Benefice. 14 E. 4. 2. *Smith* and *Clayton*'s Caſe.

8. If one man hath the Nomination to an Advowſon, and another the Preſentation; if he nominates his Clerk, and the other that ſhould preſent, preſents another Clerk, he that hath the Nomination, ſhall have a *Quare Impedit*, and the Writ ſhall be *Quod permittat ipſum præſentare*, albeit he had but the Nomination: for otherwiſe he ſhould be without remedy. Upon the ſame reaſon it is, upon a diſturbance to one to preſent to a Priory or Chauntry Donative to the King, or other, a *Quare Impedit* lyeth; and the Writ ſhall be *quod permittat preſentare*, becauſe there is no other Writ whereby the party may have right done him; and therefore the Law, although the words be improper in it, doth admit ſuch Writ. *Fitzh. N. B.* 33. b.

9. A Preſentation is but a Commendation of a fit man by the Patron to the Biſhop or Ordinary to be admitted and Inſtituted into the Benefice; and that may be done either by word or by Letter, or by writing; and ſo likewiſe may be by the King, under any of his Seals, and the Preſentment ſhall be good, in ſome caſes; and in ſome not.

10. Mich. 31 Eliz. in a *Quare Impedit*, the Plaintiff declared upon a grant of the next Avoidance; and upon Oyer of the Deed, the Plaintiff ſhewed a Letter which was written to his Father, to the true Patron; by which he had written to his Father, That he had given to his Son that of the Plaintiff the next Avoidance: And the Opinion of the whole Court was, That ſuch a Letter was a mockery; for that the Grant was not good without Deed. Mich. 31 & 32 Eliz. in C. B. *Cripp* and the Biſhop of *Canterburies* Caſe. *Owen*, 47.

11. The

11. The Caſe was; *A.* & *B.* his Wife preſented to a Church to which they had no Right; the husband dyed: the Queſtion was, Whether the Preſentation did gain any thing to the Wife? It was adjudged, It did not; for the Preſentation was but a Commendation, and the Act of the husband onely, and it was not like an Entry into Land by them. Paſch. 15 Car. in B. R. *Neiſon* and *Hampton*'s Caſe.

12. In 11 Jac. In the Court of Common-Pleas, it came in Queſtion, Whether that a Preſentation made by the King, unto an Advowſon appendant to a Manner parcell of his Dutchy, under the great Seal of *England*, were good or not? and whether the ſame ought not to have been under the Seal of the Dutchy? And it was Reſolved by the whole Court, That the Preſentation was well made: For that the Preſentation was but the Kings Commendation of his Clerk to the Ordinary, and was not an intereſt of the Inheritance of the Advowſon, but onely it was a thing concerning the Advowſon, and but as a flower fallen from the Stock which did not now participate of the Root; and alſo for that the King might have preſented by word onely; and then the Caſe betwixt the King and the Biſhop of *Chicheſter*. Mich. 8 Jac. in C.B. was affirmed for Law; That where the King had an Advowſon in the Right of his Ward, and preſented unto the Avoidance under the Great Seal, that the ſame was well made, although it was not under the Seal of the Court of Wards; for that the King might preſent by word onely, and his Preſentation was but his Commendation of his Clerk to the Biſhop: and there *Stephen Gardiner*'s Caſe was vouched by *Cook*, Chief Juſtice, where the Preſentation of *Stephen Gardiner* to the Deanery of *Norwich* was good; although that the King in his Preſentation did miſtake and miſ-recite the name of the Foundation of the Deanery, for that his Preſentation was but his Commendation of the Dean, and touched not the Inheritance of the Deanery. Mich. 11 Jac. in C.B. The *King* and the Biſhop of *Lincoln*'s Caſe. See Mich. 3 Car. in B.R. *Stephens* and *Potter*'s Caſe. *Cro.* 1. Part. 70. 71. acc. See Trin. 8 Jac. in C.B. rott. 1811. *Cro.* 2. Part. 247. the ſame Caſe.

13. *A.* ſeiſed of an Advowſon in Fee, grants *Preſentationem* to one *Quandocunq; et quotieſcunq; Eccleſia vacare contigerit pro unica vice tantum*; and in the Grant there was further this clauſe, *Inſuper voluit et conceſſit*, That the Grant ſhould remain in force *quouſq; Clericum habilem et idoneum*, by his Preſentment ſhall be Admitted, Inſtituted, and Inducted; afterwards he granted away the Advowſon in Fee, the Church became void, the Patron preſents; the Church becomes void again, the Patron preſents J. S. and upon a diſturbance by *C.* the Preſentee of the firſt Grantee a *Quare Impedit* is brought; and the Queſtion was, whether the Grantee not preſenting upon the firſt Avoidance, had loſt his benefit of his Grant. It was adjudged by the whole Court in this caſe, That although the Grantor grants *Donationem to Preſentationem, quandocunq; Eccleſia vacare contigerit, pro unica vice tantum*; yet he ought to take the firſt preſentment that happeneth; and he hath no Election to take any other turn but the firſt, when the Church ſhall firſt become void; and by his neglect in not preſenting then, he hath loſt the benefit of his Grant; and the ſubſequent words in the Grant, are but onely an Explanation of the words precedent, and relate to the next Avoydance. Trin. 8 Jac. in B.R *Stark* and *Poles* Caſe. *Bolſtr.* 1. Part. 26. 27.

14. *A.* ſeiſed of a Mannor with an Advowſon appendant, preſented *B.* who was Admitted, Inſtituted, and Inducted; afterwards *A.* ſold the Mannor to which the Advowſon was appendant, to J. S. the Church became void by the death of *B.* The Queen, the Church being void, 15. Feb. 1588. preſented J. D. by theſe words, *Per mortem naturalem Incumbentis ibid. vacant.* who upon the ſaid Preſentation 20. of the ſaid moneth of Feb. was Admitted, Inſtituted, and Inducted by Letters of Inſtitution *Per Dominam Reginam veram et indubitatam Patronam*: J. D. dyed, the King preſented *Rone* in theſe words, *ad noſtram preſentationem ſive ex pleno Jure, ſive per Lapſum temporis ſive alio quocunq; modo ſpectant*; The onely Queſtion was, Whether, notwithſtanding all this matter, the Advowſon did remain appendant, or not? And it was adjudged by the Court, That the Advowſon remained Appendant, notwithſtanding the Queens preſentation of J. D. for it appeared, there was no colour of Title to the Queen to preſent; No Lapps, for the Preſentation and Inſtitution, &c. were all in the ſame moneth wherein the Avoidance was: and it was no uſurpation by the Queen, becauſe the preſentation ſuppoſed a right where none was, and ſo was void; for the Queen meant to do no wrong; and ſo the preſentation of *Rone* upon the ſame reaſon was void. And it was holden by the Court, That the preſentation of J. D. being void, It was but a Collation of the Biſhop, which makes no diſappendancy, nor ſo much as a Plenarty againſt the true Patron, but that he may bring his *Quare Impedit* when he will; and if the Biſhop receive his Clerk, the other is out *ipſo facto*. Hill. 17 Jac. in C. B. rott. 1840. *Gawdy* and the Biſhop of *Canterburies* and *Rones* Caſe. *Hob.* 301.

7. *Within what time Preſentation muſt be to avoid Lapſe; and where Lapſe ſhall encurre for want of Preſentation,* et è contra. *Of Examination of the Clerk, and what ſhall be a ſufficient Cauſe of his refuſal to admit and Inſtitute the Clerk preſented, and what not; and how the Lapſe ſhall be accounted: And where the Ordinary and where the King ſhall preſent for Lapſe.*

1. THE Law hath given 6. moneths to the Patron after the Church is void, to preſent his Clerk to the Biſhop or Ordinary; but if he doth not preſent his Clerk within 6. moneths; then the Lapſe ſhall run to the Biſhop or Ordinary, and he ſhall Collate to the Church: and if the Biſhop or Ordinary ſhall ſurceaſe his time, and ſhall not Collate within his ſix moneths; then the Lapſe ſhall devolve to the Metropolitan; and if he doth ſurceaſe his time, and doth not preſent to the Avoidance, then the King as Supream Ordinary of all Benefices, ſhall preſent. *Doctor and Student.* 125. *Cook* 4. Part. 17. *Cook* 5. Part. 58. *Specott's* Caſe. acc.

2. Every Preſentation of the Clerk upon the Avoidance of the Church muſt be made to the Biſhop of the Dioceſs, who is the Superviſor; and for the moſt part Viſitor of all the Churches within his Dioceſs: He is called Ordinary, becauſe he hath Ordinary Juriſdiction in all Cauſes Eccleſiaſtical immediate to the King; for, for the doing of Juſtice within his Dioceſs *in jure proprio, et non per deputationem*, it is his care to ſee that the Church be provided of an able Curate, *Habet enim curam Curarum*, viz. to ſee that Divine Service be ſerved, and to compell Curates to do it by Eccleſiaſtical Cenſures; and therefore all Preſentations are made to the Biſhop or Ordinary. But in the time of the vacancy of the Epiſcopal See, Or if the Biſhop be *in remotis agendis* about the affairs of the King or State, then the preſentation muſt be to the Guardian of the Spiritualties, which commonly is the Dean and Chapter; or unto the Vicar General, who ſupplyeth the place and Room of the Biſhop. See *Cook* 1. Part. *Inſtitutes.* acc.

3. If a man doth recover, and have Judgment given for him in a *Quare Impedit*, and afterwards the Biſhop who is Ordinary, dyeth, he for the Clerk be admitted to the Benefice, the Writ to admit the Clerk, muſt be directed to the Guardian of the Spiritualties *ſede vacante*, to give Admiſſion to him; But if before his Admiſſion, another man be created Biſhop of that See, and conſecrated Biſhop, the power of the Guardian of the Spiritualties doth then ceaſe, and the party may have a new Writ to the New Biſhop to admit his Clerk. 18 Eliz. *Dyer.* 350.

4. When the Clerk is preſented by the Patron of the Advowſon, before he be admitted Clerk to ſerve the Cure; the Ordinary is to examine him of his ability: For if upon his Examination he be found unable to ſerve the Cure, or be criminous, the Ordinary may refuſe to admit and Inſtitute him into the Benefice. *Cook.* 5. Part. 58. *Specotts* Caſe.

5. Examination of the Clerk is to be done at a convenient time within the 6. moneths; for the Ordinary cannot refuſe to examine the Clerk during all the 6. moneths, and to ſuffer Lapſe to incurr to himſelf; for if he ſo doth, the Patron ſhould loſe his Preſentment, and the Ordinary ſhould take advantage of his own wrong. But if the Ordinary, when the Clerk comes to be examined, *ſedet circa Curam Paſtoralem*, he is not bound to leave the buſineſs in hand, and preſently examine the Clerk; but he may appoint a convenient time and place for the examining of him. Mich. 15 Jac. in C.B. adjudged. See acc. 5 H. 7. 7. *Cook.* 5. Part. *Specott's* Caſe.

6. If the Biſhop doth demand of the Clerk his Letters of Orders, and Letters of Teſtimonial of his good behaviour, and he requires time to ſhew them, the ſpace of a week, becauſe he hath not them there with him; but doth not return with them; and the Biſhop doth thereupon refuſe him to the Church, and preſents another: the Biſhop in ſuch caſe was adjudged to be a diſturber; for that the Statute of 13 Eliz. doth not compell the Clerk to ſhew his Orders nor Letters of Teſtimonial of his good behaviour: as it was adjudged, Paſch. 33 Eliz. in C. B. *Palmes* and the Biſhop of *Pete borough's* Caſe. *Leon.* 230.

7. The Juriſdiction of the Ordinary or Biſhop as to the Excommunication of the Clerk is not Local, or tyed to be within his own Dioceſs, or unto the Admiſſion, or Inſtitution of him; but it followeth the perſon of the Biſhop whereſoever he is: and therefore if a Clerk be preſented to the Biſhop of *Norwich*, to a Church which is void within his Dioceſs of *Norwich*, who is in *London*; Or if it be to a Biſhop of *Ireland*, who is in *England*, and in *London*, the Biſhop may examine the Clerk, or give him Admiſſion or Inſtitution in *London*: and ſo it was adjudged, 27 Eliz. in the Common-Pleas, in *Carter* and *Croſts* Caſe. *Leon.* 33. and Paſch. 21 Jac.

21 Jac. in C. B. in *Knollys* and *Dobbins* Caſe. *Leon.* 342.

8. If two men preſent one man ſeverally to the Biſhop to be admitted and Inſtituted to the Church; The Biſhop cannot admit him generally, but the Biſhop in his admittance of the Incumbent, muſt admit him Incumbent of the Preſentation of one of them: and if they make ſuch ſeveral Preſentations, claiming by ſeveral Titles, the Biſhop is to direct his Writ *de Jure Patronatus*; for that in that caſe the Church is become Litigious, but the Biſhop is not to award the Writ of *Jure Patronatus*, but at the requeſt and prayer of the parties. And Quære, at whoſe charge the *Jure Patronatus* muſt be ſued forth; whether at the charge of the Biſhop, or of the Parties: for that the Old Books do differ in it. Mich. 8 Jac. in C.B. *Danby* and *Linleys* Caſe. See 7 E. 4. *Quare Imp.* 100. 34 H. 6. 41. 21 H. 6. 43. 22 H. 6. 28. *Doctor and Student.* 17. & 117.

9. Every Rectory doth conſiſt upon Spiritualty and Temporalty: as to the Spiritualty, *Scil. Cura animarum*; the Preſentee is compleat Parſon by Inſtitution; for when the Biſhop upon examination finds him able, then he doth inſtitute him in theſe words, viz. *Inſtitutione ad tale beneficium et habere Curam animarum*, of ſuch a Pariſh, the *accipe Curam tuam et meam.* 41 Eliz. in B. R. *Co.* 4. Part. 79. *Digbie's* Caſe.

10. If a Clerk be preſented, admitted, and Inſtituted to a Benefice, with Cure of the value of 8 l. and afterwards and before Induction, he accepteth of another Benefice with Cure, and is inducted in the ſame; the firſt Benefice is void by the Statute of 21 H. 8. for the words of the Act are; I, Parſon, having one Benefice with Cure, &c. accept and take another, &c. And he who is Inſtituted to a Benefice, is ſaid to have accepted a Benefice, and to have a Benefice. *Co.* 4. Part. 97. *Digby's* Caſe.

11. In a *Quare Impedit* the Caſe was this; *A.* Vicar of the Church of *J.* being a Benefice with Cure above the value of 8 l. 15 Jac. took a ſecond Benefice with Cure, and was Admitted, Inſtituted, and Inducted, whereby the firſt Benefice became void, and continued void for two years; and ſo derived a Title to the King to preſent. The Defendant pleaded the General Pardon of 21 Jac. and that *A.* was not a perſon excepted, nor the cauſe of Lapps excepted: and that *A.* being ſo Incumbent, reſigned the ſaid Benefice of J. to J. D. who preſented the Defendant, who was Admitted, Inſtituted and Inducted before the *Quare Impedit* brought before the King, on the part of the King. The Exception in the Pardon was ſhewed, wherein all Titles and Actions of *Quare Impedit*, other then ſuch Actions and *Quare Imp.* which the King hath or may have *ratione lapſus*, incurred *ultra* 3. years laſt paſt for or concerning any Benefice whereof any Incumbent was, or the laſt day of the Parliament, ſhould be in actuall poſſeſſion by the Preſentation of any Patron, or Collation of any Ordinary, and traverſed, that the Vicarage of *J.* became void by the Reſignation of *A.* upon which the Defendant demurred in Law. The Queſtions in this caſe were, 1. The Church continuing void by Lapps for divers years, Whether the ſucceeding King might take advantage of the ſaid Lapps? or whether he was barred by the Statute of 25 E. 3. cap. 1. and it was ſtrongly urged, That the King had not this in his proper right, or as his proper Advowſon, but in the right of him who had the Inheritance; and that the Statute of 25 E. 3. extended to all the Succeſſors and heirs of King *Edw.* 3. and that none of them might preſent to a Church in anothers Right. But it was holden by the Court, That the Title of the King was not bound by that Statute. And that he might preſent to a Church fallen in the time of his Predeceſſor. The ſecond Queſtion was, Whether *A.* were Incumbent, and might reſign; and that reſted upon the Statute of 21 Jac. of the General Pardon, and upon the Statute of 21 H. 8. of Pluralities. It was urged ſtrongly, That the Church was not abſolutely void by the Statute of 21 H. 8. but voidable onely *quoad* the Patron; and that till he preſented, the other remained Incumbent; and then he continuing ſo for three years, and being in poſſeſſion, the General Pardon of 21 Jac. eſtabliſhed him in his poſſeſſion; and that afterwards he could not be ouſted by the King or any other. But it was holden and Reſolved by the greater part of the Juſtices in the Exchequer Chamber, That the Church was abſolutely void *in facto et jure*, by the taking of the ſecond Benefice; and the Patron at his perill ought to take notice thereof, and preſent within 6. moneths, otherwiſe Lapps ſhould incurr; and that appears by the pleading, which is, That by the Admiſſion, Inſtitution, and Induction to the ſecond Benefice, *Prima Eccleſia vacavit de perſona* of the Incumbent, *et vacans Continuavit*; and it was holden by them, That the general words in a Pardon, ſhall not enure to make a diſpenſation, and the Church being once void, ſhall not be full, without a new preſentation, admiſſion, and Inſtitution: alſo the Exception in the Pardon did not extend to *A.* for it extended onely to thoſe who were Incumbents; which *A.* was *de jure*, and not to ſuch Incumbents as are in by uſurpation, or wrong, or are removeable by a *Quare Impedit*; and in the principal Caſe, Judgment was given for the Plaintiff. Mich. 9 Car. in C.B. rott. 441. The *King* and the Biſhop of *Canterbury* and *Pyſſis* Caſe. *Cro.* 1. Part. 258.

12. If

12. If a Prebendary, Parſon, or Vicar, after he is admitted and Inſtituted, and before he be Inducted, grant an Annuity out of his Prebend, Parſonage, or Vicaridge, and the ſame be confirmed by the Patron and Ordinary, or by the Dean and Chapter, yet this ſhall not charge the Glebe, or the Succeſſour of the Prebendary or Parſon; for although by his Inſtitution he hath *Jus ad rem*, yet he hath not *Jus in re*, but the Charge in ſuch caſe ſhall lye upon the Parſon, and not upon the Lands. 5 Eliz. *Dyer*. 221. See *Hare* and *Birkley's* Caſe. *Plow. com.* 528. acc.

13. The Church at this day, ſince the Statute of *Weſt.* 2. is not full by Inſtitution of the King; and therefore if the King hath title to preſent by Lapps *pro hac vice*, and he preſents, and his Clerk is Inſtituted, and dyes before Induction, the King may preſent again: and ſo it was adjudged in 38 Eliz. in *Giles* Caſe; which, ſee *Co.* 10. Part. 132. in *Holt's* Caſe. See 18 Eliz. *Dyer* 348. in *Weſton's* Caſe, acc.

14. The making of a Clerk compleat Incumbent of the Church, is Induction; which is nothing elſe but the putting of him in the actual poſſeſſion of the Church and Glebe, which are the Temporalties of the Church; as the old books are of 15 H. 4. 76. b. 14 H. 6. *Quare Impedit* 162. 38 H. 6. 15.

15. If the Arch-Deacon will not Induct the Clerk into the Benefice after the Biſhop hath Admitted and Inſtituted him, an Action upon the Caſe lyeth againſt the Arch-Deacon, becauſe the Induction is a Temporal Act. See *Fitzh. N. Br.* 47. 26 H. 8. 3. by *Knightly*; and ſo was it adjudged Paſch. 23 Eliz. in the Common-Pleas. *Godb.* 23.

16. After the Incumbent is Inducted, he may plead any plea in barr of a *Quare Impedit* brought againſt him which concerneth his poſſeſſion; as he may plead a Releaſe in barr, becauſe he hath the Freehold in him, which ſhall not be loſt without his Anſwer. 4 H. 8. *Dyer*. 1.

See more of *Advowſon* in the Titles of *Quare Impedit*, *Preſentation*, *Incumbent*, *Lapſe*, and *Plenarty*.

Age. *See* Enfant.

In what Actions it ſhall be granted; And where the Plea ſhall demur for Nonage, et è contra.

1. IN a *Præcipe quod reddat*, the Tenant vouched, and ſummons to warranty iſſued forth againſt the Vouchee; and the Sheriff returned, That the Vouchee was dead. It was moved, If the Tenant might revouch, one as ſon and heir, and pray, that for his Non-age the Plea might demur. It was holden by the Court, If he were not within age, that he might well vouch at large; but whether he might vouch within age, the Court doubted. See 40 E. 3. the Quære reſolved; and that he may vouch one within age; but the Plea ſhall demur for the Nonage, of the Vouchee. See 28 H. 8. *Dyer*. 7.

2. In a *Formedon*, the Tenant vouched one *Townſend*, as Cozen and heir of Sir *Roger Townſend*; and for his Non-age prayed the plea might demur. And it was the Opinion of the Court of Common-Pleas, That the parol ſhould demur; but then he muſt ſhew how he is Cozen. Hill. 6 & 7 E. 6. *Dyer*. 79.

3. A man recovered in a *Dum fuit infra ætatem* by default after default againſt an Enfant, who brought a Writ of Errour, and aſſigned for Errour, that he was within the age of 21 years at the time of the Judgment; and did not aver, That he had the Lands by diſcent: and it appeared to the Court by Inſpection, that he was within age; and a Preſident was ſhewed, 6 H. 8. rott. 22, in B.R. That a Writ of Errour was brought by one *Carr* upon a Judgment given againſt him in the Common-Pleas, by default after default, in a *Formedon in Reverter*, and aſſigned Non-age generally: and it was tryed by Inſpection of the Court, and he adjudged within age; and thereupon the Judgment was Reverſed; and ſo according to this Preſident, the Judgment in the Caſe at barr was reverſed. Mich. 1 & 2. Ma. *Dyer* and 104 *Anderſon* and *Wards* Caſe.

4. Note; the heir of the Feoffee of a Diſſeiſor, Vouchee prayes in Ayd, and Tenant by Reſceit within age, ſhall have their age. If a Writ of *Conſimil Caſu* be brought by the husband, Infant and his Wife in Reverſion upon an Alienation by Tenant for life, becauſe it is the right of the wife, the Paroll ſhall not demur. But in a *Formedon* in the

the *Reverter*, the Parol ſhall Demur: and ſo in an appeal of Murder, becauſe he cannot deraign the Battaile; and although he may have a Champion in a Writ of Right, yet the Plea ſhall demur, becauſe he cannot well diſcern his Right. 4 Ma. *Dyer* 137.

5. *A. Baſſet*, ſon of Sir *John Baſſet*, within age ſued a Petition of Right of Land, of which a Recovery was ſuffered before, 27 H. 8. the which is averred to be to the uſe of the Lord *Dawbeny* in tail, the Remainder to Sir *John Baſſet* in Fee; and averred, That the Lord *Daubeny* dyed without Iſſue, and conceived the Remainder to Sir *John Baſſet*: and it was demurred in Law, If the Plea ſhould demur, during the Nonage of the Plaintiff; and it was the Opinion of Juſtices, That the parol ſhould demur: For it is a Rule in Law, That an Enfant in all things which ſound in his benefit, ſhall be Favoured, and be preferred in Law, but ſhall not be prejudiced in any thing to his diſadvantage, and at the Common Law, In Writs of Right, *ſur diſſeiſin Formedon* in the *Reverter*, and *Diſcender*, *Dum infra ætatem et Non Compos Mentis*, and in all other actions Rents founded upon a Right, diſcended to an heir within age, and in which ſeiſin and Explees ought to lye in the Auncеſtor, whoſe heir he is; the Tenant by exception to the perſon of the Demandant ſo within in age, ſhall ſtay the Plea, without any Plea pleaded in barr; but the Writ ought not to abate, as the Statute of *Weſt.* 1. *cap.* 41. ſuppoſeth. Hill. 3 & 4 Ma. *Dyer.* 137. *Baſſets* Caſe. See *Dyer* 133. acc.

6. An *Audita Querela* was brought by *Harriſon* againſt *Worſley*, to avoid a Recognizance in the Nature of a Statute-Staple made by him whileſt he was within age; and he being now of the age of 23 years, if it did lye or not, was the Doubt: and notwithſtanding the Opinion of *Fitzherbert* in his Writ of *Audita Querela* in his *Natura Brevium*, It was holden, That it did not lye; but he ſhould have brought it whileſt he was within age, ſo as his age might have been tryed by the Inſpection of the Court. Mich. 7 Eliz. in C. B. *Dyer* 232. *Harriſon* and *Worſley's* Caſe.

7. A Writ of Falſe Judgment was brought, of a Judgment given in the Court of *Godmanchеſter*, which is Ancient Demeaſne parcel of the Dutchy of *Lancaſter*, upon a Writ of Right proſecuted there in the Nature of a Writ of *Aiel*: and alledged the falſe Judges; That whereas the Tenant ſhewed a dying ſeiſed, and a Diſcent of the Land to him from his Father, and he being within age, prayed that the Paroll might demur; that he was ouſted of his prayer, and compelled to anſwer: and by the Judgment of the Court, the ſaid Judgment was reverſed. And although that the Cuſtome was in the Court as was ſuppoſed in the Record, That an Enfant there impleaded at the age of 16 or more, ſhould be driven to anſwer, without any ſtay of the Plea: Yet the Court took no Regard of the ſaid Cuſtome, which is contrary to the Common-Law. And it was ſaid by the Court, That although by the Cuſtome he was enabled at the age of 16 years to alien his Lands, yet he ſhall not thereby be driven to anſwer in a *Precipe quod reddat* at ſuch age. Trin. 9 Eliz. in C. B. *Dyer*. 262.

8. In an Action of Debt brought againſt three heirs in Gavel-kind upon the Obligation of their Anceſtor, the one being within age, they were Outlawed; the two of full age preſented their pardon, and upon a *Scire facias*, the Plaintiff declared againſt them all together: And the Queſtion was, Whether the Plea ſhould abide for the Non-age of the third. And the Opinion of the Court was, That it ſhould not, becauſe by the Outlawry the Original was determined as againſt him; and alſo becauſe it was not void, becauſe he was an Enfant, but voidable by a Writ of Errour. See 15 E. 3. Debt. 7. 11 H. 7. 12. *Cook.* 1. Part. *Inſtitutes* 378. b. Trin. 7 Eliz. *Dyer*. 239. *Hawtry's* Caſe.

9. If the Tenant in a real Action voucheth *A.* as heir within age; Or if the Tenant for life be impleaded, and he prayeth in Aid of *A.* in Reverſion who is within age, and prayeth that the Paroll may demur, &c. in the one caſe and the other; if the Demandant replyeth, That he is of full age, it ſhall not be tryed by the Country for the great delay of the Demandant; but a Writ ſhall be awarded to the Sheriff, commanding him, That *Venire facias talidem prædict. A. ut per aſpectum Corporis ſui, conſtare poterit præfat. Juſticar. numeres, ſi prædict. A. ſit plenæ ætatis, nec ne. Cook*, 9. Part. 31. in the Caſe of the Abbot of *Swata Marcella*.

10. In a *Scire facias* to have Execution of Damages recovered in a Writ of Intruſion of a Ward, the Sheriff returned the Defendant againſt whom the Judgment was given, dead; for which a Writ iſſued to warn the Tenants of the Lands who were to the Defendant at the time of the Judgment. One of the Tenants ſaid, That his Cozen dyed ſeiſed, whoſe heir he is, and is within age, and prayed his age, and that the Paroll might demur againſt all the other Terr-Tenants, untill he was of Age. Upon which Caſe *Cook* Collected, That if there be Grandfather, Father, and two Daughters, and the Father dyeth, one of the daughters within age, and the other of full age, the other ſhall take benefit thereof; and the eldeſt Siſter ſhall not be charged alone, but ſhall take advantage of the Infancy of her Siſter; for both are here in one degree: and ſo it is if a man be bound-

den in a Recognisance, and hath Issue two daughters, and dyeth, and they make partition; one alone shall not be charged: and if one be within age, the other shall take benefit thereof, and shall have his age: And the Case of Sir *John Langford* was agreed for Law; where the Case was, That four were bound in a Recognizance acknowledged in the Court of *Chester* to Sir *Richard Langford*, one of the Conusors, dyed his heir within age; Sir *John Langford* brought a *Scire facias* against the other three, who pleaded, That the heir of the Conusor was dead within age; and because Sir *Richard Langford* did not deny it, It was adjudged, That the paroll should Demur. 29 E. 3. 80. vouch. in *Cook* 3. Part. 13. in Sir *William Herbert's* Case.

11. A *Formedon* in the *Remainder* was brought by an Enfant, of a Remainder which was limited to his Father; and in that Case it was adjudged, That the Tenant without a Plea pleaded, could not pray that the Paroll might Demur for the Non-age of the Demandant: and in that case, these Rules were taken for Law; 1. That in all Actions reall which an Enfant brings of his own possession, although he hath the Land by discent, and although the Tenant pleads the Deed or Warranty of his Ancestors, the Paroll shall not Demur for Non-age; for when his Ancestor dyeth seised, and the Land descends to an Enfant, and he taketh the profits, it should be prejudice to the Enfant that he should lose his possession which he had, and should be thereof delayed untill his full age; and the granting that the Paroll shall Demur, shall be by intendment of Law in favour of the Enfant. But when a bare right discends to him, there the Enfant is not at such prejudice; and therefore there the Plea shall demur for Non-age. 2. In all Actions when a naked right descends from any Auncestor (which once was in possession) to an Enfant, there in some Actions Auncestral brought by him, the Tenant without any Plea pleaded, may pray, that the Plea abide as in a Writ of Right or *Formedon* in the *Reverter* brought by an Enfant as heir, and he layes the Explees in his Auncestor. But in a *Formedon* in the Remainder, although that he demands the Fee-simple, yet because his Auncestor whose heir he is, was never seised, nor took any profits; for that cause the Tenant without a Plea, cannot pray that the Paroll do abide, because that the Remainder was not in the possession of any of his Auncestors; and the Defendant himself shall be the first in which it shall vest, and who shall have seisin of the Land in demand. 3. In all Actions Auncestral possessory, as *Cosinage*, *Besail*, *Aiel*, the Tenant cannot, without Plea pleaded, pray, that the Parol Demur for the Non-age of the Defendant. But as the Common-Law, If the Tenant had pleaded a Feoffment, or other act of his Auncestor in barr; by which it appeareth, that nothing, or but a naked right at the most, discended, there the Tenant upon such Plea pleaded, might pray, That the Paroll Demur. 4. In a *Formedon* in the Discender, in which the Demandant shall not recover the meer right, but a limited estate *per formam doni*, the paroll shall not demur by the prayer of the Tenant, but he shall be answered within age, unlesse that something be pleaded against him, to which he cannot be party to try within age; But in an Assise, or an Assise of *Mortdauncester* brought by an Enfant, because that there is a Jury the first day, and the Jury shall enquire of the Circumstances, the Paroll upon some Plea pleaded shall not demur, 5. In all Actions reals at the Common-Law, If the Tenant were within age, and in by discent, he shall have his age, unlesse it be in a *Nuper Obiit*, when he claims as heir from the same Auncestor, and unlesse it be in a Writ *de partitione facienda*, because that both are in possession; and unlesse it be in an Attaint for the mischief of the death of the Petty Jury; and so the Law favoureth more the Tenant within age, who hath possession by discent, than the Demandant, who hath but a meer right by discent. 35 Eliz. in C. B. *Cook* 6. Part. 3. *Mankall's* Case.

12. The Case was; There was Lord and Tenant by Fealty and Rent, the Lord made a Feoffment of the Mannor; the Tenant being within the age of 21 years, having Lands by discent attorned: the Question was, If the Attornment were good? And in that case, It was Resolved, That in a *Per quæ Servitia* against an Enfant who hath the Tenancy by discent, he shall not have his age, because the Lord at first departed with the Land, in consideration that the Tenant should hold of him, and should pay to him his rent: and it is presumed, that the Tenant hath benefit and availe above the Services which he doth, and the rent which he payeth; and therefore he is called Tenant *per availe*: and the Tenant who hath the Land by discent, shall be distrained for the Rent being behind during his Non-age, and he shall not have his age. In a Writ of Customes and Services, and in a *Cessavit* against an Enfant of his own Cesser, although he hath the Tenancy by discent, he shall have his age, because he cannot know what arrerages he shall tender before Judgment; and if he doth not make a true tender, he shall lose his Land. In a *Quid juris clamat* brought by an Enfant, If the Plea demur for Non-age, the Enfant when he cometh of full age, may have all advantages to have the Arrearages of the Rent, or for Waste, as if the Tenant had attorned at the time of the Action brought.

brought. 8 Jac. in C. B. *Cook* 9. Part. 84. *Conty's* Caſe.

13. *A.* hath Iſſue *B.* and *C.* Enfants within age; A Leaſe is made to *A.* for life, the remainder to *B.* in taile, the remainder to *C.* in taile. *A.* Tenant for life is diſſeiſed, and afterwards releaſeth to the Diſſeiſor with Warranty, and dyeth, and the Warranty diſcendeth upon *B.* within age; afterwards *B.* dyeth within age; *C.* being then his brother and heir, and within age when the Warranty doth diſcend; and afterwards *C.* cometh of age, and 3. years after his full age, entreth into the Lands: It was a Queſtion, If his Entry was Lawfull? And it was Reſolved, That if the entry of an Enfant be lawful, and he cannot enter in the life of his Anceſtor, and doth not enter, the Warranty ſhall not bind him in ſuch caſe, *à fortiori*, when the Warranty diſcendeth upon him, his entry being lawfull, and no Lacheſſe is to be attributed to him; but if his entry were not lawfull, ſo that he was put to his Action, there the Warranty ſhould bind him: and if Warranty doth diſcend upon an Enfant, he may enter when he will, and ſhall have benefit of his age, and he needeth not haſtily to enter; but in convenient time after his full age: but in ſuch caſe he is to take heed that he ſuffer not a diſcent after his full age before his Entry, for there the Warranty ſhall bind him. *Cook.* 1. Part. 140. *Chudleigh's* Caſe.

14. In a *Dum fuit infra ætatem*, The Tenant ſaid, That his Father was ſeiſed, and dyed ſeiſed, and prayed his age. The Defendant Counterpleaded the age, becauſe that his Father and he were joyntly enfeoffed, and to the heirs of the Father: And it was adjudged in that Caſe, that he ſhould not have his Age; for though the refuſall ſhall have Relation as to himſelf, yet as to the Demandant who is a ſtranger, it ſhall not have Relation to delay his Action; whereas in truth he had the Free-hold by purchaſe. See *Cook* 3. Part. 29. in *Butler* and *Bakers* Caſe.

15. Tenant in taile of divers houſes and of other Lands holden *in Capite* by Deed Indented, made a Leaſe of the houſes whereof he was Tenant in taile, not warranted by the Statute of 32 H. 8. and dyed without Iſſue, the Reverſion deſcended to his gentral heirs who were in Ward to the King; and it was found by Office, that he dyed ſeiſed of the ſaid houſes, and that they deſcended to his heirs generally. It was in that Caſe Reſolved, That the King in privity of the heirs in taile, who were in his Cuſtody, ſhould avoid the Leaſes during the time that they were in his Wardſhip; and that in reſpect of their Enfancy. 29 Eliz. *Cook* 7. Part. 7. The Earl of *Rutford's* Caſe.

16. A man ſeiſed of Lands in fee holden in Socage, by his Will deviſed them to his baſtard daughter & her heirs, and dyed; The daughter within age made a Feoffment of the ſaid Lands, and dyed without Iſſue. In that caſe it was Reſolved, 1. That privies in blood enheritable, as general heir, ſpecial heir, or as general or ſpecial heir, ſhall take advantage of the Enfancy of their Anceſtor, and may enter upon a Feoffment made by their Anceſtor within age; But privies in eſtate ſhall not take advantage of the Enfancy one of the other. If two Joynt-Tenants in Fee be within age, the one makes a Feoffment of his moyety, and dyeth, the Survivor cannot enter for the Enfancy of his Companion; for by the Feoffment the Joynture is ſevered, ſo long as the Feoffment remaineth in force; and the heir of the Feoffor ſhall have *Dum fuit infra ætatem*, and in ſuch caſe ſhall take advantage of the Enfancy, and ſhall enter into the moyety: It was alſo Reſolved, That privies in Law (as the Lord by Eſcheat) ſhould never take advantage of Infancy, becauſe he is a ſtranger to him: But in the principal Caſe, becauſe it appeared that the Feoffment made by the Enfant, was executed by Attorney. It was holden, That the Feoffment was void. *Cook.* 8. Part. 42. 45 Eliz. *Whittingham's* Caſe.

17. If an Enfant being a *Feme-Covert*, levyeth a Fine with a Grant, and render to her ſelf in taile, or for life, and the husband dyeth; the Wife ſhall not take advantage of her Non-age, and have a Writ of Errour to reverſe the Fine, becauſe ſhe is Tenant of the Land, and ſhe cannot have a Writ of Errour againſt her ſelf, ſo as ſhe is without remedy; and ſo it is in the Caſe of another Enfant, he ſhall not have the advantage of his Age. Hill. 40 Eliz. in B. R. *Owen.* 33.

18. If there be husband and wife, and they both within age joyn in a Feoffment by Deed Indented, reſerving Rent, and the husband dyeth; the Wife may enter, or have *Dum fuit infra ætatem*: But if ſhe be of full age, then ſhe ſhall not have *Dum fuit infra ætatem* for the Non-age of her husband; although husband and wife be one perſon in Law. *Cook* 1. Part. *Inſtitutes.* 337.

19. A Writ of Entry *Sur diſſeiſin* in the Poſt was brought againſt Sir *Henry Mildmay* upon a Recovery had againſt him, of the Manor of *Wanſted*, againſt the Earl of *Newport*; where he appeared by his Guardians, and vouched the common Vouchee, and Judgment was given againſt him upon his default, after appearance; and the Earl brought a Writ of Errour, for that the Judgment was given by default, he being an Enfant: And it was adjudged, That the Writ of Errour would not lye; and this being a Common Recovery, ought not to be ſhaken by Enfancy; and the Court is truſted, That they will not admit ſuch a one to be Guardian; but ſuch as ſhall anſwer to the Enfant.

for his loſſe if he hath any. Paſch. 9 Jac. in B.R. rott. 439. The Earl of *Newport* and Sir *Henry Mildmay's* Caſe, *Cro.* 1. Part. 224. But ſee by *Cook*, *Cook*. 10. Part. 44. in *Marg. Portington's* Caſe, That a Common Recovery againſt an Enfant, who appeareth by his Guardian, ſhall not bind the Enfant; for an Enfant hath not ſuch a diſpoſing power over the Land, as Husband and Wife have, but he is diſabled in Law to transfer his Land during his minority: Note; the Law is now taken, That an Enfant may ſuffer a Recovery by his Guardian.

20. A man for ſeveral purpoſes hath divers ages aſſigned unto him, *viz.* 12 years, to take the Oath of Allegiance in the Court-Leet; 14 years to conſent to a Marriage; at 14 years for the heir in Socage to chooſe his Guardian; which age is accounted his age of Diſcretion: at 15 years, for the Lord to have Aid to make his ſon Knight: under the age of 21 years, for the heir to be in Ward to the Lord of whom he holdeth his Land by Knights-Service; under 14 years to be in Ward to a Guardian in Socage, and after that age to be out of his Guardianſhip, and able to have Accompt againſt his Guardian: at 21 years to be out of Ward to Guardian in Knights-Service: and to alien his Lands, Goods, and Chattels. Alſo a woman hath ſeven ſeveral ages for ſeveral purpoſes: at 7. years, for the Lord to have Aid to marry her: at 12 years, to conſent to a marriage: untill 14 years, to be in Ward: 14 years to be out of Ward, if ſhe attain to that age in the life of her Anceſtor: 16 years, for to tender her a marriage: 21 years, to alien her Lands, Goods and Chattels. See *Cook.* 1. Part. *Inſtitutes*, 78. *Cook.* 6. Part. 70. in the Lord *Darcies* Caſe; and *Cook* 9. Part. 72. in Doctor *Huſſey's* Caſe. acc.

21. *Poynes* an Enfant levied a Fine, and in Trinity Term after brought his Writ of Errour; and aſſigned for Errour, That at the time the Fine was levied, and yet he was an Enfant, and prayed that he might be Inſpected: and becauſe he had not his proofs there, he was not Inſpected; but day was given untill *Octob.* Mich. next: on which day, the day of Eſſoines, he came and prayed *Crook*, Juſtice, to Inſpect him, and to take his proofs, who did Inſpect him accordingly *de bene eſſe*; and before *Menſe Mich.* he came of full age: And if the Inſpection was well taken, was the Queſtion? And it was the Opinion of *Flemming*, Chief Juſtice, That the Court was full there, although there was but one Judge; and if the Inſpection be upon the day of Eſſoines; and before *4to die poſt* he come of full age, this is good. Mich 7 Jac. In C. B. *Poynes* Caſe. *Brownlow.* 2 Part. 278.

22. The Wife after the death of her husband, brought Errour to reverſe a Fine levied by her and her husband: and aſſigned for Errour, That the *Dedimus Poteſtatem* bore date before the Writ of Covenant; and had a *Scire facias* to warn the heir and Terr-Tenant; the heir appeared, and pleaded, That the Conuſee his Father dyed ſeiſed, and the Land diſcended to him as heir, and he is Terr-Tenant, and within age, and prayed the Paroll might demur. The Plaintiff Counter-pleaded the age; that ſhe was intituled to Dower before the Fine levied; and now is barred by the Fine: wherefore ſhe prayed ſhe might be reſtored to her Writ of Dower. And although it was Objected, That in Dower, age is not allowable for the miſchief that ſhe may do, claiming but an eſtate for life: and alſo, that in a Writ of Diſcent, or Attaint, an Enfant ſhall not have his age, for doubt of the death of one of the Jurours, and of the Summoners and Veiors: and alſo in the principal Caſe it is confeſſed by the Demurrer, She had title of Dower if the Fine were avoided. Yet the Opinion of the Court was, That in as much as it is a Rule in Law, That an Enfant by intendment hath not conuſance to plead in defence of his Title; and he might have divers Pleas to avoid the Writ of Errour: and although ſhe now pretends, that ſhe claims but Dower: but if the Fine were reverſed, ſhe might claim another Title, which might reach to the Inheritance; and by this means, the Enfant might be diſ-inherited; and therefore although both Dower and Enfancy were favoured in Law; It was, for the Cauſes aforeſaid, and other Cauſes adjudged, That the Parol ſhould Demur, and the Enfant have his age; and the Counter-plea, was no good Counter-plea of his age. Hill. 13 Jac. in B.R. Intrat. Trin. 10 Jac. Rott. *Barbara Herbert* and *Binions* Caſe. *Cro.* 2. Part. 398. 399.

Agreement *and* Diſagreement.

1. THE Statute of 1 Ed. 6. cap. 13. is, That if any Merchandizes be laid upon the Land, and the Cuſtome be not paid, or the Collector not agreed with for the ſame, that the ſame ſhall be forfeited. And upon an Information in the Exchequer, that 1693. Kentals of green wood was put upon the Land; the Cuſtome not paid, nor the Collector agreed with for the ſame; the Iſſue was, Whether the Defendant did agree with the Collector according to the former

forme of the ſaid Statute, or not? And for the Defendant, It was given in Evidence, That *Fogeſſa* a Merchant ſtranger, ſhipped 4500 Kentals of green Woad, and brought them towards *England*, and a great Tempeſt did ariſe upon the Sea, ſo as the Ship was in danger to be ſunk; and for the ſaving of the lives of them which were in the Ship, and the goods, the Maſter of the Ship, and the Mariners, caſt into the Sea a great part of the Woad, and afterwards the Ship came to the Port of *Southampton* with the reſidue; and becauſe the certainty of the Woad which was left in the Ship, was not known to the Defendant before the Ship was unladen, he came to the Collector of the Cuſtoms, and ſhewed him all the matter aforeſaid; and ſaid, he conceived there was 2000 Kentals left in the Ship, and required him to make an Entrance thereof in his book; and if there was more then 2000 Kentals, that he would pay to him the Cuſtome for the uſe of the King all that ſhould be due when it ſhould be tryed at the King's Beam, or otherwiſe known, and prayed him to give him Licenſe to lay it upon the Land: and the Collector agreed, and granted him Licenſe ſo to do: and thereupon he agreed with the Collector for all the Cuſtome, according to the rate of 12 in value for every 20 s. and afterwards he layd all the Woad which was left upon the Land: which 2000 Kentals, and 1693 Kentals more were ſeiſed upon, as forfeited to the King by force of the ſaid Statute; and upon this Evidence the King's Attorney did demur in Law. And the Opinion of all the Juſtices of *England* in the Exchequer Chamber was, That this ſpecial matter given in Evidence was ſufficient, to prove the agreement with the Collector of the King for the Cuſtomes, and that no part of the ſaid Merchandizes were forfeited by the ſaid Statute of 1 Ed. 6. and therefore Judgment was given againſt the King. Hill. 4 E. 6. Information in the Exchequer. *Rowe* and *Fogeſſa*'s Caſe. *Plow. Comment.* 1.

2. In a Replevin, the Avowant pleaded, That *W. B.* was ſeiſed of the place in Fee, and dyed ſeiſed, and the Land diſcended to *C.* his daughter and heir, who took husband the Avowant: The Plaintiff in barr to the Avowry, confeſſed the ſeiſin of *W. B.* and the diſcent to *C.* but ſaid, That on 16. of April, 1 Jac. the husband and wife by their Deed Indented and Inrolled, did bargain and ſell the Land to J. S. and levied a Fine thereof, and J S. 3 Jac. bargained and ſold the Land to J. D. in Fee; and that he being ſeiſed, Licenſed the Plaintiff to put in his Cattel. The Avowant replyed, That in the ſaid bargain and ſale by the husband and wife, there was a Proviſo, That if the Defendant ſhould pay 100 l. a year after, then, &c. and pleaded the Statute of 13 Eliz. of Uſury, with an averment, That the profits of the Lands were of the value of 12 l. *per annum*. The Plaintiff Rejoyned, That it is true, there was ſuch a Proviſo in the Indenture: But ſaid, That before the ſealing of the Indenture, It was agreed by word, That the Defendant ſhould have and receive the profits, and not the Plaintiff; upon which the Avowant demurred: The Caſe was, The Defendant bargained and ſold the Lands to J.S. for 100 l. to be paid a year after; and that the Bargaine; ſhould have the profits: the Bargainor enters as upon a void ſale, becauſe of the Statute of 13 Eliz. of Uſury; for by the Proviſo he is to have the 100 l. and the 10 l. for the forbearance; and by the Law, he is to have the profits, the which did amount to above 10 l. in the hundred: the bargainee to avoid the Uſury, pleaded an Agreement by word before the ſealing of the bargain and ſale: and the Queſtion was in this Caſe, If the Bargainee might plead this agreement by word for avoiding of the Deed? And it was the Opinion of the whole Court, That he might plead the verball agreement to avoid the Deed which ſuppoſed the Uſury: For it was agreed, That when a Deed is perfected and delivered as his Deed, there no verbal agreement may be pleaded afterwards in deſtruction of it; but when the Agreement is parcel of the Original Contract, (as it was in this Caſe) then it may be pleaded againſt it: but if it had been expreſſed within the Deed, that the bargainee ſhould have the profits, and that it was delivered accordingly, That then no Agreement or Aſſignment of the profits could then avoid it: for then it is an Uſurious Contract: And Judgment was given for the Plaintiff, That he might well plead the Agreement. Trin. 8 Jac. in C. B. *Burglary* and *Ellington*'s Caſe. *Brownlow.* 1. Part. 191.

3. Note, by *Cook* and *Foſter*, Juſtices; If a Parſon agree and Contract with me, That I ſhall keep back my own Tythes, if that be made after I have ſowen my Corn, and for the ſame year onely, this ſhall be good; and if the Parſon ſueth in the Spiritual Court for Tythes, I ſhall have a Prohibition: but if it be for more years then one, or before the Corn is ſowed, the Agreement by word is not good. And it was ſaid by *Cook*, Chief Juſtice, That it was adjudged in *Booth*'s Caſe, That a Contract or Agreement made with a Pariſhioner for keeping back of his Tythes ſo ſo many years as he ſhall be Parſon, was not good. And ſo alſo it was adjudged in *Wellowes* Caſe in this Court. But it was agreed by all the Juſtices, That ſuch a Contract or Agreement for the Tythes of any other was void, but onely of the party himſelf, who was party to the Agreement, and that ought to be by way of keeping them back. Mich. 8 Jac. in C. B. *Brownlow.*

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forme of the ſaid Statute, or not? And for the Defendant, It was given in Evidence, That *Fogeſſa* a Merchant ſtranger, ſhipped 4500 Kentals of green Woad, and brought them towards *England*, and a great Tempeſt did ariſe upon the Sea, ſo as the Ship was in danger to be ſunk; and for the ſaving of the lives of them which were in the Ship, and the goods, the Maſter of the Ship, and the Mariners, caſt into the Sea a great part of the Woad, and afterwards the Ship came to the Port of *Southampton* with the reſidue; and becauſe the certainty of the Woad which was left in the Ship, was not known to the Defendant before the Ship was unladen, he came to the Collector of the Cuſtoms, and ſhewed him all the matter aforeſaid; and ſaid, he conceived there was 2000 Kentals left in the Ship, and required him to make an Entrance thereof in his book; and if there was more then 2000 Kentals, that he would pay to him the Cuſtome for the uſe of the King all that ſhould be due when it ſhould be tryed at the King's Beam, or otherwiſe known, and prayed him to give him Licenſe to lay it upon the Land: and the Collector agreed, and granted him Licenſe ſo to do: and thereupon he agreed with the Collector for all the Cuſtome, according to the rate of 12 in value for every 20 s. and afterwards he layd all the Woad which was left upon the Land: which 2000 Kentals, and 1693 Kentals more were ſeiſed upon, as forfeited to the King by force of the ſaid Statute; and upon this Evidence the King's Attorney did demur in Law. And the Opinion of all the Juſtices of *England* in the Exchequer Chamber was, That this ſpecial matter given in Evidence was ſufficient, to prove the agreement with the Collector of the King for the Cuſtomes, and that no part of the ſaid Merchandizes were forfeited by the ſaid Statute of 1 Ed. 6. and therefore Judgment was given againſt the King. Hill. 4 E. 6. Information in the Exchequer. *Roniger* and *Fogeſſa*'s Caſe. *Plow. Comment.* 1.

2. In a Replevin, the Avowant pleaded, That *W. B.* was ſeiſed of the place in Fee, and dyed ſeiſed, and the Land diſcended to *C.* his daughter and heir, who took husband the Avowant: The Plaintiff in barr to the Avowry, confeſſed the ſeiſin of *W. B.* and the diſcent to *C.* but ſaid, That on 16. of April, 1 Jac. the husband and wife by their Deed Indented and Inrolled, did bargain and ſell the Land to J. S. and levied a Fine thereof, and J. S. 3 Jac. bargained and ſold the Land to J. D. in Fee; and that he being ſeiſed, Licenſed the Plaintiff to put in his Cattel. The Avowant replyed, That in the ſaid bargain and ſale by the husband and wife, there was a Proviſo, That if the Defendant ſhou'd pay 100 l. a year after, then, &c. and pleaded the Statute of 13 Eliz. of Uſury, with an averment, That the profits of the Lands were of the value of 12 l. *per annum*. The Plaintiff Rejoyned, That it is true, there was ſuch a Proviſo in the Indenture: But ſaid, That before the ſealing of the Indenture, It was agreed by word, That the Defendant ſhould have and receive the profits, and not the Plaintiff; upon which the Avowant demurred: The Caſe was, The Defendant bargained and ſold the Lands to J. S. for 100 l. to be paid a year after; and that the Bargaine; ſhould have the profits: the Bargainor enters as upon a void ſale, becauſe of the Statute of 13 Eliz. of Uſury; for by the Proviſo he is to have the 100 l. and the 10 l. for the forbearance; and by the Law, he is to have the profits, the which did amount to above 10 l. in the hundred: the bargainee to avoid the Uſury, pleaded an Agreement by word before the ſealing of the bargain and ſale: and the Queſtion was in this Caſe, If the Bargainee might plead this agreement by word for avoiding of the Deed? And it was the Opinion of the whole Court, That he might plead the verball agreement to avoid the Deed which ſuppoſed the Uſury: For it was agreed, That when a Deed is perfected and delivered as his Deed, there no verbal agreement may be pleaded afterwards in deſtruction of it; but when the Agreement is parcel of the Original Contract, (as it was in this Caſe) then it may be pleaded againſt it: but if it had been expreſſed within the Deed, that the bargainee ſhould have the profits, and that it was delivered accordingly, That then no Agreement or Aſſignment of the profits could then avoid it: for then it is an Uſurious Contract: And Judgment was given for the Plaintiff, That he might well plead the Agreement. Trin. 8 Jac. in C. B. *Burgley* and *Ellington*'s Caſe. *Brownlow.* 1. Part. 191.

3. Note, by *Cook* and *Foſter*, Juſtices; If a Parſon agree and Contract with me, That I ſhall keep back my own Tythes, if that be made after I have ſowen my Corn, and for the ſame year onely, this ſhall be good; and if the Parſon ſueth in the Spiritual Court for Tythes, I ſhall have a Prohibition: but if it be for more years then one, or before the Corn is ſowed, the Agreement by word is not good. And it was ſaid by *Cook*, Chief Juſtice, That it was adjudged in *Booth*'s Caſe, That a Contract or Agreement made with a Pariſhioner for keeping back of his Tythes for ſo many years as he ſhall be Parſon, was not good. And ſo alſo it was adjudged in *Wellowes* Caſe in this Court. But it was agreed by all the Juſtices, That ſuch a Contract or Agreement for the Tythes of any other was void, but onely of the party himſelf, who was party to the Agreement, and that ought to be by way of keeping them back. Mich. 8 Jac. in C. B. *Brownlow.*

low. 2. Part. 17. See *Brownlow*, Mich. 8 Jac. in B. R. 11. acc.

4. A man ſeiſed in Fee of Lands holden in Socage, having Iſſue 3. daughters, deviſed the ſame to his youngeſt daughter when ſhe ſhould accompliſh the age of 18 years, and to the heirs of her body; the remainder to his eldeſt daughter in taile, with divers remainders over; Proviſo, if his ſaid daughter, or any other perſon before named ſhall willingly or adviſedly conclude and agree to or for the doing of any Act, whereby the premiſes ſo intailed, ſhall or may be diſcontinued or aliened, or ſhall do any Act or thing whereby the Lands ſhall not come to them in remainder, &c. that then and immediately after ſuch Concluding and agreeing, the eſtates limited to them ſhould ceaſe, as if they were dead without Iſſue of their bodies. The youngeſt daughter took a husband, and the husband and wife concluded and agreed to ſuffer a Common Recovery to the uſe of them and their heirs; which was done accordingly: It was Reſolved in this Caſe, That the Concluſion and Agreement to ſuffer a Common Recovery, could not be reſtrained by any Condition or limitation, becauſe they were incidents *tacitè* annexed to their Eſtates; and therefore it ſhould be repugnant to reſtrain them by ſuch Condition or limitation. And it was Reſolved, That the Recovery ſuffered by the wife, was not a forfeiture of her eſtate, becauſe that the Concluſion by the Indenture onely was (as the Plaintiff pretended) a forfeiture of her Eſtate, and then the Recovery was not of any effect, becauſe that her eſtate was determined before by the Concluſion before the Recovery: and therefore it is no more then if the husband and wife had concluded without any Recovery; and here the Proviſo diſables them to ſuffer a Common Recovery; and againſt the Indenture the Wife may plead, that it is not her Deed. Mich. 11 Jac. in C. B. *Cook* 11. Part. 35. *Portington* and *Rogers* Caſe.

5. *A.* ſeiſed of the Mannor of *Toby* in Fee; And *A.* and his wife ſeiſed of the Mannor of *Hinton* to them and the heirs of their two bodies begotten, by an eſtate made to them before Coverture for the Joynture of the wife, the Reverſion to *A.* in Fee: *Toby* amounting to the value of two parts of the Lands, and *Hinton* to the third part, both holden *in Capite*: *A.* by his Will deviſed the Mannor of *Toby* to his Wife for life, upon Condition, that ſhe ſhould not take her former Joynture in *Hinton*: The Wife *in pais*, by word waved her Eſtate in *Hinton*, and agreed to the Mannor of *Toby*, and entred into it: and if the deviſe were good for the whole Mannor of *Toby*, or but for part of it, was the Queſtion, upon the Statutes of 32 & 34 H. 8. of Wills? And it was Reſolved,

1. That at the Common-Law, If Lands be given to husband and wife in taile, or in Fee, and the husband dyeth, the Wife cannot by any verbal agreement *in pais* deveſt the Freehold which is veſted in her: but if ſhe agreeth to an eſtate *in pais* by word, ſhe may afterwards wave it in a Court of Record; but if ſhe entreth into the Lands and takes the profits, the ſame is a good agreement to it in Law; for the Law reſpects more an Act without words; then words without an Act. 2. It was Reſolved, That the refuſall *in pais* to have the Mannor of *Hinton*, and the entry and agreement to the Mannor of *Toby* was a good agreement to the one, and a refuſal to the other, and thereby the Inheritance was deveſted by force of the Statute of *Uſes*; by which Statute, a woman may refuſe her Joynture *in pais*, and be endowed by her conſent *in pais*, or by a Writ of Dower. 33 & 34 Eliz. *Cook.* 3. Part 25, 26. *Butler* and *Baker*'s Caſe.

6. The Caſe was; A Diſſeiſor makes a Leaſe for years, the Leſſee enters, the Leſſor departs the Kingdom, and at his departure commands and gives authority to the Leſſee, That if the Diſſeiſee make any entry upon him, that he will not ſuffer him to continue there, but to keep the poſſeſſion alwayes as his Leſſee: The Leſſor being beyond Sea, the Diſſeiſee enters upon the Leſſee, and puts him out, and the Leſſee outs the Diſſeiſee again, and afterwards payes his Rent to the uſe of his Leſſor being abſent: and if the Leſſor were a diſſeiſor or Tenant of the Freehold, without his expreſſe agreement to the diſſeiſin after the diſſeiſin, was the Queſtion? And it was the Opinion of *Saunders*, Chief Juſtice, That without an expreſs agreement of the Leſſor after the diſſeiſin, the Freehold was not ſettled in the Leſſor, the *Ceſtuy que uſe*. *Alii contrà.* 3 & 4 Ma. *Dyer.* 141.

7. A man poſſeſſed of a houſe and Land for 5000 years, by his Will in writing deviſed the ſaid houſe and Land to his Father for the term of his life; and after his deceaſe, the Remainder of the ſaid houſe and Land to *B.* the Siſter of the deviſor, and the heirs of her body, and made his Father his Executor, and dyed; the Father took upon him the execution of the Will, and entred. *B.* took husband, the husband and Wife at the requeſt of the Father, granted, releaſed, aſſigned and yielded up to the Father the ſaid houſe and Land, with all their right, Intereſt, and Term in the premiſſes, *Habendum pro et durante reſiduo termini prædict. de* 5000 years then to come. It was Reſolved in this Caſe, That the Releaſe was good, and that there was a ſufficient aſſent and agreement in the Executor, to take the houſe, &c. becauſe that the Releaſe was made at the ſpecial inſtance and requeſt of the Executor; which impleyeth an aſſent

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and an Agreement, 10 Jac. *Cook* 10. Part. 46. *Lampitt*'s Caſe.

8. Note, there is a difference between an Agreement and Diſagreement; for an Agreement to a thing may be done in the abſence of the party; as an Attornment, which is an Agreement, may be done in the abſence of the Grantee of the Reverſion; but in caſe of a Diſagreement it ought to be done to the party himſelf: and the reaſon of the difference is, becauſe that in caſe of diſagreement, the party might perſwade and move the other by reaſon, by intreaty, or by other means, to give his conſent; and therefore the Law requireth, that the diſagreement be made to the party, for the prejudice which might otherwiſe happen unto him: but in caſe of Conſent, as in the caſe of an Attornment, which is to ſettle and perfect the eſtate of the Grantee, and ſo for his benefit, the ſame may be done in his abſence, as well as in his preſence. *Cook* 2. Part. 96. in *Tookers* Caſe.

9. Viſcount *Bindon* was ſeiſed of a Mannor holden by Knights ſervice *in Capite*, and had Iſſue *Douglas*, who married Sir *Arthur Gorge*, and had Iſſue by him *Ambroſia*; *Douglas* dyed in the Life of the Viſcount her Father: Afterwards the Viſcount dyed, all which was found by Office, and that *Ambroſia* was heir apparent of her Father, and within the age of 7. years: afterwards *Ambroſia* of the age of 7. years was married by her Father to *Francis Gorge*; and afterwards Sir *Arthur* had another Wife, and had Iſſue a Son; the husband of *Ambroſia* dyed, being *infra annos nubiles*, viz. of the age of 10 years. It was Reſolved in this Caſe, That the Queen ſhould have the marriage of *Ambroſia*; for that it was not any Compleat marriage before, becauſe there was not any agreement or conſent unto it as there ought to be, *et conſentire non poſſunt infra annos nubiles*. And it was holden by the Court, That there was no difference, to a diſagreement to a marriage at the age of Conſent, and death before that Age: for when the heir is married by the Father *infra annos Nubiles*, and diſagreement to it, then Clearly the Lord ſhall have the Ward-ſhip. Mich. 41 Eliz. in *Curia* Wards. *Cook* 6. Part. 22. 23 *Ambroſia Gorges* Caſe.

10. A *Venire facias* was awarded to the Coroner, where it ought to be awarded to the Sheriff; and ſo the Jury was returned by one who had not authority: And it was adjudged an Inſufficient Return, and not remedied by the Statutes of 32 H. 8. or 18 Eliz. But it was holden in that Caſe, that if the *Venire facias* had been awarded by agreement or aſſent of the parties, the ſame had been good, and then the Tryall had been good. Trinit. 30 Eliz. in the Exchequer, *Cook*. 5. Part. 36. *Bayham*'s Caſe.

11. A Rent-charge out of a houſe and Lands was granted by Deed to one and his Aſſigns for life, *pro Conſilio impendendo*; and, for default of payment if it be demanded, it ſhall be lawful for the Grantee and his Aſſigns to diſtrain; the Grantee aſſigned the Rent, and the Tenant attorned, and the Aſſignee demanded the Rent after the day; and, for non-payment, diſtrained. It was adjudged in this Caſe, That although a Rent, granted *pro Conſilio Impendendo*, cannot be aſſigned in Law; yet the ſame being by the ſpecial Agreement and Grant of the Grantor, That the grantee ſhall have it to him and his Aſſigns, the ſame is good: and the Aſſignee may diſtrain for it, if it be behind. *Cook*. 7. Part. 28. 43 Eliz. in C.B. 1101, 1108. *Mauds* Caſe.

Aid of a Common Perſon.

Where, and to what perſons, and in what Actions Aid *ſhall be granted; and in what not: and what ſhall be a good Counter-Plea of it; et è contra.*

1. A Man recovered in a Writ of Annuity againſt a Parſon: and upon the Recovery he brought a *Scire Facias* againſt the Succeſſour, who prayed in Aid of the Patron and Ordinary, and the Aid was granted, and one of them was eſſoin'd onely. And the Opinion of the Court was, That one of them might not be eſſoined onely. 28 H. 8. *Dyer*. 26.

2. In a Writ of Entry in the *Quibus* brought againſt a Parſon, ſuppoſing that he diſſeiſed the Plaintiff; the Defendant prayed in Aid of the Parſon and Ordinary; and the Aid was denyed, becauſe a man ſhall never have Aid, where he is ſeiſed of the Land in his own wrong.

3. The Provoſt of *Wells* was Parſon imparſonee of the Parſonage of *W.* and Leaſed the Tythe, rendring Rent; which Leaſe was confirmed by the Dean and Chapter, but not by the Patron and Ordinary: The Provoſtſhip was united to the Deanery *cum primò vacare contigerit*; the Provoſt dyed, the Dean accepted the Rent: It was adjudged, That the Leaſe was not affirmed by the acceptance of the Rent; but was void by the death of the Provoſt: As if it had been the demiſe of the Parſon of a Church, or a Prebendary, Preſentative or Collative, who are not able in Law to make

make any diſcontinuance, without the Patron in Ordinary, of whom they ſhall have Aid in Actions brought againſt them; and therefore the Patron and Ordinary ought to joyn in ſuch Leaſe; and if any diſcontinuance be made by Parſon or Prebend; their Succeſſors ſhall have a *Juris utrum.* 7 Eliz. *Dyer* 239.

4. Note; That at the Common-Law, an Aſſiſe was *remedium maximè feſtinum, et remedium maximè beneficiale feſtinum*; and therein the Defendant ſhall not be eſſoined, nor caſt a protection alſo in it; he ſhall not pray in Aid but onely of the King; nor ſhall vouch a ſtranger, nor any party to the Writ, unleſſe he enter preſently into the Warranty. *Cook.* 8. Part. 50. *Jehu Webb's* Caſe.

5. King *Edward* the third founded a Priory, and granted to the Monks, that they might chooſe a Prior; & before that the Prior was choſen, *W.* made a Leaſe to one *A.* for life therein, the remainder to the Prior and Covent; and in a *Scire facias* brought againſt *A.* he pleaded, That *W.* was ſeiſed in Fee, and Leaſed to *A.* the remainder to the Prior and Covent who were newly founded by the King: and becauſe there was not yet a Prior, the right was in the King untill, and prayed Aid of the King; and the Aid by Ward of the Court was granted; and a Writ of *Procedendo* came; and then *A.* the Defendant ſhewed, That after the Aid granted, there was a Prior made and Ordained, in whom the Right remained, and prayed in Aid of the Prior, &c. And in that caſe he was ouſted of the Aid, becauſe he had Aid before, and Aid ſhall not be twice granted in one Caſe of ſeveral perſons, and in one Writ. See 32 E. 3. Aide 39. vouched in *Cook.* 10. part. 31. in the Caſe of *Sutton's* Hoſpital.

6. If a man ſeiſed of 6. Acres of Lands in Fee, dyeth, every acre being of equal value, having Iſſue two daughters; and upon Partition each hath 3. Acres: and after, one Siſter is impeached for one Acre by one who hath title paramount; and prayeth in Aid of her Coparcener, ſhe ſhall have Aid; but ſhe ſhall not recover an Acre, but an half Acre, ſo as each of them ſhall have an equall part; for in as much as both of them claim by diſcent, by the Law both of them ought to have equal part of the Inheritance of their Anceſtor: and for this cauſe ſhe ſhall recover upon the Aid prayed, but the Moyety which ſhe loſt. Out of which Caſe Obſerve, That one Copa. cener ſhall have Aid of the other to Recover *pro rata.* See to this purpoſe, 5 E. 3. Voucher 249. *Robert de Paris* Caſe, and *Cook.* 4. Part. 122. *Buſſard's* Caſe.

7. Lord and Tenant by Fealty and Rent; the Tenant makes a Leaſe for years, the Leſſor doth his Fealty, and continually payeth his Rent to the Lord; the Lord diſtrains the Cattel of the Tenant, and avowes upon a ſtranger, as his very Tenant. It was Reſolved in this Caſe, That the Leſſee for years of himſelf could not plead in abatement of the Avowry; but the Leſſee might ſhew the ſpecial matter, and pray in Aid of him; and then he and his Leſſor ſhould joyn in Abatement of the Avowry made upon him who had nothing, and ſhall compell the Lord to avow upon him as his very Tenant in Right and in Law. And if there be Lord, Meſne and Tenant, and the Lord avoweth upon a Stranger, and not upon the Meſne, there the Tenant is without remedy to have Aid of the Meſne, becauſe that he is Tenant in Fee-ſimple, and may plead any plea that the Meſne may plead; and the Meſne cannot joyn with the Tenant, becauſe the Avowry is not made upon the Meſne: But in that caſe, the Tenant is not left without remedy, but he may reſort to the Meſne, and ſhew to him his caſe, and pray the Meſne to take his Cattel out of the Pound, and put in his own Cattel, and ſo demand Acquittal againſt the Meſne: and if upon ſuch requeſt, the Meſne refuſeth, he may have a Writ of Meſne againſt him, and plead therein, That he was diſtrained in default of the Meſne, and recover his Coſts and damages againſt him. *Cook.* 9. Part. 20. 21. In the Caſe of Avowry.

8. Note: In an *Ejectione Firme*, It was ſaid by *Brooker* Prothonotary; and not denyed by the Court, That where the Title of him in the Reverſion is not diſcloſed in pleading, nor cometh in Queſtion, Aid ſhall not be granted. Hill. 8 Jac. in C. B. *Owen.* 43.

9. Note, by *Anderſon*, Chief Juſtice, If the Defendant in Treſpaſs prayes in Aid of a ſtranger, this is a forfeiture; and if the Aid be Counterpleaded, yet it is a forfeiture; and the denyal alters not the Caſe. 20 Eliz. in the Common-Pleas, Sir *Wolſton Dixy*, and Alderman *Spencer's* Caſe. *Owen.* 81.

10. If Tenant by the Curteſie grant his Eſtate with Warranty to J. S. and comes in as Vouchee, he ſhall have Aid of him in the Reverſion, as if he were Tenant in poſſeſſion: And if a Coparcener make a Feoffment with Warranty, and comes in as Vouchee, he ſhall have Aid to deraign the Warranty paramount, as if he were in poſſeſſion: And whereas it hath been doubted, That upon a Releaſe or Confirmation with Warranty, a man cannot vouch; and therefore he ſhall have a *Warrantia Charta.* It was held clearly, That as to him that warranteth, he may vouch; but yet the Caſe may be ſuch as the Demandant may counterplead the voucher; and then the Tenant is driven to his *Warrantia Charta*, for default of his voucher in

in Deed. Trinit. 9 Jac. in C. B. Sir *Henry Rolls*, and Sir *Robert Osborn*'s Caſe, rott. 2205, *Heb.* 20, 21, 22.

11. Two Coparceners be, and one of them makes a Feoffment in Fee, the Feoffee is impleaded, and vouch'th the Feoffor, ſhe ſhall have Aid of her ſiſter Coparcener to deraigne the Warranty paramount, but not to recover *pro rata*, becauſe ſhe diſmiſſed her ſelf by the Feoffment, to have any thing in the Land. But if a man be ſeiſed in Fee, and makes a guift in tail to one daughter; and the Reverſion diſcends to both the Siſters, and the Donee is impleaded, ſhe ſhall not pray in Aid of the other, either to recover *pro rata*, or to deraign the Warranty, becauſe the other ſiſter was a ſtranger to the Eſtate taile, and partition was never done of it. *Cook.* 1. Part. *Inſtiutes.* 174. a b. See *Rolls* Caſe, *Hob.* 21, 22, 23. acc.

12. The Lord paramount avowed for the Services of his Tenant; the Plaintiff who was a Termor ſaid, That he held of the Tenant for 10 years, whereas he held for 40 years, and prayed in Aid, and the Aid was granted: And in that caſe it was holden, That the ſame ſhould conclude him of the reſt of the Term after the 10 years expired: For in the Aid *Prayer*, the number of the years is not material, nor traverſable. 12 Eliz. *Dyer* 289.

13. In a *Quo Warranto* againſt *Roger Mortimer* and *Joan* his Wife, before Juſtices in *Eyre* in the County of *Middleſex*, to ſhew by what Warrant they claimed to have Conuſans *contra voluntatem* in their Manno: of *F.* The Defendants ſaid, That *Walter de Lacie*, Anceſtor to the ſaid *Joan*, was ſeiſed of the ſaid Manno:, and of other Lands after time of memory, *viz.* in the time of *R.* 1. and had the Franchiſe to have Conuſans of Pleas in the ſaid Manno: before the time of R. 1. and that the ſaid Manno: diſcended to many daughters, and conveyed part thereof after partition, to the Wife of the Defendant in allowance of other Lands; and the Defendants prayed in Aid of the Coparceners, and the Juſtices denyed the Aid; and becauſe the Defendants held themſelves to the Aide, the Juſtices did forjudge them of the Franchiſe: Whereupon they brought a Writ of Error in B. R. and the firſt Judgment was reverſed for two Cauſes; 1. Becauſe the Juſtices denyed the Defendant Aid, where the Aid was grantable. 2. Becauſe they forjudged the Defendants to have the Franchiſes for ever; whereas for want of pleading, the Franchiſes ought not to have been forjudged, but ſeiſed onely, if the Defendants Anſwer had not been ſufficient: And therefore the Court awarded, the Judgment ſhould be reverſed. 2 E. 3. 29. vouched, in *Cook.* 9. Part. 28. in the Caſe of the Abbot of *Strata Marcella*. By which Caſe, Note: 1. Where one Coparcener ſhall have Aide of the other; and, 2. Where the decrying of Aide, where Aid is grantable, is Errour.

14. An Annuity was granted with a *Nomine pene*; In that caſe, If an Action be brought for the *Nomine pene* againſt the Succeſſour, Aide doth not lye in that caſe; but if an Annuity be brought, there he ſhall have Aid. Paſch. 1 Car. in C. B The Biſhop of *Chicheſter* and *Freeland*'s Caſe *Ley.* 72.

Aid *of the King; where granted, and where not.*

1. IF a Biſhop granteth Cuſtomary Lands by Coppy, and dyeth, the Copy-hold is not determined by his death; for he is *Dominus pro tempore*; and this Grant ſhall bind the King: and the Grantee of the Temporalties being in the King's hands, ſhall have Aid of the King. *Cook.* 4. part. 21, 22, 23. in *Brown*'s Caſe.

2. The heir of a Copyholder recovered in a Plaint in the Nature of an Aſſiſe of Mortdauncеſter in the Court of the Biſhop of *London*, as of his Manno: of *Stepney* in the County of *Middleſex*; the Tenant brought a Writ of Falſe Judgment, retornable in the Court of Common-Pleas; and a Writ of falſe Judgment doth not lye in that caſe: But in that caſe it was ſaid, That he had no other remedy, but to pray in Aid of the Lord of the Mannor, and to ſue to him by Petition: and if there be cauſe, he may reverſe the Judgment. *Cook* 4. Part. 21. *Brown*'s Caſe. 13 R. 2. *Faux* Judgment. 7. acc.

3. In an Action of Trover and Converſion of 40 Sheep, the Defendant pleaded, That the Queen was ſeiſed of the Mannor of *Newport-Pannell* in the County of *N.* and that certain perſons unknown did ſteal the Sheep from the Plaintiff, and brought them within the Mannor, and there left and waived them; for which the Defendant as the Queens Bayliff of the Mannor did ſeiſe them to the Queens uſe, as goods waived; and prayed in Aid of the Queen: And in that caſe it was adjudged, That he ſhould be ouſted of the Aid; for it doth not appear by the barr of the Defendant, that the goods were forfeited to the Queen. Paſch. 43 Eliz. in the Kings-Bench. *Cook* 5. Part. 109. *Foxley*'s Caſe.

4. If the husband ſeiſed of Lands in the Right of his Wife, be attainted of Felony, and the King upon Office found ſeiſeth the Land, and giveth the ſame to another in Fee, the ſame is good to paſs the

the eſtate during the Coverture, which the King hath gained by the forfeiture of the husband; and if in ſuch caſe the Patentee be impleaded, he may pray in Aid of the King, and the Aid ſhall be granted unto him. *Cook* 1. Part. 48. in the Caſe of *Alton-woods*. See 33. Aſſ. 10. acc.

5. Note: It was Reſolved by the Juſtices, That when the Heir is within age, and in Ward of the King, and is committed over, and he is impleaded, or cometh in as Vouchee in a Writ of Dower; there Aide of the King ſhall not be granted; and that appeareth by the Statute of *Bigamis*, Cap. 3. and therefore in the Caſe of 4 H. 7. 1. In a Writ of Dower brought againſt the Committee of the King during the Non-age of the heir, the Defendant ſaid, That it was found by Office, that the Father of the husband of the demandant was ſeiſed in Fee of certain Lands, and held the ſame of the King, and had iſſue the husband, and dyed, and the husband entred and dyed his heir within age, without any Livery, for which the King ſeiſed the Ward, and committed it to the Defendant, and demanded Judgment of the Action; upon which there was a Demurrer: And *Brian*, Chief Juſtice of the Common-Pleas, ſaid, It appeareth to us, That the right is in the King, and therefore we will not proceed *Rege inconſulto*. But when in that Caſe *Townſend* cited the Statute of *Bigamis*, *Brian*, conſideration had of the Act, altered his opinion, and diſcharged him of the Aide of the King; and ſo the Demandant recovered the Dower: and the Defendant was ouſted of the Aid. It was alſo Reſolved, in the Caſe of *Beddingfield*, That although the Statute of *Prerogativa Regis*, 17 E. 2. gives power to the King to endow the Wife, although the Heir be of full age; yet the Statute leaves it to the Election of the Wife, to be endowed by the King in Chancery, or by the heir; and therefore, If the wife bring a Writ of Dower againſt the heir, being of full age, he ſhall not have Aide of the King in that caſe. *Cook* 9. Part 17. *Anne Beddingfield*'s Caſe.

6. If an Aſſiſe be brought by a Chaplain of the King againſt another Chaplain for Lands, and the Defendant claims the ſame Chauntry by the Kings Collation, and prayeth in Aide of the King: Now if the Defendant cannot ſhew Title in the Chauntry for the King, the Plaintiff may have a *Procedendo* directed to the Juſtices of Aſſiſe, to proceed to the taking of the Aſſiſe, notwithſtanding the allegation made of the King's Collation, and he may ſue the like Writ where the Defendant doth pray in Aide of the King in an Aſſiſe, if he cannot ſhew Title for the King, the Plaintiff may have a *Procedendo*: But if in an Aſſiſe the King ſendeth his Writ to the Juſtices, reciting, That the Defendant by Charter holdeth Lands of the King for life, commanding them, That they do not proceed *Rege inconſulto*, though the Tenant will not plead the ſame, yet the Juſtices ought to ſtay their proceedings. See *Fitzh. Na. Br.* 378, 379. acc.

7. A *Scire facias* was brought in the name of the King, at the Petition of the Prince in the Chancery, to Repeal a Grant made by King *Rich.* 2d. and Confirmed by King *Henry* the 4th, of the Manor of *Helefton* in *Kerſer* in the County of *Cornwall*, to *Nicholas Surnfield* Knight, and *Margaret* his Wife, for their lives; and at the Return of the *Scire facias*, the Prince by his Attorney appeared, and alſo the ſaid *Margaret*, her husband being dead; And the Prince prayed, that the ſaid Letters Patents in manner aforeſaid made, might be revoked and made void, and the Lands be ſeiſed in the Kings hands, and delivered to the Prince as parcel of his Dutchy; according to the form and effect of the Grant, and union of the Grandfather of the King, made of the ſaid Lands to the Dutchy: And the Record of it being delivered in by the Chancellor into the Kings-Bench, *Gaſcoigne* being then Lord Chief Juſtice, *Margaret* the Defendant pleaded the Grant of the King R. 2. to her for life, and prayed in Aid of the King, and had it; and the Court gave day, &c. And the Prince at the day brought a *Procedendo in loquela dum tamen ad judicium reddendum Domino Rege inconſulto nullatenus procederetur*: and thereupon, *Margaret* made default, and thereupon day was given to the Prince, who brought a *Procedendo ad judicium*: upon which the Court gave Judgment, That the ſaid Manner, &c. ſhould be ſeiſed into the Kings hands, and delivered to the Prince as parcel of his Dutchy. Out of which Caſe, It is to be Noted, Where Ayd ſhall be of the King; and that in caſe of Aid Preyer, the Judges will not proceed to Judgment, before a *Procedendo* be awarded unto them. *Cook* 8. Part. 23. in the Caſe of the Prince.

8. The King ſeiſed the body and Lands of Lunatique by force of a Commiſſion, and granted the ſame over to a ſtranger; againſt whom an Action of Treſpaſs was brought, and the Patentee prayed in Ayd of the King: and it was adjudged he ſhould not have Aid; for the Grant was void; for the King nor his Patentee ſhall not have the profits of the Lands of a Lunatique, but ſhall have them onely to find him neceſſaries: but otherwiſe it is in the caſe of an Idiot, for there they ſhall have the profits to their own uſes. 28 H. 8. *Dyer*. 25. *Holmes* Caſe.

9. In a Writ of Dower, the Tenant vouched the heir of the husband who was in Ward to the King, for cauſe of Ward, and prayed in Aid of the King; and the Aid was granted; and then there

there came a *Procedendo*, to proceed to Judgment: and the Court was in doubt, what ſhould be done; But after upon adviſement, they gave Judgment, That the Demandant ſhould recover againſt the Tenants, and they over in value againſt the heir; but Execution was ſtayed. Mich. 8 Eliz. *Dyer.* 256. *Michaels* Caſe.

10. In an *Ejectione Firme*, the Deſendant prayed Aid of the Queen, becauſe the Reverſion after the Term ended, which the Defendant held, was come into the Queen by the Attainder of the Earl of *Northumberland*; and the Aid was granted: and in the Chancery the Deſendant prayed for him and the Queen, That the Court would grant a ſearch for the Queens Title: But the Opinion of the Juſtices was, That no ſearch ſhould be granted in this caſe, becauſe the Queen was at no damage or prejudice, if the Plaintiff recover in an *Ejectione Firme*: and the Court held, That ſearch was grantable in any Action, but in a Petition of Right: Wherefore in the principal Caſe a *Procedendo* was granted; for that upon an Aide Preyer, no ſearch was grantable; but not to proceed to Judgment *Regina inconſulta.* Mich. 15 Eliz. in B. R. *Dyer.* 320. *Gay* and *Bandes* Caſe.

11. King *Henry* the 8th gave Lands in taile to *Tho: Culpeper*, the remainder in taile to *John Culpeper*; *Thomas* was Attainted of Treaſon, which Attainder was confirmed by Parliament, and the actual ſeiſin of the Land given by the Act to *Henry* the 8th, ſaving Rights, Titles, Entries, Reverſions, Remainders, &c. of ſtrangers. The King ſeiſed of the Land, granted the ſame to one *Buſh* in Fee; *Thomas Culpeper* dyed without Iſſue, *John Culpeper* entred, and being ouſted by *Buſh*, brought a Writ of *Entry ſur Diſſeiſin* againſt *Buſh*, who ſhewed all the matter; and the diſcent of the Seignory to King *Edward* the 6th, and prayed in Aide of him, and the Aide was granted, and 4. ſearches were granted in the Chancery, depending with a *Mandamus*, was awarded at the Suit of *Buſh*; and upon that, the Grant in taile to *Tho. Culpeper* was found, and the Attainder and Execution, and the Dates being falſe, a *Melius Inquirendum* was awarded; the true date of the Letters Patents was found, but the Attainder and Execution were found to be before the Grant: upon which Return in the Chancery, for the apparent untruths, a *Procedendo* was awarded; and the Demandant was not put to his Petition, or *Monſtrans de Droit*; Becauſe it ſeemed to the Juſtices upon the matter in Law, That the baſe Fee of the King was determined by the death of *Tho. Culpeper* without Iſſue; and that the Remainder and Entry of the Plaintiff, was ſaved by the ſaid Act of Parliament: But yet the Juſtices in this Caſe would not proceed to Judgment, without a *Procedendo* to them awarded. See Trin. 1 Ma. *Dyer* 100. *Culpeper's* Caſe.

12. In an Action of Treſpaſs brought againſt two; The Defendants claimed ſeverally Common appendant to the Mannor of *B.* whereof they were ſeveral Tenants; which Mannor was holden of King *Henry* the 5th, as of his Dutchy of *Lancaſter*, by Knights Service, and was in Ward of the King for the Non-age of J. S. The Wardſhip of whom was granted by King *Henry* the 5th, to one of the Defendants, under the Seal of the Dutchy of *Lancaſter*, rendring to him and the heirs of his Dutchy 20 l. *per annum*, during the Non-age of the heir; and prayed in Aide of King *Henry* the 6th; and he had Aide by theſe words, *ſcil. ſequatur penes Dominum Regem*; and afterwards a *Procedendo* came out of the Chancery in the name of the King, and not as Duke of *Lancaſter*, to proceed *in loquela ſed non ad judicium rege inconſulto.* Mich. 4 Eliz. *Dyer.* 209. acc.

13. In *Ejectione Firme*, The Defendant pleaded, That Queen *Elizabeth* was ſeiſed in Fee of the Mannor of St. *Needs*, of which the Tenements were parcel, and by her Letters Patents *Anno* 31 of her Raign, demiſed the Tenements to *A.* for life, the remainder to J. S. for life, the remainder to J. D. for life; and that the Queen dyed, and the Reverſion came to the King. *A.* dyed, and 14 Jac. J. S. did demiſe the Tenements to the Defendant for three years; and that C. & D. did ouſt him, and diſſeiſed J. D. whereby they were ſeiſed by diſſeiſin, and made the Leaſe to the Plaintiff, upon which the Defendant did enter, claiming his Term, and ſo was poſſeſſed, the Reverſion to J. S. for life, the Remainder to J. D. for life, the Reverſion to the King; and prayed in Aide of the King, and did aver the life of J. S. It was adjudged in this Caſe, That the Aide was not grantable, 1. Becauſe it is but an Action of Treſpaſs; and no Freehold is to be recovered, and he is able to plead to all matters in Treſpaſs. 2 Becauſe a man ſhall never have Aid of the King, but where he is Bayly, or Servant immediate to the King. Mich. 14 Jac. in C. B. *Bryſon* and *Mannings* Caſe. *Bridgman* 87.

14. In a Writ of Errour brought to reverſe a Judgment, Aide was prayed of the King by the Defendant in the Writ of Errour. It was the Opinion of all the Juſtices, and ſo adjudged, That no Aid ought to be granted in this caſe: But where Land is granted in Fee Farm, and demanded, there the party ſhall have Aid granted unto him; but not where Land is not demanded, or but collaterally demanded: but when the Land comes once in Queſtion, then Aid ſhall be granted, but never before. Trin. 10 Jac. in B. R. *Baker* and *Nichols* Caſe. *Bulſtr.* 1. Part. 218.

15. In Treſpaſſe, for taking two Steers; The Defendant juſtified, For that the King by his Letters Patents did grant to him and his heirs, That he ſhould take at two Bridges within his Mannor of *Doncaſter*, viz. *Mary-bridge*, and *Willow-bridge*, ſuch Toll for the paſſage of Cattel, as is uſed to be taken *ibi et alibi infra Regnum Angliæ*; and the Defendant averrs, That at *Burrow*-Bridge in the County of *York*, there was uſed to be taken 6 d. for every Score of Beaſts; and ſo he juſtifies the taking of 12 d. for the paſſage of 40 beaſts, and prayed in Aide of the King. It was adjudged *per Curiam*, That he ſhould be ouſted of the Aide, becauſe the Patent is, ſuch Toll as hath been uſed to be paid *ibi et alibi*, which is meer incertain and void; and the averring the payment at another place, and not there, was not good: Wherefore it was awarded he ſhould Anſwer, without Aide. Paſch. 15 Jac. in B.R. *Lightfoot* and *Lenett*'s Caſe. *Cro.* 2. Part. 421.

Aide *to marry the Lords eldeſt Daughter; and to make his eldeſt Son a Knight.*

1. BY the Ancient Common-Law, every Tenant in Knights ſervice, and every Tenant in Socage, was to give his Lord a reaſonable Aide to make his Eldeſt Son a Knight, and to marry his Eldeſt Daughter: But this Aide was incertain by the Common-Law; but by the Statutes of *Weſt.* 1. and 1 E. Cap. 35. the ſaid Aide was made certain; and there is called *Rationabile Auxilium*, viz. he who holdeth his Lands by Knights ſervice, ſhall pay 20 s. to the Lord to make his Son a Knight, or to marry the Daughter, and no more: and he who holdeth Lands of the yearly value of 20 l. in Socage, he ſhall pay 20 s. to the Lord to make his Son a Knight, and 20 s. to marry his Eldeſt Daughter: and for this Aide the Lord might diſtrain and avow if he pleaſed.

2. The Kings Tenant in like manner ſhall pay Aide to the King to make his Eldeſt Son a Knight, or for to marry his Eldeſt Daughter, *viz.* every one who holdeth a Knights Fee, 20 s. and he who holdeth half a Knights Fee, 10 s. and ſo according to that rate. See 30 H. 3. *ex parte remembr. Domini. Theſaur. in Scaccario Auxilium nobis Conceſſum, ad primogenitam filiam noſtram maritandam.* And ſee divers Records vouched, to prove Aid was granted for the making of the Kings Eldeſt Son a Knight, and the marriage of his Eldeſt Daughter, in *Cook. Seleſt Caſes.* 29.

3. If the Eldeſt Son dyeth before he cometh to the age of 15 years, or before the Lord hath levied the Aide to make him Knight; then the Lord ſhall have Aide for the younger Son to make him Knight when he cometh to the age of 15 years; and yet he is not *primogenitus ſitus*, but he is the *primogenitus* which is then alive; for that is ſufficient: for he ought to be heir apparant: and ſo if the danghter dyeth who is eldeſt, before the Lord hath levied Aide of his Tenant to marry her, then he may have Aide for the next eldeſt, after ſhe is of the age of 7. years. *Fitzh. N. Br.* acc. 82.

4. If the Lord have Aide to make his Son Knight, or to marry his daughter, and dyeth before he hath paid the ſame, then the Son or daughter ſhall have an Action of Debt againſt the Fathers executors for the money; and if the Executors have no goods of the Father, then the daughter ſhall have an Action of debt for ſo much of the money as ſhe wanteth againſt the Fathers heir; and this appeareth by the Statute of *Weſtm.* 1. Cap. 35. See the Statute.

5. Note: It was moved to the Court of Common-Pleas; If Tenant in Burgage ſhould pay Aide unto the King, to make his Eldeſt Son Knight; and the point reſted in this, If Tenure in Burgage were a Tenure in Socage? for every Tenure in Socage was to yield a reaſonable Aide to make the Eldeſt Son Knight, and to marry the Eldeſt Daughter. And it was Reſolved by the whole Court, That Burgage Tenure is Socage. See *Litt.* 36. B. Burgage Tenure is, where an Ancient Borough is, of which the King is Lord; and thoſe who have Tenements within their Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent; and ſuch a Tenure is but Tenure in Socage; and all Socage Land is Contributory to Aid, and therefore a Tenant in Socage is Contributory to it. But it was Reſolved by all the Juſtices of *England*, That no Tenure ſhould pay for a reaſonable Aid to marry the daughter, or to make the ſon a Knight, but Tenure by Knights ſervice, and Tenure by Socage. But Tenure by Grand Serjantie, Tenure by Frankalmoigne, Tenure by Divine Service, ſhall not pay ſuch Aide. Alſo it was holden, That he who holdeth a Rent of the King by Knights Service, or in Socage, ſhould pay Aide: And a Rent may be holden in Socage. Hill. 6 Jac. in C.B. *Cook. Seleſt Caſes.* 27, 28, 29.

Alien *and* Denizen.

Who ſhall be an Alien, and who not; And where Lands ſhall diſcend to an Alien, where not: And where and What he may purchaſe; and to whoſe uſe.

1. AN Alien is a Subject that is born out of the Allegiance of the King, and under the Legiance of another, and can have no reall or perſonal Action for or concerning Land; but in every ſuch Action the Tenant or Defendant may plead, That he was born in ſuch a Country which is not within the Legiance of the King; and demand Judgment if he ſhall be anſwered. *Cook* 7. Part. 16. *Calvin's* Caſe.

2. *Alienigena eſt, alienæ gentis, ſeu alienæ Ligeantiæ, qui etiam dicitur peregrinus, alienus, exoticus, extrarius, &c.* But he who is born, *ſub Fide, Legiantia, Obedientia Domini regis*, is not an Alien; and therefore thoſe perſons as were born in *Gaſcoign, Normandy, Aquitaine, Turney, Callite, Guyan*, whileſt they were under the Dominion of the Kings of *England*, were natural born Subjects, and not Aliens. *Cook* 7. Part. 22. *Calvin's* Caſe 5 Eliz. *Dyer* 224.

3. *Robert Calvin*, by his Guardian, brought an Aſſiſe of *Novel Diſſeiſin* againſt *Richard Smith*, and *Nicholas Smith*, of certain Tenements in *Hagerſton*, in the Pariſh of St. *Leonard Shoreditch*; The Defendants pleaded, That he ought not to be Anſwered, *Quia eſt alienigena, natus* 50. *Novemb. Anno Domini Regis Jac. Angliæ &c. tertio, apud Edenborough infra regnum Scotiæ ac infra Ligeantiam Domini Regis Regni ſui Scotiæ, ac extra Ligeantiam Regni ſui Angliæ*; Upon which the Plaintiffs demurred: And the Queſtion in Law was, If the Plaintiff being born in *Scotland* ſince the Crown of *England* diſcended to his Majeſtie, were an Alien born, and ſo diſabled to bring any Action reall or perſonal for any Lands within the Realm of *England*? And this Caſe being argued by all the Judges of *England* in the Exchequer-Chamber, and by the Lord Chancellor *Egerton*, It was adjudged, That the Plaintiff ought to be Anſwered; for that he was *Poſt natus*, and not an Alien born out of the Faith, Allegiance, and Obedience of the then King of *England*: But in that Caſe it was Reſolved, That thoſe who were born in *Scotland*, under the Allegiance of the King, as of his Kingdome of *Scotland*, before he came to the Crown of *England*, were Aliens born; and ſuch plea againſt ſuch perſons, was a good plea. *Cook* 7. Part. 1. *Calvin's* Caſe.

4. A man ſeiſed of Lands in Fee hath Iſſue an Alien, viz. born out of the Kings Ligeance, that Iſſue cannot be his heir *propter defectum ſubjectionis*, albeit he be born within Lawfull marriage; nor ſhall he be Inheritable to his Father or any other, although he be made a Denizen by the Kings Letters Patents: But if the ſame man be Naturalized by Act of Parliament, then he ſhall be not accounted in Law *alienigena*, but he ſhall be capable to purchaſe Lands in *England*. See *Cook*. 1. Part. *Inſtitutes*. 8. *Cook* 7. Part. *Calvin's* Caſe.

5. *Cornelius Godfrey* brought Debt upon a Leaſe againſt *Dixon*, and declared, That *Cornelius Godfrey* his Father being an Alien, had iſſue *Daniel Godfrey* born in *Flanders*: The Father was made Denizen, and had Iſſue the Plaintiff his ſecond ſon born in *England*; afterward *Cornelius* the Father dyed, and *Daniel* his eldeſt ſon was Naturalized by Act of Parliament, and made the Leaſe for years to *Dixon* rendring Rent, and dyed without Iſſue; and his brother the Plaintiff brought an Action of Debt for the Rent. It was holden in this Caſe, That by the Naturalization by Act of Parliament, *Daniel* was made Capable to purchaſe: and that the Leaſe made by him, was a good Leaſe: and that the Action of Debt would well lye for the Rent: But in that Caſe, It was agreed, That Denization by the Kings Charter doth not make the heir Inheritable. Hill. 16 Jac. B. R. *Godfrey & Dixon's* Caſe. *Godb.* 275.

6. An Alien Friend may by the Common-Law acquire and get within the Realm, by Guift, Trade, or any other lawfull means, any Treaſure or Goods perſonal whatſoever; and may maintain any Action for the ſame: But an Alien Friend cannot acquire, get or purchaſe any Lands, or maintain any Action real or perſonal for Lands, unleſs it be a houſe for their neceſſary habitation; which to deny to them, were to deny them Trade and Traffique, which is the life of every Iſland: But if ſuch an Alien Friend become an Enemy, then he is utterly diſabled to maintain any Action, or to get any thing within the Realm. See *Cook*. 7. part. 17. *Calvin's* Caſe.

7. If an Alien be made a Denizen, and purchaſeth Lands, and dyeth without Iſſue, the Lord by Eſchéat ſhall have the Land. *Cook*. 1. part. *Inſtitutes* 2. But if an Alien Merchant purchaſeth a Leaſe for years; in ſuch caſe upon Office found, the King ſhall have it: but if he purchaſeth a houſe for his habitation by reaſon of his Commerce and Traffique, there the King ſhall not have

have it: But if he relinquiſheth the Kingdome, or dyeth within the Term there upon Office found, the King ſhall have the houſe, and not his Executors. *Cook.* 1. part. *Inſtitutes.* Mich. 29 Eliz. Sir *John Croſts* Caſe. acc.

7. An Alien hath Iſſue two ſons, one of them purchaſeth Lands in Fee, and dyeth without Iſſue; the other ſhall not be his heir, becauſe there never was Inheritable blood betwixt the Father and them: and where the ſon by no poſſibility might be heir to the father, the one cannot be heir to the other. But if a man hath Iſſue two ſons, and after is attainted, and one of them purchaſeth Lands, and dyeth without Iſſue, the other ſhall be his heir, becauſe by the Attainder, the Lineal blood was only corrupted, and not the Collateral blood betwixt the ſons, which was veſted in them before the Attainder. Mich. 41 Eliz. in the Exchequer. *Hobbies* Caſe.

9. If a man be ſeiſed of Lands in Fee, and taketh an Alien to Wife, and then dyeth, the wife ſhall not be endowed; but if the King taketh an Alien to Wife, and dyeth, his wife ſhall be endowed by the Law of the Crown: Yet *Edmond*, the Brother of E. 1. married the Queen of *Navarre*, an Alien, and dyed; and yet it was adjudged, That ſhe ſhould be endowed of the third part of all his Lands of which he dyed ſeiſed. *Cook* 1. part. *Inſtitutes* 31. acc.

10. A Woman brought Debt as Adminiſtratrix to another; the Defendant pleaded, That the Plaintiff was an Alien born in *Gaunt*, under the Obedience of *Philip* King of *Spain*, the Queens Enemy. It was moved to be no plea, becauſe the Recovery was to another's uſe; and the King of *Spain* was no Enemy, becauſe no War was proclaimed. *Anderſon* ſaid, That there could not be a more open Enemy than King *Philip*, who Conſpired the death of the Queen; But *Periam* doubted, Whether he could be called Enemy or not, before Proclamation. Paſch. 31 Eliz. in C. B. *Owen* 45.

11. An Alien born purchaſed Lands, and before Office found, the Queen by her Letters Patents made him a Denizen, and then confirmed his Eſtate: and the Queſtion was, Whether the Queen ſhould have the Lands before Office found? It was ſaid by *Rodes*, Juſtice, That he ſhould take the Lands only to the uſe of the Queen; and then the Confirmation was void. And it was ſaid by *Fenner*, Serjeant, That if the Kings Neece purchaſeth Lands, and takes a husband, and hath Iſſue by her, and then ſhe dyeth, that the husband ſhould be Tenant by the Curteſie of thoſe Lands. 33. Aſſ. And if an Engliſh-man and an Alien purchaſed Lands joyntly, and the Alien dyed, that it was adjudged, That the other ſhould have all by Survivour. But *Periam* and *Anderſon* were of a contrary Opinion in both Caſes: for if the Freehold ſhould be in the Alien untill Office were found, then if Treſpaſs ſhould be done upon the Land, who ſhall puniſh it? for they held, That Alien could not have any Action. The Caſe was not Reſolved, *Ideo Quære.* But as to the Caſe of purchaſe by an Alien and a Denizen, the Caſe of 11 Eliz. *Dyer.* 283. was vouched; where *King* enfeoffed two, viz. an Alien and a Denizen, to his uſe; that there, if Office were found of it, the uſe to *King* for the moyety was gone, and that the Queen ſhould be ſeiſed to their own uſe, by her Prerogative. Mich. 29 Eliz. in C. B. *Goldeſbr.* 29.

12. Note: It is a good Plea in diſability of the perſon, that the Demandant or Plaintiff is an Alien born; and that in all Actions reall and perſonall againſt an Alien Enemy; but not abſolutely ſo againſt all other Aliens: For the Law doth diſtinguiſh between an Alien that is a Subject to one who is an Enemy to the King, and one that is a Subject to one who is in League with the King; for an Alien Enemy ſhall maintain no Action either real or perſonal, untill both Nations be in Peace and Amity: But the other Alien may maintain perſonal Actions; for he may buy and ſell; and then of neceſſity he muſt be of Ability to bring perſonal Actions. See *Cook* 1. Part. *Inſtitutes*, 129. *Cook* 7. Part. 17. *Calvin's* Caſe; and there ſee, That it was adjudged, Mich. 6 Jac. in the Common-Pleas, That an Alien born being no free Denizen, may defend, and bring a Writ of Errour; and it is no plea to ſay, That he is an Alien born. *Brownlow.* 1. part. 41.

13. Note: It is ſaid in *Beaumonts* Caſe, That if Lands be given to an Alien and the heirs of his body, that he hath an Eſtate taile; and yet ſuch Eſtate after his death is not diſcendable to his Iſſues. *Cook* 9. Part. 141. in *Beaumont's* Caſe.

14. The Caſe was this; A Copyhold was ſurrendred to J. S. in Truſt, that *Holland*, an Alien, ſhould take the profits thereof to his own uſe and benefit; and upon this, an Inquiſition was taken for the King, that the King ſhould have the Truſt; and that this Truſt was not a thing meerly in Action, but an Hereditament; and every Alien that purchaſeth, is ſaid to purchaſe to the Kings uſe; and it is here a truſt mixed with an Intereſt; and a Feoffment made in Truſt for an Alien, is all one with an uſe for an Alien. And that it was adjudged, That Truſts of Annuities, made for the Lord of *Sommerſet* who was attainted, were forfeited to the King. But it was adjudged, That the Inquiſition found for the King to entitle him to the Copyhold, ſhould be quaſhed becauſe the King cannot be entitled to the Copy-hold Lands of an

Alien,

Alien, much leſs to the uſe of Copy-hold Lands; and ſuch an uſe is a thing which lyeth onely in Privity: and in this caſe it was a truſt for the Alien to take the profits, and the Alien had no Eſtate in the Land; and it is a thing which lyeth onely in Action, and in Privity, and therfore not to be ſeized upon by another: and if the King ſhould have it, the Lord ſhould be wronged; which the King cannot do. Alſo it is not for the honour of King to have a Copy-hold Eſtate, which is a baſe Tenure: Alſo the Commiſſioners who found the Inquiſition for the King, had no power to ſeiſe the Lands into the Kings hands, but onely to enquire what Lands the Alien had: And afterwards Judgment was given, That the Lands ſhould be reſtored. Paſch. 23 Car. in B. R. The *King* and *Hollands* Caſe. *Stylis.* 20, 21, 40, 41, 75, 76, 84, 90, 94, 95.

15. A man ſeiſed of divers Houſes in Fee deviſed them by his Will to his wife, (being an Alien born) The King by his Letters Patents under the Great Seal, made the Wife a Denizen; the Deviſor dyed; the Wife took another husband, and the Letters Patents being corrupted in the Teſte, they obtained an Exemplification of the Inrollment of the Letters Patents under the Great Seal, which was with the true Teſte; and afterwards Office is found before Commiſſioners by force of a Commiſſion to them directed, under the Exchequer Seal; by which it was found, That the Wife was an Alien born. It was Reſolved in this Caſe, That the Office found by Commiſſioners under the Exchequer Seal, was not ſufficient to entitle the King to the Lands of an Alien born; but ſuch Office which conce as Fee and Freehold, ought to be by force of a Commiſſion under the Great Seal: And in that caſe it was Reſolved, That in the Caſe of an alien, perſon attainted, and the like, the Inheritance, or Freehold of the Land, ſhall not reſt in the King till Office found under the Great Seal: and alſo in that caſe it was Reſolved, That if an Alien and a Subject purchaſe Lands to them and their heirs, that they are Joyntts untill Office be found, and Survivour ſhall take place. Mich. 30 Eliz. in the Exchequer. *Cook* 5. Part. *Pages* Caſe.

16. A Bill was exhibited by the King's Atturney in the Star-Chamber againſt *William Courteen*, and 160 more Dutch-men, for buying and Tranſporting ſeverall great ſums of money ſince the beginning of the Kings Raign: In this Suit moſt of the Defendants had pleaded in Barr, Not Guilty; and after in their Rejoynder pleaded the General Pardon of 7 *Jacobi*, which did extend to buying of money, but not to tranſporting. Whereupon two Queſtions were made, 1. Whether ſo many of the Defendants as were neither Naturalized, nor Indenized, were capable of the Pardon? 2. Whether the ſame was now receiveable, not being pleaded in Barr? And in this Caſe it was holden by *Hobart*, Chief Juſtice, That the Dutch living here within the Kings protection, being of a friend Country, were truly under the King's ſubjection, and ſo capable of the Title of his Loving Subjects, and Obedient Subjects; and ſo within the words of the Preamble of the Act: but they are not capable of the diſtinct Title of Natural Subjects; and therefore if ſuch a ſtranger in Amity commit Treaſon here, the Indictment ſhall conclude *contra debitam allegiantiam*, and ſhall call the King *Dominum ſuum*, but not *Dominum naturalem*; and ſuch a ſtranger ſhall have benefit of the General Pardon againſt Common penal Laws, and Common penal Offences. Paſch. 16 Jac. in *Com. Stallat. Curteens* Caſe. *Hob.* 271.

Triall of Aliens *born, in what manner: And where it ſhall be* per medietatem Linguæ, *et è contra.*

1. *John Sheltys* a *French-man*, one of the Rebels with *Stafford*, who rebelliouſly took the Caſtle of *Scarborough* in the County of *York*, was arraigned in the Kings-Bench, upon an Indictment of Treaſon; and the Indictment was *contra Legiantiam ſuam debitam*: and the Indictment was holden to be good, although he was no Subject, becauſe it was in time of Peace between the Queen and King of *France*. But it was holden, That if it had been in the time of War, then the party ſhould not have been Indicted, but ranſomed. 2. It was holden, That the Tryal was good, where the *Venire facias* was awarded in *York* was general, and not *de medietate Linguæ*; for ſuch Tryall *per mediatatem Linguæ* doth not extend to Treaſons. See 4 Ma. *Dyer.* 145. Sir *John Shirley's* Caſe.

2. *Stephano Ferrara de Gama*, and *Emanuel Lewes Tinoco*, two *Portugals* born, coming into *England* under the Queens ſafe Conduct, and living here under her protection, joyned with Dr. *Lopez* in Treaſon within the Realms of the Queen: And in this Caſe it was Reſolved, 1. That the Indictment ought to begin, that they intended Treaſon *contra Dominam Reginam*, &c. omitting the words (*naturalem Dominam ſuam*) and it ought to conclude *contra Legiantiæ ſuæ debitum*: But it was Reſolved, If an Alien Enemy come into this Realm, and be taken in War, he cannot be Indicted of Treaſon; for the Indictment cannot conclude

conclude *contra Legiancie ſuæ debitum*; for he never was in the protection of the King, and therefore he ſhall be put to death by Martial Law; and ſo it was in 13 H. 7. in *Perkin Warbeck*'s Caſe, who being an Alien born in *Flanders*, faigned himſelf to be one of the Sons of King *Edward* the 4th, and invaded the Realm, with an intent to take upon him the Dignity; who had his Judgment and Tryall by Martial Law, and not by the Common-Law of *England*. Hill. 36 Eliz. in B. R. *Stephano Ferrara de Gama*'s Caſe. See *Cook* 7. part. 6. in *Calvin*'s Caſe.

3. The Kingdome of *Ireland* was a Dominion ſeparated and divided from *England* at the firſt; and came to the Crown of *England* by Conqueſt, in the time of *Henry* the ſecond; and the meer *Iriſh* were as aliens Enemies to the Crown of *England*, and were diſabled to bring any Action, and out of the protection of the Laws: and 5. Septs of the *Iriſh* Nation were onely enabled to the Lawes of *England*, viz. *Oneil de ultonia, Omologhlin de Media, O Connegher de Connacia, O Brian de Tholmonio*, and *Mac Murrogh de Lagenia*; as appears by Records of the Dominion of *Ireland*; which ſee, in Sir *John Davis*'s Book, of the Diſcovery why *Ireland* was not ſubdued, till the time of King *James*, fol. 103, 104, 105. and ſeverall Patents of Denization were granted to the *Iriſh*; which proved them to be meer Aliens. But afterwards, though the ſame was a ſeparate and divided Kingdom; yet whileſt they were under the Subjection and Obedience of the Kings of *England*, If High Treaſon had been committed by any *Iriſhman*, he might be arraigned, Indicted, and tryed for the ſame within *England*, and by the Laws of *England*; and ſo it was Reſolved by all the Judges of *England* in *Orucks* Caſe, *Anno* 33 Eliz. and ſo alſo it was Reſolved in Sir *John Perrott*'s Caſe, That *Ireland* was out of *England*, and yet that All Treaſons committed there, were to be tryed in *England*, and that by virtue of the Statute of 33 H. 8. Cap. 23. *Cook* 7. Part. 23. in *Calvin*'s Caſe.

4. Sir *Julius Cæſar*, Maſter of the Requeſts, brought an Action in the Kings-Bench, for ſlanderous words againſt *Philip Conſini*; The Defendant pleaded, Not Guilty, and ſaid, That he was an Alien born, &c. and prayed tryall *per mediatatem Linguæ*; which was granted: and at the *Niſi Prius* in *London*, but 6. Engliſhmen, and 5. Aliens appeared; and the Plaintiff prayed a *Tales de Circumſtantibus per mediatatem Linguæ*; and it was granted, ſo as there wanted one Alien; and the Record was, *Ideo alius Alienigena de Circumſtantibus per vic. London ad requiſitionem infra nominati Julii Cæſaris per mandat. Juſticiar. de novo appoſit, cujus nomen panello predict. affixatur ſecundum formam Statuti in hujuſmodi Caſu nuper edit. & proviſ. Qui quidem Jurator, ſic de novo appoſitus*, viz. *Chriſtianus Dethick alienigena, exactus venit ac in Juratam illam ſimul cum aliis Juratoribus predict. prius impanellatis et juratis Juratus fuit.* And the Jury found for the Plaintiff. It was moved in Arreſt of Judgment, That no *Tales* was to be granted *de Circumſtantibus*, when the Tryall is *per mediatatem Linguæ* by the Juſtices of *Niſi Prius*, by the Act. of 35 H. 8. becauſe in the Act it is ſpoken of Freehold of Jurours, and an Alien is not properly ſaid of any County, or to have any Freehold; nor can have Iſſues returned upon him. But it was adjudged, becauſe that the Statute was made for ſpeedy Execution, That it ſhould be expounded favourably, according to the intent and meaning of the makers of the Act: and though in the principal Caſe the *Tales* was prayed by the Plaintiff, whereas it ought to be *ad requiſitionem Defendentis*; yet that ſhould be taken to be but the Miſpriſion of the Clerk, and ſhould be amended. Mich. 35 & 36 Eliz. in B. R. Sir *Julius Cæſar*'s Caſe. See *Cook* 10. Part 104. *Denbawds* Caſe, acc.

Alienation *without Licence*; *and what ſhall be a good Licence.*

1. WHere the Kings Tenant who holdeth of him in Chief as of his Crown, alien the Land which he holdeth for life, in taile, or in Fee, without the Kings Licence, there the King may ſeiſe the Lands till a Fine be paid for ſuch Alienation: But where a man holdeth Land of the King, as of any Honour, Caſtle, Manor, being in his hands, which he hath by diſcent from any Collateral Auncеſtor, and the Tenant doth alien his Lands without Licence granted him by the King, if the Sheriff or Eſcheator doth diſturb the poſſeſſion of the Alienee, upon the Statute of 1 E. 3. cap. 23. he may have a Writ to the Sheriff or Eſcheator not to diſturb him, or diſtrain him for any Fine in ſuch caſe. But if a man hold of the King *in Capite* as of an Honour, the uſe is to take a Fine to the King for alienation without Licence. See *Fitzh. N. Br.* and *Cook* 4. Part. in the Warden of Sadlers Caſe.

2. If the Tenant holdeth of the King *in Capite*, and dyeth, his Wife ought not to marry her ſelf again without the Kings Licence; and if ſhe doth, then the King may ſeiſe thoſe Lands which ſhe holdeth in Dower, untill ſhe hath paid a Fine to the King, which commonly is one years value of

of the Lands which ſhe holdeth in Dower; and this is by the Statute of *Prærogativa Regis*, cap. 3. But note, that ſince the Statute of 32 H. 8. cap. 46. The Compoſition is given to the Maſter of the Wards, with 3. of the Councel of that Court; So they may take a reaſonable Fine at their diſcretion; and the King ought not to ſeize any other Lands, but the Lands which ſhe holdeth in Dower: and if the Wife will not claim nor ſue for her Dower, ſhe ſhall pay no Fine, nor ſhall any of her Lands be ſeiſed. See *Fitzh. Na. Br.* acc.

3. If a man be Tenant in taile, the Reverſion to the King, and the King doth grant him Licence to alien in Fee, and to take back an eſtate to himſelf and his wife in taile, the remainder to his right heirs, and he maketh ſuch a Feoffment, and taketh back an eſtate to him and his wife in taile, the remainder to his right heirs, and dyeth, his heir within age; The King notwithſtanding his Licence ſhall have the Wardſhip of the heir during the life of the wife; for that the Licence doth not give him power to alien the Kings Reverſion. *Fitz. Na. Brevium.* acc.

4. It was found by Office, that T. by Licence of the King, did marry the Kings Neece, and that certain Lands diſcended to the ſaid Neece, which her husband aliened without the Kings Licence to another; and for that cauſe the Lands were ſeiſed. Whereupon the Alienee came into the Chancery, and ſhewed all this matter, viz. That the Neece was married with the Kings Licence: And it was awarded, That the husband ſhould hold the Lands as Tenant by the Courteſie: and thereupon the Alienee had reſtitution. 33 E. 3. traverſe 36. *Cook.* 4. Part. The Warden and Comminalty of *Sadlers* Caſe. 55.

5. Every Grand Serjeanty is a Tenure *in Capite*, 30 H. 8. *Dyer.* 44. and ſee 14 E. 3. *Quare Impedit* 54. *Wilby* ſaith, That if Tenant by Grand Serjanty alieneth his Lands without Licence, the ſame is a forfeiture, becauſe the ſervice of the body of a man cannot be transferred over to another. But notwithſtanding the Opinion of *Wilby*, It was holden by all the Juſtices, Mich. 39 Eliz. That at this day, Grand Serjanty ſhall not be forfeited for Alienation without Licence, and that by the Statute of 1 E. 3. Cap. 12. See *Cook* 2. part. 81. in the Lord *Cromwell*'s Caſe.

6. The Lord *Clifford* held his Barony, and the Sheriffwick of *Weſtmerland* of the King, by Grand Serjeanty *in Capite*; and the King gave Licence to the Lord *Clifford*, that he might thereof enfeoffe two Chaplains; ſo that they gave back the ſame to the Lord *Clifford*, and the heirs males of his body the remainder over: The Lord *Clifford* according to the Licence did enfeoffe the Chaplains; and before they had given the Land back, the Lord *Clifford* dyed, his ſon and heir within age and in Ward to the King by reaſon of other Lands: All which matter was found by *Diem clauſit extremam* returned in the Chancery: And thereupon a *Scire facias* iſſued forth againſt the two Chaplains, if they could ſay, the ſaid Lands ſo occupied by them ſhould not be ſeized into the Kings hands; who appeared, and pleaded the Kings Licence: and the Feoffment of the Lord *Clifford*, and ſo they was the Kings Tenants by his Licence; and as to the re-enfeoffment, it was at their will to do it, with that that they were alwayes ready to have made the reſeoffment to his ſon and heir: and in that Caſe Judgment was given for the King, and that the Tenements ſhould be ſeized into the Kings hands. Out of which Caſe, *Cook* Collecteth, That the Lands were holden by Grand Serjanty, becauſe it ſaith, He aliened a great part of his Barony and the Sheriffwick of *Weſtmerland*, which was parcel of his Barony; and every Barony anciently was holden by Grand Serjeanty. Secondly, *Hampton* there, either forgetting the Statute of 1 E. 3. or not conceiving the ſame to extend to Grand Serjeanty, ſaith, That the King was ſeiſed in his own right, and diſ-inherited the heirs, *ſcil.* (if an Eſtate taile ſhall be made without Licence) which by the Expreſs letter of the Act of 1 E. 3. could not be, if it were holden *in Capite*, and not by *Grand Serjanty*. 18 Aſſ. *ultimo*. See *Cook.* 4. part. 80, 81. The Warden and Comminalty of *Sadlers* Caſe.

7. The King Licenced his Tenant to alien to two, and their heirs, and it appeared by a Fine in the Treaſury, that he who aliened had but an Eſtate in taile, the Reverſion unto the King. It was adjudged, That the Licence was void, and ſhall not enure to a Licence to alien ſo much as he might lawfully alien; *ſcil.* to them and their heirs during his life; for longer he could not alien, the Reverſion being in the King: But becauſe that the King was deceived when he gave the Licence to alien to them and their heirs, for that cauſe the Licence was void, and the Land was ſeized into the Kings hands. *Cook.* 1. Part. 44. in the Caſe of *Alton Woods*.

8. If the King Licenceth a man to alien two parts of the Manner of *D.* which is holden of him *in Capite*, and he alieneth the whole Manner, he hath not purſued his Licence, and there the King may ſeize the Land for ſuch alienation. But when an Act of Parliament authorizeth the owner of *Capite* Land to charge two parts of the Lands, and he chargeth the whole, It is good for the two parts, and void for the third part. *Cook.* 8. Part. 85. Sir *Richard Pexhall*'s Caſe.

9. *A.* ſeiſed of divers Mannors holden in *Capite*, Covenanted with *J. S.* and *J. D.* to ſuffer a Common Recovery, to the uſe of himſelf for life,

and after to the uſe of *B.* in taile, and after to the uſe of *C.* in taile, and after to the uſe of *B.* in Fee, with power of Revocation and Declaration of new uſes, in his life, or by his laſt Will. The King Licenſed *A.* to alien the ſaid Mannors to J. S. and J. D. and their heirs, without mention of any Declaration of any Uſes within the Licence; The Recovery is had accordingly: *A.* revokes the firſt uſes, and declares, that preſently after his death *C.* ſhould have the ſaid Mannors in taile, with divers remainders over. It was adjudged, That the King ſhould not have a Fine for this alienation upon the Revocation and Declaration of the new uſe. For it was Reſolved, That although no uſe is mentioned in the Licence, and the Licence was onely to alien to J. S. and J. D. that although the Eſtate of the Land was transferred to another, ſo as the King did not know his Tenant: yet becauſe it was executed by the Statute of 27 H. 8. of Uſes, and an Act of Parliament, to which every one is party, cannot do wrong, for that cauſe when the King giveth Licence to alien to J. S. and J. D. and the Statute executes the poſſeſſion in another, there ſhall not be any Fine to the King for that execution of the Eſtate by force of the ſaid Act of Parliament. *Cook.* 6. Part. 28. Viſcount *Mountagues* Caſe.

10. Tenant *in Capite* Levies a Fine to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon in taile, and after to the uſe of his 2d. ſon in taile, with divers remainders over; Proviſo, that it ſhall be lawfull for him to limit by writing the ſame Lands, to the uſe of any woman who he ſhould afterwards marry, for her life, in the Name of a Joynture; The King pardoneth his alienation without Licence, and afterwards by writing he limits the ſame Lands to one whom he had married for her life: And it was adjudged, That for the ſaid alienation no new Fine ſhould be paid to the King. 43 Eliz. in the Exchequer. Sir *William Mounſon's* Caſe. *Cook.* 6. Part. 29. *ibid.*

11. The Advowſon of a Prebend holden of the King, was aliened to an Abbot and his Succeſſours; And the King granted to the Abbot and his Succeſſours, That he and his Succeſſours ſhould hold the Prebend to his own uſe; Yet it was holden, that the King ſhould ſeize the Advowſon for the alienation in Mortmain, and ſhould deſtroy the Appropriation; for that the King ſhall not be ouſted of his right to the Advowſon by implication. 27 E. 3. 39. *Cook.* 5. Part. 56. in *Knights* Caſe.

12. *Thomas* Earl of *S.* being ſeiſed in Fee of an Acre and *dimidium* of Land in *W.* held the ſame of the Queen as of her Fee of *Crowland.* The Earl ſo ſeiſed, did procure a Licence from the Queen, and ſuffered a Recovery thereof, and made a Joynture, 24 Eliz. to his Wife; the Earl and his Wife dyed ſeiſed; the Lands (*inter alia*) deſcend to the now Earl, who ſold the ſaid Acre and *dimidium* of Land to J. S. who dyed ſeiſed in Fee; and the ſame Land (*inter alia*) deſcended to his ſon and heir; and upon Office by vertue of *Que plura*, it was found, That the ſaid Acre and *dimidium* of Land was holden at the taking of the Inquiſition of the King *in Capite.* The Queſtion in the Caſe was, Whether the ſaid Acre and half of Land was holden by Knights ſervice *in Capite*, or onely by Knights ſervice? And it was the Opinion of *Cook*, Chief Juſtice, and *Tanfield* Chief Baron, and ſo adjudged in the Court of Wards, That the ſuing of the Licence of alienation, is no concluſion unto the party, whereby the ſaid Lands ſhould become to be holden of the King in *Capite*, becauſe the words of the Licence are, *Que de nobis tenentur in Capite, ut dicitur*, onely: and ſo it was adjudged, Mich. 39 & 40 Eliz. in the Exchequer, Where the Alienee hath Licence, and pleaded his Licence upon a *Quo titulo*; and the Judges then reſolved, That neither the Licence, nor a Pardon, nor the pleading of them were any concluſion, to bind or eſtopp the party touching a ſuppoſed Tenure *in Capite*, becauſe the plea hath relation onely to the Licence or Pardon: But where the party is directly charged with a Tenure, and he will confeſſe a Tenure, as by *Bene, et Verum eſt, &c.* in ſuch caſe the Plea is a Concluſion to the party: And ſo they reſolved, That the ſaid Acre and half holden of the Queen as of her Fee of *Crowland*, was not holden by Knights ſervice *in Capite.* Mich. 7 Jac. in the Court of Wards, *Daviſon* and *Dymock's* Caſe. *Ley.* 16, 17.

Amendment.

1. IN a Writ of Partition between *Wotton* Plaintiff, and *Anthony Cook*, and *Temple* Defendants; *Temple* confeſſed the Partition, and Judgment was given againſt him with a *Ceſſet executio*: *Cook* pleaded to Iſſue; and in the Record of *Niſi Prius*, by negligence of the Clerk, the name of the Defendant was omitted; for it was, *Et prædict. ſimiliter*, and the word, *Anthonius* left out; but the principal Record was perfect: and notwithſtanding the default, the Iſſue was tryed and found for the Plaintiff; and that matter being moved in Arreſt of Judgment: But it was Reſolved, that notwithſtanding the ſaid

omiſſion, (and alſo that the Iſſue was, *Inter Wolton, Quære et Cook et Temple* Defendants; where Temple was no party to the Iſſue) that the Verdict was well taken; and that the ſaid defaults were amendable. Paſch. 9 Eliz. *Dyer.* 260.

21. In *Formedon* brought upon a Patent made by King *Henry* the 7th to *Digby*, The four firſt letters of the four firſt in the Patent of the King were left out, and a ſpace made for them, *viz.* H.R.F. and A. Yet it was adjudged a good Patent; for it is for the honour of the King; for the ſaid Letters were left out onely, to have them the more flouriſhed with gold, and ſo lymned out for the King's honour, and afterwards the Patent was allowed in the Kings Bench. Paſch. 17 Eliz. *Dyer.* 342. *Mountford* and *Digbies* Caſe.

3. A Common Recovery was ſuffered in a Writ of Entry to barr the Iſſue in taile, where the Warrant of Attorney was entred *Quod Alicia poſuit loco ſuo*; whereas her name was *Eliz.* And it was a Quære there, Whether it was amendable by the Statute of 8 H. 6. Cap. 23. But ſee that Quære reſolved in *Cook.* 8. Part. in *Blackamore's* Caſe. Which ſee 1 & 2 Ma. *Dy.* 105.

4. *Killegrew* recovered in Debt, Mich. 3 Eliz. againſt *Trewynnard* as heir, upon an Obligation made by his Father by *Nihil dicit*; and for default of a Warrant of Attorney for himſelf, he brought a Writ of Errour, which was returnable the firſt day of Trinity Term, *Anno* 5 Eliz. but the Writ was not delivered to the Clerk of the Treaſury till ſix dayes after the day of Retorn of it. And by the Opinion of the Court, the Defendant was Received to put in a Warrant of Attorney for the Plaintiff in the Writ of Errour: and Commandment was given to the Clerk of the Warranty to enter the Warrant accordingly. So Note, That in ſome Caſe, an Amendment may be after a Writ of Errour brought. Trinit. 5 Eliz. *Dyer.* 225.

5. After the Death of the Lord *Powes*, a Writ of *Mandamus* was awarded out of the Court of Wards to the Eſcheator, who by virtue of the Writ, gave their Verdict to the Eſcheator in Paper: Afterwards at the Suit of *Herbert* and his Wife, a *ſuperſedeas* came to the Eſcheator; and in the Writ, this ſyllable (*ſe*) was omitted; for the word was, *Superdeas*, at length: and in this Caſe, theſe two points were reſolved, 1. That the ſaid Writ was not amendable: and, 2. That No *Superſedeas* did lye in this Caſe. Mich. 1 and 2 Eliz. *Dyer.* in the Court of Wards. The Lord *Powes* Caſe. 170.

6. Upon a Writ of Annuity brought, the Judgment was, That the Plaintiff ſhould recover the arrearages before and pendant the Writ, *Quæ quidem arreragia in toto ſe attingunt* to 75 l. and that was a Quarters Annuity more then in truth was behind; and that the ſame was aſſigned for Errour, in Errour brought to reverſe the Judgment: And by the Opinion of the Court, the ſame was no Errour; for it appeareth by the Record, to what the arrearages did amount unto; for the day of the Writ brought, and alſo of the Judgment are certain; and the Judgment had been perfect, if the arrearages had not been put in it Certain; for that was not the Office of the Clerk to do; and therefore it was but the miſtaking and default of the Clerk, which is amendable: and the Judgment was affirmed. Paſch. 35 H. 8. *Dyer.* 55. *Trewynnard* and *Shewes* Caſe.

7. In an Action of Waſte brought upon the Statute of *Glouceſter*, the Writ was, *Quod nullus faciat vaſtum venditionem et diſtrictionem*; whereas it ſhould have been *deſtructionem*. And it was Reſolved in this Caſe, 1. That this being an Original Writ, ſhould not be amended, becauſe it is matter of ſubſtance; for *diſtrictio* is a Latine word, and doth alter the ſenſe of the Statute, &c. that matter of ſubſtance in an Original Writ is not amendable by any Statute. 2. It was Reſolved, That if an Original Writ wants form, or contains falſe Latine, or varies from the Regiſter in matter of form, after Verdict, no Judgment ſhall be ſtayed for the ſame; but if it wanteth ſubſtance, although be the Omiſſion of the Clerk, the ſame is not remedied by any Statute. Paſch. 31 Eliz. in B. R. *Cook.* 4. Part. 44 & 45. *Freeman's* Caſe.

8. In Debt, after Verdict, it was ſhewed to the Court, That *Robert Moor* was returned upon the *Venire facias*, and ſo named in the *Diſtringas*: But in the Pannel before the Juſtices of *Niſi Prius*, he was named *Robert Mawre*, and ſo upon the *Poſtea*; and it was Reſolved by the Court, That if it can appear upon Examination, that his right name is *Robert Moor*, ſo as he be well named in the *Venire facias*; and alſo that he was the ſame man who was returned and was ſworn, that the *Poſtea* ſhould be amended: And in that caſe, It was Reſolved, That at this day all diſcontinuances are remedied by the Statutes of 32 H. 8. and 18 Eliz. Mich. 35 Eliz. in B.R. *Cook* 5. Part. 42. The Counteſs of *Rutlands* Caſe.

9. In an Appeal of *Maheim*; A Jurour in the Pannell of the *Venire facias* was named *Paulus Cheate*; and in the *Diſtringas* and *Poſtea*, he was named *Paulus Cheate*; and becauſe the name of the Jurour was miſ-named in the *Venire facias*, and eſpecially in his Chriſtian name, It was Reſolved, That the Judgment ſhould be reverſed. Mich. 36 Eliz. in B. R. *Cook.* 4. Part. 43. *Codwell's* Caſe.

10. A Fine was levyed of a Mannor, and of a great number of Acres of Land, Meadow, &c. and

and after to the uſe of *B.* in taile, and after to the uſe of *C.* in taile, and after to the uſe of *B.* in Fee, with power of Revocation and Declaration of new uſes, in his life, or by his laſt Will. The King Licenſed *A.* to alien the ſaid Mannors to J. S. and J. D. and their heirs, without mention of any Declaration of any Uſes within the Licence; The Recovery is had accordingly: *A.* revokes the firſt uſes, and declares, that preſently after his death *C.* ſhould have the ſaid Mannors in taile, with divers remainders over. It was adjudged, That the King ſhould not have a Fine for this alienation upon the Revocation and Declaration of the new uſe. For it was Reſolved, That although no uſe is mentioned in the Licence, and the Licence was onely to alien to J. S. and J. D. that although the Eſtate of the Land was transferred to another, ſo as the King did not know his Tenant: yet becauſe it was executed by the Statute of 27 H. 8. of Uſes, and an Act of Parliament, to which every one is party, cannot do wrong, for that cauſe when the King giveth Licence to alien to J. S. and J. D. and the Statute executes the poſſeſſion in another, there ſhall not be any Fine to the King for that execution of the Eſtate by force of the ſaid Act of Parliament. *Cook.* 6. Part. 28. Viſcount *Mountagues* Caſe.

10. Tenant *in Capite* Levies a Fine to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon in taile, and after to the uſe of his 2d. ſon in taile, with divers remainders over; Proviſo, that it ſhall be lawfull for him to limit by writing the ſame Lands, to the uſe of any woman who he ſhould afterwards marry, for her life, in the Name of a Joynture; The King pardoneth his alienation without Licence, and afterwards by writing he limits the ſame Lands to one whom he had married for her life: And it was adjudged, That for the ſaid alienation no new Fine ſhould be paid to the King. 43 Eliz. in the Exchequer. Sir *William Mounſon's* Caſe. *Cook.* 6. Part. 29. *Ibid.*

11. The Advowſon of a Prebend holden of the King, was aliened to an Abbot and his Succeſſours; And the King granted to the Abbot and his Succeſſours, That he and his Succeſſours ſhould hold the Prebend to his own uſe; Yet it was holden, that the King ſhould ſeize the Advowſon for the alienation in Mortmain, and ſhould deſtroy the Appropriation; for that the King ſhall not be ouſted of his right to the Advowſon by implication. 17 E. 3. 39. *Cook.* 5. Part. 56. in *Knights* Caſe.

12. *Thomas* Earl of *S.* being ſeiſed in Fee of an Acre and *dimidium* of Land in *W.* held the ſame of the Queen as of her Fee of *Crowland.* The Earl ſo ſeiſed, did procure a Licence from the Queen, and ſuffered a Recovery thereof, and made a Joynture, 24 Eliz. to his Wife; the Earl and his Wife dyed ſeiſed; the Lands (*inter alia*) diſcend to the now Earl, who ſold the ſaid Acre and *dimidium* of Land to J. S. who dyed ſeiſed in Fee; and the ſame Land (*inter alia*) deſcended to his ſon and heir; and upon Office by vertue of *Quæ plura*, it was found, That the ſaid Acre and *dimidium* of Land was holden at the taking of the Inquiſition of the King *in Capite.* The Queſtion in the Caſe was, Whether the ſaid Acre and half of Land was holden by Knights ſervice *in Capite*, or onely by Knights ſervice? And it was the Opinion of *Cook*, Chief Juſtice, and *Tanfield* Chief Baron, and ſo adjudged in the Court of Wards, That the ſuing of the Licence of alienation, is no concluſion unto the party, whereby the ſaid Lands ſhould become to be holden of the King in *Capite*, becauſe the words of the Licence are, *Quæ de nobis tenentur in Capite, ut dicitur*, onely: and ſo it was adjudged, Mich. 39 & 40 Eliz. in the Exchequer, Where the Alienee hath Licence, and pleaded his Licence upon a *Quo titulo*; and the Judges then reſolved, That neither the Licence, nor a Pardon, nor the pleading of them were any concluſion, to bind or eſtopp the party touching a ſuppoſed Tenure *in Capite*, becauſe the plea hath relation onely to the Licence or Pardon: But where the party is directly charged with a Tenure, and he will confeſſe a Tenure, as by *Bene, et Verum eſt, &c.* in ſuch caſe the Plea is a Concluſion to the party: And ſo they reſolved, That the ſaid Acre and half holden of the Queen as of her Fee of *Crowland*, was not holden by Knights ſervice *in Capite.* Mich. 7 Jac. in the Court of Wards, *Daviſon* and *Dymock's* Caſe. *Ley.* 16, 17.

Amendment.

1. IN a Writ of Partition between *Wotton* Plaintiff, and *Anthony Cook*, and *Temple* Defendants; *Temple* confeſſed the Partition, and Judgment was given againſt him with a *Ceſſet executio*: *Cook* pleaded to Iſſue; and in the Record of *Niſi Prius*, by negligence of the Clerk, the name of the Defendant was omitted; for it was, *Et prædict. ſimiliter*, and the word, *Anthonius* left out; but the principal Record was perfect: and notwithſtanding the default, the Iſſue was tryed and found for the Plaintiff; and that matter being moved in Arreſt of Judgment: But it was Reſolved, that notwithſtanding the ſaid omiſſion,

omiſſion, (and alſo that the Iſſue was, *Inter Wolton, Quere et Cook et Temple* Defendants; where Temple was no party to the Iſſue) that the Verdict was well taken; and that the ſaid defaults were amendable. Paſch. 9 Eliz. *Dyer.* 260.

2. In *Formedon* brought upon a Patent made by King *Henry* the 7th to *Digby*, The four firſt letters of the four firſt in the Patent of the King were left out, and a ſpace made for them, *viz.* H.R.F. and A. Yet it was adjudged a good Patent; for it is for the honour of the King; for the ſaid Letters were left out onely, to have them the more flouriſhed with gold, and ſo lymned out for the King's honour, and afterwards the Patent was allowed in the Kings-Bench. Paſch. 17 Eliz. *Dyer.* 342. *Mountford* and *Digbies* Caſe.

3. A Common Recovery was ſuffered in a Writ of Entry to barr the Iſſue in taile, where the Warrant of Attorney was entred *Quod Alicia poſuit loco ſuo*; whereas her name was *Eliz.* And it was a Quære there, Whether it was amendable by the Statute of 8 H. 6. Cap. 23. But ſee that Quære reſolved in *Cook.* 8. Part. in *Blackamore's* Caſe. Which ſee 1 & 2 Ma. *Dy.* 105.

4. *Killegrew* recovered in Debt, Mich. 3 Eliz. againſt *Trewynnard* as heir, upon an Obligation made by his Father by *Nihil dicit*; and for default of a Warrant of Attorney for himſelf, he brought a Writ of Errour, which was returnable the firſt day of Trinity Term, *Anno* 5 Eliz. but the Writ was not delivered to the Clerk of the Treaſury till ſix dayes after the day of Retorn of it. And by the Opinion of the Court, the Defendant was Received to put in a Warrant of Attorney for the Plaintiff in the Writ of Errour: and Commandment was given to the Clerk of the Warranty to enter the Warrant accordingly. So Note, That in ſome Caſe, an Amendment may be after a Writ of Errour brought. Trinit. 5 Eliz. *Dyer.* 225.

5. After the Death of the Lord *Powes*, a Writ of *Mandamus* was awarded out of the Court of Wards to the Eſcheator, who by vertue of the Writ, gave their Verdict to the Eſcheator in Paper: Afterwards at the Suit of *Herbert* and his Wife, a *ſuperſedeas* came to the Eſcheator; and in the Writ, this ſyllable (*ſe*) was omitted; for the word was, *Superdeas*, at length: and in this Caſe, theſe two points were reſolved, 1. That the ſaid Writ was not amendable: and, 2. That No *Superſedeat* did lye in this Caſe. Mich. 1 and 2 Eliz. *Dyer.* in the Court of Wards. The Lord *Powes* Caſe. 170.

6. Upon a Writ of Annuity brought, the Judgment was, That the Plaintiff ſhould recover the arrearages before and pendant the Writ, *Quæ quidem arrearagia in toto ſe attingunt* to 75 l. and that was a Quarters Annuity more then in truth was behind; and that the ſame was aſſigned for Errour, in Errour brought to reverſe the Judgment: And by the Opinion of the Court, the ſame was no Errour; for it appeareth by the Record, to what the arrearages did amount unto; for the day of the Writ brought, and alſo of the Judgment are certain; and the Judgment had been perfect, if the arrearages had not been put in it Certain; for that was not the Office of the Clerk to do; and therefore it was but the miſtaking and default of the Clerk, which is amendable: and the Judgment was affirmed. Paſch. 35 H. 8. *Dyer.* 55. *Trewynnard* and *Skewes* Caſe.

7. In an Action of Waſte brought upon the Statute of *Glouceſter*, the Writ was, *Quod nullus faci at vaſtam venditionem et diſtrictionem*; whereas it ſhould have been *deſtructionem*. And it was Reſolved in this Caſe, 1. That this being an Original Writ, ſhould not be amended, becauſe it is matter of ſubſtance; for *diſtrictio* is a Latine word, and doth alter the ſenſe of the Statute, &c. that matter of ſubſtance in an Original Writ is not amendable by any Statute. 2. It was Reſolved, That if an Original Writ wants form, or contains falſe Latine, or varies from the Regiſter in matter of form, after Verdict, no Judgment ſhall be ſtayed for the ſame; but if it wanteth ſubſtance, although be the Omiſſion of the Clerk, the ſame is not remedied by any Statute. Paſch. 31 Eliz. in B. R. *Cook.* 4. Part. 44 & 45. *Freeman's* Caſe.

8. In Debt, after Verdict, it was ſhewed to the Court, That *Robert Moor* was returned upon the *Venire facias*, and ſo named in the *Diſtringas*: But in the Pannel before the Juſtices of *Niſi Prius*, he was named *Robert Mawre*, and ſo upon the *Poſtea*; and it was Reſolved by the Court, That if it can appear upon Examination, that his right name is *Robert Moor*, ſo as he be well named in the *Venire facias*; and alſo that he was the ſame man who was returned and was ſworn, that the *Poſtea* ſhould be amended: And in that caſe, It was Reſolved, That at this day all diſcontinuances are remedied by the Statutes of 32 H. 8. and 18 Eliz. Mich. 35 Eliz. in B.R. *Cook* 5. Part. 42. The Counteſs of *Rutlands* Caſe.

9. In an Appeal of *Maheim*; A Jurour in the Pannell of the *Venire facias* was named *Paulus Cheate*; and in the *Diſtringas* and *Poſtea*, he was named *Paulus Cheate*; and becauſe the name of the Jurour was miſ-named in the *Venire facias*, and eſpecially in his Chriſtian name, It was Reſolved, That the Judgment ſhould be reverſed. Mich. 36 Eliz. in B.R. *Cook.* 4. Part. 43. *Codwell's* Caſe.

10. A Fine was levyed of a Mannor, and of a great number of Acres of Land, Meadow, &c. and

the Clerk who entred the Kings Silver, entred it in this manner; *N. B. dat Dominæ Reginæ* 40 s. *pro Licentia Concordandi in Placito Conventionis*, of ſo many Acres of Land, Meadow, &c. leaving out the Manor: and becauſe it appeared upon examination, and upon the ſurvey of all the parts of the Fine, that the ſame was but the Miſpriſion of the Clerk who entred the Kings ſilver, and that the ſaid ſum of 40 s. was in truth as well for the Manor, as for the Reſidue; It was Reſolved, That the Entry ſhould be amended. Mich. 39 Eliz. *Cook* 5. Part. 43. *Bohon*'s Caſe.

11. A *Formedon* was brought of the Mannor of *Ilfield*, the Defendant pleaded in barr a Common Recovery againſt the Donee in taile of the ſaid Mannor; The Plaintiff pleaded, *Nul tiel Record*: The Record was *Iffeild* for *Ilfeild*. It was adjudged, That if it appear to be the Miſpriſion of the Clerk, or corrupted after, that it ſhould be amended, becauſe it was Common Recovery ſuffered by aſſent of the parties. Trin. 41 Eliz. C. B. *Cook* 5. Part. 46. *Cooks* Caſe.

12. A Writ of Errour was brought to reverſe a Fine; and it was aſſigned for Errour, That the Writ of Covenant was *Teſtè* 24 *Aprilis*, returnable 15 *Paſch.* and ſo the Retorn was before the *Teſtè*. It was adjudged, That it ſhould be amended; For a Fine, and a Common Recovery are Common Aſſurances made by conſent of the parties; and therefore ſuch Miſpriſions may be amended: But in other Actions, no amendment ſhall be in ſuch Caſe: and that it was ſaid, That 18 Eliz. *Norris*'s Caſe was, That a Writ of Errour was brought to reverſe a Common Recovery, 19 H. 8. and the *Teſtè* was a day after the Retorn: and becauſe it appeared, that it was the miſpriſion of the Clerk, the ſame was amended. Trin. 41 Eliz. in B. R. *Gages* Caſe. *Cook* 5. Part. 45.

13. An Action of Treſpaſs was brought, for breaking of his Cloſe; *ſcil.* 380 Acres parcel of *Colme*-Park in *Com. Eſſex*, and 300 Oakes, 300 Aſhes, 300 Maples, 100 Beeches there growing Cutting, and a 1000 Load of Wood and underwood carrying away. The Defendant to the whole Treſpaſs *præter fractionem clauſorum, necnon præter ſucciſionem* 200 Oakes, and 10 Aſhes, &c. pleaded, Not Guilty; *et quoad fractionem clauſorum prædict. ac herbæ prædict. pedibus ambuland. conculcat, et conſumptionem*; the Defendant pleaded matter in Law, by which he intitled himſelf to the ſame Land, and juſtified the Cutting of the Trees; but in the *Quoad*, &c. as appeareth before, the Treſpaſs as to the Trees was utterly omitted, and ſo in Law nothing pleaded thereunto; and then the Demurrer being joyned, is all in the diſjunctive; and therefore, to the intent that the matter in Law might appear by aſſent, the Defendants Plea was amended; For it was agreed by the whole Court, That all was diſcontinued, and thereupon the Roll was amended, and *Quoad ſucciſionem arborum* was inſerted. Paſch. 31 Eliz. in B. R. *Cook* 4. Part. 62. *Herlakenden*'s Caſe.

14. Debt was brought againſt Husband and Wife, upon an Obligation made by the Wife before marriage; the Defendant pleaded to Iſſue; which was found againſt him: upon which Judgment was found againſt him. And afterwards a Writ of Errour was brought, and it was aſſigned for Errour, That the Writ was brought againſt them in the *Detinet* onely; whereas it ought to be in the *debet et detinet*. And it was Reſolved by the Court, That this being matter of ſubſtance, was not remedied by the Statute of 18 Eliz. Trin. 30 Eliz. in B. R. *Wilcott*'s Caſe. *Cook*. 5. Part. 36.

15. In Treſpaſs, upon the general Iſſue pleaded, at the Aſſiſes, one of the Jurours of the Principall Pannell appeared onely; and at the prayer of the Plaintiff, a Pannel *de Tales de Circumſtantibus* was returned by the Sheriff in this manner; the title was, *Nomina decem Talium*, and under the ſame he returned 11. Jurours. And it was Reſolved, That this Miſpriſion of the Clerk ſhould be amended, and *Decem* put out of the title; and then the Title ſhall be *Nomina Talium* onely, and that ſhall be good enough. *Cook*. 10. Part. 102. *Denbands* Caſe.

16. A Note was delivered to the Curſitor, to make an Original againſt J. S. *militem*; and he made the Original againſt J. S. *generoſum*; and in the Exigent, and in the other proceſs, and in the Declaration, he was named *Miles*: and If the Original being out of the Chancery, ſhould be amended in the Common-Pleas, was the Queſtion? It was Reſolved, That an Original was not amendable by the Common-Law in the caſe of a Common perſon; but in the caſe of the King it was amendable in the Chancery. And in that caſe theſe Grounds and Rules were put and agreed; 1. At the Common-Law, default of an Entry of a Continuance of an Eſſoine which was Miſpriſion of the ſame Court in form of the Entry, was amendable by the Court. 2. Variance from any part of the Record was amendable by the Common-Law. 3. In the ſame Term, the Judges may amend as well their Judgment, as any other part of the Record; for the ſame Term the Record is in the breaſts of the Judges, and not in the Roll. But the Miſpriſion of the Clerk in proceſs in another Term, was not amendable in the Court; for then the Roll is the Record. 4. The Statute of 14 E. 3. Cap. 6. doth not extend but to amendment of the Miſpriſion of the Clerk in Proceſs, to be amended in due form; and that Statute extends

to

to a Judicial Writ or proceſs; but that doth not extend to an Original, nor to a Writ which is in the nature of an Original, becauſe the ſame is not included with n the word *Proceſs*. 5. A Protection ſhall not be amended in the Common-Pleas, becauſe it is made in another Court. 6. An Original Writ ſhall abate for want of form; but a Judiciall Writ ſhall not abate if it hath ſubſtance. 7. By the Statute of 14 E. 3. Cap. 6. A word may be amended which wants, as well as a letter, or ſyllable; and a tittle ſhall be amended within the word ſyllable. 8. If an Original wanteth Legall form, the ſame is ſuch a Miſpriſion as is not amendable by the Statute of 8 H. 6. cap. 12. for the Officers and Clerks of the Chancery are tyed to have skill and knowledge in the true form of Original Writs. 9. Falſe Latine in an Original ſhall not be amended, as *hos breve*, for *hoc breve*; but the manner of Miſpriſion as negligent writing of a word which is not a Latine word, as, *Imaginavit*, for *Imaginatus eſt*, is amendable. 10. Negligent omiſſion, or addition of a thing wh.ch appeareth he himſelf ought to have added, or omitted of courſe, ſhall be amended: But omiſſion, or addition of any thing which alters the form of the Writ, is not amendable. 11. Miſpriſion or negligence of a Clerk or Officer not in writing, but in negligent keeping of Records, or in voluntary defacing of them, by which the Record becomes imperfect or Erroneous, ſhall be amended by the Statute of 8 H. 6. cap. 12. Counts which want ſubſtance ſhall not be amended in another Term; but by the Statute of 36 E. 3. a Count ſhall not abate for form. 13. Matters of ſubſtance in a Barr, or Replication, eſpecially matters in fact ſhall not be amended in another Term; But a thing apparent to be Miſpriſion, which the Clerk of Courſe ought to have added without any inſtruction of the party, although it be in a point materiall, ſhall be amended in another Term. 14. If any Errour be in the Judgment, the ſame ſhall not be amended in another Term, as if the Entry be *Ideo in Miſericordia*, where it ought to be *Capiatur*. *Cook*. 8. Part. 156, 157, 158, 159, &c. *Blackamores* Caſe.

17. In Waſte for digging of Land, and taking away Oaks, The Defendant ſaid, That the Queen by her Letters Patents under the great Seal of *England* granted to him, that he might digg for Mines of Cole in the Land, and prayed it might be entred *verbatim*; and the Grant under the Exchequer-Seal was entred; upon which the Plaintiff demurred. It was moved, It might be amended: But the Opinion of the Court was, It cannot be amended after Demurrer. Judgment was given for the Plaintiff. Paſch. 28 Eliz. C. B. *Goldeſbr.* 1.

18. In a Replevin they were at Iſſue, Mich. 28 & 29 Eliz. and the Plaintiff had a *Venire facias* in Mich. Term, returnable *Termino Hill.* and in Hill. Term took an *Alias*, retornable in *Termino Paſch.* and ſo award d it in the Roll of Mich. to the intent the matter ſhould not be tryed at the Aſſizes in *Kent*, and thereupon the Avowant moved the Court, and prayed expedition; and the Court cauſed the Roll to be brought in, and notwithſtanding that it was a Roll of Mich. Term; Yet becauſe it was awarded the ſame Term, they amended the Roll, and awarded the *Alias* retornable the ſame Term of Hillary. Mich. 29 Eliz. *Boſſe* and *Hawtrey's* Caſe. *Goldeſbr.* 31.

19. A *Quare Impedit* was brought againſt the Biſhop of *Lincoln* and others; and the Writ was, *Suum ſpectat donat.onem*, and the word (*ad*) was omitted; and the Court took time to adviſe: and at laſt, by the Opinion of all the Juſtices, it was amendable, and a Clerk of the Chancery came into the Court of the Common-Pleas, and amended it. Hill. 30 Eliz. in C. B. *Brookly* and the Biſhop of *Lincoln's* Caſe. *Goldeſbr.* 78. & 79.

20. A Writ of Errour was brought by the Lord *Seymour* againſt Sir *John Cliſton* upon a Judgment given againſt him; and the Errour deſigned was, That the Judgment was, *Quod recuperet verſus Ed. Seymour*; and did not ſay, *prædict. Ed. Seymour*, but the word [*prædict.*] was omitted. And all the Juſtices agreed, That it was amendable; and ſo the Judgment was affirmed. Paſch 30 Eliz. The Lord *Seymour* and Sir *John Cliſton's* Caſe. *Goldeſbr.* 89.

21. An Original Writ was returned by —— *Needham* Eſquire, Sheriff, and his Chriſtian name was left out: It was moved to have his name put into the Writ, but the Court denyed it, becauſe the Record was made up. Mich. 40 Eliz. in C.B. *Broughton* and *Field's* Caſe. *Goldeſbr.* 113.

22. *Thomas Welcome* Executor of *Anthony Welcome*, Executor of *John Welcome*, brought Debt againſt J. S. in the Common-Pleas, and Judgment was given, and entred *quod prædict. Johannes Welcome recuperet*; when it ſhould be, *Quod prædictus Thomas recuperet* It was moved, That the Record might be amended, for that it was the Miſpriſion of the Clerk: But it was adjudged to the contrary, becauſe the Judgment is the Act of the Court, and not of the Clerk Hill. 43 Eliz. in C.B. *Welcome's* Caſe. *Gold ſbr.* 104.

23. A Writ of Errour was brought upon a Judgment given in Debt in C. B. and the Errour aſſigned was, That the Original Writ was 20 l. and all the mean proceſs were ſo; but when the Defendant appeared to the Exigent, the Entry was, *Quod Defendens obtulit ſe in placito debiti decem librarum*, where it ought to be 20 l. It was moved, it might be amended, being Miſpriſion of the Clerk;

Clerk: but upon view of the Record, it appeared, That no Original was certified, and therefore could not be amended. Ter. Hill. 43 Eliz. *Staugiſton's* Caſe. *Goldeſb.* 133.

24. In Debt brought in the Common-Pleas upon an Obligation bearing date 12 *die Novemb.* the Defendant imparled, and the next Term the Plaintiff declared anew upon an Obligation bearing date 12. Febr. and upon *Nihil dicit* had Judgment. Errour was brought by the Defendant. The Plaintiff prayed that it might be amended. The Court was divided in Opinion. *Ideo Quære.* Hill. 43 Eliz. in B. R. *Wilkinſon's* Caſe. *Goldeſbr.* 136.

25. A Writ of Errour was brought upon a Judgment in the Common-Pleas; and it was aſſigned for Errour, that the Judgment was, That the Defendant ſhould recover 20 l. aſſeſſed to him *per Jur. nec non* 10 l. aſſeſſed to him *hic per Jur.* where it ought to be *per Cur.* The Court ſaid, They would have the Record brought out of the Common-Pleas thither, to ſee if it were ſo; and if it were ſo, it ſhould be amended: But the Juſtices of the Common-Pleas would not ſend the Record; *Cook* prayed it might be amended; for it is but the Miſpriſion of a Clerk, and that of a letter onely, *viz.* of *J.* for the letter *C.* for the word is written *Jur.* ſhort, whereas it ought to have been *Cur.* and ſo amendable by the Statute of 8 H. 6. But the Court was of a contrary Opinion, for that it is parcel of the Judgment; and you never ſaw the Judgment of the Court amended; for which it cannot be amended here. Hill. 43 Eliz. in B. R. *Harecourt's* Caſe. *Goldeſbr* 151.

26. A Writ of Errour was brought upon a Judgment given in the Common Pleas in a Replevin; the Errour aſſigned was; For that *Kidman* was returned in the *Venire facias*, and *Bidnam* was returned in the *diſtringas* and *Habeas Corpora*. It was ſaid, That it was not amendable, and that no amendment ſhould be after Judgment; for if it ſhould be, the Attaint of the party ſhould be taken away; and a Caſe between *Croſſy* and *Willet* was avouched; where *George Thompſon* was returned in the *Venire facias*, and *George Tomſon* was in the *Diſtringas*, and it could not be amended. But at laſt, the opinion of all the Juſtices of *England* was, That it ſhould be amended, in aſmuch as it appears upon examination the ſame party in the *Venire facias* was ſworn; and ſo there was no damage to any. Hill. 43 Eliz. in B. R. *Brewſter* and *Beaks* Caſe. *Goldeſbr.* 184. See Hill. 37 Eliz. in B. R. *Hugo* and *Pains* Caſe. *Owen.* 62. acc. See Trinit. 8 Jac. in B.R. *Bowſſe* and *Cannington's* Caſe. *Cro.* 2. Part. 244. acc.

27. An Action was brought upon the Statute of *Wincheſter* of *Hue-and-Cry*, againſt the Hundred of *C.* and it was found for the Plaintiff; and a Writ of Errour was brought, and all the Record was Certified; and now the Plaintiff prayed that two things might be amended; the firſt, the title of the Action; for upon the Roll it is an Action upon the Caſe, and it ſhould be an Action upon the Statute. But it was ſaid by *Hobart*, Chief Juſtice, and agreed by the whole Court, That it could not be amended; for that the Statute of 18 Eliz. did not give Amendments upon Indictments, or upon popular Actions, or Actions upon penal Statutes. The ſecond was upon the *Venire facias*, where *Gregory* was returned, but the Clerk of the Aſſizes returned one *George*: And by the Opinion of the whole Court there needs no amendment of it; it being in the *Tales de Circumſtantibus*, and not in the principal pannel, and alſo it was by conſent of the parties: and *Hobart* ſaid, If that Variance had been material, it ſhould not be amended; for that we will not make a New Certificate, for the Court of Kings-Bench may chooſe to credit the firſt or the ſecond Certificate, and ſo we ſhall ſubmit our Judgments to the Cenſure and pleaſure of another Court, which we will not do. Trin. 21 Jac. in C. B. *Harvey* and the Hundred of *Chelſams* Caſe. *Winch.* 66.

25. A *Quare Impedit* was brought *ad præſentandum ad Eccleſiam de Watton*; and before appearance, It was moved, That the Writ might be amended, for that his title of preſentation was to the Vicaridge of the ſaid Church, and not to the Parſonage: and the Court much doubted of it, becauſe it was in an Original Writ, and in a point of ſubſtance. See *Fitzh. Na.Br.* 32. and 15 Eliz. *Dyer.* 323. Yet becauſe the Attorney gave a Note to the Curſitor to draw a Writ *ad præſentandum ad Vicariam Eccleſiæ de Watton*: and becauſe it is a peremptory Action, and that the Miſpriſion happened by the fault of the Clerk, who did not purſue his direction. It was Ruled, That the Writ ſhould be amended; and the Curſitor being preſent in Court, was appointed to mend it. Trinit. 3 Car. in C. B. *Turner* and *Palmer's* Caſe. *Cro.* 1. Part. 53. See Mich. 18 Jac. in C. B. *Shirley* and *Underhill's* Caſe. *Hutton.* 41. acc. See *Hobart.* 327. acc.

29. In an Action upon the Caſe upon Aſſumpſit, The Writ and Declaration were againſt *Aunt* Executrix of Sir *William Wade*, and the Iſſue, Record, and *Venire facias* were accordingly for a tryall betwixt the ſaid parties; but the Tryal being by *Niſi Prius* in *London*, the Writ of *Habeas Corpora*, was to have *Corpora Juratorum*, &c. betwixt the Plaintiff and the Lady *Wilde*, Executrix of Sir *Henry Wade*, Knight; and this in arreſt of Judgment was moved to be a Tryall without warrant:

rant: But the whole Court was of Opinion, That in as much as the Iſſue is good, the Record of *Niſi prius* good, the *Venire facias* good, according to the Iſſue, though there was a miſpriſion in the *Habeas Corpora*, it was but the default of the Clerk, and might be amended, becauſe there is not any alteration of the Verdict; and it was appointed to be amended; and Judgment was given for the Plaintiff. Paſch. 2 Car. in C. B. *Smith* and the Lady *Wades* Caſe. *Cro.* 1. Part. 21. acc. See *Hutton.* 81. *idem.*

30. An Attorney of the Common Pleas brought an Attachment of Priviledge againſt *Hole*, and declared in an Action upon the Caſe upon Aſſumpſit; and after Verdict for the Plaintiff, and Judgment, Errour was brought, and aſſigned, becauſe there was no pledges entred upon the Imparlance Roll: It was moved, That it might be amended, and pledges inſerted; for it was ſaid, It was but matter of form, and ayded by the Statute of 18 Eliz. But the Court denyed the Amendment; for although the Iſſue Roll ſhall be amended by the Imparlance Roll, yet the Imparlance Roll ſhall not be amended by the Iſſue Roll being ſubſequent: and the Record being Removed, they would not amend it, being matter of ſubſtance, Mich. 3 Car. in C. B. *Wolfe* and *Holes* Caſe. *Cro.* 1. Part. 65. See *Clotworthy* and *Clotworthies* Caſe. Trin. 2 Car. 3. *Hutton* 82. acc. See Mich. 3 Car. *Hutton.* 92. the ſame Caſe.

31. In a *Quo Warranto* againſt the Corporation of *Maidſtone*, for claiming Liberties in the Village and Pariſh of *Maidſtone*, (in which a houſe called the *Mote*, wherein Sir *Humphry Tuſton* dwelt, and a great houſe called the Archbiſhops Palace, which was conveyed to Sir *John Aſhley*, were ſcituated) a Judgment was entred by Diſclaimer with conſent of parties *virtute vel prætextu Literarum Patentium geren. dat. Anno decimo Septimo Jacobi Regis*; but becauſe the words *geren. date Decimo ſeptimo Jac. Regis* were in the Margent, and by reaſon of a ſtroke made croſſe the words, the Clerk had omitted them in the Ingroſſing of the Judgment which was entred upon Record, *Anno* 2 *Car. Regis.* It was moved, That thoſe words might be enterlined, and the Record amended, being omitted by the negligence of the Clerk: which was much oppoſed by Sir *Humphrey* and Sir *John Aſhley's* Councel, that the Record could not be amended, being in another Term, much leſs in another year, eſpecially in the Kings Caſe: and when none of the Statutes of Amendments extend to a *Quo Warranto*, or Suits where the King is party: But it was holden by the Court to be amendable by the Courſe of the Common-Law, as well in another Term, as in the Term when it was entred; and being meerly a miſpriſion of the Clerk by the miſreading of the paper-book by examination of all Circumſtances, it is no more then when a Special Verdict is miſ-ſealed, which may be rectified by the Notes of the Clerk of the Aſſiſe; And thereupon the Record was amended. Mich. 4 *Car. Regis.* Sir *Humphrey Tuſton* and Sir *John Aſhley's* Caſe. *Cro.* 1. Part. 102.

32. In Debt againſt the heir of J. S. The Plaintiff declared, That J. S. by his Bond which he ſhewed, had bound himſelf in 200 l. &c. and left out the words which were in the Bond, (*Et ad eandem ſolutionem obligo me et hæredes meos*) which matter was moved in Arreſt of Judgment: It was moved, That the ſame might be amended, becauſe it was the meer fault of the Clerk, who had the Bond before him, and who confeſſed it to be ſo upon his examination: Againſt which it was ſaid, That it was not amendable, becauſe it was the ſubſtance of the Declaration, no more then where one declares in the *Debet et Detinet*; where it ought to be in the *Detinet* onely. But the Opinion of the Court was, It ſhould be amended; for the Action is brought againſt the heir, and ſo he is named in the Bond; and it was meerly the omiſſion of the Clerk, which is amendable. Hill. 4 Car. in B. R. *Forger* and *Sales* Caſe. *Cro.* 1. Part. 105. See Hill. 18 Jac. Rott. 673. *Walker* and *Worſley's* Caſe. *Hutton* 83. acc. See alſo Hill. 9 Jac. rott. 516. in C. B. *Govart* and *Bennet*, Caſe; the name of the Attorney, *viz. Henry* was omitted in the Imparlance Roll, and it was in the Plea Roll; and after Errour brought, it was amended. *Hutton* 83. *ibid.*

33. Debt was brought for 300 l. againſt *Arrowſmith*, for part *ſur emiſſet*, and the other part *ſur inſimul Computaſſet*; and in the Imparlance Roll both did not amount to 300 l. but wanted 60 l. and after Errour brought, it was amended. Trin. 16 Jac. rott. 581. *Arrowſmiths* Caſe. *Hutton* 83. See *Hob.* 246. acc.

34. Upon a Fine levied, Mich. 11. Eliz. The proclamations endorſed by the Chirographer, were well upon the Fine; but in the Tranſcript and Note of the Fine, which is delivered to the *Cuſtos Brevium* by the Chirographer by the Statute; the ſecond proclamation was entred to be made 20. *Maii*, where it ſhould have been 23 *Maii*, and that by Miſpriſion of the Clerk. The Court was of Opinion, That it ſhould be amended; for the Ingroſſment upon the Fine by the Chirographer is the foundation, and that being well, it is a ſufficient warrant to mend the other. And the Court held it a good Fine without any Amendment. Paſch. 9 Car. in C. B. *Strilleys* Caſe. *Hutton* 122.

35. In an Action upon the Caſe againſt the Keeper of the Gate-houſe, for an Eſcape of one in Execution, Trin. 2 Car. the Defendant pleaded Not Guilty. In *London* it was found by *Niſi Prius*;

Prius; and becauſe the Record of the *Niſi Prius* mentions the Judgment to be Trin. 3 Car. which was a Miſpriſion of the Record, the Plaintiff was Nonſuit. It was moved, that by reaſon of this miſpriſion, the Record of *Niſi Prius* was not warranted by the Roll; and the *Nonſuit* thereupon being *Null*, the *Poſtea* ſhall not be Recorded: Wherefore à *Diſtringas de Novo* was prayed; and upon ſhewing of Preſidents, a *Diſtringas de Novo* was awarded. Mich. 6 Car. in B. R. *Aquila Weeks* Caſe. *Cro.* 1 Part. 147.

36. Errour brought of a Judgment in Dower; the Record certified the Defendant in *miſericordia*; and the Errour aſſigned was, becauſe the Defendant being an Enfant, and appearing by Guardian, ought not to be amerced; It was amended in C.B. and made *Nihil in miſericordia, quia Infans*; upon a *Certiorari* this was certified into the Kings-Bench; It was prayed, it might be amended in that Court: and becauſe it was certified, that the firſt was miſ-recited, the Court would not intend that it was amended after the Judgment was entred, but that the Record in the Court there was well entred at the firſt; and being in caſe of Dower which is favoured, the Court agreed, That the *Certiorari* to ayd the Judgment was well awarded; and the Record was amended accordingly, and the Judgment affirmed. Trin. 11 Car. B. R. *Smith* and *Smith's* Caſe. *Cro.* 1. Part. 296.

37. An *Ejectione Firme* brought againſt two; the Entry in the Declaration was layed to be in the plural number *Intraverunt*, and the Expulſion and Ejectment layed to be in the ſingular number, *Scil. expulit et ejecit*; And whether it was amendable, was the onely Queſtion? And the Opinion of the Court was, That it was amendable; and afterwards was amended accordingly: and two Preſidents were vouched and ſhewed: The one was before *Yelverton* Juſtice at the Aſſizes: where the Caſe was, That in caſe of Felony two was Indicted, and found guilty; and the Indictment was in the ſingular number: and the ſame being a doubt to *Yelverton*, he moved it to all the Judges, and 9. Judges delivered their Opinions, That the Indictment was amendable; and was amended accordingly, and the parties were hanged for the Felony. The other was in an Ejectment, which ought to be *Vi et armis*; and *Vi et armis* was omitted, and Judgment given for the Plaintiff; and upon a Writ of Errour brought, and that aſſigned for Errour, the Judgment was affirmed. See Mich. 10 Jac. *Odington* and *Darbies* Caſe. *Bolſtr.* 2. Part 35,

38. In Aſſumpſit in the Common-Pleas, a Verdict was againſt the Defendant, and a Judgment; and he brought a Writ of Errour to reverſe the Judgment; and the Errour aſſigned was, That there was no Iſſue joyned between the parties; for it is *et pradict. Rectores ſimiliter*, where it ſhould be *prædict. Joſephus*. It was holden by the Court, That it could not be amended, becauſe the Iſſue is altered; for it is joyned between other parties: and ſo was adjudged in 9 Eliz. in *Dyer*. See Trinit. 24 Car. in B. R. *Pitcher* and *Symons* Caſe. *Styles* 113.

39. In an Inferiour Court a Plaint was entred againſt *Francis*, and all the proceedings were againſt *John*: And upon a Writ of Errour brought, the Opinion of the Court was, That a Plaint is in the Nature of an Original Writ; and if that be erroneous, it cannot be amended, nor helped, after Verdict: and the Judgment was reverſed. Trin. 24 Car. B. R. *Brereton* and *Monington's* Caſe. *Styles* 115.

40. In an Information by Mr. Attorney General againſt the Inhabitants of *Burmingham*, for not repairing *Burmingham* Bridge; it was found for the Defendants: It was moved, That Mr. Attorney had miſtaken the Chriſtian name of one of the Defendants in his Replication; and therefore it was prayed, that the Record might be amended before it was entred, that the Judgment might not be erronious by reaſon of that miſtake. But the Court ſaid, They could not ſee how it could be amended; for that they conceived, there was no Iſſue joyned. Mich. 1649. in B.R. *Styles* 167.

41. It was moved to the Court, That the word (*publicæ*) might be put into an Indictment which was removed into the Kings-Bench by *Certiorari*: But the Court anſwered, That it could not be, becauſe the Indictment was of another Term. *Styles.* Hill. 1651. in B. R. 321.

42. It was prayed in B.R. to amend a Record, wherein a Judgment was given in the Common-Pleas, after the Record was removed by a Writ of Errour into the Exchequer-Chamber; and the fault to be amended was, That there is day given to the parties from Eaſter Term to Mich. Term, and Trinity Term is left out: which was ſaid to be the Miſpriſion of the Clerk; and but a Miſcontinuance: But the Opinion of the Court was, That here it is not a Miſcontinuance, but a Diſcontinuance; for here wants a day, which makes it a Diſcontinuance, which cannot be amended; and it is upon a Writ of Errour brought upon a Judgment given here: and therefore we cannot amend it. Trin. 1652. in B.R. *Fiend* and *Bakers* Caſe. *Style's* 339.

43. The Caſe was, One of the Juſtices of Aſſiſe fell ſick, and dyed at *Chelmſford* in *Eſſex*: the Aſſizes were adjourned to *Brentwood* in the ſame County; and before the ſitting there, the other Judge fell ſick, and dyed at *London*: whereupon a New Commiſſion iſſued forth to authorize another Judge to ſit at *Brentwood* according to the adjourn-

Adjournment; and there a Tryall was had upon the Old *Jurata* which had been returned before the other Judges. It was a Queſtion, If this was not a Miſ-tryal? But the Opinion of the Court was, That it was not; becauſe the death of the Juſtices was not materiall to make it void; for the Juſtices are not named in the *Jurata*: And in this caſe it was ſaid by *Rolls*, Chief Juſtice, That if a Clerk miſ-enter a thing uſual in matter of form, it is to be amended; but he ſaid, That the Errour of the Judge may not be amended: and for that, he vouched, Mich. 13 Car. in this Court, *Sawyer* and *Horton*'s Caſe; and Hill. 15 Car. in B.R. *Belch* and *Flates* Caſe. Hill. 1634. in B. R. *Baker* and *Elmers* Caſe. *Styles*. 412.

44. An *Ejectione Firme* was brought: In Arreſt of Judgment after Verdict, It was ſhewed, That in the *Venire facias*, the Concluſion was, *Et habeas ibi hoc Breve*, omitting *Nomina Juratorum*; and alſo where but one was of the *Tales*, the title of Addition was, *Nomina Juratorum*: and notwithſtanding theſe, Judgment was given for the Plaintiff; for the *Venire facias* is warranted, and muſt be amended by the Roll. Trin. 12 Car. *Pridle* and *Maſſies* Caſe. *Hob*. 68.

45. In Treſpaſs, after Verdict it was found, That the *Venire facias*, and *Habeas Corpora*; was *de Placito Debiti*; and it was amended *per Curiam*. Trin. 16 Car. C. B. *Harris* and *Ap-Johns* Caſe. *Hob*. 246.

46. An Action of the Caſe was brought againſt husband and wife, for ſlanderous words ſpoken by the Wife, and the Plaintiff had Judgment; and the Judgment was, *Et prædict.* the wife *in miſericordia*, where both ought to be amerced: And upon Errour brought, the Record was Certified into the Kings-Bench; and yet by Order of the Court, the Record here in C. B. was amended, becauſe upon View of the Prothonotories Book of Judgments, it appeared there to be well entred and directed. Mich. 12 Jac. in C. B. rott. 1206. *Scaiſe* and *Noſſons* Caſe. *Hob* 127.

47. In an Aſſiſe, The Writ was *ad faciendam Recognitionem illam*; where it ſhould have been *illam*; and becauſe it was in an Original Writ, though the Cuſtos made Oath, That a Note produced in Court by him (which was right) was the Original Note; yet the Court would not amend it, becauſe in *Pennington*'s Aſſiſe, 11 H. 7. the like default in the Writ would not be amended. Trin. 14 Jac. in C.B. *Oglethorp* and *Maudes* Caſe. *Hob*. 128.

48. A *Warrantia Chartæ* was brought by I. S. againſt *Bowes*, and Counted upon a Feoffment made by *Dedi et Conceſſi ad Dunham in N.* whereas the Land lay in another Town: and upon Demurrer, it was denyed to be amended, becauſe it was pleaded without a Serjants hand. Hill. 16 Jac. in C. B. *Barrets* Caſe. *Hob*. 249.

49. In Treſpaſs for taking a Kettle at *Weſt-Town*; the Defendant juſtified by reaſon of a Cuſtome in the Mannor of *T.* the Plaintiff joyned Iſſue *de murria ſuo proprio*: The *Venire facias* was awarded *de Vicineto de Weſtowne, et Manerio de T.* by the Roll, and a Verdict for the Plaintiff: but becauſe the Sheriff had returned the pannell *de vicineto de Weſtowne* onely; the ſame was holden to be incurable, though the award was by the Roll *de vicineto de weſtowne*, and the Manner both: and it was Ruled, That the *Venire facias* was not to be amended, for two reaſons: 1. It ought not to be *de Weſtowne* at all, becauſe the taking was confeſſed on both ſides, ſo required no Tryall; but the Cauſe onely controverted, was the Cuſtome and other things ariſing from the Mannor of *T.* and although the Roll had been perfect from the Mannor onely, (as it ought to have been) ſo as the *Venire facias* might have been amended by warrant of it; yet now when it appears to the Court, that the Tryal was not had by ſuch a Jury as the Roll and the Law required, to the prejudice of the truth in ſhew it ought not to be allowed; and therefore not to be amended. Mich. 12 Jac. in C. B. *Banks* and *Parkers* Caſe, *Hob*. 76, 77.

50. In Treſpaſs: after Verdict, it was moved, That the *Venire facias* was thus, viz. *Jacobus Dei Comiti, &c.* omitting of what County he was Sheriff; and therefore it was a Miſ-tryall, and here is an ill Writ; and it is not the want of a Writ which is helped by the Statute, and not *Conſtat*, by what Sheriff of the County, nor by whom it is returnable: But becauſe the Writ was warranted by the Roll, which was well; It being a Judicial Writ, was holden by the Court amendable; and was amended, and Judgment given for the Plaintiff. Tr. 3 Jac. in B. R. *Lea* and *Lacons* Caſe. *Cro*. 2. Part. 78.

51. A Writ of Errour was brought to reverſe a Judgment given in C. B. and after a *Certiorari*, and Errours aſſigned, they in the Common-Pleas did amend the Record: It was the Opinion of the whole Court, They could not do it, becauſe after a *tranſmittur*, they have not the Record before them: And there is a difference betwixt the Common-Pleas, and Kings-Bench; and betwixt the Kings-Bench and the Exchequer; for the Record remains alwayes here, notwithſtanding Errour be brought in the Exchequer Chamber; and therefore we may mend after; And therefore the Court awarded, If the thing were amendable, that they would amend, &c. But the Court of Common-Pleas cannot ſo do. Mich. 15 Car. in B. R.

52. In Debt; Judgment was given againſt

the principal; whereupon a *Scire facias* iſſued forth againſt the Baile, and Judgment upon *Nihil dicit* was given againſt them: whereupon Errour was brought, and Errour aſſigned, That there was no warrant of Attorney filed for the Plaintiff: And in that caſe, theſe differences were agreed; 1. If there was no Warrant of Attorney, the Court cannot order the making of one; but if there was, they might Order the filing of it. 2. If the Warrant of Attorney were on the Plaintiff's part, there ſuch Warrant ſhall not be filed, becauſe the party ſhall not take advantage of his own wrong: But where the Record by Lacheſſe of the Plaintiff in the Writ of Errour is not certified in due time, there the Warrant of Attorney may be filed. And it was the Opinion of the Court, That in the principal Caſe, it was not helped by the Statute of 8 H. 6. cap. 1. or the Statute of 18 Eliz. for that Statute helps the Warrant of Attorney after Verdict onely; and not upon Confeſſion, or *Nihil dicit*, or *Non ſum Informatus*. Mich. 17 Car. in B. R. *Firburn* and *Cruſes* Caſe.

53. In *Ejectione Firme*, the Writ was, *Vi et armis*, but it wanted it in the Declaration; and whether it was amendable, or not, was the Queſtion: But the better Opinion of the Court ſeemed to be, That it was amendable; but no Judgment was given in the Caſe. Paſch. 16 Car. in B. R.

54. The Court was moved to mend a *Venire facias*, which was, *album breve*; but would not do it, although the Sheriff's name was put to the Pannel. But if the Sheriff upon the *Venire facias* had returned, that the Execution of that did appear in a Pannel annexed to that Writ, and had not put his name to the Writ of *Venire facias*, but to the Pannel, the Court would have amended the Writ of *Venire facias*. Trin. 15 Jac. in C. B. *Brownlow*. 43.

55. In Debt upon a Bond, the Plaintiff in the Imparlance Roll declared upon a Bond made 10. *Martii*, and an Imparlance was there upon untill the next Term, and then he declared of a Bond made 10. *Maii*; The Defendant pleaded *per Dureſs*, which was entred upon Record. It was ſaid, That it could not be amended, becauſe the Defendant had pleaded to it, and by amendment his plea ſhould be altered: But *per Curiam*, it was amended, for the Imparlance was entred, Hill. 1 Jac. and the Iſſue was, Paſch. 2 Jac. and the Defendant was admitted to plead anew at his pleaſure. Mich. 3 Jac. in C.B. *Burnel* and *Bowes* Caſe. *Brownlow*. 57.

56. An *Ejectione Firme* was brought *ex dimiſſione W. G.* and the Original Writ was made *ex diviſione*: and after Tryall, by the Order of the Court it was amended, Hill. 14 Jac. in C. B. rott. 1859. *Marſh* and *Spurryes* Caſe. *Brownlow*, 130.

57. An *Ejectione Firme* was brought of two houſes, but the Bill was onely for one, and it was filed; the Defendant by his paper-book pleaded to both houſes; and in the Roll, and Record of *Niſi Prius* were two houſes, and a Verdict was for the Plaintiff, and Judgment entred accordingly: a Writ of Errour was brought by the Defendant; and before the Record was removed, the Plaintiff moved, That the Bill upon the file might be amended, and made two houſes. And it was Reſolved, It ſhould be amended; for that Bill which made mention of one houſe, could not be the ground of all the proceedings afterwards; but it was as if no Bill had been filed. Mich. 7 Jac. in C. B. *Saunders* and *Cottington's* Caſe. *Brownlow*, 144.

58. A *Venire facias* was awarded in the Common-Pleas, and returned in the time of Queen Eliz. and an *Habeas Corpora*; and an *alias Habeas Corpora pro defectu Jurator.* was awarded in the time of King *James*; which was, *Quod habeat Corpora Jurator. nuper ſommonit. in Curia noſtra et apponat eis decem Tales*; and Tryal being had thereupon in B. R. and Judgment upon it; and the Judgment was reverſed, for that the *Habeas Corpora* is of Jurours *ſommonit. in Curia noſtra. Et quod ad illos apponit decem Tales*; ſo the Sheriff had not any authority *apponere decem tales*; but to the Jurours firſt ſummoned *in Curia Regis*, and there was not any ſuch, and ſo what the Sheriff did, he did without warrant, and could not be amended. Sir *Francis Knowls* and *Beckinſhaws* Caſe. *Cro'* 2. Part. 161.

59. In the Caſe concerning the School at *Bury*, The *Venire facias* was awarded in the time of the Queen, and a *Diſtringas* with *N ſi Prius* in the time of King *James*, reciting, *Quod diſtringat Jurator. nuper ſommonit. in Curia noſtra*: whereas in truth there had been no Summons in the Court of the King; but of the Queen onely, and tryall thereupon, and Judgment in the Common-Pleas. And upon a Writ of Errour brought in the Exchequer Chamber, the ſame was aſſigned for Errour; and the Judgment was reverſed: and the reaſon was, becauſe the *Diſtringas* with a *Niſi Prius* was a ſpeciall authority to the Juſtices; which being Juſtices by that ſpeciall Commiſſion, had not any authority to take any Jury, but ſuch as was ſummoned before *in Curia Regis*; and therefore the ſame could not be amended; but the Tryall was holden to be Erronious. *Goodwyn's* Caſe. *Cro.* 2. Part. 162.

60. Note, by *Tanfield*, Chief Baron, That amendment

amendment ſhall be of Judicial Writs after tryall, to make them accord with the Roll, when that is made well: and it was adjudged in *Short* and *Arundell* Caſe; Where a *Venire facias* bare Teſte out of Term, the ſame being aſſigned for Errour, was amended, and made to accord with the Roll; and ſo where the *Venire facias* bears Teſte upon the Sunday, it ſhall be amended: and ſo where a *Diſtringas* is awarded a long time before the tryal; yet the Roll being good, it was amended. See Hill. 2 Jac. in C. B. *Comyn* and *Rynelo's* Caſe. *Cro.* 2. Part. 161.

61. Debt upon an Obligation, to ſtand to an Award of J. S. and J. D. The Defendant pleaded, The Arbitrators made no award: The Plaintiff ſhewes the Award, but aſſigned no breach: Iſſue being joyned upon the Award, Judgment was for the Plaintiff. It was the Opinion of the Court, That the Plaintiff in his Replication having aſſigned no breach, there was no cauſe of Action, and ſo the Court cannot give Judgment; and though a Verdict be given for the Plaintiff, yet the ſaid defect in the Replication is matter of ſubſtance, and is not to be helped by any Statute, nor amended: and ſo Judgment was ſtayed. Trin. 7 Jac. in B. R. *Barret* and *Fletchers* Caſe, *Cro.* 2. Part. 220.

62. In a Writ of Errour of a Judgment in C. B. in *Ejectione Firme*, It was aſſigned for Errour, That the firſt Declaration was, That J. S. 25 *March* 6 Jac. let Lands to the Plaintiff for 7. years, by virtue of which he entred, and was poſſeſſed untill the Defendant *poſtea, ſcil. anno 6to. ſupradict.* ejected him. After Imparlance, the Plaintiff made a ſecond Declaration; and there the Ejectment is ſuppoſed to be 26 *Maii, Anno ſupradict.* and the Writ being brought of that Ejectment, It was found againſt the Defendant, and Judgment for the Plaintiff: And whether it was erronious, becauſe no day was mentioned in the firſt Declaration, was a Queſtion? It was agreed by the Court, That the firſt Declaration is the principal and material Declaration; and if any matter of ſubſtance be omitted in it, it cannot be helped or amended by the ſecond; for that is but a meer recital: and therefore if the firſt be not good, though the ſecond be good, and the tryal is thereupon, it is erronious: But the Court held in the principal Caſe, the firſt Declaration was good; for he declares of a Leaſe 25 *March*, 6 Jac. which is the firſt day of the year, and the *Poſtea, ſcil.* 6 Jac. that the Defendant ejected him, is certain enough; for the year when he made the Ejectment, and the day of Ejectment, is not material, it being before the Action brought: The Judgment was affirmed. *Berrell* and *Smith's* Caſe. Hill. 9 Jac. in B. R. *Cro.* 2. Part. 211.

63. Errour of a Judgment in the Common-Pleas in a Second Deliverance; The Errour aſſigned was, That there was not any Writ of Second Deliverance certified; *In nullo eſt Erratum* pleaded. It was moved, That it was not material, for it is awarded upon the Roll; and the parties appearing and pleading it, is not now material. But it was adjudged to be ill for that cauſe; for there ought to be a Writ, and if it vary from the Declaration in the Replevin, it ſhall be abated: The Judgment was reverſed. Hill. 9 Jac. in B. R. *Newman* and *Mores* Caſe. *Cro.* 2. Part. 424.

64. Errour brought of a Judgment in Treſpaſs: The Errour aſſigned was, That at the *Niſi Prius* one Jury-man appeared; and a *Tales de Circumſtantibus* was awarded; which was returned, viz. *Nomina decem Talium de novo appoſit.* and there were 11. names returned, and 11 ſworn. But it was adjudged by all the Judges and Barons, That the Juſtices might award a *Tales de Circumſtantibus* when one Jury-man onely appeared; and the *Tales* not to be *Decem*, or *Octo Tales*, but generally *de Circumſtantibus*: and the addition of *Decem*, in the Retorn was void, and ought to be ſtricken out, and then the Retorn was well enough. Hill. 9 Jac. in B. R. rott. 1111. *Denbaughs* and *Woodley's* Caſe. *Cro.* 2. Part. 316.

65. In Debt for 800 l. The Plaintiff declared upon a Statute Obligatory *ſolvendum* upon requeſt; and it appeared to be payable at a certain day. This by the whole Court was holden to be a fault incurable, and not amendable. It was then moved, That the Plaintiff might diſcontinue his Suit, elſe by that ſlip he ſhould be barred of his Bond. But it was holden by the Court, That after a Demurrer, the Plaintiff could not diſcontinue it without Licence of the Court. Hill. 9 Jac. in C. B. rott. 948. *Fox* and *Jakes* Caſe. *Cro.* 2. Part. 316.

66. Errour was brought by the Son and heir againſt H. B. of a Judgment given by default in *Formedon* in the *Diſcender* againſt the Father, of a Meſſuage and Lands in *Sunning-Hall* in Com. *Berks*: The Plaintiff aſſigned for Errour, the default of the Warrant of Attorney, who was for the Defendant in the *Formedon*, viz. *Hen. B. pro loco ſuo, Dawley Attornatum ſuum*, without putting his name of Baptiſme. It was holden by the Court, That it was not ayded by any Statute, nor amendable. Trin. 11 Jac. rott. 924. B. R. *Bartholomew* and *Belfields* Caſe. *Cro.* 2. Part. 332. See 15 Eliz. *Dyer.* 336. 365. acc.

67. Errour upon a Judgment in Debt, upon an Obligation of 60 l. *Oyer* being delivered, the Obligation was entred in *hac verba, &c. pro ſexaginta, ſexinginta*: and upon this variance, Errour was brought, and the ſame aſſigned. But by the Judgment of the Court, the Judgment was affirmed;

for it was holden, the Obligation was good, and the words all one by intendment; and therefore amendable. Mich. 11 Jac. B. R. rott. 2073. *Marſhaw* and *Jalle's* Caſe. *Cro.* 2. Part. 338.

68. In Debt upon Obligation; after Iſſue of *Dureſſe* pleaded, the Defendant *relicta verificatione dicit quod non poteſt decere actionem, nec quin ipſe fuit ſui juris et Scriptum præd. fecit voluntarie*: Judgment was for the Plaintiff; and Error brought, becauſe the Entry was *non poteſt dicere*, where it ought to have been *dedicere*. It was the Opinion of the Court, That that made all the ſentence vitious and inſenſible, and not amendable: and the Judgment was reverſed. Trin. 10 Jac. in B. R. rott. 1153. *Cro.* 2. Part. 343.

69. Debt was brought by an Executor againſt the ſon and heir of *Redner*; the Plaintiff recovered by default in the Common-Pleas: Errour was brought, and aſſigned for Errour, That there wanted a Warrant of Attorney for the Plaintiff: The Warrant of Attorney was certified thus, *Chriſtoph. Hilmiles po. loco ſuo* J. S. *Attornatum ſuum, verſus J. Redner.* It was ſaid to be inſufficient, becauſe he was not named Executor, in it: But the Court held it amendable, and the Judgment was affirmed. Mich. 4 Jac. in B. R. Sir *Chriſtopher Hilliard* and *Redners* Caſe. *Cro.* 2. Part. 135.

70 After Verdict for the Plaintiff, It was moved to ſtay Judgment, That the name of the Sheriff was not endorſed to the Writ of *Diſtringas* with *Niſi Prius*. It was ſaid, That this being a Judicial Writ, it was not neceſſary, and might be amended: But all the Court held it was ill, and not amendable, nor helped by the Statutes of 32 H. 8. nor 18 Eliz. and it is all one with the Caſe of *Venire facias*, where the name of the Sheriff is not thereto; which hath been often adjudged ill, and not amendable; wherefore ruled the Tryal was ill. Mich. 4 Jac. in B. R. *Holdeſworth* and Sir *Stephen Proctors* Caſe. *Cro.* 2. Part. 188.

71. Debt upon an Obligation; and demands 6 l. 13 s. 4 d. The Bond was, *Noverint, &c. teneri in Viginti. Nobulis*; whereupon it was demurred, becauſe *Nobulis* was of no ſenſe. But upon view of the Dictionary, where *Nobilis* is ſet down for a Nobleman, as alſo for the ſumme of 6 s. 8 d. It was Reſolved, The Bond was good; and Judgment for the Plaintiff. Hill. 3 Jac. rott. 547. B. R. *Matthew* and *Vaughans* Caſe. *Cro.* 2. Part. 203.

72. In Errour in the Exchequer upon a Judgment in B. R. in Treſpaſs. The Errour was, That the Iſſue being tryed by *Niſi Prius*, the Record was entred in this manner, *viz. Ad quem diem, &c.* J. S. J. D. &c of the principall pannel came, *et jurati exiſtunt et qui reſidui*, did not appear, &c. W. N. and J. N. &c. *de novo apponantur qui ad veritatem de infra content: electi jurati et triati dicunt ſuper Sacramentum ſuum*; omitting the uſual words, *ſimul cum aliis Juratoribus prius Impanellat.* and for this cauſe it was a Verdict by the *Tales* onely, and by thoſe with whom they were ſworn. And by the Opinion of all the Judges and Barons, for this cauſe the Judgment was reverſed. Paſch. 6 Jac. in Exchequer. *Kempton* and *Bartel* Caſe. *Cro.* 2. Part. 207.

73. In Debt upon a Bond, againſt the heir, the Defendant pleaded Nothing by diſcent, but 15 acres in *D.* in Com. *C.* The Plaintiff replyed, The Defendant had more Lands by diſcent, *viz.* 15 Acres in S. and the Plaintiff had Judgment for the 15 Acres in *D.* and upon Errour brought, aſſigned for Errour, a Diſcontinuance in the Record of the Plea, from Eaſter Term, to Michaelmaſs Term. It was adjudged, That being after Verdict, it was out of the Statute of 18 Eliz. and not amendable, becauſe the Judgment was not grounded upon the Verdict, but upon the Defendant's confeſſion of Aſſetts onely: and the Verdict was onely to make his Confeſſion the ſtronger; The Judgment was reverſed. Hill. 7 Jac. in B. R. *Mollineux* and *Mollineux* Caſe. *Cro.* 2. Part. 236.

74. In Debt upon an Obligation, the Condition was, That if each a one appear in the Kings Bench the next Term following, and put in good baile at the Suit of *H. H.* That then &c. The Defendant pleaded, That the Term was adjourned to the Caſtle of *Hertford*, and that he there put in good baile; the Iſſue was, He did not put in good bayl; which was found for the Plaintiff, and Judgment for him. And Errour brought in the Exchequer Chamber, becauſe the *Venire facias* was, *de Vicineto de Hertford*, where it ought to have been *de Caſtro de Hartford.* And it was holden by all the Judges and Barons, to be Errour; for *Caſtrum Hartford*, is a diſtinct name of a place of it ſelf: and all the Preſidents are, where a thing is alledged to be done *apud Caſtrum Ebor. apud Caſtrum Norwich*; and for that caſe, it was not amendable, but the Judgment was reverſed. Paſch. 8 Jac. in Exchequer Chamber. *Cunningham* and *Hugh Hares* Caſe. *Cro.* 2. Part. 239.

75. Errour to reveaſe a Judgment in Debt, where bayl being entred for the Defendant, Judgment was for the Plaintiff. The Errour was, That the Entry of the bayl was *ſub pœna Executionis*, in *adjudicatione Executionis*, whereas it ought to have been *ſub pœna Condemnationis.* It was moved, That the bayl might be diſcharged; which the Court would not grant; for bayl once taken, ſtands

ſtands as well for the Judgment as the Execution, and therefore it was amended, and made *ſub pœna Executionis Judicii*, as well as for the Execution. Hill. 8 Jac. in B. R. *Hampton* and *Courtney*'s Caſe. *Cro.* 2. Part. 272.

76. *Ejectione Firme* againſt two: The Declaration was, That the two Defendants *Intravit et expulit* the Plaintiff: whereas it ought to be *Intraverunt et ejecerunt, &c.* It was Objected, Not to be amendable, being the point of the Action: But all the Juſtices held it amendable; for it is an apparent Miſpriſion of the Clerk. Mich. 10 Jac. B. R. *Oginſells* and *Derbies* Caſe. *Cro.* 2. Part. 306.

77. In a *Scire facias* upon a Judgment; It was moved in Arreſt of Judgment, becauſe the *Niſi Prius* Roll whereupon the Tryal was, is, That Challenge being made to the Sheriff after Iſſue, and confeſſed; *Venire facias* was awarded to the Coroners; but the Roll of *Niſi Prius* was, That the *Venire facias* was awarded to the Sheriff, and the *Diſtringas* was awarded to the Sheriff, and thereupon the Tryal had, which cannot be the *Venire facias* being awarded to the Coroners. But it was holden, (for that this Roll of *Niſi Prius* is a Miſpriſion, and ought to be warranted by the Record) That it ſhould be amended; and it was amended, and Judgment given for the Plaintiff. Mich. 12 Jac. B. R. Sir *Ed. Muſgrave* and *Wharton*s Caſe. *Cro.* 2. Part. 353.

78. An Outlawry was reverſed, becauſe the *Capias* was awarded againſt five, *viz.* three men, and two women, and ſo the *Exigent*, the Returne was, *Quod ad quartum Comitatum, &c. non comparuerunt*, and doth not ſay, *nec eorum aliquis comparuit.* 2. The *Exigent* is returned, *Ideo per Judicium Coronatorum utlagati ſunt*; but doth not ſhew, that there is any Coroner, or his name. 3. Becauſe it was returned, *utlagati exiſtunt*; where for the Women it ought to have been, *waviata exiſtant*: And for theſe Cauſes the Outlawry was reverſed. Trin. 12 Jac. rott 15. B. R. *Middletons* Caſe. *Cro.* 2. Part. 358.

79. In an *Ejectione Firme*; The *Diſtringas* was, *Inter John Fowkes* and *John Child*; and the Writ was ſo; But the Pannel annexed was Entituled, *Nomina Jurat. inter Rich. Fowkes*, and *William Child*, and the Jurours were the ſame who were returned upon the *Venire facias*: and the Truth was, there were two Records of *Niſi Prius*, the one, *Richard Fowkes*, and *William Child*; the other, betwixt *Rich. Fowkes*, and *John Child*; and by the Sheriffs miſpriſion, The Pannel which was betwixt *Rich. Fowkes* and *William Child*, was annexed to the Writ of *Diſtringas* betwixt *Richard Fowkes* and *John Child*. It was Reſolved by the Court, the ſame was ayded by the Statute of *Jeofailes*; and it is, as if there had been no Writ at all. Paſch. 14 Jac. in B. R. *Fowks* and *Childs* Caſe. *Cro.* 2. Part. 396.

80. In Trover; the party ſuppoſeth, That 3. *Maii* 14 Jac. he was poſſeſſed of goods, and the ſame day loſt them; and that 4. *Maii, Anno* 14. *ſupradict.* they came to the Defendant's hands, and that *Poſtea*, viz. 1. *Maii, Anno* 14. *ſupradict.* he converted them. It was moved, It was not good, becauſe the Converſion is layed to be before the Trover. But it was adjudged, That *Poſtea Convertit*, is ſufficient, and the *viz.* was void, and Judgment was for the Plaintiff. Trin. 15 Jac. in B. R. rott. 199. *Teſmond* and *Johnſon*'s Caſe, *Cro.* 2. Part. 428.

82. After the Record removed, and Errour aſſigned; Whereas the Entry after the Imparlance was, *Ad quem diem venerunt tam prædict. Thomas, quam prædict. Samuel per Attornat. ſuos, et prædict. Thomas Defendant. vim, &c. et dicit non eſt inde culpabilis*; and ſo *Thomas* was miſtaken for *Samuel*. It was Ordered, That it ſhould be amended; and Preſidents ſhewed, where after the Record removed, and Errour aſſigned, there hath been amendment in the like Caſes, *viz.* Trin. 12 Jac. rott. 1466. *Spray* and *Parſons* Caſe; and ſo *Moile* and *Ewers* Caſe. Hill. 13 Jac. in B. R. rott. 629. *Leeſer* and *Weſts* Caſe. *Cro.* 2. Part. 444, 445. See Sir *Bernard Greenvill*, and Sir *Nicholas Smith*'s Caſe. Mich. 19 Jac. in C. B. *Cro.* 2. Part. 627. acc.

83. In a Writ of Errour, upon a Judgment in a Writ of *Annates*, The Errours aſſigned was, That a Jurour was returned upon the *Venire*, *Hugh Maltby*; and upon the *Diſtringas*, *Hugh Maltby* was returned and ſworn. 2. One *John Collingham* of *Cortlington* was returned upon the *Venire*; and one *John Collingham* of *Gortlington* was returned and ſworn upon the *Habeas Corpora*: And by the Court both theſe were amended; the firſt, becauſe the Jurour came in Court, and was examined, and it appeared, that he was the ſame man; the other was amended, for that the alteration of the name of the Town where the Jurour dwelt, is not material; for he may be Inhabitant of ſuch a Town at the time of the *Venire* returned, and at the time of the *Habeas Corpora*, or *Diſtringas*, he may be Commorant at another Town; The Judgment was affirmed. Hill. 15 Jac. in B. R. Sir *Philip Stanhope*, and *William Stanhope*'s Caſe. *Cro.* 2. Part. 457.

84. A Bill of Treſpaſs was filed, Hill. 18 Jac. For that the Defendant 20. Jan. 17 Jac. did aſſault, beat, and wound his ſervant, *per quod ſervitium* of his ſervant, *per magnum tempus, ſcil. a prædict. 20. March, 17. ſupradict. uſq; primæ Martii, proxime ſequend. perdidit*: Judgment upon *Nihil dicit* was for the Plaintiff, and damages

to 10 l. It was moved, That the Plaintiff ſhould not recover, but the Bill ſhould abate; for the loſs of Service is layd to be *per magnum tempus, ſcil. à prædict.* 20. *Martii*, 17 *Jac. uſq; prim. Martii* following, which was in March, 18 Jac. and damages are given for the time of the Action brought. It was Objected, That the *Scilicet* was not material; like to the Caſe of *Teſmond* and *Johnſon*; but the *Scilicet* was idle, and therefore it was amendable. But the Opinion of the Court was, That in this caſe, the point of the Action was the loſs of his ſervice, which ought to be ſhewed certainly; and if the time certain is not expreſſed, the Declaration is not good: And therefore the (*Scil.*) and what comes after it, is material; which being ill alledged, the Declaration is not good, and the ſame is not to be amended: Judgment was for the Defendant. Paſch. 19 Jac. in B. R. rott. 128. *Hanbury* and *Irelands* Caſe. *Cro.* 2. Part. 618.

Amercements & Fines *impoſed in Courts.*

1. Amercement *what it is*; *What Courts have power to Amerce or Impoſe a Fine*; *and by whom Amercements are to be aſſeſſed*; *and Fines Impoſed*; *and who are to aſſer them.*

1. AMercement, is a ſum which is aſſeſſed upon ſome perſon or perſons in a Court-Baron or other Court, which is not a Court of Record, properly, for ſome treſpaſs or offence: and it is called *Miſericordia*, in Engliſh, Mercy; for the ſmallneſs of it, which alwayes ought to be leſſe then the Offence; and the ſame is founded upon the Statute of *Magna Charta*, Cap. 14. which is, *Quod Nullus Liber homo amercietur, niſi ſecundum quantitatem delicti, &c.* and therefore if an Amercement be unreaſonable, the Law hath provided a Writ for the ſame, which is grounded upon the ſaid Statute; which is called, *Moderata Miſericordia*, *Cook* 5. Part. 39, 40, 41. and *Cook* 11. Part. *Godfreys* Caſe. See *Fitzh. Na. Br.* 181, 182. acc. And though Amercements be ordinarily aſſeſſed for defects, or defaults in Inferiour Courts; as Court-Barons, &c. Yet Amercements may be, and uſual are, Aſſeſſed, in the Courts of Records, upon ſundry defaults, made by the Plaintiffs and Defendants, or other perſons; where the Court hath power to Amerce. *Ibid.*

2. If a man be convicted before the Sheriff in the County-Court in a Writ of Reception, he ſhall be amerced, and render damages for his contempt: But if he be Convicted before the Juſtices in a Court of Record in a Writ of Reception, he ſhall be fined, and not amerced; and therewith agrees the book 39 E. 3. 36. and *Cook.* 8. Part. *Greiſley's* Caſe.

3. In perſonal Actions in the Common-Pleas, where there are divers plaintiffs, & they are amerced, in ſuch caſe every Amercement ought to be ſeverally aſſeſſed upon every one of them for his own Offence; and one ought not to be amerced for the Offence of another: For the Nature of the word *Miſericordia*, is, that a man ſhall not be puniſhed ſo much as he deſerved: and then if he ſhould be amerced for the Offence of another, it were unreaſonable: and when a man is amerced in the Common-Pleas, the Juſtices do not aſſeſſe any ſum upon the perſon; but make their entry in this manner, *viz. A. pro falſo Clamore* againſt *B. in placito, &c. in miſericordia*: and he by the equity of the Statute of *Weſt.* 1. Cap. 18. The uſage in the Court of Common-Pleas, as alſo in the Kings-Bench, and Exchequer is, That the Coroners Aſſeſſe the Amercements, and deliver them to the Clerks of the Aſſizes; who deliver them back to the Clerk of the Warrants, who maketh the Eſtreats; and then one of the Juſtices of the Common-Pleas, or the Clerk of the Warrants, goeth with the Rolls of the Eſtreats into the Exchequer, and there puts them before the Barons of the Exchequer. *Fitzh. Na. Br.* acc. in the Writ of *Moderata Miſericordia.*

4. In a Replevin; The Caſe was; The Lord of the Mannor of *A.* had a Leet within his Mannor; And time out of mind there was a Cuſtome, That the Inhabitants and Reſiants within the Mannor, at the Court-Leet holden within the Mannor, within the Moneth next after the Feaſt of St. *Michael* the Arch-Angel, had uſed to chooſe an able man of the Inhabitants within the Mannor to be Conſtable for the year following; which man ſo choſen, uſed to execute the ſaid Office; and if he were then preſent, he uſed to be ſworn in open Court by the Steward of the Mannor, to execute the ſaid Office: At a Court-Leet holden for the ſaid Mannor, by J. S. Steward of the Court; the Defendant being an Inhabitant within the Mannor, was according to the Cuſtome choſen to be Conſtable of *A.* within the Leet by the Jurours and Preſentors; and he being preſent in Court, was charged by the Steward to take the Oath of Conſtable; which he refuſed to do, but departed in contempt of the Court; for which the Steward in the

the Court ſet a Fine of 5 l. upon the Plaintiff in the Replevin; for which the Defendant as Bayliff of the Lord, diſtrained the Plaintiff's Cattle. And in this Caſe, theſe points were Reſolved by the whole Court: 1. If any Contempt or diſturbance to the Court, be committed in any Court of Record, That the Judges may impoſe upon the Offenders a Reaſonable Fine; and a Leet is a Court of Record, in which the Steward is Judge; and for any Contempt done to the Court before him, he may impoſe a Reaſonable Fine. 2. That if a Fine be impoſed by the Steward upon any in a Court-Leet, the ſame is good, although it be not afferred or aſſeſſed by the Jury or Enqueſt; for a Fine impoſed by the Court. But by the Statute of *Magna Charta*; and *Weſt.* 1. *Cap.* 6. Amercements ought to be afferred or taxed, *per pares*; and therefore in every Caſe where the Plaintiff is Nonſuit, or Judgment given againſt the Defendant, the Juſtices do not aſſeſs any Amercement; but the Entry is, That he being in *Miſericordia* generally. But if a man be Nonſuit after the Jury are ready to give their Verdict, the Court may cauſe the Amercement to be afferred preſently by the Jurours in Court. 3. That the Amercement of any one who is a Miniſter of Juſtice, or of any Officer who hath the Execution of any of the Kings Writs, ſhall be by the Judges of the Court where the Caſe dependeth; and the ſame is out of the Statute of *Magna Charta*; and *Weſt.* 1. for thoſe Statutes extend onely to private men, and not to the Miniſters of Juſtice, whoſe offences are done to the Court it ſelf; and that which is aſſeſſed upon an Officer or Miniſter of the Court, is called Amercement; but that which is aſſeſſed upon a ſtranger for a Miſdemeanour, is called a Fine. 4. That the Lord of the Leet may diſtrain as well for a Fine impoſed by the Steward for a Contempt; as for an Amercement, *Et quod Licitum eſt pro minore, pro majore Licitum eſt*; and it ſhould be paid to drive the Lord to an Action of Debt, for every ſmall Fine, or pain; but the Lord may diſtrain, and ſell the diſtreſs, or impound it at his election. *Cook.* 8. Part. 38. *Greiſly's* Caſe.

5. The Steward of a Court-Leet impoſed a Fine joyntly upon *A. B.* and *C.* chief pledges, becauſe they refuſed at the ſaid Court-Leet to preſent, that they ought to pay at every Leet, *pro certo Leeto*, 10 s. to the Lord. And becauſe the ſame was not paid, the Lord diſtrained, and avowed: And in this Caſe, It was Reſolved, 1. That the Fine ought to have been aſſeſſed upon them ſeverally, and not joyntly, becauſe the refuſal of every of them was ſeveral, and perſonal. 2. That the reaſonableneſs of the Fine ſhould be adjudged by the Juſtices; and if the Fine be exceſſive, the ſame doth not bind for *Exceſſus in re qualibet jure reprobatur*; as Exceſſive Diſtreſſe, Outragious Aide, and Exceſſive Amercement, is againſt the Common Law: and an Exceſſive Fine at the Will of the Lord, ſhall be taken to be an oppreſſion of the people, and a Copy-holder may deny to pay it; and the reaſonableneſs of the Fine ſhall be determined by the Juſtices. 3. When a Fine is impoſed againſt Law, as joynt, where it ſhould be ſeveral, if it be unreaſonable, it may be avoided by Plea or Judgment of the Court in which the Suit depends, becauſe he hath no other remedy. 4. That the Lord could not diſtrain for Head-ſilver, or Certainty of Leet, becauſe the ſame is againſt right, and for the private of the Lord, the which he could not have without preſcription: and therefore as he ought to preſcribe in the principal, *ſcil.* the Head-ſilver; ſo he ought in the Diſtreſſe. 5. That for an Amercement in a Court-Baron, the Lord cannot diſtrein without preſcription: But for a Fine or an Amercement in the Leet, a Diſtreſſe is incident of Common right. *Cook* 11. Part. 42. *Godfrey's* Caſe. See *Bullen's* Caſe. *Cook.* 6. Part. acc.

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2. *Where the Plaintiff, or Defendant ſhall be Amerced or Fined, and in what Actions, and for what; And divers Rules concerning Fines and Amercements.*

1. A. Brought Debt againſt B. by *Quo minus* in the Exchequer, and it was found againſt the Plaintiff; and for default of a good *Venire*, the Judgment was arreſted: And afterwards *A.* by his Attorney eatred a *Retraxit*, i. e. *fatetur ſe, in Curia hoc ulterius nolle proſequi*; upon which, Judgment was given, That the Defendant *eat ſine die*; but there was no Amercement aſſeſſed upon the Plaintiff: Afterwards for that cauſe, *A.* brought a Writ of Errour. And it was Reſolved in that Caſe, That the Plaintiff ought to have been amerced; For a *Retraxit* is a voluntary acknowledgment, that he hath no cauſe of Action; and the ſame is a good barr for ever: and therefore becauſe he was not amerced, it was Errour. And although a man ſhall not aſſign that for Errour which is for his advantage, yet in this caſe the Judgment was not perfect, for the Amercement ought to be parcel of the Judgment; and that for the advantage of the King: and therefore for default thereof, the Judgment was reverſed; *Cook* 8. Part. 58, 59. Note; In that Caſe divers Rules are put and agreed. Where the Plaintiff, or Defendant ſhall be Fined, or Amerced. Concern-

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ing Fines: 1. In all Actions, *Quare vi et armis*, is *Reſcous*, *Treſpas vi et armis*, If Judgment be given againſt the Defendant, he ſhall be Fined and Impriſoned; for to every Fine, Impriſonment is incident: and when the Judgment is, *Quod defendens Capiatur*, it is as much as to ſay, *Capiatur uſq; finem fecit.* 2. In a Writ of *Deceit* upon Recovery by default in a real action, if it be found, the Tenant was not lawfully ſummoned, the Judgment ſhall be, *Quod defendens pro falſitate et deceptione Capiatur.* 3. If the Defendant plead a falſe Deed to him, or deny his own Deed, if it be found againſt him, or if he, *relicta verificatione*, confeſſeth the Action, he ſhall be fined; but if he pleadeth the Deed of his Anceſtor, or denyeth it, if it be found againſt him, he ſhall be amerced onely. 4. If the Defendant in a Replevin claimeth property falſly, if it be found againſt him, he ſhall be Fined and Impriſoned. 5. In an Appeal of Death, Robbery, Felony, or Maheime; if the Plaintiff be barred, Nonſuit, or his Writ abate by his own default, he ſhall be Fined and Impriſoned; and ſo in Attaint. 6. If any one uſeth the Countenance of the Court, for double vexation, he ſhall be Fined. 7. For Contempts done to any Court of Record againſt the King's Command by his Writ, the Defendant ſhall be Fined and Impriſoned. 8. In all Caſes, where a thing is forbidden by any Statute, the Offender ſhall be Fined and Impriſoned. 9. In ſome Action the Defendant ſhall be Fined in one Court, and yet but Amerced in another, and yet the Offence ſhall be one: as in a Reception, if it be brought in the Common-Pleas, the Judgment ſhall be, That the Defendant ſhall be Fined and Impriſoned; but if it be before the Sheriff in the County; there he ſhall be onely amerced, becauſe a Court which is not of Record, cannot impoſe a Fine. Concerning *Amercements*, theſe Rules were agreed; 1. In all Writs of *Precipe quod reddat*, as Writ of Right, *Formedon*, *Quod permittat*, Writ of Cuſtomes and Services, If the Defendant be barred, or he be Nonſuit, or his Writ abate for matter or form, the Defendant ſhall be amerced; and if there be two Defendants, and the Writ abate for the death of one of them, the other ſhall not be amerced. 2. In all Actions perſonal, as Debt, *Detinue*, &c. without force, and alſo in Actions which comprehend force or deceit by a Court of Record, if the Plaintiff be barred, Nonſuit, or his Writ abate for matter or form, he ſhall be amerced onely; but if the Writ abate by the death of one Plaintiff, or if one appeareth, and the other be Nonſuit, (which in Law is a Nonſuit of both; he who ſurviveth, ſhall not be amerced; but he who appeareth not. 3. In all Judicial proceſs, If the Plaintiff be barred, Nonſuit, or his Writ abate, the Plaintiff ſhall not be amerced, becauſe the proceſs is founded upon a Judgment, and Record; and in thoſe Actions he ſhall not find pledges. 4. In all Actions reall and perſonal, If part be found for the Defendant, and part againſt him; or all, or part againſt one Tenant, and nothing, or part againſt the other, the Defendant or Plaintiff ſhall not be amerced: and therefore in *Treſpas* of battery againſt husband and wife, ſuppoſing the battery to be done by them both, and the Wife is onely found guilty, yet the Plaintiff ſhall not be amerced. 5. In all Actions real or perſonal, where there is but one Tenant, or Defendant, he ſhall not be twice amerced; but there where there is but one Demandant, or Plaintiff, the Plaintiff may divers times be ameted. 6. Upon Diſcontinuance in reall or perſonal Actions, the Plaintiff ſhall not be amerced, becauſe it is the Act of the Court: and ſo it is when the Court is ouſted of the Juriſdiction. 7. In all Actions reall or perſonal, if the Tenant or Defendant appeareth the firſt day, and tendreth the thing demanded, he ſhall not be amerced, for that he doth what the King commandeth by his Writ: But in all Actions in which the Offence is ſuppoſed with force, or of the Deceit of the Court, if the Defendant at the firſt day confeſſeth the Action, yet he ſhall be Fined and Impriſoned; for his Confeſſion is a manifeſtation, and not a ſatisfaction of the Offence. 8. In all Actions, when a real and perſonal Writ doth abate for want of form, or matter, or the Defendant or Plaintiff, be barred; The Judgment is, *Quod Querens nihil Capiat per breve ſuum, ſed ſit in miſericordia, pro falſo Clamore ſuo inde, et prædict. tenens, eat inde ſine die*: But if the Defendant or Plaintiff be Nonſuit in any Action; the Judgment is, *Ideo Conſideratum eſt quod Querens, et Plegii ſui de proſequend. ſint inde in miſericordia.* 9. Some perſons ſhall not be amerced, and therefore they ſhall not find Pledges; as the King, Queen; and ſo it is of Enfant, and therefore they ſhall not find Pledges: But the Entry is, *Ideo in miſericordia ſit pardonetur; quia Enfans. Cook.* 8. Part. 61. *Butcher's* Caſe.

2. In a Writ of Entry in the *Quibus* brought in *Wales*; the Defendant pleaded; *Non deſcivit*, and depending the Plea, the Pardon of 35 Eliz. was made, by which all Fines and Amercements, and Contempts were pardoned; and afterwards the Iſſue was found for the Demandant, and Judgment given, but no *in Miſericordia quia pardonatur.* And upon a Writ of Errour brought, the ſame was aſſigned for Errour. But it was Reſolved, That the Original Cauſe of the Amercement, was the wrong and the Contempt of the Tenant, that he did not render the Land to the Demandant; and the Original Cauſe being pardoned, the Amercement by

by Conſequence was pardoned. Mich. 40 Eliz. in B. R. *Cook.* 5. Part. 49. *Vaughan's* Caſe.

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3. *Where the Plaintiff upon Nonſuit, or upon a falſe ſuppoſal in his Writ, ſhall be amerced*; et è contra: *And where the Sheriff ſhall be amerced, for a falſe Returne made*; *where not.*

1. A Writ of Entry in the *Quibus* in the Nature of an Aſſiſe was brought againſt the Mother, and the Son within age; the Mother by Attorney, and the Son by Guardian plead *Non diſſeiſint*; and it was found againſt the Mother, That ſhe did diſſeiſe the Demandant, but the ſon did not diſſeiſe him. The Queſtion was, If Judgment ſhould be againſt the Mother, of the Whole; and that the Plaintiff ſhould be amerced *pro falſo clamore* againſt the Son, or for the moyety onely? And the Opinion of the Court was, That the Judgment ſhould be againſt the Mother for the Whole. Trinit. 14 Eliz. in C. B. *Dyer.* 312.

2. If an Enfant Plaintiff by his *Prochein Amy* after his full age maketh an Attorney, and after is Nonſuit, he ſhall be amerced; yet if he had been Nonſuit before his full age, he ſhould not have been amerced, becauſe that he was within age: And ſo was the Opinion of the whole Court. Mich. 17 Eliz. *Dyer.* 338. See 2 Ma. *Dyer.* 104. his Nonſuit in a *Quare Impedit*, is peremptory; and his Sureties ſhall be amerced.

3. A *Precipe* was brought againſt an Enfant, and pendant the Plea he came of full age. It was adjudged, That he ſhould be amerced for the delay, after his full age. Mich. 15 & 16 Eliz. in C. B. See *Cook.* 5. Part. 49. in *Vaughan's* Caſe.

4. A Writ of Errour was brought of a Judgment in Dower; The Record certified the Defendant in *Miſericordia*; and the Errour intended to be aſſigned was, becauſe the Defendant being an Enfant, and appearing by his Guardian, ought not to be amerced. And thereupon, the Defendant in the Writ of Errour moved in the Common-Pleas, That the ſame might be amended, and made *Nihil in miſericordia, quia Enfans*: And the Opinion of the Court was, That it ſhould be amended, and made ſo: becauſe an Enfant is not in ſuch caſe to be amerced. And afterwards the Judgment was affirmed in the Kings-Bench. Trin. 11 Car. in B. R. *Smith* and *Smith's* Caſe. *Cro.* 1. Part. 296

5. A *Diſtringas* in an Attaint was returnable the firſt day of the Term in the Common-Pleas, *ſcil.* 15 Paſch. And the Sheriff at the requeſt of the Plaintiff, becauſe Jurours enow did not appear at the day, kept out the Writ, and did not return it untill the Monday following; at which day, the Writ and the Pannel were returned; and the Jurours of the Grand Jury appeared; and both parties prayed the Court, That they would take the Jury. But the Court would not agree to it, but delivered back the Writ to the Sheriff, and Amerced him in 20 l. and diſcharged the Jury. Paſc. 3 Eliz. *Dyer.* 198.

6. In the City of *Glouceſter* there are two Sheriffs by their Charter; and one of them was impleaded with two others in a Writ of Entry in *le Quibus*. And upon the Original Writ the Sheriffs return the Summons of the two, but he returned, He could not ſummon himſelf, being Sheriff: And after Iſſue joyned, and found for the Defendant, this matter was moved in Arreſt of Judgment, It was a Quære, Whether the Sheriff for this Return, ſhould be amerced? And the Opinion of *Fitzherbert* 18 H. 8. was vouched, That the Sheriff ſhould be Amerced for ſuch a Return. It was not Reſolved. Mich. 9 & 10 Eliz. *Dyer.* 266.

7. *A.* had Judgment in Debt againſt *B.* and by Deed enrolled, aſſigned the ſame to the Queen, in ſatisfaction of a debt due to her, as Collector of Fifteens; Proviſo, That the Lord *Trevor* and all the Barons of the Exchequer, or any two of them, for any Cauſe reaſonable, diſallow the Aſſignment, and revoke it by writing, then the Aſſignment to be void. Afterwards by a Writ of Prerogative out of the Exchequer, the Lands of *B.* were extended, and his goods ſeized by the Sheriff by vertue of that Writ, but the Writ was not returned; three of the Barons revoked the Aſſignment after the death of the Teſtator, becauſe the Teſtator had ſatiſied the Queens debt: and now the Executor brought a *Scire facias* to have Execution of the Judgment: It was Reſolved in this Caſe, That the Execution for the Queen was good, although the Writ was not returned. And in this caſe it was ſaid and agreed, That in caſe of a common perſon, If the Sheriff by force of a *Fieri facias* levy the debt, and deliver it to the party, that the Execution is good, without the Return of the Writ; for the Debt was well levied, the Authority which the Sheriff had by the Writ was well executed; and if the Execution ſhould not be good, the Sheriff ſhould not find buyers upon any Execution, which ſhould be a great delay of Executions. But in that caſe it was adjudged,

That if the Sheriff did not return the Writ, that he ſhould be amerced; but the Execution ſhould remain good. Mich. 42 Eliz. in the Exchequer. *Cook.* 5. Part. 90. *Hoes* Caſe.

8. A man brought a *Quare Impedit*, and after Judgment had, a Writ to the Biſhop of *N.* and at the *Alias* the Biſhop returned, That after the awarding of the firſt Writ, and before the Receipt of the *Alias* the Queen had preſented the ſame Defendant by her Letters Patents, who is admitted, inſtituted and Inducted: The Opinion of the Court was, That the Biſhop as well for his Contempt in not returning the firſt Writ, as for his ill return made upon the *Alias*, ſhould be amerced; and ſo he was Amerced 10 l. and a new Writ awarded to admit the Clerk of the Plaintiff. Trinit. 28 Eliz. in C. B. *Moore* and the Biſhop of *Norwich*'s Caſe, *Goldſbr.* 3. & 24.

9. A Proclamation was directed to the Sheriff of *C.* againſt *J. H.* and the Writ was returned thus; *Tali die ad Comitat. meum, tent. in le Shire-Hall, &c. Proclamationem feci, at eodem die ad generalem Seſſionem, &c. Proclamationem feci, &c.* And this matter was pleaded in avoidance of an Outlawry to reverſe it, becauſe thoſe Proclamations were made upon one day; whereas the Writ was, (*Tribus ſeparalibus diebus*) and for this ill return, he was amerced 40 s. And at another day, the ſame Sheriff was amerced other 40 s. becauſe he had returned divers Writs in Secretary hand. Mich. 31 Eliz. in C. B. *Goldſbr.* 111.

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4. *Where a Town, or a County ſhall be amerced; and for what Cauſe; and where not.*

1. NOte: It was ſaid by the Juſtices, That for the Eſcape of a Murderer, the Townſhip ſhould be amerced for the Eſcape, if it were *tempore diurno*; although that the Murder was committed in a Field of the Town, or in a By-Lane of the Town. Hill. 4 Eliz. *Dyer.* 210.

2. The Town of *Green* in *Suſſex* was amerced for the Eſcape of a Felon, and the ſaid Amercement was grounded upon an Inquiſition taken before the Coroner, by whom the Eſcape was found. It was moved, That there was not any Eſcape found, for which the Town ought to be amerced: For it was found, That he who eſcaped 10. *die Januarii*, 30 Eliz. *Circa horam quartam poſt meridiem*, with a Pitch-fork ſtruck one *A.* who of the ſaid ſtroke dyed at 8. in the Evening of the ſame day; and that then the other Eſcaped; for which Eſcape being made in the Night, the Town by Law ought not to be amerced: for it is not Felony till the party dyeth. *Wray*, Chief Juſtice, ſaid, it ſhould be hard, that the Town ſhould be amerced upon this matter; for although the Town in diſcretion might have ſtayed the Offender before the death of the party; yet it was not bound ſo to do. The Court took time to adviſe of the Caſe. Paſch. 30 Eliz. in B. R. *Leonard.* 1. Part. 107.

3. At the Common-Law, If one be ſlain in a Town by day, *viz.* ſo long as there is full day-light; and the Murderer eſcape; The Town where the Felony was committed, ſhall be amerced for the Eſcape; but if ſuch a Murder or Manſlaughter be committed in the Night, the Town by the Common-Law ſhall not be amerced; for no Lacheſſe can be attributed to them. *Cook.* 7. Part. 4. *Milburn*'s Caſe.

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5. *Of Amercements in Inferiour Courts; as the County Court, Leet, Court-Barons; Where the Lord may preſcribe for ſuch Amercements; Where diſtrain and Avow for them: and where Damages and Coſts ſhall be given for them; who ſhall afferre them: and what remedy is given if ſuch Amercements be exceſſive, or outragious.*

1. IF a Jury, or a Leet tax an Amercement, it ſufficeth without any affeerment; for the affeerment may be well done *per totum Homagium*, as well as by ſpeciall Afferrors; becauſe the Amercement is the Act of the Court, and the Affeerment the Act of the Jurours, 10 E. 3. 9. & 10. *Cook.* 8. Part. 40. *Greiſleys* Caſe.

2. If a man be Nonſuit in an Action, and Amerced, the Land onely which he had at the time of the Amercement, ſhall be charged, and not that which he had at the time of the finding of the Pledges: For the Amercement is not in regard of the Land; but for want of proſecution, which was a default in his perſon: But the Iſſues of Jurours ſhall be levied upon the Feoffee of the Lands, albeit they were not loſt before the Feoffment, becauſe he was returned and ſworn in reſpect of the Land. *Cook. Inſtitutes.* 102. 2.

3. In a Replevin, the Defendant made Comſans as Bayliff to Sir J. S for that he was ſeiſed in Fee of the Mannor of S. whereof a great Waſte, called *Kins-Moore* was parcel, and that he, and

and all thoſe whoſe Eſtates, &c. had uſed to have a Court to be holden every year by the Steward of the ſaid Mannor; in which Court upon reaſonable Summons, all Commoners within the ſaid Common uſed to repair and appear, or elſe to be amerced; and that there was a Cuſtome within the ſaid Mannor, That the Steward ſhould out of the Commoners chooſe a Jury to enquire of all prepreſſures, and Miſeaſors within the ſaid Common, and had uſed to make Ordinances concerning the well uſing of the Common; and all thoſe that had Common, uſed to be obedient to ſuch Ordinances, under a reaſonable pain to be ſet by the Jurours: for which pains forfeited, the Lord uſed to diſtrain: and that at ſuch a Court a By-Law was made, whereby it was Ordered, That no Commoner ſhould keep any Sheep in the Bounds below the Meer, under the pain of 3 s. 4 d. and for keeping Sheep againſt the ſaid Ordinance, and the penalty forfeited, the diſtreſs was taken: The Plaintiff Demurred upon the Conuſans; & Judgment was given for the Avowant: and thereupon Errour was brought. It was ſaid, It was no good By-Law to bind one for his Inheritance. But the Court held, That the Ordinance by Cuſtome for the Government of the Common was good; and being proclaimed in Court, the Plaintiff being a Commoner, was bound to take notice of it: But the great Queſtion in the Caſe was, Whether in this Caſe Damages and Coſts ought to be given to him who juſtifies a Diſtreſs as Bayliff, being adjuged for him? or, whether the giving of them was Errour? And the better Opinion of the Court was, That the giving of the Coſts and Damages was no Errour; and that the ſame was within the Statute of 7 H. 8. Cap. 4. within the word *Cuſtome*, for that he diſtrained for a Duty grounded upon a Cuſtome; and that Damages and Coſts are recoverable as well by the Statute of 7 H. 8. as by the Statute of 21 H. 8. Cap. 9. which adds, That the Avowant for Damage Feſant ſhall have Coſts. But if the Lord diſtrains for Relief, or *pro valore Maritagii*, as he may, for that they be not Services and Cuſtomes, but flowes or fruit fallen from them. But Quære of the Caſe for Relief, becauſe they are in the nature of Services. And M. 44 & 45, It was *Shetherd* and *Mackworth*'s Caſe, where the Bayliff of the Lord *Berkley* diſtrained for Relief; and the Queſtion was, becauſe the Lord had been in Ward to the Queen by reaſon of other Lands holden of her *in Capite*, Whether the Heir ſhould pay Relief to the other Lords at his full age? And adjudged he ſhould: and there damages was given by the Jury to the Avowant. Hill. 11 Car. rott. 753. in B. R. *James* and *Turneys* Caſe. *Cro.* 1. Part. 357. & 383

4. In Treſpaſs, for taking of a Bullock and ſelling it; the Defendant Juſtified, becauſe at the Sheriff's Turne the Plaintiff was preſented for not appearing at the Turn, being *debito modo ſummonitus*, and amerced by the Jury, which was afferred by four of the Jury at 40 s. and after at the next Seſſions of the Peace it was certified and ratified by the Juſtices of the Peace: whereupon the Steward made a Warrant to him to levy the 40 ſhillings; and he took the Bullock and ſold it: upon which Plea, the Plaintiff demurred; and Exceptions was taken to the Plea, becauſe the Amercement is alledged to be made by the Jury, and afferred by four of the Jurours; whereas it ought alwayes to be aſſeſſed by the Court: for it is a Judicial Act, and ſhall be afferred by Afferrors appointed: Alſo for that the Amercement was levied by the Defendant as Bayliff, by Warrant from the Steward of the Court; whereas, by the Statute of 1 E. 4. it is expreſſly appointed, That no Fine or Amercement in the Turn ſhall be levied, unleſs it be certified at the next Seſſions of the Juſtices by Indenture, and inrolled there, and by proceſs made from the Juſtices of the Peace of the Seſſions to the Sheriff; and none of theſe Circumſtances were obſerved in this Caſe: wherefore the levying of the Amercement by Warrant from the Steward was not good. And of that Opinion was the whole Court: and thereupon it was adjudged for the Plaintiff. Mich. 8 Car. in B. R. *Griffith* and *Biddles* Caſe. *Cro.* 1. Part. 200.

5. In Treſpaſs; the Defendant juſtified, That the Plaintiff was a common Baker dwelling in *T.* in the County of *N.* and that it was preſented in a Leet in *T.* that he had ſold bread againſt the Aſſize in *locis vicinis*; whereupon he was Amerced; and by amercement afferred to 10 s. and that by a Precept out of the Court he did diſtrain the Plaintiff. And in this caſe, The Court gave Judgment for the Plaintiff, becauſe it did not appear that the Offence was committed within the Juriſdiction of the Leet; which ſhall not be preſumed to be, unleſs it be ſpecially pleaded: and that in this Caſe the Plea was abſurd: For it was ſaid, That he was amerced without ſaying (What) and that the Amercement was afferred to 10 s. for which he diſtrained: Now the Jury muſt amerce to a certain ſumme which may be mitigated and afferred by others. Paſch. 14 Jac. in C. B. Rott. 153. *Wilton* and *Hardingham*'s Caſe. *Hob.* 129.

6. In a Replevin, the Defendant did avow as Farmor of the Manor of *B.* in the County of *B.* to St. *John*'s Colledge in *Oxford*; and layd a Preſcription in him and his Farmors, to diſtrain for all Amercements in the Court of the ſaid Manno: and ſhewed, that the Plaintiff in the Replevin was preſented by the Homage, for not repair-

ng a house being a Customary Tenant of the Mannor according to a Fine imposed upon him at a former Court, for which he was amerced by the Steward to 10 s. and at the same Court he was amerced for not ringing his Hoggs, to 3 s. 4 d. for which Amercements he did distrain: And upon *Nihil dicit*, Judgment was given for the Avowant to have Retorne: and Errour was brought; and the Errour assigned was, That there was not any prescription layd in the Avowry, for the Lord to amerce the Tenants, and of common right he cannot do it: and such Amercement should be Extortion, for the Lord cannot be his own Judge; and therefore he ought to enable himself to distrain by Prescription: Also the Fine is layd to be assessed by the Steward; whereas it ought to be by the Suitors; for they are Judges, and not the Steward. It was holden by the Court, That the Steward may assess a Fine for a Contempt; but not amercements, if not by Prescription. And 2. It was holden, That the Lord of a Mannor cannot assesse an Amercement for a Trespass done to himself upon his Lands; but otherwise it is of a Common Trespass done in the Land of another; but for a Distress he ought to prescribe. The Judgment was Reversed. Mich. 32 & 33 Eliz. in B. R. *Blunt* and *Whittoms* Case. *Leon.* 242.

7. Errour of a Judgment in B. R. in Trespass; Whereas the Plaintiff was Nonsuited in Trespass Evidence; The Judgment is entred, *Quod Querens et plegii sui sint in misericordia pro falso Clamore suo*: whereas it ought to have been *Qui non prosecuti sunt*; for it ought not to be *pro falso clamore*; but where it is after Verdict, or Judgment upon Demurrer: and for that cause the Judgment was reversed. Hill. 3 Jac. Rott. 606. in B. R. *Cro.* 2. Part. 213.

8. Errour was brought to reverse an Amercement, which was afferred in a Court-Leet; the Errour assigned was, That it was an unreasonable Amercement: It was the Opinion of the whole Court, That after an Amercement is once afferred; it cannot be reversed for Errour in the unreasonableness of it: and that no Writ of *Moderata misericordia* lyeth in such case. Trinit. 7 Jac. B. R. rott. 963. *Stubbs* and *Flowers* Case, *Bastrod.* 1. Part. 125.

Annuity.

1. Annuity *what it is*; *And where, and in what Case a Writ of* Annuity *lyeth*: *and where it shall charge the person of the grantor*: *And where it shall be a Rent, or Annuity at the Election of the Grantee, and by his Act.*

1. AN Annuity is a yearly payment of a certain sum of money, granted to another in Fee, for life, or years, charging the person of the Grantor onely, which doth not enure to the Grantee onely, for his heir, and his and their Grantee shall and may have a Writ of Annuity against the Grantor, if the same be behind and unpaid. *Cook* 1. Part. *Institut.* 144. But if a Rent be granted to a man and his heirs, he shall not have a Writ of Annuity against the heir of the Grantor; albeit he hath Assets by discent, unless the Grant be for him and his heirs. *Ibid.*

2. If a man grant a yearly Rent for life, for years, or in Fee, and doth not express in the Grant, that it shall be taken out of any Lands or Tenements, nor any Distress is granted for non-payment of it, then it is merely taken for an Annuity; and the Grantee shall not have any remedy for the same but a Writ of Annuity. *Fitzh. Nat. Br.* acc.

3. An Annuity was granted for years, which was behind and not paid; The Grantee brought an Action of Debt for the Arrearages: Upon *Nihil debet* pleaded, Issue was joyned; and it was found for the Plaintiff. The Defendant moved in Arrest of Judgment, That Debt did not lye for the Arrearages, but he ought to have brought a Writ of Annuity, because it was for the Arrearages of an Annuity: which yet continued. And of that Opinion was the whole Court, and the Judgment was stayed. Mich. 1649. *Tindal* and *Harrington's* Case. in B. R. *Styles.* 162. See *Cook.* Hill. 29 Eliz. in C. B. 4. Part. in *Oxnell's* Case, a difference is put betwixt a Rent, and an Annuity, *scil.* that for an Annuity, an Action of Debt may be brought for the Arrearages, although the Annuity continue: As, if a Parson or Prebend have an Annuity, and the Annuity is behind, and the Parson or Prebend resign, he shall have an Action of Debt for the Arrearages: But in case of a Rent, when

when the ſame continueth of any eſtate of Inheritance, or Freehold, there by the Common-Law no Action of Debt did lye for the Arrearages. *Cook.* 4. Part. 49. *Ognells* Caſe.

4. If the Grantee of a Rent-Charge purchaſe parcel of the Land, he cannot afterwards maintain a Writ of Annuity, becauſe the Rent is extinct; but if the Rent determineth by the Act of God, or by the Act of the Law, there he ſhall have a Writ of Annuity, *quia actus Legis non facit injuriam. Cook.* 2. Part. 36. *Fulwood* and *Wards* Caſe.

5. An Abbot with the aſſent of his Covent granted for them and their Succeſſours to a man and his heirs, to find one of his Monks to ſay Maſs every Holy-day in ſuch a Chappel; and further granted, That *toties quoties fuerit defectus in aliquo*, that they would forfeit to him and his heirs 5 l. And the Queſtion was, Whether in this Caſe, Debt did lye for the heir, or a Writ of Annuity: The Opinion of the Court was, That in this caſe a Writ of Annuity did not lye, becauſe the thing granted was not annual: And yet the Court held, That a man might have a Writ of Annuity; for a Rent granted every ſecond or third year. Mich. 28 H. 8. *Dyer.* 24. but in ſuch caſe an Action of debt lyeth for the heir.

6. If a Rent-charge be granted for life, *Proviſo quod non onerabit perſonam*; If the Grantee dyeth, Debt lyeth by the Executors of the Grantee againſt the Grantor, for otherwiſe they ſhould be without remedy. *Cook.* 6. Part. 41. in Sir *Anthony Mildmay's* Caſe.

7. Sis *Giles Capell*, by his Deed granted an Annuity to one *Barton* for the Term of his life, out of all his Lands in *Potters-Hall* in Com. *H. Et ſi contingat prædict. annuitatem aretro fore, &c. quod huic bene licuerit B. in Tenementis prædict. tam pro prædict. annuitate, quam pro 6 s. 8 d. nomine pœnæ toties quoties diſtringere*; and there was no word of Grant in the penalty; The Annuity was behind for divers years: and for the Arrearages, and alſo the penalty, the Executors of *B.* brought Debt againſt the Executors of Sir *Giles*; and declared upon that Grant, *virtute cujus*, the Grantee was ſeiſed in *Dominico ut de Libero ſuo Tenemento*. The Defendant pleaded, That there was not any ſuch place called *Potters-Hall*: Upon which the Plaintiff demurred in Law. It was agreed by the Juſtices in this Caſe, That for the penalty no Action of Debt did lye; becauſe the perſon of the Grantor was not charged with it: But it was agreed, That if a Rent-charge be granted for life with a Proviſo, That it ſhall not extend to charge the perſon by a Writ of Annuity; yet after the Eſtate determined for the Arrearages, the Executors of the Grantee ſhould have an Action of Debt. Hill. 6 Eliz. *Dyer.* 227. Sir *Giles Capell's* Caſe.

8. If a man granteth a Rent by Deed out of certain Lands, there to charge the Land it is remedileſs; but the Grantee may charge the perſon of the Grantor in a Writ of Annuity: & if he addeth a Proviſo to it, That it ſhall not charge the perſon of the Grantor, it is void, if he doth not give him ſeiſin upon the Delivery of the Deed, for that ſuch a Proviſo taketh away all his remedy. *Cook.* 6. Part. 58. in *Bredimans* Caſe.

9. *William Ward* being Tenant for years determinable upon the life of *Tho:* Lord *Pagett*, of a Barn and certain Tythes in *Stretton* in *Com. W.* granted a Rent of 10 l. *per ann.* by his Deed dated 30. *Junii*, 29 Eliz. out of the ſaid Barn and Tythes to *Fulwood* for 15 years, with clauſe of Diſtreſs: Afterwards 32 Eliz. the Lord *Pagett* dyed: In that caſe it was adjudged, That a Writ of Annuity was maintainable for the Arrearages after the death of the Lord *Pagett*; for in ſuch caſe there was not Election given to have any one of two things, but to have one ſumme in one degree as a Rent, or in another as an Annuity: and therefore preſently by the Grant, the thing veſted in the Grantee, and his Election did remain, either to make it a Rent-thing to charge the Land, or a perſonal thing to charge the perſon in a Writ of Annuity. And in that Caſe it was alſo adjudged, That by the death of the Lord *Pagett*, the Rent was not determined. *Cook.* 2. Part. 37. *Fulwood* and *Wards* Caſe. Vouched in *Cook.* 2. Part. 37. in Sir *Rowland Heyward's* Caſe.

10. A Rent-Charge was granted to a Femeſole and her heirs, without words for the Grantor and his heirs; The husband and wife brought a Writ of Annuity and declared, and were Non-ſuit; and afterwards the husband and wife were divorced *Cauſa adulterii*, the Rent was behind, the wife diſtrained for the Arrearages. In that caſe it was holden, That the Declaration by the husband and Wife was an Election to make it an Annuity, and not a Rent-Charge; and that the Declaration of the husband had prejudiced the wife in her Inheritance; for if the husband had not declared, it ſhould have been a Rent in Fee to the Wife; but being turned into an Annuity, ſhe had but an Eſtate for life. And in that Caſe it was holden, That Debt did lye, or ſhe might diſtrain for the Arrearages. Mich. 6 Jac. in C. B. *Richardſon's* Caſe adjudged.

11. In a Writ of Annuity the Plaintiff declared, That whereas the King by his Letters Patents had granted to the Defendants certain Priviledges and Licences concerning the making of Allome within this Realm, that for the Counſel given by him before to the Defendants, he being a Counſellour at Law, concerning the drawing of the Letters Patents, as for his Counſel to be given afterwards,

granted

granted to him an annual ſum of 40 l. for 26 years; The Defendants plead, That the King granted to them the ſole making of Allome, and confeſs the Annuity to be granted to the Plaintiff by Deed Indented, but ſay, that the Annuity was granted *percipiend. extra clara Lucra et proficua*, which accrued to them by the making of Allome; and averred, That no cleer gains or profits accrued to them by the making of Allome ſince the making of the ſaid Indenture; upon which the Plaintiff did demur in Law: It was adjudged for the Plaintiff; for it is a good grant of an Annuity to charge their perſons. Trin. 17. Jac. *Intr.* Mich. 16 Jac. in C. B. rott. 3339. *Smith* and Sir *John Bowcher* and *Jones* Caſe. *Hutton* 33. See *Hob.* 248. the ſame Caſe.

12. One granted a Rent out of Land to a man and his heirs, without ſaying *pro ſe et heredibus*; the Grantor dyed, and the Grantee brought a Writ of Annuity againſt the heir of the Grantor, who appeared, and imparled till the next Term; and then the Plaintiff diſcontinued his Suit, and then diſtrained, and avowed, and then the Plaintiff in the Replevin pleaded the Writ of Annuity in barr: whereupon it was demurred: And it was adjudged for the Grantee; for the perſon of the heir was not chargeable, and therefore the Election was void and none in Law; and therefore *per Curiam*, though they had proceeded to Judgment in the Writ of Annuity, yet the Land might ſtill have been charged: But in that caſe it was ſaid, If the Writ of Annuity had been brought againſt the Grantor himſelf, it would have bound for ever, and ſo it would have turned the Rent-Charge in Fee-ſimple into an Annuity onely for the life of the Grantor Mich. 17 & 18 Eliz. *Dyer.* 344. See *Foſter* and *Jackſon*'s Caſe. Trin. 10 Jac. *Hob.* 58. acc.

13. An Annuity is granted to a Woman for life, who afterwards marries; the Arrearages of the Annuity incurr, and the wife dyes; whereby the Annuity is determined: It was adjudged, That the husband ſhould have an Action of Debt at the Common-Law; for an Annuity is more then a thing in Action, and may be granted over. And it was agreed by the Court in this Caſe, That if a man grant an Annuity out of Land in which he hath no Intereſt, yet it is a good Annuity to charge the perſon of the Grantor, in a Writ of Annuity. Paſch. 26 Eliz. in C. B. *Owen.* 3.

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2. *Where by Eviction of the Land, an Annuity or Rent granted out of the Land ſhall ceaſe, and be Extinct; and where not.*

1. IF a man grant an Annuity *pro una acra terræ*, this is a Condition; and if the Land be evicted, the Annuity ſhall ceaſe: But if a man maketh a Leaſe for life of one Acre for another Acre, if the Acre be evicted, yet the Leſſor ſhall not enter, becauſe in that caſe the Eſtate is executed; but in the other Caſe, the Annuity is onely executory. *Cook. Inſtitutes* 204 and it is like the Caſe, if a Woman give Lands to a man and his heirs *Cauſa Matrimonii prælocuti*; If ſhe marry him; or if he refuſe to marry her, the woman ſhal have the Land again to her and her heirs: But if a man giveth Land to a Woman *Cauſa Matrimonii prælocuti*; there although the marriage takes effect, or ſhe refuſe, the man ſhall not have his Land again; for in the one Caſe it is executory; and in the other, executed. *Cook. Litt.* 204.

2. If Tenant for life of another man by his Deed granteth a Rent-Charge to one for 21 years, and *Ceſtuy que vie*, dyeth, thereby the Rent-charge is determined; and yet the Grantee may have during the years a Writ of Annuity for the Arrearages incurred after the death of *Ceſtuy que vie*, becauſe the Rent-charge did determine by the Act of God; and ſo it is, If Land, out of which a Rent-charge is granted, be recovered by *Eigne* title, the Rent-charge is determined; yet the Grantee ſhall have a Writ of Annuity, for that the Rent is avoided by Courſe of Law. See *wards* Caſe, *Cook.* 2. Part. 36. in *Heyward's* Caſe. acc.

3. *Where*

3. *Where Annuity granted* pro Conſilio, *&c. or for the executing of an Office, is good; For what Cauſe it ſhall determine, and what not; And where the Fee ſhall remain, though the Office be determined* et è contra. *And where ſuch an Annuity may be forfeited; or granted over; where not.*

1. IN a Replevin, the Defendant avowed for a Rent-charge which was granted to him *pro Conſilio impendendo*. The Plaintiff in barr of the Avowry pleaded, That the Defendant was attainted of Treaſon, and was committed to the Tower; and that the Grantor had buſineſs to uſe his Councel, and could not be admitted to him: and upon Demurrer, It was adjudged, That the Avowant ſhould have the Rent; and the Defendant in ſuch Caſe may give Counſel when he is in priſon, as when he is at large. 2. It was agreed in that caſe, That ſuch a Rent ſhall not be forfeited by Attainder; nor can it be granted over. 6 H. 8. *Dyer.* 2.

2. The Parſon of *Boſworth* granted an Annuity out of his Rectory of *B.* to *J. S.* and his Aſſigns for the life of the Grantor, and the Grant was *pro Conſilio impenſo*. *J. S.* granted it over to a Stranger, who for Arrearages incurred after the Grant, brought a Writ of Annuity; and therein declared, That *J. S.* was ſeiſed *in Dominico decimo ſuo ut de Libero tenemento*. It was a Quære, Whether it were aſſignable over? and whether Annuity did lye firſt, becauſe the Defendant in his Count, had counted, that he was ſeiſed in his Demean as of Free-hold; and ſo determined his Election to have it as a Rent-ſeck. See *Cook. Inſtitutes* 144. it is aſſignable over: and ſee *Cook.* 2. Part. the Election is determined to have it as a Rent, in Sir *Rowland Hayward's* Caſe.

3. An Annuity was granted to an Attorney *pro Conſilio impenſo et impendendo*; and there being a difference betwixt the Grantor and a Stranger, he was of Councel with the Adverſary of the Grantor, not being requeſted to give Counſel to the Grantor. In that Caſe it was adjudged, That the Annuity was not gone, nor determined. Paſch. 22 Eliz. *Dyer.* 369. *Plomers* Caſe.

4. A Writ of Annuity was brought for an Annuity granted for the exerciſing of the Office of a Steward; and after Recovery had in the Writ of Annuity, the ſame was behind again; and thereupon the Grantee brought a *Scire facias* upon the firſt Judgment. The Defendant pleaded in barr, That, depending the Writ, the Plaintiff, although requeſted, had refuſed to execute the Office of Steward, viz. to hold a Court. It was adjudged to be a good Plea; for that when he refuſeth to hold a Court, the Annuity ceaſeth; and then if Arrearages be behind, he ſhall have Debt onely for the Arrearages. Trinit. 25 Eliz. *Dyer.* 377.

5. A Writ of Annuity was brought for an Annuity granted *pro Conſilio impenſo, et impendendo*. The Defendant pleaded in barr, That he carried a Bill to the Plaintiff, to have him ſet his hand to it; and becauſe he refuſed, he detained the Annuity. It was holden by the whole Court, to be no Plea; for the Counſellour is bound to give his advice, but he is not bounden to ſet his hand to every Bill, for that may be inconvenient for him. Paſch. 16 Jac. in B. R. *Mingies* Caſe. *Popham* 135.

6. A Writ of Annuity was brought for the Arrearages of an Annuity of 20 l. *per annum* granted to the Plaintiff by the Defendant *pro Conſilio impenſo et impendendo*. The Defendant pleaded, That before any Arrearages incurred, he required the Plaintiff to do him ſervice, and he refuſed. The Plaintiff Replyed, That before the Refuſal, ſuch a day and place the Defendant diſcharged the Plaintiff of his ſervice. The Opinion of the Court was, That the Plea in barr was not good; for that he ought to have ſhewed for what manner of ſervice the Plaintiff was retained, and for what kind of ſervice the Annuity was granted; and then to have ſhewed ſpecially, what ſervice he required of the Plaintiff; and what ſervice the Plaintiff refuſed. It was further moved in this Caſe, If the diſcharge were an abſolute diſcharge of the Plaintiff, of the ſervice and of his attendance, ſo as afterwards the Defendant could not require ſervice of the Plaintiff? And the better Opinion of the Court was, That becauſe the Plaintiff had the Annuity for his life, it was reaſon, that he continue his ſervice for his life, as long as the Annuity doth continue, if he be required: But in caſe where one is retained but for one or two years; there, he once diſcharged, it is peremptory and abſolute. Mich. 32 & 33 Eliz. in C. B. *Bigſhaw* and the Earl of *Shrewsbury's* Caſe. *Leon.* 209.

7. *A.* granted the Office of Stewardſhip of a Mannor to *B.* for life, with a Fee of 40 s. for the exerciſe of the ſaid Office; Afterwards the Grantor by Deed reciting, That whereas the ſaid *B.* had, and held, the Office of Steward for his life, he granted the Reverſion of the ſaid Office by name of reverſion after the death of the firſt Grantee, *una cum feodo* of 40 s. *pro exercitio Off. præ-*

dict.

diſt. the ſecond Grantee held Courts; and for arrearages, diſtrained and avowed. It was in that caſe adjudged, That the ſecond Grant was void, becauſe there was no reverſion of it: and alſo the grant of the Fee was void; for that it was an executory recompence for the execution of an Office. Paſch. 9 Eliz. *Dyer.* 259. Sir *John Savage's* Caſe.

8. Husband and Wife ſeiſed of a Mannor, to them and the heirs of the husband; The Husband granted the Stewardſhip of the ſaid Mannor to the Father for life, and by the ſame Deed, granted the ſame to the Son for life after the death of the Father, and granted a Rent-charge to them both joyntly, for the exerciſe of the ſaid Office of Steward out of the Mannor; the Father exerciſed the Office; the Rent is behind, the Grantor dyed, and his Wife ſurvived him; the Father dyed; The Wife granted a Copy-hold which was eſcheated to a ſtranger for life; the ſon diſtrained in the Copyhold, for the arrearages of the Rent incurred in the life of the Father, and avowed; the Copyholder pleaded all the matter in barr. It was the Opinion of the Court, That the Diſtreſs and Avowry was maintainable, and that the Copy-holder ſhould hold the Copyhold charged: But in that Caſe, it was agreed, That the Son ſhould be driven to ſhew that he had exerciſed the Office of Steward after the death of his Father; for if he doth not ſo, the Annuity and Rent is determinable, and not diſtrainable, &c. But Debt ſhould lye for the Arrearages onely. Hill. 10 Eliz. *Dyer.* 270. *Walton's* Caſe.

9. Note: It was holden by all the Juſtices, That a man may retain one to be Steward of his Courts for a time, as for a year or more, and that he ſhall have ſo much for his pains; and the ſame ſhall be good without a Deed; and if he keep the Courts, he ſhall have Debt for his Sallary againſt the Lord; But he ſhall not have or maintain a Writ of Annuity without a Deed of the Office; and a Steward may be retained without Deed. Hill. 8 Eliz. *Dyer.* 248. See Trin. 41 Eliz. in B. R. *Harris* and *Fayes* Caſe. *Cook.* 4. Part. 30. adjudged acc.

10. A Biſhop granted the Stewardſhip of a Mannor to one for life, and a Fee of 40 s. for the exerciſe of the Office *percipiend.* out of the Mannor of *D.* The Plaintiff brought an Annuity againſt the Succeſſour, and ſhewed that he kept Courts, but averred not the Ingroſſing of the Roll; and afterwards the Biſhop diſcharged him. It was holden in that Caſe, That the Plaintiff ought to render his ſervice to every Succeſſour; for it is Iſſuable, the Succeſſour *non exoneravit eum.* Hill. 4 & 5 Ma. *Dyer.* 156, 157. *Lucas's* Caſe.

11. A Biſhop after the Statute of 1 Eliz. granted the Office of Surveyor of all his Manor-Lands, &c. to J. S. & J. D. for their lives, and granted a Fee of 20 nobles to them for the execution of the ſame, with clauſe of Diſtreſs for the ſame, if it were behind and demanded; which Grant was confirmed by the Dean and Chapter: and in a Replevin the Defendant ſhewed all this matter, and avowed the diſtreſs for the Arrearages; and averred, the ſaid Office was an ancient Office, and that the ſaid Office with the Fee were grantable by the Biſhop and his Predeceſſours *tali perſonæ et perſonis quibus ſibi placuerit*: and that the Rent was behind, and for default of payment he avowed; and upon pleading of the Statute of 1 Eliz. in barr of the Avowry, and the Office had been granted but for one life, the Avowant demurred in Law. And it was adjudged, That the Grant of the ſaid Office for two lives, was void againſt the Succeſſour by the Statute of 1 Eliz. And in this Caſe, theſe Points were Reſolved; 1. That by the Common-Law, ſuch a Grant for two Lives, with the aſſent of the Chapter, had been good, although that it had not been granted for two Lives before. 2. It was Reſolved, That the ſaid Office may be ſaid, belonging to the Biſhoprick; for that the word, *belonging*, ſhall be taken, for *concerning*, and although that he himſelf could not exerciſe the ſaid Office, yet he had an Inheritance in the guift and diſpoſition of it. 3. Reſolved, That when an Office is ancient and neceſſary, the grant of the ſame with the Ancient Fee, is no diminution of the old Revenue; and therefore ſuch Grants are exempted out of the reſtraint of the Statute of 1 Eliz. But yet it was Reſolved, That although that ſuch an Office for neceſſity might be granted to one for life, yet of neceſſity it was not to be granted to two, for by ſuch means it might be granted in *infinitum*, for life, in taile, or in Fee; and therefore ſuch a Grant was reſtrained by the Statute of 1 Eliz. 4. Reſolved, That the grant of any Ancient Office by a Biſhop ſhall not bind his Succeſſour, unleſs it be confirmed by the Dean and Chapter. 5. Reſolved, That if the Biſhop be tranſlated, depoſed, or removed, who made the Grant, that the Grant is void againſt the Succeſſour, although he be alive who makes the Grant. *Cook* 19. Part. 51. The Biſhop of *Salisbury's* Caſe.

12. Note: That theſe points were Reſolved for Law in the Earl of *Shrewſbury's* Caſe. *Cook.* 9. Part. 46. to 53. 1. That when the King granted to the Earl of *Rut'land* the Stewardſhip of the Mannors of *A. B. & C.* although it is not expreſſed in the Patent in what Counties the Mannors lye; yet the grant is good and certain enough: for *Manerium de A. B. & C.* are certain enough; and in the Letters Patents, there may be divers circumſtances

cumſtances to deſcribe what Mannors the King meant, as in whoſe tenure, occupation, poſſeſſion, the value, or the particular; but if a man would plead ſuch a Grant, there in his pleading he ought to alledge the grant of the Mannors in a County certain. 2. Reſolved, Although the King cannot grant an Office from a day to come, as he did in this caſe, *ſcil. à tempore plenæ ætatis* 21. *annorum Comitis Rutland*; yet it ſhall be good for the life of the Patentee to begin by the Grant, and void for the time paſt. 3. Reſolved, That although without ſpecial words, a Steward cannot make a Deputy, becauſe it is an Office of skill, knowledg, and diſcretion, and theſe Qualities are ſo individually annexed to him, that he cannot make a Deputy, nor an Aſſignee without ſpecial words. Yet it was Reſolved, That when the King grants to an Earl the Office of Stewardſhip of his Mannors, that he may make a Deputy, in reſpect of the baſeneſs of the Office, and the great reſpect which the Law hath to the perſon of an Earl, who is *præfectus*, or *Præpoſitus Comitatus*, and therefore for conveniency he may make a Deputy, although there be not any expreſs words in his Patent; and alſo for neceſſity, for he ſhall be intended to be imployed in the great buſineſs of the Realm, and ſo cannot intend ſuch an inferiour Office. 4. Reſolved, That there are three Cauſes of forfeiture of Offices by matter in fact, Abuſe, Refuſall, Not Uſer. Abuſe, as if the Marſhal or Gaoler do ſuffer voluntary Eſcapes. But it was Reſolved, That the not-Uſer of the Office of Steward in this caſe, was no forfeiture of it, becauſe that this Office is not to be exerciſed but upon demand or requeſt made by him, to whom he is Officer: But the not uſer of Offices, which do concern the Adminiſtration of Juſtice, and which require continual Attendance, as Chamberlain of the Exchequer, Prejgnothory, Clerk of the Market, &c. there the Non uſer of ſuch Offices is a cauſe of forfeiture of them: But the not uſer of any Office is not a forfeiture of it, if his not Attendance be no damage to him to whom he is Officer; as the Keeper of a Park, if he do not attend two dayes, it is no forfeiture; but if by reaſon of his abſence, perſons unknown kill the Deer, there it is a forfeiture. 5. It was Reſolved, That an Action upon the Caſe being brought *vi et armis*, for the diſturbance of the party in the exerciſing of ſuch an Office, was maintainable. 6. It was Reſolved, That the holding of the Courts, and the taking of the Fees, was a diſturbance; and if any diſturbance be alledged, it is ſufficient, although all the Circumſtances of the diſturbance be not found. Note; In this Caſe, it was ſaid, That if in any former Patent of the ſaid Office, the Patentee had expreſs power to make a Deputy; then the Clauſe in the ſaid grant of the Office of Stewardſhip, *una cum omnibus aliis proficiis, juribus, dicto Officio ſpectantibus, &c. et adeo plene et integre, &c. prout aliquis et alii in Offic. prædict. occupant, ſive occupantes, habuit, &c.* being applyed to a particular Charter, which hath expreſs authority; the Plaintiff in the principal Caſe, might make a Deputy. *Cook.* 9. Part. 42. to 53.

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4. *Where an* Annuity *is by Preſcription; what remedy for it, and where. And where ſuch an Annuity ſhall be lyable to Charge the Heir, or other perſon; where not.*

1. THe Heir ſhall be charged by a Writ of Annuity upon the Grant of the Father, if he hath aſſetts by diſcent from his Father: But a Writ of Annuity ſhall not be maintainable againſt the heir by preſcription, becauſe it cannot be known, whether he hath Aſſetts by diſcent from the ſame Anceſtor, by whom the Annuity was firſt granted: But an Annuity may be by Preſcription; and may be maintained without ſhewing a Deed of it: and therewith agrees the old books of 41 E. 3. & 10 E. 4. 10. *Fitzh. Na. Br.* 152. b.

2. If a Parſon or a Vicar, have a Penſion out of another Church, and the Penſion is kept from them, or another Parſon taketh and claimeth the ſame; The Parſon or Vicar who ought to have the Penſion, may ſue for the ſame in the Eccleſiaſticall Court; and ſo if a Parſon or Vicar ſue in the Spiritual Court for a Penſion which they or their predeceſſors have had time out of mind: But yet in ſuch Caſe, at the Election of the Parſon or Vicar, they may have and maintain a Writ of Annuity at the Common-Law for the ſame: But if they once ſhew a Writ of Annuity at the Common-Law for the ſame, and declare upon the Preſcription, they ſhall not afterwards ſue in the Spiritual Court for the ſame in the name of a Penſion; and if they do, a Prohibition lyeth: and all this was agreed and adjudged, Mich. 10 Jac. in C. B. in *Spratt* and *Nicholſon's* Caſe; where the Caſe was, *Spratt*, ſub-Deacon of *Exeter*, did Libel in the Spiritual Court againſt *Nicholſon*, Parſon of *A. pro annuali penſione de* 30. out of his Parſonage, and ſhewed in his Libel, how that, *tam per realem compoſitionem quam per antiquam et Laudabilem Conſuetudinem ipſe, et prædeceſſores ſui habuerunt et habere conſueverunt prædict. annualem penſionem*, out of the

Parſonage of *A.* And it was adjudged, That although he claimed the ſame by temporal grounds, *viz.* by Preſcription and real Compoſition; yet becauſe the parties were both ſpiritual perſons, he had his Election to ſue for the ſame in the Spiritual Court, or in the Temporal Court: And the Statute of 34 H. 8. doth Licence ſpiritual perſons to ſue for Penſions in the Spiritual Court. But in that Caſe it was agreed, That if ſuch a Spiritual perſon, who hath ſuch a Penſion, doth bring a Writ of Annuity for the ſame, (as he well might do) and declare upon the Preſcription, he cannot afterwards ſue for the ſame Annuity, by the name of a Penſion, in the Spiritual Court; and if he doth, that a Prohibition lyeth. See; By all the Juſtices, A Penſion iſſuing out of a Rectory, is the ſame with a Rent. *Popham* made a Quære, If ſuch a Penſion were demandable in the Spiritual Court? or ſhall be demanded by the Common-Law in the Common-Law Courts? But all the Juſtices held, It might be demanded at the Common-Law: And ſo ſuch a Penſion was demanded in a Writ of Entry; whereupon a Common Recovery was had. Mich. 35 Eliz. *Crocker* and *Dormers* Caſe. *Popham.* 23.

3. The Biſhop of *Rocheſter* brought a Writ of Annuity againſt the Dean and Chapter of *Rocheſter*, and declared of an Annuity by Preſcription from the Prior of St. *Andrews* of *Rocheſter*; which Priory was diſſolved 28 H. 8 and 31 H. 8. their poſſeſſions were committed by the King to the Dean and Chapter of *Rocheſter*: The Queſtion was, Whether the Annuity did remain, or not? It was the Opinion of the Lord *Anderſon*, Chief Juſtice, That the Annuity was gone; for an Annuity charges only the perſon; and then the perſons being the Corporation, being diſſolved, the Annuity is gone: But if there be any thing granted by which the Land is charged, there it continues. If a Priory be charged with an Annuity, the Annuity ſhall continue, although the Priory be changed into an Abbey; and 21 H. 7. an Annuity out of a Parſonage is not a meer perſonal Charge, but chargeth the perſon only in reſpect of the Land: The Court took time to adviſe of the Caſe. Paſch. 38 Eliz. C. B. the Biſhop of *Rocheſter's* Caſe. *Owen.* 73.

Appearance.

1. *Where an Appearance ſhall be good, and where not. And how it ſhall be tryed.*

1. THE Condition of an Obligation was to appear at his Suit in the Kings-Bench; and upon Conditions performed, pleaded, It was found for the Plaintiff. It was moved in ſtay of Judgment, That the tryal of the appearance ought to have been by the Record, and Not by the Country: It was ſaid, That the tryall was good enough, for it may be he appeared there, and yet there is no Record made thereof. But the Court anſwered, Then it is no Appearance, if it be not Recorded; and the appearance ſhall be tryed by the Record. The Judgment was ſtayed. Mich. 30 Eliz. in C. B. *Brett* and *Shepherd's* Caſe. *Goldeſbr.* 67. See *Leon.* 90. the ſame Caſe more at large.

2. A Priſoner in the *Fleet* was brought to the Common-Pleas Barr by *Habeas Corpus*, to the intent to have him appear to an Original in debt brought againſt him: and being demanded, whether he was the ſame party againſt whom the Original was brought; he confeſſed it, but denyed to appear to the Action. It was ſaid by one of the Preignothories, That the Court ought to record his appearance, confeſſing himſelf to be the ſame perſon. But the Opinion of the Court was, That it was no Appearance: Wherefore he was remanded to the *Fleet*. Hill. 43 Eliz. in C.B. *Tamworth* and *Aſcough's* Caſe. *Goldeſbr.* 118.

3. Note; by *Glyn*, Chief Juſtice, If one come in upon the *Exigent*, he may appear by his Attorney; but if he come in upon the Outlawry, he muſt appear in his proper perſon, and not by Attorney; and ſo is the conſtant practice of the Common-Pleas, and of this Court alſo. Mich. 1655. B. R. *Styles.* 465.

4. A Writ of Errour was brought upon a Judgment in a *Quid juris clamat*, and it was aſſigned for Errour, That the Tenant did appear by Attorney; whereas he ought not but in perſon, becauſe he is to do an Act in proper perſon, if it be not in caſe of neceſſity, where the Attorney may be received by the Kings Writ, or plead in barre of Attornment; as if he claime Fee, &c. or other peremptory matter; after which Plea pleaded, he may make Attorney; and it is not

ſhewed

ſhewed in the *Quid juris clamat*, what Eſtate the Tenant hath: But the Opinion of the Court was, That becauſe the ſame is admitted by the Court and the Plaintiff. It was holden to be no Errour. See 32 H. 6. 22. and 1 H. 7. 27. by *Brian* and *Conſtby*, acc. Mich. 26 & 27 Eliz. in B.R. *Leon.* 290.

5. Debt was brought upon a Bond, with a Condition, that the Defendant ſhould appear before the King at a certain day, *viz. die Jovis poſt Oct. Martini*; and upon *Nul tiel* Record pleaded, the Defendant brought his Record of Appearance, *Lunæ poſt* 15. *Martini*: and this was holden by the Court an appearance at the day in the Condition. Mich. 13 Jac. in C. B. *Carter* and *Freeman*'s Caſe. *Brownlow* 1. Part. 74.

6. *A.* brought debt upon an Obligation made to him as Sheriff, with a Condition, That the Defendant ſhould appear. It was ſaid for the Defendant, That he had pleaded his appearance, but had omitted to ſay; as it appeareth by the Record: and that was held not to be good: But the Record being peruſed, it appeared, That the Caſe was, That the Defendant was bound to appear in the Kings-Bench at a day prefixed in the Writ; and the Defendant pleaded, There was no day prefixed in the Writ for his appearance. It was holden by the Court, That that was no plea, for the Defendant was eſtopped: and the Court commanded Judgment to be entred for the Plaintiff. Trin. 4 Jac. in B.R. *Andrews* and *Robbins* Caſe. *Brown.* 1. Part. 81.

7. Note; The Court was moved, upon an *Affidavit*, That the Defendant might plead and go to tryall, becauſe his Attorney had appeared; and now he ſaith, He is not an Attorney of this Court, and doth refuſe to plead. The Court ſaid, If he hath appeared, and will not plead, enter Judgment againſt his Clyent; and though he hath not appeared, if he did promiſe to appear, we will force him to do it. Where I obſerve, the Court may compell one to appear. Hill. 1649. in B.R. *Derwick* and *Bambers* Caſe. *Styles* 208.

8. In an *Ejectione Firmæ* againſt *Thomas* the Father, and *John* his ſon; the Father appearing by J. S. his Attorney; *John* by the ſame; J.S. was admitted by the Court his *prochyn Amy pro eodem, Johanne ad proſequendum*; whereas he ought to have been admitted to plead by his Guardian, *ad defendendum et non ad proſequendum*; and the ſame was aſſigned for Errour. It was ſaid, That it was no Errour; for that Guardian and *Prochyn Amy* are both one. But the Opinion of the Court was, That for both Caſes, it was Errour; for that the Defendant Enfant ought alwayes to appear by his Guardian, and not by *Prochyn Amy*. *Fitzh. Na. Br.* 27. and that to admit the Defendant *ad proſequendum*, was prepoſterous, and ill. See *Dyer.* 104. Trin. 20 Jac. in C.B. *Simpſon* an *Jackſons* Caſe. *Cro.* 2. Part. 640, 641.

9. Sir *William Read* Outlawed upon an Indictment, for not repairing a Bridge, brought Errour, and moved to purſue it by Attorney, and to put in bail, and not to appear in perſon: But it was Reſolved by all the Juſtices, That none might aſſign Errour upon an Indictment, but he ought to be in perſon, and put in baile in perſon, it being againſt the Courſe of the Court to do otherwiſe: Wherefore he being 80 years of age, was brought to *London* in a Horſe-Litter from his houſe, upon mens ſhoulders to the Barre, and there aſſigned Errour, and put in bail to proſecute, &c. Trinit. 19 Jac. in B.R. Sir *William Reads* Caſe. *Cro.* 2. Part. 616.

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2. *Appearance of an Enfant and Feme Covert: Where his appearance by Attorney is not good*, et è contra; *and where he muſt appear by Guardian; and where the appearance of the husband is good for the wife*, et è contra. *And where one may appear by Attorney; and in what Suit.*

1. Judgment was given for *Jones*, in an Action by him brought in the Common-Pleas againſt *Lewes*; *Lewes* brought a Writ of Errour, and aſſigned for Errour, That he was an Enfant at the time of the Action brought againſt him, and that he appeared by Attorney: whereas he ought to appear by Guardian, or *Prochyn Amy*: The Defendant in avoidance of the Writ of Errour pleaded, That there was no Warrant of Attorney. The Judgment was reverſed for the Errour aforeſaid. But the Opinion of the Court was, That the better way for the Plaintiff, had been to have demurred in Law; for there being no Warrant of Attorney, there was no appearance at all. Paſch. 15 Car. in B.R. *Lewes* and *Jones* Caſe.

2. Errour was brought in the Kings-Bench to reverſe a Judgment given in the Common-Pleas; The Errour aſſigned was, That the Action was brought againſt three perſons, one of whom was within age, and they all appeared by Attorney; whereas he within age ought to have appeared by his Guardian: and ſo the Judgment was erroneous as to him, as conſequently to the reſt, becauſe it was a joynt Judgment: And of that Opinion was the Court; for it being a joynt Judgment, if it be

naught in part, it is naught in the whole. The Judgment was reverſed. Hill. 1654. in B. R. *Bocking* and *Symons* Caſe. *Styles* 400.

3. A Writ of Errour was brought to reverſe a Judgment given in an Action upon the Caſe againſt two Executors; The Errour was, That one of the Defendants was within age at the time of the Action brought, and did appear, and plead by his Attorney; whereas he ought to have done it by his Guardian. It was ſaid, Where he appears in his own Right, he ought to appear by his Guardian; but where he appears in *Autre droit*, as he doth here, being an Executor, he may appear by Attorney: and ſo was *Drayton*'s Caſe. 9 Car. But the Opinion of the Court was, That it may be, that the Executor may be charged of his proper goods, and then it is not reaſon but that he ſhould plead by his Guardian; and he is not within the Statute of 21 Jac. for that Statute was made for the Plaintiff, and this is in the caſe of a Defendant, therefore he ſhould have appeared by his Guardian. The Judgment was reverſed, Hill. 1650. rott. 1193. B. R. *Weld* and *Rumney*'s Caſe. *Styles* 318.

4. *Richard Holland* and *Margaret* his Wife, one of the Daughters and heirs of Sir *Robert Langley* Knight, and *William Danſey* and *Anne* his Wife, the other daughter of the ſaid Sir *Robert*, brought a Writ of Errour to reverſe a Common Recovery had at *Lancaſter*, 13 Eliz. in a Writ of Entry *ſur diſſiſin in le Poſt*, of divers Mannors and Lands, &c. in *Alkerington*, &c. Wherein the Tenants did vouch *Tho. Leigh* and *Katherine* his Wife, who appeared by their Attorney, who entred into warranty, and did vouch the Common vouchee. The Writ of Recovery was certified, and the Plaintiffs aſſigned Errour; For that *Katherine* was within age at the time of the Appearance of her and her huſband by the ſaid Attorney, and was within the age of 21 years at the time of the Judgment, *viz.* of the age of 18 years, and no more. And the Queſtion was, (amongſt divers other points) Whether the appearance of the wife within age by Attorney, was Errour or not? It was argued for the Plaintiffs in the Writ of Errour, That the Rule of Law is, That in every *Precipe quod reddat* wherein Land is demanded, the Tenant ought to appear either in perſon, or by one lawfully authorized by him; and that is the reaſon, that if Judgment be given againſt one by an appearance by an Attorney, where the Attorney hath no Warrant to appear, the ſame is Errour: and the reaſon is, becauſe the Land or thing in demand is loſt, or gained by one who had no Warrant of Attorney: And alſo it is a Rule in Law, That an Infant ſhall not appear by Attorney; as the Books 1 H. 5. 6, 22 H. 6. 31. b. &c. It was Objected, That the husband in this caſe was of full age, and therefore he might make an Attorney for his Wife. But to that it was anſwered, That it is a Rule of Law, That the husband cannot give away, or loſe the Inheritance of his Wife; but it muſt be given and loſt by her ſelf, and her own Act: and therefore the Inheritance in this Caſe being in the wife, ſhe is the principal Owner only to be taken Notice of; and then ſhe ought to appear in ſuch manner as the Law hath appointed in regard of her Non-age; And the Conſtituting of an Attorney is utterly void as to the wife, of which every ſtranger ſhall take advantage of. See 37 Eliz. in B. R. rott. 253. *Bartholmew* and *Hobb*'s Caſe. *Cook*. 10. Part. *Mary Portingtons* Caſe. The Caſe was not adjudged, becauſe one of the Plaintiffs in the Writ of Errour dyed, depending the Suit, Hill. 13 Jac. in B. R. *Holland* and *Jacksons* Caſe. *Bridgman*. 70, 71, 72, 73, 74.

5. A man was Outlawed for Murder, and dyed; his Adminiſtrator brought a Writ of Errour to reverſe the Outlawry. It was prayed, That he might appear by Attorney, and it was granted by the Court, that he might; for the reaſon wherefore the party himſelf was bound to appear in perſon, is, that he may ſtand *rectus in Curiâ*, and may anſwer to the matter *in fait*, which fails in this Caſe: and therefore the Adminiſtrator may appear by Attorney. Trinit. 17 Car. in B.R. adjudged acc.

6. A man was Outlawed after Judgment before the general Pardon, 43 Eliz. and after the Pardon dyed; his Executors made ſatisfaction upon Record; and without any proceſs they pleaded the General Pardon, with an averment, That they are not any perſons excepted. In this caſe, it was Reſolved, 1. Although the words in the Proviſo in the Pardon are, (untill ſuch time as the perſon ſo Outlawed ſhall ſatisfie) the ſame is ſuch an Intereſt in the perſon Outlawed, that although that he dyeth after the Pardon, yet his Executors may ſatisfie, and have benefit of the Pardon. 2. Reſolved, Foraſmuch as no *Scire facias*, nor *Capias utlagatum*, nor other proceſs lyeth againſt the Executors, they may *gratis* come in (for neceſſity, without proceſs) and plead the General Pardon, with averment, That they are not any perſons except; and every Subject by himſelf, or by his Attorney, ſhall plead the Act for his or their diſcharge. 5 Jac. in C. B. *Cook*. 5. Part. 79. Sir *Ed. Phittons* Caſe.

3. *Where*

3. *Where an Appearance ſhall be good to prevent a forfeiture of Land; where not.*

IN an Action of Treſpaſs the Caſe was this; The Defendant being Lord of a Manner, and holding his Court, the Plaintiff being a Tenant, and being in Court; and there being a Queſtion, Whether the Court were then legally holden, or not? and he being asked, If he did appear, or not? He anſwered, If it be a legal Court, I do appear; and if it be not a legal Court, I do not appear. And the Queſtion was, Whether this be an Appearance, or ſuch a refuſal to appear, a Copy-holder ſhall forfeit his Copy-hold, or not? It was Objected, It was no Appearance, and therefore the Copyhold was forfeited, 42 E. 3. 25. acc. and it is *dixit Comparuit*, which doth not anſwer to the fact alledged: On the other ſide, It was argued to be no forfeiture; for if the Court be well holden, then he doth appear, as his words manifeſt, and ſo there is no Contempt; and if the Court were not well held, his not appearing ſhall not hurt him, for he is not required to do it. Beſides, it doth not appear that the Court was legally ſummoned as it ought to be, nor any Proclamation made for holding the Court, nor any Notice given to the Tenants of it. The Court ſaid, It was a hard thing to make a forfeiture of a Copyhold, If there were a reall Controverſie, whether the Court were well held or not. All the Judges inclined, That it was no forfeiture; but the Caſe was adjourned. Hill. 23 Car. in B.R. rott. 66. *Parker* and *Cooke* Caſe. *Styles* 241.

4. *For what Cauſe, after an Appearance, the party ſhall be diſcharged, and where Appearance is peremptory.*

1. NOte, It was Reſolved by the whole Court That the Cuſtome of the Court is, That if a man ſueth another for ſuch a ſumme, or thing, for which the Plaintiff ought to have ſpecial bail, and doth not declare againſt him in 3. Terms, That the Defendant being brought to the Barre by *Habeas Corpus*, ought to be diſcharged upon on Ordinary appearance; and ſo alſo is the practice in the Kings-Bench, Hill. 17 Car. in C. B. adjudged, *Rutter's* Caſe.

2. Nonſuit after appearance is peremptory; but before Appearance it is not peremptory, becauſe a ſtranger may purchaſe a Writ in the name of him who hath cauſe of Action. *Fitzh. Na. Br.* 35. *Cook.* 1. Part. *Inſtitutes*, 139.

3. After Appearance, a Protection cannot be caſt the ſame Term, untill a new continuance be taken. *Ibid.* 13.

5. *Where the Court, in the ſame Term, upon ſpeciall matter ſhewed, may order the Defendants to Appear and Anſwer, without an Imparlance till the next Term.*

NOte; It was Ruled this Term, That where a Suit was brought againſt Executors for 2000 l. a juſt Debt; and they had appeared; (upon the motion of the Plaintiff) That the Action being brought againſt them as Executors, that he on purpoſe to defeat the Plaintiff of his debt, would confeſſe Actions to others: The Defendants were Ordered to Anſwer the ſame: For it was holden by all the Juſtices, That upon ſpeciall matter ſhewed, the Court may order the Defendant to appear, and put in his Anſwer the ſame Term; (whereas by the general courſe of the Court, he might Imparle untill the next Term) and ſo adjudged. Trinit, 9 Jac. in B.R. *Bolſtrod.* 1. Part. 122, 123.

Appeal.

1. *What it is; By whom, and againſt whom it may be brought; and when, and in what County to be brought; and for what, as Murder, Manſlaughter, Maheime, &c.*

1. AN Appeal, is the violent purſuing of a Subject unto death; and is the niceſt Suit that is, and every ſmall matter will quaſh the ſame, if it be not freſhly purſued; and ſhall in divers Reſpects be taken ſtrictly, *in favorem vitæ*: and the proceſs in every Appeal is to bear date the ſame day of Return; and if it be but a day after, it will be the diſcontinuance of the proceſs; and the omiſſion of any word in the Writ of Appeal which is material, will abate the Writ; and it doth vary from all other proceedings; for there ſhall be no Amendment of the Writ of Appeal; nor the diſcontinuance of it helped by any Statute. Mich. 8 Jac. in B.R. rott, 407. *Bradlly* and *Banks* Caſe, 141 142, 143.

2. The Statute of 31 H. 8. made it Treaſon for a woman to poyſon her husband; A woman poyſoned her husband: Afterwards the Act of 32 H. 8. of General Pardon, pardoned the offence; the heir brought an Appeal of Murder; and it was the Opinion of all the Juſtices, That now an Appeal of the Murder did not lye for the heir, for that now Murder was turned into Treaſon; and the greater Offence ſhall extinguiſh the leſſer. Mich. 33 H. 8. *Dyer.* 50. *Saccombs* Caſe. See *Cook.* 6. Part. 13. in the Caſe of Pardons. acc. And ſee 7 Eliz. *Dyer.* 235. where Petty Treaſon is pardoned by a General Pardon; there one who killed his Maſter, was Indicted of Murder, and holden, the Indictment did not lye againſt him: but being found guilty, was Reprieved.

3. An Appeal of Murder was brought againſt *Warniford*, to anſwer to *A. B. alias dict. A.B. fratri et heredi* of the dead; but becauſe in that caſe, the Plaintiff in the Appeal was called, and named Brother and heir in the *alias dictus*; and the *aliat dictus* is no part of the Name, the Appeal did abate, and the Defendant was diſcharged by the Court. Mich. 33 H. 8. *Dyer.* 51. *Warnifords* Caſe. See 33 Eliz. in B. R. *Wrote* and *Wigges* Caſe adjudged acc. *Cook* 4. Part. 45.

4. The ſon and heir brought an Appeal againſt *Mary Pigott prediorie*, and *Eliz. L. felonice*, for that they conſpired the death of *Rob. Pigott* his Father; and that the ſaid *Mary proditorie* to that purpoſe, and the ſaid *Eliz. L. felonice* gave him ſuch a kind of poyſon in a poſſet, which he not knowing, drank up, and afterwards within ſuch a time dyed: The Defendants being arraigned in Trinit. Term, 14 Car. pleaded Not guilty. Afterwards in Mich. Term following they were tryed at the Barr, and *Mary* found guilty, and *Elizabeth* Not guilty. It was moved in Arreſt of Judgment, 1. That there was no Declaration upon the File in the ſaid Mich. Term. And, 2. That there ought to have been ſeveral *Venire facias*, becauſe they were ſeveral Offenders, and not one *Venire facias* onely. But the Opinion of the Court was, That in regard the Appeal was arraigned at the Barre in Trinity Term, 14 Car. and the Defendants being at the Barre inſtantly pleaded thereunto, that the ſame was well enough without any other Declaration; but if they had not pleaded the ſame Term, or had pleaded any other plea, than Not-guilty, then the Declaration ought to have been filed. And for the ſecond point, It was agreed by the Court, That the Plaintiff might take out one or ſeveral *Venire facias*, for doubt of Challenge. See 9 E. 4. 27. and Judgment was given for the Plaintiff, That *Mary* ſhould be burnt to death. Trin. 14 Car. in B. R. *Pigott* and *Pigotts* Caſe, *Cro.* 1. Part. 382, 383.

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6. The Wife brought an Appeal of Murther of her husband againſt divers; and afterward ſhe brought another Appeal againſt others: It was Reſolved by the whole Court, That all the ſaid Appeals but the firſt ſhould abate; for ſhe ought to have had one Appeal againſt them all, and ſhe cannot have two Appeals of death; but ſhe ought to joyn all in one Writ: And if one brings an Appeal of death againſt divers, and all but one makes default; yet the Plaintiff muſt declare againſt them all. *Cook* 4. Part. 47. *Weites* Caſe. See there; The Principals and Acceſſories muſt be all joyned in one Appeal.

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ceſſory of the death of his brother. The Principal pleaded Not-guilty, and was found guilty of Manſlaughter, and had his Clergy. It was Reſolved in this Caſe, 1. That the Acceſſory was diſcharged, becauſe he could not be acceſſory before the fact in caſe of Manſlaughter. 2. Although the principal was convict, yet forasmuch as he had his Clergy before Judgment; for this caſe it was adjudged, That the Acceſſory ſhould be diſcharged: and ſo it is, where the principal upon his arraignment confeſſeth the Felony, and before Judgment obtains his pardon, the acceſſory thereby is diſcharged. Paſch. 39 Eliz. in B. R. *Cook* 4. Part. 43 *Blubes* Caſe.

8. The Wife brought an Appeal of the Murder of her husband; The Defendant pleaded, That he himſelf at another time, 8. *October*, 32 Eliz. by Inquiſition taken before the Coroners of the County of *Middleſex*, at *Shepperton* in the ſaid County; It was preſented, That the Defendant 23. Sept 31 Eliz. felloniouſly did ſtrike, &c. whereof he dyed 24. Sept. following, and ſo he was Indicted of Manſlaughter. Which Inquiſition being certified to the Juſtices of Goal-delivery at *Newgate*, he was arraigned upon the ſame Indictment, and confeſſed the Felony, and had his Clergy; and pleaded over to the Felony. And it appeared, that the ſaid Arraignment, and Confeſſion, and Allowance of Clergy, was after the Writ of Appeal brought and returned. In this Caſe, theſe Points were Reſolved; 1. That, *Auſtoſt's* convict of Manſlaughter, and Clergy allowed, was a good barr in Appeal of Murder. See *Burghe* and *Holcroft's* Caſe in B. R. Paſch. 20 Eliz. adjudged accordingly, 2. Reſolved, That by the Common-Law, the Coroner of the Kings houſhold had an Exempt Juriſdiction within the Verge, and that the Coroner of the County could not intermeddle with the death of a man within the Verge, viz. 12 miles off the Court: and ſo was it adjudged, 14 Eliz. in *Swift's* Caſe. 3. Reſolved, That the Indictment taken before the Coroner of the houſhold, and the Coroner of the County, was inſufficient, becauſe it doth not appear that *Shepperton* was within the Verge, and it cannot be ſupplyed by an averment of the party. 4. Reſolved, The Indictment being inſufficient, notwithſtanding ſuch Conviction, the party may be arraigned, or appealed again of the ſame Offence, as was Reſolved in *Heydon's* Caſe, 28 Eliz. becauſe his life was never in jeopardy. See 33 Eliz. *Cook* 4. Part. *Vaux* Caſe, acc. 5. Reſolved, That though the Conviction was dependent the Appeal, yet if it had been lawfull, and before his pardon, it had been a good barre. Mich. 34 Eliz. in B. R. *Wrote* and *Wigges* Caſe, *Cook* 4. Part. 45.

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12. In an Appeal of Mayhem againſt divers; one of the Defendants pleaded, That there was *Nul tiel in rerum natura*, and if it be not found them to the Felony and Mayhem, not guilty. It was Objected, That in an Appeal of death, it was holden a good plea, *in favorem vitæ*. But it was agreed by the whole Court, That ſuch a manner of plea is not to be ſuffered in an Appeal of Mayhem, becauſe

Appeal.

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12. In an Appeal of Mayhem againſt divers; one of the Defendants pleaded, That there was *Nul tiel in rerum natura*, and if it be not found them to the Felony and Mayhem, not guilty. It was Objected, That in an Appeal of death, it was holden a good plea, *in favorem vitæ*. But it was agreed by the whole Court, That ſuch a manner of plea is not to be ſuffered in an Appeal of Mayhem, becauſe

cauſe no life is put in danger by the Suit; and therefore it was Reſolved, That the other plea, viz. Not-guilty, ſhould ſtand. Mich. 39 Eliz. in B.R. *Kirton* and *Hoxtons* Caſe. *Popham* 115.

13. A man was Indicted of Felony for breaking a houſe, and taking away 250 l. and found guilty, and burnt in the hand; afterwards the party robbed, brought an Action of Treſpaſs *Quare Clauſum fregit*, and for carrying away the 250 l. And the Queſtion was, If upon the ſpeciall matter before found, the Action of Treſpaſs would lye. It was Objected, That the Treſpaſs was brought for the ſame matter for which the party was tryed, and it ſhould be unreaſonable he ſhould be doubly puniſhed for it. But the Opinion of the Court was, That the Action did lye; for if he had been attainted for another Felony, it would not have barred the Plaintiff of his Action: and there is no fear in this Caſe, that the Felon ſhall not be tryed for the felony; for in this Caſe the Action is brought after Conviction, and there is no Inconvenience, if the Action do lye; and ſince the Plaintiff could not have his remedy before, he ſhall not now loſe it; for there is no danger of Compounding for it: Judgment was given for the Plaintiff, Hill. 1650. Rott. 653. in B.R. *Dawks* and *Cordneighs* Caſe. *Styles* 346, 347, 348.

14. If the Lord mayheim his Villain; the Villain ſhall not have an Appeal of Mayhem againſt the Lord; and the reaſon thereof is, becauſe damages are therein to be recovered; which if the ſame be given againſt the Lord, and execution ſued out of them, the Lord may afterwards take them again from the Villain: and therefore in that caſe, the Lord ſhall be puniſhed by Endictment at the King's Sute. But the Villain may have Mayhem or Appeal of the death of his Father or other Anceſtor, whoſe heir he is, againſt the Lord; and in ſuch caſe, if it be found for the Plaintiff, the ſame is an Enfranchiſement of the Villain for ever; and there is no difference whether he be a Villain regardant, or a Villain in groſs, in that caſe; though the old book of 1 H.4. 6. ſeemeth to make a difference betwixt them. So the Book, 29 H. 6. *Corone ei* and *Stamford.* 60. The Villain ſhall not have an Appeal of Robbery againſt his Lord; but in ſuch caſe the Lord may be Indicted at the Kings Sute. But by the Statutes of *Weſt* 1. & *Weſt.* 2. The Wife ſhall have and maintain an Appeal of Rape againſt her Lord. See for that, 11 H.4. 13. 1 E.41. and *Litt.* 41. Sect. 189.

15. If a man be ſtrucken in one County, and dyeth in another County; The Appeal of Murder may be brought in the one or the other County; and yet the Defendant did nothing in the County where the party dyeth; but the death which followeth the ſtroke, maketh the Felony. If a man committeth Robbery in one County, & carrieth the goods into another County; The party robbed may have an Appeal of Felony in which of the Counties he will, but not an Appeal of Robbery, but onely in the County where the Robbery was done, for it is Felony in all the Counties where the goods are carried, (for Felony doth not deveſt property) but it is not Robbery, but onely in the County where the Robbery was done. *Cook.* 7. Part. 2. in *Bulwares* Caſe.

16. A Woman brought an Appeal of Murder in the County of *Salop*, being the next County adjoyning to *Montgomery* in *Wales* for the Murder of her husband at *Montgomery* in the County of *Montgomery*: After a Verdict for the Plaintiff, being tryed by a Jury of the County of *Salop*, It was moved in Arreſt of Judgment, That the Appeal ought to have been brought in the County of *Montgomery* where the fact was done, and not in the County of *Salop*. It was Reſolved by the whole Court, That the Writ ſhould abate; for it is a Fundamental Rule of Law, That a Tryal for Murder by Appeal or otherwiſe, ſhould be out of the County where it is committed; And it was ſaid, That no Preſidents can be ſhewed, where Appeals have been allowed in Counties adjoyning, for Murder committed in *Wales*: And Mich. 25 Eliz. in B.R. a Writ of Appeal was brought againſt one *Thomas*, in the County of *Salop*, for a Murder in the County of *Montgomery*; *ſed nihil inde venit.* Hill. 5 Car. in B. R. rott. 1276. *Sontley* and *Price's* Caſe. *Cro.* 1. Part. 179.

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2. *Where an Appeal will not lye after a Recovery in Treſpaſſe; and where not.*

A Man brought an Appeal of Mayheim againſt J. S. for mayhming his right hand, and cutting his Fingers, whereby he loſt the benefit of his Fingers: The Defendant pleaded, That the Plaintiff had brought againſt him an Action of Aſſault and Battery and Wounding, and therein had Judgment, and Execution, and ſatisfaction acknowledged upon Record, of 200 marks damages aſſeſſed him by the Jury, and of 11 l. *de juramento* by the Court. It was moved for the Plaintiff, That the barr was not good; for that it is ſuppoſed, and the averment is, That the ſtroke and Wounding in the Writ of Treſpaſs, and in his Appeal of Mayheim are all one; but it is averred, That any damages were given for the Mahim, or that the mayme was given in Evidence. See 22 E. 3. 82. But it was the Opinion of the Court, and

and ſo Reſolved, That the Jurours are to take conſideration of the Wound in an Action of Treſpaſs, and to give damages according to the hurt, and the Jury in this Caſe hath given damages 200 marks; which the Defendant hath paid to the Plaintiff: and if there was any ſuch ſpecial matter, that it was not a Maheym at the time of the Action brought of Treſpaſs, it ought to have been ſhewed to the Court; otherwiſe it ſhall not be ſo intended: and ſo it was adjudged, That the barr was good, and the Action did not lye. Mich. 31 Eliz. in B. R. *Hudſon* and *Leigh*'s Caſe. *Leo.* 318. and ſo alſo was it adjudged, Paſch. 19 Eliz. rott. 74. in B.R. In *Ryder* and *Cobham*'s Caſe. *Ibid.* See *Hobart* 94. acc.

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3. *Where upon a Sentence given in the Eccleſiaſtical Court an Appeal lyeth; and to whom it ſhall be; where not. And of what effect Appeals in the Spiritual Courts are, and the manner of Proſecution of them.*

1. THe Viſitation of *Magdalen* Colledge in *Oxford* (for the good government of the houſe according to the Lawes and Statutes doth belong to the Biſhop of *Wincheſter*) exempted from every Ordinary; The Preſident of the ſaid Colledge was deprived by Sentence of the Biſhop of *Wincheſter*; and from the ſentence of the Biſhop, he appealed to the Queen in her Chancery: It was Reſolved by the Juſtices, That the Appeal did not lye; and that the ſame was out of the Statutes of 24 & 25 H. 8. and that he had no remedy, but an Aſſiſe, if put from his place. Mich. 3 & 4 Eliz. *Dyer.* 209. *Coveneys* Caſe.

2. A Parſon within the the Dioceſs of *Wincheſter* made a Leaſe for years, and afterwards he was deprived by the Commiſſary of the Biſhop of *Winton*; and he appealed to the Archbiſhop of *Canterbury in Curia Prærogativa ſua de Arcubus*; depending which Appeal, another was Collated to the Parſonage by the Biſhop of *Winton*; who made a Leaſe for years to the Commiſſary aforeſaid, who gave the Sentence of Deprivation: The firſt Leſſee brought an *Ejectione Firmæ*, in which the Defendant pleaded the Deprivation aforeſaid: And becauſe the words of the Statute of 24 H. 8. Cap. 12. are, That an Appeal ſhall be to the Archbiſhop of the Province where, &c. without limiting any Court in certain, the Defendant did Demur. It was holden by the Court, That the words, *to the Archbiſhop*, were ſufficient, and the reſt were but ſurpluſage: But becauſe the Defendant demurred generally, the Court could not take Notice of their Juriſdiction. Trin. 7 Eliz. *Dyer* in B.R. *Heath* and *Attworth*'s Caſe, 240.

3. The *Deanery* of *Wells* was diſſolved by Parliament, and a new Deanery erected; to which the poſſeſſions of the Prebend of *C.* were annexed; and by the ſaid Act, it was Ordained, That the King might make a new Dean, and that the new Dean might make Leaſes, as the Old might: The King made *Goodman* Dean; he took the Prebend of *W.* one of the Prebends of the ſame Church; for which the Biſhop by a Commiſſion of Viſitation deprived him, for taking of two Dignities in one Church; which Deprivation was affirmed upon an Appeal to the Archbiſhop of *Canterbury*, and a new Dean made: *Goodman* appealed to Queen *Mary*; and by Commiſſioners Delegates, the Deprivation of *Goodman* was diſallowed; whereupon he made Leaſes, which were confirmed by the Biſhop and Chapter; and afterwards upon another Appeal to Commiſſioners Delegates, he was deprived and removed, and another made Dean; who would have avoided the Leaſes made by *Goodman*: And the Queſtion was upon Iſſue joyned, If *Goodman* were Dean at the time of the making of the Leaſes? In this caſe divers Points were moved, 1. If a Deanery were a Temporal promotion, or a Spiritual? It was holden by the Juſtices to be a Spiritual promotion. 2. If *Goodman* were juſtly deprived, becauſe the Prebend of *C.* was not extinct, for the Prebend it ſelf was not annexed by the Act. 3. If the Deanery were *ipſo facto*, and without any Sentence of Deprivation? But theſe Queſtions were not then Reſolved; But it was then Reſolved by the Juſtices, That there need not any Confirmation of the King of the Leaſes, nor any Confirmation of the Biſhop; but onely by the Chapter. Trinit. Paſch. *Anno* 10 Eliz. *Dyer.* 273.

4. A Teſtament was diſproved in the Spiritual Court, and the party did appeal to the Metropolitan, and it was there alſo diſproved: Afterwards the party appealed to the Court of Delegates, and there alſo it was diſproved; and at laſt, he appealed to the Queen her ſelf in her Chancery by the Statute of 25 H. 8. and it was there alſo diſproved before Commiſſioners: and then, the Queſtion was, If the Queen *ex authoritate ſua regali*, ſhould grant Letters of Adminiſtration. And it was the Opinion of all the Juſtices of the Common-Pleas, That ſhe might; becauſe the Court of Chancery was her higheſt Court. Then the Queſtion was, If the Queen might grant Letters of Adminiſtration, If the Adminiſtrator bring an Action as Adminiſtrator, If he ought to ſhew ge-

nerally in his Declaration, That the Letters of Adminiſtration were granted to him by the Queen *ex authoritate ſua regali*, under the Seal of her Court of Delegates; or that he ſhould ſet forth all the ſpeciall matter, and how the ſame came into the Chancery, and ſo the Queen granted to him by her Letters Patents Letters of Adminiſtration: And the Opinion of all the Juſtices was, That he ought to ſet forth all the ſpecial matter; and ſo it was adjudged. Mich. 24 Eliz. in C.B. adjudged.

5. *A.* was ſued by *B.* in the Spiritual Court for Tythes. *A.* did alledge, That *B.* did not read the Articles according to the Statute of 13 Eliz. and that the Eccleſiaſtical Judge did refuſe to allow the ſame. The Queſtion was, Whether his refuſal was traverſable? And the Opinion of the Court was, That it was traverſable; for otherwiſe upon ſuch ſurmiſe, all matters might be prohibited in the Spiritual Court, although the ſpiritual Judge doth all which belongeth to Law and Juſtice; and in that caſe the party grieved may have his remedy by Appeal. Mich. 31 Eliz. *Morris* and *Eaton*'s Caſe. vouched in *Cook*. 2. Part. 45. in the Biſhop of *Winchester*'s Caſe.

6. Note: It was holden by *Rolls*, Chief Juſtice of the Kings-Bench, That if one be ſued in the Court of Admiralty to a Sentence, and he is in Execution upon it, and he be brought to the Kings-Bench by *Habeas Corpus*; If upon the Return, it doth not appear, that the Admiralty had not Juriſdiction of the Cauſe, but it proceeds onely, that they proceeded to a Sentence againſt the Rule of their own Court, That in ſuch caſe the Kings-Bench will not deliver the priſoner out of Execution; for he ought to have made his Appeal before he was taken in Execution. Mich. 24 Car. in B.R. *Styles* 129

7. A man made his laſt Will, and made two Executors; the Executors dyed in the life of the Teſtator; the Teſtator dyed, having two Siſters: the eldeſt Siſter procured Letters of Adminiſtration; the younger Siſter moved for a Prohibition to Repeal the Adminiſtration granted, becauſe ſhe being in equall degree, ought to have an equal ſhare in the Adminiſtration of the goods: But in that caſe the Court refuſed to grant a Prohibition; nor doth it lye in the caſe, becauſe the party might have her Appeal, if the Adminiſtration were not rightly granted. Mich. 24 Car. in B.R. *Brown* and *Poynes* Caſe. *Styles* 147.

8. A woman, who was Executor to J. S, took a husband, who afterwards were divorced *Cauſa præcontractus*; the woman Appealed from the Sentence to the Delegates; depending which Appeal, the husband adminiſtred the goods; and afterwards the wife dyed: It was a Quære in that caſe, If the husband were chargeable as Executor of his own wrong? and whether ſeizure onely, without diſpoſing of the goods, be an Adminiſtration? 2 Ma. *Dyer*. 105. But ſee *Cook*. 5. Part. 33. *Read*'s Caſe, where that Quære is reſolved.

9. In a Suite for the Subſtraction of Tythes, a man had a Prohibition in the Common-Pleas upon a ſurmiſe, That the Plaintiff in the Prohibition (Defendant in the Spiritual Court) had but one Witneſs to prove a Leaſe of the Tythes; which was not there allowed, becauſe it was *ſingularis Teſtis*. And upon Adviſement of all the Juſtices had in this Caſe, It was Reſolved, That a Conſultation ſhould be awarded: for where *Cognitio principalis* is, *Cognitio acceſſaris* followeth: and if ſuch ſurmiſe ſhould be allowed in every Caſe, the Spiritual Court ſhould be ouſted of its Juriſdiction. Hill. 8 Jac. in B. R. *Roberts* Caſe. *Cro*. 2. Part 269.

10. *A.* brought a Prohibition in B. R. ſuppoſing he was Rector of the Rectory of *L.* in *N.* and Libelled againſt *P.* for the ſubſtraction of Tythes: in which Caſe, *W.* came in *pro intereſſe ſuo*, and claimed it by Letters Patents from the Queen, to one *H.* who enfeoffed *D.* who Let it to *W.* and the Plaintiff in the Prohibition claimed by a former feoffment made to *H.* by Sir *Ed. Clere* Knight, and pretended, that he proved it by one Witneſs; and that they in the Spiritual Court would not allow of it; and for that cauſe had a Prohibition: *W.* upon a Conſultation prayed, affirmed, That he claimed by a Deed of Feoffment of the Rectory, and proved the Deed, but could not prove Livery and Seiſin: for which they ſentenced him, and traverſed, that he denyed to allow it being proved by one Witneſs: upon which the Plaintiff in the Prohibition demurred: In this caſe it was Objected, That this is matter tryable at the Common-Law, Whether Feoffment or not. But the Opinion of the whole Court was, That Conſultation ſhould be awarded: For if they proceed *invito Ordine*, it ſhall be redreſſed by Appeal; and when the Original Cauſe belongs to them, although matter triable at the Common-Law ariſeth depending upon the Original Cauſe: yet it ſhall be determined in the Eccleſiaſtical Court; and it was Reſolved in that Caſe, That the ſurmiſe that he hath but one Witneſs, is not ſufficient to have a Prohibition where the Eccleſiaſtical Court hath Juriſdiction of the principal. Paſch. 36 Eliz. in B. R. *Futter* and *Whiskins* Caſe.

11. In Debt brought by the Plaintiff as Executor, he being *Executor ratione Teſtamenti*; from this Will, the Defendant Appeals by way of Plea: It was the Opinion of the whole Court, That notwithſtanding the Appeal; yet he was a full Executor by the Probate, and ſo remained; this being but

but a ſhift, and as much as to ſay, that the Will was not proved; and ſo for the miſchief and Inconvenience which may enſue, he ſhall not have this Plea; for he may traverſe the Probate, if he ſhew it not in Court; Or he may demand *Oyer* of the Teſtament. Trinit. 13 Jac. in B. R. *Hornegold* and *Bryans* Caſe. *Bolſtrod.* 3. Part. 72, 73.

Appendant, Appurtenant, Parcell, *and* Incident.

1. *What things ſhall be Appendant, Appurtenant, Parcel, and Incident; And to what they may be ſaid to be Appendant, Appurtenant, Parcell, or Incident.*

1. APpendency is ever by Preſcription: And Preſcription doth not make a thing to be appendant, if not that the thing which ſhall be appendant, agree in Quality and Nature to the thing, to which it ſhall be appendant: A thing Corporeate cannot be appendant to a thing Corporeate, nor a thing incorporeate to a thing incorporeate. And therefore Land cannot be appendant to Land or to a Meſſuage. Mich. 2 & 3 Ma. *Plow. Com.* 168, 169, 170. 3 Ma. *Dyer.* 130. Mich. 27 Eliz. in B. R. *Cook.* 4. Part. *Tyrringham's* Caſe. 37.

2. Lands may be appertaining, or appendant, to a Grange; and that appears by 16 Eliz. *Dyer.* 331. Where King *Henry* the 8th was ſeiſed of a Grange called *S.* in the Pariſh of great *Brickhill* in the County of *Buck.* with divers Lands and Tenements to the ſame appertaining, as well in the ſaid Pariſh, as within another Pariſh in the ſaid County: and by his Letters Patents granted the the ſaid Grange with the appurtenances, &c. but becauſe there was a *Miſnoſmer* of ſome of the Lands in the Letters Patents; the ſame did not paſſe, 16 Eliz. *Dyer.* 331. And ſo ſee 23 Eliz. *Dyer.* 374. Lands may be appertaining to a Farm. See *Liſords* Caſe, Mich. 12 Jac. *Cook* 11. Part 46. acc. and that two Cloſes of Land are ſaid to be parcel of a Farm called *Wittenhams.* See Trin. 42 Eliz. B. R. *Sherwood* and *Winſtons* Caſe, holden, That Tythes cannot be Appendant to a Manor. See *Hob.* 34. *Styles* 279. acc.

3. Upon ſpecial matter alledged; a man may have Tythes as appurtenant to a Mannor. *Cook.* 2. Part. 45. in the Biſhop of *Wincheſter's* Caſe: But yet a man cannot preſcribe generally in him and all thoſe whoſe eſtate he hath in the Mannor, to have Tythes appertaining to the ſame; for without ſpecial matter ſhewed, Tythes which are ſpiritual things, and due *Jure Divino*, cannot be parcel or appurtenant to a Mannor, or any other Temporal Inheritance, Hill. 35 Eliz. *Winchcombs* Caſe, vouch in *Cook* 2. Part. the Biſhop of *Wintons* Caſe.

4. An Advowſon may be appendant to a Mannor; and one Mannor may be holden of another Mannor: If a man holdeth a Mannor of the King, to which Mannor Regall Franchiſes are appendant, *ſcil.* to have Eſcheats of all Treaſons of thoſe who hold of the Mannor; and one holdeth another Mannor of the ſame Mannor, and he who holdeth the Mannor of the King is attainted of Treaſon, and the King ſeizeth; and afterwards he who holdeth the other Mannor is attainted of Treaſon, for which the King ſeiſeth, and afterwards the King grants the Mannor which was holden of him *una cum advocationibus eidem pertinent.* in that caſe the Advowſon ſhall not paſſe with that Mannor, but it is appendant as it was before. 30 H. 8. *Dyer.* 44. acc.

5. An Advowſon may be Appendant to a Mannor; or to an Acre of Land parcel of the Mannor; but an Advowſon which is appendant to a Mannor, cannot be made appendant to a Rent, or Service of the Mannor. 5 E. 6. *Dyer* 70. in *Iſhams* Caſe: but it may be appendant to the Demeaſnes of the Mannor.

6. In a *Quare Impedit*, the Iſſue was, If *T. L.* the Father of the Plaintiff did enfeoffe the Father of the Mannor of *F.* to which the Advowſon of the Church was appendant before he granted the Advowſon to J. S. who granted it to the Defendant: The Caſe upon a Special Verdict found, was, That the Abbot of S. was ſeiſed of a Capital Meſſuage in *F.* and 100 Acres of Lands there; and there was a Tenancy holden of the ſaid Capital Meſſuage; and that the ſaid Capital Meſſuage had been known time out of mind by the name of the Mannor of *F*; and that the Advowſon was appendant to it, and conveyed the Meſſuage and Advowſon to the King by the Statute of Diſſolution; and from the King to the ſaid *T. L.* who enfeoffed the Plaintiff of the ſaid Mannor, and made Livery and Seiſin upon the Demeans: and that *T. L.* by his Deed made a grant of the Advowſon to J. S. and afterwards the Freeholder attorned to the Plaintiff: In this caſe, it was the clear Opinion of the whole Court, That he was a ſufficient Mannor to which an Advowſon

might be appendant, and that in Law the Advowſon is appendant to all the Mannor, but moſt properly to the Demeaſnes, out of which at the Commencement it was derived; and therefore by the Attornment afterwards by conſtruction of Law, ſhall have Relation to the Livery, the Advowſon did paſſe inclusive in the Livery. Mich. 33 Eliz. in C. B. *Long* and *Hemmings* Caſe. *Leon.* 207.

7. An Advowſon of a Priory may be appendant to a Mannor *per Curiam*, 33 E. 3. 15.

8. If an Advowſon be Appendant to a houſe, and the houſe is decayed, the Advowſon ſhall be Appendant to the Land upon which the houſe ſtood. See 10 H. 7. 13. b. 16 H. 79. See before, in the Title of Advowſons.

9. An Advowſon of a Vicaridge may be appendant to a Rectory. The Rectory of *Weſt Bodin* came to the King by an Attainder of Felony, to which the Advowſon of the Vicarage was Appendant: The King granted the Rectory, *et omnia hereditamenta parcel. ſpectant. vel pertin. dicta Rectoriæ.* It was adjudged, That the Advowſon of the Vicarage paſſed without ſpecial naming it. 18 Eliz. *Dyer.* 350.

10. One Office may be appendant to another Office. See 4 Eliz. *Dyer.* 213. That divers Offices did belong to the Office of Door-keeper of the Exchequer; and there it appeareth, that the ſaid Office of Door-keeper was holden of the King by Grand Serjeanty, in the time of *Ed.* the 4th. See 7. *Aſſ. pl.* 12. and ſee *Cook.* 1. Part. *Inſtitutes.* 106. a.

11. The Office of Exigenter of *London*, is inciden: to the Office of the Chief Juſtice of the Common-Pleas; and therefore a Grant made thereof by Queen *Mary* was holden void, 2 Eliz. *Dyer.* 175.

12. Queen *Elizabeth* by Letters Patents did grant the Office of Clerkſhip of the County of *S.* to *Mitton*, with all Fees, &c. for life. *Hopton*, Sheriff of the ſaid County interrupted *Mitton*, becauſe the ſaid Office was incident to his Office of Sheriff. It was Reſolved by all the Juſtices, *Nullo contradicente*, that the Letters Patents granted to *Mitton* were void: and their Reaſon was, That the Office of Sheriff was an ancient Office before the Conqueſt, of great Truſt, and Authority, and although the King might determine the ſaid Office *ad bene placitum*; yet he could not determine it in part, or abridge the Sheriff of any Incidents to his Office; for the Office being intire, ſo ought to continue without any fraction or diminution: and the County Court, and the entring of all proceedings therein, are Incident to the Sheriff's Office. 26 Eliz. *Cook.* 4. Part. 32. *Mitton*'s Caſe.

13. A Villain is regardant to a Mannor: But if a man hath a Mannor to which a Villain is regardant, and he makes a Feoffment of an Acre of the Mannor by theſe words, *Dedi unam acram, &c. et ulterius, Dedi et conceſſi J. S. Villanam meam*; It was holden, That the Villain ſhall paſs in groſſe, becauſe they are ſeveral guifts: And ſo it is, If a man hath a Mannor to which an Advowſon is appendant, and he makes a Feoffment of one Acre, and by the ſame Deed afterwards grants the Advowſon; the ſame is become in groſſe: Otherwiſe it ſhould be, if the Feoffment were made of the whole Mannor. Paſch. 33 H. 8. *Dyer.* 48.

14. Felons Goods cannot be appendant to a Mannor by Preſcription: In a *Quo Warranto* for uſing of Waifes, Eſtrays in Felons goods in *L.* It was Reſolved by the Court, That if the King granteth the Mannor of *D.* to *J. S.* and his heirs, and within the ſaid Mannor to have Waife, Eſtray, *et bona felonum, &c. dicto Manerio, ſpectant. et pertinent.*) do not refer to the Felons goods which lye in Charter, and cannot be by uſage or time appendant to a Mannor: but yet they ſhall paſſe, although they were never demiſed, or uſed with the Mannor.

15. Common of *Turbary* may be appendant to a houſe; but Common of *Turbary* cannot be appendant to Land. *Cook.* 4. Part. 37. in *Terringham* Caſe.

16. A man claimed Common Appendant by preſcription time out of mind to a Houſe, Meadow, and Paſture: But the ſame was Reſolved to be Common appurtenant, and not Common Appendant: For common Appendant is of common right, and a man needeth not to preſcribe in it: and the ſame is appendant to arrable Land, Hiem and Gaine, and onely for Carrel, and Horſes, and Oxen to plough the Land, and Cowes and Sheep to manure the Land; and therefore the ſame is againſt the nature of it to be appendant to Meadow or Paſture. *Cook.* 4. Part. 37. in *Terringham*'s Caſe.

17. A *Corodie* is incident to the Foundation of every Religious houſe; and where the King is Founder of any Abby, or Priory, or other Religious houſe, the King of Common Right ought to have a *Corodie*, and a reaſonable allowance for any of his Valeletts in the ſame houſe. *Cook.* 9. Part. 129. *Fitzh. N. Br. Cook* 10. Part. 33. in the Caſe of *Sutton*'s Hoſpital: and a *Corodie* may be appendant to the Patronage of a Priory, Biſhoprick, &c. *Ibid.*

18. Waife, Eſtray, &c. may be parcel of, or appendant to a Leet: and a Leet may be Appendant to a Mannor, Houſe, Land, Chappel or Church,

Church. *Cook* 4. Part, 36, 37. *Cook* 10. part. 64. Annd ſee there, That a Forreſt, Warren, or Chaſe may be parcel of, or appendant unto, an Honnour or Mannor.

19. A Fair may be appendant to a Mannor, *Cook*. 4. Part. 31. and a Court of Pipowders is Incident to a Fair or Market, *Cook* 6. Part. *Jentlemans* Caſe, 12. And ſee there, of what things the ſaid Courts have Juriſdiction; they muſt be of things, and Contracts within the Fair or Market.

20. A Writ of Errour was brought by *Hall* againſt *Jones* in the Kings Bench, of a Judgment given in the Court of Pipowders, of the Market in the City of *Glouceſter*; becauſe that *Hall* had publiſhed ſlanderous words of him; *ſcil.* That Mr. *Jones* and his Clerks have by colour of their Office extorted, and taken, and gotten 300 l. *per annum* by unlawful means for many years together, above their Ordinary Fees, for proving of Teſtaments, and granting of Adminiſtrations. In that caſe the Judgment was reverſed, for two Errours; 1. Becauſe the ſaid words did not concern any thing touching the ſaid Market. And, 2. Becauſe the words were ſpoken before the Market; and not within the Market: For as that Court of Pypowders hath not Juriſdiction but of things concerning the Market; ſo likewiſe it hath not Juriſdiction for things concerning the Market, if they be not done in the Market. Mich. 42 & 43 Eliz. in B. R. *Hall* and *Jones* Caſe. See *Cook* 10. Part. in the Caſe of the Marſhalſie, 73. acc.

21. Deeds, Charters, and Evidences, are *ratione terræ*, and Incident to the Lands; and therefore, If a man ſeiſed of Lands in Fee-ſimple, hath divers Charters, Deeds, and Evidences concerning the Lands, and he maketh a Feoffment of Lands in Fee without Warranty, or with Warranty, only againſt him and his heirs; The purchaſer ſhall have all the Charters as Incidents to the Lands; for the Evidences are as it were the ſinews of the Lands: But if the Feoffor be bounden to Warranty, there the Feoffee ſhall not have the Deeds which comprehend the warranty; but the Feoffor ſhall have them to deraign the Warranty paramount. *Cook* 1. Part. 1. The Lord *Buckhurſt's* Caſe.

22. Fealty is incident to Homage, becauſe it is a part of Homage, and all the words of Fealty are comprehended in the words of Homage, *Cook*. 1. Part. *Inſtitut.* 68. a. And therefore, though Tenure in Frankmarriage be a Free Tenure, as *Littleton* ſaith, tilll the 4th degree be paſt; yet Tenant in Frankmarriage ſhall do Fealty, becauſe Fealty is incident to every Tenure, (except it be Tenure in Frankalmoigne) and cannot be ſeparated from it.

23. A Reverſion may be parcel of a Mannor notwithſtanding it be ſevered in poſſeſſion by Leaſe. See *Cook*. 5. Part. 11. *Cook* 8. Part. 79. And Fealty and Rent are inſeparably incident to the Reverſion; and therefore, If there be Lord and Tenant, and the Tenant makes reſerving to him and his heirs a certain Rent, and afterwards the Leſſor dyeth without heir, ſo as the Reverſion comes to the Lord by Eſcheat, and the Rent is behind, the Lord by Eſcheat ſhall diſtrain for the Rent behind, although it was reſerved to the Leſſor and his heirs; becauſe the Rent being reſerved of Inheritance to him and his heirs, the ſame is incident to the Reverſion, and ſhall go with the Reverſion, *Cook* 1. Part. *Inſtitutes*. 215. See *Litt.* 348. acc.

24. Note: It was ſaid by *Hobart*, Chief Juſtice, in the Argument of *Colt* and the Biſhop of *Coventry* and *Lichfield's* Caſe, *Hob*. 161. which was Mich. 10 Jac. rott. 2642. in C. B. That where the King was ſeiſed of a Mannor, to which an Advowſon was appendant; and the King granteth the Mannor to J. S. for life; and afterwards the King granteth the Mannor to J. D. after the death of J. S. *Habendum una cum advocatione*; and afterwards the King by Parliament confirmeth both the Grants; that yet the Advowſon doth not paſſe: and the reaſon thereof is, becauſe an Advowſon in poſſeſſion cannot be appendant to a Reverſion expectant upon an Eſtate for life. See *Hob*. 161. acc. See *Cook*. 11. Part. *Lidford's* Caſe, acc.

25. Land may be parcel of a Caſtle; and a Hundred may be parcel of a Caſtle, as well as of a Mannor; and if a man holds by Caſtle-guard, or to pay ſo much for Caſtle-Guard, and the Caſtle be deſtroyed, yet the Tenure remains; and a Caſtle includes in it ſelf a Mannor, and it is *Nomen Collectivum et generale*; and may include divers things, as Demeans and Services, as a Mannor may do. *Cook* 4. Part. Paſch. 43 Eliz. rott. 596. in B. R. in *Lutteralls* Caſe.

26. *Eſtovers* out of Wood may by Preſcription be appendant to a houſe for habitation. And if a man hath Eſtovers to his houſe either by grant, or by Preſcription, he may alter the Rooms of his houſe, and yet the Eſtovers which are appendant, ſhall not thereby be deſtroyed; but if he maketh new Chymneys, or there be an Addition to the old houſe, he cannot imploy the Eſtovers, or ſpend the Eſtovers in the new Chymneys or new Addition which is to his houſe: and if a man hath Common of Eſtovers appendant to his houſe, and he ſuffers his houſe to fall down, he can now claim no Eſtovers; and if he ſue for them, and the other pleads, That his houſe is down, he ſhall not have Judgment with a *Ceſſat executio*, till he have re-edified his houſe: but in ſuch caſe the Plaintiff ſhall be barred, for that at the time of the Action brought

brought, he hath no right of Eſtovers, but it is in ſuſpence; and it is but a temporal barre, and if he re-edifieth his houſe again, the Eſtovers ſhall be revived; by *Hobart* Chief Juſtice, vouched by him in *Cowper* and *Andrews* Caſe. Mich. 10 Jac. in C.B. rott. 1223. in *Hobart* 39.

27. A man ſeiſed of two Old and ruinous Fulling-Mills, preſcribed, *Quod magna pars aquæ cujuſdem Pooli* did run from a place called *D.* to the ſaid two Mills, and that there was a Bank to keep the water within the Current, and he threw down the Fulling-Mills, and converted them to Corn-Mills; and the Defendant brake the Bank, and turned the water from the Mills. Upon Not-guilty pleaded, It was found for the Plaintiff. Errour was brought; and it was aſſigned for Errour, That by the building of the new Mills, he had deſtroyed his Preſcription. In this Caſe, two Points were Reſolved; 1. That the Preſcription did extend to the New Mills, and the Writ ſhall be *de Molendino* generally, without any addition. 2. That when a man hath any thing appendant or appurtenant to a Houſe or Mill, the moſt durable thing is the Land, which is the foundation: and therefore it was Reſolved, That although the houſe or Mill falls by the act or default of the Owner, or by the wrong done of another; yet becauſe the perdurable part remains, he may re-edifie it again without loſſe of any Appendant, or Appurtenant to it; but then, the ſame muſt be upon the place where the ancient houſe ſtood, and which was the Old Foundation. *Cook.* 4. Part. 86. *Lutterell's* Caſe.

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2. *How things which are Appendant, ſhall be made diſappendant, and by what Act: where appendant in part, and in groſſe in part: Where once diſappendant, they may be appendant again: And where things Parcel or Incident, can by no means be ſevered.*

1. NOte: There is difference, where things appendant or belonging to a Mannor, are ſevered and made diſappendant by the Act of the party, and where by the Act of the Law: and therefore the Caſe was, Mich. 4 Jac. in the Common-Pleas, The Lady *Moile* was ſeiſed of the Mannor of *B.* in the County of *Kent* for the Term of her life, the remainder to *Katherine* Lady *Finch* in Fee; The Lady *Finch* took to her husband, *St. Leger*; and 10 Eliz. he and his Wife, and one *B.* levied a Fine of all the Demeans of the ſaid Mannor (by certain Quantity of Acres whith did include all the Demeans) to *T. F.* and his heirs, who granted and rendred the Demeans of the ſaid Mannor to the ſaid *B.* for 50 years rendring Rent, and granted the Reverſion to *St. Leger*, and the Lady *Finch*, and the heirs of the Lady. And in this Caſe it was Reſolved by the whole Court, That although on an inſtant the Demeans were granted to *Katherine* and the Lady *Finch*, and to the heirs of the Lady *Finch*, ſo as there was not any tranſmutation of poſſeſſion; yet the Demeans being by the act of the party once ſevered in Fee-ſimple from the ſervices of the Mannor, that the Mannor was deſtroyed for ever: and there the difference was taken between the Act of the Parties, and the Act of Law. For if there be two Coparceners of a Mannor, and upon partition, the Demeans be allotted to the one, and the Services unto another; in ſuch caſe, although there be an abſolute ſeverance, yet if one dyeth without Iſſue, and the Demeans diſcends to her who hath the Services, the Mannor is revived, becauſe the Demeans and Services are united by Act of Law: and ſo if upon a Partition, an Advowſon which is appendant be allotted to one, and the Mannor to another, and afterwards one of them dyeth without Iſſue, by which the Law uniteth them again, the Advowſon which was once ſevered, is now appendant. But if a man hath a Mannor, and he granteth part of the Demeans, and parcel of the Services to another, he ſhall not have a Mannor; for that a man by his own Act cannot create a Mannor at this day, and by his Grant, the Services which were incident to the Demeans and the Mannor: for a Mannor is entire, and conſiſts of Demeans and Services, were ſevered and divided. *Cook.* 6. Part. 65. Sir *Moile Finch's* Caſe.

2. A man by Indenture demiſed a Meſſuage and Lands, excepting all Trees then growing above the age of 21. years, To have the Tenements aforeſaid, with the appurtenances (except before excepted) for life; And afterwards by Indenture he covenanted to ſtand ſeiſed of the Tenements aforeſaid, with the appurtenances to the uſe of J. S. in taile, with divers remainders over. It was Reſolved in this Caſe, That notwithſtanding the Exception, that the Trees did remain parcel, and ſhould diſcend to the heir, and ſhould go to him in the Reverſion: and a difference was put betwixt this Caſe, and the Caſe of an Advowſon: For it was agreed, That if a man maketh a Leaſe for life of a Mannor, to which an Advowſon is appendant, and excepteth one Acre with the Advowſon; In that caſe, if he grant over the Reverſion, the Acre with the Advowſon ſhall not paſſe to the Grantee, but they are ſevered and diſunited from the Mannor for ever: but

but Trees notwithſtanding the Exception, are growing out of the Land, and are not *rei veritate* divided from it: And therefore, if a man maketh a Feoffment of a Manor excepting the Trees, and afterwards the Feoffor buyeth the Trees, they are again made parcel of the Inheritance, though they were abſolutely divided and ſevered for a time: But in that caſe, If one Acre, or a houſe had been excepted, and the Feoffee afterwards purchaſe the Acre or houſe, none of them ſhall be parcel of it again. *Cook.* 11. Part. 46. *Richard Lidford's* Caſe.

3. If an Advowſon be appendant to a Mannor, which Mannor diſcendeth to divers Coparceners, and the Coparceners make Partition of the Mannor to which, &c. without ſpeaking of the Advowſon, The Advowſon notwithſtanding the Diviſion and ſeverance from the Mannor to which, doth remain appendant, 13 E. 3. *Quare Impedit*, 38. See *Cook.* 8. Part. in *Vincor's* Caſe acc.

4. *Eſtovers* granted to be burned in ſuch a houſe, ſhall go to him that hath the houſe, by what Title ſoever he holdeth it: And therefore if a man be ſeiſed of a houſe in the right of his Wife, and another granteth to the husband and his heirs to have ſufficient Eſtovers to burn in the houſe; In that caſe the Eſtovers are appurtenant to that houſe, and ſhall diſcend to the Iſſue of the husband and wife. See *Cook.* 8. Part. 54. *Sym's* Caſe.

5. If one be a Founder of a Colledge, &c. and he will grant his Founderſhip to the King by Deed Indented and Inrolled, the Grant is void, becauſe the Founderſhip is an inſeparable Incident to the blood, and cannot be ſevered or granted over: And therefore it was holden in *Cook.* 11. Part. in *Magdalen* Colledg Caſe, That if a Grant had been made of ſuch an inſeparable Incident, the ſaid Grant would not have been made good by the Statute of 18 Eliz. Cap. 2.

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3. *Where a thing which is appendant, or which hath been uſed or occupied with another thing, ſhall paſſe by the words,* cum pertinenciis; et è contra.

1. THe King, ſeiſed of the Mannor of *D.* to which an Advowſon was appendant, demiſed the Mannor to J. S. for years, except the Advowſon; And afterwards the King granted by his Letters Patents *totum illud Manerium de* D. *cum pertinenciis* to J. D. in Fee, *exceptis quæ in eiſdem Literis Patentibus excipiuntur*, reciting the Letters Patents granted for years before: And further he granted *Manerium prædict. et omnia et ſingula præmiſſa cum pertinenciis adeo plene et integre, et in tam amplis modo et forma prout omnia et ſingula præmiſſa, aut aliqua inde parcella, ad manus noſtras devenerunt; ac in manibus noſtris jam exiſtunt.* The Queſtion was, Whether the Advowſon appendant to the Mannor, did paſſe by the Letters Patents? And it was Reſolved, 1. That the Advowſon did paſſe; for when the King's Grant in general Terms refers to a Certainty, the ſame contains as expreſs mention, as if the Certainty had been expreſſed in the Grant. 2. Reſolved, That by the Common-Law, If the King grant a Mannor to which an Advowſon is appendant, without making mention of the Advowſon, *cum pertinenciis*, That the Advowſon paſſeth. 3. It was Reſolved, That if the ſaid Clauſe, *de adeo plene et integre*, had been omitted, that the Advowſon had not paſſed by the firſt Clauſe; but by addition of it in the latter Clauſe, the ſame made the Advowſon to paſſe. 10 Jac. *Cook.* 10. Part. 62. *Whiſtlers* Caſe.

2. One had Houſes and Lands which had been in the Tenures of thoſe who had had the Houſes; and he deviſed his Houſes with the appurtenances: It was holden and adjudged by the whole Court, That the Lands did paſſe, by the words [with the Appurtenances] for that it was in a Will, in which the intent of the Deviſor ſhall be obſerved. Hill. 28 Eliz. in B. R. *Harwood* and *Higham's* Caſe. *Godbold.* 40.

3. In an *Ejectione Firmæ*, the Caſe was; *A.* Copyholder in Fee of a Tenement called *Keyſhams*, erected a building by Encroachment upon 6. foot of the Waſte of the Mannor; and adjoyned it to the Shop of the Tenement: The Lord of the Mannor, 33 Eliz. by Deed demiſed to the ſaid *A.* the ſaid 6. foot ſo built upon and adjoyning for 100 yeart. *A.* 1 Jac. ſurrendred the ſaid Tenement called *Keyſhams*, to the uſe of *B.* and her heirs; and 5 Jac. aſſigned all his Term in the ſaid 6. foot of Waſte ſo built upon to *B.* who by Indenture 19 Jac. demiſed the ſaid Tenement called *Keyſhams, cum pertinentiis* to *W.* for 70 years. The Queſtion in this Caſe was, Whether by theſe words, the Meſſuage called *Keyſhams cum pertinenciis*, this Shop built as aforeſaid, and annexed as aforeſaid, ſhould paſſe? It was Reſolved by the whole Court, That it paſſed not; for being a new purpreſture, and added to the Shop, 33 Eliz. and not being found that it had been uſed altogether with the houſe, or reputed as parcel thereof, that nothing paſſed but what was parcel of the Houſe for the time, &c. *Hobart* ſaid, That peradventure in a Deviſe, it might paſſe. Trin. 20 Jac. rott. 602. in C. B. *Brian* and *Wetherhead's* Caſe. *Cro.* 1. Part. 12.

4. It

4. It was found by a Special Verdict in an *Ejectione Firme*, That one *Knight* was ſeiſed of a Farm called *Locks*, and of Lands belonging to it, and alſo that he was ſeiſed of a Farm called *Brocks*, and of Lands belonging to it; and and that he deviſed his Farm called *Locks*, to his eldeſt ſon; and all his Farm called *Brocks*, to his younger ſon; and the Land in queſtion was purchaſed long after that the Deviſor purchaſed *Brocks*: but it was not found that the ſaid Land was occupied either with *Locks* or *Brocks*; nor that it was expreſly named in the Will: And therefore the Opinion of the Court was, That the ſaid Land ſhould diſcend to the heir, *viz.* to the Eldeſt Son. In this Caſe, it was ſaid, That in ſtrictneſs of Law, Land cannot be ſaid to belong to a Houſe or Land; but in vulgar reputation it may be ſaid to be belonging. *Doddridge*, Juſtice, ſaid, That if it had been found, that the Deviſor had turned all the profits of the ſaid Lands to *Brocks*; then the ſame being in caſe of a Will, had paſſed by the Deviſe to the younger ſon. *Crook*, Juſtice, ſaid, That in a Will, Land which had been enjoyed with other, might paſſe: And therefore, If *A.* hath two houſes adjoyning, *viz.* the Swan and the Red-Lyon, and hath the Swan in his own poſſeſſion, and occupyeth a Parlour or a Hall which in truth belongeth to the Red-Lyon with the Swan houſe, and then Leaſeth the Red-Lyon houſe. And then by his Will deviſeth his houſe called the Swan, the Rooms of the Lyon which *A.* occupied with the Swan, ſhall paſſe. Paſch. 36 Eliz. *Ewer* and *Haydon*'s Caſe; A man hath a houſe and divers Lands in *W.* and a ſo a houſe and Land in *D.* and by his Will, he deviſeth his houſe and all his Lands in *W.* and *D.* there the houſe in *D.* doth not paſs: But if he had deviſed all his Lands in *W.* and had not ſpoken of the houſe, the houſes had paſſed. Trin, 20 Jac. in B. R. *Knight*'s Caſe. *Godbold.* 352, 353.

5. It was found by Special Verdict in *Ejectione Firme*, That *R. K.* was ſeiſed in Fee of a Meſſuage and two Acres of Land in *Chipping-Norton*, and of two Acres of Meadow in *Kingham*, and uſed and occupied the two Acres of Meadow, being four miles diſtant from the houſe, together with his Lands and Tenements in *Chipping-Norton*, and held them all in Socage; and 31 Eliz. by his Will deviſed the houſe *cum omnibus et ſingulis pertinenciis, ad inde vel aliquo modo ſpectantibus F. K. filio ſuo et hæredibus ſuis in perpetuum*; and for default of heirs of the ſaid F. K. to *A.* daughter of the ſaid *R. K.* for ever: One Queſtion in the Caſe was, Whether by this deviſe of *R. K.* of the Meſſuage *cum pertinentiis*, thoſe 2. Acres of Meadow paſſed, being uſed with it? And all the Court were of Opinion, That they did not paſſe, becauſe by the words, *cum pertinentiis*, Land paſſeth not, but onely ſuch things which properly may be appertaining: but otherwiſe it had been, if it had been *cum terris pertinentibus*; for then that which was uſed with it would have paſſed; but by the bare words, *cum pertinenciis*, without other Circumſtances, to declare his intent, they ſhall not paſſe, Hill. 1 Car, rott. 1876. in C. B. *Hearn* and *Allens* Caſe. *Cro.* 1. Part. 41.

6. Upon a Special Verdict in an *Ejectione Firme*, the Caſe was thus; The Prior of *Launceſton* was ſeiſed in Fee of 4. Cloſes in *North Drocomb* in *Launceſton*, and 27 H. 8. demiſed the ſame to J. S. by the name of 4. Cloſes in *Dorcomb infra Burgam de Launceſton* for 99. years. The Priory and the poſſeſſions left, it came to King *Henry* the 8th by the Statute of Diſſolutions; and afterwards to Queen *Elizabeth*, who by her Letters Patents, *Anno* 24. of her Raign, granted to *B.* and *C.* and their heirs, *Totum illud Meſſuagium et Tenementum vocat. Drocombs aliàs Drotons, et omnia terras, Tenementa diſt. Meſſuagio ſpectan. vel cum eodem demiſſa ſcituat. jacent. et exiſtent. in Launceſton nuper Prioratui de Launceſton ſpectantia*; but before this Leaſe, viz. *Anno* 21 Eliz. 1 houſe was erected upon a Rod of Land parcel of the ſaid Cloſes, by the Occupiers thereof: And it was found, That *Tenement. in narratione mentionat. eodem Meſſuagio ſpectabat*; and was demiſed and granted with the ſaid Meſſuage, and was always called by the name of *Dorcombs*, as well as by the name of *North-Dorcombs*. It was a Queſtion in this Caſe, The Patent being made of a Meſſuage and Lands thereunto appertaining, this Meſſuage being newly erected after, 1 Eliz. Whether the Land ſhould paſs? for it was ſaid, That although in a common perſon's caſe, Land may paſs by the name of Lands, appertaining to a houſe, yet it cannot ſo in the Caſe of the Queen; for it ought to be for a longer time than 20 years, if you would have it obtain Reputation of paſſing by the word Pertaining: But it was Reſolved by the whole Court, That the Patent was good for the Meſſuage and all the Lands; For although the Meſſuage was not built upon it when it was demiſed, and that afterwards a Meſſuage was erected upon it; yet it ſhould be granted as it is, & by ſuch name as it is known at the time of the Letters Patents: And the Opinion of the Court was in this Caſe, That Lands may be ſaid to be appertaining to a houſe as well in the King's Caſe, as in the caſe of a Common perſon, when it hath been Lett and occupied together by a convenient time. See *Dyer* 362. and ſee *Cok* 6. Part. Sir *Moile Finches* Caſe. Hill. 3 Car. in B.R. rott. 612. *Gennings* and *Lakes* Caſe. *Cro.* 1. Part. 120, 121.

Apportionment.

I. Where a Rent-Service, Seck, or Rent-Charge ſhall be apportioned; where not: Where by the Act of Law; where by the Act of the Party; and where not.

1. LEſſee for years of Land rendring Rent, granted over his Term in parcel of the Land; the Grantee made a Feoffment unto a Stranger of the parcel: It was adjudged in that Caſe, That debt did not lye for the Rent before the Reverſion was recontinued by the firſt Leſſor; But upon the Recontinuance, It was holden, That the Leſſor might ſue the firſt Leſſee for the whole Rent; for that the privity remained, and there ſhould be no apportionment; for that no Apportionment lyeth by the Act of the party; but by act of Law, the Rent might be apportioned. Trin. 24 H. 8. *Dyer.* 4. *Ruſhton's* Caſe. See Mich. 41 Eliz. *Brome* and *Horis* Caſe, vouched in *Cook* 3. Part. in *Walker's* Caſe, acc.

2. A man made a Leaſe of Lands, and of a Stock of Sheep, rendring Rent; all the ſheep dyed; the Queſtion was, Whether the Rent ſhould be apportioned: Divers were of Opinion, That the Rent being entire, ſhould not be apportioned: But the better Opinion was, That, it being by the act of God, the Rent ſhould be apportioned, as well as if part of the Land had been evicted by an *Eigne* title, which is the Act of the Law. Trinit. 35 H. 8. *Dyer* 56. See *Cook.* 5. Part. in *Spencer's* Caſe: and 2 Ma. *Dyer* 100. that in that caſe the Rent is iſſuing out of the Land, and not out of the Stock. See 20 Eliz. *Dyer* 361. acc.

3. An Action of Debt was brought againſt the Executors of *Potter* for Rent, which incurred upon a Leaſe for years after the death of the Teſtator; They pleaded, That part of the Land was evicted in the life of the Teſtator; and that they tendered the Reſidue. The Plaintiff demurred upon the Plea; but afterwards waived the Demurrer: and he accepted of Rent according to the apportionment; for that the Rent was apportionable by the Eviction, 7 E. 6. *Dyer* 81. Note; In this Caſe, the Action was brought againſt the Executors in the *Debet et Detinet*: and ſo was it, Mich. 41 Eliz. in B. R. *Cook.* 5. Part. 31. in *Hargraves* Caſe: and ſo Paſch. 7 Jac. in B. R. it was in the Lord *Rich* and *Franks* Caſe, againſt Adminiſtrators, it was in the *Debet et Detinet*. But Note, It hath been ſaid, Hill. 43 Eliz. That the Judgment given in *Hargraves* Caſe was reverſed; and then adjudged, It ought to be brought in the *Detinet* onely and it was there ſaid, That *C.* 5. Part vouched *Hargraves* Caſe; but did not ſpeak of the Reverſal of it.

4. A Leaſe was made for years of the *Greyhound* in *Fleetſtreet* with divers implements, rendring Rent; the Leſſor entred and made a Feoffment; the Leſſee re-entred; the Feoffee brought Debt for the Rent behind, and it was adjudged maintainable: and in that caſe it was holden, That there ſhould be no apportionment of the Rent in reſpect of the Implements; and it is not like to the Caſe, where there is an Eviction of part of the Term; for that here the Leſſee continued his Term in the houſe and Implements. Paſch. 4 Eliz. *Dyer* 213.

5. *Humphrey de Bohune* held Mannors of the King by Knights-Service to be Conſtable of *England*; He had Iſſue two Daughters, and dyed; the daughters took husband; the husband of the youngeſt is made King: It was holden in this Caſe, That by Unity of the Seignory, and parcel of the Tenancy in the King, that the Services were not ſuſpended; but that the whole Service ſhould iſſue out of the reſidue, becauſe it was by the act of Law; and ſo it ſhall be of every Service which is intire and not apportionable, Mich. 11 Eliz. *Dyer.* 285.

6. Note: If a man Leaſe 3. Acres rendring Rent, and the Leſſor ouſteth the Leſſee of one Acre, he ſhall not have an Action of Debt for any part of the Rent: But if the Leſſor do recover part in an Action of Waſte, or enter in part for a forfeiture, or by ſurrender, or by ſpecial Condition for entry in part, or if the Land be evicted by title paramount; in all theſe Caſes, the Rent reſerved upon a Leaſe for years which is a Rent-Service, ſhall be apportioned. See 20 H. 6. 23. 21 E. 4. 29. But Note, the ſame books are intended of a lawful entry as for a forfeiture, or by ſurrender, and not of a tortious Entry. See *Cook.* 3. Part. 22. in *Walkers* Caſe.

7. A Rent-Service may be apportioned by the Common Law, as if the Leſſee ſurrendreth part of the Land to the Leſſor, or part of the Land be recovered in Waſte, or by entry for a forfeiture, in ſuch caſes the Rent ſhall be apportioned: So if the Leſſor granteth part of the Reverſion to a ſtranger, the Rent ſhall be apportioned, becauſe it is incident to the Reverſion: and ſo if Tenant by Knights-Service by his Will deviſeth the Reverſion of two parts of the Land, the Deviſee ſhall

have two parts of the Rent, and the Rent ſhall be apportioned. See *Cook.* 6. Part. 2. in *Bruerton's* Caſe. *Cook.* 8. Part. 105. in *Talbotts* Caſe. See Paſch. 39 Eliz. rott. 233. in B. R. *Collyns* and *Hardings* Caſe, Trin. 43 Eliz. rott. 243. *Weſt* and *Leſſills* Caſe. Hill. 42 Eliz. in C. B. rott. 108. *Moile* and *Ewars* Caſe, all vouched in *Cook.* 1. *Inſtitutes*, 148.

8. If the King gives two Acres of Land of equal value to J. S. in Fee, for life, or in taile, reſerving 2 s. Rent; If one Acre be evicted by a title paramount, the Rent ſhall be apportioned; as it was adjudged, Mich. 8 Eliz. in the Earl of *Huntington's* Caſe.

9. A Rent, or a thing which is intire in reſpect of the realty may be apportioned, but in the perſonalty is indiviſible, and by Act of Law ſhall not be divided; as if the Conuſee of a Statute extend the Land, and afterwards part of the Land diſcends to him, the whole Execution is avoided, becauſe the duty is perſonal and indiviſible. *Cook.* 1. Part. *Inſtitutes* 150.

10. Tenant for life makes a Leaſe for years, rendring Rent at Eaſter, and the Leſſee holdeth the Land for 3. Quarters of the year, and dyeth in the laſt Quarter before Eaſter; in that caſe, becauſe the Rent is intire, there ſhall be no apportionment of the Rent for the 3. Quarters of the year. But in that caſe, if any part of the Land had been evicted before Eaſter: It was adjudged, That in ſuch caſe, the Rent ſhould have been apportioned. *Cook* 10. Part. 128. *Clans* Caſe.

11. A Mannor, which did conſiſt of Free Rents 7 l. Copy-Rents 3 l. and of Demeans which had uſually been demiſed, for ſeveral Rents of 8 l. To which Mannor, an Acre of Waſte parcel of the Mannor, and of the yearly value of 12 d. Heriots, Court-Baron, Leet, and perquiſites of Court, which were never demiſed for life, years, or otherwiſe, were incident, and did appertain, were by a private Act of Parliament, 27 H. 8. given to *A.* and *B.* in taile, with divers remainders over: And the Donees by the Act were reſtrained *Quod non facerent aliquid ad nocumentum*, or diſ-inheriſin of the Iſſue in taile, or them in remainder: and they had power to make a Leaſe for life, years, or at will, rendring the true and ancient Rent of the ſaid Tenements ſo to be demiſed; and that all other acts ſhould be void; Tenant in taile accepted of a Fine of a ſtranger of the Mannor; by which Fine, they did grant and render the Mannor for 300 years rendring Rent, amounting to the Free Rents, Copy-Rents, Farm Rents, and 18 d. more; and 12 d. for the Waſte, to be paid at 2. Feaſts; whereas the old rent was payable at 4. Feaſts. Tenant in taile dyed; and, If the Leaſe for 300 years was to be avoided by the ſaid Clauſe of reſtraint in the Act of Parliament, was the Queſtion? In this Caſe many Points were Reſolved: Amongſt other things to make the Leaſe for 300 years to be good; It was Objected, That, If the render as to the Acre of Waſte, the Services, Heriotts, Leet, &c. ſhall be void by the Act, then it followeth, that it is good for the Demeans, and then all the Rent reſerved ſhall go out of the Demeans; and if the Leaſe ſhall not be void as to ſuch things which were demiſed before, yet after the death of him who made the Render, there ſhould be an Apportionment of the Rent for them; then foraſmuch as the whole Rent and more is reſerved for the Demeans, the Render ſhall be good for the Demeans. But it was Reſolved, That in this Caſe no Apportionment could be to make the render for 300 years good; foraſmuch as in this Caſe there be Copy-holds for mens lives, which depend upon the providence of God, Heriots, profits of Courts, and other caſualties which cannot be reduced to an yearly value: And an Apportionment ought to be of a certainty. And, 2. In this caſe, though there may be an apportionment after the death of Tenant in taile, yet that will not ſerve to make the Grant and Render good; for if the true ancient Rent be not reſerved during the term, the power which the Tenant hath is not followed; for it is not ſufficient that the old Rent be reſerved to the heirs in taile; but it muſt be reſerved to Tenant in taile himſelf. *Cook* 3. Part. 5 & 6. The Lord *Mountjoyes* Caſe.

12. *A.* made a Leaſe for years of two Acres of Land, rendring rent; the Leſſee granted all his Eſtate in one of the Acres to J. S; the Leſſor confirmed the Eſtate of J. S. It was in this Caſe Reſolved by the Court, That by this Confirmation, the intire Rent was gone in all the other Acres; for it being an intire Contract, and his own Act, there cannot be an Apportionment for part, and an Extinguiſhment for the other part: and therefore the Leſſor in ſuch caſe ſhall not avow for the Rent determined, Mich. 34 Eliz. in C. B. *Goddard's* Caſe. *Owen* 10.

13. A man ſeiſed of two Cloſes called *Blanch*, made a Leaſe of them, rendring 10 s. Rent; The Leſſee granted all his Eſtate in one of them to *A.* and in the other to *B.* The Leſſor did deviſe all his Land called *Blanch* in the Tenure of *A.* and dyed; the Deviſee brought Debt for the whole Rent againſt the firſt Leſſee. It was holden by the Court, That the Action did not lye; becauſe in ſuch caſe but the Reverſion of one Cloſe paſſed; and alſo in that caſe the Rent ſhould not be apportioned, becauſe a Term is out of the Statute of *Quia Emptores terrarum*, and a Rent reſerved upon a Leaſe for years ſhall not be apportioned by

by the Act of the Leſſor; as where he takes a ſurrender of part of the Land, Mich. 29 Eliz. in C. B. *Wiſeman* and *Wallingers* Caſe, *Godbold.* 95.

14. Note: It was holden by the whole Court, That if a man maketh a Leaſe of Copy-hold-Land and Free-hold Land, rendring Rent, and the Copy hold Land diſcendeth to one, and the Free-hold to another; that in ſuch caſe, the Rent ſhall be apportioned, Mich. 30 Eliz. in B.R. *Harding's* Caſe. *Godbold.* 139.

15. Note; This difference was taken and agreed *per Curiam*, That if Grantee of a Rent-Charge releaſe parcel of the Rent to the Grantor, and his heirs, the reſidue may be apportioned, and the Land ſhall remain chargeable ſtill for the Reſidue; but if he Releaſe in one Acre parcel of the Land charged, then all the Rent is gone, Mich. 40 Eliz. in C. B. *Goldeſbr.* 118.

16. In a Replevin, the Caſe was, A man made a Leaſe of Lands of which he was ſeiſed by good Title; and of Lands of which he was ſeiſed of a defeicible Title for years, rendring Rent; And the Leſſor avowed for the whole Rent; the Plaintiff in the Replevin ſaid, That after the Leaſe made, the Diſſeiſee entred upon part of the Land; whereupon it was demurred: the Queſtion was in this Caſe, If the Avowant ſhould have Retorn of the Cattel. And the Opinion of the Court was, That the Avowant ſhould not have Return: For all the Court agreed, That in this Caſe, the apportionment muſt be made by the Judges, and the Judges in this Caſe could not make an apportionment, becauſe the value did not appear to them; and the Eviction is matter of privity, which ought to be diſcovered by the Leſſee, and he ought to give Notice of it to the Leſſor, and he ought to ſhew the Value of the Land from which he is evicted to the Judges; and although the Land evicted ought to be apportioned; yet becauſe the value did not appear to the Judges, it could not be apportioned. Paſch. 5 Jac. in C.B. *Pallets* Caſe. *Brownlow* 1. Part. 186.

2. *Where Suit-Service, Herriots, Common Appendant, or Appurtenant, Debts, Warranty, Conditions, and other the like things, ſhall be apportioned; and where not: And where ſuſpended and extinguiſhed, where not: and by what, and whoſe Act.*

1. LOrd and Tenant of 3. Acres of Land by Homage, Fealty, annual Service of a Hawk, Suit of Court, the Tenant maketh a Feoffment in Fee of one Acre; the Feoffee by the Common-Law ſhall hold by Homage, Fealty, a Hawk and Suit of Court, for *Quæ in partes dividi nequeunt, ſolida ſingulis præſtantur*: and the Statute of *Quia Emptores terrarum*, doth not extend to intire Services to hold *pro particula*, *Cook.* 6. Part. 1. & 2. *Bruerton's* Caſe. In which Caſe, concerning Apportionment, Multiplication, and Extinguiſhment; theſe differences were taken, had, and agreed: 1. If the Lord accept of any part of the Tenancy, All the Annual Services were gone; for ſuch Services cannot be apportioned: and ſo it is if the Lord doth releaſe his Seignory in part, the whole Tenancy by his own Act is gone. 2. There is a difference between Services which are for the ſole benefit of the Lord, and are a charge unto the Tenant, as the Service of a Hawk, &c. and Services intire which are for the good of the Common-wealth, or for Religion, Charity, Devotion, &c. for although that the Lord purchaſeth parcel of the Tenancy, ſuch intire Services do remain: As if the Tenure be to make a Bridge, Beacon, or to marry poor Virgins, or to find a Preacher, or to find Aide to the Sheriffs, or to be High-Conſtable of *England*, &c. In ſuch cases, by the Lords purchaſe of parcel, the whole Service doth remain; and ſo it is, if the Tenure be concerning the Adminiſtration of Juſtice; as to be Keeper of the Kings Records. But if the Tenure be to be Carver, Sewer, &c. which is for a private benefit, it is otherwiſe. 3. There is a difference betwixt intire Services, when the doing of the Service by one Tenant in part ſhall ſerve for all, and he who doth it, ſhall have contribution; and when every ſeveral Tenant ſhall do the ſeveral intire ſervices, as in caſe of Suit; and therefore in ſuch caſe, if any parcel cometh to the Lord, though it be by diſcent, which is the Act of Law, yet all Suit is gone. *Cook* 6. Part. 2. *Bruerton's* Caſe.

have two parts of the Rent, and the Rent ſhall be apportioned. See *Cook.* 6. Part. 2. in *Brunton's* Caſe. *Cook.* 8. Part. 105. in *Talbotts* Caſe. See Paſch. 39 Eliz. rott. 233. in B. R. *Collyns* and *Hardings* Caſe, Trin. 43 Eliz. rott. 243. *Weſt* and *Loſtills* Caſe. Hill. 42 Eliz. in C. B. rott. 108. *Moile* and *Ewars* Caſe, all vouched in *Cook.* 1. *Inſtitutes*, 148.

8. If the King gives two Acres of Land of equal value to J. S. in Fee, for life, or in taile, reſerving 2 s. Rent; If one Acre be evicted by a title paramount, the Rent ſhall be apportioned; as it was adjudged, Mich. 8 Eliz. in the Earl of *Huntington's* Caſe.

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10. Tenant for life makes a Leaſe for years, rendring Rent at Eaſter, and the Leſſee holdeth the Land for 3. Quarters of the year, and dyeth in the laſt Quarter before Eaſter; in that caſe, becauſe the Rent is intire, there ſhall be no apportionment of the Rent for the 3. Quarters of the year. But in that caſe, if any part of the Land had been evicted before Eaſter: It was adjudged, That in ſuch caſe, the Rent ſhould have been apportioned. *Cook* 10. Part. 128. *Clans* Caſe.

11. A Mannor, which did conſiſt of Free Rents 7 l. Copy-Rents 3 l. and of Demeans which had uſually been demiſed, for ſeveral Rents of 8 l. To which Mannor, an Acre of Waſte parcel of the Mannor, and of the yearly value of 12 d. Heriots, Court-Baron, Leet, and perquiſites of Court, which were never demiſed for life, years, or otherwiſe, were incident, and did appertain, were by a private Act of Parliament, 27 H. 8. given to *A.* and *B.* in taile, with divers remainders over: And the Donees by the Act were reſtrained *Quod non facerent aliquid ad nocumentum*, or diſ-inheriſin of the Iſſue in taile, or them in remainder: and they had power to make a Leaſe for life, years, or at will, rendring the true and ancient Rent of the ſaid Tenements ſo to be demiſed; and that all other acts ſhould be void; Tenant in taile accepted of a Fine of a ſtranger of the Mannor; by which Fine, they did grant and render the Mannor for 300 years rendring Rent, amounting to the Free Rents, Copy-Rents, Farm Rents, and 18 d. more; and 12 d. for the Waſte, to be paid at 2. Feaſts; whereas the old rent was payable at 4. Feaſts. Tenant in taile dyed; and, If the Leaſe for 300 years was to be avoided by the ſaid Clauſe of reſtraint in the Act of Parliament, was the Queſtion? In this Caſe many Points were Reſolved: Amongſt other things to make the Leaſe for 300 years to be good; It was Objected, That, If the render as to the Acre of Waſte, the Services, Heriotts, Leet, &c. ſhall be void by the Act, then it ſolloweth, that it is good for the Demeans, and then all the Rent reſerved ſhall go out of the Demeans; and if the Leaſe ſhall not be void as to ſuch things which were demiſed before, yet after the death of him who made the Render, there ſhould be an Apportionment of the Rent for them; then foraſmuch as the whole Rent and more is reſerved for the Demeans, the Render ſhall be good for the Demeans. But it was Reſolved, That in this Caſe no Apportionment could be to make the render for 300 years good; foraſmuch as in this Caſe there be Copy-holds for mens lives, which depend upon the providence of God, Heriots, profits of Courts, and other caſualties which cannot be reduced to an yearly value: And an Apportionment ought to be of a certainty. And, 2. In this caſe, though there may be an apportionment after the death of Tenant in taile, yet that will not ſerve to make the Grant and Render good; for if the true ancient Rent be not reſerved during the term, the power which the Tenant hath is not followed; for it is not ſufficient that the old Rent be reſerved to the heirs in taile; but it muſt be reſerved to Tenant in taile himſelf. *Cook* 3. Part. 5 & 6. The Lord *Mountjoyes* Caſe.

12. *A.* made a Leaſe for years of two Acres of Land, rendring rent; the Leſſee granted all his Eſtate in one of the Acres to J. S; the Leſſor confirmed the Eſtate of J. S. It was in this Caſe Reſolved by the Court, That by this Confirmation, the intire Rent was gone in all the other Acres; for it being an intire Contract, and his own Act, there cannot be an Apportionment for part, and an Extinguiſhment for the other part: and therefore the Leſſor in ſuch caſe ſhall not avow for the Rent determined, Mich. 34 Eliz. in C. B. *Goddard's* Caſe. *Owen* 10.

13. A man ſeiſed of two Cloſes called *Blacre*, made a Leaſe of them, rendring 10 s. Rent; The Leſſee granted all his Eſtate in one of them to *A.* and in the other to *B.* The Leſſor did deviſe all his Land called *Whiteacre* in the Tenure of *A.* and dyed; the Deviſee brought Debt for the whole Rent againſt the firſt Leſſee. It was holden by the Court, That the Action did not lye; becauſe in ſuch caſe but the Reverſion of one Cloſe paſſed; and alſo in that caſe the Rent ſhould not be apportioned, becauſe a Term is out of the Statute of *Quia Emptores terrarum*, and a Rent reſerved upon a Leaſe for years ſhall not be apportioned by

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2. *Where Suit-Service, Herriots, Common Appendant, or Appurtenant, Debts, Warranty, Conditions, and other the like things, ſhall be apportioned; and where not: And where ſuſpended and extinguiſhed, where not: and by what, and whoſe Act.*

1. LOrd and Tenant of 3. Acres of Land by Homage, Fealty, annual Service of a Hawk, Suit of Court, the Tenant maketh a Feoffment in Fee of one Acre; the Feoffee by the Common-Law ſhall hold by Homage, Fealty, a Hawk and Suit of Court, for *Quæ in partes dividi nequeunt, ſolida ſingulis præſtantur*: and the Statute of *Quia Emptores terrarum*, doth not extend to intire Services to hold *pro particula*, *Cook.* 6. Part. 1. & 2. *Brueton's* Caſe. In which Caſe, concerning Apportionment, Multiplication, and Extinguiſhment; theſe differences were taken, had, and agreed: 1. If the Lord accept of any part of the Tenancy, All the Annual Services were gone; for ſuch Services cannot be apportioned: and ſo it is if the Lord doth releaſe his Seignory in part, the whole Tenancy by his own Act is gone. 2. There is a difference between Services which are for the ſole benefit of the Lord, and are a charge unto the Tenant, as the Service of a Hawk, &c. and Services intire which are for the good of the Common-wealth, or for Religion, Charity, Devotion, &c. for although that the Lord purchaſeth parcel of the Tenancy, ſuch intire Services do remain: As if the Tenure be to make a Bridge, Beacon, or to marry poor Virgins, or to find a Preacher, or to find Aide to the Sheriffs, or to be High-Conſtable of *England*, &c. in ſuch cases, by the Lords purchaſe of parcel, the whole Service doth remain; and ſo it is, if the Tenure be concerning the Adminiſtration of Juſtice; as to be Keeper of the Kings Records. But if the Tenure be to be Carver, Sewer, &c. which is for a private benefit, it is otherwiſe. 3. There is a difference betwixt intire Services, when the doing of the Service by one Tenant in part ſhall ſerve for all, and he who doth it, ſhall have contribution; and when every ſeveral Tenant ſhall do the ſeveral intire ſervices, as in caſe of Suit; and therefore in ſuch caſe, if any parcel cometh to the Lord, though it be by diſcent, which is the Act of Law, yet all Suit is gone. *Cook* 6. Part. 2. *Brueton's* Caſe.

2. A man held a Meſſuage and half a yard Land, Meadow and Paſture, of the Lord by Fealty, Suit of Court, and Heriot, to be paid after the death of every Tenant, thereof dying ſeiſed, The Lord purchaſed parcel of the Land, and afterwards the Tenant enfeoffed J. S. of other parcel of the Land. It was adjudged in that caſe, That by the purchaſe of parcel of the Land by the Lord, the Heriot-ſervice was extinct: But it was alſo Reſolved, That if the Cuſtome of the Mannor be, That upon the death of every Tenant of the Mannor who dyeth ſeiſed of Lands holden of the Mannor, that the Lord ſhall have have a Heriot; in that caſe, If the Lord purchaſe parcel of the Tenancy, yet the Lord ſhall have a Heriot by the Cuſtome. *Cook* 8. Part. *Talbott*'s Caſe. 105, 106.

3. Common Appendant may be apportioned, becauſe it is of common right: and therefore by purchaſe of parcel of the Land to which the Common is appendant, the Common ſhall be apportioned: But Common Appurtenant cannot be apportioned by the Act of the party, and therefore by purchaſe of parcel of the Land, the whole Common is extinct: and Unity of poſſeſſion of the whole Land to which, and of the whole Land in which, makes an Extinguiſhment of Common Appendant. *Cook* 4. Part. *Terringham*'s Caſe. *Cook* 8. Part. 79. *Weilds* Caſe, acc. See *Hob.* 25. acc.

4. Note: It was adjudged, That where a man had a Common appurtenant to 10. Acres of Land for all his beaſts levant, and couchant upon the ſame, and ſold part of it; That the Common ſhould be apportioned, and every one ſhould have Common for his beaſts levant and couchant upon his part: For things are intire in ſeveral degrees; ſome cannot be divided by any act of the parties; as Warranty, Conditions; and yet by act in Law they are divided. But the caſe of Common is not ſo ſtrict an intierty, and the miſchief of the generality of the Caſe requires an extenſion of it for common good. Hill. 15 Jac. in C. B. *Hobart.* 235.

5. A man having two Sons, and *A.* and *B* his two Daughters, gave his Lands to his eldeſt Son in taile, the remainder to the younger ſon in taile, the remainder to *A.* his eldeſt daughter, and to her heirs; Tenant in taile in poſſeſſion levied a Fine with Warranty; he in the remainder in taile dyed without Iſſue; Tenant in taile in poſſeſſion dyed without Iſſue; The Warranty diſcended upon both Daughters as ſiſters and heirs to Tenant in taile; and if this Warranty ſhould barr the heir of *A.* the eldeſt daughter for the whole, or but for a moyety, was the Queſtion? And it was adjudged, That the heir of *A.* ſhould be barred for the whole; for that the Warranty is in her, and extended to the whole Land, and it is a barre to every perſon to whom the Land diſcends, of all the right which ſhe hath in the ſame Land; and whether they have a joynt, or a ſeveral right in the Land, every one is barred: and if one hath right, and the other hath nothing in the Land, he who hath the right is barred: and a Warranty is ſuch an intire thing as cannot be ſevered and divided. *Cook.* 8. Part. 51, 52, Hill. 5 Jac. in C. B. rott. 2541. *Syms* Caſe.

6. The Maſter and Schollers of *Corpus Chriſti* Colledge in *Oxford*, made a Leaſe for years of Lands. Proviſo, That the Leſſee nor his aſſignees ſhould not alien to any perſon or perſons without ſpecial Licence of the Leſſors; Afterwards they gave ſpecial Licence to the Leſſee, to alien or demiſe the Lands to any perſon or perſons whatſoever; the Leſſee aſſigned his Term to J. S. who by his Will deviſed the ſame to his ſon; the Leſſors by their Attorney entred for the Condition broken. It was Reſolved in that caſe, That the alienation by Licence to J. S. had deſtroyed the Condition; for that the Leſſors could not diſpence with the Condition in part; and retain it in other part: for a Condition being an intire thing, cannot be apportioned by the act of the party; but by act of Law the ſame might be apportioned: And ſo it was adjudged, 14 Eliz. in the Common-Pleas, rott. 1015. where the caſe was; a man by Indenture made Leaſe for years of 3. Mannors, *A. B.* and *C.* rendring Rent for *A.* 6 l. for *B.* 5 l. and for *C.* 10 l. with Condition to re-enter in all the 3. Mannors for want of payment of the ſaid Rents, or any of them: Afterwards the Leſſor bargained and ſold the Reverſion of one houſe, and of 40 Acres of Land parcel of the Mannor of *A.* to *J. S.* and his heirs; and afterwards bargained and ſold all the reſt to another and his heirs: It was adjudged in that Caſe, That the ſecond Bargainee could not enter for the Condition broken, becauſe the Condition being intire, it could not be apportioned by the act of the parties; but by the ſeverance of part of the Condition, the whole was deſtroyed. See *Cook.* 35 Eliz. in B. R. *Damports* Caſe. *Cook.* 4. Part. 119.

7. A Prior ſeiſed of divers houſes with the conſent of his Covent, made a Leaſe of them for years, rendring the yearly Rent of 5 l. 10 s. 11 d. at the 4. Feaſts of the year, uſual in the City of *London*, viz. for one houſe 3 l. 11 d. for another 20 s. and for the other houſes ſeveral Rents reſidue of the 5 l. 10 s. 11 d. with condition, if the 5 l. 10 s. 11 d. be arrear in part or in all at any of the ſaid Feaſts, then the Prior and his Succeſſors to enter: The Prior came to the King by ſurrender, who by his Letters Patents granted one of

of the houſes to the Leſſee, and to another in Fee; afterwards it was found by Commiſſion, that parcel of the ſaid Rent of 5 l. 10 s. 11 d. was behind at one of the ſaid Feaſts; and before the Commiſſioners returned, the King granted the reſidue to J.S. in Fee. In this caſe it was Reſolved, 1. That it was but one intire Leaſe, one intire Rent, one intire reſervation; and that the *viz.* did not make any ſeverance. 2. That becauſe the Condition was intire, giving a Re-entry into the whole, for default of payment of any part of the Rent, that (if it were in the caſe of a common perſon) the condition was utterly deſtroyed. 3. It was Reſolved, That in this caſe, in the caſe of the King, the Condition by the ſeverance of part of the Reverſion, was not utterly deſtroyed, but the Condition ſhould be divided and apportioned; and therefore the Patentee of parcel ſhould not take advantage of the Condition; but as to that part of the Land demiſed the ſame was diſcharged of the Condition; but as to the reſt, the Condition did remain to the reverſion, which the King had. *Cook* 5. Part. 55. Mich. 31 Eliz. in C. B. *Knight*'s Caſe.

8. A man enfeoffed two men, upon Condition, That the Feoffees before ſuch a day ſhould make back an eſtate to the Feoffor for the Term of his life, the remainder over in Fee to a ſtranger; one of the Feoffees made the Eſtate accordingly: It was the better Opinion of the Court, That the ſame was good for one moyety, becauſe the Condition being intire, the party by his acceptance of the Eſtate, had diſpenſed with the Condition; which could not be ſevered or divided. Trinit. 6 E. 6. *Dyer*. 69, 70.

9. Two Joynt-Tenants were with Warranty; and Partition was made betwixt them by Judgment, in a Writ of *Partitione facienda*: It was adjudged in that caſe, That the Warranty did remain, becauſe by the Statute of 31 H. 8. cap. 1. they are compellable to make partition: But if they had made Partition by Deed by Conſent, in ſuch caſe, ſuch partition had remained at the Common-Law; and then a Warranty being a thing intire, Partition would not be made of it; for it muſt either intirely remain, or intirely be annulled, and extinguiſhed; and ſo the Warranty abſolutely gone. *Cook* 6. Part. 12. *Morrice*'s Caſe.

10. *Cartwright* being poſſeſſed of a houſe called the Ship, without Temple-Barre, for 30 years by Leaſe, except a Stable, whereof one *Warlowe* was poſſeſſed for two years, aſſigned all his Intereſt to *Rawlins*; Afterwards *Rawlins* (the Demiſe of the Stable to *Warlow* being ended) by Deed Indented, for a Fine of 25 l. to be paid, re-demiſed all the houſe to *Cartwright* for 21 years, rendring 24 l. paid quarterly, and 5 l. quarterly at the ſame Feaſt, untill the 25 l. were paid; upon condition, That if the ſaid ſum of 25 l. or the ſaid Rent was behind at any Feaſt, then it ſhould be lawful for *Rawlins* to re-enter: Afterwards before any day of payment, *Cartwright* re-demiſed the ſtable to *Rawlins* for 10 years, who entred, and afterwards the Rent, and alſo the 5 l. parcel of the ſumme in groſſe for the Fine was not paid: In this Caſe, It was adjudged, That here were not ſeveral Conditions, but one intire Condition; and therefore the ſame being ſuſpended in part, and a Condition being intire, cannot be divided or apportioned by the Act of the parties; and that the Condition was intire, appeareth by the Concluſion, *ſcil.* for non-payment of the one, or the other, it ſhould be lawful to re-enter into the whole. Mich. 30 Eliz. in B. R. *Cook*. 4. Part. 52. *Rawlins* Caſe. See Mich. 27 Eliz. in C. B. *Brightman* and *Somerford*'s Caſe, adjudged acc.

Appropriations, Commendams, Pluralities, *and* Diſpenſations.

1. *The Antiquity of Appropriations; and that thoſe of Ancient time, are not now Queſtionable.*

1. NOte; In the Book of Dr. *Ridley*, Intituled, *A View of the Civil Law*, fol. 153, 154, & 155; it is ſaid, That the Beginning of Appropriations, and of Diſcharge of Tythes, was, after *Benedict*, who was the Inſtitutor of Monks, &c. And that the Saxon Kings appropriated 8. Churches to the Monaſtery of *Crowland*; as it appeareth by *Ingulphus*, who was Abbot there. *Cook*. 12. Part. 4.

2. The Abbot of *Subby* held the Parſonage of *Lubbenham* in the County of *L.* to his own uſe; which, as a Parſonage Impropriate, came to King *Henry* the 8th by the Statute of 31 H. 8. of Diſſolutions; the ſaid King, *Anno* 37 of his Raign, granted it in Fee-Farm; under which Grant, the Plaintiff claymed: The Defendant obtained a Preſentation from the Queen; and to deſtroy the Impropriation, did ſhew the Original of it, which was, 22 E. 4. with a Condition in it, That a Vi-

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carage ſhould be perpetually endowed; and alledged, That there never was a Vicarage endowed, and therefore the Appropriation was void: But becauſe the Rectory was for all the time of the Appropriation, reputed and taken to be Appropriated, and a Vicar preſented, admitted, Inſtituted and Inducted; it was Reſolved by the whole Court, That it ſhall be preſumed, that the Vicarage in reſpect of Continuance was endowed: And in that caſe it was ſaid, It ſhall be dangerous to Examine the Original of Appropriations of Parſonages, and Endowments of Vicarages; for that the Original of them in time will periſh. Trin. 37 Eliz. in Exchequer Chamber. *Grimes* and *Smith*'s Caſe; *Cook*. 12. Part. 4.

3. *Anno* 31 E. 1. The King was ſeiſed of the Mannor of *Kimbolton*, to which the Advowſon of the Church was Appended; and by his Letters Patents granted the Mannor with the Appurtenances to *Humphrey de Bohume* in general Taile: The Iſſue in taile by Deed, 4 E. 3. granted the Advowſon then full of an Incumbent to the Prior of *Stoneley*, and his Succeſſours, who at the next Avoidance held it *in proprios uſus*; And ſo the Prior and his Succeſſours held the Church to their proper uſes, untill the Diſſolution of the Monaſtery, which was in 27 H. 8. The Mannor diſcended to *Edward* Duke of *Buckingham*; the reverſion to King *Henry* the 8th. The Duke, 13 H. 8. was Attainted of Treaſon: The King granted the Mannor with the appurtenances to *Wingfield* in taile. It was Enacted by Parliament, That the Duke ſhould forfeit all Mannors, &c. Advowſons, &c. which he had in 4 H. 8. *Anno* 37 H. 8. the King granted and ſold for money the Rectory of *Kimbolton* as Impropriate in Fee: And afterwards 37 Eliz. one *Beard* obtained a Preſentation of the Queen for Lapſe, pretending, that the ſaid Church was not lawfully Appropriated to the Prior of *Stoneley*; for that the Iſſue in taile who granted it to the Prior of *Stoneley*, had nothing in it; for that it did not paſſe to his Anceſtour, by the words, *Manerium cum pertinenciis*; and alſo that he being but Tenant in taile by his death, his Grant was void. In this Caſe, it was Reſolved by *Egerton*, Lord Chancellour of *England*, being Aſſiſted with the Principal Judges, That although the Advowſon did not paſſe by the Grant of the King in ſtrictneſs of Law, by the words *cum pertinenciis*; yet it ſhall be intended in reſpect of the Ancient and continued poſſeſſion, that there was a lawful grant of the King to *Humphrey de Bohume*, ſo as he might lawfully grant it to the Priory, and all ſhall be preſumed to be done, which might make the ancient Appropriation good: For if the Appropriation had been drawn in Queſtion in the life-time of any of the parties to it, they might have ſhewed the truth of the matter: But after ſo many ſucceſſions of Ages, in which the Church was eſteemed to be rightfully appropriated, the Appropriation ſhall not now be drawn in Queſtion. Hill. 4 Jac. in Chancery, *Predle* and *Beard* and *Wingfields* Caſe. *Cook*. 12. Part. 5.

4. A *Quare Impedit* was brought againſt the Defendant for the Church of *Penmark* in the County of *Glamorgan*; the Suit was ſtayed by *Aide Prayer*, and the Record removed into the Chancery: The Plaintiff moved for a *Procedendo*, and ſhewed a guiſt in taile of the Advowſon made to his Anceſtor, 18 R. 2. and a Preſentation by his Grandfather to the ſaid Church of a Clerk, who was Inſtituted and Inducted with poſſeſſion for divers years. It was Reſolved in this Caſe by Sir *Tho. Bromley* Lord Chancellor, Sir *Gilbert Gerard* Maſter of the Rolls, *Sute* and *Windham* Juſtices, *Popham* and *Egerton* Solicitors of the Queen, That (becauſe the Defendant and thoſe from whom he claimed, time out of mind had had the poſſeſſion of the Parſonage as Impropriate (ſaving for ſome ſmall time); and becauſe it ſhall be a dangerous Preſident to the Queen and others, Owners of Impropriations, to maintain the Appropriations to be perfect in all Points and Circumſtances requiſite to an abſolute Appropriation, the Appropriations being made of ancient time) no *Procedendo* ſhould be granted in that caſe. Trin. 29 Eliz. in the Chancery. The Lord *St. John* of *Bletſo*, and the Dean and Capter of *Glouceſters* Caſe. See *Cook*. 12. Part. 3. acc.

5. *A.* Prior was ſeiſed of an Advowſon of a Parſonage; The Church being void, the Biſhop gave him Licence to hold it to his proper uſes; and there was not Endowment of the Vicarage; and the Jury found the Statute of 4 H. 4. of Appropriations, and the Statute of 27 H. 8. which gives Priories and Religious houſes to the King; the Queſtion was, Whether the Appropriation was good, there being no Endowment of the Vicarage? and whether the ſaid Statute of 4 H. 4. being in the Affirmative, (that Vicarages ſhall be endowed) makes all Appropriations void, unleſs there be a Vicarage endowed? And whether Appropriations without the King's Licence, was good? It was Reſolved, That whether the Appropriation be good, or not, cannot now be called in Queſtion, but ſhall be intended to be good, and to all requiſite Circumſtances: But in that caſe, becauſe the Defendant claimed *per Preſentationem Regis ratione Lapſus*; whereas the King if he had any title to preſent, it was *Jure Coronæ*; the Preſentment of the Plaintiff was utterly void, and that the Plaintiff had no Title, who had brought an Action upon the Statute of 2 E. 6. for not ſetting

ſetting out Tythes. Mich. 8 Jac. in B. R. *Hunſton* and *Cockett's* Caſe, *Cro.* 2. Part. 210.

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2. *Where, how, and at what time, and by whom, and to what perſons, and by whoſe aſſent Appropriations may be made; and where, and when, and by what Perſons, not.*

1. KIng *Edward* the 6th being Patron of a Church which was full of an Incumbent; by his Letters Patents granted the Advowſon to the Biſhop of *Coventry* and *Lichfield*; and by the ſaid Letters Patents granted, that after the Avoydance of the ſaid Church by death, reſignation or otherwiſe, that the Biſhop or his Succeſſours ſhould hold the ſaid Church *in propios uſus*; The Biſhop made a Leaſe by Indenture for 60 years, to begin at ſuch time as the ſaid Parſonage ſhould come to the hands of the ſaid Biſhop or his Succeſſors by death, ſurrender, or otherwiſe; which Leaſe was confirmed by the Dean and Chapter; the Biſhop dyed, the Incumbent dyed; the Succeſſour-Biſhop entred, and made a Leaſe for 21 years: It was Reſolved by all the Juſtices, That the Leaſe was void: and the reaſon was; becauſe the Leſſor had not any thing in the Parſonage Impropriate during the life of the Incumbent; by which caſe it appeareth, That an Appropriation cannot be made to a Church, which is full of an Incumbent; but by ſpecial words. Mich. 8 Eliz. *Dyer* 244. the Biſhop of *Coventry* and *Lichfield's* Caſe. See *Ibid. Jobſon* and *Michaels* Caſe, adjudged in Cancell. acc. See *Cook* 11. Part. 11. a. *Cook* 10. Part. 48. 2. in *Laopitts* Caſe: and ſee 19 Eliz. *Plow. Com.* 500. the Opinion of *Manwood* in *Grendons* Caſe. acc.

2. King E. 1. *Anno* 12 of his Raign, granted to the Biſhop of *St. Davids* and his Succeſſours, the Advowſons of 34 Churches within his Dioceſs of *Wales*, ſo as they might appropriate them or any of them to their Church of *St. Davids* and *Averguelley*, or make or annex any Prebends of them in their ſaid Churches; The Biſhop with the Kings aſſent, and the Dean and Chapter of St. *Davids*, erected a Colledge or Collegiate Church in *Lawrybreyve* being one of the 34 Churches; and Ordained 13 Cannons, and annexed and appropriated 13 of the ſaid Churches to the ſaid Cannons, and made them Prebends and Prebendaries, and the profits of the Church of *Lawrybreyve*, he divided by Appropriation after the death of the Incumbent of it, amongſt the Prebendaries, Reſerving to the Biſhop and his Succeſſours, and to the Dern and Chapter, *Locum et ſtallum in Choro, et Capitalo*: And afterwards 18 E. 1. he appropriated to the ſaid Deanery another of the ſaid 34 Churches, *ſcil. Lannarthe*, with the Chappel of *Lanina*, with the Kings aſſent. Afterwards King E. 3. reciting, the foundation of the ſaid Colledge, and all the premiſſes by his Letters Patents confirmed all and ſingular the premiſſes to the Biſhop and his Succeſſours, notwithſtanding the Statute of Mortmain, and that the Appropriations were given without the King's Licence; and ſo *Lawrybrevie* continued, and was taken for a Colledge in all points. It was holden in this Caſe by all the Juſtices of both Benches, (except *Harper*) That the Appropriations were well made; and that this was a good Colledge, and given to the King by the Statute of 1 E. 6. Mich. 9 & 10 Eliz. *Dyer*. 267. See 7 E. 6. *Dyer* 81. acc. and the reaſon of the Juſtices was, in the Caſe aforeſaid, becauſe that this Colledge had the Countenance of the King's Letters Patents: And although there was no Endowment of a Vicar, which ought to be upon every Appropriation: Yet it was holden by them, That by the ſaid Act of 1 E. 6. power is given to the Commiſſioners to eſtabliſh a Vicar in every Colledge which was a Parochiall Church. See *Cook*. 4. Part. 107. in *Adams* and *Lamberts* Caſe, acc.

3. No man can make an Appropriation of any Church, having Cure of Souls, the ſame being a thing meerly Eccleſiaſtical, and to be made by ſome Eccleſiaſtical perſon; but he onely who hath Eccleſiaſtical Juriſdiction. See *Cook* 5. Part. 10. in *Cawdries* Caſe: And therefore in all Appropriations, the Inſtrument of Appropriation is made by the Biſhop, or Ordinary, and runs in this or the like form, *viz. authoritate noſtra Ordinaria, Eccleſiam Parochialem de B. Priori et Conventui, annectimus, appropriamus, et unimus per præſentes.* But the King is ſuch a ſpiritual perſon, as he of himſelf may appropriate any Church or Advowſon, becauſe he hath the Eccleſiaſticall Power and Juriſdiction in him, *Cook* 5. Part. 10. in *Cawdries* Caſe. *Cook* 11. Part, 10, 11. in *Priddle* and *Nappers* Caſe, acc.

4. Note: It was holden by the whole Court, That a Vicarage endowed might be Appropriated; but not to the Parſon: and (as the book in 21 H. 6.) is ſuch a Vicarage, as may afterwards be diſſolved: And further it was holden, That an Appropriation may be by the King Sole, where he is Patron: But in no caſe an Appropriation can be made by the Patron himſelf onely. Trinit. 16 Jac. in B. R. *Ward's* Caſe. *Popham* 144, 145.

5. The

5. The Prior of D. was ſeiſed of the Advowſon of N. appropriated to his Priory, and alſo of the Vicarage of N. endowed with ſmall tythes. This Appropriation and Endowment was in the time of King *John*; and ſo continued till the time of *Henry* the 6th, when the Pope granted by his Bulls, That the Prior ſhould appoint one of his Monks to Officiate the Cure, who ſhould be removeable *ad nutum Prioris*; The Queſtion was, Whether the Vicarage were thereby diſſolved? It was Objected, It was, in regard, the Pope was then Supream Ordinary: and it was good without the King's Licence, in regard the endowing was a ſpiritual Act, and the Patron had nothing to do therein; and as the Endowment of a Vicarage is a ſpiritual Act, ſo is the diſſolving of it: But it was holden, 1. That a Vicarage perpetual, could not be diſſolved after the Statute of 4 H. 4. 2. It was holden, That the Pope had not any power to make any Ordinance againſt that Statute; and the Pope could not diſſolve the Vicarage in this caſe, for that by the ſaid Statute he had not any right to meddle with Advowſons, Benefices, &c. and the Pope by his Bulls cannot diſpence with the Law, though they tend *in Ordine ad ſpiritualia*. 3. That there was no diſſolving of the Vicarage alledged in the Caſe, or any words that amount to it; but the words only are, That the Vicar ſhould be *ad nutum Prioris*. 4. It was ſaid, That a Parſonage and a Vicarage are two diſtinct Benefices, and both have *Curam animarum*, the Parſon *habitualiter*, the Vicar *actualiter*; and although the Vicarage be ſpiritual; yet the Corporation is Temporal, which the Pope cannot diſſolve. And in this Caſe, *Parry* and *Banks* Caſe, 12 Jac. in the Exchequer was vouched, which was; A Parſonage was Appropriate to the Deanery of St. *Aſaph*, 24 H. 8. and a Vicarage endowed; The Biſhop 24 Eliz. diſſolved the Vicarage; *Parry* pretending the Vicarage was not diſſolved, but remained in the Kings hands by Lapps obtained a Preſentation. It was Reſolved in that caſe, That after the Statute of 31 H. 8. which made Parſonages Lay-Fees, that the Ordinary might not diſſolve the Vicarage, when the Parſonage is in a Temporal hand; for that ſhould be to deſtroy the Cure: but in that caſe, it being appropriate to the Donee, it might be well diſſolved. In the principal Caſe it was holden, The Vicarage was not diſſolved, Mich. 16 Jac. in B.R. *Britton* and *Wades* Caſe, *Cro.* 2. Part. 516, 517, 518.

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3. That no Appropriations within the Realm can be made but by the King, or by Authority derived from the King, and by his Licence; and that all other Appropriations are void in Law; And to whom the Licence muſt be made.

1. APpropriations made by the Pope, or by Authority derived from the Pope, were never approved and allowed, of by the Lawes of this Realm. *Cook.* 5. Part, 11, 12, 13. acc. And therefore where a *Quare Impedit* was brought by the Maſter of *Merton*-Hall, who alledged Plenary: It was ſent to the Biſhop to certifie, If full, or not: who certified, That the Church was not void; but was full of the Maſter and Schollars; who made entry to it by an Authority from the Pope: *Shipwith* ſaid, In that Caſe the Avoidance doth not lye in his Conuſance, and therefore the Certificate was not good. And it was holden, That the Entry by the Authority of the Pope onely, was not good; and that he could not appropriate the Church to them, to hold to their own uſe. See 22 E. 3. 13. *Cook* 5. Part, vouched in *Cawdries* Caſe.

2. A Writ of Right of Advowſon was brought againſt a Prior; the parties joyned the Grand Aſſiſe upon the meer right; and the Demandant was Nonſuit. It was prayed, That final Judgment might be given againſt the Demandant: *Hankford* took the Record, and looked in the Roll; and afterwards ſaid, That the Prior claymed the Advowſon in the right of him and his Succeſſours; and it is not declared, Whether he held the ſame to his own uſe by Appropriation as Parſon by Licence of the Pope; Or that he held the Advowſon as his Lay-Fee by the Grant of the Patron, and the Licence of the King. *Horton*, We claim to hold the ſame to our proper uſes by the Appropriation of the Pope: *Thirminge* and *Hankford* ſaid, That the ſame was not good; for that the Appropriation by the Pope cannot be good without the Kings Licence: and therefore it was adjudged in that caſe, That in regard the Licence of the King was not Recorded; That a Writ ſhould be awarded to the Biſhop for the King: and the Appropriation was void. Trin. 11 H. 4. 87. vouched in *Davies* Reports, in the Caſe of Commendams. See *Plowdens Com.* 500, 501, 502. in *Grendon's* Caſe, acc.

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3. An Advowſon of a Prebend holden of the King, was alienedto an Abbot and his Succeſſors; And afterwards the King granted unto the Abbot and his Succeſſors, That the Abbot and his Succeſſours ſhould hold the ſaid Prebend in their own hands. In that caſe, becauſe the firſt Alienation was made without the Kings Licence, the King did ſeiſe the Prebend, notwithſtanding his ſubſequent Grant. 17 E. 3. 39. *Cook* 5, Part. 65. in *Knight*'s Caſe.

4. Upon the Special Verdict, it was found, That the King by his Letters Patents, *Licentiam dedit Priori, et Conventui, quod ipſi Eccleſiam Parochialem de B. appropriare, conſolidare, incorporare, &c. et eam ſic appropriatam, conſolidatam, et incorporatam in manibus et uſus proprios retinere poſſint.* *Cook* 11. Part 9. a. *Pridle* and *Napper*'s Caſe; by which Caſe it clearly appeareth, that the Appropriation muſt be made to a ſpiritual perſon, or to a ſpiritual Body Politique.

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4. *Whether Appropriations of Churches may be made when the Church is full of an Incumbent, or not: and what are the proper words to make an Appropriation. And when a Church Appropriate, ſhall become diſappropriate; when not.*

1. KIng *Edward* the 6th being ſeiſed in Fee of the Advowſon of the Church of *Deane* as in groſſe, by his Letters Patents *Anno* 1. of his Raign, the ſaid Church being full of the Preſentment of King *Henry* the 8th, of one *Haltman*, granted to the Dean and Chapter of the Cathedral Church of Chriſt, and St. *Mary* the Virgin, of *Worceſter*, the ſaid Advowſon to them and their Succeſſors, and gave and granted Licence unto them and their Succeſſours, That they the Advowſon of the ſaid Church, when by death, Reſignation, or Deprivation, or other means, it ſhould be void, they might immediately retain it to the proper uſe of them and their Succeſſours, without any Preſentment, Nomination, Admiſſion or Induction of any Incumbent after in the ſame Church; and by the ſame Letters Patents, the King did Appropriate, Conſolidate, Unite, and Incorporate, the Church and Rectory to the Dean and Chapter, and their Succeſſours: *Haltman* dyed; King *Ed.* 6. preſented *Chamberlain*, who was Admitted and Inducted: the King dyed, Queen *Mary* granted the Advowſon to *A.* and *B.* in Fee, who granted it over to *Tho. Grendon*, who dyed: Afterwards it diſcended to *Roger Grendon* the Plaintiff; the Church voided by the Deprivation of *Chamberlain*, the Plaintiff preſented, and the Defendants did diſturb him; and he brought a *Quare Impedit* againſt the Biſhop and Dean and Chapter; the Biſhop pleaded, That he claimed nothing but as Ordinary: and the Dean and Chapter pleaded the whole matter aforeſaid; upon which the Plaintiff did demur in Law: And in this caſe divers Points were Reſolved by the Juſtices; 1. That none is capable of Appropriation but a Body Corporate or Politique Spiritual, which hath a Succeſſion: For the effect of an Appropriation as to the firſt Inſtitution of it, was to make the Body Politique perpetual Incumbent, and to have the Rectory, and that he hath the Cure of all the Souls of the Pariſhioners: and therefore he muſt be a ſpiritual perſon. 2. That the Ordinary, Patron, and King, ought to be aſſenting unto every Appropriation; and that the Authority which the Pope had uſurped in this Realm, was by Parliament. *Anno* 25 H. 8. acknowledged to be in the King; and the King being Supream Ordinary, might of his own Authority and Juriſdiction make an Appropriation without the Aſſent of the Biſhop. 3. That the Appropriation might be made by Apt words, when the Church is full, as to ſay, That the Parſon who is a ſpiritual perſon, after that the Church ſhall be void, ſhall be Parſon, and may retain the Glebe, and the fruits of the Church to his proper uſe; and that the ſame ſhall be a good Appropriation, when the Church ſhall be void by death, or otherwiſe, Paſch. 19 Eliz. in C. B. *Plowden Comment.* 496, 497, 498, 500, 501. &c. *Grendons* Caſe.

2. Note; It was the Opinion of the Maſter of the Rolls, in the great Caſe of Conſultation, which was argued in the Exchequer Chamber, 18 H. 6, 21. a. That an Advowſon could not be appropriate without a Succeſſion, although that the Incumbent purchaſe the Advowſon by Licence to hold to his Own uſe. For if a Prior be ſeiſed of an Advowſon to him and his heirs, and he purchaſe Licence of Impropriation; and that he and his Succeſſours may hold the Advowſon to their own uſe; yet the Advowſon ſhall diſcend to his heirs: But in ſuch caſe, if he will have the Appropriation to be good. It is beſt to alien the Advowſon; and to repurchaſe it to him and his Succeſſours; and then the Appropriation will be good.

3. Appropriations are not regularly grantable over, nor can they endure longer then the Bodies whereunto they were firſt appropriate; and the reaſons thereof are, becauſe that an Appropriation carries not onely the Glebe and the Tythes, (which they might grant away) but it doth alſo give mein

the ſpiritual function, and doth make them Parſons of the Church, and doth ſupply Inſtitution and Induction; which being the higheſt parts of Truſts, cannot be eſtranged, and therefore the Inſtrument of Appropriation runs in theſe words; That they and their Succeſſours, not their Aſſignees, ſhall be Parſons, or by a Periphraſis hold the Church in their proper uſe: But yet by Parliament an Appropriation may be tranſlated. Pill. 15 Jac. Rott. 1510. in C. B. in *Wright* and *Gerrard*'s Caſe. *Hobart*. 307.

4. In a Prohibition againſt the Biſhop of *Carlile*, The Biſhop pretending himſelf Parſon or Commendatory, &c. pleads himſelf the Parſon or Commendatory of the Church by Preſentation, &c. from the Counteſſe of *Arundel*; and yet he ſhews, that his Faculty and Confirmation was ſo long as he ſhould be Biſhop of *Carlile*, which may well ſtand together, that he may be Parſon abſolute, yet qualified by his faculty to hold but for a time, Trin. 13. Jac. in C. B. Rot. 3474. *Wilſon* and Biſhop of *Carliſ'es* Caſe. *Hobart*. 107.

5. Note, by *Hobart* Chief Juſtice: That by the meaning of the Statute of 31. H. 8. Of Diſſolution of Monaſteries; That between the Statute of 25 H. 8. & the Diſſolution of Monaſteries, That the Arch-Biſhop could not appropriate a Benefice with Cure to a Nunnery, although the Pope many times did it *de facto*, for that a Woman cannot be a Paſtor of the Church by the Law of God. And in *Plowden* Com. in *Grendon*'s Caſe, It is ſaid by *Dyer*, ſuch a thing was ſaid to be abominable, Alſo it is againſt the Law of the Realm, for *Beneficium non datur niſi propter Officium*; and it is no Reply that the Cure may be ſerved by a Curate for them, and the Queſtion is not, How they may make a Curate? but, How themſelves are capable? and the proper and operative word that doth make the Appropriation is, to make the perſon and his Succeſſors perpetual Parſons, which failes in this Caſe. See Mich. 10. Jac. in C. B. *Colt* and the Biſhop of *Coventry* and *Lichfield*'s Caſe. Rot. 2642. *Hobart* 147.

6. All Appropriations have been uſually to Corporations or Perſons ſpiritual, and not to Bodies Politick, conſiſting of meer Lay-men, nor Lay Corporations. But, See Trin. 9. Car. in B. R. in *Alden* and *Tothil*'s Caſe. It was then in Queſtion Whether the King, ſince the Statute of 25. H. 8. might by his Letters Patents appropriate a Church Parochial, which was before Preſentative, unto a Lay-Corporation, all the Members of the Corporation being meer Lay-men: which Caſe was not then reſolved.

7. In all Appropriations, The Patron's Preſentment, or Act, firſt takes place; and the Patron's Right to the Church is not ſubject to any the Eccleſiaſtical Officers; And no Act of the Ordinary alone can diſappropriate the Church, But if the Parſon appropriate (which is the Patron preſent;) the ſame doth diſappropriate the Church. And he doth preſent his Clark, and he is refuſed for juſt cauſe; and, Notice given of it, Lapps ſhall incurre, for that the Approbation gives him a choyce to hold it or not. See in *Colt* and the Biſhop of *Coventry*'s Caſe. *Hobart* 152. acc.

8. If the Advowſon of a Church by Licence be granted to a Prior and his Succeſſor's, and afterwards the ſame Church is appropriated to him and his Succeſſors, ſo as they be perpetual Parſons imimperſonees: In that caſe if the Wife of the Grantor, be endowed of the Advowſon, and preſenteth a Clerk, who is Admitted, Inſtituted and Inducted, the Appropriation is defeated for ever; for the whole Eſtate of the Parſon imparſonee is avoided: and ſo it was adjudged, 2 E. 3. 8. Quere of that Caſe, for it was holden by the Court, Paſch. 33 Eliz. in B. R. in *Lancaſter* and *Lucas* Caſe, That in ſuch caſe the Church was diſappropriated but during the life of the Wife; and that after her death it ſhould remain as appropriated, 33 Eliz. in B. R. *Leonar*. 235.

9. A Church which is appropriated to a Spiritual Corporation, becometh diſappropriate, if the Corporation be diſſolved. See 3 E. 74. *Finch. Comment*. 14. acc.

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5. *By what words an Appropriation of a Church, or the Advowſon of it, will paſſe, et è contra. And by what words Appropriations will paſſe to the King by the Statute of* 27 H. 8. *and* 31 H. 8. *of Diſſolution of Monaſteries: And wherein Reputation ſhall paſſe and veſt in the King*; et è contra.

1. IN a *Quare Impedit* brought againſt the Chapter of the Collegiate Church of the bleſſed *Mary* of *Southwell* of the Vicarage of *Southwell*, the Plaintiff declared, That *A.* was ſeiſed of the Prebend of *N.* in the ſaid Collegiate Church to which the Advowſon of the ſaid Vicarage did belong in Fee, and preſented, and conveyes down the Prebend to *Robert Abbot*, who did demiſe the Prebend to him for years, and that the Church became void, and the Defendants diſturbed him: The Defendants pleaded, That *Robert Abbot* did not demiſe the Prebend

Prebend to the Plaintiff; and upon Iſſue joyned, the Jury found, That *Robert Abbot* made the Plaintiff two Leaſes of one date, of divers ſeverall parcels of the Prebend, with theſe general words, *Cum omnibus Commoditatibus, emolumentis, proficuis, et advantagiis, cum pertinent. eidem Prebend. ſpectant. ſeu aliquo modo pertinent.* And the Opinion of the Court was, That the Advowſon did not paſſe by the ſaid Leaſe: for the words, Commodities Emoluments, Profits, and Advantages, are all of one ſenſe and nature, implying things gainful, which is contrary to the Nature of an Advowſon. And it was holden, That an Appropriation, or the Advowſon of it, will not paſſe by the Name of an Advowſon; and yet an Advowſon will be conteined under the name of a Tenement; and may be ſeiſed in value upon a Voucher; but the words here will not paſſe it: no more then in the Caſe of 39. H. 6. Where the King granted that the Monks ſhould have all their poſſeſſions of the Abbey for the time of the Vacation for their ſuſtentation: and it was ruled, They ſhould not have Advowſons, becauſe no ſuſtentation ariſes from them. Mich 16 Jac. in C. B. *London*, and the Chapter of the Collegiate Church of the bleſſed Virgin *Mary* of *Southwells* Caſe. rott. 1877. *Hobart*. 303.

2. In a Prohibition, the Caſe was thus; The Prior of *Hatfield* and his Predeceſſors time out of mind were ſeiſed of the Parſonage of *Hatfield*, and a Farm in the ſame Pariſh called *Downhall* Farm, *ſimul et ſemel*. The Priory being under the value of 200 l. *per annum* was given to the King by the Statute of 27 H. 8. The King granted the Parſonage and Farm to the Abbeſſe of *Barking*; the Abbeſſee ſurrendred all, 31 H. 8. to the King. And the Queſtion was, Whether the King and all thoſe that claimed under him ſhould hold the Farm diſcharged of Tythes by force of the perpetual Unity: In that caſe, It was adjudged againſt the Plaintiff, and a Conſultation granted: And amongſt other Points in the Caſe, one point was, Whether the Appropriation in this Caſe came to the King, and remained in him a Parſonage Appropriated by force of the Statute of 27 H. 8. only, as well as the like Appropriations did by the other Statute of 31 H. 8. It was Objected, That all Appropriations had been diſſolved upon 31 H. 8. if the Clauſe of diſcharge in that Statute had not been: But to that it was anſwered, That ſhall never be underſtood, that the Appropriation ſhould be diſſolved, and the Church made preſentative; and yet by the Statute, both Glebes and Tythes ſhould be taken from the Church, and given to the King: But it was holden, That Appropriations were well given to the King; and that by a proper word in the Statute: For the Statute gives (*inter alia*) the Churches, Chappels, Advowſons, and Patronages of ſuch Monaſteries; which ſhall be underſtood, their Churches as they were in them either appropriate where they were ſo, or their Advowſons, where they were not: And *Eccleſia* and *Rectoria*, are *Synonyma*; and words of Appropriating are, that they ſhall hold *Eccleſiam et Rectoriam in propriis uſus*, as it is ſaid in *Plow. Com.* in *Grendon's* Caſe. Again, the Statute of 27 H. 8. gives all thoſe Monaſteries whereof the poſſeſſions did not exceed 200 l. *per annum*; ſo that whatſoever made to that yearly Revenue, was meant to be given to the King; and a great part of their yearly profits did conſiſt in Appropriations; for it was eaſie for them to get Advowſons, and as eaſie to get them appropriate: And Appropriations although but in Reputation, paſſed both by the Statutes of 27 H. 8. and 31 H. 8. as it was holden in *Cook* 11. Part. 13. in *Pridle* and *Napper's* Caſe. Hill. 15 Jac. in C. B. rott. 1510. *Wright* and *Gerards* Caſe, *Hobart* 306, 307, 308. and ſee in *Colt* and the Biſhop of *Coventry* and *Lichfields* Caſe, *Hobart* 148. before, That all Appropriations however defective, were given to the King, by the true meaning of the Laws of Monaſteries, which meant to give all as well in Reputation as in truth. And ſee *Cook* in *Pridle* and *Nappers* Caſe, 13. where it is ſaid, Not onely thoſe which were truly Appropriate; but likewiſe ſuch as were or had been ſo in Reputation were given to King *Henry* the 8th, by Intendment of the Statutes of Diſſolution; for albeit in thoſe Statures there was a ſaving of Rights, yet the Founders, Donours, &c. are excepted out of that Saving: So they are bound by the body of the Act.

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6. *Of Diſpenſations for Pluralities and taking Benefices with Cure, granted before the Statute of* 21 *and* 25 Hen. 8. *where good; where not: and who might be diſpenſed withall for the taking of them. And of Pluralities and Commendams in general.*

1. BY a Canon of the Church made in the Councel of *Lateran*, the words of which Canon were thus; *Plurima potiſſimum Beneficia quibus animarum Cura ſubmiſſa eſt non ſine gravi Eccleſiarum damno ab uno obtineri: Cum unus in pluribus Eccleſiis vitè Officia perſolvere, aut rebus earum curam neceſſariam impendere nequeat*: It appeareth, That no Eccleſiaſtical perſon could have held *ſimul et ſemel*, two Benefices with Cure

of Souls, but that upon the taking of the ſecond, the firſt Benefice was *ipſo facto* void: Yet the Pope in ancient time by uſurpation, and the King *de jure*, was not bound by, but might have diſpenſed with, the ſaid Canon; and the reaſon was, That the ſaid Canon, though made in the Spiritual Court, yet the ſame was not repugnant to the Common-Lawes of the Land; and Kings and Lay-Subjects were the firſt Donors of all Benefices unto Eccleſiaſtical perſons; for the Donations were *Eleemoſynæ Regum et Laicorum*; and notwithſtanding the ſaid Canon, the King did from time to time, grant Diſpenſation to hold two Benefices with Cure. See *Cook.* 4. Part. 75. in *Hollands* Caſe, 24 E. 3. 38. and *Fitzh. Nat. Br.* 34. there vouched. Alſo the King, notwithſtanding the ſaid Canon, and that the Pope did grant ſuch kind of Diſpenſation: Yet the King if he pleaſed might have removed the Incumbent; for that the ſaid Canon did not bind the King; as appeareth by the Book-caſe of 26 E. 3. *Quare Impedit* 189. But ſee now by the Statute of 21 H. 8. cap. 13. What the Pope did by Uſurpation, is now veſted in the King *de jure*; and therefore at this day, the King may grant Diſpenſations for Pluralities, or to have and hold two Benefices with Cure *ſimul et ſemel*.

2. A man was Parſon of a Church with a Vicarage endowed; The Parſon accepted of a Preſentation to the Vicarage without a Diſpenſation; and the Queſtion was, Whether the ſame were Plurality by the Canon, & by the Statute of 21 H. 8. And it was the Opinion of *Hobart*, Chief Juſtice, That notwithſtanding that they were ſeverall Advowſons, and ſeveral *Quare Impedits* might be brought of them, and ſeveral other Actions might be maintained for or concerning their ſeveral poſſeſſions; Yet the Preſentment of one man unto the Parſonage and Vicarage was no Plurality, becauſe the Parſonage and Vicarage are both but one Cure, the Vicarage being endowed out of the Parſonage; and alſo becauſe there is a Proviſo in the Statute of 21 H. 8. cap. 13. That no Parſonage that hath a Vicar endowed, be taken by the name of a Benefice with Cure of Souls, within the ſaid Statute, as to make it a Plurality, Mich. 21 Jac. in C. B. *Woodley* and *Manneringes* Caſe.

3. Note; That although by the Statute of 21 H. 8. by the taking of a ſecond Benefice with Cure, that the firſt Benefice is void; yet the King, notwithſtanding the ſaid Statute, may grant Diſpenſation to have Plurality, or divers Benefices in Commendam, ſo as the ſame be made by apt words, and be made in fit and due time; and by the Statute of 25 H. 8. 21 H. 8. and 1 Eliz. The King and the Archbiſhop, his Commiſſaries and ſufficient Deputies, have power for granting Diſpenſations for them, by authority derived from the Crown. But yet note; That there is a great difference between diſpenſations and Faculties granted by the Pope in ancient times; and Diſpenſations granted by the King or the Archbiſhop at this day. See *Cok* & the Biſhop of *Coventry* and *Lichfields* Caſe, *Mob.* 147. to 164. And note there the difference between Commendams, *retinere*; and Commendams, *obtinere et recipere*, *Ibid.* 156.

4. *A.* Prebend of *Salisbury*, was Elected Biſhop of St. *Davids*; and before he was Conſecrated, he obtained a Diſpenſation from the Pope, *retinere* all his Benefices in *Commendam*; and afterwards he was Conſecrated Biſhop: And the better Opinion of that Book is, That ſuch Diſpenſation *retinere beneficium*, was good; and that the King could not have and maintain a *Quare Impedit* againſt the Biſhop; for the Prebend, nor any Action upon the Statute of 25 E. 3. which gave the Preſentation to the King, where the Pope by Proviſion gave any Benefice, whereof the Patronage did belong to a ſpiritual perſon, 11 H. 4. 170, 211, 229. The Biſhop of St. *David's* Caſe. And Note; It is ſaid there by *Haukford*, That in ſuch caſe of Diſpenſation *retinere*, that the Biſhop ſhall not pay Firſt-fruits: But it was there much Debated, but not Reſolved, That if the Diſpenſation *retinere*, had been granted unto him after he had been Conſecrated, Whether the Prebend had been void, and whether any faculty could have been granted to him to have holden the ſame againſt the King.

5. A man was Inducted into a Benefice of *N.* with Cure of the value of 8 l. And further, he had the moyety of another Church of *D.* which was a Benefice with Cure; And afterwards he was Elected Biſhop of *Carlile*, and before Conſecration and Inſtallation to his Biſhoprick, the Queen by her Letters Patents granted to him, *et licentiam et poteſtatem dedit, quod ipſe in ipſam Eccleſiæ Cathedralis de Carlile conſecrat. procuret et obtinere, necnon realem, actualem, et Corporalem poſſeſſionem, &c. recipere et obtinere, &c. nihilominus prædict. medietam dict. Eccleſiæ de, &c. ac Rectoriam de N. unà cum dicto Epiſcopatu, quamdiu eidem Epiſcopatui præeſſet, retinere, et poſſidere, ac fructus et emolumenta inde, quamdiu eidem Epiſcopatus præeſſet, in ſuos proprios uſus convertere.* Afterwards upon a pretence that the Letters Patents were void, the Queen preſented J. S. by Lapps, who Libelled in the Spiritual Court for Tythes; and upon a Prohibition awarded, upon the matter aforeſaid, prayed a Conſultation, not making mention of the Statute of 21 H. 8. cap. 13. in his Plea. And in this caſe, It was Reſolved by the whole Court, That before the Statute of 21 H. 8. If a man had a Benefice with Cure, and took another Benefice with

with Cure, that the firſt Benefice was void, but that was void by the Spiritual Law, *ſcil.* by the Canon made in the Councel of *Lateran*, holden under Pope *Innocent* the third, Tom. 4. 221. cap. 19. and not by the Common-Law, and that no Lapps ſhould incurre; as upon Deprivation, or Reſignation; and yet the Patron might preſent, and take upon him Notice if he pleaſed; ſo as for the benefit of the Patron, the Church is void in the principal Caſe, but not for his diſadvantage: But now becauſe it is affirmed by the Act of 21 H. 8. That, if the firſt Benefice be not of the value of 8 l. the Patron at his peril ought to preſent, for, in as much as it is an Avoydance by Act of Parliament, to which every one is party; Every one ought to take Notice of it at his peril: But if the firſt Benefice was not of the value of 8 l. *per annum*, it is otherwiſe; for then it is void meerly by the Eccleſiaſtical Law, of which the Patron needs not to take Notice at his peril. Trin. 39 Eliz. in B. R. *Cook* 4. Part. 75. *Hollands* Caſe. Note, The words of Diſpenſation and Licence, are, *viz. procuret et obtineret; recipere, et obtinere*: And Quære; If thoſe words make the Diſpenſation good. See afterward, *Colt* and Biſhop of *Coventry* and *Lichfields* Caſe, *Hobart* 156.

6. *A.* was Admitted, Inſtituted, and Inducted into the Rectory of *Horton*, being a Benefice with Cure of the value of 8 l. *per annum*. The King afterwards preſented him to the Church of *Stanes*, which was alſo a Benefice with Cure; and he was Admitted and Inſtituted: before, *A.* was Inducted into *Stanes*, the Lady *Borough* received him to be her houſhold-Chaplain. Afterwards the Archbiſhop of *Canterbury* granted to him *quod una cum Rectoria de Horton quam ad tunc obtinuit, Eccleſiam de Stanes, recipere, et quoad vixerit retinere liberè et licitè valeat, et poſſit; authoritate Parliamenti, diſpenſavit*, which Letters of Diſpenſation, the Queen confirmed; and afterwards he was Inducted into the Church of *Stanes*, 29 Eliz. Afterwards the Queen by Lapps preſented *B.* to the Church of *Horton*; who was Admitted, Inſtituted and Inducted: And in this Caſe it was Reſolved, 1. That the ſaid Diſpenſation made to *A.* came too late, becauſe it came after the Inſtitution; for by Inſtitution, the Church is *plena, et conſulta*, againſt all perſons, but againſt the King; and as to the Spiritualties, he is full Parſon by the Inſtitution, but he hath not the Temporalties in him untill his Induction: And by the Statute of 21 H. 8. the firſt Benefice was void by Inſtitution to the ſecond Benefice. 2. Reſolved, Admit the firſt Benefice was not void by the Inſtitution, untill Induction into the ſecond; yet the Diſpenſation came too late; for the words of the Statute of 21 H. 8. are, (may purchaſe Licence to receive and keep two benefices with Cure of Souls) and the words of Diſpenſation are, *Recipere et retinere*; and for as much as by the Inſtitution the Church was full, he could not purchaſe Licence to receive that which he had before; nor he could not retain that which he could not Receive, Mich. 41 Eliz. in B. R. *Cook*. 4. Part 79. *Digbies* Caſe.

7. Note: If a man be Incumbent of a Church as Parſon, or Vicar thereof, *de facto*; there a Diſpenſation granted to him *retinere* the ſame Benefice upon the promotion to the Office or Dignity of a Biſhop is good, and cometh time enough: and ſo it was adjudged, Paſch. 3 Car. in the Kings-Bench, in *Evans* and *Aſcues* Caſe; and Note, That in that caſe it was ſaid, That ſuch Diſpenſation or Faculty, by the Archbiſhop, his Commiſſary, or by the Guardian of the Spiritualties, (*ſede vacante*) is ſufficient, although the ſame be not enrolled in the Chancery, or any other of the King's Courts of Record, but onely enrred with the Regiſter of the Archbiſhop. See 7 Eliz. *Dyer*. 233. acc.

8. *A.* before the Statute of 21 H. 8. had a Diſpenſation from the Pope for a Plurality, and at the time of the making of the ſaid Statute had one Benefice with Cure of the value of 8 l. and within a year after the making of the Statute of 28 H. 8. cap. 16. he obtained from the King a Confirmation of his former Diſpenſation, with words in it to hold, uſe, and enjoy the effect of it: In that caſe, it was the Opinion of *Mounſon* and *Manwood*, Juſtices, That the firſt Benefice was void by the Statute of 21 H. 8. and the Statute of 28 H. 8. did not reſtore him to the ſame without a new Preſentation, notwithſtanding that the Statute of 28 H. 8. made the Pope's Bulls of Diſpenſation good for a year; and that the Chancellor of the Augmentation might make a new Diſpenſation to him: But by *Dyer*, Juſtice, as the Statute of 21 H. 8. made the firſt Benefice void; ſo the Statute of 28 H. 8. did reſtore him to the Benefice; For when two Statutes are croſſe in appearance, the one to the other, and no clauſe of *Non obſtante* is contained in the ſecond Statute, ſo as the one may ſtand with the other, ſuch conſtruction ſhall be made of the Statutes, that both of them ſhall take effect, 18 Eliz. *Dyer*. 341. *Weſton's* Caſe.

9. In a *Quare Impedit*, the Caſe was this; The Corporation of *Kilkenny* in *Ireland*, Patrons of a Vicarage within the Dioceſs of *Oſory*, preſented one *A.* to it, who was Admitted, Inſtituted, and Inducted: Afterwards during the Incumbency, the Biſhop of *Dublin*, and *B.* Commiſſioners Delegates for granting of Faculties and Diſpenſations according to the Statute of 28 H. 8. cap. 20. by Letters of Grace, 33 Eliz. granted to J. S. then Biſhop

Biſhop of *Oſory*, That the ſaid Biſhop *unum vel plura Beneficia Curata, vel non Curata retinere poſſit perpetuæ Commendæ titulo*; which Diſpenſation was confirmed by the Queens Letters Patents, *Anno* 38. of her Reign: *A.* dyed, the Vicarage voided, and ſo continued 6. moneths; The Biſhop by virtue of the ſaid Diſpenſation retained the ſaid Vicarage in *Commendam*, and took the profits during his life, and dyed; J.D. purchaſed the next Avoidance, and preſented *C.* who was Admitted, Inſtituted, and Inducted: The King preſented E. who was diſturbed by J.D. and C. and the King brought the *Quare Impedit*; And the Queſtion was, If the ſaid Biſhop by virtue of the ſaid Diſpenſation was ſo perfect Incumbent, that the Church being full of him, no Lapſe ſhould encurre to the King during the life of the Biſhop? And for the King it was ſaid, 1. That a Biſhop by the Eccleſiaſtical Law of *England*, could not hold another Benefice with Cure within his own Dioceſs; becauſe he could not Viſit himſelf; and one and the ſame perſon could not be Soveraign and Subject. 2. That the Faculty granted by the Commiſſioners was not warranted by the ſaid Act of 28 H. 8. becauſe no ſuch Faculty or Diſpenſation was accuſtomed to be granted in the Court of Rome. 2. Becauſe in this Faculty granted to the Biſhop, there is no *Obſtante*, in derogation of the right of Patronage, either of the King, or of other Lay-Patrons. 3. Becauſe that by the Faculty, he who obtains it, needs not to be put into poſſeſſion by any Eccleſiaſtical Miniſter, but might take the poſſeſſion of the Benefice immediately, without any Preſentation, Inſtitution, Induction, or other legal Collation, which are contrary to Faculties granted in the Court of *Rome*; for there, in every Faculty or Licence granted by the Pope, to make a permutation, union, or Appropriation; the aſſent of the Patron was required. 3. That by this Faculty, the Biſhop was not perfect Incumbent, becauſe the Church ſhall not be ſaid full, againſt a Common perſon, if the Incumbent be not in by Preſentation, and Inſtitution, and no Plenarty ſhall be againſt the King before Induction: But it was agreed on that ſide, That if a Clerk be preſented to a Benefice with Cure, and is Admitted and Inducted, and afterwards he is preſented to another Benefice; and before he be inſtituted to the ſecond, he obtains a Diſpenſation *retinere* the firſt Benefice for life in *Commendam*, the firſt Benefice ſhall not be void; but he ſhall be full Incumbent during his life, becauſe there was not any wrong or injury to the Patron, and the Church doth not become void by reaſon of Diſpenſation: And it was ſaid by them, That a Faculty or diſpenſation to hold a Benefice in perpetual *Commendam*, is good to ſuch a perſon onely, who is full and perfect Incumbent at the time of the granting of the Diſpenſation to him: but not to him who hath not any thing in the Benefice. And a Faculty granted to one who is not Incumbent to take a void Benefice, is void; But a Faculty to one to retain a Benefice who is Incumbent, is good; and ſo concluded, That the Faculty granted to the Biſhop being void, the Vicarage was never full of him; and then the King had good title to preſent. On the other ſide, for the Defendants it was ſaid, That the Diſpenſation was good; 1. Becauſe it was by a poſitive Law, *viz.* the Statute of 28 H. 6. 2. Becauſe ſuch Faculties had uſed to be granted in the Court of *Rome*; and the Caſe of 41 E. 3. 5. was vouched. One *W.* had a Prebend in the Church of *Salisbury*, and the Pope before his Conſecration, had given him his Benefices which he had before, and the King reciting the guift, granted to him the Temporalties: And it was adjudged, That the Prebend did not become void, but that the Biſhop might retain the ſame after his Conſecration. 3. Becauſe this Diſpenſation was not contrary to the Scripture, nor repugnant to the Lawes of the Realm: And, 4. Becauſe the Faculty was well executed to the Biſhop by his acceptance, without any Preſentation, Inſtitution or Induction; for that it is not neceſſary that thoſe Ceremonies be uſed in the Conferring of any Parſonage or Vicarage, which may be done by other wayes; as by Appropriation or Union: And, 5. becauſe when the Biſhop entred and held the Benefice by virtue of the Diſpenſation, the Church was full, becauſe he had the Benefice by Canonical title; *ſcil. virtute Commendæ perpetuæ*, and that amounts to Admiſſion, Inſtitution and Induction. The Caſe was not Reſolved, *Ideò* Quære. See Sir *John Davies* Reports, the Caſe of *Commendam*.

10. In a *Quare Impedit* brought of a Preſentation to the Church of *Clifton Camvil* againſt the Biſhop of *Coventry* and *Lichfield*, the Plaintiffs declared, That *A.* was ſeiſed of the Manor of *Clifton Camvil* to which the Advowſon was appendant, and preſented J. S. and that afterwards the Manor and Advowſon came to *Herſey* and *Moile*, and that afterwards the ſame by mean conveyances came to J. D. and then the Church became void by the death of J. S. and then that J. D. preſented one *W.* who was Admitted, Inſtituted and Inducted; and then Conveyes the Manor and Advowſon to *Heningham* in taile; who made a grant of the next Avoidance to the Plaintiffs: and then that the Church became void by the death of *W.* and ſo it belonged to the Plaintiffs to preſent: The Defendant confeſſed all the Conveyances, and the Grants of *Herſey* and *Moile*, the death of J. S. and the preſentation of *W.* and pleaded the Statute of 20 H. 8. of Pluralities, and that *Clifton Camvil*

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was a Benefice with Cure, above the value of 8 l. *per annum*, and that *W.* 3 Eliz. took the Benefice of *Y.* and was therein Admitted, Inſtituted, and Inducted, and ſo *Cliſton Camvil* was void, and remained void, and ſo it did belong to the King to preſent; and then pleaded the Statute of 25 H. 8. of power given to the Archbiſhop of *Canterbury*, and in vacation, to the Guardian of the Spiritualties to grant Diſpenſation; and that the Dean and Chapter of *Canterbury* Guardian of the Spiritualties, *Sede vacante in Novemb.* 1610. the Biſhop of *Rocheſter*, being Elect Biſhop of *Coventry* and *Lichfield*, who held the Rectory of *Southfleet* in *Kent* in *Commendam* with his Biſhoprick of *Rocheſter*, to provide for a Biſhops Eſtate, and that it ſhould not be vilified, did grant, *Inter alia ut Rectoriam de Southfleet, nec non ut unum aliud, vel plura Curata, vel non Curata Beneficia Eccleſiaſtica infra Regnum Angliæ cujuſcunq; nominis, qualitatis aut dignitatis in Commendam ibidem Obtinere, acceptare et recipere; ac propria ſua authoritate capere, et apprehendere; ac realem, actualem, et corporalem poſſeſſionem ejuſdem, abſq; Inſtitutione, Collatione, Inductione vel aliâ quacunq; juris ſolennitate intrare, ac omnes Decimas, proficua, &c. quam diu viveret, et dicto Epiſcopatui Coventry et Lichfield præeſſet, in Commendam tenere, poſſidere, et habere, et in ſuos proprios uſus, et utilitatem convertere, ac de eiſdem omnibus, et ſingulis, integrè, ac pro ſuo arbitrio libere ac licitè diſponere poſſit in tam amplis modo et forma et effectu, ac ſi Epiſcopatum non ſuiſſet aſſequutus, ac ſi in eadem in titulum Canonicum ac cum Legitima diſpenſatione poſſideret; ac in eiſdem debitam et perſonalem Reſidentiam faceret, ac ſicut veri Rectores, & Incumbentes, convertere poſſent, licet non faceret Reſidentiam.* Provided, That all his Benefices of all ſorts ſhould not exceed 100 marks in the Kings books, with averment, that the Diſpenſation was not againſt the Law of God, and that the like Diſpenſations were had and uſed in the Court of *Rome*; and then pleaded the Kings Letters Patents, 10 Jac. of Confirmation of the ſame Diſpenſation under the Great Seal, and that the King *Ad Eccleſiam prædict.* of *Cliſton Camvil* being void by Lapps, *præſentavit eundem Epiſcopum, eandemq; Eccleſiam ei Commendavit*: and further granted, *verbatim*, as in the former Letters of Diſpenſation granted by the Dean and Chapter Guardian of the Spiritualties had granted him; and then avers the remains Biſhop of *Coventry* and *Lichfield*, and that he had no Benefice with Cure at the time of his Diſpenſation, but *Southfleet*, and that *Cliſton* is a Benefice with Cure, and that the yearly value of all his Benefices *quæ jam retinet* exceeds not 100 marks: The Plaintiffs by Proteſtation, That *W.* did not accept *Y.* and alſo that ſuch diſpenſations were not had at *Rome*, for Biſhops King *Henry* the 8th Subjects before the ſaid Act of 25 H. 8. demanding *Oyer* of the Diſpenſation, Confirmation, and the Kings preſentation, did thereupon demur in Law: And this Caſe was adjourned out of the Common-Pleas into the Exchequer-Chamber; and there argued by ten Judges: And 8. of the Judges were of Opinion, That as this Caſe was, Judgment ought to be given for the Plaintiffs: and that the Diſpenſation thus granted, and the *Commendam* was void in Law; wherein divers Queſtions were made, and Points Reſolved. The firſt Queſtion was, Whether a *Commendam* of this Tenour and form (having the Clauſes that this hath, and wanting others which this wants) made by an Archbiſhop of *Canterbury*, or Dean and Chapter, with the Kings Ordinary Confirmation to a Biſhop, to take Benefices *de Novo*, to the value of 200 marks Tax in the Kings books with Cure, or without, and to hold them and their fruits for a time limited more then 6. moneths, and leſs then for life, be warranted by the Statute of 25 H. 8. and the true meaning of it: 1. It was Reſolved, That although the Statute 25 H. 8. ſayes, All Diſpenſations ſhall be granted in manner and form following, and not otherwiſe; yet the King is hereby not reſtrained, but his power remains full and perfect as before: but the Statute is to be underſtood of thoſe things that the Pope was by the erroneous opinion of that time ſuppoſed to do lawfully; *ſcil. in ſpiritualibus* merely. 2. Reſolved, That this *Commendam* granted to the Biſhop was void in Law for 7. reaſons; 1. That power is given to the Biſhop, *Propria Authoritate*, to take Benefices with Cure, or without, and to take poſſeſſion of them, and receive the fruits and profits of them to his own uſe, without Inſtitution, Collation, Induction, no reſtraint being had, or proviſion made, that the Benefices which he ſhall ſo take, ſhall be void, when he ſhall take, enter, and poſſeſs them. 2. Becauſe it is not provided, that the allowance and conſent of the Patron be had before he execute the *Commendam* as it ought to be. 3. Becauſe this *Commendam* is Temporary, more then for 6. moneths, and leſs then for life, which cannot be, and ſtand with the Rules of the Common-Law. 4. Becauſe there was never *Commendam* of this form or nature heard of in any book of Law or Record, before 25 H. 8. or ever any ſuch hath received allowance by any Judgment, or Judiciall Opinion, but have ever been diſallowed and condemned. 5. This *Commendam* is void by the Statute of 21 H. 8. of Pluralities, becauſe it contains not the number of Benefices allowed by the Law. 6. Where there is no Statute or Law againſt Pluralities, yet *Commenda* to take Benefices of any ſort, or number, ſo the value exceed not

200

200 marks, is not warranted by 25 H. 8. but the clean contrary: and to the firſt reaſon, a Patron cannot preſent to a Church full, nor can a *Commendam* be made to a Church then full, and there is no difference between a *Commendam*, and a Preſentment, but that the one preſents the Parſon to the Church; and the other commits the Church to the Parſon; and all the Canons, which ſpeak of *Commendams*, rely upon *Eccleſias vacantes*: and, If an Appropriation be made to a Church then full, the Appropriation is void, except it be by expreſſe words, *de futuro quando vacaverit*, *Plow. Com. Grendon*'s Caſe, 501. which is wanting in this caſe; ſo as the fault in this *Commendam* is not in the Execution of it, but in the Conſtitution of it; which not being warranted by the Laws of *Commendam*, makes it no *Commendam* at all. 2. In this *Commendam* there is no proviſion that the Patrons conſent be had; but the *Commendam* doth expreſly exclude the Patron, *viz. Authoritate ſuâ propria capere, & apprehendere abſq; Inſtitutione, Collatione, Inductione, vel alia quacunq; juris ſolennitate.* Now the Patron's Right was never ſubject to the Church-men, nor Eccleſiaſtical Officers, and it is the firſt and moſt worthy act in all promotions to Benefices, as in ordinary Preſentations, Appropriations, and Unions of Churches, and the Patronage is both granted and pleaded by the name of *Libera diſpoſitio Eccleſiæ*; and the Writ of *Quare Impedit* is, *Quod permittat præſentare ad Eccleſiam, &c. quæ vacat, & ad ſuam ſpectat Donationem.* 3. This *Commendam* is temporary, which brings in many incongruities, inconveniencies, and abſurdities in Law; for the Church here is neither abſolutely full, nor altogether void; for he hath not the Benefice intirely, neither in Paſtoral Cure, for there is but a Proviſion put upon him, that the Church be not defrauded; Neither hath he the Benefice wholly to him as Rector, ſo as he may be ſaid to be ſeiſed in Fee, or be ſaid to be a Succeſſour, or Predeceſſour to the Parſons which are before, or that ſhall follow; and a Benefice is ſo intire and indiviſible, that it cannot be commended by parts, as the Cure without the fruits, or the fruits without the Cure. No man can ſhew a Book of Law-Statute, or authentical Reſolution, Judicial Opinion, Hiſtory, or Chronicle, That did ever allow in this Realm a *Commendam* in the *Capere*, or *apprehendere*, and to hold *propria authoritate* for a leſſe time then for life: But a *Commendam* in the *retinere*, may be made temporary, or for years; and to ſay truth, a *Commendam retinere*, is no *Commendam* properly, though it be commonly ſo called, but is onely a Faculty of Retention and Continuation of the Benefice in the ſame perſon and ſtate wherein it was, notwithſtanding ſome intervenings, as a Biſhoprick, or the like, which without ſuch a Faculty, would have avoided it, ſo it is not a *Commendam*; for my own Benefice cannot be Commended to my ſelf, Mich. 10 Jac. in C. B. rott. 2642. *Colt* and the Biſhop of *Coventry* and *Lichfield*'s Caſe. *Hobart*, 141. to 161. acc.

11. If a Biſhop have or take two Benefices, Parſonages, or Vicarages with Cure, either by Retainer, or otherwiſe *de novo*, he is directly (as to thoſe Benefices) within the Statute of 21 H. 8. of Pluralities; for he is to all purpoſes for thoſe not a Biſhop, but a Parſon or Vicar, and by that name muſt ſue and be ſued: For the words are plain, If any perſon having one Benefice with Cure, &c. take another, &c. whoſoever will hold two Benefices, muſt have both ſuch a Qualification, and ſuch a Diſpenſation, as the Statute requires. And therefore if a man be qualified Chaplain to any Subject, and then he be made a Biſhop, his Qualification is void, ſo as he cannot take two Benefices *de novo* after, by force of that Qualification; but if he had lawfully two Benefices before his Biſhoprick, he may by Diſpenſation of Retainer (beſides his former Diſpenſation, to take two Benefices) hold them with his Biſhoprick: And if a man being the Kings Chaplain take a Biſhoprick, he ceaſeth to be the King's Chaplain; and Biſhops are not in that reſpect Chaplains to the King, within the meaning of the Statute of 21 H. 8. See *ibidem*. 157. by *Hobart*, Juſtice. And Note by him, That a Biſhop, by Diſpenſation, may retain as many Benefices as he had lawfully before; but he can take none of New, (if he had his number before) for that the words are as well againſt having of Benefices, as taking of them; and if he had none before, then he can take but one *de Novo*, unleſs by Qualification he can be a Chaplain, and alſo by a double Diſpenſation have Licence to take two Benefices, and hold them with his Biſhoprick. *Ibidem*. 158.

7. Will

7. *What ſhall be a good retainer of a Chaplain within the Statute of* 21 H. 8. *cap.* 13. *And where ſuch Chaplain ſhall be qualified to have Plurality; where not.*

1. IN a *Quare Impedit* brought by the Queen, the Caſe was this; A Counteſs being a Widow, did retain two Chaplains, and afterwards did retain a third; which third firſt purchaſed Diſpenſation to have two Benefices with Cure, and accordingly was advanced to two, whereof the firſt was above the value of 8 l; and if he was lawfully qualified, then the firſt Benefice by taking of the ſecond was not void; and ſo the *Quare Impedit* would not lye. But it was adjudged, That the *Quare Impedit* was well brought: For when the Counteſs had retained two Chaplains, thoſe two onely were capable of Diſpenſation within the Statute; and the retainer of the third Chaplain, could not deveſt the capacity of Diſpenſation which was in the two firſt Chaplains; and ſhe could qualifie but two Chaplains by the Statute: and therefore the Retainer of the third Chaplain was void, and the Diſpenſation purchaſed by him for Plurality was alſo void; and ſo the *Quare Impedit* did lye; And Judgment was given for the Queen. Trin. 43 Eliz. *Cook* 4 Part. 90. *Druries* Caſe.

2. If a Baron who is allowed but 3. Chaplains, retaineth 6. Chaplains by his Letters Teſtimonial at one time, and all 6. are preferred to 6. ſeverall Pluralities; the three firſt Chaplains are onely warranted by the Statute, and Diſpenſation purchaſed by them onely for Plurality, is good; and the 3. laſt ſhall not be reputed his Chaplains within the Statute, ſo long as the firſt 3. are within his ſervice, or are living: And therefore the purchaſe of Diſpenſation by the 3. laſt for Pluralities, are meerly void.

3. If a Baron retains three Chaplains according to the Statute, and each of them purchaſe Diſpenſation to have Plurality, or two Benefices with Cure, and are advanced according to the Statute; If the Baron doth afterwards diſcharge one of them of his ſervice, he cannot retain another during the life of him that is ſo diſcharged; for then the Statute ſhould be defrauded, and he might advance Chaplains without number: And ſo it was adjudged, Paſch. 28 Eliz. in C. B. Rott. 1130. *Stuarts* Caſe. And in that Caſe it was alſo Reſolved, That the Qualification of the Chaplain muſt be *ſub ſigno, et ſigillo*; either of the King, or other Lord whoſe Chaplain he is.

4. The Baroneſs of *Mounteagle* in her Widowhood retained *Carmell* to be her Chaplain, according to the Statute of 21 H. 8. and he then having the Benefice of *Claycotton*, obtained a Diſpenſation, with Confirmation of the Queen, for a Plurality; and afterwards the Baroneſs married with the Lord *Compton*, being a Peer of the Realm; and afterwards *Carmell* accepted of the Vicarage of *G.* and was Admitted, Inſtituted, and Inducted to it: The Queſtion was, Whether this Diſpenſation was well purchaſed, or not; in regard the Baroneſs being a Feme Covert, had loſt her Dignity of Baroneſs by her Inter-marriage: But it was adjudged in that caſe, That her Retainer was good, and the Qualification of the Chaplain was good; and the Diſpenſation and purchaſe of Plurality good, and was not Countermanded by the Enter-marriage, Hill. 45 Eliz. in C. B. *Cook.* 4. Part. 117. *Aſtons* Caſe. But if an Earl or Baron retaineth a Chaplain; and before the Chaplain be advanced unto one Benefice with Cure, the Earl or Baron be Attainted; Then the Retainer is determined, and ſuch Chaplain cannot purchaſe Diſpenſation to have a ſecond Benefice, becauſe then he who is Attainted is dead in Law; and then the Retainer is determined before the Diſpenſation obtained; and therefore if ſuch a Parſon having a Benefice with Cure of the value of 8 l. doth afterwards without other Diſpenſation obtained, purchaſe, or take another Benefice, the firſt Benefice is void by the Statute; as it was adjudged in the Earl of *Weſtmerlands* Caſe, vouched in *Cook.* 4. Part. 119. in *Aſtons* Caſe.

Arbitrators, Arbitrament, *and* Award. *See Plus* Award.

1. Arbitrators, *what they are; and their Power, what they may do; what not: And where such Power shall be said to be well executed; where not.*

1. ARbitrators, are persons indifferently chosen by the parties, to hear, end, and to determine matters in Controversie betwixt them; They are styled Arbitrators, because they have Arbitrary power to Judge, according to their wills and discretions; so as they keep themselves close to their submission: Their sentence is absolutely definitive, from which there is no Appeal; and if they do Erre, no Writ of Errour lyeth to reverse their Judgment; nor any Appeal from it, to any Court, either of Law or Equity: They are not sworn Judges, nor are they tyed to such Rules and formalities of Law; as Judges of Courts are; and yet they have as great, if not a greater power then other Judges have: But notwithstanding they have so large a power to judge; yet that which they do, must be certain; and their Awards grounded upon certainty according to their submission to them: And this their power is so inseparably incident to their persons, that they cannot delegate or assign over their power unto any other persons, but they themselves ought to Judge and determine the matters in Controversie, which are submitted to their Judgments, Pasch. 19 Eliz. *Dyer* 356. *Cook* 5. Part. 78. *Sammons* Case. Pasch. 17 Car. in B. R. *Rudstone* and *Yates* Case, adjudged accordingly.

2. In Debt to perform an Award, The Defendant pleaded, That there was no Award made; The Plaintiff set forth the Award, and assigned the breach: The Defendant did demur, & shewed, That the Award was, That one of the parties should make such a general Release to the other as Councel should advise; so as the Councel are made Arbitrators: But the Opinion of the Court was, That the referring of the making of the Release to Councel was warrantable, because it was but a ministerial Act; but it had been otherwise, if it had been a Judicial Act; for that had been for the Arbitrators to delegate their power to others, which is not warrantable, because it is contrary to the submission of the parties, Hill. 1649. 10tt. 102. in B. R. *Cator* and *Stanines* Case. *Style* 217, 218.

3. The Condition of a Bond for the performance of an Award, was, To make the Arbitrament and Award in writing, under hand and seal Indented; the same to be delivered before such a day. In debt brought for not performing the Award; the Defendant pleaded, *Nullum tale fecit Arbitrium*: And it was found, That the Arbitrament was under the Arbitrator's seal, but not under his hand. It was the Opinion of the whole Court, That his hand ought to be subscribed to the Award in pursuance, and according to the Condition. the same ought to be by writing Indented, and under his hand and seal; and if he cannot write, he is to set his mark to it, and it ought to be delivered: and for want of such subscription, Judgment was given for the Defendant, and against the Plaintiff, Pasch. 9 Jac. in B. R. *Scott* and *Scott's* Case. *Bolstr.* 1. Part. 110. Quære that Case: For in an Action of Debt brought upon an Obligation to stand to an Award, The Defendant pleaded *Nullum Arbitrium*: The Plaintiff Replyes, That the Arbitrators did make an Award, and sets it forth in *hæc verba*; and the Defendant demurred, and shewed for cause, That the Award was not well set forth; For that the party doth not shew, That the Award was delivered up by the Arbitrators according to the submission: But *Roll*, Chief Justice, said, That it was well enough, though it be not: and the Award was adjudged good, and the Plaintiff had his Judgment. Trinit. 24 Car. in B. R. *Langly* and *Wyborn's* Case, *Styles* 110.

4. In Debt brought to perform an Award; the Award was, That the Plaintiff should not prosecute nor proceed in the same Term in such an Action: It was holden by the Court, To be a good Award: And it was holden further by the Court, That the entry of the Continuance by the Attorney from Term to Term, was no breach of it: And it was said by the Court, That if one be bound, that he shall not continue such a Suit, if he continue it by Attorney, it is a breach of the Bond; but if the Attorney enter the Continuance without his privity, it is no breach of it, Hill. 16 Jac. in B. R. *Gray* and *Gray's* Case. *Cro.* 2. Part. 525.

2. *What*

2. *What ſhall be a good Arbitrament and Award, what not: where of part of the thing put in ſubmiſſion; where not: And where it ſeeming larger then the ſubmiſſion, or ſhorter than it, ſhall be ſaid to be good;* et è contra.

1. UPon a Special Verdict, the Caſe was, J.S. and J. D. did ſubmit themſelves to the Award, Order, Rule, and Judgment of *A.* and *B.* for all Matters, Quarrels, and Debates: and Bond was made to perform the Award, Order, Rule, and Judgment made by them. They Award and Adjudge, That J. S. ſhall pay to *W.N.* who was a Stranger, 20 s. It was holden by the whole Court, That the Award was void, becauſe that it was out of their ſubmiſſion; for they cannot award a man to do that which doth not lye in his power: and in this Caſe, *W. N.* is a ſtranger, and it is in his Election if he will accept of the money, or not: And it was holden alſo in that caſe, That the Bond alſo was void, becauſe that the Condition was to perform that which was againſt Law. Quære that Caſe. Alſo it was then holden by them, That Awards concerning Acts to be done by them which have not ſubmitted: and in all caſes where the parties ſubmitted have not ſome things, are void. Paſch. 24 Eliz. in C. B. *Godbolt.* 13. acc.

2. In Debt upon a Bond for not performance of an Arbitrament, the Defendant pleaded, That the Arbitrators *nullum fecerant Arbitramentum*: The Plaintiff Replyed, That they did make an Arbitrament, *viz.* That the Defendant and one of the Arbitrators ſhould enter into a Bond of 8 l. to the Plaintiff, and that after the bond entred into, that the Plaintiff and Defendant ſhould Releaſe all Actions each to other: and Iſſue being joyned upon the Arbitrament, it was found for the Plaintiff: It was moved in Arreſt of Judgment, that upon the Plaintiffs own ſhewing, the Arbitrament was void; for the Arbitrament is, That a ſtranger, *viz.* that one of the Arbitrators ſhould enter in Bond: and that after the Bond entred into, that the Plaintiff ſhould Releaſe all Actions, whereby the bond ſhould be releaſed; and ſo it was a void Arbitrament: And a void Arbitrament is no Arbitrament. It was holden by the Court, That the Arbitrament was void as to the Bond, to be entred into as to the Arbitrator; and alſo that it was void as to the extinguiſhment of the bond by the Releaſe of all Actions: But the Court conceived, That the Arbitrament did conſiſt of two parts, and matters which were diſtinct, and might be ſevered: For although the Arbitrament be void as to one matter, yet it ſhould ſtand good, and be a good Arbitrament as to the other: But *Cook*, Chief Juſtice, held, That the bond being intire, could not be divided. But it was holden by the Court, That the Plaintiff had not alledged any breach of the Arbitrament: For he hath put it, That the Defendant and the Arbitrator had not entred into the bond; and although they joyntly had not done it, yet it might be, that the Defendant alone had entred into the bond; and therefore for not alledging a ſufficient breach, it was adjudged againſt the Plaintiff. Paſch. 8 Jac. in C. B. *Pitts* and *Wardell*'s Caſe, *Godbold.* 164, 165.

3. In Debt brought, for not performing of an Award, the Caſe was, That the Arbitrators made an Award, That the Plaintiff ſhould make ſuch a Releaſe as one of the Arbitrators ſhould like of: In this Caſe, it was holden by the Court, That the Arbitrament was void, becauſe this was the dividing of an Authority, which was given to them all, unto one of them; which was not according to the ſubmiſſion; and therefore was void. Mich. 41 Eliz. in C. B. *Emery* and *Emeries* Caſe, adjudged.

4. *Bedell* recovered in an Action of Waſte againſt *Moor* 40 l. damages: After Judgment, they ſubmitted themſelves to the Award of *A.* and *B*; The Arbitrators Award, That *Moor* ſhall pay *Bedell* 10 l. at a certain day, and 15 l. at other dayes; and that one J. D. ſhould be ready to ſeal ſeverall Obligations for the payment of the ſaid 15 l. at the dayes; and alſo that the ſaid J. D. ſhould do other things which were not within the ſubmiſſion. It was Reſolved by the whole Court, That all which was to be done by J. D. he being a ſtranger to the ſubmiſſion, was void. Mich 29 Eliz. in B. R. rott. 476. *Moore* and *Bedells* Caſe. And ſee the like Caſe, Paſch. 24 Eliz. rott. 2417. in B. R. *Eccleſfield* and *Mallard*'s Caſe.

5. Debt was brought upon an Obligation; the Condition of which was, To perform the Award of *A.* indifferently choſen by the parties, to Arbitrate, &c. of, for, in, and upon the Delapidations of the Parſonage of *S.* being in decay; and alſo of in and upon all and ſingular Actions, Suits, Quarrels and Debates had and depending in variance between the ſaid parties; ſo as the ſame Award be made, ſealed and delivered in writing under the Seal of the Arbitrator before, &c. *A.* made an Award in this form, *viz.* The Award made by me *A.* indifferently choſen by the Obligor on the one part, and the Obligee on the other part: and the Award was onely of the Delapidations, with a Proteſtation, That he would not medle

dle with the reſt: and the Iſſue being upon *Nullum fecit Arbitrium*, this ſpecial matter was found; It was a Quære, If it were an Award between the parties? But it was holden to be a good Award between the parties. But the Opinion of the Court was, That the Arbitrator had diſabled himſelf, becauſe he had not arbitrated all; for that the ſubmiſſion was conditional; ſo as the ſame award be made. But it was holden by the Court, That if it be a ſubmiſſion of two things only, that the Award of one onely of them ſhould be good. 4. Eliz. *Dyer* 217. See Mich. 5 Jac. in C. B. *Middleton*, and *Wells*'s Caſe, Cro. 2. part. 200. acc.

6 The Condition of an Obligation was, That if the Defendant do fulfill and keep the Arbitrament and Award of J. S. indifferently choſen by the Defendant and the Plaintiff, to Order, Rule, and finall determination to make, of all matters, Suits and demands whatſoever, had, or depending between the Deſendant and the Plaintiff, from the beginning of the World, untill the day of the date of the Obligation, That then, &c. In Debt brought upon the Obligation, The Deſendant pleaded, That the Arbitrator *Nullum fecit Arbitrium, de et ſuper præmiſſis in conditione præditt. ſpecificat.* The Plaintiff replyed that the Arbitrator *fecit Arbitrium de et ſuper præmiſſis modo ſequente ſcil.* that where there was a Suit depending between the Deſendant and the Plaintiff for a Debt of 20 l. due by the Defendant to the Plaintiff, which Debt the Defendant had promiſed to pay to the Plaintiff, That the Defendant ſhould pay to the Plaintiff for the ſaid Debt long due, and his coſts, 22 l. In this Caſe, it was adjudged that the award was good, for the Award is as well of the one part as of the other; for the one receives mony, and the other a diſcharge of his Debt, and of his promiſe to pay it. And, 2. It appeareth that the Award was made *de præmiſſis præditt. in conditione præditt. ſpecificat.* Which words imply that he hath made Arbitrament of all that which was referred to him, and ſo it ſhall be intended untill the contrary be ſhewed on the other part; For when a ſubmiſſion is generall of all Actions, *generale nihil certi implicat*, and therefore it may well ſtand with the generality of the words, that there was but one Cauſe depending in Controverſy betwixt them; But where a ſubmiſſion is of certain things in ſpeciall, with a Condition that the Award be made *de præmiſſis*, that it behoves that the Arbitrament be made of all Debts, &c. otherwiſe it is void; But if divers things in Speciall are ſubmitted without ſuch a Condition all Concluſion, there the Arbitrator may make an Award of one of them: It was reſolved further, That if many things be in Controverſy betwixt the parties, and one of them be onely notified to the Arbitrator, that he may make an Award of that onely, for that he is in the place of a Judge, and is to determine *ſecundum allegata et probata*; and he being a ſtranger, the party grieved, ought to ſignifie the Cauſes of Controverſie to him. *Cook.* 9. Part. 97. 7 Jac. *B. Groves* Caſe. See *Brownlow* 2. Part, 309. the ſame Caſe.

7. In Debt upon an Obligation to ſtand to an Arbitrament; the Caſe was, That the Plaintiff and the Defendant put themſelves upon the Arbitrament of J. S. of all matters between them till the 9th day of *March*, 18 Jac. and he made an Award, That each of them ſhould releaſe to the other matters and differences betwixt them till the 9th of *March*, 18 Jac. It was Objected, That by the Releaſe, the Obligation upon which the Action was brought, is diſcharged: But the Opinion of the Court was, That it was a good Award; for though it ſhall be void for that part of the Award, yet it ſhall be good for the reſt. Hill. 18 Jac. in C. B. *Norton* and *Lakins* Caſe. *Winch.* 1. See before, pl. 2. *Pitts* and *Wardell*'s Caſe, acc.

8. The Condition of an Obligation to perform an Arbitrament, was, That if the Defendant his Executors, &c. ſhould perform the Award of *A. B. C.* and *D.* Arbitrators as well for the ſaid Defendant, as for the Plaintiff, elected to Arbitrate, for, and upon all manner of Actions, Suits, Treſpaſſes, Debts, Duties, and all other demands whatſoever, which between the ſaid parties have been had, moved, or now depending; ſo the ſame Award of the Arbitrators or any 3. of them of the premiſſes be made and given up before, &c. the Defendant in debt brought, did plead, That the Arbitrators did not make any Award: The Plaintiff Replyed, That *B. C.* and *D.* three of the Arbitrators did make their Award by writing Indented, That the Defendant ſhould pay to the Plaintiff 57 l. Upon the 25th of *November* next 20 l. and ſeveral other ſums at ſeveral other dayes: and whereas the Defendant and one J. D. were bound to the Plaintiff in 22 l. for the payment of 6 l. at certain dayes, that the ſaid Obligation ſhould be to the Plaintiff in force as it then was; and that he ſhould have ben ſit thereof as he might have had before; That the Plaintiff ſhould acquit and ſave the Defendant harmleſs from all debts, duties, and moneys, for which the Defendant with the Plaintiff was indebted to *E. F. G.* and *H.* or any of them; and all Actions depending between the parties for any matter betwixt them, except the matters contained in the Arbitrament; and that if any Controverſie ſhould happen between the parties about any word, ſentence, or thing in the Arbitrament, that the parties ſhould perform ſuch Conſtruction as the ſaid 3. Arbitrators ſhould make under their hands; and that the

the Plaintiff ſhould pay to *J. N.* for drawing and ingroſſing the Arbitrament 6 s. 8 d. and then the Plaintiff ſhewes, That although he performed all, yet the Defendant did not pay the 20 l. upon the 25 of *November*: And a Demurrer in Law being joyned upon this Award, It was adjudged for the Plaintiff: and the Defendant thereupon brought a Writ of Errour in the Exchequer Chamber, and aſſigned many Errours; 1. Becauſe the ſubmiſſion was to 4, and the Arbitrament was by 3. onely. 2. That the Arbitrators did not make any Award of the Bond of 12 l. and the ſubmiſſion was conditionall. 3. That the Arbitrators have made an Award of all matters concerning them for the future which is not in their power; for that all the Award ought to be before the laſt of *May*. 4. They award 6 s. 8 d. to be paid for ingroſſing the Award, which is not within their ſubmiſſion; *J. N.* being a ſtranger, and the thing awarded being agreed upon after the ſubmiſſion. But it was holden by all the Juſtices and Barons, That the Arbitrament was well made; for it ſhall be taken to be a ſubmiſſion to 4, or any 3. of them. 2. That the breach was well aſſigned; for if he did not pay the 20 l. upon the 25 of *Novemb.* it was not paid before the day: and they agreed, That the Arbitrament for the payment of the 6 s. 8 d. was void; but that was not material, for that the Award was void onely for that; but good for the reſidue: The Judgment was affirmed. Mich. 12 Jac. in B. R. rott. 386. *Berry* and *Berry*'s Caſe; *Bulmar* 90, 91. See *Bolſtrod.* 64, 65, 66, 67. the ſame Caſe. See Paſch. 9 Jac. in C. B. *Sallowes* and *Girlings* Caſe, adjudged acc. *Brownlow* 1. Part. 111. See *Cro.* 2. Part. 400. the ſame Caſe, adjudged accordingly. See Paſch. 16 Jac. rott. 2371. C. B. *Buſfield* and *Buſfield*'s Caſe. *Cro.* 2. Part. 577.

9. In Debt upon an Obligation; The Condition was, That whereas there were differences between the parties concerning ſome Actions, they had put themſelves upon the Award and Arbitrament of J. S. to be before the laſt day of *December* next; If therefore the Defendant his Executors, do and ſhall ſtand to and keep the ſaid Arbitrament of the ſaid J. S. that then, the Defendant delivered *Oyer* of the Condition, and then pleaded, That the Plaintiff ought not to have Action; becauſe he ſaid, The ſaid J. S. did not make any Arbitrament. The Plaintiff replyed, and ſhewed the Arbitrament, by which J. S. did award to the Plaintiff, intereſt to be paid for money, amongſt other things; upon which it was demurred. It was Objected, That the Arbitrament was void; for that it was for the payment of Intereſt: and Arbitrators indifferently choſen, may not award Intereſt to be paid; for that it is an unlawfull thing; and theſe differences which are to be ſubmitted, ought to be intended of lawful differences: And a Caſe was cited to be adjudged in the Kings Bench; That a Promiſe upon Conſideration to pay the principal together with the Intereſt, at a certain day upon forbearance, did lye, becauſe there the Intereſt certain was ſet down; but if the Intereſt certain had not been ſet down, then the promiſe to pay Intereſt had not been good. But the Opinion of the Court was, That the Award was good; for that the Award is not for Intereſt, but rather for damage, for forbearance of the money: but admit it were for Intereſt, yet it is not void; for then the Statutes of 13 Eliz. & 27 Eliz. ſhould be frivolous, if ſuch Contract ſhould be utterly void; for they made the Contracts void onely for above 10 l. in the 100 l; and then if Contracts for uſury are good, then whatſoever a man may contract for, the ſame may be awarded, if the Contract will bear it: and Uſury is not *malum in ſe*, but *malum prohibitum*. The Court held, That the Award was good in this caſe; and Judgment was given for the Plaintiff. Mich. 22 Jac. in C. B. *Gilſon* and *Fencers* Caſe, *Winch.* 114. and 120.

10. A ſubmiſſion was made by the parties the 29. *December*, 6 Car. to J. S. and J. D. Arbitrators, of all Actions, Suits, and Demands betwixt them, ſo that they made their Award before the 6th of January following: upon the 5th of January they made their award upon the premiſſes, and awarded 72 l. to be paid by the Defendant to the Plaintiff; and that either of them before the 12th of January following, ſhould make a Releaſe from the one to the other, of all Actions, Suits and Demands before the 28. of *December* laſt paſt: In Debt brought for the 72 l. upon *Nil debet*, It was found for the Plaintiff. In arreſt of Judgment, it was moved, That there were Actions depending betwixt them the 29th of *December*, and therefore the Arbitrament was void. But the Opinion of the Court was, That the Arbitrament being made *de et ſuper præmiſſis*, it ſhall not be intended, that new Actions aroſe betwixt them the 28. of *December*, unleſſe it be ſpecially ſhewed; and therefore the Award is good, eſpecially when the party takes Iſſue *Nihil debet*; or *Nullum tale fecerunt Arbitrium*. Trin. 7 Car. in B. R. *Ward* and *Uncornes* Caſe. *Cro.* 1. Part. 157. And ſo was it adjudged in the like caſe, Trin. 43 Eliz. rott. 947. in *Barnes* and *Greenewayes* Caſe; which ſee, *Ibid.* See Trin. 5 Jac. rott. 1618. *Goſſe* and *Browns* Caſe. *Hobart.* 190. acc.

11. Debt upon an Obligation, for not performing

forming an Arbitrament; The Award was, That the Defendant ſhould acquit and diſcharge the Plaintiff concerning a Bond of 100 l. wherein the Plaintiff and Defendant were jointly bound for the payment of 50 l. to J. S. The Defendant demurred, and for cauſe ſhews, That the Arbitrament was void, to award, that he ſhould acquit and diſcharge him of a Bond made to a ſtranger, for that it is not in his power to procure a diſcharge. But the Opinion of the Court was, That the party might well acquit and diſcharge, if the 40 l. be payable at a future day, as here it ſhall be intended it was. Adjudged for the Plaintiff. Hill. 15 Car. in B. R. *Bardſey* and *Cluſtons* Caſe. *Cro.* 1. Part. 389.

12. Debt upon a Bond dated *January*, 13 Jac. for not performing an Award of all Cauſes between them. The Defendant pleaded, No Award made; The Plaintiff replyed, That in April 14. there was an Award made between them, *de et ſuper præmiſſis, ſcil.* that the Defendant ſhould pay to the Plaintiff 20 l. in full ſatisfaction of all Controverſies untill the day of the Award, and that the Defendant paid it not. Whereupon the Defendant did demurr. In this caſe, upon view of the Preſidents of *Barnes* and *Greeneways* Caſe, Trin. 43 Eliz. and of *Goſſe* and *Brown's* Caſe, Trin. 5 Jac. both which Caſes are before vouched in *Ward* and *Hacaynes* Caſe, with which they agreed *in Termino*: The Court were ſtrongly for the Plaintiff, and gave Judgment for him: And yet if the Defendant had paid the 20 l. and the Plaintiff had accepted of it according to the Award, it would have ſatisfied and diſcharged any Treſpaſs or the like done by the Defendant to the Plaintiff, between the date of the Bond, and the Award; for it might be averred a ſatisfaction for it. Mich. 14 Jac. rott. 953. *Lea* and *Payoes* Caſe, *Hobart.* 191. See *Brownlow* 48. the ſame caſe. *Hutton* 9. the ſame caſe.

13. In Debt brought upon an Obligation to perform an Award; The Defendant pleaded, That the Arbitrators awarded, That whereas there was a Suit in the Chancery depending againſt the Plaintiff for divers matters, that the Plaintiff ſhould be acquitted of that Suit, and of all matters contained in the ſame Bill: and the Defendant alleaged, That he did not make any proſecution of that Bill, but the Plaintiff ſtands acquitted thereof. The Plaintiff Replyed, That the Defendant after the ſaid Award, *viz.* ſuch a day and year exhibited a New Bill, which did contain the ſame matter which the firſt Bill did: and ſet forth both Bills to the Court. Upon which, the Defendant did demur, and ſet forth for cauſe of Demurrer, That the Plaintiff had pleaded, That the Defendant had exhibited a New Bill; but that not taken forth any proceſs upon the ſame. It was adjudged, That the Defendant's Plea was good; and the exhibiting of a New Bill, or token of proceſs upon it, could be no prejudice; for the Bill is but a Petition; and the proceſs is ſuch, by which neither body nor goods ſhall be taken, and to the Plaintiff not prejudiced: and the Defendant hath pleaded, That he acquitted him of the Suit; and ſo Judgment was given againſt the Plaintiff. Trin. 11 Jac. in C. B. *Freeman* and *Sheild's* Caſe. *Brownlow* 1. Part. 122.

14. Debt upon a Bond, to perform an Arbitrament; The Condition was, to perform the Award of two Arbitrators of all Actions, Demands, &c. from the beginning of the World, to the day of the date of the Obligation, ſo the Arbitrament be made before the 10th of *December*: The Defendant pleadad, No ſuch Award before the day: The Plaintiff Replyed, The 9th of *December* the award of and upon the premiſſes, that the Defendant ſhould pay the Plaintiff 14 l. at two days, and that upon the laſt day, the Plaintiff ſhould make a general Releaſe to the Defendant, and the Defendant likewiſe to the Plaintiff; and alledges a breach for not payment of the firſt 7 l. and avers, the 14 l. was awarded the Plaintiff in full ſatisfaction of all Suits, &c. It was Objected, The Releaſe to be made, is not appointed, but after the payment of the money, and is then to be made of more then is ſubmitted to. But *per Curiam*, the Award is good; and it ſhall not be intended there were more matters betwixt them after the date of the Obligation. Paſch. 17 Jac. *Aſhbyes* and *Cliffords* Caſe, *Hutton* 29.

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3. *Where the Arbitrament and Award ſhall be void, becauſe of incertainty, impoſſibility to be performed; and where it is made but of one part or ſide only*; et è contra. *And where ſubmiſſion is of ſeverall matters; where Award made of one of them ſhall be good; where not.*

1. THe Plaintiff and Defendant did refer all matters and Controverſies which were betwixt them, to the Arbitrament and Award of J. S. the Arbitrators did award, That the Defendant ſhould enter into a Bond to the Plaintiff, that the Plaintiff and his Wife ſhould enjoy

enjoy certain Lands, which he had not done. In an Action upon the Caſe brought for not performing of the ſame Award: It was Reſolved, That the Action did not lye, becauſe the Award was void for the Incertainty; for it doth not appear of what ſum the Bond entred into ſhould be; and every Award ought to be certain, 36 Eliz. in B. R. *Cook*. 5. Part. *Samons* Caſe.

2. Debt brought upon an Obligation to ſtand to the Arbitrament of J. S. for the title of Copy-hold Lands between the parties; The ſaid J. S. Arbitrator awards, That the Defendant ſhould pay to the Plaintiff 20 marks, *ſcil.* 6 l. 13 s. 4 d. *ſuper victſimum primum diem Maii*, and 6 l. 13 s. 4 d. at the Feaſt of St. *Mich.* next, and that the Plaintiff ſhould releaſe to the Defendant all his right in the Copy-hold Lands, *ſuper prædictum primum diem Maii*. The Defendant pleaded, That there was no Award made. The Plaintiff replyes, and ſets forth the Award, and that the Defendant had not paid the 6 l. 13 s. 4 d. upon the firſt of *May*. The Defendant demurred in Law. It was the Opinion of the whole Court, That the Arbitrament was void in the whole, becauſe the day to which the Releaſe is referred unto, is uncertain; and ſo it doth not appear when it ſhall be made: and in this caſe it was ſaid, That if an Arbitrament doth conſiſt of divers parts, yet if any part of it be uncertain, the Arbitrament is void in all; for that an Arbitrament or Award is like a Judgment, which if it be imperfect in any part, is void for the whole. It was adjudged for the Defendant. Mich. 4 Jac. in B. R. rott. 32. *Markham* and *Jennens* Caſe.

3. Two men referred themſelves to the Arbitrament of J. S. and J. D. The Arbitrators made an Award, That one of them ſhould pay a certain ſum to the other at ſuch a day; and that the other in Conſideration thereof, ſhould acquit him of a Bond wherein they both were bounden unto a third perſon in 100 l. &c. *et ſo Circiter*: In an Action brought for not performance of the ſame Award, It was Objected, That the Arbitrators had Arbitrated a thing uncertain, by reaſon of the words, *ſo Circiter*. But the Opinion of the whole Court was, That there was ſufficient certainty, becauſe in this caſe, it doth not lye in their powers to know the direct ſum; and becauſe a ſmall variation is not material. But if they will arbitrate, That one ſhall be bound in a bond to another, and not expreſſe in what ſum, the ſame is utterly void for the incertainty; as it was adjudged in *Sammon's* Caſe. Paſch. 15 Car. in B. R. *Marſh*. 18.

4. Upon Debt upon an Obligation to perform an Award, upon *Oyer* of the Condition, the Defendant pleaded, That the Arbitrators made no Award; upon which Iſſue was joyned. The Jury found by Special Verdict, That the Defendant and one *Watſon* ſubmitted themſelves to Arbitrament, and found, that the Arbitrators made an Award in *hæc verba*, &c. but further they found, That *Watſon* one of the Obligees, was an Enfant within age at the time of the ſubmiſſion; and that the Arbitrators awarded, (amongſt other things) that *Watſon* the Enfant ſhould pay 5 l. to the other party for Quit-Rents, and other ſmall things: In this caſe 3. Points were Reſolved; 1. That the ſubmiſſion of the Enfant to an Award, was utterly void. 2. That the Award was void, becauſe of the incertainty of thoſe other ſmall things, it not appearing what thoſe other things were; and it might be, that they were ſuch things for which an Enfant by Law might not be chargeable; and alſo for that by the ſame reaſon that they have aſſeſſed 5 l. for the Enfant to pay, they might have aſſeſſed 20 l. 3. It was Reſolved, That the whole Award was void; and that as well againſt the Defendant *Yates*, as againſt *Watſon* the Enfant; for the ſubmiſſion is an intire thing; and void in part, is void in all. Trin. 17 Car. in B.R. *Rudſtone* and *Yates* Caſe. *Marſh* 111. & 141.

5. Two men ſubmitted themſelves to an Arbitrament, by Recognizance for the right and Intereſt in 200 Acres of Lands called *Kelſtorn-ling*, and for all other Actions and Suits concerning the ſame, *Ita quod Arbitrium*, &c. before ſuch a day. The Arbitrators awarded, That the Defendant ſhould have the brakes there growing during his life, paying to the Plaintiff yearly 2 s. without making any mention of Actions, Suits, &c. and upon demurrer joyned, It was adjudged, That the Arbitrament was void for 3. Cauſes: 1. Becauſe the Arbitrators had diſabled themſelves, their authority being upon Condition, *viz. Ita quod*, &c. inſomuch, as they had made an Award but of one thing, where the ſubmiſſion was of two: But it was holden, That if the ſubmiſſion had been by word, the Award had been good for that part. 2. It was a void Arbitrament, becauſe they had not awarded the property of Land of which the ſubmiſſion was; but had awarded onely a profit out of the Land, *viz.* to have the Brakes yearly. And, 3. It was holden, That the Award was void, becauſe they had not named the place *Kelſtorn Ling*; for although they intended that, yet it was holden, That the averment of the party, could not declare the Intent of the Arbitrators. Mich. 8 Eliz. *Dyer* 242.

6. Debt upon a Bond to perform an Award, to be delivered in writing; The Defendant pleaded, The Arbitrators made no Award: The Plaintiff ſhewed the Award made *de et ſuper premiſſis in conditione*, &c. in writing, which was, That the Defendant ſhould depart from the houſe where ſhe dwelt,

dwelt, and ſhould pay to the Plaintiff 3 l. 10 s. It was adjudged againſt the Plaintiff for two cauſes; 1. Becauſe the Arbitrament was but onely of one ſide. And, 2. For the incertainty, for that it doth not appear for what the 3 l. 10 s. ſhould be paid; and every Controverſie is betwixt two at the leaſt: and it appears to the Court, the Controverſie cannot be ended but in reſpect of both parties: And if an Award be, That the Obligor in a ſingle Bond ſhall pay the debt; this is no good award, unleſs it be provided, that he be diſcharged, becauſe payment is no diſcharge in ſuch caſe. Hill. 12 Jac. rott. 3027. in C. B. *Nichols* and *Grunnions* Caſe. *Hob.* 49.

7. Debt upon a Bond for not performing an Award, which was, That the Defendant ſhould pay to the Plaintiff 20 l. *per annum*, during the continuance of two Leaſes for years in being, of the Parſonage Impropriate of *Yarmouth*, &c. It was not ſhewed in the Award for what Term the Leaſes were: but the Plaintiff ſhewed for what Term they were, and the continuance of them; and alledged a breach in not payment of the 20 l. &c. It was Objected, That the Award was void for incertainty, becauſe the Term of years were not expreſſed in it, which cannot be helped by an Averment of the party. But the Court held the Award to be good; for that the payment of the 20 l. *per annum* is referred to the continuance of the Leaſes, which is certain, *et id certum eſt, quod certum reddi poteſt.* Paſch. 3 Jac. in B. R. rott. 478. *Girling* and *Goſnold's* Caſe.

8. Debt brought upon an Obligation, the Condition of which was, To ſtand to the Arbitrament of J. S. concerning all matters between them to the time of the ſubmiſſion: The Arbitrator awards, That one ſhall pay 20 s. and that the other ſhall make a general Releaſe to him, of all matters from the beginning of the World, to the time of the Arbitrament. It was agreed by the whole Court, That this is but an Arbitrament of one part, and therefore void; for it ſhall be intended by reaſonable Conſtruction, that the other party ſhould be diſcharged and acquitted. See 7 H. 6. 40. acc. Mich. 15 Jac. B. R. *May*, and *Samuels* Caſe, *Popham* 134.

9. Note; It was holden by the whole Court, and agreed by all the Serjeants, That if two men ſubmit themſelves to the Arbitrament of J. S. and the Arbitrator awards, That the one ſhall pay 10 l. and that the other ſhall make to him a Releaſe, that the ſame is a void Arbitrament, unleſs that the Submiſſion be by Deed, by which he to whom the Releaſe is to be made may have remedy, for otherwiſe the one ſhould have the 10 l. and the other ſhould be without remedy for the Releaſe. It was further Reſolved, That upon the ſubmiſſion and Arbitrament, the party ſhould not have an Action upon the Caſe for the making of the Releaſe: and the reaſon was, becauſe no Action upon the Caſe lyeth upon an Arbitrament, becauſe the ſame is in the Nature of a Judgment: and in this Caſe, *Cook* ſaid, It was wiſely done by *Maunwood*, Chief Baron, That when he made ſuch an Arbitrament to Releaſe or to do ſuch a Collateral thing; To arbitrate alſo, that he make the Releaſe or pay 10 l. for which the other might have remedy. Paſch. 10 Jac. in C. B. The Lord *Mounteagle* and *Penruddocks* Caſe.

10. In Debt brought upon an Obligation to perform an Award; the Defendant ſaid, That the Award was, That the Defendant ſhould ſurceaſe all Suits depending betwixt them, which he had done: The Plaintiff Replyed, That the Arbitrators made the Award *ut ſupra*: and alſo awarded, That the Defendant ſhould pay to the Plaintiff 20 l. at the houſe of J. S. without that, that they made the other award onely; The Defendant rejoyned, It is true, they made theſe Awards, but they farther awarded, That the Plaintiff ſhould releaſe to the Defendant, which he hath not done: Upon which Rejoynder, the Plaintiff did demur. It was Objected, That the Award was void, becauſe it is to do a thing upon the Land of another, which he cannot lawfully do: And although the Arbitrators may award to do a thing which is inconvenient, yet not to do a thing which is Impoſſible. But the Opinion of all the Juſtices was, That the Award was good: For, 1. The money is to be paid *apud Domum J. S.* and not *in domo*, and it might be, for any cauſe that appeareth to the contrary, that the ſaid houſe was adjoyning to the High-way, ſo that every ſtranger might come thither to the houſe, although he cannot come into the houſe without being a Treſpaſſor: but if it were not adjoyning to the High-way, yet he ought to come ſo near the houſe, as he might; and there he might make tender of the money, or he might procure leave to come into the houſe. 2. It was Reſolved, That although the Award ſhould be void as to that part; yet for the reſidue it was good: and therefore for not performance of the reſidue, the Bond was forfeited. See to that purpoſe, *Cook* 10. Part. 131. in *Oſborns* Caſe. If J. D. and J. N. ſubmit themſelves to the Award of J. S. who awards, That J. D. ſhall ſurceaſe all Suits, and procure J. N. to be bounden with a ſtranger, to make a Feoffment of his Manor of *Dale*, which is out of the ſubmiſſion. In that caſe there were 3. things enforcing the Arbitrament, & the firſt is only good, the ſecond againſt Law; and the third not within the ſubmiſſion: yet the Award being good in parte, the ſame ought to be performed. Paſch. 12 Jac. in B. R. *Lindſey* and *Aſhtons* Caſe.

11. Debt

11. Debt upon an Obligation to ſtand to the Award of *A.* and *B.* to be made *ante Feſtum St. Andreæ* the Apoſtle; The Defendant ſaid, They made no Award: The Plaintiff ſaid, That the Arbitrators, reciting divers ſums of money alledged by the Plaintiff to be due unto him by the Defendant, 18 *November*, did Order, That the Defendant (*inter alia*) ſhould pay 9 l. to the Plaintiff: and further, If the ſaid Defendant at or before the Feaſt of St. *Andrew* then next following ſhould before the ſaid Arbitrators or either of them, diſprove the payment of any the ſeveral ſums aforeſaid, then ſo much to be deducted out of the payment of the ſum: Upon Iſſue joyned, It was found for the Plaintiff: It was moved, That the Award was not good; becauſe it left the matter in ſuſpence, and ſo it was no final Award: and whether the Award ſhould ſtand, and the Reſervation ſhould be void, *Curia aviſare vult.* Hill. 15 Jac. Rott. 931. *Warley* and *Beckwiths* Caſe, *Hobart* 218.

12. In Debt upon an Obligation to perform an Award, the Caſe was; That 16 *March*, 33 Eliz. the Defendant was bound to the Plaintiff in 50 l. to ſtand to the Award, final End and Judgment of *A.* and *B.* Arbitrators, indifferently choſen to arbitrate, award, and judge of all Actions, Suits, Quarrels and Demands betwixt the parties untill the date of the Obligation, ſo it be made in writing under their hands and Seals, ready to be delivered up to the parties at or before the laſt day of this inſtant April; and the Arbitrators the laſt day April, 33 Eliz. made an Arbitrament in writing under their hands and ſeals, That within 4. dayes next enſuing the Award, Either of the parties ſhall Releaſe to other all Actions, Suits and Demands, before the date of the ſaid Obligation, with this Proviſo, That if either of the ſaid parties ſhall be diſcontented with the ſaid Award, or any part of it within 20 dayes after the Award, that then upon payment of 10 s. by the party which thinks himſelf grieved with the Award, to the other within the 20 dayes, the Award ſhall be void, and either of them be at liberty againſt the other as before the Award. The Queſtion was, Whether this be a good and final Award, or not? It was holden by all the Juſtices, That in this caſe, It ſhall ſhall not be ſaid to be a final Award at the time of the Award made; becauſe that inſtantly upon it, and before the dayes are paſt, there was a power in the parties to have defeated the Award upon the payment of 10 s. and therefore, and for that cauſe, the Award was void: And alſo it was holdden by them, That if the Releaſes had been limited to have been made at a day to come, as 10 dayes after, and that the Proviſo had been to have been performed in the mean time, before the 10 dayes, yet the Award had been void, becauſe they had not purſued the Submiſſion. Hill. 35 Eliz. in B. R. *Sherley* and *Richardſons* Caſe. *Popham.* 15, 16.

13. Debt upon an Obligation, to perform the the Award of J. S. and J. D. ſo as they made their Award before 10. *October* under their hands and ſeals; and if they did not agree, then to ſtand to the Umpirage of J. N. ſo as it be made in writing under his hand before 20. *October*. The Defendant pleaded, That neither the Arbitrators, nor the Umpier made award before the ſaid dayes. The Plaintiff Replyed, True it is, J. S. and J. D. did not agree, nor make Arbitrament before 10. *October*; but J. N. the Umpier did make Award before 20. *October*, where he awarded, (*inter alia*) that the Defendant ſhould pay to the Plaintiff 30 l. at the houſe of *A.* in *Chelmesford*, being the ſign of the Cock; and for non-payment, alledged the breach. It was Objected, That the Submiſſion was void and incertain; for it is, If they do not agree; and it doth not appear to what they ſhould agree: and alſo the Arbitrament by the Umpier was void, becauſe he appoints the money to be paid at the houſe of a ſtranger, where by Intendment, the Defendant hath not Intereſt, nor can compell the owner to ſuffer the money to be paid there; for ſo the Defendant might be a Treſpaſſor. But the Court agreed, The Arbitrament was good; and the appointment of the money at a ſtrangers houſe, which ſhall by Intendment be taken to be a Common Inne, ſhall not make it an unlawful Act, and the Plaintiff by Intendment may procure ſuch a kindneſs of the ſtranger. Mich. 7 Car. in B. R. *Tavernor* and *Skingles* Caſe. *Cro.* 1. Part. 193. See Trin. 8. Car. in B. R. *Jennings* and *Vendeputs* Caſe, *Cro.* 1. Part. 191. acc.

14 In Debt upon an Arbitrament, The Plaintiff declares that the Defendant and he *poſuerunt ſe in arbitrium, ordinationem et judicium.* J. S. Arbitrator indifferently choſen *de jure titulo et intereſſe in quibuſdam Meſſuagiis, &c.* and the ſaid Arbitrator *Ordinavit* that the Defendant ſhould pay unto the Plaintiff 16 l. *in plenam ſatisfactionem*, It was moved that the Arbitrament ſet forth in the Declaration was void, becauſe nothing is awarded to the Defendant, and ſo the Declaration is not good; but the Opinion of the Court was; That it doth not appear, but that it may be that the Arbitrament is good, for that the Plaintiff is not to ſhew in his Declaration all the Award, but ſuch thing onely which doth Intitle him to the thing, &c. and if the Defendant will impeach the Award, it ought to come on his part; Adjudged for the Plaintiff. M. 30. Eliz. in C. B. *Smith*, and *Kirſoots* Caſe. *Leon.* 72.

15 In Debt brought upon an Obligation to ſtand to an Award, the Plaintiff ſet forth, that the Arbitrator Awarded, 1. That the Defendant ſhould pay to the Plaintiff 10 l. 2. That the Defendant ſhould yield up, ſurrender, and relinquiſh to the Plaintiff, all ſuch Houſes and Tenements which he had in his poſſeſſion, by reaſon of the cuſtody of the Plaintiff; ſo that the Defendant ſhould acquit and diſcharge the Plaintiff of ſuch an Obligation. The Defendant to the firſt, pleaded, That he was ready, and yet is: As to that, the opinion of the Court was, That the Plea was not good, for that the Defendant ought to have pleaded a Tender. To the 2d the Defendant pleaded, That he had yielded up, &c. all ſuch houſes generally, without ſhewing which in certain. And for that cauſe, the Court was clear of opinion that the Plea was not good, To the 3d the Defendant pleaded, *Quod Querens non fuit damnificatus.* The Court held the ſame to be inſufficient, for he ought to have ſhewed him how he had diſcharged him; and it is not ſufficient to anſwer onely to the damnification. Judgment was given for the Plaintiff. Mich. 29. and 30. Eliz. in. C. B. *Brett* and *Audars* Caſe. Leon. 71.

16 An Action was brought upon an Obligation for not performance of an Award, which was void in part, and good in part, and the breach alledged in that which was good: and the Award was to pay mony, but no time of payment was alledged in the Award; But afterwards, the money was demanded. It was holden that the Award was good, and ſuch demands was alſo holden to be good. Paſc. 16. Jac. in Co. B. rott. 1200. *Rayſon* and *Winders* Caſe. *Brownlow* 1. part 65.

17 Note, It was holden by the whole Court, That if a man be bounden to perform an Award of Arbitrators, and they make an Award accordingly that one ſhall pay money, he to whom the money ought to be paid, may have an Action of debt for the money, and declare upon the Award, and afterwards he may have another Action upon the Obligation, for not performing of the Award. Mich. 5. Car. in C. B. *Brownlow.* 55.

18. Debt for 10 l. upon an Arbitrament; The Caſe was, the Plaintiff and Defendant, 8 *Auguſt*, 10. Jac. ſubmitted themſelves to the Arbitrament of J. S. and J. D. of all Treſpaſſes, duties, and demands; and the Arbitrators the ſame day Arbitrated *de et ſuper premiſſis*, viz. That the Defendant ſhould pay to the Plaintiff in ſatisfaction of all Treſpaſſes and injuries done to the Plaintiff by the Defendant, before the day of the Submiſſion, ſo much, &c. The Defendant demurred upon the Declaration; pretending the Arbitrament was void, being but of one part, and the Plaintiff is not to do any thing: But it was adjudged, the Arbitrament was good; and that the Defendant hath benefit by it, for by the payment of the money, he is quit againſt the Plaintiff of all Treſpaſſes, and it is a good bar againſt him; and it ſhall not be intended that the Arbitrators had notice given them; That the Defendant had any cauſe of Action againſt the Plaintiff, but onely that the Treſpaſſes were done onely by the Defendant; and if it were otherwiſe, it is to be ſhewed on the Defendants part: And where a ſubmiſſion is of all Actions, and not with a Condition, ſo that it be made upon the premiſes, if they make an Award of part, it is good for that part wherefore they made their Award; but if the Submiſſion had bin conditionall, it had been otherwiſe; and that difference was agreed by the whole Court. Paſc. 12. Jac. rott. 399. in B. R. *Ormelade* and *Cooks* Caſe. Cro. 2. part 354, 355.

19 Debt upon an Obligation for performance of the Award of J. S. and J. D. of all ſuits and demands betwixt the Plaintiff and Defendant, ſo as the Award of, and upon, the premiſes be made ready to be delivered to the parties under their hands and Seals before the Feaſt of St. *Bartholmew*, &c. The Defendant pleaded, They made no Award; the Plaintiff ſhewed that the Arbitrators *accepto onere arbitrandi de et ſuper premiſſis* 8. Auguſt, *Anno prædict.* made Arbitrament under their hands and Seals, *de et ſuper præmiſſis*, viz. That the Plaintiff ſhould have and enjoy a Horſe, which was in controverſy, and that the Defendant ſhould pay to him 3 l. before *Michaelmas* towards his charges; and they ſhould releaſe one to the other all matters whatſoever betwixt that time and *Michaelmas*; and the breach was alledged in not payment of the 3 l. The Defendant demurred; It was adjudged againſt the Plaintiff, for though it was pleaded that the Arbitrament was made *de et ſuper præmiſſis*; yet the words being general, the ſame will not help the Plaintiff, unleſſe it be helped by the Plaintiff by an Averment that there was no more cauſes betwixt them, and then the Releaſe appointed being void, there is nothing Arbitrated for the Defendants benefit. Mich. 12. Jac. rott. 155. in B. R. *Stain* and *Wilds* Caſe. Cro. 2. part 352, 353.

20 Debt upon an Obligation of 500 l. Conditioned to ſtand to the Award of J. S. and J. D. So that, &c. The Defendant pleaded they made no Award: the Plaintiff replyed, and ſhews the Award; but aſſigns no breach. The Defendant replies, It is not the Arbitrators Award; a Verdict was found for the Plaintiff; It was moved to ſtay Judgment, that, no breach being alledged, there was no cauſe of Action, and ſuch was the opinion of the whole Court,

Court, for the Court ought to be ſatisfied, that the Plaintiff had cauſe of Action, otherwiſe they cannot give Judgment, and this defect is matter of Subſtance, and not helped by any Statute. Judgment was Arreſted. 1 Paſc. 7. Jac. in B. R. *Barret* and *Fleetwers* Caſe, Cro. 2. part. 320.

21 Debt upon a Bond conditioned to perform the Arbitrament of J. S. ſo it be delivered the 28th *Feb.* following, at the Shop of R. in C. &c. The Defendant pleaded *Nul tiel arbitrament*. The Plaintiff ſhewed an Arbitrament 27 *Feb.* and that he delivered it at the Shop of A. in C. The Defendant demurred becauſe it is not ſaid to be delivered at the ſhop *prædict.* nor of the ſaid R. *prædict.* and it may be he hath removed his Shop; and there may be another R. But it was adjudged, that another ſhop and another perſon ſhall not be intended, unleſſe the Contrary had been ſhewen. Alſo it was objected that the Arbitrament is incertain, to pay charges in ſuch a ſuit; But the Court held it certain enough, when the Attorny hath made a Bill of Charges. Mich. 10. Car. in B. R. *Beale* and *Bates* Caſe. Cro. 1. part. 279.

22. Debt upon a bond to perform an Arbitrament: The Arbitrament was in this manner, Whereas there was a Controverſy between the Plaintiff and Defendant concerning the Leaſe of a houſe, in C. which the Defendant claymed by Leaſe from *Bond*, one of the Plaintiffs for 6 years, rending 15 l. paid quarterly, which Rent was behind for a year. That he ſhould for this Rent pay to *Furſer* the other Plaintiff, 13 l. 6 s. 8 And that he ſhould enjoy it for three years and a half, and ſhould pay half yearly for it to *Furſer* 15 l. at the Annuntiation, and Saint *Michael* or within 40 days after, and that if he failed of the payment, then the Award for the enjoying it ſhould be void, The Defendant pleaded payment of the 13 l. 6 s. 8 d. at the day, and of the Rent at the ſaid Tenement, and that none were there to receive it. It was holden by the Court that this was a Sum in groſſe, and payable at demand by the Defendant at his perill, 2. That this Tender is not ſufficiently pleaded, for that it is not pleaded at the Laſt Inſtant as it ought to be. 3. That this conditionall award was good enough, for it is abſolute if the other pay the Rent, otherwiſe it is his own default. Paſc. 14. Jac. in B. R. rott. 354. *Furſer* and *Bond*, and *Prowds* Caſe. Cro. 2. part. 423.

4. *Where a ſubmiſſion may be divided, and where a ſubmiſſion by ſeveral Obligations, ſhall be but one ſubmiſſion.*

1. THis Queſtion was moved to the Court, ariſing upon a Submiſſion, *viz.* The Submiſſion was of all Actions, Suits, &c. unto four perſon, and the Umperage of another. And an Aſſumpſit was mutually to perform the order of them five. The four perſons, and the fifth as Umpire, did make the Award, and the party ſubmitting did refuſe to perform this Order and Award: The Queſtion was whether this Award was made according to the ſubmiſſion; It was ſaid by *Williams* Juſtice, that it was well, and according to the Submiſſion But otherwiſe if it had been, if in the Submiſſion they had been divided, as if it had been, That if the Four could not agree in their Award, that then the Submiſſion be to the Umperage of a fifth man. For then thoſe five could not all of them joyn in the making of the Award. But here the Submiſſion being to four, and to the Umperage of a fifth, they all five might joyn in one Award. Paſc. 10. Jac. in B. R. *Eliot* and 1 part. 184.

2 Debt by A. upon a Bond of 1000 l. Conditioned for the performance of the Arbitrament of J. S. and J. D. of all Controverſies and demands betwixt A. and B. The Defendant pleaded, They made no Arbitrament. The Plaintiff ſhewed That H. the Father of the ſaid A. and B. was ſeiſed of divers Lands, and had iſſue, the ſaid A. B. and W. and that there were Controverſies betwixt the Plaintiff, A. and W. and B. concerning the ſaid Lands. For which the Plaintiff A. entred into Bond unto the ſaid B. and W. and B. entred into the ſaid bond of 1000 l: and W. at the ſame time entred into another Bond to perform the ſaid Arbitrament; and the Plaintiff ſhewed the Arbitrament, That A. the Plaintiff ſhould releaſe to B. and W. &c. and B. and W. ſhould pay to A. 300 l. at ſuch a time and place, and aſſigned the breach for not payment of the 300 l. The Defendant B. demurred; It was objected that the Arbitrament was void, for that the Defendants bond is for a Reference of all Controverſies betwixt A. and B; and W. is not mentioned in the Bond, and the Award is betwixt A. B. and W; and that W. and B. ſhould pay ſuch a ſum, and it appears that W. is a ſtranger to the Submiſſion, unleſſe by a Collateral ſurmiſe, which is not allowable, and this ſurmiſe is *quaſi* a departure from the Declaration. 2. The Arbitrament is void, becauſe the

submission was only for Land mentioned to be devised to W. and B. or to the use of them; and the Arbitrament is that he make a release of his right in the Lands Conveyed or devised, and there is no Authority to meddle with the Lands Conveyed; But it was resolved by the Court, that forasmuch as this is not a bare surmise, but grounded upon a Deed, which is as high as the other, and made at the same time, so it is but one submission by several Bonds, and the surmise is allowable, and stands with the Bond in Question; and when at the same time they enter into severall bonds, it is but one Submission, and is not any departure from the Declaration. And for the second poynt it was Resolved; that it shall not be intended, there were any Lands conveyed, unlesse it had been shewen. Judgment was entred for the Plaintiff. Hil. 10. Car. B. R. rott. 1045. *Hayes* and *Hayes*'s Case. Cro. 1. part. 313.

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5. *Where the power of the Arbitrators is revocable, and Countermandable; and where Notice is to be given to them of it; And what shall be a good Countermand, or a sufficient notice given of their Award by Arbitrators*, et è contra.

1. AN Action of Debt was brought upon an Obligation which was Conditioned for the standing to an Award, To which the Defendant pleaded, That the Arbitrator made no Award, The Plaintiff Replied, that after the making of the Obligation, &c. The Defendant by his Deed, &c. *revocavit et abrogavit authoritatem*, &c. which he had given by his writing to the Arbitrators, upon which the Defendant did demur in Law, In this Case these poynts were resolved. 1. That when a man is bounden to stand to the Award of J. S. he may afterwards countermand it; and a man by his Act, cannot give such an Authority, or power, or warrant which is not Countermandible, if it be revocable by Law: For my Act, or my words cannot alter the Judgment of Law. 2. It was resolved; That the Plaintiff needed not to add, That the Arbitrators had notice of the said Countermand, for that was implied in the words, *Revocavit omnem Authoritatem*; and it was taken for a Rule, That when two things are requisite to the performance of an Act, both things to be done by the same party as a Demise, Revocation, or Countermand, there notice is implied; but when the two things are to be performed by several persons, there it is otherwise. 3. It was resolved, That by this Countermand, the Obligation became single, and that the Obligee should take advantage of it, 1. Because the Defendant brake the words of the Obligation. 2. Because the Obligor by his own Act, had made the Condition of the Bond impossible; and therefore the Bond did remain single. Trinit. 7. Jac. rott. 2619. *Viners* and *Wilds* Case, Cook 8 part. 82.

2 A man was bounden in an obligation, upon Condition that if he did accompt before an Auditor of the Obligee, to be assigned when he should be required of certain Receipts of the Mannour of *Dale*, and should pay to him the Arrerages which should be found upon his accompt before the said Auditor, that then the obligation should be void. In Debt upon that Bond, the Defendant pleaded, That the Plaintiff did assign him such an Auditor before whom he accompted, and that he had been alwayes ready to pay the Arrerages, if the said Auditor had given him notice *Fu.* 1. H. 6. 5. It was holden by the whole Court, that the plea was insufficient, for inasmuch as he had bound himself thereunto; he was to take notice thereof at his perill: And there the Case was agreed by the whole Court. That if a man bindeth himself in an Obligation, to perform the Award of J. S. and J. S. maketh an Award, the Obligor ought to take notice thereof at his peril, for that he hath bound himself thereunto. Cook 8. part. 92. vouched in *Fraunces* Case.

Arrests *and* Imprisonments.

1. *Where an Arrest shall be good, lawfull, and justifiable; And by whom, and for what cause: where good by the parties themselves, and where by the Command of others: And how the party arrested, shall be used*; et è contra.

1. NOte: It was said by *Anderson*, Chief Justice, That if a man be sued in the Common-Pleas for a debt; and after he be arrested in another County for the same debt, the penalty is both Fine and Imprisonment; and that is both the Law and the Custome of this Court: And there where an Attorney of that Court brought an Action of Debt against

againſt another; whereupon he was arreſted in the Country; and when he came to *London*, the Attorney cauſed him to be arreſted in *London* for the ſame Debt: This matter being ſhewed to the Court, the Court committed the Attorney a priſoner to the Fleet: And *Windham*, Juſtice, ſaid to him, We will puniſh ſuch groſs fault in you more ſeverely, then in others, becauſe you are Attorney here; and your fault is the greater, by how much you are skilfull in the Law and the Cuſtomes of this Court. Mich. 28 & 29 Eliz. in C. B, *Goldeſbr.* 30.

2. *A.* in the Court of the Marſhalſey of the Kings houſhold, exhibited a Bill againſt *B.* in the ſaid Court of Marſhalſey upon an Aſſumpſit, for the payment of 80 l. *A.* found bayl, R. H. and R. P. and after upon Non-Aſſumpſit pleaded in that Court, It was found for the Plaintiff *A.* and Judgment given for him; he thereupon ſued forth a Warrant in the nature of a *Capias* againſt *B.* directed to the Marſhal of the Marſhalſey of the Houſhold, who returned *Non eſt inventus*: Afterwards he ſued a Precept in the nature of a *Capias*, to arreſt the body of *B.* or of R.H. and R. P. *ad ſatisfaciendum*, directed to the Marſhal of the Marſhalſey of the Houſhold; who by word commanded *C.* to execute that Writ within the Verge: By virtue of which Writ, *C.* did arreſt the body of R. H. and kept him in Execution in the priſon of the Marſhalſey in *Southwark*; neither the Plaintiff *A.* nor the ſaid *B.* at the time of the Bill exhibiting, were ſervants of the King or of his Houſhold: whereupon R. H. brought an Action of Aſſault, Battery, and Falſe Impriſonment againſt *C.* and *A.* And in this Caſe, two principal Points were Reſolved, 1. That an Action upon Aſſumpſit for paynent of Debts, being made within the Verge, was not within the Juriſdiction of the Court of the Marſhal of the Marſhalſey of the Kings Houſhold. 2. That the Action did lye againſt the Defendants for the Aſſault, Battery, and Falſe Impriſonment; and the difference was taken, When a Court hath Juriſdiction of the Cauſe, and proceedeth *inverſo ordine*, or erroniouſly, there the party who ſueth, or the Officer who executeth the proceſs of the Court, no Action lyeth againſt him: But when the Court hath not Juriſdiction of the Cauſe, there the whole proceedings is *Coram non Judice*; and then an Action will lye againſt the party or Officer who executeth the proceſs of ſuch Court: and ſo it was in this Caſe: And in that caſe, it was ſaid and agreed, That if the Court of Common-Pleas in a plea of Debt doth award a *Capias* againſt a Duke, Earl, &c. which by the Law doth not lye againſt them: and the ſame appeareth in the Writ it ſelf; Yet if the Sheriff arreſt them by force of the *Capias*, altho'gh the Writ be againſt Law, notwithſtanding in as much as the Court hath Juriſdiction of the Cauſe, the Sheriff is excuſed. See 38 H. 8. *Dyer* 60. And ſo if a Juſtice of Peace maketh a Warrant to arreſt one of Felony who is not Indicted, although that the Juſtice erre in the Warrant; yet he who maketh the Arreſt by force of the Warrant, ſhall not be puniſhed by Falſe Impriſonment, becauſe he is Judge of the Cauſe. *Cook* 10. Part. 69, 70, 71. the Caſe of the Marſhalſey.

3. *A.* Burgeſs of Parliament was taken upon an *Exigent* after a *Capias*: It was holden in that caſe, That notwithſtanding the Execution, that he ſhould have his Priviledge of Parliament for the freeing of his body of the Impriſonment; but the party ſhall not be prejudiced thereby, for that after the Parliament he ſhould be in Execution again: But it was further holden, That admitting that the priviledge would not lye in the Caſe; yet the Sheriff ſhould not be charged, becauſe he is ſworn to execute the proceſs of the Court; but it was ſaid, He is not bound to take notice of the Law. Paſch. 28 H. 8. *Dyer* 61. *Trewynarts* Caſe.

4. The Sergeants at Mace of the City of *London*, had a Warrant to arreſt the Counteſs of *Rutland* upon a *Capias ad ſatisfaciendum* at the Suit of *S.* who being fearful ſhe would be reſcued by her Servants, and ſo eſcape, if ſhe ſhould be charged with the Execution; The Sergeant did counſel *S.* to enter a feigned Action of 1000 l. before the Sheriffs of *London*, upon which they would arreſt the Counteſs, and by force thereof bring her to the Counter, and then take her body in Execution upon the *Capias ad ſatisfaciendum*. Afterwards the ſaid Serjeants in Cheap-ſide came to the Counteſſes Coach, and ſhewed her their Mace, and touched her body with it, ſaying, We arreſt you, Madam, at the Suit of *S.* which were all the words they uſed; and thereupon they compelled the Coachman to carry the Counteſſe to the Counter; and at the door thereof, the Sheriff came and carried the Counteſſe to his Houſe, where ſhe remained, untill ſhe had paid the debt: And in this Caſe, theſe Points were Reſolved: 1. That the perſon of one who is a Counteſs by marriage, or by diſcent, is not to be arreſted for debt, or Treſpaſs; for although ſhe cannot ſit in Parliament, yet ſhe is a Peer of the Realm, and ſhall be tryed by her Peers; and the Law preſumes ſhe hath ſufficient by which ſhe may be diſtrained. 2. That the perſon of a Baron who is a Lord of Parliament, ſhall not be arreſted in debt or Treſpaſs; for by reaſon of their dignity they ſhall be intended to have ſufficient to pay their debts. 3. It was Reſolved, That becauſe in the principal Caſe, a *Capias* was awarded againſt the Counteſs by the Court of Common-Pleas, That the Sheriff, or his Officer by his Warrant, might without offence execute the ſame;

same; for that they are not to dispute the Authority of the Court, but they ought to execute the Writs directed to them, and to that they are sworn: and in some cases (as in cases of Contempt) a *Capias* doth lye against an Earl, Baron, or Countess. 4. It was Resolved, That forasmuch as the Serjeants on the principal case, did arrest the Countess upon a feigned Action upon their own heads without any warrant, that the same was a false Imprisonment: And for that cause they were sentenced in the Star-Chamber: and it was holden by the Justices, That Arrests upon feigned Actions, were utterly condemned in Law. *Cook* 6. Part. 52, 53. the Countess of *Rutlands* Case.

5. Note: It is said in *Cook* 11. Part, in *Richard Godfreys* Case, That the Constable at the Petit Sessions, for any Affray made in disturbance of the Court, may Arrest and Imprison the party: But no Court may Fine and Imprison a man, or cause him to be arrested for such a Fine, unlesse it be a Court of Record. *Cook* 11. Part. 44

6. The Earl *Rivers* was arrested by a Bill of *Middlesex* in a plea of debt, and not being able to put in sufficient bayl, he was committed to the Custody of the Marshal of the Kings-Bench: By a *Habeas Corpus* he brings himself into Court, and there pleaded his Priviledge of Peerage, and prayed to be delivered: Upon which the Plaintiff demurred in Law. The Question insisted upon was, Whether by taking away the House of Lords in Parliament, the Priviledge of his Peerage, not to be arrested for debt, was also taken away? It was argued, It was not; and also that by the Common-Law no *Capias* did lye against a Peer of the Realm, in respect of the Dignity of his person, being *Consanguineus Regis*: and, 2. because Earls by Intendment have sufficient Free-hold to enforce them to come in and answer; and therefore they are not to be arrested. And such seemed to be the Opinion of the Court. But in regard the Defendant prayed, That the Writ brought against him might abate: It was said by the Court, That he should have prayed the same before he was returned over to the Marshal of the Court; and now he being in *Custodia*, the Declaration was good against him: and now it was too late for him to claym his Priviledge; and it was now too late to speak in Abatement of the Writ. Trin. 1650. B. R. *More* and the Earl *Rivers* Case. *Styles* 222, 223.

7. In an Action of False Imprisonment, the Case was this; King *Henry* the 8th by his Letters Patents erected a Colledge of Physitians in *London*, and by the same Letters Patents granted to them, That none should exercise the Art of Physick within the City of *London*, or 7 miles of it, unles they be allowed of by the President and others of the said Colledge, and by the same Letters Patents granted to them, That there should be 4. Censors, or Governours yearly chosen by them who should have the tryal and examination of all Physitians which practised Physick within the City, or 7 miles of it; and further, by the said Letters Patents granted to them, That they should have the punishment of those who practised Physick within the City *pro delictis suis in non bene exequendo, faciendo, et utendo facultate Medicinæ*, by Fines, Amercements, *et imprisonment, corporum eorum*; and the said Charters 14 H. 8. was confirmed by Parliament, and thereby further Enacted, That no person shall be suffered to practise Physick through *England*, untill he be examined at *London* by the President and 3. of the Censors, and have Letters Testimonial, except he be a Graduate of *Oxford* or *Cambridge*, who hath accomplished his terme without grace: And further, by another Act, Enacted, 1 Ma. the said Letters Patents were confirmed; and by the same Act it is Enacted, That whatsoever the President, or such of the Colledge as he shall authorize, shall send or commit any such Offender for any Offence or disobedience contrary to any Article of the said Grant to any Ward Goal or Prison, that then the Warden, Gaoler, or Keeper shall receive such person and keep them without bayl or mainprize. One *Bonham*, who was a Graduate, *scil.* a Doctor of Physick in the University of *Cambridge*, practised Physick in *London*, and was summoned by word to appear before the President and Censors, for practising of Physick in *London* contrary to the said Letters Patents and Acts of Parliament; and he did not appear: Whereupon it was Ordered by them, That for his disobedience he should be amerced 10 l. and that he should be arrested and sent to the Goal: Afterwards he came before them, and being asked, If he would satisfie the Colledge for his disobedience? He said, That he had practised Physick, and he would practise Physick in *London*, *nulla à Collegio petita venia*; and then told them, That neither the President nor the Censors had any authority over those who were Doctors of the Universities: For which the President and Censors by their Warrant under the Common Seal, sent him to prison in the Counter of *London*, there to remain without bayl or Mainprise. And thereupon he brought False Imprisonment. In this Case it was Resolved by the whole Court, 1. That the Censors had not power to commit the Plaintiff to prison for any of the Causes aforesaid: For the power of the Censors to Fine and Imprison, did not extend to the first Clause in the Letters Patents, which prohibited, That none should exercise Physick in *London* without Licence of the President and Colledge; but onely to punish those which practised Physick in

in London, *pro deliciis in non bene exequendo ſa-ciendo, et utendo facultate Medicinæ*; for, every one who practiſed Phyſick well, although he had not any Degree in the Univerſities, ſhould forfeit nothing, unleſſe he practiſed there by the ſpace of a moneth together. 2. That the Cenſors could not be Judges, Miniſters, and parties, *ſcil.* to give Judgment, and to make ſummons, and to have the forfeiture. 3. That they had not purſued their authority, becauſe by the Act, the Cenſors onely have power to impoſe a Fine or Amercement, and here the Preſident and Cenſors impoſe the Amercement; and the Fines impoſed by them, do belong to the King, and not to themſelves: and therefore the Impriſonment of the Plaintiff for not paying it to them *in proximis Comitiis*, is not lawful; alſo the Impriſonment was by parol onely, which was not lawful; and no Impriſonment can be but by thoſe who can make a Record of it, which they had not in this caſe. And laſtly, It was Reſolved, That the Arreſt of the Plaintiff, and his Impriſonment, was without cauſe. And therefore Judgment was given for the Plaintiff; and 300 l. damages given him. *Cook* 7. Part. Jac. in C. B. Dr. *Boaham's* Caſe. 94. to 121.

8. *A* Juſtice of Peace upon view of a Force, or retainer with force, may commit the perſon preſently, but then he ought to make a Record of it, otherwiſe the Commitment is not good; and if without, if the party be Arreſted and Impriſoned, an Action of Falſe Impriſonment lyeth againſt the party who arreſteth or impriſoneth him. *Cook. ibid.* 120.

9. Note: theſe points were Reſolved by the whole Court, 1. That if a man be arreſted in the Night at the ſuit of a Subject, the ſame is as lawfull as if it were at the Kings Suit: For the Officer or Miniſter of Juſtice ought to arreſt the party, when he can find him; for if he doth not then arreſt him, he is ſubject to an Action upon the Caſe. 2. That an Officer may arreſt a man upon the Sabbath; for that all Miniſteriall Acts may be executed upon that day, but not Judicial acts. 3. That the Sheriff or Officer upon the arreſting of a man, ought to tell him at whoſe Suit the Arreſt is, and out of what Court the proceſs is, that the party arreſted may either pay the money, or take order for his appearance; but that is to be meant when the party arreſted ſubmits to the Arreſt of the Officer; but not when the party arreſted reſiſteth the Officer in the Execution of his Office, and would make Eſcape: and it was there holden, That a known Bayliff or a Serjeant, ought not to ſhew their Warrant or Mace; and a ſpecial Bayliff is not bound to ſhew his Warrant, without it be demanded of him: and if notice be requiſite of it, it is then ſufficient when the Officer that makes the Arreſt, ſayes, I arreſt you in the Kings name *Cook.* 8. Part. 67, 68. *Mackalleys* Caſe.

10. A Juſtice of Peace made a Warrant under his Seal to a Conſtable, to bring the Wife of J.S. before any Juſtice of the ſame County, to find Sureties for her good behaviour. The Conſtable by force of the ſaid Warrant did arreſt the Wife; afterwards her husband and his wife, and J. S. offered them to go to *B.* another Juſtice of the ſaid County, to be bounden according to the purport of the ſaid Warrant, and the Conſtable did refuſe to go with them. Afterwards, the husband, wife, and one *C.* went to *B.* the Juſtice, and there entred a Recognizance to appear at the next Seſſions, (which was not according to the firſt Warrant) and the Conſtable afterwards brought the wife before the firſt Juſtice, before whom ſhe refuſed to find Sureties, for which he carried her to the Goal by force of the ſaid Warrant: It was Reſolved in this caſe, 1. When the Warrant is, *Coram aliquo Juſticiariorum*; that it is in the Election of the Conſtable to carry the party arreſted before what Juſtice he pleaſeth; for by preſumption of Law, he is more indifferent then the Delinquent her ſelf. 2. When the Conſtable in this caſe had brought the party before the Juſtice; and before him, ſhe refuſed to find Sureties; that the Officer without any new Warrant might carry the party to priſon; becauſe the words of his Warrant were, *Et ſi hoc facere recuſaverit*, that then he carry her to the next Goal: and it was ſaid by *Wray*, Chief Juſtice, in this caſe, That a Juſtice of Peace might make his Warrant to bring the party before himſelf; and ſuch Warrant is good, Hill. 32 Eliz. in B. R. *Cook* 5. Part. 60, 61. *Foſters* Caſe.

11. In a Falſe Impriſonment the caſe was; The Plaintiff being a Priſoner in the Counter of *Woodſtreet, London*, made an Eſcape: The Defendant being Sheriff made purſuit after him; and in his purſuit he met with the Plaintiff *in noſturno tempore circa horam nonam*; who *indecenter ſe geſſit, opprobioſa verba dedit, et detruſit ad murum*; *ſuper quo* the Sheriff *videns eum vagantem et tantopere ſeſe malè gerentem, propter malam geſturam cepit et impriſonavit*: This was holden to be a good Arreſt and Juſtification of the Impriſonment, both for the matter and the manner of it: For the Sheriff hath *Cuſtodiam Comitatus*, and is *Conſervator pacis*, and here was a breach of the Peace, which was a ſufficient cauſe of his Commitment; alſo here is violence offered to the Sheriff, *ſcil. quod detruſit ad murum*: and if a Conſtable may commit one for a breach of the Peace upon himſelf, *à fortiori* the Sheriff may do it: and in ſome caſes the Sheriff may arreſt a man, notwithſtanding he doth not break the peace in his preſence; as upon

on the Statute of *Northampton*, If he ſee one to carry weapons in the High-way *in terrorem populi*, he ought to arreſt him; although he doth not break the peace in his preſence. It was alſo holden by the Court, That Magiſtrates are not to be abuſed; no not with opprobrious words in the execution of their Office. And ſo it was adjudged in the Mayor of *Barnſtable*'s Caſe, who did commit one to priſon, and juſtified the ſame in an Action of falſe Impriſonment brought againſt him, for that he did miſbehave himſelf toward him by ill words: and it appears in the principal caſe, that what was done by the Plaintiff, was willingly to hinder the Sheriff in the purſuit of his eſcaped priſoner: Wherefore it was adjudged againſt the Plaintiff, *Quod nil Capiat Billam*. Mich. 13 Jac. in B. R. *Clare* and *Piot* Sheriff of *London*s Caſe. *Bolſtr.* 2. Part, 328, 329, 330.

Aſſetts.

1. What ſhall be ſaid to be Aſſets in the hands of Executors, what not; And where the Executors ſhall be Charged, if they have Aſſets without expreſſe mention of them.

1. Debt was brought againſt Executors, the Iſſue was, whether there were Aſſetts in the hands of the Executors the day of the Writ brought; It was given in Evidence for the Plaintiff in the Action, That the ſame day the ſum of a 100 l. was paid unto the Executors in the Prerogative Court, and preſently by the order of the ſaid Court, the Executors paid the ſaid 100 l. to another Creditor of the Teſtator; But the opinion of the Court was, in regard the money was once in the Executors hands; that payment of it over, by the order of the Court of Prerogative, was not to the purpoſe; and therefore the ſame was adjudged to be Aſſets in their hands: But yet it was holden, that upon ſpeciall pleading of ſuch matter, peradventure it might not be Aſſets in their hands; to pay another Debt. 4, and 5. Ma. Dyer. 208.

2. A man did deviſe his Lands which were holden in ſocage to be ſold by his Executors, and that the Money thereof coming, ſhould be diſpoſed of in payment of ſpecial Legacies which he appointed by his ſaid will, the Executors ſold the Lands. One of the Legatees after the Will was proved, ſued the Executors in the ſpirituall Court for his Legacy; whereupon a Prohibition was prayed: It was reſolved in that Caſe. 1. That the Money was Aſſetts in the Executors hands: and 2d That there was no remedy for it but by Suit in the Spiritual Court and therefore a Prohibition did not lye in the Caſe. Trin. 9. *Ely. Dyer.* 264. But Quære of the 2d payment, For it was holden by all the Juſtices of both Benches. M. 4. and 5. *Ma. Dyer.* 152. Where a man deviſed, That his Executors ſhould ſell Lands, and of the Mony coming, ſhould give ſuch a portion to his daughter; that this was not a Legacy becauſe going out of Land, and ſuit did not lye for it in the ſpirituall Court, but an account lies at Law for the Mony, and therefore in that Caſe a Prohibition was granted to ſtay the Suit in the Spirituall Court. *Dyer.* 151, 152.

3. A Reverſion upon a Term was granted to the uſe of the grantor for life, and after his deceaſe to the uſe of his Executors and Aſſigns for 21 years, the Remaynder over intail. The grantor was attainted of Treaſon, and died inteſtate, and without Aſſignment: In this Caſe it was holden that it was an intereſt in the grantor, and that the Queen ſhould have the Term as forfeited; But it was holden, That if the Executors ſhould take any thing by it, they ſhould not have it as purchaſors to their own uſes; but ſhould have it as Aſſetts. Paſc. 14. Eliz. *Dyer.* 310. And note in that Caſe. this difference was put upon the books of 2 H. 4. and 3 H. 6. If a man enfeoffeth one, or divers upon condition, that they ſhall ſell the Land, and ſhall diſpoſe of the mony for the good of his Soul, and he makes them his Executors, and they ſell the Land accordingly, &c. that the ſame ſhall not be Aſſetts, but if it be of Land deviſeable, or in uſe, and be ſo deviſed to his Executors, for his Soul, the ſame ſhall be Aſſetts.

4. In Debt brought againſt Executors; they were at Iſſue if Aſſetts were in their hands or not; And the Jury found by a ſpeciall Verdict, That the Teſtator was ſeiſed of a houſe in Fee, and made a Leaſe thereof, and of certain implements of houſhold in it for years; rendring Rent to him his Heirs, and Aſſigns, and found that the Executors after the death of the Teſtator, continually received the Rent, and prayed adviſe of the Court, if the ſame were Aſſetts in the Executors hands, and the opinion of the Court was, that it was not Aſſetts, for that the whole Rent was to go with the Land in Reverſion, as *magis dignè*: and ſo did belong to the Heir. Hil. 20. Eliz. Dyer. 361. ſee Plo. Com. 114. and 259. acc.

5 Debt was brought by J. S. againſt J. D. who was the Executor of W. who was the Executor of L. upon an Obligation of L. the firſt Teſtator. The Defendant

Defendant J. D. pleaded that L. the firſt Teſtator was endebted to W. 100 l. upon a Statute Staple; and that after his death, goods of the value of 100 l. came to the hands of W. as Executor of L. which goods he adminiſtred, and paid himſelf by way of Receiver, and *ultra dict. bona* of 100 l. which he adminiſtred of the goods of L. he had nothing in his hands: the Plaintiff averred Aſſetts, in the hands of W. in *London*, *ultra* the 100 l. *tempore mortis* L. *adminiſtrand.* It was found for the Plaintiff. In that Caſe the Plaintiff had judgment of the goods of L. in the Defendants hands, not adminiſtred by W. and damages of the proper goods of the Defendant, upon a *Demonſtravit* returned, becauſe the Jury found Aſſetts in the hands of W. at the time of the death of L. which were not adminiſtred. *Tr.* 2 Eliz. *Dyer.* 185. *Woodward* and Sir *John Chichester's* Caſe. See *Plo.* Com. 184. That an Executor did retain goods in ſatisfaction of a debt due to him, and the Reteyner was holden good. See 4 Eliz. *Dyer.* 210. Debt againſt two Executors, one appeared and confeſſed the Action, the other made default, and Judgment was given to recover *de bonis Teſtatoris*, in both their hands, whereupon a *Scire facias* iſſued. The Sheriff returned *Nihil*; but he who made default had waſted the goods, upon which a *Scire feci* iſſued againſt him who had waſted the goods, and upon *Scire feci* returned, execution was Awarded, of his own proper goods only, without his Companion.

6 Debt was brought againſt Executors of R. who pleaded, That they had fully adminiſtred; the Plaintiff gave evidence that they had goods in their hands, the Defendant ſhewed, that the goods were pledged by their Teſtator, and that they had redeemed them with their own money to the full value, and that for the reſt of the goods, that they had paid to the Teſtator as much for them as they were worth: It was holden, That the ſame did well maintain their Iſſue of Fully adminiſtred; for that an Executor ſhall be recompenced that which he hath paid by way of Reteiner. 6 H. 8. *Dyer.* 2. 20 H. 7. *Kelloway* 58. But ſee *Cook* 5. part 30. *Coulters* Caſe. An Executor of his own wrong cannot retain goods; but they ſhall be Aſſetts in his hands.

7 Two men were poſſeſſed of goods as Executors, the one of them took the goods into his hands and did lay out and diſpoſe of divers ſums of mony, *in piis uſibus et operibus charitatis*, as for payment of the Taxes of a poor Town, and for reparation of the Church *in Eleemoſynas proſolute animæ Teſtatoris*: which ſums did amount to more then the goods of the Teſtator were worth; and he did retain the Teſtators goods as his own proper goods, and did convert them to his own uſe, and made his Will, and Executors, and died poſſeſſed of the ſaid goods. The ſurviving Executor brought Detinue of the ſaid goods againſt the Executor, *ad valentiam* of a 100 l. upon which the Defendant pleaded the matter *Supra*; It was adjudged, that the Reteyner was lawfull; and that thoſe goods now in the hands of the Executors, were not Aſſetts, or goods of the firſt Teſtator in the Executors hands. *M.* 2, Eliz. *Dyer.* 187.

8 Debt againſt Executors upon a Bond of 200 l. The Defendant pleaded that he had nothing in his hands, The Jury found that he had Aſſetts to the value of 172 l. It was reſolved that the Plaintiff ſhould recover the whole Debt of 200 l. and coſts and damages of the goods of the Teſtator, if, &c. and if not of his own goods; for, upon the Plea in Bar, the Plaintiff may pray his Judgment preſently. So if debt be brought againſt an Heir, upon Nothing by diſcent pleaded: the Plaintiff ſhall have Judgment preſently, and a *Scire facies* upon it, when Aſſetts deſcends. *M.* 4. Jac. in *B. R. Mary Shipleys* Caſe. Co. 8. part. 134.

9 Debt againſt an Adminiſtrator, the Defendant pleaded, That J. S. recovered againſt *him* in the Court of *Cheſter*, a debt of 100 l. and other Judgments in other Courts, all which amount to 500 l. and that he had not goods of the Inteſtate, *præterquam bona et catalla quæ non attingunt, ad valentiam predict.* 500 l. *verſus ipſum inform. predict. recuperat.* The Plaintiff replyed, That J. S. accepted of 60 l. in ſatisfaction of the ſaid Judgment, and would have acknowledged ſatisfaction upon Record in the ſaid Court, but the Defendant by fraud would not ſuffer the ſame, to the intent to deceive the Plaintiff of his juſt Debt. It was reſolved in this Caſe, That when an Adminiſtrator compounds with one who hat'ra Judgment of 100 l. for 60 l. who offereth to acknowledg ſatisfaction, and the other defers it to the intent to ſuffer it to ſtand in force to deceive a Creditor, yet the ſame ſhall not hurt the Creditor, but he ſhall recover; and the mony remaining in the Adminiſtrators hands, ſhall be Aſſetts, notwithſtanding ſuch compoſition. *P.* 8. Jac. in C. B. *Turners* Caſe. *C.* 8. part. 132.

10. Notwithſtanding, it was holden by the whole Court, in *C.* B. That if I deviſe Lands to my Executors for three years for the payment of my debts, and I make Executors, and dye, that this is Aſſetts in the Executors hands. But if I deviſe my Land to be ſold for the payment of my debts, this is no Aſſetts before the Lands be ſold. P. 9. Jac. in C. B. *Browlow.* 1 part. 34. and See Hill. 10. Jac. in C. B. *Browlow.* 2. part. 47. acc.

11 A *Scire facias* was brought againſt W. Adminiſtrator of W. to revive a Judgment againſt the Inteſtate,

Inteſtate. The Defendant pleaded, Fully adminiſtred; The Jury found; That the Inteſtate conveyed a Leaſe to one F. in truſt; and F. promiſed upon the payment of 300 l. to reaſſure the Intereſt to him; Afterwards the Adminiſtrator of W. by vertue of an Order out of the Chancery, received for the Intereſt of the ſaid Leaſe of F. (more then the 300 l.) the ſum of 1060 l. and the Queſtion was whether this ſhould be Aſſetts in the Adminiſtrators hands, and it was holden by the Court to be Aſſetts; And it was holden, that if an Executor doth make gain of the Teſtators money, the ſame ſhall be Aſſetts in his hands. Hill. 11. Jac. in *Co.* B. 10ut. 1963. *Harcock* and *Wrenhams* Caſe. *Brownlow.* 1. part. 76, 77.

12 In Debt againſt Executors upon Fully adminiſtred, pleaded. It was found by Verdict, That A. made the Defendants his Executors, who being within age, Adminiſtration was committed to another untill they came of full age, and that after they came of full age, the Jury found, That in the hands of the Adminiſtrator, *fuerunt bona et catalla Teſtatoris*, to the value of 4000 l. To which Adminiſtrator, the Defendants, the Executors, at their full age, did releaſe all demands: And the queſtion was, whether that Releaſe were Aſſetts in the hands of the Executors; It was objected that the releaſe of a thing incertain, and in Action cannot be ſaid to be Aſſetts; But the opinion of the whole Court was, That this releaſe is Aſſetts, for by the Releaſe, they have given away that which might have been Aſſetts: And it is not requiſite that every Aſſetts be a thing in poſſeſſion, or in the hands of the Teſtator, for a thing may be Aſſetts which was never in the Teſtators hands, if thoſe things come in lieu of the things which were in the Teſtators hands, as money for Land or other goods ſold. And it was ſaid by the Court, That things in Action, or poſſeſſion, certain, or uncertain; if they be releaſed, they are Aſſetts. And the incertainty muſt be ſuch that the ſame cannot be proved to the Court, or Jury, that the thing releaſed might not by poſſibility be Aſſetts: For if Treſpaſſe be done to the Teſtator in his life time, for taking his goods, and he dyeth, and his Executors releaſe all Actions, the ſame is Aſſetts, becauſe it might be proved to the Jury. That had they not releaſed, but had brought their Action of Treſpaſſe *de bonis aſportatis in vita teſtatoris*; that they might have recovered damages, which would have ſatisfied debts or Legacies, and therefore ſhall be Aſſetts, In the principall Caſe, It was adjudged that the Releaſe of the Executors was Aſſetts. M. 27. Eliz. in *C. B. Kitleyes* Caſe. *Godbold.* 29, and 30. See Trin. 13. Jac. in *C. B. Foſter* and *Jackſons* Caſe. *Hob.* 59, and 60. acc. See *Mich.* 15. Eliz. *Owen.* 36. adjudged, acc.

13 In a Prohibition, the Caſe was, A. deviſed that J. S. the Teſtator, and three others, ſhould ſell certain Lands, and ſhould diſpoſe the Money to the Defendant and three others equally; The Land was ſold; the Defendant ſued the Executor of J. S. in the Spirituall Court for the fourth part of the money. It was holden in this Caſe by the Court, That neither the Land nor money was Teſtamentary, for it was not Aſſetts to debts, but a ſum ariſing of Land, and appointed to ſpeciall uſes in way of equity, and not as a Legacy, and therefore not to be ſued for in the Spiritual Court, but in Court of equity. Trin. 17 Jac. in *B. R.* 10ut. 891, *Edwards* and *Graves's* Caſe. *Hob.* 265. See *M.* 29. and 30. El z. in *C. B. Germys* Caſe. *Leon.* 87. acc.

14 Debt againſt J. S. as Executor of A. the Defendant pleaded, That he was not Executor; The Caſe was. That the ſaid A. gave 40 l. to his daughter within age, with power of Revocation upon the payment of 20 s. and it was found that this was done to defraud Creditors, and that then he died poſſeſſed of goods, and the Defendant ſold the goods, and afterwards took out Letters of Adminiſtration: In this Caſe, two poynts were reſolved. 1. That the Statute of 27 Eliz. made the Teſtators gift void, and the gift being taken away, the property was alſo taken away from the Donee, and ſetled to the Donor, as to any Creditor, and when he dyed, the ſame was Aſſetts in the hands of the Adminiſtrator; and an Adminiſtrator may take the goods which are given by the inteſtate to defraud Creditors, for that the gift is void, and therefore they ſhall be accounted Aſſets. 2. It was reſolved, That the Action was well brought, for when a man doth adminiſter as Executor, and then takes Letters of Adminiſtration; It is at the election of the party to ſue him as Executor or Adminiſtrator. Judgment was given for the Plaintiff. *Mich.* 43 Eliz. in *C. B. Bethel* and Sir *Edward Stanhops* Caſe. *Owen* 132.

15 An Action of Covenant was brought againſt an Executrix of the Aſſignee of Leſſee for years, for not payment of Rent, upon the words *yielding, and paying*: It was holden in this Caſe; That the words [yielding and paying] did imply an expreſſe Covenant, and it is not onely a Covenant in Law. And it was holden, That by her entry ſhe ſhall be accounted a true Executrix: and if one enter as Executrix upon a Term; he ſhall have the Term, if the other will admit him to be a Tenant, and he ſhall not be accounted a Diſſeiſſor to the Leſſor, and to ſtrangers he ſhall be accounted an Executor in Law, if they bring Actions againſt him, and the Term ſhall be Aſſetts in his hands: And in the principall Caſe, It was holden. That the Executrix was chargeable with the Rent; becauſe the

the Term is not in this caſe determined, but the Term doth continue: And it was holden in this Caſe. That if one receive my Rents without my Conſent, I may charge him as my Receivor, or make him a Diſſe ſor at my election. H.ll. 1654. in B. R. rott. 723. *Porter* and *Sweetmans* Caſe. *Styles.* 406, 407.

16 The Caſe was. The Obligor made his Executors and dyed: The Executors became bounden to the Obligee for the payment of the ſaid Debt, and the Obligee thereupon delivered back the Obligation of the Teſtator to them: afterwards a Creditor of the Teſtator ſhewed the Executors; who pleaded, that they had fully adminiſtred; upon which they were at iſſue; and the ſpeciall matter aforeſaid was found. It was objected, that in this Caſe, The Executors had not made any payment or ſatisfaction of the debt, but only had made a Bond to pay a ſum at a day to come, before which day, it might happen that the Obligation might be cancelled, or releaſed; and if ſuch plea, ſhould be good; then the Executors in ſuch caſe may make an Obligation to pay the Debt 40 years after, and ſo defraud other Creditors, which were unreaſonable. But all the Juſtices were clear of opinion, That, if in ſuch caſe, The Executors make a ſufficient Obligation to the Creditors of the Teſtator, and ſufficiently diſcharge the Teſtator, without fraud or Covin, that they may retain the goods for ſo much, and the goods reteyned ſhall not be Aſſetts in their hands; and although they have appointed *alteriorem diem* for the payment of the money, yet that is not materiall. And it was ſaid by *Anderſon* Chief Juſtice. That if he to whom the Teſtator was endebted in 20 l. be endebted to the Executors in ſo much; and the Executors in ſatisfaction of the debt of the Teſtator releaſeth his debt, the property ſhall be altered preſently of the whole goods in the hands of the Executor; ſo where the debtor makes the Creditor his Executor. Judgment was given for the Executors. Paſc. 30. Eliz. in C. B. *Stampe* and *Hutchins* Caſe. *Leon.* 111. 112.

17 Debt againſt an Executor, for Rent reſerved upon a Leaſe for years made to the Teſtator; the Defendant pleaded, Fully Adminiſtred; and upon the Evidence it appeared, That A. made the Defendant his Executor, who medled with the poſſeſſion of divers goods of the Teſtator, and ſo adminiſtred, and afterwards refuſed in Court. Adminiſtration was afterwards committed to B. and the Inventory of the Teſtators goods came to 1000 l. It was given in evidence for the Defendant, That he himſelf had payed certain debts; and that divers perſons had recovered againſt the Adminiſtrator, divers ſums of money amounting to 1000 l. *et alia*, &c. It was moved, If that Evidence did maintain the Iſſue for the Defendant, becauſe he had pleaded *Plenè adminiſtravit*; It was ſaid by *Periam* Juſtice, That if an Adminiſtrator (who is in truth but a ſtranger) pay any debts with the goods of the Teſtator without commandment of the Executor, the ſame is not an Adminiſtration, and the Executor cannot give ſuch matter in evidence to prove his plea of, Fully Adminiſtrated. And here in this caſe, the defendant is the very Executor, and he hath adminiſtred, in which caſe he cannot afterwards refuſe; and ſo the Adminiſtration is not well committed, and the Adminiſtrator was a ſtranger; and what he did, was without warrant, and therefore it is no Adminiſtration to prove the Iſſue: But it was agreed by him, That in this caſe an Action might be brought either againſt the Executor of his own wrongs, or againſt the adminiſtrator, but not againſt them both Joyntly; And it was holden by him, That if the Teſtator Mortgages a Leaſe for years, and dyes, the Executors may redeem it with their own money: and the Leaſe ſhall be Aſſetts in their hands, for ſo much as the ſame is worth above the ſum which they paid for the redemption of it. Trin. 32. Eliz. in C. B. *Hopkins* and *Lewſes* Caſe. *Lion.* 155.

18 Debt was brought by an Adminiſtratrix againſt an Executrix for the Arrerages of an Annuity, The Defendant pleaded, Fully adminiſtred; The Plaintiff replyed Aſſetts in her hands not Adminiſtred; upon which Iſſue being joyned, a ſpecial Verdict was found, That Sir *Thomas Greſham* Knight, was ſeized of divers Mannors and other Lands in Fee, and deviſed them by his Will to his Wife the Defendant to uſe at her own pleaſure. And by his ſaid will requeſteth his Wife to pay his debts and Legacies. And it was found, That at the Parliament holden 22 Eliz. A private Act was made, by which it was enacted; That the Lady *Greſham* the Defendant ſhould take upon her the charge of all her husbands debts, and for the diſcharge thereof, ſhe ſhall ſell ſo much Land as will yield ſo much mony as will ſerve for the payment of the ſaid debts, and if ſhe ſhall fail therein, That then certain Commiſſioners ſhall be appointed for the ſale of ſo much Land, &c. and for all ſuch debts as the ſaid Lady ſhould not acknowledg to be good and true debts, that then the Creditors to whom they were due, ſhould repair to the Commiſſioners, and they ſhould determine both of the certainty of the due debts, and of the damages for the forbearance thereof; and that afterwards the ſaid Creditors ſhould have their remedy againſt the Lady for ſuch ſums ſo agreed upon by the ſaid Commiſſioners; and it was found, that the Lady *Greſham* had ſold certain parcells of Lands of the poſſeſſions of her Husband, by which ſale ſhe had received 10000 l. which is yet adminiſtred for the

greateſt part; and if the ſaid 20000 l. be Aſſetts then they find for the Plaintiff; if not, for the Defendant. It was ſaid on the Defendants part. That it cannot be Aſſetts by the Statute: and the Plaintiff upon this general Iſſue, ſhall not take advantage of the ſpeciall Aſſetts, enacted by Parliament; and the Plaintiff hath not here followed the direction of the ſaid Statute; for they are not agreed of the debt, nor of the damages; and the money ariſing by the ſale of the Lands, ſhall not be Aſſetts, but of ſuch lands as have been appointed by the order of the Commiſſioners to be ſold; and in this Caſe, the Lands are not deviſed to be ſold, but there is onely a requeſt to his Wife, that ſhe would pay his Debts, without any Condition, or expreſſe direction or limitation. *Anderſon* and *Walmeſley*, conceived, That the ſame is Aſſetts within the Iſſue, and that the Defendant is chargeable as Executrix, otherwiſe there is no remedy. And the Act confirms her to be Executrix, and ordains, that ſhe ſhall take upon her the charge of payment of the debts: and that the goods and monies which come by the ſale of the Lands, ſhall be Aſſetts. *Periam* doubted it, and *Windham* Juſtice held, That the Aſſetts found by the Verdict, are not Aſſetts intended by the Will; and that the Plaintiff hath not purſued the Statute which makes ſuch matter Aſſetts. Quære. It was not adjudged. M. 31, and 32. Eliz. in *C. B. Alexand* v and the Lady *Gr ſhams* Caſe. *Leon.* 224, 225, 226.

19 In Debt brought againſt the Heir, the Defendant pleaded *Riens per diſcent*; The Jury found that the Anceſtor, whoſe Heir he is, and for whoſe debt he is ſued, was ſeized of Lands in Fee, and by his Will deviſed them to the Defendant being his ſon and heir, and to his Heirs upon Condition, That he ſhould pay his Debts within a year, and if he failed, That his Executors ſhould have all and pay his debts. And that he entred and did not pay the debts, and that the Executors entred, and payed the debts, and ſold the Lands, &c. It was adjudged in *C. B.* That it was Aſſetts in the Heirs hands: upon Error brought in *B. R.* the ſame was Aſſigned for Error. And the Court held the Judgment to be erronious: For although he hath a Fee, yet he hath it as a purchaſor, being tied with ſuch a condition. The Judgment was reve ſed. *Mich.* 5. Car. in 2. *R. Gilpins* Caſe. *Cro.* 1. part. 115.

20 Note, A Caſe was cited by *Henden* Serjeant, to have been adjudged 4 Jac. which was this. A Copyholder made a Leaſe for years by Licence, and the L ſſee dyed, That this Leaſe ſhould not be accounted Aſſetts in the hands of the Executors, nor ſhould it be extended: But that Caſe was denyed by the Court; He alſo ſaid, That if a Co yholder makes a Leaſe for years by Licence of the Lord, and dyes without Heir, the years expiring, the Lord might enter, for that the eſtate, out of which the Leaſe is derived, is determined; *Yelverton* Juſtice, held, That the Licence ſhould be taken as a confirmation of the Lord, and that the Leaſe ſhould be good againſt him; But it was there agreed by all; That if a Copyholder maketh a Leaſe for a year, this is a Leaſe by the Common Law, and not Cuſtomary, and ſhall be Aſſetts in the hands of the Executors of the Leſſee. *Mich.* 2 Car. in *B. R. Popham*, 188.

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2. *Where the Lands of the heir, and what Lands, and how the ſame ſhall be charged for the Debt of the Father, or Anceſtor; and what not, in regard of Aſſetts diſcended.*

1. IN Debt brought againſt the Heir upon an Obligation of his Father; The Defendant was condemned by *Nihil dicit*. And the Opinion of the Court was, That the Plaintiff ſhould have no Execution, but by a ſpecial *Elegit* of the Lands which diſcended to him from his Father in Fee-ſimple; of which Lands he was ſeiſed at the time of the Writ brought againſt him. Hill. 6 E. 6. *Dyer.* 81.

2. Debt was brought againſt the Heir upon an Obligation of his Father; who appeared, and pleaded, That he had not any Lands by diſcent from his Father in Fee-ſimple, but the Rectory of S. and 16 Acres of Lands; and demanded Judgment, if he ſhould be further charged then with thoſe Lands onely: and Judgment was given according. But it was there holden, That if the Heir doth not confeſſe the Action, and ſhew the certainty of the Aſſetts diſcended to him; but pleads, That he hath nothing by diſcent, or is condemned by *Nihil dicit*, or by Confeſſion, or by Demurrer, or by any other occaſion, without confeſſing of the Aſſetts in certain; the Plaintiff ſhall have Judgment and Execution of his other Lands, or a *Capias ad ſatisfaciendum* to take his body, as he ſhould have againſt him for the debt of the Heir himſelf. Paſch. 15 Eliz. *Plow. Davies* and *Pipps* Caſe, 449. See Hill. 41 Eliz. in B. R. rott. 447. *Barker* and *Browns* Caſe, If the Recovery be by *Nihil dicit*, his own Lands ſhall be charged with the Execution.

3. In Debt brought againſt the Heir upon an Obligation of his Father, hanging the Writ, he aliened

aſſened the Aſſetts, and pleaded, Nothing by diſcent, the day of the Writ brought; a general Judgment was given againſt him; and an *Elegit* ſued forth of the moyety of all the Lands of the Heir, as if it had been his proper debt. Trin. 3 & 4 Ma. *Dyer* 149. See *Peppis* Caſe, Sect. before. *Plowden.* 440.

4. In Debt brought againſt the Heir upon an Obligation of his Father; he pleaded, That he had nothing by diſcent in Fee-ſimple: It was found by Special Verdict, That the Father deviſed all his Knight ſervice Lands to his Wife, untill the Defendant his Heir was of the age of 24 years, and that then the whole Land ſhould be to him and his heirs, and his Wife to have the third part during her life; and if he dyed before he attained to the age of 24 years, that then it ſhould remain to the wife for life; and after her deceaſe, to the Heirs of the Deviſor: the Wife dyed after the Heir attained to the age of 24 years. It was holden by all the Court, That in this caſe there was no Eſtate taile; but that the whole Land did diſcend to the Heir in Fee-ſimple; and that the ſame were Aſſetts diſcended, and he liable to the payment of the debt upon the Obligation of his Father; Mich. 3 Ma. *Dyer.* 124.

5. In Debt brought againſt the Heir of *Muſgrave*, upon an Obligation of his Father; The Defendant pleaded, Nothing by diſcent in Fee-ſimple from his Father: and by Special Verdict it was found, That the Grandfather of the Defendant was ſeiſed of divers Lands in Fee, and before the Statute of 27 H. 8. of Uſes, made a Feoffment thereof, to the uſe of the heirs of his body lawfully begotten: and that he dyed before the Statute; and that the Lands diſcended to the Defendants, who bound him and his Heirs in the ſaid Bond: The Jury pray the Opinion of the Court, if it were an Eſtate taile, or a Fee-ſimple: and if it were a Fee, then they find for the Plaintiff, and that the Land is Aſſetts, and ſhould bind the ſon as heir to his Father: The Court delivered no Opinion, 1 & 2 Ma. *Dyer.* 111. But ſee *Cook. 6.* Part. 42. in Sir *Anthony Mildmay*'s Caſe: The Caſe of *Tirling* and *Trafford*, Mich. 12 Eliz. in B. R. where it was adjudged, That the Reverſion or Remainder expectant upon an Eſtate in taile, is no Aſſetts to the Heir in debt upon an Obligation made by his Father.

6. In Debt brought upon an Obligation of the Father, againſt the daughters and heirs of *Henningham*. The Plaintiff recovered upon *Nihil dicit*; and Judgment general was given; and upon a *Scire facias* brought to have Execution of the Judgment: The Defendants pleaded, No moyety diſcent in Fee-ſimple the day of the Writ brought, or after. The Opinion of the Court was, That after a Recovery by *Nihil dicit*, or *Non ſum informatus*, or Confeſſion, the Heirs come too late to plead, Nothing by diſcent; but they ought to have pleaded that firſt; and to ſhew the certainty of the ſame. And the Opinion of *Dyer* in that caſe was, That if the profits received after the death of the Anceſtor, till the Writ brought, are ſufficient to ſatisfie the debt, the Plaintiff ſhall have a general Judgment againſt the Heirs of their own Lands. 18 Eliz. *Dyer.* 344. *Henaingham*'s Caſe. See Sect. 2.

7. The Caſe was this; *A.* Recovered againſt *B.* in an Action of Debt; *A.* made his Wife his Executor, and dyed; the Wife made *C.* her Executor, and dyed: *B.* dyed; *C.* brought a *Scire facias* againſt the Heir of *B.* as Heir apparant to the Land to him diſcended from *B*; who pleaded, Nothing by diſcent from *B*: and it was found, that he had two Acres and an half of Land by diſcent. It was prayed, That Judgment might be given againſt the Heir of *B.* generally; for that his falſe Plea ſhall charge him and his own Lands: and to that purpoſe, *Peppes* Caſe, *Plow. Com.* 440. and *Henninghams* Caſe, *Dyer*, were vouched. But it was the Opinion of all the Juſtices, That Execution ſhould be awarded againſt the Heir, in other manner than it ſhould be againſt his Anceſtor or other purchaſor: *ſcil.* of a moyety of that which he had by diſcent; for aſmuch as in this caſe he cannot be charged as Heir, but he ought to be charged as Terr-Tenant, and as a purchaſor; and a purchaſor ſhall never hurt himſelf by his falſe plea: and in this caſe, the Opinions in *Peppes* Caſe, and in *Henninghams* Caſe, *Com.* 440, and 18 Eliz. *Dyer*, in *Henninghams* Caſe; That upon a *Nihil dicit*, or *Non ſum informatus*, that a general Judgment ſhall be given; were denyed to be Law. And in this caſe it was holden, That the Heir ſhall be charged upon a Recognizance; not as heir, but as Terr-Tenant; for he is not bound in the Recogniſance, but only the Coviſor grants, That the Debt ſhall be levied of all his Lands and Tenements, but not againſt his Heirs. And it was Reſolved, That in the principal caſe the Judgment ſhould be ſpeciall; and no Execution ſhould be but upon the Aſſetts diſcended: and Judgment was given, That the Plaintiff ſhould have Execution of the moyety of the Lands diſcended to the Defendant onely. So Note the difference of Debt againſt the Heir, and *Scire facias* againſt the Heir. And in this caſe it was alſo holden, If Aſſetts do diſcend to the Heir; yet if the Heir doth alien the Aſſetts before the Writ be brought, that the Heir and his Lands ſhall not be charged with the debt. Hill. 1 Car. in B. R. *Bowyer* and *Rivetts* Caſe. *Popham* 153, 154.

8. A man ſeiſed of Lands in Fee hath Iſſue two ſons, and binds him and his Heirs in an Obligation, and dyeth ſeiſed of the Lands, and the eldeſt ſon entreth, and dyeth without Iſſue; and the youngeſt ſon entreth: It was the Opinion of the whole Court, That he ſhould be charged by this Aſſetts as Son and Heir to his Father, although that there was a mean diſcent to the elder ſon; and ſo the Law is, If there be Grandfather, Father, and Son: and ſo it is of a Grandfather and two Daughters, which have two ſons, and do not make partition; for that they ſhall joyn in one Aſſiſe, notwithſtanding the ſeveral diſcents, for that they are but one Heir to the Grandfather. Paſch. 22 Eliz. *Dyer* 368.

9. In a Writ of Dower brought, the Tenant vouched the heirs, who entred as he who had nothing by diſcent in Fee, to render Dower; The Tenant averred, That he had Aſſetts by diſcent: It was the Opinion of the Court, That he ought to ſay, Aſſetts in Fee; for if he hath but in taile, the ſame ſhall not ſave the Lands of the Tenant from rendring of Dower: And in that caſe the Opinion of the Court was, That the Wife ſhould have Judgment preſently againſt the Heir, if he had Aſſetts; and if not, then againſt the Tenant: and that before Iſſue tryed of the Aſſetts. Trin. 3 Eliz. *Dyer* 201.

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Matthew Herbert acknowledged a Recognizance to the King of 3000 l. and after his death, a *Scire facias* iſſued forth againſt his Executors *Teſtamenti et ultimæ voluntatis prædict. Mathæi; et hæred. terrarum et tenementorum quæ ſua fuerint*: The Sheriff returned, That he had no Executors; but *Scire feci Willielmus Herbert, filio et hæred. dict. Mathæi. Will.* made, upon which, Judgment was given for the King, *quod recuperet uſus prædict. Willielm. dict.* 3000 l. Whereupon Errour was brought, and three Errours aſſigned; 1. Becauſe the *Scire facias* was, *Scire facias hæred. terrarum*, &c. which was improper; for that one is ſaid to be heir to his Anceſtor, and not the Land. 2. Becauſe the return of the Sheriff is not good; it not being according to his Warrant, for that is to ſummon the Heir of the Lands and Tenements of *Mathew*; and he returns, He hath ſummoned the Heir of *Matthew*. 3. Becauſe the Judgment is erronious; for the Judgment is general; whereas it ought to be ſpecial: Theſe were not Reſolved. But in this caſe it was Reſolved; 1. That in Debt againſt the Heir upon an Obligation made by his Anceſtor, the Plaintiff ſhould have all the Lands which diſcended to the Heir in Execution; and yet he ſhould not have Execution of any of the Land againſt the Father himſelf: and the reaſon thereof was, becauſe the Common-Law gave an Action of debt againſt the Heir; and then if he ſhould not have Execution of the Land againſt the Heir, he ſhould not have any fruit of his Action; for the Goods and Chattels of the debtor do belong to the Executors or Adminiſtrators; and ſo for neceſſity in ſuch caſe onely, Land was liable to the Execution of the debt of a Common perſon. But it was Reſolved, That at the Common-Law, the Body, Lands, and Goods of

of the Kings debtor, were liable to the Kings Execution. 2. Reſolved, That in caſe of a Common perſon at the Common-Law, he againſt whom the Judgment is given, ſhall be onely charged; and he ſhall not have Execution againſt the Terr-Tenant; and if Execution be ſued againſt the Heir, he ſhall not have Contribution againſt a Purchaſor, although that the Purchaſor comes to the Land without valuable Conſideration: and therefore, If a man ſeiſed of three Acres, acknowledgeth a Recognizance, or a Statute, and makes a Feoffment of two Acres, and the third acre diſcends to the Heir, the Heir ſhall onely be charged, and he ſhall not have Contribution againſt the Purchaſors; as it was adjudged in *Gawdies* Caſe. 3. It was Reſolved, That in ſome caſes, the Heir ſhall have Contribution, and ſhall not be onely charged with the Aſſetts diſcended, as in the Caſes *of Borough Engliſh*, or where the Lands diſcend to Coparceners, the one ſhall have Contribution againſt the other, and the one ſhall not be onely charged. 4. It was Reſolved, That in the principal caſe, that although the Heir was charged as Terr-Tenant; yet for the cauſes aforeſaid in the Kings Caſe, the Execution againſt the heir onely, and the Judgment given againſt the Heir onely, was good. Mich. 26 & 27 Eliz. in the Exchequer. *Cook.* 3. Part. Sir *William Herberts* Caſe.

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4. *Where Aſſetts diſcended may be found in any County by the Jurours.*

DEbt was brought againſt Executors; The Defendants pleaded fully adminiſtred: The Plaintiff replyed, That they had Aſſetts at *Exeter*: and the Jury found Aſſetts in *Ireland*; and that the Defendants adminiſtred them: In that caſe, the Plaintiff recovered, and had Judgment: It was moved, That the Jurours could not find tranſitory things in a Forraign County: But it was Reſolved, That the finding was good; and the difference was taken, when the place is parcel of the Iſſue, and when not: For when the place is material, as when it is parcel of the Iſſue, there the Jurours cannot find the point in Iſſue in any other place, becauſe the point in Iſſue is reſtrained to a certain place by ſpeciall pleading: but when the place is named onely for Conformity, there it is otherwiſe: And therefore in the principal, the ſame place being named for conformity, and not of neceſſity of a Trial; the Aſſetts found by the Jurours in *Ireland*, were well found. *Cook.* 6. Part. 47. *Dowdales* Caſe. See *Cro.* 2. Part. 55. the ſame caſe; The Aſſetts in *Ireland*, are Aſſetts here; and the finding Aſſetts is the principal: and when the Jury ſay, further, In *Ireland*, the ſame is but idle and void.

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5. *Where in an Action brought againſt Executors, Aſſetts need not to be alledged.*

AN Action upon the Caſe was brought againſt an Adminiſtrator; and the Plaintiff declared, That whereas the Inteſtate was indebted to him in 10 l. and the Defendant was alſo indebted to him in 40 s. the Defendant did promiſe to pay: Upon *Non Aſſumpſit*, it was found for the Plaintiff: In ſtay of Judgment, it was moved, That the Plaintiff had not ſhewed any Conſideration to charge the Defendant, becauſe it doth not appear, that the Defendant had Aſſetts. But the Court diſallawed the Exception; for if it were neceſſary, it ought to be preſumed to be found in the Verdict: and it is not of neceſſity to alledge Aſſetts: But if the Caſe be, That if an Executor or Adminiſtrator, who hath not Aſſetts, makes any promiſe of payment, if it be not mixed with any profit to himſelf, *ſcil.* forbearance, &c. there it ſhall not charge him. Hill. 16 Jac. *Bogg* and *Melins* Caſe, *Hutton* 27. See Paſch. 10 Jac. in B. R. *Bothe* and *Cramptons* Caſe, *Cro.* 2. Part. 613. acc.

Aſsiſe.

1. *Where the Writ lyeth; and by whom, and againſt whom it lyeth: and in what County the ſame is to be brought.*

1. IF Tenant for life, or in taile, or Tenant in Fee-ſimple be diſſeiſed of his Lands or Tenements, or be put out thereof againſt his Will; In ſuch caſe he ſhall and may have an Aſſiſe of ſuch Ouſter. See *Fitzh. Na. Br.* acc. and therefore, If the Tenant of the Land payeth his Rent to a ſtranger who ought not to receive, that payment is a Diſſeiſin to him who ought to have the Rent; and in Aſſiſe for that will lye againſt the Tenant: But a man ſhall not be a Diſſeiſor by the act of another, as of his Tenant at will:

8. A man ſeiſed of Lands in Fee hath Iſſue two ſons, and binds him and his Heirs in an Obligation, and dyeth ſeiſed of the Lands, and the eldeſt ſon entreth, and dyeth without Iſſue; and the youngeſt ſon entreth: It was the Opinion of the whole Court, That he ſhould be charged by this Aſſetts as Son and Heir to his Father, although that there was a mean diſcent to the elder ſon; and ſo the Law is, If there be Grandfather, Father, and Son: and ſo it is of a Grandfather and two Daughters, which have two ſons, and do not make partition; for that they ſhall joyn in one Aſſiſe, notwithſtanding the ſeveral diſcents, for that they are but one Heir to the Grandfather. Paſch. 22 Eliz. *Dyer* 368.

9. In a Writ of Dower brought, the Tenant vouched the heir, who entred as he who had nothing by diſcent in Fee to render Dower; The Tenant averred, That he had Aſſetts by diſcent: It was the Opinion of the Court, That he ought to ſay, Aſſetts in Fee; for if he hath but in taile, the ſame ſhall not ſave the Lands of the Tenant from rendring of Dower: And in that caſe the Opinion of the Court was, That the Wife ſhould have Judgment preſently againſt the Heir, if he had Aſſetts; and if not, then againſt the Tenant: and that before Iſſue tryed of the Aſſetts. Trin. 3 Eliz. *Dyer* 202.

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Aſſiſe.

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will: For although the Tenant at will do *reſcous* for the Rent, which Reſcous is a diſſeiſin of the Rent; in ſuch caſe, the Tenant at will ſhall be the Diſſeiſor, and not the Tenant of the Freehold. *Ibid.*

2. A Diſſeiſor made a Leaſe for years; the Leſſee entred; afterwards his Leſſor departed the Realm; and before his departure, he gave Commandment unto, and requeſted his Leſſee, That if the Diſſeiſee did make any entry upon him, (which he miſtruſted he would do) that he ſhould not ſuffer him to continue there, but to keep the poſſeſſion againſt him alwayes as his Termor; the Diſſeiſee entred upon the Leſſee; and the Leſſee re-entred, and payed his Rent to the uſe of his Leſſor, his Leſſor being beyond Sea. The Queſtion was in this caſe, If the Leſſor were ſuch a Diſſeiſor in this caſe, againſt whom an Aſſiſe might lye? or if he were ſuch a Tenant of the Freehold, againſt whom an Aſſiſe might be brought, without his expreſſe agreement to the diſſeiſin? *Saundes*, Juſtice, was of Opinion, That without expreſs agreement after the diſſeiſin, that the Freehold was not veſted in him ſo as an Aſſiſe might lye againſt him: But others held the contrary. It was not Reſolved. See 3 & 4 Ma. *Dyer*. 141. Sir *John Cutts* and *Weſts* Caſe.

3. Note; It is ſaid in the Serjeants Caſe, 7 E. 6. *Dyer*. 84. That Tenant by *Elegit* or by Statute, who have but a Term and a Chattel, ſhall have an Aſſiſe (if they be put out of their poſſeſſion) *ut de Libero Tenemento*, and not *de termino*, &c. and ſee *Cook* 5. Part. 105. It is ſaid, That Tenant by *Elegit* brought an Aſſiſe; and 22 Aſſ. 45. It was holden, That Ancient Demeſne was a good barre; but the Law is now holden, That it is no good barre; for that no Judgment is given to recover the poſſeſſion of the Land, but only execution done upon the Judgment. See *Cook* 5. Part. 105. *Aldens* Caſe. And ſee *Cook*. 11. Part. 64. in Doctor *Foſters* Caſe, That the Statute of 13 E. 3. *de Mercatoribus*, giveth an Aſſiſe to Tenant by Statute-Merchant; but yet that ſhall not take away the Aſſiſe which the Tenant of the Freehold hath before; but that they may both ſtand together. See Hill. 10 Jac. in C. B. rott. 2541. *Cox* and *Barnſleys* Caſe, *Hob*. 47. adjudged acc.

4. If a man hath a Rent-ſervice, or a Rent-Charge, or a Rent-Seck, iſſuing out of Land either for life, in taile, or in Fee, if he be diſſeiſed of the Rent, he may have an Aſſiſe, and the Writ ſhall be general, *de Libero Tenemento in N*; but then, if the diſſeiſin be of a Rent-charge, or of a Rent-ſeck, all the Tenants of the Lands and Tenements muſt be named in the Writ; but it is not ſo of a Rent-Service; And ſo if a *Formedon* be brought of a Rent-charge, all the Tenants of the Lands muſt be named in the Writ; but not ſo of a Rent-ſervice. And ſoe, where a *Formedon* was brought of a Rent-charge iſſuing out of two Acres of Lands: and the Tenant pleaded Joynt-Tenancy in one Acre with a ſtranger: And it was holden by the Juſtices, That that plea ſhould abate the whole Writ. Hill. 28 H. 8. *Dyer* 31. See Mich. 17 E. 3. *Fitz*. Writ. 353. acc.

5. The Caſe was this; Grandfather, Father, and two Daughters; A Fine was levied by the Grandfather, with a Render to himſelf for life, the remainder to the Father & the heirs males of his body; the remainder to the eldeſt daughter in tail; the Remainder to the youngeſt daughter in taile, with divers remainders over; The Grandfather and the Father both dyed without Iſſue male: The eldeſt daughter entred; the youngeſt daughter in her own name, and in the name of her ſiſter as heirs to the Grandfather, brought a Writ of Errour againſt the heir of the Conuſee, to reverſe the Fine, who had nothing in the Land; but no *Scire facias* was awarded againſt the Terr-Tenant the eldeſt ſiſter: And Errours were aſſigned. It was the Opinion of the Juſtices of both Benches in this caſe, That a *Scire facias* ought to have been ſued forth againſt the Terr-Tenants, before the Juſtices proceeded to Examination of the Errours: For otherwiſe, if he ſhould have Judgment to be reſtored to the Land, he could not have Execution; for that if the Tenant were ouſted without being warned by a *Scire facias*, he might have an Aſſiſe; and therefore a *Scire facias* was awarded againſt the elder Siſter as Terr-Tenant; who appeared, but ſaid nothing to the Errours aſſigned. Afterwards the Heir of the Conuſee pleaded *in nullo eſt erratum*: and afterwards the Fine was affirmed. Hill. 15 Eliz. *Dyer* 321.

6. If two Tenants in Common be diſſeiſed of their Lands, each of them ſhall have a ſeverall Aſſiſe for his moyety, becauſe they claim and are ſeiſed by ſeveral titles: But if 20 Joynt-Tenants be diſſeiſed, they ſhall have but one Aſſiſe in all their names, becauſe they have but one joynt Title: And ſo it is, If there be three Joynt-Tenants, and one of them releaſeth to one of his Companions all his right; and after, the other two are diſſeiſed of the whole: The other two ſhall have one Aſſiſe in both their names for the two parts, becauſe at the time of the diſſeiſin they held thereby a Joynt Title: but as to the other third part, he to whom the Releaſe was made, ſhall have a ſeveral Aſſiſe of that in his own name, becauſe of that part he is Tenant in Common, and hath title to it by force only of the Releaſe. And if two Coparceners be, and each of them hath Iſſue a Son, and dye, and the Sons before Partition be diſſeiſed, they ſhall joyn in an Aſſiſe; for

for although they claim by ſeveral titles in reſpect of diſcents from their Mothers, yet becauſe the Land diſcended intirely from their Grandfather to their Mothers, they are accounted ſtill Parceners; and ſhall have but one Aſſiſe. *Cook* 1. Part, *Inſtitut.* 196.

7. If a Termor be ejected out of his Farme, his Leſſor within the year may enter to prevent a diſcent; or he may have an Aſſiſe at his Election: *Dyer* ſaid, That if the Leſſee will make a Feoffment, the Leſſor being upon the Land, It is no diſſeiſin for which he can have an Aſſiſe: but he agreed, That if the Leſſor be ouſted, and he doth enter; that if after his regreſs he be put out again, that he ſhall have an Aſſiſe, and recover damages, Paſch. 19 Eliz. *Dyer* 354. The Lord *Cromwell* and *Andrews* Caſe.

8. Note: That an Aſſiſe muſt be brought in the County where the Land is, and the Tryall there; unleſs there be a ſpecial Patent to Juſtices for tryal of the Aſſiſe; or it be brought in the Common-Pleas: and therefore, If in Aſſiſe, the tryall be in a Forrein County, although it be by aſſent of the parties, it is erronious: and ſo it was holden, 11 Eliz. *Dyer.* 267. in *Butler* and *Crouches* Caſe.

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2. *Of what things an Aſsiſe will lye, and of what not. And what ſhall be a ſufficient Seiſin to maintain an Aſsiſe; and who may take, or give ſuch Seiſin.*

1. AAſſiſe was brought by the Dean and Chapter of *B. de portione Decimarum*; and the Writ was, *de Libero Tenemento*: and the Count was, *de portione decimarum*, without mentioning the certainty of the ſeals; and holden good, for that the taking of part, ſhall be a diſſeiſin of the whole, 7 E. 6. *Dyer* 83, 84.

2. Aſſiſe brought of the Office of Philizer: and the Count was *de Libero Tenemento*, Paſch. 28 H. 8. *Dyer.* 7. And, the Plaintiff made his title in the Plaint, and alledged Seiſin, by taking a *Capias*; and the Poſt, where the Officer was ſet, was put in view. 3 Ma. *Dyer* 114,

3. Aſſiſe was brought of the Office of Regiſter of the Admiralty; and it was preſcribed, *Quod Quilibet hujuſmodi perſona*, which ſhould be named by the Admiral, ſhould be the Regiſter of the Admiralty for life. 5 Ma. *Dyer*, 153. *Hunts* Caſe. See 1 & 2 Eliz. *Dyer* 176. *Scroggs* Caſe, acc. *Cook* 8. Part. 47. *Webbs* Caſe.

4. If a man hath Eſtovers in a Wood of another man to his houſe by view and delivery of the Bayliff; if he taketh the Eſtovers without view, or delivery, he is a Treſpaſſor: But if he demandeth the Eſtovers, and the Owner of the Wood, or the Bayliff will not deliver them unto him, he ſhall have an Aſſiſe of the Eſtovers. *Cook* 5. Part. 25. Sir *Thomas Palmers* Caſe. And ſee *Cook.* 8. Part. in *Webbs* Caſe. R. 2. to Grants, vouched; That at the Common-Law a Writ of Aſſiſe did lye, *quod diſſeiſivit eum de Libero Eſtoverio.* See *Cook* 9. Part. in *Robert Marys* Caſe, 112. and *Fitzh. N. Br.* 158, 159. acc.

5. An Aſſiſe lyeth of a Mill; and the Writ ſhall be general, *de uno Molendino* without Addition, of Griſt-Mill, Fulling-Mill, or other Mill; for the Mill is the ſubſtance, and thing to be demanded; and the addition of Griſt, or Fulling, are but to ſhew the Quality or Nature of the Mill: And if a man have a Water-Courſe to his Mill; that if he alter his Mill, in the quality of it, yet the Water-Courſe doth remain. *Cook* 4. Part. 87. in *Lutterells* Caſe.

6. An Aſſiſe was brought, and the Plaintiff made his plaint, *de Offic. Magiſtr. Ludorum pilarum palmarium, Anglicè*, of the Manor of the Tennis-Playes *Domini Regis.* It was Reſolved, That the Aſſiſe did lye, and the Grant ſhall have a reaſonable Conſtruction; *ſcil.* the Tennis-Playes for the houſhold of the King, and not onely for the Tennis-Playes when the King himſelf playes in his proper perſon. And whereas in that caſe Exception was taken to the Plaint, That there was not any profit belonging to the ſaid Office: yet it was Reſolved, That the Plaint was good: and there it was ſaid, and agreed, That of an Office of charge, no Aſſiſe lyeth. But it was Reſolved, That if a man be ſeiſed of an Office of which an Aſſiſe lyeth, if he be diſſeiſed of the whole Office, he ſhall have an Aſſiſe *de Officio cum pertinentiis*; but if he be diſſeiſed of parcel of the Office, he may have an Aſſiſe of that parcel onely. *Cook.* 8. Part. 46. *Webbs* Caſe.

7. There were but two Writs of Aſſiſe at the Common-Law; *ſcil.* the Writ of Aſſiſe of *Novel diſſeiſin*; and an Aſſiſe of Common of Paſture for his Cattel: and at the Common Law an Aſſiſe did lye *de Libero Tenemento*, of Land, Rent, and all other things of which a *Precipe quod reddat* did lye. But of Profits *apprehend. in certo loco*, the Statute of *Weſt.* 2. cap. 15. gave an Aſſiſe; and in ſome caſes, the ſaid Statute gave an Aſſiſe, where there was not any clear remedy at the Common-Law; and therefore the Statute gives Aſſiſe of profits *Apprehender.* gathered or taken in the ſoyl of another; as of Eſtovers in Woods. 2. Of Nuts and Acorns to be taken in Woods. 3. Of a *Carodie*,

which belong to the living, as of apparrel, washing, lodging, Cloathing, &c. 4. Of Toll; which extend to Toll-thorough, Toll-traverſe, and Toll-turn; all which a man may have in his own Land, and yet if he be diſſeiſed of them, he may have an Aſsiſe: ſo of Paſſage, Pontage, Trouage, Pannage, and ſuch like things. 5. Of Offices, *ſcil.* keeping of Woods, Parks, Chaſes, Warrens, Gates, and other Offices and Bayliwicks in Fee, an Aſsiſe doth lye: But yet of an Office, an Aſsiſe did lye at the Common-Law; for that of all of which a *Præcipe quod reddat* did lye at the Common-Law, an Aſsiſe did lye; and in ſome caſes an Aſsiſe did lye, although the Diſſeiſee had but an eſtate in the Office for life. *Cook* 8. Part. 47. *John Webbs* Caſe.

8. An Aſsiſe lyeth of Common of Paſture: and therefore, If a Commoner hath a Freehold in his Common, and the Lord, or others, will ſeed and eat up all the graſſe in the Land where the Common is to be taken, the Commoner ſhall have an Aſsiſe. *Cook.* 9. Part. 112. in *Mayrs* Caſe, but then the feeding muſt not be ſome ſmall Feeding, but ſuch a Feeding *per quod proficuum ſuum per totum tempus idem amiſit*: and in ſuch caſe likewiſe, the Commoner may take the Cattel damage feaſant; and ſo was it holden, Hill. 5 Jac. in C. B. in *Buttolph* and *Kippings* Caſe.

9. Aſsiſe lyeth, *de Cellaria*; and ſo *de Alneto*; *Bullaria*, *Salina*, and ſuch like; and although they be incertain in the Declaration, yet becauſe they may be made certain, it ſhall be good enough. Mich. 14 Car. in B. R. *Sprigg* and *Rawlinſon's* Caſe. *Cro.* 1. Part. 399.

10. An Aſsiſe doth lye of a Rent; The Caſe was; A Rent-Seck of 4 l. *per annum* was granted by J. S. to B. his ſon, iſſuing out of a houſe called the Unicorn in *L.* payable at the Feaſts of the *Annunciation* and *Mich.* at the houſe of the ſaid J. S. in L. to begin at *Michaelmas* after his deceaſe, and 6 d. was given in the name of Seiſin: And in an Aſsiſe brought of the Rent, the Jury did find the Grant of the Rent and Seiſin, and the demand at the houſe called the Unicorn, at the Feaſt of the *Annunciation*, and that none was there to pay it. It was adjudged, That the demand at the Unicorn was a good demand of the Rent; and that, the denying to pay it, was a diſſeiſin; and the guift of the 6 d. in name of ſeiſin, was a good Seiſin. Paſch. 14 Car. in B. R. *Smith* and *Smiths* Caſe, *Cro.* 1. Part. 365. See Hill. 45 Eliz. rott. in C. B. Aſsiſe of a Rent-Seck, adjudged good.

11. A man brought an Aſsiſe of a Rent againſt *J. M.* and Eliz. his wife; and divers others; and ſet forth, That *A.* was ſeiſed in Fee of 40. Meſſuages, and 1000 Acres of Lands in divers Towns, and by Will, 1 Jac. deviſed to the Plaintiff a Rent of 20 l. per Annum, going out of the ſaid Tenements for his life, and that A. died, and the Lands diſcended to *Eliz.* who afterwards married T. M. and that the Plaintiff was Seiſed of the ſaid Rent by the bonds of the ſaid T. M. Husband of the ſaid *Eliz.* and that he was ſo thereof Seiſed, untill after by the ſaid T. M. and *Eliz.* and 13 others, he was Diſſeiſed; upon ſeverall pleas pleaded by the Defendants, Judgment was for the Plaintiff againſt ſix of the Defendants; Whereupon Error was brought; and the Errors Aſſigned was. 1. Becauſe he demanded the Rent upon a Deviſe, and it doth not appear when the Deviſor died, ſo as the certainty of the Arrerages cannot be known. 2. Becauſe the Jury find Seiſin given by the hands of the Husband of one daughter, whereas the Land diſcended to two Daughters, and coheirs. 3. Becauſe the Jury find that the Rent was demanded of ſix of the Defendants, but do not find that it was demanded upon the Lands. In this Caſe, It was holden by all the Juſtices, That the demanding it of their perſons off the Land, and their denial was not good, but it ought to have been upon the Land; And alſo becauſe it was not demanded upon the Land; and alſo, for becauſe it was not found when the Deviſor dyed; the Judgment given for the Plaintiff was reverſed. *M.* 14. Car. in *B. R. Monrice* and *Prinses* Caſe. *Cro.* 1. Part 374, 375.

12. An Aſsize lyeth of an Hoſpitall. And therefore if a Layman be Patron of an Hoſpitall, he may viſit the ſame, and depoſe and deprive the Maſter for good cauſe; but if he be deprived without juſt Cauſe, and by colour thereof be put out, he ſhall have an Aſsize, becauſe he hath no other remedy: But if the Ordinary depriveth a Maſter who is Eccleſiaſtical, without cauſe, he ſhall not have an Aſsiſe, for that he hath other remedy by Appeal. *Cook* 11. part. 99. in *James Baggs* Caſe.

13. An Aſsize lyeth of a Way, and ſo of a Piſcary; and ſo of Profits *Apprend in cette lieu*. *Cook* 8. part 47, 48. in *Jebu Keibs* Caſe. And ſo of *Turbary*, Ibid.

14. An Aſsize was brought of the Office of Sadler to the Queen, which was granted to one by the King: It was holden by the Court that the Aſsize would not lye, for that the King could not make an Officer to the Queen: and alſo, becauſe by the Patent, no place was expreſſed where he ſhould enjoy and exerciſe his Office and therefore the Jury could not have the view. And if the King grant the Office of Uſher of the Prince his Son; It was holden an Aſsize would not lye of it. Paſc. 6. Jac. in *C. B. Brownlow.* 28.

15. An Aſsize was brought of the office of Clock-keeper of *Weſtm.* It was holden that an Aſsize would lye of ſuch an Office, but then it was ſaid, That it muſt be an Antient office, and becauſe the Plain-

tiff

tiff could not prove that it was an antient Office, the Plaintiff was Non-ſuit; yet the Plaintiff ſhewed a Grant in E. 6ths. time, but that was holden an Antient times. Paſc. 8. Jac. in *C. R.* rott. 31. *Brownlow.* 28. *Ceſar* and *Bulls* Caſe.

16 Note, It was ſaid by *Rolls* Chief Juſtice. That a Formedon lyeth not *de uno Croſto*, but an Aſſize doth, becauſe it is put in view to the Recognitors; But *a præcipe* doth not lye of it, nor an *ejectione firmæ*. Tr. 23. Car. in *B. R.* Styles 30. See Paſc. 12. Jac. *Ellis* and *Wallis*'s Caſe. *Bolſtrod.* 2. part 214. acc.

17 An Action upon the Caſe was brought by a Commoner, for ſurcharging the Common, and treading the Graſſe; it was moved that the Action did not lye, but an Aſſize; It was holden by the Court, That the Plaintiff might have an Action upon the Caſe, or an Aſſiſe at his election, although that be a diſturbance of the Plaintiffs Freehold. *Mich.* 1649. *Ayre* and *Pincombs* Caſe. *Styles* 164.

18 Error was brought to reverſe a Judgment given in the Court of *New Caſtle* in an Aſſize of *Novel diſſeiſin*; the Error was that the Plaintiff did declare that the Defendant did diſſeiſe him *de uno muro Lapideo*, and that the Defendant had erected a houſe in the place of it; it was holden by the Court that he ought for this to have brought an Aſſiſe of Nuſance, and not an Aſſiſe of *Novel diſſeiſin*; and the Judgment was Reverſed. H. 1649. *Colſon* and *Rees* Caſe. rott. 561. *Styles.* 195.

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3. *Where by Entry into, and upon Land, the Aſſiſe ſhall be Abated; And where not?*

IN a Writ of Errour, brought to reverſe a Judgment given in an Aſſize in the Common Pleas; The Caſe was, Queen *Eliz.* ſeiſed of the Mannour and Park of *Clipſton*, by her Letters Pattents, granted *Officium Cuſtodis parci prædict.* to A. for life; the ſaid Mannour, with the Reverſion of the ſaid Park, came to King *James*; who reciting the Grant to A. of the Cuſtody of the ſaid Park, Granted to the Earl of *Rutland*, the Office of Keeper of the ſaid Park, to begin after the death, ſurrender, or forfeiture of A. Afterwards the ſaid King granted the Reverſion of the ſaid Mannour and Park, to the Lord *Mountjoy*, who granted the ſame to the Earl of *Shrewsbury* 4 Jac. A. dyed: B. as ſervant to the Earl of *Shrewsbury*, and by his command, entred into the Park. The Earl of *Rutland* brought an Aſſiſe in the Common-Pleas, and had Judgment to recover; whereupon the Earl of *Shrewsbury* brought a Writ of Errour; and aſſigned for Error (amongſt other things) That the Plaintiff in the Aſſize after the Verdict, and before the Judgment, did enter into the Park, and did there hunt, and kill a Stag, and whether by this Entry the Plaintiff had abated his Writ, or not, and the Judgment was erronious, was the queſtion. It was holden by the Juſtices; That this Entry did not abate his Writ, but for ſome other cauſes ariſing in the Caſe, the Judgment was reverſed. Paſc. 7. Jac. in *C. B.* rott. 610. The Earl of *Shrewsbury*, and the Earl of *Rutlands* Caſe. *Bolſtr.* 1. part 5, 6, 7, 8.

2 An Aſſiſe of Freſhforce was brought by the Parſon of *Honylane* in *London*, againſt *Moor* and the Corporation of *Mercers* upon a Diſſeiſin done to him of a Cellar under the ſaid Church. The Defendant *Moor* pleaded to the Aſſiſe, *Nul tort*, *Nul diſſeiſin*: and afterwards, *relicta verificatione ſua*, he pleaded in Abatement of the Aſſiſe; that the Plaintiffe had entred into the Cellar after the laſt continuance, and was ſeiſed thereof in the right of his Church: It was found by a ſpeciall Verdict that the Plaintiff had a *ſubpena*, delivered unto him to be examined, upon Interrogatories, concerning the Title of the ſaid Cellar, and after the laſt continuance, the Defendant *Moor* requeſted the Plaintiff that he would dine with him at his houſe in *Hony-Lane*, and he being there with the Examiner; the Defendant *Moor* requeſted them to go into the Celler to ſee the Antiquity of the ſaid Cellar, at whoſe requeſt the Plaintiff and the examiner went into the Cellar; and when they had viewed it, they came up, and afterwards the Examiner examined the Plaintiff in *Moors* houſe upon the Interrogatories; And if ſuch Entry into the Cellar, ſhould be an Entry, to abate the Aſſiſe, was the queſtion; and it was the opinion of the Court, that by ſuch Entry, the Writ was not abated, And there the Caſe of a Formedon was put by *Brooke* Chief Juſtice; That in a Formedon, The Defendant pleaded in Abatement of the Writ, That the demandant had entred after the laſt continuance; and it appeared upon the Evidence; That divers perſons were cutting down Wood upon the ground, and the Demandant came upon the land, and admoniſhed them at their perills, to do no more then they could do by Law; And he ſaid, that in that Caſe It was adjudged to be no Entry, to Abate the Writ. Paſc. 2, and 3. *Ma. Plowden. Ponnet* and the Corporation of *Mercers* Caſe. 92, and 93.

Assignees *and* Assignments.

What things may be granted over, and Assigned, and what not? And who may grant or Assign, et e contra; or be an Assignee, Who not?

1. A Rent was granted to a man *pro consilio impendendo*, the Grantee was after attainted of Treason, and committed to the Tower; the grantor had occasion of Council, and could not have accesse to the Grantee; the question was whether the Rent was forfeited by the Attendor; It was the opinion of the Court, That it was not; because it was such a thing as was incident to the cause; and was not grantable or Assignable over; And there it was said, That if the King giveth Lands to a Duke, to maintain his dignity, this Land cannot be assigned over 6 H. 8. *Dyer.* 2. But see *Davis* Reports in the Case of *Proxies*; That Creation Land, or mony, may be granted or Assigned over to the King himself, although it cannot be granted to a stranger.

2 It was a question whether the Office of a Philizer might be delivered in execution upon a Statute; It was the opinion of *Shelley* Justice, That it could not, for that nothing shall be delivered over in execution, unlesse it were grantable, or Assignable over; And the Office of a Philizer, was an Office of Trust, to do the businesse of the Court, and not his own businesses; and therefore it could not be assigned over, and so not extended upon a Statute. 28 H. 8. *Dyer.* 7.

3 A Lease was made to two of Lands, *Habendum*, to them, *ad terminum vitæ eorum conjunctim et ulteriùs diutius viventis ac Assignis suis qui primus eorum decedere contingat durante vita ejus, qui superstes, et non alter.* It was a Quære, If he who first dyed, Assigned the whole; whether the same were good for the whole, or for the moyety onely; It was the opinion, that he could Assign but a moyety, for that he had but a moyety in right. See 32 H. 8. *Dyer.* 46. acc. *Co.* 1. part. *Institutes* 187. acc.

4 The Archbishop of *Canterbury*, seised of the Mannor of A. by Deed, granted to Sir *Ed. Nevill*, and Sir *Hen. Nevil* his son, the Office of Warden, and the Custody of the Park of A. for their lives, and the survivor of them, and granted them a Fee of 3 l. 10 s. paid out of the said Mannor, which grant was confirmed by the Dean and Chapter. Sir *Ed. Nevil* was afterwards attainted of Treason, and executed; after whose death, Sir *Henry Nevil* came into the Exchequer, and prayed the Court that his Deed might be allowed and enrolled, and that he might have the Arrerages of the said Fee of 3 l. 10 s. which was behind for three years; And after many Arguments at the Bar, all the Barons of the Exchequer (with whom the Justices of the Common Pleas agreed,) were of opinion, gave Judgment that the Deed should be allowed and inrolled, and the said Sir *Henry Nevill* should have the Arrerages; and agreed that the said Office nor the Fee was forfeited by the Attaindor of Sir *Edward Nevil*; but that the Fee remained; And in that Case, See what Offices may be assigned and granted over, or forfeited; and see there when a thing is unseparably incident to another thing, or to the person, that the same cannot be granted or Assigned over. See P. 12. Eliz. in the Exchequer. *Plow.* Com. 379. Sir *Henry Nevils* Case.

5 A Rent was granted to one and his Assigns for life, *pro consilio impendendo*, payable yearly at four Feasts; and for default of payment if it be demanded, that it should be lawfull for the Grantor and his Assigns, to distrain, the Grantee Assigned the Rent, the Tenant attained, the Assignee upon the Land, demanded the Rent at the day, and for default of payment distrayned: It was resolved in this Case (amongst other points), That the grant of a Rent to one and his Assigns, *pro consilio impendendo*, might be assigned over by expresse words granted; for that *modus et conventio vincunt Legem.* H. 43. Eliz. *C. B. Cook* 7 part. 28. *Maunds* Case.

6 The King granted the Office of Marshall-sea for life, and afterwards granted the same in Reversion for 21 years; The Grantee of the Reversion assigned his interest to A. Tenant for life, deputed J. S. at Will, and dyed, A. by Deed Assigned the said Office to J. S. It was resolved in this Case: That the grant of the Office, in Reversion for years was void, and that for many causes. 1. Because the same is an Office of Trust, which is individual and personal, and shall not go to Executors and Administrators. 2. Because it is an Office of attendance in Court, and if the Lesse should dye Intestate, there should be no office untill Administration were granted by the Ordinary. 3. Because such an Officer ought to be admitted and allowed by the Court and if he should dye, his Executors should be Officers without allowance or admittance. 4. Because such Office had always been granted for life, or at Will, so as the person

was

was certainly known, and the ſame was never granted for years. 5. If the ſame might be granted for years, the ſame ſhould be Aſſetts to Executors, or might be forfeited by Outlawry. But yet it was agreed in that Caſe, That by an Act in Law a Term which was but a Chattell, might be in ſuch an Office; as the Caſe. 5 E. 4. 3. If the King Seiſeth of ſuch an Office during the minority of the Heir, he may grant it, but that ſuch office might be granted for years, was denied; wherewith agrees the book of 39 H. 6. 34. See Sir *George Reynells* Caſe. *Cook.* 9. part. 96.

7 The Queen granted to *Mitton*, the Office of Clerk of the County of S. with all Fees, for Term of his life; Afterwards the Queen made A. Sheriff of the ſaid County, who interrupted *Mitton*, clayming that which was granted to him, as incident to his Office of Sheriff: It was adjudged in that Caſe, that the Letters Pattents of the Queen, were void, for that when the Queen had made a Sheriff; ſhe could not abridge the Sheriff of any thing which was incident to his office, nor aſſign the ſame over to another; and if ſuch a grant, or Aſſignment, of the Queen ſhould be good; many inconveniencies might follow; as the Records might be imbeſled, for which the Sheriff is to anſwer; and the Certificate of all Records out of the County Court doth belong to the Sheriff. Paſc. 36. Eliz. *Cook* 4. part *Mittons* Caſe.

8 A. granted a Rent of 20 l. *per annum* out of Lands to B. his Heirs and Aſſigns, to be paid at two dayes with Clauſe of diſtreſſe, and for further aſſurance, Covenanted to levy a Fine to J. S. and J. D. which ſhould be to the uſes expreſſed in certain Indentures; and further covenanted, that then, and from thenceforth, if the Rent ſhould be behind in part, or in all, and no diſtreſſe upon the Land; that then it ſhould be Lawfull for the Grantee his Heirs or Aſſigns to enter into the Land, and to retain the ſame till he was ſatiſfied the Rent. J. S. dyes before the Fine Levyed; the Grantee Aſſigned the Rent over to W. his Heirs and Aſſigns, who ſold the ſame to F.: afterwards, 10 l. of the Rent was behind. Afterwards the Fine was levyed to the ſaid uſes. The Aſſignee of the Rent, for the Rent, before the Fine levyed, came to reſtrein; and upon a Replevin ſued, entred into the Land for the whole Rent, by force of the ſaid uſe; In this Caſe, theſe poynts were agreed and reſolved. 1. That the uſe ſhould well riſe, the Covenant being, that if the 20 l. or any part of it ſhould be behind. 2. That theſe contingent benefits might be Aſſigned over, becauſe they are Annexed to an eſtate as to an Intereſt, and ſo they are well Aſſignable. 3. That the Aſſignee ſhould have the ſame benefit as his Grantor ſhould have had, 4. That the Aſſignee hath ſuch an eſtate, as that he may make a Leaſe for years, and that he hath not onely a bare occupation but alſo the abſolute poſſeſſion, of which he might make a Leaſe for years. But whether the Aſſignee ſhould have benefit of ſuch contingencies, as happened in the interim before the Fine was levied; and whether the Aſſignee ſhall now come to have the uſe of the Land to ariſe to him, by reaſon of a thing which happened before the Fine was levyed, which was the 10 l. Rent behind, and whether he ſhould have ſuch an eſtate in the Land, of which he might make a Leaſe for years; the Court was divided in opinion; and ſo the principall poynt was not reſolved. *M.* 14. Jac. in *B. R. Havergill*, and *Hares* Caſe. Intrat. *Hill.* 13. Jac. *B. R.* rott. 868. *Bolſtr.* 3. part 251, 252 to 258.

9. Note: It was holden by the Court, That ſome things, in reſpect of the Nature of things, are not grantable, or aſſignable over: as if the Donee in taile holdeth of his Donor by Fealty, and the Donor by Deed Inrolled, granteth the Fealty, (although the Grant be made to the King himſelf) yet the Grant is meerly void, becauſe the Fealty is an Incident inſeparable to the Reverſion: So if a Founder of a Colledge grant his Founderſhip to the King, the Grant is void, although it be by Deed inrolled, for that it is inſeparable to the blood. See *Cook* 11. Part, in *Magdalen* Colledge Caſe. 77.

10 Husband and Wife Joynt-Tenants of a Manor, and to the heirs of the body of the husband, the Remainder to *B.* intaile; a Recovery was had againſt the husband alone in the life of the wife with voucher; *B.* in remainder was attainted of Treaſon, and executed; and it was Enacted by Parliament, That he ſhould forfeit all ſuch Manors, Lands, Tenements, Reverſions, Uſes, Poſſeſſions, Offices, Rights, Conditions, and other Inheritances which he had in Fee or in taile, in uſe or poſſeſſion the day of the Treaſon committed: The Queen reſtored the ſon of *B.* and granted to him the Mannors which ſhe had by the Attainder of his Father: and afterwards the Queen brought a Writ of Error againſt the heir of the ſurviving Recoverer, to reverſe the ſaid Recovery. In that caſe, it was Reſolved (amongſt other Points) That a Writ of Error was not given to the Queen by any words of the ſaid Act of Attainder: For this Rule was there taken: That ſuch a Right for which the party hath not remedy but by action, to recover the Land, could not be forfeited by the Common-Law; and by general words of an Act of Parliament, Rights of Actions were never given to the King, but Rights of Entries: and there it was ſaid, That Rights of Actions concerning Inheritances, were not forfeited by Attainder. But Obligations, Statutes, Recognizances, or other ſuch things

things in Action are forfeitable by Attainder; alſo it was holden in that Caſe, that poſſibilities were not given to the Queen by the ſaid Act of Attaindor. And 2. It was Reſolved in that Caſe. That by the generall grant of the Mannor, and of all her Intereſt, claims, and demands, the Writ of Error did not paſſe. *Cook* 3. part 3. & 4. The Marqueſſe of *Wincheſters* Caſe.

11 Note, In an evidence given to a Jury at the Bar, It was admitted without contradiction, That if Judgment in an Action of Debt be given againſt Leſſee for years, and afterwards the Leſſee altereth his Term, and after the year, the Plaintiff ſueth a *Scire facias*, and hath execution, the ſame Term is not liable to the Execution, if the Aſſignment be made *bona fide*. Alſo it was ſaid by *Coke* Chief Juſtice; That if Leſſee for years Aſſign over by fraud to defeat the Execution, and the Aſſignee Aſſign the ſame over to a ſtranger *bona fide*, that in the hands of the ſecond Aſſignee, it is not lyable to the Execution. Alſo if a man who hath goods but of the value of 30 l. be endebted to two men, to the one 20 l. to the other 10 l. and the Debtor Aſſigns to him to whom he is endebted the 20 l. all the goods, which are of the value of 30 l. to the intent that for the reſidue above the 20 l. the Debtee ſhould be favourable to him; and this Aſſignment is void in the whole, becauſe that it is fraud in part. But *Foſter* Juſtice ſaid, it ſhould not be void for the whole, but onely for the overplus, as in *Twines* Caſe. *Cook* 3. part 81. Quære. *Paſc.* 8. Jac. in *C. B. Wilſon* and *Wormall's* Caſe.

12 A. made a Leaſe for life of Lands, and afterwards Covenanted to levy a Fine of the ſame Lands to the uſe of J. S. for 40 years to begin after the death of the Leſſee for life. Afterwards A. diſſeiſed the Leſſor for life; J. S. who had the future Intereſt during the diſſeiſin, Aſſigned over his future Intereſt: The Queſtion was, whether the Aſſignment were good or not, It was ſaid it was not, for that by the Diſſeiſin of Tenant for life, the future intereſt to commence after the death of Tenant for life, is converted into a Right; and a Right of a Term cannot be Aſſigned over. But it was ſaid by *Williams* Juſtice, That it was clear, That if a man have a Leaſe for years to begin after the death of Leſſee for life, that although that the Leſſor for life be diſſeiſed, yet the Intereſt remains a good Intereſt to the Leſſee, and it is not turned into a Right of a Term, and for that cauſe it may be granted over, notwithſtanding the diſſeiſin. *Hill.* 7. Jac. in C. B. *Stydſon* and *Glaſſes* Caſe, *Brown* 2, part 224, 225.

13 The Lord *Mountjoy* ſold the Mannor of *Camford* to *Brown* in Fee: In the ſame Deed, It was provided, and *Brown* Covenanted, and granted, that the Lord *Mountjoy*, his Heirs and Aſſigns might dig for Ore within the Land in *Camford*, which was a great waſt, without contradiction of *Brown*, his Heirs, and Aſſigns; The Lord *Mountjoy* afterwards deviſed his Intereſt to one *Laicott* for 21 years, and *Laicott* aſſigned it over to two other men: In this Caſe, two points were agreed, 1. The Lord *Mountjoy* could not deviſe the ſaid Intereſt to one, *viz.* to grant to one to dig within parcell of the ſaid Waſt. 2. It was Reſolved that the Aſſignment of the power to two by *Laicott* was good: But it was further agreed, that the ſaid two Aſſigns could not work ſeverally, but with one ſtock; or ſuch workmen as belonged to them both, See the Lord *Mountjoy* and the Earl of *Huntington's* Caſe, *P.* 25. Eliz. in C. B. *Godbolt*, 17, 18.

14 Bonds, Obligations, Specialties, may be Aſſigned over: If J. S. be indebted to me, and J. be indebted to J. D. J. may Aſſign that Debt to J. D. with the aſſent of J. S. otherwiſe not, If a Bond be for performance of Covenants conteyned in an Indenture of Leaſe; if he Aſſign the Leaſe, he may Aſſign the Bond alſo, becauſe they are concomitants; and he hath an Intereſt in the Leaſe, and therefore he may ſue the Bond, but if the Covenants be firſt broken, and afterwards he Aſſign over the Leaſe, if the Aſſignee ſues the Bond, it is maintenance, but if he Aſſign over the Leaſe, and afterwards the Covenants are broken; if he ſueth it there, it is no maintenance: But if he Aſſigne over the Bond, and reſerveth the Leaſe in his own hands, and then the Covenants are broken, and the other ſueth the Bond for the performance of Covenants, it is maintenance. And Note, That damages which are to be recovered for Treſpaſſe, Battery, &c. cannot be Aſſigned over, becauſe they are yet uncertain, and perhaps the Aſſignee might be a great man, who might procure a Jury to give him the greater damages. *M.* 29. Eliz. in B. A. in *Raynolds* and *Truelock's* Caſe. *Godb.* 81.

15 A man was poſſeſſed for the Term of ſix years, of a Tavern in *London*, and leaſed the ſame to another for three years; And it was Covenanted betwixt them; that, during the three years, *quolibet menſe*, the Leſſee ſhould give an Accompt to the Leſſor of the Wine which he ſold, and ſhould pay to him for every Tun, ſo much; Afterwards, the Leſſee granted the three years which were remaining of the ſix years to another; and then he did requeſt the Leſſee to Accompt, and he would not, whereupon he brought an Action of Covenant and the Defendant pleaded. That he had accompted to the Aſſignee, of the three years; and upon that there was a demur; and the Opinion of the Court was, That it was no plea, becauſe it was not a Covenant which did go with the Land, but was a

Collateral

Collateral thing, and did not paſſe by the Aſsignment of the three years. *M.* 29 Eliz. in B. A. *Godb.* 120.

16 A. Recovered againſt B. 4000 l. damages in an Action upon the Caſe. Afterwards B. being Outlawed, in a perſonall Action, the Queen, Ann. 34. (Reciting the Outlawry, and that B. was dead) granted all his goods and Chattells to J. S. to the uſe of M. the Wife of A. J. S. afterwards Aſſigned that debt and Judgment to J. D. notwithſtanding which, proceſs iſſued in the Kings name, to extend all the Lands which B. had at the time of the Judgment, and Lands in the poſſeſsion of J. D. (which he purchaſed after the Judgment,) were extended, whereupon, he as Terr-Tenant, pleaded againſt the Extent; That by the Aſsignment made by J. S. he was chargeable to him onely, and not to the King: It was upon demur, Reſolved in this Caſe by the whole Court, That as the Kings grant of a thing in Action is good enough; ſo this debt which is forfeited to the King by Outlawry of B. is well granted, and the grantor may have the benefit to levy this debt by Action in his own name, or by extent in the Kings name, although he hath not words in his grant to ſue it in the name of the King. But it was holden, That the Aſsignment over of this debt by J. S. to J. D. was meerly void, For that there cannot by Law any Aſsignment be made by a common perſon of his debt; wherefore it was Adjudged, The plea was not good, and no cauſe of diſcharge, and that the Land ſhould remain in extent for the King. *M.* 3 Jac. rott. 150. in *Scaccario*, the King and *Twines* Caſe. *Cro.* 2. part 179, 180.

17 A. was endebted to B. 2000 l. by a Statute, B. made his Wife his Executrix and dyed: ſhe married J. S. who was endebted to the King by Bond in the Court of Wards. J. S. and his Wife by Deed inrolled 14. Jac. aſsigned to the King that Statute for the payment of the ſaid debt. Whether this Aſsignment were good, or void by the ſaid Statute of 7 Jac. which Enacts, that no debt ſhall be Aſsigned to the King by his Debtor, Accomptant, or other, then ſuch debts as did before originally grow due to the Kings debtor, Accomptant, *bona fide*. It was Reſolved, That this was a good Aſsignment, for although this Debt was not due to him originally, but in the right of his Wife; yet forasmuch as they have the ſole intereſt therein, and the Husband the Kings Debtor, may diſcharge it by his releaſe; it was all one as if it had been made to him in his own name; and within the meaning of the makers of the Act of 7 Jac. to be Aſsigned; wherefore proceſſe was awarded for the levying of it. *Hill.* 16. Jac. in B. R. *Fowns* Caſe, in *Cur. Ward. Cro.* part 324.

18 In Aſſumpſit, The Plaintiff declared, That J. S. was endebted to him in a certain ſum of money, and became a Bankrupt, and that a Comiſſion of Bankrupt was ſued out againſt him; and it was found that the Defendant was indebted to the Bankrupt; and that the Commiſsioners did Aſsign over the debt of the Defendant, mentioned in a Schedule, amounting to ſuch a ſum unto the Plaintiff in ſatisfaction of the Debt owing to him by the Bankrupt; and that he Received the ſame Debt of the Defendant, who did promiſe, &c. Upon *Non Aſſumpſit*, The Jury found the matter aforeſaid, but further found, That the debts mentioned in the Schedule, and Aſsigned to the Plaintiff, amounting to ſuch a ſum, whereas the Defendant did not owe to the Bankrupt ſo much as that Debt Aſsigned is, but a leſſer ſum. It was ſaid, That the Verdict was found for the Defendant, becauſe the debt levyed in the Declaration, and the debt in the Verdict are not the ſame, and ſo the Defendant did not promiſe that which was layed in the Declaration. But the Opinion of the Court was for the Plaintiff, for the Aſsignment was not judicially before them in queſtion, but the Aſſumpſit; alſo the Aſsignment is of the Debt of the Defendant, due to the Bankrupt, and be it more or leſſe, it hath no reference to Account or Reckoning between them, and ſo the Aſsignment is good, though it doth not agree in the ſum what is juſtly due; and the iſſue is upon the Aſſumpſit, and not upon the Aſsignment: Judgment was for the Plaintiff. H. 22. Car. B. R. rott. 222. *Baker* and *Edmonds*'s Caſe. *Styles* 62, 63.

19 In an Action upon the Caſe brought for ſelling of falſe Bills of publique Faith to him, to the value of 800 l. the Defendant demurred to the Declaration, for that there is 70 l. mentioned to be paid, as is expreſſed in the papers, and it is not expreſſed at what time, or place it ought to have been; and here is an Aſsignment of Papers, which could not be; for that it is a thing in Action which is not Aſsignable, Nor can an Ordinance of Parliament give Authority to Aſsign a thing in Action. But the Opinion of the Court was, That the Ordinance of Parliament doth give Authority to Aſsign Papers, and the Papers may be Aſsigned; Judgment was for the Plaintiff. M. 1652. *Fouk* and *Boyles* Caſe. *Styles* 348.

20 A Leaſe was made for one year, the Leſſee Covenants for him and his Aſsigns to pay the Rent ſo long, as he and they ſhall have the poſſeſsion of the thing Lett, The Leſſee Aſsigns over his Term, the Term ends, the Aſsignee continues the poſſeſsion after the Term ended; and for Rent behind by the Aſsignee after the end of the Term, the Leſſor brings the Action, and the Queſtion was, Whether here be ſuch an Aſsigning that the Action will lye againſt or not. It was holden,

That

That although he be not an Aſſignee ſtrictly according to the Rules of Law; yet he ſhall be accompted ſuch an Aſſignee as is to perform the Covenants between the parties. Mich. 1651. rott. 353. B. R. *Bromfield* and Sir *John Williamſons* Caſe, *Styles* 407.

21. The Caſe was this; *A.* made a Leaſe to *B.* for 9. years, if *B.* ſhould ſo long live; the remainder after his death to the Executors or Aſſignees of the ſaid *B.* for 40. years; Afterwards *B.* dyed inteſtate, and Adminiſtration is committed to *C.* his wife, who entred, claiming the 40 years: the Defendant claiming by another Leaſe, entred upon her, and ſhe brought the Action. In this caſe, two Points were Reſolved, 1. That Adminiſtrators are not Aſſignees, for an Adminiſtration is appointed by the Ordinary, and Aſſigns muſt be in by the party himſelf, and not by a ſtranger. 2. It was Reſolved, That as this caſe is, the Adminiſtrator ſhould not hold it as a purchaſor, but as a thing veſted in the Inteſtate. Mich. 41 Eliz. in C. B. *Sperk* and *Sperks* Caſe, *Owen* 125.

22. In a Replevin, the Caſe was this; *A.* being Leſſee for 90 years, did Covenant and grant, That he would not alien, *ſub pœna* for *Faſturæ*, *niſi uxori ejus durante vita naturali*; and for the reſidue to one of his children, *vel uni fratrum juniorum*. In this caſe, It was Reſolved; 1. That this Covenant by the Leſſee, That he would not alien, was a Condition. 2. When he once had made an Alienation, that the Alienee was now at large, to alien to whom he would, and ſhould not be ſubject to the Condition. 3. It was Reſolved, That the words *vel uni fratrum juniorum*, gives him an Election to alien which of them he would: But then the Queſtion was, in regard he could not alien it to his wife during his life, becauſe the husband cannot give to his wife; Whether if he deviſed it to his wife for her life; whether ſuch a Deviſee were an Aſſignee within the Condition, or not? but this Point was not Reſolved, but *Curia adviſare vult*, Mich. 12 Jac. in B. R. *Fox* and *Whitcheots* Caſe, *Bolſtr.* 2. Part. 191, 192.

Of Aſsignes in fait, *and Aſsignes in Law: who ſhall be ſaid to be ſuch: And where an Action of Covenant ſhall lye by, or againſt ſuch Aſsignees; where not: And where they ſhall take advantages of a Condition, or other thing; where not.*

1. A Man made a Leaſe for years by Indenture; The Leſſee covenanted, That if he, his Executors, or Aſſigns, did alien, that it ſhould be lawful for the Leſſor to enter. He made his wife his Executrix, and dyed: the wife took another husband who aliened the Term. It was the Opinion of *Brown* and *Shelley*, Juſtices, That the husband was an Aſſignee in Law; and that it was a condition, and that the Lands were ſubject to the Condition in whoſe hands ſoever they were. Paſch. 28 H. 8. *Dyer* 7.

2. *A.* ſeiſed of Lands in Fee by Deed enrolled, Covenanted with *B.* That if *B.* paid to him, his heirs, or Aſſignees, 100 l. ſuch a day, that then he and his heirs would ſtand ſeiſed of the ſaid Land to the uſe of *B.* and his heirs: Before the day of payment, *A.* having iſſue a ſon, made his Will in writing, and thereof made his Wife his Executrix; the Wife renounced the Executorſhip, and took Letters of Adminiſtration. In this Caſe, the Opinion of the Court was; That the word, *Aſsignees*, ſhall be intended onely of the Aſſignees of the Eſtate of *A*; for that he hath an Eſtate aſsignable; and the Law will never ſeek for an Aſſignee in Law, when there is an Aſſignee *in Fait*. But in that caſe it was ſaid, That if *A.* had made a Feoffment in Fee, upon Condition, that the Feoffee ſhould pay money to the Feoffor, or his Heirs or Aſſignees there, becauſe he hath departed with his whole Eſtate, and hath but a naked Condition, which cannot be aſſigned over; the Law will make Conſtruction, what perſon (as moſt apt) ſhall be as his aſſignee in Law, to receive the money; and thoſe perſons, the Law adjudgeth to be his Executors, becauſe they repreſent the perſon of the Teſtator for all Goods and Chattels; and in ſuch caſe the Feoffor cannot have an Aſſignee in *Fait Cook.* 5. Part. 97. in *Goodales* Caſe.

3. The Husband and Wife made a Leaſe for years, by the word, *Demiſe by Indenture*; and the Leſſee Covenanted for him, his Executors and Aſſigns, to build a Brick-wall upon the Land Leaſed; The Leſſee aſſigned over his Term; and for not making

making of the Brick-wall, the Leſſor brought an Action of Covenant againſt the Aſſignee: In this caſe, It was Reſolved, 1. When a Covenant extends to a thing in *eſſe*, parcel of the demiſe, the ſame ſhall bind the Aſſignee, although he be not bound by expreſs words; but when the Covenant extends to a thing in *eſſe* at the time of the demiſe made, the ſame ſhall bind the Leſſor, his Executors and Adminiſtrators, but not the Aſſignee. 2. Reſolved, If a man Leaſeth a ſtock of Cattel, or other perſonal goods for a time; and the Leſſee Covenants for him and his aſſigns at the end of the Term, to leave ſuch Cattel and Goods, or to pay ſuch a price for them, and the Leſſee aſſigns over the Cattel or Goods, ſuch Covenant ſhall not bind the Aſſignee, becauſe it is but a perſonal Contract, and there wants privity betwixt them; but the ſame ſhall bind his Executors or Adminiſtrators; but if a man Leaſeth a Houſe and Land for years, with a ſtock or ſum of money, rendring Rent, and the Leſſee Covenants for him, his Executors and Aſſigns, to deliver the ſtock at the end of the Term, although that the Rent was encreaſed in reſpect of the ſtock; yet the Rent doth not iſſue out of the ſtock: and therefore as to the ſtock, the Covenant is perſonal, and ſhall bind onely the Covenantor, his Executors and Adminiſtrators, and not the Aſſignees. See *Cook* 5. Part. 16. *Spencers* Caſe. And Note; In that Caſe it was Reſolved, That the Aſſignee of an Aſſignee, Executors of an Aſſignee, Aſſignees of Executors, or Adminiſtrators of every Aſſignee, ſhall have an Action of Covenant, and are compriſed within the word Aſſignees.

4. A man brought an Action of Covenant againſt the Aſſignee of Leſſee for years, and ſet forth, That he had made a Leaſe for years rendring Rent, with re-entry for non-payment of the Rent, & that the Leſſee did Covenant to build a houſe upon the Land within the firſt 10 years; and that he aſſigned over his Term: The Aſſignee did plead, That the Leſſor did enter, and had the poſſeſſion of part the 9th year; and, if thereby the Covenant was diſcharged, was the Queſtion? It was holden in this Caſe, That the pleading, that the Leſſor generall did enter was not good; for it may be taken, that he entred for the non-payment of the Rent; and then by ſuch entry, the Covenant is not ſuſpended or extinct: And alſo it was holden in this Caſe, that the Aſſignee ought to have ſhewed, That the Leſſor would not ſuffer him to build the houſe: and becauſe in this caſe, the ſame was a Covenant which ran with the Land, and not a Collateral Covenant to do a thing in groſſe: It was holden, That the Action did well lye againſt the Aſſignee. Mich. 29 Eliz. in B. R. *Barker* and *Fleetwells* Caſe. *Godbolt.* 69.

5. In an Action of Covenant, the caſe was; Leſſee for 90 years made an Aſſignment of part of the Term, *viz.* 10 years; and the Aſſignee Covenanted to repair, &c. The firſt Leſſee deviſed the Reverſion of the Term, and dyed: The Deviſee brought an Action of Covenant againſt the Aſſignee for 10 years: The Queſtions in the Caſe, were two; 1. If the Deviſee of the Reverſion being but a Termor, were within the Statute of 32 H. 8. of *Conditions*? 2. Whether the Covenant did lye againſt the Aſſignee, without Notice of the Aſſignment of the Reverſion? And for the firſt Point, It was Reſolved, That the Termor in the Reverſion was an Aſſignee, to take benefit of the Condition within the Statute: and ſo it was ſaid, It was Reſolved in the time of the Lord *Dyer* in *Leonards* Caſe; which was, That Leſſee for years Leaſed part of the Term upon Condition, (which is as much as a Covenant) and afterwards granted the Reverſion: and it was Ruled in that caſe, That the Grantee might enter for the Condition broken. And as to the ſecond point, it was Reſolved, That in this caſe, there needed not any Notice, becauſe there is not any penalty in this caſe; as there was in *Cook* 5. Part, in *Mallories* Caſe. And, 3. It was holden in this caſe, That he who is to take advantage of the Statute of 32 H. 8. needs not that he have the whole Reverſion: For that it hath been adjudged, That if the Reverſion be Granted in tail, that ſuch a Grantee ſhould take advantage of the Statute, and ſhould enter for the Condition broken. Paſch. 8 Jac. in C.B. *Briſtow* and *Briſtows* Caſe, *Godbolt.* 161, 162.

6. Note; by *Doddridge* and *Mountague*, Juſtices, If Leſſee for years Covenanteth to repair and ſuſtain the houſes in as good plight as they were at the time of the Leaſe made; and afterwards the Leſſee aſſigneth over his Term, and the Leſſor the Reverſion, that the Aſsignee of the Reverſion ſhall maintain an Action of Covenant for the breach of the Covenant againſt the firſt Leſſee. Hill. 15 Jac. in B. R. *Godbolt.* 271.

7. In an Action of Covenant, the Caſe was; Queen *Elizabeth* by Letters Patents demiſed a Mill to the Teſtator of the Defendant for 30 years, reſerving Rent; and there was theſe words in the Letters Patents, That the Leſſee his Executors and Aſſignees ſhould repair the Mill during the Term: The Leſſee aſsigned over all his Intereſt to J. S. who attained Tenant, and paid the Rent to the Queen; and after, the Queen granted the Reverſion to the Plaintiff and his Wife: the Aſsignee is accepted Tenant; the Mill came to decay for want of Repairation: the Plaintiff, the Aſsignee of the Queen, brought an Action of Covenant againſt the Executor of the firſt Leſſee; and it was

adjudged for the Plaintiff; for theſe Reaſons, Firſt, becauſe by the Statute of 32 H. 8. all the benefit which the Queen had, was transferred to the Grantee of the Reverſion. And, 2. for that it might be parcel of the Conſideration to have the Covenant againſt the Leſſee; for, a Mill is ſuch a thing, which without continual Reparations, will decay. And, 2. It was holden in this caſe, That the Aſsignee had his Election to bring his Action againſt the Leſſee, or againſt the Aſsignee, becauſe it was a Covenant which did run with the Land, Hill. 16 Jac. in B. R. Sir *John Brett* and *Cumberlands* Caſe. *Godbolt.* 277. See 15 Car. *Nortons* Caſe. *Cro.* 1. Part. 418. acc.

8. In Debt by Executors, upon an Obligation, The Condition was, That the Obligor ſhould pay 20 l. to ſuch a perſon or perſons as the Teſtator ſhould by her laſt Will and Teſtament in Writing name and appoint to be paid. The Defendant pleaded, That ſhe did appoint no perſon to whom the ſame ſhould be paid. The Plaintiff replyed, That ſhe made her Will in writing, and thereby made them her Executors. Upon which, the Defendant demurred in Law. It was the clear Opinion of the Court, That the money is not payable unto the Executors; for though where any thing which is Teſtamentary is Covenanted to be done unto a man or his Aſsigns, that is to be done to the Executors, where there is no actual Aſsignee; becauſe the word, *Aſsignee*, is indifferent as well to Aſsignees in Fact, as Aſsignees in Law: yet in this caſe the word muſt neceſſarily be underſtood of an Aſsignee in fact, who ſhall take it to his own uſe, for that the word, *paying*, carrieth property with it. Mich. 11 Jac. in C. B. *Peaſe* and *Stilemans* Caſe, *Heb.* 9.

9. In Debt for Rent againſt an Aſsignee, by an Aſsignee: The Plaintiff declared, That J. S. made a Leaſe to J. D. for 200 years, rendring 31 s. *per annum* at *Annunciation* and *Michaelmas*, by equal portions; and that J. S. afterwards conveyed the Reverſion to him: and for 15 s. 6 d. due at *Annunciation*, he brought his Action. The Defendant pleaded, That J. S. demiſed the Land *prout*; and by the Indenture Covenanted for himſelf, his heirs, and aſsigns, with the Leſſee, his Executors and Aſsigns, That if he be diſturbed for reſpite of homage, or be forced to pay any charge or Iſſues leſt, that he ſhould retain ſo much of his Rent as he ſhould be enforced to pay: and ſhewed, That by force of a Writ iſſuing out of the Exchequer for reſpite of Homage, and Iſſues leſt, ſo much was levied by the Sheriff, which he hath retained of his Rent: Upon which, the Plaintiff did demur. The Queſtion was, whether the Aſsignee of a Term ſhould have remedy upon a Covenant by way of Retainer, againſt the Aſsignee of a Reverſion? And it was holden by the Court, That in this caſe, the Aſsignee ſhould have benefit of this Covenant, both by the Common-Law, and alſo by the Statute of 32 H. 8. for that it was a Covenant which did run with the Land; and at the Common Law he might have taken advantage to detain the Rent reſerved upon the Leaſe for years; for it may be appointed to ceaſe at the Will of the parties. Trin. 4 Car. in B. R. rott. 738. *Bayly* and *Offords* Caſe, *Cro.* 1. Part. 97.

10. In Covenant, The Plaintiff declared, That the Defendant by Indenture did enfeoffe J. S. of ſuch Lands, and Covenanted for him and his heirs, with the Feoffee his heirs and aſsigns, to make further aſſurance upon Requeſt, and becauſe the Defendant did not levy a Fine upon the Plaintiff's requeſt, he brought his Action: The Defendant pleaded a Releaſe from J. S. with whom the firſt Covenant was made, and it was dated after the beginning of the Suit: upon which the Plaintiff demurred: It was agreed by the whole Court, That it was a Covenant which went with the Land, and that the Aſsignee at the Common-Law, or at leaſtwiſe by the Statute ſhould have benefit of it. 2. It was Reſolved, That in regard the breach of the Covenant was in the time of the Aſsignee, and the Action brought by him, and ſo attached in his perſon, that the Covenantee could not releaſe his Action wherein the Aſsignee was intereſſed: Judgment was for the Plaintiff. Trin. 14 Car. in B. R. *Midlemore* and *Goodalls* Caſe. *Cro.* 1. Part. 360.

11. Covenant upon an Indenture of Leaſe for years, whereby the Leſſee Covenanted for him, his Executors, and Adminiſtrators, to leave 15. Acres every year for Paſture, *ſine cultura*; and he granted his eſtate to the Defendant, and the Defendant non *reliquit* 15. *acras ad Paſturam*, but ſuch a day and year ploughed up all. The Defendant demurred, becauſe the Aſsignee not being named, it is not any ſuch Covenant as ſhall bind the Aſsignee. It was holden by the Court, That the Covenant doth bind the Aſsignee, although he be not named, becauſe it is for the benefit of the Eſtate. But to do a Collateral Act, as to build *de novo*, or ſuch like, ſhall not bind him, unleſs named: Adjudged for the Plaintiff. Paſch. 4 Jac. B. R. rott. 607. *Cockſon* and *Cocks* Caſe. *Cro.* 2. Part. 125.

12. Errour was brought to reverſe a Judgment againſt an Aſsignee in a Writ of Covenant; The Caſe was, The Leſſee covenanted to pay yearly during the Term 20 s. to the Church-Wardens of the Church of S. and to repair the houſes, and leave them well repaired at the end of the Term; and becauſe the Aſsignee did not pay the ſaid Rent, nor repair the houſes, the Action was brought; and

Judgment

Judgment being given upon *Nihil dicit*, and intire damages found, It was adjudged for the Plaintiff. Whereupon Errour was brought, and aſsigned for Errour, That the Aſsignee is not chargeable with this Covenant for the payment of an annual ſum; but it is a meer collateral Covenant: and alſo it is not ſhewed for what time the ſum was behind: And the Opinion of the Court was, That for theſe cauſes, the Declaration was not good: and for that the damages were alſo intire, the Judgment was reverſed. *Mayho* and *Burckbarts* Caſe, Mich. 15 Jac. in B. R. *Cro.* 2. Part. 439.

13. In Debt for Rent, the Caſe was; *A.* and *B.* were Joynt-Leſſees for years rendring Rent. *A.* aſsigned over his part to *C.* one of the Defendants; the other made his Will, and made *D.* the other Defendant his Executor, and dyed. The Rent was behind after the Aſsignment; and after the death of the Leſſee, an Action was brought againſt *C.* and *D.* the Executor; in the *Debet* and *Detinet* for the Rent. It was urged, That the Actions ſhould have been brought ſeverally, the Contract being determined; and *Walkers* Caſe, *Cook.* 3. Part, was cited to that purpoſe, becauſe the Privity of the Contract was determined by the death of the Leſſee, and they have ſeveral and divided poſſeſsions. But the Opinion of all the Juſtices was, That the Action was well brought; and the ſeverance of the Land, ſhall not make a ſeverance of the Action; for thereby would follow great inconveniencies by the ſeveral Aſsignments of under-Tenants amongſt themſelves, of which the Leſſor might not have notice: and alſo the Action is always grounded upon the demiſe, which continues one and the ſame, notwithſtanding the alteration made by the Tenants. Judgment was given for the Plaintiff. Trin. 14 Jac. the Bayliffs of *Ipſwich* and *Martin* and *Parkers* Caſe. *Bolſtrod.* 3. Part, 211.

14. *A.* Leaſed Lands to *B.* rendring Rent; the Leſſee aſsigned over his whole Term. *A.* brought an Action of Debt againſt *B.* for the Rent behind after the Aſsignment. It was Reſolved in this caſe, That there are 3. marks of privities; 1. Privity of Eſtate onely; as where the Leſſor giveth over the Reverſion; or if the Reverſion Eſcheat, between the Grantee or Lord by Eſcheat, or the Leſſee, there is privity in Eſtate onely; ſo between the Leſſor and Aſsignee. 2. Of Contract only, which is a perſonal privity, and extends onely to the perſon of the Leſſor, and to the perſon of the Leſſee: as in the principal caſe, after the Aſsignment, this privity doth remain betwixt them, although that the privity of Eſtate be removed, becauſe that the Leſſee by his own act cannot prevent the Leſſor of his remedy, which the Leſſor hath againſt him by his own Contract: And, 2. The Leſſee might grant his Eſtate to a poor man, who for want, or malice, would ſuffer the Land to lye freſh, and ſo the Leſſor ſhould be without remedy by diſtreſs, or action of debt, which ſhould be inconvenient. 3. Of Eſtate and Contract together, as betwixt the Leſſor and the Leſſee himſelf. In the principal caſe it was Reſolved, That the Action was maintainable, in reſpect of the privity of Contract betwixt them remaining, 29 Eliz. in B. R. *Cook* 3. Part. *Walkers* Caſe, 22, 23.

15. Debt was brought againſt two Adminiſtrators; The Defendants pleaded, That before Rent was behind, one of them had aſsigned all his Intereſt to J. S. of which the Plaintiff had Notice, and accepted the Rent by the hands of the Aſsignee due after the Aſsignment, and before the Rent demanded was due: upon which the Plaintiff demurred in Law. And it was adjudged againſt the Plaintiff, becauſe the privity of the Contract was determined by the death of the Leſſee; and therefore after the Aſsignment made by the Adminiſtrator, debt doth not lye for rent due after the Aſsignment, Mich. 41 Eliz. in C. B. *Marrow* and *Lupins* Caſe. See *Cook.* 3. Part. 23, 24. acc.

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3. *Where the Aſsignee of a Reverſion, upon a Leaſe for years ſhall have the Rent and Debt for it; where not: What Aſsignee of a Reverſion ſhall enter for a Condition broken, what not: And where Waſte lyeth by an Aſsignee of a Reverſion, without Privity or Attornement.*

1. THe Queen made a Leaſe for years, rendring rent payable at the Exchequer, *ſeu ad manus Baliverum ſeu Receptorum*, with Condition, to be void for non payment of the Rent: and afterwards the Queen granted over the Reverſion. It was Reſolved in this Caſe, That the Patentee who was Aſsignee of the Queen, ſhould not have an Action of debt for the Rent; and therein the Opinion in *Kedwellyes* Caſe, *Plow. Com.* 70. That he in the Reverſion might enter for non payment of the Rent, without any demand of the Rent, was denyed for Law: But it was Reſolved in that caſe, That the Queen might take advantage of the Condition for non payment of the Rent, without a demand of the Rent: For the Law doth appoint the Subject to attend upon the King, and the Subject ought to do the firſt act, *ſcil.* either

to pay, or tender the Rent; but that prerogative is perſonal onely; and doth not extend to the Grantee of the Queens Reverſion: but the Patentee or Aſſignee ought to deliver the Rent, if he will take advantage of the Condition. Paſch. 38 Eliz. in B. R. *Burroughs* Caſe. 72.

2. The Preſident, and Schollers of *Corpus Chriſti* Colledg in *Oxford*, made a Leaſe for years. Provided, That the Leſſee nor his Aſſigns, ſhould not alien to any perſon or perſons without ſpeciall Licence of the Leſſors: Afterwards by their Deed, they give Licence to the Leſſee to alien, or demiſe, the Land to any perſon or perſons. The Leſſee aſſigned his Term to J. S. who by his Will deviſed the ſame to his ſon; the Leſſors enter for the Condition broken. It was adjudged in this caſe, That by the alienation by Licence to J. S. the Condition was deſtroyed, ſo as no alienation afterwards could give cauſe for the Leſſors to enter: For the Leſſors could not diſpenſe with the Condition in part; and therefore thereby they had diſpenced with all alienations which were after to be made. Hill. 45 Eliz. in B.R. *Cook* 4. Part. 120. *Damports* Caſe.

3. A man, by Deed Indented, made a Leaſe for years of 3. Mannors, *viz.* *A.* *B.* and *C.* rendring Rent for *A.* 6 l. for *B.* 5 l. for *C.* 10 l. with Condition to re-enter in all the three Mannors for default of payment of the ſaid Rents, or any of them. Afterwards the Leſſor bargained and ſold the Reverſion of one houſe, and certain Acres of Lands, parcel of the Mannor of *A*, to J. S. and his heirs; and afterwards he bargained and ſold the reſidue for other uſes to another and his heirs. It was adjudged in this caſe, That the ſecond Bargainee could not enter for the Condition broken; becauſe the Condition being intire, could not be apportioned by the Act of the parties; but the ſeverance of part from the Reverſion had deſtroyed the whole. See 14 Eliz. in C.B. vouch. acc. in *Cook.* 4. Part. *Damports* Caſe.

4. Abbot and Covent made a Leaſe for years, rendring yearly, during the Term, to the Abbot and Covent, or to his Succeſſours, 5 l. rent, at two Feaſts, upon Condition, That if the Rent were behind, to re-enter. The Abbot ſurrendred his Lands to the King; which Lands by mean Conveyances came to J. S. who levied a Fine of the Reverſion to *B*; *B.* before Attornment granted by Deed the Reverſion to his ſon and heir, to whom the Termor attorned; the rent was behind, and the ſon in Reverſion entred upon the Lands. In this caſe two Points were Reſolved, 1. That *B.* the Grantee or Aſſignee by the Fine ſhould not take advantage of the Condition without attornment, by the Statute of 32 H. 8. of *Conditions*; for that when a Statute ſpeaks of Aſſignees, It ſhall be intended ſuch a compleat Aſſignee, which hath all the Incidents requiſite to ſuch an Aſſignee: and the Conuſee of a Fine before Attornment ſhall not take advantage of a Condition, by the Statute of 32 H. 8. as it was adjudged in *Dukes* Caſe. But, 2. It was Reſolved in this caſe, which was, his Grantee ſhould take advantage of the Condition, although his Father could not, becauſe he had an expreſs Attornment, and was a compleat Grantee and Aſſignee within the ſaid Statute. Paſch. 43 Eliz. in B. R. *Cook* 5. Part. *Mallories* Caſe.

5. In Covenant; the Caſe was, *A.* by Indenture demiſed Lands to *B.* for 7. years; *B.* by the ſame Indenture did covenant with *A.* his heirs and aſſigns, That he, his Executors and Adminiſtrators ſhould pay to *A.* and his Aſſigns 75 l. *per annum*: Afterwards *A.* demiſed the ſame Land to J. S. for life; who demiſed the Reverſion to J. D. for 40 years, if he ſo long lived; the Tenant attorned, and J. D. for Rent due brought an Action of Covenant: It was Reſolved, That this was a good reſervation of Rent, being by Indenture: and the words of the Indenture ſhall be accounted to be his, who may not properly ſpeak them: as it was adjudged in *Whitchett* and *Fox's* Caſe, where a man made a Leaſe for 99 years, rendring Rent; and the Leſſee Covenanted by the ſame Deed with the Leſſor, that he would not alien without his aſſent, without pain of forfeiture, and after he aliened: It was in that caſe holden, It was a Condition, although the Plaintiff did covenant; for being by Indenture, they ſhall be the words of them both. 2. In the principal caſe it was Reſolved, That the Aſſignee for 40 years might have Covenant; for it is for payment of Rent: and if the Leſſee Covenants to do any thing upon the Land, there Covenant will lye for the Aſſignee, both by the Common-Law, and alſo by the Statute of 32 H. 8. of *Conditions*, Mich. 8 Jac. in B.R. *Dennis* and *Hannings* Caſe, *Owen* 151.

6. Husband and Wife were ſeiſed of Lands to them and the Heirs of the husband, and lett the Lands to the Defendant, who covenanted with them and either of them, and with the heirs and aſſigns of the husband, to repair; the husband and wife conveyed the Reverſion to the Plaintiff, who brought an Action of Covenant, for not repairing as Aſſignee to the husband, and did not averr the wife to be dead: It was inſiſted upon, That the Plaintiff having Eſtate as well from the Wife (who had an Eſtate for life) as from him who had the Fee, the Action ſhould have been brought as Aſſignee to both, and not as Aſſignee to him who had the Inheritance; unleſs the wife had been averred to be dead. But it was holden by the Court, That the Action was well brought by the Aſſignee of him

him who had the Inheritance, and ſo no prejudice to any, and that the eſtate for life being transferred with the Fee, was thereby drowned, ſo as he being Aſſignee of the whole Eſtate, it was good enough; adjudged for the Plaintiff. *Paſc.* 8. Car. B. R. rott. 419. *Major* and *Talbotts* Caſe. *Cro.* 1. part. 207.

Attachment; *and* Attachment *upon a Prohibition.*

1. *Where it lyeth; and for whom, and againſt whom, and for what Cauſe, and to whom it ſhall be directed; when to the Sheriff, when to the Party, and when to the Judge, in an Attachment upon a Prohibition.*

1. IF a Writ of Right comes to the Lord of a Mannor, or to his Bayliffs to hold a Court, and to do Right unto the Demandant, according to the Cuſtome of the Mannor, and the Lord will not hold his Court; the Defendant may ſue forth a Writ directed to the Lord out of the Chancery: commanding him to hold his Court, and if he refuſe to do it, the Demandant may have an Attachment againſt the Lord, returnable into the Common-Pleas, or Kings Bench, and thereupon he ſhall recover his damages. And if the Demandant be delayed of Juſtice in the Lords Court, he may Sue forth a Writ to the Sheriff, commanding him to take with him four diſcreet Knights; to go to the Court of the Lord, to ſee that right be done to the party; And if the Sheriff refuſeth to do it, after an *Alias* and a *Pluries*; An Attachment will lye againſt the Sheriff. And ſo if the Plea be in the County Court, and the Sheriff doth delay to proceed therein, the Demandant may ſue forth a Writ directed to the Sheriff, to proceed in the plea to Judgment, and to do right, and upon that have an *Alias Pluries*, and Attachment againſt the Sheriff if he will not do accordingly. *Fitz. Nat. Br.* 12.

2 By the Statue of *Articuli Cleri.* chap. 6. No diſtreſſe is to be taken in the Glebe Land of the Parſon, by the Sheriff or other Officer. And by the Statute of *Articuli ſuper Chartas.* chap. 12. The Sheriff ought not to make any exceſſive diſtreſſe for the Kings Debt, nor diſtrein the Plough, or Chattel, if he can find any other, and if the party will find ſureties to pay the Kings Debt before the Return of the Writ, the Sheriff is to deliver back the Chattells. In the firſt Caſe; If the Parſon be diſtreyned by the Sheriff in his Glebe-Lands; or if in the ſecond Caſe, the Sheriff doth otherwiſe then is expreſſed in the Statute, the party grieved may have an Attachment againſt the Sheriff. *Fitz. Nat. Br.*

3 If the Tenants, or any of them, who hold of a Mannor in Ancient demeſne, be diſtreined to do their Lord other ſervices or Cuſtomes, then they or their Anceſtors have uſed to do, they may Sue a Writ of *Monſtraverunt* directed to the Lord, Commanding him not to diſtrein his Tenants for other Cuſtomes or Services; and if the Lord will not do it, and ſuffer the Tenants to be in peace: Then the Sheriff may charge the Lord, that he do not dimand, nor reſtrain them for other ſervices, then they ought to do, and in ſuch Caſe, if the Lord do yet diſtrain them, the Sheriff may take the power of the County; and command the Neighbours next to the Mannor that they do reſcous in ſuch Caſe. And if after ſuch Writ directed to the Sheriff, the Lord doth yet diſtrein them, An Attachment ſhall be Awarded againſt the Lord Returnable into the Common-Pleas, or Kings-Bench, for the Lord to Anſwer them for this his Contempt. But in ſuch Attachment, the Tenants muſt be named by their proper names. *Plow.* Com. 129. acc. See 40 E. 3. 44. acc.

4 In Debt upon a ſingle Bill, the Defendant pleaded payment; and Judgment was given for the Plaintiff, and the Defendant was taken in Execution. And afterwards he brought an *Audita Querela*, and upon a ſingle Averment of payment by him, he was bayled out of Execution: The Plaintiff who had the Judgment, moved the Court to have remedy in this Caſe, for that ſuch a Plea of payment againſt a ſingle Bill, was no plea, but againſt Law: The Court was of opinion that no *Audita Querela* did lye in this Caſe. And the Court being informed that this baylment being out of Court, The Writ of *Audita Querela* ſhould be quaſhed, and the bail ſhould be taken off, and diſcharged, and the Defendant was taken in Execution again by the Rule of the Court, he being then preſent in Court; and an Attachment was Granted by the Court againſt the two Attornies who did proſecute this *Audita Querela*, and the Bailment for the Defendant. *Tr.* 9. Jac. in B. R. *Torry* and *Addys* Caſe. *Bolſtr.* 1. part. 140.

5 In an *Ejectione firme* to be tryed at the Bar, to delay, and put off the tryall; Infancy was Aſſigned and pleaded, but it was found by proof, by Oath,

Oath, and by Examination of the Church-Book, that the party was of the age of 63 years, and ſo it appeared to the Court, that he was of full age, and that this was but a ſhift. And an Attachment was granted againſt him by the Court. *Tr.* 9. Jac. in B. R. *Lowe* and *Thornton's* Caſe. *Bolſtr.* 2. part. 67.

6 In a *Scire facias*, the Caſe was, A. had Judgment in Debt for 200 l. againſt B. C. the Bayl of B. payes part of the Debt, 65 l. being unable to ſatisfy the whole Judgment. A. upon this payment of 65 l. makes a Releaſe to C. of the whole Debt, Judgment and Execution, and acknowledges ſatisfaction and diſcharge of the whole Debt of 200 l. C. dyes. Afterwards A. ſues forth Execution again, upon the firſt Judgment againſt B. and ſo had B. the principall, again in Execution; The Court being acquainted with this; and B. the Principal having no remedy by Law to help himſelf, but by an *Audita Querela*; and the Releaſe made to C. the Bayl, being no wayes available to him for his remedy in this Caſe, being ſo full of Equity, granted an Attachment againſt A. who appeared, and notwithſtanding his Releaſe under his hand and Seal, ſaid he did never intend this Releaſe to be a full diſcharge of the whole Judgment; But the whole Court agreed that it was a good diſcharge of the whole; And that if the Bayl be once taken in Execution, he ſhall never after have execution for any part againſt the principall; and ſo if he have the Principall once in Execution, he ſhall never after reſort again to the Bayl; And therefore in this Caſe becauſe he ſued forth a *Scire facias* againſt the Principall after the death of the Bayl, and after his Releaſe to him, and after ſatisfaction acknowledged; the whole Court was clear of Opinion, That the proceedings were very bad, and undue, and done in contempt of the Court: and an Attachment was awarded againſt A. *Paſc.* 11. Jac. in B. R. *Higgins* and *Somerlands* Caſe. *Bolſtr.* 2. part 68,

8 Upon an *Affidavit* made, That A. had Arreſted B. after a Verdict found for A. againſt B. to the intent that he may have him in cuſtody when the Judgment is entred againſt him, and for no other Cauſe, the Court held this to be an irregular courſe, and ought not to be; and therefore the Court Ruled; That an Attachment ſhould be Awarded againſt A. if he would not diſcharge B. of the Arreſt and Impriſonment; and in that Caſe; It was agreed, That if one take out a *Latitat.* againſt another, and hath no cauſe of Action againſt him; the party may have an Action upon the Caſe for it. *Poſc.* 1649. *Lamb* and *Duffy's* Caſe. *Styles* 211.

8 A. Arreſted P. by *Latitat*, taken out of the Upper Bench, in the County of *Wilts*, and thence carried him to the Town of *Malborow*, and there Arreſted him again by a Serjeant of that Town by a Writ out of that Corporation, and the Plaintiff proceeded there againſt him upon that Writ, and not upon the *Latitat*, upon which he was firſt Arreſted; It was holden by the Court to be a Contempt to the Court of Upper Bench; and thereupon an Attachment was granted againſt A. and alſo a *Habeas Corpus* to have the Body of B. *cum cauſa.* *M.* 1650. in B. R. *Brian* and *Stones* Caſe. *Styles* 239.

9 The Court of Upper Bench Ruled the poſſeſſion of certain Lands to the Plaintiff, the Defendant contrary to the Rule of the Court, diſturbed the Defendant to have the poſſeſſion, and thereupon the Plaintiff moved for an Attachment againſt the Defendant: It was holden by the Court, that for onely diſturbing his poſſeſſion, no Attachment is to be granted, but if he be put out of poſſeſſion, or if the parties Cattell were upon the Land, if they be driven off the Land, this is an Ouſting of the party of his poſſeſſion, for which an Attachment can be granted. *Tr.* 1651. *Smith* and the Earl of *Dorſetts* Caſe. *Styles* 277.

10 An Action of Waſt was brought, And an Eſtrepment was Awarded to the Sheriff to prohibit to make waſte, and the Sheriff returned the Writ executed: An *Affidavit* was made to the Court, that ſince the *Eſtrepment*, the Defendant had cut down certain Willowes, which grew upon the Bank of the River, by which the Bank fell down, and a Meadow was overflowed; and prayed an Attachment againſt the Defendant; The opinion of the Court was, that this cutting down of Willowes was waſte, becauſe they ſupport the Bank, as if they grew near a houſe; But the Court was of Opinion, Although this was waſte in Law; yet becauſe this appears only by an *Affidavit*, which is onely the Collection of the party, and doth not appear by pleading, nor by the Return of the Sheriff, that an Attachment ſhould not be Awarded in this Caſe. *Tr.* 19. Jac. in C. B. Sir *George Strippings* Caſe. *Winch.* 15, 16.

11 It was moved to the Court, for an Attachment againſt the Defendant, upon *Affidavit*, becauſe he had ejected one out of poſſeſſion, that was put into poſſeſſion by an *Habere facias poſſeſſionem*, and that he had Impriſoned the party ſo put out of poſſeſſion, and others; but becauſe it was ſeiſed by the other ſide; That the party came into the Land by vertue of an *Eigne* Judgment, and an Extent upon it, the Court would make no Rule in the Caſe. H. 1651. B. R. *Foutane* and *Johnſon's* Caſe. *Styles* 318.

12 Upon a Rule made by the Court, to ſhew Cauſe why an Attachment ſhould not be granted againſt an Attorney of the Court, and the Mayor of

of *Newberry* for iſſuing out of Execution upon a Judgment given there after a Writ of Error brought, and allowed: It was ſhewed, that the Mayor was informed by Councel, that the Record was not removed thence, becauſe the Writ of Errour was not good; and this was allowed for a good cauſe for diſcharge of the Attachment. *Hill.* 1651. B. R. The Mayor of *Newberyes* Caſe. *Styles* 321.

13 A Rule was read on the Crowns ſide in the Upper Bench, for *Staples* a Juſtice of Peace to ſhew cauſe why an Attachment ſhould not be granted againſt him for proceeding upon an Endictment of Forcible Entry, and Fining the party, after a *Certiorari* was delivered to him to remove the Endictment: and Sir *Thomas Styles*, and Sir *John Silueys* Caſe. 8 Car. was vouched where an Attachment was granted in the like Caſe. It was ſaid by *Rolls* Chief Juſtice, That upon view of the force, the Juſtice of Peace may ſet a Fine upon the party, and refuſe to admit the party to a Traverſe, or his part, at his pleaſure; but it was not ſo in this caſe. and he ſaid that 15 Car. it was Reſolved, That if a *Certiorari* be brought to the Seſſions to remove an Endictment of Forcible Entry, preferred againſt divers perſons, if ſome of them come in and find Sureties for the damages, it is good for them all to remove the Endictment for the reſt, elſe it would be miſchievous for them to find the Sureties. The Rule was, That *Staples* ſhould be examined upon Interrogatives, and make Return of the *Certiorari*. and that he reſtore the Fine to the party. *Mich.* 1651. B. R. *Staples's* Caſe. *Styles* 359, 360.

14 One who was attending the Court to give Teſtimony as a Witneſſe in a Cauſe there to be heard, was Arreſted; a *Superſedeas* was granted to diſcharge him of the Arreſt, and an Attachment granted againſt the parties who Arreſted him for this contempt done to the Court. M. 1653. B. R. *Cullins* Caſe. *Styles* 395.

15 For a Prohibition to the Prerogative Court, the Caſe was, A. and B. being in Sute in the Prerogative Court, for Letters of Adminiſtration of the goods and Chattells of J. S. who died inteſtate, they agreed by conſent. That A. putting in Bond to perform the Decree of the Prerogative Court, ſhould have the Adminiſtration granted to him, Whereupon A. enters into Bond, and had Adminiſtration. Afterwards the Court made a Decree, That he ſhould diſtribute the Eſtate in ſuch and ſuch a manner; and for not performing this Decree, B. proceeded againſt him in the Prerogative Court, by way of Attachment: whereupon A. prayed a Prohibition. In this Caſe; Two points were Reſolved. 1. That the Prerogative Court could not grant an Attachment for not performing the Decree, although it was made by Conſent. 2. It was Reſolved that they could not, Order, or Decree ſuch a Diſtribution; and their giving of Adminiſtration upon the Bond given, doth abridge them from making of any Order, or Decree, to diſtribute the Eſtate; and for the confirmation of that point, two Preſidents were vouched: one 13 Jac. which, ſee *Hob.* 83. *Slawnyes* caſe Where Sir *John Bennett*, the Judge of the Prerogative, took Bond of *Slawney* upon granting of Adminiſtration, that the Adminiſtrator ſhould diſpoſe of the ſurpluſage of the goods after the Debts and Legacies paid according to the direction of that Court. In that Caſe it was reſolved, That whereas the Statute of 21 H. 8. appoints the Adminiſtration to be granted; yet it doth not give this vaſt power to the Ordinary, to give the Surpluſage where he will. The other Preſident was, *Tr.* 15. Jac. in the Common-Pleas, *Tooker* and *Loanes* Caſe. which ſee *Hob.* 191. where the Caſe was; That A. had iſſue the Plaintiffs, and *John* and *Thomas*, *Thomas* had iſſue nine Children, and *John* three, and were dead, the Children being Infants, The Adminiſtrators the Plaintiffs, upon their Accompts before Sir *John Bennet*, Judge of the Prerogative by his mediation, and not Judicially, were contented to make a Diſtribution of the Teſtators eſtate, *per Capita*, not *per Stipites*, *at è converſo*. *Loane* the Defendant being Curator *ad Lites* for the Infants, appealed to the Delegates; and a Prohibition in that Caſe was granted, becauſe the ordinary hath no power to make diſtribution of the Surpluſage nor to take Bond for it by the true meaning of the Statute of 21 H. 8. which intends a benefit to the Adminiſtrator, and not an unprofitable burthen. 1 *Hill.* 1654. in B. R. *Cooke* and *Chamber's* Caſe. *Styles.* 439.

16 Four perſons were ſerved with a *Subpœna* out of the Court of Upper Bench, to appear as Witneſſes for the Protector at a Tryall, upon an Endictment of Perjury, who did not appear, whereby the Tryall could not go on; the Rule of the Court was That an Attachment ſhould iſſue forth againſt them. Paſc. 1655. B. R. *Styles* 445.

17 A Rule was made by the Court, to ſhew Cauſe why an Attachment ſhould not iſſue forth againſt Commiſſioners of Sewers in *Suffolk* for ſetting a Fine upon one for not obeying their Orders. After a *certiorari* was delivered unto them to remove the Orders, made againſt the party; It was ſhewed for Cauſe; That the Fine ſet, was for diſobeying a new Order of theirs made againſt the party, after a *Certiorari* returned, and not for diſobeying the Orders, removed by the *Certiorari*, and ſo it was no contempt to the Court. The Opinion of *Rolls* Chief Juſtice was, That the *Certiorari* doth not remove the Cõmiſſion of Sewers, and therefore they may proceed upon the Cõmiſſion notwithſtanding

ſtanding the *Certiorari*; The Rule for the Attachment was diſcharged. *P.* 1655. in B. R. The Lord Protector and *Bruſters* Caſe. *Styles* 445.

18 In an Attachment upon a Prohibition; the Caſe was; The Defendant Libelled in the Spiritual Court for Tythes in kind in the year 1610. A *modus decimandi* was pleaded, and thereupon a Prohibition was granted; Afterwards he Libelled there for Tythes in kind, in the year 1611. It was the clear Opinion of the whole Court, that if he Libelled the ſecond time, for thoſe Tythes in ſpecie, for which before he was prohibited, or if he thus Sueth again, an Attachment lyeth: But for other Tythes due for another year, he is not prohibited, but onely to Sue again for the ſame thing; but for any other Tythes, he is left at liberty to ſue for them; and ſo the Rule of the Court was, That if the Libell be for the ſame Tythes in the former prohibition, that an Attachment be granted for this his contempt. And it was alſo ſaid in this Caſe, That the party alſo might have his ſpecial Action upon the Caſe. And *Cook* Chief Juſtice ſaid, That he had ſeen a Record *in Temp.* Ed. 3. That if a Court do proceed contrary to a Prohibition, that not onely an Attachment ſhall be granted for the King, but a ſpecial Action upon the Caſe for the party, for this proſecution thus againſt him. For *ubicunque eſt injuria, ibi damnum ſequitur*, to the party, for which he ſhall have his Action upon the Caſe. And ſee *Fitz. Nat. Br.* 92 E. An Action of Treſpaſſe upon the Caſe brought by one having ſerved one with a Prohibition, and delivered the ſame to him, that he, *illud Breve in Luto projecit et pedibus ſuis conculcavit*, and contrary to it did proſecute his ſute in the ſpiritual Court; in contempt of the King, and to the damage of the party. M. 12. Jac. *Downs* and *Hakesbyes* Caſe. *Bolſtr.* 2. part 289.

19 If the Biſhop holdeth plea of an Advowſon or of the fourth part, or of the third part thereof, the party ſhall have a Writ of Prohibition directed to the Biſhop himſelf; and the words of the Writ ſhall be, We forbid thee that thou follow not the plea in the Spiritual Court of the Advowſon of &c. Whereupon C. complaineth that thou draweſt him into the Court, &c. and if the Biſhop do follow it after the Writ cometh to him, an Attachment lyeth againſt the Biſhop. See *Regiſtr.* 33. 34. And ſee *Pryn, Jus Patronatus*, 23. In ſuch Caſe the Biſhop ſhall be fined for his contempt, and his temporalties ſeized into the Kings hands.

20 If the Biſhop cite or diſtrein any one to appear before him, to take an Oath at the Will of the Biſhop, againſt the will of him who is ſummoned or cited. An Attachment lyeth againſt the Biſhop, *Ex quo ſequitur*, That all thoſe generall citations which Biſhops make to cite men to appear before them *pro ſalute Animæ*, without expreſſing any cauſe, are againſt Law; and the party may have an Attachment againſt the Biſhop for the ſame, and may alſo in ſuch caſe, ſue a Prohibition; and if the Biſhop do expreſſe any cauſe in the Citation, it ought to be for ſome Matrimoniall, or Teſtamentary Cauſe. *Fitz. Nat. Br.* 41. acc.

21 A man granted Lands, parcell of his Manor to a Parſon in Fee, to be quit of Tythes by Deed, and the Parſon with the aſſent of the Ordinary, grants to him that he ſhall be quit of Tythes of his Manor, for that parcel of Land; If he or his Aſſigns be afterwards impleaded in the Spiritual Court, for the Tythes of his Mannor, or any parcell of the ſame, he and his Aſſigns may have a Prohibition upon that Deed; and if the Deed were made before time of Memory, and the party had ſo continued to be quitted of Tythes of his Mannor, the ſame is a reall compoſition, and ſhall bind the Parſon and his Succeſſors, and if the Parſon afterwards ſue for Tythes in kind in the Spiritual Court, a Prohibition will lye againſt him; and if notwithſtanding ſuch prohibition, he doth proceed in that Court, An Attachment doth lye againſt the Parſon. See Mich. 16. Jac. in C. B. *Cowper* and *Andrews* Caſe. *Hob.* 41, 42. acc.

See more where Attachment lyeth upon a Prohibition, in Title Prohibition.

Where an Attachment lyeth of Debts, or goods, by Cuſtome, where not. And where ſuch Attachment ſhall be good, Where not?

1. A Recovered againſt J. S. 60 l. in an Action upon the Caſe, upon a Promiſe. B. affirmed a Plaint of Debt in *London* againſt A. and afterwards Attached the 60 l. in the hands of J. S. and had execution according to the Cuſtome of *London*; A. ſued a *Scire facias* againſt J. S. who appeared, and pleaded the ſaid Execution by Attachment, upon which A did demur in Law; In that Caſe it was adjudged that it was no plea; for that a Duty which accrueth by matter of Record cannot be Attached by the Cuſtome of *London*; and although in the Caſe, The Cuſtome of *London* was layed generally in *aliquo debito*, and damages recovered are *quoddam debitum*; yet the Opinion of the Court was clear, That Judgments given in the Kings Courts, ought not, nor can by ſuch particular Cuſtomes be defeated and avoided;

ded: And the Court ſaid, It was ſo lately adjudged in a Weſtern Caſe, Damages were recovered, and the Sheriff by vertue of a *Fieri facias* levyed the mony, which one to whom the Plaintiff was endebted, did Attach by the Cuſtome, in the hands of the Sheriff, and it was adjudged that the Attachment was not good; for that the Cuſtome of Attachment cannot reach upon a thing of ſo high a nature as a Record is. Tr. 29. Eliz. in B. R. *Floud* and Sir *John Perrots* Caſe. *Leon.* 29.

2 B. of *London* was endebted to one A. of the ſame City; B. delivered goods to J. S. Carrier of *Exeter*, who uſed to carry for him certain Wares to be carried to *Exeter* to certain Tradeſmen there, the ſaid goods to be delivered to them, &c. And ſo the goods and Wares being in the poſſeſſion of the Carrier, A. cauſed them to be Attached in the hands of the Carrier, for the Debt of the ſaid B. the ſaid Carrier who was the Defendant in the Action, being then priviledged in the Common-Pleas by reaſon of an Action there depending; It was the clear Opinion of the whole Court, That the ſaid Attachment ought to be diſſolved; For the Carryer, for the reaſon aforeſaid, is priviledged in his perſon, and his goods, not onely in his own goods whereof the property belongs to him, but alſo in ſuch goods in his poſſeſſion, for which he is anſwerable to others: and ſo it was adjudged. *Mich.* 32 Eliz. in C. B. *Edwards* and *Tidbury* Caſe. *Leon.* 189.

3 A. did recover in Debt againſt B. whereupon a *Scire facias* iſſued to the Sheriff of *Devon*. The Defendant ſeeing the Writ of Execution in the Sheriffs hands, ſaid to him, that he would pay the debt recovered at *Exeter* ſuch a day to ſatisfy the Execution, at which day the Defendant paid the mony accordingly; and preſently came an Officer of the City of *Exeter*, and attached the Mony in the Sheriffs hands, ſuppoſing the ſaid A. to be endebted to one C. in whoſe name he made the attachment. A *Certiorari* was prayed on the behalf of A. to remove the Attachment; It was in this caſe holden by the whole Court, That the Attachment was void, and the *Certiorari* was granted. *Wray*. Chief Juſtice ſaid, If it can be proved by Oath, that the Defendant did procure, or was aſſenting to the ſaid Attachment, proceſſe of contempt ſhould iſſue forth againſt him; And the Opinion of the Court further was, That the Sheriff ought to anſwer the Plaintiff the monies which were once in his hands, by force of the Execution, and it was his folly to ſuffer the mony to be taken from him by force: And the Sheriff had his remedy by Action of Treſpaſſe againſt the party, for the Attachment was void, but the Sheriff at the Return of the Writ ought to anſwer the mony. M. 19 Eliz. in B. R. *Leon.* 246.

4 A. affirmed a Plaint in the Court of the City of *Exeter* againſt B. for 20 l. and upon *Nihil* returned, it was ſurmiſed, That J. S. had certain monies in his hands due to B. and according to the Cuſtome of the ſaid City, the ſaid monies were attached in the hands of the ſaid J. S. who appeared upon the Attachment, and pleaded, That he owed nothing to B. upon which there was a demurrer, and Judgment given againſt J. S. becauſe he ought to have pleaded not onely *Nihil debet*, but further, That he had not any goods of B. in his hands: whereupon J. S. brought Errour, and aſſigned the Error in the principal matter, upon which it was demurred, and Judgment was given againſt the Plaintiff, becauſe the Plea of J. S. (That he owed him nothing) is a good Plea, for if there be not a Debt, it is not Attachable upon ſuch Attachment, The Judgment given at *Exeter* was reverſed. Tr. 31 Eliz. in B. R. *Mitchel* and *Hores* Caſe. *Leon.* 321.

5 A Citizen of *London* was endicted to a Forreiner upon an Obligation, and the Forreiner was endebted to him upon a ſimple Contract; The Forreiner dyed, the Citizen upon Oath that his Debt was a due debt, had an Action againſt the Executor of the Forreiner, and upon four defaults recorded, he Attached the Debt in his own hands, upon ſurety found, that if the Executors, within a year and a day, could not diſprove the debt, nor reverſe the Judgment, that he ſhould be diſcharged of ſo much of the Debt which he owed upon the Obligation. It was demurred in Law; If this cuſtome did extend as well to Forreiners as to Citizens; which was not reſolved. But many exceptions were againſt the Plea; one, becauſe it was alledged, That the cuſtome was, that the Debt ought to be affirmed by the Oath of the party *in Curia Guildhall*; and in the plea, it was pleaded to be done *in Curia Vic. in computatorio, ubi querela primo affirmatur et levat. fuit, et ubi judicium datum fuit*; which Judgment alſo was, that the Plaintiff ſhould have Judgment of the Debt attached in his own hands, without any Judgment, *quod ipſe recuperet debitum*, &c. Afterwards upon mediation, the Caſe was agreed. Hill. 3. Eliz. *Dyer.* 199. *Harwood* and *Lees* Caſe.

6 A. was endebted to B. in 100 l. and W. was endebted to A. in 12 l. by Bill. A. dyed Inteſtate, the Ordinary granted Adminiſtration to J. S. After which, B. affirmed a Plaint in *London* againſt the Ordinary for the 100 l. and upon his ſuggeſtion and default of the Ordinary, (being returned *Nihil habet*) the 12 l. was attached in the hands of W. and after the 4th default of the Ordinary, being re-

turned, *Non eſt inventus*; the Plaintiff recovered againſt W. Afterward, W. brought an Action of Debt in the Common-Pleas, as Adminiſtrator of A. for the 12 l. In bar of which, the Cuſtome of forrein Attachment in *London* was pleaded, upon which W. the Plaintiff demurred in Law: and becauſe it appeared by the plea above-ſaid, That no Action of debt did lye in the Caſe againſt the Ordinary after the Adminiſtration granted, nor any Action for the Ordinary againſt W. the debtor of the Inteſtate: the Plaintiff had Judgment to recover, notwithſtanding the pleading of the Attachment. Hill. 8 Eliz. *Dyer*. 247. *Toſts* Caſe.

7 In *Detinue* of two Gownes, the defandant ſaid, That a Plaint was affirmed in the Sheriffs Court againſt the Plaintiff by the Defendant, and that Attachment was of the two Gowns, being the Plaintiffs goods in the hands of the Defendant within the City, and becauſe the Plaintiff made four defaults which were recorded, the two Gowns were apprized at 22 s. by the Oath of two men, and then delivered to the now Defendant, at the price of 22 s. by pledge to render the two Gowns, or the price, if the Plaintiff did diſprove the Debt within one year after the Apprizement. The Plaintiff pleaded, there was no ſuch Record before the Sheriff; In that Caſe it was holden, That becauſe all the Records before the Mayor, Aldermen, and Sheriffs had, are *Ore tenus*; a Writ was directed to the Sheriff to certify, if there was any ſuch Record, or not. See Book *Entries* 207.

Attaint.

Where it lyeth, where not? and againſt whom it lyeth; and whom not? And What Pleas ſhall be good in barr of Attaint, What not?

1. A Writ of Attaint lyeth where falſe Verdict is given in a Court of Record, againſt the Plaintiff, or demand; or againſt the Defendant, or the Tenant, in a reall or perſonal Action; whether it be by Writ, or by Bill if the dury or damages do exceed 40 s. And ſuch Writ lyeth in the Kings Bench. See the Statute of 5 E. 3. cap. 6. See F. *Nat. Br.* acc.

2. Note, It was agreed by the Court; That an Attaint lyeth in an Aſſiſe of Freſh-force, brought in *London*: as it was ſaid to be holden in 44 Eliz. 3, 32. and ſo it was adjudged. *Mich.* 29 Eliz. in B. R. Sir *Wolſton Dixey*, and Sir *John Spencers* Caſe. *Goldsbr.* 42.

3. If a man vouch in a *Præcipe quod reddat*, one who entreth on two Warrants; and pleadeth, and looſeth by falſe Verdict, he ſhall have an Attaint: And ſo if a man prayeth to be received upon the Default of Tenant for life, and he is received, and pleadeth, and looſeth by falſe Judgment, he ſhall have a Writ of Attaint. See 34. H. 6. 3. acc.

4. An Attaint was maintainable by him in the Reverſion, after the death of Tenant for life, upon a falſe Verdict given againſt the Tenant at the Common-Law; and now by the Statute of 1 R. 2. cap. 3. it is maintainable in the life of the Tenant. 4 H. 4. *Dyer*. 1. acc. See *Coke* 3. part. in the Marqueſſe of *Wincheſter's* Caſe. 5. acc.

5. A. brought an Attaint againſt Executors upon a Verdict given as a *Quo minus* in the Exchequer, brought by the Teſtator as Termor of the King, who held the Land; It was holden by the Court, that it well lyeth againſt Executors by the Equity of the Statute of 23 H. 8. For the Statute was made in mitigation of the rigour of the Common Law, and it was holden that it lyes againſt whomſoever hath the thing which was loſt: and in the principall Caſe, the Executors pleaded a Concord by the Teſtator for the intereſt of the Plaintiff made in *London*, in the Pariſh of Saint *Faith's*: upon which the Plaintiff did demur. The matter was afterwards ended by Arbitrament, and after the Darrein Continuance, the Plaintiff releaſed to the Defendants, and acknowledged the writing to be his Deed; and that was pleaded by the Defendants, and alſo by the Petit Jury in Arreſt of the Attaint. 3 Eliz. *Dyer*. 202. *Auſtin* and *Baker's* Caſe.

6. H. brought an Attainder upon the Statute of 23 H. 8. againſt B. upon a Verdict in an Aſſiſe; B. dyed, depending the Writ; It was holden that the Writ did not abate; Their Falſe Oath was Aſſigned in this, That 12. *Jurati prima Inquiſitionis, dixerunt, quòd 40 Acr. terræ in Com. prædict.* were not conteyned in the Letters Patents, made to J. S. and J. D. Anno. 35 H. 8. the Plaintiff averred, they were conteined. And the truth was; That the Letters Patents did miſrecite the name of the Town, and the name of the laſt Tenant; but the Court held, the ſame was helped by the Statute of 25 H. 8. of miſrecitall; and in this Caſe, the Juſtices of Aſſiſe would not permit

mit the Statute to be given in evidence to the Jury in the Countrey; becauſe it was not pleaded. 3 *Ma. Dyer.* 139. *Heydon* and *Ibgraves* Caſe. See in *Nedler*, and the Biſhop of *Wincheſters* Caſe. Hill. 12 Jac. *Hob.* 227. acc.

7. Note, If the Jury find any thing that is meerly out of the Iſſue; ſuch a Verdict ſo found, is utterly void, and of no force, although it conclude in general, for or againſt the Plaintiff, or the Defendant. And the reaſon is, that the Jurors are Tryers of matters in Fact, put in iſſue between the parties, and their Oath is, that they ſhall truly try the Iſſue between party and party; ſo that whatſoever they do try beſides the Iſſue, is not *per Juratos*: And ſo if that extravagant matter or part of the Verdict be falſe, it is no perjury; nor doth Attaint lye upon it. See in Tr. 10. Jac. in C. B. in *Foſter* and *Jacksons* Caſe. *Hob.* 53. acc.

8. In Treſpaſſe againſt J. for breaking his houſe at D. and beating him, 1. Oct. 10. Jac. The Defendant pleaded, that he, together with one J. D. the time of the Treſpaſſe ſuppoſed, did joyntly break the Plaintiffs houſe, and beat him, and afterwards 13. *Junii* 11 Jac. the Plaintiff did releaſe to J. D. by his writing, all Actions, reall and perſonal, and averred, that the Treſpaſſe of which the Plaintiff complained, and that which he and J. D. did joyntly, was one and the ſame, *et non alia nique diverſa*: It was adjudged for the Defendant; for although a Treſpaſſe be joynt and ſeverall, that he may ſue either one or all, yet when two joyn in Treſpaſſe, they make but one Treſpaſſor, and either of them is anſwerable for his fellow's fact, as for himſelf; and therefore a Releaſe to one diſchargeth the whole Treſpaſſe; and againſt Joynt-Treſpaſſors there can be but one ſatisfaction; and therefore if one be ſued in one Action, though they may ſever in Pleas and Iſſues, yet one Jury ſhall aſſeſſe damages for all; And as to the damages, he that is no party to the Iſſue, ſhall have an Attaint aſwell as his fellow; and if they be ſued in ſeveral Actions, though the Plaintiff make choice of the beſt Advantage, yet when he taketh one ſatisfaction, he can take no more. Tr. 12. Jac. in C. B. *Coke* and *Jenners* Caſe. *Hob* 66.

9. The Court was moved for Judgment formerly ſtayed upon a Certificate made by a Baron of the Exchequer, that the Verdict paſſed againſt his Opinion. The Court held, That the Judgment ought not to be ſtayed; For that the party may have an Attaint againſt the Jury; and there is no other remedy at Law for him; and ſo Judgment was entred for the Plaintiff. Mich. 24. Car. B. R. *Slades* Caſe. *Styles* 138.

10. Note, That an Attaint lyes not upon a falſe Verdict given in Caſes of Fellony. *Cook 6. part.* in the Caſe of *Pardons*, acc.

11. A. ſued an Attaint in *London*, upon the Statute of 23 *H.* 8. and proceſſe contained upon the ſaid Statute, and upon the Statute of 37 H. 8. chap. 5. The Judgment was given in the Exchequer, and before Execution: the Record was removed into the Bank by *Certiorari*: Notwithſtanding the Plaintiffs prayed Judgment, and had it; For the Juſtices ſaid, That an Attaint is not a *Superſedeas*, as a Writ of Errour is: Alſo they ſaid, That a *Superſedeas* doth not lye in an Attaint. Note in that Caſe, Becauſe by the ſaid Statute, the Enqueſt ſhall not be compellable to appear out of *London*, the Juſtices cauſed the *Diſtringas* to be returned at *Guild-Hall*; and there they ſate in the Mayor's Court; and a Verdict paſſed for the Plaintiff: but Judgment was reſpited, *quia Curia aviſare vult.* Hill. 7. Eliz. 6. *Dyer.* 81.

12. In Treſpaſſe the Plaintiff recovered by Verdict, the Defendant brought Attaint againſt the Plaintiff, and Pettit Jury, and one of the Pettit Jury pleaded an Accord, with ſatisfaction between the Plaintiff and Defendant, and it was holden a good plea; for the Writ of Attaint, is not onely grounded upon the Record, but upon the matter in Fact alſo; for the ſuppoſition of the falſity of the Oath, is matter of Fact: See Attaint brought upon a falſe Oath, in Appeal of *Mayheim*, one of the Pettit Jury pleaded Arbitrament between the Plaintiff and the Defendant, and holden a good barre. 13 Eliz. 41. 35 H. 6. 30. See *Cook* 6. part. 44. in *Blakes* Caſe.

13. If an Attaint be brought; and a Feoffment is made of the Land, the Attaint is extinct, and yet it is collaterall to the right of the Land, for by it no Land is demanded, but onely to reform the erronious proceedings *ſc.* the falſe Oath, but becauſe by that means, the poſſeſſion and Inheritance of the Land ſhall be removed and diveſted by the ſame; the Attaint is barred and extinct. See 38 Eliz. 3. 16. *Cook* 1. part. 111. in *Albanes* Caſe.

2. *Where in Attaint, new Evidence ſhall be given, which was not given in the firſt Action; And where not.*

1. IN an Attaint brought upon a Verdict given in a Writ of Entry *ſur Diſſeiſin*; The Will of J. S. was ſhewed in Evidence, in an old paper in writing; but was not proved by the Ordinary, nor any ſubſcription or ſeal to it; three Witneſſes were produced to prove the Will; two of them depoſed upon the Report of others; but the name of the third was ſubſcribed to the Will: and upon this Evidence it was found againſt the Plaintiff, and thereupon Attaint was brought. In this Caſe, two Points were Reſolved: 1. That a Will of Land deviſeable at the Common-Law, was good without a Deed; if it were but in a paper, proved to be the Deviſor's hand. And ſo was it adjudged in the like Caſe, Mich. 12 Jac. in Cancell. in the Caſe between *Gage* and the Company of Fiſhmongers of *London*, of Mr. *Goddards* Will, who by a Paper under his hand written, not ſealed nor ſubſcribed, but proved by Witneſſes to be his hand-writing, of Lands in *Bray*, to the ſaid Corporation and their Succeſſours, for the building of an Hoſpital, for giving Lands for the maintenance of poor people. 2. It was Reſolved, That the Plaintiff in an Attaint, may not produce more Witneſſes, nor give further matter in Evidence; nor the Witneſſes depoſe other matter than they depoſed in the firſt Action; but it was otherwiſe for the Defendants. 3. That the Jury ought to find according to the Evidence in the firſt Action, if it were pregnant, although it be falſe. Trinit. 34 H. 8. *Dyer* 59. *Roll* and *Hampdens* Caſe. See 3 Eliz. *Dyer* 201. and Trin. 13 Eliz. *Dyer* 302. in *Chenyes* Caſe, adjudged acc.

2. Note: It was holden by the Court, That the Defendant in an Attaint may give new matter in Evidence to enforce the firſt Verdict; and the Plaintiff ſhall have time to diſprove it: but the Plaintiff may not give new Evidence, nor enforce the firſt by new matter diſcloſed. Paſch. 4 Eliz. *Dyer* 202. *Paramours* Caſe.

3. In an Aſſiſe, Iſſue was taken, Whether Lands were contained in Letters-Patents, or no, which by the Common-Law were not contained, but by the Statute of 4 H. 8. were contained: The Juſtices would not ſuffer that Statute to be given in Evidence, not being pleaded; Whereupon the Jury found, That the Land was not contained; and thereupon an Attaint was brought; and the Court would not ſuffer that Statute to be given in Evidence to the Grand-Jury, which was not given in Evidence to the Petty-Jury, 3 Ma. *Dyer*. 129. vouch. in *Needler* and the Biſhop of *Wincheſter's* Caſe. *Hob.* 227.

4. An Enfant brought an Aſſiſe in the Kings-Bench for Lands in *Midd.* depending which, the Tenant in the ſame Aſſiſe brought an Aſſiſe of the ſame Land in C. B. which laſt Writ bore date, and was returnable after the firſt Writ: The demandant in the laſt Writ did recover againſt the Enfant by default; the Seiſin and Diſſeiſin was found by the Aſſiſe. Upon plea in barr of the firſt Aſſiſe of that Recovery, the Enfant ſet forth all this ſpecial matter: In this caſe, in regard the Enfant could not have Attaint, becauſe the Judgment in C. B. was not onely given upon the default, but alſo upon the Verdict: and becauſe it ſhould be in vain for him to bring an Attaint, becauſe he ſhall not be admitted to give other Evidence, then was given at the firſt Tryal; It was holden by the whole Court, That he might falſifie the Recovery: For it was ſaid, That in all caſes where a man ſhall not have Errour, nor Attaint, he might falſifie. Hill. 15 Jac. in B. R. *Platts* Caſe, *Godbol.* 271.

3. *Where Attaint lyeth upon a falſe Verdict in aſſeſſing exceſsive Damages; And where it lyeth before Execution be ſued forth: Where well brought*; et è contra.

1. IF a man recover in a *Precipe quod reddat*, againſt a Tenant by falſe Verdict, It was a doubt, Whether the Tenant might have an Attaint before execution were ſued out againſt him. But now, by the Statute of 1 E. 3. a man ſhall have an Attaint of Damages before Execution ſued againſt him. And ſee *Temps.* E. 1. *Fitz.* Attaint. In the time of E. 1. the Defendant ſued forth an Attaint for damages upon a falſe Verdict given againſt him in a Writ of Treſpaſs, before the Plaintiff ſued Execution of the damages: And if the Tenant ſhall not have an Attaint before Execution ſued, or Entry made by the demandant or his heirs, then perhaps they will not enter till the Jurours be dead, and then the Tenant ſhall be without remedy by Attaint. See *Fitzh. Na. Br.* 34 H. 6. 13. See 5 H. 7. 12. And ſee 7 E. 6. *Dyer* 81. Attaint is no *ſuperſedeas*, nor doth *ſuperſedeas* lye in Attaint.

2. In

2. In a Writ *de valore Maritagii*, Iſſue was joyned upon the Tenure; and it was found for the Plaintiff; and the Jury aſſeſſed Damages and Coſts, but did not enquire of the value of the marriage: It was reſolved in this Caſe, That the Verdict was inſufficient; and that the omiſſion of the value of the marriage, ſhould not be ſupplyed by a Writ of Enquiry of damages; for that ſhould prevent the party of his remedy by Attaint. But in that caſe it was Reſolved, That when the Court *ex Officio* ought to enquire of any thing, upon which no Attaint lyeth; then the omiſſion of that may be ſupplyed by a Writ of Enquiry of Damages; as in a *Quare Impedit*, to enquire of of the four points; for of them no Attaint lyeth. *Cook.* 10. Part, 119. *Cheneys* Caſe.

3. In Aſſiſe againſt three Coparceners, they pleaded by Bayliff, That there was no Tenant of the Freehold named in the Writ. And it was found, That two of them were Diſſeiſors and Tenants, and that the third had nothing; and afterwards, the three Coparceners brought an Attaint; and after appearance, the third ſiſter who was acquit, was Nonſuit: By the Rule of the Court, the Writ did abate: and the reaſon was, becauſe the third Coparcener had not any cauſe of Attaint, becauſe no Verdict paſſed againſt her. See, in a Writ of Errour to reverſe a Fine levied by an Enfant within age, the Caſe was, That husband and wife were Tenants for life, the remainder to an Enfant in Fee; they levied a Fine; and the Enfant onely brought a Writ of Errour to reverſe the Fine. It was Objected, That they all three ought to joyn in the Writ of Errour. But it was holden, That the Writ was well brought, for that the Enfant was onely grieved by the Fine, and the husband and wife had no cauſe of Action. Like to the caſe of 35 H. 6. In Conſpiracy againſt many; It was found for the Plaintiff; and one of the Defendants brought an Attaint, and aſſigned the falſe Oath *in omnibus quæ dixerunt*; but afterwards abridged the Aſſignment of the falſe Oath as to the damages: and ſo the Attaint did well lye. Mich. 31 Eliz. in B. R. *Pigott* and *Harringtons* Caſe, *Leon.* 317.

4. Debt was brought upon a Bond; the Condition of which was, for the performance of Covenants and Grants in an Indenture; And in the Indenture it is recited, That in Conſideration that the Plaintiff ſhould build a Mill upon the Lands demiſed by the Defendant to the Plaintiff, and a Water-Courſe; the Defendant Leaſed the Land to the Plaintiff, and the Leaſe was by the words, *Dedi et Conceſſi*: The Plaintiff aſſigned the breach; for that the Defendant had ſtopped the Water-Courſe made by the Plaintiff; upon which they were at Iſſue: and it was found for the Plaintiff. The Defendant brought an Attaint, and the falſe Oath was found. It was moved in ſtay of Judgment, There was no Iſſue, and then by Conſequence no Verdict, and then no falſe Oath, and then no cauſe of Attaint; for the Iſſue is taken upon the ſtopping of the Water, which is no cauſe of Action upon the parties own ſhewing; for there is not any expreſs Covenant or Agreement in the Indenture, that the Leſſee ſhould enjoy the Water-Courſe ſo made; and in this caſe, the Covenant doth not extend to any thing which was not in *eſſe* at the time of the Covenant made; alſo becauſe the Plaintiff in the Attaint, might have alledged the matter in Arreſt of Judgment, he ſhall not be helped by Attaint: Alſo it was ſaid, That it doth not appear in this caſe, that Execution had been ſued, and then there is no party grieved: and then the Action being brought upon the Statute of 23 H. 8. Cap. 3. which gives Attaint to the party grieved, doth not lye; for a party grieved cannot be intended without Execution ſued. But to that, it was anſwered and reſolved, That by the Statute of 1 E. 3. The Juſtices ſhall not leave to take an Attaint for the damages not paid; ſo as before that Statute, no Attaint lay before Execution. And laſtly, It was ſaid, That Attaint did not lye in this caſe, for that the Plaintiff in the Attaint hath not purſued the Statute: For the Statute gives ſpeciall proceſs in this caſe againſt the Petty-Jury, Grand-Jury, and the Party, viz. Summons, Re-Summons, and Diſtreſs infinite: but the Plaintiff in the principal caſe hath ſued otherwiſe; which is againſt the direction of the Statute: And this was holden by the Court to be a material Exception againſt the Attaint brought. And as to the matter of the Execution, Quære if the Plaintiff be not *pars gravata* onely; in that he is ſubject to the Judgment, and ſo lyable to Execution. It was not Reſolved, Hill. 28 Eliz. in B. R. *Huddy* and *Fellers* Caſe, *Leon.* 278.

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4. *Where Attaint is brought in the Common-Pleas, where in the Kings-Bench; And where it followes the Nature of the firſt Action: And what Pleas, the Petty-Jury ſhall have therein, what not.*

1. A Writ of *Certiorari* was directed to the Chief Juſtice of the Common-Pleas, to remove a Record; whereupon a Verdict paſſed by *Niſi Prius*; and now an Attaint was brought

brought in the Kings-Bench upon that Verdict. But the Writ was not allowed; for it was ſaid, That no Preſident could be ſhewed of ſuch Writ brought: But a *Certiorari* was awarded out of the the Kings-Bench, to remove the very Record of a Fine after Errour adjudged upon the Tranſcript, to the intent to take the Fine off the File and to cancel it in the Kings-Bench: and ſuch *Certiorari* was allowed of by the Court. Paſch. 10 Eliz. *Dyer* 274.

2. In Attaint, the parties, and Petty-Jury appeared; and demanded *Oyer* of the Record upon which the Attaint iſſued, and the Record and Verdict being in the Common-Pleas, they had it; and upon it, the Plaintiff aſſigned the falſe Oath. The Defendants pleaded, That they made a good and lawful Oath; upon which, they were at Iſſue: and the ſame Term the Record was removed by Errour into the Kings-Bench; and there the Plea remained undetermined. It was adjudged in this caſe, That notwithſtanding that the Record was removed into the Kings-Bench: yet the Court might proceed, if the proceſs againſt the Grand-Jury were returned. Paſch. 11 Eliz. in C. B. *Dyer* 284.

3. Errour was brought in C.B. upon Judgment given before Juſtices of Aſſiſe in the County of *Monmouth*: See there, divers Caſes vouched of the Juriſdiction of the Common-Pleas to hold plea of Errour, or Attaint upon falſe Oath, in other Courts, and to write to other Courts to have the Record certified to try a thing depending before them. Paſch. 8 Eliz. *Dyer* 250.

4. In a Replevin againſt ſix, the one avowed, and the other four made Conuſans as Bayliffs to the firſt, for an Amercement for the breaking of a By-law in a Leet; and Judgment was given againſt them, Damages and Coſts; the ſix brought a Writ of Errour: The Defendant pleaded the Releaſe of one of the five in barr; upon which the Plaintiff demurred: It was Objected, That it foundeth in the perſonalty, and no ſummons nor ſeverance lyeth: and therefore the Releaſe of one, ſhall barr all the other: And the Writ of Errour, and Attaint, ſhall follow the nature of the Action upon which they are grounded; *viz.* If Summons and ſeverance lyeth in the firſt Action, it ſhall alſo lye in the Attaint, or Writ of Errour: But it was Reſolved in the principal caſe, becauſe the Law doth compell the Defendants to joyn in a Writ of Errour, to reap no benefit, but to diſcharge themſelves of a charge impoſed upon them; that the Releaſe of the one ſhould not barr the other: and there the caſe of 35 H. 6. 19. was put and agreed, That if damages are recovered againſt divers in a Writ of Conſpiracy; that all of them ought to joyn in an Attaint; and the Nonſuit of the one ſhall not hurt the other. *Cook.* 6. Part. 25. *Rad. docks* Caſe.

5. In Attaint upon a Writ of Treſpaſs, Concord pleaded by one of the Petty-Jury, between the Plaintiff in the Attaint, and the Defendant, is a good plea: and ſo it was holden in 13 E. 4. that in all Actions founded upon a Wrong, as Treſpaſs, Conſpiracy, Maintenance, and the like, where nothing certain is in demand, nor any thing to be recovered but damages, Concord is a good plea, 7 E. 6. *Dyer* 75. See 3 Eliz. *Dyer.* 201. *Auſtin* and *Bakers* Caſe, before, acc. Where the Petty-Jury pleaded the general Iſſue, and the Executors pleaded a Concord.

6. Debt was brought by Executors upon an Obligation made by the Teſtator; The Defendant pleaded in barre, a Recovery by the Teſtator in his life-time; upon which a Writ of Errour was brought in the Kings-Bench, and there yet remained, the firſt Judgment not ſatisfied. It was Objected, That it ſhould be againſt reaſon to enforce the Plaintiff to ſue Execution upon the firſt Judgment; for that perhaps he knoweth that the ſame is erronious, or that he hath recovered by falſe Oath. In which caſes, the Judgment is reverſeable by Errour, or Attaint; and therefore if he ſhould ſue Execution, it ſhould be in vain; for he ought to reſtore (when the Judgment is reverſed) all that which he hath received: And to that purpoſe, the Caſe of 17 E. 3. 24. was vouched: Where *Devon* brought Debt upon an Obligation of 20 l. againſt *Scott*, who pleaded, That the Plaintiff before the Mayor and Bayliffs of *Newcaſtle* by Plaint upon the Bond, recovered, and had Execution; and there becauſe the Defendant did not procure the Bond to be damned, the Plaintiff had Judgment to recover again notwithſtanding the former Judgment and Execution. But it was adjudged in the principal caſe, That as long as the Judgment did remain in force, the Plaintiffs could not have a new Action upon the ſame Bond: For when a man hath a Debt upon an Obligation, and by Courſe of Law hath Judgment upon the Contract by ſpecialty, which is of inferiour nature, it is by Judgment of Law changed into a matter of Record, which is of higher nature: and if he who recovereth may have a new Action and a new Judgment; he might have infinite Actions and Judgments to a perpetual vexation of the Defendant, *et infinitum in Jure reprobatur.* And in this caſe it was ſaid, That in ancient time it was holden, That when a man did recover upon an Obligation, the Judgment ſhou'd be, That the Obligation be damned: and that was the reaſon of the Caſe in 17 E. 3. That the Action did lye, becauſe it was the Defendants folly, that the Bond was not damned:

ed: But now, ſince Attaints, and Writs of Errour, are ſo frequent, the Judges thought it dangerous to cancel the Deed, either where the Plaintiff recovered, or where he was barred by Judgment; for that in both caſes, the Judgment might be reverſed by Errour, or Attaint; and therefore the reaſon of the Cauſe of the ſaid Judgment in 17 E. 3. is now changed, Mich. 3 Jac. in C. B. *Cook* 6. Part. 45. *Higgins* Caſe.

Attainder.

Where the heir ſhall inherit, notwithſtanding the Attainder of his Anceſtor; where, not.

1. LAnd was given to husband and Wife in ſpecial taile; they have Iſſue; the husband is attainted of Treaſon, and dyeth; the wife continues in as Tenant in taile; the Iſſue is reſtored by Parliament, and made inheritable to his Father, ſaving to the King all Advantages which were devolved to him by the Attainder of his Father; the Wife dyeth: It was conceived in this caſe, That the Iſſue was inheritable; for the Attainder which diſturbed the Inheritance, is removed, and the blood is reſtored, and nothing can accrue to the King; for the Father had not any Eſtate forfeitable, but all the Eſtate did ſurvive to the Wife not impeachable by the ſaid Attainder; and when the Wife dyeth, then is the Iſſue capable to inherit the Eſtate taile. Some of the Juſtices doubted of the Caſe; yet they all agreed, That if the wife had ſuffered a Common Recovery, the ſame had bound the King. Mich. 31 Eliz. in C. B. *Leon.* 157.

2. If the Principal be erroniouſly attainted, either for Errour in the Proceſs, or becauſe he is out of the Realm, he is Out-lawed; or that he was in priſon at the time of the Outlawry; yet the Acceſſary ſhall be attainted; for that the Attainder of the Principal ſtands good, untill it be reverſed: and ſo it was Reſolved, 2 R. 3. 12. by all the Juſtices, and 18 E. 4. 9. where the Caſe was, The Principal was erroniouſly Outlawed for Felony; and the Acceſſary taken, indicted, arraigned, convicted, attainted, and hanged; and afterwards the Principal did reverſe the Outlawry, and was Indicted and arraigned of the ſaid Felony, and found Not-guilty; for which he was acquitted. It was then demanded in ſuch caſe, forasmuch as there cannot be an Acceſſary, if there be not a Principal, (and in ſuch caſe there is no Principal) how the heir of the Acceſſary ſhould be reſtored to his Lands which his Father had forfeited by the ſaid unjuſt Attainder? To that it was anſwered, That the Heir may enter, or bring his Action; for now upon the matter by Act of Law, the Attainder againſt the Father is without any Writ of Errour annulled; for by the reverſing of the Outlawry againſt the Principal, the Attainder of the Acceſſary, which dependeth upon the Attainder of the Principal, is now *ipſo facto* defeated and void: And this appeareth in the old Book of Caſes, E. 1. *Mortdaunceſtor*, 46. where the Caſe was; *A.* was indicted of Felony, and *B.* of the Receipt of *A*: *A.* was Outlawed; *B.* was taken, and put himſelf to tryal, and found guilty; for which *B.* was attainted and hanged; the Lord entred as into his Eſcheate: and afterwards *A.* came and reverſed the Outlawry, and pleaded to the Felony, and was found, Not guilty, and was acquitted. Whereupon the heir of *B.* brought *Mortdaunceſtor* againſt the Lord by Eſcheat, who came and ſhewed all the ſpecial matter; and upon a Demurrer, It was Ruled, That the Heir of *B.* ſhould recover Seiſin of the Land; for if *B.* were alive, he ſhould go free by the acquittal of *A.* becauſe he cannot be a Receiver of a Felon, when *A.* is no Felon. *Cook* 9. Part. 119. in the Lord *Sanchers* Caſe.

3. Note: It is ſaid in *Cook* 8. part, 166. in *Digbies* Caſe, If Tenant in taile of the guift of the King to hold by Knights ſervice *in Capite*, had been Attainted of Treaſon before the Statute of 26 H. 8. and had dyed, his ſon within age, that in that caſe, although the blood was corrupted; yet becauſe in that caſe by force of the Statute of *Donis Conditionalibus*, the Land, notwithſtanding ſuch Attainder, doth diſcend to the ſon, that he ſhould be in Ward to the King, becauſe he is a ſpecial heir; and in proof of that, the Caſe of 7 H. 4. the Caſe of *Holland* Earl of *Kent* was put, where the Caſe was: King *Rich.* 2. did grant divers Mannors to *Tho. Holland*, Earl of *Kent*, to him and the heirs of his body; the ſaid Earl, 1 H. 4. levied Warr againſt the King, and committing that Treaſon, was killed without Judgment, his heir within age. Afterwards *Tho.* Earl of *Kent* was attainted by Parliament; and Ordained it was by Parliament, That all his Lands in Fee-ſimple ſhould be forfeited: The King ſeiſed the ſaid Mannors; and they were in the Kings hands during the Non-age of *Edward* ſon of the Earl, who at his full age ſued a Writ of *Mandamus* out of the Chancery, by which the ſaid Guift, Tenure, and that the ſaid *Edward* was heir *per formam doni*, was found: whereupon he came and prayed his Livery. It was there Reſolved by all the Juſtices, That in that caſe the ſon ſhould be in Ward: and although that the King

King ſeiſeth as for forfeiture of Treaſon; yet when the King is in poſſeſſion, the Law will adjudge him in, by reaſon of Wardſhip, becauſe the ſame is his beſt right, for that the Law doth reſpect more a ſmall eſtate during the minority of the Iſſue by Right, then an Eſtate of Fee-ſimple by Wrong: and in that caſe it was agreed, That if there be Grandfather, Father, and Son, and the Grandfather is Tenant in taile, and the Father is attainted of Treaſon, and dyeth ſeiſed, although that the blood be corrupt; yet the Land ſhall diſcend to the ſon *per formam Doni*. And Note, now ſince the Statute of 26 H. 8. which gives the Forfeiture of the Lands of Tenant in taile for Treaſon, the Law is otherwiſe; and that by the Attainder, the Iſſue is barred. See *Cook* 8. Part, in *Digbies* Caſe. See *Cook*. 3. Part. 10. the Lord *Lumleys* Caſe, vouched in *Dowties* Caſe, &c.

4. At the Parliament, 39 Eliz. the Caſe was thus: The Grandfather was ſummoned to Parliament by Writ: Afterwards, the Father by Parl. was diſabled to claime any Dignity or Lordſhip in any Right, Eſtate, &c. by Diſcent, Remainder, or otherwiſe: Afterwards, the Father was called to another Parliament by Writ of Summons, and dyed: The Queſtion then was, Whether the ſon ſhould be reſtored to the Seat of the Grandfather? And it was Reſolved, 1. That he ſhould be reſtored to the Seat of his Grandfather; and the difference was taken between a Diſability which was Perſonal and Temporary, and a Diſability which is abſolute and perpetual. As if one be attainted of Felony, Treaſon; The ſame is a perpetual diſability by corruption of the blood, to claim by the heir any hereditament in Fee, as Ceſin and heir to him, or unto any heir paramount him. But when one is diſabled onely by Parliament, (without any Attainder) to claim any dignity for his Life; the ſame is a perſonal diſability for life onely, and his heir after his death may claim as heir to him, or to any other Auncеſtor paramount him. 2. Reſolved, That the acceptance in that caſe of the new Creation by the Father, ſhould not hurt the ſon, becauſe that the Father at that time was diſabled, and was not a Baron, but an Eſquire; ſo as when the Ancient and New Dignity diſcended to the ſon together, the old ſhould be preferred. *Cook* 7. Part. 1. The Lord *De la Wares* Caſe.

5. In a Writ of Errour to reverſe a Judgment given in a *Monſtrans de Droit* in the Court of Exchequer: the Caſe was this; 17 E. 2. *John de malo Lacu*, gave to *Peter de malo Lacu*, and the heirs of his body, the Caſtle and Mannor of *Mulgrave*; which by many mean Diſcents came to Sir *Ralph Bigod*. Sir *Ralph*, 6 H. 8. made a Feoffment to *William Fwer* and others, to the uſe of his laſt Will, and dyed; and the Right of the Land, together with the entaile, the uſe alſo after the Will performed, diſcended to Sir *Francis Bigod*. 21 H. 8. Sir *Francis* made a Feoffment to J. S. and others, to the uſe of himſelf and *Katherine* his Wife, and the heirs of their two bodies, and they had Iſſue *Ralph Bigod* and *Dorothy*. The Statute of 26 H. 8. Cap. 13. of forfeiture for Treaſon, is made, 29 H. 8. Sir *Francis Bigod* was Attainted of High Treaſon, and was executed 31 H. 8. there was a ſpecial Act of Attainder of Sir *Francis Bigod*, and his forfeiture amongſt other things is made. 6 Eliz. *Ralph Bigod* ſon of *Francis* and *Katherine* was reſtored in blood by Parliament, and dyed without iſſue: *Dorothy* married *Roger Ratcliff* and they have Iſſue *Francis Ratcliff*. 8 Eliz. *Katherine* dyed, and *Francis Ratcliff* entred. 33 Eliz. an Office was found for the Queen. 34 Eliz. *Francis Ratcliff* dyed, having Iſſue *Roger Ratcliff*. 34 Eliz. the Queen by Letters Patents granted the Caſtle and Mannor of *Mulgrave* to *Edmond* Lord *Sheffield*, and the heirs males of his body. *Roger Ratcliff* upon his whole matter ſued his *Monſtrans de Droit* in the Exchequer, and had Judgment for him: Whereupon a Writ of Errour was brought in the Exchequer-Chamber; and whether the ſaid Judgment ought to be reverſed or affirmed, was the Queſtion? There were many Points in this caſe, 1. Whether *Francis Bigod*, who had an Eſtate taile in poſſeſſion, had alſo any right of the old entaile veſted in him at the time of his Attainder? or whether it were in abeyance? 2. Whether this Right did accrue to the King by the Attainder. 3. Whether there were a Remitter in the Caſe after the Attainder? and when the Remitter begun, how, and to whom. 4. If there were a Remitter, whether it were not over-reached and removed by the Office found: After many long Arguments by all the Judges, in the Exchequer-Chamber, the greater part being againſt *Ratcliff*, who had the former Judgment, It was Reſolved and adjudged; 1. That there was a Right of a Remainder which did remain in *Francis Bigod* after his Attainder. 2. That this Right of Remainder was not in Abeyance, but was given to the King by the Statute of 25 H. 8. and the ſpeciall Act of 31 H. 8. of Attainder of Sir *Francis Bigod*. 3. That there was no Remitter in the Caſe. And thereupon Judgment was given, That the firſt Judgment ſhould be reverſed; and the now Earl of *Mulgrave* holdeth the ſaid Caſtle and Mannor of *Mulgrave* according to the ſaid Judgment. See this Caſe at large notably argued: which was Entred in the Exchequer, 13 Jac. Rott. 96, and was argued in the Exchequer-Chamber. Paſch. 21 Jac. in *Hob.* 334. to 345. and in *Godbolt* 300. to 326.

6. Note;

6. Note; It was ſaid by *Hobart*, Chief Juſtice, If a woman hath cauſe of entry upon the diſcontinuance of her husband; or the Diſſeiſee upon the heir of the Diſſeiſor, and then attainted of Treaſon, That the King upon the Statute of 33 H. 8. of Treaſon, may upon Office ſeiſe thoſe Lands by force of the words of that Statute, that gives the King all Rights of Entry; of which ſort this is, and which hath not the miſchiefs that the Marqueſs of *Winchesters* Caſe in *Cooks* Reports ſpeaks of: though it be true, That if the Wife will take an Action, it muſt be a *Cui in vita* at the leaſt; and the Diſſeiſee, an *Entry ſur Diſſeiſin*, which the King cannot have. Paſch. 14 Jac. in C. B. in the Lord *Stanhope* and the Biſhop of *Lincolns* Caſe, *Hob.* 243.

7. Husband and Wife Joynt-Tenants of a Manor, and to the heirs of the body of the Husband, the remainder to *B.* in taile, a Recovery is had in a Writ of Entry in the *Poſt* againſt the husband only in the life of the Wife with voucher: *B.* in Remainder is attainted of Treaſon, and executed; and afterwards by Parliament it is enacted, That he ſhall forfeit all ſuch Mannor, Lands, Tenements, Rents, Reverſions, Remainders, Uſes, Poſſeſſions, Offices, Rights, Conditions, and other Inheritances, which he hath or ought to have in Fee, on in taile, in uſe or poſſeſſion, the day of the Treaſon committed: Afterwards the husband dyeth without Iſſue of his body, the wife dyeth; The Queen grants to *C.* the ſon of *B.* and reſtores him to the ſame Mannor which ſhe had by the Attainder; and afterwards, the Queen brought a Writ of Errour againſt the heir of the Survivor Recoverer, to reverſe the Recovery. It was Reſolved in that caſe, That the Writ of Errour was not given to the King by any words in the ſaid Act of Attainder, becauſe the Tenant is in by title, and the entry of the perſon attainted, was not lawful; and a Right of Action is not given to the King by any of the ſaid words. For a Rule was taken, That ſuch a Right for which the party hath no remedy but by Action to recover, the Land could not Eſcheat, or be forfeited by the Common-Law: And by the general words of Attainder, Rights of Actions were never given to the King, but rights of Entries. *Cook.* 3. Part. 1. the Marqueſs of *Winchesters* Caſe.

Attorney.

Who, where, when, and in what Courts, and in what Actions, Cauſes, or Suits a man may make Attorney; What things may be done by Attorney; and how the Attorney muſt Iſſue his Warrant: What Priviledges he hath, and how he ought to demean himſelf in his place.

1. BEfore the Statutes which grant, That a man may make an Attorney, &c. The Juſtices would not ſuffer the Plaintiff or Defendant, or the Demandant or Tenant, to make an Attorney in any Suit, or in any Court, &c. becauſe the words of the Writ Command the Defendant to appear, which is to be intended in his proper perſon: And at this day a mans reall Suit at a Leet, or at the Sheriff's Turn, cannot be done by Attorney, but ought to be done in proper perſon: But yet, before the Statutes, the King by his Prerogative by his Letters Patents, might have granted to a man to make Attorney, in every Action or Suit, as well to the Defendant and Tenant, as to the Plaintiff or Demandant: and the Courſe then was, That the King directed his Writ to the Juſtices of the Courts, to receive ſuch perſons as Attorneys, in ſuch Suits or Actions. *Fitzh. Na. Br.* 25. acc. And ſee to that purpoſe, The Writ *de Attornato faciendo et recipiendo*, which lay where a man ought to do Suit at the County, or at the Hundred or Wapentake, or other Courts, with Writs. See *Fitzh. Na. Br.* 156, 157. And the Tenant might make a Patent to his Attorney, to do ſuch Suit at ſuch Court, or at the Lords Court, And if the Steward, Bayliffs, or the Sheriffs, did refuſe ſuch Attorneys after an *Aliàs* or *Pluries*, an Attachment did lye againſt them. *Fitzh. Na. Br.* 158. But now at this day, by the Statutes of *Merton*, Cap. 10. *Weſt.* 2. Cap. 10. 7 R. 2. Cap. 14. 4 H. 4. Cap. 18. 7 H. 4. Cap. 13. (all which, ſee in *Raſtalls* Abridgments of the Statutes) and by divers other Statutes ſince made, a man may make an Attorney, to appear in Actions both in the Courts of Records; as alſo in other Inferiour Courts. See *Cook* 6. Part. 58. *Beechers* Caſe, acc.

2. A *Quid Juris clamat* was brought againſt *Eliz. Turton*; ſhe ſued forth a *Dedimus poteſtatem*, with a ſuppoſal that ſhe ought not to anſwer, becauſe ſhe was Tenant in taile; and with this ſug-

geſtion, That ſhe was ſo weak and aged, that ſhe could not travel to the Common-Pleas to plead it, The *Dedimus* was directed to *Saunders*, Chief Juſtice, to repair to her, and to receive an Attorney to appear for her; which was allowed by the Opinion of the whole Court: although it was ſaid, It was rare in ſuch caſe: And Preſidents were ſhewed, Where ſuch Writ did lye to receive Attornment of a Recluſe; and for a woman which was with child. 4 Ma. *Dyer* 136. See the like Writ of *Dedimus Poteſtatem* in a *Quid juris clamat*, brought by *Flowerdew* againſt *Cook* and his Wife, *ad recipiend. Cognitionem et juſtificand. attornament.* directed to *Robert Catlin* Knight, Chief Juſtice, which was returned executed. Mich. 3 & 4 Eliz. where the Court would adviſe of it. *Dyer.* 136.

3. In an *Audita Querela*, brought by *Richard Putnam* againſt his younger brother *George Putnam*, the Juſtices were commanded by Writ, that *vocatis coram ipſis partibus prædict. fieri faceret quod de jure et ſecundum Legem foret faciend.* They awarded a *Venire facias* out of the Common-Pleas, againſt *George Putnam*, *ad reſpondend. &c.* to which Writ, the Parties appeared by their Attorneys; and good. Mich. 13 Eliz. *Dyer.* 297.

4. *John Verney* made a Feoffment to the uſe of himſelf and *Dorothy* his Wife, and to the heirs of their two bodies, the remainder to the right heirs of the husband; they had Iſſue *Mary*, and the husband dyed: *Dorothy* ſold the Land in Fee; *Mary* and *R.* her husband joyned in a Fine in confirmation of the Eſtate; and *Mary* dyed without Iſſue. Now *R.* and *Dorothy*, and one *Ed. Verney*, brought a Writ of Errour to reverſe the Fine; and *R.* and *Dorothy* did not appear; upon which a Summons *ad ſequend. ſimul* iſſued, which was returned *Nihil*; and yet afterwards they appeared by Attorney, and joyned *gratis* with *Edward* in the Suit. Note here; their appearance by Attorney, Mich. 1 Ma. *Dyer.* 89. b.

5. Note; There is a difference in the Caſes, Where the Defendant or Tenant cannot by Law appear by Attorney; and in Caſes where the Defendant or Tenant may appear by Attorney, but upon ſome proceſs by reaſon of ſome default or Contempt he ought to appear in perſon: In the firſt Caſe, If the Court admit the Defendant or Tenant by Attorney, the ſame is Errour; but in the other not. As if an Enfant be admitted to appear by an Attorney, the ſame is Errour; but when the Defendant may make an Attorney, and the Cauſe that enforceth him to appear in perſon, is the Contempt to the Court; the Court may diſpence with the Contempt in their diſcretion, and admit him by Attorney. *Cook* 8. Part. 58. in *Beecheys* Caſe.

6. *Beecher* brought an Action of Debt upon two Obligations by *Quo minus* in the Exchequer againſt J. S. who pleaded in barr payment, according to the Condition; upon which Iſſue was joyned, and found for the Plaintiff: Afterwards, the Plaintiff by his Attorney came into Court, et *fatetur ſe in Curia hic ulterius nolle proſequi*: upon which Judgment was given, That the Defendant *eat ſine die*, but no Amercement upon the Plaintiff. Afterwards the Plaintiff brought a Writ of Errour. In this caſe it was Reſolved, That the Judgment was erronious: and in this caſe it was Reſolved, That a *Retraxit* cannot be, unleſſe the Demandant or Plaintiff be in Court in his proper perſon; and it cannot be by Attorney, becauſe a *Retraxit* is a perpetual barre, and in manner as a Releaſe. See the Caſe, 4 E. 3. 23. Where three Coparceners were Plaintiffs in a Writ of Deceit, and two of them did appear in perſon, and the third by Attorney, and ſaid, They would not forward ſue; and could not have it, becauſe that one was by Attorney: for which cauſe they were nonſuited. See Mich. 6 Jac. in C. B. *Cook* 8. Part. *Beecher* and Sir *Tho. Shirleys* Caſe.

7. A *Sub-pœna* iſſued out of the Common-Pleas againſt *Walter*, upon an Information exhibited againſt him by one *Topcliff*; for taking of Uſury, *contra formam Statuti*: He made Attorney, *ex gratia Curiæ*, and in that Caſe pleaded, Not guilty: And if that was an Apt Iſſue, or not, was a Queſtion made by the Court; but being found againſt him, Judgment was given. Hill. 18 Eliz. *Dyer.* 346, 347.

8. A man was bound in an Obligation, upon Condition to ſtand to the Award of J. S. ſo as the Award were put in writing before *Michaelmas*; the Obligor before *Michaelmas* revoked the power of J. S. to make the Award. It was Reſolved in this caſe, That a man cannot by his act make ſuch authority, power, or warrant not countermandable, which by the Law, and of his Nature is Countermandable: As if a man make a Letter of Attorney to make Livery, or to ſue an Action in his name; or if I aſſign Auditors to make an accompt, or I make one my Factor, or I ſubmit my ſelf to Arbitrament, although that theſe are done by expreſs words irrevocably, yet they may be revoked; and therefore (where it is ſaid, in 5 E. 4. If I be bounden to ſtand to the Award which J. S. ſhall make, I cannot diſcharge that Arbitrament, becauſe I am bound to ſtand to his Award; but if it be without an Obligation, it is otherwiſe;) It was Reſolved in the one caſe, I ſhall forfeit my Bond; and in the other caſe, I ſhall forfeit nothing. For *ex nudâ ſubmiſſione non oritur actio.* *Cook.* 8. Part, 81. *Vincors* Caſe.

9. An

9. An Action of Aſſault and Battery was brought, and the Defendant was condemned by *Nihil dicit*, and a Writ to enquire of Damages went forth, and then the Plaintiffs Attorney dyed; and another Attorney without any Warrant prayed the ſecond Judgment and Execution. It was moved, If this were Errour, or not? The Court delivered their Opinion, That if in an Action after Judgment, the Attorney dye, a new Attorney may pray Execution without warrant. But in the principal caſe, becauſe he dyed before the ſecond Judgment, they held, That he ought to have a Warrant of Attorney; for that the firſt Judgment is no final Judgment: And the Preignothories ſaid, That if after the firſt Judgment one of the parties had dyed, the Writ ſhould abate; which the Court granted. Paſch. 29 Eliz. in C. B. *Goldeſbr.* 49.

10. A Corporation aggregate of many perſons is inviſible, immortal, and reſteth onely in intendment, and Conſideration of the Law: and therefore a Dean and Chapter cannot have a Predeceſſor, or Succeſſor; They may not commit Treaſon, nor be Outlawed, nor excommunicate, for they have no ſouls; neither can they appear in perſon, but by Attorney: They cannot do Fealty, for an Inviſible body cannot be in perſon, nor can ſwear. *Cook.* 10. Part. 32. in the Caſe of *Sutton*'s Hoſpital.

11. Homage and Fealty are things ſo inſeparably annexed to the perſon, that they cannot be done by Attorney.

12. A Copyholder in Fee made a Letter of Attorney to two Tenants of the Mannor, to ſurrender his Copyhold to the uſe of J. S. and his heirs, who at the next Court bring the ſurrender into Court, and do accordingly, no Cuſtome being found to warrant ſuch ſurrender; Yet it was Reſolved, That the ſurrender was good, becauſe he might do it of Common right, without alledging any Cuſtome to warrant it. *Cook* 9. Part. 65. *Combes* Caſe.

12. Two ſeiſed of Lands in Fee, made a Deed of Feoffment to two others, and their heirs; and the Letter of Attorney was in theſe words, *pro me et in nomine meo* to make Livery, and it was further to enter into the Lands in the name of the Feoffors, and to make Livery *ſecundum formam Chartæ*: Livery and Seiſin was made to one of the Feoffees by the Attorney, in the abſence of the other Feoffee: the Queſtion was, Whether it was a good Authority, and well executed? It was ſaid, That here was no Authority given to the Attorney to enter into the Lands in the name of both the Feoffors, becauſe the words are *in Nomine meo*, which cannot comprehend them both, being in the ſingular number; and an Attorney hath nothing but a bare authority, which ought ſtrictly to be purſued, eſpecially it being to paſſe away an Eſtate: But it was holden, That the Letter of Attorney was good, becauſe the Authority given to the Attorney proceeds from both the Feoffors: and therefore the words, *in Nomine meo*, ſhall be intended the words of them both; and alſo it is well executed to both the Feoffees, becauſe it was by Deed; and the Feoffee who is preſent, is Attorney for the Feoffee which is abſent, to receive Livery for him; and the effect of the Letter of Attorney is well executed; though the words were not. Trin. 1650. B. R. *Trotman* and *Standards* Caſe. *Siples* 284, 285.

13. An Action of Debt was brought for ſuing in the Court of Admiralty againſt the Statutes of 13 & 15 R. 2. againſt J. S. an Attorney; The Caſe upon a Special Verdict found, was, That a Charter-party was made betwixt *A.* and *B.* at *Dunkirk*, and that J. S. did proſecute *B.* in the Admiral Court, by virtue of a Letter of Attorney: ſo as he as Attorney to *A.* did proſecute the Suit there: And the Queſtion was, If J.S. being the Attorney, were ſuch a party as might proſecute a Suit within the ſaid Statutes there? It was ſaid, That the Statute of *Merton*, Cap. 10. gave power to make Attorneys in any Court; but then, the Attorney muſt look at his perill, that that which he doth, be a lawful act: If an Enfant make a Letter of Attorney to make Livery and Seiſin, and the Attorney maketh Livery accordingly, he is a Diſſeiſor; One may do that himſelf, which he cannot do by Attorney. As, the Lord may beat his Villain, but a ſtranger cannot do it for the Lord. It was the better Opinion in this Caſe, That the doing of the Attorney, though at the Command of the Maſter, ſhould not avail him: and therefore this ſuing in the Court of Admiralty was a Contempt; for it was *malum prohibitum* within the Statutes, and ſo either *A.* or J.S. his Attorney were puniſhable, and then the Plaintiff had his Election to ſue either *A.* or his Attorney; and therefore having ſued the Attorney, the Action is well brought. Paſch. 3 Car. in B.R. *Cremer* and *Tookeleys* Caſe. *Godbold.* 385.

14. Note; It was ſaid by the Court, That an Attorney oweth to his Client, fidelity, ſecreſie, ſkill, and diligence, but he oweth not him any diſhoneſt, or undue practice; for by the general Obligation to Juſtice, and the Court where he ſerveth, he is forbidden to do any thing to pervert Juſtice, as appeareth by his Oath: and therefore if he take a Reward, to raſe Record, or to cauſe an Attorney to appear on the other ſide, and confeſſe the Action, or the like, he is puniſhable for it. See Mich. 11 Jac. in C. B. *Yardley* and *Elliſs* Caſe. *Hob.* 9. And ſee *Hob.* 117. If an Attorney followes a Cauſe, to be paid in groſſe when it is recovered, that it is Champerty. *Box* and *Barnabyes* Caſe.

15. An Attorney had profecuted three ſeveral Actions of Debt, every one of them being above the ſum of 40 l. and ſo Fineable to the King, and procured Judgments to be entred upon them, no Original Writs being ſued forth, he having received the charges as well for ſuing the Originals as for the Fine to the King: and becauſe this was done voluntarily in Deceit of the King, and againſt his Oath as Attorney, that he ſhould not practice any Deceit, It was adjudged, That he ſhould be put out of the Roll of Attorneys, and be caſt over the Barr, and committed to the *Fleet*; and a Preſident was ſhewed of the like Judgment, 30 Eliz. Where one *Oſbaſton* an Attorney for falſifying and forging a Writ of *Capias*, was ordered to be put out of the Roll, Caſt over the Barr, Fined, and ſworn never to practice after, as an Attorney. Trin. 3 Car. in C. B. *Jeromes* Caſe. *Cro.* 1. Part. 52.

16. The Warden and Fellowes of *All-Soules* Colledg in *Oxford*, Leaſed to J. S. To have and to hold from the Feaſt of the *Annunciation* next following, to the end of 20 years: the Leaſe bore date, 1. July, 10 Eliz. and made a Letter of Attorney to J. D. to enter into the Mannor, and to ſeal and deliver the ſaid Deed of the Leaſe in their names to the Plaintiff J. S. J. D. by force thereof entred into part of the demiſed premiſſes, and did there ſeal and deliver the ſame: But it was not found that there was any Mannor. It was Objected, That becauſe the Letter of Attorney was to enter in the Mannor, and all the Lands and Tenements of the Colledge in ſuch a Town, and to ſeal the Indenture of Leaſe in the name of the Leſſors, and to deliver it to the Plaintiff as their Deed, That the Attorney in executing the Warrant had not purſued it; for that he onely entred into the Lands; and it is not found that he entred into the Mannor, and ſo the Leaſe was void: and if I Leaſe two Acres in two ſeveral Counties, rendring for the one acre 10 s. and for the other Acre 10 s. and make a Letter of Attorney to make Livery in both; if the Attorney entreth into one acre, and makes Livery, the ſame is void, for that the Attorney hath not purſued his authority; for peradventure I would not have Leaſed the Acre whereof Livery is made, for ſuch a Rent of 10 s. being perhaps of greater yearly value, but with the other acre which was of leſs value, and ſo the miſ-executing my Warrant ſhould prejudice me. But it was holden by the Court, That it doth not appear upon the Special Verdict, but that the Colledge was in poſſeſſion at the time of the Leaſe made, and then there needed not any ſuch entry, but the bare ſealing and delivery of the Attorney had been good enough. And it doth not appear by the Verdict, That the Colledge had any Mannor: and then the Caſe is no other, but that a man leaſeth a Mannor and certain Lands in *D.* and makes a Letter of Attorney to make Livery of them, where he hath nothing in the Mannor; the ſame is a good Livery, and the authority well executed. But if it had been found, That the Colledge had ſuch a Mannor there, then the entry in the Land onely without meddling with the Mannor, and the Livery made accordingly ſhould not have been good. It was adjudged, That the Authority of the Attorney was well executed. Mich. 33 Eliz. in C. B. *Carter* and *Claycocks* Caſe, *Leon.* 306.

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2. *What ſhall be a good Letter of Attorney, and what not; And where Livery and Seiſin made by an Attorney, ſhall be good; et è contra. And where his Authority ſhall be ſufficiently purſued; where not.*

1. NOte; There is a difference between an Eſtate made in perſon, and made by Attorney; For if an Ideot, or *Non compos mentis*, maketh a Feoffment in Fee in perſon, and maketh Livery, and dyeth his heir within age, he ſhall not be in Ward; or if he dyeth without heir, the Land ſhall not Eſcheat: But if the Feoffment be made by Letter of Attorney, who maketh Livery, although that the Feoffor ſhall not avoid the ſame; yet after his death as to all others in Judgment of Law, the Eſtate was void: and therefore in ſuch caſe, if his heir be within age, he ſhall be in Ward; or if he dyeth without heir, the Land ſhall eſcheat, 7 H. 4. 5. And ſo, in the Caſe of an Infant, if he maketh a Feoffment in perſon, and maketh Livery, if he dyeth without heir, the Land ſhall not eſcheat; but otherwiſe if it were made by Letter of Attorney, who maketh Livery and Seiſin. *Cook* 1. Part. 125. *Beverleys* Caſe.

2. When one hath a power of Revocation, if he ſuffer a thing to be lawfully executed by force of it, as to that he cannot make any Revocation; as if a man make a Letter of Attorney to J. S. to make Livery and Seiſin of Lands before Execution, he may revoke it; but if J. S. by force of the Letter of Attorney maketh Livery and Seiſin, the ſame is a good Livery; and the power being executed, cannot after be revoked by the Feoffor. *Cook* 5. Part. 90. in *Hors* Caſe.

3. Note; There is a difference between two joynt Attorneys who have an expreſs authority to take Livery

Livery and Seiſin by Deed; and two Joynt Leſſees who have power to receive Livery for the benefit of another by Warrant of Law: And therefore, If a man make a Leaſe to *A.* and *B.* for years, the Remainder to *C.* for life, the Leſſor muſt make Livery to *A.* and *B.* before their entry, and by the Livery to *A.* and *B.* *C.* ſhall preſently take an eſtate in Remainder by force of the Livery made to the Leſſees for years; and in ſuch caſe, Livery made by one Attorney to the ſaid Leſſees in the name of both, is not good; for that he doth not follow his expreſs warrant; for he alone hath not warrant, for they both make but one Attorney: But in the Caſe of two Joynt-Leſſees, there the Livery made to one in the name of both, is good; for they have an Intereſt in the Land before their entry; and Livery to one in the name of both, maketh actuall poſſeſſion in both: which is ſufficient to ſupport the remainder to *C.* and in the one caſe, Livery is made to the Leſſees who have an Intereſt; and in the other, to him who maketh the Warrant of Attorney by his Attorneys, which have but a bare authority. *Cook* 5. Part. 94. in *Barwicks* Caſe.

4. The Cuſtome of a Mannor is, That a Copy-holder out of Court may ſurrender into the hands of the Lord by the hands of two Cuſtomary Tenants: In ſuch caſe, the Copyholder by his Attorney cannot ſurrender into the hands of the Lord by the hands of two Copy-hold Tenants, for the ſurrender ought to be warranted by the Cuſtome; and a ſurrender without a ſpecial Cuſtome to warrant it by Attorney, is not good. Hill 28 Eliz. in B. R. *Chapmans* Caſe, Note, That that Caſe differs from the principal Caſe; of *Combes*, in *Cook* 9. Part. (which ſee before) for that in *Combs* Caſe, the Common-Law without any particular Cuſtome did warrant the ſurrender; and therefore according to the Rules of the Common-Law, the ſurrender by Attorney was good.

5. In *Ejectione Firme*, the Caſe was; The Dean and Chapter of *Worceſter*, by the name of the Dean and Chapter of the Cathedral Church of Chriſt, and the bleſſed Virgin *Mary* of *Worceſter*, made a Leaſe for life; *Habendum* from the day of the date, and made a Letter of Attorney to one to make Livery *ſecundum formam Chartæ*, the Attorney makes Livery the next day after, and the Jury find the Leaſe for life made the 25th day of &c. and that the Livery by the Attorney was made *poſt veceſſimum quintum diem præditt.* The Queſtion was, Whether this was a good Leaſe thus made, and well executed It was the Opinion of the whole Court, and ſo Reſolved, That this Leaſe was not good, becauſe the Freehold is not to expect the beginning afterwards; and it is clear, this Leaſe being made for life *à die datus* is not good; for that according to *Bucker* and *Harvies* Caſe, *Cook* 2. Part, 55. a Freehold cannot begin *in futuro, et Quod ab initio non valet tractu temporis non convalescit*; and in this Caſe the Lord *Dacres* Caſe was agreed; which was, That *William* Lord *Dacres* made a Feoffment in Fee to *Thomas*, and *Leonard Dacres* his ſons, upon condition, to make a Feoffment over to one Parſon *Dacres*, and to one *Middleton*, all the Deeds were ready to be delivered; but it ſo happened, that before *William* had delivered his Deed of Feoffment unto *Thomas* and *Leonard*, that they had delivered their Deed to Parſon *Dacres* and *Middleton*, with a Letter of Attorney to one to make Livery. Afterwards (*William* delivers his Deed, Livery was then by virtue of the Letter of Attorney. It was adjudged in this Caſe, That this Livery was void, becauſe at the time of their Feoffment they had nothing to paſs: For if a man makes a Feoffment in Fee, and a Letter of Attorney to one to make Livery, before he himſelf hath an eſtate to paſſe; ſuch a Livery made, is clearly void. Trin. 12 Jac. in B. R. rott. 438. *Butler* and *Fitches* Caſe. *Bulſtrod.* 2. Part, 301, 303, 304.

6. If Leſſee for life make a Deed of Feoffment, and a Letter of Attorney to the Leſſor to make Livery, and the Leſſor maketh Livery accordingly, yet the Leſſor may enter for the forfeiture, becauſe the Leſſee for life had a Freehold in him whereupon the Livery might work: But if Leſſee for years maketh a Feoffment in Fee, and the Letter of Attorney to the Leſſor to make Livery, and he makes Livery accordingly, this Livery ſhall bind the Leſſor, and ſhall not be avoided by him; for the Leſſor, as this Caſe is, cannot make Livery, as Attorney to the Leſſee, becauſe the Leſſee had no Freehold whereof to make Livery; but the Freehold was in the Leſſor. *Cook* 1. Part, *Inſtitutes* &c.

7. A Copyholder of Inheritance made Letter of Attorney to two, joyntly and ſeverally to ſurrender his Copyhold Lands in Fee to certain Uſes after his death, according to the Cuſtome of the Mannor: It was a Queſtion, Whether it were a good Cuſtome or not? It was argued, That it was no good Cuſtome; for many reaſons; 1. Becauſe it is a Cuſtome to convey Lands againſt a general Law; and the general Law for conveying of Copyhold, is either by ſurrender into the hands of the Lord, or by ſurrender into the hands of Tenants Copy-holders, to the uſe of his Will. 2. An Authority ought to be countermanded and to determine at the death of the party; but this is no ſo. 3. By the death of the Copy-holder, the Lands are ſettled in

in the heir, and this authority given to them, ſhall not deveſt it. 4. None can give an Authority to do a thing which he could not do himſelf; but here it ſhould be otherwiſe; and therefore it is not a good Authority: and it is not like the ſurrendring of Lands into the hands of the Lord for a ſurrender, cannot be revoked, but this authority is revokeable. It was the Opinion of the Court, That the Cuſtome was no good Cuſtome: and eſpecially for theſe Cauſes; 1. Becauſe it is not found that the Land is demiſeable. 2. Becauſe it is againſt the Rules of Law; for a man cannot deviſe a Copyhold: and here the Caſe is worſe. 3. Becauſe it is not found that the Attorneys were Tenants of the Mannor; and though it be found, that the party was admitted *ſecundum Conſuetudinem Manerii*, that goes onely to the Admittance, and not to the Letter of Attorney: and it is onely by recital, that the Attorneys were Tenants: It was adjudged for the Plaintiff, Hill. 1651. in B. R. *Wallis* and *Bucknalls* Caſe. *Styles* 311. See Trin. 1652. in B. R. A Cuſtome of a Mannor was, That any Copyholder of that Mannor might make a writing in the nature of a Letter of Attorney to two Copyholders of the Mannor, to ſurrender his Copyhold after his death: And it was then holden, That the Cuſtome was good, and that the death of the party doth not revoke this writing made in the nature of a Letter of Attorney; for that it is ſtrengthened by the Cuſtome: and it is not like an Ordinary Letter of Attorney, which becomes void by the death of him that made it; for this Cuſtome is a Law, and the authority here ſurvives. Trin. 1654. B. R. *Roby* and *Twelves* Caſe, *Styles* 421. Quære; for this Caſe ſeems to be contrary to the Judgment given in *Wallis* and *Bucknalls* Caſe

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3. *What Priviledges an Attorney hath: And where he ſhall be allowed ſuch Priviledge; And where he ſhall have an Action for his Fees, and for monies laid out by him; where not?*

1. A Writ of Priviledge was ſigned by the Juſtices of the Common-Pleas, for a Clark under the *Cuſtos Brevium*, to free him from being a Souldier, reciting that it is the Cuſtome and Priviledge of the Court, That neither the Attornies nor Clerks of the Court, ſhall be preſſed for Souldiers, nor elected to any other Office *ſine voluntate ſua*; but ought to atttend the ſervice of the Court. See *Cook's Entries*, 436. The like Writ of Priviledge was granted to a Clerk of the Kings Bench to diſcharge him from being preſſed for a Souldier. 1. *Trin.* 1. Car. in C. B. *Venables* Caſe. *Cro.* 1. part 8.

2. An Attorney of the Kings Bench was elected Tythingman of the Town of T. in which Town a Cuſtome was pretended to be, That every one ſhould be Conſtable or Tythingman according to their ſeveral houſes, and he having purchaſed two houſes in the ſaid Town, was in a Leet there choſen Tythingman. He brought a Writ of Priviledge to be diſcharged, becauſe he is to be Attendant in this Court: It was prayed that the Writ might not be allowed, for although in truth Attornyes and Clerks in Courts have ſuch a Priviledge to be diſcharged when they are generally elected, becauſe of their attendance here, they ſhall not be compelled to attend ſuch an Office; Yet when there is a ſpecial Cuſtome, that they ſhall be elected in Courſes, that Cuſtome ought to prevail againſt ſuch priviledges; But the Opinion of the Court was, that it cannot be a good Cuſtome, for then a Woman inhabitant in one of the ſaid houſes, it might come to her courſe to be Conſtable, which the Law will not permit: and ſo it was adjudged that this Cuſtome could not prevail againſt a perſon who by his Office is to attend here, whereupon it was Ordered, that he ſhould be diſcharged. *M.* 10 Car. in B. R. *Prowſes* Caſe. *Cro.* 1. part. 283.

3. Note, by *Coke* Chief Juſtice of the Kings-Bench; If one hath priviledge of this Court, he is not to be ſued in any other Court, but he is onely to be ſued here in *Cuſtodia Mariſchalli*; and where it is ſaid, 1 H. 7. 12. That no Attorney is here of Record; It appears by the Records in the Tower, before the time of King *Henry* the 7th, that Attorneyes of this Court were of Record: An Attorney here was then called *Clericus*; And our Attorneyes are not to be ſued in any other Court; and it appeareth by the Roll in 12 H. 3. in the Tower, that in every Term, Rolls were here made of Warrants of Attornies; And by 31 H. 6. If any one be committed, by any of the Judges of this Court, and be in *Cuſtodia Mariſchalli*, one may now commence a ſuit againſt him, being in *Cuſtodia Mariſchalli*. Paſc. 12. Jac. in B. R. *Bolſtrod.* 2. part 207.

4. A Clerk of the Chancery married a Woman who was Executrix to her former Husband; In Debt brought againſt them in the Common-Pleas, the Plaintiff brought a Writ of Priviledge to have removed the ſaid Action into the Chancery. By all the Juſtices the Writ was diſallowed, becauſe the Wife was joyned in the Action with the Husband, and ſhe could not have the Priviledge, and therefore not the Husband. M. 24, Eliz. in C. B. *Poles* Caſe. *Godbold.* 10.

5. J. S. brought Debt againſt Sir *Simon Fanſhaw*, and his Wife as Executrix of another, and ſued them to the Exigent; at the return of the Exigent, Sir *Simon Fanſhaw* came voluntarily into the Court, and prayed his Priviledge, becauſe he was an Officer of the Exchequer; and it was a queſtion in this Caſe, if he ſhould have his priviledge or not, for two cauſes, 1. Becauſe he is ſued meerly for conformity and neceſſities ſake, and 2. Becauſe he demands his Priviledge at the Exigent: It was Objected, That he ought to have his Priviledges, and ſome Preſidents were vouched on the point, as *Paſc.* 44. Eliz. in the Exchequer, *James Aſhtons* Caſe, ſervant to the Lord *Treaver*, and 21 Jac. rott. 1211. *Stanton's* Caſe; in both which Caſes, the Husband and Wife were ſued in the right of the Wife, and the Husband had his priviledge; and ſo it was adjudged Hill. 8. Jac. in the Exchequer in *Watts* and *Glovers* Caſe. But the whole Court was of Opinion, in the principal Caſe, That the Defendant ſhould not have his priviledge, becauſe that the Action was brought againſt him in *autor Droit*, viz. in the right of his Wife as Executrix; but no Judgment was given in the Caſe. Trin. 17. Car. in the Common-Pleas. *Levett* and Sir *Simon Fanſhawes* Caſe. *M.* 149.

6. A Clerk of the Kings-Bench ſued an Officer of the Common-Pleas, and he in the Common-Pleas claimed his priviledge, and could not have it granted unto him; for that it is a general Rule That where each of the perſons is a perſon able to have Priviledge, he who firſt claims it, ſhall have it, viz. the Plaintiff, and not the Defendant. As if an Attorney of the Common-Pleas, ſueth a Clerk of the Kings Bench, yet the Kings Bench ſhall not have the Priviledge, although the Kings Bench be a more high Court, becauſe the other is Plaintiff, and firſt claymeth it. M. 29. Eliz. in B. R. *Godbolt.* 81.

7. A Servant to Serjeant *Headly* uſually attending upon him, was Arreſted upon a proceſſe out of the Court of Marſhalſey, whereupon he obtained a Writ of Priviledge out of the Common Pleas reciting, That Serjeants at Law which are attending this Court, and their Servants ordinarily waiting upon them, ought to enjoy the Privilege to be ſued in this Court, which Writ being delivered to the Steward of the Marſhalſey, he would not allow thereof; It was moved to the Court, that they ought to have the Privilege for them and their Servants, for that they are properly attendant at this bar, and none others are admitted to practice here, And a Preſident was ſhewed, where one *Martin* Serjeant was Arreſted in *London*, at the Suit of the Biſhop of *Winchester*, and at the Suit of others: And he had a Writ of Priviledge reciting. That Serjeants at Law were to be Attendants to the ſaid Court; *ex Officio plus quam alibi.* Whereupon the Writ of Priviledge was allowed, and the party diſcharged of the Suit in the Court of Marſhalſey. M. 3. Car. in C. B. *Cro.* 1. part. 59.

8. In Debt; The Plaintiff declared that he being an Attorney in the Common-Pleas, that the Defendant retained him to proſecute a Suit for J. S. and agreed to pay him his Fees; and ſhewed that he had laid out ſo much for J. S. in the Suit, and the Defendant had not paid it him; upon *Nihil debet* pleaded, It was found for, and Judgment for the Plaintiff, and Error brought, and Aſſigned for Error; That the Defendant is but a Sollicitor, and there is not any conſideration, and it is maintenance in him to Sollicite Suits; and 2. That debt doth not lye, but an Action upon the Caſe on *Aſſumpſit*, for that there is not any Contract betwixt them; But the Opinion of the Court was, that the exceptions were not good: and ſo the Judgment was affirmed. Hill. 3. Car. in C. B. *Sands* and *Trivittians* Caſe. *Cro.* 1. part. 76. See Hill. 16. Jac. in B. R. rott. 416. *Bradford* and *Woodhouſes* Caſe. *Cro.* 2. part. 520. where Debt was brought againſt the Sollicitor of Sir *Thomas Elwys*; who retained the Plaintiff being an Attorney; to proſecute a Suit againſt the ſaid Sir *Thomas Elwys* for his Fees; which being found for the Plaintiff, Error was brought, and objected, that Debt did not lye; But it was over-ruled by the Court, that the Action did well lye, and that it is a good Contract made by the Sollicitor; and ſo the Judgment in that Caſe was alſo affirmed.

9. Note, It was holden by the whole Court, That an Attorney may be a Sollicitor for his Client in other Courts, as well as in the Court where he is an Attorney, and is allowable, and a promiſe made to him to pay Fees, is lawful; And a Sollicitor of an inferiour rank, which Sollicites Cauſes for his Clients, may take recompence, and take a promiſe to pay what he ſhall lay out: But if a Perſon of Superiour Rank ſhould do it, it were maintenance: And it was holden: that an Action upon the Caſe, upon *Aſſumpſit* brought for ſuch mony laid out, or Fees, was maintainable. Trin. 4. Car. in B. R. rott. 217. *Thursby* and *Warrens* Caſe. *Cro.* 1. part. 113.

10. A Writ of Error was brought in Debt in the C[illegible]-Pleas, and Error Aſſigned, whereas the Defendant appeared by J. S. his Attorney, and Judgment was given againſt him by *Nihil dicit*, That the ſaid J. S. was no Attorney of the Common Pleas at the time of his appearance, nor at any time within the ſaid Term; and the Defendant pleaded, in *Nullo eſt erratum*. And becauſe it appears that the Defendant appeared by the ſaid J. S. and Imparled untill another Term; ſo as the Court admitted him to be an Attorney; It is againſt the Re-

cord;

cord to say that he is not an Attorney: And if he were not an Attorney before, yet this admittance of the Court, implicitely admits him to be an Attorney in the Action; wherefore the Judgment was affirmed. Hill. 16. Jac. in B. R. *Haydon* and *Mynns* Case. *Cro.* 2. part 521.

11. An Attorney of the Common Pleas, sued as Administrator, by Writ of Priviledge: and Exception was taken unto it, and it was said that he ought to sue by Original; And of that Opinion was the whole Court; wherefore he took out his Originall. M. 15. Jac. in C. B. *Gages* Case. *Hob.* 177.

12. Note, It was said and agreed by the Court, That if an Attorney of the Court be sued by Bill of Priviledge, he ought not to find Bayl; but if he be sued by Original, and comes in by *Capias*, then he ought to find bail. Mich. 11. Jac. in C. B. *Brownlow.* 2. part. 134.

Attornment.

1. *What shall be said to be a sufficient Attornment; and what not, and who shall Attorne.*

1. A Lease is made for years, rendring Rent, afterwards the Reversion is granted to one for life, the Remainder over in Fee, the Termor Attorned to the Grantee for life; afterwards the Grantee for life released all his right to him in the Remainder, and afterwards he in the Remainder granted his said remainder and the Reversion, with the Rent to one in Fee, to whom the Termor paid the Rent; and also the Grantee for life, released all his right to the Grantee and his Heirs: And if that should amount to an Attornment, was the question: The better Opinion of the Court was, That the Releases were both void, because they had not the Words, of surrender, in them; And that the [illegible] Release should not enure as an Attornment to make the remainder to passe. Pasc. 8. Eliz. *Dyer.* 151.

2. The Father ensoffted the Son to the use of the Father himself, for the use of himself for his life, and after his decease, then to the use of the Son and his Heirs, after the Father and Son came together upon the Land, and by word without Deed d d deliver Seisin of the Land to the Father. To have to him and his heirs: In that Case it was a question if it were a good Feoffment; but the Opinion of the Court was; that it was a good Feoffment, and that in Law, the Acceptance of the Livery, did imply two things, 1. That it was a surrender, and after a Feoffment: like unto the Case of a surrender to him in the Reversion; in which Case, it shall enure to an Attornment; and then to a surrender. 19 Eliz. *Dyer.* 358.

3. A man seised of Lands in Fee, leased the same to A. and B. for their lives, and dyed, the Reversion discended to his Son and Heir, who granted the Reversion to C. to whom A. one of the Joynt-Tenants Attorned, and afterwards surrendred all his Interest to C. the Grantee of the Reversion, who entred; In this Case it was adjudged, That the Entry of C. was lawfull, and that he should be Tenant in Common with B. For it was agreed that the Attornment of A. one of the Joynt-Tenants, did vest the intire Reversion in the Grantee, because their estate is intire, and the Attornment is a Lawfull Act, which gives not any interest, but onely perfects the Grant of another: And the Attornment of one Joynt-Tenant, is the Attornment of them both. 2. It was Resolved in that Case. That if the Tenant having notice of the Grant of the Reversion, Attorn unto part, it shall be an Attornment to the whole, because an Attornment is but an Assent which cannot be devided nor apportioned, and therefore, If a Reversion be granted to two, and the Tenant Attorneth to one of them, the same is a good Attornment to them both. Hill. 43 Eliz. in B. R. *Cook* 2. part 66. *Tookers* Case. And in that Case, it was further Resolved; That if one of the Joynt-Tenants, hath notice of the Grant of the Reversion, that he may Attorn to the Grant, though in the absence of his Companion, *ibid.*

4. If a Feme Sole maketh a Lease for life rendring Rent, and afterwards by Deed granteth the Reversion to another, and afterwards, and before Attornment, marrieth with the Grantee, it was holden that this entermarriage shall be no countermand of the Attornment, as if she had married with a stranger, for it is for the benefit of the Husband that it shall not be a Countermand; And therefore by the payment of the Rent by the Tenant, to the Husband in the name of an Attornment, the Reversion doth passe out of the Wife; For the same reason which proveth that the Intermarriage with a stranger, shall be a countermand of the Attornment, for the benefit of the Husband, proveth, that when the Grantor marrieth with the Grantee, that it shall not be a Countermand, for that it shall not be for the benefit of the Husband. 2 R. 2. *Fitz. Attornment* 8. vouched and agreed, in *Forse* and *Hemlings* Case. *Cook* 4. part 61.

5. Note, A difference was taken and agreed for Law, between an expresse Attornment of the party, and an Act which doth amount in Law to an

Attornment.

Attornment. For if a Leaſe be made for life, or for years, rendring Rent; And afterwards the Reverſion is granted to B. by Fine, and before Attornment B. diſſeiſeth, or oufteth the Leſſee and enfeoffeth C. the Leſſee re-entreth, it ſhall not amount in Law to make a privity to C. that he may diſtrain for the Rent, for he ſhall not be in a better Condition then his Feoffer was; but otherwiſe, if the Leſſee had expreſly attained to the Feoffee. M. 37 Eliz. *Owſeys* Caſe. So where the Conuſee of a Fine of a Reverſion before Attornment, did bargain and ſell the Reverſion to another by deed Indented, and enrolled according to the Statute; It was holden that the bargainee ſhould not diſtrein, for the Rent, before Attornment, for that he ſhould not be in a better condition then he that made the Grant. But if the Conuſee had had an expreſſe Attornment, then the Bargainee ſhould have diſtreined without any Attornment. *Knotiſfoords* Caſe, vouch. in *Mallories* Caſe. *Cook* 5. part. 112. See *Paſc.* 33. Eliz. in C. B. rott. 409. *Ouſley's* Caſe. *Owen.* 23.

6. In Treſpaſſe the Defendant pleaded, That the Dean of *Weſtminſter* made a leaſe to J. S. who made Leaſes out of it, firſt to A. for certain years rendring Rent, and after the end of that Leaſe, then to B. rendring Rent, and afterwards ſold all the intire intereſt to the Defendant, to whom the ſecond Leſſee (who had no poſſeſſion) Attorned; It was holden by the Court, That this pleading of Attornment was not good, becauſe it is no Attornment. Trin. 29 Eliz. in. C. B. *Moor* and *Hills* Caſe. *Goldsbr.* 57.

7. Lord and Tenant rendring Rent; The Tenancy diſcended to an Enfant, under the age of 21. years, The Lord granted the Seignory; and the Enfant within age Attornment; and it was adjudged, that the Attornment was good, for three reaſons. 1. Becauſe he gives no Intereſt, for it is but a bare Aſſent. 2. His Anceſtors held the ſame Land by the payment of Rent, and doing of Services, and it is reaſon that the Rent ſhould be paid, and the Services performed; and although he ſhall have his age for the Land, yet for the Rent he ſhall not have his age; and although that he ſhall have a *Per quæ Servitia*, yet after his full age, the Grantee ſhall diſtrein for all his Arrerages due from the firſt, ſo as the Attornment is no prejudice to the Enfant, and our old books are, That an Enfant of the Age of three years Attorned. 32 Eliz. 3. 3. The Attornment is the perfecting of a thing which the Law requires, and that is the grant of the Seignory which is not perfect till the Tenant Attorn. And ſo the Opinion of all the Juſtices was, that the Attornment of the Enfant was good; *Paſc.* 9 Jac. in C. B. *Crane* and *Coſpits* Caſe. *Brownlow.* 2. part 84.

8. He in the Reverſion upon a Leaſe for years made a Charter of Feoffment to divers perſons to the uſe of himſelf for life, and after to the uſe of his eldeſt Son in tail; and the words of the Charter were, *Dedi, Conceſſi, Bargainzain et Feoffain.* and he ſealed and delivered the Deed, but no Livery of Seiſin was made: afterwards he came to the Leſſee for years, and ſaid, He had made a Feoffment, and ſhewed alſo the uſes, but did not ſhew to whom the Feoffment was made; To whom the Leſſee ſaid, You have done very well, I am glad of it: It was the Opinion of the Juſtices in that Caſe That the ſame was no Attornment, becauſe it was not made to the Feoffees, and to the Grantee of the Reverſion; for an Attornment ought to be to the Grantee himſelf, and not to *Ceſtuy que uſe.* And that was the Caſe of one *Arden.* Paſc. 29. Eliz. in C. B. *Leon.* 58.

9. If many Joynt-Tenants hold by certain Services, and the Lord granteth the Services to a ſtranger, and one of the Joynt-Tenants Attorneth to the Grant, the ſame is as ſufficient as if they had all Attorned; But otherwiſe it is of a Rent-charge, for there all the Joynt-Tenants of Lands charged upon the grant of the ſaid Rent, ought to Attorn to the grant, for the Terr-Tenant ought to Attorn; and one of them is not Terr-Tenant, But if three Coparceners be of an Advowſon, or three Tenants in Common be of an Advowſon; And the Parſons, Patrons, and Ordinary, joyn in a Leaſe (whereas one of the Patrons is a Feme Covert, and ſo her Act void); In that Caſe the Succeſſor of the Incumbent ſhall avoid ſuch Leaſe, for that they all three ought to agree, but the agreement of one of them in that Caſe is nothing worth; and that Caſe differs from the Caſe of Attornment, for an Attornment is but a bare aſſent, without any Intereſt in him who Attorns, for an Abator may do it; but in the Caſe of a Confirmation, there is matter of Intereſt, and therefore if the Confirmation be not made by them all, the ſame is not good, as it was in the ſaid Caſe of Coparceners, becauſe one of them was a Feme Covert; and ſo the ſame might be avoided by the ſucceſſor of the Parſon, M. 33. Eliz. in B. R. *Lancaſter* and *Lucas's* Caſe. *Leon.* 234.

10. The Caſe was this, *Thomas Bracebridge* ſeiſed in Fee of a Mannor, Leiſed a Meſſuage, parcell of it to J. S. for 21 years, and afterwards, 35 H. 8. Leaſed the ſame to one *Moor* for 26 years to begin after the expiration of the firſt Leaſe: afterwards, 5 Eliz. 6. he enfeoffed *Griffith* and others to the uſe of themſelves and their Heirs, upon Condition, That if the Feoffees did not pay 2000 l. to *Thomas Bracebridge* within 15 dayes, that immediately after the 15 dayes, the Feoffees ſhould ſtand ſeiſed of the ſaid Mannour, to the uſe of the

ſaid *Thomas Bracebridge*, and *Joyce* his Wife for their lives, without impeachment of waſte; and after, to the uſe of T. B. their ſon in tail, with divers Remainders over; The Feoffees did not pay the 2000 l. within the 15 dayes. Afterwards J. S. Attorned to the Feoffees; In this Caſe, two points were moved. 1. If the Reverſion of the Lands paſſed to J. S. be paſſed by the Feoffment of the Mannor. 2. If by the Attornment of J. S. after the 15 dayes, the uſes did riſe to *Bracebridge* and his Wife. It was holden by all the Juſtices in this Caſe. 1. That this Attornment of J. S. two yeers after the Livery is ſufficient, for it ſhall have Relation to the Livery to make it parcel of the Mannor, but not to puniſh the Leſſee for waſt done mean between the Livery and Attornment, but betwixt the Feoffer, and the Feoffees, it ſhall paſſe *ab initio*. 2. It was holden, That although the uſes limited by it are determined by the default of payment, within the 15 dayes, Yet the Feoffees ſhall take the Reverſion by this Attornment to the ſecond uſes; As if I enfeoffone upon condition, to enfeoff J. S. who refuſeth, now the Feoffee ſhall be ſeiſed to my uſe; but if the condition were to give in tail, contrary; ſo here is a limitation beyond the firſt uſe, which ſhall not be defeated for want of Attornment to the firſt uſes; And in this Caſe it was not the meaning of *Bracebridge* to have the Lands again upon breach of the Condition in his former eſtate, but according to the ſecond uſe; And Judgment was given in the principall Caſe, according to the reſolution of the Judges aforeſaid: And in that Caſe it was further agreed, That if a Feoffment in Fee be made to J. S. upon condition, that he ſhall grant to A. a Rent-charge, who refuſeth it, J. S. ſhall be ſeiſed to his own uſe. 20 Eliz. in C. B. *Bracebridges* Caſe. *Leon.* 264, 265.

11. In Treſpaſs, the Caſe was, That J. S. was Tenant for life, the remainder to J. D. in taile: J. D. by Deed granted the remainder to the Plaintiff in Fee; J. S. being Tenant for life, having notice of this Grant, ſaid to *B.* and *C.* two ſtrangers, That he was pleaſed and content, that the ſaid Grant was made to the Plaintiff; for that he was his Coſen: and, Whether this was a good Attornment, was the Queſtion? And it was agreed by the Court, That it was an Attornment, although the words were ſpoken to thoſe who were meer ſtrangers, and who peradventure had not any Notice of the Grant, nor were required by the Grantee to take Attornment; for it ſufficeth, that the Tenant have notice of the Grants and Aſſents thereunto: and it is not neceſſary to attorn to the Grantee himſelf; for that, the pleading is, To which Grant he attorned, without mentioning the Attornment to be to the Grantee, or to any other. Trin. 11 Car. in B. R. *Hilton* and *Bembridges* Caſe. *Cro.* 1. Part. 318.

12. If the Lord grants the ſervices of his Tenant to one, and after by another Deed of a later date, grants the ſame ſervices to another: In that caſe, if the Tenant attorn to the laſt Grantee, it makes his Grant good; and afterwards albeit that he attorneth to the other Grantee, yet that cannot make the firſt Grant good. But in that caſe, if the Tenant attorn to them both, the Attornment is void to both for the incertainty. So if a Reverſion be granted for life, and afterwards it is granted to the ſame Grantee for years, and the Tenant attorneth to both the Grantors, this is alſo void for the incertainty. If the Lord by one Deed grant his Seignory to J. Biſhop of L. and his Succeſſours, and by another Deed to J. Biſhop of *Land* his heirs, and the Tenant attorns to both Grants, it is a void Attornment for both Grants; for although the Grantee be but one perſon, yet he having ſeverall Capacities, and the Grants being ſeverall, it is not according to either of the Grants; and by conſequence void for the incertainty. See *Cook* 1. Part. *Inſtitutes* 310.

13. In a Replevin, the Caſe was; J. S. was ſeiſed of a Copyhold of the Mannor of J. and by Licence of the Lord, by Indenture demiſed the ſame to the Plaintiff for 20 years, rendring 15 l. *per annum* rent; J. S. afterwards ſurrendred the Reverſion of the one moyety of the ſaid Copyhold to J. D. to which he was admitted; and then he ſurrendred the other moyety to *B.* the Wife of J. N. who was alſo admitted. It was Reſolved in this Caſe by the Court, That the ſurrender in this caſe by name of a Reverſion, was good. And, 2. That there needed no Attornment upon the ſurrender made of the moyety by J. S. to J. D. becauſe it paſſed not by way of Grant of the Reverſion and Attornment; but in this caſe there muſt be an Admittance of the Lord; and when that admittance is given, the Eſtate is ſettled; and there is no means in Law to compell the Leſſee to Attorn; and the Admittance is a kind of Act in Law, and puts the eſtate in the party in a ſort in the Poſt. Hill. 14 Jac. in C. B. rott. 2049. *Swinnerton*, and *Miller's* Caſe. *Hob.* 177, 178.

14. If a man be ſeiſed of a Mannor which is parcel in demeſne, and parcel in ſervice, If he alien the Mannor to another; all that hold of the Alienor as of his Mannor, ought to attorn to the Alienee: But if the Lord make a Leaſe for years, or for life, of a Mannor, and the Freeholders attorn to the Leſſee; here, if afterwards the Reverſion of that Mannor be granted, the Attornment of the Leſſee for years, or life, ſhall bind the Freeholders; for by their former Attornment, they have put the Attornment into the mouth of the Leſſee, their attornment being involved in his;

If

If there be Lord, Meſne, and Tenant, and the Lord will grant the ſervices of the Meſne; in that caſe albeit in the Grant he make no mention at all of the Meſne; yet the Meſne ought to attorn, and the Tenant paravail, becauſe he is the next privie in Tenure that ought to be charged, &c. See *Litt.* Sect. 554. & 557. acc.

15. If an Enfant be ſeiſed of a Reverſion, and levieth a Fine thereof; this is defeiſible by a Writ of Errour during his minority; and in that caſe the Tenant ſhall not be compelled to attorn: and ſo, If before the Statute of 4 H. 7. and 32 H. 8. Tenant in taile had levied a Fine, the Tenant could not have been compelled to attorn: But now ſince the ſaid Statutes which give ſtrength to Fines to barr the Iſſue in taile, it is otherwiſe: and to that purpoſe, ſee Juſtice *Windham*'s Caſe, vouch. in *Cook* 3. Part, in the Caſe of Fines: Where in a *Quid Juris clamat* brought by *Francis Windham*, one of the Juſtices of the Common-Pleas, the Caſe was this: The Lady *Greſham* was Tenant for life of the Mannor of *Weſt-Bradenham* in *Norfolk*, the Remainder to *Rich. Read* in taile, the Reverſion to *William Read* in Fee: *Richard* levied a Fine of his Remainder to Juſtice *Windham* and his heirs; and before the engroſſing of the Fine, Juſtice *Windham* brought a *Quid Juris clamat* againſt the Lady *Greſham*, who pleaded, that *Richard* the Conuſor at the time of the Fine levied had but an Eſtate in taile in Reverſion, and ſhewed how, and demanded Judgment, if thereupon ſhe ſhould be compelled to attorn; upon which the Plaintiff demurred: and although before the Statutes of 4 H. 7. and 32 H. 8. it was a good plea; yet it was adjudged, That now after the ſaid Statutes which makes the Fine a barr, if the eſtate fail, although the *Quid juris clamat* ought to be brought, and by conſequence before the Eſtate taile be barred, and that it doth not appear at the time of the *Quid juris clamat* brought, that it ſhall be a Fine at the Common Law, or a Fine levied with proclamations; yet it was adjudged, That ſhe ſhould attorn. See *Cook.* 3. Part. 86. in the Caſe of Fines. 28 Eliz. Juſtice *Windham*'s Caſe.

2. *Where an Attornment is neceſſary, where not: And who ſhall or may Attorn, or be compelled to Attorn; who not. What ſhall be a good Attornment; And where a Reverſion or an Eſtate ſhall paſſe without Attornment; where not.*

1. A Man ſeiſed of divers Mannors, and of divers Lands, part in Leaſe for years, with Rent reſerved; part in Copy-hold; upon a valuable Conſideration, demiſed, granted, bargained, and ſold the ſaid Mannors, Lands, &c. with all the Rents reſerved upon any demiſe, to have after the death of the bargainor for 17 years, rendring a Roſe to his heir; The Deed is acknowledged to be enrolled. Afterwards he Covenants to ſtand ſeiſed of the ſame Mannors, &c. to the uſe of himſelf and the heirs of his body, No Attornment is had to the bargainees, and afterwards the bargainor dyeth: It was adjudged in this caſe, That the Leſſees ſhould have the Demeaſnes, and the Rents of the Copyhold by the ſaid bargainee and ſale, without Attornment: for, 1. It was Reſolved, That if the ſame do paſſe as a future Intereſt at the Common-Law, there ought to be an Attornment in the life of the Grantor before the future Intereſt doth begin: but in this caſe, becauſe there was not any Attornment of the Leſſees for years in the life of the bargainor, It was Reſolved, That if they ſhall take this future Intereſt as a Demeſne at the Common-Law, they ſhould not have the Rents reſerved upon the Leaſes for years. 2. It was Reſolved, That in this caſe, that the Leſſees had election to take the ſame by demiſe, or by bargain and ſale; for if the Law ſhould enforce them to take it by demiſe, then they ſhould loſe the Rents reſerved upon the Leaſes for years: But if the Intereſt doth paſſe by bargain and ſale, then there needeth no Attornment, becauſe the Statute of 27 H. 8. of Uſes doth execute the poſſeſſion to it; and the Statute of 37 H. 8. of Inrollments doth not extend to it, becauſe no Eſtate of Freehold paſſed, but onely an Eſtate for years. 3. It was Reſolved, That this Election did remain unto them, notwithſtanding the alteration of the Eſtate, and notwithſtanding the death of the bargainor. Paſch. 35 Eliz. in *Cur. Ward. Cook* 2. Part. 35. Sir *Rowland Heywards* Caſe. See *Cook* 8. Part. 94. *Fox*'s Caſe. acc.

2. The Caſe was this; Tenant for life, the remainder over in Fee; Tenant for life made a Leaſe for years, the Leſſee entred: Tenant for life granted the Tenements aforeſaid to *C. Habendum* from the Feaſt of St. *Mich.* next following for

life; the Leſſee for years attorned; *C.* entred, and made a Leaſe at will, to whom the Tenant for life levied a Fine: he in the Remainder entred. In this Caſe, amongſt other Points, it was Reſolved, That the Grant to *C.* was void, becauſe an Eſtate of Freehold could not begin *in futuro*. And, 2. It was Reſolved, That the Grant being void from the beginning, the Attornment of the Leſſee for years which came after, could not make the Grant good. Mich. 40 Eliz. in C.B. *Cook* 2. Part, *Bucklers* Caſe.

3. *A.* Leſſee for 30 years of a houſe in poſſeſſion, but of a Stable of which J. S. was poſſeſſed for two years, aſſigned all his Intereſt to *B.*; afterwards *A.* by Deed Indented, demiſed the ſaid Stable to J. S. for 6. years; the two years expired, *B.* by Indenture, in Conſideration of 25 l. re-demiſed all the Houſe to *A.* for 21. years, rendring to him 24 l. *per annum* Quarterly, and 5 l. quarterly at the ſame Feaſts, untill the ſaid 25 l. were paid; upon condition, That if the ſaid ſum of 25 l. or the ſaid Rent were behind, that then it ſhould be lawfull for *B.* to re-enter: and upon the Indenture it was endorſed, that the ſaid J. S. ſhould have the ſaid Stable according to the demiſe made to him; Afterwards, before any day of payment, *A.* re-demiſed the ſaid ſtable to *B.* for 10. years, and afterwards the Rent was behind. *B.* did not enter into the ſtable, but J. S. continued poſſeſſion of it, and J. S. did never attorn. In this caſe, it was adjudged, That the entry of *B.* was lawful for the Condition broken: And amongſt many other Points, it was Reſolved in this Caſe, That if a man hath a Leaſe for 20. years, and he leaſeth for two years rendring a Rent; and afterwards he granteth all his Term or Intereſt to another, If the Leſſee doth attorn, the Reverſion ſhall paſſe; and if no Attornment be, yet the Intereſt in reverſion ſhall paſſe, ſo as the Grantee ſhall have the Land after the two years determined; for that the Grant of one ſhall not be adjudged void, if to any intent it may take effect. Mich. 30 Eliz. in B. R. *Cook.* 4. Part, 52. *Rawlins* Caſe.

4. *A.* Tenant for life of the Manner of *D.* the remainder to *B.* in Fee: *B.* and her husband levied a Fine, 10 Eliz. of the Demeans of the ſaid Manner, by a certain Quantity of Acres which included all the Demeaſnes, who granted and rendred the Demeaſnes to J S. for 50 years rendring Rent, and granted the Reverſion to the husband and wife, and to the heirs of the wife; and in the Indentures which had the uſe of the Fine, it is agreed, That the husband and wife ſhall have ingreſs and egreſs in and out of the ſaid Mannor, to hold Courts in and upon the Demeaſnes; and it is averred, That the ſaid Demeſnes and Services were within the ſaid Mannor known, reputed, and called by the name of the Mannor of *D.* 16 Eliz. another Fine is levied by the ſaid husband and wife of divers other Mannors of the wife, excepting the Mannor of *D.* in which Fine ſo many Acres were contained, which were ſufficient to paſſe the ſaid Demeaſnes, to the uſe of the Wife for life, and after to the uſe of Sir *Moile Finch* her eldeſt ſon in taile with divers remainders over, 19 Eliz. J. S. made his ſon of the age of 3. years his Executor, and dyed: Adminiſtration *durante minore ætate* of the Enfant is committed to *C.* Afterwards 23 Eliz. the husband and wife levy another Fine of the ſaid Mannor of *D.* and of divers Acres ſufficient to paſſe the Demeaſnes, To the uſe of the husband and wife, and the heirs of the Wife, untill the husband with the aſſent of the wife in writing, declare to what other uſes; and then to ſuch uſes: *C.* aſſigns to *E.* for 10 years; *A.* dyes, *E.* enters; The husband and wife by Writing declare the Uſes to *F.* and *G.* and their heirs, who eject *E.* and enfeoffe *H.* and *J.* to the uſe of the wife for life, the remainder to her younger ſon in taile; the wife dyeth, the rent is behind, the younger ſon diſtrains for the Rent; and the Leſſee of Sir *Moile Finch* brings a Replevin. And in this caſe, amongſt many other points of Law, It was Reſolved, That in this caſe, foraſmuch as *E.* the Leſſee had but an Intereſt of a term during the life of *A.* no Attornment could be made by him to the Fine: and to the declaration of Uſes, there needed not any Attornment; for when an Attornment cannot be had, or is not requiſite to the Fine which is the Root, no Attornment is required to the Declaration of the Uſes, which are but the branches. 2. It was Reſolved, That when a Reverſion is ſettled in any one in Judgment of Law, and he hath not any poſſible means to compell the Tenant to attorn; and no Lacheſs is in him that he ſhall avow, and have an Action of Waſte without Attornment; for it is a Rule, *Quod remedio deſtituatur, ne ipſa volet, ſi culpa abſit.* 3. It was Reſolved in the principal caſe, That there was no Lacheſs to have an Attornment in the Conuſee, although he hath rented the particular Eſtates in the Fine; for preſently after the Conuſans, and before the Fine engroſſed, the Reverſion paſſed to the Conuſee, and *eo inſtante* is executed by the Statute of 27 H. of Uſes; ſo as it is not poſſible to have *Quid juris clamat*, nor other remedy to compell the Tenant to attorn; and in as much as by the Execution of the poſſeſſion to the uſe, the benefit of the Conuſee to have a *Quid juris clamat*, is taken away; it is reaſon that the Act of Parliament ſhall not turn to the prejudice of any; for *impotentia excuſat legem*, Mich. 4 Jac. in C.B. *Cook* 6. Part, 63, 64, 65. Sir *Moile Finches* Caſe.

5. The Earl of *Kent* brought Debt againſt J. S. for a Rent, and ſhewed, how that the Counteſs

teſs of *Derby* was Tenant in Dower of the Land, and took to husband the ſaid Earl of *Kent*: and that *Henry* Earl of *Derby* had granted the Land to the ſaid Earl of *Kent*, *Habendum* after the death of the Counteſs. In this Caſe, it was ſaid by the Court, That the Attornment was not neceſſary; for that it is but a Leaſe in Reverſion, and then no Rent paſſeth: and ſo it was ſaid, It was adjudged, in *Plow. Comment.* in *Throgmorton* and *Tracies* Caſe. It was moved by *Snagge*, Serjeant, That he had granted it by the name of a Reverſion, and then the Reverſion will carry the Rent. To whom the Court ſaid, Then your Grant is void; For a man cannot grant his Reverſion, *Habendum* after the death of another; and therefore *quacunq; via data*, he could not have the Rent: whereupon the Book ſayes, *Snagge conticuit, cum tubore*, Mich. 29 Eliz. in C. B. The Earl of *Kents* Caſe, *Goldiſor.* 39.

6. Note; It was ſaid, and agreed for Law by the Court, That for acts in Law no Attornment is neceſſary; As if a Leaſe be made for years reſerving Rent, which is aſſigned to a woman for Dower; ſhe ſhall have the Rent without Attornment: In *Cambells* Caſe, upon an *Elegit* returned, That a Leſſor was ſeiſed in Fee, and that by virtue of the Judgment, the moyety was delivered to the Plaintiff; and for Rent, reſerved upon the Leaſe for years before Judgment, it was adjudged, That the Plaintiff might have an Action without Attornment. *Brownlow* 1. Part. 33. acc.

7. Note; Although Tenant in taile may Attorn, where the Reverſion of his Eſtate is granted over; yet he is not Compellable to attorn, although ſuch grant of the Reverſion be by Fine, becauſe he hath an Eſtate of Inheritance, which may continue for ever. So if a Leaſe be made for life, the remainder in taile, the remainder to the right heirs of Tenant for life: In this caſe, if the Tenant for life grant his remainder in Fee, that remainder paſſeth without Attornment; for if any ſhould attorn, it ſhould be the Tenant for life; and it were in vain for the Tenant for life to attorn to his own Grant. *Cook* 1. Part. *Inſtitutes*, 316. & 319.

8. If the Reverſion of Leſſee for life be granted, and the Leſſee for life aſſigns over his Eſtate, the Leſſee cannot attorn; but the Attornment of the Aſſignee is good, becauſe it behoveth that the Tenant of the Land do attorn; and after the aſſignment, there is no tenure nor attendance, &c. betweene the Leſſee and him in the Reverſion: So if Leſſee for life aſſign over his Eſtate upon condition, he, having nothing in him but a Condition, ſhall not attorn; but the Aſſignee may attorn, becauſe he is Tenant of the Lands. *Ibidem.*

9. In Waſte, the Caſe was; *A.* ſeiſed of a houſe and certain Lands by Indenture demiſed the ſame to *B.* from Chriſtmas next coming for 16. years, who aſſigned his Intereſt to the Defendant; Afterwards by Deed Indented and Enrolled bargain, and ſold the reverſion to the Plaintiff, who brought the Action: The Defendant confeſſed, That *A.* was ſeiſed, and made the Leaſe, and confeſſed the Aſſignment; but ſaid, That before the ſaid Indenture of bargain and ſale was enrolled, the ſaid *A.* did levy a Fine of the premiſſes to the now Plaintiff, after which the ſaid Deed was enrolled. In this caſe the point was, If the Conuſee of the Fine after the Deed enrolled ſhould be in by the Fine, or by the bargain and ſale; for if he be in by the Fine, then no Waſte lyeth before Attornment. It was Reſolved by all the Juſtices, That the Conuſee ſhould be in by the Fine, and not by the Indenture enrolled; for when the Fee-ſimple paſſeth by the Fine to the Conuſee and his heirs, the enrolment of the Indenture afterwards cannot deveſt and turn the Eſtate out of him, which was abſolutely ſettled in him by the Fine; and ſo upon the whole matter it was Reſolved, That before Attornment, the Action of Waſte did not lye. Trin. 33 Eliz. C. B. *Cook* 4. Part, 70. *Hinds* Caſe.

10. Lord and Tenant by Fealty and Rent; the Lord made a Feoffment of the Mannor, the Tenant being within age of 21 years, having the Lands by diſcent attorned. In this caſe two points were Reſolved; 1. That in a *Per quæ ſervitia* againſt an Enfant, who hath a Tenancy by diſcent, he ſhall not have his age, becauſe the Lord at firſt departs with the Land, in conſideration that the Tenant ſhall hold of him, and pay to him his Rent; and it is preſumed, that the Tenant hath benefit and availe above the Services which he doth, and the Rent which he payeth: and the Tenant who hath the Lands by diſcent, ſhall be diſtrained for the Rent behind during his Nonage, and ſhall not have his age. 2. It was Reſolved, That although in the principal caſe the Enfant was not compellable to attorn; yet in regard he by a means was compellable to attorn, if a Fine had been levied, that the attornment was good: and an attornment is but a bare aſſent, and is onely to perfect a Grant, and doth not give any Intereſt; and ſhall not amount to an Enfranchiſement of a Villain: and therefore the Attornment by the Enfant is good in this caſe: and ſo an Attornment of the husband *in pais* to a Grant made by Deed, ſhall bind the Wife, 3 E. 3. 42. Mich. 9 Jac. in C. B. *Cook* 9. Part, 84, 85. *Connys* Caſe.

11. *A.* ſeiſed of the Mannor of *D.* in Fee, Covenanted to ſtand ſeiſed thereof to the uſe of himſelf and *B.* whom he intended to marry for term of their lives without impeachment of Waſte; and after their deceaſe, to the uſe of their firſt Iſſue male, and to the heirs males of ſuch iſſue male; and

and for default of ſuch Iſſue, to the uſe of the heirs males of the body of *A.* and *B.* lawfully begotten; and for want of ſuch Iſſue, to *C.* in taile, with divers remainders over: They Intermarry, and have Iſſue *D.* Afterwards *A.* dyeth, without having any other Iſſue on the body of *B*, but the ſaid *D.* *B.* enters, a Barn is thrown down by the Wind; *B.* takes the Timber of the Barn, and converts it to her own uſe. In this caſe it was Reſolved, 1. That till Iſſue, *A.* and *B.* were ſeiſed of an Eſtate taile executed *ſub modo*, untill the birth of the Iſſue male, and then they became Tenants for life, the remainder to the Iſſue in taile, the Reverſion to the heirs males of *A.* and *B.* for the Eſtate for their lives was not abſolutely drowned, untill they had Iſſue male. 2. It was Reſolved, That Tenant in taile after poſſibility of Iſſue extinct, hath a greater priviledge in reſpect of the Quality of his Eſtate, then Tenant for life hath: and, amongſt the reſt, this is one, That he ſhall not be driven to attorn: But it was Reſolved in this caſe, That if ſuch Tenant after poſſibility doth grant over his Eſtate, the Grantee in a *Quid juris clamat* brought againſt him, ſhall attorn; becauſe by aſſignment over of his Eſtate, the priviledg is gone; as it was Reſolved, Mich. 29 Eliz. in *Ewers* Caſe. Paſch. 13 Jac. *Cook.* 11. Part, 78, 79. *Lewis Bowles* Caſe. See Mich. 40 Eliz. in C.B. rott. 3316. *Veal* and *Reads* Caſe. *Ibid.* acc.

12. If a man have a Rent-charge granted to him of 20 l. *per annum*, and he grant 5 l. a year of it to a ſtranger by Fine, the Tenant is not Compellable to attorn; as it was ſaid by *Hobart*, Chief Juſtice, in the Argument of Sir *Henry Roll*, and *Oſborns* Caſe, Trinit. 9 Jac. in C.B. *Hob.* 23.

13. *A.* purchaſor of the Reverſion, by Fine acknowledged, after the Kings ſilver was entred, wrote to the Tenant, giving him notice of the purchaſe, to requeſt him to have his good will and Aſſent to Attornment, without compulſion of Law. To whom Anſwer was made, ſubſcribed by a Letter under the hand of the Tenant, in theſe words; *The Conuſor himſelf not having it, I am glad ſo good an heir as of your Ladiſhip ſhall have it.* And by the Opinion of *Catline*, and divers Serjeants at Law, the ſame was holden to be a good Attornment, Hill. 13 Eliz. The Lord *Dyer*, and the Counteſs of *Hereſords* Caſe. *Dyer* 298.

14. Note; That if Leſſee for life or years attorn upon a Condition ſubſequent, the Condition is void; for if the Reverſion, or remainder be once veſted, it cannot be deveſted by any Condition annexed to the Attornment, becauſe the Grantee thereof is not in by the Leſſee, but by the Grantor: but if one attorn upon a Condition precedent, it is no Attornment before the Condition be performed. *Cook* 2. Part, in *Tookers* Caſe, acc.

Audita Querela.

I. *For whom, and againſt whom, and where, for what, or upon what it lyeth, and where not?*

1. THe Writ of *Audita Querela* lyeth as well upon matter in Fact, as upon matter in writing: And therefore if a man Leaſe Lands to A. for life, and afterwards grants the Reverſion to B. in Fee, and dyeth, and the Heir of the Conuſor in J. D. by Covin betwixt them, ſue forth a *Precipe in Capite* againſt A. ſuppoſing the Lands to be holden of the King, whereas they are holden of a Common perſon: And in that Writ to appear, they cauſe J. N. as Attorney for A. and to joyn the Miſne upon the Meer Right, and J.N. the Attorney by Covin makes default, ſo as Judgment is given againſt A. In this Caſe, A. ſhall have an *Audita Querela*, to the Juſtices of the Common-Pleas, to make reſtitution to him of the Lands. *Fitz. Nat. Br.* acc.

2. Executors had Judgment in an Accompt, and had the Defendant in Execution for the Arrerages, afterwards the Will was annulled becauſe the Teſtator was an Ideot, and the Record out of the Spirituall Court, was removed into the Chancery by Writ, and from thence ſent into the Kings Bench, where the Action was brought. And the Defendant thereupon brought an *Audita Querela*, It is a Quære, in 3 Eliz. *Dyer.* 203. If the *Audita Querela* did lye; But ſee *Cook* 8. part 144. in Doctor *Druries* Caſe. That in ſuch Caſe, Anno 35 H. 8. It was Reſolved in the Exchequer Chamber, that the *Audita Querela* would well lye.

3. A Woman and her Husband as Adminiſtrators of the firſt Husband, recovered in Debt depending, which ſuit the Son of the Inteſtate by Covin between him and the Deſendant, procured new Letters of Adminiſtration to be granted to him and his Mother joyntly, and after Judgment releaſed to the Debtor: The Husband and Wife ſued forth Execution, the Debtor brought an *Audita Querela* depending, which the ſecond Adminiſtration was repealed by ſentence, and the Covin and the Repeal was pleaded in Bar, upon which the Defendant did demur; It was in that Caſe adjudged againſt the Defendant, 17 Eliz. *Dyer.* 339. But note in that Caſe; If the Letters of Adminiſtration had been good, and the Adminiſtrator had made

made a Releaſe, and afterwards the Letters of Adminiſtration had bin repealed, in ſuch Caſe the Releaſe had bin good; and ſo note the difference, between a ſentence declarative, by which the Letters of Adminiſtration are declared void, and a Sentence of Repeal, which allowes them good till they are Repealed.

4. A. B. and C. 28 Eliz. acknowledged a Recognizance of 200 l. to J. S. 29 Eliz. J. S. ſued forth a *Scire facias* againſt the Recognizors, whereupon *Nihil* returned, and thereupon a ſecond *Scire facias* iſſued, and thereupon Judgment was given, That J. S. ſhould recover againſt the ſaid Recognitors the ſaid 200 l. and that he have execution, J. S. ſued forth a *Levari facias*. It was returned that they had nothing, whereupon a *Capias ad ſatisfaciendum* was Awarded to the Sheriff of *N.* by force of which he Arreſted the bodies of B. and C. 30 Eliz. and the ſaid B. at the time of the ſaid Arreſt, was in Priſon under the cuſtody of the ſaid Sheriff, being Attainted of Felony; and afterwards B. and C. did eſcape out of the cuſtody of the Sheriff; J. S. brought an Action againſt the Sheriff upon this eſcape; It was Reſolved in that Caſe, that the Awarding of the *Capias ad ſatisfaciendum* was erronious; for that the bodies of the Recognizors were not by Law lyable to execution; and yet it was adjudged in that Caſe, that becauſe the Sheriff could not take advantage of the Error in the Judgment, that he ſhould anſwer for the eſcape, for the Sheriff cannot plead *Nul tiel* Record againſt the Judgment, for that untill it be reverſed it remaineth in force, although there be apparent Error in it; but if the Judgment had bin reverſed, then the Sheriff might have bin reteined by bringing his *Audita Querela*. 31 Eliz. in the Exchequer, *Woodhouſe* and *Ognells* Caſe. *Leon.* acc.

5. In *Audita Querela*, the Plaintiff ſhewed, how that a Debt of 200 l. was recovered againſt him, upon which he was Outlawed, and afterwards by force of a *Capias utlagatum*, that he was taken in execution; and ſo being in Execution, the Sheriff ſuffered him to eſcape; The Defendant pleaded that after the ſaid eſcape, and before the *Audita Querela* was brought, the ſaid Outlawry was declared to be erronious; and ſo pleaded *Nul tiel* Record of Outlawry, upon which the Plaintiff did demur, It was Reſolved in that Caſe, That when an erronious Judgment is given, and afterwards the ſame is Reverſed by Error, collateral Acts executory are thereby barred; and therefore it was Reſolved that in ſuch Caſe, The Defendants plea of *Nul tiel* Record, was holden to be a good plea; And the Exigent in that Caſe, which is the Warrant of the Outlawry being declared to be defective for want of ſubſtance, It was therefore void *ab initio*; and ſo it was adjudged that the *Audita Querela* did not lye. *Cook* 8. part 141. Doctor *Druries* Caſe.

6. If a Statute be acknowledged, or a Recognizance be acknowledged before one, who hath not power to take Recognizance, or Statutes: and after ſuch Statute or Recognizance, the Recognizor doth enteoff a ſtranger of the Land; and afterwards the Recogniſee or Conuſee, ſueth forth execution upon the ſaid Statute or Recognizance, the Feoffee may have, and maintain an *Audita Querela*, and ſo avoid the Execution. 29 H. 8 *Dyer* 35.

7. A. acknowledged a Statute to B. and afterwards infeoffed B. the Conuſee, of part of his Land, and afterwards conveyed other part of his Lands to his ſon, and to the Wife of the Son, for the Joynter of the Wife. The Conuſee ſued forth Execution upon the Statute, the Son in his own name, without mentioning his Wife, brought an *Audita Querela*; It was adjudged in this Caſe, that the *Audita Querela* did well lye; and that by the purchaſe of part of the Lands by the Conuſee, the Statute was defeated and extinct, and that the Writ did lye, being brought by the Husband alone, and the Wife not named in the Writ. 2 Eliz. *Dyer*. 193. *Gaſcoignes* Caſe.

8. A Conuſor of a Statute Staple, ſeiſed of divers Lands in the Counties of *S.* and D. did enfeoff A. and B. of the Lands in the County of *S.* and C. of Lands in the County of D. the Conuſee ſued execution in the County of S. onely, and the Lands of A. are extended and delivered in execution, and the Sheriff upon the extent, retorned that thoſe were all the Lands which the Conuſor had in his Bayliwick, and that he had not any other Lands nor Tenements. A. brought an *Audita Querela*, and had a *Scire facias* returnable in the County of D. to have C. contributary, who appeared, and pleaded, The leaving out of the Lands in the poſſeſſion of B. in the County of S. in abatement of the Writ; It was holden, that the ſame omiſſion of the Lands in the poſſeſſion of B. was no plea to abate the Writ, for that the Plaintiff was not bound to take notice of it, nor is to take notice of all the Lands which are lyable to the Statute, but of thoſe [illegible]onely which are his proper Lands. 10 Eliz. *Dyer* 331.

9. In *Audita Querela*, the Caſe was: T. ſued a Bill of Debt againſt H. in the Kings Bench, who found J. S. his Bail, according to the Courſe of Bail: H. afterwards was condemned, and then dyed without paying the debt, or rendring his body to priſon. A *Scire facias* was brought againſt the Bail, who, upon two *Nihils* retorned, were taken in Execution, whereupon they brought an *Audita Querela*: It was the Opinion of the Court, that execution ſhould not be ſued forth againſt the Bail, til

till a default be retorned againſt the Principal; for the Recognizance of the Bail is, that the Principall ſhall yield himſelf, &c, which is to be intended, upon proceſſe Awarded againſt him; and then no proceſſe in the principall Caſe being Awarded againſt him in his life time, and now it is impoſſible that he ſhould yield himſelf to priſon, being dead; It was therefore holden that the Bail was diſcharged: and judgment was awarded for the Plaintiffs in the *Audita Querela*. *Tedcaſtle* and *Hebbs*'s Caſe. Mich. 40. Eliz. in B. R. *Goldsbr.* 174.

10. Two were bound joyntly and ſeverally in an Obligation, both of them were ſeverally ſued and condemned, and ſeverally taken in execution, the one eſcaped, the other brought an *Audita Querela*; It was adjudged, that the *Audita Querela* did not lye: for although there ſhall be but one execution, yet that ſhall be intended of an execution with ſatisfaction; for he ſhall have both their bodies in execution; and the body is no execution with ſatisfaction, but onely a pledge for the Debt. M. 29. Eliz. in B. R. *Cook* 5. part. *Blumfields* Caſe.

11. A man brought *Audita Querela*, and ſurmiſed, That B. Adminiſtrator of C. brought his Action of Debt upon an Obligation, and that before Judgment that Adminiſtration was revoked, and Adminiſtration granted to another; and notwithſtanding the Revocation, the ſecond Adminiſtrator Releaſed; And upon that Releaſe, the reſt brought an *Audita Querela*, and the Court would not grant a *ſuperſedeas*, becauſe the Revocation was but matter in Fact, for that it was not under Seal, and the firſt Adminiſtrator might appeal. *Brown.* 1. part 29. *Beck's* Caſe.

12. A. Purchaſed Lands of one, againſt whom a Judgment was given long before the purchaſe. The Vendor afterwards became altogether unable to pay the Judgment: The Plaintiff in the Judgment brought a *Scire facias* againſt the Defendant, and had Judgment againſt the Defendant by default, and afterwards had an *Elegit*, and by vertue of that extended the Lands of the Purchaſor, for that the whole Land was not extended. The Court was of Opinion that there was no other remedy for the purchaſor, but by bringing *Audita Querela*, and thereby ſhewing and ſetting forth the ſpeciall matter. M. 15 Jac. in C. B. *Fowles* Caſe. *Brownlow.* 1. part 39.

13. In *Audita Querela* ſued by Sureties upon an eſcape made by the principall; They being in Execution, offered to bring the mony into Court, or to put in ſufficient ſureties to the Court, and prayed that they might be bayled; It was agreed by the Court, That if *Audita Querela* be grounded by ſpecialty, or other matter in writing; or upon matter of Record, a *ſuperſedeas* ſhall be granted before the party be in Execution; and if he be in execution, he ſhall be bailed; but if it be grounded upon a matter in Fact, which is onely a ſurmiſe, he ſhall not have a *ſuperſedeas* in the one Caſe, nor be bailed in the other Caſe; And ſo was the Opinion of all the Juſtices. *Paſc.* 12 Jac. in C. B. *Brownlow.* 2. part. 108.

14. In Debt upon a ſingle Bill, the Defendant pleaded payment, which was found againſt him, and Judgment was given for the Plaintiff, and the Defendant was taken in Execution, after which an *Audita Querela* was brought by the Defendant upon an averrment of payment made, and the Defendant was bayled: The Plaintiff moved the Court for remedy in this Caſe; The Opinion of the Court in this caſe was, That the *Audita Querela* was illegally granted, and ought to be quaſhed; And the Court ordered that the party ſhould be taken in execution again upon the former Judgment, for that ſuch a plea of payment againſt a ſingle Bill, was no plea; and therefore the *Audita Querela* ſhould not have bin allowed nor Bail taken: And an Attachment was awarded againſt them that did proſecute the *Audita Querela*, and the Bailment of the Defendant. Tr. 9. Jac. in B. R. *Torrey* and *Adys* Caſe. *Bolſtr.* 1. part 140.

15. A Feme Covert did acknowledge a Statute, the Husband died, the Wife was taken in Execution by her body, whereupon ſhe brought her *Audita Querela*, and ſet forth; That when the Statute was by her ackowledged, ſhe was then a Feme Covert, whereupon ſhe was let to bail; and ſhe averred that the mony in demand was paid and ſatisfied in the life of her Husband; which matter was put in iſſue to be tried. Now forasmuch as the courſe is to take Bail by Manucaptors by Recognizance, to proſecute with effect; The Opinion of all the Juſtices was, That if the iſſue were found againſt the Woman, execution ought to be ſued againſt the Manucaptors, and the Recognizance is to be extended for the Debt, and Execution cannot be ſued again againſt the Woman; and if the matter in iſſue upon the Triall be found for the Woman, that then her Manucaptors are clearly diſcharged, as it was ſaid to have bin adjudged in Sir *Anthony Aſhlyes* Caſe. Paſc. 10. Jac. in B. R. *Dingley* and Sir *James Creytons* Caſe. *Bolſtr.* 1. part 187.

16. In *Audita Querela*, the Caſe was this, *Cowley* and *Bates* bound themſelves joyntly and ſeverally in a Recognizance of 200 l. to *Lydell*: After, *Lydell* brought Debt upon the Recognizance againſt them in the Common-Pleas, upon which Judgment, he had Execution by an *Elegit* againſt *Bates*. Afterwards, he brought Debt againſt *Cowley* in the Kings Bench, upon the ſame Recognizance, after

after he had ſued execution upon the *Elegit*, and the Lands of *Bates* and his goods, who was Tenant thereof onely for the life of another, he took forth a *Capias ad ſatisfaciendum* againſt *Cowley* upon the Judgment againſt him in the Kings Bench, whereupon *Cowley* brought an *Audita Querela*; and ſet forth the whole matter: And the Opinion of all the Juſtices upon Argument by them of the Caſe in Court, was, that the *Audita Querela* was well brought. And firſt it was agreed by them all, That when a man may plead a matter in bar, he ſhall not have an *Audita Querela* upon the matter; but, as this Caſe was, he could not have pleaded the ſpecial matter; and therefore, as to that poynt, the *Audita Querela* was well brought. The onely doubt of the Caſe was, whether *Lydeot* the Defendant might have a new execution by *Capias ad ſatisfaciendum*, after he had had Execution againſt one of the Obligers by *Elegit*; It was holden that a *Capias* doth not lye after Execution ſued forth by an *Elegit*; and the reaſon is, becauſe upon the prayer to have an *Elegit*, it is entred in the Roll *Elegit ſibi executionem per medietatem terræ*, ſo as he is ſtopped by the Record to have any other execution. And alſo an *Elegit* is in it ſelf a ſatisfactory Execution, and by the Common-Law, a man ſhall have but one Execution with ſatisfaction; And the Court held it no difference, although in the principal Caſe, The Judgments were given in ſeverall Courts againſt the perſons ſeverally, and at ſeveral times; and, where it is but one Judgment againſt one party: And it was alſo agreed in this Caſe, That although there had been an Eviction of the whole land taken in Execution, or that the Judgment had bin reverſed by Error, after he hath Execution againſt one by *Elegit*; yet the Defendant could not have Execution againſt the other, for that by the firſt Execution he had determined his Election. And ſo the whole Court agreed to relieve the party in the *Audita Querela*, and to diſcharge him out of Execution, being unjuſtly and illegally taken and Impriſoned for the ſame Debt, after a Satisfaction had before by an *Elegit*; and therefore it was adjudged that *Cowley* the party in the *Audita Querela* ſhould be diſcharged. Tr. 11. Jac. in B. R. Rott. 822. *Cowley* and *Lydeotts* Caſe. *Bolſtr.* 2. part. 97, 98, 99. See *Godbolt.* 257, 258. the ſame Caſe.

17. *Requiſh* an Enfant of the age of 20 years and three quarters, and who wanted but nine weeks of his full age; The Commiſſioners for the taking of a Fine, took a Fine of him, not having notice that he was within age, and by inſpection they could not perceive whether he was within age or not; He being alſo in Ward to the King. In the Exchequer they took of him a Recognizance of a great ſum, that he ſhould not convey his Land to any one unleſſe it was by aſſent and Order of that Court. In that Caſe, it was ſaid by *Cook* Chief Juſtice, That this was a Fault in the Commiſſioners, but not a Crime: And as for the Recognizance; It was ſaid, That if he bring an *Audita Querela* upon this, they will redreſſe it, for that the Law hath made a kind of perpetuity for the preſerving of the Lands of an Enfant during his minority, ſo as he cannot during this time convey away his Lands. The Fine was reverſed; and an *Audita Querela* ordered to be brought to avoid the Recognizance. *Hill.* 12. Jac. in *Cam. Stellat. Requiſh* and *Requiſhe's* Caſe. *Bolſtr.* 2. part. 320.

18. Two are in Execution for Debt, the one eſcaped; for this, an Action of Debt lyeth againſt the Sheriff; and after the Debt recovered againſt the Sheriff, the other which remained in execution ſhall have his *Audita Querela* to be releined; the body being taken in execution, is no ſatisfaction for the debt, for the body is taken *ad ſatisfaciendum*. *Hill.* 12 Jac. in B. R. Doctor *Suchloff* and Sir *George Reynils's* Caſe. *Bolſtr.* 2. part. 320.

19. By information upon the Statute of 23 Eliz. of Recuſancy, Judgment was given againſt Doctor *Foſter*, for the King and the Informer; For ſtay of Execution, it was moved, That he had now conformed himſelf, and therefore he ought to be diſcharged upon his conformity, by the Statute of 1 Car. 4. It was holden in this Caſe, that the Court cannot judicially take notice of his Conformity; and therefore Judgment being given, he ought to pay the money preſently, or elſe execution to go, and he hath no remedy to help himſelf but an *Audita Querela*; For in Caſe of a Common perſon, if he cannot plead, he is to have his *Audita Querela*: But a man ſhall not have an *Audita Querela* againſt the King, and therefore he ought to have pleaded the matter, which is now too late; But it was holden, that he might have an *Audita Querela* againſt the Informer, and that *Audita Querela* ſhould not hinder the Execution as to the King; afterwards he brought the mony into Court, and was bailed; and he was adviſed by the Court to make his Petition to the King. M. 11. Jac. in B. R. The King and Doctor *Fosters* Caſe. *Bolſtr.* 2. part. 324.

20. One Recovered in Debt, and took Execution by *Elegit*, whereupon the Defendant's Lands were extended, and after aſſigned over and conveyed into ſeverall mens hands. Afterwards the Plaintiff in the Action of Debt Releaſed all ſuch Judgments and Executions; whereupon the Defendant brought *Audita Querela*: It was demurred upon it, becauſe the Writ was brought againſt the firſt Plaintiff, who did recover; whereas it ought to have been

brought againſt the Aſſignee of the extent. But it was adjudged, that the *Audita Querela* was well brought, for that he being party to the Judgment, his Releaſe had diſcharged the Judgment. *Paſc.* 7. Car. in B. R. *Flower* and *Elgars* Caſe. *Cro.* 1. part 155.

21. *Audita Querela* was brought by three to avoid a Judgment given againſt the ſaid three, where one of them was onely taken in Execution upon the ſaid Judgment, the others not being touched; It was objected, That they ought not to have joyned in the Writ, but he onely who was in Execution ought to have had the Writ, and the others are ſtrangers to the Record: But it was Reſolved, that they are not ſtrangers to the Record, but that they may have benefit of the ſatisfaction by the Record becauſe they are all parties to the Act, the Law gives liberty to every one of them to take advantage of any one of their Acts for the others diſcharge, as if a Releaſe were to one of the Treſpaſſors, and the other had it to plead, they ſhould take advantage thereof to diſcharge themſelves accordingly. Hill. 11. Car. in B. R. *Corbet* and *Bates*'s Caſe. *Cro.* 1. part 320.

22. *Audita Querela* by the ſon, to avoid an Extent upon a Statute made by his Father, ſuppoſing the Land to be intailed, and ſo not extendable, the Defendant took iſſue that the Land diſcended to him in Fee; upon the Iſſue it was found, That all was Fee-ſimple, beſides 500 Acres: and upon this the Plaintiff prayed to be diſcharged of thoſe 500 Acres; It was holden in this Caſe, That the Extent was void, and he might help himſelf by Entry, or have an Aſſiſe upon Diſſeiſin: And therefore all the Court held, That the Iſſue ought to be found for the Plaintiff, as he hath pleaded, otherwiſe it is found againſt the Plaintiff in all; Wherefore it was adjudged, the Plaintiff ſhould take nothing by his Writ. M. 3. Jac. in B. R. Sir *John Aſhburnham* and the Lord *Saint John*'s Caſe. *Cro.* 2. part 95.

23. One in Execution upon a Statute-Merchant, ſhewed certain Articles betwixt him and the other, to diſcharge him of the Statute; and thereupon brought his *Audita Querela*, but the Court denyed to diſcharge him; for that one in Execution ought not to be bailed upon a ſurmiſe, but his remedy in this Caſe is to have an Action of Covenant upon the Articles. *Hill.* 6. Jac. in B. R. *Beſton* and *Robinſons* Caſe. *Cro.* 2. part 218. See 18 Jac. in B. R. *Lutterford* and *Peter le Mayres* Caſe. The like Judgment where an *Audita Querela* was brought, to void execution upon a Judgment, becauſe it was upon a bare ſurmiſe, which is but matter of Fact. *Cro.* 2. part 579.

24. A. was bound in a Recognizance as Bail for J. S. in 400 l. that if J. S. be condemned at the Suit of J. D. he ſhould either pay the condemnation, or render his body before ſuch a day. Judgment was given upon a *Scire facias*, upon the ſaid Recognizance. A Writ of Error was brought upon that Judgment, and the Judgment was affirmed. Afterwards a Writ of Error was brought upon the principall Judgment, which was reverſed; and hereupon an *Audita Querela* was brought. It was holden by the Court, That the firſt Judgment reverſed, is no reverſall of the Judgment in the *Scire facias*, becauſe it is a Collaterall Judgment by it ſelf; But yet it was holden by the Court, That it is a good Cauſe for an *Audita Querela*, for it is *quaſi* dependant upon the firſt Judgment, and the firſt Judgment is the Cauſe he is charged by the Recognizance, and the cauſe of the charge being taken away, it is reaſon the Bail ſhould have remedy to be diſcharged from the Execution upon the Recognizance, and the Judgment thereupon: See *Audita Querela* by the Bail after Judgment againſt him for Debt upon a *Scire facias*, becauſe he was within age at the time of the Bail; and by the *Audita Querela* he was diſcharged. See New Book of *Entries*. 87. M. 20. Jac. in B. R. Sir *John Appeſley* and *Ives*'s Caſe. *Cro.* 2. part 645.

25. *Audita Querela*, the Plaintiff ſet forth, That he was bound in a Bend with J. S. and that he being within age, the Defendant proſecuted an Original Writ againſt him, and procured one A. B. Attorney without his notice to appear to the Action, without any warrant from him; and upon *Non ſum informatus* entred, and Judgment by default, he was taken in execution; wherefore he prayed to be diſcharged; It was adjudged, That that is not a ſufficient ſurmiſe to diſcharge, for he ought to take his remedy by a Writ of Deceit againſt the Attorney, and not to relieve himſelf by *Audita Querela*. M. 22 Jac. in C. B. *Alleley* and *Colleyes* Caſe. *Cro.* 2. part 694.

26. An Enfant was made Executor, and Adminiſtration was committed to another *durante minore ætate* of the Executor, who brought Debt for money due to the Teſtator, and moved, and had the Defendant in Execution; and the Executor being come of full age, It was moved, That the Defendant might be diſcharged out of Execution, becauſe the authority of the Adminiſtrator is determined, and he cannot acknowledg ſatisfaction. It was ſaid by the Court, That although the authority of the Adminiſtrator was determined, yet the Recovery and Judgment did remain in force. But the Court ſaid, If it doth not appear in the Record, when the Enfant was made Executor, and that Adminiſtration was committed as before, the party perhaps might have an *Audita Querela*, and thereby ſeiſe

releaſe himſelf. Mich. 29 Eliz. in C.B. *Godbolt.* 104.

27. A man brought an *Audita Querela* upon a Judgment for Debt, and Coſts, and ſhewed, that he had a Releaſe after the Judgment: The Defendant pleaded, That after the Judgment, and after the Releaſe ſuppoſed to be made, he ſued forth a *Scire facias* upon the ſaid Judgment; and upon that Writ he had Judgment to have Execution by default. It was ſaid in this caſe, and a Caſe was cited out of 12 H. 7. *Crooks* Reports, 11. That if the Defendant after Judgment, have a Releaſe made to him by the Plaintiff; and after the Plaintiff ſues a *Scire facias* upon the ſame Judgment; and the Defendant makes default, and execution be awarded, that he ſhall never have an *Audita Querela*: otherwiſe it is, if a *Nihil* be returned upon the *Scire facias*. Hill. 16 Jac. in C. B. *Hanmr* and *Maſe's* Caſe. *Hob.* 283.

28. The Lord *Dudley* brought an *Audita Querela* againſt *L.* and upon it a *Scire facias* againſt the ſame party: It was moved, That foraſmuch as no Execution was ſued againſt the perſon of the Lord, ſo as he was not in priſon, that a *Scire facias* ought not to Iſſue, but a *Venire facias*. And, 2. That this *Audita Querela* ought to be ſued in the Chancery, and not in the Common-Pleas. But the Court was clear of Opinion, That it was at the Election of the party grieved, either to ſue a *Scire facias*, or a *Venire facias*. 2. That the party might ſue in which of the Courts he would. See 16 Eliz. *Dyer*, *Audita Querela* upon a Statute-Merchant directed to the Juſtices of the Common-Pleas; but upon a Statute-Staple, the Suit ſhall be in the Chancery by *Audita Querela*, or by *Scire facias* to the Sheriff, *quod ſit in Cancellaria*, Hill. 30 Eliz. in C. B. The Lord *Dudley* and *Lacyes* Caſe, *Leon.* 140. See Trinit. 31 Eliz. in C.B. *Glanvill* and *Mallaries* Caſe. *Leon.* 308. acc.

29. *A.* was bound to the Earl of *Lincoln* in a Statute-Staple, the Earl ſued Execution; and *A.* was put in priſon; the friends of *A.* brought the money into Court, and Caſt an *Audita Querela* for *A*, and prayed he might be bailed; and the money remain in Court till the *Audita Querela* were determined: By Rule, the money was to remain in Court, till the *Audita querela* was determined: and *A.* put in baile to anſwer the Coſts of Suit, Hill. 30 Eliz. in C. B. *Aſcue* and the Earl of *Lincoln's* Caſe, *Leon.* 141.

30. Note; It was ſaid by *Anderſon*, Chief Juſtice, in an *Audita Querela*, That if a man be in Execution by his body and Lands upon a Statute; If the Sheriff permit the Conuſor to go at large, yet the Execution of the Land is not diſcharged; but if he go at large by the Aſſent of the Conuſee, then the whole Execution is diſcharged, and the Conuſor ſhall have his Land again preſently. Paſch. 33 Eliz. in C. B. *Linacre's* Caſe. *Leon.* 231.

31. In *Detinue* of a Statute-Merchant, the Defendant prayed *Garniſhment*; the Plaintiff recovered againſt the Garniſhee by Erronious Judgment; by force of which, the Defendant delivered the Statute to the Plaintiff, who had Execution; afterwards the Garniſhee reverſed the Judgment by a Writ of Errour, by which he is reſtored to all that he loſt: yet by that, the Execution ſhall not be avoided; but in ſuch caſe, the party ſhall be helped by *Audita Querela*. *Cook* 5. Part. 90. in the caſe of Executions.

32. If the Defendant doth in a perſonal Action after Judgment, releaſe unto the Plaintiff all Actions perſonal, he ſhall not afterwards bring an *Audita Querela*; becauſe after he hath releaſed to the Plaintiff all perſonal Actions, he cannot have the effect of his Writ, which is to diſcharge him of a perſonall Execution. *Cook.* 1. Part. *Inſtiutes*, 289. a.

33. An Enfant at full age brings an *Audita Querela* in Chancery to avoid a Recognizance in the Nature of a Statute-Staple by him made within age; but becauſe his age was to be tryed by Inſpection of the Court. It was adjudged, That the *Audita Querela* did not lye: ſo alſo it had been, if he had dyed within age; for in ſuch caſe he ſhould have brought his *Audita Querela* before his full age. 7 Eliz. *Dyer* 232.

34. *A.* had a Judgment againſt *B.* and *B.* thereupon was taken in Execution, and being in priſon in the Kings-Bench; *A.* conſented, That *B.* ſhould come to him out of priſon to the Horſe-ſhoe-Tavern which was out of the Rule, without a Keeper, or a Rule of Court: who went to him accordingly; and becauſe no agreement could be made between them, *A.* took the Defendant again in Execution: whereupon he brought his *Audita Querela*. It was adjudged, That the *Audita Querela* was well brought, for that the Execution was diſcharged by the Priſoner's going at large; and he could not be taken upon it again. Trin. 24 Car. in B. R. *Walker* and *Alden's* Caſe. *Styles* 117.

35. A Writ of Errour was brought by the baile, to reverſe a Judgment given againſt him upon a *Scire facias*; the Errour aſſigned was, That there was no *Capias* taken out againſt the Principal; and therefore the *Scire facias* againſt the Bail was not good. The Court was of Opinion, If the Judgment was given upon two *Nihils* returned, it is as much as if *Scire facias* had been returned; and it is no Errour to give Judgment upon it: but it had been a good plea upon the *Scire facias*, to ſay, That there was no *Capias*

againſt the Principal; but now it is too late to aſſign the ſame for Errour. But the Court ſaid, That if he were inconvenienced by the Judgment, he was not without remedy, for that he might bring an *Audita Querela*: and the Judgment was affirmed; and liberty left to the party to bring his *Audita Querela*. Mich. 1650. rott. 444. in B. R. *Barrock* and *Tompſon*'s Caſe. *Styles*, 281. & 288, 324.

36. A *Scire facias* was iſſued forth againſt Executors; the Sheriff returned *Nulla bona*; After, upon a ſuppoſal upon a *Teſtatum*, that the Executors had waſted the goods, a new *Scire facias* with a *Fieri facias* in it, iſſued out, and upon two *Nihils* returned, a Judgment was given againſt them *de bonis propriis*, and the parties were never ſummoned, or had any Notice of the proceedings. In this caſe, the Court was of Opinion, That if they were condemned upon two *Nihils* returned where they were never ſummoned, that they might help themſelves by *Audita Querela*. Trin. 1653. in B. R. *Styles* 372.

37. Note: It was holden by the Court, If there be a Judgment againſt three, and one of them is taken in Execution, and be afterwards ſet at large by the parties conſent, If any other of the two be afterwards taken in Execution upon the ſame Judgment, he may have an *Audita Querela*, but he cannot be relieved upon a Motion in Court, though grounded upon an *Affidavit*. Mich. 1653. *Price* and *Goodrick*'s Caſe, in B. R. *Styles*, 387.

38. *A.* acknowledged a Judgment 17 *Car.* for 2000 l. upon which Judgment, an *Elegit* was taken forth againſt *A.* his Lands in the County of *B.* which were extended and delivered to the Conuſee, and the *Elegit* filed, and the Lands enjoyed accordingly for 6 years: The Conuſee made his Wife his Executrix, who took out a *Scire facias* upon the Judgment of 2000 l. directed to the Sheriff of the County of *C.* being another County: and upon two *Nihils* returned, had Judgment and Execution againſt *A.* for the ſame debt: Who hereupon brought his *Audita Querela*. The Opinion of the Court was, That one cannot have an *Elegit* after a former *Elegit*, if Lands be thereby found, and the *Elegit* filed. Trin. 1655. in B. R. *Strowd* and *Kekwith*'s Caſe, *Styles* 454, 455. See *Cowley* and *Lydeotts* Caſe, Sect. 16. acc.

39. In *Audita Querela*, The Queſtion was, Whether a Purchaſor after an Extent ſued, and the Land delivered, could have an *Audita Querela*, for that none ſhall have it, but the party grieved; and the Extent being before his time, he ſhould not therefore have it. And it was ſaid, That it was the Opinion of *Flemming*, Chief Juſtice, That a Feoffee upon an Extent made before his time, could not have it. Wherefore the Court being doubtful in the Caſe, the *Audita Querela* was granted *de bene eſſe*, and appointed there ſhould be a Demurrer thereupon. Mich. 7 Jac. in B. R. *Dutton* and *Mollineux* Caſe. *Cro.* 2. Part, 227.

40. Sir *Edward Grubham* brought *Audita Querela* againſt Sir *Ed. Cook*, upon a Recogniſance of 4000 l. acknowledged to the uſe of his Mother, and ſhewed, That the Conuſee had enfeoffed him and another of the Land, and that the Conuſee had ſued onely Execution againſt him. It was found for the Plaintiff; In Arreſt of Judgment it was moved, That the Declaration was not good, becauſe he had not ſhewed the day of the Teſte, and of the Return of the Writ and Execution certain, but onely by proceſs ſuch a day out of the Chancery; but he ought to have pleaded all the words of the Extent in ſpeciall; and alſo he had not ſhewed the Execution of the *Liberate*, and ſo there is no expreſs allegation of any grievance. But it was the Opinion of the Court, That the party may have an *Audita Querela* before an *Ouſter*. But yet here the ſhewing, that the Land was delivered to the Conuſee by the *Liberate*, is a ſufficient averment of an *Ouſter*: Judgment was entred for the Plaintiff. Trin. 19 Jac. in C.B. Sir *Edward Grubham*, and Sir *Edward Cook*'s Caſe. *Winch.* 20, 23.

41. *A.* brought *Audita Querela*, and ſet forth, That J. S. 10 Jac. brought Treſpaſs in B. R. againſt him, and Damages were aſſeſſed to 14 l. and Coſts to 5 l. 10 s. and Judgment there given for the Damages and Coſts. Afterwards, 11 Jac. *A.* brought a Writ of Errour in the Exchequer, and 5 l. 10 s. there aſſeſſed for Coſts, for delaying the Execution: J. S. did not enter the firſt Judgment, but mean between the firſt Judgment, and the Judgment in the Writ of Errour, he releaſed to *A.* all Executions and Demands; and that notwithſtanding this Releaſe, he had ſued Execution as well for the 14 l. damages, and 5 l. 10 s. Coſts upon the firſt Judgment, as for the Coſts upon the Writ of Errour. J. S. who was Plaintiff in the firſt Action, took Iſſue upon the Releaſe, which was found againſt him; and afterwards in Arreſt of Judgment moved, That this Releaſe ſhould not help *A.* the Plaintiff in the *Audita Querela*, becauſe that being before the Judgment, and not pleaded, the Execution is now upon the laſt Judgment, and ſo he ſhall not have benefit of the Releaſe. But the Court diſallowed of the ſaid Exception: For that he had no time to plead it, and the ſecond Judgment is onely for the Coſts increaſed; and the Execution for the firſt Coſts and Damages is upon the firſt Judgment, and not upon the ſecond: And therefore the Court was of

Opinion

Opinion, That the Releaſe was a good Barre to it: and although the Execution be intire, yet it is no cauſe of diſcharging the whole, but onely of the firſt Damages and Coſts: Of which it was adjudged, That he ſhould be diſcharged accordingly. Paſch. 12 Jac. in B. R. *Child* and *Durrant*'s Caſe. *Cro.* 2. Part. 337.

42. A man having Lands in two Counties, did acknowledg a Statute with which his Lands were chargeable: Afterwards of theſe Lands he made two ſeveral Feoffments to A. and B. An *Extent* upon this Statute is ſued out againſt B. and his Land, who afterwards levies a Fine of this Land to J. S. J. S. brings an *Audita Querela* againſt A. the other Feoffee, who pleads all the ſpeciall matter, and ſets forth the *Extent* againſt B. and the Fine alſo levied by him; upon which the Defendant did Demur in Law. The Queſtion onely was, Whether he the ſecond Feoffee might have an *Audita Querela*, to have Contribution, and remove the *Extent*? It was Objected, That the Writ of *Audita Querela* demands nothing, the ſame being but as a Commiſſion to the Juſtices, to examine the matter: And it is a ground in Law, That a Purchaſor who comes in for a valuable Conſideration ſhall not be charged alone, but every one ſhall be equally charged *pro rata*, and not otherwiſe: and by *Fitzh. Na. Br.* 104. the Feoffee himſelf ſhall have an *Audita Querela*, and ſo by the ſame reaſon the Feoffee of a Feoffee ſhall have, and ſo may the 20th Feoffee have it. But the Opinion of the Juſtices was, That this *Audita Querela* did not lye for this Feoffee, for that he is not the perſon grieved by the Execution, becauſe the Land was clogged with the Execution, and he bought the Land with the Clogg, *Et tranſit terra cum onere, Intratur.* Hill. 9 Jac. in B. R. rott. 513. *Dyer* and *Mollineux* Caſe. *Bolſtrod.* 2. Part. 15, 16, 17.

43. An Enfant acknowledged a Statute, and during his minority brought an *Audita Querela* to reverſe it: The Conuſee brought a Writ of Error at the full age of the Enfant, and reverſed the Judgment; and the Conuſor prayed a new Writ of *Audita Querela*; but he could not have it to avoid the Eſtate. And ſo note, That *Audita Querela* doth not lye upon *Audita Querela*. Paſch. 4 Jac. in B. R. *Randoll* and *Wales* Caſe.

44. In a *Scire facias* brought by J. S. againſt J. D. in the Chancery, to avoid a Statute, the caſe was this; A. acknowledged a Statute to J. D. and afterwards conveyed part of the Land liable to the Statute to B. who by bargain and ſale conveyed the ſame to J. D. the Conuſee. J. D. extended the Lands of J. S. the Purchaſor, who thereupon brought his *Scire facias* to avoid the Statute, becauſe that the Conuſee had purchaſed parcel of the Lands liable to the Statute, and ſo extinguiſhed his Statute. This Caſe coming by *Mittimus* out of the Chancery into the Kings-Bench; In Arreſt of Judgment, it was moved for J. D. the Defendant, That the Bargain and Sale is alledged to be made to him, but it is not ſhewed that it was by Deed enrolled; but it was pleaded, That *virtute cujus*, viz. of the bargain and ſale, the Conuſee was ſeiſed, and doth not ſhew that he entred. The queſtion was, What eſtate the Bargainee had, the Deed not being enrolled; and, What eſtate the Conuſee had before Entry, the Deed not being enrolled; and then If the Statute were extinguiſhed. If it was not, then the *Scire facias* was not well brought. But the Opinion of the whole Court was, That the *Scire facias* was well brought. For it was ſaid that J. D. the Defendant *perquiſivit ſibi et hæredibus ſuis*, and concludes, *virtute cujus*, and of the Statute of uſe, he was ſeiſed, which is a good averment, that he hath a Fee, and it is not material how he hath it; And this Action being an equitable Action, the Court ſhall conceive ſufficient matter to give Judgment for the Plaintiff. And in this Caſe, It was ſaid and agreed; That if a man be ſeiſed of black Acre, and white Acre, and acknowledgeth a Statute, and after makes a Leaſe for years of White Acre, the Reverſion over in Fee, and afterwards the Conuſee purchaſeth black Acre, and extendeth the Land of the Leſſee for years, that he in the Remainder ſhould have an *Audita Querela*; or a *Scire facias* for the damnification, which came to his intereſt; And it was holden, That he who had but *intereſſe termini* ſhould have an *Audita Querela*; And that *Ceſtuy que uſe*, before the Statute might have *Audita Querela*, which proves the ſame to be but an equitable Action; and in the principall Caſe, Judgment was given for the Plaintiff in the *Scire facias*. M. 15 Car. in B. R. *Leak* and *Dawes*'s Caſe. *Marſh.* 63, and 69.

45. In *Audita Querela* concerning the perſonalty brought by divers, the Nonſuit of the one is not the Nonſuit of the others, becauſe the ſame goes by way of Freeing themſelves, and therefore the default of the one ſhall not prejudice the other. *Cook* 6. Part. 25. in *Ruddocks* Caſe.

46. In a *Scire facias* in the nature of an *Audita Querela*, the Plaintiff ſhewes, that 3 Jac. That Sir *William Blackſton* was ſeiſed of Lands in the Mannor of D. and of other Lands; and being ſo ſeized, he acknowledged a Statute of 400 l. and that he had part of the Land which was ſubject to execution, and was ſeiſed of it, which was taken in execution, there being other Lands in the hands and poſſeſſions of the Defendants, whereupon he brought this Action in the nature of an *Audita Querela*, to be relieved againſt the other Defendants by way of Contribution;

Contribution; And did ſhew that they were Tenants, but did not ſhew how Tenants; but layed it to be as he ſaid, *ad grave damnum*: In that Caſe, It was adjudged; That although it was layed generally; and that it was not layed, that he was Tenant *Tempore brevis*, yet being *ex gravi Querela*, It ſhall be intended that he was Tenant at the time of the Writ brought. It was adjudged for the Plaintiff. M. 1 Car. in B. R. *Blackſton* and *Martins* Caſe. *Bolſtr.* 3. part 305.

Auncient Demeſne.

1. *What Lands ſhall be ſaid to be Auncient Demeſne, and pleadable there: How, and by what acts, the Nature of the Land is changed; what not. And what Actions do lye, or are ſuable there; what not: and in what Actions Auncient Demeſne is a good plea; what not.*

1. ALl the Lands which were in the hands of *Edward* the Confeſſor, at the time of making of the Book of *Domeſday*, are *Auncient Demeſne* Lands; and the Lands which were in other mens hands, and which are named in the ſaid Book, are *Frank Fee. Fitzh. Na. Br.* 16. acc. But ſee *Cook* 4. Part, of *Inſtitutes*, 270, that the Book of *Domeſday* was not compiled untill the 4th year of *William* the Conquerour. And, *Na. Br.* 14. Tenants in Auncient Demeſne, ought to be Tenants which hold of a Mannor which was in the hand of St. *Edward*, or in the hands of *William* the Conquerour; which Mannors are called the Auncient Demeſne of the King, or the Auncient Demeſne of the Crown of *England*.

2. H. B. and two others, as Tenants of the Mannor of B. which is Auncient Demeſne, brought a Writ of *Monſtraverunt* againſt the Lord; The Lord prayed, That H. B. might make it appear to the Court, that the Mannor is Auncient Demeſne; becauſe no Tenant is to have Suit by *Monſtraverunt*, if he be not Tenant in Auncient Demeſne. H. B. ſhewed the Record of the Book of *Domeſday* in *hâc formâ*, viz. and *Terra Sancti Stephani*, was the Titie; and the Record ſpake, That this Mannor was in the King's hands, and recited in it an *Inſpeximus* of *William* the Conquerour. Alſo he ſhewed the Charter of King *Ed.* 3. which ſaid *Inſpeximus* the Charter of *William* the Conquerour, who had granted and confirmed the ſame Mannor to one J. B. in Fee; and that the Charter of *William* the Conquerour, had *Inſpeximus Chartam Edwardi Regis*. The Court ſaid, That in the Book of *Domeſday*, there are divers manner of Titles of Land which is Auncient Demeſne; viz. of the Lands which were in the hands of St. *Edward*, the title of which is *Terra Regis Edwardi*. But of the Lands which were in the hands of *William* the Conquerour, the title is *Terra Regis*, and no more, becauſe it was known, That the Book of *Domeſday* was made in the time of *William* the Conquerour: So as a deſcription is made in that book of the whole Realm, ſo that all the Demeſnes which were in the hands of St. *Edward*, are Auncient Demeſne, although they were aliened before the Book of *Domeſday* was made: As the Mannor of *Totnam* at the time of the making of the ſaid Book was aliened before, and then in the hands of the Earl of *Cheſter*, as it was ſaid by the Court: It was ſaid by the Court, That the Record which the Plaintiff H. B. ſhewed, did not make mention of theſe two Titles; but the title is *Terra Sancti Stephani*, which was long after the Conqueſt: and ſo the Land did not appear to be Auncient Demeſne. And as to the Charters, the words whereof are *Inſpeximus*, they held, That the ſame were not material, for that thoſe words, are but words of Form: For which cauſe, the Plaintiff were Non-ſuit. Trin. 49 E. 3. 22. Commentary upon *Original Writs*, 221, 222.

3. He who holdeth by Knights-Service within Auncient Demeſne, and is ouſted, ſhall have his Action at the Common-Law, and not in Auncient Demeſne; becauſe that no Lands are Auncient Demeſne, but thoſe Lands which are holden in Socage; and if the party claim to hold by Knights-Service, it is a good cauſe to remove the plea: and if before the Statute of *Quia Emptores terrarum*, the Lord maketh a Feoffment in Fee to hold of him by Knights-Service, the Tenant ſhall not have *Monſtraverunt*, if he be not diſtrained for other Services then he ought to do; becauſe his Lands now are not Auncient Demeſne of the King: for Auncient Demeſne is onely of ſuch Lands which are holden by the ſervice of the Plough; as, to plough the Lords Lands, or to mowe his graſſe, &c. *Na. Br.* 14. acc.

4. Note: It is ſaid, That *London* is not Auncient Demeſne; for then the Writ of Right which is directed to the Mayor and Sheriffs ſhould be cloſe, and not Patent. *Na. Br.* 6. But yet ſee *Cook*, 2. Part, *Inſtitutes*, That the Tower of *London*, and ſome parts of *London*, in the Parts of the Weſt, and the Eaſt, may be Auncient Demeſne; for that *London* is now ſo enlarged, that ſome parts of it might be

be Auncient Demeſne, *Cook* 3. Part. *Inſtitutes*, in Sir *Tho. Overburies* Caſe: and in 7 H. 6. in a Writ of *Nativo habendo*, it is pleaded, That *London* is the moſt Auncient City within the Realm, and that it is the Chamber of the King: For there the Caſe was, A Writ of *Nativo habendo* brought in *Buck.* was removed by *Pone*; the Sheriff returned *Non eſt Inventus*, and the party prayed a *Latitat* to the Sheriff of *London*, who made return of it, That *London* is the moſt Auncient City within the Realm, and the Chamber of the King; And *Antiquiſſimum Domini cum Regis*; and had a Cuſtome time out of mind, That if any man abided in the ſaid City for a year and a day, that he could not be removed from thence by Writ of *Nativo habendo*, nor by any other proceſs thereupon; and that the party had abided and dwelt there by the ſpace of 40 years, and that he could not execute the Writ *Salvis Libertatibus Civitatis prædict.* And though in that Caſe it was holden, That *London* was not Auncient Demeſne: Yet the Priviledg and Preſcription, That a Villain ſhould not be taken out of the City, or arreſted by *Capias*, or *Latitat*, was good; and the Retorn in that caſe, was holden to be good; 7 H. 6. 32. acc.

5. If the Lord in Auncient Demeſne confirm the Eſtate of the Tenant to hold by certain Service at the Common-Law. although that the Eſtate of the Tenant be not changed, nor any tranſmutation of the poſſeſſion; yet the Quality of his Eſtate is changed, for the Tenant ſhall not afterwards be impleaded by Petit Writ of *Droit cloſe*, and the Lands by the Confirmation is diſcharged from the Cuſtomes of the Mannor. *Cook.* 9. Part, 140. in *Beaumonts* Caſe.

6. Lands within Auncient Demeſne, which are partible between heirs males; by a Fine levied of the Land is gone: and the reaſon is, becauſe the Cuſtome runneth not with the Lands ſimply, but by reaſon of the Auncient Demeſne; and becauſe the nature of the Land is changed by the Fine from Auncient Demeſne to Land at the Common-Law, the Cuſtome of parting it among males is gone: But it is otherwiſe of the Cuſtome of *Gavelkind*; for there although a Fine and Recovery be had of it at the Common-Law; yet the Lands remain partable, for that that Cuſtome is by reaſon of the Land, and therefore runs with the Land; and therefore in that caſe the Cuſtome is not gone. 6 E. 6. *Dyer* 72. *Finch.* 15. 16.

7. The Iſſue in taile brought a Writ of Right Cloſe, in the Nature of a *Formedon* of Lands in Auncient Demeſne; The Tenant there pleaded, That the Anceſtor of the Plaintiff being Tenant in taile levied a Fine of the ſaid Lands, which was without proclamations, but good by the Cuſtome upon a Writ of Covenant brought; and that Judgment was there given for the Diſcontinuee of the Tenant in tail, and againſt the Demandant: whereupon the Iſſue in taile brought a Writ of Falſe Judgment, and ſeveral Errours were aſſigned; 1. That the words, *parvum* and *Clauſum*, were not in the Writ. 2. That it was 4. *Legales homines*, where it ought to have been 4. *milites*. 3. It was ſaid, That the Mannor was *de Dominico Reginæ*; and it is not ſaid, *de antiquo Dominico*: but the Exceptions were diſallowed by the Court. And in that caſe it was ſaid by the Court, That if the Judgment were to be reverſed by this Writ of Falſe Judgment; yet the Judgment ſhould be no other, but that he ſhould be reſtored to his Action; and then the Court ſaid, They would judge there according to their Cuſtome; that a Fine levied there without proclamation by Tenant in taile of the Lands within Auncient Demeſne, would barre the Iſſue in taile. Mich. 23 Eliz. *Dyer.* 373.

8. Note: It was holden by the Court, That if a man levieth a Fine of Land in Auncient Demeſne at the Common-Law to another; now the Lord in Auncient Demeſne ſhall have a Writ of Diſceit againſt him, who levieth the Fine, and he who is Tenant, and thereby he ſhall make void the Fine, and the Conuſor ſhall be reſtored to his poſſeſſion and title which he hath given by the Fine: But if after the Fine, the Conuſor releaſeth to the Conuſee by his Deed being in poſſeſſion, or by his Deed confirm his Eſtate in the Land, notwithſtanding the Fine be avoided; yet the Conuſee ſhall retain and have the Land, becauſe that this Releaſe and Confirmation made to him in poſſeſſion, maketh his eſtate firm and rightfull againſt him and his heirs, who releaſeth or confirmeth. *Cook.* 10. Part. 50. in *Lampitts* Caſe.

9. In an Aſſiſe of Rent, Auncient Demeſne of the Land is a good plea, becauſe they have authority to hold plea of the Land out of which the Rent is iſſuing, and *à fortiori* of the Rent. 28 H. 8. *Dyer* 8. [illegible] *Ickenhams* Caſe.

10. [illegible] *Ejectione Firmæ*, the Defendant pleaded [illegible] the Tenements in which the Ejectment was ſuppoſed were Auncient Demeſne. It was holden by the Court, That it was a good plea. It was Objected, That this Action is in the nature of a Treſpaſs: And in Treſpaſs for breaking of a Cloſe, and cutting down of Trees, Auncient Demeſne is no plea. But it was Reſolved, That the plea was good, becauſe that by common Intendment, the right and title of the Land therein comes in debate; and where the realty comes in debate,

it

it ſhall be but reaſonable, that thoſe who beſt know how to try and determine it, ſhall have Conuſans of it. Hill. 43 Eliz. C. B. *Cook* 5. Part. *Aldens* Caſe. So in a Replevin, Writ of Meſne, Writ of Ward, Accompt againſt Guardian in Socage, Auncient Demeſne, is a good plea for the appearance and Common Intendment, that the realty doth come in debate. *Ibid.*

11. In Treſpaſs for breaking of his Cloſe at *Bromeſgrave*; upon the Non-Aſſignment, the Defendant pleaded Not-guilty; and the Jury found, That the Defendant was ſeiſed of the Land in queſtion, and held the ſame of the Mannor of *Bromeſgrave*, which is Auncient Demeſne; and that the Plaintiff recovered againſt him 40 l. in the Common-Pleas; and took out an *Elegit*, by force of which the Sheriff delivered him the Land in queſtion, in Execution, and he entred, upon whom the Defendant entred. It was the Queſtion, Whether Lands in Auncient Demeſne might be delivered in Execution upon an *Elegit*? In this caſe divers Points were Reſolved, 1. That no Freehold holden in Auncient Demeſne could be recovered in the Court of the King. 2. That although the Freehold were not to be recovered by the Action, yet if the poſſeſſion was to be recovered by the Action brought in the Kings Court, Auncient Demeſne is a good plea: but in Treſpaſs *vi et armis*, or upon the Statute of 5 R. 2. though the Freehold come in debate, yet it is no plea, becauſe the Iſſue is upon the wrong. 3. It was Reſolved, That although it be true, That the poſſeſſion of Land in Auncient Demeſne be gained by the Sheriffs act following upon an Award of the Kings Court; yet the Land it ſelf was never put in plea directly in the Kings Court. And *Aldens* Caſe, *Cook*. 5. Part, is, That upon an *Elegit*, Lands in Auncient Demeſne are liable to an Execution: and in 7 H. 4. 14. it is ruled, That in an Action of debt brought againſt the heir in the Kings Court, for the debt of his Anceſtor, Lands in Auncient Demeſne diſcended, ſhall be lyable to Execution. And it was further ſaid in this Caſe, That though an Aſſiſe would not lye in this Caſe in the Kings Court, for him that hath ſuch an Execution; yet he may have [illegible] Aſſiſe in the Court of the Mannor by Writ [illegible] Cloſe and Proteſtation, to ſue it in the [illegible] of an Aſſiſe: And it was ſaid, That for another reaſon this Caſe was clear, That ſince the Judgment was good, that the Plaintiff ſhould recover the debt, and that the *Elegit* did warrant the extending and delivery of half his Land, and the Auncient Demeſne is his Land as well as other, that the Sheriff had warrant ſufficient to deliver it in Execution; and he is not to diſpute what is lyable, and what not; neither is the Sheriff, nor he that receives it of him, ſubject to an Action of Treſpaſs: But it was ſaid, That in this Caſe, if there were any relief for the Defendant, it were by *Audita Querela*, becauſe there was no time to plead it before. Hill. 10 Jac. in C. B. *Cox* and *Barnſleys* Caſe. *Hob.* 47, 48.

12. If Lands in Auncient Demeſne is become Frank-Fee, that a Recovery of that Land in the Court of Auncient Demeſne, is *coram non Judice*; and where Execution is thereof, or of Damages, the party may have an Action of Treſpaſs, and an Aſſiſe of the Land at the Common-Law. But if a Recovery be within Auncient Demeſne, of Land which is lawfully Auncient Demeſne, the Baily may take the Cattel of him againſt whom the Recovery was had, in Execution, in each part of the Mannor, although it be Frank-Fee, by the Opinion of *Hulls*, in 7 H. 4. 29. See Comment, upon Original Writs, 53. acc.

13. In Treſpaſſe brought for ſpoyling of his graſſe, cutting of Trees, and carrying away of his goods; the Defendant pleaded, That the place where, was Auncient Demeſne, and demanded Judgment of the Writ. It was holden to be no plea: For if the Defendant had pleaded, That it was his Common where the Feeding was, he ought to have concluded, that he did it without wrong: ſo although he ſpeaketh of Common which toucheth the Freehold, yet the point of the Iſſue ſhall be upon the perſonalty: But if to the Trees, he had pleaded, that it was his Freehold, there perhaps it ſhould have been otherwiſe; but not unleſſe it had been ſo pleaded. But in a Replevin of Cattel taken, there it is a good plea, that the place where, is Auncient Demeſne, and thereby the Writ ſhall abate; and ſo in accompt againſt the Bayliff in Auncient Demeſne, becauſe the Freehold may come in debate, and the Iſſue only may be upon the Freehold. But if a Writ of Right be brought in Auncient Demeſne, the Writ ſhall abate. 46 E. 3. *Comment.* upon Original Writs, 214.

2. Of

2. *Of the Priviledges of Tenants in Auncient Demeſne; and what Priviledges they ſhall have for their Lands and Goods; what not. And how* Auncient Demeſne *ſhall be tryed.*

1. TEnants who hold Lands in Auncient Demeſne, have divers Liberties and Priviledges by Law; as, to be quit of Toll and Paſſage, and ſuch other Impoſitions which men ſhall demand of them for their Goods and Chattels ſold and bought in Market open, or in Fairs; and of all things which they ſell, which are ariſing of their Lands; or for the manurnace of their Lands. They ſhall be quit of all Taxes and Tallages granted by Parliament, if not that the King lay a Tax upon Auncient Demeſne, as he may do for ſome cauſe, whenſoever it ſhall ſeem good to him. *Fitzh. Na. Br.* 34 and therewith agree the Books of 9 H. 6. 25. 10 H. 6. 6. 7 H. 4.

2. If the Sheriff do Retorn Tenants in Auncient Demeſne in any Pannel for their Lands holden in Auncient Demeſne, The Writ *de Non ponendis in Aſſiſis et Juratis* lyeth by them againſt the Sheriff, or againſt the Bayliffs of Liberties who have Retorn of Writs: and if the Sheriff, or the Bayliffs of ſuch Liberties do retorn any ſuch Tenants to ſerve in Juries, Aſſizes, or Inqueſts, they ſhall have an Attachment againſt him, or them: and that is upon the Statute of *Weſt.* 1. And the Statute of *Articuli ſuper Chartas*, Cap. 9. And ſee, That if the Sheriff in an *Ejectione Firmæ* brought in the Common-Pleas, where the Defendant pleads Auncient Demeſne, retorns any perſons within Auncient Demeſne, they may be challenged and withdrawn. *Cook* 5. Part, 105. in *Aldens* Caſe.

3. In an Action upon the Caſe, the Plaintiff declared, That *L.* parcel of the Mannor of *E.* in *Com. Suff.* was Auncient Demeſne of the Crown of *England*; and that all men and Tenants of Auncient Demeſne ought to be quitted of Toll in all places within the Realm for them, their Goods and Chattels; and that Queen *Eliz. Anno* 19 of her Raign, Commanded all Mayors, Bayliffs, &c. to permit and ſuffer the Men, and Tenants within Auncient Demeſne to be quit of Toll, Murage, and other exactions throughout the whole Realm; and ſhewed, that he was an Inhabitant of the Town of *Land* ſuch a day carried his Goods to *Yarmouth* in the ſaid County; and the Defendant not ignorant of the premiſſes, took and carried away a Cable of the Plaintiffs goods of the value of 8 l. for Toll to his damage, &c. The Defendant pleaded by Proteſtation, That *L.* was not Auncient Demeſne; and by Proteſtation, that the Tenants in Auncient Demeſne ought not to be quit of Toll; That the Town of *Yarmouth* was an ancient Borough, & that they have had time out of mind, &c. an Officer called a Water-Bayly; and that time out of mind they and their Predeceſſors have had and taken Toll of the Tenants and Inhabitants of *L.* for any of their Goods brought there to merchandize with, and if it be not paid, they have uſed time out of mind to diſtrain for it by their Water-Baily; and ſaid, That the Plaintiff ſuch a day brought to *Yarmouth* 1000 weight of Cable Ropes to ſell, for which there was due for Toll 6 d. for Murage 6 d. for Tronage 4 d. And the Defendant being Water-Baily, demanded of the Plaintiff the ſaid ſums; which he refuſed to pay: for which he took the ſaid Cable, *Nomine diſtrictionis*, for the ſaid Tronage, &c. In this caſe, two things were objected againſt the Defendant's plea, 1. That the Defendant hath not ſet forth in himſelf any authority to demand the duty. 2. That the Preſcription to have Toll of the Tenants in Auncient Demeſne cannot be good, becauſe it cannot have a lawful beginning; for the Tenants in Auncient Demeſne are quit of Toll by the Common-Law; and ſuch Tenants have an Inheritance in ſuch Liberties, which the King by his Grant cannot take away. To which it was anſwered, as to the firſt Point, That to ſhew the Authority to demand it, is not neceſſary, for that the preſcription is not upon demand to diſtrain: For the Officer hath not authority to demand it; for they ought to demand it, who are to take the thing demanded, and thoſe are the Bayliffs and Burgeſſes, and then when their Water-Baily doth it, it is as much as if it had been done by the Corporation: as to the ſecond point, it was ſaid, that the plea is, That the Defendant take Toll onely for thoſe things which were brought by Sea by Merchants; and not otherwiſe: and Tenants in Auncient Demeſne are not diſcharged of Toll for all things, but onely for ſuch as ariſe out of their Tenements, or are bought for their Tenements or Families there, and their ſuſtentations, or for the manurancy of their Lands: And the Defendant juſtified not only for Toll, but alſo for Tronage, which their Priviledges doth not extend unto: and therefore the Juſtification in this caſe was good. Afterwards in the principal caſe, Judgment was given, *Quod Querens nihil capiat per illam*; For the Juſtices were all clear of Opinion, That the Tenants in Auncient Demeſne ſhould pay Toll for their Merchandizes. Trin. 30 Eliz. in B. R. *Ward* and *Knight's* Caſe. *Leon.* 231.

4. An Iſſue was joyned in Writ of *Entry ſur Diſſeiſin en le Poſt*, Whether the Mannor of *Sudbury* in the County of *Suff.* was Auncient Demeſne, or not? And the Court ſaid to the Tenant who pleaded Auncient Demeſne, That he ſhould have there at a certain day, the Record of the Book of *Domeſday*: at which day, the Record was brought into the Common-Pleas, by *Mittimus* out of the Chancery, with the *Certiorari* which iſſued out of the Chancery directed to the Treaſurer and Chamberlain of the Exchequer: by which Record it was found, that it was Auncient Demeſne. Whereupon Judgment was given, That the Defendant *eat ſine die*. 8 Eliz. *Dyer* 250. b.

5. Iſſue was taken, Whether Lands contained in a Fine, were Auncient Demeſne or not? pretending, that they were parcel of the Mannor of *Bowden* in the County of *Northampton*, which was pretended to be Auncient Demeſne; and the Book of *Domeſday* was brought into the Court; and by that Book it appeared, That the Mannor of *Bowden* was in the County of *Leiceſter*, and not in the County of *Northampton*. Trin. 15 Jac. in C. B. *Griffin* and *Palmers* Caſe. *Brownlow*, 1. Part, 43. See *Hob.* 188. the ſame Caſe, That the Plaintiff was barred in the Action, for that it appeared there was no ſuch Mannor of *Bowden* in the County of *Northampton*, that was Auncient Demeſne.

6. If Auncient Demeſne be pleaded of a Mannor, and denyed, It ſhall be tryed by the Record of the Book of *Domeſday* in the Exchequer: But if Iſſue be taken, That certain Acres are parcel of the Mannor which is Auncient Demeſne, It ſhall be tryed by Jury; for that it cannot be tryed by the ſaid Book. *Cook* 9. Part, in the Caſe of the Abbot of *Strata Mercella*. 31.

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3. *What ſhall be a good cauſe, to remove a Cauſe out of Auncient Demeſne; what not: And whether it may be pleaded after* Imparlance.

1. AN Abbot brought a Writ of Right-Cloſe in Auncient Demeſne, againſt Sir *Humphrey Stafford*, Knight, who made Proteſtation there to ſue in the Nature of a Writ of Right at the Common-Law: The Tenant joyned the *Miſe* upon the meer Right; and afterwards he ſued a Writ of *Accedas ad Curiam*, directed to the Sheriff to remove the Record: And, If that were a good cauſe to remove that Record, was the Queſtion? And it was holden to be no cauſe. Wherefore a *Procedendo* was granted by the Court, directed to the Bayliffs, to proceed there in the firſt Cauſe Hill. 1 & 2 Ma. *Dyer* 111.

2. Tenant in Auncient Demeſne vouched one at the Common-Law within the ſame County, becauſe he had nothing whereby to be ſummoned within, &c. and upon Demurrer, the Voucher was adjudged good; and day was given in the Common-Pleas to determine the Warranty: and a Summons *ad Warrantizandum* was Awarded to the Voucher, in the Forein County, who entred into Warranty, and vouched over into another County, &c. Paſch. 5 E. 6. *Dyer* 69.

3. A *Recordare* was to remove a Plea, upon a Writ of Right-Cloſe in Auncient Demeſne, becauſe the Lands were holden at the Common-Law by Fine. The Plaintiff in Auncient Demeſne ſaid, That the Lands were holden of a Mannor which was Auncient Demeſne, and time out of mind pleadable by Writ of Right-Cloſe; and prayed that the plea might be remanded, becauſe it appeared that the Fine was levied depending the Writ of Right-Cloſe, in Diſceit of the Juriſdiction of the Lord of the Court, and in the delay of the Plaintiff's Suit there: and upon this, the Plea was remanded. *Book. Entries*, 235. acc.

4. An Aſſiſe was brought by Executors of Tenements in *B.* The Defendant ſaid, That the Lands were Auncient Demeſne: The Plaintiff ſaid, That the Lands were Frank-Fee, and pleadable at Common-Law: And the ſame was holden a good cauſe to remove the Cauſe; and ſo it ſhould be in a *Recordare*. And in that caſe it was ſaid, That if it be found to be Auncient Demeſne, that the Writ ſhould abate, and that the Executors ſhould be without remedy; for they cannot have a Writ of Right-Cloſe, becauſe they have not any Eſtate of Freehold. 22 Aſſ. pl. 45.

5. In *Ejectione Firmæ*, After Imparlance, the Defendant pleaded Auncient Demeſne; and it was thereupon demurred; for, being after Imparlance, it came too late. But the Court doubted the Caſe, becauſe ſuch Land is not impleadable at the Common-Law; and therefore it came time enough, when he had not pleaded any other Plea. Paſch. 1 Car. in C. B. *Marſhall's* Caſe. *Ent.* 1. Part, 6.

Authority.

1. *Where an Authority or power given to Persons to make Leases for years, life, or otherwise; shall be good: And how, and under what Deeds such things shall be good, what not; And of Executors to sell.*

1. THe Custome of a Mannor is, That the Lord and Surveyor, or his Deputy, might devise by Copy. The Lord granted Authority to two, to make customary estates for payment of his debts, and dyed. They held a Court in their own names, and granted Copies in Reversion according to the custome: Afterwards, the Wife of the Lord had one of the Copyholds assigned unto her by the Sheriff, upon a Recovery of the third part of the Mannor for her Dower. In that Case, it was holden by the Court, That she should avoid the Grant made by the two Assigns. *Pasc.* 8. Eliz. *Dyer.* 251. But Quære in this Case, if the Wife shall avoid the Grant. For that Pasc. 26 Eliz. It was Resolved in the Kings Bench, That if the Lord of a Copyholder take a Wife, and afterwards granteth the Land by Copy, according to the Custome, and dyeth; his Wife being endowed of the Lands amongst other things shall not avoid the estate by Copy: for although her Title of Dower was before the Grant; yet the Title of the Copyholder which is the Custome, is Ancienter then the Title of Dower. M. 6. Jac. in C. B. *Cook* 8. part 63. in *Swains* Case.

2. A man seised of Lands in Fee, makes A. and B. his Executors, and by his Will in writing appoints, That his Executors shall have and take the profits of two parts of his Lands, untill his Heir shall come of the age of 21 years, to the intent that his Executors with the profits thereof should pay his debts, perform his Legacies, and educate his Children. One Executor dyeth; the Surviving Executor maketh his Executor, and dyeth, the Heir yet being within age; It was holden by the Justices, That the Executors of the Survivor might receive the profits of the Lands, and dispose thereof accordingly during the Nonage of the Heir, because it was in Interest in the Executors by the Devise, and not an Authority or a Trust onely. H. 4. Eliz. *Dyer.* 210.

3. *Cessat quæstio*, before the Statute of 27 H. 8. Deviseth, That A. B. and C. his Feoffees shall suffer his Wife to take the profits of his Land, during her life, and after her decease that the premises shall be sold by the said Feoffees, and that the money thereof coming, that the Feoffees should pay the same to certain persons, to certain intents and purposes. The Testator dyed, A. dyed; It was holden by the Court, that B. and C. could not sell: but contrary, if he had spoken generally of his Feoffees without naming of them. 2 Eliz. *Dyer.* 177.

4. A man seized of divers Lands in Fee; devised all his said Lands to his sister, except his Mannor of R. which I do appoint to pay my debts, and made two Executors by name, and dyed: one Executor dyed, and the other took upon him the charge of the Executorship, and sold the said Mannor of R. for the purpose aforesaid; and the Opinion of the Court was good, That the sale was good, and that it appears by reason, and the Circumstances, that such was the intent of the Testator, and not to leave the Reversion to his heir, but to trust his Executors with the sale of it, for the payment of his debts. M. 23 Eliz. *Dyer.* 371. Note, The difference between this Case, and the Case next above, of 2 Eliz. *Dyer*, is; because in the one Case it is but a bare Authority, and in the other it is an Authority coupled with an Interest. *Cook.* 1. part *Inst.* 113.

5. If a man devise, that his executors shall sell his Lands; Now by the Statute of 21 H. 8. if one of the Executors refuse the Executorship, yet the other may sell the Land; but the sale cannot be to him who refuseth. 27 H. 8. in *Bendloes* Reports adjudged. *Cook* 1. part. *Institutes*, 113. acc.

6. A man seised of Lands in Fee, devised the same in tail; and if the Donee dyed without issue, that the Land should be sold by his Sons in Law, and he had five Sons in Law, and the one of them dyed in the life of the Donee; It was adjudged in that Case, That the others might sell, because they are named generally, his sons in Law; but if they had bin named by their particular names, there, after the death of the one, the other could not sell: And in that Case it was holden; That the Sons in Law might sell one part at one time and another part at another time; as they cou'd find purchasors. *Hill.* 26 Eliz. in B. R. *Vincent* and *Lees* Case.

7. In Trespasse, the Case was this, A man made his Will, and made *A. E.* and *J. O.* his Executors, and devised his Lands to *A. E. J.* and *O.* by their speciall names, and to their Heirs; and further devised, that the said Devisees should sell the Lands to J. D. if he before such a day would give for the same a 100 *l.* and if not, then that

they ſhould ſell them to any other to the performance of his Will, viz. for the payment of his Debts. J. D. would not give the 100 l. One of the Executors refuſed to entermeddle, and the other three ſold the Lands, and the queſtion was, Whether the ſale were good or not; It was ſaid that the ſale was not good, becauſe it is a ſpeciall truſt, and a joynt-truſt, and a Joynt-truſt ſhall never ſurvive, for perhaps the Diviſor who is Dead, repoſed more confidence in him who refuſed then in the others; Alſo the Deviſees have an Intereſt in the Lands, and each of them hath a part, and therefore the one of them cannot ſell without the other; But if the Deviſe were, that four ſhould ſell, they have not an Intereſt, but onely an Authority; It was ſaid on the other ſide, that although the Deviſe was to them by their proper names, and not by the name of Executors, yet the intent appeareth that they were to ſell as Executors, becauſe it was to the performance of his Will, and that might well be by three, and the ſale of the Lands doth refer to the performance of his Will, in which Debts and Legacies are to be paid; and although there are divers Authorities to be executed, yet it is but one Truſt. The Court inclined that the ſale was not good, but the Caſe was not reſolved. M. 29 Eliz. in B.R. *Bonefant* and Sir *Richard Greenfields* Caſe. *Godbolt.* 77.

8. The Lord *Gray* for 800 l. bargained and ſold the Cuſtody and Marriage of his eldeſt Son to four of the Privy Councell by name, to the intent to be married by them without diſparagement, and ſeiſed of Lands in the County of B. and C. thoſe in C. holden in Knights-ſervice, covenanted to aſſure the Lands in B. to them four, to the intent to find him ſuch Wife as he ſhould marry by their appointment, till his age of one and twenty years, and then, the Land to remain to his Son and ſuch Wife, and to the Heirs Males of the body of his Son; A Fine was levied accordingly, one of the four dyed, the Lord *Gray* dyed: The King upon office found, ſeiſed the Ward, and Granted the marriage to the Earl of *Salisbury*, who married his daughter to the Son by the Kings Aſſent, and by the appointment of the Survivors. After the age of 21 years, The Son ſold the Lands in C. to J. S. by Fine and Recovery, and dyed; The Wife entred. J. S. brought a Writ of Entry in the *Quibus*; and upon the matter aforeſaid given in evidence, there was a demurrer in Law. In this Caſe three Judges held, That the Father might not grant the marriage of his Son, it being an inſeparable Prerogative in his perſon; But *Dyer* and *Brown* held it an Intereſt, and agreed that the death of the Lord *Gray* had determined the Grant in reſpect of the Intereſt of the King, by Office found; alſo by the Grant of the King, being under the Seal of the Court of Wards; the King ſhewed that he waved the other intereſt; and then the joyning of the Son is not to the purpoſe, but it ſhall be the Marriage of the Earl of *Salisbury* onely. And in that Caſe it was holden that the Wife is married by the appointment of the four, for where divers joyn in one Act, the Law adjudgeth them onely Actors which have Authority to do the ſame, and for that reaſon, the Land is onely in the Son, and his Grantee ſhould enjoy it againſt the Wife; And ſo it was adjudged. 3 Eliz. *Dyer* 190. the Lord *Grayes* Caſe.

9. A. made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of B. in tail, and after to the uſe of C. in Fee, with power to revoke the uſes, and to limit new uſes, if A. ſurvive J. S. and J. S. dyeth without Heir Male of his body. A. made a Feoffment, and after by Deed, renounced to B. and C. all the power and Authority of Revocation: It was ſaid in this Caſe, that the power of Revocation was not extinct; For it was ſaid, That an Authority which is collaterall to the Land, cannot be given away or extinguiſhed by a Fine, or a Feoffment made of the Land; as if *Ceſtuy que uſe* deviſe, that his Feoffees ſell his Lands, and dyeth; they make a Feoffment over, yet they may ſell againſt their own Feoffment: But it was agreed, That by the Feoffment of the Land, the power of Revocation was extinct; For it was ſaid that his power was not meerly collateral, but ſavoured and taſted of the eſtate and Intereſt in the Land; But it was ſaid, That if a Feoffment be made by A. to divers uſes, with a Proviſo, that if B. ſhall revoke, that there the uſes ſhall ceaſe, there B. cannot releaſe this power, and a Fine levied, or a Feoffment made by him ſhall not extinguiſh it, for the power of B. is meerly Collaterall, and the Land doth not move from him, nor the party ſhall not be in, by, or under him. But a Fine or a Feoffment by A. if the power had bin referred to him, would extinguiſh the ſame. *Cook* 1. part 111. *Albanis* Caſe. *Cook* 1. part 174. *Digg's* Caſe. acc.

10. J. G. was ſeiſed of a certain houſe in *London*, and, by her Will in Writing, and enrolled, deviſed the ſaid houſe, being holden of the King, to R. G. to him, and to the heirs of his body, ſo that if he dye without iſſue, that the Lands ſhall be ſold by her Executors, or Executors of the Executors, and made W. D. and W. W. and J. *de* F. her Executors, and dyed without heir. R. G. dyed without iſſue, by which the houſe came to the King by Eſchear, and afterwards J. one of the Executors dyed, W. W. refuſed, and W. D. ſold the Land, and there the queſtion was, If the ſale by one Executor was good or not; It is not there Reſolved, but it is there agreed by all, That if the ſale

ſale be good, that the ſame ſhall deveſt the Land out of the King; and the cauſe is for neceſſity of Law: for if the ſale ſhall not deveſt the Land at the time of the ſale, no ſale ſhall be made at all; And the Executors who have but a power, cannot have a Petition, *Monſtrans de Droit*, or other remedy. 49 E. 3. 16. vouched in *Cook* 8. part 76. in the Lord *Stafford's* Caſe.

11. A Copy-holder in Fee, made a Letter of Attorney to two Tenants of the Mannor, to ſurrender his Copyhold to the uſe of J. S. and his Heirs, who did it accordingly, it was adjudged that the Surrender was good; and a difference was taken, That if a man hath a bare Authority, accompted with a Truſt, there he cannot ſurrender by Attorney: But if a man hath an Authority as owner of the Land, as the Copy-holder in this Caſe had, there he may ſurrender by Attorney: But it was reſolved, That he who hath but a particular power to make Leaſes for years, that he cannot make Leaſes by Attorney, and it was ſaid, ſo it was adjudged. M. 28 Eliz. See the Lady *Greſhams* Caſe. *See Cook* 9. part 76. *Combes* Caſe. See before in Title *Attorney*.

12. Note, It was ſaid and agreed, That powers by which the eſtate or intereſt of ſtrangers ſhall be changed or charged, ſhall be taken ſtrictly, becauſe they extend to the defeating or change of the eſtate of a third perſon. And to that purpoſe, The Caſe was this; *Henry* Earl of *Suſſex* conveyed the Mannor of *Burnham* in *Eſſex* to the uſe of himſelf for life, and afterwards to the uſe of the Counteſſe of *Suſſex* for life, with divers Remainders over. *Proviſo*, That it ſhould be lawfull for the Earl to make Leaſes for 21 years rendring, &c. And afterwards the Earl made a Leaſe of the ſaid Mannor for 21 years, to begin at the Feaſt of Saint *Michael* the Arch-Angel then following; and although that the power was generall to make Leaſes for twenty one years, without being reſtreined to make them in poſſeſſion, or any number of them, but generally to make Leaſes for twenty one years, Yet it was adjudged that the ſaid Leaſe was void for two cauſes. 1. If by the ſaid power he may make any future Leaſe, or Leaſes in Reverſion; then he may make a Leaſe for twenty one years in poſſeſſion, and afterwards infinite Leaſes in Reverſion for twenty one years, which ſhall be contrary to the meaning of the parties. 2. Becauſe that foraſmuch as this Proviſo gave power to charge the eſtate of a third Perſon, with Tearms of twenty one years; ſuch Proviſo ſhall be taken ſtrictly, and ſhall not extend beyond the Letter and meaning of the parties. M. 28 Eliz. in B. R. *Lepar* and *Wraths* Caſe. vouched in *Cook* 6. part 33. in *Fitzwilliams* Caſe, but ſee the Caſe more certain put in *Leon.* 35.

13. A man ſeiſed of Lands in Fee, made a Leaſe of them for life; and afterwards, by Indenture, Covenanted to convey and aſſure the ſaid Lands, to the uſe of himſelf for life, the Remainder to his Son in tail, with divers Remainders over. And further, by the ſaid Indenture it is Covenanted and agreed that it ſhould be lawfull for him at any time after to make of the ſaid Lands any Leaſes or Grants, as well in poſſeſſion, as in Reverſion. Proviſo, That the ſaid Leaſes or Grants do not exceed the number of three lives, or twenty one years, ſo as upon every ſuch Leaſe or Grant, the ancient Rent or more be reſerved during the ſaid Leaſe, or Grant. Afterwards he levied a Fine according to the uſes in the Indenture, and afterwards he made a Leaſe of the ſaid Lands to J. S. to hold to him and his Aſſigns, for nineteen years, if the ſaid J. S. and J. D. ſhould ſo long live, to begin after the death or determination of the eſtate of the Tenant for life, rendring yearly, after the beginning of the ſaid Leaſe to Him, his Heirs or Aſſigns, or to ſuch perſon to whom the Inheritance of the Premiſes ſhould belong during the ſaid Term, 14 s. 4 d. at four Feaſts yearly to be paid: Amongſt other poynts, It was Reſolved in this Caſe, That the power which the Leſſor had, was well reſerved and purſued: for his power at the beginning was abſolute, to make Leaſe or Leaſes, Grant or Grants, in poſſeſſion or Reverſion, and the generalty was reſtreined by the Proviſo, that the Leaſe exceed not three lives, or twenty one years. And when he made a Leaſe for ninety nine years, determinable upon three Lives, the ſame did not exceed his power. And a difference was taken between a particular power affirmative, and a generall power reſtreined with a Negative; For if a man hath power to make a Leaſe for three lives, or twenty one years, he cannot make a Leaſe for ninety nine years if three ſo long live. But if he hath power to make any Leaſe or Grant: Proviſo, That ſuch Leaſe or Grant, do not exceed the number of three lives, or twenty one years; there he may make a Leaſe for ninety nine years, if three ſhall ſo long live, and ſuch Leaſe ſhall be good. 6 Jac. *Cook* B. part 69. *Whitlocks* Caſe.

2. *What*

2. *What is a good Authority to do a thing, What not? And where it muſt be ſtrictly purſued; And where it may be revoked and Countermanded; And by what Acts it ſhall be Countermanded, what not?*

1. A Copy-holder made Letter of Attorney to two joyntly, and ſeverally, to ſurrender his Copy-hold Lands after his death to certain uſes, according to the cuſtome of the Mannor; It was agreed that the Cuſtome was not reaſonable; For that every Authority ought to be Countermandable, and to determine by the death of the party that gives it; and this Autbority is to take effect after his death, and ſo not Revokeable. *Trin.* 1651. in B. R. *Wallis* and *Bucknalls* Caſe. See before the Caſe at large, in Title *Attorney*, acc.

2. A. made a Leaſe for years, reſerving Rent at *Michaelmas*, upon Condition that if the Rent be behind at *Michaelmas*, and a Moneth after, that he might enter. The Leſſee after *Michaelmas*, and before the Moneth ended, ſent his ſervant to the houſe of A. to pay the mony to A. The Servant delivered the Rent to B. who was the daughter of A. to deliver the ſame to A.; the ſaid B. having at ſeveral other times received the Rent, and paid it to A. which he had accepted of, but now he refuſed to receive it of her, but entred for non payment of the Rent: It was ſaid that his Entry was lawfull, and that the tender made to B. and by B. to the Leſſor, was not good, becauſe the ſervant of the Leſſee had authority to deliver it to the Leſſor, therefore when he delivers it to another, he hath not purſued his Authority. As a letter of Attorney is made to divers to give Livery and Seiſin; If one make Livery alone, it is void, and 18 E. 4. If one hath a letter of Attorney to make livery, he cannot transfer this Authority to make Livery for him. And in the principall Caſe, If a ſtranger had tendred the Rent, the Leſſor was not bound to receive it. But notwithſtanding this, becauſe in the principal Caſe the Rent was due at *Michaelmas*, and the Moneth after was given, becauſe of the penalty of Re-entry, and the Tender and Refuſal was after the Rent was due, and within the Moneth; and in regard the Leſſor was at no prejudice if he had accepted of the Rent, when B. his daughter tendred it to him; and becauſe it appeared to the Court, that the Leſſor had an intent to defraud the Leſſee of his Leaſe; and the Law doth not favour frauds; therefore it was adjudged againſt A. the Leſſor. *Hill.* 28 Eliz. in B. R. *Cropps* Caſe. *Godbolt.* 38, 39.

3. A man recovered upon a Recognizance, and an *Elegit* was Awarded to the Sheriff to extend the Lands, and he did extend the Lands; but doth not return the Writ; It was a queſtion if the Sheriff had purſued that Authority which he had by the Writ; It was objected that he had not, For that the words of the Writ of *Elegit* is, *Quod extendi facias et liberari, quouſque* the debt be ſatisfied; and therefore if the Land be extended only, and no delivery made of the Land, *ut tenementum ſunm liberum*, and the Writ be not returned according to the purport of the Writ, there is no execution duly done. But notwithſtanding that, It was holden in that Caſe, If the Land were delivered to the party, by vertue of the Writ of Execution; the Sheriff hath performed and purſued the Authority which is given to him by the Writ, although the Writ be not returned by him. And ſo it was ſaid it was adjudged. M. 20 Eliz. in *Colſill* and *Haſtings* Caſe, where the Caſe was; *Colſill* had an Extent upon the Lands of *Haſtings*, the Sheriff being a friend to *Haſtings*, did not deliver full poſſeſſion to *Colſill*, but gave him poſſeſſion in part, in the name of all; *Haſtings* continued poſſeſſion of the reſt, and being upon Election of a new Sheriff, *Colſill* was not over-haſty to put him out, hoping to have a more favourable Sheriff: the firſt Writ was not returned, and there being a new Sheriff, he ſued forth a new Writ to have Execution; the Defendant ſaid, that he had before ſued forth Execution of the like Writ, and had it, *Colſill* ſaid that the firſt Writ was not returned: But the Opinion of the whole Court was, That the firſt was a good Execution; and that the Sheriff had purſued the Authority which was given him by the ſaid Writ, although in truth the ſaid Writ was not returned. *Mich.* 29 Eliz. in B. R. *Raynolds* and *Trunlocks* Caſe. *Godbolt.* 81.

4. A man levyed a Fine to the uſe of himſelf for life, the Remainder in tail, &c. with power reſerved to the Conuſor to make Leaſes for 80 years in poſſeſſion, or Reverſion, if A. B. and C. did ſo long live, reſerving the Ancient Rent; Afterwards he granted the Reverſion for 80 years, reſerving the Antient Rent; It was a queſtion whether he had purſued his Authority, becauſe by the meaning of the Proviſo, a power was, that the Conuſor ſhould have the Rent preſently, or when the Term did begin; But the Opinion of the Court was, that he had done leſſe then by the Proviſo he might have done, for this Grant of the Reverſion doth expire with the particular eſtate for life. But if he had made a Leaſe to begin after the death of the Tenant for life, the ſame had bin more then this Grant of the Reverſion. And in this Caſe, It

was

was ſaid by *Coke* Chief Juſtice; That the Grantor might preſently have an Action of Debt againſt the Grantee of the Reverſion, for the Rent: But becauſe in the principall Caſe, it was not averred that any of the *Ceſtuy-que vies* were alive at the time when the Grantor did diſtrein for the Rent, Judgment in the Caſe was reſpited. *Tr.* 10 Jac. in B. R. *Parrot* and *Kebles* Caſe. *Godbolt.* 195.

5. An Action was brought againſt a Hundred, upon the Statute of *Winton*, and the Plaintiff counted upon the Statute, and further ſhewed, that he took his Oath before *John Saunders* Juſtice of Peace, within the County of *Berk*, (in which the Robbery was ſuppoſed to be) and Inhabiting within the Hundred within 20 dayes before his Writ brought, That he was robbed, and did not know any of the parties, according to the Statute of 27 Eliz. Upon a ſpecial Verdict it was found for the Plaintiff: The Oath was taken before the ſaid *John Saunders*, at his Chamber within the Middle-Temple *London*; and whether he took the Oath before the ſaid *John Saunders* Juſtice of the Peace of the ſaid County, and Inhabiting in the ſaid County *ſecundum formam Statuti*, was the queſtion. It was ſaid, That a Juſtice of Peace hath onely his Juriſdiction within the County wherein he is a Juſtice of Peace, and not elſewhere, and may not elſewhere exerciſe his Juriſdiction; and the Statute of 27 Eliz. appoints the Oath and Examination to be taken by Juſtices of the County, Inhabiting in or near the Hundred, and what he doth out of the County, is *coram non judice*, and then Juriſdiction is a private Juriſdiction, and it was compared to the Caſe where two Juſtices of Peace (upon the Statute of 18 Eliz.) ſet down in order for the keeping of a Baſtard, it cannot be done by them out of the County, and alſo by the Statute of 5 Eliz. *Of Labourers.* Orders of Juſtices of Peace ought to be by them which are Inhabitants in the County, and when they be in the County, and not to be made out of the ſame. But the Opinion of the Court was, The Caſe being propounded to all the other Juſtices of other Courts, and Barons of the Exchequer; That this Examination taken at *London* by a Juſtice of Peace of the County, Inhabiting in the Hundred, was good enough; and it was ſaid by them, That the Act of 27 Eliz. was not an Act of exerciſing Juriſdiction, but rather a direction, that ſuch an Oath and Examination ſhall be taken, and which may be as well taken in any other place, as within the County: And there is a difference where a Juſtice of Peace doth an Act to compell another to perform, as to impriſon one for non-performance, or to command one for any offence, to be Impriſoned; ſuch Acts cannot be done, but where his Juriſdiction extends; but Juſtices of Peace may take Informations againſt Offenders in any place out of the County, to prove Offences in the County where they are committed. But they cannot compell any of the County, out of the County to take a Recognizance, for they cannot uſe any coercive power out of the County; Wherefore it was adjudged in the principall Caſe, that the power of the ſaid Juſtice of Peace for the taking of the Oath and Examination was well Executed, within the meaning of the Statute of 27 Eliz. and Judgment was given for the Plaintiff. *Poſc.* 7 Car. in B. R. *Helier* and the Hundred of *Benborſts* Caſe. *Cro.* 1. part 153, 154.

6. In an Accompt brought by a Merchant, againſt his Factor, for certain Jewels which he had delivered to him, to merchandize for him beyond the Seas for his beſt profit. The Defendant by Plea ſaid and averred, That he had ſold the Jewels to *Mulleſhake* the King of *Barbary*, for the beſt profit he could, and that he was to have returned the money, being 45 l. which he had not done: and upon this Plea, the Plaintiff did demur in Law. It was Objected, That if a man receive goods of another to Merchandize withall as for him; the Owner in this caſe ſhall ſtand to the good, and loſſe of all as it happens and falls out: and in this caſe, as the manner is to have the profit; ſo he ought to bear the loſs and prejudice, if any do happen: And here the Defendant hath ſhewed, that he hath ſold the Jewels, and that is ſufficient; and he hath averred, That he ſold them for the beſt profit of his Maſter. But it was holden by the whole Court, the Plea in this caſe was inſufficient, both for the matter, and for the manner of it; and therefore the Plaintiff had good cauſe of Demurrer: For in caſes of Authority given to any one to ſell, as the caſe is here of a Factor; in the due execution of this authority, he ought preſently upon ſale thereof, to have and receive *Quid pro Quo*, otherwiſe he doth not well perform the Authority thus to him given; neither ought he upon the ſale thereof to give further time or day of payment, but as he delivers the one, ſo ought he then preſently at the ſame time to receive the money for the ſame for which it was ſold: And a Factor hath not a power given him, to truſt for the Commodities by him ſold: If a man authorize his Baily to ſell things for him, [illegible] called to account; and he ſaith, he hath ſold them to ſuch a one, and names him; and further ſaith, he hath given him 10 years time for payment of the money; this is no good Anſwer, nor juſtifible: and if ſuch plea ſhould be allowed, all Merchants which do give ſuch authority unto, and do repoſe ſuch Truſt and confidence in their Factors, ſhould be very much prejudiced thereby. Paſch. 7 Jac. in B. R. rott. 416. *Barton* and *Sadocks* Caſe. *Bolſtr.* 1. Part, 103.

7. *A.*

7. *A.* had Judgment in Debt againſt *B*, and by Deed enrolled aſſigned the ſame to the Queen, in ſatisfaction of a Debt due to her as Collector of Fifteens: Proviſo, That if the Lord Treaſurer or the Barons of the Exchequer, or any two of them, for any cauſe reaſonable, diſallow the Aſſignment, and the ſame revoke by Writing, that then the Aſſignment ſhall be void: Afterwards by a Writ of Prerogative out of the Exchequer, the Lands of *B.* were extended, and his goods ſeiſed by the Sheriff by virtue of that Writ; but the Writ was not returned: three of the Barons revoke the Aſſignment after the death of the Teſtator, becauſe the Teſtator had ſatisfied the Queens debt; and now brought a *Scire facias* to have Execution of the Judgment. In this caſe (amongſt other points) it was Reſolved, 1. That after the Execution had, the Revocation came too late; for the Queen had the end of the Aſſignment, and the ſame was executed by proceſs of Law; and when a man hath power of Revocation, if he ſuffer any thing to be lawfully executed by force of it, as to that he cannot make any revocation. 2. It was Reſolved, That the Revocation by three of them had been good: But if the words of the Revocation had been Joyntly, or ſeverally, then the three of them could not have done it; for that had been neither joyntly, or ſeverally. Mich. 42 Eliz. in the Exchequer. *Cook* 5. Part. *Hoes* Caſe.

8. A man deviſed his Lands to his Wife for life, the remainder to *A.* to his daughter in taile; and if ſhe dyed without iſſue, that then after the death of his Wife, that it ſhould be ſold *pro optimo valore*, by his Executors, with the aſſent of *A.* and *B.* and made his wife and a ſtranger his Executors; the wife entred and dyed, and *A.* and *B.* dyed; the Executor which ſurvived ſold the Land alone. It was a Queſtion, If the ſale were good. The Opinion of the whole Court was, That it was not good, for want of ſufficient Authority. Mich. 5 Eliz. *Dyer* 219.

9. If a man make a Letter of Attorney to two, to do any act, if one of them dye, the Survivour ſhall not do it: But if a *Venire facias* be awarded to 4. Coroners, to impannel and Retorn a Jury, and one of them dye, yet the other ſhall execute and retorn the ſame, becauſe it is for the [illegible]ution of Juſtice, and *pro bono publico*: So if a Quarter of Feoffment be made, and a Letter of Attorney to 4. or 3. joyntly and ſeverally to deliver Seiſin, two of them cannot make Livvery, becauſe it is neither by them 4. joyntly, nor ſeverally. But if the Sheriff upon a *Capias* directed to him, make a Warrant to 4. or 3. joyntly or ſeverally, to arreſt the Defendant, two of them may arreſt him; for ſuch an Act being for Execution of Juſtice, ſhall be favourably expounded. *Cook* 1. Part, *Inſtitutes*, 181. acc.

10. Note; A man cannot by his own act make ſuch an Authority, power, or Warrant, as ſhall not be Countermandable, which by the Law, and in its own nature, is Countermandable: As, if I make a Letter of Attorney to make Livery, or to ſue an Action in my name; or if I make any one my Factor, or I do ſubmit to an Arbitrament, although theſe are made by expreſs words irrevokable; or if I bind my ſelf, that they ſhall ſtand irrevokable; yet I may afterwards revoke the ſame; for my act or my words cannot alter the Judgment of Law, and make that irrevokable, which in its own nature is revokable. See *Cook* 8. Part, 81. in *Vincors* Caſe. See before.

3. *Of Authority and Intereſt, and their difference: where they may be joyned in one Act. And where an Act in it ſelf indifferent ſhall be ſaid to be derived out of an Intereſt.*

1. THere is a difference between an Authority and an Intereſt: In the caſe of an Intereſt, It can hardly be ſevered and divided; and therefore to that purpoſe there was a Caſe, Trin. 31 H. 8. rott. 410. in *Bendloes* Reports, Sir *Thomas Langford* was ſeiſed of the Mannor of *Langford*, and did grant to one *Fulgeam* and to another, the next Advowſon; *Habendum eis et eorum uni conjunctim et diviſim*: And it was Reſolved, That that Grant was not good, becauſe an Intereſt cannot be divided: and therewith agrees the caſe in 13 Eliz. *Dyer*. 304. where the next Avoidance was to three, *Habendum eis, et uni eorum Conjunctim et diviſim*, the firſt preſented the third, who was Admitted, Inſtituted, and Inducted, and well: But it is there ſaid, That if the Biſhop had refuſed his ſole preſentment, peradventure he might have failed in his *Quare Impedit*; for that as it ſeems, the ſeverance in the *Habendum* is void in Law: but it is otherwiſe in the caſe of an Authority, for that may be apportioned and divided; as it was ſaid and agreed in the Caſe of *Berry* and *Perrey*, Mich. 12 Jac. in the Kings-Bench, rott. 386. which ſee before in the Title of *Arbitrament*, at large. See *Bolſtr.* 3. Part, 65, 66, 67. acc.

2. When an Act will work two wayes, the one by an Intereſt, the other by an Authority, or power, and the Act be indifferent, the Law will attribute it

it to the Intereſt, and not to the Authority. And therefore it was ruled, Mich. 41 & 42 Eliz. (which ſee, *Cook* 6. Part. 17. in Sir *Edward Cleeres* Caſe,) That if a man be ſeiſed of 3. Acres of Lands holden in chief to the uſe of ſuch perſon, and of ſuch Eſtate as he ſhall give or diſpoſe by his Will; and afterwards by his Will gives and deviſes all his Lands to J. S. and his heirs, this ſhall carry but two parts of the Lands in point of Deviſe: But where an Intereſt and Authority meet, if the party declare clearly that his Will is, That this act ſhall take effect by his authority or power, there it ſhall prevail againſt the Intereſt, for *Modus et Conventio vincunt Legem*; and therefore in the ſame Caſe of Sir *Ed. Cleere*, it is agreed, That if the Deviſor had recited his power, and had relyed upon that, all would have paſſed by expreſs declaration of the party himſelf. Nay more, though the party do not make an expreſs Declaration, yet if his act do import a neceſſity to work by his power onely, to be wholly void, the Law will give way to effect the meaning of the party: And therefore in that caſe it was Reſolved, That whereas *Cleere* was ſeiſed (for example) of 3. Acres of Lands, every one of equall value, and conveyed two of them to his Wife for her Joynture; and afterwards made a Feoffment of the third to the uſe of ſuch perſon, &c. and then deviſed that third acre; that deviſe was good by force of the Authority, or elſe the whole Deviſe had been utterly void. *Cook* 6. Part. 17. Sir *Edward Cleeres* Caſe.

Averment.

1. *Where an Averment is neceſſary, or requiſite in pleading; Where not.*

1. IN an Action brought, the Caſe was; The Defendant ſold certain Lands to the Plaintiff ſowed with Woad; and if any reſtraint ſhall be by Proclamation or otherwiſe, that it ſhould not be lawfull to the Plaintiff to ſowe and make Woad, then to have certain money back again; Proclamation was, That no man ſhould ſowe Woad within 4. miles of any Market-Town, or Cloathing-Town or City, within any Manſion-houſe of the King: The Plaintiff ſhewed, That the Land was within 4. miles of a Market-Town; but did not aver, it was a Cloathing-Town alſo: upon which the Defendant demurred. It was the Opinion of the whole Court, That the Defendant had ſhewed ſufficient cauſe of demurrer; for the meaning of the Proclamation was, to reſtrain aſwell all manner of Market-Towns, as thoſe Market-Towns which were Cloathing-Towns. It was afterwards ſhewed, that the reſtraint was onely from ſowing Woad, and not from making; and their Contract was, That if any reſtraint ſhould be from ſowing *and* making in the Copulative: the Court was of Opinion, That for that, the Plaintiff ſhould be barred. Mich. 30 Eliz. in C. B. *Goldeſbr.* 7. *Cogan* and *Cogans* Caſe.

2. A Writ of Falſe Judgment, was brought upon a Judgment given in the Court of *Weſtm.* in an Action upon the Caſe upon *Aſſumpſit* brought againſt an Adminiſtrator, becauſe it was not averred in the Action of Aſſumpſit, That the Adminiſtrator had goods ſufficient after the Debts and Legacies were paid. It was holden, That the Plaintiff need not Aver, that they had Aſſetts beſide the Debts, &c. for that ought to come and be ſhewed on the other part; and ſo *Puckering* ſaid, It was adjudged in the Kings Bench. See *Plo. Woodwards* Caſe, acc. Judgment was given againſt the Adminiſtrator. *Tr.* 30. Eliz. in C. B. *Goldsbr.* 97.

3. Debt brought againſt the Husband and Wife Executrix of H. G. *nuper diſt.* H. G. of *London*, Taylor. The Defendant pleaded in Bar a Recovery had againſt him in the Kings Bench as Executor *Teſtamenti* H. G. *nuper diſt.* H. G. of *London* Barber-Chirurgion, upon which the Plaintiff demurred, and the Defendant did not aver, That G. *Taylor*, and G. *Chirurgion*, was all one perſon, and alſo omitted the word *pradict.* It was ſaid by the Defendants Councell, that the Plea was good by a common intent: But the Court was of Opinion, that here, by common intent, he ſhall not be intended the ſame perſon, but rather the contrary, for that common intent ſhall be intended, that more ſtrong then any other, and not that which reſteth indifferent, and here common intent is, that he was another perſon, becauſe *Barber-Chirurgion*, and *Taylor*, are divers Functions by common intent. And *Anderſon* Chief Juſtice ſaid. If J. S. bring a *Precipe* againſt me, And I vouch J. S. it ſhall not be intended the ſame perſon, if he do not ſay expreſly that he is the ſame perſon; *à fortiori*, here it ſhall not be intended the ſame perſon. It was adjudged for the Plaintiff. *Tr.* 30 Eliz. in C. B. *Hooker* and *Gomerſales* Caſe. *Goldsbr.* 111.

4. In an Action upon the Caſe upon *Aſſumpſit*, the Caſe was. One at the requeſt of the Defendant, and for him (but with the parties own mony) did buy certain Wares and Commodities, the which for him were tranſported into *Ireland*, and the Defendant, at whoſe requeſt this was done, did promiſe to repay the money ſo by him layed out. Upon

an Action brought for non-payment, it was found for the Plaintiff; In Arrest of Judgment it was moved that the Declaration was not good, becauſe the Plaintiff doth not therein aver, that the goods by him ſo bought, did come to the uſe of the Defendant, and the Plaintiff alſo ought to have averred in his Declaration, That when the goods were delivered to him, that he then promiſed for to repay the money; which being omitted, the Declaration is not good, and ſo Judgment ought to be ſtayed: But notwithſtanding theſe exceptions; The Court held that the Declaration was good, and that the promiſe was a good promiſe, and that the Defendant ought to repay this money; and that the Plaintiff had good cauſe of Action; and Judgment was given for the Plaintiff. *Paſc.* 9 Jac. in B. R. *Moore* and *Moore's* Caſe. *Bolſtr.* 1. part 369.

5. In a Writ of Annuity, the Plaintiff declared, That A. Granted to him by Deed, to be Captain of the Caſtle of D. to have and hold, the ſaid Office during his life, and gave him Authority to nominate a Gunner, Porter, and ſix Souldiers, and by the ſame Deed for the maintenance of them, for him and his heirs Granted an Annuity for life, and dyed; and his Son did not pay it, for which he brought the Action; and upon that, the Defendant did demur in Law, and it was adjudged for the Plaintiff, upon which Judgment Error was brought, and it was Aſſigned for Error, becauſe the Plaintiff in his Declaration had now Averred that he had exerciſed the ſaid Office: And in that Caſe it was Reſolved, that the Declaration was good enough, without ſuch Averment: and the reaſon was, That in all Caſes when an Intereſt or an Eſtate doth commence upon a condition precedent, be it to be performed by the Plaintiff, Defendant, or ſtranger, and be it in the Affirmative or in the Negative, there the Plaintiff in his Declaration ought to ſhew the performance of it, for there the Intereſt is not in him untill the condition is performed; But when the Intereſt or eſtate paſſeth preſently, and reſts in the Grantee (as in the Principall Caſe it doth) and is to be defeated by matter *ex poſt Facto*, there the Plaintiff may Declare generally without ſhewing the performance of it, and ſhall not be driven to ſhew that which makes againſt him; But the Defendant who is to take advantage of it, ought to plead it. 2. It was reſolved That when an Intereſt paſſeth preſently, and is to be defeated by matter *ex poſt facto*, if it appeareth to the Court by matter in Law, that the Action ſhall not be maintainable without ſhewing the performance of the Condition, or conſideration, there the Plaintiff in his Declaration ought to aver the performance of it, for the maintenance of his Action. *Tr.* 33 Eliz. in C. B. *Cook* 7. part 10. *Hughards* Caſe.

6. An Action of Debt was brought againſt the Defendant upon the Statute of 23 H. 6. for not returning him Burgeſſe of the Town for the Parliament; where the Words of the Statute are, That the Sheriff ſhall ſend his precept to the Mayor; if there be no Mayor, then to the Bayliff: And the Plaintiff declared, That the Defendant had made his Precept to the Bayliff; without Averring there was no Mayor, and after Verdict, this was moved in Arreſt of Judgment: But the Court was of Opinion clearly, That it was good, For we ſhould not intend that there is a Mayor, except it be ſhewed, and if there were one, it ſhould come properly on the other ſide. 10 Jac. in B. R. St. *John*, and St. *John's* Caſe. *Hob.* 78.

7. In an Action upon the Caſe for theſe words, *Thy Maſter* Brown *hath robbed me of all my goods*. After Verdict found for the Plaintiff, It was moved that the words are not Actionable, becauſe he doth not ſhew that there was any Condemnation of the Plaintiff, or that he was his Maſter, of whom the words were ſpoken; nor that he ſerved the Plaintiff, and ſo *non Conſtat de perſona*; But the Exception was not allowed; for when he ſpoke it of the Plaintiff, it is a ſufficient certainty, and there is a ſubſequent demonſtration of the perſon when he names him his Maſter: And in this Caſe, it was agreed by the whole Court, That if one ſaith *Thy Son hath robbed me*, and his Son brings an Action, he cannot without Averring that he had no more Sons, maintain it; But if one ſaith to a Son, *Thy father*; or to a Wife, *Thy Husband hath robbed me*; The Action lyes for the Father or Husband without any ſuch Averment. For there cannot be more Fathers or Husbands. *Tr.* 15 Car. B. R. *Brown* and *Lowes* Caſe. *Cro.* 2. part. 443.

8. An Action upon the Caſe was brought by a Journey-man of a Shoe-maker's Shop, which was his lively-hood, for theſe words. *It is no matter who hath him, for he will Cut him out of Dores*, and the Plaintiff Averred, That the common Acceptance of theſe words amongſt Shoe-makers was, *That he will begger his Maſter*. The Opinion of the Court was, That the Action would lye. For it was agreed, That for ſome words, An Action will lye without particular Averment of any damage; As to call a man Thief, Traytor, or the like; theſe are *malum in ſe*; But to ſay, *Such a one kept his wife baſely, and ſtarved her*, the words of themſelves will bear no Action; but if the party of whom the words were ſpoken, were in Election to be married to any other; then with ſuch an Averment they will bear an Action. *Paſc.* 15 Car. in B. R. adjudged.

9. A. Wife of J. S. promiſeth to B. to whom Adminiſtration was committed, That if he will relinquiſh

relinquish the Administration at the request of C. and that A. to Administer, that A. will discharge B. of two Bonds. In *Assumpsit* brought by B. he alledged that he did renounce the Administration. B. suffered A. to Administer, and that A. had not discharged him of the two Bonds. It was found for the Plaintiff; and Error brought because he did not shew that he did renounce at the request of C. The Court held that it was Error, for consideration is a thing meritorious, and all ought to be performed, as well the request on the part of C. as the permission of the part of B. for perhaps B. was compelled to relinquish it in the Ecclesiasticall Court, as it might be, for of right the Wife ought to Administer: And therefore he ought to have bin Averred, that it was at the requeſt of C.; and therefore if it had bin that he should renounce at the charge of C. It ought to be averred that it was at the charge of C. M. 15 Car. in B. R. *Moshes* Reports. 56.

10. Debt against an Administrator *durante minore ætate* of an Executor, and the Plaintiff did not aver that the Executor was within the age of 17. years. The Opinion of the Court was, That he need not; Otherwise it was, If the Plaintiff were such an Administrator. *Hill.* 13 Car. *Carver* and *Hasslig*'s Case. *Hob.* 251.

11. A man did bequeath to each of his Children, being Enfants, a Legacy of 20 l. a piece, The Procurators of the Enfants did Libell in the Court of Arches, against the Executors of the Testator, for the said Legacies being out of the Diocesse; and a Prohibition was Awarded; And in this Case, It was agreed by all the Justices, That the Exception in the Statute of 23 H. 8. cap. 9. doth extend onely to probate of Wills: It was further agreed in this Case, That an Averrment might be that the parties were sued out of their proper Diocesse, if the same doth not appear in the Libell; as it may be in like Case, where one suith in the Admiral Court for a thing done upon the Land; Averment may be made, That the Contract was made *infra corpus Comitatus*. M. 11 Jac. in C. B. *Hughes* Case. *Godbolt.* 214.

12. It was holden by *Anderson* Chief Justice, That if one deviseth Lands to the heirs of J. S. and the Clerk Writes it to J. S. and his Heirs, That the same may be holpen by Averment, because the intent of the Devisor is written, and more, and it shall be naught, for that which shall be against his Will, and good for the residue. But if a Devise be to J. S. and his heirs, and it is written but to the Heirs of J. S. there an Averment shall not make it good to J. S. because it is not in writing, which the Law requires, and so an Averment to take away any surplusage is good, but not to increase that which is defective in the Will of the Testator. *Hill.* 29. Eliz. in C. B. *Godbolt* 131.

13. A man in a Replevin makes Conusans for a Rent for him in the Remainder in tail, and doth not alledge the precise time when the Lessee for life died, but onely that he died, yet it is good because an Avowry is a reall Action, and in real Actions no precise day need to be alledged. 2. Because he Avowes for the Arrear of Rent due to him in the Remainder, which implies that Lessee for life is dead, and there needs no Averment that he is dead. See: A man was Lessee for 90 years, if the Lady *Morley* should so long live. In an Action brought by him as Lessee for years in his Declaration, he did not Aver that the Lady *Morley* was alive; and yet it was Awarded good, and see 12 Jac. *Ford* and *Paramours* Case. A man Avowed, as heir of Sir *John Arrundell*, and did not alledge in certain, any time that Sir *John Arrundell* dyed, and yet the same was Awarded good for the reason aforesaid, and therefore needed not any Averment to be made when he dyed. 2 Car. in B. R. *Dicher* and *Molands* Case. *Poph.* 201.

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2. *Where an Averment against a Fine by the heir in taile, levied by his Ancestor, shall not be good; where by him in the remainder: Or the Wife against a Fine levied by her husband shall be; where not.*

1. A. Tenant for life, the remainder in taile to D. the Reversion in Fee to B. and his heirs expectant. B. levies a Fine to C. and D. and to the heirs of C. unto the use of them and their heirs; and hath issue, and dyeth before all the Proclamations were past; the issue then being beyond Sea, the Proclamations are past: and then the issue returns and makes his claime to the remainder in taile. It was adjudged, That the issue in taile was barred by the Fine and Proclamations; and that by the Statute of 4 H. 7. of *Fines*; and the Issue in taile in such case cannot aver, That *partes finis nihil habuerunt* against the Fine. *Cook* 3. Part, The Case of Fines, 84, 85.

2. *Edward* Lord *Zouch* brought a *Formedon* in the *Discender*, of the moyety of the Manour of D. against *Bamfield*, who pleaded in barr, That *John*, Great Grandfather of the Demandant, levied a Fine *sur Conusans de droit come ceo*, &c. with proclamations of the said moyety of the said Manour, 30 Pasch. 30 H. 8. which was by the

ſaid Fine rendred and granted to the ſaid *John* and his heirs, whoſe Eſtate the Tenant had. The Demandant replyed, and ſaid, That at the time of the ſaid Fine levied, and at all times after, the ſaid *Bamfild* was Tenant, and ſeiſed of the Land in demand in his Demeſne as of Fee. It was adjudged by the whole Court in that caſe, That the Demandant being heir in taile, againſt ſuch Fine levied by his Anceſtor, whoſe heir he is, was eſtopped to aver his Seiſin and Continuance thereof in a ſtranger at the time of the Fine levied: nor to aver, That *partes finis nihil habuerunt*: And it was holden in that Caſe, That before the Statute of 4 H. 7. and 32 H. 8. the iſſue in taile was not admitted to ſuch averments againſt a Fine levied by his Anceſtor. Paſch. 28 Eliz. rott. 13. in C. B. The Lord *Zouch* and *Bamfields* Caſe. *Leon.* 75, 76, 77, 78, &c.

3. Note: It was Reſolved, That if the King be Tenant in taile by the guift of any of his Anceſtors being Subjects, that upon a Fine levied upon a Grant and Render, he may barr the Eſtate taile; and in ſuch caſe no Averment by the iſſue in taile, that *partes finis nihil habuerunt*, ſhall be good: and the reaſon is, becauſe the King is barred by the Statute of *Donis*; and it is reaſon, that the King ſhall have benefit of the Statutes of 4 H. 7. and 32 H. 8. and when the King claims in his natural capacity as heir of the body, *per formam doni*, he ſhall be barred by the ſaid Acts. But in that caſe it was ſaid, That it was neceſſary to have Letters Patents to grant to the Conuſee, that he may enter into the Land; for otherwiſe the Fine being executory upon a Grant and Render, it might be doubted, If the Conuſee without any ſuch Grant, might enter upon the King. *Cook.* 7. Part. The Caſe of Fine levied by the King, Tenant in taile.

See more of this, in the Title of *Fines* levied of Lands:

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3. *Where an Averment againſt the return of the Sheriff or other Officers is good; where not. Where againſt a Record,* et è contra.

1. VPon a Writ of Partition upon the Statute of 32 H. 8. of *Partition*, The Sheriff returned, That the Partition was made by 12, lawfull men: One of the parties ſurmiſed and averred, That there was an inequality in the Partition, and prayed a new Writ to the Sheriff. in 6 E. 6. *Dyer* 73. It was a Quære, If it ſhould be granted. But ſee now, *Cook* 1. Part, *Inſtitutes*, 171; That if the Partition be by Writ, although it be unequall, yet it ſhall not be avoided by Averment; but ſhall bind the party: and ſuch averment of the Retorn of the Sheriff, ſhall not be good.

2. In an Appeal brought of the death of his brother againſt J. S. of *M.* &c. as Principal, and one F. as Acceſſary; whereas the name of the Principal was T. S. the acceſſary appeared, and pleaded, *Nul tiel in rerum natura* as J. S. the day of the Writ brought, nor after. It was holden by the Court, Although there be another J. S. in another County, if there be not in the ſame where the Town of *M.* is; in ſuch caſe in favour of life, a man may aver, and traverſe againſt the Retorn of the Sheriff, 18 Eliz. *Dyer.* 348.

3. In an Action upon the Caſe, the Plaintiff ſhewed, That J. S. was bound to the Plaintiff in a Recognizance, and that he took an *Elegit* upon it to the Sheriff; and the Defendant being Sheriff, took an Inquiſition upon it, upon which Land was extended, but he refuſed to deliver it to the Plaintiff, but made a Retorn, that he had delivered: upon Not-guilty, It was found for the Plaintiff. It was moved in this caſe, That an Averment ſhould not be made againſt the Retorn of the Sheriff. But it was anſwered and Reſolved by the Court, That in another Action, an averment may be made againſt the Retorn of the Sheriff, though not in the ſame Action. It was adjudged for the Plaintiff. Mich. 22 Jac. C. B. *Sheis* and Sir *Francis Glovers* Caſe. *Winch.* 100.

4. An Action was brought againſt one as Executor, who pleaded, That he refuſed; upon which they were at Iſſue. The Biſhop did Certifie *Quod non refuſavit*; whereas in truth he had refuſed before the Commiſſary. It was moved, That the Court ought to write to the Commiſſary: But that was denyed by the whole Court; for that he is not the Officer to the Court to that purpoſe; but the Biſhop himſelf: and the party cannot aver againſt the Certificate of the Biſhop, no more than againſt the Retorn of the Sheriff. But the Opinion of the Court was, That the onely remedy for the Defendant, was by Action upon the Caſe againſt the Biſhop, for his falſe Retorn and Certificate. Then it was moved, That the Iſſue joyned upon the Refuſal, ought to be tryed by Jury, and not by Certificate of the Biſhop: And ſuch was the Opinion of ſome of the Juſtices. But *Periam*, Juſtice, ſaid, Where the Iſſue is, whether the Executor did refuſe before ſuch a day, or after, there the Tryall ſhall be by Jury: contrary, where the Iſſue is upon general refuſal, becauſe Refuſal is before him as a Judge; as alſo as Reſignation. Trinit. 31 Eliz. in C. B. *Leon.* 205.

5. In

7. In an Action upon the Caſe for calling the Plaintiff Murtherer and Thief, the Defendant juſtified Murtherer, becauſe the Plaintiff was Endicted of a Murder at *Cheſter* within the County Palatine. But it was holden to be no good Juſtification: but the Plaintiff paſſed that, and ſaid, He was acquitted of that by the Jury; and ſhewed an Exemplification of it under the Seal of the County Palatine. To which the Defendant pleaded, That there was no ſuch Record. It was a Quære, Hill. 7 Eliz. *Dyer* 236. If it were a good plea againſt the Exemplification.

See more of this, in the Title, of *Return of the Sheriff*.

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4. *Where a man pleads a General Pardon, Averment muſt be, That he is not a perſon excepted.*

1. NOte; That if a man be to take benefit of an Act of Parliament, there he ought in pleading to ſhew, That he is not a perſon excepted by the Act: But when a man claims nothing by an Act of Parliament, but claims to retain that which he had before, there it is not neceſſary to make ſuch Averment. See *Plow. Com.* 488. in *Nicholl's* Caſe.

2. A man was Outlawed after Judgment before the General Pardon of 43 Eliz. and after the Pardon, dyed, his Executors made ſatisfaction upon Record; and without any proceſs, they pleaded the General Pardon; with an averment, That they were not any perſons Excepted. And in that caſe it was Reſolved, 1. That the Executors ſhould take advantage of the ſaid General Pardon. 2. Although that the words in the Proviſo in the Pardon are, [*untill ſuch time as the perſon ſo Outlawed ſhall ſatisfie,*] That is ſuch an Intereſt in the perſon Outlawed, that though that he dyeth after the Pardon, yet his Executors may ſatisfie and have benefit of the Pardon. 3. Reſolved, That forasmuch as no *Scire facias*, nor *Capias utlagatum*, nor other Proceſs lay againſt the Executors, they might *gratis* come in, and plead the general Pardon, with averment, That they are not any perſons excepted; and every Subject by himſelf, or his Attorney, may plead the Act for his diſcharge. 5 Jac. in C. B. *Cook* 6. Part, Sir *Edward Phitton's* Caſe.

3. In an Action upon the Caſe, the Plaintiff declared, That the Defendant had ſpoken to him theſe words, He (meaning the Plaintiff) is a Thief, and why will you take his part? To which the Defendant pleaded, That 1. *Aug.* 36 Eliz. the Plaintiff did ſteal 6. Sheep of one J. S. by force whereof, &c. and ſo Juſtified, &c. The Plaintiff by Proteſtation ſaith, That he ſtole not the Sheep, and pleads the General Pardon of 7 Jac. and avers, That he is none of the perſons excepted. Whereupon, the Defendant demurred in Law. It was adjudged for the Plaintiff, for that the whole Court was of Opinion, That though he were a Thief once, yet when the Pardon came, it took away not only *pœnam*, but *reatum*; for Felony is *contra Coronam et dignitatem Regis*; and where the King hath diſcharged it, and pardoned him of it, he hath cleared the perſon of the crime and infamy, wherein no private perſon is intereſſed, but the Common-wealth, whereof he is the head, and to whom the reformation of general wrongs belongs. Trin. 13 Jac. in C. B. rott. 913. *Cuddington* and *Wilkins* Caſe. *Hob.* 67. & 81.

4. A man brought a Writ of Errour to reverſe a Judgment given againſt him in Debt in the Exchequer. The Defendant pleaded an Excommunication of the Plaintiff in the ſaid Writ of Errour; and brought the Letters of Excommunication, certified by the Official under the Seal of the Biſhop of *D.* which recited, That they did proceed againſt him for Recuſancy; and for Contempt for not appearing, he was Excommunicated. The Plaintiff ſaid, That after the Excommunication, the King by his General Pardon of 3 Jac. pardoned all Contempts, and averred, That neither the Offence, nor the perſon were excepted. In this caſe, amongſt other upon the pleading, It was Reſolved, That the plea of Excommunication was inſufficient, becauſe that the Excommunication is certified by the Official, or Commiſſary, where it ought to be by the Biſhop himſelf, who is the immediate Officer to the Court; for none ſhall certifie an Excommunication, by which any one ſhall be diſabled, but he to whom the Court may write, to abſolve the party who is excommunicated. The Point in Law was, If the General Pardon ſhould diſcharge a man Excommunicated of the Excommunication, or not? And by the Award of the Court, the Defendant was ruled to Anſwer over. Mich. 6 Jac. in the Exchequer. *Trollop's* Caſe, *Cook.* 8. Part, 68, 69.

5. *Where*

5. Where an Averment ſhall be vaine, unneceſſary, and ſuperfluous; where not: and where that which plainly appeareth ought not to be averred.

1. COunts, and ſuch as be in the Nature of Counts, (as Avowry, wherein the Defendant is an Actor) need not to be averred; but all other pleas in the affirmative ought to be averred, in this manner, *viz. Et hoc paratus eſt verificare*, &c. But pleas which are meerly in the Negative, ought not to be averred, becauſe it were in vain to averr them, in regard they cannot be proved. *Cook* 1. Part. *Inſtitutes*, 303.

2. A man having iſſue 3 ſons by his wife, ſeiſed of a houſe in Fee, in conſideration of natural affection, and to the intent that the Tenement ſhould continue in his name, Covenanted by Deed Indented, That he and his heirs would ſtand ſeiſed of the ſaid houſe, to the uſe of himſelf for life, and after his deceaſe, to the uſe of his Wife for life; and after their deceaſes, of the one moyety to the uſe of his ſecond ſon in taile; and of the other moyety to the uſe of his third ſon in taile, and dyed. The Queſtion in the Caſe was, If any uſe did riſe to the Wife, or not? And it was Reſolved, That a Conſideration which ſtands with the Deed, and is not repugnant to it, may be averred. 2. Admit, that another Conſideration then what is expreſſed in the Deed, cannot be averred: yet in this caſe, there is an expreſs Conſideration in it ſelf; for when he limits the ſame to the uſe of his Wife for life, the ſame implyes a ſufficient Conſideration in it ſelf, and needs not any averment *et manifeſtâ, probatione non indigent*: and therefore if the Father, Tenant by Knight-Service, enfeoffeth his ſon and heir apparant within age, it needs not to be averred, That the ſame is by Colluſion, becauſe it is apparant. *Cook*. 7. Part. 40. *Bedell*'s Caſe.

3. In a *Quod permittat*, the Plaintiff declared, That the Defendant erected upon his Freehold a houſe ſo near unto the Plaintiff's houſe, that part of the ſaid houſe did hang over the Plaintiffs houſe 17 Inches, and in length 17 feet, to the Nuſance of his Freehold, to his damages of 100 l. It was Objected, That he ought to have ſet forth the Nuſans more certain; *ſcil.* that the rain diſcended from the houſe new erected upon the Plaintiff's houſe. But it was Reſolved, That the Plaintiff in his Count needed not to ſet forth any ſpecial Nuſans, becauſe in this caſe the Defendant had erected a new houſe which hung over part of the Plaintiff's houſe, ſo of neceſſity the rain which diſcends, muſt fall upon the Plaintiff's houſe; and the Law doth not require that to be averred, which doth appear unto the Court. Mich. 8 Jac. in C.B. *Cook*. 9. Part, 54. *Batten*'s Caſe.

4. Note; It is ſaid in *Cook* 8. Part, in the Caſe of the City of *London*, That the Conſtitution there made concerning the ſale of Wares and Merchandizes, appearing to be agreeable to, and warranted by their Charter; the ſame needed not to be averred to be ſo: And there it is ſaid, That if the ſon brings an *Aſſiſe* of *Mortdauncester*, he needs not to aver, That it is within the time of Limitation, for that it appears.

5. In an Action upon the Statute of 32 H. 8, againſt buying of pretenſed Titles; if the Plaintiff ſheweth by his Count, that neither the Defendant, nor any of his Auncеſtors, nor any other by whom he claims, were in poſſeſſion of the Land, &c. nor received the Rents or profits, &c. by the ſpace of a year, The Plaintiff needeth not aver the Title to be pretenced; for that the Statute in it ſelf maketh the right of him which hath not been in poſſeſſion ſo, to be a pretenced right; and therefore to aver that which appears plainly by the Statute and the Declaration it ſelf, is needleſs, and impertinent. *Plo. Com.* 87. in *Partridges* and *Strange*'s Caſe.

6. In Debt for performance of Covenants, the Plaintiff aſſigned the breach; That whereas the Plaintiff had Leaſed to the Defendant for years, certain Meſſuages by Indenture; by the ſame Indenture, the Defendant did Covenant to repair all the ſaid Meſſuages *alia quàm quæ appunctuata ſerunt divelli preſcriptum dict. J. S.* and ſhewed, that the Defendant had not repaired the ſaid Meſſuages, and averred the houſe in which the breach of the Covenant is aſſigned *non fuit durante termino prædict. appunctuata divelli*; and upon that matter of Reparation they were at Iſſue, and found for the Plaintiff. In Arreſt of Judgment, it was ſaid, That the Averment in the Replication was not ſufficient, for the Leaſe was made in *Novemb.* to begin at *Mich.* after; and it might be the Meſſuage, for the repairing of which the breach is aſſigned, was appointed to be pulled down before the Term of years began, and then the Defendant is not bound to repair it, and then the breach is not well aſſigned, and ſo the Averment doth not anſwer the Exception. It was Reſolved by all the Juſtices, That the averment aforeſaid was ſuperfluous *et ex abundanti*; for it had been ſufficient for the Plaintiff to have aſſigned the breach, in not repairing of the Meſſuage, without any averment *de non appunctuando*; and if the houſe, in the not repairing of which, the breach of Covenant

nant is aſſigned, was appointed to be pulled down, the ſame ſhall come on the Defendant's part, to whoſe advantage it tendeth; for ſuch appointment doth diſcharge the Covenant as to that. Paſch. 26 Eliz. in B.R. Sir *John Smith* and *Deazes* Caſe. *Lem.*

Avowry.

1. Where an Avowry made for a Rent, or part of it, ſhall be good; where not? And where the Grantee of the Reverſion may diſtrein and Avow, without Attornment, where not? And for what Rents, or other Services, Avowry may be, and by whom made, et è contra.

1. IN a Replevin, the Caſe was: A. Avowed for a Rent-charge, granted to him by a ſtranger, who was ſeiſed of the Land where the diſtreſſe was taken, &c. *pro conſilio impendendo*; It was pleaded in Bar of the Avowry, That the Defendant was Attainted of Treaſon, and was committed to the Tower, and that the Grantor had buſineſſe for his Counſel, but could not have admittance to him. In that Caſe it was adjudged that the Avowant ſhould have the Rent, for that the Rent could not be forfeited. 6 H. 8. *Dyer.* 2, *Empſons* Caſe.

2. Tenant for life ſurrendred one Moyety to the Leſſor, afterwards the Leſſor by Indenture deviſed the whole Land to a ſtranger; *Habendum*, the one moyety, which he had by ſurrender for the term of his life; and *Habendum* the other moyety, which the firſt Leſſee held for the Term of 40 years, if he ſhould live ſo long, rendring for all the premiſes 4 l. *per annum*. The Leſſee was Arrear his Rent for a year, the Leſſor diſtreined, and Avowed for the whole Rent, living the firſt Leſſee. It was holden by the Court, That he might diſtrein and Avow for the intire rent preſently, although that the ſecond Leſſee did occupy but the moyety, becauſe the Reſervation was intire: But becauſe in the principall Caſe he Avowed in Land charged to his diſtreſſe; which is the form in a Rent-charge, and ſo he ſhall Avow upon as Tenant *per le manour*, and alſo becauſe in his Avowry, he did not tender the moyety, but ſaid generally That he ſeiſed in *dominico ſuo*, Leſſed, whereas the moyety was not in Demeſne, the Avowry was not good; Note in this Caſe, the difference between an Avowry for a Rent-ſervice, and a Rent-charge M. 9 Eliz. *Dyer.* 257. See *Plo. Com.* 191. *Adam.* and *Writoſleys* Caſe. acc.

3. Sir *John Savage* granted the Stewardſhip of a Mannor to one for life, with a Fee of 40 s. for the exerciſe of the ſaid Office, and afterwards by another Deed reciting, whereas the firſt Grantee had, and enjoyed the Office during his life, he granted the Reverſion of the ſaid Office *per nomen Reverſionis poſt mortem prediſt.* the firſt grantee, with the Fee of 40 s. After the death of the firſt Grantee the ſecond Grantee exerciſed the ſaid Office for divers years, and for the Rent behind (the ſame being granted with Clauſe of diſtreſſe) he diſtreined and Avowed: In this Caſe it was adjudged, That the ſecond grant was void, becauſe there was no Reverſion of it; and therefore the Diſtreſſe and Avowry for the Fee of 40 s. was not good. 9 Eliz. *Dyer.* 259. Sir *John Savages* Caſe. But ſee *Cook* 8. part 57. in the Earl of *Rutlands* Caſe; That ſuch a Grant of an Office with a Fee in Reverſion by the King, is now good.

4. Husband and Wife ſeiſed of a Mannor, and to the Heirs of the Husband, the Husband granted the Stewardſhip of the Mannor to A. for life, the Remainder by the ſame Deed to the ſon of A. for life, and a Rent to them joyntly out of the Mannor for the exerciſing the ſaid Office, a Copyhold being by eſcheat in the hands of the Husband and Wife at the ſame time; the Rent was behind, the Grantor dyed, the Father dyed, the Wife granted the Copyhold upon which the Son diſtreined for the Arrerages in the life of his Father; the Plaintiff in bar of the Avowry had not Averred the life of the Wife; therefore it was holden, That the diſtreſſe and Avowry was maintainable, for that the Copyholder came under the charge: And upon his Avowry in this Caſe, It was ſaid, he ought to ſhew, that he continued the exerciſing of the ſaid Office of Stewardſhip, for if he ceaſeth that; then Debt onely lay for the Arrerages. 10 Eliz. *Dyer* 270.

5. J. S. makes a Leaſe for life to A. afterwards he makes a Leaſe of the ſame land to B. for years rendring Rent; A. ſurrenders. J. S. enfeoffs a ſtranger, who ſuffereth a common recovery, Tenant for life dyeth. It is a Quære, If the Recoverers may diſtrein and Avow for the Rent within the Statute of 7 H. 8. becauſe that he againſt whom the Recovery was, could not; becauſe the Leaſe was not begun. 29 H. 8. *Dyer* 31.

6. In a Replevin, by A. and B. againſt J. S. the Defendant Avowed the diſtreſſe, becauſe that one W. was ſeiſed of the Mannor, whereof the place where, &c. was parcell in Fee, and gave the Mannor to J. D. the father of the Plaintiff, and of the Avowant, and to E. his Wife, and to the heirs

heirs of J. D. who by his Will deviſed a Rent to the Avowant of 4 l. out of the ſaid Mannor, with Clauſe of diſtreſſe, for his childs part, to be yearly paid; J. D. the Father dyed, 3 Eliz. 22 Eliz. E. his Wife dyed, and for the Arrerages of the ſaid Rent encurred, mean between the death of J. D. the father, and E. the Wife, the Defendant Avowed, and upon the Avowry, the Plaintiffs did demur in Law, for that the Rent did not begin, in effect, but after the death of E. the Wife of the Deviſor; But it was ſaid and agreed by the Court, That if he in the Reverſion upon a Leaſe for life, grant a Rent-charge of the Grantor, that the Grantee ſhall diſtrein for all the Arrerages encurred after the grant, even during the life of the Grantor, *à fortiori* in this Caſe; for that this Rent, as it appeareth by the Words of the Deviſe, was deviſed to the Avowant for his lively-hood, and for his Childs part, which words imply a preſent Advancement, and the words *Yearly to be paid*, is a ſtrong proof to that intent; and therefore it was adjudged for the Avowant that the diſtreſſe and Avowry made, was good. *Tr.* 25. Eliz. in B. R. rott 746. *Rearsby* and *Rearsbyes* Caſe. *Leon.* 13.

7. In a Replevin, the Defendant Avowed for a Rent-charge, and ſhewed that W. was ſeiſed of the Mannor of W. whereof the place where was parcell, and 26 H. 8. made a Feoffment in Fee of the place where, &c. to one O. rendring Rent, and Suit at the Court of the ſaid Mannor, and that W. was ſeiſed of the ſaid Rent, and ſuit, and dyed thereof ſeiſed, and that the ſame diſcended to A. his ſon and Heir, who was ſeiſed of the ſaid Rent as parcel of the ſaid Mannor, and that A. ſo ſeiſed of the ſaid Mannor and Rent, bargained and ſold the ſaid Mannor and Rent, 26 H. 8. to the Father of the Avowant, by theſe words, *Manerium de W. et omnes, et omnimodos redditus*, reputed, deemed, or adjudged, part or parcell of the ſaid Mannor. Who entred, and dyed ſeiſed, and the ſame diſcended to the Avowant as Son and Heir, and Averred that the ſaid Rent at the time of the ſaid bargain and ſale, *et diu ante*, was reputed parcell of the ſaid Mannor, and upon the Avowry the Plaintiff did demur in Law. After many Arguments at the Bar, The Opinion of the Juſtices in this Caſe was, That this Rent-charge did not paſſe by the bargain and ſale made, as above by A. to the Father of the Avowant; For in the premiſes of the Avowry, there is not any matter ſet forth, importing Reputation, or by which it may appear that the Rent in queſtion, was ever reputed parcell of the Mannor, but rather to the contrary, and the bare Averment of Reputation in the percloſe of the Avowry, is not ſufficient to induce Reputation. But if the Avowant had ſet forth in his Avowry any ſpeciall matter to induce the Court to conceive a Reputation upon the matter of the Avowry, as to ſhew that the Bayliffs of the ſaid Mannor, had accompted for it as parcell of the Mannor, and that the Leſſees of the ſaid Mannor had enjoyed the ſame as parcell of the ſaid Mannor the ſame had bin good matter to induce Reputation, and to have encorporated the ſaid rent, with the ſaid Mannor; but that not being done, Judgment in the Caſe was given againſt the Avowant: And in that Caſe it was ſaid by *Wray* Chief Juſtice, that of ſuch Opinion was *Anderſon* Chief Juſtice of the Common-Pleas, and *Manwood* Chief Baron of the Exchequer. And in this Caſe it was agreed, That a Rent-charge might be parcel of a Mannor. *Paſch.* 26 Eliz. in B. R. *Forman* and *Bohans* Caſe. *Lea.* 13, 14, 15.

8. The Duke of *Suffolk* was ſeiſed of three parts of the Mannor of D, and J. D. of the fourth part of the ſaid Mannor: the Duke granted out of the ſaid three parts, a Rent of 5 l. to G. and afterwards did enfeoff H. of the ſaid three parts. Afterwards J. D. conveyed his 4th part of the ſaid Mannor to H. in Fee: Afterwards H. deviſed the ſaid Mannor, reciting the ſeveral purchaſes to K. his Wife: G. diſtreined the Cattle of K. for the Arrerages of the ſaid Rent, and in a Replevin Avowed the diſtreſſe. The Opinion of the whole Court was, That the Avowry was not good; for the fourth part of the ſaid Mannor, which was in the poſſeſſion of J. D. was not charged with the Rent, and that, although after all the Mannor be in the poſſeſſion of H. yet the Mannor is not ſo conſolidated and united by this unity of poſſeſſion, but that the owner might ſingle out *eandem quartam partem*, and grant it, and the Grantee ſhall hold the ſame diſcharged of the Rent, as J. D. held it; and it was holden that the diſtreſſe taken of the Cattel of K. in this Caſe was not well taken; and ſo Judgment was given againſt the Avowant. *Paſch.* 29 Eliz. in C. B. *Gomerſton* and *Hatchers* Caſe. *Lea.* 85.

9. A man makes a Leaſe for years rendring Rent, and after makes a Leaſe of the ſame Land to begin during the firſt Term; it is a good grant of the Reverſion, and he ſhall have the Rent, being but a Chattell, and ſhall diſtrein and Avow for it without Attornment. 28 H. 8. *Dy.* 26. See *Pla. Com.* 432. 6. acc.

10. In a Replevin, the Caſe was; A. was Tenant for life of the Mannor of D. the Remainder to B. his ſon and heir apparent, and the Heirs males of his body, the remainder to the right heirs of A.: A. and B. his Son being within age, joyn in a Deed, whereby A. grants, and B. confirms to the Avowant a Rent of 10 l. *per annum*, out of the ſaid Mannor of D. at the *Annunciation*, and *Michaelmas*, with clauſe of diſtreſſe, and with a

Nomine

Nomine pœnæ, of 20 s. for every Moneth: A. and B. joyn in a Fine of the Mannor, to the uſe of A. and his Heirs, who enfeoffeth the Plaintiff. B. hath iſſue living. The Defendant Avowes for 20 s. parcell of 5 l. due at *Michaelmas*, 2 Jac. and becauſe 200 l. was due for *Nomine pœnæ*, he Avowes for 50 l. of this *Nomine pœnæ*; All this is ſet forth by way of Avowry. The Plaintiff in bar of the Avowry, ſhews the Nonage of him that confirmed and pleaded the Feoffment, and Averment of the life of the Iſſue in tail; The queſtion was whether this debt were lyable upon the Feoffee, becauſe it was granted by Tenant for life, and confirmed by him in the Remaindor in Fee, being within Age at the time of the grant. But it was holden, That in regard he that made the grant was not onely Tenant for life, but had a Remaindor in tail, and after that a Remaindor in Fee, the Rent is Iſſuing out of all his Eſtates; and although it was void as to the Son, who was next in Remaindor in tail, yet becauſe his Eſtate tail is barred by the Fine, and the limitation is to the uſe of him and his heirs who granted the Rent. The Court was of Opinion for the Avowants right to the Rent: But becauſe the Avowry was for 20 s. parcel of the 5 l. and the 5 l. was parcel of the 200 l. penalty, and he did not ſhew that the reſidue of the penalty was diſcharged, therefore it was holden that the Avowry was not good. *Tr.* 2 Car. in C. B. rott. 731. Sir *Thomas Holt* and *Sambaches* Caſe. *Cro.* 1. part 73, 74.

11. Note, It was agreed for Law, That the Deviſee of the Reverſion of part of the Land ſhall Avow for part of the Rent, and ſuch Avowry ſhall be good and maintainable; and ſo it was adjudged, *Hill.* 42 Eliz. rott. 100. in C. B. in *Ewer* and *Moyles* Caſe. And ſee *Paſc.* 39 Eliz. in the Kings Bench, rott. 233. A man ſeiſed of Lands in Fee, and of Lands by Copy of Court-Roll in Fee, and made one intire Leaſe of the Lands in Fee, and of the Lands holden by Copy, rendring one intire Rent; and afterwards the Leſſor ſurrendred the Copy-hold Lands to the Plaintiff and his heirs and at another time granted the Reverſion of the Free Lands to C. and his heirs, to which the Leſſee for years Attorned; and afterwards for the Rent behind, C. brought an Action of Debt for the whole Rent, It was adjudged that although C. cometh to the Reverſion by ſeverall conveyances, and at ſeverall times, yet he might bring an Action of Debt for the whole Rent, *Collins* and *Hardings* Caſe. *Cook. Select Caſes* 58. And there, *Hill.* 43 Eliz. *Weſt* and *Laſtells* Caſe. A man made a Leaſe for years, of certain Lands; And afterwards deviſed the Reverſion of two parts to one, he ſhould have two parts of the Rent, and he might have an Action of Debt for the ſame; and have Judgment to recover, and the reaſon is becauſe, that although the contract be intire, yet in regard a Rent reſerved upon a Leaſe for years, is more then a Contract, it is a Rent-ſervice, and therefore is ſeverall; and upon a recovery of part in Waſt, or upon Entry, upon a forfeiture, or upon a ſurrender of part, the Rent is apportionable, *Ibid. Select. Caſes*, 58.

12. In a Replevin, the Defendant Avowed for a Rent; and ſhewed, That his Father was ſeiſed and Leaſed for years, rendring rent, and dyed; and that the Reverſion diſcended to him, and for rent arrear, he Avowed; The Plaintiff in Bar ſaid, That the Father deviſed the Reverſion to another; the other maintained his Avowry, and traverſed the Deviſe; It was found that the deviſe was onely of two parts, and not of the three parts; for the truth was, That the Land was holden by Knights-Service; and for whom the Jury found was the queſtion: It was Objected that the Jury have found for the Plaintiff, for the Avowant had Avowed for all; and now it appeared by the Verdict, that the Avowant, and the Deviſee are Tenants in common, And Tenants in common ought to joyn in Avowry, and for that reaſon, the Avowants ſhall not have Retorn for any part: But the Opinion of the Court was without queſtion in this Caſe. If the Jury had given a general Verdict, it had been given againſt the Plaintiff, for it was not deviſed, if all was not deviſed according to the Iſſue; And then if it would have bin againſt the Plaintiff, the Speciall Verdict ſhall be conſtrued to be of the ſame nature in Law; and it ſhall be adjudged by us againſt the Plaintiff, For generally, where the generall Iſſue ſhall be againſt any of the parties, there the ſpeciall Verdict ſhall be of the ſame degree: And as to the other poynt: It was holden, That the Avowant ſhould have a Retorn for part, for that the Jury have found the third part of the Reverſion to him; and by that, there appears a ſufficient certainty to the Court, to make an Apportionment, and then if the Court may make an Apportionment; the Avowant ſhall have Retorn for ſo much as is due to him: Afterwards Judgment was entred for the Avowant. *M.* 20 Jac. in C. B. *Cloworthy* and *Mitchells* Caſe. *Winch.* 49, 50.

13. In a Replevin, the Caſe was; A. was ſeiſed of a Copyhold of the Mannor of *Iſlington*, and by Licence of the Lord, deviſed the ſame by Indenture to *Swinnerton* for 20 years, rendring Rent, afterwards the ſaid A. ſurrendred the Reverſion of the one moyety of the ſame to the uſe of B. to which he was admitted, and then ſurrendred the other moyety to *Mary* the Wife of *John Miller*, who was alſo admitted; and the Defendant as Bayliff to *Mary* and her Husband for half the rent, as belonging to half the Reverſion, made Conuſance;

It was holden in this Caſe, That the ſurrender by the name of a Reverſion in this Caſe, was good. And alſo that the rent was to be devided by halfes, according to the halfes of the Reverſion; And in this Caſe there needed no Attornment upon the ſurrender of the moyety by A. to the uſe of B. becauſe it paſſeth not by way of grant of Reverſion; but it muſt ennure by admittance of the Lord, and there is no means to compell the Tenant to Attorn. *Hill.* 14 Jac. in C. B. *Swimerton* and *Millers* Caſe. *Hob.* 177.

14. In a Replevin, the Defendant made Avowry, and conveyed himſelf to 5 l. rent, due ſuch a day; and for not payment thereof 80 l. *Nomine pœnæ*, but layed no Actual demand of the rent, and concluded, That for the 85 l. he had diſtreined, and ſo Avowed; It was reſolved in this Caſe. That the Avowry was inſufficient for the *Nomine pœnæ*, which could not be forfeited without an Actual demand of the rent; and yet it was adjudged that he ſhould have a retorn of the Cattell, becauſe he had juſt cauſe to diſtrein for the Rent. M. 13 Jac. in C. B. 2009. *Howell* and *Sambacks* Caſe. *Hob.* 233.

15. In a Replevin, the Defendant Avowes, becauſe his Anceſtor was ſeiſed, and let the lands in which, &c. for years rendring rent, and for rent due to him and his Wife, in the right of his Wife he Avowed: Exception was taken becauſe the Huſband alone Avowed, whereas it appears the rent was due to him and his Wife; But becauſe he ſhewed the truth of the matter as it was, and did Aver the life of his Wife, and ſo the diſtreſſe was well taken by him. It was adjudged the Avowry was good enough. *Paſc.* 15 Jac. in B. R. *Wiſe* and *Pelletts* Caſe. *Cro.* 2. part 442.

16. One Avowed, for that J. S. was ſeiſed in Fee, and granted a Rent-charge of 20 l. *per annum* to J. D. to him and his heirs during his life, and the Lives of his wife; and of C. and E. his daughters; and ſhewed that J. D. dyed 1596. E. being his daughter, who lived and married with the Defendant 1603. and becauſe at *Michaelmas* 1697. there was 20 l. behind, the Husband diſtreined and avowed; It was found for the Defendant, and Error brought, and Error aſſigned, becauſe this Rent granted to one and his heirs, during his life, and two others is not deſcendable to the heir, nor ſhall the Heir be occupant thereof. But it was holden by the Court that the limitation was good, and that the heir ſhould have the rent as a party, ſpecially nominated, and as heir by diſcent, though it be not properly an eſtate diſcendable. Then it was moved that the Avowry, ſuppoſing 20 l. to be behind, and not paid to the Husband and Wife, whereupon he diſtreins, was not good; becauſe it appears it cannot be due to the Husband, but onely to the Wife *dum ſola fuit*, ſhe not being married to him till 1603. But it was holden, the Avowry being for rent Arrear, to ſay, that it was behind to him and his Wife, was but Surpluſage, and the iſſue being taken upon a Collaterall matter, and the Verdict found; It ſhall be adjudged according to the Verdict. The Judgment was affirmed. *Hill.* 7. Jac. in C. B. rott. 1730. *Bowles* and *Poores* Caſe *Cro.* 2. part 282, 283.

17. If a man be ſeiſed of a Mannor, part whereof is in Leaſe for life, and part thereof in Leaſe for years, and he levyes a Fine to A. to the uſe of B. in tail, with divers Remaindors over; In this Caſe B. ſhall Avow for the rent, or have an Action of Waſt without any Attornment, for when a Reverſion is ſetled in any, in Judgment of Law, and he hath not any means to compell the Tenant to Attorn, and there is no Lacheſſe or default in him, he ſhall diſtrein for the Rent, and ſo Avow for it without Attornment, or have an Action of Waſt without Attornment, for the Rule is, *Quod remedio deſtituitur, re ipſa valet, ſi culpa abſit.* Cook 6. part 68. in Sir *Moile Finches* Caſe.

18. A man may diſtrein, and Avow, or make Conuſance for an Amercement, for the breaking of a By-Law in a Court Leet. *Cook* 6. part. 26. *Baddocks* Caſe. *Cook* 11. part 44. *Godfreyes* Caſe, acc. *Brown.* 170.

19. A man may diſtrein and Avow, or make Conuſance for a certain ſum, as 10 s. *pro certo Leto.* Paſc. 5. Jac. in C. B. *Cook* 6. part 77, 78. *Bullens* Caſe.

20. A man may diſtrein and Avow, or make Conuſance for an Amercement impoſed upon an Inhabitant in a Court Leet, for refuſing to take upon him the Office of a Conſtable. *Cook* 8. part 38. and 41. *Greiſlips* Caſe.

21. A man may diſtrein and Avow, or make Conuſances for Aid, to make the eldeſt Son a Knight, or to marry his daughter. *Cook* 11 part 44. in *Godfreys* Caſe.

22. A man may diſtrein, Avow, or make Conuſance for Homage, Fealty, Eſcuage, Relief, or other the like Service. *Cook* 4. part. 8. in *Breil's* Caſe: But then ſuch diſtreſſe muſt not be exceſſive or outragious.

23. A man may diſtrein, Avow, or make Conuſance for a *Herriot*. *Cook* 8. part 105. *John Talbots* Caſe. *Cook* 10. part 12 Jac. *Tiver* and *Littletons* Caſe. vouched in the Chancellor of *Oxford's* Caſe. 55, & 56.

24. A man may diſtrein, Avow, or make Conuſance, for an Amercement, for not doing ſuit to his Court; or ſuit at his Mill. *Cook* 11. part 44, 45. in *Godfreys* Caſe.

25. In a Replevin, the Defendant made Conuſance as Bayliff of J. S. for that he was ſeiſed of the

the Mannor of D. and that J. D. held of him a Tenement by rent, and Heriot-Service, payable after the death of the Tenant, and that J. D. dyed poſſeſſed *de animalibus, et catallis*, and becauſe the Heriot was not paid, he made Conuſance; and the Iſſue being upon the Tenure, it was found for the Defendant: It was moved for ſtay of Judgment becauſe he doth not ſhew what was the beaſt which he demanded, nor the kind thereof, nor the price of it, & therefore the Avowry was incertain, of what thing he ſhould have retorn: But it was Reſolved, That the Avowry was well made, for peradventure the Avowant did not know what was the beſt beaſt; and the Plaintiff having done wrong by eſſoyning the Cattell, he at his perill ought to tender a ſufficient recompence for it: and ſo it was vouched to be adjudged. *Trin.* 18 Eliz. in *Dicker* and *Higgons* Caſe. *Hill.* 5 Car. in B. R. *Major* and *Brandwoods* Caſe. *Cro.* 1. part. 189. See *Mich.* 14 Jac. in C. B. *Shaw* and *Taylors* Caſe. The Defendant made Avowry for Heriot-ſervice, the Plaintiff pleaded in Bar, That the Tenant at the time of his death *Nulla habuit animalia*, upon which the Defendant demurred. It was adjudged for the Plaintiff becauſe the Avowry was inſufficient, for that it did not ſet down in certain what the Heriot ſhould be, *ſcil.* Beaſt, or other thing. *Hob.* 176.

26. In a ſecond deliverance for taking his Cattell at C. in a Place called *Curles Yard*: the Defendant made Conuſance, that Sir *Fr. Barrington* was ſeiſed of the Mannor of *Curles*, and that the Plaintiff was ſeiſed of the Land where, and held the ſame of the ſaid Sir *Francis*, as of his Mannor of &c. by Homage, Fealty, and *Servitium Scuti* and by the Rent of 10 l. payable at two Feaſts, of which rent he was ſeiſed by the hands of the Plaintiff, as by the hands of his very Tenant, in his Demeſne, as of Fee, and Avowed for Homage not done; whereupon the Plaintiff did demur; for that the Defendant had not ſhewed any Titles to have Homage; and that the cognizance is repugnant, and no ſufficient ſeiſin alledged of the Services. But it was anſwered and Reſolved, That Seiſin of rent was ſufficient ſeiſin of the other Services, and he might have traverſed the Tenure, and then the other party ought to ſhew whether he had done Homage before: And if a man Avow for Homage, and alledge Seiſin of Eſcuage without Homage it is good: And afterwards Judgment was entred for the Defendant. *Trin.* 20 Jac. in C. B. *Whiteguift* and *Eldersham*s Caſe. *Hutton.* 50.

2. *What Seiſin, and by whoſe hands is ſufficient to make Avowry; And where it may be without alledging ſeiſin; where not. Where the Seiſin ſhall be traverſed, and where the Tenure; Where Seiſin of one thing ſhall be ſeiſin of another. And where* ne unq; *ſeiſed of the Services is good; where not.*

1. IF the Diſſeiſor giveth Seiſin to the Grantee of a Seignory, it ſhall bind the Diſſeiſee; and yet the Grantee of the Seignory cannot compell the Diſſeiſor to give him Seiſin, if he had not Seiſin before within time of Limitation: ſo if one Joynt-Tenant giveth Seiſin of the Rent to the Lord, it ſhall bind his Companion. *Cook* 2. Part, 67. in *Tookers* Caſe.

2. A man holdeth Land by Homage, Fealty, Eſcuage, and Suit of Court, the Lord hath Seiſin of the Fealty onely: It was adjudged, That the ſame was a ſufficient Seiſin of all the other Services; for that Seiſin of any part of any ſervice, is a Seiſin of the whole; and Fealty is part of Homage: And ſo the Seiſin of ſuperiour ſervices, is the Seiſin of all inferiour Services which are incident unto it. And Seiſin of annual Services, is a Seiſin of Caſual Services; but Seiſin of one annuall ſervice, is not Seiſin of another annual ſervice: and all theſe are to be intended as to an Avowry; but to have an Aſſiſe an actuall Seiſin, is requiſite: and Seiſin in Law, is a ſufficient Seiſin to make an Avowry, within the Statute of 32 H. 8. Cap. 2. by the expreſs words of the Statute: for the words are, *actuall poſſeſſion*, or *Seiſin*, in the diſjunctive. And therefore in the principal caſe it was Reſolved, That when the Tenant hath done Homage and Fealty, the ſame is a Seiſin of all other Services, as to make Avowry, which of right ought to be done, although that the Lord, nor any by whom he claimeth, hath had Seiſin within 60 years. *Cook.* 4. Part, 9. *Bevills* Caſe.

3. *A.* ſeiſed of a Mannor by Deed Indented, did enfeoffe thereof J. S. and his heirs, rendring yearly to *A.* his heirs and aſſigns, 10 l. Rent. *A.* dyed ſeiſed; The Rent diſcended to his ſon and heir, who dyed Inteſtate: his Adminiſtrators diſtrained, and avowed for the Rent. It was Reſolved in that caſe upon the Statute of 32 H. 8. which gives diſtreſs to Adminiſtrators in like manner and form, as the Teſtator might or ought to have done, That the Adminiſtrators were not driven in

their Avowry for the Rent, to alledge any Seiſin within 40 years: For in caſe of Reſervation, or grant of a Rent, there the Deed is the Title, and the commencement of it doth appear within time of memory; and no encroachment in ſuch caſe ſhall hurt, nor any Seiſin is materiall: But the Statute ſhall be intended, when the Avowant was driven to alledge Seiſin by force of any ancient Statute of Limitation; and that was, when the Seiſin was material, and of ſuch force, that it ſhould not be avoided in an Avowry. But the Statute doth not compell any to alledge Seiſin, where Seiſin was not neceſſary before; and the Avowant needeth not in his Avowry to ſhew any Seiſin within 40 years; but that ſhall come in on the other ſide; *ſcil.* not ſeiſed of the Services after the Limitation. Mich. 6 Jac. *Cook.* 8. Part, Sir *William Foſters* Caſe. See *Cook* 10. Part, 108. *Humphrey Loſields* Caſe, acc.

4. Note: It was ſaid in the Caſe of the Lady *Rogers*, That in an Avowry, it is not ſufficient for to plead his Freehold; but if the Plaintiff will traverſe the ſame, he ought to make himſelf a Title: and it is not ſufficient to make it of his own Seiſin, but he muſt make it paramount of his Seiſin. Mich. 30 Eliz. in C. B. *Goldeſbr.* 65.

5. In a Replevin the Defendant did avow the taking of the Cattel, by reaſon that one *A.* held of him an acre of Land in the place where by Fealty and 16 s. Rent, the Rent payable at two Feaſts of the year, &c. And the Plaintiff ſaid, That he held the ſame Acre and two other Acres of the Avowant, by Fealty and 36 s. payable at one day *abſq; hoc*, that he held the ſaid Acre by the ſervices payable at two dayes. It was ſaid in this Caſe, That he ſhould have the Traverſe for the miſchief which otherwiſe would follow; for if he ſhould traverſe the Seiſin, thereby he ſhould confeſs Tenure: *Periam*, Juſtice, ſaid, That there is a difference in our books, which is this, That where they agree in the Tenure, there the Seiſin is traverſable; but where they do not agree in the Tenure. there the Tenure is traverſable; and he ſaid, That he conceived in the principal caſe, that the payment at two dayes did alter the Tenure, ſo as now it is another Tenure. And he ſaid, If white-acre, and black-acre be adjoyning, and are holden the one of J. S. and the other of J. D. and J. S. diſtrain and avow for both acres, he may well traverſe the Tenure. And ſee 8 H. 7. 5. by *Brian*, If Avowry be made for a Tenure of two acres by 20 s. and the Plaintiff ſaith, That he holdeth theſe two Acres, and two other acres, by 12 s. without that, that he holdeth the two acres by 20 s. that, that is good, for he cannot do otherwiſe. Trin. 26 Eliz. in C. B. *Throgmorton* and *Tirringham's* Caſe. *Godbolt.* 23. & 24.

6. In a Second Deliverance the Plaintiff declared, of taking of Cattel at a place called *Nunn Field*, in *Swaffam Bulbeck*; and detainer of them againſt *Gages* and pledges. The Defendant made Conuſance as Bayliff to *Tho. March*, and ſaid, That long time before the taking, one *Tho. Marſh* Father of the Plaintiff, was ſeiſed of the Manner of *Michell*-Hall in *Swaffam Bulbeck* aforeſaid, of which the Land in which was parcel; and that one *Anthony Gage* and *Dorothy* his Wife, and *Tho. Grange*, and *Thomaſine* his Wife, were ſeiſed of the Lands in which, in the right of their Wives in Fee, and held the Land in which, &c. of, &c. as of his Mannor of *Michell-Hall*, by Fealty and certain Rent payable at certain dayes; and that *Tho. Marſh* was ſeiſed of the ſaid Services by the hands of *Anthony Gage*, and *Dorothy* his Wife, *Thomas Grange*, and *Thomaſine* his Wife, as by the hands of his very Tenants, and derived the Tenancy to Sir *Anthony Gage*, and the Seignorie to *Tho. Marſh* the Son, by the death of his Father; and becauſe Fealty was not done by Sir *Anthony Gage*, he as Bayliff to *Tho. March* the ſon, did juſtifie the taking of the Cattel, *ut infra feodum et dominium ſua, &c.* The Plaintiff by Proteſtation ſaid, That *Non Tenet* the Lands of the ſaid *Tho. March* as of his ſaid Mannor of *Michell Bulbeck* by Fealty and Rent, for plea ſaid, That the Defendant took the Cattel as aforeſaid, and detained them againſt gages and pledges, and traverſed *Abſq; hoc*, that the ſaid *Tho. March* was ſeiſed of the ſaid Services by the hands of the ſaid *Anthony Gage*, and *Dorothy* his Wife, and *Tho. Grange* and *Thomaſine* his Wife, as by the hands of his very Tenants. Upon which the Defendant did Demur in Law. The Queſtions in this caſe were two; 1. Whether the Plaintiff were ſuch a party as was enabled by the Statute of 21 H. 8. Cap. 19. to take the plea or not? for that by the Common-Law he could plead nothing in barr of the Conuſans, but *Hors de ſon Fee*, or a plea which did amount to ſo much. 2. Whether the Traverſe in this caſe taken, were well taken, or not? As to the firſt Point, the Juſtices were divided in their Opinions; but the better Opinion ſeemed to be, That the Plaintiff might plead (though a ſtranger) any plea, which went in diſcharge of the Lands; for ſeeing that the Statute of 21 H. 8. now enables the Lord to avow upon the Land, not naming any perſon certain, It is but Juſtice and Equity that the Plaintiff ſhould be enabled to plead any thing in diſcharge of it; and this Statute hath been conſtrued by equity for the Lord, and therefore it ſhall be conſtrued by equity for the Tenant: and although the Plaintiff claims no intereſt for the Lands, yet for the ſaving of his goods he may plead the plea. But for the ſecond point, it was agreed and Reſolved by all the

Juſtices,

Juſtices, That the Traverſe taken by the Plaintiff, was not well taken; and that for many reaſons: for, 1. Where the Seiſin is not material, there it is not traverſable; and in this caſe, the Seiſin is not material; for it is out of the Statute of Limitations, and therefore not traverſable. 2. Where the Seignory is not in Queſtion, there no traverſe of the Seiſin. 3. Where the Lord and Tenant differ in the Services, there no traverſe of the Seiſin, but of the Tenure; but where they agree in the Services, there the Seiſin may be traverſed. 4. A man ſhall never traverſe the Seiſin of Services, without admitting of a Tenure: but in this caſe, the Plaintiff took the Tenure by Proteſtation only. 5. It is not good, becauſe he hath traverſed a thing not in demand, which is the rent, and he ought to have traverſed the Fealty for which the diſtreſs was taken, and not the rent: but as this caſe is, he could not traverſe the Fealty only, becauſe ſeiſin of Rent, is ſeiſin of Fealty: and therefore in this caſe he ought to have Traverſed the Tenure; and this being in caſe of Avowry, ſeiſin of the Rent is ſufficient ſeiſin of the Fealty as to avow: and ſo in the principal Caſe, Judgment was given for the Avowant. And Note in this caſe, It was Reſolved by all the Juſtices of the Common-Pleas, That a Traverſe of a Seiſin *per manus* generally without admitting of a Tenure, is not good, Hill. 17 Car. in C. B. *Leyton* and *Granges* Caſe.

7. In a Replevin for taking a Kettle at *Cobham* in *Com. Surrey*, the Defendant avowed as Bayliff to the Dean and Chapter of *Windſor*; That one *A.* held the place, &c. of the Dean and Canons, as of their Mannor of *H.* by Rent and Suit of Court, That *A.* being ſummoned, did not appear at the Court of the Mannor, that for Suit he did diſtrain and makes Conuſance, &c. The Plaintiff confeſſeth the Seiſin of the Dean and Canons, and of the Tenure; but ſaith, That 7. *Aprilis*, 9 Eliz. the Dean and Chapter did Leaſe the ſaid Mannor to J. S. for 51 years. that he entred, and was thereof poſſeſſed, the reverſion to the Dean and Canons; The Avowant confeſſeth the Leaſe, but ſaith, that thereby Leets, Lawdayes, Fines, Amercements, Perquiſites of Court, &c. were excepted: That J. S. 10. *Oct.* 11 Jac. granted all his Eſtate to J. D. who 12 Jac. by his Deed did grant all Leets, Courts, &c. to the Dean and Canons; and that they afterwards held the Courts; and that the Defendant did diſtrain for not doing the Suit at the Court. It was agreed in this caſe, 1. That the Exception in the Leaſe was void, becauſe the Mannor was Leaſed, and the Mannor could not be without a Court: But then it was inſiſted upon, That the plea was void, and not pleadable by him being a ſtranger: For it was ſaid, This was a Suit-Service due from *A.* the very Tenant, and for default of the Suit of *A.* he did diſtrain; Now the Plaintiff conveyed himſelf no Intereſt to the Tenancy, but as a ſtranger did entitle another to the ſervice, which he could not do, but onely plead *Hors de ſon Fee*: It was Reſolved, That this was a good Exception at the Common-Law; and it is in the Lords Choice ſtill to avow at the Common-Law; but he may leave that, and now by the Statute avow as upon the Land lyable to his Diſtreſſe (as here he hath done)! and then the Statute is indifferent to both: and now by Equity the Plaintiff may alledge any thing in diſcharge of the Lands. Tr. 13 Jac. in C. B. rott. 607. *Brown* and *Goldſmiths* Caſe. *Hob.* 150, 151.

8. If there be Lord and Tenant by Fealty and Rent, and the Tenant makes a Leaſe for years, and the Leſſee hath done his Fealty and paid his Rent, and yet the Lord diſtreins the Cattel of the Leſſee for the Rent, and avowes upon a ſtranger as his very Tenant: in this caſe the Leſſee may alledge, That the Leſſor is ſeiſed of the Tenancy, and the Lord ſhall be compelled to avow upon the Tenant, and the falſe Avowry upon a ſtranger who is not very Tenant, ſhall not hurt the Leſſee againſt the truth of his caſe. *Cook* 9. Part, 20. the Caſe of Avowry.

9. If the Lord avowes for other Services, there the Tenure is traverſable; but if he avow for more Services of the ſame nature, there the Seiſin is traverſable; for he may encroach ſervices, and it cannot be avoided in an Avowry; if it be not for an Outragious diſtreſs. But the Iſſue in taile, or the Succeſſour of a Biſhop, &c. may avoid ſeiſin in an Avowry: Seiſin in an Avowry is not traverſable generally: as to ſay, Never ſeiſed of the Services, becauſe by that means he leaveth no remedy to the Lord by Avowry: but in ſuch caſe, he may diſclaim, or plead, Out of his Fee, and ſo traverſe the Tenure. And in this caſe it was holden, That he who denyeth Seiſin after the Limitation, muſt firſt acknowledg a Tenure, that the Lord may have his Writ of Cuſtomes and Services. 42 Eliz. in C. B. *Cook* 9. Part, *Buckualls* Caſe, 33. acc. See *Cook* 4. Part, *Bevill's* Caſe, *in fine* acc.

3. *Whether*

3. *Whether the Avowant ſhall have Damages and Coſts in a Replevin; whether not.*

1. IN a Writ of Errour upon a Replevin, of a Judgment given in the Common-Pleas; the Caſe was this, Sir *John Stowell* was Lord of the Mannor of S. and *James* was one of the Tenants: and within the Mannor there was a Cuſtome, That the Steward might make Ordinances for the Ordering of the Common, and further to aſſeſs a pain upon thoſe who brake theſe Ordinances; and alſo to preſcribe to diſtrain for the pain. The Steward made an Ordinance, That he who put his Cattel beyond ſuch a Bound, ſhould pay 3 s. 4 d. *James* offended againſt this Ordinance; upon which a pain was aſſeſſed upon him, and a diſtreſs taken by *Tintney*, the Defendant, in the Replevin; and Judgment was given in the Common-Pleas for the Avowant. Whereupon a Writ of Errour was brought in the Kings-Bench. And in this Caſe, divers Points were Reſolved; 1. It was Reſolved by the whole Court, That this Cuſtome was a reaſonable Cuſtome: and the difference was taken, where the Ordinance takes away the profit of the Commoners, and where it abridgeth it, or adds Limits and bounds to it. 2. It was Reſolved, That the Commoners ought to take Notice of this Ordinance. The onely point in difference was, Whether Damages and Coſts ſhould have been given in this Caſe for the Avowant. In which point, the Juſtices were divided in Opinions; for the Opinion of *Croke* and *Barkley* were, That the Avowant ſhould recover Damages and Coſts. But *Bramſtone*, Chief Juſtice, and *Jones*, Juſtice, were of Opinion, That Damages and Coſts ought not to be given: and that the ſame was neither within the Letter, nor within the Equity of the Statutes of 7 H. 8. cap. 14. or 21 H. 8. which give damages and not; was within the Letter, for the words are, Where a man diſtrains for Rents, Cuſtomes, and Services, or Damage-Feaſant; and in this Caſe he diſtrained for a pain aſſeſſed onely by Cuſtome: Nor with the Equity; for the miſchief at the Common-Law was, That Damages were not to be recovered for ſuch Rents, Services, &c. But this pain is no Rent nor Service; and it is a Rule, That in all Caſes, where at the Common-Law a man cannot recover Damages, there he ſhall recover no Coſts: And if a Statute give Damages, there he ſhall recover no Coſts; for the ſame is an Act of Creation, which gives remedy where none was before. But where there is an Act of Addition, which encreaſeth the Damages at Law, there he ſhall recover Coſts. Mich. 44 & 45 Eliz. *Skepwiths* Caſe, Avowry was for a Relief; and the Judgment was reverſed, becauſe Damages were aſſeſſed. Hill. 14 Jac. Rott. 471. *Leader* and *Standwell's* Caſe, In a Replevin, Avowry was made for an Amercement in a Leet, and found for the Defendant, and Damages aſſeſſed. But the Entry upon the Record was, *Super quo nullo habito reſpectu, &c.* the Plaintiff was diſcharged of the Damages, becauſe *Nulla damna debent eſſe adjudicanda per legem terræ.* Trin. 15 Car. in B. R. *Tintney* and *James* Caſe. *Winch.* 30, 31. See the ſame Caſe in *Cro.* 1. Part, 358. & 385. wherein the reaſons of *Croke* and *Berkley*, who were of the other Opinion, are at large recited. But no Judgment was given in the Caſe, by reaſon of the difference in Opinion of the Juſtices. See Book of Entries, 570. & 573. and *Cook* 8. Part, 38. *Greiſleys* Caſe.

Baile,

Baile.

1. *Where* Baile *muſt be given; where not: what ſhall be good Baile; what not: And the difference between Baile in the Kings-Bench, and Common-Pleas: And where it is grantable; where not.*

1. NOte, by Mr. *Kemp*, Secondary of the Kings-Bench Office; If a *Latitat* goeth forth againſt the huſband and wife, and the husband onely is taken, the husband ſhall find Bail for him and his wife; otherwiſe he ſhall lye in priſon untill he find ſuch Bail; and ſuch hath been the conſtant uſe of the Kings-Bench for 40 years of his knowledg. Mich. 43 Eliz. in B.R. *Goldeſbr.* 127.

2. *William Gerrard* was arreſted by a *Latitat*, and put in baile by the name of *William Gerr*; the Plaintiff declared againſt him by the name of *William Gerratt*, and all the proceedings were accordingly, and Judgment upon a Verdict was for the Plaintiff. In Arreſt of Judgment it was moved, That there was no baile entred; for the bail is *Gerrett*, and his name is *Gerard*: The Court was of Opinion, It was good; for otherwiſe, every man impleaded may give a falſe name to his Attorney by which he will be bailed, and then plead that in arreſt of Judgment; Judgment was entred for the Plaintiff. Mich. 43 Eliz. in C. B. *Gerards* Caſe, *Goldeſbr.* 138.

3. An Action of Aſſault and Battery was brought againſt husband and wife; the husband being an Attorney, appeared *in propria perſona*, the wife was in *Cuſtodia*; the Plaintiff ſo declared againſt them: The Queſtion was, Whether the husband ſhould not put in bail for his wife. It was the Opinion of the Court, That he ought to have put in bail for her; and the Declaration is not good againſt her *in Cuſtodia*: wherefore it was adjudged againſt the Plaintiff, Tr. 1650. *Elſy* and *Mawditts* Caſe. *Styles*, 226.

4. An Order of the publique Seſſions made againſt *D.* for keeping a Baſtard-Child, was removed into the Kings-Bench by *Certiorari*, and the party who was committed to *Aylesbury* Goal, was brought to the Court upon a *Habeas Corpus*: and Exception was taken to the Return, That it appears that the Order was made for *D.* by the Juſtices at the Quarter-Seſſions, to keep the Baſtard-Child; and for not obeying that Order, that he was committed to the Goal; whereas the Juſtices by that of the Quarter-Seſſions by the Statute, had no Authority to make ſuch Order; but it ought to be made by the two next Juſtices of the Peace of the place where the Baſtard was born: which was agreed by the Court. Yet the Court would not releaſe the Priſoner, untill he was bound over with good bail to the next Quarter-Seſſions for the County of *Buck.* to appear there, and to anſwer the fact. Mich. 1655. *Dentons* Caſe, in B. R. *Styles* 475.

5. The Court was moved, That an Action upon the Caſe was brought againſt Husband and wife, and the wife had appeared, but the husband would not; and the Plaintiff's Attorney ſtood to have ſpecial bail for her; which ſhe could not procure; and therefore it was moved, That ſhe might be delivered upon common bail. But the Chief Juſtice anſwered, If there be cauſe to have ſpecial bail, the wife muſt lye in priſon untill the husband appear, and put in bail for her; for ſhe cannot put in bail for her ſelf, being a *Feme Covert*. Mich. 1655. in B. R. *Att. Lee*, and the Lady *Bellingſlas* Caſe, *Styles* 475.

6. In a Writ of Accompt, the Defendant was awarded to accompt, and *Capias ad Computandum* awarded; The Defendant came in by *Cepi Corpus*, and Auditors were aſſigned him, &c. For which the Plaintiff entred into Accompt, and pleaded a payment by the Command of the Plaintiff; the Plaintiff traverſed the Commandment, and upon that they were at Iſſue; and after Iſſue was joyned, the Defendant was bailed by Recognizance; and afterwards the Iſſue was diſcontinued by the demiſe of the King before a Verdict was given. In that caſe, two Points were Reſolved; 1. That the bail were diſcharged by the demiſe of the King. 2. That after ſuch Judgment given, that the Defendant ſhould accompt, the Entry is, *Ideo Conſideratum eſt quod prædict. M. Computet, et idem M. in memoria quia prius non Computavit.* *Cook* 11. Part, 30. in *Metcalf's* Caſe.

7. A man was bail for another upon a *Latitat* in the Kings-Bench; and before Judgment, the Bail let his Lands for a valuable Conſideration; and afterwards Judgment was given for the Plaintiff. It was a Queſtion, Whether the Lands Leaſed

ſed were lyable to the Bailment; and a difference was put between a Bayl in the Kings Bench, and a Bayl in the Common-Pleas; for there the Suit moveth by Originall, and the certainty of the debt appeareth in the Declaration, and there it is known from the beginning of the Bailment, for what the Bail ſhall be bound. But in the Kings Bench upon a *Latitat*, there is not any certainty till Judgment given, before which the Land is not bound; and the Land being now in another mans hands, it is not lyable: And it was Reſolved, *Cook* 5. part 70. in *Hoes* Caſe. If the Plaintiff releaſe to the Bail of the Defendant in a Suit in the Kings Bench, all Actions, Duties, and demands; This Releaſe ſhall not bar the Plaintiff, for that there is not any certain duty by the Bail before Judgment: But it was ſaid by ſome of the Juſtices, That the Land ſhould be bound, otherwiſe many Judgments and Bailments ſhould be defeated, which would be a great inconvenience. It was not adjourned *Quia Curia adviſare vult*. *Trin.* 15 Jac. in B. R. *Baxtervill* and *Brooks*'s Caſe. *Poph.* 132. See *Mich.* 15 Jac. *Cro.* 2. part 149. the ſame Caſe.

8. A Writ of Error was brought of a Judgment in the Common-Pleas by the Bail; and the Writ ſuppoſed that the Error was in the principall Judgment, and alſo in the Judgment upon the *Scire facias* againſt the Bail *et in redditione executionis ſuper inde*. And the Error Aſſigned in the Execution againſt the Bail was, That no *Capias* was Awarded againſt the principal. And it was ſaid, That the Opinion of *Hobart* Chief Juſtice of the Common-Pleas was, That Execution might in that Court be ſued againſt the Bail, though there was no *Capias* againſt the Principal. But all the other Juſtices there held, That it is all one in the Common-Pleas and the Kings Bench, that a *Capias* againſt the Principal ought firſt to be taken out, and returned *Non eſt inventus*, otherwiſe no *Scire facias* ought to be againſt the Bail: For if the Principal be taken by the *Capias*, or he render himſelf upon the Judgment, no execution ought to be againſt the Bail. And ſuch was the Opinion of all the Juſtices in this Court, in this Caſe: But in this Caſe, It was agreed by the Court, That the Bail cannot Aſſign Error in the principall Judgment, nor take advantage of any Error therein: But becauſe the Error ſuppoſed the Error, to be in the Principal Judgment, and alſo in the *Scire facias* of Execution thereupon; ſome held the Error did lye for that part, but was void for the reſt: Others held the Writ of Error ſhould abate: The Caſe was not adjuged. *Hill.* 12 Car. in B. R. rott. 559. *South* and *Griffiths* Caſe. *Cro.* 1. part 343 344.

9. In Debt, It was moved by the Defendant, That the Plaintiff had declared upon an Obligation with a Condition, but had not ſet it out in the Declaration, and therefore deſired he might have *Oyer* of it, or elſe the Declaration being imperfect, and he being in Priſon, might be ſet at liberty. The Court ſaid; We cannot compell the Plaintiff to ſet it forth, but till he doth, the Defendant ſhall not be compelled to plead, and that the Plaintiff ſhew cauſe upon notice, why the Defendant ſhould not be at liberty upon common Bail; And in this Caſe it was agreed, That if one do Arreſt one, and do not proceed in three Terms, he ought to be ſet at liberty upon common Bail. *Trin.* 14 Car. in B. R. Sir *Charls Coot* and *Plunkets* Caſe. *Sty.* 125.

10. Note, One was brought into the Kings Bench by the Marſhall of the Fleet, by vertue of a *Habeas Corpus* directed to him out of this Court, And becauſe it did appear upon Record, that the party was charged with divers debts when he was turned over to the Fleet, he was not ſuffered to put in Bail in the Kings Bench, but he was remanded. *Paſc.* 1652. in B. R. *Styles* 324.

11. Note, *Rolls* Chief Juſtice ſaid, That he doubted whether one endicted of Perjury might be Bayled; although the Clarks of the Crown-ſide, ſaid, That he might. *Ideo Quære*, *Hill.* 1652. B. R. *Styles* 368.

12. Count *Arundel* and the Lord *Chandois* Indicted for killing of Mr. *Compton*, found guilty of Man-ſlaughter, were not ſuffered to be bailed; but were delivered over to the Marſhall to be brought again at another day. *Paſc.* 1653. B. R. *Styles*, 371, 372. See the Protector and *Sumners* Caſe. *Paſc.* 1654. *Styles* 450.

13. Captain *Streater* committed by the Counceil of State and the Parliament, to the Gatehouſe at *Weſtminſter* for publiſhing ſeditious Pamphlets was brought to the Bar by *Habeas Corpus*, and the Retorn read and filed; he prayed he might be Bayled, but it was denyed, and he was turned over to the Marſhall of this Court, and not remaunded, becauſe upon the filing of the Record, the Court was ſeiſed of the Record, and the Priſoner. *Mich.* 1653. B. R. Captain *Streaters* Caſe. *Styles* 397.

14. Note, In an Action of debt brought in the Kings Bench by *Arthur Gorge*, againſt Sir *Robert Lane*, upon a Bond of 3000 l. for not performance of Covenants; The Bail for *Lane* before any Judgment given againſt him, brought *Lane* into Court and prayed that they might be diſcharged, and *Lane* taken into Cuſtody. *Doddridge* Juſtice ſaid, There is a difference betwixt Manucaptors, which are that the party ſhall appear at the day, for there the Court will not excuſe them to bring the party in Court before the day: But in Caſe of Bail, there they may diſcharge themſelves if they bring the body of the Defendant into Court at any time before

fore the Retorn of the ſecond *Scire facias* againſt the Defendant. For when one goeth upon Bail, it is intended that he is notwithſtanding that, in *Cuſtodia Mariſchalli*; for the Declarations are in *Cuſtodia Mariſchalli Mariſchalſie*; and ſo note the difference. *Trin.* 21 Jac. in B. R. Sir *Arthur Gorge* and Sir *Robert Lanes* Caſe. *Godbolt.* 338, 339.

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2. *Where the rendring up of the Body of the Principall ſhall be a diſcharge of the Bail, where not? And what ſhall be a good diſcharge of the Bail, What not?*

1. A. brought a *Scire facias* againſt B. upon a Recognizance of Bail for one J. S. and ſhewed that he had Judgment, *Mich.* 4 Jac. againſt J. S. and that he did neither render his body nor ſatisfy his debt: The Defendant pleaded that after the Judgment, J. S. came into Court, and rendred his body to the Priſon of the Fleet, in Execution and diſcharge of his bail, and that the Plaintiff did refuſe to take him in Execution; It was Reſolved by the Court, That this was ill pleaded, for the yielding of his body being an Act in Court, and in diſcharge of his bail which is of Record, muſt be alſo of it ſelf of Record, and therefore he ought to have concluded *prout patet per recordum*; but in truth the Caſe was, That there was no Record of it, and yet it was proved by Oath, that J. S. came for that and other cauſes, and was committed to the Fleet; But the true form is, That Entry be made of Record of the yielding in diſcharge of the bail; but if the Plaintiffs Attorney be preſent, he may take his Election, to take him in Execution, or to refuſe him, whereof Entry alſo is to be made; But if the Plaintiff and the Attorney be both dead, or in the like Caſe, there muſt be a *Scire facias* to the Plaintiff or his Executors to anſwer whether they will have him in Execution or not; And though a man refuſeth thus to take the Plaintiff in Execution upon his yielding, and that be entred of Record; Yet he may after take him by *Capias ad ſatisfaciendum*, for it is not a releaſing or renouncing of his Execution. *Mich.* 15 Jac. in C. B. rott. 2617. *Welby* and *Coomings* Caſe. *Hob.* 210.

2. If one be arreſted upon proceſſe in the Kings Bench, and puts in Bail, and afterwards the Plaintiff recovers, and the Defendant renders himſelf in ſafeguard of his Bail. The Plaintiff at his Election may take Execution, either againſt the Principall or Bail; but if he arreſts the bail, although he had not full ſatisfaction, he ſhall never afterwards meddle with the Principal. But if two be bail, though one be in Execution, yet he may take the other; but if the Principall be in Execution, he cannot take the bail. *Paſc.* 11 Jac. in B. R. *Higgens* Caſe. *Cro.* 2. part 320. See *Bolſt.* 2. part 68. acc.

3. In an Action of Trover againſt J. S; A. and B. were bail for him, and Judgment was given for the Plaintiff, and 140 l. damages. The Defendant according to the cuſtome of the Court of the Kings Bench, rendred himſelf into the Marſhalls Cuſtody in diſcharge of his bail, as by the Record of the Recogniſance appeared, whereby the Bail were diſcharged of the Recognizance according to the Cuſtome of the Court: The Plaintiff in the Action of Trover notwithſtanding, took out a *Capias ad ſatisfaciendum* againſt the Bail, directed to the Sheriff of *London* upon the ſaid Recognizance, to be taken in Execution, and to be deteined untill they paid the 140 l. For which the bail brought their Action upon the Caſe againſt him, and being found for the Plaintiff, It was adjudged the Action did well lye; and afterwards a Writ of Error being thereupon brought, the Judgment was affirmed. *Trin.* 21 Jac. in B. R. *Steer* and *Scobles* Caſe. *Cro.* 2. part 667.

4. In a *Scire facias* upon a Recognizance, the Caſe was, A. recovered debt againſt B. who brought a Writ of Error in the Exchequer Chamber retornable 3. *Febr.* and did find the Defendant his Bail according to the Statute of 3 Jac. who was bound in a Recognizance that B. ſhould proſecute his Writ of Error with effect: and that 12 *Feb.* the *Scire facias* was brought againſt him upon the Recognizance; The Defendant pleaded, That whereas the Writ of Error was retornable, 3. *Feb.* D. the Principall, 2. *Feb. venit hic in Curia, et reddidit ſe in eadem Curia*, in diſcharge of his Bail, *et per mandatum Curiæ committitur Mariſchallo et adhuc remanet* in the Priſon of the Marſhalſey in Execution; It was the better Opinion of the Court, That the Principal rendring himſelf in Execution before the time of the Retorn of the Writ of Error: and the Judgment is not affirmed, that then the Bail upon the Recognizance is not to be charged; But the Opinion of the Court in the principall Caſe was, That the plea was not good, for he doth not ſay, that *reddidit ſe priſonæ, ſed venit hic in curia, et ſic in eadem Curia reddidit ſe priſonæ*; and that could not be becauſe 2. Feb. was not *dies Juridicus*, and then it was impoſſible ſo to do; alſo it ought to be that in *eadem Curia reddidit ſe, et per eandem Curiam Commiſſus*, for the Court ought to commit him in Execution; and this here was alſo impoſſi-

ble; and therefore for the inſufficiency of the Plea, of the Defendant. Judgment was given for the Plaintiff. *Paſc.* 14 Jac. in B. R. rott. 544. *Auſtin* and *Monk's* Caſe. *Bolſtr.* 3. part 191.

5. The Plaintiff had Judgment in Debt in the Common-Pleas againſt the Defendant, and a *Capias* againſt him; and becauſe he could not be taken, a *Scire facias* was againſt the Bail, upon which *Nihil* was retorned: afterwards the Defendant brought a Writ of Error, and the Record was removed into B. R. After a ſecond *Scire facias* was granted againſt the Bail, who before the Retorn of it in his diſcharge, brought the Principall in, and prayed to have it allowed. It was adjudged in this Caſe, That if the bail do bring in the Principall upon the firſt *Scire facias*, this ought to be allowed; but if he do nothing till the ſecond *Scire facias*, and then bring in the Principall, it is not to be allowed: And this was ſaid by the Clerks, was the Ancient courſe of this Court: And ſo it was Reſolved in the principal Caſe. And *Cook* Chief Juſtice ſaid, It was ſo Reſolved in Sir *George Bowes* Caſe. *Paſc.* 14 Jac. in B. R. The Spaniſh Embaſſador and *Gyffora's* Caſe. *Bolſtr.* 3. part 182.

6. A. recovered againſt B. in debt, where there was Bail; and, upon the recovery, a *Capias* iſſued againſt B. the Defendant, and the ſame was retorned, but before it was filed, a *Scire facias* iſſued againſt the Bail: one of the Bail for his diſcharge did ſuggeſt an Action againſt B. the Principall, and had his body in Court, and he being in Court for his Suretiſhip, did move to have B. the Principal delivered, in Execution for the Debt of A. and in diſcharge of himſelf, in regard that if he ſhould dye before the next Term, he could not plead this to the *Scire facias*, but he ſhould then be charged with the debt: Wherefore upon his Prayer, B. the Principal was committed in Execution for the debt of A. by the Court: for this was conceived to be juſt and reaſonable by the Court, and A. was in this Caſe enforced of neceſſity to pray, the body of B. to be committed in Execution for his debt; And ſo Note, How the Bail may diſcharge himſelf from the Execution. *Mich.* 12 Jac. in B. R. *Duport* and *Wildgooſes* Caſe. *Bolſtr.* 2. part 260, 261.

7. A *Scire facias* againſt the Defendant, being Bail at *Yarmouth* in an Action of Debt, for that the Principal did not render his body after Judgment; The Defendant pleaded, That after the firſt Action and bail found, the cauſe was removed by *Habeas Corpus*, and bail put in here and accepted. And afterwards the cauſe was remaunded by *Procedendo*, and then Judgment was given againſt the Principall; and therefore it was ſaid that the old bail was diſcharged by the Record removed; But all the Court held, That in this Caſe, the bail was chargeable: For when the Record is remaunded by *Procedendo*, it is as if it had never been removed, and there is no Record of the removal thereof; But if it be removed, and bail filed in this Court, and afterwards in another Term, it is remaunded, then it is otherwiſe, for then the Court is poſſeſſed of the Cauſe; but if it had been remaunded the ſame Term it was removed, it had bin otherwiſe, for there is no Record made thereof. *Mich.* 12 Jac. in B. R. *Cro.* 2. part *Beſton* and *Baller's* Caſe. 363. See the ſame Caſe in *Bolſtr.* 2. part 286.

8. In an Action upon the Caſe, the Defendant put in baile to the Court; and Judgment being given againſt him, he came into Court, and rendred himſelf, and prayed that in diſcharge of his bail, that the Court would record the rendring of himſelf, which was granted: And the Court demanded of the Plaintiff, If he would pray Execution of the body againſt the Defendant; and he ſaid, He would not: Whereupon the Court awarded, That the bail ſhould be diſcharged: and the Rule was entred, That the Defendant offered himſelf in diſcharge of his bail, *et Attornatus Querentis allocutus per Curiam, &c. dixit ſe nolle. Ideo Conſideratum per Curiam, quod tam prædict. defend. quam prædict. Manucaptores de recognitione prædict. denariis in eadem, exonerentur.* Paſch. 39 Eliz. in C. B. *Fullwood* and *Fullwood's* Caſe. *Leon.* 58.

9. In *Audita Querela*, the Caſe was; A. ſued a Bill of Debt againſt B. who found bail the Plaintiff and another: After, B. was condemned in the Action, and dyed, without paying the Condemnation, or rendring his body to priſon: for which a *Scire facias* was ſued againſt the Plaintiff his bail; and upon two *Nihils* returned, Execution was awarded againſt him: whereupon he brought his *Audita Querela*. It was moved, That the Baile might be diſcharged; for that it is now by the Act of God become impoſſible for the Defendant to render his body to pay the Condemnation; and there never was any *Capias* againſt the Defendant in his life-time. The Opinion of the whole Court was, That it was very reaſonable not to ſue Execution againſt the bail, untill a default were retorned in the principal; and the Recognizance of the bail is, that the principal ſhall yield himſelf, &c. is to be intended upon proceſs awarded againſt him: but no proceſs being awarded againſt him in his life-time, it is now impoſſible he ſhould yield himſelf to priſon being dead; and therefore the bail is diſcharged. Judgment was for the Plaintiff in the *Audita Querela*. Hill. 43 Eliz. in C. B. *Hobbs* and *Tedcaſtles* Caſe. *Goldeſbr.* 194.

10. In

10. In a *Scire facias* brought by Executors againſt *A.* and *B.* the Caſe was; That the Defendants were bail for one J. S. (who was condemned in an Action to the Teſtator) that the Defendant ſhould either render his body to priſon, or ſatisfie the Judgments. The Defendants pleaded, That after the *Scire facias* retorned, and preſently after the Judgment, the Defendant brought a Writ of Errour in the Exchequer Chamber; depending which, the Plaintiff *reddidit ſe priſonæ in exoneratione Manucaptorum ſuorum*, and there dyed. In this Caſe it was agreed by the Court, That by the Writ of Errour brought in, the bail was not diſcharged, becauſe it is incertain, whether the Judgment ſhall be reverſed, or not? But it was agreed, That if the Principal dyes before a *Capias* be awarded againſt him, that the bail is diſcharged. And in this Caſe it was Reſolved, That a *Scire facias* doth not lye againſt the bail, untill a *Capias* be awarded againſt the Principal; and no *Capias* in this caſe was awarded againſt the principall (which could not be, by reaſon of the Writ of Errour) before his death. It was adjudged, That the Plaintiffs ſhould take nothing *per Billam*. Trinit. 2 Car. in B. R. *Calf* and *Nevill*'s Caſe. *Popham* 185.

11. In a *Scire facias* againſt the bail, he pleaded, That after the Judgment, and before any *Capias* was ſued out againſt the Principal, he dyed; and it was adjudged a good plea: and ſo (it was ſaid) it was adjudged, Hill. 4 Jac. in C. B. Rott. 975. in *Timberly* and *Carverlys* Caſe. Paſch. 20 Jac. in C. B. *Suggs* and *Sparrowes* Caſe. *Hutton* 47. See Mich. 1652. *Wood* and *Mountneys* Caſe, *Styles* 360. *contra*.

12. *A.* recovered in Debt againſt *B*: *B.* was brought by his bail by *Habeas Corpus*, with a purpoſe to ſave themſelves, *A.* prayed that he might be committed in Execution; and the bail prayed he might be received in their diſcharge. But it appeared to the Court, that *A.* had brought a Writ of Errour which was allowed, but the Retorn of it was not yet come: ſo as the Court was diſabled either to award Execution, or to put him in Execution; and for that cauſe the bail could not be diſcharged; for the Bail is not onely that he bring in the body, but that he become ſubject to the Court; which cannot now be, becauſe of the Writ of Errour; for the Entry muſt be, that the Defendant *reddidit ſe* to the Court, to be in Execution if the Plaintiff will; which cannot be here: and therefore Quære if the Defendant by his act hath not ſo diſabled himſelf, that the bail is forfeited, though he proceed not in the Writ of Errour. Note, the ſame Term there, upon another *Habeas Corpus*, the Plaintiff prayed the Defendant in Execution, which was granted, becauſe the day of the Retorn of the Writ of Errour was paſt; and ſo the Court was re-enabled to award Execution. Paſch. 14 Jac. in C. B. *Wickſtead* and *Bradſhawes* Caſe. *Hob.* 116.

13. The Condition of a Recognizance was, That whereas the Plaintiff had recovered againſt J. S. 200 l. and 14 l. for Coſts; And the ſaid J. S. had thereupon brought a Writ of Errour, That if he proſecuted it with effect; Or if it were affirmed, and the Recognizee paid the Condemnation, with Coſts which ſhould be adjudged for delay of Execution, that there, &c. The Defendant pleaded, That ſuch a day after the Recognizance, the ſaid J. S. before the Judgment, rendred himſelf to the Marſhalſhey to be chargeable for Execution, and to diſcharge his bail, and there yet remain. It was adjudged, That the ſame was no plea; For this *Manucaption* is not to render his body, but to pay the debt, which is grounded upon the Statute of 3 Jac. Cap. 8. Wherefore it is not ſufficient to render the body, but to pay the debt. Paſch. 14 Jac. *Auſtine* and *Monks* Caſe. See before, Sect. 4.

14. *A.* was bail for *B.* in debt at the Suit of *W*: *A.* is taken in Execution; *B.* obſcures himſelf: Upon a Motion for the Bail, a Rule was, That the Sheriff ſhould take *B.* the Principal: the Plaintiff gives *B.* Notice of the Rule of the Court, and adviſes *B.* to abſent himſelf; and if he would ſo do, the money ſhould be levied upon the bail, and he taken in Execution: yet the Sheriff did afterwards take *B.* and the Plaintiff wrote to the Sheriff, to let *B.* go at liberty, and he would ſave him harmleſs. This appearing upon Oath, The Court was of Opinion, That this was an Execution againſt the bail, by practice of the Plaintiff, to charge the Bail with the debt; and in regard the Principal was once taken, though diſcharged upon the Plaintiff's Letter, yet he being once in Execution, the Plaintiff had no remedy againſt the Bail: And therefore it was ruled, That the Bail be diſcharged, and the principal to remain in Execution for ſatisfaction of the debt. Mich. 8 Jac. in B. R. *Worſley* and *Browns* Caſe. *Bolſtr.* 1. Part. 43.

15. Debt upon a ſingle Bill; the Defendant pleaded payment; which found againſt him, Judgment was given, and the Defendant taken; afterwards he brought an *Audita Querela* upon an Averment of payment, and was bailed: The Court being enformed of this; and that ſuch a plea of payment againſt a ſingle Bill, is no plea; and that the bailment was not in open Court, and no Cauſe for an *Audita Querela*, Ruled it, That the *Audita Querela* ſhould be quaſhed; and alſo that the bail ſhould be taken off, and diſcharged; and Execution *de Novo* taken out againſt the De-

fendant of the first Judgment. Trin. 9 Jac. in B. R. *Torrey* and *Adyes* Case. *Bolstr.* 1. Part, 140. See before in the Title of *Audita Querela*.

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3. *Where a Writ of Errour will lye by the* Bail, *where not: And where he shall take advantage of Errour; and where not: And what he may Assign for Errour, and what not: And where want of* Bail *will make the Judgment Erroneous; where not.*

1. IN an Action of Trover and Conversion, the Plaintiff had a Verdict and Judgment; the Defendant brought Errour, and assigned two Errours; 1. That there was no bail filed. 2. That there was no Bill: and upon a *Certiorari* returned, It was certified, That there was neither bail nor Bill filed: Notwithstanding the Judgment was affirmed in the Exchequer Chamber: for that, 1. The want of Bill was taken to be within the meaning of the Statute of 18 Eliz. and remedied by Equity of that Statute. 2. That the bail was not material, because it might be the Defendant was in *Custodia Marishalli*, at the time of the Bill exhibited, as the Bill supposeth. Trin. 15 Jac. in B. R. *Willis* and *Woodhouse* Case. *Hob.* 264, 265.

2. Errour brought upon a Judgment in the Kings-Bench in Debt; the Errour assigned was, because the Bill was filed, 11. Febr. and the Bail was filed 12. Feb. so as the Bill was before any bail; and it doth not appear, that the Plaintiff was in the Custody of the Marshal: yet because the Bill whensoever it was filed, hath relation to the first day of the Term, and the day of filing is not material. It was holden by the Court, That this was no Errour: and so the Judgment was affirmed. Mich. 13 Jac. in the Exchequer, the Lady *Platt* and *Plummers* Case, *Cro.* 2. Part, 384. See Pasch. 18 Jac. in the Exchequer-Chamber. *Webley* and *Gilmans* Case. *Cro.* 2. Part, 568. acc.

3. Errour brought by the Bail of a Judgment given against the Principal in the Court of the City of *Westmin.* The Writ was, *Quod tam in redditione Judicii, quam in redditione Executionis erratum fuit*: The Errour assigned was, because a *Capias* was awarded against the bail, and he taken in Execution without a *Scire facias* sued against him: This was holden by the Court to be Errour. Exception was taken to the Writ, because the bail cannot have a Writ of Errour of the principal Judgment: That also was agreed by the Court. But then the Question was, The Record being removed, Whether he might have a Writ of Errour, *quod coram vobis residet*: of which the Court would advise. Mich. 19 Jac. in B. R. *Cro.* 1. Part, 404.

4. The Defendant and his Bail in the Common-Pleas brought a Writ of Errour; The Errour assigned was, That no *Capias* was against the Principal, and yet a *Scire facias* issued against the bail, and Judgment was given against them. It was moved, That the Bail ought not to joyn with the principal in the Writ of Errour, for that the bail may not avoid the Judgment against the principal, by any Errour which is in the proceedings: and of that Opinion were all the Justices. And it was agreed in that case, That the principal ought not to joyn in a Writ of Errour, to reverse the Judgment against the Bail. It was adjudged, That the Writ should abate. Trin. 10 Car. in B. R. *Bushell* and *Telles* Case. *Cro.* 1. Part, 295. See Hill. 15 Car. in B. R. *Smith* and *James* Case, *Cro.* 1. Part, 415. acc.

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4. *Where* Bail *in one Action put in, stands against all Actions brought by the same Plaintiff against the Defendant that Term; and when it stands as well for the Judgment, as Execution: And where if no Declaration be in three Terms, the bail shall be discharged.*

1. ERrour brought to reverse a Judgment in Debt; where Bail being entred for the Defendant, Judgment was for the Plaintiff: Errour assigned was, That the Entry of the bail was, *Sub pœna Executionis in adjudicatione Executionis*; so it was entred for the Execution only; whereas it ought to have been *Sub pœna Condemnationis*. The Opinion of the Court was, That the bail being once taken, it stands as well for the Judgment, as the Execution: and therefore it was Ruled to be amended, and made *Sub pœna Executionis Judicii*. Hill. 8 Jac. in B. R. *Hampton* and *Courtney's* Case. *Cro.* 2. Part, 272. See *Bulst.* 1. Part, 107. the same Case.

2. *Tho. Ashfield* the elder, and *Tho. Ashfield* the younger, were both bound in a Bond to J. S. *Tho.* The Elder being arrested in *London*, was removed bo *Habeas Corpus* into the Kings-Bench, and put in bail. J. S. never declared upon that bail, but declared against *Tho. Ashfield* the younger: but no bail being filed, and he recovered; upon Errour brought,

brought, and a *Certiorari*, this was assigned for Errour; It was prayed, that the same bail might be filed for *Thomas* the younger: But it was denyed by the Court; for that it appears upon the *Habeas Corpus*, that it was taken for *Thomas* the Elder, and it cannot be altered. Then it was moved, That the Plaintiff might declare this Term against *Tho.* the Elder. But it was Answered and Resolved, That none shall declare against any by reason of a Bill, but within 3. Terms after the bail filed. And that was also said to be the constant Rule and Course of this Court: And therefore because the Plaintiff had not filed a Bill upon this bail in this Term, which was the 4th Term after the bail taken, It was Ruled, That the bail should be taken off the File, and that the Defendant should not Answer. Mich. 18 Jac. in B. R. *Ashfield* and *Kings* Case. *Cro.* 2. Part, 620. Hill. 17 Car. in C. B. adjudged accordingly. See *March.* 157. See Mich. 1655. B. R. That the bail to one Action of the Plaintiff, is to be bail to all Actions brought by the same party against him that Term.

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5. *Where* Bail *may be discharged; where not, and how. And how far the bail is lyable for the principal.*

1. ERrour of a Judgment in the Kings-Bench; The Record was removed in the Exchequer-Chamber: It was prayed, That the Defendant being in Execution, might be bailed: and because the Record was removed, and so there was not any Record here. It was holden, He could not be bailed here; and he cannot be bailed in the Exchequer-Chamber, for they have not any authority, but to affirm or Reverse the Judgment: Wherefore in this case the Defendant is not bailable. Hill. 3 Jac. in B. R. *Shepherd* and *Allen's* Case. *Cro.* 2. Part, 108.

2. In *Scire facias* against the bail, the Case was; In Debt against J. S. in *Lynne*, a *Capias* issued against him directed to the Serjeant at Mace there; who returned *Cepi Corpus*, and that J. S. according to the Custome of the Town, had found bail one J. D. who was dead, and the Defendant, and if he were condemned, to satisfie the Debt, or to render himself to prison: Judgment there was given for the Defendant; and Errour brought, and the Judgment reversed: and because the bail did not pay the debt, nor render the person, this Action was brought. It was the Opinion of the Court, That the bail being matter of Record, cannot be found before any, but before the Judge of the Court: and that for this cause the bail was not chargeable; but bail for appearance might be taken by the Serjeant. Mich 3 Jac. in B.R. *Loffe* and *Keldridges* Case. *Cro.* 2. Part, 94.

3. The Plaintiff recovered in Debt in the Kings-Bench, and a *Capias ad satisfaciendum* was awarded, and immediately upon the Awarding of the *Capias ad satisfaciendum*, the Defendant dyed: It was said, That in such case, the Executors having nothing, a *Scire facias* doth not lye against the bail. It was a Quære, If Debt lay against them? For it was said, That in the Court of Common-Pleas, the Court was divided in Opinion, 2. Judges being against the other 2. Judges: *Ideo Quære.* I conceive the debt doth not lye against the Bail. See before in the 3d. Section to that purpose. Trin. 21 Jac. in B. R. *Godbolt.* 354.

Bailment *of* Goods.

1. IF a man have Goods delivered to him to deliver over to another, and afterwards a Writ of Detinue is brought against him, by him that hath right to have the Goods: If the Defendant depending the Action, deliver the Goods over to him, unto whom they were given to be delivered, this is a good Bar of that Action. *Fitz. Nat. Br.* 138.

2. Note, It was adjudged to be Law by the whole Court, That if a man bail Goods to another at such a day to re-bail, and before the day, the baylee doth sell the Goods in Market-*Overt*. Yet at the day the baylor may seise the Goods, for that the property of the Goods was alwayes in him, and not altered by the sale in Market-Overt. *Mich.* 7 Jac. in B. R. *Godbolt.* 160.

3. A man bails Goods to J. S. to keep safely, and the Goods are stolen away by the Servant of J. S. or by any other. In Detinue brought, It was adjudged, That the Baylee shall be charged with the Goods, because he took upon him at the delivery of them, safely to keep them; and therefore he ought to keep them at his perill, although he hath nothing for the keeping of them; But if a man accepteth goods to keep as he keeps his own goods, there if the goods be stolen, he shall not answer for them: The same Law, if the goods be delivered to him in pawn for mony, he shall not answer for them if they be stole, for he hath a property in the goods, and shall keep them, as he keeps his own goods. *Pasc.* 43 Eliz. in B. R. *Cook* 4. part 83, 84. *Southcotes* Case.

4. In

4. In an Action of Trover and Converſion: The Caſe was, A. pawned a Hatband ſet with Jewells, to *B.* a Goldſmith for 20 l. no certain day is ſet for redeeming of the ſame by payment of the mony. *B.* on his death-bed in the preſence of C. his Neighbor, commands his Wife to fetch the Hatband, and then delivers the ſame to C. wiſhing him to keep the ſame ſafely till the 20 l. were paid, and then to re-deliver the ſame to the owner, and makes his Wife his Executrix and dyeth; A. tenders the 20 l. to the Executrix, who refuſeth the ſame. Afterwards he comes to C. and demands the Hatband, who refuſeth to deliver it him: A. brings Trover and Converſion againſt C. It was objected, That this being a pawn, cannot be redeemed, but by him that pawned it, and that muſt be during the life time of the parties, and no time being limited for redeeming this pawn, the Law ſhall ſet down the time, and the longeſt time ſhall be during the life of the parties. But it was Reſolved by the whole Court, That the Action was well brought againſt C. the Baylee. For in this Caſe, there was a good Tender made of the mony to a right perſon: For in this caſe, he to whom the goods were pawned, had a property ſpeciall in them, untill the money be paid, but the general property remains in him who pawneth the goods, and he cannot loſe this property by the death of the other, And in this Caſe the mony was to be paid to the Executrix, who was privy to the Contract, and upon a tender and refuſall, an Action will lye; And the poſſeſſion of the Husband in this Caſe, being in a third perſon, will not alter the Caſe, for that he hath neither ſale, bargain, nor gift made to him of the ſame, but he hath onely a bare delivery thereof, and this onely for the ſafe Cuſtody of the ſame, and the delivery here of the Hatband to C. was in *articulo mortis*, and it remained ſtill a pawn in him to whom it was pawned; And then the Tender here being well made; the debt not being transferred over to the Baylee, but the bare poſſeſſion of the pawn in him; he refuſing to deliver it to the Plaintiff, who made the Tender of the 20 l. it is a Converſion; and ſo the Action is well brought. It was adjudged for the Plaintiff. *Trin.* 8. Jac. in B. R. Sir *John Ratcliff* and *Davies*'s Caſe. *Bolſtr.* 1. part 29, 30.

5. Upon Trover and Converſion, the Caſe was: There was A. B. and C: A. was endebted to C. in ſuch a ſum. And B was endebted to A. in ſuch a ſum. It was agreed betwixt them, that B. in diſcharge of his Debt to A. ſhould diſcharge the debt of A. to C. in payihg and delivering him certain commodities which he had in his hands of A. which B. by and with the conſent of A. did promiſe to do, and deliver to C. in diſcharge of the debt of A. but he contrariwiſe did convert them to his own uſe after the death of A. for this C. brought his Action of Trover and Converſion: In this Caſe, It was agreed by the whole Court, That the Action did well lye. For if a man bail goods to one for to bail them over unto another, if he to whom the bailment was made, contrary to the truſt in him repoſed, doth not deliver them over as he was to have done, but doth convert them to his own uſe, he hath by this deceit made himſelf lyable to an Action, both of the firſt Bailor, and alſo of the party to whom they were to be bailed over, and either of them may have his Action againſt him; And in the principal Caſe, notwithſtanding the third perſon here, to whom the Goods ought to have been bailed, never had the poſſeſſion of them: Yet this Converſion and Non-feaſance of that which he ought to have done, is a wrong, and prejudiciall to C. the third perſon; and for this wrong and prejudice, he may have his Action upon the Caſe as well as the firſt bailor; It was adjudged for the Plaintiff. *Mich.* 8 Jac. in B. R. *Llewellin* and *Raves* Caſe. *Bolſtr.* 1. part 68, 69.

6. If a bailee of goods, as of a Horſe &c. kill them, the Bailor ſhall have an Action of Treſpaſs againſt him, for that by the killing, the Property is deſtroyed: And ſo if a man delivereth a Horſe to another to keep ſafe; and the party ſo negligent keeps the horſe, that for want of good keeping, he dyeth: an Action upon the Caſe lyeth for this breach of truſt, *Michaelmas* 43 Eliz. in B. R. *Cook* 5. part the Counteſſe of *Shrewsburyes* Caſe. 13.

7. If a man deliver a Ring to another man to keep, and he breaks it, and Converts it to his own uſe. Quære, If Detinue lyeth for it, or if he ſhall have an Action upon the Caſe for it, It ſeems Detinue will not lye of it, becauſe the thing in demand cannot be delivered as it was. See the old books. 12 Eliz. 4. 8. 18 Eliz. 4. 32. But if a man delivers goods or Chattells to another to keep, and he will not deliver them back again, he may have Detinue of thoſe goods and Chattells. *Fitzh. Nat. Br.* acc.

Bayliff

Bayliff, *or* Baily.

1. IT was Reſolved by the whole Court. That if a diſtreſſe be taken for damage feaſant, the party may tender amends untill the Cattell be impounded: But ſuch Tendor made to the Bayliff of the Lord, or party, is not good, For he cannot deliver the diſtreſſe once taken, no more then he can change the Avowry of his Maſter, or demand a rent upon a condition of Re-entry. *Paſc.* 41 Eliz. in B. R. *Cook* 5. part 76. *Pilkingtons* Caſe.

2. Nott, It was agreed by the whole Court, That payment of a Rent by a Baily, ſhall be a ſufficient ſeiſin of the rent, if it worketh not ſpecial prejudice to the Lord; as if the Lord hath not bin ſeiſed of his rent within 60 years, and the Tenant maketh one his Baily generally of his Manor, he cannot without expreſſe commandment of his Maſter, pay a rent remedileſſe to the Lord, that that ſhall be a ſpecial prejudice to him, which a Baily without Commandment cannot do. *Cook* 6. part 59. in *Bredimons* Caſe.

3. In a Replevin againſt W. he made Conuſans as the Kings Baily, and ſaid that the King was ſeiſed of the Caſtle of L. as parcel of his Dutchy of *Cornwall*, and had a rent of 20 s. iſſuing out of the Town of F. and that all that had bin Dukes there, had bin ſeiſed time out of mind by the hands of thoſe who were demurrant and reſident in the ſame Town of T. and preſcribed to diſtrein for it, *toties Quoties*, &c. In that caſe, It was holden a good ſeiſin, for the rent was iſſuing out of the whole Town, and that all the reſidents and dwellers ought to pay it, in which Caſe he could not alledge ſeiſin by the hands of any perſons certain, for the ſeiſin given by one, bound all, wherefore by the adviſe of the Court, the Conuſans in ſuch Caſe was adjudged good. *Cook.* 6. part. *Ibid.*

4. If one be the Tenants Baily of his Mannor, or of his Lands; If the Baily cuts down Trees, and repairs an Ancient pail, the ſame is good, ſo if he payes Quit-rents it is good. 30 Eliz. in B. R. by *Gawdy* Juſtice. In *Rouſes* Caſe. *Owen.* 28.

5. Bailiffs may receive rents of old Tenants, they cannot accept new upon change of Tenants, nor can they enter for non-payment of rent; by *Hobart* Chief Juſtice, in the Argument of the caſe of *Colt*, and the Biſhop of *Coventry*, and *Litchfields* Caſe. 154. *Heb.*

6. A Writ of Enquiry of damages was directed to the Sheriff of N. thus *Præceptum eſt Vic. quòd per Sacrament.* 12. *proborum et legalium hominum de balliva ſua diligenter inquirat quæ damna*, &c. The Sheriff returned *Quod mandavit J. S. Ballivo Libertatis Hundred de B. cui extent. prædict. brevis totaliter reſtat ſiendi, quod alibi infra com. prædict. per ſe fieri non poteſt. Qui quidem Ballivus, ſic ſibi reſpondet*, and ſet down the Inquiſition before the Bailiff, and 40 l. damages aſſeſſed; and upon this a Writ of Error was brought in the Exchequer-Chamber; And it was agreed by all the Judges That the return was inſufficient, for it was apparantly untrue, and againſt Law, becauſe the Warrant was directed to the Sheriff himſelf to be Executed in any part of his Shire; and no Venue conteined in this Inqueſt of Office, as there is in other Writs, which entitles the Baylies of Liberties; yet although they conceived that the Return was inſufficient, yet they would not reverſe the Judgment, becauſe there were divers of the like, both in the Kings Bench and the Common-Pleas. *Trin.* 12 Jac. rott. 252. in the Exchequer-Chamber. *Virely and Gunſtons* Caſe. *Hob.* 83.

7. If the Lord diſtrein the Cattell of his Tenant, although nothing be behind, the Tenant for the reſpect and duty which he oweth to the Lord, and which belongeth to him, ſhall not have an Action of Treſpaſſe againſt him, *vi et armis*: But if the Lord commandeth his Baily in ſuch Caſe to diſtrein where nothing is behind, The Tenant ſhall have an Action of Treſpaſſe, *vi et armis*, againſt the Bailiff. *Cook* 9. part 76. in *Combes* Caſe.

8. The Caſe was; The Sheriff returns upon an *Elegit*, That the party had not any Lands but within the Liberty of St *Edmonds-Bury*, and that J. S. Bailiff there, hath the Execution of all Writs and return of them; who enquired and returned an extent by Inquiſition, and that the Bailiff delivered the moyety of the lands extended to the party, and that the Plaintiff by vertue of that extent entred; and whether it were a good Title for the Plaintiff, was the Queſtions? 1. Whether the Bayliff of Liberty may make Inquiſition and Extent upon *Elegit* by Warrant of the Sheriff directed unto him? And it was Reſolved, That he might. 2. When the Jury by Inquiſition find the Seiſin, and value of the Land, Whether the Jury ought to ſet out the moyety? Or if the Bayliff may deliver ſuch part of the Land for the moyety? It was Reſolved, That the Jury is to extend all the Lands; and the Bayliff or Sheriff (where there is no Franchiſe) ſhall deliver the Moyeties, and not the Jury. Trin. 9 Car. in B. R. *Sparrow* and *Matterſocks* Caſe. *Cro.* 1. Part, 232.

9. In a Falſe Impriſonment againſt a man for

for an Aſſault, Battery, and Impriſonment 6. dayes; The Defendant to all but the Aſſault, Battery, and Impriſonment for 6. hours, pleads, Not-guilty: And for the Battery & Impriſonment for 6. hours, he Juſtifies by a Warrant from the Sheriff of S. who directed his Warrant to his Baily to execute it; who Arreſted the Plaintiff, and required the Defendant to be ayding to him, which is the ſame Battery, &c. It was demurred upon the plea, becauſe it was not pleadee, That the Writ being executed, was Retorned; for the Writ is conditional, *Ita quod Habeas Corpus in Curia tali die, &c.* and therefore if the Sheriff himſelf will Juſtifie, it is no plea, without ſhewing the Retorn of the Writ; and the Bayliff ſhall not be in better Condition then his Maſter. But the Exception was not allowed by the Court: For the Court ſaid, It is true, the Sheriff ought to Retorn his Writ, otherwiſe his Juſtification is not good; but it is not ſo with his Baily, or Servant, for he hath no means to enforce the Sheriff to make retorn thereof, and that which he did was legally done, and it ſhall not be made illegall by the Sheriffs act, in not retorning the Writ. 2. It was Reſolved in this Caſe, That the Sheriff might by peroly diſcharge the bail, that he keep not his Priſoner longer. *Hill.* 11 Car. in *B. R. Girlings* Caſe. *Cro.* 2. part 322, 323.

10. The Caſe was, The Sheriff of a County made a Warrant *Ballivis ſuis*, to Arreſt the body of ſuch a man, and the Bailiffs of the liberty returned a Reſcous; Exception was taken to it, becauſe the Warrant was *Ballivis ſuis*: and the retorn was made by thoſe who were not his bailiffs: but it was holden by the whole Court to be good, for the Liberty might be within his Bailiwick; and ſo are all the Preſidents. *Paſc.* 13 Car. in B. R. *Winch.* 25.

11. In Treſpaſſe, The Defendant made Conuſans as baily to another, the Plaintiff Replyed, That he took the Cattle of his own wrong, without that, that he was his Baily, *Anderſon* Chief Juſtice; If one hath good cauſe to diſtrein my goods, and a ſtranger of his own wrong, without any Warrant or Authority given him by the other, takes my goods, not as Baily or ſervant to the other, and I bring Treſpaſſe againſt him, may he excuſe himſelf by ſaying that he did it as Baily? he cannot do it, for once he was a Treſpaſſor. But if one diſtrein as Baily, although that in truth he is not Bailiff; If afterwards he in whoſe right he diſtreins agrees to it, it is a good diſtreſſe, and he ſhall not be a Treſpaſſor, for that his aſſent ſhall have relation to the diſtreſſe taken: all which was agreed by the Court: but it was then Objected, What if he diſtrein generally without manifeſting his intent, nor the cauſe for which he diſtreins, &c. *ad quod non fuit reſponſum. Mich.* 28, & 29 Eliz. in *C. B. Goſbolt.*

13. A Juſtice of Peace made a Warrant under his Seal to a Conſtable, to bring the Wife of J. S. before any Juſtice of the ſaid County, to find Sureties for her good behaviour: J. S. and J. D. offer a Recognizance to another Juſtice of the ſame County, who did not make the Warrant to appear at the Seſſions: The Conſtable carries the party before the Juſtice who made the Warrant; who there refuſed to find Sureties; wherefore the Conſtable carries the party to priſon; and a Falſe Impriſonment was brought againſt him: And in this caſe it was Reſolved, That the ſaid Warrant made *Coram aliquo Juſticiariorum*, was an Election in the Conſtable, to carry the party Arreſted to what Juſtice he pleaſed. And, 2. After the Officer in this caſe had brought the party before the Juſtice, and before him the party refuſed to give Sureties; It was Reſolved, That the Officer without any Warrant might carry the party to priſon; for that the words of the Warrant were, *Et ſine recuſaverit*, that then he carry the party to the next Goal. Hill. 32 Eliz. in B.R. *Cook* 5. Part, 59. *Foſters* Caſe.

14. The Biſhop of *York* made a Leaſe for years of divers Lands in *Batterſey*, rendring Rent at *Batterſey*; Proviſo, in the time of Vacation the Rent ſhall be paid to the Chapter *ut iuſure ſuo*; the Rent was behind *ſede vacante*; the Bayliff of the Succeſſour re-entred and diſtreined, and avowed Damage-Feaſant: In this caſe, amongſt other points, it was Reſolved, That the Bayliff might not re-enter for his Maſter without expreſs Commandment. And it was further Reſolved, That though it be not expreſſed who ſhould pay the Rent, yet it ſhall be intended the Tenant: and in this caſe, the Defendant did not ſhew the diſtreſs to be taken, after the Regreſs, and therefore it was not good. Paſch. 5 Eliz. in C. B. *Dyer* 221. the Biſhop of *York*'s Caſe.

15. An Under-Sheriff brought Debt againſt one one of his Bayliffs upon an Obligation with Condition, to ſave the Under-Sheriff harmleſs, in executing of proceſs; and aſſigns the breach, That the Bayliff had not executed ſuch a Warrant ſent unto him upon a proces directed out of the Exchequer, to levy Iſſues upon certain Lands: The Defendant demurred to the Declaration; 1. Becauſe the Warrant made to him by the Under-Sheriff, was made out of the County. 2. It is not alledged, That the Mannor of *A.* where he is by the Warrant to levy the Iſſues, is within the Hundred where the Bayliff hath Juriſdiction. And this by the Opinion of the whole Court, was ſaid to be a good Exception; *viz.* That the breach aſſigned is

is not shewed to be within the Condition of the Obligation, because the Baily cannot execute a precept out of the Hundred where he is Baily. Whereupon it was adjudged, That the Plaintiff take nothing by his Bill. Pasch. 23 Car. B. R. *Styles* 18.

15. Note, by *Rolls*, Chief Justice, A special Baily is bound to shew his Warrant to the party whom he is to arrest; otherwise the party to be arrested is not tyed to obey him; but, he is not bound to shew his Warrant to a stranger: But a known Baily is not bound to shew his Warrant to any. Hill. 1654. in B. R. *Styles* 405.

16. Note: It was Resolved in *Mackalleys* Case, That the Sheriff, Baily, or other Officer, ought to shew to him at whose Suit the Arrest is, and in what Court the process is, that the party arrested, may either pay the money, or take Order for his appearance: but that is to be intended, when the party submits himself to the Arrest of the Officer; and not when the party arrested makes resistance to the Officer in the execution of his Office, and so would escape: and there Resolved, That a known Baily, or a Serjeant at Mace, need not to shew their Warrant or Mace: and a special Baily is not bounden to shew his Warrant, without a demand of it: and if the Officer, Baily, or other, say to the party, *I arrest you in the name of the King*, &c. the same is a sufficient Notice, and the party at his peril ought to obey it. *Cook* 9. Part, 69. in *Mackalleys* Case.

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1. *Where a Bayliff shall be charged in Accompt; where not.*

1. A Bayliff cannot be charged as Receiver; for then he should lose his charges upon his Accompt. And if an Enfant be Bayliff within age, he shall not be charged in Accompt, because by intendment of Law, he cannot have skill to make an Improvement. *Cook* 1. Part. *Institutes*, 171.

2. If one Tenant in Common taketh the profits of the whole Lands, an Accompt doth not lye against him by his Companion: But if one Tenant in Common makes his Companion his Bayliff, there an Accompt lyeth against him as Bayliff, and he ought to be charged as Bayliff; otherwise, Never his Bayliff to Accompt render, is a good plea. *Cook* 1. Part, *Institutes*, 200.

3. If a man be to charge one in an Accompt, That he hath received divers parcels of goods, and that he hath sold them to divers persons unknown; in such case and the like where he cannot charge the Defendant with any certainty of Receits; he must there charge him as Bayliff, and not as Receiver, for there he must shew the certainty of the Receipt, as the book in 46 E. 3. 3. and 9. is. *Fitzh. Na. Br.* 117.

4. If a man during the Nonage of the heir, enters into the Lands of the heir which he hath by discent, and taketh the profits thereof to the use of the heir, the heir at full age may have an Action of Accompt against him for the profits received, untill the heir came to the age of 14 years; and for the profits by him received after his age of 14 years, the heir shall have a Writ of Accompt against him as Bayliff, and not as Guardian; for he cannot be Guardian to the heir for Lands in Socage, but till the 14th year of the age of the heir; but the heir shall not have an Accompt against one as Guardian, untill the heir be of full age. See *Old N. Br.* 95. *Fitzh. Na. Br.* 118, 149. 16 E. 3. Acco. 120. 3 & 4 Ma. *Dyer.* 137. 6 Jac. *Cro.* 2. Part, 219. acc.

5. In Accompt, the Plaintiff charged the Defendant as Bayliff of his Shop, *coram habeas et administrationem bonorum*. The Defendant answered to the goods, and not to the shop. It was holden, That he ought to Answer to all. And it was holden, That if one be charged as Bayliff of his Goods and Merchandize, that he shall answer for the encrease; but if he charge him as Receivor, *ad Computandum*, it is otherwise. Mich. 29 Eliz. in B. R. *Gomersales* Case, *Godbolt*. 56. See *Accompt* before.

See more of *Bayliff*, in the Titles of *Accompt*, and *Arrest*.

Bankrupts.

1. *Who ſhall be ſaid to be a* Bankrupt, *who not, within the Statutes of* 34 H. 8. *Cap.* 4. *and* 13 Eliz. *Cap.* 7. *And what ſhall make a man to be a Bankrupt: And what Acts done by him after he is become a Bankrupt, is good; what not.*

1. BY the Statute of 13 Eliz. Cap. 7. If any Merchant, or other perſon, uſing or exerciſing the Trade of Merchandiſe by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwiſe in groſſe, or by Retail, or ſeeking his or their Trade of Living by buying and ſelling, and being a Subject born of this Realm, or of any of the Queens dominions or Denizen ſince the firſt day of this Parliament, hath, or at any time hereafter ſhall depart the Realm; or begin to keep his or her houſe or houſes, or otherwiſe to abſent him or her ſelf, or take Sanctuary; Or ſuffer him or her ſelf willingly to be arreſted for any debt or other thing not grown or due for money delivered, Wares ſold, or any other juſt or lawfull Cauſe or good Conſideration, or purpoſes; hath, or will ſuffer him or her ſelf to be Outlawed; or yield him or her ſelf to priſon; or depart from his or her dwelling houſe or houſes, to the intent or purpoſe to defraud or hinder any of his or her Creditors, being alſo a Subject born as aforeſaid, of the juſt debt or duty to ſuch Creditor or Creditors: ſhall be reputed, deemed, and taken for a Bankrupt. Stat. 13 Eliz. Cap. 7. *Raſtall* 2. *Bankrupts.*

2. By the Statute of 34 H. 4. where perſons craftily obtaining into their hands great ſubſtance of other mens goods, do ſuddenly fly to parts unknown, or keep their houſes, not minding to pay or reſtore to any of their Creditors their debts and duties; but at their own wills and pleaſures conſume the ſubſtance obtained by Credit of other men, for their own pleaſures and delicate Living againſt Reaſon, Equity, and Conſcience; That the Lord Chancellour, the Lord Treaſurer, Lord Privy-Seal, and other of the Kings Privy-Councel, and Juſtices of either Bench for the time being, or 3. of them, upon Complaint made to them in writing by any parties grieved concerning the premiſſes, have power by their diſcretions to take ſuch Order, as well with the bodies of ſuch Offenders whereſoever they may be had, by Impriſonment of their bodies or otherwiſe; as alſo with their Lands, Tenements, Fees, Annuities and Offices which they have in Fee-ſimple, Fee-tail, for term of life, term of years, or in the right of their wives, as much as the Intereſt, right and title of the ſame Offenders ſhall extend or be, and may be then lawfully departed with by the ſaid Offender; and alſo with their money, goods, Chattels, Wares, Merchandizes, and Debts, whereſoever they may be found, and to cauſe their ſaid Lands, Tenements, Fees, Annuities, Offices, Goods, Chattels, Wares, Merchandizes, to be ſearched, viewed, rated, and apprized, and to make ſale of the ſame Lands, Tenements, Fees, &c. or otherwiſe to order the ſame for true ſatisfaction and payment of the ſaid Creditors, that is to ſay, to each of the ſaid Creditors a proportion, rate and rate like, according to the Quantity of their debts: and every ſuch direction, Order, bargain, ſale, and other things authorized to be done as aforeſaid in writing, ſigned with their hands, by authority of this Act, ſhall be good and effectuall in the Law to all intents, conſtructions, and purpoſes, againſt the ſaid Offenders, their heirs and Executors for ever, as though the ſame direction, order, bargain, and ſale had been made by the Offendor or Offendors, at his or their own free will and Liberty in writing Indented, in any of the Kings Courts of Record. See Statute 34 H. 8. Cap. 4. *Raſtal.* 1. *Bankrupts.*

3. *A.* being a Mercer by his Trade, brought an Action upon the Caſe againſt *B.* for theſe words, *Thou doeſt owe more then thou art worth, and art not able to pay thy debts.* Upon Not-guilty, being found for the Plaintiff, It was moved in Arreſt of Judgment, That the Action would not lye for thoſe words, becauſe they do not imply any ſhifting, fraud, or falſhood, and ſo cannot imply him to be a Bankrupt: For though he doth owe more then he is worth, and is not able to pay his debts, yet he may be an honeſt man, and have Credit and Friends to ſupport him in his Trade. And ſuch was the Opinion of the Court, for here is no fraud or deceit implyed which do make a Bankrupt, within all the Statutes of Bankrupts. Paſch. 1649. Rott. 1724. in B. R. *Viccory* and *Barns* Caſe, *Styles* 213.

4. In a Replevin upon an Avowry, the caſe was; A Tradeſman in Conſideration of marriage made a Conveyance of his Lands to the uſe of himſelf and his Wife, and afterwards becomes a Bankrupt: a Commiſſion is ſued againſt him, and his Lands are ſold by the Commiſſioners to the Avowant; the Queſtion was, Whether this Conveyance was within the Statute of Fraudulent Conveyances, and

and the ſale made by the Commiſſioners, were good? It was Objected, It was not within the Statute; for that a valuable Conſideration is onely expreſſed in the Statute, and not a Conveyance upon Conſideration of Marriage; and the Wife is not compriſed within the Statute of 1 Jac. but onely children and other perſons; and the Wife is but one perſon with her husband. The Court was of Opinion, That the Law intends a Bankrupt which is ſo by fraud, as well as by accident. And here the matter in diſpute is not in a ſpecial Verdict, but comes in point of pleading; which ſhall be taken ſtrongeſt againſt him that pleads it; and he hath not expreſſed any valuable Conſideration, as he might have done by ſaying, In conſideration of a portion, or in recompence of marriage, or in performance of Articles made upon Marriage: But the Court held, That the Wife was within the Statute of 21 Jac. and the providing for wife and children to be a providing for himſelf. Trin. 1651. in B. R. rott. 388. *Tucker* and *Coſhes* Caſe. *Styles* 288, 289.

5. In an *Ejectione Firmæ*, upon the 4. Statutes of 34 H. 8. 13 Eliz. 1. and 21 Jac. of *Bankrupts*, the Caſe was this; *A.* 9 Jac. purchaſed a Copyhold to him and his ſon for their lives, the remainder to his wife in Fee: In 11 Jac. he became an Inholder, and about 12 years after a Commiſſion of Bankrupts was ſued againſt him, and the Copyhold was ſold by the Commiſſioners to the Defendant. *A.* dyed, and his ſon entred, and made a Leaſe to the Plaintiff; the Defendant entred upon him; whereupon the Action was brought: The points in this Caſe were three. The firſt, Whether an Inn-holder may be a Bankrupt within theſe Statutes? It was Reſolved by all the Juſtices, that as to that point, That an Inn-holder, *quatenus* an Inn-holder, is not within theſe Statutes, becauſe an Inn-holder doth not live by buying and ſelling; for he doth not ſell any thing, but utter it: He that ſells any thing, doth it by way of Contract; but an Inn-holder doth not contract with his gueſts, but provides for them, and cannot take unreaſonable Rates, as he who ſells may; and if he doth, he may be endicted of Extortion, which the Seller cannot: And where the Statutes ſay, *Get their Livings by buying and ſelling*, that it ought to be for the greater part, that they gain the greater part of their Living thereby: And if a Gent. buy and ſell Land, he is not within the Statute, for it ought to be taken, thoſe who buy and ſell perſonal things. The ſecond point was, Whether Copyhold were within the Statutes of 13 Eliz. and 1 Jac. It was Reſolved by them all, That it is within the Statute; and the ſaid Statutes ſhall be conſtrued moſt beneficial for the Creditors, becauſe their ground is *ſuum cuiq; tribuere*. The third point was, That *A.* being no Inn-holder at the time of the purchaſe, and afterwards becoming an Inn-holder, Whether he were within the Statute of 13 Eliz. It was Reſolved, He was not. It is not within the words of the Statute, which are, *If the Offender purchaſe*; and here he was not an Offender at the time of the purchaſe: beſides, here the Son ſhould be puniſhed for the Offence of the Father; which the Law of God will not ſuffer: and he ought to be indebted at the time, and he might give away his goods before he was in debt: And in this caſe it was ſaid, That the thing which makes him an Offender, is his Intent to defraud his Creditors, and that doth not appear in this Caſe. It was afterwards adjudged for the Plaintiff againſt the Defendant, That he was not within the Statute; and that the purchaſe was well made, and not to be avoided. Trin. 15 Car. in B. R. *Criſp* and *Pratts* Caſe. *March.* 34, 35, 36, 37. See *Cro.* 1. Part, 395. The ſame Caſe.

6. In an Action upon the Caſe, for calling the Plaintiff (being a Shoo-maker) *Bankrupt-Rogue*, It was moved, That a Shoo-maker is not ſuch a perſon as may have an Action for theſe words, no more than a Labourer or Husband-man. But it was Reſolved, That the Action did lye; for that he is ſuch a perſon as is within the Statute of Bankrupts; for he lives by his Credit, in buying Leather, and ſelling Shoes, and not upon his manual Labour onely, as husband-men do. Paſch. 2 Car. in C. B. *Cramp.* and Barns Caſe, *Cro.* 1. Part, 21.

7. Sir *John Wolſtenhome* was one of the Corporation of the Eaſt-India Company, being a gentleman of 3000 l. *per annum*, and had a Stock in the Company of his own, and ſate in the Committee of the ſaid Company as a Merchant in the management of the Trade, and did receive at ſeveral times the proceed of his ſtock upon Returns of Ships, and became endebted to divers perſons, and obſcured himſelf. It was agreed in that Caſe, That though he did not get the greateſt part of his living by buying and ſelling; yet his imployment in the ſaid Committee and Trade was ſuch a buying and ſelling, as made him capable to be a Bankrupt: and that the Statute ſhould be taken largely againſt Bankrupts, and the moſt beneficiall for the Creditors: and the taking out of his ſtock in goods, and diſpoſing of them; was a ſelling, within the Statute of 21 Jac. And it is not the Quality of the perſon, or the greatneſſe of his eſtate, which keeps him from being within the Law; but it is his buying and ſelling and trading, which makes him within the Law; and the being of the Corporation, and ſitting in the Committee

for the Trade, and ordering the buying of goods, and the diſpoſing of them with the reſt of the Committee in the Trade of the Stock and Merchandize, makes him a Merchant, and a buyer and ſeller within the Law. Paſch. 1653. in the Kings-Bench, Sir *John Wolſtenhomes* Caſe.

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2. *Of the power of the Commiſſioners for the ſale of* Bankrupts *Lands & Goods; where their ſale ſhall be good; where not. How the diſtribution is to be made, and where. And where the Creditors muſt come in to have Diſtribution; and who ſhall be Creditors within the Statutes of* Bankrupts.

1. A Man is endebted to *A.* and *B.* in 100 l. and afterwards becomes Bankrupt; a Commiſſion under the Great Seal, according to the Statute of 13 Eliz. is awarded to *C.* and *D.* to make ſale of the goods of the Bankrupt to the Creditors: Afterwards, the Bankrupt gives all his goods to another Creditor for payment of his debt; and afterwards the Commiſſioners ſell the goods joyntly. It was adjudged, 1. That the ſale by the Commiſſioners was good in this caſe, and according to the Statute; for the intent of the Statute was to Releive the Creditors equally; and that there ſhould be an equal and valuable proportion obſerved in the diſtribution of the goods to the Creditors: and that the Bankrupt himſelf after the Commiſſion, cannot make diſtribution of his goods to any Creditor. 2. It was Reſolved, That the ſale of the goods by the Commiſſioners, was good without a Deed enrolled; and although they do not view the goods. 3. It was Reſolved, That the Commiſſioners ought to make a ſeveral diſtribution to the ſeveral Creditors; and not to make a Joynt-ſale: but that is to be meant, when the debts are ſeveral. 4. It was Reſolved, That if a Creditor refuſe to come in to the Commiſſioners, and they ſell to others, the ſale is good, and the other ſhall not have benefit of it, for *vigilantibus et non dormientibus jure ſubveniunt. Cook.* 2. Part, 23. the Caſe of *Bankrupts.*

2. A Commiſſion was ſued out by ſome of the Creditors of the Bankrupt, and they purſued it, and the Land was ſold; and after, other Creditors who would neither partake nor aid them, prayed to be joyned with them. It was Reſolved in this caſe, 1. That the Commiſſioners may ſell and prepare for diſtribution preſently upon the execution of the Commiſſion; but till the 4 moneths paſt, they may not proceed to diſtribution. 2. That in this caſe, the Offer, of the Creditors to be joyned, was not an effectual offer, without offering to be contributary to the charge; but to offer any particular ſum, is not neceſſary: and theſe words, *viz.* [*For the charge of the Commiſſion*] is to be extended to all charges ariſing in ſuing forth of the Commiſſion, and in execution and defence thereof. 3. Reſolved, That at any time before diſtribution, the Creditors may come and pray to be joyned; but after the 4 moneths paſt, and diſtribution made, they come too late; for ſo the Diſtribution may be made void. Trinit. 17 Jac. in C. B. *Ruggles* Caſe. *Hutton* 37, 38.

3. In Trover and Converſion, it was found by Verdict, That *A.* being a Merchant, had made a Fraudulent Deed to the Defendant of the goods contained in the Declaration; but afterwards he went abroad to Church, to the Exchange, and did Trade and Commerce; and yet it was contained in the Indenture of ſale by the Commiſſioners to the Plaintiff, that he had made this fraudulent Deed; and that afterwards he had traded, untill a day after, at which day he wholly abſented himſelf: and upon this Verdict, the Defendant had Judgment. For every Deed to defraud other Creditors, (but thoſe to whom ſuch Deed is made) is not ſufficient to make one a Bankrupt: But if he make any Deed after he begins to become a Bankrupt, it ſhall not bind. But upon the Statute of 1 Jac. which makes him a Bankrupt which makes fraudulent Deeds, it ought not to be as this caſe was, *viz.* ſo long before he became a Bankrupt. Paſch. 15 Jac. in C. B. *Cartwright* and *Underhills* Caſe. *Hutton* 42, 43.

4. Upon the Statute of Bankrupts, this Caſe was moved, If a Bankrupt be indebted to one 20 l. and to another in 10 l. and hath a debt due to him by Bond of 20 l; Whether the Commiſſioners may aſſign this bond to the two Creditors joyntly? The Court was of Opinion, That it was to be aſſigned and divided as the words of the Statute are, *viz.* To every Creditor a portion, part and part like. Then it was moved, Whether they might joyn in the Suit or not? It was ſaid by ſome of the Juſtices, When part of the Bond is aſſigned to one, and part to another, the Act of Parliament doth operate upon it, and they may ſue ſeverally. And it was ſaid, That by Cuſtome of *L.* part of a debt might be attached. Trin. 10 Jac. in C. B. *Godbolt.* 195.

3. *Whether*

3. *Whether the Bankrupt have ſuch an Intereſt in his Goods; after they are extended; and before a* Liberate *ſued; That the Commiſſioners may ſell ſuch Goods to Creditors of the Bankrupt within the Statutes of Bankrupts.*

1. IN Trover, the Caſe was, A. and B. were poſſeſſed of goods, and uſed the Trade of Merchandiſe, and were bound to the Defendant in a Statute for a true debt, which being forfeited, the Defendant ſued forth an Extent to the Sheriffs of *L.* who 21. *Novemb.* 3 Car. extended thoſe goods, and retorned the Writ and Inquiſition into the Chancery: 3. *Novemb.* 3 Car. *A.* and *B.* became Bankrupts, being endebted to the Plaintiff and others for juſt debts. 6. *Novemb.* 3. Car. the Defendant ſued a *Liberate* upon the Extent, and the ſame day the goods were delivered by the Sheriff according to the apprizement in the Extent: 8. *Novemb.* 3 Car. the Plaintiff and others ſued out a Commiſſion of Bankrupts againſt *A.* and *B.* And 23. *Novemb.* the Commiſſioners ſold the goods; the Defendant 25. *Novemb.* the ſame year, converted them; upon which, Trover was brought. The queſtion was, Whether the ſale by the Commiſſioners after the goods delivered upon the *Liberate*, was good. It was objected that the Intereſt of the goods remained in the Conuſors, and then when they became Bankrupts before the *Liberate*, the Commiſſioners might ſell and diſtribute them amongſt the Creditors; But it was Reſolved by the whole Court, That thoſe goods, extended before they became Bankrupts and delivered by the *Liberate* after they became Bankrupts, could not be ſold by the Commiſſioners; becauſe, being extended, they were in *Cuſtodia legis*; and the Conuſors had not power to give or ſell them; and eſpecially in this Caſe, becauſe the Extent is retorned before they became Bankrupts, and the *Liberate* was before the Commiſſion was ſued out; and when the *Liberate* is ſued out, it hath relation to the Extent; and the Statute being with an Exception. Where Execution is ſerved or Executed; this is to be accounted the Executing of one Extent where the goods be appriſed, and the Writ retorned: Wherefore in the principal Caſe, It was Reſolved, That the Extent being retorned ſerved, the goods be not ſubject to the other Execution, nor to the power of the Commiſſioners. It was adjudged for the Defendant. *Hill.* 3 Car. in B. R. rott. 943. *Audly's* and *Halſey's* Caſe. *Cro.* 1. part 107, 108.

2. The Caſe was; Mony was levied by the Sheriff upon an Execution for coſts and damages recovered, and before the retorn of the Writ, the Plaintiff became a Bankrupt, and by the Commiſſioners of Bankrupt, the mony recovered, was aſſigned to Creditors. It was the Opinion of the whole Court in this Caſe; That foraſmuch as the becoming Bankrupt, and the Aſſignment of the Commiſſioners were after the Writ of Execution ſued; That the monie remaining in the Sheriffs hands, was not Aſſignable, and being upon a *Capias ad ſatisfaciendum*, it was in the Sheriffs hands as in *Cuſtodia Legis*; and eſpecially it being upon a *Capias ad ſatisfaciendum* (as it was in this Caſe) and none can give a diſcharge thereof but the Plaintiff who is party to the Record: Wherefore it was Reſolved in this Caſe, That this mony ſhould be delivered to the party who recovered, and he to acknowledge ſatisfaction. *Mich.* 4 Car. in *B.R. Benſon* and *Flowers* Caſe, *Cro.* 1. part. 119, and 126.

3. Divers debts were aſſigned to Creditors by the Commiſſioners upon the Statutes of Bankrupts, and they brought Actions in their own names for theſe Debts, and it was ruled that the Actions did well lye, becauſe it is a debt transferred by Parliament; and it was holden, If the debts were upon contract, the Defendant might wage his Law; For although the Parliament transfer the debt, yet it is not a debt upon Record. *Mich.* 3 Jac. in C. B. *Cro.* 2. part 105. *Bradſhawes* Caſe.

4. *A.* and *B.* were ſureties for J. S. for the payment of mony, and had Counterbonds to ſave them harmleſſe, the mony was not paid at the day; the Sureties paid it; afterwards J. S. became Bankrukt; It was Reſolved in this Caſe, that *A.* and *B.* were Creditors within the Statutes of Bankrupts, *Trin.* 4 Jac. in *C. B. Osborn* and *Churchmans* Caſe. *Cro.* 2. part 127.

Bargain *and* Sale.

1. *What ſhall be a good conſideration to raiſe a Uſe upon a Bargain and Sale; And where an Averment ſhall be to enforce the Conſideration; Where not.*

1. A Man having Iſſue three daughters, ſeiſed of Lands in Fee-ſimple, married to three ſeverall perſons, in conſideration of a Joynture for his Wife, and for the advancement of the Iſſue Male of his body, if he ſhall have any; and for the advancement of his ſaid daughters, Covenants to ſtand ſeiſed to the uſe of himſelf for life; and after his deceaſe, of part of the Land to the uſe of his Wife for life, for her Joynture, and after their deceaſe, to the uſe of the Heirs Males of his body begotten; and of the other part, to the uſe of himſelf, and after to the uſe of his three daughters, and to the heirs of their ſeveral bodies: and if any of his ſaid three daughters dye without Iſſue male, that then her part ſhall ſurvive, *Proviſo* for their ſeverall Husbands, that if they ſurvive their Wives, and be not entituled to be Tenants by the Curteſie, that then he might limit any of the ſaid Land by his Will, for the payment of his debts, or for advancement to any perſon or perſons for life, lives, or years. One of the daughters dyeth without Iſſue Male, The Father Aſſigns a great part of the Land to the youngeſt daughter for her Advancement for 1000 years, without Reſervation of any Rent; And whether this was a good limitation was the queſtion: And in this Caſe, amongſt other points, it was Reſolved; 1. That a Uſe cannot be raiſed by any Covenant, Proviſo, or Bargain and ſale, upon a generall conſideration, without a ſpeciall Averment. But in ſuch Caſe, ſuch a Bargaynee, or he who ſhall take the uſe, may Aver that it was for a valuable conſideration of mony, or for the advancement of his bloud, if the perſon who ſhould take the uſe be certain. For an Averment may be taken which ſtands with the Deed, although it be not expreſly compriſed within the Deed. 2. When uſes are raiſed by Covenant, in conſideration of Fatherly affection to his ſon or daughters, and by the ſame Indenture there is a Proviſo added. That the Covenantor for good conſiderations may make Leaſes for years, the Covenantor cannot make any Leaſe; for ſuch a Covenant, upon ſuch a generall conſideration, cannot raiſe a uſe, and no particular Averment can be taken, that his intent at the time of the delivery of the Deed, was to deviſe the ſame to any perſon certain, and therefore his power to make Leaſes was void *ab initio*. But if the uſes had bin limited upon a Recovery, Fine, or Feoffment, that there needs not any conſideration to raiſe any of the uſes. And therefore in the principal caſe, It was taken for a rule, when the conſideration is generall, or the Covenant or bargain made with a perſon certain, there an Averment may be taken; but when the conſideration is generall, and the perſon incertain, there no Averment will be available. *Hil.* 26 Eliz. *Cook* 1. part 176. *Mildmayes* Caſe.

2. A. ſeiſeſed of Lands in Fee, demiſed the ſame to Husband and Wife, *Habendum* to the Husband and Wife for their lives, the Remainder to a ſtranger for life, rendring during their lives yearly 40 l. rent at *Mich.* and the *Annunciation*. The Husband dyed. Afterwards A. in conſideration of 10 l. to him paid, Demiſed, Granted, and in Forme, let the ſaid Lands to J. S. to have unto him from the date of the Indenture for 99. years, rendring yearly during the ſaid Term to J. S. &c. the yearly rent of 40 s. at the *Annunciation* and *Michaelmas*: The Wife did not Attorn; In this Caſe, theſe points were adjudged. 1. That the words (Demiſe and Grant) for conſideration of mony did amount to a bargain and ſale for the ſaid years, and ſhould be preſently executed by the Statute of 27 H. 8. of Uſes, and that there needed not any enrollment of the Deed, becauſe but a Term for years paſſed, and no eſtate of Freehold. 2. That if a man Covenant in conſideration of mony, to ſtand ſeiſed to the uſe of his ſon in Fee, if the Deed be enrolled, the ſame is a good bargain and ſale without words of bargain and ſale, becauſe they amount to as much, So if a man for mony alliен, and grant Lands to one and his heirs by deed, Indented and enrolled, the ſame amounts to a bargain and ſale, and the Land ſhall paſſe without any Livery and Seiſin. 7. Jac. *Cook* 8. part 93. *Edward Foxes* Caſe.

3. Tenant in Tail, the remainder in Fee, he in the remainder, by Deed Indented, and Enrolled, covenanted for conſideration of Deed, and other good conſiderations, to ſtand ſeiſed to the uſe of himſelf in tail, the Remainder to the Queen, her heirs and ſucceſſors, Kings and Queens of *England*, &c. It was Reſolved in this Caſe, amongſt other points. 1. That no uſe could be raiſed to the Queen upon ſuch a general conſideration, without a ſpeciall Averment, that Valuable, or other good conſideration was given. 2. That the conſideration that the Land ſhould remain in his bloud, was no conſideration to raiſe an uſe to the Queen, becauſe there wanted *Quid pro quo*. 3. That the Conſi-

Conſideration that the King is the head of the Commonwealth, and ſhall preſerve the peace of the Realm, is no good conſideration to raiſe an Uſe; becauſe Kings *ex officio*, ought to Govern and preſerve their Subjects in peace and tranquillity. 27 Eliz. in C. B. *Cook* 2. part 15. *Wiſeman's* Caſe.

4. A man made a Leaſe for years, and afterwards bargained, and ſold the Reverſion to one and his Heirs, and before the enrollment of the Deed, he levyed a Fine of the ſaid Lands to him and his heirs, and afterwards the Deed was enrolled within the 6 Months: In this Caſe it was Reſolved. 1. That the Conuſee ſhould be in by the Fine, and not by the Indenture enrolled: for when a Fee-ſimple paſſeth by the Fine to the Conuſee, and his heirs, the Inrolment of the Indenture of bargain and ſale cannot deveſt the eſtate which was given in him by the Fine; and an Inrollment ſhall have relation to avoid mean charges of the bargainor, but not to deveſt any lawfull eſtate ſetled in the interim in the bargainee himſelf. 2. Reſolved, That in ſuch Caſe Averment might be, that the deed was enrolled ſuch a day, the day after the Fine levyed; and the Law doth allow of Averments which ſtand with the Record. 3. It was ſaid by ſome of the Juſtices in this Caſe, but not Reſolved. That admit, That the Inrollment ſhall be preſumed to be made the ſame day, that the Fine was levied, That the bargainee ſhould have his Election, to have the Reverſion, either by the bargain and ſale, or by the Inrollment by the Fine. *Mich.* 34 Eliz. in C. B. rott. 2380. *Cook* 4. part *Hindes* Caſe.

5. The Husband ſeiſed of Lands in Fee, made a Feoffment to the uſe of himſelf for life, and afterwards to the uſe of his Wife for her Joynter, upon Condition that ſhe ſhould perform his will: the Husband dyed: the Wife entred and agreed to the eſtate, and afterwards brought Dower. It was Reſolved in this Caſe, amongſt other poynts, That the eſtate made to the Wife upon condition to perform his Will, might be Averred to be for the Joynture of his Wife; and ſuch Averment is given by the expreſſe words of the Statute of 27 H. 8. 15 Eliz. in C. B. *Cook* 4. part 4. *Vernons* Caſe.

6. If a man Covenant to ſtand ſeiſed to the uſe of his Wife, Son, or Cozen, the ſame ſhall raiſe a uſe without any expreſſe Conſideration; But if the Father by Deed Indented in Conſideration paid by his ſons, Covenanteth to ſtand ſeiſed to the uſe of his ſon, there no uſe ſhall be raiſed, unleſſe the Deed be enrolled, becauſe the ſame is in the nature of a bargain and Sale. *Cook* 7. part 40. *Bellels* Caſe. See *Cook* 11. part 25. *Harper's* Caſe.

7. A man ſeiſed of the Mannors of D. and S. both holden by Knight-ſervices, as in *Capite* by deed Indented in conſideration of a marriage to be had betwixt him and B. and for the advancement of the Iſſues, which he ſhould have Covenanted to ſtand ſeiſed of the Mannor of D. being of the yearly value of 30 l. to the uſe of himſelf, and the heirs Males of his body, upon the body of the ſaid B. to be begotten, and afterwards to the uſe of C. in tail, and afterwards to the uſe of his right heirs: And of the Mannor of S. to the uſe of him and B. for her Joynture, and to the heirs of her body begotten, and after to the uſe of C. in tail, and after to the uſe of himſelf in Fee. Afterwards they Intermarry; And afterwards A. purchaſed Lands to him and his heirs, holden in ſocage, and afterwards deviſed that his Executors ſhould ſell his ſocage Land, and dyed, having Iſſue a daughter on the body of B. It was Objected in that Caſe, That nothing paſſed to them in Remainder, becauſe they were not within the conſiderations expreſſed: But it was Reſolved, That the uſes were well raiſed to them in the Remainders for the reaſons, which are put in *Cook* 7. part. 46. in *Bedells* Caſe. where the Caſe upon the Record appeared to be this. A. ſeiſed of a houſe in *Langley* and *Iver* in Converſion. B. had Iſſue by his Wife, three ſons; and, by Indenture, in conſideration of the natural affection and love which he had to his Sons, and for their preferment and advancement, did Covenant that he and his heirs would ſtand ſeized to the uſe of himſelf for life, and after to the uſe of his Wife for life, and afterwards of one moyety to the uſe of one of his ſons in tail, and of the other moyety to the uſe of his other ſon in tail, and dyed; and, If any uſe ſhould be raiſed to the Wife, and the two brethren, was the Queſtion: In that Caſe it was Reſolved, That the Conſideration that ſhee was his Wife was apparent, in the Deed; and then a Conſideration which ſtandeth with the Deed, may be Averred, notwithſtanding that it be not conteined in the Deed; but if the conſideration to the Son had bin for mony, then the Deed ought to be inrolled. But things apparent need not be averred. *Trin.* 12 Jac. *Cook* 11. part 23, and 24. *Henry Harpars* Caſe.

8. In an *Ejectione firme*, the Caſe was, J. S. being ſeiſed of the Lands in Queſtion in Fee, made a Feoffment thereof to A. and B. and to their heirs untill they ſhould make a Leaſe of the ſaid Lands for divers years to certain uſes, to begin at the Feaſt of *Philip* and *Jacob* next comming. The Feoffees entred and made a Leaſe for years of the Lands to begin from the Feaſt of *Philip* and *Jacob*, next; the Queſtion was, whether the Feoffees had made ſuch a Leaſe as the Deed of Feoffment directed, and ſo the uſes are raiſed thereupon, and whether it ſhall be intended another Leaſe, not warrant-d.

ranted by the Feoffment, and ſo no uſes raiſed; It was holden, That here was a good conſideration to raiſe a uſe; For it was ſaid, That if Lands be paſſed for mony onely, the Deed ought to be enrolled; but if it be for mony and naturall affection, it is not needful to enroll it, but the Lands will paſſe without enrollment: And it was holden in this Caſe, That here was onely a matter of Truſt in the Feoffees, and the intent was not that the Feoffees ſhould have any thing by the not performing of the Truſt, but that the uſe ſhould be to the Feoffer. It was further holden in this Caſe, That this Leaſe was made to begin from the Feaſt of *Philip* and *Jacob*, and here it is made for a day longer then was agreed upon by the Deed; yet becauſe the intent of the parties is performed, it ſhall be conceived a good Leaſe, according to the agreement: And the Intent in this Caſe was not meant, That the Feoffees ſhould have any thing. But then it was ſaid, that the Intent of the parties ſhall not be implyed againſt the direct Rules of Law. It was adjudged againſt the Plaintiff. *Trin.* 24 Car. rott. 1529. in B. R. *Watts* and *Dixes* Caſe. *Styles* 188. 205.

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2. *Of Inrollments of Deeds of Bargain and Sale; Where Inrollment after the Death of the Bargaince is good; Where not: And where a uſe ſhall riſe by the Statute of uſes, and not of Inrollments: and when the Deed may be Inrolled.*

1. THe Caſe was: *A.* and *B.* by Indenture dated 3. *July*, 13 Jac. did bargain and ſell the Mannor of D. to J. S. and his heirs for valuable Conſideration of mony paid. And 4 *October* 13 Jac. the Bargaynee dyed, his Heir of full age; It was Reſolved in this Caſe, the Land being holden in *Capite*, that his heir ſhould ſue his Livery; for it was ſaid that that differenced from all the Caſes, that are put of Recovery, for Fine Executory, and Covenants to raiſe uſes, where the eſtate veſts in the heir, *quaſi* Heir, and never veſted in the Anceſtor, for this upon Inrollment ſettles as between the Bargaynor and Bargaynee *ab initio*, upon the Statute of 27 H. 8. of Uſes, which doth joyn all the eſtates to the uſes *ipſo facto*; onely the Statute of Inrollment ſayes, that in that Caſe it ſhall not veſt, except the Deed be Enrolled, ſo if it be enrolled, it doth veſt, not by the Statute of Inrollments but by the Statute of uſes preſently; Yet it was agreed in this Caſe, That the Bargainee cannot ſell unto another, untill his own Deed be enrolled; and ſo it was adjudged in *Bellinghams* Caſe. *Paſc.* 15 Jac. in *Curia Ward. Dimmocks* Caſe. *Hob.* 136.

2. It was, amongſt other things, Reſolved by the whole Court, That if a Deed of Bargain and Sale be enrolled, it is ſufficient without any other acknowledgment before a Maſter of the Chancery: becauſe in ſuch caſe the Bargainee is in, by the Statute of 27 H. 8. of Uſes, and not by the Statute of Inrollments. 8 Jac. in C. B. the Earl of *Lincolns* Caſe adjudged.

3. In a *Quare Impedit*, the Plaintiff declared, That one R. B. was ſeiſed of the Parſonage of *Horley*, whereunto the Advowſon of the Vicaridge belonged, and that the Vicaridge became void by the death of A. and that it was in the Kings hands, by reaſon of the Wardſhip of the Son of R. B. who preſented J. S. and then conveyes the Parſonage to J. D. in Fee, who 1. *Jan.* 1601. granted to P. the next avoydance of the Vicaridge, who granted it to the Plaintiff; and that J. S. dyed, and ſo the Plaintiff ought to preſent; The Defendant as Parſon Imparſonee of the Vicaridge, ſaid, that King *Henry* the 8th was ſeiſed of the ſaid Parſonage of *Horley*, to which the Advowſon of the Vicaridge, &c. and ſo makes a diſcent of it from *Henry* the 8th, to Queen *Elizabeth*, who preſented J. S. and that, by his death, King *James* preſented him who was Inſtituted and Inducted; and traverſed, that R. B. was ſeiſed of the Rectory *ad quam*, &c. It was found by ſpeciall Verdict, That J. D. and his Wife were ſeiſed to them and the heirs of the Husband, of the Rectory of *Horſham*, and 10. *May* 31 H. 8. did give the ſame Rectory to *Henry* the 8th, and his Succeſſors, and that the ſaid King being ſeiſed of the Rectory of *Horley*, to which, &c. by Letters Pattents: 21. *July* 31 H. 8. in conſideration *prædict. Rectoria de Horſham*, &c. by the ſaid J. D. and his Wife granted to the ſaid King and his Succeſſors, gave to the ſaid J. D. and his Wife, the ſaid Rectory of *Horley*, and that 26 *July* 31 H. 8. and not before J. D. and his Wife, came into the Chancery, acknowledged the ſaid Deed, which was afterwards duly Inrolled; The queſtion amongſt other poynts was; That though the Deed to the King was not acknowledged, nor enrolled at the time of the Grant made by the King, yet the Inrollment afterwards of it, when the ſame comes, it ſhall make the Kings Grant good *ab initio*; And it was the better Opinion, That though the Grant to the King was not compleat, nor perfected for want of Inrollment at the time of the Kings Grant, yet when the Inrollment comes upon it, it takes effect, neither from the Inrollment, nor by it, but by the firſt Act, and therefore between the parties, it ſhall bind

bind to all purpoſes *ab initio*; and it was holden, That if a man giveth Lands to the King by Deed, and afterwards chargeth the Land, and then a Fine is levyed to the King of the ſame Land, the King ſhall hold the ſame diſcharged. See before, *Dymocks* Caſe. *Hill.* 12 Jac. in C. B. *Needler* and the Biſhop of *Wincheſters* Caſe. *Hob.* 222. acc.

4. Note, It was ſaid by the Court, That if a Leaſe be made from the making of the Leaſe, it takes effect preſently the ſame day, whether it be dated or not; ſo if a Bargain and Sale be not dated, the ſix Moneths muſt be accounted from the delivery: But in this Caſe; where a Writ was brought againſt the Hundred of G. upon the Statute of *Hue-and-Cry*, and the Robbery was layed to be 9. *October* 13 Jac. and the *Teſte* of the Writ was 9. *October* 13. Jac. In that Caſe it was holden, That in Caſes that depended, not upon Writings dated, but upon time to be reckoned from Acts done, as in this Caſe, from the Robbery committed, which muſt be confeſſed was done upon the 9th of *October* 13 Jac. and there cannot be two ninth dayes of *October* in one year, and he might have brought his Action at the firſt day that although the party robbed deſerveth favour, yet it being a penall Law againſt the Hundreds, upon the Statute, the Action brought would not lye. *Hill.* 14 Jac. in B. R. *Norris* and the Hundred of *Gawtryes* Caſe. *Hob.* 139, 140.

5. A. the 7th. of *November* 41 Eliz. Bargained and Sold Land by Deed Indented to J. S. and afterwards the 9th. *November* 41 Eliz. acknowledged a Recognizance to J. D. The Deed Indented, is Inrolled the 20th of *November* 41 Eliz. It was adjudged that A. was not ſeiſed of ſuch an Eſtate in the Land, 9th *November* 41 Eliz. becauſe the Bargain and Sale by Judgment of Law took effect from the delivery of the Deed when the enrollment came; And alſo in that Caſe it was adjudged, That neither the death of the Bargainor, nor of the Bargainee before the Inrollment did hinder the paſſing of the Eſtate; For a Releaſe by a Stranger to the Bargaynee before the Inrollment, is good; and ſo is a Recovery ſuffered by him before Inrollment, becauſe that in Judgment of Law, he was Tenant of the Land at the time of the Recovery, and if before the Inrollment he bargains and ſells the Land to another, and after the firſt Deed is Inrolled, the Bargain and Sale is good. *Trin.* 42 Eliz. rot. 1031. in C. B. *Mallory* and *Jennings*'s Caſe. See 3 Jac. in C. B. *Alſops* Caſe. acc.

6. If an Enfant acknowledge a Recognizance, Statute, or Enrole an Obligation; in all theſe Caſes, he ought to avoid it in an *Audita Querela* during his Nonage, becauſe it ought to be tryed by Inſpection: But if an Enfant bargains and ſells Land by deed, indented and Inrolled, he may avoid it when he pleaſeth, becauſe the Deed was of no effect to raiſe a uſe; and the Statute of 27 H. 8. of Inrollments, is to be intended of Lawfull and effectuall bargains and Sales which might raiſe uſes at the Common-Law. *Cook* 2. part *Inſtitutes*, 673.

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3. *Where a Bargain and Sale ſhall be good to paſſe an Eſtate; where not: and where a man ſhall be ſaid to be in by the Bargain and Sale; where not.*

1. J. S. by Indenture made between the Queen of the one part, and himſelf on the other part, reciting, That whereas he was endebted to the Queen in 800 l. to be paid 20 l. at every Feaſt of St. *Mich.* untill the ſaid whole ſum of 800 l. be paid, Covenanted with the Queen to convey to the Lord Treaſurer and Barons of the Exchequer, and their heirs certain Lands, to the uſe of the ſaid J. S. and his heirs, untill ſuch time as the ſaid J. S. and his heirs ſhall make default of payment of any of the ſaid ſums; and after ſuch default, to the uſe of the Queen, her heirs and Succeſſours, untill they ſhall have received of the profits thereof ſuch ſums of money of the ſaid debt as ſhould be behind; and after the ſaid debt paid, and ſo received, then to the uſe of the ſaid J. S. and his heirs for ever: and he levied a Fine to the Lord Treaſurer and Barons to the uſes aforeſaid: Afterwards being ſo ſeiſed, he bargained and ſold the Lands to a ſtranger; default of payment was made, The Queen ſeiſed the Lands, and granted them over to one and his heirs *quouſq;* the money was paid: and after, the money was paid. This Caſe being referred to the Juſtices for their Opinions; They were of Opinion, That J. S. ſhould have his Lands again; for at the time of the bargain and ſale, he had an Eſtate in Fee determinable upon default of payment, which accrued to him by the firſt Indenture and Fine; which Eſtate paſſed onely by the ſaid Indenture of bargain and ſale, and not the new Eſtate which paſſed to him by the latter limitation after that debt paid, for that was not in *eſſe* at the time of the bargain and ſale: But if the Conveyance had been by Feoffment, or Fine, all uſes and poſſibilities had been carried away by the operation of it. Mich. 28 Eliz. at Serjeants-Inne, a Caſe referred to the Judges. *Leon.* 33.

2. Note: It was agreed by the Court, That

if a man bargains and sells his Lands by Deed Indented to be inrolled, and before the Deed Inrolled, he makes Livery to the bargainee, and after the Indenture is enrolled, that in that case the Livery doth prevent the operation of the Inrollment, and the party shall be accounted in by the Livery, and not by the bargain and sale; for Livery is the more worthy, and the more worthy ceremony to pass Estates, and therefore it shall be preferred. Mich. 26 Eliz. in B. R. in *Stonely* and *Brasebridges* Case. *Leon.* 5.

Baron *and* Feme.

1. *Where they are one person in Law, and to what intents; and where they shall take and hold by moyeties: where by Entierties.*

1. SIr *Robert Catlyne* purchased Lands which were holden *in Capite* to him and his wife, and to the heirs of the husband; and the purchase was made without Licence; The Queen afterwards pardoned him all offences *pro quacunq; alienatione sibi facta*; in which Pardon, there was no mention made of the wife; and yet the Pardon was allowed, and he discharged in the Exchequer: and the reason was, because the husband and wife were one person in Law; and then the Release to one of them was good. 3 Eliz. *Dyer.* 196.

2. If a Joynt-Estate be made of Land to the husband and wife, and to a third person, there in right the husband and wife shall take but one moyety, and the third person shall have the other moyety; and the reason by *Littleton* is, Because that in Law the husband and wife are but one person. And see, 21 E. 3. 9. 39 H. 6. 28. 11 R. 2. *Fitzh.* Tit. *Remitter.* And all our Old Books are, That if husband and wife purchase Land joyntly in Fee; and the husband alieneth the whole, that the Wife shall have a *Cui in vita* for the whole; because they were but one person at the time of the purchase. *Litt.* 65.

3. If a Feoffment with Warranty be made to a man, and to a Feme sole, who afterwards do marry, and they do vouch, and recover in value, there shall not be moyeties betwixt them; for although they were sole when the Warranty was made; yet when they recovered in value, they were husband and wife, and one person in Law, and then shall not take by moyeties. And so if a Reversion be granted to a man and a single woman, and afterwards they entermarry, and then the Tenant attorneth; they shall not take by moyeties, but by entierties. *Plo. Com.* 483. in *Nicholls* Case.

4. If Land be given to husband and wife, and to a third person, and to the heirs of the husband and the third person; and the third person afterwards releaseth unto the husband and wife, and to the heirs of the wife; It was holden, by the Lord *Dyer* in his Reading, That in such case the Release should not entitle the wife: but Quære in that case, If the wife shall not have a moyety of the other part of him who releaseth. See 10 H. 6. 17. But if husband and wife, and a third person, purchase Land joyntly in Fee, and afterwards they are disseised, and the husband and wife are divorced, and afterwards the husband doth release to the Disseisor, and the third person dyeth; In that case it was holden, That the wife might enter, and hold a third part of the Land. *Dyer.* in his Reading. acc.

5. If Tenant in tail enfeoffeth a woman and dyeth, and his issue within age, entermarrieth with the said woman, It is a *Remitter* to the Enfant within age; and in that case the woman taketh nothing, because that the husband and wife are as one person in Law. *Litt.* 148. b. But if Tenant in tail enfeoffeth a man, having issue a daughter who entermarrieth with the Discontinuee, Quære in that case, If she shall be remitted. I conceive, she shall not.

6. If a woman who is disseised, entermarrieth with the disseisor, and then they are disseised, and the disseisor levieth a Fine, the husband having issue before the last disseisin; and the husband dyeth before the 4. Proclamations passed, and before the 5. years passed, the issue being of full age; and afterwards the mother dyeth, the 5. years passe, the Issue is bound as heir to his Father; but as heir to his Mother he shall have other 5. years; and that proves it is no *Remitter* to the wife. *Plo. Com.* 367. by *Walsh.*

7. The husband and wife, and *A.* purchased to them, and to the heirs of the husband, and *A*; *A.* released to the husband, without saying, To him and his heirs; The husband and wife made a Lease of the whole, rendring Rent to them and the heirs of the husband, and afterwards the husband dyed; and for the moyety of the Rent being behind after the death of the husband, the heir distreined the Lessee. It was Resolved in that Case, That the Release made in that case to the husband alone, did enure to him alone, and not to his wife; and that in that case there needed not the words To him and his heirs, in the Release, but that the

the moyety, ſtate and Intereſt which the Releſſor had veſted and was put in the Husband in Feeſimple alone, and nothing in the wife; and the husband and wife were but as one perſon in Law. Trin. 9 Eliz. *Dyer* 263.

8. Sir *Thomas Wiat* in Conſideration of a Marriage of his Son, made a Feoffment and, re-took an Eſtate to himſelf for life, the remainder to Sir *Tho.* his ſon, and his wife that ſhould be: Afterwards, the marriage between the ſon and the woman was accompliſhed; The Father levied a Fine to the King of the ſaid Land, and bound him and his heirs to Warranty, and dyed; the Son was attainted of Treaſon, and executed, having iſſue living: Afterwards the Queen granted the Land to a ſtranger in tail; and afterwards the wife of the Son, and her iſſues were reſtored. It was a Queſtion in this caſe, amongſt other, between the Patentee and the Wife who was reſtored, If the wife had right to the intire Remainder, or but to a moyety? the Caſe is not there Reſolved: but it ſeems in ſuch caſe, that it being before marriage ſo ſettled, that the wife had but right to a moyety; for in that caſe the husband and wife took by moyeties, and not by entierty. 2 & 3 Ma. *Dyer* 122. Sir *Thomas Wiat's* Caſe.

9. An Action of Debt was brought againſt husband and wife, for the Recuſaney of the Wife; and the husband would have appeared by *Superſedeas* alone, without his wife: But it was Reſolved by the whole Court, That they muſt either both appear, or be both Outlawed, for that they are one perſon in Law. Hill. 14 Jac. in C. B. *Lovelas* Caſe. *Hob.* 179.

10. If a man marrieth a Wife who is indebted to divers perſons; living the wife, the husband and wife ſhall both be ſued for theſe debts; but if the wife dyeth, the husband ſhall not be charged with the debts after the death of the wife: but if the Creditor of the husband and wife do recover the debt during the Coverture which was done by the wife before his entermarriage with her; in that caſe, although the wife dyeth, yet the husband ſhall be charged with that debt after the death of the wife, in regard of the Recovery. *Fitzh. Na. Br.* 120. acc.

11. Note: It was Reſolved by all the Juſtices, That a Wife cannot be produced as a Witneſs, either for, or with, her husband, becauſe they are *due animæ in carne una*; and it might be a cauſe of diſcord and diſſention between the husband and wife, and a means of great Inconveniences which might follow. Paſch. 10 Jac. in C. B.

12. A Feoffment was made before the Statute of 27 H. 8. to the uſe of a man and a woman who was unmarried, and of the heirs of their two bodies; they entermarry, and then the Statute of 27 H. 8. is made; afterwards the husband bargains and ſells the whole Lands to one of the Feoffees, and dyeth; the wife claims the whole as Survivour. It was Reſolved in this Caſe, That the wife ſhould have but a moyety of the Land, becauſe ſhe and her husband at firſt had but moyeties as Joynt-Tenants before the Entermarriage; and that the wife might have a *Cui in vita* of that moyety. But in that caſe it was holden, That if the wife dyed, the ſon might maintain a *Formedon* of the whole Land. 3 & 4 Ma. *Dyer* 149. *Bedells* Caſe.

13. If a man give Lands to a man and ſuch a woman as ſhall be his wife, the man taketh the whole; but if a man maketh a Feoffment in Fee to the uſe of himſelf and his wife that ſhall be, and afterwards he taketh a wife, his wife ſhall take joyntly with him, notwithſtanding all at the firſt veſts in the husband. *Cook* 1. Part, 101. in *Sowleys* Caſe.

14. After the Statute of 27 H. 8. A man made a Feoffment to the uſe of *A.* his wife; and if ſhe dyed living the husband, to the uſe of the husband and ſuch wife as he ſhould after marry for life for her Joynture. The Queſtion in this caſe was, If the Feoffor who reſerved the uſe to him and his ſecond wife which ſhould be, after the death of the firſt wife, ſhall have the Freehold veſted in him onely; and afterwards, when he takes a ſecond wife, If ſhe ſhall take joyntly with her husband in poſſeſſion, and the other Eſtate ſhall be drowned in the husband; Or that ſhe ſhall take by way of Remainder after the death of her husband, by the words, *ſcil.* to the intent that ſhe ſhall have it for life for her Joynture, or not. It was the Opinion of the Lord *Dyer*, That ſhe ſhould take neither the one way nor the other, becauſe ſhe was not capable, nor in *eſſe* at the time when the remainder fell to the husband; and then ſhe ſhall never have it after, no more then if it were a Remainder of Land in poſſeſſion fallen; which had been agreed on all ſides, that ſhe ſhould take nothing: But the Remainder being in uſe, all the other Juſtices conceived, That that changed the Law, by the Statute: but the Lord *Dyer* held, That it was all one after the Statute of 27 H. 8. of Uſes. And it was holden in this caſe by *Dyer*, That the Remainder to a woman for life after the death of the husband, could not be termed nor taken to be a Joynture, with the Statutes of 11 H. 7. & 27 H. 8. Cap. 10. Hill 17 *Eliz. Dyer* 340.

15. If a Reverſion be granted to J. S. and to *Jane G.* and afterwards they entermarry, and the Tenant attorneth, they ſhall not now take by moyeties according to the purport of the Grant; but they ſhall now take by entierties, it being the

Act of the Grantees themſelves. *Cook* 2. Part, 68. in *Tookers* Caſe.

16. Husband and wife are Joynt-Tenants for life, the remainder to the Husband in tail, the remainder to another in Fee, the husband ſuffers a Common Recovery: It is no barr to the iſſue in tail for any part, becauſe there are no moyeties betwixt Husband and Wife, and there when the husband ſuffers the Recovery alone, there is no lawful Tenant to the Precipe, and ſo the Recovery is no barr. *Cook* 3. Part, 5. in the Marqueſs of *Wincheſter*'s Caſe.

17. If a Feoffment in Fee were made before the Statute of 27 H. 8. of Uſes, to the uſe of a man and a woman, and their Heirs, and they entermarry, and then the Statute were made: In this caſe they hold by moyeties; for if the husband alien, it is good for a moyety, becauſe the Statute executes the poſſeſſion according to ſuch quality, manner, form, and condition, as they had in the uſe; ſo as, though it veſt during the Coverture, yet the Act of Parliament executes ſeveral moyeties in them, ſeeing they had ſeveral moyeties in the uſe. *Plo. Com.* 58. in *Talbois* and *Wimbiſhes* Caſe. But if a Reverſion be granted to Husband and Wife, and before Attornment they entermarry, and then attornment is good, they ſhall not have any moyeties, no more than, where a Feoffment in Fee is made to a man and a woman, with a Letter of Attorney to make Livery, they entermarry, and then Livery is made *ſecundum formam Chartæ*, they ſhall have no Moyeties. *Plo. Com.* 483. in *Nicholls* Caſe.

18. If Husband and Wife were ſeiſed joyntly to them and their Heirs of an Eſtate of Inheritance in Lands made during the Coverture; and in ſuch Caſe, the Husband alone, or he together with his Wife, had made a Feoffment in Fee to a ſtranger, and the husband had dyed; in that caſe, the wife after the death of her husband by the Common-Law, might have had a Writ of *Cui in vita*, and recovered the whole Land, becauſe the Husband and Wife took by entierties; and in ſuch caſe, If the wife had dyed, her Heir might have had a Writ *Sur Cui in vita*; and now ſince the Statute of 32 H. 8. Cap. 28. ſhe or her heir may enter after ſuch a diſcontinuance, without being put to their Actions. *Cook* 1. part, *Inſtitutes*, 326.

19. The Husband and Wife made a Feoffment to the uſe of himſelf and his Wife for life, the remainder over, the husband ſowed the Land, and dyed: In that caſe it was agreed, That the Wife ſhould have the Corn, and not the Executors of the husband, becauſe the wife was ſeiſed joyntly with her husband: and therewith agree the Old Books, 8 Aſſ. 21. 7 Aſſ. 18. 46 Aſſ. 2. But contrary, if the remainder had been limited to the wife, 15 Eliz. *Dyer* 316. See 44 Eliz. *Cook* 5. Part, 116. *Olands* Caſe adjudged; and ſo was it likewiſe adjudged, Mich. 5 Jac. *Shele* and *Arnolds* Caſe, acc. and in ſuch caſe, If the Husband ſoweth the Land, and dyeth; and a third part of the Land be aſſigned to the wife in Dower, ſhe ſhall have the Corn, becauſe ſhe ſhall be endowed of the laſt poſſeſſion of her husband. See *Plow. Cogitat.* 45. in that caſe, If Dower be aſſigned to her by the Sheriff, in ſuch caſe ſhe ſhall not have the Corn. Quære. 15 Eliz. *Dyer.* 316.

20. Upon an Evidence to a Jury in an *Ejectione Firmæ*, the Caſe was; *A.* 41 Eliz. purchaſed Lands to him and his wife, and their heirs. Afterwards 16 Jac. *A.* without his wife let the Lands to J. S. for 60 years, if they lived ſo long, rendring Rent; *A.* dyed; The Queſtion was, Whether by the Statute of 32 H. 8. Cap. 28. this Leaſe ſhould bind the wife: And upon Conſideration of the Statute, It was the Opinion of the Court, That the Leaſe ſhould bind the wife. The body of the Act is, That all Leaſes made of Land which the Husband is ſeiſed of in the right of his Wife, of Inheritance, or joyntly with his wife by purchaſe during the Coverture or before, ſhall be good and Effectuall; and that the Wife ſhall have ſuch remedy for the Rent, as he that made the Leaſe. The doubt reſted upon the Proviſo, which is, That ſuch Leaſe ſhall be made of ſuch Land whereof the Inheritance is in the wife, by Indenture in his and the Wifes name, and that ſhe ſhall ſeal; and that the Reverſion ſhall be to him and his wife, and to the heirs of the wife, during the Coverture. But it was holden, That cleerly by the body of the Act it was a good Leaſe, and not within the Proviſo, becauſe it is not the ſole Inheritance of the wife, and the Proviſo extends onely thereunto: and ſo it is out of the Intent of the Proviſo. The Caſe was not adjudged, but ended by Arbitrament. Mic. 1 Car. in C. B. *Smith* and *Trinders* Caſe. *Cro.* 1. Part, 15, 16.

21. Land is given to the Husband and Wife, and to the heirs of their two bodies begotten; the husband maketh a Feoffment in Fee, and dyeth, having iſſue; and after the wife, before any entry made by her, dyeth. In this Caſe, theſe points were Reſolved; 1. That at the Common-Law, this Feoffment was a diſcontinuance to the Iſſue, for the iſſue ought to claim as heir of their two bodies immediately, and as heir to one onely he cannot be inherit, and ſo by conſequence he cannot enter. 2. That although the husband and wife have iſſue, and a joynt, and undivided eſtate, that this Joynt Eſtate was within the Statute of 32 H. 8. Cap. 28. for ſhe had a Freehold and Inheritance in the Land, although ſhe had not the ſole Inheritance or Freehold. 3. That by the ſaid

ſaid Statute, the Entry of the iſſue in tail was lawfull. 4. Reſolved, That if the Husband be Tenant in tail, the remainder to the wife wife in tail, If the Husband maketh a Feoffment in Fee, and dyeth without iſſue, that the wife may enter; but if the Husband ſuffereth a Recovery, and dyeth without iſſue, the wife is barred, and cannot enter by the Statute of 32 H. 8. 5. Reſolved, That if the Husband hath iſſue and alieneth, and the Wife dyeth, the iſſue cannot enter during the life of the Husband: But if the Husband alieneth, and afterwards the Wife is divorced *cauſa præcontractûs*, or for any other cauſe which diſſolves the Marriage *à vinculo Matrimonii*, there, by the Statute, the Wife may enter during the life of the Husband. Paſch. 7 Jac. *Cook* 8. Part, *Greenlyes* Caſe.

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2. *Where the Land of the Wife ſhall be charged with a Rent granted by the Husband, or with the debts of the Husband; where not. And where a Grant, Leaſe, Statute &c. acknowledged by them during the Coverture, ſhall bind the Wife after the death of the Husband; Where not.*

1. NOte, in a Writ of Errour, for the reverſing of a Fine levied by the Husband and Wife, it was adjudged, That the Fine being reverſed for the Nonage of the Wife, the Husband and Wife ſhould have preſent reſtitution, becauſe when the Husband and Wife joyn in a Fine, yet all the Eſtate paſſeth from the Wife, and the Huſband joyneth of neceſſity and for Conformity; and the Law doth permit, that the whole Eſtate be reſtored to the Wife during the life of the Huſband. Mich. 31 Eliz. in C. B. *Worſley* and *Charnicks* Caſe. *Cook.* 3. Part. 77. in the Lord *Cromwell's* Caſe. And Hill. 33 Eliz. in C. B. In an *Ejectione Firmæ* for Lands bought in the County of *Cornwall*, It was adjudged, That where the Husband is ſeiſed of Land in the Right of his wife, and the Husband made a Leaſe of it for 21 years, and afterwards he and his wife levies a Fine *ſur Conuſans de Droit, &c.* to J. S. and his heirs, the husband dyed, that the Leaſe was ſevered by his death, and the Conuſee ſhould avoid it. And it was there ſaid, That it was adjudged in the Common-Pleas, where a Recovery is had againſt the Husband and Wife, of the Lands of the Husband whereof he is ſeiſed in tail, with a voucher over, the intent and purpoſe of joyning of the Wife, might be ſhewed, *ſcil.* to barr her of her Dower; and yet the recompence ſhall go to the iſſue in tail. Hill. 33 Eliz. in B. R. *Harvey* and *Thomas's* Caſe. *Cook.* 2. Part, 77. Lord *Cromwell's* Caſe. See *Cook* 1. Part, 76. *Archers* Caſe. acc.

2. If a man be endebted to the King, and takes a Leaſe to him and his Wife for years; and before Execution, the husband dyed: Execution in that Caſe was ſued againſt the wife; for it was the act of the husband, and he had power of the Term at the time of his death; and in that caſe the wife came to the Leaſe without valuable Conſideration. But if an Accomptant of the King be arrear in his Accompts, and he and his Wife be poſſeſſed of a Term for divers years, and the husband for valuable Conſideration, bargains and ſells the ſame to a ſtranger, If ſuch a ſale be made without Coyn, It ſhall bind the King, as alſo the wife. And in that Caſe it was holden, That a ſale of a Term, or of goods *bona fide* after Judgment, and before Execution, ſhall be good, and bind both the wife, as alſo the King: And it was holden in the principal Caſe, That an Accomptant ſhall not be in worſe condition then a Felon; who before Execution, may ſell his Goods and Chattels *bona fide*. Paſch. 8 Jac. *Cook* 8. Part, Sir *Gerrard Fleetwood's* Caſe. 171,

3. The Cuſtome of a Mannor was, That the Lord and Surveyor, or his Deputy, might demiſe by Copy; The Lord granted authority to two, to make Cuſtomary Eſtates for payment of their debts, and dyed; They held Court in their own names, and granted Coppies in reverſion according to the Cuſtome: The Wife of the Lord had one of the Copyholds aſſigned by the Sheriff, upon Recovery of the third part of the Mannor in Dower. It was holden, That ſhe ſhould avoid the Grant made by the two Aſſignees. Paſch. 8 Eliz. *Dyer.* 251. But Quære of that Caſe; for that, Paſch. 26 Eliz. In the Kings-Bench, It was adjudged, That where the Lord of a Mannor, wherein were many Copyholds for lives, took a wife, and afterwards a Copyholder dyed, and the Lord after Marriage did grant the Land again, according to the Cuſtome of the Mannor, for lives, and dyed; That the Wife ſhould not avoid ſuch Grants in a Writ of Dower: For although the Grant were after the title of Dower; yet the Cuſtome, which is the life and force of the Grant, was long before. Paſch. 26 Eliz. in B. R. *Cook* 4. Part, 31.

4. In Treſpaſſe, the Caſe was; Within the Mannor of D. there were divers Cuſtomary Lands, which by Cuſtome of the Mannor, time out of mind had been granted by Coppy of Court-Roll of the ſame Mannor, for one, two, or three lives;

J. S.

J. S. and his wife, as in the right of his ſaid wife, were ſeiſed of the ſaid Mannor, and at a Court of the ſaid Mannor granted the place where, &c. being parcel of the Cuſtomary Tenement to J. D. and B. his Wife, *durante viduitate ſua*. It was a Queſtion, Whether this was a good Grant within the Cuſtome? It was adjudged, That this Grant was good, and within the Cuſtome; for every Grant *durante viduitate*, was a Grant for life; but every Grant for life was not a Grant *durante viduitate*: And it was holden, That ſuch Grant after the death of the Husband ſhould bind the wife. Paſch. 36 Eliz. in B. R. *Downe* and *Hopkins* Caſe. *Cook* 4. Part, 30. See *Cook*. 8. Part, 63. *Swaynes* Caſe, acc.

5. A man ſeiſed of Lands in Fee holden in Socage, having iſſue 3. Daughters, deviſed the ſame to his youngeſt Daughter, when ſhe ſhould accompliſh the age of 18 years, and to the heirs of her body; the remainder to the eldeſt Daughter in tail, with divers remainders over: Proviſo, That if his ſaid daughter, or any other perſon before named, ſhould wittingly, willingly, or adviſedly conclude and agree to and for the doing and execution of any act or thing, whereby the premiſſes ſo entailed to them, ſhall or may be diſcontinued, or alienes; Or ſhall do any act or thing whereby the Remainder, Lands, &c. ſhall not diſcend or come to them, That then and immediately from and after ſuch concluding and agreeing, the Eſtates limited to them ſhould ceaſe and be void, as if ſuch perſon ſo concluding and agreeing, were naturally dead without iſſue of their body: The youngeſt daughter took a husband; The husband and wife concluded and agreed to ſuffer a Common Recovery to the uſe of them and their heirs; which was done accordingly; the eldeſt Daughter entred, the husband and wife did re-enter, and did treſpaſs upon the Land, and the other daughter brought Treſpaſs: In this caſe, amongſt other points, it was Reſolved, That the Concluſion and Agreement to ſuffer a Common Recovery, could not be reſtrained by any Condition or Limitation; becauſe they were incidents, *ſcilicet* annexed to their Eſtates, and therefore it ſhould be repugnant to the guift, to reſtrein them by any Condition or Limitation. 2. Admit, that the Condition might reſtrain them to ſuffer a Recovery; yet it was holden, That the Recovery ſuffered in this caſe by the wife, being a *Feme Covert*, was not any forfeiture of her Eſtate, becauſe that the Concluſion by the Indenture was as the party pretended, a forfeiture of her Eſtate, and then the Recovery was not of any effect, becauſe her Eſtate was determined before by the Concluſion before the Recovery; and againſt the Indenture, the wife might plead, That it was not her Deed. And it was holden, and given for a Rule in this Caſe, That no *Feme Covert* ſhould be barred by her Concluſion of her Inheritance; but when ſhe is examined in due courſe of Law: and a *Feme Covert* cannot be examined without a Writ. Alſo it was holden in this Caſe, That if Husband and Wife acknowledg a Statute, that it is void as to the wife, although ſhe over-liveth her husband; and ſo it is if they acknowledg a Deed Inrolled; and the reaſon is, becauſe no Writ is dependant againſt them, upon which the Wife may be examined. But it was holden, That if a *Feme Covert* do levy a Fine alone, the ſame ſhall bind her and her heirs, if the husband doth not enter and avoid the Eſtate of the Conuſee, becauſe in that caſe ſhe was examined, and alſo had power of the Land. Trin. 11 Jac. *Mary Portington's* Caſe. *Cook* 10. Part, 36, 37, &c.

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3. *Where the Husband and Wife ought to bring their Actions joyntly, Where not; Where they ſhall be joyntly ſued, Where ſeverally, and where the Husband may Anſwer without the Wife, where not?*

1. IN an Action upon the Caſe, brought by Husband and Wife, they declared, That A. was ſeiſed in Fee of a Meſſuage, and 100 Acres of Land, and Covenanted to ſtand ſeiſed to the uſe of himſelf and his Wife for their Lives, for the Joynture of the Wife, and after to his Son and heir, excepting the Timber Trees, ſaving that his Wife ſhall have and take the Shrowds and Loppings of them; A. dyed, the Wife ſurvived and married with the now Plaintiff. The ſon and Heir of A. cut down five Oaks growing upon the Lands, whereupon the Plaintiffs loſt the benefit which they might have had of the Shrowds and Loppings. Upon not guilty pleaded, it being found for the Plaintiffs; amongſt other exceptions, it was moved for ſtay of Judgment, becauſe the Action was brought by the Husband and Wife, where the Husband alone ſhould have brought the Action, for he alone might have releaſed the damages, and the wrong is done to his poſſeſſion; But it was Reſolved by the Court, That the Action was well brought, for he having the Land in the right of his Wife, he may well joyn her with him in ſuing for the damages; and ſhe ſhall have the damages, and the Action alſo, if ſhe ſurvive her Husband. *Hill.* 11 Car. in B. R. *Tregniel* and *Reves's* Caſe. *Cro.* 1. part 316.

2. A

2. A. and his Wife by deed Indented, deviſed a houſe and certain Lands, whereof he was ſeiſed in the Right of his Wife to S. for 21 years: S. Covenanted by the ſame Deed, for lives, his Executors and Adminiſtrators, with the Plaintiffs, that he, his Executors, Adminiſtrators or Aſſigns would build a Brickwall upon part of the Land demiſed, S. Aſſigned over his Term to J. and J. to the Defendant. And for not making the Brickwall, the Husband and Wife brought an Action of Covenant, againſt the Aſſignee of the Leſſee; and adjudged, that the Action was well brought by them both. *Paſc.* 25 Eliz. in B. R. *Cook* 5. part 16. *Spencers* Caſe.

3. In an Information againſt Husband and Wife, for Intruſion into certain houſes; The Caſe was, A man ſeiſed of certain houſes holden in Socage, Deviſed them by his Will to his Wife (being an Allien born). The King by his Letters Patents under the Great Seal, made the Wife a Denizen, the Deviſor dyed, the Wife married another Husband; and the Letters Patents being corrupted in the *Teſte*, the Husband and his Wife got an exemplification of the enrollment of the Letters Patents under the great Seal, which was with the true *Teſte*, and afterwards an Office was found by force of a Commiſſion, under the Exchequer Seal, by which it was found, That the Wife was an Allien born; It was Reſolved in this Caſe, That the Office found by Commiſſion under the Exchequer Seal, was not good to entitle the King to the Lands of an Allien. 2. Reſolved That the Exemplification of the Letters Patents of Enrollment, of the Letters Patents of Denization, were well pleadable by the Husband and Wife by the Statute of 13 Eliz. chap. 6. Note in that Caſe, the Information was, againſt the Husband and Wife; and the Husband and Wife both joyn in the pleading of the Letters Patents of Denization, granted to the Wife. *Mich.* 30 Eliz. in Exchequer, *Cook* 5. part. 52. *Pages* Caſe.

4. In an Action of Covenant, the Caſe was; A man by deed enfeoffed J. S. and Covenanted for him and his heirs, with the Feoffee his heirs, and Aſſignes, to make further aſſurance upon requeſt; J. S. conveyed the Land to the Plaintiff and his Wife, and to the heirs of the Husband, and the Husband brought the Action alone without naming his Wife, againſt the Defendant; becauſe the Defendant did not levy a Fine upon the Plaintiffs requeſt, his Wife being then alive; It was the Opinion of the Court, That the Action was not well brought, for he ought to have joyned his Wife in the Action: wherefore Judgment was given, *quod Querens nihil Capiat per billam. Trin.* 14 Car. in B. R. *Middlemore* and *Goodales* Caſe, *Cro.* 1. part 361. 363.

5. An Action upon the Caſe in the nature of a conſpiracy was brought by Husband and Wife, for cauſing them to be Indicted of Felony falſly, and maliciouſly; and counted *ad damnum ipſorum*; Upon not guilty it was found for the Plaintiffs, and Judgment given. Whereupon Error was brought, and the Error Aſſigned was, becauſe it was *ad damnum ipſorum*; whereas the Wife cannot joyn with her Husband for damages, for it is a ſeverall damage to either of them; and a Woman may not joyn for a wrong done to her Husband, and of that Opinion was *Barkley*, Juſtice; But *Croke*, Juſtice, held the contrary, becauſe the Action is grounded upon one intire Record, by which they were both prejudiced; and they may joyn, if they will: Or the Husband onely may have the Action for it. It was adjourned for difference in Opinion. Mich. 14 Car. in B. R. rott. 415. *Balby* and *Dorihalls* Caſe. *Cro.* 1. Part, 398.

6. In Aſſumpſit brought by Husband and Wife during Coverture, The Conſideration was, That if the Wife ſhould cure ſuch a wound, the Defendant did promiſe to pay unto her 10 l. and alledged *in facto*, that ſhe had cured the wound, and that the Defendant had not paid the money, to the damage of the Husband and Wife: and being found for the Plaintiffs, and Judgment given, Errour was brought; and it was aſſigned for Errour, That the Husband alone ſhould have had the Action; for being a promiſe during the Coverture, the non-performance of it was onely to the damage of the Husband, and not to the Wife. But becauſe, the cauſe and act is ariſing onely from the Labour and Skill of the Wife, therefore the Court held, That the Action was well brought; and the Judgment was affirmed. Hill. 15 Jac. in B. R. *Braſhford* and *Buckingham's* Caſe. *Cro.* 2. Part, 205.

7. The Queen by Letters Patents let an houſe to J. S. wherein were theſe words; And the Leſſee and his Executors and Aſſigns *reparabant domum predict.* and ſhall leave the houſe ſo repaired. The Queen granted the Reverſion to the Plaintiff, who for not repairing the houſe, brought an Action ſole againſt the Defendant Executor of the Leſſee; and upon the Declaration, the Defendant did demurr, Becauſe the Action was brought by the Husband alone; whereas by his own ſhewing, the wife had an Eſtate as well as the husband. And, 2. Becauſe the words of Covenant, are not the words of the Leſſee. But it was Reſolved by the whole Court, That the Action being perſonal, and damages onely to be recovered, the husband alone might have the Action, or joyn the wife with him in it, if he pleaſed. 2. They held, That the words in the Queens Patent did amount to a Covenant on the part of the Leſſee, and he accepting the Leaſe,

Leaſe, is bound by the Covenant. Trin. 13 Jac. in B. R. Sir *John Brett* and *Cumberland*'s Caſe. *Cro.* 2. Part, 399. See *Boſſtr.* 3. Part, 163. the ſame Caſe.

8. Treſpaſſe was brought by Husband and Wife for breaking the Cloſe of the Husband, *ad damnum eorum.* After Verdict, It was moved, That the Declaration was not good; and ſo it was Reſolved by the whole Court, and that it was not helped by any Statute. Paſch. 16 Jac. in B. R. *Marſhall* and *Doyles* Caſe. *Cro.* 2. Part, 473.

9. Treſpaſſe of Aſſault and Battery, for that the Defendant did aſſault, beat, and wound the Plaintiff; *nec non*, for that he aſſaulted, and beat the Plaintiffs Wife, *per quod, conſortium uxoris ſuæ amiſit* for three dayes: upon not guilty, It was found againſt the Defendant in both, and damages given, for that, the Plaintiffs Wife went with him, and lived in a ſuſpitious manner; It was moved in ſtay of Judgment, That the Husband ought not to joyn the battery of his Wife, with the battery done to himſelf; and he cannot have an Action for battery of his Wife, without joyning his Wife in the Action, for that the Wife ought to have the damages if ſhe ſurvive her Husband; and this Recovery of the Husband, ſhall not bar her, if ſhe ſurvive her Husband: But the Court held, That the Action was well brought, for it is not brought in reſpect of the harm done to the Wife, but for the Husbands particular loſſe, that he loſt the company of his Wife, which is onely a damage to himſelf;—And ſo it was adjudged. 23 Eliz. in this Court, in *Chamley's* Caſe, where the Husband brought an Action of Battery, for the Battery of his Wife *per quod negotia ſua cui facta remanſerunt*, and the Husband had Judgment to recover. *Mich.* 16. Jac. in B. R. *Guy* and *Liveſes* Caſe. *Cro.* 2. part 501.

10. Treſpaſs; for that the Defendant made aſſault upon the Plaintiff's Wife, *et illam verberavit, &c. nec non* the ſaid wife, *ſimul cum* one gown, one Petticoat, of the goods of the Plaintiff, *ſimul cum* his ſaid wife, *apud D. cepit abduxit, et abcariavit, nec non*, his ſaid wife *per 5. annos*, from the ſame Plaintiff *detinuit, et Cuſtodivit, per quod ſolamen et Conſortium, nec non conſilium et auxilium in rebus domeſticis quæ idem* the Plaintiff *habere debuiſſet, &c.* Upon Not-guilty, it was found againſt the Defendant, and Damages given 300 l; and upon Errour brought in the Exchequer-Chamber, It was aſſigned for Errour, Becauſe the Action was brought by the husband onely for the battery of his wife; for the wrong and damages are properly done to the wife, and therefore the husband alone without the wife cannot maintain the Action. It was ſaid by the Court, It is true, if the Action had been brought for the onely battery of the wife, that the wife ought to joyn in the action: but the Action is not here brought for the battery of his wife, but for the loſſe and wrong of the husband, for loſſe and want of his company and aid; and all is included in the *per quod*, which extends to all which was before. The ſecond Errour was, Becauſe it is *Cepit, et abduxit*, where it ought to have been *rapuit.* But to that, the Court ſaid, That it might be both wayes. The Judgment was affirmed. Paſch. 17 Jac. in B. R. rott. 157. *Hide* and *Sciſſors* Caſe. *Cro.* 2. Part, 538. See Hill. 21 Jac. in B.R. *Buckley* and *Hales* Caſe. *Cro.* 2. Part, 655. acc.

11. Action of Trover and Converſion was brought of goods againſt husband and wife, *ad uſum ipſorum*; They pleaded, Not-guilty; and both were found guilty, and Damages aſſeſſed, It was moved in Arreſt of Judgment, That the Action lyes not againſt them joyntly, for the Converſion to their uſes during the Coverture; for when they joyn, it is the act of the husband onely, and the wife cannot convert to her own uſe: But Trover well lyes for Converſion by themſelves before Coverture, or by the wife only during the Coverture, for ſhe may do accordingly, and the husband ſhall be ſued with her; but not where ſhe joyns with the husband. Wherefore it was adjudged for the Defendant. Paſch. 8 Car. in B. R. *Rbemes* and *Humphreys* Caſe. *Cro.* 1. Part, 184. See Trin. 13 Car. *Perry* and *Diggs* Caſe. *Cro.* 1. Part, 355.

12. Husband and wife brought an Action upon the Caſe againſt J. S. reciting, That the Biſhop of S. was ſeiſed in the right of his Biſhoprick of 4. Mills in the City of S. and that there is a Cuſtome there, That all Inhabitants reſident within the City, of any ancient houſe holden of the Biſhop, had uſed to grind all their grain ſpent in the ſaid Meſſuages or ſold, at the ſaid Mills, and not elſewhere; and then they ſhew, That the Mills were conveyed to them the Plaintiffs by demiſe; and that the Defendant dwelling in an ancient Meſſuage, 1. *Decem.* 2 Jac. *et diverſis diebus et vicibus inter eandem diem, et* 4. *diem Aprilis Anno* 2 Jac. ſpent and ſold divers parcels of Corn, which they did not grind at the aforeſaid Mills, *ad damnum, &c.* And upon Iſſue of Not-guilty, It was found for the Plaintiff: and notwithſtanding, Judgment was given againſt the Plaintiffs, 1. Becauſe the Cuſtome in it ſelf was unreaſonable: for the reaſon of which, ſee the Book at large. And, 2. Becauſe the Action was brought by the husband and wife both; being onely to recover damages, and not for the Tenn. Trin. 14 Jac. in B. R. rott. 2263. *Harkin* and *Greenes* Caſe, *Hob.* 189.

13. *A.* brought an Action of Debt againſt B. and his wife for 3 l. 13 s. and declared for 39 s. upon a Contract of the wives, *dum ſola fuit*, and the

the other 39 s. upon an *Insimul computaverunt* with *B.* the husband onely: and after Issue, *Nihil debet* found for the Plaintiff. And after, Judgment was arrested, because being severall Contracts made by them, they cannot be joyned in one Action. Hill. 14 Jac. in C. B. *Revell* and *Greys* Case. *Hob.* 184.

14. Errour was brought to reverse a Judgment given in an Inferiour Court at *Norwich*, in an Action upon the Case for a Trover and Conversion of certain goods; The goods layed to be in the hands and possession of *Mary* the wife; and a request layed to be made, and that the husband and wife refused to deliver them; and afterwards *Mary* the wife did convert them to her use: And upon Not-guilty pleaded, a Verdict and Judgment was given for the Plaintiff. And upon this Judgment, a Writ of Errour was brought, because the Entry was, That the wife alone be in *misericordia*; where it ought to have been, That the husband and wife be both in *misericordia*; for here both of them were required to deliver the goods; and afterwards the wife converted them: and because the Entry was not accordingly, that the husband and wife be both in *misericordia*, the Judgment was reversed. Mich. 13 Jac. in B. R. *Wood* and *Sucklifs* Case. *Bolstr.* 3. Part, 150, 151.

15. Assumpsit against a woman administratrix of her husband; The Plaintiff declared, That her husband had bought of him Gold, Silver, Pearl, and was endebted for them 200 l. and that she likewise after his death bought of him Peal for 27 l. and upon Accompt she was found indebted both those sums to him, and promised to pay them. Judgment was for the Plaintiff. Whereupon Errour was brought, and assigned for Errour, That the Defendant was to be charged by two severall Actions, because she was charged in two manners one in her own right, the other as Administratrix. And of that Opinion was the whole Court; and therefore the Judgment was reversed. Hill. 12 Jac. rott. 912. in C. B. *Ferenden* and *Palmers* Case. *Hob.* 88.

16. Action upon the Case by husband and wife upon Assumpsit; the Plaintiffs declared, That in Consideration that the Plaintiff would marry *A.* the now Plaintiff's wife, the Defendant did promise to make good unto him a Legacy given unto her by her Fathers Will; and would also give her 40 l. more out of his own part, given him by the said Will, at her age of 18 years; and that he did marry her, &c. and so concludes to his damage, &c. Upon Non-Assumpsit, and a Verdict for the Plaintiff; It was moved, That the wife did here joyn in the Action with her husband; which she ought not to do, because the promise was made to her husband and his benefit; and the sole Consideration for the promise, doth arise from the husband; namely, his marriage of the woman. And it was holden by the Court, That the same was a good cause to stay the Judgment. And this Case was put by *Rolls*, Chief Justice, A promise was made by one to a *Feme Covert*, That if he will procure her husband to levy a Fine of such Lands, that he would give her a Riding-Suit. And it was adjudged, That the husband and wife cannot joyn in an Action for breach of this promise. Mich. 1651. in B. R. *Cotterell* and *Theobalds* Case. *Styles* 297.

17. Trover and Conversion was brought against husband and wife, of two Garbes, *Anglicè* Sheaves of Corn. It was holden by the Court, That the Conversion of two Garbes of Corn, was void for the incertainty. 2. It was layd in the Declaration, That they did Convert the Sheaves *ad usum ipsorum*; and that was also ruled by the Court, Not to be good, because the wife hath no property during the life of the husband: and the Court said, That that point had been often so adjudged: But yet the Court said, That they would look upon Presidents: For that *Jones*, Justice, said, That there might be a Conversion by the wife to her use; as in this case, to bake the Corn into bread, and to eat it her self. Mich. 15 Car. in B. R. *Hodges* and *Simpson's* Case. *Marsh.* 60.

18. In Debt against husband and wife; the husband was Outlawed, and the wife came in upon process, and brought the Queens pardon with her of her wavery. It was the Opinion of the Court, That she should be discharged of the Imprisonment of her body; but the Pardon was not allowed, because without her husband, she could not sue a *Scire facias* against the Plaintiff, to make him to declare upon the Original without her husband: Also the Pardon had a Condition, *scil. ita quod ipsa starnet recta in Curia*; which she could not do without her husband. Hill. 10 Eliz. *Dyer* 271.

19. Upon a Prohibition, the Case was; A woman unmarried being Proprietor of a Parsonage, took a husband; a Parishioner within the Parish set forth his Tythes, and immediately took them back; and according to the Statute of 2 E. 6. the husband alone sued the Parishioner for the treble value: Two Points were in the Case; 1. If this were a setting forth within the Statute? It was the Opinion of the Court, That it was not: and so, it was said, it had been adjudged, 45 Eliz. The second Point was, Whether the husband might sue alone for the treble value, without naming the wife? for although the husband may sue alone for a thing which is personal, as the Books of 4 E. 4. 31. and 15 E. 4, 5. & 11. are: Yet where the Statute saith, That the Proprietor shall have Suit

for the not ſetting forth; The Court inclined to be of Opinion, That the husband is not intended Proprietor within the Statute, but the wife; and for that cauſe the wife ought to joyn with the husband in the Suit. Mich. 8 Jac. in C. B. *Ford* and *Pomroys* Caſe. *Bownlow* 2. Part 9.

20. A *Feme ſole* having the Cuſtody of the Land, and of the body of an Enfant, took a husband, and ſhe and her husband did tender a Convenient marriage to the Enfant, which he refuſed, and at his full age married elſewhere, and at his full age entred into the Land; and, If they ſhould both joyn in a Writ of Forfeiture of Marriage, or that the husband ſhould have it alone, was the Queſtion? It was ſaid, That the Wardſhip of a Ward and Land, is a thing reall, and the Survivour ſhall have it, and not the Executors of the husband: And if an Action be accrued before marriage, as if a Bond be made to the wife before marriage, ſhe ſhall joyn with her husband in the Action upon the Bond: But if a right of Action do accrue after the marriage, there ſhe ſhall joyn. See 43 E. 1. *Statham.* The husband alone brought a *Raviſhment of Ward*, for a Ward which he had in the right of his wife, and the Writ was good. In the principal caſe it was Reſolved, That the ſureſt way is to have both of them joyn in the Writ. Paſch. 5 Ma. in B. R. *Owen* 82, 83.

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4. *What Goods or Chattels the Wife ſhall have again by the death of her husband; what not. And what Goods and Chattels of the Wife the Huſband ſhall have after her death: And who ſhall have the goods upon a Divorce.*

1. A Leaſe for years was made by Indenture, and the Leſſee Covenanted and granted, That if he, his Executors or Aſſigns did alien, that it ſhould be lawful for the Leſſor to enter; afterwards the Leſſee made his wife his Executrix, and dyed; the woman took another Husband, and he aliened: It was the Opinion of *Brown* and *Shelley*, Juſtices, That by the marriage the Term veſted in the Husband in manner as a guift of the Wife; and by reaſon of the Marriage, he had the Term, as in the right of his Wife, becauſe the wife ſhould have it again, if the Husband did not alien it, it being a Chattel real; but of Chattels meer perſonal, they are onely in the husband by the Intermarriage. Paſch. 28 H. 8. *Dyer.* 3.

2. Husband and Wife being poſſeſſed of a Term in the right of his wife, as Executrix of her former husband (a ſtranger pretending right to the ſaid Term) the Husband and Wife ſubmitted themſelves to an Arbitrament: The Arbitrator awarded one part to the pretender, and the other part to the husband and wife; the husband dyed; and the Queſtion was, Whether the Wife ſhould be bound by this Award: The Court delivered no Opinion to the matter in Law; but inclined, That the Wife was bound by it. But *Detinue* being brought by the Wife for the Indenture of Leaſe, becauſe the Defendant pleaded, *Non Detinet per Patriam*; where he ſhould have pleaded the ſpeciall matter: It was adjudged againſt the Defendant. Paſch. 2 Eliz. *Dyer* 183.

3. In an *Ejectione Firme*, the Caſe was; *A.* was poſſeſſed of a Leaſe of Lands for 31 years, of the Demiſe of the Dean and Chapter of *Weſtmin.* and married *B.* and then he and his Wife mortgaged their intereſt to one *C.* for the payment of 20 l; before the day of payment *A.* dyed. *B.* the Husband paid the money at the day, and entred, and made *E.* his Wife his Executrix, who entred; J. S. took Letters of Adminiſtration of the goods of *A.* the Wife of *B.* and entred upon the Leſſee; upon whom *E.* entred, and made the Leaſe to the Plaintiff. And in this Caſe it was adjudged for the Plaintiff: and the reaſon of the Judgment was, That although the Leaſe was at firſt the Wifes, and that the husband was poſſeſſed in her right, ſo as although he had purchaſed the Fee-ſimple, the Leaſe had not been extinct; yet by the Intermarriage he hath full power to alien it; and if he ſurvive his Wife, he is to enjoy it againſt her Executors and Adminiſtrators: ſo in the Caſe when he ſurvives, the Condition ſurvives to him, and reſtores him to the Leaſe in *ſtatu* as it ſhould have been if it had not been aliened. Paſch. 11 Jac. in C. B. rott. 1515. *Young* and *Radford's* Caſe. *Hob.* 3.

4. In an *Ejectione Firme*, the Caſe was this; A man poſſeſſed of a Term in the right of his wife, made a Leaſe for years of the ſame Land, to begin after his death who was the Leſſor; and afterwards he dyed, and his wife ſurvived him; The Queſtion was, Whether the Wife ſhall have the Land after the death of the Husband, or the Leſſee? It was agreed in this Caſe, That the Leſſee ſhould have it during his Term; for, as the Husband during his life, might Contract for the Land for the whole Term which his Wife had in it; ſo might he do for any part of the Term at his pleaſure: for if he may deviſe the Land for 21 years, to begin preſently, he may make it to begin at any time after his death, if the Term of the Wife be

not

not expired; but for the remainder of the Term, if the Husband made no diſpoſition of it, the wife ſhould have it. Mich. 35 Eliz. in B. R. *Popham* 5.

5. In an Action of Debt for Rent, the Caſe was this; A man poſſeſſed of a Term for 20 years in the right of his wife, made a Leaſe for 10 years, rendring Rent to him, his Executors and Aſſignees, and dyed; The Queſtion was, Whether the Executors or the Wife ſhould have the Rent? *Crooke* and *Haughton*, Juſtices, held, That the Rent was gone. *Mountague*, contrary. But it was agreed by them all, That the Executors of the Husband ſhould not have it. It was alſo agreed, That if Leſſee for 20 years makes a Leaſe for 10. years, and then ſurrenders his Term, that the Rent is gone. And it was holden in the principal Caſe, If the Husband after the Leaſe made, had granted over the Reverſion; his Grantee ſhould not have the Rent. *Mountague* ſaid, That in the principal caſe, the Wife in Chancery might be relieved for the Rent. Trin. 16 Jac. in B.R. *Blaxton* and *Hexly*'s Caſe. *Godbolt.* 299.

6. Lands were deviſed to the Husband and Wife for their lives, the remainder to the Survivor of them for years; The Husband granted over this Term of years, and dyed; and the Queſtion was, Whether the Wife ſhould have the Term of years, or the Grantee? And it was adjudged, That the Wife ſhould have it: and the reaſon was, becauſe there was nothing in the one or the other to grant, untill there was a Survivour; and the ſame Law had been, if the wife had dyed after the grant, and the Husband had ſurvived; yet he ſhall have the Term againſt his own grant. 20 Eliz. adjudged accord. See *Popham* 5. acc.

7. Husband and Wife were Leſſees of a Houſe in *Fleetſtreet*, called the *Three Coneys*; the Huſband made a Leaſe of it for part of the years, by theſe words, *The Houſe and Tenements in Fleetſtreet, called the Three Coneys, with all the Chambers, Sellers, Shops, Excepting and reſerving to J. S. the Husband, the Shops for his proper and only uſe and occupation*: and within the Term the Husband dyed; his Wife ſurvived him, and entred into the Shops. In this caſe it was adjudged, That the Entry of the Wife was lawfull; for the Exception of the Shops was void, and but temporary at the moſt; *ſcil.* during the time they were in the occupation of the Husband himſelf; and then by the death of the husband, the Houſe and Shops for and during the remainder of the Term, did remain to the Wife, not being diſpoſed of by the Husband in his life-time. Trin. 9 Eliz. *Dyer.* 264.

8. Note theſe Rules, concerning what things the Husband ſhall have by the Intermarriage with his Wife, and what not: 1. If the Wife hath a Term for years, or other Chattell-reall, and taketh a husband, he is poſſeſſed of the ſame in the right of his Wife, and may diſpoſe of it by Grant or Deviſe, or may forfeit it by Attainder or Outlawry: and ſuch a Term may be extended for the Debt of the Husband; but the Husband cannot diſpoſe of it by his Will. 2. If the Husband chargeth the Chattell-reall of the Wife, the ſame ſhall not bind the wife, if ſhe out-live her Husband. 3. If the Wife hath a Right of Action to, or for, a Chattel-reall, and ſhe taketh a Husband, and dyeth, the Husband ſhall not have the ſame by the Intermarriage, but the Executors or Adminiſtrators of the Wife: and ſo is the Law, If the wife hath but a poſſibility to a thing. 4. If a woman hath Chattels-real in the right of another as Executor, or as Adminiſtrator, or as Guardian in Socage, theſe are not given to the husband by the Intermarriage, although that he doth over-live his Wife. 5. If a woman granteth a Term to her uſe, and afterwards taketh a Husband, and dyeth, the Huſband ſhall not have the Truſt in the Term, but the Executors or Adminiſtrators of the Wife, becauſe the ſame conſiſts in privity. 6 Chattels real of a mixt nature, *viz.* part in poſſeſſion, and part in action, which happen during the Coverture, the Husband ſhall have them by the Intermarriage, if he over-liveth the Wife, as the Arrearages of a Rent encurred during the Coverture. But if the Husband ſurviveth, he ſhall have them. And now by the Statute of 32 H. 8. Cap. 37. the Husband ſhall have the Arrearages incurred before the Marriage, if he over-liveth the Wife. 7. All Chattels perſonals in poſſeſſion of the Wife in her own right, are given to the Husband, whether he over-live his wife or not; But Chattels which are perſonal in Action, the Husband ſhall not have them by the Intermarriage, if he and his wife do not recover them in the life-time of the Wife. 8. If the Woman hath but a bare poſſeſſion of Chattels perſonals, as by Trover or Bailment, theſe are not given to the Husband by the Intermarriage: but for ſuch, *Detinue* doth lye by the husband and wife. See *Cook* 1. Part, *Inſtitutes*, 351, 352. And ſee for the proof of theſe Rules and Grounds, divers Caſes herein, after mentioned.

9. If a Leaſe be made to husband and wife during their lives, the remainder to the Executors of the Survivour of them; If the husband grants away this Term, and dyeth, the ſame ſhall not barre the wife, becauſe the wife had but a poſſibility, and no Intereſt. Hill. 17 Eliz. in C.B. adjudged accordingly. But if a man be poſſeſſed of a Term for 40 years in the right of his wife, and he maketh a Leaſe for 20 years reſerving Rent, and

dyeth, albeit the wife ſhall have the reſidue of the Term, yet the Executors of the husband ſhall have the Rent, for that it was not incident to the Reverſion, becauſe the wife was not party to the Leaſe. And ſo it is, if the husband had made a grant of the whole Term, upon Condition, That the Grantee ſhould pay a ſum of money to his Executors, &c. and the husband had dyed, and upon breach of he Condition, the Executors had entred; It had been a good diſpoſition of the whole Term, and therewith he had been barred, becauſe the whole Intereſt was paſſed away by the husband. *Cook* 1. Part, *Inſtitutes*, 46. See Sect. 2. before. See *Cook* 10. Part. *Lampits* Caſe, acc.

10. A man deviſed, That after his debts and Legacies paid, That his wife ſhould have the reſidue of his goods to diſtribute for the ſoul of the Teſtator; and afterwards he made his Wife his Executrix, and dyed; the wife took another huſband, who made his Executors, and dyed, againſt whom the wife brought an Action of *Detinue* for the goods of the firſt husband: And it was adjudged, That the Action did well lye: for that ſhe had not the goods as a Legatory, but as Executor to her firſt husband; and ſo ſhe being poſſeſſed of them in *auter droit*, they were not given to the ſecond husband by his Intermarriage with the wife; nor could the ſecond husband diſpoſe of them. 16 Eliz. *Dyer* 331.

11. Debt was brought againſt the husband and wife, upon an Obligation made by the wife before marriage; which being found againſt them, It was moved by the Defendant's Counſel, That the Writ againſt them, was in the *Detinet tantum*, where it ought to have been in the *Debet et Detinet*: For the wife who was party to the Action, made the Obligation by her ſelf; and the Intermarriage was a guift in Law of all the perſonal goods, and diſpoſition of all Chattels reals, and all thoſe he had to his own uſe, and not to another uſe, as Executors: And becauſe the husband hath the goods and Chattels of his wife to his own uſe, the Writ ſhall be brought againſt them in the *Debet et Detinet*: And of that Opinion was the whole Court; and that therefore the action brought in the *Detinet* onely, did not lye. Trin. 30 Eliz. in B. R. *Cook* 5. Part, 36. *Walcotts* Caſe.

12. If a Grant be made to a woman who taketh husband, and the woman dyeth, the Husband may vouch by force of this word [*Grant*] although he cometh to it by Act in Law, as by Intermarriage or otherwiſe: ſo if a man demiſe or grant Lands to a woman for years, and the Leſſor Covenanteth with the Leſſee, to repair the houſes during the Term, the woman taketh husband, and dyeth, the husband ſhall have an Action of Covenant as well upon the Covenant in Law, upon theſe words, [*Demiſe and Grant*] as upon an expreſſe Covenant. *Cook* 5. Part, 17. in *Spencers* Caſe.

13. The Caſe was; A woman being Adminiſtrator to her former husband, brought Debt upon a Bond due to her Teſtator, and had Judgment to recover; afterwards the wife dyed, and a year and a day being paſt, the husband brought a *Scire facias* to have Execution. It was holden, That the *Scire facias* did not lye for the husband, becauſe being a debt demanded by the wife as Adminiſtratrix, it is in *auter droit*; and although that they do recover, yet ſhe dying before Execution, the duty remains to him who takes new Adminiſtration as in the right of the Inteſtate; and although the husband be party to the Judgment, yet he hath no property in the debt; and he who ought to have the *Scire facias*, muſt have privity and property to have the debt: But if husband and wife bring an Action of Debt, for a debt due to the wife, and recover, and the wife dyeth, the husband may bring a *Scire facias* to execute the Judgment; for the debt being recovered, the husband ſhall have it after the death of the wife. Hill. 16 Car. in B.R. *Beaumont* and *Longs* Caſe, *Cro.* 1. Part, 150. See Trin. 12 Jac. in B. R. *Cro.* 1. Part, 334. acc.

14. In *Ejectione Firmæ*, the Caſe was; A Termor demiſed his Term to J. S. who made his Wife his Executrix, and dyed; the wife entred, and proved the Will, and afterwards took husband, and the husband takes a Leaſe of the Leſſor; after, the Deviſee entred, and granted his Eſtate to the husband and wife: Two Points were in this caſe; 1. If by this acceptance of the new Leaſe by the husband, the Term which the wife had to another, *viz.* to the uſe of the Teſtator ſhould be deemed a ſurrender. And the Opinion of the Court was clear, That it was a ſurrender. 2. When the Deviſee enters into the Term deviſed to him without the aſſent of the Executor, and after grants his right and Intereſt to the Executor, If the grant were good, becauſe he had not any Term in him, but onely a right of the Term ſuſpended in the Land? And it was holden to be a good Grant, and that it ſhall enure firſt to the agreement of the Executor by the acceptance of the Grant; and ſecondly, the Deed ſhall have operation to enure by way of Grant to paſs the Eſtate of the Deviſee to the Executor. Trin. 27 Eliz. in C. B. *Carter* and *Lawes* Caſe, *Owen* 56.

15. Note; That upon a Divorce, the woman ſhall have her goods again which were given in marriage, except they are ſpent, becauſe they were given for the Advancement of the woman; and *Ceſſante Cauſa ceſſat effectus*. 28 H. 8. *Dyer* 13. acc.

5. *When*

5. Where the Covenant or other Act by the husband, ſhall bind the Wife after his death; where not. And where the Act of the Wife ſhall bind the Husband, et è contra: And where the acts of them both ſhall bind them.

1. A Leaſe is made by Indenture to Husband and Wife for years, and there is a Proviſo in it, That if they are diſpoſed to alien, that the Leſſor ſhall have the firſt Offer, if he would give for it as another would: It was a doubt, Whether this were a Condition, or a Covenant? But by *Shelley*, Juſtice, If it be but a Covenant, the wife ſhall be bound by it, if ſhe ſurvives, and occupieth the Land, eſpecially being a Covenant which riſeth upon the Eſtate. Trin. 28 H. 8. *Dyer* 13.

2. A Woman brought a *Scire facias* to have execution of the third part of a Mannor recovered by Writ of Dower; The Tenant pleaded in barr, That after Judgment, and before the *Scire facias*, that ſhe had by her acquittance the receipt of 30 l. of the Defendant due for his Rent, parcel of the yearly Rent of 61. adjudged to the Plaintiff in full ſatisfaction of her whole Dower, which ſhe ought to have of all the Lands which were her late Husbands before the Marriage. And it was holden to be no Plea, becauſe it was not Iſſuing out of the Land in which ſhe demanded Dower, wherefore the Tenant pleaded, That it was Iſſuing out of that Land. It was holden, If it were iſſuing out of the Land Aſſigned to her in Dower, the Acceptance did bar her, otherwiſe not. Mich. 5 Ma. *Dyer*. 91. See *Cook* 4. Part *Vernon's* Caſe. In that Caſe it was ſaid, That if before the Statute of 32 H. 8. Husband and Wife do make a Leaſe for years by word, rendring Rent; and the Huſband dyeth, and the Wife accepteth the Rent, that that doth not make good and affirm the Leaſe, becauſe her aſſent is requiſite at the making of the Leaſe, which ſhe cannot do without Deed; Quære, of that: For ſee *Cook* 2. Part 61. in *Wiſcotts* Caſe. Paſc. 33 Eliz. *Moſeley* and *Guilberts* Caſe. Trin. 31 Eliz. *Bateman* and *Allens* Caſe, and divers other Preſidents vouched, That ſuch a demiſe made by Husband and Wife without alledging the ſame to be by Deed, was good enough.

3. Sir *William Candiſh* Treaſurer of the Kings Chamber, being ſeiſed of Lands, Covenanted to ſtand ſeiſed thereof to the uſe of himſelf and his Wife, and the heirs of the Husband, and dyed, his Wife married *William Scyntlo* Captain of the Guard, who were brought into the Exchequer by proceſſe to accompt; and returned to be Ter-Tenants of the Lands. It was agreed in that Caſe that they ſhould accompt, becauſe they were Ter-Tenants of that Land, of which Sir *William Candiſh* was ſole ſeiſed, after the Office was granted to him. But it was holden in that Caſe, That if Sir *William Candiſh* his Wife had bin a Joynt-purchaſor with her Husband of the Lands during the Coverture, and before the Office had bin granted to him, that the ſaid Land ſhould not have bin lyable. Trin. 6 Eliz. *Dyer*. 224.

4. The Caſe was, The Husband was ſeiſed of Lands in the right of his Wife, they both joyned in Exchange of the Lands with a ſtranger, for other Land, which Exchange was Executed; The Husband and Wife ſeiſed of the Lands taken in Exchange, alliened the ſame by Fine; It was holden by the Juſtices, That the Wife after the death of her Husband, might enter into her own Lands, notwithſtanding the Fine. And it was reſembled to the Caſe of 19 Eliz. *Dyer*. 359. The Husband after Marriage aſſured to his Wife a Joynture; they both levyed a Fine *ſur Conuſans de droit*, &c. of the gift of the Husband, that the ſame ſhall not bar the Wife of her Dower, for that the Election is not given to the Wife to claim her Dower, untill after the death of her Husband. Hill. 28 Eliz. in C. B. *Leon*. 285.

5. The Husband claimed Lands in the right of his Wife, and made a Leaſe to J. S. for 5 years, to try the Title, who thereupon brought an *Ejectione firmæ*: The Defendant pleaded: That the husband, the Leſſor dyed after the Leaſe made, and before the Action was brought, ſo as the Leaſe was void, and determined by his death, and it cannot be then ſuppoſed, that he doth *ad hunc tenere* the Plaintiff out of poſſeſſion, and as this Caſe is, the Leſſee hath no cauſe to have any *habere facias Poſſeſſionem*; but it was holden by the Court, That in regard the Wife had not entred after the death of her Husband, the Leaſe is not determined, nor void after the death of her Husband, but voidable onely. Mich. 11 Jac. in B. R. *Jordan* and *Wikes* Caſe. *Cro*. 2. part 332.

6. In Treſpaſſe, the Caſe was, Husband and Wife (in the right of his Wife) and a third perſon, were Joynt-Tenants for the lives of the Wife, and the 3d perſon. The Husband and Wife by Deed let the moyety for 21 years, the Wife dyed the ſurviving Joynt-Tenant entred, and drave out the Cattel of the Leſſee, who thereupon brought Treſpaſſe, and whether this Leaſe ſhould bind the Survivor was the queſtion; It was objected, That the Husband was not Joynt-Tenant, but in the right

right of his Wife, and had not any power to contract for any longer, than during the life of his Wife, and here the Wife is dead, therefore the Leaſe is void, *quoad* to her and the ſurvivor. But it was holden by the Court, That the Leaſe was good, and is a good Leaſe made by her, untill ſhe after the Coverture, or one who claims in privity by her, avoids it by Entry, for it is not void by the death of the Husband, but voidable; and the avoydance cannot be by the Joynt-Tenant Survivor, for he is paramount the Wife, and not under her: and therefore the Leaſe being good, till it be avoided by one who hath privity, ſhall bind as long as any of the Joynt-Tenants be alive. Mich. 13 Jac. in B. R. rott. 609. *Smalman* and *Agborowes* Caſe. *Cro.* 2. Part 417.

7. Husband and Wife ſeiſed of Lands in *London*, in the right of the Wife, they by Indenture Covenanted to ſuffer a Recovery thereof, to the uſe of the Recoverers, untill they had made a Leaſe for 40 years, and after to the uſe of the Husband and Wife, and the heirs of the Wife; the Leaſe was made accordingly: The Husband dyed, the queſtion was, Whether this Caſe was determined by the death of the Husband, or not, and that the Wife ſhould avoid the Leaſe; It was the Opinion of the Juſtices, That the Wife ſhould not avoid the Leaſe by the limitation to the Recoverers untill, &c. but ſhall hold under the ſaid recovery; for her former eſtate was gon and extinct by the Recovery, ſo as the Term precedes her Eſtate: But what remedy ſhe had for the Rent reſerved, is there a Quære, becauſe the Wife came in *en le poſt*, and the Rent was reſerved, before her uſe created. Trin. 2. Eliz. *Dyer.* 290.

8. Husband and Wife made a Leaſe by Indenture for years rendring Rent, the Leſſee entred, the Husband before the day of payment of the Rent dyed, and the Wife alſo before the day of payment married a ſecond Husband, who accepted the Rent at the day; It was the Opinion of the Court, That the Wife could not ouſte the Termor, becauſe ſhe might have avoided the Term before the day at her pleaſure; which now ſhe hath reſigned to him, who was her ſecond Husband. Paſc. 4, & 5. *Ma. Dyer.* 159.

9. In Trover and Converſion for divers Jewels, brought by the Adminiſtrator of Serjeant *Davis*, againſt Sir *Archibald Duglaſſe*; The Caſe upon a Speciall Verdict was this, Serjeant *Davis* was poſſeſſed of 65. great Pearls, 65. ſmall Pearls, and a Diamond-Chain; and made his Will, and deviſed the uſe and occupation of all his Plate hangings, and Jewels to his Wife, during her Widowhood, ſhe giving Security to deliver and leave the ſame to his daughter at the day of her death, or ſecond marriage, which ſhould firſt happen, and dyed poſſeſſed of them, and that after his death Adminiſtration of his goods was committed to the Plaintiff. The Wife of Serjeant *Davis* was the daughter of the Earl of *Caſtle-Haven*. That ſhe in her life time uſed the ſaid Jewels, *et ut ornamenta corporis ſui* wore them: that afterwards ſhe married with the Defendant, and that he converted thoſe Jewels; This Caſe being argued by the Court, to whom the Jewels did belong, The Court was divided in Opinion; For *Jones* and *Berkly* held, That ſhe being the daughter of a Noble man, and permitted to uſe them *ut ornamenta corporis ſui*, ſhe ſhould have them as her *Paraphernalia*, and when there are no debts to be paid (as there was not in this Caſe) ſhe ſhould have them againſt the Executors and Adminiſtrators, and that the Husband could not diſpoſe them by his Will, but inſtantly upon his death, the property of them is veſted in the Wife; and although the Husband may make a gift of them in his life time yet he cannot make a Will of them, like as the Caſe, where the Wife hath a Term, and takes a Husband he may give and diſpoſe thereof in his life time, but he cannot diſpoſe of it by his Will. *Plow. Com.* 416. *Bracebridges* Caſe. And the permiſſion of the Wife to wear them, uſually is a gift of them by the Husband to the Wife. *Richardſon* and *Croke* Juſtices, contrary; That ſhe could not take them but according to the Will, and if the Husband had not made any Will; And where there be no debts of Legacies to pay, or Affects left to pay them; there peradventure the Law will allow the Wife to enjoy them as her *Paraphernalia*; but where he makes a Will, ſhe ought to take them as is appointed by the Will; and the permiſſion of the Husband to the Wife to wear them, can be neither a gift in Deed nor in Law of them, for the Husband cannot give ought to his Wife. And all Chattels (although the Wife had them before) the abſolute property of them by the marriage, is veſted in the Husband; and ſo of thoſe goods called *Paraphernalia*, the property is in the Husband, and he may diſpoſe of them: And in confirmation of their Opinions, they vouched the Caſe, Trin. 28 Eliz. Where the Executors of *Viſcount Bindon* brought Trover and Converſion of Jewells of the value of 1000 l. againſt *Mary* Viſcounteſſe *Bindon*; and ſhe pleaded, That at the time of his death, ſhe uſually wore thoſe Jewells, as Ornaments of her body, and averred, that the Executors had Affects to pay all debts, &c. beſides thoſe goods: And Iſſue was taken, that they had not Affects: in which Caſe it was obſerved; That Jewells of 1000 l. were not allowed *Paraphernalia*, if the Husband had diſpoſed of them in Legacies; But *Quacunque via data*; they agreed that the Husband might diſpoſe of them by his Will; and that the

the Wife could not take them without the Aſſent of the Executors, and this expreſſe declaration in his Will, how the Jewells ſhall be diſpoſed of, controlls any implyed gift of them, as is pretended: Quære, for the Caſe was not Reſolved then by the Court. Trin. 8 Car. in B. R. The Lord *Haſtings* and Sir *Archibald Douglaſſes* Caſe. *Cro.* 1. Part 251, 252, 253.

10. A. was bound in a Statute of 2000 l. to B. who dyed Inteſtate, the Adminiſtration of the goods of B. was committed to his Wife, who entermarried with C: C. became bound with others to the King in 600 l. and then C. and his Wife did, by Deed Enrolled, aſſign this Statute to the King, for the payment of the ſaid Debt of 600 l. to the King. It was Reſolved in Court of Wards, that this Aſſignment made by the husband and Wife to the King was good, notwithſtanding the Statute of 7 Jac. which makes Aſſignment of debts void, other than ſuch as did grow due originally to the Kings debtor *bona fide*; and that this being C's. own debt, and though the Statute was not to his own uſe, but did belong to his Wife, to whom the Adminiſtration of the goods of B. was committed: yet by the inter-marriage C. had the Intereſt and power of this Statute, and ſo he might lawfully aſſign over the ſame to the King, in ſatisfaction of the Debt, which C. and others owed to the King: And it was holden, that as C. might have releaſed and diſcharged the Statute, and the ſame ſhould have bound his Wife; ſo by the ſame reaſon he might Aſſign the ſame. Paſc. 17 Jac. in the Court of Wards. *Breadman* and *Coals* Caſe. *Hob.* 253.

11. In an *Ejectione firme*, It was found by Special Verdict, That a Copyholper ſeiſed in the right of his Wife, made a Leaſe for years, and it was a queſtion whether it was a forfeiture of the Inheritance of the Wife. It was ſaid it was no forfeiture. But *Dodderidge* Juſtice took this difference; Where a Feme ſole is a Copy-holder, and ſhe takes a Husband, who makes a Leaſe for years without Licence, the ſame is forfeiture, becauſe it is her folly to take ſuch a Husband as will forfeit her Land; But where a Copyhold is granted to a Feme Covert, and the Husband maketh a Leaſe without Licence, in ſuch Caſe it is no forfeiture. Quære, and ſee *Cook* 8. Part 44. in *Whittinghams* Caſe. Trin. 21 Jac. in B. R. *Severne* and *Smiths* Caſe. *Godbolt.* 345.

12. Note, by *Hobart* Chief Juſtice, The Law of Nature hath put a Feme Covert under the obedience of her Husband, and hath ſubmitted her Will to his; the Rule of which is *Cui ipſa in vita ſua Contradicere non potuit*; and therefore will not bind her by her Act joyning with her Husband, becauſe they are judged his Acts, not hers: yet the Law of the Land makes bold, and diſpenſeth with this Law of Nature in ſome Caſe, and therefore the Law of the Land allowes of a Fine levyed by the Husband and Wife, becauſe ſhe is examined of her Free will by a perſon truſted by the Law, or by the Kings Writ, and ſo taken as a Feme Sole; Alſo if a Feme Covert levy a Fine alone, as if ſhe were a Feme Sole, this for the reaſon aforeſaid, ſhall bind her that ſhe ſhall not be received to ſay, that ſhe was a Feme Covert; although her Husband ſhall, and may enter, and reſtore the Land again to himſelf, and alſo to the Wife: See *Cook* 7. Part 8. the Counteſſe of *Bedfords* Caſe. acc. Hill. 12 Jac. in C. B. by *Hobart*, in *Needler* and the Biſhop of *Wincheſters* Caſe. *Hob.* 227.

13. Husband and Wife ſeiſed of Lands in the right of the Wife, levyed a Fine to the uſe of themſelves for their lives, and afterwards to the uſe of the Heirs of the Wife: Proviſo, that it ſhall and may be Lawfull for the Husband and Wife at any time during their lives, to make Leaſes for 21. years, or three lives. The Wife being Covert, made a Leaſe for 21. years; It was adjudged a good Leaſe againſt the Husband, although it was made when ſhe was Covert, and although it was made by her alone, by reaſon of the Proviſo. Paſc. 21. Jac. in C. B. *Godbolt*, 327.

14. In an *Ejectione firme* upon a Special Verdict found, The Caſe was this; Tenant for life, the Remainder to Husband and Wife, and their Heirs; the Husband and Wife ſuffered a common Recovery; and whether the heirs of the Wife ſhould be barred by this Recovery was the queſtion, becauſe it was conceived ſhe was not Tenant to the *precipe*, nor doth it appear that ſhe was examined, and ſo nothing was recovered from her. In other Caſes the party may be bound by Eſtople, namely, where he might have pleaded to the Writ, but here the Feme Covert is not admitted ſo to do; and the Feme Covert here is not ſo concluded, by her admiſſion, that ſhe may not be admitted to ſpeak againſt this Recovery, if ſhe ſurvive her Husband, neither are her heirs concluded ſo to do, although ſhe do not ſurvive, although peradventure as to the warranty they may be concluded: But the Court ſaid. 1. It is not to be queſtioned, Whether a Recovery bind a Feme Covert. 2. It is not neceſſary to examine a Feme Covert upon ſuffering a Recovery, although it be a prudentiall thing to do it; but if it be not done, it is not averrable, that it was not done: The materiall queſtion here is, If the Wife be Tenant to the *Precipe* or not, ſo as ſhe ſhall be eſtopped to ſpeak againſt the Recovery: It was holden ſhe was eſtopped, for ſhe joyns in it with her Husband, and here is no default made by the husband, and the Record

cord is perfect; and she might have pleaded; and the recompence in value shall go to the heirs of the Wife; and she being party and privy to the Recovery is bound by it, and it shall bind her heirs also. Hill. 1651. rott. 1002. in C. B. *Locker* and *Palfrimans* Case. *Styles* 319, 320.

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6. *Where Acts done by them both, or either of them; and what Acts shall be good, what not: What Acts or things the Wife may do to the Husband, or the Husband to the Wife; what not; And where the Husband shall answer for the Act done by the Wife, and the Wife bound by the Act of the Husband.*

1. A Man made a Feoffment in Fee of a Manor, to the use of himself and his Wife, and his heirs, in which Manner there were underwoods which were usually cut every 21. years. The husband suffered the underwoods to grow to 15. years growth. The question was, If this suffering of the husband of it to grow to 25 years, during the Coverture, should bind the Wife so as she could not cut down the woods without committing wast. The Opinion of the Court was, That this permission of the wife should bind the wife; for the time is limited by the Law, which cannot be altered, if it be not the Custome of the Country. And the wife cannot fell the woods, notwithstanding at the time of her estate she might, and therefore because it was not felled before such time as the Lease appointed it to be felled, if the wife cut them down it should be wast. *Hill.* 23 Eliz. in C. B. *Godbolt.* 6.

2. Note, It was said by *Manwood* and *Dyer* Justices, That if a woman hath a Term, and takes a husband, who purchaseth Fee, that the Term is extinct, because the husband hath done an Act which destroyes the Term, viz. the purchase: But if the woman had enter-married with the Reversioner there the Term should not be extinguished, for the husband hath done no Act to destroy the Terme. Pasc. 17 Eliz. in C. B. *Godbolt.*

3. In an Action of Trespasse, The Custome of a Mannor was laid to let; That every Woman *vire coverta poterit* devise her Lands, being Copyhold-Lands, whereof she was seised in Fee to her husband, and surrender the same in the presence of the Reeve and six other persons: And it was found, That J. S. was seised of the Land where, &c. and had Issue two daughters, and dyed, and that they married two husbands, and that the one of the said daughters devised her part to her husband by Will in writing in the presence of the Reeve and six other persons, and afterwards at another day, she surrendered to her husband, and he was admitted, and the wife dyed, and her husband continued in possession: And the husband of the other daughter brought an Action of Trespasse against him: And it was the Opinion of the Court That the Custome was not good. 1. Because of the incertainty, for it is not mentioned of what estate she might make the Devise. 2. Because it is against reason that the wife should surrender to her Husband: for the wife hath not any Will, but the Will of her husband, and the wife cannot devise to her husband, for that should be the Act of the husband to convey the Land to himself: Also the custome is not good, For it is that *Quælibet Femina vero cooperta poterit*, &c. and it ought to be, that Feme Coverts *possunt* for Custome and Prescription must be in a thing done; also the devise is not according to the Custome. For that is that she may devise and surrender, and that ought to be at one time, and that in the presence of the Reeve and six other parties, at the surrender; and the words of a Custome must be performed strictly. It was holden that the Custome, surrender, nor devise were good; and therefore that the Action of Trespasse was well brought. Pasc. 25 Eliz. in C. B. *Shipwithes* Case. *Godbolt*, 14, 15, and 16.

4. A man being Tenant for life in the right of his Wife, made a Deed of Feoffment, *Habendum*, to the Feoffee and his heirs *ad solum opus & usum*, of the Feoffee and his heirs, for the life of the wife; and it was the clear Opinion of the whole Court, That in this Case, the husband by his Act had forfeited the estate of the Wife, because the *Habendum* was absolute, and the use in another clause, and although he doth not limit the use but for life, yet the Law limits the remainder of the use to the party who maketh the Feoffment. Mich. 31 Eliz. in B. R. Sir *Raph Egerton's* Case. *Godbolt.* 141.

5. Note by the Common-Law, A man could not by any conveyance in possession, Reversion, or Remainder limit an estate to his wife; nor since that Statute of 27 H. 8. can a man Covenant with his Wife to stand seised to her use, because he cannot grant nothing to her, nor can he covenant with her, they being one person in Law; but at this day a man may by his deed Covenant with others to stand seised to the use of his wife, or to make a Feoffment, or other conveyance to his wife, because a use is but a trust and confidence, which by

by such a means may be limited by the husband to the wife. *Cook* 1. Part *Institutes* 112. And at this day, a man may surrender his Copy-hold Land to the use of his wife, because the husband doth it not immediately to the wife, but by two means, the surrender by the husband to the Lord to the use of his wife, and by the admittance of the Lord according to the surrender; but if the Estate did passe immediately from the husband to the wife, it could not be, as it was adjudged. *Cook* 4. Part 29. in *Buntings* Case.

6. Husband and Wife levied a Fine of the wives Land, the wife being within age, then both brought a Writ of Error to reverse the Fine, the question was, If it should be reversed as to the wife onely, or against both; or against the husband onely, according to the Opinion of *Belknap.* 50 E. 3. And after long debate, It was Resolved, It should be against them both, for that it is entire, and cannot be affirmed in part, and disaffirmed in part. 31 Eliz. in B. R. *Charnock* and *Worsley's* Case. *Owen.* 21.

7. In Debt upon an Obligation, the Case was, Two were bound to a third, joyntly and severally, the Obligee made the wife of one of the Obligors his Executrix and dyed, The woman Executrix Administred, Then the husband the Obligor made his Executrix and dyed, leaving Assetts to pay the debt, Then she dyed, and the Plaintiff took Letters of Administration of the Goods and Chattells of the Obligee unadministred, and brought his Action against the Defendant, being the surviving Obligor. It was adjudged by the Court, That when the Obligee makes the wife of one of the Obligors his Executrix, the Action at least was suspended, and a personal Action once suspended, is extinct; another reason more sure was, when the Obligor made the Executrix of the Obligee his Executrix, and left Assets, the debt was presently satisfied by way of retainer, and no new Action can be had for the same debt. Hill. 11 Jac. in C. B. 1990. *Fryer* and *Gilbridge's* Case. *Hob.* 10.

8. A. possessed of a Lease for 100. years by Indenture, betwixt him and his wife of the one part, and T. of the other part; Sealed by A. but not by his wife, Assigns all their estate in the Lease to T. *reddendo et solvendo*, to him and to his wife *durante termino*, to them, and the survivor of them, the rent of 7 l. at *Michaelmas* and *Annunciation*. Proviso, If the rent be behind 40 dayes after, &c. and not paid to him and his wife, or the survivor of them then it shall be lawfull to him and his wife, and the survivor of them and their Assigns to re-enter: A. dyes, his wife survives him, the rent is behind, the wife the last of the 40 dayes, demands it; the Administrator of A. also demands the Rent: T. Assigns his Interest and estate to the Plaintiff. The Administrator of A. enters, and lets the Land to the Defendant: The Opinion of the Justices was, That although the *reddendo & solvendo durante termino*; if there had been no more said, it had bin a Reservation during the Term, yet he doth not rest upon that, but sayes further, rendring to him and his wife and the survivor of them, if they live so long, that is an expresse reservation, that it shall not be during all the Term, but to him and his wife, and the survivor of them, and the reservation to his Wife is void, because she is no party in Interest or to the deed; And (to the survivor of them) is void also, therefore the Rent endures no longer then the life of the husband; Also, they held that the word here (*solvendo*) as was objected, cannot enure by way of grant to the wife, when it is by way of reservation to the husband, for it shall not be construed to enure in several manners; It was adjudged that neither the wife, nor the Administrator had Title to the rent, but the rent was gone: and it was adjudged for the Plaintiff. Hill. 7 Car. in B. R. *Bland* and *Inman's* Case. *Cro.* 1. Part 210, 211.

9. Note, that after a *Dedimus potestatem*, a Conusance of a Fine taken of a Feme Sole, and before the day in Bank: for the Recording and Ingrossing of it, the woman took a husband: It was the Opinion of the Court, That notwithstanding that, the Fine should be recorded, as the Fine of a Feme Sole, for that she had done all that which was in her to do; and that the same should bind the wife and her heirs; and also it was said that the husband should be bound by such a Fine, for that the marriage of the wife was her own Act; but if the wife had dyed before the return of it, then the writ of Covenant had abated, because that was by the Act of God. Quære. Mich. 7. Eliz. *Dyer.* 246. 12 Jac. in C. B. adjudged, acc.

10. In Trover and Conversion of Hops; The Case appeared to be this: A woman was Tenant for life, the Remainder to another for life; And a certain parcell of Hops were growing out of the Ancient roots, being within the Lands in question The wife dyed, the Hops there growing, and not severed: And, whether the said Hops did belong to the husband, or to him in the Remainder was the question. The Court was of Opinion, That they should go to the husband, and not to him in the Remainder, like Emblements which shall go to the husband, or the Executor of the Tenant for life, and not to him in the remainder, and especially in this Case, because the wife dyed so small a while before the gathering of them, and that they be such things as grow by manurance and industry of the owner, by the making of hills, and setting of Poles. Mich. 11 Car. in B. R. *Latham*

thams and *Atwoods* Case. *Cro.* 1. Part. 390.

11. In an Action of Waſte, the Plaintiff declared, That A. was ſeiſed of the Land, and gave it to B. and C. his Wife, and to the heirs of their two bodies, (whoſe heir the Plaintiff is) and that B. and C. his Wife, made a Leaſe to the Defendant for 21 years; and that B. and C. were dead, and that the Plaintiff was heir in tail, and that the Defendant had done Waſte. The Defendant pleaded, That the ſaid B. and C. did not demiſe, &c. Upon which being at Iſſue, The Jury found, That B. and C. by their Deed Indented, made the Leaſe, *prout ſupra*, and that B. dyed; and that after his death, C. entred, and diſagreed to the Leaſe; and if the Iſſue was found for the Plaintiff, foraſmuch as it was found that both made the Leaſe; Or, If it were found for the Defendant by matter, *ex poſt facto*, by the diſagreement of the Wife, was the queſtion: And after many Arguments made, It was adjudged for the Defendant, for now by the diſagreement of the Wife in Judgment of Law, it was the Leaſe of the Husband onely; and yet in truth, during the life of the Husband, it was the Leaſe of them both: but now by the diſagreement of the Wife ſubſequent, and the operation of the Law, it was the Leaſe of the Husband onely, for if *ab initio*, it had not bin the Leaſe of the Husband onely, the Iſſue had bin found for the Plaintiff. Paſc. 28 Eliz. in C. B. rott. 122. *Thetford* and *Thetfords* Case. vouch. in *Cook* 3. Part in *Butler* and *Booker's* Case. See *Leon.* 204. the ſame Caſe.

12. A. ſeiſed of Lands in Fee, levyed a Fine thereof to B. and C. and to the heirs of B. who granted, and rendred the ſame to A. and his Wife, who was not party to the Writ, or to the Coniſance, and to the heirs of A: A. ſuffered a Recovery with voucher in the life of his Wife, and afterwards dyed: the Wife dyed: he in the Remainder brought a *Scire facias*, to have execution of the Remainder: In this Caſe it was adjudged; 1. That the grant and render to the Wife was not void, but voidable, although ſhe were not party to the Writ, or Coniſance. 2. That this Recovery againſt the Husband onely, ſhould not bind the Remainder, for that between Husband and Wife, there are no moyeties, and the Joynture was not ſevered by the Recovery againſt the Husband alone; and this Caſe is as much as if the Husband had had a Remainder in tail, expectant upon an eſtate for life, in which caſe, a common recovery had againſt him, ſhall not bind, becauſe he was not Tenant to the *Præcipe*, nor ſeiſed by force of the tail; but the Recovery as to the eſtate of the Husband, took effect by Eſtoppell and Concluſion. Trin. 27. Eliz. in C. B. rott. 276. *Owen* and *Morgans* Case. vouched in *Cook* 3. Part 5. in the Biſhop of *Wincheſters* Case.

13. A Feme Covert cannot take any thing of the gift of her Husband; but ſhe may purchaſe from others without the Aſſent of her Husband; But if the Husband doth diſagree, the Eſtate is devested; and if the Husband do agree, yet after the death of the Husband, the wife may wave it, if ſhe do not agree to the purchaſe after the death of the Husband. *Cook* 1. Part *Inſtitutes* 3.

Barr.

1. *What ſhall be a good barr, in Debt brought upon an Obligation; and What not.*

1. A. Brought Debt for 40 Quarters of Malt, and declared upon two Obligations; in which the Defendant acknowledged himſelf to owe 20 Quarters, to be delivered to J. ſuch a day; and if he failed, to pay 40. The Defendant pleaded a Tender, and that the Plaintiff refuſed Judgment of Action: upon which the Plaintiff demurred: and after, the Plaintiff releaſed 20 Quarters, and had Judgment. In that caſe it was holden, That the Defendant ought to have pleaded unto the firſt. See *Cook*. 1. Part, *Inſtitutes*, In Debt upon an Obligation for payment of money, If the Defendant plead a Tender at the day, there he ought to plead, That he is yet ready: But if a man be bounden to deliver *bona peritura* there in Debt, if the Defendant plead a Tender at the day, he ſhall not plead, That he is yet ready, becauſe it is a charge to him to keep them: but where the Condition is to perform a Collateral thing, there tender and refuſal is a perpetual barr. 18 H. 8. *Dyer* 24. *Bickheads* Caſe. *Cook* 1. Part, *Inſtitutes*, 207. See 5 Ma. *Dyer* 150. *Panel's* Caſe. acc.

2. Note; When the Condition in a Deed is to do a Collateral Act, there an Accord with Execution for money or other thing, is no plea to ſave the forfeiture; but when the Condition in a Deed by the Original Contract, is to pay money, there by accord another may be given in ſatisfaction of the money; becauſe *Nummus eſt menſura, omnium rerum convertendarum*. *Cook* 9. Part, 97. in *Pytts* Caſe. And there it is ſaid, That if a man be bounden in 200 Quarters of Corn, to pay 20 l. the Obligor may by accord betwixt them give to the Obligee, a Horſe or other thing in ſatisfaction of the 20 l. although the money be collaterall to the Obligation: but if a man be bounden in 100 Quarters of Corn, to pay 50, (as in the Caſe,

Sect.

Sect. 1.) he cannot give money or other thing in ſatisfaction of it, becauſe the Contract was not originally for money, but for a Collaterall thing. See *Ibid.*

3. The Condition of an Obligation was, That the Obligor ſhould ſurrender certain Copy-hold Land, and alſo that he ſhould ſuffer the Obligee and his heirs peaceably to enjoy the Land without interruption; the Defendant pleaded performance, and that the Plaintiff continued his poſſeſſion peaceably according to the Condition; and that afterwards, the Rent being behind, the Lord according to the Cuſtome entred for a forfeiture: and that was holden a good plea: and the reaſon was, becauſe the forfeiture was the act of the Plaintiff himſelf, Hill. 28 H. 8. *Dyer* 30.

4. A man by Indenture bargained and ſold a Mannor; in which Indenture there were divers Covenants; for the performance of which, he bound himſelf in 40 l. In Debt brought upon the Obligation, the Defendant pleaded payment, but did not ſhew any acquittance. It was holden, To be no Plea. Mich. 26 H. 8. *Dyer* 6. But ſee Mich. 38 Eliz. in B. R. In Debt upon a ſingle Bill, the Defendant pleaded payment without an acquittance; upon which they were at Iſſue: and it was found for the Plaintiff. And although payment without an acquittance is no plea, and the Iſſue is joyned upon an Affirmative and Negative; and that the Iſſue was found for the Plaintiff; It was holden in that caſe, It was helped by the Statute of 32 H. 8. & 18 Eliz. and thereupon the Plaintiff had Judgment. *Cook* 5. Part, *Nicholls* Caſe.

5. The Abbot of *Weſtminſt.* brought Debt againſt the Executor of *L.* Clerk, upon an Obligation dat. 10. *No.* 12 H. 8. The Defendant pleaded a Defeaſance dated the ſame day, by which the Plaintiff demiſed to *L.* the Rectory of *A.* and the ſaid *L.* Covenanted by that Indenture, That he and his Aſſigns would diſcharge the Abbot *de omnibus oneribus Ordinariis et extraordinariis*, and would repair the houſes, and leave them repaired in the end of the term, &c. by virtue of which, *L.* entred, and occupied till 1. *Auguſt*, 21 H. 8. during which time, he paid the Rent, and paid five Marks *debit. per appropriat. Rectoria prædict.* which are *omnia onera ordinaria, et extraordinaria, uſq; datum diem, quo die ſtatum ſuum conceſſit* to one *P*; *et hoc parati ſunt verificare*: upon which plea, the Plaintiff Demurred; and divers Exceptions were taken to the Defendant's plea: amongſt which, ſome, were theſe; 1. That the Covenants be in the Copulative, that he and his Aſſignees would pay, &c. and it ought to have been pleaded Joynly; for although the Leſſor might have Covenant againſt the Aſſignee; yet the Leſſee was not thereby diſcharged. 2. Becauſe he ſhewed not the Licence of Alienation, which prohibits Eccleſiaſtical perſons to have Farms; as the Statute of 21 H.8. 3. He doth not ſhew, That the Aſſignee was a Lay-perſon; which if he were not, the Aſſignment was void. And for theſe and other cauſes, it was adjudged for the Plaintiff. Hill. 28 H. 8. *Dyer* 27. The Abbot of *Weſtm.* and *Lemmans* Caſe. But in that caſe it was holden, That the Leſſee might have had his Action againſt the Aſſignee alone, if he had pleaſed. And ſo it was adjudged in the like Caſe, Mich. 44 Eliz. in B. R. in the Dean and Chapter of *Windſor*, and *Hide's* Caſe. *Cook* 5. Part, 24.

6. A man who was condemned in an Action of Debt brought, paid part of the debt; the Plaintiff made an Acquittance to him in theſe words, *ſcil. Received* 10 l. *in part of a more ſum*; wherein the Defendant was condemned by Judgment before the Juſtices of *Niſi Prius*: whereas Judgment is alwayes in *Banco*. It was holden in that caſe, That he cannot have that as a Releaſe by way of plea, to have an *Audita Querela*, if Execution be after ſued of the whole, for that there was no ſuch Judgment: But in that caſe it was ſaid, If I releaſe all my right in White-acre which I purchaſed of ſuch a man, where I had it by diſcent; yet it is good, becauſe White-acre is named certain, and the reſt is ſurpluſage: but if it were all his Lands which he had purchaſed, it was void, becauſe general and incertain. Mich. 33 H. 8. *Dyer*. 50.

7. Queen *Elizabeth*, *Anno* 43. made mixt money in the Tower of *London* in *England*, and ſent the ſame into *Ireland* with a Proclamation, That the ſaid money ſhould be current in the ſame Realm, and ſhould be accepted and received by all her Subjects, uſing Trade and Merchandize within the ſame Realm: and by the ſaid Proclamation, made all other Coyns currant in that Realm, of no eſteem. A Merchant of *Ireland* was bound in an Obligation of 200 l. before the Proclamation, to J. S. of *London*, upon Condition, That he pay to J. S. 100 l. *Sterling* currant and lawfull money of *England*, in the Church of *Dublin* in *Ireland*: The day of payment fell after the Proclamation; at which day, the Merchant tendered the 100 l. in mixt money: And that being in Debt brought, pleaded in barr, the Queſtion was, If the tender in mixt money was good, or not, after the Proclamation, to ſave the forfeiture of the Obligation? And it was adjudged, That the tender made in mixt money was good: for it was holden, That the King might change his money in ſubſtance and impreſſion, and might enhance or abaſe it in value, and by his Proclamation make any Coyn lawful money of *England*; and if Coyns

be of an Incertain value, he may ſet a certain value upon them. See the Caſe of Mixt moneys, in Sir *John Davis* Reports, Caſe, 3. See acc. Hill. 7 E. 6. *Dyer* 82.

8. The Condition of an Obligation was; That whereas *A.* the Plaintiff was bounden to *B.* the Defendant by a former Obligation, to perform the Covenants in an Indenture; whereof one was, That *A.* ſhould leave his Lands to diſcend to his Son, without making other diſpoſitions of them, &c. If *B.* at all times upon reaſonable requeſt, were ready, and did, and ſuffered to be done, all things which ſhould be thought reaſonable by the learned Councel of *A.* for his diſcharge and Releaſe of his ſaid Bond and Covenant, that then, &c. The Defendant pleaded, That there was no reaſonable requeſt made. The Plaintiff replyed, That J. D. his Councel deviſed a Releaſe of all Actions, Debts, Debates and Demands betwixt *A.* and *B.* aforeſaid, and one *W.* who was a ſtranger to the Covenant; which he ſent to *B.* to ſeal and deliver as his Deed to them both; which the Defendant refuſed to do: and averred, That there were not any other Obligations, Actions, Debts, &c. between the Plaintiff and the Defendant, beſides the ſaid Obligation and Indenture, but did not ſpeak any thing of *W.* And it was the clear Opinion of the whole Court, That the requeſt was an unreaſonable requeſt, and againſt the Condition of the Obligation; and the Defendant was not bounden to ſeal the ſaid Deed of Releaſe, although there was no Action and Demand betwixt him and *W.*; wherefore the plea in barr was holden good, That the Plaintiff ſhould be barred. Mich. 9 Eliz. *Dyer.* 218. *Forteſcue* and *Stroads* Caſe.

9. Note; If the Condition of an Obligation doth ſtand upon divers points: In Debt brought upon the ſame Obligation, If Iſſue be joyned upon one point, which is found againſt the Plaintiff, and he be barred; If after all the other points be broken; yet he ſhall never ſue his Obligation again: And ſuch was the Opinion of the whole Court. Mich. 21 Eliz. *Dyer* 371.

10. It was Reſolved by the whole Court, That in Actions perſonal, as Debt, Account, &c. the barr is perpetual: and therefore in ſuch caſe the party hath no remedy but by a Writ of Errour, or Attaint: But if a man be barred in an Action reall, by Judgment upon Demurrer, Verdict, or Confeſſion, yet he may have an Action of as high a nature, becauſe the ſame concerns his Freehold, and Inheritance; as if a man be barred in an Aſſize of *Novel Diſſeiſin*, yet he ſhall have an Aſſiſe of *Mordauncester*; and if he be barred in a *Formedon* in the *Diſcender*, yet he may have a *Formedon* in the *Reverter*, or *Remainder*, becauſe the Fee-ſimple is to be recovered. Mich. 44 Eliz. in C. B. *Cook* 6. Part, 7. *Ferrers* Caſe.

11. The Condition of an Obligation was ſuch; Whereas the Obligees, being husband and wife, have an Eſtate for term of their lives of, and in, certain Lands in *D.* by the Demiſe of *A.* and *B.* his wife, If the Obligor and his heirs do ratifie, confirm, and allow the ſaid demiſe at all times hereafter, and ſuffer the Obligees, and every of them, to enjoy the premiſſes without the Let, or diſturbance of the Obligor, or his heirs, and if the Obligor and his heirs do make ſuch farther aſſurance in Law, as the Obligees ſhall deviſe, &c. The Defendant, in Debt brought, pleaded, *Quod ipſe ad omnia tempora poſt confectionem hujuſmodi Scripti hujuſq; ratificavit confirmavit et allocavit prædict. dimiſionem, &c. apud D.* and further, That he had ſuffered the Obligees during the life of the husband, and after his deceaſe, his Wife, to enjoy, &c. And further, that the Obligees had not deviſed any further aſſurance in Law, *De et ſuper præmiſſis fiend.*; Upon which the Plaintiff did Demur. And the Opinion of the Court was, That it was no plea; but that he ought to have pleaded the Confirmation, by a Deed in writing. And therefore the party did afterwards confeſs the Action. Trin. 6 Eliz. *Dyer.* 229.

12. *A.* and his wife brought Debt againſt *B.* upon an Obligation of 100 l. made to the wife, when ſhe was ſole, for the payment of 50 l. The Defendant pleaded, That at the day of payment of the 50 l. he and his ſon did make a new Obligation of 100 l. to the ſaid wife being then ſole, for the payment of the ſaid 50 l. at another day then to come, in ſatisfaction of the ſaid 50 l; and that ſhe ſo accepted of it: It was adjudged for the Plaintiff: for it was holden by the whole Court, That it was no ſatisfaction actuall, as for the preſent, as it ought to be. Mich. 6 Jac. in C. B. rot. 1001. Sir *Richard Lovelace*, and *Cookells* Caſe. *Hob.* 68, 69.

13. In an Action of Covenant brought to diſcharge the Plaintiff of a ſingle Bill, in which he was bound for the debt of the Defendant; the Plaintiff alledged for breach, Non-payment, and that a Suit at Law and a Recovery was had againſt him for the money which remained in force. The Defendant pleaded, That he paid the money at the day, and thereof gave the Plaintiff Notice before the bringing of his Action: upon which, the Plaintiff did Demur; and it was holden by the whole Court, That the Defendant's plea was not good; and Judgment was given for the Plaintiff. Hill. 13 Jac. in C. B. *Rident* and *Tooks* Caſe. *Brown.* 1. Part, 24.

14. Debt upon an Obligation; the Defendant pleaded, That the Plaintiff brought another Action upon the ſame Bond in *London*, to which the Defendant

fendant had pleaded, *Non eſt factum*, and that it was found there, That it was not the Defendant's Deed: and in *London*, the Entry is upon ſuch a Verdict, That the Defendant ſhall recover Damages againſt the Plaintiff, and that the Deſendant ſhould be without day, &c. but there was no Judgment, that the Defendant ſhould take nothing by the Writ, therefore no Judgment to be barred in another Suit; for it is onely a Tryal, and no Judgment: Wherefore the Opinion of the whole Court was, That the Defendant's plea was not good; and ſo no barr. Paſch. 9 Jac. in C. B. *Levett* and *Halls* Caſe. *Brownlow* 1. Part. 81, 82.

15. A man was bounden to perform Covenants contained in an Indenture of Leaſe of Tythes; and there was a Proviſo in the Leaſe, That if the Leſſee attempt and proſecute any Action againſt *A.* who pretended a former Leaſe, if Verdict paſſed againſt the Leſſee, that the Term ſhould ceaſe: In Debt upon the Obligation for Non-payment of the Rent, It is no plea, That *A.* enjoyed the Tythe by virtue of his former Leaſe; ſo that the Defendant could not have it according to his Leaſe; and ſo no *articule ex parti ſua perimplend.* for that the Opinion of the Court was, That the Rent was payable, untill the Verdict paſſed againſt the Defendant. Mich. 19 Eliz. *Dyer* 318.

16. Debt upon an Obligation to perform the the Arbitrament of two, of all Actions, &c. depending between the parties, ſo as the ſame Arbitrament were made and yielded up by the Arbitrators in writing, at or before 21 *Julii*. The Deſendant pleaded by Proteſtation, That the ſaid Arbitrators made not any Arbitrament between the parties aforeſaid; for plea, That the Arbitrators did not deliver the ſaid parties any Arbitrament in writing, *De et ſuper premiſſis*. The Plaintiff ſaid, That the Arbitrators after the making of the writing, and before the ſaid 21 *July*, *per eorum arbitrium in Scriptis factum, et partibus prædict. per eoſdem Arbitratores tunc, et ibid. deliberat.* &c. and ſhewed all the Arbitrament, which was, That Suits and Quarrels ſhould ceaſe and end; and that the Defendant ſhould pay to the Plaintiff 40 l. for Non-payment of which, the Action was brought: upon which, the Defendant did Demur in Law. And the Opinion of the whole Court was againſt the Plaintiff; For that it is not direct, but onely an argument that the Arbitrators delivered the Award; and he ought to have pleaded, That it was delivered at or before *Mich.* according to the Condition, and not before onely. Mich. 18 Eliz. *Dyer* 244.

17. An Action of Covenant was brought by an Adminiſtrator, and he declared, How that *A.* the Inteſtate bargained and ſold Land to the Defendant by Indenture, and Covenanted to make further aſſurance, and to deliver the Evidences; In Conſideration of which, the bargainee covenanted to pay to him 100 l. *A.* dyed Inteſtate, and the Adminiſtrator brought the Action, and declared, That *A. perimplevit. &c. tamen* the Defendant *licet ſepa requiſit.* did not pay the 100 l. The Defendant pleads a Releaſe of *A.* of all Actions, made after, &c. The Plaintiff ſaid, That he was an Ideot at the time, and ſo had been from his birth, to the times of his death. The Defendant Traverſed the Ideocy. Mich. 2 Ma. *Dyer* 112. Quære if it be a *Jeofail*. It ſeems the plea of the Ideocy was holden to be a good plea.

18. A man was bound by Indenture to pay a certain ſum of money; In an Action of Debt brought upon that Deed: the Defendant ſaid, That he had paid the ſum; and that without ſhewing an Acquittance. It was ſaid, That the plea was not good; for the Indenture is like to a ſimple Obligation, in which payment is no plea, without an acquittance: Otherwiſe it is, if the Obligation hath a Condition. 28 H. 8. *Dyer* 25.

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2. *What ſhall be a good plea in barr, in Debt brought againſt a Gaoler, or Sheriff, upon an Eſcape; and what not.*

1. DEbt was againſt J. S. by the Executors of J. D. upon an Eſcape ſuppoſed to be had by the ſaid J. S. then Sheriff of the County of *Cornwall*. The Caſe was; *Trewynyard* a Burgeſs of Parliament, was taken by the ſaid Sheriff in Execution upon an *Exigent* after a *Capias*, at the Suit of J. D. and upon a Writ of Priviledg of Parliament, the Sheriff ſet him at Liberty: upon which the Executor of D. brought Debt againſt the Sheriff; upon which the Defendant did Demur in Law. And in this Caſe it was Reſolved, 1. That the Priviledg of Parliament was to be granted to him, notwithſtanding the Execution, becauſe the King and the whole Realm had an Intereſt in the body of every Burgeſs of Parliament, and the Common-wealth was to be preferred before the Intereſt of any private perſon. 2. That after the Parliament ended, the ſame perſon might be taken in Execution again for the ſame debt, upon the former Judgment; for that the party ſhall not be prejudiced in the Execution by the act of the Law, which doth not wrong to any one. 3. Admitting, That the Writ of Priviledge did not lye in the Caſe; yet the Sheriff ſhould not be charged, becauſe he was ſworn to execute the proceſſes which are delivered to him; and he is not bound to

bounden to take Notice whether the Writ lawfully iſſued out, or not. 30 H. 8. *Dyer* 60. *Trewynyards* Caſe. See *Cook* 5. Part, *Blumfields* Caſe. *Cook* 6. Part, 54. The Counteſs of *Rutland*'s Caſe: and *Cook* 10. Part, 76. acc.

2. In an Action of Debt brought againſt J. N. and J. P. Sheriffs of *London*, upon an Eſcape; and the Plaintiff doth declare upon an Execution by force of a Recovery in the priſon of *Ludgate*, *ſub Cuſtodia* J. S. and J. D. then Sheriffs in 1 E. 6. and that he ſo continued *ſub Cuſtodia* J. B. and J. G. in 2 E. 6. and ſo continued *ſub Cuſtodia* J. N. and J. P. in 3 E. 6. and then was ſuffered to Eſcape. J. N. and J. P. plead, That before the Eſcape ſuppoſed at ſuch a day, *Anno ſuperius in Narratione ſpecificat.* the ſaid J. S. and J. D. then Sheriffs, ſuffered him to Eſcape. This was holden by the Court to be no plea, becauſe there be 3 years ſpecified in the Declaration; and it ſhall be ſtrongeſt taken, That it was 1 or 3 E. 6. when they were out of their Office; and yet it is meerly induced, by the words, *ad tunc Vicecomites*, which ſhould leave the intendment to be of that year in which the Declaration ſuppoſeth that they were Sheriffs, but that ſuffiseth not; but the year muſt be alledged *in fact*, for it may be miſlayed by the Plaintiff; and therefore the Defendants, meaning to diſcharge themſelves by a former Eſcape, which was not in their time, they muſt alledge it preciſely. See 3 E. 6. *Dyer* 66. Serjeant *Minors* Caſe. See *Bacon*: *Maximes*, 18. acc.

3. Debt brought by the Executors of *A.* againſt *B.* and *C.* Executors of *T.* late Guardian of the *Fleet*, and declared upon a Recovery in Debt by their Teſtator, againſt J. D. in the Common-Pleas, for which he was in Execution in the *Fleet*, where their Teſtator ſuffered him to eſcape, the Debt not ſatisfied, *per quæ Actio accrevit, &c.* againſt his Executors: The Defendants demurred upon the Declaration: It was adjudged in that caſe, That the Action did not lye againſt the Executors of the Guardian for the Eſcape; becauſe the Guardian himſelf in his life-time was not convicted, and Judgment againſt him of the Eſcape; for the Offence is but a Treſpaſs of negligence, which *moritur cum perſona*. 15 Eliz. *Dyer* 322. See 10 Eliz. *Dyer* 271. That Debt upon an Eſcape doth not lye againſt the heir of the Guardian; for the heir ſhall not be charged for a debt due by the Common-Law, nor by Statute-Law, if he be not named; although the Recovery be in the life of his Father. See 11 E. 3. 15. 27 H. 6. *Execution*. 155. acc.

4. *A.* Condemned by default in a *Scire facias* in the Chancery, upon a Recognizance there, the Court commanded the Warden of the *Fleet*, Whereas *A.* was in his Cuſtody for other Cauſes to detain him in Execution upon the ſaid Condemnation. The Warden took a Recognizance of *A.* to ſave him harmleſs againſt every one; and afterwards ſuffered him to eſcape. The Conuſee ſued the Warden upon the Eſcape, who imparled, and then ſued *A.* upon his Recognizance; and they were at Iſſue, upon *Non-damnificatus*: It was the Opinion of the Court, That he was not damnified, 1. Becauſe *Capias* doth not lye for Execution upon a Recognizance, becauſe not in the Original, but the party ſhall have *Fieri facias* or *Elegit*. 2. Becauſe *A.* came not in upon *Habeas Corpus*, nor was viewed by the Court, or examined if he were the ſame perſon. And, 3. Becauſe it was not at the requeſt of the Plaintiff, who peradventure would chooſe another manner of Execution. But it was holden, That if the Plaintiff had brought an Original of Debt, that he might have taken Execution by *Capias*; but there he ſhall not have *Elegit*, but of the Lands which the Conuſor had the day of the Judgment; where, in a *Scire facias*, he ſhall have thoſe which he had *die Recognitionis*. Mich. 15 Eliz. *Dyer* 306. *Patenhams* Caſe.

5. The Duke of *Norfolk* being Marſhall of *England*, having liberty to make a Deputy for life, by Deed inrolled in the Kings-Bench, granted the Deputation *per nomen Mariſchalli, et Officium Mariſchalſie* to *Gawdy* for life, who was admitted, and ſworn to exerciſe the Office. Afterwards, one Condemned in Debt in the ſame Court, by Judgment of the Court was committed to the Marſhall, and was there in Execution: The Marſhall ſuffered him to go into the Country upon his own buſineſs with a Keeper for a time, who at the day returned to the priſon. The Plaintiff brought Debt in the ſame Court againſt *Gawdy*, calling him Under-Marſhall, and Keeper of the priſon of the Marſhalſie; ſuppoſing that he ſuffered the priſoner to go at Liberty. The Defendant pleaded, That he did not ſuffer the priſoner to go at liberty: upon which they being at Iſſue, the matter above appeared upon the Evidence: the Queſtion was, If *Gawdy* ſhould be charged with the Debt, becauſe he is not Marſhall, but Under-Marſhall onely, as appeareth by the enrollment in the ſame Court? And upon a long and great adviſe, Judgment was given againſt *Gawdy*, That he ſhould be chargeable with the debt: and that, although the Action was brought in *Middleſex* where the Eſcape was ſuppoſed to be; and not in *Surry*, where the priſon of the Marſhalſie is. Mich. 11 Eliz. *Dyer* 278. *Gawdy*'s Caſe.

6. Debt was brought againſt the late Sheriff of *B.* upon a Judgment of 60 l. recovered againſt one *G.* whereupon he was taken in Execution by *Capias utlagatum* within the year, and eſcaped: The Defendant pleaded, *Nul tiel Record* of the Recovery;

Recovery; upon which the Plaintiff demurred, conceiving that he ſhould plead, *Nihil debet*. But, the Opinion of the Court was, That Judgment ſhould be for the Defendant: For that the Defendant may upon Debt brought upon an Eſcape, plead *Nul tiel Record*. Trin. 15 Jac. in C. B. *Madox* and *Youngs* Caſe. *Hob.* 209.

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3. *Barr in Debt, Annuity, Accompt, Treſpaſs, Detinue, Covenant, and other Actions perſonal; and, What ſhall be a good barr pleaded in thoſe and the like perſonal Actions; What not.*

1. A Brought an Action of Debt againſt *E. Capell*, as brother and heir of *Henry Capell*, and declared upon an Obligation made by the Teſtator, in which he bound him and his heirs. The Defendant demanded Judgment of the Writ, becauſe the Teſtator made his Will, and made his Wife his Executrix, and dyed; and that afterwards the wife dyed, and Adminiſtration of the goods of the firſt Teſtator not adminiſtred, were committed to J. S. who had Aſſetts in his hands to the value of the debt. It was Reſolved by the whole Court, That in Debt brought againſt the heir upon an Obligation, that it is no plea to ſay, That the Executors have Aſſetts in their hands. Mich. 4 Eliz. *Dyer.* 204. *Capell's* Caſe.

2. Debt was brought againſt the daughters and heirs of *H.* upon an Obligation of their Father; The Plaintiff recovered againſt them upon *Nihil dicit*, and had Judgment generall: And upon a *Scire facias* ſued forth to have Execution, the Defendants pleaded, That they had nothing by diſcent in Fee at the time of the firſt Writ brought, nor after. The Opinion of the Court was, That after a Recovery upon *Nihil dicit*, *Non ſum informatus*, *&c.* or confeſſion, the Heir comes too late to plead, That he had nothing by diſcent. And in that caſe it was ſaid by the Lord *Dyer*, That if the profits received after the death of the Anceſtor till the Writ brought, are ſufficient to ſatisfie the debt; that the Plaintiff ſhall have a general Judgment againſt the Heir. Mich. 18 Eliz. *Dyer* 344. *Heningham's* Caſe.

3. A man recovered in an Aſſiſe, and had Judgment, and Damages were aſſeſſed to 10 l. Afterwards the Plaintiff brought an Action of Debt for the 10 l. and declared upon that Record. The Defendant pleaded in barr, That after the Verdict given, and before Judgment, the Plaintiff entred into the Land. Quære, if it be a Barr, or not. 2 Ma. *Dyer* 24. I conceive, the Damages are loſt, becauſe they are collateral to the Land.

4. Debt was brought for damages recovered; The Defendant pleaded, That the Plaintiff had an *Elegit*, which was ſerved, but did not ſpeak of the Return of it. It was holden to be a good plea; for that it appears upon the Record, That he hath made Election of his Execution. 13 Eliz. *Dyer.* 299.

5. A *Scire facias* was brought upon a Judgment, in a Writ of Annuity granted to the Plaintiff for term of his life, for the exerciſing of the Office of Steward of a Mannor; and the *Scire facias* was brought for the arrearages incurred one year after the firſt Judgment. The Defendant pleaded, That pendant the Writ, he being requeſted, refuſed to hold Court. It was holden by the Court, That it was a good plea. See 15 H. 7. acc. Trin. 23 Eliz. *Dyer* 377. But ſee 22 Eliz. *Dyer* 369. Where an Annuity was granted *pro conſilio impendendo*, and the Grantee was of Counſel with the Adverſary of the Grantor, not being requeſted to give Counſel to the Grantor; that in that caſe, the Annuity was not gone. *Plowers* Caſe. See 6 H. 8. *Dyer* 2. *Empſons* Caſe.

6. In 6 R. 1. debate was betwixt the Abbot of S. and *Theobald C.* upon the Advowſon of the Church of *Preſton*; they agreed; and a Fine was levied betwixt them before the Archbiſhop of *Canterbury*, and the Biſhop of *Rocheſter*, then Juſtices of the Common-Pleas, by which the Abbot did grant the Advowſon to *Theobald* and his Heirs for ever; ſo as at every preſentation of *Theobald* or his Heirs, the Clerks ſo preſented, &c. ſhould pay to the Abbot and his Succeſſours for ever 10 l. *per annum*, which was aſſented unto by the Ordinary, at which time the Church was void. The Succeſſour of the Abbot of S. brought a Writ of Annuity againſt *Thurſtan de Holland* Parſon of *Preſton*. Exception was taken to the Count, That foraſmuch as the grant of the Annuity is in ſpecial manner to be paid by the Clerks, which ſhould be preſented by *Theobald* or his Heirs; that the Plaintiff ought to have ſhewed in his Count, That the Defendant was preſented by *Theobald* or his heirs; *Herle* who gave the Rule, ſaid, That had *Theobald* alienated the Advowſon, the Annuity ſhould not thereby be extinct. By which Caſe it appeareth, That although that *Theobald* had alienated the Advowſon, and although that the Annuity in the body of the Grant is limited to be paid by the Preſentees of *Theobald* or his Heirs; yet the Preſentee of his Alienee ſhall pay the ſame: for otherwiſe by his own grant he ſhould defeat the Annuity which himſelf had granted. And it is a Rule in

Law,

Law, That the grant of every one ſhall be taken ſtronger againſt himſelf, and more beneficiall for the Grantee; and ſo as every Grant ſhall be taken ſtronger againſt the Grantor; ſo in caſe of pleading, every plea in barr, in every Action brought againſt the Defendant, which the Defendant pleadeth, ſhall be taken ſtrong againſt the Defendant that pleadeth it, and moſt beneficiall for the Plaintiff, not to abate his Writ, or to make his Action to be void. See *Cook* 8. Part, 144,145. in *Davenport's* Caſe.

7. An Adminiſtrator brought an Accompt againſt J. S. The Defendant pleaded, That the Inteſtate made an Executor, who proved the Will, and adminiſtred at *D*; which Executor is yet living, and demanded Judgment if Action; and becauſe he did not traverſe the dying Inteſtate, the Plaintiff did demur. It is a Quære not reſolved. Trin. 3 Eliz. *Dyer* 202. in *Clerks* Caſe. I conceive he ought to traverſe the dying Inteſtate.

8. If a man bayl a ſum of money *ex dono, vel accommodato* to J.S. to deliver over to the borrower or Donee, and he deliver it accordingly; and yet J. S. is impleaded as Receivor by the bailor, to render accompt of it; and he plead, That he was never Receivor, he ſhall not give the matter above in Evidence, nor the Jurours take regard of it; becauſe he ought to have pleaded the ſpeciall matter, for he was once Receivor conditionally, if he did not deliver over the ſum; and he cannot plead the ſame in diſcharge before Auditors, as it was agreed by the Juſtices in the Caſe between *Speak* and *Hungerford*. Hill. 3 Eliz. *Dyer*. 196. b.

9. An Information was exhibited into the Kings-Bench by the King's Attorney-Generall, againſt a Receivor of *Ireland* for a debt of 2000 l. being the Arrearages of an Accompt found before Auditors aſſigned by Commiſſion; the Defendant pleaded *Nihil debet per patriam*: upon which the Attorney-General did demur in Law. It was holden in that Caſe, That the plea was good: But in ſuch caſe it was holden, That the Defendant might not wage his Law. Paſch. 4 Ma. *Dyer*. 145.

10. A man was condemned in arrearages before Auditors; and in an Action of Debt brought for the Arrearages, he pleaded, That he made a Bond to the Plaintiff for the ſame debt. In that caſe it was holden to be no plea, becauſe that the firſt debt was not changed by the Obligation. See 11 H. 4. Mich. 33 H. 8. *Dyer* 51. acc. But ſee, Paſch. 2 Ma. *Dyer* 151. If debt be brought upon arrearages of Accompt before Auditors, It is a good plea for the Defendant to ſay, *Non Compuzavit*.

11. A recovery in Treſpaſs with Damages, is a good barr in an Appeal of Maiheim, becauſe that in that Action alſo he is onely to recover damages. *Cook* 4. Part, 43.

12. Accord, an Execution in ſatisfaction of it, is a good barr in an Action of Covenant; the ſame being pleaded by the Aſſignee. *Cook* 6. Part, 43. in *Blakes* Caſe.

13. If a man hath an Annuity by preſcription, and he brings his Writ of Annuity, and hath Judgment; as long as the Judgment doth remain in force, he ſhall not have a Writ of Annuity; but a *Scire facias* upon that Judgment, becauſe that the matter of preſcription is altered by the Judgment, into a thing of a more high nature. *Cook*. 6. Part, 7. acc.

14. In *Ejectione firmæ, et bona et catalla ibid. invent. vi et armis*, &c. The Plaintiff declared of a Leaſe for 40 years, to begin at *Michaelmas* next after the death of J. S. and Averred that J. S. dyed, and he entred, &c. The Defendant pleaded, *Non ejecit*, It was found *quod ejecit*, and Judgment given that he ſhould recover the Term, and becauſe he did not ſhew the time of his Entry, for if he entred before *Michaelmas*, after the death of J. S. he was a diſſeiſor, and not Termor; and alſo becauſe he pleaded *Non ejecit*, which was found; for the Plea ſhould have been, Not guilty; for theſe and other Cauſes, upon a Writ of Error brought, the Judgment was reverſed. 7 E. 6. *Dyer*. 89. *Cliffords* Caſe. Note, It was one *Alexanders* Caſe. In debt for rent behind, the Plaintiff declared that he leaſed to the Defendant for years, rendring rent, and upon his own ſhewing, it appeared that the Defendant entred before the day that his Leaſe began; It was adjudged, That he was a diſſeiſor. But ſee P. 3 Car. in B. R. A man made a Leaſe for years to begin at *Michaelmas*: In debt brought for rent, the Plaintiff declared, that the Defendant *virtute cujus dimiſſionis* entred, and no day was ſhewed of his Entry; It was the Opinion of the Court, That it ſhall be intended that he entred at *Michaelmas*, and he ſhall not be a diſſeiſor. See 14 H. 8. 12. *per Cantl.* acc.

15. In an *Ejectione firmæ* brought, the Defendant pleaded a Recovery had in the Kings Bench, againſt the Leſſor of the Plaintiff, It was objected that it was no bar, no more then in Treſpaſſe, becauſe the Plaintiff is but Leſſee to him who was barred; and that which is between the parties, cannot be an Eſtoppel againſt the Plaintiff here, who is a ſtranger. But the Opinion of the Court was, It was a good Bar, for this Action is ſtrong to bind the poſſeſſion, as a Writ of Right is to bind the Right: And although the party ſhall not plead this by way of Eſtoppel, yet he ſhall conclude, Judgment if Action; As if in an Aſſize, a recovery in another Aſſize be pleaded in bar, he ſhall not

not conclude by way of Eſtoppell, but Judgment if Action, and there he is driven to a higher Action; and the Law ſhall never have an end, if after a man is barred of his Action, he may bring the ſame Action again: And in this Caſe, It was holden, That if one who hath a Leaſe for years and no more, entret'a upon him which hath a good Title, he is a diſſeiſor of all the Fee-ſimple. Trin. 28 Eliz. in C. B. *Clayton* and *Lawſons* Caſe. *Gouldsbr.* 43.

16. An Action of Battery was brought in *London*, and a Juſtification was made in *Somerſetſhire, abſque hoc*, that he was guilty at *London*: The Plaintiff replied *De injuria ſua propria abſque tali Cauſa*: It was ſaid in that Caſe by *Anderſon* Chief Juſtice; That a man ſhall never plead *de injuria ſua propria*, where the matter ariſeth in a Forrein County. Trin. 28 Eliz. in C. B. *Gouldesbr.* 43. acc.

17. The Plaintiff declared in an *Ejectione firmæ*, upon a Leaſe made of a Meſſuage, and 40 Acres of Land in the Pariſh of S. in the County of S. The Defendant imparled untill another Term, and then pleaded, That within the Pariſh of S. there are three Villages, A. B. and C. and becauſe the Plaintiff did not ſhew in which of the Villages the Lands did lye, demanded Judgment of the Bill, the Plaintiff demurred upon the Plea: And in this Caſe it was adjudged for the Plaintiff; for that, after Imparlance, the Defendant could not plead in Abatement of the Bill, becauſe he hath admitted it to be good by entring into defence, and by his Imparlance: and 2. The Plea is not good, becauſe the Defendant hath not ſhewed in which of the Villages, the Meſſuage and the 40. Acres of Lands did lye; and that he ought to have done: for where a man pleads in abatement, he alwayes ought to give the Plaintiff a better Writ. The Opinion of the whole Court was, That the Plea in bar was not good; And note, this difference was taken in this Caſe: when a man demurs upon a Plea in Abatement, and when he goes to iſſue upon it; For if they proceed to iſſue upon ſuch a Plea, and it be found againſt the Defendant, it is peremptory, and he ſhall loſe the Land, but upon demurrer, it is not peremptory, but onely to anſwer over. Mich. 5. Jac. in C. B. *Tempſon* and *Colliers* Caſe. *Brownlow.* 1. Part 139.

18. In Debt upon an Obligation, The Caſe was; A. was bound to B. in an Obligation, upon Condition that the ſaid A. ſhould pay to B. his Executors, &c, at the choice and election of the ſaid B. within a Moneth after the death of D. 30 l. or 20 Kine. The Defendant pleaded, That the Plaintiff within a Moneth after the death of D. did not make any Election; upon which the Plaintiff did demur in Law; and the Court was clear of Opinion, That it was a good Plea in bar, for the Obligor is not bounden to make a tender of both, viz. of the Mony and the Kine, but the Obligee himſelf is bounden at his perill to make election within the time limitted; And the difference was taken where the Condition is in the diſjunctive, before the day of payment, the election is to the Defendant, but if at the day he make default, the Election is to the Obligee. See 18 E. 4. 15. the Lord *Liſles* Caſe. But in the principal Caſe, It was the clear Opinion of the Court, That upon this matter the Plaintiff ſhould be barred. Mich. 27 Eliz. in C. B. rott. 12. *Baſſet* and *Kornes* Caſe. *Leon.* 69. acc. But ſee Mich. 30 Eliz. in C. B. where the like Condition; for payment of mony at ſuch a day and place, or 10 Kine at the Election of the Obligee, That the Court was then clear of Opinion, that the Defendant, in pleading the performance thereof, ought to tender to the Plaintiff as well the mony as the 10. Kine; and becauſe he did not ſo do, Judgment was given againſt the Defendant. Trin. 29 Eliz. rott. 324. in C. B. *Fordleyes* Caſe. *Leon.* 68.

19. In an Action of Covenant the Plaintiff declared, that the Defendant by his Deed Dat. 1. *Oct.* 28 Eliz. did Covenant that he would do every Act and Acts, at his beſt indeavour, to prove the Will of J. S. Or otherwiſe that he would procure Letters of Adminiſtration, by which he might convey ſuch a Term lawfully to the Plaintiff, which he had not done *licet ſæpius requiſitus*, &c. The Defendant pleaded, That he came to Doctor *Drury* in the Court of Arches, and there offered to prove the Will of J. S. but becauſe the Wife of J. S. would not ſwear, that it was the Will of her Husband, he could not be received to prove it, upon which there was a demurrer: It was moved that the Action did not lye, for that by the Covenant no time is limited, when the thing ſhould be done by the Defendant, for which he hath time during his life; but admit the Covenant had bin to perform upon requeſt, then in the Declaration there ought to be ſhewed an expreſſe requeſt, with the place and time of it, which is not done; In this Caſe, It was the Opinion of the Court, That the requeſt ought to be ſhewed ſpecially, and certainly; for that it is for the benefit of the Covenantee, for without requeſt, the Action of Covenant doth not lye. And it was holden in this Caſe, That the bar ſhall not help the inſufficient Declaration. Hill. 30 Eliz. in B. R. *Cater* and *Boothes* Caſe. *Leon.* 124.

20. Detinue was brought for 40. quarters of Wheat, and the Plaintiff declared upon an abſolute contract: the Defendant ſaid, That it was upon condition to pay for it when it was delivered: and that he delivered 20 Quarters, for which the

Plaintiff did not pay preſently, ſo the contract was void, Judgment if Action; and it was holden good without traverſe, that the contract was ſimple: but in that Caſe it was agreed, that the Defendant might wage his Law, or plead, *Non detinet per patriam.* It was agreed furth.r in that Caſe, That a contract is not good without preſent payment, except a day be limitted, and then the one ſhall have debt for the mony, and the other Detinue for the War. 29 H. 8. *Dyer.* 30.

21. In an Action upon the Caſe for calling the Plaintiff Murderer and Thief; the Defendant juſtified, becauſe the Plaintiff was Indicted of murder at C. but the Juſtification was not good; the Plaintiff paſſed that, and ſaid that he was acquitted by the Jury, and ſhewed the Exemplificate under the Great Seal of the County Palatine of *Cheſter*; to which the Defendant pleaded *Nul tiel* Record; It is a Quære; If it be a good Plea againſt the Certificate exemplified; For the word Thief, the Defendant juſtified, becauſe a Robbery was done; and the common fame was, that the Plaintiff did it: that was not in this caſe holden to be a ſufficient Juſtification; but, in a falſe Impriſonment, it is. 7 Eliz. *Dyer.* 236.

22. In an Action of falſe Impriſonment againſt A. and B. the Defendant juſtified, that *York* was a City by preſcription Incorporate by the name of Mayor, Aldermen, & Comminalty; and that they had, time out of mind, a Court called a Chancery-Court, for all Caſes of Equity ariſing within the City, between Citizens, to hear and determine by Bill and Anſwer; and that the Mayor had alwayes uſed to direct precepts for appearance, and contempts of Orders, and to Impriſon for contempts of Orders: and then ſhewed; That one M. preferred a Bill before the now Defendant, whereupon the Defendant being ſummoned, appeared, but would not anſwer; and thereupon an Order was made againſt him that he ſhould anſwer, or be committed; and becauſe he did refuſe to anſwer, commandment was given by the Mayor A. to B. the other Defendant, Serjeant at Mace to Arreſt him; who did ſo, and brought him into the Court, where he was in open Court committed; upon which the Plaintiff demurred in Law; and in this Caſe, it was adjudged againſt the Defendants; upon one groſſe point in their Juſtification; That where the preſcription was for precepts to be directed (which muſt be underſtood by writing) the precept to the Defendant whereby the Plaintiff was taken, was by word onely; and if that was void, the whole plea of Juſtification was vitious, although the committing in open Court were good; and in this Caſe, it was ſaid, That the Plea was naught in ſubſtance, for that a Court of Equity did not lye in grant, much leſſe in preſcription being a Juriſdiction to be derived from the Crown; And ſo it was ſaid, That it had bin reſolved by all the Juſtices; That the King could not grant to the now Queen to hold a Court of Equity; and the Chancery of *Cheſter* and *Durham*, &c. are Incidents to a County Palatine, which had *jura regalia.* Trin. 10 Jac. in C. B. *Martin*, and *Marſhall*, and *Ky*'s Caſe. *Hob.* 63.

23. A. brought Replevin againſt B. who Avowed for damage feaſant in his Free-hold; The Plaintiff ſaid, that, long before B. had any thing, he himſelf was ſeiſed, untill by C. and D. diſſeiſed, againſt whom he brought an Aſſiſe and recovered; and that the eſtate of the Defendant was mean between the Aſſiſe and the recovery; The Defendant ſaid, That before the Plaintiff had any thing, one G. was ſeiſed, and enfeoffed him, *abſque hoc*, that C. and D. *vel eorum aliquis*, had any thing in the Lands at the time of the recovery. *Walmſley* Juſtice was of Opinion that the bar to the Avowry was not good, becauſe the Plaintiff hath not alledged that C. and D. were Tenants *tempore recuperationis*; and then when the Tenant traverſeth that which is not alledged, it is not good: But *Windham* Juſtice held the contrary: For the Aſſiſe might be brought afwell againſt others, as the Terr-Tenants, as againſt diſſeiſors; but other Actions, realls, ought to be brought againſt the Terr-Tenants, and therefore in his Plea, he needs not to ſhew, that C. and D. were Terr-Tenants at the time of the recovery. Quære, Mich. 32 Eliz. in C. B. *Rigden* and *Palmer's* Caſe. *Leon.* 193.

24. In Treſpaſſe for breaking of his Cloſe, The Defendant pleaded, That before this, he had brought an *Ejectione firmæ* againſt the now Plaintiff, and recovered, and had execution, &c. Judgment if Action, &c. It was agreed by all the Juſtices, That it was a good bar; and that the Concluſion of the Plea was alſo good; Judgment if Action, without relying upon the Eſtoppell. Mich. 32 Eliz. in C. B. *Kempton* and *Coopers* Caſe. *Leon.* 313.

25. In a Formedon, the Defendant pleaded in bar a warranty with Aſſetts: And, upon Iſſue joyned of nothing by diſcent, It was found that the Anceſtor of the Defendant, whoſe warranty was pleaded in bar, was ſeiſed of the Land in nature of Gavelkind, and by his Will deviſed the ſame to his two ſons (whereof the Defendant was the eldeſt) and their heirs, equally between them to be devided: In this Caſe, it was adjudged, that it was no Aſſetts, wherefore the Defendant had Judgment to have ſeiſin of the Land. Trin. 30 Eliz. in C. B. *Beares* Caſe. *Leon.* 315.

26. In Trover and Converſion of 100. ſheep, the Plaintiff declared that 25. *March* 19 Jac. he was poſſeſſed of them, and loſt them, and *ult. Aprilis*

lit, they came to the Defendant's hands, who the ſame day ſold them, and converted them; The Defendant as to 11. of them, Pleaded, Not guilty; and, as to the reſt, he ſhewed that the Plaintiff, 18. *Sept.* 19. Jac. brought an Action againſt the Defendant, and one J. S. *Quare ceperunt et abduxerant* 100. *oves*, and the Plaintiff declared againſt them of their taking 100. ſheep upon the 14th of *April*, 19 Jac. whereto for 11. ſheep they pleaded Not guilty, and for the reſidue they pleaded a Recovery in debt, by the Defendant againſt one J. D. of a Debt of 50 l. and that the ſaid J. D. was then poſſeſſed of the ſaid 89 ſheep, and that by vertue of a *Fieri facias*, the ſame ſheep were ſold to him; whereupon he took them into his Cuſtody. The Plaintiff thereto Replyed, and took Iſſue which was found for him, and damages Aſſeſſed to two pence, and thereupon the Plaintiff had Judgment of the two pence, and 6 l. Coſts: and Averred that the taking and driving, for which the Recovery was had, and the Converſion in this Action, was all one, and that the ſaid Judgment was yet in force: The Plaintiff replyed, it is true, he brought ſuch Action, and recovered two pence, for the taking and driving of the 89 ſheep, and 6 l. Coſts. But ſaid, That the two pence was not aſſeſſed for the value of the ſheep, and the Converſion of them: and that the Defendant at the day and time in the Bill ſold the ſaid 89 ſheep, and converted them to his own uſe. Upon this Replication the Defendant demurred generally. And this Caſe being argued in Court, it was ſaid by *Yelverton*, Juſtice, That becauſe the Action of Treſpaſs is *Cepit et abduxit*, therefore it included the Defendant had them, and ouſted the Plaintiff of the poſſeſſion; and although the damages be ſmall, it ſhall be intended to be given for the ſheep: and if ſo, then he cannot have an Action for Converting of them afterwards. But the Opinion of all the reſt of the Juſtices was, That the Plaintiff ſhould recover; For the damages of two pence for the 89. ſheep, being ſo ſmall, the Court ſhall intend it to be, and that it was given onely for the taking and driving, and that the Plaintiff had them again, and not in lieu of the value of them: for if it ſhould be taken for the value of them, then the Plaintiff ſhould loſe his property in them, and ſhould have nothing for his ſheep but two pence; and the Law will rather intend, that thoſe damages were given onely for the taking and driving, and that the Plaintiff had them again, and afterwards loſt them; and that the Defendant found and converted them: And ſo it was adjudged for the Plaintiff. *Intratur*, Hill. 2 Jac. in B. R. rott. 850. Paſch. 2 Car. in B. R. *Lacon* and *Barnards* Caſe, adjudged. *Cro.* 1. Part, 24.

27. In a Replevin, the Defendant avowed for Damage-Feaſant as in his Freehold; The Plaintiff ſhewed, That he was ſeiſed of a Meſſuage and 14. acres of Land; and that he and all thoſe whoſe Eſtate he had Common in the place where, &c. at all times of the year, *tanquam eidem Meſſuagio et terris ſpectant*: And Iſſue thereupon joyned, it was found for the Plaintiff. It was moved, That the barr to the Avowry was not good, becauſe he doth not ſhew, in what Town the Meſſuage and Land lye whereto he claims the Common: And of that Opinion was the whole Court; and it was holden, That though it be after Verdict, yet it is a Jeofaile: Wherefore it was Ordered, That the party ſhould re-plead. Paſch. 8 Jac. in B. R. *Broxholm* and Sir *John Thorolds* Caſe. *Cro.* 2. Part, 238.

28. In a *Quare Impedit*, if the Plaintiff be Nonſuit after appearance, the Defendant ſhall make a title, and have a Writ to the Biſhop, and this is peremptory to the Plaintiff, and a good barr in another *Quare Impedit*; and the reaſon is, for that the Defendant had by Judgment of the Court a Writ to the Biſhop, which is a Judiciall Writ in the nature of an Execution; and therefore the Incumbent that cometh in by that Writ, ſhall never be removed; which is a flat Barr as to that Preſentation. *Cook* 1. Part, *Inſtitutes*, 139.

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4. *What ſhall be a good Barr in Actions real brought; and where the Barr ſhall be* pro tempore *onely; where, for ever.*

1. THe Committee of the King of a Ward committed Waſte, and afterwards tendred a marriage to the heir, and he refuſed, and married himſelf elſewhere; afterwards the Waſte was found by Enqueſt of Office: and afterwards the Committee brought a Writ *de Valore Maritagii*. It was holden by the Juſtices, That by the Statute of *Marlebridge*, the Committee loſt onely the Cuſtody of the Land, but not of the body of the Ward: and therefore that Action did well lye for the forfeiture of the marriage: For it was ſaid, That if Lord, Meſne, and Tenant be, and the Meſne grant his *Menaltie* in *Mortmain*, the Lord Paramount may claim the Menalty by reaſon of the *Mortmain*, within the year and day; If the Tenant dyeth, his heir within age, and the *Meſne* ſeizeth the Ward before the claim of the Lord, the Meſne ſhall have the Marriage of the heir of the Tenant within age as a Chattel veſted in

him. Hill. 38 H. 8. *Dyer* 25. See 15 E. 4. 14. acc. See *Cook* 2. Part, in *Bingham*'s Caſe. acc.

2. In a Writ of Intruſion, *Maritagio non ſatisfacto*, the Plaintiff Counted and ſuppoſed a tender of Marriage to the heir within age, without diſparagement; and that he entred, *Maritagio non ſatisfacto*; the Defendant traverſed the Tender, and the Traverſe was holden good: and yet the [illegible] value of the marriage is due to the Guardian without tender. *Cook*. 5. Part, 26. *Palmers* Caſe: It was the Opinion of two of the Juſtices, That the Writ *de Valore Maritagii*, did lye without a Tender; two other of them doubted of it, Mich. 9 Eliz. *Dyer* 255.

3. If Waſte be brought by the Grantee of a Reverſion, the Defendant may plead in Barr, That he in the Reverſion, did not grant in Reverſion by his Deed, or that nothing paſſed by the Deed; and he may give in Evidence, That he never attorned: and the plea ſhall be good. 28 H. 8. *Dyer* 81. acc.

4. In an Action of Waſte brought, the Plaintiff aſſigned the Waſte *in domibus*. The Defendant pleaded, That he had done no Waſte; and afterwards he gave in Evidence, That the Houſes were repaired before the Writ brought. It was holden, That in this caſe, that this Evidence did not maintain the Iſſue, becauſe the Waſte is once acknowledged. 12 Eliz. *Dyer* 276. But ſee *Cook* 5. Part, 119. in ſuch caſe, he ought to have pleaded the ſpecial matter. See 2 Ma. *Dyer*. 112. *Cook* 1. Part, *Inſtitutes*, 53. acc.

5. The Leſſee of a Farm Covenanted in the Indenture of Leaſe, to repair the Houſes at his proper coſts and charges: Afterwards, he took great Trees which were growing upon the Farm, to repair the houſes which were decayed by age, and Tempeſt, and beſtowed them in the Repairation: The Leſſor brought an Action of Waſte againſt him, for cutting the ſaid Trees; and the Defendant pleaded the matter aforeſaid in barr: and it was adjudged a good plea, to barr the Plaintiff of his Action. Trin. 14 Eliz. *Dyer* 314. See 40 E. 3. 6. 21 H. 6. 50. 12 H. 8. 11. acc. 3 Eliz. *Dyer* 198. acc. the Leſſor in ſuch caſes is put to his Action of Covenant.

6. In Waſte brought, the Waſte was aſſigned, in cutting down 10 Trees; the Defendant as to 3. of them, juſtified, That he cut them down, and imployed them in 6. poſts, to repair ſeveral Cloſes there; but did not expreſs nor alledge how many Cloſes; nor that by Preſcription there was any ſuch kind of Incloſure there; nor did he alledge, That the 3. Trees, being Oaks, were ſo imployed: And for theſe Cauſes, the Defendant's plea as to thoſe 3. Trees, was adjudged to be inſufficient. To the other 7. the Defendant juſtified, becauſe they were dry, hollow, and putrified in the top; not being ſufficient Timber for building. It was holden by *Mounſon* and *Harper*, Juſtices, That the plea was alſo inſufficient; for though they were inſufficient for Timber, yet they might be imployed otherwiſe. *Dyer* held, That if they were *aridæ, ficcæ, non portantes fructus nec folia in æstate*, then the cutting down of them was no Waſte. Hill. 16 Eliz. *Dyer* 332. See *Cook* 11 Part, 49. in *Liffords* Caſe.

7. An Action of Waſte in the *tenuit* was brought againſt the Aſſignee of the Term, by the Aſſignee of the Reverſion for Waſte committed in digging of Sea-Coal: The Defendant pleaded in barr, That the firſt Leſſee opened the ground, and granted to him all his Intereſt in the Land, with all the profits, excepting to him, his heirs and aſſignees, the title of the Coal-Mines in parcell of the ſaid Lands, and all Timber-Trees; and averred, That the Mine in the Land at the time of the grant, and yet, is open. It was holden in this caſe to be no barr, for that he had not power to entermeddle with the digging of Coals: and therefore the Exception was a void Exception: And ſo the Court held the Defendant puniſhable for the Waſte. Hill. 41 Eliz. in C. B. rott. 747. *Saunders* and *Marwoods* Caſe, *Goldeſbr.* 241. See *Cook* 5. Part, 12. the ſame Caſe adjudged acc.

8. Waſte was brought againſt *A.* and *B.* upon a Leaſe made to J. S. by J. D. 34 H. 8. of the Mannor of S. and had general words, *Boſcis, Boſcorum venditionibus, magno maremio, minuris Carbonum*, &c. in as ample manner, &c. as the Leſſor *habuit vel habere potuit*, for the Term of 80. years; and conveyed the Reverſion to the Plaintiff, and the Leaſe to the Defendant; and then the Plaintiff aſſigned the Waſte in felling of Oaks. The Defendants pleaded, That they felled thoſe Trees for the making of Punchions, Corſes, Rolls, Roll-Scopes, and other Utenſils in and about Coal-Mines, parcel of the Demiſe; and without which they could not digg, nor get the Coals out of the pitts, and did beſtow the ſame Trees accordingly; upon which plea, the Plaintiff did demur in Law. The Queſtion was, Whether by implication of the Law, by Leaſing the Coal-Mines, the Leſſor gave power to fell Trees for the uſe of the Coal-Mines. It was agreed, That the grant of a thing, did carry all things which are included, without which the thing granted cannot be had: But in this caſe it was adjudged by the whole Court againſt the Defendants: for in this caſe it was agreed, That this ſhall be taken for a Mine opened ſince the Leaſe, becauſe it ſhall be ſtrongeſt againſt the Defendant that pleads it. Now if the Mines had not been granted by ſpeciall words, it had been

Waſte

Waſte to open a Mine anew, for the Leſſee hath not power to change the nature of the Land or thing demiſed: A Leſſee may build a new houſe where none was before; but that muſt be every way at his own charge, for he muſt neither take Timber nor other things Waſtable; though it be never ſo needfull: and yet if he keep it not in repair, Waſte lyeth, though the Writ be *in domibus dimiſsis*: but if the Leſſor build a houſe after the Leaſe, the Leſſee is not bound to repair it. Now in this caſe it were no Waſte to open a Mine, as it would have been, if the demiſe had not been of Mines by ſpecial name; yet it is like a houſe new built, for the maintenance of which, the Leſſee can fell no Timber: and ſo much the worſe, as a new houſe betters the Inheritance; whereas the digging of Mines decayes the Inheritance: and therefore it is againſt reaſon to do one Waſte to maintain another. Hill. 15 Jac. in C. B. The Lord *Darcy* and *Aſtwicks* Caſe. *Hob.* 234.

9. A Woman hath title of Dower of Land, whereof one is Tenant for life, the Reverſion to another in Fee, and the Woman releaſeth to him in the Reverſion; It is a good Barr in a Writ of Dower, brought againſt Tenant for life, and yet at the time ſhe had not any cauſe of Action againſt him, but *in futuro*, after the death of Tenant for life, *Cook* 1. Part. 112. in *Chudleigh's* Caſe.

10. A man in conſideration of Marriage to be had with *A.* makes an Eſtate of certain Lands to her for her life, and in full ſatisfaction of her Dower which ſhe may have in any other of his Lands; afterwards they Intermarry, and the husband dyeth: and ſhe brings her Writ of Dower againſt the heir, who pleads the acceptance of the Eſtate aforeſaid in barr. It is holden, That ſuch acceptance of Eſtate, did not barr the woman of her Dower at the Common-Law; becauſe ſhe had not any title of Dower to any Land at the time of the acceptance of that Eſtate. And, 2. Becauſe that no Collateral acceptance can barr any right of Inheritance or Free-hold. *Cook* 4. Part, 1. *Vernons* Caſe.

11. The husband made a Joynture in certain Lands to his Wife after the Coverture: Afterwards the husband and wife levied a Fine *ſur Conuſance de droit come ceo* of that: It was holden by the Juſtices, That that is no barr to the wife in Dower; for that Election was not given to the wife, untill after the death of her husband; and then her title of Dower doth firſt accrue unto her. Trin. 19 Eliz. *Dyer* 358.

12. Note: Concerning the detaining of Charters to be a barr in a Writ of Dower, theſe Points were Reſolved, 1. That if the heir plead *Detinue* of Charters in Dower brought againſt him, the Charters ought to concern the Lands whereof the Dower is demanded, and not concerning other Lands which are deſcended to the heir: and note, The reaſon, why in Dower brought againſt the heir, he may plead detainer of Charters, is, becauſe, If he had the Charters, he might plead any plea in barr of her Dower: And if the heir plead, That he was alwayes ready, and yet is to render her Dower if he had the Charters; the ſame is a Confeſſion of the Action, if the Demandant doth deliver the Charters to the heir, and after the Charters are delivered to him, the heir ſhall not plead over; but the Demandant in the Writ of Dower ſhall have her Judgment preſently. 2. It was Reſolved, That the ſtranger, although that he be Tenant of the Land, and hath the Charters conveyed to him, cannot plead Deteiner of Charters; for that plea lyeth onely in privity for the heir of the husband. And in this caſe it was ſaid, If a man be ſeiſed of 3. acres of Lands in one County, and enfeoffeth a ſtranger of one acre with Warranty, and dyeth, the heir may aſſign one acre to the wife in ſatisfaction of her Dower, as well of the acre of which the ſtranger is enfeoffed, as in the other; and if afterwards Dower be brought againſt the Feoffee, and he vouch the heir, he may plead this matter in barr; and in ſuch caſe, the heir may plead deteiner of Charters, becauſe he may plead, That he had been alwayes ready, and yet is, to render Dower to the demandant, in diſcharge of all that Tenancy in the ſame County. *Cook* 9. Part, 17, 18. *Anne Bedingfields* Caſe.

13. Dower was brought againſt the Feoffee of the husband, who pleaded *Detinue* of Charters: whereupon Iſſue was joyned, and the Verdict was for the Defendant, and Judgment thereupon was given for the Defendant. And after, a Writ of Errour was brought of that Judgment, becauſe that that plea is onely for the heir. *Armeſeys* Caſe, vouched, Mich. 42 Eliz. in *Kent* and *Hall's* Caſe, *Hob.* 113.

14. In a Writ of Dower againſt the heir, If he plead, That the demandant detains the Evidences, he ſhall have Judgment preſently, with a *Ceſſat executio*: If a man have Common of Eſtovers to his houſe, and he ſuffer his houſe to fall down, he can claim no Eſtovers; for if he ſue for it, and the other plead, That his houſe is down, he ſhall not have Judgment with a *Ceſſat executio*, till he have re-edified his houſe; but the Plaintiff ſhall be barred; for at the time of the Action brought, he had no Right of Eſtovers, but it is in ſuſpence, and therefore it is not a perpetuall, but a temporal barr; and if he re-edifie his houſe in the ſame place, he ſhall have his Eſtovers again; and ſo if he had pulled down his houſe, and built it again: But if he bring an Aſſiſe, or *Quod permittat*, for his

his Eſtovers where his houſe is down, Quære if he ſhall not be barred finally. See *Cook* 4. Part, in *Lutterells* Caſe. And ſee the Opinion of *Hobart*, Chief Juſtice, in the Argument of *Cooper* and *Andrews* Caſe. Mich. 10 Jac. in C. B. rott. 1223. *Hob.* 39. & 40. for this caſe.

15. In a *Formedon* in the *Diſcender*; if the demandant be barred by Verdict or Demurrer, yet the Iſſue ſhall have a new *Formedon* in the *Diſcender* by the Statute of *Weſt.* 2. Cap. 1. The ſame Law, If he be barred in Errour upon a Releaſe of his Aunceſtor, his Iſſue ſhall have a new Writ of Errour, becauſe he claims it not onely as heir, but *per formam Doni*; and the Statute ſhall not make a barr by Feint-pleader, or Falſe-pleader of his Aunceſtor, as long as the right of the entail doth remain. *Cook* 6. Part, 45 Eliz. *Dyer* 188. Sir *Ralph Rowlets* Caſe.

16. In a Writ of Partition brought, It is a good plea to plead, That the Defendant had ſuch a Writ againſt the Plaintiff, and had Judgment to have Partition; but the doubt was, Whether the Defendant ſhould plead the plea by way of barr, or in abatement of the Writ; or that he ſhall plead it by way of Eſtoppell. Mich. 1. Ma. *Dyer.* 92. *Weſt* and *Moiles* Caſe.

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5. *Where a Bar ſhall be good to a common intent, where not; And where it is inſufficient, and the Plaintiff makes an Inſufficient Replication; Where Judgment ſhall be, where not.*

1. UPon an Evidence given upon an Indictment of Murder, divers exceptions were taken to the Indictment, one of which was, becauſe that in the Judgment it was alledged, that the Indictment was taken before W. S. *Coronatore Dominæ Reginæ infra Libertat. dict. dominæ Reginæ villæ ſuæ de C. ſuper viſum corpus*, and it is not alledged to what places the Liberty doth extend, nor what part, or whether any part of C. were within the Liberty, ſo as it appeareth that the Coroner hath Juriſdiction; And it was ſaid that Indictments which do concern the lives of men, ought to be full and have a preciſe certainty, to which the party ſhall anſwer, and ſhall not be taken by Argument. But it was Reſolved, That the Indictment was good, for if an Indictment be certain to a general Intent, it is good enough; and in this Caſe to a Common intent, it is certain enough, that C. is within the Liberty of C. and the Town ſhall not be preſumed to be out of the Liberty of the Town in a ſtreyned conſtruction, which the Law will not allow; and in that Caſe, it was ſaid that there are three manner of certainties. 1. To a common intent, 2. To a certain intent in generall, 3. To a certain intent to every particular, the firſt doth ſuffice in Bars which are to defend the party, and excuſe himſelf; the ſecond is required in Indictments, Counts, Replications, &c. becauſe they are to excuſe or charge the party; the third is rejected in Law, for *minia ſubtilitas in jure reprobatur, et talis certitudo cervitudinem confundit.* *Cook* 5. Part 121. in *Longs* Caſe.

2. In an Indictment, exception was taken unto it, becauſe it was ſaid, in it, *In Curia dict. Domini Regis in computori ſuo ſcituat. in parochia St.* Michaelis Woodſtreet, *London*; and it did not ſhew in what Ward the Pariſh was: but the Exception was not allowed by the Court, For every Ward in *London* is as an Hundred in the County, and every Pariſh in *London* is as a Town in the Hundred: and it is not neceſſary to declare in what Hundred a Town is, nor yet in what Ward a Pariſh is. *Cook.* 9. Part. 66. in *Mackalie's* Caſe.

3. Debt upon an Obligation, That if the Obligee, his Executors and Aſſigns, from the time of the Obligation, may injoy ſuch Lands by vertue of a Leaſe made to him by the Obligor, that then &c. The Defendant pleaded, That, *poſt Obligationem*, untill the day of the Bill, the Plaintiff enjoyed the Land: upon which, the Plaintiff did demur. Exception was, becauſe the Defendant doth not ſay *à die Confectionis ſcripti Obligatorii, et ſemper poſt Confectionem ſcripti Obligatorii*; for, it may be the Plaintiff enjoyed it, but not *ſemper*: But the Exception was diſallowed by the Court, for that a bar is good to a common intent: and it ſhall be taken, that he alwayes enjoyed it, unleſſe the contrary be ſhewed, which muſt come on the other ſide. Trin. 6. Car. in B. R. *Harlow* and *Wright's* Caſe. *Cro.* 1. Part 141.

4. Debt upon an Obligation reciting, whereas Copy-hold Lands were to be ſurrendred to the uſe of H. and G. and their Heirs, by A. at her full age; and that G. ſhould pay to H. 30 l. at ſuch a day; and if he failed, it ſhould be to the uſe of H. and his heirs: The Condition was, That if the ſaid Obligor procured A. at her full age to ſurrender to the uſe of H. and his heirs, and if H. and his heirs might have, and deviſe the Lands to him and his heirs, that then, &c. The Defendant pleaded that G. did not pay the 30 l. and that A. of full age, at ſuch a Court did ſurrender Releaſe, and quit claim to the Plaintiff, being in poſſeſſion, all her right, eſtate, and Intereſt in the Land, &c. and that the Plaintiff afterwards, alwayes

ways might have enjoyed the Lands; the Plaintiff Replyed: That it is true, the ſaid A. did ſurrender part, but afterwards, G. ſuch a day, Entred and expelled him. The Defendant did demur upon the Replication; It was Reſolved: that in this Caſe, the Replication was not good without ſhewing that the expulſion was by Title, for otherwiſe the bond doth not extend unto it; And in this Caſe, it was alſo Reſolved, That the Bar, viz. that A. ſurrendred and Releaſed in Court was good and certain enough, to common Intendment, although it be not ſaid that ſhe ſurrendred to the uſe of the Plaintiff; yet becauſe it is alledged to be ſurrendred and Releaſed in Court, and accepted by the Plaintiff; it was good enough. Paſc. 1. Car. in C. B. *Hamond* and *Dodds* Caſe. *Cro.* 1. Part 3.

5. This Queſtion was moved to the Court: When the Defendant Pleads in Bar to the Action and the Plaintiff Replies, and the Defendant doth demur ſpecially upon the Replication, and the bar is inſufficient, whether the Juſtices ſhall give Judgment upon the Replication, or ſhall reſort to the inſufficient bar, the Replication being alſo inſufficient; And the Opinion of the Court was, That when the Action is of ſuch a Nature, that the Writ and the Count doth comprehend the Title, as in a Formedon, and the like; then, becauſe there is a ſufficient Title for the demandant by the Writ, and the Count, ſo as the Judges may ſafely proceed to Judgment for the Plaintiff, there they ſhall not reſort to the bar, contrary where the Title doth commence onely by the Replication, as in Aſſiſe, Treſpaſſe, and the like. Trin. 29 Eliz. in C. B. *Zouch* and *Bamperts* Caſe. *Godbolt.* 138.

6. In Debt upon an Obligation for not performance of Covenants, by an Under-Sheriff; One Covenant was, that he ſhould not execute any extent of any ſum above the ſum of 20 l. before he had firſt given notice to the Sheriff of the Writ, and if any ſuch Writ of Execution were above 20 l. that he ſhould not execute it without ſpeciall warrant of the High-Sheriff. The Defendant pleaded, That he had performed all the Covenants; It was the Opinion of *Hobart* Chief Juſtice in that Caſe, That if the Covenant had not bin againſt Law, for the Executions above 20 l. And that the bar had bin inſufficient, becauſe he did not plead negatively to that Covenant; That yet if the Replication were naught, and Aſſigned no ſufficient breach; the Plaintiff could not have had Judgment: For although the Action were well brought upon the Action alone; yet when it appeareth that the Condition was for performance of Covenants, there can be no cauſe of Action without ſome Covenant broken; and therefore in that caſe the Plaintiff could not have had Judgment; and if it doth appear to the Court, that the Plaintiff hath no cauſe of Action, he ſhall never have Judgment, although the bar be inſufficient, and though he hath thereupon a Verdict againſt the Defendant. Paſc. 11. Jac. in C. B. by *Hobart* in Sir *Daniel Norton's* and *Syms's* Caſe. *Hob.* 13. & 14.

7. Debt upon an Obligation for the payment of 30 l. to A. B. and C. *tam cito* as they ſhould come of the age of 21 years, The Defendant pleaded that he paid theſe ſums *tam cito*, as they came of age; It was demurred upon, becauſe it was not ſhewed when they came of age, and the certain time of the payment; The Court held the plea not to be good; For although it be a good Plea regularly to the Condition of an Obligation to purſue the words of the Condition, and to ſhew the performance; yet there is another rule in Law, that the party ought to plead in certainty, the time, place, and manner of the performance, ſo as Iſſue may be taken thereupon, otherwiſe it is not good; and therefore in the principal caſe it was adjudged for the Plaintiff. Trin. 12 Jac. in B. R. rott. 1006. *Halſey* and *Carpenters* Caſe. *Cro.* 2. Part 359.

8. In an *Ejectione firme* of a Meſſuage and Lands in L. the Defendant pleaded, that long before the Leaſe, and Ejectment; A. was ſeiſed in Fee, and let the Land to the Defendant for five years, and that he entred and was poſſeſſed untill the Leſſor of the Plaintiff entred upon him, and diſſeiſed him; and ſo ſeiſed by diſſeiſin, made the Leaſe to the Plaintiff, and that the Defendant reentred, and ejected him, as was lawfull for him to do; The Plaintiff replyed, That the Leſſor was ſeiſed in Fee, and let to the Plaintiff; and that the Defendant ouſted him, and traverſed that he did not diſſeiſe the Defendant; and upon Iſſue joyned, it was found for the Plaintiff: In Arreſt of Judgment, It was moved that the Iſſue was a vain Iſſue; For when the Defendant ſhews that he was but Leſſee for years, and poſſeſſed as Leſſee, he cannot then be diſſeiſed, and then the Allegation of the diſſeiſin is vain and impoſſible, and therefore it was a Miſpriſal, and no Judgment can be for the Plaintiff; And it was holden by the whole Court, That although the Defendant's Plea was no good Plea in Bar, and the Plaintiff might have demurred upon it, yet the Defendant himſelf ſhall not take advantage thereof; but that being an Iſſue joyned upon this falſe allegation, and being found by Jury, that the Leſſor of the Plaintiff had not diſſeiſed him, the Judgment ſhall be well given upon this verdict. But if it had bin found for the Plaintiff, that the Leſſor of the Plaintiff diſſeiſed him, peradventure he ſhould not have had Judgment: But, as it is found, The verdict well ſtands with the Law; That the Leſſor did not diſſeiſe

ſeiſe him, and the Defendant ſhall not take advantage of his own vitious plea. It was adjudged for the Plaintiff. Mich. 21 Jac. in B. R. *Cro.* 2. Part *Johns* and *Ridlers* Caſe. 678.

9. In Debt brought by the High-Sheriff againſt an Under-Sheriff, upon a Bond given to ſave him harmleſſe, the Defendant pleaded in bar, generally, That he had ſaved him harmleſſe; upon which plea, the Plaintiff did demur in Law, and the demurrer was holden by the Court to be good; for that he ought to have pleaded ſpecially; or *Non damnificatus.* for he may ſave himſelf harmleſſe in many things; and yet the Plaintiff may be damnified in ſome other things, wherein the Defendant was alſo bound to ſave the Plaintiff harmleſſe Paſc. 23 Car. in B. R. *Wroath* and *Elſey's* Caſe. *Style* 16.

10. In an Action of Treſpaſs, for aſſaulting and beating of his Servant *per quod ſervitium amiſit*, to his damage of 40 s. The Defendant as to the Battery *vi et armis* pleaded Not guilty; As to the Aſſault he Juſtified, and ſhewed, That he was poſſeſſed of a houſe, and had a Light time out of mind, and that the Servants of the Plaintiff did intend and indeavour to erect another houſe upon a certain piece of ground adjoyning to his houſe, and had erected certain timber for the houſe; the which houſe, if the ſame had bin erected, would have ſtopped up his ſaid ancient Light; and for this cauſe, that this would have bin to his Nuſance, he ſtood in his own houſe; and with a ſtaff did thruſt away the Defendants ſervants, by him implyed in the building, and did then throw down the timber ſo erected; upon which plea in bar the Plaintiff did demur in Law: It was holden by the Court that this plea in Bar was not good for many cauſſes. 1. Becauſe in this Caſe, the principall point of the Action, is the loſſe of his ſervice, and the Defendant doth juſtify as to the battery, but doth ſay nothing to the loſſe of his ſervice, and where the party doth not anſwer to all, it is no anſwer at all; and the loſſe of his ſervice, which is the ground of the Action, ought to be confeſſed, avoided, or elſe denyed. 2. For that the Plea amounts but to the general iſſue. 3. The plea of Juſtification is not good, for the Defendant ought to have *damnum et injuriam*, and if he have none of theſe, his Juſtification is not good, and it doth not appear there, that he hath any damage: and a man cannot juſtify the beating of one for an endeavour onely; and in this Caſe, It was holden by the whole Court, That the Plaintiff needed not to ſhew how he was reteined his ſervant; and ſo the Opinion of the whole Court was clear, That the declaration, and that the Juſtification and plea in bar was not good, and Judgement was given for the Plaintiff. *Morris* and *Baker's* Caſe, Mich, 10. Jac. in B. R. *Bolſtr.* 3. Part. 196, 197, 198, acc.

11. The Caſe was this, J. was agreed between the Plaintiff, a woman Executrix of her former Husband and the Defendant, that upon the payment of 89 l. upon a day to come, to the Defendant, and upon requeſt made; he did promiſe to reconvey certain Lands to the Woman, which were her former husbands: ſhe payes the mony at the day, & requeſts the Defendant to make the re-conveyance now to her, which he refuſed; afterwards, ſhe takes a Husband, ſo as the Action accrued to him, now, in the Right of his Wife: Afterwards, the Husband and Wife exhibite a Bill unto the Chancery againſt the Defendant, to have a re-conveyance made to the Wife according to his promiſe; upon the hearing of the Cauſe, The Court of Chancery did Decree, that the Plaintiff ſhould pay to the Defendant 100 l. more, at a day then to come; and after this payment made, upon requeſt, the Defendant was decreed to make the re-conveyance according to the former agreement. The Husband payes the 100 l: to the Defendant, who makes a reconveyance of the Land by a Feoffment to the Wife, Executrix of her former Husband; which the Wife accepts; And afterwards ſhe and her Husband bring an Action upon the Caſe againſt the Defendant upon the firſt promiſe; The Defendant pleads in bar the decree, and the performance of it, and the re-conveyance by him made, according to the decree; and upon the Plea, the Plaintiffs did demur in Law; It was ſaid, that the plea was not good, becauſe there is no expreſſe averment of any acceptance or agreement to this by the Husband, for the conveyance was made to the Wife, and by her acceptance, her Husband ſhall not be barred; but he ought to have averred, unto which he did agree, becauſe this is a thing collaterall. Alſo it was ſaid, That the payment of the 100 l. by the Plaintiff was compulſory, he being decreed to pay it, & he paid it *ſecundum ordinem et decretum prædict.* and not in diſcharge of the former promiſe. Bnt it was anſwered and reſolved by the Court, that this being a Plea, and good to a common intent, is ſufficient; and that the re-conveyance upon the payment of the 100 l. was to be in ſatisfaction, and full diſcharge of the firſt promiſe; and in the re-conveyance, it ſhall be a taking alſo of the Husband aſwell as the Wife, and the Lands ſhall be as well in him as in the Wife, untill the Husband do diſagree, and the payment of the 100 l. by the Husband, was a full agreement by him, that the Action which accrued unto him for the firſt breach of promiſe, ſhould thereby be gone and diſcharged, and by this payment he takes notice of the decree, and it cannot be otherwiſe taken, but to be in full diſcharge of the firſt promiſe;

promiſe; and ſo the whole Court was clear againſt the Plaintiff, that the plea was not good, and the Plaintiff ought to be barred of his Action; and Judgment was given againſt the Plaintiff accordingly. Trin. 7 Jac. in B. R. rott. 1596. *Wolterton* and *Dayes* Caſe. *Bolſtr.* 1. Part 8990.

12. In Debt upon an Obligation of 1000 l. againſt the Executors of W. N. made to the Plaintiff and to one T. G; The Defendant pleaded, That W. the Teſtator was bound to the ſaid T. G. in a Statute of 2000 l. the defeaſance of which was, That whereas he had Covenanted to aſſure the *Barton* of B. to the uſe of himſelf for his life, and after to the uſe of the Plaintiff and his Wife in tail, the Remainder to the right heirs of W. the Teſtator, and that he would not charge the ſaid *Barton* of B. with eſtates which ſhould endure longer then his own life, that if he performed the ſaid Covenant, then the ſaid Statute to be void; and ſhewed the breach of the ſaid Covenant by an aſſurance made of the ſaid Land to G. N. his ſon in tail, ſo as the Statute is broken, and the Defendants averred, *Quod non habent, nec die impetrationis billæ habuerunt, bona, quæ fuerunt bona Teſtatoris tempore mortis ſuæ, in manibus ſuis adminiſtrand. præterquam* to ſatisfy the ſaid Statute. The Plaintiff replyed, and ſhewed the Statute of 27 Eliz. of fraudulent Conveyances, and that the firſt Indenture and defeaſance was in conſideration of mony; and that after the conveyance to G. N. he made an aſſurance to himſelf for life, and after to the uſe of the Plaintiff and his Wife, according to the firſt Indenture; and that the conveyance to G. N. was void, whereupon the Defendant demurred in Law. It was moved in this Caſe. 1. That the bar was ill; becauſe he pleads, that at the day of the bill, they were not the Teſtator's *tempore mortis ſuæ*, which is not good, becauſe they might have goods lyable to debts, though they were not the Teſtators goods, *tempore mortis ſuæ*: But as to that poynt, the Court held, That the Plea in bar was good to a common intent, and it ſhall not be conceived that they had ſuch Aſſets, being ſpecial Aſſets, unleſſe it were ſpecially ſhewed; An other exception to the bar was, becauſe they pretend that they had not Aſſets, *nec die Impetrationis billæ habuerunt bona teſtatoris*, &c. and do not ſay, *nec unquam poſtea*; which ought to have bin alledged; and that was holden by the whole Court to be an incurable fault, for the pleading ought to be ſo; and it was holden in this Caſe, That although the demurrer be upon a Replication, which is vitious, yet foraſmuch as the bar is ill, the Declaration being good; and the Replication is onely to avoid the bar, which as this Caſe is, needs not to be avoided, becauſe it is no bar, they held that although the Replication was ill therein, yet Judgment ſhould be given againſt the Plaintiff; But where the Replication is to entitle himſelf to the Action, and by the Plaintiffs own ſhewing in his Replication, he hath no cauſe of Action; there, although the bar be ill, Judgment ſhall be given againſt the Plaintiff: In the principall Caſe, It was adjudged for the Plaintiff. Hill. 3. Jac. in B. R. *Gewen* and *Rolls*'s Caſe. rott. 897. *Cro.* 2. Part 131, 132.

13. In Trover and Converſion of two Loads of Fitches of certain Lands; the Defendant juſtified by the command of A. to whom part of the Land belonged, and to one B. to whom another part of the Land did belong in the Right of the Lady his Wife; and ſhewed that part of the Fitches did grow upon the Land of the one, and part upon the Land of the other; upon which plea and Juſtification, the Plaintiff did demur for two cauſes. 1. Becauſe he juſtifies by the command of two generally. 2. Becauſe he doth not ſhew particularly upon whoſe Lands the Fitches grew, but that they grew upon the Land of the one, and of the other, which is altogether incertain. For the firſt, the Court was of Opinion, That the Plea was good enough; for although it were a joynt-command, yet the parties commanding, have ſeveral intereſts, and titles, and it ſhall be taken *reddenda ſingula ſingulis* to be ſeverall Commands; But for the ſecond Exception, the Court held the bar is not good for the incertainty: ſo that although upon the other Exceptions moved by the Defendant, the Plaintiffs replication was not good, yet the Defendants bar being ill, the Plaintiff ſhall have Judgment upon the Declaration, and the Plaintiff had Judgment accordingly. Hill. 2. Car. in B. R. *Sparrow* and *Sherwoods* Caſe. *Poph.* 208, 209.

Barrator, *and* Barratry.

1. IT was holden by the Court, That a Common-Barretor, is a Common-Mover, and exciter, and maintainer of Suits or Quarrells in Courts, or in the Country, in diſturbance of the Peace, and in taking and detaining of the poſſeſſions of Houſes, Lands, or Goods, by falſe invention, ſowing of Calumniations, Rumors, and Diſcords, whereby diſquiet ariſeth amongſt Neighbours. And therefore it was Reſolved, That

the words of an Indictment of a Common-Barretor ought to be, That he is *Communis Malefactor, Calumniator, et Seminator Litium et diſcordiarum inter vicinos ſuos, Malefactor et pacis Regis perturbator*: And a Common-Barretor is the moſt dangerous oppreſſor in the Law, for he oppreſſeth the Innocent by colour and countenance of the Law, which was made for the protection of the Innocent againſt all oppreſſion; and therefore, theſe words, *Oppreſſor vicinorum ſuorum*, are materiall to be inſerted in every Indictment of a Common-Barretor, if the truth of the Caſe be ſuch. *Cook* 8. Part, 37. in the Caſe of *Barretry*.

2. Errour was brought to reverſe a Judgment given upon an Indictment of one being a Common-Barretor, Where the Indictment being found, and Judgment given, That he ſhould pay 100 l. for a Fine, and be impriſoned for two moneths; *Et ideo in miſericordia*; It was aſſigned for Errour, becauſe the Indictment is, That he was a Common-Barretor, *Contra formam diverſorum Statutorum*; which was ſaid, was not good, becauſe it is an Offence at the Common-Law, and there is no Statute to puniſh it. But the Exception was not allowed by the Court; becauſe that ſo is the courſe of common Indictments; and Barratry is an Offence againſt divers Statutes, *viz. Maintenance*, and the like. 2. Exception, becauſe he upon the Indictment appeared *gratis* at the following Aſſizes, and then pleaded, and then the *Venire facias* was miſ-awarded to make it returnable the ſame Aſſiſes; where it ought to be the next Aſſiſes. But that was diſallowed, becauſe ſuch is the common Courſe. And the Court ſaid, It might be as well when he was in the Goal, as when he is at large, and comes in *gratis*. 3d. Exception, Becauſe it was *Ideo in miſericordia*; where it ought to have been *Ideo Capiatur*. To that it was anſwered, That Record was *Ideo Committatur Gaolæ* (being) there preſent: ſo there needs not *Capiatur*. Hill. 9 Car. in B. R. *Chapman*'s Caſe, *Cro.* 1. Part, 248. See Trin. 14 Jac. in B. R. *Rice* and the King's Caſe, acc. as to the Awarding of the *Venire facias*. *Cro.* 2. Part, 404.

3. *A.* was Indicted, That he *fuit, et ad hunc eſt* a Common-Barretor, and no place is expreſſed where he was a Barretor, ſo as no tryall can be; And the Indictment was, *Per quod* he did ſtirr up Contentions, *Jurgia*, and no place alledged where he did ſtirr up *Jurgia*, Contentions. It was ſaid by the Court, That in that caſe, the place was very material, and ſo the Indictment was Quaſhed for want of ſetting forth, Where he did ſtirr up *Jurgia*, Contentions. Paſch. 3 Car. in B. R. *Man*'s Caſe. *Godbolt* 383.

Baſtard *and* Baſtardy. Mulier *and* Mulierity.

1. *Filius Baſtardus*, or a Baſtard, *dicitur filius, procreatus ex Meretrica, ſive Concubina*; and is derived from the Greek word *Baſtaris*, i.e. *Meretrix ſive Concubina. Filius Muleriatus in legibus Angliæ, dicitur qui procreatus eſt ex legitima uxore. Glan. Lib.* 7. *Cap.* 1. *Britton.* 70. *Cook* 8. Part, 102. in Sir *Richard Lechford*'s Caſe.

2. Baſtard, by the Common-Law, is *Quaſi nullius filius. Litt.* 41. b. and therefore if a Baſtard dyeth without Iſſue, the Lands ſhall Eſcheat: but yet ſee 11 H. 4. 75. in reſpect of his Mother, Baſtard is ſaid to be a Son.

3. In a Writ of Partition brought by *Ralph Haward* and the Lady *Anne Powes* his Wife; the Defendant pleaded, That the ſaid *Anne*, as daughter and one of the Heirs of *Charls* Duke of *Suffolk*, ought not to have Partition, becauſe he ſaid, That *illa fuit genita et nata inter prædictum Dominum Nuper Ducem, ad huc Nominatum Carolum Bradon armigerum, et quandam Annam Browne aute aliqua deſpondalia inter eoſdem Carolum, et A. B. celebrat.* Upon which they were at Iſſue. It was holden in that Caſe, That if the Mother diſpoſe of all her Lands holden in Knights-Service, to her baſtard-daughter by Conveyance in her life-time; that the ſame is out of the Statute of 32 H. 8. becauſe ſhe is but as a meer ſtranger to the Father, becauſe *nullius filius*; and the Statute of 32 H. 8. ſpeaks of lawfull generation. See 13 Eliz. *Dyer* 296. and 14 Eliz. *Dyer* 313. Where the Lord *Powes* conveyed Land holden *in Capite* to *Gray* his Baſtard ſon in remainder after his death, and then the Lord *Powes* dyed: Where it is holden by the Lord *Dyer*, and *Saunders*, Juſtice, That the Baſtard ſhould not ſue Livery for the third part, becauſe it was no lawfull generation. And ſee 39 E. 3. 42. In a *Pracipe*, a Baſtard, was named *filius J. S.* and for that cauſe the Writ did abate. See Mich. 18 Eliz. *Dyer* 345. *Thorneton*'s Caſe. acc.

4. *Worſley* Covenanted with his eldeſt ſon and 2 others, to ſtand ſeiſed to the uſe of himſelf for life, the remainder to his eldeſt ſon in tail, the remainder to himſelf in tail, the remainder to *Richard Worſley* his baſtard ſon in tail, and if any of them in the remainder

remainder ſhould make any diſcontinuance or other prejudice to any other in the Remainder, that his Eſtate ſhould ceaſe, and then they ſhould ſtand ſeiſed to the uſe of the next in the Remainder, according to the Limitation. The Father granted all his Eſtate to his eldeſt ſon, who levied a Fine with Proclamations; and 5. years paſſed, the Baſtard ſuppoſing he had title, entred and made a Leaſe to try the Title. In this Caſe, two Points were moved amongſt other, Whether this entring and making a Leaſe, was within the Statute of 32 H. 8. for buying of Titles. See *Plow. Com.* in *Partridges* Caſe, 8. That buying of a Leaſe for years is within the Statute, and the Offender ſhall forfeit the value of the Land. But ſee Mich. 31 Eliz. rott. 2811. in C. B. *Finch* and *Cockhams* Caſe. *Cook* 11. Part, *Inſtitutes*, 369. That if a man make a Leaſe for years, to try a Title in an *Ejectione Firme*, the ſame is out of the Statute, becauſe it is in courſe of Law; but if it be made to a great man, or to another to ſway and countenance the Cauſe, then it is within the Statute: But in the principal Caſe for the uſe raiſed to the Baſtard, there ought to be a valuable Conſideration; for natural affection is not a ſufficient conſideration: for that he is a ſtranger in Law, although he be a Son in Nature. Mich. 23 Eliz. *Dyer* 374. *Worſleys* Caſe.

5. If a Grant be made to a Baſtard by the ſurname of him who is ſuppoſed to beget him, it is good, if he be known by ſuch name: So if a Remainder be limited *Richardo filio Rich. Marwood*, it is good, although he be a Baſtard in vulgar reputation, if he be known by ſuch name; and yet in truth he is, in Law, *nullus filius*. 41 E. 3. 19. *Richard Thompſon* had Iſſue by one *Joan* before marriage, and afterwards he married the ſaid *Joan*, and made a Feoffment in Fee, and took back an Eſtate to him for life, the remainder to *Agnete filiæ prædict. Rich. et Johannæ*. In that caſe, it was agreed, That it was a good remainder, without averment, That ſhe was known to be their daughter. It was Objected there, That a Baſtard is not their daughter in Law: But *Finchien* ſaid, It is found, That the daughter was born before the marriage, ſo as by their marriage after, ſhe was their daughter. Out of which Caſe it was obſerved, That although by the Common-Law ſhe was not their daughter, yet becauſe ſhe had colour by the Eccleſiaſtical Law, which ſaith, That *ſubſequens Matrimonium tollit peccatum precedens*, the ſame was ſufficient in the caſe of a Conveyance, to make the Remainder good: So if the husband and wife be divorced, *cauſa præcontractus*, the Iſſue hath loſt his Surname, for *Cognomen majorum eſt ex ſanguine tractum*; and the Iſſue now is Baſtard, and *nullius filius*: yet becauſe once he had a lawfull Surname, it is a good ground of Reputation; to make him a Reputed Son, which is a good name of purchaſe. *Cook* 6. Part. 65. in Sir *Moils Finches* Caſe.

6. In Treſpaſs, upon a Speciall Verdict, the Caſe was; *A.* and *B.* did contract marriage *per verba de præſenti tempore*; Afterwards *B.* took to husband *C.* Afterwards *A.* Libelled in the Spiritual Court againſt *B.* upon which proceedings there it was Decreed, That the ſaid *B. ſubiret Matrimonium* with the ſaid *A. et Decretum et declaratum fuit dict. Matrimonium* with *C. fore nullum*. And further Decreed, That *A.* and *B.* ſhould entermarry; which they did, and had Iſſue *G.* the Plaintiff, *C.* then living. Afterwards *A.* dyed: It was further found, That *R.* Father of *A.* was a Copyholder in Fee; and, out of Court, according to the Cuſtome of the Manner, did ſurrender by the hands of the Cuſtomary Tenants to the Lord, to the uſe of *M.* his wife, and *R.* his younger ſon, and dyed; the Surrender was preſented after his death, and thereupon the Lord gave admittance and Seiſin to M. and R. and to the heirs of R: M. dyed, R. ſurvived, and ſurrendred to the uſe of *E.* his wife, and dyed. *E.* was Admitted. *G.* as Cozen and heir of R. who was the Father of *A.* ſon and heir of R. entred upon *E.* It was Reſolved in this Caſe, Although that *C.* being *de facto* the husband of *B*, was not party to the Suit, nor to the Sentence in the Spirituall Court, which diſſolved the Marriage betwixt him and B. but B. onely; yet the Sentence being declaratory againſt the woman, was good, and ſhould bind *C.* her husband *de facto*; and the Judges of our Law ought (although it be againſt the reaſon of our Law) to give Faith and Credit to their proceedings: So as it was Reſolved in this Caſe, That the Plaintiff was Legitimate, and no Baſtard. Mich. 28 Eliz. *Cook* 4. Part, 29. *Banting* and *Lepingwells* Caſe.

7. *A.* was ſeiſed of a Manor holden by Knights-Service *in Capite*, and took *B.* to wife, who had Iſſue *C.* between them: Afterwards the marriage betwixt *A.* and *B.* by Sentence in the Spirituall Court was declared to be void, becauſe they were married *infra annos nubiles*, and they are divorced. A. takes to wife D. and afterwards before Commiſſioners Eccleſiaſticall, the marriage betwixt A. and D. is declared lawfull, and that the ſaid A. was never lawfully married to B: D. dyed, A. took E. to wife, by whom he had Iſſue F. and dyed: Office found after his death, That F. was his daughter and heir within age; The King granted the Cuſtody and Wardſhip of F. to J. S. and E then his wife; C. exhibited a Bill into the Court of Wards, pretending, that ſhe was daughter and heir to A; and alledged, That A. and B. at the time of their marriage, were both above the age

of Conſent, and that they did cohabit 10 years together before the ſuppoſed divorce; during which time, they had Iſſue the ſaid C. and prayed, That ſhe might traverſe the ſaid Office. It was Reſolved in this caſe, That againſt the ſaid firſt Sentence of Divorce, the parties ſhould not be received, ſo long as the ſame remained in force, to aver, That they agreed and conſented to the Marriage, 1. Becauſe the Eccleſiaſticall Judge hath declared it to be void; and although they were of the age of Conſent, yet if the Original Contract was void, then there was a juſt cauſe of Divorce. 2. It was holden in that caſe, The Eccleſiaſtical Judge is Judge as well of the Aſſent, as of the Contract; and the Common-Law Courts ſhall not examine whether the cauſe be true, or not: and therefore it was holden by Conſequence in that Caſe, That C. was a Baſtard. *Cook* 7. Part, 42, 43. *Kenns* Caſe.

8. A. had Iſſue by B. his wife, two ſons, C. the eldeſt, and D. the younger, and dyed. C. within the age of 14 years took to wife E, and at full age they Cohabited, *et habuerunt carnalem copulam, et cogniti et reputati pro viro et uxore palàm*; C. afterwards put away E. his wife, and married F, living E; and had Iſſue by her G: C. dyed, F. publiſhed, That ſhe was lawfull wife to C. and that her ſon G. was *Mulier*. D. ſued in the Eccleſiaſticall Court, to reverſe the marriage betwixt G. and F. And in that caſe it was Reſolved, 1. If C. and E. had had Iſſue, and had been unjuſtly divorced, yet ſo long as the Divorce remained in force, the Iſſue had no remedy by the Common-Law. 2. It was in that Caſe Reſolved, That when the Spirituall Court ſhall have Juriſdiction, it behoves that the Cauſe be ſpiritual. 3. That although all the Cauſe be originally ſpiritual; yet, if after in the Spiritual Court they go about to try a thing which is Temporal, that in ſuch Caſe a Prohibition will lye. 22 E. 4. to *Conſultation*. 5. *Cook* 7. Part, 44. acc. *Kenns* Caſe.

9. In an Evidence in an *Ejectione Firmæ*, the Caſe was. A man married to a woman, and dyed; the wife after 40 weeks and 10 dayes, was delivered with child of a daughter; and whether the daughter ſhould be heir to her Father, or a Baſtard, was the Queſtion? And Sir *William Pady* Kt. and Dr. *Mountford*, Phyſitians, were commanded by the Court, to attend, and deliver their Opinions in the Caſe, who upon their Oaths delivered, That ſuch a Child might be a lawful daughter and heir to her Father: For as well as *Autenatus* might be heir, *viz.* a Child born at the end of 7. moneths; ſo they ſaid might a *Poſt-natus*, *viz.* a Child born after the 40 weeks: And they held, That by many Authorities, and by their own experiences, a Child might be Legitimate, although it be born the laſt day of the 10th month after the Conception of it, accounting the moneths *per menſes Solares, et non Lunares*. Mich. 17 Jac. in B. R. *Aſſop* and *Bowtrell's* Caſe, *Cro.* 2. Part, 521. *Godbolt*, 281. the ſame Caſe. See *Thecker* and *Duncombe* Caſe. *Style* 277. acc.

10. A Speciall Verdict was given in an *Ejectione Firmæ*; A man was divorced from his wife, *Cauſa frigiditatis*; and that his Wife for 3. years after *remanſit virgo intacta propter impertentiam Impotentiam generationis in viro: et quod vir ſuit ineptus ad generandum*; and divers witneſſes being examined of the perpetual diſability of the man *ad generandum*; It was pretended, That the Iſſue which he had by a ſecond wife, was a Baſtard. But in this Caſe it was adjudged, That the Iſſue of the ſecond wife was lawfull: For it is clear by the Divorce, *Cauſa frigiditatis*, the marriage is diſſolved *à vinculo Matrimonii*, and then either of them might marry again. But in that caſe it was ſaid, Admitting that the ſecond marriage was voidable, yet it remained a marriage untill it was reverſed and diſſolved, and then the Iſſues which is born during the Coverture (if no Iſſue be in the life of the parties) is lawfull. And in that caſe it was ſaid, That *Homo poteſt eſſe habilis et inhabilis diverſis Temporibus*. 40 Eliz. in C. B. *Cook*. Part, 98. *Buries* Caſe.

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2. Baſtardy, *where, and by whom it ſhall be tryed; Where by the Certificate of the Ordinary; and where it ſhall be tryed by the Common-Law by a Jury; where not.*

1. BAſtardy is an Eccleſiaſticall Cauſe; and if Baſtardy be pleaded in diſability of the Plaintiff, the ſame ſhall be tryed by the Certificate of the Biſhop, whether it be in a reall, or perſonal Action: But if it be pleaded, That the Plaintiff was born at ſuch a place before the marriage ſolemnized; and ſo he is a Baſtard: this is a ſpecial baſtardy, and ſhall be tryed by Jury at the Common-Law, where the Birth is alledged. See *Cook* 8. Part, in the Caſe of the Abbot of *Strata Mercella*, acc. See 7 E. 6. *Dyer* 79. in the Duke of *Suffolks* Caſe of Partition; where ſpeciall Baſtardy was pleaded, and Iſſue thereupon taken: the Tryall was awarded to be by a Jury of *London*, in a Writ of Partition brought.

2. An Action upon the Caſe was brought for calling one Baſtard; The Defendant juſtified, that

thrt he was a Baſtard. It was awarded, That it ſhould be tryed by the Country, and not by the Ordinary. Trin. 14 Jac. *Hob.* 179.

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3. *Of* Baſtard Eigne, *and* Mulier Puiſne; *and where the Dying ſeiſed of the* Baſtard Eigne, *or other act, ſhall barr the Entry of the* Mulier puiſne; *and where not. And of divers other differences in Caſes betwixt* Baſtard Eigne, *and* Mulier Puiſne.

1. IF a man be ſeiſed of Lands in Fee, and hath Iſſue two ſons, and the eldeſt is a Baſtard, and the youngeſt ſon is *Mulier*, and the Father dyeth, and the Baſtard entreth, claiming as heir to his Father; and occupieth the Land all his life-time, without any entry made upon him by the *Mulier*, and hath iſſue, and dyeth ſeiſed of ſuch an Eſtate in Fee, and the Land diſcendeth to his iſſue, and his iſſue entreth; in this caſe the *Mulier* is without remedy, for he cannot enter, nor have any Action to recover the Land. *Litt.* 94. a. But Quære in that caſe, If the diſcent be, the *mulier* being within age; for in *Plo. Com.* 372. It is holden by *Dyer* and *Caras*, that the Diſcent ſhall bind the *Mulier*; but *Saunders* and *Southcote* held the contrary: and ſee there, 33 E. 3. Verdict. 48. and 36 Aſs. *Br.* Diſcent. 29. acc. That if the Baſtard maketh a Feoffment, and the Feoffee be in by it, yet the *Mulier* may enter, becauſe the Rule of *Littleton* ſhall be taken ſtrictly.

2. If a man be ſeiſed of Lands, and hath iſſue two ſons *Baſtard Eigne*, and *Mulier Puiſne*, and the Father dyeth ſeiſed, the *mulier* being beyond Sea, or within age, or impriſoned, or of *Non ſanæ memoriæ*, and the *baſtard Eigne* entreth, and continueth in peaceable poſſeſſion of the Lands, and hath Iſſne and dyeth, and the Lands diſcend to the Iſſue; the better Opinion of the Books in ſuch caſes is, That the *mulier* ſhall be barred for ever: and the reaſon is, becauſe that the Continuance of poſſeſſion, and the dying ſeiſed in peace, and the diſcent to his iſſue, makes him heir, and his iſſue inheritable as heir, becauſe he was Legitimate by the Law of the Church: For as *Bracton* ſaith, *Matrimonium ſubſequens Legitimas facit quoad Sacerdotium, non quoad ſucceſſionem propter Conſuetudinem regni quæ ſe habet in contrarium*: and by the Law of *England*, The poſſeſſion, and dying ſeiſed in peace, he is adjudged heir to his Father, becauſe *Juſtum non eſt, aliquem attentatum mortuum facere baſtardum, qui toto tempore ſuo, pro Legitimo habebatur.* *Cook* 8. Part, in *Lechford's* Caſe. 100.

3. If a man hath iſſue two daughters, *baſtard Eigne*, and *mulier puiſne*, and they enter, and occupy the Lands as heir; now the Law, in favour of Legitimation, ſhall not adjudge the whole poſſeſſion in the *Mulier*, who then hath the onely right; but in them both; ſo as if the baſtard dyeth, her iſſue ſhall inherit: & if they both enter & make Partition, the Partition ſhall bind the younger for ever: But if Partition be made betwixt daughters, where one hath no colour to have partition, there the partition is void. 17 E. 3. 59. *Baſtardy* 32. 30 Aſſ. 9. 11 Aſſ. 23. *Cook* 8. Part, 101. acc.

4. If a *Baſtard Eigne* entreth, and is ſeiſed as heir of the Lands, he ſhall be vouched as heir; and if he be within age, the plea ſhall demur till his full age. 20 E. 3. Voucher. 129. and after entry, the Baſtard within age ſhall have his age. *Cook. ibid.* 101.

5. If a man hath Iſſue *Baſtard Eigne*, and *Mulier puiſne*, and the baſtard hath Iſſue, and dyeth in the life of his father, and after the father dyeth, and the Iſſue of the Baſtard entreth, and dyeth, without interruption, the ſame ſhall barr the *Mulier*: ſo if the Baſtard born before the marriage, entreth, and hath iſſue and dyeth ſeiſed, the ſame ſhall barr the Collateral heir, and the Lord by Eſcheat as well as it, ſhall bind the *Mulier*: So if *Baſtard Eigne* entreth, and dyeth ſeiſed, his wife with child with a ſon; and after the ſon is born, he ſhall Inherit; for in as much as his Father dyed in poſſeſſion without interruption, the *Mulier* ſhall not alledge againſt the iſſue, Baſtardy in his Father who is dead: and if the *Baſtard Eigne* dyeth ſeiſed, and his iſſue endoweth the wife of the Baſtard; yet the *Mulier* ſhall not enter upon the Tenant in Dower, for that the right of the *Mulier* was bound by the Dying-ſeiſed, and the Diſcent; but otherwiſe it is in diſcents, which onely take away entry: as in the Caſe of *Litt.* 94.

6. *Baſtard Eigne* makes a Leaſe for life rendring Rent; the *Mulier* brings an Aſſiſe of *Mortdauncteſter*, and recovers by default, and the Tenant for life dyeth; ſome were of Opinion, That the bringing of the Action, is an Interruption of the poſſeſſion. But Quære, If the *Mulier* be Non-ſuited. Alſo Note, That the Land is not expreſſly demanded by the *Mortdauncteſter*. 6 E. 3. *de recoverie* 2.

7. If the *Mulier* grants a Rent, and the Baſtard continues poſſeſſion and dyeth; the heir ſhall hold the Land diſcharged of the Rent. But Quære, If that be not a Claim, eſpecially if it be granted

granted out of the Land expreſly, which ought to have come to the *Mulier*. 6 E. 3. *ibid.*

8. Tenant in tail, the remainder in tail, the remainder in Fee; Tenant in tail hath Iſſue *Baſtard Eigne*, and *Mulier puiſne*, and dyeth, the Baſtard entreth, and continueth his poſſeſſion, and hath Iſſue and dyeth; the Iſſue entreth, the *Mulier* dyeth, he in the Remainder ſhall have a *Formedon* againſt the Iſſue of the Baſtard; and the Continuance of the poſſeſſion of the Baſtard ſhall not prejudice him, as it is holden, 39 E. 3. 38. b. Caſe 9.

9. If the King ſeiſeth the Lands of the Baſtard, becauſe it is found, that the baſtard was adherent to the King's Enemies, and the baſtard dyeth, and after it is found, That the baſtard was not adherent to the King's Enemies; and the Iſſue of the baſtard entreth; yet that ſhall bind the *Mulier*. 9 E. 3. acc.

10. Note: It was holden by *Shute* in his Reading in 19 Eliz. That if the baſtard maketh a Leaſe for years, and dyeth, yet the *Mulier* is ſuch a Lord which might improve by the Statute of *Weſt.* 2.

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4. *Calling one Baſtard, where it is Actionable; where not.*

1. ERrour was brought to reverſe a Judgment, for calling one Baſtard, in an Action upon the Caſe; The Errour aſſigned was, That it was not ſhewed, that he was damnified by ſpeaking the words, as to alledge, That he was Inheritable to the Lands, and that by reaſon of the words, he had a ſpecial loſſe: For it was ſet forth by the Plaintiff, That ſuch Land was given in tail to his Grandfather, and that his Father had divers ſons, and that the Plaintiff is youngeſt ſon, and that ſuch a one was to buy the Land, and offered him a ſum of money for his Title: and by reaſon of theſe words ſpoken, refuſed to give him any thing: and ſo it was ſaid, it appears, that he hath no title upon his own ſhewing, and then no cauſe of Action. But the Court ſaid, That although he hath no preſent Title, it appears by poſſibility he is to enherit thoſe Lands, and being offered a ſum of money for that poſſibility to joyn in the aſſurance, although he hath no preſent Title, yet he had a preſent Damage, and might receive prejudice in caſe he came to claim any Land by diſcent. The Judgment was affirmed. Mich. 6 Jac. in B. R. *Vaughan* and *Ellis* Caſe. *Cro.* 2. Part, 213.

2. *Cook* ſued *Webb* in the Spiritual Court, for ſaying, *That he had a Baſtard.* *Webb* the Defendant in the Spiritual Court alledged, That the Plaintiff was adjudged the Reputed Father of a Baſtard by two Juſtices of the Peace according to the Statute, whereupon he ſpoke the words; They of the Spiritual Court accepted his Confeſſion, but would not allow of his Juſtification: wherefore he prayed a Prohibition; which was granted him. Paſch. 17 Jac. in B. R. *Webb* and *Cook*'s Caſe. *Cro.* 2. Part, 535. & 625.

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5. *Who ſhall be accounted the Baſtard's Father; Who not.*

1. *A* Was brought to the Barr upon a *Habeas Corpus*; and it appeared upon the Return thereof, That he at *Lincoln* upon Complaint of two Juſtices of the Peace of the place next adjoyning, was Ordered to keep a Baſtard-Child, he being according to the ſaid Order, the Reputed Father: From this Order he appealed to the Quarter-Seſſions of the Peace; at which Seſſions the matter being examined, he was diſcharged, and the former Order repealed: Afterwards, at another Quarter-Seſſions of the Peace, the matter being re-examined, It was Ordered according to the firſt Order, That he ſhould be accounted the Reputed Father of the Baſtard, and ſhould keep it; and that if he did not perform it, he ſhould be committed; and thereupon being committed, and all this matter returned, The Court held, That he being diſcharged at the next Seſſions, to the which he appealed, according to the Statute of 18 Eliz. the ſecond Seſſions had no power to alter it: Wherefore it was Ordered, That he ſhould be diſcharged. Trin. 9 Car. in B. R. 248. *Cro.* 1. Part, *Pidgeon*'s Caſe. *ibid.* 255. acc.

2. *A.* was charged by *B.* with the getting of a Baſtard-Child upon her body; The two next Juſtices did not make any Order in it, according to the Statute of 18 Eliz. but the Cauſe came firſt to be heard at the General Seſſions of the Peace in the County of *L.* where the Juſtices Ordered, That whereas it was approved by Witneſſes, That one J. S. had often uſed private company with the ſaid *B.* and had confeſſed, That he had done as much to her, as a man could do to a woman; and that ſhe had ſaid, That J. S. had the uſe of her body: That thereupon *A* ſhould be diſcharged of the Child, and ſhe be committed to the houſe of Correction; and J. S. the reputed Father

Father ſhould pay for the keeping of the Child weekly, 14 d. Afterwards, at the Aſſizes at L. The Judges Ordered, That the two next Juſtices of the Parith where the Child was born, ſhould take Conſideration thereof, and ſettle ſuch a Courſe as in Juſtice appertained: whereupon two Juſtices declared *A.* to be the Reputed Father, and that he ſhould pay 18 l. to the Overſeers of the Pariſh, and 14 d. weekly; And that he refuſing to pay, the Juſtices thereupon committed him: Upon a *Certiorari*, *A.* appeared in the Kings-Bench upon the Return of it. In this Caſe it was Reſolved, 1. That before the Statute of 3 Car. Cap. 4. the Juſtices at the Seſſions had no authority to entermeddle in the Caſe of Baſtardy, till the two next Juſtices according to the Statute of 18 Eliz. had made an Order therein. 2. That by the Statute of 3 Car. the Juſtices of their ſeveral limits are to make an Order in caſe of Baſtardy; and therefore the firſt Order made in the principal caſe, was good and legal; and the ſecond Order made by the two next Juſtices, was void, and could not revoke that Order which was made before by good authority. 3. That the Commitment of *B.* for her life for her firſt offence, was more then the Juſtices had authority to do. But yet it was Reſolved, That an Errour in part, and in that part which onely concerned her, ſhould not vitiate the whole Order. Paſch. 19 Car. in B.R. *Slaters* Caſe. *Cro.* 1. Part, 337.

Battaile.

1. *Tryall by Battail, and the form of it, and in what Actions the Miſe, or Iſſue joyned, ſhall be tryed by Battaile.*

2. THe form of Tryall by Battaile, is after this manner, viz. After the Tenant hath made defence, he ſhall ſay, *Quod majus Jus habet tenend. &c. Et hoc paratus eſt probare per corpus Liberi hominis J. C. nomine qui præſens hic in Curia qualitercunque, Curia Domini Regis hic conſideraverit, &c. Et ſi male contigerit de ipſa J. C. (quod abſit) paratus eſt probare prælium qui.* Book Entries. 233.

2. In a Writ of Right of Advowſon, the Defendant appeared, *et defendit jus, &c. et maxime, &c. Et hoc paratus eſt defendere, per corpus Liberi hominis ſui Nomine, J. G. qui præſens eſt hic in Curia, qui defendit illud per corpus ſuum, et qualitercunque, Curia Domini Regis hic conſideraverit, et ſi male contigerit eidem J. G. (quod abſit) paratus eſt illud prælium qui, &c. Et Petens defendit Jus ſuum.* And then he recites the Count, &c. *Et quod tale ſit Jus ſuum, paratus eſt diſrationari per corpus ſuum*; in the ſame manner as the Tenant doth; and then the Champions are demanded, and if they be ready to wage the Battail, the Champions ought to put in Pledges to wage the Battail, And then the Tenant and Demandant are called, and asked if they can ſay any thing wherefore the Battail ſhould not be, and if they cannot deny it, The Champion of the Tenant ſhall find pledges firſt, and then the Champion of the Demandant; and then the day ſhall be given over by the aſſent of the parties; And it is ſaid unto them, *quod uterque eorum tunc habeat pugilem ſuum armat. competent. ſufficient. pro ut decet, ad faciendum Duellum prædictum: Et quod corpora eorum interim cuſtodiantur periculo quo incumbit*: And note, The Attorney of the demandant appeared the fourth day with *pugilem ornat.* &c. againſt the Defendant, And becauſe the Defendant was not here at the day *cum pugile ſuo ad defenſionem ſuum faciendum*; *Et ipſe ſollempniter exactus non venit*, but made default, Judgment was entred for the demandant, *Book Entries.* 103. P. 2.

3. The Order for joyning of Battail by Freemen in a Writ of Right is thus, viz. There is put into the finger of the Guantlet of the Defendant a penny; and he is to caſt his Guantlet into the Court, to the other; And the next day, the Champion of the Defendant came within the bar, and he was commanded by the Court to ſtand towards the Eaſt; and the Champion of the Demandant to the Weſt: And they both being upon their knees; It was asked of the parties, if they knew any cauſe wherefore the two Champions ſhould not be allowed, and wherefore the Battail ſhould not be; And then a Guantlet ſhould be delivered to each of them with a penny in each finger-ſtall; and then it ſhall be demanded of the Champion of the Defendant, If he will joyn the Battail: which if he anſwer, that he will; then it ſhall be asked of the Champion of the Demandant the like. And then, the Champion of the Defendant ſhall be commanded to ſtand to the Eaſt, and of the Demandant to the Weſt: and then it ſhall be asked the Serjeants, If they have miſ-pleaded, or not ſufficiently pleaded, and if they will amend their Pleas, or if there be any default in the Court, or they know any thing why they ſhould delay the Battail, and they anſwer No; Then the Juſtices ſhall ſay, We Award the Battail, and that the parties bring their Champions ſuch a day; And that they give one Guantlet with a penny in it, to the one, and to the other: And both of the Champions were commanded by the Court, the one to go to *Paul's*

and

and the other to *Weſtminſter*. And then it was commanded to them both to go off from the place, and that they do not approach the one to the other, or ſpeak the one to the other. And after the Battail was Awarded, The Defendant found two Sureties, that his Champion ſhould perform the Battail, and ſo did the Demandant for his Champion: And at the day of the Battail: The Count, the Defence, Continuance, and the names of the Champions were read; and the Defendant was called, who appeared by his Attorney; and then the Demandant was called; and the Demandant had his Champion ready clad in red Leather; And it was commanded that one ſhould hold his red Target, and his red Baſton behind the Champions back, which was done accordingly, but his head was not bare, as ſhall be the head of an Approver, nor his Baſton had not a knop of the end of it, as the Baſton of an Approver ſhall have: And in the Principal Caſe; The Tenant being demanded three times to appear with his Champion, made default. And thereupon the Count, Defence, Continuance, and the names of the Champions were read again; And upon that, final judgment was given for the Demandant. Mich. 1 H. 6, 7. See 30 E. 3. *Jeffrey de Say* and the Counteſſe of *Huntingtons* Caſe. And ſee 29 E. 3. 15. The Biſhop of *Salisbury* and the Earl of *Salisbury's* Caſe, for the Caſtle of *Salisbury*. See *Mirrour of Juſtices*, 218. acc.

4. In a Writ of Right brought by the Vendees of Cheny of certain Lands within the County of *Kent*, (they being before duly barred, both in a Writ of Entry *ſur diſſeiſin*, and in an Attaint) againſt *Paramour*: The Defendant choſe Tryall by Battail, and his Champion was one *George Thorn*, and the Champion of the Demandant was one *Henry Naylor* a Maſter of Fence; and the Court agreed the Battail: and the Champions were by Bail, and ſworn to perform the Battail at *Tut-hill* in *Weſtminſter*, upon Munday next after *Craſtin. Trinitatis*, and the ſame day was given to the parties, Demandants and Tenant. At which day, a Liſt was made ſquare in a plain ſoil, every ſquare being 60 feet, *Eaſt*, *Weſt*, *North*, and *South*. And the place and ſeat of the Juſtices of the Bench was without the Liſts, apparelled with the Apparel of the ſame Court, which was in the Hall at *Weſtminſter*; and there was a Bar made for the Serjeants at Law, and about ten of the Clock the ſame day, the Juſtices came to the place in their Robes of Scarlet, with the Appurtenances and coifes, and the Serjeants alſo: And there publique Proclamation three times made, *O Yes*. The Demandants were ſolemnly called, and did not come: Afterwards the Sureties of the Champions were called, to produce firſt the Champion of the Demandants, who came into the place apparelled in rugged Sandalls, bare legged from the Knee downward, and bare headed, and bare Arms to the Elbow, being brought in by the hand of a Knight, namely Sir *Jerome Bowes*, who carried a red Baſton of an Ell long, tipped with Horn, and a Yeoman carrying the Target made of Leather, and they were brought in at the North ſide of the Liſts, and then came towards the Bar before the Juſtices with three ſolemn Congies, and there was he made to ſtand at the South ſide of the place, it being the right ſide of the Court: And after that the other Champion was brought in, in like manner at the South ſide of the Liſts, with the like Congies, &c. by the hand of Sir *Henry Cheney* Knight, and was ſet on the North ſide of the Bar, and two Serjeants being of Counſell of each party in the middeſt, between them: This being done, the Demandants were ſolemnly called again, and appeared not, but made default; upon which default, *Barham*, Serjeant of Counſell with the Tenant, prayed the Court to Record the Nonſuit, which was done. And then *Dyer* Chief Juſtice reciting the Count, Writ, and Iſſue joyned upon Battail, and the Oath of the Champions to perform it, and the ſetting of that day and place, gave Judgment final againſt the Demandants, and that he ſhould hold the Land to him and his heirs for ever, acquited from the Demandants and their heirs for ever: And the demandants and their ſureties of *proſequend.* to be in the Mercy of the Queen; and then ſollemn Proclamation was made, That the Champions, and all other there preſent (which were above 4000. perſons) ſhould depart home in peace, and ſo they did, with a great Cry, *Vivat Regina*. Trin. 13 Eliz. *Cheny* and *Paramours* Caſe. *Dyer*. 301, 302.

5. A Writ of Right in *Durham*, The Tenant waged Battail, which was accepted of, and at the day to be performed: *Barkley* Juſtice, there examined the Champions of both parties, whether they were not hired for money? and they confeſſed they were, which confeſſion he cauſed to be recorded, and gave further day to be aviſed: And by direction from the King, all the Juſtices were required to deliver their Opinions, whether this were cauſe to de-arraign the Battail by theſe Champions; and it was ſubſcribed by all the Juſtices, That this Exception comming after the Battail gaged, and the Champions allowed, and Sureties given to perform it, ought not to be received. *Bracton*. 161. Mich. 14 Car. *Claxton* and *Lilbornes* Caſe. *Cro.* 1. Part 375, 376.

6. The Writ of Right of Land, or the like, The Writ of *Ne injuſte vexes*; The Writ of Cuſtomes and Services; The Writ of *quod permittat* in the *debet*. The Writ of *quo jure*, The Writ of Right of Advowſon, The Writ of *Secta ad Molendinum*

tinum, are all Writs of Right, and Battail lyeth thereon: but the Writ of Right of Ward, Ceſſant, Eſchat, *Droit ſur. Diſclaimer*, and the Writ of Meine, were but for, and upon Seignories, and Battail lyeth not in them. See *Fitz. Nat. Br.* acc. 124, 151 128. *Cook.* 8. Part 31. acc.

7. The Writ *De Rationabilibus deviſis*, is a Writ of Right-cloſe; and the Iſſue in it may be tryed by Battail. *Bro. Entries* 405. *Fitz. Nat. Br.* 129.

8. An Enfant may joyn the Miſe in a Writ of Right, and try the ſame by Battail, becauſe he may do it by his Champion, and not in his proper perſon: Otherwiſe it is in an Appeal, for there the Battail muſt be in perſon, 9 E. 4. 15. *Mirror* 304. acc.

9. Where the Kings Anceſtor is diſſeiſed of his Lands, and the Right diſcends to the King, and he bringeth a Writ of Right, the ſame muſt be tryed by the Grand Aſſiſe, for that the King ſhall not be compelled to joyn Battail. 24 E. 3. *Droit.* 13.

10. In a Writ of Right when the Tryal is by Battail; neither the Tenant nor the Demandant ſhall fight for themſelves, but ſhall each find a Champion, to fight for them, becauſe if either the Tenant or the Demandant ſhould be ſlain, no Judgment could be given for the Lands or Tenements in Queſtion; but it is otherwiſe in an Appeal, for that the Demandant ſhall fight for himſelf, and ſo ſhall the Defendant alſo; becauſe there if the Defendant be ſlain, the Plaintiff hath the end of his Suit, viz. the death of the Defendant. *Cook* 5. Part *Inſtitutes* 294.

11. See where Battail was waged in an Appeal brought by *R. Read*, of the death of his brother. Mich. 2, & 3. *Ma. Dyer*, 120.

12. A Citizen of *London* brought an Appeal of Robbery, and the Defendant would have joyned battail. *Hilby* Chief Juſtice ſaid, That he was not to have allowance of Battail in an Appeal brought by a Citizen by the Cuſtome of *London*, for that they were exempted from it. 3 E. 3. *Corone.* 157. and ſee 20 E. 3. *Corone.* 121. the like Appeal was ſued, and the Defendant made offer of the ſame Tryal by Battail, and although the Plaintiff who ſued the Appeal would have joyned Battail without regard had to the Franchiſe. Yet the Mayor and Corporation of *London* ſued a Writ out of the Chancery, reciting their Cuſtome and Franchiſe, and prayed allowance of it, in diſturbance of the Battail: And ſo note, where a Battail was allowable by Law, yet by Cuſtome the ſame was reſtreyned.

Bilawes.

1. *What Bilawes, and by whom made, ſhall be good, what not: And whom, and how far they ſhall bind; Where not.*

1. THE Lord of the Manner of A. Avowed the taking of a Diſtreſſe for breaking of a Bilaw, made by the Homage of the ſaid Manner, where the Cuſtome of the Manner was alledged to be, That the Tenants of the Mannor might make Bilawes for the better ordering of the Tenants, and for the better ordering of their Cattel, *cum opus fuerit*; and ſhewed that the Plaintiff being one of the Homage and Tenants, with the other, made a Bilaw, That he which did put his Cattel into a certain Common before the ringing of a Bell, ſhould forfeit 10 s. And that it ſhould be lawful to diſtrein for the ſaid forfeiture in *aliquo loco infra Man. prædict.* without alledging any preſentment of the Homage of the breach of the ſaid Order. And upon the ſaid Avowry, the Plaintiff did demur in Law, becauſe the preſcription, to make the Bilaw, was alledged to be *cum opus fuerit, et pro melioratione auſtiorum*; and it is not alledged, that *opus fuit, nec quod fuit pro meliore ordine.* And alſo it was ſaid, that this Bilaw did tend to the diſ-inheriting of the Commoner of his Comnion: But it was adjudged, That the preſcription and Cuſtome was good; and that the Avowry was good. Hill. 15 Eliz. *Dyer.* 323. The Lord *Cromwell's* Caſe.

2. In an Avowry, for an Amercement in a Leet, A preſcription was alledged for making of Bilawes; It was ſaid by *Periam* Juſtice, That every Bilaw ought to be made for the common benefit of the Inhabitants, and not for the private commodity of any man onely, or the Lord of the Manner onely: As if a Bilaw ſhall be made that none ſhall put his beaſts into the common field before ſuch a day, this is good; but if it be that they ſhall not carry hay upon the Lords Lands, or break the hedges of J. S. this is not good becauſe it doth not reſpect the common benefit of all. *Windham* Juſtice ſaid, They ſhould bind no more then ſuch as agreed to them. Hill. 30 Eliz. in C. B. *Goldesbr.* 79.

3. An Act of Common Councel was made in *London*. That if any Citizen, Freeman, or ſtranger, did put any Broad Cloath to ſale within the City, were before the ſame brought to *Blackwell-Hall*

to be viewed, and ſearched, and Hallage to be paid for it, for every Cloath a peny, That he ſhould forfeit for every Cloath 6 s. 8 d. And that the Chamberlain of *London* ſhould have an Action of debt for it. And becauſe the Defendant brake the ſaid Ordinance, debt was brought by the Chamberlain; and the matter being removed into the Kings Bench, a *Procedendo* was Awarded. For, 1. It wat Reſolved that divers Statutes being made for the making of Woollen Cloath, to avoid the deceit in them, That ſuch an Ordnance made for the better obſervation and execution of thoſe Laws, and to prevent the frauds, was good. 2. That the Aſſeſſing of the peny for halling was good, becauſe it was *pro bono publico*, and not for private gain; and the ſame was not any burthen to the Subject, when he reaps the benefit of it, and the appointment of the Chamberlain, being a publick Officer, was good; and the ſame being according to Law, might be put in Execution without any other allowance. 3. Reſolved, That Inhabitants of a Town might make Ordinances and Bilawes for the Reparation of the Church, or the Highwayes, which was for a Publick good. And in ſuch Caſe, The greater part of them ſhould bind all others without a Cuſtome: But if it be for their own private gain, as for the better ordering of their Common of Paſture, or the like, there, without a Cuſtome, they cannot make Bilawes: But Corporations cannot make Ordinances or Conditions without Cuſtome, or the Kings Charter, unleſſe it be for things which concern the publick good. Mich. 33 Eliz. in B. R. *Cook* 5. Part 62, 63. The Chamberlain of *London's* Caſe.

4. In falſe Impriſonment, the Defendant juſtified, That the Queen appointed the Term at St. *Albants*, and the Mayor and Burgeſſes, with the aſſent of the Plaintiff, did Aſſeſſe upon every Inhabitant a ſum of mony for the charges of erecting of the Courts there; And if any one refuſed to pay it, that he ſhould be impriſoned, and becauſe the Plaintiff being a Burgeſs refuſed to pay, he as Mayor Juſtified. It was adjudged in this Caſe, That it was no good Juſtification, becauſe the Ordinance is againſt the Statute of *Magna Charta*, which is *Quod Nullus liber homo impriſonetur*: But it was Reſolved, That they might have inflicted a reaſonable penalty, which they might limit to be levyed by diſtreſſe, or by Action of Debt. Trin. 38 Eliz. in C. B. *Cook* 5. Part 64. *Clarks* Caſe.

5. Note, It was ſaid by *Suit* Juſtice. That if a Cuſtome of a Mannor be, That the Homage do make Bilawes, that it ſhould bind the Tenants, aſwell the Free-holders as the Copy-holders: others ſaid it is no good and reaſonable Cuſtome: But all agreed, That if ſuch Bilawes were made by the greater number of the Tenants, they ſhould bind them, otherwiſe not. Mich. 29 Eliz. in B. R. *Godbolt*. 50. See Sect. 2. acc.

6. Debt was brought by the Port *Reeve*, and Inhabitants of *Graveſ-end*, againſt a Waterman which plyed the Ferry there, And declared, That *Graveſend*, and *Milton* were Ancient Towns adjoyning to the River of *Thames*, and that the Inhabitants of theſe Towns, have had time out of mind, an ancient paſſage from thence to *London*, and have uſed to make Bilawes for the government of that paſſage, and have provided Watermen, Steermen, and Rowers for the ſaid paſſage, and to take of every paſſenger and his fardell 2 d. That the Queen by her Letters Pattents Incorporated the ſaid Inhabitants by the name of *Port Reeve*, *Jurats*, and Inhabitants of *Milton* and *Graveſend*, and that they had enjoyed the ſaid Ferry without interruption. And that the *Port Reeve* and 12. of the Inhabitants have power to make Bilawes for the Government of the ſaid Ferry, and that 37 Eliz. a Conſtitution was made by the *Port Reeve*, *Jurats*, and 12 of the Inhabitants, That no Waterman ſhould ply any Fair or Paſſenger till the Barge had received ſo many of their Paſſengers, by which they might receive 4 s. at the rate aforeſaid and be removed from the Bridge at *Graveſend*, to the Land-mark; and that if the Tilt-boat or any other Waterman received any Paſſenger before the Barge be ſo furniſhed, that he ſhould pay to the *Port Reeve*, *Jurats*, and Inhabitants for the maintenance of the ſaid Barge, for every Paſſenger ſo Received 2 d. And Aſſigned the breach by the Defendant that he had received ſo many Paſſengers before the Barge was furniſhed, which amounted to ſo much as is demanded: for which the Action was brought. Upon *Nihil debet modo et forma* as it was demurred, It was found for the Plaintiff; And Judgment was Arreſted for theſe cauſes. 1. By the Cuſtome, the Barge hath not any precedence, nor preheminence, but equall liberty as to all Watermen to carry what Paſſengers they could: and then if the Cuſtome were not ſo, then it cannot be made ſo by the Grant of the Queen, or by the Bilaw, for this is the Liberty of the Subject, which cannot be abridged or reſtreyned by them; and the River of *Thames* is ſo publick that he cannot reſtrein it by his Grant; and the River of *Thames* is a common River, and as a common High-way which cannot be reſtreyned. 2. Becauſe the Inhabitants of *Milton* and *Graveſend*, are incorporated by the name of *Port Reeve*, *Jurats*, and Inhabitants of *Graveſend*, poſſeſſors of Ships, the which words are left out in the name by which the Action is brought, ſo as the Bilaw is not made by the ſame name by which they are incorporated. 3. Becauſe the Conſtitution is not purſued. For that is, That if any Waterman carries any Paſſenger willing

willing to go by the Barge, that ſuch Waterman ſhall pay for every ſuch Paſſenger 2 d. and it is not averred that the Paſſengers which the Defendant carryed, were willing to go and be carryed by the Barge. 4. The Conſtitution is not good, For it is that no Wherry-man ſhall carry any Paſſenger before the Barge be fully diſmiſt, and that is not good, For it may be that the Barge will not paſſe to *London* at all this Tyde, and alſo it ought to be averred, that the Barge departs in convenient time after it is furniſhed, which here is not done; and for theſe and other cauſes, the Judgment was Arreſted. Trin. 10 Jac. in C. B. *Gravesend's* Caſe. *Brownlow.* 2. Part 177, 178. 179, 180.

7. In Treſpaſſe, the Defendants pleaded, That *Exeter* is an Ancient City, and within the ſaid City, there is, and time, &c. was, a Society of Cordwayners, Incorporate by the name of Maſter, Wardens, Aſſiſtants and Commonalty of Cordwainers of the City of *Exeter*, and that they have uſed to make Bilawes for the Government and profit of the ſaid Society; And 44 Eliz. did ordain that no perſon, Burgeſſe, or Forreigner, not being a brother of the Society, ſhould make, ſell, or offer to ſell, or procure to be ſold, within the City of *Exeter*, the County, or Liberty thereof, any Boots Shoes, Pantofles, Pumps, &c. under the pain of forfeiting to the Maſter and Wardens, for every ſuch offence, ſuch ſum as ſhould be aſſeſſed by the Maſter and Wardens &c. or the greater number of them. And if any perſon of the ſaid Society, or other exerciſing the ſaid Art, inhabiting within the City, or the County, or Liberty of the ſame, who ſhall break ſuch order, and ſhall refuſe to pay the ſame, upon proof had of the breach thereof; It ſhould be lawfull for the Maſter, &c or three of them, with a Conſtable, &c. to enter the houſe, Shop, &c. of ſuch perſon, and to diſtrein any of their goods for the ſum forfeited. That the Plaintiff of the ſaid City, being an Inhabitant within the City, and no brother of the Society, did make divers Shoes, and there expoſed them to ſale. That the Maſter and Major part of the Aſſiſtants did impoſe upon the Plaintiff 33 s. 4 d. for the ſaid Offence; that he had notice of the ſums Impoſed and paid parcell of it, and refuſed to pay the reſidue which was proved before the Maſter and Wardens, &c. whereupon taking with them a Serjeant at Mace, they did diſtrein and take 10 hides within the City, in the name of a diſtreſſe, and kept them for 30 dayes after, and becauſe the Plaintiff, would not pay, &c. they did ſell them, &c. And upon this Plea, the Plaintiff did demur: And it was adjudged that the Defendants Plea was not good for divers cauſes. 1. Becauſe they have exceeded their Cuſtome in the extent of the Bilaw as to the place; for the Society of the Act is alledged to be within the City of *Exeter*, and all the Cuſtome goes to the City: But the Bilaw exceeds this, for it is, That none make, ſell, &c. any Shoes, &c. within the City or the County of *Exeter*, which is not warranted by the Cuſtome. 2. It exceeds their power in the things prohibited; For if it had bin. That none ſhould uſe the Art of a Shomaker within the City, it had bin good; But to reſtreyn him to make Shoes generally, which extends to make Shoes for himſelf is void. 3. They have not alledged any Cuſtome that none making any Shoes, &c. within the City, except thoſe of the Society; onely that they make Bilawes for the good Government and profit of the Society; And the making of Shoes for his private uſe, is nothing concerning the Society. 4. This Bilaw reſtreyns other perſons to uſe their Arts. For it is that none ſhall do any thing pertaining to the Art of Shoemakers; and many ſuch things are done by other Artificers. 5. The penalty impoſed by the Bilaw is not warranted by Law, nor by their Cuſtome; for that it ought to be reaſonable and expreſſ, that the Court may judge whether it be reaſonable or not; and alſo it ought not to be by Impriſonment: but here no certain pain is ſet down, but left to the diſcretion of any of the Shoemakers of *Exeter*. 6. The Defendants have not purſued the Order, for they have diſtreined before their time, The Order is, That if any refuſe, &c. then upon proof thereof, &c. they may diſtrein, And the proof is alledged to be before the Maſter and Wardens, &c. whereas due proof ought to be by Verdict. For theſe and many other cauſes, the Defendants plea was holden not to be good. Trin. 16 Jac. *Wood* and *Searle's* Caſe. *Bridgman* 139, 140, 141.

8. An Ordinance of a Corporation, That none ſhall exerciſe any Trade there, unleſſe he hath ſerved ſeven years as an Apprentice in the ſame, and ſhall alſo be approved by them to be skillfull therein, is not good; becauſe againſt the Common Law, which reſtreyneth men from exerciſing any Trade, and alſo is prejudiciall to the Common-Wealth, for that it puts a greater reſtraint upon Tradeſmen, then the Statute of 5 Eliz. doth ordain, in aſmuch as he ought to be approved by them, which the Statute doth not enjoyn. *Cook* 11. Part. 54. The Taylor of *Ipſwich's* Caſe.

9. Debt by the Wardens and the Society of Weavers, in the Borough of *Newbery*, They ſet forth, They have power to make Ordinances, and Laws agreeable to reaſon, and not repugnant to the Statutes of the Realm for the Government of the Society, Apprentices, and Servants, and all uſing the Trade of Weaving within the ſaid Bo-

rough. And 1. *May* 45 Eliz. they made Ordinances, which were confirmed, 1 Jac. One of which was, that none ſhould uſe the Art of Weaving within the ſaid Borough, or ſhould have any Loom in his houſe, or poſſeſſion, unleſſe he had bin an Apprentice to the Art within the ſaid Borough for ſeven years, upon pain of forfeiture for every Moneth 20 s. And that the Defendant before his Inhabiting in the ſaid Borough, had notice of the ſaid Ordinance, and alſo after his Inhabiting there. And that he afterwards for five Moneths uſed the Trade there, and that he had two Looms in his poſſeſſion, where he had not bin an Apprentice, nor uſed the Art for five years before, by which he forfeited to them 5 l. &c. Upon *Nihil debet*, after Verdict for the Plaintiffs, It was moved in Arreſt of Judgment, that the ſaid Ordinance was not reaſonable. It was Reſolved by the whole Court, That Judgment ſhould be againſt the Plaintiffs; becauſe the Ordinance was, That none ſhould uſe the Trade of a Weaver, nor have any Loom in the Town, unleſſe he had ſerved, &c. before the making of the Ordinance; ſo as all Apprentices which ſerve after, ſhall be excluded, unleſſe they may be admitted by them: which is unreaſonable. Paſc. 14 Jac. in C. B. rott. 917. *Norris* and *Stapes* Caſe. *Hutton.* 5.

10. In Treſpaſſe againſt the Corporation of Butchers in *London*. They pleaded, That they had power to make Bilawes; and they did Ordain, That no Butcher, or perſon being a ſtranger, ſhould ſell any Veal within the City of *London*, unleſſe they did dreſſe the Kidneyes of the Veal, in ſuch manner as the Kidneyes of the Sheep were dreſſed, and if they did otherwiſe, to forfeit for every time 6 d. and if he refuſed to pay the ſame, then to forfeit the Veal. The Plaintiffs ſervant comming to ſell a Veal, and not performing the Ordinance, the Defendants took the Veal for his refuſall to pay the forfeiture, for which the Action was brought. The Defendants in their bar, did not ſhew the Ordinance in certain. It was holden by the Court, That a ſtranger is not bound to take notice of a private Ordinance made in a Corporation. 2. They Reſolved, That the Bilaw was not good to reſtreyn ſtrangers; but the ſame had bin good, if made to ſuppreſſe fraud, or any other general inconvenience, uſed by a Forreigner, as corruption, or the like in the ſale of their meat, and then they ought to take notice of the ſame. It was adjudged for the Plaintiff. Hill. 7 Jac. in B. R. *Franklin* and *Green's* Caſe. *Bolſtr.* 1. Part 11, 12.

11. An Act of Common Councell according to the Cuſtome of *London* was, by which, It was decreed. That none ſhould bring any Sand, nor ſell, or uſe any in the City or Suburbs of *London*, but that onely which was taken out of the River of *Thames*, and if any did the contrary, he to forfeit for the firſt fault 5 l. and for the ſecond fault, 10 l. to be recovered in Action of Debt, in which no Eſſoin, Protection, or Wager of Law, ſhould be allowed. And it was ſhewed that the Sand of the *Thames* was much worſe then the Land Sand, and yet the price of it was greater, and the meaſure leſſe, for of that of the *Thames*, but eleven buſhells went to a Load, and of the other, thirteen buſhels. The Court held, the Act, and alſo the Decree void, and againſt Law; for it was unreaſonable, that any Freeman ſhould be reſtreyned to ſell, &c. And it may concern the Inheritance of ſome who have Sand in their Lands. And the Court ſaid, That they were very preſumptuous in making Acts ſo Parliament-like, that no Eſſoin, Protection, &c. ſhould be allowed. And Sir *Edward Knightleys* Caſe was vouched by them, who, Executor of Sir *William Spenſer*, made Proclamation in certain Towns of the Kingdome, That the Creditors ſhould come in, and they ſhould be paid their debts: And for this preſumptuous Act, he was committed to the Fleet, and was fined five hundred Marks. Mich. 29 Eliz. in C. B. adjudged.

Bill.

In what Courts the Suit ſhall be by Original, and not by Bill; et è contra.

1. A Writ of Errour was brought upon a Recovery in an Action Popular by Bill in the Court of *Ludlow*, upon the Statute of 4 & 5 *Philip* and *Mary*, which forbiddeth, That none ſhall Weave any Woollen Cloath or Kerſies, if he hath not been an Apprentice, or exerciſed the Trade, &c. by 7. years, upon pain of forfeiture of ſuch Cloath, or the value of it to be recovered by Action, Bill, Plaint, or Information, in any Court of Record, in which No Eſſoine, Protection, &c. It was aſſigned for Errour, That the Plaintiff by the Statute of 18 Eliz. Cap. 5. ought to have been ſued by Original, or Information, and not by Bill. And of that Opinion was the Court; and ſo it was ſaid, it had been adjudged, 30 Eliz. in this Court in *Woodeſden* and *Clerks* Caſe, where the Defendant was ſued by Bill upon the Statute of 23 H. 6. of Sheriffs; and adjudged, That the Action did not lye. 2d. Errour was, That the Recovery was not in

in ſuch a Court as was intended by the Statute; for when the Statute ſpeaks of Courts of Record, It ſhall be intended, the 4. Courts at *Weſtminſter*, *propter Excellentiam*. And the Court ſaid, The Information ought to be in ſuch a Court where the Kings Attorney-Generall may reply, or where he may attend, and that ſhall be at *Weſtminſter*. And for theſe Errours, the Judgment in the Court at *Ludlow* was reverſed. 38 Eliz. in B. R. *Cook* 6 Part, 20. *Gregories* Caſe.

Bill of Review.

1. VPon a Reference out of the Chancery to the Juſtices, Where the ſole Queſtion was, Whether a Decree made by the Commiſſioners upon the Statute of 43 Eliz. of Charitable Uſes, Cap. 4. and Exceptions put in againſt it in the Chancery, and there examined, heard, and confirmed in part, and altered in part, might be re-examined upon a Bill of Review, as other Bills of Review upon Decrees in Chancery. It was Reſolved by the Juſtices, That this Bill of Review is not allowable; but the Decree in Chancery is concluſive, and not further to be examined, becauſe it takes its authority by Act of Parliament, and the Act doth mention but one Examination: And it is not to be reſembled to the Caſe, where a Decree is made by the Chancellor by his Ordinary Authority. Mich. 2 Car. in B.R. *Windſor* and the Inhabitants of *Farnham*'s Caſe in Chancery.

2. Upon a Bill of Review in the Chancery to reverſe a Decree there, the Lord Keeper required the Aſſiſtance of 4. of the Judges, where the Caſe was, That *Thomas Foſter* and *Townley* being Aſſignees in truſt of a Leaſe, to the benefit of *Chaloner* an Enfant; *Tho. Foſter* took all the profits, and was in arrear upon accompt 1500 l. and being unable to ſatisfie, the Queſtion was, Whether *Townley* agreeing to this Aſſignment, by ſealing the Counter-part thereof, and joyning with *Foſter* in Acquittances of the Rents for a year and a half, (but never more meddled), ſhall be charged onely for that wherein he had joyned in the Acquittances; or for all the Reſidue: And it was Reſolved, That *Townley* being but a party truſted, ſhall not be anſwerable for more then came to his hands; for it was the fault of him who put them in truſt, to repoſe Truſt in one who was not able to pay; and he being the party truſted as well as *Townley*, *Townley* ſhall not be compelled to ſatisfie his defect. Wherefore it was Reſolved, That that part of the Decree where he was charged to pay what *Thomas Foſter* could not, ought to be reverſed. Trin. 9 Car. in the Chancery. *Townley* and *Challoner*'s Caſe. *Cro.* 1. Part, 227.

3. Note: It was ſaid by the Juſtices, Where upon the Statute of 37 H. 8. for Tythes in *London*, If a Judgment be given by the Lord Mayor; and upon an Appeal to the Lord Keeper, that Judgment be affirmed, &c. the party is concluded, and ſhall not have Aid by Bill of Review. See Mic. 9 Car. in B. R. in *Pridgeon*'s Caſe. *Cro.* 1. Part, 275.

4. The Caſe was, C. K. had Iſſue by E. S. M. K. and they are divorced, and the marriage ſentenced to be void: C. K. marrieth F. and they have Iſſue E. K. C. dyeth, E. K. is found by Office to be heir. M. and W. her husband prefer a Bill in the Court of Wards to traverſe the Office; to which the Committees of the Wardſhip Anſwer. M. and W. ſue a Bill of Reviver, and M. having Iſſue E. dyeth; her Iſſue and R. her huſband brings a new Bill of Reviver. It was Reſolved in this Caſe, That a Bill of Reviver upon a Bill of Reviver ſhall not be ſuffered, no more then a Writ of *Fourneys Accompts*. And in this Caſe it was holden by the Court, That the laſt Bill was abſurd, which prayeth, That the firſt Bill be Revived, becauſe M. was dead; but it ought to be, That her heir might traverſe. 4 Jac. *Cook* 7. Part, *Kenns* Caſe. 42.

5. Debt was brought upon an Obligation, 27 Eliz. and a Recovery by *Nihil dicit*; After the Defendants death, a *Scire facias* was brought againſt the heir, and a Recovery againſt him upon two *Nihils* returned, who dyed, and a new Writ of *Scire facias* was brought againſt the heir of the Land, and a Recovery had againſt him by default, and now he brings a Writ of Errour in the Exchequer-Chamber; and aſſigns the Errour, That there was not any Bill upon the File; as in truth there was not. But upon a ſuggeſtion to the Court, That it being an ancient Judgment, the Bill might very well be imbezelled off the File: And it is mentioned by a Note in the Attorneys Book, That ſuch a Bill was paid for, to be put upon the File. It was Ordered, That a new Bill ſhould be put upon the File. Mich. 5 Jac. in B.R. *Mayny* and *Collins* Caſe. *Cro.* 2. Part, 186.

Bill of Exception.

ERrour was brought of a Judgment at the Grand-Seſſions in the County of *Pembrook* in an Aſſize of *Darrein Preſentment* by *Henry Cort*, againſt the Biſhop of St. *Davids*, and others, for the Church of *Stackpoole*: One Errour (amongſt other) was aſſigned, Becauſe the Iſſue being, Whether *Henry Cort* did laſt preſent one R. D. the laſt Incumbent, who was Inſtituted and Inducted upon his preſentation; The Plaintiff offered in Evidence Letters of Juſtification, which appeared to be, and ſo mentions, that they were ſealed with the Seal of the Biſhop of *London*, becauſe the Biſhop of St. *Davids* had not his Seal of Office there. And thoſe Letters were made out of the Dioceſs, and the Defendant had demurred thereupon; that thoſe Letters were inſufficient, and the Demurrer was denyed, which was (as was ſaid) an Error, becauſe they ought to have permitted the Demurrer, and ſhould not have Judged upon it. But it was holden by the Court, That the not admitting of the Demurrer, ought not to be aſſigned for Errour: For when upon the Evidence, the matter was over-ruled by the Juſtices of Aſſiſe, That was a proper cauſe of a Bill of Exception, and the Remedy which the Statute appoints in ſuch Caſe. Hill. 9 Car. in B. R. *Cort* and the Biſhop of St. *Davids* Caſe. *Cro.* 1. Part, 249. Now for the Bill of Exception, and the form of it, It runs thus; *Eber. Memorandum*, That the firſt day of *Aug.* before *A.* and *B.* Juſtices, &c. for taking of Aſſiſes in the County aſſigned in a Plea of Treſpaſs and Ejectment, which J. S. in the Court of, &c. before themſelves by Bill doth proſecute againſt T. B. ſuppoſing by the ſaid Bill, That the aforeſaid T. B &c. (and recite the ſubſtance of the Declaration, or what it is, &c. and the Iſſue; and then what the Evidence to prove the Defendant guilty, was, &c.) and that he deſired to give their Verdict for the ſaid T. B. of and upon the premiſſes; and that he likewiſe deſired the Judges aforeſaid, that they would inform the Jury aforeſaid, &c. And the ſaid Juſtices did affirm to the ſaid Jurours, &c. For that the aforeſaid matter to the ſaid Juſtices in Evidence ſhewed, doth not appear, &c. did requeſt the ſaid Juſtices according to the form of the Statute in ſuch caſe provided, this preſent Bill, which doth contain in it the matter aforeſaid above by him to the Jurours ſhewed; By which the ſaid Juſtices at the requeſt of the ſaid T. B. this Bill have ſealed. Note; This Bill is to prevent the precipitancy of the Judge, and ought to be allowed in all Courts, and in all places of pleadings, and may be put in at any time before the Jury have given their Verdict.

Bills in Star-Chamber.

1. THe Attorney-General againſt *A.* in the Star-Chamber on the behalf of the Lord *Digby*, ſuppoſing that he had forged a Leaſe of divers Lands, parcell of the poſſeſſions of *Shirborn*, being now his, in the name of Sir *Walter Rawleigh* when he had it: The Caſe coming to hearing, being heard, it fell out, That the Leaſe was of divers things by name, whereof one piece of ground called *Long Meare* was one: Now the Leaſe pretended and ſuppoſed to be forged, being produced, the ground called *Long Meare*, was not contained in it neither by name, nor by general words, but all the reſt of the things were in it: The Defendant pleaded to the Forgery, Not-guilty: And the Court adjudged; That as the Bill was layed, he was not guilty; for it is not the ſame Leaſe: and it was unneceſſary, and ſpecially that marred the Caſe, for being of a ſtrangers act, if it had been at the Common-Law, he might have made his Information general, that the Forgery had been of ſome one parcel whereof he had been moſt certain *inter alia*. Trin. 16 Jac. in the Star-Chamber. *Meyrs* Caſe. *Cro.* 2. Part, 272.

2. In the Star-Chamber in a Suit between Sir *Stephen Proctor*, and *Darnbrooke*, and others, for a horrible Ryot committed by them all in *Bromley* Moors about Lead-works, becauſe it appeared upon the hearing of the Cauſe in part, that it was depoſed by divers, That one *W.* who was grievouſly hurt in that Riott, did dye within 3. months after; and being before an able man, ſaid, He would charge one of the Rioters with his death. By Order of the Court, the Judges were to conſider, Whether it were fit to proceed there? And it was Reſolved by them, That the Caſe appearing thus, It exceeded the Capacity of that Court, and was of dangerous Conſequence, though it was layed but a Riott in the Bill, ſince it fell out to be likely a Murder in them all by the proofs; and the rather, becauſe the proofs were read by the Plaintiff himſelf; and therefore the Juſtices held it fit, That the Plaintiff ſhould be Ordered to prefer his Bill of Murder at the next Aſſizes, and bring his Witneſſes, and there his Bill and Evidence to be given in open Court at the Aſſizes to the grand Inqueſt; and then if the Bill were found, to proceed

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for Felony: If not, to return to the Star-Chamber upon the Riot, and ſo to be heard. Paſch. 15 Jac. in the Star-Chamber. Sir *Stephen Proctor* and *Dunbrooks* Caſe. *Hob.* 138.

3. A Bill in the Star-Chamber was exhibited againſt *William Courteen*, and 160 Dutchmen, for buying and tranſporting ſeveral ſums of money ſince the beginning of the King's Reign; And the Bill was layed, That they had joyntly and ſeverally bought and tranſported great ſums in general, naming no certain ſum, that is to ſay, *William Courteen*, ſo much certain, and ſo one after another his portion certain: Upon this Bill one of the Defendant's demurred in Law: And this Caſe, the Attorney-Generall brought to a hearing againſt divers, and ſerved ſome with proceſſe *ad audiendum Judicium*, and ſome not. Now although the Rule of Star-Chamber be, That if one Defendant be ſerved to hear Judgment, it ſerves for all: yet as this Caſe was, It was Reſolved, That it could not be: For although there is but one writing or Bill againſt all the Defendants; yet it is as many Bills, as Defendants, becauſe they are ſo many ſeveral parties and offences: For although he did lay the Offence firſt joyntly and ſeverally, yet that is corrected, and explained by the ſeverall application of a diſtinct portion to every perſon, and ſo the word Joynt is fruſtrate: and ſo there is no reaſon that the ſerving of one Defendant, ſhould make the other anſwer, that hath nothing to do with him or his Cauſe. Paſch. 16 Jac. in the Star-Chamber. *Courteens* Caſe, *Hob.* 270.

Breach.

What ſhall be layed or aſſigned to be a good* Breach *of Covenant, Promiſe, Condition, or other thing; What not.

1. ACtion of Covenant brought, and the Breach was alledged, That the Plaintiff ſhould quietly enjoy the Land demiſed to him; And he ſhewes, That the Defendant Exhibited a Bill in Chancery againſt him, pretending, The Leaſe was made in truſt: And it was Decreed to be otherwiſe; and whether the exhibiting of the Bill, was a breach of Covenant, there being no diſturbance at Common-Law, was the Queſtion? And the Court was clear of Opinion, That it was no breach of Covenant; for it was no diſturbance at Common-Law, nor entry, and the Law could not take Notice of it. Trin. 11 Jac. in C. B. *Sally* and *Chutes* Caſe. *Brownlow* 23.

2. In Debt for not performance of Articles of Agreement, the Articles were, That the Plaintiff ſhould deliver to the Defendant 20 l. for the benefit of C. his daughter within a year: And that the Defendant ſhould pay yearly to the Plaintiff after the receipt of the ſaid 20 l. upon the 2d. of *Febr.* till the age of 18 years of C. ſuch Intereſt money as the ſaid 20 l. ſhould amount unto according to the rate of 10 l. *per* 100 l. And if C. dyed before 18 years, then the Defendant ſhould pay the 20 l. to the Plaintiff within 6. weeks after her deceaſe. The Defendant pleaded performance. The Plaintiff aſſigned the breach, That he had paid the 20 l. to the uſe of C. upon 2d. of *Febr.* 1609. and that 27. *December*, 10. Jac. C. attained the age of 18. years, and not before; and that the Defendant had not paid to the Plaintiff 40 s. for the Intereſt of the ſaid 20 l. according to the Articles. The Plaintiff demurred upon it. It was alledged, This was not any breach, becauſe Uſury is forbidden and unlawful; and a breach cannot be aſſigned, in omitting that which is unlawfull: But it was Reſolved, It was a ſufficient breach; for the payment of the Intereſt after the rate of 8 l. *per Cent*, is not meerly againſt Law, but tolerated; and when it is *ſecundum ratum*, of 10 l. *per Cent*, the Court knowes it is 40 s. for the year. Adjudged for the Plaintiff. Paſch. 13 Jac. in B. R. *Williamſon* and *Hunts* Caſe. *Cro.* 2. Part, 378.

3. Indentures of Covenant were made between A. B. C. & D; B. and C. never ſealed the Indentures: The Caſe was; Sir *Tho. Treſham* conveyed a Leaſe to the Lord *Sturton*; and he to *Meriel*; and by the Indenture brought into Court, That the ſaid *Treſham*, *Meriel*, Lord *Sturton*, or one of them, at the time of the enſealing and delivery of the ſaid Indenture, was lawfully poſſeſſed of, and in, the Mannor of, &c. And Covenanted, That the Defendant ſhould quietly enjoy the ſaid Mannor clearly and abſolutely freed and diſcharged from all Incumbrances and former bargains by the ſaid *Treſham*, L. *Sturton*, and *Meriel*, or any of them; and the breach was, That the Plaintiff was damnified; for that *Meriel* that had the Eſtate, did not ſeal the Deed. And after Debate, It was a good breach aſſigned. Hill. 7 Jac. in C. B. *Lamb* and *Treſham's* Caſe. *Brownlow*, 21.

4. In Debt, to perform Covenants of an Indenture; The Covenant was, for quiet enjoying without Lett, Trouble, Interruption, &c. The Plaintiff aſſigned the breach, That the Defendant forbade his Tenant to pay his Rent: This was hol-

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den by the Court to be no breach, unleſs there were ſome other act. And the Defendant pleaded, That oftentimes he forbade the Tenant to pay the Rent, the Tenant did pay the Rent to the Plaintiff. Trin. 9 Jac. in C. B. rott. 726. *Whitcott* and *Lindſey's* Caſe. *Brownlow* 81.

5. Covenant was brought upon the words, *Covenant, Promiſe*, and *Agree*, that the Leſſee ſhould quietly occupy and enjoy the Lands Demiſed for and during the Term of 7. years: And the Plaintiff ſhews, That a ſtranger entred upon the Land; and ſhews not, That he entred by Title. The Court was of Opinion, It was not good, becauſe it did not appear he had a good title to enter. Adjudged for the Defendant. Trin. 12 Jac. C. B. *Tiſdale* and *Eſſex* Caſe. *Brownlow* 23.

6. Aſſumpſit was, That the Plaintiff ſhould enjoy ſuch Leaſe of Lands, without the Let, Interruption, or Incumbrance of any perſon; and the Plaintiff ſhewed, That the Land was extended for Debt due to the King by Proces out of the Exchequer, and ſo Incumbred, &c. It was moved, It was not a good breach aſſigned; for he doth not ſhew for whoſe debt, nor when, nor by whom it was due; and it may be for the Plaintiff's own debt; and if ſo, and that thereby he did not perform his promiſe, it would not help him. It was adjudged for the Defendant; for the Plaintiff ought to ſhew a lawful incumbrance. Paſch. 15 Jac. in B.R. *Brocking* and *Chams* Caſe. *Cro.* 2. Part, 425.

7. In Aſſumpſit, the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff had paid him a ſum of money, did promiſe to joyn in a ſurrender of certain Copy-hold Lands: The Defendant Demurred upon the Declaration, That the Plaintiff did not ſhew, that he made any requeſt to the Defendant, to joyn in the ſurrender, which he ought to do; for it was not a ſingle act to be done by the Defendant alone. The Court was of Opinion, That the breach was not well aſſigned: And beſides, you have aſſigned a particular way, how he ſhould ſurrender, namely, in the hands of two Tenants of the Mannor; whereas he did aſſume onely to joyn in a Surrender which may be in Court; or into the hands of two Tenants: and alſo the Plaintiff ought to have ſhewed, That there is ſuch a particular Cuſtome in the Mannor, That a Copyholder may ſurrender into the hands of two Tenants of the Mannor; or elſe ſuch a Cuſtome cannot be taken notice of. Trin. 24 Car. in B.R. *Freeborn* and *Purchaſers* Caſe. *Styles* 107.

8. Covenant was brought in *London*, ſuppoſing the place to be of a Demiſe *apud Parochiam Sanctæ Mariæ le Bowe* in *London*, of a Meſſuage in D. in the County of S. and therein a Covenant to repair houſes. And alledged, That *apud London in Parochia*, &c. he permitted the houſes to decay. And upon a Demurrer upon a vitious Barr pleaded, It was ſhewed for Exception to the Declaration, That this breach is of a matter local, and not tranſitory, and is not in this caſe well aſſigned: And of that Opinion was the whole Court. Mich. 15 Jac. in B. R. *Shiers* and *Brettons* Caſe. *Cro.* 2. Part, 446.

9. Errour in the Exchequer Chamber, upon a Judgment in Debt upon an Obligation; The Errour was, That there was not a breach alledged: for the Condition being, That he ſhould enjoy ſuch Lands without eviction, the breach was aſſigned by recovery by Verdict in *Ejectione Firmæ*, upon a Leaſe made to one E. and doth not ſhew what Title E. had to make the Leaſe; but avers, That E. had good Title: and it might be he had title derived from the Plaintiff himſelf after the Obligation made: therefore he ought to ſhew, That he had good and Eigne title before the Leaſe made. And for this cauſe, all the Judges held the Replication to be ill. Mich. 10 Jac. in B.R. *Kirby* and *Hanſokers* Caſe. *Cro.* 2. Part, 315.

10. Covenant: Whereas he had ſold to the Defendant all his Copyhold Lands in F. that if it did exceed the quantity of 8. Acres, to be admeaſured according to 16 foot and a half to the pole, that he ſhould pay for every acre over and above the 8. acres ſo to be meaſured according to the rate of 4 l. for every Acre, and alledged in *facto*, that the Copyhold Land was 12 acres meaſured by the ſaid meaſure: And for that he had not paid 16 l. for the ſaid 4. acres over and above the 8. Acres, the Action was brought. The Defendant pleaded, There was not 12 Acres meaſured. It was found for the Plaintiff. It was moved, The breach was not well aſſigned, becauſe it is not alledged, That the Lands were admeaſured; and till then the ſurpluſage cannot be known; but the Exception was not allowed; for the Plaintiff might admeaſure it privately; and he need not tell the Defendant when he admeaſures it: and the Iſſue being found, That they contained ſo much. It was holden by all the Court, The Declaration was good, Paſch. 16 Jac. in B. R. *Barwell* and *Wynn's* Caſe. *Cro.* 2. Part, 472.

11. In Debt upon a Bond for not performance of Covenants; the Defendant pleads performance generally; The Plaintiff ſhewes, That the Leſſor by Deed inrolled, bargained and ſold the Reverſion to J. S. and J. D; and there being a Covenant in the Leaſe, That the Leſſee at *Michaelmas*, or after upon requeſt ſhould deliver the poſſeſſion to the Leſſor, his heirs or Aſſigns; he alledgeth for breach, That J. S. and J. D. the next day after *Mich.* came to the houſe, and required of the Defendant the delivery of the poſſeſſion; and that he had not delivered the poſſeſſion: and the Jury found,

found, that J. S. came, and he did not deliver the poſſeſſion. It was holden, That they two having but one title; the delivery of the poſſeſſion to one, had been good for both. It was Objected, That the breach aſſigned was not ſufficient, becauſe he doth not ſhew, that the two Bargainees gave notice to the Tenant, That they had the Reverſion by Bargain and Sale; and without Notice, the Tenant is not to take conuſance of it: But the Exception was not allowed; for being the Condition of a Bond, it is at his perill to take notice of it; and the requeſt by one is ſufficient. Adjudged for the Plaintiff. Paſch. 16 Jac. in B. R. *Hingen* and *Payns* Caſe. *Cro.* 2. Part, 475.

12. In Action upon the Caſe, the Plaintiff declares, That the Defendant in Conſideration that the Plaintiff would marry E. his ſiſter, he would give with his ſiſter 300 l. for her marriage-portion, upon his marriage with her; and for breach of this promiſe, obtains a Verdict. The Defendant in ſtay of Judgment, moved, That the breach in the Declaration aſſigned, was not well aſſigned; for it recites another promiſe than upon which the Plaintiff declared: for he declares of a promiſe to give 300 l. in marriage to the Plaintiff with his ſiſter E, and he aſſigns the breach, in not paying the 300 l. to the Plaintiff, ſo the breach doth not anſwer the promiſe; for if money be paid to the wife, which for any thing appears, it may be; the promiſe is not broken, though ſhe be married. It was the Opinion of the Court, That the breach was well aſſigned; for the huſband is to give the acquittance for the money, and the moneys are to be paid to the husband, and the Verdict finds they are not paid; and it is all one in this caſe, as if the Plaintiff had ſaid, That the Defendant had not paid the moneys to the huſband with his wife in marriage. Mich. 1653. *Rodwell* and *Fenwick*'s Caſe. *Styles* 393, 394.

13. Debt upon an Obligation, the Condition was, That if the Defendant ſhould ſtand to the Award and Arbitrament of J. S. that then, the Defendant pleaded, That the Arbitrator awarded, That whereas there was a Suit in the Chancery depending againſt the Plaintiff for divers matters, that the Plaintiff ſhould be acquitted of that Suit, and of all matters contained in the ſame Bill; and the Defendant alledged, That he did not make any proſecution of that Bill; but the Plaintiff ſtands acquitted thereof. The Plaintiff replyed, That after the Award, the Defendant did exhibit a new Bill, which did contain the ſame matter which the firſt Bill did; upon which plea, the Defendant did demur: and the Cauſe of the Demurrer only was, Becauſe the Plaintiff had pleaded. That the Defendant had exhibited a new Bill, but had not alledged any Proces taken forth upon the Bill: and, If that were a Breach, was the Queſtion? It was alledged, That it was a breach; for the words are, *Quod ſtaret acquietatus*; but if he be put to fright, or liable to proceſs, it is a breach. But the Court held it to be no breach; for the taking of this Proces, is not ſuch a Proces as can prejudice; for neither goods nor body ſhall be taken: and it is not ſuch a Proces as our Law reſpects or regards; for a Bill is but a Petition. Judgment was for the Defendant. Trin. 11 Jac. in C. B. *Freeman* and *Shields* Caſe. *Brownlow* 122, 123.

14. In Debt upon an Obligation for performance of an Award; which was, That the Plaintiff ſhould not proſecute or proceed in the ſame Term in ſuch an Action. It was agreed, 1. That it was a good Award. 2. That the Awarding, That he ſhould not proſecute in ſuch an Action in the ſame Term, that the Entry of Continuance from Term to Term, is not any breach. But *Doddridge* and *Haughton*, Juſtices, ſaid, If one be obliged, That he ſhall not continue ſuch a Suit, If he continue it by Attorney, it is a breach of the Obligation: But if the Attorney enter the Continuance without his privity, it is no breach. Hill. 16 Jac. in B. R. *Gray* and *Gray*'s Caſe. *Cro.* 2. Part, 525.

Capacity.

Capacity of Persons, And who may Purchase, or take Estates in Lands, &c. Or take Goods and Chattells; And how, when, and by what Names; and from whom; And to whose use they may take the same; And where not.

1. AN Allien, born in *France*, brought Debt in the Common Pleas; the Defendant demanded Judgment, if he should be Answered, because he was born out of the Realm, out of the Allegiance of the King: It was holden by the Justices that the Plea was not good, for notwithstanding that he were an Allien born, yet the same is no disability in an Action personal, except he be Allegiance of the Kings Enemy, but contrary in real Actions, for that an Allien may not have Land in the Realm, unlesse he be made a Denizen. 6 H. 8. *Dyer*. 8.

2. If an Allien purchase Land: upon Office found, the King shall have it. *Cook Institutes* 2. But if an Allien be made a Denizen, and purchaseth Lands, the Lord by Escheat shall have the Land, and not the King.

3. If an Allien Merchant purchase a Lease for years, upon Office found, the King shall have it, but not if he purchase a house for his habitation, for the cause of Commerce, but if he leave the Realm, and dyeth during the Term, the King shall have the Lease, and not his Executors. *ibid.* See Mich. 29 Eliz. Sir *John Cuts* Case, adjudged accordingly.

4. One *King* enfeoffed two, viz. An Allien and a Denizen to his own use; Office was found: It was holden by the Court that the use as to *King* for one moyety was gon; and that the Queen should have the other moyety to her own use by her prerogative. Pasc. 11 Eliz. *Dyer*, 283.

5. A person Attaint, can purchase onely to the use of the King. *Cook* 1. Part. *Institutes* 2.

6. A man made a Feoffment, to the use of his Wife for life, and after her death, to the use of the Right heirs of the body of the Husband and Wife, the Woman had Issue, and dyed, the Husband survived: In this Case, It was holden that the Issue might not enter, for that the Husband might not have Right heir during his life. Pasc. 1, *Ma. Dyer*. 99.

7. A Bastard may purchase by his reputed name; and a Remainder, limited to him, by the name of the son of his reputed father, is good; but a Bastard cannot take a Remainder by the name of Issue. See *Cook* 1. Part *Institutes* 3.

8. A man may purchase by his name of confirmation, as if a man be Baptized by the name of *Thomas*, and he is confirmed by the name of *John*. *Cook* 1. Part, *Institutes* 3. Sir *Francis Gawsts* Case.

9. A Feme-Covert cannot take any thing of the gift of her Husband; but she may purchase Lands of others without the assent of her Husband: but if the Husband doth disagree, the same is devested; and if the Husband doth agree, yet after the death of the Husband, the Wife may wave it, if she do not agree to the purchase after the death of her Husband. *Cook* 1. Part *Institutes* 3.

10. Parishioners, Inhabitants, Church-wardens, are not persons capable to purchase Lands but they may take goods to the use of the Church, or the Poor, &c. 12 H. 7. 28. 37 H. 6. 30.

11. A. in consideration of Marriage of his Son, made a Feoffment, and took back an estate to himself for life, the Remainder to his son, and his Wife, which should be in tail; the Marriage took effect: the Father levyed a Fine, and bound him and his heirs to warranty, and dyed; the Son was Attainted of Treason, and Executed, the Queen granted the Land to a stranger in tail, and after the Queen restored the Wife; In that case, it was held That the conveyance to the Son and his Wife, which should be, was good to make her a purchaser; and therefore after the restitution of the Wife, The question was, whether the Wife had right to the moyety of the Land, or to the whole, and, if she might enter upon the Queen's Patent. It was conceived she had right but to a moyety of the Land. See 3. *Ma. Dyer*. 122. Sir *Thomas Watts* Case. See *Cook* 1. Part *Institutes* 187. acc.

12. A. Levyed a Fine of Lands to the use of himself, and of such Wife or Wives as he should marry, and after he married with E. It was holden by the Justices that he should take joyntly with the Husband, being upon an use, contrary upon

upon an eſtate Executed, by which it ſeems that the word (Wife) is a good name of purchaſe; but Quære, If it be a joynture, before or after Coverture, and in whom the uſe was before the marriage. Paſc. 10 Eliz. *Dyer.* 274.

13. Note, It is a rule in Law, That if an eſtate be limited to two, whereof the one is capable, and the other is not; he who is capable, ſhall take the whole, as if Lands be given to one *Et primo-genito ſuo*, if he hath no ſon, the Father taketh the whole; and ſo it is if a man give Lands to a man and to ſuch a Woman as ſhall be his Wife, the man taketh the whole, *Cook* 1. Part 100. in *Shelleys* Caſe. But if a man maketh a Feoffment in Fee to the uſe of himſelf, and his Wife that ſhall be, his Wife ſhall take jointly with him.

14. A man made a Feoffment before the Statute of 27 H. 8. to the uſe of a man and a Woman unmarried, and to the heirs of their two bodies, and after, they enter-marry; and after marriage, the Husband bargains and ſells the whole Lands in Fee, to one of the Feoffees, and dyes without Iſſue, and after the Statute of 27 H. 8. made of Uſes, the Woman claimed the whole by Survivour as Tenant in tail, after poſſibility, &c. It was the Opinion of the whole Court, That ſhe ſhould have but a moyety, becauſe they had at the firſt but moyeties by joynt-tenancy, and the words (Wife which ſhould be) was a good name of purchaſe. Paſc. 4. *Mr. Dyer.* 146. *Bedell's* Caſe.

15. The Lord *Bray* for 800 l. bargained and ſold the cuſtody and marriage of his eldeſt Son, to four of the Privy Councel by name, in the behalf of the King, to the intent to be married by them or their Aſſigns, appointment and nomination without diſparagement; and ſeiſed of divers Lands in the Counties of *Berks*, and *Buckingham*: thoſe in *Berks* holden in Knight-ſervice, in *Capite*, he covenanted to aſſure the Lands in *Berk.* to them four, to the intent to find him, and ſuch Wife as he ſhould marry by their appointment, till 21. years of age, and then the Land to remain to his ſon, and ſuch his Wife, and to the heirs Males of the body of his ſon, and a Fine was levyed to them to the ſame intent. One of the four dyed, the Lord *Bray* dyed. The King upon Office ſeiſed the Ward, and granted the marriage to the Earl of *Salisbury*, who married his daughter to the ſon by the Kings Aſſent, and by the appointment of the Survivors, After the age of 21 years, the ſon ſold the Lands in *Berks* to J. S. the Wife entred; J. S. brought Entry in the *Quibus*. In this Caſe, divers points were Reſolved. 1. That in this Caſe, the Wife is not married by the appointment of four: for where divers joyn in an Act, the Law adjudgeth them onely Actors, who have Authority to do the ſame; and for that cauſe, the Land was onely in the ſon, and that his Grantee ſhould enjoy it againſt the Wife. 2. It was moved, That the Wife was not known at the time of the Eſtate conveyed, and that therefore ſhe ſhould never have any part of the Land; But it being by way of uſe the Court held it clear, that ſhe ſhould take aſwell after ſhe was known, as before. 3 Eliz. *Dyer* 190. 191. The Lord *Bray's* Caſe.

16. If Lands be given to a man, and his Wife that ſhall be; if the Husband maketh a Feoffment in Fee before the taking of the Wife, the Wife ſhall never take, for that the poſſeſſion and ſtate in the Land is altered, and changed, and transferred to the poſſeſſion of another, before the Title of the Wife doth accrue: but if no deviſing or alteration be, then the uſe ſhall reſt in the Wife. 17 Eliz. *Dyer.* 340. acc.

17. A. after the Statute of 27 H. 8. of Uſes, did enfeoff divers perſons, unto the uſe of the Feoffees and their heirs; for the life of B. his eldeſt ſon; and after to the firſt Iſſue Male of B. with divers Remainders over to 10 of his ſons, with the Remainder over to his right heirs, and dyed. The Feoffees by Deed indented, enfeoffed, B; having notice of the firſt uſes to him and his heirs, without any Conſideration. B. had Iſſue C. D. and according to the Statute 27 H. 8. of Inrollments, bargained, and ſold the Land to J. S. and his Heirs. The queſtion in this Caſe (amongſt many others) was, If the Contingent uſes before their Eſſence, by the Feoffment of the Feoffees, was deſtroyed; ſo as they ſhould never riſe out of the Eſtate of the Feoffees, after the births of the other Iſſues of the Father. It was Reſolved in this Caſe by all the Juſtices. 1. That the Feoffment made by the Feoffees, did deveſt all the Eſtates, and the future uſes alſo, and although that the Feoffees had notice of the firſt uſes, yet the ſame was not materiall, becauſe that all the Ancient uſes were deveſted by the Feoffment, and the new Eſtate cannot be ſubject to the Ancient uſes which riſe out of the old Eſtate. which was by the Feoffment deveſted. And it was ſaid, That the Law will not preſerve any thing, which is againſt the rule of Law, and the rule of Law, is, That a Remainder ſhall take effect when the particular Eſtate determines, or elſe ſhall be void; And in this Caſe, by the Feoffment of the Tenant for life, it was a forfeiture, and then thoſe in the future Remainders, were not in *eſſe*, to take advantage of it, and therefore the future Remainders by the Rules of the common Law, were deſtroyed, and there was no difference when the Eſtate of the Tenant for life did determine by death, or by forfeiture as to them in the Remainder: And although the Remainders were in Abeyance, yet a thing in Abeyance might be deſtroyed. 2. It was Reſolved, That the Sta-

tute of 27 H. 8. of Uſe, doth not transfer any poſſeſſion to any uſe, in contingency, untill they come in *Eſſe*, for as there ought to be a uſe in *Eſſe*, ſo there ought to be a perſon in *Eſſe*, who ſhall take the uſe, before that any poſſeſſion can be executed to the ſame uſe. For if the perſon who ſhall take the uſe, be not in *Eſſe*, nor no uſe in *Eſſe*, but onely a poſſibility of a uſe; there, there cannot be any Execution of the poſſeſſion, to the uſe, by the expreſſe words of the Statute. And it was ſaid, That if that Eſtate ſhould be utterly out of the Feoffees, and veſted in them who had the preſent uſes then the future uſes could never riſe, for it was not poſſible that they ſhould be raiſed out of the poſſeſſion of *Ceſtuy que uſe*; And a uſe cannot be raiſed out of a uſe. 3. It was Reſolved, That becauſe the Statute of 27 H. 8. did not extend, but to uſes in poſſeſſion, and to perſons in *eſſe*, and not to any uſes which did depend upon poſſibility, that for theſe cauſes the Contingent uſes did remain as long as they depended in poſſibility onely at the Common Law, and by conſequence they might be deſtroyed, or diſcontinued before they came in *Eſſe*, by ſuch means as uſes might have bin deſtroyed, or diſcontinued at the Common Law: And it was holden, that the alteration of the Eſtate before they came in *Eſſe*, had deſtroyed them. And it was alſo holden, That the Statute of 27 H. 8. ſhould not be extended by Equity to the preſervation of Contingent uſes againſt the expreſſe Letter in the Act. *Cook* 1. Part. *Chadleigh's* Caſe.

18. Tenant in tail, the Remainder in tail: he in the Remainder, bargained and ſold his Remainder to A. for the life of Tenant in tail, and after his death, the Remainder to the King in Fee upon Condition. Tenant in tail ſuffered a common recovery; the King granted his Remainder to the Tenant in tail, and his Heirs. Afterwards, he in the Remainder bargained and ſold his Remainder to B. the Remainder to the King upon Condition. Another Recovery was had. Tenant in tail dyed without Iſſue. It was adjudged, That he in the Remainder, and all others, claiming by or under him were barred by the Recovery; And in that Caſe, It was Reſolved, That the Grant to A. was not good, becauſe he took no particular eſtate, and then the Remainder upon that to the King, was void, by name of a Remainder, becauſe it could never come in poſſeſſion, and the Grantee ſhould never have any benefit of it. But a grant of a Recovery during the life of Tenant in tail, is good, becauſe he hath the Services which the Tenant in tail ought to do; And it was ſaid that a poſſibility which is to make a Remainder good, ought to be *potentia proxima*, and not *remota*; As a Leaſe is made for life, the Remainder to the right Heirs of J. S. is good becauſe by poſſibility, J. S. may dye during the life of the Tenant for life; but if J. S. be not in *Eſſe* at the time of the Remainder limited, but be born after, during the life of the Tenant for life, there the Remainder is void, *quia potentia remota*. And a Remainder limited by a general name may be good, although that the party who ſhall take be not in *Eſſe*, at the time of the Remainder limited; As a Leaſe for life, the Remainder to the right heirs of J. S. or a Remainder *Primo-genito Filio*; But a Remainder limitted by a particular name of Baptiſm, or Surname, is not good, if the party be not in *Eſſe*. *Cook* 2. Part 51. Sir *Hugh Cholmeley's* Caſe.

19. Land was deviſed to the Husband and Wife, and after their deceaſe, to their Children, they then having Iſſue, a ſon and a daughter: It was Reſolved, That the Husband and Wife had but an Eſtate for their lives, with a Remainder to their Children for life, and no eſtate tail, and the intent of the Deviſor ſhall be conſtrued according to the Rules of the Cómon Law, and by that Law, the Husband and Wife have but an Eſtate for life, the Remainder to their Children for their lives: If A. deviſeth his Land to B. and to his Iſſues, or Children, and he hath not any Iſſue at the time of the Deviſe, it is an Eſtate tail, for the intent of the Deviſor is manifeſt and certain; for they cannot take as immediate Deviſors, becauſe they are not in *rerum natura*; and by way of Remainder they cannot, becauſe it was not the intent of the Deviſor; and therefore thoſe words ſhall be taken by way of Limitation, and ſhall make an Eſtate tail. But if a man deviſeth Lands to A. and his Iſſues, and he hath Iſſue of his body then alive, they have but a joynt eſtate for their lives. *Cook* 6. Part. 17. *Wilds* Caſe.

20. Lands were aſſured to A. B. to the uſe of C. D. and his Wife, for the Term of their lives, and the longer liver of them, the Remainder after their deceaſe, for ſix Moneths, to the uſe of the Executors of the ſaid C. and after the ſix Moneths, to the uſe of E. and F. his Wife, and to the heirs of their two bodies lawfully begotten; and for want of ſuch Iſſue to the ſaid C. and his Heirs for ever, provided that if it ſhall happen the ſaid C. at any time after, to have Iſſue of his body, or any Wife of the ſaid C. at the time of his deceaſe to be with Child, begotten of the ſaid C; Then after ſuch Iſſue had, and after 500 l. paid to G. or tendred, or refuſed within the ſpace of ſix Moneths, then next after the birth of the ſame Iſſue of the ſaid C. then the uſe of the ſaid Lands immediately after the deceaſe of the ſaid C. and D. and after the ſix Moneths ended, to be to the uſe of C. and the heirs of his body, and for want of ſuch Iſſue, to the right heirs of C. D. The Wife of the ſaid C. dyed, and C. took another Wife; It was a Queſtion, What Intereſt C. had

had in the Lands before: Iſſue had in the ſecond wife? And it was the Opinion, That before the Contingent performed, he had not any larger eſtate then he had before. Trin. 14 Eliz. *Dyer* 314.

21. A man was bound to a Dean in 20 l. *ſolvend. eidem Decano, et ſucceſſoribus*; the Dean dyed. It was holden, That the Succeſſours ſhall have it: for an Obligation may be made to him and his Succeſſours, as well as to him and his Executors. But *Baldwin* held the [paiment to his ſucceſſour] was void, becauſe the Obligation was made to the Dean onely. 32 H. 8. *Dyer* 48.

23. A Leaſe was made to a Chauntry Prieſt, To have and to hold to him and his Executors; and a Releaſe was made to him and his Succeſſours. It was holden in this caſe, That he ſhould have an Eſtate but for his own life; for the ſame ſhall enure according to his firſt Leaſe, which was not to him and his Succeſſours; but to him and his Executors. Mich. 21 Jac. in C. B. *Wakes* Caſe.

23. If the King grants Lands *Decano et Capitulo*: *Habendum ſibi et hæredibus et Succeſſoribus*; they ſhall take in their politique Capacity: So it is, if the King grants Lands to J. S. *Habendum ſibi et Succeſſoribus, ſive hæredibus*, the ſame ſhall enure to him and his heirs. *Cook* 1. Part. *Inſtitutes*, 8.

24. King *Henry* the 8th did tranſlate the Abbot and Prior of *Norwich* by his Letters Patents, and did create them by the Name of Dean and Chapter, who ſurrendred to King *Ed.* 6. all their poſſeſſions: And afterwards King *Ed.* 6. did incorporate them by the name *Decani et Capituli ex fundatione Regis* E. 6. And afterwards he re-granted their poſſeſſions to them by the name *Decani et Capituli Sanctæ et individuæ Trinitatis Norwiche*; omitting the words, *Ex fundatione* E. 6. It was adjudged in this Caſe, That the Tranſlation was good, and the re-grant to them was good. 2. It was Reſolved, That their ancient Corporation was ſurrendred, and the new Corporation made by King *Edw.* the 6th, good; and that the ſaid words, *Ex fundatione Edwardi* 6. were omitted, and were material, yet the Grant to them was good, notwithſtanding this Miſnomer by the Statute of 1 E. 6. Cap. 6. of *Confirmations*. *Cook* 3. Part, 73, 74. The Dean and Chapter of *Norwich*'s Caſe.

25. King *Ed.* 2d. by his Letters Patents granted the Caſtle and Mannor of *Skipton* in *Craven* to *Robert de Clifford* in tail: Afterwards King *Henry* 6. granted to *Tho.* Lord *Clifford*, who was heir of the body of the ſaid *Robert de Clifford*, *Reverſionem Caſtri, et Manerii prædict. nec non Caſtrum et Manerium prædict.* It was Reſolved in this Caſe, That admit that the Grant to *Robert de Clifford* was void, that yet the ſaid Caſtle and Mannor did paſſe by the ſaid latter Grant made to *Tho. Clifford* in Fee-ſimple in poſſeſſion: For the Intent of King *Henry* the 6th was, That were it in poſſeſſion, or reverſion, that the ſame ſhould paſſe, and with his intention the words agree: For, 1. He grants the Reverſion, if the firſt Eſtate tail was good; and if the ſame was not good, he grants the ſaid Caſtle and Mannor in poſſeſſion; and ſo his words, and his Letters Patents agree with his intent, and both agree with the Law. *Cook* 8. Part, 166. The Earl of *Cumberlands* Caſe.

26. A man ſeiſed of Gavel-kind Land in Fee, by his laſt Will in Writing, deviſed the ſame to husband and wife for the Term of their lives, the remainder thereof to the next heir male of their bodies lawfully begotten *in perpetuum*: And after, the husband and wife had Iſſue three ſons; The Queſtion was, Whether the eldeſt ſon ſhould have the whole remainder, or in Common with his elder brothers? It is there a Quære not Reſolved. 4 Ma. *Dyer* 134. See 32 H. 8. *Dyer* 42. and 6 E. 6. *Dyer* 72. 2 Eliz. *Dyer* 179. Where a Feoffment is made of *Borough-Engliſh* Land, after the Statute of 27 H. 8. of Uſes, to the uſe of the Feoffor, and his heirs males *ſecundum Curſum Communis Legis*, that yet the Younger brother ſhall inherit the Land.

27. The Mannor of H. was conveyed by W. H. to make his Joynture by a Deed in Latine made by the Recoverors to himſelf and his wife for Term of their lives, the reverſion *Seinori puero de corpore ipſius W. H. et hæred. de corpore ſuo Legitimo procreat.* the remainder thereof in general tail to the husband, the remainder to J. S. in Fee, &c. And afterwards by an Indenture between him and J. S. in Engliſh, he Covenanted, That he and his wife would levy a Fine to B. and C. to the uſe of himſelf and his Wife for their lives, the remainder to the uſe of the eldeſt Child of the ſaid *William*, and the heirs of the body of ſuch eldeſt Child, the remainder over a Fine was levied accordingly; and after, the wife dyed without Iſſue; The husband married another woman, and by her had Iſſue a daughter his eldeſt Child, and a ſon his younger. It was a Queſtion, Which of them ſhould have the remainder? And the Opinion of the Court was, That the daughter ſhould have the Remainder, and not the ſon; for that was the intent of the Auncеſtor, as they conceived, although *puero* in Latine is intendable rather an Iſſue male, then a Female: and yet they ſaid, That many Authors have taken the word indifferently, to extend to both Sexes. Trin. 16 Eliz. *Dyer* 337. *Hamfreſtons* Caſe.

28. A guift made *Omnibus filiis* of J. S. with-

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out other name, is good; and ſo it is of a guift *Parochianis de Dale*, although they are not incorporate; but that muſt be underſtood of a guift of Chattels perſonals, for that other things Pariſhioners cannot take. 37 H. 6. 30.

29. Note, this difference; That he who is next *jure repreſentationis*, and not he who is next *jure propinquitatis*, ſhall take and inherit the Land. And therefore if a man hath Iſſue two ſons, A. and B. and dyeth: A. hath Iſſue two ſons, C. and D. and dyeth; C. hath Iſſue a ſon, and dyeth: A. purchaſeth Lands in Fee, and dyeth without Iſſue, the ſon of C. ſhall inherit him, and not D; although that D. be his next Coſen *jure propinquitatis*, becauſe the ſon of C. is next Coſen *jure repreſentationis*: But if a Leaſe had been made to A, the remainder to the next of his blood; in that caſe D. ſhould take the remainder, becauſe he is more near of blood to take by purchaſe. 30 *Aſſ.* 47. *Cook.* 1. Part, *Inſtiutes*.

30. Three brothers were; The middlemoſt brother purchaſed Lands, and deviſed the ſame to his ſon in tail, and if he dyed without Iſſue, that then it ſhould remain to the next of kin, of the Lineage of his Father; the eldeſt brother being dead, then having Iſſue a Son: The queſtion was, who ſhould have the Remainder; And after long deliberation had of the Caſe; It was adjudged that the eldeſt brother ſhould have it, for that he is the next of Lineage, for Lineage ſhall be taken in a Lineall diſcent. Paſc. 29 Eliz. in the Exchequer Chamber adjudged. See 19 Eliz. *Dyer.* 333.

31. If Land be given to a man and *Margaret* his Wife by Deed, and to the heirs of their two bodies begotten; although the Wife, her name be *Margery*, yet the gift is good, and the heirs ſhall be inheritable by force to the tail, and the Land ſhall paſſe by the Deed, and not by the Livery onely, for the Deed was good without a Sirname. And if Land be given to a man *Et uxori ſuæ*, the gift is good without naming any name of the Wife. See 1 H. 5. 8 H. 7. *Hankford*, in *Hanlye's* Caſe.

32. A man hath Iſſue two ſons and a daughter, and deviſeth his Land to his Wife for 10 years, the Remainder to his younger ſon and his heirs, and if any of his two ſons dye without iſſue, the remainder to the daughter and her heirs; the younger ſon dyeth in the life of his Father; after, the Father dyeth: It was holden by the whole Court, That it was a good Remainder to the daughter, being upon a deviſe, although the particular eſtate fails. 3 *Ma. Dyer.* 122. *Rickman's* Caſe.

33. *Greſwald* ſeiſed of Land in Fee, gave the ſame by Indenture to one for life, the Remainder *reſtis hæredibus maſculis* of his body, the Remainder to his right heirs, and dyed, having Iſſue two ſons; Tenant for life dyed, the eldeſt ſon entred, and dyed, having iſſue a daughter. It was adjudged, that ſhe ſhould have the Land as heir, and not the younger ſon, for the tail is not good, for he cannot make his own right heir purchaſer, without departing with the Fee-Simple out of his poſſeſſion; as it was Ruled in *Champernon's* Caſe. 4 H. 6. But another poynt, admitting it to be good, was, whether the Eſtate ended by the death of the eldeſt ſon without heir male, or that it ſhould go to the younger ſon; *Dyer* held, That the younger ſon ſhould have the Land, for if the Donor bring a Formedon in the Revertor, it ſhall ſuppoſe that the Father is dead without Iſſue, and that is not true during the life of the younger ſon, but others held the contrary, becauſe the eldeſt ſon took by purchaſe, and not by diſcent, and therefore whoſoever will inherit as Iſſue in tail, he ought to be iſſuing of the body of the firſt purchaſor, and that is not the youngeſt ſon, in reſpect of the eldeſt. 5 *Ma. Dyer.* 156. *Greſwald's* Caſe. See *Cook* 1. Part *Inſtiutes* 22. acc.

Capias *and* Exigent.

1. *Where, and in what Actions; and againſt whom* Capias *and* Exigent *did lye at the Common Law; where, and againſt whom not: And in what Actions, and againſt what perſons it now lyeth, by Statute Law.*

1. IT was Reſolved by the Juſtices, That at the Common Law, a common perſon could not have Execution againſt the body of the Defendant, nor againſt his Land, upon a Recognizance or Judgment for Debt and damages, but he ſhould have Execution onely of his goods, and Chattells, or of the profits which grew upon the Lands, and that by *Levari facias*, or *Fieri facias*, onely within the year after the Judgment. But in Debt brought againſt the heir upon an Obligation, made by his Father by the Common-Law; Execution might be againſt the Land of the heir, which he had by diſcent, otherwiſe the party ſhould have no fruit of his Action, and therefore of neceſſity the Land was lyable, becauſe the goods did go to the Executors. But at the Common Law, the body, goods, and Lands of the Accomptant, or Debtor of the King were lyable to Execution:

ecution: For it is ſaid, *Theſaurus Regis eſt Vinculum pacis, et Bellorum nervi. Cook* 5. Part in Sir *William Herbert's* Caſe. 12. See *Cook* 11. Part 72. In the Caſe of the *Marſhalſey*, &c.

2. It was Reſolved, That in all Actions, *Quare vi et armis*, a *Capias* lyeth; and where a *Capias* lyes in proceſſe, there after Judgment a *Capias ad ſatisfaciendum* lyeth; and there alſo the King ſhall have a *Capias pro fine*, and all that was by the Common Law; and ſo for a force the Law did ſubject the body of the party to Impriſonment. *Cook, ibid.*

3. A man was Outlawed upon a Judgment in Debt, he brought a Writ of Error, and the Judgment was affirmed, and thereupon, within the year a *Capias Utlagatum* was Awarded, and the Sheriff ſuffered him to eſcape before the Return of the Writ: And in that Caſe, theſe points were Reſolved. 1. That if at the Common Law, a man hath Judgment in Debt, and after the Judgment, had Outlawed the Defendant, the Plaintiff was at an end of his ſuit, as to to the ſuing out of any proceſſe by himſelf, for he could not have a *Scire facias*; nor other Execution upon the Judgment, but he was put to his new Original; And although a *Capias* did not lye, nor the body of the Debtor was ſubject to Execution before the Statute of 25 E. 3. yet in ſuch Caſe, if the party were taken by *Capias Utlagatum* at the Kings ſuit, he ſhould be in Execution for the party, if the party pleaſed; and upon ſuch *Capias Utlagatum*, the Defendant being taken, he was preſently in Execution for the party Plaintiff, although he was not put in Execution by the Court. 2. Reſolved, If Judgment be given in C. B. & the ſame be removed by Error, & the Judgment is affirmed within the year, they may Award a *Capias*, or a *Fieri facias*, and the Plaintiff ſhall not be put to his *Scire facias*, although it be in another Court: and in that Caſe, theſe differences were taken, and holden for Law. 1. In all Caſes when the party may have *Capias ad ſatisfaciendum*, and the Defendant is taken by *Capias pro fine*, there the Defendant is in Execution preſently for the party if he will: and in ſuch Caſe, the party may pray that the Defendant be in Execution for his damages. 2. When the Plaintiffe ſurpaſſeth his time, that he cannot be in Execution preſently, but is put to his *Scire facias*, there if the party be taken by *Capias pro fine*, the Plaintiff may pray that he do remain in Execution, but it ſhall not be without prayer. Hill. 4. Eliz. rot. 114. in B. R. *Cook* 5. Part 88. *Garnons* Caſe.

4. A man was Out-lawed after Judgment, before the generall Pardon in 43 Eliz. and after the Pardon, he dyed, and his Executors made ſatisfaction upon Record; and, without any proceſſe, pleaded the generall pardon, with an Averment, that they were not any perſons excepted in the pardon; It was Reſolved in this Caſe, That becauſe no *Scire facias*, nor *Capias Utlagatum*, nor other proceſſe, lay againſt Executors, that they might *gratis* come in (for neceſſity) without proceſſe, and plead the general pardon with Averment, that they were not any perſons excepted, and ſo might every ſubject by himſelf, or by his Attorney, plead the ſame for his diſcharge. *Cook* 6. Part. Sir *Ed. Phitton's* Caſe 80.

5. In Debt againſt a Sheriff for an Eſcape, the Caſe was; *A.* did acknowledg a Recognizance in the Chancery, and the Plaintiff had a *Scire facias*, and 2. *Nihils* retorned; afterwards he had a Judgment *Quod recuperet debitum*, and a *Levari facias* came to the Sheriff to levy the ſame; who returned, *Nulla Bona*: afterwards he took forth a *Capias ad ſatisfaciendum* to the Sheriff, who took the party in Execution, and afterwards did ſuffer him to eſcape; upon which, the Action was brought. The Point inſiſted upon was, Whether a *Capias* doth lye upon a Recognizance acknowledged in Chancery, or not? It was Objected, That a *Capias* doth not lye upon a Recognizance taken out of the Chancery; and 13 & 14 Eliz. 306. *Puttenham's* Caſe was vouched to be accordingly; and *Cook* 3. Part, 12. Sir *William Herbert's* Caſe. But on the other ſide it was Anſwered, That as this Caſe was, the Action for the Eſcape did well lye againſt the Sheriff: For preſently after the Recognizance is acknowledged, it is a Judgment preſently, and ſo a Judgment upon Record; and where a Debt is of Record, there by the Statute of 25 E. 3. Cap. 17. the party may have a *Capias*; and the Courſe of the Chancery hath alwayes been in ſuch caſe, to award a *Capias*: But admitting, That the Proces was Erronious, and they award an Erronious Proces, or do miſ-award a *Capias*, by which the party is taken in Execution, yet it is a lawfull Execution, and the Sheriff is chargeable with the Eſcape; and he is not to examine the Errour of the Court, where the Court hath Juriſdiction of the Cauſe: and the Sheriff is not to argue or diſpute the authority of the Court. And ſo it was adjudged, Trin. 31 Eliz. in the Exchequer, in *Ognell* and *Paſtons* Caſe: which ſee, *Cook* 8. Part, 142. in Dr. *Druries* Caſe; where in an Action of Debt upon an Eſcape, the firſt Proces was erronious, yet the party being in Execution by force of it, it was adjudged, That the Sheriff ſhall be chargeable, if he ſuffer the party to eſcape, notwithſtanding the Erronious Record, of which the Sheriff ſhall not take any advantage. And in this caſe it was agreed, That if a *Capias ad ſatisfaciendum* be iſſued out againſt a Noble-man, (where

(where it ought not ſo to be) and he is taken by force of it, and afterwards ſuffered to eſcape, though *de Jure*, he ought not to be taken; yet the Sheriff ought not to ſuffer him to eſcape: And ſo in the principal Caſe, the Court was clear of Opinion, That Judgment in this caſe ought to be given for the Plaintiff: and afterwards Judgment was given accordingly. *Intrator.* Paſch. 44 Eliz. in B. R. rott. 453. and Mich. 11 Jac. in the Kings-Bench adjudged. *Weever* and *Clifford's* Caſe. *Bolſtrod.* 2. Part, 62, to 65.

6. An Action of Falſe Impriſonment was brought by the husband againſt the Defendant, for making an Aſſault in and upon his wife, and Impriſoning of her. The Defendant juſtified, That a Warrant was directed to him, to take *Julian Doiley*, Widow, who by force thereof did take her, being the Plaintiff's wife. The Judgment was, *Quod Capiat Julianam prædict. per nomen* of *Julian Goddard, ad ſatisfaciendum* to *Leonard Loves, pro damnis*: and the truth was, That at the time of the Warrant iſſuing out againſt her, ſhe was then *Julian Goddard*, Widow, but at the time when ſhe was arreſted and Impriſoned, the wife of the Plaintiff *Julian Doyley*; and the firſt Action was brought againſt her *Julian Goddard*, Widow. The Court was clear of Opinion in this caſe, That here was a good deſignation of the party in nomination that was to be taken, and that the *Capias* here was well awarded: and if upon this *Capias* the Sheriff had retorned, either that ſhe was married, or a *Non eſt Inventus*, it would have been an ill retorn, and falſified all the proceedings; and ſo the Action of Falſe Impriſonment brought by the husband, was not maintainable. And by the whole Court, If an Action be brought againſt one being a Widow, and ſhe is found guilty, and before Judgment ſhe takes a husband, yet the *Capias* ſhall be againſt her, and not againſt her husband: and ſo Judgment was to be given, That the Plaintiff *Nil Capiat per billam*. Hill. 6 Jac. in B. R. rott. 853. *Doiley* and *Waters* Caſe. *Bolſtr.* 2. Part, 80, 81. See *Cro.* 2. Part, 323. the ſame Caſe.

7. A man taken by a *Latitat* out of the Kings-Bench, put in bail, *Wellſhmen*; and afterwards a Judgment paſſed againſt him. And it was moved to the Court, Whether Proces upon a *Capias ad ſatisfaciendum* might go into *Wales* againſt the bail, or not? It was ſhewed to the Court, That in the Court of Common-Pleas, they do not uſe there to ſend ſuch Proces into *Wales*, but onely of Outlawry. But *Man*, Secondary, informed the Court, That it had been otherwiſe here in this Court: and therefore the Court directed, That Proces ſhould be ſent into *Wales* againſt the Bail; and if the parties found themſelves grieved, they might have thereof a Writ of Errour. Mich. 10 Jac. in B. R. *Hall* and *Rotherams* Caſe. *Bolſtr.* 2. Part, 54, 55.

8. Errour was brought of a Judgment in an Inferiour Court; and the Errour aſſigned was, Becauſe the firſt Proces was a *Capias*, where it ought to have been a Summons; and for this cauſe, the Judgment was reverſed. Paſch. 8 Jac. in B. R. *Ward* and *Allayns* Caſe. *Cro.* 2. Part, 260.

9. Debt was brought for 8 l. Coſts adjudged to the Defendant, now Plaintiff upon a Nonſuit. The Defendant pleaded in barr, That a *Capias ad ſatisfaciendum* iſſued againſt him upon the Judgment, and he was taken in Execution for the ſaid 8 l. Coſts. Upon which the Plaintiff demurred. It was moved, 1. That a *Capias ad ſatisfaciendum* lyes not for Coſts, and ſo there was no Legal Execution. 2. If it lyes, yet the Defendant hath not pleaded, That he is yet detained; and then it ſhall be intended, he eſcaped out of Execution, and ſo the Action well lyes. But the Court Reſolved, 1. That the Plea was good, and that a *Capias ad ſatisfaciendum* lyes for Coſts awarded upon a Nonſuit. And, 2. When he was taken in Execution, it ſhall not be intended, That he eſcaped; and, if he did, he might be retaken, and ſo put to his *Audita Querela*. It was adjudged for the Defendant. Paſch. 18 Jac. in B. R. rott. 371. *Dyer* and *Finchams* Caſe. *Cro.* 2. Part. 595.

10. Errour was brought of a Judgment given in an Action upon the Caſe in *Briſtow* for words; where upon Not-guilty pleaded, it was found againſt the Defendant: and the Errour aſſigned was, That a *Capias* was awarded in that Action for the ſecond Proces; whereas a *Capias* lay not in this Action, untill the Statute of 19 H. 7. which extends onely to thoſe Actions in *Weſtminſter*, and not to Corporate-Towns: but the Errour was not allowed; For that the Court ſaid, It well might be by Cuſtome in that Town. Trin. 6 Jac. in B. R. *Tuthill* and *Miltons* Caſe. *Cro.* 2. Part, 222.

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2. *Whether a* Capias *lyeth after an* Elegit *is executed.*

IN *Audita Querela*, the Caſe was, *Cowley* and *Bates* bound themſelves in an Obligation joyntly and ſeverally to *Lydcot*: *Lydcot* brought Debt upon the Bond againſt *Bates*, and had Judgment in the Common-Pleas: and afterwards he brought Debt againſt *Cowley* in the Kings-Bench, and obtained a Judgment there againſt him; and afterwards

wards he ſued forth Execution upon the firſt Judgment by *Elegit*, and had the Land of *Bates* in Execution; and then he took forth a *Capias ad ſatisfaciendum* againſt *Cowley* in the Kings-Bench, and took him in Execution: Whereupon he brought his *Audita Querela*, and prayed to be diſcharged. The onely doubt in the Caſe was, Whether *Lydcott* might have a new Execution by *Capias ad ſatisfaciendum*, after he had Execution executed againſt one of the Obligors, becauſe the Judgments upon which he gounded his Executions, were given at ſeveral times, and in ſeveral Courts. It was agreed by the whole Court in this Caſe, That a *Capias* doth not lye after Execution ſued by *Elegit*, againſt the ſame perſon; but after a *Capias*, an *Elegit* is grantable: and the reaſon of the difference is, becauſe upon the prayer to have an *Elegit*, it is entred in the Roll, *Elegit ſibi Executionem, per medietatem terræ*; ſo he is ſtopped by the Record to have another Execution; but upon a *Capias*, nothing is entred upon Record. But it was agreed, That if the Sheriff return upon the *Elegit*, That the party hath not Lands, then the party may take forth a *Capias*. Alſo it was holden, That an *Elegit* in it ſelf is a ſatisfactory Execution; and by the Law, a man ſhall never have but one Execution with ſatisfaction: and if the Land be evicted, the party afterwards ſhall have no remedy. And the Opinion of the Court was, That there is no difference, although the Judgments were in ſeverall Courts againſt ſeverall perſons, and at ſeveral times: And afterwards it was adjudged, That *Cowley* the Plaintiff in the *Audita Querela* ſhould be diſcharged. Trin. 11 Jac. rott. 822. in B. R. *Cowley* and *Lydcots* Caſe. *Bolſtr.* 2. Part, 97. See *Godbolt.* 257. the ſame caſe.

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3. *Where a* Capias *may be awarded by a Juſtice of Peace; and where one taken by* Capias, de Excommunicato Capiendo *is bayable; Where not.*

1. NOte; It was the Opinion of the whole Court of Common-Pleas, That if one be Outlawed before the Juſtices of Aſſiſe, or Juſtices of Peace upon an Indictment of Felony, that they may award a *Capias utlagatum*; and ſo was the Opinion of *Periam*, Chief Baron, and all the Court of the Exchequer, as to the Juſtices of Peace; for they who that have power to award Proces of Outlawry have power alſo to award a *Capias utlagatum* as incident to their Authority and Juriſdiction. Trin. 10 Jac. See *Cook's Reports*, 12. Part, *Bolſtred.* 103.

2. One was taken by force of a *Capias de Excommunicato Capiendo*: and the Queſtion was, upon the Statute of 5 Eliz. Cap. 23. if the party were baylable, or not? And the Rule of the Court was, That he ſhould be bailed: and ſo it was ſaid, It was Reſolved in one *Keyſers* Caſe, where he was taken by a Writ of *de Excommunicato Capiendo*; and brought to the Kings-Bench Barr by a *Habeas Corpus*; and upon Cauſe ſhewed, he was bailed by the Court *de die in diem*. But it was holden, That neither the Sheriff, nor any Juſtice of the Peace in the Country, could bail ſuch a one; but this Court might well bail one, as in the Caſe before *de die in diem*. Paſch. 9 Jac. in B. R. *Keyſers* Caſe. *Bolſtr.* 1. Part, 122.

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4. *Where, upon a* Capias pro fine, *or* utlagatum, *or the Kings Suit, the Priſoner ſhall be in Execution for the party; Where not.*

1. A Being under Protection, was brought by *Habeas Corpus* to the Court of Common-Pleas by one who deſired to have charged him in Execution, by reaſon of a *Capias utlagatum* for his debt. But it was agreed by the Court, That becauſe the *Capias utlagatum* was the Kings Suit, and for the Subject but in the ſecond degree, the King might diſcharge his own Suit: But that was ſaid, was, If any Act had been done by the King, to fruſtrate the Outlawry; but a Protection will not do it, eſpecially not being delivered or made known to the Coroners: and therefore in ſuch caſe, the party is not in Execution for the party, though he make his Election after, as the Caſe at Barr was, being after the year: But it was ſaid, That though the Kings debtor were in Execution by his body, or his Lands for the King; yet the Subject might lay, or take him in Execution by his body: For the Statute of 25 E. 3. is underſtood of ſuch Executions, whereby the King may be prejudiced, *ſcil.* Lands or goods. But the body is all, to all. Trin. 13 Jac. in C. B. Sir *Thomas Shirley's* Caſe. *Hob.* 115.

2. If a man be condemned in Treſpaſs, or in Debt upon an Obligation, (where he denyes his Deed) at the Suit of the party, and after he is taken by *Capias pro fine* within the year at the Kings Suit, and committed to the Goal, if the Goaler ſuffer him to eſcape, the party ſhall have an Action of Debt againſt the Goaler, and yet he was not committed to him at his Suit, but at the Suit of the King: Howbeit, the Kings Suit ſhall ſerve the

Party in this case, because the King was intituled to the Fine by the party; but it is otherwise after the year, for then it will be intended, That the party hath agreed with him that was condemned; and therefore, after the year he shall be put to a *Scire facias* upon that Judgment. *Fitzh. Na. Br.* 121. See *Cook.* 3. Part, in Sir *William Herbert's* Case before, Sect. 1.

3. The King by his Prerogative is to be preferred in payment of his duty, or debt, by the debtor, although the King's debt be the latter: and therefore the Law gave the King remedy by Writ of Protection *cum clausa Nolumus*, to protect his debtor, that he should not be sued or attached, untill he had paid the Kings debt: But inconveniencies growing by such delay of other mens Suit, It was enacted by the Statute of 25 E.3. Cap.19. that other Creditors might have their Actions against the Kings Debtor, and proceed to Judgment, but not to Execution, unless the Creditor would take upon him to pay the Kings debt, and then to have Execution for both the debts, (for regularity) whensoever the King is entituled to a Fine or duty by the Suit of the party, the party shall first be satisfied: as in a *Decies tantum* against a Jurour, or an Embraceor, there the Ten-fold Damages shall be first satisfied, and then the Kings Fine, because it is but as accessary to that. See *Cook* 1. Part, *Institutes*, 131. And see Sir *Edward Cook's* Case, Pasch. 21 Jac. in the Court of Wards, *Godbolt* 289, 290, 291. acc.

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5. *Where, and in what Case, a* Capias *lyeth against an Earl, Baron, Countess, Bishop, Noble-man, or Peer of the Realm; and Where, and in What Case, not.*

1. IN an Information in the Star-Chamber, against divers Sergeants at Mace, for arresting the body of *Isabell* Countess of *Rutland*, by force of a *Capias ad satisfaciendum*, upon a Judgment given in the Court of Common-Pleas. It was Resolved by the Court, 1. That the person of a Baron, who is a Lord of Parliament, shall not be arrested in Debt or Trespass, for he shall be tryed by his Peers; and by the reason of their dignities, it shall be intended that they have Assetts: And Barons who are Peers of the Realm, shall not be sworn upon Enquests unless they will; and if they be, they shall be discharged. 2. It was Resolved, That because in the principal Case, a *Capias* was awarded against the Countess, by the Court of Common-Pleas, That the Sheriff or Officer by his Warrant might without any Offence execute the same, for they ought not to dispute the authority of the Court, but ought to execute the Writs directed to them, and to that they are sworn: and although it appeared in the *Capias*, that she was a Countess, (against whom a *Capias* in such case did not lye) yet because that in some Cases (as in cases of Contempt, a *Capias* lyeth against a Baron, or Countess) It was Resolved, That the Sheriff nor his Officers ought not to examine the Judiciall act of Court. But because that the Sergeants did arrest the Countess upon a feigned Action upon their own head without Warrant, (although they after charged her upon the *Capias ad satisfaciendum*) It was holden to be a False Imprisonment, and therefore they were fined in the Star-Chamber. Mich. 3. Jac. in *Cam. Stellat. Cook* 6. Part, 52, 53. the Countess of *Rutlands* Case.

2. *Comites dicuntur à Comitando quia Comitantur Regem*, Bracton, *L.* 1. *Cap.* 8. *Comites, à Comitatu, sive à Societate nomen sumpserunt qui etiam dici possunt Consules. Reges enim tales sibi associant ad Consulendum.* And [Earl] was the most eminent and supream Dignity before the Conquest, untill 11 E. 3. when the Black Prince was created Duke of *Cornwall*; and those of ancient who were created Earls, were of the Blood-Royall; and the King at this day doth style them, *per nomen charissimi Consanguinei nostri*: and for these Causes, the Law gives them many priviledges; and therefore their bodies shall not be arrested for Debt, Trespass, &c. because the Law doth intend they do assist the King with their Counsel for the Common-wealth, and do keep the Realm in safety by their Prowess and Valour: And if Issue be taken, if the Defendant be an Earl, or not, it shall not be tryed by Jury, but by the King's Writ. *Cook.* 9. Part, 43. in the Earl of *Shrewsbury's* Case. See *Cook* 7. Part, in *Nevill's* Case, for the Title, Honour, and Dignity of an Earl.

3. *More* arrested the Earl *Rivers* by a Bill of *Middlesex* in a plea of Debt; the Earl not being able to put in sufficient bail, was committed to the Custody of the Marshal of the Marshalsie: He being there in Custody, brought a *Habeas Corpus*, and pleaded his priviledge of Peerage, and saies, He ought not to be arrested; and demanded Judgment of the Writ, and prayes to be delivered: upon which the Plaintiff demurred. The main Question insisted upon in the Case, was, Whether by taking away the House of Lords in Parliament, whereby their voice in Parliament was gone, the priviledg [of Peerage not to be arrested, for Debt] was also taken away. It was said, That it was not; and the Honour, Dignity, and Priviledges

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of Peers of the Realm, to have their bodies freed from Arrests, was much ſtood upon, according to the Reſolutions in *Cook* 7. Part, *Nevill*'s Caſe: and *Cook* 9. Part, the Earl of *Shrewsburies* Caſe. It was ſaid by the Court, That the Earl now came too late to pray his Peerage; for he ought to have prayed it at the firſt, and have abated the Writ before he was turned over to the Marſhal of the Court; for now he is in *Cuſtodia Mariſchalli*, and any body that hath cauſe of Action, may declare againſt him: Alſo it was ſaid, That the preſumption, That he hath ſufficient Freehold, may fail; and it doth not appear by averment, That he hath Freehold, and therefore it ſhall be intended a failer of Juſtice for want of Freehold, if the party ſhould not have been arreſted. The Court all agreed, That he being now *in Cuſtodia*, the Declaration againſt him was good, and that it was now too late to claim his Priviledg of Peerage. Trin. 1650, in B. R. *More* and the Earl *Rivers* Caſe. *Styles* 222, 223.

Certiorari *and* Certificate.

1. *Where, and in what Caſes it lyes; where not. To whom, and out of what Court, awarded, and directed,; and what to Certifie: And whether it be an Original or Judicial Writ; and where it is well granted; Where not.*

1. A *Certiorari* was directed to two Clerks of the Parliament, to certifie the tenour of an Act of Parliament, which concerned the Attainder of the Duke of *Norfolk*, made in ſuch a year, and one of the Clarks onely made the Certificate of the Bill naked, without the Circumſtances: and if the ſaid Certificate was good, or not, was the Queſtion? And it was holden, That the Certificate made by one of them, was not good: and becauſe that the purchaſers had procured a *Certiorari*, and the Tenour of the Act, without ſpeaking of a Commiſſion, The Original Record of the Act was brought by the Clark of the Parliament before the Juſtices at Serjeants-Inne; and becauſe the King when he ſigned the Commiſſion to give his Aſſent to the ſaid Act of Parliament of Attainder of the Duke, was ſo ſick, that he could not well write; and becauſe his name was written after the Teſte, where it ought to have been *ſupra Caput*; It was declared by the Parliament to be void. 1 Ma. *Dyer* 93. The Duke of *Norfolk*'s Caſe.

2. A man Outlawed after Judgment in Debt, came *gratis* into the Court of Common-Pleas, where he was condemned, and was committed to the *Fleet*; and afterwards a *Certiorari* was directed *Capitali Juſtic. de Banco*, to remove the Tenor of the Record of the Outlawry into the Chancery; and alſo to Certifie the truth of the rendring of himſelf, and of his being in priſon; which was certified accordingly, without ſaying any thing, Whether the Plaintiff was ſatisfied, or not? and upon that Certificate, the Defendant had his Pardon allowed, *Ita quod ſtet rectus in Curia*; where it ſhould be, *Ita quod ſatisfaceret Querenti*: and upon two *Scire facias*, and two *Nihills* retorned, his Charter of pardon of the Outlawry was allowed. Quære there, what remedy for the Plaintiff, becauſe the Statute of 5 E. 3. cap. 12. is, That where one is Outlawed for Fine to the King in Treſpaſs, he ſhall not have Charter of pardon for the Outlawry, till the Chancellour be aſſured that the Plaintiff be ſatisfied. Quære. Mich. 1 & 2 Eliz. *Dyer* 172.

3. Note; At an Aſſembly of the Juſtices at Serjeants-Inne, It was Reſolved by them, That where divers Records of Verdicts were taken by the Juſtices of *Niſi Prius*, to be Retorned and Certified into the Courts at *Weſtminſter*; and the Juſtices of *Niſi Prius* dyed before the retorn of them, That the Clerk of the Aſſizes, in whoſe Cuſtody the Records were, might bring in the ſaid Records, becauſe the Juſtices before whom the Verdicts were found, were dead; for it is in their diſcretion to give more Credit to the Clerk of the Aſſizes, then to the Executors or Adminiſtrators of the Juſtices of *Niſi Prius* deceaſed; and yet *Certiorari* have heretofore been directed to the Executors of the Juſtices of Aſſize, to bring in ſuch Records. Mich. 6 Ma. *Dyer* 163.

4. If a man be Outlawed in *London*, the Judgment is not to be given by the Coroner who is the Mayor, but by the Sheriffs, by the Cuſtom; and if the *Exigent* be not retorned, the Outlawry is not pleadable in diſability of the perſon; and in ſuch caſe the *Certiorari* ſhall be awarded to the Sheriffs; and the Retorn was general; and ſuch Retorn and Certificate was holden to be ſufficient. Mich. 15 Eliz. *Dyer* 317.

5. Note: It was ſaid, That the Chancellor, or any Judge of any of the Courts of Record at *Weſtminſter*, may bring a Record one to another without a Writ of *Certiorari*, becauſe one Judge is ſufficiently known one to the other; as 3 H. 7. 21. where a Certificate was by the Chancellour

alone: But other Judges of Baſe Courts cannot do ſo, nor Juſtices of the Peace; as 3 H.6. where the Certificates made by Suitors was void. Paſch. 24 Eliz. in B. R. *Godbolt.* 14.

6. *A.* prayes his Priviledge, becauſe he is a Commoner in *Exeter* Colledg in *Oxford*, and brought Letters under the Seal of the Chancellor of *Oxford*; And he Certified, That *A.* is a Commoner, as appears by the Certificate of Dr. *Prideux* Rector of the ſaid Colledge; whereas it ought to have been, That he was a Commoner upon his own knowledge; but afterwards it was Certified, That he was a Commoner there of his own knowledg, and then the Certificate was alone: But becauſe the Certificate came in too late after Imparlance; and it is not that at the time of the Action brought he was a Commoner, but now he is a Commoner, the priviledge was diſallowed. Paſch. 3 Car. in B. R. *Fryer* and *Dewes* Caſe, *Godbolt.* 404.

7. Debt was brought in the Common-Pleas upon a Judgment in the Kings-Bench; the Defendant pleaded *Nul tiel Record*: The Plaintiff thereupon obtained a *Certiorari* out of the Chancery, to ſend the Record thither, which by *Mittimus* might be ſent into the Common-Pleas: It was doubted, Whether ſuch *Certiorari* ſhould be allowed, becauſe the Record of the Kings-Bench ſhall not be removed out of that Court; for that they are *Coram Rege*. Divers Preſidents were ſhewed, That ſuch Records were but by *Mittimus* out of the Chancery into the Common-Pleas. Hill. 20 Eliz. rott. 1374. Mich. 23 & 24 Eliz. in C. B. rott. 2013. *Lee* and *Stargill's* Caſe, Hill. 11 Jac. in C. B. rott. 3455. *Palmer* and *Stewards* Caſe. Debt upon a Bond to the Sheriff for appearance; he pleads, *Comparuit ad diem*: The Plaintiff denyed it, and by *Mittimus* out of the Chancery, the Record was brought into the Common-Pleas, and Judgment there was given. Hill. 11 Jac. rott. 1715. *Philips* and *Manings* Caſe, acc. Hill. 8 Car. in B.R. *Luttrell* and *Leas* Caſe, *Cro.* 1. Part, 217.

8. It was moved for a *Certiorari* to remove an Indictment into this Court, of a Battery before the Juſtices of *Wales*; It was ſaid at the Bar, that it had not bin ſeen from the time of E. 1. that ſuch a Writ had bin granted. But it was Reſolved by the Court, That the *Certiorari* ſhould be granted in regard it is in the Kings Caſe. For notwithſtanding the Statute *Quod Communia placita non ſequuntur Curiam noſtram*; yet the King may ſue in what Court he will. And although the Writ ought not to be granted in the Caſe of a common perſon; yet it may be granted in the Caſe of the King. Trin. 16 Jac. in B. R. *Popham* 144.

9. A *Certiorari* was prayed to be Awarded to the Mayor and Juſtices of *Dover*, being within the Cinque-Ports, to remove an Indictment of Felony againſt one J. S. of *Dover*; It was moved that it ſhould be directed to the Lord Warden of the Cinque-Ports: But the Court agreed it ſhould be immediately directed to the Juſtices before whom the Indictment was, for they held plea of it as Juſtices of the Peace, by vertue of their Commiſſions, and not by their Ancient Charters, or Preſcription. Mich. 8 Car. in B. R. *Cro.* 1. Part 184.

10. A *Certiorari* was Awarded to the Mayor of *Hithe*, and the *Juratts* there, being one of the Cinque-Ports, to remove an Indictment of Felony, *ſci.* Buggery againſt T. committed there: They would not return the Writ, becauſe the Liberty is pretended within the Cinque-Ports, and becauſe no Warrant was brought from the Warden. Whereupon an *Alias Certiorari* being Awarded, and delivered to the Mayor and Jurats, they ſaid they would not return it, and Impriſoned the Meſſenger which brought it, in the common Goal, and the Writ being under Green Wax, a *Juratt* ſpake contemptuouſly of the Writ, ſaying, This is no time for Green Plums. And for theſe Contempts, an Attachment was Awarded: And a Preſident was ſhewed. 33 E. 1. rott. 101. Where the Biſhop of *Durham* pretending that he had priviledges, That the Kings Writ ſhould not run there; becauſe one brought the Kings Writ thither, Impriſoned him, and it was adjudged that he ſhould pay a fine to the King *Et quod Capiatur* and ſhould loſe his Liberties. And Trinit. 21 E. 3. A Prohibition was Awarded to the Biſhop of *Norwich*, and he Excommunicated the party who brought the Writ; And an Action upon the Caſe being brought againſt him for the ſame, he being found guilty, his Temporalties were ſeiſed into the Kings hands, and 10000 l. damages given againſt him. Paſe. 8. Car. in B. R. *Tindal's* Caſe. *Cro.* 1. Part. 183. & 192. and a *Pluries Certiorari* was directed to the Mayor and Jurats.

11. One Indicted in the Grand Seſſions at *Angleſey* in *Wales*, of Petit Treaſon, a *Certiorari* was prayed to remove the Indictment, and to have it tryed in another adjoyning County. The Court doubted of it. And Preſidents were ſhewed, That a *Certiorari* hath bin Awarded in ſuch Caſes, by reaſon of the Statute of 26 H. 8. which allowes, That Indictments in caſes of Felonies, may be enquired in the adjoyning Counties, and it was ſaid That 32 Eliz. ſuch a *Certiorari* was Granted; But afterwards the *Certiorari* was ſtayed, and it was appointed by the Court to be argued, whether a *Certiorari* were grantable. Mich. 9 Car. in B.R. *Cro.* 1. Part. 245. *Chedlyes* Caſe.

12. A Judgment given in the Court at *Dyn* Church, a limb of one of the Cinque-Ports, was removed by *Certiorari* into the Kings Bench, and a

Scire

Scire facias iſſued for the Defendant, to ſhew cauſe why the Plaintiff ſhould not have Execution upon the Judgment. The Defendant took Exception to the *Alias Certiorari*, that it is ſaid *ſicut prius*, and not *ſicut Alias*, but the Exception was diſallowed; and Judgment was given for the Plaintiff. Mich. 22 Car. in B. R. *Rooke* and *Knight's* Caſe. *Styles* 9.

13. It was moved for a *Certiorari* to remove an Order of Seſſions made for electing of one to be a Conſtable, that the order might be confirmed in the Kings Bench, and the Conſtable compelled to be ſworn; But the Court would not Grant the *Certiorari*, for that by the granting of it, the Execution of Juſtice, by the Juſtices of Peace might be hindred, but a *Mandamus* was Awarded to compell the Conſtable to be ſworn. Paſc. 25 Car. in B. R. *Styles* 127.

14. The Court was moved for a *Certiorari* to remove an Information exhibited in the Mayors Court of the City of *London* againſt a *Woodmonger* of *London*, grounded upon an Act of Common-Councell; The Court ſaid, We cannot remove it hither if it be grounded upon an Act of Common-Councel: But if the Act of Common-Councel be againſt Law, there we may grant a *Certiorari*. Paſc. 1649. *Styles* 211.

15. A Prohibition was prayed to the Admiralty, for preferring an Indictment there, which is not within the Statute touching the Admiralty: But the Court ſaid, That a Prohibition did not lye in Caſes of Felony: But the Court ſaid, The party might have a *Certiorari*, to remove the Cauſe into the Kings Bench, if there be cauſe. Mich. 1650. *Dethick's* Caſe. *Styles* 233.

16. A *Certiorari* was directed to Juſtices of Peace to remove an Endictment of Forcible Entry, being taken at a Private Seſſions before them. And becauſe they did it not, an Attachment was prayed againſt them: It was urged for them, that they had not contemned the Proces of the Court; for that the *Certiorari* ought to have bin delivered in open Seſſions of the Peace, and this was at a private Seſſions, and ſo not allowable; and 2. The party who procured the *Certiorari*, ought to put in ſecurity to proſecute, or elſe it was not to be allowed; but that was not done, therefore they were not bound to allow it; and 3. The *Certiorari* is to remove a Forcible Entry, but the Return was, That it was a peaceable Entry, and a Forcible deteyner; ſo there was no ſuch Indictment before them, as the *Certiorari* mentions: But the Court anſwered, the courſe of the Court was, to make ſuch *Certioraries* in this form. The Court ordered the party to have reſtitution; and the Contempt was ſpared by conſent of the parties. Hill. 23 Car. in B. R. *Chamber's* and *Floyd's* Caſe. *Styles* 89.

17. Note, It was ſaid by *Rolls* Chief Juſtice, That a *Certiorari* to remove a Record, ought not to be made, but to a known Officer, who is known to have the Cuſtody of the Records, and therefore the Court would not grant a *Certiorari* upon an *Affidavit*, but upon a ſurmiſe made upon the Roll. Paſc. 1653. in B. R. *Styles* 371.

18. Upon Error brought, of a Judgment upon *Non ſum informatus* in the Common Pleas; the Error Aſſigned was, That it appeared by the Record, that the Declaration was before the Plaintiff had any cauſe of Action. It was ſaid, If it be ſo, then there is a wrong Original certified: Wherefore a new *Certiorari* was Awarded to have the true Originall certified. Mich. 1652. *Jennings* and *Downes's* Caſe. *Styles* 352.

19. A man that was fined, and ordered to lye in Priſon, for ſpeaking words againſt the Parliament, till he found ſureties for his good behaviour; was brought to the Bar by *Habeas Corpus*. It was moved for him that he might be diſcharged, becauſe he was pardoned by the Act of Oblivion: It was ſaid for the Protector, that he may be excepted out of the Act, wherefore he ought not to be delivered upon ſuch ſurmiſe: whereupon a *Certiorari* was Awarded to remove the Record in B. R. where he ſtands convicted, that he might enter his ſuggeſtion, that he was pardoned. Trin. 1653. The *Protector* and *Norrices* Caſe. *Styles* 454.

20. The Conuſee of a Statute-Merchant ſued a *Certiorari* out of the Chancery to the Mayor, &c. and thereupon a *Capias* Iſſued out againſt the Conuſor, returned in C. B; And upon *Non eſt inventus*, an *Alias Capias* Iſſued, before the return of which, the Conuſee dyed; And if his Executors ſhould have a *Scire facias* againſt the Conuſor, or they ſhould ſue a new ſpeciall Writ to the Mayor, to make a new Certificate, was the queſtion; It was the Opinion of the Court, that they ſhould have a new *Certiorari*, and begin again, notwithſtanding the firſt Certificate; and that was ſaid to be the cleareſt courſe without Error. See 29 H. 8. 29. 9 E. 4. 15. Paſc. 2 Eliz. *Dyer* 180.

21. A. informed againſt B. upon the Statute of Recuſancy, who pleaded that he was Indicted in *Middleſex* of the ſame Offence, the Plaintiff ſaid *Nul tiel Record*; whereupon the Defendant took a *Certiorari Juſticiariis pacis*; And at the day brought *tenorem Recordi*, certified by J. S. *Cuſtos rotulorum*. It was holden in this Caſe, That the Defendant need not take his *Certiorari* out of the Chancery, and ſo bring it by *Mittimus*. But this Court might ſend the *Certiorari* immediately to an Inferiour Court; But if it were to certify the Record it ſelf, or a *Certiorari* out of the Kings Bench, which removes the very Record it ſelf to hold plea upon, there it was otherwiſe; But in the principal

Caſe,

Caſe, the Certificate was diſallowed, becauſe it ought to have been made in the name of the Juſtice before it was taken; for although the *Cuſtos Brevium* keep the Records, yet the Chief Juſtice of the Common Pleas alone, certifies all Records: And becauſe it appeared after, that the Plea was of a Conviction before Juſtices of Goal-delivery, and ſo the *Certiorari* and all was void, a *Certiorari de Novo* was Awarded to the Juſtices of Goal-delivery. Hill. 13 Jac. in C. B. *Pie* and *Thrill's* Caſe. *Hob.* 135.

22. Error was brought by J. S. againſt J. D. upon a Judgment had againſt the Plaintiff's Father, and Error Aſſigned was, for want of Warrant of Attorney; and the Plaintiff prayed one *Certiorari* to the Chief Juſtice of the Common-Pleas, and another to the *Cuſtos Brevium*, both which returned *Non inveni aliquod Warrant.* And now the Father of J. D. being dead; the Plaintiff brought a new Writ of Error by Journeyes Accompts, againſt the ſon and heir of J. D. who appeared, and alledged Diminution *in hoc*, that the Warrant of Attorney is not certified, and prayed another *Certiorari* to the Chief Juſtice, and another to the *Cuſtos Brevium*; It was ſaid in this Caſe, That a *Certiorari* ought not to be granted, for the Certificate is in the nature of a Tryal, which ſhall not be creſſed in the ſame Action, eſpecially when it is certified by one who is Judge of the Record, and a *Certiorari* ſued at the prayer of the Plaintiff, ſhall be as peremptory as it it had been ſued at the prayer of the Defendant; for the Plaintiff may alledg Dimunition as well as the Defendant: And Dimunition cannot be alledged in this Warrant of Attorney, becauſe it is certified that no Warrant of Attorney is to be found. And ſee 9 E. 4. that after *in nullo eſt Erratum* is pleaded, which is certified againſt that matter; the party ſhall not alledge Diminution. On the other ſide it was ſaid, That a Certificate upon a *Certiorari* which was Awarded after a *Scire facias ad audiendum Errores*, is peremptory and final, but contrary where it is Awarded before the *Scire facias*; And this *Certiorari* now prayed, is onely to inform the Court; and here is no contrariety, for the return of the *Certiorari* is, *Non inveni aliquod Warrant.* and now preciſely, *Non habetur aliquod Warrantum.* And therefore if the Court now at the prayer of the Defendant grant another *Certiorari*, upon which is a return, *quod habetur Warrantum Attornat.* the ſame is not contrary to the firſt Certificate, but they may both ſtand. The Court was of Opinion, That it would be hard to grant a new *Certiorari* in this Caſe; but if any variance could be alledged, it ſhould be otherwiſe, as it was adjudged in *Laſſells* Caſe: who certified no Warrant of Attorney, and afterwards it was moved for another *Certiorari*, as it is here, and becauſe the Originall was *inter Johann. Laſſell Armiger. Executor. Teſtament.* &c. where he was not named Executor in the firſt *Certiorari*; upon that matter a *Certiorari de Novo*, was granted. Trin. 26 Eliz. in B. R. *Darrell* and *Thinns* Caſe. *Leon.* 22.

23. Error brought to reverſe a Judgment in the Common-Pleas in Debt, the Error Aſſigned was that *no* Warrant of Attorney was entred in the ſuit in ſuch a Term, certain; and for this cauſe the Rule of the Court was *quod Judicium reverſetur*, but inaſmuch as this was not entred of Record, and for that the Entry of a Warrant of Attorney in another Term is good, a *Certiorari* was prayed to inform the Court of all the proceedings, in regard the Judgment for reverſal, was not entred of Record, and the *Certiorari* was prayed onely to inform the Court, whether any Warrant of Attorney were entred or not, and when: The Court ſaid, It was the default and neglect of the Plaintiff himſelf in the Writ of Error, that the Judgment for reverſall was not entred upon Record; and therefore a *Certiorari* was granted by the Rule of the Court, Paſc. 7. Jac. in B. R. rott. 653. *Smith* and *Skipwith's* Caſe. *Bolſtr*, 1. Part. 21.

24. Error was brought in the Exchequer-Chamber, upon a Judgment given in an Action of Trover in the Kings Bench, againſt Husband and Wife; and divers Errors were Aſſigned which were over-ruled by the Court: But afterwards it was affirmed to the Court, That there was not any Bail entred for the Wife, Defendant in the Action; and a *Certiorari* was prayed to certify it; But it was moved, That in regard he had Aſſigned his Errors, and had not Aſſigned that for Error, and the Defendant had pleaded *in Nullo eſt Erratum* and the Record is Examined, he may not now alledge it, but peradventure to help a Record in affirmance of a Judgment, they may Award a *Certiorari ex Officio* upon a ſuggeſtion, that there is Diminution. But the Juſtices held, That although the party after *In nullo eſt Erratum* pleaded, is not receiveable to alledge ſuch a thing for Error, which did not appear in the Record certified; yet to inform the Court he may move them, and they *Ex Officio*, may Award ſuch *Certiorari*: Whereupon they Awarded a *Certiorari*; and the Bail was certified to be well entred, and the Judgment was affirmed. Hill. 44 Eliz. in the Exchequer-Chamber, *Cox* and *Cropwell's* Caſe. *Cro.* 2. Part. 5. See Trinit. 3 Jac. In Error brought to reverſe a Judgment given in the Common Pleas, After Errors Aſſigned, and over-ruled: It was moved to the Court, That the *Venire facias* was returned in the time of Queen *Elizabeth*, and the *Habeas Corpus Juratorum* was ſummoned in *Curia noſtra*, whereas it ought to have been in *Curia nuper Reginæ*, for there

there was not any ſummons in the Kings Court. It was a manifeſt Error, as it was Reſolved in Sir *Francis Knollis* and *Beckinſhawes* Caſe. Whereſore it was prayed that a *Certiorari* might be Awarded to certify, which was granted (*abſent. Popham*) But afterwards being moved for ſtay thereof, *Popham* being in Court, becauſe it was in the diſcretion of the Court to Award it or not, it being after a *Nullo eſt Erratum* pleaded, and in diſaffirmance of a Judgment, they all agreed, That no *Certiorari* ſhould be Awarded. Trinit. 3. Jac. Sir *William Read* and *Potter's* Caſe. *Cro.* 2. Part, 139, 140, 141.

25. Errour in Debt upon an Obligation; The Action was brought, Mich. 13 Jac. and Continued by Imparlance till Mich. 10 Jac. and then, Judgment given by *Nihil dicit*, The Errour aſſigned was, becauſe the Continuance was *ab Oct.* Mich. 7 Jac. *uſq;* *Octab.* Hill. 7 Jac. whereas *Octab.* Mic. 7 Jac. was adjourned *uſq;* *menſem.* Mich. 7 Jac. the Defendant pleaded in *Nullo eſt Erratum*. A *Certiorari* was prayed to Certifie the Writ of Adjournment: It was doubted, Whether it ſhould be awarded after *in Nullo eſt Erratum* pleaded, becauſe it extends to reverſe a Judgment, and not in affirmance thereof: But it was Reſolved, It ſhould be awarded as wel for the reverſall, as the affirmance of a Judgment. Mich. 10 Jac. in C. B. rott. 251. *Cro.* 2. Part, 445.

26. A *Certiorari* was granted to remove Endictments taken in *Wales* of Ryots; and *Doddridg*, Juſtice, ſaid, That the Regiſter makes mention of a *Certiorari* to remove a Record taken at *Calice*. Trin. Jac. in B. R. Sir *John Carews* Caſe. *Cro.* 2. Part, 484.

27. Errour of a Judgment in an Action upon the Caſe upon Aſſumpſit in the Common-Pleas after the Record Certified; the Plaintiff in the Errour alledges Diminution for want of an Original, which was Certified and entred: and then aſſigns for Errour, Variance betwixt the Original and the Declaration; which being aſſigned, and a *Scire facias ad audiendum Errores* brought, the Defendant in the Errour ſurmiſes to the Court, That there was another Original, and the Plaintiff had procured an ill Original to be Certified; prayed a *Certiorari* to Certifie it. Whereupon, becauſe the Plaintiff might procure the vitious Originall to be Certified without the Defendant's privity in the Writ of Errour: and in truth, that is not the Original upon which the Declaration is founded. Therefore the Court granted to the Defendant another *Certiorari*: For one perſon ſhall have but one *Certiorari*; but ſeveral perſons may have ſeveral *Certioraries* to Certifie. Trin. 18 Jac. in B.R. rott. 1613. *Johns* and *Bowers* Caſe. *Cro.* 2. Part, 597.

28. Two men and their Wives were Indicted upon the Statute of Forcible Entry, who brought a *Certiorari* to remove the Indictment; ſome of them did refuſe to be bound to proſecute according to the Statute of 21 Jac. Cap. 8. and therefore, notwithſtanding the *Certiorari*, the Juſtices of the Peace did proceed to tryal of the Indictment. It was Reſolved in this Caſe, That whereas the Statute is, The parties Indicted, &c. ſhall become bound; That if one of the parties find Sureties, and the one will not, yet the Indictment ſhall be removed. 2. Where the Statute is, The parties ſhall be bound in 10 l. with ſufficient Sureties, as the Juſtices of Peace ſhall think fit; That if the Sureties be worth 10 l. the Juſtices cannot refuſe them, becauſe the Statute preſcribes in what ſum they ſhall be bound: and after a *Certiorari* brought, and tender of ſufficient Sureties, all the proceedings of the Juſtices of Peace are *Coram non Judice*. Trin. 15 Car. in B. R. *Maſſ.* 27.

29. *A.* and *B.* are Indicted of Murder; *B.* flies; *A.* brings a *Certiorari* to remove the Indictment into the Kings-Bench. It was moved, Whether by it the whole Record be removed, or but part of it? It was ſaid, That the whole was, and that there could not be a Tranſcript of it, becauſe the Writ ſaith, *Recordum et proceſſus cum omnibus attingentibus*: But the Court doubted of it, and ſaid, It might be miſchievous if it ſhould be ſo; for ſo the other might be attainted here by Outlawry, who knew not of it. Quære. It was not Reſolved: But it was holden by the Court, That the Clerk of the Aſſizes might bring in the Indictment *propriis manibus*, without a *Certiorari*. Trin. 17 Car. in P. R. *Maſſ.* 112, 113.

29. There are 6. manner of Certificates allowed at the Common-Law for Tryal, 1. In time of War, the Certificate of the Marſhall of the King out of the Realm. 2. In the time of peace out of the Realm, as Outlawry; if it be alledged by the Defendant, That he was impriſoned at *Bourdeaux*, It ſhall be tryed by the Certificate of the Mayor of *Bourdeaux* there. 3. The Cuſtome of *London*, ſhall be Certified by the Mouth of the Recorder. 4. By the Certificate of the Sheriff, upon a Writ to him directed in caſe of Priviledg, If he be a Citizen or Forreiner. 5. Tryall of Records by the Certificates of the Judges, in whoſe Cuſtody they are by the Law. 6. Loyalty of Matrimony, Baſtardy, &c. ſhall be tryed by the Certificate of the Ordinary. *Cook* 1. Part, *Inſtitutes*, 73, 74, 75.

Challenge.

Challenge.

1. *What ſhall be a good* Challenge *to the Array; what not. What to the Polles; what not. And what ſhall be a Principall Challenge; what not.*

1. IN an Attaint, the Grand-Jury were retorned ſummoned by the Sheriff, who was Coſen to one of the Petit Jury: But the Reſummons, Diſtreſs, and *Tales*, all were retorned by the New Sheriff; and for this cauſe, the Grand-Jury was quaſhed, and the *Tales* alſo: but yet Preſidents were ſhewed, that the *Tales* ſhould ſtand. 6 E. 6. *Dyer* 78. See *Cook* 102. acc.

2. In an Attaint the *Array* was Challenged, becauſe *Mary* the Wife of J. S. who hath Iſſue a ſon who is an heir, is Coſen to one of the Petit-Jury. It was demurred unto to be no Challenge, becauſe it was not ſhewed, that he was Sheriff at the time of the making of the Pannell; or that *Mary* was then his wife. 1 Ma. *Dyer* 91. See 29 H. 8. *Dyer* 38. acc.

3. It is not a Principal Challenge to ſay, That one of the Jury was choſen Commiſſioner for the other party for Examination of Witneſſes in the Court of Chancery; for that every Commiſſioner is made by the appointment of the King by his Commiſſion under the Great Seal; and therefore he being a Commiſſioner upon Record, is preſumed in Law to be indifferent. But otherwiſe it is of an Arbitrator; for he is created onely by the ſubmiſſion of the parties themſelves: and therefore it is a Principal Challenge to ſay, That ſuch a one Retorned of the Jury, was an Arbitrator for the other, *Cook* 9. Part, 71. in *Richard Peacock*'s Caſe. *Godbolt*. 193. Trin. 10 Jac. C. B. Sir *P. Forteſcue* and *Coakes* Caſe. acc.

4. In an Aſſiſe in the Common-Pleas, between *Newdigate* and the Earl of *Derby*, the Array was Challenged by the Earl, becauſe he was a Peer of the Realm, *habeat locum et vocem in Parliamento*. And that the Array was made by the late Sheriffs of *Middleſex*, and no Knight was retorned in the Pannell as there ought to be by the Law of the Land; and the Challenge was awarded good. Paſch. 1 & 2 Ma. *Dyer* 107. See *Plo. Com.* 117. acc. And ſee 4 Eliz. *Dyer* 208. where in the like caſe the Array was Challenged by the Lord *Haſtings*; and a Writ Iſſued to the Coroners to make a new Pannel. And ſee, That every Baron of the Parliament ought to have a Knight retorned of his Jury. *Cook* 6. Part, 45. in the Counteſs of *Rutland*'s Caſe.

5. The Earl of *Kent* being reputed but an Eſquire, brought a Writ of Entry by the Name of Eſquire, and the Pannel was retorned, and then by the Heralds he was declared to be an Earl; and he Challenged the Array, becauſe no Knight was retorned, &c. but the Challenge was not allowed, becauſe there was no default in the Sheriff. 15 Eliz. *Dyer* 318. See 10 Eliz. *Dyer* 256. *Cook* 1. Part, *Inſtitutes*, 156. acc.

6. Judgment in an Action upon the Caſe was reverſed in the Exchequer Chamber; For that the *Venire facias* was to the Coroners, upon a ſurmiſe made by the Plaintiff, That the Under-Sheriff was the Plaintiff's Coſen, and ſhews how; and becauſe the Defendant *non dedicit*, therefore it was awarded to the Coroners: Whereas it was ſaid, By Law it was no principal Challenge; and it is no cauſe to award the *Venire* to the Coroners, though the Defendant do admit the Coſenage: and ſo it was adjudged in Sir *Edward Kinaſton* and the Tenant of the Earl of *Bridgwaters* Caſe, where Challenge was taken to the Array, becauſe the Sheriff was Coſen of the Leſſor: And it was adjudged to be no Principal Challenge. Mich. 17 Jac. in the Exchequer. *Simonds* and *Waſhes* Caſe. *Cro.* 2. Part, 547. See Trin. 16 Jac. in C. B. *Eire* and *Bannefters* Caſe. *Hutton* 24. acc.

7. In the Great Caſe, which was between the Earl of *Shrewsbury*, and the Earl of *Rutland*, in an Aſſiſe of *Novel diſſeiſin*, of the Office and keeping of *Clypſon* Park; When the Aſſiſe was to be taken in the Country, The Array was Challenged by the Tenants, for that one of the Tenants in the Aſſiſe, had an Action of Treſpaſs hanging againſt the Sheriff: and the Queſtion was, Whether this was a good Cauſe of Challenge to the Array, or not? And the better Opinion of the Book is, That it was no principal Challenge. And the difference was put, Where a man brings an Aſſiſe of certain Land, and hath an Action of Treſpaſs againſt the Sheriff for entring in the ſame Land; there it ſhall be a principal Challenge to the Array: but if it be for Entry into other Land not in demand, there it is otherwiſe. And ſee 38 H. 6. A Juror was challenged, becauſe one of the parties had an Action of Treſpaſs hanging againſt him. And it was holden, It was not a principal Challenge, unleſs it be Treſpaſs of Battery: for it was agreed, That if ſuch an Action be hanging, which tends to the utter undoing of him, againſt whom it is brought, then, if the Defendant in ſuch Action make the Array, this ſhall be a principal Challenge: but if it be ſuch an Action, wherein a man

ſhall

ſhall recover but his debt or damages, there to ſay, That ſuch Action is hanging between them at the time of the Array made, ſhall be no principall Challenge. Paſch. 8 Jac. in the Kings-Bench. The Earl of *Shrewsbury*, and the Earl of *Rutlands* Caſe. *Brownlow* 2. Part, 229. to 243.

8. An Attaint was brought upon a Falſe Oath made in a *Replevin*, where the Demandant made Conuſans as Baily to J. S. And in the Attaint ſurmiſe was made, That the Sheriff was Coſen to J.S. and Proces prayed to the Coroners, It was the Opinion of the whole Court, That this is not a principal Challenge, but matter of Favour. See 3 H. 7. acc. Mich. 29 Eliz. in C. B. *Goldeſbr.* 42.

9. A Jury being ready for Tryal at the Barr, the Array was Challenged for want of Hundreders, It was ſaid againſt it, That the Jury was retorned by the Secondary by Rule of Court, and the Hundreders were put out by the Aſſent of the parties. The Court ſaid, The Conſent of the party was to no purpoſe to avoid the Challenge: wherefore the Pannell was quaſhed. And in this caſe it was Ru'ed, That after the firſt man of a Jury is ſworn, the Array cannot be Challenged. Mich. 1649. *Syes* 233.

10. In an Attaint brought, one of the Grand-Jury was challenged, becauſe he was a Captain, and one of the Petty-Jury was his Lievtenant. It was holden by the whole Court, It was no principal Challenge; and ſo it was where one of the Jurours was Maſter of the Game, and one of the Petit Jury, was Keeper of his Park. Mich. 29 Eliz. in C. B. *Hodie* and *Wiſcombs* Caſe, *Godbolt.* 110.

11. In a Writ of Right, the parties joyn the Miſe upon the meer right, Proces went to the Sheriff to retorn 4. Knights to chooſe the Grand Aſſiſe; who retorned two Knights, and two Serjeants; and that there were no more Knights within the County, who were not of affinity to the one or the other. *Thorp* ſaid, The Retorn was not ſufficient, for that the party might challenge them if they were ſo. Afterwards, *ex aſſenſu partium* the Retorn was admitted: And it was conceived, If the Sheriff had retorned Gent. and called them Knights, it was ſufficient, and not Traverſable: For the Writ of Attaint is, 24 *Militeſ*; and yet if the Retorn be *Generoſos*, it is good. 39 E. 3. 2. 6. See now; 1 Ma. *Dyer* 98. there need not to be 16 of the Grand Enqueſt in a Writ of Right, for that the form of the Writ is, *ad eligendum ex ſcipſis et aliis duodecim.*

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2. *Where a Challenge ſhall be good to the Array; or to a Juror, for Favour, Conſanguinity affinity, or becauſe within the diſtreſſe of the party, Where not; And for other Cauſes: Where not.*

1. UPon an Attachment made, That one of the Jurors that gave the Verdict againſt the Plaintiff, had at that time a Suit in Law depending with the Plaintiff; and that therefore the Tryall was not indifferent, prayed a new Tryall. But the Court ſaid, That could not be, for the party might have challenged the Jurour for that cauſe at the Tryall, for want of which he hath now loſt the advantage of it. Mich. 24. Car. in B. R. *Lovedayes* Caſe. *Styles* 129.

2. If a Juror be laboured with by the Plaintiff, to appear, and to give his Ve dict according to his Conſcience; If no Cauſe of Challenge, *per Curiam*, Mich. 38 H. 8. *Dyer.* 48.

3. The Array was Challenged, becauſe the Sheriff was *Conſanguineus Defendentis*; It was holden to be a principal Challenge, for that is matter of partiality; and it is as principall a Challenge if he be of the blood of the Sheriffs Wife, as of his own blood; but becauſe he did not ſay that he was *Conſanguineus*, at the time of the Array made, it was diſallowed. Mich. 29 H. 8. *Dyer.* 37. See 1. *Ma. Dyer.* 191. and 14 Eliz. *Dyer.* 319. acc.

4. A Juror was Challenged in the Common-Pleas, becauſe he was within the diſtreſſe of the Plaintiff, that the Plaintiff was Lord of the Hundred in which the Juror was reſident, and did ſuit to his Leet, and this being tryed, and found; It was adjudged a principall Challenge, and the Juror was withdrawn. Hill. 2 Eliz. *Dyer.* 176.

5. A Juror was Challenged becauſe he had not any Lands at the day of the *Venire facias* within the Hundred, at the retorn of the Writ, and it appeared, that at the day of the *Diſtringas*, that he had Lands within the Hundred; the Opinion of *Harper*, Juſtice, and of the Clerks, was that he ſhould be ſworn, becauſe the Challenge is in the preſent Tenſe, *quod nihil habet*, &c. which *Dyer* denyed: But he agreed, that if he had at the time of the making of the Pannell, and had not Lands at the time of the diſtreſſe, that he ſhould be ſworn. Quære. 15 Eliz. *Dyer.* 319.

6. Upon Iſſue joyned in an *Ejectione firmæ* Chal-

lenge made by the Plaintiff, That he & the Sheriff, and one of the two Coroners, were of the Livery of the Earl of *Worceſter*, he prayed a *venire facias* to the other Coroner; the Defendant did confeſſe the ſuggeſtion, whereupon the *Venire facias* iſſued, and it was found for the Plaintiff; It was moved in Arreſt of Judgment, but becauſe it was *ex aſſenſu partium*, and alſo it was helped by the Statute of 32 H. 8. Jeofailes, which helps miſconveyance in proces; Judgment was given for the Plaintiff. Mich. 22 Eliz. *Dyer.* 367. See *Cook* 5. Part, 36. in *Baynhams* Caſe.

7. It is a good Challenge to a Juror becauſe he was Attainted in a Conſpiracy or Attaint: or if any Juror was put into the Pannell at the deſire of the party, it is a good Challenge to the Array: And if a Jury be of two Counties, and both Arrayes are Challenged, two of one County ſhall try the Array of that County, and two of the other ſhall try the Array of the Other County, and they ſhall not be ſworn of the Principall: And two of one Hundred, and two of the other Hundred do ſuffice. If in Treſpaſſe the Defendant doth juſtify as Servant to the Lord, and by his Commandment; It is a good Challenge to the Juror, that he is Tenant to the Lord, although the Lord be not party to the Record: And where a man Challenges the *Polles* of the principall Pannell, he cannot afterwards Challenge the Array of the *Tales*; And if the Array be quaſhed, it is upon Record, but if it be affirmed it is not entred. Mich. 2. Jac. in C. B. *Friſhwater* and *Rea's* Caſe. *Brown.* 1. Part, 195.

8. In an *Ejectione Firme* made upon a Leaſe made by Sir *John Digby*, after Not-guilty pleaded, A Surmiſe was made of Conſanguinity between the Leſſor of the Plaintiff, and the Sheriff; and thereupon a *Venire facias* was to the Coroners: and afterwards the Challenge was adjudged inſufficient; and a *Venire* was awarded to the Sheriff. Mich. 44 Eliz. in C. B. rott. 1208. *Bedford* and *Dandyes* Caſe. *Hutton* 25. See Trin. 14 Jac. in C. B. rott. 2284. *Craddock* and *Wenlocks* Caſe. *Hutton* 26. acc.

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3. *How Challenge may be to the Array, or the Polles: How the Array is to be Challenged, and how to be tryed; and the manner of the Tryall: And where Cauſe ſhall be ſhewed; where not.*

1. IN Treſpaſs they were at Iſſue, and the Jury ready at the Barr; For ſtay of Tryall it was moved, That the Sheriff who returned the Pannell held certain Lands of the Manner then in Queſtion, whereof the Defendant had the poſſeſſion; and alſo certain Lands for Term of years of him. The Plaintiff ſaid, That he ought to take himſelf to one Cauſe: But the Court ſaid, That he might take both; for the Challenge is, That he is within the Diſtreſs. The Plaintiff ſaid, Not within the Diſtreſs. The Court appointed Tryers. The Defendant ſaid, That all the Jury are favourable, and prayed Tryers *de Circumſtantibus*. The Court ſaid, In this Caſe we cannot appoint Tryers, but onely of the Jurours: wherefore let the 4. and 7th be Tryers; but you may refuſe them, and take others if you pleaſe: wherefore the Defendant refuſed the 4th, and the 3. was appointed; and they found the Jury favourable. Wherefore it was Quaſhed. Trin. 30 Eliz. *Liſter* and *Dilabarr* Caſe. *Goldeſbr.* 91.

2. Errour was brought in the Exchequer Chamber, upon a Judgment in the Exchequer; The Errour aſſigned was, That the Sheriffs of *London* having returned a Jury, they not appearing, the Plaintiff prayed a *Tales*; and after the Jury made full by *Tales*, the Plaintiff Challenged the whole Pannel by Exception to the Sheriffs; and the Jury quaſhed, a new Jury was Impanelled by the Coroners; by which Jury the Cauſe was tryed. Exception was, That the Plaintiff having prayed a *Tales* to the Sheriffs, and obtained it, was eſtopped to Challenge the Pannel, for Exception to the Sheriffs. But it was Reſolved, There could be no Challenge, neither to the Pannels, nor to the Polles, till there were firſt a full Jury; ſo as the Jury not appearing full, there was a neceſſity to have a *Tales*, or elſe the Challenge could not have been taken, and ſo the cauſe would have remained *pro defectu Juratorum*, if the Plaintiff had not prayed it, for the Defendant would not; and ſo the Judgment was affirmed. In this caſe it was holden, If the principal Pannel do once appear full, the Challenge muſt be to the Pannel, before any be ſworn, elſe it comes too late. And it was alſo holden, Where the Plaintiff ſues his *Venire facias* to the Sheriff, he is not thereby eſtopped to Challenge the Pannel for kindred or other cauſe that was before the *Venire*. Hill. 13 Jac. in the Exchequer Chamber. *Viccars* and *Langhams* Caſe. *Hob.* 235.

3. Note: It was ſaid by the Court, That a Challenge to the Array is no part of the Record, but ought to be determined, whether it be good, or not, by the Judge, before the tryall of the Cauſe ſhould have been, if the Challenge had not been taken. And it was likewiſe then ſaid, If there be a Demurrer to a Challenge at the Aſſizes, the Judg of Aſſize may determine it there, or over-rule it; or adjourn it to be heard at another time. Mich. 1655.

1655. in B. R. Sergeant *Bradshaw* and *Proctors* Case. *Styles* 464.

4. Note: It was holden by the Court, That where two of the Petty-Jury Challenge the Array, which was tryed against them: If the other Challenge the Polles, they ought to shew cause presently; for as if they had been quashed, all should have had advantage; so they shall have disadvantage now. Trin. 3 Eliz. *Dyer* 201. *Austine* and *Bakers* Case, acc. Pasch. 9 Jac. *Bolstrod.* 1. Part, 113.

5. Note: Where the King is party in a tryall; Or if the other side Challenge a Jurour, he ought to shew his cause of Challenge presently, and two Tryers shall be chosen, *scil.* the two former which are sworn, and they are to inform the Court, Whether for this Cause shewed, or for any other cause, the Jurour Challenged be indifferent, or not. Pasc. 10 Jac. in B. R. *Bolstr.* 1. Part, 191.

6. Where one doth Challenge the Array; after that two Tryers are elected by the Court, and sworn, the Cause of favour then ought to be shewed to the Tryers, which is called their Issue; and after proof of this, they are to deliver their answer to the Court, whether they do find them to be indifferently Impanelled, or not; if they answer, They are not indifferently Impanelled, this is then Entred of Record: but if they answer, They are indifferently impannelled, and so not quashed, they are to proceed to tryall, and no speciall Entry is to be made of this. See 21 E. 4. 59. Pasch. 9 Jac. in B. R. *Bolstr.* 1. Part, 114.

7. Note: It was said by *Man*, Secondary; and consented to by the Court; Where one doth challenge the Array, and concludes to Favour, then he may give kindred in Evidence; but if the same be a principal Challenge, then he ought to make mention of the Kindred specially: And where one doth Challenge the Array, this Challenge ought to be read by the Councel in French; and if he do pronounce it himself, he ought to pronounce it in French; but if he do put it into the Court in Writing, it ought to be done in Latine, and the same ought to be recorded in Latine, but to be repeated by the Councel at bar in French. Pasch. 9 Jac. *Bolstr.* 1. Part, 114.

4. *General Rules concerning* Challenges: *and the Tryal and Ordering of them.*

1. A Principall Challenge to the Array is in respect of the Cause of Unindifferency, or default of the Sheriff, or other Officer, who makes the Return, and not in respect of the persons returned where there is no unindifferency, or default in the Sheriff or the Officer. *Cook.* 1. Part, *Institutes*, 156.

2. A Common person in case of Petit Treason, Murder, or Felony, may Challenge but 20. persons peremptorily; but in case of Treason, he may Challenge 35 Jurours. But a Peer of the Realm in case of Treason, shall be tryed by his Peers, and cannot make any challenge at all to them, because they are not sworn, but each of them giveth his Judgment upon his Allegiance. *Cook.* 1. Part, *Institutes*, 156. b.

3. Challenges to the Polles may be for 4. causes; 1. *Propter honoris respectum*, as a Peer returned on a Jury in the Case of a Subject, may be Challenged by him: Or he may challenge himself. 2. *Propter defectum, Patriæ Libertatis, annui Census, Liberi tenementi*, as *Aliens, Villains*, and those who have not 40 *s.* by the year. 3. *Propter affectum.* 4. *Propter delictum*, as a person Attaint, Outlawed, *Stigmaticus. Cook* 1. Part, *Institutes*, 157.

4. Concerning Challenges for Hundred. Note these Rules: 1. If in a Reall plea or Action, if two Hundreders appear, it is sufficient. 2. He ought to have Freehold in the Hundred where he dwells. 3. If the Cause of Action ariseth within divers Hundreds, yet the number is sufficient as if they had come out of one. 4. If there be 2. severall Hundreds in one Leet, if he cometh out of any Hundred, it is sufficient. 5. If the party be Lord of the Hundred, if the Jury cometh *de Corpore Comitatus*, it is sufficient. 6. If a Hundredor sells his Land, it is not material, because his Knowledg continues. 7. He who challengeth for Hundred, must shew in what Hundred, &c. *Cook.* 1. Part, *Institutes*, 157.

5. A Principall Challenge for favour is, where there is expres Favour, or expres Malice, Consanguinity, or of the blood of any of the parties, Affinity or Alliance by marriage, these are principal Challenges for Favour. *Ibid.*

6. In all Challenges; The time to make the Challenge ought to be observed; and therefore,

1. He who hath divers Challenges, ought to take them at one time. 2. If one be challenged by the party, and be found indifferent, he may be afterwards challenged by the other party. 3. After Challenge of the Array, which is found to be duly made. If the ſame party Challengeth the *Polles*, he muſt ſhew cauſe preſently. 4. When the King is Party, or in an Appeal of Felony, the Defendant who Challengeth for Cauſe, ought to ſhew his Cauſe preſently. 5. In Caſe of Felony or Treaſon, If the party Challenge for Cauſe, and he who is Challenged is found indifferent, yet the perſon may be Challenged peremptorily. 6. In a Challenge for the Hundred, It ought to be before all are ſworn, which ſhould ſerve for Hundreds. 7. The Array of the *Tales* ſhall not be Challenged by any of the parties untill the Array of the principall Challengers be tryed: But if the Plaintiff Challengeth the Array of the Principall Pannell, the Defendant may Challenge the Array of the *Tales*. 8. After one hath taken Challenge to the *Polles*, he cannot Challenge the Array. 9. A Challenge cannot be made to the Array, when the Array is appointed by the Court, becauſe the Court is indifferent, but there a Challenge may be to the *Polls*. 10. If the cauſe of Challenge touch not the Honour, or diſcredit of the Juror, he ſhall not be examined upon Oath; But upon all other matters he ſhall be examined upon his Oath to inform the Tryers. *Cook* 1. Part, *Inſtitutes*, 157, 158. And See all theſe Rules of Challenges made good; by the Judgments and books above mentioned, in this Tytle of Challenge.

Chancery *and* Chancellor.

The Antiquity of the Court; and in what things and Pleas it hath Juriſdiction, what not; and in what Caſes it may Relieve the Plaintiff Complayning there, in what not; And of the Decrees, and Proceedings there.

1. THe Court of Chancery is a fundamental Court, as Antient as the Kingdome it ſelf, and known to the Law: It is the Repoſitory of all the Rights of the People; It is *Officina Juſtitiæ*, a Court of a high nature; out of which Courts, Iſſue all Originall Writs remediall; A Court wherein Equity is adminiſtred by the King himſelf, or by his Chancellor, in his name, as a ſpeciall truſt committed to him, bounden to no Rules certain, but abſolute and unlimited; though unto diſcretion, ſome Rules and forms are obſerved there, which that Court may juſtly leave in ſpecial Caſes. In that Court, a man ſhall have remedy for that which he hath no remedy at the Common Law, See *Cook* 4. Part, *Inſtitutes*, in Title Chancery, Book, Diverſity of Courts: and ſee Mirrour of Juſtices, chap. 1. where it is ordeined, That every one have a Writ remediall from the Kings Chancery, according to his Plaint, without difficulty, and that every one have proces from day to day; without the Seal of the Judge, or of the party: and ſee *Cook* 9. Part, 99. in *Margaret Podges* Caſe, where it is ſaid, That all Pleas in Chancery according to the Ordinary power, are *Coram Domino Regad, in Cancellaria*; And the Keeper of the Great Seal, or Chancellor of *England*, is but the Queens Deputy during her pleaſure.

2. Where it is found by Office, That the Kings Tenant was ſeiſed of Lands in Fee-ſimple, or in Fee-tail, and that he dyed ſeized, and held of the King in *Capite*, The Wife may come into the Chancery, and there make Oath, that ſhe will not marry without the Kings Licence; and thereupon the King may Aſſign her Dower in Chancery, of the Mannors and Lands, and Award a Writ to the Eſcheator, to deliver the Lands Aſſigned to her, and although the King doth commit the Cuſtody of the Land to another, yet the King may Aſſign Dower to the Wife in Chancery. *Fitz. Nat. Br.* 262, 264. And if the King make Livery to the heir of full age, ſaving to the Wife, her Dower to be Aſſigned by the King; then if the Wife will demand Dower, ſhe may ſue for the ſame in the Chancery, and a Writ ſhall be to Eſcheator, to warn the heir to be in Chancery at a certain day, and the ſame day ſhall be given to the Woman to receive her Dower; And if the Land Aſſigned to her in Dower in the Chancery be Evicted from her, ſhe ſhall have a *Scire facias* to re-ſeize the Land, and be anew-endowed. See 43 Aſſ. Br. Dower. 65. *Fitz. Nat. Br.* 264. acc.

3. Upon a Bill in Chancery, to be relieved againſt Dower; the Caſe was referred to the Juſtices for their Opinions. The Caſe was this, I. S. ſeiſed of Lands by Indenture, bargains and ſells to the Husband for 120 l. In conſideration, that he ſhall re-demiſe it to him and his Wife for their lives, rendring a Pepper-corn; and with Condition, that if he paid the 120 l. at the end of twenty years, the bargain and ſale ſhould be void. He re-demiſed, and dyed; his Wife brought Dower.

And

And, whether the Plaintiff ſhould be releived againſt this Title of Dower, was the queſtion. And although the Juſtices conceived, that it was but in the nature of a Mortgage, and upon a Mortgage, if the Land be redeemed, the Wife of the Mortgagee ſhall not be endowed; and although the Husband take a Fine, *Sur Conuſans de Droit*, and renders arrear, although it be once in the Husband, yet the Wife ſhall not be endowed: Yet in this Caſe, they conceived the Wife was to have her Dower, for that by the bargain and ſale the Land was veſted in the Husband, and thereby the Wife entituled to have her Dower; And when a Woman is Dowable by Act, or Rule of Law, a Court of Equity ſhall not bar her to claim her Dower: For where there is no fraud or Covin, a Court of Equity will not relieve. And ſo the Opinion of the Juſtices was, That the party by his Bill, was not to be relieved, againſt the Dower in the Court of Chancery. Paſc. 6. Jac. in B. R. *Noſh* and *Preſton*'s Caſe. *Cro.* 1. Part, 138.

4. Note, although the Chancery be alwayes open to purchaſe Original Writs, or to try matters of Equity, to have Writs retornable immediately; Yet if a Writ be Awarded to call one to be a Serjeant at Law, this Writ is of ſo high a nature, viz. *ad comparandum, et recipiendum ſtatum et gradum Servientis ad legem*, that it cannnot be returned in the time of Vacation, but it ought to be made retornable at a day certain in Term. See 1 Car. *Cro.* 1. Part, 1. acc.

5. Note, where Lands are holden of the King in *Capite*: It was Reſolved in ſuch Caſe, That although, that the Statute of *Prerogativa Regis*, made 17 H. 2. gives power to the King, to endow the Wife of his Tenant in Chancery, although the Heir be of full age; Yet the Statute leaves the ſame to the Election of the Wife, either to be endowed in Chancery by the King, or by the Heir. And therefore, If in ſuch Caſe; the Wife brings a Writ of Dower againſt the heir; and not a Writ to be endowed by the King in Chancery, the Heir being of full age; he ſhall not have in ſuch Caſe, aid of the King. See *Cook* 4. Part, 16, 17. *Anna Bedingfeild*'s Caſe.

6. In Falſe Impriſonment, the Defendants juſtified, That *York* was a City by Preſcription, Incorporate by the name of Mayor, Aldermen, and Commonalty: and that they had had time out of mind, a Court called a Chancery-Court, for all Cauſes of Equity ariſing within the City; and that they had uſed to direct precepts for appearance there, and contempt of Orders there: And ſet forth, That an Order was made by the Court, the Defendant ſhould anſwer, which he abſolutely refuſed to do, and ſo Juſtifies the committing of the Defendant to Priſon; for his contempt in breach of the Order of the Court: It was ſaid in this Caſe, That a Court of Equity could not lye in Grant, much leſſe in Preſcription, being a Juriſdiction to be derived from the Crown: For the King cannot grant any thing in derogation of the Common Law; but *tenere placita*, according to the Courſe of Law, may be granted and preſcribed in; And it was ſaid, That *Cheſter* and *Durham* had Chancery Courts, but that was in regard they were County Palatines, which had *Jura Regalia*; and Courts of Chancery are incident to a County Palatine, And it was ſaid, That *London*, and the Cinque-Ports have Courts of Chancery, but they have them by Acts of Parliament; But it was ſaid, that the High Court of Chancery was a fundamentall Court, and had its being with the firſt Government of the Nation: And therefore when a man pleads a thing to be done in the ſaid Court of Chancery, the Party doth not begin his Plea with a Preſcription, but pleads a thing done in Chancery; as men do all things done in the other Courts of Juſtice, as in the Courts of Kings Bench or Common Pleas, without alledging of any Preſcription; or that the ſaid Court hath Title to hold Plea thereof by Preſcription: It was the better Opinion of the Court, That a Court of Chancery could not commence by Preſcription. Paſc. 13 Jac. in B. R. *Martin* and *Maſſhet* Caſe. *Hob.* 63. See *Godbolt.* 262. acc.

7. A. Bill was exhibited by Sir *William Candiſh*, and another againſt the Heir of *Worſley*: And the Caſe upon the hearing appeared to be this, viz. That the Grandfather of *Worſley* being Tenant for life, the Remainder in tail to the Father. The Grandfather levyed a Fine of Lands 60. years paſt, to J. S. and the Father alſo conveyed the Land by bargain and Sale. And the Land by mean Conveyance came to the Plaintiffs. It was a Queſtion in this Caſe, whether the Plaintiffs in this Caſe could be Relieved in Chancery; and the Lord Keeper calling the Cheif Juſtice of the Common-Pleas, and other of the Juſtices to his Aſſiſtance in the hearing of this Cauſe, It was Reſolved, That *Candiſh* the Plaintiff could not have any Relief in that Court, becauſe by the Statute, Tenant in tail is diſabled to bar his Iſſues, but by ſuch means as the Laws and Statutes have allowed. *Candiſhes* and *Worſleyes* Caſe. *Hob.* 203.

8. Sir *Arthur Mannering* and his Wife, one of the co-heirs of Sir *Tho. Dennis*, exhibited their Bill in Chancery againſt *Gabriel Dennis*; The effect of the Bill was, That Sir *Robert Dennis*, Father of Sir *Thomas*, 18 Eliz. had conveyed the ſubſtance of his whole Inheritance to Sir *Thomas* for life, with divers Remainders; and for default of Iſſue Male, the Remainder was limited to the Father of the Defendant *Gabriel*, and the Heirs Males

Males of of his body, and a Proviſo was, giving him power to revoke by writing under his hand and Seal in the preſence of Credible Witneſſes; and it ſet forth, that he had made ſuch a Revocation; The Defendant denyed the Revocation; Examination was preſſed, (for want of Witneſſe) to be had in the Chancery, and to that end, an Injunction was granted. The Lord Keeper afterwards called the Juſtices to his Aſſiſtance, for the hearing of this Cauſe; And, whether this Caſe was examinable in Chancery or not, was the queſtion. It was Reſolved, That this Caſe was not fit for that Court, but for the Common Law, except all Cauſes which were tryable naturally by the Common Law by Jury, ſhould be examinable and tryable in the Chancery *per teſtes*: which were to confound Juriſdictions, and to make the Common Law, and all the courſe of it needleſſe: wherefore the Suit in Chancery was abſolutely diſmiſt. 13 Jac. in *Cancell.* Sir *Arthur Mannering* and *Dennis*'s Caſe. *Hob.* 203.

9. A. deviſed that J. S. and three others, ſhould ſell certain Lands, and ſhould diſpoſe of the mony to the Defendant, and three others; the Land was ſold accordingly: the Defendant ſued the Executor of J. S. in the Spiritual Court for a fourth part of the mony; whereupon a Prohibition was prayed: It was Reſolved in this Caſe, That neither the Land nor the mony was Teſtamentary: for it was not Aſſetts to debts, but a ſum of mony ariſing of Lands appointed to ſpeciall uſe in a way of Equity, and not as a Legacy; and that Court cannot hold plea of a Legacy in Equity: But it was Reſolved, That in ſuch Caſe, the Sute might have bin in the Chancery, or other Court of Equity, to have compelled the Defendant to perform the Legacy. Trin. 1. Jac. in C. B, *Edwards* and *Grovers* Caſe. *Hob.* 265.

10. In an *Audita Querela*, the Caſe was; A. was bound in a Statute to B. and being taken in Execution, brought *Audita Querela*, ſuppoſing the Statute to be void, and found four Sureties in Chancery, that the ſaid A. ſhould appear in Chancery *octab. Mic.* following, *Et Staret Juri in ea parte proſequere cum effectum*, and to that end were bound, each in 200 l. And if A. appeared not *in forma pradict. et proſequeretur cum effectu*; And being at Iſſue, upon this ſurmiſe, it was ſent to be tryed in B. R. and there adjudged, That the ſurmiſe was inſufficient; and becauſe he did not render himſelf to Priſon, and pay the Condemnation, a *Scire facias* was brought upon the Recognizance, And the breach Aſſigned, was, becauſe he paid not the Condemnation, nor rendred himſelf to Priſon. *Et ſic non ſtetit Juri, &c.* upon which it was demurred. It was moved, The breach was not well Aſſigned; for here the Recognizance is not but for appearance, *Et ad proſequendum cum effectu*; and there is no word that he ſhould render himſelf or pay the condemnation. But it was Reſolved, That the Recognizance being *ad Comparandum et ad ſtandum Juri*, &c. It ſhall be taken according to the Courſe of the Court there, which is not only to appear, but to ſatisfy the Condemnation, or to render himſelf to Priſon: And of the Courſe of Chancery, in ſuch Caſe, other Courts ought to take notice, and the words *ad ſtandum Juri* in ſuch parts, ſhall have ſuch Conſtruction: otherwiſe the party who hath Execution, ſhould be at Miſchief if the Recognizance ſhould be onely *ad Comparandum et proſequend.* which is onely to proſecute without being Nonſuit, and yet the other ſhould not have other remedy for his debt; Wherefore it was adjudged, the breach was well Aſſigned; and Judgment was given accordingly. Paſc. 3 Jac. in B. R. *Woodlich* and *Maſſy's* Caſe. *Cro.* 2. Part, 67.

11. A man committed to the Fleet for not performing of a Decree in Chancery, being brought by *Habeas Corpus*, the Caſe was, A. ſold to B. a young Gentleman, a Jewel which he pretended to be worth 360 l. whereas it was worth but 20 l. and took a Bond of him, of 600 l. in the name of J. S: and A. procured the Bond to be put in ſuit, and procured a Judgment againſt B; and A. paid all the charges of the Action: B. exhibited his Bill in Chancery for Relief: Afterwards B. brought a Writ of Error to reverſe the Judgment, upon which the Judgment was affirmed. Afterwards upon the hearing in Chancery, it was Decreed; That A. ſhould take again his Jewell, and J. S. releaſe, and acknowledge ſatisfaction of the Judgment, It was holden by the Court, That this Decree and Impriſonment after Judgment at the Common Law, was unlawfull: And 5 E. 4. rott. 35. *Cobb* and *Mores* Caſe was vouche, where *Cobb* procured Debt to be brought againſt *More*, and the Action to be confeſſed by Attorney; and a Writ of Error was brought thereupon, and the Judgment was affirmed; And all this being done, *More* being beyond Sea, he exhibited his Bill in Chancery, to be releived againſt the Judgment, And in that Caſe it was Reſolved, That after a Judgment at Common Law, he could not be Relieved in Chancery: whereupon he was enforced to exhibite his Bill in Parliament; and there a Speciall Act was made for his Relief. Paſc. 11 Jac. in B. R. *Courtney* and *Glanvill's* Caſe. *Cro.* 2. Part, 344. See *Bolſtr.* 2. Part, 301, 302. The ſame Caſe.

12. In an Action brought for non-payment of Rent, upon a Leaſe made by the Queen; The Caſe was; Sir *Moyle Finch* purchaſed the Reverſion of the Queen. 3 Eliz. and 9 Eliz. entred for

for non-payment of the Rent: And the Judgment being Affirmed in a Writ of Error, The Defendant, which was *Throgmorton*, exhibited his Bill in Chancery; setting forth, That at the time of non-payment, which was 9 Eliz. he sent the Rent by his Servant, who was robbed of it, which, when he knew, he immediately paid it the day after, which the Queen accepted; and that he continued the payment of it, till 30 Eliz. when the Queen sold the Land as a Reversion charged with this Lease, and therefore that it was against Conscience, that the Patentee should now avoid the Lease. To the Bill, Sir *Moyle Finch* pleaded the proceedings at Common Law, and the Judgment. It was holden by all the Judges of *England* in this Case, and so Resolved, That although the said Bill did comprehend much matter of Equity, if he had complained before the Judgment; yet having suffered Judgment at the Common Law, he comes too late to be relieved in a Court of Equity. Mich. 40 Eliz. in Sir *Moyle Finch* and *Throgmorton*'s Case. acc. And so in the principall Case; the party being by *Habeas Corpus* brought to the Kings Bench, was discharged.

13. The Case was this, The Earl of *Derby* was Chancellor of *Chester*; A Suit was there between Sir *John Egerton* Plaintiff, against the Earl of *Derby*, and one *Kelley*, for a Lease, he having the said Lease; The Earl Decreed the Lease for *Kelly*, and so he was there Judge of his own proper Cause, and made the Decree in effect for himself, Sir *John Egerton* finding himself grieved by the Decree, being thereby put out of possession, exhibited his Bill here in Chancery against them, to have redresse: It was the Opinion of *Cook* and *Dodd* Justices, to which the Lord Chancellor here agreed, That the proceedings might be here in the Chancery Court holden here at *Westminster* in the same Cause; and so the proceedings went on in the Chancery here after the Decree, passed in the Chancery at *Chester*. Hill. 11 Jac. Sir *John Egerton* and *Kelly*'s Case. *Bollstr.* 3. Part, 118. And in that Case; It was Resolved, That a man Inhabiting out of the County Palatine of *Chester*, who hath right to Land lying in *Chester*, that for this he might Sue in the Court of Chancery here, for he ought to have means to come to his right.

14. Where a man is wronged by a Decree in Chancery, his best and onely way to have remedy, is to have his Petition to the King, and so pray his Redress: For so was it done in the great Cause between Sir *Moyle Finch*, and the Earl of *Worcester*: Where the Earl of *Worcester* and others were upon a Feoffment seised to the use of the Lady of *Southampton*. The Earl was Plaintiff on the behalf of the said Lady in the Chancery against Sr *Moile Finch*; which Suit was concerning the Manners of *Ramestone* and *Stoke-Coddington*: which Decree in Chancery was for the Earl, and against Sir *Moyle Finch*: with which he finding himself agrieved, the upon he preferred his Petition to Queen *Elizabeth*, to have some redress; the which matter was referred by her to her Judges; and by them the said Decree was reversed. Mich. 43 Eliz. Sir *Moyle Finch* and the Earl of *Worcester*'s Case. See before. And see *Vandry* and *Pannells* Case. Mich. 13 Jac. in the Case for a Prohibition to *Chester*. *Bolstr.* 3. Part, 116. acc.

15. Judgment was given against the Defendant, in Debt brought upon the Statute of 13 Eliz. of Usury: and day being given him to move in Arrest of Judgment, He preferred his Bill in Chancery, and there procured an Injunction, to stay Execution: Notwithstanding which, the Court awarded Execution: and there it was said by the Court, That they much wondred, that none would Inform upon the Statutes of 27 E. 3. Cap. 1. and 4 H. 4. Cap. 23. against the parties that procured such Injunctions for to stay Judgments and Executions after Tryall had at the Common-Law; for that by the same Statutes, be it in a plea reall or personal, after Judgment given, the party ought to be quiet, and submit to it: For Judgments given once *in Curia Domini Regis*, ought not to be avoided, but by Errour or Attaint. Hill. 11 Jac. in B. R. *Heath* and *Ridleys* Case. *Bolstr.* 2. Part, 194.

16. Note, by *Cook*, Chief Justice; for a general Rule and Maxime of Law, That if any Court of Equity doth intermeddle with matters, that are properly at the Common-Law, and which do concern matter of Freehold, they are to be prohibited; and the reason is, because they draw the matter there *ad aliud examen*; and the matter is put *in arbitrio, boni viri*; and there Judgments are binding, upon which no Writ of Errour or Attaint lyeth, and so the party is without legall remedy: If in the Exchequer or other Courts of Law, the Judges do erre in their Judgments, a Writ of Errour doth lye; but after a Judgment, or a Decree given in a Court of Equity, the party hath no remedy, for that no Errour or Attaint lyeth in the Case, although the Judgment or Decree be Erronious. Hill. 11 Jac. in B. R. *Bolstr.* 197. acc.

17. A Copy-hold was surrendred to J. S. in trust, that *Holland* an Alien should take the profits thereof to his own use and benefit. Upon this, an Inquisition was taken for the King; and upon a tryall concerning these Lands, a Special Verdict was found, containing the matter aforesaid. It was said in this Case, That a Trustee, or *Cestuy que Trust*, cannot take the profits of the Land, but hath

hath onely his remedy in Equity; for the Eſtate in the Land is onely in the party truſted: and the King ſhall not have the profits of the Lands upon an Outlawry againſt *Ceſtuy que uſe*, or *Ceſtuy que Truſt*. Therefore if the King hath Equity for a thing, he ought not to ſue firſt at the Common-Law. And ſo in this Caſe, Judgment was given againſt the King. Trin. 23 Car. in B. R. The King and *Hollands* Caſe, *Styles* 21, 41, 75, 84, 90, 94, 95.

18. The Spaniſh Embaſſadour Exhibited his Bill in Chancery againſt Sir *Richard Bingley*, as Procurator General of all the King of *Spain*'s Subjects, and layed the Goods to belong to the Subjects of his Maſter generally, without naming any perſons certain. The Defendant demurred upon the Bill. Upon a Reference of the Demurrer by the Lord Chancellour, to ſome of the Juſtices, It was by them Reſolved, and they were clear of Opinion, That the Embaſſadour was not to be Anſwered to that Bill: For no man can be a Procurator for me, but my ſelf. Therefore the King cannot make a Procurator for all, or any of his Subjects, without their Allowance. 2. That the Office of an Embaſſadour doth not include a Procuration private, but publique for the King; nor for any ſeverall Subject, otherwiſe then as it concerns the King and his publique Miniſter to protect them, and therefore they may and ought to mediate, proſecute, and defend for them, or any one of them at the Councel-Table, which is as it were a Court of State. But when they come to ſettled Courts, which do and muſt obſerve eſſential forms of proceedings; then they muſt be ruled by them. In this Caſe, The Court appointed a Suit by Conſent in the Chancery, onely to examine Witneſſes, and then to determine the Caſe as Judges of the ſaid Court Arbitrable, and not by Warrant of any Order of Chancery: And ſo a Bill being filled by Conſent, the Juſtices made a final Order in the Cauſe. *Don Diego Servienti de Acuna*, the Spaniſh Embaſſadour, and Sir *Richard Bingley*'s Caſe. *Hob.* 72. & 113, 114.

Charge *and* Diſcharge.

Where Land ſhall be charged; where not.

1. DEbt upon a Bond for performance of Covenants, the Caſe was; Tenant for 31. years, deviſeth to his wife as long as ſhe ſhall be ſole, and a widow, the occupation and profits of his Term; and after her Widowhood expired, all the Leaſe and Intereſt to *A.* his ſon, and dyeth: He in the Reverſion by Indenture did give, and grant, bargain and ſell, all that his Tenement to the wife, and to her heirs for ever; and did covenant to make further aſſurance; and that it ſhould be diſcharged of all former Bargains, Sales, Titles, Rights, Joyntures, Arrearages of Rents, and all other charges, Except Rents and Services which ſhall be due after to the Chief Lord, &c. And afterwards he levied a Fine; and after the wife married, and the ſon entred, and the Adminiſtrator of the wife brought Debt upon the Bond, againſt the Adminiſtrators of him in the Reverſion; and averred, That the Land at the time of the Feoffment was charged with the ſaid Leaſe of 31 years. It was ſaid, That in this caſe Judgment ſhould be given for the Plaintiff, becauſe it was not diſcharged at the time of the Feoffment: and here, although it be not preſently charged, yet when there is a Charge which doth ariſe, the Covenant is broken. On the other ſide, It was ſaid, That the Term was extinct by the bargain and ſale, and then the Feoffment void, and therefore no charge; and 40 E. 3. was vouched, That a man ſhall not have the Rent and the Decree of the Land alſo. Trin. 29 Eliz. in B. R. *Hannington* and *Orams* Caſe. *Gold. Obſ.* 59, 60.

2. The Caſe was; Tenant for life the Remainder in tail, Tenant in tail in Remainder acknowledged a Statute, and afterwards granted his Remainder; and afterwards Tenant for life dyed, and he in the Remainder entred. It was a Queſtion in this caſe, if now Execution might be ſued upon this Statute, becauſe the Lands was never in the hands of the Conuſor in demeſne: But it was Reſolved, That the Land ſhould be charged, although ſome doubt of it was in 33 H. 8. *br.* 227. For it was ſaid, That if he in the Remainder make Leaſe to begin at a day to come, yet if he grant over his remainder, the Grantee ſhall hold it charged

ged with the Leaſe. And it was ſaid, That every Statute as a Charge is Executory: wherefore a *Liberate* was awarded to the Conuſee. Hill. 43 Eliz. *Bull* and *James* Caſe. *Goldeſbr.* 120.

3. If Tenant in tail enfeoffeth the heir in tail being under age, and when the heir is of full age, he chargeth the Land with a Rent-charge; And afterwards the Tenant in tail dyeth, whereupon the heir is remitted. In this caſe, by the *Remitter*, the Grant of the Rent is determined, becauſe the Grantor had not any right of the eſtate in tail in him at the time of the Grant, but onely the eſtate in Fee-ſimple, which he gained by the Feoffment, which is wholly defeated, and the Eſtate of the Land out of which the Rent iſſued, being defeated, the Rent alſo is defeated. But if Tenant in tail makes a Leaſe for life, whereby he gaineth a new Reverſion in Fee, and he granteth a Rent out of the Reverſion; and after Tenant for life dyeth, whereby the Grantor becometh Tenant in tail again, and the Reverſion in Fee is defeated; yet becauſe the Grantor had a Right of the tail in him, cloathed with a defeſible Fee-ſimple, the Rent remaineth good againſt him, but not againſt his Iſſue. *Cook.* 1. Part, *Inſtitutes*, 349.

4. A man ſeiſed of an Acre of Land, hath Iſſue two ſons, and dyeth; the younger ſon diſſeiſeth the elder; the eldeſt ſon brings an Aſſiſe; the other pleads in barr, and they are at Iſſue; and it is found againſt the Plaintiff by falſe Oath; and afterwards the younger ſon granteth a Rent-charge; and before any Attaint brought, the younger ſon dyeth, and the Land diſcends to the other; in this Caſe he ſhall not avoid the Rent-charge, for that he ſhall not be remitted againſt the Record; and now there is not any one againſt whom he may bring an Attaint. Mich. 25 H. 8. *Dyer* 5.

5. The Cuſtome of a Mannor was, That the Lord, or Surveyor, or his Deputy, might demiſe Lands by Copy; The Lord gave authority to two, to make Cuſtomary eſtates for the payment of his debts, and dyed: They held a Court in their own names, and granted Copies in Reverſion, according to the Cuſtome: The wife of the Lord had one of the Copy-holds aſſigned unto her upon a Recovery of the third part of the Mannor for her Dower, and holden, She ſhall avoid the grant by the two Aſſignees. Mich. 8 Eliz. *Dyer* 251. But Quære of that Caſe, For that, Paſch. 26 Eliz. it was adjudged, That if the Lord taketh a wife, and afterwards granteth the Land by Copy according to the Cuſtome of the Mannor, and dyeth; his wife being endowed of the Land amongſt other, ſhall not avoid the Eſtate by Copy; for although that her title of Dower was before the Grant, yet the Title of the Copy-holder which is the Cuſtome, is ancienter than the Title of Dower. *Cook* 8. Part, 83. in *Swaynes* Caſe.

6. A man grants a Rent to another upon Condition out of his Land, and afterwards he makes a Feoffment of the Land; the Condition to determine the Rent, doth remain, and is not extinguiſhed by the Feoffment. *Ibid.*

7. The husband and wife ſuffered a Recovery of a Tenement in *London* in a Writ of Right brought there, (which by the Cuſtome binds as ſtrong as a Fine at Common-Law) and the ſame was unto the uſe of the Recoverors, untill they had made a Leaſe for 40 years, and afterwards to the uſe of the husband and wife, and the heirs of the wife, the Leaſe is made, and then the husband dyes. It was holden in that caſe, That the wife ſhall not avoid the Leaſe by the Limitation to the Recoverors, untill, &c. but ſhall hold under the Recovery, ſo as the Term ſhall precede her eſtate. Trin. 12 Eliz. *Dyer* 290. See *Cook* 2. Part, *Beckwiths* Caſe. But then it was a Quære, what remedy the wife ſhould have for the Rent, becauſe the wife came *en le poſt*; and the Rent was reſerved before her Eſtate was made. See 2 Eliz. *Dyer* 187.

8. If Tenant for life granteth a Rent-charge, and he in the Reverſion granteth another Rent-charge; and afterwards the Tenant for life ſurrendreth, he in the Reverſion ſhall hold the Lands charged with two Rents; and as to one, he ſhall be Tenant in Fee-ſimple; and to the other, but Tenant for life. Paſch. 28 H. 8. *Dyer* 10. by *Knightley*.

9. Tenant for life, and he in the Remainder in tail of Land, joyn in a Fine of the Land *ſur Conuſans de Droit come ceo* to *A.* who renders and grants a Rent-charge of 40 l. *per annum* to the Tenant for life; he in the Remainder in tail dyeth without Iſſue, he in the ſecond Remainder entreth; the Rent is behind, and the Tenant for life diſtreins for the Rent. It was Reſolved in this Caſe, That the diſtreſs was well taken, for that the Rent remained as a Charge upon the Land during the life of the Tenant for life; and that the Fine was no diſcontinuance, for that every one granted that which he might lawfully; and that it was no forfeiture by the Tenant for life, for that the Law ſhall Conſtrue this firſt to be a grant of him in the Remainder, and after the grant of the Tenant for life, *ut res magis valeat, quàm pereat. Cook* 1. Part, 76. *Ereſons* Caſe.

10. The Father ſeiſed of Lands in Fee, made a Feoffment thereof to the uſe of his ſon and heir apparant, and his heirs upon Condition: Afterwards the Father and Son joyned in a Grant of a Rent-Charge, the Condition was broken, and the Father entred; and the Queſtion was, Whether the Father ſhould hold the Land charged with the Rent? And it was Reſolved, That the Charge

was good. It was Objected, That the Grant of the Father was but a Confirmation; and a Confirmation cannot alter an Eſtate: But a difference was taken, when the Eſtate of him to whom the Confirmation is made, is made upon an expreſs Condition, there the Confirmation made to him cannot alter it. But when ſuch a Feoffee upon Condition maketh a Feoffment in Fee over, ſo as his Eſtate is ſubject onely to a Condition contained in another Conveyance, but no Condition is expreſſed or annexed by the Feoffor to the Eſtate; there a Confirmation of his eſtate which he hath by abſolute words doth extinct the Condition, which was annexed to the Eſtate of the laſt Feoffee: As if a man grant a Rent-Charge in Fee, the ſame is abſolute; but in reſpect of the Eſtate of the Grantor, it is determinable: and if he in the Reverſion confirm ſuch a Grant, the Confirmation is good; but if the determination of the Rent had been expreſſed by the Deed, the Confirmation had not made it abſolute: As if Leſſee for life grant a Rent to one and his heirs during the life of Leſſee for life, and afterwards the Leſſor confirm the Rent to the Grantee and his heirs, and the Tenant for life dyeth, there the Rent ſhall ceaſe. 2. It was Reſolved in this Caſe, That becauſe all thoſe who had Intereſt in the Land, joyned in the Grant of the Rent-charge, That the Grant was good; for that all Lands in Fee-ſimple may be charged, *Concurrentibus, &c. Cook* 1. Part, 146. *Maywots* Caſe.

11. King *Ed.* the 6th granted to the Lady *Mary* his ſiſter, the Mannor of *D.* ſo long as ſhe ſhould continue ſole; The Lady granted a Rent-charge; King *Ed.* 6. dyed, and then ſhe became Queen, and the Reverſion diſcended unto her, and then ſhe married King *Philip* of *Spain*. It was a Quære in 4 Ma. *Dyer*. 141. If the Queen might avoid the Rent, or not? But ſee that Quære reſolved, in *Cook* 1. Part, *Inſtitutes*, 300, 301. That the Queen cannot avoid the Rent; but the ſame remains as a Charge upon the Land.

12. After the Statute of 27 H. 8. Cap. 10. of *Uſes*, A Fine was levied of Lands; the uſe of which was declared by Indenture, that the Conuſor ſhould have and receive a yearly Rent of 10 l. out of the ſaid Land for his life: and becauſe there was no words of diſtreſs in the Indenture, by reaſon of which he might diſtrain for the Rent; It was a Queſtion, Whether the Conuſor might diſtrain for the ſaid Rent? And the Opinion of the Court was, That by a Clauſe in the ſaid Statute of Uſes; the Conuſor might diſtrain for the ſaid Rent: and that it was a good Rent iſſuing and chargeable out of the Land, although there were no words or power of diſtreſs mentioned in the Deed. Paſch. 21 Eliz. *Dyer* 361. And ſee *Cook* 2. Part, in the Lord *Cromwell's* Caſe. acc.

13. *Putnam* by Deed Indented, did enfeoffe *Duncomb* and his heirs of the Mannor of D. rendring to *Putnam* and his heirs, a Rent with clauſe of Diſtreſs; and for non-payment a Re-entry: and by another Indenture of the ſame date, *Putnam* Covenanted with *Duncomb* to levy a Fine of the ſaid Mannor; which Fine ſhould be to the Uſes and intents and Conditions expreſſed in the former Indentures, and to no other. After, a Fine was levied accordingly by *Putnam* to *Duncomb*, with the uſual words of Releaſe of all his Right, &c. In this Caſe it was Reſolved, That by this Fine, neither the Rent nor the Condition were extinguiſhed, or touched; but the Rent remained a good Rent chargeable upon the Land, and that by force of the Covenants in the former Indentures. See 3 & 4 Ma. *Dyer* 157. *Putnam* and *Duncomb* Caſe. And ſo was it Reſolved by the Opinion of all the Juſtices, Mich. 23 Eliz. in *Tuſſer* and *Bradborns* Caſe; in the caſe of a Common Recovery, where a Rent reſerved to *Bradborn* and his wife in Fee before by a Fine, was not extinguiſhed by a Recovery afterwards with Warranty ſuffered of the Land; but the Rent continued by the former againſt one of the parties, notwithſtanding the general entry of the parties into the Warranty. See theſe Caſes vouched in *Cook* 2. Part, in the Lord *Cromwell's* Caſe, 73. according to which Caſes, it was ſo likewiſe Reſolved in the ſaid Lord *Cromwell's* Caſe.

14. A man ſeiſed of Black-Acre in Fee, and of White-Acre for years, by Deed granted a Rent out of both Acres to J. S. for life, with Clauſe of diſtreſs in both acres, the Rent was behind; J. S. diſtrained, and avowed the diſtreſs in White-acre. It was Reſolved in this Caſe, 1. When a man grants a Rent out of Land in Fee, and out of a Term for years to have for life, the Freehold of the Rent ſhall iſſue out of the Land in Fee, and not out of the Term, which is but a Chattel; and the agreement of the parties cannot charge ſuch a thing with a Rent, which is not chargeable by the Law. But, 2. In this caſe, it was Reſolved, That White-Acre during the Term, ſhould be charged with the Diſtreſs, although that the Rent was not iſſuing out of it: and when Lands are charged with a Rent in Fee, Goods, and Chattels may be charged to the Diſtreſs; and if the Grantee takes a Leaſe of part of the Land, the ſame doth not ſuſpend the diſtreſs: and a man may diſtrain in his own poſſeſſion; but a man cannot have a rent out of his own Land. And if a man grants to another, That he and his heirs may diſtrain for the Rent of 40 s. within the Mannor of *Sale*, the ſame amounts to a grant of a Rent out of the ſaid Mannor; But if a man grants a Rent out of the Man-

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nor of D. and if the Rent be behind, that the Grantee ſhall diſtrain in the Mannor of S. it is but a penalty out of the Mannor of S. becauſe the Rent is granted expreſly out of the Mannor of D. and the Law will not make an Expoſition againſt the expreſs words of the parties. *Cook* 7. Part, 23, 24. *Butts* Caſe.

15. If a man grant a Rent *in Manerio de B. percipiendum* in 100 acres of Land parcel of the ſame Mannor, with clauſe of diſtreſs in the 100. acres; the Rent ſhall iſſue out of the 100 acres only, and the general words ſhall be conſtrued according to the ſpecial words. So if a man grant eth a Rent, and goeth no further, the ſaid general words ſhall create an Eſtate for life: but if the *Habendum* be for years, the ſame doth qualifie the general words. See *Cook* 8. Part, 154. in *Altham's* Caſe, &c.

16. *A.* Biſhop, after the Statute of 1 Eliz. made a Leaſe of a Fair, parcel of his ſaid Biſhoprick for 3. Lives, rendring the ancient and accuſtomed rent which was confirmed by the Dean and Chapter. It was adjudged in this caſe, That the Succeſſour ſhould avoid the Leaſe, becauſe a Fair is but a Franchiſe, or a Liberty, not Mayorable, out of which a Rent could not be reſerved; and though the reſervation of the Rent was good by way of Contract; yet it was not incident to the Reverſion, and ſo not binding to his Succeſſours. *Cook* 5. Part, 3. *Jewells* Caſe.

17. In Debt brought upon an Obligation againſt the daughters and heir of *Henningham*, upon an Obligation of their Father; the Plaintiff recovered upon *Nihil dicit*; and Judgment general was given: And upon a *Scire facies* brought to have Execution, the Defendants pleaded Nothing by diſcent in Fee at the day of the Writ brought, nor after. The Opinion of the Court then was, That after a Recovery by *Nihil dicit*, *Non ſum Informatus*, or Confeſſion, that the heir comes too late to plead, That he had nothing by diſcent; but he ought to have pleaded that firſt. And in that caſe it was ſaid by *Dyer*, That if the profits received after the death of the Anceſtor, are ſufficient to ſatisfie the Debt, that the Plaintiff ſhould have a general Judgment againſt the heir: But *Manwood* held the contrary, that the Judgment ſhould be ſpecial. Quære. See 7 E. 6. *Dyer*. 81. *Pepps* Caſe. See 23 Eliz. *Dyer* 373. the Judgment ſhall be ſpeciall. And ſee *Lib.* Entries, 171. &c.

18. The Caſe was; *A.* recovered againſt *B.* in an Action of Debt; *A.* made his wife his Executrix, and dyed: The wife made *C.* her Executor, and dyed: *B.* dyed, *C.* brought a *Scire facias* to have Execution upon the Judgment againſt the heir of *B.* who pleaded, That he had nothing by diſcent from *B.* his Father. And it was found, that he had two acres of Land by diſcent. It was moved, That for this falſe plea, he ſhall bind his own Lands: and *Pepps* Caſe in *Plo. Com.* 440. was vouched, where in Debt againſt the heir upon his falſe plea, his own Lands ſhould be lyable to the debt. But in this caſe it was Reſolved, That a ſpeciall Judgment ſhould be againſt the heir, and not a general Judgment to charge his own Land, becauſe the heir is not charged here as heir, but as Terr-Tenant; and where the heir is charged as Terr-Tenant, the Judgment ſhall be but ſpeciall. See 33 E. 3. Execution, 162. and ſo Judgment was given in this caſe, That the Plaintiff ſhould have Execution but of the moyety of the Lands which diſcended to the Defendant from his Father; and ſo ſee, there is a difference of Debt againſt the heir, and a *Scire facias* brought againſt the heir. See *Cook* 3. Part, in Sir *William Herbert's* Caſe. Hill. 1 Car. in B. R. *Bowyer* and *Rivets* Caſe. *Popb.* 153, 154, 155.

19. *A.* and his wife, levied a Fine to J. S. of a Rectory, who granted and rendred a Rent-charge of 30 l. *per annum* iſſuing out of it to *A.* for his life, to begin after the death of his wife, with a Proviſo, That it ſhould not extend to charge the perſons of the Conuſees, but to charge the Rectory only during the life of the ſaid *A*; and rendred the Rectory to *A.* and his wife during the life of the wife, the remainder to J. D. and his wife in tail; the remainder to the right heirs of J. D: *A.* acknowledged a Statute to *B*; the wife of *A.* dyed; thoſe in the remainder entred: *A.* releaſed the rent to him in the Remainder; The rent upon the Statute is extended; and for the arrearages of it, Debt was brought: And in this caſe, theſe points amongſt others were Reſolved, 1. That a Rent might be extinct as to one perſon; and in *eſſe* as to another perſon. 2. That the Rent was liable to Execution preſently by the Recognizance, by the Statute of 13 E. 1. to which Eſtate the Statute of 23 H. 8. cap. 6. did refer. So if a man hath Judgment to recover debt or damages, by that the Rent which he hath of any Eſtate of Freehold is liable to it; and although that after the Judgment he releaſeth it, yet the party ſhall have Execution of the moyety of it by *Elegit*. 3. It was Reſolved, That the Act of the Conuſor ſhould not barr the Conuſee, who is a ſtranger to the Releaſe of the Execution of the Rent, no default being in him. 4. That the Action of debt did not ly: ſo long as the Extent did endure, for ſo long had the Rent continuance, although the Free-hold of it was determined. 5. Reſolved, That if a man hath a Rent-charge out of Lands, the Rent is behind, the Grantor enfeoffeth J. S. the Rent is behind in his time; J. S. enfeoffeth J. D. the rent

is behind again in his time, the Grantee dyeth, That the Executors ſhall have debt againſt each of them for the Rent behind in his time, for *qui ſentit Commodum, ſentire debet et Onus. Cook* 7. Part, 38, 39. *Lillingſton's* Caſe.

20. A man ſeiſed of Lands in Fee after the Statute of 27 H. 8. of Uſes, did enfeoffe divers perſons to the uſe of himſelf and the heirs males of his body, the remainder to divers other in tail, the Reverſion to the Feoffor and his heirs; the Feoffor had iſſue, and dyed, the Iſſue entred; he in the remainder granted a Rent-charge out of the Land, and the Iſſue in tail levied a Fine, and ſuffered a Recovery, and dyed without Iſſue. It was Reſolved in this Caſe, 1. That the Recoverors, nor any which came in under their Eſtates, ſhould be ſubject to the Charge of him in the remainder, becauſe that the Recoverors are in, of an Eſtate which he hath gained under the Tenant in tail in poſſeſſion; which Eſtate was not ſubject to the Charge of him in the Remainder: and ſo it was Reſolved, That no Leaſe, Rent, nor Eſtate made by him in the remainder, ſhould charge the poſſeſſion of the Recoveror. 2. That a Common Recovery againſt Tenant in tail, did not barr onely the remainder, and all charges made by him in the remainder, but alſo the reverſion, and all Leaſes and Charges by him in the reverſion alſo. See *Cook* 1. Part, 62. *Capell's* Caſe. See *Cook* 2. Part, Sir *Hugh Cholmleys* Caſe. acc.

21. In a Writ of Annuity brought, the Caſe was: Queen *Elizabeth*, ſeiſed of a Barn and Tythes in S. for the life of the Lord *Pagett*, by Letters Patents, 29 Eliz. demiſed it to *Ward* for 21 years; *Ward* afterwards granted to *J. F.* the Plaintiff an Annual Rent of 10 l. iſſuing out of the ſaid Barn and Tythes for 15 years, with clauſe of diſtreſs. The Lord *Pagett* dyed; and for the Arrearages of the Rent, *J. F.* the Plaintiff brought an Annuity. It was Reſolved in this caſe, That Judgment ſhould be given for the Plaintiff, to recover the Annuity; for that the Law at the beginning gave him Election to have it as a Rent, or an Annuity; which Election ſhall not be taken from him, but by his own Act, as in caſe if he purchaſeth part of the Land out of which it is iſſuing: But neither the preſumption of Law, nor the expreſs grant thereof, as a Rent ſhall not take away from the Grantee the benefit of his Election, where no default is in him. And in this caſe it was agreed, That where a Rent was granted out of a Rectory by the Parſon, who afterwards reſigned the Parſonage; that yet the Annuity did lye againſt the Grantor upon the ſame Grant; as it was reported to have been adjudged by Mr. *Bendloes* in his Reports. Hill. 37 Eliz. in B. R. *Fulwood* and *Wards* Caſe, *Popham* 86, 87.

22. Grantee of a Rent-Charge acknowledged a Statute, and afterwards purchaſed the Land out of which the Rent was iſſuing. It was in this caſe Reſolved by the whole Court, That the rent was ſtill extendable, for that the party by his own act ſhould not avoid the Charge. Eliz. in the Common-Pleas. *Dellington* and *Duncombs* Caſe adjudged.

23. If a man grant to another a Rent-charge for his life; Provided, he ſhall not charge his perſon, if the Rent be behind, and the Grantee dyeth, his Executors ſhall charge the perſon of the Grantor in an Action of debt, becauſe otherwiſe they ſhould be without remedy. *Cook* 6. Part, 41. Sir *Anthony Mildmayes* Caſe. *Cook* 7. Part, 34. b. acc.

24. *A.* grants a Rent-Charge to *B.* the Rent is behind; *B.* dyeth, *A.* enfeoffeth *C.* of the Lands in Fee, who divers years after enfeoffeth *D.*; who divers years after enfeoffeth *E.* It was holden by all the Juſtices upon the Conſtruction of the Statute of 32 H. 8. of Rents, Cap. 37. That *E.* ſhould be chargeable with the ſaid Arrearages to the Executors of *A.* But they all agreed, That the Lord by Eſcheat, Tenant in Dower, or by the Curteſie ſhould not be charged, for they do not claim it by the party onely, but alſo by the Law. Mich. 32 Eliz. in B. R. *Leon.* 302.

Common, *and* Commoners.

1. *Of Common Appendant, Appurtenant, In Groſſe, Common for Cauſe, of Vicaridge; Common* ratione Commorantiæ, *and of other ſorts of Common.*

1. COmmon Appendant is of Common Right, and commenceth by operation of Law, and in favour of Tillage, and it is Appendant onely to Ancient Arrable Land, Hide, and Gain onely for Cattell: Horſes and Oxen to Plough the Land; and Cowes and ſheep to manure the Land, and all for the advancement and bettering of Tillage: And although Common Appendant may be ſaid, to be by preſcription; yet a man needeth not to preſcribe therein: And therefore where a man did preſcribe to have Common appertaining to his houſe and Land.

Land, in the Land of A. and in the Land of B. purchaſed the houſe and Land to which the Common was belonging, and made a Leaſe thereof: It was Reſolved in that Caſe, That the ſame was not Common Appendant, but Common Appurtenant. Mich. 27 Eliz. in B. R. *Cook* 4. Part, *Tyrringham's* Caſe. 37. See acc. Mich. 40 Eliz. in C. B. *Goldsbr.* 114.

2. In a Replevin, the Defendant Avowes for damage Feaſant, the Plaintiff claims Common by Preſcription; When the Fields, called F. and G. lye fallow at the time of the year; And, when the Fields are ſowed, after the Corn is Reaped: And it was found, that he had Common, viz. when the Fields lye Fallow every year, at the time of the year; and when the Fields are ſowen, they uſed to have Common from ſuch a time, &c. It was holden in this Caſe, That for Common Appendant, it is not neceſſary to preſcribe in it, but to ſay that he is ſeiſed of a Meſſuage, &c. in Fee, and that he hath Common of Paſture in the ſaid place, as belonging and appertaining to the ſaid Meſſuage and Land, &c. Trin. 12 Jac. in C. B. *Johnſon* and *Thorowgoods* Caſe. *Brownlow.* 1. Part, 177.

3. In Treſpaſſe for depaſturing his Cloſe with Sheep, the Defendant juſtified, becauſe the Prior of Dale was ſeiſed in Fee, of ſuch a great Cloſe in D. and was ſeiſed of the Paſturage aforeſaid, for all his ſheep, Levant, and Couchant, in the ſaid great Cloſe at all times of the year; and it was upon Iſſue joyned, found for the Defendant, and Error thereupon brought: And the Error Aſſigned, was, becauſe the Defendant in the Action did not entitle the Prior to the Common, either by preſcription or Grant, and this being a profit appender, in *alieno ſolo*, none can entitle himſelf by the Courſe of the Common Law thereunto, without Grant or preſcription: But it was adjudged in this Caſe, That this Paſturage claimed for Sheep Levant, and Couchant upon the Defendants Lands, is Common Appendant, and cannot be ſevered from the ſoil by grant; and then to make a preſcription therein, is not good. Trin. 14 Car. in B. R. *Daniel* and the Earl of *Hertford's* Caſe. *Cro.* 1. Part, 390.

4. The Caſe was, A man was ſeiſed of two Yard Lands, with the Appurtenances, and had Common of Paſture for four other Beaſts, three Horſes, and ſixty ſheep; and he Demiſed part of the ſaid two Yard Lands; the Iſſue being in a Replevin; whether he and all thoſe, &c. had Common in the ſaid two Yard Lands: the Commoner having purchaſed part of the Lands. It was Reſolved in this Caſe, That this was Common Appendant, and not Appurtenant; and that the purchaſing of the Common Appending, did not extinct the Common; but if a man hath Common in many Acres of Land, a releaſe of Common in one Acre, extinguiſheth the Common, if it be Common Appurtenant: and ſo if a man have Common Appurtenant in Land, if he purchaſe part of the Lands, the Common is extinct. Hill. 6 Jac. in C. B. *Morſe* and *Wills's* Caſe. *Brownlow.* 1. Part, 180.

5. In a Replevin, The Caſe was; A man claimed Common for his Cattell Levant, and Couchant upon his Land; in a Field called D. when the ſaid Field was unſowed with Corn: and ſet forth, that he put ſix Kine, uſing his Common in the ſaid Field; becauſe the Field was not ſowed then with Corn; The Defendant in his Avowry ſaid, That part of the Field was then ſowed with Corn: It was the Opinion of the whole Court, That ſowing parcell of the Field, ſhould not hinder the Plaintiff from uſing his Common in the Reſidue, for that might be done by Covin, to deceive the Commoner of his Common. Mich. 5 Jac. in C. B. *Trulock* and *Riggesbyts* Caſe. *Brownlow.* 1. Part, 189.

6. Common Appurtenant is, where a man preſcribes to have Common to his Land for all manner of Cattell, and ſuch Common may be made in groſſe, but it is otherwiſe of Common Appendant. 9 E. 4. 3. 37 H. 6. 34. *Fitzh. Nat. Br.* 180. acc.

7. A man hath Common Appurtenant by preſcription to a houſe, and 40 Acres of Lands, and he made a Feoffment in Fee of parcell of the Land, It was Reſolved that the Common ſhould be apportioned, and the Feoffee ſhould have Common for that parcell, which was aliened to him; for the preſcription is to have Common in ſuch Land, which is to be taken by the mouths of his Cattell, which are Levant and Couchant upon the Land to which, and that extends to the whole Land, and to every parcell of it, and it cannot be more damage or prejudice to the Tenant of the Land in which the Common is claimed after the ſeverance, then it was before: But it was Reſolved, That if he who hath Common Appurtenant, doth purchaſe parcell of the Land, that the whole Common is extinct, and ſo if he take a Leaſe of part of the Land, the whole Common is ſuſpended, becauſe it is the fault of the Commoner to meddle with the Land which doth not belong unto him. See Trin. 7 Jac. in C. B. *Cook* 8. Part, 78. *Wyat Weild's* Caſe. See *Cook* 4. in *Tyrringham's* Caſe. acc.

8. Note, It was adjudged, That where one had Common Appurtenant to ten Acres of Land for all his Beaſts, Levant and Couchant upon the ſame, and ſold part of it; That the Common ſhould be apportioned; and every one ſhould have Common for his beaſts Levant and Couchant upon his

his part, for there are things intire in ſeverall degrees, ſome that cannot be divided by any Acts of the parties, as Warranty, Conditions, and ſuch other, which yet by Act in Law are divided. But the Caſe of a Common, is not ſo ſtrict an entirety; and therefore it may be apportioned and divided. Hill. 15 Jac. in C. B. *Hob.* 235.

9. In Treſpaſſe, the Caſe was: A. and others were ſeized in Fee of the place, where being a Waſte, and 2 H. 4. granted by Deed, Indented to the Prior and Covent of S. Common for him, and all his Tenants in D. *pro omnibus averiis ſuis communicalibus omni tempore* in the ſaid Waſt, *Habendum* the ſaid Common to the Prior and Covent *et ſucceſſoribus et tenentibus ſuis in perpetuum*: The Priory being diſſolved, The King Grants the ſaid Tenements; (which anciently were the Priors in D.) with all Commons to them appertaining, to J. S. and his heirs, who conveyes 30 Acres parcell thereof to the Defendant; who thereupon juſtified the uſing of Common there: In this Caſe, It was Reſolved. 1. That the Common granted 2 H. 4. and ſo within memory to the Prior and Covent, may be ſaid Common Appurtenant, to the ſaid Tenements of the ſaid Prior in D. for being Granted to him and his Tenants in D. it is Common Appurtenant, and may paſſe by Feoffment, as Common Appurtenant, together with the Tenements. 2. Although that part of the Land be conveyed, and not the whole; yet it is Common Appurtenant, as Common for the beaſts Levant and Couchant upon the ſaid Lands, and ſhall paſſe with them, with the words *cum pertinenciis*: And 3. Although it be created within time of memory; yet it is Common Appurtenant, and may be well Apportioned. Mich. 11 Car. in B. R. *Cro.* 1. Part, 346. *Sacheverill* and *Porter's* Caſe.

10. In Treſpaſſe for breaking his Cloſe, the Defendant pleaded, That J. S. and his Wife were ſeiſed of the Land where, &c. and of the Manor of C. of which the Land where, was parcell; and of a Meſſuage and two Yard Lands, in the right of his Wife for life, the Remainder to J. S. and that they all joyned in a Fine of the ſaid Meſſuage and two Yard Lands, and granted them to the Defendant and his heirs; and further, by the Fine, granted to him Common for four Horſes, and five Beaſts, and 200. ſheep in the ſaid Mannor and Lands in C. and averrs the life of the Husband, and that he put in his Cattell; and for the breaking of part of the Cloſe, he ſhewed a Leaſe for 99 years, upon which Pleas, the Plaintiff did demur. It was ſaid, That the firſt Plea was not good, becauſe he doth not plead that it was Waſte, or Common, otherwiſe he might not claim Common unleſſe in Land Commonable, but that exception was diſallowed, for there is no reſtraint to the Waſtes, or Commons, but it is granted generally in his Manor, and not like the Caſe, 9 H. 6. A Grant of Common *ubicunque et quandocunque averia ſua ierint*; And therefore in this Caſe, Judgment was given for the Defendant. Hill. 15 Car. in B. R. *Stringer's* Caſe. *Cro.* 1. Part, 345.

11. In a Replevin, the Caſe was, A man preſcribes to have Common Appurtenant to the Manor of B, for all his beaſts Levant and Couchant upon it; He Grants that Common to A. It was adjudged that he could not grant it over, for he hath it *quaſi ſub modo*, &c. for the beaſts Levant, &c. But Common Appurtenant for beaſts certain, may be granted over. Hill. 45 Eliz. in C. B. rott. 113. *Drury* and *Kents* Caſe. *Cro.* 2. Part, 15.

12. In Treſpaſſe for chaſing 20 of the Plaintiffs beaſts in a Cloſe called A. the Defendant juſtified for damage feaſant in his Freehold, the Plaintiff Replyed, That the Lord *de la Ware* was ſeiſed thereof in Fee, and granted Common of Paſture to J. S. and his heirs, for 20. beaſts in A. who conveyed it to J. D. who Licenſed the Plaintiff to put in thoſe 20. beaſts: It was ſaid, That this Replication was not good; For the Land is the Defendant's Freehold: and it was ſaid that he who had that Common, could not Licence any other to put in his beaſts, but he ought to uſe it with his own beaſts, and if he might Licence him, yet he could not do it without Deed; But whether he might in this Caſe Licence another to Feed there with ſuch number of beaſts, becauſe it is for a certain number, and is as paſture, and not Common which ought to be taken with the mouths of the Beaſts of the Commoner, the Juſtices doubted of it, and therefore gave no Reſolution in the Caſe. Paſc. 17 Jac. in B.R. rott. 140. *Monk* and *Butler's* Caſe. *Cro.* 2. Part, 575.

13. A Copyholder for life, had Common in the Lords Waſte. The Lord Grants and confirms the ſaid Copy-hold and Land *cum pertinenciis*, to him and his heirs; It was Reſolved in this Caſe by all the Court, That the purchaſer ſhould not have Common there as the Copy-holder had, for he hath his Common by reaſon of the Cuſtome which annexeth the ſame to his Cuſtomary eſtate, which being deſtroyed and determined by his own Act, by making it a Freehold, the Common is deſtroyed and determined, without ſpeciall words; and it was Reſolved, That the generall words *cum pertinentiis*, are not ſufficient to paſſe the Common. Trin. 7 Jac. in B. R. rott. 120. *Marſham* and *Hunter's* Caſe. *Cro.* 2. Part, 253. See Trin. 15 Jac. in C. B. *Leet's* and *Edward's* Caſe. *Hob.* 190. acc. *Bolſtr.* 1. Part, 18. acc.

14. Common for cauſe of Vicinage or Neighbour-

hour-hood is; where *Dale* and *Sale*, two Towns are adjoyning, and the Lord of *Dale* and his Tenants have Common in a Waſte with theſe of *Sale*; In ſuch Caſe, They cannot put in their beaſts, in the waſtes each of the other, but in their own waſtes; and then if the Cattell eſcape into the waſtes of the other, they cannot be diſtreyned by the own Towns, for damage Feaſant, but if they be put into the Waſtes, the one or the other, of the ſeverall Lords, by the owners of the Cattell, there they may be diſtreined for damage Feaſant. See 31 H. 8. *Dyer.* 48. acc. See 15 Eliz. *Dyer.* 317. acc.

15. In the County of *Norfolk*, there is a Speciall Manner of Common called *Shack*, which is to be taken in Arable Land after Harveſt, untill the Land be ſowed again; and that Common which at the beginning was but in nature of feeding by reaſon of Vicinage, for avoiding of Suit in any Place, is by Cuſtome altered in the nature of Common Appendant, or Appurtenant, and in ſome places, yet doth remain in it's proper nature, and to know the ſame, is the Cuſtome of every place. For if in one Town, one who hath gotten divers ſmall parcells of Land together, in which the Inhabitants have uſed to have *Shack* there, by paſſage into it by bars, or Gates, with their beaſts there, the ſame is taken as Common Appendant, or Appurtenant: But if in ſuch Town of D. the Cuſtome and uſage hath bin, That every owner of the ſame Town hath uſed to encloſe their proper Lands from time to time, and ſo have held it in ſeveralty; There that uſage proves, that the ſame was not but in the nature of *Shack* originally for the Cauſe of Vicinage: And therefore there he may encloſe, and hold the ſame in ſeveralty: And if a man hath an Ancient Cloſe, in Ancient time taken out of the Field, and he and all thoſe whoſe eſtate he hath, have holden the ſame alwayes in ſeveralty; he may well hold the ſame encloſed, and as to ſuch parcell ſo encloſed, the *Shack* retains his Ancient originall nature, and he who claims *Shack* there, cannot preſcribe to have Common in it. 27 Eliz. in *Scaccario*, *Cook* 7. Part, 6. Sir *Myles Corbetts* Caſe.

16. In Treſpaſſe, the Defendant pleaded, That the Cuſtome of the Town of S. is, That every Inhabitant, Commorant, and Reſident within any Ancient Meſſuage, *ratione commorantiæ et reſidentiæ ſuæ*, have uſed to have Common in the place, where time out of mind for all Cattell Commonable, And pleaded that he was *Commorans et inhabitans in prædict. villa de S.* in an Ancient Meſſuage there; and ſo juſtified; And in this Caſe, It was Reſolved and adjudged, That this Cuſtome was void and againſt Law, for divers cauſes. 1. Becauſe there are but four manner of Commons, Appendant, Appurtenant in groſſe, or by reaſon of Vicinage and Neighbourhood, and this Common *ratione commorantiæ et reſidentiæ*, is not any of thoſe manner of Commons. 2. Becauſe no man can have an Intereſt in any Common, in reſpect of a houſe in which he hath not any Intereſt, but onely a Habitation. 3. Becauſe every Common may be extinguiſhed, or ſuſpended, but this Common is of ſuch a nature, and is ſo incident to the perſon, that it cannot be extinguiſhed or ſuſpended. 4. Becauſe that the Law gives no remedy, or Action for him who claims ſuch Common as Inhabitant: And 5. Becauſe if ſuch Common ſhould be allowed, no Improvement could be made in any Waſtes, which ſhould be a great Inconvenience. 4 Jac. in C. B. *Cook* 6. Part, 60. *Gatewood's* Caſe. See Trin. 28 Eliz. in C. B. rott. 507. *Coſtard* and *Wingfield's* Caſe. *Godbolt.* 96. acc. And ſee *Cro.* 2. Part, 152. the ſame Caſe; where it was alſo Reſolved; That Inhabitants, unleſſe they be Incorporated, cannot preſcribe to have matters of profit *in alieno ſolo*; but matters of Eaſement, as in a Way, or Cawſey to the Church; or in matters of diſcharge, as to be diſcharged of Toll, or of Tythes, or in a *modus Decimandi*, there they may preſcribe.

17. Common in groſſe is, where a man preſcribes, that he or his Anceſtors have Common in ſuch Lands, for Cattell without number; and ſuch Common may be uſed with all manner of beaſts; and he who hath ſuch Common, may agiſt the Cattell of a ſtranger in the Common, as the book in 11 H. 62. is: but contrary of him who hath Common Appendant: there he cannot agiſt the Cattell of a ſtranger upon the Common. 15 E. 4. 33. and *Fitz. Brevium.* 180. acc.

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2. *By what, and whoſe Acts, Common may be loſt, or extinguiſhed; and where Common may be Improved; where not and by whom.*

1. IN Treſpaſſe for taking Turf, and Stones, in the Waſte of the Lord of the Mannor, the Defendant juſtified by a *uſitatum fuit*, that it had bin there uſed time out of mind, That every Tenant for years of an Ancient Tenement and Cloſe within the ſaid Mannor, have uſed to have Common of Turbary and Limeſtones in the Waſte of the ſaid Mannor; And ſet forth that he was Tenant of an Antient Tenement and Cloſe, and that the ſame was granted to him with all Commons Appurtenant to the ſaid Meſſuage: and ſo juſtified

juſtified. It was found by Verdict. That the Abbot of F. was ſeiſed of the ſaid Mannor, and that there was ſuch a preſcription for Common: That the poſſeſſions of the Abbot came to the Crown, and that by mean conveyance the ſaid Mannor came to the Plaintiff, and the Tenement and Cloſe came by grant to the Defendant, the queſtion was, when the Lord of a Mannor is ſeiſed of a Waſte, and a Tenant of an Ancient Tenement preſcribes to have Common in the Waſte, and afterwards the Tenement is ſevered from the Mannor, and both are in the hands of the Lord, and afterwards the Lord grants the Tenement and Cloſe for a Term with all Commons to the ſame belonging, whether the Common which was before belonging to the Ancient Tenement ſhould paſſe: In this Caſe, It was ſaid. 1. If this Common was Appurtenant to the ſaid Ancient Meſſuage and Cloſe; that then when the Mannor, and alſo the ſaid Meſſuage and Cloſe come both into the Lords hands, that the Unity of Poſſeſſion in the Lords hand, did deſtroy the Common: And 2. Admitting, it was a Common Appurtenant to the Meſſuage and Cloſe, that the Leſſee here cannot have the Common, the preſcription being grounded upon a weak foundation. For where it is ſaid, That the Leſſee of the ſaid houſe and Cloſe, have uſed to have Common, this is no ſuch *uſitatum* to have a clear right to the Common, for that every new Leaſe and contract is an Interruption of it, and ſuch a uſage ought to be perpetuall, which it is not here. 2. The Termor cannot have the Common by preſcription, becauſe there is a certain commencement, and determination of his eſtate; and then by the Leaſe of the houſe and Cloſe, although it be with all Commons to the ſame belonging, it will not paſſe: and here the *uſitatum eſt* is annexed unto the Eſtate of a Termor, which cannot be good: and therefore it was adjudged, That for this cauſe, amongſt other, this preſcription layed by the Termor by *uſitatum eſt*, is not good, to make his Juſtification good: Judgment was given for the Plaintiff againſt the Defendant. 7 Jac. in B. R. Sir *Thomas Grimes* and *Peacocks* Caſe. *Rolſtr.* 1. Part, 17,18,19.

2. Note, by *Popham*, Juſtice, there is a difference between a Common appendant, which is of neceſſity, and a Common groſſe; for in caſe of a common appendant, If one Tenant of the Mannor doth purchaſe the Seignory, and then grants over the Tenancy, the Common which he had before, ſhall be ſtill Appendant, for it is not extinguiſhed by the unity, but ſhall paſſe with the Tenancy; but it is otherwiſe of a Common in groſſe. The principall Caſe was, A. was ſeiſed of a Meſſuage called D. which had a Way to it in the Land of J. S. in a Cloſe called Black-Acre. Afterwards A. purchaſed the ſaid Cloſe, and enfeoffed the Plaintiff thereof; and an Action was brought by the Feoffee againſt the Feoffer, for uſing the ſaid way; and the queſtion was, If the way were extinguiſhed or not; It was adjudged, That it was not. It was holden, If it were a way of eaſe or pleaſure, there it ſhould be extinguiſhed by unity; but if it be of neceſſity, there it is otherwiſe: for without it, a man ſhall loſe the benefit of his Land or houſe. Mich. 3 Jac. in B. R. rott. 561. *Jorden* and *Atwoods* Caſe. *Owen.* 121. See Hill. 1. Car. in B. R. rott. 124. *Swy* and *Piggotts* Caſe. *Popham*, 166. acc.

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3. *What Priviledges the Commoner hath in the ſoil where he claims Common; And what Acts, or things a Commoner may do there, what not: What Actions he may have, and what not; and where he may diſtrein for damage feaſant in the Common, Where not.*

1. NOte, he that hath Common in another's Land, hath nothing to do with the Land no more then a meer ſtranger, but onely to put therein his Cattell, and ſo let them feed there with their mouths, and it is not his Common untill his Cattell have fed there, and the owner of a Common cannot Grant the Common to anothers uſe; A *Præcipe* doth not lye of a Common, for it is not my Common untill my Cattell have eaten it. If a man hath Common in another mans ſoil, and a ſtranger puts in his Cattell, there the Commoner ſhall not have an Action of Treſpaſſe; for although he hath Common, yet the Herbage doth not belong to him; nor can the Commoner do any thing upon the ſoil, though it tendeth to the bettering of the Land, or improving the Common, as to cut buſhes, Fern, or ſuch things which do impair the Common; neither can he make a Fence, or ditch to let out the water which ſpoils the Common; And as the Commoner cannot meddle with the ſoil it ſelf, ſo cannot he meddle with any thing ariſing out of the Land, or that doth grow, or is nouriſhed by the ſame: But a Commoner may diſtreyn Cattell damage feaſant, becauſe their being there, is not onely a damage to the Owner, but alſo to the Commoner, and a Commoner may abate a hedge or a Gate, which hinders him from comming to his Common. See 14 H. 8. 10. 12 H. 8. 2. 27 H. 8. 12. and divers other old books to that purpoſe.

2. Treſpaſſe for digging the Plaintiffs Cloſe, and

and killing 18. Conyes; the Defendant to all but killing of two Conies, pleaded Not-guilty; and as to them, he ſaid that the place where, was a Heath, in which he hath Common of Paſture, and that he found them eating the Graſſe, and that he killed them, and carried them away, as it was lawfull for him to do. In this Caſe, It was Reſolved. 1. Although Conyes are *fera naturæ*, yet they are reduced to ſuch property when they are in my ground, by reaſon of my poſſeſſion which I then have in them, that I may have Treſpaſſe againſt him that takes them. And ſee 22 H. 6. 59. acc. And ſee Regiſter 102. where an Action was brought *Quare ducentos cuniculos precii, &c. cepit*, which ſhews the party hath property in them. 2. It was Reſolved, That although the Defendant hath Common there; yet he cannot meddle with the Wood, Sand, Graſſe, but by taking it with the mouths of his Cattell. 3. It was Reſolved that the Commoner could not kill the Conies, becauſe the Commoner may have other remedy: As if the Conies deſtroy the Common, ſo as he cannot have ſufficient Common for his Cattell; he may have an Aſſiſe againſt him for putting in of the Conies. Hill. 29 Eliz. in C. B. *Conyes* Caſe. *Godbolt*. 123. 124.

3. A. brought an Action upon the Caſe againſt B. becauſe he digged Clay in the Land where the Plaintiff had Common, and carried away the ſame over the ſaid Common, *per quod* he loſt his Common, and could not uſe his Common in as ample manner as he did before: The Defendant entituled himſelf to be a Commoner, and alſo to have Common in the ſame Land; and juſtified his Entry, and ſet forth a preſcription, That every Commoner had uſed to dig Clay there; and there being two Iſſues, the firſt was found for the Defendant, that he was a Commoner there, but the ſecond Iſſue was found for the Plaintiff, that there was no ſuch preſcription that a Commoner might dig Clay; and the Jury did aſſeſſe damages for the Plaintiff generally: Whereupon Error was brought, and it was moved that the Plaintiff had not any damage by carrying away of the Clay, becauſe the ſame did not belong to him; and the Declaration is *Cepit et aſportavit* the Clay, which implies a property and intereſt in the Clay to be in the Plaintiff. But it was adjudged by the Court, That by the digging of a pit the Commoner is prejudiced, and by laying of the Clay upon the Common, the Commoner is prejudiced: and ſo the Damamages are given for the digging and carying the Clay over the Common, and not for the Clay; and if he had ſuffered the Clay to have lyen there, yet the Commoner is prejudiced. Alſo it is damage to him, for it is dangerous leſt his Cattell ſhould fall into the pit; alſo it will not ſuddenly be filled up again, and ſo no Graſſe there for a long time: Alſo the carrying away of the Clay, over the Common, is a detriment to the Common to carry it either by Carts or otherwiſe. And for theſe three wrongs, he layes the *rationæ cujus*, he could not have his Common in as ample manner as he uſed to have it, and doth not conclude any damage for the Clay; and theſe three Acts do Increaſe the damages, and *Cepit et aſportavit* doth not alter the Caſe: Wherefore the Judgment given in the Common Pleas, was affirmed, and the damages well aſſeſſed. Mich. 21 Jac. in B. R. *Bullen* and *Sheeves* Caſe. *Godbolt*. 343, 344.

4. It was holden by the whole Court, That a Commoner cannot generally juſtifie the cutting and taking away Buſhes off from the Common; but by Preſcription he may juſtifie the ſame: ſo he may ſay, The Commoner hath, time out of mind, uſed to digg the Land to let out the Water, that he may the better take his Common, with his Cattel. And it was agreed, That if the Lord of the Waſte doth ſurcharge the Common, that the Commoner cannot drive off his Cattel, or diſtrain them Damage feaſant, as he may do the Cattel of a ſtranger; but the remedy againſt the Lord is either an Aſſiſe, or an Action upon the Caſe. Mich. 9 Jac. in C. B. *Godbolt* 192.

5. Action of Treſpaſs, for that the Defendant entred his Warren, and digged his Land, and chaſed his Coneys, and took them. And as to the entring the Warren, chaſing the Conies, and digging, he pleaded a ſpecial Juſtification, That he had Common there; and becauſe that the Plaintiff ſtored the burrowes there with Conies, and made new holes, by reaſon whereof the Defendant's ſheep feeding there, fell into them, to his great damage, he did with a Ferret hunt the Conies, and ſtopped up the holes with the earth digged: upon which the Plaintiff demurred in Law. It was ſaid in this caſe, That a Commoner cannot make any thing *de novo* in the Land; if he do, he is a Treſpaſſor; But if a Commoner amend or reform a thing which is abuſed, it is no Treſpaſs; and therefore if the Land be full of Mole-hills, he may digg them. And it was ſaid, That in this caſe, it appeareth, that the Coney-berries were made by the Plaintiff himſelf, and he ſhall not take advantage of his own wrong: But it was anſwered and ſaid by the Court, That the Lord may uſe the ſoile as he pleaſeth, and he may make new Coney-berries lawfully, for that they are neceſſary for the preſervation of the Coneys; and the Commoner cannot kill the Conies: So, if the Tenant of the Land cannot kill the Conies with his Ferret: For a free Warren, in ſuch a Precinct, is a charge upon the Land, in whoſe hands ſoever it c meth: But if a man hath a Warren adjoyning to my Land, and the Conies come into my Land out of the Precinct of the Warren, I may kill the Co-

ness. And so was it adjudged, Pasch. 43 Eliz. in B. R. rott. 234. in *Belly* and *Laughorns* Case. And so in *Boster* and *Hardies* Case, in C. B. Trin. 11 Jac. in C. B. *Carrill* and *Bakers* Case. *Brownlow* 227. See Mich. 5 Jac. in C. B. *Holdesden* and *Grisills* Case adjudged accordingly. *Brownlow* 208. *Bolstr.* 2. Part, 116. the same Case.

6. In Trespass, the Defendant justified the taking of the Cattel Damage-Feasant, pretending a Custome, That the Plaintiff being Lord, hath the place in which, intirely to himself till *Lammas*-day, and afterwards it is Common for the Tenants, so as the Plaintiff can put in but 3. horses onely; and because the Plaintiff after Lammas, put in more then 3. horses, the Defendant took them damage-feasant: Being found for the Defendant, It was moved, That the Defendant could not take the Cattle Damage-feasant, because he was onely a Commoner, and the place where, is the Plaintiff's soil, and his Cattle cannot be Damage-feasant upon his own soil. Two of the Justices of the Court held the taking to be good, because the Lord is to be excluded by the Custome for all but his stint; and the Commoners have no other remedy to preserve their right, and feeding their Cattel, but by taking the Lords Cattle, if he offend. But the two other Justices doubted of it, because they did not shew the usage to distrain the Lord's Cattle for damage-feasant. Trin. 6 Jac. in B. R. *Kenrich* and *Pargiters* Case, *Cro.* 2. Part, 208.

7. Note; Upon a Demurrer, the Question was, Whether a Commoner may cast down and fill up Coney-burrowes which were made in the common Waste where he was to have Common: And it was Resolved and Adjudged without Argument, That the Commoner had not any other Interest, then to take the Common by the feeding there of his Cattel, and must not destroy the Conyes nor Coney-burrowes. Mich. 7 Jac. in B. R. Sir *Jerome Horsey* and *Hagbertons* Case. *Cro.* 2. Part, 229. See Trin. 19 Jac. in B. R. *Samborn* and *Harilocs* Case. *Bridgman* 9. & 10. acc.

8. In Debt for Rent, the Defendants confessed the Lease and Reservation of Rent; but pleaded, That he and and all those whose Estate had Common in 10. Acres in E. alwayes for their beasts Levant and Couchant upon the Tenements every year after the Corn sowen, from *Aug.* 7. till the Corn reaped and carried away; and that before any Rent was due, the Plaintiff the Lessor incloseth the said 10. acres with hedges and ditches, so as he might not use his Common, and thereby the Rent was extinct. It was adjudged in this case against the Defendant, because it is not alledged, the Land is not sowed with Corn; otherwise by his prescription he is not to make Common, 2. Because not alledged, He kept it so inclosed; for otherwise the Commoner might break the hedges, and take his Common. And, 3. Because the rent is not issuing out of the Common, and so there cannot be a suspension of the Rent by enclosing the Land. And for these causes it was adjudged for the Plaintiff. Mich. 21 Jac. in B. R. Sir *Nicholas Sanderson* and *Harrisons* Case. *Cro.* 2. Part, 679.

9. In Trespass for chasing his Gelding, the Defendant justified for damage-feasant in his Freehold: The Plaintiff replyed, That he was seised of a Messuage and such Lands in M. in Fee, and he and all those whose, &c. had had Common *pro 25. magnis averiis*, every year after *May*-day in the place where, &c. and therefore he put in his Gelding to use that Common. It was moved, That the plea *pro 25. magnis averiis* was not good, because of the Incertainty: but the Exception was disallowed; for it may be intended Horses, Oxen, Kine, or other such beasts, which by the Common phrase of the people are best known among them. Trin. 18 Jac. in B. R. *Standred* and *Shordiches* Case, *Cro.* 2. Part, 580.

Commissions & Commissioners.

1. IF he who ought to levy a Fine, and make the Conusance, cannot come for sickness, or other Cause, into the Court, a *Dedimus Potestatem*, which is a Commission, may be directed to some Justice, that he go to him to take the Conusance, and to certifie the same to the Justices of the Common-Pleas; which Commission of *Dedimus Potestatem* ought to recite, That the Writ of Covenant is depending before the said Justices in the Common-Pleas. See for such Commission, or *Dedimus Potestatem*. *Fitzh. Na. Br.* 146.

2. Conusance of a Fine was taken by *Dedimus Potestatem* in the Vacation-time after *Hillary* Term by *Carrell* and his Wife, of the Land of the wife, who was then but of the age of 19 years. The Writ of Covenant bare date in *January*, returnable *Crastin. Purificat.* and the *Dedimus Potestatem* bare date 3. dayes after the Original; and the Queens silver was entred in *Hillary* Term, 4. dayes before the death of the wife, *die veneris in Septimana*, *Pasch.* but yet the Fine was not engrossed *usq; diem Mercurii proximi*; for which cause the heir of the wife prayed, that the Fine might not be

be delivered to the party, nor Recorded. But the Opinion of the Court was, becauſe the Fine was well taken by the Commiſsion of *Dedimus*; and the Queens Silver was entred; the Fine was afterwards engroſſed: and it was holden, That although the wife dyed before the Fine was engroſſed; yet it was a good Fine, and ſhould barr the heir of the wife. Hill. 5 Eliz. *Dyer* 220. *Carrells* Caſe. See *Cook* 5. Part, 39. in *Teyes* Caſe, acc.

3. A Fine was taken by the Queens Attorney-Generall, and by him certified into the Common-Pleas without any Writ of *Dedimus Poteſtatem*; and the ſame was holden to be good, although he was not a Juſtice of any of the Benches, but was a Juſtice of Aſſiſe in a Circuit by Commiſsion, where they had a general Patent, *ad recipiend. omnes Fines, Concordias, et Recognitiones in Circuitu ſuo*; *conjunctim et diviſim*, with a *Non obſtante aliquo Statuto, Ordinatione, &c.* Trin. 4 Eliz. *Dyer* 224.

4. After the *Teſte* of a Writ of Covenant, and a *Dedimus Poteſtatem* awarded, and a Conuſance was taken of a Fine of a *Feme Sole*, and before the day in Bank, to engroſſe and Record the Fine, the woman took a husband; yet becauſe the Commiſsion was well awarded and executed, and the woman had done all that ſhe could or was to do, It was holden by the Court, That the Fine was a good Fine, and that it ſhould be recorded, and ſhould bind the wife and her heirs. Mich. 8 Eliz. *Dyer* 246.

5. Conuſance of a Fine was taken by a Commiſsion of *Dedimus Poteſtatem*; but in the *Dedimus Poteſtatem* there was no mention made where the Land did lye; and all the ſame was certified the ſame Term, and the Kings Silver was Entred, but no Fine was engroſſed, but remained in the Chirographies Office. It was holden, It was a good Fine taken by virtue of the Commiſsion: and that it might be now engroſſed; but becauſe it is in the Election of the party, to have it either with, or without Proclamations, and the party is now dead, ſo as no Election can be made; It was holden, That it ſhould be but a Fine at Common-Law, and not a Fine within the Statute of 4 H. 7. Mich. 8 Eliz. *Dyer* 254. *Comptons* Caſe.

6. A Commiſsion was directed to 8. perſons, *Nominatim*; and 7. of them onely did certifie: the Queſtion was, If it were good, or not? It was Objected, That it was good enough; and to prove it, the Caſe in the Earl of *Leiceſter*'s Caſe in *Plo. Com.* 393. was vouched; where a Commiſsion was granted to 15, to take an Indictment, authority by the ſame was given to them 15, and to every 4. of them, or more, whereof two to be of the *Quorum*, to take the Endictment; and it was taken by 8. onely, having ſufficient of the *Quorum*: and the Endictment there taken was good. But it was Reſolved in the principal caſe, That the power here given to 8. perſons, is a joynt power, and not a ſeveral, and ſo ought to be purſued by them in their Return; and it is not to be otherwiſe, unleſs it be ſo ſet down and ſpecified. And it was ſaid, That if a Writ of *Diem Clauſit extremum* be directed to 3, and be executed but by two of them, (unleſs it be expreſſed ſpecially in the Writ, That the ſame be executed by them all three, or any two of them) it is not good; and ſo it ſhall be in all ſpeciall Commiſsions, they ought to be ſpecially executed, according as the Commiſsion is to them directed, and they ought not to ſwerve at all from it. Paſch. 3 Jac. in B. R. *Bolſtr.* 1. Part, 107.

7. In Hillary Term, 22 Jac. a Commiſsion was awarded, to examine Witneſſes, returnable in Eaſter Term following. The Commiſsioners began the Examination of the Witneſſes upon Monday, 28 *March*, 1625. which was the day after the demiſe of King *James*, and continued in Examination of divers Witneſſes untill Friday following; at which day, and not before, having notice of the Demiſe of the King, they ſurceaſed: And whether this Examination of Witneſſes, and their Depoſitions, ſhould be ſuppreſſed, was a Queſtion? which was referred by the King to the Juſtices, to certifie. And the Opinion of the Juſtices was, That the Depoſitions ſhould ſtand; For although legally the Commiſsion was determined by the Demiſe of the King; yet the Commiſsioners having not notice thereof, and having examined concerning the ſame, they held, That ſuch Witneſſes were duly ſworn, and ſhould be allowed, eſpecially in a Court of Equity, where the proceedings be *de jure naturali*, and not according to the ſtrict courſe of Law; and no inconvenience could proceed upon ſuch proceedings, before notice of the Kings Demiſe. And the Juſtices approved of the Courſe which was uſed in the principal caſe, which was this, That the Witneſſes ſhould be called, and their former Examinations and Interrogatories tendred to ſuch of them as were alive, and whether they approved of them; and not to examine them *de novo*. It was then propounded to the Juſtices, That if any Witneſſes examined upon ſuch Commiſsion, ſhould be perjured, whether they might be puniſhed by the Statute of 5 Eliz. for that Perjury? And it was Reſolved by them, That they might; for being Examined before Notice of the Kings Demiſe, what they did, was legall. Mich. 3 Car. in C.B. Sir *Randolph Crews*, and Sir *George Vernons* Caſe. *Cro.* 1. Part, 69, 70.

8. A man was Indicted of the death of a man upon *Scarborough* Sands, between the High-water mark, and Low-water mark; the party being ar-

raigned upon the ſame Indictment removed in B.R. he ſhewed, That the ſaid Indictment was by virtue of Commiſſion 1. *Maii*, directed to the Juſtices of Aſſiſe; and pleaded further, That 2. *Maii* aforeſaid, another Commiſſion iſſued to the Lord Admiral and others, upon the Statute of 28 H. 8. Cap. 15. by which he was Indicted of the ſame Murder, whereof he was now arraigned; and the laſt Commiſſion was, *Ad inquirendum tam ſuper altum mare, quàm ſuper Litus maris*: and that the ſaid Indictment taken before the Ordinary, was taken before this, upon which he was arraigned. And the Opinion of the Juſtices in this caſe, was; That the firſt Commiſſion was repealed by the 2d; and ſo the Indictment upon which he was arraigned taken *coram non-Judice*: For theſe two Commiſſions are in reſpect of two ſeverall Authorities; the firſt authority meerly by the Common-Law; the other by the Statute: and therefore the party was diſcharged as againſt the Queen, as to that Indictment. Hill. 25 Eliz. in B.R. *Lacyes* Caſe. *Leon.* 270.

9. A man was endebted to *A.* and *B.* in 100l. and became Bankrupt: A Commiſſion was awarded according to the Statute of 13 Eliz. to *C.* and *D.* to make ſale of the goods to the Creditors: afterwards the Bankrupt gave all his goods to another Creditor for his debt; afterwards the Commiſſioners ſold the goods joyntly. It was adjudged, That the ſale of the Goods by the Commiſſioners was good, and according to the Statute; for the intent of the Statute was to relieve the Creditors equally, and that there ſhould be an equall and rateable proportion obſerved in the diſtribution of the Goods to the Creditors. 2. That the Commiſſioners ought to make ſeverall diſtributions to the ſeveral Creditors, and not a joynt-ſale; but that muſt be meant, when their debts are ſeverall. *Cook* 2. Part, the Caſe of *Bankrupts*, 23.

10. The Commiſſioners of Bankrupts, have their Warrant and Commiſſion under the Great Seal, and by Act of Parliament; yet, if the Commiſſioners do not purſue the Act, and their Commiſſion; becauſe in ſuch caſe the party hath no other Remedy; he may traverſe contrary to the finding of the Commiſſioners, that he is not a Bankrupt, although that the Commiſſioners do affirm him to be one: And ſo was it adjudged in *Cutts* and *De la Barrs* Caſe: which ſee vouched in *Cook* 8. Part, 121. in the end of Dr. *Bonham's* Caſe.

11. In the time of the vacancy of the place of the Chief Juſtice of the Common-Pleas, Queen *Mary* granted the Office of *Exigenter* of *London* to *Coleſhill* by Letters Patents: and afterwards by Letters Patents of the ſame date, made *Anthony Brown* Chief Juſtice of the ſame Court; who being ſworn the firſt day of the Term, refuſed *Coleſhill*, and ſwore *Scroggs* in the Office; and there being difference riſen concerning the ſaid Office, a Commiſſion was awarded to *Bacon*, Lord Keeper of the Great Seal, and to the Chief Juſtice of the Kings-Bench, and other the Juſtices there, and the Chief Baron, and others, to examine the Right and Title of *Coleſhill*, and to Certifie, &c. who Certifie, That *Coleſhill* had no Title; and that the ſaid Office was in the diſpoſition of the Lord Chief Juſtice of the ſaid Court of Common-Pleas; Notwithſtanding which Certificate and Reſolution of the ſaid Juſtices, upon importunate Suit to the Queen, another Commiſſion was directed to the Earl of *Bedford*, and 9. others, giving them full authority to determine the Intereſt and Title of the ſaid Office betwixt the ſaid parties; and to place *Coleſhill* in the Office, if, &c. and if *Scroggs* refuſed to Anſwer before them, to commit him to priſon, &c. *Coleſhill* exhibited his Bill to the ſaid Commiſſioners, ſetting forth his Title, and that he was diſſeiſed by *Scroggs*. *Scroggs* Demurred upon the Bill and the Juriſdiction by the Bill, and would not anſwer; and for this Contempt, he was committed by them to priſon in the *Fleet*. But in this Caſe, the Juſtices of the Common-Pleas granted a *Habeas Corpus* directed to the Warden of the *Fleet*; becauſe he was a neceſſary Member of the Court. Mich. 1 Eliz. *Dyer* 175. *Scroggs* Caſe.

12. Note: It was ſaid by the Juſtices, That if a Statute doth make an Offence, which was not an Offence at the Common-Law, and inflicts a pain upon it, to be recovered in any of the Courts of Record; that ſuch a penalty cannot be ſet, or determined before Commiſſioners of *Oyer* and *Terminer*, &c. nor out of the 4. uſuall Courts at *Weſtminſter*; but if no Court be limited, then the King by his Prerogative may ſue for ſuch penalty in any Court. Mich. 7 Eliz. *Dyer* 236. *Cook* 11. Part, 38. acc.

13. Dower was brought by the Lady of *Arundell* againſt the Earl of *Pembroke*, who made default after appearance; before Judgment, Leſſee for years of a houſe prayed to be received to ſave his Term, and ſhewed his Leaſe, which was made by Indenture by the husband after marriage; and ſhewed, That the husband was Attainted; and that the King granted a Commiſſion under the Seal of the Court of Augmentation, to certain Commiſſioners, to aſſign to the Wife the third part of the Land, which was her husband's; by virtue of which Commiſſion, the third part of the Rent of the ſaid houſe was aſſigned to her, which the King, reciting the Commiſſion and the Aſſignment, Confirmed; and the Wife afterwards accepted of it. It was holden in this Caſe, That the aſſignment of Dower by the Commiſſioners in the Court of Augmentation, was not good; but the ſame ſhould have been in the Court of Chancery. And,

2. That

2. That the Aſſignment made by the Commiſſioners in that Court was not good, becauſe they had not purſued their authority: For their Commiſſion was to aſſign Land; and they aſſigned Rent out of Land; and then it followed, That the Confirmation made by the King to Confirm the Aſſignment, was void: And Judgment was given for the Plaintiff. Trin. 9 Eliz. *Dyer* 263.

14. Note; upon the Statute of 1 E. 6. Cap. 7. It was Reſolved by all the Juſtices, That the Patents of Judges, Sheriffs, Eſcheators, Commiſſioners of *Oyer* and *Terminer*, and Goal-Delivery, and Juſtices of Peace were determined by the Demiſe of the King: but not the Offices of Coroners, which are choſen by Writ. 2. That an Original Writ not returned at the death of the King, was not helped by the ſaid Statute. But if a Priſoner Reprieved after Judgment; by the new Juſtices might be executed, was a Quære not Reſolved. Mich. 1 Eliz. *Dyer* 165. See *Cook*. 7. Part, 30. acc.

15. *A.* who by a Patent was made Remembrancer in the Exchequer, was made one of the Barons of the ſame Exchequer. And it was adjudged, That the other Office, was *ipſo facto* gone and determined; and that there needed no Inquiſition to be made of it, nor *Scire facias* to avoid it, becauſe that the taking of the Office of a Baron is of Record; and a man cannot be Judge and Miniſter in one and the ſame Court; and therefore the firſt Office is determined, by taking of the ſecond: and there need no Office to be found of it. 3 Eliz. *Dyer* 198. acc.

16. The Biſhop of *London*, one of the Commiſſioners, in Cauſes Eccleſiaſticall, was tranſlated, and made Biſhop of *York*; and the Queſtion was, Whether his authority to exerciſe the ſaid Commiſſion was determined, or not? And it was the Opinion of divers of the Juſtices, That it was not; but that his authority did remain by a Clauſe in the Statute of 1 E. 6. cap. 7. which is, *viz.* *Be it Enacted*, &c. *That albeit any perſon being Juſtice of Aſſiſe, &c. Or being in any other of the Kings Commiſſions, &c. ſhall fortune to be made or created Duke, Archbiſhop, &c.* which Statute ſhall be expounded Liberally, to extend to all Biſhops, &c. Trin. 12 Eliz. *Dyer* 289.

17. Note; It was Reſolved by all the Juſtices, That the Commiſſioners in the Commiſſion of Sewers, ought to tax all that are in danger to be endamaged equally, and not he who hath the Land next adjoyning to the River onely; for the Statute of 6 H. 6. cap. 6. is, in which the Commiſſion of Sewers is formed, That no perſon of any eſtate or condition ſhall be ſpared. And if the Law ſhould be otherwiſe, inconvenience might follow; for it may be, that the force and rage of the water ſhall be ſo great, that the value of the Land adjoyning will not ſerve to make the Banks: and therefore the Statute will have all to be contributary, for *Qui ſentit Commodum, ſentire debet et Onus.* Hill. 40 Eliz. *Cook* 5. Part, 100. *Rooks* Caſe.

18. Upon the Statute of 23 H. 8. cap. 5. of Sewers, It was Reſolved by the Juſtices, That if one who is bound by Preſcription to repair a Wall *contra fluxum maris*, and he keeps the Wall in good repair, and by ſudden flouds the Wall is driven down, and the Sea overflowes; That the Commiſſioners of Sewers ought to tax all ſuch perſons who hold any Lands or Tenements, Common of Paſture, or profit of Feeding, or who may have loſſe or damage by any manner of means according to the quality of their Lands to repair it, becauſe there was no default in him who ought to repair it; but it was by the Act of God: But if one be bound by Preſcription or otherwiſe, to repair a Wall, if any default be in him, and the danger is not inevitable, but he may well repair it, The Commiſſioners may charge him onely to repair it; and if by his default, the danger become inevitable, or that he himſelf be not able to repair it, whereby others are charged, each of them may have an Action upon the Caſe againſt him who ought to repair it; *Cook* 10. Part, 139. *Knightleys* Caſe.

19. The Caſe upon the Commiſſion of Sewers concerning *Cheſter*-Mills was this, That there was a Cawſey or Mill-bank of ſtone in the River of *Dee*, and City of *Cheſter*; which Cawſey before the Raign of King *Edw.* 1. was erected for the neceſſary maintenance of certain Mills, ſome of the Kings, and others of the Subjects, at the end of the ſaid Cawſey. And a Decree was made by the Commiſſioners of Sewers, for a Breach to be made of 10. Poles in length in the ſaid Cawſey; which Cawſey was Erected before the time of King *Ed.* 1. and ſo continued without any exaltation or inhanſing; And if by any Decree of the Commiſſioners by force of any Statute, any breach of the ſaid Cawſey was referred to divers of the Juſtices to conſider of: And by the ſaid Juſtices, It was Reſolved, That by the Statute of *Magna Charta, Omnes Kidelli deponantur*, extends upon Weares onely for taking of Fiſh; And that Commiſſioners of Sewers cannot ſubvert a Cawſey, &c. erected before the time of *Ed.* 1. But by the Statutes of 25 E. 3. cap. 4. & 1 H. 4. cap. 12. if they be Inhanſed, they ought to be amended by abatement of the Inhanſement. And it was Reſolved, That the Cawſey in Queſtion being before the time of *Ed.* 1. and never ſince inhaunſed; was out of the ſaid Statutes. See *Cook. Select Caſe.* 36. *Cook* 10. Part, 137. The Caſe of *Cheſter*-Mills.

20. Com-

20. Commiſſions under the great Seal of *England* in *Engliſh*, were directed to divers Commiſſioners in ſeveral Counties, to enquire of divers Articles annexed to it: And the Articles were alſo in Engliſh, to enquire of Depopulation of houſes, Converting of Arrable to Paſture, &c. But the Commiſſioners ſhould not have power to hear, and determine the ſaid Offences, but onely to enquire of them: By colour of the ſaid Commiſſions, the Commiſſioners took many preſentments in Engliſh, and retorned them into the Chancery. It was Reſolved by all the Juſtices of *England*, That the ſaid Commiſſions were againſt Law, for theſe cauſes. 1. Becauſe they were in Engliſh. 2. Becauſe the Offences enquireable were not certain within the Commiſſions themſelves, but in a *Schedule* annexed to them. 3. Becauſe they were onely to enquire, which is not Law, for ſo a man may unjuſtly be accuſed by Perjury, and he ſhall not have any remedy, for that it is not within the Statute of 5 Eliz. Alſo the party may be defamed, and ſhall have no Traverſe to it: And it was ſaid, That ſuch Commiſſions were never ſeen to enquire onely. Trin. 5 Jac. *Cook* 12. Part, 31. acc.

21. Upon the Statute of 23 H. 8. chap. 5. Of *Sewers*. The Caſe was this; The Commiſſioners do decree, That a new River ſhall be made out of the River of O. through the main Land for 7. miles; unto another part of the ſame River, and for the doing of it, Tax nine ſeverall Towns, and the Inhabitants, and the Tax was generall upon every Town, &c. In this Caſe, two points were Reſolved. 1. That the Commiſſioners cannot make any new River, nor can they make any new Inventions (as artificial Mills to caſt out the water, for that ſuch new Inventions are many times to the damage of the Subject). But ſuch new Rivers, or ſuch new Inventions, if they be *pro bono publico*, ought to be made by Parliament: But the new making of an old bank by them, or a Sewer more fit with ſome ſmall alteration and diſtance, upon an inevitable neceſſity, may be warranted by them. 2. That the Tax generally of a ſeverall ſum in groſſe upon every Town, was not warranted by the Commiſſion; but the Tax ought to be particular upon every Owner, or poſſeſſor. 1. According to the quality of their Lands, rents, and number of Acres, and 2. According to the rate of every perſons portion, tenure, profit, or Common of Paſture, or of Fiſhing, or other Commodity. *Cook* 10. Part, 141. the Caſe of the Iſle of *Ely*.

22. Note, That after the Argument of the great Caſe, *De modo Decimandi*; and Prohibitions, which was Argued both by the Eccleſiaſticall Councel, and by ſome of the Councell at the Common Law; That it was ſaid by King *James* in that Caſe, That the High Commiſſion ought not to meddle with any thing, but that which is enormious and exorbitant, and cannot permit the Ordinary proceſſe of the Eccleſiaſticall Law, and which the ſame Law cannot puniſh: And that was the Cauſe of the Juſtification of the ſaid Commiſſion. And therefore, although every offence *ex vi termini*, is enormious; yet in the Statute, it is to be intended of ſuch an offence as is *contra omnem normam*, as Hereſy, Schiſm, Inceſt, and the like great Offences. For the King ſaid, That it was not reaſon, That the High Commiſſion ſhould have Conuſance of Common Offences, but to leave them to the Ordinaries, becauſe that the party cannot have any Appeal, in caſe the High Commiſſion ſhall determine of it. *Cook*, *Seleſt Caſes*. in the Caſe *De modo Decimandi. in fine*. 47.

23. Note, It was Reſolved, that the Eccleſiaſticall Judges, the High Commiſſion Court, cannot examine a man upon Oath, upon the Intention and thought of his heart, for *Cogitationis pœnam nemo emovet*: And in Caſes where a man is to be examined upon his Oath, he ought to be examined upon Acts or words, and not of the Intention and thought of his heart. And if every man ſhould be examined upon his Oath, what Opinion he holdeth concerning any point of Religion, he is not bound to anſwer the ſame; for in time of danger, *Quis modò tutus erit*, if every one ſhould be examined of his thoughts? And ſo long as a man doth not offend, neither in Act, nor in word, any Law eſtabliſhed, there is no reaſon that he ſhould be examined upon his thought or cogitation. It was Reſolved, That the High Commiſſioners ſhall not have any Conuſans of any ſcandal to themſelves, for that they are parties, and ſuch ſcandall is puniſhed by the Common Law, as it was Reſolved in *Hales* Caſe. 3. It was ſaid and Reſolved, That the High Commiſſioners cannot proceed, or hold Juriſdiction in any Cauſe which is a Temporall caſe. And therefore it was ſaid, That where the Biſhop of *Winchester* being Viſiter of the School of *Winchester*, of the Foundation of *William Wickham*, 5 *Caroli*, cited the Uſher of the ſaid School by force of the ſaid Commiſſion to appear before them, and there proceeded againſt him, that they incurred the danger of Præmunire. And ſo alſo it was holden, in the Caſe of *Frank* and Sir *Ralph Boſvile* Knight, where the Biſhop of *Canterbury* and his Colleague, cited *Frank* a Maſter of Arts, and Uſher of the School of *Sevenoak* in *Kent*, to appear before the High Commiſſioners at *Lambeth*: and when *Frank* appeared; The Archbiſhop and his Aſſociates made an Order, That *Frank* ſhould continue in the ſaid School; and that he ſhould have 20 l. paid him by Sir *Ralph Boſvile* Knight.

Mich.

Mich. 6 Jac. *Edwards's* Caſe. *Cook, Select Caſes* 10, & 11.

Conditions.

1. *What ſhall be a good Condition, What not: And what words ſhall be a Condition, Limitation, or Covenant; in Grants, both of the King, and of a Common perſon; and what not: And Where Conditions ſhall be void, becauſe Impoſſible, Repugnant, and againſt Law Where; not.*

1. IN an *Ejectione firme*, the Caſe was, A man made a Leaſe for years, rendring Rent upon Condition, with a Covenant that the Leſſee ſhould repair the houſes: Afterwards he deviſed the ſame Lands to the ſame Leſſee for more years, rendring the like rent, and under the like Covenants, as in the firſt Leaſe, the Remainder over to another in Fee; and dyed: The firſt Leaſe expired, and the Leſſee held in by force of the Deviſe, and did not repair the houſes. It was Objected, that this was a Condition; but the Court held it to be no Condition, becauſe the words are under the like Covenants, which do not make a Condition, although it be in the Caſe of a Will: And it was ſaid, that the words (under the like Covenants) were void. Hill. 30 Eliz. in C. B. *Goldesbr.* 74.

2. A man ſeiſed of Lands in Fee, made his Will, and thereby deviſed his Land to his younger ſon H. when he ſhould accompliſh the age of 24. years, upon Condition that he ſhould pay 20 l. to the daughter of the Deviſor, and if it ſhould happen that he dye before the age of 24. years. Then that R. his eldeſt ſon ſhould have the Land, upon Condition that he ſhould pay the ſaid daughter 20 l. And if his ſaid ſons failed to pay the ſaid 20 l. that the Land ſhould remain to his ſaid daughter. The Deviſor dyed, H. his younger ſon entred after his age of 24. years, and did not pay the 20 l. R. the elder ſon entred upon him; the queſtion in this Caſe was, If it were a Condition or a Limitation: It was Objected, That it was a Condition, for ſo are the expreſſe words; But the Opinion of the whole Court was, and ſo it was Reſolved, That it was a Limitation, and not a Condition; and the reaſon was, becauſe R. the eldeſt ſon was to have nothing, if H. the younger ſon did not dye before the age of 24 years; and the intent of the Deviſor appears, that his daughter ſhould have the Land for non-payment of the mony; And a Caſe 9 Eliz. out of *Dalisons Reports*, was vouched to confirm this Caſe: Where a man deviſed Land to his younger ſon, upon condition of payment of a certain ſum of mony to his daughter, the Remainder over to another of his younger ſons; and the firſt Deviſee entred, and did not pay the mony; and he in the Remainder took advantage of it. Wherefore the Court agreed, That in the principall Caſe, It was a Limitation, and not a Condition, and therefore the Entry of the eldeſt ſon was not Lawfull. Hill. 43 Eliz. in C. B. *Wiſeman* and *Baldwin's* Caſe. *Goldesbr.* 153.

3. In an *Ejectione firme* the Caſe was, That a Leaſe was made to a Woman a Widow, for 40. years *ſub hac tamen conditione, quòd ſi ipſa tam diu ſola fuerit, et inhibitaverit* in the ſame houſe: The Woman continued Widow all her life, and dwelt all her time in the ſaid houſe, and dyed within the Term; The queſtion was, whether the Term determined or not; and whether the words make a Condition or Limitation. The Court was of Opinion in this Caſe, That the words were inſenſible, and that it was neither a Condition, nor a Limitation: But if the word (*ſi*) had bin omitted, it would have been a Condition. And it was ſaid, That if I make a Leaſe for 40. years, If the Leſſee dwell upon the thing lett, during the Term; there if the Leſſee dye, the Leaſe is determined, for that the point of Limitation goeth to all the Term: but if it be a Leaſe for 40. years, if the Leſſee dwell upon it during his life, there, if he dye, the Leaſe continueth. The Opinion of the Court in the principall Caſe was, That the Term did yet continue: And Judgment was given for the Plaintiff. Hill. 43 in C. B. *Sayer* and *Hardy's* Caſe. *Goldesbr.* 179.

4. The Prior and Covent of *Bath* made a Leaſe of a Farm to B. and E. his Wife for their lives, the Remainder to C. their ſon for life, *ſi ipſa inhabitaret et reſidens eſſet omnino de et ſuper* the ſaid Farm; and if it ſhould happen, the ſaid C. to dye before the ſaid B. and E. then the ſaid Prior and Covent would, that the ſaid Farm ſhould remain to D. another ſon of the ſaid B. and E. *ſi ipſe etiam vellet inhabitare et reſidens eſſe infra prædict. grangiam et firmam durante termino ſuperius expreſſo.* B. and E. entred: C. dyes, B. and E. dyed, D. entred; And, in pleading, ſaid, That *ipſa continuo poſt ingreſſum ſuum inhabitavit et reſidens fuit infra prædict. firmam*; The point in Law was, whether it were a good remainder which depended upon this, If the words implyed a Condition, or a Limitation; In which the Juſtices were devided in Opinion; ſome held it a Condition, others a Limitation;

mitation; But they all agreed, That, be it a Condition, or a Limitation, yet the Remainder was good; And they all agreed, That if it ſhould be a Condition, that then by the intent of it, the Deſendant ought to be reſident upon it all the Term, from the time the Remainder fell, untill the death of the Tenant. Paſc. 4 E. 6. *Coltheirſt* and *Bemſtons* Caſe. *Plo. Com.* 21. to 35.

5. A. ſeiſed of a Mannor to which an Advowſon was Appendant, by Deed Indented, bargained and ſold the Mannor with the Appurtenances, for good conſideration to B. and his heirs: Provided, That B. ſhall give the Advowſon to A. for his life; and, if it happen not void, then one time to his Executors. The queſtion was, whether this Proviſo, were a Condition or not; and it was, That it was a Condition although it was intermixed amongſt divers other Covenants in the Indenture; for it was ſaid, That the Law hath not appointed any proper place in the Deed for the Condition, but its place is, where it pleaſeth the parties, although it be intermixt amongſt Covenants: And in that Caſe, It was put for a ground in Law, That when the Proviſo doth not depend upon another ſentence, but ſtands Originally of it ſelf; And when the Proviſo is the word of the Bargaynor, Feoffor, or Donor; and when a Proviſo is compulſory, to enforce the Bargaynee or Donee, or Grantee to do an Act; there, and in ſuch Caſe, the word (Proviſo) makes a Condition, although it be intermixt amongſt Covenants, Precedents, or Subſequents. *Cook.* 2. Part, 40. Lord *Cromwell*'s Caſe.

6. In an Action upon the Caſe, the Caſe was, That the Earl of *Pembrook* granted the Office of Lievtenantſhip of the Forreſt of *C.* to Sir *Maurice Berkley*, and the heirs males of his body; and in the ſaid Deed of Grant were ſuch Words, viz. Provided alwayes, and the ſaid Sir *Maurice* doth Covenant and Grant, That it ſhall be lawfull for the Earl, his heirs, and Aſſigns, to have the preheminence of the Game, Provided alſo, and the ſaid Sir *Maurice* doth Covenant and Grant with the Earl, that neither he the ſaid Sir *Maurice*, nor his Heirs, ſhall or will cut down any Timber-Trees, growing in the ſaid Walk. Sir *Maurice* dyed, his ſon cut down Timber-Trees; It was Reſolved in this Caſe by all the Juſtices, That although the Proviſo was coupled with an expreſſe Covenant of the Grantee, and every Condition ought to be created by the words of the Grantor, yet it was ſaid, that the word (Proviſo) in this Caſe; was a Condition, although it was intermixed with the words of Covenant: And *Popham* Chief Juſtice ſaid, in this Caſe; Sometimes the word (Proviſo) ſhall be taken for a Condition, ſometimes for a Covenant, ſometimes for an Exception, ſometimes for a Reſervation, ſometimes for an Explanation. If a man Leaſe Lands, Provided, that the Leſſee ſhall not alien without the aſſent of the Leſſor *ſub pœna forisfacturæ*, here it is a Condition. If I have two Mannors, both of them named *Dale*, and I Leaſe you my Mannor of *Dale*; Provided, that you ſhall have my Mannor of *Dale*, in the Occupation of J. S. this Proviſo is an Explanation. If a man Leaſe a houſe, and the Leſſee Covenanteth, that he will repair it, Provided alwayes the Leſſor is contented to find great Timber, here it is a Covenant. If I Leaſe you my Meſſuage in D. Provided, I will have a Chamber my ſelf, this is an Exception of the Chamber. If I make a Leaſe rendring Rent, at ſuch a Feaſt as J. S. ſhall name, Provided that the Feaſt of Saint *Michaelmas* ſhall be one, here the Proviſo is taken for a Reſervation: And in the Principall Caſe, it was Reſolved, That it ſhould be taken for a Condition. 36 Eliz. in B. R. The Earl of *Pembroke*, and the Lord *Berkleyes* Caſe. *Goldesbr.* 130. See *Cook* 2. Part, 72. in the Lord *Cromwell*'s Caſe. acc. See this Caſe at large in *Popham.* 116, 117.

7. The Caſe was this, A. made a Leaſe to B. of a Farm, except the Wood. And Covenanted with the Leſſee, that he ſhall take all manner of Under-wood: Provided alwayes, And the Leſſee Covenants that he will not cut down any Timber Trees; In this Caſe, It was ſaid, That the Proviſo was but in the nature of a Declaration, with what Trees the Leſſee ſhall not meddle, becauſe it depended upon the Covenant of the Leſſor, and it is generall, to wit, That he may cut down any underwood, Provided, that he do not cut down any manner of Timber-Trees. It was ſaid, That at the beginning, the Court inſiſted much that it was a Condition: But they ſaid, It was well put, in that he ſhould not cut any Timber Trees: and therefore it was, that a Declaration with what Wood he ſhould not meddle, although in truth, it was of another thing, than was compriſed in the thing before; and then the adding of a Proviſo to ſuch a Covenant, ſhall not make the Proviſo of another nature than it was before the Covenant made, or if no Covenant had bin made to it; and upon that reaſon, the Court gave Judgment, That it was not a Condition. 17 Eliz. in B. R. *Pepall* and *Hammingtons* Caſe, *Poph.* 117. 118.

8. Doctor *Batts* was ſeiſed of divers Mannors and Lands in Fee; and having three ſons, A. B. and C. by his Will in Writing, deviſed part of them to his Wife for her life: *ſub Conditione quod ipſa educabit pueros ſuos in eruditione, et bonis moribus*, the remainder to *C.* his ſon in tail, and the Reverſion in Fee, deſcended to A. his eldeſt ſon. The Condition was broken; the queſtion was, If the Heir ſhould enter for the Condition broken, or that C. ſhould enter, as for breach of a Limitation, or

ſt the Condition were deſtroyed by the Limitation of the Remainder over. In that Caſe, It was Reſolved by the whole Court, That it was not a Limitation, for that there are expreſſe words of Condition: and the meaning of the Teſtator was, That his heir, who alwayes is to take advantage of a Condition, ſhould enter, and defeat the eſtate of the Wife; but his meaning did not accord with the Law, for he could not defeat the Eſtate for life, if he did not defeat the Remainder: and therefore by the Limitation of the Remainder over, the Condition was deſtroyed. 3, & 4. *Ma.* See *Dyer.* Doctor *Butt's* Caſe.

9. Note, It is put for a Rule in *Cook* 10. Part, 42. in *Portington's* Caſe: That there are in Law, Apt, and Legall words, aſwell of Limitation, as Condition. Apt words of Limitation are, *Quamdiu, Dummodo, Dum, Quouſque, Durante*, as a Rent granted out of the Mannor of D, *Quamdiu* the Grantor ſhall remain there, A man maketh a Leaſe of Land *Dummodo*, the Leſſee ſhall pay 20 l. A man maketh a Feoffment in Fee *Quouſque*, the Feoffer hath paid to him a certain ſum of Mony. A man makes a Leaſe for years, if the Leſſee doth ſo long live. A Leaſe for years of Lands, untill he be promoted to a Benefice. A Leaſe of Lands during the Coverture. All which are words of Limitation, by which the eſtate is determined, before Entry, or Claim. Words of Condition, are *ſub Conditione, Ita quod, ſi Contingat*, Proviſo. But the words *Ad effectum, ea intentione, ad ſolvendum*, or the like, do not make a Condition in Feoffments and Grants, if it be not in the Caſe of the King, or in the Caſe of a Will. *Cook* 10. Part, 42. in *Mary Portingtons* Caſe.

10. Land is given *ad ſolvendum* 20 s. The ſame is a good Condition: So Land is given, *ad erudiendum filium*: So Annuity is Granted, *pro Conſilio impenſo et impendendo*; Theſe are uſuall words of Condition, and are ſo taken to be: But if Lands be given for to repair a Bridge, or to keep a Caſtle, and that before the Statute of *Weſt.* 3; theſe words do not make a Condition, but a Tenure. *Plo. Com.* 142. in *Browning* and *Beeſton's* Caſe.

11. If a man makes a Feoffment in Fee *ad intentionem*, to perform his Will; the ſame is not a Condition, but a Declaration of the purpoſe and Will of the Feoffor; and the heir cannot enter for not-performance of it. 32 H. 8. *Broke Conditions.* 191.

12. The Word (*Iſſint*), (So) is a Condition by *Portman. Plo. Com.* 107.

13. A Leaſe was made for life by Indenture, in which, are words *Proviſo quòd*, if the Leſſee dye within 60 years, that his Executors ſhall have his right untill the 60 years be ended. It was holden by the Court, That it was not a Condition, but a Covenant. 5. *Ma. Dyer.* 150. *Parker's* Caſe.

14. A Leaſe was made *ſcil. quod non licebit* to the Leſſee, *dare, vendere, vel concedere ſtatum et terminum ſuum alicui perſonæ, ſine licentia* of the Leſſor *ſub pœnâ forisfacturæ Termini ſui prædict.*: the Leſſor and the Leſſee dyed, and the Executors ſold the Term without Licence of the Heir. It was holden, That it was out of the Caſe of Forfeiture, becauſe that the reſtraint was but during the lives of the Leſſor and Leſſee: but it was holden, that the words aforeſaid did make a Condition. Mich. 3. E. 6. *Dyer.* 65, 66.

15. The Counteſſe of *Surrey* being Tenant for life of certain Lands ſurrendred them to the King *ea intentione* that he ſhould give to her other Lands in recompence: The King alienes thoſe Lands, and gave her other Lands in recompence, which being upon a defeaſible title, they are after evicted; and ſhe entred by force of the Condition upon the Pattentee; And it was holden, That her Entry was not lawfull; for the words *ea intentione* was not a Condition, but a Truſt and Confidence; and there ought to have bin theſe words, *Et ſi deficerit*, that then *bene licebit*, to re-enter: for otherwiſe it is not a Condition. Hill. 4. *Ma. Dyer.* 138. The Counteſſe of *Surreys* Caſe.

16. A man made a Feoffment in Fee to the uſe of himſelf for life, and after to the uſe of A. whom he intended to marry, untill the Iſſue which he got of her be of the age of 21. years; and after the ſon comes of that age, then to the uſe of his ſaid Wife during her Widow-hood: the Husband dyed without Iſſue, the Wife entred, and continued Sole. It was adjudged in this Caſe, That the Entry of the Wife was Lawfull; For if a Feoffment be made to one and his heirs *Quouſque*, or untill J. S. or his Feoffees ſhall pay 100 l. and J. S. dyeth before any payment made, the Feoffee and his heirs ſhall have the Lands for ever. Paſc. 13 Eliz. *Dyer.* 300, 301.

17. The Biſhop of *York* made a Leaſe for years of divers Lands in *Batterſey*, rendring rent at *Batterſey*; Proviſo, in time of Vacation, the Rent ſhall be paid to the Chapter *ut in jure ſuo*; the rent was behind *ſede vacante*, the Bayliff of the Succeſſor re-entred and diſtreined. It was holden in this Caſe, That the Proviſo was not a Condition, but a forſpriſe not being annexed to the thing given; and if it ſhould be a Condition, yet it was impoſſible, becauſe that the Rent could not be paid to the Chapter, becauſe they had not the Reverſion. Paſc. 5 Eliz. *Dyer.* 222.

18. In Covenant brought, the Plaintiff declared, That he Demiſed to R. the Defendant, certain Rooms in Bear-Alley, from &c. 1624. untill *Mid-Summer*, 1626. rendring 6 l. 15 s. 4 d. rent, Provided, and upon Condition, that the ſaid R.

ſhould gather the Rents of other the Plaintiffs Tenements in Bear-Ally, reſerved intirely, and mentioned in a Schedule, and pay the ſame within 20 dayes after every Quarter-day. And it is agreed That the ſaid R. ſhall retain the reſt of the benefit of the ſaid Rooms over and above the ſaid 61 l. 15 s. 4 d. *per annum*, for his pains, in gathering up the ſaid Rents; and ſhewed, That the Rents mentioned in the Schedule, did amount to 190 l. *per annum*, and that the Defendant had not paid the ſaid Rents, but did not ſhew, that the Defendant had gathered them. It was inſiſted upon, that the words, Provided, &c. ſhould make a Covenant; But the Opinion of the whole Court was, That it is not a Covenant, but a meer Condition annexed to the Eſtate, which determines it, by not Collecting and paying the Rents: And it is not to be intended that it ſhould be a Covenant, to enforce him to gather and pay them, where peradventure he cannot collect them. It was adjudged for the Defendant. Mich. 4 Car. in B. R. *Gee* y and *Reaſon*'s Caſe. *Cro.* 1. Part, 91.

19. A. ſeiſed of Lands in Fee, having Iſſue two daughters B. and C.: Covenanted to ſtand ſeiſed of the Lands to the uſe of B. her eldeſt daughter in tail, upon Condition, That the ſaid B. ſhould pay to her other daughter within a year after the death of A. 300 l. or within a year after the ſaid other daughter ſhould come to the age of 18. years; And if B. ſhould fail of payment of the ſaid ſum, then to the uſe of C. her other daughter in tail: A. dyed, B. took a Husband, and had Iſſue, and afterwards dyed without Iſſue before the day of payment: And if the Husband ſhould be Tenant by the curteſy or not, was the queſtion. And it was the clear Opinion of the Court, That he ſhould: For as to the Condition of payment of the ſaid ſum, the ſame is not determined, for ſhe dyed without Iſſue before the day of payment, before C. came to the age of 18. years; and as to that there is no Condition broken; And as to the point of dying without Iſſue, the ſame is not a Condition, but rather a Limitation of the eſtate, and is no more then what the Law ſaith, and the eſtate tail, in B. is ſpent, and determined by the dying without Iſſue, and doth not ceaſe, or is cut off by any Limitation. And afterwards Judgment was given for the Tenant, by the Curteſy. Mich. 31 Eliz. in C. B. *Sommes* and *Paynes* Caſe. *Leon.* 167.

20. A. ſeiſed of Lands in Fee, and having Iſſue two daughters, deviſed the ſame to *Ann* his eldeſt daughter; that ſhe ſhould pay 40 l. to B. her ſiſter at ſuch a day; the mony is not paid; B. entreth into the moyety of the Land. It was holden by the whole Court, That the ſame is a good Condition, and that the Entry of B. was lawfull. For it hath bin adjudged, That where a man deviſed his Land to his Wife; Proviſo, My Will is, That ſhe ſhall keep my houſe in good Reparations, that the ſame is a good Condition; and the Lord Chief Juſtice *Wray* ſaid, That if a man deviſeth his Lands to B. paying 40 l. to C. it is a good Condition, for C. hath no other remedy, and a Will ought to be expounded according to the intent of the Deviſor. Trin. 30 Eliz. in B. R. *Crechmere* and *Patterſons* Caſe. *Leon.* 174.

21. The Caſe was, A man was poſſeſſed of a Term for years, and of goods & Chattels; and made his Will in theſe words, That if the Wife of the Deviſor would permit J. S. to enjoy ſuch a Term for the Term of three years next following, That then ſhe ſhould have all the reſidue of his goods and Chattells, as his Sole Executrix; It was Objected, That ſhe could not be Executrix, For ſhe is to be Executrix upon a Condition precedent to be performed before ſhe be Executrix, and the Condition is impoſſible to be performed, and then ſhe ſhall never be Executrix: for where an Eſtate is to be created upon a Condition impoſſible to be performed, there the Eſtate ſhall never come in eſſe, and here the Condition is impoſſible. For how can ſhe ſuffer J. S. to enjoy the Term for three years next following, and the three years are to be paſt before ſhe hath any power to permit, or reſiſt; for till the three years be encurred, ſhe cannot be Executrix, nor before years expired, can ſhe have any Action as Executrix; for her Authority doth not begin before the three years be expired. But it was holden by the Court, That although a Grant upon a Condition precedent, doth not take effect untill the Condition be performed, yet ſuch Conſtruction ought to be uſed in this Caſe, ſo as the intent of the Deviſor ſhall ſtand. If the Condition had bin, That if the Wife will find meat and drink to ſuch a perſon untill his death, That then ſhe ſhall be Executrix, Shall not the Wife be Executrix untill after the death of ſuch party? Truly yes, For otherwiſe ſhe could never be Executrix, which is againſt the meaning of the Teſtator; and it was not his intent, that the Ordinary ſhould commit Adminiſtration of his goods in the mean time; and the ſubſequent words prove directly, that the Teſtators meaning was, That his Wife ſhould be Executrix immediately, untill ſhe diſturbed J. S. for the words are, If ſhe refuſe to ſuffer J. S. to enjoy the Term, then his Son ſhall be his Executor; which implies, That by a diſturbance made by the Wife, her Executrix-ſhip ſhould ceaſe, and that the ſon ſhould have it, which cannot properly be, if ſhe were not Executrix from the beginning; and afterwards Judgment was given for the Wife, That ſhe was Executrix preſently, and ſhould be Executrix untill her actuall diſturbance of J. S. Poſſ.

31 Eliz.

31 Eliz. in C. B. *Jennings* and *Gower's* Caſe. *Leon.* 229.

22. In an *Ejectione firmæ* of a Leaſe made of the Manor of M. The Defendant pleaded, That before the Leſſor of the Plaintiff had any thing in the Manor, the Biſhop of *R.* was ſeiſed, and Leaſed the ſame to the Defendant, The Plaintiff Replyed, That the Leſſee by the ſaid Leaſe did Covenant, That he would not put out or diſturb any of the Tenants inhabiting within the ſaid Manor out of their Tenancies doing their duties according to the Cuſtome of the ſaid Manor; and ſhewed, that the Defendant had put out one A. a Tenant dwelling there upon a Tenement parcell of the ſaid Manor, and that the Biſhop had entred for the Condition broken, and made the Leaſe to the Leſſor of the Plaintiff; upon which, the Defendant demurred in Law. It was ſaid, That the Biſhop had no cauſe of Entry, for here was not any Condition in the Caſe, but onely a Covenant; for that it comes onely on the part of the Leſſee, and every Condition ought to be the words of the Leſſor. But it was anſwered, and Reſolved, That though the words found in Covenant, and be the words of the Leſſee, yet the Leaſe being by Indenture, the ſame is the Deed of both, and every word in it is ſpoken by both, and it was a Condition; And *Hill* and *Lockham's* Caſe. 24 Eliz. was vouched; where, by Indenture, the Leſſee Covenanted to grind all his Corn at the Mill of the Leſſor; And afterwards, in the end of the ſaid Indenture, the Leſſee Covenanted to perform all Covenants *ſub pœna foriſfacturæ*, and by the Opinion of the whole Court, the ſame was holden to be a Condition: and ſo in this Caſe, it was a Condition. But in the principall Caſe, becauſe the breach was not ſufficiently ſet forth; for the breach is aſſigned, that he had put out *unum Tenentem et Inhabitantem* out of the ſaid Lands, parcell of the ſaid Mannor; and it might be, that ſhe was but a Tenant at Will, and the Covenant doth referr onely to Copy-holders; And for want of Averment that ſhe was Tenant in *fee* of any part of the Mannor; and for ſome other Imperfections, Judgment was given againſt the Plaintiff. Trin. 32 Eliz. in B. R. *Thomas* and *Ward's* Caſe. *Leon.* 244.

23. The word (*Pro*) or, In conſideration, doth not always import a Condition, or make a grant defeaſible, though the thing taken in lieu, be either taken away by the giver wrongfully, or by any other perſon upon a juſt title, ſo as the thing given be wholly loſt. And therefore if J. S. give White-Acre to J. N. for Black-Acre, without the word, *Exchange*, it will not be defeaſible: Nay more, if they uſe the proper word [*Exchange*] and that be executed; a wrongful Entry of either party will do no hurt, but a Rightfull Entry will. But in ſome Caſes the word *Pro*, hath the force of a Condition, when the thing granted is executory: and the Conſideration of a Grant, is a Service, or ſome other like thing, for which there is no remedy, but the ſtopping of the thing granted: As in the caſe of Annuity granted *pro Conſilio impenſo et impendendo*, or for doing the Office of Steward of a Court, or the Service of a Captain or Keeper of a Fort; and in theſe Caſes the Condition is not precedent, and therefore needs not to be averred, performed, when the Annuity is demanded; and theſe caſes are within the reaſon of an Exchange, where the Land given is evicted; for here the failer of Counſel, or Service, is a kind of eviction of that that is to be done for the Annuity, in as much as he hath no means either to exact the Counſel, or recompence for it, but to ſtop the Annuity. See *Hob.* 41. 42. in the Argument of the Caſe of *Cowper* and *Andrews*. Mich. 10 Jac. in C. B. See *Cook* 7. Part, *Nightred's* Caſe, acc.

24. *A.* makes *B.* and a woman his Executors; Provided, that *B.* ſhall not adminiſter his eſtate; this Proviſo is void for Repugnancy: for when *A.* hath made them once Executors, the ſeveral powers limited to them afterwards is void, if it reſtrain the authority which was given by the premiſſes; becauſe when the intent of a man who makes a Teſtament, agrees not with the Law, his intent ſhall be taken as void: As if a man deviſe Lands to J. S. and his heirs in Fee, and if he dye without heir, that then the Land ſhall remain to J. S. and his heirs; that this deviſe is void in remainder for the Repugnancy, becauſe that by a Maxime and Rule in Law, One Fee-ſimple cannot depend upon another Fee-ſimple. 29 H. 8. *Dyer* 3.

25. A Leaſe was made for Term of life, *Abſq; impetitione vaſti; et ſi contingat*, that he do Waſte, that then it ſhall be lawfull for the Leſſor to enter; and the Leſſee committed Waſte: It was holden by *Shelley*, That it was a void Condition, becauſe it was repugnant to the words of the Grant. But others held, It was a good Condition, becauſe it ſhall be intended, That the Leſſee ſhall not be impleaded for the ſaid Waſte. Trin. 32 H. 8. *Dyer* 47. And ſee *Cook* 4. Part, 63. in *Herlakendens* Caſe, That if I grant to one that he ſhall not be impeached for the cutting down of all my Trees in ſuch a Wood, that the ſame ſhall excuſe him in an Action of Waſte for the Cutting, but notwithſtanding the property and Intereſt doth remain in me. But ſee it Reſolved in *Cook* 11. Part, 83. in *Lewes Bowles* Caſe, that by the Grant to Tenant for life without impeachment of Waſte, that the Grantee hath as great a power to do Waſte, as the Grantor himſelf hath, and ſhall have the Trees

themſelves after ſeverance; and therefore ſuch a Condition of Reſtraint is repugnant to the Grant.

26. A man by Deed Indented, Covenanted to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of divers of his Sons, and the heirs males of their bodies. Provided, That if they, or any of their heirs, ſhall reſolve, adviſe, or attempt any act, by which the Limitation of the ſame Land, or any Eſtate tail ſhould be undone, barred, or determined; or by which the ſame ſhould not come, remain, and be in manner and form as is limited by the Indenture, that then after that, and before any ſuch act done by which, &c. before any ſuch bargain, diſcontinuance had or executed, the Eſtates or Uſes to him limited who ſhall ſo do, ſhall ceaſe, onely having reſpect to ſuch perſon ſo attempting, &c. ſhould ceaſe, as if ſuch perſon were naturally dead, and dyed; the eldeſt ſon ſuffered a Common Recovery; the younger ſon entred. In this caſe it was Reſolved, That that Proviſo to ceaſe an Eſtate limited to one and his heirs males of his body, as if Tenant in tail were dead, was repugnant, and impoſſible, and againſt Law: For the death of Tenant in tail, is not the ceaſing of the Eſtate tail, but the death without iſſue of his body, is the determination of it; and before Iſſue, Tenant in tail hath an Inheritance, which by poſſibility may continue for ever; and it is repugnant, that the Land ſhould remain during the life of Tenant in tail himſelf. *Cook* 1. Part, 84. *Corbets* Caſe. See 37 Eliz. *Fermyn* and *Arſcotts* Caſe. *Cook* 1. Part, 85. acc.

27. If a man make a Feoffment to the uſe of himſelf for life, and after to his eldeſt ſon, and the heirs males of his body; and for want of ſuch Iſſue, to the uſe of his ſecond ſon in tail: Provided, That if his eldeſt ſon attempt to ſuffer a Common Recovery, or levy a Fine, &c. that then his Eſtate ſhall ceaſe as if he were naturally dead: the eldeſt ſon hath Iſſue, and attempts to alien. In this caſe, the Proviſo is repugnant and void; for if the ſame had been limited by Conveyance at the Common-Law in poſſeſſion, it had been void: and if a man by Deed with Livery and Seiſin giveth Land in tail, the remainder in tail the remainder in Fee: Provided (as above); ſuch proviſo is repugnant and void; and ſo it is proved by *Richells* Caſe. *Litt. F.* 161. *Cook* 1. Part, 130. in *Chudleigh's* Caſe. See *Cook* 10. Part, *Portingtons* Caſe, *Cook* 9. Part, *Sondyes* Caſe. acc.

28. If a man make a guift in tail, upon Condition, that he ſhall not make a Feoffment, this is a good Condition; but if it be, That he ſhall not make a Charter of Feoffment, this is not good; for this without Livery amounts but to a Tenancy at will, which Tenant in tail cannot be reſtrained to do: So if a man make a guift in tail, upon Condition, That he ſhall not make a Leaſe for his own life, this is void and repugnant, for when a man makes a guift in tail which is an Eſtate of Inheritance, and thereby makes the Donee owner of the Land, he cannot reſtrain him from doing any lawfull act, or making any lawfull Eſtate which is no wrong to any. But if a man make a Leaſe for life, or years, upon Condition, That he ſhall not alien or deniſe, this is good, becauſe the Leſſor hath the Reverſion, whereby he hath power to reſtrain the Leſſee. *Cook* 6. Part, Sir *Anthony Mildmay's* Caſe, 42, 43.

29. The Cuſtome of *London* is, That one may deviſe his Lands in Mortmain; and a purchaſor in *London*, by his Will deviſed, That the Prior and Covent of St. *Bartholomew* ſhould have his Lands *Ita quod reddant annuatim Decano et Capitulo Sancti Pauli London* 16. marks and if they failed, that their Eſtate ſhould ceaſe; and that the ſaid Dean and Chapter, and their Succeſſours, ſhould have the ſaid Lands. It was the Opinion of the Juſtices in that caſe, That it was a void Condition, and repugnant; for that the Land could not remain after he had given a Fee-ſimple before; for the Feoffor had determined his Intereſt and right; and then alſo the ſtranger could not enter for the Condition broken; but the heir might. Paſch. 28 H. 8. *Dyer*. 33.

30. Debt upon an Obligation, the Condition of which was, That he ſhould not keep a Merchants ſhop in *F*; and if he did, that he ſhould pay 40 l. to the Plaintiff. It was holden in this caſe by the Juſtices, That although that the Condition did not reſtrain the party totally of his Trade; yet it was adjudged a void Obligation. Paſch. 18 Car. in B. R. *Barrow* and *Woods* Caſe. *March* 191. and ſo was it adjudged in Mich. 44 Eliz. rott. 3715. in *Clegat* and *Batchellors* Caſe. But Quære, if there be not a difference betwixt a Promiſe, and an Obligation, upon a Condition: for that a man may promiſe and contract, that he will not uſe his Trade; but he cannot bind himſelf by a Bond with Condition not ſo to do.

31. If a Rent be granted in Fee, with a Proviſo, That the wife of the Grantee ſhall not be endowed, it is a void Condition, becauſe it is repugnant: But if the Proviſo be, That ſhe ſhall not be endowed during the Non-age of the heir; in ſuch caſe the Condition is good, and ſhe ſhall recover her Dower, but Execution ſhall ſtay. See *Perkins*, and 2 E. 3. to *Condition* 12.

32. Note: In all caſes where the Condition of a Bond is poſſible at the time of the making of it; and afterwards by the Act of God, of the Law, or of the party, the ſame becomes impoſſible before the ſame is performed; there the Bond is ſaved:

But

But if the Condition be impoſſible at the time of the making of it; there the Obligation is ſingle, and without any Condition; and ſo it is in the Caſe of a Feoffment, with a Condition ſubſequent that is impoſſible; As for example, If a man be bounden in an Obligation, with Condition, That if the Obligor go from the Church of St. *Pauls* in *London* to *Rome* within 3. hours, that then the Obligation ſhall be void. In that caſe, the Condition is void, and the Obligation is ſingle without any Condition, and ſtands good. And ſo if a man make a Leaſe for life, upon Condition, That if the Leſſee go to *Rome* in a day, that he ſhall have Fee, in ſuch caſe, the Condition is Impoſſible, and void: and therefore the Fee ſhall not accrue: For that no accruer ſhall be upon an Impoſſible Condition. See *Cook* 1. Part, *Inſtitutes*, 206. *Cook* 10. Part, Lord *Staffords* Caſe, acc.

33. Debt was brought upon Obligation: the Condition was for performance of Covenants, the Caſe was; Sir *Daniel Norton* being High Sheriff of H. made *Chamberlain* his Under-Sheriff, who by Indenture (amongſt other Covenants) did Covenant, That he would not execute any *Extent*, *Liberate*, *Elegit*, or any other Execution for any ſum, above the ſum of 20 l. before he had made known the Nature and quality of the ſaid Writ to the High Sheriff. And the Plaintiff (upon the Defendant's plea, That he had performed all Covenants) Replyed, That *A.* had recovered againſt *B.* in the Common-Pleas 200 l. and dyed; and that J. S. the Executor of *A.* ſued forth a *Scire facias* againſt *B.* for the ſaid ſum; by force of which, *Chamberlain* the Under-Sheriff arreſted him in Execution; and that afterwards *B.* eſcaped, the debt not ſatisfied; upon which the Defendant did demur in Law. It was Reſolved in this caſe, That although the Covenant in this Caſe, That he ſhould not ſerve or execute any Proceſs or Execution, was a void Covenant in Law; yet the Obligation was good for the reſt of the Covenants which were agreeable to Law: And a difference was taken between a Bond made void by the Statute, and a Bond by the Common-Law: For upon the Statute of 23 H. 6, If a Sheriff will take a Bond for a point againſt that Law, and alſo for a due debt, the whole Bond is void by the Letter of the Statute; but the Common-Law doth divide according to Common reaſon; and having made that void which is againſt Law, doth make the Bond to ſtand good for the reſidue: And in this caſe it was lawfull for the Sheriff to take a Bond of his Under Sheriff, to ſave him harmleſs againſt Eſcapes. And therefore although that in this caſe, the Condition of the Bond was as to the one, ſerving of Execution, void, as being repugnant to the Office of a Sheriff; yet for the breach of the other Covenants, the Bond and Condition were both good: and ſo, there being an Eſcape, the Bond put in ſuit; for that breach of the Covenants was lawfull. Mich. 11 Jac. in C. B. Sir *Daniel Norton* and *Syms* Caſe. *Godbolt* 212. *Hob.* 14. acc.

34. A man deviſed Lands to his wife for life, the remainder of one parcell to *T.* his Son, the remainder of the other parcell to his younger Son in Fee: Proviſo, That his Wife ſhall pay his Legacies; and if his Wife dyed before payment of his Debts and Legacies, that then his two ſons ſhould pay them: and, if either of his ſons dye before his Debts and Legacies paid, or before either of them do enter into his part, then, the other ſhall have all the Lands in Fee; and dyed: The Eldeſt ſon in the life of his Mother, releaſed to the youngeſt all his right, title, claim, and demand to the Land, which was deviſed to him by his Father, and then the Wife dyed. It was a Queſtion in this caſe, If this Releaſe was good; and Whether theſe words would extinguiſh this future poſſibility? It was ſaid, It would not: becauſe it was a Remote poſſibility; for here the Mother ought to be dead, and Legacies ought to be paid; and *T.* ought to be dead, before the Plaintiff can have the Land: alſo the Mother may in a ſhort time pay the Legacies, and then neither of the ſons ſhall have the Land; and therefore this is ſuch a forren expectancy, that it cannot be gone by Releaſe. And it was ſaid, That it was the Opinion of the Court in *Pell* and *Browns* Caſe, which was the like with this caſe, That where a Deviſe was to the Son in Fee, and if he dyed without Iſſue, then his younger brother ſhould have it; if the ſecond ſuffer a Common-Recovery, it had not deſtroyed the poſſibility which the Elder ſon had to have the Land: and if a Common Recovery which is a matter of Record, will not take away ſuch a poſſibility; *à fortiori*, a Releaſe which is matter of fact, as in this Caſe, will not do it. But it was ſaid on the other ſide, to which the Court inclined, If the ſon had any right, by this Releaſe of right in the caſe, the ſame ſhall extinguiſh it. And it was ſaid, That this poſſibility is not remote, for the Condition, or Limitation, is annexed to the Eſtate; and it is not a ſubſequent Condition which creates an Eſtate; and here it is an Intent of a Remainder to the Plaintiff, and therefore may be releaſed: and in this caſe, the Releaſe is of all his right, title, and claim to the Reverſion and Remainder which his father deviſed to the Plaintiff, and ſo the Releaſe is not general, but it is a particular and ſpecial Releaſe: and the Condition being annexed to the Eſtate, may be releaſed. Mich. 22 Jac. in C. B. *Hoes* Caſe. *Winch.* 54, 55, 56.

35. In Debt for Rent, the Caſe was; The Grandfather of the Plaintiff was ſeiſed of Lands, and

and made a Leaſe thereof to the Defendant for years rendring Rent: afterwards, he deviſed the Reverſion to the Plaintiff in Fee, and ſet forth in his Will, That his intent was, That his Executors ſhall have the Reverſion during the Term, upon Condition, That they enter into Bond to pay 34 l. *per annum* during the Term; this Bond to be made by the advice of Overſeers, and to be done within ſix moneths after his deceaſe; and the Obligation was to be made to the Plaintiff; and dyed. The Executors ſhewed the Will to the Overſeers, but no Bond was made within the 6. moneths, the Plaintiff required the Executors to enter Bond, and to pay the Rent, which was not done; and he claimed the Reverſion, and brought an Action for the Rent. In this caſe, It was holden by the Juſtices, That here was a Condition by which the Reverſion veſted in the Executors; but it was in the Plaintiff till performance of it: which not being performed within the time limited, the Plaintiff ought to have the Rent. And in this caſe it was agreed, That the Overſeers had not the Reverſion; for although it was deviſed to them, yet it was upon the refuſal of the Executors; and no refuſall is found, but onely a Non-performance: and ſo the Opinion was, That the Plaintiff had right. But becauſe the Action was not brought in the proper County; the Lands lying in *Southwood*, and the Action was brought in *London*; It was adjudged againſt the Plaintiff. Hill. 21 Jac. in C. B. *Trebern* and *Claybrook*'s Caſe. *Winch* 89.

36. In Debt for Rent, the Caſe was; A man ſeiſed of a Meſſuage in Fee, deviſed the ſame by his Will to *A.* his daughter, and her heirs at her full age of 18 years; and further deviſed, That his Wife his Executrix ſhall have the Education, with her portion of money, and profits of the Land to her own uſe without accompt, untill his daughters ſaid age: Provided, his Executrix ſhould pay the Quit-Rents, and bring up his daughter at School; and dyed. The Wife took upon her the charge of the Will, and then married J. S. and after dyed. It was the Opinion of the Court in this caſe, That it was a good Term given to the Wife to her own uſe, which accrued to the huſband by the death of the Wife: and the Education of a Child is not ſuch a particular privity, but that it may be performed by another. Trin. 17 Jac. in C. B. *Balder* and *Blackborns* Caſe. *Hobart* 285.

37. Debt upon an Obligation, the Condition was, That if the Defendant ſhould not at any time or times after the making of the Obligation, by any way or means, be ayding or aſſiſting to J. S. or any other perſon or perſons for him the ſaid J. S. in any Actions, Suits, Troubles, &c. to be commenced or proſecuted againſt the Plaintiff, his Wife, Children, or Aſſignes, Then, &c. And the Plaintiff aſſigned a breach, That he brought an Action againſt J. S. and the Defendant, and had Judgment for 8 l. damages againſt J. S. and 2. d. damages againſt the Defendant, and 8 l. coſts againſt them both: and ſaid that thereupon after the making of the Bond, J. S. and the Defendant brought a Writ of Errour, and ſo hindred the Plaintiff of his Execution upon his Judgment: upon which the Defendant demurred. And it was adjudged no breach of the Condition; for although the Defendant might bind himſelf not to bring a Writ of Errour expreſſly; yet ſuch general words as theſe, ſhall not inforce it ſo: For the ſenſe of the Condition is, That he ſhall not maintain J. S. in any his proper Suits againſt the Plaintiff, which is juſt and reaſonable; but it is not reaſon that he ſhould be barred to defend himſelf by joyning with J. S. againſt unjuſt proceedings of the Plaintiff againſt him: And therefore in this caſe, If the Plaintiff after Verdict againſt J. S. had releaſed, and yet have taken forth Execution, the Defendant might have joyned with J. S. in an *Audita Querela*; for it is his own defence againſt an unjuſt Suit. Mich. 16 Jac. in C. B. Rott. 2342. *Lamb* and *Thompſons* Caſe. *Hob.* 304. See *Hutton*, 40. the ſame Caſe.

38. Debt upon an Obligation; the Condition was, That if *A.* and *B.* his wife before the end of Eaſter Term next, ſhall levy a Fine before the Juſtices of C. B. to the uſe of the Plaintiff, &c. The Defendant pleaded, That before the end of Eaſter Term, the Plaintiff did not purchaſe any Writ of Covenant *pro fine levando*, according to the Courſe of Law. The Plaintiff Replyed, That 15. *Aprilis*, the ſaid *A.* for money, enfeoffed a ſtranger of parcel of the Land, that was to be conveyed by the Fine; and that *A.* and *B.* his wife have not any Eſtate or Intereſt in the ſaid parcel ſo conveyed whereof they may levy a Fine. The Defendant Demurred upon the Replication. In this caſe it was holden, That the Plaintiff ought to do the firſt act, to procure a Writ of Covenant to have made himſelf capable of a Fine. The ſecond Queſtion was, If the Obligation was forfeited? And it was agreed by the Court, That the Condition was impoſſible, and is all one, as if he had diſabled himſelf afterwards. And in this caſe it was ſaid, It was all one, as if one (who had granted the Reverſion for years or life) Covenant, That he upon ſurrender will make a new Leaſe; he had broken his Covenant, being diſabled at the time. And it was ſaid in the principal Caſe, the Fine ought to be an effectuall Fine, which might operate to convey the Land according to the Covenant. Hill. 19 Jac. in C. B. *Waldron* and *Hills* Caſe. *Hob.* 48.

39. The

39. The Caſe was this; W. R. 28 H. 8. made a Feoffment in Fee to the uſe of himſelf and his heirs: 21 H. 8. he made his Will, by which he deviſed his Lands to C. his younger ſon, and to the heirs males of his body, the remainder to J. his eldeſt ſon in Fee, upon Condition, That if C. or any his Iſſue ſhould diſcontinue or alien, but onely to make a Joynture for their Wives for term of their lives, that then, &c. and dyed. The Statute of 27 H. 8. of Uſes came: C. made a Leaſe to the Defendants for their lives, according to the Statute of 32 H. 8. and levies a Fine, with proclamation, to the uſe of himſelf and his wife, and the heirs males of their two bodies begotten, the Remainder to the right heirs of the Deviſor; J. the Eldeſt ſon entred for the Condition broken. It was holden in this caſe, That this Condition to reſtrain an unlawfull diſcontinuance, was good: and this Condition was annexed to good purpoſe. For W. R. being a Serjeant at Law, well knew, That *Ceſtuy que uſe* might have levied a Fine, or ſuffered a Recovery by the Statutes of 1 R. 3. and 4 H. 7. and this Condition annexed or tied to the Uſe by the Will, is now knit to the poſſeſſion, and by Conſequence, the Condition annexed to it. And all the Juſtices were clear of Opinion in this caſe, That the Condition was broken, and alſo that the Intent of the Condition was broken; for it might be, that *C.* had Iſſue by a former wife, which by this Fine ſhould be diſ-inherited, and a new Tail ſet on foot againſt the meaning of the Deviſor. Mich. 29 Eliz. in C.B. *Ruddall* and *Millers* Caſe. *Leon.* 298, 299.

40. If a man makes a guift in tail, upon Condition, That he ſhall not make a Leaſe for his own life; Or if a man make a Leaſe for life or years, upon Condition, That they ſhall not grant over their Eſtate, or let the Lands to others; In ſuch and the like Caſes, albeit the Tenant in tail hath power by the Law to make a Leaſe for his own life, and the Leſſee for life or years to grant, or let; Yet by the Condition, and their own Agreement, they have reſtrained them of the Liberty which the Law gives them. So if a man make a guift in tail, upon Condition, That he ſhall not make a Leaſe for 3. Lives, or 21. years, according to the Statute of 32 H. 8. In this caſe, the Condition is good, to reſtrain the Tenant in tail for making ſuch Leaſes: for although the Statute doth give him power to make ſuch Leaſes; yet that power may be reſtrained by a Condition, and his own agreement; becauſe this power is not incident to his Eſtate, but is given him collaterally by the act; and by the Rule in Law, *Quilibet poteſt renunciare juri pro ſe introducto. Cook. Inſtitutes*, 223. acc.

41. In an *Ejection Firme*, the Caſe was; A man Covenanted to levy a Fine of Lands to the uſe of himſelf and his wife for life; and afterwards he leaſed the Lands for 21. years, for 3 l. rent *per annum* by equall portions: and after the death of J. S. to pay a groſſe ſum of 225 l. by way of Fine, payable by 5 l. a year quarterly, with a Proviſo in the Indenture, That for default of payment of the Rent or Fine, or for want of Repairations, it ſhould be lawfull for the Leſſor to re-enter: afterwards, the Leſſor levies a Fine, and aſſigns over his Intereſt in the Reverſion. The Queſtion was, Whether the Condition of Entry be tranſferred over to the Aſſignee, by the transferring over of the Reverſion. It was ſaid, That the Leaſe proceeds from the husband onely, and not from the husband and wife; and the Condition is tranſferred; for the Condition runs joyntly as well to the Fine reſerved as to the Rent; and it is as it were a ſeveral Condition in Law, and the Condition as to the Rent is transferred, though not as to the Fine. And alſo it was ſaid in this caſe, As it reſpects the Rent, it is not a Condition in groſſe; but as it reſpects the Fine, it is a Condition in groſſe: and a Condition which is intire in words, may by acts of Law receive diſtributions. But it was ſaid by the other ſide, That the Fine here is a ſum Collateral, and is not incident to the Reverſion, and ſo the Condition is collateral, and cannot be apportioned. But it was Reſolved by the whole Court, That a man cannot by his own act divide a Condition, which goes in deſtruction of an Eſtate: And ſo Judgment was given for the Defendant. Hill. 1651. in B. R. *Dekins* and *Lathams* Caſe. *Styles* 316, 317.

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2. *Where a* Condition *ſhall be performed, and yet the words are not performed*; et è contra.

1. A Leaſe for years was made by Indenture, and the Leſſee did Covenant, That if his Executors or Aſſigns did alien, that it ſhould be lawfull for the Leſſor to enter; he made his Wife his Executor; ſhe took husband, who aliened the Term. And, If the Condition was broken, or not, was the Queſtion? It was the better Opinion, That the husband was an Aſſignee in Law; and then the Condition was broken, though the words of it were not broken. Paſch. 28 H. 8. *Dyer* 7.

2. *Coles* made a Leaſe to *Taunton* for 99 years, upon Condition, That if he deviſed it in other manner, than in ſuch manner as he had the ſame

to

to him, that then it ſhould be lawfull for him to re-enter; the Leſſee deviſed it by his Will to his younger ſon. It was Reſolved, That *rigore Juris*, this was a breach of the Condition; for a Deviſe is an alienation, and ſhall be intended within the word, *Demiſe*. And yet it was ſaid, That it was very hard, that in Equity the Eſtate ſhould be loſt; for he intended by his Will, to prefer one of his younger Children, and not to break the Condition. Yet Judgment was given, That it was a breach, Hill. 38 Eliz. in B. R. *Tauntons* Caſe. *Owen* 14. See *Hob.* 37 Eliz. in B. R. *Roper* and *Roper's* Caſe. acc.

3. The Earl of *Arundell* granted the Mannor of D. to the Earl of *Northumberland* in tail, the Remainder in tail, upon Condition, That neither of them the Mannor or any part thereof ſhould alien, diſcontinue, or do any act in any manner, nor permit directly or indirectly, but that the ſaid Mannor without impediment might revert, if they dyed without Iſſue: The Earl of *Northumberland* took a Wife, and alſo he granted the reverſion of a Copyhold according to the Cuſtome. It was the Opinion of the Juſtices, The taking of the Wife, although her Dower may hinder the reverting of the Mannor; yet it was no breach of the Condition: for if there had been an expreſs Condition, That the Donee ſhould not take a Wife; or that his Wife ſhould not be endowed, it ſhould be repugnant to the Eſtate, and void. And, 2. The granting of the Copyhold was no hindring of the reverting of the Mannor, for that the Copyholder was but a Tenant at Will, according to the Cuſtome of the Mannor: and ſo although the words were broken of the Condition; yet, according to the Intent, the Condition was not broken, Trin. 17 Eliz. *Dyer* 343, 344.

4. If I grant to you an Annuity untill you have purchaſed 5 s. rent; and you purchaſe 5 s. joyntly with another; the ſame is no performance of the Condition: for my meaning was, That you ſhould purchaſe it to your own profit onely, and for your advantage onely. So if I be bound to you in an Obligation, upon Condition, That if you purchaſe a Rent of 5 s. to have and to hold to you and your heirs; and a ſtranger hath 5 s. Rent out of your Land, and afterwards he releaſeth all his right in the Land to you, yet the Condition is performed. Trin. 28 H. 8. *Dyer* 15.

5. If a man Covenants, That his eldeſt Son marry with the daughter of J. S. and his eldeſt ſon dyeth; although that the younger ſon marry the daughter of J. S. the Condition is not performed, yet he is no eldeſt ſon. So a man was bound to deliver a Deed, if the other upon reaſonable warning levy a Fine, 15. Paſch. next, and the Sheriff return the Obligor ſummoned; the ſame is not a ſufficient warning, although in truth it be a warning, becauſe it ought to be by the party himſelf, 11 H. 4. 18. So a man was bound, that the Feoffees of J. S. ſhould grant a Rent-charge, and he had 3. Feoffees, and 4. of them granted the Rent-charge, the Condition was not performed, and yet the Words were performed. And ſo in *Baiſhins* Caſe, The Condition was, *Quod ipſe vellet inhabitare et reſidens eſſe* upon the Land during the Term. It was holden, He ought to be reſident for the whole Term; and yet if he once dwelt and were reſident upon the Land, the words of the Condition were performed. *Plow. Com.* acc.

6. Note, in ſome Caſes, the words of the Condition ought of neceſſity be performed: As two are bounden to ſtand to the Arbitration of J. S. ſo as it be made and delivered to the parties by the Arbitrator in Writing, by ſuch a day; now although the Arbitrator deliver one Deed to one of them who is preſent, the ſame is no performance; but he ought of neceſſity to deliver two writings, one to the one, and another to the other: and ſo where a Feoffment is made upon Condition to enfeoff one, he ought of neceſſity to enfeoff him alone. Br. *Condition* 107. If a man be bound to perform the Award of J. S. who Awards that the Defendant ſhall make a *Retraxit*, and he diſcontinueth the ſuit, yet the Bond is forfeit, for the *Retraxit* is a final bar; but it is otherwiſe of a diſcontinuance; and therefore he ought to perform the words, 21 E. 4. 38. So if a man Mortgageth his Land, and the Mortgagee Leaſeth the Lands again to the Mortgagor for ten years, upon Condition that if the Mortgagor pay 10 l. within the Term, that then the firſt Mortgage ſhall be void. Afterwards he ſurrenders, and within the ten years payes the mony. It was holden in this Caſe, That the Condition was not performed, for he ought to have paid it before the ſurrender, for the Term was gone by the ſurrender; but if the performance had referred to the ten years, although he did ſurrender, it was not materiall. 39 H. 8. *Dyer* 58. *Br. Condition* 203. acc.

7. A Leaſe for years was made, in which there was a Proviſo, That the Leſſee his Executors or Aſſigns ſhould not Alien to any perſon without Licence of the Leſſors but onely to the ſon of the Leſſee; the Leſſee dyed, and his Executors aſſigned the ſame to one of his ſons. It was holden in that Caſe, That the Condition was determined, and that now the ſon might Alien it unto any perſon without Licence. See 5. *Mr. Dyer.* 152. *Cook* 4. Part, in *Dampore's* Caſe.

8. The Condition of an Obligation was, That the Obligor upon requeſt ſhould do all ſuch Acts which ſeem reaſonable to the Counſell of the

Obligee

Obligee to releaſe, an Obligation in which the Obligee ſtood bound to the Obligor; and a requeſt was made to ſeal a releaſe of all demands to the Obligee, and unto one M. and averred that there was no other matter between them, but ſpake not of M. It was adjudged in that Caſe, that the requeſt was unreaſonable, although there be no matter between the Defendant and M. 5 Eliz. *Dyer.* 218. acc.

9. The Caſe (in an Attaint brought upon a Verdict given in Debt, upon a Recognizance taken before the Mayor) was this. There was Suit between one *Oke* and *Parrey*, concerning a Tenement in *Ab-Church*-Lane *London*: the poſſeſſion of which was Decreed to *Parrey*, in which Tenement one *Whaly* Inhabited: *Parrey*, miſ-truſting that *Whaly* was affected to *Oke*, to have him for his Landlord, procured a Recognizance from *Whaley*, wherein one *Smith* was bound: the Condition of which was, That if the within bounden *Whaly* do well and honeſtly behave himſelf towards *Parrey*, ſo long as he doth remain and dwell in the ſaid Tenement, may keep the poſſeſſion of the ſame for the uſe of the ſaid *Parrey*, as Tenant to the ſaid *Parrey*: and that if *Whaly* do depart out of the ſaid Tenement and dwell in any other place; then to deliver the Key, and quiet poſſeſſion to J. S. the Lord Mayor to the uſe of *Parrey*; And at all times to depart and go from the ſaid Tenement at 14. dayes; after warning given at the ſaid Tenement by the ſaid *Parrey* or his Aſſigns, That then, &c. In Debt brought upon this Recognizance, The Defendant pleaded, That ſuch a day and year he departed the ſaid Tenement, and came to the houſe of the ſaid Mayor in *Lombard*-ſtreet the ſame day, and there delivered to him the Key and quiet poſſeſſion of the ſaid houſe, to the uſe of the ſaid *Parrey*: And that upon Traverſe being found againſt *Parrey*, he brought Attaint upon the ſaid Verdict; and the general Iſſue being pleaded; It appeared upon the Evidence that the Key was delivered to the Mayor according to the Condition, and that the houſe was ſeen empty and void at the time of the departure of the ſaid *Whaly*: And yet within an hour after, *Oke* entred the houſe by a Shop-door with a Key which he had ſecretly kept long before. It was the Opinion of the Juſtices, that this Evidence was good to have Attainted the Jury; for although the words of the Condition were performed, yet the intent of the Condition was not performed: and that the quiet poſſeſſion could not be delivered to the Mayor in the form aforeſaid, but that the Plaintiff or his Deputy perſonally ought to have come to the houſe in Ab-Church-Lane, and there have received the poſſeſſion. Mich. 5 Eliz. *Dyer* 219. *Parrey* and *Smiths* Caſe.

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3. *Where an Eſtate upon a Condition broken, ſhall be adjudged in the Grantor, Leſſor, Feoffor, &c. without Entry in fact, Seizure or Claim; where not: and where Conditionall words, imply an Entry; Where not, without words of Re-entry.*

1. IF a man make a Feoffment in Fee, *Ita quod*, the Feoffee do ſuch an act: In ſuch Caſes, *Littleton* ſaith, That it is uſuall to have theſe words, [*And if the ſaid act be not done, that it ſhall be lawfull for the Feoffor to re-enter*] the which, he ſaid, were more then needed; for the firſt words are ſufficient in Law to include them: And yet he ſaid, They are well put in, to declare and expreſſe the Law to the Lay-people. See *Litt.* 75. 2. *Cook* 1. Part, 104. in *Shelleys* Caſe. And therefore if a Feoffment be made, That if the Feoffee pay to the Feoffor a certain ſum of money at ſuch a day, that he ſhall have Fee: If the Feoffee doth not pay the money at the day, although there be no words of Re-entry, yet it is a Condition in Law implyed, and the Feoffor may enter.

2. If a man make a Leaſe for life rendring Rent, upon Condition, That if the Rent be behind, that the Land ſhall revert to the Leſſor, the ſame ſhall be taken for a Re-entry. Trin. 28 H. 8. *Dyer* 22.

3. Regularly a Freehold, or an Inheritance, cannot ceaſe without an Entry, or Claim: But when a man cannot make an Entry, there he ſhall not be driven to make a Claim to the Reverſion, but the Reverſion ſhall be veſted in him without Entry or Claim. *Cook* 1. Part, *Inſtitutes*, 218. See *Plow. Com.* 133. acc.

4. The Caſe was; Tenant in tail, the remainder in tail; he in the Remainder bargained and ſold his Remainder to *A.* for the life of Tenant in tail; and after his death, the remainder to the Queen in Fee: Tenant in tail ſuffered a Common-Recovery; the Queen granted her Remainder to the Tenant in tail and his heirs: Afterwards he in the Remainder bargained and ſold to *B.* the remainder to the Queen, upon Condition; and the Recovery was had: Tenant in tail dyed without Iſſue. In this caſe it was argued, If the Remainder ſhould be deveſted out of the Queen, without a Petition, or *Monſtrans de Droit*? which point was not Reſolved by the Juſtices. But it was agreed by them, That although the Remainder

did passe by bargain and sale, so as in Judgment of Law an use passeth first; and although it was of a thing which lay in Grant, and not in Livery, and that the words are, That upon payment of money, that the Estate should cease and be void; yet the Estate should not be revested in the Grantor without Claim; for an Estate of an Inheritance cannot be determined by a Condition, without entry or claim: and a Condition cannot determine without entry or claim; but otherwise it is of a Limitation. And it was further holden in this case, That the claim of a Remainder by force of a Condition, must be upon the Land, and not out of the Land: and therefore in this case, the Bargain and Sale made to *B.* being at *Westminster*, did not enure to two Intents, *scil.* to make a claim, and to passe the Remainder. *Cook.* 2. Part, Sir *Hugh Cholmley's* Case. 50.

5. Tenant in Tail had Issue two sons, the eldest had Issue a daughter, and dyed, his Wife being with Child in the life of his Father. Tenant in Tail suffered a Recovery to the use of himself for the Term of his life, and afterwards to the use of J. S. for 21 years, and after to the heirs Males of his body begotten, and to the heirs Males of the bodies of such heirs Males; and presently after the Judgment, and before Execution the same day that the Recovery was suffered, Tenant in tail dyed: It was said in this Case, That the Recovery was executed by the Judgment presently: and a difference was taken when Lands were in possession, and when in Lease for years or life; As if a Fine be levyed *sur Conusans de droit*, onely of Lands in possession; in that Case the Conusee hath nothing before Entry: but if it was of a Reversion upon an estate for life, or years, there the Reversion or thing in grant did passe presently. And it was said, That when the Law prescribes a means to perfect or settle any right or estate, if this in any circumstance become impossible by the Act of God, (as it was in this Case by the Act of God, by the death of Tenant in Tail) no party (who was to have benefit, if the means had bin in all circumstances executed) should receive any prejudice for the not execution thereof, in such circumstance which became impossible by the Act of God: if all were done without Lachesse, which the party might; But on the other side it was said; and so it was Resolved by the Court; That in the principall Case, the Reversion was not Executed in the Recoverers presently by the Judgment, untill Execution was sued forth; for it was said, That where a man may enter or claim, the Law will not adjudge him in possession untill Entry or claim. *Cook* 1. Part, *Shelleyes* Case. 84. and 79. acc.

6. A man seised of Land in Fee, Covenanted to stand seised to the use of himself for life, and after to the use of his eldest son in tail; Provided, that at any time during his life, with the consent of divers by Deed Indented, enrolled in any of the Kings Courts, to revoke any of the said uses, and to limit new uses; Afterwards he by Indenture Inrolled in the Chancery, revoked the uses in any part of the Land, and limited the same to the use of him and his heirs: And afterwards by another Deed he declared, That from the time of the enrolment of that Deed in the Chancery, all the first uses in the first Indenture should be void; And afterwards he levyed a Fine of all the Land, and afterwards the Deed was Inrolled in the Chancery, and afterwards he entred, and made claim, and dyed: It was Resolved in this Case (amongst other poynts), That the Fine levyed before the Inrollment in the Chancery, had extinct the power of Revocation. And 2. If the Fine had not bin levyed, then by the Revocation, all the Antient uses had bin destroyed without Entry, or claim, because he himself was Tenant for life of the Land, and could not enter. And it was said and agreed in this Case, That if a man maketh a Feoffment upon a Collaterall Condition; If before the Condition performed, he makes a Lease for years to the Feoffor, and after the Condition is broken; the Land shall be presently in him without Entry, or claim. *C.* 1. Part, 174. *Digg's* Case. See *Cook* 4. Part, 53. in *Rawlisons* Case. acc.

7. A man seised of Lands in Fee, makes a Lease for years, rendring Rent upon Condition, That if he, his Executors, Administrators, or Assignes, did grant, Alien, or Assign any part of the Land, without the assent of the Lessor, his Heirs, or Assigns; that it should be lawfull for him, his Heirs or Assigns to re-enter; the Lessee Assigned part of it without assent; the Lessor before notice, and before re-entry, accepted the Rent, and afterwards re-entred. In that Case, it was adjudged, That his Re-entry was lawfull; and the difference was there taken between a Lease for life, and a Lease for years; For it was agreed, That in Case of a Lease for life, if the Conclusion be, That the Lease shall be void; there because the Freehold is created by Livery, it cannot be avoided before Entry, that the acceptance of the Rent at a day after, shall bar the Lessor of his entry, and shall affirm the Lease; for he cannot receive it as due upon any Contract, as in the Case of a Lease for years, but he ought to receive it as a Rent, and then he affirmeth the Lease to continue, and therefore acceptance of his Rent shall bar him of his Entry. *Cook* 3. Part, 65. *Penants* Case.

8. A Tenant for life, the remainder in tail to B. the Reversion to B. and his heirs expectant: B. levyed a Fine to C. and D. and to the heirs of C. to

C. to the uſe of them and their heirs, and had Iſſue, and dyed, before all the Proclamations were paſt; the Iſſue being beyond Sea, then the Proclamations paſſed: and afterwards the Iſſue returned, and made his claim to the Remainder in tail. In this Caſe, it was Reſolved (amongſt other points) 1. That when the Proclamations paſſed, without any claim made by the Iſſue in tail upon the Land, that the right which deſcended to him was barred by the Statute of 4 H. 7. and 32 H. 8. of Fines. 2. That the Iſſue in tail being heir, and privy, could not by any claim which he could make, ſave the eſtate tail which deſcended to him, becauſe the ſavings in the ſaid Statutes extended to ſtrangers, and not to parties or privies: But it was there agreed, That if Tenant in tail maketh a Feoffment in Fee, and the Feoffee levyeth a Fine with Proclamations, the Iſſue ſhould have five years after the Tenant in tail; to make his claim. *Cook* 3. Part, 85. in the Caſe of *Fines*.

9. A man poſſeſſed of a Term for years, made his Will, and made his Wife his Executrix, and deviſed further, that if his Wife dyed within the Term, that J. S. ſhould have the reſidue of the Term. In this Caſe, It was Reſolved, That J. S. did not take by way of a Remainder, but by way of Executory Deviſe; and that the deviſe was good, becauſe it was but a Chattell, which might veſt, or deveſt at the pleaſure of the Deviſor, without prejudice to any: And in the Argument of this Caſe, This difference was agreed for Law, That if a Leaſe for years be made by a man upon Condition, That if he do ſuch an Act, that the Leaſe ſhall be void; and afterwards he grants over the Reverſion, and then the Condition is broken, the Grantee ſhall take advantage of the Condition by the Common Law, for that the Leaſe thereby is abſolutely void: But in ſuch Caſe, If the Leaſe had bin for life with ſuch Condition, the Grantee ſhall not take advantage of the Condition; For a Freehold, (of which a *Precipe* lyeth) cannot ſo eaſily ceaſe, but is avoidable by Entry after the Condition broken, which by the Common Law cannot be transferred to a ſtranger. *Cook* 8. Part, 95, *Mathew Manning's* Caſe. See before *Pennant's* Caſe, Sect.

4. *Where, and by what Act, and by whom done, a Condition ſhall be extinct, or ſuſpended in part, or in all: And where it may be apportioned, where not.*

1. J. M. Tenant in tail, made a Feoffment upon Condition to re-make an eſtate to him and his Wife, and the heirs of his body, the Remainder to T. M. *filio meo*, &c. the Remainder *Sibilla, filia mea*; The Feoffee reciting by the Deed, made the Feoffment by the words *Dedimus et Conceſſimus* to J. M. and his Wife, and the heirs of their two bodies, the Remainder T. M. *filio meo*, the Remainder *Sibilla, filia mea*; J. M. dyed, T. M. his heirs within age, entred for the Condition broken. It was the Opinion of the Court, That *Sibilla filia mea* cannot be meant the daughter of J. N. And it was holden, That the heir ſhould not take advantage of the Condition, becauſe he was a party to the breach, and alſo for that his acceptance had extinguiſhed the Condition: But Quære in this Caſe, If the Condition be not ſuſpended onely, 32 H. 8. *Dyer.* 45. See *Cook* 4. Part, in *Dampott's* Caſe, Where a Condition if it be intire, be ſuſpended in Part, it ſhall be ſuſpended in all.

2. A man made a Feoffment to two upon Condition to make back an eſtate for the life of the Feoffor, the Remainder in Fee to a ſtranger, and one of them made the eſtate accordingly. In that Caſe, It was holden good for a moyety, becauſe the party who was to have advantage of the Condition, had diſpenced with it by the acceptance of the eſtate. 4 E. 6. *Dyer.* 69. acc.

3. A man by Deed Indented, made a Leaſe of three Mannors, A. B. and C. rendring for A. 6 l. for B. 5 l. for C. 10 l. upon a Condition to reenter in all the three Mannors, for want of not payment of the ſaid Rents, or any of them; Afterwards, the Leſſor bargained and ſold the Reverſion of one houſe, and 40. Acres of Land, parcel of the Mannor of A. to J. S. and his heirs; and afterwards bargained and ſold all the reſidue to another and his heirs. It was adjudged in this Caſe, That the ſecond Bargainee could not enter for the Condition broken being intire, which could not be apportioned by the Act of the parties; but, by ſeverance of part of the Reverſion, the Condition was deſtroyed in all. But it was agreed in that Caſe, That by an Act in Law, a Condition might be ap-

Pertioned. Mich. 14 Eliz. in C. B. rott. 1015. adjudged.

4. The Preſident and Schollers of *Corpus Chriſti* Colledge in *Oxford* made a Leaſe for years; Provided, that the Leſſee nor his Aſſigns ſhould not alien to any perſon, or perſons, without ſpeciall Licence of the Leſſors, and afterwards, they by their Deed gave Licence to the Leſſee to alien, or Leaſe the Land to any perſon or perſons whatſoever; The Leſſee aſſigned all his Term to J. S. It was Reſolved, That the Alienation by Licence to J. S. had deſtroyed the Condition, ſo as no Alienation afterwards could give cauſe to the Leſſors to enter, for the Leſſors could not diſpence with the Condition in part, but that thereby they deſtroy all Alienations afterwards to be made. Hill. 45. Eliz. in B. R, *Cook* 4. Part, *Damports* Caſe.

5. A Leaſe was made to three upon Condition That they, nor any of them ſhould Alien without the Aſſent of the Leſſor, and afterwards one Alienes without his aſſent, and afterwards the other two alienes without his aſſent. It was adjudged, That the Condition being intire as to one perſon; was determined in all. Mich. 28 Eliz. in C. B. *Leeds* and *Crompton's* Caſe adjudged.

6. Leſſee for years of divers parcells of Land, rendring rent, and for not payment a Re-entry, the Leſſee aſſigned part of the Land to A. and part to B. and kept a part to himſelf. Afterwards the Leſſor levyes a Fine of all the Lands to the uſe of the Conuſee and his heirs, the Leſſee payes the rent for the whole Land to the Conuſee, and afterwards the rent becomes behind, and the Conuſee enters for the Condition broken. It was moved in this Caſe, That by the aſſigning of the Leſſee of part of the Lands to one, and part of the Lands to another, that the Condition was gon and deſtroyed. But in this Caſe, It was agreed by all the Juſtices, That the Condition did remain, and was not gone, nor deſtroyed; And it was not like to *Winters* Caſe, *Dyer* 308. where the Leſſor did aſſign part of the Reverſion to one, and part to another; for in that Caſe the Leſſor by his own Act had deſtroyed the Condition, but in this Caſe, it is the Act of the Leſſee; and therefore there is no Colour in it, that the Condition ſhould be gone or deſtroyed. Trin. 21 Jac. in B. R. *Hawkeſwith's* and *Davies's* Caſe. Intrator, Paſc. 19 Jac. rott. 83. *Godbolt.* 336.

7. A Leſſee for 91. years did Covenant and Grant, that he would not Alien *ſub pœnâ forisfacturæ* to any one, but to his Wife for life, and afterwards for the reſidue, to one of his Children, or for ſuch default, to a yonnger brother. In this Caſe, It was Reſolved, admitting it to be a Condition; That by his Alienation to the firſt, he hath now an abſolute eſtate, and to his eſtate, no Condition can be annexed, by the words of the firſt Covenant, and the word (*Niſi*) ſets him at Liberty to grant to thoſe which are comprehended within the *niſi*; and *reſiduum termini* to one of the younger brothers. And it was ſaid, that the word *vel*, or *Niſi* here, gave no Election at all to the Leſſee to Alien the whole Term unto his Wife, or to one of his younger brothers; but the firſt Alienation ought to be to the Wife for her life, and the *vel* or *Niſi*, ſhall be for the diſtribution of the reſidne of the Term, after the death of the Wife, and then to his Children, and for default of ſuch, to one of his younger brothers, and this to be of the reſidue of the Term. Mich. 12 Jac. in B. R. *Fitz* and *Whitchcock's* Caſe. *Boldſt.* 2. Part, 290, 291, 292. acc.

10. A man having no Iſſue, by his Will Deviſed certain Tenements which he had in *London* to Friends in Fee, upon a Condition, that they and their heirs ſhould pay a yearly Rent of 7 l. Iſſuing out of the ſaid Tenements, at four Quarter-dayes, according to the Cuſtome of *London*, to the Wife of the Deviſor during her life, and 4 l. yearly, to 42. poor men of the Hoſpitall of B. for ever: and if the Rent ſhould be behind by the ſpace of ſix Weeks after any dayes of payment (and lawfully demanded) that it ſhould be lawfull for the Wife to diſtrein; and further added, that his intent was, that ſhe ſhould be paid the ſaid yearly Rent accordingly. The Rent was behind, and no demand made of the Tenements by the Wife, nor any for her; the heir of the Deviſor entred. It was a queſtion, if his Entry were lawfull or not, or that the penalty of the expreſſe Condition, annexed to the Eſtate of the Deviſees, were qualified or deſtroyed by the penalty of diſtreſs added to the Rent; and ſo a Limitation of the payment of the Rent to the Wife, and the heir of the Deviſor to take an advantage of the breach of the Condition. It was holden by the better Opinion of the Juſtices in this Caſe, That if the Rent be behind, that the Wife might not diſtrein till it be demanded, and yet the heir of the Husband might enter for the Condition broken, although the Wife never made demand; And it was holden in this Caſe, That the Subſequent words of diſtreſſe did not qualifie the penalty of the Condition. Hill. 18 Eliz. *Dyer.* 348.

9. A Prior ſeiſed of divers Lands with the Aſſent of his Covent, made a Leaſe of them for years rendring the Rent of 5 l. 10 s. 11 d. at four Feaſts, for one houſe 3 l. 11 d. for another 20 s. and for the other houſes, ſeverall Rents amounting to the reſidue, with Condition, that if the ſaid Rent of 5 l. 10 s. 11 d. be behind in part, or in all, &c. then

when the Prior and his Succeſſors to re-enter. The Priory came to the King by ſurrender; who under the Great Seal granted one of the houſes to the Leſſee, and a ſtranger in Fee: Afterwards it was found by Inquiſition, that part of the ſaid Rent of 5 l. 10 s. 11 d. was behind, and then the King before the Office returned, granted the other houſes to J. S. in Fee. It was Reſolved in this Caſe, that becauſe the Condition was intire, giving a Re-entry into all for default of payment of any part, (If it were in the Caſe of a common perſon) the whole Condition ſhould be deſtroyed; But being in the Caſe of the King, the Condition by ſeverance of part of the Reverſion, ſhould not be utterly deſtroyed, but the Condition ſhould be devided, and apportioned. Mich. 31 Eliz. in C. B. *Cook* 5. Part, 101, 102. *Knighters* Caſe.

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5. *Where, upon a Condition broken, the Eſtate ſhall be void* ab initio, *and the Feoffer, &c. adjudged in his former Eſtate, where not; And where a Condition is not to be performed, without notice,* et è contra, *Where to be performed within Convenient time.*

1. IT is regularly true, That he who entreth for a Condition broken, ſhall be ſeiſed in his former eſtate; or of that eſtate which he had when he made the Eſtate upon Condition; But this Rule hath divers exceptions. 1. In reſpect of poſſibility: As if the Husband, ſeiſed in the right of his Wife, makes a Feoffment upon Condition: the Husband dyeth, the Condition is broken; the Heir ſhall enter, and yet he ſhall not have the eſtate of the Feoffer, but his eſtate ſhall vaniſh; and his eſtate ſhall veſt again in the Wife, as it is holden in *Cook* 8. Part, 44. in *Whittingham's* Caſe. 2. In reſpect of neceſſity: As if *Ceſtuy que uſe* after the Statute of *Richard* the third, and before the Statute of 27 H. 8. of Uſes, makes a Feoffment in Fee upon Condition, which is broken; he is now ſeiſed of the Land, whereas before he was ſeiſed of the Uſe; as *Cook* 1. Part, *Inſtitutes* 202. 3. In ſome Caſe the Feoffer ſhall be in of his former eſtate, but not in reſpect of ſome qualities, As if Tenant by Homage Auncеſtrell makes a Feoffment and enters for the Condition broken, he ſhall not be Tenant by Homage Auncеſtrell, becauſe the privity of the Tenure is deſtroyed. And ſo it is; If Tenant for life makes a Feoffment in Fee upon Condition, and enters for the Condition broken; he ſhall be Tenant for life as he was before, but yet ſubject to a Forfeiture; for although that the eſtate be reduced, yet the forfeiture is not purged.

2. A. ſeiſed of divers Lands holden in *Capite*, deviſed parcell of theſe Lands to divers perſons to have and to hold, to them and the ſurvivor of them untill ſuch time, and Term, that 800 l. by them and their Executors were levyed of it, and that to imploy in the preferment of his daughters, and dyed; his ſon and heir took the Will into his hands and entred into the ſaid Lands, and received the profits of them during his life: Afterwards the Deviſees entred into the Lands, and received the profits, and levyed of them 640 l. according to the Will; And if the profits taken by the heir, and which the Deviſees might have taken, ſhould be accounted parcell of the ſaid ſum of 800 l. was the Queſtion. In this Caſe it was Reſolved. 1. That where the words are, untill the ſum of 800 l. ſhall be levyed, that the ſame is as much as to ſay in Law; as untill they ſhould and might be levied, for otherwiſe it ſhould be in the power of them who were to levy the mony, to exclude him in the Remainder, or in the Reverſion to take the profits. 2. That when the Deviſee is put out by the Entry of the heir, that it is in the Election of the Deviſees to have an Action to recover the mean profits, or to re-enter, and retein the Land over untill the entire ſum be levyed; for the other ſhall not take advantage of his own wrong: And in this Caſe It was Reſolved for one point, That although the Deviſees had not notice of the Deviſe; yet the Deviſees ought to have taken notice of it at their perill. Mich. 42 Eliz. in *Curia Wardorum*. *Cook*, 4. Part, 81. Sir *Andrew Corbets* Caſe.

3. Debt was brought upon an Obligation to perform an Arbitrament, between the Plaintiff of the one part, and A. and B. of the other part: *Ita quod arbitrium prædict. fuit et deliberetur utrique partium prædict.* The Defendant pleaded that that Arbitrament was delivered to one of the parties onely. In this Caſe, It was adjudged, That the Action did not lye: for it is reaſon that every one who is ſubject to the penalty, and danger, have notice of the Arbitrament, and that it be delivered to each of them; for without ſuch notice, advantage ſhall not be taken againſt him: and therefore becauſe the Arbitrament was not delivered to both; It was adjudged, that the Action did not lye. *Cook* Trin. 43 Eliz. rott. 1804. in C. B. *Hugates* Caſe, 203.

4. The Lord *Cromwells* Caſe, (which ſee before) was this: A. ſeiſed of a Mannor, to which an Advowſon was Appendant, bargained and ſold the Mannor for good Conſideration to B. and his heirs. There was a Covenant to ſuffer a Recove-

ry, and Levy a Fine to uſes. Provided, That B. ſhould give the Advowſon to A. for his life; and if it happened not void, then one time to his Executors. The Fine was levyed, and the Recovery had accordingly: B. did not grant the Advowſon to A. in his life, but he dyed, and the Condition became void: The ſon of B. entred into the Mannor, and afterwards A. entred for the Condition broken, and ſold the Mannor to the Lord *Cromwell*. In this Caſe it was Reſolved. 1. That it was a Condition. 2. That the Fine Levyed by A. and B. had not extinct the Condition. And 3. That by the death of B. the Condition was broken: And in the Argument of this point, it was agreed for a Rule in Law, That when the Feoffee or Grantee upon a Condition, is to make an eſtate to the Feoffor or Grantor, the Condition is broken. But when the parties by mutuall agreement give a certain time within which the Condition ſhall be performed, and within the time he who ought to perform the Condition dyeth, ſo as it becomes impoſſible by the Act of God; there the Eſtate remains abſolute diſcharged of the Condition. And in that Caſe it was alſo holden. That when an Eſtate is to be made by the Feoffee upon Condition to a ſtranger, the Feoffee ought to make it within convenient time, and the eſtranger needs not to make any requeſt in that Caſe. *Cook* 2. Part, 70. in the Lord *Cromwells* Caſe.

5. A Parſon promiſed, that he would make a good and Lawfull eſtate and aſſurance in Law of a Rectory, and diſcharge of former bargains and ſales done by him during the Joynt-lives of him and the Plaintiff, as by the Learned Counſell of the Plaintiff upon requeſt ſhould be adviſed; In *Aſſumpſit* brought, it was moved, If the advice ſhould be given to him immediately, who ſhould make the Eſtate, or to the Plaintiff. It was Reſolved, that it was the moſt fit, that the Counſellor ſhould give his Counſell to him with whom he was of Counſel, and that he make known the ſame to him who is to make the Eſtate; for otherwiſe, perhaps he might miſtake it; and would have notified the ſame: But in this Caſe, It was Reſolved; That the Counſellor cannot give notice without requeſt. Paſc. 35 Eliz. in B. R. *Cook* 5. Part, 20. *Higginboorns* Caſe.

6. A man made a Feoffment in Fee of Land, and for the better aſſurance, bound himſelf in an Obligation, that he and his ſon ſhould do all ſuch Acts as ſhould be deviſed by the Obligee: The Obligee deviſed a Deed of Releaſe, and the Father delivered it as his Deed, but the ſon would not deliver it; but being unlearned, deſired the Obligee to read it unto him, or to have the Deed read unto him, which he refuſed to do. And brought an Action of Debt againſt the Father upon the Obligation. But it was Reſolved in this Caſe, That the ſon was bound to deliver it at his perill, becauſe that the Father had bound himſelf that his ſon ſhould do it, and he took upon him that his ſon, though a ſtranger, ſhould do it. *Cook* 2. Part, 19. *Maner's* Caſe.

7. Debt brought upon an Obligation, the Condition of which was, That if the Defendant deliver to the Plaintiff one Obligation of the ſum of 10 l. wherein the Plaintiff ſtood bound with one T. to the Defendant, for the payment of 5 l. and alſo if the Defendant do acknowledge ſatisfaction of a Judgment upon the ſaid Obligation; And alſo deliver true notes of all Bills of charges as concern the ſame, that then, &c. The Defendant pleaded *Quod non fuerant aliquæ Billa miſa rum pro et con. fact. prædict.* and did not anſwer to the reſidue of the Conditions. It was adjudged againſt the Defendant: for he ought to have performed the reſidue of the Condition within convenient time; and in this Caſe, It was further Reſolved. 1. When the Act by the Condition of the Obligation to be done to the Obligee, is in its nature a tranſitory Act, as payment of mony, and no time is limited, although a place be expreſſed, the Act ought to be performed within convenient time; And a difference was taken between the concurrence of the Obligor and a ſtranger, and the Obligor and the Obligee. As if I be bound to enfeoff a ſtranger, and no time is appointed, although that the concurrence of the Obligor and Obligee be requiſite, the Obligor ſhall not have convenient time during his life, but ought to do it preſently, for the Obligor hath taken upon him to do it to a ſtranger, and it may be done without the concurrence of the Obligee. But when the Obligee himſelf is party, and the Act cannot be done without his concurrence, there it is reaſon that the Obligor have time during his life, if the Obligee doth not haſten it upon requeſt. 2. It was Reſolved, That when the Act which the Obligor by the Condition ought to do, doth not in any manner concern the Obligee, nor his benefit, but is to be done by the Sole Act and Labour of the Obligor, and no time is limitted in the Condition when the ſame ſhall be performed, there the Obligor hath time during his life to perform it, if it be not haſtned by requeſt. *Cook* 6. Part, 30. *Bothies* Caſe. See *Cook* 2. Part, *Cromwell's* Caſe. *Cook* 1. Part, *Inſtitutes* 208, &c.

8. In Debt brought upon an Obligation for non performance of Covenants; the Caſe was: Whereas Sir *Robert Brown* was ſeiſed of the Mannor of G. with the Advowſon Appendant, and Sir *Robert Strowd* was ſeiſed of the Mannor of D. in the ſame County. It was agreed betwixt them, that there ſhould be an Exchange betwixt them of the

ſaid

ſaid Mannors: and becauſe the Mannor of G. was the better, *Strowd* Covenanted with Sir *Robert Brown* and his ſon, to pay 1200 l. to the Father for the Demeſnes of the ſaid Mannor of G. and that at *Michaelmas* next there ſhould be a mutuall Entry into the ſaid Mannors, and that in the mean time they ſhould take the profits of their own Mannors; and the Plaintiffs declared that they had performed all the Covenants which were to be performed on their parts, and the Defendant had not payed the 1200 l. The Defendant by proteſtation that the Plaintiff had not performed the Covenants ſaid, That the Plaintiff after *Michaelmas* ſold the ſaid Mannor of G. to J. S. and his heirs; upon which the Plaintiff did demur in Law. It was ſaid for the Defendant, that the Action could not lye, for the contract is Executory, for there is no mony to be paid, untill he hath the Mannor: for the Covenant is *pro manerio*, and (*pro*) implies a Condition, and being Executory on the one party, it ſhall be alſo Executory on the other party; alſo there is no time Limited when the payment ſhall be made; And it being a tranſitory Act, ought to be done within convenient time. And in this Caſe, the Law will appoint no time, becauſe the other party hath diſabled himſelf to perform his part. On the other part it was ſaid, That the Act here is to be done upon an indefinite time; and the Defendant is to do the firſt Act; and the Defendant ought to procure Counſell to adviſe, for mutuall aſſurances were to be made, and the one ought not to be a Carver to the other: And for the time, It ought to be before *Michaelmas*, for otherwiſe the Plaintiff ſhall be enforced to keep his Mannor all his life, and ſhall be hindred of the Sale of it for the payment of his debts, and by the Articles every thing was to be done before *Michaelmas*. And Mich. 37 in B. R. *Mills* and *Parſon's* Caſe was: A man Covenanted in Conſideration of 4 l. Rent, to be granted to him, payable at *Michaelmas*, and our *Lady*-day, yearly to levy a Fine of a Mannor to the uſe of, &c. and the aſſurance of the firſt is not made before *Michaelmas*; and it was Reſolved, That the Covenant was not performed; for the grant of the Rent ought to be before *Michaelmas*, otherwiſe he could not have the benefit intended. The Caſe was not Reſolved, but adjourned. Mich. 2 Car. in B. R. Sir *Robert Brown* and Sir *Robert Strowds* Caſe. *Popham*, 198, 199.

9. A man ſeiſed of a Wharf and houſe holden in Burgage, Deviſed the ſame to his Wife and her heirs, upon Condition that his Wife, by the advice of Learned Counſell, and in convenient time, ſhould give and aſſure all the ſaid Lands, to maintain a Free-School, and Almeſmen, and Almeſwoemen for ever; And that his Wife ſhould have the Iſſues and profits of them during her life, bearing the charges of the ſame School; and made his Wife his Executrix, and dyed. She entred, and was ſeiſed accordingly, and afterwards ſhe made a Leaſe for years of the Lands, the heir entred for the Condition broken. It was in this Caſe Reſolved. 1. That the Condition was not void, for the Teſtator had demiſed, That Councel Learned ſhould adviſe how the Lands and Tenements ſhould be aſſured or maintenance, and continuance, &c. which might well be. 1. By making them a Corporation by the Kings Letters Patents, and then by Licence to aſſure the Lands and Tenements to them. 2. It was Reſolved, That the Condition was broken, becauſe the Wife had not done it within convenient time, and becauſe ſhe had diſabled her ſelf by the making of the Leaſe for years, to perform the Condition. *Cook* 1. Part, 22. *Porter's* Caſe.

10. A man was bound to make an Aſſurance before the firſt day of *January*, and the laſt day of *December*; the Obligee an hour before Sun-ſetting came to the Obligor with a Deed ready to be ſealed, and prayed him to Seal the ſame; who ſaid unto him, that he was a man unlearned, and that he would ſhew it to his Councell, and then Seal, but he did not Seal it. It was moved that the Obligation was not forfeit, for when a thing is not to be done but upon requeſt, then he who is to make the requeſt, ought to leave ſufficient time to perform the Condition which is not here done, for by his late requeſt it is become impoſſible to be performed; for before his Counſell could peruſe it, the time would be paſt: But it was the Opinion of all the Juſtices, That the Obligation was forfeited, becauſe he did not ſeal it preſently, for when he knew of the laſt Inſtant of time, he ought to have had his Councel ready with him. Hill. 26 Eliz. in C. B. See *Cook* 2. Part, *Manſer's* Caſe. *Cook* 5. Part, *Slingsbyes* Caſe. acc.

11. An Award was made, That the Defendant ſhould pay to the Plaintiff 8 l. or 3 l. & Coſts of Suit as ſhould appear under a Note of the Attorneyes hand of the Plaintiff. In this Caſe, It was adjudged, That although the Attorney, as in ſome reſpect, he was a ſervant to his Maſter; yet to this purpoſe he is a meer ſtranger; and therefore the Plaintiff was not bound to make any tender of that note, but the Defendant ought to have required the Note and coſts of Suit of him, that he might have his election to pay the 8 l. or the 3 l. and coſts of Suit: And in this Caſe, It was agreed by the whole Court, That when it is a thing which lyeth in the knowledge of the Plaintiff, there he ought to make the Tender and give notice: but in the principall Caſe it did not lye in the knowledge of the Plaintiff, and he could not compell the Attorney to do it. Hill. 17 Car. in B. R. *Dowell* and *Moſon's* Caſe. *Mar. Rep.* 156.

6. *Where*

6. Where the performance of a Condition in pleading is to be averred; where not.

1. NOte: In all Caſes, when an Intereſt or Eſtate beginneth upon a Condition precedent, be the Condition or act to be performed by the Plaintiff, or Defendant, or any other, and be the Condition in the affirmative or negative, there the Plaintiff ought to ſhew that in his Count, and aver the performance thereof: For in ſuch caſe, the Intereſt or Eſtate commenceth in him by the performance of the Condition; and is not in him till the Condition be performed. But it is otherwiſe, when the Intereſt or Eſtate paſſeth preſently, and veſts in the Grantee; and is to be avoided by matter *ex poſt facto*, or Condition ſubſequent, be the Condition or act to be performed by the Plaintiff, Defendant, or other, and be the Condition in the affirmative or negative; for in ſuch caſe the Plaintiff was Count generally, without ſhewing the performance thereof; and this ſhall be pleaded by him who will take advantage of the Conditions or matter *ex poſt facto*, and not by the Plaintiff. *Cook* 7. Part, 10. *Mghtreds* Caſe.

2. The Grange and Ferme of *Barton* were by Indenture Leaſed to *Henry Beinſhin* and *Elienor* his Wife for their lives, the remainder to *William Beinſhin* their ſon for his life, *ſi ipſe inhabitaret, et reſidens eſſet omino de et ſuper prædict. Grangiam.* It was in that caſe ſaid, That the Defendant in his plea in barr ſhewed the time of his Entry, and his abode thereupon. But yet it was Reſolved, That the barr was not, notwithſtanding he did not do it, becauſe by Common Intendment it ſhall be taken, that his Entry was immediate after the remainder fell to him; and if it were not ſo, the Plaintiff ought to have ſhewed it in his Count, and not the Defendant in his Barr. Paſch. 4 E. 6. *Plow. Com.* 26. *Calthirſt* and *Beinſhins* Caſe. And ſee there, 30. That if I grant to one, That when he ſhall do ſuch an act, that he ſhall have a Rent-charge out of my Land; In that caſe he ſhall not avow for the Rent, unleſs he ſhew that he hath performed the Condition; for that the performance of the Condition enables him to have the Rent. But if I grant to one a Rent-charge out of my Land, upon Condition, That he ſhall do ſuch a thing, here he ſhall not avow for the Rent, before he hath performed the Condition; for the Condition is ſubſequent, and goeth in defeaſance of the Eſtate, which he who would have the Eſtate to continue, ought not to ſhew, for that it makes againſt him. *Plow. Com.* 30. *Ibid.*

3. Aſſumpſit. The Plaintiff declared, That the Defendant promiſed, that if the Plaintiff *ad inſtantiam Defendentis* would marry the Defendant's daughter, he would pay unto him 20 l. and give him 20 French Crowns towards their Wedding-Dinner, and alledges *de facto*, That he married the Defendant's daughter, and had required him to pay the ſaid 20 l. and the ſaid 20 Crowns; and he had not paid it. Upon Non-Aſſumpſit, It was found for the Plaintiff. It was moved, in ſtay of Judgment, That the promiſe was but conditional, if he *ad inſtantiam* of the Defendant married his daughter: And he ſaith, That he married her; but he doth not ſay, *ad inſtantiam Defendentis*: and ſo being a Condition precedent, he hath not averred the performance thereof. But it was holden by the whole Court, upon this agreement, To marry her *ad inſtantiam Defendentis*, and he marrying her, that it ſhall be intended *ad inſtantiam Defendentis*; without averring, That he afterwards at the Inſtance of the Defendant married her. Trin. 6 Car. in B. R. *Poyns* and *Poyns* Caſe, 5th. 1. Part, 141.

Confirmation.

1. What words in a Deed ſhall make or amount to a Confirmation; What not.

1. A Leaſe was made to a woman for years, who took husband, and dyed; the husband poſſeſſed of the Term, the Leſſor by Deed Indented, did grant and demiſe all that his Ferm in B. and alſo another Tenement there, with all Lands, &c. now in the Tenure of J. S. who was the firſt husband of the Leſſee to *William W.* To have and to hold, all the ſaid Ferm and Tenement, with all the recited premiſſes to the ſaid *W. W.* and his Aſſigns, from the end and expiration of the Term of years granted to the ſaid J. S. for 63 years. Afterwards, J. S. took another wife, and made her his Executrix, and by his Will deviſed to her his Term, and dyed; and the Wife entred and claimed by the deviſe; and afterwards ſhe took another husband, and ſhe and her husband being in poſſeſſion of the ſaid Term, took a Leaſe for term of their lives, of him who had the Fee-ſimple; whereby the Term was drowned. *W. W.* ſuppoſing the firſt Term was en-

dod,

tted, and that the ſecond Term did now begin, entred upon them. Divers Exceptions were taken; 1. Becauſe the ſecond Leaſe was made to begin after the end and expiration of the ſaid Term of years granted to J. S. and the firſt Leaſe was made to *B.* and *A.* his Wife, and came to J.S. by means of his entermarriage with *A*; and therefore it could not be ſaid, that the Term was demiſed to J. S. But to that Exception it was Anſwered and Reſolved, That although the firſt Term was conveyed to J. S. by Act of Law, *ſcil.* Intermarriage, yet the words were ſufficient to limit a certain commencement of the ſecond Term: for it is not to be taken by the word [*dimiſſorum* to J. S.] that it ought to be intended of neceſſity, that the firſt Term was granted to J. S. But the words [*dimiſſorum* to J. S.] may be fitly uſed when the Term was granted to another, and aſſigned over to J. S. And the Exception taken to the Declaration was, That it could not be ſaid, that he in the Reverſion could make a Leaſe, as the Plaintiff hath ſuppoſed; for during the time that the Leſſees were poſſeſſed by the firſt Leaſe; the ſecond Leaſe took not effect: but it ought to have been alledged, That they firſt made a ſurrender, and that thereupon he in the Reverſion made a new Leaſe. Alſo it is not alledged to be *per Chartam*. But in this caſe it was holden, That by the words in the Deed, *ſcil.* Demiſe and grant, the ſame did enure by way of Confirmation, without other words to make a Confirmation. 1 Eliz. *Adams* and *Wrottesley*'s Caſe. *Plo. Com.* And ſee 2 Eliz. *Dyer* 178. acc.

2. Tenant for life the remainder in tail, joyned in a Fine *Sur Conuſans de Droit* to *A.* who rendred a Rent-charge of 40 l. *per annum* to Tenant for life: he in the Remainder dyed without Iſſue; he in the ſecond Remainder entred: Tenant for life diſtrained for the Rent. It was adjudged, That he might well diſtrain, for that the Fine was no diſcontinuance, for that every one gave that which they might lawfully give: for firſt it ſhall be ſaid to be the grant of Tenant in tail, and afterwards the Confirmation of Tenant for life, and ſo ſhall be no forfeiture. And in that Caſe it was agreed, That if there be Tenant for life the remainder in tail, and the Tenant for life and he in the firſt Remainder, make a Feoffment by Deed, that the ſame is no diſcontinuance, for every one gives that which he may lawfully give; and although that he in the firſt Remainder dyeth without Iſſue, yet the Feoffee ſhall hold the Land during the life of the firſt Tenant for life, becauſe his joyning in the Grant ſhall but enure by way of Confirmation, and it ſhall be the grant of him in the Remainder; but if the Feoffment were by word, then the ſame ſhall be the ſurrender of the Tenant for life, and the Feoffment of him in the Remainder. *Cook.* 1. Part, 76. *Bredons* Caſe.

3. Leſſee for life, and the Leſſor, joyned in a Leaſe for years by Indenture; the Leſſee dyed, the Termor committed Waſte; the Leſſor brought an Action of Waſte againſt him. It was holden in that Caſe, That it was but the Confirmation of him in the Reverſion. 7 Eliz. *Dyer* 234. *Newdigates* Caſe.

4. *A.* Tenant for term of life, the remainder to *B.* in Fee; both, by Deed Indented, joyned in a Leaſe to *Treport*. It was a Queſtion, Whether the ſame ſhould be adjudged in the Law, the Leaſe of them both? And it was Reſolved, That it was the Leaſe of *A.* during his life, and the Confirmation of *B*; and after the death of *A*, it was the Leaſe of *B*, and the Confirmation of *A*: and becauſe the Plaintiff declared of a Joynt-Demiſe of *A.* and *B.* It was adjudged againſt the Plaintiff. And in that caſe, *Bredons* Caſe, *Cook* 1. Part, was agreed to be Law. And, 2. In that caſe it was Reſolved, That although that the Leaſe was by Deed Indented, that it ſhould be no concluſion; for when the Deed doth enure by way of paſſing of an Intereſt, (as in the caſe it doth) it ſhall not be taken by any Concluſion. See *Cook* 1. Part, *Inſtiutes*, 45. Hill. 44 Eliz. in C. B. rott. 1459. *Ellis* and *Chownes* Caſe. acc. Mich. 37 Eliz. in B.R. *Cook* 6. Part, 15. *Treports* Caſe.

5. In a Replevin, the Iſſue being joyned upon a Surrender made by the Leſſee for years to the Leſſor. Upon the Evidence, it appeared by Indenture, That the Leſſor had but an Eſtate in tail in the Land, the Reverſion to the Queen in Fee; and the Leſſor Covenanted and granted to the Leſſee, That he ſhould have and hold the Land to him and his wife that then was, and to any other wife which he ſhould marry, during the life of the Leſſor, without paying any Rent, but no Livery was made upon that Deed. And if the ſame ſhould enure as a Surrender of the Term, or as a Confirmation to the Leſſee to enlarge his Eſtate, during the life of the Leſſor, was a Queſtion? It was Reſolved by 3. Juſtices, That it was neither a Surrender of the Term, nor a Confirmation, but a meer Covenant onely: But *Weſton* held it to be a Confirmation, by the word, *Grant*. Paſch. 10 Eliz. *Dyer* 272. *Sackfords* Caſe.

6. A Termor for 1000 years made a Deed of Feoffment by the words, *Dedi, Conceſſi, et Confirmavi*, and made a Letter of Attorney to make Livery; and afterwards the Attorney made Livery, and gave Seiſin, the Leſſor being upon the Land, not contradicting it. It was holden in that caſe, That the Term did not paſſe by the words, and enure as a Grant; but the Lands paſſed by the Livery and Feoffment, and ſo was a forfeiture.

Paſch. 21 Eliz. *Dyer* 362. But ſee *Cook* 2. Part, 31. *Bettisfords* Caſe. Where a Leaſe was made of a Meſſuage for years, and of divers Lands; and afterwards, the Leſſor entred into a cloſe parcell of the Lands Leaſed, (the Leſſee for years being in the houſe) and made a Feoffment of the Meſſuage and Lands herewith demiſed, and made Livery in the cloſe, that, in that caſe, the Livery, and alſo the Feoffment was void; for that the Leſſee being in the poſſeſſion of the houſe, the ſame is his Caſtle; and is the poſſeſſion alſo of the Lands deviſed with the houſe.

7. Note: It is holden in the Old Books, 7 E. 3. *Fitz. Confirmation* 23. If the Leſſor recites, That where his Leſſee holdeth for years, that his Will is, that he ſhall hold for life, the ſame is a good Confirmation, without other words, 19 H. 6. 44. If a man makes a Deed by *Dedi Conceſsi et Confirmavi*, to one who is ſeiſed of the Freehold, the ſame ſhall enure as a Confirmation, and not as a Feoffment, 22 H. 6. 42. One Joynt-Tenant enfeoffeth another, the ſame ſhall not enure as a Feoffment, but as a Confirmation. So 10 E. 43. If 2. Coparceners be, and one enfeoffeth the other by Deed, containing *Dedi et Conceſsi*, it ſhall enure as a Confirmation. And if a man be Tenant at Will, and a Deed is made to him by him in the Reverſion, containing the words, *Demiſe, and grant, and to Farmlet, to him for his life*; the ſame ſhall enure as a Confirmation. And ſo it was holden in *Baſſet* and *Mauxells* Caſe. Quære. And ſee *Litt.* 121. b. That the words, *Dedi* and *Conceſsi*, ſhall have the ſame Conſtruction, and enure as the word *Confirmavi*: As if I be diſſeiſed of a Carve of Land, and I make ſuch a Deed, *Sciant præſentes, quod Dedi* to the Diſſeiſor, *vel Conceſsi* to the diſſeiſor the ſaid Carve, and deliver the Deed to him without any Livery of the Land, the ſame is a good Confirmation, and as ſtrong in Law, as if it had had the word *Confirmavi* in it. *Cook Inſtitutes* 154. a. acc. But yet I conceive, That if the diſſeiſee had delivered the Deed upon the Land, It ſhould be taken as a Feoffment, and not as a Confirmation; for he ſhall be adjudged by his entry in his Remitter; and then the delivery of the Deed upon the Land, will amount to a Livery in Law. See *Br. Confirmation*, 17. acc.

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2. *What ſhall be ſaid a good Confirmation; and by whom made, and who not: And where Leaſes, or other Grants made by Biſhops, Deans and Chapters, Parſons, with Confirmation, ſhall be good; where not: and who muſt Confirm the ſame. And ſo of Prebends or other perſons.*

1. THis Caſe was put to the Juſtices of the Court of Common-Pleas: An Alien purchaſed Lands, and, before Office found, the Queen made him a Denizen, and then confirmed his Eſtate. The Queſtion was, Who ſhould have the Lands? Some of the Juſtices held, That he ſhould take onely to the uſe of the Queen; and then the Confirmation is void. And to that purpoſe, *Kings* Caſe, Paſch. 11 Eliz. *Dyer* 283. If a man Enfeoff an Alien and a Denizen to his uſe, That the Queen ſhall have the moyety: And ſo it was ſaid, That if the Freehold ſhould be in the Alien before Office found, If a Treſpaſſe be committed, who ſhall puniſh it; for that the Alien ſhall have no Action. But it was the Opinion of the Lord *Anderſon*, and ſome other of the Juſtices, and of divers Serjeants, That it is a Rule in Law, That in every Feoffment there is a Feoffor and a Feoffee; and if there be a Feoffee, he muſt of neceſſity take: and therefore, till Office be found, it muſt of neceſſity be in the Feoffee: and therefore in the principal caſe, the Confirmation is good. Mich. 28 in C. B. *Goldeſbr.* 29.

2. Land was given to husband and wife, and the heirs of their two bodies, the remainder to the husband in Fee; The husband levied a Fine, with Proclamation to the King; who by his Letters Patents gave the Land to J. S. and his heirs; the husband dyed; the wife within the 5. years entred, claiming her Eſtate. J. S. dyed, his heir reciting the ſpecial tail granted to the husband and wife, and that the wife was ſeiſed of an Eſtate tail, confirmed to the wife her Eſtate, *Habendum* the Land to her and to the heirs of the body of her husband begotten, who was deceaſed; the Wife having iſſue then a ſon called *A.* begotten betwixt her and her husband, and dyeth. *A.* the ſon enters, and afterwards accepts a Fine *Sur Conuſans de Droit tantum*, from two ſtrangers, with a Render for 99. years after the death of *A*, if *B.* his wife ſo long live; the Proclamations paſſe; *A.* dyeth, having Iſſue two ſons; the Eldeſt in Ward to the

the King at his full age, and before Livery, Covenants to ſtand ſeiſed to the uſe of himſelf, and the heirs males of his body; the eldeſt ſon dyeth without Iſſue male, having a daughter within age: The Queſtion was, Whether the Land did belong to the daughter, or to the younger ſon? It was Objected in this caſe, amongſt other things, That the Iſſues ſhould be inheritable by the ſaid Confirmation: For by the Confirmation, J. S. had excluded himſelf and his heirs by expreſs words, as long as the wife had any Iſſue of their body to claim the Land: and it ſhould be againſt reaſon, that J. S. who made the Confirmation after the death of the wife, ſhould enter into the Land againſt his own Confirmation. And again it was ſaid, That the Confirmation did alter the quality of the Eſtate of the wife; for, whereas J. S. after the death of the wife might have entred and barred the heirs in tail; now by the Confirmation he had added this enlarging quality, to make all the heirs of the Tail inheritable. But it was Reſolved, That the Confirmation wrought nothing; for when the wife entred and was ſeiſed in tail, no Eſtate was left in the Conuſee, but onely a poſſibility; and then ſuch poſſibility did not paſſe by ſuch Confirmation: and then when the husband had the Remainder in Fee, the Confirmation made by the heir of J. S. could paſſe nothing in reſpect of the poſſibility, which was gained by the Fine before the continuance of the Eſtate-tail, but that which was drawn out of the remainder in Fee; and that could not be, 1. Becauſe that no new Eſtate is created by the Confirmation, but the old Eſtate confirmed, and therefore it cannot diſcend. 2. It was Reſolved, That the Confirmation could not add a diſcendable quality to him who is diſabled to take by diſcent. And it was agreed, That *Confirmatio aut eſt proficiens, Creſcens*, or *Diminuens*; and this was none of them; for that the wife had as perfect, and as large Eſtate before the Confirmation as ſhe had afterwards. *Cook* 9. Part, 138, 139. *Beaumonts* Caſe.

3. In Treſpaſſe, the Defendant pleaded, That the Plaintiff being within age, made a Feoffment in Fee of the Lands to the Father of the Defendant, rendring Rent, and that the Plaintiff by Indenture confirmed *Tenementum prædict. &c. Habend. ſibi et hæredibus*. And that his Father dyed ſeiſed, and the Lands diſcended to him. It was holden in this caſe, That upon his own ſhewing, the Feoffment was void; for being made by an Enfant, and by a Letter of Attorney as it was pleaded to be, it was a Diſſeiſin: and alſo becauſe it was not averred, That the Defendant had any thing in the Land at the time of the Confirmation upon which it might enure; and the Land did not paſſe here: but where a Confirmation enures by way of enlargement: neither was it averred, That the Plaintiff was of full age at the time of the Confirmation. And for theſe cauſes, Judgment was given againſt the Defendant. Mich. 2 Ma. *Dyer* 109. *Ragways* Caſe.

4. The Prior of St. *John* of *Jeruſalem* and his Confreers, made a Leaſe for years to 3. by Indenture at Will; one of the Leſſees dyed: the Leſſor reciting the death of them by Deed, made an Eſtate to the Survivour, To have to them and their heirs; but made no Letter of Attorney to make Livery. It was adjudged, That by the ſurrender of the Deed, the Eſtate of Will was determined, ſo as the ſecond Grant could not enure now to a Confirmation. Hill. 10 Eliz. *Dyer* 269. It was a Quære in that caſe, If the death of one of them did not determine the Eſtate at Will. See *Cook* 5. Part, 10. in *Henſteads* Caſe, Reſolved, That the Eſtate at Will is not determined.

5. Father and Son; the Father ſeiſed in Fee, made a Feoffment to the uſe of the ſon and his heirs, upon Condition: Afterwards the Father and Son joyned in a Grant of a Rent-Charge; the Condition was broken: the Father entred. It was Reſolved, That he ſhould hold the Land charged. It was Objected, That the Deed was pleaded as a Confirmation; and a Confirmation cannot alter the Quality of the Eſtate, unleſs it inlarge the Eſtate. In that caſe this difference was taken; When the Eſtate of him to whom the Confirmation is made, is upon an expreſs Condition; there the Confirmation made to him cannot alter the Eſtate: but if ſuch Feoffee upon Condition make a Feoffment over, ſo as his Eſtate is ſubject to a Condition contained in another Conveyance, but no Condition is expreſſed or annexed by the Feoffor to his heir; there, a Confirmation of his Eſtate which he hath by abſolute words, doth extinct the Condition which was annexed to the Eſtate of the Feoffee: As, if Leſſee for life grants a Rent-charge in Fee, the ſame is abſolute; but in reſpect of the Eſtate of the firſt Grantor, it is determinable: and if he in the Reverſion Confirm ſuch a Grant, the Confirmation is good: but if the determination of the Rent had been expreſſed by the Deed, the Confirmation had not made it abſolute: As if Leſſee for life had granted a Rent to one and his heirs during the life of Leſſee for life, and afterwards the Leſſor confirm the Rent to the Grantor and his heirs, and the Tenant for life dyeth, the Rent ſhall ceaſe, for that a Confirmation cannot enlarge that which is determinable upon an expreſs Condition. *Cook* 1. Part, 111. *Albaniet* Caſe.

6. Lands are given to two men, and to the heirs of their two bodies; the Donour confirms their Eſtates in the Land, To have to them and

heir heirs: The queſtion was, if they were Joynt-Tenants, or Tenants in Common: Some were of Opinion, That they were Joynt-Tenants of the Fee, becauſe their poſſeſſion was joynt. Others held that they were Tenants in Common, becauſe when the Eſtate which comprehends ſeverall Inheritances is confirmed, the confirmation ought to ennure according to their ſeverall Inheritances which is the moſt durable Eſtate; and ſo they ſhould be Tenants in Common. Quære. For the Caſe is not Reſolved. *Cook* 1. Part, *Inſtitutes* 229.

7. A Prebend made a Leaſe for 70 years, The Biſhop, and Dean, and Chapter, reciting the Leaſe confirmed *dimiſſionem prædict. fact.* for 51 years, *et non ultra.* And after, the Prebend made another Leaſe to begin after the determination of the firſt Leaſe. It was adjudged, That the confirmation did extend to the whole Term, and the words (for the Term of 51 years) came too late; And the Leaſe being for 70 years, it ſhould be repugnant to confirm *dimiſſionem prædict.* for 51. years. But if he had confirmed the Lands for 51 years, the ſame had bin good, for that had not bin repugnant to the Confirmation: And there it is ſaid, That if a Prebend makes a Leaſe for years, a Confirmation may be made of the Lands for a leſſe number of years, becauſe the years are ſeverall, though the Term be one. But if a man makes a Leaſe for life, or a gift in tail, or in Fee; a Confirmation of the Land to the Leſſee, made for an hour, is good for ever; becauſe the eſtate of Free-hold or Inheritance is entire. See *Litt.* 220. b. *Cook* 5. Part, 81. *Ford's* Caſe.

8. A Woman is Tenant in Dower, and ſhe granteth over her eſtate, he in the Reverſion having before confirmed her eſtate, to have and to hold to her for her life; and afterwards the Aſſignee commits Waſte, and the heir brings an Action of Waſte againſt the Tenant in Dower; and ſhe pleads the Confirmation to have and to hold the Land for the Term of her life: In this Caſe, notwithſtanding the Confirmation, It was adjudged, That an Action of waſte ſhall be maintainable againſt her after her Aſſignment made of her Eſtate, for the confirmation doth not enlarge her Eſtate, and therefore it cannot take away the deſcendable quality to the heirs, to have an Action of Waſte againſt her, after her Aſſignment made of her Eſtate. See 38 E. 3. 29. vouched in *Cook* 9. Part, 142. in *Beaumonts* Caſe.

9. King *Ed.* the firſt, by his Letters Patents, Granted to the Biſhop of Saint *Davies* and his Succeſſors, 34 Churches in *Wales* within his Dioceſſe, ſo as the Biſhop and his Succeſſor might appropriate them or any of them to their Church of Saint *Davies*, and *Aberguilly*: the Biſhop afterwards erected and eſtabliſhed a Collegiate Church in *Landwybrewy*, being one of the 34 Churches, and Ordained Prieſts, Channons, and Deacons, and of them made Prebendaries, and annexed and appropriated 13 Churches unto them, and reſerved to him and his ſucceſſors *locum in Choro, et vocem in Capitulo, Viſitationem, &c.* In which the Biſhop did not purſue the power given him by the ſaid Letters Pattents. King *Edward* the third having ſome doubt of the validity of the Erection of the ſaid Colledge by his Letters Pattents granted and confirmed to the Biſhop of Saint *Davies* and his Succeſſors, All that which his predeceſſors had done in the premiſes, notwithſtanding the Statute of *Mortmaine*; It was holden in that Caſe, That the ſaid Grant and Confirmation could not make the ſaid Colledge which wanted a Legal Foundation, good. And yet by the ſaid Letters Pattents, the ſaid Colledge of *Landwybrewy*, continued a Colledge in Reputation, untill 1 E. 6. and the ſaid Colledge was given to the King by the Act of 1 E. 6. becauſe it had the Countenance of the Kings Letters Pattents, although for the Cauſe aforeſaid, the ſaid Letters Pattents were of no effect. Mich. 10 Eliz. *Dyer.* 267. *Cook* 4. Part, 107. in *Adams* and *Lamberts* Caſe. acc.

10. Note, If a Biſhop be Patron of a Church, that the Biſhop cannot make any grant good, made by the Parſon, or other, by Licence precedent, or Confirmation ſubſequent, to bind the Succeſſor, without the Dean and Chapter, *Cook* 1. Part, *Inſtitutes* 300. And therefore ſee the Caſe, where a Prebend in a Cathedrall Church, made a Leaſe of parcell of his Prebendary for years, though it was confirmed by the Dean and Chapter, yet becauſe it was without the aſſent of the Biſhop, who is Patron and Ordinary of every Prebend, the Leaſe was holden void. Paſc. 33 H. 8. *Dyer.* 60. See 2. *Ma. Dyer.* 107. acc. where a Prebend of the Cathedrall Church of *Chicheſter*, made a Leaſe by Indenture; where the words were, that he with the aſſent of the Biſhop and Dean, and Chapter of the ſame Church made the Leaſe; yet becauſe the Seal of the Biſhop and Dean was not put to it, it did not amount to ſo much as a Confirmation, but the Leaſe was void.

11. A Parſon *Anno* 9 Eliz. demiſed his Reſtory to the Patron for 50 years, who 14 Eliz. by Deed Aſſigned the ſame over; the Biſhop confirmed the Leaſe, 17 Eliz. in the life of the Leſſor. It was Reſolved in this Caſe. 1. Becauſe the Leaſe was made before the Statute of 13 Eliz. and ſo not within the ſaid Act, The Confirmation after the ſaid Act to perfect the ſaid Leaſe, was not within the purview and intention of the ſaid Act. 2. It was Reſolved, That the Grant made over by the Patron, did imply in it ſelf as well a Grant of the

the Term as a Confirmation of the ſame Term. And ſo, ſee in this Caſe. That a Deed made of one thing, to one and the ſame perſon, by one and the ſame perſon, and at one and the ſame time, ſhall enure to two ſeverall purpoſes, to a Grant of an Intereſt, as Leſſee, and to a Confirmation of the ſame Intereſt as Patron. 30 Eliz. in *Scaccario*, *Hodges* and *Mearings* Caſe. See *Cook* 4. Part, in the Caſe of Eccleſiaſtical Parſons. acc.

12. The Deanery of *Ferns*, which is a Donative, being void; the King gave the ſame by his Letters Pattents to J. S. without Limitation of any eſtate; J. S. is deprived by Sentence of the Biſhop of F. becauſe he was a meer Layman; Afterwards the King Granted the Deanery to J. D. during his life; The Biſhop of F. made a Leaſe of a Mannor parcell of his Biſhoprick to A: J. D. Dean, made B. being a Layman, his Subſtitute, to give his aſſent to all Leaſes, and Grants; and he and three Prebends (the Chapter conſiſting onely of a 11. perſons) fixed the Chapter-Seal to a Confirmation of the ſaid Leaſe made to A. which Confirmation was made in the name of the Dean and Chapter Afterwards, three other Prebends, at three ſeverall dayes, by themſelves, ſubſcribed their names to the ſaid Confirmation: the Biſhop dyed. Amongſt many other points, In this Caſe, it was Reſolved, That the Confirmation was not good, and that for divers Cauſes. 1. Becauſe it was made by a Subſtitute, who was a ſtranger to the Chapter; and therefore void, For it is a Rule in *Juſtinians Inſtitutes* Lib. 1. Cap. *de Ejectionibus*, *Abſens non poteſt demandare votum ſuum niſi uni de Capitulo*; *et*, *Oportet*, *quòd Procurator ſemper ſit inſtitutus de Collegio*. 2. Becauſe the major part did not give their aſſent for the Dean; and, the Major part of the Corporation make the Corporation. 3. Becauſe they ought to put their Seal, and give their aſſent in one place, and at one time: for the Leaſe ought to be confirmed *ex aſſenſu*, *et conſenſu* of them *capitulariter congregat.* in a place certain, and that is the Chapter-houſe; and becauſe the Confirmation was not ſo, the ſame was holden void. See Sir *John Davies*'s Reports, The Caſe of the Dean and Chapter of *Ferns*. And ſee 4. *Ma. Dyer*. 145. acc.

13. If a Biſhop have two Chapters (as there may be two or more Chapters unto one Biſhoprick) both the Chapters muſt confirm the Leaſes made by the Biſhop: but if one of the Chapters after the making of the Leaſe be diſſolved, there a Confirmation made by the Chapter which is in being, is ſufficient to make the Leaſe good; and in ſuch Caſe, there needs not any Confirmation of the King, who is the Supream Ordinary of all Biſhopricks in *England*. 11 Eliz. *Dyer*. 282. *Cook* 1. Part, *Inſtitutes* 301.

14. If a Dean of a Collegiate Church be elected Biſhop of another See, with a Diſpenſation *retinere Decanatum in Commendam*; It after the Biſhop of that See, whereof he was the head, and Dean, do make a Leaſe of parcell of the poſſeſſions of the Biſhoprick; The Confirmation of that Leaſe by the Commendatory Dean is good, as it was adjudged. Paſc. 3 Car. in B. R. in *Evans* and *Aſcues* Caſe. See *Hobart* Mich. 10. Jac. in C. B. *Colt.* and the Biſhop of *Coventries* Caſe. 140. to 163.

15. *Confirmare*, or a Confirmation is but *firmum facere*: And therefore, If a Biſhop before the reſtreining Statutes of 1 Eliz. and 1 Jac. had made a Feoffment in Fee, of Lands, parcell of his Biſhoprick; and the Dean and Chapter by their Deed had confirmed the Deed of the Biſhop, the ſame had bin good, and Livery and Seiſin made upon the firſt Deed had bin good, after the ſaid Deed had bin Confirmed. So if a Biſhop by Deed enrolled, had conveyed Lands to the King, and the Dean and Chapter had confirmed the Deed of the Biſhop, and afterwards the Deed had bin enrolled; It had bin ſufficient to have confirmed the Lands to the King, although the Deed of the Dean and Chapter had not bin enrolled: For the aſſent was to be made to the Act by the Biſhop; and to him, and not to the King: And at this day, If a Parſon Vicar, &c. make a Leaſe for 21 years, or three Lives; And the Patron and Ordinary do confirm the Deed of the Parſon, or Vicar; this ſhall make the Leaſe good to ſome purpoſes, and ſhall be a confirmation of the Deed it ſelf, although the Term be not confirmed, and ſo it was holden. Paſc. 3 Car. in the Common Pleas. See *Cook* 1. Part, *Inſtitutes*, 301, 302. acc.

16. King *Ed.* the 6th granted to a Biſhop and his Succeſſors, an Advowſon, and that he ſhould hold the ſame to his proper uſe; After the death of the Incumbent, the Biſhop by Indenture, made a Leaſe to begin after the death of the Incumbent; which Leaſe was confirmed, and then the Biſhop dyed: Afterwards the Incumbent dyed. It was holden by all the Juſtices, That this Leaſe was void againſt the Succeſſor, for that the Biſhop had nothing during the life of the Incumbent; and therefore the Confirmation could not make the Leaſe good. Mich. 8 Eliz. *Dyer* 244.

17. In Treſpaſſe, the Caſe was: A Prebend of the Prebendary of P. and F. was ſeiſed of the Rectory of P. in the right of his Prebendary: and 13 Eliz. did deviſe the ſame to J. S. and J. D. for 70 years: C. Biſhop of L. Patron of the Prebendary, and Ordinary of the Dioceſſe, Granted the next avoidance to D. which Grant was confirmed by J. W. Dean and Chapter. After D. did confirm the Leaſe made by A. to J. S. and J. D; the ſaid

J. S.

J. S. being then alive; then J. S. dyed, and the next avoidance being come to E. and G. they presented J. N. who was admitted, installed, and Inducted into the Prebendary: D. dyed, L. succeeded him; then dyed J. N; L. did Collate K. to the Prebendary, who was Instituted and inducted, and entred into the Parsonage, and Leased the same to W. for five years, which Lease came to the Plaintiff, upon whom one *Burket* entred, as Servant to one *Henry Corvill*, who claimed under the Lease made by A. to J. S. and J. D. and in this Case, It was adjudged for the Plaintiff, for although the Lease made by A. for 70. years, was not yet expired; and although B. the Prebend came in after, and under the Confirmation of the Lease; Yet J. N. the Prebend before him, came in by a Grant of the next avoidance, made, confirmed, and perfected before the confirmation of the Lease, and so consequently was not subject unto it, and then when he entred upon the Parsonage, he was seised in his Demesne as of Fee, and so did defeat the Lease totally, so as it could never take effect, or revive against any Successor whatsoever. Trin. 11 Jac. in C. B. *Spendlows* and *Burkets* Case. *Heb.* 7.

18. In Debt brought for Tythes, the Case was: A Parson made a Lease of his Rectory for 60. years; which was confirmed by the succeeding Bishop, and the succeeding Patron, neither of them being Bishop or Patron at the time of the Lease; yet it was Resolved by the whole Court, That the Confirmation was good. Trin 2 Car. in B. R. Sir *Robert Banisters* Case. *Cro.* 1. Part, 27.

19. If a Parson of a Church charge the Glebe by his Deed; And afterwards the Patron and Ordinary do confirm the same Grant; In this Case, If the Patron be Tenant in Fee-simple, the Grant is good, but if he hath the Advowson onely for life, or in tail, then shall the Grant stand no longer good but during his life, and the life of the Parson that Granted it; and in such case, If the Bishop be Patron, he cannot confirm alone, but the Dean and Chapter must confirm also. *Cook* 1. Part, *Institutes* 300.

20. The Deanery of W. was dissolved by Parliament, and a new Deanery erected, to which the possessions of the Prebend of C. were annexed; The King made J. S. Dean, who took the Prebend of one of the Prebendaries of the same Church, upon which the Bishop by Commission of visitation, did deprive him for taking two dignities in the same Church, and a new Dean made, upon which he appealed, and by Commission-delegates, the said deprivation was disallowed; upon which, certain Leases made before by J. S. Dean, were confirmed by the Bishop and Chapter. Afterwards upon another Appeal, J. S. was removed, and the other Dean restored, who would have avoided the Leases: But upon this Case, (amongst other points) It was holden, That the Leases made by J. S. were good, and that the same needed not the Confirmation of the King (as was pretended there ought to have bin) nor of the Bishop, but onely of the Chapter, for that a Deanary is a Spiritual Promotion, and is not a Donative. Pasc. 10 Eliz. *Dyer*, 273.

21. The King presented (by reason the Temporalties of the Bishop was in the Kings hands) a Prebendary; and afterwards the King repealed his Presentment, and yet the Clerk was Instituted, and Installed by the Dean and Chapter, being Guardian of the Spiritualties *Sede durante*; afterwards, the King reciting that he was lawfully Instituted, confirmed the presentment; and afterwards a Bishop was created, and the Incumbent dyed: It was holden, That the King should now have the Presentation, for by reason of his repeal, the Church was not full before; and then if the Presentment was void, the Confirmation of him was void also. Mich. 13 Eliz. *Dyer* 292.

22. H. made a Lease for years of 20 Acres of Land, rendring Rent; the Lessee Granted all his Estate in one of the Acres to J. S. The Lessor confirmed the Estate of J. S. It was Resolved that by this Confirmation, the entire Rent was gone in all the other Acres: for being an entire contract, and by his own Act, there cannot be an Occupation of part, and an extinguishment of the other part; and this Case was put, out of *Bendloes* Reports. A Warren did extend into three Parishes, and a Lease was made for years rendring Rent; and after the Reversion was Granted to another of all the Warren in one of the Parishes; and the Lessee did Attorn: The Justices said, That in that Case, neither the Grantor, nor the Grantee should have any Rent, for that no contract should be apportioned. 2. It was Resolved, That in the principal Case, H. should not Avow; for the Arrerages of the Rent determined. Mich. 34 Eliz. in C. B. *Goddards* Case. *Owen.* 10.

23. Note, a Confirmation shall never enlarge an Estate, but where there is privity; neither shall it abridge Services, but where there is privity: Therefore if there be Lord and Tenant, and the Tenant holds of the Lord by fealty, and 20 s rent, The Lord by his Deed, may confirm the Estate of the Tenant to hold by 12 d. and the Tenant is discharged of the other Services, but those which are contained in the Confirmation; and that is in respect of the privity, that is between the Lord and the Tenant. But if there be Lord, Mesne, and Tenant, The Lord cannot confirm the Estate of the Tenant, to hold of him by lesser Services, but such Confirmation is void; because there is no privity betwixt

betwixt them. See *Cook* 1. Part, *Inſtitutes* 296. and 305. acc.

24. If a man hold by Suit of Court, at the Manor of D. and the Lord and the Tenant agree that the Tenant ſhall do his ſuit at the Manor of S. or the Lord confirm to the Tenant by Deed, that he ſhall do his Suit at the Manor of S. In ſuch Caſe, notwithſtanding ſuch Agreement, or Confirmation, the Lord may diſtrein the Tenant to do his Suit at the Manor of D. becauſe the Suit remains to the Manor, notwithſtanding the Agreement, or Confirmation of the Lord. See *Old. Nat. Br.* 104. acc.

Conſiderations.

1. *What ſhall be ſaid to be good and ſufficient Conſiderations to raiſe, or change Uſes; And where, upon ſuch Conſiderations, the Uſes, or Eſtates ſhall be raiſed, or changed; and Where not?*

1. A Man enfeoffed J. S. of Lands holden in Knights Service, to the uſe of B. and his heirs. Afterwards J. S. enfeoffed J. N. to the uſe of the ſaid B. and his Wife, and to the Heirs of B: B. dyed, and his Wife ſurvived, and they had Iſſue a ſon within age; It was holden in this Caſe, That this Feoffment being without conſideration, no new uſe was altered by it; and the old uſe was not gone, and ſo the heir was to be in Ward. Trin. 28 H. 8. *Dyer.* 8. *Bocktenham's* Caſe.

2. If a man Recovers againſt me by a Common Recovery, and afterwards I enfeoff the Recoveror, he ſhall be ſeiſed to my uſe, for he ſhall be adjudged in by the Recovery, and not by the Feoffment; and ſo ſhall be ſeiſed to my uſe; there being no expreſſe Conſideration, to raiſe or change the former uſe. Trin. 28 H. 8. *Dyer.* 18.

3. A. Covenanted with B. in conſideration that the ſaid B. had conveyed divers Lands to the ſaid A. in Fee-ſimple, after the death of the ſaid B. that the ſaid A. ſhould levy a Fine of other Mannors, of which A. was ſeiſed, by which Fine the ſaid Mannors ſhould be aſſured to the ſaid A. for his life, the Remainder to B. in tail; no Fine was Levyed. It was the Opinion of all the Juſtices, That that Fine could not change any Uſes preſently; for if it ſhould, then by no poſſibility the Covenant could be performed; But it was agreed by them, That if I in conſideration of Marriage, or of a Sum of mony to me paid, Covenant, That the party ſhall have the Mannor of D. expreſly, the ſame ſhall change the uſe preſently, for that the ſame are good Conſideration to raiſe or change an Uſe. Mich. 1. *Ma. Dyer.* 6.

4. A Man before the Statute of 27 H. 8. of Uſes, Covenanted in Conſideration of the Marriage of his daughter, that he would ſtand ſeiſed of certain Lands to the uſe of himſelf for life, and after his death, that his daughter and her Huſband ſhould have the ſaid Lands to them and the Heirs of their bodies in tail; And that he and all other perſons then ſeiſed, or after to be ſeiſed, ſhould be ſeiſed to the ſaid uſes: And Covenanted, that he would make further aſſurance to the ſaid Uſe. The Marriage took effect; And afterwards he bargained and Sold the Land for a valuable conſideration of a Sum of Money, (which was not paid) to one who had notice of the firſt uſe, and thereupon levyed a Fine, and ſuffered a Recovery, and afterwards dyed. It was holden in that Caſe, That in that Caſe the Bargain and Sale, the Mony not being paid to one who had notice of the firſt Uſe, did not change the firſt uſe, which was well raiſed by the Covenant; And therefore a Feoffment made by the Husband and Wife, afterwards was holden good. 7 Eliz. *Dyer.* 235.

5. A. by Indenture Covenanted with B. and his Wife, for Love and Affection, that ſhe would aſſure certain Lands before ſuch a day to the ſaid B. and his Aſſigns, to ſuch uſes as ſhould by the ſaid Indenture be declared: and B. Covenanted by the ſame Indenture, that within ſix Moneths after the aſſurance made, that he would cauſe an Eſtate to be made to the ſaid A. if the premiſes for the Term of her life, the Remainder to the ſaid B. and his Wife in ſpeciall tail, the Remainder to the Wife of B. in Fee; and further Covenanted to Grant a Rent-charge of 20 l. to a ſtranger in tail; And afterwards a Recovery was had accordingly, but no Eſtate was Executed again by the ſaid B. And the queſtion was, whether the uſe was changed after the ſix Moneths, or not. And the Opinion of the Juſtices was, That the uſe was not changed by the Indenture, and Recovery onely, without an Eſtate Executed; For then the Covenants aforeſaid, ſhould be impoſſible to be performed; and no uſe after is declared; and therefore it ſhall be to the firſt uſe. Trin. 4 *Ma. Dyer.* 162. *Wingfields* Caſe.

6. A. by Deed falſly recited, that in Conſideration of 7000 l. paid, he had enfeoffed B. and C. to have and to hold, to them and their Heirs, to the uſes of the ſaid B. and C. *in perpetuum*. And afterwards it was found by Office, That A. dyed

dyed ſeiſed, and that the Land was holden in *Capite*, and that J. was his heir, and of full age It was holden in this Caſe, That the Heir ſhould not have bin received, to averr the falſe conſideration againſt the Conuſans of his Aunceſtor; for that the Conſideration of mony was in it ſelf, a good Conſideration to raiſe an uſe; and therefore it was holden, that the Court of Wards could not remove the Feoffees upon examination of the Conſideration, and retain the Land untill Livery were ſued; But that yet the Queen in Juſtice was to tender Livery to him, who was found to be Heir; And in this Caſe, It was further holden, That B. & C. had an Eſtate in the uſe, but for Term of their lives; but contrary if the words, (to the uſe of them, &c.) had bin left out. Trin. 11 Eliz. *Dyer*. 169. *Wilk*'s Caſe.

7. A. upon a Communication of a Marriage to be had betwixt his younger ſon, and B. promiſed to the friends of the ſaid B. that after his death, and the death of his own Wife, that his ſaid Son ſhould have the ſaid Land to him and his Heirs; And this promiſe being by word onely; and no conſideration on the part of the Wife, upon a Verdict found of this Speciall matter; It was a queſtion, if the Uſe was changed by this Covenant or not. But the Opinion of all the Juſtices was; That the uſe was not changed by ſuch a naked promiſe; it not being ſufficient to raiſe an uſe. Mich. 13 Eliz. *Dyer*. 297.

8. A Woman ſeiſed of Lands by diſcent from her Father, ſuffered a Recovery to her own uſe; And afterwards by Indenture declared, That the Recoverors ſhould be ſeiſed to the uſe of her and B. whom ſhe intended to marry, and their Heirs: they married: the Feoffees Executed the Eſtate accordingly. Afterwards the Husband and Wife by another Indenture made betwixt them, and the next Heir, of the part of the Mother of the Wife, reciting that, The Land was Inheritable by her, on the part of the Father, and that ſhe had none Iſſue of her body, and that ſhe was deceived in the firſt Judgment, for that ſhe alwayes intended if ſhe dyed without Iſſue of her body, that the heirs of the part of her Father ſhould have the Land, agreed to be ſeiſed to the uſe of themſelves in tail, the Remainder to the right Heirs of the Wife; and the Husband Covenanted, if the Wife dyed without Iſſue, he would execute an Eſtate to himſelf for life, the Remainder to the right Heirs of the Wife; the Statute of 27 H. 8, is made, the Husband dyed without executing any Eſtate. It was holden in this Caſe, That the Heir of the Wife ſhould have the Land, and that the conſideration in the laſt Indenture of the Husband and Wife, was ſufficient to raiſe an uſe of the whole Land to the heirs of the Wife, becauſe the Land moved from the Wife, and it was for the Advancement of the Line from whence the Land deſcended. Trin. 13 Eliz. *Dyer*. 302. See *Plow. Com.* 301. *Bayton's* Caſe. And ſee 14 Eliz. *Dyer*. 308. acc.

9. Sir *Francis Calthrope* not having Iſſue, Covenanted with *Windham* alone, That *A.* the ſon of *Ed. Calthrope* his brother ſhould marry the daughter of *Windham* before Mich. And further Covenanted with him to make an Eſtate to a ſtranger, of ſo much of his Mannor of *N*, as ſhould amount to 40 l. *per annum* to the uſe of himſelf for life; and after his deceaſe and carnal Copulation betwixt *A.* and the daughter of *W.* to their uſe, and the uſe of the heirs of the ſaid *A.* on the body of the daughter, the remainder to *A.* in general tail, the remainder to his own right heirs. And for the reſt of the ſaid Mannor, to the uſe of himſelf for life, and after to the uſe of *Edward* in tail, the remainder to his own right heirs: and he Covenanted with *Ed.* to make further aſſurance within a year, and that the ſaid Uſes ſhould not be altered without the aſſent of *Windham*. And *Edward* by the ſaid Indenture Covenanted to pay Sir *Francis* 100 l. which he paid, and a Fine and a Recovery was had to the ſaid Uſes. The marriage did not take effect; Sir *Francis* after, had Iſſue one ſon, and dyed: and the Queſtion was, Whether the Land ſhould diſcend to the ſon, or ſhould come to *Edward* in the remainder. In this caſe, It was ſaid, That although here money was paid, which was a ſufficient Conſideration to raiſe the Uſe; yet becauſe the principal cauſe of this Conveyance, was the marriage which did not take effect. It was a Queſtion, If all the Uſes were not deſtroyed. The Caſe was not Reſolved, Quære. Paſch. 16 Eliz. *Dyer* 335.

10. *A.* Covenanted with his eldeſt Son, and others, to ſtand ſeiſed to the uſe of himſelf for life, the remainder to his eldeſt ſon in tail, the remainder to himſelf in tail, the remainder to *B.* his baſtard ſon in tail; and if any in the remainders ſhould make any diſcontinuance or other prejudice to any in the Remainders, his Eſtate ſhould ceaſe, and they ſhould ſtand ſeiſed to the uſe of the next in the Remainder; the Father granted all his Eſtate to the eldeſt ſon, who levied a Fine with proclamations: the Baſtard *B.* pretending title, made a Leaſe to try the title. It was in this caſe Reſolved amongſt other points, That for the uſe to the Baſtard, there ought to be a valuable Conſideration; for that natural affection was not a ſufficient Conſideration to raiſe the uſe, for that a baſtard is a ſtranger in Law, though he be a ſon by nature. Mich. 23 Eliz. *Dyer* 374. *Worſleys* Caſe.

11. *Francis* Earl of *Bedford* made a Feoffment in Fee of divers Mannors to the uſe of himſelf for

years:

years; and afterwards to the uſe of *John* Lord *Ruſſell*, his ſon and heir apparant, and to the heirs males of his body begotten; and for want of ſuch Iſſue, the remainder to the right heirs of the Earl: *John* dyed without Iſſue male: In that caſe, the Conſideration for raiſing the uſe, was good; but the uſe and the Eſtate which was limited by way of remainder to the right heirs of the Earl, was void; becauſe ſuch an Eſtate could not be limited by way of Remainder at the Common-Law. 35 Eliz. in the Court of Wards. The Earl of *Bedfords* Caſe. *Cook* 1. Part, in *Chudleighs* Caſe.

12. Tenant in tail, the Remainder in Fee; he in the Remainder by Deed Indented, Enrolled, Covenanted, for Conſideration of blood, and other good Conſiderations, to ſtand ſeiſed to the uſe of himſelf in tail, the remainder to the Queen, her heirs and Succeſſors, Kings and Queens of *England*. Tenant in tail ſuffered a Common Recovery. It was adjudged, That the Eſtate tail was barred. And in that caſe it was Reſolved, That no uſe could be raiſed in the Queen upon ſuch general Conſideration, without a ſpeciall averment, That valuable, or other good Conſideration was given. And that Conſideration, that the Land ſhall continue in his blood, was no Conſideration to raiſe the uſe to the Queen: and no more is it, if it were in Conſideration, that the King is the head of the Common-wealth, and the preſerver of the peace of the Realm; ſuch general Conſiderations are not ſufficient to raiſe Uſes, for that Kings *ex Officio* ought to govern and preſerve their Subjects in peace and tranquillity. *Cook* 2. Part, 15. *Wiſemans* Caſe.

13. The Lord *Paget* ſeiſed of divers Mannors, by Deed Indented, Covenanted with J. S; That in Conſideration of diſcharge of his Funerals, payment of his Debts and Legacies, and advancement of his ſon, and others of his blood, to ſtand ſeiſed of the ſaid Mannors, to the uſe of the ſaid J. S. for the life of the ſaid Lord *Pagett*, and after his death, to the uſe of *C. P.* and others, for 21 years; and after the expiration of the ſaid Term of 21. years, then to the uſe of *W. Pagett* his ſon, in tail: And afterwards the Lord *Pagett* was attainted of Treaſon. In this caſe it was Reſolved, That the ſaid Term was void to C.P. becauſe the ſame wanted a good Conſideration; but, if he had made him Executor, and chargeable to the debts, then the Conſideration had been good. Mich. 32 Eliz. in the Exchequer. *Leon.* 194. The Lord *Pagett's* Caſe.

14. A man having Iſſue 3. daughters, ſeiſed of Lands in Fee, in Conſideration of his Iſſue male, if he ſhould have any; and for the advancement of his daughters and the heirs of their bodies, and for the continuance of the Land in his Blood, Covenanted to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his 3. daughters, and the heirs of their bodies; and if any of them ſhould dye without Iſſue male, that then, &c. part ſhould ſurvive: Proviſo, That he might limit any part of that Land by his Will for payment of his debts, or for the advancement of any perſons for lives or years. In this caſe, amongſt other points, It was Reſolved, That an uſe cannot be raiſed by any Covenant, Proviſo, or Bargain and Sale, upon a general Conſideration without a ſpecial averment. But in ſuch caſe, the Bargainee onely who ſhall take the uſe, may aver, That it was for valuable Conſideration of money, or for the advancement of his blood, if the perſon who ſhall take the uſe be certain; for an averment may be taken of a Conſideration which ſtands in the Deed, although it be not compriſed within the Deed. 2. Reſolved, That when Uſes are raiſed by Covenant in Conſideration of blood, or Paternal Love to his ſons or daughters; and by the ſame Indenture, a Proviſo is added, That the Covenantor, for divers good Conſiderations, may make Leaſes for years; the Covenantor in ſuch caſe cannot make a Leaſe to any perſon, for the Covenant upon ſuch general Conſideration, cannot raiſe an uſe; and no particular averment can be taken, that his intent was not at the time of the delivery of the Deed, to denuiſe the ſame to any perſon certain. And in that caſe, this Rule was taken, That when the Conſideration is general, and the Covenant, or Bargain made with a perſon certain, there an averment may be taken; but when the Conſideration is general, and the perſon incertain, there no averment can avail. *Cook* 1. Part, 174. *Mildmay's* Caſe.

15. A. Covenanted with B. for the advancement of ſuch heirs males, as well which he had begotten, as which he ſhould after beget, on the body of his wife, before ſuch a Feaſt, to levy a Fine of Lands to the uſe of himſelf for life, and after to the uſe of the eldeſt Iſſue male of the body of him and his wife lawfully begotten, with divers Remainders over; and afterwards he made Leaſe of the ſaid Lands for a 100 years: and afterwards levied a Fine accordingly. In this caſe, amongſt other points, it was holden, That Conſideration of blood and natural affection, was not a good Conſideration againſt a purchaſor which comes in *bona fide*; for it is not ſuch a Conſideration which the Statute of 27 Eliz. of Fraudulent Conveyances, intends a valuable Conſideration. 32 Eliz. in C.B. *Needham* and *Beaumonts* Caſe. Vouched in *Cook* 3. Part, in *Tupre's* Caſe.

16. A man ſeiſed of Lands in Fee, by Indenture made between him and his wife of the firſt part, his eldeſt ſon of the ſecond part, and his younger ſon on the third part, Covenanted to ſtand

ſeiſed to the uſe of himſelf for life, and after to his Wife for life; and afterwards of the one moyety to one ſon, and of the other moyety to the other ſon. In this caſe, It was Reſolved, That the uſe did riſe to the wife, although ſhe were not named in the Conſiderations in the Deed, becauſe the expreſs of the uſe to her (being his wife) doth import a ſufficient Conſideration. And ſo in that caſe, It was Reſolved, That if I in conſideration of fatherly love and affection to my eldeſt ſon, Covenant, that I will ſtand ſeiſed to the uſe of my eldeſt ſon for life, or in tail, and after to the uſe of my ſecond ſon in tail, and after to the uſe of one of my Coſens in Fee: albeit the Conſiderations in words have reſpect onely to the eldeſt ſon; yet it is ſufficient in Law to raiſe an Uſe to my ſecond ſon, or Coſen. *Cook* 7. Part, 40. *Bedells* Caſe. See *Cook* 11. Part, 25. *Harpers* Caſe, &c.

17. Tenant in tail Covenanted to ſtand ſeiſed in Conſideration of a marriage to be had by his ſon, with the daughter of J. S. to the uſe of himſelf and his heirs, untill the marriage be had; and afterwards to the uſe of himſelf for life, and after to his ſon and his wife, the daughter to J. S. and the heirs of their bodies, and ſuffers a Recovery with voucher to that purpoſe; they dye without Iſſue. It was adjudged, That the Entry of him in the Remainder depending upon the Eſtate tail was lawful; for here is no Conſideration to raiſe an uſe, for the Conſideration is only the marriage of his ſon with a ſtranger, which as to the changing of the poſſeſſion, is not any benefit to the Father; for he is a ſtranger to that perſonall and particular Conſideration: but if the Conſideration had been for the eſtabliſhing of the Land in his blood, then it had been good, for that that concerned the father. Mich. 2 Jac. in C.B. *Freſhwater* and *Rens* Caſe. *Brownlow* 193. See *Calthrops* Caſe before.

18. Note: If I convey my Lands to which I have on the part of the Mother, or Lands which I have in Borough-Engliſh, to J. S. and his heirs, without Conſideration, the uſe ſhall be void, and ſo the Lands ſhall return again to me, and to my heirs of the part of the Mother, or in Borough-Engliſh as they were before; for the Law doth conſtrue the uſe in the ſame quality as the Land was: But if I do declare the uſe to me and my heirs, Or upon ſuch Feoffment reſerve a Rent to me and my heirs, it ſhall go to my heirs, at the Common-Law; for it is not within the Cuſtome, but it is a new thing divided from the Land it ſelf. See Hill. 10 Jac. in C. B. in *Cunden* and *Clarks* Caſe. *Hob.* 30. &c.

19. In an *Ejectione Firme*, It was found by Special Verdict, That A. Father of the Leſſor, was ſeiſed in Fee, and Covenanted by Indenture, in Conſideration of love to his eldeſt ſon, and for the ſettling of his Lands in his name and blood, That he would before Eaſter convey the Lands to J. S. and others, to the uſe of himſelf for life, the remainder to his ſaid ſon in tail, with divers remainders over; with a Proviſo, That he might make Leaſes for 21 years; and with a Proviſo, that he might revoke all the Uſes and Eſtates by any his Writing or Will. And he Covenanted further, That he would ſtand ſeiſed after Eaſter of ſo much of the Lands as ſhould not be ſufficiently conveyed to the ſaid ſeverall Uſes: And they found, that no Aſſurance was made, and that 40 Eliz. he for 40 l. paid, demiſed the Land to the Defendant for 21 years; and they found the Clauſe of the Statute of 27 Eliz. Cap. 4. and one makes a Conveyance with clauſe of Revocation, &c. It was Reſolved in this caſe, 1. That the Uſes raiſed by this Covenant, being made in Conſideration of love to his ſon, That the Covenant extended to all; for the Conſideration being ſufficient, the Covenant will extend to all, there being nothing conveyed by the Eſtate executed. 2. It was Reſolved, That the Eſtate not being executed, the Proviſo to make Leaſes was void, and the Leſſees are ſtrangers to the Conſideration of blood, and therefore cannot take benefit of any ſuch Eſtate thereby. 3. It was holden, That the Leaſe ſhould be good and abſolute, and not impeached: But he who made it, having power to revoke it, the ſame ſhall conſtrue it as revoked and void as to the Leſſee, and that he was as Tenant in Fee, when he made that Leaſe. Hill. 2 Jac. in C. B. *Croſſe* and *Buſtedditches* Caſe. *Cro.* 2. Part, 180.

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2. *What ſhall be a good and ſufficient Conſideration to ground a Promiſe upon.*

SEe before, the Caſe in Title, *Action upon the Caſe upon Aſſumpſit.*

Conſul-

Conſultation.

Where a Conſultation ſhall be grounded upon a Suit in the Spiritual Court; and where not.

1. THe Fermor of a Rectory ſued a Pariſhioner in the Spirituall Court, for the Tythes of Wheat in 60 Acres of Lands: The Defendant in the Spiritual Court ſuggeſted, That the 60 Acres was barren ground, and that for 30 years together Tythe only of Lamb and Wooll had been paid for the ſame Land; and that afterward by the manurance and labour of man, the ſame was become fertile, and did bear Corn and Grain. It was Reſolved in that caſe, That the Owner of the Land ſhould for 7. years pay but ſuch Tythes as he had uſed to pay before; and that by force of the Statute of 2 E. 6. 2 Ma. *Dyer* 170. and therefore in ſuch caſe, a Conſultation was not granted.

2. If Land be barren *ſuapte natura*, Tythes ſhall not be paid of it, as it was adjudged, Mich. 11 Jac. in the Common-Pleas, in *Sherrington's* Caſe. But if under-woods be digged up by the Roots; or if a Marſh or Meadow by accident of Inundation be over-run with Buſhes, Thorns, or the like; yet the ſame is not barren Land; as it was adjudged, Hill. 38 Eliz. in *Sherrington* and *Fleetwoods* Caſe; but the Parſon ſhall have Tythe of it. And Mich. 15 Car. in B. R. *Sugden* and *Cottells* Caſe was, A man ſtocked up wooddy grounds, and ſowed them with Corn; and before the ſtocking, Tythes had been paid for the paſture of it with ſheep. It was adjudged in that caſe, That it was not barren Land within the Statute of 2 E. 6. and therefore where a Prohibition was granted in that Caſe; this appearing upon the Iſſue tryed, a Conſultation was awarded.

3. Note: It is ſaid and agreed, That the Cauſes Eccleſiaſticall, or Spirituall, are, Blaſphemy, Apoſtacy from Chriſtianity, Hereſies, Schiſms, Ordaining, Admiſſions, Inſtitutions of Clerks, Celebration of Divine Service, Rites of Matrimony, Divorces, Generall Baſtardy, Subſtraction of Right of Tythes, Oblations, Obventions, Dilapidations, Reparation of Churches, Probate of Wills and Teſtaments, Adminiſtrations, and Accompts upon the ſame, Symony, Inceſt, Fornications, Adulteries, Solicitation of Chaſtity, Penſions, Procurations, Appeals in Eccleſiaſtical Cauſes, Commutation of Pennance, and the like. And where a Suit is in the Spirituall Court for any of the ſaid cauſes meerly, and not intermixt with a temporal thing or juriſdiction; If a ſuggeſtion be made for a Prohibition; in ſuch caſe, a Conſultation ſhall be awarded, *Cook* 5. Part, 9. in *Cawdries* Caſe.

4. A. had Iſſue by his wife 2. ſons, C. his eldeſt, and D. his youngeſt, and dyed: C. within the age of 14 years, took E. to Wife, and at full age dwelt together, and had carnall knowledg one of the other, and were reputed for man and wife. Afterwards C. put away E. and married F. and by her had iſſue G: C. dyed, F. publiſhed, That ſhe was lawfull Wife to C, and that G. her ſon was *Mulier* born. D. ſued in the Spiritual Court, to reverſe the marriage betwixt G. and F: and F. brought a Prohibition. In that caſe, it was Reſolved, That if C. and E. had had Iſſue, and had been unjuſtly Divorced, ſo long as the Divorce ſtood in force, the Iſſue could not have remedy by the Common-Law. And, 2. That when the Spirituall Court ſhall have Juriſdiction, the whole Cauſe ought to be ſpiritual. But where the cauſe is originally ſpiritual, yet if afterwards they go about to try a temporal Conuſans; a Prohibition lyeth. *Corbets* Caſe vouch. in *Cook* 7. Part. *Denne's* Caſe, 44.

5. A man brought an Action againſt J. S. Clerk, and declared, That the ſaid Clerk and his Predeceſſors time out of mind had uſed to do Divine Service, and adminiſter the Sacraments to him and his Servants at his Chappell within his Mannor every Sonday in the year. It was adjudged, That the Action did not lye; but his remedy was, for the default of ſuch Service and Sacraments, to ſue in the ſpirituall Court. *Cook* 5. Part, 35 Eliz. in B. R. *Williams* Caſe. 72, 73.

6. If a Parſon or Vicar have a Penſion out of another Church, and the Penſion is kept from them, or another Parſon taketh or claimeth the ſame; the Parſon or Vicar who ought to have the Penſion, may ſue for the ſame in the Spirituall Court: and if the other party purchaſe a Prohibition, upon the matter ſhewed, he ſhall have a Conſultation; yet he may maintain a Writ of Annuity at the Common-Law for the ſame. But if he once ſue a Writ of Annuity at the Common-Law for the ſame, and declare upon a Preſcription, then he ſhall not afterwards ſue in the Spiritual Court for the ſame Penſion, in the name of a Penſion. *Fitzh. Na Br.* acc.

7. *Spratt*, Sub-Deacon of *Exeter*, did Libell in the Spi ituall Court againſt *Nicholſon* Parſon of A. in the Spiritual Court, *pro annuali Penſione de* 30 l. out of his Parſonage, and ſhewed in his Libell, That *Idem per vetalem Compoſitionem, quam per antiquam et laudabilem Conſuetudinem, ipſe et prede-*

Prædeceſſores ſui habuerunt et habere conſueverunt præd. annualem penſionem out of the Parſonage of A. It was adjudged in this Caſe, That although he claimed the ſame Penſion by Temporall grounds, *ſcil.* by Preſcription and reall Compoſition; yet becauſe both parties were ſpiritual perſons, he had his Election to ſue for the ſame either in the Spiritual Court, or in the Temporal Court; and the Statute of 34 H. 8. doth Licenſe ſpiritual perſons to ſue for Penſions in the Spiritual Court. So if a Pariſhioner ſhall refuſe to pay his Tythes, or ſubſtracteth them after they are ſet forth, the Parſon may libell againſt him in the Spirituall Court for the ſame, if he pleaſe; or ſue him upon the Statute of 2 E. 6. in the Kings Temporall Court, and ſhall recover the treble value: but if he ſue in the Spiritual Court, he ſhall there recover but the Double value; and all this was ſo adjudged, Trin. 10 Jac. in C. B. *Spratt* and *Nicholſons* Caſe. *Godbolt* 196.

8. Note: It was holden by the whole Court, upon a Motion to diſſolve a Prohibition granted to the Spiritual Court in caſe of Tythes, That when a Conſultation is Lawfully Granted, there a new Prohibition ſhall not be Granted upon the ſame Libell; but yet they qualified it with this difference, *ſcil.* when a Conſultation is granted upon any default of the Prohibition in the form, by the miſpriſion of the Clerk, or by miſ-pleading in it, there a Prohibition may be granted upon the ſame Libel: but if Conſultation be granted upon the right of the Thing in Queſtion, there a new Prohibition ſhall not be granted upon the ſame Libell. Paſch. 7 Jac. in C. B. *Brownlow* 2. Part, 247.

9. A man ſued in the Spirituall Court for all the Tythes of the ground of one E, who prayed a Prohibition upon ſurmiſe, That the Queen was ſeiſed of two parts of the Tythes, and had granted them to one W. and ſo conveyes them to another, to whom he had payed thoſe two parts of the Tythes; A Conſultation was prayed for the third part; but it was denyed by the Court, for that his Conſultation cannot be granted but according to his Libell; and therefore it was ſaid, That he muſt libell for the third part *de novo*. Hill. 13 Jac. in C. B. *Hoskins* and *Toes* Caſe. *Hob.* 115.

10. In ſtay of Suit for Tythes in the Spiritual Court, It was ſurmiſed, That A. was ſeiſed of a Meſſuage and Lands in the Pariſh of D. and agreed with the Defendant being Parſon, in Conſideration of 10 l. to be annually paid by A. to the Defendant during their Joynt-lives, and his continuing Parſon, in ſatisfaction of all Tythes growing upon the ſame Lands, that he ſhould retain the Lands without payment of other Tythes; and ſhewed, That A. paid the 10 l. accordingly; and that notwithſtanding this, the Defendant ſued him for Tythes. And in this caſe, the whole Court was of Opinion, That it was not a ſufficient Surmiſe to maintain a Prohibition: for, an Agreement to be diſcharged from payment of Tythes for a year by word may be good; but to have an agreement during the Parſon's life, cannot be without Deed. And it was ſaid, That ſuch a Surmiſe was made in a Caſe betwixt *Nelſon* and *Pretiman*, and ruled, void: And ſo was it adjudged in *Rolls* and *Rolls* Caſe. Wherefore a Conſultation was awarded. Mich. 4 Jac. in B. R. *Hawkes* and *Brayfields* Caſe. *Cro.* 2. Part, 137.

11. A. was leaſed in Fee of certain Lands in D. and poſſeſſed of a Leaſe for years of certain Lands in D; and deviſed all his Lands and Leaſes to his ſon and heir, excepting 20 l. *per annum* for 7. years, to be imployed in this manner, *ſcil.* 100 l. to his daughter E. to be paid within 5. years, and 30 l. to his daughter M. within 7. years, and dyed: T. the ſon took the profits of both for ſeven years, and dyed; and left Aſſetts. M. the younger daughter ſued for her Legacy of 30 l. and to have a Prohibition. It was ſurmiſed, that this Legacy being out of the profits of Lands, no Suit could be for it in the Spiritual Court. But the Court was of Opinion, in regard it was a meer perſonal Legacy, although it was to be raiſed out of the profits of Lands, and he having raiſed it, and being dead without payment of it, no Action could lye at the Common-Law by Accompt againſt his Executors for it; therefore the Court held it reaſonable, ſhe ſhould have her remedy in the Spirituall Court. And a Conſultation was awarded *per Curiam*. Paſch. 9 Jac. in B. R. *Love* and *Mapſideus* Caſe. *Cro.* 2. Part, 279. See Trin. 9 Jac. in B. R. *Dens* Caſe, *Bolſtr.* 1. Part, 153. acc.

12. If a man ſueth in the Spirituall Court for taking and detaining wrongfully his wife lawfully married unto him, if the other ſueth for a Prohibition for the ſame, he ſhall have a Conſultation, for as much as concerneth the reſtitution of his wife onely; and yet he may have an Action at Common-Law, *de uxore abducta, cum bonis viri*; or an Action of Treſpaſs for taking his wife. *Fitzh. Na. Br.* 51. acc.

13. Prohibition; The Plaintiff ſurmiſed, That his Father dyed ſeiſed of ſuch Lands which deſcended to him as heir, and that the Defendant by Libell in the Spiritual Court had ſuggeſted, That he made a Will, and deviſed thoſe Lands to his Executor to ſell, and made the Defendant Executor, who ſued in the Spiritual Court to have probate thereof; whereas *re verâ* he made no Will: and being at Iſſue, Whether he made a Will, or no, the Plaintiff was Nonſuit, And yet it was moved

ved for him, That the Defendant was not to have a Conſultation; for that it is not ſhewed, That the Teſtator had goods, &c. and then there was no cauſe of probate; for a Will of Lands need not be proved. The Court agreed thoſe Caſes; for it appears there, that there was not any cauſe of Eccleſiaſtical Suit. But here in this caſe it appears, that he hath cauſe of Suit to prove the Will for the goods; for otherwiſe he cannot have an Action: And therefore a Conſultation was granted *Quoad* the goods. Mich. 5 Car. in B. R. *Hill* and *Thornton*'s Caſe, *Cro.* 1. Part, 118. See Hill. 10 Car. in B. R. *Natter* and *Beatts* Caſe. *Cro.* 1. Part, 284, acc. and 287.

14. The Parſon Libelled for Tythes upon the Statute of 2 E. 6. and the Caſe appeared to be this; The Pariſhioner who was to pay his Tythes, ſet them out; but he would not ſuffer the Parſon to come and take them away: and hereupon the Parſon libelled in the Spiritual Court for the Tythes: The Defendant there ſurmiſed, that he did not hinder him from the having of his Tythes; but he ſaith, he did hinder him from coming for the Tythes one way, but he might have come for them another way; and prayed a Prohibition, ſuppoſing that there was no queſtion at all touching the payment of the Tythes. But the Opinion of the whole Court was, That ſuch a ſetting forth of Tythes as this was, was a fraudulent, and no good ſetting forth of the Tythes according to the Statute; for by the Statute he ought to ſet forth his Tythes, and to ſuffer the Parſon to come, have, and take away the Tythes; otherwiſe it is no ſetting out of Tythes according to the Statute: and a Conſultation was awarded. Hill. 8 Jac. in B.R. *Bolſt.* 1. Part, 108.

Coppy-hold, *and* Coppy-holders.

1. THe Cuſtome of a Mannor was, That if a Coppy-holder in Fee dyed ſeiſed, and his Wife over-lived him, that ſhe ſhould hold all the Lands during her Widdowhood, as Free-bench, and ſhould be admitted Tenant to the Land, and that the Heir ſhould not be admitted to it during the life of his Mother: Alſo the Cuſtome was, That if any Coppy-holder committed Felony, and the ſame were preſented by the Homage, that the Lord might ſeize the Coppy-hold. And the Caſe was, That a man having a Wife, dyed ſeiſed, having Iſſue a ſon, who was convicted of Felony; and the ſame was preſented by the Homage, and the Wife was admitted to her Free-bench; and after the Wife dyed; And whether the Lord might enter for the forfeiture, was the queſtion: And it was ſaid in this Caſe, The Lord could not ſeiſe the Land as forfeited, becauſe he could not in this Caſe ſeiſe; becauſe the Woman is the Coppy-holder during her life, and the Son, who committed the Felony, was not within the danger of this Cuſtome, not being a Tenant; and a Cuſtome ſhall be taken ſtrictly, and not ſupplyed by Equity, with a claymor in the place of a ſeiſance: But yet afterwards, Judgment was given for the Lord, that he might ſeize the Coppy-hold. Hill. 25 Eliz. in B. R. *Borneford* and *Packingtons* Caſe. *Leon.* 1.

2. A Coppy-holder did ſurrender to the uſe of his Will, and then deviſed the Land to his Wife for life, the Remainder to his ſon in tail; the Wife dyed; a ſtranger did intrude upon the Land, and made three ſeverall Feoffments to three ſeverall perſons: he in the Remainder entred upon one of the Feoffees in the name of all the Lands deviſed, and made a Leaſe of the whole Land; It was the Opinion, That his Entry was good, and that the Leaſe was good for the whole Land, the Lands being in one County. Trin. 28. Eliz. in B. R. *Troublefield* and *Troublefield*'s Caſe. *Leon.* 35.

3. A Coppy-holder in Fee, having Iſſue two ſons, B. and C. ſurrendred to the uſe of B. for life, and afterwards to the uſe of C. in Fee; they both being within age, ſurrendred to the uſe of J. S. in Fee, who is admitted; B. dyed, then C. dyed, having Iſſue, who was alſo admitted, and entred into the Land; and, If his Entry were lawfull or he put to his plaint, in the nature of a *Dum fuit infra ætatem*, was the Queſtion; And it was the clear Opinion of the Juſtices, That his Entry was lawfull: And it was ſaid, That if a man be ſeiſed of a Coppy-hold in the right of his Wife; or Tenant in tail of a Coppy-hold, doth ſurrender to the uſe of another in Fee; the ſame doth not make any diſcontinuance, but that the Iſſue in tail, and the Wife may reſpectively enter. Hill. 30 Eliz. in B. R. *Right* and *Footman's* Caſe. *Leon.* 95.

4. The Queen being Lady of a Mannor, by her Steward did Licence a Coppy-holder to make a Leaſe for three lives if he ſhould ſo long live, the Coppy-holder did make a Leaſe general to the Plaintiff for three years: It was objected, That the Coppy-holder had not purſued his Licence, for a Licence or Authority muſt be ſtrictly purſued:

But

But the Opinion of the Court was, That he had purſued his Licence. For when his Licence is to make a Leaſe for years, if he ſo long live; theſe words (If he ſo long live) are but ſurpluſage; For the Law ſayes, That if a Coppy-holder make a Leaſe for years, and dyes; the Leaſe is determined; and therefore the clauſe in the Licence is no more then what the Law ſayes, and ſo is void: And a difference was taken between a Coppy-holder in Fee, and a Coppy-holder for life. For if the Lord doth Licenſe his Coppy-holder in Fee to make a Leaſe for three years, if he ſo long Live, and he makes a Leaſe abſolutely, this is no forfeiture, for this Leaſe ſhall be a good Intereſt againſt the Heir of the Coppy-holder, but otherwiſe of a Coppy-holder for life. Hill. 38 Eliz. in B. R. *Haddon* and *Armſmith's* Caſe. *Owen.* 72, 73.

5. In an *Ejectione firme*, It was found by ſpeciall verdict, That J. S. a Coppy-holder of Lands in Fee, ſold his Coppy-hold Lands in ſuch a Town to the Leſſee for years of the Mannor by Indenture, the which was to this effect, He ſold all his Land and Tenements, as well Coppy-holds as other Lands, bought of J. D. in ſuch a Town, And it was found that the Leſſee of the Mannor entred into the Copy-hold; and after J. S. dyed, and W. S. was admitted as heir upon the preſentment of the Homage that J. S. dyed ſeiſed, and ſurrendred to the uſe of the Plaintiff. In this Caſe, It was agreed by the Court, That although a Coppy-holder may not convey his Coppy-hold to a ſtranger without ſurrender and admittance, yet he may Grant his Eſtate to the Lord of the Mannor out of Court by Bargain and Sale; for that the Cuſtome is not between the Lord and his Tenant, but between themſelves onely. 2. It was agreed in this Caſe, That the admittance of the Lord, viz. the Leſſee of the Mannor amounts to a Grant to him who hath a good Title; but it is otherwiſe if it is to him who is in by wrong, as by Diſſeiſin. Trin. 21 Jac. in C. B. *Haſſet* and *Hanſon's* Caſe. *Winch.* 66, 67. *Hutton.* 65. acc.

6. Coppy-holder in Fee, did ſurrender his Lands to the uſe of a ſtranger for life, and afterwards to the uſe of the right Heirs of the Coppy-holder, who afterwards ſurrendred his Reverſion to the uſe of a ſtranger in Fee, and dyed; and the Tenant for life dyed, and the right heir of the Copyholder entred. It was agreed, That in this Caſe, nothing remained in the Copyholder: upon the ſaid ſurrender, but the Fee is reſerved to his right heirs; for if he had not made any ſecond ſurrender, his Heir ſhould be in, not by diſſcent, but by purchaſe; and the difference was taken where a ſurrender was to the uſe of himſelf for life, and afterwards to another in Tail, the Remainder to the right Heirs of him who ſurrendreth; there his Heirs ſhall have it by diſcent; contrary where the ſurrenderer hath not any Eſtate for life, or in tail, limited to him; for there his Heir ſhall enter as a purchaſor, as if ſuch Uſe had bin limited to the right Heirs of a ſtranger. And it was alſo agreed, That if a Copyholder doth ſurrender to the uſe of his right Heirs, the Land ſhall remain in the Lord, till the death of the Copyholder, for then his heir is known. Paſc. 30 Eliz. in B. R. *Allen* and *Palmers* Caſe, *Lett.* 101.

7. In an *Ejectione firme*, It was found by Speciall Verdict, That A. a Copyholder ſurrendred a Meſſuage, and 20 Acres of Lands, into the hands of two Tenants of the Mannor, to the uſe of J. S. and his Heirs, upon Condition, If he paid the ſaid J. S. 100 l. upon the firſt of *July* next, the ſurrender to be void: And it was found, that the Cuſtome of the Mannor was, That a Copyholder might ſurrender into the hands of two Tenants; and it was found, that before the day of payment of the mony, he ſurrendred one Acre, parcell of the 20 Acres, to J. D. and his Heirs; And afterwards the ſurrenderer paid the 100 l. and then ſurrendred the ſaid Tenements into the hands of the Steward, to the uſe of J. N. and his Heirs: And at the firſt Court after the ſurrenders made, the ſaid two laſt ſurrenders were preſented, and J. N. was admitted to the Meſſuage and 20 Acres, and the ſaid J. D. was admitted to the ſaid one Acre, ſurrendred to the uſe of him: And it was found, that the ſurrender made to J. S. was never preſented: And it was further found, That if any ſurrender be made out of Court, to the uſe of another and be not preſented at the next Court, that it is meerly void; and that J. N. entred into the ſaid one Acre, and made the Leaſe to the Plaintiff. The onely queſtion was, Whether this ſurrender of the Acre before the Condition performed, were good or not; It was urged, That by the firſt ſurrender all the eſtate of the Copyhold, till the Condition performed, is out of the Copyholder, ſo as he hath not any Intereſt left to make a ſecond ſurrender, although afterwards he ſhould perform the Condition: But it was Reſolved by the Court, That the ſecond ſurrender is not hindred by the firſt, for that nothing paſſed thereby, untill it was preſented in Court, and admittance thereupon; but the Intereſt and right of the Copyhold, and the poſſeſſion remained in him who made the ſurrender, ſo as he might transfer it to any other, and it ſhall be good if the firſt ſurrender ſhall not take effect: For the ſurrender into the hands of the Tenants, was but an Inchoation of the Eſtate, to whoſe uſe the ſurrender was made, and ſuch an Inchoation as had no perfection, but became void, and the ſecond ſurrender good. Trin. 7 Car. in B. R.

Burgis.

Burgoin and *Spading's* Caſe. *Cro.* 1. Part, 199. and 206.

8. The Caſe was, A Copyholder in Fee ſurrendred to the Lord of the Mannor, his Copyhold-Eſtate, and the Lord made a Leaſe for years of the Mannor, and of the Copyhold, by the name of his Tenement, called H. and, If this were a determination of the Copyhold, was the queſtion. And it was holden by all the Juſtices, That it was not, becauſe when he lets the Mannor, it is included as parcell of the Mannor; But if he had made a Leaſe for years of the Copyhold it ſelf; that had deſtroyed the Copyhold: for it was then, during that time, ſevered from the Mannor, and ſo could never be demiſeable again by Copy. Mich. 14 Car. in B. R, *Lee* and *Boothbyes* Caſe. *Cro.* 1. Part, 375.

9. A Copyholder doth ſurrender his Copyhold into the hands of two Copy-Tenants: It was adjudged, That in ſuch Caſe, before preſentment, the Heir of the Surrenderer may take the profits of the Lands againſt the Surrenderee, for that no perſon can have a Copyhold, but by admittance of the Lord; As if a man make Livery within the view, although it cannot be countermanded, yet the Feoffee takes nothing before entry: But it was agreed, That if the Lord doth take knowledge of the ſurrender, and doth accept of the Cuſtomary Rent, as Rent due from the Tenant, as being admitted, the ſame ſhall amount to an Admittance; but otherwiſe, if he accept it as a duty generally. Mich. 14 Jac. in C. B. *Froſwell* and *Weiches* Caſe, *Godbolt.* 268.

10. The Cuſtome of a Mannor was; That the Widows of Copyholders for lives, ſhould, during their Widowhood, enjoy their Cuſtomary Land, whereof their Husbands dyed ſeiſed: The Lord of the Mannor 5 Eliz. Granted a Cuſtomary Tenement to A. for life by Copy, and 19 Eliz. conveyed the Mannor to B. in Fee, who the ſame year conveyed the Inheritance of a Tenement to C. and others, their Heirs and Aſſigns, during the life of A. the Remainder to E. the Wife of A. the Remainder to A. in Fee: A. 28 Eliz. Granted his Remainder to W. his ſon in Fee, to whom C. and the reſt releaſed; W. having Iſſue, D. dyed, then E. dyed, and A. married again F. and dyed ſeiſed of the Cuſtomary Eſtate, 14 Jac. and then F. his laſt Wife entred. It was Reſolved by the Juſtices, That the Cuſtomary eſtate of A. remained as it was during his life, not extinct, nor altered by the purchaſe of the Fee-ſimple, which, during his life, was in others, not in him; whereupon it followes, That all Cuſtomary Incidents, to ſuch Cuſtomary Eſtate ſtill remaining, whereof this is one, which is an excreſence, which by the Cuſtome and Law, grows of it ſelf out of that Eſtate, even as a Diſcent ſhould have done, if A. had bin a Copyholder in Fee, and the Freehold had bin granted to another in Fee; and therefore it was Reſolved, That the Widow of A. ſhould hold and enjoy her Widows Eſtate: And ſo was it adjudged in the like Caſe. Paſc. 16 Jac. in *Kemmingtons* Caſe. Mich. 13 Jac. in B.R. *Howard* and *Bartlets* Caſe *Hob.* 181.

11. A Copyholder by Licenſe of the Lord demiſed the ſame to J. S. for 21. years, rendring 20 l. Rent, afterwards he ſurrendred the Reverſion of the one moyety to the uſe of B. to which he was admitted, and then ſurrendred the other Moyety to M. who was admitted; M. diſtreined for the Moyety of the Rent, as belonging to the Reverſion, of the Reverſion of the Moyety. It was adjudged that the Surrender by name of a Reverſion was good, although the Leaſe was made by Indenture, for that it is ſtill the Leaſe of the Copyholder, and not of the Lord; and, in this Caſe, It was alſo Reſolved, That the Rent was to be devided by halves, according to the halves in the Reverſion; and that there needed no Attornment upon the ſurrender made of the Moyety, becauſe it paſſeth not by way of Grant of a Reverſion, but there muſt be an admittance of the Lord. And when that admittance is given, the State is ſetled; and the admittance is an Act in Law, and puts the party in, in the Poſt. Hill. 14 Jac. in C. B. rott. 2049. *Swinnerton* and *Miller's* Caſe. *Hob.* 177.

12. In *Ejectione firmæ*, the Caſe was, That, by the Cuſtome, Cuſtomary Lands did deſcend to the younger ſon, who was an Enfant at the time of the death of his Anceſtor; and after 30. years incurred, after the death of his Father, he entred, and made a Leaſe of the Lands to another, who took the profits, and afterwards was ejected; whereupon he brought *Ejectione firmæ* without any admittance of his Leſſor, or preſentment, that he was Heir. It was Objected, That after ſo many years incurred, there was *ſupina negligentia*, which diſabled him to make the Leaſe. But in regard, That at the time of the death of his Anceſtor, he was but of the age of two years; and after his full age, no Court had bin holden for a long time; the ſame was a good excuſe of his negligence: And in this Caſe, it was holden, That if a Copyholder ſurrenders in *extremis*, to the uſe of himſelf for life, or if he be well again, the ſurrender ſhall ſtand, for he hath reſerved an Eſtate to himſelf: And it was alſo Reſolved, That if a Copyholder dyeth, his Heir within age, he is not bound to come at any Court during his Non-age to pray Admittance, or to tender his Fine. And ſo if the death of the Anceſtor be not preſented, nor Proclamations made, he is not at any miſchief, though

he

he be of full age. Pasc. 30 Eliz. in B. R. *Rumney* and *Eves* Case. *Leon.* 100.

13. A Copyholder surrendred his Customary Lands to the use of his last Will, and thereby devised the same to his younger Son, and his Heirs; who being in Prison, made a Letter of Attorney to one to be admitted to the Lands in the Lords Court, in his room; And after admittance, to surrender the same to the use of B. and his Heirs, to whom he had sold it for the payment of his debts. It was Objected, That he ought to come in Court in person to make the surrender, or else the Lord ought to appoint a speciall Steward to go to the Prison to take his surrender; But it was the Opinion of *Wray* Chief Justice, That it was a good surrender made by the Attorney. Trin. 28 Eliz. in B. R. *Leon.* 17. And See *Cook* 9. Part, 75, 76. *Combes* Case. Where a Copyholder in Fee made a Letter of Attorney to two Tenants of the Mannor, to surrender his Copyhold to the use of J. S. and his Heirs, who at the next Court brought the surrender into Court, and did accordingly, no Custome being to Warrant such Surrender. And it was Resolved, That the surrender was good, because he might so do *de Comuni jure*, without the alledging of any Custome: But see there, Where the Custome of a Mannor is, That the Copyholder out of Court may surrender into the hands of the Lord, by the hands of two Customary Tenants; That in such Case, the Copyholder by his Attorney cannot make a surrender into the hands of the Lord by the hands of two Copyholders Tenants, for that the surrender ought to be warranted by the Custome; and a surrender without a speciall Custome to Warrant it, is not good by Attorney: And that was so holden. Hill. 28 Eliz. in B. R. *Chapman's* Case.

14. If a Copyholder makes a Lease for years, which is a forfeiture at the Common Law; and after the Lord makes a Feoffment, or a Lease for years of the Freehold of this Copy-hold. It was a question, If the Feoffee or Lessee shall take advantage hereof. It was holden, That he shall not, for the Lease of the Freehold made by the Lord before Entry, is an assent, That the Lessee of the Copyholder shall continue his Estate, and so it is in nature of an Affirmance, and Confirmation of the Lease. Mich. 40 Eliz. in C. B. *Penn* and *Mcivall's* Case. *Owen.* 63.

15. A Woman Copyholder for life, took a Husband, the Reversion of the said Copyhold was Granted to three, A. B. C. *cum acciderit* after the death, surrender, or forfeiture, &c. for their lives successive, according to the Custome, the Husband surrendred to the use of A. for life, to whom the Lord Granted a Copy for life; A. and B. dye; The Opinion of the Court was, That C. should not be admitted, for that after the death of the Husband, the Wife might enter, or have her Plaint, in the nature of *Cui in vita*, and that during the life of the Husband, the Lord should have the Land in nature of an Occupant. 9 Eliz. *Dyer*, 264.

16. A man seised of a Mannor, made his Will and thereby gave Authority to divers persons, to make Leases according to the Custome of the Mannor, to raise Fines to pay his Debts, and dyed; they held a Court in their own names, and Granted the Reversion of two mens, who were Copyholders, to three others; where the Custome of the Mannor was, that the Land might be Leased by the Lord of the Mannor, or by his Surveyor, or Deputy Surveyor; Afterwards, the Wife of the Devisor recovered the third part of the Mannor in Dower, and had the said Copyhold assigned to her by the Sheriff in Dower, with other Lands; It was holden by the Justices in that Case, That the Wife should avoid the said Grant made by the said persons, assigned by the Husband. Hill. 8 Eliz. *Dyer*, 251. Quære this Case. For *Cook* 9. Part, 64. in *Swaynes* Case, and *Cook* 4. Part, 24. seem to be contrary to this Case.

17. Copyholder in Fee, surrendred his Copyhold to the Lord, to the intent that he should Grant the same again to him for life, the Remainder to his Wife, untill his son should come to the age of 21 years, and after that Term ended, the Remainder to his son in tail, the Remainder to his said Wife, for Term of her life, the Remainder over; and dyed; before the Execution of the Estates, dyed the son of the age of five years, the Lord in Court Granted the Land to the Wife, untill the son should come of full age, and further Granted, &c. Afterwards the Wife took a Husband, and dyed Intestate; the Husband held himself in the Land; And the Administrator of the Wife entred upon the Husband; And if his Entry were Lawfull, was a question: And it was the Opinion of the Court, That his Entry was not Lawfull, but that the Interest which was in the Wife, was a Term, which by the death of the Wife, was vested in the Husband by the Law, if there were no private Custome of the Mannor to the Contrary. Hill. 8 Eliz. *Dyer*, 251. *Hitchetts* Case.

18. The Queen was seised of a Mannor, whereof Black Acre was holden by Copy in Fee. The Queen Leased Black Acre to B. for 21. years, who Assigned the same to the Copyholder, who accepted of it. The Queen Granted Black Acre to C. in Fee; the Term expired, C. entred; and it was adjudged that his Entry was lawfull, for by acceptance of the said Term, the Customary Estate was determined, as if the Copyholder had accepted

ted of it immediately from the Queen. Mich. 31 Eliz. in C. B. *Smith* and *Lanes* Caſe, *Leon.* 170.

19. Upon a Speciall Verdict in *Ejectione firmæ*, the Caſe was; W. a Copyholder in Fee, ſurrendred the ſame to the uſe of E. for life, the Remainder to R. and A. in Fee: A. made a Leaſe to the Defendant E. R. and A. ſurrendred the Lands; *ſcil.* a third part to the uſe of R. for the life of A. the Remainder to the right Heirs of R. and of another third part to the uſe of R. for life, the Remainder to E. the Remainder to J. S. and of another third part to the uſe of E. and his Heirs. After partition was made betwixt them, and the Land where, &c. was allotted to J. S. who afterwards ſurrendred to the uſe of the Plaintiff: upon this Speciall Verdict; It was holden, That Judgment ought to be given for the Plaintiff, for the Leſſee of R. had the firſt poſſeſſion; and that Leaſe is to begin after the death of E. who was Tenant for life; and then when E. and he in the Reverſion, joyn in a ſurrender, the Eſtate for life in that third part, is extinct in R. who hath the Inheritance; and then his Leaſe took effect for a third part; ſo as the parties are Tenants in Common, betwixt whom no Treſpaſſe lyeth. Hill. 31 Eliz. in B. R. *Dove* and *Williots* Caſe. *Leon.* 174.

20. A Copyholder had Iſſue, three ſons G. H. and T. and ſurrendred his Copyhold to the uſe of his laſt Will, and thereby deviſed the Land to his Wife for life, the Remainder to H. and the Heirs of his body; the Wife dyed after admittance; H. dyed without Iſſue; the Lord Granted the Copy-Land to T. and his Heirs, who afterwards ſurrendred to the uſe of the Defendant, then his Wife for life; and afterwards dyed without Iſſue; G. the eldeſt ſon entred, It was holden by the Court that the Entry of G. was lawfull, and admittance for him is not materiall: for if a Copyholder ſurrendreth to the uſe of one for life, who is admitted, and dyeth, he in the Reverſion may enter without a new admittance. Hill. 31 Eliz. in B. R. *Bulleigh* and *Graunt's* Caſe. *Leon.* 174, 175.

21. A Copyholder did alledge the Cuſtome of the Mannor to be, That the Lord of the Mannor might Grant Copyes in Remainder, with the Aſſent of the Tenants, and not otherwiſe; and that Copies in Remainder otherwiſe Granted, ſhould be void. It was a queſtion, If it was a good Cuſtome; It was ſaid, That it was a void Cuſtome, for that a Copyhold Eſtate is an Eſtate of which the Law doth not take notice, and Copyholders are meer Tenants at Will by the Common Law, and therefore to ſay, That he who hath not an Intereſt, ſhould have him who hath the Intereſt of the Copyhold in him, at his pleaſure, ſhould be unreaſonable: But it was ſaid on the other ſide, That this Cuſtome might have a lawfull beginning, and it ſeems to be grounded upon the reaſon of the Common Law, That a Remainder ſhould not be without the aſſent of the particular Tenant; ſo a Cuſtome that a Woman ſhall not have Dower if ſhe do not claim it within a year and a day, is a good Cuſtome: It was not Reſolved. *Ideo Quære.* Mich. 31 Eliz. in C. B. *Godbolt.* 140.

22. The Cuſtome of a Copyhold-Mannor was, That a Feme Covert might give Lands to her Huſband, and, If it was a good Cuſtome or not, was the queſtion. It was urged, that the Cuſtome was good, and 12 E. 3. was vouched, That in *York* there is ſuch a Cuſtome, That the Husband might give Lands of his own purchaſe to his Wife during the Coverture. But the Opinion of the Court was, That the Cuſtome was unreaſonable, becauſe it cannot have a lawfull Commencement. And in this Caſe, It ſhall be intended, That the Wife being *ſub poteſtate viri*, did it by the Coercion of the Husband; and the ſame Law is of a Cuſtome, that the Wife may Leaſe to her Huſband. Trin. 33 Eliz. in C. B. *Shipwith* and *Sheffields* Caſe. *Godbolt.* 143.

23. In a Replevin, the Caſe was, A. was ſeiſed of a Mannor, in which were Copyholds, and took to Wife B. and dyed ſeiſed, after whoſe deceaſe, B. demanded the third part of the Mannor for her Dower, by the name of a 100 Meſſuages, a 100. Gardens, &c. and was endowed accordingly of parcell of the Demeſnes, and parcell of the Services of the Copyholds; And afterwards ſhe granted a Copyhold; And, If it was a good Grant was the Queſtion: for if ſhe had a Mannor, the Grant was good; otherwiſe not. And the Opinion of the Court was clear againſt the Grant; for when ſhe demanded her Dower, ſhe was at liberty to demand the third part of the Mannor, or the third part of 100 Meſſuages, &c. And when ſhe demanded it by the name of 100 Meſſuages, &c. ſhe could have no Manner: and then when a Grant of a Copyhold is made by her which hath no Mannor, the Grant is utterly void. Mich. 29 Eliz. in C. B. *Speke's* Caſe.

24. Note: When a Copyholder ſurrenders to the uſe of another, and the Lord admits him, now he who is ſo admitted, was in by him that made the ſurrender: For in a Plaint, in the nature of a Writ of Entry in the *Per*, he ſhall be ſuppoſed in the *Per*, by him that made the ſurrender, becauſe that the Lord is but an Inſtrument to make the Admittance; and he that is admitted, ſhall not be ſubject to the Charges and Incumbrances of the Lord; for that the Lord hath but a Cuſtomary power to make admittance *ſecundum formam & effectum ſurſum reddit.* *Cook* 4. Part, *Taver-*

ners Case. And *Cook* 4. Part, *Westwicks* Case, acc.

25. In Treſpaſſe of Trover and Converſion of Beans, The Caſe was: That the Lands upon which the Beans grew, were the Lands of a Lunatick, and Copyhold Lands; and the Lord granted to one the Cuſtody of the Land, by whoſe leave and aſſent, the Plaintiff did ſow the Beans upon the Land; The Action was brought in the name of the Lunatick: For it was holden, for there was no Intereſt gained in his Lands by the commitment. And it was agreed, That the Lord hath not any power over the Lunatiques Land, without a Cuſtome; for the imitation of the Kings power over Freeholds, is no conſequence, that the Lord ſhould have it. For although the Statute be but in affirmance of the Common Law, in the Caſe of the King; yet the Collaterall Incidents of Eſtates, as Dower, Tenancy by the curteſy, Wardſhips, and the like, are not without ſpeciall Cuſtome. H. 15 Jac. rott. 519. in C. B. *Cocks* and *Darſon's* Caſe. *Hob.* 215, 216.

26. The Caſe was, That a Copyholder in Fee, with the Lords Licence, made a Leaſe for 21 years by Indenture, rendring Rent; and the Leſſee Covenanted for him, his Executors, and Aſſigns, That he would erect a pale about ſuch a Cloſe, and lay upon the Lands yearly, 40 Loads of Dung, and repair the houſes: Afterwards the Leſſor ſurrendred to the uſe of the Plaintiff and his Heirs, who was admitted; and for not performance of the Covenants, brought an Action of Covenant. The doubt was, Whether a Copyholder who comes to his Tenement by ſurrender of the Leſſor, be ſuch an Aſſignee as ſhall have an Action of Debt, or Covenant, by the Statute of 32 H. 8. And admitting he be not within the Statute, by the Common-Law, Covenants being made by expreſſe words with the Leſſor his Heirs and Aſſigns; the Aſſignee for theſe Covenants may maintain an Action. The Caſe was not Reſolved, *Ideo* Quære. Mich. 20 Jac. in C. B. rott. 1759. *Plott* and *Plomer's* Caſe. *Cro.* 1. Part, 17.

27. A Copyholder ſurrendred in conſideration of mony paid to B. the Lord accepted the ſurrender, and granted the Copyhold to B. for her life, who was admitted, and ſhe dyed: A. being alive, claiming it as her former Eſtate, let the Land to the Defendant; the Lord entred, and Leaſed it to the Plaintiff. It was ſaid in this Caſe, When a Copyholder for life ſurrenders to the uſe of another who is admitted, that the firſt Copyholder hath *quaſi* a poſſibility or Remainder of Eſtate; and if he ſurvive him, to whoſe uſe the ſurrender was made, that he ſhould have it again. But all the Court were clear of Opinion, that ſhe ſhould not have it again, and that there is no difference as to that purpoſe, to ſurrender to the uſe of one, and to Surrender generally: But they agreed, That if a Copyholder in Fee ſurrender to the uſe of another for life, who is admitted, he is in *quaſi* by the Copyholder, and by his death the Copyholder ſhall have it again. Hill. 2 Car. in B. R. *King* and *Lord's* Caſe. *Cro.* 1. Part, 148.

28. A Copyholder in Fee ſurrendred into the hands of the Lord by the hands of Tenants, according to the Cuſtome, without ſaying to whoſe uſe the ſurrender ſhould be; and at the next Court the ſaid Copyholder was admitted *Habendum* to him and his Wife in tail, the Remainder to his right Heirs: It was Objected, That the ſurrender was void, becauſe no uſe was limitted, and therefore by conſtruction of Law, it ought to be to the uſe of the Surrenderor. And 2. That the admittance was not good to paſſe an Eſtate to the Wife; ſhe being not named in the premiſes, but onely in the *Habendum*. But it was Reſolved. 1. That the ſubſequent Act ſhall explain the ſurrender; And when the Copy-holder accepts a new admittance, the Law intends that the ſurrender generally was made to ſuch a uſe as is ſpecified in the Admittance; for the Lord is onely as an Inſtrument to convey the Eſtate. 2. It was Reſolved, That the Wife ſhould take by this admittance, though ſhe were not named in the premiſes of the Deed. For this Caſe of a Copyhold is like to the Caſe of a Will, or Caſe of Frankmarriage, in which it is ſufficient to paſſe an Eſtate, although the party be not named in the *Habendum*. Trin. 14 Jac. in B. R. *Brooks* Caſe. *Poph.* 125.

29. The Cuſtome of a Mannor was, That the Lord might grant Copyhold Eſtates for life in reverſion, where the Cuſtomary Lands were demiſed and demiſeable according to the Cuſtome for one, two, or three Lives: The Lord granted the Lands by Copy in poſſeſſion, and took a wife, and granted the ſame Copyhold Lands to a ſtranger in reverſion for life and dyed; the Copyholder in poſſeſſion dyed; the Land demiſed by Copy is (*inter alia*) aſſigned to the Wife in Dower; who entred and made a Leaſe to the Defendant, againſt whom the Leſſee of the Copyholder brought an *Ejectione Firmæ*. And it was found, That every Copyholder of the Mannor might Leaſe his Copyhold for a year *ad paſturandum, ſed non ad colendum*: and that the Leaſe was made to the Plaintiff for a year *ad paſturandum*. It was holden in this caſe, That the Copyholder ſhould hold his Land diſcharged of the Dower; for that the Copyholder is in by the Cuſtome, which is paramount the title of Dower, and the Seiſin: and ſo it was adjudged, That he and his Leſſee ſhould hold the Lands diſcharged of the Dower. Paſch. 26 Eliz. in B. R. *Cham* and *Davers* Caſe, *Leon.* 16.

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30. In *Ejectione Firmæ* the Caſe was; A. purchaſed Copyhold Lands to him, his wife, and their ſon and heirs; and 2. years after, he became an Inne-holder, and received all the profits of his Lands: and afterwards, 4 Car. he became endebted to B. and others, and committed divers acts which declared him to be a Bankrupt. *Anno* 5 Car. upon a Petition to the Lord Keeper, That A. was a Petit Chapman, and got his living by buying and ſelling, prayed a Commiſſion of Bankrupts againſt him, which was granted. The Commiſſioners found him a Bankrupt, and ſold the Copyhold Land to the Leſſor of the Plaintiff. Afterwards A. dyed, and his wife dyed; the ſon entred, the Leſſor of the Plaintiff entred: The Queſtion was, Whether an Inn-holder, who did get his Living by buying and ſelling, and not otherwiſe, whether he was a Bankrupt within the Statutes of 13 Eliz. & 21 Jac. And it was the Opinion of the Juſtices, That he was not within the ſaid Statutes; for although he buy proviſion to ſpend in his houſe, he doth not properly ſell it, but utters it at ſuch rates as he thinks reaſonable, and the Gueſts do not take it at a certain price; but they may have it, or refuſe it if they will: and he is no more a perſon who getteth his living by buying and ſelling, then a Farmer: and the Statutes mention onely thoſe who buy and ſell by retail, or in groſs. But all the Juſtices held, That Copyholds generally are within the Intents of the ſaid Statutes, which is generally, All Lands, Tenements, and Hereditaments. And the Juſtices held, That the ſaid Copyhold Lands being purchaſed long before he was a Tradeſman, or became endebted; and no fraud being found, or of purpoſe of being a Bankrupt being found; It would be hard, to hold the ſaid purchaſed Lands to be within the Statutes. And it was adjudged for the Defendant. Hill. 10 Car. in B. R. *Criſp* and *Pratt's* Caſe. *Cro.* 1. Part, 395, 396. See *March.* 34. the ſame Caſe.

31. The Cuſtome of a Mannor was, That if a Copyholder in Fee dyeth ſeiſed, having a wife at the time of his death ſurviving him, that ſhe ſhall have the Copyhold-Land during her life, and for 12 years after. It was found, that A. Copyholder became bankrupt; whereupon a Commiſſion of Bankrupts was ſued againſt him; and that the Commiſſioners, 5. *Aprilis*, 10 Car. by Indenture enrolled, ſold the ſaid Copyhold Lands to the Plaintiff and other Creditors: and a private Act of Parliament, 1 Car. was found, whereby the Cuſtomes of the ſaid Mannor are eſtabliſhed; and particularly, the ſaid Cuſtome, That all women now living, and all the now Wives of the Copyholders, ſhall enjoy their Cuſtomary Lands now, and take their husband for their lives, and 12 years after. And it is found, That at a Court 1. *Aprilis*, 12 Car. the Wife ſurvived her Husband, and ought to enjoy the Lands for the Term of her life, and 12. years after; and that ſhe was admitted Tenant. In this caſe, It was Reſolved, 1. That the Bargain and Sale binds the Copyholder, and barrs his Eſtate, and that he is no Copyholder after the bargain and ſale enrolled; and the Bargainee by the Statute is onely barred to take the profits untill the Compoſition with the Lord, which is for the Lord's benefit, and not for the Copyholders. 2. That when the Bargainee is admitted by the Lord, it ſhall veſt in the Bargainee, and ſhall have relation to the Bargain and Sale, and ſhall deveſt the Eſtate which the wife claimed by the Cuſtome: And it is like the Caſe, where the Mortgagee dyeth, his heir being in Ward, and then the Condition is performed, the Wardſhip ſhall be deveſted. Hill. 13 Car. in B. R. *Parker* and *Blecks* Caſe, *Cro.* 1. Part, 410.

32. The Cuſtome of a Mannor was laid to be, That every Copyholder may nominate one to his Copy-Eſtate, who upon tender of his Fine to the Lord in Court, ought to be by him admitted; and he being admitted, he was to have the like priviledge of the like Nomination afterwards: and that the Plaintiff being nominated to the Copyholder, tendred his Fine to the Lord in Court, and prayed to be admitted, and the Lord refuſed to admit him, for which he brought his Action upon the Caſe againſt the Lord: And, If the Action would lye, was the Queſtion? It was the Opinion of all the Juſtices, That the Action did not lye; for the Plaintiff hath not any Intereſt, and therefore by ſuch an Action he ſhall not draw an Intereſt to himſelf from the Lord againſt his will. Hill. 12 Jac. in B. R. *Forde* and *Haskins* Caſe. *Bulſtr.* 2. Part, 336, 337.

33. A Copyholder of Inheritance in Fee-ſimple, (*jacens in extremis*) 43 Eliz. ſurrendred his Copyhold Lands into the hands of the Lord of the Mannor, *Habendum* after his death to the uſe and behoof of an Enfant, being in *ventre ſa mere*; and if ſuch Enfant dyes without heir within age, or before marriage, then to the uſe of B. and his heirs, according to the Cuſtome of the Mannor. The Child with whom the Mother went, was born, and dyed within age: The Queſtion was, Whether B. ſhould have the Eſtate according to the ſurrender, or J. S. who was the heir of A. In this caſe, It was Reſolved, 1. That the Surrender to the Enfant *in ventre ſa mere*, is not good, as an immediate ſurrender; for that it cannot begin at a day to come, like *Hegge* and *Croſſes* Caſe, where an Eſtate was made, To have and to hold to him after his death for life, and made Livery. It was void, becauſe a Freehold cannot begin at a day to

come. And ſo it was adjudged, Paſch. 23 Eliz. in *Clamps* Caſe, of a ſurrender. 2. That the Remainder to B. was void, becauſe it was to commence upon a Condition precedent, which was never performed, and therefore the ſurrender into the hands of the Lord was void; and the Lord doth not take but as an Inſtrument to convey the Land to another. And it was agreed, That, if a Copyholder in Fee doth ſurrender to the uſe of him and his heirs, becauſe the limitation of the uſe is void to him who had it before, the ſurrender to the Lord is void. Intrator. Hill. 7 Jac. in B. R. rott. 679. *Simpſon* and *Sotherns* Caſe. *Bolſtr.* 2. Part, 273, 274. and Mich. 13 Jac. adjudged. *Godbolt.* 264. the ſame Caſe. See Hill. 17 Car. in B. R. *Bambridge* and *Whitton's* Caſe adjudged acc.

34. The Lord of a Mannor ſeized a Copyhold without cauſe, and granted it to another in Fee; the Grantee dyed, and his heir was admitted; the firſt Copyholder dyed, his heir entred, and ſurrendred to the uſe of a ſtranger. It was Reſolved, That the diſcent of a Copyholder ſhall not take away the entry of another Copyholder, who hath right: and in this caſe, the heir entring without admiſſion, his entry was lawfull; and being in, his ſurrender to the ſtranger was good. Trin. 2 Jac. in B. R. *Joyner* and *Lamberts* Caſe. *Cro.* 2. Part, 36.

35. Note: It was holden by the Court, That if a Copyholder makes a Leaſe for years of Land, whereof a woman by the Cuſtome is to have her Widowes Eſtate, that the woman ſhall not avoid ſuch Leaſe, unleſs there be a ſpeciall Cuſtome ſo to do. Trin. 2 Car. in B. R. *Farleys* Caſe. *Cro.* 2. Part, 36.

36. A Copyholder for life had Common in the Lords Waſte; The Lord grants and Confirms the Copyhold Meſſuage and Lands to him and his heirs. It was Reſolved by all the Court, That this purchaſe ſhould extinct his Common by reaſon of the Cuſtome, which annexeth the ſame to his Cuſtomary Eſtate, which being deſtroyed and determined by his own act, in making it Freehold, the Common is alſo determined: and although the Grant be *Habendum cum pertinentiis*; yet the ſame will not help it, but that the Common is deſtroyed. Trin. 7 Jac. in B. R. *Marſham* and *Hunts* Caſe. *Cro.* 2. Part, 252. See 43 Eliz. in B. R. A Copyholder had uſed to take Eſtovers to repair his Copyhold, and the Lord granted to him the Freehold of the Copyhold, and all Lands, Tenements, and Hereditaments thereunto belonging, or therewith occupied; yet it was Reſolved, He ſhould not have Common in the Lands of the Lord, *Forth* and *Wards* Caſe. *Cro. Ibid.*

37. A. a Copyholder in Fee ſurrendred it into the hands of the Lord, who regranted it in this manner; *Memorandum, Quod A. cepit de Domino* (and mentions the Lands); *cui Dominus conceſſit inde ſeiſinam*; *Habend. eidem: A. et uxori ejus, et heredibus eorum de Corporibus ſuis exeuntibus*, the remainder to A. in Fee. It was adjudged, That the wife ſhould take; for there is no more granted to the husband, then to the wife: and the intent of the Lord was to give Seiſin to them both. Hill. 13 Jac. in B. R. *Brook* and *Brook's* Caſe. *Cro.* 2. Part, 474.

38. A. and B. being Convicted of Recuſancy, for not paying of 20 l. for every moneth, a Commiſſion was awarded to Enquire of their goods and Lands; and amongſt certain Lands, certain Copy-hold Lands were ſeiſed for to pay the debt: whereupon they came in, and by way of plea ſet forth, That ſome of their Lands were Copyhold, and prayed *amoveat manum* of the Queen; upon which, the Attorney-General of the Queen did demur in Law; and, Whether they were within the Statute of 29 Eliz. of Recuſancy, was the Queſtion? It was Objected, That they were within the meaning of the Statute, though not within the words; and ſo were Auncient Demeſne Lands. But it was adjudged, That Copyhold Lands were not within the ſaid Statute, by reaſon of the prejudice that might thereby come to the Lord, who had not committed any Offence, and therefore was not to loſe his Cuſtomes and Services. See *Everads* Caſe. *Owen* 37.

39. The Caſe was; That a Copyholder by his Will deviſed his Copyhold Land to his Wife for life, and that after her death, ſhe or her Executors might ſell the Lands: and after he did ſurrender into the hands of Tenants to the uſe of his Will; which ſurrender was preſented and entred *in hac forma* unto his wife for life *ſecundum formam ultimæ voluntatis*. In this caſe, two points were Reſolved, 1. That the Wife had an Eſtate for life in the Lands. And, 2. That ſhe had an Eſtate in Fee-ſimple to her to ſell: for, though the words were, That ſhe or her Executors after her death might ſell the Lands; yet the Will ſhall be ſo conſtrued by the Intent of Deviſor, that ſhe might ſell the Eſtate which was to remain after the death of her the wife; and if ſhe had not an Eſtate in Fee to ſell, then the Words *ſecundum formam Chartæ voluntatis*, ſhould be void: And ſuch Conſtruction ſhall be made of it, that all the words of the Will may ſtand, if it be poſſible. Mich. 29 Eliz. in B. R. *Leon.*

40. In this caſe, It was agreed by all the Juſtices, That if the Cuſtome of a Mannor be, That a Copyholder ſhall not alien his Copyhold without the Licence of the Lord of the Mannor, and the

the ſame be proved by the Court-Rolls, or ancient Preſidents, or by ſeiſures made by the Lord for ſuch alienation without Licence, although that the contrary uſage hath been put in practice by the ſpace of 80 years laſt paſt before, yet the ſame ſhall not deſtroy the Cuſtome. And it was further agreed by the Court, That if the Cuſtome of the Mannor be, That a Copyholder may make a Leaſe of his Copyhold for the Term of 3. years without Licenſe of the Lord; although on the part of the Lord it be ſhewed, That ſome Copyholders upon ſuch Leaſes, have paid a Fine by reaſon of ſuch Leaſes ſo made; yet ſuch Fine by encroachment ſhall extend to deſtroy or break the Cuſtome of the Mannor. Mich. 25 Eliz. in B. R. *Howard's* Caſe.

41. It was adjudged by the whole Court, That if a Copyholder doth ſurrender his Copyhold Lands to the uſe of a ſtranger for ever, and the Lord admit the ſurrenderee to have and to hold the Lands to him and his heirs, That if the ſurrender was made to the uſe of his Will, and in his Will it is deviſed, That the Deviſee ſhall have the Lands for ever; That in ſuch caſe, the Copyholder ſhall have Fee-ſimple in the Copyhold. But if a ſurrender be to a ſtranger onely for ever, without having Relation to a deviſe made by his Will, or that the ſurrender be not to the uſe of his Will. Quære, If the Lord do admit the ſurrenderee to have to him and his heirs for ever, whether the ſame ſhall be good, or not. Mich. 29 Eliz. in B. R. *Paſhall's* Caſe.

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2. *Of Admittance, Where a Copyholder ſhall be adjudged in poſſeſſion before admittance; and to what Intents: and what ſhall be ſaid a good Admittance; and by whom, and where in a Court and where out of Court: and divers other points concerning admittance of a Copyholder.*

1. A Copyholder in Fee had Iſſue two Daughters by divers women, and dyed ſeiſed; the daughters entred, and took the profits divers years; and before any admittance, the eldeſt daughter dyed without Iſſue; and afterwards the youngeſt daughter is admitted to the whole, as ſole heir to the Father. It was holden in that caſe, That the poſſeſſion of the eldeſt, though before admittance, ſhould make the Siſter, though of the half blood, heir inheritable to the Land; and that there ſhould be *poſſeſſio fratris*, before admittance, 12 Eliz. *Dyer* 291. *Cook* 4. Part, 23. acc.

2. In an *Ejectione Firmæ*, It was found by a ſpeciall Verdict, That the Cuſtome of a Mannor was, That a Copyholder might ſurrender his Copyhold out of Court into the hands of two Cuſtomary Tenants to the uſe of another; and at the next Court, the party to whoſe uſe the ſurrender was uſed, to be admitted. And it was feund, That there was ſuch a ſurrender made, but the party to whoſe uſe the ſurrender was, dyed before the next Court, and ſo was not admitted. And the Queſtion was, he dying before admittance, If he ſhall be ſaid a Copyholder by the Cuſtome of the Mannor, or not? It was ſaid, He was not a Copyholder within the Cuſtome; for a Cuſtome ſhall be expounded according to the apprehenſion of the Lay-people; and by ſurrender of a Copyhold before admittance, the Surrenderee hath no poſſeſſion; and the heir is in by diſcent, and holds by the Copy of his Auncеſtor, and ſo he hath the title to the Copyhold. But it was ſaid, That in the Principal Caſe, the ſurrender was into the hands out of Court, which is good; and it differs from the ſurrendring into the hands of Tenants: and the Lord's acceptance of rent, is an Admiſſion. Mich. 23 Car. in B. R. *Barker* and *Denham's* Caſe. *Styles* 145.

3. A Copyholder in Fee by Licenſe made a Leaſe for years; the Leſſee entred; the Copyholder having Iſſue a ſon and a daughter by one woman, and a ſon by another woman, dyed; the eldeſt ſon dyed before admittance. It was adjudged, That the Land ſhould diſcend to the daughter of the whole blood. And in that caſe it was Reſolved, That the heir of a Copyholder may ſurrender to the uſe of another, before admittance: and before admittance, the heir may enter, and take the profits of the Land: and after his entry before his admittance, he may have an Action of Treſpaſſe; and that there ſhould be *poſſeſſio fratris* of a Copyhold before admittance. Mich. 24 Eliz. in C. B. *Cook* 4. Part, 21, 22. *Browns* Caſe. 26 Eliz. *Clark* and *Pennyfathers* Caſe. *Cook* 4. Part, 22. acc.

4. A woman, Copyholder in Fee, ſurrendred her Copyhold Lands unto the uſe of W. her ſon in Fee; and at the next Court the entry was, That *W.* and *Joan* his wife *coperunt*, &c: *W.* dyed: *Joan* his wife ſurvived, and ſurrendred to the uſe of J. S. in Fee. It was Reſolved in this caſe, That when the Lord hath the Copyhold by ſurrender to the uſe of another, he hath but a Cuſtomary power to make admittance *ſecundum effectum ſurſum reddi-tionis*; & if he grant it to another, the Grant is void: and when the party is admitted, he ſhall be in by him who made the ſurrender, and not by the Lord:

and

and if the Lord admit one, To have to him and his heirs, where the ſurrender was for life onely, he ſhall have but for life. Trin. 33 Eliz. in B. R. *Cook* 4. Part, 28. *Weſtwicks* Caſe. See *Cook* 9. Part, 107. in *Podgers* Caſe, acc. See *Cook* 8. Part. 136. in Sir *John Needham's* Caſe, acc.

5. A Copyholder in Fee of Land, out of Court according to the cuſtome of the Mannor, did ſurrender by the hands of Cuſtomary Tenants to the Lord, to the uſe of *M.* his wife, and *Robert* his younger ſon, and dyed, the ſurrender was preſented, and the Lord gave Admittance, and granted Seiſin of the Land to *M.* and *Robert*, and to the heirs of *Robert*. *M.* dyed, *Robert* ſurvived, and ſurrendred to the uſe of E. his wife, and dyed: E. was admitted; *C.* the heir of A. entred upon E. It was Reſolved in this caſe, 1. When A. doth ſurrender into the hands of the Lord to the uſe of *M.* and *Robert*, without limiting any Eſtate, that they had but an Eſtate for their lives. 2. That when the Lord doth make admittance to *M.* and *Robert*, and the heirs of *Robert*, it was an Admittance only for their lives, becauſe the Lord is but onely an Inſtrument, and nothing remains in the Lord, but the reverſion of the Eſtate remains in him who made the ſurrender, to diſpoſe as he pleaſeth according to the Cuſtome of the Mannor. It was Reſolved, That a man may ſurrender to the uſe of his Wife, becauſe he doth it not immediately to his wife, but by a means, *ſcil.* by the ſurrender to the Lord to the uſe of his Wife; and by the Lord's admittance to the wife according to the ſurrender. Mich. 28 Eliz. *Bantings* Caſe. *Cook* 4 Part, 29.

6. Copyholder in Fee ſurrendred to the uſe of his Wife for life, the remainder to M. his younger ſon in Fee, and dyed; the wife was admitted, but M. refuſed to be admitted during the life of his Mother: afterwards without other admittance, he ſurrendred to the uſe of the Plaintiff in the life of his Mother. It was holden by all the Juſtices, That this admittance of the wife, was an admittance of him in the remainder, without any other admittance; for the wife being admitted to the particular Eſtate, the remainder depends thereupon, and veſts without other admittance, for they make but one Eſtate. Trin. 2 Jac. in B. R. *Auncelme* and *Auncelme's* Caſe, *Cro.* 2. Part, 31. See *Cook.* 4 Part. 23. Paſch. 36 Eliz. in B. R. *Fitch* and *Haskley's* Caſe. acc.

7. A Copyholder with Licence of the Lord Leaſed for years, and afterwards ſurrendred the Reverſion with the Rent, to the uſe of a ſtranger, who is admitted accordingly. It was moved, If there needed any Attornment either to ſettle the Reverſion, or to create a Privity? And it was the Opinion of the Juſtices, That the Surrender and Admittance are in the nature of an Inrollment, and ſo amounted to an Attornment, or at leaſt to ſupply the want of it. Hill. 28 Eliz. in C. B. *Love*, 297.

8. The Caſe was, That the Lord did confirm the Eſtate of a Copyholder before admittance. It was holden, That that did not amount to an Admittance to the Copyhold. And in that caſe it was further agreed by all the Juſtices, That no payment of Rent, or of the Fine to the Lord, was no forfeiture of the Copyhold, without a verball denyal of it. Trin. 21 Jac. in C. B. adjudged acc.

9. If a Court be holden by a Steward of a Mannor out of the Mannor, and divers Grants and Admittances be there made; the Court, and all the Grants and Admittances are void: For the Court of the Mannor ought to be holden within the Mannor, and not out of the Juriſdiction of it: But by Cuſtome, a Court may be holden out of the Mannor; and Grants and Admittances there, ſhall be good. Mich. 28 Eliz. in B. R. *Cook* 4. Part, 27. *Clifton* and *Mollineux* Caſe. See *Cook* 4. Part, *Melwiches* Caſe, acc.

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3. *Where he who is* Dominus pro tempore, *may grant Copy-holds, and may make Admittances: and what other acts he may do; What not.*

1. THe Queen let a Mannor to one *Orme*, except Courts, and perquiſites of Courts: Afterwards the Queen granted the Reverſion to a ſtranger with perquiſites and Courts. The Grantee made another Leaſe to begin after the firſt Leaſe, Excepting Courts and perquiſites. It was holden by the Juſtices, That the Exception was good in the Leaſe made by the Queen; but contrary in the Leaſe made by the Grantee of the Reverſion: and therefore the Grantee of the Reverſion during the firſt Term might grant Copies; but when the ſecond Leaſe begins, he cannot, but the firſt Leſſee. Paſch. 12 Eliz. *Dyer* 288. See 1 Ma. *Dyer* 97. acc.

2. In a Replevin. The Queſtion was, Guardian in Socage, held a Court in his own name, and granted Copies in Reverſion: And, If it were a good Grant, or not, was the Queſtion? It was Objected, That a Guardian is but a Servant, and not *Dominus*, becauſe he can neither grant, nor forfeit the Eſtate, and hath nothing to do with the Mannor, but to accompt for the profits of it: But it was Reſolved by all the Juſtices, That a Guardian is *Dominus pro tempore*, and that he hath an Intereſt

reſt in the Land, and may make a Leaſe thereof in his own name: and he hath the Ward by reaſon of looking to him, and therefore he hath Intereſt ſufficient to keep Court, and admit Copyholders who are not in by him, but by the Cuſtome. But a Bayliff of a Manner hath no Intereſt, and therefore he cannot make Grants and Copies: and therefore, Mich. 3 Jac. it was adjudged, That the Grant was good, and ſhould bind the heir. *Intrator.* Trin. 1 Jac. rott. 853. in C.B. *Sheapland* and *Ridlers* Caſe, *Owen* 115.

3. Every one who hath a lawfull Eſtate or Intereſt in a Manner, be it in Fee, in Tail, Dower, Tenant by the Curteſie, Tenant for life, Tenant for years, Guardian, Tenant by Statute or *Elegit*, or at Will; if a Copyhold eſcheats, or cometh into their hands during the time, they may regrant it, and it ſhall bind the Lord, becauſe every one of them is *Dominus pro tempore*, 26 Eliz. *Cook* 4. Part, *Clark* and *Pennyfathers* Caſe. See *Cook* 1. Part, in *Chudleigh's* Caſe, acc. See 1. Part, *Inſtitutes*, 58. acc.

4. Note: In ſome caſes, an Eſtate may be granted by Copy by one who is not *Dominus pro tempore*, nor that hath any thing in the Mannor; As, if the Lord of a Manner by his Will in writing deviſeth, That his Executors ſhall grant the Cuſtomary Tenements of the Mannor, according to the cuſtome for payment of his debts, and dyeth; the Executors having nothing in the Mannor, may make Grants according to the Cuſtome of the Mannor. *Cook* 1. Part, *Inſtitutes*, 58 acc.

5. The Caſe was, Tenant for the Term of the life of another man, continued & held in his Eſtate after the death of *Ceſtuy que vie*, and granted Copies of Copyhold Lands; and, If they were good, or voidable, was the Queſtion. In which the further Queſtion was, If he were Tenant at ſufferance, or a Diſſeiſor, or Tenant at Will? It was the Opinion of the Juſtices, That he was Tenant at ſufferance; and then when he holds over, he taketh upon him an Intereſt which ſhall not be thought wrongful; for he is neither Abator nor Diſſeiſor; For they, as it hath been judged, cannot grant Copies; and if they do grant them, they ſhall be void. But Tenant at ſufferance came in firſt by agreement of the party; and therefore is *Dominus pro tempore*: and ſo the grants of Copies by him are good. Mich. 30 Eliz. *Roufe's* Caſe. *Owen*. 28, 29.

6. The Earl of *Arundell* granted a Manor to the Earl of *Northumberland* in tail, with remainders over, upon Condition. The Earl of *Northumberland* took a wife, and granted the Reverſion of a Copyhold according to the Cuſtome of the Manor; and afterwards committed Treaſon, and was Attainted: the Copyholder in poſſeſſion dyed: whereupon the Grantee of the Reverſion entred into the Copyhold Land. In which Caſe, many Points were Reſolved: and amongſt the reſt, it was agreed by all the Juſtices, That although there was cauſe of Entry for many other matters; yet the Grantee of the Reverſion of the Copyhold ſhould keep the Land; for that it is a thing incident to Cuſtomes of Manor, That *Dominus pro tempore* may grant Copies. Trin. 17 Eliz. *Dyer* 342. The Earl of *Arundells* Caſe. See *Popham*, 71. acc.

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4. *What ſhall be a good Cauſe of forfeiture of a Copyhold; What not. And where the Lord may enter and ſeize the Copyhold for ſuch forfeitures, without preſentment; Where not.*

1. IF the Jury in a Leet refuſe to make preſentment, the Steward may aſſeſſe a Fine upon each of them for their Contempt: And ſo it is, if the Homages who are Copyholders in a Court Baron, refuſe to make their preſentments; it is a forfeiture of their Copyholds. 4 Eliz. *Dyer* 211. See *Cook* 11. Part, 43. in *Godfrey's* Caſe. And for the caſe of Forfeiture of Copyholds, It was accordingly Reſolved in the Star-Chamber by the Lords Chief Juſtices in the Earl of *Arundell's* Caſe.

2. If a Copyholder doth not do his Services which he ought to do, by which he breaks the Cuſtome of the Mannor; the Lord may enter into the Land as forfeit: and if the Land be ſowed with Corn, the Lord ſhall have the corn. 42 E. 3. 25. And ſo if a Copyholder alieneth his Copyhold, it is a diſſeiſin to the Lord, and a forfeiture of his Eſtate. 33 E. 3. vouch. in *Cook* 4. Part, 21. in *Browns* Caſe.

3. If a Copyholder be ſeiſed by force of ſeveral Copies, *ſcil.* of black-acre, by the rent of 4 d. and of white-acre by the rent of 4 d. and of gr. acre by the Rent of 6 d. And afterwards he committeth Waſte in any part of black acre, or denyeth the Rent of that acre; by that all black-acre is forfeited. But it is no forfeiture of any of the other acres: for although they all be in one hand, yet every acre is holden ſeverally, ſo as the forfeiture of the one, cannot be the forfeiture of the other: and if the ſaid Copyholder ſurrendreth one of the ſaid Acres to A. and his heirs; and the Lord admitteth A. accordingly, *Tenend. per ſervitia prius debita, et conſuet.* And afterwards A. commit-

teth a forfeiture in Black Acre, he ſhall forfeit only the ſame, and none of the other Acres. Hill. 35 Eliz. *Tavernor* and *Cromwell's* Caſe. *Cook* 4. Part, 27.

4. Note, If the Eſtate of the Lord of a Mannor ceaſeth, by limitation of an uſe, and the uſe and Eſtate thereof be transferred to another, who demandeth the Rent of a Copyholder, who denyeth to pay the ſame unto him; It is no forfeiture, without notice given to the Copyholder of the alteration, of the uſe and Eſtate: So a Bargaynee of a Mannor by Deed Indented, and Enrolled, ſhall not take advantage of a forfeiture of a Copyhold for non-payment of Rent without notice given to him of the Bargain and Sale. Hill. 1 Jac. *Beconſhaw* and *Southcotes* Caſe. vouched in *Cook* 8. Part, 92. in *Fraunces's* Caſe.

5. The Cuſtome of a Mannor is, That if a Copyholder in Fee of the ſaid Mannor dyeth ſeiſed, and his Heir doth not come in at the next Court to claim his Lands, and to be admitted, and pay his Fine; That then Proclamations ſhall be made at three Courts holden for the ſaid Mannor; and if the Heir at ſome of the ſaid Courts, in which Proclamations are made, doth not come and claim the Lands, and pray to be admitted; that then the Lord ſhall ſeize the Copyhold as forfeit. A Copyholder in Fee dyed ſeiſed, his Heir being beyond Sea, all the Proclamations paſſed at the three Courts, and the Heir did not come and claim the ſaid Lands, and the Lord ſeiſed the Copyhold Lands, and Granted the ſame to a ſtranger by Copy. The Heir returned; and when he had notice of the death of his Father, came to the Lord and claimed his Lands, and prayed to be admitted, and the Lord refuſed to admit him. In this Caſe, It was Reſolved, That that Cuſtome and non-claim, ſhould not bar him who was beyond Sea at the time of the Proclamations, of his Inheritance; becauſe, by intendment of Law, he who is beyond Sea, cannot have knowledge of the death of his Father, nor of the Proclamation made to warn him to come in to make his claim, and pray to be admitted. *Cook* 8. Part, 99. Sir *Richard Lechford's* Caſe.

See *Bornford* and *Packington's* Caſe, here Copyhold. Caſe 1.

See before, *Penn* and *Merivald's* Caſe, here Copyhold, Caſe 14.

6. The King was Lord of a Mannor; and a Copyholder within the ſaid Mannor made a Leaſe for three lives, and made Livery; and afterwards the ſurvivor of the three continued in poſſeſſion for 40 years. In that caſe, It was holden, becauſe that no livery did appear to be made upon the Endorſement of the Deed (although in truth there was Livery made) the ſame was not forfeiture, of which the King ſhould take any advantage. And in that Caſe, It was cited to be adjudged in one *London's* Caſe; That if a Copyholder doth bargain and ſell his Copyhold Tenement by Deed Indented and Enrolled, that the ſame is no forfeiture of the Copyhold, of which the Lord can take advantage. Mich. 5 Jac. in *Scaccario*. *Godbolt*. 269.

8. The ſummons of a Copyholder to appear at the Lords Court, was at the Church; and there upon the Copyholder did not appear; And it was the Opinion of the whole Court, That the ſame was no cauſe of forfeiture of the Copyhold, becauſe it was not ſpecially ſhewed to be the Cuſtome, and it ſhall be hard to make it a forfeiture, for perhaps the Copyholder had not notice of it: And ſo was it holden, as they ſaid in the Lord *Dacres* and *Hurleſtons* Caſe. And they held, That notice ought to be given to the perſon, and the refuſall muſt be willfull: For if a Copyholder be demanded his Rent, and he ſaith, He hath it not, it is no forfeiture; but the denyall muſt be a willfull denyal; and ſo it was adjudged in one *Winter's* Caſe. *Godbolt*. 142, 143. Hill. 36 Eliz. in C. B. See 30 Eliz: in B. R. Sir *John Braunchers* Caſe. *Litt*, 140.

8. An Enfant Copyholder made a Leaſe for years by word, not warranted by the Cuſtome, rendring Rent; The Enfant at his full age was admitted to the Copyhold, and afterwards accepted the Rent: The queſtion was, Whether this Leaſe and acceptance of this Rent ſhould conclude and bind the Enfant? It was ſaid, If this Leaſe ſhould be good and effectuall, It would be a wrong to a ſtranger, or the Lord, and a prejudice to himſelf, to make a forfeiture of the Inheritance: On the other ſide, it was ſaid, That the Leaſe was good by the acceptance of the Rent at his full age, *Cam.* 54. A Leaſe is made for years, the Remainder for years rendring Rent, by an Enfant; And afterwards at full age, he accepts of the Rent of the particular Tenant, it is a good Confirmation of the Eſtate of him in the Remainder, and the Enfant being a Copyholder, makes no difference in the Caſe. Trin. 2 Car. in B. R. *Aſhfield* and *Aſhfeild's* Caſe. *Godbolt*. 364, 365. And in this Caſe, The Caſe was put. That if a Copyholder for life hath Licence to make a Leaſe for three years if he live ſo long; and he makes a Leaſe for three years, without ſuch limitation; yet this is no forfeiture of his Eſtate, becauſe the operation of the Law makes ſuch a limitation to the Eſtate which he makes, that it ſhall not continue, but for his life, as it was adjudged. Hill. 18 Jac. in *Hall* and *Arrowſmiths* Caſe, which ſee *Popham* 105. See Trin. 15 Jac. in B. R. *Worledge* and *Benberyes* Caſe. *Cro.* 2. Part, 436, 437. acc.

9. The Caſe was, A Copyholder brought an Action

Action of Treſpaſſe againſt his Lord for a houſe, and an Acre of Land. The Defendant pleaded, That he had admitted the Copyholder, and had aſſeſſed a Fine of twenty Nobles upon it, and had appointed him to pay it to his Bayliff, at his houſe within the Mannor, three Moneths after; and alledged that he had not paid it: wherefore he entred upon the Land as forfeited; upon which, the Plaintiff did demur. It was the Opinion of the Court in this Caſe, That the Lord was not bound to aver, or ſhew that the Fine aſſeſſed, was a reaſonable Fine; but that muſt come on the Copyholders ſide, to ſhew the Circumſtances, to make it appear to the Court, that it is an unreaſonable Fine, and put it to the Judgment of the Court: But yet, in the principall Caſe, the Opinion of the Court was againſt the Lord, becauſe he had not layed a demand of his Fine at the time it grew due, or ſometime after, of the perſon of the Tenant, as he muſt do in Caſe of forfeiture of Copyhold, both for Rent and Fine. Hill. 13 Jac. in C. B. *Denny* and *Lemmons* Caſe. *Hob.* 135. See Mich. 1653. in B. R. *Fanſhaw* and *Bond's* Caſe. acc. *Styles* 387.

10. The Cuſtome of a Mannor was, That if a Copyholder lets his Lands for a longer time then a year, they ſhall be forfeited. A Copyholder makes a Leaſe for a year, and ſo from year to year, excepting the laſt day of every year. It was the Opinion of all the Court, That it was a forfeiture, for it is but a ſhift to avoid a forfeiture, and in Law, it is no avoydance, for it is a certain Leaſe for two years excepting two dayes, and although there be intermiſſion of a day, yet that is not materiall. It was adjudged for the Plaintiff in Treſpaſſe brought. Mich. 10 Jac. in B. R. *Lutterell* and *Weſtons* Caſe. *Cro.* 2. Part, 308. See *Bolſtr.* 1. Part, 215. the ſame Caſe. See 4 Car. in B. R. *Mathews* and *Whettons* Caſe. *Cro.* 1. Part, 169. acc.

11. In an *Ejectione firmæ*, the Queſtion was, Whether a Copyholder not comming to the Lords Court to do his Suit for three years ſpace, be a cauſe to forfeit his Copyhold. It was holden, it was no forfeiture, unleſſe that he denyed to do his Suit: And there is no Cuſtome layed to have a forfeiture for Non-feaſans of his Suit within three years; And if a Copyholder doth withdraw his Suit, it is onely Fineable, but if he deny his Suit, it is a forfeiture. And it was ſaid alſo by the Court, That it is no forfeiture, if a warning be not given by the Lord, of the time of his Court to be holden, and notice thereof was given to the Copyholder himſelf. Mich. 13 Jac. in B. R. *Belfield* and *Adams's* Caſe. *Bolſtr.* 3. Part, 80, 81. See Mich. 14 Jac. in B. R. *Hamond* and *Wembank's* Caſe. *Bolſtr.* 3. Part, 268, 269. acc.

12. Note, there was a difference taken between a Reall and a Perſonal forfeiture of Copyhold-Lands: for a Reall forfeiture, needs not to be found by the Homage; but contrary, of a perſonall forfeiture. And that difference was ſaid to be agreed in one *Brock's* Caſe. And it was ſaid, and adjudged by the Court, That if a Copyholder doth erect a new houſe upon his Copy-Land, without Licenſe of the Lord, that the ſame was a forfeiture of his Eſtate, though it might ſeem to be for the advantage and benefit of the Lord; Quære, for I conceive the Law to be otherwiſe. Mich. 8 Jac. in B. R. *Ward's* Caſe.

13. A Copyholder made a Leaſe, by which a forfeiture accrued to the Lord, who afterwards accepted of the Rent, and, If by that acceptance of the Rent, he was concluded to enter for the forfeiture, was the queſtion. It was ſaid, He was not: for it is not like the Caſe where a Leaſe is made upon Condition, That the Leſſee ſhall not do waſte, and the Leſſor afterwards accepts the Rent, the ſame acceptance diſpences with the forfeiture, becauſe it is a Condition in Fact; but it is otherwiſe of a Copyhold, for there it is a Condition in Law, and a Condition in fact may be ſaved by an Accepeance, but not a Condition in Law. And it was agreed, That when ſuch a forfeiture is preſented, the ſame is not to entitle the Lord, but to give him notice; for the Land is in him by the forfeiture preſently, without any preſentment. Mich. 29 Eliz. in B. R. *Godbolt.*

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5. *If Copyhold Lands be within the Statute of* Donis Conditionalis, *and may be entailed, or not, and if it be, How, and by what means the Tail may be deſtroyed, What not.*

1. NOte, It was ſaid to be Law, That an Eſtate tail might be of Copyhold. And that a Formedon in the Diſcender, might lye thereof by Proteſtation in the nature of a Formedon in the Deſcender at the Common Law. And it ſhall be intended that there hath bin a Cuſtome, time out of mind, to entail ſuch Lands; And the Demandant did recover by the advice of all the Juſtices. 26 H. 8. *Tenant at Will.* 24.

2. It was moved to the Juſtices, to have their Opinions, Whether Copyhold-Land might be entailed or not: who anſwered, That no entail might be thereof, but where it had bin uſed to entail ſuch Lands, time out of mind, &c. by Cuſtome: for the

ſame is not within the compaſſe of the Statute of *Weſt.* 2. of Entails, according to the Common-Law. And further, they ſaid, That if ſuch Lands are intailed, that the tail can never be defeat.d by Proteſtation in the nature of an Action. And ſuch was the Opinion of the Juſtices, upon a reference to them out of the Chancery, by the Lord Bacon, Lord Chancellor. Trin. 17 Eliz.

3. A *Monſtraverunt* was by a Copyholder againſt Husband and Wife: and upon default of the Husband, the Wife was received to defend her right before Judgment. And the Wife pleaded, That there is a Cuſtome within the Mannor, time out of mind, &c. That every Cuſtomary Tenant might ſurrender his Cuſtomary Lands of the Mannor out of Court, in the preſence of two or three Cuſtomary Tenants, into the hands of the Lord, holding of any perſon in Fee-ſimple, Fee-tail, for life, or years, and that the Lord might admit them out of Court; and pleaded, That ſuch a ſurrender was made, and the Plaintiff did imparle. Book *Entries.* 130. p. 2.

4. It was teſtified by the Steward in Court, That J. B. Son and Heir of C. B. deceaſed, came before the Steward, and ſurrendred into the hands of the Lord according to the Cuſtome, a Tenement in S. to the uſe of C. D. and J. his Wife, and the Heirs of the body of the Husband, after the death of the Wife, who held for life, with divers Remainders over in tail. And that the Lord by his Steward granted Seiſin out of his hands by the Rod, To have and to hold the ſaid Lands in Reverſion in tail, as before, according to the Cuſtome of the Mannor, at the Will of the Lord, by the Rents and Services of Antient time due, and accuſtomed. Book *Entries* 131. p. 1.

5. In Treſpaſſe for breaking of his houſe and Cloſe, the Defendant ſaid, That the Lands are, and, time out of mind, were Cuſtomary, and parcell of the Mannor of S. in the County of E. and are, and, time out of mind, were demiſeable by the Lord of the Mannor by his Steward for the time being, to any perſon who would take the ſame in Fee-ſimple, Fee-Tail, for life, or years, &c. Book *Entries*, 569.

6. Guardians, and Channons Regular of a Colledge, ſeiſed of divers Lands, Ancient Copyhold, of the Mannor of D. Granted parcell of thoſe Lands to A. and B. for their lives, by Copy, according to the Cuſtome of the Mannor; And afterwards 30 H. 8. they by Deed Indented, made a Leaſe to C. of the ſaid parcells of Lands for 30 years, rendring the Ancient Rent, and afterwards ſurrendred their Colledge to the King; and after the Statute of 31 H. 8. was made, A. and B. dyed; C. the Leſſee entred; and the King brought Intruſion. And in this Caſe, It was Reſolved, 1. That the ſaid Leaſe made to C. of the ſaid Lands, whereof A. and B. were ſeiſed by Copy, was void; and Reſolved, That the ſaid Copyhold Eſtate, was an Eſtate for life, within the Statute of 31 H. 8. for the intent of the Act was, to avoid doubling of Eſtates, and to have but one ſingle Eſtate in *Eſſe* at one time. 2. It was Reſolved, That the Statute of *Weſt.* 2. *de Donis*, &c. did not extend to Copyholds; for, if the Statute ſhould alter the Land, the ſame ſhould alſo be an alteration of the Cuſtome, in prejudice of the Tenant and Land, and alſo ſhall be a great inconveniency for then a Common Recovery, or Fine ſhould not bar an Eſtate tail without aſſent of the Lord, unleſſe he commit a forfeiture. But by Cuſtome, a Copyhold might be entailed: But the Statute which gave *Cui in vita*, *Reſceit*. *Quod in deforc* which are not prejudiciall to the Lords, did extend to Copyholds. 26 Eliz. *Cook* 3. Part, 7. *Hyde's* Caſe.

7. Note, It was agreed by the Juſtices, That whereas by the Cuſtome of the Mannor, Plaints had bin made in the Court of the Mannor, in the nature of reall Actions, That if a Recovery be in a Plaint, in the nature of a Reall Action againſt Tenant in Tail (admitting that Copyhold-Lands may be entailed) that it ſhall be a Diſcontinuance, and take away the Entry of the Heir in Tail; for, inaſmuch as Plaints in the nature of reall Actions, are warranted by the Cuſtome, it is an Incident which the Law annexeth to the Cuſtome, that a Recovery ſhall be a Diſcontinuance. Trin. 36 Eliz. in B. R. *Cook* 1. Part, 23. *Deal* and *Rigden's* Caſe.

Note: It was ſaid by *Coke*, Chief Juſtice, That it was adjudged, 29 Eliz. for the Mannor of *North-Hall* in the County of *Eſſex*, That admitting, that a Copyholder may be entailed by the Statute, That then a Cuſtome, that a Surrender ſhall be a barr, or a Diſcontinuance of ſuch an Eſtate, ſhall be good: For as well as the Eſtate may be created by Cuſtome, as well may it be barred, or diſcontinued by ſurrender or cuſtome. Mich. 9 Jac. in C. B. *Hill* and *Upchurches* Caſe. *Brownlow*. 121.

9. In *Ejectione Firme*, the Caſe was; *A.* was ſeiſed of certain cuſtomary Tenements holden of the Mannor of F. and 3 H. 8. (before which time, the cuſtomary Tenements of the ſaid Mannors had alwayes been uſed to be granted by Copy of Court-Roll in Fee-ſimple for life or years, but never in tail but then) the ſaid A. ſurrendred his ſaid Copyhold Lands to the uſe of *Joan* his eldeſt daughter for life, the remainder to J. G. the eldeſt ſon of *Joan*, and to the heirs of his body, the remainder to H. G. and the heirs of his body, the remainder to the right heirs of A; and Seiſin was given

to

to *Joan*. A. dyed, having Iſſue the ſaid *Joan* and *Eliz*. And at the Court holden for the Mannor, 4 H. 8. it was preſented, the Daughters were his heirs, and that the ſaid ſurrender made, was void, becauſe it was not uſed within the ſaid Mannor to make ſurrenders of Eſtate tails, and thereupon the Homage made a partition of the Lands, and limited part to *Joan*, and part to *Eliz*. and Seiſin was given them accordingly. *Eliz*. dyed, M. was found her heir, and admitted Tenant; afterwards *Joan* dyed, M. took to husband J. S. who with his wife ſurrendred his part to the uſe of J. D. and his heirs. M. dyed without Iſſue: J. D. held his part, and ſurrendred it to the uſe of J. N. and J. K. and their heirs, who were admitted: J. G. dyed. In this caſe, It was ſaid by ſome of the Juſtices, That an eſtate tail could not be of Copyhold Lands, unleſſe in caſe where it had been uſed: for that the Statute of *Donis* ſhall not enure to ſuch cuſtomary Lands, but to Lands at the Common-Law. And they ſaid, That the remainder here limited to J. G. upon the death of the ſaid A. was a Fee conditional; which is well warranted by the cuſtome to demiſe in Fee; but they ſaid, That during the uſe of A. nothing was in *Elizabeth*, which could diſcend from her to her daughter M. or might be ſurrendred by the ſaid M. and her husband; and therefore M. dying without Iſſue in the life of J. G. who had the Fee-ſimple conditionall, nothing was done which might hinder the ſon of H. G. of his entry. But yet, after long debate, It was holden by the Court, That the Statute of *Donis Conditionalibus*, co-operating with the cuſtome, That a Copyhold might be entailed; and further in this caſe it was holden, and ſo Reſolved, That ſuch an eſtate tail could not be deſtroyed by a ſurrender, unleſs by a ſpeciall cuſtome. Mich. 36 Eliz. in B. R. *Gravenor* and *Brooks* Caſe. *Popham*, 32, 33.

10. The Caſe was, Tenant in tail of Copyhold Lands ſurrendred the ſame into the hands of the Lord, to the uſe of J. S. There were 2. Points, 1. If Copyhold Lands be within the Statute of *Donis*? 2. If it may be cut off by Surrender? To the firſt, it was ſaid, That it had been a great doubt, Whether it may be entailed? But the common and better Opinion was, That by the Statute of *Weſtm*. co-operating with the cuſtome, it might be entailed. See *Cook* 3. Part, *Heydons* Caſe, acc. And, 2. That it could not be cut off by ſurrender, without a ſpeciall Cuſtome. And the Court ſaid, That to maintain the cuſtome, it ought to be ſhewed, That a *Formedon* had been brought upon ſuch a ſurrender, and Judgment given, That it did lye. Mich. 15 Jac. in B. R. *Lee* and *Browns* Caſe. *Popham* 128, 129.

11. In Treſpaſs: It was found by ſpecial Verdict, That A. a Copyholder in Fee, 39 Eliz. ſurrendred his Copyhold Lands into the hands of two Tenants of the Mannor, to the uſe of his Will, and had Iſſue 2. ſons, J. and H. and deviſed his ſaid Lands to J. and the heirs males of his body, the remainder to H. and the heirs males of his body, with divers remainders over, and dyed: 41 Eliz. the ſurrender was preſented; and J. admitted, To have to him and his heirs. Afterwards J. had Iſſue 3. ſons; and ſurrendred the ſame to the uſe of his Will, and thereby deviſed it to K. his wife, and dyed: 42 Eliz. the Surrender was preſented, and ſhe was admitted: the 3. ſons of J. dyed without Iſſue, and the Jury found, That no Copyholder might ſurrender or deviſe his Copyhold Lands in tail. And that afterwards A. married J. D. who Leaſed to the Plaintiff: And here the Queſtion was, When a Copyholder in Fee ſurrenders to the uſe of one in tail, being no cuſtome to warrant ſuch entail, Whether it be an entail by the Statute of *Weſtm. de Donis*, &c. or a Fee-ſimple conditional, at the Common-Law? And it was holden by all the Juſtices, That a Copyhold could not be entailed within the Statute of *Donis*? and that for divers cauſes: 1. Becauſe that it is not within the Letter of the Statute, which ſpeaks onely *de Tenementis per Chartam datis*. 2. It is not within the meaning of the Statute, becauſe before 7 E. 4. 19. they were not of any account in Law, being but Eſtates at Will. 3. The Statute provides againſt thoſe who might make Diſheriſin by Fine or by Feoffment; which a Copyholder could not do, or make. 4. Becauſe, if they might have been entail'd, that the Reverſion ſhould be left in themſelves, which cannot be. And, 5. Becauſe it ſhould be miſchievous, becauſe there ſhould be no means to dock or cut off the Eſtate tail. Mich. 2 Car. in B. R. *Intrator*. Trin. 18 Jac. rott. 1051. *Royden* and *Mouſters* Caſe. *Godbolt*. 367. See *Cro*. 1. Part, 31, 32. the ſame Caſe.

12. A ſurrender was made to the uſe of one in tail, with divers remainders over in tail: In that caſe it was adjudged, 1. That it was no diſcontinuance. 2. If it were a diſcontinuance, yet a *Formedon* in the *Remainder* did not lye of it; for when a Copyholder makes a guift in tail, he hath no Reverſion, but onely a poſſibility; and the Lord ought to avow upon the Donee, and not upon the Donour. And, 3. a Recovery ſhall not be without a ſpeciall Cuſtome. 37 Eliz. in C. B. *Lane* and *Hill*'s Caſe.

13. Note: It was Reſolved, That Copyholds were not within the Statute of *Donis*; for if they were within the ſaid Statute, the Lord ſhould not enter for Feleny, but the Donor; and the Services ſhould be done to the Donor, and not to the Lord

of the Mannor. Paſch. 35 Eliz. in C.B. rott.334. *Pitts* and *Hockley*'s Caſe.

14. A ſurrender was made of a Copyhold within the Mannor of *Stevenſden*, unto the uſe of one, and the heirs males of his body; and after Iſſue, he ſurrendred to another: And it was adjudged by all the Juſtices, That the Iſſue was barred; for it was adjudged, That the ſame was a Fee conditional at the Common-Law, and *poſt prolem ſuſcitatam*, he might alien. Hill. 34 Eliz. in B. R rott. 292. *Stanton* and *Barneys* Caſe.

15. It was adjudged in the Common-Pleas, upon an Evidence given for Lands within the Mannor of *Iſleworth*, That no eſtate tail might be of a Copyhold, without a ſpeciall cuſtome to warrant it, Trin 36 Eliz. in C. B. rott. 547. and Mich. 36 Eliz. in B. R. It was adjudged, That a Copyholder could not ſuffer a Recovery, becauſe that Recovery in value is by reaſon of the warranty annexed to an eſtate at the Common-Law, which cannot be annexed to a cuſtomary eſtate. 42 Eliz. in B. R. *Eriſh* and *Ives* Caſe.

16. Note: It was ſaid by *Rolls*, Chief Juſtice, That Copyhold Lands in tail are not within the Statute of *Weſtm.* 2. but it is a Cuſtomary entail, like in its nature to another entail; and ſuch an eſtate muſt be docked by Fine, or ſome other cuſtomary way. And he ſaid, That if Copies of Court-Rolls be ſhewed to prove a cuſtomary eſtate, the enjoyment thereof muſt alſo be proved; otherwiſe the proof is not good. And in the Evidence given in the Caſe, It was ſaid, That the ſeizure of the Lord of Copyhold entailed Lands within the Mannor of *Wakefield*, is in the nature of a Recovery to dock the entail; and that the manner of doing it, is either for the Copyholder to let his Copyhold for more years then he ought, or to refuſe to do his ſervice, and then the Lord ſeizeth the Land for a forfeiture, and grants it to another by the conſent of the Copyholder that made the forfeiture. But the Chief Juſtice ſaid, That there could be no ſuch cuſtome, to cut off entails of Copyhold Lands by the forfeiture and ſeizure of the Lord; for that his ſeizure upon the forfeiture deſtroyes the Copyhold eſtate by the Common-Law; for it is in the Lords Election after ſeizure, if he will grant it again by Copy, or no. Paſch. 1655, in B. R. *Pilkington* and *Bagſhawes* Caſe, *Styles* 459.

6. *Where, and by what, and whoſe Act, a Copyhold Eſtate ſhall be ſaid extinguiſhed, or ſuſpended; and where revived again; where not.*

1. A Purchaſed a Copyhold of B. to himſelf and his wife and his child, for the Term *vitæ eorum*, &c. B. leaſed the Freehold of the Land by Indenture to *C.* for the term of his life, reſerving to him a Rent, and made Livery and Seiſin accordingly. Afterwards B. levied a Fine to A. of the ſame Land; and A. accepted the Rent of *C*: and, If the Copyhold were determined or not, was the Queſtion? And it was holden, It was gone and determined. And there the caſe was put; If a Diſſeiſor makes a Leaſe for life rendring rent, and afterwards grants the Reverſion to the Diſſeiſee, and he accepts the Rent of the Leſſee; he ſhall never put him out. 28 H. 8. *Dyer* 30. *Comptons* Caſe. See *Cook*. 3. Part, *Pennants* Caſe, 64. acc.

2. If a Copyholder accepts a Leaſe for year, of the Lord of his Copyhold, the Copyhold is deſtroyed for ever, and can never be granted again. If the Copyholder takes a Leaſe for years of the Mannor, by that his Copyhold hath not continuance; as it was adjudged, Paſch. 17 Eliz. in *Hides* Caſe. But in the ſame Caſe it was Reſolved, That ſuch Leſſee may regrant the Copyhold to whom he will; for the Land was always demiſed or demiſable. Mich. 19 Eliz. in B. R. *French* his Caſe. *Cook* 4. Part, 31. See Mich. 29 Eliz. *Godbolt* 101. acc.

3. In Treſpaſs: The Iſſue was; If the Lands were Cuſtomary, and demiſed, and demiſeable *per Copiam, &c. de tempore cujus Contrarium, &c.* And it was found, That it had been demiſed for 60. years *per Copiam* in Fee-ſimple, Fee-tail, for life, years, or otherwiſe; And that afterwards the Lord demiſed the ſame by Indenture for the Term of 18 years, if the Leſſee ſhould ſo long live: and that afterwards the Lord leaſed the Tenements by Copy to the Deſendant for the Term of his life; and then concluded, That the Leſſee *continuaverunt et habuerunt Statum et poſſeſſionem prædictor. Tenementorum, cum pertinentiis modo et forma prædict. per ſpatium dicti termini 60. annorum*; and demanded the Opinion of the Court, If the Land be Cuſtomary, and demiſed and demiſeable by Copy, or not? And the Court held the Verdict to be naught; and a *Venire facias denovo* was awarded.

4. The

4. The Queen being ſeiſed of the Mannor of B. granted part of the ſame being ancient Copyhold, to F. in Fee; and afterwards the Queen granted the Inheritance of the ſaid Copyhold to a ſtranger in Fee: F. made his Will, and thereby deviſed the Copyhold Land to the Plaintiff in Fee, and at a Court holden at the ſaid Mannor, ſurrendred into the hands of the Queen to the uſe of his Will: In pleading, the Defendant did alledge the ſaid Grant made to F. by force whereof he was ſeiſed; and ſo ſeiſed, dyed ſeiſed; and that the ſame diſcended to the Defendant as his ſon and heir. And in this caſe it was Reſolved, That Cuſtome had ſo eſtabliſhed and fixed the Eſtate of the Copyholder, that by the ſeverance of the Inheritance of the Copyhold from the Mannor, the Copyhold was not deſtroyed, for as much as the Lord himſelf cannot ouſte the Copyholder, no more can any one claiming under him do: and that, in this caſe, the ſaid Copyhold diſcended to the Defendant, notwithſtanding the Deviſe and Surrender; for the ſurrender after the ſeverance of the Inheritance of the Copyhold from the Mannor, was void; and the Deviſee alone cannot transfer ſuch cuſtomary eſtate. Mich. 34 Eliz. in B.R. *Murrell* and *Smith*'s Caſe. *Cook* 4. Part, 24. See *Cook* 4. Part, 27. Trin. 30 Eliz. *Milwick* and *Luters* Caſe, adjudged acc.

5. The Cuſtome of a Mannor is, That every Copyholder Tenant for life might take Timber growing upon his Copyhold, to imploy in the Reparations of his Copyhold. The King made a Leaſe of a Mannor, of which a Copyhold is parcell, for years; Excepting all Woods, Underwoods, and Timber-Trees: The Leſſee for years *Dominus pro tempore*, deviſed and granted a Copyhold, upon which was Timber, to another for life, who cut Trees to repair and amend his Copyhold. It was Reſolved in this caſe, That notwithſtanding the ſeverance and Exception, yet the Grantee ſhould have the Trees: For the Eſtate of the Copyholder, who comes in by voluntary grant, is not derived out of the Eſtate or Intereſt of the Lord; but the Copyholder is in by the cuſtome which is paramount, and the Lord is but an Inſtrument to make the Grant. 2. It was Reſolved, That when a Copyholder Tenant for life according to the cuſtome, hath uſed to have Common, or Eſtovers in the Waſte of the Lord, and the Lord alieneth the Waſte or Wood in Fee, and afterwards grants a Copyhold Meſſuage for life; the Cuſtome ſo unites the Common or Eſtovers to the Meſſuage or Land, and they are ſo incident to it, that, notwithſtanding the Feoffment, or Fine of the Waſte, or Wood, made by the Lord, they remain, and are preſerved by the cuſtome. 6 Jac. in C. B. *Cook* 8. Part, 63. *Swaines* Caſe.

6. The father Tenant for life of a Copyhold (where the cuſtome was to have for 2. or 3. Lives ſucceſſive) the remainder to his eldeſt daughter for life, the remainder to the two daughters for life, after the death of the one or other: The Father Tenant for life by bargain and ſale enrolled, purchaſed the Inheritance of the Copyhold of the Lord, who levied a Fine of it to the father and his heirs with Proclamations: The father dyed, the ſon entred and levied a Fine to the uſe of himſelf and his wife, and to his heirs, and dyed; 10 years after, the wife entred: the Queſtion was, If the eldeſt daughter in remainder might enter, or ſhe were barred by the Fine? In this caſe divers Points were Reſolved, 1. That Copyhold Lands were within the Statute of 4. H. 7. of Fines, and ſo was a Leaſe for years. But if a Copyholder, or a Leſſee for years, by *Covin* to barr the Lord or the Leſſor, levy a Fine, the ſame ſhall not barr them. 2. Reſolved, That no Fine or Barr. ſhould barr any eſtate in poſſeſſion, reverſion, or remainder, which is deveſted and put to a right: and, in the principal caſe, the bargain and ſale did not deveſt the eſtate of them in the remainder; 1. Becauſe he did that which he might lawfully do by the Law; and the Copyholder accepted that which he might well accept. 2. Becauſe the Copyholder was in poſſeſſion, and was onely paſſive, and not active; and therefore it could not deveſt the Eſtate of them who had the Freehold and Inheritance. And, 3. the Bargainee was in, by the Statute of Enrollments; and an Act of Parliament cannot do wrong. 3. Reſolved, That after the bargain and ſale, the daughter in remainder could not enter, becauſe her eſtate was to begin after the death of the firſt Tenant for life, by the Cuſtome. And in this Caſe, It was ſaid, That if the Lord had charged the Inheritance of the Copyhold, that the particular Tenant for life ſhould have holden the Land diſcharged during his life; for the eſtates in Remainder do preſerve the particular eſtate by Copy from Incumbrances made and had by the Lord. Paſch. 10 Jac. in C. B. *Cook*. 9. Part, 104, 105. *Margaret Podgers* Caſe.

7. The King, ſeiſed of a Mannor in the right of his Crown, granted Copyhold Lands, parcel of the Mannor to one in Fee; and afterwards by his Letters Patents under the Exchequer Seal, made a Leaſe of thoſe Lands for 21 years: the Leſſee for years granted his eſtate to the Copyholder; The King reciting the Leaſe for years, granted the Reverſion in Fee: the years expired, the Grantee of the Reverſion entred upon the Copyholder. It was adjudged, That his entry was lawfull: For it was Reſolved, That by the acceptance of the Term for years by the Copyholder, the Copyhold eſtate was determined. But it was Reſolved, That the

severance of the Freehold and Inheritance of the Land holden by Copy, did not determine the Copy estate; for although that a Copyholder hath but an estate at Will, yet he is not removeable at the Will of the Lord, so long as he performs his Customes and Services, *Cook.* 2. Part, 16. & 17. *Lanes* Case.

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7. *What are good Customes concerning Copy-holds; What not. What a Copyholder may do by virtue of such Custome; and what shall be a breach of it; what not.*

1. IN an *Ejectione Firme*, the Defendant pleaded the Custome within the Mannor, That the Widow of every Copyholder in Fee-simple, Fee-tail, or for life, should have and enjoy the Copyhold *pro tempore vitæ suæ.* And in Evidence, It was shewed, That in pleading the custome, she claimed but a Widows estate onely. And it was holden, That that did not maintain the Issue and the custome alledged; because a Widowes Estate was a lesser estate, then an estate for life. Mich. 3 Ma. *Dyer* 192.

2. In Trespasse, the Defendant said, That the Lands are, and time out of mind were, customary Lands parcel of the Mannor of *S*; and are, and time out of mind were, demiseable and demised by the Lord of the Mannor, and by his Steward for the time being, to any person who would take the same in Fee-simple, Fee-tail for life, or years, at the Will of the Lord, by Copy of Court-Roll of the said Mannor; And that there is such a Custome, That when the Lord grants by his Steward to have and to hold to such a person *sibi et suis*, or to such person *et suis*, That the person shall have an Estate in Fee-simple: and shewed such a surrender; and it was admitted good. *Book Entries*, 269.

3. A grant was made in the West Country to Husband and Wife, and their son successive, according to the Custome of the Mannor: Afterwards the Husband dyed, and the wife took another Husband; The son put her out, supposing that the wife had but her Widowes Estate. *Dyer* said, It cannot be a good Custome; for it is expressed, That the wife should have it for life: But if nothing had been expressed, then the custome, That she should have it but during her Widowhood, should be a good custome. *Manwood* said, It was greater reason, that the wife should ouste the son named with the father, because she doth not defeat altogether the Estate of the son. But the custome, That the wife should have nothing, when an Estate is expressed, is not good: For in Kent the wife shall have the moyety during her Widowhood, or whileſt she liveth chaste; which is more then the Common-Law giveth her: and therefore the custome is good. And here when the wife is named, the custome shall not take effect: and by the word, *Successive*, every one of them shall have it after the other by the custome, by way of Remainder. Mich. 17 Eliz. in C. B. See *Bendloes* Reports.

4. The Custome of a Manner within the County of *Southampton* was, To grant Copies for one, two, or three Lives: and at a Court holden of the said Mannor, customary Tenements were granted to a woman *durante viduitate sua*; and, If this Grant were according to the custome, was the Question? And it was adjudged, That this Grant was within the custome; for every Grant *durante viduitate*, is for life; but every Grant for life is not *durante viduitate*; for a generall Grant for life is more larger and beneficiall then a grant *durante viduitate*. And it was adjudged, That the Custome was well pursued, because the Estate granted, was less then the custome did warrant. Pasch. 36 Eliz. in B.R. *Cook* 4. Part, 30. *Dews* and *Hopkins* Case.

5. See where Copy-hold Lands may be Intail-by customes; diversion, Sect. 1.

6. And see where the Custome of a Manner is, to grant Lands by Copy in *feodo simplici*, (as the usual pleading is) without question, by the same custome, Lands may be granted to one, and the heirs of his body, or upon other limitation or condition, for that they are not so large and ample, as the general estate of Fee-simple is; and therefore the generality of the custome doth include them. *Cook* 3. Part, 9. in *Heydons* Case. See Mich. 36 Eliz. *Cook* 4. Part, 25. *Gravenor* and *Tedds* Case, acc.

7. A Custome was alledged, That a Tenant in Fee, (and so of a Copyholder, with licence) that he could not make a Lease above 6. years. It was adjudged a void custome, because it is repugnant to the Fee, and unreasonable. 19 Eliz. *Dyer*, 357.

8. A custome was, That the Lord of a Manner hath used to have the best Beast of his Tenant there dying; and if such Beast be eſloined before seizure, that the Lord may take the Beast of any other Levant and Couchant upon the Land within his Tenure: and it was adjudged a void custome. 6 Eliz. *Dyer* 229.

9. The Custome of a Mannor was, That if a Copyhold Tenant suffer his house to be ruined for want

want of Reparations, that he might be amerced, and that the Lord might diſtrein the Cattel as well of the Tenant, as of the under-Tenant, Levant and Couchant upon the Land for the Amercement: A Copyholder ſuffered his houſe to go to ruine for want of Reparations; and afterwards made a Leaſe of his Copyhold Meſſuage for a year; and the Lord diſtreined the under-Tenant: And it was adjudged a good cuſtome, and a good diſtreſs. And it was ſaid, That the amercement is not meerly perſonal, but it is a charge upon the Land, and the Diſtreſſe is but as a pledge, therefore a ſtranger may be diſtrained by ſuch a cuſtome. Hill. 17 Car. in B. R. *Thorn* and *Tylers* Caſe. *Maſh* 161.

10. The Cuſtome of a Mannor was, That a Copyholder for life might nominate his Succeſſor, and ſo *in perpetuum*; and that ſuch a Copyholder might cut down and ſell Timber Trees. In that caſe, both the Cuſtomes were adjudged good: and for the laſt, the difference was taken, Where ſuch a Copyholder hath the Inheritance, and where his Succeſſour comes in by his Nomination (whom by intendment he would not prejudice) there ſuch a cuſtome might be good. But in that caſe, ſuch a cuſtome, that a Copyholder for life might fell, cut down, and ſell Timber Trees, was not good. And ſo it was ſaid, it was adjudged, 45 Eliz. in the Common-Pleas, in *Powell* and *Peacocks* Caſe. Trin. 10 Jac. in C. B. *Rolls* and *Maſons* Caſe. *Brownlow* 2. Part, 197. And that a cuſtome, that a Copyholder for life might cut down and ſell Timber-trees growing upon his Copyhold, is not good. See Trin. 4 Car. in B. R. *Rockey* and *Haggens* Caſe, rott. 764. *Cro.* 1. Part, 160. See alſo, Where the Cuſtome within the Mannor of *Mardent* was pleaded, That the Copyhold Tenants of the ſaid Mannor might fell Timber trees; and the Cuſtome was found, but adjudged no good cuſtome, unleſs they were Copyholds of Inheritance. Hill. 8 Jac. *Brock* and *Spencers* Caſe. *Hob.* 6. & 11. See Mich. 8 Jac. *Bolſtr.* 1. Part, 50, 51. acc.

11. In an Action of Trover and Converſion of Timber-trees, The Queſtion was touching the power of a Copyholder for life, for the cutting down of Timber-trees; and whether ſuch a Copyholder may preſcribe by Law to cut down Timber-trees growing upon his Copyhold: And the Opinion of the whole Court was, That this preſcription for a Copyholder for life, to cut down Timber-trees, is a preſcription againſt reaſon, and void in Law: and ſo it was ſaid, It was adjudged in *Lutterell* and *Woods* Caſe in C. B. Hill. 7 Jac. in B. R. rott. 1133. The Earl of *Northumberland* and *Wheeler's* Caſe. *Bolſtr.* 1. Part, 158.

12. Note: It was ſaid by *Hobart*, Chief Juſtice, and agreed by the Court, That a Copyholder by Cuſtome may hedge and incloſe his Land; but never where it was not incloſed before: And ſo a Copyholder may digg Marle without a danger of forfeiture of his Copyhold; but then he ought to lay the Marle upon the ſame Copyhold Land, and not upon other Land. Paſch. 19 Jac. in C. B. *Paſton's* Caſe. *Winch.* 8.

13. In Treſpaſs; It was found, That the Land was Copyhold; and that the cuſtome is, That *Quælibet famina viro cooperta poterit* deviſe Lands whereof ſhe was ſeiſed in Fee according to the cuſtome of the Mannor, to her husband, and ſurrender the ſame in the preſence of the *Reeve* and 6. other perſons: and that J. S. was ſeiſed of the Land, and had Iſſue two daughters, and that they married husbands; and one of them deviſed her part to her husband by Will in the preſence of the Reeve and 6. perſons; and afterwards at another day ſhe ſurrendred to her husband, and that he was admitted. In this caſe, It was holden by the Court, That the cuſtome was not good; 1. For the Incertainty of it; For here the cuſtome is alledged, *Quod poterit*; and it ought to be alledged, *Quod quælibet famina poteſt*, for Cuſtome or Preſcription ought to be alledged in a thing certain: alſo it is againſt reaſon, that the wife ſhould ſurrender to the husband, for that the wife hath not any Will, but the Will of her husband: alſo the deviſe is not good as it is ſet forth according to the cuſtome; for the cuſtome is ſet forth, That ſhe may deviſe and ſurrender; and that ought to be all done at one time, *ſcil.* in the preſence of the Reeve and 6. other perſons; and the words of a Cuſtome are to be performed ſo far as they may be. It was adjudged, That both the Cuſtome and the Deviſe were not good. Paſch. 25 Eliz. in C. B. *Shipwith's* Caſe. *Godbolt* 14, 15, & 16.

14. Upon a Special Verdict, the Caſe was; A Cuſtome of the Mannor was found to be, That if a Copyholder in Fee dyed ſeiſed, That his wife ſhould hold it during her life as Free bench: The Lord enfeoffed the Copyholder, who dyed ſeiſed: Whether ſhe ſhould hold it, was the the Queſtion? And it was adjudged, She ſhould not. But if the Lord had enfeoffed a ſtranger of that Land; yet the Land remained Copyhold, and the cuſtome is not taken away. Hill. 3 Jac. rott. 451. in B. R. *Laſhmer* and *Averies* Caſe. *Cro.* 2. Part, 126.

15. In Treſpaſs, It was found, That the Cuſtome of S. is, That Lands are demiſeable for 3. Lives; and the cuſtome is, That the firſt name in the Copy ſhall have it during his life onely, and ſo the others as they are named in the Copy; and alſo there is a Cuſtome, That if any Copyholder

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dyes seised, having a wife at the time of his death, that his wife shall have it during her Widowhood. It was found, That A. was a Copyholder for life of that Mannor, and Viscount *Bindon* Lord thereof, enfeoffed of that Land J. W. and J. N. and their heirs, who, 29 Eliz. enfeoffed J. W. and his heirs, to the use of him for the life of A; the remainder to H. wife of A. for her life, the remainder to A. in Fee: A. granted the remainder to W. B: H. dyed; A. took to wife the Defendant, and dyed: And, If the said wife should have her Widows estate, or not, was the Question? It was said, That this Copyhold estate was destroyed before her marriage, for by the severance of the Freehold from the Copyhold, it was not parcell of the Mannor; and the Custome is, That if a Copyholder dyes seised of Tenements, parcell of the Mannor; and here the Tenements are not parcell of it. But it was Resolved, That the wife should have it during her Widowhood; for the Custome is continued *quoad* her, although that the Freehold be severed from the Mannor: and it remains not onely as a priviledg, but as a meer Copyhold; and notwithstanding the Remainder was in the husband, and he granted it over, yet he continued and dyed a Copyholder, and so his wife should have her Widowers Estate. Trin. 18 Jac. in B. R. *Waldor* and *Bartlett*'s Case. *Cro.* 2. Part, 573.

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8. *Of Fines paid to the Lord by Copyholder; And what shall be said to be a reasonable Fine; and by whom to be so adjudged: and where the Lord may seize for not payment of such Fine; where not.*

1. IF the Fine of Copyholders of a Mannor upon admittance be incertain; yet the Lord cannot demand, or exact unreasonable and excessive Fines; and if he do, the Copyholder may by the Law deny to pay them without any forfeiture: and it shall be determined by Justices, Whether the Fines be reasonable, or not. Mich. 42 Eliz. in B. R. *Cook* 4. Part, 27. *Hubbard* and *Hamonds* Case. See *Cook* 8. Part, 43. *Godfryes* Case, acc.

2. No Fine is due to the Lord, either upon surrender or discent, untill admittance; for the admittance is the cause of the Fine; and if after the Tenant deny to pay it, (if it be a reasonable Fine) it is a forfeiture. *Cook* 4. Part, 28. *Sands* Case.

3. In Trespass, the Question was, Whether the Lord of a Mannor may assesse two years and a half value of the Land, according to the racked Rent for a Fine upon the grant of a Copyhold, and, for non-payment of it, enter for a forfeiture. And the Court was of Opinion, That one year and a half of Rent improved, is high enough; and the Defendant assessing two years and a half, it is unreasonable; and therefore the Plaintiff might well refuse to pay it; and the Entry of the Defendant for a forfeiture, was not lawfull. Hill. 5 Car. in B. R. *Dow* and *Goldings* Case. *Cro.* 1. Part, 142.

4. The Lord assessed a Fine of 12 l. to be paid by a Copyholder, and appoints it to be paid at his Capital Messuage of the Mannor 3. moneths after; and the Copyholder pretending the Fine to be certain, (that is to say, two years quitt-Rent) offered at the day of assessing the Fine according to the Rent for two years; but at the appointed place for the payment thereof cometh not thither to excuse his non-payment, nor makes any other refusal: It was the Opinion of the Justices, That this is a forfeiture of his Copyhold: But if he had come at the day assigned him for the payment, and had then tendred the two years Quitt-Rent, being the Fine certain according to the Custome, though not assessed nor demanded by the Lord, it had not been a forfeiture. Mich. 19 Jac. in B. R. *Gardner* and *Normans* Case. *Cro.* 2. Part, 617.

5. In Trespass, for breaking of his Close; the Trespass was assigned in an Acre of Pasture: The Defendant pleaded, The place was his Freehold, &c. The Plaintiff replyed, That the place where, was parcell of the Mannor of F. demiseable by Copy in Fee-simple, and that the Lords of the Mannor granted the Tenements to J. S. and his heirs, who surrendred them into the hands of the Lord, to the use of the Plaintiff and his heirs. The Defendant recoyned and said, That at the time of the admission of the Plaintiff, the Tenements were of the clear yearly value of 53 s. 4 d. and that within the Mannor there is a Custome, That upon every Admission of any person, a reasonable Fine should be assessed by the Lord of the Mannor, or his Steward; and set forth, That the Steward of the said Mannor, at a Court holden for the Mannor, admitted the Plaintiff, and set a reasonable sum of money, *scil.* 5 l. 6 s. 8 d. the value of the Tenements for 2. years, for a Fine to be paid; and that the Lord afterwards requested the Plaintiff to pay the said Fine, which he utterly denyed and refused: for which the Lord entred into the Tenements for a forfeiture. In this case it was Resolved by all the Justices, 1. If the Fine

assessed

aſſeſſed had been reaſonable, yet the Lords ought to ſet a certain time and place where the ſame ſhould be paid, becauſe it ſtands upon a point of forfeiture. 2. Reſolved, That the Fine in this caſe was unreaſonable, *ſcil.* To demand for a Cottage and an Acre of Paſture 5 l. 6 s. 8 d. for the Admittance of a Copyholder in Fee-ſimple upon a ſurrender made: and it is not like unto a voluntary grant; as when a Copyholder hath an Eſtate for life, and dyeth; or hath a Fee-ſimple, and committeth Felony; there *Arbitrio Domini res æſtimari debet*: but when the Lord is compellable to admit him to whoſe uſe the ſurrender is, there the value of two years is unreaſonable, eſpecially when the value of a Cottage, and one Acre of paſture is a Rack of 53 s. *per annum*. It was adjudged for the Plaintiff, Mich. 6 Jac. in C. B. *Willowes* Caſe. *Cook, Select Caſes*, 1.

6. In Treſpaſs; the matter upon the Iſſue was, Whether Copyholders upon their admittances have uſed to pay Fines uncertain at the Will of the Lord, or Fines certain; *ſcil.* the value of two years Rent, and no more. The Plaintiff did ſhew divers Court-Rolls of admittances upon ſurrenders, and that the Fines taken by the Lord were not certain, but ſometimes ſuch a ſum, ſometimes another ſum, but alwayes under the value of 2. years rent, and none above. It was holden by the Court in this caſe, To prove a Cuſtome for uncertainty of Fines, and not to be certain 2. years Rent, there ought to be ſhewed Court-Rolls, and that in caſes of diſcents; and that upon ſuch admittances they have uſed to pay for Fines above 2. years rent: But Rolls to prove uncertainty of Fines, if the Fines be under the value of 2. years rent, theſe are no proof at all, for the Fines ought to be above 2. years rent; For it is a good Cuſtome for to pay Fines upon admittances, the value of two years rent, or under; and the proofs ought to be in caſes of Diſcent; for in caſe of ſurrender, or of purchaſe of a Copyhold, the Lord may take what Fine he will; but ſuch Fines are no proof to prove the taking of uncertain Fines by the Cuſtome. Mich. 10 Jac. in B. R. *Allen* and *Abraham's* Caſe. *Bolſt.* 2. Part, 32, 33.

Corporations.

1. *Where a Corporation cannot be by Preſcription without the Kings Grant, and where the Kings Grant ſhall be ſufficient to give them capacity to take purchaſe, or Grant; Where not.*

1. THe Colledge of *Grayſtock* was founded by Pope *Urban*, at the requeſt of *Ralph Bacon* of *Grayſtock*, Anceſtor of the Lord *Dacres*, and was alwayes called the Colledge of *Grayſtock*; and it conſiſted of a Maſter, and of ſix Prieſts, who had yearly ſtipends, who came in by Admiſſion and Inſtitution of the Biſhop, and were not Illegible, nor had they a Common Seal. It was the Opinion of the Juſtices, That this was not a Colledge well Incorporated; and therefore it was not given to the King by the Statute of 1 E. 6. Of *Diſſolutions* Hill. 7 E. 6. *Dyer*. 81.

2. If the King at this day by his Charter, give Lands *probis hominibus de Iſlington*, To have and to hold, to them and their Succeſſors, rendring rent; It is a good Corporation, as to that intent onely, but not to other intents; And they are but Tenants at Will, and if the King releaſeth to them the Rent, the Corporation is diſſolved. Trin. 1. *Ma. Dyer*. 100.

3. The King Granted *hominibus de D. hered. et ſucceſſoribus ſuis manerium de D.* rendring rent, They are Incorporate for all ſuch things as Concern the ſaid Mannor: But if the Grant be *hominibus de D.* that they ſhall be quit of Toll, the ſame is void, unleſſe they be Incorporated before. It was ſaid, It was a good Corporation to that purpoſe, but not to purchaſe. The principall Caſe was, That *Norwich* was Incorporated by the name of Citizens and Commonalty: And the King afterwards granted *Civibus de Norwich*, that they ſhould not be put on Juries. And afterwards, It was enacted, That all Grants made *Civibus*, ſhould be good *ſecundum eorum Conſuet.* And if this ſecond Grant ſhould be void or not, was the doubt; for if it ſhould be void, then *Nihil operatur* by the Act of Parliament. But it ſeemed to ſome of the Juſtices, That the Grant ſhould be good to the Citizens, and to that purpoſe ſhould make them a Corporation; and that every one at their pleaſure might take benefit of it. And it was ſaid, That

if the King Grant to the Inhabitants of D. that they may chuſe a Mayor, and that they ſhall be impleaded by the name of Mayor and Commonalty of D.: Now the name Inhabitants is gone, and yet it was a good Corporation before by force of the Grant. And note, It is there ſaid, That in all the Ancient Cities and Boroughs in *England*, as *London*, &c. The Grant is made *Civibus et Burgenſibus de L.* which were not Corporations before; and yet the Grant is good. 21 E. 4. 55. 56.

4. If the King Grant to a Corporation to purchaſe or give by the name of Mayor and Wardens, Brothers and Siſters, and alſo by the ſame Letters Pattents, g v: the power to implead, and to be impleaded, by the name of Maſter and Wardens onely, the ſame is good; And ſo it is to a Corporation, as to a purchaſe, to be named Bayliffs, and as to implead, or be impleaded, to be named Mayor, &c. See 11 H. 7. 27. a good Caſe.

5. A. acknowledged a Recognizance of 150 l. for Orphanage mony to the Chamberlain of *London* and his ſucceſſors, and afterwards before the Mayor and Recorder, he acknowledged a Statute to B; B. ſued forth an Execution, but it was not returned: the ſucceſſour of the Chamberlain ſued forth Execution by *Elegit*. It was Objected in this Caſe, That the Succeſſour of the Chamberlain ſhould not have this Recognizance: For it was ſaid, That in Caſe of a Sole Corporation, be it either by Preſcription, or by Charter, no Chattell either in Action or in poſſeſſion, ſhould go in Succeſſion; But otherwiſe it was, of a Corporation aggregate. But it was Reſolved that in this Caſe, The Succeſſor ſhould have the Recognizance, for that the Corporation of the Chamberlain of *London* was by Cuſtome, which hath created and made him a Corporation in Succeſſion, as to this ſpecial purpoſe concerning Orphanage: And the ſame Cuſtome hath enabled him to take ſuch Recognizances, Obligations, &c. which are made to his Succeſſors; and ſuch Cuſtome is grounded upon great reaſon, for the Executors of the Chamberlain ought not to intermeddle with ſuch Recognizances, &c. which by the Cuſtome are taken in his Corporate Capacity, and not in his private capacity. But it was agreed, that a Biſhop, Patron, &c, or any Sole Corporation, which are bodies politique, cannot take Recognizances or Obligations, but onely in their private Capacity, and not in their politique Capacity, becauſe there wanteth ſuch a Cuſtome. Mich. 33 Eliz. *Cook* 4. Part, 65. *Fulwoods* Caſe.

6. In the Caſe of the foundation of *Suttons* Hoſpitall: It was objected, That the Foundation was not good. 1. Becauſe *Sutton* dyed before the foundation. 2. Becauſe the place was uncertain, and every Corporation ought to have a place certain, by metes and bounds, and a place known will not ſerve. 3. Becauſe the King by his Letters Pattents intended to make a Corporation preſently, but that could not be before there was a Maſter named, and the Maſter was not named in the life of *Sutton*, and an Hoſpitall muſt be founded before a Maſter be named: And the Foundation could not be without the Special words of *Erigo, fundo*, &c. But it was Reſolved, That the Foundation was well made; for the Licence to *Sutton* is to him, his Heirs, and Succeſſors, &c. at any time hereafter; and the words of the Incorporation are in the preſent, ſo as the Corporation exceeded the Licence. And where it was ſaid, A place incertain cannot be an Hoſpitall. It was Reſolved, That a Mannor might be an Hoſpitall, which was more incertain then the *Charterhouſe*. And it was agreed, That to the Eſſence of Corporation, five things were onely requiſite. 1. Lawfull Authority to incorporate, and that may be divers wayes, by the King himſelf, by Authority of Parliament, by the Kings Charter, by Preſcription. 2. That the perſons be either naturall or Political. 3. That it be Incorporated by a name. 4. That there be a place certain. And laſtly, That there be ſufficient words of Incorporation: And in this Caſe, It was ſaid, That if it were an Hoſpitall in *poteſtate* onely, it was ſufficient, though it was not a houſe built; For it was ſaid, That the *Temple* was a Corporation in the time of *Henry* the firſt, and yet it was not built untill E. ſeconds time. *Cook* 10. Part, 25. the Caſe of *Suttons* Hoſpital.

7. The King Granted to the Mayor, Citizens or Commonalty of *London*, *Domum Muſionalem vocat. Bridewell*, and that it ſhould be founded and erected an Hoſpital for the Poor, and Granted to them, to the end, that the Lands might be better governed for them; That the ſaid Hoſpitall, when it ſhould be founded, erected, and eſtabliſhed, ſhould be called the Hoſpitall of King *Edward* the ſixth, of *Chriſt*, and St. *Thomas* of *Bridewell*: and that the Mayor and Citizens of the ſaid Cities, ſhould be incorporated by the name of the Governours of the poſſeſſion of the Revenues of the Hoſpital of King *Edward* the ſixth, of *Chriſt*, and St. *Thomas*, of *Bridewell*. It was Reſolved in this Caſe, That this Hoſpitall in intention onely, was ſufficient to ſupport the name of a Corporation: and that the words *ſcil.* that the Governours from henceforth, ſhould be *unum corpus per nomen* in Law doth incorporate them preſently: and they ſhall not ſtay till the houſe be fitted and furniſhed with the mechanical part of the Hoſpital. Mich. 34, & 35 Eliz. rott. 172. in B. R. The Caſe of the Hoſpital of *Bridewel* vouched in *Cook* 10. Part, 31. in *Suttons* Hoſpitall's Caſe.

8. The

9. The Biſhop of St. *Davids* by Licence of the King of appropriation, made a Collegiate Church; and conſtituted Prebends there, and appropriated unto every Prebend a Church, which afterwards was confirmed by the Kings Letters Patents: And it was adjudged in that Caſe, That the ſame was a good foundation of the ſaid Colledge, and Incorporating of them; And therefore ſuch Colledge was given to the King by the Statute of 1 E. 6. Mich. 70 Eliz. *Dyer.* 267. See *Cook* 4. Part, 107. acc.

9. In an Action of Treſpaſſe brought for taking away 12 plate locks, the Defendant as to the taking of the locks, pleaded a ſpecial Juſtification. That by vertue of Letters Patents of Incorporation granted to the Lock-*Smiths* of *Durham*, by *Cuthbert* Biſhop of *Durham*; who had *Jura regalia* within the County Palatine of *Durham*, and that by this Charter, the locks not being good, he as Warden of the Company did take them. It was demurred upon the Plea, becauſe it did not appear by the plea, That the Lockſmiths are a Corporation created by the Biſhop, but onely that the Cuſtomes uſed amongſt them, for their regulating of their Trade, were confirmed by the Biſhop, which doth not make them to be a Corporation. It was holden by the Court, That becauſe it did not appear by their Charter, that they had any Authority to take away ill Locks, and therefore what was done, was without Warrant: And it was ſaid, That it would be hard to maintain the Lock-Smiths to be a Corporation, becauſe the Biſhop confirmed their Orders; Is was adjudged for the Plaintiff. Mich. 1650. rott. 633. in B. R. *Goodyer* and *Shawes* Caſe. *Styles* 298.

10. In a Replevin, the Caſe was; The Queen granted to the Mayor and Burgeſſes of *Chipnam*, the moyety of a Yard land in a Waſte called *Ruddesdowne*, in the Pariſh of *Chipnam*; without ſaying in what part of the Waſte they ſhould have the ſame, in the ſpeciall name of the Land, or how the ſame was bounded: Afterwards the Queen granted the ſaid Waſte to Sir *Walter Hungerford*. The Mayor and Commonalty, by Warrant under their Common Seal, authorized A. to enter into the ſaid Waſte, and in the behalf of the Mayor and Burgeſſes, to make Election of the ſaid Moyety, who did accordingly: And upon this matter, there was a demurrer in Law. It was Reſolved in this Caſe, That the Grant to the Mayor and Burgeſſes, was utterly void for the incertainty of the thing Granted. And 2. That it was not onely void againſt the Queen her ſelf, but againſt Sir *Walter Hungerford* alſo: and it was further Reſolved, That if a Common perſon had ſuch a grant, which ought to be reduced to certainty by Election; the Corporation to whom the Grant was made, ſhould not make their election by Attorney: but after they were Reſolved upon the Land, they might make a ſpeciall warrant of Attorney, reciting the grant to them, and in which part of the Waſte their Grant ſhould take effect by abuttalls, according to which, the Attorney might make entry according to his direction. Trin. 27 Eliz. in B. R. Sir *Walter Hungerfords* Caſe. *Leon.* 30.

11. If Lands holden of J. S. be given to an Abbot and his Succeſſors, or to any other Corporation. In ſuch Caſe, If the Abbot and all the Covent do dye, ſo as the body politick is diſſolved, the Donor ſhall have the Lands again, and not the Lord by Eſcheat, becauſe in the Caſe of a body politick, the Fee-ſimple is veſted in their Politick Capacity, and the Law doth annex a Condition to every ſuch gift and grant, That if ſuch body Politick be diſſolved, the Donor ſhall re-enter: And if a Rent be granted to one and his Succeſſors, and the Corporation be diſſolved, that the Rent ſhall revert to the Donor, and there is no difference as to this matter, betwixt things which lye in Prender, and things which lye in Render. And the principall Caſe was, A Preſcription was laid of diſcharge of Tythes, in an Abbot and Covent; And it appeared that the Corporation war afterwards diſſolved, becauſe all the Monks dyed, and the Land came to the hands of a Layman. And it was Reſolved, That, the Preſcription now determined, the party ſhould pay Tythes in kind. Mich. 11 Jac. in C. B. The Dean and Channons of *Windſor* and *Webbs* Caſe. *Godbolt.* 211.

12. In Debt, the Plaintiffs declared, That Queen *Elizabeth* Incorporated them by the name of Wardens and Fellowſhip of the Weavers of *Newberry*; and gave them power to make Lawes *rationi conſonas*, and not contrary to the Laws and Statutes of the Realm, and by the ſame Letters Patents the Queen did ordein for her and her Succeſſors, That none ſhould exerciſe the Trade of Weaving within the ſaid Town, except he were admitted thereunto by the Guardians and Society of Weavers: And then they ſet forth, That the two Guardians, and the greater part of the Society did make an Ordinance, That no perſon ſhould uſe the Art of Weaving within the ſaid Town, unleſſe he had bin an Apprentice in the ſaid Town, and had uſed it by the ſpace of five years before the Ordinance, and were admitted by the Guardians and Fellowſhip upon pain of 20 s. for every Month, and he ſhews, that the Defendant had uſed the ſaid Art, whereas he had not bin Apprentice there, nor uſed the ſaid Art five years before the Ordinance, nor was admitted. In this Caſe, the principall queſtion was, Whether a new Corporation, having no Preſcription to appropriate, and exclude others, can make a Law to exclude all perſons to

uſe an Art or Trade in their Town, whereas they were Apprentices in the ſame Town. It was Reſolved in this Caſe, That the ſimple Incorporating of a Town, doth not by conſequence draw a peculiar Trading to that Town, with an excluſion of Forreyners, but it muſt be by ſome ſpecial Law and Ordinance. It was agreed, That Companies, or Colledges of men, might make By-lawes; and ſo may Pariſhoners, or Commoners, for that they are Incorporated for ſome neceſſities, both common and peculiar to their diſtinct bodies, and therefore they may make Bylawes for the repairing of their Church, and the like: But a Corporation cannot make a Bylaw, to reſtrein generally a trade, and ſo it was Reſolved in this Caſe. Paſc. 14 Jac. in C. B. *Norris* and *Stayes* Caſe. *Hob.* 211. ſee *Cook* 11. Part, 53. The *Taylors* of *Ipſwiches* Caſe. acc, *Cook* 5. Part, 26. the Chamberlain of *London*'s Caſe. acc.

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2. *What things a Corporation may do without Deed, and what not; And where things done by them ſhall ſtand, notwithſtanding their Corporation be altered.*

1. IT is holden in the Old Books, That a Corporation cannot do any thing without Writing; For if they do preſent to Church, It ought to be by Deed; and yet in pleading, they ought not to ſhew it, that it was by Deed; but it ſhall be ſo intended. But the Election of a Dean Maſter of a Colledge and the like, are good without a Deed: and ſo is the making of an Attorney, but that appears by Record, and therefore is good. And ſo the uſe at this day, is to certifie the Mayor of *London*, and other Mayors of Corporations into the Exchequer without a Deed, and ſuch Certificates are good. See 13. and 14. H. 8. 12. and 29. acc.

2. A Corporation cannot retein a Bail nor Receivor, nor can they aſſign Creditors without a Deed, nor can they be diſſeiſors by agreement without Deed, nor veſt or deveſt any Freehold in them, or out of them, without Deed, nor can they Licence one to take Trees, or to make Livery, or give any Intereſt without Deed: So if a Corporation make a Deed, and delivereth it to one to deliver over, heought to have a Deed: But it hath bin ſaid. That the Commandment onely of Dean and Chapter hath bin good to do a thing without a Deed; as 16 H. 7. 2. it is holden, but it is otherwiſe of Mayor and Commonalty; For that is, as is the Capacity of the Corporation: And there it is holden, That if one be head of the Corporation, as Mayor, or Abbot; in ſuch Caſe, If they command by word, it is good without Deed; But where it is a Corporation without a Head, as Commonalty onely, or Brethren onely, there the Command ought to be by Deed. Quære, for 11 E. 4. 10. it is holden, That the Commandment of the Commonalty without writing, is good, ſo as they may juſtify; And the ſame Law is, If the Covent in time of vacation, command one to cut down Trees: And there *Littleton* ſaith, That ſuch was the Opinion of all the Juſtices his Companions, and alſo of the Juſtices of the Kings Beach. Mich. 12 E. 4. 10.

3. If the Mayor and Commonalty of *London* have an Eſtate for the life of J. S. If in Caſe the Mayor and Commonalty attorn to the Grantee of the Reverſion, the Law doth require that it ſhould be by Deed, for notwithſtanding that the Grantee doth not claim in by them who attorn, and that an Attornment is but a conſent, yet in the pleading, the Deed of Attornment ought to be ſhewed, for that the Deed is requiſite *ex inſtitutione Legis* in ſuch Caſe. Paſc. 3 Jac. in C. B. *Cook* 6. Part, in *Bellomyes* Caſe. 38.

4. In an information of Intruſion, It was found, That the King was ſeiſed of a Rectory: And by his Letters Patents demiſed the ſame to the Wardens of the Church of S. for 21. years. And afterwards the King by other Letters Patents, reciting the ſaid Leaſe, which Letters Patents, and all their Eſtate, Intereſt, and Term of years, *Guardiani prædict. modo habentes, et ad præſens poſſidentes nobis ſurſum reddiderunt, et reſtituerunt cancelland. quam quidem ſurſum reddicionem acceptamus in Conſideratione ſurſum reddit. prædict.* and for the Fine of 20 l. *ad receptum Scaccarii Guardianis ſolut.* demiſed the ſaid Rectory to the Guardians of the ſaid Church for 50. years, and it was found, that the Guardians of the ſaid Church at the making of the ſaid Leaſe of 40. years, ſurrendred and yielded up the ſaid Letters Patents to be cancelled, and paid the Fees, for the cancelling of them; but no *vacat* was made of the Inrollment of them; and that the Defendants entred into the ſaid Rectory, by force of the ſaid Leaſe. It was Reſolved in this Caſe. 1. That there needed not any Actuall ſurrender, becauſe theſe words (*modo habentes, et ad præſens poſſidentes*) prove, that at the time of the making of the ſaid Letters Patents, the Guardians had the Leaſe for years in them. And by acceptance of the new Leaſe, their Eſtate for years was determined: And in Judgment of Law, the ſurrender did precede the new grant: And although a Corporation

cannot

cannot make an expreſſe ſurrender, without Deed under their Seal, yet they may by an Act in Law, ſurrender their Term without writing. 2. It was Reſolved, That the delivery made by the Guardians, of the Letters Patents in Chancery to be cancelled by their own hand, without writing, was ſufficient, and as much as they could do, and it belonged to the Chancellor and his Officers to have cancelled them. *Cook* 10. Part, the Wardens of the Church of St. *Saviours* Caſe. 66.

5. If a Leaſe for years be made to a Corporation, who cannot take without Deed, and they grant it over, the Grantor may entitle himſelf thereunto, without ſhewing the Deed, becauſe the Leaſe of the thing in its nature, might have paſſed without Deed, although the perſons who took it, could not take it without Deed. Hill. 3 Jac. in B. R. *Predyman* and *Wodyes* Caſe. *Cro.* 2. Part, 108.

6. In *Ejectione firmæ*, the Caſe was; A. ſeiſed of a houſe in the Pariſh of St. *Olaves* in *Southwark*, by his Will deviſed the ſame to his Wife for life, the Remainder to B. who was an Allien born (if he ſhould then be a Denizen, and a perſon capable to take the ſame) if not, then to the heirs of his body lawfully begotten, and dyed, the Wife dyed; B. entred, and injoyed the Lands for ſome years, Afterwards he bargained, and ſold the ſame to C. the Deed was enrolled, and afterwards he levyed a Fine to the Bargainee, with proclamations, and five years paſt; The Will further was, That in default of ſuch Iſſue, The Remainder to the Maſter and Wardens of the Queens Free-School of St. *Olaves* in *Southwark*, who brought the Action, ſuppoſing that B. was an Allien, who made the Bargain and Sale, and that he died without Iſſue. For the Defendants, it was ſhewed in Evidence, that B. was a Denizen, becauſe he calls himſelf ſo in the deed of Bargain and Sale, and in the Fine; Beſides, he exerciſed a Trade, and the exerciſing of the ſame, proved him to be a Denizen, and then if he were a Denizen, the Fine levyed with Proclamations, and five years paſt, did bar the Plaintiffs Title: It was further urged, That the Corporation could not take by the Deviſe, for that the Statute of 34 H. 8. of Wills, hath an exception of bodies politick or Corporate. But in this Caſe, It was Reſolved. 1. That the Deviſe to them was good, according to *Porter's* Caſe. *Cook* 1. Part, 2. Reſolved, That a Denizen cannot be made, but by Letters Patents, or Act of Parliament, and then ſuch Iſſue cannot be proved, but by matter of Record. 3. It was Reſolved, That by his Bargain and Sale enrolled, and by the ſubſequent Fine, no alteration at all was made, as to the eſtate in the Remainder, as it was adjudged in the Lady *Arbella's* Caſe; but otherwiſe it had bin if the Fine had bin firſt levyed before the Inrollment. It was adjudged for the Plaintiffs, The Maſter and Governours of the Queens Free School of St. *Olaves* in *Southwark's* Caſe. Mich. 10 Jac. in B. R. *Rolſt.* 2. Part, 33, 34.

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3. *What things the head of a Corporation may do of himſelf, without the conſent of the whole Corporation; What not?*

1. NOte, It hath bin ſaid, That a Maſter, or a Dean, may aſſign Auditors, or make Baylies, and they may take Offerings, or he may make a Steward in his own name, by himſelf, and theſe are good during his life; And ſo they may make an acquittance in their own name. 14 H. 8. 30. by *Bradnell*, yet ſee 2 R. 3. 7. That a ſum of 100l. is due to the Mayor and Commonalty of *Southampton, per annum, extra Cuſtumas Regis*, It was holden by all the Juſtices, That if the Mayor alone makes the acquittance, the ſame is not good, but becauſe a hundred the like Acquittances were ſhewed, the Acquittance was allowed.

2. In 21 E. 4. 76. It is holden, That where there is Warden and Chaplain, Mayor and Commonalty, Dean and Chapter, The Warden, Mayor, or Dean alone, cannot make a Leaſe, nor can they diſcontinue, becauſe no Writ lyes upon it, but the ſame ought to be done by the whole Corporation, and by Deed, otherwiſe it is void. So if any of them make a Releaſe in their own name, it is void, but contrary it is of their poſſeſſions, which they have in ſeveralty. But an Abbot may make a Leaſe, or a Releaſe in his own name, and it is good.

3. In L. 5. E. 4. 70. Debt was brought againſt Provoſt and Schollers, and the Plaintiff Declared upon a Contract of the Predeceſſors, ſome of the Juſtices held, that the ſame could not be the contract of the Schollers and Provoſt, but the contract of the Provoſt alone; And ſo it is of Abbot and Covent, Dean and Chapter, Mayor and Commonalty, Husband and Wife, it is the contract of the Abbot alone, Dean alone, Husband alone. Others held, that the Contract made in that manner, was void in all. But I conceive, that the name of the Schollers was but ſurpluſage, and that it was the Contract of the Provoſt alone.

4. See the Caſe of the Warden of the Church of St. *Saviours* in *Southwark*. Trin. 11 Jac. *Cook*;

Cook 10. Part, 67. before. If a Prior with the conſent of his Covent, maketh a Leaſe for years rendring Rent; If the Prior by Deed expreſly Releaſeth the Rent, and dyeth, the Succeſſours ſhall recover the Arrerages, but if the Prior had ouſted the Leſſee, and dyed, this diſcharge in Law ſhould diſcharge the Rent, which encurred during the Ouſter againſt the Succeſſor. 34 H. 6. 21. acc.

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4. *Where one ſhall be ſaid to be one of the Corporation in one degree, and not in another degree.*

1. IN Aſſiſe brought againſt the Mayor and Commonalty, They appeared by one of the Commonalty, as their Attorney, and it was the Opinion of the Court, That they might well do it, for as an Attorney, he was but in the degree of a private perſon. 3 H. 6. 43.

2. An Aſſiſe of *Nuſans* was brought againſt the Dean and Chapter of E. and J. W. who was one of the Chapter, and holden that it did well lye: for as he is J. W. he ſhall render damages of his own goods. 46 E. 3. 23.

3. Treſpaſſe was brought for taking of Toll againſt the Mayor of the Commonalty of P. and againſt J. S. who pleaded, that he the ſaid J. S. was one of the Commonalty, and yet the Writ was holden good; for he is there in reſpect of another degree and capacity. For if the Mayor and Commonalty do diſſeiſe me, and I do releaſe unto 20 of them, by their proper names, the ſame is not of any worth as to the Mayor and Commonalty. And it is there ſaid, If the Mayor and Commonalty do diſſeiſe one of the Commonalty, he ſhall have an Aſſiſe againſt them, for they are ſeverall bodies, viz. a body politick, and a body naturall. 8 H. 6. 1. and 14.

4. If a Citizen be diſſeiſed, And the Mayor and Commonalty do releaſe to the Diſſeiſor all their right, the ſame ſhall not bind the Diſſeiſee; So if the Mayor and Commonalty be diſſeiſed, and every one of them will releaſe by their proper names to the diſſeiſor, the ſame is not good becauſe it is in ſeveral reſpects. 19 H. 6. 64. by *Martin* in the Rector of *Edlington's* Caſe.

5. If an Abbot and all his Monks by their proper names, and not by the name of their Corporation, make an Obligation under the Covent Seal the ſame ſhall not bind the Succeſſor, becauſe the Covent is not named by the name of the Covent. The ſame Law is of Mayor and Commonalty. 25 E. 4. 1.

6. The Maſter and Confreres cannot preſent the Mayor to a Benefice, for that he is the head, and cannot do an Act to himſelf, as to preſent himſelf; So they cannot enfeoff the Maſter, and make a Letter of Attorney to make Livery unto him; But the Maſter and Confreres may give to one of the Confreres: Or the Dean and Chapter may give to one of the Chapters, for there is a perfect Corporation without him who takes, becauſe *Major pars tota eſt.* Alſo it is there holden, That one may give Lands to J. S. Dean, and his Succeſſours, &c to J. S. one of the Chapter and his heirs, and there he ſhall be Tenant in Common with himſelf. And ſo where he hath a Seignory as Dean, and if he purchaſe the Tenancy as J. S. he ſhall hold of himſelf. 14 H. 8. 2. and 29.

7. J. S. Maſter of the Fraternity of B, and his Confreres *conceſſerunt quendam annualem reditum*, to B. *ſolvend. &c. In cujus rei Teſtimonium prædict. J.* his Maſter and his Confreres, to this writing have put their Common Seal; And alſo *prædict. J. S. ſigillum ſuum apposuit*: And it was holden, becauſe that there are no words in the firſt part of the Deed to bind him, therefore he ſhould not be charged as a private man. 17 H. 7. 16. 14 H. 6. 17. acc.

8. The King Grants Lands *Decano et Capitulo, Habendum ſibi et heredibus et ſucceſſoribus ſuis*, they ſhall take in their politick Capacity: ſo if the King Grants Lands to J. S. *Habendum ſibi, et ſucceſſoribus ſive hæredibus*, it ſhall enure to his Heirs. 18 H. 6. 11. adjudged. *Cook* 1. Part, *Inſtitutes* 9.

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5. *Where one ſhall be named by his right name of the Corporation in an Action brought againſt him; and where by his name of Baptiſm; Where not.*

1. IF Treſpaſs be brought againſt an Abbot, it is ſufficient if it be brought againſt him by his known name. But if an Action be brought againſt him, wherein a Freehold is demanded, or to be recovered, there the Action ought to be brought by the right name of his Corporation. 20 H. 6. 27.

2. In Debt againſt a Corporation, the Action ought to be brought in their right name: So every Grant by a Corporation ought to be by the right name of the Corporation, elſe the Grant is void. 35 H. 6. 5.

3. A

3. A *Scire facias* was upon a Recovery had againſt the Prior of St. *John's* of *Jeruſalem* in *England*, where the Record was, *Prior Hoſpitii St. Johns de Jeruſalem in Anglia*, and becauſe he was known, as well by the one name, as the other, it was holden good. 44 E. 3. 16.

4. A P. *accipe quod reddat* was brought againſt *Magiſtrum ſive Cuſtodem et Presbyteros Collegii de A.* and being in the disjunctive, it was holden good, becauſe the Foundation was accordingly. 7 H. 6. 13.

5. Note, It was holden, That if in Treſpaſſe, the Defendant plead *Miſnoſmer*; That it is a good Plea, to ſay, that he was known by the one name, or the other: But contrary if the Plaintiff plead *Miſnoſmer*. 1 E. 6. 4. See 25 H. 8. *Br.* 16. there *Brook* ſeems to agree, the difference when it is in an Action reall, and when in an Action perſonal. acc. to 20 H. 6.

6. An Annuity was granted by a Corporation, by name of Provoſt of the Colledge of E. and an Action was brought by the ſame name, without naming him by his name of Baptiſm, and yet good: But in a Grant, the name of the Grantor ought to be ſet forth in his Declaration: So if an Abbot and Covent be bound in an Obligation, without naming the name of Baptiſm, of the Abbot, it is good; and in a Writ brought againſt the Succeſſor, in his Declaration, he ſhall declare, and ſet forth his name of Baptiſme in certain. 12 H. 4. 5.

7. If a Dean and Chapter make a Leaſe by theſe words, *ſcil. Sciatis nos Decanum et Capitulum dimiſiſſe*, and it doth not expreſſe the proper name of the Dean, the Leaſe is void by *Littleton*, which was granted by the whole Court. 18 E. 4. 8. Quære, For *Brooke* to Corporation, 73. makes a doubt of it.

8. See, That a Grant made to J. Abbot, D. where his name was W. *Abbot*, was good. 27 E. 3. 85. Feoffments, and Grants. 67.

9. So the Mayor and Commonalty, without naming the proper name of the Mayor, may make a Feoffment, and by the ſame reaſon they may make a Leaſe. 14 H. 8. in the Book at large.

See more of this in the Title, *Miſnoſmer, poſtea*.

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6. *Of Miſnoſmer of a Corporation; and where a Grant ſhall be void by reaſon of Miſnoſmer; where not. And what ſhall be ſaid a Miſnoſmer; what not.*

1. THE Corporation of the Colledge of *Eaton* was erected by King *Henry* the 6th, by the name of *Prepoſiti et Collegii Regalis Collegii Beatæ Mariæ de Eaton juxta Windſor*: and J. S. being Provoſt, made a Leaſe by the name of *Prepoſiti et Collegii Regalis de Eaton, &c.* omitting *Collegium et Beatæ Mariæ*. And it was the Opinion of all the Juſtices, That the Leaſe was void. Trin. 3 & 4 Ma. *Dyer* 150.

2. The Dean and Chapter of *Carlile* being incorporated by the name of *Decanus et Capit. Eccleſiæ Cathedralis Sanctæ et individuæ Trinitatis Carliens.* made a Leaſe of certain of their Lands by the name of *Decanus Eccleſiæ Cathedralis Sanctæ Trinit. in Carlile, et totum Capit. de Eccleſia prædict.* It was the Opinion of moſt of the Judges, That it was a good Leaſe, notwithſtanding the Variance, which is not in the ſubſtance of the Name, as in 35 H. 6. 5. & 6. where a Prior ſued by the name of *Sancti Petri*, where the foundation was, Peter and Paul, and yet it was good. Mich. Eliz. *Dyer* 278.

3. The Caſe was, That the Hoſpital of *Donington* in the County of *Berk*, was founded by the name of *Miniſter, Dei pauperis Domus de Donington*: and they made a Leaſe in Engliſh by theſe words, Miniſter of the Almeſ-hand of God of *Donington* beſides *Newberry*: and whether for this variance, the Leaſe was good, or not, was the Queſtion? It was the better Opinion of the Juſtices in this caſe, That the Leaſe was good; for here if he be *Miniſter Pauperis Dei de Donington*, he is the Miniſter of God; and the addition of the word, *Dei*, after *Domus*, ſhall never hurt: for if they agree in common underſtanding, it ſhall be good. Hill. 43 Eliz. in B.R. *Sherborn* and *Lewes* Caſe. *Goldſbr.* 121, 123. See 12 Jac. in C. B. rott. 2187. *Petts* and *James* Caſe, upon a Leaſe made of the ſaid Hoſpital of *Donington*, adjudged accordingly.

4. A Corporation was incorporated by the name, *Majori et Burgenſium Burgi Domini Regis de Lynn Regis*; and it is granted to them, that they ſhall be called by the ſame name onely, *et non per aliud nomen*. And an Obligation was made to them by the

the name of *Majoris et Burgenſium de Lynn Regis*, leaving [*Burgi Regis*] and in this caſe it was Reſolved, That the Obligation notwithſtanding that Miſnomer was good, and it is not requiſite, that the name of the Corporation in Grants be *idem ſyllabis, ſeu verbis*; but it is ſufficient if it be *Idem re, et ſenſu*. And in this caſe the variance is onely in ſyllables and words, and not in ſenſe. And it was Reſolved, That the words (*Non per aliud nomen*) ſhall be intended *aliud ſenſu, et re*. And theſe words, *Burgenſes de Lyn Regis*, imply, that *Lyn Regis* is *Burgus*; for *Burgus*, and *Burgenſes*, are Conjugate: for from Boroughs, come Burgeſſes: and the words, *Lyn Regis*, imply, that the ſame is *Burgus ſuus, id eſt, Regis*; ſo as the name in the Obligation by matter apparant in it, did carry in it a certain demonſtration of the true name of the Corporation. And it was holden, That in pleading, or in a Speciall Verdict, If by expreſſe averment, or by finding of the Jury, it ſhall be made apparant to the Court, that the true name of the Corporation, and the name in the Leaſe or Grant, or Obligation, be all one in effect, the ſame doth much ſtrengthen the matter; although in the words there be a ſeeming difference. But if the eſſential part of the name of the Corporation be omitted; or the Corporation miſ-named in any eſſentiall part of it, the ſame makes their Leaſes, Grants, or Obligations void. Trin. 10 Jac. in C. B. rott. 2413. The Caſe of the Mayor and Burgeſſes of *Lynne*. *Cook* 10. Part, 125.

5. The Dean and Channons of *Windſor* were Incorporated by Act of Parliament made 22 E. 4. by the name of Dean and Channons of the King's Free Chappell of St. *George* the Martyr within the Caſtle of *Windſor*; and they made a Leaſe in the time of King *Philip* and Queen *Mary*, by the name of Dean and Channous of the King and Queens Chappell of St. *George*, within the Caſtle of *Windſor*: And it was adjudged, that for one of theſe differences, *viz.* of the King and Queens Free Chappell, that the Leaſe was void; for the Corporation ought to be ſuch as was given by the Founder, and ſhall not be altered from the name given by the Founder: But notwithſtanding the other variances in the miſnaming of it, if the other had bin true, the Leaſe had bin good. For St. *George*, implyes St. *George* the Martyr. Mich. 30 El. z. in B. R. *Hill* and *Wingats* Caſe.

6. A Colledge in *Oxford* was incorporated by the name *Guardiani et Scholarium Domus ſive Collegii Scholarium de Merton, in univerſitate Oxonia*: and they made a Leaſe of the Lands, by the name *Cuſtodis Domus ſive Collegii de Merton in Oxonia et ſcholarium ejuſdem Domus*. In the Caſe, four variances were obſerved. 1. For the word *Guardianus, ſcil. Cuſtos*. 2. Whereas the name of the Colledge was *per nomen Domus ſive Collegii ſcholarium de Merton*, the Leaſe was, *per nomen Domus ſive Collegii de Merton*, omitting *Scholarium*. 3. For *univerſitate de Oxonia*; the Leaſe was *de Oxonia*. 4. The word *Scholares* was miſplaced, for they came in the end, whereas in the Incorporation, they were immediately named after the word *Guardiani*. In this Caſe, it was adjudged, That the ſecond variance was a variance in matter of ſubſtance, For the Act of Incorporation had Baptized the Colledge by the name of Colledge of Schollers of *Merton*, and they made the Leaſe by the name of Colledge of *Merton* it ſelf, and for that cauſe the Leaſe was void, But for the other variances, *ſcil. ſic Guardianus Cuſtos*: And for the Univerſity of *Oxford*; and *Oxford*, they are all one in effect, and therefore not materiall variances. Hill. 30 Eliz. in B. R. *Fiſher* and *Boyes* Caſe. vouched in the Caſe of the Mayor and Burgeſſes of *Lynne*'s Caſe. *Cook* 10. Part, before.

7. In an *Ejectione firme* the Caſe was, King *Henry* the ſeventh erected and founded an Hoſpitall by the name of Maſter and Chaplains of the Hoſpitall of King *Henry* the ſeventh *de le Savoy*; And afterwards in the time of Queen *Mary*, made a Leaſe of the Lands, parcell of, &c. by the name of Maſter of the Hoſpitall *Henrici nuper Regis Angliæ Septimi vocat. le Savoy*: and if this were a good Leaſe or no, was the Queſtion. And in the Exchequer upon the Argument of two of the Barons there, *viz. Clark* and *Gent* it was adjudged, that the Leaſe was void, upon which Judgment, a Writ of Error was brought in the Exchequer Chamber, and there the Caſe was argued again; but was not adjudged, but the Caſe was Compounded: But the better Opinion ſeemed to be, That the Leaſe was a good Leaſe, and the words *de le Savoy*, and *vocat* the *Savoy*, were *idem ſenſu*. See this Caſe, and the Arguments at large. Mich. 30 and 31 Eliz. in the Exchequer Chamber. *Marſiot* and *Paſchall's* Caſe. *Leon.* 159. 160. to 165.

8. The *Cookes* of *London* were Incorporated by the name of Maſters and Governours, and Commonalty of the Myſtery of *Cooks*, and they by the name of Maſter and Wardens of the ſaid Craft and Myſtery of *Cooks* made a Conveyance: And it was holden, That the variance in the abſaidnce of this word (Craft) in the Conveyance, which was not in the Incorporation; was not any materiall variance, but onely matter of ſurpluſage, for that Craft and Myſtery are all one, and of one ſenſe: and did not make the Conveyance to be void. 20 Eliz. *Plowden Comment.* 537. *Craft* and *Hawell's* Caſe.

9. The Guild of *Boſton* in *Lincolneſhire*, was Incorporated

Incorporated by the name of the Guild of Saint *Nicholas*, and our Lady the Virgin *Mary*, &c. And they made a Leaſe for years, by the name of the Guild of our Lady, the Virgin and Saint *Nicholas*, *religione quadam motus ut nomen Virginis Mariæ in Charta dimiſſionis præponeretur nomini St. Nicholai*; and yet it was adjudged a void Leaſe for this variance. Quære of it, This Caſe was vouched by the Lord *Burleigh* in the Argument of *Paſchall's* Caſe. See *Leon.* 162.

10. The true name of the Corporation of Queens Colledge in *Oxford*, is, *Præpoſitus, et Scholares Aulæ Scholarium Reginæ de Oxonia*; And they confirm a Leaſe by the names *Præpoſit. Sociorum et Scholarium Aulæ vel Collegii Reginæ in Univerſitate de Oxonia.* In that Caſe, It was adjudged, That the Confirmation was good: for that the Colledge there is named by ſuch name, that it might be well diſtinguiſhed from every other Colledge in the ſame Univerſity: And there it was Reſolved, That although that the name of a Corporation is like unto the name of Baptiſm; yet if the perſons be ſo deſcribed, that they may be certainly diſtinguiſhed from other perſons; there miſpriſe or omiſſion of the true name ſhall not avoid the Grant: And there it was Reſolved, that the Word (King) is a name of Corporation; yet if a Grant be made unto the King, by the name of Soveraign Lord *James*, omitting the word (King) the Grant is good; For *Nihil facit Error Nominis cum de corpore conſtat. Cook* 11. Part, 19, 20, 21. Dr. *Arays* Caſe.

Corpus Cum Cauſa, *or* Habeas Corpus.

1. *By whom, and for whom it lyeth: And where one in Execution by a Judgment in one Court, may be removed into another Court, and awarded in Execution there.*

1. IF a man be an Officer in one of the four Courts of Law in *Weſtminſter*-Hall, and he be ſued in *London*, or in another Inferiour Court, he may have a Writ of Priviledge; or if he be impriſoned, a *Habeas Corpus* to remove him; and the Writ of Priviledg is a ſtatt *Superſedeas* to the Inferiour Court; and a *Procedendo* cannot be granted in ſuch caſe, becauſe his attendance in the higher Court is neceſſary. Hill. 12 Eliz. *Dyer* 287.

2. A Commiſſion being granted to examine the right of the Office of Exigenter of *London*; which belonged to the Chief Juſtice, and by him was granted to *Scroggs*: And a Bill thereupon exhibited againſt him before the Commiſſioners, *Scroggs* demurred upon their Juriſdiction, and would not Anſwer; for which they committed him to the Fleet: But in that caſe, the Juſtices of the Common-Pleas granted him a *Habeas Corpus*, becauſe he was a neceſſary Miniſter to the Court. Mich. 2 Eliz. *Dyer* 175.

3 An Action was brought in *London*, becauſe the Defendant called the Plaintiffs wife, Whore; It was moved, to have a *Procedendo* to remand it, becauſe the Action was moveable in *London*, it having been removed out of *London* by *Habeas Corpus* into the Kings Bench: But the *Procedendo* was denyed by the Court. And it was ſaid, That a Cuſtome to maintain Actions for brabling words, is againſt Law. Trin. 41 Eliz. *Oxford* and *Croſe's* Caſe. *Cook* 4. Part, 18.

4. One who had Priviledge in the Common-Pleas, was arreſted in *London*; and before Judgment, the Defendant delivered a Writ of *Superſedeas* in the Inferiour Court, and notwithſtanding the Recorder proceeded to Judgment, and thereupon his body was taken in Execution; and afterwards he was brought into the Court of Common-Pleas by a *Habeas Corpus cum Cauſa*; and becauſe that after the *Superſedeas*, there was a Nullity in the proceeding, as well to the Judgment, as to the Execution, the Court awarded, That the party ſhould be diſcharged of the Execution: And ſo he was diſmiſſed without ſuing forth a Writ of Error. *Cook* 8. Part, 143. *Druries* Caſe.

5. Errour was brought of a Judgment in an Inferiour Court; The Errour aſſigned was, becauſe after a *Habeas Corpus cum Cauſa* was ſued out of the Kings Bench, and delivered to the Mayor and principal Officer of that Court, and acceptance, and allowance thereof, they notwithſtanding proceeded to Triall and Judgment. The Defendant pleaded *in nullo eſt erratum*. It was moved, It was not Errour, becauſe he doth not allege the *Habeas Corpus* to be upon Record: But it was holden by the Court, That the proceeding after the *Habeas Corpus* delivered, is an Errour, and *Coram non Judice*, which is confeſſed by the pleading *in nullo eſt erratum*: And if it were not true, that it was delivered to the Mayor, and allowed, it ought to have been denyed, and is tryable by the Country. The Judgment was reverſed. Trin. 7 Car. in B. R. rott. 1039. *Ellis* and *Johnſon's* Caſe. *Cro.* 1. Part, 190.

6. Errour was brought, for that a Writ of *Ha-*

beas Corpora, with *Niſi Prius* being awarded, a Writ of *Superſedeas* was granted and delivered to the Sheriff, for ſtaying the Return of the Writ, and he notwithſtanding returned the Writ of *Habeas Corpora*, at the Aſſizes; whereupon the Tryall was had, and Judgment accordingly. It was holden by the Court to be a manifeſt Errour: as the proceedings in an Inferiour Court, after *Habeas Corpus* delivered, without a *Procedendo*. The Judgment was reverſed. Hill. 1 Jac. in B. R. rott. 479. *Kings* Caſe. *Cro.* 2. Part, 43.

7. A man being in Execution in the Fleet, for a debt recovered in the Common-Pleas, being before that time condemned for another debt in the Kings-Bench, was removed by *Habeas Corpus cum Cauſa condemnationis*. It was holden, The *Habeas Corpus* was well awarded; and that now the Plaintiff might acknowledge ſatisfaction in the Kings-Bench for both the ſaid debts: for now he is in the Cuſtody of the Marſhall for both; and if the Marſhall do afterwards ſuffer him to eſcape, he ſhall be chargeable with both the debts. Mich. 4 Ma. *Dyer* 132.

8. A. was taken in Execution upon a *Capias ad ſatisfaciendum* out of the Kings-Bench, and there iſſued a Writ of Prerogative out of the Exchequer, to have his body. The *Teſte* bare date before the Arreſt; and the Return before the *Capias*: Upon which the Sheriff brought his body into the Exchequer, and there ſhewed the Cauſe of the detainer: and thence the Priſoner was committed to the Fleet in Execution for the ſaid debts; and alſo for the debt due to the Queen, which he had confeſſed in the Exchequer: Afterwards a *Habeas Corpus* came from the Kings-Beneh; and the Warden of the Fleet brought the body, and ſhewed all the ſpeciall matter in the Return: whereupon he was remanded, Hill. 3 Eliz. *Dyer* 197. *Laſſels* Caſe. Mich. 5 Car. in *Scaccario*. The Lady *Sands* Caſe, adjudged accordingly. See 3 E. 6. *Dyer* 167. acc.

9. Execution by default was awarded in a *Scire facias* upon a Judgment, and the Defendant after the year and the day, *ſcil.* 4. years after, was in the Fleet for another cauſe; [redacted] being brought to the barr by *Habeas Corpus*, he was examined, If he were the ſame perſon who was condemned *ut ſupra*? Who confeſſed he was: and thereupon he was committed to the ſame priſon of the Fleet, there to remain till he paid the Condemnation. And note, That this was after the year and day, without any new *Scire facias* awarded. Trin. 4 Eliz. *Dyer* 214.

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2. *Where the Writ of* Habeas Corpus cum Cauſa *lyeth; where not: And when allowable; when not. And what ſhall be a good Return of it: And where the party ſhall be diſcharged upon it; where not.*

1. THE Court was moved for a *Habeas Corpus* for a Priſoner in the Kings-Bench, that he might be a Witneſſe in a Cauſe at a Tryall at the Aſſizes in *Derbyſhire*. The Court would not grant it; for they ſaid, This was but a trick, to gain his Liberty in the long Vacation. Yet the Court agreed, That a *Habeas Corpus* had been granted for one to be a Witneſſe at a Tryall at the Guild-Hall in *London*; but that at the charge and perill of the party for whom he was to be a Witneſſe, if he eſcape. Trin. 24 Car. in B. R. *Styles* 119. And ſo was it holden, Trin. 1630. in B. R. in *Treton* and *Squires* Caſe, where a *Habeas Corpus* was awarded, That a Priſoner in the Marſhalſie might obtain Liberty to be at a Tryall, to give his Teſtimony as a Witneſſe, but at the charge of the party, and at his perill, if he Eſcape. *Styles* 230.

2. A man was arreſted by a *Latitat* out of the Kings-Bench, in the County of *Wilts*, and carried from thence to the Town of *Marlebrough*, and there arreſted by a Sergeant of the Town, by a Writ out of that Corporation: and the party proceeded againſt him there upon that Writ, and not upon the *Latitat*. It was Ruled by the Court, That the party ſhould have an Attachment againſt the party that arreſted him; and a *Habeas Corpus* was alſo awarded, to remove his body into the Kings-Bench. Mich. 1650. in B. R. *Brian* and *Stout*'s Caſe. *Styles* 239.

3. Captain *Streater* was committed by the Councel, and Parliament, for publiſhing ſeditious Pamphlets, to the Gate-houſe; he brought a *Habeas Corpus*, and prayed the Return might be read, and filed, and that he might be bailed; but it was denyed, and he was returned over to the Marſhall: but not remanded, becauſe upon filing of the Return, the Court was ſeiſed of the Record, and of the Priſoner. Mich. 1653. in B. R. Captain *Streater*'s Caſe. *Styles* 397.

4. A man was ſued in the Eccleſiaſtical Court, for beating of his Wife, and for calling her Whore, and there ſentenced to pay her 3. ſhillings a Week for Alimony; and a Fine impoſed upon him for

not

not paying; and he ordered to enter into a Recognizance there to perform it: And for these causes a Prohibition was awarded, and a *Habeas Corpus* to deliver the party out of prison. Trin. 8 Jac. in C.B. *Agar's* Case. *Brownlow* 2. Part, 36.

5. An Attorney of the Common-Pleas was cited before the High Commissioners, and committed to the Fleet, for that he would not swear upon the Articles by the Commissioners administred to him; and a *Habeas Corpus* was awarded to deliver him, and a Prohibition to the Court of High Commission was awarded. See Trin. 7 Jac. in C. B. *Brownlow* 2. Part, 271. And in that case it was Resolved, That it belongs to the Judges of the Common-Law to expound the Statute of 1 Eliz. upon which the Court of High Commission is grounded. See *Leyes* Case, 9 & 10 Eliz. *Dyer.* Rott, 1596. acc.

6. Sir *Henry Lea* was committed, for disobeying a Decree made in the Court of Requests; whereupon he prayed a *Habeas Corpus*: And upon the Retorn the case appeared to be, That *Henry Lea* the Defendant pretending title to Lands which Sir *Henry Lea* held by discent from his Uncle, shewed his Title to the Kings Majestie, who upon the Petition of *Henry Lea*, sent for Sir *Henry Lea*, and had speech with him, that he would give to *Henry Lea* some recompence for his title; and thereupon Sir *Henry* promised, That if *Henry Lea* would not molest him for any of the said Lands, that then he would give to the said *Henry Lea* 200 l. *per annum*; and for not performance of this promise, he exhibited his Bill into the Court of Requests, upon which the said Decree was grounded. And the said Court made the said Decree upon a Certificate made by the King of such promise. And it was moved, That because it appeared, that the Plaintiff had remedy by way of Action upon the Case at the Common-Law upon the said promise, That the Court would grant a Prohibition to the Court of Request; and also deliver him from his said Imprisonment. But because upon the Retorn it appeared, that his commitment was for a Contempt, for not performing the Decree; and no other cause appeared in the Retorn: therefore they could not discharge him upon his *Habeas Corpus*; but the party might have False Imprisonment, if his Imprisonment was not lawful. Trin. 10 Jac. in C.B. Sir *Henry Lea* and *Henry Lea's* Case. *Godbolt.* 199.

7. H. was committed and detained in prison, upon a Commitment made by the Justices of Peace at the Quarter-Sessions: And upon a *Habeas Corpus* retorned, It appeared, That H. having got a Bastard Child, That by the Statute of 18 Eliz. is to be referred to the examination of the two next Justices of the Peace, for to Examine and Order the same; They did examine the matter, and made their Order therein, the which if the party refuse to perform, or to enter bond to appear at the next Quarter-Sessions, then they are to commit him to prison without bail or mainprise: H. entred Bond, and after at the next Quarter-Sessions, the Justices did make another Order; and because they refused to perform it, they committed him to prison. It was the Opinion of the Court, That the Justices ought not to have committed him for not performing of this their Order at the Quarter-Sessions, where they do alter their former Order; for by this, The first Order made by the two next Justices of Peace, is made void. And therefore this appearing, The Court granted a *Habeas Corpus* to remove the body from his Imprisonment: And upon the Retorn, it appearing that his Imprisonment was illegall, he was bailed by the Rule of the Court. Mich. 3 Car. in B. R. The King, and *Hamond's* Case.

8. A. being in prison in the Marshalsey, had a *Habeas Corpus*: upon which it was retorned, That he was committed to prison the 18. day of Sept. last, by the command of the Lords of the Councel; The Warrant was, viz. That he was committed for insolent behaviour, and words spoken at the Councel Table, which was subscribed by the Lord Keeper, and 12. other of the Councel: and because it was not mentioned, what the words were, so as the Court might adjudge of them, the Retorn was holden to be insufficient; and afterwards he was bailed. Mich. 5 Car. in B. R. *Chambers* Case. 94.

9. Upon a *Habeas Corpus* to the Porters of the prison of the Councel of the Marches of *Wales*, It was retorned, That they were committed to him by virtue of a Decree upon an Information, That one of them enveigled the son and heir of J. S. being of the age of 17 years, in the night, and when he was drunken, to marry the sister of one of the Defendants: whereupon they were fined in several sums, and to pay 100 marks to the prosecutor, and were committed to prison for a year, and untill the said Fines paid, and untill they entred Recognizance for their good behaviour, and untill the Court took further Order. It was retorned also, That they were committed by an Order from the Lords of the Councel. The Court held the Retorns to be insufficient; whereupon the parties were bailed. Trin. 15 Car. in B. R. *Seelces* and others Case. *Cro.* 1. Part, 401.

10. A *Habeas Corpus* was directed to the Steward and Marshal of the Marshalsey, for one *Howell*; who retorned, That the said *Howell* was committed to his Custody *per Mandatum Francisci Walsingham Militis Principalis Secretarii et unus de privato Consilio Domina Reginæ*. It was holden by

by the Court, That the Return was inſufficient, becauſe the cauſe upon which he was committed, was not ſet down in the Return; and day was given to mend his Return; and now he returned, *viz. Infra Nominatus Johannes Howell Commiſſus, &c. ex ſententia et mandato Totius Concilii privati Dominæ Reginæ, et quod Corpus ejus habere non poſſumus, &c.* and that Return was alſo holden inſufficient, for (by whatſoever perſon, or by whatſoever means he was committed) the return ought to be, *Corpus tamen ejus paratum habeo*: and then if it ſhall ſeem to the Court, ſhall have his priviledge, and ſhall be diſmiſt, he ſhall be diſcharged; but if not, then he ſhall be remanded. Mich. 31 Eliz. in C. B. *Howell's* Caſe. *Leon.* 70, 71.

11. *A.* a Priſoner in the *Fleet* was, by *Habeas Corpus* awarded to the Warden, brought to the barr: The Warden made return, That he was, 11. *Nov.* 1607. committed by Warrant from the Lords of the Councel to the *Fleet*, to remain there untill other Order. And it was the Opinion of the Court, becauſe there was not any Cauſe of Commitment, mentioned either in the Commitment, or in the Return, the Court conceived it not fitting to detain him in priſon: whereupon he was diſcharged by bail. Paſch. 14 Car. in B. R. *Barkhams* Caſe. *Cro.* 1. Part, 365. See *ibid. Lawſon's* Caſe adjudged accordingly.

12. *Wolnough* and 7. others were committed by the Mayor of *London* to *Newgate*, for refuſing to enter into a Recognizance to appear before the Lords of the Councel. Upon the *Habeas Corpus* returned, It appeared, That by an Order from the Councel Table, they were to come before the Mayor, and to treat of forrein matters; and when they appeared, being required by the Mayor being in Commiſſion of *Oyer* and *Terminer* for the City, to perform the Order of the Lords of the Councel, and to enter into a Recognizance, they refuſed; whereupon he committed them. It was ſaid, That the return was not good, becauſe it doth not mention the Order, nor ſhew what the Order was, ſo as the Court might judge thereof: and alſo becauſe the Recognizance is demanded for them to appear before the Lords of the Councel, no time nor place being appointed, nor cauſe ſhewed why it was demanded: and for theſe cauſes the parties were bailed. Trin. 15 Car. in B. R. *Wolnoughs* Caſe. *Cro.* 1. Part, 397.

13. One J. S. was brought to the barr by *Habeas Corpus*; And it was returned, That he was committed by Order of the Exchequer, for not paying of a Fine of 50 l. impoſed upon him by the Eccleſiaſticall Commiſſioners. And although it was not ſhewed, wherefore the ſaid Fine was impoſed; yet becauſe the Commitment was by a Judiciall Court, the Court would neither bail, nor diſcharge him. Paſch. 16 Car. in B. R. *Cro.* 1. Part, 418.

14. *A.* having a Suit in the Kings-Bench, coming to *London*, was committed to *Newgate*: And upon a *Habeas Corpus*, It was returned by the Goaler in this manner, *viz.* That the ſaid *A.* was committed to his Cuſtody by Warrant from the Lord Chancellor of England, for certain matters concerning the King, there to remain untill the Lord Chancellor delivered him; and for that cauſe he could not have his body here. It was ſaid, That the return was too general; for it ſhews not for what cauſes he was committed; and it might be for a Cauſe which would not hinder him of his priviledge. Alſo the return is, That he ought to remain there, till he were delivered by the Lord Chancellor. The Court ſaid, It was the firſt time that ſuch Exceptions had been taken, therefore they would conſider of the Caſe. Hill. 6 Jac. in B. R. *Addis* Caſe, *Cro.* 2. Part, 219.

15. *A.* was impriſoned at *Dover* by the Lord Warden of the 5. Ports, becauſe he took an Anchor and a Cable as Wreck, which the Lord Warden pretended to be in the 5. Ports, and did belong to him: and being impriſoned 20 weeks, he brought *Habeas Corpus cum cauſa*; and the Lord Warden would not obey it: Whereupon an alias *Habeas Corpus* was granted with a penalty: and the Lord Warden pretended, that the Kings Writ did not run there: And a Preſident was cited, Where one *Bowley* was committed in *Barwick*, and a *Habeas Corpus* awarded, and the Mayor of *Barwick* would not obey it, becauſe he pretended the King's Writ did not run there. But it was ſaid, That ſuch pretences were diſallowed, and an Attachment was awarded againſt the Mayor, and he impriſoned for his Contempt. And it was the Opinion of all the Juſtices, That the Kings Writ did run there, and eſpecially this Writ which is a Prerogative-Writ, which concerns the King's Juſtice to be adminiſtred to his Subjects, for the King ought to have an Accompt, why any of his Subjects is impriſoned; and no Anſwer can ſatisfie it, but to return the Cauſe, with a *Paratum habeo*. And it was ſaid, That a Writ had been awarded out of this Court to *Calice*; And *Brierley's* Caſe was remembred by *Doddridge*, Juſtice, Where a Writ of Reſtitution had been awarded out of this Court to the 5. Ports. Wherefore it was adjudged, That another *Habeas Corpus* in the principal caſe ſhould be awarded under a great penalty at another day. Mich. 17 Jac. in B. R. *Richard Bourns* Caſe. *Cro.* 2. Part, 543.

16. Doctor *Alphonſo* was committed to priſon by the Colledge of Phyſitians in *London*, for practiſing of Phyſick; He was brought to the barr by *Habeas Corpus*; the return was read; and upon the

the reading, it did appear to the Court, to be insufficient, no cauſe being therein ſhewed for his Commitment. It was then moved by the Councel of the Colledg, for time to amend the return; but they would not grant it, but bailed the Doctor; the Court conceiving this to be the beſt for the Doctor; for if the Court ſhould diſcharge him for the inſufficiency of the Return, Then they would preſently take him again and commit him, and then would mend their return, and make it better. And for this cauſe, the Doctor was bailed, but not abſolutely diſcharged of his Impriſonment. Mich. 12 Jac. in B.R. Dr. *Alphonſo* and the Colledge of Phyſicians in *London*'s Caſe. *Bolſtr.* 2. Part, 259.

17. A. had a Judgment againſt B, and had him in Execution in the Kings-Bench. B. procured himſelf by *Habeas Corpus* to be removed into the Chancery, and there was committed to the Fleet: Afterwards, he procured a Releaſe to be forged, whereby A. had releaſed him the ſaid Execution: and upon this he obtained an *Audita Querela*, and a *Scire facias* againſt A. returnable at ſuch a day in the Chancery, to ſhew cauſe why he ſhould not be diſcharged of the Execution; and he was bailed by Knights of the Poſt, and ſet at Liberty. It was the Opinion of the Juſtices, That there was not any book in Law to warrant ſuch proceedings; That upon a Judgment given in any of the Kings Courts, an *Audita Querela* ſhould lye, and a *Scire facias* upon it returnable in the Chancery, but onely in the ſame Court where the Judgment was given: But if the Judgment had been upon a Recognizance, upon a Statute ſtaple, or Merchant, in ſuch caſe the ſame might have been returnable in the Chancery, becauſe the Recognizance is there before them, and they are the Judges of it: Wherefore this practice being made known to the Lord Chancellor, and to the Court of Kings-Bench, the Bill was caſt out of Court: and the Rule in the Kings-Bench was, That B. *removeat in executione ut prius*, but according to the firſt Judgment. Mich. 10 Jac. in B.R. *Scrivin* and *Wright*'s Caſe, *Bolſtr.* 2. Part, 10.

18. A man being committed to the Fleet by the High Commiſſion Court, for not giving Alimony to his Wife, was brought to the Barr by *Habeas Corpus*; The Return was, That for cauſes Eccleſiaſtical, and by force of the Statute of 2 H.4. cap. 15. he was detained in priſon, and for Adultery. It was urged, That the cauſe of his refuſal was, becauſe he feared to be entrapped by them in his Oath, having entred into a Bond, not to uſe his wife otherwiſe then well. It was the clear Opinion of the Court, That the High Commiſſion Court, for Alimony, are neither to Fine, nor yet impriſon: and being bound to them in a bond, they cannot examine him upon Oath, or Articles, thereby to make him forfeit his Bond, and therefore he ought not to Anſwer them. And ſo it was ſaid, It was adjudged in *Gower*'s Caſe, in the time of *Wray*, Chief Juſtice. The party was bailed, Mich. 12 Jac. in B. R. *Bradſhaw* and the High Commiſſion Courts Caſe. *Bolſtr.* 2. Part, 300, 301.

19. A man was impriſoned by the Court of Admiralty: and upon a *Habeas Corpus*, this was the Return, *viz.* That the Cuſtome of the Court of Admiralty is, to attach goods *in cauſa civili et maritim*, in the hands of a third perſon, and that, upon 4. defaults made, the goods ſo attached, ſhould be delivered to the Plaintiff, upon Caution to reſtore them, if the debt, or cauſe of Action be diſproved within a year: and after 4. defaults, if the party in whoſe hands they were attached, refuſed to deliver them, to impriſon him untill he did; and ſhewed, That *K.* was endebted to J. S. upon an Agreement made *ſuper altum mare*, and dyed; and that afterwards J. S. attached certain goods of *K.* in the hands of *Heaman*; and after ſummons, and 4. defaults made, that J. S. did tender Caution to redeliver the goods, if, &c. and *Heaman* refuſed to deliver them; for which they impriſoned him. It was the Opinion of the whole Court, That an Attachment could not be againſt the goods of the party being dead: Wherefore the Cuſtome to Attach goods after the death of the party, was no good Cuſtome: and ſo the Impriſonment was not lawfull, nor the Return good; and therefore the Priſoner was diſcharged. Paſch. 18 Car. in B. R. *Heaman*'s Caſe. *Marſh* 204.

20. Sir *Anthony Roper* was drawn before the High-Commiſſioners at the Suit of *B.* for a Penſion out of a Rectory Impropriate, of which Sir *Anthony Roper* was ſeiſed in Fee: The High-Commiſſioners ſentenced him to pay it; which he refuſed: and upon this, they committed him to priſon; who brought a *Habeas Corpus*: and upon the Return of the Writ, this matter did appear. And it was Reſolved by the whole Court, That the High-Commiſſioners had not authority or Commiſſion in this caſe; and that the Act of 1 Eliz. doth not extend to this Caſe, to determine *Meum et tuum*; but onely to Crimes, as to impriſonment; and not to him, who detains a Penſion, Legacy, or Tythes. Mich. 5 Jac. in C. B. Sir *Anthony Roper*'s Caſe. *Cook.* 12. Part, 46, 47.

21. Sir *William Chauncy* being committed to the Fleet by a Warrant from the High-Commiſſioners in Cauſes Eccleſiaſticall, was brought to the Barr by *Habeas Corpus*; the Return of which was *in hac verba*, We require you to take into your

your Custody the body of Sir *William Chauncey*; letting you know, That the Cause of his Commitment is, That he, being convented before them for Adultery, and for expelling his Wife from his company, without allowing her any maintenance, and upon his own Confession convicted thereof; He was by the Order of the Court enjoyned to allow his wife a competent maintenance, according to his ability, and to perform such submission and other Order for his Adultery, as by Law should be enjoyned him; which he refused to do. In this case, It was Resolved by all the Justices, 1. That the High-Commissioners have not power to determine of Adultery, or of Alimony: but the same ought to be punished by the Ordinary; and they have power onely to determine of enormious Offences; as Heresie, Schisme, &c. 2. Resolved, That the Retorn was insufficient; 1. Because it is not shewed when the Adultery was committed. And, 2. He was enjoyned to allow his wife a competent maintenance without any certainty; and to perform such submission and other Order for his Adultery, as by the Law he shall be enjoyned. It is all *in futuro* and uncertain, what Order they will take. 3. It was Resolved, That when upon the Retorn it doth appear, That the Imprisonment is not lawfull; the Court may discharge him of his Imprisonment. Pasch. 9 Jac. in C. B. Sir *William Chauncey*'s Case. *Cook* 12. Part, 82, 83.

22. Judgment was entred against A. in the Court of Common-Pleas; and afterwards the bail of A. brought a *Habeas Corpus* to the Marshalsey, A. being there a Prisoner, to have his body before the Justices of the Common-Pleas to be committed in Execution, in discharge of the Bail; but before the retorn of the *Habeas Corpus*, A. brought a Writ of Errour, returnable the day following: and when he came to be committed, the Court doubted, That their hands were tyed up by the Writ of Errour, by reason he could not be committed upon the Judgment. Yet they would have discharged the Bail, if they knew which way. Quære. Pasch. 14 Jac. in the Common-Pleas, *Wickstead* and *Bradshaw*'s Case, *Brownlow* 1. Part, 61.

Costs.

1. *In what Actions the Defendant shall recover Costs against the Plaintiff; in what not. And in what Actions the Plaintiff shall recover Costs against the Defendant.*

1. IN an Action upon the Case, the Plaintiff was Nonsuit, and the Defendant had Judgment of Costs upon the Statute of 23 H. 8. Afterwards a Writ of Errour upon the Judgment was brought in the Kings-Bench: And afterwards the Defendant brought Debt in the Common-Pleas for the Costs. It was adjudged, That the Action did well lye. It was also holden, That although the Record were afterwards reversed, yet the Defendant should have the Costs assessed him by the Court, for his wrongfull Vexation. Pasch. 32 H. 8. *Dyer*. 32.

2. Judgment was given in an Action grounded upon the Statute of 1 & 2 *Philip* and *Mary*, for driving of a Distresse out of the Hundred and County where it was taken; and in the Action the Plaintiff recovered treble damages: And therefore it was holden by the Court, That he should recover no Costs.

3. Note: In all Cases where the Plaintiff might have Costs against the Defendant, there if the Plaintiff be Nonsuit, the Defendant shall have his Costs. *Brownlow* 46. acc.

4. In debt, the Plaintiff declared of a Recovery of Damages and Costs in a Writ of Entry; the Defendant pleaded in barr, That the Plaintiff after his Judgment, immediately brought an *Elegit*, and delivered the same to the Sheriff, who executed the Writ, and delivered the moyety of the Land extended, to the Plaintiff, &c. without shewing, that it was returned. It was holden to be a good barr; for the Plaintiff cannot vary from his Execution, for that he hath made his Election upon record. Pasch. 12 Eliz. *Dyer* 299. See *Cook* 5. Part, *Hoes* Case, acc.

5. *A.* brought debt against *B.* upon a Lease for years. The Grandfather of the Plaintiff seised of Land in *Southwark*, made a Lease of the same to the Defendant at *London*, rendring Rent; afterwards he devised the Reversion to *A.* the Plaintiff in Fee; and in his Will declared his intent to be, That his Executors should have the Reversion

ſion during the Term, upon condition, that they enter Bond to pay 34 l. *per annum* at the uſual Feaſts; and deviſed, that this Bond ſhould be made by the advice of his Overſeers, all this to be done within 6. moneths after his deceaſe; and if his Executors refuſe, his Will was, That the Overſeers ſhould take the profits upon the ſame Condition; the Deviſor dyed; No Obligation was made within the 3. moneths; the Plaintiff required the Executors to enter the Bond, and pay the Rent; which was not done: whereupon he brought his Action in *London*, and not in *Southwark* where the Land did lye. It was agreed in this caſe, That the Plaintiff had good title to have the Rent: but becauſe the Plaintiff had miſtaken the laying of his Action, it was for that cauſe onely adjudged againſt the Plaintiff. Then it was moved, That in this Action the Plaintiff might pay Coſts. But it was Reſolved, That this Caſe was not within the Statute of 32 H. 8. and 4 Jac. where the words of the Statute are, That if the Plaintiff be Nonſuit, or Verdict given againſt him upon a lawfull triall, that he ſhould pay Coſts: For that he ſhall not pay Coſts; for no Verdict is found againſt the Plaintiff, but rather for him: and Judgment is given againſt him, becauſe he onely miſtook his Action. Hill. 21 Jac. in C.B. *Trobern* and *Claybrook*'s Caſe. *Winch.* 69. See *Cook* 5. Part, *Biſhop*'s Caſe, acc. See Trin. 21 Jac. in B. R. *Godbolt.* 345. contr.

6. A man brought an Action upon the Caſe for words; After Not-guilty pleaded, the Plaintiff was Nonſuit. It was moved, That no Coſts ſhould be given to the Defendant, becauſe the words will not bear Action; and one *Grewſton*'s Caſe in B.R. was vouched, That now by the laſt Statute of 4 Jac. Coſts ſhall be given to the Defendant in all caſes where the Plaintiff ſhould have Coſts, if he recover; but in ſuch caſe, where the Plaintiff, if he recover, ſhall not have Coſts, the Defendant upon the Nonſuit of the Plaintiff, ſhall not have Coſts. But it was the Opinion of the Court, the Coſts in this caſe are for the vexation; and it is the more vexation, if he have no cauſe of Action. And if the Action doth not lye, yet the Defendant ſhall have Coſts; for it was in ſuch an Action in which the Plaintiff ought to have Coſts, if he recover. Paſch. 16 Jac. in C. B. *Drury* and *Fitch*'s Caſe. *Hutton* 16.

7. An Information was exhibited upon the Statute of 35 Eliz. for converting a houſe in *London* into many dwellings. Upon Not-guilty, the Defendant was found guilty: but becauſe the ſaid Statute is diſcontinued by the Statute of 43 Eliz. The Court awarded, That the Defendant *eat ſine die*; and whether the Defendant ſhould have Coſts upon the Statute of 18 Eliz. cap. 5. was the Queſtion? It was Objected, 1. That the Statute doth not extend but to Statutes penal then in *eſſe*. 2. If there be no Statute, then there is no Informer; and there is no Judgment, but onely that the Defendant *eat ſine die*: and *Kyldridges* Caſe, 25 Eliz. in B.R. was, An Information upon the Statute of 35 H.8. for not incloſing of Woods, but ſuffering them to lye open the ſpace of a moneth. It was found for the Plaintiff; And upon a Motion in Arreſt of Judgment, It was awarded, The Defendant *eat ſine die*, and no Coſts. But it was Reſolved by the Court, That this Statute was made for the eaſe of the Subjects, and for avoiding and preventing of vexations; and if the matter paſs againſt the Informer, be it by Verdict, or Judgment, it is all one; for the Statute intended to curb all vexatious Informers: And if Informers might be ſuffered to Inform upon Statutes not in force, it would be a great vexation to the Subject. Trin. 17 Jac. in C. B. *Pies* Caſe. *Hutton* 35, 36.

8. In a Replevin, the Defendant avowes for 36 l. Rent for a year and a half, being 24 l. *per annum*. The Plaintiff pleaded payment of 12 l. and another Iſſue was brought for the 14 l; and for the firſt Iſſue it was found for the Plaintiff, and Damages and Coſts taxed by the Jury. But it was found againſt the Plaintiff for the ſecond Iſſue. It was moved, That the Juries finding of Coſts and Charges for the Plaintiff, was void; for when part is found for the Avowant, he ſhall have Return, and Damages and Coſts; and the Return ſhall be for the Defendant, where any part is found for him. Wherefore it was adjudged accordingly. Paſch. 16 Jac. in B.R. *Dunt* and *Parſon*'s Caſe. *Cro.* 2. Part, 473.

9. Replevin againſt two; One pleads Not-guilty; the other Juſtifies, by reaſon of an Amercement in a Leet. Whereupon it was demurred, and adjudged for the Avowant, and the Iſſue was afterwards tryed, and found for the Defendant, and Damages and Coſts aſſeſſed for both. It was moved, That no Judgment ſhould be for the Damages and Coſts; for it is out of the Statutes of 7 & 21 H.8. But the Court upon Conſideration of the Statute which gives Coſts to the Defendant in each Action where the Plaintiff ſhould have Coſts, were of Opinion, That the Avowant ſhould have Coſts; but they adviſed him to releaſe his damages. Hill. 16 Jac. in B. R. *Samuel* and *Hoders* Caſe. *Cro.* 2. Part, 520. See Paſch. 38 Eliz. in C. B. *Chapley* and *Harſley*'s Caſe. And Mich. 44 Eliz. *Mackworth* and *Shepherd*'s Caſe, acc. See Hill. 11 Jac. in B. R. *James* and *Putney*'s Caſe. *Cro.* 1. Part, 357, 383. And ſee *March* 28. the ſame Caſe, That in Avowry, for an Amercement by reaſon of a Cuſtome, the Avowant ſhall recover Damages and Coſts.

11. The

11. The Plaintiff brought an Action for breaking of his house, and carrying away of his goods; and at the Tryall was Nonsuit; and he said, That there was Errour in the Declaration, and therefore there could be no Judgment, and prayed that he might be spared Costs. It was said by the Court, It had been a Question if the Plaintiff be Nonsuit, Whether he should pay Costs? but now since the Statute of 4 Jac. it is clear, he shall pay costs. And so it was adjudged, the Plaintiff in this case should pay cost. Mich. 24 Car. in B. R. *Frank* and *Burt's* Case. *Style's* 149. See Mich. 24 Car. in B. R. *Frank* and *Davies* Case, acc. *Styles*, 153.

12. Debt was brought, and Judgment was given for the Plaintiff, and a space was left in the Roll for the Costs of the Judgment. And after a year and a day, a *Scire facias* was brought to revive the Judgment, and in the *Scire facias* the Costs are put in. Afterwards Judgment being by default, A Writ of Error was brought, and the Error Assigned was, because there was no Costs in the principall Roll; And after the Record was removed, It was moved that the Costs might be put into the Roll; But it was denyed by the whole Court; For it was holden, that it was a manifest Error. Pasc. 44 Eliz. in C. B. *Elliot* and *Golding's* Case. *Brownlo.* 75.

13. Debt was brought upon the Statute of Perjury, in which the Plaintiff was Nonsuited: The Defendant prayed Costs upon these words of the Statute of 23 H. 8. Or upon any Statute for any Offence or wrong personal, immediately supposed to be done to the Plaintiff, or Plaintiffs; and the Plaintiffs after appearance be Nonsuit, &c. But it was the Opinion of the Court, That he should not recover Costs upon that Statute, because the Statute of 5 Eliz. was made, long after the Statute of H. 8. and upon the Statute of King *James*, the Defendant shall not recover Costs, for if the Plaintiff had recovered, he should have recovered no Costs, And so no Costs was given to the Defendant in that Action. Trin. 16 Jac. in C. B. *King* and *Lawes* Case. *Brownlow.* 1. Part, 66. *Hutton* 22. 16 Jac. acc.

14. A. sued a Prohibition against B. Parson of D. and suggested a *modus Decimandi*, for part of the Tythes, and a Contract between him and the Parson for the residue, and because he proved not his suggestion in six Moneths, the Parson had a Consultation, and Costs assessed to 10 s. but in truth no Judgment was given to recover them: The Parson notwithstanding, brought Debt for the Costs, and set forth the matter aforesaid, upon which, it was adjudged, That he should recover his Costs; and the Costs were not paid Upon this Error was brought, And the Error Assigned was, that there was no judgment in the Prohibition for Recovery of the Costs, but onely an Assessment of Costs, without any more, which is not sufficient; which is no Judgment to bind, and of that Opinion was the whole Court. Another Error was, That no Copy ought to be assessed in the Case above, because the Prohibition is grounded onely upon the *modus Decimandi*, which needs no proof, and the suggestion being entire, and part of it needing proof, and part of it no proof, they could not give any Costs, for that is onely, where the whole matter of the suggestion needs proof, and therefore the mixing of the Contract, with the manner of Tything, priviledges the whole as to the matter of Costs, all which was agreed to by the Court, And so both the Judgments were reversed, Mich. 5 Jac. in C. B. *Cob* and *Hunt's* Case. *Brownlow*, 100.

15. In an *Ejectione firme*, the Jury found for the Defendant; It was moved for the Plaintiff, That the Defendant might not have Costs, because the *venire facias* is mistaken; But the Defendant's Counsel cited a President, Mich. 11 Jac. betwixt *Done* and *Knot*, where the Defendant had Judgment for his Costs, notwithstanding that the Plaintiff mistook his *Venire facias*, in an *Ejectione firme*, where the Jury found for the Defendant. Trin. 21 Jac. in B. R. *Pritchard* and *Williams* Case. *Godbolt.* 329.

16. Trespasse by Husband and Wife, for battery done to them both *ad damnum ipsorum*; upon Not-Guilty, It was found for the Defendant, and that he did as a Constable in Execution of his Office. It was moved, that the Declaration was not good, for that Husband and Wife joyn in Battery done to them both, and therefore Judgment ought to have been given against the Plaintiff, upon the Declaration, and not upon the Verdict, and so no Costs ought to be given. But the Court was of Opinion, because the Defendant is found Not-guilty, and that he did it as an Officer in Execution of his Office, the Plaintiff should not take advantage of the insufficiency of the Declaration, and excuse themselves of the Costs. Adjudged for the Defendant. *Cro.* 1. Part, 125. *Heyes's* Case, 5 Car. in B. R.

17. Judgment was given for the Defendant in the Common-Pleas, and that Judgment was affirmed, and 10 l. Costs given in the Kings Bench to the Defendant, upon the Statute of 3 H. 7. It was moved, that the Costs were not grantable; For the Statute is, where Judgment is given against the Defendant, and he to delay the Execution, brings a Writ of Error, and the Judgment is affirmed, &c. but here the Judgment is given for the Defendant in the Common-Pleas, so no Execution was to be awarded there against him; and

although

although the Plaintiff brought the Writ of Error, and the Judgment be affirmed, yet it is out of the Statute: And of that Opinion was the whole Court; therefore it was awarded, that Execution for the Costs should be stayed. Hill. 10 Car. in B. R. *Bowler* and *Nicholls's* Case. *Cro.* 1. Part, 291.

18. Error upon a Judgment given in an *Assumpsit*: The Error Assigned was, That the Plaintiff declared to his damage of 10 l. and the Jury assessed damages 10 l. 13 s. 4 d. for Costs, which was Error: But the Opinion of the Court was, That it was not Error; for although the Entry is always of damages and Costs, by the name of Damages: yet the damages and Costs are distinct, and although if the Jury find more damages then the Plaintiff declared of, it is erronious: yet it is not Error, if they find more Costs then the damages amounted unto; for it may be the Costs of Suit through long dependance of it, exceeded the Debt it self, so adjudged no Error, but the Costs to stand. Pasc. 1 Jac. in B. R. *Eglet* and *Vales* Case. *Cro.* 2. Part, 69.

19. In *Assumpsit* the Verdict found damages and Costs, and the Judgment was *Quod recuperet damna*, and Costs found by the Jury to 53 s. 4 d. *de incremento per Curiam adjudicat*; and doth not say it was *ex assensu partium*, or *ad requisitionem* of the Plaintiff; and for that cause the Judgment was reversed in a Writ of Error brought, for that Costs ought not to be inserted for the Plaintiff, but upon his request; and so was it adjudged in *Crowslaw* and *Eyres* Case, this Term. Mich. 18 Jac. in B. R. *Sachy* and *Yeoman's* Case. *Cro.* 2. Part, 587. See Hill. 2 Car. in B. R. *Good's* Case. *Popham.* 211. acc.

20. In a Writ of Error, the Judgment being affirmed, Costs were taxed by the Clark, without motion in Court, which he conceived ought to have bin given by the Court: But because upon suggestion in Court, That this Writ of Error was brought after Execution served, and so not in delay of Execution; It was held by all the Court, That no Costs were to be given: for the Statute of 3 H. 7. doth not give any, but where Execution is delayed by the Writ of Error, A *supersedeas* was Awarded to stay Execution for the Costs. Pasc. 20 Jac. in B. R. *Eardly* and *Turnock's* Case. *Cro.* 2. Part, 636. See Mich. 10 Car. in B. R. *Smith* and *Smith's* Case. acc.

21. Error was brought in the Exchequer Chamber, of a Judgment in the Kings Bench, the Judgment was affirmed, and 5 l. Costs assessed *pro dilatione Executionis*; And the Record being removed, a *Scire facias* was shewed against the Bail, to have Execution against the Bail, as well for the principall Debt, as for the 5 l. Costs; And Execution was against the Bail accordingly: A *supersedeas* was prayed, because the Bail is not Chargeable, but with the damages and Costs in this suit: And not with the Costs in the Exchequer: And of that Opinion was the Court; wherefore a *Supersedeas* was awarded to avoid the entire Execution. Pasc. 20 Jac. in B. R. *Smith* and *Faldots* Case. *Cro.* 2. Part, 636.

22. Note, It was the Opinion of the whole Court, That a *Capias ad satisfaciendum* lyes for Costs awarded to the Defendant upon a Nonsuit of the Plaintiff. Pasc. 18 Jac. in B. R. *Dyer* and *Fitzcham's* Case. *Cro.* 2. Part, 595.

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2. *Where an Executor or an Administrator shall pay Costs; and where not. And where the omitting of Costs is Errour; where not.*

1. AN Action of Debt brought by Executors; The Defendant pleaded, That the Plaintiffs were not Executors; and tryed, and found for the Defendant. The Defendant upon the Statute for Costs, desired Costs, because the Jury found against the Plaintiffs, that they were not Executors: and if a Verdict passe against one that is not Executor, he shall pay costs. But the costs were denyed by the whole Court, for that the Jury might find an untruth. Trin. 10 Jac. in C. B. *Brownlow* 79.

2. An Action of Trover and Conversion of Goods of the Intestates. The time of the Conversion being supposed after the Administration committed. Verdict being found against the Plaintiff, the Question was, Whether the Plaintiff should pay costs? It was Resolved, That this Action being grounded upon the Conversion in his own time, and not in the time of the Intestate, was as his own proper Action. Wherefore he should pay Costs, Mich. 7 Car. in B. R. *Airey* and *Heards* Case. *Cro.* 1. Part, 159.

3. In a Ravishment of Ward, the Plaintiff declared, That one J. S. held such Lands of the Testator by Knight's service, and dyed, his heir within age; and that the Testator seised the Ward, and dyed thereof possessed; and afterwards the Defendant ravished him. The Issue being upon the Defendant, it was found for the Defendant. The Question was upon the Statute of 4 Jac. if the Plaintiff shall pay Costs, because she cannot bring her Action upon her own possession. It was holden by the Court, That the Defendant should not have costs. Hill. 1 Car. in C. B. *Peacock* and

Steers Case. See Mich. 12 Jac. *Goldsmith* and the Lady *Platts* Case. See Mich. 3 Jac. *Havers* and *Dacres* Case. See Mich. 29 Eliz. *Fetherstone* and *Atylards* Case. acc.

4. In the Star-Chamber, It was a Question, If Damages and Costs be recovered there of one for a Ryot, whether his Executors and Administrators shall be chargeable therewith? It was the Opinion of the Clarks, and some Presidents were shewed, That they should be charged. But the Lord *Cook* held, They were not chargeable for a Ryot. But if damages or costs be given by any Statute there upon recovery in that Court, it shall be otherwise. Hill. 6 Jac. in Star-Chamber. *Cro.* 2. Part, 219.

5. The Executors of J. S. brought Debt upon an Obligation; The Defendant pleaded, *Non est factum*, and found for him. It was a Question, Whether the Plaintiff should pay costs upon the Statute of 4 Jac. It was Resolved, That this Case was not within the Statute, he suing in anothers right, and of matter which lay not in his Conusance, therefore the Law never intended to give costs against him. And so it was adjudged in one *Ford*'s Case. Mich. 7 Jac. in B. R. *Hayworth* and *Davids* Case. *Cro.* 2. Part, 229.

6. *A.* Administratrix of J.S. brought an Action upon the Case, *tam pro Domino rege quàm pro se ipsa*, against B. Sheriff of the County of *Oxford*, for that she sued an Action of Debt against J. D. and thereupon had a *Capias* and *Exigent*, and he was Outlawed, and she sued a *Capias utlagatum* directed to the said Sheriff, who arrested the same J. D. whereupon she brought this Action. It was holden in this case, That the Action brought for the King and party, did well lye, because he was to have benefit by the Outlawry. Wherefore it was adjudged for the Plaintiff. And in another Action brought by the same party, for the same matter before, the Plaintiff was Nonsuit: And there the Question was, Whether the Defendant should have Costs against the Plaintiff. And it was the Opinion of the Court, That the Defendant should not have costs, because she brought the Action as Administratrix: and although it was not shewed, That the Debt was due to the Testator; yet because the Action was brought in the *Detinet*, it shall be intended she brought it in his right, and then she shall not pay costs upon Nonsuit, for it is out of the Statute. Mich. 12 Jac. in B. R. *Barret* and *Winchcomb*'s Case. *Cro.* 2. Part, 361.

7. An Action was brought by the Plaintiff as Executor of J.S. against the Defendant; and upon the Tryall, the Plaintiff was Nonsuit. The Defendant moved the Court for costs: But the Court answered, According to our former Rules, the Defendant in this case is not to have any costs within the Statute of 4 Jac. because by a former Statute made in the time of Queen *Elizabeth*, in such case the Defendant was not to have costs; and so not by this Statute, which hath reference to a former Statute. Trin. 12 Jac. in B. R. *Lake* and *Emmes* Case. *Bulstr.* 2. Part, 261.

8. Note, by *Hobart*, Chief Justice, That if a man dyed Intestate, and he to whom the Administration appertains is sued by others, who pretend to be Administrators, and Sentence is given against the right Administrator, and Costs given against him, the costs shall not be of the proper goods of the Administrator, but of the goods of the Intestate; as the costs which are spent in the Spiritual Court, for the Probate of a Testament, shall be onely of the goods of the Testator. Pasch, 19 Jac. in B.R. *Winch.* 11.

9. Executors brought a Ravishment of Ward against J. S. and his Wife, for ravishing the body of B, son and heir of D. and Counted of the Tenure by Knights service in B, of J. S. and that B. dyed, D. his son within age; and that the Testator seised of the body, dyed possessed thereof, and made them his Executors, and they being possessed of the said Ward, the marriage of whom belonged to them the Defendants, *rapuêre illam et abduxir.* And upon Not-guilty pleaded, the Plaintiff after Evidence was Nonsuit: and whether the Defendants should have Costs upon the Statute of 23 H.8. cap. 15. or 4 Jac. cap. 3. was the Question? The Court was divided in Opinion; for two of the Justices held, That they should have no Costs: But two other Justices held the contrary; which seemed to be the better Opinion: and they agreed, That in all Actions brought by Executors upon Contracts, Obligations, or other things made to the Testator, there shall be no Costs. Or if an Action *de bonis asportatis in vita Testatoris*, or upon any wrong supposed to be done not immediately to the Plaintiff, there shall be no costs, because the Statute gives not costs in these cases. But in this case, though the Plaintiffs are named Executors, and their title is derived from the Testator, yet the Action is brought upon an immediate wrong done to themselves, and it is within the very words of the Statute. And this Ravishment of Ward is an Action within the Statute of 23 H. 8. and the Statute of *West.* 2. gives no damages: and therefore costs by the Statute of *Gloucest.* cap. 1. and the Statute of 4 Jac. cap. 3. enlarge the Action, and not the persons. Hill. 1 Car. in C. B. *Townly* and *Steel*'s Case. *Hutton*, 79.

10. In Trespasse, the Defendant pleaded a plea which was insufficient; and afterwards the Plaintiff was Nonsuit; yet it was Resolved by the Court, That the Defendant should have his Costs against the

the Plaintiff. But if a default be in the Original Writ, and afterwards the Plaintiff is Nonsuit, the Defendant shall not have Costs, because that when the Original is abated, it is as if no Suit had been. Mich. 11 Jac. in C. B. *Laiston's* Case. *Godbolt.* 220.

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3. *Where there shall be treble Costs given; and where but double Costs*; et è contra.

1. NOte, It was said by the Justices, That if a man recover in a Writ of Forcible Entry, upon the Statute of 8 H. 6. by Confession, or by default, he shall recover his treble Costs. Pasc. 38 Eliz. in C. B. *Goldesbr.* 12.

2. In an Action of Trespasse for breaking of his Close, &c. the Plaintiff declared to his damages of 40 l. And the Jury gave him 49 l. for damages, and 20 s. for Costs; and the Plaintiff waved the 9 l. for the damages; And prayed but onely 40 l. for damages, as he had declared: And demanded Judgment for the same, with increase of Costs, and the Court increased the Costs to 10 l. and so he had Judgment for 50 l. together. And in Error brought, the same was assigned for Error, that the damages and Costs put together, did amount to more then the damages alledged in the Declaration; for it was said, that damages do include Costs. In that Case, it was Resolved, That when an Act of Parliament creates, or gives recompence for a thing, where no recompence was before, or gives damages in Case, where damages were at the Common Law; there the Defendant shall have Costs and damages also: But where a Statute adds but a greater Recompence and satisfaction, and damages was given before at the Common Law for the same, there the Defendant shall have his damages and Costs, for there the encreasing of the damages doth not take away the Costs. And Note, in that Case it was said, That Costs are not alwayes included within the word Damages; For in Trespasse brought against two, the one is found guilty by himself, and the other by himself, and damages are severally assessed; yet the Costs shall be joyntly taxed: And it was agreed, That a man shall not recover more damages then he hath declared of, but that is intended damages for the wrong done: But *expense Litis* may be added to it; although he doth not declare of them, See *Cook* 10. Part, 115, 116. *Robert Pitford's* Case.

3. In an Assize against two, one was found guilty, as to part with force, and the other guilty to other part, but not with force; and as to him who was found Guilty with force, the damages and Costs were trebled, *quod nota.* 12 E. 4. 1.

4. Note, That by the Statute of *Gloucester* cap. 1. In all Cases, where damages shall be recovered, the Plaintiff also shall recover Costs of Suit, and damages are to be recovered where a man brings an Action against one for his own Act, and recovers; But the same is to be intended in such Actions, where damages are not given by the Statute, and especially in such Actions, where high damages are given, As in a *Quare Impedit*, there shall be no recovery of Costs, because the damages are so high, and such was the Opinion of all the Justices. 27 H. 6. 10. 9 H. 6. 32. and 22 H. 8. 3. by *Spilman*. But yet at the Common Law, Costs were in a *Quare Impedit*, but that was before the Statute of *west.* 2. cap. 5.

5. A man shall not recover Costs in an Action of Waste; as is 19 H. 6. 66. and the reason is, because that great damages are given by the Statute: And yet in 5 H. 5. 13. the contrary is holden, That there shall be Costs, but the Costs shall not be trebled as the damages were. See 5 E. 4. 7. the Justices of the Kings Bench were of Opinion, That Costs in Waste should be treble, according to the rate of the damages, and not according to the rate of the Waste taxed.

6. See 19 H. 6. 32. That in Waste there shall be no Costs: But in an Action of Forcible Entry, there the Costs shall be trebled; and *Paston* there gives the reason to be, because the Statute of Forcible Entry gives them; And for treble Costs in a Forcible Entry, See 22 H. 6. 57. yet see 14 H. 6. 13. that Costs in a Forcible Entry were not trebled, but onely the damages for the whole.

7. Note, Costs may be taxed and assessed by a Forrein Jury; but it is otherwise of damages: and note, that Costs are alwayes entirely assessed, as the book in 33 H. 6. is. 55.

8. In Trespasse of Assault and Battery *ad damnum* of the Plaintiff, the Defendants pleaded Not-guilty, and a Verdict was found for the Plaintiff against both the Defendants, and the Jury assessed severall damages to the Plaintiff, *scil.* so much against one, and so much against the other severable, and Costs to the Plaintiff entirely against them both; It was moved, That they being joyntly sued, the damages should have bin entirely set, and not severed: But it was the Opinion of the Court, That the Battery is severall, and so the Damages ought to be, but Costs entire are to be given to the Plaintiff against both. See 1 R. 3. 1, 2, 3. Trin. 9. Jac. in B. R. *Sampson* and *Cranfield's* Case. *Bolstr.* 1. Part, 157.

9. A man exhibited an Information upon the Statute of 21 H. 8. cap. 13. againſt two men, againſt one of them for non-reſidence, the other for taking a Farm; the one of them pleaded ſickneſſe, and by adviſe of his Phyſitians, he removed for better Ayre; this was juſtifiable, and a good plea by the Court, according to *Cook* 6. Part, *Butler* and *Goodales* Caſe: The other pleaded that he took it for the maintenance of his houſe and Family, this was holden a good plea alſo, *per Curiam*. The Court was informed that the Plaintiff was a Common Informer, and did inform againſt them onely for their vexation, and to draw a compoſition to himſelf, for which they proſecuted an Indictment againſt him upon the Statute of 8 Eliz. cap. 5. to puniſh common Informers for abuſes; And now moved the Court, That in regard the Informer was a man of no means, That they would order him to put in ſufficient ſureties to anſwer coſts. But the Opinion of the Court was, That that could not be done: but they gave a Rule, that the Defendants ſhould not anſwer the Information, before the Informer appeared in perſon. Mich. 10 Jac. in B. R. *Martin's* Caſe. *Bolſtr.* 2. Part, 18.

10. Note, That where an Action of Debt is grounded upon a penall Law, there the Plaintiff ſhall not have Coſts nor damages, 35 H. 8, 58. And by the Statute of 24 H. 8. 8. He who Informs for the King, although he be Nonſuit, ſhall not pay Coſts; and ſo it is if a Verdict paſſe againſt him: And yet by the Statute of 23 H. 8. every other perſon who is Plaintiff, unleſſe he ſueth *in forma pauperis*, if he be Nonſuit, ſhall pay Coſts, and ſo it is if a Verdict paſſe againſt him: And by the Statute of 8 Eliz. if he doth not put in his Declaration within three dayes after Bail put in, or doth not proſecute it with effect, he ſhall pay coſts according to the diſcretion of the Juſtices. See *Raſtall*, Proceſſe 337. acc.

Covenants.

2. IN Debt upon an Obligation for not performance of Covenants; the Plaintiff aſſigned the breach, That the Plaintiff had Leaſed to the Defendant certain Meſſuages for years. And the Leſſee did Covenant to repair all the ſaid Meſſuages *alia quam quæ appunctuata forent divelli per ſcriptum ipſius* the Plaintiff; and ſhewed that the Defendant had not repaired the ſaid Meſſuages; and averred, that the ſaid houſe in which the breach of Covenant was aſſigned *non fuit, durante Termi. no prædict. appunctuat. divelli.* And upon Iſſue joyned, it was found for the Plaintiff. It was moved in ſtay of Judgment, that the Averment in the Replication, was inſufficient, for the Leaſe was made to begin at *Michaelmas* after; And it might be that the Meſſuage was appointed to be pulled down before, and then the Defendant is not bound to repair it; and the Clauſe *alia quam* in the Covenant, ought to be ſatisfied, by him who pleads an aſſignable breach. But it was Reſolved by all the Juſtices, That the averment aforeſaid was ſuperfluous *et ex abundanti*, for it had bin ſufficient for the Plaintiff to have aſſigned the breach of the Covenant, in not repairing the Meſſuage, without any averment *de non appunctuando*: and if the houſe, in the repairing of which, the breach is Aſſigned, was appointed to be pulled down, it ſhall come on the other ſide. Paſc. 26 Eliz. in B. R. Sir *John Smith* and *Peazes* Caſe. *Leon.* 17.

2. A. Leaſed a houſe to B. for years; B. Covenanted to repair the houſe, and that it ſhould be Lawfull for A. his Heirs, and Aſſignes, to enter into the houſe, to ſee in what plight for matter of reperations it ſtood, and if upon ſuch view, any default ſhould be found, in not repairing; and thereof warning being given to B. his Executors; then within four Moneths after ſuch warning, it ſhould be amended: The houſe became ruinous for want of reparations. A. granted the Reverſion over in Fee to C. who upon view gave Warning to B. of the default, which was not repaired, upon which C. as Aſſignee to A. brought Covenant: It was ſaid, that the Action did not lye, becauſe the houſe became ruinous before his Intereſt in the Reverſion: But it was holden *per Curiam*, that the Action did lye, for the Action, as not conceived upon the ruinous eſtate of the houſe, or for the committing of Waſte; but for the not repairing it within the time appointed, ſo it is not materiall within what time the houſe became ruinous. Mich. 30 Eliz. in C. B. *Maſcoll's* Caſe. *Leon.* 62.

3. In Debt upon an Obligation, for not performance of Covenants; the Caſe was, A ſeiſed, made a Leaſe to B. for years, who ſo poſſeſſed, deviſed that E. his Wife ſhould have the uſe and occupation of all the Lands, for all the years of the ſaid Term, as ſhe ſhould live, and remain Sole, and if ſhe dyed, or married, that then his ſon ſhould have the reſidue of the Term not expired: B. dyed, E. entred; To whom the Reverſion was conveyed, by Feoffment of A. who Covenanted, That the Land ſhould be clearly exonerated *de omnibus prioribus barganiis, titulis, juribus, et omnibus aliis oneribus quibuſcunque*: E. took Husband, the

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ſon entred: If the Covenant was broken, was the Queſtion: It was the Opinion of all the Juſtices, That the Land at the time of the Feoffment, was not diſcharged of all former Rights, Titles, and Charges; And in this Caſe, It was holden, That the Term aforeſaid was not extinct by the acceptance of the Feoffment; and although at the time of the Feoffment, it was but a poſſibility, and no certain Intereſt, yet now upon the marriage of E. it is an Actuall bar, and charge upon the Lands: And if a man, ſeiſed of Lands, Grants a Rentcharge to begin at a day to come, before which day he bargains and ſells the Lands, and Covenants that the Lands are diſcharged of all Charges; in that Caſe, when the day, when the Rent ought to begin, is encurred, the Covenant is clearly broken, for the Lands were not clearly diſcharged. Mich. 30 Eliz. in C. B. *Handington* and *Ryders* Caſe. *Leon.* 92, 93.

4. In Covenant, the Plaintiff declared, That the Defendant by Indenture did Covenant, that he, would do every Act and Acts, at his beſt indeavour to prove the Will of J. S; or otherwiſe, that he would procure Letters of Adminiſtration, by which he might lawfully convey ſuch a Term to the Plaintiff: The Defendant pleaded, That he came to Dr. R. B. to the Court of Arches, and there offered to prove the Will of the ſaid J. S. but becauſe the Wife of the ſaid J. S. would not ſwear that it was the Will of her Husband, they could not be received to prove it. It was moved, That the Action did not lye: for that there is no time limited by the Covenant, when the thing ſhould be done by the Defendant, in which he hath time during his life: and the Plaintiff ought to have layed a requeſt in his Declaration, which he hath not done: It was the Opinion of the Court, That the Covenantor hath not time during his life to perform this Covenant, but he ought to do it upon requeſt, within convenient time; and it was holden in this Caſe, That the bringing of the Action was a ſufficient requeſt. Trin. 30 Eliz. in B. R. *Cator* and *Booth's* Caſe. *Leon.* 105.

5. Debt upon an Obligation for performance of Covenants of an Indenture; In which it was Covenanted by the Plaintiff, That E. the brother of the Defendant, ſhould enjoy certain Lands untill the Feaſt of M. then next following, rendring ſuch a Rent at the end of the Term: And the Defendant Covenanted, That E. at the Feaſt aforeſaid, ſhould ſurrender quietly and peaceably the Lands to the Plaintiff; And that the Plaintiff to ſuch of the ſaid Lands, as by the Cuſtome of the Country *tunc jacebant friſca*, ſhould have in the mean time, free egreſſe and regreſſe, &c. at his will and pleaſure, with his ſervants, ploughs, &c. And as to that Covenant, the Defendant pleaded, *Quod permiſit Querentem habere introitionem et exitum, &c. in tales terras, quæ tunc jacebant ſecundum Conſuetudinem patriæ, friſca*, &c. Exception was taken to the plea, becauſe he hath not ſhewed certain, which Lands they were, which did then lye Freſh, according to the Cuſtome of the Country. To which it was anſwered, and confeſſed, That where an Act is to be done, according to a Covenant, he who pleads the performance of it, ought to plead it ſpecially; But it was ſaid, That in this Caſe, there was no Act to be done, but a permittance as aforeſaid; and it is as in the negative, a not diſturbance; in which Caſe, *permiſit* is a good plea, and then it ſhall come on the other ſide the Plaintiffs part, to ſhew in what Lands the Defendant *Non permiſit*. Mich. 30 Eliz. in C. B. *Littleton* and *Pernes* Caſe. *Leon.* 136.

6. In *Ejectione firmæ*, the Caſe was 9 A. Covenanted with B. That in Conſideration of a marriage to be had betwixt the Son of A. and the daughter of B. that he before ſuch a day would levy a Fine, which Fine would be to the uſes of the ſaid ſon and daughter in tail, for the Joynture of the daughter: the Fine is levyed to the uſes aforeſaid, The Father dyed; but in the Fine no mention is made of any marriage had: It was the clear Opinion of the Court, that notwithſtanding that the marriage was not accompliſhed, yet the eſtate tail was well enough executed in the Son and daughter; for the Fine without any conſideration, doth carry the uſes; but without a Fine, ſuch a conſideration would not raiſe ſuch an uſe without accompliſhment of the marriage; for the conſideration executed, ought to produce the uſe. But in this Caſe, the uſes are perfected by the Fine. And B. upon the matter, might have had Covenant againſt A. to have the Fine before the marriage. Hill. 30 Eliz. in C. B. *Stephens* Caſe. *Leon.* 138.

7. The Caſe was, Tenant for life of certain Lands, Leaſed the ſame for years by Indenture by theſe words, I Give, Grant, Bargain and ſell my Intereſt in ſuch Lands for 20. years; To have and to hold, in ſuch manner and form as I my ſelf do hold the ſame, and no otherwiſe. Tenant for life dyed within the Term, and he in the Reverſion entred, and the Leſſee brought an Action of Covenant. It was ſaid in this Caſe, That the Action doth not lye, for here is not any warranty, for the Plaintiff is not Leſſee, but Aſſignee, to whom this warranty in Law cannot extend: But admit that the warranty did extend to the Plaintiff, yet it is now determined with the Eſtate of the Tenant for life, and ſo the Covenant ended with the Eſtate; and ſuch was the Opinion of the whole Court. Judgement was given againſt the Plaintiff. Trin. 30 Eliz. in B. R. *Cheney* and *Langleyes* Caſe. *Leon.* 179.

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8. In Covenant, the Case was, That the Queen *Eliz.* being seised of a Mannor, by Letters Pattents demised the same to the Defendant for 21 years; And the Defendant, his Executors and Assigns, were thereby tyed to leave the houses sufficiently repaired at the end of the Term. The Queen afterwards, by her Letters Pattents, granted the Reversion to B. and C. and their Heirs, who by Indenture inrolled, between them of the one part, and *Ralph* Lord *Ewer*, by the name of *Ralph Ewre* Knight of the other part, sold the said Reversion to the said Lord *Ewre*, and for not repairing the houses, he brought the Action. The Defendant pleaded, That at the time of the Bargain and Sale, the said Lord *Ewre* was not Knight Lord *Ewre*. Upon which it was demurred. In this Case, it was Resolved, That as to the plea in bar, That a Bargain and Sale made to one by the name of Knight, who is not Knight, is good enough: for a Conveyance, shall not be avoided for such a Cause, especially, when as he is before sufficiently described by the name of *Ralph* Lord *Ewre*, which is a greater dignity. 2. It was Resolved in this Case, That the Clause for repairing, should be taken and Interpreted as a Covenant on the Lessees part to bind him and his Assigns: for when he takes by Pattents, he consents to all things therein, and the words in these Clauses [for keeping the houses in reparation] are spoken by him; And it was also Resolved, That although the Bargainee was not named Assignee in the Declaration, yet it was good enough. It was adjudged for the Plaintiff. Pasc. 7 Jac. in B.R. The Lord *Ewre* and *Stricklands* Case. *Cro.* 2. Part, 240.

9. Debt upon Obligation for performance of Covenants: The Defendant shewed, That the Deed was a Deed of Feoffment, wherein was conteyned that he for 110*l.* had enfeoffed the Plaintiff in such Land, with a Proviso, That if the Defendant paid such a sum at such a day, the Feoffment should be void, and he might re-enter with Covenants, to save harmlesse from Incumbrances, and to make further assurance. And that he had performed all the Covenants, Articles, and Agreements on his part to be performed. The Plaintiff Assigned the breach, that he did not pay such sums at such dayes, according to the Proviso: It was Resolved in this Case, That forasmuch as there is not any Covenant to pay that sum, It is a Proviso in advantage of the Feoffor, That if he paid the mony, he should have the Land again, and it is in his election to pay the mony, or to lose the Land, which is a sufficient losse unto him. And therefore the Condition of the Bond doth not extend thereunto, but extends to perform other Covenants, as the Covenant to save harmlesse from Incumbrances, which are the points intended; wherefore it was Resolved against the Plaintiff. Trin. 9 Jac. in B.R. *Biscoe* and *King's* Case. *Cro.* 2. Part, 281.

10. The Defendant Covenanted by Indenture That whereas the King had granted the Office of Aulnageor of all Drapery, to the Duke of J. who had made the Plaintiffs Deputies for seven years in all places in *Essex*, besides *Colchester*, That the Defendant Covenanted with them, That whereas the said Duke had made a Deputation of the said Office in *Colchester* for two years, to one A. That in the end of two years, he would procure them a Deputation for seven years in the same manner as A. had it: Proviso, that they upon making thereof should give security for the payment of 2 100*l.* *per annum* Rent for it; and that the Defendant had not procured the Deputation, whereupon the Defendant demurred. It was adjudged that the Declaration was good; whereupon Error was brought. The first Error was, because they do not alledge performance of the promise, but only a readinesse to give security; But it was Resolved, they need not give security till a Deputation was made. 2. Error, they have not alledged *in fact* a Deputation to A. but *Non allocatur*, because the Covenant mentions, there was a Deputation to A. and he should be estopped to say to the contrary; and he at his perill ought to procure such a Deputation to the Plaintiffs: The Judgment was affirmed. Hill. 9 Jac. in B.R. *Barwick* and *Gibson's* Case. *Cro.* 2. Part, 297.

11. A. enfeoffed J. S. of Lands, and by Indenture Covenanted for him and his heirs, with the Feoffee his heirs and assigns, to make further assurance upon request, J. S. conveyed the Lands to the Plaintiff, who brought Covenant, because the Defendant did not levy a Fine upon his request. The Defendant pleaded a Release from J. S. with whom the first Covenant was made, which was made after the Suit. It was Resolved in this case, That although the breach was in the time of the Assignee, yet if the Release had been by the Covenantee, who is a party to the Deed, and from whom the Plaintiff derives, before any breach, or before the Suit commences, It had been a good barr to the Assignee, from bringing the Action; but the breach being in the time of the Assignee, and the Action brought by him, It so attaches in the person, that the Covenantee cannot release his Action wherein the Assignee is Interessed. Trin. 14. Car. in B.R. *Middlemore* and *Goodales* Case. *Cro.* 1. Part, 361.

12. Covenant was brought against an Apprentice for departing his service without Licence within the time of his Apprentiship. The Defendant pleaded, That at the time of the making of the Indenture he was within age. It was Resolved, That though

though an Infant may voluntarily bind himſelf Apprentice; yet neither at the Common-Law, nor by the Statute of 5 Eliz. a Covenant for his Apprentiſhip ſhall bind him. Hill. 5 Car. in B. R. *Gilbert* and *Fletcher*'s Caſe. *Cro.* 1. Part, 129.

13. A Copyholder in Fee, with the Licence of the Lord, made a Leaſe for 21 years, rendring rent; The Defendant Covenants for him, his Executors and Aſſignees, to repair houſes: Afterwards the Leſſor ſurrendred to the Plaintiff and his heirs; who admitted, brought Covenant, for not repairing. It was adjudged, That a Copyholder is ſuch an Aſſignee as may have Debt, or Covenant, by the Statute of 32 H. 8. Mich. 20 Jac. in B.R. *Platt* and *Plomers* Caſe. *Cro.* 1. Part, 17. See before.

14. Covenant upon a Charter-party. The Plaintiff having hired a Ship of the Defendant, for a Voyage to *Dantzick* for Corn; It was agreed betwixt them, That the Ship ſhould be laden with Corn, and to ſail to *Legorn*. By the ſaid Indenture, In conſideration that the Plaintiff had agreed, that the Defendant ſhould have the moyety of the Corn *quod tunc fuit*, or afterwards ſhould be laden in the ſhip for the ſaid Voyage, The Defendant promiſed to pay the moyety of the money for the corn *quod tunc fuit*, or afterwards ſhould be laden, &c. And the Plaintiff alledged, That 9. *Octob.* 38 Eliz. the Ship was laden with 60 Laſts of Corn: and for not performance, &c. brought the Action. The Defendant pleaded, That the Deed was ſealed the 28. *Octob.* 38 Eliz. *et quod ad tunc vel poſtea*, there was not any corn laden there. It was Reſolved in this caſe, That in regard that the Plaintiff declares upon a Deed dated 9. *October*, 38 Eliz. It ſhall be intended to have his eſſence and delivery at that time, and at no other: and if he ſhould confeſſe it to be delivered at any other time, it would be a departure from his Declaration; and the word *tunc*, is referred to the delivery, and not to the date: and if it were delivered 10 moneths after the date, he ſhould not have benefit of the Corn laden; and therefore the Defendant ſhall not be charged with it for the time before the delivery. Adjudged againſt the Plaintiff, That the plea in barr was good. Mich. 8 Jac. in B. R. *Oſley* and Sir *Baptiſt Hix*'s Caſe. *Cro.* 2. Part, 263.

15. *A.* let the Mannor of B. to the Plaintiff for 21 years; And Covenanted, That the Plaintiff ſhould enjoy it during the Term, without the lett or diſturbance of him, his heirs or aſſignes, or of any other perſon by or through his means, title, or procurement. The Plaintiff ſhewed, That before the Leaſe, J. D. granted that Land to A. and the Defendant his wife, and to the heirs of A. and that the ſame was ſo granted by J. D. by Fine, by the means and procurement of A: and the Plaintiff ſhewed, That A. dyed, and the Defendant the wife of A. ouſted him. It was Objected, That the title which the wife of A. claims, was from J. D: and that ſhe ſurviving A, was in of an immediate Eſtate to her ſelf: and the Covenant doth not extend to titles paramount. But it was Reſolved, in regard there was an Averment, That though ſhe claims by J. D. the Conuſor, yet ſhe is in, and claims by the means of her husband; for if A. her husband had not procured the Fine, ſhe had had no Eſtate; therefore ſhe was a perſon within the Covenant, though ſhe claim by title derived from another. Adjudged for the Plaintiff. Hill. 20 Jac. in B. R. *Butler* and the Lady *Swinerton*'s Caſe. *Cro.* 2. Part, 657.

16. Sir *Anthony Mayne* made a Leaſe for years by Indenture to *Scot*, and Covenanted with the Leſſee, upon ſurrender of his ſaid Leaſe at any time during the Term, to make him a new Leaſe: Afterwards the Leſſor accepted a Fine *ſur Conuſans de Droit come ceo*, of the Land; and by the ſame Fine granted and rendred the Land to the Conuſee for 80 years. In this caſe, It was Reſolved, 1. That by the Fine levied, the Conuſor had diſabled himſelf either to take the ſurrender, or to make the new Leaſe: and although the Leſſee by the words of the Indenture was to do the firſt act; *ſcil.* to make the ſurrender; yet when the Leſſor had diſabled himſelf to take it, the Law will not enforce him to do that which ſhall be vain and fruitleſs. 2. Reſolved, That if a man ſeiſed of Lands in Fee, Covenants to enfeoffe J. S. of them upon requeſt; and afterwards he makes a Feoffment in Fee of the ſame Lands, That J. S. ſhall have an Action of Covenant without requeſt. 3. Reſolved, Although the ſaid Leaſe for 80 years was but an Intereſt of a future time, ſo as the Leſſee might make the ſurrender to the Leſſor: yet becauſe the Leſſor hath diſabled himſelf to make the new Leaſe, the Leſſee ſhall not be compelled to make the ſurrender; for by ſo doing, he ſhould loſe his old Term, without any poſſibility to have a new Term. Paſch. 38 Eliz. Sir *Anthony Maynes* Caſe. *Cook* 5. Part, 20.

17. In an Action of Covenant; The Covenant was, That a Ship ſhould go with the next Wind, and that the Merchant ſhould pay ſo much for fraight. The Defendant ſaid, by way of Traverſe, That he did not go with the next Wind. It was ſaid, That the traverſe was not good: but he ought to have traverſed, That the Ship did not go at all; for that which is materiall, is to be traverſed; and that is, That the Ship did not go: and not, That it did not go with the next Wind: and a Circumſtance cannot be traverſed, and Wind is alterable. It was adjudged for the Plaintiff. Paſch. 2 Car.

in B. R. *Conſtable* and *Cloberies* Caſe. *Popham*, 161.

18. Two Leſſors made a Leaſe to two Leſſees: and the Leſſors Covenanted to diſcharge them of all Incumbrances done by them or any other perſon. And in Covenant brought, the Plaintiff aſſigned the breach, That one of the Leſſors had made a Leaſe, whereupon the Plaintiff brought the Action. It was Objected, The breach was not well layed, becauſe it is layed to be done by one of them, and the Covenant ſhall extend only to joynt Incumbrances. It was the Opinion of the Court, That the Covenant goes as well to ſeverall Incumbrances, as to joynt; for it is of all Incumbrances by them, or any other perſon. Mich. 2 Car. in B. R. *Sanders* and *Meritons* Caſe. *Popham*, 200.

19. A. made a Bill of Debt to B. for the payment of 20 l. at 4. dayes, *ſcil.* 5 l. at every of the ſaid dayes; and in the end of the Deed Covenanted and granted with B, his Executors, &c. That if he made default in any of the ſaid payments, that then he would pay the reſidue which then ſhould be unpaid. A. failed the firſt payment; and before the ſecond, B. brought debt for the whole 20 l. It was moved, That debt did not lye, but it ought to be by way of Covenant. But the Opinion of the Court was, That the Action did lye; for if one Covenant to pay me 100 l. at ſuch a day, debt lyes, *à fortiori*, where the words of the Deed are, *Covenant and Grant*. Mich. 33 Eliz. in C. B. *Leon.* 208.

20. A. brought Covenant againſt B. an Enfant of 15 years of age, his Apprentice; and declared, That the Defendant Covenanted to ſerve him honeſtly and truly as an Apprentice in the Myſtery of Drapery for 7 years; and that he had defrauded him of his goods, &c. The Defendant pleaded the Statute of 5 Eliz. That none ſhall be an Apprentice to any of the moſt worthy Trades, (amongſt which, Drapery is one) except his Father have Freehold to the value of 40 s. *per annum*, to be certified to the place in which he is to be Apprentice, by 3. Juſtices of Peace of the ſame County, and this Certificate be Inrolled in the Town-Book: and he pleaded, That no ſuch Certificate was made; and pleaded the breach of the Statute, That every Retainer contrary to the form of the Statute, be void. The Plaintiff Replyed, That he had 40 s. *per annum*. The Defendant Rejoyned, That he had not 40 s. *per annum*, upon which the Plaintiff demurred. In this caſe, It was holden by the Juſtices, 1. That the Retainer is good, though there be not any ſuch Certificate and Inrollment, if, *revera*, the Father had 40 s. *per annum*; for the Intent of the Statute is, That ſufficient mens ſons ſhall be Apprentices; which is obſerved, if the father have 40 s. *per annum*. 2. It was holden, That there ought to be Certificate preceding the Indenture, otherwiſe it ſhall be void. 3. It was Reſolved, That the Action brought by the Plaintiff, would not lye: for it appears by the Plaintiff's Declaration, That the Enfant Defendant was but of the age of 15 years at the time of the Retainer; and the Enfant was not bounden by this Covenant at the Common-Law, and no Collaterall Covenant ſhall be maintainable upon the Statute; for this being in caſe of an Enfant, it ſhall be taken ſtrictly. And whereas it was Objected, That it is incident to every Retainer to ſerve truly and faithfully. It was Anſwered, That is true, and an Action upon the Caſe lyes upon a Covenant in Law, but not upon the Covenant in fact. And the Court ſaid, That the Retainer is for the benefit of the Enfant, that he learn his Trade; but the Covenant here is for his diſadvantage, and for the advantage of his Maſter, and for that reaſon it is void. As if an Enfant had Covenanted to pay 10 l. for the learning of his Trade when his time was up. Judgment was given againſt the Plaintiff. Paſch. 21 Jac. in C. B. *Fleming* and *Pitman's* Caſe. *Winch.* 63, 64. See *Gilbert* and *Fletcher's* Caſe before. See *Hutton* 63. the ſame Caſe.

21. Note: It was adjudged, That if a man Covenants, That his ſon then within age, and *infra annos nubiles*, before ſuch a day, ſhall marry the Daughter of J. S. and he doth marry her accordingly; and afterwards at the age of Conſent, he doth diſagree to the marriage; yet is the Covenant performed; for it is a marriage, and ſuch a one as the Covenantee would have, untill the diſagreement. 29 Eliz. *Fenners* Caſe, *Owen* 25. See Paſch. 29 Eliz. in C. B. *Leigh* and *Hannets* Caſe, *Leon.* 52. acc.

22. The Defendant made a Leaſe of the Parſonage of B. to the Plaintiff, and Covenanted to ſave the Plaintiff harmleſs and indemnified; and alſo all the profits of the premiſſes againſt J. S. Parſon of B. And upon a Covenant brought, the breach was aſſigned, That J. S. had entred, and deceived the Plaintiff. It was a Queſtion, If it ſhall be the Deed of the Defendant; becauſe the Defendant delivered his part of the Indenture to the Plaintiff, but the Plaintiff did not deliver the Counterpart to him. But the Opinion of the Court was, That it was the Defendant's Deed, and good. The ſecond doubt was, becauſe it is not ſhewed, That J. S. entred by title: But the Opinion of the Court was, That the Covenant was broken: For if J. S. diſturb him, ſo as he cannot take the profits, it is a breach of the Covenant; for thereby the Plaintiff is dampnified: And the difference was taken, where the Leſſor Covenants to

to warrant the Land to the Leſſee, for there he ſhall not have Covenant if he be wrongfully ouſted; but in this caſe, the Covenant is to ſave harmleſs, which is of greater force then to warrant; for to warrant Land, is onely upon the title: But in this caſe, be the Leſſee ouſted by wrong, or by title, the Covenant is broken. Adjudged for the Plaintiff. Paſch. 32 Eliz. in B. R. *Foſter* and *Wilſons* Caſe. *Owen* 100.

23. In Covenant, the caſe was; the Dean and Chapter of N. 38 Eliz. made a Leaſe for 99. years to J. S. and then in 42 Eliz. made a Leaſe to the Plaintiff for 3. lives, rendring rent, with a Letter of Attorney to make Livery, and a Covenant to ſave the Plaintiff harmleſs againſt J. S. Afterwards the Attorney made Livery, *ſcil.* after Mich. which was a Rent-day. The Queſtions were, Whether the Leaſe to the Plaintiff was void; Whether that Covenant was void alſo. 2. If Livery made after the Rent-day, were void. It was Objected, That the Covenant was void, becauſe the Leaſe was void; but if it had been a Covenant to enjoy for 3. Lives, it had been otherwiſe. But it was Reſolved, That the Covenant was good, and in force: For when an Eſtate is created, in which is implyed a Covenant in Law, there if the Eſtate be void, the Covenant is void alſo. But when there is an expreſſe Covenant in the Deed, there it is otherwiſe, although the Leaſe be void, or voidable: As if he Covenant, that the Leſſee ſhall enjoy during the Term, and the Leſſee reſigneth, yet is the Covenant good, although the Term be gone. As to the ſecond point, It was Reſolved, That the Livery was good: For untill the Livery be made, the Leſſor ſhall retain the Land and no Rent is due; for by Intendment, the poſſeſſion is better then the rent. Paſch. 10 Jac. in C. B. *Waller* and the Dean and Chapter of *Norwich*'s Caſe. *Owen*, 136.

24. Errour, to reverſe a Judgment, in an Action of Covenant upon a Leaſe for years, for not paying the Rent reſerved, and not repaying. It was againſt the Executrix of the Aſſignee of the Leſſee, and it was brought upon the words, *Yielding and paying*; and not upon an expreſs Covenant; and for that the words, *Yielding and paying*, are but a Covenant in Law, and onely an implyed Covenant, and ariſeth from a perſonal Covenant, and not upon a reall Contract; It was ſaid for the Plaintiff the Writ of Errour that would not lye here againſt the Executrix. And, 2. It was ſaid, That the Plaintiff in the Action doth not ſay, that ſhe was made Executrix: and if ſhe be but Executrix in her own wrong, ſhe is not liable to an Action. It was the Opinion of the Court, That the words, *Yielding and paying*, are an expreſs Covenant; for the words are the words of both parties to the Indentures, and then the Executrix is chargeable; and there is no difference in this caſe betwixt a Covenant in Law, and a Covenant expreſſe, becauſe it is touching a thing which ariſeth from the Land, and ſo the Aſſignee is bound by it. And the Opinion of the Court was, That ſhe ſhall be accounted a true Executrix; for by pleading, the Defendant hath admitted it. And if one enters as Executor upon a Term, he may have the Term, if the other will admit him to be Executor; and he ſhall not be accounted a Diſſeiſor to the Leſſor; and to ſtrangers he ſhall be accounted an Executor in Law, if they bring Actions againſt him, and, the Term ſhall be Aſſetts in his hands. Hill. 1654. in B. R. *Porter* and *Swetmans* Caſe. *Styles* 416. and 432.

25. A man let an Advowſon for 40. years; The Leſſee Covenanted, That he would not alien without the aſſent of the Leſſor; and becauſe he had aliened to J. S. without his aſſent, the Action was brought. The Defendant pleaded, That he had not aliened without his aſſent. By an Iſſue joyned, It was found for the Plaintiff. It was moved to ſtay Judgment, becauſe he had not layed the alienation to be by Deed; for that an Advowſon cannot paſſe without Deed. If a man will declare in an *Ejectione Firmæ*, of a Leaſe made by Husband and Wife without Deed; yet if the Defendant will plead, Not guilty, or *Non demiſit*, and it is found for the Plaintiff, the Plaintiff ſhall have Judgment; for that it ſhall be Intended to be by Deed. Afterwards in the principall caſe, Judgment was given for the Plaintiff. Trin. 20 Jac. in C. B. *Winch.* 34.

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2. *Where an Action of Covenant lyeth; where not. Where for, or againſt the Heir; where not. Where for, or againſt Executors or Adminiſtrators: for Covenant broken; and for what Covenants: Where againſt the Aſſignee,* et è contra.

1. A Termor for himſelf, and his Executors, covenanted to ſuſtain and repair a houſe at his own charges *principalis maremio in laſſo vel in deceſſu pro defectu reparationis*, or otherwiſe, in default of the Leſſee, or his Executors onely excepted, and dyed; the houſe is burnt in default of the Executors, adjudged, that Covenant lyes againſt them, and Damages recovered of the goods of the Teſtator, and not conditional, if they had not of

their own goods, 14 *Eliz. Dyer* 327.

2. Leſſee for years covenanted by Indenture, that he within 3 years would build a new houſe, and did not covenant for him and his Executors; the term expired, and he dyed; It was the Opinion of *Shelley* and *Fitzh.* that his Executors ſhould be charged in an Action of Covenant, although they were not named: But contrary, If the heir upon an Obligation of his Anceſtors, if he were not named, 28 *H.* 8. *Dyer.* 14. And ſo upon an Obligation of the Teſtator, the Executors ſhall be charged, although they be not named. See 32 *H.* 6. 32. 48 *E.* 3. 3. by *Fi bden.*

3. A man covenanted with his Leſſee without heirs or Executors, to pay Quit-Rents, and dyed: The queſtion was, Whether his Executors ſhould be bound, or not: It was a Query, becauſe it was a perſonal Covenant; *et moritur cum perſona, Finch.* L. 1. 17. 3 *Ma. Dyer.* 114. See *Cook* 5. *part. Spencers* Caſe, 17 *M.* ſhall bind his Executors.

4 Tenant for life, the remainder in Fee; Tenant for life, leaſed for 15 years, rendring Rent, and dyed; and he in the remainder entred, and the Termor brought an Action of Covenant againſt the Executors of the Leſſor; It was the Opinion of the Juſtices, that the Action did not lie againſt the Executors, becauſe it was but a Covenant in Law, which determined with the Eſtate and Intereſt of the Leſſee, unleſs it had been broken in the life of the Teſtator: But if it had been an expreſs Covenant, it had been otherwiſe. But it was there agreed, That if a man ſeized in Fee-ſimple, makes ſuch a Leaſe for years by Indenture, without an expreſs Covenant, and dyeth; that an Action of Covenant lyeth againſt the heir, by reaſon of the privity, *Hill.* 9 *Eliz. Dyer.* 257.

5 A man made a Leaſe for years, of a houſe, by the words, Demiſe and Grant; and the Leſſor covenanted, that the Leſſee ſhould enjoy the houſe during the term, without Eviction by the Leſſor, or any clayming under him; and bound himſelf in a Bond to perform all Covenants, Articles, and Agreements. The Leſſee aſſigned over the Term, a ſtranger entred upon the Aſſignee, and recove s in an *Ejectione Firmæ*: After caſt, the firſt Leſſee brought Debt. It was Reſolved in this caſe; Firſt, that upon thoſe words, Deviſe and Grant, the Aſſignee ſhould have an Action of Covenant. Secondly, that by breaking of this Covenant in Law, the Obligation was forfeit; for the Bond extended to all Covenants, aſwell to Covenants in Law, as to Covenants in Faits. Thirdly, It was Reſolved, That the expreſs Covenant, did qualifie the Covenant in Law, and ſo received it by mutual aſſent of the parties, that the ſame did not extend further then the expreſs Covenant, *Trin.* 41 *Eliz.* in *Paſch. Hill Cook* 4. *part* 8. *Nokes* Caſe.

6 Husband and Wife make a Leaſe for years by Indenture, by the word Demiſe: The Leſſee covenants for him, his Executors and Aſſigns, that he, his Executors, Adminiſtrators, and Aſſigns, ſhall build a Brick-wall upon the Land demiſed, the Leſſee aſſignes over his Term, and for not making of the Brick-wall, an Action of Covenant was brought againſt the Aſſignee: And in this caſe it was reſolved; Firſt, That where the Covenant doth extend to a thing in *eſſe*, parcel of the Demiſe, the ſame ſhall bind the Aſſignee, although he be not named by expreſs words, but where the Covenant extends to a thing which is not in *eſſe*, at the time of the Demiſe made, the ſame ſhall bind the Leſſee his Executors and Adminiſtrators, but not the Aſſignee. Secondly, Reſolved, That if the Leſſee covenants for him and his Aſſignes, to do any new thing upon any part of the Land demiſed, becauſe that the Aſſignee is to take the benefit of it, the ſame ſhall bind the Aſſignee: but if the thing to be done be collateral, and doth not any ways touch the thing demiſed, there the Aſſignee ſhall not be charged with it, *Paſch.* 25 *Eliz.* in B. R. *Cook* 5. Part, 16, 17. *Spencer's* Caſe. M. 29 Eliz. in B. R. *Barker* and *Fleetwels* Caſe, *Godbolt.* 69, 70. acc.

7. C. W. and D. purchaſed Lands jointly in Fee, and every of them covenanted with the other his heires and aſſignes, *et utriq; eorum*, to make ſuch aſſurance to the other Heirs, who ſhall firſt dye, as they ſhall adviſe. D. and W. dyed. The heir of W. deviſed an Indenture of Bargain and Sale, and tendred it to C. to ſeal and deliver. C. required time to adviſe with his Counſel: Upon which the heir of W. brought an Action of Covenant againſt C. as heir. In this Caſe, it was, amongſt other points, Reſolved, That the Action of Covenant was well brought: And note, in that Caſe it was ſaid, That a Covenant lyeth for the heir, where it is not annexed to the Land: and in that Caſe, it was further Reſolved, That the Covenantor was further bound, upon Requeſt to ſeal the Indenture of Bargain and Sale. Trin. 10 Eliz. *Dyer.* 337. *Wootton* and *Cookes* Caſe.

8. The Caſe was: A. Covenanted by Indenture with J. N. and J. D. and A. J. to enter Bond, to pay 10 l. to J. N: J. N. dyed; and his Adminiſtrators brought an Action of Covenant. The Queſtion was, Whether the Action was well brought by him; or whether the ſame ſhould ſurvive to the other two. It was objected, it was well brought by the Adminiſtrators; for it ſhall be taken a ſeveral Covenant, and divers more in the nature of a Debt, and ſhall accrue only to him that ſhall have it, and the payment of the money; which is, the effect of the Covenant ſhall go to him onely, and ſo ſhall the dammage for the non-

non payment of it. But it was Resolved, That forasmuch as it was a joynt Covenant, that it should survive to the others, and that the Action was not well brought by the Administrator; and because the words are, That he shall enter into Bond: and it doth not say to whom, he shall enter the Bond to the Covenantees: and although the *Solvendum* be but to one of them, both must joyn in Debt upon the Bond. Trin. 8 Jac. in B. R. *Brownlow*, 2. Part, 207. *Yates* and *Rolls* Case.

9. In a Writ of Errour upon a Judgment in the Court of *Briſtoll*, the Case was; A. was Plaintiff in the said Court against W. in an Action of Covenant, and declared of a Covenant made by Word by the Testator of W. with A; and declared also, that within the said City there is a Custom, That *Conventio ore tenus facta*, shall bind the Covenantor as strongly, as if it were made by Writing. It was the Opinion of the whole Court, That the Custome doth not warrant this Action; for the Covenant binds by the Custome the Covenantor, but doth not extend to his Executors, and a Custome shall be taken strictly; and therefore the Judgment was reversed. Hill. 25 Eliz. in B. R. *Wade* and *Bembors* Case. *Leon.* 3.

10. Note: It was the Opinion of all the Justices of the Kings-Bench, upon Conference had with other Justices, That if a man makes a Lease for years; and Covenants with him and his Assignees, his Assignee by word shall have an Action of Covenant. Pasch. 39 Eliz. in B. R. *Auder* and *Nokes* Case, vouch. in *Cook.* 3. Part, *Lincoln* Colledg Case. 63.

11. Lessee for 99. years, made an Assignment for part of the Term, *viz.* for 10. years, and the Assignee covenanted to repair. The first Lessee devised the Reversion of the Term, and dyed: The Devisor of the Reversion brought an Action of Covenant against the Assignee for 10 years. It was a Question, If the Devisee of the Reversion being but a Termor, were within the Statute of 32 H. 8. of Conditions? 2. Whether the Action would lye, no Notice being given of the grant of the Reversion. It was Objected, That this grant of the Reversion was not within the Statute; for the Statute is, That the Grantee shall have such remedy as the said Lessors or Grantors themselves, or their heirs or Successors should have had; so as it shall be intended of a Reversion in Fee. But the better Opinion of the Court was, That the Assignee of the Reversion for years should have an Action of Covenant by the Statute. And so it was said, it was adjudged in *Leonards* Case, in the time of the Lord *Dyer*. And it was said in that case, That it needs not, that he who is to take advantage by the Statute, should have the whole Reversion: For that it had been adjudged, That if the Reversion be granted in tail, that the Grantee shall take advantage of the Statute; and yet he hath not the whole Reversion: and for the second point, the Opinion of the Court was, That in the principall case, there needed no Notice, because there is not any penalty in the Case. Pasch. 8 Jac. in C. B *Briſtow* and *Briſtow's* Case. *Godbolt*, 161.

12. A man was possessed for the Term of six years, of a Tavern in *London*, and Leased the same to another for 3. years; and it was covenanted betwixt them, That during the 3. years, *quolibet menſe*, the Lessee should give an Accompt to the Lessor of the Wines which were sold, and should pay unto him for every Tunn so much money: Afterwards, the Lessee granted the 3. years which were remaining of the 6. years, to another: and then the Lessor did request the Lessee to accompt, and he would not; whereupon he brought an Action of Covenant. The Defendant pleaded, That he had accompted to the Assignee of the 3. years: and upon that it was demurred in Law. And the better Opinion of the Court was, That it was no plea, because it was not a Covenant which did go with the Land, or the Reversion, but was a Collaterall thing, and did not passe by the Assignment of the 3. years. Hill. 29 Eliz. in B. R. *Godbolt*, 120.

13. A man made a Lease for life, and covenanted for him and his heirs, That he would save the Lessee harmless from any claiming by, from, or under him. The Lessor dyed, and his Wife brought a Writ of Dower against the Lessee, and recovered: and the Lessee brought an Action of Covenant against the heir of the Lessor. And it was adjudged against the heir, because the wife claimed under her husband, who was the Lessor. But if the woman had been Mother of the Lessor who demanded Dower, the Action would not have layen against the heir, because she did not claim by, from, or under the Lessor. Trin. 21 Jac. in B. R. *Godbolt* 333.

14. A. sold 3. Licences to sell Wine unto B; who covenanted to give him 10 l. for them: and B. covenanted with him, that he should enjoy the Licences. It was moved, Whether the one might have an Action of Covenant against the other? It was the Opinion of the Justices, That they could not: For it was said, That if a man covenanteth to pay money at a day, Debt lyeth for the money, and not an Action of Covenant. Mich. 11 Jac. in C. B. *Chawner* and *Bowes* Case. *Godbolt.* 217.

15. Covenant, against the Defendant, as Assignee of an Assignee, for not repairing a house *inter alia*: After a Verdict for the Plaintiff, In arrest of Judgment, It was said in Exception to the Declaration, That the Plaintiff shews the Lease to be to J. S; and by him devised to J. D, and made J. N.

his Executor, and that he *virtute Legationis* entred, and aſſigned to W. S. and he entred and aſſigned an houſe parcel of the premiſſes to the Defendant, who entred, and made ſpoyl in a Hall and a Chamber parcell of the demiſed premiſſes. The Exception, becauſe he ſhews, that the Defendant entred, and was poſſeſſed *virtute Legationis*; but doth not ſay, that the Executor aſſented, *ſed non allocatur*, for it ſhall be intended he entred with the aſſent of the Executor. Another Exception, That the Defendant is but an Aſſignee of parcel of the demiſed, and then he is not chargeable with the Covenant, no more then an Aſſignee of parcel ſhall be charged in Debt for the Rent; but the Action lyes againſt the firſt Leſſee, as *Wakers* Caſe, *Cook* 3. Part. But the Exception was diſallowed: For this is a Covenant which is divideable, and followes the Land, with which the Defendant as Aſſignee is chargeable at the Common-Law, or by the Statute of 32 H. 8. It was adjudged for the Plaintiff. Hill. 6 Car. in B. R. *Gonyham* and *Kings* Caſe. *Cro.* 1. Part, 161.

16. Covenant; The Leſſee covenanted for him and his Aſſignees, to repair a houſe from time to time, and to leave it at the end of the Term ſufficiently repaired. The Leſſee pleaded, He aſſigned by Indenture his Eſtate and Intereſt in the Term to J. S; who entred, and paid his Rent at ſuch a day after to the Plaintiff the Leſſor, who accepted thereof, and there was no default of Repairations before the Aſſignment. It was adjudged in this caſe, notwithſtanding the acceptance of the Rent of the Aſſignee, and him to be his Tenant, That the Action did well lye againſt the Leſſee, or againſt the Aſſignee at the Election of the Leſſor. Hill. 15 Car. in B. R. *Norton* and *Acklands* Caſe. *Cro.* 1. Part, 418. See *Brett* and *Comberland's* Caſe before.

17. Error was brought of a Judgment in B. R. in Covenant brought againſt him as Aſſignee of T. M. for that the Leſſee Covenanted to pay yearly, during the Term of 21 years, 20 s. to the Churchwardens of S. and to repair the houſes; And becauſe the Aſſignee did not pay the Rent, nor repair the Tenements the Action was brought, and upon *Nihil dicit*, damages entire found, and Judgment for the Plaintiff, whereupon Error was brought, becauſe the Aſſignee is not chargeable with this Covenant of the payment of the yearly ſum, but it is a meer Collaterall Covenant: Alſo it is not ſhewed for what time the ſum was arrere: And for theſe cauſes, the Judgment was reverſed. Mich. 15 Jac. in B. R. *Mayho* and *Buckhurſt's* Caſe. *Cro.* 2. Part, 438, 439.

18. Upon a Leaſe, the Leſſee Covenanted, That he would from time to time, during the Term, after three Moneths warning, ſufficiently repair, and at the end of the Term, leave it ſufficiently repaired to the Leſſor, and for not ſo doing, the Leſſor brought Covenant, and ſhews in what part. The Defendant demurred, becauſe he doth not alledge, That he, three Moneths before, gave notice unto him of the defects, &c. But it was Reſolved, That the Declaration was good notwithſtanding that Exception: For the Clauſe, To leave it well repaired at the end of the Term, is diſtinct by it ſelf, and doth not depend upon the former Clauſes: and the notice, Within three moneths, refers onely to the Reparation within the Term, whereto he is not tyed without notice three Moneths before. Adjudged for the Plaintiff, Mich. 20 Jac. in B. R. *Harſlet* and *Butcher's* Caſe. *Cro.* 2. Part, 644.

19. A man Leaſed a houſe by Indenture for years, the Leſſee for him, and his Executors, Covenanted and Granted with the Leſſor, to repair the houſe at all times neceſſary, and the Leſſee aſſigned over his Term. The Aſſignee ſuffered the houſe to fall to decay. It was adjudged, That an Action of Covenant did lye againſt the Aſſigne becauſe that the Covenant did extend to the ſupport of the thing demiſed. Mich. 44 Eliz. in B. R. The Dean and Chapter of *Windſor's* Caſe. *Cook* 5. Part.

20. Sir *Oliver Cromwell* being ſeiſed in Fee of a Capitall Meſſuage, and alſo poſſeſſed of another houſe for years, did leaſe them both by one Deed to the Lady *Saint-John* for ten years; by which Leaſe ſhe did Covenant to repair the houſes, with all needfull reparations during the Term; And afterwards Sir *Oliver Cromwell* by two ſeverall Deeds, aſſigned over the Reverſions he had in both houſes to J. S. who for breach of Covenants, brought two ſeverall Actions of Covenant: And it was adjudged in the Common-Pleas, That the Plaintiff there ſhould have but one Writ of Covenant, and Judgment was there given accordingly: Hereupon a Writ of Error was brought; not for the matter in Law, but for ſome other Collaterall matters alledged in the Declaration: one matter was, That he being but an Aſſignee in the Reverſion, one part of the Covenant was, To leave the things demiſed, in as good repair as he found them; and he hath alledged the Covenant to be broken in ſuch things, for which no Action of Covenant doth lye: And yet damages entire are given for all theſe breaches, for which cauſe the Judgment was erronious. See Mich. 15 Eliz. in B. R. *Pely* and *Osbornes* Caſe, vouched in *Cook* 10. Part, 130. where, in Treſpaſſe brought, for breaking of his Cloſe, and beating his Servant, and in his Declaration, he did not lay, *per quod Servitium amiſit*, and damages entire given, and for that omiſſion the

the Judgment was ſtayed. But it was Reſolved in this caſe, That the Reverſion is granted of both houſes; The Covenant was to repair *Capitale Meſſuagium*, and to repair Structures of the other houſe; ſo the Covenant extended to both houſes: and the words are *manutenere prædict. premiſſa*; and this goes to all. And if Damages ſhould be ſeverally aſſeſſed, it muſt then be intended to be done at ſeveral times, and not at one time, as they were found to be. And therefore the Court was clear of Opinion, That the former Judgment given in the Common-Pleas, was well given: And the Judgment was affirmed. Trin. 12 Jac. in B. R. The Lady *St. John*, and *Piotts* Caſe. *Bolſtr.* 2 Part, 102, 103.

21. If a man demiſe or grant Lands to a woman for years, and the Leſſor covenants with the Leſſee to repair the houſes during the Term, and the woman takes a husband, and dyes; The husband ſhall have an Action of Covenant as well upon the Covenant in Law, as by force of the words [*Demiſe and Grant*], as alſo upon the expreſſe Covenant, becauſe the Covenant runs with the Land, and is incident to it. And ſo it is alſo of Tenant by Statute-Merchant, or Statute-Staple, or by *Elegit*; and ſo of a Term ſold by force of an Execution, the Vendee of the Term ſhall have an Action of Covenant, although all theſe come to the Term by Act in Law: So alſo, if a man grant to his Leſſee for years, That he ſhall have ſo many Eſtovers as ſhall ſerve to repair his houſe, or to burn within his houſe, during the Term, this is as an Incident to the Land, and runs with it in whoſe hands ſoever it falls. *Cook* 5. Part, 17. in *Spencers* Caſe.

22. Two Coparceners were of Land, and they made Partition of the Land, and the one made a Covenant with the other, to acquit her and her heirs of a Suit which iſſued out of the Land. The Covenantee aliened. It was adjudged in that caſe, That the Aſſignee ſhould have an Action of Covenant, although that he was a ſtranger to the Covenant, becauſe the Acquittall did run with the Land, into whoſe hands ſoever it came. *Cook* 1. Part, *Inſtitutes* 384.

23. A. ſeiſed of a Mannor whereof a Chappel was parcel; A Prior with the aſſent of his Covent, covenanted by Deed Indented with A. and his heirs, to celebrate Divine Service in the Chappel weekly for the Lord of the Mannor and his Servants. In this caſe, the Aſſignees ſhall have an Action of Covenant, although they are not named, becauſe the Covenant doth run with the Land. But if the Covenant had been with a ſtranger, to Celebrate Divine Service in the Chappel of A. and his heirs, there the Aſſignee ſhall not have an Action of Covenant; for the Covenant cannot be annexed to the Mannor, becauſe the Covenantee was not ſeiſed of the Mannor. *Cook* 1. Part, *Inſtitutes*, 385. acc.

24. An Action of Covenant was brought upon an Expreſs Covenant in a voidable Leaſe: The Queſtion was, Whether the Covenant was good, the Leaſe being void? It was adjudged, That the Action would lye, although the Leaſe were void. And *Mapes* Caſe was cited, which was: *Mapes* made a Leaſe of the Parſonage of D. for 7. years, and did covenant to ſave the Leſſee harmleſs againſt B. the Parſon. In that caſe, It was holden, If the Parſon ſue the Covenantee by right or by wrong, an Action lyes upon the Covenant. And in the principal caſe it was ſaid, If the Leaſe were originally void, yet the Action of Covenant would lye; for elſe great inconvenience might happen: For a Dean might as to day make a Leaſe unto one, and keep it ſecret, and to morrow make another, and covenant to enjoy it, and ſo avoid the ſecond Leſſee. Trin. 9 Jac. in C. B. *Walter* and the Dean and Chapter of *Norwich's* Caſe. *Brownlow*, 1. Part, 21.

25. Covenant was brought againſt Leſſee for life, upon a covenant of the Indenture, for not keeping the houſe let to him in repair. The Defendant pleaded, That the houſe was burnt by caſualty: upon which the Plaintiff demurred; and for cauſe ſhewed, That this plea was contrary to the Defendants expreſſe Covenant by his Deed: It was the Opinion of the Court, That a Leſſee that Covenanteth to repair, ought to do it if the houſe be burnt, be it by negligence, or other means. Trin. 1649. rott. 348. in B. R. *Compton* and *Allens* Caſe. *Styles* 362.

26. Debt brought upon Indenture of Covenants; The Covenants were, That A. ſhould raiſe 500. Souldiers, and bring them to ſuch a Port, and that B. ſhould find Shipping and Victuals for them, to tranſport them to *Calice*: and for not providing of the Ship and Victualls at the time appointed, the Action was brought. The Defendant pleaded, That the Plaintiff had not raiſed the Souldiers at that time. Upon which the Plaintiff demurred. It was adjudged, That the Defendant ought to have provided the Shipping and the Victualls againſt the time, though the Souldiers were not raiſed, for the not raiſing of them can onely be moved for mittigation of damages, and not pleaded in diſcharge of the breach aſſigned; and they are diſtinct and mutuall Covenants, and there may be ſeveral Actions brought for them; And the Defendant is firſt to raiſe the Shipping and Victualls, and then if the Plaintiff doth not raiſe the men, the Defendant hath remedy by Covenant againſt him, for not raiſing the Souldiers, as the Plaintiff hath againſt the Defendant for not providing

viding the Shipping and the Victualls. It was adjudged for the Plaintiff. Mich. 1649. *Ware* and *Chappell's* Case. in B. R. *Styles* 186, 187.

27. Lessee for years Covenanted by Indenture with his Lessor, That he would not Assign over the Land let. The Lessor during the Term, entred into part of the Land; Afterwards the Lessee assigned over the Remainder of his Term in the rest of the Land, without the Consent of the Lessor: whereupon the Lessor brought Covenant against the Lessee. The point was, If the Action did lye, in regard the Lessor had entred into part of the Land. It was the Opinion of the Court, That the Covenant was Collaterall; And therefore it was broken by the Assignment, notwithstanding the Lessors entry into part of the Land. Hill. 1650. in B. R. rott. 302. *Collins* and *Sylleys* Case. *Styles*. 265.

28. Covenant brought against an Executor to Lessee for years, for non-payment of a Rent reserved upon the Lease, upon the generall words in the Lease, *Yielding and paying*, there being no express Covenant for the payment of the Rent. It was said, It was a meer Covenant in Law, and so binds only the Testator. But it was Resolved, That an Action of Covenant did lye against an Executor, upon a Covenant in Law, though not named; and the Reservation of the Rent doth here seem to be an express Covenant, for that it is the Agreement of both parties. Mich. 1653. in B. R. *Newton* and *Osburns* Case. *Styles* 387.

29. The Mayor and Comminalty of *London* brought Covenant upon a Lease, for not payment of Rent, upon a Lease for years made to the Defendant of the Garblers Office. The Defendant pleaded, It was an Office in trust reposed in the City, and could not be let for years, and so no ground for an Action: and the Office it self is not vested in the Mayor, and therefore he could not grant it. But it was said on the other side, That they had a Fee-simple in the Office by their Charter; and that this Lease shall be accounted but as a Deputation; and the Lessee by taking the Lease, and entring into the Covenant, shall barr him of this plea. Quære, the Case was not Resolved. Mich. 1652. The Mayor and Comminalty of *London*, and *Hatton's* Case. *Styles* 357.

30. In an Action of Covenant, The same being brought for ploughing of Land; which was not *Nuper* laid down for pasture. The Question was, What number of years shall be said *Nuper* laid down? It was the Opinion of the Court, That 20 years shall be said *Nuper*. But it was Agreed by the whole Court, That the Plaintiff here ought to have layd a certain breach of Covenant, *scil.* That he had ploughed up Lands; and shewed what Lands, which were not *Nuper* arrable Lands, contrary to his Covenant; and because he hath not done this, he can have no Action. It was adjudged against the Plaintiff. Hill. 11 Jac. in B. R. rott. 499. *Gesner* and *Lackings* Case. *Bolst.* 2. Part, 258.

31. Covenant brought upon a Covenant made by a Merchant with a Master of a Ship, *scil.* That if he would bring his Fraight to such a Port, then he would pay him such a sum: and shews, that part of the goods were taken away by Pyrats, and that the residue of the goods were brought to the place appoint d, and there unladed; and that the Merchant hath not paid, and so the Covenant broken. The Question was, Whether the Merchant should pay the money agreed for, since all the Merchandizes were not brought to the place appointed. And it was the Opinion of the whole Court, That he ought not to pay the money, because the agreement was not by him performed. Trin. 9 Jac. in C. B. *Bright* and *Compo's* Case, *Bownlow*, 1. Part, 21.

32. A Copyholder Covenanted upon reasonable request, to surrender her Copyhold Land according to the Custome of the Mannor: And it was found, that the Custome is, That a surrender may be made either in person, or by Attorney, and that the Plaintiff did request the Defendant being a Woman Copyholder, to surrender by Letter of Attorney; which she refused to do. In this case it was Objected, That she ought to make the surrender presently, according to *Manfers* Case. *Cook* 2. Part; & 16 Eliz. *Dyer*, Sir *Anthony Cook's* Case. But it was holden, That she should have convenient time to do it. And Hill. 37 Eliz. in C. B. *Perpoynt* and *Thimblebyes* Case was put, that the party shall have convenient time to do it. And the Opinion of *Popham*, Mich. 27 Eliz. was put, That if a man be bounden to make such an Assurance as Councel shall advise; there, If Councell shall advise the Assurance, the party is bound to perform it: but if it were such reasonable assurance as Councel should advise; there, If the Councel do advise, That he shall enter into, seal, and deliver a Bond of 1000 l. for the payment of 100 l. at a day, he is not bound to do it, because it is not reasonable. And it was said, That in the principal case, the request was not according to the Covenant; for the Election was on the womans part, and not on the Covenantee's part, for she was to do the first act, *viz.* to surrender: and if it should be otherwise in the principal case, the Covenantee should take away the Election of the Covenantor. Trin. 8 Car. in B. R. *Symmes* and *Smith's* Case. *Godbolt*. 445. See *Cro.* 1. Part, 218. the same case, adjudged.

33. *A.* Covenants, in Consideration of a Marriage of his son with the daughter of *H.* and such a portion

a portion to be paid, to ſtand ſeiſed of ſuch Lands to the uſe of the wife for life, and to the uſe of the ſon in tail; and Covenants in the Indenture, *ſcil.* That he was ſeiſed in Fee of thoſe Lands of a lawfull Eſtate in Fee, notwithſtanding any act done by him: and that the ſaid Lands were of the annuall value of 200 l. *per annum*: upon which the Plaintiff demurred; the Defendant having pleaded, that they were of the annuall value of 200 l. notwithſtanding any act done by him. It was Reſolved in this caſe, That theſe words, *For any act*, &c. do not refer to the ſecond Covenant, but onely to the firſt, that it makes not a general Warranty; but the value is properly in the Conuſance of the Covenantor; and it was his intent ſhe ſhould have a Joynture of the value of 200 l. abſolutely: and it is not proper to ſay, For any act by him, &c. it ſhould be of ſuch a value. It was adjudged for the Plaintiff. Trin. 13 Car. in B. R. *Cro.* 1. Part, 356.

34. A man Leaſed to the Plaintiff a Mannor, for years; and Covenanted, That he had lawful right and Eſtate to let it for that Term. In Covenant brought, the breach was aſſigned, That he had not right nor lawfull Eſtate to let it. The Defendant pleaded a Concord, for that he gave him 10 l. in ſatisfaction; and iſſue thereupon. It was found for the Plaintiff, and 120 l. damages. Errour was brought, and the Errour aſſigned was, That it was not ſhewed, that he had an eſtate, nor how the Leſſor had not any right, or that a ſtranger had evicted him by title: *Sed non allocatur*, for the Covenant being general, the breach may be aſſigned as general as the Covenant: and it lyes not in the Plaintiff's Notice, who hath the rightful Eſtate: But the Defendant ought to have maintained, He was ſeiſed in Fee, and had a good Eſtate to demiſe; and then the Plaintiff ought to have ſhewed a ſpeciall title in ſome other. The Judgment was affirmed. Trin. 10 Jac. in B. R. *Cro.* 2. Part, *Salman* and *Bradſhaw*'s Caſe, 304. See Hil. 12 Jac. *Muſcott* and *Ballett*'s Caſe, *Cro.* 2. Part, 370. acc.

35. A Covenant was, That the Leſſee ſhould enjoy ſuch Lands according to his Leaſe without the Let, Interruption, or Incumbrance of any perſon; and then the Plaintiff ſhews, That the Land was extended for a debt due to the King by proceſs out of the Exchequer, and ſo Incumbred. It was moved, That this was not a good breach aſſigned, becauſe he doth not ſhew for whoſe debt, nor when, nor by whom it was due; and it might be for his own debt. It was adjudged for the Defendant; for the Plaintiff ought to ſhew a lawfull Incumbrance, otherwiſe he might have his remedy elſewhere. See *Dyer* 328. Paſch. 15 Jac. in B. R. *Brocki* and *Cham*'s Caſe, *Cro.* 2. Part, 425.

36. *A.* and *B.* entred into Articles Indented betwixt them, wherein *A.* covenanted to pay 100 l. at a day to come, to *B*: and *B.* covenanted upon the receipt of the 100 l. that he would give to *A.* an Acquittance for the 100 l. and would enter into a Bond of 400 l. to A. to ſave him harmleſſe from all claims, which ſhould be made to certain Lands in the poſſeſſion of A. A. tendered the 100 l. But B. refuſed to receive the 100 l. at the day, and to give an acquittance, and alſo to enter Bond of 400 l. Whereupon A. brought Action of Covenant. It was agreed in this Caſe, That there was no breach of the Covenant to ground an Action upon, for the Articles expreſſe, that upon the Receipt of the 100 l. he would give an Acquittance, and enter into Bond; And the breach is alledged, That the Plaintiff tendred the 100 l. at the day, and the Defendant refuſed to receive it, and hath not ſealed the Acquittance, nor given the Bond: And it may be it ſhould be the intent of the parties, that it ſhould be in the Election of the Defendant, either to receive the 100 l. or not receive it And the Plaintiff is not prejudiced by the Defendant's not receiving it: for if he ſhould ſue for the 100 l. the Plaintiff might plead this tender and refuſall againſt him, and that will be adjudged payment; and when he ſues for the 100 l. then may the other ſue for the Acquittance and the Bond. It was adjudged againſt the Plaintiff. Trin. 1655. in B. R. *London* and *Craven*'s Caſe. *Styles.* 481.

37. A. the Grandfather of the Husband of the Plaintiff, did by Indenture Covenant with B. that before ſuch a day, his ſon ſhould marry the daughter of B. and Covenanted to convey 6 l. 13 s. 4 d. of rent Iſſuing out of the Land, to hold to them during the life of the Covenantee, and his Wife; And after this, he Covenanted for him, his heirs and Aſſignes, that, after the death of the Covenantor and his Wife, the Land ſhould remain, come, and be to the ſaid Son and his Wife. The Queſtion was, Whether this Covenant did raiſe a preſent uſe to the Son and his Wife, or whether it reſts onely in Covenant. It was ſaid, That the words are in the Future Tenſe, That the Lands ſhall remain, come, &c. And therefore till the death of the Covenantor, the Fee-ſimple was in him: And a difference was taken when the words are in the preſent Tenſe, and when in the Future Tenſe. It was ſaid on the other ſide, That the intent of the parties was, That this ſhould raiſe a preſent uſe, for the Intent was to advance them firſt, during their lives with the Rent; and after the death of the Covenantor and his Wife, with the Land it ſelf: And therefore of neceſſity, this will raiſe a preſent uſe, and eſpecially in this Caſe, becauſe they who are to take benefit of it, are ſtrangers to the Covenant, and

and a Stranger ſhall not take benefit of a Covenant, and therefore the intention of the parties was to raiſe an uſe, for otherwiſe there ſhall be no advancement at all: Alſo the words are, Covenant and Grant; and if no uſe is raiſed, then the word *Grant*, is idle; and the word *Covenant*, is ſufficient of it ſelf to paſſe an Eſtate in Land; and words ſhall be expounded in Deeds, that they may take effect. But if there was another act to be done or made by the Covenantor or Covenantee, then no Uſe ſhould riſe, but it ſhould reſt onely in Covenant. But it was ſaid, that in this caſe no act of the Covenantor might hinder that this uſe ſhall ariſe, and therefore it is good: and the Covenant is here by writing, and not by words; and therefore the uſe ſhall well riſe. 37 Eliz. *Callard* and *Callard*'s Caſe. *Stand forth*, Euſtace, *Reſerving to my Wife and my ſelf, I give to thee and thy heirs.* It being by word, it was a doubt, Whether an uſe did riſe to the ſon? but if it had been by Deed, it had been ſufficient to raiſe an uſe to the ſon. Quære. The principall caſe was not Reſolved. Mich. 18 Jac. in C. B. rott. 2120. *Buck'ey* and *Simonds* Caſe. *Winch.* 31, 32.

38. In *Ejectione Firme*, the Caſe was; *A.* ſeiſed of Land in Fee, by Deed in Conſideration of Marriage, did give and grant the Land to the Defendant his ſecond ſon, and to his heirs after his death, but made no Livery: A. dyed, the Eldeſt ſon entred, and made a Leaſe to the Plaintiff, who entred; the ſecond ſon entred, and ejected him: whereupon, *Ejectione Firme* was brought. The Queſtion was, Whether an eſtate paſſed to the ſecond ſon by the Deed? It was agreed, If Livery had been made, it had been void, becauſe a Freehold cannot begin at a day to come. But it was Objected, That by the Covenant an uſe was preſently raiſed to the ſecond ſon; for it was ſaid, An uſe was but a Truſt betwixt the parties, and there needs not expreſſe words of Covenant to ſtand ſeiſed to an uſe. It was agreed, and Reſolved in this caſe, That if the meaning of the party might appear, that he intended to paſſe his eſtate by way of raiſing an uſe, then it might well riſe and enure by way of Covenant. But in the principall caſe there was no ſuch appearance; but by the word *Grant*, he intended to paſſe it by way of tranſmutation of poſſeſſion. And it was ſaid, That a guift of a Remainder after the death of the Grantor, was void: and it ſhall be intended, That when a man makes a doubtfull Conveyance, it ſhall be intended a Conveyance at Common-Law: and in the principal caſe, It ſhall not be intended, that the Father would make him Tenant for life, onely puniſhable for Waſte. It was adjudged for the Plaintiff, That no uſe did ariſe to the ſecond ſon by way of Covenant. Trin. 15 Car. in B. R. *Pitfield* and *Perce*'s Caſe. *Mar.* 46, 91. See *Cook* 8. Part, *Fox*'s Caſe. *Cook* 9. Part, *Bedell*'s Caſe. acc.

39. In Covenant, the caſe was; Queen *Eliz.* was ſeiſed of certain Mills, and by Letters Patents ſhe made a Leaſe of them to J. S. for 31 years, in which Letters Patents, there was a Clauſe for him, his Executors and Aſſigns, to repair the Mills, and to leave them ſufficiently repaired in the end of the Term: The Reverſion of them came to the King; who did grant them to J. D. and his Wife: and for breach of Covenant, in not repairing the Mills upon the Clauſe in the Letters Patents, the husband alone brought Covenant: The Points in the caſe were, 1. Whether theſe words, having no expreſs Covenant, ſhall be taken a Covenant? 2. If an Action of Covenant lyeth without ſealing the Counterpart of the Deed? 3. Whether the Action were well brought by the husband alone, without the wife? For the firſt, It was Reſolved, That the words in the Letters Patents ſhall be taken for a Covenant; for that every party to Letters Patents ſhall be bound, as if the ſame had been by Indenture. See 4 Ma. *Dyer* 150. To the ſecond point, Reſolved, It lyeth without ſealing the Indenture. 28 H. 8. *Dyer* 13. A Feoffment made by Deed with divers Covenants, one of the Feoffees ſeals this Deed; the other not; yet occupies and ſurvives. Adjudged, he ſhall be bound by the Covenants. To the third point, Reſolved, That the husband alone may have Covenant, although the Intereſt in the Reverſion was in him and his wife; for it was taken for a Rule, That where the husband was to have the ſole profit of that which is to be recovered, and may alone diſcharge it, there the husband alone may have the Action, as here in the principal caſe he hath done. And ſo it was the Opinion of the Court, That the Action of Covenant was well brought by the husband alone without the wife. Trin. 13 Jac. in B R. Sir *John Brett*, and *Cumberland*'s Caſe. *Bulſtr.* 3. Part, 163. See *Popham*, 136, 137. See Trin. 6 Car. in B. R. *Batchelour* and *Gages* Caſe. *Cro.* 1. Part, 136. acc.

40. J. N. did Covenant with J. S. by Indenture, to pay him 40 l. *per annum* for 21. years. And afterwards J. S. did releaſe to J. N. all Actions. The Queſtion was, Whether the whole Covenant was diſcharged? It was holden by all the Juſtices, That onely the Arrearages were diſcharged, becauſe the Covenant was executory, yearly to be executed for the Term of 21. years: for he may have ſeverall Actions of Covenant for every time that it is behind; and nothing ſhall be diſcharged by Releaſe of all Actions, but that which was a duty at the time of the Releaſe made. A man did releaſe to his Tenant for Term of life, all his right for

for the term of the life of the Tenant for life, and that he nor his heirs may any right demand, challenge, or claim for the life of Tenant for life in the Land; and afterwards he dyed, and the Tenant committed Waſte: And the Heir brought an Action of Waſte, and the Tenant pleaded the ſame Releaſe: And it was holden to be no plea; for nothing was extinct by the ſame Releaſe, but that which was in Action at the time of the releaſe made. Mich. 40 Eliz. 3. 22. the Earl of *Angus* Caſe. See Paſc. 24 Eliz. in C. B. *Godbolt*. 11.

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3. *Covenants between the Leſſor and Leſſee, and where the one ſhall have Action againſt the other: And upon what breach, upon what not.*

A. Brought Debt upon an Obligation; The Condition was, to perform Covenants, Grants, and Agreements in an Indenture of of Leaſe. The Defendant pleaded the Indenture, and that after (*viz.* at ſuch a day, 5. years after) the Plaintiff by Deed, &c. Releaſed, unto the firſt day of *May*, which ſhould be in *Anno*, &c. all Covenants in the Indenture: upon which the Plaintiff demurred. And it was adjudged No plea, becauſe he had not alledged, That untill the Releaſe, he had not broken any Covenant; for if the Obligation be once forfeit, the Releaſe of Covenants will not diſpence with it: And a Releaſe is not available but for a Right, or an Action which one had at the time of the Releaſe, for it is contrary to the nature of a Releaſe, to take effect in a time to come. Trin. 35 H. 8. *Dyer* 57. See 24 Eliz. in C. B. adjudged, That a Releaſe doth not extinct a Covenant, or diſcharge that which is not broken. *Godbolt*. 11.

2. If Leſſee for years Covenant, to repair Banks, and the banks are broken by ſudden floods, the Leſſee is bound to repair them; and if he doth not, an Action of Covenant lyes againſt him. But the Opinion of the Court was, That he ſhall have convenient time to repair them, becauſe the decay came by the Act of God. Paſch. 29 H. 8. *Dyer* 33. Trin. 8 Jac. in C. B. *Twentimans* Caſe adjudged acc.

3. A Leaſe was made of a houſe, and of certain Lands, and Woods; and the Leſſee covenanted to repair the houſe in *omnibus* at his proper coſts and charges: The houſe is afterwards in decay in the Groundſells; and the Leſſee cut down Trees growing upon the Lands, to repair them: and in Waſte brought, the Defendant juſtified by his Leaſe. The Plaintiff would have charged him in an Action of Waſte. But the Opinion of the Court was, That he could not ſo do, but his remedy was by way of Action of Covenant. So if the Leſſor covenanteth to repair, and doth not do it, the Leſſee may cut down Trees and repair, and juſtifie the ſame in the Waſte brought againſt him. Paſch. 3 Eliz. *Dyer*, 198. See Trin. 14 Eliz. *Dyer* 314.

4. A man in Conſideration of a ſum of money, made a Leaſe for years; and covenanted, That the Leſſee ſhould quietly and peaceably hold and enjoy it during the Term without Interruption of any: the Father of the Leſſor entred, and Interrupted him; upon which he brought his Action upon the Caſe of *Aſſumpſit*. It was adjudged, That the Action did lye. And it was ſaid, It is not like unto the Caſe of a Warranty; for that is againſt Titles, and not againſt wrongfull Interruptions and Entries. Mich. 16 Eliz. *Dyer*, 328. *Mountford's* Caſe.

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4. *Where a Covenant to Convey, ſhall amount to a Leaſe; Where not: And where words of Covenant ſhall amount to a Condition; where not. And what words do imply a Covenant.*

1. THe Caſe was; A. Covenanted with B, to convey by Fine, or other aſſurance, Lands to B. and his heirs, which ſhould be to the uſe of him and his heirs, with a Proviſo, That if he paid to B. 100 l. at the end of 13. years, that then he might re-enter: And Covenanted and granted for him and his heirs with B. his heirs, That he and his heirs ſhould enjoy the ſaid Lands untill the end of the ſaid 13. years, and after for ever, if the ſaid 100 l. was unpaid. And B. Covenanted, That he would yearly, during the 13. years, give 2. Capons; and that he would not do Waſte: And, If this Covenant did amount to a Leaſe, or not, was the Queſtion? It was Objected, That it ſhould amount to a Leaſe; otherwiſe, the Covenant not to do Waſte, was a vain Covenant But it was the Opinion of the whole Court, That it was not a Leaſe; for the intent of the parties was, to make an Aſſurance of the Inheritance by way of Mortgage, which is but a Covenant, that he ſhould enjoy during the time of the Mortgage, and not to make a Leaſe: and the Covenant, That he and his heirs ſhould enjoy it untill the end of 13 years, and *in perpetuum*, if the 100 l. was not paid,

ſhewes the Intent, that it ſhould not be a Leaſe, but meerly a Covenant for the quiet enjoying. Tr. 15 Jac. in B. R. *Evans* and *Thomas* Caſe. *Cro.* 2. Part, 172.

2. In Covenant, the Caſe was; A. did Covenant with B. the Plaintiff, *quod haberet poſſideret et occuparet* ſuch Lands from ſuch a time, for the ſpace of 7. years, without any diſturbance; and the Plaintiff did alſo Covenant to pay him 200 l. a year Rent for the ſame: and being diſturbed, he brought his Action of Covenant. It was Objected, It was no Leaſe, becauſe there was no word of demiſe. And, 2. It was ſaid, There was no breach layed, and ſo the Action would not lye. But it was Reſolved, That it was a good Leaſe. And a difference was taken between a Covenant made by one who is owner of the Land, and where the ſame is made by a ſtranger. If by the owner, it will amount to a Leaſe; otherwiſe if by a ſtranger, for then it will amount but to a meer Covenant. And Trin. 37 Eliz. in B. R. Sir *James Harrington*'s Caſe was, That Articles of Agreement to have Lands for ſuch a time, was Reſolved to be a good Leaſe. And a Licence to occupy, ſhall amount to a Leaſe. And if a Licence will enure to a Leaſe, ſo alſo will a Covenant. And for the breach, the Court ſaid, It was well layed, that he did enter, & covenanted to take the poſſeſſion, and they did diſturb him, and put him out. Judgment was given for the Plaintiff. Trin. 14 Jac. in B. R. *Tyſdale* and Sir *William Eſſex*'s Caſe. *Bolſtr.* 3. Part, 204.

3. Debt by an Executor, the Caſe was; By Articles betwixt the Teſtator and the Defendant, It was Covenanted; and the Teſtator did covenant, &c. with the Defendant, That he ſhould have and enjoy ſuch a houſe and Lands for 6. years; and that the Teſtator will ſufficiently repair the houſe: *Et in conſideratione præmiſſorum*, the Defendant covenanted, &c. for him and his heirs, Executors and Aſſigns, to pay to the Teſtator his heirs, Executors and Aſſigns, an yearly rent of 90 l. during the ſaid 6. years: the Defendant entred; the Teſtator dyed, the 90 l. was behind for a year after his death, and the Executor brought the Action of Debt. It was ſaid, That this is meerly in Covenant, and ſhall not enure as a Rent by way of Reſervation; and if it be a Covenant, it is due to the Executor; and if it be a Reſervation, it followes the Reverſion: and it appears by the intent of the parties, that it ſhould be onely a Covenant, and as a ſum in groſſe; otherwiſe the words of *Covenant* were idle. But the whole Court conceived it to be a Rent, and then it ſhall enſue the Reverſion, and ſhall go to the heir: For as the words of *Covenant and Grant*, That he ſhall enjoy the Lands for 6. years, amount to a Leaſe, and ſhall bind the heir; ſo the words of *Covenant and Grant of the Leſſee*, ſhall amount to a Reſervation, and the rather, becauſe he covenants and grants to pay to him and his heirs. Hill. 6 Car. in B. R. *Dixie* and *Mundayes* Caſe. *Cro.* 1. Part, 150.

4. In *Ejectione Firmæ*, the Caſe was; A woman made a Leaſe for years rendring rent, with a Covenant, that the Leſſee ſhould repair the houſe, with other Covenants; and then deviſed the ſame to the ſame Leſſee for divers years more, reſerving the like rent, and under ſuch Covenants as were in the firſt Leaſe, the remainder over in Fee, and dyed: the firſt Leaſe for years expired, the Leſſee continued in by force of the ſecond Leaſe by the Deviſe, and repaired not the houſe. It was Reſolved in this caſe, That the Will expreſſing, that the firſt Leſſee ſhould have the Land, obſerving the firſt Covenants, It ſhall not now be taken to be a Condition by any intent that may be collected out of the Will: For a Covenant and a Condition are of ſeverall natures, the one giving Action; the other, Entry: and here the Intent of the Will was, That although the Covenants were not performed, yet the Leſſee ſhould not forfeit his Term; but be bound to ſuch pain as he was at the beginning, and that was onely to render damages in an Action of Covenant. Adjudged againſt the Plaintiff. Hill. 30 Eliz. in B. R. *Mitchell* and *Dunton*'s Caſe. *Owen* 54, 55.

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5. *What ſhall be a good Bar in Covenant What not, And where it ſhall be pleaded in Bar to another Action.*

1. A Writ of Covenant was brought againſt an Aſſignee for not repairing a houſe. The Defendant pleaded in bar an Accord between him and the Plaintiff, and Execution of it in ſatisfaction of the Reparations. It was Objected, That when an Action is founded upon a Deed, as in this Caſe, that neither Arbitrament, nor Accord with ſatisfaction, is a plea, becauſe matter in *fait* cannot be avoided by matter in *pais*: And when an Action is in the realty, or mixt with the realty, Accord with ſatisfaction is no plea, and is not a bar for the perſonalty. But it was adjudged, That the plea was good; And a difference was taken where a duty accrues by a Deed in certainty, as by Covenant, Bill, or Obligation to pay a ſum of money, there, becauſe it takes its eſſence by writing, it ought to be avoided by matter of as high a nature, but when no certain duty accrueth by the Deed: but a default ſubſequent, gives onely damages; there

there Accord with ſatisfaction, is a good plea. 3 Jac. in C. B. *Cook* 6. Part, 44. *Blakes* Caſe.

2. If Leſſee for years Covenanteth to leave a Wood in as good plight as it was at the time of the Leaſe; And afterwards the Trees are overturned by a Tempeſt, he may plead this matter in bar, and it ſhall diſcharge him of his Covenant *quia impotentia excuſat legem*, as it is holden in 40 E. 3. 6. *Cook* 1. Part, in *Shelleys* Caſe.

3. If a Man ſeiſed of the Manor of S. Covenanteth with another, that when J. S. ſhall enfeoff him of the Manor of D. then he will ſtand ſeiſed of the Manor of S. to the uſe of the Covenantee, and his heirs; the Covenantee dyeth, his Heir within age, J. S. enfeoffeth the Covenantor, In this Caſe, It was adjudged, That the Heir of the Covenantor ſhall be adjudged in Courſe and nature of a diſcent: and yet there was not right, Title, Uſe, or Action, which deſcended but onely a poſſibility of an uſe, which could not be releaſed or diſcharged, and this matter may be ſo pleaded, *Cook* 1. Part, 99. in *Shelleys* Caſe. acc.

4. A man made a Leaſe for ſix years, if J. S. ſo long lived: And the Leſſor Covenanted with the Leſſee, that he had full and lawfull power to demiſe the premiſſes according to the Deed: The Leſſee brought Covenant, and alledged the breach, That the Leſſor had not full power and Authority to demiſe the premiſes according to the Deed: The Leſſor alledged a Concord betwixt them, and that he had paid 20 l. in ſatisfaction and diſcharge of the ſaid Covenant, and all other Covenants upon which they were at Iſſue. It was found for the Plaintiff, and Error brought, and two Errors were aſſigned. 1. That the Plaintiff had not averred that J. S. was alive, at the time of the beginning of the Leaſe, nor at the time of the Action brought. But it was Reſolved, That he needed not to alledge that, becauſe the Covenant refers to the time of the Leaſe made; and then, be J. S. alive or dead, the Action lyeth. The ſecond Error was, That the Plaintiff in his Declaration, hath not alledged, what perſon had right, title, or Intereſt in the Land, at the time of the making of the Leaſe to the Plaintiff; by which it might appear to the Court, that the Defendant had not power to demiſe the Premiſſes. But it was Reſolved, That the Aſſignment of the breach of the Covenant was good; for he had purſued the words of the Covenant *negativè*; and it lyeth more aptly in the nature of the Leſſor to ſay what part he himſelf hath in the Leaſe, than the Leſſee who is a ſtranger to it: and therefore the Defendant ought to ſhew what ſtate he had in the thing demiſed: by which it may appear that he had lawful power and authority to demiſe it. Trin. 10 Jac. *Cook* 2. Part, 60, 61. *Bradſhaws* Caſe.

5. If Tenant in Tayl doth enfeoffe his Unckle, who enfeoffeth another in Fee with Warranty: If afterwards the Feoffee by his Deed releaſeth to his Unckle all manner of Warranties, or all manner of reall Covenants, or all manner of Demands, by ſuch Releaſe, the Warranty (which is a Covenant Reall and Executorie) is extinct. And the reaſon of the ſame is, becauſe by releaſe of all Demands, the future Right and Intereſt to the thing in Demand, be it by way of Covenant or otherwiſe, is releaſed. *Cook*. 8. Part, 154. in *Altham's* Caſe.

6. Covenant upon a Deed of Covenants of Charter-party; whereby it was Covenanted, in conſideration of a certain ſumme of Money, agreed to be paid to the Defendant, for fraught of ſuch a ſhip, that he ſhould make ſuch a Voyage, and bear all loſſes and dammages which ſhould befall the ſhip, or Merchandizes in her, excepting only perils of the Sea. And the Plaintiff declared, That the Defendant had not performed his Agreement. The Defendant pleaded, That upon making of his Voyage upon the Sea, the ſhip was taken, *per quoſdam ignotos homines bellicoſos*; Whereby he was hindered in making of the Voyage, according to his Agreement. The Plaintiff demurred upon the Petition. It was holden in this Caſe, That Pyrats are perils of the Sea: and to that purpoſe, a Certificate was read that they were ſo eſteemed amongſt Merchants: Wherefore it was holden, That the Plea in Bar was good; Perils of Sea being excepted in the Covenant. Paſch. 24 Car. in B. R. Rot. 154. *Pickering* and *Barkley's* Caſe. *Styles* 132.

7. In Covenant brought againſt Leſſee for years, for not keeping the houſe in repair. The Defendant pleaded in Bar, that the houſe was burnt by caſualty. It was holden to be no good Plea in Bar, for that a Leſſee that covenanteth to repair, ought to do it, be his houſe burnt by negligence, or by any other means. M. 1649. *Compton* and *Allen's* Caſe, *Styles* 162. See before.

8. See the Mayor and Commonalty of *London*, and *Hattons* Caſe. M. 1652. before Diviſion.

9. A. Brought an Action of Covenant upon a Covenant contained in an Indenture of Leaſe, for non-payment of Rent, according to the Covenant. The Defendant pretended in Bar, that the Plaintiff entred into part of the Land demiſed, before the Rent was due; for which the Action was brought, and ſo had ſuſpended his Rent. The Plaintiff replyed, the Defendant did re-enter, and ſo was poſſeſſed, as in his former Eſtate. And it was holden by the Court, becauſe the Plaintiff did not ſhew, that the Defendant continued the poſſeſſion till the Rent grew due, but onely that he was poſſeſſed in his former Right. But the Plea in Barr was a good Plea; and Judgment was given, that the Plaintiff *nil capiat per billam*. Trin. 1614. Rot.

1687. in B. R. *Page* and *Pa*'s Caſe, *Styles*, 243.

10. A Leſſor covenanted and granted to a Termor for years, that he ſhould hold the Land to him and his preſent wife, and other wife which after he ſhould marry, for the Term of the life of the Leſſor; but no Term was made: It was the Opinion of the Juſtices, That was not a ſurrender of the Term, nor a confirmation; but onely a meer Covenant. But Juſtice *Wroton* held, that in an Action brought againſt him, he might pretend this as a Grant. Paſch. 15 Eliz. *Dyer* 272.

11. A Leaſe was made for 21 years to A. and B. his wife, if he or ſhe, or any child, or children, between them lawfully begotten ſhould ſo long live: and after they were married, the wife died without Iſſue: If the Leaſe were determined, or no, was the Queſtion; becauſe it is in the Conjunctive (he and ſhe) and no one of them is dead without Iſſue. It was ſaid, this was not like *Chapman*'s Caſe, *in Plo. Com.* Where one covenants to enfeoffe B. and his heirs: for ſure it is impoſſible to enfeoffe his heirs, as long as B. ſhall live, and therefore it ſhall be in the disjunctive. The Court ſaid, that it appeareth by the Disjunctive Sentence which cometh afterwards, that the intent was, that the Leaſe ſhould not be determined by the death of one of them: and the Reaſon that moved them thereunto, was, becauſe the Eſtate was made before the Marriage, and ſo it is a Joynture to the Wife, and ſo not determined by the death of one; adjudged accordingly. Paſch. 29 Eliz. in 61. B. C. *Corn* and *Baldwin*'s Caſe, *Goldeſbr.* 71.

Count and Declaration.

1. *Where the Count, or Declaration ſhall be good, where not.*

1. IN Error brought upon a Judgment in *Ejectione firme*; It was Aſſigned for Error, That the Writ did ſuppoſe a Demiſe to be made by the Abbot of C. And the Declaration was, That the Abbot and Covent *Beate Petri de C.* demiſed unto, &c. It was ſaid, That the Count was not good for the variance. *Bromley* ſaid, That it was good enough by that name, becauſe the departed but with a Term; contrary, if it had bin in Caſe of Free-hold. But the Opinion of all the Juſtices was; That for that, and ſome other omiſſions in the Count, the ſame was not remedied by the Statute of *Jeofailes*; and therefore the Judgment was reverſed. *Mr. Dyer.* 97.

2. In an *Ejectione firme* of a Rectory, It was moved, That the Declaration was inſufficient, becauſe that the Life of the Leſſor, viz. the Perſon, was not averred, but by implication; but becauſe it was *quod predict. A. B. Rector. Eccleſie predict. fuit et adhuc eſt ſeiſitus, de et in Rectoria predict. in Dominico ſuo ut de feodo in jure Eccleſie.* The Opinion of the Court was, That the Count or Declaration was good enough. 14 Eliz. Dyer. 304.

3. In a Writ of Annuity the Plaintiff declared, That A. Granted him by Deed to be Captain of the Caſtle of D. to have and exerciſe the ſaid Office during his life, and gave him Authority to nominate a Gunner, Porter, and ſix Souldiers: And for the maintenance of them, by the ſaid Deed, Granted to them, an Annuity for him and his Heirs, for his life, and dyed, and that the ſon did not pay it. And being upon Iſſue joyned, adjudged for the Plaintiff. It was moved in Arreſt of Judgment, That the Plaintiff had not averred, That he had exerciſed the ſaid Office. But it was Reſolved, That the Declaration was good without ſuch averment: For it was ſaid, That in all Caſes, where an Intereſt or Eſtate begins upon a Condition precedent, be it to be performed by the Plaintiff, or by the Defendant, or a ſtranger, and be it in the affirmative, or in the Negative; The Plaintiff in his Count ought to ſhew the performance of it: For there the Intereſt is not in him, untill the Condition be performed: But when the Intereſt or Eſtate paſſeth preſently, and is to be defeated by matter *ex poſt facto*; The Plaintiff may Declare generally, without ſhewing the performance of it: But if it appeareth to the Court by matter in Law, That the Action ſhall not be maintainable, without ſhewing the performance of the Condition, or Conſideration; there the Plaintiff in his Count ought to aver the ſame for the maintenance of his Action. *Cook* 7. Part, 19. 11. *Aſtred*'s Caſe.

4. An Action upon the Statute was brought, That none ſhould diſtrein the Beaſts of the Plough, ſo long as other reaſonable diſtreſſe may be had; and the Plaintiff declared of taking a diſtreſſe *contra formam Statuti*, but did not ſhew ſpecially how he had other diſtreſſe; Yet it was adjudged, That the Declaration was good, for it ſhall be implyed in the words *Contra formam Statuti*; And it ſhall come on the part of the Defendant, after he hath ſhewed the cauſe of the Diſtreſſe. Paſc. 14 Eliz. *Dyer.* 312.

5. No

5. Note, There are three manner of certainties. 1. Certain in a common intent, and that ſufficeth in Barr for thoſe that defend themſelves. 2. To a certain intent in generall, and that is ſufficient in Indictments, Plaints, Counts, and Replications. 3. To a certain intent, to every particular intent, and that is rejected in Law, for *talis certitudo, certitudinem confundit; et nimia ſubtilitas in lege reprobatur.* *Cook* 8. Part. 57. in the Earl of *Rutland's* Caſe. *Cook* 5. Part, 121. in *Long's* Caſe.

6. Debt upon an Obligation of 100 l. againſt an Adminiſtrator: The Defendant pleaded, That J. S. recovered in the Court of *Cheſter* 100 l. againſt him, and pleaded other Judgments by others in the ſame Court, in all amounting to 500 l. And that he had not goods of the Inteſtates *praeter bona, et cattalla, quae non attingunt ad valentiam praedict.* 500 l. againſt him in form aforeſaid recovered. The Plaintiff replyed, That J. S. accepted of 60 l. in ſatisfaction, and would have acknowledged ſatisfaction therein of Record in the ſame Court: but the Defendant ſuffered the Judgment by fraud to continue, to deceive the Plaintiff of his juſt debt: And ſo pleaded the ſame Plea to the other Record. In this Caſe, (amongſt other Points) It was Reſolved, That the Recoveries pleaded in the Court of *Cheſter*, were void. 1. Becauſe it doth not appear by the Bar, That the Mayor had Juriſdiction to hold a Court: And it appeareth by the Count in the ſaid Contract, that the Action was for 100 l. without making mention of the Obligation; and therefore it ſhall not be intended, that there was any Obligation; and although the Defendant in his bar acknowledgeth, That the debt was by Obligation; Yet the ſame doth not make the Declaration good, for a Declaration which wants ſubſtance, cannot be made good by the bar, otherwiſe it is when it wants Circumſtance of time or place. *Cook* 8. Part, 133. *Turner's* Caſe.

7. In Action upon the Caſe upon *Aſſumpſit*, the Caſe was; That the Defendant being poſſeſſed of an Intereſt of a Term, as Executor to J. S. who was indebted to the Plaintiff, in conſideration that the Plaintiff would not moleſt him, but would defer the payment till *Mich.* promiſed to pay him the mony, or to aſſign to him Land for it at *Mich.* next, upon *Aſſumpſit*, and found for the Plaintiff; Error was brought, and aſſigned for Error, That the Plaintiff had not averred that the Defendant had Aſſets in his Count. But it was Reſolved, That the Plaintiff in his Count need not aver that the Defendant hath Aſſets, for the Law ſhall preſume the ſame *prima facie*; and that the Teſtators would not leave a greater charge upon his Executors, or his Heir, then he would leave to diſcharge it withall, and therefore Aſſets ſhall be intended. *Cook* 9. Part' 94. *Bates* Caſe.

8. Tenant for life, the Remainder over in Fee, by Indenture demiſed the Lands for 15 years, rendring Rent to the Leſſor, his Heirs and Aſſigns, without any Warranty in the Deed, or expreſſe Covenant, That the Leſſee ſhould enjoy the Term: The Leſſor dyed within the Term, he in the Remainder entred upon the Leſſee: who brought Covenant upon the Indenture againſt the Executors of his Leſſor: And the Opinion of the Court was, That the Plaintiff ſhould be barred for theſe defects, in his Declaration. 1. Becauſe he had not alledged in fact, that he was poſſeſſed, and afterwards expelled, &c. but by Implication. 2. Becauſe the particular eſtate, with the Remainder, was not certainly alledged; and not by an *eſque*, &c. Mich. 9 Eliz. *Dyer.* 257.

9. Treſpaſſe, Quære, *Clauſ: fregit* was brought againſt two; one appeared, and the other was Outlawed: and the Plaintiff declared againſt the one onely, who was found Guilty by Verdict. It was moved, That he ſhould have Declared againſt them both, or againſt the one *ſimul cum*, &c. but the Court held the Declaration good, and if not good; yet it is helped by the Statute of *Jeofailes*, Mich. 31 Eliz. in C. B. *Goldsbr.* 109.

10. Action upon the Caſe was brought againſt a Sheriff, That where an Execution was directed unto him, he by vertue thereof had taken goods to the value of the Execution, and had ſold them for leſs, and had not Returned the Writ. The Defendant demurred upon the Declaration, becauſe it was alledged to be double. But the Court held the contrary, for that an Action upon the Caſe is like to an Action of Covenant, where a man may ſhew all the Covenants broken. And if one matter be depending upon another, it ſhall not be double; and here all is for not returning the Writ. Trin. 30 Eliz. in C. B. *Goldsbr.* 97. *Matthewes* Caſe.

11. A. brought an Action of Debt upon an Obligation of J. B. and his wife, Executrix of the Will of H. H. *nuper dict* H. G. of *London* Taylor. They pleaded in barr a Recovery againſt them in the Kings-Bench as *Executor. Teſtament. H. G. nuper dict. H. G.* of *London*, Barber-Chirurgion; and the Defendant did not aver, That the ſaid H. G. Taylor, and H. G. Barber-Chirurgion, was one and the ſame perſons; and the word (*predict.*) was alſo omitted in the plea. It was the Opinion of the whole Court, That it was not good; although it was alledged, It ſhall be intended all one perſon; and then if a plea in barr be good to a Common intent, it is good enough: For it was ſaid by the Court, That he by Common intent, he ſhall not be intended the ſame perſon, but rather the contrary:

trary: For common intent, is that which shall be intended more strong then any other, and not that which resteth indifferent: but here common intent is, that he was another person, because Barber-Chirurgion, and Tayler, are distinct Functions by common Intendment. Mich. 39 Eliz. in C. B. *Goldesbr.* 111.

12. In an *Ejectione Firme*, the Original bare Teste 13. *Aprilis*, *Anno* 39 Eliz. and the Plaintiff declared upon a Lease made to him 22. *Aprilis*, *Anno* 39 Eliz. so it appeared to the Court, That the Plaintiff brought his Action before he had any Interest in the Land. And the Opinion of the whole Court was, That Judgment should be arrested. And afterward the Plaintiff came, and shewed, How that after Imparlance, he filed a new Original. Mich. 40 Eliz. in C.B. *Goldesbr.* 115. *Bacon* and *Selings* Case.

13. In an *Ejectione Firme*, the Ejectment was supposed to be 100 acres of Lands in D. and S: the Jury found the Defendant guilty of 10. Acres, and did not shew in what Town they lay: Whereupon it was moved in Arrest of Judgment, for that it doth not appear where the Sheriff may put the Plaintiff in possession. But the Exception was disallowed, for the party at his perill ought to shew unto the Sheriff the right Land. It was adjudged for the Plaintiff. Hill. 43 Eliz. in C. B. *Thomas* and *Kings* Case. *Goldesbr.* 188.

14. An Executor brought Debt, and in his Declaration said, That the Testator in his lifetime was possessed of Land for Term of years, and so possessed, granted part of his Term to a stranger reserving rent; and that he granted his estate to the Defendant; and that the Testator dyed possessed of the Reversion of the Term; and because the Rent was behind, he brought the Action of debt for the Rent. And the Opinion of the Court was, That the Declaration was not good, for that it did not appaer, that he that made the first Demise was seised in Fee, or of any other estate by which he could make a Lease. Hill. 14 Jac. in C. B. *Scott* and *Herbert's* Case. *Browalow*, 1. Part, 48.

15. An Action was brought upon the Statute of 1 & 2 *Philip* and *Mary*; which Statute is, That no distress shall be driven out of the Rape, Wapentake, Hundred, or Laith, where such distresse is, or shall be taken, except it be to the Pound overt within the same County, not exceeding 3. miles distant from the place where the distress was taken. And the Plaintiff declared of a Distresse taken in a Hundred in such a County, and that he drove it 6. miles out of the County: And because a Hundred may be in divers Counties, and the Statute is, That the driving ought to be no more then three miles out of the Hundred; and it might be, that the driving was 6. miles from the place where the Distresse was taken in another County, and yet not 3. miles distant from the Hundred where the Distresse was taken, for that cause it was not adjudged against the Defendant. Mich. 24 Eliz. in C. B. *Godbolt.* 11.

16. A man brought an Action upon the Case, because he caused him to be Indicted and arraigned, &c. to his damage, &c. and the Plaintiff did not shew in his Declaration, That he was *Legitimo modo acquietatus*. It was said by *Clench*, Justice, That a man shall not have an Action without cause; and he hath not shewed, whether he was convicted or acquitted: and he said, There is no difference betwixt an Action upon the Case, and a Conspiracy in such case, but onely that a Conspiracy ought to be by two at the least, and an Action upon the Case may lye against one: and he said, in both, he ought to shew, That he was *Legitimo modo acquietatus*. It was adjudged for the Defendant. Mich. 29 Eliz. in B. R. *Shotbold's* Case. *Godbolt.* 76.

17. An Action upon the Case was brought, because the Defendant had spoken these words, viz. That the Plaintiff had said many a Masse to J. S. In this case it was said, That the Declaration was incertain, viz. The places where the Masses were said, were not alledged, nor the day when they were said; for it might be, that the Masses were celebrated in France, or in some other places out of the Kingdome; and the Statute also doth not appoint any penalty, if they be not Indicted within a year, and a day. And for this cause, it was adjudged, That the Declaration was not good, nor the Action lyes. Mich. 29 Eliz. in C. B. *Godbolt.* 106.

18. A. brought an Action of Assault and Battery, and declared, *Quod cum* the Defendant *verberavit*, and did not shew certain, nor alledge precisely in his Declaration, That the Defendant did beat him: and Mich. 39 Eliz. *Sheriff* and *Bridges* Case was vouched, where such a Declaration was not good. But the Opinion of the Court was, That the Declaration was good enough, notwithstanding the said Judgment of 39 Eliz. Pasch. 12 Jac. in B.R. *Sherlees* Case. *Godbolt.* 251.

19. A Writ of Errour was brought to reverse a Judgment given in the Court at *Lincoln*, in an Action of Trespasse there brought, for taking away a Box with Writings. And the Errour assigned was, because in his Declaration there he saith, That the Defendant took away a Box with writings, and doth not make title to the Box, nor shews, that the same was lock'd, nayled, nor sealed; nor doth set forth the Quality of the Evidences, whether they were Releases, Deeds of Feoffment, or other Evidences particularly. And for these causes, (amongst other) the Judgment was reversed.

Pasch.

Paſch. 2 Car. in B. R. *Holmes* and *Wingreeves* Caſe. *Godbolt* 370.

20. A. brought an Action againſt B. for erecting a houſe in a certain place called *Riſborough-Common*; and alledged in certain, That every one who had Common in *Riſborough prædict.* &c. and did not alledge, That the Common is in the Manor of *Riſborough*. But he declared, That there is ſuch a Cuſtome within the Manner of *Riſborough*. The Opinion of the Court was, That the Declaration was good, becauſe there is but one *Riſborough* alledged, and therefore of neceſſity it muſt be meant, *de Maneria, &c.* Paſch. 10 Jac. in B. R. *Clayton* and Sir *Jerom Horſey*'s Caſe. *Godbolt* 252.

21. Debt upon an Obligation, the Condition of which was, That the Obligee 28 *Aug.* 4 Jac. ſhould go from Aldgate in *London*, to the Parith Church of Stow-Market in *Suffolk* within 24. hours: and the Plaintiff ſhewed, That he went from Aldgate to the ſaid place: and becauſe he did not ſhew in his Declaration, in what Ward Algate was, It was holden by the Court, That the Declaration was not good. Mich. 7 Jac. in B. R. *Croſſe* and *Caſons* Caſe. *Godbolt* 160.

22. In an Action of Treſpaſſe, the Declaration was, That the Defendant had felled 20 perches of Hedging; whereas it ought to have been, That the Defendant had felled a Hedge containing 20 perches; for a man cannot cut a Mathematical Hedge. But the Court was clear of Opinion, That the Declaration was good, notwithſtanding the ſaid Exception; for that it is the common ſpeech to ſay, 20 perches of Hedging, a Pint of Wine, an Acre of Corn, &c. See 17 E. 4. 1. acc. Paſch. 21 Jac. in B. R. *White* and *Edwards* Caſe. *Godbolt* 286, 287.

23. An Action upon the Caſe was brought in the Common-Pleas; and the Plaintiff declared, *Quod diu fuit, et adhuc ſeiſitus exiſtens* of a houſe, &c. and he did preſcribe, That he and all thoſe whoſe eſtate he had in the ſaid houſe, had uſed to have Common in the Waſte of *L*; and that the Defendant 15 Jac. made Cony-berries in the Waſte, *Quorum quidem præmiſſorum* he loſt his Common. Judgment was given in the Common-Pleas for the Plaintiff there. Whereupon Errour was brought, and aſſigned for Errour: 1. That *diu ſeiſitus* was not good, becauſe it hath not any Limitation of time: for it may contain as well 40 years, as one year. 2. Errour, Becauſe he doth not conclude, *Quorum quidem præmiſſorum prætextu*, he loſt his Common; but he ſayes, *Quorum quidem præmiſſorum*, he loſt his Common; and leaves out the word (*prætextu*) which ought to have been in the Declaration. But here, the Declaration is incertain, both in the *ſeiſitus*, and in the alledging of the damages. And of that Opinion was the whole Court. And for theſe cauſes, the Judgment given in the Court of Common-Pleas, was reverſed. Trin. 21 Jac. in B. R. Sir *Thomas Lee* and *Griſley*'s Caſe. *Godbolt* 347, 348.

24. In Treſpaſſe, the Original bare Teſte 3. *January*, 6 Jac. And in the Declaration the Treſpaſſe is ſuppoſed 20. *Jan.* 6 Jac. which is after the *Teſte* of the Original. In this caſe it was agreed by the whole Court, That the Declaration was not good, and that it was not amendable by the Statute of Jeofails. Mich. 7 Jac. in C. B. *Brownlow*, 2. Part, 273.

25. Note, in a Count or Declaration, If the Plaintiff reciteth a Statute (which he needs not to do, being a generall Statute, of which the Juſtices are bounden to take Notice) in ſuch caſe if he miſrecite it, as in the date, or otherwiſe, his Count ſhall abate; for although it was not requiſite to recite it, yet he making uſe thereof by way of Recitall, he ought to recite it as in truth it is. Becauſe when he hath grounded his Action upon a Statute by him recited, or where it appears to the Court judicially, that there was no ſuch Statute at that time; he hath made his Declaration naught upon his own ſhewing. See *Plow. Com.* 84. in *Partridge* and *Strange*'s Caſe. See there, That a Declaration ought to have, 1. Certainty, ſo as the Defendant may know to what to make anſwer. And therefore when of neceſſity a thing muſt be ſhewed incertain in the Declaration, it muſt by no means be left out. 2. Verity ought to be joyned with the Certainty; for if it appear to the Court, that falſhood is produced inſtead of truth, the party that ſheweth it, hurteth himſelf. *Ibid.* 84. a. b.

26. Errour was brought of a Judgment given in the Court of the Pallace of *Weſtminſter*, in an Action upon the Caſe of Aſſumpſit. And it was aſſigned for Errour, That in the ſaid Action, the Plaintiff declared, That 23. *December*, 13 Car. in Conſideration of a ſum of money, the Defendant aſſumed and promiſed, That he, 23. *January*, 13 Car. would pay ſuch a ſum of money to the Plaintiff: and becauſe it appeared by the Plaintiff's own ſhewing, That the Action was brought, before there was any cauſe of Action. The Court held, That the Declaration was ill, and the Judgment was errronious; and therefore it was reverſed. Hill. 19 Car. in B. R. *Smith* and *James* Caſe. *Cro.* 1. Part, 415.

27. Errour of a Judgment in the Court of Marſhalſea; Upon an Action upon the Caſe upon a promiſe, The Plaintiff declared, That in Conſideration of ſuch a ſum of money received, that the Defendant promiſed, that he would pay him ſuch

ſuch a ſum when he returned into *England* from *Hamborough* being beyond the Seas: and alledged, that ſuch a day he went over the Sea to *Hamborough*, and returned ſuch a day to the Pariſh of St. *Clements Danes*, *London*; and that he delivered the money, and the Defendant had not paid it. Upon Non-Aſſumpſit, it being found for the Plaintiff, and Judgment given; Errour was brought, and aſſigned, becauſe the Plaintiff did not alledge, That he gave notice to the Defendant of his Return: and although it was alledged, That the Defendant *habens noticiam inde*, and upon ſuch a day requeſted, had not paid it: yet it was holden, That the Declaration was inſufficient for this cauſe, for he ought to have alledged expreſſe notice, and ſhewed the day and place of ſuch notice given. The Judgment was reverſed. Hill. 15 Car. in B. R. *Cro.* 1. Part, 412.

28. *Audita Querela* by 3. to avoid a Judgment againſt the ſaid 3. in Treſpaſſe, where one of them was onely taken in Execution upon the Judgment. Exception was taken to the Writ and Declaration, becauſe he who was in Execution onely ought to have had the *Audita Querela*; and the others not being grieved, ought not to joyn in it. But the Exception was diſallowed by the Court, for they being parties to the Judgment, and lyable to the Execution, although it was never had againſt them; yet they might well have *Audita Querela*, and joyn with him who is in Execution. Another Exception was to the *Audita Querela*, That it was not good; which was, That whereas one J. S. was ſued in the Common-Pleas for a Battery ſuppoſed to be done in *London*, and by Verdict, the Plaintiff had Judgment for 3 l. damages and Coſts; and the ſaid J. S. taken in Execution for the ſame; That afterwards he and the other Defendants were ſued in this Court for this battery ſuppoſed to be done in the County of H. and they 3. were by Judgment condemned in this Court: and it appeared, that this Action, and the Action in the Common-Pleas, were for one and the ſame Battery: and the Plaintiff had acknowledged ſatisfaction of the Judgment to J. S. in the Common-Pleas, and yet notwithſtanding againſt Law, had ſued Execution of the ſaid Judgment, where he was ſatisfied for the ſame Treſpaſſe. And hereupon the Defendant demurred in Law. For the Defendant in the *Audita Querela* it was moved, That this cannot be ſurmiſed, becauſe the one Recovery being in *London*, and the other in the County of H. it cannot be Intended, to be one and the ſame Battery, *ſed non allocatur*: For the Action being tranſitory, may be layed in what County the party pleaſeth; and it being averred by the Record to be one and the ſame Treſpaſſe, and not divers, and this being confeſſed by the Demurrer, the Plaintiffs are not ſuch ſtrangers to the Record, but that they may have benefit of the ſatisfaction by the ſaid Record, and becauſe they are all parties to the act, the Law gives liberty to every one of them to take advantage of any act of theirs, for the others diſcharge. Hill. 11 Car. in B. R. *Corbitt* and *Bates* Caſe, *Cro.* 1. Part, 320.

29. In Debt upon a Leaſe for years, the Plaintiff declared of a Leaſe of a Meſſuage *vocat. M. Farme, in C. in Com. Midd. ac omnia domus, ædificia, &c. in M. H. F. & C. in dict. Com. vel eorum aliquibus*; and of an Acre of Meadow *vel paſtur.* It was moved, That the Declaration was not good, for the Incertainty. But it was Reſolved, The Declaration was ſufficient; It being grounded upon the Contract; for in ſuch caſe the Declaration may be as general as the words of Demiſe are. But in an *Ejectione Firmæ*, where the poſſeſſion is recoverable, there the certainty of the Land, and in what place it lyeth, muſt be ſhewed. Mich. 3 Jac. in B. R. *Matthewſon* and *Rowes* Caſe. *Cro.* 2. Part, 124. Sir *William Read's* Caſe, in *Scaccario* Chamber adjudged acc. *ibid.*

30. Action upon the Statute of *Winton* of Hue and Cry; The Plaintiff in his Declaration ſhews the ſaid Statute, and that ſuch a day he was robbed of ſo much in the Hundred of *L*; and that he made Hue and Cry: and that according to the Statute of 27 Eliz. within 40 dayes before the Action brought, he was ſworn before ſuch a Juſtice of Peace, that he was robbed of ſo much, and did not know any of the parties; and concludes, *Contra formam Statuti prædict.* It was ſaid, The Action was not good, becauſe founded upon two Statutes both mentioned in the Declaration; yet he concludes, *contra formam Statui prædict.* and not, *Statutorum prædictorum.* But the Court held it the beſt form, to be *contra formam Statui prædict.* for that the Action was founded upon the Statute of *Winton*, which gives the penalty; and the other ſhews onely how the Execution ſhall be, but gives not any Action: and *Statuti prædict.* refers onely to the Statute of *Winton.* Mich. 5 Jac. in B. R. *Andrew* and the Hundred of *Lewknors* Caſe. *Cro.* 2. Part, 187.

31. In Aſſumpſit, the Plaintiff declared, That in Conſideration he would marry ſuch a one his Coſin, that he would give him 100 l; and alledgeth, That he married her ſuch a day and place. Upon Non-Aſſumpſit, found for the Plaintiff, It was moved, The Declaration was not good, becauſe it is not alledged, that he gave notice of his marriage. But it was Reſolved, That the Declaration was good enough; for it is a neceſſary intendment, That when after the marriage he requeſted

queſted the payment of the money, that notice was given of the marriage. Mich. 7 Jac. in B. R. *Bradley* and *Toders* Caſe. *Cro.* 2. Part, 228. See *Morley* and *Hodges* Caſe, in the Exchequer-Chamber, adjudged acc. *Ibidem.*

32. Treſpaſſe. *Quare Clauſum fregit, et ſpinas ſuas ad valentiam ſuccidit.* Upon Not-guilty, found for the Plaintiff; It was ſaid, That the Declaration was not good, becauſe it doth not ſhew the quantity of the Lands or Land, ſo it is incertain; as in *Cook* 5. Part, *Playters* Caſe. *Quare piſces ſuos cepit.* But upon the view of many Preſidents produced and ſhewed, It was adjudged for the Plaintiff, That the Declaration was good. Mich. 15 Jac. in B. R. *Jones* and *Wilſons* Caſe. *Cro.* 2. Part, 435.

33. In Aſſumpſit, the Plaintiff declared, whereas he bought of the Defendant a parcell of Gum, containing 28. Hundred weight, at 3 l. 8 s. the hundred weight, good and Merchandiſeable; and had ſatisfied the Defendant for it in Linnen, called Holland, at 16 d. the Ell: And whereas there was the ſame day a Communication betwixt them, concerning another parcel of the Defendant's Gum, which he affirmed to be upon the Sea, and was to come to *London* in *May* following, and which he affirmed to be as good as the other. The Plaintiff thereupon promiſed to the Defendant, That if the ſaid parcel did not exceed 2000 weight, he would within 4. moneths after the delivery of the ſaid parcell to J. S. the Plaintiff's brother, deliver to the Defendant ſo much Holland, according to the rate of 16 d. the Ell, as the ſaid Gum ſhould amount unto after the rate of 3 l. 8 s. the 100 weight. And the Defendant in conſideration made, promiſed to deliver to the ſaid J. S. the ſaid parcel of Gum, when it ſhould come to the Port of *London*; and ſhould be as good as the firſt was. And then ſhews, That the Defendant delivered to the ſaid J. S. 8. baggs of Gum not ſo good as the former, containing 1800 weight of ill, and not Merchandiſeable Gum, although the Plaintiff had delivered to him ſuch a Quantity of Cloath according to the Rate aforeſaid, in ſatisfaction thereof. Upon Non-Aſſumpſit, It was found for the Plaintiff. Errour was brought in the Exchequer-Chamber. And it was there adjudged, That the Declaration was not good, becauſe it was not averred, That the parcell of Gum which he delivered, was the ſame Gum which was upon the Sea; nor that this Quantity came to the Port of *London*, nor that it did not exceed 2200 weight; for if it were another parcell of Gum, it was not within the promiſe: and although it was ill, and not Merchandiſeable, it was not materiall, not being within the promiſe, and it was his folly to accept of it; and it ſhall not be helped by an Intendment. Trin. 7 Jac. in B. R. rott. 1141. *Weſton* and *Dikes* Caſe, *Cro.* 2. Part, 235.

34. In Aſſumpſit, the Caſe was; The Plaintiff declared, That whereas A. was poſſeſſed of Lands in M. for the Term of divers years of the Demiſe of J. S. and whereas there was a Communication betwixt A. and the Defendant, for his Eſtate and Intereſt; the Defendant at M. aforeſaid, in Conſideration the Plaintiff would procure the ſaid J. S. to Licence the ſaid A. to aſſign his Leaſe and Intereſt to the Defendant, promiſed he would pay all his charges, and as much as he deſerved for obtaining thereof, not exceeding 44 s. And alledged, That he at M. procured J. S. to grant a Licence; and that he deſerved for his pains 20 s. Upon Non-Aſſumpſit found for the Plaintiff, Errour was brought; and amongſt other things, it was aſſigned for Errour, That he alledges the promiſe to be, to pay *tantum, quantum meruit*; and avers, That he deſerved 20 s. which is an Incertain and void promiſe: for it cannot appear what he deſerved. But the Opinion of the Court was, That it was good enough, and certain enough; and he ſhall make the demand what he deſerved; and if he demand too much, the Jury ſhall abridge it according to their diſcretion. Paſch. 19 Jac. in B. R. rott. 423. *Hall* and *Wallands* Caſe. *Cro.* 2. Part, 618. See Hill. 7 Jac. *Ive* and *Cheſter's* Caſe. A Tayler brought ſuch an Action, and alledged to pay *tantum quantum meruit*, for the making of ſuch garments, and Recovered. Hill. 11 Jac. *Shephard* and *Edwards* Caſe. A Phyſitian brought ſuch an Action, and declared upon a promiſe, to pay *tantum quantum meruit*, for ſuch a Cure; and that he deſerved 100 l. Adjudged, the Declaration was good.

35. *Aſſumpſit*; The Plaintiff Declared, whereas the Defendant was endebted to him in 5 l. *pro redditu antelayce debito*: That the Defendant promiſed to pay him 5 l. *quandocunque requiſitus* And alledged, that after requeſt at ſuch a day, year, and place made, he had not paid, &c. It was ſaid, The Declaration was not good, becauſe he hath not ſhewed when the Rent was due, nor for what Term, nor upon what contract: Yet becauſe the Defendant had taken notice thereof, affirming he had paid it; and Iſſue joyned thereupon; It was holden by the Court, That the Declaration was good, which otherwiſe it had not bin. Hill. 20 Jac. in B. R. *Slack* and *Lowſalls* Caſe. *Cro.* 2. Part, 668.

36. An Information was upon the Statute of 2 E. 6. for ingroſſing of divers ſtocks of Corn; and it was by the word *Cumulus*. It was adjudged not good for the incertainty; for it might be a heaped, threſhed, or in ſhocks; And Detinue lyeth not *de Cumulo*: And an Indictment *de uno Cu-*

multo tritici pretii, is not good. So a *Pracipe quod reddat virgini libratas terræ*, is not good for the incertainty, for the ſame ought to contain certainty, becauſe of the *habere facias poſſeſſionem*: And alſo this Information being upon a penall Law, the certain quantity of the Corn Ingreſſed, ought to appear to the Court. Adjudged, the Information not good, for the great incertainty in it. Hill. 12 Jac. in B. R. *Gold. sborow* and *Whicher's* Caſe. *Bolſtr.* 2. Part, 317.

37. In Treſpaſs for Aſſault and Battery, The Plaintiff declared, *Quod cum* ſuch a one did Aſſault and beat him. It was agreed by the Court, That this Declaration in this manner with a *Quod cum*, was not good, for that it is but a rehearſall, and it is not an Affirmative, That he was beaten. Trin. 12 Jac. in B. R. *Sherlnd* and *Heaton's* Caſe. *Bolſtr.* 2. Part, 215. See Trin. 37 Eliz. in B. R. rott. 349. *Sherive* and *Bridgman's* Caſe. acc. *ibid.* But if the Declaration had bin, *Quod cum* he was in *pace Domini Regis*, the Defendant did Aſſault him *contra pacem*, this had bin good: for that there is a Relative to the *Quod cum*, which alwayes preſuppoſeth ſome matter ſubſequent, to be depending upon it.

38. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes: The Caſe was, The Huſband claimed the Tythes in the Right of his Wife, and in the Declaration averred the life of the Wife. Exception was taken to the Declaration, becauſe he doth not ſhew how he hath the ſame; And another Exception was taken to it, becauſe it was not ſhewed that the Grant was by Deed, becauſe the thing it ſelf cannot paſſe without Deed. For the firſt, the Court held, That to ſay generally, Poſſeſſor, Occupator, Firmarius, or Proprietarius, was good; and for the ſecond point, the Declaration is good, becauſe it is but an Inducement to the Action. Paſc. 12 Jac. in B. R. *Babbington* and *Matthewes* Caſe. *Bolſtr.* 2. Part, 228.

39. The Caſe was, A. being Lord of the Manor of D. did Covenant for himſelf, his Heirs, Executors, Adminiſtrators, and Aſſigns, within ſeven years, upon requeſt, to ſettle, and convey upon the Plaintiff, a Copyhold Eſtate for the Term of his life, according to the Cuſtome of the Manor, this to be done upon requeſt, made by the Plaintiff, to him, his Heirs, Executors, or Aſſigns. The Plaintiff ſhewed, That A. dyed, and that he requeſted the Defendants, the Executors of A. to perform it within the time, which they refuſed to do: And by the Covenant, it was to be done *infra unum menſem poſt rationabilem requiſitionem*: And it was not ſhewed in the Declaration, what Eſtate A. had in the Manor. It was ſaid in this Caſe, That the Requeſt was not well made, being made to the Executors, and ſo no breach of Covenant, For the requeſt ought to have bin made to the Heir, for that A. ſhall be intended to have a Fee-ſimple. But it was the Opinion of the whole Court, That the requeſt made to the Executors was good: and it ſhall be taken, that the ſaid A. had but a Term in the Land: and the Executors do repreſent the perſon of the Teſtator, as to the performance of Covenants to be by him performed: and it being here generally taken, and no eſtate ſhewed, It ſhall be intended, that he had onely an Eſtate for years in the Manor; and if he had no eſtate at all in the Manor, yet his Executors are bound to procure this to be done at their perill; and therefore the requeſt made to the Executors, and their non performance, is a breach of the Covenant: and the Action of Covenant well brought, and the Declaration upon it well and good enough. Mich. 11 Jac. in B. R. *Thurſeden* and the Executors of *Warthams* Caſe. *Bolſtr.* 2. Part, 158, 159.

40. In an Action upon the Caſe for a promiſe, the Caſe was; There being a difference between the Plaintiff and the Defendant, concerning the Quantity of a Rent to be paid by the Defendant: The Defendant ſaid, That if J. S. would ſay, That the Rent reſerved upon the Leaſe was 6 l: he did then promiſe to double it to the Plaintiff. J. S. did affirm the Rent to be 6 l. Upon *Non aſſumpſit*, and a Verdict for the Plaintiff, It was ſaid, That the Declaration was not good, becauſe that no notice is layed therein to be given, of this to the Defendant; It being layed onely in the Declaration, That J. S. affirmed the Rent to be 6 l. and notice was requiſite, becauſe no certain time is ſet down, but is here indefinite: and it being to be done by a ſtranger, and under a penalty of doubling the Rent; Notice ought to have been given of it to the Defendant. But it was Reſolved in this Caſe, That the Declaration was good, although no Notice was layd in it to be given the Defendant: and the difference was taken, where one is ignorant of a thing to be done by him, there Notice is to be given to him of the ſame; but if a man undertakes to do a thing, there he alſo undertakes to perform all Circumſtances incident to the doing of the ſame, and that without Notice. It was the Opinion of the whole Court, That the Declaration was good, without expreſſing any Notice. Mich. 11 Jac. in B. R. *Child* and *Hardres* Caſe. *Bolſtr.* 2. Part, 143, 144.

41. Debt upon an Obligation, The Plaintiff declared upon a Bond to pay ſo much *cum inde requiſitus fuit*. The payment was to be made two dayes after the date of the Bond; but no ſum was moved in the Condition paid. Upon *Nihil debet* pleaded, found for the Plaintiff. It was moved, That the Declaration was not good; for this variance; no ſum being in the Condition. It was

Reſolved.

Reſolved, the Declaration was good; for no ſum being in the Condition, the Bond is ſimple without a Condition; and ſo the ſame ought to be paid upon requeſt. Mich. 11 Jac. in B. R. *Dorrington* and *Walters* Caſe. *Bulſtr.* 2. Part, 156.

42. In an Aſſumpſit, the Caſe was this; Certain Wares being ſold and delivered by the Plaintiff to J. S. *ad requiſitionem* of the Defendant: The Defendant in Conſideration that the Plaintiff would give truſt and credit to J. S. for the ſaid Wares, ſo as the ſame did not exceed 100 l. he promiſed to pay for the ſame *cum inde requiſitus eſſet*; and the Plaintiff layed *in facto, quod ſuper inde fiduciam dedit* to the ſaid J. S. and had delivered him the ſaid Wares, which did not exceed 100 l. It was ſaid, That the Declaration was not good, the ſame being uncertain, being *fidem dedit ſuper inde*, and doth not ſhew in all the Declaration, whether this was before, or after the promiſe; and by Intendment, it may be taken as well the one, as the other: alſo, he doth not ſhew, whether J. S. hath paid it, or not. But it was, after long Argument, Reſolved by the whole Court, That the Declaration was good; for it is expreſſed in it, that *fidem adhibens ſuper fiduciam illam deliberavit*. And it was agreed, That *ſuper inde*, is as much as *fidem dedit*, when no time is mentioned before. And as to the Objection, That it may be that J. S. *principalis debitor*, hath paid the money; If this *revera* were ſo, it ought to come on the other ſide, to ſhew it. It was adjudged for the Plaintiff. Paſch. 11 Jac. in B. R. *Crank* and *Johnſons* Caſe. *Bulſtr.* 2. Part, 74, 75.

43. Debt upon the Statute of 2 E. 6. cap. 13. for not ſetting forth of Tythes. It was moved, The Declaration was not good, for that the Statute therein is miſcited. In the Declaration, the Statute is recited to be, *Quilibet ſubjectus dicti Domini Regis*. The Statute being, Every of the Kings Subjects. It was the Opinion of the whole Court, That it was a plain miſ-recital of the Statute: and for that cauſe it was adjudged, *Quod Querens nihil Capiat per billam*. Trin. 11 Jac. in B. R. *Tipping* and *Swans* Caſe. *Bulſtr.* 2. Part, 119.

44. In an Action upon the Caſe for ſtopping a way; It was moved, That the Declaration was not good, it being therein ſet forth, That he ought to have a way over the Land of the Defendant for his carriages at any time when he ſhould have occaſion to uſe the ſame; and ſhews, That the Defendant ſtopped the ſame, ſo as he could not uſe it. The Exception was taken, becauſe in his Declaration he doth not ſhew, That he had occaſion to make uſe of the way, and how. But the Court held, It had been idle for him to have ſet forth, He had occaſion to uſe it, for that the Law ſayes ſo much for him; and he may have his Action for ſtopping of it, without ſhewing of the Cauſe he hath to make uſe of the Way. Adjudged for the Plaintiff. Trin. 11 Jac. in B. R. *Collicum* and *Tuckers* Caſe. *Bulſtr.* 2. Part, 121.

45. Errour was brought, upon a Judgment upon *Non ſum informatus* pleaded in Debt: The Errour was, That the Original was againſt Sir *Fr. Harris de Browton*, and the Declaration was *de Brewaton*; and this was after Imparlance. It was the Opinion of the Court, That this was a plain Variance, and that therefore the Judgment thereupon given was erronious, and was out of the help of any Statute. Paſch. 10 Jac. in B. R. *Harris* and *Shirley's* Caſe. *Bulſtr.* 1. Part, 184.

46. In an Action of Debt, the Declaration was *in placito debiti*; and he declares as for an Annuity, as in a Writ of Annuity *de annuali reddita & retro fore*; it was 10 l. *de annuali reddita*: A Verdict being for the Plaintiff; It was moved, The Declaration was not good, being *in placito debiti*, being for 10 l. *de annuali reddita*. It was for the Plaintiff ſaid, That if Leſſee for years grants an Annuity to another for years, Debt will lye for it. In this caſe it was ſaid by the Juſtices, That in this Declaration there are all the words for an Annuity, and more alſo for a Debt; and that ſuch a vitious Declaration as this was never ſeen: *Subſtrank* is the word for an Annuity; which was alſo in his Declaration. And it was ſaid, That the Plaintiff in this caſe could not have Judgment. As it is an Action of Debt, he cannot have Judgment, becauſe it appears by the Declaration, that this was in caſe of an Annuity; neither can he have Judgment as for an Annuity, becauſe by his Declaration he demands the ſame as a debt. It was adjudged, That the Plaintiff *Nihil Capiat per Billam*. Trin. 9 Jac. in B. R. *Lucas* and *Fulwoods* Caſe. *Bulſtr.* 1. Part, 15, 16.

47. Treſpaſſe, brought by the Maſter for an Aſſault and Battery of his ſervant; the aſſault was, for giving him a box on the Ear, *ad damnum*. In Arreſt of Judgment, it was moved, That the Declaration was not good, for that it is not layd in it, *per quod ſervitium amiſit*. And ſuch was the Opinion of the whole Court. And ſo it was ſaid, It was adjudged in the like caſe in one *Glanvill's* Caſe. Judgment was, *Quod Querens nil Capiat per Billam*. Trinit. 9 Jac. in B. R. *Bulſtr.* 1. Part, 163.

48. In Treſpaſſe, the Plaintiff declared, That the Defendant *ſimul cum quodam J. S. clauſum ſuum fregit*; being found for the Plaintiff, It was moved to ſtay Judgment, That the Declaration was not good; for it appeareth upon the Plaintiff's own ſhewing, That the Action ought to be brought

againſt another not named in the Writ; notwithſtanding which, Judgment was given for the Plaintiff: And thereupon Errour was brought; and the ſame matter aſſigned for Errour. But all the Juſtices of the Common-Pleas, and Barons of the Exchequer were of Opinion, that by the Common-Law the Declaration was not good for that reaſon. But it was agreed by them, If in Treſpaſs againſt one, who pleads, That the Treſpaſſe was done by himſelf and one B, to whom the Plaintiff hath releaſed; and the Plaintiff traverſeth the Releaſe; in that caſe for as much as the matter doth not appear upon the Plaintiff's own ſhewing, but comes in on the part of the Defendant, and not denyed by him, the Declaration is good. 2. It was agreed by them all, That now this defect in the principal caſe after Verdict, is helped by the Statute of 18 Eliz. for that it doth not concern ſubſtance, but form onely. The Judgment was affirmed. Mich. 29 Eliz. in the Exchequer-Chamber. *Henley* and *Broad*'s Caſe. *Leon.* 41.

49. In an Action upon the Caſe, the Plaintiff declared, That whereas he and one A. were joyntly and ſeverally bound to a ſtranger for the debt of the ſaid A: which A. dyed, and the Defendant married his wife, and ſo the goods of A. came to his hands: yet the Plaintiff 1. *May* after, which was the day of payment of the money, paid 25 l. for avoiding the forfeiture: and that the Defendant as well in Conſideration of the premiſſes, as that he might peaceably enjoy the goods, promiſed to pay the ſaid ſum *cum inde requiſitus fuerit*. The Jury, upon Iſſue joyned, found the payment of the ſaid ſum, and all the ſpeciall matter. It was moved in ſtay of Judgment, That although the Jury have found ſufficient cauſe of Action; yet if the Declaration be not according, the Plaintiff ſhall have Judgment. And it was ſaid, That here the Plaintiff hath declared upon two Conſiderations; and the Jury hath found but one, *ſcil.* if he peaceably enjoy the goods of the Teſtator. Alſo the Plaintiff declared of a ſimple promiſe, and the Jury have found a Conditionall, *Si gaudere poteſt, &c.* and ſo the promiſe ſet forth in the Declaration, is not found in the Verdict: The Juſtices were of Opinion, That the firſt Conſideration was good, and then the promiſe is good. But the ſecond Conſideration is void, *ſcil.* that the Defendant ſhall enjoy the Teſtator's goods: and therefore the Court was clear of Opinion, That the promiſe found by the Jury, was not the promiſe alledged in the Declaration; and ſo the Iſſue was not found for the Plaintiff. The Judgment was ſtayed. Hill. 31 Eliz. in B. R. *Muſted* and *Hoppers* Caſe. *Leon.* 173.

50. In an Action upon the Caſe, the Plaintiff declared, That the Defendant would not ſuffer him to take *unam Acram Ligni*. It was moved, that the Declaration was not good; for it ought to have been *unam acram boſci*, and not *Ligni*, for that was incertain; but afterwards Judgment was given for the Plaintiff, becauſe damages onely were to be recovered; and the words were uſed onely but inducements to deſcribe the thing for which damages were onely demanded. 23 Car. in B. R. *Long* and *Brunet*'s Caſe. *Styles* 19.

51. In Treſpaſſe, the Plaintiff declared againſt the Defendant, for breaking his houſe, and taking his houſe, and taking away *Quinq; Inſtrumenta ferrea, Anglicè* Fetters. In Arreſt of Judgment it was ſaid, That the Declaration was not good, for the word *Inſtrumenta*, is not a word which ſignifies Fetters, and it is too general a word, and may expreſſe any thing as well as Fetters: And ſuch was the Opinion of the Court; and there is a particular Latine word for Fetters, *ſcil. Compedes*; and the *Anglice*, cannot help it; and the word *Anglicè* in a Declaration, is to be uſed to help words of art, which cannot be expreſſed but onely by an *Anglicè*. Adjudged, the Declaration was not good. Trin. 23 Car. in B. R. *Barker* and *Martin*'s Caſe. *Styles* 19. & 37. See Mich. 23 Car. in B. R. *Lodge* and *Weedens* Caſe. See Paſch. 24 Car. in B. R. *Leving* and *Gamball*'s Caſe. *Styles* 102. acc. See *Styles* 194. the like Caſes. See Hill. 1648. in B. R. *Graves* and *Drakes* Caſe. *Styles* 199. See Hill. 1651. in B. R. *Floyd* and *Morgan*'s Caſe. *Styles* 313.

52. Action upon the Caſe for theſe words; *Thou Mutton-Monger Thief, bring home my ſalles bay*. The Defendant Juſtified, That the Plaintiff had ſtollen a ſheep. Upon Iſſue joyned, it was found for the Plaintiff. It was moved, the Declaration was not good; for that onely it chargeth the Defendant with ſpeaking of the words, and doth not ſay, *dixit de Querente*. It was the Opinion of the Court, that for that cauſe the Declaration was not good: alſo, the word *dixit*, was not in the Declaration; and then they cannot be ſcandalous. Mich. 23 Car. in B. R. *Styles* 70.

53. A. made a Leaſe for years of Lands reſerving rent; the Leſſee made the Defendant his Executor, and dyes; the Executor poſſeſſeth himſelf of the remainder of the Term; after, the Rent is behind, and A. the Leſſor brings debt, and declares againſt him in the *Debet et Detinet*. It was ſaid, It ought to be in the *Detinet* onely: and therefore the Declaration was not good in the *Debet et Detinet*. But it was Anſwered, and ſo Reſolved by the Court, That the Declaration was good, for that it is not for the diſadvantage of the Executor, and the Plaintiff hath his election to bring it either way: and ſo adjudged, 17 Jac. in

Pale

Pake and *Mordyes* Caſe, in C. B. Judgment was for the Plaintiff. Hill. 23 Car. in B.R. *Roys* and *Mers* Caſe. *Styles* 79, 80.

54. In Debt, upon the Statute of 2 E. 6. for not ſetting forth of Tythes; it was moved, that the Declaration was not good; for that it was for ſuch a Quantity of Grain, and doth not ſet forth what ſort of Grain; which is incertain, and ſo it may be for Grain which is not tytheable: for the word *Grain*, extends to Rape-ſeed, Cole-ſeed, Muſtard-ſeed, &c. Alſo, it was not ſaid, that it was in Cocks or Sheaves. But it was Ruled, That the Declaration was certain, and good enough; for that it is ſaid, Grain growing in ſuch a Field, which makes it certain: and the word (*Grain*) in common underſtanding is meant for Corn. 10 Car. in B. R. *Goldſmiths* Caſe adjudged accord. It was adjudged for the Plaintiff. Trin. 24 Car. in B. R. *Southcott* and *Southcott's* Caſe. *Styles*, 108.

55. In an Action upon the Caſe, the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff had paid him ſuch a ſum of money, did promiſe to joyn in a ſurrender of certain Copyhold-Lands; and for not performing, he brought the Action. The Defendant demurred upon the Declaration, for that the Plaintiff doth not alledge that he made any requeſt; for it was not a ſingle act to be done by the Defendant alone. And of that Opinion was the whole Court, that the Declaration was not good, and the Demurrer good. In this Caſe, it was alſo holden by the Court, That the breach was not well aſſigned: For the Plaintiff hath aſſigned a particular way how he ſhould ſurrender, *ſcil.* into the hands of two Tenants of the Mannor: whereas he did aſſume onely to joyn in a ſurrender, which may be in Court, or into the hands of the Lord, as well as into the hands of two Tenants. Trin. 24 Car. in the Kings-Bench, *Freeborn* and *Purchaſe* Caſe. *Styles* 107.

56. In Trover and Converſion of Goods, the Plaintiff declared, That the goods for which the Action was brought, came to the hands of the huſband and wife, and a ſtranger *ad uſum ipſorum*. It was adjudged, the Declaration was not good; for that the goods cannot come to the uſe of the wife, but of the husband onely. Trin. 24 Car. in B. R. *Gallop* and *Simſons* Caſe, *Styles*, 115, 126.

57. Debt brought upon an Obligation made to a woman *dum ſola fuit*: the Action was brought by the husband and wife, and the Declaration is *ad damnum ipſorum*; and adjudged good: for the money due upon the Bond not being paid to the woman whileſt ſhe was ſole, it was a damage to her; and now being Covert, it is a damage to the huſband alſo. Mich. 24 Car. in B.R. *Styles* 134.

58. In Treſpaſſe, *Quare clauſum fregit*, and eating his graſſe with Cattell. Upon Not-guilty, It was found for the Plaintiff, and Judgment; and Errour brought, and the Errour aſſigned was, That the Declaration was uncertain: For the Plaintiff declares of breaking his Cloſe, and eating of his graſſe, *cum quibuſdam averiis*; and doth not ſay with what Cattel. It was Objected, That *averia* is a large word, and ſignifies cattel of divers kinds; and it is too general a word to declare upon. To which it was Anſwered and Reſolved, That where the thing it ſelf is in demand, and an Action is brought for it, as in Trover and Converſion, the thing ought to be particularly named: but here the Action is brought for damages for breaking his Cloſe, and eating his graſſe. The Judgment was affirmed. Mich. 1648. *Brook* and *Brook's* Caſe. *Styles* 170.

59. Treſpaſſe was brought, *Quare filium et hæredem rapuit et maritavit*. Exceptions was taken to the Declaration, becauſe the Plaintiff doth not ſay, *cujus Maritagium ad ipſum pertinet*; and for that he doth not ſay, that the heir was within age. But the Court held the Declaration to be good enough; for the ground of the Declaration is, *Quare filium et hæredem rapuit*; and the other words are onely for encreaſe of damages; and by the Law, the marriage of the Son belongs to the Father. Mich. 1651. *Wood* and *Topham's* Caſe. *Styles* 303.

60. In an Action upon the Caſe, the Plaintiff declared amongſt other things, for plundering him of *Viginti fardellas*; *Anglicè*, Packs. It was ſaid, That the Declaration was good, becauſe he being a Carrier, cannot know what was in the Packs. And Trin. 10 Jac. *Bedingfield's* Caſe was vouched, where an Action was brought for a Library of Books. But it was Reſolved, That the Declaration was not good, but void for the uncertainty; for he ought to have expreſſed what was in the Packs. Mich. 1652. in B. R. *Heath* and *Udall's* Caſe. *Styles* 348. See Paſch. 1653. *Herbert* and *Lanes* Caſe. *Styles* 370.

61. A. brought an Action upon the Caſe againſt B. upon an Aſſumpſit, to pay him ſuch Fees as ſhould be due unto him as his Attorney, in the proſecuting of a Suit for him in C. B; and ſuch moneys as he ſhould lay out in ſolliciting a Suit for him in the Chancery. Upon *Non-Aſſumpſit*, and Judgment thereupon for the Plaintiff; Errour was brought, and aſſigned for Errour, That the Plaintiff in his Declaration did not ſhew particularly what ſums of money he had layd out for him, nor to whom he had paid them. But the Opinion of the Court was, That it was not neceſſary ſo to do, for that might make the Declaration tedious; and if the Plaintiff

Plaintiff ſhould bring any other Action again for any ſuch Fees which he hath recovered, the Defendant may plead the Recovery in barr to the Action. The Judgment was affirmed. Hill. 1653. *Banks* and *Pratts* Caſe. *Styles*, 428.

62. In an Action upon the Caſe upon *Aſſumpſit*, the Caſe was; A. being a Coachman, did by careleſs driving of his Coach, break a Pipe of Wine of B. which lay in the ſtreet; whereby much of the Wine run out, and was loſt: B. apprehended A, who thereupon promiſed, That if he would forbear to ſue him for the Wine, he would pay him as much as he had damnified. A Verdict was found for the Plaintiff. It was moved in ſtay of Judgment, That the Declaration was not good, for that the Plaintiff had not averred how much the Wine was worth which was ſpilt, and ſo he could not tell what ſatisfaction to make the Plaintiff for it, for he knowes not the value. And, 2. There doth not appear to be any requeſt made of ſatisfaction. The Opinion of the Court was, That the Declaration was good, for here doth appear an apparant damage, and the Defendant hath not ſatisfied the damage layd in the Declaration, nor pleaded any tender: and the Defendant is bounden to take Notice of the damage; and the Plaintiff is not bound to give him notice: and the Jury hath made the ſame certain. It was adjudged for the Plaintiff. Trin. 1655. in B. R. *Fowke* and *Preſcotts* Caſe. *Styles*, 458.

63. Error brought to reverſe a Judgment in Dower: The Error Aſſigned was, That the firſt Declaration was of demand *de Tertia parte unius Meſſuagii acr. terræ acras prati. acras paſturæ in H.* all with blanks. But the ſecond Declaration after the imparlance was perfect, *ſcil. de uno Meſſuagio* 100. *Acr. terr.* 40. *acr. paſt.* 40. *acr. prati cum pertinentiis in H.* And thoſe were aſſigned for Errors in the Declaration; And the Opinion of the Court was, That they were Errors materiall; For the firſt is the materiall Declaration, and the ſecond is but a recitall of this Record; which is not helped by the Verdict. Paſc. 15 Jac. in C. B. *Lowry* and *Gatacres* Caſe. *Cro.* 2. Part, 489.

64. In *Aſſumpſit* the Plaintiff declared, Whereas the Defendant was endebted to him 200 l. for a Legacy given to his Wife, he promiſed, That if he would forbear the payment, that he would pay him for it, according to the rate of 10 l. *per cent.* And alledges, That he forbore him from 26. *Auguſt.* 17 Jac. which was the day of the promiſe, untill the time of the Bill exhibited, which was 26 *Jan.* 17 Jac. and that he had not paid the 200 l. nor 9 l. 4 s. for the forbearance for the ſaid time, *Licet ſæpius requiſitus.* Upon *Non-Aſſumpſit* found for the Plaintiff; It was moved, The Declaration was not good, becauſe it is in confideration, that he ſhould forbear, and he doth not ſhew any time. 2. Becauſe it is alledged that 9 l. 4 s. is due for the ſaid time, but doth not ſay *ſecundum ratum* of 10 l. *per* 100 l. and in truth upon the computation, this is more then is due. It was the Opinion of the Court, That for theſe cauſes, the Declaration was not good. Trin. 18 Jac. in B. R. *Bayley* and *Parleyes* Caſe. *Cro.* 2. Par, 603.

65. In a Writ of Error to reverſe a Judgment in C. B. in Treſpaſſe and Ejectment, The Plaintiff declared upon the Imparlance Roll upon a Leaſe made, 21. *Jan.* 10 Jac. *Habendum* 10. *Decemb.* in the ſame year, for four years. And upon the Iſſue Roll, he declared upon a Leaſe made, 30. *Jan.* 10 Jac. *Habendum à viceſimo, Decembris* in the ſame year, for four years; Upon Not-Guilty, the Jury gave a Verdict for the Plaintiff, upon the latter Leaſe made 30. *Jan.* and Judgment given for the Plaintiff; Error was brought. The queſtion was, Whether theſe by intendment might be taken for one and the ſame Leaſe. It was the Opinion of the Juſtices, That the ſecond Leaſe doth vary from the firſt, and therefore cannot be intended to be the ſame Leaſe. And if upon the Imparlance, the Plaintiff doth declare in Debt, and upon the Plea Roll, he declares in Treſpaſſe, and hath Judgment; It is a materiall variance in a Writ of Error to reverſe it. Trin. 14 Jac. in B. R. *Milward* and *Watts*'s Caſe. *Bulſtr.* 3. Part, 229.

66. Debt for 800 l. And declares, for that the Defendant *per ſcriptum ſuum Obligatorium* 20. Eliz. *Cognovit ſe teneri* to the Plaintiff in 800 l. *ſolvendum, cum requiſitus eſſet*: And upon *Oyer*, it appeared to be, That a Statute Merchant was acknowledged, *Solvendum* at the Feaſt of Saint *George* the Martyr, which was a day certain. It was holden by the whole Court, That the Declaration was not good, but it was a fault incurable, and not to be amended. Hill. 9 Jac. in B. R. *Fox* and *Jakes*'s Caſe. *Cro.* 2. Part, 316.

67. In Treſpaſſe, the Plaintiff declared, That the Defendant took and carried away at D. three load of Wheat, being ſevered for Tythes, *contra pacem*, &c. omitting the words *vi et armis*. After Verdict, upon Not-Guilty found for the Plaintiff; It was moved, that the Bill ſhould abate, for that it was an eſſentiall part of the Declaration, which induceth to have a Fine for the King: And of that Opinion was the whole Court, wherefore Judgment was given againſt the Plaintiff. Paſc. 17 Jac. in B. R. *Willis* and *Neilder*'s Caſe. *Cro.* 2. Part, 526. See Hill. 13 Jac. *Webbed* and *Taylor*'s Caſe. A Judgment was reverſed for taking a hog of money, becauſe *vi et armis* was limited, being aſſigned for Error, *ibid.*

68. In

68. In Action upon the Caſe, The Plaintiff declared, Whereas the Defendant recovered againſt him 7 l. 10 s. for Coſts and damages, and upon that Judgment, the Plaintiff paid him 7 l. and the Defendant made him a releaſe of this Judgment, and by Deed Covenanted, that he would withdraw all proceſſe of Execution for that debt: The Defendant againſt his Releaſe, and againſt his promiſe, 20 *Jan.* 15 Jac. ſued a *Capias ad ſatisfaciendum* againſt the Plaintiff for this debt returnable, 3 *Trinit.* following, which he delivered to the Sheriff, who arreſted him, and deteyned him in Priſon, untill he paid the 7 l. 10 s. The Defendant pleaded thereunto, that the Sheriff did not Arreſt him by his appointment, which being a vitious plea, the Defendant took exceptions to the Plaintiffs Declaration: and amongſt many, one was That it appears by the Plaintiffs own ſhewing, that he was not grieved by the proceſs of Execution. For it ſhewed, that the Sheriff arreſted him upon the 20th of *July*, which was a long time after the Retorn of the Writ, ſo it was done without Warrant, and is falſe Impriſonment in the Sheriff, who took him by colour of that proceſs; And for that cauſe, the Court held the Declaration to be ill. It was alſo ſaid, That the Declaration was not good, becauſe he declares upon a Deed, and recites but parcell of it; whereas he ought to ſhew the whole Deed: but that exception was diſallowed by the Court; but for the other exception, It was adjudged for the Defendant. Mich. 16 Jac. in B. R. **Bennis and Guyldleyes** Caſe. *Cro.* 2. Part, 505.

69. *A.* brought an Appeal of Burglary againſt B. and declared that the Defendant *domum manſionalem* of the ſaid A. *felonicè fregit Burgaliter*, &c. The Defendant pleaded Not-guilty: And he was Convicted of the Felony and Burglary: It was moved in Arreſt of Judgment, that the Count was inſufficient, becauſe this word (*Burgaliter*) was not of any ſignification, but the Count ought to be *Burglariter*, or *Burgulariter*. It was adjudged, that for that cauſe, the Count was inſufficient. And it was further Reſolved, That the Count being inſufficient, the party ſhould be diſcharged; And if the Count had bin ſufficient, yet being convict at the ſuit of the party, he ſhould not again be inſpeached at the Kings Suit. Hill. 28 Eliz. in C. B. **Brookes's** Caſe. *Cook* 4. Part, 39.

2. *Where a Count or Declaration which is not good, ſhall be made good by the Defendants Plea, Replication, or otherwiſe*, et è contra.

1. THe Leſſee for life, and the Leſſor joyn in a Leaſe for Term of years by Indenture: the Leſſee dyeth, The Termor doth Waſte, And the Leſſor brings an Action of Waſte againſt him, ſuppoſing to be done *ex dimiſſione ſua propria*, without ſhewing the ſpeciall matter in his Declaration; but the ſame is diſcloſed by the Defendant in his plea in bar to the Action. It was the Opinion of the Juſtices, That the Writ and Declaration are now made good; and that the Plea is not good, for although that it was but a Confirmation of the firſt Leſſor, during the life of the firſt Leſſee; yet now by the death of the firſt Leſſee, it is become in Law, a Leaſe and demiſe made by him. Mich. 7 Eliz. *Dyer.* 234. *Cook* 1. Part, 77. in **Bredon's** Caſe. *Cook* 6. Part, 15. *Treports* Caſe. acc.

2. In Debt upon an Obligation, It behoves, to alledge a place where the Obligation was made, from whence the *Viſne* ſhall come; and if it wants a place, the Obligation is not good. But yet, If the Defendant pleads, That the Obligation was made by dureſſe at B. now the Declaration ſhall ſtand good, becauſe that the Deed is confeſſed. Trin. 28 H. 8. *Dyer.* 15. Mich. 29 H. 8. *Dyer.* 39. acc.

3. A man ſeiſed of black Acre in Fee, and of White Acre for years, by Deed granted a Rent out of both to J. S. for life, with clauſe of diſtreſſe in both. The Rent was behind, J. S. diſtreyned and avowed onely in White Acre. In this Caſe, It was adjudged, That the Avowry was inſufficient. 1. Becauſe in the Avowry, no mention was of any Land, but of the Land in which he had but a Leaſe for Term of years, whereas in his Avowry, he ought to have derived the Rent out of the Land in Feeſimple onely, for out of the ſame onely in Judgment of Law, the Rent for life was iſſuing. And although the Plaintiff in Bar to the Avowry, hath diſcloſed all the truth of the ſpeciall matter, which in the Judgment of Law, maketh for the Avowant, and he hath made his Caſe better for him, then the Avowant hath made it for himſelf; yet the ſame doth not make the Avowry which wanteth ſubſtance, good; for the Avowry, which is in the nature of a Count, ought to contain ſufficient matter, upon which he may have Judg-

ment

ment to have a Retorn of the Cattell, but if the Avowry, or other Count, or Replication, &c. wanteth form, or omitteth circumſtance of time, place, &c. there the plea of the other party may help ſuch imperfections, but cannot ſupply the defect of matter of ſubſtance. 2. Becauſe the Avowant pleaded the Grant out of the Term for years onely, and concluded *virtute cujus*, he was ſeiſed in *Dominico ſuo ut de libero laico pro termino vitæ ſuæ*, which was repugnant to have a Freehold out of a Term for years. Trin. 42 Eliz. in C. B. *Cook* 7. Part, *Butt's* Caſe. 25.

4. Note, It was agreed by *Cook* Chief Juſtice, That when the Plaintiff replyes, and, by his Replication, it appeareth, That he hath not cauſe of Action, there the Plaintiff ſhall never have judgment: But when the Plea in Bar is inſufficient in matter, or amounts to a confeſſion of the point of the Action: And the Plaintiff replyes, and ſhews the truth of the matter, to enforce his cauſe, which in Judgment in Law is not materiall; yet the Plaintiff ſhall have Judgment. For ſometimes Counts are made good by the Bar; Bars by the Replication; Replication by the Rejoynder: For when the Count or Declaration wants time, place, or other Circumſtance, it may be made good by the Bar; And ſo of the Bar and Replication. But when a Count or Declaration wants ſubſtance, no Bar can make it good. And ſo of Bar, Replication, &c. But when the Plaintiff makes Replication, Sur-rejoynder, &c. and by that it appeareth, that upon the whole Record, the Plaintiff hath not cauſe of Action, there he ſhall never have Judgment, although that the bar, and Rejoynder be inſufficient, becauſe the Court ought to judge upon the whole Record. *Cook* 8. Part, 120. in Dr. *Bonhams* Caſe.

5. Covenant, for that Defendant, by Indenture demiſed to the Plaintiff a Meſſuage and certain Lands in C. for 60. years, and Covenanted, That he was then lawfully ſeiſed in Fee of an Indefeaſible. And the Plaintiff layed *in facto*, That at the time of the making of the Indenture, he was not lawfully ſeiſed in Fee. The Defendant pleaded *Non eſt factum*, and found againſt him. In ſtay of Judgment, it was moved, That the Declaration was not good, becauſe the breach is too generall, not ſhewing that any other was ſeiſed, nor any cauſe why the Defendant was not ſeiſed. But the Exception was diſallowed by the Court, becauſe, as the Covenant is generall, ſo the breach may be aſſigned generally, eſpecially as this Caſe is, where the Defendant hath made the Declaration good by pleading *Non eſt factum*. So he allows of the breach, if it had been his Deed. Hill. 12 Jac. in B. R. *Maſcot* and *Ballatts* Caſe. *Cro.* 2. Part, 369. 370.

6. A man made a Leaſe for ſix years. If J. S. ſhall ſo long live, and the Leſſor Covenanted with his Leſſee, That he had a full and lawfull power to demiſe the premiſes, according to the Indenture. The Leſſee brought Covenant, and alledged for a breach, That the Leſſor had not full power and Authority to demiſe the premiſes according to the Indenture: The Leſſor alledged a Concord betwixt them, and that he had payed 20 l. in ſatisfaction of the ſaid Covenant, and all other Covenants, upon which they are at Iſſue, and found for the Plaintiff. Error was brought, and two Errors Aſſigned. 1. That the Plaintiff hath not averred that J. S. was alive at the time of the Commencement of the ſaid Leaſe, nor at the time of the Action brought. But it was Reſolved, That he need not to alledge that, becauſe the Covenant refers to the time of the Leaſe made, and then, be J. S. alive, or dead, the Action lyeth. The ſecond Error was, That the Plaintiff in his Declaration, hath not alledged what perſon had Right, Title, or Intereſt, at the time of the making of the ſaid Leaſe to the Plaintiff, by which it may appear to the Court, That the Defendant had not power to demiſe the premiſes: But it was Reſolved, That the Aſſignment of the breach of the Covenant was good, for he hath purſued the words of the Covenant *Negative*, and it lyeth more properly in the Notice of the Leſſor, to ſay what Eſtate he himſelf hath, than in the Leſſee, who is a ſtranger to it; And therefore the Defendant ought to ſhew what Eſtate he had in the Land demiſed, by which it may appear that he had lawfull power and Authority to demiſe it. *Cook* 9. Part, 60. *Bradſhaw's* Caſe.

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3. *Counts and Declarations, in ſeverall Actions: And where in ſuch Actions, the Count or Declaration ſhall be good, where not.*

1. IN *Ejectione firmæ*, the Plaintiff declared of a Leaſe made to him, 8. *die Maii*, To have and to hold, for 21 years, *exeunte proximè ſequent. virtute cujus poſtea, ſi eodem die*, he entred, The Opinion of the Court was, That the Declaration was good, and that he did not enter as a Diſſeiſor, before the Leaſe began, for the word *exeunte*, is to be underſtood immediately after the delivery, and ſhall not be intended the day after the date; and the word *Poſtea* doth declare, That he did not enter before the Leaſe made. Mich. 11 Eliz. *Dyer.* 286.

2. Inden-

2. Indentures of demiſe were engroſſed, bearing date 26. *die Maii*, 25 Eliz. To have and to hold, for three years, from thenceforth, and the Indentures were delivered at four of the Clock in the Afternoon. 20. *June*, *Anno* 25 Eliz. *ſupradict.* It was Reſolved, That (from henceforth) is as much as to ſay from the delivery, or à *Confectione*: for the making of the Leaſe doth begin from the delivery. 2. Reſolved, That in this Caſe, the day of the delivery of the Leaſe ſhall be taken *inclusivè*, and the day it ſelf is parcell of the demiſe. But if the Leaſe be to begin à *die Confectionis*, or à *die datus*, there the day it ſelf of the date is excluded. Mich. 28 Eliz. in B. R. *Cook* 5. Part, 1. *Clayton's* Caſe.

3. A man by Indenture, dated 4. *Octobet*, 4. and 5. *Ma.* bargained and ſold his Land in Fee, And after in *Octab. Mich.* which was the ninth day of the ſame Moneth, he bargained and ſold the ſame by Fine to another in Fee; And afterwards, 21. *March. tunc proximè ſequent.* which was the laſt day of the ſix Moneths, the Indenture was inrolled in the Chancery. It was a Queſtion, which of the Bargainees ſhould have the Land; And it was the Opinion of the Court, That the firſt bargainee ſhould have it: So ſee, from the date, which are the words of the Statute, or of the ſame ſenſe, or from the day of the date. Mich. 5 Eliz. *Dyer.* 228. *Popham's* Caſe. See Paſc. 34 Eliz. *Franklie* and *Holland's* Caſe. adjudged. acc.

4. The Plaintiff declared in *placito Tranſgreſſionis* againſt the Defendant *pro eo quòd vi et armis cepit et chatellavit*, his Cattel, by force of which, they went into the Land of J. S. for which he took them damage feaſant: and the Plaintiff was inforced to pay him 40 s. for the damage. Upon Not-Guilty, it was moved in ſtay of Judgment, becauſe he did not conclude *contra pacem*: The Bill being *placitum tranſgreſſionis*, and Declaration *vi et armis*. But it was holden by the Court, and ſo Reſolved, That the Action is not brought meerly for chaſing the Cattell, but for an eſpeciall wrong, *ſcil.* for chaſing them into another mans land, ſo as they were there Treſpaſſers: And although the Declaration be *vi et armis*, yet that doth not prove to be an Action of Treſpaſſe; for theſe words may be in Action upon the Caſe: And ſo although the Recitall of the Bill be in *placito Tranſgreſſionis*; yet it is not of neceſſity to be Treſpaſſe onely, but may ſerve for Treſpaſſe upon the Caſe. It was adjudged for the Plaintiff. Mich. 9 Car. in B. R. *Tiſſin* and *Wingfeild's* Caſe. *Cro.* 1. Part, 236.

5. Error brought here upon a Judgment in *Ireland*, in an *Ejectione firmæ*; of a Leaſe made by the Earl of H. there, of 40 Meſſuages, 500. Acres of Lands, 20 Acres of Paſture, 500 Acres of Bog, 100 Acres of Heath, *in villis et territoriis* of B. C. and D. and the Plaintiff there declared accordingly: And Judgment being given for the Plaintiff: Exception here was taken to the Declaration, That 100 Acres of bog was not good, for there is not any ſuch word known. But it was holden by the Court, That it was an uſuall word there, and well known; And if it were not, yet, the Plaintiff might releaſe his demand, as to that Land, and have his Judgment for the reſidue. Another Exception to the Declaration was, becauſe it was *in villis et territoriis*; but that was holden alſo good enough, for that they have one ſenſe, and if not, it is but ſurpluſage for Territories. Mich. 14 Car. in B. R. *Metcarry* and *Eyres* Caſe. *Cro.* 1. Part, 368.

6. Error brought of a Judgment in *Ireland*, in an *Ejectione firmæ*, where the Plaintiff there declared *de piſcaria* in ſuch a River; And becauſe it was not ſaid *terra aqua cooperta*, nor of any Land but onely of a profit Apprender: the Court was Clear of Opinion, that an *Ejectione firmæ* did not lye thereof, no more then of a common Apprender, or Rent; And therefore that the Declaration was not good. But it was ſaid, That perhaps an Aſſiſe would lye of ſuch a Piſcary; becauſe it is *proficuum in certo loco capiend.* Paſc. 12 Car. in B. R. *Herbert* and *Langhlayn's* Caſe. *Cro.* 1. Part, 354.

7. Errour brought of a Judgment in C. B. in an Action upon the Caſe, upon Trover: The Error Aſſigned was, That the Writ was, *Quod fuit poſſeſſionatus de diverſis bonis et catallis ad valentiam* 20 l. and that he loſt them, and that they came to the Defendants hand's. But the Declaration was, *quod fuit poſſeſſionatus de duobus Cadis de Claret-Wine*, and one Hogſhead of White Wine, and doth not mention any value, ſo the Writ and Declaration do not meet, nor doth it appear that the Declaration is founded upon this Writ; and when the Declaration varies from the Writ in ſubſtance, it is not helped by the Statute of 18 Eliz. And although the Statute helps where there is not any Originall, or that the Originall varies in form; yet it doth not where the Originall varies from the Declaration, in matter of ſubſtance: But the Exception was diſallowed by the Court, for the Court held, That *ad valentiam* is not matter of ſubſtance in the Declaration; and, being after Verdict, it is helped by the Statute. Trin. 17 Jac. in B. R. *Bradford* and *Ramſey's* Caſe. *Cro.* 2. Part, 653.

8. Debt upon the Statute of 32 H. 8. cap. 9. of pretenſed Titles. The Plaintiff Declared, That whereas it was enacted, That no perſon or perſons of what Eſtate, &c. *prout in Statuto*. That the

Defendants had Granted, bargained, demiſed, and to Farm let, for years, to A. and B. a Meſſuage, and 11. Acres of Lands to the ſame appertaining, in the County of G. of the value of 80 l. *per annum*; of which Lands and Tenements, the Defendants nor any of them, nor any of their Auncеſtors, nor thoſe from whom the Defendants claimed, were in poſſeſſion of them, nor of the Reverſion, nor Remainder, nor received the Rents and profits of them by the ſpace of a year before the ſaid bargain, grant, and demiſe thereof made. Upon this Declaration, the Defendants demurred in Law; divers Exceptions were to the Declaration. 1. That the Plaintiff had miſ-recited the Statute in the Date of it. 2. Had not declared the certainty of the years. 3. That the Declaration was not good, becauſe that Land cannot belong to a Meſſuage. 4. That the Declaration was double. 5. There wanted an Averment, That the Leſſors had a pretended Title: But it was Reſolved, For the 1. That the Plaintiff need not recite the Statute certain, becauſe it was a generall Law that the Juſtices are to take notice, and therefore the miſ-recitall not materiall. For the 2. Their Opinion was, That the Declaration was ſufficient, becauſe the Plaintiff is a ſtranger to the Leaſe, and by preſumption of Law, cannot have knowledge of it. 3. They all agreed, That Lands could not belong to a Meſſuage; but yet they agreed, That the Declaration as to that, was good, for that the quantity of the Land is expreſſed, *ſcil.* 11. Acres, and then the words appertaining to the Meſſuage, are void, and then it is a Meſſuage and 11. Acres of Land, in which Caſe the Declaration is good enough. And the better Opinion of the Juſtices was, That the Declaration was not double. Hill. 7 E. 6. *Plow. Com. Partridge* and *Strange's* Caſe. 78. to 89.

9. Debt upon the Statute of 2 E. 6. cap. 13. for not ſetting forth of Tythes. The Plaintiff declared, whereas 30. *Sept.* 6 Jac. he was Proprietor of the Rectory of C. and of all the Tythes within the ſaid Pariſh, and whereas the Defendant the firſt of *Sept.* 5 Jac. was poſſeſſed for divers years to come, of 300 Acres of Land within the ſaid Pariſh, whereof 130 Acres were ſowed with Wheat 40 with Peaſe, 100 with Oats; And all Tythes in *ſpecie* for fourty years before the ſaid Statute were uſually paid: And whereas the Defendant the ſaid 30 *Sept.* 6 Jac. *ſic inde poſſeſſionatus exiſtens*, and all the Grain *ad tunc creſcens*, upon the ſaid Lands, did cut down, and carry away, without ſetting forth of Tythes, and without agreement with the Plaintiff *ad tunc proprietar.* of the ſaid Rectory; And ſet forth, that the Tythe of the ſaid Corn, ſo carried away, was worth 55 l. and demanded the treble value 165 l. The Defendant pleaded, That the Plaintiff himſelf ſowed that Corn, being poſſeſſed of the ſaid Land; and 5 Jac. ſold the Corn to the Defendant, and traverſed, that he was poſſeſſed from the time, &c. Upon which it was demurred, and adjudged for the Plaintiff, and 465 l. that he ſhould recover. Upon which, Error was brought; The Errors Aſſigned in the Declaration, were many; and the Declaration was not good. 1. Becauſe all the matter of the Declaration is by way of recitall, and the offence is not alledged by matter in fact, that he carried away the Corn, and that the Tythes were not ſet forth. But Reſolved, It is ſufficiently alledged, and as well as if it had bin by expreſſe charge, becauſe the Action is brought for not payment of treble value, and the other is but to ſhew, how it came due. Another Error Aſſigned; becauſe he ſheweth, he was *Proprietarius*, but doth not ſhew how, nor any Title: That, by the Court, was ſaid, to be but conveyance to the Action, and therefore *non allocatur*. 3. It is not ſhewed, by whom the Corn was ſowed: *ſed non allocatur*; for it is not materiall by whom it was ſowen, the Defendant being owner at the time of the reaping of it. 4. There is not any time alledged of the cutting and carrying it away. The Court was of Opinion, that the Declaration being, That he 30 *Sept.* 6 Jac. *ſic poſſeſſionatus exiſtens* of the ſaid Land, *Meſſuit granum predict.* Although he doth not ſay, *ad tunc et ibidem*, yet it is coupled with the former, by the word [Or] and hath reference to the former time: And the Court held the Law to be, That if one will buy Corn ſtanding of the Proprietor of the Rectory, if he hath not ſpeciall words to diſcharge it, he ought to pay Tythes of it. The Judgment was affirmed. Mich. 10 Jac. in B. R. *Moyle* and *Ewer's* Caſe. *Cro.* 2. Part, 361, 362. See Mich. 14 Jac. in B. R. *Sands* and *Sandford's* Caſe. agreeing with *Moyle* and *Ewer's* Caſe. *Cro.* 2. Part, 437.

10. Error of a Judgment in *Northampton*, upon a Writ of Covenant. The Error Aſſigned was, That the Declaration there was ill, becauſe he declares of a Covenant, whereby the Defendant covenanted to find the Plaintiff with meat, drink, apparell, and other neceſſaries, and doth not ſhew in particular what other things were neceſſary; alſo, the breach was aſſigned as general; and doth not ſhew what other things were neceſſary. It was the Opinion of the Court, That the Declaration was not good; and therefore Judgment being there upon *Nihil dicit*, and entire damages given, the Judgment was reverſed. Trin. 16 Jac. in B. R. *Mills* and *Aſtell's* Caſe, *Cro.* 2. Part, 486.

11. Errour of a Judgment in C. B. in a Writ of Covenant: The Errour aſſigned was, That the Declaration

Declaration was not good; For it was upon an Indenture, which recites, *Quod cum per Indenturam Teſtatum exiſtit*, That B. enfeoffed the Plaintiff of ſuch Land, and therein Covenanted to diſcharge him, and ſave him harmleſſe from all former Dowers and Joyntures or Incumbrances: and ſhews, That F. was ſeiſed in Fee of the Land, before B. had any thing therein, and enfeoffed B; who enfeoffed H. the Plaintiff; and that the Wife of F. brought a Writ of Dower againſt him, and recovered. The Defendant demurred in C. B; and there adjudged for the Plaintiff. Errour brought, and Errour aſſigned, was, That it is not alledged by matter in fact that he enfeoffed him, and that he was ſeiſed in Fee; but onely *Quod Teſtatum exiſtit*, which is onely by way of recital; and therefore not good: But the whole Court Reſolved to the contrary. And the difference is, where it is by way of Declaration; and where it is by way of Barr, or Replication: For they held, That in the Declaration, *Teſtatum exiſtit* is ſufficient to induce the Action, and to aſſign the breach. The Judgment was affirmed. Trin. 17 Jac. in B. R. **Bulivant** and **Holmes** Caſe. *Cro.* 2. Part, 537.

12. *Aſſumpſit*; the Plaintiff declared, In conſideration the Plaintiff would pay to the Defendant ſuch a ſum of mony, the Defendant promiſed to take his Son to be his Apprentice for ſeven years, in ſuch a Trade, and to find him meat, drink, and apparell *durante termino prædict.* And Aſſigns for breach, That he did not find him meat, drink, and Apparell; And never avers, That he put him Apprentice, nor that the other accepted him: Upon Non-Aſſumpſit found for the Plaintiff, this matter was moved, that the Declaration was not good: And ſuch was the Opinion of the whole Court, for he ought to ſhew that he was Apprentice, otherwiſe he is not to find him meat and drink. And if it be alledged, that it ſhall be intended, foraſmuch as the breach is Aſſigned in not finding him meat and drink *durante termino Apprenticii*; which ſhews he was an Apprentice, and the Defendant admitting it by pleading Non-Aſſumpſit: Yet the Court held, That in regard he had not ſufficiently entituled himſelf to the Action, although the Defendant hath pleaded Non-Aſſumpſit, and it is found againſt him; yet the Plaintiff ought not to have Judgment. Trin. 14 Jac. in B. R. rott. 1304. *Talkorn* and *Wriggs* Caſe. *Cro.* 2. Part, 406.

13. Treſpaſſe was brought *Quare clauſum fregit & piſces ſuos cepit*: And in his Declaration he did not ſet forth the number, nor the nature of the Fiſhes. It was adjudged that the Declaration was inſufficient; And although that the Verdict found for the Plaintiff upon Not-guilty pleaded, yet when the Declaration is inſufficient, the ſame doth not make the Verdict good, and Declarations ought to reduce the generality of the Writ to particularity. 2. It was Reſolved, That the omiſſion of the Number and Nature of the Fiſhes was matter of ſubſtance, which was not remedied by the Statute of 18 Eliz. Mich. 26 Eliz. in B. R. *Cook* 5. Part, 85. *Player's* Caſe.

Courts.

1. *Of the Courts of Record at* Weſtminſter: *Their ſeveral Powers and Juriſdictions: Of Acts and Pleadings there; And where the Courſe and Preſidents of the ſaid Court ſhall be taken into the Nature of a Law: And what are ſaid to be Courts of Record: What not: And the different proceedings between the* Kings Bench, *and* Common-Pleas.

FIrſt, Note in the Caſe of the Lord *Sanchet*, upon a Condition of *Oyer* and *Terminer*; It was ſaid, That the Kings Bench is the higher Court of ordinary Juſtice within the Realm, and above the Authority of Juſtices of Goal-Delivery, and Commiſſions of *Oyer* and *Terminer*; and is more then the Eyre; for they may examine the Errors of the Juſtices on Eyre, Goal-Delivery, and Oyer and Terminer: And the Juſtices of the Kings Bench are paramount all others, and cannot be included within inferiour Courts, as Juſtices of Goal-Delivery, or Juſtices of Oyer and Terminer: But it was Reſolved, That although the power of the Juſtices of the Kings Benches is ſo large and ſo great: Yet the Juſtices of the Kings Bench are the Soveraign Juſtices of Goal Delivery, and of Oyer and Terminer, and they are included within the ſaid words: And there the Juſtices of the King's Bench, according to the Statute of 2 Eliz. 6. Cap. 24. Writ to the Juſtices of Oyer and Terminer, and Goal-Delivery in *London*, to certifie a Record of Indictment upon the Arraignment of the Principal in *London*, who certified the Record accordingly. And in that Caſe, it was alſo holden by the Court, That if an Indictment of Forcible Entry be removed into the Kings Bench, the Juſtices of the Kings Bench, ſhall

there award Reſtitution: and yet the Statute of 8 H. 6. is, and ſpeaks onely of Juſtices of Peace; but the Reaſon is, becauſe they have the Soveraign and Supream Authority in ſuch Caſe. And ſuch is the Juriſdiction of the Juſtices of the Kings Bench, That Commiſſioners of Oyer and Terminer cannot ſit in that County, where the Kings Bench is, ſitting the ſaid Court of Kings Bench. And therefore it was Reſolved, That the Lord *Sanchet*, in the Term time could not be Indicted, Arraigned, and Convicted at Newgate before Commiſſioners of *Oyer* and *Terminer* in the County of *Middleſex*. Trin. 10 Jac. *Cook* 9. Part, 118, 119. The Lord *Sanchers* Caſe.

2. An Information was Exhibited into the Kings-Bench, by the Kings Attorney-General, againſt Sir *John Eliot*, *Denzel Hollis*, and *Ben. Valentine*, Knights and Burgeſſes of Parliament, That the ſaid Sir *John Eliot*, *machinans et intendens omnibus viis, et modis ſeminare et excitare*, diſcord and ſeditions, as well *verſus Regem, Magnates, Prælatos, Proceres, et ſubditos Regis, et totaliter deprivare et everterè regimen et gubernationem Regni Angliæ tam in Domino Rege, quàm in Conciliariis et Miniſtris ſuis cujuſcunq; generis*; and to induce Tumults and Confuſion in all Eſtates; that all the Kings Subjects ſhould withdraw their affections from the King, 3. *Febr.* 5 Car. in the Parliament, falſly and malitiouſly uſed theſe words, *viz.* The King's Privy-Councel, his Judges, and his Counſel Learned in the Law, have conſpired together, to trample under their feet the Liberty of the Subjects of this Realm, and the Liberties of this houſe And afterwards, 2. *Martii*, *Anno* 5 Car. the King having appointed and ſignified his pleaſure to the Houſe of Commons for the Adjornment of the Parliament; the Defendants, 5. Car. 2. *Martii*, maliciouſly conſpired amongſt themſelves to diſtract the Commons, That they ſhould not Adjourn according to the Kings pleaſure ſo ſignified: and to the intent and purpoſe aforeſaid, in the ſaid Houſe of Commons, had ſpoken thoſe falſe and ſeditious words: and the Speaker endeavouring to get out of the Chair, according to the King's Command, They, *vi et armis, manu forti et illicitâ*, forcibly detained him in the Chair; and afterwards, he being put out of the Chair, they *violenter, manu forti et illicitâ* drew to the Chair, and thruſt him in, whereupon was great Tumult and Commotion in the Houſe, to the Terrour of the Commons there aſſembled, againſt their allegiance, in contempt and diſinheriſin of the King, his Crown and Dignity. The Defendants pleaded to the Juriſdiction of the Court, becauſe it is for Offences done in Parliament, and ought to be there examined, and puniſhed, and not otherwiſe. Upon which it was demurred. In this caſe it was adjudged, That they ought to Anſwer: For the Charge is for Conſpiracy, Seditious acts and practiſes, to ſtop the Adjournment of the Parliament, which may be examined out of Parliament; and the Kings-Bench might take Conuſance of it, and puniſh them: whereupon afterwards, they refuſing to Anſwer, Judgment was given againſt them; That Sir *John Eliot* ſhould be committed to the Tower, and pay 2000 l. Fine: and againſt the others, That they ſhould be Fined and Impriſoned, and find Sureties. Hill. 5 Car. in B. R. The King and Sir *John Elliot* and *Hollis* Caſe. *Cro.* 1. Part, 130, 131.

3. A Prohibition was prayed to the Court of Requeſts. The Caſe was; One, by his Will, deviſed a certain Legacy in money, and afterwards ſaid to his Executors, I have by my Will given ſuch particular Legacies; I would have you to encreaſe the ſame to ſuch a ſum: This by the Civil Law was held a good Legacy: and if for this Legacy there be any remedy to be had in the ſpiritual Court, and the Court of Requeſts will encroach upon the Juriſdiction of other Courts, and ſo draw the matter *ad aliud examen*: Whether the Kings-Bench might not correct it, was the Queſtion? It was Reſolved, That if the Court of Requeſts might not hold plea thereof, this Court (notwithſtanding it ſelf cannot hold plea thereof) may prohibit that, and other Courts from holding plea of ſuch things: For that this Court is to correct all Errour and proceedings in them. Paſch. 12 Jac. in B. R. *Benſon* and *Cartwright's* Caſe. *Cro.* 2. Part, 345.

4. Severall Informations were Exhibited againſt A. and B. for ſeveral Eſcapes out of the Priſon of the Gate-houſe: The Caſe was; The ſaid A. and B. were by the Kings Command committed to Priſon for miſdemeanour alledged againſt them in the Houſe of Commons in the laſt Parliament: Both of them being by Order of this Court to be removed to the Gate-houſe: The Warden of the Marſhalſee, where they were before impriſoned, ſent A. to the Keeper of the Gate-houſe, who received him to his houſe adjoyning to the Priſon, but being no part thereof: and afterwards Licenſed him with his Keeper to go to his Chamber in *Grayes-Inne*: B. alſo was delivered to the Keeper of the Gate-houſe; but, being ſick, he could not be delivered and removed to the priſon; but there remained in his Lodging in Fleetſtreet: Afterwards, the Plague encreaſing in *London*, they with the Licence of the Keeper retired to their ſeverall houſes in the Country for the ſpace of 6. Weeks; but they were never in the old priſon, unleſs when ſince they withdrew themſelves to a Cloſe-Stool, which was placed near the Parlour, and was part of

of the old Prison of the Gate-house: And all this appearing upon Evidence, It was a Question, whether this receipt and continuance in the new house onely, It may be said, that they never had been imprisoned. It was Resolved by the Court, That their voluntary retirement to the Close-stool made them prisoners: Also, that in this and all other cases, although a Prisoner departs from prison with his Keeper's Licence, yet it is an Offence as well punishable in the Prisoner, as in the Keeper. And it was Resolved, That the Prison of the Kings-Bench is not any Local Prison confined onely to one place, and that every place where any person is restrained of his Liberty, is a Prison. Hill. 6 Car. in B. R. Sir *Miles Hobart*, and *William Stroud*'s Case. *Cro.* 1. Part, 152.

5. A *Certiorari* was directed to the County Palatine of *Chester*, to remove a Cause into this Court; They made Return, That they have Jurisdiction of the Cause. It was said, That Return was not good: For that this Court hath Jurisdiction over all the Courts of *England* in Writs Mandatory; and an Act of Parliament doth not take away the power of this Court, if it run not in the Negative, and the Cause may be well tryed here, notwithstanding it be concerning a matter which ariseth in the County Palatine. And it appears in this case, That the Mayor and Citizens of *Chester* are parties, and so they would try their own case; which they ought not to do. It was the Opinion of the Court, For that it did not appear by the Return, that the matter of the Suit did arise within the Jurisdiction of the City of *Chester*, so as they have not shewed any Cause why they should have Jurisdiction, that they should make a better Return. Hill. 1650. in B. R. *Alleyn*'s Case. *Styles* 255.

6. An Action of Debt was brought for 5 l. for selling Wine without Licence; A Verdict was found for the Plaintiff. It was moved in stay of Judgment, That the Action was not well brought as it ought to be by the Statute of 18 Eliz. and that this being a popular Action, cannot be sued by Bill, but by Original. But it was Resolved, That the Action was well brought, for a Writ and a Bill is all one in this Court; and it is the common practice in this manner to sue in this Court: and it doth not appear, Whether the said Statute of 18 Eliz. meant to oust this Court of its Jurisdiction, but it is left at large in the Statute; and we conceive it to be an Original Action: and *Platts* Case is, That an Original Action may be by Bill: and the constant course here is, That the party being *in Custodia Marischalli*, he may proceed against by Bill: and this Court is not to be excluded from its Jurisdiction by obscure words in the Statute: wherefore it was adjudged for the Plaintiff. Trin. 1653. in B. R. *Hill* and *Dechairs* Case. *Styles* 381.

7. A Writ of *Mandamus* out of this Court was directed to the Master & Fellows of *Gonvil* & *Caius* Colledge in *Cambridge*, to restore one to an Ushers place of a Free-School in *Cambridge*, of which they were Visitors. It was said, That a School-master's place was a Temporal Office, and an Action upon the Case lyes for the party to recover it; and therefore a *Mandamus* which is an extraordinary course, ought not to be granted. And it was said, That the Master and Fellowes were no Corporation, to whom the *Mandamus* could be directed: and *Boreman*'s Case of the Middle-Temple was cited, who prayed a *Mandamus* to be restored to that Society; where it was holden, That the Innes of Court are not Corporations, but voluntary Societies; and therefore could not be granted to them to restore him. On the other side it was said, That it was proper to have a *Mandamus* in this case: for a School-Master is a publique Office. And this Court hath Jurisdiction to reform all Grievances, and to keep other Jurisdictions in good Order, that they do not intrench one upon the other, and here is no Visitor to whom the party may appeal; and *Mandamus* hath been granted to prefer one to the place of a Town-Clerk: and so 5 Car. to the place of a Parish-Clerk: and *Eslancks* Case, to the place of a Common-Councel-man of *London*: and here the party hath an Imployment for life, though he hath not a Freehold: The Court doubted the Case; for that this being but a private School, and the party a School-Master but *durante bene placito* removeable at pleasure; and that he had not a Freehold in it: and conceived, That the Visitors might remove the Master of the School, if he observe not the rules of Government of the School; and it is as reasonable to turn him out, as receive him in: and therefore no Judgment was given in the Case. But the matter was Referred to the Lord Chief Justice *St. John*, Chancellor of the University of *Cambridge* where the School is. Trinit. 1655. in B. R. The Protector and *Craford*'s Case. *Styles* 457.

8. Note: If the Court of Common-Pleas hold plea in an Appeal of Death, Robbery, or any other Appeal; and the Defendant is attainted, It was agreed by the Justices, that 'tis, *Coram non Judice*. But if the Court of Common-Pleas in a plea of Debt, doth award a *Capias* against a Duke, Earl, &c. which by the Law doth not lye against them; and the same appeareth in the Writ it self; Yet if the Sheriff arrest them by force of the *Capias*, although the Writ be against Law, notwithstanding, in as much as the Court hath

hath Juriſdiction of the Cauſe, the Sheriff is excuſed: So if the Court of Common-Pleas hold plea in Debt, Treſpaſſe, &c. without an Original, it is not void; for they are Judges of theſe pleas: and it cannot be ſaid, That the proceeding is *Coram non Judice*. *Cook* 10. Part, 76. in the caſe of the Marſhalſee. See 38 H 8. *Dyer* 60. 19 E. 4. 8. acc.

9. A Writ of Priviledg was ſigned by all the Juſtices of the Common-Pleas, for J. S. a Clerk under the *Cuſtos Brevium*, to free him from being a Souldier, reciting, That it is the Cuſtome and Priviledge of the Court, time whereof, &c. That neither the Attorneys nor Clerks of the Courts ſhould be preſſed for Souldiers, nor elected to any other Office *ſine voluntate ſuâ*; but ought to attend the ſervice of the Court. Trin. 1 Car. in C. B. *Venables* Caſe. See *Cook*, *Book Entries*, 436. acc.

10. A Servant to Serjeant *Headley* uſually attending on him was arreſted by a proceſs out of the Court of the Marſhalſee; whereupon he obtained a Writ of Priviledge out of the Common-Pleas, reciting, That Serjeants at the Law who are attending that Court, and their Servants ordinarily waiting upon them, ought to enjoy the priviledge to be ſued in that Court; and that the Writ of Priviledg being delivered to the Steward of the Court of Marſhalſee, he would not allow thereof. This matter being moved to the Court, ſuppoſing Serjeants at Law ought not to have ſuch priviledg for them and their Servants. But the Opinion of the Juſtices was, That they ought to have the Priviledg, for they are properly attendant at this Barr, and none others are admitted to practiſe there. Whereupon the Writ was allowed, and the party diſcharged of the Suit in the Court of the Marſhalſee. Mich. 3 Car. in C. B. *Cro.* 1. Part, 59.

11. *Ejectione Firme* of a Leaſe of a Meſſuage in *Oxon*. The Defendant pretended, That he being a Schollar in *Oxford*, and a priviledged perſon ought to be ſued there, before the Vice-Chancellor of *Oxon*, *ſecundum morem univerſitatis*, according to the Charters granted to the Univerſity in 3 R. 2. & 14 H. 8. confirmed 33 Eliz. And ſhewed, That they had Conuſans of all Suits, Contracts, Covenants, Quarrells, except concerning Freehold: And ſhewed an old Record of 22 E. 1. where a plea of Covenant was brought in the Court of the Vice-Chancellor of the Univerſity of *Oxford*, by reaſon of a Covenant made before that time: And the Writ of Covenant was, That he ſhould enjoy ſuch a houſe for a year. And becauſe the Court of Common-Pleas granted a Prohibition to ſtay the ſaid proceedings in that Court in the Suit, This Charter being ſhewed, and it appearing that the Action was brought upon the Contract, and not *pro Domibus*, a Conſultation was granted: But in the principal caſe, the Juſtices denyed to grant a Conſultation; and affirmed, That the Vice-Chancellor had not any Juriſdiction, nor might hold plea thereof; becauſe in this Action he ſhall recover the poſſeſſion, and ſhall have an *Habere facias poſſeſſionem*, and thereby he that hath a Freehold, may be put out of poſſeſſion. And it is not like the Record ſhewed, For there it is onely an Action of Covenant, where damages onely are to be recovered. Mich. 3 Car. in C. B. *Cro.* 1. Part, 62. *Halley*'s Caſe.

12. The King, ſeiſed of a Mannor in Fee in the right of his Crown, granted Copyhold Lands parcell of the Mannor to one in Fee; and afterwards by his Letters Patents under the Seal of the Exchequer, made a Leaſe of thoſe Lands for 21. years; The Leſſee granted his Eſtate to the Copyholder, The King reciting the Leaſe for years, granted the Reverſion in Fee: The Leaſe for years expired, the Grantor of the Reverſion entred upon the Copyholder, It was adjudged, That his Entry was lawful. And, amongſt other things, it was reſolved, That the Leaſe under the Exchequer-Seal was good by the common uſage: For the Cuſtomes of the Kings Courts are as a Law; and the Common-Law takes Notice of them: and a Leaſe by order of the Exchequer by the word *Committimus*. *Habend. et Tenend. et Reddend.* ſuch a Rent is good by the ancient uſe of that Court. Mich. 29 Eliz. in C. B. *Lanes* Caſe. *Cook* 2. Part, 16.

13. Errour in the Exchequer-Chamber, of a Judgment given in the Kings-Bench in *Ejectione Firme*; The Queſtion was, Whether it might be examined in this Court? The Court was of Opinion, That they might not examine it, being after the Judgment entred. It was then moved, Whether an Errour in fact be aſſignable in the Exchequer-Chamber upon the Statute of 27 Eliz. becauſe the Statute onely gives authority to Examine Errours in Law. But the Opinion of the Court was, That it was well aſſignable; for the Statute giving the Writ of Errour, gives authority to examine as well Errours in Deed, as Errours in Law. It was then moved, How it ſhould be tryed? It was ſaid, That it had been tryed by *Niſi Prius* out of the Exchequer-Chamber, and divers Preſidents ſhewed to that purpoſe: Some of the Juſtices doubted of it, that it was not the Intent of the Statute to give them ſuch Authority: But the better Opinion of the Court doubted of it, but inclined it might be done, becauſe the Statute giving authority to reverſe or affirm, implyes allowance of the means to do it. It was adjourned. See Mich. 43 Eliz. rot. 335. *Rewe* and *Longs* Caſe. Errour in

in the Exchequer-Chamber in fact aſſigned and tryed by *Niſi Prius*, and found, and for that cauſe reverſed. See Hill. 16 Jac. rott. 75. Errour in fact aſſigned there, and tryed by *Niſi Prius*. Mich. 10 Car. rott. 169. *Smith* and *Merchants* Caſe, acc. Mich. 14 Car. in B. R. *Cro.* 1. Part, 369, 370.

14. The Lord Viſcount *Say* having had Judgment to recover, a Writ of Errour was brought to remove the Record into the Exchequer-Chamber upon the Statute of 27 Eliz. cap. 5. which gives Writ of Errour upon a Judgment given in Actions upon the Caſe, Debt, Detinue, Accompt, *Ejectione Firme*, or Treſpaſſe. It was moved, That the Writ of Errour is not allowable, becauſe it is given in 7. ſeverall Actions there enumerated, and is not allowable in any other Action, as in a *Replevin*, *Scire facias*, &c. And although it be here in the principal caſe termed an Action upon the Caſe, yet it is more then an Action upon the Caſe; for the Action is of a higher nature, being founded upon the Statute of 2 R. 2. and is for the King and party; and this Action is out of the Statute; for the Statute is intended of Actions upon the Caſe; and this Action is *Scandalum Magnatum*, and grounded ſpecially upon the Statute. And it was ſaid, That after that Statute, no Writ of Errour hath been brought upon ſuch Actions. And it was ſaid, That if the Lords in Parliament had intended, that this ſhould have been examined by a Writ of Error any where but onely in Parliament, they would never have agreed unto: And of the ſame Opinion were the Juſtices. Mich 4 Car. in B.R. The Lord Viſcount *Say* and *Stephens* Caſe. *Cro.* 1. Part, 101. See Mich. 8 Car. in B. R. *Nevill* and *Sooths* Caſe, That Errour did not lye upon a Judgment in a *Scire facias* in the Exchequer-Chamber; the ſame not being one of the Actions mentioned within the Statute of 27 Eliz.

15. In a Writ of Errour brought by *Somerſet* againſt *Rawlyns*; Errour was aſſigned, becauſe that *Rawlyns* the Plaintiff was an Enfant, and was admitted by Guardian, and no Record thereof made, but onely recited in the Record, *Jo. R. per A.B. Gardianum ſuum in hac parte ſpecialiter admiſſum queritur, &c.* All the Juſtices of the Common-Pleas, and Barons of the Exchequer, in the Exchequer-Chamber, commanded, That the Preſidents of the Kings-Bench ſhould be ſearched, for without Preſidents *prima facie*, it ſeemed to them, That there ought to be a Record made of the ſaid Admittance by Guardian. And upon ſearch of the Records in the Kings-Bench, many were ſhewed to the Juſtices, where Enfants had ſued by Guardians in the ſame Court, and no Record made of their Admittance by Guardian, but ſuch a Recital as aforeſaid. Wherefore they all *una voce*, in regard of the ſaid Preſidents which in this caſe make a Law in Court diſallowed the Errour, although that Preſidents in a ſmall number were ſhewed, Where Record was made of the like Admittance by Guardian of an Enfant in the Kings-Bench, as is done in the Common-Pleas. Mich. 30 Eliz. in B.R. *Cook* 4. Part, 53, 54. *Rawlyns* Caſe.

16. In Debt againſt the Executors of *Charles* Earl of *Nottingham* for 200 l. The Defendant appeared, and Judgment againſt them, and 4 l. Coſts *de bonis Teſtatoris, &c. Et ſi, &c. tunc de bonis propriis* for the 4 l. for Coſts. This being in *London*, a *Fieri facias* was awarded to the Sheriffs of *London*, who returned *Nulla bona Teſtatoris*; and for the 4 l. *Nulla bona*. The Plaintiff afterwards upon a *Teſtatum* that goods were ſold and eſſoyned, procured a new *Fieri facias* reciting the Judgment and the former Writ, and the Return thereof, *Et quod Teſtatum exiſtit*, that they had goods ſufficient, and had eſſoyned and ſold them. Wherefore the Sheriffs were commanded, That they by Inquiſition *vel alio modo quæviſlibet quo conſtare poterit*, ſhould enquire if they had ſold or eſſoyned the ſaid goods; and if it were ſo found, That *Scire faciant* the Executors to anſwer thereunto. The Sheriff returned the Inquiſition finding the ſale and eſſoyner of the goods, The Court adjudged the Writ good. Whereupon they imparle, and afterwards Judgment was given by *Nihil dicit*, that the Plaintiff ſhould have Execution *de bonis propriis*. Whereupon Errour was brought: Error aſſigned was, *in redditione Executionis*, becauſe the *Scire facias* in the ſaid Writ was, *Si conſtare poterit per Inquiſitionem vel alio modo*, That they had waſted the goods *Quod Scire faciant eis ad reſpondendum* to the *Deviſtavit*, and ſhew cauſe wherefore Execution ſhould not be *de bonis propriis*. This was ſaid and holden to be No Error, being a Judicial Writ, which may be well framed as the Court ſhall appoint; And ſuch writs are often framed according to the diſcretion and direction of the Court, & theſe Writs have been uſually granted in the Common-Pleas; and therefore we ought to adjudge it to be the Law of the ſaid Court: And the Cuſtomes and Preſidents of all Courts are the Law of the ſame Court: And Conſonant Judiciall proceedings are to be accounted Law: and therefore in the Common-Pleas it is the uſual Courſe and Law to have but one *Scire facias* to have Execution; which being returned *Nihil*, the party is to have Execution. But in the Kings-Bench, the courſe is to have two *Scire facias*; and that if Execution be taken upon a new *Scire facias* awarded, and *Nihil* returned, it is Errour, and therefore may be reverſed, becauſe it is contrary to the courſe of the Court, Hill. 14 Car. in B.R.

The

The Lord *Monſon* and *Barnes* Caſe. *Cro.* 1. Part, 379, 389.

17. Debt upon an Eſcape againſt the Sheriff: he declared, That J. S. and others was endebted to him by a Recognizance acknowledged in Chancery of 200 l. whereupon he ſued a ſpeciall *Scire facias* in Chancery, and had Judgment by default after two *Nihils* retorned, and *Elegit* ſued; which being retorned *Nihil*, he ſued a *Capias ad ſatisfaciendum*; and thereupon J. S. was taken in Execution; and afterwards at *London* ſet at large. The Defendant did Demur upon the Declaration. It was ſaid, That this Execution by a *Capias ad ſatisfaciendum* was good, although it be in Chancery upon a Recognizance, where no *Capias* lyes at firſt, and ſo hath alwayes been the courſe there uſed, which is to be allowed; for the courſe of every Court is to be obſerved: and although the granting of the *Capias* be Errour, yet the Sheriff is not to take advantage of it, but is good againſt him, and he is chargeable for the Eſcape: and it was adjudged accordingly, 36 Eliz. in the Exchequer-Chamber in *Paſton* and *Ognell*'s Caſe. And of ſuch Opinion were the whole Court in the principall caſe. Paſch. 44 Eliz. in B. R. *Weaver* and *Clifford*'s Caſe. *Cro.* 2. Part, 3.

18. Errour of a Judgment in the Common-Pleas by the bayl: The Errour was aſſigned in the Execution againſt the Bayl, That no *Capias* was awarded againſt the Principal. It was ſaid, It was a Queſtion ſtirred in the Common-Pleas, Whether an Execution might be in the Common-Pleas againſt the bayl, though no *Capias* was againſt the Principal: And that *Hobart* Chief Juſtice there was of Opinion, that it might, becauſe the Recognizance by the bayl in the Common-Pleas, differs from the courſe of the bayl in the Kings-Bench; for there the Recognizance is in a ſum certain. But all the other Juſtices there held, That it is all one in the Common-Pleas, and in the Kings Bench, That a *Capias* againſt the Principal ought to be taken forth, and retorned, *Non eſt Inventus*; otherwiſe, no *Scire facias* ought to be againſt the bail: For if the Principal be taken by the *Capias*, or that he render himſelf to priſon upon the Judgment, then no Execution ought to be againſt the Bayl. And of that Opinion was all the Court here in the principal caſe. Mich. 13 Car. in B. R. *South* and *Griffiths* Caſe, *Cro.* 1. Part, 345, 346.

19. Note: If a Recovery be in Debt upon an Obligation in the County by Juſtices, there notwithſtanding ſuch Judgment, the Plaintiff may have an Action of Debt upon the Bond in a Court of Record; for the County-Court is not of Record: and therefore the Obligation is not charged with a thing of a higher nature; but ſo long as ſuch Judgment remaineth in force, the Plaintiff ſhall not have an Action in the County Court by Juſtices, for the Infinite vexation of the party. See Mich. 3 Car. in C. B. *Cook* 6. Part, in *Higgins* Caſe. 45. acc.

20. If a Writ of Right be directed to the Lord of the Mannor in Ancient Demeſne, or unto the Bayliffs, or a *Juſticies* to the Sheriff, in all ſuch caſes, the Lord of the Mannor, Bayliffs or Sheriffs, although that the plea be holden before them by Writ, they are not the Judges, but the Suitors are Judges; and the reaſon that the Writs are directed to them, is, becauſe that the Courts do belong unto them: and although ſuch Courts hold plea by Writ of Record, yet they retain the nature of their former Courts; for upon a Judgment given in ſuch Courts, Falſe Judgment lyeth, and not a Writ of Errour. And it was Reſolved, That the King's Writ cannot alter the Juriſdiction of the Court-Baron, County, or Hundred Court, and the like, which are Courts by the Common-Law; And therefore all things determinable in ſuch Courts, ought to be determined by the Judges of the ſame Courts. And therefore neither the Lord in Ancient Demeſne, nor of Court-Baron, nor the Sheriff in the County where a Plea is holden before them by Writ of Right, Admeaſurement, or ſuch like Writs, are the Judges in the ſaid Courts in the ſaid Suits, or Pleas, but the Suitors are the Judges thereof there. *Cook* 6. Part, 11. *Fenkman*'s Caſe.

21. A Writ of Error was brought upon a Recovery had in an Action popular by Bill in the Court of *Ludlow*, which is a Court of Record, upon the Statute of 4 and 5 *Ma.* cap. 5. Two Errors were Aſſigned. 1. That the Plaintiff ought, by the Statute of 18 Eliz. cap. 5. have ſued by Originall, or by Information, and not by Bill: For it was ſaid, that where Suit was by Bill, upon the Statute of 23 H. 6. of Sheriffs, that the Action did not lye. The 2. Error was, That the Recovery was not in ſuch a Court of Record as was intended by the Statute. For the Courts of Record intended by the Statute *propter excellentiam*, are the four Courts at *Weſtm.* And the Information ought to be in ſuch a Court, where the Kings Attorney may Reply, or where he can attend, and that ſhall be onely at *Weſtminſt.* Hill. 38 Eliz. in B. R. *Cook* 6. Part, 20. *Gregories* Caſe.

22. By the Statute of 1 E. 6. cap. 7. of Diſcontinuance of proceſs; It was Reſolved, That if any Judiciall Writ, or any proceſs in a Court of Record be Awarded in the time of the Predeceſſor of the King: the ſame may be executed in the time of the Succeſſor; But in the County Court, and the like Courts, which are not Courts of Record, it remaineth as it was at the Common-Law; For

For the words of the Act are, in any of the Kings Courts, or any of the other Courts of Record. *Cook* 7. Part, 30. acc.

23. Note, In a Falſe Impriſonment, if the Defendant juſtifieth by a *Capias* to the Sheriff, and a Warrant to him, there *De injuria ſuâ propria* is no good Replication; for then the matter of Record ſhall be parcel of the cauſe, for all maketh but one cauſe, and the matter of Record ought not to be put in Iſſue to the tryall of the people. But in ſuch Caſe he may reply *de injuria ſua propria*, and traverſe the Warrant, which is matter of Fact. But upon ſuch Juſtification, by force of any proceeding in the Admiral-Court, Hundred, or County-Court, or any other which is not a Court of Record, there *de injuria ſua propria*, generally is good, for all is matter in fact, and maketh but one Cauſe. Mich. 6 Jac. in C. B. *Cook* 8. Part, 67. in *Cregg*'s Caſe.

24. For Contempts done to any Court of Record againſt the Kings Command by his Writ under the Great Seal; the Defendant ſhall be Fined, and Impriſoned, as in *Quare Impedit*, *Quare non admiſit*, *Quare Incumbravit*: Attachment upon Prohibition, &c. But when the Demandant or Plaintiff, or the Tenant or Defendant *ſe retraxit* or *receſſit in contemptu Curiæ*; there is no Contempt againſt the Kings command by Writ: And therefore the party ſhall not be fined or amerced. If a Writ of Reception be brought in the Common-Pleas, and Judgment be there given, the Defendant ſhall be fined and Impriſoned; But if the Writ be brought in the County-Court, and the Defendant be convinc'd before the Sheriff in the County, the Judgment ſhall not be *Quod capiatur*, *quia nulla Curia*, *quæ recordum non habet*, *poteſt imponere finem*, *neque aliquem mandare Carceri*, *quia illa ſpectant tantummodo ad Curiam de Recordo*; and therefore in ſuch Caſes, the party ſhall be only amerced. *Cook* 8. Part, 60. in *Beecher*'s Caſe.

25. The Court of Chancery is a Court of a very high nature, conſiſting of two parts, The Legall or Lative part; and the Equitable: It is *Officina Juſtitiæ*, and the Repoſitory (in the abſence of Parliaments) of all Caſes where the helps of Parliaments are not neceſſary; The Originall and Authority of all mens aſſurances, and conveyances by Fines, Recoveries, &c. and the preſerver of their Rights in them. The Fountain and Channell by which Juſtice upon the peoples neceſſities, or complaints, is conveyed unto them; The Magazine, ſtorehouſe, and diſpenſatory of all Writs, and remediall, in which the Rights, Liberties, and properties of the people are ſo cemented, that they muſt either dye or live with it; It is the eſtheme of the Nation; *Salus Populi*, *Lex terræ*. The Head from which all other the Courts of Juſtice in *Weſtminſter*, and other Courts, may be ſaid to have their beings, or Originalls. See *Cook* 4. Part, *Inſtitutes*. The Book called *Diverſity of Courts*. Sir *Henry Spilman* in his *Gloſſary*. *Doctor and Student*. *cap.* 7. *Lib.* 1. The Equitable part of this Court conſiſteth of Bills, Anſwers, Decrees, for the examining of Frauds, Combinations, Truſts, ſecret Uſes; and for moderating, and taking away of the Rigor of the Common-Law, and the reſcuing of the Lands, Eſtates, and Intereſts, of men who would oppreſſe, and put extremities upon them. The Lative or Legall part of it, doth conſiſt in granting of Writs of *Habeas Corpus*, which no other Court can Grant in Vacation time, Sealing and enrolling of Letters Patents, Pardons; Inrolling of Treaties, and Leagues with Forrein Princes and States; making and Granting of Writs of Summons of Parliament, Proclamations, Charters, Protections, Safe Conducts, Writs for Election of Knights and Burgeſſes of Parliament; Writs of *Moderata Miſericordia*, Writs of *Rationabili parte Bonorum*, of goods for Widows, Orphans, Writs of *Audita Querela*, *Scire facias*, Writs remediall and Magiſteriall, Inrollments of Deeds concerning Lands: taking Recognizances for payment of monies, and other matters of Concernment, Commiſſion of Appeal, Oyer and Terminer, and for the Peace, and all other proceſſe and proceedings tending to the well-being, or Conſervation of the peace. See conſiderations touching the Chancery, acc. *Cook* 4. Part, *Inſtitutes*, *Crompton* Juriſdiction of Courts. acc.

26. If *Ceſtuy que uſe* before the Statute, were diſſeiſed, or his Feoffees, The Diſſeiſor could not be compelled in the Chancery to execute an Eſtate to *Ceſtuy que* uſe. But in ſuch Caſe, *Ceſtuy que uſe* ſhall compell the Feoffees in the Court of Chancery, to enter upon the diſſeiſor, or to recover the Land againſt him at the Common-Law, and then the Chancery ſhall compell the Feoffees to Execute the Eſtate according to the uſe. *Cook* 1. Part, 139. in *Chadleigh*'s Caſe.

27. If a man be bounden by Obligation to two men, unto the uſe of one of them, and he to whoſe uſe it is not, releaſeth to the Obligator, all Actions, ſo as the Obligation is diſcharged in Law, he to whoſe uſe the Obligation was made, hath good remedy by a Subpena in Chancery, againſt his companion, who releaſed, although againſt the Obligator he hath no remedy; becauſe it is Lawfull for every man to get a diſcharge of that which he is charged withall. So if a man hath recovered againſt another, Debt, or damages and he hath paid the ſame without any acquittance, or without having a Releaſe, and notwithſtanding, the party taketh Execution againſt him

upon the ſame Judgment, he hath no remedy by the Common-Law; But then he ſhall have remedy in the Chancery, in this Caſe, in Equity. *Diverſity of Courts.* acc.

28. A queſtion was, Whether a Decree made by the Commiſſioners, upon the Statute of 43 Eliz. of Charitable uſes; and Exceptions put in againſt it in Chancery, and there examined, heard, and Confirmed in part, and altered in part, may be examined upon a Bill of Review, as other Bills of Review, upon Decrees in Chancery. This was referred to the two Lord Chief Juſtices, the Lord chief Baron, and to other Juſtices; and by them it was Reſolved, That the Bill of Review was not allowable, but the Decree in Chancery is concluſive, and not to be further examined, becauſe it takes its Authority by Acts of Parliament, and the Act doth mention but one Examination. *Cro.* 2. Part, 29. 2 Car. *Winſor* and the Inhabitants of *Farnham's* Caſe.

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2. *Of Inferiour Courts, their power and Juriſdiction, and what Acts done by them, and in them, ſhall be good, What not. And of the ſeveral proceedings in the ſaid Courts.*

1. AN Action of Trover and Converſion was brought in the Marſhalſey, where none of the parties were of the Kings Houſehold. And upon a Judgment given, there a Writ of Error was brought in the Kings bench: It was Reſolved, That the Judgment ſhould be reverſed, and it was ſaid, That for the nature of the Actions, they ſhall hold plea in Treſpaſſe, contract, and Covenant, and in no Action which concerns the Freehold, or Inheritance; And in Treſpaſſe within the Verge, It is ſufficient, if one of the parties be of the Kings Houſhold, but in contract or Covenant, both ought to be of the Houſhold; And in Treſpaſs brought in the Marſhalſey, no other Error was Aſſigned, but onely, that none of the parties were of the Kings houſhold, and the Judgment for that Error reverſed. 38 Eliz. in B. R. *Cook* 6. Part, 21. *Mitchelborn's* Caſe.

2. In an Appeal of Murder, the Defendant pleaded, That at another time by Inquiſition found before the Coroner of the Queens Houſehold, and B. one of the Coroners of *Middleſex*, he was Indicted of Man-ſlaughter, which Inquiſition was certified to *Newgate* at the Goal delivery, and upon this the Defendant was arraigned, confeſſed the Felony, and had his Clergy; And it appeared, that the Indictment was after the bringing of the Appeal, and before the Return of it. It was Reſolved in this Caſe. That the Coroner of the Houſhold at the Common-Law had an exempt Juriſdiction, within the Verge, and the Coroner of the County, could not meddle, as appears by the Statute of *Articuli ſuper Chartas*; and therefore the Inquiſition taken by the Coroner of *Middleſex*, was not good. But it was Reſolved, That the Juſtices of the ſaid Kings-Bench of *Oyer* and *Terminer*, might determine all Murders within the Verge; for that their authority is general through all the County. 2. It was Reſolved, That the Indictment was not good, becauſe it doth not appear that the place where the ſtroke and death was, was within the Verge; and though in truth it were within the Verge; yet it ought to be found by the Oath of the Indictors, and cannot be ſupplyed by an averment, and it ſhall not be found void as to the Coroner of the Houſhold, and good before the Coroner of the County, becauſe the Record is entire, and taken entirely before them. 33 Eliz. *Cook* 4. Part, 45. *Wrote* and *Wiggs* Caſe.

3. An Action upon the Caſe upon *Aſſumpſit* was brought in the Marſhalſee, where no party was of the Kings houſhold: The Plaintiff recovered, and the Defendants by virtue of a Precept in the Nature of a *Capias ad ſatisfaciend.* arreſted the party; whereupon he brought a Writ of Falſe Impriſonment againſt them: And in this caſe, theſe Points were Reſolved; 1. That at the Common-Law, the Steward, and Marſhal of the Marſhalſee had two Authorities to hold Courts, one as Juſtices in *Eyre*, by which authority they held plea of Treſpaſſe of the Crown and other reall Actions; the other, as Judges of the Marſhalſee of the Kings-Houſe, by which authority they held plea onely in Debt, Treſpaſſe *vi et armis*, and Covenant, and not in any other perſonal Action, or Mixt. 2. Reſolved, That the Statute of *Articuli ſuper Chartas*, are but Explanations of the Statute of *Magna Charta*; and *Charta de Foreſta*, in the third Chapter of *Articuli ſuper Chartas*, is but an Explanation of the 23 Chapter of *Magna Charta*. And it was Reſolved, That when a Statute prohibits any thing, If any implead another, although it be in courſe of a legall proceeding, yet the party grieved ſhall have an Action upon the Statute againſt the party which ſues againſt the Statute, although the words of the Statute do not give an Action to the party. 3. Reſolved, That the Statute of 28 E. 1. of the Marſhalſee did extend to Treſpaſſe *ſimpliciter*, and not to Treſpaſſe *ſecundum quid*, as Action upon the Caſe, Treſpaſſe upon Trover and Converſion. 4. It was Reſolved, That the Action did well lye againſt the Defendants

dants, becauſe all the proceedings was *Coram non Judice*; and the party is not of neceſſity to obey them, who are not Judges of the Cauſe, no more then a ſtranger. And there this difference was taken and agreed, That when the Court hath Juriſdiction of the Cauſe, but proceeds *inverſo ordine*, there for an Arreſt made, an Action doth not lye againſt the Officer; and when the Court hath not Juriſdiction of the Cauſe, as in the principall caſe. Mich. 11 Jac. in B. R. *Cook* 10. Part, 68, 69. The caſe of the Marſhalſee.

4. Errour was brought of a Judgment in the Court of Marſhalſee, upon an Action upon the Caſe, upon Aſſumpſit at the Pariſh of St. *Clements Danes*, within the Juriſdiction of the Court; And declared, In conſideration of ſuch a ſum received, he would pay him ſuch a ſum when he returned into England from *H*, being a place beyond the Sea. Upon Non-Aſſumpſit, and Verdict, and Judgment for the Plaintiff; Errour was brought, becauſe he did not give Notice to the Defendant of his return; although it was alledged, That the Defendant *habens Notitiam inde*; and for that cauſe the Declaration was holden inſufficient. And 2. Becauſe the Action is brought, if an Act be done at *H*, out of the Juriſdiction of the Marſhals Court, being a private Juriſdiction: The Judgment was reverſed. Hill. 14. Car. in B. R. *Cro.* 1. Part, 412.

5. In Falſe Impriſonment, the Defendant Juſtified, That the Court of Marſhalſee was an Ancient Court holden before the Steward and Marſhal of the Kings-Houſe, and had Juriſdiction to hold plea of all Treſpaſſes within the Verge, That Precepts had been uſed time out of mind to be awarded to Officers *Portatores virgarum*; to be executed by command of the Marſhal *ore tenus*; and ſet forth, That he affirmed a Plaint of Treſpaſſe in the Marſhals Court againſt the Plaintiff; and a Precept was made to the Marſhall, to take the Plaintiff *ad habendum* his body at the next Court, and that the Marſhall commanded *R. Portator virge* there to arreſt the Plaintiff, *Ita quod, &c.* and the Defendant came to aid him, and ſhewed the Plaintiff, &c. It was thereupon demurred. And becauſe the Preſcription is layed in the Plea, to hold pleas of All Cauſes within the Verge; and it is not ſhowed, Between what perſons: for by the Statute they ſhould not hold any Pleas, unleſſe betwixt perſons of the Houſhold: and alſo, becauſe the Precept is returnable at the next Court, and it is not upon any day certain; ſo as the party might be detained a long time, not knowing when the Court ſhall be holden. It was adjudged, That the awarding of the Proceſs was ill; and that the Action of Falſe Impriſonment did not lye. Paſch. 9 Jac. in B. R. *Johns* and *Smiths* Caſe. *Cro.* 2. Part, 214.

6. A Prohibition was awarded to the Councel of the Marches of *Wales*, for that upon a ſuppoſed Ryot and Battery of the Plaintiff upon a Bill exhibited there, they gave 100 Marks damages to the Plaintiff; where, by their Inſtructions, they ought not to hold plea of damages or debt above 50 l: It was Objected, That they might hold plea of Ryots as the Star-Chamber did, and that their Court was eſtabliſhed by Act of Parliament, 34 H. 8. But it was Reſolved, That although the Star-Chamber have uſed to Decree Damages to the party, being a Supream Court; yet other Courts may not aſſume upon them ſuch Juriſdiction. Prohibition was awarded. Hill. 14 Car. in B. R. *Powell* and *Sheens* Caſe. *Cro.* 1. Part, 384.

7. Upon a *Habeas Corpus*, to the Keepers of the Priſon for the Councell of the Marches of *Wales*: It was returned, that the party was Committed by vertue of a Decree of the Councell, That one of them had inveigled the ſon and heir of J. S. of 17 years of age, in the night, when he was drunken, to marry the Siſter of one of the Defendants: whereupon they were fined, ſome 100 l. ſome 100 Marks, and, until they paid the ſame, were Impriſoned; and alſo 100 Marks damages to the Father, the proſecutor. It was holden, That the Return was not good, becauſe it was Returned, that they were committed by order from the Lords of the Councill; and it was not mentioned what the Order of the Councill was, and alſo, becauſe it was there to remain, untill further Order, which is altogether uncertain: And it was there a queſtion, whether that Court might meddle with a Clandeſtine Marriage to puniſh, being a meer Spirituall Act; It was not Reſolved, but the parties were bailed. Trin. 15 Car. in B. R. *Steel's* Caſe. *Cro.* 1. Part, 402.

8. A Prohibition was prayed to the Councill of the Marches of *Wales*, becauſe one Sued there for a Legacy above the value of 50 l. The Court doubted of their proceedings there, in ſuch Caſe; and whether their Inſtructions were good, becauſe cauſes Teſtamentary, and Legacies are ſueable in the Spirituall Court, and not elſewhere, notwithſtanding their Inſtructions; for they cannot Warrant that which is not according to Law. Mich. 16 Car. in B. R. Sir *Henry Williams's* Caſe. *Cro.* 1. Part, 432.

9. In a Prohibition to the Councill of the Marches of *Wales*, the Caſe was, A. made a Leaſe for life, and afterwards levyed a Fine of all his Lands, which was to the uſe of B. for 15. years, and afterwards to the uſe of himſelf for life, with a power by a Proviſo, for him to make Leaſes for 21 years, or three lives in poſſeſſion: This Leaſe was queſtioned there, to ſtay execution of the power, during the 15 years. It was Reſolved by the

whole Court, That this Term of 15. years was presently subject to the power by the Proviso of him in the Remainder, to *Wikes* Leases; and that this power doth issue out of the whole Estate, and that the first Lessee shall have the Rent reserved during the 15 years limitted to him, and these being matters determinable at the Common-Law, a Prohibition was Awarded. Pasc. 12 Jac. in B. R. *Fox* and *Prickwood's* Case. *Cyoke*, 2. Part, 349.

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3. *Court Leet. Court Baron, County Court. Court of Pipowders. and other inferiour Courts; Their Originalls, Jurisdictions; And how they ought to proceed in them; And what Acts, or things may be sued there, and the Judges thereof.*

1. IF the Lord of a Mannor, who hath many Antient Copyholders in one Town, granteth the Inheritance of all the Copyholds to another; The Grantee may hold Court for the Copyhold Tenements, and take surrenders to the use of others, and make Admittances. For although it is not a Mannor in Law, because it wanteth free Tenants, yet as to the Copyhold Tenements, the Feoffee or Grantee of such a Mannor, may hold a Court. For every Mannor which consisteth of Freehold, and Copyhold Tenements, containeth in it self two Courts, one which is called the Court Baron, *scil.* The Court of Freeholders, in which the Free-Tenants, the Suitors are Judges; And another is for the Copyholders; and as to that, the Lord, or the Steward is the Judge. And if all the Freeholds Escheat to the Lord, or if the Lord releaseth the Tenures and Services of all his Free Tenants, yet he may hold a Customary Court for his Copyhold Tenements, to make admittances and Grants to them. Trin. 10 Eliz. in B. R. *Melworth* and *Luter's* Case. *Cook* 4. Part, 36.

2. If the Lord of a Mannor doth demise all his Lands granted by Copy to another for 2000. years, such a Lessee may hold a Court for the Copyhold. Pasc. 37 Eliz. in C. B. *Neal* and *Jackson's* Case. *Cook* 4. Part, 26. acc. Note, a difference betwixt these Cases, which consists upon Numbers of Copyholds, which may support a Custome, and one single Case of a Copyholder, as in *Murrel's* Case, *Cro.* 4. Part, 24. in which case the Lord doth not grant *Tacitè* any Customary Court, nor the Grantee having but one single Copyhold, cannot hold Court,

3. If a Court be holden by a Steward of a Mannor out of it, and divers Grants, and admittances there made, the Court, and all the Grants, and admittances are void: for the Court of a Mannor ought to be holden within the Mannor, and not out of the Jurisdiction of it. But by Custome, the Court may be holden out of the Mannor, and Grants and Admittances there, good enough. Mich. 28 Eliz. in B. R. *Clifton* and *Molineaux's* Case. *Cook* 4. Part, 77.

4. A Court of Pipowders is incident to a Fair, and a Court Baron to a Mannor, and a Court Baron cannot be separated from a Mannor, for it is annexed to the Mannor, the like of a Court Pipowder to a Fair; by the Grant of the Mannor *cum pertinentiis*, the Court passeth, for it is an Incident inseparable to the Mannor; And a man cannot grant his Court, but a man may grant the profits of his Court. Trin. 13 Jac. in C. B. rot. 607. *Brown* and *Goldsmith's* Case. *Brownlow.* 1. Part, 175. See Mich. 8 Jac. The *King* and *Stafford's* Case. of *Quo Warranto*, *Bulst.* 1. Part, 55, 56.

5. In *Ejectione firmæ*, upon a speciall Verdict; The Case was, A Copyholder in Fee, of the Mannor of *Taddington* (where the Custome is, That any Copyholder out of the Court, might surrender into the hands of two Tenants, Copyholders of the Mannor, to the use of another) surrendred into the hands of two such Tenants, certain Lands, to the use of B. and C. and C. son of B. and the longest liver of them, and for want of Issue of the body of C. the Remainder to the younger Son of E. Wife of the Plaintiff, the surrender not to be in force till after the death of A: A. dyed, the next Court the surrender was presented, and B. and C. were admitted accordingly; B. dyed, and afterwards C. dyed without Issue; H. who was the younger son of E. was admitted, and entred, and made a Lease to the Plaintiff. The Question was, Whether this was a good surrender to the use of E. the Plaintiffs Wife, because the Verdict finds, It is Customary Land, of the Mannor of *Taddington*, but the Copy of the surrender found, is in hæc verba, *Taddington* in the Margent? At the Court Baron of the Mannor of *Hampton*, J. S. and J. D. Tenants of the Mannor of *Hampton* do present, That A. did surrender into the hands of the Tert-Tenants, of the Mannor, &c. *ut supra*: It was the Opinion of the Justices, That it was good enough; For *Taddington* being in the Margent, It shall be said a distinct Court by it self: For an Honor consists of many Mannors, yet all the Courts of the Mannors are distinguished, and have severall Copyholders, and although there is for all the Mannors but one Court, yet they are quasi severall and distinct Courts; wherefore it was adjudged

judged for the Plaintiff. Mich. 8 Car. in B. R. rott. 195. *Seagood*, and *Hone* and his Wives Caſe. *Cro.* 1. Part, 267, 268.

6. In an Action upon the Caſe, the Plaintiff Declared, That whereas in ſuch a Court of Pipowders, holden at *Glouceſter*, *ſecundum Conſuetudinem civitatis illius* he brought Debt againſt J. S. as Adminiſtrator, and thereupon J. S. was Arreſted, and in Cuſtody of the Defendant, the Sheriff of *Glouceſter*, according to the Cuſtome there; That they permitted him to go at large, ſo as he hath not anſwered him his Debt: upon Not-guilty, found for the Plaintiff, It was the Opinion of all the Judges in this Caſe, That the Court being ſtyled a Court of Pipowders (which is a Court incident to Fairs and Markets, and for cauſes onely ariſing within them) ſhall not be intended a Court, unleſſe it be ſhewen to be held by Charter, or Preſcription: And that the Defendant being an Officer of the Court, and arreſting the party, ought to ſhew, as Sheriffs when they make any Certificates out of inferiour Courts, ought to ſhew how the ſaid Courts are holden, and the omiſſion thereof is a juſt cauſe to reverſe all their proceedings; But otherwiſe it is in the Caſe of a ſtranger, as here, where the ſtyle of the Court is but an Inducement to the Action. 2. It was holden by them, That theſe words, *ſecundum Conſuetudinem Civitatis*, being in the Imparlance-Roll, That the Omiſſion of them in the Iſſue-Roll, was but *vitium Clerici*, and might be amended: It was adjudged for the Plaintiff. Mich. 2 Car. in C. B. *Hodges* and *Meyſe's* Caſe. *Cro.* 1. Part, 33.

7. Note, It was holden by the Court, That there may be a Cuſtomary Mannor, and holden by Copy, and ſuch a Cuſtomary Lord may hold Courts, and grant Copies; And that ſuch a Cuſtomary Mannor may paſſe by ſurrender, as well upon alienation, as upon diſcent: And there may be alſo a Cuſtomary Lord, Miſne, and a Cuſtomary Tenant, as well in Caſe where the Menalty is a Tenancy at will, at the Common-Law of a Mannor; And alſo if ſuch a Cuſtomary Mannor be forfeited, the Lord ſhall have the Cuſtome and Services, as appertaining to the ſame. Mich. 11 Jac. *Cook* 11. Part, 17. Sir *Henry Nevill's* Caſe.

8. It was moved for a Prohibition to the Admiralty, upon a ſurmiſe that one was arreſted there for Arreſting one out of the hands of a Meſſenger of the Admiralty, who was taken by him by Warrant of the Court, for a contempt to the Court in a ſale depending there betwixt him and another: It was the Opinion of the Court, That if the cauſe were Maritime, which was depending, there the Court may examine a Contempt there to the Court in that cauſe; but they cannot proceed criminally againſt the party that Reſcued him, that did the contempt. Mich. 1649. *Styles* in B. R. 171.

9. A Prohibition was prayed to the Prerogative Court, becauſe they proceeded to examine Witneſſes, there to diſpence a Will that was proved there 20 years before, by which Will Lands were deviſed, and the Lands ſold, and that this they did to prevent a Tryall at Law touching the Title of the Land: The Opinion of the Court was, That they might examine the probate there, becauſe you have Libelled there to take benefit of the probate, and therefore the other may diſprove the probate if he can, as far as concerns any goods deviſed by the Will. Mich. 1652. in B. R. *Styles* 346.

10. In Caſe for a Prohibition to the Prerogative Court: the Caſe was, A. and B. being in ſale, in the Prerogative Court, for Letters of Adminiſtration of the goods and Chattells, of one who dyed Inteſtate, they agreed by conſent, That A. putting in Bond to perform the Decree of that Court touching the diſtribution of the Eſtate ſhould have the Adminiſtration Granted to him: Whereupon he entred Bond, and had Adminiſtration. Afterwards the Court made a Decree, that he ſhould diſtribute the Eſtate in ſuch a Mannor, and, not performing the Decree, B. proceeded againſt him in the Prerogative Court by way of Attachment; It was ſaid, That the Attachment was Granted beyond the Condition of the Bond given to the Court, and they have no power to award it, notwithſtanding the diſtribution of the Eſtate be not made according to the Bond; and they cannot Order ſuch a diſtribution of the Eſtate notwithſtanding our conſent; for our conſent was, that the clear Eſtate onely ſhould be diſtributed, and not the whole Eſtate. The Opinion of the Court was, That they could not Grant an Attachment for not performing the Decree, although it was made by conſent; But the Court ſaid, that they, taking off the Obligation, tyed them up to that remedy: And that they could not proceed by way of Attachment. Hill. 1654. in B. R. *Cookes* and *Chambers* Caſe. *Styles* 139.

11. Information was againſt the Defendant upon the Statute of 23 H. 8. chap. 4. in B. R. for ſelling of Beer at another price then is appointed by the Statute: Upon Not-Guilty pleaded, and found for the Plaintiff; It was moved in ſtay of Judgment, That the Information was not maintainable in this Court by the Statute of 21 Jac. cap. 4. which appoints, That Informations ſhall be before Juſtices of the Peace, for ſuch matters whereof they have power to enquire, and not in the Courts at *Weſtminſter*; and ſo the Statute being in the Negative, the Information is not here allowable

able. But it was Reſolved, That the Information was well brought; It was holden, That the Statute of 20 H. 8. which gives the forfeiture to be recovered in Courts where no Protection, Eſſoine, &c. is allowable, extends onely to the Courts at *Weſtminſt.* and not to any other inferiour Court, although *Weſtminſt.* be not named; For an Inferiour Court cannot allow protections, nor wager of Law, and therefore it cannot be Sued before the Juſtices of Peace, and *Oyer* and *Terminer*. 2. Reſolved, That the Statute of 21 Jac. makes not any new Law to enable Juſtices of Peace to meddle with informations, which were not appointed before by the Statutes, to be by them enquired of before them, but onely appoints, That where Informations may be brought before them, or at the Courts at *Weſtminſt.* at their Election, there they ſhall be brought into the Seſſions of the Peace, before the Juſtices of Aſſiſe, or *Oyer* and *Terminer* in the Counties where the Offences were committed, and that for the uſe of the Subject. 3. Reſolved, That the Statute of 33 H. 8. cap. 10. extends not to give them Authority to receive Informations upon the Statute of 23 H. 8. and that Brewers ſhall not be ſaid Victuallers within the ſaid Statute; for that the words Victualls and Victuallers are properly applyed, and extended againſt Ale-houſe-keepers, who ſell by Retail, and keep not the Aſſize. It was adjudged for the Plaintiff. Trin. 4 Car. in C. B. *Farrington* and *Keymer's* Caſe. *Cro.* 1. Part, 79.

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4. *Eccleſiaſticall and Spirituall Courts, Juriſdictions, Power and Authorities; of their Acts and proceedings; where ſubſervient to the Common-Law; and where the Common Law ſhall take notice of their acts; where not.*

1. A Prohibition will not lye after a Sentence in the Spiritual Court. And if the Libell be for ſuch matter as may be determined there, no Prohibition will lye, unleſſe ſome Plea be pleaded by the Defendant in that Court; which the Judge will not allow: For if a Suit be in the Admiralty upon a Contract made upon the Sea, and the Defendant plead a Releaſe, or a guift after the coming to Land; that Court may enquire and try this Iſſue; The like of Tythes. Mich. 40 Eliz. in C. B. *Goldeſbr.* 113.

2. A. the Wife of W. ſued in the Chancery as Adminiſtratrix of her ſaid husband againſt J.S. who had married one of the Daughters of the ſaid W: The Defendant pleaded, That before Adminiſtration committed to the Plaintiff, he put in a Caveat in the Spirituall Court, hanging which Caveat ſhe obtained theſe Letters of Adminiſtration, whereby the Defendant hath appealed; the which Appeal is not yet determined; for which he demanded Judgment, if, hanging the ſaid Appeal, the Plaintiff ſhould be received to ſue in this Court as Adminiſtratrix. It was the Opinion of *Egerton* Lord Chancellor, That the Defendant's plea is good to ſtay the Suit untill the Plea of Appeal be determined; and ſaid, There is a difference betwixt an Appeal in the Spirituall Law, and a Writ of Errour in our Law; for by the bringing of a Writ of Errour, the Judgment is not impeached untill the Record be reverſed. But the very bringing of an Appeal, is a ſuſpenſion of the firſt Judgment in the Spiritual Court. Hill. 43 Eliz. in Chancery. *Willoughby* and *Willoughbys* Caſe. *Goldeſbr.* 119.

3. There were divers Canons and Eccleſiaſticall Conſtitutions, and alſo directions from the late King *James* and King *Charles*, That none ſhould be admitted to have the Office of a Chancellor to a Biſhop, unleſſe he were inſtructed and learned in the Canon and Civill Lawes. Articles were exhibited before the Commiſſioners Eccleſiaſtical, againſt *Sutton* a Deacon, having a Rectory with Cure of Souls, and never brought up in the Science of the Civil or Canon-Law, or having any intelligence in them, for taking upon him the Office of Chancellor to the Biſhop of *Glouceſter*; who being examined upon the Articles, confeſſed that he was a Divine, and had a ſpiritual Living; and that the Chancellorſhip of the Biſhop is grantable for life: And that J. Biſhop of *Glouceſter* had granted to him the ſaid Office for his life; which Grant was Confirmed by the Dean and Chapter, whereby he had a Freehold therein; and that, notwithſtanding this anſwer made in the Spirituall Court, they intended to proceed againſt him there, and therefore he prayed a Prophibition: But a Prohibition was denyed by the Court: For if he be a perſon unskilfull in thoſe Lawes, and by Law ought not to enjoy it; they may there examine that: For although a Lay-perſon by his Admiſſion and Inſtitution to a Benefice, hath a Freehold; yet he may be ſued in the Spiritual Court, and deprived there for that cauſe. Hill. 2 Car. in C.B. *Cro.* 1. Part, 47. *Sutton's* Caſe.

4. J. P. was examined by the Commiſſioners Eccleſiaſticall upon Articles, That ſhe was ayding and aſſiſting to Sir J. H. in the years 1622, and 1623. untill *September*, 1624. to have acquaintance with the Viscounteſſe P. with whom he committed Adultery, and that ſhe

ſhe was chief Agent for their Meetings through her private Lodgings, by means whereof they took their opportunities to commit Adultery; for which cauſe, *Febr.* 1627. ſhe was ſentenced to be guilty of Bawdry, and fined 200 l. and to make a penetentiall acknowledgment in the Church of *S.* and to be impriſoned. J. P. prayed a Prohibition, for that by the General Pardon, *Anno* 21 Jac. ſhe was pardoned for theſe Offences committed in the years 1622, and 1623; and avers, ſhe is not guilty of any ſuch Offence ſince the pardon, nor is a perſon excepted. It was the Opinion of Juſtice *Hutton*, That a Prohibition ought to be granted, becauſe ſhe is ſentenced to be impriſoned, untill ſhe find Sureties to perform the whole Order, which is not warrantable: For although by the Statute of 1 Eliz. the High Commiſſioners may Aſſeſſe Fines, or award Impriſonment for an Offence: yet they can neither commit any to priſon for the Fine, nor untill the parties find Sureties for the performance of their Orders; but they ought to certifie the Fine into the Exchequer. It was further ſaid, That Suits for Adultery (unleſſe ſuch onely as were enormious and notorious) ought to be brought before the Ordinary in his Court: In the principal caſe, a Prohibition was granted. Trin. 4 Car. in C. B. *Iſabel Peeters* Caſe. *Cro.* 1. Part, 80.

5. A Libell was before the High-Commiſſioners, which ſuppoſed divers particular Cruelties uſed upon the wife, for which ſhe was inforced to depart, and that her husband would not allow her maintenance; and therefore ſhe ſued before them for maintenance: and becauſe it is a Suit properly triable before the Ordinary, wherein, if there be any wrong, the party may have an Appeal: and although it be one of the Articles within their Commiſſion to hear and determine of; yet becauſe it is not any of the Cauſes within the Statute of 1 Eliz. for which cauſes the Commiſſion is Ordained: The Court awarded a Prohibition. Trin. 7 Car. in B. R. *Drakes* Caſe. *Cro.* 1. Part, 161.

6. *Toole* and others, Pariſhioners of St. *Bartholomews, London*, were brought by *Habeas Corpus* to the Barr: It was returned, That they were committed to a Meſſenger, for contempt to the Eccleſiaſticall Commiſſioners, for not performing their Order in paying the Pariſh Clerk his wages, rated at the rate of 4 d. a Quarter for every houſe, which they refuſed to pay; but according to their Cuſtome, which they were rated by their Church-Wardens and Veſtry. It was moved, That they might be remanded, for that this Order was grounded upon Letters Patents, that the Clerks ſhould gather and receive their own wages, by vertue of an Order from the High-Commiſſioners: But upon this return, the parties impriſoned were bayled by Order of the Court. Paſch. 16 Car. in B. R. *Toules* Caſe. *Cro.* 1. Part, 420, 421.

7. In a Prohibition to ſtay a Suit in the Eccleſiaſtical Court for Tythe Wood, upon a ſurmiſe, that the Wood was ſpent in his houſe for firing: and that the Cuſtome of the Pariſh was, That the Owners of any houſe or Lands within the Pariſh who pay Tythes to the Parſon, ought not to pay Tythes for Wood ſpent for fewell in their houſes. Upon Iſſue upon the Cuſtome, it was found for the Defendant. It was moved, That although it be found, there is no ſuch Cuſtome, yet he ought not to pay Tythes for wood ſpent in his houſe, nor, for fencing for hedges, *per Legem terræ*, ought to be diſcharged. It was Reſolved, That it is not *per Legem terræ*, that any be diſcharged of them, for it is as well in Prohibitions to alledge Cuſtomes, as for Hattlepeny: or by reaſon of other Lands whereof he payes Tythes, that he is diſcharged of that Tythe, but not to alledge, That *per Legem terræ*, he was diſcharged. A Conſultation in the principal caſe was granted. Trin. 4 Car. in C. B. *Norton* and *Farmers* Caſe. *Cro.* 1. Part, 80.

8. J. S. was brought to the Court by *Habeas Corpus*: It was returned, That he was committed by Order of the Exchequer, 9 Car. for not paying of a Fine of 50 l. impoſed by the Eccleſiaſticall Commiſſioners upon him: and although it was not ſhewed, wherefore the Fine was impoſed, yet becauſe the Commitment was by a Judiciall Court; the Court would either bayl, nor diſcharge him. Paſch. 16 Car. in B. R. *Cro.* 1. Part, 418.

9. Upon a *Habeas Corpus* returned; the return was, That the Commitment was by the High-Commiſſion Court, for refuſing to Anſwer upon Oath unto certain Interrogatories, miniſtred to them in matters touching penall Lawes: whereas they ought not to be compelled to anſwer upon Oath, and ſo thereby to accuſe themſelves. It was adjudged in this caſe, That the High-Commiſſion Court cannot examine one upon Oath upon the breach of a penal Law; nor Impriſon or commit any one for refuſing to take ſuch Oath, and ſo to drive themſelves within the danger of a penall Law. But it was holden by the Court, That if one be convicted or impleaded in the ſaid Court before the Commiſſioners for Hereſie, which is, *hærere, et pertinaciter hærere*, they have as good power to commit for ſuch cauſes as any Court hath: and ſo it is for a great Schiſm; for that this doth not properly belong to them. Trin. 13 Jac. in B. R. *Boroughs* and the High-Commiſſion Court's Caſe. *Bolſtr.* 3. Part, 49, 50, 51, 52.

10. A man committed by the High Commiſſion-Court, was brought to the Barr by *Habeas Corpus*

Corpus. It was returned, That he was committed for words, *scil.* That he had uſed divers contemptuous and reproachfull words touching their proceedings, the which they had drawn into Articles againſt him, unto which he did refuſe to anſwer; and therefore they did commit him to priſon. The Queſtion was, Whether they themſelves might puniſh this there, or not. It was the Opinion of the Court, they could not; but that he was puniſhable for this at the Common-Law, for ſlandering their proceedings: Alſo it did not appear what the words were which he ſpake, and they might be ſuch as ought to be determined by the Common-Law: The Return adjudged not good; and the party was diſcharged. Mich. 13 Jac. in B.R. *Hoods* Caſe. *Bolſtr.* 3. Part, 146.

11. For a Prohibition to the Court of Prerogative upon a ſurmiſe that the party did endeavour to baſtardize one that was Legitimate: The Caſe was this; A. had a Wife called *Bridget*, who dyed: Afterwards he took another wife, called alſo *Bridget*, and dyes Inteſtate. *Bridget* the ſecond wife takes Letters of Adminiſtration of the goods of her husband: The ſon of A. ſues in the Prerogative Court to Repeal theſe Letters of Adminiſtration, upon a pretence, That *Bridget* the firſt wife of A. was living. In this caſe, the Court delivered theſe poſitive Rules following: 1. That one ought not to ſue in the Eccleſiaſtical Court to baſtardize an Iſſue, but at the Common-Law. 2. That where the Ordinary hath granted Letters of Adminiſtration to one who ought to have them, they ought not to be repealed by them. 3. Where a Suit is in the Eccleſiaſticall Court for Lands and Goods, a Prohibition may be granted as to the Lands, and they may proceed there notwithſtanding as to the Goods. 4. That in the principal caſe, neither Baſtardy of Iſſue, nor Marriage, is in Queſtion, but onely the validity of the Letters of Adminiſtration, and that the other things are but as incidents to the matter. 5. That Wife or not wife, is tryable at the Common-Law; but whether lawfully married or not, is tryable in the Eccleſiaſticall Court. 6. Where a thing is tryable in the Spiritual Court, and there is alſo a matter incident to it, which is tryable at the Common-Law, that a Prohibition ſhall not be granted. 7. That a thing concluded in the Eccleſiaſtical Court touching Lands, cannot be given in Evidence in a Tryal at Law for Land. 8. That if the Common-Law differ from the Civill Law touching the Legality or not Legality of a thing; if they will proceed according to their Law, a Prohibition lyeth, becauſe the Common-Law is to be preferred. Paſch. 3. Car. in B.R. *Beteſworth* and *Beteſworth's* Caſe. *Styles* 30.

5. *Of other Temporal Courts, not before mentioned. And of Acts and other proceedings in and by them: And where ſuch Acts ſhall bind and be good; where not.*

1. A Prohibition was prayed againſt the Warden of the *Stannaries* in *Cornwall* and his Deputy and others, for that they procured an Order and Decree for the payment of a ſum of money to them without any Bill, and ſummoning the Defendant to appear, and without any Anſwer and ſentence of the Court. It was ſaid, All their proceedings there ſummarily, and *de plano*, without any formall courſe, were illegal; and the Kings Courts may take Notice, where they proceed irregularly, and ſhall controll them, and preſerve the Juriſdiction of the Court. It was further ſaid, That the Juriſdiction of the Stannaries is onely for Tynne matters, and where the perſons which ſue, or one of them be a Tynner: whereupon a Prohibition was granted. Mich. 9 Car. in B.R. *Cro.* 1. Part, 242. *Adams* and the Warden of Stanneries Caſe.

2. Errour brought of a Judgment in the Comman-Pleas, upon the Outlawry in the ſaid Judgment. The firſt Errour was aſſigned in the Outlawry; for that the Exigent (wherein is recited a former Exigent, *quod allocat. quatuor Comitat. exigi faceret* the Defendant, which bare date, *Craſtino Aſcenſionis*; and it was returned, *Quod ad Huſtinges de placitis terræ*, holden the ſame day it bare *Teſte*, he was *quinto exactus, & non Comparuit*; and for this cauſe, Errour was aſſigned. 2. For that the former *Huſtinges* were *de communibus placitis*, and this is *de placitis terræ*, and ſo varies, and therefore ill. 3. Becauſe it is upon the ſame day it bare Teſte; which ought not to be: For this laſt cauſe, It was holden by the Court to be ill, and Reverſed: For the two firſt cauſes, the Court much doubted; For that there be Preſidents, That the *Huſtings* are held *alternatim* every fortnight, &c. Hill. 20 Jac. in B. R. *Archer* and *Dalbyes* Caſe. *Cro.* 2. Part, 660, 661.

3. In Treſpaſſe, the Caſe was; A. a Freeholder within the Mannor of J, of which the Earl of *Northumberland* was Lord, and had a Leet, erected a new Dove-Coat thereon, and ſtored it with Pigeons, and ſuffered them to fly out; which was preſented in the Leet as a common Nuſans, and an Amercement of 40 s. aſſeſſed and afferred for this Offence,

Offence, and a pain of 10 l. impoſed, That he ſhould ſtop it up before ſuch a day; and he did not ſtop it: whereupon it was preſented the next Court, and the pain impoſed aſſert to 12 l; and for non payment, a diſtreſſe taken: He entred Bond for the payment of the 12 l, and brought Treſpaſs for taking his Cattel, and detaining them untill he had entred Bond. This appearing all by way of plea, the Plaintiff demurred upon it. It was holden by all the Juſtices in this caſe, That the erecting of a Dove-Cote by a Freeholder who is not Lord of the Mannor, nor owner of the Rectory, and the replenithing it with Doves, is not any Nuſans enquireable nor puniſhable in a Leet: And if it were a common Nuſans, neither the Lord of the Mannor, nor the Parſon could erect a Dove-houſe more then any other Freeholder: For that none can preſcribe to make a Common-Nuſans: And the Common Law doth not look upon the erecting of a Dove-Coat as a common Nuſans; but makes proviſion againſt them that deſtroy Doves, near a Dove-houſe. Wherefore it was adjudged for the Plaintiff. Trin. 16 Jac. in B. R. *Drwell* and *Sanders* Caſe. *Cro.* 2. Part, 491. In that caſe, It was further adjudged, That the Avowry made, was not good. For as they have pleaded, They have not made it inquirable within the Leet: For they ought to enquire of publique Nuſances made within the Leet; and not of Nuſances made in the County out of their Juriſdiction. But in this caſe they ſay, That he erected a Dove-Cote within the Leet, *Et quod Columbæ volabant, et revolabant*, and conſumed the Corn *ad Nocumentum Totius Patriæ*; but they do not ſhew, that they conſumed any Corn within the Leet: and therefore it was alſo holden, That the Avowry was not good. See *Ibidem*.

4. Errour was brought of a Judgment in *Leiceſter* in Aſſumpſit; becauſe in the ſtyle of the Court, it doth not appear by what authority the Court was holden, whether by Cuſtome, or by Letters Patents. And although it was alledged, that it needed not, becauſe that being an Action brought, and proſecuted there, they may take Conuſans of their own Juriſdiction, without being inſerted in the ſtyle of the Court. Yet the Court was of Opinion, That their Juriſdiction ought to be ſhewed; and therefore would adviſe of it. Trin. 16 Jac. in B. R. *Johnſon* and *Underwood*'s Caſe. *Cro.* 2. Part, 493.

5. There was a Pariſh in the County of W. called A; there was alſo in the ſame Pariſh a Chappell called B. Chappell; and a Precinct called Caſtle B, the Inhabitants whereof did reſort to the Chappell, and there married, chriſtned, and received Sacraments, and had Church-wardens and perambulation by it ſelf; but they buried not there, but at A: A. Church being in decay, the Pariſhioners of B. Chappell were taxed towards the reparation with the reſt of the Pariſhioners of A; and obtained a Prohibition upon a ſurmiſe, that there was a Chappell Parochiall, and that they alone had uſed to repair that at their own charge, and by reaſon thereof, had been diſcharged from the reparation of A. Church; yet confeſſed they were within the Pariſh of A: It was holden by the Court, That although the ſurmiſe were matter of fact, and tryable by Jury: yet it was in the diſcretion of the Court to deny a Prohibition, when it appears to them, that the ſurmiſe is not true, eſpecially in a caſe of this nature, when the delay of Reparation may turn to the utter decay of the Church, and the intolerable charge of the Pariſhioners: and it is apparant to the Court, that they were to all purpoſes part of the Pariſh of A: and therefore *de com. jure*, lyable to reparation with the reſt. Therefore a Conſultation was awarded. Trin. 12 Jac. in B.R. The Caſe of the Pariſh of *Aſton* and *Caſtle Birmidg*-Chappell. *Hob.* 66, 67.

6. For a Prohibition, the ſurmiſe was, That A. was ſeiſed of the Mannor of B; and that he, and thoſe whoſe Eſtate he had in the ſame, had uſed time out of mind to have a peculiar Pew in the body of the Church, and that the Defendant by Suit in the Eccleſiaſticall Court ſought to diſpoſſeſſe him of the ſame. This was holden by the whole Court, to be no ſufficient ground of a Prohibition: For although the Church and Church-yard be in Law the ſoyl and Freehold of the Parſon, yet the uſe of the body of the Church, and the repair and maintenance of it is common to all the Pariſhioners; and for avoiding Confuſion, the diſpoſing of Seats, and charges of repair, belong to the Ordinary; and therefore no man can challenge a peculiar Seat without a ſpecial reaſon. But if it had been preſcribed, That A. had uſed time out of mind at his own coſts to maintain that Pew, and therefore had the ſole uſe of it, the Preſcription had been good, and might have been warrant for a Prohibition, though the Pew were in the body of the Church. Trin. 12 Jac. in B.R. *Boothy* and *Baylies* Caſe. *Hob.* 69.

7. Note: It was the Opinion of *Hobart*, Chief Juſtice, That every Libel in the Admiralty doth and muſt lay the cauſe of Suit *ſuper altum mare*; for the Juriſdiction there growes not from the cauſe, as of Tythes and Teſtaments in the Spiritual Court, but from the place; and therefore if a Contract were made in truth at Sea, and a Suit upon that in the Admiral's Court, and there the contract is layed generally, without ſaying *ſuper altum mare*, Prohibition will lye: For the Libell muſt warrant the Suit in it ſelf; though there

may be in the contrary part a ſurmiſe, that the contract was made at Land, againſt the Libel that lyes it on the Sea. Alſo by him it is not ſufficient, for the Libel is *infra juriſdictionem maris* generally; but it muſt be ſo layd, as it may appear to the Kings Courts to be ſo indeed. Mich. 9 Jac. in C. B. in *Palmer* and *Pope's* Caſe, *Hob.* 212.

8. The Caſe was; A Copyholder brought Treſpaſſe againſt his Lord for a houſe and an acre of Land; The Defendant pleaded, That he had admitted the Copyholder, and had Aſſeſſed a Fine of 20 Nobles upon it, and had appointed him to pay it to his Bayliff at his houſe being within the Manor, and alledged, That he had not paid it: The Opinion of the Court was, That the Lord was not bound to aver and ſhew, that the Fine aſſeſſed was reaſonable; but it muſt come on the Copyholders part to ſhew the Circumſtances to the Court, and put it to the Judgment of the Court; and it is onely in excuſe of the Tenant, if it be unreaſonable, which the Court cannot judge but upon the fact agreed. But the Opinion of the Court was againſt the Lord in the principal caſe, becauſe he had not layed a demand of his Fine at the time it grew due of the perſon of the Tenant, as the Lord muſt do. See *Denny* and *Lucas* Caſe. *Hob.* 135. See this Caſe before.

9. A *Quare Impedit* by the King againſt the Biſhop of *Rocheſter* and *Jackſon*; and declared, That Queen *Eliz.* was ſeiſed of the Advowſon of the Church of M. in groſſe, and preſented S, who was admitted, &c. and that the Church is now void by the death of S: The Defendant pleaded, That before the Queen, &c. J. Biſhop of *Rocheſt.* was ſeiſed of the ſaid Advowſon, and Collated J.S. and then was removed to *Norwich*; and then in the Vacation J. S. dyed, and the Queen preſented S; and S. being dead, it belongs to the now Biſhop, who collated the ſaid *Jackſon*, who is *Perſona impersonata, abſq; hoc* that the Queen was ſeiſed of the Advowſon: And the Jury found, that the Advowſon in Fee was preſentable by the Queen by two Turns contiguous, and by the Biſhop the third Turn: and that the Queens firſt Turn was ſatisfied by the preſentment of S: and that this is the ſecond for the King. It was holden in this caſe, That although this Verdict did not find the Iſſue for the King; for the Iſſue was to be underſtood of the whole Advowſon: Yet becauſe it did clearly appear to the Court by the Verdict, That this preſentation did of right belong to the King; therefore the Court did award a Writ to the Biſhop for the King. Hill. 13 Jac. in C. B. The King and the Biſhop of *Rocheſters* Caſe. *Hob.* 218, 219.

10. Note; It was agreed by the Court, That if the Court of the Councel of *York*, which is a Court of Equity, do make a Decree againſt a Maxim in Law; as againſt a Joynt-Tenant that hath Land by Survivorſhip, that the heir of his Companion ſhall have the moyety of the Land, this is a void Decree, and a Prohibition ſhall be granted in ſuch caſe, except that, during the Lives of the parties, it be agreed betwixt them, That there ſhall not be a Survivorſhip; for then they may hold plea of it, and then ſuch a Decree ſhall be good. Paſch. 22 Jac. in C. B. *Portington* and *Beaumonts* Caſe. *Winch.* 79.

11. One entred a Plaint in a Baſe Court to purſue in the nature of a Writ of Entry in the Poſt, and had Summons againſt the party until ſuch a day; at which time, after Sun-ſet, the Steward came and held the Court, and the Summons was returned ſerved, and the party made default, and Judgment was given. The Queſtion was, If the Judgment was good? It was the Opinion of the whole Court, although the Judgment was given, and the Court was holden at Night, yet it was good: and if it were erronious, he could have no remedy by Writ of Falſe Judgment, nor otherwiſe, but onely by way of Petition to the Lord; and he ought in ſuch caſe to do right according to conſcience, for he hath power as a Chancellor within his own Court. Mich. 6 Eliz. *Owen* 63.

12. The Steward of a Leet being in Court, did ſay to the Defendant who was a Reſient within the precinct of the Leet, That he muſt be ſworn for the Queen to make preſentments at the Court: To which the Defendant replyed, I ſaying, I ought to be ſworn, you lye. It was agreed by the Court, That this was ſuch a Miſdemeanour for which the Defendant is fineable: For every Leet is the Queens Court, and a Court of Juſtice, to which, reſpect and recovery ought to be given; and theſe words are in great contempt of the Court. *Popham*, Chief Juſtice, ſaid, That if any miſdemeaned himſelf in the Leet in any outragious manner, the Steward might commit him. The Plaintiff had Judgment to recover. Paſch. 36 Eliz. in B.R. The Earl of *Lincoln* and *Fiſhers* Caſe. *Owen.* 113.

13. In an *Ejectione Firmæ*, by the Leſſee of R. of the Church of D, It was found by Verdict, That the King was the true Patron, and that W. entred a Caveat *in vita Incumbentis*, he then lying *in extremis*; ſcil. *Caveat Epiſcopus ne quis admittatur, &c. niſi Convocatus.* The ſaid W. the Incumbent dyed; J. S. a ſtranger preſented one M. who is admitted and Inſtituted and Inducted; afterwards the ſaid W. pretents one G. who is Inſtituted and Inducted: Afterwards R. procures a Preſentation from the King, and was Inſtituted and

and inducted. It came in Queſtion in the Spiritual Court, who had the beſt right? And there ſentence was given, That the firſt Inſtitution was *irrita, vana, et iniqua* by reaſon of the Caveat; and then the Church being full of the ſecond Incumbent, the King was put out of poſſeſſion. But it was adjudged and Reſolved by all the Juſtices, 1. That this Caveat was void, becauſe it was in the life of the Incumbent. 2. That the Church upon the Inſtitution of *M.* was full, againſt all but the King, and then the Preſentation of G. was void, by reaſon of the *ſuper*-Inſtitution, and therefore no obſtacle to hinder the preſentation of R, and therefore he had good right: And if the ſecond Inſtitution be void, the ſentence cannot make it good: For the Spiritual Court ought to take Notice of the Common-Law, which ſaith, That *Eccleſia eſt plena et Conſulta* upon the Inſtitution, and the Parſon hath thereby *Curam animarum*. Hill. 14 Jac. in B. R. *Rouſe's* Caſe. *Poſham*, 133.

14. *Langham* a Citizen and Freeman of *London*, was committed to Newgate by the Court of Aldermen: He was brought to the Barr by *Habeas Corpus*; upon which Return was made, That *London* is an Ancient City Incorporate by the name of Mayor, Comminalty and Citizens: and that a Court of Record had been time out of mind before the Mayor and Aldermen: And that there is a cuſtome, That if any Freeman be elected Alderman, that he ought to take an Oath *in hac verba*, viz. You ſhall ſwear to ſerve the King in ſuch a Ward in the Office of Alderman, of which you are elected; you ſhall duly come to the Court of Orphans and Huſtings, if you be not hindred by command of the King, or any other lawful cauſe; you ſhall give good Counſel to the Mayor; you ſhall not ſell Bread, Ale, Wine, or Fiſh, by retail: And ſet forth a cuſtome, That if any perſon be choſen Alderman, he ſhall be called to the Court, and the Oath tendred to him; and if he refuſe to take it, then he ſhall be committed till he take the Oath: And then ſet forth, That *Langham* being a Freeman, and having taken the Oath of a Freeman, was *debito modo electus* Alderman, and being *habilis et idoneus*, 1. *Feb.* was called to the Court of Aldermen, and the Oath tendred to him, and that he refuſed to be ſworn *in contemptum Curiæ et contra Conſuetudines*; wherefore according to the cuſtome he was committed. It was ſaid, That this was an inſufficient Return for the matter of it; for he is impriſoned generally, and untill he takes the Oath: which utterly takes away the Liberty of the Subject; for by this means he may be impriſoned for ever. 2. There is no Notice given him, that he was choſen Alderman: And, 3. The Oath is naught, being unreaſonable; For he ought to forſeit his Trade; for if he ſell Bread, Ale, Wine, or Fiſh before, he muſt ſwear, he ſhall never ſell them by retail afterwards; which is very unreaſonable: For perhaps he may be impoveriſhed afterwards, and ſo neceſſitated to uſe his Trade, or otherwiſe to periſh. But the Opinion of all the Juſtices upon Argument in Court, was, That the Return was good, that the Oath was reaſonable; and that the Court, being a Court of Record, might lawfully commit him for refuſing to take the ſaid Oath; and ſuch Commitment, upon ſuch Refuſal, had been admitted and practiſed. Wherefore the Party was Remanded to priſon. H.11. 17 Car. in B.R. *Langham's* Caſe. *Mo.* 179, 180, to 191.

Cuſtomes.

1. *Cuſtome, what it is; And what ſhall be ſaid to be a good and reaſonable Cuſtome, and allowable, and what not, but ſhall be ſaid to be void.*

1. CUſtome is defined to be *Conſtitutio ex diverſis actionibus ſæpius iterata, Goldesbr.* 103. in *Plympton* and *Dalyett's* Caſe; but that which is alledged to be throughout *England*, is the Common-Law, and ought not to be layed as a Cuſtome. And that which is by Cuſtome, is not to be layed as the Common-Law. See 34 H. 8. *Dyer*. It was layed, *Quod habetur Conſuetudo inter Mercatores per totam Angliam*, &c. It was holden, It was no good manner of alledging a Cuſtome, for that it is the Common-Law. See *Cook* 9. Part, 74. in *Combes* Caſe. acc.

2. In an Action upon the Caſe, the Plaintiff declared, That whereas the Defendant 20 *Jan.* 9 Jac. was, and long before had bin, a Common Hoyman, to carry goods by water for hire from *London* to *Milton*, and from thence to *London*: And where by the Cuſtome of *Englands* ſuch Carriers, ought to keep the goods delivered to them to be carried ſafely, ſo as they ſhould not be loſt by default of them, or their Servants. That he 20 *Jan.* had delivered a Portmanteau, with 50 l. in it to be carried, for which he gave him 2 d. and that the Defendant had ſuffered the goods to be loſt. In that Caſe, It was Reſolved. That although it was layed as a Cuſtome of the Realm; yet in Deed it is the Common-Law. Trin. 11 Jac. in B. R. *Rich* and *Kneeſands* Caſe. *Hob.* 17, 18.

See 22 H. 6. 21. *Horſelowes* Caſe. An Action upon the Caſe brought againſt an Inkeeper, And Exception was taken to the Writ, becauſe it was *ſecundum legem, et conſuetudinem regni*, It appearing, that the matter did lye in Cuſtome.

3. The Writ *de rationabili parte Bonorum* lyeth, where the Wife, after the death of her Husband, cannot have the third part of her Husbands goods, after his debts paid, and funerall expenſes performed, for then ſhe may have this Writ againſt the Executors of her Husband. And it ſeemeth by the Statute of *Magna Charta*, cap. 18. that this was the Common-Law of the Realm; and ſo it appeareth by *Glanvil*, That after the Debts paid, the Goods ſhall be divided into three parts, one part for the Wife, another for the ſons and daughters, and a third part to the Executors; and yet the Writs in the Regiſter recite the ſame, to be the Cuſtome of the Countries. See 39 E. 3. 9. Detinue brought, and declares, That the Heir by cuſtome, ought to have reaſonable part of the goods of his Father, who dyed Inteſtate and good. 31 E. 3. A Woman did demand the moyety of her Husbands goods, becauſe he had no Children, and counted upon the cuſtome of the Realm. See 30 H. 6. *Reſpondet* 75. acc. Mich. 18 and 19 Eliz. in B. R. A Writ was brought, allowed there, notwithſtanding that Exception was taken to it, that it was maintainable by ſpeciall cuſtome in *London*. See *Fitzh. Nat. Br.* 122.

4. Cuſtome that the Lord may take the beaſt of a ſtranger Levant and Couchant upon the Land for a Heriot due by his Tenant, is not good. 3 Eliz. *Dyer*. 199.

5. Cuſtome that the Tenant ſhall be amerced if he do not put his Cattell into the Lords pound, is a void Cuſtome. 21 H. 7. 20.

6. Cuſtome is ſuch an uſage as hath obtained *vim legis*, and is a binding Law to particular places, perſons, and things, which it concerns, and cannot be eſtabliſhed by the Grant of the King, or by Act of Parliament. But it is *jus non ſcriptum* made by the people onely of ſuch a place, where the Cuſtome runs.

7. Cuſtome and Preſcription are in the Right, Uſage is in Poſſeſſion: Cuſtome is applyed properly to a place certain, as a Country, Town, Hundred, and runs with the Land, as Gavel-kind: Preſcription hath reſpect to a place certain, which by intendment, hath continuance for ever: Uſage differs from them both, for it may be more particular, as to a Hundred, and perſons, which cannot have continuance for ever; As to Inhabitants of a Town, to have a Way; &c.

8. Every Cuſtome is not unreaſonable, which is contrary to a particular Rule or Maxim of the Common-Law. For cuſtomes may have reaſonable Intendment, and beginning, where they are not prejudiciall to the Common-Weal, nor to the preſent intereſt of every particular perſon: As the Cuſtome of Gavell-kind, and Borough-Engliſh; one is againſt the Maxim of Diſcent, the other of Eſcheats, and yet they are good Cuſtomes. Sir *John Davis*, in the Caſe of *Tanſtry*.

9. A Cuſtome may be prejudiciall to a particular Intereſt, of a particular perſon, and yet reaſonable, where it is for the benefit of the Commonwealth: As the Cuſtome to make Bulwerks upon the Land of another for defence of the Realm. 36 H. 8. *Dyer* 60. or to pull down a houſe *in publico incendio*: or to dry Nets upon the Land of another, in favour of uſage. 8 E. 3. 18. or turning of the Plough upon the Land of another, in favour of Tillage: But a Cuſtome which is contrary to the Common-Wealth, and injurious to a multitude, cannot have a reaſonable beginning, and therefore is void, *Davis's* Reports *ibid.* As the Cuſtome, That none ſhall put his Cattell into the Common, untill the Lord hath put in his Cattell. 2 H. 4. 24. becauſe the ſame is injurious to a Multitude of Commoners.

10. A cuſtome, That ſuch of the Tenants of ſuch a Mannor, as ſhall firſt come to the place, ſhall have all Windfalls, is a void Cuſtome for the Incertainty, and yet it may be reduced to a certainty by matter *ex poſt facto*. *Davis, ibid.*

11. A Cuſtome which exalts it ſelf, and encroacheth upon the King's Prerogative, is void, as againſt the King: As a cuſtome to make a Corporation, is void, becauſe none can do it but the King. 49 Eliz. 3. 3. So a Preſcription to have Sanctuary for Treaſon: Or to have *Catalla felonum*, is void. 1 H. 7. 23.

12. A Cuſtome was alledged, That Tenant in Fee-ſimple might make a Leaſe but for ſix years, It was adjudged a void Cuſtome, becauſe repugnant to the Fee, and unreaſonable. 19 Eliz. *Dyer*. 358. *Salford's* Caſe.

13. A Cuſtome in *Denbigh* in *Wales*, is, That a Feme-Covert, with her Husband, by ſurrender in Court there, might allien her Lands. It was holden that the ſame was a good Cuſtome, and was not taken away by the Statute which Unites *Wales* to *England*, for that ſuch a Cuſtome was good in *England*. Hill. 21 Eliz. *Dyer*, 363. 6.

14. In Ancient Demeſne, Tenant in Tail levyed a Fine with Proclamations; And in a Formedon there brought, the Tenant pleaded the Fine to bar the Tail by cuſtome, and Judgment there given accordingly: upon which a Writ of Falſe Judgment was brought, and if the cuſtome of barring Eſtate tail, be averrable againſt the Statute of *Donis*, which is within memory, was Aſſigned

for

for Error: It was ſaid, That if in that Caſe, the Judgment be reverſed, the Judgment ſhall onely be, that he ſhall be reſtored to his Action: and then they will adjudge according to their cuſtome. Mich. 23 Eliz. *Dyer* 373.

15. Cuſtome, that every Inhabitant of a Town had payed *Modum decimarum* to the Parſon, in diſcharge of the Tythes, is a good Cuſtome, for they do not claim a charge or profit in the ſoil of another, but a diſcharge in their own Land. So a Cuſtome, That every Inhabitant of ſuch a Town, ſhall have a way over ſuch Land to the Church, or Market, is a good Cuſtome, becauſe it is but an eaſement, and no profit; and a way or paſſage may well follow the perſon. *Cook* 6. Part, 69. *Gatewood's* Caſe.

16. In a Replevin, the Plaintiff intituled himſelf to have Common of Paſture, in ſuch a place where, &c. to his Copyhold, It was found that he ought to have Common: But that every Copyholder had uſed to pay time out of mind, &c. *unum gallinam et quinque ova annuatim.* It was adjudged in this Caſe, That the payment did not limit or qualify the cuſtome, but the ſame is a Recompence for the Common, for which Recompence the Terr-Tenant hath remedy by diſtreſſe. It was adjudged for the Plaintiff. *Cook* 5. Part, 78. *Gray's* Caſe.

17. A Cuſtome that a Freeholder may not paſſe his Land unleſſe by ſurrender, into the hands of the Lord, is a good Cuſtome. *Cook* 5. Part, 84. acc.

18. Cuſtome of the Mannor is, That every Feoffment, Deviſe, or Grant, made of the Lands of that Manner, ſhall be preſented by the Tenants in open Court, was adjudged a good Cuſtome; and if it be not preſented, the Livery is void; And it was holden, it is not a perfect Feoffment untill it be preſented, but *opus inchoatum et non perfectum.* 6. 5. Part, 84. *Peryman's* Caſe.

19. The Cuſtome of a Mannor was, That if a Copyholder ſuffered his Copyhold-Meſſuage to be ruined, that he might be amerced; and that the Lord might diſtrain the beaſts, as well of the Tenant, as of the under-Tenant Levant, and Couchant, for the ſaid Amercement. A Copyholder ſuffered his houſe to go to ruine for want of reparations, and afterwards made a Leaſe of his Copyhold for a year, the Lord diſtreyned the under-Tenant: It was holden by the Court a good Cuſtome, and a good diſtreſſe, and then Amercement is not perſonall but a Charge upon the Land, And the diſtreſſe is but as a pledge, and therefore a ſtranger may be diſtrained by ſuch a Cuſtome. Hill. 17 Car. in B. R. *Tyler* and *Thornes* Caſe. *Mo.* 231.

20. A man preſcribed to have Pot-water out of a River; and the Jury found, That he ought to have it, paying 6 d. yearly. It was holden, he hath failed in his preſcription; and if he do not pay the money, the Terr-Tenant may diſturb him in taking of the water; which is all the remedy which he hath. *Cook* 5. Part, 78.

21. The Lord preſcribed to hold his Turn in a place, and to have of the Terr-Tenant a horſe as a Reward at every Turn. It was holden a void preſcription for the incertainty, becauſe the ſame lyes in the Will of the Lord, which is incertain.

22. A Cuſtome which maintains Tyranny, Oppreſſion, Extortion in the Lord, or in any other, is void, as the Cuſtome of Taniſtry in *Ireland*; *Davis* Reports in the Caſe of Taniſtry.

23. A Cuſtome, that the Land ſhall go [*digniſſimo* of the Sex] is void for the incertainty, and cannot be reduced to any certainty by proof; for Dignity doth conſiſt in the opinion of the Multitude, which is the moſt incertain thing in the world. See *Davis*, *Ibid.*

24. A Cuſtome long time continued, cannot be interrupted by the bare alteration of the Tenure: And therefore if Land be ancient Socage and Gavelkind, and the ſame comes to the Crown; and it is delivered out of the Crown again *Tenendum in Capite*, or by Knights ſervice; yet the Land ſhall diſcend to All the males as Gavelkind. 5 Ma. *Daliſons* Reports. *Lambert's* Perambulation of *Kent*, 535.

25. A Cuſtome, That the Pariſhioners onely, ſhall elect their Church-Wardens without the Parſon, was adjudged a good Cuſtome. Paſch. 15 Car. in B. R. in the caſe of the Pariſh of *Ethelborow* in *London*.

26. In a Special Verdict, It was found, That the Cuſtome of a Mannor was, That *Qualibet Fœmina viro cooperta poterit legare* to her husband, and ſurrender her Copyhold Land in the preſence of the Reeve and 6. other perſons. It was holden by the Court, That the ſame was no good cuſtome, becauſe of the incertainty; for it ought to be alledged, That *Qualibet Fœmina poteſt legare, et non* [*poterit.*] Surrender, Cuſtome, or Preſcription, ought to be alledged in a thing done. Paſch. 25 Eliz. in C. B. *Skipwiths* Caſe. *Godbolt* 14.

27. Debt was brought upon a *Conteſſit Solvere* according to the Law Merchant, and the Cuſtome of the City of *Briſtol*: Exception was taken, becauſe the Plaintiff did not make mention in his Declaration of the Cuſtome. But becauſe in the end of his Plea, he ſaid, *Protestando, ſe ſequi Querelam ſecundum Conſuetudinem Civitatis Briſtoni*, It was awarded good. Mich. 29 Eliz. in B. R. *Godbolt* 49.

28. Errour of a Judgment in *Cornwall*, upon Debt

Debt upon Obligation. The Errour was, because the Tryall of the Iſſue there was by *6.* onely. It was ſaid to be no Errour, becauſe the Court was by Preſcription, and the Tryall there *ſecundum conſuetudinem ibidem à tempore, &c.* before uſed. But it was holden by the Court, That ſuch a Cuſtome to try by *6*, was a void cuſtome, and againſt the Common-Law; and there cannot be an Exemption of perſons from being Jurours, unleſſe there be ſufficient Jurours beſides the perſons exempted, to make tryals. Mich. 1 Car. in B. R. *Tredymock* and *Peryman*'s Caſe. *Cro.* 1. Part, 188.

29. Enfant Tenant in tail of Land in Gavelkind, (where the Cuſtome was, That an Enfant above the age of 15. years, might make a Feoffment of his Lands, and bind himſelf) made a Feoffment of the Lands entailed. It was the Opinion of the whole Court, That this Feoffment was not any diſcontinuance to bind him, nor was good by the Cuſtome; for that the cuſtome ſhall never enable him to do a wrong; and therefore it ſhall be intended of Land onely, whereof he is ſeiſed in Fee. Mich. 3 Jac. in B. R. *Vaughan* and *Floids* Caſe. *Cro.* 2. Part, 80.

30. Errour of a Judgment in *Salop*: It was aſſigned, That in an Action upon the Caſe there, the Defendant was Eſſoyned, and had by Eſſoine, *et Querens habuit eundem diem*; at the day the Defendant being demanded, appeared not, but made default *et habuit diem per defaltam ſecundum Conſuetudinem, &c.* at which day the parties appeared, and Judgment was given againſt the Defendant by *Nihil dicit*; ſo the Plea was utterly diſcontinued, becauſe when the Defendant made default, no day can be given unto him when he is out of Court: and although it was done *ſecundum Conſuetudinem*, yet that cannot help it: For no Cuſtome can help that which is againſt Common-Law. The Judgment was reverſed. Mich. 12 Jac. in B. R. *Popham* and *Rowley*'s Caſe. *Cro.* 2. Part, 357.

31. The Parſon ſued in the Spiritual Court, to have the Clerk eſtabliſhed there, being placed there by the Parſon according to the late Canon, That the Parſon of the Church ſhould have the placing of the Clark: where the Pariſhioners diſturbed him, upon a pretence of a Cuſtome to place a Clark there by Election of their Veſtry; upon which ſurmiſe of a Cuſtome, the Churchwardens and Pariſhioners prayed a Prohibition, and a Prohibition was Granted, for that the Court held, That it was a good Cuſtome, and that the Canon cannot take it away. Trin. 21 Jac. in B. R. *Jermyn* and *Hammond*'s Caſe. *Cro.* 2. Part, 670.

32. In Caſe for a Prohibition to the Spiritual Court for Tythes: It was ſurmiſed, That there was a Cuſtome, That all Lambs eryanded, fallen and bred upon any one Tenement, or Living, in ſuch a Pariſh, although they belonged to ſeveral Owners, they have been caſt, and reckoned together, as if they were but one mans, and the Tenth, or Tythe Lamb of them ſo counted together, have been paid for Tythe. In this Caſe, two points were Reſolved. 1. That a Prohibition ſhould be granted, becauſe all Cuſtomes againſt Common Right, are tryable at the Common-Law. 2. That this Cuſtome was void, unreaſonable, and againſt Law: for by this means, it might fall out, that ſome one might have but one Lamb, and that might be taken for Tythe, and he that had more ſhould pay nothing at all. Mich. 18 Jac. in B. R. *Barker* and *Cocker*'s Caſe. *Hob.* 329.

33. In an Action upon the Caſe for erecting a Mill; the Queſtion was, upon the validity of a Cuſtome, which was ſet forth, That the Lord of the Mannor of D. ſet forth the Cuſtome to be, That all Reſidents, and Inhabitants within the ſaid Mannor, ought to come and grind at his Mill. It was a Queſtion, If this was a good Cuſtome. The Opinion of all the Juſtices upon open Argument in Court was, That it was a good Cuſtome. And as to the lying of the Writ of *Stella ad nocendum*, It lyes not alwayes between the Lord and the Tenant, but where there is a Tenure; but where there is no Tenure, it lyes by Cuſtome, and then it may be againſt a ſtranger: and in this Caſe, the party, though a ſtranger, hath benefit by the Cuſtome, becauſe here he hath his Tenement; and it was ſaid, that although no reaſon can be alledged for the beginning of ſuch a Cuſtome, yet it ſhall not be judged unreaſonable, for *qui rationem in omnibus quærit, rationem deſtruit.* Hill. 11 Jac. in B. R. *Hix* and *Gardiner*'s Caſe. *Bulſtr.* 2. Part, 195.

34. In Trover and Converſion of Goods, The Defendant pleaded, and juſtified, the taking at ſuch a place at L. as Bellman there by Cuſtome, to take out of every bag of Corn holding a Buſhell, and no more, a pint, and if it hold more, then a Quart; and ſhews that he was choſen Bell-man, *ex tempore quo*, he did take the ſame as by Cuſtome it belonged to him to do, and layes the taking at one place by the Cuſtome, and the Converſion at another: and upon this plea, the Plaintiff demurred in Law: And amongſt other points, one was, Whether this was a good Cuſtome. It was the Opinion of all the Juſtices, That the Cuſtome was good and reaſonable, and ſhall be conſtrued to have a reaſonable commencement, for the Office of the Bell-man, is to cleanſe and pave the ſtreets; and *pro labore*, he had this allowed him; and it is *pro bono publico*; And the Cuſ-

Converſion here is the point, and the Trover is but the inducement to the Action; and he ſheweth here, that he hath not converted the goods of the Plaintiff, but his own goods, when he conveyes to himſelf a property, and after Converts. It was adjudged againſt the Plaintiff, that it was a good Cuſtome. Paſc. 12 Jac. in B. R. *Hill* and *Banks* Caſe. *Bulſtr.* 2. Part, 201, 202, 203.

35. Note, It was Ruled by the whole Court, That if a Cuſtome be alledged, That the eldeſt daughter ſhall ſolely inherit; the ſame may be a good Cuſtome, but then the eldeſt Siſter ſhall not Inherite by force of ſuch Cuſtome: So if the Cuſtome be that the eldeſt daughter and the eldeſt Siſter ſhall Inherite, the eldeſt Aunt ſhall not Inherite by that Cuſtome. And ſo if the Cuſtome be, That the youngeſt ſon ſhall Inherite; the youngeſt brother ſhall not Inherite by the ſaid Cuſtome, as it was adjudged in one *Denton's* Caſe. Paſc. 8 Jac. in C. B. *Rapley* and *Chaplyn's* Caſe. *Godbolt.* 166.

36. In Treſpaſſe for taking away of Timber, and the boughs of Trees felled, the Defendant juſtified, and ſet forth, That the cuſtome of the Manner of A. was, That the Lord ſhould have *Quicquid valeret ad maremium*, and that the Freeholders ſhould have *Ramilles* (which the Court ſaid muſt be meant of the Arms and boughs for whatſoever is not *maremium*, is *ramillum*: But the Defendant in his juſtification, further ſet forth, That the Tenants *in Boſcagio parte manerii* time out of mind, had uſed to have the branches of Trees to be burnt *in neceſſario focali in terris et Tenementis*: The Opinion of the Court was, That the Cuſtome in the generality of it, to have *Ramilles*; was a good Cuſtome, and ſo was the Caſe in 13 E. 3. viz. title bar, where ſuch a cuſtome was ſet forth; which was ſued to be in the very Manner, which was in the principall Caſe: But becauſe the cuſtome was not well expreſſed in the principall Caſe where it was ſet forth to have *Eſtovers* to be burnt *in terris et Tenementis*, and for that *Eſtovers* cannot be appertaining to Lands, but to houſes onely, by reaſon of that ſpeciall Juſtification onely, It was adjudged againſt the Defendant. Mich. 11 Jac. in C. B. The Biſhop of *Chichester* and *Strodwick's* Caſe. *Godbolt.* 234, 235.

37. Debt againſt an Executor in *Briſtow* upon a cuſtome of *Conceſſit ſolvere*, by him to pay a Debt due by the Teſtator, upon a ſimple contract, a Verdict was, and Judgment for the Plaintiff. Errour was brought; and the Error Aſſigned was, That the cuſtome of bringing an Action of Debt upon a *Conceſſit ſolvere*, as in this Caſe, is not good, becauſe it hinders the party to wage his Law, as by the Law he may do: The Court inclined to Opinion, That it was no good cuſtome; for a *Conceſſit ſolvere* is without any conſiderat on, eſpecially being brought againſt an Executor. Mich. 19 Car. in B. R. *Twigg* and *Roberts* Caſe. *Styles* 195.

38. In an *Ejectione firmæ*, the Caſe was, A Copyholder of Inheritance, made a Letter of Attorney to two jointly and ſeverally, to ſurrender his Copyhold-Lands in Fee to certain uſes, after his death, according to the cuſtome of the Manner. The Queſtion was, Whether the cuſtome was good or not. It was ſaid, it was not good, Becauſe the cuſtome here is to convey againſt a generall Law. And 2. None can give an Authority to another to do a thing, which he could not do himſelf. And 3. By the death of the Copyholder, the Lands are ſeiſed in the heir, and an Authority given to deveſt them is not good. Alſo it is not found, that the Tenant had a Feeſimple in the Land, and if he had but an Eſtate for Term of life, he cannot make ſuch a Letter of Attorney. It was the Opinion of the Court, That the cuſtome was not good; and ſo much the rather, becauſe it is not found, That the parties to whom the Letter of Attorney was made, were Cuſtomary Tenants, for one of them is not mentioned at all, and the other is onely found to be ſo by way of recitall. It was adjudged for the Plaintiff. Hill. 1651. in B. R. *Walls* and *Bucknall's* Caſe. *Styles* 311.

39. In an Action brought upon a Bill of Exchange, for mony paid by a wrong perſon, to whom the Bill belonged not, and a Verdict for the ſame: If it were a good payment, if the wrong perſon do ſhew the Bill. It was holden by the Court, That by the cuſtome of Merchants, it was a good payment, and that the party that paid it, ſhall not be charged again. Hill. 1652. in B. R. *Styles* 366.

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2. *Particular Cuſtomes of* London, *and of other Counties, Cities, Towns, and Boroughs; where they be good, and ſhall bind, where not.*

1. BY the cuſtome of *London*: Lands and Tenements in *London*, may be bargained and ſold, by word onely, without Indenture, or Inrollment, notwithſtanding the Statute of 27 H. 8. of *Inrollments*. Paſc. 6. Eliz. *Dyer.* 229. *Chibborn's* Caſe.

2. Husband and Wife were ſeiſed of a Tenement in *London*, to them, and the Heirs of the Husband,

Husband, and the Husband Covenanted by Indenture, in Conſideration of 20 l. that he would ſuffer a Common Recovery by Writ of Right, according to the cuſtome of *London*, which bindeth as a Fine at Common Law, and that the Recovery ſhould be to the uſe of the Recoverors, untill they had made a good and ſufficient Eſtate, and Leaſe by Indenture for 40 years, and after the making of the ſaid Leaſe, then to the uſe of the Husband and Wife, and the heirs of the Husband. It was Reſolved, That the Leaſe was good, and not defeaſible by the Wife, who ſurvived the Husband, and yet the Husband onely was party to the Deed; which declared the uſe, and yet the ſame bound the Wife, by reaſon of the Cuſtome. Mich. 12 Eliz. *Dyer* 290. *Cook* 2. Part, 57. in *Berkwith's* Caſe.

3. By the cuſtome of *London*, A deviſe of Land by Will is good, it being enrolled, for it hath greater ſolemnity added to the Will, then in other Towns and Boroughs, where Lands are deviſeable. *Cook* 5. Part, 84. in *Perimans* Caſe.

4. A. ſeiſed of a houſe in *London*, took a Wife, and afterwards acknowledged a Recognizance to the Chamberlain of the City of *London*, according to the Cuſtome for Orphanage-mony; and afterwards acknowledged another Recognizance before the Recordor and Mayor of the Staple to B; B. ſued Execution upon his Recognizance, and had a *Liberate*, but the ſame was not Returned, and the Sheriff upon the ſame delivered the ſaid houſe to B. The ſucceſſor of the Chamberlain, ſued Execution upon his Recognizance by *Elegit*, to a Serjeant at Mace, immediate Officer to the Court, and had the moyety of the houſes delivered to him in extent. A. the Recogniſor dyed, his Wife had the houſes delivered to her for her Dower: and afterwards the Wife dyed. The Chamberlain Aſſigned his Intereſt over to F. and afterwards B. the other Conuſee aſſigned alſo his Intereſt to F. the Heir of the Conuſor, demiſe the houſes to the Plaintiff. In this caſe, amongſt other points, It was Reſolved, That the Succeſſor of the Chamberlain of *London*, ſhould have the ſaid Recognizance: for although the Corporation of the Chamberlain be a ſole Corporation; yet the Corporation was by cuſtome, and the cuſtome hath created and made him Chamberlain, and a Corporation in ſucceſſion, as to that ſpeciall purpoſe concerning Orphanage, The ſame Cuſtome hath enabled the Succeſſor to take the Recognizances made to his predeceſſor: And it was holden, That the cuſtome was a reaſonable cuſtome, for the Executors, or Adminiſtrators, ought not to intermeddle with ſuch Recognizances, which by the cuſtome are taken in his Corporate capacity, and not in his private capacity. Hill. 13 Eliz. *Cook*, 4. Part, 64. *Fulwood's* Caſe.

5 Note, It was Reſolved by the whole Court, That if any Orphan of *London*, who is by the cuſtome of *London*, under the Government of the Mayor and Aldermen of the ſaid City, ſue in the Eccleſiaſticall Court, or in the Court of Requeſts, for any goods, monies, and Chattells due to them, either by cuſtome of *London*, or by any deviſe, or Legacy in the Will of their Anceſtor, or to have an Accompt; that a Prohibition will lye, becauſe the Government of the Orphans, by cuſtome, doth appertain to the Mayor and Aldermen; and they onely have the Juriſdiction of them. Paſc. 35 Eliz. in B. R. *Cook* 5. Part, 73. Caſe of the Orphans of *London*.

6. A. brought debt upon an Obligation againſt an Adminiſtrator, who pleaded that there is a cuſtome in *London*, That if a contract be made by a Citizen of *London*, to pay ſo much mony to another Citizen; and he that ought to pay it, dyeth inteſtate, that his Adminiſtrator ſhall be bounden to pay it, aſwell as upon an Obligation, And it was adjudged a good Cuſtome; For although that none was chargeable at the Common-Law, by the name of Adminiſtrator, and cuſtome cannot begin within time of memory; yet becauſe they were chargeable at the Common-Law, as Executors, It was Reſolved, That ſuch a generall cuſtome was good; and it was Reſolved, That although the Plaintiff was a ſtranger and no Citizen, yet the Cuſtome was good to bind him. Trin. 37 Eliz. in C. B. *Cook* 5. Part, 32. *Snelling's* Caſe.

7. A. ſued an Appeal of Robbery in the County of W. where the Robbery was done, againſt B. and C. as *acceſſores*, and declared that the Principalls named in the Writ, and who were attainted, did the Robbery in the County of W. and that the Defendants felonioully at *London*, before the Robbery done, did abet them to do it: It was adjudged in that Caſe, That although the Plaintiff cannot have but one Appeal againſt the Principalls and acceſſaries, and againſt the principall of neceſſity it ought to be brought in the County of W. yet becauſe thoſe of the County of W. cannot enquire of a thing done in *London*, and *London* by the cuſtome cannot joyn with them, for in caſe of Felony which concerneth a mans life, every Act ſhall be tryed in the County, where the Act was done. It was adjudged, That the Appeal againſt the *Acceſſores* ſhould abate. 26 Eliz. *Dyer*. 38. *Cook* 7. Part, 2. in *Bullwer's* Caſe.

8. The cuſtome of *London* is, to enter a Plaint firſt, and then Arreſt the party, or elſe by the cuſtome they may Arreſt the party, and then enter the Plaint, upon a good cauſe of Action: In an Information againſt S. and other Ser-

jeants

jeants at Mace of the City of *London*, for Arresting the body of *Isabell* Countesse of *Rutland*: The Case was, A judgment was had against the said Countesse in the Common-Pleas: Whereupon a *Capias* was Awarded against her out of the Common-Pleas to the Sheriffs of *London* to Arrest her body: The Serjeant who had a Warrant to Arrest her, being fearfull that she would be rescued by her Servants and friends, and so escape; for which the Sheriffs (if she was Arrested) should be charged; The Serjeants caused S. to enter a feined Action of 1000 l. against her, before the Sheriffs, according to the custome, upon which they would Arrest the Countesse and bring her to the Counter, and then take her body to Execution, upon the *Capias ad satisfaciendum*; And after the said Serjeants came to her Coach, and shewed her their Mace, and touched her body with it, Saying, *We Arrest you Madame*, and afterwards compelled the Coachman to carry her to the Counter, where she remained till she paid the debt: In this Case, these points were Resolved, That the Person of a Baron or Countesse shall not be Arrested in debt, or Trespasse, because it is intended, that they have sufficient in Law, by which they may be distreyned. 2. Resolved, That because in the principall Case, a *Capias* was Awarded against the Countesse by the Court of Common-Pleas, that the Sheriff, or his Officer, by his Warrant, might without Offence execute the same, for they ought not to dispute the Authority of the Court, but to execute the Writs sent to them, and although it appeared in the *Capias*, that she was a Countesse, against whom no *Capias* lay by Law, yet because in some cases (as in cases of contempt, *Capias* lyes against them). It was Resolved, That the Sheriff, nor his Officers ought not to examine the Judiciall Act of the Court: But it was Resolved in the principall case, because the Serjeants Arrested the Countesse upon a feyned Action of their own heads; without any Warrant, that the same was a false Imprisonment, and therefore they were fined. And Arrests upon such feined Actions, were condemned in Law. *Cook* 6. Part, 53. The Countesse of *Rutland*'s case. See *Cook* 9. Part, 62, 63. *Markally*'s case. acc.

9. The Plaintiff in an Action brought, declared, That whereas he was possessed of a Messuage for years, which had antient Lights, and the Defendant had a house adjoyning, and a yard: the Defendant upon the yard had erected a house, and Stopped his Lights. The Defendant pleaded, That the custome of *London* was, That every one might build upon an old Foundation, and if there be not any agreement by Covenant, might Stop the Windowes of his Neighbor: Upon which the Plaintiff did demur: And it was adjudged for the Plaintiff, because he did not answer the charge of the Plaintiff, that he built upon the new, and not the old foundation: And it was holden by the Court in this case, That a man might build upon an old foundation, and darken all the lights of his Neighbour which are adjoyning to it; And if he maketh new windowes higher, his Neighbour might also erect his house higher, and destroy these new windows. But a man cannot build a house upon a place where there was none before, as in a yard, and thereby darken the Lights of his Neighbour: And so it was adjudged in *Altham*'s Case, upon such a custome in the City of *York*. And it was said by *Coke* Justice, That one Prescription might be pleaded against another, where the one might stand with the other, as it was adjudged in *Wright* and *Wright*'s case, That the Copyholder of a Bishop prescribed. That all Copyholders within the Manor, had bin discharged of Tythes, but not where one Prescription is against another, as where one prescribes to have Lights, and the other prescribes to Stop them. Mich. 9 Jac. in B. R. *Hughes* and *Keime*'s Case.

10. The Custome in *London* is, That no person whatsoever not being Free of the City, shall by any colour, way or means whatsoever, directly or indirectly, by himself or by any other, keep any Shop, or any other place whatsoever inward or outward, to put to sale any Wares or Merchandizes by way of Retail, or use any Trade or Mystery or Handicraft for hire, gain or sale within the City, upon pain of forfeiture for every time 5 l. It was Resolved by the Court, That the same was good by way of Custome; but the same was not good by way of Grant or Charter made to the City. *Cook* 8. Part, 122, 123. The Case of the City of *London*. See 7 Jac. in C. B. *Wagners* Case. *Brown*. 2. Part, 284. acc.

11. There are divers Customes in *London* which are against Common right, and the Rule of the Common-Law; and yet they are allowed to be good: and so much the rather, because they have not onely the force of a Custome, but they are also supported and fortified by authority of Parliament. *scil.* They have a Custome in *London*, That the Creditor may arrest the body of the Debtor before the day of payment, to drive him to find Sureties. 5 E. 4. 30. 2 H. 7. 12.

12. They have a Custome in *London*, to enter the house of another which is his Castle: and therefore the custome of *London* is, That when a Chaplain or Priest hath a Woman in his house or chamber, and one hath an ill suspition thereof, he who hath such suspition, may come to the Constable of the Ward, or Beadle, and with him may enter into the house and chamber of the Chaplain

or Prieſt, and commit the Offender to priſon, 2 H. 4. 12.

13. They have a Cuſtome in *London*, which doth alter the courſe of Juſtice, *ſcil.* where an Action is brought before one Judge, to remove the plea before another. In an Action of Debt upon an Eſcape of a man taken by a *Capias* upon a Statute-Merchant at the Plaintiff's Suit, The Defendant ſaid, that the Cuſtome of *London* is, That where a Plaint is entred before the Sheriffs of *London*, That the Mayor at the ſuggeſtion of the Plaintiff or Defendant, may ſend for the parties; and if it be found by Examination before the Mayor, that the Plaintiff is ſatisfied, he may award, That the Plaintiff ſhall be barred; and that the Plaintiff did enter a Plaint of the matter, and was examined before the Mayor; and upon Examination it was found, that the party was paid; and that the Plaintiff took a Bond for the Reſidue; and therefore the Mayor awarded, That he ſhould be barred. And it was adjudged, That the Cuſtome was a good cuſtome, for that the Examination was pendant the Action. But if the cuſtome had been alledged, to have examined the matter after a Judgment, ſuch Cuſtome had not been good. 10 H. 6. 15. *Cook* 8. Part, 126. acc.

14. The married Wife of a Merchant in *London* may ſue, and be ſued, by Cuſtome; and the reaſon given is, becauſe *London* is the chief City and place of Merchandize within the Realm of England; and it is conceived that the Merchants cannot be alwayes reſident there, but ſometimes beyond Sea, and other where about their buſineſſes and affairs: and for that cauſe it ſhall be reaſonable, that his wife ſhall ſue and ſhall be ſued in his abſence. 39 H. 6. See Hill. 7 Jac. in B. R. in *Gittins* and *Compers* Caſe. *Brownl.* 2. Part, 118. acc.

15. Note: It was holden by the whole Court, That the Statutes of 32 & 34 H. 8. of Wills, did not extend to Lands in *London*, but the Deviſe of the whole is good: and that if the Deviſee of Lands in *London* be diſturbed, he ſhall have *Ex gravi Querela*; but otherwiſe it is, of Lands at the Common-Law; And if an Aſſiſe of Mortdanceſter be brought of Lands in *London*, it is a good plea to ſay, that the Lands are deviſeable; but if it be brought of Lands at the Common-Law, it is not any plea. 20 Eliz. in C. B. *Leon.* 267.

16. Treſpaſſe of Battery and Impriſonment; the Defendant to the battery pleaded Not-guilty; and to the Impriſonment juſtified, That, being a Sergeant of the Mace in *London*, by Cuſtome there upon a plaint of Debt entred in any of the Counters againſt any, he may arreſt him againſt whom ſuch plaint is entred, and carry him to priſon, untill he find bail; and ſhewed, that a plaint is entred, &c. The Plaintiff replyed, That after the arreſt, he tendred him ſufficient bail, J. S. and J. D; and notwithſtanding he detained him. It was holden by the whole Court, That when he juſtifies the Arreſt and Impriſonment by the Cuſtome, although he might have accepted bayl, (which was agreed by the Court, he could not do, but that ought to be done by the Judge of the Court) and refuſed; that that did not make the Arreſt and Impriſonment tortious, as to have an Action of Treſpaſſe. But the Court agreed upon the matter, That he might have had an Action upon the Caſe for the detaining of him in priſon after bayl tendred. Trin. 6 Car. in B. R. *Cro.* 1. Part, 141. *Salmon* and *Percivall*'s Caſe.

17. In an Information againſt the Defendant, for uſing the Trade of a Goldſmith, upon the Statute of 5 Eliz. not being an Apprentice: The Defendant pleaded the Cuſtome of *London*, That one having been an Apprentice for 7. years, and made Freeman of *London* of any Trade, may uſe any other Trade in the ſame City: and ſhewed, he was bound Apprentice in the Art of Cordwayner, and ſerved 7. years, and was made a Freeman, and ſo juſtified. It was Excepted to the Plea, becauſe he pleaded *quod uti poſſit* any other Trade; and not *Quod uſus fuit*. But it was anſwered, That this being alledged by way of Cuſtome in the City, and not as a particular preſcription, it was well enough: and ſo ſeemed to be the Opinion of the Court. 2. It was Objected, That the matter of the plea was not good, becauſe a Cuſtome cannot be alledged againſt a Statute. But it was anſwered, That being the Cuſtome of *London*, which Cuſtomes are confirmed by Parliament, it was good enough: But that point the Court doubted; and therefore it was not Reſolved. Hill. 9 Car. in B. R. The King & *Bagſhaws* Caſe. *Cro.* 1. Part, 153, 163.

18. In Treſpaſſe, for taking away a bagg of Nutmegs. The Defendant pleaded, That the Mayor, Citizens, and Comminalty had been time out of mind ſeiſed of a Wharf in *London*, called *Queen-Hithe*; & that all that time, they had uſed to have and take for goods layd upon the ſame Wharf, to be ſo conveyed from thence by water, of perſons not lawfully thereof diſcharged, Wharfage, *ſcil.* a half-penny of every Porters burthen there layd to be ſo conveyed; and for default of payment, to diſtrain ſuch goods upon the ſaid Wharf by a perſon appointed by the Mayor for collection thereof: and ſhewed, that two perſons unknown, brought two Porters burthens of goods of the Plaintiff's, being no perſon diſcharged, whereof the baggs of Nutmeggs was part, and laid them upon the ſaid Wharf to be conveyed by Water; and that the Defendant being Collector, delivered two *ob.* which not paid, he diſtrained: The Plaintiff confeſſed the barr; and layd, That time out of mind in the ſaid City, there had been a Cuſtome, That

That all the Freemen of the ſaid City had been and ought to be diſcharged of the ſaid payment of Wharfage for their ſaid goods; and averred, he was a Freeman of the City, &c. The Plaintiff ſaid, There was no ſuch Cuſtome within the City: and then ſurmiſes, that time out of mind there had been a Cuſtome, That when any Iſſue upon any cuſtome of the City is joyned, though the Mayor and Comminalty be parties to the Action, The Mayor and Aldermen of the City have uſed to certifie to the Juſtices the truth of ſuch cuſtome; and prayed a Writ to the Mayor, to certifie: and in this caſe, the onely materiall Queſtion was, Whether the Cuſtome in this ſpeciall caſe were good, That the Mayor and Aldermen ſhould ratifie a Cuſtome which concerned the Intereſt of the Corporation whereof they were a part? And it was Reſolved by the whole Court, That the Cuſtome was not good: For, 1. It was not properly a Cuſtome, but a kind of preſcription, or in the nature of a preſcription, and then clearly it was not their Cuſtome. 2. That it was not ſuch Cuſtome as was within the reaſon or meaning of that ſpecial form of Tryall by Certificate that was granted and uſed in *London*. 3. Becauſe it was againſt right and Juſtice, and againſt natural Equity, to allow them their Certificate, wherein they are to try and judge their own cauſe. Trin. 12 Jac. in C. B. *Day* and *Savages* Caſe. *Hobart*, 85, 86.

19. An Action upon the Caſe was brought for certain parcels of plate; The Iſſue was, Whether the Cuſtome of *London* was, That there was a Common Market in *London* for all goods, in all Shops, except Sundayes and Holidayes, from the Sun-riſing, to Sun-ſetting: The Defendants made their ſirmiſe for tryall of their Cuſtome by the Mouth of their Recorder, and prayed a Writ accordingly, which was granted, returnable in Trinity Term, and continued untill *Octab. Mich.* and then it is entred, That the Concluſion of the Defendant's plea ought to have been, *Et de hoc ponit ſe ſuper patriam*; whereupon the Plea was ſo made, and Iſſue taken: and upon a *Venire facias* to the Sheriff of *London*, found for the Plaintiff; which is a very ſtrong caſe to prove, They ſhall not try a Cuſtome by their own Certificate. Mich. 38 Eliz. in C. B. *Bilford* and *Lowes* Caſe. *Hob.* 87.

20. A Citizen of *London* was endebted to a Forrainer upon an Obligation, and the Forrainer to him upon a ſimple Contract: the Forrainer dyed; the Citizen (as he may by the Cuſtome) upon Oath that it is a due debt, had an Action againſt the Executor of the Forainer, and upon 4. defaults recorded, he attached the Debt in his own hands, according to the cuſtome of Forein Attachments; and the Executor found Maiſprife, that if he could not diſprove the debt within a yeare and a day, that ſo much ſhould be recovered upon the Obligation: and in Debt brought by the Executors of the Obligation, and this Attachment pleaded, It was Demurred, Whether it be a good Cuſtome, and as well between Forainers as Citizens; alſo becauſe the Judgment was, That the Plaintiff ſhall have Execution upon the debt attached; and not Judgment that he ſhall recover. Hill. 3 Eliz. *Dyer* 196. *Lees* Caſe. See 8 Eliz. *Dyer* 247. *Toſts* Caſe, acc.

21. If a man ſue another before the Mayor of *London*, &c. and a third perſon is indebted to the Defendant in ſo much as the Suit of the Plaintiff is, and by the cuſtome of the Law of Attachment, the third perſon is condemned, and Judgment given againſt him: Notwithſtanding, if no Execution be ſued againſt the third perſon, the Plaintiff may reſort, and have Judgment and Execution againſt the Defendant, being his principal debtor; and alſo may ſue the third perſon for his debt, notwithſtanding the Judgment unexecuted. Hill. 7 E. 6. *Dyer* 182.

22. In Detinue of two Gowns, the Defendant ſaid, That a plaint was affirmed againſt the Plaintiff by the now Defendant, upon a demand of 30 s. For which the Plaintiff was attached by the two Gowns in the Cuſtody of the Defendant within the City being; and becauſe the Plaintiff made 4. defaults which were recorded, The Gowns were apprized at 22 s. by Oath of two men, and then delivered to the Defendant here at the ſaid prize of 22 s. by ſureties, to render the two Gowns, or the price, if the Plaintiff diſprove the debt within a year after the Appraizement: The Plaintiff pleaded, *Nul tiel Record*, before the Sheriff, and becauſe that all the Records before the Mayor and Sheriff, had *ore tenus*, do remain before themſelves; for that Cauſe a Writ was directed to the Sheriffs to certifie, If there was ſuch a Record, or not. See *Book Entries*, 207.

23. Upon a *Habeas Corpus* of a Priſoner: It was returned by the Mayor, Aldermen, and Sheriffs of *London*; Their Cuſtome concerning the Orphans of Freemen of *London*, and for ſecurity of their Portions to be paid to them at the age of 21 years, or at the time of their marriage, or at ſuch time as is appointed by the Will of their Father, or Mother, or other Freeman, giving to them any Legacy, they uſe to take ſufficient ſecurity of them, which ought to pay them; and if they refuſe, then to commit them to the Compter, untill they give ſecurity, and return, Their Cuſtomes were confirmed by Act of Parliament, 2 R. 2. And that A. a Freeman having one Son, and one Daughter by E. his wife, dyed; that the Priſoner being a Suiter to the wife before marriage, agreed, That if the

wife would marry him, ſhe ſhould diſpoſe of 200 l. &c. and he was bound in a Statute to permit her to make her will, and diſpoſe thereof; and after ſhe dyed, and by her Will gave 100 l. to her ſon, and 100 l. to her Daughter, and the Priſoner agreed to her Will, and yet refuſed to give ſecurity to the Chamberlain of *London*, to pay it at the time appointed by the Will, pretending that he was bound by Statute to the Friends of the Orphans to perform it: upon the reading of the Return, the Priſoner was remanded by the Court: For the cuſtome was holden to be a good and laudable cuſtome; and the voluntary obligation upon marriage, is not any diſcharge as to the ſecurity by the cuſtome. Paſch. 16 Jac. in C. B. *Andrews* Caſe. *Hutton*, 30.

24. If a man do leave his Horſe in an Inne in *London*, and there he eats up in Hay and Provender more then he is worth; The cuſtome of *London* was ſaid to be, That the Horſe ſhould be prized by the Inne-keeper's next Neighbour, and afterwards to be ſold for the payment of the money owing for him: And the Court was clear of Opinion, That this was a good cuſtome, as the ſame was alledged; but not if the debt was for other Horſes; As if one do bring many Horſes into an Inne, and afterwards takes all of them away but one, the Inne-keeper cannot ſell this one Horſe for the payment of that which was due to him for the other Horſes by the cuſtome, notwithſtanding that the debt doth amount to more then the price of his Horſe; for every Horſe is to be ſold by the cuſtome to ſatisfie the debt due for his own meat only. Trin. 10 Jac. B. R. *Moſſe* and *Townſends* Caſe. *Bolſtr.* 1. Part, 207.

25. Upon a *Habeas Corpus* returned, the Caſe was; A man would erect a Tavern in *Birchin*-Lane, *London*; and the Mayor and Comminalty of the City for his diſobedience becauſe he would not obey them, but would erect a Tavern there againſt their wills, they knowing the ſame to be an unfit place, did impriſon him. It was the Opinion of the Court, That he ſhould be remanded, becauſe the Mayor and Comminalty had authority over him, and they might appoint him a place in which he might erect his Tavern. Note in that caſe the Recorder certified *ore tenus* the cuſtome to be, That the Mayor might appoint a place. Paſch. 15 Car. in B. R. *Marſh*, 15.

26. In Debt, the Plaintiff declared, That *London* is *antiqua Civitas*; And they have uſed time out of mind, That the Mayor take Recognizances of any perſon being of full age, and not a *Feme-Covert* every day of the year, except Sundayes, Holy-dayes, Councel-dayes, and dayes of Quarter-Seſſions and Goal-delivery. And that the Defendant ſuch a day had acknowledged a Recognizance to the Plaintiff. It was Objected, That the Cuſtome was unreaſonable, and too general, not being reſtrained to any perſons or matters; for it may extend to Recognizances, taken of Idiots, men of Non-ſane memory; and though the whole Realm as well as within the City. But the Opinion of the Court was, That the Cuſtome was good; and the Recognizance makes the Debt local: And the Mayor is ſuch a perſon as may take Recognizances, for he is a Judge of Record. And if the party be within age, Non-ſane Memory, Ideot, &c. ſhall come on the other ſide, and the Plaintiff need not ſhew the ſame in his Declaration. And the Court ſaid, They have uſed a long time to take Recognizances, and their Cuſtomes are Confirmed by Parliament. It was adjudged for the Plaintiff, Paſch. 31 Eliz. in B. R. *Chamberlain* and *Thorpe's* Caſe. *Leon.* 131.

27. Treſpaſſe of Aſſault, Battery, and Wounding the Plaintiff's Wife: The Defendant pleaded, That *Salisbury* was an Ancient City; and within the ſame, is a Cuſtome, That if any make an Affray, and aſſault any Officer of the City, or any other perſon, that if he upon whom ſuch Aſſault is made, complain to the Mayor of the City, that the Mayor for the time being, may ſend for him who made the Affray as a Juſtice of Peace, and make him to anſwer to it: And that the Plaintiff made an aſſault within the City; of which complaint being made to the Mayor, the Mayor ſent the Defendant being Conſtable, to bring the Plaintiff to him, who went to the Plaintiff's houſe, and ſignified to him the Commandment of the Mayor, and the wife of the Plaintiff did aſſault them; and they *Molliter* put their hands upon the ſaid Wife; which is the ſame Aſſault, Battery and Wounding. It was holden, The Defendant's plea was not good, for many cauſes; 1. This cuſtome, to impriſon upon a bare ſuggeſtion, is not good, nor reaſonable. 2. To be a Juſtice of Peace, doth not lye in preſcription; for no Juſtice of Peace was before 1 E. 3. and then the Commencement being known, Preſcription cannot be of it. 3. Becauſe the Preſcription is layed, that the Mayor might ſend for him, and doth not ſay, within the City; and it ſhall be unreaſonable to ſay, That in ſuch caſe the Mayor may ſend for him in any place within England. 4. Becauſe the wounding is not Anſwered; for *molliter injicere manus*, cannot be taken for a wounding: It was adjudged againſt the Defendant. Paſch. 30 Eliz. in B. R. *Jerome* and *Neal's* Caſe. *Leon.* 103, 104.

28. In Action upon the Caſe; The Plaintiff declared, That L. parcell of the Manner of E. is Ancient Demeſne of the Crown, &c. and that all the Manner and Tenements of Ancient Demeſne ought to be acquitted of Toll in all places within the

the Realm, for them their goods and Chattels; and ſet forth the Letters Patents of the Queen, 10 Sept. *Anno* 19. of her Raign, whereby ſhe commanded all Mayors, &c. to permit Tenants in Ancient Demeſne to be quit of Toll, Murage, &c. throughout the whole Realm; and declared, That he being Inhabitant of L. ſuch a day, carried his Goods to *Yarmouth*; and that the Defendants there had taken and carried away a Cable of the Plaintiff's Goods, to the value of 8 l. for Toll: The Defendant, by Proteſtation, that L. is not Ancient Demeſne; nor that the Tenements of Ancient Demeſne ought to be quit of Toll, ſaid, That *Yarmouth* was an ancient Town Incorporated by the name of Bayliff and Burgeſſes. And that they had time out of mind there an Officer called a Water-Baily; and that they and their Predeceſſors have had and taken Toll of the Tenants and Inhabitants of L. for any goods thither brought to Merchandize; and if it be not paid, they have uſed to diſtrain for it by their Water-Baily: And that the Plaintiff brought to *Yarmouth* 2000 weight of Cable Ropes to ſell; for which there was due 6 d. for Murage, 4 d. for Thronage, which he demanded, and the Plaintiff refuſed to pay: for which he took the ſaid Cable *Nomine diſtrictionis* for the ſaid Thronage, &c. It was ſaid, That Tenants in Ancient Demeſne are quit of Toll by the Common-Law, and have an Inheritance in ſuch Liberties which the King by his Grant cannot take away, and then the preſcription layed by the Defendants is not good, being againſt the Common-Law. But it was holden by the Court, That the preſcription as it was laid, was good: For it is to take Toll onely of thoſe things which are brought by Sea by Merchants, and not otherwiſe: and Tenants in Ancient Demeſne are not diſcharged of Toll for all things, but onely for ſuch as ariſe out of their Tenements, or is bought for their Tenements, or Families, and their ſuſtentations, according to the Quantity of their Tenements: They ſhall be Quit of all things for their manurance of their Lands and for beaſts, bought and ſold for their Tillage. See *Fitzh. Na. Br.* 22. But the Juſtices were clear of Opinion, That the Tenants in Ancient Demeſne ſhould pay Toll for their Merchandizes. It was adjudged againſt the Plaintiff. Trin. 30 Eliz. in B.R. *Wards* and *Knights* Caſe. *Leon.* 231, 232.

3. *Particular Cuſtomes within Mannors, and other Lands; what ſhall be ſaid to be good and reaſonable Cuſtomes, and ſhall bind the Tenants of the ſaid Mannors or Lands; What not.*

1. IN a Replevin, The Defendant avowed, That the place where was parcel of the Mannor of B, being a Waſte ground, and that there were one hundred Copyholders there who had Common in that place; and ſhews a Cuſtome, that they chooſe every year a Surveyor of their Fields, who have uſed to diſtrain their Cattel Damage-Feaſant, and ſhews, he was elected Surveyor according to the Cuſtome, and found Cattle there Damage-Feaſant, and ſo avowes. It was adjudged, That the Avowry was not good. For although they have ſuch a cuſtome to make Surveyors of their Fields, and who might diſtrain Damage-Feaſant; yet he ought to diſtrain in the name of him that hath the Freehold, but not in his own name; and therefore is holden, It was not a good Juſtification to have a Retorn. Mich. 15 Jac. in B.R. *Koblethaupt* and *Stephens* Caſe. *Cro.* 2. Part, 436.

2. Upon Evidence in an *Ejectione Firmæ*, The Cuſtome of the Manner of F. in the County of B, was found to be, That the Land was demiſeable for 21 years, paying the treble value of the Rent; and if he dyed within the Term, that the Term ſhould be to his heir, paying a Fine certain of one years Rent; and if he aſſigned the Term, the Aſſignee ſhould have it, paying for a Fine one years value of the Rent, and that he who had it, might by the cuſtome renew it for 21 years, paying 3 years value: and this was holden to be a good Cuſtome, by the Court. Mich. 21 Jac. in B. R. *Pages* Caſe. *Cro.* 2. Part, 671.

3. The Lord of a Mannor did preſcribe, That if the Tenant do a Reſcous, or drive the Cattel off from the Land when the Lord comes to diſtrain, that the Tenant ſhall be amerced by the Homage; and that the Lord might diſtrain for the ſame. It was the Opinion of the whole Court, That it was a good cuſtome. Hill. 39 Eliz. in C.B. *Godbolt.* 135.

4. Note, by *Anderſon*, Chief Juſtice; He who will give in Evidence ſeveral Cuſtomes within Mannors, ought to ſhew the ſeverall Limit, in which the ſeveral cuſtomes are ſeverally running; as that the Mannor extends into two Towns, and that

that the Lands in one of the ſaid Towns are grantable for lives onely, and the Lands in the other in Fee, and he ought not to ſhew the ſeveral cuſtoms *promiſcuè valere* through the whole Manner: and to that purpoſe he remembred this caſe, *ſcil.* The Mannor of *Wadhurſt* in the County of *Suſſex*, conſiſted of two ſorts of Copyhold, *viz.* Stockland and Bondland, by ſeveral cuſtomes diſcernable in ſeveral manners: As if a man be firſt admitted to Stockland, and afterwards to Bondland, and dyeth ſeiſed of both, his heir ſhall inherit both; but if he be firſt admitted to Bondland, and afterwards to Stockland, and of them dyeth ſeiſed, his youngeſt ſon ſhall inherit; and if of both *ſimul et ſemel*, his eldeſt ſon ſhall inherit. But if he dyeth ſeiſed of Bondland onely, it ſhall diſcend to the youngeſt ſon. Paſch. 29 Eliz. in C. B. in *Kempe* and *Carter*'s Caſe. *Leon.* 55.

5. In a Replevin, the Defendant avowed, becauſe in the Mannor there is a Cuſtome, That the greater part of the Tenants at any Court within the ſaid Mannor holden appearing, may make By-lawes for the moſt profit and beſt Government of the Tenants of the ſaid Mannor; and that the ſaid By-Laws ſhould bind all the ſaid Tenants; and that at ſuch a Court within the Manner, the Homage there being the greater part of the Tenants of the ſaid Mannor made this By-law, *ſcil.* That no Tenant of the ſaid Mannor ſhould put into ſuch a Common any Steer being a year old or more, upon payn of 6 d. for every ſuch Offence; and that it ſhould be lawfull to diſtrain for the ſame. The Court was of Opinion, That the By-law was void, for it is againſt Comnion-right, where a man hath Common for all his Cattel Commonable, to reſtrain him to one kind of Cattel: But if it had been, that None ſhould put in his Cattel before ſuch a day, it had been good; for ſuch By-law doth not take away, but order the Inheritance. Mich. 32 Eliz. in C.B. *Erbery* and *Latton*'s Caſe. *Leon.* 189.

6. It was moved for a Prohibition to the Eccleſiaſtical Court: and ſhewed, that the Suit there was for money, which by the aſſent of the greater part of the Pariſhioners was aſſeſſed upon the Plaintiff, for reparation of the Church, and for the re-caſting of their Bells: the truth was, for the making of new Bells, where there were 4. before; whereby it appears, it is meerly matter of Curioſity, and not of neceſſity, for which Pariſhioners are not lyable to ſuch taxations: and alſo he alledged a Cuſtome, that he and all thoſe whoſe Eſtate he had in ſuch a Tenement, have uſed to pay but 11 s. for any reparation of the Church. The Court ſeemed to be of Opinion, That the Cuſtome was not reaſonable, becauſe it layed a burthen upon the reſt of the Pariſh. The Prohibition was denyed by the Court. Mich. 2 Car. in B. R. *Popham* 197.

7. Tenant of a Copyhold for life, in which the Cuſtome was, That the Wife ſhall have her Widowes eſtate; and the husband was attainted of Feleny, and executed: and whether the Wife in this caſe ſhall have the Widowes Eſtate, was the Queſtion upon a Demurrer. And *Winch*, Juſtice, being onely in Court, he ſeemed to be of Opinion, That ſhe ſhould not, without a ſpecial Cuſtome. Hill. 19 Jac. in C. B. *Allen* and *Brathes* Caſe. *Winch.* 27.

8. In an Action; the Plaintiff declared upon the Cuſtome of Merchants, That if any Merchant over the Sea deliver money to a Factor, and make a Bill of Exchange under his Seal, and this is ſubſcribed by the Maſter or any of the Company of ſuch Merchants, That the Merchant or all the Company, or any one in particular, may be charged to pay it: and ſhewed, that one M. was Factor of the Company of which the Defendant was one, and that the ſaid M. did ſubſtitute one G; to whom the Plaintiff delivered 100 l. upon a Bill of Exchange: to which Bill, one C. being one of the Company, ſet his hand in *England*. The Defendant pleaded *Nihil debet per legem*: upon which the Plaintiff demurred: the Queſtion was, Whether the Defendant might wage his Law. *Hobart*, Juſtice, ſaid, If 2. or 3. Merchants trade over Sea, who make a Factor there, who takes money there, and gives a Bill, and this is ſubſcribed by one of the Company; that this ſhould bind all or any of the Company, is not a good cuſtome; and the cuſtome of Merchants is part of the Common-Law of this Kingdom, of which the Judges ought to take notice: and if any doubt ariſe to them about their cuſtome, they may ſend for the Merchants to know their cuſtome: and he ſaid, That the Defendant ought to be admitted to wage his Law; for the delivery of the money made a Contract in Law; and ſo he may have an Action upon the Caſe for it, and declare upon the promiſe: and then the Defendant may not wage his Law. Mich. 19 Jac. in C. B. *Vanbeath* and *Turner*'s Caſe. *Winch.* 24, 25.

9. Copyholder brought Treſpaſſe againſt the Lord for cutting down of Trees: and alledged a Cuſtome, that he might cut down to repair his houſe, and that there was not ſufficient tree left to repair it. In this caſe, It was Reſolved; 1. That without a Cuſtome a Copyholder might cut down trees to repair, and for Firebote and other neceſſaries. 2. That Treſpaſſe did lye againſt the Lord, for that the Copyholder hath an Intereſt in the Trees as well as in the Land. And it was ſaid, That the Lord might as well pull down his houſe, as cut down the trees; and the Copyholder hath a

ſpecial

ſpecial Intereſt in the ſhadow and lopps; and the Lord the general Intereſt. Mich. 8 Jac. in C. B. *Heydon* and *Smith*'s Caſe. *Godbolt.* See 26 Eliz. *Doyles* Caſe. 40 Eliz. *Stebbings* Caſe. acc.

10. If the Lord alledge a Cuſtome within his Mannor, to have a Fine of every Copyholder at the alteration or change of the Lord, be it by alienation, demiſe, or death; ſuch a Cuſtome is againſt Law, becauſe it is the Act of the party: and by ſuch means, Copyholders ſhould be oppreſſed with multitude of Fines. But a cuſtome to pay a Fine upon the death of every Lord may be good, becauſe it is the Act of God. See 39 Eliz. *Cook.* 1. Part, *Inſtitutes* 49. b.

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4. *Concerning the Cuſtome of* Kent; *The Cuſtome of* Gavelkind; *The Cuſtome of* Borough-Engliſh; *and Concerning other the like Cuſtomes of places: Where they ſhall be good, where not. How, and by what Acts altered, changed, or Extinct, what not.*

1. IN the County of *Kent*, where Lands or Tenements are holden in *Gavelkind*, where, by Cuſtome time out of mind uſed, The Sons which are Males, ought equally to Inherite the Lands: And that cuſtome is good and allowable; And the reaſon is rendred by Mr. *Littleton*, becauſe that every Son is as great a Gentleman as the eldeſt ſon is. *Litt.* 46.

2. In *Kent*, there is a Free Socage, and baſe Socage. Free Socage ſhall diſcend according to the courſe of the Common-Law: Baſe Socage-Land is partable amongſt the Males, by the cuſtome of *Gavelkind*. *Lambert*'s Perambulation of *Kent.* 542, 543.

3. By the cuſtome of *Gavelkind* in *Kent*: all the Heirs in *Gavelkind* ſhall be vouched upon the Warranty of their Anceſtor, but the eldeſt Son onely, ſhall be barred by the Warranty of his Anceſtor. 11 E. 3. to voucher. 22 E. 4. acc.

4. By the cuſtome, The eldeſt Son onely in *Gavelkind* ſhall enter for a Condition broken: But all the ſons ought to joyn in an Attaint, or Writ of Error, to reverſe a Judgment: All the ſons ſhall be charged for the debt of their Anceſtor if they have Aſſetts: But if they allien their parts of the Aſſetts, and the eldeſt ſon hath Aſſets onely in his hands, he ſhall be onely charged. 11 E. 3. *Fitz.* Debt 7.

5. By cuſtome of *Gavelkind* in *Kent*, no tryall ſhall be by Battail, or by Grand Aſſize by Knights: but the tryall ſhall be by Jurors, Tenants in *Gavelkind*. *Lamb.* 550. acc.

6. By cuſtome of *Gavelkind* in *Kent*, Tenant in Fee ſhall not forfeit his Land by Attainder of Felony, or of Murder: But for Treaſon, Piracy, or for Felonies done and made by late Statutes, he ſhall forfeit his Land; But if he be outlawed for the Felony, or Murder, or abjureth, or taketh Sanctuary, he ſhall forfeit his Land, becauſe the cuſtome ſhall be taken ſtrictly. But he ſhall forfeit his goods for Felony; and all his Lands for Treaſon. 8 E. 3. Preſcription, 150. 22 E. 3. acc.

7. The Lord of the Land in *Gavelkind*, ſhall by the cuſtome have the Cuſtody of the Lands and Goods of the Heir, But if the Lord committeth the Cuſtody of them to another, the Heir at the age of 15 years, may diſtrein the Lord to accompt for the profits; And the Lord alſo may have an accompt againſt the Committee, but if the Committee be not of ability to anſwer the profits, the Lord and his Heirs ſhall remain chargeable to the Heir. *Lamb.* 552. 18 E. 2. *Avowry* 220.

8. By the cuſtome of *Gavelkind* in *Kent*, The Lord for the Rents, Cuſtomes, and Services, after four Courts (if no diſtreſſe may be found upon the Land) may ſeize the Land into his hands, and keep it for a year without manurance: And if the Tenant doth not come within that time, and agree with the Lord; the Lord at the next Court may enter, and manure the Land as his own proper Tenement; And the forfeiture for the Ceſſor, by the cuſtome is 5 l. 21 H. 7. 13. by *Frowick*.

9. By the cuſtome of *Gavelkind*, The Huſband ſhall have the moyety of the Wives Land for life, as Tenant by the Curteſy; if he live ſole, and unmarried, although he hath not Iſſue by the Wife; but if he marrieth, he ſhall loſe the Land by the cuſtome: And by the ſame cuſtome, the Wife ſhall have the moyety of the Land of the Husband *dum ſola vixerit*, and be not found with child by fornication committed: And the Wife ſhall not forfeit her Dower for Felony committed by the Husband: But by the cuſtome, The Wife ſhall have Dower onely of the Lands and Tenements, of which the Husband was ſeiſed, and veſted in poſſeſſion, and not of a poſſeſſion in Law. 8 H. 3. *Preſcription* 60.

10. By the cuſtome of *Gavelkind*, The Wife ſhall have the moyety of her Husbands goods after his Debts paid: And the Wife may relinquiſh her Dower by the cuſtome, and be endowed of the Land according to the Common Law, if it be for her beſt advantage; but if ſhe marrieth before Dower aſſigned, ſhe ſhall not be endowed. 2 E. 4. 19. *per Curiam*.

11. By

11. By the cuſtome of *Kent*, the Lawfull Children, after the debts of the Father paid, ſhall have the third part of his goods. The Father one part to diſpoſe of at his Will and pleaſure, and the Wife ſhall have the third part. 17 E. 3, *Fitzh. Nat. Br.* acc. The ſame cuſtome is in *London*. See *Glanvil* cap. 18.

12. Note, a cuſtome long time continued without interruption, cannot be loſt by the bare alteration of the Tenure; And therefore, if Land antient Socage, and *Gavelkind* in *Kent*, comes to the Crown, and be delivered out of the Crown again, *Tenend. in Capite*, or by Knights Service, yet the Land ſhall deſcend to all the Males, as *Gavelkind*. 4 and 5 M. *Daliſon's* Reports. *Lamb.* Perambulation of *Kent*. 535. acc.

13. Lands in *Gavelkind*, although that the ſame diſcendeth to the eldeſt Son, and ſo continueth by a long time, without interruption of the younger ſons; yet the Land in its nature remaineth *Gavelkind*, and is partable, becauſe the pleading of the Cuſtome is, *Quod terra illa à toto tempore partabilis fuit*. 16 E. 2. Preſcription 52.

14. Unity of poſſeſſion of the Land in the Lord, and the Manner doth not alter the nature of the Land of *Gavelkind*, but that the ſame is partable; And if Land which is *Gavelkind* cometh to the King by purchaſe, If the King afterwards granteth it to another and his Heirs, the Lands ſhall be afterwards partable amongſt the Heirs Males. See 14 H. 4. in the *Long Recovery*. See 7 Eliz. *Dyer*. by *Brown*.

15. The cuſtome of *Gavelkind* is as Common-Law in *Kent*: And therefore in a demand of *Gavelkind* there, It is not requiſite that the party ſhew, That the Town or Borough where the Land lyeth, is an Antient Town; And that all the Lands in the ſaid Town are partable betwixt Males: but it is ſufficient to ſuch, that the Land lyeth in *Kent*, and that all Lands there are of the nature of *Gavelkind*. See 5 E. 4. 8. 2 E. 4. 19.

16. If a Rent be granted in Fee out of *Gavelkind*-Land, the ſame ſhall deſcend to all the Heirs males, as the Land ſhall diſcend: yet although the Tenancy be of the Nature of *Gavelkind*, yet the Rent-Service by which the Tenancy is holden, may be diſcendable according to the Common-Law, his Lands in *Gavelkind* entailed ſhall diſcend to the Heirs males; But the Lands in *Gavelkind* ſo ſet for life, the remainder to the Right Heirs of J. S. who hath four ſons, and afterwards dyeth, The eldeſt Son of J. S. ſhall have the Land becauſe he comes in by purchaſe. But if the Land be deviſed to J. S. the Remainder to his right Heirs males, the ſame is an Eſtate tail in J. S. and then the ſame ſhall deſcend to all his Sons. 37 H. 8, *Br. Devt* 42, See 3 and 4 *Ma.* in *Daly-ſon's* Reports acc. See *Cook* 1. Part, 103. in *Shelleyes* Caſe.

17. By the cuſtome of *Kent*, upon Partition of Lands in *Gavelkind*, the eldeſt Son or daughter ſhall have the preheminence in the Election, but the younger ſon or daughter ſhall have the preferment in the partition: And therefore the youngeſt ſhall have the *Aſtre*, viz. the ſtock, Hearth, or Chimney for Fire: but the eldeſt ſhall have the Capitall Meſſuage. 23 *Aſſ.* 39 E. 3. 10. See *Br. Bon.* acc.

18. By the cuſtome of *Gavelkind*, an Enfant at the age of 15 years, may give, or ſell his Land for good conſideration, by Livery of his own hand. But a Releaſe by him of his right to Land, without Conſideration at ſuch age, is not good: And a Warranty, or a Grant of a Reverſion, by ſuch an Enfant of 15 years, is not good: But a Leaſe, with a Releaſe upon it, may be good, becauſe the ſame amounteth to a Feoffment, but then it ought to be for value given, as upon a Feoffment. See 5 H. 7. by *Vavaſor*. 11 H. 4. by *Hankford*.

19. There are no Tenures by Villinage in *Kent*, for their perſons are of Free Condition; And it is a good plea in an *Nativo habendo*, That the party was born in *Kent*. 30 E. 1. *Fitz Villinage*, 46.

20. By the cuſtome of *Kent*, the Tenant may lawfully enchaſe, or drive in the High way, the beaſts of any perſon for damage feaſant in his Land, without impounding them in the Common Pound. See *Lambert's* Perambulation of *Kent*. 567. acc.

21. Note, It was ſaid, That of Lands in *Gavelkind*, or in *Borough-Engliſh*, The Son cannot endow his Wife *ex aſſenſu patris* becauſe by poſſibility, he ſhall not continue Heir. *Cook* 6. Part, 22. in the Marqueſſe of *Winton's* Caſe.

22. Note, there is a difference between Preſcription and Cuſtome: For every Preſcription ought to have, by common intendment, a Lawfull beginning, but it is otherwiſe of a cuſtome, for that ought to be reaſonable *ex certa et rationabili uſitate*; but needeth not to have intendment of a Lawfull beginning: As a cuſtome to have Land deviſeable, or of the nature of *Gavelkind*, or *Borough-Engliſh*, for theſe and the like cuſtomes are reaſonable, but by common intendment they cannot have a Lawfull beginning, by no Grant, or Act, or agreement, but onely by Parliament. See *Cook* 4. Part, 31. in *Foiſton's* Caſe. *Cook* 6. Part, 61. in *Gateward's* Caſe. acc. See alſo another difference between Preſcription and cuſtome; Preſcription is made in the perſon, As he and all his Anceſtors, &c. and all thoſe whoſe Eſtate he hath, &c. cuſtome lyeth upon the Land, as *Infra manerium talis habetur Conſuetudo*: And therefore

fore ſuch cuſtome ſhall bind the Land, as *Gavelkind*, *Borough-Engliſh*, and the like. *Cook* 8. Part, 62. in *Beecher's* Caſe.

23. Grandfather, Father, and Son; The Grandfather ſeiſed of a houſe holden of the King in *Capite*, and of other Lands holden in *Gavelkind*, of other Lands in Socage, deviſed part of his Lands to his ſon in tail, and the other part of them for the advancement of other his Grandchildren, and dyed, the ſon within age, all the Grand children being alive: It was Reſolved in this Caſe, That when by will he deviſed that to his ſon; in ſuch Caſe the ſaving in the Statutes of 32 and 34 H. 8. gave to the King, the Wardſhip and Primor-ſeiſin, and therefore the King ſhould have the third part of the whole Land. And 2. It was Reſolved, That the King ſhould have the third part out of every ſeverall part; and ſo the charge ſhould be equall, and ſhould not light upon one onely. *Cook* 5. Part, 133. *Matthew Menes* Caſe.

24. A Copyholder of Lands in *Borough-Engliſh*, having three ſons, and one daughter, deviſed his land to his eldeſt ſon, paying to his daughter, and to every other of his ſons, 40 s. within two years; and ſurrendred to the uſe of his Will: the eldeſt ſon is admitted, and doth not pay the mony within the two years, and the younger ſon entred; and his Entry was adjudged lawfull: And in this caſe, it was Reſolved. 1. That although the annuall profits of the Lands for two years, did exceed the monies to be paid, yet the eldeſt ſon had a Fee-ſimple. 2. That although this word (paying) in ſale of a Will makes a Condition, yet in this caſe, the Law ſhall conſtrue that unapt word (paying) a Limitation; For if it were a Condition, it ſhould deſcend to the eldeſt Son, and then it ſhould be at his pleaſure, If the daughter, or brothers ſhould be paid or not; and therefore the Law ſhall judge it a limitation, of which the youngeſt ſon ſhall take advantage: And it is as much, as if he had deviſed the Land to his eldeſt ſon, untill he ſhould make default of payment. Mich. 33 Eliz. in B. R. *Wellock* and *Hammond's* Caſe. *Cook* 3. Part, 21. in *Boraſton's* Caſe.

25. If Lands in *Borough-Engliſh*, are holden of the King in Knights-ſervice, The father ſhall not have the Wardſhip of his younger ſon, no more then the younger ſon can endow his Wife of Land in *Borough-Engliſh*, *ex aſſenſu patris*: for, he ought in ſuch Caſe to be Heir apparent, who in Judgment of Law, ſhall continue Heir apparent; and not he Heir apparant, who by accident is Heir, by accident is not Heir. *Cook* 3. Part, 38. in *Ratcliff's* Caſe.

26. If an Erronious Recovery be had of Lands in *Borough-Engliſh*, the youngeſt ſon ſhall have a Writ of Error, becauſe the Land it ſelf goeth to him, And ſo ſhall all the ſons of Lands in *Gavelkind*. *Fitzh. Nat. Br.* 21. See before.

27. If the King purchaſeth Lands of the Cuſtome of *Gavelkind*, and dyeth, having Iſſue divers ſons, the eldeſt ſon ſhall onely inherite thoſe Lands, and the reaſon is, for that the quality of the perſon doth in this Caſe alter the diſcent, ſo as all the Lands and poſſeſſions whereof the King is ſeiſed *in jure Coronæ*, ſhall, *ſecundum jus Coronæ*, attend upon, and follow the Crown; and therefore, to whom ſoever the Crown diſcendeth, the Lands ſhall deſcend. *Cook* 1. Part, *Inſtitutes*, 15, 16.

28. If Tenant in tail of an Acre of Land of the Cuſtome of *Borough-Engliſh*, maketh a Feoffment in Fee within age, and dyeth, the youngeſt ſon ſhall avoid it, for he is privy in bloud, and claimeth by diſcent from the Enfant. *Cook* 1. Part, *Inſtitutes*, 337.

29. In Treſpaſſe, the Caſe was, Copyholder in Fee of Land, of the nature of *Borough-Engliſh*, diſcendable to the youngeſt ſon, had Iſſue three ſons, A. B. and C. and ſurrendred the Copyhold to the uſe of himſelf, and his Wife, and his Heirs, who were admitted; the Copyholder dyed ſeiſed of the Reverſion, which diſcended to C. the youngeſt ſon, the Wife entred, and held it; Afterwards C. dyed without Iſſue, the Wife dyed, A. the eldeſt ſon was admitted: The Queſtion was in this Caſe, whether A. ſon and Heir of the Copyholder; Or B. the middle ſon ſhould have this Reverſion. In this Caſe it was agreed. 1. That B. cannot have it as Brother and Heir of C. who had this Reverſion as youngeſt ſon, by the Cuſtome, becauſe the Cuſtome is onely to extend to the youngeſt ſon, and not amongſt brothers where no ſuch Cuſtome is found. And without a ſpeciall Cuſtome found that it ſhall deſcend to the youngeſt brother, the Law will not admit, becauſe Cuſtomes ought to be taken ſtrictly, and ſo it was Reſolved in *Ballard's* Caſe. 2. It was agreed, That betwixt a Copyhold in *Borough-Engliſh*, and a Freehold in *Borough-Engliſh*, there is not any difference: and that if the Wife had dyed in the life of C. and C. had entred, and dyed without Iſſue, then A. ſhould have had the Land, as Heir of C. The ſole doubt was, This being a Reverſion expectant upon an Eſtate for life; and C. being never ſeiſed of the Lands in poſſeſſion, but dyed in the life of Tenant for life without Iſſue, whether B. as youngeſt ſon may claim, or A. as Heir at the Common-Law ſhould have it. The Court was divided in Opinion, For two of the Juſtices held, That B. ſhould have it as Heir in *Borough Engliſh*, becauſe he is the youngeſt ſon when the

Wife dyed, and the Reverſion fell in poſſeſſion: But that was denyed by the other two Juſtices: For he was not youngeſt ſon when his Father dyed, and none may have it by that Cuſtome, but he who is youngeſt at the time of the death of the Father: The Caſe was not adjudged. Hill. 9 Car. in B. R. *Reve* and *Mallet's* Caſe. *Cro.* 1. Part, 297.

30. A man is ſeiſed of Tythes of Corn ariſing out of the Mannor of D. which is *Borough-Engliſh*: The Queſtion was, Who ſhould have them, the elder or younger ſon; The Opinion of the Court was, That the Eldeſt ſon ſhould have them; becauſe Tythes do not come naturally of the Land, but by manuall occupation of man: Alſo of common Right, Tythes are not an Inheritance deſcendable, but are Inheritances which come in Succeſſion: And by the Statute of Monaſteries, It is onely, that they are diſcendable to Heirs. Mich. 10 Jac. in C. B. *per Curiam.*

31. Note, *per Curiam*, If a Feoffment be made of *Borough-Engliſh* Land, upon Condition, That the Heir at Common-Law ſhall take advantage of the Condition: But all Actions in right of the Land, the youngeſt ſon ſhall have; As a Writ of Error to reverſe a Judgment, Attaint, &c. Mich. 20 Eliz. in C. B. adjudged.

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5. *Where Cuſtome ſhall be ſaid to be extinct; and by what and whoſe Act; what, and where not.*

1. LAnds within Antient Demeſne, which are partable amongſt Heirs males, are alliened by Fine levyed of them at the Common-Law: It was a queſtion, If by that courſe, the courſe of the Inheritance were altered, and made diſcendable to the Heir at Common-Law: It was the better Opinion of the Court, That it was not. Mich. 6 E. 6. *Dyer*, 60.

2. A man ſeiſed in Fee-ſimple, of Lands in *Borough-Engliſh*, after the Statute of 27 H. 8. made a Feoffment to divers perſons in Fee, to the uſe of himſelf, and the Heirs Males of his body begotten *ſecundum curſum communis Legis*, and afterwards dyed ſeiſed accordingly, having Iſſue two ſons: the elder ſon entred, and held out the younger ſon. It was the Opinion of all the Juſtices at *Serjeants-Inn*; that the youngeſt Son ſhould have the Land by diſcent, notwithſtanding the words before. Paſc. 2. Eliz. *Dyer*, 179.

3. Lands deviſeable in *London*, came to the hands of King *Henry* the 8th by the diſſolution of Abbeys; and afterwards the King granted them by his Letters Patents, in Fee, to hold by Knights Service in Chief: The Queſtion was, Whether the Patentee might deviſe the whole Land by his laſt Will in Writing, or but two parts. It was holden in this Caſe, That it was a good deviſe againſt the Heir for the whole Land, for that no words in the Statute of 32 H. 8. do reſtrein the authority to deviſe Lands which were deviſeable before the Stature. But it was ſaid, that peradventure it was not good againſt the King, either for Wardſhip, or Primer Seiſin. See Mich. 5. *Ma. Dyer*, 155. *Cook* 1. Part, *Inſtitutes* 111. See *Cook* 9. Part, 133. in *Matthew Manes* Caſe.

4. The Queen was ſeiſed of *Whaddon* Chaſe, and the Lord *Gray* was Lievtenant there in Fee, And he and his Auncеſtors, and their Keepers, had by Preſcription uſed to hunt vagrant Deer in the Demeſnes of the Mannor of S. adjoyning, as in prtence: The Mannor of Stane to the Queens hands, who granted the ſame to J. S. in Fee, with a Free Warren within his Demeſnes, *Ita quod nullus intret in Warrennam illam ad ſagandum ſine Licentia* of J. S. It was holden in this Caſe, that the unity did not extinguiſh the purlew, and that the Clauſe, *Ita quod*, &c. is not to be extended againſt the Keeper of the Queen, but other Subjects. Mich. 16 Eliz. *Dyer*, 326. The Lord *Grey's* Caſe.

5. King *Henry* the 8th, ſeiſed in Fee in the right of his Crown, of the Mannor of C. of which Mannor a certain Tenement called H. whereof a Cloſe called P. was parcell, and then was, and had bin, time out of mind, demiſed, and demiſeable, by Copy of Court-Roll of the ſaid Mannor, did build a new Meſſuage upon the ſaid Tenement, And afterwards by his Letters Patents, did grant the Office of keeping the ſaid Meſſuage to J. S. for Term of life, with all Lands thereunto belonging, And by the ſaid Letters Patents, did grant to the ſaid J. S. the Lands belonging to the ſaid new built Meſſuage, whereof the ſaid Cloſe called P. was parcell for Term of his life, for the exerciſing of the ſaid Office, and after dyed ſeiſed of the ſaid Mannor, and of the Reverſion of the ſaid Meſſuage and Cloſe, which afterwards came to *Queen Mary*. J. S. dyed. The Queen entred upon the ſaid Mannor, and Meſſuage, whereof the ſaid Cloſe was parcell, and by her Letters Patents, did Grant to S. and her Heirs for ever, The ſaid Mannor Meſſuage and premiſes, by mean conveyances came to J. D. and his Heirs, who being ſeiſed thereof, did by Indenture demiſe the ſaid Mannor, Meſſuage, and premiſes to L. for 60 years. Afterwards J. D. granted away the Reverſion of the ſaid Mannor, Meſſuage, and

and premiſes to J. N. which after by mean conveyance came to *Boothby*: L. who had a Leaſe for 60 years, by his Will deviſed the reſidue of his Leaſe, then unexpired, to C. his ſon; by vertue of which, he at a Court holden for the ſaid Manor, did grant the ſaid Meſſuage with the Appurtenances, and the lands thereunto belonging, to D. his brother, to hold of the ſaid Manner in Fee, at the Will of the Lord by Copy of Court-Roll, of the ſaid Manner, who was admitted thereunto accordingly: Afterwards the ſaid Leaſe for 60. years expired, And then *Boothby* who had the Reverſion of the ſaid Mannor, and Premiſes, entred in his Reverſion, and dyed ſeiſed thereof, leaving Iſſue F. his ſon. F. the ſon enters into the ſaid Mannor, and claims the ſaid Meſſuage, with the Appurtenances, with the Lands thereunto belonging, whereof the ſaid cloſe called P. was parcell, as parcell of the Demeaſnes of the ſaid Mannor of C. and doth deny it to be Copyhold; and, to try his Title, did by his Bayliff diſtrein the Cattell in the ſaid Cloſe damage feſant, as in his Freehold. There were many Queſtions made in this Caſe. 1. Whether by the Grant of the new houſe to J. S. *per nomen Officii* of Keeper thereof, were a good Grant. 2. Whether the King, not being informed, that at the time of the Grant, That the ſaid houſe was Copyhold Tenure, he was not deceived in his Grant. 3. Whether by this Grant, the Cuſtome was not deſtroyed. 4. Whether the Kings Pattentee hath not the ſame priviledge to grant this houſe &c. again by Copy of Court-Roll, after the death of J. S. This Caſe was argued at the Bar ſeverall dayes, and afterwards it was argued in Court by the Judges, and *Rolls* Lord C ief Juſtice, delivered the Opinion of all the Juſtices to be to this effect. *ſcil.* 1. That they were all agreed, That the Grant of the Office of the Cuſtody of the houſe, was a good Leaſe for life, notwithſtanding that it was a Copyhold; and it was not neceſſary to recite in the Grant, that it is Copyhold. 2. That after the Eſtate for life determined, The King might grant the houſe and Land again by Copy of Court-Roll, becauſe the Kings Grants ſhall be taken favourably, and not extended to two intents, where there is no neceſſity for it, as there is not here, and we are not here to intend a Collaterall intent, and ſo the Copyhold is not deſtroyed; for the Law takes care to preſerve the Inheritance of the King for his Succeſſors, and it may be a benefit to the King to have it continue Copyhold, *viz.* to have Common, &c. and his Election is alſo deſtroyed if he may not have it Copyhold: And ſo Judgment was given for the Plaintiff againſt the Avowant: a Replevin being brought. Paſc. rott. 414. in B. R. *Cremer* and *Barnet*'s Caſe. *Styles* 266. to 273.

6. *Cuſtomes, Impoſitions, and Taxes of the King, what they are; and where payable, where not.*

1. THE Caſe was, A Merchant brought 80. weight of Bay-Salt by Sea, to a Haven in *England*, and out of the Ship ſold 20 Weighs, and diſcharged them into another Ship, in which they were tranſported: But the ſaid 20 Weighs were never actually put on the ſhore; and for the reſidue, being 60, he agreed for the Cuſtome, and put them on Land; And now the queſtion was, If in this Caſe, The ſaid 20 weighs which alwayes were Water-born, and never touched the Land, ought to pay Cuſtome as well inward as outward: And it was Reſolved, That in both the Caſes, the Cuſtomes ought to be paid; for the diſcharging out of the ſhip aforeſaid, amounts in Law to a putting them upon the Land; For in the Law, this is *infra corpus Comitatus*: And if the Law ſhall not be ſo taken, The King may be defrauded of all his Cuſtome: and in this Caſe, foraſmuch as no Cuſtome was paid, It was Reſolved, That the goods were forfeited. Hill. 24 Eliz. in the Exchequer. *Cook* 12. Part, 17, 18.

2. Cuſtomes are duties certain and perpetuall, payable to the King, as the Inheritance of his Crown, for Merchandizes, Tranſports, from, and beyond Sea, from one Realm unto another: See the Caſe of Cuſtomes, *Davis* Reports, *Magna Cuſtuma et antiqua*, is payable out of Native Commodities *ſcil.* Wool, Woolfells, and Hides, and that is certain impoſed, and this Cuſtome which is called *Magna Cuſtuma*, is due to the King of Common-Right, for four cauſes. 1. For leave to depart the Kingdome, and to carry Commodities of the Realm out of it. 2. For the Intereſt which the King hath in the Sea, and the Arms thereof. 3. Becauſe the King is the Guardian of all the Ports within the Realm, *& Cuſtos totius Regni*. 4. For Whaſtage and Protection of Merchants upon the Seas againſt the Enemies of the Realm, and Pyrats: Cuſtome which is called *Parva Cuſtuma*, is a Cuſtome payable by Merchants, ſtrangers; and begun in the time of King E. 1. when they granted to him, that they would pay to the King and his Heirs, 3 d. in the pound, for all Merchandizes Exported, Imported by them, See 1 Eliz. *Dyer*, 165. Priſage of Wines, is a Cuſtome due by Preſcription, and an Antient Inheritance of the Crown,

and that appears by the Charters thereof granted to the City of *London*, which were allowed in the Exchequer, 44 Eliz. where it was Reſolved, That he that was free of *London*, and an Inhabitant within it, and payed Scot and Lo, ſhould be free from Priſage, by the ſaid Charter. And Note, That the Earl of *Ormond* in *Ireland*, hath an Inheritance in the Priſage of Wines by the Kings Charter. Subſidy is a duty payable for Merchandiſes exported and imported, Granted by Act of Parliament for the life of the King. And are 1. Aids and Subſidies, payable out of Native and Staple Commodities exported and imported. 2. Tonnage which is a Subſidy out of Wines of all ſorts. Poundage, which is a Subſidy granted out of all Commodities exported, and Imported, except Wines, and Antient Staple Commodities, and is the 20th part of the value of the Merchandize, Impoſts, or duties payable for Merchandiſes, rated and Aſſeſſed by Parliament, and then they are in the nature of Subſidies, or Impoſed by the King's Prerogative. See the Caſe of Cuſtomes in *Davis*'s Reports.

3. In a *Quo Warranto* againſt the Mayor, Sheriff and Citizens of *Waterford*, becauſe they had received, and converted to their Uſes, the great Cuſtomes and Pettit Cuſtomes, and the Subſidies, and the Poundage of all Merchandizes imported, and exported, in and from the Port of *Waterford*; And becauſe they had ordeyned a Collector, Controler, Searcher, and Gager, without Warrant. The Defendants juſtified by force of four ſeverall Charters. The firſt, the 8th of *November*, in the ninth year of King *John*, by the which, the ſaid King granted to them *Cuſtumum*, called the *Marage de omnibus rebus venalibus et merchimoniis infra dictam Civitatem emptis ſeu venditis ita plenè, et integrè, ſicut Burgenſes villæ de Briſtoll habebant*. And averred, That the ſaid Burgeſſes of *Briſtoll* had the ſaid Cuſtome of Murage, of all things bought and ſold within the ſaid Town of *Briſtoll*. The ſecond, That King *Henry* the fifth, the 6th of May, in the firſt year of his Reign, Granted to them, *Cuſtumam Civitatis ejuſdem*, called the *Cocquet, capiend. per manus Majoris et Balivorum imperpetuum*. The third, That King *Henry* the ſeventh, in the third year of his Reign, Granted to them, *Quod omnes, et ſinguli Cives, et Inhabitantes dictæ Civitatis, et omnes et ſinguli Mercatores tam indigena quam alienigenæ de Nova Cuſtuma*, called the Poundage, viz. *de præſtatione* 12 d. *de libra imperpetuum, ſint Quieti et exonerati*. The fourth, That Queen *Elizabeth* in the 11th year of her Reign, granted to them, That they *annuatim de ſeipſis eligere poſſint Scrutatorem, Gageatorem, et alios Officiarios quoſcunque infra eandem Civitatem uſuales et neceſſarios*: And upon theſe Warrants, they claimed the ſaid Cuſtomes. In this great Caſe, it was Reſolved, That by the firſt Charter, No Cuſtome nor Subſidy was granted to the Corporation of Mayor, Sheriffs, and Citizens of *Waterford*. 1. Becauſe, that Murage is but a Toll payable for reparation of Walls, out of things ſold in open Market by Retail, whereas Cuſtome is payable for Merchandiſes exported, and Imported, and ſold in groſſe. 2. Becauſe Murage doth not lye in grant, but in Preſcription, and ſo of Poundage, Piccage, and to have Warren in the Lands of another. 3. Becauſe the reference to the Town of *Briſtoll* is uncertain and void, becauſe there is no ſuch Town or Borough in *Ireland*, and the Averment, That the Burgeſſes of *Briſtoll* in *England* had Marage at that time, cannot be tryed here. 2. It was Reſolved, That by the ſecond Charter of King *Henry* the 5th, The Antient Cuſtome of Wool, Woolfells, and Hides, were Granted to the ſaid Corporation, by that word *Cocquet Cuſtum*; for it is an Antient Cuſtome, and known by the Name of *Cocquet Cuſtum*, in all the Ports of *England* and *Ireland*. And *Cuſtuma dictæ Civitatis* ſhall be intended Cuſtome payable for Merchandiſes, in *dicta Civitate*: And a favourable Interpretation ſhall be made of ſuch grants, according to uſage and allowance, and they may collect the ſame by their proper Officer, and the Kings Officer is not acceptable for the ſame. 3. It was Reſolved, That the third Charter was not a ſufficient Warrant to them, to receive to their proper uſes, Tonnage of all Merchants, Denizens, and Alliens, within the Port of *Waterford*, becauſe that this Grant doth extend onely to the diſcharge of every particular Merchant, and doth not give the Poundage to the Corporation. And 2. Becauſe the Poundage in queſtion, was a new Poundage Granted by Parliament. 15 H. 7. For the Antient Poundage was granted to the Brotherhood of St. *George*, for defence of the *Engliſh* Pale, and therefore the ſame could not be diſcharged by the Charter made in the third year of *Henry* the 7th. As the King cannot grant any parcel of the Tenths of the Clergy, before that a Tenth be granted by the Convocation; And the King cannot diſcharge the penalty of an Act of Parliament, which is after to be made: And alſo the King cannot diſpence with a future thing, in which he hath an Inheritance; And the Poundage was not in *eſſe* at the time of the Charter made; but if it had bin in *eſſe*, it might have bin Granted, or diſcharged, As the King may grant that the Heir of his Tenant ſhall not be in Ward, for although it be a future thing, yet the King hath the Inheritance at the time. 4. It was Reſolved upon the fourth Charter of 11 Eliz. When the Cuſtomes and Subſidies

ſidies remained in the Crown, The King himſelf ſhould appoint the Officers: But as to the Cuſtomes and Subſidies granted to the Corporation there they might appoint the Officers. 5. It was Reſolved, That whereas King *Henry* the ſecond granted to the ſaid Corporation, that they ſhould be *quieti de conſuetudine*, that the ſame did not diſcharge them of their great Cuſtome, becauſe that *Conſuetudo eſt nomen Collectivum* and ſignifies many kinds of Cuſtomes, and a generall word ſhall not paſſe a Royall duty. The King granted to a *Venetian* Merchant, that he ſhould be quit *de omnibus Cuſtumis ſubſidiis et impoſitionibus et omnibus aliis denariorum ſummis debitis et ſolubilibus pro quibuſcunque Merchandizis importandis*; and that he ſhould be as Free as the Citizens of *London*: In that Caſe, it was adjudged in the Exchequer in *England*, That by that grant the King did not diſcharge him of Priſage, becauſe that the Priſage was not ſpecially expreſſed in the Grant, although that the City of *London* by a ſpeciall Charter, were freed of Priſage. 6. It was Reſolved, That a Subject cannot preſcribe to be free and diſcharged of the old Cuſtomes payable for Merchandiſes, or to receive the ſame to his own uſe, becauſe the ſame is a certain Renenue of the Crown. The Caſe of Cuſtome payable for Merchandiſes, in Sir *John Davis's* Reports.

4. A Merchant ſhipped certain Cloathes to be conveyed beyond Sea to Merchandize, and payed the Cuſtome and Subſidy due for them to the King. The Ship in ſayling was ſo toſſed by Tempeſt, that the Marriners for ſafeguard of the Ship and of their lives, caſt the Cloathes into the Sea, and brought the Ship back to the firſt Port, and there acquainted the Cuſtomer with his misfortune, and asked him, If he might ſhip as many Cloathes as were loſt, without paying of Cuſtome for them? who conceived that he might, and gave him Licence ſo to do: and by virtue of that Licence he carried as many Cloathes without paying Cuſtome. And upon an Information brought for the forfeiture of theſe laſt Cloathes, all the matter was pleaded in barr. Upon which the Kings Attorney did Demur in Law. But afterwards the King waved the Demurrer; and took Iſſue, That Cuſtome and Subſidie *Domino Regi debit. concelare et ſubſtrah. &c. fuerant, contra formam Statuti* And it was found, that he did not conceal and withdraw, &c. in manner and form as is ſuppoſed by the Information. It was doubted, If this Verdict found for the King or not, becauſe it wanted the Concluſion *prout Defendens allegavit*. But *Read* ſaid, It ſeemed to be their Intents to acquit the Defendant of the Concealment, but not of the Subſtraction. And in this caſe, It was Reſolved, That Cuſtome for Merchandizes to be tranſported out of the Realm was an Inheritance in the King by the Common-Law, and not given by any Statute: For the firſt Statute, viz. the Statute of 14 E. 3. which ſpeaks of Cuſtome, gives not Cuſtome, but abridgeth it onely for Woolł and Leather. And in that caſe, It was holden, That the Cuſtome is paid timely enough, if it be paid before the departure of the Ship out of the view of the Port. Mich. 30 Eliz. *Dyer* 43, 44.

5. Information was Exhibited by Sir *Tho. Walter*, Chief Butler of the King, againſt the Defendant, for detaining of Priſage of 8. Tunn of Wine. And ſhewed, the King was ſeiſed in Fee of this Ancient Duty called Priſage *ut in jure Coronæ*, and he and his Executors had uſed to have Priſage, which is of every ſhip of Merchants, Aliens or Denizens, containing 10. Tuns of Wine, to have for Priſage one Tun; and if it contain 20 Tunn or more, 2. Tuns, *ſcil. unum ante dolium*, and the other, *deorſum*: and this he is to have as a flower of his Crown. That 28 *Novem.* 5 Jac. two Ships laden with Wines of the goods of G. H. arrived in the Port of *London*; the *Hope*, with 86 Tuns; and the *Deſire*, with 22 Tuns of Wine: And that alſo afterwards two other Ships did arrive in the ſaid Port; and that in theſe four Ships were 124. Tuns of Wine, of which 8. Tuns was due to the King for Priſage; and that the Defendant ſeeking the diſenheritance of the King, refuſed to deliver them. The Defendant by Proteſtation, That Sir *Tho. Walter* was not chief Butler of the King, ſaid, That it is true, that 4. Ships with Wines did arrive in the Port of *London*; 2. of which ſhips did arrive in the life of the ſaid G. H. her Husband, and 2. after his death, and that the ſaid G. her husband was poſſeſſed of theſe goods, *ut de bonis propriis*; and ſo poſſeſſed, made her his Executrix, and dyed. Afterward ſhe being *Libera fœmina, accepto ſuper ſe onere Teſtamenti*, did unlade theſe 2. ſhips, and did take and occupy the Wines as Executrix, and plead the Charter of Diſcharge of Priſage, made 1 E. 3. unto the Mayor, Comminalty, and Citizens of *London in hæc verba, ſcil. Quod de Vinis Civium, nulla priſa fiat, ſed perpetuò inde eſſent quieti*; and traverſed *abſq; hoc*, that they were her proper goods, and that ſhe had nothing in them but as Executrix of her late Husband: with an averment, That G. *fuit Civis et liber homo de Civitate London*; and that *London* is *Antiqua Civitas* Incorporated by the name of Mayor and Comminalty, &c. Upon which Plea, the King's Attorney did demur in Law. The onely Queſtion was, Whether Priſage ſhould be paid for theſe Wines, or no? This caſe was very often argued at the Barr: and afterwards by all the Juſtices at the Bench very Learnedly; and much on both ſides ſaid therein: But at length,

It

It was Reſolved, That G. H. was a Compleat Citizen in every reſpect, and ſo continued till his death; and theſe Wines in the hands of the Defendant his wife, are *bona Civium*, and ſo within the compaſſe of the Grant to be freed from the payment of Priſage: and ſo Judgment was given againſt the King, and for the Defendant to be diſcharged from payment of Priſage for theſe Wines. See this caſe, and the reaſons of the Judgment; the Caſe, *Intratur*, Paſch. 9 Jac. in B. R. rott. 163. Sir *Thomas Walter* and *Hangen*'s Caſe. *Bridgm.* 1. to 26. See Trin. 11 Jac. in B. R. *Kennycott* and *Bogens* Caſe, *Bollſtr.* 2. Part, 250, to 254. Where it is ſaid and agreed, That no ſtranger is to pay Priſage: For Engliſhmen pay Priſage, and Strangers pay Butlarage, and a Citizen of *London* ſhall pay neither of them: and Merchants ſtrangers for Butlerage ſhall pay two ſhillings for every Tun of Wine; and to pay this two ſhillings was granted to Merchants ſtrangers by Charters made 4 E. 1. in lieu of which they were diſcharged of Priſage, which is a duty, by the Common-Law, to be paid by all men generally; if not diſcharged by Charter, or otherwiſe.

6. Note: It was ſaid in *Plow. Com.* 9. in *Fogaſſaes* Caſe, That the Storm at Sea being a thing which could by no means poſſible be prevented, and that cauſing the uncertainty of the quantity of the Woad; and there being no means of knowing the certainty thereof before it ſhould be landed and weighed, and that uncertainty being cauſed by no folly in the Defendant, but comming by the Act of God, that there was great reaſon that he ſhould be excuſed, and not made lyable to forfeit the Woad; albeit he did not obſerve the ſtrict words of the Statute of 1 E. 6. cap. 13. which are, That if any Merchandizes are put upon the Land, and the Subſidie not paid, or the Collector not agreed with, that they ſhall be forfeited, &c. *Plow. Com.* 9. in *Ranegar* and *Fogaſſaes* Caſe.

7. Upon a Reference upon a Judgment in the Exchequer, in the Caſe of an Impoſition of Currants, *Popham* and *Cook*, Juſtices; It was ſaid and Reſolved, That the King cannot at his pleaſure put an Impoſition upon any Merchandizes to be Imported to this Kingdome, or exported, unleſs it be for advancement of Trade and Traffique, which is the life of every Iſland, *pro bono publico*: As if in Forraign parts any Impoſition is put upon the Merchandizes of our Merchants, *ans pro bono publico*; for to make an Equality for the purpoſe to advance Trade and Traffique, the King may put an Impoſition upon their Merchandizes, for it is not againſt any Statutes made for advancement of Merchandize; or of the Statute of *Magna Charta*, cap. 30. 2. It was Reſolved, That ſuch Impoſition ſo put, cannot be demiſed or granted to any Subject; for that it is to augment and decreaſe, or be quite taken away upon juſt occaſion for advancement of Merchandize. 3. It was Reſolved, That at the Common-Law, no Cuſtome was paid but onely for Wooll, Woollfells and Leather, which is called, in *Magna Charta*, *Reſta Conſuetudo*: and all others are there called *Mala Tolneta*. 4. Reſolved, That it hath been of long time uſed at the beginning of the Raigns of Kings by authority and conſent of Parliament to grant to the King certain Subſidies of Tunnage and Poundage for the Term of his life; which began in ſuch form, *ſcil.* for the Defence of the Realm, and maintenance of certain Wars by Act of Parliament: which proves, that the King by his own power cannot impoſe it, but by conſent of Parliament: But ſuch Subſidie of Tunnage and Poundage might be granted by the King ſo long as he lived; for that this is limited and given to the King in Certain. But an Impoſition put for equality, hath not any certain continuance, and therefore it cannot be demiſed or granted over unto another. 5. It was Reſolved, That the King for the benefit of the Subject, may make an Impoſition, or Toll within the Realm, to repair High-wayes, Bridges, or to make Walls of defence. But then the ſum impoſed ought to be proportionable to the benefit. Trin. 5 Jac. *Cook* 12. Part, 33.

Damages. *See before* Coſts *and* Damages.

1. THe word [*Damna*] Damages, is taken in Law in two ſeveral ſignifications, the one properly and generally; the other *relativè et ſtrictè*: properly, where Coſts are included within the Ward: For *Damnum* in his proper and general ſignification *dicitur à demendo, cùm diminutione rei deterior fit*: and in this ſenſe Coſts of Suits are damages to the Plaintiff, for by them *res ſua diminuitur*. But when the Plaintiff ſheweth the wrong done to him, to the damages of ſuch a ſum, the ſame is to be taken *relativè*, for the wrong which is paſt before the Writ brought; and are aſſeſſed *occaſione tranſgreſſionis præditt.* and cannot extend to Coſts of Suit, which are future, and of another nature, *ſcil.* to legal expences, and whereof no certainty then can be known: So theſe are diſtinct things, *ſcil. Damna pro injuria illata*, and *expenſæ Litis*. *Cook.* 10. Part, 116.

2. A *Quare Impedit* againſt the Biſhop of S, and the Incumbent: A Verdict paſſed before the Juſtices of Aſſiſe for the Plaintiff, and according to the Statute of *Weſt.* 2. Judgment was given before them, and a Writ awarded to the Metropolitan; and for Damages, a *Fieri facias* to the Sheriff. The Defendant brought Errour to remove the Record in B. R: and afterward the Plaintiff ſued a *Scire facias* to have Execution, becauſe the Defendants did not aſſign the Errours. Afterwards Errour was aſſigned; 1. Becauſe it was found by Enqueſt of Office, That the Incumbent was in, *ex preſentatione A*, who was not named in the Writ. 2. Becauſe Damages were adjudged for half a year; whereas it appeareth, that the preſentment was not deraigned within 6. moneths: and the words of the Statute of *weſt.* 2. are, *Quod ſi diſrationetur præſentatu infra tempus ſemeſtre, tunc adjudicentur damna ad valorem Eccleſiæ per unum annum*: but, notwithſtanding theſe Objections, the Judgment was affirmed. 6 E. 6. *Dyer* 77.

3. A man was in the Common-Pleas in an Action of Battery. Upon Not-guilty pleaded, It appeared upon the Evidence, That the Defendant had thrown Daggers at the Plaintiff, and grievouſly hurt and mayhmed him in outragious manner: The Court ſaid to the Jury, That they ought to conſider, that the Plaintiff was put in fear of his life, and had one of his hands mayhmed, and what damages he had ſuſtained by his Mayhem, and that they ought to give damages as well for the Fear and Aſſault, as for the Mayhem. Mich. 29 Eliz. in C. B. *Leas* Caſe. *Goldeſbr.* 33, 34.

4. In Treſpaſſe for breaking his Cloſe with a *Continuando*: It was moved, That the Plaintiff needed not to ſhew a regreſſe to have damages for the Continuance of the firſt Entry, *ſcil.* for the meaner profits. But the Court was of Opinion, That without an Entry he ſhall not have damages for the Continuance; if not in caſe where the Term or Eſtate of the Plaintiff in the Land be determined. 20 H. 6. 15. Trin. 31 Eliz. in B. R. *Rawlyns* Caſe. *Leon.* 302.

5. Errour upon a Judgment in B. R. in Battery; The Errour aſſigned was, That the Declaration was of Aſſault, Battery, and Impriſonment: The Defendant, to the Battery pleads a Juſtification: whereupon the Plaintiff demurred. And as to the Impriſonment, he pleaded another Juſtification; upon which the Plaintiff takes Iſſue *De injuria ſua propria*, and Iſſue joyned: And at the Tryall, the Jury found, That as to the Plea of the Battery, that the Defendant did it *De injuria propria*; and aſſeſſed damages 5 l: whereas they ought not to have medled therewith, becauſe a Demurrer was thereupon; but onely to have found Conditional, Damages if it ſhould be adjudged for the Plaintiff: And for the Impriſonment, they did not find the Iſſue, but aſſeſſed conditional Damages 20 s: ſo they found meerly croſs to what they ought to have found: and therefore the Judgment in this Verdict for the 5 l. found by the Jury, and of the 20 s. *nullo habitu reſpectu*, was Erronious. And of that Opinion was the whole Court; and that it was ſuch a Miſpriſion as could not be amended: and for that cauſe, the Judgment was reverſed. Paſch. 2 Car. in C. B. *Stonyns* and *Rogers* Caſe. *Cro.* 1. Part, 22.

6. Errour of a Judgment in *Bridgwater* aſſigned was, That in an Action upon the Caſe upon Aſſumpſit, the parties being at Iſſue, a Demurrer was joyned upon the Evidence, and thereupon the Jury diſcharged; and afterwards Judgment was given for the Plaintiff, and damages found, and Judgment thereupon: where the Jurours which came to find the Iſſue, although by the Demurrer they were diſcharged, yet ought to have aſſeſſed Damages Conditionally, if Judgment ſhould be given

given for the Plaintiff. To which purpoſe divers Books were cited, *Plo. Com.* 408. *Book Entries*, 146. in Demurrer. It was ſaid by the Court, If theſe Preſidents be good Law, then it may be Enquired of by the ſame Jury Conditionally: But it may be enquired of as well by a Writ of Enquiry of Damages, where the Demurrer is determined; and the moſt uſual courſe is, where there is a Demurrer upon Evidence to diſcharge the Jury without more enquiry. *Book Entries*, 551. Mich. 4 Car. in B. R. *Darroſe* and *Newbatts* Caſe. *Cro.* 1. Part, 102.

7. Note, by *Hobart*, Chief Juſtice, That a man may recover damages for a thing that is not in *eſſe*; As Fines, and in repair of his houſe, If I ſtubb up this Wood ſo as that neither is nor will be any Wood again, yet he ſhall have an Aſſiſe from year to year of his common of Eſtovers: whereof theſe Conſequences do follow; 1. That the Inheritance of the Common of Eſtovers doth remain, notwithſtanding that there are no Eſtovers, elſe he could not have an Aſſiſe wherein he muſt declare of his Inheritance or Freehold at leaſt by Grant or Preſcription. 2. He ſhall recover a Seiſin of thoſe Eſtovers which are not in being, whereof he is ſuppoſed to be diſſeiſed; and alſo damages not according to that that it now yields, but according to that value that it yielded, *Communibus annis*; though it was incertain. Mich. 10 Jac. in C. B. in *Cooper* and *Andrews* Caſe, by *Hobart*, 43.

8. In an Action upon the Caſe for words, A man had Judgment by *Nihil dicit*, and a Writ of Enquiry of Damages to the Sheriff of *N*, *Quod per Sacrament. 12 proborum hominum de ballivæ ſuo inquirat, quæ damna, &c.* who returned, *Quod Mandavit, J. G. Libertatis H. R. Milit. Hundredi de B. cui executio prædict. Brevis totaliter reſtat ſicenda, et quod alibi, infra Com. prædict. per ſe fieri non potuit. Qui quidem Ballinus, ſic ſibi reſpondit*, and ſets down an Inquiſition before the Bayliff, and 40 s. Damages. Upon Errour brought in the Exchequer-Chamber, It was agreed by all the Juſtices, That the Return was inſufficient; for it was untrue, and againſt Law, becauſe the Warrant was directed to the Sheriff himſelf, to be executed in any part of his Shire, and no *Venire* contained in this Enqueſt of Office, as there is in other Writs which intitles the Bayliffs of Liberties. But yet the Court did not reverſe the Judgment, by reaſon that many the like Preſidents were ſhewed. Hill. 13 Jac. in Exchequer-Chamber. *Virely* and *Gunſtones* Caſe. *Hob.* 83.

9. Raviſhment of Ward was brought upon the Statute of *Weſt.* 2. cap. 35. againſt Husband and Wife, and others; and the Jury found, That the Wife was guilty of the Raviſhment, but not the Husband, and aſſeſſed Coſts and Damages; and found alſo, That the heir *maritatus exiſtit*; and that he was of the age of 16 years at the time of the marriage. It was Reſolved in this caſe; 1. That by the Common-Law for the Raviſhment of a Ward, an Action of Treſpaſſe did lye againſt the parties in which the Plaintiff ſhould recover Coſts and Damages. 2. It was holden, That a *Feme Covert* was not within the Statute of *weſt.* 2. becauſe ſhe is diſabled to ſatisfie, and the Goods and Lands of the Husband who is innocent, are not lyable by that Statute to anſwer for the Raviſhment done by his Wife; but the Plaintiff in this caſe might have had his Action of Treſpaſſe at the Common-Law, againſt thoſe which raviſhed him, or a Writ of *valore maritagii* againſt the heir. 3. It was Reſolved, That a man in Raviſhment of Gard, upon the Statute of *Weſt.* 2. Cap. 35. ſhould recover Damages: and with that agrees the Common Experience againſt the Book of 16 E. 3. *Dabrayes* Caſe, 80. *Cook* 9. Part, 71. Dr. *Haſeys* Caſe.

10. A. brought an Action of Treſpaſs againſt B. C. and D: B. pleaded, Not-guilty; whereupon Iſſue was joyned: C. and D. made a Juſtification, after a Replication, Iſſue was joyned: Dependant which Demurrer, the Iſſue was tryed againſt B. and damages given, and Judgment againſt him. After which Judgment, the Plaintiff entred a *Nolle Proſequi* againſt the Defendants C. and D: whereupon Errour was brought by all the Defendants againſt the Plaintiff: The Errour aſſigned was, That the *Nolle Proſequi* had diſcharged all the Defendants. But the Opinion of the Court was, That the *Nolle Proſequi* againſt C. and D. had not diſcharged B, and ſo there was no Errour: And the Opinion alſo was, That C. and D. ſhould not have joyned in the Writ of Errour, becauſe there was no Judgment againſt them, nor they grieved. And the Writ of Errour is *ad grave damnum* of them all. Hill. 11 Jac. in B. R. *Parker* and Sir *John Lawrence* Caſe. *Hob.* 70.

11. In an Action of Accompt upon the Judgment, *Quod Computet*, before the final Judgment given for the arrearages and damages, a Writ of Errour lyeth not; for in that Writ, theſe words, *Si Judicium inde redditum ſit*, are meant not only *de principali judicio*, but alſo *de integro* judicio, when all the matter within the Original is determined. *Cook* 11. Part, 39. *Metcalfs* Caſe.

12. Note: If a man have a *Quare Impedit* againſt one; And the Defendant hath alſo an Aſſiſe of Darrein Preſentment againſt the Plaintiff, and recovereth in the Darrein Preſentment; and the Plaintiff is Nonſuit in the *Quare Impedit*: In this caſe, the Defendant ſhall have two Judgments againſt the Plaintiff, *viz.* to have a Writ to the Biſhop in both Actions, and two Writs ſhall be awarded

awarded to Enquire of damages: But yet he ſhall not pay damages twice for one and the ſame diſturbance. See *Fitzh. Na. Br.* 39. acc.

13. A man recovered Land, and dyed ſeiſed of other Land holden of the King, his heir within age; and the Wife was endowed of the Land recovered in the Chancery; the heir dyed, and he againſt whom the Recovery was, brought an Attaint againſt the Wife, who prayed in aid of one in the Reverſion, who did not appear; by reaſon of which the Plaintiff in the Attaint did recover: whereupon the Wife did remove the Record of Attaint into the Chancery; and upon that Record, and the firſt Record of Aſſignment of Dower, a *Scire facias* iſſued, reciting the whole matter, to the heir, if he could ſay any thing, wherefore the Land ſhould not be taken into the Kings hands, and the wife endowed of the other two parts. The Defendant ſued forth a Protection, and would have put the Wife to her Writ of Right of Dower. But it was ſaid, That the firſt Endowment was conditional, That if the Land were evicted by title, &c. And then, as in Dower, if the heir be vouched in one County, and appeareth, the Judgment ſhall be, That the Wife ſhall recover of the Land of the heir; and if after the wife loſe by Action of another nature, ſhe ſhall have a *Scire facias* againſt the Tenant, to be endowed of that Land out of the firſt Judgment: And becauſe in the principal caſe the Tenant could not deny the matter, the Land was ſeiſed into the Kings hands, and Dower thereof was delivered to the Wife, but nothing was ſpoken of Damages, becauſe that Damages are not given in Chancery. Mich. 43 Aſſ. p. 32. *Comment on Original Writs*, 171.

14. Treſpaſſe brought upon the Statute of 2 R. 2. The Defendants pleaded, That the Lands was holden of the Bayliffs of D, as of their Manor of C; and alledged, That they are a Corporation by Preſcription, which Manor is Ancient Demeſne of the King, and pleaded to the Juriſdiction. It was adjudged no plea for divers cauſes; 1. Becauſe none ſhall plead that plea but the Tenant of the Land, and none of the Defendants have taken the Tenancy of the Land upon them: And 2. Becauſe in this Action no Land is to be loſt, but damages onely ſhall be recovered. And, 3. Becauſe he who pleadeth for the Juriſdiction of a Court, ought to give Juriſdiction to another Court; which they have not done in this caſe. Trin. 2 H. 7. 17. *Ibid.* 210.

2. *Where, and in what Actions, a man ſhall recover Damages, without declaring of Damages,* et è contrà: *And where a man ſhall recover Damages, as he hath counted where not.*

1. NOte, all the Counts of the King in a *Quare Impedit*, they are to his Damages, and yet Damages ſhall not be recovered: In a Writ of *Ultima Preſentationis*, or *Quare Impedit*, Damages ſhall be recovered, *viz. Si tempus ſemeſtre tranſierit per Impedimentum alicujus: ita quod Epiſc. Eccleſiam conferat, et verus Patronus eâ vice preſentationem ſuam amittat, adjudicentur damna ad valorem Eccleſiæ de duobus annis. Et ſi tempus ſemeſtre non tranſierit ſed diſrationatur Præſentatio infra tempus prædict. tunc adjudicentur damna ad valorem Mediatatis Eccleſiæ per unum annum.* And though it is ſaid, The King ſhall Count to his damages in a *Quare Impedit*; yet the King ſhall not recover damages, becauſe the King is not within the ſaid Clauſe of the Statute of *Weſt.* 2. which giveth the damages: He is not within the firſt branch, which is, If the time of ſix moneths paſſe by the Impediment of any, ſo as the Biſhop doth not preſent, and the very Patron loſeth his Preſentation: For that the King cannot loſe his Preſentation by any Collation or Preſentation, and therefore by Conſequence he cannot have double Damages. The ſecond Branch is, And if the 6. moneths be paſt, &c. and this branch doth depend upon the other: ſo, foraſmuch as the King is not within the firſt Branch of the ſaid Statute of *Weſt.* 2. he cannot be within the ſecond: And ſo, though in a *Quare Impedit* the King doth Count to his damage, yet he ſhall not recover damages. *Cook* 6. Part, 51. in *Boſwell's* Caſe.

2. In Treſpaſſe for breaking of his Cloſe, the Plaintiff Counted to his damages of 40 l; the Jury gave him 49 l. for Damages, and 20 s. for Coſts. The Plaintiff waived the 9 l, and prayed but the 40 l. for damages as he had Counted; and demanded Judgment thereof, with increaſe of Coſts: and the Court encreaſed the Coſts to 10 l; for which he had Judgment. Errour was brought; and it was aſſigned for Errour, That the Damages and Coſts did amount to more then he had Counted of: and a man ſhall never Recover more Damages then he hath Counted of. In this caſe it was Reſolved, That when an Act of Parliament creates or gives recompence for a thing, where no recom-

pence was given before; or gives damages where no damages were before; there the Defendant shall not have Damages, and also Costs. But where a Statute adds but a greater recompence, and Damages were before at the Common-Law, there the Defendant shall have his Damages and Costs: for there the increasing of the Damages doth not take away the Costs. 2. In this Case, It was said, and Resolved, That in personal Actions, the Plaintiff shall Count to his Damages certain, because he shall recover damages only for the wrong before the Writ brought; and shall not recover damages for any thing done pendant the Writ. But in real Actions, the Plaintiff shall not Count to Damages at all, because he shall recover damages pendant the Writ. And in this case, It was agreed, That a man shall never recover more damages, then he hath Counted of: but that is to be understood, damages for the wrong done: But yet in some cases, a man shall recover more Damages then he hath Counted of, as in *Detinue*, a man shall recover more Damages then he hath Counted of. *Cook* 10. Part, 166. *Robert Pilford's* Case.

3. In an *Ejectione Firmæ, de Decimis garborum, quodam horreo: Et Gardino Rectoriæ*; Judgment was given, That the Plaintiff should recover his Term to come *in Rectoria, horreo, gardino*: and a Writ of Seisin, and also a Writ of Enquiry of Damages awarded, which was returned more then the Plaintiff counted of. It was holden, That for this cause, because the damages were more then the Plaintiff had Counted, That the Judgment was erronious. Hill. 9 Eliz. *Dyer* 258.

4. Errour brought to reverse a Judgment in the Common-Pleas in *Detinue*; where the Plaintiff Counted to his damages of 100 l; and the Jury found the damages to be 150 l; and so the Jury found more in damages then the Plaintiff himself had counted upon in his Declaration. The Plaintiff in the Common-Pleas had Judgment to recover the 150 l, according as the Jury found. Upon which, Errour was brought, and this only insisted upon: That for this cause only the Judgment there was Erronious. It was Resolved by the whole Court in this case, That where the Plaintiff doth declare no certain damages, there he shall recover such damages as the Jury find; but where the Plaintiff declares of certain damages, there the Plaintiff ought to have no greater damages then according to his Count, and not as the Jury finds, they finding greater damages then the Plaintiff declared upon: and in this Action, the Plaintiff declaring to his damage of 100 l; and the Jury finding for the Plaintiff, and damages 150 l; and he having his Judgment for 150 l, according to the find ng of the Jury; The Court was clear of Opinion, That the Judgment given in the Court of Common-Pleas was erronious: and the Judgment was reversed. Pasch. 3 Jac. in B. R. rot. 513. *Hoblins* and *Kimbles* Case. *Bulstr.* 1. Part, 49.

5. Note: It was Resolved by the whole Court, That Writ of Estrepement lyeth in an Action of Waste, as well at any time before Judgment, as after Judgment and before Execution: and the reason is, because he cannot recover damages for more then is contained in his Count: and he cannot assign any Waste after the Writ of Estrepement brought. Trin. 43 Eliz. C. B. *Cook* 1. Part, *Fuliams* Case.

6. In a Writ of *Warrantia Chartæ*, the Plaintiff declared, That *Robert Osborn* and *M.* his wife, and J. G. did levy a Fine, 2 Jac. to Sir *Henry Roll*, of the Mannor of *Kilmarsh*, and of divers other Lands: And by that Fine did grant for them and the heirs of *Robert*, That they should warrant the said Mannor and Lands to the said *Henry* and his heirs against all men; which Fine, as to the Lands in Question, was to the use of the said *Henry* and his heirs; and shewed, that he being so seised, One J. S. did implead him by Writ of Entry *Sur disseisin en le Post* in C. B. for the Lands in Question: depending which plea, the said *Henry* required the said *Robert* and *M.* to warrant to him the said Messuage and Lands, or to minister to him a Plea in barr of the said Action, which they refused to do to his damage. Amongst many other things in this case, the Count was excepted unto; That he hath declared to his damage, where no losse appears; and therefore the Count was not good. To which it was answered by Hobart, Chief Justice; It is true, he shall recover No Damages but where he hath taken losse by recovery had against him, and therefore he shall not have damages, where the Warranty of Charters is brought before the Action, *quia timet*: and therefore if it be pleaded by the Defendant, That the Plaintiff is not impleaded, the Plaintiff shall presently have his Judgment, but no Damages. But yet he said, He shall declare to damage according to the form, which is not strange in many cases; as in a Quare *Impedit* for the King. And he said, That the losse whereupon the Plaintiff may have damages, is not only where in the principal Action damages were recovered against him, as in an Assise, or the like, but also where the Land hath been recovered only, as in a *Formedon*, and the like: And he put the Case of 43 E. 3. 20. where one *Charnel* made a Warranty against him and his heirs, and all others suing by his Collusion. Upon a *Warrantia Charta* it was found, That the principal Action (a *Formedon*) was brought by his Collusion; yet he could have no damages, because he had not lost the Land. Whereupon he brought a Writ of *Deceit* upon the trouble and charge that he suffered by

by the Colluſion and Suit, and declared upon the Verdict in the *Warrantia Chartæ*, finding the Colluſion as binding in that point: and becauſe the Defendant could not deny that, the Court gave Judgment, and 20 l. damages. Note, That this Forrein Action is no ground for the like in other Suits of Warranties of Charters: For this particular Warranty grew upon a Colluſion; which is nothing to other Warranties; and ſuch a practiſe by Colluſion will bear an Action without Warranty. Trin. 9 Jac. in C. B. Sir *Henry Rolt* and Sir *Robert Oſborn*'s Caſe. *Hob.* 201.

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3. *Where the Enqueſts ſhall aſſeſſe all the Damages againſt the Defendants: where the Juſtices may encreaſe the damages, or abridge them: and where the Court ſhall not aſſeſſe the damages, but a Writ of Enquiry of Damages ſhall be awarded.*

1. IN Treſpaſſe, *Quare Clauſum fregit et piſces ſuos Cepit*: without ſhewing the number or Nature of the Fiſh: the Defendant was found guilty of the Damage. In Arreſt of Judgment, It was ſaid, That the Declaration was not good, becauſe by the Declaration it did not appear of what nature, or number the Fiſhes were. To which it was ſaid, That the ſame was good at the Common-Law, for that the Verdict hath found the Defendant guilty to damages, and therefore it is not material of what nature or number the Fiſh were, but taking of Fiſh to damages: and admit that the Declaration was not good for the form, at the Common-Law, yet that was made good by the Verdict. But the Opinion of the whole Court was, and ſo Reſolved, That the Declaration was not good, for the incertainties: and Declarations ought to reduce the generality of the Writ to particulars; and the Verdict which gave the Damages did not make it good; and the omiſſion of the nature and number of the Fiſhes was matter of ſubſtance, and was not helped by the Statute of 18 Eliz. of Jeofailes. *Cook* 5. Part, 35. *Playters* Caſe.

2. Husband and Wife brought a *Quare Impedit* againſt the Biſhop of E, and declared, That A. was ſeiſed of a Mannor to which an Advowſon was appendant, and demiſed it to the wife for life, and that they preſented J. S, who dyed, and ſo it belonged to them to preſent: The Defendant pleaded, That the Plaintiff preſented one who was *Schiſmaticus Inveteratus*: whereof he gave Notice to the Plaintiff. Which plea was adjudged Inſufficient. Whereupon the Court gave Judgment, *viz. Ideo Conſideratum eſt*, that the ſaid Husband and Wife *recuperent verſus pradict. Epiſcopum, præſentationem ſuam ad Eccleſiam pradict. et habeant bre. Archiepiſcopo Cant. totius Angliæ Primat. loci illius Ordinario ꝯ quod pradictus Epiſcopus eſt part. Et Idem Epiſcopus in mannerium.* And afterwards a Writ of Enquiry of the value of the Church was awarded. And upon that, Judgment entred again, *ſcil.* That the Plaintiff ſhould have a Writ to the Archbiſhop *ut ſupra, et quod recuperent verſus pradict. Epiſcopum damna, &c. Et pradict. Epiſcopus in mannerium.* Upon this Judgment, Errour was brought: and Errour aſſigned, That the Biſhop was twice amerced, and in no caſe he ought not by Law to be twice amerced. To which it was Anſwered and Reſolved, That he was but once amerced: For the Judgment in the Kings-Bench was but a recital of the firſt, and ſo to give a Judgment of all with the damages; and not a new Judgment: for he cannot have 2. Writs to the Archbiſhop or Metropolitan, no more then he can be twice amerced: But if it were admitted, That the later Judgment were erronious, yet the firſt Judgment is good and perfect in it ſelf, and ſhall not be impeached by any Errour in the ſecond Judgment: For the firſt Judgment was the Judgment which was in the *Quare Impedit* at the Common-Law: for before the Statute of *Weſt.* 2. the Plaintiff in a *Quare Impedit* did not recover Damages: and the Plaintiff after the Statute may take the Judgment at the Common-Law, and leave the benefit of the Statute if he will: for which cauſe, the Court gave Judgment, that the Judgment ſhould be affirmed. Hill. 32 Eliz. in B. R. *Cook.* 5. Part, 59. *Speccots* Caſe.

3. In a Writ *de valore Maritagii*, Iſſue is joyned upon the Tenure, and found for the Plaintiff, and the Jury aſſeſſed Damages to 40 s, and Coſts to 20 s, but do not find the value of the marriage. In this caſe it was Reſolved, 1. That the Verdict was inſufficient, and a new *Venire* ſhould be awarded. 2. That although the Iſſue was joyned upon the Tenure, yet as a Conſequent depending upon the Tenure and as parcell of their charge, the Jury ought to enquire of the value of the Marriage, of the Damages, and of the Coſts: and if the Jury aſſeſſe an exceſſive value, or exceſſive damages, an Attaint lyeth. As in an Aſſiſe, if the Iſſue be joyned upon a Releaſe, and an immediate *Ouſter* confeſſed; there if the Iſſue be found for the Plaintiff, the Recogniſers of the Aſſiſe, as parcel of their charge, ſhall enquire of the Seiſin and Diſſeiſin; for that is the point of the Writ. 3. Reſolved, That the omiſſion of the value of the Marriage in

the Verdict, ſhould not be ſupplyed by a Writ of Enquiry of Damages, for that ſhould prevent the Plaintiff of his remedy by Attaint: But it was holden, That when the Court *ex Officio* ought to enquire of any thing upon which no Attaint lyeth, there the omiſſion of the ſame may be ſupplyed by a Writ of Enquiry, as in a *Quare Impedit* of the 4. points. *Cook* 10. Part, 118. *Cheneys* Caſe. See. Mich. 11 Jac. in C.B. *Cooks* Caſe. *Godbolt.* 207. acc.

4. In Treſpaſſe of Aſſault and Battery, The Plaintiff declared to his damage of 40 l; and the Jury found for the Plaintiff, and gave damages 50 l: It was the Opinion of the whole Court, That the Plaintiff ſhall recover no more then he hath declared for: and this ought to be done of courſe by the Clerk. Paſch. 13 Eliz. *Owen* 45.

5. Husband and Wife brought a Writ of Dower, and Judgment was given upon *Nihil dicit.* And becauſe the firſt Husband of the Wife dyed ſeiſed, a Writ of Enquiry of damages was Awarded: And the Jury found, that the Land which ſhe ought to have Dower of, the third Part was of the value of 8 l. *per annum*, and that eight years *elapſerunt à die mortis viri ſui proximè ante Inquiſitionem et aſſeſſant damna* to 8 l. and it appeared upon the Record, that after Judgment in the Writ of Dower aforeſaid, the Demandants had Execution upon *Habere facias ſeiſinam*, ſo as it appeareth upon the whole Record put together, That the damages are aſſeſſed for 8 years, whereas the Defendants have bin ſatisfied upon part of the ſaid years: Upon which the Tenant brought Error, and Aſſigned Error, becauſe the damages are Aſſeſſed to the time of the Inquiſition, where it ought to be but to the time of the Judgment; but the Exception was not allowed. 2. Becauſe where it is found, that the Land is but of 8 l. *per annum*, they have aſſeſſed damages for 8 years, to 80 l. for *ſecundum ratam*, it did amount but to 64 l. But that alſo was diſallowed, becauſe it might be, that by the long detainer of the Dower, the Defendants ſuſtained more damages then the bare Revenue. 3. Becauſe the damages are Aſſeſſed for the whole 8 years after the death of the Husband: whereas for part of the years the Defendants were ſeiſed of part of the Lands by force of the Judgment, and the Court held that that was a good cauſe, and for that the Writ of Error was allowed. Paſc. 29 Eliz. in C. B. *Walter* and *Nevil's* Caſe. *Leon.* 56.

6. In Treſpaſſe, the parties were at Iſſue upon Not-Guilty, and it appeared that the Thumb of the Right hand of the Plaintiff was clean cut off: and ſo he maimed. It was found for the Plaintiff and damages taxed to 40 l. The party came in Court, and prayed, in reſpect of the haynouſneſſe of the Maihm, that the Court would encreaſe the damages: which damages, upon great conſideration, were made 100 l. and Judgment given accordingly. See 28 E. 3. 54. by *Stone.* And for further damages aſſeſſed by the Court. Book Entries. 46. 8 H. 4. 135. 39 E. 3. 20. Hill. 30 Eliz. in C. B. *Mallet* and *Ferrer's* Caſe. *Leon.* 139.

7. In Trover and Converſion of 40 Loads of Corn; As to 20. the Defendant pleaded Not-guilty, to the reſidue, a ſpeciall plea, upon which the Plaintiff did demur; and it was adjudged for the Plaintiff, upon which Iſſued a Writ of Enquiry of Damages, which was Retorned: It was moved, that the Writ ought not to have Iſſued forth, for that the Iſſue doth yet depend untryed; and 34 H. 6. 1. was vouched. In Treſpaſſe againſt many, one of them made default after a Plea pleaded; where it was Awarded, That a Writ of Enquiry ſhould be Awarded, but none ſhould Iſſue untill the plea of the others was tryed: The Court in the Principall Caſe ſaid, It was in their diſcretion to Award ſuch a Writ or not, and it is reaſonable here to Grant a Writ preſently: Whereupon the Writ of Enquiry was allowed as good. Trin. 31 Eliz. in B. R. *Ward* and *Blunt's* Caſe. Leon. 141.

8. In Treſpaſſe for breaking his houſe at D. and beating of him, The Defendant pleaded, That he together with J. S. did beat him, and afterwards the Plaintiff did Releaſe to the ſaid J. S. all Actions Realls and Perſonalls, and ſues the Treſpaſſe whereof the Plaintiff complained, and that which he and J. S. did, was *una et eadem*: upon which the Plaintiff demurred. It was adjudged for the Defendant: For againſt joint-Treſpaſſers, there can be but one ſatisfaction; And therefore, if they be ſued in one Action, though they may ſever in Pleas and Iſſues; yet one Jury ſhall Aſſeſſe damages for all: And as to the Damages, he who is no party to the Iſſue, ſhall have an Attaint as well as his fellowes. And if they be ſued by ſeverall Actions, though the Plaintiff make choice of the beſt advantage, yet when he hath taken one ſatisfaction, he can take no more. And if he require another, an *Audita Querela* will lye. Trin. 11 Jac. in C. B. *Cook* and *Jones* Caſe. *Hob.* 66.

4. *Where*

4. Where Damages given ſhall be entire, and where ſeverall, and in what Caſes: and where they are Intire, when they ought to be ſeverall, ſhall be Error, Where not.

1. IN Waſte the Plaintiff did Declare, That the Defendant had committed Waſte in uncovering a Barn, by which the Timber was decayed, and in the deſtroying of ſtocks of Elmes, Aſhes, White-Thorn, and Black-Thorn: and made Title to the Land, as Son and Heir of his Father: The Defendant pleaded the generall Iſſue, *Nul waſt fait*: The Plaintiff in his Declaration ſet forth the ſame to be done in ſeverall Caſes, to his damage of 300 l. And, upon the Defendants Plea of the generall Iſſue, It was found for the Plaintiff, and damages were aſſeſſed by the Jury to 50 l. In this Caſe, when the generall Iſſue is pleaded *Nul Waſt fait*, and the Plaintiff counted to his damage of 300 l. whether they could mitigate the damages or not: But all the Juſtices agreed, That in the principall Caſe, although the Iſſue was found for the Plaintiff, That he could not have Judgment, becauſe he declared of Waſte done in 8 ſeverall Cloſes to his damage of 300 l. generally, and did not ſend the damages: And the Jury found that in ſome of the Cloſes there was no Waſte committed, wherefore the Court ſaid, He could not have Judgment through his own default: But after at another day, *Hobart* being then Chief Juſtice, and *Warberton* Juſtice, ſaid; That the Verdict was ſufficient, and ſo was alſo the Declaration, and that the Plaintiff might have Judgment thereupon: but yet the Caſe was adjourned. Mich. 11 Jac. in C. B. Sir *John Gage*, and *Smith*'s Caſe. *Godbolt*. 209, 210.

2. In Trover and Converſion of 2000 Loads of Coals, upon Not-guilty pleaded: The Defendants were found guilty, ſeverally for ſeverall Loads of Coals: and were ſeverally found Not-guilty for the reſidue, and Judgment accordingly, and entire damages, and one *Ideo injuria*; and thereupon a Writ of Error was brought in the Exchequer-Chamber, and the Error Aſſigned was, becauſe the Judgment was given againſt the ſeverall Defendants, for the ſeverall damages ſeverally: for it was alledged, that ſeverall damages ought not to have bin aſſeſſed; but, there being a joynt Trover and Converſion layed to their charge, they ought to have bin both found Guilty, and they ought not to have bin divided in the Verdict, and in the aſſeſſing of damages. But all the Juſtices and Barons agreed, That the Plaintiff ſhould have ſeveral damages: for, being found ſeverally Guilty of ſeverall parcells Converted, he ſhall have Judgment accordingly. Mich. 2 Car. in the Exchequer-Chamber. *Player*, and *Wain*, and *Dowes* Caſe. *Cro.* 1. Part, 39.

3. Treſpaſſe of Battery was brought againſt A. B. and C: A. appeared, and the Plaintiff declared againſt him *ſimul cum*, &c. And he pleaded, Not-guilty; And afterwards B. appeared, againſt whom alſo the Plaintiff declared *ſimul cum*, &c. And upon Not-guilty pleaded, *Venire facias* was Awarded, and both Iſſues tryed at the Aſſizes. And the Iſſue againſt A. being firſt tryed, the Jury aſſeſſed upon that Iſſue, for the Plaintiff, 200 *l.* damages; and afterwards the Iſſue was tryed againſt B. and 50 l. damages aſſeſſed by the ſecond tryall. C. appeared, and confeſſed the Action, and a Writ of enquiry of damages Awarded upon the Roll; but none Iſſued. In this Caſe, divers points were Reſolved. 1. When in Treſpaſſe againſt divers Defendants, they plead Not-guilty, or ſeverall Pleas, and the Jury finds for the Plaintiff in all, The Jurors cannot aſſeſſe ſeveral damages againſt the Defendants, becauſe all is one Treſpaſſe, and made joynt by the Writ and Count. But if the Jury find one Guilty at one time, and another at another time, there ſeverall damages may be taxed. 2. It was Reſolved, That the Defendant who pleads laſt, ſhould be charged with the damages taxed by the firſt Enqueſt, and the ſecond Enqueſt ſhall not aſſeſſe damages, but the party ſhall be contributary to the damages aſſeſſed by the firſt Enqueſt: for, the Treſpaſſe which the Plaintiff hath made Joynt by his Writ and Count, and done at one time, cannot be ſevered by the Jury, if the Jury find the Treſpaſſe to be done at one time. And if the Damages taxed by the firſt Enqueſt be exceſſive, the party to the ſecond tryall ſhall have an Attaint. But to ſave a Diſcontinuance, If one Defendant maketh default, a Writ of Enquiry ſhall be Awarded, but none ſhall Iſſue forth. 3. It was Reſolved, That becauſe in Judgment of Law, the ſeverall Jurors gave a Verdict at the ſame time, the Plaintiff might have his Election, to have Judgment, *de melioribus damnis*, and that ſhould bind them all: but there ſhould be but *unica executio*. 4. Reſolved, That where in Treſpaſſe, the Defendants plead ſeverall pleas, tryable all at one time by the ſame Jury, and found for the Plaintiff, the Jurors cannot ſever the damages, and, if they do, the whole Verdict is naught. *Cook* 11. Part, 5, 6, & 7. Sir *John Hyden*'s Caſe.

4. Error was brought upon a Judgment by default in Waſte, That the Writ of Enquiry. It

was

was found, that in the houſes and Gardens, and intire damages found, whereas the Waſte was aſſigned in two houſes, three Gardens, &c. and that the damages ought to be found ſeverall for every of them: But the Error was not allowed, for when the Sheriff and Jury had had the View, and found damages for the Waſte, it ſhall not be intended Pettit-damages in any; and in all ſuch Caſes, the uſuall Courſe is to find intire damages: But becauſe the enquiry was by ten Jurors, where there ought to have bin twelve Jurors, It being a Verdict upon which an Attaint lyeth, the Judgment was reverſed. Mich. 11 Car. in B. R. *King* and *Fitch*'s Caſe. *Cro.* 1. Part, 299.

5. In Action upon the Caſe, The Plaintiff did declare, That the Defendant did aſſume to perform the Award of J. S. and aſſumed alſo that he would not ſue execution upon a Judgment which he had obtained againſt the Plaintiff in an Action, And ſhewed that the Award was made (which Award was void in Law) and that the Defendant had not performed the ſaid Award, and alſo that he had ſued Execution againſt the Plaintiff, Upon Non-Aſſumpſit pleaded, It was found for the Plaintiff, and Judgment given. Error was brought in the Exchequer-Chamber; and was Aſſigned, That the Plaintiff had declared upon two breaches, whereas for one of them, there was no cauſe of Action, for that the Award was void in Law, and ſo no breach could be aſſigned in that, and when the Jurors have aſſeſſed damages intirement for both breaches, whereas for one there was no cauſe of Action, the Verdict was void. *Tanfield* Chief Baron ſaid, That the Verdict was well enough for there is but one Iſſue upon the whole Aſſumpſit, but if ſeverall Iſſues had bin joyned upon theſe ſeverall poynts of the Aſſumpſit, and both had bin found for the Plaintiff, and damages aſſeſſed intirely for both breaches, then was the Judgment reverſeable, for being ſeverall Iſſues, the Jury might have aſſeſſed the damages ſeverally, but here is but one Iſſue, and it was the folly of the Defendant, that he would not demur upon the Declaration for one part, *ſcil.* the not performance of the Award, and traverſe the other, *ſcil.* the ſuing of Execution, or the Aſſumpſit Note, the Verdict for the aſſeſſing of the damages, was in theſe words, *ſcil.* *Et affidant damna occaſione, non performationis Aſſumptionis prædict.* &c. But notwithſtanding all this ſaid, It was Reſolved, and adjudged, that the Judgment ſhould be reverſed, becauſe the damages were aſſeſſed entirely for a thing which was out of the Submiſſion. Mich. 31 Eliz. in the Exchequer Chamber, *Bedell* and *Moor*'s Caſe. *Leon.* 170, 171.

6. In Accompt, Damages was given by the Jury: It was moved, That damages ought not to be by way of Damages, but the Damages of the Plaintiff ſhall be conſidered by way of Arrerages: But ſee H. 29 Eliz. in C. B. *Collet* and *Andrew*'s Caſe. In Accompt, the Plaintiff ſhall Count to his Damages, but ſhall not recover damages; but the Court ſhall Award *quoddam incrementum*, to the Arrerages: *Cook* of Councell in the Caſe ſaid, It had bin adjudged, That the Plaintiff ſhall recover damages *ratione Implacitationis, non retentionis.* Trin. 31 Eliz. in B. R. *Harris* and *Baker*'s Caſe. *Leon.* 302.

7. In an Action of Aſſumpſit, the Plaintiff declared, that he bought of the Defendant *domſa bonaet catalla*, viz. *unum fulcrum Lecti, anglicè*, a Field-Bedſtead, with Curtains and Vallens of Say, *unum operimentum, Anglicè*, a Rug which the Defendant did aſſume to deliver to the Plaintiff, and had not done it, the Defendant pleaded Non-Aſſumpſit, and found for the Plaintiff, and damages and Coſts aſſeſſed. Error brought, and Errour aſſigned, That the Damages were intirely given, and for ſome of them no Damages ought to be given: and in this caſe, where it is ſaid, *Fulcrum Lecti Anglicè*, a Field-Bedſtead: For that Damages may be given; but for the addition ſubſequent, no Damages ought to be given: for *Fulcrum Lecti* includes no more then the Bedſtead it ſelf. But in the principal caſe, It was adjudged, That the Judgment ſhould be affirmed: For *Fulcrum Lecti* is onely the thing for which Damages ſhall be given, and here is but one thing onely put in Iſſue: and for the Teſtern and Vallens no Damages ſhall be given, for they are not alledged poſitively, but *expoſitivè*, and the Expoſition extends to more, then *Fulcrum Lecti* doth ſignifie, and therefore the ſame is but as a Negation, and void, as a thing not at all alledged. *Cook* 11. Part, 403. 11 Jac. in B. R. *James Osborns* Caſe.

8. In Battery againſt Husband and Wife, The husband juſtified, for that the Plaintiff aſſaulted his wife, in ayd of whom, &c. The wife by her ſelf pleaded, *de ſon aſſault demeſn.* The Plaintiff replyed *de injuria ſua propria abſq; tali cauſa*: Both Iſſues being found for the Plaintiff, Damages entire were given; which being moved in Arreſt of Judgment, was holden to be ill by the whole Court, and the Tryall ill, becauſe the wife could not plead by her ſelf. Paſch. 8 Jac. in B. R. *Watſon* and *Thorps* Caſe. *Cro.* 2. Part, 239.

9. Covenant was brought againſt the Aſſignee of A; For that the Leſſee Covenanted to pay annually during the Term of 21 years, 20 s. to the Church-Wardens of the Pariſh of S, and to repair the houſes; and becauſe the Aſſignee did not pay the rent, nor repair the Tenements, the Action was brought; And upon *Nihil dicit*, Judgment was for the Plaintiff, and damages aſſeſſed intire. Upon

Error

Errour brought, It was adjudged, becauſe the Aſſignee is not chargeable with this Covenant of payment of the annuall ſum, it being a Collateral Covenant. It was the Opinion of the Court, That the Declaration was not good: and therefore the Damages being intire, the Judgment was reverſed. Mich. 15 Jac. in B. R. *Maybo* and *Bacchurſts* Caſe. *Cro.* 2. Part, 439.

10. Treſpaſſe againſt 3. Defendants: One of the Defendants pleaded generally, Not-guilty: The ſecond pleaded, That at the time of the Treſpaſs, he was Conſtable of H, and pleaded, Not guilty: And the third Defendant pleaded, *de ſon aſſault demeſne*. And 3. Iſſues being joyned, One Jury found all theſe Iſſues for the Plaintiff, and aſſeſſed Damages intirely to 40 l, and Judgment given accordingly. Whereupon Errour was brought; for that they ought to have found ſeveral damages upon the ſeveral Iſſues. But the Opinion of the Court was, That it was good enough. And the Judgment was affirmed. Mich. 13 Jac. in B. R. *Mathews* and *Coles* Caſe. *Cro.* 2. Part, 385.

11. Action upon the Caſe brought for words ſpoken at ſeveral times; where the words ſpoken at one time were actionable, but not for the words ſpoken at the other time; and the Jury found for the Plaintiff, and gave intire damages; which was ſaid, in Arreſt of Judgment was not good, but the Court was of Opinion, That the damages were well given by the Jury, and the ſame ſhall be taken to be for the words that are Actionable, and not for the other words. Hill. 14 Jac. in B. R. *Meſſline* and *Farrendons* Caſe. *Bolſtr.* 3. Part, 283.

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5. *Where, and in what Actions and Caſes, double damages ſhall be recovered; and where treble damages. And where one ſhall anſwer all the Damages, where not.*

1. IN Error brought to reverſe a Judgment in *London*; the Caſe was, Sir *Wolſtan Dixſey*, brought Debt in *London* againſt Alderman *Spencer*; for Rent upon a Leaſe for years, made to *Spencer* by one B. who afterwards Granted the Reverſion to *Dixſey*, and the Tenant Attorned, and the Rent was unpaid, &c. *Spencer* pleaded in Bar, That before the Grant of the Reverſion, B. was ſeiſed, and ſhewed the Cuſtome of *London* to make Inrollments of Deeds Indented: And that before the bargain and Sale to *Dixſey*, he bargained the Reverſion to him by parol, and added Judgment if Action. This plea was entred upon Record, and, pendant the Suit, *Dixſey* entred into the Lands, for a forfeiture of the Term, becauſe he had claymed a Fee-ſimple; And *Spencer* re-entred with force; and his Servant with him, but not with force. And thereupon *Dixſey* brought an Aſſiſe of Freſh-force againſt them in *London*; and all this matter was there pleaded, and adjudged it was a forfeiture of the Term, and the Jury gave damages, and the Court increaſed them, and the Judgment trebled, as well the damages encreaſed as the others: And alſo the Judgment was, *Quod pradicti Defendentes Capiantur*. Whereupon Error was brought, and Aſſigned in the point of Judgment, that it was no forfeiture; and alſo becauſe the damages, increaſed by the Court, were trebled: And becauſe the Judgment was *Capiantur*, where but one was a Diſſeiſor with force: for the firſt point, the Court was clear of Opinion, That it was a forfeiture. For the ſecond point, the Court was of Opinion, that he who was preſent when the force was made, was a Diſſeiſor with force, and then the *Capiantur* well: And for the third point of trebling of the damages increaſed, The Court made no doubt, but that they ſhould be trebled: And ſo they ſay it was adjudged in a *Staffordſhire* Caſe. Mich. 29 Eliz. in C. B. Sir *Wolſtan Dixſey*, and Alderman *Spencer's* Caſe. *Goldesbr.* 40, 41, 42. See *Cook* 10. Part, 116. in an Action of Forcible Entry, upon the Statute of 8 H. 6. or in an Aſſiſe for a Diſſeiſin done with force, the Plaintiff ſhall recover treble damages and Coſts alſo, becauſe at the Common-Law, the Plaintiff ſhould have recovered treble damages and Coſts alſo.

2. A Parſon did Libell in the Spirituall Court for Tythes, and the Subſtraction of them: They were at Iſſue upon a Priviledge of diſcharge, which being found for the Parſon, he had a Conſultation, and he proceeded in the Spirituall Court, and there obtained a Sentence, and the Sentence was, that he ſhould recover the ſingle damages. *Et ulterius, quòd recuperet duplicem valorem*, which was alſo by the ſentence ſet certain: It was Reſolved by the whole Court, That for that cauſe, a Prohibition ſpeciall ſhould be Awarded, for although the ſentence there given, is not expreſſly to recover the treble damages; yet becauſe it doth amount to ſo much, and in their Court by the Statute of 2 E. 6. they may give onely double damages, the Prohibition was Awarded. And in that Caſe it was agreed by the whole Court, That the Statute of 2 E. 6. for Subſtraction of Tythes, doth not give any damages, but if the Tythes be firſt ſet out; and then becauſe they are ſubſtracted, the perſon who hath an Intereſt, ſhall recover treble damages; And it was reſembled

reſembled to the Caſe of Waſte, where, if the Jury give 20 l. damages, the Court ſhall treble the damages, and make it 60 l. and ſo it was done in the Principall Caſe. Hill. 11 Jac. in C. B. *Baldwin* and *Girrey*'s Caſe. *Godbolt.* 245.

3. B. Bayliff of the Sheriff of W. was Endicted before the Juſtices of Peace in their Seſſions in the County of W. upon two Indictments of Extortion. In the one, That he as Bayliff had received 20 s. from one *extorſivè colore Officii ſui*, and of the other, that he took *extorſivè* 6 s. 8 d. and was forced to plead preſently to the ſame Indictments, and the ſame day they were tryed, and he convicted, and Judgment againſt him at one and the ſame Seſſions, That he ſhould be Impriſoned, and Fined to the King for one of his Offences, 40 l. and for the other 20 l. and treble damage given, viz. for the one 3 l. and for the other 26 s. 8 d. which was more by 6 s. 8 d. then he had received: Upon theſe Indictments, he brought ſeverall Writs of Error; and ſeverall Errors Aſſigned. 1. Becauſe the Indictment and Tryall were at one and the ſame Seſſions, whereas they ought not to be tryed, and traverſed the ſame Seſſions. 2. Becauſe they gave damages to the party where they ought not to have given any damages. The Opinion of the whole Court was, That Juſtices of Peace ought not to try, and determine civill offences in one and the ſame day, for the party ought to have a convenient time to provide for tryall: and 2. for the aſſeſſing of the treble dammages to the party, the ſame was erronious. For although by colour of the Statute 23 H. 6. where treble dammages are given to the party, they might aſſeſſe them; yet in this caſe it is undue and Erronious, for they ought firſt to have enquired of the damages, for peradventure it may be more or leſſe according to the Circumſtances, but they may not aſſeſſe them themſelves without enquiry by the Jury; for the Jury ought firſt to have found the damages, and then they might have trebled them: and for the Quadruple damages, the Court was clear of Opinion, That it was out of the Statute. And for theſe Errours, the Judgment was reverſed. Hill. 11 Car. in B. R. *Bumſteds* Caſe. *Cro.* 1. Part, 317, 309.

6. *Where, and in what Caſes, Damages given may be mitigated; and what ſhall be a good Cauſe for the mitigation of them; what not. Where Releaſed; Where not.*

1. IN Treſpaſſe for breaking of his Cloſe, and for Cropping 200 Pear-Trees, 100 Apple-Trees; Damages was found 40 l. It was moved to the Court, That the damages might be mitigated, becauſe it appeared by *Affidavit*, That the party himſelf before the Action brought, would have took 5 l: But the Court ſaid, That they could not mitigate the Damages in Treſpaſſe which was locall, and therefore could not appear to them, and the damages might well amount to 40 l. for Cropping of an Orchard; and ſo Judgment was entred. Mich. 3 Jac. in C. B. *Delvis* and *Ayres* Caſe. *Brown.* 1. Part, 204.

2. In Aſſumpſit brought for 100 l, the Caſe was, The Defendant, in Conſideration of a French Crown given him, did promiſe, That if he did not ſuch an Act before ſuch a day, that then, &c. It was moved, That the Plaintiff can only recover ſo much as he is damnified by the French Crown: And the like caſe was before the Chancellor, where a Gentlewowan took the death of her husband ſo heavily, that ſhe ſaid, She would never marry again: and the ſon comforted her and ſaid, God will provide a new Husband; and ſaid, That he would give her 10 l, to pay 100 l. when ſhe ſhould marry: which ſhe accepted of, and then the ſon brought an Aſſumpſit for the 100 l. within a year after, ſhe married: and the matter was brought into the Chancery; And the Maſter of the Rolls awarded 10 l. only, and ſaid, He would never give a penny more, becauſe it was unreaſonable to bar a Gentlewoman from marriage. Trin. 31 Eliz. in B. R. *Owen* 34.

3. Note: It was ſaid by *Rolls*, Chief Juſtice, in a Tryall at the Barr in a Caſe upon the Statute of *Winchester* againſt a Hundred; That if a Carriers man, or ſon, conſpire to rob him, and accordingly do it, the Carrier not being privy to it; The Carrier may bring an Action againſt the Hundred, upon the Statute of *Winchester* for this Robbery; but this Conſpiracy may be urged in mitigation of Damages. Mich. 1654. *Styles* 427. *Matthew*, and the Hundred of *Godalmings* Caſe.

4. Debt for Arrerages of Rent for ſeven years and for ſeven Capons; the Defendant pleaded *Nihil debet*,

debt, and upon Iſſue joyned, a Verdict found for the Plaintiff. In Arreſt of Judgment, Exception was taken, That the Plaintiff of his own ſhewing had demanded more then was due, and ſo ought not to have Judgment, The Queſtion was, Whether the Plaintiff might not relinquiſh that part, which is not due, and have Judgment for ſo much as is due. It was holden by the Court, That the relinquiſhing of part is not the falſifying of his Writ, although the thing demanded be entire, for he may as well releaſe after the Writ brought as before: And there was no queſtion but he might have releaſed part before; and he may Releaſe where there is an ill demand, as well as where a demand is good. It was adjudged for the Plaintiff. Mich. 1649. *Styles* 175. *Barker* and *Pomeroyes* Caſe.

5. Treſpaſſe was brought againſt four Defendants; and, before a Verdict, one of them dyed: and the Verdict was found againſt the Defendant. It was prayed that the Plaintiff might have Judgment againſt the other three; *Rolls* Chief Juſtice, *If you will relinquiſh your damages as to the perſon that is dead, you may have judgment againſt the reſt.* Mich. 1651. *Preſton* and *Mortled's* Caſe. in B. R. *Styles* 299.

6. An Action of Ejectment was brought, and alſo a battery in one Writ. After Verdict, It was moved in Arreſt of Judgment, becauſe the battery was joyned with the Ejectment: the Damages were found ſeverally, and the Plaintiff had releaſed his damages for the Battery, and prayed Judgment for the Ejectment: One Juſtice held the Writ to be naught; but yet notwithſtanding, Judgment was given for the Plaintiff. Hill. 16 Jac. in C. B. *Bide* and *Snelling's* Caſe. *Brown.* 1. Part, 235.

7. In a Writ of Annuity, the parties were at Iſſue, which was tryed for the Plaintiff, and the Jury found the Arrerages, but did not aſſeſſe any Damages and Coſts: which verdict was inſufficient, and cannot be ſupplyed by Writ of Enquiry of Damages; but the Plaintiff releaſed his Damages and Coſts, and thereupon had Judgment; for that was for the Defendants benefit. Mich. 12 Jac. *Cook* 11. Part, *Bentham's* Caſe.

8. In a Writ of *Ejectione Cuſtodiæ terræ et hæredis*, The Jury aſſeſſed damages entirely, which was not good, for, for the Heir, it doth not lye, yet he releaſed his damages, and had Judgment for the Land. 22 Eliz. *Dyer.* 370.

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7. *Where Damages are well given, where not, and Where the Particular Damages are to be alledged; Where not?*

1. HUſband and Wife, Executrix of A. brought Trover and Converſion againſt B. of goods of the Teſtator, and Converted by the Defendant, and obtained a Verdict: In ſtay of Judgment, the Defendant took Exception to the Declaration, That the Declaration was of a joynt poſſeſſion of Goods of the Husband and Wife, and damages were given to the Husband and Wife, whereas the goods do properly belong to the Wife onely as Executrix. It was ſaid by the Court, That the poſſeſſion of the Wife as Executrix, was alſo the poſſeſſion of the Husband; and that the damages recovered, ſhall be to the Eſtate of the Teſtator, and ſo may concern them both: and this being a poſſeſſory Action, it is not neceſſary to ſhew how the poſſeſſion of the goods was gained. Mich. 23 Car. in B. R. *Fremling* and *Clutherbooks* Caſe. *Styles* 48.

2. In Aſſumpſit, the Caſe was, A. did promiſe to B. that in conſideration that B. would marry the daughter of A. that he would be bound to give over his ſhop to him, and not uſe his Trade in *Dale*, and would lend unto him 50 l. and for not performing this, he had Judgment: Error was brought, and Aſſigned, That there is a breach layed of all the promiſes, one part of which is againſt Law, *ſcil.* not to uſe his Trade, and yet damages are given intirely for all, which is not good: It was the Opinion of the Court, That if the words be generall, it is ill; but it is otherwiſe if there be a Conſideration, for a man may ſell his title and priviledge for a Conſideration; It was then moved, That the damages were given for a thing which was impoſſible. But to that, It was Anſwered, If damages entire be given for ſome things, with others, whereof ſome are impoſſible, the damages ſhall be deemed to be given for thoſe things which were poſſible, and void to the reſt. The Judgment was affirmed. Paſc. 24 Car. in B. R. *Styles* 111. *Pongnell* and *Goff's* Caſe.

3. Debt upon an Obligation, The Defendant pleaded *per minus*, upon Iſſue and Verdict, a Judgment for the Plaintiff in the Court of *Barnſtable*: Upon Oyer of the Record, this Error was found, That the Jury in Aſſeſſing of damages, ſay *pro miſis et Cuſtagiis*, but do not ſay *Circa Stellum expenditis*,

penditis, ſo it cannot appear for what the Coſts and damages are aſſeſſed: and though the Judgment be right entred, yet there is no Verdict to Warrant the Judgment. The Judgment was reverſed. Mich. 1649. in B.R. *Cribie* and *Orchard*'s Caſe. *Styles* 164.

4. The Plaintiff brought an Action upon the Caſe, for ſpeaking theſe words of her, viz. *This is the whore that my man C. begot a Baſtard on, and ſpent all my mony upon, and the Queen hath been too long in Town to my eaſe.* A Verdict being for the Plaintiff, it was moved, that there is no ſpeciall loſſe or damage alledged, by reaſon of the words, And it was ſaid, That for ſaying generally the Plaintiff had a Baſtard, an Action would not lye, As was adjudged in *Winter* and *Barnard*'s Caſe. Trin. 1650. and for that reaſon, the Court was of Opinion that the Judgment ſhould be Arreſted. Paſc. 1651. in B. R. *Owen* and *Jevon*'s Caſe. *Styles* 274.

Darrein Preſentment: *Or*, Aſſiſe of Darrein Preſentment.

1. AN Aſſiſe of Darrein Preſentment, Or, *Aſſiſa ultimæ Preſentationis*, are Writs grounded upon the poſſeſſion, which the Patron had upon an Uſurpation within his own poſſeſſion, or his Anceſtors; or upon a ſpecial diſturbance, may have and maintain; and thereby he ſhall recover the Preſentment, and remove the Incumbent who is in by wrong; and therein he ſhall recover his damages. See *Bract.* lib.4.246,247. *Fl.tch.* lib. 5. cap. 12. *Ganvil.* lib.6.cap.17. acc.

2. A man ſhall have an Aſſiſe of Darrein Preſentment, although he and his Anceſtors do not preſent to the laſt avoidance; as if Tenant for life, for years, in Dower, or by the courteſie, ſuffer an Uſurpation to the Church, and dye, he in the Reverſion, who is heir unto the Anceſtors, who laſt preſented, ſhall have an Aſſiſe of Darrein Preſentment, if he be diſturbed: But if a man preſenteth, and then granteth the Advowſon to one for life, and he ſuffer one two or three Uſurpations at the next avoidance, he in the Reverſion ſhall not have Aſſiſe of Darrein Preſentment, if he be diſturbed to preſent: For by the Statute of Weſt. 2. cap. 5. the Remedies given for the Heir of him who made the Demiſe, who is in the Reverſion; and not for the Leſſor himſelf. *Fiſh* to *Dyer* upon preſentment, acc.

3. Note, there is a difference betwixt the Writ of Darrein Preſentment, and Quare Impedit: For, 1. where a man may have a Writ of Darrein Preſentment, there he may have a Quare Impedit; but not *è contrà*. 2. A man may have a Quare Impedit, without alleadging any preſentment in a perſon certain. But a man cannot have an Aſſiſe of Darrein Preſentment; but therein he muſt alleadge the Preſentment in a perſon certain, 30 Eliz. 3. *Darr. Preſentment* 13. 3. A Leſſee for years, Guardian, or Tenant at Will, may have a Quare Impedit; but they cannot have and maintain Darrein Preſentment, becauſe no perſon can maintain an Aſſiſe, but he that hath a Free-hold, 5 H. 7. 14; 50. E. 3. 14. by *Holt* 16 H. 7, 8. 40. If the Husband be ſeiſed of an Advowſon in the Wives Right, and a ſtranger uſurps, the Husband may have a Quare Impedit in his own name, without naming the Wife in the Writ; for that the diſturbance is perſonal, which falls in damage to the husband: but he cannot have an Aſſiſe of Darrein Preſentment, wherein the Advowſon is to be recorded; but the wife muſt be joyned and named in the Writ, 14 Hen. 4. 12. 5 Eliz. 3, 14.

4. In an Aſſiſe of Darrein Preſentment, the Writ doth ſuppoſe, that the Defendant doth deforce him of the Advowſon; and yet in the Court or Prolecution, he counts, that he or his Anceſtors did laſt preſent; and the Count, although it ſeem repugnant to the Writ, yet it is not ſo, but is good; and the Count ſhall not, for the ſeeming variance therein, abate the Writ, becauſe there is no other form of Writ, 20 E. 3. *Darr. Preſentment* 13.

5. In a Quare Impedit, the Plaintiff counts, That A. was ſeiſed of a Mannor in Fee, to which an Advowſon of a Church was appendant, and preſented J. S. who was admitted, inſtituted, and inducted. A. dyed, his heir levyed a Fine of the Mannor, to which, &c. to be in Fee, who granted the next avoidance to the Plaintiff; and that J. S. had reſigned; ſo it belonged to him to preſent. The Defendant pleaded, That before the Writ brought, he was in by ſix moneths of the preſentment of A. without that, that the Church was void *modo & forma*, as the Plaintiff had counted; and upon that they were at Iſſue, and found for the Plaintiff. And the Jury *ex officio* found, That the Church was full of one J. D. by Indictment of the King, prait the *Quare Impedit*, betwixt the Plaintiff and the ſaid J. S; and that the Church was of the value of

of 80 l. *per annum*, and that the Action was brought within 6. months after the Avoydance: Upon which, Judgment was given for the Plaintiff, That he ſhould recover his Preſentment to the Church againſt J. S, although it was full of the preſentment of the King, pendent the *Quare Impedit* betwixt the Plaintiff and J. S: and alſo that he ſhould recover againſt him Damages *ad valorem Eccleſiæ per dimid.* And he had a Writ to the Biſhop, notwithſtanding he had admitted *idoneam perſonam* to the ſaid Church at the preſentation of the Plaintiff. And upon this Judgment, a Writ of Errour was brought. And in this caſe, theſe points were Reſolved: 1. At the Common-Law, before the Statute of *Weſt.* 2. Cap. 5. If a Common perſon do preſent to the Church his Clark, who is Admitted and Inſtituted, that thereby the lawful Patron was put out of poſſeſſion, and the uſurper gained the Inheritance of the Advowſon by wrong, and the preſentment of the Patron *pro hac vice* loſt for ever: For he had not any means but a Writ of Right of Advowſon, in which the Inheritance was onely to be recovered; but by that Writ the Incumbent was not removed, and the Church was full as to the ſpiritualty by the Inſtitution before the Induction. 2. That at the Common-Law, If an uſurpation were upon an Enfant, or a Feme Covert, they were put to their Writs of Right of Advowſon; 1. Becauſe he who comes in by Admiſſion, Inſtitution, and Induction of the Biſhop, came in by a Judiciall act; and it was preſumed in Law, that the Biſhop would not do wrong, nor aſſent to a wrong to be done to the Patronage of the Church. But if the Church were Litigious, that he would enform himſelf in a *jure Patronatûs*, and ſo do right. 2. Becauſe that in every Pariſh there ought to be *idonea perſona*, who ought to be religious, and diligent in his function; and that was the reaſon, that after Inſtitution to the Church, that the Incumbent was not removeable at the Suit of a common perſon, but was put to his Writ of Right of Advowſon: But at the Common-Law, If any had uſurped upon the King, and his Preſentee was Admitted and Inducted, yet the King might have a *Quare Impedit*, and remove the Incumbent, *Quia nullum tempus occurrit Regi.* But if the Preſentee of another were Admitted and Inducted, the King could not preſent, untill the other were removed by a *Quare Impedit* brought by the King. 3. It was Reſolved, by the Statute of *weſt.* 2. Cap. 5. If an uſurpation be upon an Enfant or a Feme Covert, who hath an Advowſon by diſcent, that the Enfant, or the Feme Covert after the death of her husband, might have a *Quare Impedit* or Darrein Preſentment: ſo as the Statute did not onely reveſt the right, but gave a poſſeſſory Action to recover the Advowſon againſt every one who had gained the Inheritance by uſurpation or wrong; whereas by the Common-Law they had onely a Writ of Right of Advowſon before. 2. That Plenarty is no plea in an Aſſiſe of Darrein Preſentment or *Quare Impedit.* 3. That in a Writ of Darrein Preſentment, or *Quare Impedit*, Damages ſhould be recovered. 4. Reſolved, That at the Common-Law in ſome caſes, He who was Admitted, Inſtituted and Inducted at the preſentment of another, ſhould be removed by a *Quare Impedit*; As if the diſturber being Defendant, preſent pendent the Writ, and his Clerk Admitted, Inſtituted, and Inducted, and afterwards Judgment is given againſt him, the Incumbent ſhould be removed; and in all caſes, when the Clerk came in by the preſentment of a ſtranger, againſt whom the Plaintiff had good title, his Clerk ſhould be removed. 5. Reſolved, That by the Statute of *Weſt.* 2. no Incumbent ſhould be removed by a *Quare Impedit*, or Darrein Preſentment brought within 6. moneths, unleſſe the Incumbent were named in the Writ, although the Incumbent were in by a defeicible title. 6. In the principal caſe, It was Reſolved, That though it were found *ex Officio*, that the Church was full of J. D, who was a ſtranger to the Writ, and it doth not appear that he comes in by better title then the Plaintiff hath, yet he ought to have a Writ to the Biſhop generally, and the Biſhop ought to execute it, and he cannot Return, That the Church is full of another: for no Iſſue can be taken between the Plaintiff and him, for he hath no day in Court; and although thas the third perſon hath right, yet the Biſhop is excuſed, becauſe they have their warrant by proceſs of Law. 3 Jac. in B. R. *Boſwells* Caſe. *Cook* 6. Part, 48, to 53.

6. No Writ of Deceit lyes in an Aſſiſe of Darrein Preſentment: and if ſuch Writ be brought in *Middleſex*, upon the Retorn of ſuch Writ, the Aſſiſe ſhall be there arraigned by the Sergeants at the Barr in French, and the Tenant ſhall be demanded; and if the Tenant do not appear when he is demanded, a Reſummons ſhall be awarded: and if upon the Reſummons the Tenant ſhall not appear, the Aſſiſe ſhall be taken againſt him by default: and if the Tenant appear, he may demand Oyer of the Writ and the Retorn, and the Writ ſhall be read to him in *hac verba*, and the Retorn thereof, and the Jury ſhall have the View; and the Tenant may take Exceptions either to the Writ, or to the Retorn thereof, if there be cauſe: and if there be no cauſe, Then he may pray a day to plead: And if the Court give a day, then the Jurours that appeared ſhall be diſcharged of their attendance, and ought to appear upon a new proceſs to be awarded againſt them. The Judgment

in this Aſſiſe is to recover the Preſentation, Damages, and the value for half a year; and if 6. moneths be paid the value of the Church for two years, by the Statute of *Weſt.* 2. And 6. of the Jury ought to have the View of the Church, to the intent they may put the Plaintiff into poſſeſſion if he recover; and in the Writ the Plaintiff ſhall not recover the Advowſon, but the Preſentation: The Proceſs in this Writ, is Summons, Reſummons againſt the Tenant; and Summons, *Habeas Corpus*, and *Diſtringas* againſt the Jury: and the Proceſs ſhall be returned from 15. dayes to 15. dayes, and no Eſſoyne, or Voucher lyeth after a Reſummons. See *Brownlow*, 1. Part, 159, 160.

7. Errour of a Judgment at the Grand Seſſions in the County of *Pembroke*: In an Aſſiſe of Darrein Preſentment, many Errours were aſſigned; which were diſallowed by the Court. See *Libr.* But the principal Errour inſiſted upon, was, That the Verdict was not good, and the Jury had not well Enquired, becauſe they did not find when the Church became void, but ſaid in their Preſentment, *Quod tempus ſemeſtre modò tranſivit*, which might be long before the Writ brought. But all the Court delivered their Opinions, That the Verdict is good; and it is not neceſſary to find when the Church became void. But *modò tranſivit* ſhall be intended, That the 6. moneths paſſed, hanging the Writ, which is onely enquireable in reſpect of the damages: and when here the value of the Church is enquired and found of the annual value of 80 l; and that the Defendant is found to come in, *ex præſentatione* of one other of the Defendants; ſo the Patron and the Incumbent are not named in the Writ, although the Defendant may be in by 6. moneths by the ſame Patron, which was named before the Writ brought; he ought to be removed: And the Judgment is for 40 l; which is the moyety of the value. Therefore the Enquiry and the Judgment are good enough. And although Preſidents be, That in the Declaration he declares, *Et unde dicit, Quod ipſe* (*idem* the Plaintiff) *ad eandem Eccleſiam præſentavit*; and in this caſe the words, *ſcil. ad eandem Eccleſiam*, are omitted: yet becauſe it cannot have any other intendment, but that he preſented to the ſame Church mentioned in the plaint; and the words after, *ſcil.* That he was Admitted, Inſtituted, and Inducted *in eadem*, refers to the Church mentioned in the Plaint: therefore it was holden good enough. Whereupon the Judgment was affirmed. Hill. 8 Car. in B. R. *Cart* and the Biſhop of St. *Davids*, *Owen* and *Prichards* Caſe. *Cro.* 1. Part, 249, 253.

Note: In the Writs of Darrein Preſentment, and *Quare Impedit*, a Protection doth not lye for the Defendant, becauſe of the danger of the Lapps: Neither ſhall Conuſans of Plea be granted in a *Quare Impedit*, becauſe the Inferiour Court cannot write to the Biſhop to admit the Clerk; neither ſhall a man have Aide in a *Quare Impedit* for the danger of the Lapps. See 39 H. 6. 38. 13 E. 3. *Protection*, 52. 9 H. 7. 16. *Br. Aide*, 120.

Debt.

1. THe Tenour of a Recognizance taken in the Chancery, was brought into the Court of Common-Pleas by *Mittimus*; to the Intent, that the party might have a *Scire facias* there upon it. But it was holden by the Court, That he could not have a *Scire facias ſuper tenorem Recordi*: But he might have an Originall of Debt, and then he might declare *ſuper tenorem Recordi*. Paſch. 22 Eliz. *Dyer* 369. See 5 Eliz. *Dyer* 217. acc.

2. Debt was brought upon a Recognizance acknowledged in *London*; and the Plaintiff declared, That *London* was *antiqua Civitas*, and that they had uſed time out of minde, That the Mayor take Recognizances of any perſon being of full age, and not a Feme Covert every day of the yeare, except Sundayes; and ſhewed, that ſuch a day the Defendant acknowledged a Recognizance to him, *&c.* It was ſaid, The Cuſtom was unreaſonable, for ſo he might take Recognizances of *Idiots*, and of men of *non ſanæ memoriæ*, and alſo it is ſo generall; for ſo it muſt extend to all places through the whole Realm, alſo none can take Recognizances by preſcription, nor can a Recognizance be taken but by a Judge of Record: But the Court held, The Recognizance was well taken, for it hath alwayes allowed them, and their Cuſtoms are confirmed by Act of Parliament; and the Mayor is ſuch a perſon who may take a Recognizance, for he is Judge of Record; and the Recognizee cannot have an Action of Debt elſewhere upon it but in *London*; and it is not out of the Juriſdiction of the Court, for the Recognizance hath made it locall; and if the Recogniſor be Idiot, Infant, *Non Compos mentis* ſhall come to be ſtayed and pleaded by the other ſide, and the Plaintiff need not ſhew the ſame in his Declaration. It was adjudged, That the Action of Debt upon that Recognizance did well lye. Paſch. 31 Eliz. in B. R. *Chamberlain* and *Thorpe* Caſe. *Leon.* 130.

3. Debt was brought upon a Recognizance in the

the nature of a Statute-Staple, for not performance of Covenants in an Indenture. The Caſe was this, A. ſeiſed of certain Lands, had Iſſue *Elizabeth* his daughter and heir, and by Indenture 20 *Martii*, 19 Eliz. granted *Cuſtodiam regalem, gubernationem, educationem, et Maritagium dict. Eliz.* to T. L: after which, T. L. by Indenture, 14 *Maii*, 19 Eliz. aſſigned the ſaid Cuſtody, &c. and all his Intereſt and the ſaid Indenture to Sir *John Spencer*. Afterwards, the ſaid Sir *John Spencer* and T. L. 29 Aug. 20 Eliz. aſſigned to J. H. the ſaid Cuſtody, &c. and all their Intereſt by Indent. of 29 Auguſt, Covenanted with the ſaid L. That T. H. ſon and heir of the ſaid J. H, and heir apparant of the ſaid J. H, *maritaret, et in uxorem duceret predict. Eliz. ad vel antequam dict. Eliz. et dict. T. H. perimplerat ſuas ſeparatas etates* 14 *annorum & dict. Eliz. ad id Condiſcenderet et agreare vellet*: and afterwards before the ſaid T. H. and *Eliz. ſuas ſeparatas etates* 14 *annorum perimpleviſſent, ſcil.* 8. Sept. 20 Eliz. the ſaid *Tho. H.* took to wife the ſaid *Eliz.* the ſaid T. H. then being of the age of 13 years and more; and the ſaid *Eliz.* then being of the age of 9. years, and no more, and *Tho. H.* over-lived, &c. and pleaded further, That the ſaid T. H. after attained his full age of 14 years; and before any agreement by the ſaid *Tho. H.* to the Marriage aforeſaid, betwixt the ſaid *Tho. H.* and the ſaid *Eliz.* had, at, or after the ſaid T. H. came to his age of 14 years, *ſcil.* 10. Sept. 22 Eliz. *ad dict. Maritagium diſagreavit, et maritagium illud renunciavit*: And all this matter being pleaded in barr as performance of the ſaid Covenants in the ſaid Indenture of Defeaſance upon the ſaid Recognizance, and thereupon demanded Judgment of the ſaid Action. And the only Queſtion here was, If this Marriage, had in manner aforeſaid, be ſuch a marriage as is intended by the Covenant, ſo as the ſaid Covenant be ſatisfied or not? And the Opinion of the Court was, That it was a ſufficient marriage in performance of the Covenant: for H. is bound for the performance of the Covenant, and that his ſon and heir apparent *maritaret et in uxorem duceret dict. Eliz. ad vel ante, &c.* which is executed accordingly, and he is not bounden for the continuance of the ſaid Marriage, but the continuance of the ſame ought to be left to the Law, which giveth the parties liberty to continue the marriage by agreement, or diſſolve it by diſagreement: and if I be bounden to you, that J. S. who in truth is an Enſant, ſhall levy a Fine before ſuch a day; which is done accordingly, and afterwards the ſame is reverſed by Errour, yet the Condition is performed. Afterwards, Judgment was given againſt the Plaintiff. Paſch. 29 Jac. in C. B. *Leigh* and *Hammers* Caſe. *Leon.* 52, 53, 54.

4. In Debt, by the Executors of Sir *William Cordell*: The Caſe was; A. ſeiſed of Lands in Fee, bargained and ſold the ſame to one P, and by the Indenture Covenanted, That the ſaid P. and his heirs ſhould quietly enjoy the ſaid Lands without interruption of any perſon. Afterwards, Controverſies ariſing betwixt them concerning the ſaid Lands; they ſubmitted themſelves to the Arbitrament of Sir *William Cordell*; to whom they were bound to perform the award ſeverally. Sir *William* awarded, That P. and his heirs ſhould enjoy quietly the ſaid Lands *in tam amplo modo et forma*, as the ſaid Land is conveyed and aſſured by the Conveyance and Aſſurance aforeſaid. And the truth was, That A. at the time of the ſaid Aſſurance was bounden in a Recognizance of 600 l. to one J. S; and the ſaid J. S. ſued forth Execution by *Elegit* thereupon, and the moyety of the Land of P. was delivered in Execution. And, If the Arbitrament was broken, was the Queſtion? The Court was clear of Opinion, That the Lands paſſed with the Charge; and the Covenant, That P. and his heirs ſhould enjoy it without interruption of any perſon, is a Collateral Surety: and the words are, that he ſhall enjoy it *in tam amplo modo et forma*; and theſe are not words of Aſſurance, but the aſſurance doth conſiſt in the Legall words of paſſing the Eſtate, and not in the words of Covenant. Alſo here doth not appear any Interruption againſt the Covenant in the Indenture; for here is not any lawful Execution, for it appeareth, that J. S. hath ſued Execution by *Elegit* 4. years after the Judgment in the *Scire facias*; in which caſe, he ſhall be put to a new *Scire facias*; for the Sheriff ought to have returned, That the Conuſor after the Execution had enfeoffed divers perſons, and ſhewed who, and upon that returned, the Conuſee ſhould have a new *Scire facias* againſt the Feoffees. It was adjudged againſt the Plaintiff. Paſch. 27 Eliz. in B. R. rott. 584. *Allington* and *Bates* Caſe. *Leon.* 20.

5. Debt upon an Obligation: The Condition was, That whereas the Plaintiff had bought of the Defendant a Ship, If the Plaintiff ſhall enjoy the ſaid Ship, with all the furniture belonging to the ſame, without being diſturbed for the Ship, or any furniture appertaining to it, That then, &c. and the caſe was, That after the ſale of the Ship, a ſtranger ſued the Plaintiff for certain moneys due for Ballaſt bought by the Defendant for the ſame Ship: in which Suit he obtained Judgment and Execution, upon which the Ship was ſeiſed. The matter was, If Ballaſt be furniture for a Ship, or not? It was moved, It was; for that it is as neceſſary as Sayl. But the Court was of Opinion againſt that, for that ſometime a Ship may ſayl without ballaſt, and the Merchandizes laden may

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be a convenient ballaſt of themſelves; and alſo becauſe the Plaintiff had not ſhewed, that at the time of the ſale, the ballaſt was in the Ship. It was adjudged againſt the Plaintiff. Mich. 29 Eliz. in C. B. *Lynters* Caſe. *Leon.* 46, 47.

6. Debt upon Obligation, the Condition was, That if the Obligor deliver to the Obligee at ſuch a day and place 20 l, or 10 Kine at the then choice of the Obligee; that then, &c. The Court was clear of Opinion, That the Defendant in pleading the performance thereof, ought to plead as well a tender of the 20 l, as of the 10 Kine: and becauſe he did not ſo, it was adjudged againſt the Defendant. Mich. 30 Eliz. in C. B. *Fordleys* Caſe. *Leon.* 68.

7. In Debt, upon ſeveral *Precipe's*, one Judgment was given, The Plaintiff took forth a *Capias* againſt one of the Defendants, and arreſted him in Execution; and afterwards, he took a *Fieri facias* againſt the other: The Court was clear of Opinion, He could not have ſeverall Executions againſt them, for a man ſhall have but one ſatisfaction: and becauſe in the principal caſe, the debt was but 30 l; and upon the *Fieri facias*, 5 l. was levied, if the other who was in priſon paid the other 5 l, the Court awarded, That he ſhould be diſcharged out of Execution. And the Court was clear of Opinion, That the party cannot have a *Fieri facias* againſt one, and a *Capias* againſt the other. And it was holden, That if a man have a Judgment againſt ſeven perſons, he may take all their bodies in Execution, becauſe the body is no ſatisfaction, but onely a gage to the debt. Mich. 1 Jac. in C. B. *Roſſier* and *Welſhes* Caſe. *Godb.* 208. See Paſch. 12 Jac. in B. R. *Cowley* and *Lydeots* Caſe, acc.

8. Errour was brought to reverſe a Judgment given in an Action of Debt. The Action of Debt was upon a *Conceſſit ſolvere, &c. pro diverſis ſummis pecuniæ*; And the Opinion of the Court was, That Debt doth not lye upon *Conceſſit ſolvere pro diverſis ſummis*, &c. becauſe of the Incertainty: But the ſame Term, in *Storie's* Caſe, That by the Cuſtome of *London*, It was holden, That Debt doth lye upon *Conceſſit ſolvere pro diverſis ſummis*. And it was ſaid, That in an Action upon the Caſe, it is good; That in Conſideration *de diverſis ſummis Conceſſit ſolvere*; and that ſo it had been adjudged, Trin. 21 Jac. in B. R. *Owfield* and *Shierſts* Caſe, *Godbolt* 336.

9. In Debt, for marriage-money, the caſe was, A. was bound to B. to pay him 1000 l. after that he had married his daughter; and afterwards he married her; and B. brought debt upon the Bond; and it was not averred, That he had not given Notice to him of the marriage. It was ſaid, That he ought to have given him Notice; for where the thing lyes properly in the Conuſans of the Plaintiff, he ought to give Notice to the Defendant: and *Stephen Gawneys* Caſe was cited to that purpoſe, which was, Leſſee for years, the Reverſion is granted over for years by way of future Intereſt, to begin upon the death, forfeiture, or determination of the firſt Leaſe. Provided, That if the Rent upon the ſecond Leaſe be arrear, that the Leſſor may enter. The firſt Leſſee ſurrenders, a Rent day incurres, the ſecond Leſſee doth not pay the Rent, the Leſſor ſhall not enter for the forfeiture, becauſe the firſt Leaſe determined by an Act which lyes properly in the Conuſans of the Leſſor; and becauſe he was to take advantage of it, he ought to have given Notice thereof to the Leſſee: But the Opinion of the Court was in the principal caſe, That there needed no Notice, becauſe he takes upon him to pay it: and a Marriage is an Eccleſiaſtical Judgment, of which he ought to take Notice. And upon divers Preſidents ſhewed, That there needs no Notice to be given in this caſe, Judgment was afterwards given for the Plaintiff. Hill. 22 Jac. in B. R. *Hodges* and *Moors* Caſe. *Popham* 164, 165.

10. In Debt for Rent, the caſe was; A. was ſeiſed in Fee of a Meſſuage in S, and let it to the Defendant for divers years to come, rendring rent payable at four uſuall Feaſts of the year; the Leſſee entred: A. by bargain and ſale conveyed the Reverſion to the Plaintiff; and before the Feaſt of Annunciation in the ſame year, the Defendant aſſigned his whole Term to J. S. who before the ſame Feaſt entred; and for Rent due at the Feaſt of the Anunciation, the Plaintiff brought the Action. It was agreed by the whole Court, That the Action would not lye: for although A. if he had not aliened the reverſion over, might have had the Action againſt the Defendant, notwithſtanding that he had aſſigned over his term before, for the privity of Contract which was between them, in as much as they were parties to it of either part: yet the Grantee of the Reverſion ſhall not have advantage of the privity, he being a ſtranger to the Contract, and now was but privy in Law by the bargain, and now he hath no remedy but againſt him who had the Eſtate at the time when the Rent appeared to be due, and that was J. S. and not the Defendant. Mich. 36 Eliz. in B. R. *Humble* and *Olivers* Caſe. *Popham*, 55.

11. In Debt the Plaintiff declared, That whereas A. Inteſtate was endebted to J. S. in divers ſums of money, for Wares ſold, that J. S. became Bankrupt, and ſo adjudged by Commiſſioners; and by them this debt was aſſigned to the Plaintiff, being a Creditor, and that the Inteſtate dyed; whereupon he brought debt againſt his Adminiſtrator. It was ſaid, That this debt being aſſigned by Commiſſioners,

miſſioners, is *quaſi* a debt upon Record, and the Plaintiff is enabled to the Suit by Act of Parliament. And it was ſaid, That for a debt forfeited to the King, by the Common-Law no wager of Law lay. But notwithſtanding, the Opinion of the Court was clear, That debt upon a ſingle Contract againſt an Executor, or an Adminiſtrator: and the Aſſignment by the Commiſſioners doth not alter the Law; but that againſt the Aſſignee the party might wage his Law. It was adjudged for the Defendant. Paſch. 6 Car. in B.R. *Morgan* and *Greens* Caſe. *Cro.* 1. Part, 135.

12. Debt was brought in the Common-Pleas, upon a Judgment given in the Kings-Bench: The Defendant pleaded *Nul tiel Record*: And upon that, the Plaintiff in the Common-Pleas obtained a *Certiorari* out of the Chancery to ſend the Record thither, which by the *Mittimus* might be ſent into the Common-Pleas. It was much doubted by the Court, Whether ſuch *Certiorari* were allowable, becauſe the Records of the Kings-Bench ſhall not be removed out of that Court. But upon many Preſidents ſhewed, That ſuch Records were by *Mittimus* out of the Chancery, Upon *Nul tiel Record* pleaded, it was ſent in *Banco*; the ſame was allowed, *viz.* Hill. 20 Eliz. rott. 2013. in C.B. *Leex* and *Scargill's* Caſe. Hill. 11 Jac. in C. B. rott. 1715. *Philips* and *Mannings* Caſe. Hill. 11 Jac. in C. B. rott. 3455. *Palmer* and *Stewards* Caſe. Hill. 8 Car. in B. R. *Lutterell* and *Leas* Caſe. *Cro.* 1. Part, 217.

13. A. Executrix of B, brought debt upon an Obligation of 200 l. by W. W: The Defendant pleaded, That J. S. late husband of the ſaid A: and the ſaid W. W. were bound in the ſaid Obligation to B, and that J. S. dyed, and made the Plaintiff and the ſaid B. the Obligee his Executors; and B. renounced, and A. adminiſtred, and that Aſſetts came to the Plaintiff's hands. The Plaintiff confeſſed the Will of J. S, and that the ſaid B. renounced, and that the ſaid A. fully adminiſtred all the goods of J. S; and that after the ſaid B. made the Plaintiff her Executrix, and that neither at the death of the ſaid B, *nec unquam poſtea* any goods of the ſaid J. S. came to the Plaintiff's hands: and upon this the Defendant demurred in Law. It was much inſiſted upon, That when the Obligee makes the Obligor his Executor, It is a releaſe in Law of the debt; and by the ſame reaſon when the Obligee makes the Executor of one of the Obligors who is chargeable to that debt, his Executor, for he may not ſue him nor his Companion. But the Court all agreed, That the Defendant had no cauſe of Demurrer, but that Judgment ſhould be given for the Plaintiff: For they agreed, That when the Debtee makes the Debtor his Executor, it is not abſolutely a diſcharge of the debt, for the debt remains Aſſetts in the hands of the debtor Executor, and it is *quaſi* a Releaſe in Law, becauſe he cannot be ſued: Or if a man Debtee takes the Debtor to wife, it is a Releaſe in Law, becauſe he may not be ſued; and perſonal Actions once ſuſpended, are perpetually ſuſpended: But where the Executor of the Debtor, is made Executor to the Debtee, he hath nothing thereby in his own right, but is onely to uſe an Action in the right of another: and in the principal caſe, though ſhe be Executor to J. S; yet when ſhe hath fully adminiſtred all the Eſtate of J. S. before ſhe be made Executrix to B, ſhe hath in a manner diſcharged her ſelf of being Executrix to J. S, and hath not any thing of his eſtate: where in the principal caſe ſhe having adminiſtred all the goods of J. S, and not being chargeable to that debt as Executrix to J. S, ſhe as Executrix to B, may maintain this Action againſt the ſaid W. W. the other Obligor. It was adjudged for the Plaintiff. Mich. 9 Car. in B.R. rott. 373. *Dorcheſter* and *Webbs* Caſe. *Cro.* 1. Part, 271, 272.

14. Debt againſt A. D. Executor of J. D. upon a Bond of the Teſtator. The Condition thereof was, Whereas A. D. ſon of the ſaid J. D. was bound apprentice to the Plaintiff for 8. years, If he, during that term, waſted or conſumed any of the Plaintiff's Wares or Goods; Then if J. D. or his Executors within 3. moneths after due proof thereof made, either by confeſſion of the ſaid A. D. or otherwiſe, and Notice thereof given the ſaid J. D. or them, ſhould render him ſatisfaction of all ſuch moneys as ſhould be duly proved to be conſumed, that then, &c. The Defendant pleaded, That the Plaintiff before the Writ brought had not proved, that the ſaid A. D. had conſumed, &c. The Plaintiff Replyed, That the ſaid A. D. had within that term, *ſcil.* ſuch a day conſumed 400 l. of the Plaintiff's Wares; and that the ſaid A. D. had by a Writing under his hand confeſſed the ſame, and that ſuch a day and place he gave Notice to the Defendant, that the ſaid A. D. had conſumed, &c. that 400 l, and ſhewed him his Confeſſion under his hand. Upon which the Defendant did Demur in Law. And it was ſaid, That the Plaintiff's Replication was not good, for that the proof ought to be by Action brought, and tryal at the Common-Law againſt the Apprentice, or upon Confeſſion of the Apprentice, upon an Action brought againſt him, and that the Law eſteems not of any proof but of that which is upon Record: But it was Reſolved by the Court, That although generally, proof is to be intended tryall by a Jury; yet it may be in another manner, according to the intention of the parties, ſhewed by Circumſtances in Writing; and the proof in this Caſe being referred to the confeſſion of the party, it is ſufficient

if he confeſſe it under his hand if it be true, but if it be not true, it cannot bind the Defendant: but *prima facie*, it is a good proof, and the Defendant having demurred thereupon, it is confeſſed that he made ſuch proof; Wherefore the Replication was holden good, and it was adjudged for the Plaintiff. Mich. 10 Jac. in B. R. *Gold* and *Deack's* Caſe. *Cro.* 2. Part, 381. Note, a Writ of Error was brought in the Exchequer Chamber; and the Error aſſigned in the point in Law: And all the Juſtices and Barons conceived, That the proof was good enough. But then an Exception was taken, That Notice was not given to the Defendant after the death of the Teſtator, for if it were in his life, it was to no purpoſe: And all the Juſtices held this to be a materiall Exception; And for that cauſe, the Judgment was reverſed. See Trin. 16 Jac. in B. R. *Lee* and *Fidges* Caſe. *Cro.* 2. Part, 488. to the ſame purpoſe.

15. Error to reverſe a Judgment in C. B. The Plaintiff declares upon ſeverall Accompts of divers ſorts of Wares ſold for divers ſums, and upon ſeverall retainers at ſeveral dayes, to do ſeverall ſorts of works, *in toto*, amounting to 42 l. The Defendant pleaded *Non debet*, and found *debet* 30 l. *et quoad reſiduum, Non debet*, and Judgment given for the Plaintiff: Errour was brought, and the Error Aſſigned, The Action of Debt being for ſeverall parcells, The Jury finding that he owed 30 l. *Et quoad reſiduum, Non debet*, ſo as the Defendant cannot know for which he is condemned, and for which acquitted, and thereby might plead in bar to other Actions, or have an Attaint (if it be falſe) for this cauſe, the Court held the Verdict was not good, but erronious, and reverſed the Judgment. Hill. 20 Jac. in B. R. *Teſwill* and *Middleton's* Caſe. *Cro.* 2. Part, 653.

16. *Woodſhaw* Executor of H. brought Debt upon an Obligation againſt F. The Writ was in *Octobor*, 30 Eliz. The Condition was, That if F. dyed before his age of 21 years, and before he had made a Joyntuce to A. his Wife, daughter of H, Then if the Defendant cauſed 100 l. to be paid to the ſaid F. within three Moneths, after the death of the ſaid *William F.* that then the Bond ſhould be void, And the ſaid *William* dyed, 30th *Sept.* 30 Eliz. The Plaintiff doth traverſe *abſq; hoc*, that the ſaid H. dyed Inteſtate. It was ſaid, That it appeareth of Record, that the Plaintiff hath no cauſe of Action; for the 100 l. was to be paid within three moneths after the death of *William F.* which is confeſſed by the Plaintiff, and this Action is in *Mich. Octobor*, 30 Eliz. within a Moneth after the death of *William*, and ſo before the Plaintiff hath cauſe of Action. *Gawdy* Juſtice ſaid, Where it appeareth, That the Plaintiff hath not cauſe of Action, he ſhall never have Judgment, but here it doth appear, that the Plaintiff hath cauſe of Action; For where a man is bounden in an Obligation, the ſame is a duty preſently, and the Condition is but in defeaſance of it, which the Defendant may plead in his diſcharge. It was adjudged for the Plaintiff. Hill. 30 Eliz. in B. R. *Woodſhaw* and *Palmerſton's* Caſe. *Leon.* 186.

17. In Debt for Rent, The Plaintiff declared, That Land was given to him, and to T. his Wife, and to the Heirs of their bodies, and that the Wife Leaſed the Lands to the Defendant, and that the Donees are dead, and that the Plaintiff as Heir, &c. for Rent arrear, &c. And upon *Non demiſerunt*; the Jury found, that the Husband and Wife *demiſerunt* by Indenture; And afterwards the Husband dyed, and the Wife entred, and within the Term dyed; Upon the matter, It ſeemed clear to *Anderſon* Chief Juſtice, that the Jury have found for the Defendant, *ſcil. Non demiſerunt*, for it is now no Leaſe *ab initio*, becauſe the Plaintiff hath not declared upon a Deed: And alſo the Wife by her diſagreement to it, and the occupation of the Land after the death of her Husband, hath made it the Leaſe of the Husband onely. Mich. 23 Eliz. in C. B. *Thetford*, and *Thetford's* Caſe. *Leon.* 192.

18. Debt upon Obligation, The Condition was to make a ſufficient aſſurance of certain Lands to the Obligee before the tenth day of *March*, 17 Eliz. And if it fortune the ſaid Obligee to be unwilling to receive, or miſlike ſuch aſſurance, but ſhall requeſt to have 100 l. for ſatisfaction thereof; then if, upon ſuch requeſt, the Obligor pay 100 l. within five Moneths, the Obligation, &c. And at the day the Obligee doth refuſe the aſſurance, and afterwards 27 Eliz. requeſt is made to have the 100 l. It was the clear Opinion of the whole Court, That the requeſt was well enough for time, and he might make it at any time during his life, and he is not reſtrained to make it before the day in which the aſſurance is to be made. It was adjudged for the Plaintiff. Hill. 30 Eliz. in B. R. *Repton* and *Andrew's* Caſe. *Leon.* 185.

19. In Debt for a *Nomine pœnæ*, the Leſſee pleaded, That the Leſſor had entred into parcell of the Land demiſed; upon which they were at Iſſue, and found for the Plaintiff; And now the Leſſor brought an Action of Debt for the Rent reſerved upon the ſame Leaſe; To which the Defendant pleaded *ut ſupra*, an Entry into parcell of the Land demiſed: upon which Iſſue was joyned; And the Iſſue was, Whether the Plaintiff *expulit, et amovit, et adhuc extinet*, the Leſſee: It was given in Evidence upon the Defendants part, That upon the Lands demiſed, there was a Brick-

Kill,

Kill, and thereupon a little Cottage, and that the Leſſor entred, and went to the Cottage, and took ſome of the Bricks and untiled the Cottage on the other ſide, It was ſaid, That the Leſſor had reſerved to him the Bricks and Tyles aforeſaid, which were there ready made at the time of the Leaſe, and that he did not untile the Brick houſe, but that it fell by Tempeſt, and ſo he came upon the Land to carry away his goods: And as to the *Extra tenet*, which is parcell of the Iſſue, The Leſſor did not continue upon the Land, but went off it, and relinquiſhed the poſſeſſion. But as to this laſt point, It ſeemed to the Court, That it is not materiall, If the Plaintiff continued his poſſeſſion there or not, for if once he doth any thing which amounts to an Entry, although he depart preſently, yet the poſſeſſion is in him ſufficient to ſuſtend the Rent, and he ſhall be ſued *extra tenet* the Defendant, untill he hath done an Act which doth amount to a Re-entry: And Afterwards to prove a Re-entry; It was given in Evidence on the Plaintiffs part, That the Defendant put his Cattell into the Field where the Brick-Kill was, and that the Cattell did eſtray into the place where the Defendant had ſuppoſed that the Plaintiff had entred: It was the Opinion of *Anderſon* Chief Juſtice, That the ſame was not any Re entry to revive the Rent, becauſe they were not put into the ſame place by the Leſſee himſelf, but went there of their own accord, which *Periam* Juſtice Granted; ſo it was found and adjudged for the Defendant, and that the Rent was goue. Mich. 30 Eliz. in C. B. *Cibill* and *Hill's* Caſe. *Leon.* 110.

20. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes, The Plaintiff ſhewed, That the Rector of M. had two parts of the Tythes in three parts to be divided; And the Vicear of the ſame place had the third part, and that by Preſcription: And ſhewed, that the Parſon and Vicar by ſeverall Leaſes, had demiſed the Tythes to him; and ſo he being Proprietor of the Tythes, the Defendant ſowed 10 Acres within the Pariſh with Wheat, Rye, &c. and carried it away without ſetting out the Tythe. Upon *Nihil debet*, It was found for the Plaintiff: It was moved in ſtay of Judgment, that the Plaintiff in the Action had compriſed ſeverall Actions, for the Plaintiff claimed not the Tythes under one Title, but under the ſeverall Tides of the Parſon and the Vicar. It was holden by the whole Court in this Caſe, That although the Parſon and Vicar could not joyn in an Action in this Caſe, becauſe they claim their titles ſeverally by divided rights; yet when both their Titles are conjoyned in one perſon, as it is in this Caſe; then the Intereſt of their Title is conjoyned alſo in one; And it is ſufficient generally to ſhew, That the Plaintiff is a Farmer and Proprietor of the Tythes, without ſaying of what Title, for it is but a perſonall Action grounded meerly upon a contempt againſt the Statute for not ſetting forth Tythes: And alſo Tythes are not demanded by this Action; And yet it was agreed by all the Juſtices, That the Plaintiff ſhould recover his Tythes, and damages, and ſhall not demand them again in any Suit after this Action. Paſc. 3 Jac. in C. B. Sir *Rich. Campion* and *Hill's* Caſe. *Brownlow.* 1. Part, 86, 87.

21. Debt was brought upon the Statute of 2 E. 6. for not ſetting forth of Tythes, which being found for the Plaintiff. It was ſaid, That Judgment ought not to be given for the Plaintiff, becauſe the Plaintiff did not ſhew in his Plaint, that he was Parſon, for he ought to bring his Action according to that name he claimed the Tythes by: And that ought to be named in the *Queritur*: and if a man will bring his Action to recover any thing as Heir, Executor, or Sheriff, he ought to name himſelf ſo in the *Queritur*: And it was ſaid, If it had bin by Writ, Originall, he muſt have ſhewed it; and Plaint in the Kings Bench, is in the nature of an Originall: But at laſt upon ſhewing the Preſident of *Merrick* and *Wrights* Caſe, That the Plaint was without naming of the Plaintiff Rector in the *Queritur*, It was holden to be good, and by the whole Court Judgment was given for the Plaintiff. Mich. 9 Jac. in B. R. *Willet* and *Spencer's* Caſe. *Brownlow.* 98.

22. Debt brought upon a Bill which was made in this manner, *viz. Memorandum*, That I have received of E. T. which was the Plaintiffs Teſtator, to the uſe of my Maſter, Mr. Serjeant *Gawdy*, the ſum of 4 *li.* to be paid at Michaelmas following; and the Plaintiff declared *verbatim* as the Bill was. Upon which the Defendant did demur, becauſe he ſuppoſed he had received the money but to anothers uſe, and ſo he ought not to be charged as Principal: for the Bill is but a Teſtimony of the Receipt. But it was adjudged for the Plaintiff: for although the firſt part of the Bill witneſs the Receipt to be to anothers uſe; yet the laſt clauſe doth not ſay to be repaid by his Maſter, but is general to be repaid, which of neceſſity is to bind him that ſealed it, otherwiſe the party ſhall loſe his debt. M. 6. Jam. *Talbot* and *Godbolts* Caſe. *Brownl.* 11. Part 103.

23. A. Brought Debt as Executor of B. for arrearages of divers Rents, aſwell Copyhold Rents, as Free-hold Rents pertaining, to a Manner, whereof the Teſtator was ſeized, and died ſeized, and the Rents were not paid in his life-time. It was the Opinion of the Court, that the Action did not lye for the arrearages, if Copyhold Lands; for that

that the Statute of 32 H. 8. of Rents, doth not extend to them; and that it did not lye for the Freehold Rents, becauſe the Plaintiff had not ſhewed in his Declaration, That the Tenant had attorned to the Teſtator in his life-time: and when the Rent of any Freehold comes in debate, it behoves both the Owner of the Mannor, and his Executor who demands it, to convey privity betwixt the Tenant and the Lord, which ought to be by Attornment; for Rents and Services veſt not without Attornment. Mich. 6 Jac. in C. B. *Appleton* and *Baylies* Caſe. *Brownlow* 1. Part, 102.

24. Debt was brought by Original againſt an Adminiſtrator in another County than where the Adminiſtrator was commorant; and before Notice of the Suit, he paid divers debts of the Inteſtate due by Specialty, ſo he had not Aſſetts to pay the debt demanded, having Aſſetts at the time of the Teſte of the Original; and now the Defendant appearing, pleaded this ſpeciall matter, and concluded, ſo he had nothing in his hands: And by the whole Court it was holden a good Plea. Trin. 32 Eliz. in C. B. *Corbetts* Caſe. *Leon.* 312.

25. Debt upon an Obligation againſt *Oliver St. John* and *Alice* his Wife as heir to her Father. The Defendants pleaded *Non eſt factum* of the Father. It was found by ſpeciall Verdict, That the Bond was made by the Father of the Wife to the Plaintiff: whereas in truth the Plaintiff hath declared upon an Obligation made to himſelf onely without ſpeaking any thing of the other Joynt Obligee, and that the Plaintiff as Survivour hath brought the Action; and, If upon the matter, it ſhall be ſaid the Deed of the Defendant, in manner as the Plaintiff declared, the Jury refer unto the Court: and the caſe of 10 Eliz. *Dyer* 279. was vouched: W. S. was bound in an Obligation to one H. by the name of J. S; and upon that Obligation an Action was brought againſt him by the name of W. S, and he pleaded *Non eſt factum*, and the ſpecial matter was found; And it was Ruled, That upon that Verdict the Plaintiff ſhould not recover; but the beſt way for the Plaintiff was, to ſue the Defendant by the name by which he is bound, and then if he appear and plead *ut ſupra*, he ſhall be concluded by the Obligation. In the principal caſe the Court was clear of Opinion, That the Plaintiff ought to have declared upon the ſpeciall matter. Mich. 31 Eliz. in C. B. *Denais* and *St. Johns* Caſe. *Leon.* 322.

26. J. S. made his Wife his Executrix, and dyed: J. D. being then endebted to the Teſtator, the Wife Executrix took to husband the ſaid J. D: J. D. made his Executor and dyed: A Creditor of J. S. brought an Action of debt againſt the Wife Executrix of J. S: and upon the pleading, the matter in Queſtion was, If by the entermarriage of the wife with the debtor, the ſame was a *Deviſtavit* or not: and if the debt due by J. D. ſhould be Aſſetts in her hands. And the Opinion of the Court was, It is no *Deviſtavit*, nor Aſſetts, for the Wife may have an Action againſt the Executor of J. D. It was alſo agreed by the Court, That if a man make his Debtor, and a ſtranger, his Executors, and the Debtor dyeth, the ſurviving Executor may have an Action of Debt againſt the Executor of the Debtor. Mich. 31 Eliz. in B. R. *Croſman* and *Readers* Caſe. *Leon.* 320.

27. Error of a Judgment in S. in Debt upon a Leaſe for years by Aſſignee of the Reverſion. The firſt, The Court is holden by Letters Patents, and the proceſſe is Awarded *ſecundum conſuetudinem curiæ*, which cannot be where the Court is erected within time of memory. 2. The Action is brought, ſuppoſing a demiſe of Lands in S. of Lands in D. whereas it ought to have bin brought in D. being brought upon privity of eſtate. 3. Becauſe he claims by grant of a Reverſion, and doth not ſhew a Deed, and without a Deed, or Fine, a Reverſion cannot paſſe. For the firſt, and third Errors, the Judgment was reverſed, Trin. 4 Car. in B. R. *Long* and *Nathercotes* Caſe. *Cro.* 1. Part, 101. See Paſc. 6 Car. *Lord* and *Cadmores* Caſe. acc. *Cro.* 1. Part, 132.

28. In Error to reverſe a Judgment in C. B. the Caſe was: A. being an Attorney, brought an Action of Debt againſt S. and declared, that he being an Attorney, S. reteined him to proſecute a Suit againſt in C. B. betwixt J. S. and J. D. and deſired him to be Attorney for J. D. and promiſed to pay him all his Fees, and all he ſhould lay out to Councell, &c. and ſhewed he layed out ſo much, for which, &c. The Defendant pleaded *Nil debet*, and found againſt him. Judgment was for the Plaintiff, and Error brought, and Aſſigned for Error, That Debt doth not lye againſt him, who ſo entreated him to be Attorney. It was the Opinion of the whole Court upon Argument in this Caſe, That no Action of Debt lyes here, but an Action upon the Caſe onely. For the Reteiner being for another man: And he being Attorney for another man, who agreed to that reteiner, there is no cauſe of Debt betwixt him who reteined, and the Attorney, and no Contract or conſideration to ground this Action. And he who is ſo reteined, may well have Debt for his Fees againſt him, for whom he was reteined, he having thereunto agreed; but againſt the Defendant who is a ſtranger to the Suit, and at whoſe requeſt he took him to be Attorney, debt lyes not: And ſo it was Reſolved. H. 38 Eliz. in *Rolls* and *Germin's* Caſe. And ſo it was ſaid, was the Opinion of all the Juſtices of the Court of Common-Pleas. That Debt lyes not, but in Action upon the Caſe. Mich.

Mich. 4 Car. in B. R. rott. 196. *Sands* and *Tyrrian's* Caſe. *Cro.* 1. Part, 140.

29. Debt by Husband and Wife upon an Obligation of 100 l. made to the Wife while ſhe was ſole: It was for the payment of 52 l. 10 s. The Defendant pleaded, That at the day of payment of the 52 l. 10 s. That he and his ſon did make a new Bond of another 100 l. to the Wife, being then ſole, for the payment of the ſame 52 l. 10 s. at another day then to come, in full ſatisfaction of the ſaid 52 l. 10 s. and that ſhe accepted of it. It was holden upon a Demurrer, and ſo adjudged, That the ſame was no Actuall and preſent ſatisfaction as it ought to be; and therefore Judgment was given for the Plaintiffs. Trin. 12 Jac. in C. B. *Lovelace* and *Cocket's* Caſe. *Hob.* 68, 69.

30. Debt upon an Obligation; The Condition was, If the Obligor ſhall pay the Rent of 37 l. yearly, at two Feaſts, according to the true intent of certain Articles of Agreement, made between the Obligor and Obligee during the Term, &c. that then, &c. The Defendant pleaded, The Articles contain, That the Obligee *Demiſit et ad firmam tradidit* to the Defendant, *omnia talia Domus tenementa et terras in parochia de P. de et in quibus* the ſaid Obligee had an Eſtate for life by Copy according to the Cuſtome of the Manner *Habendum* for 21 years, if the Obligee ſhould ſo long live, rendring to the ſaid Obligee during the ſaid Term, 37 l. to be paid at the Caſtle of C. and pleaded further, That at the time of the making of the ſaid Articles, The ſaid S. the Obligee had not any Eſtate in any Lands, houſes, &c. in P. for the Term of his life by Copy: Upon which Plea the Plaintiff demurred, and Judgment was given for the Plaintiff. In the Caſe, were two points, 1. If nothing paſſe by the Articles, and ſo the reſervation of the Rent is void. 2. If the Obligation for payment of the ſaid Rent be void; It was ſaid, and ſo reſolved upon the firſt poynt, That no Rent is reſerved; for the Leaſe in the Caſe at bar did never begin, and therefore the Rent ſhould not. And for the ſecond point, Whether the Rent ſhould be paid by reaſon of the Bond, as a ſum in groſſe, or not, the Court differed in Opinion; For *Fenner* Juſtice held, The Condition of the Bond is to pay the Rent according to the Articles, which is, That if the Leſſee have not the Land, the Leſſor ſhall not have the Rent. *Popham* contr. That the Obligor is bound to pay it, although nothing were demiſed to him, for that by the Bond he hath made it a ſum in groſſe. And it is altered from the nature of a Rent, upon the firſt Obligation, and he is bound to pay the Rent or ſum, and of this be either of them, he muſt pay it. Quære, for there was no Judgment in the Caſe. Paſc. 38 Eliz. in B. R. *Strowd* and *Willis's* Caſe. *Owen.* 110, 111.

31. A *Scire facias* iſſued in the name of the Queen, to ſhew cauſe, why Execution of a Debt which came to the Queen by the Attainder of J. S. ſhould not be had. The Defendant pleaded, That the Queen had granted over this Debt by the name of a Debt, which came to her by the Attainder of J. S. and all Actions and demands, &c. upon which the Plaintiff demurred. The Queſtion was, Whether the Patentee might ſue for this in the name of the Queen without ſpeciall words: and two Preſidents were ſhewed that ſhe might; the 1. Paſc. 30 Eliz. rott. 191. in *Scaccario*. The 2. 32 Eliz. rott. 219. *ibid.* where *Mabb* of *London*, was endebted by Bond, and the Debt came to the Queen by Attainder, and ſhe granted it to B. and all Actions and demands and a *Scire facias* iſſued out in the name of the Queen. Note in the principall Caſe, the Patentee had expreſſe words to ſue in the name of the Queen, although it was not ſo pleaded. The Caſe was adjourned. Paſc. 30 Eliz. *Allen's* Caſe. *Owen.* 112. But note, In this Caſe it was holden, by *Manwood* Chief Baron, and all the Court, That parcell, or a moyety of this Debt could not be aſſigned over to the Queen, yet parcell of a Debt might be Attached, as 22 H. 6. 47. is, Paſc. 26 Eliz. *Owen.* 2.

32. A man delivered mony to J. S. to be re-delivered to him, when he ſhould be required: which J. S. refuſed, and therefore an Action of Debt was brought, the Defendant demurred for that Debt would not lye, but accompt: But the Opinion of the whole Court was, That the Action of Debt would well lye: and the difference was taken between goods and mony: For if a Horſe be delivered to be re-delivered, there the property is not altered, and therefore Detinue lyes, for they are goods known; but if mony be delivered, it cannot be known, and therefore the property is altered, and therefore Debt will lye. It was adjudged for the Plaintiff. Mich. 42 Eliz. *Bretton* and *Barret's* Caſe. *Owen.* 86.

33. Debt, ſuppoſing that A. delivered 100 l. to the Defendant, *ſolvendum* to the Plaintiff: It was moved, That Debt did not lye, becauſe there never was any Contract betwixt the Plaintiff and the Defendant; But it was agreed, The Action did lye. It was agreed, That if mony be delivered to another, to deliver to J. S. or to the uſe of J. S. there J. S. ſhall not have an Action of Debt, but an Action of Accompt onely, but when it is delivered (as it is here) *ſolvendum* to J. S. which is intended in ſatisfaction of a Debt, there it is not countermandable; and he who is to recover it as a Debt, may upon this Receipt have an Action of Debt, or Accompt: and ſo was adjudged.

ged. Trin. 13 Jac. in C. B. in *Greenvill* and *Slaning's* Case. Whereupon a Rule was given, that Judgment should be entred for the Plaintiff. Trin. 22 Jac. in B. R. *Harris* and *Peter de Bevoiers* Case. *Cro.* 2. Part, 689.

34. In Debt upon a Judgment, the Case was; The Plaintiff had Judgment against the Husband, and sued him to outlawry; He brought a Writ of Error, and removed the Record into the Kings-Bench, and reversed the Judgment for the Outlawry, but the first Judgment was affirmed, and then he acknowledged a Statute, and dyed, his Wife took Letters of Administration; The Statute is extended upon the Wife, and all the goods which she had of the Intestate, taken in Execution. After which, the Plaintiff in B. R. sued a *Scire facias* upon the Judgment against the Wife as Administratrix, and she pleaded the Statute in bar, and the extent, and more then that she had nothing to satisfy: Upon this plea in bar, the Plaintiff demurred in Law. The Court seemed to incline, That this was no bar; for although the Wife hath not any means to aid her self, or prevent the extent of the Statute, yet it seemed to them that this would not avoid the Execution: And that the Wife might have an *Audita Querela* against the Consisee of the Statute, and so make the extent void. Hill. 8 Jac. in C. B. *Brandlock* and *Reades* Case *Brownlow*, 2. Part, 39, 40.

35. Debt upon an Obligation to perform an Award: The Arbitrators Award, That the Defendant should make submission, and should acknowledge himself sorry for all Transgressions, and words at or before the next Court to be holden for the Mannor of D. and for not performance of it the Action was brought. The Defendant pleaded, That at the next Court, he went to the Court to make his submission, and to acknowledge himself, &c. and was there ready to perform it, and the Plaintiff was not there to accept it, upon which the Plaintiff demurred. The Court was divided in Opinion, For *Cook* and *Foster* held, That the Defendant had done as much as was by him to be done, and, for that the Plaintiff was not there ready to accept it, he was discharged. *Walmesley* and *Warburton's*, contr. for it might be made in the absence of the Plaintiff, as well as a man may submit himself to the Arbitrament of a man which is absent. It was adjourned, and the Case was afterwards agreed betwixt the parties. Hill. 8 Jac. in C. B. *Cartwright* and *Gilbert's* Case. *Brownlow*. 2. Part, 48.

36. Debt was brought by the Lessor against Lessee for years, for a Rent behind during the Term; The Defendant pleaded a Release made by the Lessor to the Lessee 6. years before the Rent was arrear, of all Demands. It was adjudged a good barr. Trin. 16 Jac. in B. R. *Whitton* and *Byes* Case, *Brownlow* 1. Part, 80.

37. In Debt for Rent upon a Lease for years, the case was; Land was devised to a woman, That she should have the profits of the Lands, untill the Daughter of the Devisor should be 18 years old; The woman made the Lease, reserving Rent; and afterwards married, and then dyed: And if the husband after her death should have the Land till the daughter of the Devisor came to the age of 18 years, was the Question. It was adjudged he should hold the Land: and it is not like a Lease made by Guardian in Socage which ends with the Guardian. In that case, the Declaration was, Of a Messuage demised the 4th of *May*, 15 Jac. for one year, and so from year to year as long as both parties should agree, paying 24 l. by the year; and *Nihil debet per Patriam* was pleaded, and the Jury found it specially, That one J. W. was seised of the Tenement, and held it in Socage, and made his last Will in Writing, and by that did devise to A. his daughter, the said Tenement, and her heirs for ever at the full age of 18 years. *Item*, I will that my Wife my Executrix shall have the Education of my daughter, with the portion of money and profits of my Lands to her own use, without accompt, untill my daughters age aforesaid. Provided, she shall pay the Out Rents, and keep her daughter at School, and by that Will made his Wife his Executrix, and dyed; *the Wife* took upon her the Executorship, and married one P; the woman performed the Condition, and afterwards dyed. In this case, Judgment was given for the Plaintiff, That it was a Term, and that the husband should have it. Trin. 16 Jac. in B. R. *Balder* and *Blackbo us* Case. *Brownlow* 79.

38. In Debt brought upon the Statute of 5 Eliz. for perjury, the Case was; L. was Plaintiff against B. in Chancery, and upon a Bill and Answer, such matter appeared to the Lord Keeper, That he Ordered, that one J. S. should become party to the Bill against B: and afterwards a Commission Issued out of the Chancery between J. S. and B, to examine Witnesses: by which Commission O. the Defendant was examined on the behalf of J. S; and did depose directly for J. S. against B; by reason whereof a Decree was made in Chancery against B.; and for that cause B. brought the Action against O. upon the Statute; upon which O. demurred in Law. It was the Opinion of the Court, That the Action would not lye; for the words of the Statute are, *scil.* Where a man is grieved and damnified by a Deposition in one Suit between party and party; and in this case it appeareth, That J. S. was no party to the Suit but came in by Order, and no Bill depending either against him, or brought by him, and so out of the Statute, and

and the Statute is a penal Law, and ſhall be taken ſtrictly. M ch. 45 Eliz. in *Cantell. Broad* and *Owens* Caſe. *Brownlow* 1. Part, 82, 83.

39. In Debt upon Obligation for performance of Covenants in a Leaſe: Payment of the Rent being one Covenant, the Caſe was, The Leſſee dot not pay his Rent at the day; and the Leſſor without any requeſt, brings Debt upon the Obligation, and the Defendant pleaded the ſame matter in barr; Whether the Rent ought to be paid without a demand, was the Queſtion? It was ſaid for the Defendant, That when any penalty is annexed to the payment of a Rent, be it annexed to the Eſtate, or otherwiſe, yet it ought to be demanded; and without a requeſt to pay, no penalty ſhall be incurred. On the other ſide, It was ſaid, That the Leſſee ought to make tender of it upon the Land, and the Leſſor need not to make requeſt. And this Obligation for performance of Covenants, doth not alter the nature of the Rent. *Coke*, Chief Juſtice, cited *Miles* and *Dingles* Caſe, Where a man was bound for performance of a Will, he need not to pay Legacies deviſed by the Will, for which no day is aſſigned without requeſt: The principal caſe was adjourned. Paſch. 10 Jac. in C. B. *Manley* and *Jennings* Caſe. *Brownlow*, 2. Part, 176.

40. A. and B. brought Debt againſt the Defendant as Adminiſtrator during the minority of one J. S: and the Plaintiffs declared, That the ſaid J. S. at the time of the Action brought, was, and yet is, within age of 21 years. It upon Iſſue being found for the Plaintiffs, It was moved in Arreſt of Judgment, That the Declaration was inſufficient: For they have declared, That the Executor was within the age of 21 years, and the Adminiſtration during the Nonage ſhall ceaſe when the Enfant comes to 17 years; ſo that he may be of 17, 18, or 20 years, and yet the Adminiſtration ceaſeth: and ſo the Action will not lye. And ſuch was the Opinion of the Court; and Judgment was ſtayed. Paſch. 9 Jac. in B. R. *Brombead* and *Rogers* Caſe, *Brownlow* 2. Part, 247, 248.

41. Debt brought againſt three, upon an *Inſimul computaverant*, and an Arrear of 800 l. found. One of the Defendants was Outlawed, the reſt appeared by one *Sawyer* their Attorney: One of them who appeared onely Tendred his Law, that he did not owe, &c. The other not Outlawed did plead to his Country. It was Objected, That the one was not to be admitted to his Law alone, becauſe they were all charged as one Defendant being for a joynt debt: After diverſ Motions, and Preſidents produced, Trin. 12 Jac. rott. 2220. Hill. 41 Eliz. rott. 441. in C. B. where one of the Defendants alone waged his Law, That he did not owe; and the reſt *Nihil dicunt*, after the Law made, Judgment was againſt the Plaintiff. M ch. 16 Jac. in C. B. *Eſſington* and *Bourchers* Caſe, *Hob.* 244, 245.

42. Debt brought for Arrearages of Rent upon a Leaſe for years: The Defendant pleaded, That at the time of the Leaſe made he was within age: Upon which the Plaintiff did demur. The Queſtion was, Whether a Leaſe made to an Enfant were void, or voidable? It was ſaid to be void, otherwiſe he might be much prejudiced; and the Law intends not Enfants to be of ſufficient diſcretion for the managing of Lands; alſo the Rent may be greater then the value of the Land, and ſo it may tend to the impoveriſhing of the Enfant. But the Court held it onely voidable at election; for if it be to the Enfants benefit, be the benefit apparant, or implyed, it ſhall be void in the caſe *prima facie*; but the Enfant at his Election may make it void; for before the Rent-day come he may waive the Land, and then Debt will not lye againſt him. Paſch. 11 Jac. in C. B. *Kellans* Caſe. *Brownlow* 1. Part. 120.

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2. *Where an Action of Debt lyeth, where not: And for whom, and againſt whom it lyeth, where not; and how it lyes, when in the* debet, *when in the* Detinet.

1. THE Caſe was, That a Prebendary made a Leaſe for years, rendring Rent, and the Leſſee dyed, and the Executors of the Leſſee Aſſigned over the Term; And the Succeſſors of the Prebendary brought an Action of Debt againſt the Executors for Rent due after they had Aſſigned the State over; And the Opinion of the Juſtices was, That the Action would not lye. Hill. 43 Eliz. *Overton* and *Sydall's* Caſe. *Goldsbr.* 120.

2. Debt brought for Arrerages of 300 l. *Nomine pœnæ*, and the Plaintiff declared of a Leaſe for years made by him to one A. rendring Rent, and if default of payment be made of the Rent, that then, and ſo often, A. his Executors and Aſſigns ſhall pay 3 s. 4 d. for every day untill the ſaid Rent behind be ſatisfied; and ſhewed, That the Rent was behind for two years: but did not ſay that he demanded the Rent. It was Objected, That he ſhould have but one 3 s. 4 d. *nomine pœnæ*, and that he ought to have demanded the Rent, which he hath not ſayed he had done: *Gawdy* Juſtice, was of Opinion, That it was

good,

good enough: *Fenner* contr. But they all agreed, That the Action did well lye againſt the Aſſignee in this Caſe. Hill. 43 Eliz. in B. R. *Thynn* and *Chomleyes* Caſe. *Goldesbr.* 129.

3. A. and B. his Wife, as Adminiſtratrix of one J. G. brought Debt of 20 l. againſt J. S. and alledged that the Teſtator was Adminiſtratrix of one M. G. which M. G. lent the mony to the Defendant. Judgment was given in C. B. againſt J. S. and Error brought, becauſe the Action was brought by an Adminiſtrator of an Adminiſtratrix; whereas Adminiſtration of the firſt Teſtators goods ought to have bin committed by the Ordinary to the next of Kin, and for that cauſe, the Judgment was reverſed, Hill. 43 Eliz. *Thorns* Caſe. *Goldesbr.* 182.

4. Note, theſe Rules in the manner of bringing Debt. In Debt, if it be demanded by Originall, The proceſſe is Summons, Attachment, and Diſtreſſe, and upon a default of ſufficiency, upon a *Nihil* returned, Proceſſe to the Outlawry: If the Summons, and Attachment be returned, an Eſſoin lyes; And Wager of Law lyes if the Count be upon a ſimple contract, if the parties be living which made the contract, or debt againſt an Heir, the Writ ſhall be brought in the *debet*, but when it is brought againſt an Executor, or againſt an Adminiſtrator, or of Chattells, it ſhall be in the *Detinet tantum*. The Judgment in Debt, where the demand is in the *Debet* and *Detinet*, is to recover the Debt-damages, and Coſts of Suit, and the Defendant *in miſericordiam*; but if the Defendant denyes his Deed, Then a *Capias* for his Fine iſſues out. And if the Originall be in *Detinet* for Chattels, then the Judgment is to recover the thing in demand, or the value thereof, and Coſts and damages. And the proceſſe of Execution is a Diſtreſſe, to deliver the Chattells, or the value, and the damages. And if the Cauſe of Action be againſt Executors or Adminiſtrators, The Judgment is to recover the Debt and damages of the Teſtators goods, if the Executor hath ſo much in his hands, and if not, then the damages of the Executors or Adminiſtrators proper goods. And if the Sheriff upon a *Fieri facias*, return a *Devaſtavit*, then the *Fieri facias*, or *Elegit*, may be ſued out to levy the Debt and damages of the Executors, or Adminiſtrators proper goods. And if the Executor plead, That he never was Executor, and it be found againſt him, that he had Adminiſtred, be it never ſo little, the Judgment ſhall be to recover the debt and damages of the Executors own goods. Debt brought upon a Record, the Execution ſhall be where the Record remains. Trin. 44 Eliz. in C. B. *Brownlow.* 1. Part, 50.

5. Debt: The Plaintiff declared, That the Defendant, in conſideration, that he the Plaintiff at the requeſt of the Defendant had ſold certain Wares to J. S, did promiſe to the Plaintiff, That he would pay ſuch a ſum of money for them: and for non-payment the Action was brought, and a Verdict and Judgment for the Plaintiff; and Errour brought, and Errour aſſigned, That in this caſe, Debt lyes not, becauſe the debt which the Defendant promiſed to pay, and for which the Action is brought, became a duty before the promiſe made for it, and ſo an Action of Debt cannot be grounded for it on the promiſe: And the words in the Declaration do ſound meerly upon promiſe, which is a good Conſideration for an Action upon the Caſe which might be brought, Paſch. 22 Car. in B. R. *Styles 6. Ward* and *Giggins* Caſe.

6. Debt brought for arrearages of a Rent due to the Plaintiff as Leſſee of a Vicarage: Upon *Nihil debet* pleaded, Iſſue joyned, a Verdict was for the Plaintiff. It was moved in Arreſt of Judgment, That the Action of debt did not lye, but that he ought to have brought a Writ of Annuity, becauſe it was for the Arrearages of an Annuity which yet continues. The Judgment was ſtayed till the Plaintiff ſhould move. Mich. 1649. *Tyndal* and *Harringtons* Caſe. *Styles* 162.

7. It was a Queſtion in Court, Whether an Action of Debt did lye againſt an Executor, upon a *Conceſſit ſolvere* of the Teſtator upon a ſpeciall Cuſtome? *Rolls*, Chief Juſtice, held it did not, for this would be to charge an Executor in an Action of debt, where by Law, he may wage his Law. And an Action of Debt lyes not againſt an Executor upon a ſimple Contract made by the Teſtator: And he ſaid, That the reaſon of Wager of Law is, becauſe it is intended, That as well as the Contract may be private, ſo alſo may the payment be made in private. Hill. 1649. *Hodges* and *Jones* Caſe. *Styles* 199.

8. One was bound in a Bond to pay a ſum of money to a Feme-Sole, the Feme took husband and dyed: J. S. took Letters of Adminiſtration of the Goods and Chattels of the Woman, and brought debt upon the Obligation againſt the Obligor: The Obligor pleaded, That by the coverture marriage, the debt became due to the husband. The Opinion of the Court was, That this debt came not due to the husband, for that it was a thing in Action, and therefore the plea was not good. Trin. 24 Car. in B. R. rott. 932. *Cowle* and *Lockes* Caſe. *Styles* 105.

9. Debt was brought upon a Sheriff's Bond; which bond was given upon the arreſting of one upon an Attachment out of the Chancery; the Condition was, That the Defendant ſhould appear ſuch a day in *Cancellaria apud Weſtm.* ubicunq;

ubicunq; fuerit: The Defendant pleaded in barr the Statute of 36 H. 6; upon which, the Plaintiff demurred, becauſe the party is bound to appear in a Court, which is not a fixt Court: whereas the Chancery is a moveable Court, and ſo not fixt at *Weſtminſter*. 2. The Condition is impoſſible; for it is, That the Defendant ſhall appear in the Chancery at *Weſtminſter* whereſoever it ſhall be; and it is impoſſible to appear at *Weſtminſter*, and at another place at the ſame time. The Court held, That there was a materiall variance in it, which made the Bond void; and that neither the Upper-Bench or Chancery are fixt Courts, and then the Defendant ought not to be bound preciſely to appear at *Weſtminſter*; and then to adde, *ubicunq; fuerit*, is a material Variance, and makes the Bond void. Mich. 1650, in B.R. *Burton* and *Love*'s Caſe. *Styles* 234.

10. In Debt brought by Executors upon an Obligation: The caſe was, Sir *Humphry Stiles* and B. were joyntly and ſeverally bounden to *William Tallie* the Teſtator in a Bond of 120 l, for the payment of 60 l. The mony not paid, B. made his Will, and made his Wife his Executrix, and dyed; *William Tally* made his Will, and made the Plaintiffs his Executors, and dyed; and by his Will releaſed to M. B. the Wife of B. all Debts which T. B. her Husband did ow to him at the time of his death: The Executors prove the Will, and after bring Debt againſt Sir *Humphry* in C. B. Sir *Humfry* demurs to the Declaration, and for cauſe ſhews, That *William Talley* by his Will had releaſed the Debt to *Mary B.* Upon the demurrer, Judgment was given againſt Sir *Humfrey Styles*, and thereupon he brought Error: The Queſtion was, Whether the debt was releaſed by the Will or not: The Opinion of the Court was, That it was a ſtrong Caſe for the Executors, and that it is unreaſonable, that the Teſtator ſhould make ſuch a deviſe, and here is no aſſent of *Mary* the Executor to this Releaſe; and beſides, A Will cannot releaſe a thing created by Deed, and ſo diſcharge Creditors. It was adjudged againſt Sir *Humphrey Styles*. Trin. 1651. in B. R. rott. 587. Sir *Humphrey Styles* and *Tally*'s Caſe. *Styles*. 286.

11. In Debt upon an Obligation for performance of Covenants upon a Leaſe, the Caſe was. A Leaſe was made for one year, the Leſſee Covenants for him and his Aſſigns, to pay the Rent ſo long as he and they ſhall have the poſſeſſion of the thing let, the Leſſee Aſſigns over the Term, the Term expires, the Aſſignee continues the poſſeſſion after the Term expired; and for Rent Arrear by the Aſſignee after the Term expired, the Leſſor brought the Action; the Queſtion was, Whether here be ſuch an Aſſignee, that the Action will lye againſt, or not; *Rolls* Chief Juſtice held, That although here be not an Aſſignee ſtrictly againſt to the Rules of Law, yet that he ſhall be accounted ſuch an Aſſignee, as to perform the Covenants made between the parties. Hill. 1654. *Bromfield* and Sir *John Williamſon*'s Caſe. *Styles* 407.

12. Debt: Two were bound in a Bond, the Condition was, that if they, or either of them upon requeſt made, ſhould pay for ſo many Barrells of Beer as ſhould be delivered to them, ſo much for every Barrell as ſhall be agreed upon betwixt them, and the payment of this mony by the Condition of the Bond to be made within five dayes after requeſt: The Plaintiff ſet forth that he delivered ſo many barrells of Beer, and had agreed with them to pay 10 s. for every Barrell, which ſum he requeſted of one of the Obligors; And for non-payment, the Action brought. The other pleaded, there was no ſuch agreement; It was holden in this Caſe by the Court, that the party had his Election to demand payment of the one, or the other, and that here was a good breach aſſigned of the Condition broken; and Judgment was given for the Plaintiff. Trin. 14 Jac. in B.R. *Bolſtr*. 3. Part, 210.

13. In debt, the Caſe was; Feme-Executrix takes a Husband, they bring debt as Executrix, they recover, and have Judgment, in bar of this, the Outlawry of the Husband is pleaded; The Court was of Opinion, that by this Outlawry, the Husband forfeits not the goods, which the Wife had as Executrix, for that he had them in the right of his Wife as Executrix. Adjudged for the Plaintiff. Trin. 14 Jac. *Hix* and *Hanſon*'s Caſe. *Bolſtr*. 3. Part, 211.

14. Debt brought for 523 l. 17 s. againſt the Sheriff of S. and the Plaintiff declared, That P. and others were bound in a Recognizance of 2000 l. to the Plaintiff; And that after Judgment, he ſued a *Levari facias* to the Defendant, which he delivered him: whereupon the Defendant levyed the ſum, and at the day retorned, *quod paratos habeo*, and yet did not deliver it in Court, *per quod*, &c. The Defendant *Quoad* 308 l. pleaded *Nihil debet*, and to the reſt, that before the Return, he did pay to the Plaintiff, the ſame ſum, whereupon the Plaintiff by his acquittance, reciting, that he had received it, did acquit him, upon which the Defendant demurred in Law. There were divers queſtions in the Caſe. The 1. Whether Debt would lye, becauſe there is no Contract betwixt the Plaintiff and the Sheriff. Reſolved by the Court, That it would lye, for though there be no Actuall contract, yet there is a kind of Contract in Law, for when the mony is levyed by the Sheriff, the Action ceaſeth againſt the

the Defendant, and the Action is, *ipso facto*, transferred to the Sheriff, having both the Judgment to make it a debt, and the levy to make him answerable. And it was holden, That upon such levyes appearing upon Record, the Court may award a *Distringas*, or the party may have a *Fieri facias*, or an *Elegit* against the Sheriff, to levy as much of his own. 2. It was holden, That the Defendants plea to the 308 l. *Nihill debet*, was not good, because it was contrary to his return of Record. 3. Resolved, That since the Defendant by his Return had charged himself with the whole money, *paratos*, then to be delivered to the Plaintiff, he cannot now say, that it was paid, and acquitted before. Trin. 15 Jac. in C. B. *Speake* and *Richard's* Case. *Hob.* 206.

15. Debt was brought of 10 l. and the Plaintiff declared upon three severall Bonds, of five Marks a year; Upon Oyer of the Conditions, It appeared, That one of the sums in the Condition was payable after the Bill exhibited, and issue was joyned upon Conditions performed, and a Verdict for the Plaintiff, and entire damages, and Costs assessed: It was the Opinion of the Court, That he could not have Judgment, it was found. Nevertheless, upon a Release of damages and Costs; Judgment was given upon the two first Bonds onely; For although the Bill was one intire sum, yet by the Count, it appeareth that they were as severall demands. Quære, If it had been so by Originall. Hill. 14 Jac. in C. B. *Andrews* and *De la Ray's* Case. *Hob.* 178.

16. A Servant made a Bill under his Hand, but it was not under Seal, testifying the buying of fat Ware for the use of his Master, by which Bill he bound himself to pay the Debt; the money was not paid: Whereupon Action of Debt was brought against the Servant. It was the Opinion of the Justices, That the Action of Debt did not lye against the Servant, but an Action upon the Case; for it was the Debt of the Master, and the Assumpsit onely of the Servant. Trin. 6 Eliz. *Dyer* 23. *Alford's* Case.

17. A man made a Lease for years of certain Lands rendring Rent; the Lessee granted parcel of the Lands to J. S. who enfeoffed a stranger of that parcel; and, for the Rent arrear, brought an Action of Debt against the first Lessee. It was said that the Action of Debt did lye against him, because he hath not granted his Interest in the whole Land, and he is Tenant to him in the Reversion, and privity remains betwixt them; and an Action of Debt is always grounded upon privity, and if the private faits, (which it doth not in this Case) the Action Failes, otherwise not. But it was holden in that Case, That Debt did not lye for the Rent, until the Reversion was recontinued; for that the Rent being the accessary, *sequitur principale*, 24 Hen. 8. *Dyer* 5. *Rosheder's* Case. See *Cook* 3. Part 3. 27. in *Walker's* Case. That Action of Debt lyeth against the first Lessee. See 8 Eliz. *Dyer*, 248.

18. A brought Debt against the Administrators of G. W. and declared upon a Bill *in hæc verbis, viz.* Be it known to all men, &c. that I G. W. have received 20 *li.* of A. to bear the Adventure to *Roan*, and there to bestow it in French Pruens, and to see them shipped, and A. to bear the Adventure home; and added, That G. W. had not bestowed it in French Pruens. In that Case it was adjudged, That an Action of Debt did well lye upon the said Bill. For an Accompt lyeth not against Executors or Administrators, because they are not privie to the Accompts: and although there be no Bill, it is in the Election of him who delivered the money, to have an Action of Debt, or Accompt; for *Detinue* lyeth not for money numbred, because that one peny may not be known from another. Trin. 28 Hen. 8. *Dyer*, 20, 21.

19. Note, It was agreed by the Court, That a Steward or a Bayliff may be retained without Deed, and shall have an Action of Debt, or their Sallary, if they do exercise their Offices: But they shall not have a Writ of Annuity without a Deed. See Hill. 8 Eliz. *Dyer* 248.

20. Debt was brought by an Administrator of A. B. who supposed by his Writ that A. B. dyed Intestate; and in his Declaration, he shewed first the Letters of Administration: by which it did appear, that the said A. B. made his Will, and made three Executors, and shewed that they all refused before the Ordinary: For which Cause, the Ordinary granted Administration to him. The Defendant pretended, in Bar, that the said A. B. made a Will, and his Executors, and traversed, that he dyed Intestate, as the Plaintiff by his Writ supposed: *unde nota*, that the Action brought by the Plaintiff was good. Hill. 7 Eliz. *Dyer*, 237.

21. An Abbot and his Covent, granted for them and their Successors, to a man and his Heirs, to find one of his Monks to say Matens and Vespers, every Holiday in such a Chappel; and further granted, that *toties quoties defectus fuerit*, that they would forfeit to him and his heirs 5 l. The Question was, Whether Debt did lye for the 5 l. or a Writ of Annuity onely. It was the Opinion of the Court, that the Heir might have Debt for every default for the 5 l. penalty, for that the penalty shall follow the nature of the Land. But Annuity in that Case would not lye, because it was a casuall thing, and perhaps there would never be a default. In that Case it was agreed, That Executors should not have Debt for a Re-

a Relief: But ſee more, *Cook's Inſtitutes*, 47 *Cook*. Part, 49. *Cook* 5. Part, 16. 32 H. 8. *Br. Reliefe* 11. That Executors ſhall have Debt for Arrearages of Reliefe, becauſe they have not any other Remedy, 28 H. 8. *Dyer*, 24.

22. Note, That acceptance of the Rent, or of the ſervices, by the hands of the Feoffee, ſhall not barre the Lord of the Reliefe due before: For Reliefe is not ſervice, but a fruit and approvement of ſervices: For if it accept of the ſervices, then an Action of Debt ſhould not lye for the ſame, ſo long as the Rent continueth; but it is as a bloſſome and fruit fallen from the Tree, and it behoveth not them to avow upon any perſon certain, *Ex quo*. Note, That Debt lyeth for Reliefe, *Cook* 3. Part 66. in *Pena's* Caſe.

23. *Walker* Leaſed certain Lands to *Harris* for years: The Leſſee aſſigned all his Intereſt to another; *Walker* brought an Action of Debt againſt the firſt Leſſee for Rent behind, after the aſſignment. It was adjudged by all the Juſtices in the Kings Bench, that the Action did lye againſt the firſt Leſſee, upon the privity of Contract, *Cook* 3. Part 22. *Walkers* Caſe. But if the firſt Leſſee had aſſigned over all his Eſtate, then the Action of Debt would not have lain. So that this Caſe put, Debt was brought againſt Executors, upon a Leaſe made to the Teſtator. The Defendant pretended, that before the Rent arrear, one of them had aſſigned all his Intereſt to J. S. of which the Plaintiff had notice, and accepted the Rent by the hands of the Aſſignees, due after the Aſſignment, and before the Rent now demanded was due; upon which the Plaintiff demurred, and it was adjudged againſt him, becauſe the privity of Contract was determined by the death of the Leſſees: and therefore after Aſſignment, Debt doth not lye againſt the Executors, for a Rent due after the Aſſignment. 41 Eliz. in C. B. *Marrew* and *Turpin's* Caſe, vouched in *Cook* 3. Part, 23. in *Walker's* Caſe. See the Quære in 8 Eliz. *Dyer*, 247. Reſolved.

24. A. made a Leaſe to C. of three Acres of Land rendring Rent: C. aſſigned all his Intereſt in arrear to another: A. ſuffered a Recovery to the uſe of P. in fee; who brought an Action of Debt againſt the firſt Leſſee. In that Caſe, it was adjudged, That the Action did lye; becauſe that the Leſſee had aſſigned his Eſtate but in part, and becauſe he remained poſſeſſed of the Reſidue, the Action of Debt was main ainable for the whole Rent againſt the Leſſee; becauſe in that Caſe there was not privity of Contract onely, but privity of Eſtate and Contract. 41 Eliz. *Brome* and *Hore's* Caſe, *Ibid*.

25. Leſſee for years of a Cloſe of Land, ſowed the ſame with Corn; and at the Requeſt of J. S. bargained and ſold to the ſaid J. S. the Corn growing in the ſaid Cloſe, who promiſed to pay him for the ſaid Corn at *Eaſter* following, 16 l. and for non-payment, he brought an Action upon the Caſe upon Aſſumpſit: and in this Caſe, it was Reſolved. 1. That although an Action of Debt did lye upon the Contract, yet the Bargainor might have an Action upon the Caſe, or an Action of Debt for the money at his Election. 2. Reſolved, That *eo* or Contract executory, did import in it an Aſſumpſit: and therefore, If a man ſelleth Goods to another, and agrees to deliver them at a day to come; and the other in conſideration thereof agrees to pay him ſo much money, each party may have an Action of Debt or Aſſumpſit, becauſe the mutuall agreement executory of both, carrieth in it ſelf as well an Action upon the Caſe, as an Action of debt. *Cook* 5. Part, 94. *Slade's* Caſe.

26. A man comes into a Tavern, and calls for a pint of Wine, and drinks it, and afterwards upon requeſt refuſeth to pay for it, It was holden in that caſe, The Taverner might have an Action of Debt for it. *Cook*. 8. Part, the 6. *Carpenter's* Caſe. And in that caſe it is ſaid, That a Taylor ſhall not have a general Action of debt for the making of a garment, if the price be not certain agreed upon; but he ſhall have a ſpecial Action of debt, *quantum meruit*, for that the Law impiyes ſo much by the putting of the garment to him to be made: But if a Taylor makes a Bill, and he himſelf valueth the neceſſaries, and the making, he ſhall not have debt for it; but in ſuch caſe he may detain the garment untill he be ſatisfied for them.

27. Debt was brought againſt an Adminiſtrator of N. upon an Obligation: The Defendant pleaded, That the Cuſtome of *London* is, That if a Contract be made by a Citizen of *London*, to pay money to another Citizen, and he who ought to pay it, dyeth Inteſtate; That the Adminiſtrator ſhall be bound to pay it as well as if it were by Obligation: and ſhewed, that the Inteſtate was a Citizen of *London*, and was endebted upon a Contract to one ſuch Citizen, who after the death of the Inteſtate, hath recovered againſt him; upon plea, the Plaintiff did demur in Law. In this caſe it was adjudged, 1. That the ſaid Cuſtome was good, for although that none was chargeable at the Common-Law by the name of Adminiſtrator, before the Statute of 31 E. 3. and the Cuſtome cannot begin after 31 E. 3. which is within time of memory; yet becauſe at the Common-Law they were chargeable as Executors by their Adminiſtration, for ſuch cauſe the Cuſtome alledged in ſuch general manner was good. And, 2. It was Reſolved, That although the Plaintiff was a ſtranger, and No Citizen, yet the Cuſtome was good

to bind him. Trin. 37 Eliz. in C. B. *Cook* 5. Part, *Snellings* Caſe.

28. Note: If a man ſell a thing to be paid by 20 l. a year, in 5. years; In that caſe he ſhall not have an Action of Debt, till all the years be incurred. But if a man maketh a Leaſe for 5. years, rendring rent 20 l. *per annum*, there the years are ſeveral, and he ſhall have an Action of debt for the Rent every year. *Cook* 4. Part, 82. in *Fords* Caſe.

29. If a man dyeth poſſeſſed of goods Inteſtate, and his goods are ſequeſtred into the hands of the Ordinary, debt lyeth by a Creditor againſt the Ordinary: and after notice to him given, the Ordinary may not adminiſter to others, if he hath not ſufficient to ſatisfie that debt. Mich. 7 Eliz. *Dyer* 232.

30. Debt was brought againſt 3. heirs in Gavelkind, upon an Obligation made by their Anceſtor; The one being within age, they were Outlawed; The two of full age procured their pardon: And upon a *Scire facias* the Plaintiff declared againſt them *ſimul cum, &c.* In that caſe it was holden, That the Paroll ſhould not demur for the Nonage of the third; becauſe the Original as againſt him was determined: and it was not void, becauſe he was an Enfant, but voidable onely by Errour. Trin. 7 Eliz. *Dyer* 239. *Augers* Caſe.

31. Debt brought againſt an Executor, The Defendant pleaded, Fully Adminiſtred. The Plaintiff ſaid, He had Aſſets at E: The Jury found, that the Teſtator dyed *infra regnum Hibernia*, and that the Defendant after the Teſtators death, within *Ireland*, took divers goods, and adminiſtred to the value of the Debt: And that *Nulla alia ſeu pluria bona quæ fuêre teſtatoris poſt mortem teſtatoris infra regnum Angliæ unquam adminiſtravit.* The Queſtion was, Whether the Jurors might finde tranſitory things in a Forreign Country. It was ſaid they could not; and the Caſe of 10 Eliz. *Dyer*, 271. was vouched, for Debt brought in *London* againſt one as Son and Heir, upon an Obligation of his Father, who pleaded, Nothing by diſcent at the time of the Writ brought, nor ever after; and the Plaintiff did aver Aſſets by Diſcent in *London*: and the Plaintiff gave in Evidence, Aſſets in *Cornwall*; and there it was conceived, that it was no good Evidence, nor could the Jury find this Local Matter in a Forreign County. But it was Reſolved, That the Jury have found the ſubſtance of the Iſſue Aſſets; and the finding that they are beyond Sea, is but ſurpluſage: and if Executors have goods of the Teſtators in any part of the World, they ſhall be charged in reſpect of them. M. 3. Jac. in C. B. *Cook* 6. Part, 4. *Dowdall's* Caſe.

32. A. by Deed (in which his Son was joyned, but did not ſeal it) did grant an Annuity to C. for term of his life out of certain Lands; *Et, ſi contingat predict. annuitatem à retrò fore*, That then it ſhould be lawful for the ſaid C. in the Tenements aforeſaid, *tam pro predict. annuitate, quam pro 6 s. 8 d. Nomine pœnæ toties quoties, &c. diſtringere.* Debt was brought for the Arrerages, and penalty againſt the Executors of A. who pleaded, No ſuch Land out of which, &c. The Plaintiff demurred, The doubt was, whether debt did lye for the penalty, becauſe the perſon of the Grantor was never charged with it, and the word (*ſi contingat*) are not words of Grant à *Quære*. For if a Rent-charge be granted for Life, *Proviſo non onerabit perſonam*, if the Grantee dyes, Debt lyes againſt the Executors for the Arrearages: and although the Son was named in the Deed, yet becauſe he never ſealed it, It was holden, that the Grant did not bind him. Hill. 6 Eliz. *Dyer*. 227. Sir *George Capel's* Caſe.

33. Annuity was granted for the Exerciſe of the Office of a Stewardſhip; and after Recovery in a Writ of Annuity, the Rent was behind; The Grantee brought a *Scire Facias* to have Execution. The Defendant ſaid, that, dependant the Writ, he had refuſed, being requeſted to the Court; and it was adjudged a good Plea: For, upon the *Scire Facias*, he had Judgment of the Arrearages before, and dependant the Writ; and after, if he refuſeth, the Annuity ceaſeth. Paſch. 23 Eliz. *Dyer*, 377.

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3. *Where the Action of Debt ſhall be brought in the* Debet et Detinet, *and where in the* Debet *or* Detinet tantum; *Where not: And againſt whom ſo to be brought.*

1. LEſſee for years dyed Inteſtate; J. S. took Letters of Adminiſtration; and for Rent behind in his time, after the death of the Inteſtate, the Leſſor brought an Action of Debt againſt him in the *Debet et Detinet*, and adjuged, That it did well lye. Mich. 42 Eliz. in B. R. *Cook* 5. Part, 31. *Hargraves* Caſe. And note, that in that caſe it is ſaid, That in all Actions brought by Executors as Executors, the Writ ſhall be always in the *Debet tantum*, although that the date doth accrue in his own time; and alſo, becauſe the thing recovered ſhall be Aſſets. Trin. 43 Eliz. in B. R. *Sparks* Caſe, acc. Paſch. Jac. in B. R. the Lord *Rich* and *Franks* Caſe, adjudged according to *Hargraves* Caſe. But note: It was ſaid by *Jones*, Juſtice, 15 Jac. in B. R. That *Hargraves* Caſe was reverſed. Hill 43 Eliz. in the Exchequer Chamber, and there adjudged, That the Writ ought to be brought in the *Detinet tantum*. See *Brownlow* 1. Part, 56. acc. *Brownlow* 2. Part, 202. acc.

1. Debt for 300 l. was brought in the *Debet et Detinet*; For that the Plaintiff by Indenture by the name of P. H. Executor of J. H. demiſed to the Defendant certain Lands which he had by Extent, for ſuch a debt, recovered by J. H. *Habendum* for ſo many years, rendring Rent; and for 3. years Rent arrear, he brought the Action. The Defendant demurred, becauſe the Action is brought by him in the *Debet et detinet*, upon a Leaſe of Lands, which he had as Executor. But the Demurrer was over-ruled: For it is not brought by him as Executor, though he be named Executor in the Indenture: For this Action is of his own Contract; and although he made the Leaſe as Executor, yet making it by Indenture, it paſſeth well enough, and is upon his own Contract, and he ſhall have Debt for it, as if he were ſeiſed in his own Right. Paſc. 12 Jac. in C. B. Rot. 400. *Holman* and *Chutes* Caſe, *Cro.* 2. Part, 85.

3. Debt was brought againſt Sir *George Reynell*, for an eſcape of a priſoner, who was in Execution in the time of the Teſtator; It was brought by the Executor, and it was brought in the *Debet et detinet*: It was objected, That the Writ was well brought, being upon an Action grounded upon a Tort done to himſelf: and to that purpoſe, *Bedel* and *Sherymen*'s Caſe was vouched; Where an Executor being Leſſee for years of a Rector in the Right of the Teſtator, brought Debt upon the Statute of 2 E. 1. for not ſetting out of his Tythes, and adjudged good; becauſe it was upon a perſonal wrong in his own time; and it was for this ſaid, that it was not good: yet it was helped by the Statute of 18 Eliz. for that it is not matter of ſubſtance, but of form onely, he being Plaintiff. But it was Reſolved by the whole Court, That it ought to have been in the *Detinet* onely, for that; it is grounded upon the former Judgment; and although the Eſcape was in the Executors time, yet being for a Debt due to the Teſtator, it ought to have been in the *Detinet*: And it is not like *Bedel*'s Caſe; for that was meerly a perſonal wrong, and grounded upon the Statute, which gives it to the party grieved onely, and which was never given for any cauſe in duty to the Teſtator, but a Tort to the Executor: Wherefore, It was holden, that the Action ought to have been in the *Detinet*; and the Judgment therefore was reverſed. Mic. 17 Jan. 16. Exchequer Chamber, Sir *George Reynel* and *Lancaſter*'s Caſe. *Cro.* 2. Part, 545, 546. See *Hob.* 264. acc. and 272.

4. The Plaintiff brought Debt againſt the Defendant, the Executor of J. D. for Rent due to him by the Teſtator in his life-time, and had a Verdict: The Defendant moved in Arreſt of Judgment, that the Plaintiff had declared in the *Debet et Detinet*, which ought not to be, but in the *Detinet* onely; but it is the proper Debt of the Teſtator, and the Executor may be ſaid *debere*, becauſe he ought to pay it, but doth not. *Rolls*, Chief Juſtice, ſaid; It had been adjudged good both wayes; and ſaid, That Executors cannot wave a Term come to them; and yet they cannot be charged in the *debet et detinet*; but *primâ facie*, in the Caſe at Bar: The Court inclined to examine, that the Action might be brought in the *Debet et Detinet*. It was adjudged. Mic. 23 Car. in B. R. *Vandicoote*'s Caſe. *Styles* 52.

5. In an Action of Debt, the Plaintiff declared for Rent, grown due from the death of the Teſtator, by vertue of a Sale made of certain Lands by the Plaintiff to the Teſtator, which yet continues; and declared againſt the Executor in the *Debet et Detinet*. The Defendant pretended, That he had fully adminiſtred: upon which the Plaintiff demurred; for that he declared in the *Debet & Detinet*. It was holden, that the Declaration was good in the *Debet et Detinet*; for it ſhall be intended, that the Land let to the Teſtator, is worth as much by the year, as the Rent that is to be paid for it, till the contrary be ſhewed; and then it is reaſon that the Executor be paid; and the Declaration muſt be in the *Detinet* and *Debet*; otherwiſe it will be miſchievous to the Plaintiff. And it was ſaid in that Caſe, That Specialty ſhall be ſatisfied, before a Rent reſerved, upon a Leaſe by Deed: and that a Leaſe for Years, ſhall be Aſſets in the hands of an Executor. Mic. 23 Car. B. R. *Kele* and *Jocelyn*'s Caſe. *Styles* 61.

6. A. brought Debt againſt B. a Sheriff, for an Eſcape, and had a Verdict. The Defendant, in Arreſt of Judgment, took two Executions; Firſt, That the Action was brought by the Plaintiff as Adminiſtrator for the Eſcape, which was made in the life of the Inteſtate onely. Secondly, That no *Capias* iſſued to the Sheriff. It was Reſolved by the Court, That the Sheriff cannot take advantage of an Erroneous Proceſs: But for the other, the Court held the Exception to be good, becauſe the Action ought to be brought in the *Detinet* onely, the Plaintiff being but an Adminiſtrator, who recovers not to his own uſe. Mic. 1650. *Martin* and *Hendlye*'s Caſe. *Styles* 232. See before, Sir *George Reynels* Caſe, acc.

4. *Where an Action of Debt lyes upon an Escape against the Sheriff or Bayliff; and what shall be said to be an Escape upon an Execution. What not; and where not.*

1. DEbt was brought against the Sheriff; and the Plaintiff declared, That he recover against one C. 300 l. and the body of C. was taken in Execution, 33 Eliz. by the Defendant, Sheriff of the County of D; and that afterwards, The Defendant suffered him to escape, *in Warda de Cheape, London.* The Defendant pleaded, That C. was taken in Execution, 20 *Aprilis*, 33 Eliz. and so continued till the 8th of *December* following: at which day, at D. he broke the Prison, *et à custodia ipsius R. contra voluntatem ipsius R. evasit*; and that he re-took him again *in recenti in secutione.* The Plaintiff by way of Replication, by Protestation, that the Defendant did not make Fresh-suit, said, That before the said C. was re-taken, he was a whole day and night at *London*, in the Parish and Ward aforesaid out of the View of the said R: upon which the Defendant did demur in Law. In this case it was Resolved, That if a Prisoner who doth escape be out of View; yet if Fresh-suit be made, and he be taken in *recenti insecutione*, he shall be in Execution again, although he be taken in another County, and he shall not take advantage of his own wrong: and no Action for such Escape will lye against the Sheriff, but the Sheriff may have an Action upon the Case against the party for this tortious Escape: but otherwise it is, when one escapes with the assent of the Gaoler. Pasch. 36 Eliz. in B.R. *Cook* 3. Part, 52. *Rigeways* Case.

2. A man was taken in Execution by Bayliffs of a Franchise by force of a Warrant upon a *Capias ad satisfaciendum.* The Bayliffs before the return of the Writ into the Kings-Bench, at the request of the Prisoner, brought him in the Interim before the return of the Writ, in another County; and after the Return of the Writ, delivered him again to the Prison of the Kings-Bench. In this case, 1. It was Resolved, That the same was not any escape: and this difference was taken, If the Sheriff or Bayliff of a Franchise, suffer one who is in Execution and in their Custody, to go out of the Goal for a time, and then to return; although that he return at the time, yet the same is an Escape, if he suffer him to go by bayl, or with a baston, for the Sheriff ought to keep him in *salva et arcta Custodia*: But where the Sheriff hath one in Execution for Debt, and a *Habeas Corpus* issueth out of the Kings-Bench, to have the body of him who is in Execution, in the same Court at a day certain; The Sheriff before the Return, brought his body to an Inne in *Smithfield*, and the prisoner of his own head without any Keeper went into *Southwark* in another County; and it was adjudged, That the same was no escape; and an Action would not lye against the Sheriff. 2. It was Resolved, That if one be in Execution, and of his own wrong escape, and be retaken again, he shall not have an *Audita Querela* to discharge himself of the Imprisonment, because he shall not take advantage of his own wrong, and in such case it is lawful for the Goaler to retake him again. 35 Eliz. in B. R. *Cook* 3. Part, 43. *Byers* Case.

3. In Debt brought against the Sheriffs of *London* for an Escape, the Case was; A. is in Execution several under the Sheriffs of L, at the Suits of B. and C: The old Sheriffs delivered the body of A. by Indenture, in which the Execution of B. is onely mentioned, and the other omitted: A. in the time of the new Sheriffs, escapes: In that case it was adjudged, That the old Sheriffs should be charged with that escape: Wherein it was Resolved, 1. That the not delivery of A. to the new Sheriffs in Execution at the Suits of both, was an Escape as to one of them, though the prisoner were within the Walls of the prison. 2. That the old Sheriffs ought to give Notice to the new Sheriffs of all Executions which they have against any party, although that the Executions are upon Record; for the new Sheriffs are not compellable to take Notice of them at their perils. But it was Resolved, That, untill the Prisoners are delivered to the new Sheriffs, they remain in the Custody of the old Sheriffs, notwithstanding the Letters Patents to the new Sheriffs, the Writ of Discharge, and the Writ of Delivery. 3. It was Resolved, If the Sheriff hath Execution against divers persons, and dyeth, the new Sheriff at his perill ought to take Notice of all Executions against any person which he shall find in the Goal, and that of necessity. 4. If the Sheriff dyeth, and before another is made, one who is in Execution breaks the Goal, and escapes; the same is no escape, because that then the prisoners are in the Custody of the Law. 40 Eliz. in B. R. *Cook* 3. Part, 71, 72. *Wisby* and the Sheriff of *London*'s Case.

4. Debt against the Sheriff for an Escape of a prisoner in Execution. Upon Issue *Nihil debet*, upon Evidence, the Case: One A, Goaler of the Sheriff, having the prisoner in Execution in the Castle of G, suffered him to walk abroad in the said Town,

Town, yet for the moſt part with a Keeper. It was adjudged in that caſe, That it was an Eſcape: Although the Sheriff may remove his Goal from one place to another within his Bayliwick, yet he muſt not ſuffer them to go at large out of the priſon, though himſelf be attending upon the Priſoners, without a *Habeas Corpus* from ſome Court of Juſtice: And therefore the Lord Chief Juſtice *Hobart*, before whom the Cauſe was, directed the Jury to find againſt the Defendant, that it was an Eſcape. And he adviſed All Keepers of Priſons to beware, That when they receive *Habeas Corpus* out of the Court of Chancery, or other Courts of Juſtice, that they do not by colour of ſuch Writs ſuffer the party to go at large all the mean time; for the Writ warrants no more but that he be brought out of priſon onely for that purpoſe, and onely for ſo much time as in Judgment of Law ſhall be convenient and neceſſary for the Execution of the Writ and no more, which in *privilegiis otioſis* muſt be taken ſtrict. Mich. 15 Jac. *Balden* and *Templers* Caſe. *Hob.* 202.

5. In Debt againſt the Sheriff of *Eſſex* upon an Eſcape: It appeared upon the Evidence, That the Priſoner having been in Execution, was willingly let go by the Goaler out of Priſon, till the time of another Sheriff, and then Eſcaped: whereupon the Action was brought. The Judge before whom the cauſe was tryed, directed, That this Sheriff was not anſwerable to the Action; for when the Priſoner was let to go abroad voluntarily by the Goaler, the Execution was utterly diſcharged, ſo as he could not lawfully be taken again, nor judged in Execution by Law, though the party would yield himſelf unto it, or the Creditor ſo allow it; and therefore the next Sheriff cannot be chargeable with him, nor anſwerable for him. Nor can two Sheriffs be anſwerable *ſimul et ſemel*, for two eſcapes out of one and the ſame Execution, at the ſame time. Mich. 15 Jac. The Sheriff of *Eſſex* Caſe. *Hob.* 202. Note: at the ſame time another tryal was before the ſaid Lord Chief Juſtice *Hobart*; and the Caſe fell out to be thus, That upon a *Capias ad ſatisfaciendum*, one was taken in Execution by the Under-Sheriff, who took money for the Execution, and let him go; and this he concealed from the Plaintiff, and then the Sheriff dyed, and a new Sheriff being made, the ſame man that was Under-Sheriff before, became Under-Sheriff to him alſo, and procured the Plaintiff to take out a new Execution by *Capias ad ſatisfaciendum* againſt the party, upon which he was arreſted again, and eſcaped: And the ſaid Lord Chief Juſtice directed the Jury, That the new Sheriff was not anſwerable to this Action, becauſe the ſecond taking in Execution was never lawful. Mich. 15 Jac. *Hob.* 202.

6. Debt brought againſt P. late Sheriff of *Denbigh*; and declared, That he recovered againſt one R. O. in the Common-Pleas 40 l. debt; and that R. O. was Outlawed, and the Plaintiff delivered a *Capias utlagatum* againſt him to the Defendant then Sheriff, and that he having been in his preſence, would not arreſt him, being required, but returned *Non eſt inventus*. Upon Iſſue Not-Guilty, It was found againſt the Defendant. It was moved, That the Action ſhould have been layed in *Middleſex*, becauſe the fault, which was not Arreſting him, was in *Denbigh ſhire*. But Judgment was given for the Plaintiff, for the falſe Return which was in the Court in *Middleſex*, was alſo a wrong: ſo the Plaintiff hath his choice. Mich. 15 Jac. in C. B. *Packhurſt* and *Powell*'s Caſe. *Hob.* 209.

7. The Plaintiff brought an Action of Debt upon an Eſcape againſt the Sheriff upon a *Capias utlagatum* after Judgment: The Defendant pleaded, That there was no ſuch Record of the Recovery of the Debt and Damages. To which the Plaintiff demurred, pretending he had not directly anſwered to the Declaration. But Judgment was given for the Defendant. And it was ſaid, That where a *Capias* is not the Proceſs, a *Capias ad ſatisfaciendum* is not the Execution; and at the Common-Law no *Capias ad ſatisfaciendum* would lye, but onely where the Action may *vi et armis*; but onely a *Levari facias*. Mich. 15 Jac. in C. B. rott. 2118. *Maddock* and *Young*'s Caſe. *Brownlow*, 1. Part, 51.

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5. *What ſhall be ſaid ſufficient matter to abate the Action of Debt brought upon a Bond, or a Recognisance, and againſt whom: What not.*

1. DEbt was brought againſt the Executors of R; they were at Iſſue upon Fully Adminiſtred: The Plaintiff gave in Evidence, That they had Goods in their hands. The Defendants ſaid, That they redeemed part of them with their own moneys, which were pledged by the Teſtator to the full value; and for the reſidue, that they had paid as much for them as they were worth. And upon a Demurrer, It was adjudged good Evidence to maintain the Iſſue, and abate the Action, becauſe a man ſhall be recompenced that which he hath truly and lawfully paid; and that they might retain them for that which they had paid. Mich. 6 H. 8. *Dyer* 2. & 3.

2. A man recovered 200 l. debt againſt T; and before Execution the Defendant dyed inteſtate

ſtate, poſſeſſed of goods to the value of 140 l: Adminiſtration was committed to J.S, againſt whom the Plaintiff brought a *Scire facias*, and he pleaded Fully adminiſtred, and that he had nothing in his hands the day of the *Scire facias*, nor after: the Plaintiff averred Aſſetts: and in Evidence, the Defendant ſaid, (who firſt gave Evidence) which is not uſual) that the Inteſtate was endebted by Obligation to ſuch a one 100 l. upon condition to pay 40 l. by an Obligation bearing date after the ſaid Judgment; and that he had paid the 40 l. before the Writ brought, and that he was likewiſe endebted to another in an Obligation of two marks which he had alſo paid before the Writ of *Scire facias* brought, with an Averment, That he had ſo adminiſtred. Upon *Oyer* of the Obligations, it appeared, that the Condition of the firſt was not to pay 40 l. in money, but to deliver Tynne to the value of 40 l; but the Condition of the other was, to deliver Tynne, or 100 l, in the disjunctive: And upon this Evidence the Plaintiff did demur. It was holden in this caſe, That the Adminiſtrator was tyed to pay the debt upon Record, before Specialties. And if they were ſued upon the Obligations, they might plead a Recovery againſt them; which ſhall not be intended, unleſſe it be pleaded: but if they do plead it, it ſhall be good matter to abate the Writ or Action brought againſt them. And becauſe they did not plead the ſame before the Execution ſued out againſt them, It was holden, That they ſhould pay the firſt Judgment, and that of their proper goods. 7 E. 6. *Dyer* 80, 81.

3. Debt was brought upon a Bill againſt one, The Defendant pleaded *Non eſt factum*: The Jury found, That it was a Joynt Bill, made by him and another. In that caſe, It was adjudged for the Plaintiff: For when two are joyntly bound in an Obligation, None of them may ſay, that it is not his Deed; but he may avoid the ſame by ſpeciall pleading, Judgment if Action: and ſo it is, if a Deed be void by Act of Parliament; he may not plead, *Non eſt factum*, but he may ſhew the ſpeciall matter for his advantage, and demand Judgment if Action. Trin. 2 Jac. in C.B. *Cook* 5. Part, *Whelpdales* Caſe.

4. Debt was brought upon an Obligation of 40 l; the Defendant pleaded a Releaſe; the Plaintiff demanded *Oyer* of the Releaſe, which was, That the Plaintiff acknowledged himſelf to be diſcharged of all Bonds, Debts and Demands by the Defendant, untill the day of the date of the Releaſe; and that the Plaintiff is to deliver all Bonds as he hath yet undelivered to the Defendant, Except one Obligation of 40 l. not yet forfeited, in which he and two others ſtand bound to the Plaintiff; and the Plaintiff did aver, The ſaid Obligation was excepted; and that the ſaid Bond brought into Court, and the ſaid Bond ſo excepted are one and the ſame Obligation; upon which the Plaintiff did demur in Law. In this caſe it was Reſolved, That when the Plaintiff confeſſeth himſelf to be ſatisfied and diſcharged of all Bonds, the ſame was a good Releaſe by the word, *Diſcharge* and *Satisfied*. 2. Reſolved, That the Exception ſhould extend to all premiſſes, and not only to the clauſe of delivery, becauſe all the words before make but one intire Sentence, and one depending upon the other. But foraſmuch as it appeareth by the confeſſion of the Plaintiff in his Replication, That he cannot have an Action againſt the Defendant onely, but he ought to have the ſame againſt both the Obligors, for the Bond excepted was a joynt Bond; for that cauſe, the Court Reſolved, That the Plaintiff had abated his own Writ. Mich. 8 Jac. in C.B. *Cook* 1. Part, 53. *Hickmotts* Caſe.

5. Debt was brought upon an Obligation, which was upon a Condition to perform Covenants in an Indenture *hic in Curia prolat.* and in truth the Deed was not Indented, but written, *Hoc Indentura*, &c. It was adjudged, That the ſame was not an Indenture, although it were of two parts, for the words of the Deed do not make the Indenture, but there ought to be a manuall Act of Indenting of the Parchment. H. 38 Eliz. in B.R. *Cook* 5. Part, 20. *Styles* Caſe.

6. Debt brought upon an Obligation againſt A. and B, which was to perform the Arbitrament of two between the Plaintiff of the one part, and the Defendant of the other part, *Ita quod Arbitrium prædict. fiat et deliberetur utriq; partium.* before ſuch a day, The Defendants pleaded, That before the day the Arbitrament was made, but was delivered to the Plaintiff and A, one of the Defendants, and not to B; upon which the Plaintiff did demur in Law. It was adjudged, That the Action did not lyer: For it was holden, that this word [*uterq;*] in this caſe ſhould be taken *collectivè*, for reaſon wills, that every one who is ſubject to the penalty and danger, ſhould have the Arbitrament ſeverally delivered to him; and therefore it ought to be delivered to them both. 2. Reſolved, That if two be of one part, and two of the other party, and the words are, *Quod deliberetur utriq; partium*, the delivery to one of one part, and to one of the other party is not ſufficient. Trinit. 44 Eliz. in C. B. *Cook.* 6. Part, 40. *Stangers* Caſe.

6. Who

6. What ſhall be ſaid to be a good Barr in an Action of Debt brought; What not.

1. A Brought an Action of Debt againſt B, and declared, That whereas the Plaintiff was poſſeſſed of a Cloſe ſowed with Corn. The Defendant in Conſideration that the Plaintiff at the inſtance of the Defendant, had bargained and ſold to him the ſaid Corn growing upon the ſaid Cloſe, did aſſume and promiſe to the Plaintiff, to pay him 16 l. at the Feaſt of, &c. next. Upon Non-Aſſumpſit, the Jury found a ſpeciall Verdict, that the Defendant bought the Corn of the Plaintiff in Ears or blades growing upon the Land; and that between the Plaintiff and the Defendant there was no other promiſe but onely the ſaid bargain. In this caſe, It was Reſolved, That although that debt doth lye upon the Contract, yet the ſaid Bargainee might have debt, or Action upon the Caſe at his Election: and that every Contract imports in it an Aſſumpſit. 2. It was Reſolved, That in this Action upon the Caſe upon Aſſumpſit the Plaintiff ſhall not recover onely damages for the ſpecial loſſe which he hath, but alſo for this whole debt; ſo that Recovery or barr in that Action, ſhall be a good barr in an Action of debt brought upon the ſame Contract; *et è converſa* in an Action of debt, ſhall be a good barr in an Action upon the Caſe upon Aſſumpſit. Trin. 44 Eliz. *Cook.* 4. Part, 93. *Sladers* Caſe.

2. A Writ of Covenant was brought againſt an Aſſignee, for not repairing of a houſe: The Defendant pleaded in barr an Accord betwixt them, and Execution of it in ſatisfaction of all Repairations. In that caſe, It was Reſolved, in caſe when a duty accrues by a Deed on certainty, as by Covenant, Bill, Obligation to pay money, there this certain duty takes its operation, and ſolely by the writing, and therefore it ought to be avoided by a matter of as high a nature, although the duty be meerly in the perſonalty; but when no certain duty doth accrue by the Deed, but a wrong or default ſubſequent together with the Deed, giveth an Action to recover damages, there accord with ſatisfaction is a good plea in barr. And becauſe in the principal caſe, the Covenant doth not give to the Plaintiff at the time of the making any cauſe of Action, but the wrong or default after, together with the Deed, gave the Cauſe of Action; In this caſe it was holden, That the plea in barr was good. Mich. 3 Jac. *Cook* 6. Part, 44. *Blakes* Caſe.

3. In an Action of Debt brought upon an Obligation, The Defendant pleaded, That he delivered the Obligation to the Teſtator, as a Schedule upon Condition, That if the Plaintiff made Indentures between the Defendant on the one part, and the Teſtator on the other part, *de certis conditionibus, Convent. et agreament. inter eaſdem partes tunc contord. &c. pro Annullatione prædict. Script. Obligat. &c. ante Feſtum Sancti Michaelis deliberand. quod tunc prædict. Scriptum obligat. in omni ſuo robore ſtaret; ſin autem, vacua fuerit.* And the Defendant ſaid, That the aforeſaid Teſtator *non fecit aliquam Indenturam, &c.* And ſo the Defendant ſaith, *Quod Scriptum prædict. in forma prædict. deliberat. dictis Indenturis inter eaſdem partes minimè Confectis non eſt factum ſuum*; And demanded Judgment if Action. Upon which the Plaintiff did demur. It was Reſolved, That the ſaid Delivery was good in Law, although the Condition were not performed, and the Plaintiff had Judgment to recover. 12 H. 8. rott. 751. in C. B. *Quilts* Caſe. See 13 H. 8. rott. 405. in C. B. *Bodenham* and *Mormons* Caſe. vouch. in *Cook.* 9. Part, in *Throggoods* Caſe, 137.

4. Debt upon an Obligation of 10 l; The Defendant pleaded, That at the inſtance of the Plaintiff, he paid to the Plaintiff 5 l, which he accepted in full ſatisfaction. In this caſe it was Reſolved, That payment of a leſſe ſum at the day in ſatisfaction of a greater ſum, could not be any ſatisfaction; but the giving of a Horſe, or a Robe, or other ſuch thing, might be in ſatisfaction of it. 2. It was Reſolved, That payment and acceptance of a leſſer ſum before the day, or at another place, is a good ſatisfaction for a greater ſum; for peradventure it ſhall be more beneficiall for him. Trin. 44 Eliz. in C. B. *Cook* 5. Part, 117. *Pinnells* Caſe.

5. *Matthew Herbert* acknowledged a Recognizance of 3000 l. to the King, and dyed; after his death a *Scire facias* iſſued againſt the Executors *Teſtamenti, et ultimæ Voluntatis prædict. Matthæi, et hæredem Terrarum et Tenementorum quæ ſua fuerint*; at the day the Sheriff returned, That he had not Executors, but *Scire feci Willielmo Herbert militi filio et hæred. dict. Matthæi quod ſit: William* made default, and Judgment upon that default was given for the King, *quod recuperet verſus, dict. Will. Herbert. &c.* Whereupon Errour was brought: And, amongſt other Errours, It was aſſigned, That the Judgment was Erronious: For the Judgment is given generally againſt *William Herbert*, &c. Whereas the Judgment ought to have been ſpeciall; for by this general Judgment, his own Land ſhall be lyable; where, by Law, the Land which came to him by his Father, ſhall be lyable; and he is charged as Terr-Tenant: For the

the Conuſee cannot have an Action of Debt upon the Recognizance againſt the heir: For the Recognizance is, *Quod tunc vult. et concedit quod dicta pecunia ſumma de bonis, et catallis, terris, et Tenementis, &c. levetur*: ſo as the Charge is impoſed upon his Goods and Lands, ſo that Debt doth not lye upon it againſt the heir, no more, then in a Recovery in Debt; for there *Scire facias* lyeth againſt the heir, but no Action of Debt: Then, though the heir make default, yet the Judgment ought to have been ſpecial. Note, This Point was not Reſolved in the Caſe. *Cook* 3. Part, 15. Sir *William Herberts* Caſe.

6. Note: In the Star-Chamber it was overruled by the Lords, That if in an Action at the Common-Law, a man wage his Law, although that he maketh a falſe Oath; yet he ſhall not therefore be impeached by Bill in the Star-Chamber: and the reaſon was, becauſe it is as ſtrong as a Tryal: and the Lord Chancellor demanded of the Judges, If he were diſcharged of the debt, by waging of his Law? And they Anſwered, That he was. But *Manwood*, Chief Baron, ſaid, It was the Plaintiff's folly, becauſe he might have changed his Action into an Action upon the Caſe, where the Defendant cannot wage his Law. Paſch. 29 Eliz. in the Star-Chamber. *Goldeſbr.* 51.

7. In Debt, againſt an Adminiſtrator, It was found by Verdict, That certain Obligations made by the Teſtator, to the value of 100 l, were forfeited; the Adminiſtrator took in the Bonds, and for part of the debt gave his own Bond; and for other part of it his promiſe. It was ſaid, That this was no payment, but a Compoſition. But it was the Opinion of the Court, That for ſo much as he had given his promiſe, it was not good, becauſe by this promiſe the firſt debt being due by Bond, is not diſcharged; but for ſo much as he had given his Bond, it was good enough, becauſe the firſt Debt is thereby diſcharged, although the Obligation be made to a ſtranger, by appointment of the Debtee, and alſo, although before the Debt be due; for by this, the firſt debt is gone. But it was holden, that the mony not diſcharged, ſhould be Aſſets in the Adminiſtrators hands. Hill. 30 Eliz. in C. B. *Goldesbr.* 79, 80.

8. Debt was brought, the Defendant pleaded *Nihil debet, per legem*: the truth of the Caſe was, The mony was due to the Plaintiff, but the Plaintiff was alſo endebted to the Defendant in the like ſum, And before the Action brought, it was agreed betwixt them, that each of them ſhould be acquitted againſt the other; and thereupon the Defendant would have waged his Law. *Anderſon*, and *Periam* Juſtices doubted, whether he might ſo do or not; for that Accord without ſatisfaction, is no plea: But *Rodes* Juſtice ſaid, It was good by conſent of the parties; and ſuch alſo was the Opinion of ſome Serjeants at the bar, Paſc. 30 Eliz. *Goldesbr.* 31, acc.

9. If a man lets *bona et catalla*, or the profits of his Courts rendring rent, in an Action of Debt brought for the Rent, it is no plea, that he had no profits that year; but if the Leſſor releaſe, or diſcharge all, that is a good bar in an Action brought for the Rent. See *Hob.* 44. in the Caſe of *Cooper* and *Andrews*, acc.

10. In Debt brought, for Rent reſerved upon a Leaſe for years; As to part, the Defendant confeſſed the Action; And as to the reſt, he pleaded a ſpeciall plea, *viz.* That *Prince Rupert*, an Alien born, and an enemy of the King, invaded the Land with an Army; and with divers armed men did enter upon him, and did drive away his Cattell, and expelled him from the Lands let, and kept him out, that he could not enjoy the Lands for ſuch a time, and demanded Judgment of the Action for the Rent during that time; upon which plea, the Plaintiff did demur in Law: The Queſtion was, Whether a Leſſee for years, outed by an Army of Alliens, can plead it in bar, in Debt for Rent due upon a Leaſe: It was ſaid, That this Action is grounded upon the contract, and this matter pleaded, is collaterall, and nothing to the purpoſe: but if Waſte had been done by Prince *Rupert*, and his Souldiers, perhaps it might have been pleaded in bar in an Action of Waſte brought by the Plaintiff. It was alſo ſaid, *It* ought to have bin averred, that the Army with Prince *Rupert* were Alliens, which is not done. The Defendants Councill in defence of the plea, ſaid, It was not neceſſary to aver that the Army of Prince *Rupert* were Alliens, and put the difference between a Rebellion and an Invaſion, and ſaid, that the Defendant in this Caſe ought not to be charged with the Rent, becauſe he could not enjoy that which was let him, and it was no default of his own, and both the Civill Law, Common-law, and Morall Authors do confirm this, and 11. Aſſ. 13. was put to that purpoſe. But the Opinion of the Court was, That the plea was not good, for he hath not pleaded, That the Army were Alliens, and unknown, as he ought to have done; And the pleading, that it was *Hoſtilis exercitus*, makes not the Plea more certain then it was before; And if Tenant for years Covenant to pay rent, though the Land let be ſurrounded with water, yet he is chargeable with the Rent, much more in this Caſe. It was adjudged for the Plaintiff. Mich. 23 Car. in B. R. *Pavadise* and *Jones* Caſe. *Styles* 47, 48.

11. Debt upon an Obligation of 400 l. the Plaintiff declared, That the Condition was, That the Defendant ſhould make ſuch a Voyage with

with a Ship, and pay certain monies at his return, and for not performing the Conditions, the Action was brought, The Defendant pleaded in bar, That the Ship was taken in the Voyage *per homines bellicosos*, and demanded Judgment of the Action. The Plaintiff demurred to the plea, for that he did not give anſwer to all the Declaration: The Defendants ſaid, The plea anſwered all the Condition of the Bond, which was to make the Voyage with the Ship, and then at his Return, to perform the other Conditions; and being hindred in the one, he was not bound to perform the other. There was no Judgment in the Caſe, but it was adjourned. Trin. 23 Car. in B. R. *Boon* and *Sheers* Caſe. *Styles* 79.

12. Debt upon an Obligation of 200 l. The Condition was, That whereas the Plaintiff had carried ſo many thouſand of Billets, and had delivered them at D. in the County of *Kent*, for the uſe of the Defendant, amounting at ſo much the thouſand, to 100 l. If the Defendant ſhould pay the ſaid 100 l. at ſuch a time and place, that then, &c. The Defendant pleaded, That the Plaintiff did not carry ſo many 1000 of billets to D. as the Plaintiff had declared. It was the Opinion of the Court, That the recitall in the Obligation was an Eſtoppel to the Defendant to plead the contrary. It was adjudged for the Plaintiff. Paſc. 24 Car. in B. R. *Hart* and *Buckminſter's* Caſe. *Styles*, 103.

13. Debt by an Executor, upon divers Obligations made by the Teſtator, The Defendant ſaid, That he did pay a Leſſer ſum then is expreſſed in the Obligation to the Teſtator in his life time, and that he did accept thereof in full ſatisfaction of the ſaid Obligation; upon a Demurrer, the queſtion was, Whether the payment of the mony, or the acceptance thereof in ſatisfaction, were to be traverſed. It was holden, it was indifferent to traverſe any of them; but *Curia aviſare vult*: But in this Caſe, It was agreed, That if one pay mony in ſatisfaction of an Obligation, and the party to whom it is paid ſaith, He will receive it for another cauſe; yet if he receiveth it, It ſhall be adjudged to be paid in ſatisfaction of the Obligation, for he muſt receive it, upon ſuch Terms as the other will pay it. Mich. 1650. *Rois* and *Cranfield's* Caſe. *Styles* 239. See Paſc. 1651. in B. R. *Dewſe* and *Maſter's* Caſe. *Styles*, 263. acc.

14. Debt againſt an Executor upon a Bond entred into by the Teſtator: The Defendant confeſſed the Bond, but ſaid, That he gave another Bond to the Teſtator in ſatisfaction of that Bond, which the Teſtator did accept of: It was holden by the Court, That the plea was not good, for it is no good plea to ſay that he did accept of one thing in Action, in ſatisfaction of another thing in Action, and here the Defendant hath confeſſed the Debt, therefore the plea is not good. Trin. 1652. *Brock* and *Vernon's* Caſe. in B. R. *Styles*, 339, 340.

15. Debt upon a Bill; The Defendant pleaded, That after the mony did become due, he and the Plaintiff by paroll, did ſubmit to an Award, and there was an Award made, that the Defendant ſhould pay 8 l. at ſuch a houſe to the Plaintiff, and thereupon the Plaintiff ſhould give him a generall Releaſe: The Plaintiff demurred, and for cauſe ſhewed, That here was a ſubmiſſion by paroll pleaded after the day of payment expreſſed in the Bill, which is not good to diſcharge a debt due by ſpecialty; The Court held the plea not good, and gave Judgment for the Plaintiff. Mich. 1652. in B. R. *Luddington* and *White's* Caſe. *Styles* 350.

16. Debt upon a Sheriffs Bond, to ſave him harmleſſe; The Defendant pleaded a ſpeciall plea, which amounts to no more, but that he had ſaved him harmleſſe; Exception was taken, becauſe he had not ſhewed, how he ſaved him harmleſſe, and becauſe he did not ſhew *how*, it was adjudged for the Plaintiff. Mich. 1652. in B. R. *Bird* and *Martin's* Caſe. *Styles* 353.

17. Debt upon an Obligation againſt an Executor: The Defendant pleaded generally, Fully Adminiſtred, and after Iſſue joyned, gave in Evidence a Judgment againſt the Teſtator. The Queſtion was, Whether this Judgment might be given in Evidence, upon the late Meal-Act, to maintain the Iſſue. It was ſaid, That a *Plene Adminiſtravit* is a plea in bar, although it be not a perpetuall bar, and it is a generall Iſſue, becauſe it comprehendeth many things which may be given in Evidence, and it would be miſchievous if it ſhould be otherwiſe. *Rolls* chief Juſtice. If upon the generall Iſſue, one give in Evidence, *Non eſt factum*, would it be good? Certainly the Act for the generall Iſſue, is in it ſelf miſchievous, and we will not enlarge it; And this is not the generall Iſſue intended in the Statute, for the generall Iſſue intended, ought to be an Iſſue proper to the Action that is brought, and which might have been pleaded at the beginning, and, Who can tell upon this Plea, what you will give in Evidence, therefore you muſt relye upon your ſpeciall plea of *Plene Adminiſtravit*, and not vary from it in ſhewing new matter. It was adjudged for the Plaintiff. Trin. 1653. *Newman* and *Maſſy's* Caſe. in B. R. *Styles* 378.

18. Debt; The Caſe was, Two were bound to a third perſon joyntly and ſeverally, The Obligee made the Wife of one of the Obligors his Executrix, who Adminiſtred; Then the Husband the

Obligor made her his Executrix, and dyed, leaving Assetts to pay the debt, then she dyed; and the Plaintiff took Letters of Administration of the goods of the Obligee not Administred, and brought Debt against the Defendant, being the surviving Executor. It was adjudged in this Case, That the Action would not lye, for that at least the Action was suspended, and a personall Action once suspended is extinct. But 2. when the Obligee made the Executrix of the Obligor, his Executrix, and left Assetts, the Debt was presently satisfied by way of Reteiner; and so no new Action could be had for that Debt. Hill. 11 Jac. in C. B. *Fryer* and *Gildridges* Case. *Hob.* 10.

19. If an Obligation be made to pay a certain sum to the Obligee, at such a day, and no place is limitted for the payment thereof, the Obligor is to seek out the Obligee, to make payment if he be to be found in *England*, yet it hath lately been often Resolved, seeing the mony to be paid is a sum in grosse: it is otherwise if he tender it: But if the Condition of a Bond, or of a Feoffment be to deliver 20 Quarters of Wheat, &c. the Obligor, or Feoffor, is not bound to carry the same about, and seek the Feoffee or Obligee, but the Obligor before the day, must go to the Feoffee or Obligee, to know where he will receive it, and there it must be delivered; so note the difference betwixt mony, and things ponderous. *Cook* 1. Part, *Institutes*, 210.

Debt *to the* King; *Or the* Kings Debtors.

1. *The Prerogative and Priviledges which the King hath for the payment of his Debts.*

2. THe King hath this Prerogative *ab Origine Legis*, That, by the Common-Law, the King might have the Lands, goods, and body of the person, his Debtor, in Execution; but by the Common-Law, a Common person could not have taken the body of his Debtor in Execution for his debt, but that was given by the Statute of 25 E. 3. *Cook* 3. Part, 12. in Sir *William Herberts* Case.

2. The King had this Prerogative; That he is to have his debt paid before the debt of any other Subject. See 3 E. 6. *Dyer*, 67. in *Stringlethowes* Case, where the Sheriff was amerced, because the King, &c.

3. *Lassell* was taken in Execution upon a *Capias ad satisfaciendum* out of the Kings Bench, and there issued out a Writ of Processe out of the Exchequer to have his body, bearing date before the Retorn of the Arrest; and the Retorn before the *Capias*; upon which the Sheriffs of L. where he was taken, brought his body into the Exchequer, and there sued the cause of the Detainer, to have the body at the day of the Retorn, &c. And from thence the Prisoner was committed to the *Fleet* in Execution, for the first debt, and also for the debt of the Queen, which he had confessed in Court; And upon a *Habeas Corpus*, out of the Kings Bench, directed to the Warden of the *Fleet*, to have his body there such a day, The words shewed all this matter upon the Retorn, wherefore the Prisoner was remanded to the Prison of the Fleet for the Queens debt. 3 Eliz. *Dyer*, 197.

4. A man was condemned in the Exchequer for a Debt due to the Queen, and was Committed to the Fleet, and being in Execution; he was also condemned in the Kings Bench, at the suit of a subject, upon a Bill of debt in *Custodia Marischalli, Marischalsiæ*. Afterwards upon prayer of the party, a *Habeas Corpus* was Awarded out of the Kings Bench to the Warden of the Fleet, who retorned the cause *ut supra*, and he was remanded in Execution to the Fleet, for the Debt: Afterwards, a Command was given by the Lord *Treasurer* on the Queens behalf, to suffer the Prisoner to go into the Country to collect and levy mony the sooner, to pay the Queen her Debt: In that Case, the Subject brought an Action upon the Case against the Warden of the Fleet upon the Escape, who justified the Escape by the said Commandment. It was holden by the Court, That the Action did not lye, For the Kings Bench had no authority to commit him to the Fleet, for the Marshalsey is their proper Prison, and so the Prisoner was never in Execution for the party. But if he had bin, yet the Execution for the Subject begins not till the Queen be satisfied, for she may not have a Subject her Companion in the Interest of the body of any: But if he had bin in Execution, No Commandment, although it had bin of the Queen her self, without a Writ, is a sufficient Warrant to discharge the Keeper, as in this Case, it was Resolved by all the Justices. Mich. 13 Eliz. *Dyer*, 297.

5. By the Common-Law, The King might Grant a Protection to his Debtor, that no other might sue him before the King was satisfied his Debt. See Registr. 281. the Writ of Protection; the words of which are, viz. *Et, Quia nolumus solutionem*

solutionem debitorum nostrorum, Ceteris omnibus pro-ut ratione Prærogativa nostræ, totis temporibus retroactis usitatæ, &c. But that grew such a grievance to the Subject, That the Statute of 25 E. 3. cap. 19. was made; and now, by that Statute, a common person may Lawfully sue to Judgment, but he cannot proceed to Execution (and so the Kings Prerogative is saved) unlesse the Plaintiff who sueth, will give security to pay first the Kings debt. For otherwise, if the party doth take Execution upon his Judgment, and doth levy the mony, the same mony may be seised upon to satisfy the Kings Debt, as appeareth by the book, 45 E. 3. to *Decies tantum*, 12. *Godbolt*. 290. acc.

6. The King by his Prerogative shall have the Debt due to his Debtor paid unto him to satisfy the Kings debt.

7. A Prior Alien was endebted to the King for his Farm Rent, and being sued for the same, He shewed unto the Court, that there was a Parson who held a certain portion of Tythes from him, which were part of the possessions of the same Priory which he kept in his hands; so as he could not pay the King his Farm-Rent, unlesse he might have those Tythes which are in the Parsons hands. Wherefore a Writ of *Quo minus* was awarded against the Parson, to appear in the Exchequer; and to shew cause why he should not pay the same to the King for the satisfying of the Kings Rent: In that Case it was said by *Skipwith*, Justice, That for any thing which toucheth the King, and may turn to his advantage to hasten the Kings businesse, that the Court of Exchequer had Jurisdiction of it, whether it were of a thing which was spiritual, as Tythes, or temporal: and the *Quo minus* allowed and issued accordingly, and the Tythes were seized into the Kings hands, 39 E. 3. 28. See likewise 21 H. 7. 12. The Prior of *Ramseys* Case. The Prior was endebted to the King, and another Prior was endebted to the Prior of *Ramsey*, and in an Action brought against him by the Prior of *Ramsey*: The Defendant pleaded in barr, That he had paid the debt to the King; and the plea was adjudged a good plea: and if a Rent be due and payable to me by my Lessor for years, It was said, That in that case the same might be taken for the payment of the Kings debt: and the speciall matter shewed shall be a good barr in an Avowry for the Rent. See *Godbolt* 291. acc.

8. A Prerogative which the King hath, is, That the King shall have an Accompt against Executors, because the Law there maketh a privity. It being found by matter of Record, That the Testator was endebted to the King, and the Accompt which the King brings, is *ad Computandum ad Dominum Regem*, without setting forth, how the party came lyable to accompt. And if a man doth entermeddle with the Kings Treasure, (the King pretending a title unto it) he shall be chargeable to the King for the same. *Cook* 11. Part, 89.

9. Upon a Suggestion by the Earl of *Devonshire* to the King, That all Munitions, decayed and unserviceable, had been used to be taken as Fees by the Master of the Ordinance, The King, by a Privy Seale, Licenced the Earl, being Master of the Ordinance, to take all unserviceable Ordnance, Shot, and Ammuuition contained in such a book, and so sell the same, and to convert the mony to his own use. The Earl took the Ordinance and Ammunition, and sold the same, and converted the mony to his own use; and made his Will, and dyed. The Question was, If the Executor of the Earl should be charged to the King for the Conversion of the said Ordnance and Ammunition. In that Case, divers points were Resolved. 1. That the Earl could not claim the Iron Ordinance as Fees, because the Office was erected but of late time, and then he could not claim them as Ancient Fees by Prescription to a new Office. 2. Although the Earl claimed them to his own use, yet he should be accomptable to the King for the same, because in the Kings Case the Law makes a privity, and in that Case, it was said, That if any one taketh the Kings goods, or entred wrongfully upon the Kings Lands, and receives the profits thereof, the King may charge him in an Accompt. 3. That no Officer of the King can *Ex Officio*, Issue, or dispose of the Kings Treasure, although it be for the honour of the King, without the Kings Warrant; and a Warrant by word, or under his privy Signet, is not sufficient to Issue out such Treasure, but it ought to be under the Great Seal, or his privy Seal. 4. That if a man be a means or an Instrument whereby the King is put to losse or damage, he shall be charged, because he put the King in damage, and shall be compelled to yield an accoupt of the same; and if he dyeth, his Executors shall be charged with the same. *Cook* 11. Part, the Earl of *Devonshire's* Case.

10. Sir *Walter Mildmay* was Chancellor of the Exchequer, and suggested to the Lord *Treasurer* of *England*, that his Office was of great Attendance, and desired the Lord *Treasurer* that he would be pleased to allow unto him 100 l. for his Dyet, and 40 l. *per annum* for his Attendance, which the Lord Treasurer did grant unto him, and he enjoyed the same accordingly: and afterwards he dyed, and his Executors were forced to accompt for it, and to pay back the money for all the time that their Testator had received it. Mich 38 Eliz. in the Exchequer. Sir *Walter Mildmy's* Case.

11. The Kings Debtor brought a *Quo minus*

in the Exchequer againſt his Debtor, the Defendant appeared, and afterwards the Plaintiff would have been Nonſuit, but the Court would not ſuffer him ſo to be: For it was ſaid, That a Releaſe by the Kings Debtor to his debtor, would not diſcharge the Kings debtor as to that debt. Hill. 20 E. 3. And it was alſo ſaid, That in a *Quo minus* in the Exchequer upon a ſingle Contract, the Defendant cannot wage his Law, becauſe the King is to have benefit by the Suit, although the King be no party to the Suit. See *Cook* 4. Part, 94. in *Sladers* Caſe.

12. *William Porter*, Maſter of the Mint, &c. Covenanted with the King by Indenture, That all Bullion which ſhould be delivered *ad Cambium Regis pro moneta faciendâ*, that the money ſhould be delivered for the ſame within 8. dayes; which Covenant he broke, for he did not deliver to divers ſubjects their money due to them for the Bullion which they brought *ad Cambium*: which being ſhewed in the Exchequer, the King paid to them all the money due for the Bullion: and becauſe that *John Walwayn* and *Henry Picard*, *duxerunt et preſentaverunt praedict. William Porter in Officium illud, tanquam ſufficientem*, and that they offered to be Sureties for him, but were not accepted of; which matters they confeſſed: It was adjudged in that caſe, that the ſaid *John Walwayn* and *Henry Picard*, ſhould be charged to pay and ſatisfie the King all the moneys which the King had paid for the ſaid *William Porter*. Mich. 30 E. 3. Rott. 6. in the Exchequer.

13. *Walter de Chirton*, one of the Kings Cuſtomers, had purchaſed certain Lands with the Kings money, and by Covin had cauſed the ſeller of them to enfeoffe his friends in Fee to defraud the King: and nevertheleſſe, he took the iſſues and profits of the Lands to his own uſe: And thoſe Lands by an Inquiſition with the values of them, were returned into the Exchequer, And there by Judgment of the Court were ſeiſed into the Kings hands, and yet the Eſtate of the Land was never in him; but becauſe it appeared clear, that upon the purchaſe he intended to deceive the King, therefore were thoſe purchaſed Lands ſeized. Trin. 24 E. 3. Rott. 4. in the Exchequer. *Cook*. 11. Part, 41. 92. acc.

14. Queen *Elizabeth* by her Letters Patents did grant to Sir *Chriſtopher Hatton* the Office of Remembrancer or Collector of the Firſt-Fruits for his life, To have to him after the death of one *Godfrey*, who held the ſaid Office in poſſeſſion: Sir *Chriſtopher*, being thus ſtated in the ſaid Reverſion, and being ſeiſed in Fee ſimple of divers Mannors, Lands, Tenements, &c. did Covenant to ſtand ſeiſed of the ſaid Lands, &c. to the uſe of himſelf for life, and afterwards to the uſe of J. H. his ſon in tail; and ſo with remainders to his other ſons, the remainder to the right heirs of J. H. in Fee, with a Proviſo of Revocation at his pleaſure during life: *Godfrey* dyed poſſeſſed, and Sir *Chriſtopher* became Officer, and was poſſeſſed of the Office, and afterwards became endebted to the Queen by reaſon of the ſaid Office. The Queſtion in this caſe was, Whether the Mannors and Lands which were ſo conveyed and ſettled by Sir *Chriſtopher*, might be extended for the ſaid Debt due to the Queen, by reaſon of the Proviſo and Revocation in the ſaid Conveyance and aſſurance of the ſaid Lands: The debt due to the Queen was aſſigned over, and the Lands extended, and the Extent came to Sir *Ed. Coke*: The heir of Jo. H. ſued in the Court of Wards to avoid the ſaid extent. It was agreed in this Caſe by *Doddridge* Juſtice of the Kings Bench, *Tanfield* Chief Baron, *Hobart* Chief Juſtice of the Common-Pleas, and *Lea*, Lord Chief Juſtice of the Kings Bench, and by the Maſter of the Wards then being, That the ſaid Mannors and Lands were lyable to the ſaid Extent, For that the power and diſpoſe of the ſaid Lands were in the ſaid Sir *Chriſtopher* the Debtor, and the Lands which ſuch a Debtor hath in his power, although he hath not an Eſtate in the Lands, ſhall be lyable to pay the Debt to the King. And he had a Fee in them untill his death, by reaſon of the Proviſo, and Revocation, and ſo they were extendable; and he had the Lands when he was aſſured of the Office, although he had not the poſſeſſion of it; for he was ſure that none other could have it from him, and no other could have it but himſelf; and he had a time in which he might let the Land to paſſe, and yet he had a power to put it back again at his pleaſure; And if he had been living (being endebted to the King) the King might have extended the Lands, becauſe that then he had the poſſeſſion of them. And any Lands, be the Lands in uſe, upon Truſt, by Revocation; the Kings Debt ſhall be taken largely to extend unto them: And it was ſaid, that in this Caſe, there was not any alienation *animo alienandi* for Sir *Chriſtopher* gave the Lands, but he kept the poſſeſſion, and received the profits of them. Paſc. 21 Jac. in the Court of Wards. Sir *Edward Coke's* Caſe. *Godbolt*. 299, to 300.

15. A. being in Execution for Debt to the King adjudged againſt him in the Exchequer, was condemned in B. R. by a Judgment, and was brought to the bar by *Habeas Corpus*, to be charged in Execution for this Debt alſo. It was moved, That he ought not be charged in Execution here, becauſe he is in Execution at the Kings Suit: For it was ſaid, That by the Statute of 25 E. 3. chap. 19. a common perſon ſhall not have an Execution againſt the Kings Debtor, un-

till

till he makes agreement for the Kings Debt: And of that Opinion was the whole Court. But for asmuch as he had not a Writ of Protection, The Court Resolved, That he is out of the Statute, and thereupon Awarded, that he should be in Execution, as well for the party as for the King. Mich. 10 Car. in B. R. *Stevenſon's* Caſe. *Cro.* 1. Part, 283.

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2. *Debt Aſſigned to the King, where good, where not.*

1. A. was endebted to B. by Statute, in 2000 l. B. made his Wife his Executrix, and dyed, ſhe afterwards married with J. S. who was endebted to the King by Bond acknowledged in the Court of Wards. He and his Wife by Deed enrolled 14 Jac. in the Court of Wards, Aſſign unto the King that Statute for the payment of the ſaid Debt: And whether it were good, or void by the Statute of 7 Jac. with Enacts, that no Debt ſhall be Aſſigned to the King by his Debtor accomptant, other then ſuch Debts as did before Originally grow due to the Kings Accomptant *bona fide*, and that all other Aſſignments ſhould be void. It was Reſolved by the two Chief Juſtices, and Chief Baron, That it was a good Aſſignment, for although this debt is not due to him generally, but in the right of his Wife, who had it from her Teſtator; yet becauſe they have the ſole intereſt therein, and the Husband who is the Kings Debtor diſcharged by his Releaſe, it is all one as if it had bin made to him in his own name. For the intent of the Statute is onely to receive Aſſignments of Debts which are not due to the Debtors themſelves, but Aſſigned to, or by him to other perſons. Hill. 6 Jac. in *Cur. Ward.* and *Fawnes* Caſe. *Cro.* 2. Part, 524.

2. A man recovered damages in an Action upon the Caſe, and he Aſſigned parcell of his Debt to the Queen before Execution: And the Queen thereupon brought a *Scire facias*. *Manwood*, Chief Baron, and all the Court of Exchequer were of Opinion, That parcell, or a moyety of this Debt could not be aſſigned over to the Queen. Paſc. 26 Eliz. in the Exchequer. The Queen and *Allen's* Caſe. *Owen.* 2.

3. A. acknowledged a Statute to J. S. Alderman of *London*; Afterwards he acknowledged another Statute to H. who aſſigned the ſame to J. D. who Aſſigned the ſame to the Queen: J. S. ſued forth Execution upon his Statute, and thereupon the Lands of A. are extended, and he hath a *Liberate* of it. It was the Opinion of all the Barons in the Exchequer, That if J. S. had Execution upon his Statute before the Queen, his Execution ſhould ſtand againſt the Queen, and the Queen ſhould not put him out. And it was further agreed, That if A. recovers in Debt in the Common-Pleas, ſo as he hath title to ſue forth Execution by *Elegit*, and the Defendant ſells his Lands; And afterwards A. Aſſigns his Execution to the Queen, That the Queen ſhould not have Prerogative againſt the Feoffee to have Execution of the whole Lands. Mich. 33 Eliz. in the Exchequer.

4. Note, It was holden by the Court, That whereas A. was endebted to B. without any Bond had of it, but onely by a Note in Writing, ſigned with the hand-writing of A. *ſcil.* by me A. &c. but not ſealed, That ſuch a Debt may be Aſſigned to the Queen, although before his Aſſignment againſt his Creditor, he might have waged his Law; For, inaſmuch as by theſe Notes, or Bills the certainty of the Debt appeareth, and that they are due debts, and ſo well Aſſigned. See 21 H. 7. 19. An Obligation may be Aſſigned to the King without Inrollment of it, and where the Obligee is not endebted to the Queen: but it cannot be Aſſigned to a Subject, unleſſe for a Debt due by the Aſſignor to the Aſſignee: It was alſo holden in this Caſe, where the Queen ſueth for a Debt Aſſigned to her, that the Obligor in ſuch Caſe, cannot plead *Nihil debet*, for that now by the Aſſignment, it is become matter of Record. Paſc. 32 Eliz. in the Exchequer. *Gouth* and *Marſhes* Caſe. *Leon.* 2. Part.

Deeds.

1. *Of the Eſſentiall Parts of a Deed*, viz. *The Making, Writing, Sealing, Delivery, Date, Witneſſing, and other the parts of a Deed; Where they ſhall be good, where not: And What ſhall be ſaid to be a good Deed; What not.*

1. EVery Deed ought to prove it ſelf, and be proved by others; Approve it ſelf upon ſhewing forth to the Court. 1. As to the compoſure, The words to be ſufficient in Law;

and

and the Court ſhall judg that. 2. That it be not raſed and enterlined in materiall points and places; that to be tryed by the Jury, if it be before, or after the delivery, That it may appear to the Court; If it were upon Condition, Limitation, or with power of Revocation; If the Deed be ſingle, or if there wanteth a Counter-part of the Indenture, that the other party might take advantage of the Condition, Limitation, or power of Revocation; And theſe are the cauſes, That Deeds are ſhewed in Court; and it were a dangerous thing in Law for any party, who, by the Law in pleading, ought to ſhew forth the Deed, to prove in Evidence to a Jury by witneſſes, That there was ſuch a Deed, which they have ſeen Read, or heard read. But yet in great and Notorious extremities, As by caſualty of Fire, That all his Evidences were burnt in his houſe, If the ſame ſhall appear to the Judges, they may in favour of him who hath ſo great a loſſe by Fire, ſuffer him, upon the generall Iſſue, to prove the Deed in Evidence by Witneſſes, that Affliction be not added to Affliction. *Cook* 10. Part, 92. in Doctor *Leyfield's* Caſe.

2. A Charter party, Indented between the Maſter and Owners of a Ship, of the one part, and divers Merchants of the other part, was made; by which the Maſter and Owners Covenanted to Ship certain Merchandiſes at ſuch a Port beyond Sea, and to tranſport them to the City of *L.* for which, every of the Merchants Covenanted *ſeparatim* with the Maſter and Owners, that one Merchant ſhould pay 3 l. another 3 l. *et ſic de cæteris*. And in the end of the Deed was this Clauſe, *Et ad performationem omnium et ſingularum conventionum ex parte prædict. Mercator quilibet Mercatorum prædict.* bound himſelf to the Maſter and owners in double the freight. In Debt brought againſt one of the Merchants, upon the ſaid Deed, The Defendant pleaded, That a Seal of one of the other Merchants fixed to the Deed, was broken off from the Deed; upon which the Plaintiff demurred. In this Caſe it was Reſolved, That in the Deed, the word *Separatim* made the Covenants ſeverall, and not to be one joynt-Covenant, and for that cauſe, though one of the Seals of the Merchants were broken from the Deed, yet it did not avoid the Deed but onely againſt him: But if any of the Seals of the Maſters or Owners had bin broken from the Deed, all the Covenants had bin defeated; and if the Deed had bin raſed in the date after the delivery, the ſame had gone to the whole, and all; But when Covenants are ſeverall, they are as ſeverall Deeds Written in one peice of Parchment. Hill. 39 Eliz. in C. B. *Cook* 5. Part, 23. *Matthewſon's* Caſe.

3. In Debt upon a Bond againſt an Executor, the Defendant pleaded, *Non eſt factum* of the Teſtator: Upon a Speciall Verdict, The Caſe was, The Teſtator with two others, were joyntly and ſeverally bound in the Bond; and afterwards the Seals of the two others were eaten with Mice and Ratts; and whether that was the Bond of the Teſtator or not, was the Queſtion: It was objected in this Caſe, That the Bond was good, becauſe that where they are bound joyntly and ſeverally, it is all one as if they had bin ſeverall Obligations, according to *Matthewſon's* Caſe, And to this purpoſe. Trin. 2 Car. in B. R. was vouched, *Banning* and *Symmond's* Caſe, where 28 Merchants were bound joyntly and ſeverally, and three of their Seals were broken from the Deed, and Reſolved, that the Deed did remain good againſt the others; On the other ſide, it was ſaid, That the whole Deed was avoided, and that the Defendant might plead *Non eſt factum* to it, for where it was joynt at the firſt, now if the Deed ſhould ſtand good againſt the Defendant onely, it ſhould be his Bond onely, whereas it was his Bond, and the Bond of the other at the firſt, and ſo not the ſame Bond; And whereas it was objected, this is a caſuall Act, and ſhall not prejudice the Plaintiff, It was anſwered, the ſame ſhall not help him, becauſe it was his own Lacheſſe and default, And where the Bond is altered in a materiall point or place by a ſtranger, without the privity of the other, yet the ſame ſhall avoid the Deed in all; And this Caſe differs from *Matthewſon's* Caſe; becauſe there the Covenants were ſeverall, and not joynt as this Obligation is, The whole Court was ſtrongly inclined, That Judgment in the principal Caſe ſhould be given for the Defendant, and their reaſon was, That if the Obligee by his Act or his own Lacheſſe, diſcharge one of the Obligors where they are joyntly and ſeverally bounden, that the ſame diſcharges them all; but a day was given for further Argument of the Caſe. Mich. 17 Car. in C. B. *Bayly* and *Gerford's* Caſe. *Mod.* 125, 126, 127.

4. Note, when two are joyntly bound in an Obligation, none of them can plead, It is not his Deed, becauſe they have Sealed and delivered it; but if afterwards, before the Action brought, it becomes void by raſure, addition, or otherwiſe breaking of the Seals; there, in ſuch caſe, the party may, in Action brought upon ſuch Deed, plead, that it is not his Deed; for by ſuch Act, it hath loſt the proper and eſſentiall parts of a Deed. *Cook* 5. Part, 119. *Whelpdales* Caſe.

5. J. S. was Sheriff of *Oxford*, and an Obligation was made to him *Novemvir univerſis, &c. me teneri J. S. armig.* in 60 l. and after the delivery of the Deed, theſe words, *viz. Vic. Oxon. ante verba in 60 l. et poſt verba.* J. S. were enterli-

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ned without Notice of J. S. and it was adjudged, That becauſe, that that Addition was without the privity of J. S. in a place not materiall, that the Obligation remained good. But it was there Reſolved, That when a Deed is altered by the party himſelf, or by a ſtranger in a point materiall, by Addition, Interlineation, Raſing, or other means, the Deed is void: And it was there Reſolved, That when a lawfull Deed is raſed, by which it becomes void, there the Obligor may plead, that it is not his Deed, and may give the ſpeciall matter in Evidence. *Cook* 11. Part, 25, 26. *Henry Pigot's* Caſe.

6. If a Feoffment in Fee be made by Deed with divers Covenants, and one of the Feoffees Seal it, but the other not, but occupieth the Land, and ſurviveth, In that Caſe, it was adjudged, that he ſhould be bound to perform the Covenants, though he never ſealed the Deed, but ſhall be bound by the Seal of his Companion. Trin. 28 H. 8. *Dyer*, 13. acc.

7. The date of a Deed is not of the ſubſtance of the Deed, for if it want a date, or have a falſe or impoſſible date, yet the Deed is good; For there are but three things of the eſſence of a Deed, *viz.* The writing in paper or parchment, Sealing, and Delivery, and if it have theſe three, though it wanteth, *In cujus reitestimonium ſigillum ſuum appoſuit*, yet the Deed is ſufficient, for the delivery is as neceſſary to the eſſence of a Deed, as the putting of the Seal to it; and yet it needs not to be contained in the Deed: And therefore, the Caſe was, Debt was brought upon an Obligation by an Adminiſtrator, The Defendant pleaded, That the Inteſtate dyed before the date of the Obligation, and ſo it was not his Deed; And it was found, That the Deed was delivered in the life of the Inteſtate, and that the Inteſtate dyed before the date of the Deed: In that Caſe it was adjudged, that it was his Deed; For although that the Obligee cannot in pleading alledge the delivery before the date, yet the Jurors who are ſworn to ſay the truth, ſhall not be eſtopped, for an Eſtoppel is to conclude to ſay the truth, and therefore the Jury cannot be eſtopped, becauſe they are ſworn to ſay the truth; but the Jurors cannot find any thing againſt that which the parties have affirmed, or admitted, for they are not charged with any thing, but thoſe onely wherein the parties vary. Hill. 26 Eliz. in C. B. *Cook* 2. Part, 4. *Goddard's* Caſe.

8. In Debt upon an Obligation of 10 l. The Defendant pleaded, that one F. was bound by the ſaid Deed with him, and each in the whole, and that the Plaintiff had made an acquittance to F. bearing date before the Obligation, and delivered after, by which Acquittance he did acknowledg himſelf to be paid 20 s. in full ſatisfaction of the 10 l. It was adjudged to be a good Bar; for if a man do acknowledge himſelf to be ſatisfied by Deed, it is a good Bar without any thing received. *Cook* 5. Part, 117. in *Pennell's* Caſe.

9. Note, Two things are requiſite to the perfection of a Will, by which Land ſhall paſſe, viz. The Writing, for that is *initium*, and the death of the Deviſor, and that is *finis et conſummatio*; And the *initium* ought to be *plenum et perfectum*, otherwiſe it is not good; And therefore, if one command another to make his Will, and by the ſame to deviſe Wh. Acre to J. S. and his Heirs, and Bl. Acre to J. N. and his Heirs, and he writeth the Deviſe to J. S. and his Heirs, in the life of J. S; and before the other is Written, the Deviſor dyeth; yet it is a good Will to J. S. But if he command one to make his Will, and to deviſe W. Acre to J. S. and his Heirs upon Condition, and the Deviſor dyeth, this deviſe is void, for in one caſe the Deviſes are ſeverall, and diſtinct, and in ſuch Caſe, the Deviſe to J. S. is perfect, but in the latter Caſe, the Deviſe is not full, but maimed and imperfect; for the whole Deviſe to J. S. was not fully put in writing, and ſo *initium* in ſuch Caſe, *non fuit plenum*. *Cook* 3. Part, 31. in *Butler* and *Baker's* Caſe.

10. If an Obligation be made, and in the concluſion of it, It wants the words *In cujus rei teſtimonium ſigillum appoſui*; yet it is good if it be ſealed. 28 H. 8. *Dyer*, 19. acc.

11. In Debt brought upon an Obligation, The Jury found a Special Verdict, That after Iſſue joyned, and before the *Niſi Prius*, the Seal of the Defendant was fallen off. *Et ſi, &c. Windham* Juſtice ſaid, That it had been adjudged, That where a Bond was delivered to the *Cuſtos Brevium* to be kept, and the Mice broke the Seal; that the Court adjudged, That the Plaintiff ſhould be at no prejudice thereby: and in this Caſe, forasmuch as no default was in the Plaintiff, the Court commanded Judgment to be entred for the Plaintiff. Paſc. 30 Eliz. in C. B. *Mitchell* and *Stockwith's* Caſe. *Goldesbr.* 93.

12. In a Replevin, the Defendant avowed for 9 s. Rent; The Plaintiff pleaded a Deed of Feoffment of the ſame Land, made before the Statute of (*Quia Emptores terrarum*) by which 6 s. 8 d. is onely reſerved; and demanded Judgment, if he ſhall be receaved to demand more then is reſerved by the Deed. This Deed was without date; and it was averred, That it was made before the Statute of (*Quia emptores terrarum*) which was made in the 18. of Ed. the 1ſt. It ought to be averred, to be made after the beginning of the Reign of Rich. 1. For a Writing, after the beginning of the Reign, checks preſcription, But if a man

hath

hath a thing by Grant before that, he may claim by preſcription; for he cannot plead the Grant, in as much as it is before time of memory. Mic. 9 Jac. in C.B. *Brownlo.* 2 Part, 107.

13. Debt was brought upon an Obligation to perform an Award: upon *Nullum arbitrium* pleaded, a Special Verdict was found, and upon the Special Verdict, ſeveral Queſtions were made; One was, Whether a miſ-recital of the date of one of the Obligations of Submiſſion, by the Arbitrators in their Award, ſhall avoid the Award or not. To that it was ſaid, That the Submiſſion was the Submiſſion of the Parties, and the miſtaking of the Arbitrator of the time, when it was made, is not material, nor ſhall hurt it. For the Bond of Submiſſion is not in the Cuſtody of the Arbitrators, and ſo they might eaſily miſtake the date, becauſe they had it not to view. *No. Com. 79 Croker's* Caſe. And ſecondly, the date of the Obligation is not an eſſential part of the Obligation: For an Obligation may be good, though it have no date; and therefore the miſtaking of the date is not material. Thirdly, there is a ſufficient certainty of the Bond in the Award, though the date be miſtaken; and a void additional deſcription of it, ſhall not avoid a good deſcription of it ſet forth in the Award. *Quære*; for the point was not Reſolved. Paſc. 24 Car. in B. R. *Keniſton* and *Jone's* Caſe. *Styles* 97.

14. Note, by *Glyn*, Chief Juſtice, That if divers perſons do ſeal a Deed, and if but one of them do acknowledge the Deed, and the Deed is thereupon enrolled; That this is a good Inrollment within the Statute, and may be given in Evidence, as a Deed inrolled at a Tryal. It was then alſo ſaid, That if a Deed expreſs a Conſideration of Money upon a purchaſe made; yet this is no proof upon a Tryal, that the monies expreſſed were paid; but it muſt be proved by Witneſſes. Mich. 1655. *Thurle* and *Madiſon's* Caſe. *Styles* 462.

15. In Debt upon a Bill of 6 l. 13 s. 4 d. After this Clauſe, *In cujus rei teſtimonium, &c.* This Clauſe was added in the nature of a Deviſe. Provided, nevertheleſs, That the ſaid 6 l. 13 s. 4 d. is not to be paid untill ſuch a one hath had a Recovery in ſuch an Action or Suit, which he hath had againſt the Plaintiff, upon a Bond of 200 l. conditioned for ſaving harmleſs, or hath made an end of the ſame Suit: and then the Concluſion was, *Dat. eiſdem die et anno.* All this was dated upon Record. The Defendant pleaded in Bar, That no end was made of the ſaid Suit, upon the Bond of 200 l. nor any Recovery had; but that the ſame ſtill depends: and therefore according to the Proviſo, the ſaid 6 l. 13 s. 4 d. demanded by the ſaid Bill, is not to be paid, the Plaintiff having commenced, &c. Suit for it, before the time, by the Proviſo. The Plaintiff replyed, That an end was made of the ſaid Suit by a Compoſition of 20 l. given and accepted in full ſatisfaction and diſcharge of the ſaid Suit, *in plenam ſatisfactionem actionis prædict.* The Defendant rejoyns, No ſuch end was made of the ſaid Suit: upon Iſſue joyned, it was found for the Plaintiff. It was moved in Arreſt of Judgment: for that of this matter of Fact ariſeth, the matter of Law, which makes againſt the Plaintiff; which is, that the giving of 20 l. cannot be a ſatisfaction of the 200 l. To that it was ſaid, That the giving of the 20 l. is not in ſatisfaction of the 200 l. which cannot ſo be by Law; but the 20 l. by Compoſition was given in ſatisfaction and diſcharge of the ſaid Suit, upon the ſaid Bond of 200 l. and that is good; and the onely Iſſue was, Whether ſuch an End was made by Compoſition? and the ſubſtance of the Plea is the Compoſition, and not the payment of the money. It was ſaid by the Juſtices, That it was here to be conſidered, Whether this Proviſo be parcel of the Bill, or as a Condition to the ſame annexed. If it be part of the Bill, then it tends to the matter. It was objected, It was not parcell, becauſe it comes after the Clauſe, *In cujus rei*, &c. To that it was anſwered, That a Deed is good, dated without that Clauſe, *In cujus rei*, &c. if the Deed be ſealed: and it is not of ſuch force to make a Deed void, if it be wanting. For if the words in the Deed contained, are ſufficient to bind the party, and it be ſealed and delivered, it is ſufficient. But it was the Opinion of all the Juſtices That this Clauſe and Proviſo was parcel of the Bill of 6 l. 13 s. 4 d. to be paid either upon the Recovery in the Action, or upon an End made of the Suit. And this being put in Iſſue, and found for the Plaintiff, It muſt be intended to be paid for the end of the Suit, and not in ſatisfaction of the 200 l. And this Caſe was compared to *Cook's* Part, *Nichol's* Caſe. And the whole Court were cleer of Opinion for the Plaintiff; and Judgment, was given for the Plaintiff accordingly. Mic. 1 Car. in B. R. *Thompſon* and *Batcher's* Caſe. *Rolls.* 3 Part, 300, 301, 302, 303.

4. Where

2. *Where a Deed ſhall be void in part, and ſtand good in other part; and where it ſhall ſtand good as to one perſon, and void as to another perſon:*

A Recognizance was made to Sir *Nicholas Bacon*, Lord Keeper of the Great Seal, and to two others; and it was *Capt. et Recognit. coram eadem Nicholao B. milite, Cuſtod. Magni Sigilli.* The Opinion of the Juſtices was demanded, if it were good, or not; and it was the Opinion of all the Juſtices, that it was good, as to Sir *Nicholas Bacon*; and to the other it was good enough. Paſc. 5 Eliz. *Dyer*. 220.

2. A. By his Deed (in which B. his Son and Heir apparent was joyned) granted an Annuity to C. for the Term of his life, out of all his Lands in D. *Et ſi contingat*, the ſaid Annuity to be behind; That then it ſhould be lawful for the ſaid C. in the Tenements aforeſaid, *toties quoties*, to diſtrain. To this Deed, A. ſet his Hand and Seal; and a Label put for the ſaid B. his Son: but he did not ſeal it, the Annuity was behind for divers years: For the Arrearages and the penalty, the Executors of C. the Grantee brought Debt againſt the Executors of A; and declared upon that Grant, without making mention of B. the Son of A; *virtute cujus*, the ſaid C. the Grantee was ſeiſed, *in dominico ſuo ut de tot. feodo.* It was moved in that Caſe, If the Plaintiff in his Declaration ought to have made mention of B. the Son, or not; It was the Opinion of the Juſtices, that the ſaid Deed was void, as to B. the Son: And that if the Plaintiff ſhould make mention of him in his Declaration, that then the Plaintiff ought to have averred in fact, that he was a Party to the Deed: But he never ſealing the Deed, the Deed was holden void as againſt B; but did ſtand good as againſt A. the Father. Hill. 6 Eliz. *Dyer*, 227.

3. When a Deed ſhall be good in part, and void in part, ſtands upon this difference: When a Deed is void *ab initio*, and when it becomes void by miſeaſance, by matter *ex poſt facto*. Alſo, there is a difference, when the Deed, which is void in part *ab initio*, doth conſiſt upon the Intirety, and when upon divers ſeveral Clauſes; and in this alſo there is a difference, when the ſeveral Clauſes are abſolute and diſtinct, and when they are ſeveral, and yet the one hath dependance upon another. If any of the Covenants in an Indenture, or the Conditions endorſed upon an Obligation, are againſt Law, and ſome good and lawful; In that Caſe, the Covenants and Conditions which are againſt Law, are void *ab initio*, and the others ſtand good. So if three diſtinct Obligations be written upon one piece of Parchment, and one of them onely is read to the Obligee, and he being a Lay-man, not letter'd, ſealeth this Deed, it is good for that which is onely read, and *ab initio* void for the others. *Cook* 11. Part, 27. *Henry Pigott's* Caſe.

4. One brought Debt for 20 l. againſt another, and declared upon an Obligation of the ſame ſum: The Defendant pleaded, That he was a Lay-man, and could not read, and that he did acknowledge to be bound to the Plaintiff by the ſame Deed in 20 s. which he hath paid, and ſhewed an Acquittance thereof; and as to the remnant of the ſaid ſum, in the ſaid Obligation, It was not his Deed; and the ſame was holden a good Plea: Which Caſe being of an entire ſum, proveth without Queſtion; That if there be two abſolute and diſtinct Clauſes in a Deed, and the one to be read to the party not lettered, and not the other, that the Deed is good for that Clauſe which was read, and *ab initio* void for the Reſidue. See 14 Hen. 8. 26. 9 Hen 5. 15. *Cook* 11. Part, 27. acc.

3. *Where an* Habendum *ſhall ſtand, and be good in a Deed; Where not.*

1. LAnd is given to husband and wife, *Habendum* to them to the uſe of them for the term of the life of the wife; and after her deceaſe, then to the uſe of the husband and his heirs: the Husband and Wife are Joynt-Tenants of the uſe; as if Land be let to two for the term of the life of one of them; It is clear a Joynt Eſtate, although the ſurvivorſhip doth not hold: But if Land be given to two, *Habendum* to one for the Term of his life; they are Tenants in Common, becauſe *in omni majori includitur. minor.* Trin. 28 H. 8. *Dyer* 10. in *Bokenhams* Caſe.

2. A Leaſe is made to one for term of years, upon Condition, that the Leſſee ſhall not alien his Term to J. S; and he aliens to J. S: It was moved, If the Condition were broken, or not? It was holden, That it was not; for every Condition is taken ſtrictly: For if a man make a Feoffment upon Condition that he ſhall not enfeoffe J. S, and he dyeth, and his heir enfeoffeth J. S; the ſame is no breach of the Condition: and it is like to a Reſervation; For if a man makes a Leaſe for term of years, rendring rent to the Leſſor, in this caſe his

heir ſhall not have this Rent, becauſe he is not named in the Reſervation. But it was agreed, That if a man makes a Leaſe for years rendring certain Rent, without ſaying, To the Leſſor or his heirs; yet the Leſſor and his heirs ſhall have the Rent, becauſe it is reſerved as long as the eſtate continues: And it is like the caſe where a man makes a Feoffment, and binds him and his heirs to Warranty, without ſaying to whom he ſhall warrant: yet the Feoffee and his heirs ſhall have advantage of the Warranty: but if the Warranty were certain, as to the Feoffee onely, then his heir of that ſhould not have any advantage. Mich. 31 H. 8. *Dyer* 45.

3. A. let Land to two, *Habendum eis, ad terminum vitæ eorum (conjunctim) & alterius diutiùs, vivent. et aſſignatis ſuis, ſi primus eorum decedere contingat, durante vita ejus qui ſuperſtes*; *et non aliter*. The Queſtion was, Whether by the word (*conjunctim*) they were reſtrained to make partition? See that Queſtion more reſolved; For by the Statute of 32 H. 8. Joynt-Tenants are now compellable to make partition by Writ, and cannot be reſtrained by any words. The other Queſtion was, If he who let and aſſigned all, If it were good for the whole, or but for a moyety? It ſeems, that he can aſſign but a moyety, becauſe he hath but a moyety in right. 31 H. 8. *Dyer* 41.

4. The Stewardſhip of his Courts of the Manor of S. was granted by the Biſhop of *Lincoln* to one for term of his life, *Habendum, et exercend. poſt mortem* of the firſt Grantee, which was confirmed by the Dean and Chapter. It was holden, That this ſecond Grant was good, being in caſe of a common perſon: But if it were in the caſe of the King, it was otherwiſe. Hill. 7 E. 6. *Dyer* 80. See 11 Jac. in C. B. *Staunton* and *Greens* Caſe, adjudged acc. See alſo 41 Eliz. *Scaribtors* Caſe, acc.

5. In a Second Deliverance the Caſe was; The Abbot of *T.* was ſeiſed in Fee of certain Lands in *D.* in the County of *Glouceſter*, and by the aſſent of his Covent demiſed the ſame to J. G. for term of life, and afterwards by Indenture with aſſent of his Covent, *Tradidit, conceſſit, et ad firmam demiſit* to J. S. and M. his Wife, the Tenements aforeſaid, with the appurtenances *inter alia per nomen Reverſionum omnium et ſingulorum Meſſuag. terrarum, et Tenementorum ipſorum Abbatis et Conventus in D. in Com. Glouceſter, quæ omnia et ſingula J. G. ad tunc tenebat, ad Terminum vitæ ſuæ*: *Habendum et Tenend. prædict. Meſſuag. terras Tenementa, &c. eiſdem J. S. et M. et aſſignatis ſuis* from the Feaſt of St. *Michael* next after the death, ſurrender, and forfeiture of the ſaid J. G, *aut cum aliquo alio modo quocunq; reverſio prædict. accideret*, unto the end of 21 years next following, without any attornment? And afterwards the Eſtate of J. S. came to the Plaintiff, and the Reverſion in Fee to the King, H. 8. And then ſhewed, that the Abby came to the King by ſurrender: and that the King conveyed the Fee-ſimple of the Lands, &c. to the Defendant: and the Defendant demanded *Oyer* of the Deed of the Grant of the Reverſion; and the words were theſe, viz. *Conceſſit reverſionem, Habend. ut ram, &c.* And if by this grant of the Land, the Reverſion ſhould paſſe, or not, was one Queſtion made in the Caſe; and whether it ſhould be a good Leaſe in Reverſion, by the words aforeſaid, or that it ſhould be void, becauſe the premiſſes of the Deed ſpeaks onely of a Reverſion, and the *Habendum* mentions the Land; and no Attornment was had by the Leſſee for life; and long Argument by all the Juſtices: They all agreed, That the Leaſe was a good Leaſe; and that the premiſſes and the *Habendum* did well ſtand together. And ſo Judgment was given for the Plaintiff. Mich. 2 & 3 Ma. *Plow. Comment.* 155. to 164. *Throgmorton* and *Tracyes* Caſe. See *Dyer* 125. acc.

6. A. for 100 l. paid by B. by Deed Indented and inrolled, bargained and ſold, granted and conveyed Lands, To have and to hold the ſaid Lands to B. and his heirs for ever, to the uſe of the ſaid A. for the Term of her life, without Impeachment of Waſte; and after her deceaſe, to the uſe of the ſaid B, and the heirs of his body *lawfully* begotten; and for default of ſuch Iſſue, to the uſe of the heirs of the ſaid A. for ever. It was holden in this caſe by the Juſtices, That this Limitation by the *Habendum* was void, and impeachment, for that an uſe cannot riſe out of an uſe. Mich. 5 Ma. *Dyer* 155. See *Cook.* 1. Part, 137. in *Chudly's* Caſe, by all the Juſtices, acc.

7. In an *Ejectione Firmæ*, the Caſe was; The Abbot of W. ſeiſed of a Meſſuage and 60 Acres of Lands in B: He and his Covent 22 E. 4. made a Leaſe of the ſame to J. S. and *Joyce* his Wife for 80 years: J. S. dyed, *Joyce* took husband R. W, *Joyce* dyed; R. W. ſurvived: The Succeſſour of the Abbot and the Covent, 26 H. 8. by Indenture granted and demiſed to J. D, the Reverſion of all their Farm in B; and alſo another Tenement with all Lands, &c. to them appertaining, then in the tenure of R. W. To have and to hold all the ſaid Farm and Tenements, with the appurtenances to the ſaid J. D. from the end and expiration of the Term of years granted to the ſaid R. W, untill the end of 60 years: Afterwards the Abbot and Prior, 31 H. 8. granted to the King the Reverſion of, &c. after which, the King granted the Reverſion to J. N. and C. his Wife in Fee: R. W. made his Will, and demiſed all his Term and Intereſt in the ſaid Tenements to E. his Wife, and

made

made his Wife his Executrix, and dyed: E. took to husband the Defendant: and they being poſſeſſed, J. N. and his Wife made a new Leaſe to them for their lives; upon whom the Plaintiff entred by ſale of his Leaſe for 60 years, and the Defendants did eject him; and the Plaintiff brought *Ejectione Firme*. In this caſe there were many points Argued and Reſolved: Amongſt other, It was Reſolved, 1. That Reverſion in this caſe ſhall be ſaid *Terra reverſens*; ſo as the Leaſe of the Reverſion of the Farm, ſhall be taken to be the Leaſe of the Farm reverting, or when it ſhall revert: and that it is all one when he demiſeth the Reverſion of the Farm, *Habendum* the Farm from the time of the firſt Leaſe ended and expired; and when he demiſeth the Reverſion of the Farm, *Habendum* the Reverſion of the Farm from the time of, &c. and that the premiſſes of the firſt Leaſe, and the *Habendum* did well ſtand together. 2. The Juſtices held, That the ſecond Leaſe ſhould begin preſently upon the determination of the firſt Leaſe and term of years determined: ſo that being the firſt Leaſe determined by Act in Law, or by the act of the party, or by conſumption of time, it is all one, and that the Plaintiff ſhould take benefit of the determination of it: And ſo all the Juſtices were clear of Opinion for the matter in Law for the Plaintiff. Mich. 1 Eliz. *Plow. Comment. Wroteſley* and *Adams* Caſe, 190, to 197.

8. Tenant for Term of life of Lands, ſurrendred one moyety of them to his Leſſor: The Leſſor afterwards by Indenture demiſed the whole Lands to a ſtranger by theſe words, *ſcil. Habendum* the one moyety which he had by the ſaid ſurrender to the ſtranger for the Term of his life; the other moyety which the Leſſee held to the ſaid ſtranger from the day of the death of the firſt Leſſee for 40 years, if he ſhould live ſo long, rendring *pro omnibus et ſingulis premiſſis* 4 l. *per annum*: The Leſſee was behind of his Rent for a year, the Leſſor diſtrained, and avowed for the whole Rent, living the firſt Leſſee. It was the Opinion of the Court, That the Leſſor might diſtrain for the whole rent preſently, although that one moyety be but Land reverting, becauſe the reſervation is entire. But in the caſe, becauſe he avowed as in Land charged to his diſtreſs, which is alwayes intended for a Rent-charge; and for this Rent which is a Rent-ſervice, he ought to have avowed upon him *per le* manner as Tenant; and alſo, becauſe he did not ſever the moyety, but ſaid generally, That he was ſeiſed *in Dominico ſuo ut de feodo*, whereas the moyety was not in demeſne: The Avowry was holden by the Court to be inſufficient. Mich. 9 Eliz. *Dyer* 257.

9. A Termor reciting by Indenture his Term and Leaſe, granted all his Term, Eſtate, and Intereſt to another *Habendum ſibi et aſſignatis ſuis* immediately after the death of the Grantor: and if the Grantee ſhould have it preſently, or expect till after the death of the Grantor, was the doubt: Upon a Demurrer, in this Caſe, It was Reſolved by the Juſtices, That the *Habendum* was void, and that the premiſſes of the Grant was good to paſſe the Term to the Grantee preſently. Paſch. 10 Eliz. *Dyer* 272.

10. The next avoidance of a Church was granted to three, *Habendum* iis *et uni eorum conjunctim et diviſim*, the firſt preſented the third, who is admitted, Inſtituted and Inducted. It was adjudged, That it was well. But it was ſaid, That if the Biſhop had refuſed his ſole preſentment, perhaps he might have failed in his *Quare Impedit*, for that the ſeverance of the *Habendum* was void in Law, as was conceived. Mich. 14 Eliz. *Dyer* 304.

11. A Leaſe was made by Indenture to the Mother and Son, *Habendum eis pro termino vitæ eorum, et alteri eorum diutius vivent. ſucceſſivè uni eorum poſt alterum ſicut nominantur in Indentura, et non conjunctim*: and Livery and Seiſin was made by attorney accordingly. It was adjudged in this caſe, That the whole Freehold was in the Mother onely; and that the ſon took in remainder, and not joyntly with his Mother. Hill. 20 Eliz. *Dyer* 361.

12. A man ſeiſed of Lands in Fee, demiſed the ſame to one, and B. his Son, and to the heirs of B. *Habendum* for 99. years, and ſo from 99. years, to 99 years, untill 300 years were paſſed without Impeachment of Waſte, rendring rent, if it were demanded: And the Leſſor Covenanted, That he and his heirs after the end of thoſe 300 years, would make to the heirs of the Leſſee ſuch Leaſe for other 300 years. No Livery was made: The Queſtion was, forſmuch as the Fee-ſimple was expreſſed in the premiſſes of the Deed, If the Limitation in the *Habendum* for years be repugnant and contrary to the premiſſes? And it was Reſolved, That the *Habendum* was not repugnant to the premiſſes. And in this caſe, theſe differences were agreed for Law: When things take their eſſence and effect by delivery of the Deed, and which lye in grant without other ceremony, there ſuch a Limitation to one and his heirs, *Habendum* for life or years is void. The ſame Law, If a Seignory be granted to one and his heirs, *Habendum* to the Grantee for years, the *Habendum* is void; but when to an Eſtate limited in the premiſſes of the Deed, a Ceremony is requiſite to the eſſence and perfection of it: and to the Eſtate limited by the *Habendum*, nothing is requiſite but onely the delivery of the Deed, (as in the principal caſe) there although that the *Habendum* be of

leſſer Eſtate then is mentioned in the premiſſes, the *Habendum* ſhall ſtand. And therefore it was holden to be a good Leaſe in the principal Caſe. Note, in that Caſe a difference, between an Eſtate in the premiſſes of a Deed implyed, and an Eſtate expreſſed: As if A. grant a Rent to B. generally, the ſame by Implication is an eſtate for life: but if the *Habendum* be for years, the ſame Qualifies the generality, and implication of the premiſſes of the Deed. 2. It was Reſolved in the principall caſe, that theſe words, To the heirs of B. upon the conſideration of the whole Indenture, was void: and both Leſſees had a good eſtate for years; and if Livery had been made, the ſame ſhould not change their Eſtate. Paſch. 31 Eliz. in C.B. *Cook* 6. Part, 23. *Baldwins* Caſe.

13. Tenant for life, the remainder in Fee; Tenant for life made a Leaſe for years, the Leſſee entred: Tenant for life granted *Tenemento prædict.* to C. *Habendum Tenement. prædict.* from the Feaſt of St. *Michael* following for life, the Leſſee for years attorned: C. entred, and made a Leaſe at Will; to whom the Tenant for life levied a Fine *come ceo*, &c. he in the remainder Entred: In this caſe (amongſt other Points), It was Reſolved, That the Grant to C. was void; for that an Eſtate of Freehold cannot begin *in futuro*: And that the *Habendum* in this caſe is not repugnant to the premiſſes; for no certain eſtate is contained in the premiſſes of the Deed, but generally the Land given and granted, which might be qualified by the *Habendum* to an Eſtate for years, or at Will: For the Office of the premiſſes of a Deed of Feoffment, is to expreſs the Grantor, Grantee, and the thing granted; and the Office of the *Habendum* is to limit the Eſtate, ſo as the general implication of the Eſtate which ſhall paſſe by Conſtruction of Law of the premiſſes, is alwayes controlled and qualified by the *Habendum*: As a Leaſe to two, *Habendum* to the one for life, the remainder to the other for life, ſhall alter the general Implication of Joynt-Tenancy: And although the *Habendum* be void, yet no Eſtate ſhall paſſe by implication of Law, againſt the expreſſe Limitation of the party. Mich. 49 Eliz. *Cook* 2. Part, 55. *Bucklers* Caſe. Mich. 43 Eliz. in B. R. *Hodge* and *Croſſes* Caſe, adjudged acc.

14. In Treſpaſſe, the Caſe was, A man made a Leaſe of *Sextens* Meadow to A. for 10 years, and of Cheeſe Meadow to B. for 20 years: Afterwards by Indenture reciting both the Leaſes, he made a Leaſe to another of both for 40 years, to begin after the end or determination of the ſaid ſeverall Leaſes made to A. and B: The former Leaſe of *Sextens* Meadow ended, and the Leaſe of *Cheeſe*-Meadow continueth; and when the laſt Leaſe as to Sextens-Meadow in Queſtion ſhall begin, is the Queſtion? And if it ſhall not begin till the Leaſe of Cheeſe-Meadow be ended, then the Plaintiff hath entred before his time; for the former Leaſe of Cheeſe-Meadow hath yet Continuance. But if the *Habendum* in the later Leaſe, ſhall be taken *reſpectivè*, or *diſtributivè*, *reddendo ſingula ſingulis*; ſo that when the Leaſe of *Sextens Meadow* determineth, the new Term for 40 years ſhall therein begin; then Judgment ought to be for the Plaintiff. In this caſe it was Reſolved and adjudged, That the *Habendum* in the later Leaſe ſhall be taken *reſpectivè*; that is to ſay, the Leaſe of *Sextens* Meadow, to the Leſſee for 40 years ſhall begin preſently after the end of the firſt Leaſe thereof made; for that every Deed ſhall be taken ſtrongeſt againſt the Grantor, and moſt beneficiall for the Grantee; and it is more beneficiall for the Leſſee to have the Leaſe of *Sextens* Meadow to begin preſently after the firſt Leaſe made, then to tarry till the Leaſe of Cheeſe-Meadow be ended. Mich. 32 Eliz. in B. R. *Cook* 5. Part, 7. Juſtice *Windhams* Caſe.

15. The Queen ſeized of the Mannor of *Sutton Galeres* in the County of *York*, leaſed the ſame to H. B. for 21 years, who demiſed divers ſmall parcels thereof for years: And afterwards, the Queen reciting the ſaid Letters Patents made, and in Conſideration of a ſurrender of all his Eſtate, Term and Intereſt, granted the ſaid Mannor to the ſaid H. B, *Habendum à Die Confectionis Litterarum Patentium*, for 3. Lives. And in this caſe, It was Reſolved, 1. That the Grant was void, becauſe that the Queen was deceived in the Conſideration: For all the Eſtate and Term demiſed to the ſaid H. B. by the Queen, was not ſurrendred according to the Conſideration, and it was a ſurrender but in ſhew, and not in ſubſtance. 2. It was Reſolved, That when the Grant made to H. B, *Habendum à die Confectionis*, That the day of the Letters Patents themſelves was excluded; for, that (*a*) or (*ab*) is taken *excluſivè*. 3. Reſolved, That an Eſtate of Freehold could not commence at a day to come, becauſe he cannot make a preſent Livery to a future Eſtate; and an Eſtate for life cannot paſſe without Livery: and therefore the Leaſe granted by the Letters Patents, which amount to a Livery in Law, cannot begin at a day to come: For if the Freehold paſſe preſently by the Letters Patents from a day to come, then the Queen ſhould have a particular Intereſt or Term without a Donour or Leſſor, againſt the Rules of the Common-Law. Trin. 39 Eliz. in the Exchequer. *Cook* 5. Part, *Barwicks* Caſe, 94.

16. A Biſhop made a Leaſe of a Mannor to A. and B. for 60 years, without Impeachment of Waſte, rendring Rent, Provided, That if the ſaid

ſaid A. and B. dyed within the ſaid Term, that preſently after *deceſſum eorundem A. et B. et diviſus eorum vivent.* that it ſhould be lawful for the Biſhop and his Succeſſors to re-enter: A dyed; B. ſurvived; The Biſhop dyed, The Succeſſor Leaſed the Mannor to C, *Habendum cum, poſt, ſive per mortem ſuſum redd.* or forfeiture *prædict. B,* it ſhould be void for 60 years, which is confirmed by the Dean and Chapter, and afterwards granted the Reverſion to D. in Fee; the Tenant attorned, and after B. dyed: the ſecond Leſſee dyed, and his Intereſt came to the Plaintiff. It was Reſolved, That the ſecond Leaſe did veſt preſently in Intereſt, and did not depend upon contingency to take effect in poſſeſſion, or at the end of the firſt Term, if by none of the three former means, the firſt Leaſe became void in the mean time. And therefore it was Reſolved, That if a man maketh a Leaſe for years to begin after the ſurrender, forfeiture, determination, or end of a former Leaſe, The Leſſee hath not Election to have the ſecond Leaſe, either upon ſurrender or forfeiture, or end of the firſt Leaſe, which he ſhall pleaſe; but, which of them ſhall firſt happen, the ſecond Leaſe, which before did conſiſt in Intereſt, ſhall begin in poſſeſſion. 2. Reſolved, That when the Leaſe of the King is doubtfull if it ſhall be good, or not, and another is to take a Leaſe of the ſame Lands, The Courſe is, to make the *Habendum* to begin after the end or determination of the firſt Leaſe for ſo many years; and theſe Leaſes are good and effectual, *a fortiori* in the caſe of a common perſon. And therefore if A. reciting that B. hath a Leaſe for years, demiſeth the Land to C. for years, to begin after the end or determination of the firſt Leaſe (and in truth, there is not any former Leaſe in *eſſe*) the Leaſe to B. ſhall begin preſently. Trin. 3 Jac. in C. B. *Cook* 6. Part, 34. The Biſhop of *Bath*'s Caſe.

17. The King by his Letters Patents, granted the Office of his Park, called *Clipſon* Park, to A. for his life; and by the ſame Letters Patents granted the Herbage and Pawnage of the ſaid Park to A. for life: And afterwards the King by other Letters Patents, renting the Eſtate of the ſaid A, granted to B. *Officium prædict. Cuſtodis Parci prædict. vocat.* C. Park, for his life, *quam cito per mortem, ſurſum reddit. forisfact. aliquo modo vacaverit,* with all Fees; and by the ſame Letters Patents granted to B, the Herbage and Pawnage for his life (without ſhewing when the Eſtate of the Herbage or Pawnage ſhall begin) *adeo plene et integrè, prout prædict. A. habuit, tenuit, ſive gauviſus fuit.* The Queſtion was, If the ſaid Grant of the ſaid Herbage and Pawnage to B. was good, or not? And it was adjudged, That the grant of the Herbage and Pawnage was good. And amongſt other things in this caſe, It was Reſolved, That there was not any incertainty in the ſaid Grant of the ſaid Herbage and Pawnage when it ſhould take effect in poſſeſſion, for the ſame ſhall begin when the firſt Grant ſhall be ended, or determined: and although the ſame may be determined by death, ſurrender, or forfeiture, yet it can determine but once; and when which of them ſhall firſt happen, the Grant ſhall begin. And in that caſe, this Caſe was put; The King granted a Mannor to B. and his heirs, in the premiſſes of the Deed, *Habendum* the ſaid Mannor to B. and his Aſſigns, the Fee of the Mannor ſhall paſſe, and the omitting of the words, *Heirs,* in the *Habendum,* ſhall not overthrow that which was certain, in the premiſſes; and the Grant of the King ſhall be conſtrued *ſecundum intentionem et non in deceptionem Regis.* Auditor *Kings* Caſe. Mich. 6 Jac. in C. B. *Roger* Earl of *Rutlands* Caſe. *Cook* 8. Part, 55.

18. An Abbot and Covent made two ſeverall Leaſes of two ſeverall parcels of Lands, to two ſeveral perſons for 31 years by Indenture, both Leaſes to begin at one time; The Succeſſor reciting both the Leaſes, made a new Leaſe of both the ſaid parcels to another, *in hæc verba, Noveritis nos prædict. Abbatem et Conventum, dictis* 31. *annis finitis Conceſſiſe omnia præmiſſa* to the ſaid other perſon, *Habendum, à Confectione præſentium (dicto termino finito) uſq; ad finem* 31. *annorum tunc immediate ſequent.* And the words, *à die Confectionis,* were drawn through with a line by the Leſſee, but yet remained legible; and if this Leaſe ſhould take effect, to begin the term of 31 years after the end of the firſt 31 years, or immediately after the making of the Indenture, was the Queſtion? It was the Opinion of all the Juſtices, That it ſhould take effect in poſſeſſion at the end of the former Term, and not before: and the words, *à die Confectionis præſentium,* was but a Declaration of the firſt ſentence: and if it ſhould not be ſo, the Leſſee ſhould have but a ſhort term in the premiſſes, which was not the intent of the parties: And for the Indenture it ſelf, It was their Opinion, That it had loſt its force, by the drawing of the line through the words, although it was not in any place materiall, it being done by the Leſſee himſelf. Mich. 9 Eliz. *Dyer* 261.

4. *Where*

4. Where in pleading, a man ſhall ſay generally, Not his Deed; or plead the ſpeciall matter, and conclude ſo, Not his Deed; where not: And where Deeds pleaded, muſt be ſhewed; Where not.

1. IN Debt upon an Obligation, The Defendant ſaid, that he ſealed the ſaid Obligation, and delivered the ſame to the Plaintiff as an Eſcrowle ſafely to be kept, to be his Deed upon Conditions performed; And ſo it is not his Deed untill, &c. and averred, that the Conditions were not performed; And the Opinion of the Juſtices then was, That the Plaintiff ſhould not maintain an Action upon the Bond, untill, &c. See 43 E. 3. *Br. Conditions* 35. 27 H. 8. *Dyer* 35. But ſee now *Cook* 4. Part, 137. in *Thorowgood's* Caſe, That an Obligation cannot be delivered to the party himſelf, as an Eſcrowle, but it ſhall be his Deed preſently.

2. In Debt brought upon an Obligation, The Defendant pleaded *Non eſt factum* generally; and gave in Evidence, that upon an Agreement made between him and the Plaintiff, he paid the Plaintiff the mony, and that thereupon the Plaintiff pulled off the Seal from the ſaid Obligation; and ſo he ought not to be charged for that Debt, upon which the Plaintiff did demur: It is there a Quære, if the plea were good or not; But ſee now, *Cook* 5. Part, 119. in *Whelpdales* Caſe, the ſaid Quære Reſolved, That he cannot plead *Non eſt factum*; but he ought to plead the ſpeciall matter, and ſo conclude; and ſo it is not his Deed.

3. A. brought an Action of Debt as Executor upon an Obligation made, and dated 12. *Jan.* The Defendant ſaid, That the firſt of *May* he cauſed the Deed to be written, and delivered it as his Deed to A, to be delivered to the Teſtator, and A. profered it, and the Teſtator refuſed it, ſo not his Deed, upon which the Plaintiff did demur; It was adjudged for the Plaintiff, for it cannot be intended the ſame Obligation upon which the Action is brought; And it was holden in that Caſe, That the refuſall of it, did not make it to be no Deed, but that at another time, he might have accepted of it, and therefore in this Caſe, the Defendant ought to have pleaded the ſpeciall matter, and demanded Judgment of the Action. Trin. 1 Eliz. *Dyer*, 1 7. *Towes* Caſe. But if he had delivered it to A. as an Eſcrowle, to be delivered as his Deed; there, upon refuſal of it, the Defendant might plead *Non eſt factum*. See *Cook* 5. Part, 119. acc.

4. W. S. was bound in an Obligation to one J. D. and in the Obligation, he was named J. S. which was miſtaken: W. S. perceiving himſelf to be miſ-named in the Bond, ſealed and delivered it as his Deed; In Debt afterwards brought by J. D. againſt him upon this Obligation by the name of W. S. *alias dict.* J. S, The Defendant pleaded, That it was not his Deed, And if he ſhould be charged upon this Obligation, was the doubt; a Verdict being found for the Plaintiff. And the Opinion of the Juſtices of the Kings Bench was, That the Plaintiff ſhould not recover upon that Verdict. But it was ſaid by them, That it had been better that he had brought his Action by the name of J. S. as he was named in the Obligation; and then if he had appeared, and pleaded *ut ſupra*, that it was not his deed, he ſhould be concluded by the Obligation. Mich. 11 Eliz. *Dyer* 280. *Stebbolts* Caſe.

5. A. and B. were joyntly bounden in a ſingle Bill to J. S: B. dyed; J. S. brought Debt upon the Bill againſt A: The Defendant pleaded, That he ought not to be charged upon the ſame Bill; becauſe as to part of the money, B. paid it to the Plaintiff at ſuch a place in L: and for the reſidue of the money, that he himſelf paid the ſame to the Plaintiff at another time, which the Plaintiff did accept of in full ſatisfaction, and delivered the Bill to him in the name of an Acquittance of the ſame debt; by virtue of which, the Bill loſt his force and effect; and that afterwards the Plaintiff with force and arms took the Bill from him: and ſo he ſaid, That the ſaid Bill is not his Deed. It was holden by the Court, That this was no good plea; but he who pleads payment in the ſame County, muſt rely upon the *debet*: And a Bill Obligatory, though it be ſimple, cannot be diſcharged but by a Deed of as high a nature. And it was holden, That the Redelivery of the Bill to the Defendant, could not be an Acquittance, becauſe it wanted words of an Acquittance, or to that purpoſe. Mich. 33 H. 8. *Dyer* 51. *Cotterells* Caſe.

6. A Charter of Feoffment was made to 4, and Seiſin was delivered to 3. of them, in the name of all: & after the Seiſin was given, the 4th came, & ſaw the Deed, and ſaid by word, That he would have nothing in the Land, nor agree to the Deed, but diſagree. It was adjudged, That this diſagreement to the Deed by word *in pais*, ſhould not deveſt the Freehold out of him, which was veſted in him by the Deed, and the Livery made upon it. 13 R. 2. *Cook* 3. Part, 26. in *Butler* and *Bakers* Caſe, acc.

7. In Treſpaſſe for taking and carrying away four Aſhes, in a place called Cave cloſe, The Defendant

fendant ſaid, That one J. P. was ſeiſed of the Cloſe in which, And by Indenture, 21 Eliz. demiſed the ſame to J. D. and others, *inter alia* excepting the Wood, and Underwood, there growing, To have for the life of one A. P. and Covenanted, That it ſhould be lawfull for the Leſſees and their Aſſigns, to take neceſſary Firebote, Houſebote, &c. to be expended upon the premiſes. J. P. dyed, A. P. ſurvived him, and took to Husband J. N. and that the Leſſees Aſſigned over their Eſtate to the ſaid A. and that the Defendant as her ſervant, took the four Aſhes for neceſſary Houſebote, to be expended upon the premiſes: and averred the life of A. It was thereupon demurred, becauſe he juſtifies by force of a Covenant in an Indenture, and doth not ſhew the Indenture; it being a thing which cannot be Granted without Deed: It was ſaid for the Defendant, that, in regard that he juſtifies onely as a ſervant, and doth not claim any Title, that he need not ſhew the Deed of Covenant. But all the Court held the Plea to be ill; For a Servant juſtifying under the Intereſt of his Maſter, and medling with the Title, ought to ſhew the Deed, for it is the ſubſtance of the Title, and without ſhewing it, he cannot juſtify, and it is his folly to juſtify under one who neither could nor would ſhew the Deed. It was adjudged for the Plaintiff. Mich. 8 Jac. in B. R. *Purfrey* and *Grymes* Caſe. *Cro.* 2. Part, 291, 292.

8. In Treſpaſſe, the Defendant juſtified and pleaded, That the King was ſeiſed of a Rectory in Fee, and demiſed the ſame to the Plaintiff for life (without ſhewing the Letters Patents to the Court): And that the Plaintiff demiſed the ſame to J. S. for eight years, if he lived ſo long; and that he as Servant to J. S. took the Tythes, upon which the Plaintiff did demur. In this Caſe, amongſt other points, one was, If the Letters Patents ought to be ſhewed by him who juſtifies as Servant to him who hath but parcell of the Eſtate of him to whom the Letters Patents were made: In which Caſe, it was Reſolved. 1. That he who is party, or privy in Eſtate, or Intereſt, or he who juſtifies in the right of him who is party or privy, ſhall plead a Deed, although he who is party, or privy, doth not claim but parcell of the Originall Eſtate; That it may appear to the Court if it be legall or not; And alſo becauſe it may appear to the Jury, that it is ſealed, It ought to be ſhewed in Court; But upon great extremity, as in Caſe where the Evidences are burnt by a Fire, there, upon the generall Iſſue pleaded, a Deed may be proved upon an Evidence to the Jury by Witneſſes, without ſhewing the ſame in Court. 2. Reſolved, That where a man is a ſtranger to a Deed, and doth not claim any thing compriſed in the Grant, nor any thing out of it, nor doth any thing in the right of the Grantee, there he may plead the Patent, or Deed without ſhewing the ſame, As if the Tenant plead a Grant of the Seignory, with an Avowment. 3. Reſolved, That the not ſhewing of the Letters Patents in the principall Caſe to the Court, was matter of ſubſtance, and not of form. 4. Reſolved, That where an Eſtate is created by Act in Law, and not by the Act of the party, there he ſhall not ſhew the Deed, his Guardian, Tenant in Dower, Tenant by Statute Merchant, Staple *Elegit*; Yet Tenant by the Curteſy, ought to ſhew a Releaſe made to his Wife, becauſe the ſame doth belong unto him, and he had it in his power. *Cook* 10. Part, 88. Dr. *Leyfield's* Caſe.

9. In Aſſumpſit, the Plaintiff declared upon a Promiſe to the Inteſtate, and that the Inteſtate dyed, and that Adminiſtration of his goods was committed to him; but did not ſay that he produced his Letters of Adminiſtration in Court. And upon Iſſue of Non-Aſſumpſit, it being found for the Plaintiff; It was moved, that the Plaintiff could not have judgment, becauſe he produced not in Court his Letters of Adminiſtration. And of that Opinion was the whole Court, for it is the ſubſtance of the Action, that he be a ſufficient Adminiſtrator, and though he hath pleaded ſo, yet he muſt ſhew it to the Court, that it may appear to them to be ſo as he hath pleaded, as upon a Plea of a Deed, the Deed muſt be ſhewed in Court. Trin. 12 Jac. *Cape* and *Lewyn's* Caſe. *Hob.* 38.

10. An Action upon the Caſe was brought againſt the Sheriff of *Oxon*, and the Plaintiff declared, When upon an Action of Debt brought by him as Executor of J. S. againſt J. D. the Defendant had him in Cuſtody upon a *Capias ad ſatisfaciendum*, that he ſuffered him to eſcape, not ſhewing the Teſtament, and notwithſtanding Judgment was given for the Plaintiff: But this Caſe differs from the Caſe in the Section next before, for that the Eſcape was a wrong to the Executor himſelf, though it be true, that the damages to be recovered, ſhall be Aſſets in his hands, for ſo they ſhall be in all poſſeſſory Actions, and the producing of his Letters in his firſt Action is ſomewhat. Trin. 12 Jac. *Barret* and *Winchcombes* Caſe. *Hob.* 38.

11. Husband and Wife brought an Action againſt J. S. the Defendant pleaded, That J. D. was ſeiſed, and dyed ſeiſed, &c. and that the Lands came to him as Heir. The Plaintiff replyed, that before &c. one B. was ſeiſed, and leaſed the ſame to one M. who dyed Inteſtate, and the Adminiſtration was committed to the Wife, and traverſed the dying ſeiſed; being found for the Plaintiff, It was moved in ſtay of Judgment, that the Plaintiff ſhould have ſhewed the Letters of Adminiſtration;

tion; But the Court gave Judgment for the Plaintiff, because his possession which is affirmed by the Verdict, was his Title, and the Administration was but an Inducement to the traverse. Hill. 15 Jac. in C. B. *Chester* and St. *John's* Case. *Hob.* 218.

12. In a *Quare Impedit* brought by A. against Sir *John Shelley*, the Bishop of N. and J. S. Clark, The Plaintiff declared that King E. the fourth, the eighth of his Reign, did Grant to J. M. by his Letters Patents, *Quod ipse, Hæredes, et assignati sui habebunt omnia et omnimoda bona et Catalla quorumcunque felonum, &c. ac omnia bona et Catalla quæcunque nuper Regi, hered. et succ. suis, quocunque modo, &c. forisfact. ei forisfaciend.* and then conveyes the Liberties to him for years, and the Advowson to Sir *John Shelley*, who Granted to one T. S. the next Avoydance, who was outlawed for Debt, and the Church became void, and so it belonged to him to present; upon which Declaration, the Defendant Sir *John Shelley*, confessed the Action, and the Bishop demurred in Law, his Counsell conceiving that the Grant of the Liberties did extend onely to the goods and Chattells of persons, Outlawed onely for Felony. In this Case many points were stood upon, and Resolved: Amongst which, one was, If the Plaintiff were to produce and shew forth, the Grant of the Advowson and next Avoydance; And as to that point, It was Resolved, That the Deed of the Grant of the Avoydance to *Shelley*, was not to be shewed by the Plaintiff, he being in the Post, and not privy to the Grant in any wise. 2. Resolved, That the Advowson had such a Locality in the place where the Church was, that it accrued to the Plaintiff, whersoever the Deed of Grant was, or the Grantee himself at the time of the Outlawry. Mich. 17 Jac. in C. B. rott. 2710. *Holland* and *Shelleys* Case. *Hob.* 303.

13. The Lord by Escheat, although that his Estate be created by Law, shall not plead a Condition to defeat a Freehold, without shewing of it; because the Deed doth belong unto him, and therefore it is presumed that he hath it in his Custody. So likewise a Tenant by the Curtesy, shall not plead a Condition made to his Wife, and a Re-entry for a Condition broken, without shewing the Deed: for albeit his Estate be created by the Law, yet the Law doth presume that he hath the possession of the Deeds belonging to his Wife. *Cook* 1. Part, 1. *Institutes*, 226.

5. *Where Deeds, after they are pleaded, shall remain in Court; and where they shall be delivered out of Court: Where not; Where damned, where not.*

1. IN Debt brought upon an Obligation, The Defendant pleaded, That it was not his Deed, and the Deed was brought into the Court, and left with one of the Clerks of the Court; and they being at Issue upon it, before the day of appearance of the Enquest, by negligence of the Clerk who had the Custody of it, the Ratts had eaten off the Labell from the Obligation. It was by the Justices given in charge to the Jury, That they should find that the same was the Deed of the Defendant, at the time of the Plea pleaded, although the Seal of it was eaten off by negligence, whilest the Deed did remain in Court; and the Jury found it to be the Deed of the Defendant accordingly. 31 H. 8. *Dyer*, 59. *Harwood's* Case.

2. In Debt upon an Obligation, the Case was, A man was bound to pay 20 l. *viz.* 10 l. at *Michaelmas*, and 10 l. at *Christmas*, he tendered the 10 l. at *Michaelmas*, and it was in Pollards, which after was abused, which was refused; and he failed of payment of the other 10 l. upon which the Action was brought: And upon the tender pleaded, &c. Judgment was given in that Case, that because it was the default of the Plaintiff himself, that he received not the 10 l. upon the first payment, that it should be paid to him in Pollards, but for the second payment of the 10 l. it should be paid to him in Sterling mony, with the Damages; and the Deed being in Court, It was adjudged, That it should be Cancelled. Hill. 7 E. 6. *Dyer*, 82.

3. In an *Ejectione firmæ*, The Defendant pleaded, That J. S. was seised, and by Deed Indented, and enrolled, *quod quidem scriptum hic in Curia profert.* bargained and sold the Land to J. D. and his Heirs, who made to him a Lease for years, The Plaintiff in his Replication confessed the Bargain and Sale, but said, *In eodem scripto Indentato.* There was a Proviso, That if the said J. D. did not pay 300 l. to J. S. such a day, that then the said bargain and Sale should be void, and that he did not pay it; And if the Plaintiff should have advantage of the said Indenture without shewing the same in the Court, was the Question. In that Case, It was Resolved, That when any Deed is shewed in Court, The Deed by Judgment of

of Law, remains in Court all the Term, in which it is ſhewed; And when the ſame remains in Court, any party the ſame Term may take benefit of it, though he have it not in *poigne*. But at the end of the Term, there is no Officer appointed by Law to keep the Deed, and then the party who ſhewed it, ſhall have the keeping of it; And when the Deed in another Term, is in the keeping of the party, and not in Court, there the Defendant ſhall not have *Oyer* of it: And in that Caſe, it was ſaid, there is a difference between Letters Patents, and other matters of Record, which of their own nature are of Record, and matters in *fait*. For although, That a Deed be enrolled of Record, one cannot plead it in the the ſame Court, without ſhewing of it; But if a Deed be pleaded, and ſhewed forth, and denyed; then the ſame for ever remains in Court, For if it ſhall be found not his Deed, it ſhall be damned: And if the Deed be denyed in Court, by which it remains there, the ſame Deed may be pleaded in another Court without ſhewing of it. Mich. 36 Eliz. in B. R. *Wymarkes* Caſe. *Cook* 5. Part, 74.

4. Note, In Antient times, when a man recovered upon an Obligation, It was holden, That the Deed ſhould be damned, otherwiſe by the folly of the party, he might be charged again upon the ſame Bond. 17 E. 3. 24. In which Caſe was obſerved, the Contentation and quietneſſe of men in old times, that when Judgment was given againſt them by courſe of Law, they were ſatisfied with it, without prying into the proceedings, or tryall, or inſufficiency of pleading to find Error, to enforce the party to a new Suit; but after Writs of Error and Attaints became frequent, the Judges thought it dangerous to cancell the Deed, either where the Plaintiff recovered, or was barred by the Judgment, for that in both Caſes the Judgment might be reverſed by Error, or Attaint. *Cook* 6. Part, 46. in *Higgins* Caſe.

6. *Where a Deed may be uſed in Pleading, or otherwiſe as a Grant, Releaſe, or Confirmation, where not; And where a man ſhall plead a Deed, as a Feoffment, Grant, Releaſe, or Confirmation, by the Name compriſed in the Deed, though he hath another name, Where not.*

1. IN an Action of Treſpaſſe brought, the Defendant pleaded in bar, That the Plaintiff within age, by Indenture made a Feoffment to the Father of the Defendant, rendring Rent, and that after by Indenture, he confirmed *Tenementa prædict.* &c. *Habend. Tenementa prædict. ſibi et hæredibus*, and that his Father died ſeiſed, and that the Land diſcended to him, upon which the Plaintiff did demur. It was holden by the Court, that the Feoffment which he pleaded, was void by his own ſhewing, for being by Letter of Attorney of an Enfant, it is a Diſſeiſin. Alſo he pleaded, That the Plaintiff confirmed *Tenementa prædict. Habend. Tenementa prædict.* and that is not true, that the Land ſhould paſſe here; but where a confirmation enures by way of enlargement. See Mich. 2. *Ma. Dyer*, 109. *Rugwayes* Caſe.

2. The Queen had a Rent of 20 l. out of certain Lands, whereof the Husband and Wife were Joynt-Tenants, and Gave, Granted, Demiſed, Releaſed, and Renounced the Rent to the Husband and his Heirs; the Husband deviſed the Rent; It was holden by the Lord *Dyer*, That that ſhall be a Declaration of the Husband of his Election, to have the Deed ennure as a Grant, and not by way of Extinguiſhment. Mich. 14 Eliz. *Dyer*, 319.

3. Leſſee for years rendring Rent, the Reverſion was granted for life, the Remainder over, the Grantee releaſed all his Right to him in the Remainder; He in the Remainder, Granted the Reverſion in Fee, the Tenant for life alſo Releaſed to his Grantee, *ut ſupra*. It was holden in this Caſe, That the Releaſes were void, becauſe there are not words in them of ſurrender: Yet it is there a Quære, If the ſecond Releaſe ſhall not ennure as an Attornment to make the Remainder to paſſe. Paſc. 8 Eliz. *Dyer*, 251.

4. Husband and Wife, and A. purchaſed Lands to them, and to the Heirs of the Husband, and A.; A. releaſed to the Husband without words of enlargement of his eſtate, The Husband and

Wife made a Leaſe of the whole Land, rendring Rent, the Husband dyed; it was adjudged, That the Heir of the Husband ſhould have but a moyety of the Rent, for the Releaſe did enure to the Husband onely, and not to the Wife, and that there needed not any words of enlargement, becauſe he had a Fee, but contrary if the Releaſe had been to the Wife, who had an eſtate but for life. Trin. 9 Eliz. *Dyer* 263.

5. A Corporation is incorporated by the name *Majoris et Burgenſium Burgi Domini Regis de Lynn Regis*; And a Grant is made to them, that they ſhall be called by the ſame name onely, and not by any other name: An Obligation is made to them by the name *Majoris et Burgenſium de Lynn Regis*, leaving out the words *Burgi Regis* out of the Obligation; Yet it was Reſolved, That the Obligation was good; And it is not needfull That the name of the Corporation be in Grants and Conveyances *idem ſyllabis ſive verbis*, but it is ſufficient if it be *idem re et ſenſu*; And in this Caſe the variance is onely in Syllables and words, and not *ſenſu, et reipſâ*: And it was holden, that in pleading, or in a ſpeciall Verdict, If by expreſſe Averment, or by the finding of the Jury it ſhall appear to the Court, that the true name of the Corporation, in the name, in the Leaſe, Grant, or Obligation, be all one in effect, they ſhall much enforce the matter, although in the words there ſeems to be ſome difference. Mich. 10 Jac. in C.B. The Mayor and Burgeſſes of *Lynn's* Caſe. *Cook* 10. Part, 122, 123.

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7. *More Concerning the Validity, Legality, Conſtruction, and pleadings of them; and Where they ſhall be void, becauſe fraudulently made; or for incertainty, or other defect in them; and, Where not; and what things muſt paſſe by Deed; What not.*

1. ERror of a Judgment in the County of *Flint*. The Caſe was, A. gave Lands to B. and his Wife; *Habendum*, to the Husband and Wife, to the uſe of them, and the Heirs of their two bodies; and for default of ſuch Iſſue, to the uſe of C. and his Heirs; And, whether the Husband and Wife have an Eſtate Tail, or but for their lives, was the Queſtion. It was objected, that the Eſtate out of which the uſe ſhould riſe, was but for their lives, and the uſe cannot make the Eſtate longer then the Limitation. For where Lands are given to two for their Lives, to the uſe of another for his life, if the Leſſees dye, the uſe to him to whom it is limitted, is determined: But the Court held, there is a difference, where an Eſtate is limitted to one, and the uſe to a ſtranger, there the uſe ſhall not be more then the Eſtate, out of which it is derived; But when it is limitted to two, *Habendum*, to the uſe of the Heirs of their bodies, This is no limitation of the uſe, but a Limitation of the Eſtate, and the Heirs of their bodies, and they are in by the Common Law, and ſhall take, as a Limitation to them, and the heirs of their bodies, with a Remainder over, that the Deed might be conſtrued, according to the intent of him that made it. Paſc. 6 Car. in B. R. *Jenkins* and *Young's* Caſe. *Cro.* 1. Part, 167.

2. In *Ejectione firmæ*, the Caſe was, That an Abbot, 31 H. 8. made a Leaſe for *Octoginta et treſdecem annos*; And whether in this Caſe *treſdecem annos*, ſhall be thirty, or thirteen years, was the Queſtion: It was holden by the Court, that it ſhall be taken according to the Common ſpeech, for thirteen years, for *tredecem*, and *treſdecim* are all one, and it is ſo Writ *Euphoniæ gratia*; and it being one intire word, cannot be otherwiſe taken, but if it were written as ſeverall words, it ſhould be otherwiſe. And it being after *Octoginta annos*, it ſhall be rather ſo intended, for if he meant it for thirty years, it ſhould have bin 110, years, wherefore they agreed it to be for 93 years, and no more, Adjudged for the Plaintiff. Hill. 9 Car. in B. R. *Hopewell* and *Starkin* Caſe. *Cro.* 1. Part, 281.

3. Debt upon an Obligation, dated 24 *Junii*, 9 Car. The Defendant pleaded, That the Plaintiff 22 *Feb.* 10 *Caroli*, releaſed unto him all Actions, and demands which he had, &c. The Plaintiff demands Oyer of the Releaſe, which was a Releaſe of all Actions untill the day of the Releaſe; And for this miſpriſion, the Plea was adjudged ill, and the Plaintiff had Judgment. Mich. 11 Car. in B. R. *Digby* and *White's* Caſe. *Cro.* 1. Part, 308.

4. In Error to reverſe a Judgment in *Cheſter*, the Caſe was, J. Earl of *Oxon*, and E. his Wife, were ſeiſed of the mannor of B. in Fee, and had Iſſue *John*. Afterwards J. Earl of O. by Indenture, let the ſaid Mannor to A. S. for 30 years: E. dyed, and after J. Earl of O. dyed; *John* the ſon by Indenture, reciting the Leaſe to A. S. to be dated 20. *Feb.* 2 H. 8. let the ſaid Mannor to J.S. *Habendum*, after the end, ſurrender, or forfeiture of the ſaid A. S. for 31 years: Then it was found, That after the making of the ſaid Indenture, the word 28 H. 8. were raſed and made, 27 H. 8. and afterwards 35 H. 8. the ſaid *John* Earl

Earl of *Oxon*, by Indenture betwixt him and J. D. reciting the Leaſe of A. S. to be 27 H. 8. granted the Reverſion of the ſaid Mannor and Premiſes to the ſaid J. D. *Habendum* the ſaid Mannor and Premiſes, from ſuch time as the ſame ſhall revert, or come to the Poſſeſſion of the ſaid Earl, or his Heirs, by ſurrender, forfeiture, or otherwiſe, for 60 years: 4 Eliz. *John* dyed ſeiſed, and the Mannor is diſcended to his ſon *Ed.* Earl of *Oxon.* That he by Indenture, 14 *July*, 15 Eliz. reciting whereas *John* his Father by Indenture, 30 *July*, 35 H. 8. demiſed to J. S. the ſaid Mannor of R. for 30 years from the end, and determination of the Leaſe made to A. S. which was dated 10. *Feb.* 28 H. 8. and re-granted the Leaſe to J. D. for 60 years, to begin after the expiration, ſurrender, or forfeiture (omitting the words, or otherwiſe) of the Leaſe of A. S. The ſaid *Ed.* Earl, demiſed the ſaid Mannor to J. S. *Habendum* from the end of the ſaid Leaſes, for 50 years; The Queſtion was, whether any of theſe Leaſes to J. D. or J. S. be good, or were in *Eſſe* at the time, by Sir *Randall Crew*: which Leaſe was made 12. *Aug.* 4 Car. Sir *Randall Crew* claimed the Inheritance, from the Earl of *Oxon*; and J. G. claymed the Leaſes from J. S. and J. D. And Judgment being given for the Plaintiff in *Cheſter*; Error was brought. This Caſe was argued by all the Juſtices; And it was agreed by them all, That the Judgment in *Cheſter* was well given, and ſhould be affirmed. The firſt Queſtion was, Whether the Leaſe to A. S. was determined after the death of *John* Earl of *Oxon*, who was ſeiſed thereof in the right of his Wife; and he Tenant by the Curteſy; or onely determinable by the entry of the Heir. And all the Juſtices agreed, That it was determined by the death of *John* Earl of *Oxon*, Tenant by the Curteſy, and then A. S. was but Tenant at ſufferance, and the Freehold was in the Earl of *Oxon*, and no Reverſion. The ſecond point was, When the Leaſe to J. S. began; It was Reſolved, That it began preſently at the time of the ſealing, becauſe no ſuch Leaſe was in *Eſſe* to A. S. The third point was, the Leaſe to J. S. being raſed in a materiall point, after the Sealing and delivery thereof, whether it be a cauſe to make the Leaſe void; *Jones* and *Berkley* Juſtices ſaid, That the Deed was void by the raſure, but the Leaſe was good, and remains in *Eſſe*, notwithſtanding the raſure, and took a difference when an Eſtate loſeth his Eſſence by a Deed, viz. where it may not have an Eſſence without a Deed, there if the Deed be raſed, after the delivery, it determines the Eſtate, and makes it void, but when an Eſtate may have an Eſſence without a Deed, there although it be created by Deed, and the Deed be afterwards raſed by the Party or a Stranger, it ſhall not deſtroy the Eſtate, although it deſtroy the Deed. A 3d point was, Whether the Leaſe to J. D. were good or void. It was Reſolved, That it was void; For the Grant in the premiſes, is onely of a Reverſion, and it was the Judgment of the parties, to paſſe the Reverſion onely expectant upon the former Leaſes; And when there is not any ſuch Leaſe, it cannot paſſe the Lands in poſſeſſion: And although the *Habendum* is to have and to hold the Land, that ſhall not paſſe the Land in poſſeſſion, for it is intended he ſhould have the Lands ſo returning; And Deeds are to be conſtrued, that they ſhall paſſe things according to the intent of the parties, and here the demiſe and Grant is onely of a Reverſion; and the *Habendum* ſhall not enlarge it contrary to the Grant. Hill. 10 Car. in the Exchequer Chamber. *Miller* and *John's* and *Manwearing's* Caſe. *Cro.* 1. Part, 289, 290.

5. In *Ejectione firmæ*, the Caſe was, One gave Lands to Husband and Wife, and their Heirs, *Habendum* to them and the Heirs of their bodies, the Remainder to them, and the ſurvivor of them for life, To hold of the chief Lord, with a Warranty to them and their Heirs; Whether it were a tail, and a Fee expectant, or onely an Eſtate tail, was the Queſtion, It was adjudged, That it was an Eſtate tail, with a Fee expectant; For, firſt, It is given in Fee, and the *Habendum*, though it limits the Eſtate in tail, doth not limit the Remainder to another, and this is enforced by the Tenure limitted of the Lord Paramount, which cannot be, if it were an Eſtate tail; And the Office of Judges is ſo to expound a Deed, that all the words of the Deed be effectuall if it may be. Paſc. 16 Jac. in B. R. *Cro.* 2. Part, 476.

6. *Ejectione firmæ* was brought upon a Leaſe made 1. *Jan.* 3 Jac. *Habendum à Dato Indenturæ prædict.* and the Ejectment was the ſame day. It was moved in ſtay of Judgment, that this Leaſe being *à dato Indenturæ prædict.* that it is as much as to ſay, from the date, according to *Cook* 5. Part, 1. *Clayton's* Caſe. But it was Reſolved, That the date is the time of the delivery, and it differs from the time, or day of the date; wherefore the Ejectment alledged *poſtea*, the ſame day, is good enough, and it was adjudged for the Plaintiff. Hill. 13 Jac. in B. R. *Osborn* and *Rider's* Caſe. *Cro.* 2. Part, 135.

7. Covenant upon an Indenture dated 9. *Oct.* 38 Eliz. The Plaintiff declared, Whereas by Indenture a *Charter partie*, dated 7. *Sept.* 38 Eliz. between the Plaintiff and *Fr. C.* The Plaintiff having hired a Ship of him for a Voyage to D. for Corn; It was agreed betwixt them, that the ſhip ſhould be laden with Corn to D. and to ſail to *Legorn*; by the ſaid Indenture, in conſideration that

the Plaintiff had agreed, That the Defendant ſhould have the moyety of the Corn, *quod tunc fuit*, or hereafter ſhould be, laden in the ſhip in the ſaid Voyage: The Defendant promiſed to pay the moyety of the mony for the ſaid Corn *quod tunc fuit*, or afterwards ſhould be laden, &c. and layed, That the 9th of *October*, 38 Eliz. the ſhip was laden with 60 Laſts of Corn, and for not performance, the Action was brought: The Defendant pleaded, That the Deed was Sealed and delivered, 28. *October*, 38 Eliz. *et quod tunc vel poſtea*, there was not any Corn laden there, and traverſed the delivery, 9 *Octobris*, or at any time after, before the 28th of *October*, 38 Eliz. upon which it was demurred. It was Reſolved by the Court, in regard the Plaintiff declares upon a Deed dated 9. *October*, 38 Eliz. It ſhall alwayes be intended to be delivered, and to have its eſſence at that time, and at no other; And if he would afterwards confeſſe it to be delivered at another time, it is a departure from his Declaration; And the word *tunc* is referred to the time of the Eſſence of the Deed, by the delivery, and not to the date. It was adjudged for the Defendant. Mich. 8 Jac. in B. R. *Oſley* and Sir *Baptiſt Hixes* Caſe. *Cro.* 2. Part, 263, 264.

8. Note, It was Reſolved by the Chief Juſtice, and Chief Baron in the Court of Wards, That upon a Deed of Bargain and ſale for years, of Lands whereof he is in poſſeſſion, and the Bargainee never entred; If afterwards the Bargainor makes a Grant of the Reverſion (reciting his Leaſe) expectant upon it to divers uſes, that it is a good conveyance of the Reverſion, and that the Eſtate was abſolutely veſted in the Leſſee for years by the Statute; and as the uſe was, but not to have Treſpaſſe without Entry, and actuall poſſeſſion. Mich. 18 Jac. *in Cur. Ward. Lutwich* and *Mitton's* Caſe. *Cro.* 2. Part, 604.

9. A man poſſeſſed of divers Lands within the Mannor of D. ſome for Years, others at Will, others by Copy, and of ſome in Fee, demiſed the whole to another for life, and then levyed a Fine to the Tenant for life, and his Heirs of ſo many Acres, as amounted to the whole Land, and continued the poſſeſſion, and paid the Rent to the Lord five years paſſed. In that Caſe, it was holden, That the Lord was not barred by the Statute of 4 H. 7. of Fines, for the Makers of that Statute did never intend, That ſuch a Fine levyed by fraud and practice of the Tenant for years at Will, or by Copy, which pretend no title to the Inheritance, ſhould be a bar to them of their Inheritance. For by the preamble of the Statute, Fines ought to be of greateſt ſtrength to avoid ſtrifes, and debates; but when ſuch Tenants make a Feoffment by aſſent and Covin, that a Fine ſhould be levyed, this is not to avoid ſtrife, and debate, but to ſtir them up; and therefore that Statute ſhall not intend to eſtabliſh ſuch an Eſtate made and created by ſuch fraud and practice. *Cook* 3. Part, 77. in *Farmer's* Caſe.

10. A. is endebted to B. in 100 l, and to C. in 200 l: C. brings Debt againſt him; A. in ſecret makes a general guift to B. by Deed, of all his goods, in ſatisfaction of his debt, and notwithſtanding continueth the poſſeſſion of the ſaid goods: C. recovers againſt A, and hath Judgment; and hath a *Scire facias* to the Sheriff: The Sheriff coming to levy Execution of the ſaid goods, B. makes Reſcous, and affirms the guift of the goods to be good to him. It was adjudged in this caſe, That the guift was fraudulent, and is within the Statute of 13 Eliz. for here were all the badges of fraud, 1. The guift was general, without exception of things neceſſary. 2. The Donor continued the poſſeſſion of the goods after the guift. 3. It was ſecret, and not delivered amongſt his Neighbours. And, 4. It was dependent the Suit. (2.) It was Reſolved, That although the debt was a true debt, and the Conſideration good, yet it was not good, becauſe it was not made *bona fide*. And it was holden, That as a guift made upon good Conſideration, unleſſe it be made *bona fide*, is not within the Proviſo of the Statute; ſo a guift *bona fide*, if it be not upon good Conſideration, is not within the Act, but it ought to be upon good conſideration and *bona fide*: And Conſideration of blood or nature onely, is not a good Conſideration within the Statute, for that implyes a Truſt, which implyes a fraud; but the Conſideration within the Statute ought to be a valuable Conſideration. *Cook* 3. Part, 18. *Twines* Caſe.

11. A man being Endicted for Recuſancy, intending to flye over Sea, made a guift of all his Leaſes and goods upon feigned Conſiderations, and then fled beyond Sea, and afterwards was Outlawed upon the Endictment: It was Reſolved in that caſe, That the ſame was a fraudulent Conveyance within the Statute of 13 Eliz. And it was Reſolved, That this word (forfeiture) in the Statute, ſhall not extend onely to forfeiture of an Obligation, or the like; but to every thing which by the Law ſhall be forfeited, either to the King, or a Subject. Mich. 36 Eliz. in the Exchequer. *Pouncefoot* and *Blonts* Caſe.

12. A man conveyed his Land to the uſe of himſelf for life, and afterwards to the uſe of divers of his Kindred, with power of Revocation after ſuch a Feaſt; and afterwards and before the power of revocation began, he for valuable Conſideration bargained and ſold the Land from his heirs. It was adjudged, That this bargain and ſale was within the remedy of the Statute of 27 Eliz.

Eliz. Cap. 4. of *Fraudulent Conveyances*: For the Act wills not, that ſuch a voluntary conveyance originally ſubject unto the power of Revocation, ſhall ſtand againſt a purchaſor *bona fide* for valuable Conſideration. Mich. 43 Eliz. in B. R. *Standen* and *Rollocks* Caſe, vouch. in *Cook* 3. Part, in *Twynes* Caſe.

13. A man makes a Leaſe for years by Covin and Fraud, and afterwards makes another Leaſe *bona fide*, with a Rent reſerved. It was adjudged in that caſe, That the ſecond Leſſee ſhould not avoid the firſt Leaſe; 1. Becauſe that an Eſtate by fraud ſhall be avoided onely by him who hath a former right. 2. Becauſe that no Purchaſor ſhall avoid a precedent Conveyance made by fraud, but he who is a purchaſor for money, or other valuable Conſideration paid, or given; which words exclude conſideration of nature, or blood. 37 Eliz. in C. B. *upton* and *Baſſetts* Caſe.

14. A. by Indenture Covenants with B, for the advancement of ſuch heirs males as well which he hath begotten, as which hereafter he ſhall beget on the body of his wife, before ſuch a Feaſt, to levy a Fine to the uſe of himſelf for life, and afterwards to the uſe of the eldeſt Iſſue male of the body of him & his wife begotten, with divers remainders over; and afterwards A. makes a Leaſe of all the Lands for 1000 years, and afterwards levied a Fine accordingly; It was Reſolved in this caſe, although the Iſſue was a purchaſor; yet he was not a purchaſor in the vulgar and common Intendment. 2. That the Conſideration of blood, and naturall affection, was not a good Conſideration, which ſhall be intended a valuable Conſideration within the Statute of 27 Eliz. Cap. 4. Paſc. 32 Eliz. *Needham* and *Beaumonts* Caſe, vouch. in *Cook* 3. Part, *Twynes* Caſe.

15. Debt was brought againſt the ſon and heir, upon an Obligation made by his Father: The Defendant pleaded, That he had nothing by Diſcent. It was found by Verdict, That before the Suit began, the Defendant had made a Feoffment in Fee of all his Lands, to defraud the Plaintiff of his Action; but this fraud was not pleaded: It was adjudged by the Court, That this fraud need not be pleaded ſpecially, but might be given in Evidence, 1. Becauſe the Statute of 13 Eliz. provides generally, That the Eſtate as to Creditors ſhall be void; and Acts of Parliament made for the prevention and ſuppreſſion of Fraud, ought to have a favourable Interpretation. 2. If that matter ought to be pleaded, It would prove miſchievous to Creditors, and would much tend to the maintenance and encreaſe of Fraud and Covin: For Fraud and Covin is ſo privily hatched, and ſo artificially contrived and concealed, that the party grieved hath no means to find out, or know them, and then to force the Plaintiff who is a ſtranger to it, to plead the firſt, and that it was done by fraud, would be miſchievous, and againſt Law and reaſon. *Cook* 5. Part, 60. *Gooches* Caſe.

16. In Debt againſt the Adminiſtrator of J. S, the Caſe was; J. S. for 20 l. paid by the Plaintiff, 9 Febr. 2 Car. granted all his goods mentioned in the Schedule annexed to the Deed, and gave poſſeſſion of them by a Pewter diſh, with a Covenant, that He, his Adminiſtrators, &c. ſhould ſolely keep them, and deliver them to the Plaintiff upon his demand, and bound himſelf in 40 l. to the Plaintiff for the performance of that Covenant: A. dyed; The Plaintiff demanded the goods of the Adminiſtrator, who would not deliver them. Whereupon the Plaintiff brought his Action, and in his Declaration ſhewed *in ſpecie*, what goods were contained in the Schedule: The Defendant pleaded the Statute of 13 Eliz. of *Fraudulent Guifts*: and ſaid, That J. S. the Inteſtate, 2. *Febr.* 2 Jac. was endebted to divers perſons in ſeveral ſummes, and ſet forth the perſons and ſums, amounting to 100 l: and 19 Febr. made the Deed of the goods above mentioned, being then of thoſe and other goods poſſeſſed to the value of 80 l, and no more; and that it was made of Fraud and Covin betwixt J. S. and the Plaintiff, to defraud his Creditors; and that J. S. notwithſtanding the guift, uſed and occupied all the goods during his life; and that after his death, adminiſtration was committed to the Defendant. The Plaintiff Replyed, That the Defendant had Aſſetts in his hands, and that the guift was made upon good Conſideration. The Plaintiff demurred upon the Defendant's plea: And the demurrer was adjudged to be good for theſe cauſes; 1. Becauſe the Defendant had not averred, That the Debts due to the Creditors were unpaid. 2. Becauſe he did not ſhew, that the debts due to the Creditors, were due by ſpecialties. 3. Becauſe the Defendant ſuppoſed it would be a *Deva-ſtavit* in him; which it would not be, for that thoſe goods in the Plaintiff's hands would be lyable to the Creditors, as Executor of his own wrong, if the guift were a fraudulent guift. 4. The Defendant is not ſuch a perſon as is enabled by the Statute of 13 Eliz. to plead that plea; for the Statute makes the Deed void as againſt the Creditors, but not againſt the party himſelf, his Executors or Adminiſtrators. It was adjudged for the Plaintiff. Hill. 8 Jac. in B. R. *Hawes* and *Reads* Caſe. *Cro.* 2. Part, 270.

17. Note: In Evidence to a Jury, It was admitted without Contradiction, That if Judgment in an Action of Debt be given againſt Leſſee for years, and afterwards the Leſſee alieneth his Term, and after the year, the Plaintiff ſueth forth a *Scire facias*, and hath Execution; The Term is not lyable

able to Execution, if the Aſſignment be made *bona fide*. And in this caſe, It was ſaid by *Coke*, Chief Juſtice, That if Leſſee for years aſſign over his Term by fraud, to defeat the Execution, and the Aſſignee aſſign it over to a ſtranger *bona fide*, that, in the hands of the ſecond Aſſignee, it is not lyable to the Execution: And it was then delivered for lawful, That if a man who hath goods but of the value of 30 l, be endebted to two men, *ſcil.* to the one in 20 l, and to the other in 10 l, and the Debtor aſſigns to him to whom he is endebted 10 l, all his goods to the value of 30 l, to the intent that for the reſidue above the 10 l, that the Debtee ſhould be favourable unto him; that the Aſſignment was void for the whole, becauſe it was fraudulent in part. But *Foſter*, Juſtice, ſaid, It ſhould not be void for the whole, but for the overplus onely of the 10 l. Quære. Paſch. 8 Jac. in C. B. *Wilſon* and *Wormalls* Caſe, *Godbolt.* 161.

18. A man ſeiſed of Lands in G. and W, deviſed the Lands in G. to his younger ſon for life, and dyed, his heir entred into the Lands in W, and was ſeiſed in Fee; The younger ſon being within age, The Mother as Guardian by Nature entred into the Lands in G: and afterwards it was agreed betwixt the Mother and the eldeſt ſon, That the Mother ſhould releaſe to the eldeſt ſon all her Dower to the Lands in W; and afterwards the Mother did releaſe to the eldeſt ſon all Actions realls and perſonals, Suits, Quarrels and Demands, *nec non totam dotem ſuam et titulum dotis ſuæ de aliquibus terris in W. quæ vel quas* ſhe had, or ever after might have, by reaſon of any thing, from the beginning of the world, unto the date of the Releaſe. It was Reſolved in this Caſe, (amongſt other points) That as well the firſt words as the ſecond words, ſhould extend onely to releaſe all Actions, Quarrels, Demands, Title and Dower, to the Lands in W, and not to the Lands in G: for the later words did qualifie and reſtrain the firſt words to the Lands in W: 1. Becauſe that all the words are but one ſentence. 2. Becauſe if the general words ſhould ſtand without Qualification, then the ſpecial words ſhould be vain, and of none effect, *et maledicta eſt Expoſitio quæ corrumpit Textum.* 3. Becauſe it is a Rule in Law in the Conſtruction and Expoſition of Deeds, *quod Quando Charta continet generalem clauſulam, poſteaq; deſcendit ad verba ſpecialia quæ clauſulæ generali ſunt conſentanea, Interpretanda eſt ſecund. verba ſpecialia*: As if a man grant a Rent *in Manerio de D, percipiend.* out of 100 Acres of Land parcel of the ſame Mannor, with clauſe of Diſtreſs in the 100 Acres, the Rent ſhall iſſue out of the 100 Acres onely, and the general words ſhall be conſtrued according to the ſpecial words: So if a man gives Lands to one and his heirs, *Habendum* to him and the heirs of his body, he ſhall have but an Eſtate tail, and a Fee expectant; for the *Habendum* doth Qualifie the general words precedent: But if a man gives Lands in the premiſſes of a Deed to one and the heirs of his body, *Habendum* to him and his heirs, he hath an eſtate tail and a Fee expectant, for that ſtandeth upon another Rule and Principle in Law, *ſcil. Generalis Clauſula non porrigitur ad ea, quæ antea ſpecialiter ſunt Comprehenſa*; and therefore when a Deed at the firſt doth contain ſpecial words, and afterwards concludes in general words, both words as well general as ſpecial ſhall ſtand. Mich. 8 Jac. in C.B. *Cook* 8. Part, *Altham's* Caſe, 155.

19. In *Ejectione Firmæ*, It was found by a Speciall Verdict, That A. having two ſons; B. his eldeſt, and C. his younger, by Indenture Covenanted to ſtand ſeiſed of the Land in queſtion, to the uſe of himſelf for life, and after his deceaſe, to the uſe of B. his ſon and heir, and the heirs of his body, the remainder to his own right heirs. Provided Nevertheleſs, That if A. the Father ſhould at any time during his life, be minded upon any occaſion to make void or change the uſes, that then it ſhould be lawful for him, being in perfect health and memory, by writing under his hand and ſeal, and by him delivered in the preſence of 3. Credible Witneſſes, to declare, That his Will and pleaſure is, that the ſaid uſes, or any of them ſhould be altered or made void, and that then and from thenceforth, the ſaid Uſes ſhall be void; And the ſaid A. and all other ſhall ſtand ſeiſed to ſuch uſes, as by ſuch writing ſhall be limited: That A. made his Will in writing under his hand and ſeal, and thereby did deviſe the ſaid Lands to C, and the heirs of his body; and for want of ſuch Iſſue, to his ſon B. in tail, the remainder to his daughter in Fee; and that the Will was ſealed and delivered in the preſence of 4. credible Witneſſes: A. dyed, C. the younger brother entred, and made the Leaſe to the Plaintiff: upon whom B. entred, and Ejected him. In this Caſe, It was agreed by all the Juſtices, That although the Verdict doth not find, That A. the Father was in perfect health and memory; yet it was good enough, for it ſhall be ſo preſumed, unleſs the contrary be ſhewed. 2. That all the forms and Circumſtances preſcribed muſt be obſerved. But it was Reſolved, Though Revocations muſt obſerve the Circumſtances, that the Owner impoſeth upon himſelf, yet no more ſhall be impoſed upon him, but his power ſhall be taken favourably, agreeable to a Rule, that every man have free power over his own, which is the reaſon that the later act which cannot ſtand with the former uſes, is conſtrued a Revocation, though according to the expreſſe words and vulgar ſenſe it

it is none: and for the Clauſes, *ſcil.* Then and thenceforth, they are ſurpluſages and of no force: for the power of Revocation is perfect and compleat, before they come to thoſe words; and then words needleſs ſhall not impeach a clauſe which is certain, and perfect without them: and therefore he ſhall have power to declare the Uſes void, according to the nature of his declaration in Law, which in caſe of a Will is from his death, or according as he ſhall expreſly appoint the time: And therefore in this caſe, If A. had made a ſimple Declaration in writing, and not in the manner of a Deed to any certain perſon, that the uſes ſhould be void; and had ſigned, ſealed, and delivered it in the preſence of 3. Witneſſes, and had either in the body of the Deed, or verbally declared, that it ſhould take effect upon 100 l. paid, or at his death and not before, this Revocation ſhall be good. Trin. 17 Jac. in C. B. *Kibbett* and *Letts* Caſe. *Hob.* 312, 313.

Default.

1. IN a Writ of Right brought; The Plaintiff and 4. Knights, and 11. of the Jury or Aſſize appeared; And the Tenant made default: It was the Opinion of all the Preignothories in the Court of Common-Pleas, That the default of the Tenant ſhould onely be recorded, and the Jurors ſhould not be demanded, for that the Inqueſt ſhall not be taken by default in this caſe, as it ſhall be in perſonal Actions: But the default of the demandant, or after the Miſe joyned of the Defendant, is peremptory. See 44 E. 3. 22. Huſband and wife were Tenants, they made default after the Miſe joyned, and the Wife was received to joyn the Miſe again: but, If the party ſhall have Seiſin of the Land without a *Petit Cape*, Quære. 1 Ma. *Dyer* 98. The Lord *Wiuſors* Caſe.

2. A *Quod ei deforceat* in the nature of a Writ of Right was brought in *Wales*, The Tenant joyned the Miſe upon the meer right; and upon that a Jury by *Venire facias* was returned, and 12 appeared; and before Verdict was found, the Demandant was Nonſuit: upon which, final Judgment was given. It was Reſolved in that Caſe; 1. That although the Statute of *Rutland* made 12 E. 1. provides, That a Tryal in *Wales* by a Writ of Right ſhall be by Common Jurours, and by 12; yet Judgment final ſhall be given there: For although that the manner and dignity of the tryall be altered, yet the ſame Judgment doth remain which was before. 2. Reſolved, That if Judgment finall be given in a Writ of Right, the ſame ſhall bind untill it be reverſed. 3. Reſolved, That if the Tenant after the Miſe joyned doth make default, Judgment final upon that default ſhall not be given, but a *Petit Cape* ſhall iſſue forth; for perhaps he may ſave his Default. Trin. 38 Eliz. in B. R. *Cook* 5. Part, *Penryns* Caſe.

3. A *Venire facias* was returnable *Quinque Paſch.* The parties appeared, but the Sheriff returned not the Writ, therefore a *Venire facias* was awarded *de Novo*, as at the firſt, and Continuance made upon the Plea Roll; and yet at the *Quinque Paſche*, the Defendant was eſſoined: whereupon a *Venire facias* iſſued; and the Plaintiff being demanded appeared not, but made Default; and a Nonſuit was entred upon the Roll; and notwithſtanding that, the Plaintiff proceeded with the Iſſue, and had Judgment: For the Recording of the appearance did confound the Eſſoine. Quære, Where the Enqueſt appeareth at the *Niſi Prius* ſued out by the Defendant by Proviſo; and neither the Plaintiff nor his Attorney do appear, but make default, what ſhall be done in ſuch Caſe. Trin. 5 Eliz. *Dyer* 223, 224.

4. A Jury of *Middleſex* was demanded in the Common-Pleas, the firſt day of the Term, and ſome of them appeared, and ſome not, ſo as the Jury was not full, and neither the Defendant nor his Attorney did appear; and therefore the Plaintiff prayed, That the Enqueſt might be awarded by default. It was the Opinion of the Juſtices, That it ſhould be awarded by default: And the *Cuſtos Brevium*, and all the Preignothories ſaid, The Courſe was ſuch, and ſo are all the Preſidents; For the parties are demandable before the Jury: and if the Plaintiff maketh default, he ſhall be Nonſuited; and if the Defendant maketh default, the Enqueſt ſhall be awarded by default, whether they appear or not. See *Brook Entries*, and all the Preſidents according. M. 8 Eliz. *Dyer.* 265.

5. An Information was Exhibited by the Kings Attorney-General, againſt 6. ſeveral perſons, *viz.* A. B. C. D. E. F. for an Aſſault upon the Sheriff of *Middleſex*, in the ſerving an Execution upon A; by means of which he eſcaped and reſcued himſelf. All the Defendants pleaded Not guilty: and upon the Tryal, all beſides C. made default, and he appeared. It was moved, That the default of the others ſhould bind him, for that the Suit is entire, and they all have joyned in a plea; and therefore may not now be ſevered. But all the Court held, becauſe the Suit was for a Criminal Offence, although they all pleaded Not-guilty; yet it is to every one of them as it were ſeverall, and the default of the one ſhall not be the default

of the others; nor the Confeſſion of any of them ſhall not prejudice the others: whereupon the Enqueſt was taken onely by default againſt the 5, which appeared not: and they all were found guilty, but C. whom the Jury acquitted. And the Attorney-General demanding Judgment, The Court ſeverally gave their Opinions, That A. being the principal Offender, ſhould pay a Fine of 500 l: and, upon all the other Defendants but C, ſeveral Fines were aſſeſſed. And it was Reſolved by the Court, That ſuch Fines being aſſeſſed in Court by Judgment upon an Information, cannot afterwards be Qualified. Paſch. 8 Car. in B. R. The King and Sir *James Wingfields* Caſe. *Cro.* 1. Part, 182.

6. Errour upon a Judgment in *Salop*; The Errour aſſigned was, For that in an Action upon the Caſe there layed, the Defendant was Eſſoined, and had day by Eſſoine, *et Querens habuit, eandem diem*: on which day the Defendant being demanded, appeared not, but made default: *Et habuit diem per defaultam ſecundum Conſuetudinem villæ prædict.* given by the Court, *ſcil.* ſuch a day: At which day the parties appeared, and Judgment was given againſt the Defendant by *Nihil dicit*, ſo the plea was utterly diſcontinued, becauſe untill the Defendant made default, no day can be given unto him, when he was out of Court; and the Allegation, that it was done *ſecundum Conſuetudinem*, cannot help it: For no Cuſtome can help that which is againſt the Common-Law. Wherefore the Judgment was reverſed.

7. Aſſiſe of *Novel Diſſeiſin*, The Defendant pleads a Recovery in a former Aſſiſe againſt him: The Demandant Replyes, That he was an Enfant; and avers, That he was not Terr-Tenant; but that P. the Defendant was Terr-Tenant, and that the Recovery was by default; whereupon the Tenant did Demur in Law. And the Caſe was argued by all the Juſtices in open Court: *Haughton* and *Cook* held the Barr to be good, and that a Recovery in an Aſſiſe, is a good barr in another Aſſiſe. And it was ſaid by them, That an Enfant ſhall have many priviledges, which a perſon of full age ſhall not have: As if Judgment be given againſt Enfant by default, after default he ſhall have a Writ of Errour and reverſe the Judgment for his Nonage: But yet they ſaid, That if an Enfant after appearance make default, Judgment ſhall be given againſt him, and he ſhall not reverſe it. *Dodderidge* and *Mountague*, Chief Juſtice, held the contrary; and that a Recovery is not ſo ſacred, but that it might be falſified as well in point of Recovery for the thing, as alſo betwixt the ſame parties; and the Caſe in Queſtion being concerning an Enfant, the Judges ought to be his Counſellours: And in this caſe, the Enfant cannot have Errour, or Attaint, and therefore he might falſifie the Recovery: and many caſes were there put by them of the priviledges of an Enfant; and where a Judgment by default ſhall bind him, where not; for which, ſee the Book at large, and the Demurrer adjudged for the Plaintiff. But afterwards 16 Jac. the Plaintiff being demanded, made default: Whereupon the Jury were directed by the Court to enquire onely of damages from the time of the Diſſeiſin: and Judgment was given accordingly. Hill. 15 Jac. in B. R. *Holford* and *Platts* Caſe. *Cro.* 2. Part, 264, 265, 266, 267.

Defence.

ANnuity was brought againſt the Succeſſor of the Biſhop of E, who granted to the Plaintiff for life the Stewardſhip of, &c. and Fee of 40 s. *pro. &c. percipiend. de Manerio de D*; and the Plaintiff ſhewed, That he kept the Court, but averred not the Ingroſſing of the Rolls: and that after the Biſhop diſcharged him, &c. It was holden in this caſe, That he ought to tender his ſervice to every Succeſſor: and it is iſſuable, that ſuch Succeſſor, *non exoneravit*. The Biſhop in this caſe appeared by Attorney, but made no Defence; but his Bayliff demanded Conuſance, and it was allowed: and yet the words, *licet ipſemet ſit pars*, are not in the Patent, becauſe it had been allowed before: Note out of this Caſe, That where Conuſance of plea is demanded; There no Defence need be made. Hill. 5 Ma. *Dyer* 157.

2. An Attorney of the Common-Pleas was ſued by Bill in the Nature of an *Ejectione Firmæ*, and the Plaintiff declared upon a Leaſe for Term of 10 years, to begin *à die Obitûs* of the Leſſor, and ſhewed the day of the making of the Leaſe, and the day of the death of the Leſſor: The Defendant imparled untill another Term; at which day without making Defence, he ſaid to the *vi et armis* Not-guilty: and to the reſt, that the Plaintiff ought not to have the Bill; and for Barr ſhewed, That the Land was demiſeable: And that the Cuſtome was, That Tenant in Fee-ſimple might not make a Leaſe for above 6. years; and the Barr was holden not good, becauſe the Cuſtome was unreaſonable, and alſo repugnant to the Common-Law, and the Liberty of a Tenant in Fee. Paſch. 19 Eliz. *Dyer* 357. *Salfords* Caſe.

3. Errour brought of a Judgment in the Grand Seſſions in the County of *Pembroke*, by D. G. in a

Suit

Quod ei Deforceat protestando prosequi illud Breve, in the nature of a Writ of Right at the Common-Law, according to the form of the Statute of *Ireland* of 3. Meſſuages, 300 Acres of Lands, 100 Acres of Meadow, 60 Acres of Paſture, 100. Acres of Wood, and the moyety of the Mill of L, *ut jus, et hereditatem ſuam*: Whereof he ſaid, That he himſelf was ſeiſed of the Tenements aforeſaid *ut Dominico ſuo ut de feodo*: *Et quod talefit jus ſuum, offert &c.* And the Defendants T. & B. came and denyed *jus pradict. D.G. et ſeiſinam, &c.* and imparled, &c. and at the next Seſſions, the Plaintiff Counted *ut ſupra*: And the Defendant B. pleaded, That ſhe had more right to hold the ſaid Meſſuages, 300 Acres, &c. then the ſaid D.G. had to hold *Tenementa pradict. Et de hoc ponit ſe ſuper patriam, et pradict. D. ſimiliter*: And the ſaid T. ſaid, That he had more right to hold the Tenements aforeſaid, *ut illa tenet*; then the ſaid D. &c. *Et de hoc ponit ſe ſuper patriam. Et pradict. D. ſimiliter*: And the Jury found both Iſſues for the Demandant, and Judgment was entred *Quod recuperet verſus prafatos B. et T. pradict. Tenementa, &c. quietè de prafatis B. et T. et hæredibus ſuis in perpetuum*: Divers Errours were aſſigned, 1. That the Writ being a *Quod ei Deforceat*, and the Proteſtation being to ſue *in natura Brevis de Recto*, he ought to ſhew what Writ of Right, becauſe there are divers Writs of Right. 2. The Defendants joyning in Defence, ought not to have ſevered in pleas. 3. That the Plaintiff having admitted them to plead ſeveral pleas, hath admitted, that they are ſeveral Tenants, and ſo hath abated his own Writ. 4. Becauſe B. pleads as Tenant for life for part of the Tenements, alledging the Reverſion to be in T, and for the reſidue, pleads nothing, nor claims any Eſtate, yet Judgment is given againſt T. and B. and their heirs for all the Tenements; and ſo finall againſt B. a woman for all, where ſhe pleads but to part; and againſt her heirs, where ſhe claims but for life: This was holden by the Court a manifeſt Errour: and for this cauſe chiefly the Judgment was reverſed. Hill. 5 Car. in B. R. *Gwyn* and *Gwyn's* Caſe. *Cro.* 1. Part, 226, 227.

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3. *In what Actions Defence ſhall be made; in what not.*

1. NOte: It was ſaid, 34 H. 6. 33. by *Fortiſcue* in an Attaint, That in an Aſſiſe, In Dower, In a *Per quæ Servitia*, In Attaint, In Aſſiſe of Mortdauncеſter, there needeth not any Defence, becauſe that nothing is expreſly demanded, but the Writ is general. 33 H. 6. 33. by *Fortiſcue*.

2. In an Aſſiſe of *Nuſans Vicz-Comiel*, and before the Juſtices *de Banco*, the Tenant ſhall make Defence; for that Writ is in the nature of a *Precipe*, and therefore in that Aſſiſe, the party ſhall have the View, and plead in barr upon it: But contrary in an Aſſiſe of Nuſans before the Juſtices of Aſſiſe; for there ſhall be no Defence, no View. See 50 E. 3. 11.

3. In a *Scire facias*, there ſhall be no Defence; No more then in an Aſſiſe. See *Br.* Defence 10.

4. In an Attachment upon Prohibition, No Defence. See *Book Entries*, to *Scire facias*.

5. In an Aſſiſe of Darrein Preſentment, There ſhall be no Defence. See *Br.* to Defence 48.

6. In a *Precipe* brought againſt two, they may make ſeveral Defences.

7. In every *Precipe* where Land is demanded, there the Defence ſhall be, *Defendit jus ſuum*: As in a Writ of *Intruſion*, Writ of *Entry ad Terminum qui præteriit*, Writ of *Aiel*, Writ of *Eſcheat*, In a *Formedon*, In *Nativo habendo*, *in rationabilibus diviſis*, The Defence is, *Venit et defendit Jus ſuum*.

8. In a Writ *de rationabilibus Eſtoverriis*, The Defence is, *Defendit vim et Injuriam, Quando &c.* And ſo in a Replevin, Action upon the Statute, Writ of *Reception*, *Rationabili parte bonorum*, *Quare Impedit*, and in all Actions of Contempt, *Detinue* of *Charters*, *Quo Jure*, *Ne injuſte vexes*, *Eſſeſſione Cuſtodiæ*, Action upon the Caſe, and ſo in all Actions where Proceſs of Outlawry lyeth.

9. In a Writ of Right the form is, After the Count rehearſed, To make Defence anew; and then to vouch or plead in barr: and in the ſame form it is, If the Demandant Reply to the barr, The Defendant ought to make Defence, and then to anſwer to the Title of the Demandant. See 21 H. 6. 26. by *Newton*; and *Book Entries*, acc.

Demand.

1. *A* Precipe quod reddat, *Where it lyeth, and of what it lyeth, and how: And the Order of Demand in it; the Forme of the Writ: and where the Writ ſhall not abate for want of ſuch Form: and againſt whom it lyeth; againſt whom not.*

1. IT appeareth in the Regiſter of Writs, that every thing in a Writ is to be demanded according to its dignity; and therefore in every Writ a Meſſuage is placed before Land, and Land before Meadow, and Meadow before Paſture, &c. and the reaſon of this precedencie and dignity, is ſaid to be of Neceſſity: For to have a houſe for a man to inhabit in, and to preſerve his body from Tempeſts, and the violence of the Air, is more needful then to have Land to plough, and get him bread: and to have Land for bread, is more neceſſary then to have Meadow for Hay for Cattel: and to have Meadow for Hay for Cattel, which will ſerve all the year, is more neceſſary, than to have Paſture: and ſo of the like. *Plo.Com.* 169 in *Hill* and *Granges* Caſe.

2. A Precipe lyeth of a Meſſuage, or of a Houſe, and by the Sale *de Domo*, the Vendee may take it down; for by buying of it, it is become his Chattel: and yet in a *Precipe* brought of a Meſſuage, with the Appurtenances, no Land ſhall be recovered thereby; although that the Land hath been occupyed and uſed with it, or lain with, or to the Meſſuage time out of mind. But the Leaſe of a Houſe, and ſo many Acres of Lands appertaining to it is good, when the Land hath been occupyed with it time out of mind, and doth paſs the Land; but yet it is not appendant to it: nor will the Land paſs by the Feoffor of the Meſſuage alone. But a Dove-houſe, a Mill, and Shops, may be parcel of a houſe, and by the name of a Meſſuage they ſhall paſs. *Plo.Com.* 171. acc.

3. In an Aſſiſe, the Plaint was of a Meſſuage and Gardens, and holden good. Book Entries, 62. And if an Aſſiſe be brought of two Meſſuages, the Defendant pleaded, they were two Toſts, and not Meſſuages; and the Plea was holden to be a good Plea: for they ought to have been demanded by the name of two Toſts, 26 H. 8. *br.* to Aſſiſe, 347.

4. In an *Ejectione Firmæ*, the Originall and Declaration was of two Meſſuages; whereof the one is called a Coal-houſe, and the other a Ware-houſe: and the Caſe coming to Tryal before the Lord *Dyer* at a *Niſi Prius* at Guild-Hall, *London*: the Lord *Dyer* diſmiſſed the Cauſe, and abated the Writ before the Tryal had, because it appeared by the Declaration, that thoſe were not Meſſuages. Mich. 20 Eliz. in C.B. *Lewey* and *Hoskin's* Caſe. See 17 Car. in the King's Bench, in *Sprigg* and *Rawlinſon's* Caſe; That *Regiſtrum*, which is properly a Ware-houſe, cannot be called or demanded by by the name of a Meſſuage. *Weſtm.* 96.

5. In an *Ejectione Firmæ*, the Plaintiff declared, That J. S. did let unto him a Meſſuage, with the Appurtenances in L. and a Cloſe called Dovecote-Cloſe, containing by Eſtimation three Acres, for the term of three years: and declared of an Ejectment by the Defendant. The Defendant pleaded, Not Guilty; and the Jury found as to the Meſſuage the Defendant was Not Guilty; and as to the Cloſe called Dovecote-Cloſe, the Defendant was found guilty. In Arreſt of Judgment, It was moved, that an *Ejectione Firmæ* did not lye of a Cloſe; but the Writ ought to be of certain Acres; and the quality of the Land, as Land, Meadow, Paſture, Wood, ought to be ſhewed: and for the aforeſaid Exception, the Judgment was arreſted. Mic. 12 Jac. *Cook* 11. Part, 55. *Sauel's* Caſe. But note, in that Caſe, It was ſaid by the Juſtices, That although by good Order, the moſt worthy ſhall have the precedency, and ſhall be preferred before the leſs-worthy, and an entire thing preferred before a part: yet if the ſaid Order be not preciſely followed, the Judges ſhall not abate the Writ, or Count for that.

6. A *Precipe* lyeth of a Knights-Fee, which anciently was equal in value with 40 l. *per annum* Socage Land; and that appeareth by a Record of Paſc. 3 E. 1. rott. 10. *Radulphus de Normanvill Petens in Brevi de Medio, Quæritur contra Lucium de Kiue, Quòd cum ipſe levet de ipſa dua carucatas terræ in Coningſton per Homagium et ſervicium militare, unde 12. carucatæ terræ faciunt unum feodum militare pro omni, ſervitio ipſe & ſui vinxit ipſum ad faciend. ſectam ad curiam ſuam de Thoreton i. Cranc, &c.* *Cook* 9. Part, 134. in *Lowe's* Caſe.

7. A *Precipe* was of a Toft, and 5 Acres of Land, two Acres of Meadow; and the Plaintiff counted of a Meſſuage and Toft in G. Book Entries, 159.

8. An Aſſiſe was brought *de uno Molendino*, without ſaying, it was *aquatico*, or *ventitico*; and yet it was holden to be good in 21 Aſſiſe, p. 23.

23. *Cook* 4. Part, 87. in *Luttrel's* Caſe.

9. A *Precipe* lyeth of the profits of a Mill; of a Bayliwick; of the Cuſtody of the Park of B; of a Stream. 7 E. 4. 63. *Precipe* 30, 31.

10. A man made a Leaſe for 30 years of a Manor, excepting all Woods and Under-Woods, growing or being upon the Manor, and afterwards made another Leaſe to the ſame Leſſee of all the Woods and Under-Woods, growing or being upon the ſaid Mannor, for 60 years, without impeachment of Waſte, and afterwards made a 3d Leaſe to the ſaid Leſſee for 30. years without any exception, to begin at a day to come from the expiration of the firſt Leaſe for 30 years. The term of 30 years being expired, the Leſſee cut down Trees, and he in the Reverſion brought an Action of Waſte; It was Reſolved in this Caſe, That by the Exception of the Woods and Under-Woods, growing and being upon the Mannor, the ſtock it ſelf is excepted; and by the name of Wood may be demanded and recovered: and that theſe words (growing or being) are words of abundance, for that without them the Law will imply ſo much. Mic. 4 Eliz. in C. B. *Cook* 5. Part. *Ives's* Caſe, 11.

11. A *Precipe* lyeth of an Acre of Land, *aqua co-operta* in general; or generally of an Acre of Land: and ſo treſpaſs *Quare vi et armis clauſum aqua co-opertum fregit.* 11 H. 7. 4. And a *Precipe* lyeth of a portion of Land in B. *per Hankford* and *Hill.* 11 H. 4. 40.

12. A Demand made of a place of Land without certainty is not good: But a Demand made of a piece of Land, containing ſo much in length, and ſo much in breadth, is good. 16 E. 3. *br.* Demand 34.

13. A Garden is a good Demand in a *Precipe quod reddat*; and Dower brought of the third part of a Garden was good: But *Pomarium* is no good Demand in a *Precipe quod reddat*, although it be ſuffered in Common Recoveries, and in Fines for aſſurances; for a Garden includes it, as it appeareth by the Regiſter, and as it was holden by the Lord *Dyer.* Trin. 17 Eliz. And ſee, That in an Aſſiſe, the Plaint was of a Meſſuage, and fifteen Gardens. *Book Entries*, to Aſſiſe, 62.

14. A Writ of Error was brought upon a Judgment given in a Writ of Entry in the Poſt, upon which a Recovery was had in the Common-Pleas: And the Error Aſſigned was, becauſe that the Writ of Entry was, *de uno annuali reddit. five penſione 4. marcarum exeunt. de Eccleſia ſive Rectoria.* It was Reſolved in this Caſe, That the Writ was good, for there is not any incertainty in it, for one of two things is not ſeverally demanded, but one thing onely, for the demand is of Rent, or a Penſion of four Marks, ſo as there is not but one four Marks. And *Reddit. & Penſio* are all one: And the words *exeunt. de Rectoria* proves it to be a Rent, for if it ſhould be an Annuity, the Rectory ſhould not be charged, but the perſon of the Parſon, in reſpect of the Rectory. Paſc. 35 Eliz. in B. R. *Cook* 5. Part, in *Downe's* Caſe. 40.

15. If the Demandant in Dower make her demand, to be endowed of the third part of Common without number; or if a man bringeth an Aſſiſe of Land and Annuity; or if he do Aſſign Waſte in timber, and blackthorn; In ſuch Caſes, foraſmuch as the Writs are generall, it ſhall ſtand for ſo much as may be maintained by the Law, for the Writ is true; but the Count, Plaint, or Aſſignment, ſhall abate for the reſt; but it is otherwiſe when a Writ doth comprehend certainty, and it appeareth that the Writ doth not lye for part; there the whole Writ ſhall abate. If a man bring a Formedon of Land, and of an Advowſon, although the Writ be certain; yet foraſmuch as it goeth to the Action of the Writ, as to that the Writ ſhall ſtand good for the Land. A man brought a Writ of *Ejectione Cuſtodie terræ et hæredis*; the parties pleaded to Iſſue, and it was found for the Plaintiff, the Plaintiff had judgment of the Land onely, for it lyeth not of the Heir: But if a man brings a Writ of Entry in the Nature of an Aſſiſe of two Acres, whereof of his own ſhewing, for one he ought to have a Writ of Entry in the *Per.* there the whole Writ ſhall abate, for that he may have a better Writ as to one Acre, and the ſame doth not extend to the Action, but to the Writ onely. *Cook* 11. Part, 45. in *Richard Godfrey's* Caſe.

16. A *Precipe quod reddat*, doth not lye of an Advowſon, nor doth a Formedon lye of an Advowſon in groſſe, alliened by the Auncеſtor, but a *Quare Impedit* at the next Avoydance in his time; And an Advowſon ſhall not be Aſſets in a Formedon, for that it is not valuable; yet ſee 20 E. 4. 15. It is ſaid, That a *Precipe quod reddat* doth lye of an Advowſon, and that the Advowſon veſts by Grant, and Livery; and it lyeth in Tenure; and a Writ of *Ceſſavit* lyeth of it. See *Fitzh. Nat. Br.* 2. 5 H. 7. 20 E. 4. 14. 21 E. 3. *Ceſſavit* 46.

17. A *Precipe* lyeth of the Office of Serjeancy in *Aba. de Burgo. Sancti Petri et de reddit.* 34. *panum*, 40 *Lagenarum ſervicia. Fitzh. Nat. Br.* 192. and a Woman ſhall have her Dower of it. *Fitzh. Nat. Br.* 3. And that an Aſſiſe lyeth of Offices, and a *Precipe* lyeth of them; and that a *Quod permittat* doth not lye of an Office. See *Cook* 8. Part, in *John Wells's* Caſe, 47. where many Caſes are put of *Precipes*, and Aſſizes brought of Offices. And ſee 28 H. 8. *Dyer*, 7. 3. *Ma. Dyer.* 114. 5. *Ma. Dyer*, 193. an Aſſiſe of the Office of Admiralty: See before, more in the Title *Aſſiſe.*

18. In the demand of a Caſtle or Meſſuage in an Aſſiſe, it is not needfull to give a name to the Caſtle, or Meſſuage, nor in what Town they are. 8 H. 4. 7.

19. Note, When a man hath any thing Appendant, or Appurtenant, to a Houſe, or Mill, or the like, the moſt perdureable thing thereof, is the Land in which the foundation is, and upon which all the building thereof doth conſiſt; and in reſpect thereof, by Grant of all Lands, all Houſes, Mills, and Woods, will paſſe: For in a *Precipe*, where a Houſe, Mill, or Wood, is demanded, the Warrant of Attorney is in *placito terræ*; and in the Caſe of Voucher, when Judgment is given for the Tenant, to have in value againſt the Vouchee, The Judgment is *Quod habeat de terris*, of the Vouchee *ad valentiam*; and yet thereby he ſhall have Houſes, Mills, Woods, &c. *Cook* 4. Part, 87. in *Lutterell's* Caſe.

20. *Ejectione firmæ* is brought, *De omnibus, & omnimodis Decimis in W.* &c. without ſaying *garbarum, ſanfoinæ, agnellorum*, or any certainty of the nature, or quality of the Tythes: whereof a certain Judgment may be given, or Execution had, by *Habere facias poſſeſſionem*; And therefore the ſame was not good; and that appeareth in 7 E. 6. *Dyer*, 84. in the Aſſiſe brought *de Quadam portione Decimarum*; and although the certain number of them ſhall not be expreſſed (for the fruitfullneſſe, or barrenneſſe may increaſe, or diminiſh) yet the ſeverall kinds ought to be expreſſed; And it may be, That all the Tything doth conſiſt in *modo Decimandi*; by payment of a yearly Rent in ſatisfaction of the Tythes, whereof no *Ejectione firmæ* lyeth; And the Statute of 32 H. 8. which giveth the Action for Tythes, gives it as they ſhould or might do for Lands, but in an Action for Lands, the Plaintiff ought to ſhew the Quality, or nature of them, as Land, Meadow, Paſture, Wood, &c. Paſc. 5 Jac. The Counteſſe of *Oxford* brought a Writ of Dower to be endowed of Predial Tythes within ſuch a Town: And in that caſe it was holden, That the beſt Aſſignment is of the third part; for if the Garbs of the third part of the Arable Land be Aſſigned, it is in the Election of the Ter-Tenant, whether he will ſow the ſame, or not; And in that Caſe, a Report of *Beadloes* 3. and 4. *Ma.* was ſhewed. In a Writ of Dower of *Wades-Mill*, in the County of H. The Aſſignment was of the third part *Molendini*. viz. *de integro molendino per Quemlibet tertium menſem*. Trin. 12 Jac. *Cook* 11. Part, 27. *Henry Harpar's* Caſe.

21. See *Cook* 4. Part, 55. in the Caſe of the Conſervanlty of Sadlers That a *Precipe* will not lye againſt the King, For it is a Rule, and Maxime in Law; That when a Common perſon againſt another Common perſon, is put to his reall Action, in ſuch Caſe he ſhall be put to his Petition which is in the nature of a reall Action againſt the King.

22. In a Mortdauncеſter, demand of two parts of the moyety of a Mill, is good, without demanding of the third part of the whole, for the Mill is not ſevered; otherwiſe, if the Mill were divided by Partition made, or by Alienation; And a *Precipe* doth lye *de Medietate, Medietatis cujuscunque terræ*. 11. Aſſ. 20.

23. In Dower, a demand was of the third part of the Manner of D. *ac exituum et proficuorum de quodam Mercato, et unius feria quolibet anno, in feſto, &c.* for three weeks then next following, *in villa de N. Tenend. cum pertinentiis* is *N. et L.* 1 H. 6. rott. 220. Book *Entries*, 226.

24. In a Writ of Dower, the Demandant made her demand, *de tertia parte Liberi feodi*, and the Opinion of the Court was, That it was not good, for the Incertainty, for what Cattell; And ſo it is of a demand of Common incertain. Some of the Juſtices ſaid, That if the Common be incertain, that the Woman ſhould have allowance for it: But the Court ſaid, they did not know how the allowance ſhould be made. Paſc. 28 Eliz. in C. B. *Godbolt*. 21.

25. A Demand was made of the third part of a Caſtle and Manner: Book *Entries* 230. but ſee, That if it be of a Caſtle which is *pro defenſione Regni*, a Woman ſhall not be endowed of it by the Statute of *Magna Charta. Cap.* 7. *Cook* 2. Part, *Inſtitutes* 31.

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2. *Where, and againſt whom, Demand by* Precipe quod reddat, *doth not lye, But a* Quod permittat *doth lye.*

1. A. built upon his own Freehold, a houſe ſo near to the Curtilage of the houſe of J. S. *quod domus illa ſuperpendet magnam partem*, viz. 3. *pedes Curtilagii prædict.* J. S. And after, A. conveyed his houſe to B. J. S. conveyed his houſe to C. who brought a *Quod permittat* againſt B. and counted, That the Water did Diſtill and Deſcend from the ſaid houſe, to the Nuſans of his ſaid Curtilage and houſe; And, If the *Quod permittat* did lye by the Feoffee, was the Queſtion: It was Objected, That it did not lye, becauſe he to whom the wrong was done, had conveyed over his houſe, and ſo the wrong was remedileſſe, for he ſhall take the houſe in the ſame plight as it was conveyed to him: As if a man be ſeiſed of Land, to which Common is Appendant; And is diſſeiſed of the Com-

Common, upon which he brings an Aſſiſe, and afterwards he infeoffeth another of the Land, the Common is extinct for ever: But it was Reſolved by the whole Court in this Caſe. That the diſtilling of the Water in the time of the Feoffee, was a new wrong, ſo as the permiſſion of the wrong by the Feoffor, or his Feoffee to continue to the prejudice of another, ſhould be puniſhed by the Feoffee of the houſe, to which the Nuſans was done, and if the ſame be not reformed after Requeſt, and demand made, That a *Quod permittat* did lye by the Feoffee, againſt the Feoffor, and he ſhould recover his damages; but againſt him who did the firſt wrong, the Action did lye without any demand, or requeſt. Trin. 40 Eliz. in C. B.

2. At the Common-Law, there was but two forms of Writs of Aſſiſe of *Novel diſſeiſin, ſcil. ad ſſe de libero tenemento*, and an Aſſiſe of Common of Paſture for his Cattell, &c. which was ſo neceſſary, that without the ſame his Freehold could not be manured: And an Aſſiſe *de Libero tenemento* lay, of Land, Rent, and all other things whereof a *Precipe quod reddat* lay at the Common-Law: But of profits Apprender in a place certain, The Statute of *Weſt.* 2. *cap.* 15. gave an Aſſiſe of *Novel diſſeiſin*, in the place of a *Quod permittat*, which was the remedy for them at the Common-Law, before the ſaid Statute: And in ſome Caſes, the Statute giveth an Aſſiſe, where there was not any clear or certain remedy at the Common-Law: For if one had not ſuch profits Apprender, but for the Term of his life, It was holden he ſhould not have had a *Quod permittat* of them, becauſe that ſuch Writ was in the nature of a Writ of Right, in which Battel was waged. *Cook* 8. Part, 46. in *Jehu Wells*'s Caſe.

3. In a *quod permittat*, the Plaintiff declared, That the Defendant had erected upon his Freehold, a houſe ſo near the Plaintiffs houſe *quod pars eiuſdem Domus ſuperpendet* the houſe of the Plaintiff in breadth 17 Inches, and in length 17 Foot, *ad nocumentum Liberi Tenementi ſui*, to his damages of 100 l. It was objected in this Caſe, That the Plaintiff ought to have alledged the Nuſance certain, *ſcil.* that the Rain fell from the houſe new built, upon the Plaintiffs houſe, by which he loſt his light, or that his houſe was corrupted by the Rain: But it was Reſolved, That the Plaintiff in his Count needed not to ſet forth any ſpeciall Nuſance in this Caſe; becauſe in this Caſe, the Defendant had built a new houſe, which hung over part of the Plaintiffs houſe, ſo as of neceſſity the Rain which fell, ought to fall upon the Plaintiffs houſe; And the Law doth not compell a man to ſet forth, or aver that which appears clearly to the Court. Mich. 8 Jac. in C. B. *Batten*'s Caſe. *Cook* 9. Part, 54.

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3. *Who ought to make a Demand, who not; And where a demand is to be made, where not; And what ſhall be ſaid to be a good Demand; What not.*

1. THe Duke of *Norfolk* Mortgaged Lands to Alderman *Howard*, upon Condition that if the ſaid Duke did re-pay to the ſaid Alderman, a certain ſum of mony, That then the Duke might re-enter. Afterwards the Duke was Attainted before the day of payment, and all his Lands were given to the Queen: The Queſtion was, Whether *Howard* ought to make a demand upon the Land, or to demand the mony at the Receipt of the Exchequer; or that the Queen ought to make the Tender upon the Land: It was agreed by all the Judges at Serjeants-Inn, that the Queen ought to make no Tender, but that the Alderman ought to make his demand at the Exchequer; and not upon the Land. Mich. 31 Eliz. *Howard*'s Caſe. *Goldesbr.* 137.

2. A man made a Leaſe for years, rendring Rent, at a place payable off from the Land, It was moved, whether a demand of the Rent might not be upon the Land. It was the Opinion of the Court, That it could not, for they ſaid, The demand muſt be made at the place of payment, although it be off the Land. Trin. 5 Jac. in C. B. *Vintres* and *Farmer*'s Caſe. *Brownlow.* 1. Part, 96.

3. The Dean and Chapter of *Chicheſter*, made a Leaſe to one R. of Lands in W. rendring rent at the Cathedrall Church of *Chicheſter*, upon Condition, &c. It was agreed by the whole Court, That the demand ought to be made in the Cathedrall-Church of *Chicheſter*, although it was off the Land Leaſes; And the demand ought to be at the ſetting of the Sun, the laſt Inſtant of that day; And when he made his demand, he ought to ſtand ſtill, and not to walk up and down, for the Law did not allow of walking demands, as *Popham* ſaid, and becauſe that thoſe whom the Dean and Chapter ſent to demand the Rent, ſaid, Bear witneſſe, we are come hither to demand ſuch Rent: It was holden by the Court, that ſuch a demand was not good. And they held, That the demand ought to be made at that part of the Church, where the greateſt, and moſt going in is. Paſc. 5 Jac. in C. B. The Dean and Chapter of *Chicheſter*'s Caſe. *Brownl.* 1. Part, 138.

4. If

4. If a man Leases Lands rendring rent, for a year, whensoever the Lessor should demand it; In this Case, If the Lessor come and demand it before the end of the year, his demand upon the Land, is not good, except the Lessee be there also. For the time being incertain when the Lessor will demand it, he ought to give notice to the Lessee of it; And if the Lessor come to the Lessee in person, and demands the Rent, yet it is not sufficient: For although notice is to be given to the Lessee in person, yet the Land is the Debtor, and therefore the Law ties the Lessor to the Land, as to the place in which he shall be paid: But if the Lessor stay untill the end of the year, then the Lessee at his perill ought to attend at the Land to pay it, for the end of the year is the time of payment prescribed by the Law; all which was adjudged. Pasc. 1 Jac. in B. R. in *Stretton* and *Cashes* Case. *Brownlow.* 1. Part, 135.

5. In an Action upon the Case, the Plaintiff declared, That in consideration, that he the Plaintiff would marry with A; B. promised to pay the Plaintiff 20 l. when he should, after the marriage, be required; And the Plaintiff in his Declaration, did not alledge any speciall demand of it; which was moved in stay of Judgment. But the Court was clear of Opinion, That it was good, and it was not necessary for the Plaintiff to alledge a demand of it. Hill. 14 Jac. in C. B. *Shipwash* and *Shipwashes* Case. *Brownlow.* 10.

6. If a Feoffment in Fee be made to the use of one for life, and after to the use of another in tail, with a Remainder over, with power to the Lessee to make Leases, so as he reserve the accustomed Rent reserved payable to all those who have the Reversion; If Tenant for life maketh Leases according to his power, the Lessees derive their Interest out of the first Feoffment, How then can the Reservation of the Rent be good, or how can his Heir, or he in the Remainder come by the same? And if such Proviso be added in the Original Assurance, there the Lessees, as much as the same is no Rent, it ought to be paid without demand, and if he do not pay the same, his Interest, shall presently cease by the Limitation of the use. *Cook* 1. Part, 139. in *Chudleigh's* Case.

7. A man made a Lease for years of a house, and a Close severed from the house, and of other Lands; The Lessor made a Feoffment of the house, and the Land demised, and made Livery in the Close, the Lessee being in the house. It was adjudged in that Case, That the Livery was void, as well for the Close, as for the house, and the other Lands; For when a Messuage and Lands are let entirely together, the Messuage is the principall, for there the Rent shall be demanded, and the Land is but the Accessary, so as the possession of the House, is the possession of the whole Land demised with it; and so the Livery void in the Principall Case. *Cook* 2. Part, *Belknap's* Case.

8. The Queen made a Lease for years rendring Rent, payable at the Receipt of her Exchequer at *Westminster*, or to the hands of her Bayliffs, or Receivers, with Condition to be void, for non-payment of the Rent; And afterwards the Queen Granted over the Reversion; And where the Patentee should demand the Rent to take advantage of the Condition, was the Question: And in this Case, it was Resolved. 1. That if a Common person reserveth a Rent upon a demise, payable at a place off from the Land, he who shall take advantage of the Condition, for non-payment of the Rent, ought to demand the Rent at the place where the same is limitted to be paid; for the payment of the Rent out of the Land, doth not alter the nature and quality of the Rent: And therefore the Opinion in *Plow. Com.* 70. that he in the Reversion may enter for not payment of the Rent, was denyed for Law. 2. Resolved, That if the King makes a Lease for years rendring Rent, with such a Condition, That the King shall take advantage of the Condition without a demand, because it is not for the Honour and Dignity of the King, to make a demand of his Rent from his Subject, but the Law doth appoint the Subject to wait upon the King; and therefore the Subject is to do the first Act, either to pay or to tender the Rent; but that Prerogative is personall onely; And therefore if the King Granteth over the Reversion, his Grantee ought to demand the Rent, if he will take advantage of the Condition. 3. Resolved in the principall case, That the Patentee ought to demand the Rent upon the Land. 4. Resolved, That if the King makes a Lease for years rendring Rent, without limitting any place, or to whose hands it shall be paid, that the Lessee ought to pay the same at the Exchequer, to the hands of the Kings Bayliff, or Receiver. Pasc. 38 Eliz. in B. R. *Cook* 4. Part, 72. *Broughes* Case.

9. A Prior, seised of divers houses, with the consent of his Covent made a Lease of them for years, rendring the old Rent of 5 l. 10 s. 11 d. at four Feasts of the year, usuall in the City of *L. scil.* for one house 3 l. 11 d. for another 20 s. and for the other houses, severall Rents, amounting in the whole to 5 l. 10 s. 11 d. with Condition, That if the Rent of 5 l. 10 s. 11 d. were behind in part, or in all, at any of the said Feasts, that it should be lawfull for the Prior and his Successors to re-enter, the Prior came to the King by surrender, who by his Letters Patents under the Great seal, Granted one of the houses to the Lessee and to another in Fee; and after it was found by Com-

Commiſſion, that part of the Rent of 5 l. 10 s. 11 d. was behind at one of the Feaſts, and before the Commiſſion Returned, the King Granted the Reſidue of the houſes to J. S. in Fee. It was Reſolved in this Caſe, amongſt other points, That in many Caſes, The King who claymeth by a Subject, ſhall be in better Caſe, in reſpect of the Dignity and Prerogative incident by Law to the Perſon of the King, then the Subject himſelf by whom he claymeth; and therefore in the Caſe at Bar, The King ſhall take advantage of the Condition without a demand; And yet the Prior himſelf, under whom the King claymed, cannot re-enter for not payment of the Rent, without a demand. Mich. 31 Eliz. in C. B. *Cook* 5. Part, *Knight's* Caſe. 65.

10. Abbot and Covent made a Leaſe for years rendring yearly, during the Term, to the Abbot and Covent, and his Succeſſors, 5 l. Rent, upon Condition, that if the Rent be behind, to re-enter, the Abbot ſurrendred the Lands to the King, which by mean conveyances came to J. S. who levyed a Fine of the Reverſion to B. B, before Attornment, Granted by Deed the Reverſion to his Son and Heir, to whom the Termor Attorned; The Rent was behind, the ſon in the Reverſion entred into the Land for the Condition broken: It was Reſolved in this Caſe, amongſt other things, That B. the Grantee, or Aſſignee by the Fine, ſhould not take advantage of the Condition for not payment of the Rent, without Attornment: but the ſon of B. who was his Grantee, ſhould take advantage of it, becauſe he had an expreſſe Attornment, and is an Aſſignee within the Statute of 32 H. 8. *Cook* 5. Part, 113. *Mallories* Caſe.

11. A Rent by Deed was Granted to one and his Aſſigns for life, *pro Conſilio impendendo*, payable yearly at four Feaſts; and for default of payment, if it be demanded, that it ſhould be lawfull for the Grantee and his Aſſignees to diſtrain. The Grantee aſſigned the Rent, the Tenant attorned; The Aſſignor upon the Land, demanded the Rent at the day; and for Default of payment diſtreined: and in this Caſe, theſe Points were Reſolved. 1. That a Grant of a Rent to one and his Aſſignes *pro Conſilio impendendo*, may be Aſſigned over by the expreſſe words of the Grantor, *Et modus et Conventio ſignt legem*. 2. That the Aſſignee needed not to demand the Rent at the day, as he ought to do in Caſe of Re-entry; but in Caſe of diſtreſſe, he may demand it at what time he pleaſeth. 3. If a man hath a Rent-Seck, payable yearly at the Feaſt of *Eaſter*, and hath once Seiſin of the Rent, and the Feaſt paſſeth, and no Tender or demand is made, he may after the day, demand the Rent upon the Land, and if none be ready to pay it, the ſame is a denyall of the Rent, for which he may have an Aſſiſe; But if the Tenant be at the laſt inſtant of the day, ready upon the Land to pay the Rent, and none cometh to demand it, or to receive it, there he cannot afterwards, in the abſence of the Tenant, come upon the Land and demand it, and make the other a diſſeiſor, and recover damages without default in him; But in ſuch Caſe, the Rent ought to be demanded upon the Land, with all the Arrearages, and although the ſame be in the abſence of the Tenant, yet the ſame amounts to a Denyer in Law, upon which he may have an Aſſiſe, and recover the Arrerages, Damages, and Coſts. Hill. 43 Eliz. in C. B. *Cook* 7. Part, 28. *Maund's* Caſe.

12. A man made a Leaſe to J. S. for 50 years, if the Leſſor ſo long lived, rendring rent at the 4. Feaſts, or within 13 dayes after every of the ſaid Feaſts, by even portions: after one of the Feaſts, *ſcil.* the Annunciation, the Leſſor dyed, his Executors brought Debt for the Rent due at the ſaid Feaſt. In this caſe it was Reſolved, That the Action did not lye, 1. Becauſe the payment being limited in the disjunctive, the moſt beneficiall time ſhall be taken for the Leſſee; and before that time the Leſſee is diſcharged by the Act of God; and the moſt extream time, is the moſt legal time. 2. Becauſe that when the Leſſee doth not make payment at the firſt day, the election is paſt, and then the Rent is abſolutely due at the ſecond day; and the ſecond day is as well parcell of the Reſervation, as the firſt day. 3. The rent is not due untill the day of payment encurred, becauſe it is to be raiſed out of the Iſſues and profits of the Lands; and therefore if the Land be evicted before the legal time of payment, no Rent ſhall be paid. Mich. 11 Jac. in B. R. *Cook* 10. Part, 127. *Clunns* Caſe.

13. A. Leaſed certain Lands for years, rendring a Rent of 35 l. at the Feaſt of St. *Michael* and the *Annunciation*, or within 12 dayes after every of the ſaid Feaſts, payable at the Font-ſtone in the Temple Church, upon Condition, That if the ſaid rent or any part of it be behind and not paid, by the ſpace of 12 dayes after any of the ſaid Feaſts or dayes of payment thereof, that then the Leaſe ſhall be void. It was adjudged in this caſe, That the Leſſee, in ſafeguard of his Leaſe, ſhould have 12. dayes after the 12 dayes, to pay the ſaid Rent; for when the Rent is not paid at the firſt day, It is as much as if it had been reſerved at the 12th day after, and *Dies ſolutionis* is the 12th day of the Feaſt; and the Leſſee ſhall have 12 dayes after the 12th day, which is *Dies ſolutionis poſt feſtum*: and ſo it was adjudged, Trin. 31 Eliz. in B. R. rott 656. *Smith* and *Ballards* Caſe.

14. A. ſeiſed of the Mannor of D. by Deed Indented, Leaſed the ſame to J. S. for 99 years, it

if the ſaid A. ſhould ſo long live, rendring the Rent of 100 l. at *Michaelmas* and the *Annunciation*, or within 40 dayes after every of the ſaid Feaſts: J. S. made his Wife Executrix and dyed, the Executrix married M: A. dyed, having made J. D. her Executor the 13th day after the Feaſt of St. *Michael*; her Executor brought Debt for the half years rent before the death of A: And the Opinion of all the Juſtices was, That the Action would not lye. Mich. 40 Eliz. in B. R. The Lady *Pawletts* Caſe. *Cook* 10. Part, 118.

15. The Vicar of *Paperas* leaſed his Vicarage, the Glebe Land, the Church, and all things to the ſame belonging, to J. S. (excepting the Howſing) reſerving 20 l. rent, yearly at Lammas, and the Feaſt *Sancti Petri ad vincula*, by equall portions; and if the Rent be behind by the ſpace of a moneth, it ſhould be lawful for the Vicar to diſtrein: and the Leſſee was bound to perform all Covenants, Articles, and Agreements, recited within the Indenture of the Leaſe; and for Rent behind 29. Auguſt, 25 Eliz. the Vicar brought Debt. To which the Defendant pleaded, That the Rent was not demanded the 29th day of Auguſt; upon which they were at Iſſue, and the Jury being at the Bar, Exception was taken, That he hath made a Leaſe of the Vicarage (except the houſing), and hath alledged the Demand to be general, *ſuper terras glebales*, and hath not ſhewed where. It was ſaid by the Juſtices, That it had been better to have ſaid, At ſuch a Gate, or Hedge, or High-way: but notwithſtanding they did not allow the Exception; For that if it were not well demanded, it ought to be ſhewed on the other ſide. But nothing was ſpoken, whether there needed any demand in the caſe, or not: which Quære. Paſch. 26 Eliz. in C. B. *Bolſins* Caſe. *Godbolt* 23.

16. A. made a Leaſe for years rendring Rent at *Mich* upon Condition, That if the Rent be behind at *Mich.* and a moneth after, that he might enter. The Leſſee after *Mich.* and before the moneth ended, ſent his ſervant to the houſe of A, to pay the Rent, he found him not there, but the Servant delivered the Rent to one M. his daughter, to deliver to A, (which M. at 2, or 3. dayes before the payment of the Rent, had received the Rent in like manner, and had paid it to A, and he accepted of it) but now he refuſed to receive it of her, but at the laſt day of the moneth went to the Land, and there demanded the Rent; and becauſe it was not paid, he entred. It was Reſolved by the Court in this caſe, That becauſe the Rent was due at *Mich.* and the moneth was given becauſe of the penalty of Re-entry, and the tender and refuſal was after the Rent was due, and within the moneth, That the penalty was ſaved. And it was ſaid, That Laws ought to be expounded *ſecundum æquum et bonum*, and good Conſcience; and the Leſſor in this caſe was at no prejudice, if he had accepted of the Rent, when his daughter tendred it unto him; and becauſe the Court conceived, That the Leſſor intended to defraud the Leſſee of his Leaſe, and the Law doth not favour fraud. It was therefore adjudged againſt A. the Leſſor. Hill. 28 Eliz. in C. B. *Croppe* Caſe. *Godbolt* 39.

17. Sir *John Spencer* made a Leaſe for years to Sir *John Poynes* rendring Rent by Indenture; The Leſſee Covenanted, That if the Rent be behind at any time of payment according to the Indenture, that the Leſſor ſhould have 20 l. *Nomine pene* for ſuch default: The Rent is behind, Sir *John Spencer* brought Debt for the *Nomine pene*. The Queſtion was, Whether without demand of the Rent, Debt did not lye for the *Nomine pene*? The Opinion of the Court was, That the Action of Debt did not lye. Trin. 5 Jac. in B. R. Sir John *Spencer* and Sir *John Poyns* Caſe. *Godbolt*. 154.

18. A man made a Leaſe for years rendring Rent at the Feaſt of St. *Mich.* and if it were behind by 10 dayes after, being in the mean time lawfully demanded, and no ſufficient diſtreſs found upon the Land, that then it might be lawfull for the Leſſor to re-enter: The laſt of the 10 dayes, at the hour of 2. afternoon, the Rent was demanded, and there was a ſufficient diſtreſſe upon the Land before the demand, but not after; whether the Leſſor might enter, was the Queſtion? It was ſaid, That ſufficient diſtreſs ought to be referred to the time of the demand, to the laſt inſtant; at which time the demand is only material. But it was the better Opinion of the Court, That it was ſufficient, if there was a diſtreſſe for a reaſonable time, ſo as it might be preſumed that the Leſſor might have knowledg of it: But if a diſtreſſe be upon the Land onely for an hour, or by Night, It was not holden a ſufficient diſtreſſe. Mich. 29 Eliz. in B. R. *Godbolt* 67.

19. In Treſpaſſe, for entring of his houſe; It was found, That the Plaintiff Leaſed to the Defendant the houſe for 7. years, with Condition, That if the Rent be behind by the ſpace of 10. dayes, that then it ſhall be lawfull for the Leſſor to re-enter. Afterwards at the Feaſt of, &c. the Rent was behind, and the 10th day after, the Leſſor came to the houſe a quarter of an hour before the Sun-ſetting, and demanded the Rent in theſe words, *I demand 3 l. 10 s. for a half years Rent of this houſe now due*: and there continued till the Sun was ſet, but no Rent was paid. Note, The Iſſue was, If he came to the houſe half an hour before Sun-ſet, and there continued, demanding the half years rent of the premiſſes due at the Feaſt of the *Annunciation* then laſt paſt. It was moved, That upon

upon this Verdict, the Iſſue is not found for the Plaintiff; the Iſſue was upon the half hour, and the quarter part of the hour was found. 2. The Iſſue was, If the demand were of the Rent due at the Feaſt of the *Annunciation* paſſed; and the Verdict is for Rent due at the time of the demand. It was the Opinion of the Court, That the Verdict was good for the Plaintiff. But it was agreed by all the Court, That if in demand of Rent (*ut ſupra*) The Leſſor, or any on his part doth demand one penny more, or leſſe then is due, or in his demand doth not ſhew the certainty of his Rent, and the day of payment of it, and when it was due, the demand is not good, and no re-entry in ſuch caſe ſhall be given, unleſſe the demand be preciſely and ſtrictly followed. Mich. 31 Eliz. in C. B. Rott. 814. *Fabian* and *Windſors* Caſe. *Leo.* 305.

20. Errour brought to reverſe a Judgment in B. R. upon an Obligation, Conditioned, That if the Obligor ſhould at all times well and truly pay all and ſingular the Rents, Covenants, Grants, Articles, Payments, and Agreements, which on his part are and ought to be performed, compriſed in an Indenture of Leaſe, &c. that then, &c. The Defendant pleaded generally, performance of all Covenants, &c. The Plaintiff Replyed, and ſhewed a breach for not payment of the Rent at ſuch a day, but doth not ſhew any demand of that Rent: upon which the Defendant did demur; and adjudged for the Plaintiff: and now aſſigned for Errour, That in as much as the Condition of the Bond is general for the performance of Covenants, and not particularized for the payment of the rent, the rent is not payable without demand; and therefore the breach not well aſſigned. But it was the Opinion of all the Juſtices and Barons in the Exchequer Chamber, That the Judgment was well given: For he pleading the performance of the payments, Covenants, &c. it ſhall be intended he had really performed them; and when the Plaintiff replyes, he hath not paid ſuch a Rent, he needs no a lledge a demand; for the Defendant may not ſay, It was not demanded; for then it ſhould be a Departure from his Plea. Wherefore it was holden, That the Replication was good, and the Judgment was affirmed. Trin. 2 Car. in Exchequer-Chamber, *Chapman* and *Chapmans* Caſe. *Cro.* 1 Par, 54.

21. In an Avowry for a Rent-Charge, The Grant was of a Rent of 12 l. *per annum* at two Feaſts; and if it be behind for the ſpace of a month after any of the ſaid Feaſts, it being lawfully demanded, that he might diſtrain; and for Rent arrear at the Annunciation, and by the ſpace a month, he diſtrained. The Plaintiff demurred upon the Avowry, for that it is not ſhewed, that the Avowant made any demand before the diſtreſs, and for that cauſe, it was ſaid, it had been ſo adjudged in *Baſden* and *Downes* Caſe. But it was agreed by the whole Court, That no actuall Demand was neceſſary to precede the Diſtreſſe; but that the Diſtreſſe is a demand: But if the Grant had been penned, That if it be arrear at ſuch a Feaſt, and for a moneth after demand, that then he may diſtrain, it is otherwiſe; for there the diſtreſs is limited to the moneth after the demand: And ſo it was ſaid, It was adjudged in this Court, Trin. 3 Car. Rott. 2865. in *Coppiſtone* and *Langfords* Caſe. Trin. 16 Jac. in C. B. *Kud* and *Ammy's* Caſe, *Hutton* 23. See Mich. 8 Car. in C.B. *Lamb* and *Wills* Caſe, adjudged acc. *Hutton*, 113, 114. See Mich. 18 Jac. in C.B. in a *Replevin*, Sir *Tho. Wentworth's* Caſe. *Hutton* 42, acc.

22. Aſſiſe of a Rent-Seck: The Caſe was; A Rent-Seck of 4 l. *per annum* was granted by J. S. to N. his ſon in Fee, iſſuing out of a houſe called the Unicorn in *L*, payable at the *Annunciation* and *Michaelmas* at the ſaid houſe, to begin after his deceaſe; and 6 d. given in the name of Seiſin: For rent due at the Feaſt of the Annunciation, 1637. and for 6. years before not paid, &c. The Jury find the grant of the Rent, and the Seiſin and the Demand at the houſe called the Unicorn, at the Annunciation 1637. and that none was there to pay it: And whether this was a Diſſeiſin for the Rent, was the Queſtion? The doubt was, Whether it was a good demand for the Rent, at the houſe out of which it was iſſuing; and not at the houſe where it was payable. It was the Opinion of the Juſtices, That it was a good demand, and a Diſſeiſin for non-payment, and that the guift of 6 d. was a good Seiſin: and the Jury found all in damages, *ſcil.* 24 l, not mentioning it to be for arrearages of Rent; and yet good. It was adjudged for the Plaintiff. Paſch. 15 Car. in B. R. *Smith* and *Smith's* Caſe. *Cro.* 1. Part, 365. Note there, Aſſiſe for a Rent-Seck.

23. Errour brought againſt T. M. and others, of a Judgment given in an Aſſiſe in the County of *Montgomery*: The Aſſiſe was brought againſt the ſaid 6. Defendants, and againſt *C. Vaughan* and his wife, and divers others, (in all, 15 perſons) *de libo Tenemento ſuo in B*, and 5 other Villages in the ſaid County: All the Defendants being attached, the Plaintiff made his Plaint, to be diſſeiſed of a Rent of 20 l. iſſuing out of 40 Meſſuages, 1000 Acres of Lands, &c. and for title, ſhewed, that one E. P. was ſeiſed of the Tenements aforeſaid, and by his Will, 1 Jac. deviſed to the Plaintiff a Rent of 20 l. *per annum* iſſuing out of the ſame Tenements for his life, and that the ſaid E. P. dyed ſeiſed, and that the ſaid Tenements deſcended

to *Elizabeth*, who afterwards was married to the ſaid T. M. and to *Margaret*, who afterwards was married to the ſaid C. V: and that the Plaintiff was ſeiſed of the ſaid Rent by the hands of the ſaid T. M. being ſeiſed in the right of his wife, untill by the Defendants he was diſſeiſed; and thereupon brought the Aſſiſe: *C. V.* and *Margaret* his wife, and 9. other of the Defendants made default; wherefore the Aſſiſe was awarded againſt them by default; and others pleaded other pleas: and Judgment was given for the Plaintiff againſt 6; and for 9, that they ſhould go without day. Upon this, Errour was brought, and aſſigned, Becauſe he demanded Rent by a Deviſe, whereof Arrerages are found for 30 years, and it doth not appear when the Deviſor dyed, or any time, or Feaſts appointed for the payment of it, and therefore the Verdict was ill, becauſe the certainty of the Arrerages cannot be known. 2. If the Jury, finding a Seiſin by the hands of one of the Husbands of the Heirs, whereas the Land diſcended to two daughters; whether this was a ſufficient finding of Seiſin. To that it was Reſolved, That it was a ſufficient Seiſin. A third Queſtion was, Whether the Jury finding the Demand of the Rent from ſix of the Defendants, and their deniall of payment, and not finding that it was demanded upon the Land, (but that they ſo Diſſeiſed the Plaintintiff) Whether that was ſufficient: It was holden by all the Juſtices, That the demanding it of the perſons off from the Land, and their deniall, is not ſufficient, for it ought to be upon the Land. The Judgment was reverſed, becauſe it was not found when the deviſor dyed. Mich. 14 Car. in B.R. *Morrice* and *Princes* Caſe. *Cro.* 1. Part, 375.

24. Note, that in caſe of Entry of the Feoffor for not payment of Rent, theſe Rules ought to be obſerved. 1. That the Feoffor cannot enter for not payment of Rent without a demand. 2. The Demand ought to be upon the Land, at the moſt notorious place. 3. If the Rent be to be paid off the Land, it ought to be paid at the place appointed, and at the moſt known place of it. 4. Tender of the Rent to the Feoffor himſelf at the day, upon any part of the Land, is good, and ſhall ſave the Condition, although it be not at the moſt notorious place. 5. The Tender of the Rent upon the Land, at a convenient time before Sun-ſetting, is ſufficient to ſave the Condition, unleſſe that the parties do meet upon the Land the ſame day; for then Tender of the Rent ſaves the Condition, although that the Feoffor refuſeth to receive it. 6. If Reſervation be of Rent at a certain Feaſt, with Condition, That if the Rent be behind by 20 dayes, there the Feoffee is not bound to make a demand untill the laſt day of the 20 dayes. 7. If the Rent be granted payable at a day certain; and if it be behind, that the Grantee diſtrain for it, there it is not neceſſary that the Grantee demand it at the day; but if he demand it at any time after, it is ſufficient, becauſe the Grantee hath Election to demand it when he will, to enable him to diſtrain. And all theſe Rules are proved by the Caſes precedent, and by the ſubſequent Caſes. See for theſe Rules, *Cook* 1. Part, *Inſtitutes*, 202, 203.

25. In a Replevin, the Caſe was; A. ſeiſed of Land in Fee, granted a Rent of 6 l. *per annum* out of the ſame to B. and C. his Wife for the life of C. payable at *Michaelmas* and our Lady-day, or within 30 dayes after; and if the Rent ſhould be behind, that he ſhould forfeit 10 l. by way of a pain after any of the ſaid Feaſt-dayes, being lawfully demanded; and that then and ſo often it ſhould be lawful for B. and his Wife to diſtrain and determine, untill the ſaid Rent and pain were ſatisfied: and ſhewed, that 54 l. for 9. years that was behind in the life of B, were unpaid; and that therefore he diſtrained. The Plaintiff demyed the Seiſin; which was found for the Defendant. It was moved, That the Rent behind in the life of B. did not belong to the Wife as Adminiſtratrix, but in her own right. But that was anſwered, That ſhe might diſtrain in her own right, and ſo the Conuſans good as Baily to her. And the Exception was, That it was not averred, that the Rent was demanded before the diſtreſs; as they ſay it ought to be by the expreſs clauſe. To that it was ſaid, That the clauſe of diſtreſs is no otherwiſe to be extended, then as the Grantor gives it; and therefore if the clauſe were, That if the Rent be behind, being demanded at another place beſides the Land, or of his perſon, then he may clearly diſtrain without ſuch a demand firſt made; for there the demand is other then the Law requires: But where the Clauſe is no more, but, If the Rent be behind, being lawfully demanded, then he may diſtrain, it is no more then the Law ſpeaks, and therefore the diſtreſſe implying a demand, and a diſtreſs, one before another, by operation of Law, ſatisfies it: But if he would have diſtrained for the pains, he muſt have made an Actual demand at the end of the 10 dayes, for then it grew due: alſo he muſt have made another demand of the pain it ſelf. Trin. 15 Jac. in C. B. *Brown* and *Dauneries* Caſe, *Hob.* 208.

26. In Debt, the Plaintiff declared upon a Leaſe made by him to the Defendant, reſerving Rents, and for the rent arrear, the Action is brought; The Defendant pleads, That the Leaſe in the Declaration mentioned was made by Indenture, reſerving the rent *prout*, with this Condition, That if the Rent be behind, then the Leaſe to be void; and doth not alledge a deſault of payment

of

of the Rent; and ſo the Leaſe determined. The Plaintiff demurred. It was Reſolved by the whole Court, That this Leaſe is not void without a demand, which therefore the Defendant ſhould have layed actually; and for want of it, his plea was not good, and it is in the Election of the Leſſor to avoid or continue the Leaſe in ſuch caſe. Hill. 18 Jac. in C. B. rott. 286. *Hanſon* and *Norcliffs* Caſe. *Hob.* 332. See there, Paſch. 19 Jac. in C. B. *Acopburſt* and *Palmers* Caſe, The Rent is due without demand, but forfeiture of the Eſtate, neither by entry, nor by avoiding upon Condition, is given either for Leſſor or Leſſee, without due demand made, which muſt be expreſly layed in the pleading.

27. In a *Replevin*, the Queſtion was, Whether if the Lord for a Rent-Service did not demand it at the day, whether he can diſtrain without a demand of the perſon? It was holden by the Court, That he might: For the Tenant is yet bound to tender it, and the Land is the debtor, and the Lord may reſort thither, when he pleaſeth to demand his Rent upon the Land; but if he tender his Homage, and the Lord refuſeth it, he cannot diſtrain without a demand of the perſon. It was adjudged for the Defendant. Paſch. 15 Jac. in C. B. *Grantley* and *Kingswell's* Caſe. *Brownlow*, 1. Part, 181.

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4. *That in all Writs and Actions where one is to Demand any thing, the form of the Demand is to be obſerved: What ſhall be a good Demand: And where a Demand is neceſſary; Where not.*

1. WHen a man is to demand any debt, duty, or other thing by Writ or other; the form of the Writ and the demand muſt be obſerved, for that the form many times gives Eſſence to the thing: When he that makes a Bargain or Contract, or borrowes money, or he to whom the Obligation is made, brings an Action againſt him that is bound, and is party to the Contract, bargain or borrowing, and alſo when the Action is brought for money, the Demand by the Writ muſt be in the *Debet et Detinet*: But if a man ſelleth 20 Quarters of Wheat for a Horſe; there if he bring an Action for the horſe, it ſhall be in the *Detinet* only: For the Rule is, *In Brevi de Debito de Catallis nunquam dicitur Quod ſi debet*; In an Action of *Debt* for money, The demand ſhall be in the *Debet*: but if it be for any thing elſe, it ſhall be in the *Detinet*: But in Debt, If a man demand money, and 20 Quarters of Wheat, then the demand in the Writ is *Precipe A. quod juſte, &c. reddat B. decem libras, &c. quas ei debet; et decem Quarteria frumenti quæ ei injuſtè detinet.* See *Fitzh. Na. Br.* 119. & 111. acc.

2. When a woman is endowed of parcell of the Land, and afterwards would demand the Dower of the reſt againſt the ſame Tenant in the ſame Town or place: In that caſe for the recovery thereof, ſhe ſhall have a Writ of Dower generally, and not a Writ of Dower, *unde nihil debet*, for the words of that Writ will not ſerve, becauſe ſhe hath already received part of her Dower; and therefore ſhe muſt bring her Writ of Right of Dower to recover the reſidue, and therein make her demand according to her right. *Fitzh. Na. Br.* 8. acc.

3. An Action of Debt was brought upon a Bond to pay rent, and perform all Covenants, Grants, Payments and Agreements contained in a pair of Indentures, and the Defendant pleads the Indenture, and the performance thereof. The Plaintiff aſſigns a breach, That the Defendant had not paid the money. The Defendant ſaid, That the Plaintiff outed one part of the premiſſes before the day of payment: and upon that, they were at Iſſue; and Execution was taken, becauſe the Plaintiff had alledged no Demand to be made. But the Court held it good enough, and that it was implyed in the Iſſue, and that it was not neceſſary. Mich. 10 Jac. in C. B. *Baker* and *Payns* Caſe. *Brownlow* 1. Part, 76.

4. A. granted a Rent out of Lands to B, with Clauſe of Diſtreſs, and a *Nomine pœna* in the Deed for non-payment thereof according to the time limited, the Rent is behind after the time limited by the *Nomine pœnæ*, B. brings a Writ of Annuity in the Common-Pleas for the Arrearages of the Annuity, and for the moneys due upon the *Nomine pœnæ*, and hath Judgment: A. brings Errour, and aſſigns for Errour, That the Writ of Annuity did not lye for the *Nomine pœnæ*, although it did for the Rent: For although it was in the power and Election of B, to charge the Land out of which the Rent was to iſſue; or to bring his Writ of Annuity againſt B, and to charge his perſon, yet he had no ſuch power for the *Nomine pœnæ*, becauſe it was in the Nature of a Rent, and was neceſſarily to iſſue out of the Land, and not to charge the perſon. 2. It appears not in the Record, that B. did make a good Demand of this *Nomine pœnæ* upon the Land, out of which the Rent was iſſuing, as he ought to have done, before he could bring an Action for it: for although there were a Demand, yet if it were not a legal Demand, it was void, and

the party ſhall take no benefit of it. The Caſe was adjourned. Mich. 18 Car. in B.R. *Remmington* and *Kingerbyes* Caſe. *Style* 4.

5. In an Action upon the Caſe brought, The Plaintiff declared upon a promiſe made by the Defendant to pay 84 l. out of the freight of a Ship; and for not paying it, brought the Action. Upon *Non-Aſſumpſit*, and found for the Plaintiff, It was moved in ſtay of Judgment, that the Plaintiff's averment in his Declaration of the Non-payment of the 84 l. was not good; for that it doth not appear, that there was any freight due for the Ship out of which the moneys were to be paid. The Court was of Opinion, That the Plaintiff ought to have averred, That there were moneys due for the Freight of the Ship; otherwiſe how can it be known that there were any moneys due to be paid out of them. It was alſo ſaid, It is parcell of the promiſe, that the moneys ſhall be paid out of the Freight; and as the averment is, the matters cannot ſtand together, and here is no Demand layed to be made for the moneys to be paid out of the Freight: And therefore the Court gave Judgment, That the Plaintiff *Nil Capiat per Billam.* Trin. 1650. *Chace* and *Lovings* Caſe. *Styles* 220.

6. An Action was brought, for not paying moneys upon the Receipt of a Bill of Exchange according to the Cuſtome of Merchants. Upon a Verdict for the Plaintiff, It was moved for ſtay of Judgment, That it appears not whether the Demand of the money was according to the old ſtile, or according to the new; and ſo it was incertain, whether the money was due; if according to the old ſtile, then it was not due, for the new ſtile is 10 dayes before the old. It was ſaid by the Court, That if the Bill be accepted, it is not neceſſary to alledge a Demand; and the demand in this caſe is not layed as part of the Cuſtome upon which the Action is founded. It was adjudged for the Plaintiff. Paſch. 1653. in B.R. *Styles* 370.

7. A man granted a Rent-charge out of certain Lands *pro Conſilio impenſo et impendendo*, To have and to hold to him and his aſſigns for the term of his life, payable at 4. Feaſts of the year; and for default of payment upon demand, that it ſhould be lawful for him to diſtrain: The Grantee granted the Rent over; The Aſſignee after one of the dayes demanded the Rent, and diſtrained: In that caſe it was adjudged, That the Diſtreſſe was lawfull: For in that caſe he needed not to make any demand at any of the dayes, as in the caſe of re-entry, but he muſt demand it when he pleaſed, becauſe it was onely to entitle him to his remedy for the duty: For it is not neceſſary, that the Grantee of a Rent-charge, or of a Rent-Seck, ſhould demand it at the very day that it becometh due; but if he demand it at any time after, it is ſufficient; and it is not like a demand of a Rent upon a Condition, becauſe that is penal, and overthroweth the whole Eſtate: and therefore in that caſe the Demand muſt be certain. But the demand of a Rent-charge, or a Rent-Seck, is onely a formal mean to recover that which is due, and therefore it may be demanded at any time, whether the Tenant be preſent or no. *Coke* 1. Part, *Inſtitutes*, 144. & 193. See *Hob.* 107. & 108. acc.

8. In a *Replevin*, the Caſe was; a man granted a Rent out of certain Lands, and limited the ſame to be paid at a houſe which was another place off the Land, and in the Grant was this clauſe, That if the Rent were behind, and lawfully demanded, that then it ſhould be lawful for the Grantee to diſtrain. The Rent was behind; the Grantee diſtrained: and, If this Diſtreſs upon the Land be a good Demand, was the Queſtion? It was ſaid, That a Diſtreſs is a demand of it ſelf; and there is no difference where the Rent is payable upon the Land, and where not; and ſome Preſidents vouched to prove it. See Paſch. 4 Jac. *Fox* and *Vaughans* Caſe, Trin. 3 Car. *Berriman* and *Bowdens* Caſe. Trin. 18 Car. Sir *John Lambs* Caſe. The Court did incline, That there ſhould be a demand at the place which the Grantor had appointed for the payment thereof: For they ſaid, It is a part of the Contract, and is like unto a Condition precedent; for as in a Condition precedent, a man ought to perform the Condition before he can take any thing by the Grant; ſo in this Caſe, the Grantee ought to make a demand to enable him to diſtrain; for before the demand, he is not by the manner of the Grant (which ought to be obſerved) intitled to a Diſtreſſe: *Et modus legem dat Donationi*: And as to the Preſidents vouched, It was anſwered, That in *Berriman* and *Bowdens* Caſe, there the Judgment was given upon Confeſſion, and therefore doth not rule this caſe: and in Sir *John Lambs* Caſe, there was no Judgment given. But it was ſaid, That *Melſam* and *Darbies* Caſe, Mich. 6 Car. rott. 389. in B.R. was a Caſe in the point, where Judgment was reverſed upon a Writ of Error there brought for want of Demand. And the Court further ſaid, That where the Rent was demandable upon the Land, that theſe Caſes were not to the purpoſe: and therefore wiſhed they would not trouble the Court with them: There was no Judgment given in the Caſe, becauſe the Court deſired to ſee and view the Records of the Caſes; which had been vouched, and day given, for to ſhew further Preſidents. Trin. 17 Car. in C. B. *Selden* and *Kings* Caſe. *Noſs*, 147.

9. If a man makes a Leaſe for years rendring Rent, and if the Rent be behind by the ſpace of a moneth after the day of payment, that then the

Term

Term ſhall ceaſe. In this caſe, If the Rent be reſerved to be paid at ſome place out of the Land, upon failer of payment, or due tender of the Rent at that place, the Leſſor may enter without making any demand upon the Land; but if the Rent were payable upon the Land, or no place named where it ſhould be paid, upon ſuch failer the Leſſor cannot enter without demanding of the Rent upon the Land, becauſe the rent is payable there of right. 33 H. 8. *Dyer* 51.

10. A Writ of Errour was brought to reverſe a Judgment given in a Writ of Dower: and divers Exceptions were taken; 1. That the Demand was uncertain: For the Demand was *de tertia parte Decimarum garbarum in C*; and by this Demand, the kind of the Tythes demanded is not made certain; for the word, *Garba*, admits of divers Conſtructions. 2. The Demand is, *ac etiam de Rectoria de A*; which is incertain, for it ought to be *de Rectis in Eccleſia*. It was the Opinion of the Court, That the demand of the *tertiam partem garbarum*, was certain enough by common intendment; but it is here more certain then ſo, for it is *tertiam partem garbarum granorum*, which ſignifies Corn: and it is not neceſſary to expreſs the ſetting forth of the Dower *per metas et bundas*: and for the other Exception, It was holden, That it is not neceſſary to ſay, *Rectoria Eccleſiæ*, for that it muſt be ſo neceſſarily intended. And it was agreed, That a Demand in a *Precipe* ought to be more certain then it is neceſſary for a demand to be in a Writ of Dower. It was ſaid, That the word *Garb*, is a French word, and ſignifies any thing bound up in a Bundell. But by *Cowell* the Civilian, It ſignifies Corn bound up, and ſo is the word commonly taken at the Common-Law. The Judgment was affirmed. Mich. 1650. in B. R. *Fairfax* and *Fairfax*'s Caſe. *Styles* 237, 238.

11. In Debt brought upon a Bond, The Condition was, to ſtand to the Arbitrament of J. S; who did award, That the Defendant ſhould pay 10 l. to the Plaintiff, and no time was limited to pay it. The Defendant confeſt the Arbitrament, and pleaded in barr, That the Plaintiff had not required him to pay the money. It was adjudged by the Court, to be no good Plea; for the Defendant at his perill ought to pay it, and the Plaintiff need not make any demand of it. Mich. 30 Eliz. in C. B. *Brett* and *Averdens* Caſe. *Owen* 7.

Demurrer.

1. *What ſhall be a good cauſe of Demurrer, to a Bill, Declaration, Plea, Replication; what not. And where, upon Demurrer, the party might ſhew cauſe; where not.*

1. TReſpaſs for breaking of his Fence and Entry of his Cloſe, the Defendant pleaded, That J. S. was ſeiſed of the Land, and demiſed the ſame to the Plaintiff by Deed, rendring Rent with a Clauſe of re-entry for non-payment, and made his Will in Writing, by which he gave the Land to the Defendant, and that the Rent was behind; and that for that Cauſe, he entred into the Lands: for which Entry the Action is brought, and demanded Judgment of the Action. The Plaintiff demanded, and for cauſe ſhewed; becauſe the Plea doth not ſhew that the Leaſe made to the Plaintiff, is a Leaſe of the Land in which the Treſpaſs is ſuppoſed: and alſo becauſe the Defendant doth not ſhew that he did enter into the Land by the leave of the Executor, which he ought to have done. Adjudged the Leaſe of Demurrer good. Trin. 23 Car. P. R. *Mathew* and *Herle*'s Caſe. *Styles*, 65.

2. Treſpaſs brought for breaking his Cloſe, and taking a Gelding. The Defendant pleaded, That he for fear of his life, and wounding of 12. armed men, who threatned to kill him, if he would not do it, went into the Plaintiffs houſe, and took the Gelding: Upon which Plea, the Plaintiff did demurre, It was holden to be no Plea, to juſtifie the Defendant; for that a man may not do a Treſpaſs to one, for fear of threatning of another: for by this means the Party injured ſhall have no ſatisfaction, for he cannot have it of the Party that threatneth. Mic. 23 Car. B. R. *Gilbert* and *Store*'s Caſe. *Styles* 72.

3. Debt brought upon an Obligation; The Defendant appeared, and imparled; and, for Imparlance, pleads in abatement of the Writ, that he was Earl of *Nova Albion*, and ought to be impleaded by that name, and not by the name of *Ed. Powden*, as in the Caſe he was. The Plaintiff demurred upon the Plea; It was the Opinion of the Court, that the Plea was not good, becauſe it

was

was after Imparlance; whereas a Plea in Abatement of the Writ, ought to be pleaded before Imparlance. And 2ly, becauſe the Plea is frivolous, for the Defendant pretends, that he was Earl of *Albion*, before he entred into the Bond, and that he is eſtopped to do by his own Deed: Adjudged for the Plaintiff. Mich. 1649. in B. R. *Weſton* and *Plowden*'s Caſe. *Styles* 180.

4. In Treſpaſs for taking his Cattels, *vi et armis*, The Defendant pleaded Not-Guilty, as to the Force, &c. And as to the taking of the Cattel, he pleaded, That he bought them in a Market. The Plaintiff demurred to the Plea: The Exception to the Plea was, That the Defendant doth not ſhew what day the Market was kept, nor whether it were out of Lent, according to the Patent for keeping of the Market; It was the Opinion of the Court, That the ſame ought to have been added; and therefore the Plea without it was not good Hill. 23 Car. in B. R. *Marſhal* and *Pork*'s Caſe. *Styles* 113.

5. Debt upon an Obligation to ſtand to an Award: The Defendant pleaded *Nullum Arbitrium*. The Plaintiff replyed, That the Arbitrators did make an Award, and ſet forth the Award *in hæc verba*. The Defendant demurred, for that he doth not ſhew, that the Award was delivered up according to the Submiſſion: Alſo, it is not found touching what Suits the Award was made: It was holden by the Court, that the Award was good; for the Award is good, though not delivered up by the Arbitrators; and for the ſecond Exception, it is good enough: for that the Award is ſaid to be *de premiſſis*. It was adjudged for the Plaintiff. Trin. 24 Car. in B. R. *Langley* and *Wyboord*'s Caſe. *Styles* 110.

6. Debt for Rent. The Defendant pleaded, That he is Tenant and Servant to the Lord *Moon*, a Lord of Parliament; and prayes the Priviledge of Parliament: whereupon the Plaintiff demurred. The Queſtion was, Whether a Writ of Priviledge belongs to a Parliament man, ſo far as to protect his Lands and Eſtate. *Rolls* Chief Juſtice conceived it did; and therefore, the Demurrer good. Mich. 4 Car. in B. R. *Smith* and *Hack*'s Caſe. *Styles* 139.

7. Debt upon an Obligation to ſave the Defendant harmleſs; The Defendant pleaded, *Non Damnificatus*. The Plaintiff Replyed, and ſhewed a breach whereby he was damnified. The Defendant demurred upon the Replication; and for cauſe ſhewed, that the breach was aſſigned to be at *Weſtmin.* and doth not ſhew in what County *Weſtminſter* is. The Court held, that although *Weſtminſter* be a City, yet it ought to be ſhewed in what County it is; and Ruled the Cauſe of Demurrer good. Trin. 24 Car. in B. R. *Nelſon* and *Thompſon*'s Caſe. *Styles* 142.

8. Treſpaſs for breaking his Cloſe, and eating his Graſs with Cattel. Upon Not-Guilty, a Verdict and Judgment for the Plaintiff, Error brought, and Aſſigned for Error, That the Declaration was uncertain; for the Plaintiff declares of breaking his Cloſe, and eating of his Graſs, *cum quibuſdam averiis*, and doth not ſhew what Cattel: So he may recover Damages in this Action, and have another Action for the ſame Treſpaſs, becauſe it cannot be known what Cattel did the former Treſpaſs; and it was ſaid, that *Averia* is a word at large, and ſignifies Cattel of divers kinds. The Opinion of the Court was, Where the thing it ſelf is in Demand, and an Action brought for it, as in *Trover and Converſion*, the thing ought to be particularly named: but here the Action is brought for Damages, and eating his Graſs; and if you had demurred to the Declaration, it had not bin good; *à fortiori* now, if after a Verdict. The Judgment was affirmed. Mich. 24 Car. in B. R. *Broke* and *Brooke*'s Caſe. *Styles* 170.

9. Action upon the Caſe, upon Aſſumpſit, to pay for certain Barrels of Beer, ſold and delivered to the Defendant ſuch a day: The Defendant pleaded ſpecially, that he did not aſſume as the Plaintiff had declared. The Plaintiff demurred, becauſe that by this pleading the Plaintiff is tyed up to a particular day, whereas he may give in Evidence for any other Barrels of Beer ſold at any other time before the Action brought. The Court held the Demurrer good. Trin. 1649. in B. R. *Cook* and *More*'s Caſe. *Styles* 195.

10. Debt upon an Obligation to ſtand to an Award; The Plaintiff declares of an Arbitrament made 28 *May*, in a year, ready to be delivered up the 29th day of *May* the ſame year. The Defendant pleads *Nullum Arbitrium*. The Plaintiff replyes, the Award was made by the Umpire the 28th day of *May*, ready to be delivered up the ſame 28th day of *May*. The Defendant demurs to the Replication; for that the Plaintiff hath ſet forth double matter; one in his Declaration; the other in his Replication. The Court ſaid, The Iſſue to be tryed is not to be taken upon the day of the Award made, and therefore requires no Anſwer, and ſo cannot be double; and one ought not to demur for doubleneſs of matter upon a thing upon which no Iſſue can be taken: It was adjudged for the Plaintiff. Trin. 23 Car. in B. R. *Tyler*'s Caſe. *Styles* 41.

11. A *Quare Impedit* was brought for the Vicarage of *Leeds* in the County of *York*, againſt the Biſhop, and *Cook*, &c. The Biſhop claims nothing but as Ordinary, and further pleads, That the Church became void, 1 Jan. 12 Jac. and that 6 moneths had elapſed; by reaſon whereof he collated

lated the 23. of *December*. The Defendant *Cook* pleaded the ſame Plea. The Plaintiff replyed, and converted the Avoydance, the 1. of *Jan.* but ſaid, That within the ſix moneths, and 20. of *May*, he preſented his Clerk, and the Arch-Biſhop refuſed to admit him, and afterwards the 30. of *May* the Biſhop collated; and the Defendant demurred for the doubleneſs of the Plea. It was ſaid by the Court, If the Incumbent plead good matter for his Preſentation, although the Biſhop plead inſufficiently, that ſhall not prejudice the Clark. The Defendant took Exception to the Plaintiffs Writ, becauſe it bore date the 9th of *May*, and the Preſentment was the 29th of *May*, and the refuſal of the Biſhop was the 29th of *May*, and he collated the 30th of *May*: ſo the Writ was brought before the Refuſal made by the Biſhop. Paſch. 14 Jac. in C. B. *Birkhead*, and the Biſhop of *York* and *Cook*'s Caſe. *Brownloe* 1. Part, 164.

12. Debt upon an Obligation: The Condition was, That if A. would render himſelf to an Arreſt in ſuch a place, &c. The Defendant pleads, That by Priviledge of Parliament, thoſe of the Parliament and their neceſſary Servants ought not to be arreſted by the ſpace of 40 days, before the Parliament, nor ſitting the Parliament, nor 40 days after A. And ſets forth that A. was a Servant to ſuch a man of the Parliament at ſuch a time, ſo that he could not render himſelf to be Arreſted. To which the Plaintiff demurred. It was the Opinion of the Court for the Plaintiff: for A. might render himſelf, and let it be at their peril if they will arreſt him. Trin. 4 Jac. in C. B. *Jackſon* and *Kinſon*'s Caſe. *Brownloe* 1. Part. 92.

13. In a *Replevin* for diſtraining of Cattel, The Defendant imparled, and afterwards pleaded, That the Lands were Ancient Demeſne, where the Diſtreſs was taken: The Plaintiff demurred to the Plea. It was ſaid, that the Plea was not to be admitted, becauſe that the Party had made his Defence, and cannot therefore plead afterwards to the Juriſdiction of the Court: Alſo, it doth not appear that the Lands are holden of the Mannor, but only one parcel of the Mannor, and ſuch Lands are pleadable in other Courts. The Opinion of the Court was, That after the Imparlance, the Plea was not good, becauſe by it he hath admitted the Juriſdiction of the Court. Hill. 24 Car. in B. R. *Vincent* and *Wallis* Caſe. *Styles* 197.

14. Action upon the Caſe, upon an *Indebitatus Aſſumpſit* Br. was ſold. The Defendant pleaded the Statute of Limitation of Actions in Bar. The Plaintiff Replyed, He is a Merchant, and was in *Ireland*, and did not return till ſuch a time; and ſhewed when, and that within 6 years after his Return he brought this Action. The Defendant demurred upon the Replication. Judgment was given for the Plaintiff. The Defendant brought Errour, and aſſigned it, That the Replication upon which the Demurrer is to proceed, was double: For firſt, He alleadgeth he is a Merchant, and ſo is a perſon out of the Statute of Limitations: And ſecondly, He ſhews that he brought his Action within ſix years, which is needleſs. 2. He ſaith, he did not return into *England*, whereas the Statute is general, If he returned; and he may return into *Wales*. And thirdly, the Action was an Action upon the Caſe; and that Action is not mentioned in the Statute. The Court was of Opinion, That an Action upon the Caſe is within the Statute; and that the word Treſpaſs in the Statute doth comprehend in it an Action upon the Caſe. The Judgment was affirmed. Paſc. 1650. *Robinſon* and *Walker*'s Caſe. *Styles* 230.

15. Action upon the Caſe, for words: The words are; The Knave the Apothecary that marryed my Siſter, hath poyſoned my Uncle, and I will have him taken up again to hang him. The Defendant pleaded an Accord betwixt him and the Plaintiff, That whereas the Plaintiff had done a Treſpaſs againſt him, that one Treſpaſs ſhould be ſet againſt the other. The Plaintiff demurred to the Plea. The Court was of Opinion, that the words were Actionable, and that the Plea in Barr was not good; and therefore the Demurrer to it good. *An.* 1650. *Dowes* and *Oakham*'s Caſe. *Styles* 245.

16. Debt upon an Obligation to ſtand to an Award. The Defendant pleaded, there was no Award. The Plaintiff replyed, that there was an Award made, and ſets forth the Award, and aſſigns a breach. The Plaintiff demurrs, and for cauſe ſheweth, That part of the Award was, that one of the parties ſhould make ſuch a general Releaſe to the other, as Councel ſhould adviſe; ſo as the Councel are made Arbitrators, in regard that a Judicial Act is referred to them, which ought not to be, for Arbitrators cannot delegate their Authority to others. The Court was of Opinion, that there was no Judicial thing left to the Councel to do, therefore it is well enough: but it had bin otherwiſe, if it had bin a Judicial Act; for that had bin for Arbitrators to delegate their Authority to others, which is not warrantable, becauſe it is contrary to the Submiſſion: but to delegate a Miniſteriall Act is not contrary to it. It was adjudged for the Plaintiff. H. 1649. *Cater* and *Starkute*'s Caſe. *Styles*, 217, 218.

17. Treſpaſs *Quare Clauſum fregit* was brought againſt an Attorney of the Common-Pleas; He pleaded his priviledge by an Attorney. Upon which Plea, the Plaintiff did demur. The Queſtion was, Whether he might plead this Plea by Attorney, or whether he ought to plead it in proper perſon: It

was

was ſaid he ought not to plead it by Attorney; and every one by the Common Law ought to appear in perſon: and there is no Statute Law, or Uſage, that authorizeth an Attorney, to make an Attorney to demand his priviledge: Alſo, it is againſt the Dignity of the Court; and alſo thereby he deſtroys the very Reaſon why he hath his priviledge, which is his Attendance in Court. But the Opinion of the Court was, That an Attorney may plead his priviledge by Attorney, and there is no Inconveniency follows by it, and it is not contrary to any thing that he hath done, but it may be he is ſick, or hath buſineſs in another Court. The Plea was allowed, and the Demurrer over-ruled. M. 1653. *Higgs* and *Harriſon*'s Caſe. *Styles* 413.

18. In Accompt: The Defendant pleaded, He was never Receiver; and found for the Plaintiff. The Defendant was adjudged to accompt before Auditors. The Defendant pleaded before the Auditors, That he had delivered over part of the Money. The Plaintiff demurs, and for cauſe ſhews, That the Plea is contrary to the Verdict; for that is, that he ſhould accompt for all, and here he would accompt but for part only. The Court was of Opinion, that it cannot be a good Plea before Auditors in diſcharge of the Accompt: But here the Plea of Delivery over, hath made it a Plea in Bar, and it would be miſchievous now to plead it in diſcharge; for this would cauſe one and the ſame Iſſue to be twice tryed, and then there may be contrary Verdicts, which would be very inconvenient. It was adjudged for the Plaintiff. Trin. 1653. *Pendarvis* and St. *Aubins* Caſe. *Styles*, 410, 411.

19. Debt upon a Bill: The Defendant pleaded, That after that the money became due, he and the Plaintiff ſubmitted themſelves by word to an Award; and that there was Award made that the Defendant ſhould pay the Plaintiff 8 *li.* at ſuch a place, and thereupon the Plaintiff ſhould give him a general Releaſe, and that he accordingly tendred the money. The Plaintiff demurred, and ſhewed for cauſe, That here is a ſubmiſſion by word pleaded, after the day of payment expreſſed in the Bill, which is not good to diſcharge the Debt. It was adjudged, That the Demurrer was good, and Judgment given for the Plaintiff. M. 1651. in B. R. *Luddington* and *White*'s Caſe, *Styles*, 350.

20. Debt upon an Obligation to ſtand in Award. The Defendant pleaded *Nil Debet*; and upon a Demurrer, Exception was taken, That the Action here is meerly grounded upon the Award; and therefore the Award ought to be brought into Court, which is not done. It was the Opinion of the Court, That if an Action of Debt be brought upon an Obligation, the Obligation ought to be produced, and in all other Caſes where things cannot be demanded but by Deed: Otherwiſe it is, if they may be demanded either by Deed or without Deed; but in this Caſe here is no Deed: For an Arbitrament under Seal is no Deed, and the Arbitrament may be made without Deed, and therefore it is not neceſſary to be produced in Court. It was adjudged for the Plaintiff. Trin. 1655. *Dod* and *Horton*'s Caſe. *Style*, 459.

21. Debt upon an Obligation for performance of certain Covenants in an Indenture. The Defendant pleaded performance generally. The Plaintiff demurred to the Plea, and ſhewed for cauſe, That divers Covenants are contained in the Indenture; ſome of them in the affirmative, and ſome in the Negative: and therefore a general pleading of performance of all is not good. For as to the Covenants in the affirmative, he ought to plead a ſpecial performance, and ſhew how; and of that Opinion was the Court: Wherefore adjudged for the Plaintiff. M. 1649. in B. R. *Fiſher* and *Dell*'s Caſe. *Styles*, 165.

22. A *Quare Impedit* was brought againſt the Biſhop of *Ely* by Husband and Wife: the Biſhop pleaded generally, that he was *Schiſmaticus inveteratus*, but did not ſhew in what he was a Schiſmatick: and for that cauſe, It was adjudged againſt the Biſhop. But if he had ſhewed certainly in writing he was *Schiſmaticus, et ea occaſione inidoneus ſit et inhabilis*, it had been good. The doubt was, if the ſame were helped by the Statute of 27 Eliz. of Demurs. It was ſaid, That the Statute helpeth onely in matters of Form; but this is matter of Subſtance. But *Anderſon* Chief Juſtice ſaid, Although it be the Subſtance of his Plea, yet it is but Form to plead it certainly. And he ſaid, If one generally demur to a double Plea, it is not good at this day: And ſo He, *Periam*, and the other Juſtices, by their ſilence, ſeemed to agree thereunto: But the Caſe in that point was not Ruled. In this Caſe, It was agreed, That the Action brought in the name of the Husband and Wife was well brought: And in this Caſe, it was ſaid by the Lord *Anderſon*, That if a thing be ſufficiently alleadged, it is confeſſed by the Demurrer; otherwiſe not. Trin. 29 Eliz. in C. B. *Specot* and the Biſhop of *Ely*'s Caſe. *Goldesbr.* 52. 6. See *Cooke* Part. Spencer's Caſe, 57.

23. Aſſumpſit againſt an Adminiſtrator upon a Promiſe by the Inteſtate, ſuppoſing that the Inteſtate borrowed of the Plaintiff, 1. May, 12 Jac. 20 l. and promiſed to pay it upon Requeſt. That the Plaintiff, 1. Aug. 12 Jac. requeſted the payment, and that he had not paid it, and died, and Adminiſtration was committed of his Goods to the Defendant, who upon Requeſt had not paid it. Upon Non Aſſumpſit, It being found for the Plaintiff. It was

was moved in stay of Judgment, that this Assumpsit being made, *Anno* 12 Jac. and the breach the same, there this Action is brought too long after; for by the Statute of 21 Jac. of Limitations of Actions, it should have been brought within six years: Some of the Justices were of Opinion, That he could not have advantage of the Statute, unlesse he had pleaded it, or had demurred thereupon: Other of the Justices conceived, That forasmuch as it appeareth upon the Plaintiff's own shewing in his Declaration, That it is out of the Statute of Limitations, and that the Statute is in the Negative, that it shall not be brought at all, unlesse it be brought within the time limitted by the Statute; therefore the Defendant shall have advantage thereof by Exception, without pleading, or demurring: The Court took further time to advise. Mich. 5 Car. in B. R. *Faukersley* and *Robinson's* Case. *Cro.* 1. Part, 116.

24. Debt brought against the Administrator of J. who pleaded, That the Intestate was endebted to him by divers Obligations (and recites them) to the sum of 80 l. and that goods to that value, and not above, came to his hands, which he deteynes for his Debt: and that he hath nothing *ultra*. The Plaintiff demurred, because it amounted to the general Issue. The better Opinion of the Court was, That this was no cause of Demurrer, for the Plea is sufficient, and the reason of pressing a generall Issue, is not for insufficiency of the Plea, but not to make a long Record, when there is no cause which is matter of discretion; And therefore it is to be moved to the Court, and not to be demurred upon. *Trin.* 13 Jac. in C. B. Sir *Henry Warner* and *Wainford's* Case. *Hob.* 117.

25. Debt upon an Obligation by an Administrator, the Defendant pleaded, That the Obligation was with Condition, for the performance of Covenants in a Deed Poll, and pleaded, That he had performed them all, not shewing what they were; Whereupon the Plaintiff demurred in Law, And the Plea upon the Demurrer was adjourned from *Oct. Mich.* to *Oct. Hillary*, at which day the Defendant pleaded, That since the Darrein continuance, the Plaintiff's Administration was revoked, and committed to the Defendant: In this Case, it was agreed, That upon those adjournments, and Continuances of Demurrers, the Plaintiff might be Nonsuit at the day in another Term, whereunto it is adjourned, and by the same reason, he may plead a Plea, *Puis le Darrein Continuance*. 2. It was agreed, That if he or the Plaintiff should here take Issue, or demur upon this Plea, yet the Court must consider upon the first demurrer, for if upon that standing confessed by the demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, however the latter Issue or demurrer passe; Otherwise it were if the first had bin an Assise, for then nothing were confessed to his prejudice, and then that had bin utterly relinquished by the second Issue, or Demurrer. Hill. 13 Jac. in C. B. *Stoner* and *Gibson's* Case. *Hob.* 81.

26. The Queen brought a *Quare Impedit* against the Arch-bishop of *Canterbury*, the Bishop of *Chichester*, and the Incumbent: And Counted, that A. was seised of the Advowson, and that he was Outlawed in an Action personall, at the suit of one, and shewed the whole Outlawry certain; Exception was taken to the Declaration, because in the setting down of the Outlawry, the processe is alledged to be retorned by the Sheriff, but the name of the Sheriff is not there expressed; It was agreed as to that point, That the Sheriffs are to put their names to the Retorn of the Writs, but it is not requisite so to plead it, for the omitting of it doth not make the Retorn void. Another Exception was, That the Patron had pleaded one plea, and the Incumbent the same Plea in bar; And the Queen had demurred in this manner, *scil. Quod seperalia placita per dictos, &c. seperaliter placitat. &c. dicta Domina Regina necesse non habet, nec per legem terræ tenetur respondere*. The Opinion of the Court was clear, That the Demurrer ought to have bin severall, upon the Plea of the Patron by himself, and of the Incumbent by himself. Hill. 30 Eliz. in C. B. The Queens, and the Bishop of *Canterburyes* Case. *Leon.* 139.

27. The Case was, the Defendant being endebted to C. who dyed Intestate; Administration of his goods were committed to J. S. who brought Debt, and had Judgment, and dyed before Execution, and Administration of the goods Intestate was committed to the Plaintiff, who took out a *Scire facias* upon the Judgment; and whether it lay or not, was a demurrer in Law, It was the Opinion of the Justices, That the *Scire facias* did not lye, for want of privity, and therefore the Plaintiff was put to bring his Action *de novo*, Pasc. 1 Jac. in B. R. *Yate* and *Gough's* Case. *Cro.* 2. Part, 4.

28. A, B, and C. were joyntly bound in a Recognizance to the Plaintiff, viz. A. in 120 l. and B. and C. in 60 l. *et uterque eorum*: If the Plaintiff should bring Debt of 60 l. A. before *Octab. Hill.* following in C. B. that he within 8. dayes after warning, should appear by himself or his Attorney, and if he were condemned, should satisfy the Debt, or render himself to the Prison of the *Fleet*, there to remain untill he be satisfied: And layes *de facto*, That he brought debt of 60 l. in the Common-Pleas against A. and it was so far proceeded in the Action, that it was adjudged, That

The Plaintiff ſhould recover his Debt of 60 l. and 5 l. Coſts. And that he ſued forth a *Capias ad ſatisfaciendum* againſt A. and that he had not paid the Condemnation, nor rendred his body: The Defendant demurred, becauſe the Action is brought againſt C. onely, whereas it ought to have been brought againſt him and B. for the words are *utrique cognovit*. But as to that, it was ruled by the Court, That foraſmuch as both appeared at the day of the Retorn, and that *Taliter proceſſum fuit*, that the Plaintiff recovered, it was ſufficient, being but a conveyance to the Action, and Collaterall: Another Exception was, becauſe the Plaintiff had not ſhewed, That he gave warning of the Action brought. It was holden by three of the Juſtices, That that was a materiall Exception becauſe it is a Condition precedent, which ought to be firſt alledged to be performed; wherefore for that cauſe, Judgment was entred for the Defendant. Mich. 1 Jac. in B. R. *Hargrave* and *Rogers* Caſe. *Cro.* 1. Part, 45.

29. In a Replevin, the Caſe was, The Plaintiff, in bar to the Avowry, ſhews, That the Land was Copyhold-Land, Grantable in Poſſeſſion, or Reverſion, for life, or in Fee; And that the Lord Granted the Reverſion unto him after the death of W. who was Tenant for life, and ſhews the death of W. whereby he entred: Upon which, it was demurred, becauſe he did not ſhew the beginning of W. his Eſtate, or by whom W. had the Eſtate Granted. But the Opinion of the Court was, That that was no cauſe of Demurrer, becauſe it is not the Plaintiff's Title, but matter of Conveyance thereunto: It was adjudged for the Plaintiff. Paſc. 2 Jac. in B. R. *Lodge* and *Fryes* Caſe. *Cro.* 2. Part, 52.

30. Debt brought upon the Statute of 8 Eliz. for Coſts recovered in an *Ejectione firme*, the Plaintiff being Non-ſuit, and ſuppoſing the Statute to be made *Ad Parliamentum tenium Anno* 8 Eliz. whereas the Parliament began *Anno* 5 Eliz. and by Prorogation, was held in *Anno Octavo*; ſo it ought to have bin *ad ſeſſionem Parliamenti tent.* Anno, 8 Eliz. and for this Cauſe after Demurrer, it was ruled to be ill. Hill. 3 Jac. in B. R. *Ford* and *Hunter's* Caſe. *Cro.* 2. Part, 111.

31. Debt brought for 300 l. in the *Debet et Detinet*; for that the Plaintiff by Indenture, by the name of O. H. Executor of J. H. demiſed to the Defendant ſuch Land as he had in Extent, for a Debt recovered by J. H. *Habendum*, for ſo many years rendring Rent; and for three years Rent the Action was brought. The Plaintiff demurred, becauſe the Action is brought by him in the *Debet et Detinet*: But the Demurrer was over-ruled by the Court, for it is not brought by him as Executor, though he be named Executor in the Indenture; And although he made the Leaſe as Executor, yet making it for years by Indenture, if he hath not any other Title, it will paſſe well enough and it is upon his own contract, and he ſhall have Debt for it, as if he were ſeiſed in his own right. Paſc. 22 Jac. in B. R. *Holman* and *Chutes* Caſe. *Cro.* 2. Part, 685.

32. Debt upon a Demiſe of a houſe, and divers Lands *apud* C. and of ſeverall Cloſes, The Defendant pleaded an Entry into parcell of the Lands at C: Iſſue being thereupon, It was found for the Plaintiff, It was moved the Declaration was not good, becauſe no place is mentioned where the Lands were; But it was holden by the Court, That the Declaration was not good; and it had bin a good cauſe of Demurrer, &c. But in regard the Defendant hath pleaded a Collaterall plea, *ſcil.* Entry of the Plaintiff, he hath made the Declaration good. Mich. 21 Jac. in B. R. *Backland* and *Otleys* Caſe. *Croke*, 2. Part, 692.

33. Treſpaſſe for Aſſault, Battery, Wounding, and taking away 12 Plate Locks. To the Aſſault and Battery, &c. the Defendant pleaded Not-guilty; And for taking away the Locks, he pleaded a ſpeciall Juſtification; by vertue of Letters Patents of Incorporation, Granted to the Lockſmiths of *Durham*, by the Biſhop of *Durham*, who had *Jura regalia* within the County of *Durham*; And that he as Warden of the Company, took them. The Plaintiff demurred upon the Plea, and for cauſe ſhewed, That it appears not by the Plea, that they are a Corporation created by the Biſhop, but onely that the Cuſtomes uſed amongſt them in order to the regulating of their Trade, were Confirmed by the Biſhop, which doth not make them a Corporation. The Opinion of the Court was, That the Demurrer was good, For that there doth not appear any Order made by the Corporation to take away the Locks; and therefore what was done, was without Warrant, though the Corporation had ſuch a power; And the Court ſaid, It would be hard to maintain, the Lockſmiths to be a Corporation, becauſe the Biſhop Confirmed their Orders. Mich. 1650. in B. R. rott. 33. *Goodyer* and *Shawes* Caſe. *Styles* 293.

34. Action upon the Caſe for ſelling him falſe Bills of publick Faith, &c. The Defendant demurred upon the Declaration for that the Ordinances of Parliament, was miſrecited, as alſo the names of the Commiſſioners in the Ordinance, and alſo becauſe, It is not ſhewed in what manner the ſame were Aſſigned, but generally, that they were Aſſigned in due form of Law; The Court held, That the naming of the Ordinance, and of the Commiſſioners, was but inducement to the Action,

and

and the shewing how the Bills were Assigned, not necessary; but the ground of the Action is the Deceit, in Assigning over false Bills, and Affirming them to be true; And the Defendant by his demurrer, hath the Deceit: and therefore the Demurrer was over-ruled, and Judgment given for the Plaintiff, Trin. 1652. rott. 460. in B. R. *Fowk* and *Boyles* Case. *Styles* 343.

35. Covenant brought by the Mayor and Commonalty of *London*, against H. for Rent reserved upon a Lease made to him of the Garble-Office, The Defendant pleaded, That the Office was an Office of trust, and consequently could not be let for years, and so no ground of Action: For the Plaintiffs, it was said, That the Mayor and Commonalty had a Fee-simple in the Office, and not a meer Trust in them to execute it. And 2. This Lease shall be accounted but a Deputation, and not a Grant of the Office, and the Lessees Covenant will bind him to pay the Rent. For the Defendant, it was said, That the Office is an Office reposed in the Corporation for the publique good, and is not vested in the Mayor, and therefore he cannot Grant it, though he may make a Deputy to execute it, but not Grant it to make a Revenue of it. The Court said, It would be hard to maintain the Defendants plea; for that they may make a Deputy to Execute the Office: But in regard it is an Office of Trust, they said it is considerable, Whether it may be leased out, though the Mayor might make a Deputy. Mich. 1652. The Mayor and Commonalty of *London*, and *Hutton*'s Case. *Styles* 357.

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2. *Where, and what matters in fact, shall be Confessed by the Demurrer, What not.*

1. DEbt is brought upon an Obligation, and doth not declare at what place the Obligation was made, for which cause the Declaration is not good. If the Defendant doth not demur upon the Declaration, but pleads an Acquittance; in which he acknowledgeth the Deed; the same makes the Declaration good. Mich. 29 H. 8. *Dyer*, 62.

2. An *Ejectione firme* was brought against two: one appeared, and pleaded the generall Issue; processe continued against the other, who now appeared, and pleaded an Entry after the last continuance, in abatement of the Writ; And upon that Plea, the Plaintiff demurred in Law. In the Interim, the Issue was found for the Plaintiff, by *Nisi Prius*, against him who appeared first: And thereupon the Plaintiff demanded Judgment; It was the Opinion of the Court, That the Plaintiff should not have judgment, because by his Demurrer in Law, he had confessed his Writ to be abated. Otherwise it had bin, if he had onely Imparled to the Plea. Hill 6 Eliz. *Dyer*, 226.

3. The Vicarage of Y. being of the Patronage and gift of the Prebend and Parson of Y. became void, and remained void two years, by which Title of Lapps, devolved to the Queen by her Prerogative. The Bishop of B. made Collation for Lapps to *L.* The Queen presented J. S. and the Bishop would not admit him; who thereupon brought a *Quare Impedit* against the Bishop and Incumbent depending, which L. purchased another Presentation in the name, without mentioning of the first, by fraud and Deceit; Afterwards the Queen certified the Court, That she had forgot her first Presentation, and said, That her pleasure was, That her first Presentation should stand, And, If that the second Patent of Presentation, obtained by fraud, and without expresse mention of the pleasure of the Queen, be sufficient to avoid the first or not, was the Question. Afterwards Judgment was given for the Queen; because that the fraud and deceit done to the Queen, dependent, the Writ, was confessed by the Demurrer of L. Mich. 17 Eliz. *Dyer*, 339.

4. A man brought an Appeal of Maim, and Declared, That the Defendant did Feloniously Maim him in his left hand; The Defendant pleaded at another time, and before the Appeal brought, the Plaintiff brought an Action of Trespasse in the Common-Pleas, of battery against him, for the same battery, and had judgment thereupon, and Damages and Costs Assessed, which the Defendant had satisfied and paid; and averred that the Action of Trespasse, and the said Maim, whereof the Appeal was brought, was one and the same, and not divers: Upon which Plea, the Plaintiff demurred. And because it appeared to the Court by the Bar of the Defendant, which the Plaintiff by his Demurrer hath confessed, And that he himself in the Action of Trespasse for the battery, hath recovered damages, for the Maim (for wounding, includeth the Maim and more) and the Defendant hath averred, That the wounding in the Action of Trespasse, and the Maim in the Appeal, are all one: It was Resolved, That the Plea in bar was good. Hill. 31 Eliz. in B. R. *Cook* 4. Part, 43, *Hudson* and *Lees* Case.

5. A man made a Lease for years, and afterwards bargained and sold the Reversion, to one and his Heirs, and before that Inrolment of the Deed, he levyed a Fine of the Tenements to him and his Heirs, and afterwards the Deed was en-

rolled within six Moneths, which was averred so to be by the Defendant in the Action: And the Defendant further pleaded, That she never Attorned; The Action was an Action of Waste. The Plaintiff demurred upon the Defendants Plea. The point was, Whether the Defendant shall be admitted to aver, When the Deed was enrolled: It was said, That it shall be intended in Law, That the Deed was Enrolled the first day of the Term; and so much the rather, because it doth not appear by the Record, when it was enrolled. But in this Case, It was Resolved by the whole Court, That it is true, That it shall be intended by Presumption of Law, That the Deed was enrolled the first day of the Term: But *stabit Præsumptio donec probetur in Contrarium*; And because in this Case, the Plaintiff by his demurrer hath confessed the Enrollment to be after the Term, for this cause, the Presumption shall vanish, and become of no force, and the confession of parties shall stand. Trin. 33 Eliz. in C.B. *Cook* 4. Part, 71. *Hind's* Case.

6. In a Replevin, the Defendant Avowed for a Rent of 20 l. The Plaintiff in bar of the Avowry alledged the Statute of Usury; And that A. lent to B. 100 l. and that B. granted to A. an yearly Rent of 20 l. upon Condition, That if the said B. pay to the said A. such a day, 100 l. that then the Rent should cease; B. received the mony, and granted the Rent upon such Condition, and for rent arrear, distreyned; And note, the Distreyn was, 27 *December*, 33 Eliz. for 20 l. at *Michaelmas*, then past; upon which the Avowant demurred in Law. It was Objected, That the Plaintiff in Bar of his Avowry hath alledged that the grant was made upon a corrupt Contract against the Statute; And the Avowant hath demurred thereupon, by which he hath confessed all matters in Fact; Yet because, upon the matter disclosed in the Bar, it appeareth to the Court, That it was not a corrupt Contract against the Statute, and so his Allegation of the same, repugnant to the matter, shewed by himself, in his bar to the Avowry, And a Demurrer is not a confession of all matters in fact, but of all such matters in fact as are well and sufficiently pleaded for this cause; Judgment was given for the Avowant. Mich. 34 Eliz. in B.R. *Cook* 5. Part, 69. *Burton's* Case.

7. In a Replevin, the Defendant did Avow the taking of the Cattell at B. in a place called N. which was his Freehold for damage Feasant: The Plaintiff in bar of the Avowry said: That A. was seised of the place, and had Issue three sons, B, C, and D. and by his Will in Writing (of which he made his sons his Executors) Devised the same to B. his eldest son for 60 years, if the said A. should so long live; And afterwards to the use of C. his son for life, and afterwards to the Heirmales of the body of B. with divers Remainders over. Proviso, That if B. do not suffer his Executors quietly to carry away all his goods in his house, or shall do any Act to hinder the intent of A. his Father, that then the Uses limitted to B. and his Heirs, should cease. A. dyed, the Executors came to the house, and there would have carried away the goods: B. would not suffer them, but hindred them to carry them away; he in the Remainder entred, viz. C. The Plaintiff claymed under the Title of B. It was Resolved in that Case, amongst other points, That although, That the Title which the Plaintiff claymed in his Bar be utterly destroyed (for that was Countermanded by the Feoffment which the Avowant pleaded, and which the Plaintiff did confesse by his Demurrer) yet the Plaintiff should have Judgment, because his Count is good; and the Avowant in his Replication to the Bar of his Avowry, hath done two things: One, he hath destroyed the Title which he made by the Will; the other, he hath given to the Plaintiff another Title, *scil.* to have the Land for 60 years, by force of the uses declared upon the Feoffment. So the Court was clear of Opinion, That the Plaintiff had a Lawfull Term in the Land, and therefore Judgment was given for the Plaintiff against the Avowant. Mich. 7 Jac. in C. B. *Cook* 7. Part, *Francis's* Case. 93.

8. In *Ejectione firmæ*, the Defendant shewed, That King *James* was seised of the Manor of D. in the right of his Crown, in which there were divers Copyholds, Demiseable in Fee, in Tail, for Life, or Years; And that the Copyholders by Custome, might make Leases for three years, without Licence; And that the King did Grant the Copyhold in Question to A. who was admitted; under whose Title the Defendant claymed, The Plaintiff replyed, and set forth, That Queen *Elizabeth* was seised of the said Mannor, And *Anno* 22. of her Raign, did Grant the said Copyhold in Fee to B. who was admitted, and dyed seised, and that his son was admitted to it; and did enter, and made the Lease to the Plaintiff; Upon this Replication, the Defendant demurred in Law, and for cause shewed, that the Plaintiff (as he ought to have done) had not traversed the second Grant alledged: It was the Opinion of the whole Court in this Case, That the Replication was good without any Traverse; For how can the Defendant have the Land when the Plaintiff had it before, as by his Replication it appears, for that his Lease being first in time, avoids the Defendants Lease being the latter; And therefore the Defendant in this Case, ought to have rejoyned, and so to have traversed the first Lease: but by his

his Demurrer to the Replication, he hath confeſſed the Leaſe under which the Plaintiff claims. Judgment was given for the Plaintiff. Trin. 10 Jac. in B. R. rott. 767. *Rice* and *Harris's* Caſe. *Rolls.* 2. Part, 1.

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3. *Where Demurrer may be upon the Evidence; And where ſuch Demurrer ſhall be good, where not: And where after Demurrer, there ſhall be no Repleader; And when, where, and who may wave his Demurrer, who not; And where it ſhall be peremptory, where not, but paſſes Ouſter.*

1. NOte, It was Reſolved, That if the Plaintiff in Evidence ſheweth any matter in writing, or of Record, or any Sentence in the Eccleſiaſticall Court, upon which Queſtion in Law doth ariſe; And the Defendant offereth to demur in Law; The Plaintiff cannot refuſe to joyn in Demurrer; but he ought to joyn in Demurrer, or wave his Evidence: The ſame Law is, If he produceth Witneſſes to prove matter in fact, upon which a Queſtion in Law doth ariſe; there if the Defendant admit their Teſtimony true, he may Demur upon it, and the reaſon is, becauſe matter in Law is not to be put to the people: But if Evidence be given for the King, and the Defendant offereth to demur upon it, the King is not bound to joyn in Demurrer; But the Court may direct the Jury to find the ſpeciall matter; and upon that to adjudge according to the Law. Alſo the King may wave a Demurrer, and take Iſſue at his pleaſure. Trin. 42 Eliz. in B. R. *Cook* 5. Part, *Bafer's* Caſe.

2. In an *Ejectione firme*, upon Not-guilty pleaded, The Jury found by ſpeciall Verdict, That the Defendant had not any thing in the Land at the time of the making of the Leaſe, upon which the Action is brought: And if the ſame Leaſe ſhould be a good Leaſe by Eſtoppell, was the Queſtion; the Jury have now found the truth of the matter, *ſcil.* That the Leſſor had not any thing at the time of the Demiſe. *Periam* and *Anderſon* Juſtices were clear for the Plaintiff; That it was a Leaſe by Eſtoppell, and ſaid, It had bin adjudged in the Kings Bench, That the Jury in ſuch Caſe, upon pain of Attaint, are compellable to find the Eſtoppell. *Windham* Juſtice ſaid, That the Plaintiff ought to have demurred upon the Evidence, *Windham*. What if the Defendant will not joyn with the Plaintiff in the Demurrer, *Windham* ſaid, Then the Court ought to over-rule them, and if the parties had demurred upon the Evidence; we ſhould have adjudged upon that Evidence, That a man cannot Leaſe Lands in which he hath not any thing; And the Court ſaid, That here the Eſtoppell could not be pleaded, for the Defendant hath pleaded the generall Iſſue; but if he had pleaded *Non demiſit*, then the Eſtoppell ſhould have holden place. Mich. 31 Eliz. in C. B. *Sutton* and *Dickens* Caſe. *Leon.* 106.

3. In Treſpaſſe for Aſſault and Battery: The Plaintiff by his Declaration, ſuppoſeth the Treſpaſſe to be done, 1. *May*, 8 Jac. at ſuch a place. The Defendant pleads, That at the ſame day that the Defendant would have aſſaulted him, that he laid his hands upon him to defend himſelf, which is the ſame Treſpaſſe of which the Plaintiff complaineth. The Plaintiff replyes, *De ſon aſt demeſne*: At the tryall, the Defendant produced Witneſſes, which proved not Aſſault to be made by the Plaintiff upon the Defendant long time, *ſcil.* by the ſpace of a year before the day contained in the Declaration, and that at this time, the Defendant to defend himſelf, hath aſſaulted the Plaintiff: upon this Evidence the Plaintiff demurred, in as much as this proves an Aſſault at another day then is contained in the Declaration; And the Defendant by pleading hath confeſſed an Aſſault and battery made upon the Plaintiff, the day contained in the Declaration, and now upon Evidence, proves his juſtification at another day: And, if this Evidence to prove his juſtification was ſufficient, was the Queſtion. It was agreed by the Court in this Caſe, That if the Defendant had pleaded Not-Guilty, the day had not been materiall; but the Plaintiff might have given in Evidence any Battery before the day contained in the Declaration, or after, before the Action brought, and this is ſufficient to prove his Declaration: But the parties, *ſcil.* the Plaintiff by his Declaration, and Replication, and the Defendant by his Juſtification, have both agreed of the day; and therefore it was holden, That they could not now vary from it. Trin. 10 Jac. in C. B. *Downes* and *Shrimpſhawe's* Caſe. *Brownlow.* 2. Part, 183.

4. An Action of Trover and Converſion of goods, The Defendant ſaid, That the Queen was ſeiſed of the Mannor of D. and that perſons unknown ſtole the ſaid goods, and brought them into the Mannor, and there left, and waved them, and that the Defendant, as the Queens Bayliff, ſeiſed the goods, and prayed in aid of the Queen: It was adjudged in this Caſe, he ſhould not have aid: For it was Reſolved, That if a Felon ſtealeth goods, and

and leaves them in a Mannor, and afterwards flyeth, these goods are not forfeited, nor waved, But *bona waviata*, or *derelicta*, are, when they are stollen, and waved by the Thief in the flying; and the cause why the owner shall lose the goods waved, is, because he doth not make fresh suit; and the Fellon is not Attainted by the party in his Appeal. 2. It was Resolved, That in the principall Case, the Demurrer was not peremptory; but a *Respondes Ouster*. Pasc. 43 Eliz. in B. R. *Cook* 5. Part, *Foxleyes* Case.

5. A man was in Execution for Debt, and broke the Prison, and escaped. The Sheriff made Fresh suit, and took him again: It was Resolved in this Case, 1. That if a Prisoner who escapeth, be out of sight of them which make pursuit, yet if he be taken *in recenti Executione*, although he be taken in another County, the Sheriff shall have an Action upon the Case for such an escape against him, but otherwise it is where he escapes with the assent of the Goaler. 2. It was Resolved in this Case, That after a demurrer, there shall be no Repleader, for that the parties, by mutuall assent, have put themselves upon the Judgment of the Court. See *Cook* 3. Part, *Rigeways* Case. Pasc. 36 Eliz. in B.R. *Popham* 42. the same Case.

Deodands.

Omnia quæ movent ad mortem sunt Deodanda. 6 E. 6. Dyer, 77.

1. THe King Leaseth *Richmond* Fee, with all Deodands which should fall within the same to J. S. for years; And afterwards the King Granted generally, all Deodands to his Almoner. The Term of J. S. expired; Afterwards the King made a new Lease, as above, to J. S. It was the Opinion of the Justices, That the Almoner should not have the Deodands, because his Grant was void, because the first Lease to J. S. was not recited in his Grant. 6 E. 6. *Dyer*, 77.

2. The Archbishop of *Canterbury*, amongst other Liberties and Franchises, had the Goods of all Felons of themselves, within his Mannors, &c. Afterwards he made a Lease to Sir *James Hales*, late Justice of the Common-Pleas; which Lease was confirmed by the Dean and Chapter. The Bishop committed Treason: After, the King made a general Grant to the Bishop of *Chichester* his Almoner, of all goods of Felons of themselves: He became after *Felo de se*: The Question was, Whether the Almner should have the Lease? It was the Opinion of the Justices, That the Grant was good to the Almner, because in many cases, the King may grant nothing which is not in him at the time of the grant; As, the King may grant the Marriage and Custody of the heir of his Tenant when it shall happen: Or the King may grant the Temporalties of the Bishop *quando acciderint*. But the Court was clear of Opinion, That if the Bishop of *Canterbury* had been Attainted at the time of the Grant, that the Grant had been good. Mich. 2 Ma. *Dyer* 128. See *Cook* 1. Part, 50. in the Case of *Altonwoods*, &c.

3. If a man who is *Non Compos mentis*, giveth himself a mortal wound, and, before he dyeth, he becometh of sane memory, and afterwards dyeth of the same wound; in this case, although that he dyeth *sana memoria*; yet because the Original cause of his death, viz. the stroke was when he was *Non Compos mentis*, he shall not be *Felo de se*, and so forfeit his goods, because the death hath Retorn to the Original Act, which was the stroake. *Cook* 1. Part, 100. in *Shelleys* Case.

4. When the King granteth any Priviledges, Liberties, Franchises, &c. which were Priviledges and Franchises in his own hands, as parcell of the Flowers of his Crown, as Goods and Chattels of Felons, Fugitives, Outlawes, Goods and Chattels Waived, Deodands, Wreck of the Sea, &c. within such possessions; there if they come again to the King, they are drowned in the Crown, and he hath them in the Right of his Crown: But when a Liberty, Priviledg, Franchise, &c. was first created by the King, and was not any such flower before in the Garland of the Crown, there by the coming of them again to the Crown, they are not extinct. *Cook* 9. Part, 25. in the Case of the Abbot of *Strata Mercella*.

5. *Deodands*, are goods which occasion the death of a man by misadventure, and are not forfeited untill the matter be found of Record, and therefore they cannot be claimed by Prescription; and the Jury who find or present the death by such misadventure, ought to find and apprise the *Deodand* also. *Cook*. 5. Part, 110. in *Foxleys* Case.

6. It was moved to the Court, That a man Riding upon a horse through the water was drowned, and by the Coroner's Inquest it was found, that his death was caused *per Cursum aquæ*; and the Horse was not found to be a *Deodand*. And the Opinion of the Court was, That it was well done; for that the Water, and not the Horse, was the cause of his death. Pasch. 16 Jac. in B. R. *Pash.* 136. And so it was adjudged in the Lord *Chandois* Case. Which see, *Cro.* 2. Part, 483.

Departure.

Departure.

1. *What ſhall be ſaid to be a* Departure *in pleading; and what not.*

TReſpaſſe brought for Aſſault, Battery, and Impriſonment, *ultimo Octob.* 6 Car. at W. The Defendant Juſtifies, becauſe 13. Aug. 6 Car. a *Supplicavit* iſſued out of the Chancery, and by a Warrant from the Sheriff to the Defendant, he arreſted him the 21. of Septemb. and detained him two dayes, and carried him and delivered him to the Sheriff. The Plaintiff Replyes, and confeſſeth the Writ, Warrant, and Arreſt 21 Sept. and Impriſonment for two dayes, but ſhews, that afterwards he found Sureties before the Sheriff, and was diſcharged; and that the Defendant *poſtea, viz. prædict. 1. Octobris*, 6 Car. aſſaulted and Impriſoned him of his own wrong. Upon this, the Defendant did demur in Law. It was ſaid, the Plea in barr was not good, becauſe he doth not anſwer the time in the Declaration, *viz. ult. Octob.* neither by Anſwer, nor Traverſe; but that was holden to be good enough. But the Court conceived, That the Replication was not good, varying from the day in his Declaration, and that it was a Departure. Mich. 7 Car. in B. R. *Tyler* and *Walls* Caſe, *Cro.* 1. Part, 165.

2. In Trover and Converſion of a Ship and Goods, The Plaintiff declared, the 2. *Martii*, 21 Jac. he was poſſeſſed, &c. and left them, and that they came to the Defendant's hands, and he converted them. The Defendant pleads the Statute of 21 Jac. of Limitation of Actions, and the 20 *Martii*, 19 Jac. *cauſa Actionis accrevit*; ſo that not onely 3. years and more are Incurred ſince the Parliament, but 6. years after the Converſion. The Plaintiff Replyes, That he was poſſeſſed of the Ship as of the proper goods, and ſo poſſeſſed before the 20th of *March*, 21 Jac. *ſcil.* 1. *Martii*, 19 Jac. they agreed at L. that the Defendant or his ſervant ſhould tranſport the ſaid Ship and Goods to *Spain*, and ſhould afterwards reſtore them to the Plaintiff upon requeſt: whereupon the Defendant taking the Ship, 1. *Martii*, 19 Jac. tranſported her; and 20. *Martii*, 19 Jac. there ſold the Ship and goods to perſons unknown, and converted them to their own uſe: and that the Defendant after the Converſion remained *in partibus tranſmarinis, uſq;* 1. *Martii*, 1 Car. Upon this Replication, the Defendant demurred in Law. In this Caſe, other Points being Reſolved, It was urged, That the Replication was a Departure from the Declaration: For by the Declaration he ſuppoſeth a Caſual loſſe, and a trover by the Defendant, and that to be 21 Jac. But in the Replication he ſuppoſeth a delivery to reſtore, and then a ſale of them the 20th of *March*, 9 Jac. So it varies in the time and manner how the Defendant had them: and although ſome of the Juſtices doubted, that the ſame was a Departure; yet upon the whole matter, Judgment was given for the Plaintiff. Hil. 6 Car. in B. R. *Swayn* and *Stephens* Caſe. *Cro.* 1. Part, 179.

3. Errour was brought of a Judgment in the Common-Pleas, In an Action brought by the Preſident of the Colledg of Phyſitians in *London* againſt *Butler*: and the Errour aſſigned was in the Replication of the Plaintiff. The Plaintiff in the Declaration in that Action ſet forth, That King *Henry* the 8th, *Anno* 19 of his Reign, Incorporated the Colledge of Phyſitians by the name of Preſident, &c. And that no man ſhould practiſe Phyſick in *London*, or within 7. miles, without Licence under the Seal of the Colledge, under penalty of 5 l. for every moneth: And that the Defendant had practiſed Phyſick in *London*, not being allowed, for 12 moneths. The Plaintiff pleaded the Statute of 34 H. 8. That every one who hath Science and Experience of the nature of Herbs, Roots, and Waters, or of the operation of the ſame by ſpeculation or practice, may miniſter and apply in and to any outward Sore, Venome, Wound, Apoſthumations, Swellings, or Diſeaſe, any Herbs, Oynments, or Implaiſters, &c. according to their cunning, experience, or knowledg for the Stone, Strangury, &c. in any part of the Realm, without Suit, or vexation, &c. And that he, having skill in the nature of Herbs, Roots, &c. by ſpeculation and practice; applyed to perſons requiring his Skill, Herbs, Roots, Waters, Oyntments, Baths, &c. to their Sores, Wounds; and for the Stone, Strangury, or other Diſeaſes in the Act mentioned, *prout ei benè viſum eſt*, &c. The Plaintiff Replyed, and ſhewed the Statute of 1 Ma. Cap. 9. the Statute of 34 H. 8. and appoints, that it ſhall be in force, notwithſtanding any Statute or Ordinance to the contrary. It was Demurred upon this Replication, becauſe it was a Departure: for it entitles him by another Act, *viz.* 1 Ma. which is not mentioned in the Declaration. But it was the Opinion of the whole Court, That it was no Departure, becauſe it fortifies the Declaration: And for the confirming of their Opinions in that, the caſe of the Preſident of the Colledge of All-Souls, was remembred. Mich. 43 Eliz. where the Preſident of the ſaid Colledge brings in an Action for taking of Toll in, &c. and ſhewes the Charter

of

of 26 H. 8. to be discharged of Toll. The Defendant pleaded the Act of Resumption of Liberties granted by King *Henry* the 6th, made, &c. and so the Liberty gone. The Plaintiff pleaded a Reviver of them by the Statute of 4 H. 7. and it was held to be No Departure, but as it were a Confession and avoiding. Trin. 8 Car. in B. R. *Butler* and the President of the Colledge of Physitians of *London's* Case. *Cro.* 1. Part, 186, 187.

4. In Debt brought for non-performance of an Award, the Case was, Two submitted themselves to the Award of others, of all Controversies Spiritual and Temporal; the Arbitrators make Award, and for not performance, the Action is brought: The Defendant in barr pleads, That the Award was, That he should Release all Suits unto the Plaintiff, which he had done; and demanded Judgment if Action. The Plaintiff Replyes, It is true, that they made such Award; but did further Arbitrate, that the Defendant should pay unto him 15 l. at the house of J. S. a stranger at such a time, *Absq; hoc*, that *fecerunt Arbitrium tantummodo*, as the Defendant hath alledged. The Defendant Rejoyns, True it is, that they did arbitrate, That he should pay unto the Plaintiff such a sum, but they did further Award, that the Plaintiff should release all Actions unto the Defendant; the which he hath not done. The Plaintiff demurred upon the Rejoynder. It was holden in this Case, That the Rejoynder of the Defendant was a clear departure from his former plea: Also the Defendant here pleads but parcell of the Award; and so it is not good: also the Court held the barr to be naught, the Replication good, the Rejoynder bad, and that the Defendant's Plea was altogether vitious, and therefore Judgment was given for the Plaintiff. Mich. 10 Jac. in B. R. *Linsey* and *Astyn's* Case. *Bo'str.* 2. Part, 39, 40. See *Godbolt* 155. the same Case.

5. In a *Replevin*, The Avowant said, That long time before the taking, J. S. was seised in Fee, and Leased the Land to him for 30 years, and avowed for Damage-Feasant. The Plaintiff said, That J. S. had not any thing but in tail, and shewed of whose guift, and conveyed the discent to him as heir in tail, and that he entred upon the Lessee. And the other said again, That the said J. S. did reserve a Rent upon the Lease, which the Plaintiff as son and heir had accepted after the death of his Father, and demanded Judgment if, &c. The same was holden by the Court to be a Departure. Mich. 1 Ma. *Dyer* 95.

6. The Case was, A Termor without impeachment of Waste, Covenanted, after felling to inclose; In debt brought upon an Obligation for performance of Covenants: The Defendant pleaded, That he had not felled. The Plaintiff said, That he had felled two acres, and that he had not made defence. The Defendant said, That he had made defence, *Et de hoc ponit se super Patriam*. It was holden, That it was a Departure and Jeofail, and the Jury was discharged. Trin. 8 Eliz. *Dyer* 253.

7. An Action of Covenant was brought against J. S. who had been his Apprentice: The Defendant pleaded, That he was within age. The Plaintiff did maintain his Action by the Custome of *London*, where one by Covenant shall bind himself within age. Exception was taken to it, That it was a Departure. It was the Opinion of *Wray*, Chief Justice, That it was no Departure; for he said, It should be frivolous to shew the whole in the Declaration, *viz.* that he was an Enfant, &c. and that by Custome he might make a Covenant which should bind him. Quære, for that many doubted of it. Hill. 29 Eliz. in B. R. *Godbolt* 122.

8. A *Quare Impedit* against the Bishop of St. *Asaph*, who justified by Lapps: The Plaintiff by Replication said, That before the 6. moneths expired, he presented to the Bishop one R. a Master of Arts and Preacher allowed, &c. The Defendant by way of Rejoynder said, That the Church upon the presentment to which the Action is brought, is a Church with Cure of Souls, and that Parishioners there are *homines walliti, Wallicam loquentis Linguam, et non aliam*: for which Cause he refused him, and gave notice to the Plaintiff of such Refusal, and of the cause of it: upon which the Plaintiff did Demur in Law. It was said in this case, That the Rejoynder was not good, for that the Defendant had departed from his barr: For in the barr the Defendant intitles himself to the Presentment by reason of Lapps: and in the Rejoynder he confesseth the presentment of the Plaintiff, and pleads his refusal of his Clerk, and shewes the cause of it, *scil.* the want of the *Welsh* Language, which is a Departure: Like to this Case, 27 H. 8. In forfeiture of Marriage, the Defendant pleaded the Feoffment of the Auncestor of the heir to divers persons, *absque hoc*, that he dyed in the homage of the Plaintiff. The Plaintiff by Replication said, That the said Feoffment was made to the use of the said Auncestor and his heirs. The Defendant by Rejoynder saith, That the Auncestor did declare his Will of the said Lands; The same was holden to be a Departure, for he might have pleaded the same in barr. The Opinion of the Justices was, in the principal case, That it was a Departure; but the Judgment was given for the Plaintiff upon another point. See *Librum*, Trin. 27 Eliz. in C. B. *Albany* and the Bishop of St. *Asaphs* Case. *Leon.* 31.

2. Of

2. *Of Departure in deſpight of Court; the form of it, and the proceedings upon it.*

1. A *Retraxit* is alwayes on the Plaintiff's or Demandant's part: And a Departure in deſpight of Court, is alwayes on the Defendants or Tenant's part: and the Entry is, *Quod venit recuſſit in Contemptum Curiæ*: and in the one caſe, the Plaintiff or Demandant is barred; and in the other, the Demandant or Plaintiff ſhall have Judgment preſently. *Cook* 8. Part, 58. in *Bitchers* Caſe.

2. If an Enfant make default, and ſo will not diſcover his title in an Action brought, his default is either *mera negligentia*, and that ſhall not prejudice him; or it is *negligentia cum Contemptu*, and is in the ſame degree, as a Departure in deſpight of Court, as if he appear, and afterwards make default: and there Judgment ſhall be given againſt him. See Trin. 15 Jac. in B. R. The Opinion of *Dodderidge*, Juſtice, in the Argument, of *Holford* and *Pratts* Caſe. *Cro.* 2. Part, 466.

3. If in a Writ of Right, the Tenant make default after he hath taken day of Imparlance, from one day to another, the ſame Term, Judgment final ſhall be given; for when he hath taken day to Anſwer in the ſame Term, and maketh default, the ſame is a Departure in deſpight of Court. Mich. 11 H. 7. 10. *Comment. on Original Writs*, 29.

Deprivation *and* Depoſition.

What Deprivation *is*; *And what are ſufficient Cauſes of Deprivation of a Biſhop, Prebend, Parſon, Vicar, or other Spirituall perſons of their Livings and Spirituall promotions*; *What not. And where Notice muſt be given of ſuch Deprivation, by the Ordinary: Where not.*

1. DEprivation is an Act of Law in the Spiritual Court, grounded upon ſome Act or defect of the perſon deprived; and is the Diſcharge of the Incumbent, or other Spiritual perſon of his Benefice or Spiritual promotion by Sentence Declaratory in the Eccleſiaſtical and Spiritual Court: upon a ſufficient cauſe proved in the ſame Court againſt him or them. Now the Cauſes of Deprivation or Depoſition of the party in the Spiritual Court (which are approved and allowed of by the Common-Law) are *Conſcientia Criminis*, *Debilitas Corporis*, *Defectus Scientiæ*, *Malitia plebis*, *Grave Scandalum*, *Irregularitas perſonæ*; *Hereſie*, *Sciſm*, *Baſtardy*, and many more. See *Dodderidge* in his Book of Advowſons. *Cook* 5. Part, *Cawdries* Caſe.

2. A. Cardinal was Collated by the Biſhop of *Durham* to a Benefice with Cure; The Biſhop dyed, and the Temporalties being in the Kings hands, The King brought a *Quare Impedit*, and ſhewed, that the Cardinal was Miſcreant, and was deprived for his Miſcreancy in the Court of *Rome*. In that Caſe, it was adjudged, that the ſame was a good and ſufficient cauſe of Deprivation: and *Bilknap*, Juſtice there, ſaid, the Law to be, That if a man for adhering to the Kings Enemies, ſhall forfeit his Lands by his adherency, and if the King ſhall have the Eſcheat of them, becauſe he is out of the Faith of his Liege-Lord the King; *à fortiori*, he ſhall forfeit his Spiritual Living, who is out of the Faith of God. And in that caſe, It was agreed, That although the Cardinal was deprived in the Court of *Rome*, yet, whether he were Miſcreant, or not, ſhould be tryed where the Church was in *England*, by the Biſhop of the Dioceſs there. See 5 R. 2. *Fitz.* to Tryall 54.

3. If a Clerk who is preſented and admitted, Inſtituted and Inducted, be perjured, and be thereof attainted in the Spiritual Court by proceſs of their Law, or by his own Confeſſion; the ſame is a good and ſufficient Cauſe to deprive him of his Benefice: But the Patron of this Deprivation muſt have Notice from the Ordinary: And ſo it is if the Clerk preſented be Irreligious, Illiterate, Baſtard, Villain, or a meer Lay-man not within Orders. See 38 E. 3. 2. 5 E. 4. 3. 5 H. 7. 19.

4. If a Parſon preſent a meer Lay-man within the age of 23 years, to a Benefice, and he is Admitted, Inſtituted and Inducted, and then is ſued in the Spiritual Court, to be deprived for Incapacity by a ſtranger; and afterwards a *Quare Impedit* be brought againſt the Ordinary and Incumbent, and Judgment be given againſt the Defendant for his default at the Grand Diſtreſſe; If afterwards the Incumbent by Sentence pronounced in the Eccleſiaſtical Court, be deprived for his incapacity at the ſtrangers Suit, ſuch Deprivation is good, although he were removed from his Benefice before by the Judgment given in the *Quare Impedit*. But it was ſaid in that caſe, That if the

Incumbent who was ſo deprived, do afterward bring a Writ of Diſceit upon the Judgment given againſt him in the *Quare Impedit* by Default, for that he was not ſummoned as he ought to be, he ſhall have Judgment thereupon; and the Deprivation in the Spiritual Court ſhall be no Impediment unto him, nor ſhall be pleaded againſt him, for that in the *Quare Impedit* the Incumbency was not in queſtion, but the Diſturbance onely; and he ſhall be reſtored to what he loſt. Mich. 19 Eliz. *Dyer* 353.

5. If the Patron preſent a meer Lay-man to a Benefice, the ſame is a good cauſe of Deprivation of him. But if ſuch a Lay-man be Inſtituted and Inducted into the Benefice, he is Incumbent *de facto*; and ought to be deprived by a Sentence in the Eccleſiaſtical Court; and of ſuch Deprivation, the Ordinary muſt give Notice to the Patron: But if the Patron doth preſent a meer Lay-man, and the Ordinary doth refuſe him, there the Ordinary needeth not to give Notice thereof to the Patron, becauſe it is notorious that he is incapble. 13 Eliz. *Dyer* 292.

6. In Ancient time, If a man had been a Dilapidator of his Church, he might have been deprived for the ſame Cauſe; As if a Biſhop, Prebendary, or Parſon had committed Waſte, in deſtroying and cutting down all the Timber-Trees and Woods which were ſtanding or growing upon the Lands; or had pulled down the houſes belonging unto, or parcel of, his Biſhoprick, Prebend, or Parſonage, he might have been depoſed or Deprived: And ſo it was, If a Parſon, Vicar, or other Eccleſiaſticall perſon, ſeiſed in the Right of his Church, had alienated the Lands which did belong and appertain to the Church, he might have been deprived for the ſame cauſe. See the Old Books, 29 E. 3. 16. 20 H. 6. 46. 2 H. 4. 3. by *Thirwit*, 9 E. 4. 34. *Cook* 11. Part, 72. And ſee the Biſhop of *Corks* Caſe, vouched in *Cook* 11. Part, 49. in *Richard Liſords* Caſe.

7. Note: It was holden by the Court, That if a Biſhop, Parſon, or other Eccleſiaſticall perſon, do cut down Trees upon the Lands, unleſſe it be for repairations of their Eccleſiaſtical houſes; and do, or ſuffer to be done, any Dilapidations, That they may be puniſhed for the ſame in the Eccleſiaſtical Court; and a Prohibition will not lye in that caſe. And it was there alſo holden, That the ſame is a good cauſe of Deprivation of them of their Eccleſiaſtical Livings, Dignities, and Promotions: But yet, for ſuch Waſtes done and committed, they may be puniſhed at the Common-Law if they will ſue there. Mich. 12 Jac. in B.R. The Biſhop of *Salisburies* Caſe. *Godbolt* 259.

8. A Parſon being Convicted at the Common-Law for Homicide, and allowed his Clergy, was ſued in the Spiritual Court to be deprived of his Benefice, and a Prohibition was prayed. But the whole Court was of Opinion, That no Prohibition ſhould be granted in that caſe; for that being *Convictus de homicidio* at the Common-Law, it was holden, That the ſame was a good cauſe of Deprivation of him. Trin. 15 Jac. in B.R. *Stanly* Caſe. *Cro.* 2. Part, 430, 431.

9. A man being Patron of a Benefice in the right of his wife, granted the next Avoidance of the Church to another: after which, the Incumbent made a Leaſe rendring Rent; which Leaſe was confirmed by the Patron and Ordinary: Afterwards the Parſon was deprived, becauſe he was a married man; ſo as the Grantee of the next Avoidance did preſent: It was holden, That the marriage of a Prieſt was a ſufficient cauſe to deprive him of his Benefice; and therefore that the Leaſe made by him, was now void, and the Entry of the laſt preſented upon the Leſſee, was lawful. Quære: For the ſame is now taken to be, That the ſame is no cauſe of Deprivation. Mich. 4 Ma. *Dyer*, 133.

10. In Treſpaſſe, for breaking of his Cloſe at *North-Luffenham*: The Caſe was this, The Plaintiff was Rector of *North Luffenham*, and was deprived of his Rectory by the Biſhop of *London* and his Colleagues by virtue of the High-Commiſſion, becauſe he had pronounced ſlanderous and Contumelious words againſt, and in depravation of, the Book of Common-Prayer. But the Form of the Sentence was, That the ſaid Biſhop, by and with the aſſent and conſent of five others of the ſaid Commiſſioners, naming which, had deprived him; and it was found, That the Commiſſioners named, were natural born Subjects of the Queen, as the Statute enacts they ſhould be. And if the Deprivation was good, or not, was the Queſtion. It was ſaid, That the Deprivation was void, becauſe it ought to have been by the Sentence of them all; and not that it was done by one, with the aſſent of the others. 2. That for the firſt Offence, the party was to loſe the profits of his ſpiritual promotions by the ſpace of ſix moneths, and not to be deprived but for the ſecond Offence after he had been once convicted: and therefore to deprive him for the firſt Offence, was void. But it was Reſolved by the Court, Firſt, to the Form of the Deprivation, that it was that which hath alwayes bin uſed in the Eccleſiaſtical Courts, to which this Court ought to give allowance: And for the Deprivation it ſelf, all the Juſtices agreed that it was good, being done by the Authority of the Commiſſion; and that they might proceed to puniſh the Offence, proved or confeſſed before them: And that all the Biſhops and Popiſh Prieſts were deprived by virtue of a Commiſſion, warran-

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ted by this Clauſe in the Act of Parliament: Wherefore, it was holden, The Deprivation was good; and Judgment given, that the Plaintiff ſhould take nothing by his Writ, Mic. 35 Eliz. in B. R. *Cawdrie* and *Allen's* Caſe. *Popham* 59. See *Cook* 5 *Cawdries* Caſe, the ſame Caſe.

11. An Incumbent was admitted, inſtituted, and inducted into a Benefice with Cure of Soules, in the time of King *Edw.* the 6. And afterwards in the time of Queen *Mary* he was deprived, becauſe he was a married man, and a Favourer of the Religion on foot, in the time of King *E.* 6. and the Church being void by his deprivation, another man was inſtituted in, and inducted in the Church; and afterwards in the time of Queen *Eliz.* the laſt Clark was deprived, and the firſt Sentence of Deprivation, in the time of Queen *Mary*, adjudged and declared to be void, and the firſt Incumbent reſtored to his Benefice. It was adjudged in that Caſe, That the Deprivation of the firſt Incumbent was good, and ſtood good, until the ſame was afterwards declared to be void; and untill then the ſecond Clerk was lawful Incumbent. But when the Sentence of Repeal came, and made void the firſt Deprivation, Then was the firſt Incumbent in again by force of his firſt Preſentation, Inſtitution, and Induction, and needed not any new Inſtitution or Induction to the Church. *Cook* 4. Part, 102. *Windſor's* Caſe.

12. The Biſhop of *Norwich* refuſed to admit a Clark unto a Benefice, becauſe he was a Common-Hunter of Taverns, and a player at unlawful Games. It was adjudged, that they were not ſufficient Cauſes of Refuſal of ſuch a Clark; for although they were Offences prohibited by the Law of the Realm to ſome perſons at certain times, and were *mala prohibita*: yet they were not *mala in ſe*, for which a Clerk was to be refuſed; or for which he was to be deprived, if he were admitted. 9 Eliz. *Dyer* 254. And note, there it is ſaid, That whatſoever are ſufficient Cauſes of Deprivation of an Incumbent, the ſame are ſufficient Cauſes not to admit the Clerk unto a Benefice. But in all ſuch and the like Caſes, the Ordinary muſt give notice to the Patron, of the cauſe of his Refuſal or Deprivation, that the Patron may preſent another fit Clerk unto the Church. See 12 Eliz. *Dyer*, 293, acc.

13. The Statute of 13 Eliz. Cap. 12. Enacteth, That he who doth not ſubſcribe unto the Articles, nor read the Articles of Religion, ſhall be deprived *ipſo facto*, and all his Eccleſiaſtical promotion ſhall be void, as if he were naturally dead. It was holden, That upon ſuch an Avoidance, there needed not any Sentence Declaratory of deprivation of the Incumbent; For that there the Church was preſently void; and where Avoidance is by Act of Parliament, there needeth not any Sentence of Deprivation: For if ſuch a Parſon or Vicar ſhall Libell againſt a Pariſhioner for Tythes, they may plead againſt him the not reading the Articles, without making any mention at all, that he was deprived for the ſame cauſe: But if a man be deprived for not reading the Articles, the Ordinary muſt give Notice thereof unto the Patron, and the Notice muſt be certain and particular, that the party hath not read the Articles; and general Notice, that he is incapable of the Benefice, is not ſufficient. But if the Patron do dwell in a far and Remote County; ſo as he cannot eaſily be found out by the Ordinary, in ſuch caſe, If the Ordinary make the Inability of the Clerk known by an Intimation fixed upon the Church-Door, in that caſe the ſame is ſufficient. See 18 Eliz. *Dyer* 346. 22 Eliz. *Dyer* 369. and 16 Eliz. *Dyer* 327. *Cook* 6. Part, 29. *Green's* Caſe.

14. If one under the age of 23 years be preſented to a Benefice, It was adjudged, That no Lapſe ſhall incur upon any Deprivation *ipſo facto* without Notice, ſeeing the Act of 13 Eliz. Cap. 12, ſpeaks nothing of Preſentation; ſo as the Preſentation remaining in force, the Patron ought to have Notice. Trin. 18 Car. in B. R. The Biſhop of *Hereford* and *Okeley's* Caſe. *Marſh* 119.

15. In Treſpaſſe, the Caſe was this; B. was made Biſhop of L, in the time King *Henry* the 8th, and continued ſo untill 2 E. 6; at which time a Commiſſion iſſued forth to the Lord Chancellor and others, to Convent B. before them; and if they found him to be contumacious and would not anſwer, they were impowred to Impriſon, or Deprive him. The Commiſſioners hereupon did firſt Impriſon him, and afterwards deprived him: B. Appealed, The Appeal undiſcuſſed, J. S. was made Biſhop of L, who made a Leaſe under which the Defendant claimed: Afterwards, 1 Ma. J. S. is declared to be an uſurper, and B. by a definitive Sentence is reſtored to his Biſhoprick, and made a Leaſe to the Plaintiff: There were 2. Points in this Caſe, 1. If the Deprivation of B. were good, or not, the authority to the Commiſſioners being in the Diſjunctive, to Impriſon or Deprive; and they firſt impriſoning him, the Deprivation was void. 2. Admitting the Deprivation void, That he ſhall remand B; and ſo J. S. was never Biſhop, and ſo the Leaſe made by him to the Defendant was void. 3. Admitting that the Deprivation was good; the Point was, If the Appeal did not ſuſpend the Sentence of Deprivation? and if it did, then J. S. was never Biſhop; and ſo the Leaſe made to him was void: The Judges inclined to be for the Plaintiff in all theſe points, and againſt the Defendant: Where the Defendant Exhibited his Bill in

Equity upon this matter aforesaid in the Court of Chancery, and there obtained a Decree against the Plaintiff. Mich. 6 Jac. in C. B. *Lechmere* and *Carr's* Case. *Bulst.* 3. Part, 73.

16. In an Action of Debt brought, for not setting forth of Tythes; The Defendant pleaded, *Nil debet per Patriam*: and to prove that the Plaintiff was not Parson, he shewed a Deprivation of the Plaintiff for Drunkennesse by the High-Commissioners. The Court was of Opinion, That for such a common default, after Admonition, that the High-Commissioners might deprive a Minister: but because the Crime of Drunkennesse was before the General Pardon; and the Sentence was given after the Parliament. It was holden, That the Sentence of Deprivation was void. Hill. 9 Jac. in C. B. *Mortimer* and *Freemans* Case. *Brownlow* 1. Part, 70. But see Mich. 8 Jac. in C. B. A Parson of a Church being deprived by the High-Commissioners for Drunkennesse; It was moved for a Prohibition; but the Court would not grant it. *Parkers* Case. *Brownlow* 2. Part, 37.

Deputy *and* Deputation.

Where and what Offices may be executed by a Deputy; What not: And where one may make a Deputation; *Where not.*

1. Humphrey de Bohun, Earl of *Essex*, held divers Mannors of the King, by the service, To be Constable of *England*. He had Issue two Daughters, and died; the Daughters took husbands, and the youngest daughter was married to the King: Afterwards they made Partition. In that case, It was holden, That the Daughters before marriage might exercise the said Office by a Deputy; and that after the entermarriage of the youngest Daughter with the King, That the said Office should be exercised by the husband of the eldest Daughter onely. Trin. 12 Eliz. *Dyer* 280. *Humphrey de Bohuns* Case.

2. The Office of Chirographer or *Custos Brevium* in the Court of Common-Pleas, is in the guift of the King, and cannot be exercised by a Deputy: and that appears by the Letters Patents granted of the said Office; which run in this manner, viz. *Sciatis, quod de gratia nostra speciali, ac de consensu Concilii nostri, nec non de advisamento Capitalis Justiciarii de Communi Banco nostro, Concessimus Roberto Kirton, Officium Chirographi in Banco nostro praedict. Habendum quamdiu nobis placuerit, cum feodo et proficuis eidem Officio pertinen. Proviso semper quod praefat. R. in propria persona sua supradict. Officio, absq; aliquo Deputato sub se faciendo, continuè moretur.* Hill. 2 Eliz. *Dyer* 176.

3. *Robert Blage* was the Kings Remembrancer in the Exchequer by Patent for the Term of his life, *occupand. per se, vel per sufficient. Deputat.* which Patent was granted to him, 18 H. 7. In 3 *Hen.* 8. the said *R. Blage* was made third Baron of the Exchequer, and his Patent was but *Quam diu se bene gesserit in eodem Officio Baron.* and yet he did continue the exercising of the said Office of Remembrancer by a Deputy. Pasch. 5 Eliz. *Dyer* 227.

4. The Duke of *Norfolk* being Marshall of *England*, and having authority to make a Deputy, he made *Gawdy* his Deputy, who was sworn in Court: Afterwards, *Gawdy* let a Prisoner who was in Execution, Escape. Debt was brought against *Gawdy* for the Escape, and adjudged maintenable, although that he was but Under-Marshall. Mich. 11 Eliz. *Dyer* 278. *Gawdyes* Case.

5. The King by his Letters Patents did grant to the Earl of R. the Office *Senescalli Dominorum suorum, Manerior. suorum de A. Pr. et C. à termino plena aetatis* 21. *annorum ejusdem Comitis, pro et durante termino vitae naturalis dict. Comitis una cum vadiis et feodis eidem Officio ab antiquo debitis et consuet. capiend.* But there was no power to make a Deputy of the said Office of Steward of the said Mannors: And by the same Letters Patents he granted to the same Earl *Custodiam Parci de N, habend. gaudend. et exercend. Offic. praedict.* (written by such Contraction) *per se vel sufficient. Deputatum, seu Deputatos suos, plena aetatis, &c.* And in the Conclusion of the Letters Patents were these words, *Volentes et firmiter injungendo percipientes per praesentes, omnibus Officiariis & Ministris tam infra Libertates quam extra, quod eidem R. Comiti R. et Deputat. sive deputatis suis in praemissis omnibus faciend. exequend. sint auxiliantes, &c.* It was Resolved in this Case, That although a Steward cannot make a Deputy because it is an Office of Trust, Science, and Discretion; and these Qualities are so indevidably annexed to his person, that he cannot make a Deputy or an Assignee without special words; Yet it was Resolved, That when the King grants to an Earl of the Realm the Office of Stewardship of his Manors, that he may make a Deputy, in respect of the hastinesse of his Office, and the great respect which the Law hath to the person of an Earl, who is *Praefectus seu Praepositus Comitatûs*; and therefore for Conveniency

veniency he may make a Deputy, although there be not any ſuch expreſſe words in his Patent; and alſo for neceſſity, for he ſhall be intended to be Converſant upon the buſineſſe of the Realm, and cannot attend ſuch an Inferiour Office. *Cook.* 9. Part, The Earl of *Shrewsburies* Caſe.

6. In an Action of Falſe Impriſonment brought by the Plaintiff againſt the Defendant being a Deputy-Conſtable, for Arreſting and Impriſoning him: The Queſtion was, Whether a Conſtable may make a Deputy to arreſt one upon a Writ to him directed by a Juſtice of Peace, the Conſtable himſelf being ſick: and whether ſuch a Deputy-Conſtable upon an Action brought againſt him, and found for him, be ſuch a perſon as may plead, and by pleading may have the benefit of the Statute of 7 Jac. Cap. 5. to have double Coſts, or not. It was Reſolved in this Caſe, by the whole Court, That a Conſtable may well make a Deputy, and a Deputy-Conſtable is within the meaning of the Statute of 7 Jac. for he is a Conſtable *pro tempore*. And it was ſaid in this Caſe, Mayors may make Deputies; and ſo Deans: And High-Sheriffs may and do make Under-Sheriffs: and yet there is no words in their Patents of making Deputies. And it was agreed in this caſe, That there are two kinds of Officers, Judicial, and Miniſterial; a Judicial Officer cannot make a Deputy, becauſe he is called to do Juſtice; but it is otherwiſe of a Miniſterial Officer: and yet all Returns made by a Miniſterial Officer, ought to be in the Name of the principal Officer. Hill. 9 Jac. B. R. *Phelps* and *Winchcombs* Caſe. *Bolſtr.* 3. Part, 77.

7. Note: There is a difference betwixt a Deputy and an Aſſignee of an Office: For an Aſſignee is a perſon who hath an Eſtate and Intereſt in the Office it ſelf, and doth all things in his own name, for whom his Grantor ſhall not anſwer: But a Deputy hath not any Intereſt or Eſtate in the Office; but is the Officers ſhadow, and doth all things in the name of the Officer himſelf, and nothing in his own name, and for whom his Grantor ſhall anſwer: and when an Officer hath power to make Aſſignees, he may *implicitè* make Deputies; for cui *Licet quod majus eſt, non debet quod minus eſt non Licere*; and by Conſequence, when an Office is granted to one and his heirs, he may make an Aſſignee, and by Conſequence a Deputy. *Cook* 9. Part, 48. acc.

8. The Statute which appoints Parents to relieve their poor Children, appoints that Juſtices in their Seſſions ſhall ſet the rate that is to be paid for their maintenance. The Juſtices at a Seſſions at *Derby* transferred their authority over to other Juſtices to ſet the ſaid Rate; which they could not do; who made the Rule acuordingly. The Court ſaid, That the Order made, was not good: For it was all one, as if an Arbitrator ſhould arbitrate another to make the Arbitrament; which is not good. Wherefore the Order made at the ſaid Seſſions, was quaſhed by the Court. Mich. 24 Car. in B. R. The King, and *Humphreys* Caſe. *Styles* 154.

9. See in the Title of Demurrer, Mich. 1652. The Mayor and Cominalty of *London*, and *Hattons* Caſe, Where the Mayor made a Deputation of the Office of Garbler, and the Deputation adjudged good. *Styles* 357.

10. A Citizen or a Burgeſſe cannot do Grand Serjeanty to the King in perſon, but he ſhall do the ſame by a Deputy, who ſhall be a Nobleman: But a Knight is of ſuch Dignity, that he may do that ſervice to the King in perſon. But a woman, or an Enfant ſhall do the ſervice by a Deputy, by the Kings appointment, 1. R. 2. rott. Clauſe 45. *Cook* 1. Part, *Inſtitutes* 109. acc.

Detin[illegible]

1. *Where, and for what things it lyeth, for what not: And where Detinue, or an Action upon the Caſe lyeth, at the Election of the Party.*

1. IF I deliver 20 l. to one to keep to my uſe, If the 20 l. be not contained in a Bag, Coffer, or Box, an Action of Detinue doth not lye for it; becauſe the 20 l. cannot be diſcerned, or known to be Coin; but in that Caſe, I may have Debt, or Accompt, at my pleaſure: If I bail certain Plate to one to keep to my uſe, If he doth alter the Plate; I may have an Action upon the Caſe, or an Action of Detinue, at my Election. Trin. 28 H. 8. *Dyer*, 22.

2. A man bought 20 Quarters of Corn to be delivered at ſuch a day, at ſuch a place, The Vendor did not perform the Contract, for which the Vendee was driven to buy other Corn for his Trade, being a Brewer, at a dearer rate: The Vendee in that Caſe, brought an Action upon the Caſe againſt the Vendor; and it was adjudged maintainable; Alſo it was ſaid, That he might have an Action of Debt for it; but he could not have an Action of Detinue, becauſe the property of the Corn could not be known, for one Quarter cannot be known from another. Trin. 28 H. 8. *Dyer*, 22.

3. Detinue

3. Detinue was brought of 40 Quarters of Wheat, and the Plaintiff declared of one abſolute Contract. The Defendant ſaid, It was upon Condition to pay for it, when it was delivered; and that the Plaintiff had received 20. Quarters, and payed him for that preſently; and at another day he came and received 10. Quarters, and for that he had not paid; and demanded Judgment of the Action. It was holden good, without traverſe, That the Contract was ſimple: But in that Caſe, it was agreed, That the Defendant might wage his Law, or plead *Non Detinet, per patriam*: In that Caſe alſo it was agreed, That a Contract is not good, without preſent payment, except a day be limitted; and then one ſhall have debt for the mony, and the other Detinue for the Ware. Hill. 28 H. 8. *Dyer*, 27, 30.

4. The Lord *Monteagle* brought an Action upon the Caſe againſt the Counteſſe of *Worceſter*, ſuppoſing by his Writ a Declaration, That he was poſſeſſed of a Chain of Gold of the price of 100. Marks, and that being ſo poſſeſſed, he left it at *London* in ſuch a Pariſh, and that afterwards it came to the hands of the Counteſſe at *London* by *Trover*, and [illegible] ſaid Counteſſe knowing the ſaid Chain to [illegible] Plaintiff's Chain, to deceive the Plaintiff, ſold it to divers perſons unknown to the Plaintiff, and received the mony, and Converted it to her own uſe; It was holden by the Lord *Dyer*, (amongſt other points) in this Caſe, That an Action upon the Caſe did not lye, becauſe he had his remedy by Action of Detinue; for the Plaintiff had not ſhewed, That the ſale was in *Market-overt*, to alter the property; And although *London* be by Preſcription, an open market every day: yet that ſpeciall Cuſtome ought to have bin pleaded; otherwiſe the Court was not bounden to take notice of the ſame. Mich. 3 *Ma. Dyer*, 121. The Lord of *Monteagles* Caſe.

5. Detinue lyeth for Heir-loomes by Cuſtome, before any poſſeſſion had of them before, and the Heir ſhall have Detinue for his reaſonable part of the goods by the Cuſtome of *Suſſex*, without any Poſſeſſion of them, 39 E. 3. *br. Detinue* 30, 31. So if a man bail goods to one to deliver over to J. S. he ſhall have a Detinue for them by *Priſoit*, 39 H. 6. 44. and yet he hath not any property in them before agreement: And ſo after a Divorce had betwixt the Husband and Wife, the Wife ſhall have a Detinue for the goods given with her in marriage. *Fitzh.* to *Detinue* 61.

6. In Trover and Converſion, the Caſe was, J. S. pawned a Hat-band ſet with Diamonds, to J. D. a Goldſmith in *London* for 20 l. and no day was ſet down for the Redeeming the ſame by payment of the mony. J. D. lying on his death-bed in the preſence of J. N. his Neighbor, commanded his Wife to fetch the Hat-band, and then delivered the ſame to the Defendant, wiſhing him to keep the ſame till the 20 l. were paid, and then to redeliver the ſame to the Owner, and afterwards made his Wife his Executrix, and dyed: J. S. tenders the 20 l. to the Wife, who refuſed to accept of the money: After which Tender and Refuſall, J. S. came to the Defendant, and demanded his Hat-band, who refuſed to deliver the ſame; and upon this refuſall, he brought his Action of Trover and Converſion againſt the Defendant. It was holden in this Caſe, That he might have an Action of Detinue againſt the Defendant for this Hat-band, or an Action of Trover at his Election. And in the principall Caſe, it was adjudged, That the Action of Trover did well lye in this Caſe: See for this Caſe, and the reaſons of the Judgment in it before, in the ſame Caſe which you ſhall find in Title *Trover* and *Converſion*, It was Sir *John Ratcliff* and *Davis*'s Caſe. Hill. 7 Jac. in B. R. rott. 1217. *Bulſtrod.* 1. Part, 29.

7. Error was brought of a Judgment in Detinue in the Common-Pleas. One Error was, becauſe in a Writ of Detinue brought, it was returnable. Mich. 45 Eliz. and therein the Plaintiff was Non-ſuit, yet in *Hilary* Term, 45 Eliz. he Declared, and proceeded to Judgment without a new Originall; This being Aſſigned for Error, and *in Nullo eſt erratum* pleaded: It was ſaid, That it was but a miſ-priſion, for the Non-ſuit was entred in one Preigotorie's Office; and the Imparlance in anothers Office; but the Court did not take any Conuſance of ſuch diſtinction of Offices. The ſecond Error was, That the Writ ſuppoſed the Deteyner, *de una Domo vocat.* a Bet-houſe, which cannot be that a Detinue ſhould be of a houſe; Wherefore for theſe Errors, It was adjudged, That the Judgment ſhould be reverſed. Mich. 2 Jac. in B. R. *Coupledick* and *Coupledick*'s Caſe. *Cro.* 2. Part, 29.

8. See the Caſe of *Iſaac* and *Clark*. Trin. 11 Jac. in B. R. rott. 1100. in Title *Trover* and *Converſion*; In what Caſe Detinue doth properly lye, in what Caſe *Trover* and *Converſion*.

2. *Detinue of Charters; by whom it lyeth; and where it ſhall be a good Plea in Bar in Dower, where not; and by whom to be Pleaded, by whom not.*

1. IF I be enfeoffed to me and my Heirs, and I enfeoff another and his heirs, with Warranty; my Heir ſhall have Detinue for the Deed by which I am enfeoffed; and ſhall make a ſpeciall Court upon the ſpeciall matter, in reſpect of the ſpeciall eſſe, and prejudice which he may have; but, without a ſpeciall prejudice, that is to ſay, that his Anceſtor were not bound to Warranty, the Heir of the Feoffor ſhall not have the Charters, *Cook* 1. Part, 2. in Lord *Buckhurſt's* Caſe. See the reaſon of this Caſe in *Fitzh. Nat. Br.* 138. L. my Heir ſhall have a Writ of Detinue of the Deed, by which I was enfeoffed, to the end he may have advantage of the Warranty.

2. If a man maketh a Feoffment of his Land by Deed, yet the Feoffee ſhall not have the Charters which concern the Land, but the Feoffor ſhall retain them, if he doth not give them to the Feoffee, but againſt a ſtranger the Feoffee ſhall have an Action of Detinue for them which concern the Land, if he cannot make a Title to them by the Feoffor, or by thoſe who claim Title by the Feoffor; and the Heir in tail, ſhall have and maintain an Action of Detinue againſt the Diſcontinuer of the Land for the Deed in ſale, by which the Land was given. 29 Eliz. in C. B. adjudged acc.

3. If a man makes a Leaſe for years, and afterwards confirms his Eſtate in Fee, the Heir of the Feoffee ſhall have the Deed of the Leſſor for Term of years, as well as the confirmation, becauſe that that Deed makes the Confirmation good; and ſo every Deed which makes his Title, or Releaſes, and the like, without which his Title cannot be ſure, and he ſhall have Detinue for them. 9 E. 4. 52.

4. In Dower, the Tenant ſaid, That he was ready to have rendred Dower to the Demandant, if ſhe would have delivered unto him certain Charters, which did concern his Inheritance, which ſhe detayned from him: It was agreed by the Court, That he ought to ſhew the certainty of the Charters for the certainty of the Iſſue, if the Plaintiff ſhould ſay, That ſhe did not detein any; For when the certainty is ſhewed, then the Jury may give their Verdict, and by their Declaration and Verdict, it will appear, if the Deeds do belong to the Tenant, or to the Demandant; and if it be doubtfull to the Jury, then the Court ſhall adjudge to whom they do belong: And thereby alſo, it will evidently appear, if they do belong, or concern the Inheritance of the Tenant, or not; For if they do belong to the Tenant by reaſon of purchaſe made by him, he may put to his Writ of Detinue for them; And in Detinue he muſt ſhew the certainty of the Deed, unleſſe they be contained in ſome Cheſt or Box, ſealed; And in that Caſe it was ſaid, That it was no plea in Dower, brought againſt the Guardian, that ſhe hath eſſoyned the Heir: unleſſe he name the name of the Heir in certain, and alſo declare whether he be Male or Female, that a certain Iſſue may be taken upon it. Mich. 2 H. 7. 6.

5. In a Writ of Dower, the Tenant ſaid, That the Demandant did deteyn from him a certain Charter concerning the Land; The Demandant produced and ſhewed forth the Deed, and prayed her Dower, The Court ſaid, the Deed muſt be read in Court, that it may be known if it was the ſame Deed, and the Deed was read, and the Plaintiff had Judgment preſently. Mich. 9 E. 4. 47. acc. See *Cook* 9. Part, in *Anne Bedingfield's* Caſe.

6. Note, concerning Deteyner of Charters, theſe points were Reſolved. 1. That he who pleads Deteyner of Charters, ought to ſhew the certainty of the Charters, that thereupon a certain Iſſue may be joyned, or that they are contained in ſome Box or Cheſt locked. 2. That no ſtranger although he be Tenant of the Land, and hath the Deed and Charters conveyed unto him, can plead deteyner of Charters, for that the ſame lyeth onely in privity for the Heir of the Husband; But yet in ſome caſes, the Heir ſhall be as a ſtranger. As firſt, If the Heir hath the Land by purchaſe. 2. If the heir himſelf hath delivered the Charters to the Woman who is Demandant, becauſe the ſame is his own Act. 3. If the Heir be not immediately vouched, but vouched by the Vouchee. 4. If the heir comes in as Vouchee, having no Lands in the County where the Dower is demanded. 5. If the heir come in as Tenant by Receit. *Cook* 9. Part.

7. In Dower if the Tenant Pleads, That the Demandant deteins Evidences; The Demandant in delivering the Evidences, may have Judgment preſently; But if ſhe will deny the deteiner of the Evidences, and that be found againſt her, ſhe ſhall loſe her Dower, by *Hobart* Juſtice; In *Birkhead* and the Arch-biſhop of *York's* Caſe. *Hob.* 199.

Deva Taciti,

Devastavit.

1. *What shall be said to be a* Devastavit, *by the Executor, Administrator, Ordinary, or other persons; And where, upon such Wasting, they shall be charged with their own goods, Where not.*

1. DEbt was brought against an Executor, who pleaded, Fully Administred; and gave in Evidence, That he had paid divers Debts upon Contracts made by the Testator, whereas the Plaintiff's suit was upon an Obligation. The Plaintiff demurred upon the Plea, and had Judgment, because debts upon Specialties must be paid before debts upon Contract; But the Judgment was onely *de bonis Testatoris*, and not of his own goods. 29 H. 8. *Dyer*, 32.

2. A man who was condemned in debt, dyed before Execution: It was holden, That this debt upon Record, was to be paid before debts upon Specialties: And if they be sued upon the Obligation, they may plead a Recovery against them, which is not executed; which if they do not do, but Judgment is given, and Execution passe against them before the first Judgment be Executed; It is a Devastation, and they shall answer *de bonis propriis*. 6 Eliz. *Dyer*, 8. See *Cook* 5. Part, *Harrison's* Case, acc. And see there, That Judgment in a Court of Record, shall be paid before Statutes, which are private Records; and so, likewise, they shall be paid before Recognizances acknowledged by assent of the parties.

3. If a man be bounden in a Recognizance, or a Statute-Merchant, or Staple, and afterwards a Recovery is had against him, in an Action of debt; and he makes his Executors, and dyeth, his Executors are bound by Law to pay the Debt upon the Recovery, though it be a later debt, before the Debt due by Recognizance or Statute, because although they are both Records, yet the Judgment in the Kings Court, upon Judiciall proceeding, is the most notorious, and the more eminent in Degree, than a Statute or Recognizance taken in private by consent of the parties, and therefore shall be preferred before it. See Mich. 32 Eliz. in C. B. *Pemberton* and *Barham's* Case. And 43 Eliz. in B. R. *Beareblock* and *Reade's* Case, vouched in *Cook* 4. Part, in the Case of the Warden and Commonalty of *Sadlers*.

4. The Queen was endebted to A. in 100 l. for Musquets, and Callivers delivered into the Tower: for which mony, A. took a Debenture from the Queen in the name of J. S. And afterwards made B. his Executor, and dyed: B. procured J. S. to release and surrender the former Debenture to the Queen, and took a new Debenture from the Queen for the said hundred pound to himself. It was holden, That this was no Devastavit in the hands of B. the Executor, but it had bin otherwise, if the first Debenture had bin taken in A. his own name; for then it had bin a Devastavit by the Executor. Mich. 40 Eliz. in C. B. *Eveling* and *Levison's* Case. *Goldsbr.* 115.

5. A. brought an Action of debt against B. Executor of J. S. The Defendant pleaded, That the Testator in his life time, made a Statute-Staple to J. N. in 1000 l. above which he hath nothing. *Gawdy* Justice held, That it was no Plea, For if the Testator were bound in a Statute to perform Covenants, which are not yet broken, and perhaps will never be broken, and yet shall never be compelled to pay debts, it would be a great inconvenience; And yet on the other part, I think there will be a greater mischief; for if the Executor do pay this debt, and then the Statute is broken, he shall be chargeable by Devastavit of his own proper goods, the which will be a greater Inconvenience. Hill. 43 Eliz. in C. B. *Woodcock* and *Hernes* Case. *Goldsbr.* 142.

6. Note, It was Resolved, and adjudged by the whole Court, That when Judgment is given against Executors; And upon a *Fieri facias* the Sheriff Returns *Nulla bona*, that in such Case the Plaintiff may have a speciall Writ of *Fieri facias, scil.* That the Sheriff levy the debt of the Goods of the dead: *Et si sibi constare poterit*, that the Executors have Wasted the goods, then *de bonis propriis*, because in such Case, if the Sheriff maketh a false Return, the party may have his remedy against him by Action upon the Case. Hill. 45 Eliz. in B. R. *Cook* 5. Part, 32. *Pettister's* Case.

7. Debt was brought by A. against J. S. Executor of B. Executor of J. D. upon an Obligation of the first Testator; The Defendant pleaded, That the said J. D. the first Testator, was endebted to B. 100 l. And that afterwards, goods of the value of 100 l. came to the hands of B. as Executor of J. D. which goods he Administred, and paid himself by reteyner, and besides the said goods of the value of 100 l, that the said B. had Administred all the goods of the said J. D. and so there was nothing in the hands of B: The Plaintiff averred Assets in the hands of B. of the goods of J. D. above the 100 l. at the time of his death to be Administred in *London*; and upon the said Issue joyned, and

and tryed. It was found for the Plaintiff, *ſcil.* That B. had divers goods which were the ſaid J. D's. at the time of his death, in his hands. It was adjudged in this Caſe, That the Plaintiff ſhould recover againſt J. S. of the goods of J. D. in the Defendant's hands, and damages of the proper goods of the Defendant: And it was holden, That if the Sheriff of *London* retorn, That there are no goods of J. D. in the hands of J. S. the Defendant, they ought to Retorn a *Devaſtavit* in J. S. and not in B. becauſe it is found, that B. had Aſſets of the goods of J. D. at the time of his death; and the Sheriff made Retorn accordingly, and thereupon Execution was Awarded againſt the Defendant J. S. of his own goods. Trin. 2 Eliz. *Dyer*, 185. Sir *John Chicheſter's* Caſe.

8. In Debt againſt an Executor, the Caſe was; A. made the Defendants Executors: they being within age, Adminiſtration was committed during their minority to J. S. And it was found that, during the minority of the Executors, there were goods of the Teſtator's in the Adminiſtrators hands, to the value of 4000 l. and that the Defendants, the Executors, when they came of full age, did Releaſe to the Adminiſtrator, *durante minori ætate*, all manner of Demands; It was made a Queſtion, Whether the ſaid 4000 l. were Aſſetts in the Executors hands: It was the Opinion of the Court, That it was Aſſets in their hands; and it was ſaid, It is not requiſite, That every Aſſet be a thing in poſſeſſion, or in the hands of the Teſtator; for a thing may be Aſſetts in the Executors hands, if it come in lieu of a thing which was in the hands of the Teſtator. It was alſo holden, That this Releaſe of the Executors to the Adminiſtrator, was a *Devaſtavit* of the goods of the Teſtator; and that a *Devaſtavit* may be of goods, though they be not goods in poſſeſſion. Mich. 27 Eliz. in C. B. *Rutleyes* Caſe. *Godbolt.* 29.

9. A. brought an Action upon the Caſe againſt B. an Attorney of the Kings-Bench: And declared, That he had recovered againſt the Defendant who was Executor of his Father, and that he ſued forth a *Scire facias* to the Sheriff, to have Execution. And before the Sheriff could come to ſerve the Execution, and levy the debt, the Defendant, ſecretly, and fraudulently, ſold, and diſpoſed of the Teſtators goods, ſo as the Sheriff was conſtrayned to Retorn *Nulla bona*. It was holden in this Caſe, That the Action would well lye, becauſe the Sheriff could not Retorn a *Devaſtavit*, becauſe the goods were ſecretly conveyed away; And the ſale being ſo ſecretly made; if the Sheriff had Retorned a *Devaſtavit*, perhaps an Action upon the Caſe would have bin brought againſt him for making ſuch a Retorn. Paſc. 21 Jac. in B. R. *Tate* and *Alexander's* Caſe. *Godbolt.* 285.

10. Debt upon an Obligation of 100 l. againſt an Adminiſtrator, The Defendant pleaded, That J. S. recovered in the Court of *Cheſter*, a Debt of 100 l. againſt him, and that there were other Judgments in other Courts, all which did amount to 500 l. and that he had not goods of the Inteſtates, *præterquam bona et Catalla quæ non attingunt ad valentiam præditt.* 500 l. againſt him in form aforeſaid recovered, The Plaintiff replyed, That the ſaid J. S. did accept of 60 l. in ſatisfaction of the ſaid Judgment, and would have acknowledged ſatisfaction upon Record in the ſaid Court, but the Defendant ſuffered the ſaid Judgment by fraud, to ſtand in force, to the intent, to deceive the Plaintiff of his juſt Debt. It was Reſolved in that Caſe, That an Executor, or Adminiſtrator, ought to execute his Office, and Adminiſter the goods of the Inteſtate truly, and diligently, and not waſtingly, or falſly: And then when an Adminiſtrator compounds with one who hath a Debt of 100 l. for 60 l. and he offereth to acknowledge ſatisfaction for it, and the other defers it, and ſuffers it to continue in force againſt him, with a fraudulous intent, be it before the agreement or after made, or the recovery, it is all one as to another Creditor who is a third perſon; and ſuch agreement ſhall not hurt or prejudice the third perſon. Paſc. 8 Jac. in C. B. *Cook* 8. Part, 132. *Turner's* Caſe. See *Cook* 5. Part, *Goodale's* Caſe. acc.

31. The Caſe was, J. S. made his Wife his Executrix and dyed; J. D. being then endebted to the Teſtator, in 100 l. upon a ſimple Contract; the Wife Executrix took to Husband the ſaid J. D: J. D. made his Executor, and dyed. A Creditor of J. S. brought an Action of Debt againſt the Wife, Executrix of J. S. and upon the pleading, the Queſtion was, If by the entermarriage of the Wife with the Debtor of the Teſtator, the ſame was a *Devaſtavit* or not; And if the ſaid 100 l. due by J. D. ſhould be Aſſets in her hands? It was the Opinion of the whole Court, That it was no *Devaſtavit*, nor Aſſets. For the Woman may have an Action againſt the Executor of J. D. And it was agreed by the Court in this Caſe, That if a man make his Debtor, and a Stranger, his Executors, and the Debtor dyeth, the ſurviving Executor may have an Action of Debt againſt the Executor of the Debtor; and ſo in the principal Caſe. Mich. 31 Eliz. in B. R. *Croſman* and *Read's* Caſe. *Leon.* 320.

12. Debt againſt an Executor upon an Obligation of the Teſtator's: The Defendant pleaded, That the Teſtator made him Executor till J. S. ſhould come of the age of 21 years; and in the mean time to keep all his goods for him, and

then to deliver them unto him, and the ſaid J. S. to be then Executor, and ſhews, that before the Action brought, J. S. was of the age of 21. years, and that he delivered to him the goods which he accepted without that, that at the time of the Action brought he was Executor. It was debated by the Court, If the firſt Executor ſold or waſted the goods, how the Creditor ſhould relieve himſelf for thoſe goods, the new Executor taking upon him the Executorſhip; for the goods never came to the hands of the new Executor. The Court inclined to be of Opinion, That he might have an Action againſt the firſt Executor, for ſo much as he did not Lawfully Adminiſter, for againſt the Vendees he can have no remedy; and that the Executor ſhall remain Executor ſtill for that purpoſe, the other being now in effect for thoſe goods. Trin. 17 Jac. in C. B. *Chandler* and *Thompſon*'s Caſe. *Hob.* 265.

13. If a man be bounden in an Obligation which is uſurious, the Bond is void betwixt the parties: and therefore if ſuch an Obligor makes his Executors, and dyeth; and the Executors pay an Uſurious Bond, the other Creditors may ſhew this matter, and make a *Devaſtavit* of it. By *Hobart* Juſtice, in *Winchcomb* and the Biſhop of *Winchcſters* and *Palleſton*'s Caſe. *Hob.* 167.

14. Debt by Executors againſt an Executor, upon a Bond made by the Teſtator of 100 l. for the payment of 52 l. The Defendant pleaded, That he had paid the 52 l. to A. one of the Executors in ſatisfaction of the ſaid debt, and all Intereſt, and damages for it, and thereupon, A. releaſed him the ſaid Obligation. The Plaintiff Replyed, That A. was within age at the time of the Releaſe, viz. of the age of 18 years. It was Objected, That this Releaſe of an Enfant of 18 years, was good, he being of age ſufficient to take upon him the Executorſhip, and none can deny but that there was payment of the principall mony, and that it ſhould not be a *Devaſtavit*, becauſe he did that which he was compellable to do in a Court of Conſcience: But the Opinion of the Court was, That this Releaſe of an Enfant was not any Bar, becauſe the Enfant being Executor by courſe of Law, is to have the benefit of the forfeiture of the Bond; and when the Enfant, being but one of the Executors, takes part of the mony onely, yet this Releaſe ſhall not bar him; but if he will take all the mony, and make a Releaſe, it is good. And this Caſe afterwards being moved at Serjeants-Inn, *Dompart* and *Denham* Barons, agreed, That this Releaſe, without payment of the intire ſum contained in the Bond (it being forfeited) was not any bar to the Enfant: It was then agreed, That ſuch a Releaſe by an Executor of full age, upon the Receipt of the principall mony, and Intereſt, ſhall be onely Aſſets, and ſhall not be a *Devaſtavit* for the Reſidue. Trin. 13 Car. in B. R. *Kniverton* and *Latham*'s Caſe. *Cro.* 1. Part, 352, 353.

15. Debt againſt Husband and Wife, Adminiſtratrix of her former Husband: Judgment was againſt them; And upon a *Fieri facias*, the Sheriff Returned *Nulla bona*; whereupon another *Fieri facias* was Awarded againſt them, with a clauſe in the Writ, that if it be found, That the Husband and Wife *devaſtarunt bona, tunc fieri faciat*; &c. The Sheriff Returned, That they had not in their hands any goods of the Inteſtates, but that the Wife, being Adminiſtratrix to her firſt Husband, had goods of the Inteſtates, and had Waſted them: And whether they had waſted them according to the Writ, the Jury referred it to the Court. The Court held, That it was a *Devaſtavit*; and that the Return of the Sheriff was good enough. It was adjudged for the Plaintiff. Trin. 16 Car. in B. R. *King* and *Hilton*'s Caſe. *Cro.* 1. Part, 438.

Deviſe.

1. *What ſhall be a good Deviſe of Lands and Tenements; What not: And what Eſtate ſhall paſſe by the words of the Will to the Deviſee, whether Fee-ſimple, Fee-tail, for life or other Eſtate.*

1. A Seiſed of the Mannor of D. in S. with Lands thereunto belonging, and of other Lands and Tenements lying in E. and in S. in the Tenure of J. S; the Lands in E. being of the yearly Rent of 50 s. *per annum*, By his Will deviſed all that his Tenement with the appurtenances wherein J. S. dwelleth in E. to his brother. After the death of J. S. The Queſtion was, Whether the Lands in S. appertaining thereunto, did paſſe? It was ſaid, That they ſhould paſſe: for the word, *Tenement*, refereth to his dwelling which was in E: alſo it paſſeth by the words, *cum pertinentiis*: alſo in the principal caſe there was a Rent reſerved of 4 l. *per annum*, and the Lands which lay in E. were Lands which were holden *in Capite*, but two parts paſſed by the Deviſe by the Statute of 32 H. 8. and the Rent of thoſe Lands were but 40 s. *per annum*: and it cannot be intended, That the Deviſee ſhould pay 4 l. for the Lands in E. and the

value of Lands are Conſiderable in a Will: And for theſe Cauſes, the Court was of Opinion, That the Deviſe was good, and the Lands in S. ſhould paſſe by it to the Deviſee. Mich. 31 Eliz. in B. R. *Butcher* and *Samfords* Caſe. *Goldesbr.* 99.

2. A *Feme Sole* ſeiſed of Lands in Socage, deviſed them to J. S. in Fee; and afterwards ſhe did take the Deviſee to Husband, and during the Coverture, ſhe countermanded her Will, ſaying, That her Husband ſhould not have the Land, nor any other advantage by her Will, and after dyed: and if this were a good Countermand, ſo as her Husband could not have the Land, was the Queſtion? It was adjudged in this caſe, That becauſe that the Woman was a *Feme Covert*, at the time of her deceaſe; and that the Will doth not take effect till the death of the party, and ſo ſhe was diſabled, at the time of her death, that the Deviſe was not good, and the Husband ſhould not have the Land. Mich. 31 Eliz. in C. B. *Goldesbr.* 107.

3. A. deviſed his Lands to his Wife for life, the Remainder to his ſon in tail; and, if he dyed without Iſſue, the Land to remain to J. S. and his Wife for their Lives; and after their deceaſes, to their Children: The Queſtion was, Whether the Children of J. S. ſhould take by diſcent, or as purchaſor? It was the Opinion of *Popham* and *Gawdie*, That they had an Eſtate in tail: but *Fenner* and *Clench* held, they had but an Eſtate for life. Mich. 40 Eliz. in B. R. *Goldesbr.* 138.

4. A. ſeiſed in Fee of a Meſſuage with which the Lands in Queſtion had been occupied time out of mind, lying ſick, gave Inſtructions to a Scrivener to make his Will, and declared that his meaning was, That his ſaid Meſſuage and all his Lands in W. ſhould be ſold by his Executors. The Scrivener penned the Will in this manner, *I will that my houſe with all the appurtenances, ſhall be ſold by my Executors.* The Deviſor dyed; The Executors ſold part of the Lands to the Defendant. It was ſaid, That the ſale of part of the Lands was not good. But it was Reſolved by all the Juſtices, That by this Deviſe, the Lands did paſſe; for the words, *With all the appurtenances*, are effectuall words to enforce the Deviſe, and that doth extend to all the Lands, and eſpecially becauſe the Deviſor gave the Scrivener Inſtructions accordingly. It was adjudged for the Defendant. Hill. 28 Eliz. in B. R. *Higham* and *Haywoods* Caſe. *Leon.* 34. See 3 Eliz. *Plow. Com.* 210. *Sanders* and *Freemans* Caſe, There the Deviſe is pleaded in this manner, viz. *Meſſuagium cum pertinentiis ad illud ſpectantibus in perpetuum in Villa de Arthingworth.*

5. A man ſeiſed of Lands, made his Will in this manner: Firſt, I bequeath to my Wife bl. Acre for the Term of her life, the remainder to my Son *T.* in tail. *Item*, I Will to my ſon *T.* all my Lands in *D*, alſo my Lands in *S*, and alſo my Lands in *V*; Alſo I give to the ſaid *T.* my Son, all my Iſland, or Land encloſed with water, which I purchaſed of J. S. To have and to hold all the ſaid laſt before deviſed premiſſes to the ſaid *T.* my ſon, and the heir of his body. The Queſtion was, If the *Habendum* ſhall extend to the Iſland onely, in which caſe, *T.* ſhall have but for life in the Lands in *D. S.* and *V*; or unto the Iſland, and alſo to the Lands in *D. S.* and *V*? It was Objected, That the *Habendum* ſhould extend onely to the Iſland: For it was adjudged 4 Eliz. That if I Deviſe my Mannor of *D.* to my eldeſt ſon, and alſo all my Lands in *S.* in tail, in that caſe the entail limited for the Land in S. ſhould not extend to the Mannor: but if the words had been, [I Deviſe my Mannor of *D*, and my Lands in *S*, to my Son in tail,] there the Son had had an Eſtate tail in both: But in the principal caſe, It was Reſolved by all the Juſtices, That the thing laſt deviſed by the Will, was an Iſland in the ſingular number, which cannot ſatisfie the *Habendum* which is in the plural number; and therefore to verifie the plural Number, the *Habendum* by fit Conſtruction ſhall extend to all the Lands in D. S. and *V*; and that the *Habendum* ſhould not ſtreighten the Deviſe onely to the Iſland. Trin. 28 Eliz. in C. B. rott. 1458. *Wiſeman* and *Wiſeman's* Caſe. *Leon.* 57, 58.

6. A. ſeiſed of Lands in Socage, deviſed the ſame by word to his three Siſters; A ſtranger being preſent, recited to the Deviſor the ſaid words of his Will, and he did affirm them: Afterwards the ſaid ſtranger put the ſaid words in writing for his own remembrance, but did not read them to the Deviſor, who afterwards dyed. It was the Queſtion, If this Deviſe being reduced in writing *modo et forma*, were good or not? It was the Opinion of the whole Court, That the Deviſe is void. It was ſaid by *Wray*, Chief Juſtice, That if he appoint A. to write his Will, and it is written by B, it is void; but if after he had written the Will, if he had read it to the Deviſor, and he had confirmed it, it had been a good Will. It was adjudged, That the Plaintiff ſhould recover the Lands who was the Deviſor's heir at Law, againſt the three Siſters. Paſch. 30 Eliz. in B. R. *Noſs* and *Edwards* Caſe. *Leon.* 113.

7. A. ſeiſed of Lands, deviſed them in this manner; I give my ſaid Lands to *Margaret* my Wife, untill ſuch time as E. my Daughter ſhall accompliſh the age of 19. years, the Reverſion to the ſaid E, and the heirs of her body, upon Condition, that ſhe ſhall pay to my ſaid Wife during her life, in recompence of her Dower of all my

Land, 12 l: and if default of payment be made, then I Will, my Wife ſhall enter, and have all my Lands during her life, the remainder *ut ſupra*, the remainder to J. S. in tail, &c. A. dyed: M. the Wife entred, E. being within the age of 14. years; M. took to husband J. D: the Husband and Wife came and demanded the 12 l, and none was ready to pay it. Afterwards, the Husband and M. brought a Writ of Dower, and recovered. It was the Opinion of the Juſtices in this Caſe, were the 12 l. a Rent or a ſum in groſſe, That by the bringing of the Writ of Dower, the Wife of the Deviſor had loſt all the benefit which was to come to her by the Deviſe, for the ſaid Rent was deviſed to her in recompence of her Dower, ſo that it was not the meaning of the Deviſor that the Wife ſhould have both. Mich. 30 Eliz. in C. B. *Geſlin* and *Warburton*'s Caſe. *Leon.* 137, 138.

8. A. ſeiſed of Lands, deviſed the ſame to W. his Godſon, after the deceaſe of his Wife: and, if he fail, then he Willed all his part to the diſcretion of his Father, and dyed: W. ſurvived, the Father being dead before without any diſpoſition of the Land. It was the Opinion of the Juſtices, That upon theſe words the Father had a Fee-ſimple; and there is no difference where the Deviſe is, That J. S. ſhall do with the Land at his pleaſure; and the Deviſe thereof to J. S. to do with it at his diſcretion. Trin. 36 Eliz. in C. B. rott. 1760. *Whiskir* and *Clayton*'s Caſe. *Leon.* 156.

9. A man, ſeiſed of Lands in A, had Iſſue 4. daughters, A. B. C. and D, and deviſed all his Lands in A, to A. and B. his two daughters, and made them his Executrixes: Afterwards he purchaſed other Lands in A; a ſtranger was deſirous to purchaſe this Land of him newly purchaſed: And he ſaid, That that Land ſhould go with the reſidue of his Lands to his Executors, as his other Lands ſhould go; after, the Teſtator made Codicill, and cauſed it to be annexed to his Will; but in the Codicill no mention was made of this Land: and whether this new purchaſed Land ſhould paſſe by the Will without a new publication of the Will for this Land, was the Queſtion? It was holden by the Court, That this Land newly purchaſed ſhould not paſſe: For notwithſtanding that the reading of the Will, and the making of a Codicill, may amount to a new publication; yet it doth not manifeſt the Intent of the Deviſor to be, that more ſhall paſſe by that, then he intended at the firſt: alſo the new reading of the Will, and the annexing of a Codicill, may not properly be termed a new publication: and without an expreſſe publication for this Land newly purchaſed, this Land ſhall not paſſe. Hill. 43 Eliz. in B. R. *Beckford* and *Parnecole*'s Caſe. *Goldesbr.* 150. See *Brett* and *Rigdens* Caſe. *Plo. Com.* 340.

10. A Copyholder deviſed his Land unto his Wife for her life, and that, after his death, the wife, or her Executors, ſhould ſell the Land, and diſtribute the uſe of his Will, which was entred, that, *viz.* To the uſe of his Wife for life, *ſecundum formam ultimæ voluntatis*: and whether ſhe had an Eſtate in the Lands for her life, or an Eſtate in Fee to ſell, was the Queſtion? It was the Opinion of the Court, That ſhe had an Eſtate in it for her own uſe for her life, and alſo an eſtate in it to ſell it: For if ſhe had not a Fee to ſell, the Clauſe *ſecundum formam ultimæ voluntatis* ſhould be void. Mich. 29 Eliz. in B. R. *Godbolt* 46.

11. A man ſeiſed of a Meſſuage holden in Socage in Fee, deviſed the ſame by theſe words, I deviſe my Meſſuage where I dwell, to my Coſen H. and her aſſigns for 8. years, And my Coſen H. ſhall have all my Inheritances, if the Law will. It was adjudged by the whole Court, That it was a good Deviſe in Fee of the Meſſuage; and that by the general words of the Will, all his Inheritances did alſo paſſe. Mich. 11 Jac. in C. B. *Wellock* and *Hardings* Caſe. *Godbolt* 208.

12. A. ſeiſed of Lands in Fee, deviſed them to his Wife for life, and after to his two Sons, if they had not Iſſue males, for their lives; and if they had Iſſue males, then to their Iſſue males: and if they had not Iſſue males, then if any of them had Iſſue male, to the ſaid Iſſue male: The Wife dyed, the ſons entred into the Lands, and then the eldeſt ſon had Iſſue male, who afterwards entred; the younger ſon put out the Iſſue. It was adjudged by the whole Court in this caſe, That by the birth of the Iſſue males, the Lands were deveſted out of the two ſons, and veſted in the Iſſue male of the eldeſt, and that he had taile therein. Hill. 13 Jac. in B. R. *Blanfords* Caſe. *Godbolt*, 266.

13. The Caſe was; Lands were deviſed to E. for life, upon Condition, that ſhe ſhould not marry; and if ſhe dyed, or married, that then the Land ſhould remain to A. in tail; and if A. dyed without Iſſue of his body in the life of E, that then the Lands ſhould remain to the ſaid E, to diſpoſe, thereof at her pleaſure; and if the ſaid A. did ſurvive the ſaid E. then the Lands ſhould be divided betwixt the Siſters of the Deviſor. It was objected, that E. had but an eſtate for life, and that theſe words, *viz.* If A. dyeth without Iſſue in the life of E. that then the Lands ſhould remain to E. to diſpoſe, ſhall not be conſtrued to give her a Fee-ſimple, but to diſcharge the particular Eſtate of the danger which might come by her marriage: and by the Limitation of the latter Remainder, the meaning of the Deviſor was not, that ſhe ſhould have a Fee-ſimple, for the Remainder is not limited to her heirs. But the Opinion of the Court was, That upon the words of Limitation of the Remainder to E, *Quod integra remaneat vitæ* E, ſhe might diſpoſe thereof at her pleaſure: for the Diviſion is limited to be upon a Contingent, *ſcil.* If A. ſurvive

E; but if E. ſurvive A, then his Intent is, not that the Lands ſhould be divided, but they ſhould wholly remain to E; and ſo E. had a Fee-ſimple in them. It was ſaid in this Caſe, If Lands be granted to A. and B, and to the heirs of A; B. cannot ſurrender to A: for a ſurrender is as it were a Grant; and as a Releaſe it cannot enure: for a Releaſe of a right, cannot be without Deed. Trin. 27 Eliz. in C.B. *Jennor* and *Hardies* Caſe. *Leon.* 283.

14. A. ſeiſed of Lands having Iſſue 4. Daughters, viz. B. C. D. and E: B. had Iſſue F, A. deviſed the Lands to his Wife for life; and after her deceaſe, the ſame to be equally divided among his Daughters, or their heirs: A. dyed, the Wife dyed; The Defendant in the right of C. D. and E, entred: F. the daughter of B. entred into the Lands, and Leaſed them to the Plaintiff. And whether F, who was the daughter of B, one of the Siſters, ſhould have a 4th part of the Lands, was the Queſtion. It was the Opinion of the Court, That ſhe ſhould have a 4th part of the Land: for in this Caſe, the word *Heirs*, was not added of neceſſity, for the heir of any of the Siſters to take by purchaſe; but only to make the heir of B. to take part of the Land. And it was the Opinion of the Court, That it being in the disjunctive, it was the ſtronger for the Plaintiff: for they ſaid, If it were, (*And*) then it would give the three Siſters the Fee, but being in the Disjunctive (*Or*) there is more colour that ſhe ſhould take a 4th part by the Deviſe. Mich. 1 Car. in B. R. rott. 189. *Taylor* and *Baldyes* Caſe. *Godbolt* 363.

15. Errour brought to reverſe a Judgment in the Kings-Bench, The Caſe was, *Ejectione Firmæ* was brought of 30 Acres Land, & 5. Acres of Meadow in *Cleyton*. It was found, That A. was ſeiſed of the Lands in the Declaration, and of 5. Acres of Lands in *Cuckfield* called *Well-Croft*, which were called by the Name of *Heſelands*, and had been occupied as one Farm: and made his Will in this manner; As concerning the Diſpoſition of all my Lands, &c. He deviſed all thoſe his Lands and Tenements in *Cuckfield*, called *Heſelands*, to his Wife for life; and after her deceaſe, that it ſhall remain to J. his ſon, and his heirs. And afterwards he Wills, That if I dye without Iſſue, *Heſelands* ſhould remain to his three daughters in Fee. The Queſtion was, Whether this Clauſe, All his Lands called *Heſelands*, being an entire Farm extending into *Cleyton*, now in Queſtion, and into *Cuckfield* alſo, ſhall paſſe. It was the Opinion of the Court, That the Daughter ſhould take none of the Lands in *Cleyton*; and that onely ſo much of *Heſelands* as extended into *Cuckfield*, ſhould paſſe: For the Deviſe to the wife is of the Lands in the Pariſh of *Cuckfield* called *Heſelands*, which paſſeth nothing but that which is in the Pariſh of *Cuckfield*, that being firſt named: And where the words are, It ſhall remain to J. and his heirs, That is that which was before deviſed to the Wife. And where the words are, If I dye without Iſſue, That *Heſelands* ſhall remain to his daughters, that is to ſay, part of *Heſelands*, as were deviſed to *John*: and hereby the Eſtate alſo is countermanded by Implication into an Eſtate in taile. It was therefore the Opinion of the Court, That the Lands in *Cleyton* did not paſſe to the Daughters. And whereas Judgment had been given for the Daughters, The Judgment was reverſed. Hill. 1 Jac. in B. R. *Tuttſham* and *Roberts* Caſe. *Cro.* 2. Part, 21.

16. A man let ſeveral Houſes and Lands by ſeveral Leaſes for years, rendring ſeveral Rents, amounting to 10 l. *per annum*, and made his Will in this manner, *ſcil.* I bequeath the Rents of D. to my Wife for life, the remainder over in tail: The Queſtion was, If the Reverſions did paſſe with the Rents of thoſe Lands. It was Reſolved by the Court, That by this Deviſe, the Land it ſelf ſhould paſſe; for it appears, his intent was to make a Deviſe of all his Lands and Tenements, and that he intended to paſſe ſuch an Eſtate, as ſhould have continuance for a longer time then the Leaſes ſhould endure; and the words are apt enough to convey the Lands, it being an uſual manner of ſpeaking of ſome men, who name their Land by their Rents. Mich. 45 Eliz. in C. B. rott. 125. *Kerry* and *Dirricks* Caſe. *Cro.* 2. Part, 104.

17. A man deviſed his Lands to his Wife for life; and after her, to J. his eldeſt ſon, and his heirs, upon Condition, that he ſhould grant to C. his ſecond ſon and his heirs, a Rent of 4 l. *per annum* out of the ſaid Tenements: and that if J. dyed without heirs of his body, that the ſaid Lands ſhould remain to the ſaid C. and the heirs of his body, and dyed: The Wife entred, and dyed: J. granted a Rent of 4 l. to C. and his heirs, out of the Lands, with clauſe of diſtreſſe. The Queſtion was, If J. had an Eſtate in Fee by his deviſe at the time of the grant of the Rent. It was Reſolved, That it was an Eſtate taile; but yet by Limitation of the Will, he is to make his Grant of this Rent, which being by the appointment of the Donour, is not *contra formam Doni*, but ſtands with the guift, and ſhall bind the Iſſue in taile. 2. It was Reſolved, That this is a good Grant of the Rent in Fee iſſuing out of all the Eſtate, and not out of the Eſtate tail onely; and being guided by the directions of the Will, it ſhall take according to the Limitation thereof, and charge all the Inheritance. Paſch. 15 Jac. in B. R. rott. 204. *Dutton* and *Engrams* Caſe, *Cro.* 2. Part, 427.

18. A man deviſeth by his Will his Lands to his wife; and if ſhe have Iſſue by the Deviſor, that his Iſſue ſhall have it at his age of 21 years: and if the Iſſue dye before that age, or before his wife, or if ſhe hath no Iſſue, That then ſhe ſhall

chooſe two Attorneys; And ſhe to make a Bill of Sale of any Lands to her beſt advantage. It was Reſolved in this Caſe, That ſhe hath thoſe Lands for life, and ſhe having no Iſſue, hath not any Intereſt to diſpoſe, but hath an Authority to nominate two who ſhall diſpoſe of the Lands, and they may make ſale of them. Mich. 5 Jac. in B. R. *Beal* and *Shepherds* Caſe. *Cro.* 2. Part, 199.

19. Note: It is a Rule in Law, That ſuch an Eſtate which cannot by the Rules of the Common-Law be conveyed by Grant executed in his life-time by advice of Councel learned in the Law, ſuch an Eſtate cannot be deviſed by the Will of a man who is intended to be void of Councel: As if a man deviſe Lands to one for ever, there he hath a Fee; for ſuch Eſtate might be conveyed by act executed: But if he further deviſe, That if the Deviſee do ſuch an act, that another ſhall have the Land to him and his heirs, the ſame is void; for when as he hath diſpoſed of the Eſtate in Fee to one, he hath not power after in the ſame Will to diſpoſe the ſame to another. *Cook* 1. Part, 85. in *Corbets* Caſe.

20. A. ſeiſed of Lands in Fee, had iſſue 6. ſons and one daughter: and deviſed the ſaid Mannor to J. S. for 90. years, if the ſaid J. S. and G. his wife, or any of them ſhould ſo long live, the remainder to P. his eldeſt ſon, and the heirs males of his body, the remainder to his other ſons, the remainder to his daughter. Provided, That if the ſaid P. his ſon, or any of the ſons of the ſaid Deviſor, or any of the heirs males of their body, ſhould endeavour by any act to alien, bargain, or diſcontinue; then after any ſuch attempt or endeavour, and before any ſuch bargain, ſale, &c. were executed, that the Eſtate of ſuch perſon attempting, &c. ſhould ceaſe, as if he were naturally dead; and that then the premiſſes ſhould diſcend, remain, and come to ſuch perſon to whom the ſame ought to come, remain, or be, by the intent and meaning of his Will, and dyed: P. levied a Fine of the Mannor; he in the next remainder entred and claimed the Reverſion by force of the Deviſe. It was adjudged in this Caſe, That the Conuſee had the Reverſion in him, and might maintain an Action of Waſte, becauſe the Proviſo of Reſtraint in the Will of A. was void and repugnant in Law; and a Proviſo, Condition, or Limitation, ought to defeat the whole Eſtate; and it cannot continue it for part, and defeat it for the reſidue. Hill. 37 Eliz. in C. B. rott. 1758. *Fernys* and *Arſcotts* Caſe.

21. A man deviſed Lands to another man and his heirs: The Deviſee dyed in the life of the Deviſor, and then the Deviſor dyed. It was adjudged in this caſe, That the heirs ſhould not take by Deviſe, for that the heirs are not named as words of purchaſe, but only to expreſs and limit the Eſtate which the Deviſee ſhould have; for without theſe words (heirs) the Deviſee could not have the Fee-ſimple, and the heirs are named onely to convey the Lands in Fee-ſimple, and not to make any other to be purchaſor but the Deviſee. See *Plow. Com.* 342. in *Brets* and *Rigdens* Caſe.

22. A man ſeiſed of Lands in Fee, had iſſue two Sons, A. and B: A. had iſſue two daughters, and B. had iſſue C. a ſon, and he deviſed his Lands to his Executors for the payment of his debts, untill C. (being of the age of 9. years) come to the age of 21 years; and when C. cometh to the age of 21. years, that then he enjoy the Land to him and his heirs, and dyed: C. before he came to the age of 21 years dyed, his heir entred, and made a Leaſe for years, the two daughters entred, the heir re-entred. In this Caſe it was Reſolved, 1. That the Intereſt of the Executors did not ceaſe, although that C. dyed before the age of 21. years: For in Wills, the intent of the Deviſor ſhall be conſidered: and when he deviſed the Lands to his Executors for the payment of his debts, it is to be intended that he had made a Computation, that the profits of the Lands for 12 years would be ſufficient to pay his debts, and therefore he did not intend, that the Intereſt of the Executors ſhould determine by the death of the Son; and when the Deviſor by apt words might have made by good advice his Will good and ſufficient in Law, according to his intent; there, although the Deviſor being hindred by ſickneſſe, makes his Will in a diſordered manner, and by unapt words, yet the Law ſhall reduce thoſe words into good Order according to his intent: and therefore theſe words, [untill ſuch time as C. ſhall come to the age of 21. years,] ſhall be conſtrued, [untill ſuch time as C. ſhould have come to his age of one and twenty years] 2. In this caſe it was Reſolved, That the Remainder was good: and a difference was taken betwixt a Leaſe and a Will: For it was agreed, That if a man doth make a Leaſe for years untill his ſon ſhall attain unto his full age, the ſon being then of the age of 9. years, the Leſſee hath not an abſolute Leaſe for 12. years: for if the ſon dyeth before his full age, the Leaſe ſhall determine. 3. It was agreed, That if a man having a ſon of the age of 9. years, makes a Leaſe untill his ſon ſhall attain his age; and after that, he ſhall accompliſh his full age, that the ſame ſhall remain over to another in Fee, that nothing veſts in him in the Remainder: For the Rule is, That when a Remainder is limited to take effect upon the doing of an act; which act ſhall be the determination of the particular Eſtate, if the act doth depend upon a Caſualty, the remainder ſhall be in Contingency,

and

and ſhall not preſently veſt. *Cook* 3. Part, *Breſtons* Caſe.

23. A Copyholder of Lands in Borough-English having 3. ſons, and one daughter, deviſed his Lands to his eldeſt ſon, paying to his daughter, and to every one of his Sons 40 s. within two years, and ſurrendred to the uſe of his Will; the eldeſt ſon was admitted, and did not pay the 40 s. within the two years. In this caſe it was Reſolved, 1. That although the yearly profits of the Lands for two years, did exceed the money to be paid, yet the eldeſt ſon had a Fee-ſimple. 2. Although that this word (*paying*) in the caſe of a Will makes a Condition; yet in this caſe the Law ſhall conſtrue this unapt word (*Paying*) a Limitation; for if it ſhould be a Condition, the ſame ſhould diſcend to the eldeſt ſon, and then it was at his pleaſure, if the daughter or brothers ſhould be paid or not: and therefore the Law ſhould judge the ſame a Limitation; of which the youngeſt ſon ſhould take advantage. 33 Eliz. in B. R. *Wollock* and *Hammonds* Caſe. See *Cook* 6. Part, *Collyers* Caſe, acc.

24. A man deviſed divers Mannors to his ſon in tail, the remainder to J. S, and the heirs males of his body, upon Condition, That he or they, or any of them ſhall not alien, diſcontinue, &c. The Queſtion was, If the meaning of the Deviſor was to include his ſon within the words of the Condition, [he or they] and not onely him in the Remainder. It was Reſolved, That no ſuch averment ſhould be out of the Will; for a Will of Lands ought to be in writing, and the Conſtruction of Wills ought to be gathered out of the words of the Will, and not by any averment: And there this Caſe is put, If a man hath Iſſue two ſons, both named *John*, and conceiving his eldeſt ſon to be dead, He deviſeth his Land by his Will to his Son *John* generally, and in truth the eldeſt ſon is living. In that caſe, the younger ſon may alledge and give in Evidence the Deviſe to him, and may produce Witneſſes to prove the intent of his Father: and if no proof can be made, the Deviſe ſhall be void for the incertainty of it. Mich. 34 Eliz. in the Court of Wards. *Cook* 5. Part, 67. the Lord *Cheneys* Caſe.

25. Land was deviſed to Husband and Wife, and after their deceaſe, to their Children, they then having iſſue a ſon and a daughter. It was Reſolved in this Caſe, That the husband and wife had but an Eſtate for the term of their Lives, the remainder to their Children for life, and no Eſtate tail; for the Intent of the Deviſor ſhall be conſtrued according to the Rules of the Common-Law: and by the Common-Law, the husband and wife have but an Eſtate for their Lives, with a Remainder to their Children for their Lives. Hill. 42 Eliz. in B. R. *Cook* 6. Part, 16, 17. *Wields* Caſe.

26. A man poſſeſſed of a Term for 40 years, by his Will deviſed the ſame to J. S. after the death of his wife, and that the wife ſhould enjoy it during her life; and that J. S. ſhould neither deviſe it, nor ſell it, but leave it to deſcend to his ſon: and in the mean time my Will is, That my Wife ſhall have the uſe thereof during her life, yielding to J. S, during her life, 10 l. at two Feaſts, and made his Wife his Executrix, and dyed; the Wife entred, and paid the ten pound yearly according to the Will: In this Caſe many points were Reſolved, 1. That J. S. did not take by way of Remainder, but by way of Executory Deviſe: and a man may deviſe ſuch an Eſtate by his Will, which he cannot make by act executed; and that the Caſe was no more but this, That the Teſtator deviſed, That after the death of J. S, that his wife ſhould have the Reſidue of the Term. 2. The Deviſe was good, being but of a Chattel which may veſt and deveſt at the pleaſure of the Deviſor. 3. That there is no difference when one deviſeth his Term, the Remainder over; and when a man deviſeth his Land, or his Leaſe, or the uſe or occupation, or the profits of his Land, That a man by his Will may create an Intereſt, which by Grant or Conveyance he cannot create in his life-time. *Cook* 8. Part, 96. *Matthew Mannings* Caſe.

27. Leſſee for 99. years by his Will deviſed his Leaſe in theſe words: I deviſe my Leaſe to my Wife during her life; and after her death, I Will that it go to her Children unpreferred; and made his Wife his Executrix, and dyed. The wife entred, and married with J. S; and afterwards for 140 l. debt, recovered againſt J. S; and upon a *Fieri facias* the Term was ſold by the Sheriff. Afterwards the Judgment was reverſed by Errour, *et quod omnia quæ amiſit ratione Judicii reſtituantur*. The wife Executrix dyed. In this Caſe it was Reſolved, 1. That the Executory Deviſe of the Leaſe after the death of the wife, to the daughter not preferred, was good. 2. That the Sale made by the Sheriff upon the *Fieri facias*, did not deſtroy the executory deviſe; although the perſon to whom it was made, was incertain during the life of the wife. 3. That the Sale made by the Sheriff ſtood good, although the Judgment was reverſed, and that the Plaintiff ſhould be reſtored to the value of the Term, and not to the Term it ſelf: and the Vendee had an abſolute property in the Term during the life of the Wife: and the value of the Term ſhould go to the daughter not preferred after the death of the wife. Mich. 27 Eliz. in B. R. *Amery* and *Loddingtons* Caſe.

28. A man ſeiſed of Lands holden in *Capite*, deviſed

deviſed them to his Wife for life; and after her deceaſe, his ſon *John* to have it; and if his ſon *John* marry, and have by his Wife any Iſſue male of his body lawfully begotten, then his ſon to have it; if one Iſſue male, then his ſon *Thomas* to have the houſe: and if *Thomas* marry, having iſſue male of his body, his ſon to have the houſe after his deceaſe: and if any of his ſons, or Iſſue males go about to alien, or Mortgage the houſe; then the next heir to enter, &c. In this caſe it was Reſolved, 1. That the Sons had an Eſtate tail in them ſeverally, and to the heirs males of their bodies, for that theſe words [if he have no Iſſue male, his Son *Thomas* to have it] are ſufficient to create Taile to *John*; and ſo of the reſt. 2. Reſolved, That no Condition, or Limitation, be it by act executed, or by limitation of uſe, or by deviſe by laſt Will, can barr Tenant in tail to alien by ſuffering a Common-Recovery. Hill. 8 Jac. in Court of Wards. *Sondays* Caſe. *Cook* 9. Part, 128.

29. A. deviſed Lands to his wife for life, the remainder to J. S, and the heirs males of his body; and if it happen he to dye without heirs of his body lawfully begotten, without ſaying [males, or ſuch heirs] the remainder to J. D. his Coſen, and his heirs males in Fee-ſimple, the remainder to the next heirs males of the Kin. It was adjudged in this Caſe, That the Proviſo did not alter the firſt Eſtate tail, becauſe the intent of the Deviſor did clearly appear. Mich. 2 Eliz. *Dyer. Trembams* Caſe.

30. A. ſeiſed in Fee of a Meſſuage in *London*, deviſed the ſame by his laſt Will to *Allice* his Coſen; and after her deceaſe, to W. L. her Son, who was her heir apparent, and dyed: *Allice* took another Husband, and by him had Iſſue, and dyed: and if the Husband ſhould be Tenant by the Curteſie, was the Queſtion? It was adjudged in that Caſe, That the ſaid *Alice* was but Tenant for life, the remainder to W. L. her ſon for his life, the remainder in Fee-ſimple to the wife, ſo as the husband ſhould not be Tenant by the Curteſie. Paſch. 19 Eliz. *Dyer* 357. *Chicks* Caſe.

31. A, ſeiſed of 3. houſes in B, having three Brothers, made his Will in this manner, *ſcil.* I deviſe that houſe that J. V. dwelleth in, to my 3. brothers among them, and J. V. to dwell in it ſtill, and they to raiſe no term. And I Will my houſe that T. C. my brother dwelleth in, to him, and he to pay to C. C. 3 l. 6 s. 8 d. to find him to School with, or elſe to remain to the houſe. Provided that the houſes be not ſold, but go to the next of the name and blood that are males. It was Reſolved, That this is an Eſtate in tail, and ſhall go to the houſe, and ſhall be conſtrued to go to the moſt worthy of the Family; and the words [*that are males*] ſhall be taken for the future times. Paſch. 16 Eliz. *Dyer* 333. *Chapmans* Caſe.

32. *Clack* deviſed a houſe to A. his eldeſt daughter and her heirs, and if ſhe dye having no Iſſue, then to T. his youngeſt daughter, and to her heirs; and other Lands he deviſed to T. his daughter and her heirs of greater value; and if ſhe dye within 16 years, that A. ſhall have her part to her and her heirs: and if A. marry ſuch a one, that T. ſhall have her part to her and her heirs: and if T. dye having no Iſſue, that all her part ſhall go to two other Neeces. And if A. dye without Iſſue, That T. ſhall have her part, to her and her heirs. T. after 16 years dyed without Iſſue: It was adjudged in this Caſe, That A. ſhould not have her part, but the Neeces; for notwithſtanding the croſſe Limitation, it appears, the intent was not, that A. ſhould have by T. if ſhe over-lives 16 years; and when his intent is expreſſed, it ſhall not be taken by Implication. Note: *Dyer* ſaid, It was not an Eſtate tail, but a Fee-ſimple. *Dyer* 16 Eliz. 330. *Cletches* Caſe.

33. A man had 3. ſons, A. B. and C; and having Lands in 3. ſeveral Towns, *viz.* D. E. and F, deviſed his Lands in D. to A. his eldeſt Son; the Lands in E, to B. his ſecond Son; and the Lands in F, to C. his third Son: and that if any of them dyed, the other ſurviving ſhall be his heir: A. the eldeſt Son hath Iſſue G, and dyes. It was Reſolved by the Juſtices, In regard that nothing but a Freehold paſſed by the Deviſe, the Reverſion in Fee diſcending upon the eldeſt Son, had drowned that Eſtate, and that his death afterwards could revoke and veſt the remainders in B, and C: It was adjudged for the Plaintiff, who claimed under G, the heir of A. Paſch. 7 Jac. in B.R. *Wood* and *Ingerſoles* Caſe. *Cro.* 2. Part, 260, 261.

34. A, ſeiſed of Land, deviſed it to W. his ſon for his life, and afterwards to T. ſon of the ſaid W. except the ſaid W. his ſon purchaſed other Lands of as good value for the ſaid T. and then the ſaid W. to have the Lands ſo deviſed, to ſell at his pleaſure, and T. to pay to his Siſters 10 l. a piece: W. did not purchaſe the Land, and dyed. T. entred, and paid the 10 l. a piece to his Siſters. The Queſtion was, What Eſtate T. had, Whether a Fee, or for life onely. It was Reſolved by all the Juſtices, that T. had a Fee, for the Intent of the Deviſor, appears to be ſo through the whole Will: for when it is limited to W. for life, which is an expreſs eſtate; and there is no Eſtate limited to T. but it is appointed he ſhall pay 10 l. a piece to his Siſters: It was an apparent Fee by his Intent, and by the Law. *Co.* 3 P. *Boraſton's* Caſe. & *C.* 6. P. *Collier's* Caſe; and the Exception makes it ſtronger: If *W.* purchaſe other Land of as good value for T. ſuch is meant of an Eſtate in Fee; and the Exception not being performed, it appears, That T. ſhall have Fee. Mich. 18 Jac.

18 Jac. in B. R. *Greve* and *Dewel's* Caſe. *Cro.* 2. Part, 499. See Trin. 12 Jac. *Greve* and *Armſten's* Caſe. *Hob.* 65. acc.

35. A. having iſſue one Son, J; and E. his daughter; E. took to Husband J. D. and had Iſſue by him two daughters, F. and G. and E. dyed: A. made his Will, and thereby gave to F. and G. his Grandchildren 10 l. a piece, during their lives, iſſuing out of Lands in S. And in his Will was this Clauſe, Touching all my Lands in S. N. L. and G. of which I am now ſeiſed; and which of right will come to J. my ſon; this is my Deviſe: And then appoints certain friends to receive the profits of them all, until his ſon ſhall come to the age of 24 years. Provided always, That if my Son J. ſhall happen to deceaſe without Iſſue of his body lawfully begotten, That then I will that all and ſingular my ſaid Lands, and every parcell thereof, ſhall go unto the right Heirs Males, and Poſterity of me and my name for ever, equally to be divided unto and amongſt them; and then, and in ſuch caſe, I do Will unto F. and G. and to either of them, an Annuity of 5 l. a piece out of the Tenements in S. for the term of their lives. A dyeth: J. his Son dyeth without Iſſue. F. and G. enter as Heirs, and make a Leaſe to the Defendant. H. the Brother, and F. the Deviſor, of his name and bloud, enters and makes a Leaſe to the Plaintiff. The Queſtions in this Caſe were, 1. Whether the Limitation to the Heirs Males, &c. upon the dying of J. without Iſſue, ſhall take effect by way of Reverſion or Remainder, or by way of Original and expectant Deviſe. 2. Whether it can carry the Land to the Brother in caſe of a Deviſe. It was Reſolved in this Caſe, That the Son was Tenant in tail; and then it will follow, that the Limitation after following to the right Heirs-Males, will be but a Reverſion and veſt alſo in the Son, in way of diſcent: and then if the Reverſion veſted in him in Fee, it muſt of neceſſity diſcend from him to the daughters of his ſiſter E. and not to the Uncle. Hill. 10 Jac. in C. B. *Camden* and *Clarks* Caſe. *Hob.* 30. 31, 32, 33.

36. A. Seiſed of Lands in Fee holden in Socage, having Iſſue three daughters, B, C, and D, deviſed the ſame after his deceaſe to his wife for life; and after her deceaſe, That his Executors ſhould receive the profits, until the ſum of 900 *li.* was received, for the preferment of his daughters in Marriage; and after the 900 *l.* received, the ſaid Meſſuage ſhould remain to his right Heirs Males for ever. And if his Heirs Males ſhould diſturb his Executors in the receiving of the profits; that then their Eſtates ſhould ceaſe, and the Lands ſhould be divided amongſt the Daughters then living; and dyed. One F. was found his Heir Male: the Wife entred, and dyed: B. his Daughter after his deceaſe married J. D. the Defendant, and had Iſſue; and the Plaintiff by a Leaſe made from F. the Heir-Male, brought an *Ejectione firme*, upon which all the ſpecial matter was found. In that Caſe, it was adjudged againſt the Plaintiff. Mic. 7 Jac. in B. R. *Aſhenhurſt* and *Carter's* Caſe. *Hob.* 34.

37. In Treſpaſs, the Caſe was; One deviſeth his Lands to his two Sons, and the Heirs of their bodies, and that his Executors ſhall have them, until they come to their ſeveral Ages of 21 years, the one attains to the age of 21 years. The Queſtion was, Whether he might enter. It was ſaid, they were Joynt-Tenants, and that their Executors ſhould hold them till they both came of the age of 21. years. But it was holden otherwiſe by the Court, for the words, untill they accompliſh their ſeverall ages, *viz. reddenda ſingula ſingulis, quoad* either of them came to the age of 21. years, he ſhould then have his part and poſſeſſion; and yet the Joynt-Tenancy ſhould hold place. Mich. 8 Jac. in B. R. *Aylor* and *Chep's* Caſe. *Cro.* 2. Part, 259.

38. A man deviſed his Lands in this manner, *viz. I give to my Wife all my houſes and Free Lands, and after her deceaſe, to my three daughters, equally to be divided, and if any of them dye before the other, then the others to be her Heirs, equally to be divided; and if they all dye without Iſſue, then to three other named in the Will*: The Queſtion was, what eſtate the daughters have. It was adjudged by the whole Court to be an Eſtate Tail: And *Webb* and *Herring's* Caſe was put. Hill. 14 Jac. A man deviſeth to his ſon after the death of his Wife; And if his daughters outlive the Mother and brother, and his Heirs, then they ſhould have it: It was Reſolved to be an eſtate tail in the ſon, for it is impoſſible the ſon ſhould dye without Heirs as long as his Siſters were alive, and therefore the intent of the Deviſor ſhall be conſtrued to extend to the Heirs of his body, and ſo be an Eſtate tail. Mich. 15 Jac. in B. R. *King* and *Rumball's* Caſe. *Cro.* 2. Part, 248.

39. A man having Iſſue three ſons A. B. and C. deviſed his Land to B. his ſecond ſon, and his Heirs in *perpetuum*, paying to his brother C. 20 l. at his age of 21 years; And if B. dyed without Iſſue, living A, then A. his brother ſhould have thoſe Lands, to him, his Heirs and Aſſigns for ever, paying the ſaid ſum as B. ſhould have paid; The Queſtion was, Whether B. had an Eſtate in Fee, or in Fee tail: It was Reſolved, That it was not an eſtate tail in B. but a Fee, for it is deviſed to him and his Heirs *in perpetuum*, and alſo paying 20 l. And the clauſe [*If he dyed without Iſſue*] is not abſolute, and indefinite, Whenſoever he dyed without Iſſue, but it is with a contingency: If

he dyed w'thout Iſſue, living A. for he might ſurvive A. or have Iſſue at the time of his death, living A. 2. It was Reſolved, That it was a good Limitation of the Fee to A. by way of contingency, not by way of immediate Remainder. Mich. 18 Jac. in B. R. *Pell* and *Browns* Caſe. *Cro.* 2. Part, 590.

40. A. ſeiſed of Lands in D. and S. and having two ſons, T. and F. deviſeth all his Lands to his Wife for life; and after her death, all his Lands in D. to T. and his Heirs for ever; and his Lands in S. to F. and his Heirs for ever. *Item, I will, That the ſurvivor of them ſhall be Heir to the other, if either of them dye without Iſſue,* and dyed. The Wife dyes; T. enters into the Lands in D. and deviſeth them to R. his ſecond ſon in Fee, The Queſtion was, Whether this be an eſtate tail, immediate by the Deviſe, or onely a contingent eſtate; if he dyed without Iſſue in the life of his brother: It was holden by all the Court, That it was an Eſtate tail, with the Remainder over, ſo as the Deviſe of T. was void; And that although the firſt part of the Will gives a Fee, yet the ſecond part corrects it, and makes it but an Eſtate in tail. Mich. 22 Jac. in B. R. *Chadock* and *Cowleyes* Caſe. *Cro.* 2. Part, 695. See 16 Eliz. *Dyer*, 330.

41. A man being bound in a bond to pay 40 l. *per annum* to his Wife; and ſeiſed of Lands in Fee, deviſed the Land in Queſtion to A. and B. his ſons, upon this Condition, That if they ſell it to any but to D. his ſon, then he to enter as of his Guift. *Item*, All the houſes which I have given to my ſons, is to this purpoſe, That they ſhall bear part, and part-like, going out of all my houſes and Lands towards the payment of my Wives 40 l. *per annum*; And which of my ſons ſhall refuſe to bear their part, ſhall enjoy no part of my bequeſt. The Queſtion was, Whether A. and B. have a Fee-ſimple by this Will, or for life onely: It was objected, It was a Fee to A. becauſe the Deviſe is to the eldeſt ſon, who ſhould have taken by diſcent, and he intended every ſon ſhould have a Fee as well as his eldeſt. 2. Becauſe it is deviſed, paying ſuch a ſum. But it was Reſolved by the Court, That it was but an eſtate for life onely which paſſed by the Deviſe, for that the eldeſt ſon had not any Fee by the Deviſe, but by diſcent, and operation of Law, and they may be reſtreyned from ſelling an Eſtate for life; and it doth not appear, he intended to give a Fee, and the Land is not deviſed paying ſuch a ſum, which is a ſum in groſſe, but that every one ſhall pay out of his part towards the payment of the 40 l. *per annum*, which is *quaſi* an Annuall Rent, out of the profits of the Lands, and therefore no Fee given. Mich. 8 Car. in B. R. rott. 842. *Anſley* and *Chapman's* Caſe. *Cro.* 1. Part, 112, 113.

42. A. ſeiſed of a Meſſuage, and two Acres of Lands in P. and of two Acres of Meadow in S. uſed with the ſaid Meſſuage and Lands in D. Deviſed the ſaid Meſſuage *cum omnibus pertinentiis* to E. his ſon and his Heirs *in perpetuum*; and for want of ſuch Iſſue of E. to A. daughter of R. K. and her Heirs for ever; And, for default of Heirs of the ſaid A, then *prædict' Meſſuag. cum pertinentiis* to E. K. his Cozen, *et heredibus ſuis in perpetuum*; And by his ſaid Will deviſed *omnes terras ſuas, et omnia bona ſua mobiliaet immobilia*, to his Wife during her Widdow-hood, and dyed; the Wife entred; T. entred into the two Acres of Meadow, and diſſeiſed the Wife, and afterwards made a Feoffment thereof to J. S. with Warranty againſt him and his Heirs: T. dyed without Iſſue, *A.* the daughter of R. K. was his Siſter and Heir; the Feoffee deviſed that Land to his Wife for her life, and dyed. The Queſtion in this Caſe was, Whether by this Deviſe of the Meſſuage, *cum pertinentiis*, the two Acres of Meadow paſſed. 2. If it was an eſtate tail in T. and the Remainder in A. or a Feeſimple in T. and the Remainder void. For the firſt, the Court held, The two Acres did not paſſe by the words *cum pertinentiis*; but otherwiſe it had bin, if it had bin *cum terris pertinentibus*. For the ſecond point, three of the Juſtices held it To be a Fee: two of them, That it was but an eſtate in tail; but they all agreed, There was a Collateral Warranty deſcended, which barred the Remainder, and not a Warranty which commenced by diſſeiſin. Trin. 22 Jac. rott. 1876. in C. B. *Heavn* and *Allen's* Caſe. *Cro.* 1. Part, 41, 42. See *Hutton* 85. the ſame Caſe.

43. A. having two ſons by ſeverall Weomen; Deviſed his Lands to J. his eldeſt ſon, and his Heirs, after the death of his Wife, to whom he deviſed them for her life: the Queſtion was, Whether the ſon ſhould take them by Deviſe as a purchaſor, or as Heir at Common-Law by diſcent. It was Objected, That he ſhould take them by purchaſe, becauſe the Deviſe is not to the Son in preſent, but after the death of the Teſtator's Wife: And although he might have waved the thing by purchaſe; yet here it ſhall be intended *prima facie*, to be in by purchaſe, becauſe any Actuall waver doth not appear: But the Court held, That the Deviſe was void, and that it is not in the power of the ſon to make Election to take by diſcent, or by purchaſe, but he muſt of neceſſity take the Land as the Law directs, which is by diſcent, and it is againſt a Maxime of Law to give a thing to ſuch a perſon to whom the Law gives it, if it had not bin given. Mich. 24 Car. in B. R. rott. 2052. *Preſton* and *Holmes* Caſe. *Styles* 148, 149.

44. A man ſeiſed of a Copyhold in Borough-English, Deviſed it to H. his Grandchild, and his Heirs; and if he dye during the life of his Mother, the Remainder to B. his younger brother and his Heirs: The Queſtion was, Whether there be an Eſtate Tail in H. or a Fee-ſimple Executory: If it was an eſtate tail, then the Deviſe was ſaid not to be good, becauſe it is a Copyhold; But if it be a Fee-ſimple, then the Deviſe is good. It was ſaid in this Caſe, That it had bin adjudged in the Court of Common-Pleas. Mich. 38 Eliz. rott. 1149. That if Lands be deviſed to one and his Heirs, and if he dye without Iſſue, that the Land ſhall be to another and his heirs, that this is no tail, for it cannot ſtand with the Rules of Law, to deviſe ſuch an eſtate; for it is but a poſſibility, and if it ſhould be more, it muſt be a Fee upon a Fee, and ſo a Perpetuity, and it cannot be known within what bounds it ſhall end, either in the Caſe of years, or life, or other Contingencies; and though there could be ſuch a Deviſe of other Lands, yet Copyhold-Lands cannot be ſo deviſed, for there cannot be ſo much as a poſſibility of Reverter, for that there is no Cuſtome to warrant it, and although there might be a Reverter, yet he cannot deviſe it by Will; and if he could, yet the Conveyance is made up by ſurrender, Admittance and Deviſe, and the party is here in by the ſurrender, and not by the Deviſe: The Court debated of the Caſe, but ſeemed to encline It was not good. Trin. 1650. Rott. 1350. in B R. *Jay* and *Joyes* Caſe. *Styles* 258, 274.

45. A man made his Will in theſe words, *ſcil.* I give and bequeath one half of my Lands to my Wife, and after her death, I give all my Lands to the heirs Males of any of my Sons, or next of Kin: It was ſaid in this Caſe, That the Deviſe was void, becauſe it is uncertain, for the intent of the Deviſor doth not appear, for it appears not what heir Male ſhall have the Land, Whether the heir Male of the ſon, or the Heir Male of the next of Kin, for the words are in the disjunctive: And 42 Eliz. in C. B. It was adjudged in *Tayler* and *Sawyer's* Caſe, that Lands deviſed to a mans Iſſue was incertain, and therefore the Deviſe void: And ſo it was ſaid it was adjudged in this very point, Hill. 2 Car. in C. B. rott. 1288. in *Hunt* and *Fiſher's* Caſe. *Rolls* Chief Juſtice, in the principall Caſe ſaid, That the intent of the Deviſor here was *caca et ficca*, ſenſeleſſe, and cannot be known, and we ought not to frame a ſenſe upon the words of a Will, where we cannot find out the Teſtator's meaning The Court inclined to Opinion, That the Deviſe was void. Trin. 1649. rott. 849. in B. R. *Beal* and *Wyman's* Caſe. *Styles* 240.

46. In an Ejectment, the Caſe was, A man Deviſed all his Fee-ſimple Lands whereſoever to his brother, upon Condition, That he ſuffer his Wife to enjoy all his Free-Lands in H. during her life; And the Jury found, That the Teſtator had onely a portion of Tythes in *H.* And if the Portion of Tythes did paſſe to the Wife by the Deviſe, was the Queſtion. It was objected, That the Tythes paſſed not; and Mich. 43 Eliz. a Deviſe of Lands extends not to Tythes, for Tythes are not Lands, but a Collaterall thing to the Land. And Trin. 42 Eliz. in that Tythes cannot be Appendant to a Mannor. But it was holden by the Court, That the Tythes did paſſe, for that being in Caſe of a Will, the meaning of the party ſhall be obſerved if it may be found out; and if it ſhould not be ſo in this Caſe, part of the Will ſhould be void, which may not be, if it may be otherwiſe by a reaſonable Conſtruction; And it is clear, the Teſtator intended to Deviſe the Land in *H.* and by a Will, things of one nature may paſſe by words which are proper to paſſe things of another nature. The Court inclined to Opinion, That the portion of Tythes in *H.* did paſſe to the Wife. Hill. 1649. rott. 748. in B. R. *Sanders* and *Riches* Caſe. *Styles* 278, 279.

47. A. had 3. ſons, B. C. and D, and deviſed certain Lands to C. and D, thus, *viz.* joyntly and ſeverally for their Lives, ſo that neither of them ſhall alienate the Lands: and if they do, that the ſame ſhall remain to his heirs, and dyes: B. dyes without Iſſue, the Reverſion of the Lands diſcends to C, who dyes, leaving Iſſue. It was Reſolved in this Caſe, Upon the death of A, that C. and D. were Joynt-Tenants of the Lands, and not Tenants in Common, notwithſtanding the words ſeverally, becauſe it is coupled with the word (joyntly); but yet they agreed, That by the Diſcent from B. to C, the Fee-ſimple was executed in C. for the moyety, as if he had purchaſed the Reverſion of the whole, or of his moyety: and it is not like the Caſe, where Land is given to two, and to the heirs of one of them; in which Caſe, for the benefit of Surviverſhip, it is not executed to divide the Joynture. Paſch. 36 Eliz. in C. B. *Morgans* Caſe. *Popham* 52.

48. A man made a Deviſe in theſe words, *viz.* I Will and Deviſe, That A. and B. my Feoffees, ſhall ſtand ſeiſed, and be ſeiſed to the uſe of J. S. for life, the remainder over: and the truth was, he had no Feoffees. It was the Opinion of the whole Court, That it was a good Deviſe to J. S. by reaſon of the Intention. See 15 Eliz. *Lingen* made a Feoffment to his own uſe, and afterwards Deviſed, That his Feoffees ſhould be ſeiſed to the uſe of his Daughter A, who in truth was a Baſtard, and yet adjudged a good Deviſe of the Lands by Intention; for by no poſſibility they can be ſeiſed

to his uſe. Mich. 2 Car. in B. R. *Baſſeild* and *Ryborn's* Caſe. *Popham* 188.

45. A. ſeiſed of Lands, Deviſed them to his Wife for life, the remainder to B. his Son and his heirs, upon Condition, That after the death of his Wife, he ſhall grant to C. and his heirs a Rent-charge; and if B. dye without heirs of his body, that the Land remain to C. in tail. The wife dyeth, B. grants the Rent to C; C. grants over the Rent: B. dyes without heirs of his body; the ſecond Grantee diſtrains for the Rent: C. brings a *Replevin*. It was Reſolved in this Caſe, That by C. granting this Rent over, it was a Confirmation: Alſo, it was agreed by the Court, That this grant of the Rent enures from the Deviſor, and he hath a power to charge the Land in what manner he pleaſeth: and the Intent of the Deviſor in this caſe was, That foraſmuch as the Land is limited in tail, and the Rent in Fee, that by this the Grantee ſhall have power to grant or diſpoſe of the Rent in what manner he pleaſeth: but if the Land had been in Fee, then the Intent of the Deviſor would have been, that the Grantee ſhould have the Rent onely untill the Remainder fall. Mich. 15 Jac. in B.R. *Gouldwell's* Caſe. *Popham* 131.

50. B. had 100 Acres of Land, called *Jacks*, uſually occupied with a houſe; he Leaſed the houſe and 40 Acres of Land, parcel of the 100. Acres to J. S. for life, and then made his Will, and thereby Deviſed his houſe and all his Lands called *Jacks*, now in the occupation of J. S. to his wife for life; and after her deceaſe, the Remainder of that and all other his Lands appertaining to *Jacks*, to A. his ſecond ſon. The Queſtion was, 1, Whether the wife ſhould have that which her Husband was ſeiſed of for life? or the eldeſt Son ſhould have it? and what Eſtate he ſhould have in it? It was ſaid in that Caſe by *Anderſon*, Chief Juſtice, That if Lands be Deviſed to one after the death of his wife, he ſhall have it for life; but if a man be ſeiſed of two Acres, and Deviſeth one to his Wife, and that J. S. ſhall have the other after the death of his Wife, ſhe takes nothing in that caſe. 2. It was holden, That the Reverſion after the death of the Wife, ſhould paſſe to the ſecond ſon, for although it doth not paſſe by theſe words, [uſually occupied] yet becauſe the Deviſe cannot take other effect, and it appears, his intent was to paſſe the Land, the younger ſon ſhall have it. Paſc. 25 Eliz. in C. B. *Higham's* Caſe. *Godbolt.* 17.

51. A man Deviſed all his Farm called Locks to his eldeſt ſon, and all his Farm called Brocks, to his yeunger ſon; and the Lands in Queſtion as purchaſed by the Deviſor, long after he purchaſed Brocks, and it was not named in the Will, and therefore it was holden, That the ſame ſhould deſcend to the Heir, the eldeſt ſon; and the Jury did not find the ſame to be uſually occupied with Brocks: And it was holden, That if a man do occupy ſeverall Farms together, and then doth Deviſe one of the Farms called D. and all the Lands to the ſame belonging, the other Farm ſhall not paſſe with it, although they be occupied all together. It was adjudged That the Land did not paſſe by the Deviſe. Trin. 20 Jac. in B. R. rott. 811. *Knight's* Caſe. *Godbolt.* 358.

52. A Feme-ſole deviſeth Lands to a man, and then takes him to husband, and dyes: This Intermarriage is a Reverſion of the Deviſe, and the heir of the Woman ſhall have the Lands, and not the Husband, becauſe after Marriage, the Will of the Wife, in Judgment of Law, is ſubject to the Will of her Husband; and a Feme-Covert hath not any Will; for the making of the Will, is but the inception thereof, and takes not effect till the death of the Deviſor. *Cook* 4. Part, 61, *Forſe* and *Hembling's* Caſe.

53. A. ſeiſed of Lands in R. E. and *H.* having Iſſue J. his ſon, and two daughters, and his brother having three ſons K. L. M. deviſeth all his Land to J. his ſon, and his heirs, and if he dyed without Iſſue, he Deviſed his Lands in K. to L. his Nephew in Fee. *Item*, I Deviſe my Lands in *H.* to K. my Nephew in Fee; And whether this were a good Deviſe to K. by way of Remainder after the death of J. without Iſſue, and an immediate Deviſe to K. and a Countermand of the Deviſe to J. *quoad* thoſe Lands, was the doubt. It was Reſolved, That it was a Limitation by way of Remainder to K. and no Countermand, for the words ſhall be conſtrued, That if J. dyed without Iſſue, then the Land ſhould remain as the Deviſe was made to M; and the firſt by Limitation, is to him, and the heirs of his body, and no Fee; and ſo it was adjudged. Trin. 8 Jac. 1. rott. 1880. *Brown* and *Jervis's* Caſe, *Cro.* 2. Part, 290.

54. A. Deviſed his Lands to his daughter and her heirs, when ſhe came to the age of 18. years, and that his Wife ſhould take the profits of the Lands to her uſe, without any accompt to be made, untill the Daughter come to 18 years; and made his Wife his Executrix, and dyed: Provided, the Wife ſhould pay the old Rents, and find the Daughter at School; the Wife enters, proves the Will, takes husband, and dyes: It was found, that all the Conditions were performed, and that the daughter was within the age of 18. years. It was Reſolved in this Caſe, That it was a Term for years in the Wife, and a good Leaſe. The other Queſtion was, If his Truſt of Education were a Limitation perſonall, that the Leaſe ſhould be no longer to the Wife, then ſhe did educate the daughter. It was Reſolved, That it was not.

Trin.

Trin. 17 Jac. in C. B. *Blackbornes* Caſe. *Hutt.* 36.

55. In Treſpaſſe, the Caſe was; A. ſeiſed of Lands in Queſtion, Demiſed the ſame to D. his Wife for life, and Deviſed this Land to T. his younger ſon, to him and his heirs in Fee, under the Condition, and after to be declared; and other Lands he Deviſed to his Wife for life, and to N. and his heirs in Fee, under the Condition after limitted: If D. dyed before the Legacies paid, then he willed they ſhould be paid by his ſons Portion-like, out of the Lands given to them; And if either of my ſons dye before they enter, or before the Legacies paid, or before either of them enter, the longer liver ſhall enjoy both parts to him and his Heirs; and if both dye before they enter, then his Executors, or one of them to pay the Legacies, and made his Wife and J. S. his Executors: The Wife entred, N. in the life of the Wife releaſed to F. all his Right with Warranty; F. Deviſed the Land. The firſt Queſtion was, If this Deviſe of a Fee after a Limitation be good, or not: Much was ſaid for it, That it ſhould be good, and operate as a Future Deviſe Executory, aſwell as one may by his Will Deviſe, That if his ſon dye before he marry, that then J. S. ſhall have the Lands; But of that point, the Court delivered no Opinion, But the whole Court Reſolved, That by the Releaſe of N. to T. be it a Condition or not, he had diſcharged it, and as to him, it is an Intereſt reverſed by the Deviſe, but not Executed till it happen, and here he had no Title executed, but veſted, and this Releaſe with Warranty, doth bind him: Alſo as to N. it is a Condition, and thereof as to him, he hath barred himſelf. Hill. 20 Jac. in C. B. *Howell* and *Augur's* Caſe, *Hutt.* 60, 61.

56. A man having Lands in Fee-ſimple and goods to the value of 5 l. onely, Deviſed to his Wife all his Eſtate, paying his Debts and Legacies: his Debts and Legacies amounting to 40 l. It was adjudged in this Caſe, that all his Lands did paſſe by the Deviſe, and that the Deviſee had a Fee-ſimple in the Lands, the word [paying] enforcing it, for they are to be paid preſently, which cannot be, if the Lands paſſe not in Fee. Trin. 1651. in B. R. *Kirman* and *Johnſon's* Caſe, *Styles* 293. Mich. 45 Eliz. in C. B. *Riches* Caſe. A. Deviſeth all his Rents: It was holden, That all his Lands do paſſe, *ibid.*

57. In Treſpaſſe, It was holden, That Gavelkind-Lands, though they were holden by Knights-ſervice, yet they might be Deviſed by Will by the Cuſtome of *Kent*. Mich. 1655. in B. R. *Hammond* and *Thornhill's* Caſe. *Styles* 476.

58. The Cuſtome of the Town of *New-Caſtle* is, That the Owners of houſes in the Town of *New-Caſtle* in Fee-ſimple, may deviſe them by parcell, but not Tenants in Tail. It was found, the Teſtator was ſeiſed of houſes in tail in poſſeſſion, and of the Remainder of them in Fee-ſimple, and ſo ſeiſed, did Deviſe them by paroll: It was ſaid, That the Cuſtome did not Warrant the Deviſe, becauſe they are not to be enlarged, but taken ſtrictly: And here is but a power of an Eſtate, and not a Fee in poſſeſſion; Alſo the word [*Owners*] doth not extend to all Owners, for it doth not extend to Enfants, and therefore it ſhall be conſtrued to extend to an abſolute owner in Fee, and not to a Reverſioner in Fee: On the other ſide, it was ſaid, That here is an Eſtate within the Letter of the Cuſtome, for he is the true Owner of the houſe in Fee-ſimple, and although it be not in preſent poſſeſſion, yet he hath the Fee-ſimple in him, and though Cuſtomes ſhall be taken ſtrictly, yet they ſhall be taken reaſonably, having reſpect to the benefit of the party. A Remainder in Fee, ſhall go, according to the Cuſtome, whither by the Cuſtome Lands in Fee ſhall go, the Cuſtome ſhall go to all things iſſuing out of the Lands, and ſo to all Eſtates in the Land. Quære, the Caſe was Adjourned. Hill. 1654. in B. R. *Swan* and *Fenham's* Caſe. *Styles* 409, 410.

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2. *Where, and what manner of Limitation in a Deviſe ſhall make an Eſtate for Life, or other Eſtate to paſſe to the Deviſee; by Implication, and what not.*

1. THe Son, ſeiſed of a Remainder in Fee, after the death of his Father who was Tenant for life, Deviſed the ſame by theſe words, *viz.* I Deviſe to D. my Wife, the Lands which I have, or may have in Reverſion, after the deceaſe of my Father, paying therefore yearly, during her life, to the right Heirs of my Father, 40 s. and dyed, living his Father: It was the Opinion of the Court, that no Eſtate paſſed by this Deviſe, but for Term of the life of the Wife, and that ſhe ſhould not pay the 40 s. untill the Reverſion did fall after the death of the Father. Mich. 25 Eliz. *Dyer*, 371.

2. A man poſſeſſed of a Term for 40. years, By his Will Deviſed, That A. his eldeſt daughter ſhould have the Term to her, and her Heirs of her body, the Remainder (if ſhe dyed without Iſſue within the Term) to B. his ſecond daughter in Tail. The eldeſt daughter took a Husband within the Term; who aliened the whole Term: It was

was the Opinion of the Court, that the ſecond Daughter B. had no remedy for it, and that it was a void Remainder; and ſuch was the Opinion of *Baldwin* and *Shelley* Juſtices. But *Englefield* conceived that the Remainder was good, becauſe it is by Will: wherein the Intent of the Deviſor ſhall be taken, and that was thus; That if it did fortune, that the eldeſt Daughter did die without Iſſue within the Term, that the ſecond Daughter ſhould have it. 28 H. 8. *Dyer*, 8. See more *Cook* 8. Part, in *Mathew Manings* Eſtate, that ſuch an Eſtate is good by way of Executory Deviſe.

3. A man was Leſſee for 40. years of a houſe, and by his Will gave the Houſe to J. S. without limiting any Eſtate, that he ſhould have it. It was the Opinion of the Court, that the Deviſee ſhould have the whole; For no other Eſtate in the Houſe, either for Life, or at Will, ſhall paſſe by Implication, or for one year, or years; and therefore the whole Term ſhall paſſe to the Deviſee. Mich. 14 Eliz. *Dyer*, 307.

4. Leſſee for 60. years of a Meſſuage and certain Lands, made his Will in this manner; I will, that J. my Wife ſhall have and occupy all the Lands contained in the Leaſe for ſo many years, as ſhe ſhall fortune to live: and after her deceaſe, I give the reſidue of the years in the ſaid Leaſe to B. my Son, and his Aſſigns, and made his Wife his Executrix, and dyed, leaving goods beſides ſufficient to pay all his Debts; the Feme proved the Will, and entred into the Land, claiming her Eſtate and Legacy in the Term for her Life, the Remainder to B. according to the Will: Afterwards, ſhe took another Husband; and then ſhe and her Husband naming her ſelf Executrix, aliened and granted all her Intereſt, Title, and Term of years to come, and all their Eſtate therein, *Habend.* the Lands and Term, untill the full end of the 60. years; and if the ſame ſhould barr the Remainder, was the Queſtion. In this Caſe, It was Reſolved by all the Juſtices, That the Deviſe was good unto the Wife, and alſo to the Son in Remainder; and that the Entry of the Wife with her Claim of the Land, as a Legacy, was a good Execution of both their Eſtates; and the Intereſt of the Wife was not any Collateral Occupation, but out of the ſame thing which was limited to the Son in Remainder; and the Limitation to the Son was not a poſſibility (as it was objected) but a Deviſe of the Land it ſelf. Paſc. 20 Eliz. *Plo. Com.* 516. *Welcoten* and *Elkingdon's* Caſe, See Trin. 19 Eliz. *Dyer*, 356. 357. acc.

A. Deviſed a houſe to a Woman, and to the Brother of the Woman, and to the Heirs of every of their bodies; and for want of ſuch Iſſue of the Brother and Siſter, the remainder to the right Heirs of the Deviſor: The Brother dyed without Iſſue; the Siſter had Iſſue, and dyed. It was the Opinion of the Court, That the Iſſue ſhould have but a moiety, and no more: And it was holden, that the Word [every] made and implyed ſeverall Eſtates. Mic. 16 Eliz. *Dyer*, 326. *Hartley's* Caſe.

6. *Ceſtuy que uſe* deviſed his Lands in E. to his Sons and his Heirs: Provided, that if he dye without Iſſue; or that the Iſſues fail, living his Executors; that they ſhall ſell the Land: It was the Opinion of the Court, that this ſhall not be taken to be an Eſtate-Tayl by Implication; nor to be any Guift of the Land it ſelf. Mich. 19 Eliz. *Dyer*, 354. See 5 Ma. *Dyer* 143. that the Deviſe is not good; for a Deviſe is not within the Statute of 1 R. 3. to convey the poſſeſſion.

7. In an *Ejectione Firme* the Caſe was. A. ſeiſed of divers Lands in A. B. and C. the Lands in C. being in him by Mortgage forfeited; Deviſed the Lands in A. and B. to ſeveral perſons: and then adds this Clauſe in his Will; All the reſt of the Goods, Chattels, Leaſes, Eſtates, Mortgages, whereof he was poſſeſſed, be deviſed to his Wife, after his Debts and Legacies paid, made his Wife his Executrix and dyed: The Wife entred into the Mortgaged Lands, and deviſed it to the Defendant and his Heirs, and dyed. The Queſtion was, Whether the Fee paſſed to the Wife by this Deviſe, by the name of all his Eſtate, Mortgages, &c. And it was the Opinion of the whole Court, that an Eſtate for life onely paſſed unto her; and not a Fee by Implication, of the general words in the Will. Trin. 10 Car. in B. R. *Wilkinſon* and *Merrylands* Caſe. *Cro.* 1. Part 323.

8. Note by Intendment of Law, a Deviſee ſhall be for the benefit of the Deviſee, and not to his prejudice: As if Land of the value of 3 l. *per annum*, be deviſed to A; and that A. ſhall pay out of it 50 *s. per annum*. In this Caſe, A. hath but an Eſtate for Life, for he may pay it out of the profits of the Land, and is ſure to be at *no* loſſe. But if it be deviſed to B. for life, the Remainder to A. paying 50 *s. per annum*, out of it; In this Caſe, A. hath a Fee-ſimple by Implication; becauſe after the payment thereof A. may dye, before he can receive ſatisfaction for the ſame out of the profits of the Land: and therefore ſuch Deviſe ſhall be a Fee-ſimple, becauſe the Law intends that the Deviſe was for the benefit of the Deviſee. *Cook* 6. Part 16. *Collins* Caſe.

3. *De-*

3. Deviſes upon Condition; And what Condition in a Deviſe ſhall be good; What not: And what words ſhall make a Condition; What not.

1. THe Cuſtome of *London* is, That a man might Deviſe the Lands which he purchaſed in Mortmain; And one deviſed his purchaſed Lands to the Prior and Covent of S. *Ita quod*, they render to the Dean and Chapter of P. 20 l. *per annum*; and if they fail thereof, then their Eſtate to ceaſe, and to remain to the ſaid Dean. It was holden, The Deviſe was good; but the limitation of the Remainder was void, becauſe a Remainder cannot be limited after a Fee. Paſch. 29 H. 8. *Dyer* 33.

2. A man Deviſed Lands to his Wife, upon Condition, That ſhe ſhould bring up his Son at School, and in Virtue, Learning, and Good Manners; and that after the death of his Wife, the Land ſhould remain to his ſecond Son in Fee, and dyed; the Wife entred; the Condition was broken, the eldeſt ſon after his full age entred for the Condition broken: In this Caſe it was holden, That a Condition might be annexed to a Will by the Statute of 32 H. 8. of Wills, which gives Liberty to a man to Deviſe for the advancement of his Wife, &c. 2. That a particular Eſtate may be upon Condition, though the remainder be without Condition. 3. That he in the Remainder ſhould not take advantage of the Condition, but the heir, becauſe he is prejudiced in the Inheritance by the Deviſe. Hill. 3 Ma. *Dyer* 127. *Warrens* Caſe.

3. If a man make two men his Executors, Proviſo, That one of them ſhall not adminiſter his Goods, the ſame is a Proviſo which is void, becauſe it reſtrains the authority which was given by the firſt part of the Will, and agrees not with the Law; for by Law every Executor may adminiſter the goods: And ſuch was the Opinion of *Baldwin* and *Egglesfield*, Trin. 19 H. 4. *Dyer* 4. But *Fitzh.* conceived the Proviſo to be good; for that he might bring an Action, although he did not adminiſter.

4. A man ſeiſed of Tenements in *London*, Deviſed the ſame to two, upon Condition, That they ſhould pay to his Wife 10 l. *per annum* iſſuing out of the ſaid Tenements, at two Feaſts; and if the Rent be behind by the ſpace of 6. Weeks being demanded, that it ſhould be lawful for the Wife to diſtrain. It was holden by the Juſtices, A good Condition; and that if the Rent be behind, yet the Wife cannot diſtrain before a demand of the Rent; but the Heir of the Husband might enter for the Condition broken, though the Wife did not demand the Rent. Hill. 18 Eliz. *Dyer* 348.

5. *Ceſtuy que uſe* in Fee before the Statute of 27 H. 8. by his laſt Will did Deviſe his Lands to his Wife for her life, *Ita quod non faceret Waſtum*; the remainder after her deceaſe to his ſon in tail. Afterwards the Statute of 27 H. 8. of Uſes was made; The Wife committed Waſte in the Lands. It was holden by the Court, That it was a good Deviſe, a good Condition; but who ſhould enter for the Condition broken, the Heir, the Feoffees, or he in the Remainder, is left a Quæry, and not Reſolved. Paſch. 3 Ma. *Dyer* 117. *Stubbs* Caſe.

6. A man having no Children, by his Will Deviſed, That his Lands ſhould continue in the hands, uſe, and occupation of his Wife (who he made his Executor) for 30 years: For theſe Intents and purpoſes: 1. He willed, That out of the Rents and profits ſhe ſhould yearly during the Term pay to A.B. and C, who he made his Overſeers of his Will 30 l. for the ſatisfaction and payment of diverſs Legacies to be paid over by the ſaid Overſeers to divers perſons, at ſeveral times, in as ſhort a time as it might be levied. 2. They willed and deſired his wife to be bound in her Widowhood to his Overſeers, for the performance of his Will according to the Truſt committed to her; the Remainder of his Lands to his brother, (his heir) and the heirs males of his body, with divers other Remainders over in tail, the remainder to his right heirs; The Wife entred, and took the profits of the Lands for divers years, being of the value of 30 l. and did not pay the money to the Overſeers; but by their conſent ſhe paid all the Legacies; but not at the very time that they were to be paid: The heir for non-payment of the 30 l. to the Overſeers, entred upon the Wife. The Queſtions were, If theſe words in the Will, (*ſcil.* For theſe intents and purpoſes) were a Condition, or not? And, if it was, If it was broken by the not payment of the 30 l. to the Overſeers, nor to the Legatees in the due time? The Points were not Reſolved. But the Opinion of the Juſtices inclined to be againſt the Plaintiff, *ſcil.* That the entry of the heir upon the wife, was not lawful. Paſch. 4 Ma. *Dyer* 163.

7. See 16 Eliz. *Dyer* 333. *Chapmans* Caſe. Sect. before to this Diviſion.

8. A man ſeiſed of a Wharf and Houſe in *London* holden in Burgage, Deviſed the ſame to his Wife, and her heirs, upon Condition, That the Wife by the advice of Counſel learned in the Law, within convenient time ſhould give and aſſure

aſſure all the ſaid Tenements to maintain a Free-School, Almes-men, and Almes women for ever; and that his Wife ſhould have the profits of them during her life, bearing all the charges of the ſaid School, &c. and made his Wife his Executrix, and dyed; the wife entred, and afterwards made a Leaſe of the Tenements for years: and the Heir entred for the Condition broken. In this Caſe, It was Reſolved, 1. That this was a good Deviſe, and the real good Uſes not taken away by any Statutes of 23 H. 8. or other Statutes. 2. That the Condition is not void, but a good Condition; for the Teſtator hath Deviſed, That Councel Learned ſhould Deviſe, how every the ſaid Tenements might be aſſured to the Uſes expreſſed in the Will, which might well be, by making them, 1. A Corporation by the Kings Letters Patents, and then aſſuring the Lands unto them. 3. That the Condition was broken, becauſe the wife had not done it within convenient time; and alſo becauſe ſhe had diſabled her ſelf by making the Leaſe for years, to perform the Condition. Mich. 33 Eliz. *Cook* 1. Part, 23. *Porters* Caſe.

9. See *Boraſtons* Caſe. *Cook* 3. Part, 19. before, In this Title of Deviſe.

10. See *Trellock* and *Hamonds* Caſe. 33 Eliz. in B. R. before.

11. A man ſeiſed of Lands in Fee, by his Will deviſed them to his brother for life, upon Condition, that he find a Chaplain to ſay Maſſe, and to find *Obits*, *Anniverſaries*, and divers other ſuperſtitious uſes mentioned in his Will, the remainder in tail to others upon the ſame Conditions; and if all they in the Remainder forfeit their Eſtates in not performing of the ſaid Condition, then the Lands to remain to the right heirs of the Deviſor. It was Reſolved in this Caſe, That all the ſaid Uſes were ſuperſtitious Uſes, and ſo the Lands came, and were given to, and veſted in the Crown by the Statute of 1 E. 6. Cap. 13. 2. It was Reſolved, That although the Land was Deviſed but conditionally, to find a Prieſt, &c. yet it was found, to find a Prieſt, and therefore within the ſaid Statute, 3. It was Reſolved in that caſe, That if the Deviſor had limited by expreſſe words, or by any words which might imply his meaning to be, That the Deviſee for the advancement of his blood ſhould have the reſidue of the profits deviſed by the Will, the ſame ſhould be a good Uſe; and the King ſhould have onely the Rent of it, and not the Lands. Hill. 45 Eliz. in C. B. *Cook* 1. Part, 104. *Adams* and *Lamberts* Caſe.

12. See the Lord *Cheneys* Caſe. Mich. 34 Eliz. in the Court of Wards. *Cook* 5. Part, 68. before.

13. A man deviſed his Land to his younger ſons when he ſhould accompliſh the age of 24 years, upon Condition, That he ſhould pay 20 l. to the daughter of the Deviſor, and if he ſhall dye before the age of 24. years, then his eldeſt ſon ſhall have the Land, upon Condition, that he pay the ſaid 20 l. And if both his ſons failed, that the Land ſhould remain to his daughter, and dyed: the younger ſon entred after 24 years of age, and did not pay the 20 l. to the daughter; the elder brother entred upon him: It was Reſolved by the Court in this Caſe, That the ſame was a Limitation, and not a Condition, and therefore the entry of the elder brother was not Lawfull. Hill. 43 Eliz. in B. R. *Wiſeman* and *Baldwin's* Caſe. *Goldesbr.* 152, 153.

14. A man made a Leaſe for years, upon Condition, That if the Leſſee ſhall demiſe the premiſes, or any part of it, other then for one year, to any perſon or perſons, then the Leſſor and his Heirs to re-enter; The Leſſee afterwards deviſed it by his Will to his ſon: It was holden by the Court, It was a breach of the Condition. See 31 H. 8. *Dyer*, 45. Hill. 36 Eliz. in B. R. *Cole* and *Taunton's* Caſe. *Goldesbr.* 184.

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4. *Where a Deviſe to his Executors; or that his Executors, or Feoffees, ſhall ſell his Lands, is good, where not; Where it ſhall be an Intereſt in them; where an Authority onely; And where ſale by them made, ſhall be good, Where not.*

1. BEfore the Statute of 27 H. 8. *Ceſtuy que Uſe*, by his Will deviſed, That A. B. and C. his Feoffees, ſhould ſuffer his Wife to take the profits of his Lands during her life, and that after her deceaſe, that the premiſes ſhould be ſold by the ſaid Feoffees; and that, the monies thereof received, they ſhould pay to certain perſons. The Teſtator dyed, A. one of the Feoffees dyed, The Opinion of the Court was, That the ſurvivors could not ſell the Lands; but they doubted of it, if they had not been ſpecially named. Hill. 2 Eliz. *Dyer*. 177.

2. A man deviſed his Lands to his Wife for the Term of her life, the Remainder to K. his daughter in tail, and if ſhe dyed without Iſſue, that then after the death of his Wife, the Lands ſhould be ſold for the beſt value by his Executors, with the aſſen of A. and B. and made his Wife and a ſtranger, his Executors, and dyed: the Wife [illegible] and dyed; A. and B. died; And the Executors [illegible] ſold the Land alone: The Opinion

Opinion of the Court was, That the ſale was not good, becauſe he wanted ſufficient Authority to ſell. Mich. 5 Eliz. *Dyer*, 219.

3. A man ſeiſed of divers Mannors and Lands, deviſed all the ſaid Mannors and Lands to his Siſter, and her Heirs for ever, except, out of this generall Grant, my Mannor of R. which I do appoint to pay my debts; and made two Executors by name, and dyed. One of the Executors dyed; and the other took upon him the charge and Execution of the Will, and afterwards ſold the ſaid Mannor of R. for 300 l. for the purpoſe aforeſaid, in Fee; It was the Opinion of the Court, That he might well ſell it, for by the circumſtances, it appeareth, that ſuch was the Teſtators intent, and not to leave the Reverſion to diſcend to his Heir, but to truſt his Executors with the ſale of it, for the payment of his Debts. Mich. 23 Eliz. *Dyer*, 371.

4. A. made B. and C. his Executors, and by his Will appointed, that they ſhould have and hold the Iſſues and profits of his Lands, untill his Heir ſhould come to his age of 21 years, to the intent, that the Executors, with the profits thereof, ſhould pay his Debts and Legacies, and bring up his Children. One of the Executors dyed, the ſurviving Executor made his Executor, and dyed alſo, the Heir being within age; It was the Opinion of the Juſtices, That the Executor of the ſurvivor might receive the profits of the Lands, and diſpoſe of them during the Non-age of the Heir, becauſe it was an Intereſt in the Executors, and not an Authority or a Truſt onely. Hill. 2 Eliz. *Dyer*, 210.

5. If a man hath Feoffees upon confidence, and makes his Will, That his Executors ſhall alien his Land; if the Executors refuſe the Adminiſtration of his goods, yet they may ſell the Lands, becauſe the Will is not of a thing Teſtamentary; But the Executors have not a power to meddle with the Land, unleſſe ſuch a ſpeciall power be given to them: If a man makes his Will of his Lands, and that his Executors ſhall ſell them without naming them by their proper names, if they refuſe to be Executors, yet they may ſell the Land: But if a man makes his Will, that his Lands which his Feoffees have, ſhall be ſold, and doth not ſay by whom; the Executors ſhall ſell the ſame, and not his Feoffees, becauſe the monies which come by the ſale, ſhall be Aſſets in the hands of the Executors, which is a proof that they may ſell them: And if his Will be, That the Executors ſhall ſell the Lands before the Alienation, the Heir may take and receive the profits of them, and if no ſale be made, the Heir ſhall hold the Land for ever. Mich. 15 H. 7. 12.

6. A man deviſeth, That his Executors ſhall ſell his Lands: Now by the Statute of 21 H. 8. C. 4. if the one refuſeth, the other may ſell the Lands; but the ſale cannot be made to him who refuſeth. 27 Eliz. in *Bendlows* Caſe adjudged. See *Cook* 1. Part, *Inſtitutes*, 113.

7. A man made his Will, and made A. E. J. O. his Executors, and deviſed his Lands to the ſaid A. E. J. and O. by their ſpeciall names, and to their Heirs, and further deviſed, that the Deviſees ſhould ſell the Lands to J. D. if he would give for it before ſuch a day 100 l; and if he would not, that they ſhould ſell it to any other, to the performance of his Will, *ſcil.* the payment of his debts: J. D. would not give the 100 l. one of the Executors refuſed to intermeddle, the other three ſold the Land; It was the Opinion of the Court, That the ſame being a ſpeciall and a joynt Truſt, that it could not ſurvive, and that the ſale by the three was void. Mich. 29 Eliz. in B. R. *Boniſant* and Sir *Rich. Greenfield's* Caſe. *Godbolt*. 77. See 26 Eliz. in B. R. *Vincent* and *Lees* Caſe, in *Cook* 1. Part, *Inſtitutes* 113. acc.

8. One deviſed houſes, deviſeable in *London* by Cuſtome, the Land was holden of the King in tail; And if the Donee dyed without Iſſue, Deviſed, That the Land ſhould be ſold by his Executors, and dyed: The Deviſee dyed without Iſſue, It was holden in that Caſe, although the Land eſcheated to the King, yet the ſale made by the Executors, ſhould deveſt the Eſtate out of the King, without Petition, or *Monſtrans de Droit*, becauſe that upon the ſale, the Vendee was in by the Deviſor paramount the Eſchear. 49 E. 3. *Iſabell Goodcheap's* Caſe, vouched in Sir *Hugh Chomley's* Caſe. *Cook* 2. Part, 53.

9. The Caſe was, A. by Will deviſed, That his Executors ſhould ſell his Lands, and dyed; The Executors levyed a Fine thereof to F. taking mony of F. for the ſame: If Title be made by the Conuſee to the Land: If it be pleaded againſt the Fine *Quod partes ad finem nihil habuerunt*: If it were a good plea, was the Queſtion. *Anderſon* chief Juſtice ſaid, He conceived that it was, But *Windham* and *Periam* Juſtices ſaid, That upon Not-guilty pleaded, the Conuſee might help himſelf by giving the ſpeciall matter in Evidence, in which Caſe the Conuſee ſhall be adjudged in, not by the Fine, but by the Deviſe: In that Caſe, It was agreed: A. Deviſeth, That his Executors ſhall ſell a Reverſion of certain Lands, of which he dyed ſeiſed; they ſell the ſame without Deed; yet the ſale is good, becauſe that the Vendee is in by the Deviſe, and not by the Conveyance of the Executors.

10. A man ſeiſed of two houſes, Leaſed one of them to his brother for life; And afterwards by his Will, deviſed, *viz. I give to my Executors, all*

my Lands and Tenements, Free and Copy, To hold them, and they to take the profits of them for 10. *years; and afterwards to ſell the ſaid Lands and Tenements*, and dyed, his brother dyed within a Quarter of a year after: The Executors entred into the houſe undeviſed, and took the profits, but not into the other, and at the end of the 10. years, they ſold the whole: It was holden by the Court; That by the Deviſe, both the houſes did paſſe to the Executors; and the words (*take the profit*) do not reſtreyn the generall words before (*All my Lands and Tenements*) but rather expounds them, *ſcil.* ſuch profit as they might take of a Reverſion *cum acciderit*: Like the Caſe 39 E. 3. 21. The King Grants to the Abbot of *Reading*, That in time of vacation, the Prior and Monks ſhall have the diſpoſition of all the poſſeſſions of the ſaid Abby *ad ſuſtentationem Prioris et Monachorum*, and, If in the time of Vacation, they ſhould have Advowſons, was the Queſtion; for it was ſaid, That Advowſons could not be to their ſuſtentation. But the Opinion in the book is, That the Grant of the King did extend to Advowſons, for it ſhall be intended, ſuch ſuſtentation as Advowſons might give; In the principall Caſe, the Opinion of the Juſtices was, That the Intent of the Deviſe was to perform the Will of his Father, and his own Will, and in Caſe the houſe in poſſeſſion was not ſufficient to perform both the Wills, all ſhall paſſe, and therefore the Deviſe by a favourable conſtruction, ſhall be taken largely, and his Deviſe is generall: All his Lands which are not reſtreyned by the ſubſequent words, (*to take the profits*) For *to have and to hold*; and, to have and to take the Profits, is all one. Trin. 31 Eliz. in C. B. *How* and *Conneyes* Caſe. *Leon.* 180, 181.

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5. *Where to the Execution of a Deviſe, the aſſent of the Executor is requiſite, Where not.*

1. IN an Action of Debt for Rent, the Plaintiff declared; that he Leaſed the Lands to J. S. rendring Rent, and that the ſaid J. S. deviſed them to the Defendant, and that the Defendant entred, and was poſſeſſed; the Defendant demurred upon the Plea; becauſe it was not alledged, that the Deviſee J. S. made Executors, and that the Defendant entred with their conſent and Agreement. Mich. 9 Eliz. *Dyer*, 254. *Bowles* Caſe.

2. Leſſee for years, deviſed his Term to one whom he made his Executor, and dyed: The Deviſee entred before any probate of the Will, and held and enjoyed the Land for a year, and more, without proving of the Will, and then dyed; It was a queſtion, If his Executor, or if he dyed Inteſtate, his Adminiſtrator ſhould have the Term; It was the Opinion of the Court, That the Term was lawfully ſettled in the Executor by his Entry; and it was a good execution of the Deviſe, without any probate made of the Will. Mich. 22 Eliz. *Dyer* 367.

3. Leſſee for years deviſed his Term to one for life, the Remainder to another, and made the Deviſee his Executor, and dyed; who entred, and made his Executor and dyed; the Executor entred, and took the profits for a year, againſt whom he in the Remainder brought an Accompt as Bayliff: It was the Opinion of the Court in this caſe, That the Action did not lye, becauſe there wanted privity, and he was never in poſſeſſion of the Term. And, 2. Becauſe he had not declared to have the Term as Executor, or as Deviſee; and it ſhall be intended that he took it as Executor, untill the contrary be ſhewed. Trin. 10 Eliz. *Dyer* 277. See the Caſe before, Sect. 2.

4. If a man Deviſe a Term to J. S, and the Executors agree, That J. S. and J. D. ſhall have the Term; in this caſe J. S. ſhall have the Term alone, and abſolutely; for that, after the aſſent of the Executors, he is in by the Deviſe. *Cook* 4. Part, 29. in *Weſtwicks* Caſe.

5. A man was poſſeſſed of a Term for divers years, and deviſed the profits thereof to one for life, and after his deceaſe, to another for the reſidue of the years, and dyed: the firſt Deviſee entred by the aſſent of the Executors, and afterwards he in the Remainder during the life of the firſt Deviſee, aſſigned it to another; and afterwards the firſt Deviſee dyed: It was adjudged, That the Aſſignment was void; for he in the Remainder had but a poſſibility during the life of the firſt Deviſee: For it is as much in Law, as if the Land had been deviſed to him for ſo many years as he ſhould live, or for all the Term if he ſhould live ſo long, ſo as the Intereſt of the Term is *ſub modo* in him, and the other in remainder hath but a poſſibility, which he cannot grant over. See *Cook* 4. Part, 66. in *Fulwoods* Caſe.

6. Leſſee for years aſſigned his Term to another, and maketh his Executors, and dyeth; and the Executors do Waſte, and afterwards aſſent to the Deviſe. It was holden in this caſe, That although between the Executors and the Deviſee it hath relation, and the Deviſee is in by the Deviſor, yet an Action of Waſte ſhall be maintainable againſt the Executors, in the Tenant. *Cook* 4. Part, 12. in *Saunders* Caſe.

7. See *Cook* 8. Part, 95. *Mannings* Caſe, Sect. 26.

16. before, where he in the Remainder took it as an Executory Deviſe, and not as a Remainder: and that the payment of the 7 l. rent, was an Aſſent to the Legacy: and ſo there Reſolved, That after an Executor hath aſſented to the firſt Deviſee, It doth not lye in the power of the firſt deviſe to bart him in the Remainder, becauſe he cannot transfer more to another, than he himſelf hath.

8. A man poſſeſſed of a houſe and half an acre of Land for 5000 years, deviſed the ſame to A. his Father for the Term of his life; and after his deceaſe, the Remainder to B. ſiſter of the ſaid Deviſor, and to the heirs of her body, and made A. his Executor, and dyed: A. took upon him the execution of the Will; B. took husband: The huſband and wife at the Requeſt of A, did aſſign and yield up all their intereſt to A. in the houſe and Land, *Habend. pro et durante reſiduo dicti Termini 5000 annorum.* A. demiſed the Land to C. for 10 years; the husband dyed: B. took another husband; A. dyed, the wife of the ſecond husband entred into the houſe and Land. In this Caſe, theſe points were Reſolved, 1. That if a man, poſſeſſed of a Term for years, deviſeth the profits of the Land, or the Land it ſelf for life to one, and afterwards to another the reſidue of the Term, ſuch executory deviſe is good. 2. That the firſt Deviſee after aſſent made by the Executor, cannot bar the executory Deviſe. 3. That the aſſent of the Executor to the firſt Deviſee, doth entire to the other who hath the executory Deviſe. 4. When a Deviſe is made to an Executor for life, and the Executor enters generally, he ſhall have it as Executor, and not as a Legatory, unleſſe he make a ſpeciall Election. 5. That ſuch an executory Deviſe cannot be granted to a ſtranger during the life of the firſt Deviſe. 6. That ſuch a poſſibility (as in the principal caſe) may be extinguiſhed by Grant or Releaſe made to him who is in poſſeſſion. *Cok.* 10. Part, 47. & 49. *Lampits* Caſe.

9. A. poſſeſſed of a Leaſe for 1000 years, deviſed the ſame to *Eliz.* his daughter for life: the remainder to *J. Holloway*, and made J. S, the huſband of his Daughter, his Executor, and dyed: *J. Holloway* deviſed his Intereſt to *Hen.* and *George Holloway*, and made J. D. and others his Executors, and dyed. Afterwards J. S. ſpake theſe words, If *Eliz.* my wife were dead, my Eſtate in the premiſſes were ended, and then it remains to the *Holloways*: *Eliz.* dyed; the Executors of *J. Holloway* made a Leaſe to the Plaintiff, upon whom the Leſſee of J. S. entred. The Queſtions in this Caſe were, 1. If the words ſpoken by J. S. the Executor, be a ſufficient aſſent to the Deviſe? 2. Whether this aſſent came in due time as to the Intereſt of *J. Holloway* in the Remainder, becauſe he dyed before the words ſpoken which ſhould make the Aſſent. And in this Caſe, it was Reſolved by all the Juſtices, 1. That the ſaid J. S. had made a ſufficient Declaration to take the Term as Deviſee in the right of his wife, and that was a ſufficient aſſent; and the words (*viz.* then it remains to the *Holloways*) is a proof, that he took Notice of it as a Legacy. 2. It was Reſolved, That the Aſſent came time enough after the death of *J. Holloway*, for otherwiſe it would be a great inconvenience, for by that means it ſhould be deſtructive to all Legacies: for of neceſſity there muſt be an Aſſent of the Executors to a Legacy; and if he will not aſſent, and the Legatee dyeth before, to compell him to aſſent; or if the Legatee dyeth immediately after the Deviſor before any aſſent to the Legacy. In the firſt Caſe, it would be in the power of the Executor to prejudice the party: or in the other caſe, the Act of God ſhould prejudice him, which is againſt Law. It was adjudged for the Plaintiff. Mich. 17 Car. in B. R. *Southwaid* and *Millards* Caſe. *Marſh* 135, 136, 137.

10. Note: It was Reſolved by all the Juſtices That if a man hath Lands in Fee, and Lands for years, and he deviſeth all his Lands and Tenements, the Fee-ſimple Lands paſſe onely, and not the Leaſe for years. 2. If a man hath a Leaſe for years, and no Free-hold, and deviſeth all his Lands and Tenements, the Leaſe for years paſſeth. 3. That if one deviſeth his Land which he hath by Leaſe, to his Executor for life, the remainder over, that there ought to be a ſpecial aſſent thereunto by the Executors as to a Legacy; otherwiſe it is not executed. Trin. 7 Car. in B. R. *Roſe* and *Bartletts* Caſe. See the Caſe at large, *Cro.* 1. Part, 213.

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6. *Deviſes, how they ſhall be taken, conſtrued, and expounded, to paſſe Eſtates, or otherwiſe: And certain Rules for the Expoſition of them.*

1. A. Made his Will in theſe words, I bequeath all my Lands to my ſon R, except my Chauntry Lands: And I deviſe all my Chauntry Lands to be divided amongſt all my Children, Men and Women alike, except my Son R: And if R. dye without Iſſue, the remainder to B. my ſecond ſon, with remainders to his 3d. and 4th ſon, the remainder to the next of my blood, and ſo from heir to heir: And ſo likewiſe I would to be done upon my Chauntry Lands and Tenements, in caſe all my aforeſaid Children dye without iſſue; Then I would the one half of my Chauntry Lands

to remain to the next of Kin, the other half to the Hoſpital of M: The Queſtion was, What Eſtate the Heir of the eldeſt Son ſhould have in the Chauntry Lands? It was ſaid, That he ſhould have an Eſtate tail in them. But *Cook*, Chief Juſtice, ſaid, That *Richard* the eldeſt Son was excepted, and he ſhould have no part of them: and that every one of the Sons ſhould have the Chauntry Lands one after the other. And for the younger Children, they ſhall be Tenants in Common for life, and that the Chauntry or Hoſpital ſhall have nothing till they be all dead. And he put *Petwiches* Caſe, 29 Eliz. where it was adjudged, That if a man deviſeth a Houſe to his eldeſt Son in tail, and another to his ſecond ſon in tail, and the third Houſe to his third ſon in tail; and if any of them dye without Iſſue, the remainder to the other two equally, this ſhall be but for life, for it enures to the Quantity of the Land, and not to the quantity of the Eſtate. Paſch. 9 Jac. in C. B. *Pitts* and *Dowſes* Caſe. *Brownlow.* 2. Part, 74.

2. If a man deviſeth by theſe words, *ſell.* I give, grant, Will, and bequeath to T. all my Manors, Lands, &c. To have and to hold to T, and the heirs of his body, for and during the Term of 500 years, that the ſame is but an Eſtate for years, determinable upon the Limitation for default of Iſſue, by *Cook* and *Winch*, Juſtices. *Cook* 10. Part, in *Leonard Lovies* Caſe. But it was agreed, That if a man hath a Term, and deviſeth the ſame to one, and his heirs of his body, his heir ſhall not have it, but it ſhall go to his Executor, becauſe a Term which is but a Chattel, cannot be entailed. See 28 Eliz. *Peacocks* Caſe; and 21 Eliz. *Higgins* and *Mills* Caſe adjudged acc.

3. In a *Replevin*, the Caſe was; A. was ſeiſed of the Manor of D. in Fee, and gave the ſaid Manner to L. R. the Father of the Plaintiff, and Avowant, and *Jane* his wife, and of the heirs of the Father, who deviſed unto the Avowant a Rent of 4 l. *per annum* out of the ſaid Manor, with Clauſe of Diſtreſſe for his Childs part to be yearly paid; the Father dyed, the wife dyed; and for the arrearages of the Rent encurred mean between the death of the Father and the Wife, the Defendant avowed: upon which Avowry, the Plaintiff did demur in Law. It was holden, That the Avowant might well avow the taking of the Diſtreſſe for theſe arrearages: For if he in the Reverſion grant a Rent-charge after the death of the grantor, the Grantee ſhall diſtrain for all the arrearages encurred after the grant, and this is a ſtronger Caſe; for this Rent as it appeareth by the words of the Deviſe, was deviſed to the Avowant for his Livelihood, and for his Childs part; which words imply a preſent advancement; and the words, *Yearly to be paid*, is a ſtrong proof of that intent. Mich. 26 Eliz. in B. R. *Reaveſbies* Caſe. *Leon.* 13.

4. See Hill. 28 Eliz. in B. R. *Higham* and *Haverwoods* Caſe. Diviſ. 1. Sect. 4. before.

5. *Tho. F.* had Iſſue by two ſeverall women, two ſons; F. his eldeſt, and W. his youngeſt, and Deviſed his Lands to F, to the uſe of himſelf for life, and after to the uſe of the heirs males of his body; and for default of ſuch iſſue, to the uſe of the heirs males of T. R, and the heirs males of their bodies for ever: and afterwards makes a Leaſe to W. his ſon for 30 years, to begin after his death, and dyeth without alteration of his Will; W. enters, and ſurrenders his Leaſe to F, who Leaſeth the Lands to the Defendant for years yet enduring. 1. If this Leaſe to *William* for 30. years, to begin after the death of the Deviſor, be a Revocation of the Deviſe totally, or onely *Quoad* the term, and ſhall ſtand as to the Inheritance. It was Reſolved, That it was no Revocation of the Inheritance, but onely of the Term, for they may both ſtand together; and it cannot be a Revocation, unleſſe it be expreſſed, That the intent of the Teſtator is changed, or that they cannot ſtand together. 3. If the Deviſe to F, and the heirs males of his body; and for default of ſuch Iſſue, to the heirs males of the Deviſor, and the heirs males of their bodies; and for want of ſuch Iſſue, to the heirs males of the body of the Deviſor, be a Limitation in tail to the heirs males of the Deviſor, ſo as W. may claim thereby an Eſtate tail, or it be a purchaſe in F. onely: but this Point was not Reſolved; but yet afterwards it was adjudged for the Plaintiff, who claimed under W. Trin. 19 Jac. in B. R. rott. 596. *Hodgkinſon* and *Wbood's* Caſe. *Cro.* 1. Part, 16.

6. A. ſeiſed of a houſe called the White-Swan, in *Oldſtreet*, *London*, and of a Garden thereto appertaining, made his Will thus; I deviſe all my Fee-ſimple Lands, Goods and Tenements to H. my ſon, and the heirs males of his body; and for want of ſuch Iſſue, the Remainder to his right Heirs; and made him his Executor: And I Deviſe the Houſe or Tenement wherein W. N. dwelleth, called the White-Swan in *Old-ſtreet*, to J. D. for ever: And it was found, that W. N. at the time of the Deviſors death, Inhabited the Entry of the ſaid houſe, and three upper Rooms therein; and that J. G. held the Garden, and other places in the ſaid houſe; and ſome others, other Rooms: J. D. claymed that houſe, and entred, and made a Leaſe thereof to the Plaintiff; the Defendant by the Command of the Heir of the Deviſor, entred upon him, and put him out: Whereupon Ejectment was brought, 1. Whether J. D. had any more then an Eſtate for life, becauſe all the Fee-ſimple Lands being before

before Deviſed to his ſon, and the Heirs Males of his body, he afterwards Deviſed that Houſe to J. D. for ever, or if he had but an Eſtate for life, extracted out of the firſt Eſtate. It was Reſolved, That it was a Fee-ſimple becauſe of the words (*for ever*). 2. Whether all the houſe paſſed, or onely the Entry, and the three Rooms, which were in the poſſeſſion of W. N. It was the Opinion of the Court, That all the houſe paſſed to the Deviſee; For the Deviſe being, That houſe or Tenement, and the Concluſion, called the White-Swan, both import the whole houſe, and cannot be intended to refer to the three Rooms; and the words, wherein W. N. dwelleth, do not abridge, or alter that Deviſe, and the houſe being named by a particular name, though W. N. never inhabited it, paſſeth by the Deviſe, and is good, becauſe he Inhabited therein, though he accepted but three Rooms of it. Mich. 4 Car. in B. R. *Chamberlain* and *Turner's* Caſe. *Cro.* 1. Part, 91, 92.

7. Error to reverſe a Judgment in *Ely*, the Caſe was, A. had three ſons, J. T. and W. he Deviſed the Lands in Queſtion to J. and the Heirs of his body in Fee, after the death of M. his Wife; and if J. dyed, living M. that W. ſhall be his Heir; He Deviſed other Lands to P. and the Heirs of his body; and if he dyed without Iſſue, J. ſhould be his Heir; other Lands he Deviſed to W. and the Heirs of his body; And if all his ſons dye without Heirs of their bodies, then their Lands ſhould be to the Children of the brother of the Deviſor; J. dyed, having a Son in the life of M. M. dyed, W. entred upon the Son of J. It was the Opinion of the whole Court upon the Context of the whole Will, That it is to be conſtrued according to the intent of the party, and that the Conſtruction ſhall be, That if *John* dyed without Iſſue, living M. that then W. his Son ſhould have it; and it ſhall not be conſtrued (where he limits it firſt to J. and the Heirs of his body; that by this limitation, he intended, if he dyed, living M. that W. ſhould be his Heir) *John* having Iſſue; and thereby to diſinherite the Heirs of J. his body; and what was his intent, appears by other parts of the Will, that if they all dye without Iſſue, then to be to his brothers Children, not meaning to diſinherite any of his Children. Wherefore it was holden by the Court, That during the time J. ſhould have Heirs of his body, W. ſhould not have the Lands. Paſc. 6 Car. in B. R. *Spalding* and *Spalding's* Caſe. *Cro.* 1. Part, 134.

8. A. ſeiſed of two houſes in D. one called the Corner-houſe in the Tenure of B. and of one N. and another houſe adjoyning in the Tenure of H. He Deviſeth his houſe called the Corner-houſe in D. in the Tenure of B. and H. to J. S. in Fee; It was Reſolved by the whole Court, That the houſe in the Tenure of H. did not paſſe, but the Corner-houſe onely in the Tenure of B. and H. if they occupy joyntly, ſhall paſſe, but if they occupy ſeverally, onely that in the Tenure of B. ſhall paſſe, and not that in the Tenure of N. Hill. 11 Car. in B. R. *Blague* and *Gold's* Caſe. *Cro.* 1. Part, 323. 340.

9. A man Deviſed to his daughter 500 l. towards her marriage. In this Caſe, it was the Opinion of the Juſtices, That if ſhe dye before Marriage, that her Executors ſhall have it: but if the words were to be paid at the day of her Marriage, or at the age of 21. years; and ſhe dyeth before both, it is otherwiſe. Paſc. 37 H. 8. *Dyer*, 55. in the Lord *Latimer's* Caſe.

10. If a man Deviſeth Land generally to his Wife for the Term of her life; It cannot be averred to be for the Joynture of the Wife, and in ſatisfaction of her Dower; But if a man Deviſeth Lands to his Wife for life, or in tail, for her Joynture, and in ſatisfaction of her Dower, the ſame is a good Joynture within the Statute of 27 H. 8. For, as an Eſtate for life made to a Woman before Marriage, when ſhe is not his Wife, is within the Equity of the ſaid Act; ſo an Eſtate deviſed to a Woman for her life, which taketh effect preſently after her death, when the marriage is diſſolved, is alſo within the Equity of the ſaid Act, for ſuch Eſtate agreeth with the intent of the makers of the ſaid Act, and with the deſcription of a Joynture. *Cook* 4. Part, 4. in *Vernon's* Caſe.

11. A. poſſeſſed of a Leaſe for 60 years; Deviſed that B. his Brother ſhould have the uſe and occupation thereof, and take the profits thereof during his life, and after his death, the uſe and occupation thereof, ſhould remain to the Wife of B. during her Widdow-hood, and after her Widdow-hood, the occupation and profits of the Premiſſes, to remain to the eldeſt ſon of B. which he ſhall happen to have during his life, and after ſuch ſon dying without Heir Male, to any other ſons which B. ſhould have, one after another; and if B. dye without Heir Male of his body. And for that I have a purpoſe to have the Leaſe kept in my name, My will is, That the uſe, profits, and occupation, ſhall remain, and be to J. D. and ſo to divers others in the ſame words: It was Reſolved by the whole Court, That the Deviſe of a Term in this manner to make a perpetuity cannot be good: For to limit a poſſibility after a poſſibility, and to limit the Remainder of a Term after a dying without Iſſue, ſtands not with the Law. Trin. 5 Car. in B. R. *Sanders* and *Cornifhes* Caſe. *Cro.* 1. Part, 166, 167.

12. Leſſee

12. Leſſee for years, Deviſeth his Term to his Executor for life, the Remainder to A. and dyes, the Executor enters, and makes his Executor, and dyes; the Executor of the Executor enters, and takes the profits for a year; he in the Remainder brings an Accompt for the profits. It was holden in that Caſe, that the Action did not lye, for want of privity, and alſo becauſe the Remainder of the Term was void, and ſo becauſe the Executor had not declared, to have the Term as Deviſee or Executor, it ſhall be intended as Executor untill the contrary be ſhewed. 10 Eliz. *Dyer*, 277.

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7. *Deviſe of Goods and Chattels, Reals or Perſonals; where good, where not; and to whom.*

1. A Man poſſeſſed of a Term for 40 years, deviſed that his eldeſt Daughter ſhould have the ſame to her and the Heirs of her body, the Remainder, if ſhe dyed without Iſſue within the Term, to C. his ſecond Daughter in tail. The eldeſt Daughter took husband, and dyed within the Term without Iſſue: Her Husband ſold the Term. It was the Opinion of the Juſtices, that his Sale of it was good, and that the younger Daughter had no remedy for it; becauſe it was of a void Remainder, being of a Term, which was a Chattel real, and ſo is to go to the Husband. Trin. 28 H. 8. *Dyer* 7.

2. A man deviſed the moiety of his goods to his Wife and dyed. It was the Opinion of the Juſtices, that ſhe ſhould have the moiety of them, as they were at the time of her death; if the Executors had Aſſets ſufficient to pay his Debts. 5 Ma. *Dyer*, 164. See 38 H. 8. *Dyer*, 59. the Lord *Latimer's* Caſe, adjudged, acc.

3. A Leaſe was made to A. for 41 years, if he ſhould ſo long live; and if he dyed within the ſaid Term, that his Wife ſhould have it for the reſidue of the ſaid years. It was holden, that the Limitation to the Wife in remainder was void; for that the Term ended by the death of A. and then there was no reſidue to remain to his Wife. 9 Eliz. *Dyer*, 254. See *Plo. Com.* 190. See Sect. 8.

4. A man was poſſeſſed of a Meſſuage for 40 years, and by his Will gave the ſaid Meſſuage to J. S. without limiting any Eſtate. It was holden, it was a good Deviſe, and that the whole Term did paſſe to him, becauſe he could not give any other Eſtate, for Life, at Will, or for one and more years. Paſc. 14 Eliz. *Dyer*, 307.

5. A man, poſſeſſed of a Manor for 77. years, by his Will deviſed all his Leaſe to T. his eldeſt Son, during all the Term, if the ſaid T. ſhould ſo long live; and if he dyed, before he had Iſſue of his body, then he deviſed the ſame to his younger Son in like manner, &c. diverſe Remainders over; and further deviſed, that G. his Wife ſhould have the profits thereof, untill T. his eldeſt Son ſhould come to the age of 21. years; and if he dyed before, then till his younger Son came of ſuch age, to the intent, that with the profits of the ſaid Lands ſhe might bring up his Children, and ſee his Will performed; and gave other Legacies to his Daughter and others, and made the ſaid G. his Wife his Executrix, and dyed. G. proved the Will, and took upon her the Executorſhip, and afterwards by Deed granted all the ſaid Term, and all her Intereſt therein to J. S. having then ſufficient Goods to pay all the Teſtators Debts above the ſaid Leaſe; and notwithſtanding the ſaid Grant, ſhe brought up the Children, and afterward ſhe took Husband J. D; T. entred, and granted all his Intereſt to the Plaintiff. All this matter being found by Special Verdict; It was the Opinion of all the Juſtices, That notwithſtanding the Deviſe of all the Term firſt to his Son, that the Deviſe afterwards to the Wife was good, and in the ſenſe and intention of the Teſtator did precede the Deviſe to the Son. 2. That the Deviſe in Legacy to the Wife by her Occupation, and bringing up of the Children after the death of the Teſtator, until the time of the Grant made to J. S. was a good Execution of the Eſtate, aſwel given to the Wife, as of the remainder given to the Son; and ſo the Entry and Grant of T. the Son to the Plaintiff was a good Grant. Hill. 21 Eliz. *Plo. Com.* 540. *Paramour* and *Yardley's* Caſe.

6. Note, This Caſe was lately adjudged in the Common-Pleas, *viz.* A man poſſeſſed of a Term for divers years, deviſed the profits thereof to one for life, and after his deceaſe to another for the reſidue of the years, and dyed; the firſt Deviſe entred with the aſſent of the Executors, and afterwards he in the remainder, during the life of the firſt Deviſee, aſſigned it to another, and after the firſt Deviſee dyed; It was adjudged in this Caſe, That the Aſſignment was void; for he in the Remainder had but a poſſibility, during the life of the firſt Deviſee: for that is as much in Law as if the Land had been deviſed to him for ſo many years, if he ſhould live, or for all the Term if he ſhould ſo long live, ſo as the Intereſt of the Term *ſub modo* was in him; and the other in Remainder had but a poſſibility, which he could not grant over. *Cook* 4. Part 66. in *Fulwoods* Caſe.

7. Note, There is a difference, when one deviſeth his Term for life the remainder over, and when

when a man deviſeth the Land, or his Leaſe or Farm, or the Occupation, or uſe, or profits of his Lands: for in a Will the Intent and Meaning of the Deviſor is to be obſerved; and the Law makes conſtruction of the words to ſatisfie his Intent, and puts them in ſuch order that his Will ſhall take effect. And when a man deviſeth his Leaſe to one for life, it is as much as to ſay, He ſhall have ſo many years in it as he ſhall live; and that if he dyeth within the Term, that another ſhall have it for the reſidue of the years: and although at the beginning it is uncertain how many years he ſhall live, yet when he dyeth, it is certain how many years he hath lived, and how many years the other ſhall have, and ſo by a ſubſequent Act, all is made certain. *Cook* 8. Part, 65. in *Manning's* Caſe. See *Deviſe*, Sect. 5.

8. Grandfather, Father, and Son; the Grandfather poſſeſſed of a Term for 21 years, Deviſed the ſame to the Son for 21 years, and that the Father ſhould have it during the Minority of the Son, and made the Son his Executor, and dyed; the Son within age, the Father entred upon the Land, and made a Leaſe for ſeven years of it, until the Son came of 21 years; the Father made the Son his Executor, and dyed: It was a Queſtion, If the Son ſhould avoid the Leaſe made by his Father; And it was agreed, That he ſhould, for that the Deviſe was Executory, and doth not reſt till the full age of the Son, and then he being Executor, ſhall avoid all Acts done by his Father. Hill. 7 Jac. in C. B. *Dumnolt* and *Glyes* Caſe. *Browlow*, 2. Part, 308.

9. A. ſeiſed of Lands in Fee by Indenture, Mortgaged them to J. S. and his Heirs, upon Condition, if he or his Heirs paid to J. S. and his Heirs 100 l. that he might re-enter. Afterwards the ſaid J. S. gave to J. D. all his goods, Monies, Bills, Bonds, Mortgages, and Specialties for monies, and made him his Executor, and dyed: the 100 l. not being paid, J. D. entred, It was the Opinion of the Court, That theſe words (All my Mortgages) made a good Deviſe of the Lands Mortgaged. Trin. 1 Car. in C. B. *Crips* and *Gryſits* Caſe. *Cro.* 1. Part, 26.

10. See Trin. 7 Jac. in B. R. *Roſe* and *Barker's* Caſe before, Diviſion 5. Sect. 10.

11. The Incumbent of a Church, purchaſed the Advowſon thereof in Fee, and the Advowſon being holden in Socage, By Will he Deviſed, That his Executor ſhould Preſent after his Deceaſe, and Deviſed the Inheritance to another in Fee. It was Objected to be no good Deviſe of the next Avoydance, becauſe inſtantly by his death, when his Will ſhould take effect, the Church was void: But the Opinion of the Court was, That the Deviſe was good, for the Law is ſo, that all ſhall be good according to the intent of the party, expreſſed in his Will. Paſc. 13 Jac. in *Scaccario*. Sir *Ed. Pytchin* and Dr. *Harris's* Caſe. *Cro.* 2. Part, 371.

12. The Caſe was, A man was poſſeſſed of a Leaſe for 76 years: And Deviſed, (he having before made a Leaſe for years, if A. his Wife ſo long live, whereof three years were in being to come) that W. his ſon and his Aſſigns, ſhould have the Tenements, and the Reverſion, and all his Title and Intereſt in them, for all others of the ſaid 76 years unexpired at the time of his death. Provided, That if W. dyed without Iſſue living at the time of his death, that then T. his ſon ſhould have all the reſidue of the ſaid 76. years unexpired, from the death of his ſaid Wife; and if he dyed, then to his daughters; and made his Wife his Executrix, and dyed: The Wife aſſented to the Legacies. W. Aſſigned all this Leaſe, and his Intereſt to the Wife; then ſhe dyed; then W. dyed without Iſſue, and T. the Deviſee entred: The Queſtion was, Whether this Deviſe, being to W. and his Aſſigns (with a Proviſo, that if he dyed without Iſſue living, that T. ſhould have it: And he Aliens it, and after dyeth without Iſſue) whether it ſhould bind T. It was Objected, That it ſhould not bind him: And to ſtrengthen the ſame. Hill. 9 Car. in B. R. the Caſe betwixt *Rethorick* and *Chappell* was vouched, where the Caſe was. A. poſſeſſed of a Term, Deviſed it to his Wife for life, and afterwards that *John* ſhould have the occupation of it as long as he had Iſſue, and if he dyed without Iſſue, unmarried, that B. his younger brother ſhould have the occupation of it ſo long as he had Iſſue of his body; and if he dyed without Iſſue, he deviſed the one Moyety to his daughter, and the other Moyety to his ſons, C. and D. and dyes; his Executrix aſſented to the Legacies, and dyed; J. and B. dyed without Iſſue unmarried, and afterwards C. and D. entred, clayming the moyety: And it was adjudged, they ſhould recover the moyety: But notwithſtanding, it was adjudged in the principall Caſe; That it was a void Deviſe in Remainder, and that there was a difference betwixt this Caſe, and *Rethorick* and *Chappell's* Caſe: For in that there is a Deviſe, but of the occupation onely; but here of the Term it ſelf. 2. It is a Deviſe here of his Eſtate and Term, to him and his Aſſigns, wherein is Authority given, that he may Aſſign. 3. The Limitation is, if he dye without Iſſue unmarried in that Caſe, for if he be not married, he cannot have Iſſue. But in the Caſe here, he might have Iſſue, and yet if that Iſſue ſhould dye without Iſſue, that it ſhould remain, which the Law will neither expect nor ſuffer, wherefore it was adjudged againſt him who clay-

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med the Remainder. Hill. 15 Jac. in B. R. *Child and Bayliss* Caſe. *Cro.* 2. Part, 459.

13. A man poſſeſſed of certain goods, Deviſed them by his Will to his Wife for life, and after her deceaſe to J. S. and dyed: J. S. in the life of the Wife, did commence ſuit in a Court of Equity, there to ſecure his Intereſt in Remainder, a Prohibition was Granted in this Caſe; and the reaſon was, becauſe a Deviſe in Remainder of goods was void, and therefore no remedy in Equity, for *Æquitas ſequitur Legem*. It was agreed, Heir-looms ſhould diſcend, but that is by Cuſtome; Alſo a Deviſe of the uſe and occupation of Lands, is a Deviſe of the Land it ſelf; but not ſo of goods, for one may have the occupation of them, and another the Intereſt in them: and ſo it is where one pawns his goods. Trin. 17 Car. in C. B. *Marſh.* 106.

14. Note, It was agreed by the Court, That if a man deviſeth to his daughter 100 l. when ſhe ſhall be married; Or to his Son when he ſhall be of full age, and they dye before the time appointed, their Executors ſhall not have it. But it is otherwiſe, If the Deviſe were to them, to be paid at their full ages, and they dye before that time, and make Executors; there the Executors ſhall have it. Mich. 9 Jac. in C. B. adjudged, acc. And that difference was likewiſe ſo agreed and adjudged. Trin. 1653. in the Kings Bench, in *Doomlow* and *Shawes* Caſe. See 15 Car. in B. R. If a man Deviſe a ſum of money to be paid to J. S. when he cometh to full age; and afterwards he ſueth for it in the Spirituall Court; It was holden by the Court, That they ought to take notice of the time of his full age, as is uſed by the Common-Law, *viz.* 21 years, and not of the time of full age, as it is uſed amongſt them in the Spirituall Court, which is 25 years. *Rones* Caſe. *Popham*, 133.

15. A man ſeiſed of Lands in Fee, ſowed it, and afterwards Deviſed the Land to J. D. It was adjudged, That the Deviſee ſhould have the Corn, and not the Executors of the Deviſor. Mich. 20 Jac. in C. B. *Spencer's* Caſe. *Winch.* 51. And it was there ſaid, That it was adjudged 18 Eliz. in *Allen's* Caſe, That where a man Deviſed Land (which was ſowed) for life, the Remainder in Fee, and the Deviſee for life, dyed before ſeverance, he in the Remainder ſhould have it: And it was ſaid by *Winch* Juſtice, That if a man Deviſeth Land; and afterwards ſowes it, and after dyes, that in that Caſe: It was adjudged, That the Deviſee ſhould have the crop, and not the Executor of the Deviſor. *ibid.*

16. Leſſee for years, of a Term for 60 years, Deviſed in this manner: I give my Wife, and my Cozen, my Term for their lives, and after to ſuch perſon as ſhall remain in my houſe at N. at the time of their deceaſe. The Wife ſurvives, and Aſſigns the Term to another; the Heir of the Leſſor entred, and lets for years, the Term expires, the Leſſee continues in poſſeſſion untill the death of the Wife. 1. If this Remainder of the Term be good. Two of the Juſtices held it was not, becauſe it was but a poſſibility; and it cannot be good by Will, for that were to make that good, which by Counſell could not have bin adviſed. Two other Juſtices contrary; upon the books of *Paramor* and *Yardleyes* Caſe, and *Wedden's* Caſe, in *Plow. Com.* ſo that point not then adjudged. 2. Whether this Tenant at ſufferance ſhall be ſaid to be in poſſeſſion to have benefit of this Remainder: That point was adjorned. Mich. 15 Jac. in B. R. *Mallet* and *Sackford's* Caſe. *Cro.* 2. Part, 199.

17. Leſſee for 21 years, Deviſed the benefit of his Leaſe to A. his Wife for ſix years; and after that ſix years ended, then J. my ſon, if he come home, ſhall have the benefit of my Leaſe during the reſidue of the Term; and if J. my ſon doth not then come home, W. my ſon ſhall have and poſſeſſe that Leaſe to his benefit, untill my Son J. come home: He Deviſed to his Wife all his goods, and made her Executrix, and dyed; the Wife entred, clayming *virtute Legationis*, W. during the ſix years (J. being beyond Sea, not Returned) made his Will, and Deviſed the ſame to H. his Wife, and made her his Executrix, and dyed; The ſix years expired, J. doth not return; H. takes Husband, the Plaintiff, who enters; A. takes Husband the Defendant. It was objected, That it was meerly a Poſſibility in W. the ſecond ſon, and that he could not have it, unleſſe he ſurvived the ſix years, and his brother did not return, ſo as there were two contingencies therein; and it was never veſted in the Teſtator, and therefore he could not Deviſe, That his Executor ſhould have it, for ſhe can take nothing, unleſſe her Teſtator had an Intereſt therein: But it was holden by the Court when it was firſt Deviſed for ſix years, and afterwards, for the Reſidue of the Term, It was not a poſſibility, but an Intereſt of the Term after the ſix years expired; and although it ſhould be accounted to be a poſſibility in the Teſtator, yet forasmuch as it is ſuch a poſſibility, that the Term might have veſted in him if he had lived till after the ſix years, the Wife A. by her Entry having agreed to that Legacy; It was holden, That that poſſibility might well go to his Executor. It was adjudged, That the Term veſted in W. It was adjudged for the Plaintiff. Mich. 15 Jac. in B. R. *Cro.* 2. Part, 509.

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8. *A Deviſe made to an Enfant in his Mothers belly, if good, or not; and what other things ſuch Enfant ſhall have.*

1. A Man had Iſſue five ſons, his Wife being with child of the ſixth at the time of his Death; And by his laſt Will, he declared, That the third part of his Land ſhould diſcend, and come to his ſon and Heir, and the other two parts he gave and bequeathed to his four younger ſons by name, and to the Heirs Males of their bodies; And if the Enfant in the belly of the Mother be a ſon, then he to have a fifth part, as co-heir with his four elder brothers; And if they all five ſhall dye without Iſſue Male of their bodies, then that the ſaid two parts ſhould revert, remain, and come to the next Heirs of the Deviſor. The ſixth ſon was born after the death of the Father, and, after, three of the younger brothers dyed without Iſſue. If the ſurviving brother ſhould have an Eſtate Tail, or in the fifth part, and if the other four parts, after the death of the ſurvivor, ſhall revert to the Heirs of the Deviſor, was the doubt. In this Caſe, It was Reſolved, That the ſon born after the death of the Father, ſhould not have any thing, becauſe he was uncapable as a purchaſor, when the Deviſe was firſt to take effect, becauſe he was not then in *Eſſe*, or *rerum natura*. 2. That the ſurvivor ſhould have an Eſtate tail in all the two parts, and, as long as there was any Iſſue Male of his body, none of the two parts ſhould revert, or remain to the Heirs of the Deviſor, for that ſuch was the intent of the Deviſer. Mich. 14 Eliz. *Dyer*, 303.

2. A man had Iſſue two daughters by ſeverall Women; and Deviſed one moyety of his Land for years to his Wife, and that his eldeſt daughter ſhould enter into the other moyety at the day of her marriage; And if his Wife were then with Child of Iſſue Male, that then he ſhould have all the profits of the Lands, and ſhould pay to each Daughter 20l. and if ſhe had Iſſue a Female, then the ſame Daughter ſhould have an Equall Portion with his other Daughters, and dyed. The Wife entred; the eldeſt Daughter took Huſband, and they entred into the other moyety, the youngeſt Daughter dyed without Iſſue, the Unkle of the youngeſt Daughter, as Heir of the whole bloud on the part of the Father, claymed the moyety of the Land. It was the Opinion of the Juſtices, That the eldeſt daughter ſhould have but the Moyety of the whole Land, and not three parts of the Land. Note in that Caſe, It is admitted, That a Deviſe to an Enfant in his Mothers belly, was good. Trin. 17 Eliz. *Dyer*, 342.

3. Note, although that *filius in utero matris, eſt pars viſcerum matris*; yet the Law in many Caſes, hath conſideration of him in reſpect of the apparant expectation of his birth. See the Opinion of *Saunders* and *Brown*, in *Stowells* Caſe, in *Plow. Com.* for ſuch an Enfants avoiding of a Fine, See E. 1. title *Gard.* 3. 31 E. 1. *brevium.* 873. for the wardſhip of him. See 38 E. 3. 7. and 11 E. 3. vouched, that he ſhall be vouched in his Mothers belly. See 41 E. 3. 11. In Dower brought, the Defendant pleaded, That the Plaintiff did detain from him certain Charters concerning the ſame Lands, the Plaintiff ſaid, That ſhe was and is with Child by her Husband, and, in reſpect of Iſſue, ſhe did detain the Charters, and it was holden a good plea. See 3. *Ma. Dyer*, 136. Adulterer doth counſell the Woman to kill the Child when he is born, who doth accordingly; the Adulterer is acceſſary, yet at the time of the Counſell, the Child was in his Mothers Belly. See 9 H. 6. 23. and 11 H. 6. 13. in the Caſe of *Farringdon*, That a Deviſe to an Enfant in his Mothers belly, is good. See *Cook* 7. Part, 9. in the Earl of *Bedford* his Caſe. acc.

Diminution.

1. ERrour brought to reverſe a Judgment againſt the Plaintiff's Father, by J. S: The Errour aſſigned was, for want of a Warrant of Attorney: The Plaintiff prayed one *Certiorari* to the Juſtice of the Common-Pleas; and another to the *Cuſtos Brevium*, both which returned, *Non inveni aliquod Warrant.* and now J. S. being dead, the Plaintiff brought another Writ of Errour by Journeys Accounts, againſt the heir of J. S, who alledged Diminution, *in hoc*, that the Warrant of Attorney is not Certified, and prayed another *Certiorari* to the Chief Juſtice, and another to the *Cuſtos Brevium*. It was ſaid, It ought not to be granted; for a Certificate is in the nature of a Tryall, but both parties ſhall be bound by it; and a *Certiorari* at the Suit of the Plaintiff ſhall be as peremptory, as if it had been ſued at the prayer of the Defendant; for the Plaintiff may alledge Diminution as well as the Defendant: and Diminution cannot be alledged in that which is Certified contrary to the Record. On the other ſide:

it was ſaid, That, notwithſtanding the Defendant pleadeth *in Nullo eſt erratum*, and ſo affirmeth the Record to be ſuch as is certified; yet the Court *Ex Officio* ſhall award a *Certiorari*, to aſcertain themſelves if there be any ſuch Warrant of Attorney, or not. And in this Caſe, the return of the *Certiorari* is *Non Invenî aliquod Warrantum*, not preciſely *Quod non habetur aliquod Warrantum*, which is not contrary, but both may ſtand together; but, upon further ſearch, ſuch Warrant of Attorney may be found. *Wray*, Chief Juſtice, ſaid, It would be hard to grant a new *Certiorari* in this Caſe: but if any variance could be alledged, it ſhould be otherwiſe. Trin. 26 Eliz. in B.R. *Dortell* and *Thynns* Caſe. *Leon.* 23. See before, in Title *Certiorari*, this Caſe.

2. Errour brought of a Judgment in the Kings-Bench, in an Aſſumpſit, where a Verdict and Judgment was for the Plaintiff; The Errour aſſigned was, That the Iſſue was joyned, Trin. 2 Car. And the *Venire facias* bears date 4. *die Maii*, which was before the Iſſue joyned, ſo the Tryall thereupon was ill: And by a Writ of *Certiorari*, upon Diminution alledged, to Certifie the *Venire facias* and *Diſtringas*, they being Certified the Writ of *Venire facias* was of the date 4. *Maii*, which was Eaſter Term. But the Errour was not allowed by the Court; for the Court ſhall intend, that there was no other *Venire facias*; and the Roll of awarding the *Venire facias* being good, the miſ-dating of it is no cauſe to ſtop the Judgment. Wherefore the Court was of Opinion, That the Tryall was good: and the Judgment was affirmed. Mich. 3 Car. in Exchequer Chamber. *Moore* and *Hodges* Caſe, *Cro.* 1. Part, 64.

3. Errour to reverſe a Judgment in the Kings-Bench in *Ejectione Firmæ*: The Errour aſſigned was, becauſe in the Bill the Plaintiff declares upon a Leaſe for 3. years; and in the Plea-Roll upon which the Iſſue is joyned, and in the Record of *Niſi Prius*, it is upon a Leaſe for 5. years; ſo as the Bill and Declaration varies, and Diminution was alledged by the Defendant; and by *Certiorari* the Bill was Certified, That it was onely for 3. years. The Defendant in the Writ of Errour, when the Plaintiff alledged Diminution, had thereupon another Certificate whereby the Bill was Certified, wherein he Declared upon a Leaſe for 5. years. In this Caſe, It was holden by all the Juſtices and the Barons, That the ſecond Certificate upon the Diminution alledged by the Defendant, ſhould be received; for the Bill certified upon it, is intended the true Bill, for it warrants well the Declaration upon the Roll, and the Record of *Niſi Prius*; and the allegation of Diminution by the Plaintiff in the Writ of Errour, ſhall not ſtop the Defendant, without aſſigning of Errours to alledge Diminution, and from procuring the true Bill to be Certified. The Judgment was affirmed. Trin. 1 Car. in the Exchequer Chamber, Rott. 158. *Howell John* and *Thomas* Caſe. *Cro.* 1. Part, 64.

4. In a Replevin brought, upon Iſſue joyned, It was found for the Plaintiff in the Court of *Windſor*, being a 3. Weeks Court: The Defendant brought Errour, and aſſigned for Errour, That the Entry of the Plaint in the ſaid Court was the 7th of *May*, and the Plaintiff afterwards did Declare there, of a taking of the Cattle the 25. day of *May*: and whether the ſame was Errour, being in a 3. Weeks Court, was the Queſtion? The Court held the ſame to be Errour, becauſe no Plaint can be entred but at a Court: and this entry was mean betwixt the Court-dayes, and ſo the Declaration not warranted, no Cuſtome being alledged to maintain ſuch Entry. It was holden by the Court in this Caſe, That after *In nullo eſt Erratum* is pleaded, the Defendant cannot alledge Diminution, becauſe that is a perfect Iſſue before. Alſo it was holden, That a man cannot alledge Diminution of any thing which appeareth of Record to be true: And becauſe the Defendant did alledge Diminution in this Caſe of the Record; and by the Record it was certified, That the Plaint was entred the 25. of *May*; the ſame was not good after Iſſue joyned, and after Judgment is given upon the firſt Declaration and pleading in the ſaid Court at *Windſor*. Wherefore the Judgment was reverſed. Hill. 13 Car. in B. R. *Brook* and *Gregories* Caſe. *Godbolt* 266, 267.

5. A. brought a Writ of Errour againſt B, to reverſe a Record upon a Judgment given in the Common-Pleas: The Original which was Certified, bears Date, Trin. 18 *Jacobi*, and the Ejectment is brought Trin. 18 Jac. for an Ejectment which was made in Septemb. following. Upon this Errour aſſigned, the party had a *Certiorari* to remove the Record: There was another Originall in Septemb. 18 Jac. and the Treſpaſſe was done after the firſt Original ſued forth, and before the latter; and both Originals were returnable St. *Mich.* and both the Writs were in Court. Note; The Ejectment was layed after the firſt Original purchaſed, which agrees with the Record, and after the Action brought. The Court gave no Judgment in the Caſe. But Trin. 18 Jac. Rott. 1613. *Brown* and *Jones* Caſe was vouched, An Action upon the Caſe was brought upon Aſſumpſit; Errour was aſſigned, becauſe that no place was limited where the payment ſhould be made. The Original was, That the Promiſe was, In Conſideration that the Plaintiff did lend to the Defendant ſo much, he at *London* did promiſe to pay the ſame again. There were two Originals which bore date the ſame day, and Judgment was in that Caſe for the Plain-

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tiff: And the Defendant brought a Writ of Error, and alledged Diminution of the Original: Then the other Original was certified; The Defendant in the Writ of Errour ſaid, That the Original upon which the Recovery was grounded, was an Original which had a certain place: The Judges did affirm the ſame to be the true Original, which did maintain the Judgment, and agree with the proceedings, otherwiſe great miſchief would enſue. But the principal Caſe was adjourned, Mich. 19 Jac. in B. R. rott. 322. *Croach* and *Haynes* Caſe. *Cubbit* 407.

Diſceit. *See* Action *upon the* Caſe *in toto.*

1. DIſceit properly is, when a man doth any thing in the name of another, by which the other perſon is damnified or deceived. *Fitzh. Na. Br.* 95.

2. A. brought an Action upon the Caſe, and Declared, That the Defendant for 20 l. whereof the moyety was paid in hand, and the reſt agreed to be paid at a day certain, the Defendant promiſed to deliver to him 400. pound of Wax to the Plaintiff ſuch a day; and at the day, he delivered to him 373 pounds of ill Wax not warranted to be good and Merchantable, by which he was damnified. The Defendant pleaded an Agreement betwixt them, as well for the 26 l. of Wax not delivered, as for the inſufficiency of the reſt delivered. The Plaintiff demurred, becauſe the Diſceit was not Anſwered. It was holden, That the Plea of the Agreement was good; and that the Diſceit was not material to be anſwered, becauſe the Warranty of the ſufficiency of it, was after the Contract made. Trin. 6 E. 6. *Dyer* 75. *Andrews* Caſe.

3. If a man ſueth a *Scire facias* upon a Recognizance of debt; and the Sheriff returns the Defendant ſummoned, where he is not ſummoned, for which the Plaintiff hath Execution awarded againſt the Defendant: In that caſe the Defendant ſhall have an Action of Diſceit againſt him who had the execution, and alſo againſt the Sheriff, and the Sheriff ſhall be puniſhed for his falſity; and the party that recovered, ſhall make reſtitution of that he recovered. See *Fitzh. Na. Br.* 96. acc.

4. An Action of Diſceit was brought againſt an Attorney, who by Fraud and Covin appeared without any Warrant, in an Action of Debt brought againſt the now Plaintiff, and pleaded *Non ſum informatus*. The Defendant pleaded, That he was retained for the Plaintiff and another, and that the other party retained him for them both. *Et pro defectu Informationis* he pleaded *ut ſupra*. It was holden by the Court in this Caſe, That he ought to traverſe the Fraud, otherwiſe his Plea is not good. Mich. 20 Eliz. *Dyer* 361. See 22 E. 39. If a man be Attorney for another man in a Reall Action, and, by Covin and Fraud between the Attorney and the Demandant, the Attorney maketh default, by which the other loſeth his Land, the Tenant who loſeth the Land, ſhall have and maintain a Writ of Diſceit againſt the Attorney.

5. A. brought an Action upon the Caſe againſt B, and declared, That the Defendant brought an Action againſt him at the Suit of one J. S, and without his privity, and thereupon did Arreſt and Impriſon the Plaintiff, by reaſon whereof all his Creditors came upon him, and thereby that he loſt his Credit. A Verdict was found for the Plaintiff, and thereupon Errour brought; and it was aſſigned for Errour, That the Action would not lye, becauſe in truth there was a juſt Debt due to J. S, in whoſe name he ſued: But the Judgment was affirmed by the whole Court; and the difference was taken, Where J. S. Sueth or Commenceth Suit againſt the Plaintiff, there although by that Suit all the Creditors come upon him, ſo as perhaps they undo him, yet becauſe it was a lawfull act, no Action lyeth againſt him: but where one Commenceth Suit againſt another, in the name of another, and without his privity, there it is Maintenance, which is a tortious act, and therefore the Action will lye. The Judgment was affirmed. Trin. 15 Car. in B. R. *Thurſton* and *Simmons* Caſe. *Mayſh* 47.

6. A. brought an Action for a Diſceit; and the Caſe was: A. being a common Carrier, uſing to carry Wares out of *Eſſex* into *Northamptonſhire*, the Defendant having a Cade of Woad to be carried, came to A, and bargained with him for the carriage of this, and by agreement he was to give him 2 s. for every 100 weight; and the Plaintiff demanding How many hundred weight it did contain? he ſaid, It was about 800 weight. Upon this, he giving Credit to him, did put it into his Cart; and by the hardneſſe of the Weight and draught, two of the Plaintiff's Horſes were killed; and then the Plaintiff did weigh the Woad, and found it to be 2000 weight; and for this Diſceit uſed, by which he was much damnified, he brought his Action. The Defendant pleaded Not-guilty; upon which all the matter aforeſaid was found. It was the Opinion of the Court in this Caſe, That the Action did not lye: for it belonged to

the Carrier to have weighed it firſt, and it was his own default if his horſes were killed with the weight, becauſe it was his default that he did not weigh it: and a difference was taken, upon the abſence and preſence of the party. If one lends his Cart to another to carry a Load of Wood, and that he will have for it 10 s. a Load, If he overload the Cart, an Action lyeth not for this fraud, without damage, or damage without fraud; but when theſe two do concur and meet together, there an Action lyeth. It was ſaid, the Book of 11 E. 4. is the Warranty of a Servant who ſells Wares: If he ſelleth Purple to one, and ſaith to him, This is Scarlet, the ſame is not to the purpoſe; for that the other may perceive this, and then that gives no cauſe of Action. Mich. 13 Jac. in B. R. *Bayly* and *Merrells* Caſe. *Bolſtr.* 3. Part, 95.

7. In a *Formedon* in the *Diſcender* brought by Husband and Wife againſt the Tenant who vouched J. S: The Demandants Counterpleaded the Voucher, and ſhewed, that they had at another time proſecuted a *Formedon* in the *Diſcender* againſt the ſame Tenant for the ſame Land, and had Judgment againſt him by default upon *Grand Cape*; which Judgment was Reverſed by a Writ of Diſceit brought by the Tenant, becauſe he was not duly ſummoned; and that this Writ was brought by Journeys Accompts: and the Demandants ſaid, That the ſaid J. S. *quæ*, &c. had not any thing in the Land in Demeſne, Reverſion, or in Service, unto the day of the bringing of the Writ. It was Reſolved in this Caſe, That when a Writ abates by the act or default of the Demandant; as in miſ-information of the name of the Tenant, or of the Town, &c. there the Demandant ſhall never have a Writ by Journeys Accompts; but where the Writ abates by default of the Clerk, as by Falſe Latine, variance, &c. Or if it abate for default of Summons, the ſame is the default of the Sheriff, and not of the Demandant; and therefore, there, he ſhall have a new Writ by Journeys Accompts. Hill. 45 Eliz. in C. B. *Cook* 6. Part, 9. *Spencers* Caſe.

8. If a man levies a Fine of Land at Common-Law, and alſo of Land within Auncient Demeſne, the party ſhall have a Writ of Diſceit for the Lands which are Ancient Demeſne, and ſhall reverſe the Fine for them, but the Fine ſhall ſtand good for the Lands at the Common-Law. 21 E 3. 20. 17 E. 3. 31. *Diſceit.* 37.

9. In an Aſſiſe, the Tenant pleaded Ancient Demeſne; the Plaintiff pleaded a Fine for Releaſe betwixt the Plaintiff and the Tenant in the Kings Court. It was the Opinion of the Court, That the ſame ſhould bind the Tenant, although there was no Tranſmutation of poſſeſſion, becauſe it is a Judgment which makes the Land Frank-Fee; but the Lord and ſtrangers ſhall not be bound by it: and although the Lord in the Caſe was one of the Defendants, yet becauſe he pleaded by Baily, and did not take the Tenancy upon him, he was eſtopped to Reverſe the Fine by a Writ of Diſceit. 21 E. 3. 25. 50 E. 3. 24. *Comment.* upon Original Writs. 230. acc.

10. If a man do recover in a *Quare Impedit* by default, &c. If the Defendant be not ſummoned, he ſhall have a Writ of Diſceit, and the Summoners and pledges, ſhall be examined upon an Attachment directed: and if the Diſceit be found, he ſhall have a Writ to the Biſhop. See 26 H. 6. *Diſceit.* 15. See 27 H. 6. 5.

11. B. being a Lay-man, was Inſtituted and Inducted into a Benefice, a ſtranger cited him out of the Court of Delegates to deprive him; Dependent which, one W. brought a *Quare Impedit* againſt B. and the Ordinary, and had Judgment by Default at the Grand diſtreſſe: B. and the Biſhop brought a Writ of Diſceit: Upon Non-Summons, W. pleaded, in barr to both, the Deprivation of B: In that caſe it was holden to be no plea; for that the Incumbency was not in Queſtion, but the Diſturbance onely: Wherefore it was adjudged, That the firſt Judgment ſhould be void, and the Plaintiffs reſtored to what they loſt. 19 Eliz. *Dyer* 353. *Blowers* Caſe.

Diſclaymer *and* Diſagreement.

1. IF Lands be given to Husband and Wife in tail, or in Fee, and the Husband dyeth, the Wife cannot deveſt the Freehold out of her by any Waiver or Diſagreement *in pais*, or other Diſclaimer *in pais*: As if before any entry made by her, ſhe ſaith, She utterly waiveth or diſagreeth to the ſaid Eſtate, & will never take or accept thereof, yet the Freehold doth remain in her, and ſhe may enter when ſhe pleaſeth: And ſo if before her entry, ſhe reciting her Eſtate, had ſaid by words *in pais*, That ſhe doth not aſſent and agree to the ſaid Eſtate; yet ſhe may wayve the ſame in a Court of Record: For the Law doth more reſpect an Act without words, then words without act; and therefore if ſhe entreth into the Land, and taketh the profits, although ſhe ſaith nothing, it is a good Agreement in Law. *Cook* 3. Part, 26. in *Butlet* and *Bakers* Caſe.

2. If the Tenant do diſclaim in an Action real

or

or perſonal, and Judgment be given, he ſhall not have Writ of Errour, becauſe by his Diſclaimer he hath barred himſelf of the right of the Land: For the words of Diſclaimer of the Tenant are, *Nihil habet, nec habere clamat in terra illa, nec die impetrationis Originalis Brevis habuit ſive clamavit ſed aliquid in terra illa habere diſclamat*, and againſt the ſame he cannot have a Writ of Errour to have reſtitution of the Land againſt that Diſclaimer. *Cook* 8. Part, 62. in *Beechers* Caſe.

3. *Humphrey de Bohun.* held divers Mannors of the King by the Service, to be High-Conſtable of *England*, which Tenure was Grand Serjeancy; he had Iſſue two Daughters: One of the Daughters was married to the King. It was holden in that Caſe, That by the Unity of the Seignorie, and parcel of the Tenancy in the King, the Services were ſuſpended, and the whole Service ſhould iſſue out of the Reſidue. Note, It was ſaid in that Caſe, That King *Henry* the 8th afterwards refuſed the Service, and diſclaimed therein, becauſe they were very high and dangerous. 12 Eliz. *Dyer*. 285. *Humphrey de Bohuns* Caſe.

4. A *Quo Warranto* was brought againſt the Biſhop of *York*, concerning the Franchiſe of Priſage of Wines, he diſclaimed in the Franchiſes. It was adjudged, That his Diſclaimer ſhould bind his Succeſſors. 6 E. 3. Br. Diſclaimer, 47. 6 E. 3. 5. See *Waller* and *Hangers* Caſe. Hill. 12 Jac. in B. R. *Bolſtr.* 3. Part, 25. acc.

5. If one Avoweth upon his Tenant according to the Statute of 21 H. 8. the Tenant ſhall not diſclaim; contrary, if he avow upon him as his Tenant by the Common-Law. 28 H. 8. *Dyer* by *Fitzherbert*, Juſtice.

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2. *In what Actions, or Writs,* Diſclaimer *doth lye; and in what not.*

1. IN a *Per quæ Servitia*, no Diſclaimer lyeth, becauſe there no Land is demanded: But in a *Per Quæ Servitia*, the Tenant may ſay, That he did not hold of the Conuſor, at the time of the Fine levied. See 33 E. 3. *Fitz.* Diſclaimer. 31. In a *Per Quæ Servitia* againſt a Prior, he ſaid, He did not hold of the Conuſor.

2. In a Writ of *Meſne* brought by Tenant in tail againſt him in the Reverſion, no Diſclaimer lyeth, 40 E. 3. 27. Quære: For 44 E. 3. 2. by *Finchden*, and 14 E. 3. *Meſne* 7. there in a Writ of *Meſne* brought, the Tenant did Diſclaim in the Seignory, and the Diſclaimer was admitted.

3. A Writ of Entry in the *Quibus* was brought, of a Diſſeiſin made by two to the Plaintiff; one of the Defendants would have diſclaimed, but could not be admitted, becauſe the Plaint did ſuppoſe him to be the wrong-doer. 4 H. 5. *Fitzh.* Diſclaimer. 27.

4. In a *Ceſſavit*, the Defendant ſhall not be admitted to Diſclaim, but he may plead, That he doth not hold of him *Temp.* E. 1. *Diſclaimer.* 29.

5. In a Writ of Cuſtomes and Services, the Tenant may Diſclaim: And ſo in Aſſiſe of a Rent; but in a *Ceſſavit* he cannot diſclaim. In a *Formedon* in the *Diſcender* the Tenant may diſclaim, and the Demandant may preſently enter. And ſee 16 H. 7. 1. by all the Juſtices, That in a *Formedon Cui in vita*, and all other Actions where a man ſhall not recover damages, the Defendant or Tenant may diſclaim: but where damages are to be recovered, there the Plaintiff may aver him Tenant, but yet *prima facie* the Diſclaimer is good: And although that he doth aver, that he is Tenant, yet notwithſtanding he may wayve it, and enter, and he ſhall not be eſtopped, by 33 Aſs. *Fitz.* to Eſtoppell, 141.

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3. *The Nature and Effect of a* Diſclaymer; *and what things enſue upon it; and of ſpeciall Diſclaimer.*

1. WHen a *Precipe* is brought againſt two, and one of them doth Diſclaim, the Intereſt is veſted in the other preſently: and the reaſon is, becauſe the Law intends that they are both in by one joynt Feoffment, and then all ſhall be in the other by the Feoffment made. It was ſaid, That if they be Joynt-Tenants by Diſcent, or by Fine, that they cannot diſclaim: But Quære if they may not wayve the Diſcent: For it was ſaid, That the Demandant may counterplead the Diſclaymer. 35 E. 3. *Fitz.* to Diſclaymer 22. Note: It is ſaid by *Fitzherbert*, in abridging the Caſe, That although that one of them who are in by diſcent, may diſclaym, yet the ſame ſhall not veſt the Land in the other, but the Demandant ſhall have Judgment, *Quia nihil dicit.* See, If two Joynt-Tenants be, and the one Diſclaymeth, yet the other may chooſe, if he will take the entire Tenancy upon him, or not, 27 H. 6. to *Diſc.* 28.

2. Note: There is a difference betwixt Diſclaymer in the Tenure, and Diſclaymer in the Tenancy: For if one diſclaymeth in the Tenure, that diſclaymer goes in barr of the Rent and Services; and

and that gives him Action to demand the Land by a Writ of Right *ſur Diſclaymer*, and that alſo goes in barr of damages, which are but acceſſaries to the principal: But upon a Diſclaymer in the Tenancy, if it be in an Action in which damages are to be recovered, there he may aver him Tenant for the benefit of them: and if it be in ſuch Action in which no damages are to be recovered, then the party may enter. 16 H. 7. 2.

3. A *Precipe* was brought againſt two; the one made default after default recorded: The other ſaid, That the Demandant held the Land in demand of him; and ſaving his Seignory, he doth diſclaim in the Land; by this ſpeciall diſclaimer the Demandant ſhall recover the whole Land againſt him that made default. 33 H. 6. 53.

4. A man Leaſed Land to another for 8. years, upon Condition, That if he did not pay 10 l. within the firſt year, that then the Leſſee ſhould have Fee. In a *Precipe* brought againſt the Leſſor, he durſt not diſclaim, for fear of loſing his Condition. Quære in that Caſe, If he might not diſclaim ſpecially, ſaving his Condition. 12 E. 2. to Voucher 265.

5. In a *Precipe*, the Tenant vouched a Biſhop, by reaſon that the Predeceſſor and the Dean and Chapter gave the Land to him in tail; The Biſhop would have diſclaimed, ſaving the Ancient Services, but could not by reaſon of the Reverſion; for no other Services ſhall be intended but thoſe onely, although the Predeceſſor diſſeiſeth the Tenant who holdeth of him by certain Services. 40 E. 3. 27.

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4. *Where the Husband ſhall diſclaim for him and his Wife; and where for the Wife alone.*

1. IN an Avowry made upon the husband and wife, they diſclaym, and by the Court the Diſclaimer holden to be good. 35 H. 6. 10. *Brook*, in Abridging the Caſe, makes a *Mirum* of it forth of the Books of 10 E. 4. 2. and the whole Court is contrary to it; for by ſo doing, he ſhould loſe the Land of the wife. See 21 H. 7. 20. and 22 E. 3. to Diſclaymer 24. agree with the Book of 10 E. 4. 2. But ſee 43 E. 3. In a Writ of Entry brought againſt husband and wife, and a third perſon, the husband did diſclaim for him and his wife, and the diſclaymer admitted. See 9 H. 6. 52. The husband may prejudice his wife; as in diſclayming in Avowry, or in a *Quid juris clamat*, and the wife is without remedy: and ſo it is holden 33 E. 3. to Diſclaymer. 32.

2. In a *Precipe quod reddat*, the husband appeared, and the wife made default at the *Grand Cape*, the husband diſclaymed in the abſence of his Wife. But ſee 32 E. 3. to Diſclaymer 25. The husband ſhall not diſclaym in that caſe, and to maintain *de bre.* 54. that that diſclaymer ſhall onely bind the husband; and that the wife ſhall have an Aſſiſe.

3. A Writ of Right was brought againſt the husband and wife, and the Plaintiff ſhewed, how that in a Writ of Cuſtomes and Services, the husband and wife diſclaimed: and ſo he had more right againſt the wife: In that caſe, the wife was receaved upon the default of her husband, and joyned the Miſe upon the Diſclaymer, If the Plaintiff had more right by the Diſclaimer then the wife. 32 E. 2. *Fitzh.* to *Droit.* 72.

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5. *Diſclaymer by the Vouchee, or him in the Reverſion.*

1. NOte: It is ſaid 27 H. 6. to Diſclaymer 18, That he in the Reverſion ſhall not diſclaym where he comes in by Voucher by reaſon of the Reverſion; and ſo it is holden 40 E. 27. where a Biſhop was vouched by force of a Reverſion in him.

2. In 8 E. 3. 26. *Fitz.* Meſne 19. Tenant in tail brought a Writ of Meſne againſt him in the Reverſion, and did not ſhew a Deed of Acquittall; but onely bound him in reſpect of the Reverſion and the Services: And it was holden, That he might well diſclaim; but if he had ſhewed a Deed, then for the benefit of the Acquittall, It was holden, he ſhould not diſclaym.

3. Note; In 17 E. 3. *Fitz.* to *Quid juris clamat.* 26. It is holden, That he in the Reverſion may diſclaym when he is vouched; unleſſe it be in the caſe of Tenant in Dower: and ſo ſeems the book to be in 47 E. 3. *Fitz.* to Voucher 271. To have in Dower, the Tenant vouched one as heir, by reaſon that he held of his Father, and alledged Seiſin in the Father of Homage, and that he was alwayes ready to render Homage; and becauſe he did not ſhew a Deed, he went without day.

4. In 14 E. 3. *Fitz.* Warranty 32. It is holden, That the heir of him in the Reverſion being vouched may diſclaim; and ſo it is of the Grantee of him in the Reverſion: But Note, That now the Grantee of the Reverſion ſhall not be vouched, by

by reaſon of the Exception in the Statute of 32 H. 8. of Conditions.

5. In a *Precipe Quod reddat* brought againſt one, he vouched two to Warranty, by reaſon of the Reverſion, and one of them would have diſclaymed, and the Court ſeemed to admit it. But yet the Court doubted how the Reverſion ſhould veſt in the other Vouchee, 33 E. 3. *Fitz.* to Diſclaimer 21.

6. If Tenant in tail doth diſcontinue the tail, and dyeth, and his Iſſue brings a *Formedon* againſt the Diſcontinuee, the Diſcontinuee may plead, That he is no Tenant, but utterly diſclaym in the Tenancy; and in that caſe, the Judgment ſhall be, That the Tenant be without day: and after ſuch Judgment, the Iſſue in tail who is demandant, may enter into the Land, notwithſtanding the Diſcontinuancy, and by ſuch entry he ſhall be remitted; And the cauſe is, becauſe, If a man bring a *Precipe Quod reddat* againſt any Tenant of Freehold, in which Action the Demandant ſhall not recover Damages, and the Tenant diſclaims, or pleads Non-Tenure, the Demandant cannot have his Writ, and ſay, That he is Tenant as the Writ ſuppoſeth; and therefore the demandant, after Judgment given, That the Tenant be without day, may enter into the Tenements demanded, and by ſuch entry, he ſhall be remitted to the tail. See *Litt.* Sect. 691. And ſo it is, If a *Formedon* be brought againſt two, and one pleads Non-tenure, or Diſclaimeth. *L.* 5 E. 4. 125. *Thelwell. Bre.* 241.

7. Where the Tenant diſclayms in Avowry, and alienes, A *Writ of Right ſur Diſclaymer* lyeth againſt the Tenant, although he hath nothing: And ſo a *Quid Juris clamat* lyeth againſt him who was Tenant at the time of the Fine levied, 18 H. 6. 25.

8. In a *Formedon* in the *Diſcender*, If the Tenant diſclaym, there no Judgment ſhall be, but the Demandant ſhall enter, although it be upon a Diſcent, or a Diſcontinuance, for the ſame ſhall be no Eſtoppell, and the demandant adjudged in as to him who diſclaims according to his Title by the taile, but this Eſtoppell ſhall conclude no other, for if he be but Tenant for life, he cannot retain the Land but during his life, and therefore he in the Reverſion may enter, for the Judgment upon the Diſclaymer is not, that the Defendant ſhall recover, but that the Writ ſhall abate. 36 H. 6. 29. *Comment.* upon Original Writs. 35.

9. A Poſſibility may paſſe by Diſclaymer: As if Tenant for years, and he in the Reverſion diſclaym, it is a good Diſclaymer, 44 E. 3. 4. *Godbolt* 25.

L.

Diſcent.

1. *When, where, and to what Heir Lands in Fee ſimple ſhall diſcend: And what ſhall be a ſufficient Poſſeſſion to make the Siſter inherite the Land: What not: And where, the Heir ſhall take by Diſcent; where by Purchaſe.*

1. IT is a Rule in Law, That a man cannot raiſe a Fee-ſimple to his own right Heirs, by the name of Heirs, as a Purchaſe; neither by Conveyance of Land, nor by Uſe, nor by Deviſe: If a man Deviſe Lands to a perſon who is his next Heir, and to his Heirs, the Deviſe is void, and it works by Diſcent. See 35 H. 8. *Dyer*, 54.

2. See Hill. 10 Jac. rott. 3315. *Launds* and *Clark's* Caſe. *Hob.* 30, 31. before in the Deviſe. Sect. 35.

3. Debt brought againſt an Heir, The Defendant pleaded, that he had but the third part of 20 Acres by Diſcent: The Iſſue was, Whether he had the whole. It was found, that the Obligor his Father, deviſed the whole to his Wife, untill the Defendant his Son and Heir ſhould come to the full age of 24. years; and from thenceforth to him and his Heirs. In that Caſe, It was ruled, that the Son took by Diſcent, and Judgment was given for the Plaintiff. 3 Ma. *Dyer* 126. But yet Lands may be ſo limited to the Heirs in tail, or to any one by the name of Heir-ſimple in tail; as the Caſe of *Greſwold* was. 5 Ma. *Dyer* 156. He made a Feoffment in Fee to A. for life; the Remainder to the Heirs-Males of the body of the Feoffor; the Remainder to his own Heirs in Fee. The Father the Feoffor had two Sons, and the Elder had a Daughter and dyed; and it was adjudged for the Daughter againſt the Unckle, either becauſe the Entail to the Heirs-Males was void, or becauſe it ceaſed in the Elder Sons.

4. Note, If I convey Lands, which I have on the part of the Mother, or in Borough-Engliſh, to J. S. and his Heirs without conſideration, the uſe ſhall be paid, and ſo the Land ſhall return again to me and my Heirs of his Mother, or in Borough-Engliſh as before; for the Law doth conſtrue the Uſe in the ſame ſtate and quality as the Land was. But if I do declare the uſe to me and my Heirs, or upon ſuch a Feoffment reſerve a Rent to me and

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my Heirs, it ſhall go to my Heirs at the Common-Law; for it is not within the Cuſtom, but it is a new thing divided from the Land. Trin. 4 Ma. *Dyer* 163. *Hob.* 32. So it is in Caſe of Entails, which were Fee-ſimple at the Common-Law, they take their effect by the Statute of *Weſt.* 2. in Caſes of Diſcent: but where they are not in Caſes of Diſcent, but the Limitation is immediately, and by way of purchaſe to the Heir-Male or Female of the Body, he muſt be aſwel right Heir-Male as Female of the Body that ſhall take; for that this is clearly aſwel out of the Letter, as out of the Intent of the Statute of *Weſtmin.* 2. See *Hob.* 32. acc.

5. A man having two Sons and a Daughter, deviſed his Lands to a ſtranger for life, the remainder *propinquioribus de ſanguine puerorum* of the Deviſor, and dyed, his Sons having no Children, but his Daughter having two Daughters. It was holden in that Caſe, that neither the Sons nor the Daughter can take; for they are *pueri*, and not *de ſanguine puerorum*: But the two Daughters of the Daughter ſhall take for their Heirs; and if there were alſo Sons of Sons, or Daughters, they ſhould all take together: and that Children born after the Remainder veſted (which was after the death of the Teſtator) ſhould take nothing, and that the neareſt in degree of bloud ſhould take; and not the worthieſt in order of Diſcent: for the words do import no reſpect of Dignity, but of Propinquity of bloud. 30 Aſſiz. 47. and 30 E. 3. 27.

6. A. Seiſed of Lands in Fee, made his Will, and deviſed his Land to his Wife for life, the remainder to his Son in Tail; and if he dyed without Iſſue, the Land to remain to J.S. and his Wife for their Heirs; and after their Deceaſes to their Children. The Queſtion was, Whether the Children of J. S. did take by Diſcent, or by Purchaſe. *Popham* and *Gawdie* were of Opinion, that they had an Eſtate Tail. *Fenner* and *Clinch*, that they had an Eſtate for Life. Mich. 40 Eliz. in B.R. *Goldesbr.* 138.

7. The Caſe was: There was Grandmother, on the part of the Father, Mother, and Son; the Grandmother had a Brother, and the Mother had a Brother alſo; The Son purchaſed Lands in Fee, and dyed without Iſſue. The Queſtion was, If the brother of the Grandmother, or the brother of the Mother ſhould be Heir to him: It was the Opinion of all the Juſtices, That the brother of the Grandmother ſhould Inherite as Heir to the Son, as next of bloud on the other part of the Father, although he was not of the Surname of the Son or Father, for he is of the moſt Auncient bloud; and alſo of the moſt worthy bloud by the Male Sex of the Father, and he is to be preferred before the Heir of the Mother of the Purchaſor, although he be the next of bloud. Trin. 14 Eliz. *Dyer*, 314. Paſc. 5 Eliz. *Plow. Com. Clear* and *Brooke's* Caſe, 442.

8. There were three brothers, the middlemoſt purchaſed Lands, and deviſed the ſame to his ſon in tail; and if he dyed without Iſſue, that then it ſhall remain to the next of kindred, of the lineage of his Father, the eldeſt brother then being dead, having Iſſue a Son. The Queſtion was, Who ſhould have the Land; And, upon great advice, It was adjudged, That the Son of the eldeſt brother ſhould have it, for he is next of Lineage; for Lineage ſhall be taken in a Lineall diſcent, and in the moſt worthy. Mich. 25 Eliz. in *Scaccario*, adjudged. See 15 Eliz. *Dyer*, 333.

9. A man, ſeized of a Mannor by diſcent on the part of the Mother, enfeoffed a ſtranger, of a houſe, parcell of it, to hold to him and his Heirs, by certain Services, before the Statute of *Donis*, &c. and afterwards dyed without on the part of the Mother: Some were of Opinion, That the Lands ſhould diſcend to the Heirs of the part of the Father, becauſe it was new created by the Feoffor: But the Rule of the Court there was, That it ſhould diſcend to the Heirs on the part of the Mother onely; and for want of ſuch Iſſue, ſhould Eſcheat, for the Seignory which he had reſerved by the Feoffment, is due by reaſon of the Right which he had in the Tenancy; and the Right which he had in the Tenancy, diſcended on the part of the Mother. 5 E. 3. *Avowry* 207. *Cook*, 8. Part, in *Syms's* Caſe, 54.

10. Copyholder in Fee, having Iſſue a Son and a Daughter, by one Woman, and a Son by another, dyed; the Eldeſt ſon dyed before Admittance: It was Reſolved and adjudged in this Caſe, That the Land ſhould diſcend to the daughter of the whole bloud. 2. Reſolved, That where the Cuſtomary part of the Inheritance diſcendeth to the Heir before admittance, he may enter, and take the profits, and there ſhall be a *poſſeſſio fratris* before admittance upon an Actuall poſſeſſion. *Cook* 4. Part, 21. *Brown's* Caſe.

11. Husband and Wife had Iſſue, a ſon and two daughters, the Husband appointed the Government and Education of his Son and daughters, to his Grandfather and Grandmother for their lives, and dyed; the Wife took another Husband, the Grandfather dyed; The Grandmother, ſeiſed of Lands holden in Socage, Deviſed them to the Son in tail, the Remainder to the two daughters, and to the Heirs of their bodies begotten, by equall portions, equally to be divided betwixt them; the Remainder to their Mother and her Heirs. The Grandmother dyed, the Son dyed without Iſſue, the eldeſt daughter took Husband, they entred; the

the younger daughter, above the age of 14 years, and within the age of 16 years, departed with the conſent of the Husband, and took C. to Husband, who entred. In this Caſe, amongſt other, theſe points were Reſolved. 1. That the two daughters were Tenants in Common, the Reverſion to the Mother, for that theſe words in a Will (equally to be divided) makes a Tenancy in Common, according to the intent of the Deviſor. 2. Reſolved, That the Mother might enter for the forfeiture, for ſhe was next of bloud to the daughter; and Adminiſtration of the goods of the Son or daughter, may be granted to the Mother as next of bloud: And in this Caſe, it was put to be a Rule of Law; That of all Hereditaments in poſſeſſion, he who claims ſuch Inheritance as Heir, ought to make himſelf Heir unto him who was laſt actually ſeiſed: But of a Reverſion or a Remainder expectant upon an Eſtate for life, or in tail, there he who claims the Reverſion, or Remainder ought to make himſelf Heir to him who made the gift, or Leaſe, if the Reverſion, or the Remainder diſcend to him; Or if a man purchaſeth ſuch a Reverſion, he who claims as Heir, ought to make himſelf Heir to the firſt purchaſor. *Cook* 3. Part, 40, 41. *Ratcliff*'s Caſe.

12. It was found by Office, that the Mannor of D. was by Indenture bargayned and ſold to J. S. and his Heirs; and that he dyed, 4. *Off.* 13 Jac. and that 30. *Off.* 13. Jac. the Deed was enrolled, and that his Coſen and heir was of the age of 21. years at the time of his death; and that the Mannor was holden by Knights ſervice in *Capite*; And whether his heir ſhould ſue Livery, and ſhall be in *Ward* by diſcent, and not meerly by diſcent, was the Queſtion, and in the nature of a purchaſor, in whom the Land firſt veſted. This Caſe being referred to the two Chief Juſtices, and chief Baron; It was Reſolved by them, That he ſhould be in by Diſcent, and ſhould ſue Livery; For when the Inrollment comes, and there is no Act done in the Interim to ſtop it, the Eſtate veſted in the Auncеſtor *ab initio* by the uſes limitted: For the Statute being, That nothing ſhall paſſe, &c. excepting by Deed enrolled; when the Exception is performed, It is in the Auncеſtor by the Statute of uſes; and therefore the Heir being within age, ſhall be in ward; and being of full age, ſhall ſue Livery. Mich. 14 Jac. in the Court of Wards. *Dimock*'s Caſe. *Cro.* 2. Part, 408, 409. *Hob.* 136. the ſame Caſe.

13. A man, ſeiſed of the Mannor of S. Covenanted with another, that when J. S. ſhall enfeoff him of the Mannor of D. that then he would ſtand ſeiſed of the Mannor of S. to the uſe of the Covenantee and his heirs; the Covenantee dyed, his Heir within age, J. S. enfeoffeth the Covenantor. It was adjudged in this Caſe, That the Heir ſhall be in, in the nature and courſe of a diſcent, and yet there is not any right Title nor Action which diſcended, but onely a poſſibility of an Uſe, which could not be releaſed or diſcharged; yet becauſe the ſame might have veſted in the Auncеſtor, therefore the Heir in that Caſe, was not in by purchaſe, but in courſe of Diſcent. 3 Eliz. in *Cur. Wardorum*, *Wood*'s Caſe. vouched in *Cook* 1. Part, 99. *Shellies* Caſe.

14. See Mich. 24 Car. in B. R. rott. 2052. *Preſton* and *Holmes* Caſe. *Styles* 148. 149. in title of *Deviſe*. Sect. 43.

15. A. was ſeiſed of a Mannor in Fee, and took to Husband J. and had Iſſue S. Afterwards J. and A. his Wife dyed; and S. was ſeiſed of the Mannor, as heir on the part of her Mother, and before the Statute of *Quia emptores*, &c. did enfeoff P. of parcell of the Mannor, by 4 s. Rent, afterwards S. dyed without Iſſue. The Queſtion was, Who ſhould have this Seignory and Rent newly created, either the Heir on the part of the Mother, or the Heir on the part of J. the Father. It was ſaid by the Chief Juſtice of the Common-Bench, That when S. enfeoffed P. of parcell of the Mannor, which diſcended to her from A. theſe ſervices are then Appurtenant to the Remainder of the Mannor, by which the death of S. without heir of her body, cannot defeat the appendance: So if a man be ſeiſed of a Mannor of the part of his Mother, and maketh a gift in tail, rendring Rent, this new Rent which is incident to the Reverſion, ſhall go with the Reverſion to the Heir of the part of the Mother. 5 E. 2. *Avowry*. 207. 7 H. 6. 4. *Cook* 8. Part, *Syms*'s Caſe. 54. acc.

16. If a Leaſe be made to one for life, the Remainder to the right Heirs of J. S. he dying, having a daughter, his Wife with child of a Son; the daughter claims the ſame by purchaſe, and therefore the ſon born after, ſhall never deveſt the ſame; and ſo if a Condition diſtendeth to the daughter, and ſhe entreth for the Condition broken, the Son born after ſhall never enter upon her, and yet there ſhe is in by diſcent, and the Title of her entry, *ſcil.* the Condition ſhe hath as heir, yet becauſe ſhe was the firſt in whom it veſted, the Son after born, ſhall not deveſt the ſame. 9 H. 7. 25. *Cook* 3. Part, 39.

17. If Lands be given to one, and the Heirs Females of his body, & the Donee having Iſſue a Son, & a daughter, maketh a Feoffment within age, and dyeth, the daughter being heir ſpeciall, to whom the Right of Entry diſcendeth, ſhall enter, and not the Son, who hath nothing by diſcent: So of the Heir in Borough-Engliſh; For in all Caſes, when one claymeth by diſcent as ſpeciall Heir, he

ſhall take advantage of a Right of Entry, which diſcendeth to him for the Infancy, or other Incapacity of his Auncestor. *Cook* 8. Part, 43. in *Wittingham's* Caſe.

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2. *Where a Diſcent ſhall take away an Entry, and where not.*

1. IF a Diſſeiſor maketh a gift in tail, and the Donee diſcontinueth the Fee, and afterwards doth Diſſeiſe the Diſcontinuee, and dyeth ſeiſed, this Diſſeiſin ſhall not take away the Entry of the Diſſeiſee; For the Diſcent of the Fee-ſimple is gone and vaniſhed by the Remitter; and although the Iſſue be in by force of the Eſtate tail, yet the Donee dyed not ſeiſed of that Eſtate, and of neceſſity there muſt be a dying ſeiſed to take away entry. *Cook* 1. Part, *Inſtitutes*, 238.

2. A Diſcent ſhall not take away Entry of a man in Priſon, at the time of the Diſcent caſt, becauſe he could not make continuall claim when he was in Priſon, being there kept in *arcta Cuſtodia*. So a Diſcent caſt during the Vacation of an Abby, ſhall not take away the Entry of the next ſucceſſor; becauſe, ſeeing that by the death of the Abbot (which is the Act of God) no perſon is able to make continuall claim: therefore the diſcent during that time, ſhall not prejudice the Succeſſor. *Cook* 1. Part, *Inſtitutes*, 268.

3. Note, there is a difference in Caſe of Diſcents, betwixt Corporall Inheritances, as Houſes, Lands, &c. which do lye in Livery; and Inheritances incorporeal, his Advowſons, Rents, Commons, &c. which lye in Grant. For a Diſcent of theſe ſhall not put the Diſſeiſee to his Action, but he may claim them notwithſtanding ſuch Diſcent: but a Diſcent of Lands doth put the Diſſeiſee to his Action; becauſe houſes ſerve for the habitation of men, and the Land to be Manured for their ſuſtenance, and therefore an Heir, after a Diſcent of them, ſhall not be moleſted or diſturbed in them by Entry. *Cook* 1. Part, *Inſtitutes* 237.

4. A man being beyond Sea, out of the Realm, is Diſſeiſed; Afterwards he Retornes into the Realm, and then goes beyond Sea again; during which time, there is a Diſcent caſt. In this Caſe, If it cannot be proved, that he had notice of the Diſſeiſin when he was within the Realm; it ſeems his Entry is not taken away, for by intendment of Law, he could not have notice of the Diſſeiſin at the time when it was done. Mich. 4. Ma. *Dyer*, 143.

5. In Error brought to reverſe a Fine, the Caſe was; W. levyed a Fine, the Defendant the Earl of *Oxford* pleaded, That he was beyond Sea at the time of the Fine levyed: W. Replyed, That he came into *England* in *Auguſt* within the five years; and upon that they were at Iſſue. The Jury found that he came over in *July*; and notwithſtanding, the Opinion of the Court was clear, That the Writ of Error did not lye: For although the Jury find that he came over in *July*; yet the ſubſtance of the matter is, that he was in *England*, ſo as he might have made his claim. The Caſe was compared to the Caſe 10 Eliz. *Dyer*, 271, which is a Quære, but Reſolved in *Cook* 6. Part, 42. A man brought Debt againſt the Heir, who pleaded, That he had nothing by Diſcent, the Plaintiff pleaded, That he had Aſſets in *London*, and the Jury found Aſſets in *Cornwall*, and good; For the ſubſtance is, If he had Aſſets or not. Paſc. 15 Car. in B. R. *Waterhouſe*, and the Earl of *Oxford's* Caſe. *Marſh.* 9.

6. If a Recovery be had by A. againſt B. and before Execution: B. dyeth ſeiſed, this Diſcent ſhall not take away the Entry of the Recoveror; and ſo it is in Caſe of a Fine; For if that were admitted, there would be no end of Suit, but a new one would be occaſioned: So if a Recovery be had againſt Tenant for life, where the Remainder is over in Fee; Tenant for life dyeth, he in the Remainder entreth before Execution, and dyeth ſeiſed, here alſo the Entry of the Recoveror is Lawfull, not onely becauſe he in the Remainder is privy to the Eſtate, but that otherwiſe it would be occaſion of a new Suit. *Cook* 1. Part, *Inſtitutes* 237.

7. The King was ſeiſed of the Mannor of B. in the right of his Crown; A ſtranger erected a ſhop in a vacant place of the Mannor, and took the profits thereof without paying of any Rent to the Queen for the ſhop; And afterwards the Queen Granted the Mannor to the Earl of *Leiceſter*, who never entred into the ſhop, nor took any Rent for it; And afterwards the occupier of the ſhop dyed in poſſeſſion; And if his Heir ſhould be in by Diſcent, was a Queſtion; And the better Opinion of the Court was, That it was no Diſcent againſt the Patentee, becauſe at the firſt it was a Diſſeiſin againſt the Queen. 10 Eliz. *Dyer*, 266.

8. If Lands be given to Husband and Wife, and to the Heirs of their bodies, the Remainder to the Heirs of the Husband, and they have Iſſue a Son, and the Wife dyeth, and the Husband taketh another Wife, and they have Iſſue, and dye, the eldeſt ſon dyeth without Iſſue, the youngeſt ſon ſhall have the Land as Heir to his Father, and not the Unkle of the eldeſt Son; becauſe the

ſame

ſame did never diſcend unto him in Poſſeſſion. See 39 E. 3. *Fitzh.* to *Diſcent*, 15.

9. A. having Iſſue two Sons, H. and E. and ſeiſed of divers Mannors and Lands holden in Knights-Service, in the County of H. and other places; Deviſed the Lands in *Hertford*, to E. his younger ſon, and dyed ſeiſed of all the Premiſſes; H. his eldeſt Son being then within age: After Office found, not mentioning the Deviſe, the Queen ſeiſed the body of the Heir, and the Poſſeſſion of the Lands, of which A. dyed ſeiſed, and Leaſed the ſame to a ſtranger during the Minority of the Heir; the Leſſee entred; the Heir at full age, ſued Livery of the whole, and before any Entry into the Land by E. to him Deviſed, or any Entry made by H: H. Leaſed the Lands to J. S. rendring Rent: J. S. entred, and paid the Rent divers years to the ſaid H. Afterwards E. by caſualty walked over the Land, in the Company of J. S. without any ſpeciall claim made thereunto: And twenty four years after the death of A, E. entred into the Land Deviſed to him; and if this dying ſeiſed of H. of the Lands in H. and Diſcent to his Heir, ſhould take away the Entry of E. was the Queſtion. In this Caſe, the Juſtices were of Opinion, That this was not ſuch a Diſcent as ſhould prevent the Deviſe: For a Deviſee by a Deviſe, hath but a Title of Entry, which ſhall not be bound by any Diſcent; and in this Caſe, there was not any Diſcent at all; For by the Deviſe, and the death of the Deviſor, the Frank Tenement in Law, and the Fee was veſted in the Deviſee, and then where the Queen Leaſed the ſame during the Nonage of H. and the Leſſee entred, he did wrong to E. and by his Entry, had gained a tortious Eſtate in Fee; and when H. at his full age by Indenture, without any ſpeciall Entry, Leaſed the ſame to J. S, he did a wrong to E. and the paying of the Rent to H. and by his walking over the Land, he did not gain any Seiſin to himſelf; and then when he dyed, the ſame was no Diſcent to take away the Entry of E; and ſo the Leaſe made by E. to the Plaintiff, was good. Mich. 32 Eliz. in C. B. *Matthewſon* and *Trotto*'s Caſe. *Leon.* 209.

10. In *Ejectione firmæ* the Caſe was: A. was Tenant in tail of certain Lands, and made a Leaſe for years to one B. who Aſſigned it over to the Father of the Plaintiff. A. dyed, W. his Son and Heir, entred upon P: W. demiſed the Land to P. for life, the Remainder to J. his Wife for life, the Remainder to the Son of P. for life, with Warranty, and made a Letter of Attorney to enter and deliver Seiſin; P. dyed before the Livery was executed, and afterwards the Attorney made Livery to J: W. dyed; E. his Son and Heir entred upon the Wife. It was Objected, That when P. entred upon W. the Iſſue in tail, he was a Diſſeiſor, and by his death, the Land diſcending to his Heir, the Entry of W. the Iſſue in tail was taken away: But it was holden by the Court, That P. by his Entry was not a Diſſeiſor, but at the Election of W. For when P. accepted ſuch a Deed from W. it appeareth, that his intent was not to enter as a Diſſeiſor; and it is not found that P. had any Son and Heir at the time of his death, and if not then, no diſcent; and there is not any Diſſeiſin found, That P. *Expulit* W. out of the Land. And the Caſe of *Shipwith* was cited, which was adjudged in the Common-Pleas. The Caſe was this: Grandfather, Tenant in Tail, Father and Son; the Grandfather dyed, the Father entred and paid the Rent, and dyed in poſſeſſion; It was adjudged no diſcent, for the paying of the Rent doth explain by what Title he entred, and ſo he ſhall not be a Diſſeiſor, but at the Election of another. It was adjudged for the Plaintiff. Trin. 30 Eliz. in B. R. *Pits* and *Leverſudits* Caſe. *Leon.* 121.

11. If a Diſſeiſor be Diſſeiſed, and dyeth having Iſſue, and the Iſſue entreth upon the Diſſeiſor of his Father, his Entry is lawfull, and when he hath entred, he ſhall be in by Diſcent; ſo as the Entry of the firſt Diſſeiſee is not lawfull. by *Halls* in 9 H. 4. 5.

12. If a Diſſeiſor makes a Feoffment in Fee upon Condition, and dyeth, and the Condition is broken, and the Heir entreth, the ſame is no Diſcent to take away an Entry, for the ſame is not a Diſcent in Fact, but in Reputation onely.

Diſmes, or *Tythes*.

1. Tythes, *what they are, the Antiquity of them; To whom they were payable; Where the Right of Tythes was, and is determinable; in what Court. and betwixt what perſons; And where Writs and Suits were for them by a ſecondary means brought at the Common-Law.*

1. TYthes are an Eccleſiaſticall Inheritance, Collaterall to the Eſtate of the Lands, to take the tenth part of the profits of the Lands, due Originally, and onely unto Eccleſiaſticall perſons, and recoverable onely in an

Eccleſiaſticall Court; payable *jure Divino*, or at leaſt *jure poſitivo*. *Cook* 11. Part, 13. in *Priddle* and *Napper's* Caſe. Naturally, it is the Tenth part of the Revenue of my Ground, or Land; not of my labour or induſtry, *Hob.* 250. They are things of Common-Right, and do of right belong unto the Church. *Hob.* 296. Mich. 15 Jac. *Slade* and *Drake's* Caſe.

2. Before the Councell of *Lateran*, Every man might have given his Tythes to what Church he pleaſed, and might have beſtowed them upon what perſon he thought beſt, for before that Councell, there were no Pariſhes, nor Pariſh Prieſt, that could claim them. But by a Canon made in that Councell, every man is ſince compellable to pay and give his Tythes to the Parſon or Vicar of that Pariſh, where the Tythes are ariſing: And although before the ſaid Canon, The Biſhop of every Dioceſſe might have made Diſtribution of them within his Dioceſſe, where he thought convenient, to Spirituall perſons, for their neceſſary maintenance, as *Bede*, *Lib.* 1. *cap.* 28. yet it is now otherwiſe. Now although, before the ſaid Councell of *Lateran*, the parties might have granted them at their own Liberties, or they might have been diſtributed as aforeſaid: Yet did not the ſaid Canon make them more Eccleſiaſticall then they were before; But the Juriſdiction of Tythes, as well before the ſaid Canon, as ever ſince, concerning the Right of them, did appertain and belong unto the Eccleſiaſticall Court. *Cook*, 2. Part, 44. 44 E. 3. 5. by *Ludlow* 7 E. 3. 5. by *Payne*. Mich. 15 Jac. in C. B. *Slade* and *Drakes* Caſe. *Hob.* 296. acc.

3. In ſome books and Records, it appeareth, That Writs and Suits have bin brought at the Common-Law for Tythes: As 4 E. 3. 27. By *Shard*, A Writ of Right lay at the Common-Law, *De Advocatione Decimarum Eccleſiæ*. *Fitzh. Nat. Br.* 30. acc. *Cook* 2. Part, *Inſtitutes*, 661. A *Scire facias* at the Common-Law lay of Tythes: So *Regiſter*, 165. A Writ of Covenant lay to levy a Fine *de Decimis garbarum*, with which agree 38 H. 6. 20. 4 E. 3. 27. and 29. 7 E. 3. 5. by *Parning*. And 44 E. 3. 5. an Aſſiſe was brought of Tythes: Yet it is to be obſerved, That the ſaid Writs and Suits were not for them, meerly or properly as Tythes, but as Lay-profits Apprender, Iſſuing or going out of the Lands, and not for them as Eccleſiaſticall Duties; For neither Aſſiſe, nor *Præcipe* did lye of Tythes at the Common-Law, or of any other Eccleſiaſtical Duty. See *Doddridge* in his Treatiſe of Advowſons.

4. An Aſſiſe was brought of Tythes, 44 E. 3. 5. But Note, and Obſerve there, That the Aſſiſe there brought, was of the Tenth of all manner of Corn and Grain growing in 100 Acres of Lands, after the Tythes of the Parſon were taken away, which was but a Lay-profit Apprender, and no Eccleſiaſtical duty.

5. If Tythes do lye in any Forreſt, as in the Forreſt of *Windſor*, *Rockingham*, or *Sherwood*, or other Forreſt which is not within any Pariſh. The King ſhall have them by his Prerogative, and not the Biſhop of the Dioceſſe, or Metropolitan of the Pariſh, as ſome have thought. 14 H. 4. 17. But yet it ſeemeth by 22. Aſs. 75. If there be cauſe of Suit for ſuch Tythes againſt the parties who ought to pay the ſame, ſuch Suit might be brought in the Eccleſiaſtical Court. But if a ſtranger taketh away ſuch Tythes from the Parſon or Vicar there for ſuch Treſpaſſe, the Suit may be in the Temporal Court, as the ſame may be for taking away of other goods in the like caſe: and ſo, if the Parſon, Vicar, or other Proprietor be ejected of his Tythes. It was adjudged 15 Car. in B. R. That an *Ejectione Firmæ* will lye of ſuch Tythes, See *Styles* 137.

6. The Leſſee for years of the Earl of *H*, prayed a Prohibition againſt the Vicar of *L*, to ſtay a Suit in the Spiritual Court for Tythes, becauſe the Lands out of which the Tythes were demanded, were parcell of the Forreſt of B; whereof the King was ſeiſed in the Right of his Crown, and he and all his Predeceſſors held the ſaid Lands diſcharged of Tythes; and ſhewed, that the King had granted the ſaid Forreſt to the Earl of *Hertford* in Fee and ſo he ought to have had them diſcharged from Tythes. In that caſe it was holden by the Court, That it was onely a Priviledge annexed to the Crown, during the time that the Land was in the Crown. But the Court doubted, Whether the Patentee might have ſuch Priviledg? But yet *de bene eſſe*, the Prohibition was granted. Mich. 3 Car. in C. B. *Morant* and *Candings* Caſe. *Cro*, 1. Part, 67.

7. The King brought a *Precipe Quod reddat* of the 4th part of the Tythes and Offerings of the Church of St. *Barſlow* in the Weſt: And it was Ruled, That the Writ did lye. But note, in that Caſe, 16 E. 3. *Quare Impedit*, 147. That the Writ was not brought againſt the Prior as a Pariſhioner who ought to pay the Tythe, but againſt him as a Prior, for taking the Tythes againſt right; So as the Suit was not originally for them as Tythes, but for the tortious and wrongful taking of them. For Tythes ſet forth, are become Lay-Chattels, for which the King had his remedy at the Common-Law, if they were withheld from him. See 38 E. 3. 13. by *Finchden*. *Cook* 11, Part, in Doctor *Grants* Caſe.

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the Court, that there was a Parſon who held a portion of Tythes, which was parcell of the poſſeſſions belonging to his Ferm, and that the Parſon withheld the Tythes from him, ſo as by reaſon thereof he could not pay the King his Ferm-Rent, without having thoſe Tythes out of the Parſon's hands: And thereupon a *Quo minus* iſſued forth out of the Court of Exchequer, at the Suit of the King and of the Prior, for the paying of thoſe Tythes to the King. It was there ſaid by *Skipwith*, Juſtice, That of that which concerneth the King, and may turn to his advantage, and haſten his buſineſs, whether the ſame be Spiritual or Temporal, the Court of Exchequer ſhall have Juriſdiction. But it was there agreed by the whole Court, That ſuch Suit for Tythes did not fall into the Juriſdiction of the Courts of Kings-Bench, or Common-Pleas: for that the right of Tythes is determinable onely in the Eccleſiaſtical Court. See 38 E. 3. 20. and 44 E. 3. 43, 44. The Prior of *Ekeborns* Caſe.

9. After the Statutes of 27 H. 8. & 31 H. 8. of Diſſolution of Monaſteries; By which Acts, many Advowſons, Parſonages, Vicarages, Penſions, Portions, and Tythes, by Conveyance and otherwiſe, were transferred and granted over unto layperſons, who were not capable of Tythes by the Common-Law: The Statute of 32 H. 8. Cap. 7. was made, By which Statute it was Enacted, That if any perſon which ſhould have any eſtate of Freehold or Inheritance, Term, Right or Intereſt, in any Parſonage, Vicarage, Portion, Tythes, Oblations, or other Eccleſiaſtical or Spiritual profits then made Temporal, or which ſhould be ſuffered to go into Lay-mens hands, ſhould be diſſeiſed, wronged, or kept out of the Lawful Intereſt, Rights, or Inheritance to the ſame, That ſuch perſons ſo diſſeiſed, or wrongfully kept out of their Rights or poſſeſſions, their heirs, &c. ſhould have remedy in the Kings Temporal Courts for the recovery of their rights and poſſeſſions by Writs of *Precipe Quod reddat*, Aſſiſe of *Novel Diſſeiſin*, Writs of Dower, or other Writs, as the Caſe ſhould require: This Statute for the ſaid Tythes, Oblations, and Spiritual profits made Lay-Fees in Temporal mens hands, gave remedy in the King's Temporal Courts: Yet did not this Act take away the force of the Eccleſiaſtical Law concerning Tythes; but, for not ſetting forth, or for refuſing to pay the ſame, All Eccleſiaſticall perſons who had right before the ſaid Statute, might ſue for the ſame in the Eccleſiaſtical or Spiritual Court: ſo as this Act of 32 H. 8. was but an Addition unto the Law in reſpect of the Lay-Fees, and no alteration or diminution of that power which Eccleſiaſticall perſons had for Tythes, to ſue for the ſame in the Spiritual Court before the making of that Statute: And upon this Law of 32 H. 8. was the Caſe of 7 E. 6. *Dyer* 83. grounded, where an Aſſiſe was brought *de Libero Tenemento de quadam portione Decimarum*: As alſo the Caſe of 5 Jac. the Counteſſe of *Oxfords* Caſe, where a Writ of Dower was brought of Prediall Tythes. *Cook* 11. Part, 13, 14. in *Pridle* and *Nappers* Caſe.

10. A man cannot preſcribe generally in him and all thoſe whoſe eſtate he hath in the Mannor of D, to have any Tythes appertaining to the ſame, becauſe Tythes are ſpiritual things, and due *Jure Divino*, for the ſubſtraction of which, remedy lyeth onely in the Spiritual Court, and no remedy at the Common-Law. Hill. 35 Eliz. *winſcombs* Caſe. But by a ſpeciall matter alledged, a Layperſon may alledge, that all thoſe who have eſtate in ſuch a Mannor, have uſed time out of mind to pay to the Parſon a certain yearly Penſion for maintenance of Divine Service, and in Contentation of all Tythes remaining within the ſaid Mannor; and ſuch a preſcription hath been adjudged good. Mich. 40 Eliz. in the Kings Bench. *Piggott* and *Hernes* Caſe, vouched in *Cook*. 2. Part, in the Biſhop of *Wincheſters* Caſe, 45.

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12. The Rights of Tythes were ſometimes decided in Temporal Courts, before the Statute of 18 E. 3. *Fitzh. Na. Br.* Yet that did not make them to be Spiritual things before that Statute: For it is ſaid of them, as it was ſaid of Probate of Wills, in *Cook* 9. Part, in *Henſloes* Caſe, Probate of Wills and Teſtaments did belong unto the Courts of Lords of Mannors, and did appertain to the Spiritual Courts but of later times, *ex Conſuetudine Angliæ, et non de jure Communi*: Yet it is not to be doubted, but that Wills, and Teſtaments, and Legacies contained in them, were belonging Originally to Eccleſiaſticall Courts: But it is then ſaid, That Tythes, *Quatenus Tythes*, were Spiritual.

Eccleſiaſticall Court; payable *jure Divino*, or at leaſt *jure poſitivo*. *Cook* 11. Part, 13. in *Pridle* and *Napper's* Caſe. Naturally, it is the Tenth part of the Revenue of my Ground, or Land; not of my labour or induſtry, *Hob.* 250. They are things of Common-Right, and do of right belong unto the Church. *Hob.* 296. Mich. 15 Jac. *Slade* and *Drake's* Caſe.

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tuall things, and due *ex jure Divino*, and where not accompted as temporall Inheritances; for they could not be Appendant to Mannors or Lands, *Cook* 2. Part, in the Biſhop of *Winchester's* Caſe. Nor were they extinguiſhed by a Feoffment made of the Lands. 7 E. 6. 84. and *Cook* 11. Part, 13. in *Napperer's* Caſe. And by the Deviſe of all Lands, with all profits and Commodities belonging to the ſame, they did not paſſe; as it was adjudged in *Perkins* and *Hind's* Caſe, which ſee in *Cook* 2. Part, 13, 14. And yet that they were ſuch things as might be given in Exchange for Temporall Inheritances; for that in Exchanges, it is not requiſite, That the things exchanged be of one nature and quality; And therefore the Exchange for Annuity or Rent, was good, in 9 E. 4. 21. in the Prior of *Sempringham's* Caſe. But Note there, That the Exchange was betwixt Spirituall and Eccleſiaſticall perſons, and not betwixt Lay-men.

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2. *What perſons, where capable of Tythes; where ſuch perſons were to Sue for them; And where a Preſcription in* Non Decimando, *was good; where not: Cannot paſſe without Deed,*

1. THe Biſhop of *Winchester* ſeiſed of a Mannor in the right of his Biſhoprick, did preſcribe, that he and all his Predeceſſors time out of mind, had holden the ſaid Mannor, and the Demeſne thereof; his Farmers, Tenants for years, and at Will diſcharged and acquitted from the payment of Tythes. The Biſhop made a Leaſe of parcell of the Demeſnes; the Farmer of the Rectory Libelled in the Spirituall Court, for the Tythes of the ſame Lands. In this Caſe, it was Reſolved. 1. That at the Common-Law, None had Capacity to take Tythes, but onely a Spirituall perſon, or a mixt perſon, as the King; who was *ſacro oleo unctus*; and therefore by his Prerogative, capable of them, and of a Diſcharge of them, by the Common-Law. 2. Reſolved, That a Lay-man who was not capable of Tythes in Permancy, yet he was capable of a diſcharge of Tythes, by the Common-Law, by Grant of the Parſon, Patron, and Ordinary, or by Compoſition. 3. It was Reſolved, That Lay-men might preſcribe in *modo Decimandi*, but not *in non Decimandi*; but a Spirituall perſon might be diſcharged of Tythes, and alſo *in Non Decimando*. *Cook* 2. Part, The Biſhop of *Winchester's* Caſe. 4. It was Reſolved in that Caſe, That if the Biſhop were abſolutely diſcharged of Tythes whileſt the Lands were in his hands by Preſcription, That the demiſing of the ſame to a Lay-man, could not make the ſame chargeable with the ſame.

2. A. Libelled in the Spirituall Court for Tythes of Rough Hay growing in the Marſhes, and Fenny Lands in M. The Plaintiff brought a Prohibition, ſurmiſing that there was 2000 Acres of Fenny Lands within the Pariſh, and 600 Acres of Meadow, and that the Pariſhioners payed Tythe of Hay and Grain growing upon the Meadow, and Arable Land, and had paid a certain rate for every Cow, and becauſe they had not ſufficient Graſſe to keep their Cattell in Winter, they uſed to gather this Hay called Fenny Fodder for the ſuſtenance of their beaſts, for the better encreaſe of their Husbandry, and for this cauſe, had bin alwayes freed from the payment of Tythes. It was adjudged in this Caſe, That this ſurmiſe was not ſufficient, for that one may not preſcribe in *Non Decimando*; and the alledging that they beſtowed it upon their Cattell there, is not any Cauſe of Diſcharge, for ſo they might preſcribe for Corn ſpent on their Family, or for Corn given in Provender to their Cattell. A Conſultation was Awarded. Mich. 2 Jac. in B. R. *Webb* and Sir *Henry Warner's* Caſe, *Cro.* 2. Part, 47, 48.

3. Monks are not of Evangelicall Prieſthood, *ſcil* capable of Tythes in pernancy, but meer Lay-men, and cannot preſcribe in *Non Decimando*. And *Bede* ſaith of them, That they are meer *Laici*, and the Monks of the Order of *Præmonſtratenſes* were ſuch; and therefore they could not preſcribe to be diſcharged of Tythes. Hill. 1 Car. in B. R. in *Dickenſon* and *Greenhowes* Caſe, *Popham*, 157.

4. The Biſhop of *Lincolne* prayed a Prohibition againſt C. who Libelled againſt him in the Spirituall Court for Tythes out of the Mannor of D. The Biſhop did ſuggeſt, that he and his Predeceſſors had been ſeiſed of the ſaid Mannor: and that as long as it had been in their poſſeſſion, it had been diſcharged of Tythes; and ſhewed, that in the time of King E. the 6th, the ſaid Mannor was conveyed to the Duke of S. in Fee; and afterwards re-granted to the Biſhop and his Succeſſors; It was adjudged in this Caſe, That although the Preſcription was good in the Caſe of *Non Decimando*, in the Caſe of a Spirituall perſon, yet in this Caſe, the ſame being interrupted by the Seiſin of the Duke of S. the Preſcription was gone. For the Tythes are not iſſuing out of the Lands, nor can Unity of Poſſeſſion extinguiſh them, nor are they extinguiſhed by Releaſe, and therefore in the principall Caſe, the Tythes were now payable

in

in kind. Mich. 33 Eliz. in B. R. the Biſhop of *Lincoln* and *Cowper's* Caſe. *Leon.* 248.

5. A Parſon Leaſed all his Glebe-Lands, with all Profits and Commodities, rendring 13 s. 4 d. *pro omnibus exactionibus et demandis*; and afterwards Libelled in the Spirituall Court againſt his Leſſees for the Tythes thereof. It was the Opinion of the Court, That Tythes are not things iſſuing out of Lands, nor any Rent or duty, but Spirituall; and if the Parſon doth Releaſe to his Pariſhioners, all demands in his Lands; his Tythes thereby are not extinct; and therefore a Conſultation was Granted. Trin. 31 Eliz. in B. R. *Style* and *Miller's* Caſe. *Leon.* 300. And ſo was it adjudged, 32 Eliz. in *Babbington's* Caſe, That the Leſſee ſhould pay Tythes to the Parſon, for that they are due *jure Divino*, and cannot be included in Rent.

6. If Tythes be ſevered, and ſet forth, and afterwards the Parſon Leaſe out the Parſonage, not mentioning the Tythes, the Tythes ſet forth ſhall paſſe; for although they be divided and ſevered, yet they are as yet Spirituall Duties of the Parſonage: But if the Tythes be carried into the Barn; and afterwards the Parſon Leaſeth out his Parſonage, with all profits, &c. thoſe Tythes ſhall not paſſe to the Leſſee, for that now they are become Lay-Chattels. Mich. 6 Jac. in C. B. *Smith's* Caſe adjudged.

7. If a Parſon doth Demiſe his Rectory for years, the Tythes will paſſe *inclusivè*, although the Leaſe be by word onely; But if the Parſon Leaſe his Tythes alone, they will not paſſe, unleſſe the ſame be by Deed or Writing. Trin. 26 Eliz. in B. R. *Withy* and *Paunder's* Caſe, adjudged acc. But ſee, That ſtands upon a difference, For the Parſon may Demiſe his Tythes to the Owner of the ſoil, for a year by word onely, as it was agreed by all the Juſtices, Mich. 2 Car. in B. R. in *Bellamy* and *Babthorp's* Caſe. rott. 175. *Godbolt.* 373. but he cannot demiſe them to a ſtranger, but the ſame muſt be by Deed: and although Tythes will paſſe to the owner of the ſoil by Contract, as is ſaid: Yet may the Parſon ſue the owner for Tythes in kind in the Spirituall Court, and the owner by reaſon of the Contract, ſhall not have a Prohibition, as was holden. Mich. 8 Jac. in C. B. in *Croſts's* Caſe. But then the owner of the Owner may ſue the Parſon upon the contract in the Temporall Court, and recover as much in Damages; But then in his pleading, he muſt not declare of a Verball Contract, but muſt ſet forth the ſame to have been made in writing, and ſo it was adjudged. Mich. 7 Jac. in C. B. in *Pawling's* Caſe.

8. In a Prohibition, the Plaintiff ſuggeſted, That the Lord *Sbandois* was ſeiſed of a Meſſuage and Lands in the Pariſh of D, and that it was agreed between the Parſon and him, in Conſideration of 10 l. to be yearly paid to the Parſon during their joynt Lives, and his continuing Parſon, that the ſaid Lands, and the Tenants and Fermors thereof, ſhould be diſcharged from payment of Tythes for thoſe Lands, and ſhewed the Lord *Sbandois* paid the 10 l. yearly accordingly; and that notwithſtanding, the Defendant ſued the Plaintiff, being his Fermor, for Tythes. It was holden by the Court, That this was not a ſufficient Surmiſe to maintain the Prohibition: For an agreement to be diſcharged from Tythes, may be a year by word; but to have ſuch an Agreement for life, or years, cannot be without Deed. And although it was ſaid, An Agreement by Contract, by way of Retainer, is not any Leaſe; yet the Court held, That it could not be, that ſuch a ſurmiſe could be good. Mich. 4 Car. in B. R. *Hawkes* and *Brayfields* Caſe. *Cro.* 2. Part, 137. See *Nelſon* and *Prettimans* Caſe: and *Rolls* and *Rolls* Caſe, in B. R. adjudged accord. *ibid.*

9. *Ejectione Firme* was brought of a Leaſe of Tythes; and the Plaintiff doth not ſhew, that the Leaſe was by Deed: and becauſe Tythes cannot paſſe without Deed, after a Verdict found for the Plaintiff, It was ruled to be ill, and adjudged for the Defendant. Paſch. 19 Jac. in B. R. *Bothe* and *Cromptons* Caſe. *Cro.* 2. Part, 613.

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3. *Of Diſcharge of Tythes; how many wayes ſuch Diſcharge may be, viz. By Grant, Compoſition, Priviledge, Preſcription, Unity: and what ſhall be ſuch a Diſcharge by the Common-Law, or by the Statutes of* 27 H. 8. 31. & 32 H. 8; *what not: And other matters concerning diſcharge of Tythes.*

1. THe Court were of Opinion, That where a Biſhop holds Lands diſcharged of Tythes, and he makes a Feoffment of the Land, the Feoffee ſhall be diſcharged of Tythes. And the like, If the King hath ancient Forreſt Land diſcharged of Tythes, and the King grants this Land, the Grantee is to be diſcharged of Tythes. And it is a general Rule, That he which may have Tythes, may be diſcharged of them. Mich. 9 Jac. in C. B. *Brownlow* 1. Part, 31.

2. A Parſon did Covenant and grant with one of

of his Pariſhioners; That in Conſideration of 6 l. 13 s. 4 d. *per annum* to be paid to him, That the Pariſhioners ſhould be diſcharged of all Tythes, upon Condition to be void upon default of payment: Afterwards the Parſon againſt his own grant, did ſue the Pariſhioners in the Spirituall Court for Tythes in Kind. It was moved for a Prohibition; but the Court would not grant it, becauſe that the Original, *viz.* the Tythes do belong to the Spiritual Court. But it was ſaid, That the Pariſhioners might have an Action of Covenant againſt the Parſon, upon the Deed in the Temporal Court. Mich. 16 Jac. in B. R. *Barnwell* and *Pleiſers* Caſe. *Godbolt.* 273.

2. Two Parſons were of two ſeveral Pariſhes, One of them claimed Tythes within the Pariſh of the other; and ſaid, That all his Predeceſſors, Parſons of ſuch a Church, *ſcil.* of D, had uſed to have the Tythe of ſuch Lands within the Pariſh of S, and pleaded the ſame in the Spiritual Court. The Court was of Opinion, That in this Caſe, a Prohibition did lye, for he claims only a portion of Tythes, and that by Preſcription, and not meerly as Parſon, or by reaſon of the Parſonage, but by a Collateral cauſe, *ſcil.* Preſcription, which is a Temporal cauſe and thing. See 35 H. 6. *Br.* to *Preſcription* 3. Mich. 29 Eliz. in B. R. *Godbolt.* 45.

4. A Parſon did contract with A. his Executers and Aſſigns, for 10 s. paid to him every year by A. his Executors and Aſſigns, That he, his Executors and Aſſigns, ſhould be quit from the payment of Tythes for ſuch Lands during the life of the Parſon: A. paid the Parſon 10 s, which he accepted of, and made B. an Enfant his Executor, and dyed: The Mother of the Enfant took Letters of Adminiſtration *durante minori ætate* of the Enfant, and made a Leaſe at Will of the Lands: The Parſon Libelled in the Spiritual Court for the Tythe of the ſame Land againſt the Tenant at Will. In this Caſe it was ſaid, That during the life of the Parſon, the Agreement did bind the Parſon: and although the Aſſignee could not ſue the Parſon upon the Contract, yet he ſhould have a Prohibition to ſtay his Suit in the Eccleſiaſticall Court, and put the Parſon to his remedy for the 10 s, upon the Contract, for that he could not have Tythe in kind, by reaſon of the Compoſition made. Paſch. 21 Jac. in B. R. *Snell* and *Bennets* Caſe. *Godbolt* 333.

5. Note, Paſch. 16 Jac. in B. R. Where the Parſon of *Dale* Covenanted with one of his Pariſhioners, That he ſhould pay no Tythes: For which, the other Covenanted to pay the Parſon 5 l. yearly. It was agreed by the Court in that Caſe, That if no Intereſt of Tythes paſſe, but a bare Covenant, that then he who is ſued for the Tythes, hath no remedy but a Writ of Covenant: And in this caſe, it was the Opinion of the Court, That it was a bare Covenant, and that no Intereſt did paſſe. Paſch. 16 Jac. in B. R. *Fulcher* and *Griffins* Caſe.

6. A Prohibition was prayed, upon a ſuggeſtion of this Cuſtome, That for Tares cut or mowen before they be ripe, and given to Plough-Cattel, Tythes ought not to be paid: And another Cuſtome for Headlands ſowen with Corn, uſed to be fed with Plough-Cattel, or mowed or cut for that purpoſe, That the Owners ſhould be diſcharged of Tythes. It was holden by the Court, That this Suggeſtion grounded upon a ſpecial Cuſtome, was good: and the parties being ſued for the Tythes of the premiſſes in the Spiritual Court, the Court granted a Prohibition. Hill. 10 Car. in B. R. *Mead* and *Thurmans* Caſe. *Cro.* 1. Part, 285.

7. Note before, *Cook* 2. Part, the Biſhop of *Wincheſters* Caſe, It is agreed, That a Lay-man cannot preſcribe *in non Decimando*: Yet ſee Doctor and Student, 167, That a Country may preſcribe to be quit of the Tythe of Corn and Grain, ſo as the Vicars or Curates have ſufficient portions beſides to live upon. But it is there ſaid, That if one man of a Town would preſcribe to be diſcharged of tythe of Corn and Grain, ſuch Preſcription would be altogether void, unleſſe he did ſhew that he did recompence the Parſon or Vicar ſome other way. But one man in a Town, may preſcribe to pay a certain Penſion to the Parſon or Vicar in lieu and Contentation of all his Tythes, and ſuch a Preſcription, was adjudged good, in the Caſe of 40 Eliz. of *Piggott* and *Horne*; which ſee in *Cook* 2. Part, in the Biſhop of *Wincheſters* Caſe. See 15 Car. in the Kings-Bench. A Hundred may preſcribe in not payment of Tythes; but a Pariſh, or a particular Town, cannot preſcribe *in Non Decimando*, but upon the reaſon in the Caſe, in *Doctor* and *Student*, as is ſaid: And ſo it was adjudged.

8. A Prohibition was prayed, to ſtay a Suit in the Spiritual Court for Tythes. It was ſurmiſed to be a Cuſtome within the Pariſh, That the Pariſhioner ſhould cut his graſſe, and make it into Cocks, and ſet out the 10th Cock for the Parſon, which was a diſcharge of the firſt and ſecond Veſture: And the Suit being for tythe of the After-Mowings by the Vicar; This Preſcription being alledged againſt him, he demurred thereupon. It was adjudged by the Court, that it was a good Preſcription, and that the ſame ſhould barr the Vicar. Paſch. 4 Jac. in B. R. *Green* and *Auſtins* Caſe. *Cro.* 2. Part, 116.

9. In Debt upon the Statute of 2 E. 6. for ſubſtracting of Tythes, the Plaintiff entituled himſelf to the Tythes, as Proprietor of the Rectory

tempore

tempore Quo, &c. the Plaintiff was poſſeſſed of the Land ſowed with Corn, (but had not then the Parſonage) and that *tali die*, before ſeverance of the Corn, he did ſell and paſſe this away unto the Defendant, and before ſeverance, he became to be Parſon of the ſame place, and ſo demanded Judgment, Whether contrary to his own grant, by this puiſne title happening to him in the interim, he ſhall have tythe? The Plaintiff demurred upon the Plea. It was ſaid, That the Defendant's Plea was not good; for he ſaith, That *tempore Quo*, the Plaintiff was poſſeſſed of the Land ſowed with Corn; but he doth not ſay, that he was then poſſeſſed of the Parſonage: but at the time of the taking, he was Proprietor of the Rectory; which is confeſſed. The Caſe upon the matter is but this, A man is poſſeſſed of a Leaſe for years, of Land ſowen with Corn; he doth grant this, and before ſeverance, becomes to be Parſon of the ſame place, whether he ſhall have now tythe of this Corn, contrary to his Grant. It was the Opinion of the Court, That he hath good right and title to the Corn; and eſpecially in this caſe, becauſe the Defendant hath not averred, that he was Parſon at the time of the Grant: For it was holden by *Cook*, Chief Juſtice, That if a Parſon ſoweth the ground, and is afterwards deprived, or doth reſign, if the tythe was not ſevered at the time of the Succeſſour's coming, he ſhall have the Tythes. It was the Opinion of the whole Court, that the Plea in barr was not good; and that the Plaintiff had good cauſe of Action: and Judgment was given for the Plaintiff. Mich. 10 Jac. in B.R. *Moyle* and *Ewers* Caſe. *Bolſtr.* 2. Part, 283, 284.

10. In a Prohibition, upon a Suit in the Spiritual Court for Tythe-Hay: It was alledged in diſcharge, That the Abbot of E. was ſeiſed of the Manner of M, of which the Lands were parcell, and held them for himſelf, his Tenants, Commoners, Fermors, and Occupiers diſcharged of Tythes, until, at the time of the Diſſolution; and afterwards the ſame came to the Defendant, who ſued for Tythes: The Defendant pleaded in bar, That the Plaintiffs and all thoſe who had the houſe, and Land, had uſed to have *Libertatem falcandi*, to make Hay onely, without that they were Tenants, Fermors, or Occupiers of the Land, out of which he demanded Tythes: The Plaintiffs replyed, They did put in their Cattel, and alſo mowed the ſame, *per quod*, they were Occupiers of the Land, and ſo ought to be diſcharged for the ſame. It was the Opinion of the Court in this caſe, That he which takes any thing as a profit apprender, is not Tenant nor Occupier; if he takes the profits, he is to pay Tythes; here the Plaintiffs have *Libertatem*, or *Poteſtatem falcandi*; that doth not make them Fermors, Tenants, nor Occupiers: and the Concluſion of the Plaintiff *per quod ſuit occupator*, is but a Concluſion of his own; and it doth not appear to the Court, that he was Tenant, Fermor, or Occupier; for they have onely *Jus falcandi*: and the Preſcription goes to Tenants and Commoners onely. Wherefore it was adjudged againſt the Plaintiffs, and a Conſultation was awarded. Mich. 11 Jac. in B.R. *Sucgherman* and *Coates*, and Sir *Henry Warners* Caſe. *Bolſtr.* 2. Part, 249.

11. The Ciſtertians, Templers, and Hoſpitalers, by their Orders, were to defend Chriſtians againſt Infidels, and had a Priviledge granted unto them by the Pope in the Council of *Lateran*, *ut Decimas Prædiorum ſuorum, quas in omnibus ſuis propriis excolunt, non tententur ſolvere.* This was but a ſpeciall Priviledge for the Lands in their own manurance for the maintenance of Hoſpitality, and had many reſtrictions: 1. It extended onely to ſuch Lands as they had at the time of the Councel, and for ſo long time onely as the ſame remained in their own poſſeſſions. 2. It was ſpeciall, for the Lands in their own manurance. 18 Eliz. *Dyer* 349. *Cook* 2. Part, 44. For if they had Leaſed out their Lands to Fermors for Rent, the Fermors or Occupiers of thoſe Lands ſhould have had Tythes: and ſo it was adjudged, 10 Jac. in C. B. in *Foggard* and *Huttons* Caſe. 3. It was ſpeciall, and did not extend to new Erections upon the Lands priviledged: For that, Trin. 15 Jac. in B. R. it was adjudged, That whereas a Parſon did Libell in the Spiritual Court for Tythes of a Mill, which was erected upon Lands which were diſcharged from payment of tythes by reaſon of ſuch Priviledge within the Statute of 31 H. 8, That a Prohibition would not lye in that Caſe: For that *de Molendino novo erecto*, tythes ſhould be paid. Mich. 15 Eliz. in *Harpers* Reports, acc.

12. The Abbot of *Fountains*, was of the Order of the *Ciſtertians*: And, 11 *Johannis*, before the Councel of *Lateran*, gave Lands to one *Kirby*, to hold of them by Fealty, &c. And afterwards in 36 E. 3. thoſe Lands did Eſcheat to the Abby. It was Reſolved in that caſe, That of thoſe Lands Eſcheated, tythes ſhould be paid. Like unto the Caſe of 29 E. 3. *Quinzim* 1. where Lands are holden of an Abby, and diſcharged of *Quinzim*; and afterwards the Lands came to the Abby by Eſcheat, the Abby paid *Quinzim* for thoſe Lands. Mich. 16 Jac. in C. B. *Potter* and *Bathurſts* Caſe. Mich. 15 Jac. *Ibid.* Sir *Robert Dickenſons* Caſe, acc.

13. Note: It was holden by the Juſtices of Aſſiſe, That Lands which come to the *Templers*, or others, priviledged from Tyths by the Councel of *Lateran*, after the Councel by purchaſe or

Eſcheat, ſhall not partake of ſuch priviledge: But Lands then in Leaſe, or Copyhold, when the Leaſe is ended, or Copyhold comes to the Lord, it ſhall be priviledged, as thoſe then in their hands ſhould be. See 8 Car. in *Cleytons* Reports, *Hodgſons* Caſe. *pl.* 181. adjudged.

14. An Abbot held a Parſonage Impropriate which was diſcharged of Tythes; and was parcell of the Lands, the Tythes were ſuſpended in the hands of the Abbot: Afterwards, the poſſeſſions of the Abbot came to the King by the Statute of 31 H. 8. The Queſtion was, Whether the Lands ſo purchaſed by the Abbot before his ſurrender to the King, were diſcharged of tythes. It was the Opinion of Mr. *Plowden* in that Caſe, That they were not diſcharged, for that no Lands were diſcharged but ſuch, as were lawfully diſcharged by right Compoſition or other lawfull thing; and in the ſaid Caſe, the Lands were not diſcharged in right, but ſuſpended onely during the time that the Lands were in the Abbots hands. Mich. 17 Eliz. in B. R.

15. In a Prohibition, for that the Defendant ſued in the Spiritual Court for Tythe-Wood; The party did ſurmiſe, that the Lands were parcel of the poſſeſſions of the Priory of C; and that the Prior and his Succeſſors time out of mind held the Lands diſcharged of tythes, and ſo held them at the time of the Diſſolution; the other party traverſed it: whereupon they were at Iſſue, If the Prior held the Lands diſcharged *tempore Quo*; Exception was taken to the ſuggeſtion, that here is nothing elſe then a Preſcription *de modo Decimandi*, for here is not ſet forth any diſcharge, as Compoſition, Unity of poſſeſſion, Priviledge of Order. It was the Opinion of *Wray*, Chief Juſtice, although it be not ſet down, the ſpeciall manner of the diſcharge, yet it is well enough; for we are to take it, that it was by a lawfull means, as Compoſition, or otherwiſe: For the Statute is, That the King ſhall hold diſcharged as the Abbot, and we ought to take it, it was a lawful diſcharge of tythes *tempore diſſolutionis*. It was found for the Plaintiffs in the prohibition. Mich. 33 Eliz. in B. R. *Naſh* and *Mollins* Caſe. *Leon.* 240.

16. An Abbot had a Mannor within the Pariſh of D, and a Compoſition was made betwixt the Parſon of D. and the ſaid Abbot, That the Parſon ſhould have yearly certain Lands of Woad out of 30 Acres of the ſaid Mannor, for and in recompence of all tythes of Woad there; Afterwards the Parſonage was appropriated to the ſaid Abbot; and afterwards the ſaid Houſe was diſſolved, and the Mannor was granted to one, and the Rectory to another. It was holden in that caſe, That the ſaid portion of tythes was revived: For he had then, *ſcil.* the Mannor and the tythes in ſeverall Rights. Mich. 5 Eliz. in C. B. *Leon.* 335. See there, the principall Caſe. Trin. 33 Eliz. in the Kings-Bench, *Knightly* and *Spencers* Caſe. *Leon.* 331. acc.

17. Unity of the Parſonage and Lands which ſhould pay tythes by appropriation or otherwiſe, in the hands of Religious and Eccleſiaſticall perſons, had diſcharged them from the payment of tythes: and now ſince the Statute of 31 H. 8. ſuch an Unity of poſſeſſion in the ſaid Religious Houſes and Lands, and perſons, ſhall be a diſcharge for the Kings Patentee for the Lands that came to the Crown by the ſaid Statute. But then it was Reſolved, That ſuch an Unity muſt have been *Juſta, Libera, æqualis & perpetua*: It muſt have been *Juſta*, claymed by Right: For if either the Parſonages, Vicarages Lands, or Tythes, had come or been united to their houſes by Diſſeiſin, or other tortious and unlawful acts, ſuch an Unity had not been a good diſcharge within the Statute. 2. It muſt have been *Equalis*, there muſt have been a Fee-ſimple both in the Lands, and in the tythes or Parſonage in them: For if the Abbots, Priors, or other Religious perſons, had held but by Leaſe, that had not been ſuch an unity as the Statute intended. 3. It muſt have been *Libera*, free from the payment of any tythes: For if their Fermors, Tenants at Will, or years, had paid tythes, that had not been a ſufficient unity. And, 4. It muſt have been *perpetua*, time out of mind; and then for the infinite impoſſibility, and impoſſible infiniteneſſe, That ſuch Immunities and diſcharges, that ſuch Religious perſons and houſes had before time of memory could not be known, ſuch an unity had been a good diſcharge in their own hands: and at this day, ſuch an unity is a good diſcharge in the hands of the Kings Patentee, within the Statute of 31 H. 8. *Cook* 11. Part, 13. *Pridle* and *Noppers* Caſe.

18. Note: That at this day, Lands that come to the Crown by the Statute of 27 H. 8. of *Diſſolutions*, ſhall pay tythes, although the Lands in the hands of the ſaid Religious perſons or houſes, were diſcharged from the payment of tythes; For that the Priviledges being perſonal priviledges, were extinguiſhed by the ſaid Statute of Diſſolution: And there are not any words in the ſaid Statute of 27 H. 8. to ſave the Priviledges: And the Statute of 31 H. 8, being a ſubſequent Law, had no retroſpect to thoſe priviledges: and ſo was it adjudged by all the Juſtices of *England*. Mich. 13 Jac. in the Common-Pleas, in *Garret* and *Wrights* Caſe; and 3 Car. in the Kings-Bench in *Whites* and *Wiſtons* Caſe. *Godbolt* 372, and 7 Car. in the Court of Exchequer, in *Clark* and *Wards* Caſe. See 1639, Sir *Marmaduke Stricklands* Caſe, in *Cleytons*.

Clayton's Reports 117, acc. See Mich. 11 Car. in B. R. *Sidowne* and *Holmes* Caſe. *Cro.* 1. Part, 305.

19. It was a Queſtion, If Beeches be Timber-Trees, and whether tythe ſhall be paid of them? But the better Opinion alwayes hath been, That they are not Timber, and that tythes ſhall be paid of them: Except, Where by Cuſtome of the Country, where there is great ſcarcity of Wood, they be accounted Timber-trees, for there no tythes ſhall be paid of them. Trin. 16 Jac. in C. B. *Pinder* and *Spencers* Caſe, adjudged acc.

20. A. brought Debt for 600 l, upon the Statute of 2 E. 6. for not ſetting forth tythes of Wood; and ſhewed, that the Defendant had cut down 100 Loads of Wood, to the value of 200 l; and that the 10th part did amount to 20 l: The Plaintiff was Nonſuit, being miſtaken in his Declaration, for ſetting down 200 l; whereas he ſhould have ſet down the value of the Wood to have been 2000 l: In this caſe, it was ſaid by *Tanfield*, Juſtice, That Beech by the Common-Law, is not Timber: and ſo he ſaid it was adjudged in *Cary* and *Pagets* Caſe; and in that caſe it was holden, That Tythes ſhall not be paid for Beech above the growth of 20 years in a Common Country for Wood, as in *Buckinghamſhire*, for there it is reputed Timber; but in a plentifull Country of Wood it is otherwiſe, for there it is not Timber, and tythes ſhall be paid of it, as *Silva Cedua*, for which tythes ſhall be paid under the growth of 20, years. Paſch. 5 Jac. in C. B. *Man* and *Somertons* Caſe. *Brownlow* 1. Part, 84.

21. A Parſon Libelled in the Spiritual Court for the Tythes of young Trees planted in a Nurſery upon purpoſe to be rooted up, and ſold to be planted in other Pariſhes: The Queſtion was, Whether Tythes ſhould be paid for them? It was ſaid, They were of the nature of the Land, and tythes ſhould not be paid of them, no more then of the Mines of Coal, or Stones digged; or for Trees ſpent in fuel in the houſe. But it was the Opinion of the whole Court, That for as much as he made a profit of ſuch young trees, tythes ſhould be paid of them, when he diggs them up and ſells them in another Pariſh, as well as of Corn and Carrets, or ſuch things. Hill. 14 Car. in B. R. *Gibs* and *Wyburs* Caſe. *Cro.* 1. Part, 378.

22. A Record of a Prohibition was ſhewed to the Court, where a Prohibition was awarded to the Spiritual Court, for tythes of Willowes, upon a ſurmiſe, that they are of uſe as Timber in the County of *Southampton*. In that caſe it was ſaid, If Willowes grow within the Scite of a houſe, it is Waſte to fell them; yet if they be felled, that tythes ſhall be paid of them. Paſch. 14 Jac. in C. B. rott. 1918. *Goffly* and *Pinders* Caſe. *Rob.* 219.

23. Tythes generally and originally are not payable for houſes of habitation, nor of any Rent reſerved upon any demiſe of them: For tythes are to be paid of things which grow and renew every year by the act of God. And for the Houſes in *London*, tythes anciently were not paid; For the profits of the Churches in *London* did conſiſt onely in Oblations, Obventions, and Offerings: And afterwards by a Decree made in the year 1532, and afterwards confirmed by Act of Parliament made 37 H. 8. Cap. 12. The Parſons in *London* were to have 2 s. 9 d. in every pound of Rent, in lieu of a Tythe. But if a *Modus* be alledged, to pay 12 d. in every pound of Rent for every houſe within ſuch a Pariſh in *London* for the tythe of the houſe, this is a good *Modus*, for it may be, that for the Land upon which the houſes have been built, ſuch a *Modus* of 12 d. time out of mind hath been paid. *Cook* 11. Part, 16. Dr. *Grauns* Caſe.

24. The Statute of 18 Eliz. Cap. 6. is, That no Maſter and Fellowes of a Colledg in *Cambridge* or *Oxford*, ſhall make any Leaſe for life or years of any Farm of any of their Lands, Tenements, &c. unleſſe a third part at the leaſt of the ancient Rent, be reſerved and paid in Corn for the ſaid Colledges, otherwiſe the caſe to be void: In an *Ejectione Firme* brought of a Leaſe made of the Rectory of St. *Lawrence* Church in *London*; the Queſtion was, Whether the Leaſe were void or not; becauſe Tythes in *London* do not conſiſt of ſuch things, but onely in money according to the Decree made concerning the ſame. It was holden in that caſe, That this Leaſe was good, notwithſtanding the defect by the ſpeciall Reſervation, which is limited and appointed by the ſaid Statute. And it was ſaid, That a Leaſe of a Houſe, Mill, Ferry, were out of the ſaid Statute. And it was ſaid and agreed, That the ſaid Statute ought to be intended of Tythes of Common-right, and not of ſuch Cuſtomary Tythes as thoſe of *London*: and therefore if all the Pariſhioners preſcribe *in Modo Decimandi*, *ſcil.* to pay a certain ſum of money for all manner of Tythes, upon demiſe of ſuch a Rectory, ſuch ſpeciall reſervation is not neceſſary; for theſe are Tythes againſt common right, and no Tythes are within the ſaid Statute, but thoſe which are annual. Paſch. 26 Eliz. in the Exchequer. *Kemp* and *Hollingbrooks* Caſe. *Leon.* 19. 20.

25. *Modus Decimandi* is, When Lands, Tenements, or Hereditaments, have been given to the Parſon, and his Succeſſors, or an annuall certain ſum or other profit alwayes time out of mind to

the Parſon and his Succeſſors, in full ſatisfaction of all Tythes in kind in ſuch a place; and all Preſidents in Prohibitions in diſcharge of Tythe in caſe *de Modo Decimandi*, run thus, That ſuch a ſum had been alwayes paid *in plenam contentationem ſatisfactionem et exonerationem omnium et ſingularum Decimarum, &c.* And although that the ſum be not paid, yet cannot the Parſon ſue for Tythes in kind, but for the money: and although Parſons did ſue in the Spiritual Court, and yet pay *pro modo Decimandi*, yet the annual payment of money, was as Temporal as the annuall profits of Lands are: and therefore the Tryal of a *Modus Decimandi* ſhall be at the Common-Law, and not in the Spiritual Court. Trin. 7 Jac. in the Caſe *de Modo Decimandi*, Prohibitions debated before the King. *Cook* Select Caſes, 40. & 46.

26. A. ſued a Prohibition againſt B, Parſon of O, becauſe he Libelled in the Spiritual Court for tythes of Agiſtments; and the Plaintiff pleaded, That he had alwayes paid 12 d. for every Milch-Cow going in ſuch a Paſture; and for this payment he had been diſcharged of tythes for all Agiſtments in that Land. In this caſe it was ſaid, That this payment of money for Milch-Beaſts, ſhould not diſcharge him from the payment of Tythes for other beaſts. Hill. 43 Eliz. in C. B. *Sharrington* and *Fleetwoods* Caſe. *Goldeſbr.* 157.

27. The Parſon of St. *Clements* without Temple barr, Libelled againſt a Pariſhioner for tythes of certain Stables, and ſet forth in his Libell, That of common right and preſcription time out of mind, the Parſons there had uſed to have a *Modus Decimandi*, after the rate of the 10th part of the yearly rent or value of the ſame. It was the Opinion of the Court, That in this caſe a Prohibition ſhould be granted; for *de Communi jure*, no tythes are to be paid of the yearly Rent or value of houſes, for tythes are paid for the Revenue and encreaſe of things; and therefore no Tythes are paid for houſes in any Cities or Towns in *England*, ſaving in *London*; and this Pariſh is out of *London*, and the Liberties thereof; now where there is no tythe at all, there can never be a *Modus Decimandi*; and yet it ſeems that this kind of payment hath been long uſed in *London*; which certainty was by uſe. But for houſes, Oblations were paid in all places; which are now by the Statute brought to a certainty, *ſcil.* a groat for a houſe. Trin. 12 Jac. in C. B. Doctor *Lyſfield* and *Tyſdales* Caſe. *Hob.* 10, 11.

28. To pay a Buck or a Doe, or the ſhoulder of a Deer, when a Deer is killed, may be a good *Modus Decimandi* for the tythe of a Park; and although that afterwards the Park be diſparked, and converted into Tillage or Hop grounds, yet the Parſon ſhall not have tythes in kind; but the *Modus* doth remain: ſo it is if all the Park pale fall down, which is a diſparking in Law; yet the ſame doth not deſtroy the *Modus*, for the ſame may be a Park again. Mich. 5 Jac. in C. B. adjudged acc.

29. It was ſuggeſted to have a Prohibition That A. was ſeiſed of 140 Acres of Land, which were parcell of a Park, and a *Modus Decimandi* by preſcription was ſaid to be, That the Tenements of the ſaid 140 Acres of Lands for the time being, had uſed to pay for the tythes of the ſaid Lands 2 s. in monies, and the ſhoulder of every third Deer which was killed in the ſame Park, in Conſideration of all Tythes of the ſaid Park: and it was ſhewed, that the ſaid A. had enfeoffed one C. of the ſaid 140 Acres of Land, who bargained and ſold the ſaid Land to the Plaintiff, who prayed the Prohibition: The Defendant ſaid, That the ſaid Park is now diſparked, and that the ſame is now converted into arrable Lands, and paſture grounds, and ſo demanded Tythes in kind. It was Reſolved in this Caſe, That by the diſparking of the Park, the Preſcription was not gone, nor extinct, becauſe the preſcription is layed to be to the 140. Acres of Lands, and not to the Park: and although that the ſhoulder of the Deer, being but a caſual thing, and at the pleaſure of the party, be gone, yet the ſame did not make void the preſcription; and the act of the party ſhall not prejudice the preſcription: and although it be not a Park now in form and Reputation, yet in Law it doth and ſhall remain a Park. It was adjudged, the *Modus Decimandi* did continue. Mich. 11 Jac. in C. B. *Cowper* and *Andrews* Caſe. *Gobbolt.* 237. *Hob.* 40, 41. 42. acc. the ſame Caſe.

30. Suit was for Tythe of Corn growing in a Park, which was lately diſparked: The Defendant did plead a Cuſtome to pay Veniſon, and a Horſe paſture time out of mind, in ſatisfaction of all Tythes, &c. It was given in Evidence, That Corn had been ſowed there, and reaped, but no Tythes paid: but the Witneſſes proved a Buck paid yearly, but could not tell whether it was out of this Park, or not: The Jury found, That if it was paid out of any Park, If it was accepted and allowed, this was better to uphold the Cuſtome, then if particularly tyed to pay a Deer out of this Park; for now if the Park be diſparked, yet this payment of the Deer may be performed: Otherwiſe it is, If the Cuſtome had been a Deer out of this Park onely; for then by the deſtroying of that, the Cuſtome is gone alſo. It was holden in this caſe by the Judges, That although the Deer had been often, and for the moſt part paid, out of this

this Park, yet this doth not alter the Cuſtome if it may be paid out of any Park; and if the Cuſtome were to pay a ſhoulder of Veniſon generally, It may come out of any Park. Wherefore the Judges directed the Jury, That if they found the Deer was to come out of the Park which is now diſparked, then, to find a Special Verdict. 13 Car. at the Aſſizes at *York*. *Thwſbyes* Caſe. *Claytons* Reports, 91.

31. Note: Tythes by Cuſtome may be altered in any other thing: which Cuſtome ſhall be a *Modus Decimandi*, and bind the Parſon and his Succeſſors; If the Lord of a Mannor grants parcel of his Mannor to a Parſon in Fee to be quit of Tythes, and makes an Indenture, and the Parſon with the aſſent of the Ordinary (without the Patron) grants to him, That he ſhall be quit of Tythes of his Mannor for that parcell of Land, If after he or his Aſſigns be ſued in the Spiritual Court for Tythes of his Mannor, he or his Aſſigns ſhall have a Prohibition upon that Deed; and therefore if the Lord of the Mannor hath alwayes holden his Mannor diſcharged of Tythes: and the Parſon had before time of memory, or in ancient times divers Lands in the ſame Pariſh of the gift of the Lord, of which the Parſon is ſeiſed at this day in Fee, in reſpect of which, the Parſon, nor any of his Predeceſſors ever had received any Tythes of that Mannor; If the Parſon now ſueth for Tythes of the Mannor, the Owner of the Mannor ſhall ſhew that ſpeciall matter, that the Parſon and his Succeſſours time out of mind have holden thoſe Lands of the guift of one who was Lord of the Mannor: and the ſame is good Evidence to prove the Surmiſe in the Prohibition. 6 Jac. in C. B. in the Caſe of *Modus Decimandi*. *Cook Stiff Caſes*, 14. & 46.

32. If a Cuſtome be alleadged, That the Parſon ſhall have but the Tenth Sheafe of Wheat for all manner of Tythe of Corn and Grain; this is no good Cuſtome. 38 Eliz. in C. B. adjudged. So a Cuſtome was alleadged, That the Owners of ſuch a Farm had uſed, time out of mind, to take back 30 ſheaves of the Corn, after the Tythe ſet forth, to their own uſes. It was adjudged in this Caſe, That it ought to be averred, That the Farm was a great Farm, otherwiſe the Cuſtome would not be good; for that it tended to the impoveriſhing of the Parſon or Vicar, in taking away a good part of the profits. Mich. 11 Jac. in Count *Jux*, and Sir *Charles Chandiſhes* Caſe. But in the Argument of that Caſe, It was ſaid and agreed, That if a man ſoweth his Lands with Corn, and dyeth; and afterwards his Heir makes a Compoſition with the Parſon and Vicar to have but the third ſheafe for his Tythe; That this is a good Compoſition, and ſhall bind the Parſon; and that if afterwards the Heir doth endowe his Mother of the third part of the ſame Land, the Mother ſhall have benefit of his Compoſition, although ſhe cometh in paramount the ſame.

33. A Vicar did contract with his Pariſhioner to pay ſo much for encreaſe of Tythes, and dyed, and his Succeſſour ſued in the Eccleſiaſtical Court for them. A Prohibition in this Caſe was granted by the Court. The words of the Contract were (*Inter ſe Convenerunt*) It was holden that this was not a Real Compoſition, although that the Biſhop did call it *Realis Compoſitio*, for his calling of it ſo, doth not alter the nature of it; but it remains a perſonal Contract, and ſo ſhall not bind his Succeſſor, although it were confirmed by the Biſhop. It was ſaid by *Mallet* Juſtice in this Caſe, A Real Contract, although it be made betwixt Spiritual perſons, and of Spiritual things, is onely queſtionable at the Common-Law. Paſch. 17 Car. in B. R. *Hitchcock* and *Hitchcocks* Caſe. *Marſh.* 87.

34. Every *Modus Decimandi* is by Preſcription, and is intended to have had a lawful beginning upon ſome Agreement at the firſt made, for valuable conſideration, with the Parſon and Vicar: And therefore, although that Tythes in kind have been paid for 20 or 30 years together, yet the ſame ſhall not deſtroy the Compoſition, or *Modus Decimandi*. And *vid. Doctor and Student*: If it was ordained by Law, That all paying of Tythes in kind ſhould ceaſe; and that every Curate ſhould have aſſigned him ſuch a portion of Land, Rent or Annuity, as ſhould be ſufficient for him, ſuch a Law would be a good Law: And then if Tythes might be ſo changed by a poſitive Law into Rent, or Annuity, then there is no Queſtion to be made, but that a Compoſition made with the Parſon or Vicar, to pay a *Modus* to them, (which hath continued out of mind.) Cuſtome being equivalent to a Law,) will bind the Parſon and Vicar, or their Succeſſors. But a *Modus Decimandi* cannot begin at the day, but muſt be by Preſcription. But yet at this day a Compoſition may be made which ſhall bind during the life of him that made it, though not his Succeſſors. Mich. 6 Jac. in C. B. *Mildmay* and *Huttons* Caſe.

35. In an Action for Tythes, a Preſcription was laid, That 21. 9 d. had been paid for 11. Doles of Meadow, the Caſe was, That theſe 11. Doles were parcel taken out of a great Meadow; and the Witneſſes did prove, That a third had been paid for every Dole of the whole Meadow, of which the 11. Doles were parcel. It was adjudged in this caſe againſt the Plaintiff, becauſe he layed his preſcription entire, and ſeverall thirds for every Dole, though it did amount to ſo much:

and

and thereupon the Plaintiff was Nonſuit. 13 Car. *Setons* Caſe.

36. Note; That if a preſcription be layd to pay a *Modus Decimandi* to 100 Acres, or to ſeveral things, if there be a failer of one Acre, or of one thing, it is a failer of the whole Preſcription: and ſo it was adjudged, 15 Car. in Sir *Arthur Robinſons* Caſe. See *Claytons* Reports, Sect. 135.

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4. *Where, and in what Court, the Parſon or Vicar muſt ſue for his Tythes: And of Actions brought upon the Statute of* 2 E. 6. *for not ſetting forth of Tythes; and how the Proceedings muſt be in ſuch Actions. Of the Subſtraction of them; and what Remedy, and where, for the ſame.*

1. THe proper Court for a Parſon, or Vicar, to ſue for his Tythes, not paid or with-holden from him by his Pariſhioners; or for the profits of his Church taken from him by another Parſon, is the Eccleſiaſtical Court by a Libell there preferred. *Fitzh. na. br.* in the Writ *Spoliation.*

2. If one Parſon take away the Tythes or Profits belonging to the Church of another Parſon; If the Tythes and Profits do not amount to the 4th part of the value of the Church, he ſhall have a *Spoliation* againſt him in the Spiritual Court, although they claimed by ſeveral Patrons; and if they claim both by one Patron, there the one ſhall have a *Spoliation* againſt the other, although the profits do amount to above a fourth part, as to a third part, or to the moiety of the Church, becauſe the Patronage doth not come *in debete.* But if the Profits do amount to above the fourth part of the Church, and they claim by ſeveral Patrons, that if one Parſon ſueth a *Spoliation* in the Spiritual Court againſt the other, the Party grieved, (ſhall have an *Indicavit*, which) is the Patron (which is in the nature of a *Prohibition*) unto the Spiritual Court, becauſe the Right of the Patron doth come into Debate: But where the Right of the Tythes doth onely come Debates, and not the Patronage, there the Juriſdiction doth belong unto the Spiritual Court. *Cook* Select Caſe, in the Caſe *de Modo Decimandi*, 38, 39, 40, 46. 38 H. 6. 20. by *Forteſcue*, 26 H. 8. 3. &c.

3. If there be Contention *De jure Decimarum, originem habens de jure Patronatus tunc ſpectat ad legem Civilem*, by the Opinion of all the Juſtices. Mich. 29 Eliz. in B. R. in *Buſhie*, the Vicar of *Paucas* Caſe. *Godbolt* 63. And in that Caſe, it was ſaid, That *de mero jure*, the Parſon is to have all the Tythes, if there be no Endowment of the Vicarage; and ſo it was holden. Paſch. 15 Car. in B. R. That a Vicar cannot have Tythes, but by Guift, Compoſition, or Preſcription; for that all Tythes *de jure* do belong to the Parſon. *Marſh.* 11.

4. An Action of Treſpaſs was brought by a Parſon againſt a Vicar for *underwoods*, and each of them did claim the *underwoods* by Preſcription, as his Tythes, that (although their Claim was by Preſcription, yet becauſe the Right of the Tythes was in Debate onely, the Temporal Court was ouſted of the Juriſdiction of them. 22 E. 4. 24. But if a Parſon or Vicar claim a portion of Tythes by Preſcription onely, which is a Temporal thing, and ſueth in the Spiritual Court; It was holden by *Suit* and *Clerk* Juſtices, 29 Eliz. in the Kings Bench, That a Prohibition lyeth.

5. *Spratt*, Sub-Deacon of *Exeter*, did libell againſt *Nicholſon*, Parſon of A. in the Spiritual Court, *pro annuali penſione de* 30 l. out of his Parſonage, and ſhewed in his Libel, How that *tam per realem Compoſitionem quam per antiquam et laudabilem conſuetudinem, ipſe et Predeceſſores ſui habuerant et habere conſueverant prædictam annualem penſionem*, out of the Parſonage of A. It was adjudged in this Caſe, That although he obtained the ſame Penſion by Temporal Grounds, *viz.* by Preſcription, and real Compoſition; yet becauſe the Parſons were both Spiritual Perſons, he had his Election to ſue for the ſame in the Spiritual Court, or in the Temporal Court: and that the Statute of 34 H. 8. doth licenſe Spiritual Perſons, to ſue for Penſions in the Spiritual Court: But if a Spiritual Perſon, that hath ſuch a Penſion by Preſcription, bring a Writ of Annuity for the ſame (as he may do) and do declare upon the Preſcription, he cannot afterwards ſue for the Annuity in the Spiritual Court by the name of a Penſion; for that he hath determined his Election; and that if he doth, then in ſuch Caſe a Prohibition will lye. Mich. 10 Jac. in C. B. *Spratt* and *Nicholſon's* Caſe. *Godbolt* 196.

6. In Errour, brought for Reverſing of a Recovery in a Writ of Entry into the Poſt. The Recovery was of the Manor of F. and ſix Meſſuages, and of the Yearly Rent or Penſion of 4 Marks, iſſuing out of the Rectory of F. and of the Advowſon of the Church of F: And amongſt others, Errour was aſſigned, becauſe he demands the Advowſon of the Rectory; and alſo becauſe the Demand was in the Diſjunctive a Rent or Penſion:

For

For if a Penſion iſſuing out of a Rectory, ſhall be ſaid to be a thing meerly Spiritual, and not to be demanded by our Law, or meerly of another nature, then the Rent it ſelf, wherewith it is contained by the word (*Or*) then it is Erroneous. But it was holden by the Court, That a Rent and a Penſion iſſuing out of, &c. ſhall be taken to be all one: For if a man grants a Penſion of 20 *s.* a year, iſſuing out of the Manner of D; or of the Rectory of S, theſe are Rents iſſuing out of them: and if the Demand had been of an Annual Rent, or an Annuity iſſuing out of the Rectory, this had been good: And therefore it was holden by the whole Court, that the Demand was good; and eſpecially being in a Common Recovery, which is a Common Aſſurance of the Realm; and the Judgment was affirmed. Paſc. 35 in Eliz. B. R. *Crocker* and *Dormer's* Caſe. *Poph.* 23.

7. A Parſon Libelled for Tythes in the Spiritual Court, and ſet forth, That the Tythes were ſet forth, and that the Defendant did hinder and ſtop him to carry them away: But becauſe he did not ſue there upon the Statute of 2 E. 6. for he doth not mention the double value as he ought, and as it was agreed by all the Juſtices he ought to have done; nor mention the Statute as he ought to do; a Prohibition in that Caſe was awarded. Paſc. 17 Car. in C. B. adjudge, acc.

8. It was moved, to arreſt Judgment in an Action brought upon the Statute of 2 E. 6. becauſe the Plaintiff ſaid, the Defendant was Occupier, but did not ſhew what Intereſt he had: But it was holden by the Court, That he needs not ſo to do: For whoſoever taketh the Tythe away is a Treſpaſſer, and an Action lyeth againſt a Diſſeiſor for Tythes; and if one collecteth them, and another carryeth them away, an Action will lye againſt any of them.

9. Note, It was adjudged, That if a Pariſhioner ſetteth forth his Tythes, and they ſtand upon the Land two or three days, and afterwards he taketh and carryeth them away; That this is no ſetting forth of the Tythes within the Rent of 2 E. 6. Mich. 10 Car. in B. R. *Anderſon's* Caſe adjudged.

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5. *Where, and what perſon ſhall pay Tythes, and what not: Of what things Tythes ſhall be payed, and of what not: And what ſhall be ſaid a good* Modus Decimandi *for payment of Tythes, what not; and of divers other things concerning the payment of them, And the difference between Prædiall, and other perſonall Tythes.*

1. ALL Tythes are Prædiall, Perſonall, or Mixt: Prædiall Tythes are ſuch as encreaſe, or renew yearly on ground, as Corn, Grain, Graſſe, Hops, Saffron, Woad, Hemp, Flax, and other profits ariſing meerly off the Ground. Perſonall Tythes, are thoſe which are paid of the profits of ſuch things as are gained by the Induſtry of man; Mixt Tythes, are thoſe which are called Prediall immediats, as Calves, Lamb, &c. which come not immediately off the ground, but proceed of things maintained out of the ground: of all theſe ſorts, Tythes ſhall be paid, but with this Proviſo, or Limitation, That the party who is to pay the Tythe of them, have a property in them; For of things which are *feræ naturæ*, and of which a man hath not an abſolute property: Or of things which are meerly for pleaſure, Tythes ſhall not be paid: And therefore of Apes, Monkeyes, and the like, Tythe ſhall not be paid, 12 H. 8. 4. by all the Juſtices.

2. Note, There are *Decimæ Majores, et Decimæ minutæ*: In Treſpaſſe for taking of two Loads of Woad; the Jury found, That if they were *Minutæ Decimæ*, then the Jury found the Defendant guilty, if they were not *Minutæ Decimæ*, then for the Plaintiff: It was ſaid for the Plaintiff, that without more circumſtances, it ſhall not be intended *Minutæ Decimæ*, for it may be a great quantity of Woad may be ſowen, and the greateſt part of the Commodity in the Pariſh may conſiſt in it, for *Minutæ Decimæ* are but of ſmall conſideration in a Pariſh, as Hearbs in a Garden, and ſuch like; and therefore Woad ſowen in a Field, is not *Minutæ Decimæ*: It was Reſolved by the Court, That Woad growing in the nature of an Hearb, the Tythe thereof ought to be accounted *Minutæ Decimæ*, and belong to the Viccar. And the Dean and Chapter of *Norwich's* Caſe, Paſc. 42 Eliz. was vouched to prove it, That the tythe of 40. Acres of Land ſowed with Saffron, did belong unto the

the Vicar, and not to the Parſon, becauſe they were *minuta Decima*. Hill. 1 Car. in C. B. Sir *Richard Udall* and the Vicar of *Alton's* Caſe. *Croke*, 1. Part, 20. See *Hutton*. 77. the ſame Caſe.

3. A Prohibition was prayed becauſe the Parſon Libelled in the Spirituall Court for the tenth part of a Bargain of ſheep, which had depaſtured in the Pariſh from *Michaelmas* to our *Lady-day*: the party ſurmiſed, that he would pay the tenth part of the Wool of them, according to the cuſtome of the Pariſh: The Court would not Grant a Prohibition, for that, by this way, the Parſon might be defrauded of all, and the Sheep being now gone to another Pariſh, he cannot have any Wooll at this time, becauſe it was not the time of Shearing. Note in that Caſe, It was ſaid, That *de animalibus inutibilibus*, the Parſon ſhall have the third part of the bargain for depaſture, as Horſes, Oxen, &c. but *de animalibus utibilibus*, he ſhall have tythe in *ſpecie*. Mich. 2 Car. in B. R. *Hob*. 197.

4. If a Parſon of a Church purchaſeth a Mannor within his Pariſh, by this purchaſe, and Unity of Poſſeſſion, the Mannor which before was Tytheable, is now made *Non Decimabilis*, becauſe he cannot pay Tythes to himſelf, but if he maketh a Leaſe of his Parſonage and Rectory to a ſtranger, the Parſon himſelf ſhall pay tythes of his Mannor to his Leſſee, and ſo if the Parſon maketh a Feoffment of his Mannor, the Feoffee ſhall pay Tythe to the Parſon, becauſe Tythes are due by the Law of God *ex debito*, and cannot be extinct, into whoſe hands the Lands come, unleſſe they come to the hands of the Parſon himſelf. Mich. 30 H. 8. *Dyer*, 43.

5. Tythes ſhall be paid of Pheaſants, Partridges, but they are not Prediall, but Perſonall; ſo it is of Coneyes taken in a Warren, and of Doves in a Dove-houſe; they are not Prediall, and they cannot be ſet forth; But Quære 15 Car. in B. R. by *Barkley* Juſtice, If Tythes ſhall be paid of Coneyes, becauſe they are not Tytheable, but by Cuſtome. A Faukner who Hauks for his pleaſure, ſhall not pay Tythe of the Foul which he takes, but, If a Fowler kill Foul, and make profit of them; It hath bin holden, he ſhall pay a perſonall Tythe for them: If a Man ſteals Conyes out of a Warren, or Doves out of a Dove-houſe, he ſhall not pay Tythe of them, becauſe he is not lawfull owner of them; and the Law gives him not a property in them: And the right Owner of them ſhall not pay Tythe of them, becauſe he hath not the profit of them. Paſc. 15 Car. adjudged acc.

6. If Cattell be pawned, or pledged, the Gagee ſhall pay Tythe of them, becauſe he is Owner of them for the time; But if a man bail goods to Re-bail, Tythes of them ſhall not be payed by the Baylee, becauſe he hath no property in them, but onely a Re-bailer, *ibid.*

7. A Parſon Libelled in the Spirituall Court for the Tythes of a Fulling-Mill, and ſuggeſted, that the Miller fulled every Week 40 Cloaths, and did gain of every Cloath 2 s. Wherefore he demanded Tythes for them: A Prohibition was Granted in that Caſe; for it was ſaid by the Juſtices, That by the Law of the Land, he ought not to pay Tythes of ſuch Mills; For ſuch things as come onely by the Labour of men, Tythes are not payable, but of things which are renuable every year. Hill. 16 Jac. in B. R. *Dawbridge* and *Johnſon's* Caſe. *Cro*. 2. Part, 523.

8. If Land lyeth Fallow every two or three years, the ſame is a charge unto the Owner, and Tenant for that time, and an advantage to the Parſon in the bettering of his Crop the year following, when the ſame is ſowed with Corn or Grain; And therefore, although the Graſſe and feeding of the Fallow-ground for that year, be ſome ſmall profit to the Owner of the ſoil, yet he ſhall not pay Tythe for the ſame, As it was adjudged, Paſc. 7 Jac. in C. B. But ſee 15 Car. by *Barkley* Juſtice, in C. B. it was adjudged, That if Lands be Tytheable, And the Tenant or Occupier of the Land, will not Plough it, or Manure it, eſpecially thereby to prejudice the Parſon; That in ſuch Caſe the Parſon may ſue the Tenant in the Eccleſiaſticall Court to have Tythe of that Land.

9. Tythe ſhall not be paid of Quarreys of Stone, nor of Tyle, Brick, Lime, Gravel, Sand, and Clay, for theſe are parcell of the Inheritance, and the Parſon or Vicear have the Tythe of the Graſſe growing upon the ſame Lands, and the Land ſhall not pay a double Tythe, *Regiſter*. 55. *Fitzh. Nat. Br*. 53. ſee *Br*. to *Diſmes* 18. See Mich. 15 Car. in B. R. in *Skinner's* caſe. It was adjudged, That Tythes ſhall not be paid of the Roots of Coppice-Woods which is grubbed up, unleſſe it be by Cuſtome. *Marſh*. 58.

10. Note, That 20 Eliz. It was the *Opinion* of *Popham* Chief Juſtice, and of all other the Judges, That Coals are not Tytheable, and therefore a Preſcription, *de Non Decimando*, in them is good.

11. If Wood be felled for fencing of the Corn, or Paſtures, The Parſon or Vicear ſhall not have Tythe of it; And if there be Parſon and Vicear in one Church, and the Vicear hath the Tythe of Woods, and the Parſon the Tythe of the Paſtures; And Wood be felled for fencing and incloſing of the Paſtures, the Vicear ſhall not have Tythe of the Wood. Hill. 15 Jac. in C. B. *Hide* and *Ellis's* Caſe. adjudged,

12. If

12. If Wood be cut and imployed for Hop-poles, where the Parſon or Vicar have Tythe Hops, they ſhall not have Tythe of the Hop-poles. So if a man have a great Family, and much Wood be felled, and ſpent in houſe-keeping, Tythe ſhall not be paid of ſuch Wood, by *Hobart* Chief Juſtice. Mich. 15 Jac. in C. B. *White* and *Bickerſtaff*'s Caſe. Quære that Caſe.

13. A Prohibition was granted to ſtay a Suit for Tythe Wood, upon a ſurmiſe, That the Wood was ſpent in his Houſe for firing, and ſhews, That the Cuſtome in the ſame Pariſh is, That the owners of any houſe and Land in the ſaid Pariſh, who pay Tythes to the Parſon, ought not to pay Tythe of Wood ſpent for Fewell in their houſes; And Iſſue being upon this Cuſtome, It was found for the Defendant. It was moved in Arreſt of Judgment, That although it be found there is no ſuch Cuſtome, That he ought not to pay Tythe for Wood ſpent in his houſe, nor for fencing-ſtuff for Hedges, but *per legem terræ* ought to be diſcharged of them: But it was Reſolved by the Court, That it is not *de jure per legem terræ*, that any be diſcharged of them; For it is uſuall in Prohibitions, to alledge Cuſtomes, or by reaſon of other Lands whereof he payes Tythes, that he is diſcharged of that Tythe, but not to alledge that *per legem terræ*, he is diſcharged; And in this Caſe, the Plaintiff in the Prohibition having alledged a Cuſtome; and it being found againſt him, It was adjudged for the Defendant, That a Conſultation ſhould be Awarded. Trin. 4 Car. in C. B. *Cro.* 1. Part, 80. *Newton* and *Fermor*'s Caſe.

14. A Prohibition was Granted againſt the Parſon of W. in the County of L. for ſuing in the Spirituall Court for the Tythe of Trowts taken in a River, becauſe being *feræ naturæ* they are not Tytheable, and a Preſident was ſhewed, 5 Car. where a Prohibition was Granted againſt the ſame Parſon for ſuing for Tythe Eeles taken in the River, becauſe they were *feræ naturæ*: And it was ſaid, That in *Yarmouth*, was a ſuit for Tythe Herrings taken in the Sea, but they could not prevail in it. *Jones* Juſtice ſaid, That in *Wales* they uſe to pay Tythe for Herrings; And in *Ireland* it is a Common courſe to pay Tythe for Salmons taken in Rivers. It was ſaid, That that may be peradventure by Cuſtome, for otherwiſe Tythes be not for Fiſh taken in Rivers. Hill. 9 Car. in B. R. *Cro.* 1. Part, 247. See and Note, That by the Cuſtome of the Realm, Tythe ſhall be paid for Fiſh taken in the Sea; but the tenth Fiſh ſhall not be paid, but a ſmall ſum of mony in lieu and conſideration of the Tythe: But if Fiſh be taken in a Pond, or in a ſeverall Piſcary, and not in the Sea, or in any open River, there the Owner ſhall pay Tythe thereof as a prediall Tythe which ought to be ſet out within the Statute of 2 E. 6. Trin. 8 Jac. in C. B. The Earl of *Deſmond*'s Caſe. Mich. 15 Car. in B. R. adjudged acc. See Trin. 9 Car. in B. R. *Cro.* 1. Part, 192. acc.

15. A Prohibition was prayed, for ſuing for divers kinds of Tythes, and *inter alia*, for Honey, upon a ſurmiſe that it was not payable, that Bees are *volatilia*: It was thereupon demurred, But the Opinion of the Court was, That Tythes are to be paid for Honey, for ſo is the book *Fitzh. Nat. Br.* 51. acc. And therewith agreeth *Linwood*; Wherefore the Court Awarded there ſhould be a Conſultation. Trin. 15 Car. in B. R. rott. 1227. *Barſcot* and *Norton*'s Caſe. *Cro.* 1, Part, 403.

16. Tythe ſhall not be paid of After-paſture, where tythe hath bin paid before of the Graſſe of the ſame ground, unleſſe by Covin there be left more Graſſe ſtanding upon the Ground, with an intent to deceive the Parſon, then there hath bin want to be *teſte*. And ſo it is of Rakings of Corn or Grain: for by the Law of *Moſes*, None ought to rake their Grattens, but to leave the ſame to the Poor and Orphans; And the Law will not give to the Parſon or Vicar, tythe of that which is appointed for Almes. Mich. 6 Jac. in C. B. *Smith*'s Caſe. and Paſc. 7 Jac. in C. B. adjudged accordingly.

17. A Parſon of B. Libelled in the Spiritu-all Court againſt C. an Inholder becauſe that the ſaid C. took all the benefit of his Paſture by putting in Gueſt-Horſes into his Paſture; Whereupon C. prayed a Prohibition, but it was denyed by the Court; for that it is Tytheable in this Caſe. But it was ſaid, That if C. had taken a Crop of Hay, and afterwards he had put his Gueſt-horſes into the paſture; in that Caſe, It had not bin tytheable, becauſe he had tythe of the Land before. Trin. 16 Car. in B. R. *Richardſon* and *Cobbell*'s Caſe. *Poph.* 142.

18. Tythe ſhall not be paid of beaſts of the Plough, or Husbandry, but if a man keepeth Cattell upon his grounds, that they be ready for the pail, and afterwards ſell them and make profit of them, tythes ſhall be payed for them. Mich. 8 Car. in B. R. *Baxter* and *Hope*'s Caſe. *Brownlow.* 2. Part, acc. Trin. 20 Jac. *VVinch.* 33. acc.

19. If a man let out his paſture, reſerving the Paſture for a Horſe, for himſelf to ride upon about his Husbandry affairs; Tythe ſhall not be paid for the paſture of this Horſe, but if a man keep and breed Horſe in his paſture to ſell them, there a Tythe ſhall be paid for the Horſes paſture. Trin. 15 Jac. in B. R. *Larking* and *Wild*'s Caſe. *Popham*, 126. See Trin. 9 Jac. in B. R. *Pothill* and *Mayes* Caſe. *Baſſiv.* 1. part, 171.

20. Note, in *Fitzh. Nat. Br.* 53. No tythe ſhall be paid for Agiſtment of Cattell; But the Law is now taken to be otherwiſe, That tythe ſhall be paid for Agiſtment, and that by the Owner of the Lands, and not by the Owner of the Cattell: and the reaſon is, for that the Parſon or Viccar may not certainly know whoſe Cattell they are, and therefore the beſt ſhall be taken for the Church, and that which is moſt certain, and therefore tythe ſhall be paid for them by the Owner of the Soil where the Agiſtment is, and who took the Cattell to Agiſt: And ſo it was agreed by *Cook* and *Foſter*, Juſtices in the Argument of *Baxter* and *Hopes* Caſe. Mich. 8 Jac. in C. B.

21. If Sheep after they be ſhorn, dye before the Feaſt of *Eaſter* next following, tythe ſhall not be paid of the Wool of thoſe Sheep. 1. Becauſe they are but of ſmall and no value. And 2. Becauſe the Owner of the ſheep hath paid tythes for them the ſame year, and there ſhall not be a double tythe paid for one and the ſame thing in one year. 3. Tythe ſhall be paid of the clear profit onely, but if the Sheep do dye before the Feaſt of *Eaſter*, all the profit of them is loſt, and therefore to demand tythes of them, were *Afflictionem addere afflicto*. 15 Car. in B. R. adjudged. See Mich. 2 Car. in B. R. *Poph.* 197.

22. A Cuſtome was alledged to pay tythes in kind for ſheep, if they continue in the Pariſh all the year, but if they be ſold before ſhearing time, then to pay but *ob.* for every one ſo ſold: It was holden by the Court to be an unreaſonable Cuſtome, for in ſuch Caſe the Parſon ſhall be defeated of his tythes. Paſc. 17 Car. in C. B. *Weeden* and *Hardens* Caſe, *Marſh.* 79.

23. To have a Prohibition, a man ſurmiſed, That he was ſeiſed of a Meſſuage, and of ſeverall parcells and quantities of Arable Lands, Meadow and Paſture, and kept upon them Cattell for Husbandry and the plough; and that he uſed to rear many Colts, and young bullocks to ſupply the ſtock of Horſes and Oxen for the plough; and uſed to keep Milch-kine, Heifers, and ſheep for increaſe of ſtock, and maintenance of his Family; and alſo alledged a Cuſtome, that they uſed to clip the Wool from the necks of their ſheep for the preſervation of them, and at Shearing, they uſed to pay the tenth Fleece, in conſideration whereof they uſed to be diſcharged of Neck-wool: Alſo that every Pariſhioner and Inhabitant who kept any Oxen, Steers, or Bullocks of his own by way of Agiſtment, uſed to be diſcharged from the payment of tythes for them; and alſo, that if any kept any dry Heifers *pro ſupplemento ſtauri vaccarum*, to be diſcharged of the payment of tythes for ſuch Heifers; Iſſue being joyned upon theſe ſeverall Preſcriptions, and found againſt the Plaintiff; It was moved, no Conſultation might be Awarded, but it was adjudged for the Defendant: For the Prohibition is grounded upon the Preſcription, and being found againſt it, that they have uſed to pay for agiſted Cattell, it is good, and he doth not claim to be free from Cattell agiſted of his own proper Cattell, but generally for all Cattell agiſted, which is not reaſonable, nor ſtands with Law. Wherefore being found for the Plaintiff, a Conſultation was Granted. Trin. 18 Jac. in B. R. *Jouce* and *Parkers* Caſe. *Cro.* 2. Part, 575. See *Bolſtr.* 3. Part, 242, 243. the ſame Caſe.

24. Tythe ſhall not be paid of the Pelts, and Fells of ſheep which dye of the Rot, without a ſpeciall Cuſtome: For where the Viccar of *Kilmonſden*, in the County of *Somerſet* libelled in the Spirituall Court, for Tythe of the Wooll of Sheep which dyed of the Rot, a Prohibition was Granted. Trin. 3 Car. in B. R. *Aſhton* and *Willes's* Caſe.

25. A man Libelled to have Tythe of Mills, upon a ſuggeſtion of a *modus Decimandi* for the ſame; a Prohibition was Granted: In that Caſe, it was ſaid by *Coke* Chief Juſtice, That in ſome Caſe Tythe is payable of Mills, and in ſome Caſes not. No perſonall Tythe by the Statute is to be paid of Mills, but where by ſpeciall uſage the ſame hath bin paid; and whereas a *modus Decimandi* was alledged to pay a Tythe for Mills, It was Reſolved, That the *Modus* did not extend to Mills newly erected; upon the Statute of *Articuli Cleri*, Fer *de molendino de novo erecto non ſolvuntur Decimæ*. Trin. 14 Jac. in B. R. *Jakes's* Caſe. *Bolſtr.* 3. Part, 212.

26. If Ground be barren *ſuapte Natura*, tythe ſhall not be paid of it. Mich. 11 Jac. in C. B, *Sharrington's* Caſe, adjudged acc. But of Underwoods digged up by the Roots, tythe ſhall be paid, and ſo of Hedg-rowes.

27. If a Marſh or Meadow by accident, as by Inundation, or by ill Husbandry be over-run with buſhes, thorns, and the like, yet it is not barren Land, but the Parſon ſhall have tythe of it. Hill. 38 Eliz. *Sharrington* and *Fleetwood's* Caſe. in B. R. adjudged acc. If ground be barren, and tythe Lamb and Wool have bin paid of the ſame for 30 years together, and afterwards by the Manurance and labour of man, the ſame is made fertile, and it doth bear Corn or Grain; The Owner of the Lands for ſeven years, ſhall pay ſuch tythe of it as he paid before. See 2 Eliz. *Dyer*, 170. See 15 Car. in B. R. In *Sugden* and *Cottell's* Caſe. Where a man ſtocked up Woody ground, and ſowed the ſame with Corn, and before the ſtocking up of it, had bin paid for the Paſture of it, a valuable ſum of mony, That ſuch Land was not barren

ren Lands within the Statute of 2 E. 6.

28. If one do gain Land from the Sea, and that by his great coſt; and he afterwards turns this to Arable Land; It was the Opinion of the Court, That for this he ſhall clearly pay tythe, notwithſtanding his Coſts, and notwithſtanding that time out of mind, no Graſſe hath bin there growing; yet becauſe the ſame is not barren land of it ſelf, but onely by accident, *ſcil.* by reaſon of the Sand, and Salt water flowing over it, therefore ſo ſoon as this ſhall be re-gayned, and ſowen with Corn, tythes ſhall then preſently be paid for this Land. For that this Land bears good Corn, and that without marling, or any great coſt in Manuring of the ſame, which is a proof that the ſame is not barren ground within the ſcope and intention of the Statute of 2 E. 6. for by the meaning of that Statute, the Land ought to be barren *ſuapte naturâ*, or elſe it is not within the Statute. Paſc. 14 Jac. in B. R. *Wut* and *Backs* Caſe. *Bolſtr*, 8. part; 165, 166.

29. Tythe ſhall be paid of Heath, Fur, and Broom, unleſſe the party ſet forth a Preſcription, or ſpeciall cuſtome, That time out of mind there hath bin paid, Milk, Calves, &c. for the Cattell that have bin kept upon the ſame Lands, for then they ſhall not pay tythe of the Heath, Furrs, or Broom. Mich. 29 Eliz. in B. R. adjudged.

30. Of trees of the age of 20 years growth, and upwards, which are timber trees, tythes ſhall not be paid but of *Sylva Cædua*, and Under-woods, tythes ſhall be paid, but not of great trees by the Statute of 45 E. 3. Cap. 3. 11 H. 4. 89. 50 E. 3. 10.

31. It is ſaid 50 E. 3. 10. by *Belknap*, That of great trees, or of timber-trees, tythe was never demanded, and that by the Statute of 45 E. 3. But ſee *Cook* 11. part, in *Liford*'s Caſe, the words in the Statute of 45 E. 3. and in the book of 50 E. 3. *ſcil.* Great trees, muſt be intended, viz. Oaks, Aſh, and Elms, of all which, as well before the Statute of 45 E. 3. by the Common, and ſince, if they were of the age of 20 years growth, tythes was not to be paid, becauſe they of their nature were onely accounted timber-trees, and fit for building. But of Sallowes, Willowes, Maples, and the like, although they be above 20 years growth, yet tythes ſhall be paid of them.

32. In a Prohibition, the Queſtion was, If trees, which were above the age of 20 years growth become rotten, and be cut down for Fewell, ſhall pay tythe or not, It was the Opinion of the Court Tythe ſhall not be paid of them, for tythes are payable for an increaſe, and not for a decreaſe; and being priviledged in regard of their high nature, this priviledge ſhall not be loſt, in regard of its decreaſe. Hill. 43 Eliz. in C.B. *Rants* and *Patteſons* Caſe. *Goldesbr.* 145.

33. If Timber-trees have bin uſually topt and Lope, Tythes ſhall not be paid of the Tops and Loppings; for the Law, which priviledgeth the body of the Tree, doth priviledge the branches of the ſame Tree. *Cook* 11. Part, 48. *Liford*'s Caſe. So it Timber trees be *arida, ſicca, nec portans fructus, nec folia in eſtate, nec exiſtens, Maremium*, yet, becauſe ſometimes it was an inheritance which was diſcharged of Tythe, although it be now become Dotard, Tythe, ſhall not be paid of the ſame, for the quality remaineth, although the Eſtate of the Tree be changed. *Cook* 11. Part, 81. *Bun*'s Caſe. See Paſc. 8 Jac. in C. B. Doctor *Newman*'s Caſe. *Godbolt*. 175. acc. Hill. 2 Jac. in B. R. *Brook* and *Rogers*'s Caſe. *Cro. 1.* Part, 100.

34. If a great Wood do conſiſt for the moſt part of Underwoods which are Tytheable, and ſome great Trees or Beeches grow therein, *Sparſim*, Tythe ſhall be paid of the whole Wood, unleſſe they be ſpecially excepted: And ſo if a Wood doth conſiſt for the moſt part of Timber-trees, and there is ſome ſmall parcell of Underwoods, or Buſhes growing in the ſame Wood; The priviledge of the great Wood and Timber-trees, ſhall priviledge the reſt of the Under-woods from Tythes to be paid for the ſame. Trin. 19 Jac. in B. R. adjudged. And Hill. 16 Jac. in C. B. *Leonard*'s Caſe, adjudged accordingly. *Croke*, 2. Part, 199. acc.

35. If a man top a Tree under the growth of 21 years, and ſuffereth the body to grow; and afterwards when the boughs are grown out again, he Top, and Lop it again, he ſhall not pay Tythe, although that the Tree was not priviledged at the firſt cutting, and ſuch was the Opinion of the whole Court of Common-Pleas. See *Brownlow*. 1. Part. 33.

36. If a Pariſhioner doth not ſet forth his Tythes, or ſubſtracteth them after they be once ſet forth, The Parſon may Libel againſt him for the ſame within the Spiritual Court; or elſe by the Statute of 2 E. 6. cap. 13. The Parſon or other Proprietor of the Tythes may have their Action in the Kings Temporal Courts, for the not ſetting forth, or ſubſtracting of them at their Elections, and ſhall recover the treble value of the Tythes in an Action of Debt: For although the treble value be not given to the Parſon, or other Proprietor of the Tythes, by any expreſſe words in the Statute: Yet foraſmuch as he is the party grieved, and hath the Right of the Tythes in him, the treble value is given to him. For whereſoever a Statute giveth a forfeiture or penalty againſt any one, who wrong-

ful detaineth or diſpoſſeſſeth another of his Right or Intereſt, in that caſe, he that hath the wrong ſhall have the forfeiture or penalty, and ſhall have his Action at the Common-Law for the ſame, or he may ſue in the Eccleſiaſtical Court for the ſame. Mich. 29 Eliz. *Wood's* Caſe adjudged. *Cook* 2. Part, Inſtitutes 650. But he ſhall in his Action brought at the Common-Law recover no Coſts, as it was adjudged 43 Eliz. in C. B. in Sir *Moyle Finches* Caſe: and ſo ſee Hill. 40 Eliz. in B. R. rott. 699. *Bidel's* Caſe, acc. But if the Parſon or other Proprietor will ſue in the Eccleſiaſtical Court for the ſubſtraction of the Tythes, he ſhall recover there but the double value of them; and the reaſon thereof is, becauſe in the Eccleſiaſticall Court he ſhall recover the Tythes themſelves, which is equivalent to the treble value at the Common-Law. *Cook.* 2. Part, Inſtitutes 651. *a.*

37. A Parſon did Libel in the Spiritual Court for the ſubſtraction of Tythes; and the Defendant in the Common-Pleas ſuggeſted to be diſcharged by priviledge within the Statute of 31 H. 8. and thereupon had a Prohibition: and Iſſue being joyned in the Court of Common-Pleas upon the Priviledge, the Plaintiff in the Prohibition was Non-ſuit, and a Conſultation awarded. And Sentence after was given in the Spiritual Court, that the party ſhould recover the ſingle value, and ſet forth the ſame in certain. *Et ulterius quod recuperet duplicem valorem*, and ſet the ſame in certain alſo: And after this Sentence, a new Prohibition was awarded, becauſe they exceeded the value in their Sentence, which was to be recovered in that Court; and it was adjudged in that Caſe, although the Sentence was not that he ſhould recover the treble value, yet becauſe the Sentence did amount to ſo much being laid together, a ſpecial Prohibition ſetting forth all the ſpecial matter ſhould be awarded. Hill. 11 Jac. in C. B. *Baldwyn* and *Girrey's* Caſe. *Godbolt* 245.

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6. *Divers Caſes concerning Tythes; the Payment and Recovery of them omitted and left out, of the former Diviſions of Tythes, and upon the Statute of* 2 E. 6. cap. 13.

THE Farmor of a Parſonage ſued in the Spiritual Court for Tythes of Saffron againſt the Vicar. The Vicar pleaded, Time out of mind, the Vicar and his Predeceſſors had had the Tythe of all Saffron growing within the Pariſh. The Plaintiff pleaded, that the Land where the Saffron was growing this year, ſod 40. years before had been ſown with Corn; and becauſe they in the Spiritual Court would not allow the Plea, there a Prohibition was prayed: Becauſe the Right of the Tythe did come in Debate, It was adjudged, that a Conſultation ſhould be awarded. So note, That by the Spiritual Law, the Vicar ſhall have Tythe of Saffron, of Land newly ſowed with Saffron; albeit, before the Parſon had Tythe of the Land being ſowed with Corn. Mic. 31 Eliz. in B. R. *Benfield* and *Feak's* Caſe. *Goldesbr.* 149, 150.

2. In a Caſe concerning Tythes, the Libel in the Spiritual Court was for Corn, Hay, and other things; and the Tenant of the Land did preſcribe to pay in one part of the Land, the third part of the Tenth; and in another part the moiety of the Tenth for all manner of Tythes. The Court did encline that the ſame was a good Preſcription; and a Prohibition was granted to the Eccleſiaſticall Court. Hill. 29 Eliz. in B. R. *Rooke's* Caſe. *Godbolt*, 120.

3. It was holden by the Court, That if a *Modus Decimandi* be for Hay in Black-Acre, and the party ſoweth the ſame with Corn 7 years together, the ſame doth not deſtroy the *Modus Decimandi*; but the ſame ſhall continue when the ſame is made again into Hay: And when it is ſowed with Corn, the Parſon ſhall have Tythe in kind; and when the ſame is Hay, the Vicar ſhall have the Tythe Hay, if he be endowed of Hay. Trin. 10 Jac. in C. B. *Brown's* Caſe. *Godbolt*, 194.

4. An Endictment was of Forcible Entry into Tythes, where the party ouſted prayed reſtitution. And whether the Endictment were maintainable was the Queſtion. For it was agreed, That an Aſſiſe did lye of Tythes by the Statute of 31 H. 8. and they be recoverable as a Lay-Inheritance. And it was moved, That Endictments ſhould be as well for Tythes as for Rents: And for Rent it appears, that Forcible Entry lyes 20 H. 6. 11. *Fitzh. Na. Br.* 49. Afterwards a Writ of Reſtitution was awarded by the Court. Mic. 6 Car. in B. R. *Cro.* 1. Part, 146.

5. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes; the Plaintiff ſhewed that two parts of the Tythes did appertain to the Rectory, and a third part to the Vicarage, and that he had a Leaſe for years of the Rectorie, and another Leaſe of the Vicarage: And for not ſetting forth of the Tythes, he demanded the treble value: Upon *Non Debet*, it being found for the Plaintiff, It was urged, in ſtay of Judgment, that he ought to have brought ſeveral Actions, being grounded upon ſeveral Leaſes, as his Title is ſeveral. But it was Re-

Reſolved, that the Action was well brought, in regard he had both Titles in him; and the Action is brought upon the wrong, becauſe he did not ſet out the Tythes. Hill. 2 Jac. in B. R. Sir *Rich. Champernon* and *Biſſ's* Caſe. *Cro.* 2. Part, 68.

6. Debt upon the Statute of 2 E. 6. The Plaintiff declared, That the Defendants were Occupyers of 128. Acres of Meadow in *Radley* and *Thorp*; and that the Abbot of *Abbington* was ſeiſed *de Decimis prædict. creſcent.* upon the ſaid Lands, and ſurrendred them to King *H.* 8. and afterwards they came to Queen *Eliz.* who *Anno* 36. *Regni ſui*, by her Letters Patents, deviſed *Decimas prædict.* to the Plaintiff for life, and that the Defendant cut down the Hay thereupon of the value of 20 Marks, and carryed it away, without paying Tythes. The Defendant demanded *Oyer* of the Letters Patents, which were, That the Queen *demiſit omnes illas Decimas ſuper quandam parcellam terræ vocat. Bremere in parochia de Radley nuper in tenura* J. H. *et omnes illas Decimas creſcent. ſuper quandam parcellam terræ vocat. Barton Bremere nuper in tenura* A. H. *in parochia de Radley prædict. Quæ nuper fuerunt parcella poſſeſſion. Monaſterii de* Abbington, *exceptis omnibus illis Decimis in Radley in tenura*, J. T. *verus redditus* 67 l. It was demurred to the Declaration, becauſe the Plaintiff had not entituled himſelf to the 28 Acres of Meadow: For by the Patents it is not expreſſed; but the Queen granted thoſe Tythes by the names in the Letters Patents: Nor is it averred, that any of thoſe Lands were any of the Lands in the Letters Patents, or that they were in the Tenures of ſuch perſons, nor ſhewed that theſe be any of the Tythes excepted. But the Opinion of the Court was, that the Declaration was good: For the Plaintiff declaring, that the Queen granted *Decimas prædict.* it is a ſufficient allegation, that thoſe Tythes paſſed by the Letters Patents; and that the Queen *conceſſit Decimas prædict.* without more, is a ſufficient averrement in it ſelf. And it was ſaid, That if the Queen had granted thoſe Tythes by thoſe means in the Patent, the Plaintiff needed not to have averred, that they were of ſuch a name named in the Patent, and were not excepted: But *Decimas prædict.* implies as much: wherefore the Court held the Declaration to be good; and Judgment was given for the Plaintiff. Trin. 7 Jac. in B. R. Sir *William Stonehouſe*, and Sir *Thomas Read's* Caſe. *Cro.* 2. Part, 679, 680.

7. Debt upon the Statute of 2 E. 6. for not ſetting forth Tythes. The Plaintiff declared, That he was Proprietor of the Rectory of B. for ſeven years, by a Demiſe. 10 *Martii*, 10 Jac. and that the Defendant, 27 *Aug. anno prædict.* did cut his Corn there growing; and 10 *Septem.* next following, carryed away the ſame, not ſetting out the tenth part, Being found for the Plaintiff, upon *Nihil Debet*, It was moved, that the Plaintiff by his own ſhewing had no cauſe of Action; for that the Defendants Intereſt was determined before the Tythes were carryed away, It was Reſolved, that though his Intereſt in the Land was determined, yet he remained Owner of the Corn; for if Corn be cut down, though a ſtranger take it away before ſeverance, yet the Action will lye againſt him. Mic. 11 Jac. in B. R. *Kipping* and *Swayn's* Caſe. *Cro.* 2. Part, 324, 325.

8. In Debt for not ſetting forth of Tythes upon the Statute of 2 E. 6. the Caſe was: Corn was growing upon the Gleab-Lands of the Vicar, which was diſcharged of Tythes being in his own uſe. It fell out, that the Vicar dyed before the Tythe was ſevered, and his Executors did cut and carry away the Corn; and he that had the Parſonage appropriate brought the Action: The Counſel of the Defendant prayed the Opinion of the Court, whether he might plead *Nihil Debet*: But the Court refuſed to deliver their Opinion in it, becauſe it hanged in Suit before them. Trin. 15 Jac. in B. R. *Horn* and *Cotton's* Caſe. *Hob.* 387.

9. A Suit was in the Spiritual Court by the Defendant Vicar of A. for Tythes: A Prohibition was prayed upon the Plaintiffs Plea there, of a *Modus Decimandi*, to pay ſo much Yearly to the Parſon of A. in diſcharge of his Tythes. It was the Opinion of the Court, that this *Modus* between him and the Parſon will not diſcharge him from payment of Tythes to the Vicar, and therefore the Court granted a Conſultation. Mic. 14 Jac. in C. B. *Winter* and *Child's* Caſe. *Bolſtr.* 3. Part, 220, 221.

10. Note, by *Doddridge* Juſtice, If one be a Patentee of the King of a Rectory, he may ſue for Tythes in the Spiritual Court: Sir *Tho. Vavaſour* was ſuch a Patentee. But if they in the Spiritual Court will go about to try and determine the validity of the Grant, and of the Kings Letters Patents; as whether *Dominus Rex conceſſit*, or not, they having no power ſo to do, this Court will grant a Prohibition. Trin. 10 Jac. in B. R. vouched in *Robinſon* and *Walkers* Caſe. Mic. 14 Jac. *Bolſtr.* 3. Part, 271.

11. In an Action of Treſpaſs for taking of three Load of Oats, the Caſe was, That Corn is ſet forth for Tythes, and the Owner of the Land takes it for *damage feaſant*, without making it to appear in pleading, as he ought to have ſhewed; That the Parſon had ſuffered the Corn to remain overlong upon his Land to his Damage. It was ſaid, that in this Caſe, It doth not appear, whether the Plaintiff hath brought his Action as the Parſon: and

and therefore the Defendant may well plead in Bar. The Parson where Tythes are set out hath a Liberty for a convenient time to come, and carry them away; and this Convenience of time is tryable by a Jury. If he exceed this, he shall be subject to an Action, and then by Judgment of Law he shall be taken to be a Trespassor *ab initio*: otherwise it shall be of a Licence in Fact given by the Parson himself. It was holden by the Court, if the Corn had continued over long, his Remedy had been by Action upon the Case: But it appearing in the Case, that the Defendant had no Title, and a Title appearing for the Plaintiff, Judgment was given for the Plaintiff against the Defendant. Hill. 22 Jac. in B. R. rott. 312. *Mountford* and *Sidley's* Case. *Bolstr.* 3. Part, 336, 337. See Trin. 21 Jac. in B. R. *Wiseman* and *Denham's* Case. *Godbolt*, 319.

12. Debt was brought upon the Statute of 2 E. 6. for not setting out of Tythes. The Case was, A Lease was made to two, they entred and occupied, and did not set out their Tythes, and Debt was brought against one of them; It was holden, the Action will not lye: But if one of them onely occupyeth the Land, there the Action will lye: And Sir *John Gerrards* Case was vouched. Mic. 8 Jac. in an Action of Debt brought upon this Statute against two Tenants in Common; and it appeared that one of them set out his Tythes, and that the other afterwards took and carryed it away; and it was adjudged, that the Action did lye onely against him that carryed it away. Mic. 8 Car. in C. B. *Cole* and *Wilkes* Case. *Hutton*, 121, 122.

13. The Inhabitants within the Parish of H. having a Chappel of Ease, had a Custome, that those within such a Precinct, ought to find a Rope for the third Bell, and to repair part of the Mother-Church: In consideration of which, they have been free from the payment of Tythes to the Mother-Church: Whether it were a good Custome, or not, was the Question: The Case was not Resolved, but Adjorned. Hill. 15 Car. in B. R. *Marsh.* 91.

Disseisin *and* Disseisor.

1. *Who shall be said to be a Disseisor, and who not; And what shall be counted a Disseisin: Of Land, Rent, or other thing; what not.*

1. TBeing a Disseisor made a Lease for years, rendring Rent; the Disseisee entred, the Lessee re-entred, claiming his former Estate, and payed Rent to the Disseisor: It was the Opinion of the Court, that notwithstanding his continuance of Possession, That he was a Disseisor; and that he could not limit his own wrong. Mich. 4. *Ma. Dyer*, 134. *Kirton* and *Brilling's* Case.

2. A Disseisor made a Lease for years, the Termor entred, the Lessor departed the Realm, and gave Commandment to his Lessee, That if the Disseisee made any entry upon him, that he should not suffer him to continue there, but keep the Possession alwayes against him as his Lessee; Afterwards the Lessor being beyond Sea, the Disseisee entred upon the Lessee, he put him out, and afterwards paid his Rent to the use of his Lessor, being absent; and whether his Lessor were a Disseisor, or Tenant of the Free-hold, without his expresse Agreement to the Disseisin, was the Question. It was the Opinion of *Saunders* chief Justice, That without an expresse agreement, after the second Disseisin, the Free-hold was not in him, to whose use the second Disseisin was; but others were of another Opinion. Pasc. 4. *Ma. Dyer*, 141. Sir *John Cuts's* Case.

3. A Lease was made for years, of the Scite and Demesnes of a Mannor; Afterwards the Lessor conveyed the same for the Joynture of his Wife for life, and afterwards he alliened the Fee-simple; and afterwards the Allienee received the rent by the hands of the Lessee; the Lessor dyed, the Wife entred, and claimed her Joynture, and held Court, and the Termor payed to her the Rent; And if the same was a Disseisin to the Allienee, was the Question, It was the Opinion of the Court, That it was at the pleasure of the Allience, to take the same to be a Disseisin, or not; notwithstanding the Termor continued the possession of the Land. Hill. 2 Eliz. *Dyer*, 178.

4. Note,

4. Note, In the Caſe of Aſſiſe betwixt *Penington* and *Morſe* in *Kent*; It was holden, That if a Tenant for Term of years ſurrendreth his Eſtate to his Leſſor, and yet continueth in Poſſeſſion alwayes, paying the Rent to the Leſſor, that the ſame is no Diſſeiſin, but at the Election of the Leſſor; The Caſe was, That the Termor levyed a Fine to the Leſſor, and yet continued the Poſſeſſion of the Land. Paſc. 38 H. 8. *Dyer*, 62.

5. Error was brought of a Judgment in *Ejectione firmæ*, where the Plaintiff Declared, That a Leaſe was made for 50 years, to begin at the feaſt of St. *Mich.* next to come after the death of J. S. and Averred the death of J. S. and that he entred, The Defendant pleaded, That *Non Ejecit*, the Plaintiff *Modo et forma*, upon which they were at Iſſue; It was found by Verdict: *Quod Ejecit modo et forma*, upon which Judgment was given, That the Plaintiff ſhould recover his Term, whereas it was not ſhewed the time when he entred, ſo as it might be the Term was ended before, nor did he ſhew when he entred, and it might be before *Mich.* and then he was a Diſſeiſor, and no Termor. The point, if he were Diſſeiſor, is not there Reſolved. Trin. 7 E. 6. *Dyer*, 89. *Cliffe*'s Caſe. Note, one *Alexander*'s Caſe was, The Plaintiff in an Action for Rent Declared, That he Leaſed to the Defendant for years rendring Rent; and it appeared, That the Leſſee entred before the day; And it was adjudged, That he was a Diſſeiſor, See Paſc. 3 Car. in B. R. A man made a Leaſe for years rendring Rent, the Leaſe to begin at *Michaelmas* after; And in Debt brought for the Rent, the Leſſor declared, *virtute cujus dimiſſionis* he entred, and no day of Entry was ſhewed. It was holden by the Court, that it ſhall be intended, That he entred at *Michaelmas*, and he ſhall not be accounted a Diſſeiſor; And by the Recovery of the Rent, the Leſſor and his Heirs are for ever after concluded to ſay, that the Leſſee was otherwiſe in, but by virtue of the Leaſe for years. See 14 H. 8. 12. by *Carell* acc.

6. If a man maketh a Leaſe of the Land of J. S. who hath nothing in the Land, rendring Rent, and the Leſſee entreth, and payeth the Rent, the Leſſor is the Diſſeiſor, *quod nota*; for that this acceptance of the Rent, doth amount to a Commandment. See 23 H. 8. 7. and 25.

7. If Tenant for years, or at ſufferance, make a Leaſe for years of Lands in their own names, the ſame is a Diſſeiſin, ſo as the Free-hold is in them; And ſo it is, If a man maketh a Feoffment upon Confidence, and occupieth at Will, and maketh a Leaſe in his own name, the ſame is a Diſſeiſin. But Quære there, If a man giveth power to his Tenant at Will to make a Leaſe, If the ſame be a Diſſeiſin. 12 E. 4. 12. 3 E. 4. 17.

8. The Guardian of an Enfant made a Feoffment; and the Heir brought no Aſſiſe without any Entry; And it was holden, That the Aſſiſe was well brought, for that, by the Entry, The Feoffee was a Diſſeiſor. 8. *Aſſ.* 28.

9. The Guardian Aſſigns Dower to the Wife where the Wife is not Dowable, they are both Diſſeiſors as to the Enfant, and yet ſhe is Tenant in Dower as to the Guardian, and ſhall be Attendant upon him. 21 E. 3. 4.

10. A Leaſe is made to two, and to the Heirs of one of them; Waſte is brought againſt him who had but an Eſtate for life, and a Recovery is had againſt him, the ſame is a Diſſeiſin of the whole of him who had the Fee. 14 E. 3. *Fitzh. Waſt.* 27.

11. Note, It was Reſolved by the Juſtices, That if a man levyeth a Fine *ſur Conuſans de Droit come ceo que il ad de ſon done*; and afterwards continueth the poſſeſſion, that he is a Diſſeiſor. Mich. 30 Eliz. in C. B. *Goldesbr.* 82.

12. A. ſeiſed of the Mannor of D. leaſed a Meſſuage, parcell of it to B. for years, rendring Rent, who held other Land of him, parcell of the ſaid Mannor at Will, and by Coppy, by ſeverall Rents: B. being ſeiſed of other Lands within the ſaid Mannor, in his Demeſne as of Fee, made a Leaſe for life to C. of the ſaid Meſſuage Land at Will, and by Coppy, and afterwards levyed a Fine, with Proclamations of all the ſaid Meſſuages, Lands, comprehending the Land which he held for years, at Will, and by Coppy, as his own Inheritance, by Covin to bar him who had the Inheritance, and five years paſſed. It was adjudged in that Caſe, That A. was not barred by the Proclamations and Fine: for it was Reſolved, That a Fine levyed by Tenant at Will, or by Coppy, who pretended no Title to the Inheritance, was not good by the Statute of 4 H. 7. of *Fines*, eſpecially the ſame being done by fraud: And it was Reſolved, That when Leſſee for years makes a Feoffment by Covin, which amounts to a wrong, and a Diſſeiſin, a Fine levyed by him who is *particeps Criminis*, and who pretends no right to the Land, ſhall not bind the Leſſor. *Cook* 3. Part, 77, & 78. *Farmers* Caſe.

13. Tenant for life, the Remainder in Fee: Tenant for life made a Leaſe for years, the Leſſee entred, Tenant for life Granted the Tenements aforeſaid to C. To have the ſaid Tenements from *Michaelmas* next for life, The Leſſee for years Attorned, C. entred, and made a Leaſe at Will, to whom the Tenant for life levyed a Fine, he in the Remainder entred: In this caſe, theſe points (amongſt other) were Reſolved. 1. That when C. entred by colour of the Grant, (which was made

made to begin at a day to come, which was void in Law) that he was a Diſſeiſor; and a difference was taken, when a Grant is utterly void at the beginning, and by no ſubſequent act can be made good, and a Grant good at the beginning, but requires ſome Ceremony ſubſequent to perfect it: in the one Caſe, if the party entreth, he is a Diſſeiſor, in the other, not. 2. Reſolved, That if the Fine had bin levyed to the Diſſeiſor himſelf, he who had the right in the Remainder might enter for the forfeiture, for a Right of a particular Eſtate may be forfeited, and an entry thereby given to him who had but a right to the Remainder. 3. Reſolved, That if the Diſſeiſee levy a Fine to a ſtranger, the Diſſeiſor ſhall retain the Land for ever, for the Diſſeiſee againſt his Fine, cannot claim, and the Conuſee cannot enter, for the Right which the Conuſor had, cannot be transferred to him; but by the Fine, the Right is extinct, of which the Diſſeiſor ſhall take advantage. *Cook* 2. Part, 55. *Buckler's* Caſe.

14. A man made a Feoffment in Fee, upon Condition to re-infeoff the Feoffer for life, the Remainder to his eldeſt ſon, and his Heirs; Afterwards the Feoffee entred, and took the profits without any agreement of the Feoffor, and made a Leaſe for years: It was adjudged in this Caſe, That when the Feoffer entred after the Feoffment, and took the profits, and made a Leaſe for years, the Law doth adjudge it a Diſſeiſin, although the intent of the parties was, that the Feoffor ſhould make a re-demiſe to him for life; for this Entry by wrong, and taking of the profits without the Agreement of the Feoffee, is a Diſſeiſin. *Cook* 2. Part, 59. *Julius Winnington's* Caſe.

15. The Duke of *Northumberland*, ſeiſed of divers Meſſuages in the Pariſh of Saint *Sepu'chres* in *London*, by Deed Indented for valuable conſideration, bargained, and ſold all his Tenements to the Lady *Lea*, in the Pariſh of Saint *Andrews* in *Holborn*, in the occupation of J. G. to have to her for life, the Remainder to K. her daughter, and her Heirs, the Lady *Lea* did enter into the Meſſuages: and took Husband T. C. and after the ſaid T. C. and the Lady his Wife, demiſed the ſaid Meſſuages to J. D. for 21 years, who entred, and took the profits: In this Caſe, It was Reſolved. That nothing paſſed by the bargain and ſale, but the bargain and ſale was void; for though the laſt certainty was true, that the ſaid Meſſuages were in the tenure of J. G. yet becauſe the firſt Allegation, that they were in the Pariſh of Saint *Andrews* in *Holborn*, was void, the bargain and ſale was void, and then the Lady *Lea* by her Entry, was a Diſſeiſor. *Cook* 3. Part, 10. *Dowties* Caſe.

16. Note, by *Bacon* Sollicitor-General, That it was adjudged 40 Eliz. in the Exchequer, That where the King made a Leaſe for life, who was ouſted by a ſtranger, that the ſame ſhall be ſaid a Diſſeiſin of the particular Eſtate, contrary to the Common ground which is, That a man cannot be Diſſeiſed of a leſſe Eſtate then a Fee-ſimple, 40 Eliz. in the Exchequer, *Godbolt.* 134.

17. In *Ejectione firmæ*; It was found, That C. Lord Admirall, ſeiſed of Lands in tail, in Conſideration of a Marriage betwixt W. his eldeſt ſon, and E. daughter to the Lord *St. John*, Covenanted to ſuffer a Recovery of the ſaid Land, to the uſe of the ſaid W. and E. the Heirs Males of the body of the ſaid W. with divers Remainders over. The Marriage took effect; W. with the aſſent of the Lord Admirall, occupied the Lands at Will; and 4 Jac. demiſed the Lands to J. S. and J. D. for 21 years, rendring Rent; the Leſſees enter; the Lord Admirall, and W. by Indenture, levy a Fine of thoſe Lands, to the uſe of W. and E. for the Joynture of the ſaid E. and the Heirs Males of the body of W. with Remainder over, and this was in purſuance of the firſt Covenants: 9 Jac. W. dyed without Iſſue Male of his body; J. D. dyed; J. S. by Indenture, in conſideration of mony, bargained, and ſold to *Charls* Lord *Howard*, ſon and Heir apparant of the Admirall, and to his Heirs: C. Lord Admirall dyed, *Charls* his ſon and Heir entred; the Defendant by the command of E. entred, and claymed the Land as her Joynture; *Charls* entred, and made the Leaſe to the Plaintiff; and in this Caſe, It was adjudged for the Plaintiff in the Common-Pleas. Whereupon Error was brought, and the Queſtion was, Whether by any of theſe Acts, there be a Diſſeiſin committed to *Charls* Earl of *Nottingham*, *Nolens Volens*. 2. If there be a Diſſeiſin, who ſhould be Diſſeiſor and Tenant to the Free-hold. It was Reſolved, That the Law will not impute, or conſtrue it to be a Diſſeiſin, unleſſe at the Election of *Charls* Earl of *Nottingham*, when as none of the parties intended it to be a Diſſeiſin, nor to ouſt him of the poſſeſſion, and it is at the Election of him to whom the wrong is done, if he will allow him to be a Diſſeiſor, or himſelf out of poſſeſſion, and the Court held, It ſhall not be intended, that the Son intended to Diſſeiſe his Father, but that the Leaſe was made by the aſſent of the Father, and the party to whom the Leaſe is made, doth not claim any Free-hold, but to have the Leaſe onely, and to pay his Rent, and there was no intent in any of the perſons to make a Diſſeiſin. 2. It was Reſolved, Admitting there was a Diſſeiſin committed by theſe Acts, That W. who made the Leaſe, is the Diſſeiſor, *quoad* all perſons, but the firſt Leſſor, but *quoad* the firſt Leſſee, they both are Diſſeiſors: For when Tenant at Will takes upon him to make

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a Leaſe for years, which is a greater Eſtate then he may make, that Act is a Diſſeiſin, And by this Leaſe made, and the Leſſee paying the Rent to him, and he accepting thereof, he is in as Leſſee, and the Leſſor is the Diſſeiſor, and hath the Reverſion expectant upon the Leaſe. It was therefore adjudged, That the Joynture made to E. ſtood good; And the Judgment given in the Common-Pleas, was reverſed. Hill. 7 Car. in B. R. *Blenden* and *Baugh's* Caſe. *Cro.* 1. Part, 221, 222.

18. A. Bargained, and ſold Lands to B. upon Condition, That upon the payment of 300 l. at the end of three years, it ſhould be void, and that in the Interim, the Bargainee ſhould not meddle with the profits of the Land; the bargainor occupied the Land, and made a Leaſe for ſeven years, and at the day doth not pay the mony; the Bargainee doth not enter, but (the Bargainor occupying it) he Deviſed the Land; It was adjudged in that Caſe, It was a good Deviſe: which could not be if he had been Diſſeiſed. Hill. 18 Jac. in C.B. *Prowſey* and *Bertram's* Caſe. *Cro.* 1. Part, 221. *ibid.*

19. A. and his Wife, ſeiſed of Land in the Right of his Wife by Indenture, with a Letter of Attorney, let the ſaid Land, *Habendum à die datu*, for the life of the Leſſee rendring rent, The Attorney made Livery the ſame day *ſecundum formam Charta*; the Leſſee entred, and paid the rent which was alwayes Received, the Wife dyed, her Heir without entry ſuffered a common Recovery, The Queſtion was, Whether it was good, The Opinion of the Court was, That the Leaſe was void, and that Livery, the ſame day it beareth date is void, to make it a good Leaſe. It was then moved, That one entring without Livery, was but Tenant at Will of the Feoffor, and cannot be a Diſſeiſor without an intent in him to make a Diſſeiſin, and without the intent of the Leſſor, to have it a Diſſeiſin: But admitting it to be a Diſſeiſin, yet ſuffering a Recovery, he and all under him were Eſtopped to ſay he was not Tenant of the Freehold, and therefore the Recovery was good; and to that Opinion the Court inclined. Mich. 10 Car. in B. R. *Bull* and *Wyat's* Caſe. *Cro.* 1. Part, 282.

20. Tenant for life, the Remainder to his ſon and Heir apparent in tail, the Father by Covin, made a Leaſe for years to A. who made a Feoffment to B. in Fee, to whom the Father did Releaſe with Warranty, and dyed, the Warranty diſcended upon the Son. It was Reſolved in this Caſe. 1. That the Son ſhould not be barred, for that the Feoffment by the Leſſee for years was a Diſſeiſin, and the Father himſelf is *particeps Criminis*, and agreeing unto it, and the Law ſhall adjudge upon the entire Act; and although the Father releaſed with Warranty, yet the Warranty is after the Diſſeiſin, and therefore it was a Warranty which began by Diſſeiſin. 2. Although that the Diſſeiſin was done to the Father himſelf who made the Releaſe, yet becauſe the Father did agree and conſent to the Diſſeiſin, the ſame ſhall not hinder, but that the Warranty beginneth by Diſſeiſin. 3. That although the Diſſeiſin was done immediately to the Son, who is to be bounden by the Warranty; yet becauſe this Diſſeiſin was a wrong to him, and deveſted his Remainder out of Court, It was a Warranty which began by Diſſeiſin. *Cook*, 5. Part. 79. *Fitchurbert's* Caſe.

21. The Queſtion was, If Tenant for the Term of the life of another man, doth continue, and hold in his Eſtate, after the death of *Ceſtuy que vie*, If he be a Diſſeiſor; It was the Opinion of the Court, That he was no Diſſeiſor; for there is no Freehold taken from the Leſſor, which the continuance of the poſſeſſion doth not take from him: But all the Juſtices held, That if Tenant at Will, or for years, or at ſufferance, made a Leaſe for years, this is a Diſſeiſin; And the Tenant at Will doth thereby gain a Freehold, and thereby doth claim a greater Eſtate then he ought: But if Tenant at ſufferance do grant Coppies, the Court was of Opinion, That they were good, for that he is *Dominus pro tempore*. and no Treſpaſſe will lye againſt him. Mich. 30 Eliz. *Rouſes* Caſe. *Owen.* 27.

22. If divers perſons do Diſſeiſe one to the uſe of another, or one of them; or with the aſſent of another; Albeit he to whoſe uſe the Diſſeiſin is done, is the ſole Tenant of the Land; yet the Law is, That the Coadjutors, Counſellors, or Commanders, all are Diſſeiſors, 50 E. 3. 2. And if a man Diſſeiſeth Tenant for life to the uſe of him in the Reverſion, and afterwards the Reverſioner agreeth to the Diſſeiſin; In this Caſe, the Reverſioner is the Diſſeiſor in Fee, becauſe by the Diſſeiſin made by the ſtranger, the Reverſion was deveſted, which cannot be re-deveſted by the Agreement of the Reverſioner, for that makes him a wrong doer, and no Reverſion in that Caſe can help him. *Cook* 1. Part, *Inſtitutes* 280.

23. Denyer is a Diſſeiſin of a Rent-charge, if it be demanded upon the Land, and there payable; but if the payment of the Rent is to be off the Land; there the Denyer to pay it, is no Diſſeiſin of the Rent. See *Plowden. Comment.* 71. acc.

24. If three Joynt-Tenants be of Land, out of which I have a Rent-charge, and I diſtrein upon the Land for the Rent charge, and one of the Joynt-Tenants doth Reſcous, that is a Diſſeiſin

done by them all, becauſe thereby all of them do detein the Rent. 34. *Aſſ.* 4. *br. Diſſeiſin.* 60. acc.

25. A. Granted a Rent Seck of 4 l. by the year to B. his ſon in Fee, going out of a houſe called the Unicorn in L. payable at *Mich.* at the houſe of the Son, the ſame to begin at *Mich.* after his deceaſe, and gave him Seiſin of it. The Rent was demanded at the houſe at *Mich.* and not paid; And whether it was a Diſſeiſin of the Rent was the Queſtion: It was Reſolved in this Caſe, That the demand of Rent off from the houſe out of which it was Iſſuing, was a good demand, and was a Diſſeiſin for not payment of it. Paſc. 14 Car. in B. R. *Smith* and *Smith's* Caſe. *Cro.* 1. Part, 365.

26. A man cannot be Diſſeiſed of a Rent-Service in groſſe, a Rent-charge, or a Rent-Seck, by Attornment, or payment of ſuch a Rent to a ſtranger, but at the Election of him to whom the Rent is due; But if the Diſſeiſee bring an Action againſt ſuch a Perſon, or taker of the Rent, he doth thereby admit himſelf to be out of poſſeſſion of it: And yet a Diſcent of a Rent in groſſe, bindeth not the right Owner, but that he may diſtrayn for it, albeit he admit himſelf to be out of Poſſeſſion, by bringing an Aſſiſe of it. *Cook.* 1. Part, *Inſtiutes* 323. acc.

27. If a man hath a Rent-Seck payable yearly at the Feaſt of *Eaſter*, and hath once Seiſin of the Rent, and *Eaſter* paſſeth, and no demand or tender made of the Rent; the Grantee after the day of payment may come to the Land, and there demand it; and although the Tenant of the Land be not there, yet upon ſuch demand, if none be ready there to pay the Rent, it is a denying of the Rent, upon which he who hath the Rent, ſhall have an Aſſiſe: But in the ſame Caſe, if the Tenant at the laſt inſtant of the Feaſt of *Eaſter*, be ready upon the Land to pay the Rent, and he who hath the Rent, nor any for him, cometh to demand, or receive the Rent; there he who hath the Rent, cannot come in the abſence of him who is Tenant of the Land, and demand it, and make him a Diſſeiſor, and render Damages and Coſts without any default in him. *Cook* 7. Part, 29. *Maund's* Caſe.

28. If the Lord granteth his Seignory upon Condition, and the Tenant payeth the Rent to the Grantee, and afterwards the Condition is broken, and the Lord diſtraineth for the ſervices, and the Tenant maketh Reſcous; the ſame is ſuch a Diſſeiſin for which he may have an Aſſiſe, and the firſt Seiſin ſhall be ſufficient to maintain it: If the Diſſeiſee Releaſeth to the Diſſeiſor upon Condition, and after the Condition is broken, the Diſſeiſee ſhall have an Aſſiſe of the firſt Diſſeiſin. *Cook* 4. Part, 9. in *Bevill's* Caſe.

29. In an Action of Treſpaſs the Defendant pleaded in Bar, that the Plaintiff within age by Indenture, and a Letter of Attorney made a Feoffment to the Father of the Defendant rendring Rent, and that after by Indenture, he confirmed *Tenementum prædict.* Habendum *tenement. prædict.* to him and his Heirs, and that his Father dyed ſeiſed. It was holden by the Court, (without Argument) that it was a void Feoffment, upon his own ſhewing, for being made by Letter of Attorney by an Enfant it was a preſent diſſeiſin; and that the Confirmation afterwards did not enlarge his eſtate. 2 Ma. *Dyer*, 109.

30. If a Warrant of Attorney be made to J. S. to deliver ſeiſin to J. D. upon a Feoffment upon Condition, and he delivereth Seiſin without the Condition, the ſame is a Diſſeiſin to the Feoffor: And ſo it is, If the Warrant of Attorney be to make Livery and Seiſin after the death of a ſtranger, and he makes Livery in his life-time, the ſame is a Diſſeiſin: and ſo it is if it be to make Livery to two, and the Attorney makes Livery to one, it is a Diſſeiſin. But if a Warrant of Attorney be to make Livery and Seiſin to one man, and the Attorney maketh Livery to two men, the ſame is no diſſeiſin; but the Livery and Seiſin is good to him to whom the Warrant of Attorney was to make Livery: and ſo if a Warrant of Attorney be to make Livery and Seiſin of white Acre, and the Attorney make Livery of white Acre, and black Acre; it is good for white Acre, and void for black Acre, and the ſame is no Diſſeiſin of the Feoffor. *Perkins* 39. acc.

31. In Errour brought upon a Judgment given in *London*, the Caſe was: Sir *Wolſtan Dixſey* brought Debt againſt Alderman *Spencer* for Rent upon a Leaſe made to *Spencer* by *William Bacchus*, who afterwards granted the Reverſion to *Dickſey*: the Defendant pleaded, That before the Grant of the Reverſion, *Bacchus* was ſeiſed, and ſhewed the Cuſtom of *London*, to make Inrollments of Deeds indented in *London*; and that before the Grant to *Dickſey*, he bargained the Reverſion to him by Paroll, depending which *Dixſey* entred into the Land, for a Forfeiture of the Term, becauſe he had claimed a Fee-ſimple, and *Spencer* re-entred with force, and his ſervant with him, but not with force: *Dickſey* brought an Aſſiſe of Freſh-force againſt him in *London*; and all this matter was there pleaded, and adjudged it was a forfeiture of the Term, and the Jury gave Damages, and the Court encreaſed them: and the Judgment was entred *Quod prædicti defendentes Capiantur.* Whereupon Errour was brought, and one Errour aſſigned was, becauſe the Judgment was *Capiantur*, where but one was a Diſſeiſor with Force. It was agreed by the Lord *Anderſon*, and other Juſtices in this

this Caſe, That two may be Diſſeiſors; the one with force, and the other not: As if I command one to make a Diſſeiſin, and he makes a Diſſeiſin with force: Alſo, if one entreth with force to my uſe, and I after agree; he is a Diſſeiſor with force, and I am not: But if a man be preſent when a Diſſeiſin is made with Force, he is a Diſſeiſor with Force. Another Errour was alleadged, becauſe the Coſts were trebled. But the Court made no doubt of that, but that they ſhould be trebled, and ſo they ſaid it was adjudged in the ſame Court in a *Staffordſhire* Caſe: The Judgment was affirmed. Mic. 29 Eliz. in C. B. Sir *Wolſtan Dickſey*, and Sir *John Spencer's* Caſe. *Goldesbr.* 42.

32. In Errour brought upon a Judgment, the Caſe was; An Aſſiſe was brought againſt five of 100. Acres of Land: Three of the Defendants were found not Tenants, and acquitted of the Diſſeiſin. Two were found guilty, *quoad* three Acres; and for the Reſidue, the Verdict was found for the two Defendants; and yet the Verdict was entred for the 100. Acres. Hereupon falſe Judgment was brought, That the Verdict was entred in other manner then it was given by the Jury. The Defendant in the falſe Judgment demurred upon it, and adjudged againſt him. Errour was brought of that Judgment, becauſe the five Defendants ſued the Writ of Errour; whereas three of them were acquitted, and had no loſs: but it ought to have been brought by the two onely. The Opinion of the Court was, That the ſame was a manifeſt Errour: Wherefore the Judgment was reverſed. Mic. 5 Car. in B. R. *Vaughan* and *Loriman's* Caſe. *Cro.* 2. Part, 138.

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3. *Where, and what things done by a Diſſeiſor ſhall ſtand in force againſt the Diſſeiſee, what not: Where the Diſſeiſee ſhall accord Charges by the Diſſeiſor; and what, and where not: And where, and by what not, the Diſſeiſor is purged and avoided; and when.*

1. A. Hath Iſſue B. and C. Enfants within Age, a Leaſe is made to A. for life, the Remainder to B, in Tail; the Remainder to C. in Tail. A. Tenant for life is diſſeiſed, and afterwards releaſeth to the Diſſeiſor with Warranty, and dyeth; and the Warranty deſcendeth upon B. being within age. Afterwards B. dyeth within age, C. his Brother and Heir being within age, upon whom the Warranty diſcendeth: and afterwards C. cometh full of age, and afterwards he entreth. It was Reſolved, That if the Entry of an Enfant be lawful, and he cannot enter in the life-time of his Anceſtor, and doth not enter, the Warranty ſhall not bind in ſuch Caſe, *à fortiori*, when the Warranty diſcendeth upon him, his Entry being lawful, and no Lacheſs to be attributed unto him: But if his Entry were not lawful, ſo as he was put to his Action there the Warranty ſhall bind him. 2. In this Caſe, It was Reſolved, That if a Diſſeiſor, or other who hath a diſſeiſible Eſtate in a Mannor, grant a voluntary Eſtate by Copy: As if a Copyhold be forfeit unto him, or a Copyholder dyeth without Heir, and he grants thoſe Lands again by Copy, thoſe Grants ſhall not bind him who hath Right, after he hath reentinued the Mannor: but ſuch Admittances, which a Diſſeiſor maketh unto Copyholds of the Mannor, thoſe are good; for that they are Judicial Acts, and ſhall bind the Diſſeiſee. *Cook* 11. Part, 140. in *Chadleigh* Caſe. See 17 Eliz. *Dyer*, 343.

2. Dower aſſigned by an Abator or a Diſſeiſor, ſhall not be avoided by the Diſſeiſee, becauſe it is a lawful Act. 12 Aſſ. 20. *Cook* 2. Part, 67. *Tookers* Caſe. So if a Diſſeiſor doth attorn or giveth Seiſin unto the Grantee of Seignory, it ſhall bind the Diſſeiſee; yet the Grantee of the Seignory cannot compell the Diſſeiſor to attorn unto him, or give him Seiſin, *ibid.*

3. If A. purchaſeth Lands of B. by Feoffment, or by Bargain and Sale, and doth enroll the Deed; and afterwards perceiving that B. hath but a Diſſeiſible Title, and that C. hath right to it; B. levyeth a Fine, with Proclamations to a ſtranger; or taketh a Fine from another with Proclamations, to the intent, to barr the Right of C; this Fine levyed by Conſent ſhall bind: for that nothing is done in this Caſe which is not lawful. And the Intent of the Makers of the Statute of 4 H. 7. was, to avoid ſtrife and debates; and by expreſs words ſhall bind ſtrangers, who do not purſue their Rights within five years: So if one pretending Title to Land entreth and diſpoſſeſſeth another, and after with an intent to bind, the Diſſeiſee levyeth a Fine with Proclamations; this Fine ſhall bind the Diſſeiſee, by the expreſs words of the Act of 4 H. 7. if he do not enter and bring his Action within five years; and the ſame cannot be ſaid to be a Fine by Covin, becauſe the levying of the Fine is lawful, and the Diſſeiſee may re-enter, and bring his Action within the five years. *Cook* 3. Part, 79. in *Farmers* Caſe.

4. Note, It was adjudged, That where the Lord of a Mannor, wherein were many Copy-

holders for lives, took a Wife, and afterwards a Copyholder dyed, and the Lord after Marriage, did Grant the Land again according to the Cuſtome of the Manner, for lives, that the Wife ſhould not avoid ſuch Grant in a Writ of Dower brought: for although the Grant was after the Title of Dower; yet the Cuſtome, which is the life of the Grant, was long before; And if a Feoffee of a Manner, upon Condition, maketh voluntary Grants, and after the Feoffor entreth for the Condition broken, yet ſuch Grants are good. Paſc. 26 Eliz. in B. R. *Cook* 4. Part, 22. But ſee, and Note, That it was adjudged in B. R. That if Tenant for another mans life be of a Manner, and *Ceſtuy que vie* dyeth, and the Tenant continueth the Manner, and holdeth Courts, and maketh voluntary Grants by Copy, they ſhall not bind the Leſſor: for that he was but Tenant at ſufferance who hath not any Lawfull Intereſt, and ſo he is a Diſſeiſor of the Manner. Paſc. 29 Eliz. in B. R. *Cook* 5. Part, 23. *Rouſe* and *Arteis* Caſe. See Sect. 1.

5. Note, In many Caſes, he who is in by wrong, ſhall retain, and recoup: He who hath a Rent of 10 l. iſſuing out of certain Land, Diſſeiſeth the Tenant of the Land: In an Aſſiſe brought by the Diſſeiſee, the Diſſeiſor ſhall recoupe the Rent, in the value in damages; ſo as where the mean profits of the Land in ſuch Caſe, were 13 l. *per annum*, the Diſſeiſee ſhall recover but the 3 l. 3 H. 6. *Damages* 18. ſo the Diſſeiſor in an Aſſiſe ſhall receupe all damages which he hath expended in the Reparations; So if a Rent-ſervice, incurred during the Diſſeiſin, the ſame ſhall be recouped, But the reaſon of theſe Caſes is, becauſe otherwiſe, when the Diſſeiſee re-entreth, the Arrerages of the Rent-Seck-charge, or Service, ſhall be revived; and therefore to avoid Circuit of Action, *ne lis ex lite oriatur*, the Arrerages ſhall be recouped in damages; But if the Diſſeiſor ought to have Common in the Land, the value of the Common ſhall not be recouped, for that by the regreſs of the Diſſeiſee, he ſhall not have any recompence for it. Mich. 41 Eliz. in B. R. *Cook* 5. Part, in *Coulter's* Caſe.

6. The Caſe was, A man deviſed a Rent of 10 l. out of his Manner of A. for life, and by the ſaid Will, Deviſed the ſame Manner to B. for years; the Deviſor dyed, the Leſſee for years, paid the Rent to the Deviſee of the Rent during the Term, the years expired; the Deviſee of the Rent demanded it at the day of payment; and it was not paid; upon which he brought an Aſſiſe; And if this payment of Rent by the Deviſee for years, of the Manner, was a ſufficient Seiſin to maintain the Aſſiſe, was the Queſtion. It was Reſolved in this Caſe, (amongſt other things) That the payment of the Rent by the Deviſee for years, was not a ſufficient Seiſin to maintain an Aſſiſe againſt the Tenants after the years ended, for divers cauſes. 1. In regard of the weak Eſtate of the Leſſee for years, which cannot prejudice or draw in Queſtion the Free-hold. 2. Becauſe he who hath not Seiſin of the Land, cannot give Seiſin of a Rent, becauſe no *Præcipe* lyeth againſt him; for in no Caſe in Law, a *Præcipe* lyeth againſt him who hath but a Chattell, but onely one, where a Writ of Dower lyeth againſt Guardian in Chivalry, becauſe in ſuch Caſe, it doth not lye againſt the Heir, and if it ſhould not lye againſt the Guardian, the Wife ſhould be without remedy to recover her Dowry. And in this Caſe, a difference was taken, betwixt giving of Seiſin, and receiving of Seiſin; for he who hath but an Eſtate for years, may take a Seiſin for the benefit of him in the Reverſion, but he that giveth a Seiſin, ought to be Tenant of the Free-hold. And the Tenant for years, by his payment cannot give Seiſin to bind him who hath the Free-hold. But Seiſin by the hands of a Diſſeiſor, or him who hath a defeaſible Title, is ſufficient to bind him who hath Right, becauſe he is Tenant of the Land, and the Act is Lawfull: But an Encroachment by his hands, ſhall not bind him who hath Right, becauſe the ſame is not Lawfull; The ſame Law is, if there be any Covin in the Diſſeiſor in giving of the Seiſin, the ſame ſhall not bind him who hath Right. Hill. 4 Jac. in C. B. *Cook* 6. Part, 57. *Erediman's* Caſe.

7. By the Common-Law, and before the Statute of *Gloucester*, If A. were Diſſeiſed by B. and B. had enfeoffed C. or were Diſſeiſed by him; A. had no remedy for damages againſt the Feoffee, or Diſſeiſee of his Diſſeiſor, but was to bring his Action againſt B. who was his Immediate Diſſeiſor; and therein he was to recover the mean profits by way of Damages, not onely for his own time, but alſo for the profits received by the Feoffee, or ſecond Diſſeiſor; So if A. the firſt Diſſeiſee had re-entred, whereby he loſt his Aſſiſe, he might by an Action of Treſpaſſe brought *vi et armis* againſt his Diſſeiſor, recover the mean profits for all the mean poſſeſſions; but neither at the Common-Law, nor now, can he recover damages againſt the Feoffee, Leſſee, or ſecond Diſſeiſor, by Action of Treſpaſſe *vi et armis*, for that lies not his Caſe as to them who did not immediately Treſpaſſe; and the Common-Law did no wrong therein to charge the firſt Diſſeiſor for the profits not received by him, becauſe the firſt Diſſeiſee had no remedy for them againſt the ſecond Diſſeiſor, or the Feoffee; but the firſt Diſſeiſor, had remedy againſt the ſecond Diſſeiſor, or was ſuppoſed to have received ſatisfaction at the hands of the Feoffee,

eſſee, or Leſſee; and ſo he paid but where he received. See, by *Hobart* Chief Juſtice, in the Argument of *More* and *Haſſet* Caſe. Tr. 7 Jac. in C. B. *Hob.* 98. acc.

8. Note, If a Diſſeiſor makes a Leaſe for life, rendring Rent, and afterwards Grants the Reverſion to the Diſſeiſee, and he accepts of the Rent of the Leſſee; he ſhall never after put him out during the Term. Hill. 28 H. 8. *Dyer*, 30.

9. Note, It was agreed by the Juſtices according to the book of 9 H. 6. That if the Leſſor maketh a Feoffment in Fee, by the Agreement of the Termor, that the Feoffee ſhall have the Rent; And they all agreed, That if the Leſſor put out the Termor againſt his Will, and made a Feoffment, although the Termor re-enter, the Term is extinct, for the Land was diſcharged of the Rent in the hands of the Feoffor, and in the hands of the Feoffee it ſhall not be revived, no more, then if the Lord Diſſeiſe his Tenant, and maketh a Feoffment in Fee, although that the Diſſeiſee entreth, the Feoffee ſhall not have the Seignory. Paſc. 27 H. 8. *Dyer*, 93.

10. In an Action of Treſpaſs brought, The Defendant ſaid, That the place where the Treſpaſs was done, was the Free-hold of one A. at the time of the Treſpaſs done; and that he as Servant, &c. The Plaintiff ſaid, That long time before the Treſpaſs, one B. was ſeized in Fee, and Enfeoffed him, and that thereby he was ſeiſed, untill he was Diſſeiſed by A. upon whom he entred; and was ſeized, untill the Defendant the day and year before-ſaid, did the Treſpaſs: The Defendant maintained his bar, and traverſed the Diſſeiſin. It was holden by the Court, That the ſame was a Jeofaile, becauſe in the Replication, he did not traverſe, nor deny the Free-hold *tempore tranſgreſſionis*, &c. but he ought to have alledged the Treſpaſs Meſne between the Diſſeiſin, and the Regreſſe. Mich. 4. *Ma. Dyer*, 134.

11. A. ſeiſed of Lands in Fee, by Indenture, Inrolled, Bargained, and ſold the ſame to J. S. in Fee, for 300 l. Proviſo, If he paid to J. S. 300 l. at ſeverall dayes, then the Bargain and ſale to be void. Provided further, and it was agreed between the ſaid parties, that the ſaid J. S. his Heirs, or Aſſigns, ſhould not entermeddle with the actuall Poſſeſſion of the Premiſes, or Perception of the Rents, till default were made of the payment of the ſaid Sums; J. S. did not enter. Afterwards, A. before any day of payment, let the Lands to J. D. for years, rendring Rent, and dyed: J. D. entred, clayming nothing but his Term, and paid his Rent to A. and at the end of the Term, ſurrendred the Lands to A. J. S. made his Will, and Deviſed the Lands to B. and afterwards dyed, C. being his Heir. B. entred, and made the Leaſe to the Plaintiff. In this Caſe, The Queſtion was, admitting that J. D. was not Leſſee for years, but onely Tenant at the Will of the Bargaynee, or Tenant at ſufferance; Whether his making a Leaſe for years, and the Leſſee entring, and paying the Rent, and clayming nothing but the Term, and yeilding up the Poſſeſſion to the Bargaynor, ſhould be a Diſſeiſin; And if it were a Diſſeiſin, If it were not charged by the Re-entry of the Bargainor, and occupying it *in ſtatu quo prius*; ſo as he was not out of Poſſeſſion; and ſo his Will thereof be good; It was Reſolved by all the Juſtices in this Caſe, That when the Bargaynor entred (as it ſhall be conceived by the Words, Yielding up the Tenements at the ending of the ſaid Tenure); If he were a Diſſeiſor before, (as they did not agree that he was) becauſe neither the Leſſor, nor Leſſee intended to make a Diſſeiſin: It was onely a Diſſeiſin in the Leſſee for years; And when the Term being expired, the Bargaynor entred, that charged the Diſſeiſin, and the Bargainor is in as he was before, and the Inheritance is reveſted in the Bargainee, and ſo his Will is good. And in this Caſe, The Court was of Opinion, That if Tenant at Will be ouſted by a ſtranger, and he re-enters, he is Tenant at Will to his Leſſor; otherwiſe it would be very miſchievous; In many Aſſurances where the Mortgages bring in Poſſeſſion upon a Condition, to pay at the end of the year, and in the mean time, that the Mortgages ſhould not meddle, who makes a Leaſe for half a year, and after re-enters; that the ſame ſhould be a Diſſeiſin againſt his own intent, and the Intent of the Bargainee. It was adjudged for the Plaintiff. Trin. 18 Jac. in B. R. *Powſeley* and *Blackman*'s Caſe. *Cro.* 2. Part, 699, 670.

12. The Iſſue in tail brought a *Formedon* in the Diſcender, The Defendant pleaded in bar, and confeſſed the Eſtate tail, but ſaid, That before the death of Tenant in tail, J. S. was ſeiſed in Fee of the Lands, and levyed a Fine to him, and five years paſſed; and then Tenant in tail dyed; and whether this Plea was a bar to the Plaintiff, or not, was the Queſtion; and it reſted upon this, Whether J. S. upon this generall Plea, ſhall be in by Diſſeiſin, or by Feoffment: It was the clear Opinion of the whole Court, That he ſhall be intended in by Diſſeiſin; And ſo the Plaintiff is barred, *Cook* 3. Part, 78. acc. And *Crawley* Juſtice ſaid, That it ſhall not be intended, that Tenant in tail made a Feoffment to bar his Iſſues, unleſs it be ſhewed; And it lyes on the other part to ſhew it; and a Feoffment is as well an unlawfull Act, as a Diſſeiſin; for it is a Diſcontinuance. Paſc. 18 Car. in C. B. *Taylers* Caſe. *Marſh.* 195.

Diſcontinuance,

Diſcontinuance *of* Lands.

1. *Diſcontinuance, what it is; And what Acts done by Tenant in tail in Poſſeſſion, ſhall be a Diſcontinuance of the Eſtate Tail; What not.*

1. Mr. *Littleton* ſaith, That Diſcontinuance, is when a man hath alliened certain Lands, and Tenements, and dyeth; and another man hath Right to have the ſaid Lands and Tenements; but he cannot enter into them by reaſon of ſuch Alienation. *Litt.* 134. Sect. 592. Note, there is a Diſcontinuance in fact, and a Diſcontinuance in Law. In Fact, as if there be a tranſmutation of the Poſſeſſion. In Law, As by *Conuſans de Droit*, by Fine; by which, notwithſtanding that the Conuſor continueth the Poſſeſſion, yet the other is Tenant in Law; and the Right of the Eſtate, or of the Tail, is Diſcontinued, or Diſſolved.

2. King *Henry* the 8th, Tenant in Tail to him, and the Heirs Males of his body, of the Mannor of A. by force of a Fine in 3 H. 7. and of the Reverſion of the ſaid Mannor, to him, his Heirs, and Succeſſors, by force of an Attainder, and Office found, By his Letters Pattents, gave the ſaid Mannor of A. to W. W. in Tail: And afterwards it was Enacted by Parliament, That the ſaid Mannor of A. ſhould be re-veſted in the King, his Heirs, and Succeſſors, ſaving to all their Rights, &c. W. W. bargained and ſold the ſaid Mannor of A. to J. S. and his Heirs, againſt whom, Intruſion was brought. It was Reſolved in this Caſe (amongſt many other points), That when in this Caſe, The King was Tenant in Tail of the ſaid Mannor, the Reverſion expectant to him in Fee; and he reciting his Eſtate, Granted the Mannor and Land in Tail, That the Grant was not good, for although the King recites his Eſtate, and takes notice of it, yet the Eſtate Tail which he intended to Grant, did not ſtand with his Eſtate, for neither his Eſtate in Poſſeſſion, nor his Eſtate in Reverſion, would enable him to make a Grant of an Eſtate Tail in Poſſeſſion; and therefore becauſe the ſaid Eſtate could not take Effect according to the Kings intent and meaning, the ſaid Grant was adjudged void: *Cook* 1. Part, The Caſe of *Alien Woods*.

3. Note, It was adjudged, That if there be Tenant for life, the Remainder in Tail, the Reverſion in Fee, and the Tenant for life doth enfeoff him in the Reverſion in Fee, the ſame is a forfeiture of his Eſtate, and doth deveſt the Eſtate Tail in Remainder: So if there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail doth enfeoff him in the Reverſion in Fee, it is a Diſcontinuance. *Cook* 1. Part, 140. in *Chadleigh's* Caſe.

4. Tenant for life, the Remainder in Tail, Tenant for life levyed a Fine *come ceo*, to the uſe of himſelf in Fee; Afterwards Tenant for life, and he in the Remainder joyned in a Feoffment, and made a Letter of Attorney to make Livery; It was holden in that Caſe, That the ſame was a Diſcontinuance of the Eſtate Tail; for firſt, It was an Entry for the forfeiture, and then it was the Feoffment of him in the Remainder, and the Confirmation of the Leſſee for life. Paſc. 16 Eliz. *Dyer*, 324. See *Co.* 1. Part, *Bredon's* Caſe, acc.

5. Husband and Wife, Joynt-Tenant of a Mannor, and to the Heirs of the body of the Huſband, the Remainder to B. in Tail, a Recovery is had in a Writ of Entry in the Poſt, againſt the Husband alone, in the life of the Wife, with voucher. In this Caſe, (amongſt other things) It was Reſolved. 1. That as long as the Recovery ſtood in force, (for it was but avoidable) he in the Remainder, had not any Right to the Remainder, in reſpect of the intended recompence, but the ſame Remainder was barred for the moyety, As if Tenant in Tail ſuffer an Erronious Recovery, and afterwards Diſſeiſeth the Recoveror, and dyeth; the Iſſue in tail ſhall not be remitted ſo long as the Recovery ſtands in force, and a man ſhall never be remitted, but where if the right and Poſſeſſion were in ſeverall perſons, he who hath Right may have an Action to recover the Poſſeſſion. 2. It was Reſolved, That for one moyety, the Recovery was a bar to the Eſtate Tail, and to the Remainder alſo, becauſe that by the Recovery, the Joynture was ſevered; but for the other moyety, whereof the Wife was Tenant for life, the Recovery was not any bar to the Eſtate tail, or unto the Remainder, becauſe of that moyety, there was not any Tenant to the *Præcipe*: In that Caſe, this Caſe was put and agreed. Tenant in Tail diſcontinueth the Tail, and takes a new Eſtate tail to himſelf: A Writ of Entry is brought againſt him, and he voucheth the Common Vouchee, and Judgment is given, That the Iſſue in tail, ſhall not be barred for the firſt Entail, becauſe that the Father, at the time of the Recovery, was not ſeiſed by

byforce of the Tail in the place of which the Recompence might Enure. *Cook* 3. Part, 3, and 5. The Marqueſſe of *Wincheſters* Caſe.

6. A man ſeiſed of Lands, made a Feoffment to divers upon Condition, that they ſhould give back the Land to him and his Wife in tail, the Remainder to his Right Heirs; they have Iſſue a Son; the Husband dyed, the Son in the life of the Wife, levyed a Fine with Proclamations to A. in Fee, the Wife entred, and made a Leaſe for three Lives, not Warranted by the Statute of 32 H. 8. In this Caſe, theſe points were Reſolved. 1. That the Leaſe made by the Wife, although it was without Warranty, was within the Statute of 11 H. 7. cap. 20. for that a Diſcontinuance ſtands equall with a Warranty, or a Recovery. 2. That if he in the Remainder had Granted over his Remainder in Fee onely, that he might have entred for the forfeiture. 3. That the Conuſee might enter for the forfeiture, becauſe that by the Fine, the Eſtate Tail was barred; and then he is the next party to whom the Intereſt, Title, and Inheritance, after the death of the Wife doth appertain. *Cook* 3. Part, 51. Sir *George Brown's* Caſe.

7. Husband and Wife, Tenants in Speciall tail, the Husband alone levyed a Fine to his own uſe, and afterwards he Deviſed the Land to his Wife for life, the Remainder over rendring Rent; the Wife enters, and payes the Rent, and dyeth: In this Caſe, It was Reſolved, That the Fine had barred the Iſſue in tail, but not the Wife. *Trin.* 18 Eliz. *Dyer*, 351. See *Cook* 1. Part, 87. in *Corbets's* Caſe, acc. and becauſe the Iſſue cannot claim as Heir to both. 2. That in this Caſe, the Entry of the Wife was a diſagreement to the Eſtate of Inheritance, and an Agreement to the Eſtate for life; as it is ſaid in *Cook* 3. Part, 26. in *Butler* and *Baker's* Caſe. But in this Caſe, if the Wife had not waved, the Eſtate tail, as to the Wife, had remained, and for that, See *Cook* 9. Part, 139. in *Beaumont's* Caſe.

8. Land was given to Husband and Wife, and to the Heirs of their two bodies begotten, the Husband made a Feoffment in Fee, and dyed, having Iſſue; And afterwards, the Wife before any Entry made by her, dyed. In this Caſe, divers points at the Common-Law, and upon the Statute of 32 H. 8. cap. 28. was Reſolved. 1. That at the Common-Law, the Feoffment was a Diſcontinuance to the Iſſue, for the Iſſue ought to claim as Heir of their two bodies immediately, and as Heir to one onely he cannot Inherite, and by conſequence, he could not enter. 2. That although the Husband and Wife have Iſſue, and a joynt, and undivided Eſtate, that that Joynt-Eſtate was within the Statute of 32 H. 8. for ſhe had a Freehold, and Inheritance in the Land, although ſhe had not the ſole Inheritance or Free-hold. 3. That by that Statute, the Entry of the Iſſue in tail was Lawfull. 4. That the ſame Statute of 32 H. 8. did extend onely to Diſcontinuances, and it did not extend to take away future bars. 5. That if the Husband be Tenant in tail, the Remainder to the Wife in tail; If the Husband maketh a Feoffment in Fee, and dyeth without Iſſue, that the Wife may enter, but if the Husband ſuffereth a Recovery, and dyeth without Iſſue, there the Wife is barred, and ſhe cannot enter by the ſaid Statute of 32 H. 8. 50. If Husband and Wife have Iſſue and alien, and the Wife dyeth, the Iſſue cannot enter during the life of the Husband. But if the Husband alieneth, and afterwards the Wife is divorced *Cauſa precontractûs*, or any other Divorce, which diſſolves the marriage *à vinculo Matrimonii*, there the Wife during the life of the Husband may enter, by the Statute of 32 H. 8. Paſch. 7 Jac. *Cook* 8. Part, 71. *Grenelyes* Caſe.

9. Land was given to Husband and Wife, and to the Heirs of their two Bodies, the remainder to the Husband in Fee; the Husband levyed a Fine of the Land with Proclamations to the King, who by his Letters Patent gave the Land to J. S. and his Heirs: the Husband dyed, the Wife within the 5 years entred, claiming the Eſtate: J. S. dyed, this Heir reciting the Eſtate in Special Tail granted to the Husband and Wife, and that the Wife was ſeiſed of the Eſtate Tail, by Deed did confirm to the Wife her Eſtate; To have to her, and the Heirs of the body of her Husband deceaſed; the Wife having Iſſue a Son, A. betwixt her and her Husband, dyed: A. the Son entred, and afterwards accepted a Fine *ſur Conuſans de droit tanium*, from two ſtrangers, with a Render for 99. years, after the death of A, if B. his Wife ſhould ſo long live: the Proclamations paſs; A. dyeth, having Iſſue two Sons; the eldeſt in Ward to the King at his full Age, and before Livery, Covenanted to ſtand ſeiſed to the uſe of himſelf, and the Heirs-Males of his Body, with divers Remainders over: The eldeſt Son dyed without Iſſue-male, having a Daughter within Age: The Queſtion was, if the Land did appertain to the Daughter, or to the younger Son. It was objected; Firſt, That by the Fine levyed by the Husband, the Eſtate Tail was barred, according to 18 Eliz. *Dyer*, 351. becauſe the Iſſue ought to claim as Heir to both their Bodies; that the Eſtate Tail was barred and extinct, and the Eſtate of the Wife was changed into an Eſtate for Life diſpuniſhable of waſte; like the Caſe of 7 H. 4. 16. If Husband and Wife, Tenants in Special Tail, are divorced by a Divorce, which diſſolves the marriage,

marriage *à vinculo matrimonii*, the Donees have but an Eſtate for their lives, and the Eſtate Tail is extinct: and if the Eſtate of the Wife be converted to an Eſtate for Life, it is in the nature of a Tenancie, after poſſibility of Iſſue extinct, and then the Confirmation made to her did inlarge her Eſtate, and ſo the Daughter was inheritable to the Land. Secondly, Admit the Wife had an Eſtate Tail, her Iſſues ſhould be inheritable by the Confirmation; for by the Confirmation J. S. hath excluded himſelf and his Heirs by expreſs words, as long as the Wife had Iſſue of her Body to claim the Land; and it was againſt Reaſon, that J. S. who made the Confirmation after the death of the Wife, ſhould enter into the Land againſt his own Confirmation; and the Confirmation doth alter the quality of the Eſtate of the Wife, and incorporate a new quality in the Eſtate: But it was Reſolved; 1. That after the death of the Husband, that the Wife after the death of the Husband, had an Eſtate in Special Tail, and by the Common-Law, the Eſtate of the Wife in ſuch Caſe, ſhould not be changed into an Eſtate for Life. For by the Common-Law, If it had been given to Huſband and Wife, and to the Heirs of their two Bodies; and after Iſſue, the husband had alienated, and dyed, the Alienation ſhould not have barred the Wife, nor the Iſſue in Tail, becauſe the huſband alone had not *poteſtatem alienandi*, becauſe he had an undivided Eſtate joyntly with the Wife: And as to the Caſe of 10 Eliz. *Dyer*, there the Wife entred and claimed an Eſtate by the Deviſe; which proves, that if ſhe had not waved the Eſtate Tail, that ſhe ſhould have had it, and not an Eſtate for life: And the Caſe of 7 H. 4. is not like this Caſe; for there the Eſtate Tail was diſſolved *ab initio*: But in this Caſe the Eſtate Tail is barred, but not diſſolved, but hath continuance as long as the Wife lived, or Heirs in Tail did remain. 2dly, Reſolved, That the Confirmation did work nothing; for when the Wife entred, ſhe was ſeiſed in Tail, and no Eſtate was left in the Conuſee, but onely a poſſibility, and then ſuch a poſſibility by the ſaid Confirmation: and then when the huſband had the Remainder in Fee, the Confirmation made by the heir of J. S. can paſs nothing in reſpect of the poſſibility which was gained by the Fine, before the continuance of the Eſtate Tail; but it ought to be extracted out of the Remainder in Fee; and that it cannot be, becauſe no Eſtate Tail is created by the Confirmation, but the ſaid Eſtate confirmed. And again, a Confirmation cannot add a diſcendable quality to him who is diſabled to take by diſcent; and if a Confirmation ſhould add to the Eſtate of the Wife, a diſcendable quality, the ſame ſhould Repeal the Statutes of 4 H. 7. & 32 H. 8. by which the Eſtate Tail, as to the Iſſue, is barred. *Cook* 9. Part, 138. *Beaumonts* Caſe.

10. The Caſe was this; Tenant in Tail, the Remainder in Tail the Reverſion to the right heirs of Tenant in Tail: Tenant in Tail bargained and ſold the Land, by Deed Indented and Enrolled to J. S. and his heirs; and afterwards levyed a Fine, with Proclamations to the Bargainee with Warranty: The Conuſee made a Feoffment in Fee; he in the Remainder had Iſſue, and dyed; Tenant in Tail dyed without Iſſue. In this Caſe, theſe Points (among other) were Reſolved. Firſt, That by the Bargain and Sale, the Bargainee had an Eſtate diſcendable to him and his heirs, upon the death of Tenant in Tail, and had the Reverſion expectant upon the Remainder in Tail, and that the Wife of ſuch a Bargainee ſhould be endowed. Secondly, That the Fine levyed to the Bargainee, did not make any diſcontinuance of the Remainder, becauſe the ſame did not touch nor diſplace the Remainder, and no Eſtate of Frechold paſſed by the Fine: But the Fine with Proclamations did coroborate the Eſtate of the Bargainee: For whereas his Eſtate was determinable upon the death of Tenant in Tail now it is not determinable without death without Iſſue: But if the Fine had been levyed before the Bargain and Sale, it had been a diſcontinuance. Thirdly, That the Warranty did not barr the Remainder, becauſe the Warranty was annexed to an Eſtate Tayl; and the Eſtate Tayl was not diveſted by the Fine: and therefore when the Eſtate to which the Warranty is annexed is determined, the Warranty alſo was determined: And the Conuſee by his act cannot extend it further, then it was at the time of the creation of it. Fourthly, Reſolved, That a Warranty cannot inlarge an Eſtate. Fifthly, Reſolved, That the Feoffment of the Conuſee was not any diſcontinuance of the Remainder; for none can diſcontinue the Remainder or Reverſion, but he onely to whom the Land was entailed: and therefore if Tenant in Tail grants *totum ſtatum ſuum*, and he makes a Feoffment in Fee, the ſame doth not take away the Entry of him in the Remainder or Reverſion. *Cook* 10. Part, 46, 47. *Edward Seymors* Caſe.

11. The Caſe was; Tenant in Tail the Reverſion over to J. S. in Fee, they by Deed joyned in a Leaſe for life by Deed afterwards, he in the Reverſion deviſed the Reverſion and dyed, afterwards Tenant in Tail dyed without Iſſue: the Point was this, If Tenant in Tail joyns with him in the Reverſion, in a Leaſe which is not warranted by the Statute of 32 H. 8. Whether it be a Diſcontinuance of the Eſtate Tail onely, or a Diſcontinuance of the Reverſion onely: It was ſaid, That it was not any Diſcontinuance, nor the Reverſion diſplaced; becauſe it ſhall not be taken to be a tortious Leaſe,

Leaſe or a Diſcontinuance, when by any means it may be conſtrued to be good, as it may be in this Caſe when they joyn; and when it was not the Intention of any of the Parties to diſ-inherit him in the Reverſion, or to take away or diſplace the Reverſion. See *Cook* 6. Part, 14. *Treports* Caſe. *Cook* 1. Part, 76. *Bredon's* Caſe. But it was Reſolved, That the Deviſe was void: For that the Leaſe for Life is onely the Leaſes of Tenant in Tail, during his and the life of the Leſſee, and then it is a Diſcontinuance, and the Reverſion taken from him in the Reverſion is diſplaced; and then being a Leaſe for the life of the Leſſee, the Livery is onely made by the Tenant in Tail, for he onely hath the power of the Freehold, and the immediate Poſſeſſion and Inheritance. Then when they make a Leaſe for Life, it is an immediate wrong to the Entail, and diſcontinues the Eſtate Tail during the life of the Leſſee, and the Tenant in Tail hath gained a new Fee, and ſo ſeiſed of a Reverſion in Fee expectant upon the Eſtate for life, and it is a Diſcontinuance preſently; for the Charge of the Reverſion is preſently by the Livery, or not at all; and it cannot be a Leaſe for the Life of Tenant in Tail, and after his death without Iſſue, a Leaſe for Life againſt him in the Reverſion. Wherefore the Juſtices were clear of Opinion, That it was a Diſcontinuance. Hill. 8 Car. in B R. Rot. 347. *Baker* and *Hacking's* Caſe. *Cro.* 1. Part, 281, 294.

12. A, and his Wife, ſeiſed of Lands to them, and the heirs of the body of A; the Remainder to B, and the heirs of his body; the Remainder to C, and the heirs of his body; the Remainder to B, in Tail; the remainder to the right heirs of A: A, his Wife, and C, (the Third in Remainder) joyned in a Feoffment with Warranty to J. S. and afterwards A. and his Wife, levyed a Fine to J. S; A. dyed without Iſſue; B. and C. dyed without Iſſue: J. S. dyed, the Land diſcended to his Son, who after the death of the Wife of A. entred, and made a Leaſe to the Plaintiff: The Defendant, by the Command of D, ouſted him. The Queſtion was, Whether the Entry of D, was lawful, or not: Wherein the Queſtion was, Whether this Feoffment were a Diſcontinuance of the Eſtate Tail? It was the Opinion of the whole Court, That the Eſtate Tail was veſted and ſetled in him; and his and his Wives Feoffment did make a Diſcontinuance, and the joyning of C. with them was not material, for there is an immediate Remainder in D. which is diſcontinued. 2. It was agreed, That this Feoffment and Fine to the ſame Perſon, made but one Aſſurance; And when the Wife is barred, and her Eſtate deſtroyed by the Fine, that ſhe cannot enter; thoſe in the Remainder may not enter, but are in Caſe as they were at the Common-Law: And in this Caſe, they all Reſolved, That an expreſs Diſcent being found, it takes away the Entry. Trin. 7 Car. in B. R. *King* and *Edward's* Caſe. *Cro.* 1. Part, 233, 234.

13. In *Ejectione Firme*, the Caſe was, A. ſeiſed of Lands in Fee, deviſed them to his Wife for life; the Remainder to B. in Tail, the Remainder to his next Heir-male, being of his ſirname in Fee, and dyed: his Wife entermarried with B. who had the next Remainder in Tail. They levyed a Fine *come ceo*, &c. to J. S. who by the ſame Fine rendred to the Wife for life, the Remainder to the Husband in Fee, and a Recovery was had to the uſes contained in the Fine; the Wife dyed, and the Husband dyed without Iſſue; the right Heir of the ſirname of the Deviſor entred, who made the Leaſe to the Plaintiff; who being ouſted by the Leſſee of B, brought the Action. It was the Opinion of the Court in this Caſe, That he in the Remainder might enter, for that all paſſed from the Tenant for life, and it is her Feoffment, and the Confirmation of the other: And ſo the Eſtate Tail being ſpent, he in the Remainder ſhall enter for the Forfeiture, and the Recovery ſhall be no barr, becauſe it was of another Eſtate; and this Title of Entry ſhall not be barred by the Common-Recovery, and Judgment was given for the Plaintiff: ſo as his Remainder was neither diſcontinued by the Fine, nor his Entry taken away by the Recovery. Hill. 43 Eliz. in C.B. *Peak* and *Charnells* Caſe. *Owen*, 129, 130.

14. Grandfather Tenant for life, the Remainder to the Father in Tail: The Grandfather made a Feoffment in Fee, to the uſe of himſelf for life; the remainder to the Father in fee: afterwards they both came upon the Land, and made a Feoffment to J. S. in Fee. It was ſaid, That this was not any Diſcontinuance upon the matter, for the Father might wave the advantage of the Forfeiture; and when he joyns with the Grandfather in a Feoffment, it declares that he came upon the Land without an intent to enter for the Forfeiture, and ſo it can be no Diſcontinuance. But the Opinion of the Court was, That it was a Diſcontinuance; for when the Father entreth, he ſhall be adjudged in by the Forfeiture, and then he hath granted a Poſſeſſion, and ſo a Diſcontinuance; for both cannot have the Poſſeſſion. Trin. 30 Eliz. in B.R. rott. 528. *Toſt* and *Tompkin's* Caſe. *Leon.* 127.

15. Husband and Wife, the Wife being within Age, levyed a Fine; afterwards upon Inſpection, the Wife was adjudged to be within Age. It was Reſolved by the whole Court, That the whole Fine ſhould be reverſed; and not *quoad* the Wife onely: For if it ſhould be reverſed as to the Wife onely, then the Fine levyed by the huſ-

hand alone ſhould be a Diſcontinuance: by which, by the Common-Law, the Wife ſhall be put to her *Cui in vita*, and that were not reaſonable, and therefore the Fine was reverſed *in toto*. Trin. 32 Eliz. in B. R. *Charnock* and *Worſley's* Caſe. *Leon.* 225.

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2. *Where, and what ſhall be a Diſcontinuance of an Eſtate Tail in Reverſion, or Remainder: What not; And where, and what ſhall be a Diſcontinuance of the Lands of the Wife by the Husband; and what not.*

1. TEnant for Life of Land the remainder in Tail; the remainder in Tail Tenant for life, and he in the firſt remainder in Tail, joyn in a Fine *ſur Conuſans dedicit come ceo*, with a render, of a Rent of 40 l. to Tenant for life: He, in the firſt Remainder, dyeth without Iſſue. It was Reſolved, That the Fine levyed by Tenant for Life, and him in the firſt Remainder was no Diſcontinuance, becauſe each of them gave onely that which they might lawfully give. So it is, If the Tenant for Life, and he in the firſt Remainder, make a Feoffment by Deed, the ſame is no Diſcontinuance: And although he in the firſt remainder dyeth without Iſſue, yet the Feoffee ſhall hold and enjoy the Land during the life of the Tenant for life. But if there be Tenant for life, the remainder in Tail, and the Tenant for life, enfeoffeth him in the firſt remainder, who dyeth without Iſſue, the ſame is a Diſcontinuance and a Forfeiture; for that the ſame is a deveſting of the remainder, by the acceptance of the Feoffment; contrary, when they come in a Conveyance. *Cook* 11. Part, 76. *Bredon's* Caſe.

2. A Tenant for Life of divers Mannors, made a Feoffment of them to divers Perſons; to the intent, that they ſhould give them to A. and B. whom he intended to marry, and to the heirs of the body of A. A. and B. enter-marry, and have Iſſue C. A. dyed: C. in the Life of B, Tenant of the Freehold, ſuffered a Common Recovery with Voucher, to the intent, the Recoverors ſhould make a Feoffment to uſes; and that the Wifes Tenant for Life ſhould releaſe with Warranty, the Feoffment and Releaſe with Warranty was made accordingly: And if this Collateral Warranty were a barr to the Demandant who was heir in Tail, or was void by the Statute of 11. H. 7. *cap.* 20. was the Queſtion: In this Caſe, amongſt other things, it was Reſolved. 1. That although the Statute of 11 H. 7. *cap.* 20. made the Diſcontinuance, Alienation, Warranty, and Recovery void; yet they ſtood good betwixt the Parties themſelves, and againſt all others, but thoſe to whom the Intereſt, Title, or Inheritance, after the death of ſuch Wife or Woman did appertain, and they onely can avoid them by Entry. 2. When the Heir in Tail conveyes the Land to another, and the Releaſe or Confirmation of the Wife with Warranty, is but to perfect and ſtrengthen the Eſtate which the Heir in Tail hath made, ſuch Warranty is not reſtrained by the ſaid Statute of 11 H. 7. for that ſhall be intended for his benefit, and not for his prejudice: And the Wife, with the Heir, might have barred the Eſtate Tail by Fine; and then the Statute doth not reſtrain the Warranty made by him to ſuch Conveyance of the Heir in Tail. 3. When he in the Remainder in Tail by the Common-Recovery had againſt him by his Agreement, diſables himſelf to take benefit of the Forfeiture, which is given by the ſaid Statute, his Iſſue after his Death, ſhall not take benefit of it. 4. Reſolved, That if Tenant in Tail, being in of another Eſtate, ſuffereth a Common Recovery, and a Collateral Anceſtor of the Tenant in Tail, doth releaſe to the Recoveror with Warranty, ſuch Warranty ſhall bind, and the Terr-Tenants may take advantage by way of Rebutter. *Cook* 3. Part, 84, 85, 86. in *Lincoln*-Colledge Caſe.

3. See *Cook* 10. Part, 97. *Edward Seymor's* Caſe. The 5th Reſolution, in the Title *Precedent. Sect.* 10.

4. If a man be ſeiſed of Copyhold Lands in the Right of his Wife, and he ſurrendreth the ſame to the uſe of another, and the husband dyeth, It is no Diſcontinuance to the Wife; but that ſhe may enter, and ſhall not be put to her *Cui in vita*, nor her heirs to ſue a *Cui in vita*. Paſch. 35 Eliz. in B. R. rott. 734. *Baſtock* and *Dibley's* Caſe. *Cook* 4. Part, 23.

5. If the husband be ſeiſed of Lands in the right of his wife, and maketh a Feoffment in Fee upon Converſion, and dyeth, if the heir entreth upon the Feoffee for the Converſion broken, the Entry of the wife is lawful upon the heir, becauſe by the Entry of the heir the Diſcontinuance was defeated, See 4 H. 6. 2. and 3. acc. *Litt.* 141. acc. If a Woman who hath Lands of Inheritance takes a husband who is within Age, and the husband maketh a Feoffment in Fee of the Wifes Lands, and dyeth, in that Caſe, the Wife may enter. See *Cook* 8. Part, 43. in *Wittingham's* Caſe.

6. A man ſeiſed of Lands in the right of his wife,

Wife made a Feoffment thereof, by Deed Indented to certain perſons; upon Condition, that he ſhould Leaſe the Lands again to the Husband and Wife, for their lives, with divers Remainders over in Tail, the Remainder to the Right Heirs of the Husband. And afterwards the Husband dyed, the Feoffees Leaſed the Lands to the Wife for life, with the Remainder over in tail; the Remainders to the Right Heirs of the Wife, where it ſhould be to the Right Heirs of the Husband. In that Caſe, It was Reſolved, That for the Condition broken, the Husband's Heir might enter: for although no Right diſcendeth to him from the Husband, whoſe Eſtate is determined by death, yet the Title of Condition which he himſelf created upon the Feoffment, and reſerved to him and his Heirs, ſhould diſcend after his death, to his Heir. 2. It was Reſolved in that Caſe, That when the Husbands Heir entreth for the Condition broken, the Feoffment which made the Diſcontinuance, is defeated, and, by conſequence, the Diſcontinuance it ſelf is defeated. 3. That after the Heir hath entred for the Condition broken, the Eſtate of the Heir doth vaniſh, and preſently the Eſtate is re-veſted in the wife, without any Entry or claim made by her. 4. In that Caſe, although the Wife hath accepted an Eſtate for life, and ſo concluded her ſelf, by Acceptance, to have any *Cui in vita*; yet when the Eſtate which ſhe hath taken, is defeated by the Condition; the Concluſion by Acceptance, is alſo avoyded. 4 H. 6. 2. *Cook* 8. Part, 44. in *Whittingham's* Caſe.

7. Husband and Wife, and a third perſon, purchaſed Lands joyntly, the Husband Alliened the whole Land, and dyed, the Wife dyed; It was holden, That the third perſon might have an Aſſiſe of the whole Land: It was alſo holden, That the Wife during her life, might have had her *Cui in vita* of the moyety, becauſe that by the Alliena-tion, the joynture was ſevered. 35. *Aſſ.* 15. *Fitzh. Nat. Br.* 193. acc.

8. Husband and Wife were ſeiſed of a Tenement in *London*, to them, and the Heirs of the Husband; the Husband Covenanted by Indenture in Conſideration of 20 l. that he and his Wife would ſuffer a Recovery by Writ of Right, according to the Cuſtome of *London* (which binds as a Fine at Common-Law) and that the Recovery ſhould be to the uſe of the Recoverors, untill they ſhould make a Leaſe for 40 years, and after the making of the Leaſe, then to the uſe of the Huſband and Wife, and the Heirs of the Husband; the Recovery was had accordingly: It was holden in that Caſe, by the Juſtices, That the Leaſe was good, and not defeaſible by the Wife, who ſurvived her Husband; and yet the Husband onely, was party to the Deed, which declared the uſe; yet it was holden, it ſhould bind the Wife. *Cook* 2. Part, 24. in *Bethwith's* Caſe. 12 Eliz. *Dyer*, 290.

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3. *Where the Reverſion or Remainder in the King, ſhall be diſcontinued by the Act of a Common perſon, Where not.*

1. A Recovery had by Aſſent of the parties, without Title, ſhall not deveſt a Reverſion or a Remainder, which is ſetled in the King, becauſe that the ſame being ſuffered by aſſent of the parties, without Title, is but a Conveyance. 25 E. 3. 48. *Cook* 1. Part, 16. in Sir *William Pelham's* Caſe. acc.

3. The King, Tenant in Tail of the Mannor of *Abbotſly*, by force of a Fine in 3 H. 7. with a Reverſion to him, his Heirs, and Succeſſors; Granted the ſaid Mannor to *Walter Walſh*, and the Heirs Males of his body: It was adjudged, That the Grant was void, for that it appeareth, That the King did intend to Grant an Eſtate in Tail, and that he could not do, becauſe he had but an Eſtate tail himſelf; and the higheſt Eſtate that Tenant in tail might Grant, was but an Eſtate for his own life: for he who hath Land Entail to him and the Heirs of his body, hath ſuch Eſtate ſo appropriate and Incorporate to him, and to the Heirs which ſhall Iſſue out of his Loyns, that he cannot Lawfully Grant the ſame to a ſtranger, and the Heirs of his body, for that ſhould be *Contra formam doni*, and againſt the Statute *De Donis Conditionalibus*, by which Statute, the King is bounden. *Cook* 1. Part, 10 the Caſe of *Alton-woods* 44, 45.

3. If the King be Tenant in tail, and Grants the Land by his Letters Patents for years, or for life, the Patent is void; for a Grant without Livery, doth not make a Diſcontinuance, nor ſhall it bind, but during the life of the Grantor: and ſo it is of a Grant in Fee, it doth not make a Diſcontinuance without Warranty: And if the Kings Grant ſhould make a Diſcontinuance, it ſhould do wrong, which the King by his Grant cannot do, but rather his Grant ſhall be void. 38 H. 8. Br. *Diſcontinuance*, 35. Pat. 101. and Tail. 29.

4. Tenant in Tail, the Remainder in Fee, he in the Remainder, by Deed Indented, and Inrolled, in Conſideration of blood, and other Conſiderations, Covenanted to ſtand ſeiſed to the uſe of himſelf in tail, the Remainder to the Queen, her Heirs, and Succeſſors, Kings, and Queens of *England*; And afterwards Tenant in Tail ſuffered a Common Re-

covery; It was adjudged in that Caſe, That the Iſſue in tail was barred: And (amongſt other points) in that Caſe, it was Reſolved, That no Eſtate tail is preſerved by the Statute of 34 H. 8. but that which is created by the Kings Letters Pattents, or elſe be of the Proviſion of the King; and an Eſtate Tail created by a common perſon, is not preſerved by that Statute: But when the King, in Conſideration of mony, or for other good conſideration, procures a ſubject to make a Gift in Tail, to one of his Servants, the Remainder to the King, the ſame is ſaved by the Statute. Trin. 27 Eliz. in C. B. *Cook* 2. Part, 15. *Wiſeman's* Caſe.

5. King *Henry* the ſeventh, by his Letters Pattents, Granted the Mannor of D. to A. and B. in Tail, and afterwards reciting the former Letter-Pattent, and that they were ſurrendred and delivered up to be Cancelled: by other Letters Pattents, *ex certa ſcientia*, &c. he Granted to the ſaid A. B. and E. his Wife *Manerium prædict.* to them, and their Heirs: It was Reſolved in this Caſe, That the Grant was good, and the Reverſion of the Mannor, which the King had paſſed by the Grant, for inaſmuch as the party had truly informed the King of the Eſtate tail, and of the delivery of the ſaid Letters Pattents to be Cancelled; although the King had miſtaken the Law in matter of fact, yet the ſame ſhould not avoid his Grant, eſpecially the ſame being *ex certa ſcientia*, &c. which ſhall be taken in the moſt liberall ſenſe, according to the Intention of the King, expreſſed in his Grant, And 2. In that Caſe, It was Reſolved, That by the Grant of the ſaid Mannor, without the word Reverſion, the Reverſion did paſſe, for that the Word Mannor, includes all degrees of Eſtates of the Mannor. Trin. 4 Jac. *Cook* 6. Part, 55. The Lord *Chandois's* Caſe.

6. The Caſe was; The King Granted the Honor of Saint *Walry* with the Advowſon of the Church of M, to the ſame Appendant, to *Rich.* Earl of *Cornwall*, &c. and to the Heirs of his body, ſaving the Reverſion to the King: which *Earl* had Iſſue *Edmond* his ſon, and dyed, *Edmond*, 8 E. 1. levyed a Fine of one Acre of Land, parcell of the ſaid Honor with the Advowſon of the ſaid Church of M. to the Biſhop of R. which Allienation was before the Statute *de Donis Conditionabilibus*: Afterwards the ſaid *Edmond* Earl of *Cornwall* dyed without Iſſue: In that Caſe, It was holden, That although the ſaid Allienation was made before the Statute, and *poſt prolem ſuſcitatum*, the Donees and their Iſſues had *poteſtatem alienandi*, to bar the Reverſion of a Common perſon; Yet it was holden the ſame ſhould not bar the Kings Reverſion, although it be with Collaterall Warranty, if there be not Aſſets diſcended, ſo as the King may have a full ſatisfaction and recompence, for without Warranty and Recompence, it is not ſuch a Compleat Allienation, becauſe it moveth from him who hath not a compleat Eſtate, which ſhall bar the King of his Reverſion; and yet in the Caſe of a Common perſon, ſuch a bare Allienation before the ſaid Statute, ſhould bar the Donor in ſuch Caſe. See 6 E. 3. 56. 45. *Aſſ.* 6. acc.

7. The Caſe was, Grandfather, Father, and Son; the Grandfather ſeiſed of Lands in *Capite*, conveyed part of his Lands to the uſe of the Father, and his Wife for their lives, the Remainder to the ſon in tail, the Remainder to others in tail, the Remainder to the Grandfather for life, the Remainder to the right Heirs of the Grandfather; And conveyed other of his Lands in *Capite*, to the uſe of himſelf for life, the Remainder to other of his younger ſons for their lives ſeverally, the Remainder to the Father for life, the Remainder to the ſons in tail, with divers Remainders over, the Reverſion to the right Heirs of the Grandfather; the Grandfather dyed, the Father of full age, who tendred his Livery, and dyed before Livery ſued, or office found, the ſon of full age, the Wife and the younger ſons being alive. In this Caſe, theſe points were Reſolved. 1. That by the death of the Father before Livery ſued, the King had loſt his Primer-Seiſin after the death of the Grandfather, but the King ſhould have the mean Rates, if any were, becauſe they were veſted in the King. 2. That the ſon ſhould not ſue Livery, nor pay Primer-Seiſin, becauſe he is out of the Statutes of 32 and 34 H. 8. and the Primer-Seiſin was due by the Father, and the King ſhall not have but one Seiſin by the Statute. 3. That the King ſhould have Primer-Seiſin for the Lands which were conveyed to the younger ſons, becauſe they are within the Statute. 4. Reſolved, That the King ſhould not have Primer-Seiſin of this dry and fruitleſs Reverſion, and that by the Statute of *Prerogativa Regis*; for when no Rent is reſerved, the King cannot take the profits. But yet it was Reſolved, That for ſuch a Reverſion, the Heir ſhould be in Ward. 9 Jac. *Cook* 9. Part, 131, 132.

4. *Of Alienations made by Biſhops, Parſons, Prebends, &c. What ſhall amount to Diſcontinuances; What not: And of other Acts done by them.*

1. BY the Common-Law, If a Biſhop, Abbot, &c. or the Husband, ſeiſed in the Right of his Wife, had made a Feoffment in Fee, it had bin a Diſcontinuance, and had put the Succeſſors to their Action, for the favour which the Law gave to Eſtates which paſſed by Livery, and Seiſin, being the antient and common aſſurance of the Realm: But if a Biſhop, Abbot, &c. or Husband, &c. ſeiſed of a Rent, or of any thing which lay in Grant, had by Deed Granted the ſame in Fee, it had bin no Diſcontinuance, and yet it was not abſolutely determined by the death of the Biſhop, &c. for that the Succeſſor or the Wife had Election to determine it, and make it void by bringing their Writ, or by claim made upon the Land. *Cook* 3. Part, 86. in the Caſe of *Fines*.

2. If a Biſhop, &c. or the Husband ſeiſed in the right of his Wife be Diſſeiſed, and the Biſhop or Husband releaſeth to the Diſſeiſor, it is no Diſcontinuance: But if the Biſhop or Husband maketh a Leaſe for years, and releaſeth to the Leſſee and his Heirs, It is not abſolutely determined by the death of the Biſhop or Husband; but it is void, or voidable at the Election of the Succeſſor, or the Wife: But if a Biſhop, or the Husband make a Leaſe for life, and afterwards Grant the Reverſion in Fee, and the Leſſee for life dyeth, in the life of the Biſhop, or of the Husband, it is a Diſcontinuance. *Cook* 3. Part, 86. *ibid.*

3. The Provoſt of *Wells*, Parſon *imperſonee* of the Parſonage of W. let the Tythe thereof for 50 years, rendring Rent, which was confirmed by the Dean and Chapter, but not by the Patron and Ordinary; the Provoſt-ſhip by Act of Parliament was united to the Deanery *cùm primò vacare contigerit*; the Provoſt dyed; the Dean accepted the Rent: It was adjudged, That the Leaſe was not affirmed, for the Leaſe of the Provoſt was void by his death, as it is in the Caſe of a Parſon and Prebend: but contrary of a Biſhop, Dean, and Abbot, who are Elective, and may make Diſcontinuances. But if the Leaſe aforeſaid had bin for life, it ſhould have bin void without Entry; and the Acceptance of the Rent was to no purpoſe, for that the Reverſion was determined. Trin. 7 Eliz. *Dyer*, 239.

4. Note, there is a difference betwixt perſons who have not the meer Right in them, but a qualified Right. Although they be barred in reall Actions (without making them parties who have Intereſt) yet the ſame ſhall not bind the Succeſſor, as Prebendary Parſons, &c. For in ſuch Caſe, in a new Action of the ſame nature, he ſhall falſify the Recovery, for that the Recovery was not any Diſcontinuance, but the Succeſſor might enter. But otherwiſe in Caſe of an Abbot, Biſhop, or the like, who have the whole Fee-ſimple in them: in ſuch Caſes the Succeſſor at the Common-Law, could not falſify in a *Scire facias*, or in another Action of the ſame nature. *Cook* 6. Part, 8. *Ferrer's* Caſe.

5. By the Statutes of 1. & 13 Eliz. and 1 Jac. Biſhops, and other Eccleſiaſticall perſons are reſtreyned to Allien, or Diſcontinue, any of their Eccleſiaſticall Lands, or Livings; for although they do convey, or Allien them to the King himſelf, yet the Alliegnation is void in Law: for, although the King be not expreſly named in the Act of 1. Jac. yet the ſame being made to ſuppreſs Allienations, Wrongs, and Diſcontinuances done by Clergy-men to their Succeſſors, the King is included in the generall words of the Act, Parſons, and perſons. *Cook* 5. Part, 14. *Cook* 11. Part, *Magdalen-Colledges* Caſe.

6. If a Biſhop had bin Patron of a Church; he could not make (by the Common-Law) any Grant of the Parſon of any Lands of his Parſonage good, either by Licence precedent, or by his Confirmation ſubſequent which ſhould have bounden the ſucceſſor of the Parſon, without the Confirmation of the Dean and Chapter: But if there had bin Parſon, Patron, and Ordinary; and the Patron and Ordinary had given Licence by their Deed to the Parſon, to have Granted a Rent-charge out of the Gleab, and the Parſon had made ſuch a Grant, this ſhould have bounden the Succeſſor of the Parſon at the Common-Law, before the reſtreyning Statutes, although it had not bin confirmed afterwards, by reaſon of the Licence precedent. But in that Caſe, the Ordinary alone might have agreed to ſuch a Grant of a Rent by his Licence precedent, or Confirmation ſubſequent, without the confirmation of the Dean and Chapter, becauſe in ſuch Caſe the Dean and Chapter had not to do with any thing that the Biſhop did as Ordinary, for that did not concern their Poſſeſſions: But in ſuch Caſe, the Confirmation, or Licence of the Patron had not bin good to make the charge perpetuall, unleſſe the Patron had had a Fee-ſimple in the Patronage, which if he had; then

covery; It was adjudged in that Caſe, That the Iſſue in tail was barred: And (amongſt other points) in that Caſe, it was Reſolved, That no Eſtate tail is preſerved by the Statute of 34 H. 8. but that which is created by the Kings Letters Patents, or elſe be of the Proviſion of the King; and an Eſtate Tail created by a common perſon, is not preſerved by that Statute: But when the King, in Conſideration of mony, or for other good conſideration, procures a ſubject to make a Gift in Tail, to one of his Servants, the Remainder to the King, the ſame is ſaved by the Statute. Trin. 27 Eliz. in C. B. *Cook* 2. Part, 15. *Wiſeman's* Caſe.

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2. If a Biſhop, &c. or the Husband ſeiſed in the right of his Wife be Diſſeiſed, and the Biſhop or Husband releaſeth to the Diſſeiſor, it is no Diſcontinuance: But if the Biſhop or Husband maketh a Leaſe for years, and releaſeth to the Leſſee and his Heirs, It is not abſolutely determined by the death of the Biſhop or Husband; but it is void, or voidable at the Election of the Succeſſor, or the Wife: But if a Biſhop, or the Husband make a Leaſe for life, and afterwards Grant the Reverſion in Fee, and the Leſſee for life dyeth, in the life of the Biſhop, or of the Husband, it is a Diſcontinuance. *Cook* 3. Part, 86. *ibid.*

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then the Grant of the Rent *Concurrentibus his* had bin good, and ſhould have charged the Lands, and bounden the Succeſſors of the Parſon, before the reſtreyning Statutes. See 31 H. 8. *Br. Barge.* 40. 11 H. 4. 15. *per Curiam.* 31 E. 3. *Fitz. Grants.* 61. *Cook* 1. Part, *Inſtitutes* 300. 301.

7. There is a Rule in Law, That *Prelatus, Eccleſia ſuæ cautionem meliorare poteſt, deteriorare nequit.* 43 E. 3. 23. And therefore, If a Biſhop, Parſon, &c. Purchaſe Lands to him and his Succeſſors, he cannot wave the purchaſe after himſelf, but his Succeſſor, upon a juſt cauſe ſhewed, viz. That the Rent payable upon the purchaſe is of greater value then the Land it ſelf, may wave ſuch purchaſe made by his Predeceſſor. So if a Biſhop, Prebendary, Parſon, &c. be ſeiſed of any thing in the right of their Church, they cannot diſclaim in that thing which is ſetled in that Church, becauſe they cannot by their Diſclaymer, deveſt that which is ſetled in the Church: But if a *Quo Warranto* be brought againſt any of them for Liberties, or Franchiſes by the King, in that ſpeciall Caſe, they may diſclaim in the Liberties, or Franchiſes, and ſuch Diſclaymer ſhall bind their Succeſſors. 40 E. 3. 27. 5 E. 41. 20 H. 6. 46. By *Markham. Cook* 1. Part, *Inſtitutes*, 301, and 370.

8. A Prebendary, Parſon, Vicear, &c. for the benefit of their Churches, ſhall be eſteemed to have the Fee-ſimple of the Gleab Lands in them: For they ſhall have and maintain an Action of Waſte, for Waſte committed in the Gleab, and in the Writ it ſhall be ſaid, *ad exhæredationem Eccleſiæ*: But a Parſon, Prebendary, &c. cannot Diſcontinue the Fee of the Gleab: And if they make Leaſes for years, reſerving Rent, and dye, the Leaſes are now void by their deaths; and no Acceptance of Rent by their Succeſſors, ſhall make ſuch void Leaſes good: Otherwiſe it is, if they make Leaſes for lives; there the Acceptance of the Rent by the Succeſſors, will make the Leaſes good, becauſe the Leaſes were not void, but voydable onely. But if a Biſhop, Abbot, Prior, &c. make Leaſes for years, and dye, and the Succeſſors do accept of the Rent, they ſhall never avoid the Leaſes, for that the Leaſes were not void, but voidable onely. *Cook* 3. Part, 65. in *Pennant's* Caſe.

Diſcontinuances of Suits, Proceſs, Writs, *and* Proceedings *in* Courts.

1. THe Queen brought a *Quare Impedit* againſt the Biſhop, and the Incumbent, they pleaded ſeverall Pleas; the Suit long depended. It was prayed, in regard the Queen did not proſecute her Suit, that ſhe might be Non-ſuited: But it was agreed and Ruled by the Court, That the Queen could not be Non-ſuit: but it was ſaid, That after a year paſſed, the party may have the Suit diſcontinued, but the Queen ſhall not be Nonſuit: But in the Caſe of a Common-perſon, the Court ſaid, The Plaintiff may Diſcontinue his Suit within a year; but the Defendant cannot pray it to be diſcontinued untill after the year. Trin. 29 Eliz. in C. B. The Queen and *Leigh's* Caſe. *Goldesbr.* 53.

2. Upon the Statute of 1 E. 6. Of *Diſcontinuance of Proceſſe*, by the Demiſe of the King, theſe points were Reſolved. 1. If any Judiciall Writ, or any proceſſe in a Court of Record be Awarded in the time of the Predeceſſor of the King, the ſame may be executed in the time of the Succeſſor. 2. If an Appeal of death be delivered to the Sheriff, within the year, and, before the Retorn of it, the King dyeth, there, by the Common-Law, the Plaintiff upon a *Certiorari* directed to the Sheriff, Retornable in B. R. ſhould have another Appealment, although the ſame doth not come in by the Retorn of the Sheriff, but by *Certiorari*, for neceſſity; otherwiſe the Plaintiff, who lawfully bringeth his Suit within the year, without any default in him, ſhould loſe his Appeal, and therefore, becauſe by Act of Law, it is Diſcontinued, the Law will give a means to revive it. 3. That by the death of the King, The Office of Sheriffs are determined; and without new Pattents of their Offices, nothing can be done by them. But if a man hath the Office of Sheriff by Inheritance by Charter, he may Execute any Judiciall Writ Awarded to him, in the time of the Predeceſſor-King. 4. That the Statute of 1 E 6. extends onely to Actions betwixt party and party, and doth not extend to Caſes where the King is par-

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ty. 5. If an Information be preferred by the King, or *tam pro domo Domino Rege quam proſe ipſo*, and Iſſue or Demurrer is joyned, and the King dyeth, all is abated but onely the Information, and that ſhall ſtand, and upon that, Attachment ſhall be Awarded, upon the Retorn of which, if the Defendant appear, he ſhall plead *de novo*, for although in generall, the King doth not dye and there is no *Inter-Regnum*, yet *in Individuo* he dyeth; and that ſtands upon great reaſon, for upon many Penall Statutes, the Suit is to be commenced within a certain time, and if the Information ſhould not be of force after the death of the King, the Offence ſhould be unpuniſhed: But if the King bring an Original, as a *Quare Impedit*, the ſame ſhall abate by his death: But if a man be Endicted in the time of the King, and pleads to Iſſue, and the King dyeth; the party ſhall plead *de Novo*. *Cook* 7. Part, the Caſe of Diſcontinuance of Proceſſe, by Demiſe of the King.

3. A *Quare Impedit* was brought againſt A. and B. upon a Grant of the next Avoydance. A. pleaded *Non Conceſſit*, upon which Iſſue was joyned: B. pleaded a Plea upon which it was demurred, Verdict was found againſt A. at the Aſſizes, and the *Poſtea* being Retorned. 8. *Mich.* the Entry was *Curia adviſare vult*, of the Judgment upon the Verdict and demurrer; and day was given untill 1. *Hillarii*, to the Plaintiff, and B. but no day was given to A. againſt whom the Verdict was found; And upon Error brought, That was Aſſigned for Error, that it was a Diſcontinuance. But it was Reſolved, That it was no Diſcontinuance, for the Verdict being againſt A. he is out of Court, and no day ſhall be given to him, againſt whom a Verdict is found, becauſe he hath no day in Court to plead any thing; but in this Caſe, day onely was to be given to the party, who was to plead to the Demurrer. Mich. 7 Car. in B. R. *Lokins*, and Sir *John Lamb*'s Caſe. *Cro.* 1. Part, 170, 171 See Mich. 12 Jac. in B. R. *Popham* and *Rowlyes* Caſe. *Cro.* 2. Part, 357. acc. See Mich. 13 Jac. in B. R. *Elkin* and *Wallas*'s Caſe. *Bollſr.* 3. Part, 230, 231, 232. acc.

4. Debt was brought upon an Obligation, the Defendant pleaded payment, which was found againſt him, there being Error in the *Venire facias*; the Plaintiff entred a *Retraxit*, whereupon Judgment was given, *Quod Defendens eat ſine die*. In a new Action brought, the Defendant pleaded the ſame in bar; Whereupon Error was brought, and amongſt other Errors, It was Aſſigned, That there was a Diſcontinuance, for there is not any continuance from Mich. 2 Jac. (at which time the Verdict was given) to Mich. 4 Jac. at which time the Judgment was given; and this was Error, and not aided by the Statute of *Jeofailes*, becauſe the Judgment is not given upon the Verdict, for then it had bin good; but upon the *Retraxit*, which is out of the Statute; It was ſaid, That a Diſcontinuance can never be Objected *pendente placito* before Judgment, for it may be continued at the pleaſure of the Court, but after in another Term, it may be well rejected, and a Continuance cannot then be entred. Mich. 16 Jac. in B. R. *Beecher* and Sir *Tho. Shirleys* Caſe. *Cro.* 2. Part, 211.

5. Error of a Judgment in *Havering*-Court, in *Eſſex*, becauſe the Judgment being in Debt by *Nihil dicit*, there was a Diſcontinuance, viz. That after Imparlance-day was given to the parties, untill the next Court, and no day certain: for that cauſe, It was holden by the Court to be a Diſcontinuance, and the Judgment was reverſed. Paſc. 18 Jac. in B. R. *Adams* and *Flyth*'s Caſe. *Cro.* 2. Part, 571.

6. Error brought of a Judgment, In Debt upon an Obligation of his Father, The Defendant Pleaded, Nothing by diſcent, but 15 Acres in D. in *Comitatu* C. The Plaintiff Replyed, That the Plaintiff had more Lands by Diſcent, *ſcil.* 15. Acres in S. It was found that the Plaintiff had nothing in S. ſo the Plaintiff had Judgment and Execution of the 15 Acres in D. upon which he brought Error, and Aſſigned for Error, a Diſcontinuance of the Record, from *Eaſter* Term, to *Michaelmas* Term following. It was adjudged to be Error, and that it was out of the Statute of 18 Eliz. and not helped by that Statute, and the Judgment was reverſed. Hill. 7 Jac. in B. R. in *Mollineux* and *Mollineux*'s Caſe. *Cro.* 2. Part, 236. See Trin. 1652. *Friend* and *Baker*'s Caſe, in B. R. *Styles* 339. acc.

7. In Treſpaſſe for entring his houſe and Cloſe at G. the Defendant juſtifieth, for that a *Capias ut legatum*, was by a Warrant from the Sheriff, directed to him to Execute upon one S. and becauſe it was the Common voice, That S. was at the Plaintiffs houſe, he went in a Foot-path through the Cloſe to the ſaid houſe, and asked leave of the Plaintiff to enter his houſe, to ſearch for the ſaid S. and that the Plaintiff Licenſed him; whereupon he entred, and not finding S. he Returned the ſame way: Iſſue joyned upon the Licence, It was found for the Plaintiff: It was moved in ſtay of Judgment, That there was not any Replication for the Cloſe, nor any Iſſue joyned thereupon, ſo all was Diſcontinued; But the Opinion of the Court was, That Judgment ſhould be given for that which was found, and that the Diſcontinuance for the other, was aided by the Statute. Mich. 12 Jac. in B. R. *Wats* and *King*'s Caſe. *Cro.* 2. Part, 353.

8. Debt

8. Debt was brought upon an old Statute of 800 l. The Plaintiff declared upon a Statute, *Solvendum* upon requeſt, and it appeared upon *Oyer* of the Statute, that the mony was payable at a day certain, which being an Incurable fault, the Plaintiff moved, That he might Diſcontinue his Suit; otherwiſe, by this ſhift, he ſhould be barred of his Bond: It was Anſwered by the Court, That the Plaintiff, after a Demurrer, cannot Diſcontinue it without the leave of the Court. And although the continuance be not entred, it may be entred at any time; And the Defendant, by leave of the Court, for his own advantage, may enter the Continuance; And becauſe the Suit was upon an old Statute 34 years old, wherein the Defendant was but a Surety, he gave day till the next Term, to Treat and compound; and that the Defendant might enter the Continuance. Hill. 9 Jac. in B. R. *Fox* and *Iukes* Caſe. *Cro.* 2. Part, 316. See *Bolſtr.* 1. Part, 117. the ſame Caſe. See Mich. 24 Car. in B.R. *Styles* 134. acc. Mich. 1651. *Styles* 306. acc.

9. Error of a Judgment in an Inferiour Court, The Plaint was entred before ſuch a one Mayor, and the Suit was continued before another Mayor, and it is not ſhewed, that the firſt Mayor is removed, and that the other Mayor was lawfully Elected, and ſworn. *Rolls* Juſtice ſaid, That the Continuances in an Inferiour Court, ought to ſhew the Manner of the Continuances, and it ought not to be expreſſed generally; Alſo it is not ſaid *tunc majores*, which would have made it certain: The Court doubted, If the *Venire facias* was not diſcontinued, and ſome Inclined, It was. Trin. 24 Car. in B. R. *Styles* 111.

10. Error of a Judgment in an Inferiour Court, the Error was Aſſigned in a Continuance, which was *ad proximam Curiam* 16. *die*, whereas the Court was not held that day. It was holden Error, and the Judgment reverſed. Paſc. 24 Car. in B R. *Pay* and *Paxteſts* Caſe. *Styles* 97. See Mich. 23 Car. in B. R. *Pimpe* and *Jhuſons* Caſe. It was Aſſigned for Error, That one of the Continuances was to a day certain, where it ought to be *ad proximam Curiam*, the Judgment was reverſed. *Styles* 70. See 24 Car. in B. R. *Pimley* and *Robinſons* Caſe. *Styles* 122.

11. Treſpaſſe of Battery againſt A. B. and C: A. appeared, and the Plaintiff Declared againſt him, *ſimul cum*, and he pleaded Not-Guilty. And afterwards B. appeared, againſt whom the Plaintiff alſo declared, *ſimul cum*, &c. And upon Not-guilty pleaded, a *Scire facias* was Awarded, and both Iſſues tryed at the Aſſizes; and the Iſſue againſt A. being firſt found, the Jury upon that Iſſue aſſeſſed damages for the Plaintiff 200 l. Afterwards the Iſſue was tryed againſt B. and 50 l. damages aſſeſſed by the ſecond Tryall: C. appeared, and confeſſed the Action, and a Writ of Enquiry of Damages was Awarded upon the Roll, but none Iſſued: In that Caſe, theſe points were Reſolved. 1. When in Treſpaſſe againſt divers, the Defendants plead Not-Guilty, or ſeverall Pleas; and the Jury find in all for the Plaintiff, the Jurors cannot Aſſeſſe ſeverall damages againſt the Defendants, becauſe it is all but one Treſpaſſe; and made joynt, both by the Writ and Declaration: But if the Jury find one Guilty at one time, and another at another time, there ſeverall damages may be taxed. 2. Reſolved, That the Defendant who pleads laſt, ſhall be charged with the damages taxed by the firſt Jury, and the ſecond Jury ſhall not aſſeſſe damages, but the party ſhall be contributary to the damages aſſeſſed by the firſt Jury. 3. Whereas it was objected, That there was a Diſcontinuance againſt C. for the Judgment given upon the Confeſſion, and not upon the Verdict, and C. is not party to the Iſſue, or the Enqueſt which aſſeſſeth the damages, that the ſame was not helped by the Statute of 32 H. 8. But it was Reſolved, That by the Act of Parliament, of 32 H. 8. the Diſcontinuance againſt C. was ſaved, becauſe that C. was party to the Originall, and one of the Defendants in the Action; And ſo within the words of the Act, and he might have Attaint. *Cook* 11. Part, 5. Sir *John Heydons* Caſe.

12. Accompt was brought againſt J. G. of divers Receipts and parcells, to all which, except one, the Defendant pleaded to Iſſue, (and for one parcell pleaded nothing) and the Iſſues were found for the Plaintiff: It was moved, That the Plea was Diſcontinued, becauſe he did not anſwer to parcell; And it was ſaid, That the Diſcontinuance was not remedied by the Statute of 32 H. 8. becauſe no anſwer was given to one parcell, and of parcell the Plaintiff could not have Judgment according to his Declaration; for of the parcell to which no Anſwer was made, no Judgment could be given. But it was Reſolved by the whole Court in that Caſe, That the Statute of 32 H. 8. cap. 30. did extend to it, for it is thereby Enacted, That after Verdict found, Judgment ſhall be given any Diſcontinuance, &c. notwithſtanding. Mich. 29 Eliz. in B. R. *Gomerſal* and *Gomerſal's* Caſe. *Godbolt.* 55.

Diſpenſations *for Reteyner of Benefices.*

1. BY the Statute of 21 H. 8. cap. 13. The King, Queen, Prince, and other the Kings Children, are not limitted within the Statute, how many Chaplins they ſhall retein, and therefore they may retain as many Chaplins as they pleaſe; And every of their Chaplins may purchaſe a Diſpenſation to have Plurality of Benefices, with Cure of Souls. But Arch-Biſhops, Biſhops, Dukes, Earls, Barons, Counteſſes, and other Offices of Honor and Place named in the Statute, are ſtinted how many Chaplins every one of them may retein, who are Capable of Diſpenſations for Pluralities. See Statute 21 H. 8. cap. 13.

2. A Counteſſe may retain two Chaplins within the Statute, and each of them may purchaſe a Diſpenſation to have Plurality of Benefices, with Cure; But if a Counteſſe who is a Widdow, doth retein two Chaplins, and afterwards doth retein a third Chaplin, and the third Chaplin, before any of the other two, doth purchaſe a Diſpenſation to have two Benefices with Cure, he having a Benefice before, of the value of 8 l. the firſt Benefice is void by the Statute, For when the Counteſſe hath reteyned two Chaplins, thoſe two are onely capable of Diſpenſations within the Statute, and the Reteyner of the third Chaplin cannot Deveſt the Capacity of Diſpenſation which was veſted by their Reteyner in the firſt two Chaplins; And therefore the Diſpenſation purchaſed by the third Chaplain, is void, and his firſt Benefice is void by the Statute. *Cook* 4. Part, 90. *Drwyes* Caſe.

3. If a Baron who is allowed but three Chaplins, retein ſix by his Letters Teſtimoniall at one time, the three firſt Chaplins are onely Warranted by the Statute, and a Diſpenſation for Plurality purchaſed by them, is onely good; and the three laſt ſhall not be reputed his Chaplins within the Statute, ſo long as the three firſt are in his Service, or are living, and therefore the purchaſe of Diſpenſations by the three laſt for Pluralities, are void. 14 Eliz. *Dyer*, 312.

4. In a *Quare Impedit*, the Caſe was, The Queen preſented to a Parſonage, which was void by taking of another Benefice by S. the Defendant; The Defendant S. to enable him to have two Benefices, pleaded, That he was the Chaplin of Sir *James Croſts*, Compteroller of the Queens Houſhold: who by the Statute of 21 H. 8. might have two Chaplins, and might qualify them to take two Benefices, to which it was Replyed, That Sir *James Croſts* had two other Chaplins which are Qualified to have two Benefices, and alſo to have two Benefices by reaſon of that Qualification; and alſo are alive, ſo as he is a third Chaplin, who could not be qualified by that Statute; To which it was anſwered, That one of thoſe two Chaplins was removed and diſcharged by the ſaid Sir *James Croſts*, to be his Domeſticall Chaplin, *ſcil. Cappellanum familiarem*, and ſo he hath now but two Chaplins, of which the Defendant was one; upon which there was a Demurrer in Law: In this Caſe, there were three Points. 1. If a Qualification *ſub ſigillo* be ſufficient within the Statute, without the ſignature, or name of Sir *James Croſts*. 2. When two Chaplins are qualified, and one is removed out of Service, if he might qualifie another by the Statute, the party being alive who was Qualified. 3. Whether he remain his Chaplin during his life, notwithſtanding ſuch removall. It was adjudged in this Caſe for the Queen; and that for theſe reaſons: For the firſt point, becauſe the Defendant S. was not qualified *ſub ſigno et ſigillo Jacobi Croſt.* but onely *ſub ſigillo*; And the words of the Statute are, *viz.* Under the ſign and Seal of the King, or other their Lord or Maſter &c. which words (or other their Lord or Maſter) ſhall be referred to Sign and Seal, which is Limitted to the King. To the ſecond point, they agreed it to be clear Law; That after he hath reteyned as many as by the Law he may retein, and they are *ſub ſigno et ſigillo*, teſtified to be his Chaplins, and by reaſon thereof, have Qualification to have two Benefices, and by Vertue thereof, have two Benefices, although that afterwards they are removed for diſpleaſure, or otherwiſe; yet during their lives, their Maſter cannot take other Chaplins which may be Qualified by the Statute, for ſo every Baron, &c. might have Chaplins, *ſans* number which was not the meaning of the Statute. 3. They Reſolved, That although he was removed from Domeſticall Service of the Family, yet he did remain Chaplin at large, and ſo a Chaplin within the Statute; And it was alſo holden in this Caſe, That if the party Qualified do dye, The Queen, or other Maſter mentioned in the Statute, might Qualify another again. Trin. 28 Eliz. in C. B. The Queen and *Savacres* Caſe. Rott. 1130. *Godbolt.* 41, 42.

5. If a Counteſſe that is a Widdow, doth retein

tein a Chaplin, and he purchaſeth a Diſpenſation for Plurality; And afterwards the Counteſſe entermarrieth with a Peer of the Realm, and afterwards the Chaplin is Admitted, Inſtituted, and Inducted into a Benefice with Cure; this is well, and good in Law, for that the Reteyner was not Countermanded by the entermarriage. *Cook* 4. Part, 118. *Alton's* Caſe.

6. If an Earl or Baron reteyneth a Chaplin, and before the Chaplin be advanced to any Benefice, the Earl, or Baron be Attainted: Now thereby the reteyner is determined, and the Chaplain cannot purchaſe a Diſpenſation to have a ſecond Benefice, becauſe that he that is Attainted, is dead in Law, and thereby the Reteyner is determined before the Diſpenſation obtained, and therefore, If ſuch a Parſon, having a Benefice with Cure of Souls, do afterwards, without other Diſpenſation obtayned, take another Benefice, the firſt Benefice is void by the Statute. *Cook* 4. Part, 119. The Earl of *Weſtmerland's* Caſe.

7. If a man before the Statute of 21 H. 8. hath a Diſpenſation from the Pope for a Plurality, and at the time of the making of the Statute of 21 H. 8. hath one Benefice with Cure of Souls, of the value of 8 l. and within a year after the making of the Statute of 28 H. 8. cap. 16. he obtaineth a Confirmation of his former Diſpenſation; It was holden in ſuch Caſe by *Manwood* and *Mounſon* Juſtices, That the firſt Benefice was void by the Statute of 21 H. 8. and the Statute of 28 H. 8. cap. 16. doth not reſtore him to the ſame without a new Preſentation, notwithſtanding that the Statute of 28 H. 8. doth make the Bulls of Diſpenſation made by the Pope good for one year; And that if they be ſurrendred within the year, that the Chancellor of the Augmentation might make a new Diſpenſation unto him. But the Lord *Dyer* held, As the Statute of 21 H. 8. made the firſt Benefice void: ſo the Statute of 28 H. 8. cap. 16. did reſtore him to the Benefice; For when two Statutes are croſſe in appearance one to the other, and no Clauſe of *Non Obſtante* be conteyned in the ſecond Statute, ſo as the one may ſtand with the other, ſuch Conſtruction ſhall be made of the Statutes, as both of them ſhall take effect. 18 Eliz. *Dyer*, 347.

8. In an *Ejectione Firmæ*; It was found by ſpeciall Verdict, That A. being Parſon of M. and the Land in Queſtion, parcell of the Rectory, That he was Chaplain to the Earl of S. and obtained a Licence from the Biſhop of *Canterbury*, to accept another Benefice, *Modo ſit infra* ten Miles of the former, which was confirmed under the Great Seal: A. accepts another Benefice, with Cure, which was found to be ſeventeen Miles from the firſt, and was Inſtituted and Inducted, both being within the Dioceſſe of *Lincoln*. The Arch-biſhop in his Viſitation, Inhibited the Biſhop of *Lincoln* to Execute any Induction during his Viſitation. It was found, That the Patron omitted to preſent to the firſt Benefice, within the ſix Moneths; and the Biſhop of *Lincoln*, within the ſix Moneths Collated the Leſſor of the Plaintiff to the firſt Benefice, who was admitted, Inſtituted, and Inducted, and made the Leaſe; Whether the Plaintiff had good Title againſt the Defendant, was the Queſtion: The Doubt aroſe upon that, Whether *Modò ſit* was a Condition. The Civilians in this Caſe delivered their Opinions, That *Modo ſit*, are Proviſoes, and not Conditions, unleſſe there be added other words, That if it be otherwiſe, That then it ſhall be void. The Court was of Opinion, That although *Dummodo*, *Ita quod*, be generally a Condition in our Law, as *Dummodo* is, yet it is to be expounded, as it uſually hath bin; otherwiſe great Inconveniences would enſue, and multitude of Benefices would be void, and in Lapſe to the King. And therefore they Reſolved, It ſhould not in this Caſe be taken to be a Condition: to make the Benefice void by the Statute of 21 H. 8. but ſhould be as it was at the Common-Law before the Statute: It was adjudged for the Defendant in the *Ejectione Firmæ*. Trin. 11 Car. in B. R. Rott. 446. *Dodſon* and *Lynn's* Caſe. *Cro.* 1. Part, 241.

See more of Diſpenſations. In the Titles of Appropriations, Commendations, Faculties, *and* Pluralities.

Diſtreſſe *and* Diſtringas.

1. *What things are Diſtreinable for Services, Rents, or other things; And when, and in what place; and by whom they ſhall be good, and in what not: And how ſuch Diſtreſſe is to be uſed; and for what a Diſtreſſe may be taken, what not.*

1. A Diſtreſſe may be taken of a thing, whereof a valuable property is in ſome perſon; and not of things which are *feræ naturæ*. 2. Things valuable for the maintenance of Trade, which are for the Common-Wealth, are not Diſtreinable. 3. Nothing can be diſtreyned, but that which may be rendred again in as good plight, as it was at the time of the Diſtreſſe taken. 4. *Averia Carucæ*, are not Diſtreinable, nor the books of a Schollar. 5. Things fixed to the Inheritances, cannot be Diſtreyned for Rent. *Cook.* 1. Part, *Inſtitutes*, 49.

2. In Treſpaſſe for taking of his Goſhauk, the Defendant did Juſtify the taking of it, becauſe he had a Dove-houſe adjoyning to the place where; and the ſaid Hauk divers times flew at his Doves, and ſo did at the time of the taking, for which cauſe he juſtified the taking of the Hauk, 16 E. 4. 7. So ſee, that one Diſtreyned a Lanneret, for deſtroying of his Pheaſants. *Fitz.* Diſtreſſe. 20. But Quære, If for a Rent-Service, a Hauk ſhall be Diſtreyned.

3. In a ſecond deliverance of a Barge taken at *Graveſ-End*, in the Stream of the River of *Thames*. The Defendant Pleaded, That he was ſeiſed of an Inn called the *George* in *Milton*, and preſcribed, That he, and all thoſe whoſe Eſtate he had, &c. had uſed for to repair part of the Bridge at *Graveſ-End*. In Conſideration of which, the Plaintiff being a Ferry-man, he and his Auncеſtors, and thoſe whoſe Eſtate, &c. had, time out of mind, &c. paid to him and his Auncеſtors, &c. 4 s. yearly, at *Mich.* and for one year, he Avowed to Diſtrein the Ferry-mans Barge, and Averred, That the Bridge was in repair, and the Barge to be the Ferry-mans Barge; upon which there was a Demurrer in Law. And Whether the Barge, being upon the ſtream of the River was diſtreinable, was the Queſtion, the Caſe is not Reſolved. 3. *Ma. Dyer.* 117.

4. Treſpaſſe was brought upon the Statute, that none ſhall diſtrein the beaſts of the Plough ſo long as another reaſonable diſtreſſe may be had; and the Plaintiff declared of taking his Cattell of the Plough, *contra formam Statuti*, but did not ſhew, how that he had other Diſtreſſe; and yet it was adjudged to be good; for that ſhall be intended within the words *contra formam Statuti*, and it ſhall come on the other part, after the Defendant hath ſhewed the cauſe of Diſtreſſe. Paſc. 14 Eliz. *Dyer*, 312.

5. A man did preſcribe to have pot-water out of a River; And the Jury found, that he ought to have it, paying ſix pence yearly. In that Caſe, It was Ruled, That he had failed of his Preſcription; and if he doth not pay the mony, the Tenant of the Land may only diſturb him from taking the Pot-water, which is all the remedy which he hath; but it ſeems, he cannot diſtreyn for it. *Cook* 5. Part, 78. *Grayes* Caſe.

6. If there be Lord and Tenant, by Rent or other Service; If the Rent be behind, and the door of the houſe of the Tenant be open, the Lord may enter into the houſe of his Tenant, and diſtrayn for the Rent or Service. 38 H. 6. 28. and See 33 E. 3. *Avowry* 256. The Lord may Diſtrain in the houſe, although the Tenant holdeth Lands in which he may diſtrain. *Cook* 5. Part, 92. in *Semaynes* Caſe. acc.

7. A man ſeiſed of bl. Acre in Fee, and of Wh. Acre for years, by Deed granted a Rent out of both Acres to J. S. for life, with Clauſe of Diſtreſſe in both Acres; the Rent was behind, and J. S. diſtreyned and Avowed in Wh. Acre. In this Caſe, amongſt other points, It was Reſolved. 1. That when a man Grants a Rent out of Land in Fee, and out of Lands for years, to have for life; the Freehold of the Rent ſhall Iſſue out of the Land in Fee, and not out of the Term, becauſe it is but a Chattell, and the Agreement of the parties cannot charge ſuch a thing with a Rent, which was not chargeable by the Law, as an Advowſon, Hundred, Fair; becauſe in an Aſſiſe, they cannot be put in view, nor any Diſtreſſe taken out of them. 2. It was Reſolved, That White Acre, during the Term, ſhould be ſubject to the Diſtreſſe, although the Rent did not Iſſue out of it; And when Land is charged with a Rent in Fee, Goods and Chattells may be charged to the Diſtreſſe; And if the Grantee taketh a Leaſe of parcell of the Land, the ſame ſhall not ſuſpend the Diſtreſſe; And a man may Diſtrain in his own Poſſeſſion. *Cook* 7. Part, 23, 24. *Butt's* Caſe.

8. If a man Granteth a Rent out of the Manner of D. and further granteth, That if the Rent be behind, That he ſhould Diſtrain for it in the Mannor of S. It is but a penalty in the Mannor of S. and it is a Rent out of the Mannor of D. onely, and if it ſhould be a Grant out of the Mannor of S. then the Grantor ſhould be twice charged; And if a man Granteth a Rent of 40s. to have and to hold, to him and his Heirs, out of the Mannor of D. the ſame is a Rent going out of D. onely. But if a man Granteth to one and his Heirs, that he ſhall Diſtrain for a Rent of 40 s. within his Mannor of S. the ſame ſhall amount to a Grant of a Rent out of his Mannor of S. For if it ſhould not amount to a Grant of a Rent; for the Grant ſhould be of no effect if the Grantee ſhould have onely a bare Diſtreſſe, and no Rent in him; and therefore it ſhall amount to a Grant of a Rent in conſtruction of Law *ut res magis valeat*. 3 E. 3. 12. 3 Aſſ. 7. 22 H. 6. 11. See *Litt.* 48. b.

9. A Woman Granted an Annuity of 20 l. *per annum* to her younger Son, Iſſuing out of the Mannors of E. O. and P. lying and being in the Pariſhes of E. W. and C. in the County of K. *aut alibi in eodem Com. diſtit Manoriis ſive eorum alicui, quoquo modo ſpectant. ſeu pertinent.* The Woman was alſo ſeiſed of an Acre of Land in C. not parcell of, nor appertaining to, any of the ſaid Mannors, and dyed ſeiſed; the Grantee entred, and abated into the ſaid parcell and Acre, and continued ſeiſed by Abatement; And if the ſaid Acre which was not parcell, nor appertaining to the Diſtreſſe, ſhould be charged with the ſaid Rent or not, was the Queſtion. It was adjudged, That the Rent did not Iſſue out of that Acre, becauſe in this Caſe there is but one Grant, and one ſentence, for there is no period nor end of the ſentence, before the Concluſion of theſe words *aut alibi*, and the *aut alibi* doth not enlarge the Grant of the rent, to Iſſue out of other Lands or Tenements, but enlargeth the Towns and places in which the Lands charged before, did extend, as if it had bin ſaid *in parochia de E. W. & C. aut alibi in Com. K. diſt. manoriis ſpectant. ſive pertinent.* Hill. 3 Jac. in B. R. *Cook* 6. Part, 39. *Henry Finches* Caſe.

10. If one Coparcener hath a Rent Granted to her for owelty of Partition, ſhe may Diſtrain for the ſame of Common right, without any words of Diſtreſſe, and ſo ſhall her Grantee, for that it was not annexed to her perſon onely, but to the Land, and the Eſtate of it. 21 H. 6. 7. *Cook* 3. Part, 22. in *Walker's* Caſe, acc.

11. The King hath power to make a Court Leet, where there was none before: And a Diſtreſſe is incident of Common Right, unto a Court Leet, But in a Court Baron, a Preſcription might be layed to Diſtrain. *Brown.* 1. Part, 36.

12. If a man ſeiſed of Lands in Fee, maketh thereof a Leaſe for Life; And afterwards he Granteth a Rent-charge, though the Grantee cannot Diſtrein the Cattell of a ſtranger, who is in Poſſeſſion of the Land for the Rent; Yet if the Cattell of the Grantor do come upon the Land, the Grantee may Diſtrain them for the Rent. *Brown.* 1. Part, 32. adjudged.

13. The Lord of a Waſte, of 200 Acres of Land, enfeoffed a ſtranger of 50 Acres of the ſame Land, lying towards the North; the Feoffee put his Cattell in the Fifty Acres, and they Eſtrayed into the reſidue of the Land, and were Diſtreyned Damage-feaſant, and the Diſtreſſe holden good. For the Purchaſer ought to encloſe, or keep his Cattel within the 50 Acres; and ſo ought the Lord for the reſidue. Mich. 23 Eliz. *Dyer*, 372. See 14 Eliz. *Dyer*, 317. *Cook* 6. Part, Sir *Miles Corbets* Caſe, acc.

14. An Avowry was made for Damage-feaſant in &c. The Plaintiff ſaid, That he was ſeiſed in Fee of the Cloſe adjoyning, and the Defendant, and thoſe whoſe Eſtate he had, &c. time out of mind, &c. were bounden to encloſe. The Defendant ſaid, that the Cloſe was the Free-hold of A; without, that the Plaintiff was ſeiſed of that in Fee; the Plaintiff did demur upon the Plea. It was holden, That this ſpeciall Traverſe of the Eſtate in Fee, was good, becauſe the Plaintiff had given advantage of that; yet if he had but an Eſtate for years, or at ſufferance, or Common, or Licence, it ſufficeth: Out of which Caſe, Note, If two Cloſes be, and the one ought to encloſe againſt the other; if the Cattell of a ſtranger eſcape into the Cloſe, which ought to make the Encloſure, he may Diſtrain them. 22 Eliz. *Dyer*, 365.

15. The Patentee of the King *de herbagio Forreſtæ*, may have an Action of Treſpaſſe againſt any one who conſumes and deſtroyes the Graſſe; and alſo he may take Cattell there damage Feaſant, and the Writ of Treſpaſſe ſhall be *Quare clauſum fregit*, aſwell, as if it had bin of Land. And it was the Opinion of three Juſtices, That by ſuch Grant, the Patentee might Encloſe the Forreſt; but he could not take the Trees there. Trin. 11 Eliz. *Dyer*, 285.

16. A man had Common Appurtenant by Preſcription, to a houſe, and 40 Acres of Land; and he made a Feoffment in Fee of parcell of the Land: It was Reſolved, That the Common ſhould be Apportioned, and that the Feoffee ſhould have Common for that parcell which was Alliened unto him: For the Preſcription was to have Common in ſuch Land, in which, to be taken by the mouthes of his Cattell, Levant and Couchant upon the Land, to which; and that extends to all and every parcell of it; And in that Caſe, It was agreed,

agreed, That a Commoner may diſtrain Damage-Feaſant, of Common-Right. *Cook* 8. Part, 78. *Wright* and *Wild*'s Caſe.

17. Note, theſe points were Reſolved by the Court, When an Entry, Authority, or Licence is given by the Law, and the party doth miſ-do in it; he is a Treſpaſſer *ab initio*: As if the Lord, who Diſtraineth for Rent, or Damage-Feaſant, doth labour, or work the Diſtreſſe, he is a Treſpaſſor. 2. That the not doing of a thing ſhall not make him, who hath Authority, or Licence in Law to do it, to be a Treſpaſſer *ab initio*. As if a man Diſtreins for his Rent, or Damage-Feaſant, and the Leſſee tendreth the Rent, or Amends, and requires his Cattell which are Diſtrained, and the party will not deliver them, that doth not make him to be a Treſpaſſor *ab initio*, but Damages there ſhall be recovered onely for the detaining of the Cattell, but not for the Diſtreſſe. 3. It was holden in that Caſe, That if a mans Cattell are Diſtrained, That tender of Rent upon the Lands before the Diſtreſſe, doth make the diſtreſſe wrongfull; Tender after the Diſtreſſe, and before the Impounding of the Cattell, makes the Detainer, and not the Diſtreſſe, wrongfull. Tender of amends, or of a Rent, after the Cattell are Impounded, makes neither the one, nor the other wrongfull: But if after the Avowant hath Return, If the Plaintiff maketh unto him a ſufficient Tender, he may have Detinue againſt the party, or he may upon ſatisfaction made in Court, have a Writ for the Delivery of his goods unto him. *Cook* 8. Part, 146. The ſix Carpenters Caſe,

18. In Treſpaſſe, The Defendant pleaded, That the Dean and Chapter of P. were ſeiſed of the Mannor of C. in Fee, in the right of their Church, and ſo ſeiſed King E. 4. by his Letters Patents, Granted them all Fines *pro Licentia Concordandi*, of all Homagers and Tenants, Reſiants, and Non-Reſiants within their Fee; and that ſince they have uſed to have ſuch Fines; and that, 29 Eliz. a Fine was Levyed in C. B. betwixt the Plaintiff, and one A. of 11. Acres of Land, and the Poſt-Fine Aſſeſſed to 15 s. And that S. the Common oppoſer, did allow to them the ſaid 15 s. becauſe the Land was within their Fee, and that afterwards they demanded the 15 s. of the Plaintiff, which he refuſed to pay, and therefore the Defendant, in the right of the Dean and Chapter, Diſtrayned: And it was not Averred, That the Land wherein they Diſtreyned, was within their Fee; onely S. allowed it to be within their Fee. It was the Opinion of the Court, that the Dean and Chapter could not Diſtrain for this matter, for they ought to ſue for it in the Exchequer. And *Gawdy* Juſtice ſaid, That this Grant did not extend to the Poſt-Fine, for Fine *pro Licentia Concordandi*, is the Queens Silver, and not the Poſt-Fine. Paſc. 31 Eliz. in B. R. Rott. 318. *Stoud* and *Bragg*'s Caſe. *Leon.* 249.

19.* In Treſpaſſe, the Defendant did juſtify as Bayliff unto another; the Plaintiff Replyed, That he took his Cattell of his own wrong without that, That he was his Bayliff. *Anderſon* Chief Juſtice ſaid, If one hath cauſe to Diſtrein my goods, and a ſtranger of his own wrong, without any Warrant by the other, taketh my goods, not as Bayliff, or Servant to the other; and I bring an Action of Treſpaſſe againſt him, Can he excuſe himſelf, that he did it as my Bayliff? Can he father his miſdemeanor upon another? He cannot, for once he was a Treſpaſſor, and his intent is manifeſt; But If one Diſtrain as Bayliff, although in truth he is not Bayliff, if after, he in whoſe Right he doth it, doth aſſent to it, he ſhall not be troubled as a Treſpaſſor, all which was agreed by the other Juſtices: And in this Caſe, It was ſaid, That if a man hath Cauſe to Diſtrein, and cometh upon the Land, and Diſtreyneth, and another asketh the Cauſe, Why he doth ſo? If he Aſſigns a Cauſe not true or ſufficient, yet when an Action is brought againſt him, he may Avow, or juſtify and Aſſign another Cauſe. It was Reſolved in the principal Caſe, That the taking was not good. Mich. 29 Eliz. in C. B. *Godbolt*. 110.

20. In a Replevin, the Defendants made Conuſans as Bayliffs for Rent behind; The Plaintiff ſaid, That two ſtrangers had Right of Entry in the place where &c. and that the Defendants by their Command entred and took the Cattel *abſq; hoc*, that they took them as Bailiffs to A. upon the Traverſe the Defendants demurred in Law; It was adjudged that the Traverſe was well taken: For it was agreed by the Court, That When a Bailiff diſtreins he ought, if he be required, ſhew the Copy of his Diſtreſs, but if he be not required then he is not tyed to do it, and no Requeſt was in this Caſe. Paſch. 29. Eliz. in C. B. *Butler*'s Caſe, *Leon.* 50.

21. If the Lord cometh to diſtrein the Cattel of his Tenant for Rent or Services behind, and he ſeeth that the Cattel be within his Fee, if the Tenant or any other, to prevent the Lord to diſtrein, drives the Cattle out of the Lord's Fee, yet the Lord may freſhly follow and diſtrein the Cattel; and in ſuch Caſe, the Tenant cannot make reſcous: But if the Lord, coming to diſtrein, had no view of the Cattel to be within his Fee; In ſuch Caſe, though the Tenant remove them unto ſome other place; or the Cattel, after the view, of themſelves go out of the Fee, then the Lord cannot diſtrein them out of his Fee; and if he doth the Tenant may make Reſcous of them, *Cook* 9. Part, 22. in the Caſe of Avowry.

22. Lord,

22. Lord, Meſne, and Tenant, The Lord Grants, by Fine, the Services of his Tenement to another in Fee; the Grantee dyeth without Heir, the Services of the Meanalty ſhall Eſcheat to the Lord Paramount; and in ſuch Caſe, if the Services of the Meanalty be afterwards behind; the Lord Paramount may Diſtrain the Tenant for the Services, though the Tenant did never Attorn to the Grant. *Cook Inſtitutes* 1. Part, 321.

23. In a Replevin, the Caſe was; A man acknowledged a Statute, and afterwards Granted a Rent charge: The Statute afterwards was ſatisfied by Effluxion of time, and the Grantee did Diſtrain for the Rent; And, whether the Diſtreſſe was well taken without firſt bringing a *Scire facias*, was the Queſtion. It was Reſolved in this Caſe, That none who claims any Eſtate in the Land under the Conuſor, after the Statute acknowledged, can avoid the extent without a *Scire facias*, or a *Venire facies ad Computandum*; wherein, if it appears, that he hath taken the profits of the Lands, after the time of the extent ſatisfied, he ſhall be allowed for them, and ſhall anſwer for the profits ſo fortiouſly taken: But Grantee of a Rent, after the Statute ſatisfyed, may well Diſtrain, and ſo may the Grantee of a Common, for they claim no Intereſt in the Land, but profits out thereof; wherefore they cannot have a *Scire facias*, or a *Venire facias ad Computandum*, for they ought not to account with them, and therefore they may Diſtrain or otherwiſe put in their Cattell to take the profits, otherwiſe they ſhould be without remedy: It was adjudged for the Avowant. Hill. 15 Car. in B. R. Rott. 177. *Burwell* and *Harwell*'s Caſe. *Cro.* 1. Part, 438. See *Godbolt*. 207. the ſame Caſe. acc.

24. In a Replevin, the Caſe was, Two Hundreds were adjoyning to two ſeverall Mannors, of two ſeverall perſons, the Avowant was ſeiſed of one of them, and preſcribed, That he, and all the Tenants of the other Hundred, have uſed to make Suit at the Leet within his Manor, and alſo, that the Lord of the other Mannor uſed to appear, or to pay him 4 s.. And if it was not paid, the Avowant preſcribed, that he, and all thoſe whoſe Eſtate he hath, have uſed to Diſtrain any Inhabitant within the Hundred for the ſame; and for 4 s. not paid, he did Avow the Diſtreſſe within the Mannor of the Plaintiff, who was one of the Inhabitants: It was agreed and Reſolved in this Caſe, That the Cattell of the Lord might be Diſtreyned upon any Land within the Hundred, for ſuit and Services; But for perſonall matters, as for Amercement in default of Suit, no ſtranger might be Deſtreyned; Wherefore it was adjudged for the Plaintiff. Paſc. 40 Eliz. in C. B. *Gooſey* and *Potts*'s Caſe. *Owen.* 146.

25. In a Replevin, the Defendant did Avow the taking of the Cattell Damage-Feaſant in a Common, and did not ſhew, That he had Common there for his Cattell, Levant, and Couchant, nor ſhew that he was damnified by the Cattell Diſtreyned damage-Feaſant: It was the Opinion of the Court in this Caſe, That if one who hath no right to Common, do put his Cattell upon the Common, he who is a Commoner, may take the Cattell Damage-feaſant upon the Common, and it is not neceſſary for him to Aver, That he hath damage by them, for he hath an Intereſt which doth Authorize him to remove the Nuſance, but he muſt make a Title to the Common; and if it be but by Implication, it is ſufficient, and well enough. Mich. 1654. in B.R. *Bronge* and *Mores* Caſe. *Styles* 418.

26. In Trover and Converſion, for taking the Plaintiffs Cattell by way of Diſtreſſe, and ſelling them by Virtue of a Warrant of Commiſſion of Sewers, for not paying of a Tax ſet by them towards the Reparation of Sea-walls: the Defendant pleaded all the ſpeciall matter by way of Juſtification; the Plaintiff demurred to the Plea, and took divers Exceptions to it; amongſt which. 1. That it doth not appear, that the Lands taxed, were within the Levell to be taxed by the Commiſſioners. 2. There is not layed to be any notice given of the Tax. 3. The Tax is of the Land of ſuch a one and his Aſſignees, and it doth not appear, That the Plaintiff, was the Aſſignee of the Land. And the Court was of Opinion, That although one may Diſtrein, and ſell the Cattell of the Owner of the Land, for ſuch a Tax not paid, or the Cattell of his Aſſignee; yet the Cattell of ſtrangers cannot be Diſtreyned, or ſold for the ſame. Wherefore Judgment was given for the Plaintiff. Paſc. 23 Car. in B. R. *Whitley* and *Fawſett* Caſe. *Styles* 13.

27. In Treſpaſſe *Quare Clauſum fregit*, the Defendant did juſtify, That he did enter and Diſtrein for an Amercement in the Sheriffs Torn, which was impoſed upon the Plaintiff, for encroaching upon the Kings High-way, without ſhewing, That the ſame was preſented before the Juſtices of the Peace at their Seſſions, as the Statute of 1 E. 4. cap. 2. requireth. In that Caſe, It was the Opinion of the Court, That the Statute of 1 E. 4. cap. 2. did not extend to Treſpaſſes, which were not *contra pacem* (as the encroachment in this Caſe is) for otherwiſe, the Lord of a Leet could not Diſtrein for an Amercement without ſuch Preſentment before Juſtices of Peace: And although the Statute ſpeaks of Felony, Treſpaſſe, &c. the ſame is to be meant of other things of the ſame nature; which is proved by the Clauſe in the Statute, viz. That they ſhall be impriſoned: which cannot

cannot be in the principall Caſe at bar. It was adjudged for the Plaintiff. Trin. 10 Jac. in C. B. *Hardinghams* Caſe. *Godbolt.* 190.

28. In a Replevin, the Plaintiff declared, That the Defendant *cepit averia* of the Plaintiff *quæ Oculd.* and did not ſay, *In Quodam loco*, &c. upon which the Defendant did demur in Law: The Queſtion was, Whether the expreſſing of the place where the taking and Diſtreyning of the Cattell, were materiall in the Plaintiffs Declaration or not: It was objected for the Defendant, That the Ancient form of the Regiſter ought to be obſerved; And in the Regiſter, the place in which the taking is, is ſet forth, and 35 H. 6. 40. Exception was taken to the Count, becauſe the Plaintiff in the Replevin did not alledge the place where the taking was. It was ſaid by *Cook*, Chief Juſtice, to which the other Juſtices inclined, That the effect of the Suit in this Caſe, is not the ſhewing of the place, but the taking of the Cattell; and it is on the part of the Defendant to ſhew where he took the Cattell, for perhaps the Plaintiff doth not know where he took them; and if he did know the place where they were taken, yet perhaps he hath not Witneſſes to prove the ſame, and ſo by this means the Plaintiff ſhould be at a miſchief, and delayed in his Suit, whereas a Replevin is *Feſtinum Remedium*, to have his Cattell again, which perhaps are the Cattell of his Plough: And in this Caſe, upon the matter, the Avowant is the Actor, and he beſt knows the place where he took the Cattell; and it is no reaſon, that the Plaintiff miſſing of the place, not being matter of ſubſtance, ſhould be trieed: And divers books were vouched, where the taking is alledged to be in a Town, without ſaying *In quodam loco*, &c. was good. 4 E. 3. 13. 44 E. 3. 14. 21 H. 7. 22. 9 E. 4. In a *Homine Replegiando.* 3 & 9 H. 6. It was adjourned. Trin. 10 Jac. in C. B. *Read* and *Hawes* Caſe. *Godbolt.* 186, 187, 188.

29. In a Replevin, the Plaintiff was Nonſuit, and the Defendant had a Return of the Cattell; the Plaintiff afterwards ſued a ſecond Deliverance, and was Nonſuit in that Caſe alſo; whereupon a Return irrepleglible was Awarded; And, Whether the Defendant ought to make Avowry, ſhewing the certainty of the place of taking the Cattell, Day, and colour of the Cattell, was the doubt, to have a Writ of Enquiry of Damages ſome held it ought ſo to be. And 34 H. 8. vouched, That ſuch Avowry was made: Others held, he might not make ſuch Avowry, but might juſtifie the detaining of the Diſtreſſe, untill the Plaintiff tender him amends for his Damages. Some were of Opinion, That the Avowant might work the Cattell: Others, not; becauſe he had no property in them, but as a Gage: But it was holden by the Juſtices, That he might put them again into the Pound; and that the Owner of them was bound to keep them there with meat, &c. and if they dyed in Pound, That it was at the perill of the Owner; and that then he might Diſtreyn *de novo* for the ſame Cauſe. Mich. 11 Eliz. *Dyer*, 280. See 3 Eliz. *Dyer*, 189. 28 H. 6. 6. by *Forteſcue.* 9 E. 4. 4. p. 10. 19 E. 2. *Replevin.* 26.

30. A man made a Leaſe for years, rendring Rent at the Feaſt of St. *Mich.* and if it were behind by ten dayes after, and no ſufficient diſtreſſe found upon the Land, then the Leſſor to enter. The laſt of the 10 dayes, at two of the Clock Afternoon, the Rent was demanded, and there was a ſufficient Diſtreſſe upon the Land before the demand, but not after; Whether the Leſſor might enter or not, was the Queſtion. *Clenche* Juſtice held, That there ought to be a ſufficient diſtreſſe upon the Land for all the ten dayes: But *Suit* Juſtice held, It was ſufficient, if there were a ſufficient Diſtreſſe for a convenient time, ſo as it might be, That the Leſſor might be preſumed to have knowledge of it: But it was agreed by the whole Court, That if a Diſtreſſe be put upon the Land onely for an hour, or by night, it was not a ſufficient Diſtreſſe. Mich. 29 Eliz. in B. R. *Godbolt.* 67.

31. Treſpaſſe brought, for that he took and *abduxit* a Gelding; The Defendant Juſtified as the Kings Bayliff of the Mannor of E. for that he had Waifes and Eſtrayes there; and took that Gelding coming in there as an Eſtray; and kept and deteyned him, untill afterwards the Plaintiff re-ſeiſed him: the Plaintiff replyed, That the Defendant ſeized him. 14 *Oct.* 2. Jac. and that *poſtea, ſcil.* 16. *October*, 2 Jac. before his re-ſeiſure, laboured the ſaid Gelding, riding upon him, and drawing with him: It was holden in this Caſe by the Court, That a Diſtreſſe may not be laboured, or uſed, becauſe he hath it onely by Law as a Gage; And that there is no difference betwixt this Caſe, and the Caſe of a Diſtreſſe, for he hath it by Authority of Law, wherefore he is puniſhable for the abuſe as a Treſpaſſor *ab initio*: And the Court held, That this uſer of the Eſtray, was an abuſer thereof; for it is not lawfull for any man to uſe it in any manner, unleſſe in Caſe of neceſſity, or for the benefit of the Owner; And to uſe a Stray horſe by riding or drawing, is tortious, though it was alledged, That the Common courſe is, to tye ſtray-Horſes with Withes about their necks. It was adjudged for the Plaintiff. Hill. 3 Jac. in B. R. Rott. 1070. *Bagſhaw* and *Goward*'s Caſe. *Cro.* 2. Part, 147.

32. Note, It was agreed by the Juſtices, That if a man hath a Horſe, or Oxe, or Cowes, at pawne, That he hath a ſpeciall property in them; and he may

may work ſuch Pawn; and he may Milk the Cowes, and make ſuch uſe of them as the Owner might; but if he abuſeth the Pawn, an Action lyeth: And he hath ſuch an Intereſt in the Pawn, he may Aſſign over, and the Aſſignee ſhall be ſubject to Detinue, if he deteins it upon payment of the mony by the Owner. 2. It was agreed by the Juſtices, That if a man taketh a Diſtreſſe, he cannot work the Diſtreſſe, for it is onely the Act of Law, that gives him power to Diſtrein, for he hath no property in the Diſtreſſe, nor poſſeſſion *in jure*. If a man have a Retorn irrepledgible, he cannot work them, for the Judgment is to remit them to the Pound *ibi remanſurum*, &c. And it was agreed by the Court, That when a man hath a ſpeciall Intereſt in a thing by Act of Law, That he cannot work it, or otherwiſe uſe it; but contrary upon a ſpeciall Intereſt upon the Act of the party, As in Caſe of a Pawn. Mich. 7 Jac. in C. B. *More* and *Conhams* Caſe. *Owen*. 123.

33. A. had a ſecond Deliverance Retorned: which was Retorned *Averia Elongata*, &c. whereupon he prayed a *Withernam* of the Cattell of the Plaintiff, and it was Granted; And then the Defendant came, and ſatisfied the Defendant his Coſts and Damages; and prayed a Writ of Reſtitution to have his Cattell again taken in *Withernam*. It was the Opinion of the Court, That the Cattell were not repleviſible, but for ſatisfaction of Damages, he ſhall have reſtitution of his Cattell: and ſo is 16 H. 6. and the Courſe of the Court, as it was affirmed by the Preignothories and Clerks of the Courts. And a Writ of Reſtitution was Awarded. Mich. 32 Eliz. in C. B. *Almeſkey* and *Johnſon's* Caſe. *Owen*. 46.

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2. *Of Diſtreſſes taken and driven out of the County: Of Exceſſive Diſtreſſes, and of the Writ of* Diſtringas: *and other matters concerning the ſame: and Diſtreſſes.*

1. ACtion upon the Statute of 1 & 2 *Philip* and *Mary*: The Statute is, That no Diſtreſſe ſhall be driven out of the Rape, Hundred, Wapentake, or Laith where ſuch Diſtreſſe is, or ſhall be taken, except it be to the Pound Overt, in the ſame County, not exceeding three miles diſtant from the place where the Diſtreſſe was taken: The Plaintiff declared of a Diſtreſſe taken within a Hundred in ſuch a County, and that he drove it ſix miles out of the County: Being found for the Plaintiff, after Verdict, in Arreſt of Judgment. It was holden by the Court, becauſe a Hundred may be in divers Countyes, and the Statute is, That the driving ought not to be more then three miles out of the Hundred; And that it might be, That the Diſtreſſe was taken in another County, and the driving was ſix miles from the place where the Diſtreſſe was taken, yet not three miles from the Hundred where the taking was, for that cauſe, It was adjudged againſt the Plaintiff. Mich. 24 Eliz. in C. B. *Godbolt*. 11.

2. A man Diſtrayned Cattell in the County of *Wilts*, in a place which was within the Honor of *Wallingford*, the Caſtle and Court being within the County of *Berks*; and drove them to the ſaid Caſtle, and there Deliverance was made, The Plaint was removed by *Accedas ad Curiam*, directed to the Sheriff of *Bedford*, to remove the ſame into the Common-Pleas: And there the Plaintiff declared of a taking *in prædict. loco in Com. Wilts*; And the Opinion of the Court was, That the Declaration was good. Trin. 1 Eliz. *Dyer*, 169.

3. The Statute of *Marlebridge* prohibits, That none ſhall bring a Diſtreſs out of one County into another: Yet ſee the Book of 1 *H.* 6. 3. *Fitzh.* title diſtreſs. 1. Where it is holden by the whole Court, Where a Mannor extends into two Counties, That the Lord may diſtreyn in one County, and bring the Diſtreſs into another County where the Mannor is, and this is to avoid the miſchief and inconvenience that would enſue, if the Lord ſhould be reſtreined from bringing his Diſtreſs to his Mannor. See 20. E. 3. 5. Adjudged to the contrary.

4. Homage and Fealty are ſervices of ſo great accompt and eſteem in the Law, that the Seiſin of them is the Seiſin of all other ſervices, and no diſtreſs of them, or any goods or cattels, is exceſſive in the. Judgment of Law; And although the Lord ſo often diſtreineth for them, ſo as the Tenant cannot till his Land, yet the Tenant ſhall not have an Aſſiſe of ſovent diſtreſs, as he ſhall have for Rent or other profits. *Cook* 4. Part, 8. in *Bevil's* Caſe.

5. By the Statute of *Articuli ſuper Chartas*, Cap. 12. The Sheriff ought not to make an exceſſive Diſtreſs for the King's debt nor diſtrein the plough-Cattel, if he can find others; And if the party will find Sureties to pay the King's debt before the day of the Return of the Writ, the Sheriff ought to deliver back the Cattel; and if he do otherwiſe than is appointed by the Statute, he may ſue forth a Writ forbidding the Sheriff, that he do not diſtrein, contrary to the Form of the Statute, *Fitzh.* N. B. acc.

6. If there be Lord and Tenant, and the Tenant ceaſeth for two years, and doth not do his ſervices, and the Land be not open and ſufficient to diſtreſſe, the

the Lord ſhall have a *Ceſſavit*, though he wanteth Seiſin of the Services, for in a *Ceſſavit* Seiſin is not traverſable, 11 Eliz. *Dyer* 274. and although the Lord was never ſeiſed, yet becauſe the Seigniory doth remain, if he doth diſtrein, the Tenant may not do reſcous: But if nothing be behind, and the Lord diſtreineth the Tenant, he may do reſcous; Or if he diſtrein ſo often that he cannot manure the Land, he may have an Aſſiſe of Sovent diſtreſs. See 8 H. 41. 4 E. 6. by Diſtreſs, 75, by the Juſtices. *Cook* 4. Part. 11. acc.

7. In an Action of Trover, the Defendant pleaded, That he took them, as Bayliff of the King, for a Diſtreſs upon a plaint in *Curiâ Manerii*, and that he ſold them; upon which, It was demurred, and it was adjudged no Plea: For upon a *Diſtringas* the Cattel ſhall not be ſold, eſpecially in a Court Baron, although it were the King's Court. M. 8. Jac. in B. R. *Gomerſall* and *Wayt*'s Caſe, *Cro.* 2. Part. 255.

8. In an Aſſumpſit after Verdict, It was moved in arreſt of Judgment, That the *Diſtringas* was blank, and no Return thereupon, nor the Name of the Sheriff added or put thereunto: But becauſe the *Venire facias* was well returned, with the Name of the Sheriff added thereunto, and the *Diſtringas* is of the ſame Jurors as were returned before, the Court held it amendable: And this Caſe is not like to *Rowland*'s Caſe, *Cook* 5. Part. 41. for there the Sheriff's Name was wanting upon the *Venire facias*, which guides all the proceſs; wherefore it was ordered that it ſhould be amended, and Judgment given for the Plaintiff. M. 15. Jac. in B. R. *Churcher* and *Wright*'s Caſe. *Croke* 2 Part. 413. See Paſch. 17, Jac. in B. R. *Fitzhugh*'s Caſe. acc.

9. If there be Lord and Tenant, and the Tenant pay the Lord a greater Rent than is due to him, and that voluntarily without coercion of Diſtreſs, In ſuch Caſe the Lord having gained a ſeiſin may diſtrein the Tenant for ſuch ſurpluſſage of Rent, and the Tenant cannot avoid it in Avowry, becauſe of the ſeiſin of the Rent. But in ſuch Caſe he may have his remedy by a Writ of *Ne injuſtè vexes*, upon the Statute of *Magna Charta*. Cap. 10. See *Fitzh.* 11. acc.

10. The Lord of a Leet cannot juſtify to diſtrein for the certainty of the Leet, becauſe it is collateral and againſt common right, and for the private profit of the Lord of the Leet, which the Lord cannot have without Preſcription, and therefore as he ought to preſcribe in the principal, ſo he ought to preſcribe in the Diſtreſs: Notwithſtanding, although, that for an Amercement in a Court Baron, the Lord cannot diſtreine without a Preſcription. Yet, for a Fine, and all Amercements in a Court Leet, a diſtreſs is incident of common right. *Cook* 11. Part. 44. 45. *Godfrey*'s Caſe.

11. In *Ejectione firmæ*, the Caſe was, Tenant in Fee of one Acre, and Leſſee for 21. years of another; lets both of them for 10 years rendring Rent, with a Proviſo, that if the Rent be behind 28. daies, that he and his heirs might reſtrain, and if that there be not a feoffment Diſtreſs upon the Land, that they may enter; the Leſſor dyes, the Reverſion deſcends to his heir of the Inheritance, and of the Leaſe to his Executors; afterwards the Rent being behind 28. dayes, the Heir demands the portion of Rent according to the value of the Inheritance, and not being paid, nor ſufficient Diſtreſs upon the Land, he entred: It was holden by the Court in this Caſe, That the word *Reſtrein*, was as much as to ſay *Diſtrein*, and ſhall be accepted to be of the ſame ſenſe: But whether this Reverſion being ſo divided, the Rent alſo ſhall be divided and apportioned, and whether the Heir may demand part of the Rent, and, for non-Payment of it, enter; The Court did not deliver any Opinion: It was adjourned. Trin. 13. Jac. in B. R. *Wood* and *German*'s Caſe. *Cro.* 2. Part. 390.

12. In a Replevin, The Queſtion was, Whether one Tenant in Common might diſtrein upon the other; and the Opinion of the Court was, That he might, where he comes in under the Leſſee, and a Diſtreſs to be upon any part of the Land is good: It was there ſurmiſed on the Defendant's part, That 40. Beaſts were taken and Impounded, and all the 40. Beaſts were not delivered back again, and therefore the Defendant prayed that the forty Beaſts might be delivered to him by the Sheriff, for that four Beaſts were not a ſufficient Diſtreſs; and the Sheriff had taken ſecurity of him, to proſecute for 40. Beaſts taken: But the Court denied it, for that the Plaintiff had declared but of four Beaſts taken, and the Defendant agreed, that four Beaſts were onely taken, and avowes for them: But the Defendant in his Avowry might have ſhewed, that 40. were taken, and have Avowes for all, and prayed Return for all, although the Plaintiff declared not of ſo many; but becauſe he had not ſo done, he could have Return of no more than he avowed the taking of, Hill. 18. Jac. in B. R. *Sutton* and *Henſton*'s Caſe. *Cook* 2. Part, 611.

13. In a ſecond Deliverance the Caſe was, A man had a Rent-charge, Iſſuing in Fee out of Land, and for the Arrearages thereof he did diſtrein, and then granted over the Rent to another; The Queſtion was, Whether he ought to avowe or juſtify, The doubt reſted upon this, Whether the Arrearages were gone by the Grant of the Rent, notwithſtanding the Diſtreſs before taken? It was ſaid, that the Arrearages are loſt, for he cannot have debt for them, and he cannot avow, for that depends upon the Inheritance which is gone by the Grant; and a difference was taken, where it is

by the Act of good, and where by the Act of the Party, as where a man hath a Rent in the Right of his Wife and ſhe dyeth, in that Caſe the Arrearages ſhall not be loſt; but where a man grants over the Rent, there, becauſe it is his own Act, the Arrearages are loſt: *Reeve* Juſtice ſaid, That it was good by way of Avowry, for the Diſtreſs being lawfully taken at the time, it ſhall not take away his Avowry, and this differs from *Ognell's* Caſe; for there was no Diſtreſs taken before the Grant over, and there the Privity was gone, and the Diſtreſs followes the Rent, but here the Avowant hath Pledge for the Rent, which is the Diſtreſs and Return of the Cattel, if it be found; All the Court agreed, That at the leaſt, the Avowry is turned into a Juſtification: It was adjourned. Trin. 17. Jac. in C. B. *Lawſon* and *Cook's* Caſe. *Mayſh* 103, 104.

14. A Rent-Charge was granted for years with a *Nomine pene*, and Clauſe of Diſtreſs, if that was not payed at the day, and the Rent was behind, and the years encurred: It was moved, That he might diſtrein for the *Nomine pene*, though the years were encurred. But it was the clear Opinion of the Court, that he could not diſtrein for the *Nomine pene*, for that did depend on the Rent, and the Diſtreſs was gone as to both. Paſc. 19. Jac. in C. B. *Tatter* and *Fryer's* Caſe. *Winch.* 7.

Divorce.

1. THere are five Cauſes of Divorce, of which the Common Law onely takes Notice; viz. *Cauſa Profeſſionis*, *Cauſa Præcontractus*, *Cauſa Conſanguinitatis*, *Cauſa Affinitatis*, *Cauſa Frigiditatis*; 47. Edw. 3. 38. and ſome of them are *à vinculo Matrimonii*, ſome *à Thoro & Menſa* onely, and do not diſſolve the Marriage: See *C.* 7. Part, 44. in *Kynn's* Caſe, though in ancient time, other things were cauſes of Divorce. And Note, That the Book, 18. E. 3. 28. is, That after Divorce, *Cauſa Profeſſionis*, the Wife ſhall be endowed, and the Heire ſhall inherit, but not ſo in the other Cauſes, for that they baſtardize the Iſſue. See accordingly for a Divorce *Cauſa Conſanguinitatis*.

2. See in 39. Edw. 3. 31. A Cauſe of Divorce was holden to be good, becauſe the Husband had baptized one before the Marriage, who was Couſin to the Wife: and See 19. Aſſ. 2. where a Woman was divorced, becauſe ſhe was married, *infra annos nubiles*, and never aſſented to it.

3. There was alſo a Divorce *Cauſa Adulterii*: But that was conceived to be contained in the *Cauſa Præcontractus*: Alſo anciently it was holden, That if a Woman had entred into Religion, it was a good Cauſe of Deraigment of her, that ſhe had a Husband, as is holden in 5 E. 4. 3. Now for theſe and the like Cauſes, how far they ſtand in force at this day; See the Caſes ſubſequent.

4. A man was divorced *Cauſa frigiditatis*, Afterwards he took another Wife, and had Iſſue by her; It was adjudged, That the Iſſue had by the ſecond Wife was not a Baſtard: For by the Divorce, the Marriage was diſſolved *à vinculo Matrimonii*, and either of them might marry again. 2. It was Reſolved, That admitting that the ſecond Marriage was voidable, yet it was adjudged, That the ſame did remain in Force untill it was diſſolved, and that the Iſſue born during the Coverture was a lawful Iſſue to inherit the Land. *Cook* 5. Part, 98. *Bury's* Caſe.

5. A. and B. did contract Marriage betwixt them *per verba de præſenti tempore*. Afterwards B. took to Husband C. Afterwards A. libelled againſt B. upon the ſaid Contract; and thereupon it was Decreed, That B. ſhould marry the ſaid A. and It was further Decreed, That the ſaid Marriage had with the ſaid C. ſhould be void. A. and B. had Iſſue, living C; and afterwards A. died, being ſeiſed of a Copy-hold of Inheritance; It was adjudged in this Caſe (amongſt other Points), That although C, being the Husband *de facto* of B, was not Party to the Suit, nor to the Sentence in the Spiritual Court, which diſſolved the Marriage betwixt him and B. but the ſaid B. onely; yet the Sentence againſt B. the Woman being onely but declaratory was good, and ſhould bind C. *de facto*; and, forasmuch as the Right of Conuſans of Marriage doth belong to the Eccleſiaſtical Court, and the ſame Court hath given Sentence in this Caſe, It was holden, That the Judges at Law ought to give credit to their proceedings and Sentence; and ſo in that Caſe, It was Reſolved, That the Sons of the ſaid A. and B. were Legitimate and Inheritable to the Copyhold. M. 28. Eliz. in B. R. *Bunting* and *Lepingwel's* Caſe. *Cook* 2. Part, 29.

6. A. ſeiſed of a Mannor holden by Knight's Service *in Capite*, took B. to Wife, who had Iſſue betwixt them C. The Marriage betwixt A. and B. was in the Spiritual Court declared to be void becauſe they were *infra annos nubiles*, and they are divorced. A. took to Wife D. and afterwards the Marriage betwixt A. and B. by Eccleſiaſticall Courts is declared by Sentence to be lawful, and that A. was never lawfully married to D: D. died, A. took E. to Wife, by whom he had Iſſue F. and dyed: It was found that F. was his Daughter and Heir

Heir within Age: The King granted the Wardſhip, C. exhibited a Bill in Chancery, pretending that ſhe was Daughter and Heir of A. and alledged, That A. and B. cohabited together, and were both of the Age of Conſent, and lived together ten years before the pretended Divorce, during which time they had Iſſue the ſaid C. In this Caſe two Points were Reſolved, 1. That againſt the firſt Sentence of Divorce, the Parties ſhould not be received, ſo long as the ſame remained in force, to averr, That they agreed and conſented to the Marriage, becauſe the Eccleſiaſtical Judge hath declared the ſame to be void; and although they were of Age and did conſent, yet if the original Contract was void, then there was juſt cauſe of Divorce, and ſo the Eccleſiaſtical Judge is Judge as well of the Conſent as of the Contract. *Cook* 7 Part, *Kenn*'s Caſe. 42.

7. A. had Iſſue by his Wife, two Sons, B. his eldeſt, and C. his youngeſt, and died; B. being within the Age of Conſent took E. to Wife, and at full Age lived together, *& habuerunt carnalem Copulam, & cogniti & reputati fuerunt pro Viro & uxore palam*: Afterwards B. put away E. and married F. living E. and had Iſſue by her G: F. publiſhed that ſhe was lawfull Daughter to B. and that G. her Son was *Mulier*, D. ſued in the Spiritual Court to reverſe the Marriage between B. and F. In this Caſe, It was Reſolved, 1. If B. and E. had had Iſſue, and had bin unjuſtly divorced, ſo long as the Divorce ſtood in force, their Iſſue could not have remedy by the Common Law. 2. Reſolved, That when the Spiritual Court ſhould have Juriſdiction, that the whole Cauſe ought to be ſpiritual. 3. That if all the matter be originally ſpiritual; yet, if after they goe on to try there a thing temporal; in ſuch Caſe a Prohibition will lye. 22 E. 4. to Conſultation, *Corbet*'s Caſe. See 29 E. 3. 23. 5 H. Trin. 10. acc.

8. *Si Divortium factum fuerit inter aliquos propter Conſanguinitatem, Comparnitatem, Affinitatem, vel aliam cauſam quamcunq; quæ multiplex eſt, ſi vir aliam poſtmodum duxerit uxorem, filius primæ mulieris hæres remanebit, ſed mater dotem ſuam non habebit. Bracton.* 398. 301, 304. acc. See *Cook* 5 Part, *Burſe*'s Caſe. *in fine.* acc.

9. If the Baſtard *Eigne* enter, and dy ſeiſed, his Wife being with Child of a Son; and after the ſon is born; he ſhall inherit the Land, for in as much as his Father dyed in poſſeſſion without Interruption, the *Mulier* ſhall not alledge againſt the Iſſue of the Baſtard, Baſtardy of his Father after his death. For it is a Rule in Law, *Injuſtum eſt, aliquem poſt mortem facere Baſtardum, qui pro toto tempore vitæ ſuæ legitimè habebatur*, *Cook* 4 Part, *Inſtitut.* 244. *Cook* 8 Part, Sir *Richard Letchford*'s Caſe. and See, That a Sentence of Divorce may be repealed after the death of the Parties; but after their death there can be no Sentence of Divorce given to declare the Marriage void, for that were to traduce the dead, and to baſtardize the Iſſue, to the ſhame of the deceaſed. *Cook* 7 Part, in *Kenn*'s Caſe.

10. A. was Indicted upon the Statute of 1 Jac. of Felony, for having two Husbands; And it was found, That A. was lawfully married to P. and before the Judge of the Audience ſhe ſued a Divorce againſt P. *propter ſævitiam*; Whereupon, It was Decreed, That, *propter ſævitiam* of her Husband towards her, ſhe ſhould be ſeparated *à Menſâ & Thoro*, and it was expreſly intimated in the Sentence that ſhe ſhould not marry any other during the life of the ſaid P: ſhe afterwards, P. living and ſhe knowing thereof, took to Husband J. S. Whether this were Felony within the Statute, was the Queſtion; There was not in the Sentence the word *Divortiamus*, but onely the words *Separamus à Menſâ & Thoro*. It was ſaid, That this being a Divorce *ex cauſâ ſubſequente*, viz. *Cauſa Adulterii*, was but a ſeparation *à Menſâ & Thoro*, and is no diſſolution *à vinculo Matrimonii*; and therefore notwithſtanding ſuch Divorce, That the Marriage continued betwixt them: and the Caſe of 40 Eliz. Rot. 292. in B. R. *Steven*'s Caſe was vouched, where a Retorn made by the Husband, after ſuch a Divorce *Cauſa Adulterii*, of an Obligation made to the Wife, was adjudged good. Alſo Trin. 2 Jac. *Stowell*'s Caſe. That after ſuch a Divorce, the Wife ſhould have Dower of the Husbands Lands: The Proviſo in the Statute being, That the parties Divorced by Sentence, *viz.* If he take another Wife, or ſhe take another Husband. The Court doubted if this extends to every manner of Sentence of Divorce; But the Court inclined to be of Opinion, That ſhe was not within the Proviſo; for that if this ſhould be ſuffered, many would be divorced upon ſuch pretences, and marry again, whereby many Inconveniences would ariſe. Wherefore the Court adviſed the Woman, to procure a pardon to avoid the danger of the Statute: For all the Civilians agreed, That the ſecond Marriage was unlawful. Paſc. 12 Car. in B. R. *Porter*'s Caſe. *Cro.* 1. Part, 333. See *Godbolt.* 145. for the Lady *Stowell*'s Caſe, to have Dower after a Divorce, *Cauſa Adulterii*. See 17 Car. in B. R. *William*'s Caſe. *Marſh.* 101.

2. *Where and how* Divorce *ſhall alter and change the Eſtate, and where not: And what things the Wife ſhall have again after the* Divorce, *What not.*

1. IF Lands be given to Husband and Wife in Tail, and after they are divorced, now they ſhall have an Eſtate but for their lives. 7 H. 4. 16. and See 13 E. 3. Deraigment and Divorce 15, they have now a joynt-Eſtate, and the Survivor ſhall hold place.

2. If Husband and Wife be Joynt-Purchaſers, and afterwards they are divorced, they ſhall hold by moyeties, although at the firſt upon the purchaſe they held by entierties, 32. H. 8. acc. But if Lands be given to them in Frank-Marriage, and afterwards they are divorced, the Wife ſhall have the whole Land; and See 39. Aſſi. That if Lands be given to Husband and Wife in Frank-Marriage, *infra annos nubiles*, and afterwards they are divorced; That the Wife ſhall have Tail in the Land. And note the difference betwixt the Caſes, where Lands are given, to Husband and Wife in Tail, and they are divorced, and where Lands are given to Husband and Wife, with the Wife in Frank-Marriage; for that in the one Caſe, the Land is given for the advancement of the Wife, in the other not. See Paſc. 26. Eliz. in C. B. *Webb* and *Potter's* Caſe. *Godb.* 18. acc.

3. The Wife ſhall be endowed of the Lands of her Husband, if the Marriage doth continue betwixt them until the time of his death; but if the Husband and Wife be divorced *à vinculo Matrimonii*, as in Caſe of Precontract, Conſanguinity, or Affinity, or the like, (but not *à Menſâ & Thoro* onely, as for Adultery) the Dower ceaſeth; for *ubi nullum Matrimonium, ibi nulla Dos. Cook* 1. Part, *Inſtitut.* 42.

4. If a Man marrieth a Woman which hath goods, and afterwards they are divorced, the Wife ſhall have her goods again; but if her Husband doth give them away during the Coverture without Colluſion, becauſe the ſame is an Act executed during the Coverture, the ſame ſhall bind the Wife, but if they be undiſpoſed of, the Wife ſhall have them, and, if ſhe knowes them, have Detinue for them: 28 H. 8. *Dyer.* 13. 62. acc. But of ſuch goods as ſhe knowes not of, as monyes and the like, ſhe muſt ſue for the ſame in the Spirituall Court.

5. Note, By *Fitzherbert* in his Title, *Prohibition*, If goods are given in Frank-Marriage, and afterwards the Husband and Wife are divorced; the Wife may ſue for the goods in the Spiritual Court, and a Prohibition will not lye; Quære *Brok.* Deraigment and Divorce, 17. if the Property of the goods be altered by ſale, or otherwiſe, before the ſuit began.

6. Note, in 32 H. 8. It is put for Law, That if Husband and Wife be divorced, where ſhe is an Inheritrix; yet mean acts executed ſhall not be deveſted by the Divorce, as Waſt, Receipt of Rents, Preſentments to Churches, Gifts of the goods of the Wife, becauſe theſe are as Chattels. But it is otherwiſe of matter of Inheritance, as if the Husband had diſcontinued the Wives Land, or charged it, a *Cui ante Divortium* did lye, the like of a Releaſe made by the Husband, or the Manumiſſion of her Villains: And it is there ſaid, That if Husband and Wife do purchaſe jointly, and they are diſſeiſed, and the Husband doth Releaſe to the Diſſeiſee, and afterwards they are Divorced, there the Wife ſhall have the moyety of the Land, although there were not moyeties betwixt them.

7. If a Leaſe be made to Husband and Wife during the Coverture, and the Husband ſoweth the Land, and afterwards they are Divorced *Cauſa Precontractus*, the Husband ſhall have the Corn which is ſowed, and not the Leſſor; for although the ſuit is the Act of the Party, yet the Sentence which diſſolveth the Marriage is the Judgment of the Law, *Et Judicium redditur in invitum*, and therefore in ſuch Caſe the Husband ſhall have the Corn which was ſowed. Hill. 44. Eliz. in B. R. *Oland's* Caſe. *Cook* 5. Part, 116.

Done, *or* Gift *and* Sale.

1. IN Waſt, for cutting down and ſelling of Trees, The Defendant ſaid, That the Plaintiff ſold to him *Omnes arbores ſuas creſcentes ſuper* &c. *quæ poſſint rationabiliter parari*: It was held, That the Grant was not good by *Arbores ſuas*; for, not being excepted in the Leaſe, The Leſſor during the Term, had but a Right in them, and not a Property; alſo the Grant was void for the Incertainty, when they may be ſpared. M. 1. Ma. *Dyer.* 93.

2. If

2. If two have goods in Common, and have other goods in ſeveralty, and they give *Omnia bona ſua*, the goods which they have in Common, and the goods which they have in ſeveralty ſhall paſſe. 19 H. 6. 4. But if a man give *Omnia bona ſua*, the goods of the Teſtator, which he hath as Executor, ſhall not paſs; and yet the Executor ſhall have an Action of Treſpaſs, *Quare bona & Catalla ſua cepit & aſportavit*, 9 E. 4. 1.

3. If a man gives *Omnia terras & tenementa ſua*, a Leaſe for years ſhall not paſſe; for that Lands and Tenements extends to Freehold at the leaſt, 37 H. 8. 65. acc. See 12 H. 8. 4. by *Elliot*, by the Gift *de omnibus Bonis & Catallis*, Doggs, Hawks, &c. ſhall not paſſe.

4. If a man diſtreins goods, and afterwards the Owner gives the Diſtreſſe to the King: It is ſaid in 37 H. 6. 10. that the Gift is good, be it by Deed or without Deed; But I conceive that the Gift is not good, becauſe that the goods are in *Cuſtodia Legis*, and the Owner cannot take them, and by the ſame reaſon he cannot make a Gift of them; And ſo ſeems the Opinion of *Brook* Juſtice, in his Abridgement, in the Title Done, 16.

5. If I give to one my Horſe or my Cow, it is a good Gift, and he hath Election to take which of them he will at his pleaſure: But if I promiſe one, That If I dye, I will give him an Oxe or a Cow, the ſame is no good Gift, becauſe they are words *de futuro*; 20 H. 7, 29. by *Rede*: If I give to you a Deer in my Park, it is void: But if one gives a black Deer, whereas there is not any other of the ſame Colour, or a Hart whereas there is but one Hart, the ſame is good by *Brian*, 18 E. 4. 14.

6. Note, In 6 H. 7. 9. *Brian* held for Law, That if a Stranger taketh my goods, I cannot give them to him, but I may releaſe them to him well enough, 1 E. 6. 16. The Contrary was holden by all the Juſtices; But 10 H. 7. 22. *Brian* held his old Opinion. *Keble* held that the Gift ſhould enure as a Releaſe by Word, which is good enough for Chattel; But *Brian* ſaid, If a man be diſſeiſed of a Rent, and grants the ſame, that the Grant is void; See & *Quare*: for a Releaſe by word is not good, no more for Chattels, than for any reall things.

7. If a man maketh a Gift to me of all his goods by Deed, in my abſence, the ſame is a good Gift without the delivery of the Deed to me, untill my Diſagreement to the Gift, 7 E. 4. 20. And by *Piggot* and *Catesby*, If a man give to me all his goods by Deed, and the Deed is not delivered, yet the Gift is good, and the Donee may juſtify the taking of them, without any Notice given to him; and if in ſuch Caſe the Donor commits Felony not having Notice of the Gift, yet he ſhall forfeit the ſame: But the Opinion of the Court was, That ſuch Gift was not good without Notice, for that a man cannot give to me any thing againſt my Will. 7 E. 4. 29.

8. Though the words *Bona & Catalla* do not extend in their proper nature to Charters or Evidences, which do concern Free-hold or Inheritance, or Obligations, or other Deeds or Specialties, being things in Action; yet in ſome particular Caſe, they ſhall extend to them, and therefore if one bringeth a Bagg or Cheſt, &c. of Evidences into an Inn, or Obligations, Deeds, or other Evidences or Specialties, and by default of the Inkeeper they are taken away; He ſhall have an Action, and the Writ ſhall be *Bona & Catalla*, generally; and the Declaration ſhall be Special. *Cook* 8. Part, 31. *Caly*'s Caſe.

9. If a man give goods and Chattels, If the Deed be delivered to the uſe of the Donee, the goods and Chattels are in the Donee preſently, before Notice or Agreement, but the Donee may make refuſal *in pais*, and by that the Property and Intereſt ſhall be deveſted, and ſuch Diſagreement need not to be in a Court of Record. *Cook* 3. Part, 27. in *Butler* and *Baker*'s Caſe.

10. A. ſeiſed of diverſe Mannors, and of diverſe Lands, part in Leaſe for years with a Rent reſerved, part in Copy-holds; For diverſe Conſiderations demiſed, granted, bargained, and ſold to J. S. the ſaid Mannors, &c. with all Rents reſerved upon any Demiſe, To have after the death of the Bargainer, for 17 years, rendring a Roſe to his Heir, the Deed was acknowledged and enrolled, and afterwards he covenanted to ſtand ſeiſed of the ſaid Mannors, &c. to the uſe of himſelf and the Heirs of his body; no Attornment was to this Bargain & ſale, and afterwards the Bargainor dyed, his Heir within Age; It was Reſolved, That the Leſſees ſhould have the Rents reſerved upon the Bargaine and Sale without Attornment: And in this Caſe (amongſt other things), It was Reſolved. 1. That the Leſſees had Election to take by Demiſe, or by Bargain and Sale; for when a man for mony demiſeth, bargaineth, and ſells his Lands for Term of years, the Owner gives Election to the Leſſee to take it the one way or the other; for if the Law ſhould enforce him to take it by Demiſe, then they ſhould forfeit their Rents reſerved upon the Leaſes for years; but if the Intereſt paſſeth by Bargain and Sale, then there needs no Attornment, becauſe the Statute executs the uſe to the poſſeſſion. 2. Reſolved, That this Election doth remain to them notwithſtanding the Alteration by the ſecond Indenture, and notwithſtanding the death of the Leſſor, and notwithſtanding the King be entituled to the Ward-ſhip, becauſe they had an Intereſt in them preſently, which they preſently might aſſign over, and which the Executors of the Survivor of them

them ſhould have; and here was not an Election to claim ſeverall things by one and the ſame Title, but to claim one thing by ſeveral Titles; for when things are ſeveral, the Election ought to be precedent, but when one thing paſſeth, the Election of it may be ſubſequent; as if one grant 40. s. out of his Mannor, the Grantee hath Election to take it as a Rent-Charge, or as an Annuity; but if I have three Horſes, and grant to you one of my Horſes; Election ought to be in the life of the parties. *Cook* 2. Part, 36, 37. Sir *Rowland Heyward*'s Caſe.

11. In Evidence to a Jury in an Action of Debt brought, It was ſaid by *Dyer* and *Manwood* Juſtices, That if Executors grant *omnia bona ſua*, that the goods which they have as Executors, do not paſs. See 10 E. 4. 1. by *Danby*: But the Contrary to that was holden by *Wray* Chief Juſtice of the King's Bench, and by *Plowden* in *Broadbridges* Caſe. Paſch. 18 Eliz. and they denied the Opinion of 10 E. 4. to be Law; for by ſuch Grant made by Executors, the goods of the Teſtator do paſſe. Mich. 19 Eliz. in C. B. The Lord *St. John* and the Counteſs of Kent's Caſe. *Leon* 263.

See more of *Gifts*, in the Titles of *Grants*, *Deeds*, *Bargain* and *Sale*.

Double Plea.

1. *SIcut Actor una actione debet expedire (ſaltem illa durante); ſic oportet Tenentem una Exceptione, dum tamen peremptoria (quod in dilatoriis non eſt Tenendum): quia ſi liceret pluribus uti Exceptionibus peremptoriis ſimul et ſemel, ſicut fieri poterit in dilatoriis, ſic ſequetur, quod ſi in probatione unius defecerit, ad aliam probandam poſſit habere recurſum, quod non eſt permiſſibile, non magis quàm aliquem ſe defendere duobus baculis in duello cum unus ſufficiat.* Bracton. *Fol.* 460.

2. In Dilatory Pleas, there may be a Duplicity, and Multiplicity of diſtinct matter, for in their time and place a man may uſe divers of them; but in Pleas perpetuall and Peremptory, there ought not to be Duplicity, or Multiplicity of matter to one and the ſame thing, whereunto ſeverall anſwers (admitting each of them to be good) are required, for that is not allowable in Law for the incertainty. *Cook* 1. Part, *Inſtitutes* 304.

3. Debt brought by the Executors of G. upon an Obligation: the Condition of which was, Whereas W. hath ſold to the ſaid G. a Meadow in D. the ſaid W. ſhall Warrant the ſaid G. and ſave harmleſſe againſt Lord, King, and all others; if the ſaid G. ſhall have, and peaceably enjoy the ſaid Meadow, to him and his Heirs, to hold of the Lord by the Services due after the Cuſtome, That then, &c. The Defendant pleaded, That the Meadow is Copyhold, and that there is ſuch a Cuſtome within the Mannor, That if the Cuſtomary Tenants fail in payment of their Rents, or do Waſte, that then the Lord may enter for the forfeiture; And that G. took the ſaid Meadow by Copy, to him and his Heirs at ſuch a Court, holden in *October* next after the Obligation, and further ſaid, That the ſaid G. all his life *habuit et pacifice gavi-ſus fuit* the ſaid Meadow, and dyed ſeiſed, by which the ſaid Meadow Diſcended to B. his Son and Heir, which ſon *de injuria ſua propria*, entred without admiſſion of the Lord, contrary to the Cuſtome, and becauſe the Rent was behind ſuch a day, the Lord entred into the Mannor; upon which Plea the Plaintiff demurred in Law: It was ſaid, That this Plea was double. 1. Becauſe it is alledged, That the Son, as Heir to G. entred into the Land without admiſſion, contrary to the Cuſtome. 2. That for 3 s. of Rent, the Lord entred *ut in terris ſibi forisfactis per conſuetudinem predictam.* But it was the Opinion of all the Juſtices, That the Plea was ſingle enough, for that the firſt is not effectualll but ſurpluſſage. Mich. 30 H. 8. *Dyer*, 42.

4. An Aſſiſe was brought by the Dean and Chapter of B. of a Portion of Tythes: Divers exceptions were taken to the Writ, Plaint, which did comprehend the Plaintiffs Title; amongſt which, one was, That the Title was double, becauſe it was alledged, That one J. late Prior of S. was ſeiſed in Fee in the right of his Church, and that he and all his Predeceſſors were ſeiſed, &c. time out of mind, &c. and ſo the Preſcription makes it double. But the Opinion of the Juſtices was, That the Preſcription did not make the Title double, for that the Preſcription was but an Inducement to the right and the Seiſin onely was the effect, and Seiſin onely ſhall not be a ſufficient Title of a profit Apprender to charge anothers ſoil: and therefore the Preſcription was Induced, but to make the Title onely, and was not a Title in it ſelf. Paſc. 7 E. 6. *Dyer*, 85. the Serjeants Caſe.

5. If a man gives to me all his Trees, and afterwards he himſelf cuts them down, and I take and carry them away, and be brings Treſpaſſe; *Quare ſuccidit et aſportavit*; If he plead as to the cutting down, Not-Guilty, and juſtify as to the reſt; the ſame doth not make the Plea double: It is made a Quære, becauſe the firſt Plea of Not-Guilty, did go to all. 14 Eliz. *Dyer*, 305. 12 H. 8. 1. acc.

6. In

6. In Treſpaſſe, the Defendant conveyed himſelf a Title by one to whom the Land was entailed by Fine, in the time of A. and conveyed from the Donee by five or ſix Diſcents, by dying ſeiſed of an Eſtate Tail of every of them, That the Plaintiff confeſſed the tail, and conveyed a Title to himſelf by a Feoffment by the Heir of the Donee, which was a Diſcontinuance, and traverſed the dying ſeiſed of the ſame Feoffer; It was the Opinion of the Court, That it was not good, but he ought to have traverſed the laſt Diſcent, for otherwiſe it may be underſtood, that one by the Meſne Diſcents, came to the Land, and dyed thereof ſeiſed, which was a remitter to the next Heir; Wherefore the Plaintiff confeſſing the entail, took all the dyings ſeiſed by Proteſtation; And for Plea ſaid, That the laſt Anceſtor enfeoffed the Anceſtor of the Plaintiff *abſque hoc*, that the ſaid laſt Anceſtor of the Defendant dyed ſeiſed *modo et forma*, Quære in this Caſe, If the Plea be not double; for that one Plea, *ſcil. Ne dona pas*, would make an end of all. Mich. 2. *Ma. Dyer*, 107.

7. In Debt brought upon the Statute of 32 H. 8. of pretenſed Titles, The Plaintiff declared, That the Defendant had Bargained, Granted, and let to Farm, a Meſſuage and 11 Acres of Lands to the ſame appertaining, To which Lands and Tenements, the ſaid Defendants, nor any of their Anceſtors, nor they by whom they claimed, were in Poſſeſſion of them, nor of the Reverſion, or Remainder of them, nor received the Rents or Profits of them by the ſpace of a whole year, before the Bargain, Grant, and Leaſe thereof made. In that Caſe, Exception was taken to the Declaration, that it was Double, becauſe he ſaid, That the Defendants had Bargained, Granted, and to Farm Let. In that Caſe, *Cook* and *Mountague* held, That the Declaration was Double; But *Hales* and *Brown* Juſtices, held the contrary, and ſaid, That by thoſe three words, the Offence was the greater, but they did not make the Declaration to be double, or to comprehend a double Title. See Hill. 7 E. 6. *Plow. Com.* 78. *Partridge* and *Strangs* Caſe.

8. It was Covenanted by Leſſee for years by Indenture, That he ſhould not cut any Trees by which they ſhould be waſted: In Debt brought upon an Obligation for performance of Covenants, The Plaintiff declared, and Aſſigned a breach in cutting down, 20. Oaks by which they were waſted: The Defendant pleaded, That he did not cut down the ſaid 20 Oaks *nec earum aliquam, modo et forma prout.* The Plaintiff rejoyned *Quod ſuccidit* 20 Oaks, *prout ipſe allegavit*, And by *Niſi Prius*: It was found *Quod ſuccidit decem Quercus*, &c. And if upon this Verdict the Plaintiff ſhould have Judgment, was much debated: But at laſt, Judgment was given for the Plaintiff; For although the whole Allegation of the breach of Covenant was not found for the Plaintiff; yet the Court held, That ſufficient was found to make the Defendant to forfeit his Obligation; and the Court held, That the other which the Plaintiff alledged, was not double matter, but ſurpluſſage onely. Paſc. 3. *Ma. Dyer, Tirret* and *Dans* Caſe. 115.

9. One brought a *Scire facias* upon a Fine as Heir to two Parceners, The Tenant pleaded a Fine levyed by the two Parceners, with Warranty, and relyed upon the Warranty: And the Plea was holden double, and he forced to relye upon the Warranty onely of one. 9 H. 7. 12. So if one have divers Warranties, and they fall by Diſcent upon a Perſon, Heir unto them both; yet he muſt be vouched as Heir onely unto one, and the reaſon is apparant (whether you conſider the Demandant, or the Vouchee): for as to the Demandant, it is a kind of Plea in Bar, and therefore ought to be ſingle, for the Demandant may Counter-plead the Poſſeſſion of the Vouchee, and his Anceſtors which he cannot do, if they be divers: And again the Voucher of the Tenant againſt the Vouchee, is a kind of Demand, or Suit, and therefore ought to be ſingle, and the Vouchee may Counterplead the lien, which he cannot do if they be divers. 31 E. 3. Tit. *Voucher* 25. *Hob.* 9. in Sir *Hen. Rolls* and Sir *Robert Osborn's* Caſe. 29. acc.

10. Note, by *Popham* Chief Juſtice, If a double Plea be pleaded, if the other party demur upon it, he ſhall take advantage of the doubleneſſe: but if he paſſe it over, and they proceed in pleading upon another point, in ſuch Caſe, the doubleneſſe is gone, and he ſhall not take advantage of it. Mich. 39 Eliz. in B. R. in *Holme* and *Gees* Caſe. *Pop.* 113, 114.

11. A. brought a *Quare Impedit* againſt B. and C. and the Biſhop of *London* of the Church of D. and ſhewed, That J. S. was ſeiſed, and preſented C. and let the Mannor to which the Advowſon is Appendant to the Plaintiff, and that the Church became void by the Reſignation of C. by reaſon whereof it belonged to him to preſent. The Biſhop pleaded, That he claimed nothing but as Ordinary; C. entitled himſelf to it by a Preſentation, as to an Advowſon in groſſe, and traverſed the Appendancy, whereupon the Plaintiff took Iſſue: B. pleaded as Parſon impersonee of the Preſentation of the King, and confeſſing the Title of J. S. and the Leaſe for years to the Plaintiff, pleaded over, That J. S. *per quandam pecuniæ ſummam*, betwixt him, and one J. D. preſented the ſaid C. and pleaded the Statute of 31 Eliz. which makes the Preſentation upon Simony void, ſo that the Preſentation did belong to the King, and that the King Preſented him, and that he was admitted, Inſtituted,

ſtituted, and Inducted, and traverſed, That the Church became void by the reſignation of *C. pront.* Whereupon it was demurred, and ſhewen for cauſe, that the traverſe was inſufficient to traverſe a matter not traverſable, and that the Plea was double; For the Preſentment being the principall which being confeſſed, and Avoided, cannot be traverſed, for the Avoiding and traverſing makes it double, and that being ſhewed for cauſe of Demurrer, and the other joyning in the Demurrer; Judgment ought to be for the Plaintiff: But the Opinion of the whole Court was, That the Plea was good, For the Plea maketh the Traverſe but Argumentative, that he might not reſign; And being alledged, that the Church is void *per mortem, reſignationem*, or otherwiſe, it ought to be confeſſed, or traverſed; Whereupon by conſent, Judgment was Reſolved to be given for the Plaintiff againſt C. he relinquiſhing his Plea, and confeſſing the Action; And upon the Demurrer, Judgment ſhould be given for B. the Defendant, and ſo it was, and a Releaſe of Errors on both ſides. Hill. 22 Jac. in B. R. Sir *Gregory Fenner*, and *Nicholſon* and *Paſfields* Caſe. *Cro.* 1. Part, 44.

12. A. brought a *Quare Impedit* againſt the Biſhop of *Y.* and *B.* for the Vicarage of L. and ſhewed, That divers perſons were ſeiſed of the Advowſon of the ſaid Vicarage, and preſented J. S. and brings down the Advowſon to the Plaintiff; and that by the death of J. S. the Vicarage became void, and that ſo it appertained to him to preſent, and the Defendants did diſturb him: The Biſhop pleaded, That he claimed nothing but as Ordinary, and confeſſeth the Plaintiffs Title, and that the Church voided by the death of J. S. But further ſaid, that J. S. dyed, 1. *Jan.* 12 Jac. and becauſe the ſaid Church being void after the death of J. S. no perſon being preſented by the Plaintiff by the ſpace of ſix Moneths: he as Ordinary, after the ſix Moneths, collated B. to the ſaid Vicarage, and Inſtituted and Inducted him into the ſame. The Plaintiff replyed to the Biſhop, and confeſſeth that the Church voided 1. *Jan.* 12 Jac. by the death of J. S. and that the Church being void, he did after the 1. of *Jan.* within the ſix Moneths, *viz.* 29. *May.* 1615. by his writing ſealed with his Seal, preſent to the Biſhop one J. N. praying him to admit him to the ſaid Vicarage, which he refuſed to do, and afterwards, *viz.* the 30th of the ſame *May*, he did collate the ſaid B. to the ſaid Church; And pleaded the ſame pleas by Replication to B. upon which both the Defendants ſeverally did demur in Law; and ſhewed for cauſe, That the pleas were incertain, and did Contain double matter: But as to the Demurrer, the Court was clear of Opinion, That the Plea was not double; The doubleneſſe was ſuppoſed, in that the Plaintiff Aſſigned his Preſentation, and a refuſall of his Clark, and a Collation of the Biſhop of his own Clark; But it was holden by the whole Court; That the onely materiall part of the Plaintiffs Replication was, That he had preſented a Clark, For the ſubſtance of the Defendants Plea was, That the Plaintiff had not preſented any Clark unto him within the ſix Moneths, and that he had afterwards Collated: Now to this, the Replication ſayes, That he did preſent within the ſix Moneths; ſo here is a perfect Negative and Affirmative, which makes the Iſſue; but yet the Plaintiff muſt add a refuſall to make good the Diſturbance layed; and then the Plea is Compleat; Like the Caſe of Debt upon a Bond to perform an Award: The Defendant pleads no Award made, the Plaintiff ſhews the Award, which makes the Iſſue, yet he muſt add a breach, which, though it be not Iſſuable; yet it is ſo materiall a form, That the Plaintiff hath no cauſe of Action without it: It was adjudged, That the Replication was not double, but good. Mich. 15 Jac. in C. B. *Birkhead* and the Biſhop of *York's* Caſe. *Hob.* 197.

13. In a *Juris utrum*, the Tenant pleaded, That his Father was ſeiſed, and dyed ſeiſed, and that the Predeceſſor of the Plaintiff did abate, againſt whom the Tenant brought a Mortdaunceſtor, and recovered, and ſo it is his Lay-Fee, and not the *Frankalmoigne* of the Church of the Plaintiff: It was holden to be a good Plea, and not double by alledging the Recovery, and the Lay-Fee, for it is a Writ of Right, where the party ought to conclude to the Right, as he hath done. Paſc. 19 H. 6. 8.

14. In Dower, the Tenant ſaid, That the Demandant, the Wife of his brother did keep from him certain Charters and Evidences concerning the ſame Lands, and ſhewed what Evidences, and that he was alwayes ready, if &c. The Plaintiff as to the Charters ſaid, That the Defendant did enfeoff two, who re-enfeoffed the Husband and Wife, ſo as the Deed did belong to her; And as to the reſt, that ſhe was with Child by the Husband of one who ſhould be Heir, if it pleaſe God he be born, and that by reaſon of Nurture, ſhe is bound to keep the Evidences, and demanded Judgment, and prayed her Dower. It was holden in that Caſe, although one Plea went to the whole; yet it was not reaſon, that if one be found againſt the Plaintiff, that ſhe ſhould be forcloſed of the Rent: and therefore both Pleas were allowed unto her. Paſc. 41 E. 11. See Comment. on Originall Writs. 184. acc.

Dower.

1. *Of what Inheritances of the Husband the Wife ſhall be Endowed; and of what not: And what ſhall be a ſufficient Seiſin of the Husband, upon which the Wife ſhall have and demand Dower; what not.*

1. IF Tenant in Tail, in conſideration of Paternall Love, Covenanteth by Deed to ſtand ſeiſed to the uſe of himſelf for life, and after his death, to the uſe of his eldeſt Son in tail; And after this Covenant, the Covenantor taketh a Wife, and dyeth, the Wife ſhall be endowed; for when Tenant in Tail hath limitted the uſe to himſelf for the Term of his own life, he cannot limit any Remainder over for an Eſtate, for his own life is as long as he can limit, by Law; and therefore the limitation of the Remainder is void, and his Wife ſhall be Endowed. Hill. 25 Eliz. in *Blythman's* Caſe. vouch. *Cook* 2. Part, in Sir *Hugh Cholmley's* Caſe. 52.

2. If a man maketh a Feoffment in Fee upon Condition, and afterwards the Feoffor Diſſeiſeth the Feoffee upon Condition, and during the Diſſeiſin, the Feoffee acknowledgeth a Statute; the ſame is no cauſe for the Feoffor to enter for the Condition broken, for that the Feoffee having but a Right, the Poſſeſſion in the hands of the Feoffor is not charged: But if the Feoffee in Poſſeſſion taketh a Wife, there the Land is preſently ſubject to the Title of Dower of the Wife, and tyed therewith: But in ſuch Caſe, if the Feoffee taketh a Wife, and afterwards acknowledgeth a Statute; and when the Wife dyeth, or the Conuſee doth Releaſe the Statute, then in the firſt Caſe, the Feoffee may enter and perform the Condition which was limitted upon the firſt Feoffment. *Cook* 2. Part, 59. in *Winnigton's* Caſe.

3. If Lands be given to Husband and Wife in tail, the Remainder in tail to the Husband, and the firſt Wife dyeth without Iſſue, and the Husband taketh another Wife and dyeth, the ſecond Wife ſhall have Dower, becauſe that the Eſtate Tail was Executed in the Husband by the death of his former Wife, who was but Tenant for Life in effect, and that Eſtate was drowned in the Remainder in Tail, which was in him *quod non.* 40 E. 3. 4. But ſee *Plow. Com.* 263. b. That if a Woman taketh a Husband, and hath Iſſue; and afterwards Lands do Diſcend to the Wife, and the Husband entreth, ſo as he is Entituled to be Tenant by the Courteſy, and after the Wife is found Ideot, and her Eſtate in the Land is alſo found, the King ſhall have the Land, and if the Wife dyeth, the Husband in ſuch Caſe ſhall not be Tenant by the Curteſy, for by the firſt poſſeſſion of the Wife, the Husband was entituled to be Tenant by the Curteſy, and when the Office was found, the Title of the King ſhall have Relation to the firſt poſſeſſion of the Wife alſo: and ſo both Titles beginning at one time, the King ſhall have the preheminency.

4. If Tenant in Tail Granteth all his Eſtate over unto another; It is ſaid by *Litt.* 145. That the Grantee hath not an Eſtate, but for the life of Tenant in Tail, and the Reverſion of the Tail, is not in the Tenant in Tail, becauſe he hath Granted all his Eſtate, and his Right. But note, the Intent of *Littleton* in that Caſe was not, That the Grantee had but an Eſtate for life, and that his Eſtate ſhould be determined by the death of Tenant in tail, but that the Iſſue after his death, might at his pleaſure determine the ſame; And if the Grantee ſhould not have in ſuch Caſe an Eſtate, but during the life of Tenant in tail: then the Wife of ſuch a Grantee ſhould not be endowed, againſt which, It hath bin adjudged, That the Wife ſhould be endowed of ſuch Eſtate in 24 E. 3. 28. *Cook* 3. Part, in the Caſe of *Fines.* 84.

5. If a man in conſideration of Marriage to be had with A. makes an Eſtate to her for life; and in full ſatisfaction of her Dower, which may accrue unto her in any of his Lands; and afterwards they entermarry; the ſame was no bar to her of her Dower at the Common-Law; becauſe ſhe was Dowable of the Inheritance, and of the beſt Poſſeſſion of her Husband; and before her marriage, ſhe had not any Title of Dower, but her Title of Dower did accrue to her by her entermarriage, and the death of her Husband: and then ſhe is Dowable. And 2. No Collaterall acceptance ſhould bar her of her Title to her Dower. *Cook* 4. Part, 1. in *Vernon's* Caſe.

6. A Woman ſhall not be endowed of Rent reſerved upon a Leaſe made by her Husband for Term of life; and yet the Heir ſhall have it; for the Rent is not an Inheritance, but is determinable by the death of the Leſſor; And where a man is ſeiſed in Fee, and makes a Leaſe for years rendring Rent, and afterwards taketh a Wife and dyeth, the Wife ſhall have Dower of the Land, but ſhe ſhall not have Execution during the Term of years, becauſe the Title is *Eſgne*, and ſhe cannot be endowed of the Rent, for the cauſe aforeſaid. Mich. 1 E. 6. *Dower*, 80.

7. In Dower brought, the Tenant ſaid, That

the Husband was never ſeiſed, ſo that ſhe could have Dower; The Wife ſaid, That her Husband made a Leaſe of the Land by Deed Indented, ſaving the Reverſion to himſelf; and demanded Judgment, whether againſt the Deed. In that Caſe, It was holden a good Plea, although ſhe was a ſtranger to the Deed; As where a man makes a Leaſe for life; and afterwards he Grants the Reverſion by Fine, and the Grantee brings a *Quid juris clamat* againſt the Tenant for life: who ſaith, That the Grantor had not any thing in the Land, the Grantee may ſay that the Leaſe was made by Indenture ſhewed forth, and that he Granted the Reverſion, Judgment if Action; And in that Caſe, it was ſaid, That if Leſſee for life maketh a Leaſe for another nams life; although the Reverſion be diſcontinued, yet he ſhall not have ſuch an Eſtate in Fee, as that his Wife ſhall be endowed. Mich. 3 H. 4. 6.

8. See *Cook* 6. Part, 4. in Sir *Anthony Mildmayes* Caſe, That if a man maketh a Gift in tail, upon Condition, which is againſt Law, or repugnant to Law, the Condition is void; As if it be made upon Condition, That his Wife ſhall not be endowed of the Land, it is a void Condition; for the Dower is an inſeparable Incident to an Eſtate in tail, or Fee by the Common-Law, which cannot be taken away by any Condition. *Cook* 6. Part, Sir *Anthony Mildmayes* Caſe. 41.

9. Husband and Wife, ſeiſed of a Rent, or Common in Fee, if they do releaſe to the Tenant of the Land, the Rent is extinct; yet having regard to the Wife, the Rent continueth, becauſe the Wife ſhall be endowed of it. *Cook* 6. Part, 79. in the Lord *Aburgavenies* Caſe. See *Cook* 7. Part, 38. in *Lillingſton's* Caſe. acc.

10. A Woman is entituled to have Dower of a Marſh; and the Heir by his Induſtry makes it good Meadow; the Wife ſhall recover, and have Dower, as now it is, becauſe her Title is to the quantity of the Land, and not to the value of it; but if the Husband hath improved it by building, or by any other Collateral improvement, it ſeems it is otherwiſe. 13 H. 3. *Dyer*, 292. Quære, If the Heir decay the Lands, if the Wife ſhall not be endowed in the Land according to the value, when it was in the poſſeſſion of her Husband, or ſhall have a third part as it is. *Comment upon Originall Writ.* 196.

11. The Counteſſe of *Oxford* brought a Writ of Dower to be endowed of Prædiall Tythes, &c. within ſuch a Town. In that Caſe, it was holden, That the moſt Aſſignment is of the third Sheaf; for if the third part of the garbs of the Arable Land be Aſſigned, It is in the Election of the Terr-Tenant if he will ſow the ſame or not. See 3 & 4 Eliz. in *Bendloes* Reports. In Dower of a Mill; the Aſſignment was of the third part *Molendini*, viz. *de integro molendino per quemlibet tertium menſem.* Paſc. 5 Jac. the Counteſſe of *Oxford's* Caſe. vouched in *Cook* 11. Part, in *Harpar's* Caſe. 25.

12. A Woman demanded Dower of the third part of two Mills; the Defendant ſaid, That at the time of the Writ brought, and after, they were but two Toſts, and not Mills. It was holden in that Caſe, That the Demand was not good, but ſhe ought to have demanded them by the name of two Toſts; but if they were two Mills in the life time of her Husband, then the demand was good, and ſhe ſhould be endowed of them. 14 H. 4. 33. acc.

13. In Dower, The Demandant recovered the tenth of Wool and Lamb: It was a Queſtion, how Execution ſhould be ſued, It was the Opinion of the Juſtices, That the Sheriff might deliver the Tenthes of every third Yard land, and aſſign the Yard Lands in certain: But yet afterwards, this was conceived would be uncertain and unequall. And therefore the Sheriff was awarded to deliver the third part of all in generall; and yet the firſt was agreed to be good, but onely in reſpect of Inequalities; As in Dower of a Mill, the third diſh; and of a villain, the third dayes work: And it was agreed, That the Sheriff might aſſign this Dower without a Jury. Mich. 11 Jac. in C. B. *Browne.* 1. Part, 143.

14. Of a Caſtle which is maintained for the private uſe and habitation of the Owner, a Woman ſhall be endowed; but of a Caſtle which is maintained for the neceſſary defence of the Realm, a Woman ſhall not be endowed: And ſo it was Reſolved in the Court of Common-Pleas, Where in a Writ of Dower, the demand was *de tertia parte Caſtri de H. in Com. H.* And ſee the Statute of *Magna Charta*, cap. 7. Where it is ſaid *Niſi domus illa ſit Caſtrum*; It is to be underſtood of a Caſtle for the publick defence of the Realm. Trin. 17 Eliz. in C. B. adjudged, acc.

15. If a man make a gift in tail, reſerving Rent to him and his Heirs, and afterwards the Donor taketh a Wife and dyeth, and the Tenant in tail dyeth without Iſſue, The Wife of the Donor ſhall not be endowed of the Rent, becauſe the Rent is extinct, for that it was reſerved upon an Eſtate Tail which is determined; But in that caſe, although the Eſtate in the Rent be determined, yet the Wife ſhall be endowed of the Land, becauſe that doth continue and is not determined as is the Rent. See *Fitzh. Nat. Br.* 149. acc.

16. If a Woman bring a Writ of Dower, of 6 l. Rent-charge, and hath Judgment to recover the third part, although it be certain that ſhe ſhall have 40 s. yet ſhe cannot Diſtrain for the 40 s. before

before the Sheriff deliver the ſame to her, becauſe the demands nothing in certain, but a third part of the Rent; but, upon Execution ſued, a third part of it ſhall be delivered to her by the Sheriff: but otherwiſe of Land, or of other things, of which the demand is certain, for there, after Judgment, ſhe may enter to diſtrain before Seiſin delivered by the Sheriff by Writ of *Habere facias ſeiſinam*. *Cook* 1. Part, *Inſtitutes* 14. acc.

17. If a man take an Allien to Wife, and afterwards he allieneth his Lands, ſhe is made a Denizen, ſhe ſhall not be endowed; for ſhe was abſolutely Diſſolved by the Law, and by her birth not capable of Dower, her capacity being onely by her Denization: But if a man, ſeiſed of Lands, takes a Wife, and afterwards ſhe elopes from her Husband, now ſhe is barrable of her Dower, if during the Elopement the Husband allieneth the Land; but if after, the Wife be reconciled to her Husband, the Wife ſhall be endowed: And if a man, ſeiſed of Lands in Fee, taketh a Wife, and after the Wife is Attainted of Feleny, and afterwards the Husband Allieneth the Land, and afterwards the Wife is pardoned, and then the Husband dyeth; in that Caſe the Wife ſhall be endowed: for by her birth, ſhe was not incapable, but was Lawfully by her marriage and Seiſin in Fee, Entituled to have Dower; and therefore, when the Impediment is removed, ſhe ſhall be endowed. *Cook* Select Caſes, 33.

18. A. ſeiſed of Lands in Fee, took a Wife, and levyed a Fine of the ſaid Lands with Proclamation; and afterwards was Endicted and Outlawed of High Treaſon, and dyed; The Conuſees conveyed the Lands to the Queen; the five years paſſed after the death of the Husband: the daughters and Heirs of A. brought a Writ of Error in the Kings Bench, and reverſed the Attainder. Whereupon the Wife ſued to the Queen by Petition, containing all the ſpeciall matter, *ſcil.* the Fine with Proclamations, and the five years paſt, after the death of her Husband, and the Attainder, and the reverſall of it; and her own Title, *ſcil.* her Intermarriage and Seiſin of her Husband before the Fine levyed. The Queen upon the Petition Endorſed, *fiat droit aux parties*. In this Caſe, It was Reſolved. 1. That the Wife ſhould be endowed, and the Fine with Proclamations was not a Bar unto her; and yet it was Reſolved, That the Act of 4 H. 7. ſhall bar a Woman of her Dower by a Fine levyed by her Husband with Proclamations, if the Wife doth not bring her Writ of Dower within the five years. 5 Eliz. *Dyer*, 224. For by the Act, the Right and Title of the Wife was not ſaved; But by another clauſe in the Act, the Wife was to be aided, *viz.* And ſaving all other perſons who were not parties to the Fine, ſuch Action, Right, Title Claim, and Intereſt to the Lands, as ſhall now remain, diſcend, or come after the Fine Engroſſed, and Proclamations by force of any Gift in tail, or any other cauſe or matter had, ſo as they take their Title, and purſue it within five years after ſuch Action, Right, Title, Claim, to them accrued: And in this Caſe, the Action and Title accrued to the Wife after the reverſall of the Attainder, by reaſon of a Title of Record before the Fine, by reaſon of a Seiſin in Fee had, and the marriage made before the Fine levyed. 2. It was Reſolved in this Caſe, That by the reverſall in the Writ of Error, the party ſhould be reſtored to the mean profits; and to his poſſeſſion, *nuâ cum exitibus*: and that the Plaintiff ſhould have reſtitution againſt him, againſt whom he recovered in the Writ of Error. See 4 H. 7. 12. acc. Hill. 27 Eliz. in the Chancery, *Menvill's* Caſe. *Cook* Select Caſes 19. acc.

19. Tenant in Tail, the Remainder in Tail, the Reverſion to the Right Heirs of Tenant in Tail; Tenant in tail bargained and ſold the Land by Deed, Inrolled, to J. S. and his Heirs; And afterwards levyed a Fine with Proclamations to the Bargainee, the Conuſee made a Feoffment in Fee, he in the Remainder had Iſſue, and dyed; Tenant tail dyed without Iſſue. In this Caſe, it was amongſt other things, Reſolved, That by the Bargain and Sale, the Bargainee had an Eſtate diſcendable to his Heirs, upon the death of Tenant in tail, and had the Reverſion expectant upon the Remainder in tail; and that in ſuch Caſe, the Wife of the Bargaynee ſhould be Endowed. *Cook* 10. Part, 96. *Edward Seymour's* Caſe.

20. A Woman cannot claim to have Dower of any thing, but of ſuch things which ſhe may uſe and enjoy *ſine vaſto, exilio, & deſtructione*: She ſhall be endowed of reaſonable Eſtovers on the Lands of her Husband; but then ſhe muſt uſe them to burn in, and to encloſe the Lands of which ſhe is endowed: and if ſhe burn them off the Land, or otherwiſe diſpoſe them in not encloſing and fencing of the Land, of which ſhe is endowed; the Heir may diſturb her in taking of them, and alſo he may have a Prohibition againſt her, that ſhe do not waſte *in Domibus, Boſcis, Gardiis*; and ſo if ſhe do manumit or enfranchiſe the Villains, or ſell the Land or the Rents of which ſhe is endowed, or if ſhe take unreaſonable Iſſues or Services, a Prohibition will lye againſt her, *Quod non capiat de omnibus ejuſdem terræ niſi rationables exitus & ſervic.* which they ought to do; But yet for ſuch waſte, a Woman ſhall not loſe her Dower. See *Bracton* 316. acc.

21. A Woman ſhall be endowed *de tertiâ parte trium vodorum terræ, unius rodi prati, & reddit.*

tot panum & tot lagenarum ſervicia, vel tot ferculorum per diem, vel per ſeptimanam, vel per annum, cum pertinenciis, in villâ de D. quas clamat pertinere ad liberũ tenementũ ſuum; and ſhe ſhall be endowed with any thing that is appendant or appurtenant to the Land of which ſhe demandeth Dower. See *F. H.* in his Writ of Right of Dower. acc. And ſee 2 H. 6. 12. That a Woman ſhall be endowed of Villains Regardant or Ingroſs.

21. Error was brought of a Judgment in the Common Pleas in Dower, The Error aſſigned was that the Writ and her Demand was of a Meſſuage, 160. acres of Land, 60. *Acr. prati*, 100 *Paſturæ, & de communi paſturâ in omnibus averiis cum pertinentiis*, &c. The Tenant pleaded *Neunq; ſeiſi que Dower*; It was found for the Demandant and Judgment given; and it was ſaid, That this ſhall be intended of Common in groſs without Number, of which a Woman is not dowable: It was the Opinion of the Court, That of Common in groſs without Number, a Woman ſhould not be endowed: But it ſhall be intended, that this Common was not Common in groſſe, but common appendant or appurtenant to the Land, of which ſhe was dowable; and it needed not to have been demanded, becauſe it was included in the words *cum pertinentiis*, and the Court conceived it to be rather Common Appendant, or Appurtenant, after which ſhe was dowable, being after a Verdict which finds, That her Husband was ſeiſed *Quod Dower* &c. And by Intendment, it was ſuch a Common as went with the Land of which ſhe was dowable, and if it had been Common in groſs without Number, the Judge before whom the trial paſſed, would have directed it to be found againſt the Demandant. The Judgment was affirmed. Paſc. 8 Car. in B. R. *Pruet* and *Drake*'s Caſe. *Cro.* 1. Part, 219.

23. Error of a Judgment in Dower, and in the Executors thereof: The Errors aſſigned were, That the Demand was of the third part of the Honor of C. and of 600 Meſſuages, 1000 Acres of Land in C. and of the Advowſon of H. A. Recovery may by Default, and *Habere facias ſeiſinam* awarded to the Sheriff, who returned, *Quod habere fecit ſeiſinam de tertiâ parte* of the Honor, *Tenementorũ et advocationũ*, viz. *de uno tenemento ſive firmâ de C.* And it was ſaid that the Retorn *de uno Meſſuagio ſine Tenemento*, was not good for the Incertainty; But the Court held the Return good, and that no Error can be aſſigned in the Sheriff, in giving Seiſin, and returning thereof: The ſecond Error was, Becauſe the Sheriff hath given the third part of an Advowſon, and *Bona & Catalla Felonum*, which are Franchiſes of which ſhe is dowable. But the Court held, That the Return was good in that, for of an Advowſon, if it be Appendant or in groſs, ſhe is dowable, and Franchiſes parcel of the Honor of G. may be well aſſigned, and they may be parcel and appendant to the Honor, although they be not belonging to a Manner which is of an inferior nature. The Judgment was affirmed. See M. 18 Jac. in B. R. Sir *Charles Howard* and Sir *William Cavendiſh*'s Caſe. *Cro.* 1. Part, 621.

24. Note, It was agreed by the Court, That if Tenant in a Writ of Dower brought ſhew, That before her Husband had any thing to do with the Land, A. was ſeiſed of the ſame Land in Fee, & leaſed the ſame Lands for years rendring Rent, and then granted the Reverſion to the Husband of the Plaintiff, who dyed ſeiſed of the Reverſion, and ſo demands Judgment, if the Demandant ſhall have Dower; That the ſame is no plea in Barr of her Dower, but proves that ſhe hath Title in Dower, only it ſhall have the Leaſe for years; and ſhe ſhall have Judgment only of the ſaid Reverſion and the Rent, and the Demandant ſhall be endowed of the Reverſion. Paſc. 22 Jac. in C. B. *Winch.* 80.

25. Note, It was holden by *Anderſon* Chief Juſtice, That if a Feoffment be made to the uſe of J. S. and his Heirs, untill J. D. hath done ſuch a thing; and then unto the uſe of J. D. and his Heirs, the thing is done, and J. S. dyeth, That in ſuch caſe his Wife ſhall be endowed. Mich. 31. Eliz. in C. B. in *Sammes* and *Payne*'s Caſe, *Leon.* 167.

26. A. ſeiſed of a Mannor containing ſeveral Freehold and Copyholds, took a Wife and died, The Wife demanded the third part of the Mannor for her Dower, by the name of 100 Meſſuages, 100 Gardens, ſo many Acres of Lands, Meadows, Paſture; The Sheriff aſſigns to her part of the Demeans and parcel of the Services. It was holden by the Court, That in this Caſe a Mannor did not paſs to her, and ſhe could not, by vertue of ſuch Aſſignment, hold a Court, or grant Copyes; but in that Caſe it was agreed, If a Mannor, to which an Advowſon is appendant, be delivered by the name of a Mannor *cum pertinentiis*, that the Advowſon paſſeth; but it is otherwiſe, if it be delivered in the Execution by the names of Lands, Meadow, Wood, *&c.* M. 28 Eliz. in C. B. *Bragg* and *Brooks* Caſe. *Owen* 4.

27 Husband and Wife, Tenants in ſpeciall Tail, had Iſſue, the Wife died, the Husband made a Deed of Feoffment to the uſe of himſelf for life, and after to the uſe of B. his Son in Tail, and a Letter of Attorney to make Livery; before Livery made he took C. to Wife, and after Livery was made to thoſe uſes the Husband died. The Tenant endowed C. the Son entred, Whether this Dower was well aſſigned, was the Queſtion; The firſt Queſtion was, Whether C. his Wife were dowable of this Poſſeſſion, and the Aſſignment of Dower

to

to her was good? 2. Admitting ſhe were dowable, yet in as much as the Livery was made upon a Deed of Feoffment, ſealed before the Coverture, yet executed after to the uſe of the Husband for life, Whether ſhe be now dowable? It was Reſolved by the Court, That ſhe was not dowable, for this Livery doth not gain to him any new Eſtate; but being *eodem inſtanti* drawn out of him, it doth not gain unto him any ſeiſin whereof C. is dowable, for at the firſt before his Feoffment he had not any Eſtate whereof C. was dowable, being ſuch a Tenant in Tail, that his Iſſue by his ſecond Wife could not inherit; Then, when he hath not any Eſtate before the Feoffment whereof his Wife was dowable, he hath not by his Feoffment gained any ſuch Eſtate to make her dowable; and in this Caſe It was ſaid, that it was adjudged, That where a man married took a Fine, and by the ſame Fine rendred the Land to another in Tail, that his Wife ſhould not be endowed, becauſe although he took it in Fee, yet it was inſtantly out of him. Paſc. 19 Jac. in the Exchequer. *Amcotts* and *Cotherichs* Caſe. *Cro.* 2. Part, 615.

28 Tenant for life having a Wife made a Feoffment; the Husband and Wife were afterwards Divorced; The Wife appealed, and, depending the Appeal, the Husband died, the Feoffee endowed the Wife and died without Heir, the Lord entred upon the Wife. In this Caſe it was Reſolved, 1. That this momentary Fee had not gained Dower to the Wife, no more than to the Wife of a Feoffee to an uſe, or the Wife of the Conuſee of a Fine upon a Grant and Remainder ſhould be endowed. 2. That by the Appeal brought by the Wife, the Divorce was not ſo defeated, that that might give Title to the Wife after the death of the Husband to be endowed, although ſhe had done all that in Law could be, becauſe by the Appeal the Divorce was onely ſuſpended, and not defeated. 41 E. 43. E. 3. acc. M. 9 Jac. in C.B. adjudged. acc.

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2. *Of Dower* ad Oſtium Eccleſiæ. *Dower* ex *Aſſenſu Patris*, *Matris*, *&c.* *And of Dower* de la pluis Beale, *part. Where good, and by whom: Where not.*

1. IF the Wife bring a Writ of Dower, of Endowment *ad oſtium Eccleſiæ*, there muſt be theſe words in the Writ, *viz. unde talis vir meus me dotavit ad oſtium Eccleſiæ*; for if they be omitted ſhe ſhall not recover her Dower, and ſo it is if ſhe had not Dower aſſigned her *ad oſtium Eccleſiæ*; or if ſhe be not eſpouſed *ad oſtium Eccleſiæ*, ſhe ſhall loſe her Dower; And the Writ to try the ſame ſhall be directed to the Sheriff, and to the Cuſtos of the Plea of the Crown, and not to the ſpiritual Court where the Eſpouſals were; But if the Eſpouſals be *ad oſtium Eccleſiæ*, at a lawful, or at a prohibited time, it is not material, and when the Husband nameth the Dower *ad oſtium Eccleſiæ*, it muſt be certain *& nominata*, and not uncertain *& non nominata*, for that it cannot be encreaſed or diminiſhed; and ſuch Dower ſhall be demanded by the words, *unde dotata fuit ad oſtium Eccleſiæ*. And the Writ to the Sheriff muſt be certain of what Lands the Husband endowed the Wife, whether of ſuch a Mannor as ſhe claimeth, or of the third part of all his Lands whereof the Husband was ſeiſed before the Marriage; and it muſt be done openly, to be enjoyed diſtinctly by it ſelf, and not in Common. See *Bracton* 304, & 305. *Cook* 1 Part, *Inſtitut.* 34. acc.

2. Note, The Husband cannot aſſign more Dower to his Wife *ad oſtium Eccleſiæ*, than of a third part of his Lands, and if he doth aſſign more, the Wife ſhall be admeaſured. *Fitzh.* Nat. Brev. 150.

3. In all Caſes where the Demand of Dower is certain, as in Caſe of Dower *ad oſtium Eccleſiæ*, or *ex aſſenſu Patris*, there the Wife, after the death of her Husband, may enter, but where the Demand is uncertain, as in Writs of Dower at the Common Law, there although the thing it ſelf be certain, yet ſhe ſhall not take it without Aſſignment, as if a Woman brings a Writ of Dower of 3 s. Rent, although ſhe ought to be endowed of one ſhilling, yet ſhe cannot after Judgment diſtrein for 12. before Aſſignment, becauſe the Demand was uncertain. *Cook* 1 Part, *Inſtitut.* 34. acc.

4. Dower *ad oſtium Eccleſiæ* ought to be without a Deed, becauſe a man cannot make a Deed to his Wife, and alſo it ought to be after Marriage becauſe before Marriage ſhe is not entituled to have Dower. *Cook* 4 Part, in *Vernon's* Caſe. 40 E. 3. 41. acc.

5. If an Enfant, of the age of 8. years, endow his Wife *ad oſtium Eccleſiæ*, ſuch Endowment is not good, unleſs it be by Deed, notwithſtanding that the Wife agreeth to ſuch Endowment after the Husband accompliſheth his Age of 14. years; and the reaſon is, becauſe a thing which in it ſelf is void cannot afterwards be made good by any conſent or agreement of the Wife afterwards; for although the Marriage may ſtand good by ſuch agreement, yet ſuch Aſſignment of Dower by the Husband is void, and therefore by ſuch Aſſignment of Dower the Inheritance of the Husband is not bound. *Perkins* 85. acc.

6. It

6. In an Ejectment of Ward, brought in the County of *N*, The Plaintiff set forth the Tenure, the Defendant said, That her Husband was seised as Tenant of the Plaintiff, and that her Husband assigned Dower of the said Tenements to her at the Door of the Church of H. in the County of H. which was another County, in the presence of A. and so she held the said Tenements, &c. The Opinion of the Court was, That the Assignment in another County might be without Deed, because he was seised &c. and it was holden in that Case, That if Issue be joyned upon the Assignment, it should be tried in the County where the Assignment was; Like the Case of a Surrender of Land, or the tender of Homage, in another County than where the Land is: But in that Case It was holden, That an Assignment *ad ostium Ecclesiæ* cannot be until after the Marriage solemnized, and if it be before the Marriage, such Assignment is void; and upon such Dower the Wife after the death of the Husband may enter, and have an Assize if shee be put out. 40 Edw. 3. 43. See *Bracton* 306. acc.

7. *Constitutio Dotis ex assensu Patris consistit ex nominatione Filii & Patris consensu, quorum unus non potest esse sine altero, quia si filius nominet, & Pater non consentit, nenter valent, sed instrumentum quod unus nominat, & alter consensit, validum est*; and in the Demand of Dower, the Writ shall say, *Quod vir suus eam dotavit per assensum Patris, & consensus non potest esse sine scripto.* Bracton 305.

8. A man seised of Borough English Land hath Issue two Sons, the Eldest endoweth his Wife *ex assensu Patris*, and it was holden good; for the Land is Fee, and he is Heir apparant to his Father, and it is not requisite that he be Heir apparant to the same Land, because that the Priviledge goeth to the Person, and not to the Land; for it is in consideration of the Person: And the Father shall have all Priviledge, *scil.* That the King shall not have the Wardship of him, living the Father, and therefore the Father shall have the Marriage of him; and if any one taketh him out of his Custody, Trespass lyeth against him, *Quare Filium & Hæredem rapuit*, which doth extend but to the Heir general, (and not to the special Heir,) and upon a Warranty shall discend; and therefore the Eldest Son may endow his Wife *ex assensu Patris*, and not the younger Son; for he ought to be Heir apparant who in Judgment of Law shall continue Heir apparant, and not an Heir who by accident may be Heir apparant, and by accident not Heir apparant. *Cook* 3 Part, 38. in *Ratcliff*'s Case. See *Plow.* Com. 348. acc.

9. Tenant for life of a Carve of Land, the Reversion to the Father in Fee, the Son and Heir apparant endoweth his Wife of this Carve by the Assent of the Father, the Tenant for life dyeth; the Husband dyeth, in this Case the Reversion was a Tenement in the Father, and yet this Endowment was no good Endowment *ex assensu Patris*, because the Father at the time of the Assent had but a Reversion expectant upon a Freehold, whereof he could not have endowed his own Wife; and albeit the Tenant for life dyed, living the Husband, yet, *Quod ab initio non valet, tractu temporis non convalescet.* *Cook* 1. Part, *Institut.* 35. acc.

10. If a man be seised of 40 Acres of Land, (20 holden by Knight's Service, and 20 other by Soccage,) and he dyeth thereof seised, his Heir being under the Age of 14 years, his Wife shall be endowed *De la pluis beale*, out of the Soccage Land, and not out of the Knight's Service Land; for that the Common Law gives this Priviledge to Knight's Service Land, that it shall not be dismembred, and the reason is, for that Knight's Service Land is for the defence of the Realm, which is *pro bono publico*, and therefore the Dower onely shall be of the Soccage Land. *Cook* 1. Part, *Institut.* 395.

11. A Woman being Guardian in Soccage brought a Writ of Dower against the Heir in Ward, It was holden by the Court, That it was no Plea for the Heir to say, That she might endow herself *de la pluis beale* of the Soccage Land; but is a good Plea for Guardian in Knight's Service, if Dower be brought against him, to plead such Plea, thereby to save the Interest of the Guardian in Knight's Service. 45 E. 3. 6. by *Finchden.*

12. If all the Lands of the Husband be holden in Soccage, and the Guardian in Soccage is entituled to have Dower *de la pluis beale part.* In that Case she shall not be endowed of the third part of the Land, but of the third part of the profits upon Accompt, and she cannot endow herself, for then she should be her own Judge; but when the Heir cometh of full Age, she shall have a Writ of Dower against him, and she shall be endowed against the Heir. 22 Ed. 4. *Fitz.* to Dower. 16.

13. A. the Wife of J. S. brought a Writ of Dower, to be endowed of a third part of a Messuage and to Carves of Land; the Tenant pleaded, that J. S. the Husband of the Demandant by Deed granted to her and the Heir with Warranty, and further shewed that the Demandant by reason of the Nonage of her Son held Tenements in ward to the value of the Land in demand, and prayed that she might endow herself *de la pluis beale* of the said Lands: In that Case, although it was said, That that Plea lyeth onely for Guardian in Knight's Service, to save his Tenancy, because he cannot vouch; and the Tenant in this Case might vouch the Heir, yet the Opinion of the Court was, That it was a

good

good Plea for the Woman who was the Tenant, although it doth not appear by the Book that the Lands were in her hands as Guardians in Knight's Service; and the Judgment was entred thus, *Quod querens capiat de terris dicti hæredis in Custodiâ suâ existentis, ad valentiam dictæ tertiæ partis, nomine Dotis, pro perdict. tertiâ parte petitâ.* 21. Ed. 3. 38.

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3. *Where, and by what, and by whose means, and by what and whose Act, a Woman shall lose her Dower; and where, and by what, not.*

1. IF the King's Tenant who holdeth of him *in Capite*, or by Knight's Service, dyeth seised, and his Heir dyeth before he entreth, or after his full Age before he sueth his Livery, his Wife shall be endowed; But if the Heir entreth and intrudeth upon the Possession of the King, or he entreth into the Land before he hath done his Homage, and sued his Livery out of the King's hands. Then by the Statute of *Prærogativa Regis*, *Nullum ei accrescit Tenementum*, and if in such Case he dyeth seised, *uxor ejus non habebit Dotem de Tenemento illo.* See Stat. *de Prærogativâ Regis* Cap. 13. and See 1 H. 7. 17. and 4 H. 7. 1. acc.

2. If Tenant in Tail doth discontinue the Lands in Fee, and afterwards taketh a Wife, and doth disseise the Discontinuance, or Discontinuee doth enfeoffe the Tenant in Tail and his Heirs, and afterwards the Tenant in Tail dyeth seised; now his Wife shall lose her Dower, because the Heir is now in of another Estate, and is remitted to the Estate Tail, and the Estate of which the Husband was seised during the Marriage, is now determined, *Fitz.* N. B. 149. acc. So See 10 E. 3. *Fitz.* to Avowry, 159. If a man give Lands in Tail reserving Rent to him and his Heirs, and afterwards the Donee taketh a Wife and dyeth, and the Tenant in Tail dyeth without Issue: In that Case, The Wife of the Donor shall not be endowed of the Rent, because the Rent is extinct being reserved upon an Estate Tail which is determined; but yet in such Case the Wife shall be endowed of the Land, because the Land continueth, and is not gone, as the Rent is.

3. In Dower the Issue was, *Ne unq; seisi que Dower*; It was given in Evidence for the Demandant, That a Feoffment was made to the Husband and Wife in Fee; To which it was said, That before the Feoffment the Husband was seised to him and his first Wife in special Tail, and that after the Husband discontinued the Land, and took back an Estate to him in Fee by the Feoffment aforesaid, and of such Estate he dyed seised, for which the Heir who is Tenant in Tail was remitted, and then the second Wife was not dowable: The Plaintiff would have Demurred upon it; but the Opinion of the Court was, That the Jury was to find for the Demandant, because their charge was only upon the seisin, *scil.* If the Husband was seised of such an Estate of which the Wife was dowable, and they were not to have any regard to the Remitter; But the Court was of Opinion, That if the special matter had been pleaded, the Demandant had been barred of her Action, but now they were not to take any regard of that upon the Issue which was given in Charge to the Jury. Pasch. 30 H. 8. *Dyer.* 41.

4. The Dutchess of *Somerset* had divers Manors and Lands assured unto her and her Husband the Duke, and to the Heirs Males of the said Duke between him and his Wife lawfully begotten, and she was a Joynt-Purchaser with the Duke in diverse other Mannors of like Estate, before the Statute of 32 H. 8. Afterwards the Duke was attainted of Treason and executed; In 5 E. 6. the last part of the said Act was repealed with a Proviso, That the said Act of Repeal should not be prejudicial to any Woman for any Dower or Joynture to which she was lawfully entituled before the said Act of Repeal, and thereupon the Dutchess was a Petitioner to the Queen, for all her Joynture, as also for her Dower of the Rent of the Lands of the Duke her late Husband, because the Attainder of her Husband did not now barr her of her Dower, by the Statute of 1 E. 6. cap. 12. It was Resolved in that Case, That she should not have her Joynture and Dower also; for that such was not the Intent of the Statute. Pasc. 1. Ma. *Dyer.* 97.

5. In a Writ of Dower brought, The Defendant pleaded the Attainder of the Husband of the Demandant for Treason. The Demandant said, that long time before the Attainder, and the committing of the Treason, and after her Marriage, her Husband was seised of the Lands in Fee, and made a Feoffment thereof to J. S. whose Estate the Defendant hath; Upon which Plea it was demurred: It was the Opinion of the whole Court, That the Demandant was barred of her Dower: See Stat. 5 & 6 E. 6. cap. 11. *viz.* That the Wife of any man attainted of any manner of Treason whatever, shall in no wise be received to ask or demand Dower, or have Dower of any of her Husband's Lands during the force to the Attainder; and some were of Opinion, That the same did extend also to Petit-Treason. H. 4. Ma. *Dyer.* 142.

6. If

6. If a man be Attainted of Felony, and afterwards hath his Pardon, the Wife ſhall not be Endowed of the Land which he had before the Attainder, but of Lands purchaſed after, ſhe ſhall be Endowed, *Plow. Com.* 75. So, if the Husband Allien the Land after Coverture, and after is Attainted of Felony; the Wife ſhall be endowed againſt the Feoffee. But if the Land Eſcheat to the King or other Lord, ſhe ſhall not have Dower. See *Litt.* 11. and Tit. *Dower*, 80.

7. At the Common-Law, If the Husband were Attainted of Felony, &c. the Wife ſhould not be endowed. 8 E. 3. 20. *Stamford* 194. But ſee now by the Statutes of 1 E. 6. cap. 13. 6 E. 6. cap. 11. and 13 Eliz. cap. 1. The Wife of a perſon Attainted of Miſpriſion of Treaſon, Murder, or Felony, is Dowable.

8. In Dower after default made by the Tenant, a Termor to ſave his Term according to the Statute of *Glouceſter*, Pleaded, That the Husband of the Demandant was Attainted of Felony by Parliament; And a Commiſſion Iſſued out of the Court of Augmentation, which Aſſigned the third part of the Lands of the Husband to the Wife in Dower; ſo as the Rent reſerved upon the Term, was Aſſigned to her, which ſhe accepted. It was the Opinion of the Court, That the ſaid matter was not good to ſave his Term, becauſe this Aſſignment of the Dower in the Augmentation Court, was void; For the Aſſignment ſhould have been in the Chancery. It was adjudged for the Plaintiff. 9 Eliz. *Dyer*, 263.

9. A man ſeiſed of Lands in Fee, holden in Socage, and of Lands in Tail, holden in Knights-Service *in Capite*, he deviſed the third part of all his Lands and Tenements to his Wife, in recompence of her Dower, and dyed. It was a Quære, If the Wife ſhould have her third part of all out of the Fee-ſimple Lands. But becauſe ſhe entred into the third part of the Fee-ſimple-Land, before ſhe brought her Writ of Dower; ſhe was barred of Dower of the reſt. Hill. 5 Eliz. *Dyer*, 220. *Baſhes* Caſe.

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4. *Where, and by what, and by whoſe Act, done by herſelf, or by others, a Woman ſhall be barred of her Dower; And what ſhall be ſaid ſuch a ſufficient Barr, what not.*

1. IN Dower brought by the Lady *Powes* of a Manner and Lands of her Husband, The Defendant pleaded in Barr, That the ſaid Lady *ſponte apud* Bednal Green *reliquit virum ſuum, & ab eo abiit cum quodam* J. S. *ut ſq; parochiam St. Clement. Danes in Comit.* Midd. *& ibidem cum prediſt.* J. S. *moram traxit continuam totâ vitâ* of her Husband, *abſq; hoc, Quod ipſa in vitâ* &c. *reconciliata fuit*: The Demandant ſaid, That *poſt prædict. deceſſum*, her Husband *in vitâ ſuâ ipſam ſponte & abſq; coërcione apud L.* &c. *reconciliavit & ſecum cohabitare permiſit*; And it was given in Evidence to prove the Reconcilement, that after the ſaid ſeparation they diverſe nights, and in diverſe places, demeaned themſelves as Husband and Wife; It was holden in that Caſe, That the ſame was a ſufficient Reconcilement, and that by the Elopement the Wife ſhould not loſe her Dower: But if ſhe did Elope after, then ſhe ſhould be barred of Dower. Mich. 1 & 2 Ma. *Dyer*. 106. tho Lady *Powes* Caſe.

2. In Dower, the Tenant ſaid, That the Wife eloped from her Husband, and continued in Adultery without being reconciled to her Husband; The Plaintiff ſaid, That he himſelf raviſhed her with Force and Arms againſt her Will, without that that ſhe did elope, and the Elopement was ſuppoſed to be in another County: It was holden by the Court, That the Plea was not good; for although it was by force, yet ſhe did not deny but that ſhe lived with the Adulterer with a good Will, without being reconciled; Wherefore the Plaintiff ſaid, That he raviſhed her againſt her Will, and wounded her Husband, ſo as he dyed the ſecond day after the Raviſhment, and betwixt the place where the Raviſhment was ſuppoſed to be, and the place where ſhe lived in Adultery, was 40 miles; and ſhe ſhewed, That after the death of Husband ſhe ſued an Appeal againſt the Raviſher, till he was Outlawed, ſo as ſhe did not remain with him of her good Will; and to enforce her Plea ſhe ſaid, That the fourth day after the Raviſhment, at the Houſe ſhe found her Husband dead; and becauſe the Statute is in the Copulative, *ſcil.* That if the Wife

Wife eloped and continued all the life of her Husband with the Adulterer, without being reconciled, and that the Elopement is here traverſed, and that he ravished her againſt her Will *&c.* and ſhe came back the fourth day: It was holden by the Court, That that time which ſhe was with the Adulterer, ſhould be adjudged Impriſonment, and becauſe ſhe Out-lawed him who ravished her, It was adjudged, That ſhe ſhould have her Dower. 43 E. 3. 19, 20. *Book Entries*, 124. acc.

3. A *Scire facias* was brought to execute a Recovery in a Writ of Dower; The Defendant pleaded that the Plaintiff had accepted a Rent after the Judgment in ſatisfaction *&c.* It was the Opinion of the Court, That if the Rent were iſſuing out of the ſame Land of which the Dower is demanded, it was a good Barr of her Dower, otherwiſe not; and there it was holden, That the acceptance of other Land, which is not in Demand is not Barr of Dower. M. 1. Ma. *Dyer*. 91.

4. In a Writ of Dower, The Defendant pleaded in Barr an Aſſignment of a Rent to the Demandant, out of the Land of which ſhe demanded Dower for the Term of the life of the Demandant, but becauſe the Defendant did not plead and ſhew, That he was ſeiſed of the Land at the time of the Aſſignment of the Rent: It was adjudged againſt the Defendant, and that the Demandant ſhould recover her Dower. H. 20 Eliz. *Dyer*. 361.

5. Note, By the Statute of 27 H. 8. cap. 10. Where a man maketh his Wife a Joynt-purchaſer with him, after the Marriage, of any Eſtate of Free-hold; if it be not in Fee-ſimple to them both, the Wife ſhall be barred thereby of her Dower, if ſhe agree to the Joynture after the death of her Husband; but contrary it is of a Purchaſe Joynt in Fee-ſimple, for ſuch a Joynture is not ſpoken of in the Statute; And a Deviſe of Lands, by the Husband to the Wife by Will, is no Barr of her Dower, for that it is but a Benevolence, and not a Joynture, 5 E. 6. *Br.* Dower. 69.

6. If a Joynture be made to a Woman before Marriage, after the Death of her Husband ſhe cannot wayve it and recover her Dower, as ſhe may of a Joyture made during the Coverture; But if Lands be conveyed to a Woman before Marriage for part of her Joynture, and after Marriage other Land is conveyed to her for her full Joyneture, and in ſatisfaction of her Dower; If the Woman wayve the Land conveyed after Marriage, ſhe may after the death of her Husband reteine the Land conveyed before Marriage, and have her Dower alſo, becauſe the Land conveyed in part of her Joynture is no Barr for the incertainty of it. *Cook* 4 Part, 1, & 2. in *Vernon's* Caſe, *Aſhton's* Caſe. *ibid.*

7. Of a Joynt-Eſtate, a Woman ſhall not be endowed; But if Land be given to Husband and Wife, and the Heirs of the Husband, or the Heirs of their two bodies, or to their Heirs, and afterwards the Husband dyeth; The Wife, if ſhe will wayve and refuſe the Joynt-Eſtate, ſhe may bring her Writ of Dower; and thereby, by Judgment in Law, the Husband ſhall be ſaid to be ſeiſed *ab initio*, otherwiſe the Wife cannot be endowed; and yet the Husband and Wife were Joynt-Tenants during the Coverture, but now the Refuſal ſhall have relation, That the Husband ſhall be ſole ſeiſed *ab initio*. See 11 E. 3. Tit. Dower, 163. The Caſe was, Lord and Tenant of a Houſe holden by Homage and 10. s. Rent; The Tenant enfeoffed W. The Lord granted the Seigniory to Husband and Wife in Tail; W. attorned, the Husband dyed, the Lord ſurvived the Wife, brought a Writ of Dower, in Barr of which the Lord pleaded acceptance of Homage; whereby it appeared, That by any act or conveyance made, the Wife was not barred of her Dower, but that the Writ of Dower did well lye. *Cook* 3. Part, 27. in *Butler* and *Baker's* Caſe. acc.

8. Note, It is ſaid in *Plow.* Com. 514. in *Trivilian's* Caſe, That in Common Recoveries the Uſage and Intent of the parties is to be reſpected; and therefore, If a common Recovery be had againſt Husband and Wife, it ſhall barr the Wife of her Dower, and yet the Wife ſhall not have any Recompence in value; and although in ſtrictneſs of reaſon it is hard to maintain it, yet it being the common Uſage and the Intent of the parties, it ſhall be a Barr of her Dower. *Cook* 2. Part, 74. in the Lord *Cromwell's* Caſe. 78. *ibid.* acc.

9. If Husband and Wife levy a Fine, the Wife is barred of her Dower. Firſt, Becauſe the Inter-Marriage and Seiſin are the fundamental Cauſes of Dower, and the death of the Husband is but an Execution thereof: And ſecondly, Becauſe all thoſe who have Eſtate, or Title, or Claim in the Land do joyn; and therefore, If the Husband and Wife have granted a Rent-charge by Fine out of the Land, or have made a Leaſe for years rendring Rent to the Husband and his Heirs; and afterwards the Wife duth recover her Dower, ſhe ſhall hold the Land charged with the Rent, and with the Term; And therefore the Books of 6 E. 2. *Dower*, and 9 E. 2. *Dower*, 165. Where as a Writ of Dower brought by Husband and Wife, It was ſaid, That a Fine levyed by the Husband and Wife was no Barr, becauſe, before the death of the Husband, the Wife had neither Right nor Action; were not at this day holden to be Law. *Cook* 10. Part, 49 in *Lampit's* Caſe.

10. If a Woman releaſeth all her Right to him in the Reverſion, thereby her Dower is gone & extinct; for when the Right which is the principal is releaſed, the Conſequent, the Action to recover it,

is releaſed: And therefore, If ſhe bring a Writ of Dower, to be endowed of the Land, ſhe ſhall be barred by her Releaſe. *Cook* 8. Part, 151.

11. In Dower brought by the Wife againſt the Heir, to be endowed of divers Mannors and Lands which were late her Husbands: the Heir pleaded Detainment of Charters by the Demandant: And in that Caſe, concerning detainment of Charters, which ſhould be a barr of Dower, theſe Points were Reſolved: 1. That if the Heir pleads Detainment of Charters, That the Charters ought to concern the Land of which Dower is demanded: And the reaſon wherefore the Heir ſhall plead Detainment of Charters, is, becauſe if he had the Charters, he might plead ſome plea in barr of her Dower. And if the Heir plead, That he alwayes was, and yet is ready to render Dower, if he had the Charters, the ſame is a Confeſſion of the Action, if the Demandant deliver the Charters; and after the delivery of them, the Demandant ſhall have Judgment preſently. 2. That he who pleads Detainment of Charters, ought to ſhew the Certainty of the Charters: whereupon an Iſſue may be joyned. 3. That no ſtranger, although he be Tenant of the Land, and hath the Charters conveyed unto him, can plead detainment of Charters, becauſe that Plea is in privity for the Heir of the Husband onely: And in 5. Caſes, the Heir ſhall be as a ſtranger, 1. If the Heir hath the Land by purchaſe. 2. If the Heir hath delivered the Charters to the wife, becauſe it is his own Act. 3. If the Heir be not immediately vouched, but be vouched by the Vouchee. 4. If the Heir comes in as vouchee, having no Lands in the County where the Dower is demanded. And, 5. Where the Heir comes in as Tenant by Reſceit. 3. Reſolved, That in Dower againſt Guardian in Knights Service, he cannot plead detainment of Charters; for he cannot plead, That if the Demandant will deliver him the Charters, that he is alwayes ready, &c. becauſe the Charters do concern the Inheritance, and ſhall not be delivered to the Guardian, but he may plead a detainment of the Heir; and that he is alwayes ready to render Dower, if the Heir be delivered to him. *Cook* 9. Part, *Anne Bedingfield*'s Caſe.

12. In Dower brought againſt the Heir, he pleaded, That the Demandant detained Charters concerning his Free-hold, and if ſhe will deliver them, he is ready to render Dower; The Caſe was, That the Father had by Deed Leaſed the Lands to the heir; which Deed the Wife kept: And although it was no Plea unleſs it was for Charters, which concerned the Land diſcended; yet becauſe the Deed did belong to the Son, by reaſon of the Reverſion which diſcended to him, the Plea was holden to be good although the ſon were a purchaſor for life. 22 H. 6. 16, 17. acc.

13. See more, where Detainment of Charters ſhall be a Barr in Dower, in Title *Charters*, before. And ſee *Dyer* 37. and 230.

14. Husband and Wife brought a Writ of Dower of the Endowment of the Wives firſt Husband: The Defendant pleaded in barr, That an Annuity was granted to her firſt Husband and her ſelf in recompence of her Dower, which ſhe after his death accepted. *Anderſon*, Chief Juſtice, ſaid, That if ſhe diſagree to it *in pais*, although not in a Court of Record, it is a good diſagreement and refuſal; and if ſhe once diſagree to it, ſhe can never after agree to have the Annuity: And therefore this acceptance and agreement cannot barr her of her Dower. Paſch. 28 Eliz. in C. B. *Aſcoughs* Caſe. *Goldeſbr.* 4.

15. In Dower brought, it was ſhewed, That the Husband of the Demandant had given to her certain Lands in lieu of her Joynture, upon Condition, That ſhe ſhould make her Election within 3. moneths after his death: and ſhe made Election to have the Joynture; and notwithſtanding ſhe hath now brought Dower againſt the Heir by Covin; and he hath confeſſed the Action, to the intent that J. S. who had a Leaſe for years of the Land from the firſt Husband, ſhould loſe his Term. But in regard it appeared to the Court, That that which was given to her, was but a Leaſe for years; and a Leaſe for years can be no Joynture: Therefore, the Opinion of the Court was, That the ſame ſhould not barr her of her Dower. Trin. 28 Eliz. in C.B. *Goldesbr.* 27.

16. Dower was brought by Husband and Wife for the third part of Land in *Wolwich*: The Defendant pleaded, That the Lands are Gavel-kind; and that the Cuſtome of Gavel-kind within the County of *Kent*, is, That the Wife ſhall have the moyety during her Widowhood, and not any third part according to the Common-Law: upon which Plea it was demurred in Law. Two Queſtions were: 1. If this Preſcription in the Negative, be good with the Affirmative? The Court held the Preſcription good. 2. If the Wife might waive her Dower by the Cuſtome, and take it according to the Common-Law. It was ſaid by the Court, That this Cuſtome ſhall bind the heir and his Inheritance; and by the ſame reaſon it ſhall bind the Wife and her Dower. All the Court held, That as this Cuſtome is alledged, it ſhould barr the Wife of her Dower: but if the pleading had been in the Affirmative onely, without the Negative; then the ſecond poynt had come in Queſtion. Mich. 31 Eliz. in C. B. *Hunts* Caſe. *Goldesbr.* 109.

5. *Aſſignment*

5. *Aſſignment of Dower, by whom, and what, and where it ſhall be good; Where not.*

1. A Man ſeiſed, of a Mannor where the Cuſtome of the Mannor was, That the Cuſtomary Land was to be let by the Lord of the Mannor, or by his Surveyor, or Deputy of the Surveyor; by his Will gave power to certain perſons, to make Leaſes according to the Cuſtome of the Mannor, to raiſe moneys for the payment of his debts, and dyed: They held a Court in their own names, and granted Copies in Reverſion: Afterwards the Wife of the Lord, upon a Recovery of a third part of the Mannor in Dower, had one of the Copyholds aſſigned to her by the Sheriff. It was holden, That the Aſſignment was good, and that the Wife ſhould avoid the grants made by the other perſons. Hill. 8 Eliz. *Dyer.* 251.

2. Upon a Recovery in Dower, an *Habere facias ſeiſinam*, was directed to the Sheriff, to put the woman in Seiſin: The Sheriff made his Retorn, that he proffered Seiſin to the Demandant, of the third part of the Land by metes and bounds, which ſhe refuſed. It was holden by the Juſtices, That notwithſtanding this refuſal of the woman, that her entry after was lawful, for that now the certainty of the Land is known; and another *Habere facias ſeiſinam* cannot be granted. Mich 11 Eliz. *Dyer* 278.

3. Husband and Wife made a Feoffment to the uſe of himſelf and his wife for life, the remainder over: The Husband ſowed the Land and dyed. It was holden, That the Wife ſhould have the Crop, and not the Executors of the Husband. And in that caſe it was agreed, That if the Husband ſoweth the Land, and dyeth; and afterwards his Heir aſſigns Dower to the Wife, That ſuch Aſſignment of Dower by the Heir, is good, and the Wife ſhall have the Cropp. Mich. 15 Eliz. *Dyer.* 316.

4. If a man be ſeiſed of 3. Acres of Lands in 3. ſeveral Towns, A, B, and C, in one County; and enfeoffeth a ſtranger with Warranty of one Acre, and dyeth; the Heir may aſſign to the Wife one Acre, as well in ſatisfaction of her Dower in the Acre of which the ſtranger is enfeoffed, as of the other Acre diſcended to the Heir; for by courſe of Law ſhe ſhall have Dower againſt the Heir in diſcharge of all the Tenancy, as well that which he ought to warrant, as that which is diſcended to him in the ſame County; for which cauſe, the Heir may agree with the Wife as well out of Court, as in Court: for that which by the Law he is bound to do, and being vouched by the Feoffee in a Writ of Dower, he ſhall plead the ſame in barr. 33 E. 3. *Fitz.* to *Judgment*, 154. *Cook* 9. Part, in *Beddingfields* Caſe, 18.

5. In Dower, *Habere facias ſeiſinam* was awarded to the Sheriff, to enquire of the value, and to give Seiſin: The Sheriff retorned, *Quod habere fecit ſeiſinam* of the third part of Land, and divers Lands, *et de tertia parte Advocationis de D:* It was ſaid, That the Retorn was not good for the incertainty of it: But all the Juſtices held the Aſſignment good enough, becauſe it is but the Retorn of the Sheriff, and needs not ſuch preciſe certainty, as in Counts and Endictments. Mich. 18 Jac. in B. R. Sir *Charles Howard* and *Cavendiſhes* Caſe. *Cro.* 2. Part, 621.

6. In Dower, the demand was of the third part of a Carve of Land: It was holden to be no Plea, That the demandant was ſeiſed of the third part, without ſhewing of whoſe Aſſignment, or that ſhe recovered the ſame; for if it were by diſſeiſin, ſhe ſhall have her Dower of the two parts: for which cauſe the Defendant was driven to anſwer to the two parts. 34 E. 3. 17.

7. If a woman hath Cauſe to be endowed of certain Lands, and a certain Rent is aſſigned to her for the ſame out of the ſame Land, though it be without Deed, if ſhe be diſſeiſed, ſhe ſhall have an Aſſiſe; but if it be aſſigned out of other Lands, of which ſhe ought to be endowed, ſhe ſhall not have Aſſiſe of the Rent, becauſe ſhe was never Dowable of the Land. 33 H. 6. 2. Vouch. *Cook* 4. Part, 3. & 4. in *Vernons* Caſe.

8. In a *Quare Impedit*, the Plaintiff declared, That ſhe ſued a Writ of Dower of divers Mannors and Tenements, and recovered; and that a Writ iſſued to the Sheriff to extend the Lands: and that the Sheriff did aſſign unto her a Mannor, and the Advowſon of that Church for her Dower; and the Church became void, and ſo ſhe had right to preſent. It was holden in that Caſe, That the Aſſignment of the Sheriff was well made, as to the third Preſentment; and as well as if the Heir had aſſigned the ſame. And in that caſe it was agreed, That the Sheriff ſhall not be compelled to aſſign her the third part of every Acre, for that ſhould be *opus infinitum*; but if ſhe hath had one Acre, or one Mannor for all, it is good by Law. But Quære, if there be Meadow, Paſture, and Wood, If the Sheriff may aſſign all the Meadow, or all the Wood. But it was agreed, That the Sheriff cannot aſſign a Rent out of Land of which ſhe is dowable; but the Heir may ſo do. Paſch 12 E. 4. 2.

9. In an Aſſiſe for Rent, the Plaintiff made Title, That her Husband was ſeiſed and held of the King, and dyed; and that the Lands were ſeiſed into the Kings hands for the Non-age of the Heir, with other Lands: and that the Plaintiff prayed her Dower in Chancery, and a Writ went out directed to the Eſcheator, to deliver 10 marks of Land and Rent; and that the Eſcheator thereupon did deliver her five marks in Land, and five marks in Rent, which is the Rent now in demand. It was holden by the Court, That the Aſſignment made by the Eſcheator was good, for that the Writ is his Warrant; And although the Husband was not ſeiſed of the Rent, but of the Land; yet the Aſſignment was as good, & as well as where an Heir Aſſigns a Rent unto the Wife out of Land of which the Husband dyeth ſeiſed. See 26. *Aſſ.* 41. acc.

10. If the Guardian do Aſſign more to the Demandant in Dower then ſhe ought to have, the Heir ſhall have an Admeaſurement of Dower: And if the Heir within age, before entry of the Guardian, doth Aſſign overplus in Dower, the Guardian ſhall have an Admeaſurement. But Quære, If the Heir himſelf upon ſuch Aſſignment made by him, ſhall have a Writ of Admeaſurement. *Fitzh. Nat. Br.* 149, 150.

11. In all Caſes where the Dower is certain, there the Wife may enter after the death of her Husband, without Aſſignment of any one, but where the demand in the Writ of Dower is uncertain, there ſhe cannot enter before an Aſſignment be made unto her. 40 E. 3. 22. *Cook* 1. Part, *Inſtitutes*, 37.

12. Note, to a perfect Aſſignment of Dower, theſe are to be obſerved. 1. The Aſſignment ought to be certain. 2. It ought to be of Land of which ſhe is Dowable, or of a Rent out of the ſame, and not of other Land. 3. It ought to be abſolute, and not conditionall. 4. It ought to be made by him who is Tenant of the Land. 5. That if the Woman be of Covin with him, who Aſſigns to her Dower, the Aſſignment is void, becauſe the Covin doth avoid her Right. 6. Dower Aſſigned by a Diſſeiſor, or by an Abator, is good, if it be without Covin. 7. It ought to be by him who is onely Tenant of the Freehold, and therefore Guardian in Socage cannot Aſſign Dower; But Guardian in Knights Service may, becauſe a Writ of Dower lyeth againſt him. 8. The Heir within age, before Entry of the Guardian, may Aſſign Dower. 9. The Sheriff, Eſcheator by Writ, and authority of Law, may Aſſign Dower: All which points you may ſee by the Caſes before: And Note, That no Livery of Seiſin, or Writing is neceſſary to an Aſſignment of Dower, becauſe the ſame is due of Common-Right. *Cook* 1. Part, *Inſtitutes* 35, acc.

13. In Dower brought, the Tenant pleaded the Entry of the Demandant into parcell of the Land, after the Darrein Continuance, and that without Aſſignment: It was holden by the Court, That that Tortious Entry did abate her Writ, Wherefore the Demandant ſaid, That ſhe entred for a Quarentine; and in ſuch Caſe, it was holden, That ſhe ought to ſhew the death of her Husband in certainty, and the time of the 40 dayes. 6 E. 6. *Dyer*, 76.

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6. *To whom the Wife ſhall be Attendant, and for what Services.*

1. NOte, Where the Husband gives or makes a Feoffment in Fee of the Land, ſhe ſhall hold of the Feoffee by fealty. But before the Statute of *Quia Emptores terrarum*; If the Husband had enfeoffed a ſtranger of part of the Lands, then ſhe ſhould be Attendant to the Heir for the Seignory; but if the Husband had made a gift in Tail of the whole Land, and dyed, ſhe ſhall be Attendant to the Donee, becauſe that the Heir had but a Seignory in Groſſe. *Fitzh. Nat. Br. Dower.* 8. acc.

2. Tenant in Dower ſhall not be Attendant to the Lord Paramount, but to the Heir, and therefore ſhe ſhall be endowed of a Seiſin in Law; but a man ſhall not be Tenant by the Curteſy of a Seiſin in Law; becauſe he ſhould be Attendant to the Lord Paramount, which he cannot be, becauſe the Wife dyed before ſhe was actually ſeiſed. *Cook* 8. Part, 36. in *Paynes* Caſe.

3. If the Lord ſeiſe the Wardſhip of the Land of his Tenant by Knights Service, the Seignory is ſuſpended; but if the Guardian endoweth the Wife of the Tenant, of the third part of the Tenancy, the third part of the Seignory is revived, and the Tenant in Dower ſhall be Attendant to the Guardian for the third part of the Services, becauſe the Tenant in Dower is in by Act of Law; and for the ſame reaſon, If a man ſeiſed of Lands in Fee, taketh a Wife and enfeoffeth another, and the Husband dyeth, the Wife is endowed of the third part of the Land, out of which the Rent is Iſſuing; the third part of the Rent, in ſuch Caſe, which the Wife hath for life, is extinct; and the two parts of the Rent remain in him, iſſuing out of the other two parts. *Cook* 8. Part, 135. in *Aſcough's* Caſe.

4. If Tenant in tail maketh a Leaſe for 30 or 40 years, rendring Rent, and afterwards taketh a

Wife

Wife, and dyeth without Iſſue, his Wife young with child; and afterwards the Wife recovereth her Dower of the ſame Land, ſhe before the Sons death, ſhall not avoid the Leaſe, for her Eſtate is *quodam modo*, a continuance of part of the Eſtate tail, for ſhe ſhall be Attendant for the third part of the Services which the Tenant in tail did; which ſhe ſhould not be, if the Eſtate tail were to all intents extinct, and Tenant in Dower is in the *Per* by her Husband, and in of his Eſtate. *Cook* 7. Part, 9. in the Earl of *Bedford's* Caſe.

5. Lord, Meſne, and Tenant, the Tenant holdeth of the Meſne by 1 d. and the Meſne by 20 d. the Meſne doth releaſe to the Tenant all the right which he hath to the Land, the Tenant dyeth, the Wife ſhall be endowed, and ſhall be Attendant to the Heir for the third part of the 1 d. and not for the third part of the 20 d. for that ſhe ſhall be endowed of the beſt poſſeſſion of her Husband. 22 E. 3. *Fitz.* Tit. *Dower.* 131.

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7. *Where a Woman ſhall not be Endowed; or have her Dower out of another Dower; And where and in what Caſe ſhe ſhall be Endowed in the Chancery; And what ſhall be ſaid a forfeiture of her Dower, and by whom.*

1. GRandfather, Father, and Son: the Grandfather is ſeiſed of three Acres of Lands in Fee, and taketh a Wife, and dyeth, and the Land Diſcendeth to the Father, who dyeth, either before or after Entry; now is the Wife of the Father Dowable; yet ſhe ſhall have but the 3d part of the two Acres onely, and the Wife of the Grandfather ſhall have her Dower of the other Acre intirely, becauſe the Dower of the Wife of the Grandfather is Paramount the Title of the Fathers Wife; and the Seiſin of the Father which diſcended to him (be it in Law, or actually) is defeated, and now upon the matter, the Father had but a Reverſion expectant upon a Freehold, and in that Caſe *Dos de Dote peti non poteſt*, although the Grandmother dye, living the Fathers Wife. *Cook* 1. Part, *Inſtitutes* 32.

2. If a man maketh a Feoffment in Fee with Warranty, and dyeth, and the Wife of the Feoffor brings a Writ of Dower againſt the Wife of the Feoffee, and ſhe voucheth the Heir of the Feoffor, and, depending the Action, the Wife of the Feoffee brings a Writ of Dower of the whole Lands, and not of two parts, ſhe cannot recover Dower untill the firſt be determined, and then after the death of the firſt Wife, ſhe ſhall have Dower of the whole third part, by the Aſſignment of the Heir. See *Fitz.* Tit. *Dower.* 80.

3. Grandfather, Father, and Son; the Grandfather dyeth; the Father enters, and Aſſigns Dower to the Grandmother; the Grandmother ſurrendreth to the Father, paying 10 l. *per annum* the Father dyeth, and his Wife brings a Writ of Dower againſt the Son, by reaſon of the poſſeſſion of her Husband, of the third part of the whole Land, and recovereth; the recovery was holden good, becauſe the Father had the Fee and Free-hold, conjoyned in the life time of the Grandmother by the ſurrender: And in that Caſe, It was holden, That if the Father were within age, he ſhould be in Ward; And in a Writ of Entry, his Entry ſhall be adjudged and ſuppoſed to be by the Auncеſtor, and not by the Grandmother; and he ſhall deraigne the Warranty againſt the Feoffor of the Grandfather, but he ſhall not have in value till after the death of his Wife. Mich. 45 E. 3. 13.

4. A. held Lands in Socage, and other in Knights-Service of F. as of his Mannor of S. and F. held over in *Capite*; F. dyed, his Heir within age, and in Ward to the King. A. alſo dyed, and his Heir alſo within age: the Heir of F. ſued his Livery; and by Office, it was found, That the Heir of A. was of full age. It was a Queſtion, If he ſhould ſue Livery, or an *Ouſter le Mayne*, and if aſwell for the Socage-Land, as for the Knight-Service-Land. The Court inclined to Opinion, That the Socage-Land ſhould not be in Ward by the Prerogative, becauſe the Tenant held not immediately of the King; And in that Caſe it was holden, That when the Wife of A. hath her Dower Aſſigned to her in the Chancery, That ſhe ſhould not be ſworn the Kings Widdow. Mich. 3. *Ma. Dyer*, 123.

5. See before, where Dower Aſſigned by a Commiſſion out of the Court of Augmentation, though it was under the Great Seal, was not good, for that the Dower ſhould have bin Aſſigned in the Chancery. Trin. 9 Eliz. *Dyer*, 263. See before *placito.* Sect.

6. A. Wife of E. B. Son and Heir of H. B. brought Dower againſt T. B. ſon and Heir of E. B. to be Endowed of the Mannor of O. N. and other Mannors. T. B. purchaſed a Writ out of the Chancery, called *Circumſpecte agatis*, ſetting forth, That whereas E. B. was ſeiſed of the Mannor of N. in Fee, and held the ſame of the King in Chief by Knight Service, and dyed thereof ſeiſed, the ſaid T. B. of full age, as by Office is found by reaſon whereof the King was ſeiſed, as well of the ſaid Mannor, as of the other Mannors, and becauſe

cauſe the Queen was bound to reſtore the ſaid Manners *tam integrè* as they came to her hands; therefore it was commanded to the Judges to ſurceaſe *Domina Regina conſulta*. In this Caſe, theſe points (amongſt others) were Reſolved. 1. That the Writ *de Circumſpectè agatis*, which is in the nature of an Aid-prayer of the King, did not extend to any Mannors not found in the Office, becauſe the King cannot ſeiſe more Mannors then are compriſed in the Office. 2. Reſolved, That when the Heir is within age, and in Ward to the King, and the King commits him over, and he is impleaded, or comes in as Vouchee in a Writ of Dower, there aid of the King ſhall not be Granted, as appears by the Statute *de Bigamis, cap.* 3. 3. Reſolved, That when the King is Tenant by Primer-Seiſin *capiendo exitus* for a year, he could not at the Common-Law endow the Wife, becauſe he was not then Guardian; and none who hath but a Chattell can endow a Woman of a Freehold, nor doth a Writ of Dower lye againſt him. 5. Reſolved, That although that the Statute *de Prerogativa Regis*, gives power to the King to endow the Wife, although the Heir were of full age; yet the Statute leaves the ſame at the Election of the Wife, to be endowed, either by the King in Chancery, or by the Heir: And therefore, If a Woman brings her Writ of Dower againſt the Heir, being of full age, that in that Caſe, he ſhould not have Aid of the King. Hill. 28 Eliz. *Cook* 9. Part, 16, 17. *Ann Bedingfields* Caſe.

7. If the King make Livery to the Heir at his full age, ſaving to the Wife her Dower, to be Aſſigned by the King; in that Caſe, If the Wife will demand Dower, ſhe ought to ſue for the ſame in the Chancery; And if ſhe do demand her Dower there, a ſpeciall Writ ſhall Iſſue forth to the Eſcheator, to warn the Heir to be in the Chancery at a certain day; and the Wife ſhall have the ſame day to receive her Dower. But if the King maketh Livery to the Heir, and by his Writ commands the Sheriff to give him Seiſin of all his Lands, ſaving the right of every man; and there is not in the Writ, ſaving E. which was the Wife of, &c. her Dower of her Lands, to be by us Aſſigned, there, in that Caſe, the Wife may ſue her Writ of Dower againſt the Heir, without any reſervation of Dower to be Aſſigned to her by the King in Chancery. See *Fitz. Nat.* in his Writ *de Dat. aſſignand.* 263, 264.

8. If a Woman be Aſſigned her Dower in Chancery, and after it is ſurmiſed by the Heir or other, for the King, That the Land Aſſigned is not extended to the very value, but is much more in value, then it is extended at. If it be found upon a *Scire facies* Retorned, That the Land Aſſigned to her, is of greater value, and ſhe be warned upon the *Scire facias*, and makes default; ſhe ſhall be endowed *de novo*, and part of the Land aſſigned to her, ſhall be taken from her; And ſo if the Land Aſſigned to her be evicted; ſhe ſhall have a *Scire facias*, to re-ſeize the Land, and ſhall be endowed the *Novo*, as the Book in 43. *Aſſ.* 32. br. *Dower*, 65. is.

9. If a Woman cauſeth another to Diſſeiſe the Tenant of the Land againſt whom ſhe bringeth a Writ of Dower, and recovereth; ſhe ſhall loſe her Dower, although ſhe hath Right to have Dower of the Land: But if the Wife be of Covin to do a Lawfull Act; As if the Wife cauſe the Guardian in *Droit* to enter upon the Guardian by wrong, to the intent to recover her Dower, that is good, and Lawfull. Trin. 19 H. 8. 13.

10. If a Woman brings a Writ of Dower againſt a Diſſeiſor, upon whom the Diſſeiſee entreth by Covin, between the Diſſeiſor and the Diſſeiſee, to abate the Writ, there, becauſe the entry was by good Title, and the Covin not materiall, the Writ ſhall abate: But if a Woman cauſe a Diſſeiſor to enter, to the intent, to recover againſt him her Dower: in ſuch Caſe, the Diſſeiſee may recover the Land againſt the Woman by Aſſiſe. Mich. 15 E. 4. 2. acc.

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8. *Of Dower by Cuſtome, and what part of the Lands ſhe ſhall have, what not; At what age a Woman may be Endowed at the Common-Law, or by Cuſtome; and where Dower doth lye againſt the Committee of the King, or the Guardian, where not.*

1. THe moyety of the Land was demanded by a Writ of Dower, and becauſe the Tenements were holden in Socage; and alſo, becauſe all the Women of all the Lands, of which their Husbands were Tenants by Socage Tenure, were by Cuſtome of the County Dowable of the moyety of the Lands, time out of mind; the Writ of Dower was admitted to be good. *Book Entries.* 226. p. 12.

2. In Dower, the Defendant pleaded, That if the Husband did Allien and ſell his Lands; and did imploy the mony which he received to the Common profit of them; that the Wife ſhould be barred of her Dower, and it was admitted to be a good uſage, and the Demandant was put to anſwer to it: wherefore ſhe ſaid, That the monies did not come to their Common profit. 20 E. 3. Preſcription. 30.

3. In

3. In Dower brought of the moyety of the profits of a Marsh; It was said by the Councell of the Tenant, That the Marsh was holden in Socage, and that the usage of the Countrey is, That of Lands and Tenements in Socage, the usage was, That the Wife should be endowed of the Moyety of the Land it self; Wherefore she was enforced to make a demand accordingly, which she did; and the Tenant rendred Dower unto her. 12 E. 3. *Fitz. Dower*, 157. See 11 E. 3. *Dower*, 35. where the Wife recovered Dower of the moyety of a Stallage of a Fair.

4. By the Custome of *Kent*, the Wife shall have the moyety of the Lands of her Husband for her Dower *Dum sola vixit*, and she be not found with Child by fornication; And by the same Custome, she shall have Dower onely of the Lands and Tenements of which the Husband was seised and vested in possession; and not of a Possession in Law. 18 H. 3. Tit. *Prescription*. 60. See 44 E. 3. 31. acc.

5. Note, A Woman shall have Dower of the Moyety according to the Custome of *Kent*; And she in Dower, made her Demand of 23 Acres of Land, because *terra est* of the nature of Gavelkind *secundum consuetudinem ab antiquo usitatam quod de medietate dotari debet*; but she did not say time out of mind, &c. and yet it was holden by the Court, That her Demand was good, because the Course is such: And note, that it was said, she must say, That she was sole. Mich. 2 E. 4. 77.

6. A Custome was alledged to be of the County of *Hereford*, That the Wife which takes a second Husband, shall lose her Dower which she hath by her first Husband. 8 H. 3. *Customs*, 55. And *Bracton* 309. *p.* 1. sayes, That there is a Custome in *Lincoln*, That if a man doth sell his Inheritance for need, that his Wife shall not have Dower of the Land, but otherwise if he Mortgage it, or maketh a Lease thereof for need.

7. In a Writ of Dower brought by a Woman of the third part of Lands; the Tenant pleaded, That the Lands of which Dower is demanded, is of the nature of Gavelkind, and that the Custome of such Land is, That Dower ought to be demanded of the moyety of it, and not of the third part, upon which it was demurred. It was the Opinion of *Anderson* and *Windham* Justices, That such a Woman of such Lands might at her pleasure demand her Dower, either according to the Custome, or according to the Common-Law, for that the Common-Law was before the Custome. And by *Windham*, If the Demandant here recover her Dower, according to the Common-Law, yet if she taketh another Husband, she shall lose her Dower, as if she had bin endowed according to the Custome. It was said by some at the Bar, and so affirmed by the Prothonotaries, That the Woman ought to be endowed according to the Custome, and not otherwise; and so it was said to have bin adjudged. Mich. 16 Eliz. in *Gellibrand* and *Hunt's* Case. Mich. 30 Eliz. in C. B. *Leon.* 62. See *Hunt* and *Gellybrand's* Case. *Leon.* 133.

8. If the Husband Allieneth his Land, and then the Wife is Attainted of Felony, now she is disabled to have Dower, but if she be pardoned before the death of the Husband, she shall be endowed: And if the Son endoweth his Wife at the age of seven years *ex assensu patris*, if she before the death of her Husband, attain to the age of 9 years, the Dower is good. *Cook* 1. Part, *Institutes* 33. acc.

9. See 9 H. 6. 11. by *Strange*, If the Wife be of the age of nine years, it is sufficient, and she shall have Dower of what age soever the Husband be. See 12 R. 2. *Dower*, 54. If the Husband dyeth before the Wife accomplisheth the age of nine years, she shall not have Dower.

10. Note, If a man marries a Wife, and afterwards sells his Lands, and afterwards she cometh of the age of nine years, and the Husband dyeth, the Wife shall have Dower of the Land, although the Husband had not possession of it after she came of the age of nine years, For if a Woman Elopeth, and afterwards the Husband purchaseth Lands, and allieneth the same, and afterwards the Wife is reconciled, and the Husband dyeth, she shall have Dower, 4 E. 3. acc. And to prove the first Case, See *Litt.* 8. which is, That the Wife shall be endowed of such Lands which were her Husbands at any time during the Coverture, so as she passe the age of nine years at the time of the death of her Husband. *Litt.* 8. Part, 36.

11. See, if a Woman be of the age of 10. years, she shall have Dower, but if she be but of the age of eight years, she shall not have Dower. 2 H. 4. 1.

12. See, If the Husband be dead before the age of seven years, she shall not have Dower: *Old. Nat. Br.* 7. and see 12 R. 2. *Dower*, 54. The Husband was of the age of 11 years, and the Wife was of the age of ten years, and she had Dower by the Award of the Court.

13. Note, It was holden 16 Eliz. in C. B. That the Marriage of the Husband before the age of seven years, was void, where the Issue was joyned upon *Ne unques accouple en loyall Matrimonie*. Quære of that, because 12 R. 2. is contrary. 7 H. 6. 11. It is holden, That the Marriage is not void, but voidable, but 47 E. 3. Action upon the Statute 17. that it is void, because there ought to be words of Consent, which cannot be at such age.

See

See 22 Eliz. *Dyer*, 369. A marriage, *infra annos Nubiles* is perfect *Quoad dotem*, and *quoad* other purposes, it is but *inchoatum, et imperfectum*, *Cook* 6. Part, 40. in Sir *Anthony Mildmayes* Case.

14. Note, It was holden by the Court, That Dower may be brought, as well against the Heir himself, as against the Committee of the Ward: But if an Enfant be in Ward to the Lord in Knights service, the Writ of Dower shall be brought against the Guardian in Knights-Service: And if Dower be brought against one who is not Tenant of the Free-hold, the Tenant before Judgment shall be received, and upon default of the Tenant after Judgment, he may falsify the Recovery. Mich. 6 Jac. in C. B. *Goldesbr.* 127.

15. A Writ of Dower at the Common-Law, lay against Gardian in Knights Service, but then in the Writ, he must be named Guardian, and a Writ of Dower brought against the Heir within age, shall abate, for it ought to be brought against the Guardian. See 8 E. 3. Dower lyeth against the Guardian within age, and against the Heir at full age, and it doth not lye against any one in respect of any Possession if he be not Guardian; And that appears by 8 E. 3. 15. A Woman brought a Writ of Dower against A. as Guardian in Knights-Service, who pleaded, That he had nothing of the Lease for six years of the Lease of J. S. who was Guardian of the Lands: It was holden in that Case, That the Writ did not lye against him, in respect of the Possession, and the Demandant was forced to maintain that he was Guardian. *Cook* 9. Part, 17. vouched in *Bedingfield's* Case.

16. Dower was brought against the Committee of the King, during the Non-age of the Heir; The Defendant shewed, That it was found by Office, That the Father of the Husband of the Demandant was seised of Lands holden of the King, and dyed, his Heir within age; and that the King seised the Ward, and committed him unto him; and demanded Judgment of the Action: In that Case, It was holden and adjudged, That the Action well lay against the Committee; And wherefore, after in the Case, he was upon another Cause, ousted of the Aid proper. 4 H. 7. 1. *Cook* 9. Part, in *Bedingfeild's* Case.

17. In Dower, the Case was, Land was given to the Father for life, the remainder to his Son and Heir for life, the remainder to the right Heirs of the body of the Father; The Father and Son joyned in a Deed to the Father's Brother, Uncle of the Son in Fee; The Uncle took Wife, the Father dyed, his Son being his Heir in Tail; the Uncle dyed without Issue, so as the Land did discend to the Son as Heir to the Uncle, against whom the Wife of the Uncle brought Dower. It was moved, If the Son being Heir in Tail to his Father, & Heir also to his Uncle for the Land was remitted, for if there be a Remitter, then no Dower accrueth to the Wife of the Uncle, because the Estate, of which she claims Dower, is gone; but if the Livery in which the Son joyned with the Father be the Livery of the Son, then the same doth prevent the Remitter during his life, and he shall be adjudged seised in Fee, by discent from Uncle. The Court doubted of the Case, and gave no Opinion in it. *Quare* and *vide Dyer*. 339. Mich. 29 Eliz. in C. B. *Partridge* and *Partridges* Case. *Leon.* 37.

18. Error was brought upon a Judgment in a Writ of Dower by *Nihil dicit*, because a Writ of Enquirie of Damages was awarded, by which it was found, That the Land in which shee ought to have Dower was of the value of 8. l. *per annum*, and that 8. years *elapserunt post mortem viri sui ante Inquisitionem*, and they assessed Damages; and it appeared upon the Record, That after the Judgment the Demandant had Execution upon *Habere facias seisinam*, so as it appeared upon the whole Record put together, that Damages were assessed for 8. years, whereas the Demandant had been seised for part of the years; and the Damages were assessed to the time of the Inquisition, whereas they ought to have been but to the time of the Judgment: It was holden by the Court, that the Damages were not rightly assessed, and therefore the Execution for them, and the Judgment, was erroneous; And the Judgment was reversed. Pasch. 29 Eliz. in Com. B. *Walder* and *Nevil's* Case. *Leon.* 56.

19. Dower was brought *de tertiâ parte Rectoriæ de D.* and upon the Grand *Cape* issued, *scil. Cape in manum nostram tertiam partem Rectoriæ*; the Sheriff, by colour of that Writ, took the Tythes severed from the 9. parts, and carried them away with him: It was agreed by the Justices, That that was not such a Seisure as was intended by the Writ; for the Sheriff upon the Writ ought generally to seize onely, and leave the Tythes where he found them: Wherefore the Court were of Opinion to commit the Sheriff for such his Misdemeanors. M. 30 Eliz. in C. B. *Mitchell* and *Hyde's* Case. *Leon.* 92.

20. The Case was, A. seised in Fee of Lands, in consideration of 100. l. bargains and sells to the Husband, in consideration that he should redemise it to him and his Wife for their lives, rendring a Pepper-Corn, and if he paid the 100. l. at the end of 20. years, the bargain and sale should be void; he redemised it accordingly and dyed; his Wife brought Dower: And whether the party should be relieved in Equity, against this Title of Dower, was referred to some of the Justices: And although the said Justices conceived, That this was but in the nature

nature of the Mortgage, and upon a Mortgage, if the Land be redeemed, the Wife of the Mortgagee ſhall not be endowed, no more than the Wife of the Conuſee of a Fine, upon a Grant and Render, for that it is in him and out of him in an Inſtant, *quaſi non ſtatu*; yet they were of Opinion in this Caſe, That the Wife ſhould have Dower: for by the bargain and ſale the Land is veſted in the Husband, and thereby his Wife entituled to Dower, and when he redemiſeth it upon the former Agreement, yet the Leſſees are to hold it ſubject to Dower, and when a Woman is dowable by Act in Law, a Court of Equity cannot barr her to claim her Dower. Paſch. 6 Car. in B. R. *Naſh* and *Preſton*'s Caſe. *Cook* 1. Part, 138.

21. Error was brought to reverſe a Judgment in Dower, of the Endowment of W. S. her late Husband, where the Defendant pleaded, *Ne unq; accouple en loyall Matrimony*; whereupon a Writ was awarded to the Biſhop to certify, who certified, That ſhe was accoupled *in vero Matrimonio, & quod* W. & E. *Thori & Menſæ participatione mutuò cohabitaverunt uſq; ad mortem prædict.* W. Amongſt other Errors aſſigned and diſallowed, It was ſaid, That the Certificate was not good, for that it doth not anſwer to the words of the Iſſue which are, *Quod ne unq; accouple en loyall Matrimonie*; and he ought to have anſwered *Quod fuit copulata in legitimo Matrimonio*; and Law anſwers *Quod vero Matrimonio, ſed Clandeſtino copulati fuerunt*: But the Error was diſallowed alſo by the Court, for *vero Matrimonio*, although *Clandeſtino copulati fuerunt*, is as good as *Legitimo Matrimonio*, for they are all one by Intendment, and though it be *Clandeſtino*, yet it doth not vitiate the Marriage; and when it is added, That *Thori & Menſæ participatione duxerunt vitâ* W. *cohabitaverunt*, that proves they continued Husband & Wife during his life; The Judgment was affirmed. M. 8 Car. in B.R. *Wickham* and *Enfield*'s Caſe. *Cro.* 1. Part, 256.

22. Error was brought and aſſigned upon a Judgment in Dower, becauſe the Tenant was an Enfant, and Judgment was given againſt him by default; It was the Opinion of the Court, It was not Error; For Dower is demandable againſt an Enfant, and he ſhall not have his Age, and his default ſhall prejudice himſelf and not the Plaintiff, otherwiſe the Wife ſhould never be endowed during his minority, and Dower is favoured in Law; The Judgment was affirmed. Hil. 3 Jac. in B.R. *Smith & Smith*'s Caſe. *Cro.* 2. Part, 111. See 35 Eliz. *Williams* and *Williams* Caſe. *Cro.* 2. Part, 393. acc.

23. Error brought to reverſe a Fine levyed by Husband and Wife; The Error aſſigned was, That the *Dedimus poteſtatem* bare Date before the Writ of Covenant, and had a *ſcire facias* to warn the Heir and Terr-Tenant; T. B. was warned, and returned to be Terr-Tenant, and he appeared and pleaded that W. B. the Conuſee his Father dyed ſeiſed, and that the Land diſcended to him as Heir, and that he was Tenant, and within Age, and prayed that the Plea might demurr; The Plaintiff counterpleaded the Age, That ſhe was entituled to have Dower before the Fine levyed, and now ſhe is barred of her Dower by this Fine, wherefore ſhe ſues to be reſtored to her Writ of Dower; Whereupon it was demurred, Whether it was a good Counter-Plea to ouſte him of his Age. It was Reſolved, That it was no Counter-Plea to ouſte him of his Age; For it is a Rule, The Heir being within Age, and in by diſcent, (ſo as he is Heir and Terr-Tenant) ſhall have his Age in a Writ of Error; And although that in Dower Age is not allowable for the miſchief, ſhe may dye and loſe her Eſtate; yet for as much as an Enfant by Intendment hath no Conuſans to plead in defence of his Title, and might have diverſe Pleas to avoid that Writ of Error; and the Plaintiff herſelf by her Fine hath given from her ſelf her Right of Dower by her own Act, as long as the Fine ſtands unreverſed; therefore the Law ſhall more favour the Enfant, than the Wife to reverſe her own Fine: and alſo for that Counter-Plea ſhall not be, but where it appears that he is not Heir, as a Baſtard, or one who is not as Heir but by Purchaſe, or in caſe of inevitable neceſſity; Wherefore it was adjudged, That it was no good Counter-plea; but the parol ſhould demurr for the Nonage of the Enfant. Trin. 10 Jac. in B. R. *Herbert* and *Binion*'s Caſe. *Cro.* 2 Part, 392, 393.

24. Dower: The Writ was, *Precipe A. quod reddat E. F. rationabilem dotem ſuam* of the Lands *dudum B. F. quondam viri ſui*: The Court was of Opinion, That the Writ was not good, for that the words in the Writ *B. F. quondam viri ſui, &c.* be not ſufficient: for ſhe ought to be named *Uxor* of her husband, for that is the name by which ſhe claims Dower, and ſhe ought to be his lawful Wife; otherwiſe ſhe may not claim Dower. Hill. 6 Jac. in C. B. *Fullam* and *Harris* Caſe. *Cro.* 2. Part, 217.

25. Tenant of the King by Knights Service, bargained and ſold his Land to J. S. and his heirs; the Bargainee dyed his Heir within age, and then the Deed was enrolled: The Queſtion was in this Caſe, if the King ſhould have primer Seiſin? It was the Opinion of all the Juſtices, That the Heir ſhould be in ward, and pay primer Seiſin if he were of full age; for when the Deed is enrolled, the Land paſſeth *ab initio*, and then the bargainee ſhall be Tenant *ab initio*. But it was agreed by all the Juſtices, That the Wife of the Bargainee ſhould not be endowed; and that the Rent paid to

the Bargainor at the day encurred after the bargain, is good; and the bargainee hath no remedy for it, becauſe it is a thing executed. Paſch. 5 Jac. in the Court of Wards. Sir *Henry Dimmocks* Caſe. *Owen.* 149, 150.

26. Note: It was agreed by the Court in a Writ of Dower, That if the Tenant plead, *Ne unq; Seiſi que Dower*, and in truth, the Husband of the Demandant had an Eſtate, but that was by Diſſeiſin, which is avoided by the entry of the Diſſeiſee, who had a Title Paramount; that this is no title by which ſhe may have Dower, although they are at Iſſue, upon the Plea, *Ne unq; ſeiſi, &c.* And in this caſe it was alſo agreed by them, That if a man had a good Eſtate by bargain and ſale from him who had right to alien it; and yet after he accepts a Fine *ſur Conuſans de Droit come ceo, &c.* from the other party, though in this caſe this be a Concluſion between the parties to whom the Fine is; yet it is not any concluſion to the Jurours to find the verity of the matter in fact. Paſch. 22 Jac. in C.B. The Counteſs of *Berkſhire* and Sir *Peter Van Lores* Caſe. *Winch.* 77.

27. In Dower brought by A. S. againſt the Tenant of the Land; he pleaded a Fine with Proclamations levied by her Husband, 14 Jac. in which year the husband dyed, and the Wife had not made claim within the Statute of 4 H. 7. The Demandant replyed, That 15 Jac. ſhe brought a Writ of Dower againſt the now Tenants, and againſt two others, and that the Writ abated by the death of the two others; and that ſhe brought this Writ by *Journeys Accompts*. The Defendant replyed, That the others were not Tenants but one J. D: It was ſaid, That this Rejoynder was not good, for they confeſſed that they themſelves are Tenants, by which the Writ is good againſt them: *Hobart* Chief Juſtice, If ſhe brought the Writ againſt one who was not Tenant, It is not any Claim within the Statute, but if ſhe brought her Writ againſt 4. who were Tenants, and two of them dye, and ſhe brings a Writ againſt the others by Journeys Accompts, the ſame is a good Claim within the Statute, though the ſecond Writ were after the time limited by the Statute. Paſch. 21 Jac. in C. B. *Summer's* Caſe. *Winch.* 66.

28. A. and her ſecond Husband brought Dower againſt T. and demanded Dower of the Endowment of J. S. her firſt Husband: It was agreed by the Court, That this Tryal ought to be by Witneſſes, according to *Dyer.* 155. Wherefore, It was awarded by the Court, That the Council of either ſide ſhould draw up Interrogatories, and put their names to them, then to be delivered to the Pregnothory, in whoſe Office the Cauſe is entred; and he ſhall have the Examination of the Witneſſes on both ſides, and then ſeal up the Interrogatories and Depoſitions, to be delivered over to the Court, and then *Qui melius probat, habet melius*, &c. Paſch. 22 Jac. in C. B. *Slater* and *Tacker's* Caſe. *Winch.* 82.

29. Dower againſt an Enfant who appeared by his Guardian and ſaid, That his Father, who was the Husband of the Demandant, was ſeiſed of a Meſſuage and Lands in Soccage, and deviſed them to the Demandant for her Joynture, and ſhewed that after the death of his Father the Demandant did enter into the ſaid Meſſuage and Land, and was ſeiſed by vertue of the Deviſe, ſaid and confeſſed the Seiſin of her Husband and her own Entry, but ſaid that the Enfant who was the Tenant was within the age of 14. years, and that ſhe entred as Guardian in Soccage to the Enfant, and diſagreed to accept of the Land by the Deviſe, and traverſed the Agreement; It was holden by the Court, That this was a good Barr; though it had been more pregnant to have alledged, that ſhe entred *virtute Legationis prædict.* and was ſo ſeiſed: and alſo it was ſaid, That the Replication was good without a Traverſe. M. 22 Jac. in C. B. *Baker* and *Baker's* Caſe. *Winch.* 100.

30. E. G. the Wife of her late Husband C. G. brought Dower againſt J. S. to be endowed of the third part of the Mannor of D. and he vouched to Warranty the Son of G. who appeared and entred into Warranty, and pleaded that he had nothing by diſcent from C. G. his Father, and the Demandant had Judgment againſt the Tenant to recover with a *Ceſſet Executio*, until the Voucher be determined; and after that, and before the day of the *Niſi prius*, the Son dyed; and then at the day the Tenant may revouch the Heir of the Heir; for it is not poſſible that the Vouchee ſhould loſe by default, becauſe he was dead; and where it is ſaid upon the back of the Record of *Poſtea*, that the Tenant loſt by default, It was conceived that was meant of the Vouchee, and not of the Tenant to the Writ of Dower; But it was Anſwered, that he might revouch; for there was a Judgment given againſt him with a *Ceſſet Executio* till the Voucher is determined, and that is determined by his death; and when Judgment is once given, he hath no day in Court: But the Court ſaid, It ſhall be intended, that the Record ſhall be meant that the Tenant in the Writ made default, and then it is not poſſible he ſhould ever recover, but they ſaid It had been more Queſtionable if the Tenant had appeared at the day of the *Niſi prius*, and had pleaded the death of the Vouchee, after the Darrein Continuance, and had prayed the advantage of his Warranty. 2. It was moved, That the Judgment given againſt the Tenant was not good, for that it was abſolute with a *Ceſſet Executio*, where it ought to have been Conditional: In that it was ſaid,

It

it might be either way, and that was no prejudice to the Warranty. Pasch. 19 Jac. in B. R. *Goldingham* and Sir *John Strouds* Case. *Winch.* 81. See *Cro.* 2. Part, 288. The same Case.

31. Note, In a Court Baron the Damages ought not to exceed 40. s. Yet in a Copyhold Manor where the Custom is, That the Wife shall be endowed; If she recover Dower with Damages in the Lord's Court, although those Damages exceed 40. s. yet are they recoverable in the same Court, for otherwise she should be without Remedy, because they are not recoverable by the Common Law, but onely in the Court of the Lord by *Levari facias. Cook* 4 Part, 30. *Shaw* and *Thompson's* Case.

32. A man made a Lease for life by Deed and Covenanted for him and his Heirs, That he would save him harmless from all claiming by, from, or under him; the Lessor dyed, and his Wife brought a Writ of Dower against the Lessee, and recovered; Whereupon he brought a Writ of Covenant against the Heir of his Lessor; It was adjudged, The Action would lye; for that the Wife claimed under the Husband, *scil.* The Lessor, But if it had been the Mother of the Lessor that had demanded Dower, There the Action would not have layen against the Heir, because she doth not claim by, from, or under the Lessor, and so it was adjudged. Trin. 21. Jac. 1. in B. R.

33. Note, By the Common Law, If the Husband had levyed a Fine *de terrâ propriâ, & in jure propriâ in fraudem vel odium mulieris, vel propter Lucrum*, yet the Wife in such Case should have recovered her Dower of the Land; But if it were *res aliena*, or *jus alienum*, and the Land had discended to the Son, who had levyed a Fine to him who had right, there the Wife of the Heir should not have had Dower of it; for if he who had right had recovered against her Husband, the Wife could not have been endowed against him that recovered: But if a Fine had been levyed to a stranger, It should then have been otherwise, for there the Wife should have had Dower; And if he had aliened by Fine, and received back the Land again from him who had Right, there the Wife should have been endowed of so much as he had received back by the Fine, but of no more; and if a Fine had been levyed of a thing doubtful, or uncertain to whom the Right of it did belong; In such Case the Wife should not have had Dower of it. See *Bracton.* 310. acc.

Doves *and* Dove-Cotes.

1. A Dove-Cote is an Inheritance whereof a *Precipe quod reddat* lyeth, and it shall be demanded next to a House: Also an Assize lyeth of a Dove-Cote; and of a Dove-Cote a Woman shall be endowed. *Fitzh.* 4. 15 E. 3. 22. & 1 H. 5. 1.

2. There are many Statutes which take notice of Dove-Cotes, and Doves. By the Statute of 18 E. 2. Title *Leet*, The Destruction of Doves is inquirable in Leets. The Statute of 4 Jac. None shall shoot within a Hundred paces of any Dove-House.

3. Trespas *Vi & Armis* was brought because he broke the Plaintiff's Dove-House, and 200 Pigeons of the price of 40. s. *cepit, per quod volatum Columbarum totaliter amisit.* The Defendant pleaded, That the place where the Dove-House was, was holden of the Mannor of *D.* which was Ancient Demesne, and pleaded to the Jurisdiction; It was holden by the Court, That it was no Plea in that Action: wherefore the Defendant was forced to make Title. M. 43. E. 3. 23.

4. The Case was, That a Free-holder erected a Dove-House upon his own Free-hold, where there was not any before, and stored it with Pigeons: This was presented at the Leet, and a pain assessed to amove it by such a day; and for not amoving it the party was amerced; and for the Amercement, a Distress taken by the Lord of the Leet: There were two Questions in the Case, 1. Whether the erecting of a Dove-Cote by the Free-holder, and storing it with Doves, be a *Nusans* and an Offence of Law? 2. Whether the Lord might distrein without a speciall Custom for an Amercement in a Leet: For the first Point, *Cook* Chief Justice held, That it was a Common Nusance and inquirable in the Leet; But the other Justices doubted of it: For the second Point, It was holden, That he might distrein or have an Action of Debt: The Presentant was, that he had erected a Dove Cote, and stored it with Pigeons; but he doth not say in the Presentant, that it was *ad Communem Hominum*; and for that Cause it was holden by the Court to be insufficient. Hill. 11 Jac. in B. R. *Pratt* and *Stern's* Case. *Cro.* 2. Part. 381.

5. Note, It was Reſolved, 1. That if a man makes Cony-boroughs in his own Land, which ſo encreaſe with Coneys, that they deſtroy the Land of his Neighbour which is next adjoyning to it, That an Action upon the Caſe will not lye againſt him that makes the Cony-boroughs; for preſently when the Conies come upon the Land of his Neighbour, he may kill them becauſe they are *feræ naturæ*. 2. It was Reſolved, That none may erect a Dove-Cote but the Lord of the Mannor, and if any doth ſo, he ſhall be puniſhed in the Leet; but an Action upon the Caſe lyeth not for the Infinitement of Actions which might be. M. 4 Eliz. in C. B. *Boulſtor's* Caſe. *Cook* 5. Part.

6. The Earl of *Northumberland* was ſeiſed of the Mannor of *Iſlewerth Syon* wherein he had a Leet: H. D. being a Free-holder within the Mannor erected a Dove-Cote upon his own Land within the Precinct of the Leet, which was preſented at the Leet for a Common Nuſans, for which he was amerced 40. s. and commanded to amove it upon pain of 10 l. Which he not doing, a Diſtreſs was taken by the Bayliff of the Earl; whereupon H. D. brought a Replevin, and the Defendant juſtified as Bayliff, and preſcribed, they uſed to make By-Laws to redreſs Common-Nuſances, and preſcribed to diſtrein for them. The only Queſtion was, Whether the new erecting of a Dove-Cote by a Freeholder upon his Land, and ſtoring it with Pigeons, were a Common-Nuſance puniſhable in the Leet: It was Reſolved by all the Juſtices, That it was not a Common-Nuſans either puniſhable or enquirable in a Leet; and in that Caſe, It was Reſolved, That a man had *Jus proprietatis & privilegii* in Doves, and that Treſpaſs lyeth, *Quare fregit Columbare, & Columbas cepit*, and Treſpaſs doth not lye; becauſe the Doves do no Treſpaſs nor is there Remedy for the killing of them, and therefore they are no Common-Nuſans. 2. It was Reſolved, That a man may have a Dove-Cote by preſcription, which could not be if it were a Nuſans; And it is lawful for a man to kill Doves upon his own Lands, but then they muſt take care that they do it not contrary to the Statute by which Doves are preſerved. 3. As a man cannot preſcribe to do a Nuſans, ſo a man cannot licence one to do it. Judgment was given for the Plaintiff in the Replevin for the Dove-Cote: And in this Caſe, It was Reſolved, and denyed that *Cook* 5 Part, *Boulſtor's* Caſe, was not Law. Trin. 17 Jac. in B. R. *Dewell* and the Earl of *Northumberland's* Caſe. Paſch. 142. See *Cro.* 2 Part, 492. the ſame Caſe. And See Mich. 14 Jac. in B. R. *Veyſey's* Caſe adjudged, acc.

Droit, Right, or Writ of Right.

1. *The Nature of Writs of Right; and to whom they ſhall be directed; and the Form of the Writ.*

1. WRits of Right are either open, or enclоſed in Wax; called Writs of Droit Patent, or Writ of Droit Cloſe; and it is nothing elſe but a Commiſſion to the Lord or his Bayliff, that they do Right to the parties. A *Precipe in Capite* although it be of as high a Nature as a Writ of Right, yet the ſame is enclоſed in Wax, and is directed to the Sheriff or other Officer to return the ſame in the Common Pleas. *Fitz.* N. B. 21. acc.

2. The Writ of Right Patent remains alwayes in the hands of the Demandant, becauſe that if the Lord or Sheriff will not do right to the party, he may remove the Cauſe into the Court of Common Pleas; and therefore there is this Clauſe put in the Writ, *& niſi feceris, talis vir Comes faciat*, which is not put in other Writs; and when the Writ of *Pone* comes to the Sheriff, the Writ runs thus, *Quod habeas Summon. & hoc breve, & non aliud Breve*, becauſe that the original Writ of Right remains alwayes with the Demandant, and not with the Sheriff as other Originals do. *Fitz.* N. B. 4. & 6.

3. The Form of the Writ of Right directed to the Lord of the Mannor, runs thus, *Precipimus tibi, Quod plenum rectum teneas* A. B. *de uno Meſſuagio*; The Writ of Right's Caſe runs thus, *Rex Vicecom. S. ſalutem. Precipimus tibi, Quod ſecundum conſuetudinem Manerii &c. plenum rectum teneas &c. de uno Meſſuagio, &c.* The Writ of Juſticies runs thus, *Rex*, &c. *Precipimus tibi, Quod Juſticiet* A, *quod juſtè & ſine dilatione reddat* B. 2d. *Cook* 6. Part, 11. *Gentleman's* Caſe.

4. In a Writ of Right, the Tenure ſhall be expreſſed, If the Lands be holden in Socage, then thus, *Per Liberum Servitium unius denarii per annum pro omni ſervitio*: Or, *per Liberum Servitium ad faciendum Sectam ad Curiam Domini Honoris de H*: Or, *per Liberum Servitium ad inveniendum nobis, quinq; Naves ad tranſitum noſtrum, ad mandatum pro omni Servitio.* 39 E. 3. 20. *Brafton.*

ſection 318. Alſo Note, That the Writ of Right Patent to the Lord is, *Quod rectum teneat.* without Commandment of the Tenant to render the the Land. But in a *Precipe in Capite*, and all other Writs, which are directed to the Sheriff, it is, That he Command the Tenant that he render the Land.

5. If a Mannor or an Honour which is holden of the King *in Capite*, do come to the King by Eſcheat for Treaſon; yet they continue a Mannor and an Honour as they were before; and the Services are ſuch onely as they were before: for if they ſhould hold them in groſſe, the Mannor ſhould be deſtroyed: And it is there ſaid, That if a man be to bring a Writ of Right; for Lands holden of the King in Chief, the Writ ſhall be directed to the Sheriff: but if they be holden of the King as of an Honour, or Mannor, the Writ ſhall be directed to the Bayliff. Mich. 31 H. 8. *Dyer.* 44. acc.

6. If the Lands be holden of another than of the King, or Queen, then the Writ ſhall be directed to the Lord himſelf, of whom the Lands are holden, if ſo be the Lord be not out of the Realm; for then upon a Certificate made by the Chancellor, the Writ ſhall be directed to the Lords Bayliffs: And where a Biſhop is elect, the Writ ſhall be directed to the Bayliffs of the Biſhop elect, and not to the Biſhop himſelf: and in caſe of a Committee of a Ward of a Mannor, the Writ ſhall be to the Bayliff, of the Committee. But if a man be Guardian in his own Right, then the Writ ſhall be directed to the Guardian himſelf. And where the Heir in Ward cannot hold a Court, for the meanneſs of his Land, that it is but of ſmall value, Then it ſhall be directed to his Lord Paramount. *Fitzh. Na. Br.* 1. 2. & 3. acc.

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2. *For whom a Writ of Right lyeth; for whom not: And of what it lyeth, and for what Eſtate; what not. And the ſeverall forms of Writs of Right.*

1. NOne ſhall have a Writ of right Patent, but thoſe who have an Eſtate in Fee-ſimple; or as Tenant in Fee-ſimple: An Abbot, Prior, Biſhop, Maſter of an Hoſpital. Alſo, Corporations or bodies Politique; as Mayor and Comminalty, Bayliff and Comminalty, may have, and maintain Writs of Right for their poſſeſſions: But Parſons, Vicars, Chauntry Prieſts, Prebendaries, &c. who have a Patron or Ordinary over them, ſhall not have or maintain Writs of Right Patents. *Bracton* 285.

2. He who hath a Colledg or Common Seal, ſhall not have Aide, no more then an Abbot, Dean, &c. who may implead, and ſhall be impleaded, and ſhall have a Writ of Right of his poſſeſſions. But it is otherwiſe of a Parſon; for he ſhall not have a Writ of Right: but the higheſt Writ in its Nature which he can have, is a *Juris utrum.* 44 E. 3. 11.

3. A Prior who is preſentable by the Founder, If he be Impleaded, he ſhall not have Aide of his Patron, becauſe that the Right is in him and his houſe; and he may have a Writ of Right: And if he alieneth without the aſſent of the Chapter, the Succeſſour ſhall have a Writ *ſine Aſſenſu Capituli*: and if he alieneth with the aſſent of the Chapter, The Writ of *Contra formam Collationis* lyeth. But a Parſon hath not the meer right in him, and therefore he ſhall not have a Writ of Right, but a *Juris utrum.* Trin. 11 H. 4. 68.

4. In a Writ of Right Patent, it is a good Plea, That the Demandant hath nothing but in tail. 5 E. 4. 2.

5. In a *Quo Jure*, which lyeth for Tenant in Fee, where another claimeth Common in his Land, a man ſhall have the View, becauſe it is a Writ of Right; but Tenant in tail ſhall not have this Writ, nor a Writ of *Ne injuſte vexes*, becauſe they are Writs of Right. 5 E. 4. 2.

6. A Writ of Right of Advowſon lyeth onely for him who claimeth Fee in the Advowſon. *Fitz. Na. Br.* 30. And if Tenant in tail of an Advowſon recovereth by a Writ of Right, yet he ſhall hold but in tail: And although he cannot have a Writ of Right of an Advowſon in tail; yet he ſhall have and maintain a *Quare Impedit.* See *Fitz. Tit. Judgment*, 137.

7. A Writ of Right Patent in *London* lyeth for none but for him who hath a Fee-ſimple: and ſo it is of a Writ *de Rationabili parte* betwixt Privies in blood, It lyeth only of a Fee-ſimple. See *Fitzh. Na. Br.* 19. acc.

3. *What ſhall be a good Barr in a Writ of Right; What not.*

1. NOte, That in a Writ of *Formedon*, and in all other Writs (except a Writ of Right) where the Point of the Writ is traverſed, a man may have a new Writ, for that he is at large to other Writs, and barred but to that Action, if not that his Title be found againſt him: But if a man be once barred in a Writ of Right, where the Miſe is joyned upon the meer Right, it is a perpetual barr: and Judgment final ſhall be given. *Cro.* 6. Part, in *Ferrers* Caſe.

2. A *Quod ei Deforceat* in the Nature of a Writ of Right, was brought in *Wales*: The Tenant joyned the Miſe upon the meer Right: and upon that, a Jury by *Venire facias* was returned, and 12. appeared, and before Judgment, the Demandant was Nonſuit; upon which, final Judgment was given. In that Caſe, It was Reſolved, Although the Statute of *Rutland* made 12 E. 6. provided, That Tryal in *Wales* in a Writ of Right ſhould be by Common Jurours, and by 12; Yet Judgment final ſhould be given there; for although the manner and dignity of the Tryal be altered, yet the ſame Judgment remains as was before. 2. Reſolved, If Judgment final be given in a Writ of Right, where it ought not to be, the ſame ſhall be a barr and conclude the party, untill it be reverſed. 3. It was Reſolved, That if the Tenant after the Miſe joyned, maketh default, That Judgment final ſhall not be given, but a *Petit Cape* ſhall iſſue out, becauſe peradventure he may ſave his default. Trin. 38 Eliz. in B. R. *Cook* 5. Part, 85. *Penrys* Caſe.

3. If the Demandant in an Aſſiſe of Mortdaunceſter brought againſt him, as in a Writ of Entry *ſur Diſſeiſin*, or the like, be barred by Action tryed; yet he may have and maintain a Writ of Right, and if the Land be holden of the King in Chief, he may have and maintain a *Precipe in Capite*. *Cook*, 4. Part, 43. *Nat. Br.* 5. acc.

4. In a Plaint, in Treſpaſſe entred in a Court Baron, If the Plaintiff do declare of his Freehold in the nature of a Mortdaunceſtor, or any other reall Action, and the Tenant pleads to the Juriſdiction of the Court, and Judgment is given againſt him for not anſwering, there the Recovery is good, as alſo for the damages thereupon, untill it be reverſed by a Writ of falſe Judgment, becauſe the Lord hath Juriſdiction over the Tenant, and for that the Freehold is holden of him. But if Covenant, Contract, or Treſpaſſe, be done out of the Juriſdiction, or in Land not holden of the Lord, there, and in ſuch Caſe, If Judgment be given, the party againſt whom it is given may have Treſpaſſe, or an Aſſiſe; But Quære, If the Defendant doth admit of the Juriſdiction, and in ſuch Caſe, pleads in Chief, if he ſhall not be barred, or ſhall after avoid the ſaid recovery. 22. Aſſ. 64. See *Cook*, 6. Part, 7. and 8. *Ferrer's* Caſe.

3. *What perſons may joyn the Miſe in a Writ of Right, what not; And where Judgment finall given upon it, ſhall bind, Where not; And what perſons may joyn in the Writ, What not.*

1. IF two Joynt-Tenants be of Land, to them, and to the Heirs of one of them, they ſhall not joyn in a Writ of Right: But if two Joynt-Tenants, and the Heirs of one of them be of an Advowſon; they ſhall joyn in a Writ of Right of Advowſon: and the reaſon of the difference is, becauſe, that in the firſt caſe, they have ſeverall wayes of Remedies, but not in the other Caſe. If the Tenant for life ſhall not joyn with him who hath the Fee, neither the one, nor the other ſhould have remedy, and therefore for neceſſity they ſhall joyn, *ex neceſſitas vincit legem*. *Cook* 5. Part, 40. in *Dorrel's* Caſe.

2. A. ſeiſed of the Mannor of D. in Fee, Covenanted to ſtand ſeiſed thereof to the uſe of himſelf, and B. whom he intended to marry, for the Term of their lives, without Impeachment of Waſte, and after their deceaſe, to the uſe of their firſt Iſſue male, and the Heirs Males of ſuch Iſſue Male, and for want of ſuch Iſſue, to the uſe of the Heirs Males of the body of the ſaid A. and B. lawfully begotten; and for want of ſuch Iſſue, to the uſe of C. in Tail, with divers Remainders over; they entermarryed, and had Iſſue D. Afterwards A. dyed without any other Iſſue of the body of B. but the ſaid D; B. enters. In this Caſe, theſe points were Reſolved. 1. That untill Iſſue had, A. and B. were ſeiſed of an Eſtate tail, executed *ſub modo*, untill the birth of the Iſſue Male, and then they become Tenants for Term of life, the Remainder to the Iſſue Male in tail, the Reverſion to the Heirs Males of A. and B. for the Eſtate for their lives, was not drowned abſolutely, untill they had Iſſue. 2. Reſolved, That B. in this Caſe was

Tenant

Tenant in Tail after poſſibility of Iſſue extinct. 3. That Tenant in tail after poſſibility of Iſſue extinct, had Priviledges: of which, amongſt many others, this was one, That ſhe might joyn the Miſe in a Writ of Right in a ſpecial manner. *Cook* 11. Part, 80. *Lewes Bowles* Caſe.

3. Note; That where a Recovery is againſt Tenant in tail in a Writ of Right, upon the Miſe joyned, there the Iſſue in tail ſhall not avoid the Recovery in the ſame point, without any Attaint: and if he do bring in Attaint, and be barred in it, he is without all remedy; as the Book is, 13 E. 4. 4. 3.

4. *Cheny* Levies a Fine of Lands, and afterwards brought a Writ of Errour to reverſe it; and aſſigned for Errour, That he was within age: Whereupon he had a *Scire facias* againſt the Conuſee; and upon two *Nihils* returned, the Court proceeded, and by Witneſſes and inſpection, they reverſed the Fine: *Cheny* ſold the Lands to others, upon which the firſt Conuſee entred, the Vendees brought a Writ of Entry *ſur Diſſeiſin*, and againſt the Judgment, before an Exemplification of examination of Witneſſes was given in the Chancery, were given in Evidence, proving him to be of full age: and although the Opinion of the Court ſeemed to be, that the ſame was not available againſt the firſt Judgment; yet the Verdict paſſed according to thoſe Witneſſes: Afterward upon that Judgment, an Attaint was brought: in which alſo the Vendees of *Cheny* were barred, they affirming the ſaid Verdict, and Judgment upon it. Afterwards they brought a Writ of Right, and the Tenant joyned the Miſe, and choſe tryall by battail; and the Battail being awarded, and the Champions, the Plaintiff in the Writ of Right being demanded, was Nonſuit; ſo final Judgment was given againſt him. Trin. 3 Eliz. *Dyer* 201. and Trin. 13 Eliz. *Dyer* 301. *Chenys* Caſe.

5. A Writ of Right was brought by Two againſt husband and wife, who joyned the Miſe in the Right of the wife; and afterwards the husband made default, the Wife upon Examination was received, and joyned the Miſe upon the meer right; and afterwards made default. It was adjudged, That the Demandant ſhould recover in Common againſt them both in Fee, quit of the Husband and Wife. 44 E. 3. 28. 9 E. 4. 16. Quære if it ſhall bind the husband.

6. In a Writ of Right, the Tenant joyns the Miſe by Grand Aſſiſe; the Proceſs continues untill *Niſi Prius*; at which time the Tenant maketh default. It was ſaid in ſuch caſe, Judgment finall ſhould not be given, but a *Petit Cape* ſhould Iſſue, becauſe he might excuſe his default by Impriſonment, or otherwiſe, that he could not come at the day of *Niſi Prius*: But if at the *Petit Cape* he doth not appear and ſave his default, then Judgment final ſhall be. And where the King dyeth after the Miſe joyned, and afterwards the Demandant ſues a ſpecial Reſummons, and the Defendant maketh default; The Demandant upon the whole matter ſhall not have Judgment final, but a *Grand Cape*. If Tenant maketh default after default, after he hath taken day of Imparlance, from one day to another the ſame Term, Judgment final ſhall be given; for when he hath taken day to anſwer in the ſame Term, and maketh default, the ſame is a departure in deſpight of Court. And ſo if the Tenant joyneth the Miſe by his Champion, and he appeareth, and his Champion is not ſeen with him; Judgment final ſhall be given againſt him, becauſe he hath taken upon him to do the thing by his Champion. See Mich. 12 H. 7. 10. See 13 Eliz. *Dyer* 301. acc.

7. The Lord *Windſor* brought a Writ of Right againſt Husband and Wife, at the *Petit Capias* returned, the Wife was Received; and prayed, That becauſe the Demandant offered not himſelf at the firſt, *ſcil.* the day of Eſſoine, that he might be Nonſuit. But the Opinion of the Court was, That he needs not to do where the Tenant makes default, and a difference was taken where the Iſſue is joyned by Battail or Grand Aſſiſe, and this caſe; for in the caſe of Battail, the Demandant ought to appear, and offer himſelf the firſt day; and his appearance and offer of his Champion ought to be entred in the Roll, but not in this caſe, becauſe the Tenant before had made default: afterwards the Wife was received, and then vouched to Warranty; and afterwards ſhe waived the Voucher, and joyned the Miſe upon the Grand Aſſiſe; and 4. Knights appeared, and one of them was challenged, becauſe he had married the daughter of the Demandant: and the ſame was holden a good Challenge, and he was drawn out; and a Summons awarded to ſummon another. Mich. 2 Mar. *Dyer* 103. The Lord *Windſors* Caſe.

4. of

4. *Of the Election of the Grand Aſſiſe; and of the 4. Knights: in what manner arrayed. And where the Tryall may be without 4. Knights: And of the Triall by Battail.*

1. IN a Writ of Right, the parties put themſelves upon the Grand Aſſiſe; and proceſs iſſued to the Sheriff, to ſummon 4. Knights to chooſe the Grand Aſſiſe; who returned 2. Knights, and 2. Serjeants, and that there were not more Knights within the County, who were not of Affinity to the one, or to the other. It was holden, That the Retorn was ſufficient, and it was not traverſable whether they were Knights or not: For the Writ, although it be *Quatuor Milites*; yet if the Retorn be *generoſos*, it is good. And afterwards they choſe 16. *de ſeipſis* girt with Swords, all within the County. By which it appeareth, That the Grand-Aſſiſe muſt be of the Number of 16 at the leaſt. And it was ſaid, That if any of the Four Knights be Challenged, the Challenge ſhall be tryed by the other Knights. 39 E. 3. 3. *Book Entries*, 103. that the Retorn is good. But Quære if there need to be 16. of the Grand-Aſſiſe; For that the form of the Writ to the 4. Knights, is, *Ad eligendumex ſeipſis et aliis, Duodecim &c.* 1 Ma. *Dyer* 98.

2. In a Writ of Right, the 4. Knights retorned the Pannel of the Grand-Aſſiſe, which were 16. by name. It was moved for a Queſtion, If a *Venire facias*, or a *Habeas Corpora*, ſhould iſſue to the Sheriff? It was holden, That a *Venire facias* ſhould iſſue: but that is in the nature of a *Habeas Corpora*, becauſe the Names of the Jurours are put in the *Venire facias* to the Sheriff: and if they do appear upon that Writ, they ſhall be taken. Hill. 30 Eliz. *Dyer* 270.

3. In a Writ of Right, the Miſe was joyned upon the Grand-Aſſiſe, and the Jury and the four Knights *Eſſiors* appeared the day of the Eſſoine (*come oportet*) and they being 16. in Number, an Oath was given to them *præciſè dicere veritatem*; and by the direction of the Court, the Tenant firſt gave his Evidence, becauſe the Miſe was firſt joyned and prayed by him; and the Verdict was found for the Tenant, Hill. 8 Eliz. *Dyer*, 247.

4. A man brought a Writ of Right-Cloſe in Ancient Demeſne, and made Proteſtation to ſue in the Nature of a Writ of Right at the Common-Law: and the Tenant joyned the Miſe upon the meer right, and thereupon removed the Record by an *Accedas ad Curiam*. But becauſe that was holden no good Cauſe, a *Procedendo* was awarded to the Bayliffs. And Note, It is there ſaid, That there is a Writ in the Regiſter, *de Jurat. loco Magn. Aſſiſe. eligend.* 1 H. 7. 29. Hill. 2 Ma. *Dyer* 111.

5. *Where a Right cannot be given to a ſtranger, who hath nothing in the Land; And where it ſhall remain, notwithſtanding a Releaſe of Actions.*

1. THE Caſe was this, Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years: The Leſſee entred; Tenant for life Granted the Tenements aforeſaid to C. To have from *Michaelmas* following, for life, the Leſſee Attorned; C. entred, and made a Leaſe at Will, to whom Tenant for life levyed a Fine, he in the Remainder entred. In this Caſe, it was Reſolved, (amongſt other points) 1. That when C. entred by vertue of the ſaid void Grant, that he was a Diſſeiſor. 2. Reſolved, That if the Fine had bin levyed to the Diſſeiſor, that he who had right unto the Remainder, might enter for the forfeiture, for that the right of a particular Eſtate might be forfeited, and entry given thereby to him who had but a Right in Remainder. 3. It was Reſolved, That if a man be Diſſeiſed, and the Diſſeiſee levyeth a Fine to a ſtranger, the Diſſeiſor ſhould detain the Land for ever, becauſe the Diſſeiſee againſt his own Fine cannot claim the Land, and the Conuſee cannot enter, for that the Right which the Conuſor had, cannot be transferred by the Fine, but by the Fine, the Right is extinct, of which the Diſſeiſor ſhall take advantage. *Cook* 2. Part, *Buckler's* Caſe. 55, 56.

2. A man made a Leaſe for years, to begin after the end of a former Leaſe for years then in being: the firſt Leaſe determined, the ſecond Leſſee did not enter; but he in the Reverſion entred, and made a Feoffment, and levyed a Fine with Proclamations, and five years paſſed after the Proclamations, without Entry or claim made by the ſecond Leſſee for years. In this Caſe it was Reſolved. 1. That the ſecond Leſſee was barred by the Fine and Proclamations paſſed, for although he had not an Eſtate, that he could levy a Fine, yet he

he had ſuch an Intereſt as was within the Statute, which was barred by the Fine; And it was Reſolved, That he who hath but a naked Right, or Title to an Inheritance, cannot levy a Fine to a ſtranger; but yet he might be barred by a Fine levyed by the Tenant of the Land. 2. Reſolved, That by the ſaid Feoffment, the ſecond Leſſee had but a Right, and when his future Intereſt began, then he had an Eſtate in the Land, which he might re-veſt by his re-Entry; And it was ſaid, That this Caſe did differ from *Saunders* Caſe. 21 Eliz. where it was adjudged, That a Leaſe for years, was not within the Statute of 4 H. 7. for that then at the time of the Fine levyed, the Leſſee had not a power to enter and take the profits, but onely a future Intereſt; which (if it were deveſted) he had not any means to reveſt it. *Cook*, Paſc. 3 Jac. in C. B. *Sattin's* Caſe. 124.

3. If there be Tenant in Tail, the Reverſion in Fee, and he in the Reverſion Diſſeiſeth the Donee, and maketh a Feoffment in Fee, and the Donee re-entreth, he leaveth the Reverſion in the Feoffee. But if the Donee be Diſſeiſed, and the Donor diſſeiſeth the Diſſeiſor, and maketh a Feoffment in Fee, and the Donee doth make regreſſe, the Feoffee ſhall not have the Reverſion, but the Diſſeiſor; for there is a difference betwixt an Eſtate, and a Right; An Eſtate may well paſſe to the Feoffee by the Feoffment, as where he in the Reverſion Diſſeiſeth the Donee, or the Leſſee for life, but where the Donee, or Leſſee is diſſeiſed; now he in the Reverſion hath but a Right, which he cannot paſſe to another, and therefore, when he Diſſeiſeth the Diſſeiſor, and maketh a Feoffment, it paſſeth the Eſtate which he hath gained by the Diſſeiſin, and extinguiſheth the Ancient Right, which he could not transfer to another; And then the firſt Diſſeiſor hath the firſt poſſeſſion, and better right then the Feoffee of him in the Reverſion, for he cometh in under him who diſſeiſed the firſt Diſſeiſor, and the Ancient Right is extinct. See *Cook* 6. Part, in Sir *Moile Finches* Caſe. 70. *in fine*.

4. If a man Diſſeiſeth me of my Land, or diſpoſſeſſeth me of my goods; And I do releaſe to him all Actions, yet I may enter into my Lands, or take my goods, for that the diſcharge of my Action is no bar of my Right. See *Cook* 4. Part, 63. *Litt.* 115. acc. And ſee *Cook* 8. Part, 152. in *Althams* Caſe. That when a man hath divers means to come to his Right; he may releaſe one of them ſpecially; and yet take benefit of the other: but when a man hath not any means to come to his Lands but by way of Action, there by a Releaſe of all Actions, by that, in Husband, his Right in Judgment of Law to his Land is gone; like the Caſe of 9 E. 4. 49. where a Releaſe of all advantages upon an accompt, is a good bar in an Action of Debt upon an Accompt.

5. A man did releaſe to his Tenant for life, all his right to the Land, for the life of the ſaid Tenant for life, and that he and his Heirs would claim no right in the ſaid Land, for the life of the ſaid Tenant for life, and dyed; The Tenant for life afterwards committed Waſte in the Land; the Heir brought an Action of Waſte againſt him, and he pleaded the Releaſe in bar. In that Caſe, It was adjudged no bar, becauſe that nothing was extinct by the releaſe, but that which was in Action at the time of the Releaſe made; and that was not the Waſte. 44 E. 3. 33. acc.

6. A man Covenanted by Indenture, to pay 40 l. *per annum*, for 21 years; afterwards the Covenantee did releaſe all manner of Actions: It was adjudged in that Caſe, That the Arrerages onely were diſcharged; and that the future Covenant was not Releaſed, for if the Annuity did after encur, he might have an Action of Covenant for it, if it were not paid. Mich. 24 Eliz. in C. B. adjudged acc.

7. A. had an Eſtate in certain Lands for Term of life, without impeachment of Waſte; the Inheritance expectant in B. A. cut down divers Timber-Trees growing upon the Land. The Queſtion was, Whether he in the Reverſion might take the Timber-Trees, or that they did belong to A. In this Caſe, It was Reſolved. 1. That if the Eſtate had bin made for life, without any ſuch clauſe, that then, without Queſtion, he in the Reverſion ſhould have the Trees, becauſe they were parcell of his Inheritance, and what Intereſt the Tenant for life had in the Trees, was by the ſeverance of them from the Lands determined, becauſe he had them annexed to the Land. 2. That the ſaid clauſe without Impeachment, gave not any greater Intereſt in the Trees to the Tenant then ſhe had before, but ſhall onely ſerve, that ſhe ſhall not be impeached in any Action of Waſte; either to recover the place Waſted, or Damages; but the property or Intereſt, or the Right of him in the Reverſion to the Trees, is not given to the Tenant for life; by the words of that Clauſe. The Lady *Finch* and Sir *Moyle Finches* Caſe. vouched in *Cook*, 4. Part, 63. *Herlakenden's* Caſe.

Dum fuit infra Ætatem.

1. THis is a Writ which lyeth where an Enfant within age Allieneth his Lands which he hath in Fee-simple, or for Term of life; for then, when he cometh of full age, he may either enter into the Land, or bring this Writ if he pleaseth; and so may his Issue do upon the Allienation of his Father; but before they come of full age, they cannot have this Writ, because the words of the Writ are, *Qui plenæ ætatis esse ut dicitur.* See 39 H. 6. 42. *Fitzh. Nat. Br.* 192. acc.

2. If an Enfant maketh a Lease for years of his Lands; and after releaseth to the Lessee and his Heirs; Quære, if in that Case, he can have *Dum fuit infra ætatem*, See *Old Natura Brevium*: that he cannot have this Writ, but if the Lessee entreth he may have an Assise, because the Entry of the Lessee, and continuance of the Seisin of the Land afterwards, is a Disseisin to the Enfant. Quære also, if the Release be to him and his Heirs, upon a Lease for life; for in that Case, the book seems to be, That this Writ will lye.

3. If two Joynt-Tenants be in Fee within age, and one of them maketh a Feoffment in Fee of his Moyety, and dyeth, the survivor cannot enter by reason of the Enfancy of his companion, for by his Feoffment, the joynture was severed so long as it doth remain in force; and therefore in such Case, the Heir of the Feoffor shall have *Dum fuit infra ætatem*, or shall enter into the Moyety: But if two Joynt-Tenants be within age, and they Joyn in a Feoffment, in such Case, a joynt Right doth remain in them, and therefore, if one dyeth, the Right shall survive, and the survivor shall have the Land, as from the first Feoffor; for otherwise this mischief will follow, That the heir of the Feoffor who dyeth, could not enter, because that the Right doth survive, nor shall the survivor enter, because he shall not take the benefit of the Enfancy of his Companion, but that the survivor shall be driven to his Writ of Right, which without doubt he may have, because that after the Feoffment, the Joynt-Tenants might have joyned in it. *Cook* 8. Part, 43. in *Wittingham's* Case.

4. If there be Husband and Wife, and the Husband be seised of Lands in the Right of his Wife, and during the Non-age of them both, the Husband doth make a Feoffment in Fee of the Lands, or otherwise Allieneth the Lands, and dyeth, the Wife after the death of the Husband, when she is of full age, may have a *Dum fuit infra ætatem*, and avoid the Feoffment of her Husband, or she may have a Writ of *Cui in vita*: But if the Husband be of full age, and the Wife within age, and they Allien the Lands of the Wife, and afterwards the Husband dyeth: It hath bin a Question, if the Wife should have *Dum fuit infra ætatem*: But I conceive the better Opinion hath alwayes been, That she might have *Dum fuit infra ætatem*, or *Cui in vita* at her pleasure, for when they joyn in a Feoffment of the Lands of the Wife, it shall be said the Feoffment of the Wife untill she doth disagree; For if the Husband and Wife make a Gift in Tail, or a Lease for life of the Lands of the Wife, rendring Rent; If the Husband dyeth, the Reversion is onely in the Wife, and she may accept the Rent, and that shall bind her and her Heirs; but then if she will not accept the Rent, but bring her Writ of *Dum fuit infra ætatem*, the same will lye, for by that Writ, she affirmeth the Feoffment, and then it shall not be said the Feoffment of the Husband alone, but the Feoffment of the Wife alone, after the death of the Husband; and, being her Feoffment within age, she at full age may have and maintain *Dum fuit infra ætatem*. See 34 H. 6. 31. 19 H. 6. 45. *Fitzh. Nat. Br.* 192. acc.

5. Note, If the Husband within age, maketh a Feoffment in Fee of the Land, which he is seised in the Right of his Wife, and dyeth, the Heir of the Husband cannot enter, and avoid the Feoffment, because that nothing discendeth to him from the Husband, for the Law doth not respect what Estate the Auncestor giveth, but what Estate he hath before the Gift, and what Right or Title the Ancestor doth leave to Discend to the Heir: But the Wife in such Case, when the Husband within age, maketh a Feoffment in Fee, may enter in her own Right, in whose Right her Husband might have entred: But if the Husband within age had taken a Wife, Tenement in tail, and had made a gift in Tail to another, by which he gained a new Reversion in Fee, there the Entry is given to the Wife, for that the Husband might have entred in her Right, but if he doth not enter and defeat the Estate Tail by the Husband Enfant, the new Reversion by the Act of Law, doth vanish, and the Wife by operation of Law, shall be presently seised of her Antient Estate. See 4 H. 6. 2. *Cook* 8. Part, in *Whittingham's* Case.

6. See, where *Dum fuit infra ætatem* was brought of a Rent, and yet by some, the Grant it self was void, but by others, the delivery of the Deed is not void. 46 E. 3. 34.

7. A Formedon in the Remainder was brought by an Enfant, of a Remainder limitted to his Father: It was adjudged, That the Tenant without a Plea pleaded, could not pray that the Paroll might Demur for the Non-age of the Demandant; And in that Case it was Resolved, That in all Actions reall, which an Enfant bringeth of his own Possession; although he hath the Lands by Discent, and although the Tenant plead the Deed, or Warranty of his Ancestor, the paroll shall not demur for his Non-age, for when the Ancestor dyeth seised, and the Lands Discend to an Enfant, and he entreth, and taketh the profits, it should be a prejudice to the Enfant, that he should lose his Possession which he had, and should be thereof delayed, untill his full age, and the granting that the paroll shall demur, shall be by the intendment of the Law, in favour of the Enfant; But when a naked Right discendeth to him, there the Enfant is not at such prejudice, and therefore the Plea shall demur for his Non-age. 2. In all Actions, when a naked Right in Fee-simple discends from one Ancestor (who was once in possession) to an Enfant, there in an Action Aunceſtrel brought by him, the Tenant without any Plea pleaded, may pray that the paroll demur; as in a Writ of Right, Formedon in the Reverter, brought by an Enfant as Heir, and he layes the expleas in his Ancestor. But in a Formedon in the Discender, although he demandeth a Fee-simple, yet because his Ancestor, whose Heir he is, was never seised, nor took any expleas, for that Cause, the Tenant without a Plea, cannot Plead, That the paroll do demur, because that the Remainder was never in the Possession of any of his Aunceſtors, and the Demandant himself shall be the first, in which it shall vest if he have Seisin of the Land. 3. In all Actions, Aunceſtrell Possessory, as *Cosinage Aeil*, &c. the Tenant cannot, without a Plea plead, pray that the paroll demur for Non-age of the Demandant: But at the Common-Law, If the Tenant had pleaded a Feoffment, or other out of his Ancestor in Bar; by which it appeared, that either nothing, or that but a naked right at most descended; then the Tenant upon such Plea pleaded, might pray that the paroll might demur. *Cook* 6. Part, 6. *Markalls* Case. See 4. *Ma. Dyer*, 137. *Bassett's* Case. acc.

See more of *Dum fuit infra Ætatem*, In the Title *Enfant*.

Dum Non fuit Compos Mentis. Ideot, *and* Lunatique.

1. THe Writ of *Dum Non fuit Compos Mentis*, is a Writ which lyeth; where a man that is out of his Wit, *scil.* Mad, or Frantick, Alieneth his Lands which he hath in Fee-simple, and afterwards dyeth: In such Case, his Heir after his decease, shall have and maintain this Writ to recover the Land again; but he himself shall not have this Writ, because a man shall not be received for to stultify and disable himself; and so it is if he Allien in Tail, for life, or years. *Fitzh. Nat. Br.* 202.

2. A man who was *Non Compos Mentis*, made a Feoffment in Fee, and afterwards took back an Estate for his own life. It was adjudged in that Case, he was remitted: Whereupon Issue was taken, Whether he were *Non Compos Mentis* at the time, or not. 25. *Ass.* acc.

3. If a man who is of good and perfect memory, maketh his Will, and afterwards by the visitation of God, he becomes of unsound Memory, (as every man for the most part, before his death is) this Act of God shall not be a revocation of his Will, which he made when he was of good and perfect memory. *Cook* 4. Part, 61. in *Forse* and *Hemblings* Case.

4. A. bound himself in a Bond of 1000 l. to B. and this Bond being sued against him, he exhibited a Bill to be relieved against the same, and set forth in his Bill, that at the time of the entring the said Bond, he was not *Compos Mentis*; and whether in this Case, a Prohibition should be Awarded, was the Question: And in this Case it was Resolved, 1. That every Deed, Gift, or Feoffment made by *Non Compos Mentis*, is avoidable, but not by himself, because he shall not be received to stultify and disable himself. 2. That it being against a Maxime in Law, That a man shall not be received to disable himself; he shall not for that have relief in any Court of Equity; for that should be the overthrowing of a Principle and Ground in Law. *Cook* 4. Part, 124. *Beverlyes* Case.

5. If a man who is *Non Compos Mentis*, do levy a Fine, and doth declare the use thereof, this

Declaration ſhall bind him as long as the Fine remaineth in force, foraſmuch as he hath bin admitted as a man of ſound memory to levy the Fine, the Law, as long as the Fine remaineth in force, admitteth him to declare the uſe thereof. *Cook* 2. Part, 58. in *Beckwith's* Caſe.

6. Note, That privies in bloud, as the Heir, or privies in repreſentation, ſhall avoid Acts done by one who is *Non Compos mentis*: But if one who is *Non Compos mentis*, levyeth a Fine, or ſuffereth a Covin, Recovery, or acknowledgeth the Statute, in ſuch Caſe, neither his Heir nor Executor ſhall avoid the ſame, becauſe that thoſe are matters of Record; which by no ſuch Averment, that the party was not *Compos mentis*, ſhall be avoided; and alſo ſuch Averment ſhould be againſt the Office and dignity of the Judge, for that he cannot by Law take a Recognizance, or a Fine, or a Conuſance from one who is *Non Compos Mentis*. *Cook* 4. Part, 125. in *Berkeyes* Caſe. But Privies in Tenure, or in Law, as the Lord by Eſcheat, ſhall not have benefit of the Enfancy of a man, or of the Coverture of a Woman, or that the party was *Non Compos mentis*, as was Reſolved in *Cook* 3. Part, 44. in *Whittingham's* Caſe.

7. If a man who is *Non Compos Mentis*, maketh a Feoffment in Fee in his own proper perſon, and dyeth, his Heir within age, he ſhall not be in Ward; but if he maketh a Feoffment in Fee by an Attorney, and dyeth, his Heir within age, there the Heir ſhall be in Ward; Or if he dyeth without Heir, the Land ſhall Eſcheat: And ſo it is in the Caſe of an Enfant, if he maketh a Feoffment in his proper perſon, and dyeth without Heir; but otherwiſe it is if he maketh a Feoffment by Letter of Attorney. 7 H. 4, 5. & 12. acc.

8. If a man levyeth a Fine of Lands with Proclamations, and at the time of the Fine levyed, he who hath right to the Land is *Non Compos Mentis*; and afterwards he recovereth his memory, he ought to make, and purſue his claim within five years after his Recovery; But it is otherwiſe of a meer Ideot, becauſe his Heir may enter, or bring his Action for the Land. *Cook*, 4. Part, 125.

9. He who is *Non Compos Mentis* ſhall not loſe his life for Felony, or Murder, becauſe he cannot be an example to other men; and ſo it is if he do commit Petit Treaſon; But he who is *Non Compos Mentis*, may commit High Treaſon, as if he offer to kill the King, &c. for that the King is *Caput et ſalus Reipublicæ*. See *Fitz. Nat. Br.* 202. Nor ſhall he forfeit his Lands or goods for Felony or Petit Treaſon, becauſe it appeareth that he had not diſcretion. *Plow. Com.* 19. acc.

10. The Marqueſſe of *Winchester*, as was ſuppoſed, by his Will in Writing, deviſed divers Mannors to his reputed ſons, and further deviſed, That divers Mannors ſhould be ſold by them, and bequeathed divers Legacies, and Plate to them; and the Will was endeavoured to be proved in the Prerogative Court: It was Reſolved by the Court, becauſe it appeared by Circumſtances, That the ſaid Marqueſſe was not of *ſana Memoria* at the time of making the ſaid ſuppoſed Will; a Prohibition was Awarded, and the reaſon given was, becauſe the Will concerning the Lands, and the goods, were both mixt together, and if they ſhould proceed concerning the goods, the ſame would prevent the tryall at Common-Law, which did concern the Lands. 2. In that Caſe, It was Reſolved, That it is not ſufficient, that the Teſtator be of a memory, when he makes his Will to give an Anſwer to familiar Queſtions, but he ought to be of a diſpoſing memory, ſo as he be able to make a diſpoſition of his Lands with reaſon and underſtanding, and that is ſuch a Memory which the Law underſtands by *ſana Memoria*. *Cook* 6. Part, 23. the Marqueſſe of *Winchesters* Caſe.

11. If a man who is *Non Compos Mentis*, or an Enfant, or a Biſhop, Prebend, Parſon, &c. do make a voluntary Grant upon an Eſcheat, or upon a forfeiture of a Copyhold ſuch a Grant is good, and ſhall bind for ever, for the Cuſtome is, That the Tenements are Demiſed and Demiſeable *per Dominum Manerii*, &c. *pro tempore exiſtent*. But if a Diſſeiſor, or the Feoffee of a Diſſeiſor, or any other who hath but a tortious, or deforceable eſtate, ſubject to an Action or Entry, holdeth a Court, and Grameth Copy-Eſtates, ſuch voluntary Grants made by him, ſhall not bind him who hath Right when he hath re-continued the Mannor by Action, or Entry. But if one who hath ſuch defeaſible Eſtate, doth admit one upon a ſurrender, or doth admit the Heir upon a Diſcent, ſuch admittances are good, and within the Cuſtome. Trin. 26 Eliz. in B. R. *Clark* and *Penſather's* Caſe. *Cook* 4. Part, 23.

12. In Criminall cauſes, as Felony, &c. the Act and wrong of a man *Non Compos Mentis*, ſhall not be reputed unto him for theſe cauſes *Actus non facit reum, niſi mens ſit rea*, and he is ſaid to be *amens* ſcil. *ſine mente*; and therefore his madneſs being the cauſe thereof, and not his intention, is is excuſable. *Cook* 1. Part, *Inſtitutes*, 247.

13. Of an Ideot or Fool naturall, the Cuſtody of him is given to the King by the Law as his Tutor and Governour; and his Lands are given to the King by the Statute of *Prerogativa Regis*, and the uſe of them is in the King, becauſe the Freehold of them is in the Ideot: and the King ſhall have

have the Cuſtody of his body, Goods, and Chattells, as well as of his Lands, and other Inheritances which he hath, either by Purchaſe, or as Heir at the Common-Law: And if an Ideot *à Nativitate*, do Allien his Lands at full age, the King ſhall have a *Scire facias* againſt the Allience, and reſeize the Lands into the Kings hands; and the Inheritance of the Lands ſhall be veſted in the Ideot. See *Fitzh. Nat. Br.* 232. *Regiſter*, in the Writ *de Idiota inquirendo*. 17 E. 3. 11. 18 E. 3. Tit. *Scire facias*, 10. But the King ſhall not have the Cuſtody of the Lands which the Ideot holdeth by Copy of Court-Roll, becauſe the ſame is but an Eſtate at Will by the Common-Law, and if the King ſhould have the Cuſtody of the ſame, the ſame ſhould be a prejudice to the Lord of the Manor; But yet the Alienation of an Ideot of his Copyhold Land, after Office found, ſhall be Avoided. 13 Eliz. *Dyer*, 302. And all Alienations, or Gifts made by an Ideot before Office found, ſhall be Avoided after Office found; but if the Ideot dyeth before Office found, after his death no Office can be found to Entitle the King to his Land: And *Non Compos Mentis*, after Office found is in the like Caſe as an Ideot; And the Writ *de Idiota Inquirenda* in the Regiſter, extends aſwell to *Non Compos Mentis*, as to a Fool Naturall, and are in the ſame Caſe, as to their Alienation of their Lands and goods. *Cook*, 5. Part, 125. acc.

14. In an Action of Treſpaſſe brought, the Defendant pleaded, That it was found by Office, that the Plaintiff was a Lunatique; and that the King ſeiſed his Lands, and by his Letters Patents granted the Rule and Government of the Plaintiff, and of his Lands to the Defendant *quam diu*, as the perſon was a Lunatique to take the profits to his own uſe, and ſo juſtified, and prayed in Aid of the King. It was adjudged in that Caſe, That he ſhould not have Aid, becauſe the King is bound to keep the Lunatique, his Wife, Children, and Houſhold, with the profits of his Lands without taking any thing to his own uſe; and the King after Office found, hath onely proviſion, and hath not the Cuſtody of the body, and of the Lands of a *Non Compos Mentis*, as he hath of an Ideot; And he hath nothing to Grant over; And in that Caſe, It was Reſolved, That if a man of his own wrong takes ſo much upon him, he ſhall be but as Bayliff, and accomptable as Bayliff to him, who is *Non Compos Mentis*, or to his Executors or Adminiſtrators. 28 H. 8. in C. B. rott. 401. *Fraunces* Caſe.

15. A. ſeiſed of divers Mannors holden of the Queen in *Capite*, dyed ſeiſed, the ſame Diſcended to B. his Son: It was found by Office, That B. was a Lunatique, and ſo had been long before the death of his Father: The Queen Granted the Cuſtody of him and his Lands to F. after which there was another Office found in the County of Y. of the Seiſin of A. his death, and that B. was his Heir, and of full age. In that Caſe, It was Reſolved, That the King was not to have any meanrates in this Caſe for default of Livery ſued, or tendred becauſe no Lacheſſe could be imputed to the Heir before, and ever ſince the death of his Anceſtor; and the Lacheſſe of his friends ſhall not hurt him; Otherwiſe if he had bin, if at any time he had bin *ſanæ Memoria*, ſince the death of his Anceſtor. Paſc. 15 Jac. *Butcher's* Caſe. *Hob.* 137. and ſo it was adjudged. Mich. 10 Jac. in the Court of Wards, in one *Vaughans* Caſe.

16. A man Deviſed a houſe in L. to B. his Wife for life, and after her death, made Feoffees of the ſaid houſe to keep it in reparations, and to beſtow the reſt of the profits upon the reparation of the High-wayes there: A. and his Wife being dead; The houſe deſcended to C. an Enfant: It was Reſolved in this Caſe, That this Deviſe was within the Statute of 43 Eliz. of *Charitable Uſes*, to have relief; for although the Deviſe were utterly void, yet it was within the words (limitted and appointed to Charitable uſes) Otherwiſe it had bin, if he were an Enfant *Non Compos Mentis*, Lunatique, or the like that gave it; or that one appointed that which was not his own to Charitable Uſes. Paſc. 15 Jac. in *Coliſon's* Caſe. *Hob.* 136.

17. In Treſpaſſe of Trover and Converſion of Beans, the Caſe was, That the Lands upon which the Beans grew, were the Lands of a Lunatique, and his Copyhold, and the Lord of the Manor had granted unto one the Cuſtody of the Land, by whoſe Heir and Aſſent, the party did ſow the Lands. It was the Opinion of the Court, That the Action in this Caſe, was to be brought in the name of the Lunatique, for that there was no Intereſt gained in his Land by the Commitment; And the Lord hath not power over the Lunatiques Land, without a Cuſtome; For the imitation of the Kings power over his Free-hold, makes no conſequence, for the Lord of the Manner, for Copyhold; and although in the Kings Caſe, the Statute is but an affirmation of the Common-Law; yet the collaterall incidents of Eſtates, as Dower, Tenancy by the Curteſy, Wardſhips, &c. are not without ſpeciall Cuſtome. Hill. 15 Jac. in B. R. Rott. 519. *Cooks* and *Dawſon's* Caſe. *Hob.* 215. See *Poph.* 141. the ſame Caſe.

18. A. ſeiſed of a Mannor for life, where were many Copyholds, Tenements Grantable by Copy of Court-Roll for life, in poſſeſſion, and for another.

ther in Reverſion, Granted the Stewardſhip by Deed under his hand and Seal to J. S. for life, with a Fee for executing thereof; and afterwards he became a Lunatique, and *Non Compos Mentis*, and ſo was found by Inquiſition, who was Committed to J. D. under the Seal of the Court of Wards: The Queſtion was, Whether the Steward by the conſent of the Committees, or the Committee himſelf, by their Steward, might Grant Copyhold Eſtates according to the Cuſtome of the Mannor. It was Reſolved by *Hobart* Chief Juſtice, and *Tanfeild* Chief Baron, That the ſaid Committees could not Grant any Copyhold Eſtates for that they themſelves by Law, had no Eſtate in the Mannor, nor are Lords thereof for the time being: But that the ſaid Lunatique by his Steward might Grant Copyhold Eſtates, according to the Cuſtome of the Mannor. Trin. 9 Jac. in the Court of Wards. *Blewit's* Caſe. *Leon.* 47. 48.

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J-10-20

THE Grand Abridgment OF THE LAW Continued.

OR,

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WITH

Two *Tables*, The one containing the Names of the *Cases*: The other, Of the Matter of every of the said *Cases*.

The Second Volume.

Published in the Thirteenth Year of the Reign of Our Soveraign Lord Charls *the Second*, *of* England, Scotland, France, *and* Ireland, *King*, *&c.*

By *WILLIAM HUGHES*, of *Grayes-Inne*, Esquire.

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Printed by *John Streater*, and are to be sold by *Henry Twyford*, *George Sawbridge*, *Thos: Dring*, *John Place*, and *William Place*; at their Shops in Vine-Court in the Middle-Temple, at the *Bible* on Ludgate-Hill, at the *George* in Fleetstreet, at *Furnivalls-Inne* Gate, and at *Grayes-Inne* Gate in *Holborn*, 1662.

J.P.
Sc.

To the Right Honourable,

Sir ROBERT FOSTER, Knight, Lord Chief Juſtice of His Majeſties Court of *Kings-Bench*;

Sir ORLANDO BRIDGMAN, Knight and Baronet, Lord Chief Juſtice of His Majeſties Court of *Common-Pleas*;

MATTHEVV HALE, Lord Chief Baron of His Majeſties Court of *Exchequer*.

And the reſt of the Honourable Juſtices of the ſaid ſeverall COURTS.

My Lords,

WHen I publiſhed the First Part *of this* Work, *Your Lordſhips were not ſettled in thoſe Honourable Places of Judicature, which you now hold, which was the Cauſe, Wherefore in* That Part, *your Lordſhips were not named by your particular Names and Titles: But it was my full Deſire and Reſolution then, That not onely that Part, but the whole enſuing Work (when perfected) ſhould lye under the Cenſure of your Gravities, for the Allowance and Approbation of it: I then engaged my ſelf by Promiſe, That (if God did give me life) in a ſhort time to finiſh the whole* Work; *Which now (with much Labour and Pains) I have brought to paſſe; Dividing the*

Whole, into Three Volumes, *the Laſt of them being now in the* Preſs.

For the Work *it ſelf, I ſhall ſay no more, then what I ſaid in my firſt* Epiſtle Dedicatory; *Only this I ſhall add, That as in the Tender of ſeverall Baggs of Money, wherein are many Pieces of Gold and Silver, ſome few Pieces may unwittingly ſlip in; which although for the matter of them, they are pure, good, and of value; yet becauſe they have not a Lawfull Inſcription and Stamp ſet upon them, they may be refuſed, in point of payment, as current Money: So in this* Grand Work, *ſome* Caſes *may happen to be found, which (although for the matter of them, they may be* Law, *yet) becauſe they have not had and received an approved Allowance, may lye under a Cenſure, not to be ſo; And therefore, becauſe I ſhall not preſume to ſay, That all the* Caſes *vouched and abridged in this* Whole Work, *are Current* Law *at this day, I do ſubmit them to your Lordſhips Profound Learning and Judgments; And conclude with ſuch my humble Petition to Your Lordſhips, as I made in the* Epiſtle *to the* Firſt Part, *That your Lordſhips would be pleaſed to Accept of theſe my weak Endeavours and Pains, for the Propagating of ſo Neceſſary and Uſefull a Work; and to honour the Whole, with Your Lordſhips Allowance and Protections.*

From my Study in *Grayes-Inne*, the 23. of *January*, 1661.

Your Lordſhips in all Duty and Service,

William Hughes.

To

TO

The Honourable Society of *Grayes-Inne*; the *Readers*, *Barresters*, and *Students* of the said *Society*.

Gentlemen,

THE First Part of this Work, which I publiſhed a Year and a half ſince, having found good Acceptance with many *Eminent Lawyers*, as a Work Neceſſary, and Uſefull, for all Practizers and Students of the Common-Law: And I having now Finiſhed the Whole Work, which I have divided into Three Volumes; The Laſt of which, is now in the Preſſe: I did not think upon any Perſons (next to the Honourable Judges of the Courts of Common-Law) to whom I might preſent the Whole Work, then to this Honourable Society, of which I have been a Member Fifty Five Years and upwards. To which Honourable Society, I have ever given ſo great Reſpect, That I could never think, That any thing which I could do, could equall the Love which I bare to It, and the *Gentlemen* the Members of the ſame; And therefore it hath been my only aym and end, in my ſetting forth of ſome Tracts of Law, and Reports of Caſes, That they might Contribute ſomething to the furtherance, and regulating of their Studies of the Law, and in their Practice of the ſame.

I am now, as it were, *confectus ſenio*, and not in a Condition to take in hand any further matter of this Nature, or Kind; Wherefore, *tanquam Syngraphàm Amoris*, I preſent theſe my laſt intended Labours to You of this Honourable Society, hoping, that you will accept of the ſame, with the like Love, and Affection, as I have tendred it. It may, peradventure, be expected by ſome of You, That I ſhould (as all other Reporters of Caſes and Tracts of Law have accuſtomed to do) have ſaid ſomething in this my Dedication, of the Antiquity, Excellency, and Precedency of the Common-Law of *England*, above all other humane Lawes: But, ſo much hath been written by others, in their ſeverall Epiſtles to their Works, That I can add little thereunto, and therefore I have been ſilent thereof herein: Yet, If you pleaſe

to

to look into the Work it ſelf, you ſhall therein find ſome mention to be made of the ſame.

Some Books of REPORTS, coming forth very lately, when I had almoſt finiſhed the Third Volume, I conceived, That I might be ſtreimed in time, for the finiſhing thereof, Wherefore I was enforced, (becauſe I was deſirous that the whole Work might be compleated by my ſelf) to lay out my whole time about the ſame. And as it is mentioned by *Virgil* in his 8th Book *Æneid.* of the Carefull Houſe-wife,

——— *Cùm fœmina primùm*
Cui tolerare colo vitam, tenuique Minerva,
Impoſitum cinerem, et ſopitos ſuſcitat ignes,
Noctem addens operi, famulaſque, ad lumina, longo
Exercet penſo; Caſtum ut ſervare cubile
Conjugis, et poſſit, parvos educere gnatos:

So, I may truly ſay, I was driven, Night and Day, Early and Late, to ariſe, ſit up, and ſpend my whole time, in the Collection of this Work, (not ſo much for my own Advantage; as) that I might (during my life-time) perfect it, and ſo leave it for your Uſes; and as a Remembrance of the Love, which I bear to this Honourable Society. Wherefore, here I commit it to your Favourable Acceptance: And if you ſhall find any Errours either in the matter, as miſ-collected by me, or in the Printing of it; My Requeſt is, That you would be pleaſed lightly to paſſe them over, or Correct them, if need ſhall require it. And ſo wiſhing, That theſe my Labours and Endeavours, may add ſomething to your Studies and Practices, I humbly Leave it to due Conſideration.

From my Study,
the 23. day of
Jan. 1661.

Your Fellow-Member of the Honourable
Society of *Grayes-Inne*,

William Hughes.

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to look into the Work it ſelf, you ſhall therein find ſome mention to be made of the ſame.

Some Books of REPORTS, coming forth very lately, when I had almoſt finiſhed the Third Volume, I conceived, That I might be ſtreimed in time, for the finiſhing thereof, Wherefore I was enforced, (becauſe I was deſirous that the whole Work might be compleated by my ſelf) to lay out my whole time about the ſame. And as it is mentioned by *Virgil* in his 8th Book *Æneid.* of the Carefull Houſe-wife:,

——— *Cùm fœmina primùm*
Cui tolerare colo vitam, tenuique Minerva,
Impoſitum cinerem, et ſopitos ſuſcitat ignes,
Noctem addent operi, famulaſque, ad lumina, longo
Exercet penſo; Caſtum ut ſervare cubile
Conjugis, et poſſit, parvos educere gnatos:

So, I may truly ſay, I was driven, Night and Day, Early and Late, to ariſe, ſit up, and ſpend my whole time, in the Collection of this Work, (not ſo much for my own Advantage; as) that I might (during my life-time) perfect it, and ſo leave it for your Uſes; and as a Remembrance of the Love, which I bear to this Honourable Society. Wherefore, here I commit it to your Favourable Acceptance: And if you ſhall find any Errours either in the matter, as miſ-collected by me, or in the Printing of it; My Requeſt is, That you would be pleaſed lightly to paſſe them over, or Correct them, if need ſhall require it. And ſo wiſhing, That theſe my Labours and Endeavours, may add ſomething to your Studies and Practices, I humbly Leave it to due Conſideration.

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Eccleſiaſtical

Ecclesiastical Persons, Courts, *and* Causes.

1. *Of Bishops, their Election, Creation, and Investure, and Jurisdiction: And of other Ecclesiastical Persons; and of Acts done by them, or to them.*

THE Arch-Bishopricks, and all the Bishopricks of the Realm of *England*, were of King's Foundation, and they were the Founders of them all: At the first, they were donative, *per traditionem bachuli et pastoralis annuli*. But King *John* by his Charter, *Anno* 17. of his Reign, *de communi consensu Baronum*, granted, that they should be eligible, and after that time came in *Congé de Elire*. *Cook* 5. Part, 14. in *Bancroft's* Case.

2. They held the Possessions of their Bishopricks *per Baroniam*, as appeareth *22 Ass. Pat. Anno* 18. *Ken.* 3. *Member.* 17. *Mandatum est omnibus Episcopis, qui convenerunt sunt apud Glocestriam, die Sabbat. Cruc. Sanctæ* Katherinæ *firmiter inhibendo, Quod sicut Baroniam suam quas de Rege tenent diligunt, nullo modo præsumant Consilium tenere de aliquibus quæ ad Coronam Regis pertinent, in quæ personam Regis, vel Statum suum, vel Statum Consilii sui contingunt: Sciunt pro certo, quod si fecerint, Rex inde se capiat ad Baronias suas.* And they sit in Parliaments by reason of their Baronies and temporal Possessions. See *Rott. Pat. Anno* 18. *Hen.* 3. *Cook* 5. Part, in *Cawdries* Case. 7 H. 4. in *Kellaway*, 184. in Dr. *Standish's* Case.

3. First, To the Creation of every Bishop were required two things: 1. Election. 2 Confirmation, Consecration, and Investure: The Election was by a Licence under the great Seal of *England*, which was in the Nature of a Letter missive to the Dean and Chapter of the Cathedrall Church, to elect such a Person as the King shall nominate unto them by his Letters Patents, to the Bishoprick being void: For the form and manner of the Election, and within what time it is to be done. See the Statute of 25 H. 8. cap. 20.

4. By Election the party is not absolute Bishop in all intents and purposes; He is a Bishop *nominè* only *non re*: *Non habet totalem Jurisdictionem, nec Ordinis*. By such Election he is called only elect, *Fitz. Na. Br.* 1. And if he were before Parson or Vicar of any Church, or a Dean of a Cathedral, or held any other Dignity Ecclesiastical in the Church, such his Election to the Bishoprick did not make his first Benefice or Dignity *ipso facto* to be void: For it hath been adjudged, That a *Commendam retinere* such Benefice or Dignity which he had before his Election, comes time enough. Trin. 11. Jac. in C. B. in *Colt* and the Bishop of *Coventry* and *Litch field's* Case. See *Hob.* 140.

5. Secondly, To the Creation of a Bishop, Confirmation, Consecration, and Investure are requisite: This was, before the Statute of 25 H. 8, done by Bulls or Breves from the Bishop of *Rome*; But, since the said Statute, is done by the Arch-Bishop or Metropolitan of the Province in manner as prescribed by the Statute: But note, that before a Bishop be confirmed, consecrated, or invested, he must take the Oath of Fealty onely to the King; which being done, the King under the Great Seal doth signify the Election of the party to be Bishop, to the Arch-Bishop, and some other Bishops, who after was to consecrate and invest him in the Bishoprick, and to use such Ceremonies therein as are requisite. See Stat. 25 H. 8. cap. 20.

6. After Consecration he is compleat Bishop to all intents and purposes, aswell to Temporalties as to the Spiritualties; for then he hath *plenam potestatem Jurisdictionis et Ordinis*, 41 E. 3. *Quare impedit*, 128. For after Consecration he may certify an Excommengment which is point of Jurisdiction: When he is confirmed, he may admit any Clark to his Benefice, which see 22 E. 3. 18. A Writ to admit a Clark, directed *Episcopo electo et confirmato*, was good and allowed: And see 18 Eliz. *Dyer*, 352. When he is confirmed, the Power of the Guardian of the Spiritualties doth cease. When he is consecrated he may conferr Orders upon others, and may consecrate Churches and Chappels which he could not do before his Consecration: For although by Confirmation *Conjugium contrahitur spirituale*, yet by Consecration *consummatur*, as is said by *Dodd* Justice, in his Book of Advowsons.

7. After he is confirmed, the King may by his Letters grant to him the Temporalties, but such Grant is *potius de Gratia quàm de Jure*: But after he is consecrated and estated in the Bishoprick, he is fully enabled to sue for the Temporalties out

of the King's hands, by a Writ *de Reſtitutione Temporalium* directed to the Eſcheator, and ſo he ſhall enjoy the actuall Poſſeſſion of them: But yet the Temporalties are not *de Jure* to be delivered to him until the Metropolitan hath certified the time of his Conſecration, although that the Free-hold of the Temporalties be in him by his very Conſecration. See 41 E. 3. 6. 46 E. 3. 32. 38 E. 3. 30.

8. In Error here of a Judgment in the King's Bench in *Ireland*, in an *Ejectione firmæ*, the Caſe was, The Land was parcell of the Biſhoprick of *Oſſory*, and King *Ed.* 6. *Anno* 6. of his Reign, by Letters Patents under his Privy Signet, directed to *A.* Lord Deputy of *Ireland*, *B.* his Chancellour, and others of his Council, there ſignified, that he elected and appointed *I. S.* to be Biſhop of *Oſſory*, requiring them to take ſuch order for the inſtalling of him, as by the Laws of *Ireland* was neceſſary: The Deputy was removed, the Chancellor and two others made Juſtices awarded a Commiſſion under the great Seal of *Ireland* to the Arch-Biſhop of *D.* in *Ireland*, *in hæc formâ*; *Sciatis quod nos conſiderantes, Epiſcopatum Oſſory* to be void, I. S. *juxta tenorem quarundam Literarum aſſignavimus, & per preſentes in Epiſcopatum* Oſſory *eligimus, creamus, & conſtituimus; vobiſq; præcipimus quatenus premiſſa conſi metis, ipſumq; Epiſcopum* Oſſory *inveſtiri & conſecrari faciatis.* He was conſecrated accordingly, and 7 E. 6. the King accepted of his Fealty, and the Temporalties were delivered to him: Afterwards, during the life of I. S. Queen *Mary*, under the great Seal of *Ireland* to the Dean and Chapter of *K.* ſignified, She had appointed and elected to that Biſhoprick I. N. and appointed them to elect him Biſhop; who was elected, and had a Patent to be conſecrated, and all things done for his Conſecration to make him perfect Biſhop; who afterwards entred into the Lands in the life of I. S, and made a Leaſe of the Land to W. for 101. years, which was confirmed by the Dean and Chapter. I. S. 9 Eliz. dyed; Afterwards I. N. dyed. C. was elected Biſhop, who entred upon the Aſſignee of W. and Leſſor to the Plaintiff, upon whom C. re-entred, and Judgment was there given for the Plaintiff; and thereupon Error brought here: Divers Queſtions were in the Caſe, Firſt, If I. S. was well created Biſhop? Secondly, Whether I. N. being Biſhop *de facto* and not *de jure*, in the life of I. S. who was never deprived, his Leaſe being confirmed by the Dean and Chapter was good? It was objected, That I. S. was never well created Biſhop, becauſe the Letter was not executed by the Deputy, and the Deputy being the principal being removed, all was determined. Secondly, Becauſe the direction was, that they ſhould take order for his Creation according to the Lawes of *Ireland*, which ought to be by Writ *de Conge de Eſtier*, which was not in this Caſe. But it was Reſolved, That the King here, before the Statute of 2 Eliz. and alſo in *Ireland*, might create a Biſhop, by his Letters Patents, without any Writ of *Conge de Eſtier*, which was but a Form or Ceremony: And although there was not any Patent ſhewed of the Creation, but only a Commiſſion to the Arch Biſhop of D. to conſecrate him, yet the ſame was a ſufficient Patent of Creation, without any other; for there are the words *Eligimus, Creamus, & Conſtituimus.* Thirdly, It was Reſolved, That I. N. not being lawful Biſhop, the Leaſe made by him to charge the Poſſeſſions of the Biſhoprick was void, although all Judicial Acts made by I. N. as Admiſſions, Inſtitutions, Certificates, &c. whilſt he was Biſhop *de facto*, were good and lawful: The Judgment was affirmed. Mich. 17 Jac. in B. R. *Revan o Brian* and *Knaton's* Caſe. *Cro.* 2. Part, 353, 354.

9. It was thought fit in Chriſtian policy: For as much as Schiſms, Sects, and Hereſies might ariſe in the Church, not to lay the whole burthen of the Church, and the Eccleſiaſtical Government, upon the Perſon of the Biſhop only; and therefore it was thought neceſſary, that every Biſhop within his Dioceſs ſhould be aſſiſted with a Council, to conſult with in matters of difficulty concerning Religion, and the ordering of the Eccleſiaſtical Government, as alſo for the diſpoſing of things of the Church, as alſo to give their aſſents to ſuch Eſtates as the Biſhop ſhould make of the Lands and Temporalties of the Biſhop, and for the further ordering of the Eccleſiaſtical Government: And therefore there was a Dean and a Chapter conſiſting of Prebends, Canons conſiſting of Spiritual and Eccleſiaſtical Perſons annexed to every Cathedral Church, which Dean and Chapter were ſubordinate to the Biſhop. *Cook* 3. Part, in the Caſe of the Dean and Chapter of *Norwich.*

10. Now there are four ſorts of Deans, The firſt is a Dean, who hath a Chapter, ſuch is the Deanery of *Paul's*, *Canterbury*, and the like, who is ſet forth to be an Eccleſiaſtial Perſon, and Governour ſecular over the Prebends and Canons in the Cathedral Church, and the Patronage of all ſuch Deaneries is in the Crown, and doth not belong to any ſubject. The ancient Deans of Chapter came in as Biſhops did, by a *Conge de Eſtier*: But ſuch Deaneries as were tranſlated from Priories and Covents, and ſuch as by King *Henry* the 8. after the Statutes of Diſſolutions of Abbies and Monaſteries, are now Donative, and by the King's Letters Patents they were inſtalled. *Cook* 1. Part, *Inſtit.* 99. acc.

11. The ſecond Dean, is a Dean which hath no Chapter, but is preſentable, and hath a Peculiar and

and a Court wherein he holdeth Eccleſiaſtical Juriſdiction, but is not ſubject to the viſitation of the Biſhop. Such a one is the Dean of *Battell* in the County of *Suſſex*, which was founded by *William* the Conqueror, who hath Eccleſiaſtical Juriſdiction within the Liberty of *Battell*, and comes in by Inſtitution and Induction of the Biſhop of *Chicheſter*, though not ſubject to his viſitation. And the Patronage of ſuch a Deanery may be in a Subject, as the Patronage of the Dean of *Battell* is at this day in the Lord Viſcount *Mountacute*.

12. The third Dean is Eccleſiaſtical alſo, but the Deanery is not preſentative but donative: He hath alſo a Court, and a Peculiar, wherein he holdeth Plea and Juriſdiction of all matters and things Eccleſiaſtical, which ariſe within his Peculiar, which oftentimes extends over many Pariſhes, ſuch Dean is conſtituted by Commiſſion of the Metropolitan: and of ſuch ſort is the Dean of the Arches, the Dean of *Bocking*, and many more.

13. The fourth Dean is called the Rural Dean: He hath not any abſolute Judicial Power of himſelf, but is only to order and prepare the Eccleſiaſtical Affairs within his Deanery, and is the Biſhop's ſubſtitute in many Caſes, as in granting of Letters of Adminiſtration, Probate of Wills, *&c.* His Juriſdiction was great at the firſt upon the diviſion of Dioceſſes: For every Dioceſſe of every Biſhop was divided into Arch-Deaneries and Deaneries, which were theſe Rural Deanries: But the Power which theſe Rural Deans had at the firſt is now loſt and extinguiſhed, or ſwallowed up in the Office of Arch-Deacon and Biſhop's Chancellor, who execute their Power and Authority for the moſt part throughout all the Dioceſſes of the Biſhops within the Kingdom of *England*, although the Juriſdiction of theſe rurall Deans in ſome Countreys is yet in force. See *Hughes* Parſons Law, 14,15.

14. All Arch-Biſhops, Biſhops, Arch-Deacons, Deans, Prebendaries, Parſons, Vicars, are ſecular Perſons, and are not now religious, although they be men of the Church: (For no Perſons are ſaid to be religious Perſons, but ſuch as have vowed three things, ſcil. true Obedience to the Soveraign of their Houſe and Order, perpetual Chaſtity, and wilful Poverty, and which are profeſſed in ſome Religious Order, as *Auguſtine*, *Franciſcan* Monks, and the like): Yet may all ſuch Eccleſiaſtical perſons ſecular, hold Lands in Frankalmoigne, and Lands at this day may be given to them and their Succeſſors to hold in Frankalmoigne, with the conſent of the King, and of the Lords mediate and immediate, notwithſtanding the Statute of *Mortmain*: And if they do conſiſt of a ſole Corporation or Body politick, as Biſhop, Prebendary, Parſon, *&c.* a Feoffment may be made to them of Lands in *libera Eleemoſyna*, either by deed or without deed, and the Fee-ſimple ſhall paſs to them without the word (Succeſſors): But if any ſuch Feoffment be made to a Spiritual or Eccleſiaſtical Corporation aggregate of many Perſons, as to Dean and Chapter, *&c.* there to paſs the Inheritance, the word (Succeſſors) muſt be in the *Habendum*, and the Feoffment muſt be the deed, otherwiſe it is not good. *Cook* 2 Part, in the Arch-Biſhop of *Canterburies* Caſe. See 29 E. 3. 14. 21 H. 7. 39. acc.

15. There is a great difference in this to be done by Eccleſiaſtical Perſons and Corporations ſole, and thoſe which are aggregate of many Perſons: If a Biſhop, Prebendary, Parſon, *&c.* make a Feoffment in Fee, with a Letter of Attorney to make Livery and Seiſin; the Livery muſt be made in the life of the Biſhop, Prebendary, Parſon, *&c.* But if a Dean and Chapter, or other Corporation Eccleſiaſtical aggregate, make a deed of Feoffment of Lands, with a Letter of Attorney to make Livery, Livery made by the Attorney after the Death of the Dean is good in Law. *Cook* 1. Part, *Inſtit.* 52. Secondly, A ſole Eccleſiaſtical Corporation, as a Biſhop ſeiſed of Lands in the right of his Biſhoprick, ſhall do Homage; but a Parſon, Vicar, *&c.* who gave but a qualified Fee in them, ſhall neither do Homage, nor receive Homage. A Dean and Chapter ſhall not do Homage, becauſe they cannot do it in Perſon; and Homage being a thing entire and inſeparable muſt always be done in Perſon. *Cook* 7. Part, 10. *Cook* 10. Part, 31. acc. A Biſhop ſhall not do Eſcuage in Perſon, but he may find an able man to do the Service; For it is a Rule, That *Nemo militans Deo, implicat ſe negotiis ſecularibus*: And the Homage which a Biſhop, or other man of the Church doth, is rather Fealty than Homage. Yet ſee by *Cook* Chief Juſtice, It is Homage, becauſe therein he ſaith, [I do you Homage.] *Cook* 1. Part, *Inſtit.* 65.

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2. *Of the Biſhop of the Dioceſſe, as he is Ordinary, and what Acts and things are to be done by him as Ordinary, what not; and where ſuch Acts ſhall be good, where not.*

1. THE Statute of 21 H. 8. cap. 5. appoints that Adminiſtration of the Inteſtat's Goods ſhall be by the Ordinary granted, *&c.* and that the Ordinary (who is the Biſhop) ſhall take Sureties for the Adminiſtration of the Goods of the dead: And the Caſe was, That I. B. being Judge in the Court of Prerogative of the Arch-Biſhop of C.

A. dying Inteſtate, and Adminiſtration of his Goods being committed to his Wife, the ſaid J.B. upon the Grant of the Adminiſtration, took a Bond of J. S. That the Adminiſtrator ſhould diſpoſe of the Surpluſage of the Goods, after the Debts and Legacies paid according to the direction of that Court; who after finding that there was a Surpluſage remaining in the Adminiſtrators hands, did give a Sentence there, That the ſaid Adminiſtrator ſhould give certain propo.tions of the Inteſtates Goods, to the Kindred her of Husband, not being the Inteſtates Children; and a Prohibition being thereupon prayed, It was the clear Opinion of the Court, That the Ordinary might not impoſe any other or further Condition upon the Bond, than what was intended by the Statute, which was to be judged by the Courts of Common Law, and the intent and meaning of the Statute for the diſtribution of the Surpluſage, as alſo of the Inteſtate, if he had made a Will, ſhall be taken to be, that the ſame ſhould go to the Adminiſtrator, or to the Children of the Inteſtate, and not to give ſuch a vaſt Power to the Ordinary, to give the Surpluſage of the Eſtate at his Will. Trin. 11 Jac. in C. B. *Stanley's* Caſe. *Hob.* 83. See Trin. 15 Jac. in C. B. *Tooker* and *Loan's* Caſe. acc. *Hob.* 191. See Caſe 1655. *Davies* and *Matthew's* Caſe. *Styles*, 456.

2. A man who dyed Inteſtate had Goods, only in an Inferior Dioceſſe, yet the Metropolitan of the Province pretending that he had *Bona Notabilia* in divers Dioceſſes, committed Adminiſtration of the Goods: It was Reſolved in that Caſe, That the Adminiſtration granted, was not void, but voidable by Sentence onely, becauſe that the Metropolitan hath Juriſdiction in all places within his Province: But if the Ordinary of an Inferior Dioceſſe doth commit the Adminiſtration of Goods, when the party hath *Bona Notabilia* in divers Dioceſſes, the Adminiſtration is meerly void, aſwell for the Goods within the Dioceſſe as without. 22 Eliz. in B. R. *Vere* and *Jeffrey's* Caſe. *Cook* 5. Part, 30.

3. In Debt brought by an Adminiſtratrix upon an Adminiſtration committed by the Biſhop of R, the Defendant pleaded an Adminiſtration committed to him by the Dean and Chapter of C. *ſede vacante*, becauſe the Inteſtate had *Bona Notabilia* in diverſe Dioceſſes; the Plaintiff replyed, That before the Writ brought, the ſaid Adminiſtration granted in the prerogative Court was revoked and annulled. 1. It was Reſolved in this Caſe, That becauſe the Defendant had not ſhewed in his Barr, that the Inteſtate had *Bona Notabilia* in certain, it ſhall be intended that the Adminiſtration was granted, where the Inteſtate had not *Bona Notabilia* in divers Dioceſſes; but ſuch Adminiſtration was not void, but voidable. 2. Reſolved, That becauſe the Eccleſiaſtical Judge had pronounced the Letters of Adminiſtration granted to the Defendant void, it ſhall be intended that they were void *ab initio*. And in this Caſe, It was holden, That the Ordinary cannot releaſe any Debt, or make any gift of the Goods, becauſe he hath but a ſpecial property in the Goods of the dead, and nothing to his own uſe; and the Ordinary cannot give an Authority to another to ſell the Goods of the Inteſtate, becauſe he himſelf hath no ſuch Authority: Alſo, that the Ordinary ſhall not have an Action of Treſpaſſe for carrying away the goods before actual poſſeſſion of them (as an Executor or Adminiſtrator ſhall have) but he may ſue for them in the ſpiritual Court; but he ſhall not have Debt, as Ordinary. *Cook* 8. Part, 135, 136. Sir *John Needham's* Caſe.

4. The Commiſſary of a Biſhop of a Dioceſſe granted Letters *ad colligendum & vendendum bona ea que peritura eſſent, & ad Computum inde reddendum* &c. And he to whom the Letters were granted ſold Goods that afterward would periſh. In that Caſe, It was Reſolved, That he was an Executor of his own wrong, becauſe the Ordinary himſelf had not ſuch Authority to ſell ſuch Goods. M. 9 Eliz. *Dyer*, 256.

5. Power to grant Adminiſtrations was granted to the Ordinary by the Statute of 31 E. 3. cap. 11. For before that time, when a man dyed Inteſtate, the King, who is *Patens Patriæ*, was accuſtomed by his Miniſters to ſeize the Goods, to the intent they might be beſtowed in the Burial of the dead, and for the Payment of his Debts, and the advancement of his Wife and Children if he had any, or otherwiſe to his Kindred; and afterwards this care and truſt was committed to the Biſhop, Ordinary of the Dioceſſe: See 2 R. 3. tit. Teſtament 4. That it is but of late time that the Church had Probate of Wills and Teſtaments; for in many places in *England*, the Stewards in their Court-Barons had the Probate of Teſtaments. And ſee there out of a Book publiſhed by *Parker* Arch-Biſhop of *Canterbury*, where it is written, *Rex Angliæ erat olim Conciliorum Eccleſiaſticorum Præſes, vindex temeritatis Romanæ, propugnator Religionis, nec ullam habebant Epiſcopi Authoritatem, præter eam quam à Rege acceptam referebant. Teſtamenta probandi non habebant, Adminiſtrationis poteſtatem cuiq; delegare non poterant.* And note, It is there Reſolved, That if all the Executors do refuſe before the Ordinary, they may prove the Will afterwards; which muſt be intended if they refuſe before the Ordinary hath committed Adminiſtration, but afterwards they cannot. But note there, That in ſuing of Action in the Kings Courts, the Judges will not admit the Executors to ſue, except they

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ſhew the Teſtament duly proved under the Seal of the Ordinary, and yet the Probate of the Teſtament doth not give them any Intereſt or Title, either to the thing in action or in poſſeſſion, for that they have by the Teſtament it ſelf. *Cook* 9 Part, 39. *Henſlows* Caſe.

6. The Biſhop may ſequeſter the Profits of the Church, if the King, who hath Title to preſent, doth not preſent: And ſee 12 H. 8. 8. by *Pollard*, the Biſhop muſt ſee the Cure ſerved, if the Parſon fail, at his own Charge; and if a Biſhop doth celebrate Divine Service in any Pariſh of his Dioceſſe, he may require the Offering of that day; and if the Executor being called by the Ordinary will not prove the Will, the Ordinary may commit Adminiſtration till he doth it. See 4 H. 7. 13. *Hob.* 244. acc.

7. To have a Prohibition the ſurmiſe was, That Sir *Bernard Wellon* was ſeiſed of the Mannor of Wood-hall, and that he, and thoſe whoſe Eſtate he had in the ſame, had uſed time out of mind to have a peculiar Pew in the Body of the Church, and that the Defendant by ſuit in the Eccleſiaſticall Court ſought to diſpoſſeſſe him of the ſame: It was the Opinion of the whole Court, That the ſame was no ground for a Prohibition; For although the Church and Church-yard be in Law the Freehold of the Parſon, yet the uſe of the Body of the Church, and the repaire and maintenance of it is common to all the Pariſhioners; and for avoiding of Confuſion, the diſtribution and diſpoſing of the Seats there, and Charges of Repair, doth belong to the Ordinary, and therefore no man can challenge a ſpecial Seat there without a ſpecial Reaſon: But if it had bin preſcribed, That he &c. had uſed, time out of mind, at his own Coſts, to maintain that Pew, and therefore had the ſole uſe of it, the Preſcription might have bin a Warrant for a Prohibition, though the Pew were in the Body of the Church; and ſo it is in Caſe of an Iſle or Chappel adjoyning to the Body of the Church, whether it hath bin maintained by the whole Pariſh, or by ſome particular Perſon. Hill. 12 Jac. in C. B. in *Boothby* and *Baſy's* Caſe, *Hob.* 69. See Trin. 10 Jac. in C.B. *Garvers* and *Pym's* Caſe, *Godb.* 199. adjudg. acc.

8. In an Action upon upon the Caſe, upon an Aſſumpſit for 10. l. upon a Promiſe to cover a Church in *Ipſwich* in *Suffolk*, brought againſt an Adminiſtrator upon *Non aſſumpſit*; It was found for the Plaintiff: In Arreſt of Judgment, one exception (among other) was taken to the Declaration, That the Commiſſary of the Biſhop of *Norwich* at *London*, did commit Adminiſtration of the Goods of the Inteſtate to the Defendant at *London*, which was ſaid not to be good, becauſe he had not Power in *London* to execute any Power which appertained to him at *Norwich*. But it was Reſolved, That the place where the Commiſſary of the Biſhop did grant the Letters of Adminiſtration was not material: For if the Biſhop of *Norwich* be in *London*, yet this Power as to granting of Letters of Adminiſtration, and making of Deacons and Clarks in his own Dioceſſe, doth follow the Perſon of the Biſhop, although his other Juriſdiction be local. Trin. 21 Jac. in B. R. *Knollys* and *Dobbin's* Caſe, *Godbolt*, 342. See Paſch. 11 Jac. in Communi Banco. *Hutton's* Caſe, *Hobart*, 15.

9. In the Caſe of a Prohibition, for citing the Plaintiff out of his Dioceſſe into the Eccleſiaſtical Court, upon the Statute of 23 H. 8. It appeared by the Libel, that the Defendant had complained againſt the Plaintiff in the Spiritual Court, for ſcandalous words ſpoken in the Pariſh of St. *Sepulchres*, *London*: It was holden by *Coke* Chief Juſtice, That a Prohibition would lye, unleſſe the Biſhop of *London* had given Liberty to the Arch-Biſhop of *Canterbury* to entermeddle with matters within *London*: For he ſaid, That in the Statute of 23 H. 8. there is a Clauſe of Exception in caſe where ſuch Liberty is given by the Inferior Dioceſan; and day was given to procure a Certificate of the Opinion of the Civilians, Whether ſuch Authority given by the Inferior Ordinary to the Arch-Biſhop be warranted by their Law: For if the Authority be lawfully granted, no Prohibition will lye: And he ſaid, That the Statute of 23 H. 8. was but in affirmance of the Common Law, as appears by 8 H. 6. & 2 H. 4. For there it is ſaid, That if one be Excomeaged in a Forrein Dioceſſe, the ſame is void, *& coram non Judice*: and he ſaid that the principal Cauſe of making the ſaid Statute was to maintain the Juriſdiction of Inferior Dioceſſes: But if the Plaintiff had defamed the Defendant within the Peculiar of the Arch-Biſhop, in ſuch caſe he might be puniſhed there, although he did inhabite within any remote place out of the Peculiar of the Arch-Biſhop: And in this Caſe it was ſaid, That the Arch-Biſhop had in thirteen Pariſhes in *London* peculiar Juriſdiction. Trinit. 10 Jac. in Com. B. *Francis* and *Powell's* Caſe. *Godbolt*, 191.

10. In a Prohibition upon the Statute of 23 H. 8. for being cited out of the Dioceſs; the Caſe was, The Chancellor of the inferiour Ordinary, did make requeſt to Dr. *Dun*, Dean of the Arches, to take the Cauſe (being a Cauſe of *Modus Decimandi*) to his hearing, for that the Cauſe was ſo difficult, that the Plaintiff could have no ſufficient Councel here for that Cauſe. The Queſtion was, Whether the tranſmitting of this Cauſe were warranted by the exception of the Statute: The clauſe in the Statute is, That any Biſhop, or any other inferior

ſeriour Judg, having under him juriſdiction in his own right and title, or by Commiſſion make requeſt, or inſtance to the Arch-biſhop, or other ſuperiour Ordinary, or Judg, to take, treat, examine, or determine the matter before him; and that to be done onely where the Law, Civil, or Canon, doth affirm execution of ſuch requeſt to be lawful or tolerable, &c. upon pain of forfeiture, &c. of double damages and coſts to the party. The Caſe was argued by the Civilians, and they held, That although the Common-Law did reſtrein the Arch-biſhop to call cauſes from the Ordinary, but in 21. Caſe, all mentioned in the Caſe; yet the Law left it to the abſolute power of the Ordinary to ſend the Cauſe to the Arch-biſhop abſolutely at his will without aſſigning any ſpecial reaſon: But it was holden by the Juſtices. 1. That the principal Caſe was not within the ſpecial Caſes in the exception particularly expreſſed. 2. That to expound the Statute, That the Ordinary might at his will and pleaſure, ſend the ſubject from one end of the Kingdome to another without cauſe, was both againſt the letter of the Statute, and utterly eludes it; For the purpoſe of the Law, was to provide for the eaſe of the ſubject, more then for the juriſdiction of the Ordinary; for an Action is given to the party for his vexation, and a penalty to the King, but none to the Ordinary. And the Arch-biſhop is reſtreyned to two Caſes of neceſſity, none of which the principal Caſe was. And the clauſe, after it begins with referring, checks it only to be done in Caſes, &c. Alſo in this Caſe, It was holden, That the form of referring was not obſerved, the referring being from a Chancellor, to a Delegate, and not from Biſhop to Biſhop. And it was holden in this Caſe, That if the Arch-biſhop call a Cauſe unto him which is none of the Caſes within his power, the inferiour Ordinary may have his remedy againſt him, or the Defendant may plead to the Juriſdiction. *Trin.* 15 Jac. in C. B. *Jones*, and *Jones*'s Caſe. *Hob.* 185, 186. See *Trin.* 9 Jac. *in* C. B. *Jones* and *Boyer*'s Caſe. *Brownlow.* 2. Part, 27. acc.

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3. *Of Leaſes made by Biſhops, Deans, and Chapters, and other Eccleſiaſtical perſons. And where their Leaſes are good by the Statutes of* 1 *and* 13th *of* Elizabeth, *and other Statutes, and where not.*

1. EVery Archbiſhop, Biſhop, Prebendary, Dean, and other Eccleſiaſtical perſon, by the Common-Law, might have made Leaſes of the poſſeſſions which they held in the right of their Churches, or other Eccleſiaſtical livings *concurrentibus his qui in lege requiruntur*, for lives or years, without limitation, or ſtint of time. But now by the Statutes of 32 H. 8. 1 Eliz. 13 Eliz. and other Statutes, they are reſtreyned to make any Leaſes of their Lands or poſſeſſions belonging to their Churches, or other Eccleſiaſtical Livings, but according to ſuch limitations and proviſoes as are mentioned in the ſaid Statutes. See *Cook* 5. Part, 13. *Cook* 10. Part, 60. *Cook* 11. Part, 66.

2. By the Statute of 32 H. 8. which is an enabling Statute as to ſome perſons, A Biſhop by his Deed, without the Dean and Chapter; A Parſon ſeiſed in fee in the right of his Church, may make Leaſes, but under theſe reſtrictions, cautions, and proviſoes following. 1. The Leaſe muſt be made by Deed Indented, and not by word. 2. The Leaſe muſt begin from the day of the date thereof, or from the making thereof, *Cook* 5. Part, 6. The Lord *Mountjoyes* Caſe. 3. The ancient Leaſe muſt be ſurrendred, expired, or ended, within one year, at the making of the ſecond Leaſe, and ſuch ſurrender muſt be abſolute and not conditional, *Cook* 5. Part, 2. *Elmar's* Caſe. 4. There muſt not be a double Leaſe in being, at one time. 5. The Leaſe muſt not exceed 21 years, or three lives from the making thereof. 6. The Leaſe muſt be of Lands or Tenements manurable, out of which a Rent may be reſerved, *Cook* 5. Part, 3. *Jewell's* Caſe. 7. The Leaſe muſt be of Lands or Tenements which commonly have bin let to Farm, within 20 years next before the Leaſe made, *Cook* 6. Part, 37. The Dean and Chapter of *Worceſter's* Caſe. 8. There muſt be reſerved to them and their Succeſſors, ſo much yearly Rent, or more, which hath bin accuſtomably uſed to be paid for the ſaid Lands or Tenements within 20 years before the Leaſe made, *Cook* 5. Part, 6. *Cook* 6. Part, 37. acc. And 9. The Statute of 32 H. 8. doth not extend to any Leaſe to be made without impeachment of Waſte. *Cook* 6. Part, 37. acc.

3. A Parſon, or Vicear, &c. if they make Leaſes, according to the enabling Statute of 32 H. 8. they are out of the Statute, and their Leaſes muſt be confirmed by the Patron and Ordinary: But if a Biſhop who is ſeiſed in the right of his Biſhoprick, A Dean of his ſole poſſeſſions ſeiſed *in jure Diaconatus*, and a Prebendary ſeized *in jure Prebendæ*; every one of them be ſeiſed, *in jure Eccleſiæ*, and are within the Statute of 32 H. 8. and may make Leaſes under the Clauſes and Proviſoes before mentioned, without any confirmation. *Cook* 1. Part, *Inſtitutes*, 44. acc.

4. If a Biſhop maketh a Leaſe for 21 years, and all thoſe years are ſpent, ſaving three or more; yet may the Biſhop make a new Leaſe for 21 years to begin from the making, according to the exception

of

of the Statute, but not a Leaſe for life, or lives, and ſuch concurrent Leaſe hath bin reſolved to be good, aſwell upon the exception of 1 Eliz. which extends to Eccleſiaſtical Corporations; as Deans, and Chapters, which the Statute of 32 H. 8. did not. But then in the Caſe of concurrent Leaſes in the Biſhops Caſe, it muſt be confirmed by the Dean and Chapter.

5. *Grindal*, Biſhop of *London*, Leaſed parcel of the poſſeſſions of his Biſhoprick for 21 years, and afterwards ouſted the Leſſee, and Leaſed to another for three lives, rendring the ancient and accuſtomed Rent, which was confirmed by the Dean and Chapter. Afterwards *Grindal* was tranſlated. Whether this Leaſe were warranted by the Statute of 1 *Eliz.* was the Queſtion. It was holden that it was. In this Caſe, it was ſaid; At the Common-Law, A Biſhop might make an Alienation in Fee-ſimple, being confirmed by the Dean and Chapter. But by the Statute of 32 H 8. Biſhops without the Dean and Chapter, or their confirmation, may make a Leaſe for 21 years; but with confirmation of the Dean and Chapter, they might make a Leaſe for 1000 years. But by the Statute of 1 Eliz. the power of the Biſhop is much abridged, for that now with confirmation, or without confirmation, they cannot diſpoſe of their poſſeſſions, but for 21 years, or three lives. 2. It was holden, That the Leaſe in the principal Caſe, was in all points according to the Statute of 1 Eliz. For, 1. It begins preſently upon the making of it. And, 2. The ancient Rent is reſerved payable yearly during the ſecond tearm, for payable is a word of power, and not of Action. And a Caſe was cited to be adjudged in the Exchequer, which was, The Leſſor entred upon Leſſee for years, and made a Feoffment rendring rent, with clauſe of re-entry, the Leſſee re-entred, claiming his Term; and afterwards during the ſaid Term, the rent, reſerved upon the Feoffment, was behind; that in that Caſe the Leſſor had regained the Reverſion. And it was Reſolved further in this Caſe, That ſuch Leaſes might be good, although there were a former Leaſe in being, if the ſame ſhall be expired or ended within one year after the making of ſuch new Leaſe. Paſc. 29 Eliz. in B. R. *Bunny* and *Wright's* Caſe. *Leon.* 59, & 60.

6. Note, That all Leaſes not warranted by the Statute of 1 and 13 Eliz. ſtand good againſt the Leſſors themſelves, and are avoidable only by their Succeſſors, *Cook* 3. Part, in the Biſhop of *Lincoln's* Caſe. But if a Parſon, Dean, Prebendary, &c. make a Leaſe for years or life, ſuch Leaſe is void by his death, by the Statute of 14 Eliz. and if it were for 21 years, or three lives, it were void by the Statute of 13 Eliz. if it were not made according to the proviſoes, and limitations before mentioned. Paſc. 39 Eliz. in C. B. *Hunt* and *Singleton's* Caſe. acc.

7. A Leaſe was made by a Biſhop for three lives, viz. to one for life, the Remainder to a ſecond for life, the Remainder to the third for life; ſo not warranted by the Statute of 1 Eliz. and the Succeſſor accepted the Rent; and whether it ſhould bind him during his time, ſo as he cannot enter to avoid it, and make a new Leaſe, was the Queſtion; and it was Reſolved, That it ſhould bind him by his acceptance of the Rent. Hill. 2 Car. in C. B. *Owen* and *Thomas ap Rees* Caſe. *Cro.* 1. Part, 67. And for confirmation of that, a Caſe was cited to be adjudged, which was this, The Biſhop of *Glouceſter* was ſeiſed in Fee of the Manner of M. whereof an Acre of Land was parcel, and by Indent. 8 Eliz. demiſed that Acre to J. S. and J. D. *Habendum*, to the ſaid J. S. for his life, the Remainder to J. D. for his life, rendring 3 s. 2 d. by the year, at *Mich.* and the *Annunciation.* the Biſhop dyed. The Succeſſor having notice that divers of the Rents of the ſaid Mannor were due, commanded his Bayliff to receive the ſaid Rents, which he received accordingly, amongſt which the Rent of the ſaid J. D. was one, and afterwards the Biſhop accepted of all of the ſaid Rents by the hands of his Bayliff. It was Reſolved in that Caſe, That this acceptance of the Rent by the Biſhops Succeſſor, ſhould bind him for the time, ſo as he ſhould not avoid that Leaſe, which was otherwiſe voidable, becauſe it is a Leaſe of parcel of the Demeanes, and for two lives, the one after the other in Remainder. Paſc. 5 Jac. in C. B. rott. 1041. *Wheaker* and *Daubyes* Caſe. *Cro.* 1. Part, 67.

8. In *Ejectione firmæ*, the Caſe was, A Prebendary made a Leaſe for years of Land, parcel of his Prebend, with the exception of the great Wood, as Oaks, Aſhes, &c. which Leaſe was confirmed by the Archbiſhop, but not by the Dean and Chapter, and afterwards he made another Leaſe, without the ſaid exception, the Land being uſually let with the exception. In this Caſe, it was Reſolved. 1. That this confirmation of the Leaſe by the Archbiſhop, being Patron of the Prebend, was good without the confirmation of the Dean and Chapter. And 2. That the 2d Leaſe was no good Leaſe warranted by the Statute of 13 Eliz. but a void Leaſe by the ſaid Statute. Hill. 13 Jac. in B. R. *Smith* and *Bowles* Caſe. *Bollr.* 3. Part, 290, 291.

9. A Biſhop after the Statute of 1 Eliz. granted the Office of Surveyor of all his Mannors, to J. S. and J. D. for their lives, and granted a Fee of 20. Nobles to them for the execution of it, with clauſe of diſtreſſe if it were behind, being demanded: which grant was confirmed by the Dean and Chapter. In a Replevin, the Defendant ſhewed all this ſpecial matter, and avowed for the Arrerages, and averred, that the ſaid Office, was an ancient Office, and that the ſaid Office, and the Fee, were grantable by the

Biſhop

Biſhop and his Succeſſors, *tali perſonæ, vel perſonis quibus ſibi placuerit*; and that the Rent was behind, and for that he avowed. And upon the pleading of the Statute of 1 Eliz. in bar of the Avowry; and that the ſaid Office had bin granted but for one life; the Avowant did demur in Law. And in this Caſe, theſe points were Reſolved. 1. That the ſaid grant of the ſaid Office for two lives, was void againſt the Succeſſor, by the Statute of 1 Eliz. 2. Reſolved, that by the Common-Law, a Biſhop with the aſſent of the Chapter, might make a Leaſe and Grant to bind their Succeſſors and by the Common Law, ſuch a grant for two lives had bin good, although it had not bin granted for two lives before. 3. That by the Statute of 32 H. 8. a Biſhop might make a Leaſe for 21 years, or three lives, ſo as ſuch Leaſe be expired within one year, and that he might make without the Chapter. 4. That that Office might be ſaid belonging to the Biſhop, and the word belonging, ſhould be taken for concerning. And although he himſelf could not exerciſe the ſaid Office, yet he had an Inheritance in the gift and diſpoſition of it, within the Act. 5. When an Office is ancient and neceſſary, the grant of the ſame, with the ancient Fee, is no diminution of the ancient revenue, and therefore ſuch grants are exempted out of the reſtraint of the Statute of 1 Eliz. But it was Reſolved, That although ſuch an Office for neceſſity might be granted for one life, yet it ought not of neceſſity to be granted unto two, for by ſuch means it might be granted *in infinitum*, for life, intail, or in Fee; and therefore ſuch a grant is reſtreyned by the Statute of 1 Eliz. 6. That the grant of an ancient Office by a Biſhop, ſhould not bind his Succeſſor, unleſſe it were confirmed by the Dean and Chapter. 7. That if the Biſhop were tranſlated, depoſed, or removed, before the grant, yet the grant is void againſt the Succeſſor, although he be alive who made the grant. See 11 Jac. in C. B. *Cook* 1. Part. The Biſhop of *Saliſburies* Caſe. 58, 59.

10. A Biſhop ſeiſed of a Park (to which was the Office of a Keeper belonging, with a Fee of five Marks, and a Livery granted from time to time by the Biſhop), granted the ſaid Office, together with the Fees, *nec non cum paſtura pro duobus equis in eodem parco*, which grant was confirmed by the Dean and Chapter. The Biſhop dyed, and another was made Biſhop; and if the grant were good to bind the Succeſſor, was the doubt. It was Reſolved, that the grant of the Office and Fees, was good. And although it was objected, That here was a greater Fee granted then was before, *viz.* Paſture for two Horſes, and therefore the grant ſhould not bind the Succeſſor. It was agreed, That the ſaid grant of the ſaid Paſture was void, and yet the ſame ſhould not prejudice the grant of the ſaid Office, with the ancient Fee, for that they are ſeveral and diſtinct grants, ſo as the one with the grant of the Office with the ancient Fee, is good by the Law againſt the Succeſſor, and the other was void againſt the Succeſſor. 1 Car. in C. B. The Biſhop of *Chicheſter* and *Freeland's* Caſe. *Bridgman.* 29, 30.

11. *Horn*, Biſhop of *Winchester*, did grant to Dr. *Dale*, during his life, a Rent out of the Mannor of *Waltham, pro conſilio impendendo*; the Biſhop dyed, and becauſe the Rent was arear, Dr. *Dale* brought an Action of Debt againſt the Executors. In that Caſe, two points were Reſolved. 1. That the grant was not void againſt the Biſhop himſelf. 2. That although the Rent was iſſuing out of the poſſeſſions, and not parcel, the grant was void by his death. 23 Eliz. *Dyer*, 370. Doctor *Dale's* Caſe.

12. The Biſhop of *Chicheſter*, after the Statute of 1 Eliz. did grant to *Boulton*, an Annuity of five Marks *per annum, pro conſilio impenſo, et impendendo*, which was confirmed by the Dean and Chapter, and then the Biſhop dyed. *Boulton* brought a Writ of Annuity againſt the Succeſſor, and in his Count did aver, That the Predeceſſors of the Biſhop had granted reaſonable Fees, (but did not aver that this Fee had bin granted before) and did aver that he was *homo Conſiliarius, et in lege peritus*; and the Opinion of the Court in that Caſe, was againſt the Plaintiff. But in that Caſe, it was there Reſolved, That although the ſaid Biſhopr. was founded but of later times, *ſcil.* in the time of King *Henry* the 8th; yet the grant of an Office of neceſſity to one in poſſeſſion, with reaſonable Fees, was good. Trin. 30 Eliz. The Biſhop of *Winchester* and *Boulton's* Caſe. See *Bridgman* 31. acc.

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4. *Of Alienation and Diſcontinuance made of their Lands and Poſſeſſions by Biſhops, Deans, Prebendaries, and other Eccleſiaſtical perſons; Where their grants, or Charges were good, without Confirmation, where not; And by what Statutes they are now reſtreyned to Alien or Diſcontinue their Lands, or other Poſſeſſions.*

1. BY the Statutes of 1 Eliz. and other Statutes, and 1 Jac. Biſhops, and all other Eccleſiaſtical perſons are now reſtreined to alien or diſcontinue any of their Eccleſiaſtical Lands or livings. See the Statute.

2. The Maſter and Fellows of *Magdalen* College in *Cambridg*, after the Statute of 13 Eliz. by their Deed

Deed Indented and Inrolled, did convey a houſe, parcel of their poſſeſſions, unto the Queen in Fee, rendring Rent, with clauſe of diſtreſs. Proviſo, that the Queen ſhould convey the ſame to J. D. in Fee. The Queen by her Letters Patents conveyed the ſame to J. D. according to the Proviſo. Afterwards J. D. levyed a Fine with Proclamations of it: the Maſter dyed, the Succeſſor accepted the Rent, and made an Acquittance for the ſame under his hand, without a Seal to it, and then the Maſter dyed. In this Caſe, theſe points were Reſolved amongſt others. 1. That the Maſter and Fellows were reſtreyned by the Act of 13 Eliz. to convey any of their Lands or poſſeſſions to the King, although that the King be not named by expreſſe name in the Act, for that the King is within the general words of the Act, Perſon, or perſons, bodies Politick and Corporate, for the King is a perſon and body Politick. And general Statutes which provide neceſſary and profitable remedies, for the maintenance of Religion, advancement of Learning, and relief of the poor, ſhall be extended generally according to the words of the Act. 2. That the King ſhall not be exempted out of the general words of Statutes which are made to ſuppreſſe wrong; and the Statute of 13 Eliz. was made to ſuppreſſe the Diminution of Spiritual livings. 3. Reſolved, That for as much as the Maſter and Fellows were by the Statute of 13 Eliz. diſabled to grant, The Queen could not take of them who were ſo diſabled. But it was Reſolved, That the diſability of the Maſter and Fellows, was not *ſimpliciter*, but *ſecundum quid*. For if the Maſter of a Colledg do make ſuch a grant, it ſhall not be avoided by the Maſter himſelf, but by his Succeſſors. 3. It was Reſolved, That the ſaid Fine and Non-claim did not bar the right of the Colledges, becauſe the eſtate conveyed to the Queen was in force during the life of the Maſter, ſo as none could enter or make claim during the life of the Maſter, and when the Succeſſor entred within the five years after the death of the Maſter in the right of the Colledg, the ſame did avoid the Fine. 4. Becauſe the ſaid Corporation is aggregate of many, the Maſter only by his Acceptance, could not deveſt any right or intereſt, which was in him and the Fellows, eſpecially the ſame being without Deed.

3. If a Biſhop had bin Patron of a Church. The Biſhop could not make any grant of the Parſon of any of the Lands of his Parſonage good, either by his Licence precedent, or his confirmation ſubſequent, which ſhould have bound the Succeſſors of the Parſon, without the confirmation of the Dean and Chapter. But if there had bin Parſon, Patron, and Ordinary, and the Patron and Ordinary had given Licence by their Deed to the Parſon to have granted a Rent-charge out of the Gleab, and the Parſon had made ſuch a grant. This ſhould have bounden the Succeſſors of the Parſon at the Common-Law, before the reſtreyning Statutes, although it had bin confirmed afterwards by reaſon of the Licenſe precedent. And in that Caſe the Ordinary alone might have agreed to ſuch a grant of a Rent, by his Licenſe precedent, or confirmation ſubſequent, without the confirmation of the Dean and Chapter. But in that Caſe, 31 H. 8. *Br. Charge.* 40. 7 H. 4. 15. *per Curiam. Cook* 1. Part, *Inſtitutes* 300. the confirmation, or Licenſe of the Patron had not bin good to have made the Charge perpetual upon the Church, unleſs the Patron had had a Fee-ſimple in the Patronage, which if he had had, then the grant of the Rent by the Parſon *concurrentibus bis*, had bin good, and ſhould have charged the Lands, and bound the Succeſſors of the Parſon at the Common-Law before the reſtreyning Statutes. 31 E. 3. Grants. 61. 9 Eliz. *Dyer*, 252.

4. If the Biſhop before the Statutes of 1 Eliz. and 1 Jac. had made a Feoffment in Fee of Lands, parcel of his Biſhoprick, and the Dean and Chapter by their Deed, had confirmed the Deed of the Biſhop, the ſame had bin good, and Livery and Seiſin had and made upon the firſt Deed, had bin good after the ſaid Deed had bin confirmed. So if the Biſhop by Deed enrolled, had conveyed Lands unto the King, and the Dean and Chapter had confirmed the Deed of the Biſhop, and afterwards the Deed had bin enrolled; It had bin ſufficient to have confirmed the Lands to the King, although the Deed of the Dean and Chapter had not been enrolled: For the aſſent was to be had to the Act of the Biſhop, and to him, and not to the King. But Biſhops now cannot make any Conveyances, thereby to diſinherite their Sees or Succeſſors; and yet although it be ſo, yet that doth not take away the Rule of Law; But that a Confirmation made of the Deed of the Biſhop or Parſon at this day, is ſufficient, although the eſtate be not confirmed which is granted by the Biſhop or Parſons Deed. *Cook* 1. Part, *Inſtitutes* 301.

5. If Parſon and Ordinary make a Leaſe for years of the Gleab to the Patron, and afterwards the Patron doth aſſign and grant this Leaſe over to another perſon by his Deed. The aſſignment is good, and a Confirmation of the firſt Leaſe made unto himſelf, and the Deed of the Patron in this Caſe, doth ennure to a double intent, both to make the Aſſignment of the Leaſe good, & to a Confirmation of that Leaſe to the Aſſignee. *Cook* 5. Part, 15.

6. Note, there is a difference betwixt a Confirmation of the Term, and a Confirmation of the Land. If before the Statute of 13 Eliz. a Prebendary had made a Leaſe for 70 years of the Corps

of his Prebend, and the Biſhop, Patron of the Prebend, and the Dean and Chapter of the Prebend, had confirmed *Dimiſſionem prædict.* for 50 years *et non ultra*. The Confirmation had extended to the whole Term, and the words (for 50 years *et non ultra*) had been void. But if the Biſhop and Dean and Chapter had recited the Leaſe for ſeventy years, and had confirmed the Lands to the Leſſee for fifty years, the Confirmation had bin good for thoſe 50 years only. *Cook* 5. Part, 81. *Ford's* Caſe.

7. If a Biſhop have two Chapters, (as there may be two and more Chapters to one Biſhoprick,) both the Chapters muſt confirm Leaſes made by the Biſhop: But if one of the Chapters after the Date or making of the Leaſe be diſſolved, there a Confirmation made by the Chapter which is in being is ſufficient to make the Leaſe good, and in ſuch Caſe there needs not the Confirmation of the King, who is ſupream Patron of all the Biſhopricks of *England*. 11 Eliz. *Dyer*, 282. See *Cook* 1 Part, *Inſtit.* 301. acc.

8. If a Dean of a Cathedral-Church be elected Biſhop of another See, with diſpenſation *retinere Diaconatum in Commendam*; If the Biſhop of that of which he was the Dean and Chapter, do make a Leaſe of parcel of the Poſſeſſions of the Biſhoprick, the Confirmation of the Leaſe by the Commendatory is good, and ſufficient to make the Leaſe good; And ſo it was Reſolved and Adjudged. Paſc. 3 Car. in the King's Bench, in *Evans* and *Aſcue's* Caſe.

9. It is a Rule in Law, That *Prælatus Eccleſiæ ſuæ conditionem meliorare poteſt, deteriorare non poteſt.* If a Biſhop, Parſon, &c. purchaſe Lands to him and his Succeſſors, he cannot wave the purchaſe after himſelf, but his Succeſſor upon a juſt cauſe ſhewed, *viz.* upon Cauſe ſhewed, that the Rent payable is of greater value than the Land purchaſed, may gain ſuch Purchaſe made by his Predeceſſor: and ſo if a Biſhop, Prebendary, Parſon, or other Eccleſiaſtical Corporation, be ſeiſed of any thing in the Right of their Church or Corporation, they cannot diſclaim in that thing wherein they were ſo ſeiſed, becauſe they cannot deveſt that which is veſted in their Church or Spiritual Corporation, 20 H. 6. 46. by *Markham*. But if a *Quo Warranto* be brought againſt a Biſhop, Prebendary, &c. by the King, for Liberties or Franchiſes uſed by them, they may diſclaim in the Liberties and Franchiſes, and ſuch Diſclaimer ſhall bind their Succeſſors. *Cook* 1. Part, *Inſtit.* 102.

10. If a Biſhop make any Leaſe, grant any Rent-Charge, enter into Warranty, or do any other act or thing which tendeth to the diminution of any of the Revenews which ought to contiue for the maintenance of his Succeſſors: If the Biſhop be depoſed, tranſlated, remove, or dyeth, the Succeſſors ſhall avoid ſuch Leaſe, Grant, or Warranty: But if a Biſhop being Patron and Ordinary do confirm a Leaſe made by the Parſon, without the Dean and Chapter; and afterwards the Parſon, &c. dyeth, and the Biſhop collates another to the Benefice, and is afterwards depoſed, tranſlated, or dyeth, yet the Confirmation of the Leaſe remains good, becauſe the Revenues which are to maintain the Succeſſours are not diminiſhed. *Cook*, ibid. acc.

11. If a Parſon, &c. bring a *Juris utrum*, or any thing which doth concern the Church, and the Defendant pleadeth in Barr the Warranty of his Predeceſſor or Anceſtor, the Plaintiff ſhall not be barred by ſuch Warranty; for that the Parſon demandeth the thing in the right of his Church, and in his politick Capacity; and ſo, if the Parſon &c. bringeth an Aſſize, although that thereby he recovereth the Lands, and he himſelf is to take the profits to his own uſe, yet becauſe after the Recovery he is ſeiſed of the Free-hold, of which the Aſſize was brought in the Right of the Church, a Warranty of his Predeceſſor or Anceſtor pleaded in Barr, ſhall not barr him. The like Law is of other Eccleſiaſticall Perſons, they ſhall not be barred, by the Warranty of their Predeceſſours, *Cook* 1. Part. *Inſtitutes*, 370. 27 H. 6. Warranty, 48.

12. A Prebendary, Parſon, Vicar, &c. for the benefit of their Churches, ſhall be eſteemed to have the Fee-ſimple of the Gleab Lands in them: For they ſhall have and maintain an Action of Waſte, for Waſte done in the Gleab, and in the Writ it ſhall be ſaid that the Waſte was *ad Exheredit ationem Eccleſiæ*; But a Prebendary, Parſon, &c. cannot diſcontinue the Fee of the Gleab; and if they do make Leaſes for years reſerving Rent and dye, the Leaſes are void by their Deaths, and no acceptance of Rent by their Succeſſours ſhall make ſuch void Leaſes good: Otherwiſe it is, if they make Leaſes for Lives, there the acceptance of the Rent by the Succeſſors will make the Leaſes good, becauſe the Leaſes were not void, but voidable only: But if a Biſhop make Leaſes for years, and dy, and the Succeſſour doth accept the Rent, they ſhall never avoid the Leaſes, for that the Leaſes were not void, but voidable onely: *Cook* 3. Part, 65. acc.

5. *Eccleſi-*

5. *Eccleſiaſticall Courts, and their Juriſdiction, from whom the ſame is derived: That the Statutes of* 27 *E.* 3. *and* 16 *H.* 8. *of* Premunire, *are in force: And where the Proceedings by Colour of the Eccleſiaſticall Law, before Eccleſiaſticall Judges, were and are in danger of a* Premunire, *before the Statute of* 1 Eliz. *and now are; and where not.*

1. AS the *Romans* fetching their Laws from *Athens*, yet being approved and allowed by the State there, called them notwithſtanding *Jus Civile Romanorum*: And as the *Normans* borrowing all or the moſt of their Laws from *England*, yet baptized them by the Name of the Laws and Cuſtoms of *Normandy*: So, although the Kings of *England* derived their Eccleſiaſtical Laws from others, yet ſo many as were proved, approved, and allowed here, by and with a generall conſent, were rightly called the King's Eccleſiaſtical Laws of *England*: And the Kings, by their Charters made in Parliament, did diſcharge and exempt Perſons from the Juriſdiction of the Biſhops, and by many Charters did grant Eccleſiaſtical Juriſdiction unto Abbots and others: which Eccleſiaſticall Juriſdiction being derived from the Crown, continued till the Diſſolution of the Abbeys, in the time of King *Henry* the 8. See *Cook* 5. Part, *Cawdrey's* Caſe, &c. And therefore note, That although the proceedings and proceſs in Eccleſiaſticall Courts be in the Name of Biſhops, &c. it followeth not therefore that either the Court is not the Kings, or the Law whereby they proceed is not the King's Law: For every Leet or View of Franchiſe is kept by Subjects in the Lord's Name, and yet it is the King's Court, and all the proceedings therein are directed by the King's Laws: and ſo it is of many Courts of Record, and other Courts holden by Subjects; yet their proceedings be according to the King's Laws, and Cuſtoms of the Realm. *Cook*, 5. Part, *Cawdries* Caſe, *in fine*.

2. Note, It was moved, Paſc. 4 Jac. in B.R. That foraſmuch as by the Statute of 1 Eliz. cap. All Eccleſiaſtical Power withia the Realm was annexed to the Crown: That for that cauſe no *Premunire* now lyes againſt any Eccleſiaſticall Judge whatſoever; And their Reaſons were, 1. Becauſe the Statutes of 27 E. 3. & 16 R. 2. of *Premunire*, were made when the Pope uſurped Eccleſiaſtical Juriſdiction in this Realm, and the Writ of *Præmunire* is *contra Coronam et dignitatem Regis*, which cannot be now when the Eccleſiaſtical Power is ſetled in the Crown. 2. The Statute of *Præmunire* ſpeaks *de Curia Romana ſeu alibi*, which cannot extend to a Court erected by Parliament, as the Court of High-Commiſſion, which is erected by Parliament, and the King's Letters Patents. But it was Reſolved by all the Juſtices, That the ſaid Statutes of *Præmunire* are yet in force, and are not repealed by any Statute, and therefore when any Eccleſiaſtical Judge doth uſurp upon the Temporal Law, becauſe he draweth the Subject *ad aliud examen*, he doth offend *contra Coronam et dignitatem Regiam*; and although the High-Commiſſion be a new Court, yet the ancient Statutes of *Præmunire* do extend to it within the word *Alibi*: But in what Caſes a *Præmunire* now lyes, and what not: See the Rules following. *Cook* 12. Part, 38. in the Caſe of *Præmunire*.

3. Firſt, In all Cauſes, when the Cauſe originall belongs to Eccleſiaſtical Cognizance, and is proſecuted there in that Court, (although in truth, the Circumſtances diſcloſed, the cauſe ought to be determined at the Common Law,) yet no *Præmunire* lyes in that Caſe, but a Prohibition only; as if Tythes be ſevered from the nine parts, and carried away, if the Parſon ſue for ſubtraction of the Tythes in the Spiritual Court, the ſame is not in Caſe of a *Præmunire*, becauſe perhaps the Eccleſiaſtical Judge may not know of it. But although the Cauſe originally may appertain to the Conuſance of the Eccleſiaſtical Judge, yet if he ſue for it in the nature of a Suit which doth not belong to the Eccleſiaſtical Court, but to the Common Law, there a *Præmunire* lyeth; as if the Parſon will, after the ſevering of the Tythes, ſue in the Eccleſiaſticall Court for carrying away his Tythes ſevered from the 9 parts, which matter appears to them plainly to appertain to the Common Law, in ſuch Caſe both the Actor and the Judge are in danger of a *Præmunire*, and ſo it was adjudged. 17 H. 8. *Spilman's* Reports, in *Turburvile's* Caſe.

4. Secondly, When the Cauſe originally belongs to the Cognizance of the Common Law, and not to the Eccleſiaſtical Court there, although they libel for it, according to the Eccleſiaſtical Law, yet a *Præmunire* lyeth: For this cauſe, That this draws the cauſe which is determinable at the Common Law *ad aliud examen*; ſcil. to be decided by the Eccleſiaſtical Law; and ſo deprives the Subject of the benefit of the Common Law, which is his Birth-right: *Book of Entries*, Tit. *Præmunire*, 229, 430. And ſee the Indictment of Cardinal *Woolſey*, Mich. 21 H.8. was, *Quod predict. Cardinalis intendens finalit. antiquiſſimas leges Angliæ penitus ſubvertere et enervare, univerſumq; hoc regnum Angliæ, et ejuſdem Angliæ populum, legibus Imperialibus*

rialibus, et eorum legum Canonibus imperpetuare, ſubjugare, et ſubjicere, &c. And that was awerded in theſe words[*Ad aliud examen trabere*]. See the Biſhop of *Norwich*'s Caſe, Hill. 25 H. 8. In which Caſe, It was Reſolved, That this word *Alibi* extends aſwell to the Courts of Biſhops, and other Eccleſiaſtical Courts within the Realm, as elſe-where. Mich. 4 Jac. in the King's Bench. *Cook* 12. Part, 50, 41. in the Caſe of *Præmunire*.

5. If one Spiritual Perſon ſueth another Spiritual Perſon in the Court of *Rome* for a matter Spiritual, where he might have Remedy before the Biſhop, his Ordinary within the Realm, is within the danger of a *Præmunire*, *quia trahit ipſum in placitum extra Regnum*, *contra Legi natiæ ſuæ debitum, in contemptum Domini Regis, et contra Coronam et Dignitatem ſuam*. Cook 5. Part 17. in *Cœdries* Caſe.

6. The Queens Attorney-Generall brought and proſecuted a *Præmunire* for the Queen and one J. S. againſt the Dean of Chriſt-Church in *Oxford*, and others, becauſe they did procure the ſaid J. S. to be ſued in the City of *Oxford*, before the Commiſſioners there in an Action of Treſpaſs by Libelling to the Eccleſiaſtical Law. In which ſuit, J. S. pleaded, San Frank-tenement, and to the Juriſdiction of the Court; and yet they proceeded againſt him, and condemned, and impriſoned him. The Queens Attorney afterward, withdrew the ſuit for the Queen: The Queſtion was, Whether notwithſtanding the party might proceed in the *Premunire*. And Book *Entries*, 427, 428, 429. were vouched. Where it was, *Reſpondendum tam Domino Regi quam*, R. F. But it was the Opinion of the whole Court, That if the Kings Atturney will not further proceed, the party grieved cannot maintain this ſuit, for the principal matter in the *Premunire* is, The conviction and putting of the party out of the protection of the King; and the Damages for the party are but acceſſary, and the principal being releaſed, the Damages are gone. Mich. 27 Eliz. in B. R. The Queen, and the Dean of Chriſt-Churches Caſe. *Leon.* 290.

7. If I ſet out my Corn, and afterwards take it away, the Parſon may ſue me in the ſpiritual Court, or bring an Action of Treſpaſs againſt me. But if the Parſon ſueth in the Spiritual Court a ſtranger for taking away the Tythes which were ſet out, this is a *Premunire* in the Parſon. Hill. 6 Jac. in C. B. *Brownlow* 1. Part, 30.

8. In *Ejectione firme*, the Caſe was: A. was endicted of a *Premunire* upon the Statute of 13 Eliz. and afterwards he made a gift in tail of the Land, and afterwards he was attainted by Verdict, and had Judgment for the ſame offence. It was afterwards found by Inquiſition upon a Commiſſion out of the Exchequer, that A. was ſeiſed in Fee of the Lands in Queſtion at the time of the offence committed; and that the Queen by her Letters Patents had granted the Lands to J. S. under whom the Leſſee of the Plaintiff claimed; and the Defendant under the Title of the Tenant in tail. And whether the Attainder in a *Præmunire* ſhall have relation to the offence, for the forfeiture of the Lands, or only to the time of the Judgment; the point being a matter of great difficulty, was not Reſolved; but the Court was clear of Opinion, That by this Judgment he ſhould forfeit his Lands. And in this Caſe, it was Reſolved, That the Freehold being in the party offending (and in this Caſe in a ſtranger by the gift in tail), at the time of the Attainder, it ſhall not be deveſted from him, and in the King, without Office by Commiſſion under the Great Seal, and not by Office by a Commiſſion under the Exchequer Seal. Hill. 1 Car. in B. R. rott. 828. *Groſſe* and *Gayers* Caſe. *Cro.* 1. Part, 123.

9. The Statute of 16 R. 2. cap. 5. is, That all Lands and Tenements of one Attainted in a *Præmunire* ſhall be forfeited to the King. And the Caſe was, That J. S. being Tenant in tail of certain Lands and Tenements, was Attainted in a *Præmunire*: And the Queſtion before all the Juſtices of *England* was, If the eſtate tail were barred or not. And it was Reſolved by all the Judges, That thoſe general words of the Statute of 16 R. 2. have not repealed the Statute of *Donis Conditionalibus*, but that he ſhould forfeit only for life, and that the Iſſue in tail ſhould inherit the Land. Paſc. 21 Eliz. *Trudgins* Caſe. vouched in *Cook* 11. Part, in Dr. *Foſters* Caſe. 63.

Ejectione firme, *et* Ejectione Cuſtodie.

1. *Of what* Ejectione firme *lyeth, and for whom, and by whom it lyeth, and againſt whom it lyeth,* et è contra. *And the Declaration in it.*

1. EJectment was brought, *de aquæ curſu*, & the Plaintiff declared upon a Leaſe made by J. S. *de quodam rivulo et aquæ curſum*. Judgment was given for the Plaintiff, and errour brought, and the Judgment was reverſed, for that *Rivulus, ſeu aquæ curſus* lye not in demand, nor doth a *Precipe* lye of it, nor can Livery and Seiſin be made of it, for it cannot be given in poſſeſſion; but the

Action

Action muſt be brought of ſo many Acres of Land covered with water. But an *Ejectione firme* will lye of a Stang, becauſe a *Precipe* lyeth of it. Mich. 6 Jac. in C.B. *Challoner* and *Thomas*'s Caſe. *Brownl.* 1. Part, 142.

2. *Ejectione firme* was brought *de Piſcaria* in ſuch a River, and becauſe it was not *terra aqua cooperta*, nor of any Land, but only of a profit apprender: It was the opinion of the whole Court, That an *Ejectione firme* did not lye thereof, no more then of a common apprender, or a Rent: But peradventure an Aſſiſe will lye of ſuch a Piſcary, becauſe it is *proficuum in certo loco capiendum*. Paſc. 12 Car. in B. R. *Herbert* and *Laughains* Caſe. *Cro.* 1. Part, 354.

3. A. brought an *Ejectione firme* againſt S. and declared of an Ejectment *de uno Meſſuagio, et de uno Repoſitorio*. The Jury found for the Plaintiff, and aſſeſſed Damages entirely: Whereupon Error was brought; and the error aſſigned was, That the word *Repoſitorium*, which was in the Caſe put for a Warehouſe, was a word incertain, and of divers ſignifications; and therefore *Ejectione firme de Repoſitorio* is not good, and an Ejectment ought to be of a thing certain, in which the party may be put in poſſeſſion by *Habere facias poſſeſſionem*. Wherefore the Judgment was reverſed. Paſc. 17 Car. in B. R. *Sprig* and *Rawlinſons* Caſe. *Marſh.* 96. See *Cro.* 1. Part, 399. the ſame Caſe.

4. An *Ejectione firme* was brought of a Leaſe made by the Earl of *Thomond* in *Ireland*, of 40. Meſſuages, 100. Acres of Land, 200. Acres of Paſture, 100. Acres of Bog in the Villages and territories of A. B. and C. Exception was taken to the Writ and Declaration, becauſe it was of 100. Acres of Bog; and becauſe it was ſaid to be *in Villis et territoriis*, for there is not any ſuch word as Bog known. But the Opinion of the Court was, That the word Bog was well known in *Ireland*, and it is an uſual word there; and for the word *territoriis*, the Court held the ſame to be but ſurpluſage; and therefore the Declaration was good enough, and the Ejectment being brought of other Lands, as well as of the 100 Acres of Bog; the Plaintiff might releaſe his demand as to that Land, and have his Judgment for the reſidue. Mich. 13 Car. B. R. rott. 333. *Mulcarry* and *Eyres* Caſe. *Cro.* 1. Part, 368.

5. Note, It was Reſolved, That an *Ejectione firme* doth not lye of a Cloſe by the name of a Cloſe certain, as Dove-cote-Cloſe; but the Writ ought to be of certain Acres; and the quality of the Land, as of Land, Meadow, Paſture, Wood, ought to be ſhewed, and the moſt worthy ought to be firſt named in the Writ. But yet if ſuch order be not obſerved in a Writ, the Judges will not abate the Writ or Declaration for that cauſe. *Cook* 11. Part, 55. *Sayer*'s Caſe. But Quere of that Caſe, for that it was Reſolved, Trin. 15 Jac. in B. R. in *Wicks* and *Sparrows* Caſe. That an *Ejectione firme* lyeth of a Cloſe. See the Caſe *Cro.* 2. Part, 399. vouched in *Sprig* and *Rawlinſons* Caſe.

6. In *Ejectione firme*, the Plaintiff declared, That A. was ſeiſed of the Mannor of D. in which are divers Copyholds of Inheritance, and that the Cuſtome of the Mannor is, That if any Copyholder of Inheritance of the ſaid Mannor dyeth, his Heir within the age of 14. years, that then the Lord of the Mannor might grant the cuſtody of his body and Lands to whom he pleaſed: And ſhewed, That J.S. a Copyholder of Inheritance of the ſaid Mannor dyed, his ſon and Heir within the age of 14 years, of which the Lord committed the cuſtody of his body and Lands to the Plaintiff, upon Not guilty. It was found for the Plaintiff: It was moved in arreſt of Judgment, that the Action did not lye of a Copyhold-eſtate, which was granted *per Curiam*, and yet it was ſaid, that an *Ejectione firme* lyes upon a Demiſe of Copyhold-Lands by Leaſe of the Copyholder himſelf, but not upon a Demiſe by the Lord of the Copyhold, which was alſo granted *per Curiam*. Afterwards, it was ſaid by the Plaintiff, That this Action was but an Action upon the Caſe, in the Nature of an *Ejectione firme*, and this Intereſt is not granted by Copy, but entred only into the Court-Roll; ſo as it is an Intereſt by the Common-Law, and not by Copy, for the words are *Dominus commiſit Cuſtodiam, &c.* and doth not ſay *in Curia*. Wherefore Judgment was given for the Plaintiff. Paſc. 33 Eliz. in B. R. *Cole* and *Walles* Caſe. *Leon.* 328.

7. Upon a Verdict given in *Ejectione firme*; It was moved in arreſt of Judgment, and exception taken, That it was declared, That the Plaintiff was ejected *de duo Croſto*, which was a word of incertain ſignification; and becauſe the Plaintiff doubted, Whether an *Ejectione firme* would lye, *de uno Croſto*, he prayed a ſpecial Judgment for the reſt of the Land in the Declaration, and that he might releaſe Damages as to the *Croſt*. *Rolls* doubted whether *Ejectione firme* did lye, *de uno Croſto*; for he ſaid that a Fornedon did not lye of a *Croſt*, but an Aſſiſe did, becauſe it is put in the view of the Recognitors. It was ruled, that a ſpecial Judgment ſhould be entred as was deſired, and releaſe the *Croſt* and damages to all. Trin. 23 Car. in B.R. *Styles* 30. Hill. 1652. *Aſhworth* and *Staleys* Caſe. *Styles* 364.

8. Upon a Verdict in *Ejectione firme*; It was moved in Arreſt of Judgment, whereas the Plaintiff Declared, That the Defendant did eject him *de uno Cottagio*, that an *Ejectione firme* did not lye of a Cottage, no more then a *Precipe quod reddat*. But the Opinion of the Court was, That Ejectment did lye:

lye of a Cottage, becauſe the deſcription of the thing by that name is ſufficient to ſhew the Sheriff of what to deliver Poſſeſſion of. Yet it was ſaid, That a Recovery lyes not of a Cottage. Paſc. 1649. in B. R. rott. 818. *Hamond* and *Ireland's* Caſe. *Styles* 215. See there, 10 Jac. *Retorick* and *Chappells* Caſe adjudged accordingly, That an *Ejectione firme* lyes of a Cottage, and alſo a *Precipe quod reddat*.

9. *Ejectione firme* was brought of a Leaſe of Tythes appertaining to ſuch a Chappel; the Ejectment was ſuppoſed to be in taking ſo many Loads of Tythes of Wheat and Barley, ſevered from the nine parts. Upon Not-guilty pleaded, It being found for the Plaintiff; it was moved in ſtay of Judgment, That an *Ejectione* lyes not of Tythes only, but it may be of ſuch a Rectory, or ſuch a Chappel, and the Tythes belonging to it, whereof an *Habere facias poſſeſſionem* may be, but not of Tythes only. The Court doubted, and would adviſe: but being afterwards moved again, It was adjudged for the Plaintiff. Hill. 8 Car. in B. R. rott. 181. *Prieſt* and *Woods* Caſe. *Cro.* 1. Part, 219.

10. Note, It was Reſolved by the Juſtices, That an *Ejectione firme* generally of Tythes is not good, but the certainty of the nature of the quality of the Tythes ought to be expreſſed, as *lorum fecit lanæ agnellorum*, ſo as Judgment might be given, and an *Habere facias poſſeſſionem* had. And in that Caſe, it was Reſolved, That it is not formal to bring an *Ejectione firme de una Capella*, but it ought to be by the name of a houſe. *Cook* 11. Part, 25. *Harpers* Caſe. 5 Jac. the Counteſs of *Oxfords* Caſe. 3, 4. Mar. in *Bendloes* Reports, acc.

11. Error was brought of a Judgment in an *Ejectione firme* of a Cole-mine in the Pariſh of S. upon Not-guilty, and Judgment given for the Plaintiff, The Error aſſigned was, That *Ejectione firme* lyes not of a Cole-mine, becauſe it is *Quoddam proficuum ſubtus ſolum*; and an *Habere facias poſſeſſionem* cannot be thereof. But it was Reſolved by the Court, That it is ſuch a profit of which the Law takes Conuſance, and *Ejectione firme* well lyes thereof. Hill. 5 Jac. in B. R. *Cummin* and *Kinſto's* Caſe. *Cro.* 2. Part, 150. See *Harbotle* and *Placocks* Caſe. *Cro.* 2. Part, 21. acc. See *wylds* Caſe. *Cro.* 2. Part, 150. *Ejectione firme* lyes of a Boyllary of Salt.

12. *Ejectione firme de una Domo et uno Pomario.* It was moved, That a *Precipe* doth not lye *de Domo*; for *non conſtat* what it is; but he ought to demand *Meſſuagium*. And that a *Precipe* lyes not *de pomario*, but he ought to demand it by the name of a Garden, and this Action ought to be as certain as a *Precipe*. But it was holden by the Court, That the Writ was well brought, for it is but an Action of Treſpaſs in its nature; and Treſpaſs lyes, *Quare domum fregit*; and ſo here being a convenient certainty, the Sheriff may deliver poſſeſſion of it; and for the ſame reaſon, the Action brought *de pomario*, is good. Adjudged for the Plaintiff. Hill. 20 Jac. in B. R. *Royſton* and *Eccleſtons* Caſe. *Cro.* 2. Part, 654.

13. *Ejectione firme* of two Cloſes, called the Higher Gulwell, and the Lower Gulwell, containing three Acres of Land. Being found for the Plaintiff, it was moved, That the words [containing three Acres of Land] do not contain any certainty: and *Savills* Caſe, *Cook* 11. Part, 55. was vouched. But it was adjudged, That the *Ejectione* did lye, and was well brought, and that it differs from *Savills* Caſe: for there is neither quantity, nor quality of the Land, but here the quality of the Land is mentioned. And it was adjudged, That although the Cloſes do contain more, he ſhould recover the whole Cloſes. And it was ſaid, That *Ejectione firme* was bought of the Scite of a Mannor, and three Cloſes by name, and upon a Demurrer, the Declaration was holden good, and adjudged for the Plaintiff. Trin. 15 Jac. in B. R. rott. 774. *Wykes* and *Sparrows* Caſe. *Cro.* 2. Part, 435. See Sect. 5. before.

14. In Debt for Rent upon a Leaſe for years, the Plaintiff Declared of a Leaſe of a Meſſuage and Farm, called Muſwel-Farm, in *Clarkenwell in Com. Midd. ac omnia Domus, ædificia, &c. eidem Meſſuag: pertinent. jacent. et exiſtent. in* Muſwel, Hornſey, Finchley, & Clarkenwel, *vel eorum aliquibus in dict. Com. Midd. ac omnia ſeparalia, clauſa, et parcellas terræ in* Muſwel, Hornſey, Finchley, & Clarkenwell, *vel eorum aliquibus in dict. Com. Midd. in eodem dimiſſ. viz. totum illud clauſum prati vel paſturæ, vocat. Hillyfield.* It was moved, that the Declaration was uncertain, for that it appears not in which of the Towns the Land lay; for the Declaration is of a Leaſe of Lands in thoſe Towns, *vel eorum aliqua*; But it was holden, That the Declaration was good; for in a Declaration wherein no Land is recovered, it is ſufficient if the Declaration be as general as the Leaſe, becauſe the Action is grounded upon the contract. But in an *Ejectione firme* where the poſſeſſion is recoverable, the certainty of the Land is to be ſhewed, and in what place it lyes. For an *Ejectione firme de una Domo ſive Tenemento*, hath bin adjudged not to be good. Mich. 3 Jac. in B. R. *Mathewſon* and *Rowes* Caſe. *Cro.* 2. Part, 124.

15. An *Ejectione Cuſtodie* was brought of the Land, and of the Heir, and the parties were at Iſſue upon Traverſe of the Tenure, which was found for the Plaintiff, and damages aſſeſſed. It was moved in ſtay of Judgment, that the Writ did not lye for the Ejectment of the body, but only for the Land; for

for which the Plaintiff relinquiſhing his Damages and Coſts, he had Judgment in the Ejectment for the Land only. 22 Eliz. *Dyer*, 370. *Cliffords* Caſe.

16. In *Ejectione firme*, the Caſe was, the Abbot of F. was ſeiſed of the Mannor of B. wherein the Tenements in which Copyhold Lands were parcel in E. which Mannor came to King *Henry* the 8th, by diſſolution. The King granted the Inheritance of all the Copyholds in E. to J. S. and his Heirs; who called it his Mannor of E. Afterwards a Copyholder of Tenements of the ſaid Mannor in which, did ſurrender them to J. S. who being ſeiſed of the Mannor of H. in the ſame County, granted the Tenements in which, &c. to the Leſſor of the Plaintiff by Copy, according to the Cuſtome of the Mannor of E. for life, by force of which he was poſſeſſed, untill ejected by the Defendant, claiming it under the title of J. S. pretending that the ſaid Grant by Copy did not bind him. In this Caſe, amongſt other points, it was Reſolved, That the Leſſee of the Copyholder, for one year, ſhall maintain an *Ejectione firme*; for inaſmuch as his Term is warranted by the Law, by the general Cuſtome of the Realm, it is reaſon, that if he be ejected, that he have an *Ejectione firme*: And it is a ſpeedy courſe for a Copyholder to have the poſſeſſion of the Land againſt a ſtranger. Trin. 30 Eliz. in B. R. *Melanch* and *Luter's* Caſe. *Cook* 4. Part, 26.

17. If the Leſſor putteth out his Leſſee for years, and preſently maketh a Feoffment in Fee, ſo as the Feoffee be party and privy to the ouſter of the Leſſee; The Leſſee may have a Writ of *Ejectione firme vi et armis* againſt the Feoffee, becauſe he is party to the Ouſter, and to the wrong done unto him. So the Lord by Eſcheat, if he put out the Termor of the Leaſe made by the Tenant, the Leſſee may have and maintain *Ejectione firme* againſt the Lord by Eſcheat. And ſo an *Ejectione firme* will lye againſt the Lord of the Villain, if he put the Termor out of his Leaſe made by his Villain before entry made by the Lord into the Land. *Fitzh. Nat. Br.* 221. acc.

18. If a man Leaſe Lands for years, and afterwards ſuffereth a Recovery in a Writ of Entry in the Poſt, or any other Writ: If he who recovereth, entreth, the Termor ſhall have an *Ejectione firme* againſt him, by force of the Statute of 21 H. 8. cap. 15. becauſe the Statute giveth him power to retain, hold, and enjoy his Term, and ſo it appeareth by that Statute, that he who recovereth, doth wrong unto him, if he put him out of his Term; but before that Statute, he could not have had *Ejectione firme* in that Caſe, becauſe he who recovered, came in by courſe of Law. And that in this Writ he ſhall recover his Term again, if the Term be not ended. See *Fitzh. Nat. Br.* 220. acc.

19. Note, In all Caſes where the Regiſter hath two Writs for one Caſe, it is in the parties election to take which Writ he will. And therefore if a man putteth out the Executors of his Leſſee for years of the Term, they may have a ſpecial Writ upon their Caſe. *Regiſter* 97. and yet they may have a Writ of *Ejectione firme*, or an Action of Treſpaſs at their Election againſt him. *Cook* 4. Part, 95. in *Slades* Caſe.

20. *Ejectione firme* of a Leaſe, 6. *Sept.* 2 Jac. The Plaintiff declared, That he was poſſeſſed untill the Defendant *poſtea. ſcil.* 4. *Sept.* 2 Jac. ejected him. Upon Not guilty pleaded, being found for the Plaintiff, It was moved in Arreſt of Judgment, That the Declaration was not good, for that the Ejectment is ſayed to be two dayes before the Leaſe made, which cannot be: But it was Reſolved, That the Declaration was good enough, for that the *ſcil.* was impoſſible, and repugnant; and therefore void, for the *Poſtea* here was good without the *ſcilicet*: Wherefore it was adjudged for the Plaintiff. Mich. 3 Jac. in B. R. *Adams* and *Gooſes* Caſe. *Cro.* 2. Part, 96. See Trin. 15 Jac. rott. 199. *Treſmond* and *Jones's* Caſe. Where Trover and Converſion of goods was ſuppoſed to be, 3. *May*. And the Converſion was ſuppoſed *Poſtea, ſcilicet.* 1. *May* the ſame year which was before the loſs, and yet adjudged good, *ibid.*

21. *Ejectione firme* of a Leaſe made 12. *Decembris, Habendum à primo die.* The Jury found a Leaſe, which was dated 1. *December. Habendum* from henceforth, but delivered 12. *Decemb.* Whether it were according to the Declaration, was the Queſtion. It was objected, that from the day of the date, and from henceforth, are ſeveral Commencements. But it was Reſolved, They are both one, being a computation of time from the time paſt, and both ſhall be pleaded from the day of the date, when the Leaſe is Sealed afterwards another day. But if he declares of a Leaſe of the firſt of *December, Habendum à die datus*, the ejectment cannot be alledged the ſame day; but if the Leaſe be made the firſt of *December, Habendum* henceforth, the Ejectment may be alledged the ſame day: And ſo it was adjudged, Trin. 8 Jac. in B. R. rott. 150. *Lewellin* and *Williams's* Caſe. *Cro.* 2. Part, 258.

22. In *Ejectione firme*, the Plaintiff declared, Whereas J. S. by Indenture 9. *Junii.* 19 Jac. *dimiſſet* ſuch Land to the Plaintiff, *Habendum terminum prædict. à die datus ſigillationis et deliberationis Indenturæ prædict.* for three years: *virtute cujus*, the Plaintiff, 10. *Junii*, 19 Jac. was poſſeſſed untill the Defendant the ſame day ejected him. Upon Not-guilty, It was found againſt the Defendant. It was moved, The Declaration was not good, becauſe

canſe neither the day of the date, nor of the Sealing and delivery of the Indenture were mentioned. But it was the Opinion of the Court, That the Declaration was good: For where the Verdict found him guilty upon the Declaration, and the Ejectment is alledged according to the Declaration, it may be well intended, That the Indenture bore date, and was Sealed and delivered the day mentioned in the Declaration of the Leaſe. It was adjudged for the Plaintiff. Trin. 19 Jac. in B. R. rott. 84. *Featon* and *Hartefloas* Caſe. *Cro.* 2. Part, 646.

23. Errour of a Judgment in C. B. in *Ejectione firme* aſſigned was, That the firſt Declaration was that A. 25. *Marcii* 6 Jac. let to the Plaintiff for ſeven years, by vertue whereof he was poſſeſſed untill the Defendant *poſtea, ſcilicet. Anno* 6. *ſupradict.* entred and ejected him, ſo there is not any day mentioned. After Imparlance, the Plaintiff made a ſecond Declaration, and there without any ſpace made, the Ejectment is ſuppoſed to be 26. *May, Anno ſupradict.* and the Ejectment was brought, *M.* 7 Jac. In this Caſe, it was Reſolved. 1. That the firſt Declaration is the principal and material Declaration, and the ſecond is but a recital of the firſt, and if there be any miſ-recital in the firſt, it cannot be mended by the ſecond. But the Court held, as this Caſe was, the firſt Declaration was good enough. For he Declares of a Leaſe 25. *Marcii.* 6 Jac. which is the firſt day of that year, and the Declaration, *Quod poſtea ſcilicet,* 6 *Jacobi* the Defendant ejected him, is certain enough, for the year wherein he made the Ejectment: ſo as it appears, it was after the Leaſe made, and in the ſame year of 6 Jac. wherein the Ejectment was. And the Action was brought *Anno* 7 Jac. and the Ejectment made between the making of the Leaſe, and the Action brought, is good enough, although there be not any day certain alledged. It was adjudged for the Plaintiff. Mich. 10 Jac. in B. R. *Merrel* and *Smiths* Caſe. *Cro.* 2. Part, 311.

24. In an *Ejectione firme* upon a Leaſe made to the Plaintiff by Husband and Wife. It being found for the Plaintiff: It was moved in Arreſt of Judgment, for that it was alledged, that the Leaſe was made by the Husband and Wife generally, without alledging the ſame to be by Deed, as it ought to be. But it was Reſolved by the Court, upon ſight of a Judgment given, Trin. 36 Eliz. in B. R. rott. 339. *Bateman* and *Allens* Caſe. And of another Judgment, Paſc. 33 Eliz. in C. B. between *Moſeley* and *Guilbert.* And of another Judgment in B. R. between *Digs* and *Withers.* In all which Caſes, Judgment was given for the Plaintiff upon a Demiſe made by the Husband and Wife, without alledging the ſame to be by Deed. Judgment was given for the Plaintiff. Hill. 41 Eliz. in C. B. *Cook* 2. Part, 61. *Wſcots* Caſe.

25. In *Ejectione firme,* the Plaintiff Declared, That whereas J. S. and others, 9. *Octob.* 5 Jac. at G. in the County of C. did demiſe to the Defendant, one Meſſuage, four Gardens, 200 Acres of Land, 20 Acres of Meadow, &c. with the Appurtenances, called *Eaſt Ditzard* in the ſaid County, to have and hold for five years. The Defendant pleaded, Not Guilty; and found for the Plaintiff, and Judgment given: Error was brought, and aſſigned for Error, That the Plaintiff in his Declaration did not ſhew in what Town, Pariſh, Hamlet, or place, the ſaid Tenement called the *Eaſt-Ditzard* lay, but in the general County aforeſaid. It was holden by the Court, That it was erronious for that cauſe, and therefore the Judgment was reverſed in the Exchequer Chamber. Hill. 13 Jac. *Rich* and *Sheres* Caſe. *Hob.* 89.

26. In *Ejectione firme,* the Plaintiff Declared, That one W. M. 5. *Maii,* 10 Jac. at C. in the County of C. Leaſed to the Plaintiff a houſe, 40. Acres of Land, 20. Acres of Meadow, with the Appurtenances in C. *pradict. Habendum,* from the Feaſt of the Anunciation laſt paſt, for 21 years, and the Ejectment was alledged to be the ſaid 5th of *May, Anno* 10. Upon Not Guilty pleaded; It was found by ſpecial Verdict, That before the ſaid demiſe, W. M. was ſeiſed of the Lands in Fee, and ſo ſeiſed the ſaid 5. *May, Anno* 10. *ſupradict.* made an Indenture of Leaſe to the Plaintiff, *in hac verba, ſcil. demiſit tenenta pradict. Habendum* the ſaid houſe or Tenement, with the Appurtenances, from the Feaſt of the Anunciatian of the Virgin, laſt paſt, for 21 years next enſuing, by force of which, the Plaintiff was poſſeſſed untill he was Ejected by the Defendant, the ſaid 5. *May, Anno* 10 *Jacobi.* The Queſtion was, If the Leaſe found by the Jury, did agree with the Leaſe mentioned in the Declaration for one Term of years, or not, becauſe that the Leaſe by the Declaration was a Leaſe made 5. *May, Anno* 10. of the King. *Habendum* from the Feaſt of the Annunciation then laſt paſt, for 21 years, *extunc. ſcilicet.* from the Feaſt of the Annunciation then next enſuing: but the Leaſe found by the Jury, was a Leaſe made the ſaid 5. *May,* 10 *Regis,* by Indenture, bearing date 5. *May, Anno* 10 *Regis, Habendum de feſto Annunciationis tunc ultimo preterito pro termino* 20 *annorum prox. ſequend. poſt. dat. dict. Indenture.* It was adjadged for the Plaintiff in the Exchequer Chamber, and afterwards affirmed by both the Chief Juſtices, and the Lord Chancellor and Treaſurer. Trin. 11 Jac. in the Exchequer Chamber. *Moor* and *Muſgraves* Caſe. *B. b.* 18, and 19.

27. In an Action of Covenant, the Plaintiff declared, That it was agreed by Articles betwixt the Plaintiff and Defendant, and the Defendant did Co-

venant

Tenant, promiſe, and agree, with the Plaintiff, that the Plaintiff *haberet, occuparet, et gauderet* certain Lands for ſeven years, from the Feaſt of the Annunciation next enſuing the Date of the Bill; and the Plaintiff covenanted that he ſhould pay 220 l. a year for it during the Term, and that he would deliver the Poſſeſſion of the Land at the end of the Term to the Defendant, and declared that he entred into the Lands; and the next day after our Lady day, one J. S. entred upon him, and ejected him, and hath ever ſince held him out, which he layed to be a Breach of Covenant to his dammage of 1000 l. The Defendant did demurr in Law. The Queſtions were, 1. If this were a naked Covenant, or amounted to a Leaſe? 2. Whether the Ejectment by J. S. being taken to be by wrong, becauſe no Title was layed in him, ſhould be adjudged a breach of Covenant? It was firſt adjudged, That this was a Leaſe of the Land for 7. years, for the words *haberet, occuparet, et gauderet* the Lands, are the perfect words to give Intereſt: And here is a certain Term from the beginning, and certain Rent and Covenants on both ſides, importing preſent Poſſeſſion of the Land, and the word *Covenant* in this Caſe, ſounds not properly in Covenant, but in Agreement. 2. It was adjudged, That it was no breach of Covenant; yet it was agreed, That if the Leſſor eject his Leſſee, he may have an Action of Covenant, but the Law ſhall never judge that I covenant againſt the wrongfull Acts of Strangers, except ſuch Covenant be expreſſe to that purpoſe. Mich. 9 Jac. *Tiſdale* and Sir *William Eſſex* Caſe, *Hob.* 35. But ſee, An Action was brought in the King's Bench, where the Caſe was, That one Paſtor had leaſed to the Plaintiff the Parſonage of B. for a year, and covenanted to ſave the Plaintiff harmleſſe concerning the premiſſes and profits of the ſame to be received for that year, againſt J. D. Parſon of B, and alledged That J. D. Parſon of B. had ejected them, and although that were taken by the Court to be a wrongful Ejectment; for though he were Parſon, yet there might be many wayes to make his Ejectment wrongful, and the worſt ſhall be taken againſt the Pleader: Yet it was adjudged, That the Covenant was broken in that Caſe; 1. Becauſe it was to ſave harmleſſe for the Receipt of the profits: And 2. It was againſt a Perſon certain; both which did import that the Plaintiff ſhould receive no harm by that Parſon touching the profits. Hill. 33 Eliz. in C. B. *Wilſon* and *Foſter* againſt *Mape's* Caſe, *Hob.* 34. acc.

28. A. brought againſt B. a Writ containing both an Ejectione firme, and a Treſpaſſe of Aſſault and Battery; and upon Not-Guilty pleaded, a Verdict was found for the Plaintiff, both for the Ejectment and battery, and entire damages aſſeſſed, and the Court would adviſe of the Judgment to be given in this Caſe, becauſe it was without a Preſident, but the damages for the Battery could not be releaſed, becauſe they were entire with the Ejectment. Hil. 16 Jac. in C. B. Rott. 1819. *Bird* and *Snell's* Caſe, *Hob.* 249.

29. In an *Ejectione firmæ*, the Caſe was this: Tenant for years makes a Leaſe at Will; the Tenant at Will is ejected, and the Queſtion was, Whether the Tenant for years, for this Ejectment of his Leſſee at Will, might have an *Ejectione firmæ*: It was Reſolved, That upon a Poſſeſſion in Law, a man ſhall never maintain an Ejectione firmæ, but he ought to have an actual Poſſeſſion; and therefore, where the Tenant at Will of the Leſſee for years is ouſted clearly, the Tenant for years for this Ejectment of his Leſſee at Will cannot have an Ejectione firmæ without his actual Poſſeſſion at the time of the Ejectment; and ſo if the Leſſee for years be the Remainder for years, and the Leſſee for years is ouſted, his Term expires, the Remainder for years cannot have *Ejectione firmæ*, for the reaſon that he had not an actual Poſſeſſion at the time of the Ejectment. Paſch. 12. Jac. in B. R. *Stone* and Sir *Richard Grubham's* Caſe. *Bolſtr.* 2. Part, 209.

30. In an *Ejectione firmæ*, upon Not-Guilty pleaded: Upon opening the Declaration, the Ejectment Leaſe appeared to be ſealed 8 *May*, 7 Jac. the Execution layed to be 13 *May*, 7 Jac. The Plaintiff brings his Action in *Eaſter*-Term following, and failed in the proving of the Ejectment: It was ſaid by the Court, If the Plaintiff proves the Ejectmment at any time after the Leaſe is made, and before the Action brought, it is ſufficient, notwithſtanding the Ejectment be layed at a time certain which he cannot prove, the ſame is not materiall; if he can prove the Ejectment at any time before the Action brought it is ſufficient, but becauſe the Plaintiff failed to prove this, he was Non-ſuit. Paſc. 9 Jac. in B. R. *Hall* and *King's* Caſe, *Bolſtr.* 1. Part, 122.

31. In an *Ejectione firmæ*, The Plaintiff declared of a Leaſe made to him the 8th day of *May*, to hold for 21 years then next following, by vertue of which afterwards, *viz.* the ſame day, he entred: It was holden, That it was good, and that he had not entred as a Diſſeiſor before the Leaſe began, for *ex tunc* is immediately after the delivery, and it ſhall not be intended before the Date, and the *Poſtea* declares that he entred not before the Leaſe made. Trinit. 11 Eliz. *Dyer*, 286.

32. A Leaſe was made of a Garden containing three Acres, and a Writ of *Ejectione* was brought and the Plaintiff declared, that he was ejected out of three Acres of Land: It was a Quære, if the

Declaration was good. Is ſeemed the better Opinion to be, That it was, becauſe a Garden is a good Demand in a *Præcipe*: But it was holden, That it was in the Election of the Party to declare of a Garden, or of three Acres of Land; but it had bin the better to declare of a Garden containing three Acres of Land. Hill. 23 Eliz. in C. B. adjudg. acc.

33. In an *Ejectione firme*, The Plaintiff declared upon a Demiſe made to the Plaintiff by J. G. Dat. 1. *Jan.* 15 Jac. and ſealed and delivered 12. *Jan.* following, to hold from Chriſtmas laſt paſt for two years: Upon a ſpecial Verdict, the Jury found the Leaſe, and a Letter of Attorney to execute the Leaſe; That the Leſſor was ſeiſed of the Land in Fee, and ſo ſeiſed, he made, ſigned, and ſealed an Indenture, of the Demiſe of the Tenements, and found that the Leſſor the ſaid 15 *Jac.* did not deliver the ſaid Indenture of Demiſe to the Plaintiff as his Deed, but by his Attorney bearing date the ſame day, gave full Power and Authority to one J. S. to enter into all the Premiſſes in the name of the Leſſor; by vertue of which the Attorney took Poſſeſſion, and immediately after he did deliver the ſaid Indenture of Demiſe as the Leſſors Deed to the Plaintiff: Exception was taken to the Declaration, becauſe it is ſaid, whereas he had demiſed; and if it was a Demiſe, then the Letter of Attorney was idle, and to no purpoſe: But it was holden by the Court, That it was the Demiſe of the Leſſor, and the Declaration was good, and Judgment was given for the Plaintiff. Trinit. 16 Jac. in C. B. *Hill* and *Stake's* Caſe. *Brownl.* 1. Part, 128.

34. In an *Ejectione firme*, the Caſe was, The Husband and Wife joyned in a Leaſe to A. rendring Rent for years, and made a Letter of Attorney to ſeal and deliver the Leaſe upon the Land, which was done accordingly. A. brought a Writ of *Ejectione firme*, and declared upon a Demiſe made by the Husband and Wife: It was holden by the Court, upon the evidence given, That the Leaſe did not maintain the Declaration, for that a Woman could not make a Letter of Attorney to deliver a Leaſe upon the Land, although Rent was reſerved upon the Leaſe, and ſo the Warrant of Attorney was meerly void, and the Leaſe was only the Leaſe of the Husband; and ſo the Declaration was not good, by the Opinion of the whole Court. Paſc. 44 Eliz. in C. B. *Wilſon* and *Rich's* Caſe, *Brownl.* 1. Part, 134.

35. In an Ejectment brought, The Plaintiff declared upon a Leaſe made by Sir *William Cotton* Knight, the Defendant pleaded Not-Guilty, and made Challenge, and prayed a *Venire facias* to the Coroners, becauſe the Sheriff was Couſin to the Leſſor's Wife, which being a Challenge for favour, after Tryall and Verdict it was amended, becauſe it was miſ-tryed; and in this Caſe, It was agreed, That miſconveyance of proceſs is, where one Writ is awarded in the place of another, to an Officer which of right ought to execute that proceſs, and he returns it; this is helped after Verdict by a Statute: But if a Writ be awarded to an Officer, who ought not to execute the proceſs, and he returns it; this is a miſ-tryal, and not helped by the Statute: And in this Caſe, It was holden, That if two Tenants in Common, joyn in a Leaſe for years to bring an Ejectment, and declare, That whereas they did demiſe the Tenements, that the ſame was not good, becauſe it is a ſeverall Leaſe of Moyeties; and if they had declared, That one of them had demiſed one moyety, and the other, the other moyety, it had been good. Trinit. 9 Jac. in C. B. Rott. 2284. *Craddock* and *Jones* Caſe. *Brownl.* 1. Part, 134.

36. A Woman, Tenant for life of a Copyhold, after the death of her Husband, took another Husband, who with his Wife made a Leaſe by Indenture for years, to begin at a day to come, reſerving Rent: The ſecond Husband dyed, the Wife cauſed the Rent to be paid to a Stranger for Debt due by the Wife, and afterwards made a Leaſe of the Lands to another, who brought an *Ejectione firme* againſt the Leſſee, upon promiſe that his Leaſe was ſealed upon the Land: It was the Opinion of the Court, That the firſt Leaſe was good by acceptance of the Rent by the Wife, and no Exception was taken for the bringing of the Action here, nor to the making of the Leaſe for years to be a forfeiture: But the Queſtion onely was, Whether the firſt Leaſe was a Leaſe in *Eſſe*, or in Reverſion, and then the acceptance of the Rent was nothing to the purpoſe; But it was holden by the Juſtices, That it was a good Leaſe in poſſeſſion. M. 16 Eliz. in C.B. adjudg. acc.

37. In an Ejectione firme of a Leaſe upon Not-Guilty pleaded: The Evidence on the Defendant's part was by reaſon of a Leaſe of the Land in Queſtion made by the Abbot of C. before the Diſſolution, to J. S. and *Joan* his Wife, and A. their Daughter, for three lives by Indenture, and by the ſaid Indenture the Abbot granted and confirmed to the three Leſſees, that the Land ſhould remain to the Aſſignee of the Survivor of them for 90 years: F. ſurvived, and took to Husband J. D. Who 20 Eliz. granted the Eſtate to J. N. and all their Intereſt in the Remainder, and all their Power for all the Tearm, and the ſame by mean Aſſignments came to the Defendant: And whether an Intereſt paſſed in Remainder by the Leaſe of the Abbot, was the Queſtion. And it was the Opinion of all the Juſtices, That it was a good Intereſt in poſſibility, and to be reduced into

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a certainty in the Perſon of Survivor: As where Land is given to three, and the right Heirs of the Survivor, this is a good limitation of the Inheritance preſently; but it is in expectancy untill the Survivor be known, for then the Fee is executed in him. 2. It was holden, That although in this Caſe, the Remainder is not limited to any of the 3. Leſſees, but to the Aſſignee of the Survivor, yet that this was not a bare Nomination in the Survivor to appoint what Perſon he pleaſed, but an Intereſt. Paſch. 4 Jac. in C. B. *Clerk* and *Sydenham's* Caſe, *Brownl.* 135.

38. In an Ejectione firme, upon a ſpecial Verdict the Caſe was; A. poſſeſſed of a Term for 1000 years deviſed the ſame to E. his Daughter for life, the Remainder to J. S. and made L. the Huſband of his Daughter E. his Executor and dyed. J. S. deviſed his Intereſt to J. D. and J. G. and made J. R. his Executor, and dyed: L. ſpake theſe words, If E. my Wife were dead, my eſtate in the Premiſſes were ended, and then it remains to J. S. E. dyed, the Executors of J. S. made the Leaſe to the Plaintiff, and L. made the Leaſe to the Defendant, who entred upon the Plaintiff, who brought the Ejectione firme. The Queſtions in the Caſe were; 1. If the words ſpoken by L. the Executor were a ſufficient aſſent to the Deviſe. 2. Whether the aſſent came in due time as to the Intereſt of J. S. in the Remainder, becauſe he dyed before the words ſpoken which ſhould make the aſſent. It was Reſolved by all the Juſtices upon ſolemn Argument; 1. That L. the Executor had made a ſufficient Election to take the Term as Deviſee in the right of his Wife. 2. That it was a good and ſufficient aſſent to the Deviſe. And 3. That the aſſent came time enough, otherwiſe it might be prejudicial to the Legatees, for elſe by that means they might be defeated of their Legacies; and ſo Judgment was given for the Plaintiff. See *Cook* 8 Part, *Manning's* Caſe, &c. Mich. 17 Car. in B. R. *Southwood* and *Mitterds* Caſe, *Marſh.* 135.

39. In Ejectione firme the Caſe was, A. ſeiſed of Lands in Fee, in conſideration of Marriage, did give and grant the ſame to J. his younger Son, and to his Heirs after his death, but no Livery was made: A. dyed, his eldeſt Son entred, and made a Leaſe to the Plaintiff who entred, and upon Ejectment of J. brought Ejectione firme: It was agreed in this Caſe, That if Livery had been made, that it had been void, becauſe that a Free hold cannot begin at a day to come. But it was objected, That it ſhould paſſe by Covenant to raiſe an uſe to J. and there need no expreſſe word of Covenant to raiſe an uſe, as was adjudged in *Elithman's* Caſe. But it was Reſolved by the whole Court, That the gift ſhould not enure by way of Covenant to raiſe an uſe, unleſſe it had appeared that the meaning of the party was, that he intended to paſſe his Eſtate by way of raiſing an uſe, otherwiſe not; and in this Caſe it doth not appear that he intended to paſſe by way of Uſe: But by the word [*Give*] he intended tranſmutation of Poſſeſſion, and in Poſſeſſion it could not paſſe for want of Livery, and Livery cannot become at a day to come. Trin. 15 Car. in the King's Bench, *Pitfield* and *Peacet's* Caſe.

40. In an Ejectione firme the Caſe was, A Copy-holder Tenant in Fee did ſurrender into the hands of two Tenants unto the uſe of J. S. immediately after his death; the Queſtion was, If the ſurrender was void. It was Reſolved by the whole Court, That the ſurrender was void: It was ſaid that Eſtates of Copy-hold ought to be directed by the Rule of Law, and as in a Grant, a Grant to one in *ventre ſa mier* is void, ſo alſo in a Will or Deviſe, and it hath been adjudged, That a ſurrender to the uſe of one in *ventre ſa mier* is void. And as to the Common Law, a Free-hold cannot commence *in futuro*, ſo likewiſe of a Copy-hold. See 23 Jac. in B. R. Rott. 676. A ſurrender was of a Copy-Tenement to the uſe of an Enfant in *ventre ſa mier*, after the death of the Surrender: And it was Reſolved by all the Judges, that the Surrender was void, 1. Becauſe it was to the uſe of an Enfant in *ventre ſa mier*. And 2. Becauſe it was to begin *in futuro*, which is contrary to the Rule of Law, *Simpſon* and *Southwell's* Caſe. In the principall Caſe, It was adjudged, that the Surrender was void, and that the Plaintiff *nihil capiat per Billam*. Hill. 17 Car. in B. R. *Bambridge* and *Whitton's* Caſe, *Marſh.* 177.

41. In an Ejectione firme brought, Exception was taken to the Declaration, becauſe it was *Quod à poſſeſſione ſuâ ejecit*, whereas it ought to be according to the ſuppoſall of the Writ, *quod à firmâ ſuâ ejecit*: Alſo it was of three Cloſes, naming them with a *videlicet*, containing by Eſtimation thirty Acres, and that was incertain, whereas it ought to be alledged in fact, how many each did contain: But it was holden by the Juſtices, That although he doth not alledge the certainty of the Acres, if he giveth a Name certain to them, it is ſufficient; and as to the Acres, and as to the other Exception, It was Reſolved, That *ejecit à poſſeſſione & à firmâ* was all one in effect, and eſpecially in this Caſe, becauſe it was *à poſſeſſione inde*, and the word *inde* hath relation to the Ferme, and it ſhall be aſmuch as if he had ſaid *à poſſeſſione firmæ*. The Declaration was holden good, and Judgment given for the Plaintiff. Mich. 29 Eliz. in B. R.

2. *What ſhall be a good Plea in Barr, or in Abatement of an* Ejectione firme, *and what not.*

1. ERror brought upon *Ejectione firme, Quia Bona et Catalla ibid. invent. cepit et vi et armis*, &c. The Plaintiff declared upon a Leaſe for fifty years, to begin at *Michaelmas* next after the death of J. S. and averred that J. S. dyed, and he entred. The Defendant pleaded *Non ejecit*: It was found *quod ejecit*, and Judgment, that he ſhould recover the Term. Error aſſigned, becauſe it is not ſhowed when he entred, ſo as it may be the Term is ended; nor when he entred, and it may be he entred before *Michaelmas*, and ſo a Diſſeiſor; for theſe and other Errors the Judgment was reverſed. Mich. 7 E. 6. *Dyer*, 89. & 1 Ma. 96.

2. *Ejectione firme* was brought againſt A. & B. A appeared and pleaded an Entry of the Plaintiff into the Land after the Darrein Continuance, and delivered Judgment of the Writ upon which the Plaintiff did demurr in Law; After which the firſt Iſſue was found for the Plaintiff. It was the Opinion of the Court, That the Plaintiff could not have Judgment, becauſe the Plaintiff by his Demurrer had confeſſed his own Writ abateable; but it had been otherwiſe if the Plaintiff had onely imparled to the Defendants Plea. Hill. 6 Eliz. *Dyer*, 226.

3. *Ejectione firme* brought againſt three: The Defendants pleaded, That after the Treſpaſſe and Ejectment there was an accord and agreement betwixt them, that one of the Defendants ſhould pay to the Plaintiff 10 l. in ſatisfaction thereof, and ſhould give Bond for the Payment of the ſame, which he had performed: In this Caſe, It was Reſolved, 1. That in all Caſes and Actions which ſuppoſe a wrong to be done *vi et armis*, where a *Capias* or Exigent lyeth at the Common Law; That an accord is a good Plea for redeeming of his Body out of Priſon; and the Writ of *Ejectione firme* doth include in it ſelf an Action of Treſpaſſe, as it appears by the Writ, for the Writ is *vi & armis*, and the Entry of the *Ejectione firme* is in *placito Tranſgreſſionis et Ejectionis firme*. 2. Reſolved, That a Diſcharge and ſatisfaction by one of the Defendants, did diſcharge all other Defendants. *Cook* 9 Part, 78. *Peytoe's* Caſe.

4. In an *Ejectione firme* the Defendant pleaded in Barr a Recovery had in the King's Bench againſt the Leſſor of the Plaintiff: It was moved, That this was no Barr no more than in Treſpaſſe, eſpecially not being betwixt the parties themſelves; for here the Plaintiff is but Leſſee to him which was barred, and that which is an Eſtoppel againſt the parties themſelvs cannot be an Eſtoppel againſt a Stranger, as the Plaintiff is here: But the Opinion of the Court was, That it was a good Barr, for that this Action is as ſtrong to bind the Poſſeſſion, as a Writ of Right is to bind the Right; and where it was ſaid that that which was between the parties cannot be an Eſtoppel to the Plaintiff here which is but a Stranger: Yet it was ſaid, That although he ſhall not plead it by way of Eſtoppel but Judgment of Action, and the Law ſhould never have an end, if after a man is barred in his Action he might bring the ſame Action again: And it was holden in this Caſe, That if two claim by Leaſe from one man, and one bringeth an *Ejectione firme* and is barred, the other ſhall not have any Action, becauſe he hath no Right. It was adjudged, that in the principal Caſe the Plaintiff ſhould be barred. M. 29 Eliz. in C.B. *Clayton* and *Lawſon's* Caſe. *Goldeſbr.* 43.

5. In an *Ejectione firme* brought, The Defendant pleaded an Accord with ſatisfaction in Barr, the Plaintiff did demurr: It was holden by the Court a good Plea, becauſe the Action is not only in the Realty, for he recovered damages and poſſeſſion. 2. Becauſe the Defendant pleads the ſatisfaction, as in diſcharge of that Action and all others; and it was ſaid by *Coke* Chief Juſtice, that in all Actions where money or damages are recoverable, aſwell wherein the Defendant might wage his Law, as wherein not accord, is a good Plea, Paſch. 3 Jac. Rot. 1033. in C. B. *Eden* and *Bliches* Caſe: but in matters where Free-hold or Inheritance is recovered, it is no Plea; as in Dower, recompence out of other Land or Rent is no Plea, but Rent iſſuing out of the ſame Land demanded is a good Barr: And in all Actions Quære *vi et armis*, wherein proceſſe of Outlawry lyes by the Common Law, Concord or Accord is a good Plea in Bar, and by the Opinion of the whole Court, Satisfaction in Treſpaſſe by a Stranger is a good Bar, although it be without Notice of Treſpaſſe. Trin. 9 Jac. in C.B. Rott. 2151. *Pats* and *Chittles* Caſe, *Brownlow*. 1 Part, 133, 134.

6. In an *Ejectione firme*, the Plaintiff declared upon a Leaſe made by A. and B. of a Meſſuage and 40 Acres of Lands in S. in the County of S. the Defendant imparled untill another Term, and then pleaded, That within the Pariſh of S. there were three Villages, A. B. and C; and becauſe the Plaintiff had not ſhewed in which of the Villages the Land lay, the Defendant demanded Judgment of the Bill, upon which Plea the Plaintiff demurred in Law. It was adjudged for the Plaintiff, for after imparlance the Defendant cannot plead in

abate-

abatement of the Bill, for he hath admitted it to be good, by entring into defence, and by his Imparlance. 2. The matter of his Plea is not good, becauſe the Defendant hath not ſhewed in which of the Villages the houſe and 40 Acres of Lands did lye; and where a man pleads in abatement, he alwayes ought to give the Plaintiff a better Writ: and the Court held, That the Plea was not in bar, but he ſhould anſwer over. And a difference was taken when a man demurs upon a Plea in abatement, and when he goes to Iſſue upon it; for if they go to Iſſue upon ſuch Plea, if it be found againſt the Defendant, it is peremptory, and he ſhall loſe the Land, but upon demurrer it is not peremptory, but only an anſwer over, *quod nota.* Mich. 5 Jac. in C. B. *Tompſon* and *Colliers* Caſe. *Brownl.* 1. Part, 138.

Election.

1. *Where upon Grants, the Election ſhall remain of the thing granted in the Granter, and where in the Grantee. And where, and by what Acts, the Election upon Grants ſhall be determined; Where not.*

1. THE Biſhop of *Salisbury* made a Feoffment in Fee to J. S. of a Meſſuage and 17 Acres of Wood, in a great Wood conteyning 10000 Acres, at the Election of the Feoffee and his Heirs: J. S. dyed before Election, and after five Diſcents, his Heir would have made election. In that Caſe, it was adjudged, That the Heir ſhould not have Election. 1. Becauſe he pleaded the Feoffment without Deed; and an Election cannot be annexed to an eſtate without Deed. 2. Becauſe it was an Eſtate which paſſed by Livery, which is certain; and after Livery, the Election doth not remain to make the Freehold, as abeyance. And 2. Becauſe the Election was not made in the life of the parties; and Election ought to be made in the life of the parties; for before Election, there was no property in the Trees, and therefore before Election, they cannot diſcend. Mich. 11 Jac. *Dyer*, 281. The Biſhop of *Salisbury* and *Bullock's* Caſe.

2. If Tenant in tail of a Rent, Advowſon, Tythes, Common, or other ſuch things which lye in Grant, grants them by Deed in Fee, the Grant is not abſolutely determined by his death, but it is in the Election of the Iſſue, to make the Grant voidable, or void: For if he bringeth a Formedon for the Rent, &c. he makes the Grant voidable; but if he doth diſtrein for the Rent, or claim it upon the Land, he thereby determines his Election, and makes it void. *Cook* 3. Part, 84. in the Caſe of *Fines* acc.

3. The Queen had a Rent of 20 l. out of Land, whereof the Husband and Wife were Joynt-Tenants, and gave, granted, remiſed, and releaſed the Rent to the Husband and his Heirs. The Huſband deviſed the Rent. It was the Opinion of the Lord *Dyer*, That the Demiſe was good, and that the ſame ſhall be a Declaration of the Election of the Husband, to have the Deed enure as a Grant, and not by way of extinguiſhment. Quære in that Caſe, If he had not made Election, if his Heir might. Paſc. 15 Eliz. *Dyer* 319.

4. A man was bound to diſcharge or releaſe A. B. ſon and Heir of I. B. of the Wardſhip and Marriage of his body at his full age of 21 years, or before, at the requeſt of the Obligee. It is a Queſtion who ſhall have the Election, if requeſt be made before the full age of 21 years. For if I be bounden to pay 10 l. at the Feaſt of Eaſter next, or before, at the requeſt of the Obligee; It ſeems I have conſented to give the Election to the Obligee. Yet turn the ſentence, and then it ſeems, That I ſhall have the Election; as to ſay, If I pay 10 l. before the Feaſt of Eaſter, at the requeſt of the Obligee, or at the Feaſt of Eaſter; there it ſeems I ſhall have the Election. 2. *Ma. Dyer*, 108. See this Quære Reſolved, upon the Rules of Election, in *Cook* 2. Part, Sir *Rowland Howard's* Caſe.

5. A. ſeiſed of Lands, part in Leaſe for years, with Rent reſerved, part Copyhold, for valuable conſideration, did Demiſe, Grant, Bargain and ſell the ſaid Lands, with all Fines reſerved upon any Demiſe, and to have and to hold after the death of the Bargainor, for 17 years, rendring a Roſe to his Heir; the Deed was acknowledged to be enrolled. And afterwards he Covenanted to ſtand ſeiſed of the ſaid Lands, to the uſe of himſelf, and the Heirs of his body; there was no Attornment to the Bargainee: And afterwards the Bargainor dyed, his Heir within age. In this Caſe, it was Reſolved, That the Leſſees ſhould have the Rents reſerved by the ſaid Bargain and Sale, without any Attornment. For that it was Reſolved. 1. That the Leſſees had Election to take the ſame by Demiſe, or by Bargain and Sale; for when a man for money Demiſeth, Grants, Bargains and ſells his Lands for years, the Owner gives Election to the Leſſee to take it in the one way, or the other; for if the Law ſhould enforce them to take it by Demiſe, then they ſhould loſe the Rents reſerved upon the Leaſes for years. But if the Intereſt paſſeth by Bargain and Sale, then there needs no Attornment, becauſe the Statute of 27 H. 8. of Uſes, executes the Poſſeſſion to the uſe.

And

And the Statute of 27 H. 8. of Enrolments, doth not extend to it, becauſe no eſtate of Freehold paſſeth, but only an eſtate for years. 2. Reſolved, That this Election doth remain, notwithſtanding the alteration by the ſecond Indenture, and notwithſtanding the death of the Leſſor, and that the King be entituled to the Wardſhip: for they had an Intereſt in them preſently, which they preſently might aſſign over, and which the Executors of the ſurvivor of them ſhould have, for here is not an Election to claim ſeveral things by one Title, but to claim one thing by ſeveral Titles; for when the things are ſeveral, the Election ought to be precedent; but when one thing paſſeth, the Election of the Title may be ſubſequent. And in this Caſe, as to the points of Election, theſe Rules were given for Law. 1. When nothing paſſeth to the Feoffee, or Grantee before Election, there the Election ought to be made in the life of the parties; but when an Eſtate, or Intereſt paſſeth, Election may be by them, their Heirs, or Executors. 2. When a thing paſſeth to the Grantee or Donee, he hath Election in what manner he will take it, there the Intereſt paſſeth preſently. 3. When Election is given to ſeveral perſons, there the firſt Election made by any of them ſhall ſtand. 4. When Election is given of ſeveral things, he which is to do the firſt act, ſhall have the Election. 5. If the things Granted be annual things, and are to have continuance for ever, the Election may be to the Grantor, as well after the day as before. 6. A man by his own wrong, may loſe his Election, as if a Feoffment be made of two Acres, the one for life, the other in Fee; if the Feoffee maketh a Feoffment of both, the Feoffor may enter into which of them he pleaſeth, becauſe the Feoffee hath loſt his Election. *Cook* 2. Part, 36, 37, &c. Sir *Rowland Heywards* Caſe.

6. A Leſſee for years of a Barn, and divers Lands determinable upon the death of the Lord *Paget*, granted a Rent of 10 l. *per annum*, by Deed out of the ſaid Barn and Lands to B. for 15 years, with clauſe of diſtreſs. Afterwards the Lord *Paget* dyed. It was Reſolved by all the Juſtices of *England*, That a Writ of Annuity was maintainable for the arrerages after the death of the Lord *Paget*, for there was not an Election given to have one of two ſeveral things, but to have one ſum in one degree as a Rent, and in another, as an Annuity; and preſently by the grant, the thing veſted in the Grantee, and his Election did remain to make it a real thing to charge the Land, or a perſonal thing to charge the perſon, and the death of the Lord *Paget*, was no determination of the Annuity. *Vaughan* and *Wards* Caſe. vouched in *Cook* 2. Part, Sir *Rowland Heywards* Caſe. 36.

8. When a grant is general, and the Law gives to the Grantee two remedies to have the thing granted, then the Grantor by a Proviſo may take away one of the remedies from the Grantee; but when the Grantee hath but one remedy to have the thing granted, there he cannot be barred of that remedy by any Proviſo. *Cook* 1. Part, *Inſtitutes* 144. acc.

8. If a man Mortgages his Lands for mony, and the Money is appointed to be paid to the Feoffee, and before the day of payment, he maketh his Executors, and dyeth, the Mortgagor ſhall pay the money to the Executors: Or if it be limitted to be paid to the Mortgagee, or his Heirs, if he dyeth, then it ought to be paid to his Heirs, but if it be to his Heirs or Executors, there the Mortgagor hath Election to pay it to either. So likewiſe if the Condition be to pay it to the Feoffee, his Heirs, or Aſſigns, and the Feoffee maketh a Feoffment over, it is in the Election of the Feoffor to pay the money, to the firſt or ſecond Feoffee at his pleaſure; and ſo if the firſt Feoffee dyeth, the Feoffor may pay the money, either to the Heir of the firſt Feoffee, or to the ſecond Feoffee at his Election. *Cook* 1. Part, *Inſtitutes*, 210. See *Litt.* Sect. 334. acc.

9. A man makes a Leaſe for life of Lands, rendring Rent, and further binds him and his Heirs to warranty; here the expreſs warranty doth not take away the warranty in Law, for if he in the Reverſion, granteth over his Reverſion, and the Leſſee attorneth, and afterwards he is impleaded, he may vouch the Grantee by reaſon of the warranty in Law, or he may vouch the Leſſor by his expreſs warranty at his Election. And if a man maketh a Feoffment by the word *Dedi*, and with an expreſs warranty in *fait*, he may uſe the one or the other at his Election. *Cook* 4. Part, 81. in *Nokes*'s Caſe. acc.

10. If a man who is condemned in Debt or damages, have Lands in divers Counties, the Plaintiff at his Election, may pray an *Elegit* into each County for the whole Debt, or damages; or he may at his Election make diviſion of his Debt; and *Quod* 10 l. to have execution in one County, and *Quod* other 10 l. in another County at his Election. 4, and 5. *Ma. Dyer.* 162. acc.

11. The Father granted a Rent-charge out of certain Lands to his ſon in Fee, the Rent was behind, the Father dyed, the Land diſcended to the Son, by which the Rent was extinct by Act in Law. The Son brought an Action of Debt againſt the Executors of the Father, for the arrerages encurred in the Fathers life time. It was adjudged in that Caſe, That for theſe (as arrerages of a Rent) no Action did lye, but for the arrerages of an annuity, an Action did lye: And although that by the diſcent of the Land to the Grantee, being Heir to the

Grantor

Grantor, aſwell the Annuity as the Rent was determined, and that the original Election was annexed to an Inheritance: yet in as much as the Inheritance in both was determined by Act in Law, which will do no wrong; for that cauſe, It was adjudged, That the Election which he hath made by bringing an Action of Debt againſt the Executors of his Father ſhall remain; for the Son may chooſe whether he will have a Writ of Annuity or Diſtrein. *Cook* 4. Part, 49. in *Andrew Oyſell's* Caſe.

12. If three Coparceners be, upon Partition made by them, the Eldeſt Siſter ſhall have Election which part to have; but if ſhe her ſelf maketh Partition, ſhe loſeth her priviledge of Election, and ſhall take laſt. *Cook* 1. Part, *Inſtitutes*, 166.

13. In Debt the Plaintiff declared upon diverſe contracts, *viz.* That he had ſold to the Defendant ſuch Merchandizes, for ſo many Portagues, and ſuch Merchandizes for ſo many Ducats which *in toto* amounted to 100 l. Sterling: which Sum he demanded in Sterling Money, and not in Ducats or Portagues, according to the Contract, and upon that the Declaration the Defendant did demurr in Law: And in that Caſe, Judgment was given for the Plaintiff; for that it was in the Election of the Plaintiff to demand his Debt in which of theſe Coyns he pleaſed, either in the proper Coyn of the Contract, or of the Sterling, ſcil. the currant Money: And upon a Writ of Error brought, the Judgment was affirmed. Mich. 29 Eliz. in Exchequer, *Wilſadge* and *Davidges* Caſe, *Leon.* 41.

14. In Debt upon an Obligation the Caſe was: A. was bound to B. in a Bond, upon Condition that the Obligor ſhould pay to B. his Executors, *&c.* at the choice and Election of the ſaid B. within a Month after the Death of G. 30. l. or twenty Kine: The Defendant pleaded, That the Plaintiff within the Month after the Death, *&c.* did not make an Election, upon which the Plaintiff did demurr: It was holden by the Court, That it was a good Plea in Bar; for the Obligor is not bounden to make Leader both of the Money and the Kine, but the Obligee is bound at his perill to make Election within the time limited; and in that Caſe, It was holden, That the Election of the Plaintiff ought to precede the tender of the Defendant. Sir 18 Eliz. 4. the Lord *Liſle's* Caſe. Mich. 27 Eliz. in Com. Banc. *Baſſet* and *Kerne's* Caſe, *Leon*, 69, 70.

15. A man made a Leaſe to J. S. for 40 years, if the Leſſor ſo long lived, tendring Rent at the four uſual Feaſts, or within thirteen weeks after every Feaſt by equal portions: After one of the Feaſts, *ſcil.* the Annunciation, the Leſſor dyed, and his Executors brought an Action of Debt for the Rent due at the ſaid Feaſt: It was Reſolved, That the Action would not lye, becauſe the Payment being limited in the diſjunctive, the moſt beneficial ſhall be taken for the Leſſee, and before that day the Leſſee is diſcharged by the Act of God. 2. Becauſe that when the Leſſee doth not make Payment at the firſt day, the Election is paſt, and then the Rent is abſolutely due at the ſecond day, and the ſecond day is aſwell parcell of the Reſervation as the firſt day. *Cook* 10. Part, 128. *Clann's* Caſe.

16. Note, It was agreed and Reſolved by the whole Court, That whereas a man was ſeiſed of a Mannor, & alienced it, except one Cloſe, parcel of the Mannor called *Newdick*, and there were two Cloſes, parcel of the ſaid Mannor, called *Newdick*; the one containing nine Acres, and the other containing 3. Acres: That the Allienee ſhould not chooſe which of the ſaid Cloſes he would have; but the Allienor or Feoffee ſhould have the Election, which of the ſaid Cloſes ſhould paſs. M. 29 Eliz. in C. B. Sir *Thomas Lee's* Caſe, *Leon*, 268.

17. In Debt upon an Obligation, the Condition was, That if the Obligor do deliver unto the Obligee certain Obligations which the Obligor hath of the ſaid Obligee, or elſe do ſeal ſuch a Releaſe as the ſaid Obligee ſhall deviſe before *Mich.* that then *&c.* The Defendant pleaded, That before the Feaſt of *Michaelmas* the ſaid Obligee did not tender unto him any Acquittance: It was adjudged in this Caſe, That there was not any Election in the party in this Caſe, for that the making of the Acquittance reſteth in the Will of the Obligee, and ſo the Obligee hath not Election. Hill. 43 Eliz. in C. B. *Gretingham* and *Ewer's* Caſe, *Goldeſbr.* 142.

18. Debt againſt an Adminiſtrator for Rent behind, after the death of the Inteſtate: they pleaded, That before the Rent was behind, one of the Adminiſtrators aſſigned all their Intereſt to J. S. of which the Plaintiff had notice, and accepted the Rent by the hand of the Aſſignee before the day in which the Rent in Queſtion was due: It was adjudged in that Caſe, That the privity of Contract as to the Action of Debt, was determined by the death of the Leſſee, and therefore after the death Debt did not lye againſt the Adminiſtrators, and in that Caſe, It was adjudged, That when the Leſſor hath Election to charge the Leſſee or Aſſignee, then if he accept of the Rent of the Aſſignee, he hath determined his Election, and ſhall not have Debt againſt the Leſſee after the Aſſignment. Mich. 41 Eliz. in C. B. *Marrow* and *Turpin's* Caſe, *Cook* 3. Part, 24.

19. A man made a Leaſe for years, and afterwards bargained and ſold the Reverſion to another and his Heirs, and before the enrollment of the Deed he levyed a Fine out of the ſaid Lands to him and his Heirs, and afterwards the Deed was enrolled within the ſix Months: It was ſaid by ſome of the Juſtices, but not Reſolved, That admit that the Fine was levyed, and the Indenture of Bargain and Sale were at one and the ſame time, that the Bargainee had Election to take Reverſion, either the one way or the other. *Cook* 4. Part, 71. *Hinde's* Caſe.

20. A Biſhop made a Leaſe of the Manner of D. to A. and B. for ſixty years, without Impeachment of Waſte rendring Rent, Provided, That if the ſaid A. and B. dyed within the Term, that preſently after the Deceaſe of the ſaid A. and B. and the longeſt liver of them, that it ſhould be lawfull for the Biſhop and his Succeſſors to re-enter: A. dyed, B. ſurvived, the Biſhop dyed; the Succeſſor leaſed the Manner to C. *Habendum omnia poſt ſuæ per mortem*, ſurrender, or forfeiture of the ſaid B. it ſhould be void: In this Caſe amongſt other Points, It was Reſolved, That the ſecond Leaſe did reſt preſently in Intereſt, and did not depend upon contingency to take effect in Poſſeſſion at the end of the firſt Term, if by none of theſe former means the firſt Leaſe became void in the mean time, and therefore It was Reſolved, That if a man makes a Leaſe for years, to begin after the ſurrender, forfeiture, determination, or end of a former Leaſe, the Leſſee hath not Election to have the ſecond Leaſe either upon ſurrender, forfeiture, or ends which he pleaſeth, but which of them ſhall firſt happen; the ſecond Leaſe which before conſiſted in Intereſt, ſhall begin in Poſſeſſion. See *Cook* 6. Part, 36. The Biſhop of *Bathe's* Caſe.

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2. *Where a man may have two or three, or ſeverall Actions for the Recovery of his Right, or other things; he may at his Election bring what Action he pleaſeth, where not: And where the Actions are to be brought, Where not; And of other matters concerning Election.*

1. IN an Accompt brought, the Defendant ſaid, That he never was his Receivor to render Accompt: It was found, That the Mony was delivered to the Defendant upon condition, That if he made ſuch aſſurance to the Plaintiff of certain Lands, that then he ſhould retein the main to his own uſe, and if not, that he ſhould rebail it: It was holden in that Caſe, That the party might have either an Action of Debt for the Mony, or an Accompt: For when a man hath received Mony, and doth not employ it according to the Truſt and Condition, he is keeper of the Mony to my uſe, as my Debtor if I pleaſe, and it is the greater prejudice to me if I bring my Action of Debt for the Mony becauſe by it I ſhall recover but the bare Money which I delivered; but if I bring an Accompt againſt him to whom I delivered the Mony, beſides the principal Sum, I ſhall recover the profit and encreaſe of it, and when a man hath two Actions by the Law given him, he may chooſe to bring which Action he pleaſeth. Trin. 28 H. 8. *Dyer*, 20, 21. and 57. acc.

2. The Lord *Monteagle* brought Action upon the Caſe againſt the Counteſs of *Worceſter* ſuppoſing, That whereas he was poſſeſſed of a Chain of Gold of the price of 100 l. that he loſt it ſuch a day, in ſuch a Pariſh in *London*, and it came to the Defendant's hands, and that ſhe knowing it to be the Plaintiff's Chain, ſold it to diverſe Perſons unknown, and converted the Money to her own uſe: The Defendant pleaded that ſhe did not ſell it *modo et formâ*, upon which the Plaintiff demurred, and one cauſe was becauſe it was in his Election to have this Action becauſe of the ſuppoſed Miſdemeanor: But it was holden by the Lord *Dyer* that the Action upon the Caſe did not lye, becauſe the Plaintiff had his Remedy by Action of Detinue, for he had not ſhewed the Sale to be in Market overt to change the property. Mich. 2. Ma. *Dyer*, 121. The Lord *Monteagle* and the Counteſſe of *Worceſter's* Caſe.

3. If a man by his Deed granteth a Rent-charge unto another, and the Rent is behind, the Grantee may chooſe whether he will bring a Writ of Annuity or Diſtrein for the Rent behind; but he can make his Election but once: for if he recover in a Writ of Annuity, he ſhall never after diſtrein: Or if he doth diſtrein and avow in a Court of Record, he ſhall never after bring a Writ of Annuity, becauſe an Avowry in a Court of Record, being in the Nature of an Action, is a determination of his Election before any Judgment given. *Cook*, 1. Part, *Inſtit.* 445. See *Littleton*, 219. acc.

4. If a man be diſſeiſed by an Enfant, who makes a Feoffment in Fee of the Lands, and the Feoffee dyeth ſeiſed, and his Heir enters, the Diſſeiſor being within Age: In this Caſe, It is in the Election of the Diſſeiſor to have his Writ of *Dum fuit infra ætatem*, or a Writ of Right againſt the Feoffee; or otherwiſe he may make his Entry into the Lands without any ſuit. And ſo note. That many times the Law doth give a man ſeverall Remedies, and of ſeveral kinds, as in this Caſe, by Action and by Entry. *Cook* 1. Part, *Inſtitutes*, 278. acc.

5. If

5. If a Feoffment be made to two, and to the Heirs of one of them, and he that hath the Fee dyeth; and afterwards the Tenant for Term of life dyeth: In this Case, the Heir hath Election to have a Mortdancester, or a *Scire facias*, or a Formedon in the Remainder, at his pleasure. *Cook* 2. Part, 61. in *Wiscot's* Case.

6. If there be Lord and Tenant by Knight's Service, and the Tenant dyeth, his Heir within Age: In that Case, the Lord hath Election either to seize the Ward, or to distrein for the Services, and wave the Ward; by *Popham* Chief Justice, 1 E. 3. acc. But if one Lord seiseth the Ward, and the other Lord distreineth for the Services, he who first seised or distreined shall bind the other. *Cook* 2. Part, 69. in *Tooker's* Case.

7. Lessee for years of a Close of Land, sowed the same with Corn, and at the request of J. S. bargained and sold the said Corn to J. S. growing upon the said Close, who promised to pay him for the said Corn at *Michaelmas* next, 16 s. And for not Payment thereof, he brought an Action upon the Case upon his promise: And in this Case, It was Resolved, That although an Action of Debt did lye upon the Contract, yet the Bargainor might have the Action upon the Case, or Debt, at his Election. 1. Because there are infinite Presidents and Judgments in the Case: And 2. Because every Contract executory doth import an Assumpsit, and therefore if a man sells Goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much Money; both parties may have Debt or Assumpsit, for that the mutuall agreement executory of both doth import in it self, aswell a reciprocall Action upon the Case, as an Action of Debt: And in this Case it was said and Resolved, That an Action upon the Case is aswell a formed Action conteined in the Register, as an Action of Debt, and in divers Cases in the Register an Action upon the Case lyeth, although the Plaintiff might have another Action in the Register, as if a man hath a Manor within any Honor, and hath a Leet within his Honor, if he or his Tenants be distreyned by the Lord of the Honor, he who is so distreined may have a generall Action of Trespasse, or a special Action upon the Case. *Cook* 4. Part, 93, 94. *Slade's* Case, *Register*, 103.

8. A man granted a Rent-charge out of his Lands by Deed, in which there wanted these words [for him and his Heirs], the Grantor dyed, and the Grantee brought a Writ of Annuity against the Heir, and afterwards discontinued his Suit and distreined: And it was adjudged that he might well distrein, for that the Election to make it an Annuity was determined by the death of the Father. M. 18 Eliz. *Dyer*, 344. acc.

9. A man sued A. before the Mayor of *London*, and a third Person being so much indebted to the Defendant, by the Custom of *London* of Attachment he is condemned: It was holden, That notwithstanding this Judgment, yet till the Execution the Plaintiff might resort, and have Judgment and Execution against the Defendant himself: Also it was holden, That he might sue the third person for his Debt, notwithstanding the Judgment unexecuted, all which was certified by the Recorder of *London*. Hill. 7 E. 6. *Dyer*, 82.

10. The Servant made a Bill, testifying the buying of certain Goods to the use of his Master, but the Bill was not sealed, by which Bill the Servant bound himself to pay the Debt: In an Action of Debt brought against him, It was holden, That the Action would not lye, but the party might have an Action upon the Case against the Servant, for that it was the Debt of the Master, and the Assumpsit of the Servant. Trin. 6 Eliz. *Dyer*, 330. *Alford's* Case.

11. If there be Lord and Tenant, if the Lord encroacheth other Services than such as are due to him, as Homage, Escuage, or the like; In such Case, the Tenant may avoid such encroachment in an Avowry made by the Lord for such Services, because the Tenant may traverse the Tenure, as to say, That he holds by Fealty and 20 s. Rent, without that that he holds by Homage, Fealty, and Rent, as in the Avowry is set forth: Or otherwise, he may bring a Writ of *Ne injuste vexes*, at his Election. See *Fitzh. N. Br.* 10. acc.

12. A Writ of Deceit may issue out of the Court of Common Pleas, or out of the Chancery at the Election of the Plaintiff: as if a man lose his Land by default, in a *Precipe quod reddat* brought in the Common Pleas, the Tenant may have a Writ of Deceit, alledging that he was not summoned out of the Common Pleas, or out of the Chancery: And so it is, if Tenant in Tail, Dower, by the Courtesy, or for life, lose in a *Precipe quod reddat* by default where they were not summoned, they may have a Writ of Deceit, or a *Quod ei deforceat*, at their Election. See *Fitzh. Nat. Br.* 99. & 155. acc.

13. Sir *Andrew Corbet* seised of diverse Lands holden *in Capite*, devised parcell of them to diverse persons, to have and to hold to them, and to the Survivor of them, untill such time and term as 800 l. by them or by their Executors be levyed, and the same to employ for the preferment of his Daughters, and dyed: His Son and Heir took the Will into his hands, and entred into the Lands, and received the profits of them during his life; afterwards the Devisees entred and received the profits, and levyed 600 l. according to the Will. In that Case, amongst other Points, It was

Reſolved, That when the Deviſees are expulſed by the Entry of the Heir, that it was in the Election of the Deviſees, to have an Action to recover the mean profits, as to re-enter and hold the Land over untill the entire Sum were levyed. *Cook* 4. Part, 81, 82. Sir *Andrew Corbet's* Caſe.

14. In an Action of Trover and Converſion for the cutting down of a Tree, and carrying away a Load of Bark of the ſaid Tree: The ſole Queſtion was, If a Stranger cuts down a Timber Tree in the time of the Leſſee for years, and carryes the Bark thereof away, Whether the Leſſor during the ſaid Term, may have an Action of Trover for it againſt him who cut it down, or be put to take his Remedy againſt the Leſſee by Action of Waſte, and the Leſſee to have his Remedy by Action of Treſpaſſe or Trover againſt him that cut it down, and whether the Leſſor at his Election may puniſh the one or the other. Some of the Juſtices were of Opinion, That the Leſſee alone during the Term ought to have an Action for carrying away of it, and not the Leſſor, for that the Poſſeſſion and Property was veſted in him during the Term, and is not loſt by cutting down of it by a Stranger. And he is chargeable in Waſte to anſwer treble damages to the Leſſor and ſo the Leſſor having ſufficient Remedy, it is reaſon that the Leſſee have the Action againſt the Stranger; and the Recovery by the Leſſor in an Action of Trover is no Barr for the Leſſee to plead in an Action of Waſte. But the Opinion of the greater part of the Juſtices was, That the Action of Trover did well lye for the Leſſor againſt the Stranger, and that he hath Election to ſue the Leſſee for the Waſte, or him who cut down the Tree, for the property generall is alwayes in the Leſſor, and the Leſſee for years hath but a ſpecial property in it during the time it is growing, & not otherwiſe; and when it is ſevered, the property which the Leſſee had is loſt, and then the property thereof is ſole in the Leſſor, ſo as he may have an Action for carrying it away, or an Action upon Trover and Converſion. Hill. 19 Jac. in B. R. *Berry* and *Heard's* Caſe, *Cro.* 1. Part, 176. See *Cook* 4. Part, 62. *Cook* 11. Part, 48, & 81. acc.

15. A. brought Treſpaſſe againſt B. in the King's Bench, and declared, That he levyed a plaint of Debt in the Counter of *London* againſt one W. and upon Proceſs he was arreſted by J. S. a Serjeant, and that B. the Defendant did *vi et armis*, reſcue him, whereby he loſt his Debt, and upon Non-guilty, and Verdict for the Plaintiff, Judgment was given, *Quod defendens capiatur*: Whereupon Error was brought in the *Exchequer*-Chamber, and the Judgment was affirmed; for although the Nature of Action is properly upon the Caſe, as touching the Plaintiff's damages or loſs of Debt, yet it being done with force, & that force being done (though not to the Plaintiff himſelf) to the Servant, who was Miniſter as well for him as to the Court, he may take his Action *vi et armis*. Paſch. 14 Jac. in B. R. *Wheatley* and *Stone's* Caſe, *Hob.* 180. and ſo was it adjudged: Mich. 35 Eliz. Rott. 169. in B. R. in *Aſhell* and *Ridge's* Caſe; and M. 43 Eliz. Rot. 468. in *Pawling* and *Marriot's* Caſe.

16. An Array made by the Predeceſſor of the Sheriff was challenged and quaſhed for Couſenage: It was Reſolved by the Juſtices, That it was at the Election of the Plaintiff, to have a *Venire facias* to the Coroner, or elſe to the new Sheriff. Mich. 3 Eliz. *Dyer*, 188. See 22 H. 6. 61. 18 E. 4. 1. acc.

17. In Ejectione firmæ, the Caſe was, *Charles Howard* Lord Admirall, Tenant in Tail of Land in conſideration of a Marriage betwixt *W. Howard* his Son, and *Eliz.* the Daughter of the Lord St. *John*, covenanted to ſuffer a Recovery of the ſaid Lands to the uſe of the ſaid *W.* and *Eliz.* and the Heirs Males of the Bodie of *William* with diverſe Remainders over. The Marriage took effect, *W.* entred by the aſſent of his Father, and occupied it Will, and 4 Jac. he demiſed the Lands to A. and B. for 21. years rendring Rent, the Leſſees entred; Afterwards *Charles* Admiral, and *William* his Son, (the firſt Indentures not being executed), levy a Fine of thoſe Lands, to the uſe of the ſaid *William* and *Elizabeth* for the Joynture of the ſaid *Elizabeth*, and to the Heirs of the body of the ſaid *W.* with Remainders over. Afterwards *William* dyed without Iſſue Male; A. dyed, B. being poſſeſſed by Indenture enrolled, ſold the Lands to *Charles* Lord *Howard*, Son of the Admiral, and his Heirs, who dyed: *Charles* now Earl of *Nottingham* being his Son entred, and the Defendant in the Right of *Elizabeth* entred, clayming it as her Joynture; and Judgment being given for the Plaintiff againſt the Title of the Joyntreſſe in the Common Pleas: Error was brought in the King's Bench: And the main Queſtion in the Caſe was, Whether by any of the Acts done there was a Diſſeiſin committed to *Charles* Earl of *Nottingham*, *Nolens volens*? and who ſhould be the Diſſeiſor and Tenant to the Free-hold: And it was the Opinion of the Court in this Caſe, That the Law will not conſtrue or impute any Act to be a Diſſeiſin againſt *Charles* Earl of *Nottingham*, unleſſe at the Election of the Earl, when as none of the parties intended it to be a Diſſeiſin, nor to ouſte him of his poſſeſſion: And it was ſaid, That it was at the Election of him to whom the wrong was done, if he will allow him to be a Diſſeiſor, or himſelf out of poſſeſſion; and it was ſaid, If one receives my Rent, it is at my Election if I will charge him with a Diſſeiſin, and bring an Aſſiſe, or have an Action againſt him;

and

and ſo if an Enfant makes a Leaſe for years rendring Rent, and the Leſſee enters, it is at the Election of the Enfant to charge him in an Aſſize, or to bring an Action of Debt for the Rent; And in the principal Caſe, It was holden, That there was no Act done to make a Diſſeiſin, and ſo the Joynture of *Elizabeth* remained good in Law, and the Judgment given in the Court of Common Pleas was reverſed. See the Caſe at large, Hill. 7 Car. in B.R. *Blondin* and *Baugh's* Caſe, *Croke* 1 Part, 220, 221, 222.

18. In Debt upon an Obligation, the words of the Obligation were, *Noverint univerſi &c. ad quam quidem ſolutionem bene et fideliter faciendam, obligamus nos, vel quemlibet noſtrum*; and Whether it ſhould be a joynt Bond or ſeveral at the Election of the Plaintiff, was the Queſtion? It was objected, That the Action ſhould be brought againſt both, and at the moſt the Plaintiff had but an Election; for the word [*vel*] could not be taken for [*et*], and then if he had an Election, he had made that already, for the Defendant hath pleaded and averred that it was made by two joyntly by the appearance. But the Opinion of the Court was, That the Obligation was joynt or ſeveral, 7 H. 4. 66. acc. The Obligation was *nos vel alterum noſtrum*, and the Plaintiff brought ſeveral *Precipes*, and adjudged good, that it might be joynt or ſeverall: And the Court was clear of Opinion, That there was no Cauſe to make Election untill the Bond was perfected, and therefore though one deliver it at one time, and the other at another, yet the Plaintiff may have a Joynt *Precipe* in Wiſh; for the Election is in bringing the Action; and the words *vel* and *et* are but Synonymaes. *Plow. Com.* 286. 21 E. 4. 29. M. 11 Jac. in Com. B. *Hankinſon* and *Sandiland's* Caſe, *Brownlow*, 1 Part, 121.

19. In Debt againſt J. P. as Adminiſtrator of F. the Caſe was, F. was bound in a Bond of 30 l. to the Plaintiff, and was alſo bound to W.P. in 80 l. F. dyed Inteſtate, Adminiſtration of his Goods was committed to J. P. the Defendant, W. P. alſo made the ſaid J. P. his Executor and dyed, and the Defendant in the Action brought pleaded that F. was endebted to the ſaid W.P. and that he was as Executor, and that he had Goods of the ſaid F. to ſatisfy the ſaid Debt which he detained, and that over that he hath not to ſatisfy the Plaintiff: Upon which Plea the Plaintiff did demurr, for that the Defendant doth not plead that he hath made his Election to retain the ſaid Goods for the ſatisfaction of his own Debt before the Action brought: And it was the Opinion of all the Juſtices, That he ought to make his Election before the bringing of the Action, otherwiſe he ſhall be charged with the other Debt. See *Plow. Com.* 184. a. Hill. 8 Jac. in C. B. *Burdett* and *Pixe's* Caſe, *Brownl.* 2 Part, 50.

20. A man made a Leaſe for two years, at *Michaelmas*, rendring 2 s. Rent during the Term, after the Annunciation, and Michaelmas, or 10. dayes after. At the Feaſt of *Michaelmas* in the laſt year, the Rent was not paid: The Queſtion was What Remedy the Leſſor hath for the Rent the laſt half year? It was ſaid, as this Caſe is, The Leſſee hath Election to pay either upon the Feaſt, or the tenth day after, and that is for the benefit of the Leſſee; then when he hath made his Election not to pay at the Feaſt of *Michaelmas*: It is clear, the Leſſor hath no Remedy by way of diſtreſſe, for the Term is ended before; and by Action of Debt upon the Contract he hath no Remedy, for the Contract is, That the Rent ſhall be paid yearly during the Term; then when the Term is ended the Contract is determined: And of that Opinion was the whole Court; and it was ſaid, That if a man makes a Leaſe at *Michaelmas* for a year, rendring Rent only at our *Lady* day, and the ninth of *October*, which is after *Michaelmas*, that the Leſſor hath not any Remedy for the Rent of the laſt half year, for that is not reſerved to be paid yearly according to the Contract. Hill. 7 Jac. in Com. B. *Barwick* and *Foſter's* Caſe, *Brownl.* 2. Part, 201.

21. Note, It was ſaid and agreed in the Caſe of *Winch: Corble*, and the Biſhop of *Wincheſter*, Paſc. 14 Jac. in C. B. That a thing may be void or not void, at the Election of him whom it concerns, and therefore if a man having one Benefice taketh another without diſpenſation, though he be not inducted, and ſo not within the Statute of 21 H. 8. yet the Patron of the firſt Church may take it as void, and preſent preſently, or may leave it as full untill a Sentence of deprivation. *Hob.* 166. acc. See *Cook* 4 Part, *Holland's* Caſe.

22. In Debt, The Plaintiff declared upon a Leaſe for years made by him to the Defendant reſerving Rents, and for the Rent behind the Action was brought: The Defendant pleaded, That the Leaſe in the Declaration mentioned was made by Indenture, reſerving the Rent *prout*, and with condition, that if the Rent be behind, then the Leaſe to be void, and doth allledge the default of Payment of the Rent, and ſo the Leaſe determined. The Plaintiff demurred in Law upon the Plea: It was Reſolved in this Caſe, That the Leaſe is not void without a Demand, which therefore the Defendant ſhould have laid actually, and for want of that, his Plea was holden to be naught; and ſo it is at the Election of the Leſſor, and his Heir, to continue or avoid the Leaſe in ſuch Caſe. Hill. 18 Jac. in C. B. Rot. 2861. *Hanſon* and *Norcliff's* Caſe, *Hob.* 331.

23. In Dower brought by Husband and Wife, againſt B. W. of Lands *ex dotatione* of H. her firſt Husband: The Tenant pleaded that H. being ſeiſed of the Manor of W. did make a Feoffment thereof to the uſe of himſelf and his then Wife for their lives, for the Joynture of the ſaid Wife, the Remainder to one C, and dyed; and that his ſaid Wife held her ſelf in by Survivor, claiming her ſaid Eſtate. The Defendant replyed, That before the ſaid Feoffment made, the ſaid H. being ſeiſed of the ſaid Manor, did covenant to ſtand ſeiſed thereof to the uſe of himſelf in Tail, and afterwards made the Feoffment *prout*, and then dyed without Iſſue; and that the Wife entred, and was ſeiſed by force of a Remitter, To which the Tenant rejoyned, That ſhe held her in, claiming her Eſtate by the Feoffment in Joynture, and demanded Judgment, Whether againſt that claim ſhe could be remitted; upon which Plea the Defendant demurred. It was the Opinion of the Court in this Caſe, That the Remitter to the Woman could not work till her Husband was dead without Iſſue, becauſe till then the Poſſeſſion and Right did not meet together in her; Alſo the Court held, That becauſe both the Eſtates were made unto her during Coverture, that therfore regularly upon the death of her Husband ſhe might claim which Eſtate ſhe would, according to the Books in *Dyer*, 3 Eliz. 191. and 18 Eliz. 351. Hill. 10 Jac. in C. B. Sir *John Shirley* and his Wife, and *Barbara Wood's* Caſe, *Hob.* 71.

24. In Debt, The Plaintiff declared upon a Recogniſance taken before *Hobart* Chief Juſtice at Serjeants Inn in *Fleet-ſtreet London* out of Term, and layed his Action in *London*: Whereupon the Defendant demurred. The Queſtion was, Whether the Action ought to be brought in *Middleſex*, where the Recognizance is recorded, or in *London* becauſe the Entry of the Record is, that the Recognizance was acknowledged before the Chief Juſtice at Serjeant's Inn *Fleet-ſtreet*, *London*, out of Term ſuch a day. In this Caſe, It was agreed 1. That the ſeverall Judges may take Recognizances in any part of *England*. 2. That though it were not a perfect Record till it were entred upon the Roll, yet when it is entred, it is a Recognizance from the firſt acknowledgment, and binds the Perſons and Lands from that time. 3. It was holden, That becauſe in this Caſe, The Inrolment of the Record doth expreſs that the Recognizance was taken at the time and place aforeſaid, by which it was a Record *ipſo facto* then and there, and the Inrolment is but a Complement and Conſummation of the ſame, therefore becauſe both do concurr to the making of it a perfect Record: It was holden, That the Action might be brought in either County at the Election of the party, and the Chief Juſtice held, That it may be in *London*, as the firſt and more worthy part of the Act. See *Brown.* 5 Ma: *Lew.* 85. A *Scire facias* upon a Recognizance ſhall be directed to the Sheriff of *London*, and not of *Middleſex*. But it was holden, That if the Entry of the Record were generall, that the Recognizance was taken before the Chief Juſtice, it ſhould be underſtood in Court, and then the Action were to be brought in *Middleſex*. Trin. 14 Jac. in Com. Banc. *Hall* and *Winchfield's* Caſe, *Hob.* 195, 196.

25. W. brought a *Scire facias* againſt C. upon a Recognizance of Bail of 600 l. for one D; and ſhewed, That he had Judgment againſt D. M. 4 Jac. and that he did neither render his Body, nor ſatisfy his Debt: The Defendant pleaded, That after the Judgment, ſcil. 23 *Jan.* 4 Jac. D. came into Court, and rendred his Body to the Fleet, in execution and diſcharge of his Bail, and that the Plaintiff did refuſe to take him in execution: The Plaintiff denyed the yielding of his Body, upon which Iſſue was joyned. It was Reſolved by the Court, That this was ill pleaded, for the yielding of his Body being an Act in Court, and in diſcharge of his Bail, which is of Record, muſt be of it ſelf of Record, and therefore ought to be concluded *prout patet per* Record; and the other Plea ſhould have been, *Nul tiel Record*. But the truth of the Caſe was, there was no Record entred of it; but it was proved by Oath, That D. came in for that and other cauſes, and was committed to the Fleet, and afterwards ſet at large: And it was holden in this Caſe, That if the Plaintiff or his Attorney be preſent, he muſt make Election to take him in Execution, or to refuſe him, whereof Entry is alſo to be made; but if the party be abſent, then he muſt not be diſcharged, becauſe the time of bringing him is uncertain, for they receive him if he be brought in at any time before the *Scire facias* againſt the Bail, or upon the Retorn of it, and therefore he muſt be committed, that the party may have time for his Election: The principall Caſe was ended between the parties arbitrably by the Chief Juſtice, who gave 20 l. to W. from C. the Bail, and left him nevertheleſs his Remedy, as D. the principal for his whole Judgment. Mich. 14 Jac. in C. B. Rot. 2617. *Welly* and *Canning's* Caſe, *Hob.* 210.

26. In an Action upon the Caſe, upon an Award, the Caſe was. The Award was, that the Defendant ſhould pay to the Plaintiff 5 l. or 3 l. and Coſts of ſuit in an Action of Treſpaſs betwixt the Plaintiff and the Defendant, as appears by a Note under the Plaintiff's Attorney's hand, *ad libitum Defendentis* &c. The Plaintiff did not averr that a Note was delivered by the Attorney of the Plaintiff to the Defendant: The Defendant pleaded *Non Aſſumpſit*, and it was found for the Plaintiff. It

was

was moved in Arrest of Judgment, for the reason before: It was the Opinion of all the Court, That the Defendant in this Case ought to have the Election to pay the one or the other, but in this Case he is to have Notice: And if the Case had been, That the Plaintiff himself had been to deliver the Note, then without Question there ought to be Notice; and here the Attorney is not a Stranger, but is a Servant to the Plaintiff: *Bank* Chief Justice doubted whether Judgment ought to be stayed or not, but agreed that the Defendant hath Election in this Case, and he said he agreed, That where a thing is to be done by the Plaintiff, there no Notice ought to be given; but otherwise, in Case of a Stranger: But the Question here is, Whether the Attorney be a Stranger here or not? And he said he was of Opinion, That it is not in the Power of the Plaintiff to compell him to bring the Note, and is all one as a Stranger; and therefore the Defendant ought to seek the Attorney to deliver the Note unto him: It was adjourned. Trinit. 17 Car. in C.B. *Dewell* and *Masons* Case, *Marsh.* 108, 109.

27. A. brought Debt against B. as Heir to J. S. his Father, and declared upon an Obligation made by J. S. to the Testator of the Plaintiff, in which he bound him and his Heirs: The Defendant demanded Judgment of the Writ, because J. S. made a Will, and made his Wife his Executrix and dyed, and that she proved the Will, and administred, and afterwards dyed Intestate, and Administration of her Goods was committed to J. D. who administred, and had Assets in his hands to pay the Debt: It was holden by the Court to be no Plea, because it is in the Election of the Plaintiff to have Debt either against the Heir, or against the Executors of the Obligor. Mich. 4 Eliz. *Dyer*, 204. *Capell's* Case. See *Plowd. Com.* 439. a. acc.

28. After the Death of the Lord *Powis*, It was found by Office that he dyed seised of Lands holden of the Queen *in Capite*, and that one *Vernon* was his Cousin, and Heir within Age: *G. Gray* his Bastard tendred a Traverse that he dyed not seised, and that *Vernon* was not his Heir, afterwards *Vernon* came of full Age. It was a Question, Whether he should sue a special Livery, or not? And it was the Opinion of the Justices, That it was in the Election of the Queen to drive him to sue a general Livery, notwithstanding the Statute of 33 H. 8. and that the Land is of the value of 100 l. *per annum*: And it was holden, That if G. did not proceed with his Traverse, or that it was not found for *Gray*, that then *Vernon* might proceed with his Livery, 23 Eliz. *Dyer*, 377. acc.

29. The Queen granted to the Mayor and Burgesses of *Chipnam*, the Moyety of a Yard-Land in a great Waste called *Anddelsdown*, without any certain Description where it lay, or where or how bounded: Afterwards the Queen granted the Waste to Sir *Walter Hungerford*. The Mayor and Burgesses by Warrant of Attorney under their Seal authorize A. their Attorney, to enter in their behalf into the Waste, and to make Election of the said Moyety, who did accordingly: It was holden in this Case, 1. That the Grant to the Mayor &c. was utterly void, and that onely not against the Queen, but against her Patentee. And it was further holden by the Court, that if a Common Person had made such a Grant which ought to be reduced to certainty by Election, the Corporation to whom the Grant was made should not make their Election by Attorney. Trinit. 27 Eliz. in *Banco Regis*, Sir *Walter Hungerford's* Case. *Leon.* 30.

30. In Debt brought upon a Recognizance by *Thomas Leigh* against *John Hanmer*, The Case was this; *Rowland Leigh* seised of diverse Mannors and Lands had Issue *Elizabeth* his Daughter and Heir, and 17 Eliz. granted *Custodiam, Gubernationem, et Maritagium* of the said *Elizabeth* to *Thomas Leigh*, who 19 Eliz. granted the Custody, Government, and Marriage to Sir *John Spencer*, who granted the same over to the Defendant; by which last Indenture, the Defendant *John Hanmer* covenanted with the said *Thomas Leigh*, That *Thomas Hanmer* his Son and Heir *maritaret et in uxorem duceret dictam* Eliz. *ad vel antequam dicta* Eliz. *et dictus* Tho: *implerint suas seperales etates* 14 *annorum, si dicta* Eliz. *ad id condiscendere et agreeare vellet.* 8. *Sept.* 20 Eliz. the said *Thomas Hanmer* took to Wife the said Eliz. the said *Thomas* being then of the Age of thirteen years, and the said *Elizabeth* of nine years; and afterwards 22 Eliz. *Thomas Hanmer* disagreed to the said Marriage: The Question was, If this Marriage had by the manner, and afterwards renounced, was such a Marriage as was intended by the Covenant? It was Resolved, That it was; for it was Resolved, That it was in the Election of *John Hanmer* the Defendant to procure this Marriage, *scil*, That his Son take to Wife the said *Elizabeth*, at which of the said two times he will; which Marriage being executed accordingly, he is not bounden for the continuance of the said Marriage, but the continuance thereof ought to be left to the Law, which giveth the parties Liberty [to continue the Marriage by agreement, or to dissolve it by disagreement, and so the Covenant was not broken; and Judgment was given against the Plaintiff. Pasch. 29 Eliz. in Com. Banc. *Leigh* and *Hanmer's* Case, *Leon.* 52.

31. In an Action upon the Case upon *Assumpsit*, The Plaintiff declared that the Defendant, in con-

consideration that the Plaintiff had ſold a certain number of pieces of Stuff, did promiſe to deliver to the Plaintiff the value of the Stuffs in ſuch Pipes of Wine lying in the Cellar of J. S. in *London* as the Plaintiff ſhould make choice of, for not performing which he brought his Action, and obtained a Verdict: And becauſe the Plaintiff did not averr in his Declaration, that he had made Election of the Pipes of Wine, for before Election the Defendant was not bound to deliver them, and before that done, it was impoſſible to perform the Agreement: It was adjudged, upon a motion in Arreſt of Judgment, againſt the Plaintiff. M. 23 Car. in B. R. *Parmiter* and *Creſſy's* Caſe, *Styles*, 349.

32. By Articles indented between A. and B. A. did article to pay to B. 110 l. at a day to come. And B. did article, that upon the Receipt of the 110 l. he would give to A. an Acquittance for the 110 l. and alſo enter into a Bond of 400 l. to ſave him harmleſs from all Claims concerning certain Lands in the poſſeſſion of A. In purſuance of the Articles A. did tender the 110 l. to B. at the day, but B. refuſed to receive the 110 l. and to give the Acquittance, and to enter the Bond of 400 l. It being found for the Plaintiff in an Action of Covenant brought; It was moved in Arreſt of Judgment, That there was no breach of Covenant ſhewed, for that it was in the Defendant's Election either to refuſe the 110 l. and to give no Acquittance, nor enter Bond; or elſe to receive it, give Acquittance, and enter Bond; and ſo his refuſall was no breach of Covenant: And ſuch was the Opinion of the Court; for it was the intent of the parties, that it ſhould be in the Election of the Defendant either to receive the 110 l. or not to receive it, and the Plaintiff is not prejudiced by the Defendant's not receiving it; for if he ſhould ſue for the 110 l. the Plaintiff may plead the Tender and Refuſal againſt him, and that will be adjudged a Payment; and when he ſues you for 110 l. you may ſue him for the Acquittance and Bond. It was adjudged againſt the Plaintiff. Trin. 1655. in B. *London* and *Craven's* Caſe, *Styles*, 481.

33. In an Action of Treſpaſs for breaking of his Cloſe, The Caſe was, A. was indicted for the breaking of the Houſe of B. and taking 25 l. and found guilty, and burnt in the hand: Afterwards B. brought Treſpaſs againſt him for breaking his Houſe, and taking away the Mony. The Queſtion was, Whether the Action would lye by the party robbed againſt the Party that robbed him or not? It was the Opinion of the Court, That the Action would lye for that it was at the parties Election at the beginning, either to indict him, or to bring his Action of Treſpaſs; and here the party hath made no Election, for the Defendant was indicted at the ſuit of the Common-wealth, and not at the proſecution of the party, and ſo he hath made no Election till now; and ſo it was ſaid it was adjudged, Trin. 1 Car. Rott. 112. in B. in *Markham* and *Cobb's* Caſe. And this being after conviction, there is no fear that the Felon ſhall not be tryed, and there is no inconvenience if the Action do lye; and ſeeing he could not have his Remedy before, he ſhall not now loſe it: And Judgment was given for the Plaintiff. Hill. 1650. in B. R. Rot. 653. *Dawkes* and *Covenigh's* Caſe, *Styles*, 347, 348.

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3. *Caſes concerning Elections made in Corporations, and of the Elections of Sheriffs, Coroners, Knights to the Parliament, and other Officers.*

WHereas in the Charters of Corporations it is ſaid, That the Election of the Mayor, Bailiffs, Provoſts, or the like Magiſtrates or Officers, they ſhall be choſen by all the Commonalty or Burgeſſes: If they have been choſen (time out of mind) by a certain ſelect Number commonly called the Common-Council, or by ſuch like name, and not in generall by all the Commonalty or Burgeſſes, onely ſo many of them as will come to the Election, ſuch ancient and uſual Elections are good and well warranted by their Charters, and by the Law alſo: For in every of their Charters they have power given unto them to make Laws, Ordinances, and Conſtitutions, for the better Government of their Cities, Borroughs, *&c.* By force whereof, and to avoid popular Confuſion, if they by their Common Conſent do conſtitute and ordain, That the Mayor, Bailiffs, or other principall Officers, ſhall be choſen by a certain ſelect Number of the principall of the Commonalty or Burgeſſes, as aforeſaid, and preſcribe alſo how ſuch ſelect Number ſhall be choſen; ſuch Ordinances and Conſtitutions were Reſolved to be good and allowable, and to agree with the Law and their Charters, for avoiding of popular diſcord and confuſion: And it was Reſolved, That although ſuch an Ordinance and Conſtitution cannot be now produced, yet it ſhall be preſumed, in reſpect of ſuch a manner of ancient and continuall Election, and that at firſt ſuch an Ordinance or Conſtitution was made. And it was ſaid, That the ancient and uſuall Uſages, Elections have been made in the Cities of *London*, *Norwich*, and in other Cities, and Corporations, all which were Reſolved to be good; and they were not to be innovated, or altered, for the many great inconveniences which may ariſe thereby. *Cook* 4 Part, 77. The Caſe of Corporations.

Elegit.

Elegit. *See* Executions.

1. *Where Elegit lyeth, where not; and againſt whom, and whom not: Where the Writ ſhall be general, where ſpecial. And where a man cannot have Execution upon an Elegit, without a* Scire facias, et è contra.

1. A Man was Outlawed after Judgment, and a Writ of Elegit was awarded againſt the Defendant: The Court was moved for a *ſuperſedeas, quia Error nice emanavit*: For it was ſaid that the party might not have any manner of Execution, but only a *Capias*; For he could not have a *Fieri facias* againſt the Defendant, becauſe the Queen was intituled to the Defendants goods, by reaſon of the Outlawry; nor could he have an Elegit, for that by the Outlawry, the Queen was intituled to all the profits of his Lands. The Court ſeemed to incline, That the party Outlawed, might make a Feoffment in Fee of his Lands, and ſo ouſt the King of the profits: And ſo in this Caſe, an Elegit might iſſue forth to have execution of the parties Lands. Quære, for the Caſe was not Reſolved. Mich. 13 Eliz. in C. B. *Goldesbr.* 180.

2. In an Action of Treſpaſs, for taking away Wheat, Rye, and Wood, upon an Elegit taken out againſt a Parſon; the Queſtion was, Whether Tythes are extendable upon an Elegit by the Statute of *Weſt.* 2. or not. It was ſaid, That they are *not* extendable, becauſe they are meerly Spiritual things; and there is no preſident to be ſhewed that they ever were extended, and that is an argument that they are not extendable: For proceſs uſually is directed to the Biſhop, for ſequeſtration only of them. But the Court ſeemed to be of Opinion, That Tythes are extendable, and that an Elegit lyeth of them, for that otherwiſe there ſhould be a failer of Juſtice, and eſpecially now, ſince Biſhops are taken away by Act of Parliament: But it was determined by the Court, That Preſidents ſhould be ſearched, If a Recognizance had ever bin extended by Elegit upon Tythes. Mich. 1649. in B. R. *Harwood* and *Pary's* Caſe. *Styles*, 168, 169.

3. The Heir was condemned upon *Nihil dicit* in an Action of Debt brought upon an Obligation entred in by his Father, It was the Opinion of all the Juſtices, That the Plaintiff ſhould not have any other Execution, but an Elegit, and that only of all the Lands which diſcended in Fee to the Heir from his Father, of which he was ſeiſed at the time of the Writ brought only. Hill. 7 E. 6. *Dyer*, 81. See *Cook* 3. Part, 12. in Sir *William Herberts* Caſe. acc.

4. Debt was brought againſt the Heir, upon an Obligation of his Anceſtor; the Defendant, depending the Writ, alliened the Aſſets, and then pleaded, That he had nothing by diſcent the day of the Writ brought, which being found againſt him, a general Judgment was given, and a general Writ of Elegit awarded of the moyety of all his Lands and Tenements, as in caſe of his proper debt. And upon a ſpecial return made by the Sheriff, that he had not any Lands or Tenements; but what he had, he had alliened depending the Writ. A new Writ of Elegit iſſued to the Sheriff, to extend that which he had at the time of the *Niſi prius*. Trin. 4. *Ma. Dyer*, 140. See *Plow. Com.* 440. acc. And ſee Hill. 41 Eliz. in B. R. *Barker* and *Browns* Caſe. If a Recovery be againſt the Heir by *Nihil dicit*, he ſhall be charged of his own Lands.

5. If a man be bound in a Recognizance to pay money at a certain day; after the year and day paſt, the Conuſee is to ſue forth a *Scire facias* againſt the Recogniſor, to ſhew why the Recogniſee ſhould not have execution. And if the party be warned, and doth not appear; or if he doth appear, *et nihil dicit*, the Conuſee may ſue forth a Writ of Elegit to have execution of all his goods, and of the moyety of his Lands. And if the Sheriff returneth upon the Elegit, that the Conuſor hath made a Feoffment of part of the Lands to divers perſons, and that he hath enfeoffed the King of the reſidue, thoſe of which the King is enfeoffed, are diſcharged. But a *Scire facias* lyeth againſt the other Feoffees; and if they cannot plead any thing in bar of the execution, the Recogniſee ſhall have execution againſt them of thoſe Lands by Elegit. *Fitzh. Nat. Br.* acc.

6. In Debt upon an Obligation, the Defendant pleaded, Conditions performed, and being at Iſſue upon a point certain, the Defendant before tryal, knowing that the Verdict would go againſt him, conveyed his Lands to others, upon condition of payment of 20 l. but he himſelf took the profits of them. The Plaintiff ſued forth an Elegit to have the moyety of the Land in execution. The Sheriff returned, That he and the Jury doubted, if the Lands ſhould be extended. It was the Opinion of the Court, That the Lands were extendable upon the Elegit. Mich. 13 Eliz. *Dyer* 294. See *Cook* 3. Part, 78. in *Twines* Caſe, adjudged acc. 22. *Aſſ.* 44. acc.

7. Debt

7. Debt and Damages were recovered; the Defendant dyed before execution: A *Scire facias* iſſued out againſt the Heir, of all the Lands which were the Defendants at the time of the Judgment, and upon that an Elegit was ſued forth, as upon a Recognizance. And it was the Opinion of the Juſtices in that Caſe, That there needed not any *Scire facias* to iſſue forth againſt the Executors, for that by the Statute of *Weſt.* 2. the Lands as well as the goods, were ſubject to the Elegit. Mich. 4 Eliz. *Dyer*, 200. *Owyns* Caſe.

8. Debt was brought againſt one as Couſin and Heir of her Unckle, upon an Obligation of her Unckles; the Defendant confeſſed the Action, but ſaid that nothing diſcended to her, but the Reverſion of 30 Acres of Land after the death of J. S. who was Tenant of them for life. It was the Opinion of the Court, That upon this confeſſion of the Defendant, the Plaintiff might pray a ſpecial Judgment, That he *recuperet debitum et damna de reverſione prædict. cum accideret*, and have a ſpecial Writ of Elegit to extend the moyety of the 30 Acres, and that the Law was ſuch before the Statute of *Weſt.* 2. cap. 18. Mich. 22 Eliz. *Dyer*, 373.

9. Debt was brought againſt one as Heir upon an eſcape ſuffered by his Father of a Priſoner which he had in his cuſtody in execution. It was the Opinion of the whole Court, That the Action did not lye for the Heir, and ſhall never be charged, but where he is expreſly named in the ſpecial, and neither the Law, nor any Statute ſhall charge the Heir for any fact done by his Father: And it was holden, That the Action did not lye againſt the Heir, although the Judgment was given againſt the Father in his life time, and that he dyed before execution. But yet it was holden, That the Land which the Father had at the time of the Judgment, might be extended by an *Elegit*, upon a *Scire facias* brought againſt the Heir as Ter-tenant, as Land lyable to the Execution. Hill. 10 Eliz. *Dyer*, 271, acc.

10. Upon a Writ of Elegit, the Sheriff made his Retorn, That he had delivered to the Plaintiff, *bona et catalla Defendentis ad valentiam* 20 *l. per rationabile precium*, and that he had delivered unto him 20 Acres of Lands of the Defendant, which is the moyety of all his Lands, *per rationabile extentum*; but did not Retorn, That there was an Inquiſition taken of it by the Oath of 12 men: And for that cauſe, the Retorn was holden inſufficient, For the Elegit ought to be by Inquiſition. For the Sheriff himſelf cannot extend the Lands. Trin. 1. *Mar. Dyer*, 100. acc.

11. In Debt againſt the Heir upon an Obligation of his Father, who pleaded, that he had nothing by Diſcent; which was found againſt him: alſo Plaintiff had an Elegit againſt him, as well of the Land which he had by purchaſe, as of that which diſcended unto him; but the reaſon thereof, as it ſeems, was by reaſon of his falſe Plea. 21 E. 3, 9, & 10.

12. If the Sheriff upon an Elegit awarded, Retorneth, That the Defendant hath not Lands in the ſame County: Upon a Teſtatum, he ſhall have an Elegit into another County, 21 H. 7. 19. 26 H. 8. 7. 20 E. 3. *Fitz.* tit. Proceſs. 43. But ſee 18 E. 2. *Fitz.* tit. Execution. 140. where it is holden, That he ſhall not have Elegit unto another County upon a *Nihil* Retorned.

13. A. brought Debt upon an Obligation in C. B. againſt B. and had Judgment; and he prayed an Elegit to the Sheriff of L. and another to the Sheriff of *Lanc.* which was granted and entred upon the Roll: After which, iſſued an Elegit to the Sheriff of *Lanc.* upon a *Teſtatum*, ſuppoſing that an Elegit iſſued out to the Sheriff of L. who retorned, *Nulla bona*, and *Quod Teſtatum eſt*, that the Defendant hath, &c. in the County of *Lanc.* Upon which Elegit upon the *Teſtatum*, the Sheriff of *Lanc.* extended a Farm of the Defendants in a groſs ſum of 100 l. and delivered it to the party; and now the Defendant brought Error, and aſſigned for Error, that the Elegit iſſued forth upon a *Teſtatum*, whereas no Elegit was directed to the Sheriff of L. and ſo the Writ iſſued upon a falſe ſuppoſition. In this Caſe were two points. 1. If it were Error in the Execution. 2. If Error, if the Plaintiff might be reſtored to the Term again. It was ſaid, That when a man brings Debt in L. and hath a * Judgment, That without requeſt, the Plaintiff is to have his Elegit to the Sheriff of L. where the Original was brought, and he cannot have an Elegit to the Sheriff of another County, without a ſurmiſe made upon the Rectory of the firſt Elegit, which ſurmiſe ought to be true; but where the Elegit is granted to both Counties at the firſt, and ſo entred upon the Roll; if the ſurmiſe be falſe, this is but a default of the Clark which may be amended: and it was ſaid in this Caſe, The Roll warrants an Elegit Originally to the Sheriff of *Lanc.* and although that this be made upon a *Teſtatum*, which is falſe, this ſhall be no Error, becauſe warranted by the Roll. Trin. 8 Jac. in B. R. *Goodyes* and *Jounces* Caſe. *Brownl.* 2. Part, 209.

14. A. acknowledged a Recognizance of 250 l. unto the Chamberlain of *London*, and his Succeſſor; and afterwards he acknowledged a Statute-ſtaple, of 200 l. to B. B. ſues Execution by a *Liberate* which is not retorned. The Succeſſor of the Chamberlain ſues execution by Precept, to a Serjeant at Mace, in the nature of an Elegit, and hath the moyety of the Lands of A. delivered in execution. A. dyes: It was Reſolved in this Caſe, amongſt other points, 1. That the execution by the

the Serjeant at Mace was good, notwithſtanding the Statute of *Weſt.* 2. cap. 18. which is, *Vicecomes liberet ei medietatem*, for the Statute extends to every immediate Officer to any Court of Record. 2. That the Execution of the Elegit was good enough, without ſuing a *Scire facias* againſt B. being by matter of Record: but it was ſaid, That if the Sheriff had Returned the former Execution, he ought to have had a *Scire facias* againſt B. 35 Eliz. *Cook* 4. Part, 64. *Fulwoods* Caſe.

2. *How the Sheriff is to demean himſelf upon an Execution upon a Statute or Recognizance upon an Elegit; and what Lands ſhall be delivered upon it in Execution, what not: And what ſhall be a good Return of it by the Sheriff; what not.*

1. THE Conuſor, and the Conuſee of a Statute both dyed, the Executors of the Conuſee ſued forth execution by Elegit, upon which Writ the Sheriff returned the death of the Conuſor, and alſo an Inquiſition of extent of the Lands of the Conuſor: but in the Inquiſition, no eſtate was returned, but generally, that the Conuſor was ſeiſed at the day of the Recognizance acknowledged of the Mannor of B. Notwithſtanding a *Liberate* iſſued forth upon that Return, and the Executors accepted of it according to the extent. The doubt was, If the Executors dye before any profits received by them of the Land upon that extent, If their Executors might have a re-extent upon that inſufficient and uncertain return: And it was the Opinion of the Juſtices, That they might, for the firſt extent was void. For the return, That he was ſeiſed, might be taken, either of an Eſtate for life, or in tail, in which Caſe, after the death of the Conuſor, his Land is not extendable: and where the death of the Conuſor appears in the Return, it ought to be found, that he was ſeiſed of an Eſtate in Fee-ſimple only, and not of any other Eſtate. Paſc. 13 Eliz. *Dyer*, 299.

2. In an Action of Debt, the Plaintiff declared of a Recovery of Coſts and Damages in a Writ of Entry; the Defendant pleaded in bar, That the Plaintiff immediately after the Judgment took forth an Elegit, and delivered the Writ to the Sheriff, who executed the ſame, by delivery of the moyety of the Land to the Plaintiff, but the Writ was not returned; yet it was holden a good bar, becauſe the Plaintiff cannot vary from the execution of which he hath made Election upon Record. Paſc. 13 Eliz. *Dyer*, 299. acc.

3. Note, It was Reſolved by the Court, That if a *Fieri facias* commeth to the Sheriff to levy mony upon the goods of a man, and the Sheriff by writing reciting, that he had a Term for years, which began 2. *Ma.* whereas in truth the Term began 3. *Ma.* ſell the ſame Term, the ſale is void, for that there is not any ſuch Term; but if the Sheriff ſell alſo all the Intereſt which the party had in the Land, the Sale is good. 26 Eliz. Sir *George Sydenhams* Caſe adjudged acc. But in the principal Caſe, afterwards upon looking into the Record, It was found, That the Execution was not by *Fieri facias*, but by Elegit, which ought to be made by Inquiſition *per ſacramentum* 12. and not by the Sheriff: And becauſe the Term was miſ-recited in the Inquiſition, and the Sheriff cannot ſell any Term, but that only which was apprized by the Jurors of the Enqueſt; for this cauſe, it was the Opinion of the whole Court, That the ſale of the Term, in the principal Caſe, was void. And Judgment given accordingly. Hill. 39 Eliz. in B. R. *Cook* 4. Part, 74. *Palmers* Caſe.

4. Note, it was agreed by the Court, That in every Elegit, the Sheriff muſt return, and ſet out the moyety of the Land diſtinctly, unleſs they be Tenants in Common; and in that Caſe, he muſt return the ſpecial matter. Hill. 15 Jac. in C. B. *Brownl.* 1. Part, 38. acc. See *Hutton.* 13 Jac. in C. B. 16. acc.

5. Upon an Execution upon an Elegit, if there be no execution but upon goods, and the goods be not enough to ſatisfy the Debt, and there is no Land. It was the Opinion of *Hobart* Chief Juſtice, That the party may have a *Capias* againſt the Defendant; for now it is in effect but a *Fieri facias*, although the word be Elegit; but if Land be extended, it is otherwiſe: And yet Quære, if the debt be 40 l. and nothing extended but a Leaſe for three years, at 5 l. a year; for then, as to that which remains, the Elegit fails. See *Hob.* 58, 59. in *Foſter* and *Jacksons* Caſe, acc.

3. *Whether after an Elegit taken out and Recorded, the party may take forth a* Capias, Fieri facias, *or other Execution. And whether there may be a re-extent upon the Land after Elegit returned if the Land be evicted.*

1. NOte, by *Hobart* Chief Juſtice, it was ſaid in the Argument of *Foſter* and *Jackſon's* Caſe, Trin. 13 Jac. in C. B. That if I take out a *Capias*, or a *Fieri facias* againſt the party, and they take no effect, I may have one of them after another, or an Elegit after both, if they fail: And there-

therefore he ſaid, That although the Books of 18 E. 2. Execution, 132. and 15 H. 7. 15. be, That after a *Capias* retorned *Non eſt inventus*, the Plaintiff ſhall not have other Execution; yet he ſaid the Law is not ſo. But if I take out an Elegit, and enter it of Record, and it be retorned *Nihil*, without effect, the Queſtion is, Whether I be utterly remedileſs: He ſaid, That in this divers Books are peremptory, that I am remedileſs, becauſe (they ſay) I have made my Election, and that entred upon Record, and therefore I can never reſort to other. See to that effect, 19 H. 6. 4. by *Newton*. 5 E. 4. 41. 30 E. 3. 3. 15 H. 7. 15. by *Fairfax*. But notwithſtanding thoſe Books, he ſaid, He conceived the Law to be clear contrary; and that where the party takes an Elegit, and can have no fruit of it, that he may reſort to another Execution, though the Election be entred of Record. See 17 E. 4. 4. *per Curiam*. After Elegit taken forth, the year expired before it was ſerved: Whereupon a *Scire facias* was ſued forth, and upon that a *Capias* by Judgment; for it was ſaid, That the Statute of *Weſt.* 2. being affirmative, took not away the Execution at the Common-Law. And ſee 50 E. 3. 4. the Opinions of *Percy* and *Finchden*.

2. In *Audita Querela*, the Caſe was this, A. and B. were joyntly bound in a Recognizance to J. S. who had a Judgment againſt them both in the Common-Pleas; and afterwards he took the body of B. in Execution in the Kings Bench, having before had an Elegit againſt A. upon which Elegit the Lands of A. was extended and delivered to him, to hold the ſame *Quouſq; &c.* and his goods alſo for ſatisfaction of the ſame Judgment: Whereupon B. brought an *Audita Querela*, and by Judgment of the Court, he was diſcharged; For it was ſaid by the Court, That the Lands of A. could not be delivered in part of the Execution, but it muſt be for the whole Execution; and when he hath taken and accepted of Execution by Elegit, the other party being afterwards taken by him by a *Capias ad ſatisfaciendum* for the ſame debt, he ought to be diſcharged. And in this Caſe, it was agreed and Reſolved by the whole Court, That if an Execution by Elegit be once executed, though the Land delivered in Execution be afterwards evicted, yet the party ſhall not have a new Elegit, becauſe he had Lands once extended, and this is a full ſatisfaction, which as it is ſaid in *Cook* 5. Part, in *Blamfields* Caſe, is an end of all Suit. Trin. 11 Jac. in B. R. *Cowly* and *Lydcots* Caſe. *Bollſt.* 2. Part, 97. See *Cro.* 2. Part, 338. and *Godbolt.* 257. the ſame Caſe. See *Hob.* 2. acc.

3. A. recovered 400 l. againſt *Ed. Owen*, who dyed, and upon a *Scire facias*, the Sheriff retorned, B. Ter-tenant, *medium terrarum, et tenementorum in balliva ſua, quæ fuerant prædict. Ed. &c.* And Judgment was given, That A. ſhould have Execution againſt the ſaid B. whereupon A. prayed Elegit, which was entred upon the Roll. *Elegit ſibi liberari medietatem omnium terrarum et tenementorum in Com. S. tenend. &c. quouſq; &c.* but the words, *Quæ fuerant prædict. Ed.* were omitted; And for that the Judgment was reverſed, *quoad adjudicationem executionis* upon the Elegit; and yet it was holden by the Court, That the Writ it ſelf, and the Retorn of it were well in that point; but it was ſaid, Where the Roll is faulty, the Writ will not help it. Mich. 5 Jac. in the Exchequer. *Kyer* and *Owens* Caſe. *Hob.* 90.

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4. *What ſhall be a good Return of the Sheriff upon an Elegit; and of what Lands. Where the Writ ſhall be amended upon omitting any word; And whether the Bayliff of a Liberty may make extent upon an Elegit.*

1. NOte, that it was Reſolved by the Court in *Fulwoods* Caſe, which ſee before Diviſa. 1. Sect. 14. That the Execution of the *Liberate* was good, although that the Writ was not Retorned: And ſo it is upon a *Capias ad ſatisfaciendum*, and *Habere facias poſſeſſionem*, and all other Writs where Land only is to be delivered, ſeiſin had, or goods ſold, they are good, although the Writs are not Retorned. But otherwiſe it is, where an Enqueſt is to be taken, as in an Elegit, and that is to the intent, that the Court may judg of the ſufficiency of the Inquiſition, *Cook* 4. Part, 65. acc. See *Cook* 4. Part, *Palmers* Caſe, 74. acc.

2. In Treſpaſs for breaking of his Cloſe at B. the Defendant upon the new aſſignment, pleaded, Not Guilty. It was found by Verdict, That the Defendant was ſeiſed of the Lands in Queſtion, and held the ſame of the Mannor of B. which is Ancient Demeſne, and that the Plaintiff recovered againſt him 40 l. in C. B. and took out an Elegit; whereupon the Sheriff delivered him the Lands in queſtion, who entred. The Queſtion was, Whether Lands in Auntient Demeſne might be delivered in Execution by the Sheriff by force of an Elegit out of the Kings Court. It was adjudged, That the Execution was well done; yet it was agreed, 1. That no Freehold in Auncient Demeſne, could be recovered in the Kings Courts: 2. That if the Freehold were not to be recovered by the Action, yet if the poſſeſſion was to be recovered, Auncient Demeſne was a good Plea, *Cook* 5. Part, *Aldens* Caſe. 3. It was Reſolved, That though the poſſeſſion of Land in Auncient Demeſne be gained by the Sheriff

iff; act following the Award of the Kings Court, et the Land it ſelf was never put directly in Plea n the Kings Court; and therefore it is adjudged, E. 2. Execution 113. That the Conuſee of a Sta-te, having taken Land in Auncient Demeſne in Execution, and an Aſſiſe of it in the Kings Court, nd had Judgment: And it was ſaid by the Chief Juſtice, That the principal Caſe was a clear Caſe. That ſince the Judgment was good, and that the Plaintiff ſhould recover his debt, and that the Ele-git did warrant the extending; and delivery of the half of his Land, and the Auncient Demeſne is his Land as well as other; the Sheriff is not to diſpute, What Land is lyable, what not, nor he that receives it of him, be ſubject to an Action of Treſpaſs; but the way to retein it is by *Audita Querela*. Hill. 10 Jac. in C. B. *Cox* and *Barnſlayes* Caſe. *Hob.* 47.

3. A Writ of Elegit was ſued forth after Judg-ment, The Writ recited the Judgment, *Quod Ele-git Executionem* of the goods, of the moyety of the Lands: And the Writ was, *Tibi præcipimus quod bona et catalla* of the Defendant *que habuit die judicii, prædict. redditi deliberari facias*, omitting the words, *Et medietatem terrarum et tenementorum*, *Tenendum* the ſaid goods, and the moyety of the ſaid Lands. *Quouſque debitum levetur*. The Sheriff extended the moyety of the Lands, and the goods, and delivered the moyety of the Land, and Retorned the Inquiſition. It was moved, that the Writ might be amended, it being but the miſpriſion of the Clark, and that the extent might ſtand. But it was the Opinion of the Court, That it ſhould not be amended, but he might have a new Elegit, becauſe the Inquiſition was taken without warrant. Mich. 5 Car. in B. R. *Walker* and *Riches* Caſe. *Cro.* 1. Part, 116.

4. In Treſpaſs upon a Demurrer, the Caſe was, The Sheriff Retorned upon an Elegit, That the party had not any Lands, but only within the Li-berty of B. and that J. S. there had Execution, and Retorn of Writs, who enquired and Retorned an extent upon Inquiſition, and that the Bayliff deli-vered the moyety of the Lands extended to the par-ty, and by vertue of that extent, the Plaintiff en-tred. The firſt Queſtion was, Whether the Bayliff of a Liberty might make Inquiſition and Extent up-on an Elegit by warrant from the Sheriff. It was Reſolved, That he might. 2. When the Jury finds the Seiſin of the Land, If the Jury ought to ſet out the moyety for the Plaintiff, or the Bayliff? It was Reſolved, That the Jury ſhall extend all the Land, and the Bayliff or Sheriff where no Franchiſe is, ſhall deliver the moyety to the party, and not the Jury. Hill. 8 Car. in B. R. *Sparrow* and *Mat-ſocks* Caſe. *Cro.* 1, Part, 232.

Emblements.

1. NOte, It was holden by all the Juſtices, That if a man be diſſeiſed, and the Diſ-ſeiſor ſows the Lands with Corn, and after ſevers them, and before the Corn is carried away, the Diſſeiſee enters into the Land, that the Diſſeiſee ſhall have the Corn. Hill. 25 H. 8. *Dyer*, 31. *Sayes* Caſe.

2. The Leſſor commanded his ſervant to enter upon his Tenant at Will, who did accordingly; notwithſtanding the Leſſee continued his poſſeſſion, and his Rent was accepted by the Leſſor; after-wards the Leſſee ſowed the Land, and ſevered the Corn, the ſervant of the Leſſor, by the Comman-dment of the Leſſor, entred and took the Corn; It was holden in this Caſe, That it was a good Com-mandment where the Diſſeiſor ſows the Land. But in this Caſe, the Court inclined to be of Opinion, That the acceptance of the Rent waived the advan-tage of the Diſſeiſin, and made the Leſſee Tenant at ſufferance, and the Court was clear of Opinion, That the Tenant ſhould have the Corn which was ſowed by him. Mich. 2 Eliz. *Dyer*, 173.

3. The Caſe was Husband and Wife, the Huſ-band made a Feoffment of Lands to the uſe of him-ſelf and his Wife for life, the Remainder over, the Husband ſowed the Land with Corn, and dyed: It was the Opinion of the Court, That the Wife ſhould have the Crop, and not the Executors of the Husband, becauſe the Wife was a joynt-purchaſer with her Husband; but if the Remainder had bin limitted to the Wife, then it was otherwiſe. Alſo it was agreed, That if the Husband ſows the Land of which he is ſeiſed in the right of his Wife, and the Wife dyeth, the Husband ſhall have the Corn ſowed: And it was alſo holden, That if the Huſ-band ſows his Lands with Corn, and dyeth, and the third part of the Land is aſſigned to the Wife for her Dower, ſhe ſhall have the Emblements, be-cauſe the Wife ſhall be endowed of the beſt poſſeſſi-ſion of her Husband. Mich. 15 Eliz. *Dyer*, 316.

4. A Woman Copyholder during her Widdow-hood ſowed the Land with Corn, and before ſeve-rance of the Crop of Corn, ſhe took a Husband: It was adjudged in that Caſe, That the Lord ſhould have the Crop, and not the Husband: for al-though the eſtate of the Wife was incertain, and determined by limitation, and not by Condition in *fait*, or in Law; yet becauſe the ſame determines by the Act of the Leſſee her ſelf, the Lord ſhall have the Crop. The ſame Law is, If the Woman ma-

keth a Leaſe for life, and the Leſſee ſows the Land, and afterwards the Wife taketh a Husband, for the Leſſee ſhall not be in a better condition then his Leſſor. Hill. 44 El. z. in B. R. *Cook* 5. Part, 116. *Olands* Caſe.

5. If a Leaſe be made to Husband and Wife during the Coverture, and the Husband ſows the Land with Corn, and then they are divorced *Cauſa precontractûs*; the Husband in ſuch Caſe ſhall have the crop; for although that the ſuit be by the Act of the party, yet the marriage is diſſolved by the Judgment of Law, *Et judicium redditur in invitum.* *Cook* 5. Part, 116. acc.

6. A man makes a Leaſe at Will; the Leſſor is outlawed by Will, the Will is determined, the King ſhall have the profits of the Lands; yet the Leſſee ſhall have the crop of Corn ſowed: But if the Leſſee at Will be Outlawed, by which the Will is determined; there the King ſhall have the crop. Note the difference, *Cook* 5. Part, 116. 9 H. 6. 20, 21. acc.

7. Tenant for life, the Remainder in Fee; Tenant for life makes a Leaſe for years, who is diſſeiſed: The Diſſeiſor makes a Leaſe for years, his Leſſee ſows the Land with Corn, and then Tenant for life dyes. It was adjudged in that, That the meer right of the crop of Corn was in the Leſſee for years of the Tenant for life, and that he might have Treſpaſs, and recover the mean profits from the Leſſee of the Diſſeiſor. And 2. He hath the more right to the Corn ſowed, as things annexed to the Land; and it was holden, That although his Intereſt to the Land was determined by the death of the Tenant for life, yet his right to the crop of corn did remain. 3. In that Caſe, it was Reſolved, That the Leſſee for years of the Diſſeiſor had good right againſt him in the Remainder in Fee, in reſpect of his poſſeſſion. Paſc. 38 Eliz. in B. R. *Cook* 5. Part, 85. Sir *Henry Knevitts* Caſe.

8. The Lord brought an Action of Treſpaſs againſt his Copyholder, who pleaded, Not Guilty. The Jury found by their Verdict, that the Copyholder had not done his ſervices, by which he brake the Cuſtome of the Mannor. It was adjudged, That for that cauſe the Entry of the Lord was lawful for the forfeiture; and upon ſuch entry, that the Lord ſhould have the Corn which was growing upon the Land. 42 E. 3. 25. *Cook* 4. Part, 21. in *Browns* Caſe.

9. Note, It was agreed by the Juſtices, That if a man be diſſeiſed, and during the diſſeiſin, the Diſſeiſor cuts down the Trees, Graſs, Corn, growing upon the Lands, and the Diſſeiſee re-entreth, he ſhall have Treſpaſs, *vi et armis* againſt the Diſſeiſor for the Trees, Graſs, and Corn growing, for after entry, the Law doth ſuppoſe that the Freehold had alwayes continued in the Diſſeiſee: The ſame Law is, If the Feoffee or Leſſee of the Diſſeiſor, or the ſecond Diſſeiſor ſoweth the Land, after regreſs, the Diſſeiſee may take the Corn growing upon the Lands; for the regreſs of the Diſſeiſee hath relation as to the property, to continue the Freehold in the Diſſeiſee *ab initio*. But if the Diſſeiſee taketh them, they ſhall be recounted in Damages againſt the Diſſeiſor. See 27 H. 6. 1. 37 H. 6. 6. *Cook* 11. Part, 52. in *Liſords* Caſe.

10. Tenant at Will, ſhall reap the crop which he ſowed in peace, before his Leſſor determined his Will, whether it be Corn, Hemp, Flax, or any other annual profit, for it cannot be imputed to his folly, that he knew not his Leſſors intention that he would determine his Will before they might be ripe. The ſame Law of Tenant by the Curteſy, Dower, for Life, *pur auter vie*, or any other uncertain eſtate, *viz.* when the Term ſhall determine; and if ſuch Tenant happen to dye, his Executors ſhall have and enjoy the crop. If Tenant by Statute-Merchant ſow the Lands, and then a ſudden and caſual profit falleth, by which he is ſatisfied; yet he ſhall have the crop upon the Lands: And in all theſe, and the like Caſes, it is not material whether the Corn, &c. be not ripe, or dead ripe ready to be cut: For by the ſame reaſon they may be taken when they are not ripe, they may be taken when ripe. *Cook* 1. Part, *Inſtitutes*, 55. acc.

11. Debt upon Obligation, the Condition was, That if a certain crop of Corn growing upon a peece of Land late in the occupation of J. S. did of right belong to the Plaintiff, then the Defendant ſhould pay to him for it, 20 l. the Caſe upon a Demurrer, was this; A. ſeiſed of Land, made a Leaſe of it to J. S. for 21 years by Indenture, and did Covenant and grant to J. S. his Executors and Aſſignees, That it ſhould be lawful for him to take and carry away to his own uſe ſuch Corn as ſhould be growing upon the Land at the end of the Term. Afterwards A. conveyed the Reverſion to the Plaintiff: And the Executors of J. S. having ſowed the Land with Corn, and that growing upon the Land at the end of the Term, ſold it to the Defendant. It was ſaid for the Plaintiff, That the Leſſor never had property in the Corn, and therefore could neither give or grant it. In this Caſe it was agreed and adjudged by the Court, That if A. ſeiſed of Land, ſow it with Corn, and then convey it to B. for life, the Remainder to C. for life; and then B. dyeth before the Corn be reaped, C. ſhall have it, and not the Executors of B. though his Eſtate was incertain; yet in this Caſe Judgment was given againſt the Plaintiff, *ſcil.* That the property and very right of the Corn, when it happened, was paſſed away, for it was both a Covenant and a Grant, and therefore if it had bin of natural fruits

which

which run with the Land, the like Grant would have carried them in property after the Term. And it was holden in this Caſe, That although the Leſſor had not the Corn actually in him, yet he had it potentially, for the Land is the Mother and root of all fruits, Therefore he that hath it, may grant all fruits that may ariſe upon it after, and the property ſhall paſs as ſoon as the fruits are extant; and though the words in this Caſe are not by words of gift of the Corn, yet it is good to tranſfer the property. Trin. 13 Jac. in B. R. *Grantham* and *Hawleyes* Caſe. *Hob.* 132.

12. Note, It was Reſolved, *per Curiam*, That if Land which was ſowed, were Leaſed to one for life, the Remainder to another for life; that Tenant for life dyed before ſeverance, that he in the Remainder for life ſhould have the Corn which was ſowed upon the Land. Mich. 6 Jac. in C. B. adjudged.

13. If Feoffee upon a condition ſoweth the Land, and after the Condition is broken, and then the Feoffee ſevers the Corn, and after the Feoffor entreth, yet the Feoffee ſhall have the Corn, becauſe the ſowing of it was before the Condition was broken, and the Leſſors Title grows puiſne to the ſowing, 5 H. 7. 16. But in Caſe of diſſeiſin, the Title of the Diſſeiſee is before the ſowing. Quære, if there be not a difference between a Condition to be performed on the part of the Feoffee, and on the part of the Feoffor.

14. If there be Lord and Villain, and the Villain makes a Leaſe of the Land, and the Leſſee ſows the Land, and dyeth, and the Lord entreth, he ſhall have the Corn ſowed, and not the Executors of the Leſſee, becauſe the Lord entred by a Title paramount the Leaſe. 30 E. 3. *Villenage.* 45.

15. Diſſeiſor and Diſſeiſee, the Diſſeiſor cuts down a Tree, the Diſſeiſee dyeth, his Heir entreth, and finds the Tree upon the Land. It was the Opinion of *Townſend*, 2 H. 7. 2. That he ſhould have the Tree: but *Bryan* and *Catesby* held the the contrary. See *Cook* 11. Part, in *Liford's* Caſe.

Encumbent.

What Pleas the Encumbent ſhall have in a Quare Impedit, *as well in the Caſe of a Common perſon, as in the Caſe of the King; what not, and where.*

1. A. Brought a *Quare Impedit* againſt J. S. Patron, and B. his Clark, who was preſented by the ſaid J. S. The Patron J. S. made Title to the Advowſon by the grant of the Auncеſtor of A. The Plaintiff, B. the Clark not being Inducted, would the ſame Plea; but by the Opinion of the Court, he was ouſted of ſuch Plea by the Statute of 25 H. 8. which is, That the poſſeſſor ſhould plead in bar. But it was holden, That before Induction, B. the Clark was not poſſeſſor; where he could not plead to the Title, but pleaded, That he did not diſturb the Plaintiff in his Preſentment. Paſc. 4 H. 8. *Dyer*, 1. acc.

2. If a *Quare Impedit* be brought againſt two, whereof the one is Clark, and ſo named in the Writ, and is alſo Incumbent; and the one pleads as Patron, making Title to the Advowſon, and that he preſented the other, who upon his preſentment, was received; and the Incumbent pleads the ſame plea in bar; but concludes the end of his Plea with an *ſic dicit quod ille eſt perſona impерſonata*. It was the Opinion of the Juſtices, That that was no good form of pleading, but he firſt ought to have enabled himſelf as poſſeſſor of the Church to have the ſaid Plea in bar. Paſc. 11 Eliz. *Dyer*, 283.

Encumbent

Encumbent. *See* Advowſons.

1. *When, by what, and by whoſe Act, the Clark preſented unto any Church or Benefice ſhall be ſaid to be perfect Incumbent thereof: What Acts he may do before he be perfect Incumbent; and what Pleas he may plead before, What not.*

1. THere are four Incidents to the making of a Clark perfect Incumbent of any Church, or Benefice Eccleſiaſticall. The firſt is Preſentation, which is the Act of the Patron, who is to preſent the Clark by an Inſtrument in Writing under his hand and Seal, within ſix Moneths after the Church or Benefice is void, to the Biſhop who is Ordinary of the Dioceſs. The ſecond is Admiſſion of the Biſhop or Ordinary of the Clark preſented, 14 H. 7. See Tit. *Advowſons.* The third is Inſtitution, which is alſo the Act of the Biſhop or Ordinary, which he doth ordinarily in theſe words, *viz. Inſtitui te Rectorem Eccleſiæ de D. et habere curam animarum, et accipe curam tuam et meam.* See *Cook* 4. Part, 79.

2. By Inſtitution made by the Biſhop, the Clark preſented is Incumbent of the Church to ſome purpoſes, *viz.* as to the Spiritualties, That is to ſay, to celebrate Divine Service in the Church; to adminiſter the Sacraments, and inſtruct the Pariſhioners in the true Faith. And in a *Quare impedit* brought Plenarty, or that the Church is full in Caſe of Common Perſon, 33 H. 6. 34. is a good Plea, for he hath then *Beneficium*: But in Caſe of the King, the Church is not full untill Induction. The fourth and laſt for the making of the Clark perfect Incumbent, is Induction, which uſually is done by the Arch-Deacon, 11 H. 4. 75. 14 H. 7. *Quare Impedit*, 162. but may be done by the Biſhop himſelf, which is the putting of the Clark in the Poſſeſſion of the Church, and of the Gleab Lands, which are called the Temporalties of the Church: For untill then, as the Book of 38 E. 3. *Quare Impedit* is, He is not Parſon *in facto*: And the Patron in a Writ of Right of *Advowſon* brought, ought to count that his Clark was inducted into the Church: But after the Clark is inducted, he is then perfect Incumbent, and he may maintain any Action reall or perſonall, for the Gleab or other Profits of the Church. *Cook* 1 Part, *Inſtit.* 341. acc.

3. A man was admitted, inſtituted, and inducted to a Benefice, with Cure of the yearly value of 8 l. and afterwards the King preſented him to the Church of S. which was alſo a Benefice with Cure, and he was admitted and inſtituted. The Biſhop of *Canterbury* granted him Letters of Diſpenſation for Plurality, which were confirmed by the King, and afterwards he was inducted into the Church of S. It was adjudged in that Caſe, That the Diſpenſation came too late, becauſe it came after the Inſtitution; For by the Inſtitution *Eccleſia plena exiſtit* againſt all Perſons, but againſt the King; and as to the Spiritualties, he is full Incumbent by the Inſtitution: But as to the Temporalties, he is not compleat Incumbent, as to have them delivered unto him before he is inducted into the Church. *Cook* 4. Part, 79. *Digby's* Caſe.

4. A Prebendary of the Prebend of D. in the Cathedrall Church of L. after that the Biſhop had conferred the ſaid Prebendary unto him, and inſtituted him, and before he was inducted and inſtalled, by Deed graunted an Annuity of of 5 l. *per annum* to *Hare* out of the ſaid Prebend, which Graunt was confirmed by the Biſhop before the Induction of A. and by the Dean and Chapter the ſame day that he was inſtalled and inducted. Afterwards A. dyed, and B. was made Prebendary of the ſaid Prebend, againſt whom *Hare* brought a Writ of Annuity for the Arrearages, being behind ſeventeen years. It was Reſolved by the Opinion of all the Juſtices in that Caſe, That the ſaid Grant made by the ſaid A, Prebendary of the ſaid Annuity, to charge the ſaid Prebend, was void before he was inſtalled and inducted, and ſhould not Charge the Succeſſor. Paſch. 20 Eliz. *Plow. Com. Hare* and *Bickleys* Caſe. See 5 Eliz. *Dyer*, 221. acc.

5. If a Parſon or Vicar, who is inducted as compleat Incumbent, doth afterwards make a Leaſe of his Gleab Lands and Tythes (by Deed, as the ſame muſt be) for years: It was holden by the Juſtices, That ſuch Leaſe was a good Leaſe: But in that Caſe, It was holden by them, That the Parſon or Vicar himſelf muſt ſerve the Cure, and not the Leſſee; for that the Cure being a ſpiritual Charge and Miniſtration, doth not follow the Gleab or Tythes, but is inſeperably annexed to the Perſon of him who is the Incumbent of the Church. See 36 H. 8. 58. *Dyer*, in *Taverner's* Caſe. See *Cook* 1 Part, *Inſtit.* 96. acc.

6. In a *Quare Impedit* brought againſt A. Patron of a Church and B. his Clark, which B. was preſented by the ſaid A. but he was not inducted, and ſo not perfect Incumbent. The Plaintiff made Title to the Advowſon by a Grant made by the Anceſtor

ſiſter of the Plaintiff; and the ſaid B. the Clark would have pleaded the ſame Plea: But he was ouſted of the Plea by Judgment of the Court, becauſe the Statute of 25 E. 3. *cap.* 7. is, That he who is Poſſeſſor ſhall plead in Barr; and B. the Clark is not Poſſeſſor untill Induction, and therefore is out out of the Statute: Wherefore B. pleaded, That he did not diſturb the Plaintiff. Paſch. 4 H. 8. *Dyer*, 1.

7. A *Quare Impedit* was brought againſt the Ordinary, and the Incumbent, without naming the Patron in the Writ; and the Queſtion was, Whether the Writ was good, or Whether it ſhould abate? It was the Opinion of the whole Court, That the Action did not lye, but that the Writ ſhould abate, and that for theſe Reaſons. 1. Becauſe the Patronage ſhould be recovered againſt him who had nothing in the Patronage. 2. Becauſe that at the Common Law, The Incumbent could not plead any Plea which did concern the Patronage; and therefore it was againſt all right and reaſon, that he ſhould be onely named in the Writ, which could not defend the Patronage: But it was ſaid, That the Statute of 25 E. 3. *cap.* 7. did enable the Incumbent to plead againſt the King, and to defend his Right, although he claim nothing in the Patronage, and that by the Equity of the ſaid Statute he might plead againſt all Common Perſons. See *Cook* 7 Part, 26. in *Hall's* Caſe.

8. In a *Quare Impedit*, The Plaintiff declared, that A. was ſeiſed of the Mannor of B. to which an Advowſon was Appendant, and preſented J. S. who was admitted, inſtituted, and inducted. A. dyed, his Heir levyed a Fine of the Mannor to which the Advowſon *&c.* unto B. in Fee, who granted the next Avoidance to the Plaintiff, and that J. S. had reſigned, and ſo it belonged to him to preſent: The Biſhop pleaded, that he claimed nothing but as Ordinary: The other Defendant the Incumbent pleaded, That before the Writ brought he was in by ſix Moneths of the preſentation of the ſaid A. without that, that the Church was void *modo et forma* as the Plaintiff declared: And the Jury *ex Officio* found, That the Church was full of J. D. by the preſentment of the King, depending the *Quare impedit* betwixt the Plaintiff and the ſaid J. S. and that the Church was of the value of 8 l. In this Caſe, It was holden amongſt other things, That although it was found *ex Officio*, that the Church was full of J. S. who was a Stranger unto the Writ, and it did not appear that he came in by better Title than the Plaintiff had, yet the Plaintiff ought to have a Writ to the Biſhop generally, and the Biſhop ought to execute it, and he cannot return that the Church is full of another; for no Iſſue can be taken betwixt the Plaintiff and him, becauſe he hath no day in Court. Note in this Caſe, Where the Incumbent pleads a Plea againſt the Title of the King. M. 3 Jac. in B. R. *Cook* 6 Part, 49. *Roſwell's* Caſe.

See more of Encumbent in Title *Quare Impedit*.

Enfranchiſement *and* Diſfranchiſement.

1. IT was found by Office, That F. by Licence of the King did marry the King's Nieſe, and that certain Lands deſcended to the ſame Neiſe, which her Husband had alienea without the King's Licence to another, for which cauſe the Land was ſeized: The Alienee came into the Chancery, and ſhewed all this, *ſcil.* That the Neiſe was married with the King's Licence, and that the Lands diſcended to the Neiſe after the Marriage: It was holden in this Caſe, That the Husband ſhould be Tenant by the Courteſy: By which it appeareth, That the Wife being married with the King's Licence, it was an Enfranchiſement at leaſt of the Wife during the Coverture, for if ſhe ſhould remain Neiſe, then the Husband ſhould not have been Tenant by the Courteſy. *Cook* 4 Part, 55. in the Warden and Commonalty of the Sadler's Caſe.

2. The King's Grants ſhall be interpreted by a favourable Interpretation, that no prejudice ſhall come unto him more than he truly intended by it: and therefore, If the King grants Lands to J. S. and his Heirs, and in truth J. S. is the King's Villain; it ſhall not enfranchiſe the Villain by Implication. *Cook* 4. Part, 56. in *Knight's* Caſe.

3. If a Villain attorn to the Grant of his Lord which he maketh: It is no Enfranchiſement of the Villain, for that an Attornment doth not give an Intereſt, but is only a bare Conſent. *Cook* 4. Part, 85. in *Pinchon's* Caſe.

4. A man made a Leaſe for the life of another of a Mannor to which a Villain was Regardant, the Leſſee dyed living *Ceſtui que vie*. The Villain entred as an Occupant to the uſe of a Stranger, and afterwards ſurrendred to him in the Reverſion, *Ceſtui que uſe* diſagreed: The Villain purchaſed other Lands; the Leſſor ſeiſed them as a perquiſite, and entred; and the Villain brought an Aſſize. It was holden in this Caſe, That the Action did well lye, becauſe the Occupancy was an Enfranchiſement of the Villain for ever.

5. A Villain in the preſence of the King is enfranchiſed only during that time: The ſame Law, If a Villain be within ancient Demeſne for a year and a day; for theſe are by the Law Priviledges *pro tempore*: But if the Lord doth enfranchiſe them, by Manumiſſion, either in Fait or in Law for an hour, it is an Enfranchiſement for ever *in favorem libertatis*. See 38 H. 8. *Dyer*, 61. 33 H. 6. *Br.* Villenage, 47. acc.

6. In Treſpaſs the Iſſue was, If the Plaintiff were a Villain or not; and it was found that he was not: Whereupon the Lord brought a Writ of Error. It was holden, That the bringing of the Writ of Error was no Enfranchiſement of the Villain, becauſe the Lord without the bringing of the Writ of Error could not defeat the former Recovery, 18 E. 4. 5. The ſame Law is of a *Formedon* or *Audita Querela*. *Fitz. B.* 104.

7. In a Replevin, The Defendant claimed property, which was found againſt him in a *proprietate probanda*: Yet it was holden, that he might afterwards plead Villenage in the Plaintiff to E. 1. Title *Villenage* 15. See *ibid.* 23. That if a Villain brings a Replevin, and the Lord doth remove it by a Recovery, that the ſame is no Enfranchiſement.

8. Non-ſuit is no Enfranchiſement, but contrary of a *Retraxit*, becauſe that the ſame is the Act of the Lord, and ſo it is of a Departure in deſpight of the Court. 27 E. 2. *Vill.* 66. *Fitzh. B.* 78. acc.

9. If I preſent my Villain to a Church which is void, the ſame is no Enfranchiſement of him, and ſo it was adjudged, in *tempore* Eliz. in *Topſfield's* Caſe. But if the ſaid Villain be choſen Abbot of another place, I cannot ſeize him, as it was holden by *Marrow* in his Reading.

10. If the Lord deviſeth the Land to his Villain, It was the Opinion of Mr. *Plowden*, That it ſhould be an Enfranchiſement againſt the Heir, and yet he was Villain to the Heir as ſoon as the Deviſe took effect: But becauſe the Father had power to enfranchiſe him, he ſhall be enfranchiſed becauſe he is in by the Father; as if the Father had delivered a Deed of Enfranchiſement to one, to deliver to his Villain as his Deed ſeven years after, and the Father Lord dyes, and the Deed is afterwards delivered, it ſhall be an Enfranchiſement: So if a man makes a Leaſe for life, the Remainder to the right Heirs of J. S. who hath Iſſue a Son, who is Villain by Confeſſion to the Feoffor, and the Feoffor dyeth; and afterwards J. S. dyeth, and the Tenant for life dyeth, and the Son of J. S. enters, he ſhall be enfranchiſed. See *Plow. Cognizance*. 98. acc.

11. In a *Precipe* brought againſt the Villain and the Lord of a Purchaſe made by the Villain; They vouched over (*Villano ab omni Libertatis beneficio excluſo*). It was holden to be no Enfranchiſement; contrary, If there had been no Exception in the Voucher. 33 Hen. 6. 1. See *Librum*.

12. If there be two Coparceners of a Villain, and the one Manumit the Villain, the ſame is no Barr to the other: And ſo if there be two Coparceners of a Villain, and they make partition that the one ſhall have the Villain one day, and the other another day: If the one enfranchiſe him the one day, the other ſhall have him a Villain, the other day; ſo as the Manumiſſion ſhall be but for a time. 12 E. 4. *Br.* Villeinage, 68. acc.

13. Alſo Enfranchiſement is, when a man is incorporated into any Society or Body politick, and made a Member of the ſaid Body or Corporation, and he is to enjoy the Liberties and Franchiſes of ſuch City, Town, or Corporation, of which he is a Member; of which Enfranchiſement he cannot be diſcharged or diſenfranchiſed, but upon a very good ground, tending to the Subverſion of the Liberties of the City, Town, or Corporation. See *Cook* 1. Part, in *Bagg's* Caſe.

14. Sir *James Bagg*, a Capital Burgeſſe of the Town of *Plymouth*, behaved himſelf contemptuouſly againſt the Mayor there, and ſaid unto him theſe words, *viz.* You are a couzening Knave, come and kiſs, *&c.* and perſwaded A. and B. Vintners, that they ſhould not pay Wine-weight, for which cauſe they diſfranchiſed him: Whereupon he prayed Reſtitution in the King's Bench. And in this Caſe, It was Reſolved by the whole Court, 1. That words of Contempt, or *contra bonos mores*, are not ſufficient Cauſes to diſfranchiſe a Citizen or Burgeſs of any City, Town, or Corporation: But if he doth any thing againſt the Duty or Truſt of his Freedom, and unto the prejudice of the City, or Borrough, the ſame is a good cauſe to diſfranchiſe him: But there ought to be an Act done, & not an Endeavour only, for that *non officit conatus niſi ſequatur effectus, et non officit effectus niſi ſequatur effectus*. 2. Reſolved, That no Freeman of any Corporation can be diſfranchiſed by the Corporation, unleſs they have Authority to do it by expreſs words of their Charter, or by Preſcription; But ſuch Citizen, *&c.* ought to be convicted by Law before he can be relieved. 3. Reſolved, That if a Burgeſs be diſfranchized, and a Writ is awarded to reſtore him, or to ſhew upon the Return a ſufficient Cauſe; and they return ſufficient Cauſes, but the Cauſes in the Return are falſe: If the party for any of the ſaid Cauſes be committed to Priſon or his Shop ſhut up, he may have and maintain Falſe Impriſonment, or Treſpaſſe

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vi et armis; in which Actions the Cauſes of Diſfranchiſement ought to be pleaded, and the party in ſuch Caſe ſhall be reſtored. *Cook* 11. Part, 98, 99. Sir *James Bagg's* Caſe.

14. *Langham*, a Citizen and Freeman of *London*, was committed to *New-gate* by the Court or Aldermen: He prayed a *Habeas Corpus*; Upon which it was returned, That there was a Cuſtom within the City, that if any Free-man be elected Alderman, that he ought to take an Oath, viz. To ſerve the King in ſuch a Ward, in the Office of Alderman, of which he is elected. 2. That he well entreat the People, to keep the Peace and the Laws and Priviledges of the City within and without. 3. That he ſhall duly come to the Court of Orphans and Haſtings, if not hindred by Command of the King, or other lawfull Cauſe. 4. That he ſhall not ſell Bread, Ale, Wine, or Fiſh, by Retail; and ſet forth a Cuſtom, That if any Perſon be choſen Alderman, he ſhall be called to the Court, and the Oath tendred, and if he refuſe to take it he ſhall be committed till he take the Oath; and ſet forth, That the Cuſtomes of *London* are confirmed by Parliament; and that *Langham* being a Free-man, and having taken the Oath of a Free-man, was *debito modo electus* Alderman of ſuch a Ward, and called to the Court of Aldermen, and tendred the Oath, and that he refuſed to be ſworn *in Contemptum Curiæ, et contra conſuetudines*; for which cauſe they committed him to *New-gate*. It was objected againſt the Return, that it was inſufficient, for many cauſes: Firſt, it was too generall, viz. That he was *debito modo electus*, without ſhewing by whom or how; alſo the Impriſonment is too generall, which takes utterly away the Liberty of the Subject. 2. It was unreaſonable to take an Oath to forſwear his Trade, for perhaps he might be ſo impoveriſhed that he ſhall be neceſſitated to uſe his Trade. 3. It was not a good Retorn for want of Notice given him, that he was choſen Alderman: And diverſe other Exceptions were to the Retorn. But it was Reſolved, That the Retorn was good, 1. Reſolved, That there needs not ſuch certainty in a Retorn of a *Habeas Corpus* as in pleading, and if it ſhould comprehend all Circumſtances, it would be but the perplexing of the Court. 2. Reſolved, That the Impriſonment being by a Court of Record, and for a Contempt to the Court, was good. 3. The Oath was good, and makes him to abjure no more than the Law forbids him to do, and it is not to abjure all Trade. 4. The Impriſonment is ſpecial, for it is but till he take the Oath; and the Commitment of him by a Court of Record, for not obſerving the Cuſtomes of the City which is againſt the Oath of a Freeman, is a good and lawful cauſe of Commitment, eſpecially the Cuſtomes of the City being confirmed by Act of Parliament. He was remanded to Priſon. Hill. 17 Car. in B.R. Alderman *Langham's* Caſe.

Enfant *or* Infant.

1. *What Acts or things done by an Enfant ſhall bind him, What not: Where his Feoffments, Grants, Leaſes, Contracts, Covenants, are void: Where voidable only, and who ſhall avoid them: And where his Acts upon Record are voidable, Where not: And where he ſhall avoid Grants made by others; Where not.*

1. A. At full Age, brought an *Audita Querela* in the Chancery, to avoid a Recognizance in the Nature of a Statute Staple made by him, when he was within Age: It was the Opinion of the Court, becauſe his Age ſhall be inſpected by the Court, which cannot now be done when he is of full Age; That the *Audita Querela* did not lye, but that the Recognizance ſhould bind him. Mich. 7 Eliz. *Dyer*, 232. *Harriſon's* Caſe. See Paſch. 4 Jac. in C. B. adjudged acc.

2. In an Aſſumpſit the Caſe was, That the Defendant was a Shop-keeper, and an Enfant, and he brought certain Wares to ſell again in his Shop: It was the Opinion of the whole Court, That this buying of the Defendant being within Age, although he bought the Wares for the maintenance of his Trade, ſhould not bind him: For an Enfant ſhall not be bound by his Bargain for any thing, but for his neceſſity, viz. his Diet and Apparell, or neceſſary Learning; but his buying to maintain his Trade, although he gain his living thereby ſhall not bind him. Trinit. 16 Jac. in B. R. *Whittingham* and *Hill's* Caſe. *Cro.* 2. Part, 494.

3. In Aſſumpſit, The Plaintiff declared, That in conſideration that he delivered to the Defendant diverſe ſuits of Apparell, viz. A Sattin Doublet and Hoſe with Silver and Gold-Lace, and a Velvet Jerkin and Hoſe to his own proper uſe, the Defendant promiſed to pay him 40 l. when he ſhould be required: The Defendant pleaded, that at the time of the Promiſe he was within Age. The Plaintiff replyed, That at the ſame time he was Servant and attending upon the Earl of *Eſſex* in his Chamber, and that this Apparell was delivered him as his ne-

ceſſary Apparell during the ſaid time of his ſaid Service: Upon the Reading of the Record, It appeared to the Court, that the Defendant in his Addition was written Gent. Wherefore the Court Reſolved, That Sattin with Gold and Silver Lace, or Jerkin or Hoſe of Velvet, were not neceſſary Apparell for a Gentleman, and ſo the Defendant being an Enfant was not bounden to pay for ſuch Apparell; and therefore, That the Action would not lye. Hill. 43 Eliz. in C. B. *Mackerell* and *Bachelor's* Caſe. *Goldeſb.* 168.

4. A man ſued in the Court of Requeſts by Engliſh Bill for Mony which he had layed out for an Enfant within Age for his Meat, Drink, and neceſſary Apparell, and ſet forth that the Enfant being within Age did promiſe to him: In that Caſe, a Prohibition was awarded, becauſe Debt lay at the Common Law, becauſe they were things for his neceſſary livelihood: And in that Caſe, It was agreed, That if an Enfant be bounden in an Obligation for things neceſſary within Age; it is not good, but voidable. Quære, for difference was taken when the Aſſumpſit is made within Age, and when at full Age; for if he maketh a Promiſe when he cometh of full Age, or enters into an Obligation for neceſſaries when he was within Age, the Law is now taken to be that it ſhall bind him. But ſee 44 Eliz. *Randall's* Caſe. That an Obligation, with a penalty for Mony borrowed within Age, is abſolutely void. Mich. 11. Jac. in Com. Ban. *Rearſby* and *Cuſſer's* Caſe. *Godbolt.* 219.

5. Covenant brought againſt an Apprentice for departing his Service without Licence: The Defendant pleaded, That at the time of the making of the Indenture he was within Age. It was argued, that the Covenant ſhould bind the Enfant, becauſe it was for his Advantage to be bound Apprentice: But all the Court Reſolved, That although an Enfant may voluntarily bind himſelf Apprentice, and if he continue ſeven years, he may have benefit to continue his Trade: Yet neither at the Common Law, nor by any words of the Statute of 5 Eliz. a Covenant or an Obligation of an Enfant for his Apprentice-ſhip ſhould bind him. Trinit. 4 Car. in B.R. *Gilbert* and *Fletcher's* Caſe, *Cro.* 1. Part, 129.

6. A Dean and Chapter made a Leaſe for 99. years, to begin after the end of a Leaſe for 50 years in being. The ſaid Leaſe for 99 years was aſſigned to A. and B. Enfants, who before the 50 years ended took a new Leaſe from the Dean and Chapter, for the ſame Term, and for the ſame Rent, and upon the ſame Covenants: The Leaſe for fifty years determined; the Enfants of full Age entred; a new Dean and Chapter made an Entry to avoid this Leaſe. The Queſtion was, Whether an Enfant might ſurrender a future Intereſt by taking a new Leaſe? It was the Opinion of the whole Court in this Caſe, That a Surrender by an Enfant cannot be by Deed, but it is abſolutely void; and that a Surrender by acceptance of this ſecond Leaſe is void, becauſe it was without encreaſe of his Term, or decreaſe of Rent, and where there is no apparant benefit nor ſemblance of benefit, the Acts of Enfants are meerly void; and ſo it is in the principall Caſe. Trin. 14 Car. in B. R. *Lloid* and *Gregorie's* Caſe, *Cro.* 1. Part, 360.

7. In Debt, for Arrearages of Rent, upon a Leaſe made to an Enfant, he pleaded Infancy at the time of the Leaſe made: The Queſtion was Whether a Leaſe made to an Enfant was void, becauſe it might be prejudicial to him, and he had not diſcretion to manage it? It was holden by the Court, That it was voidable only by him at his Election; for if it was for his benefit, it was no ways void: But the Enfant at his Election may make it void by refuſing and waving the Land before the Rent-day incurrs, and then no Debt will lye againſt him: But in the principall Caſe, becauſe it was not ſhewed, that the Rent was of greater value than the Land, and the Defendant was of full Age before the Rent-day; It was adjudged for the Plaintiff. Paſch. 11 Jac. in B.R. *Kelſey's* Caſe. *Cro.* 2. Part, 310. See Hill. 10 Jac. in B.R. *Kirton* and *Elliot's* Caſe, *Bolſtr.* 2. Part, 69. acc.

8. In an Aſſumpſit, The Plaintiff declared, That the Defendant did promiſe to pay ſuch a Sum of Mony in conſideration that he would cure him of the Falling-Sickneſs, and layes in Fact that he cured him; and for not Payment of the Money the Action was brought: The Defendant pleaded in Barr, that at the time of the Promiſe made, he was within Age, and ſo demands Judgment of the Action. It was the Opinion of ſome of the Juſtices, That the Action would lye. and that the alledging of Nonage by the Defendant was not material, for that this ſhall be taken as a Contract, and that to be for a thing in the nature of neceſſity to be done for him, and the ſame is as neceſſary for him, as if the Promiſe had been made by him for Meat, Drink, and Apparel, which ſhall bind him although he be within Age: The Court declared their Opinions, That the Plea in Barr was not good; but no Judgment was given, becauſe the ſame was ended betwixt them by Agreement. Trin. 7 Jac. in B. R. *Dale* and *Copping's* Caſe. *Bolſtr.* 1. Part, 39.

9. The Caſe was, An Enfant bargains and ſells Land, and is vouched to Warranty, and he comes in upon the Voucher, and thereupon a Common Recovery is had, The Queſtion was, Whether this be ſuch a Recovery that the Enfant can avoid by

by Entry. It was the Opinion of the Court, That an Enfant may avoid a matter in *pais* by Entry, but not a matter of Record; and here in this Caſe, there is a proper way to avoid it by Law, *ſcil.* by a Writ of Error, which is a matter of Record, and of as high a nature. It was adjudged for the Defendant. Hill. 1650. in B. R. *Aiſt* and *Wallaſſes* Caſe. *Styles* 246.

10. A man made a Feoffment on Condition, That if he, his Heirs, or Executors, do pay the Rent of 100 l. before ſuch a day, that he may reenter; the Feoffor dyes, his Heir within age, the Mother (without notice of the Son) requeſts J. S. that he would pay the money for her Son. In this Caſe, it was agreed by all the Juſtices, That if the Enfant were within the age of 14, the tender of the money by his Mother had bin good; contrary if he had bin more then 14 years; and becauſe in the principal Caſe, no age was proved, but that he was within age, the Court ſaid, It ſhall be intended, That he was within the age of 14 years, and therefore adviſe to begin *de novo*. Hill. 28 Eliz. in C. B. *Watkins* and *Aſtwicks* Caſe. *Owen.* 137.

11. Note, It was Reſolved by all the Juſtices of *England*, That the releaſe of a Debt, or a duty by an Enfant Executor after probate of the Will, is not good, becauſe it ſhould be a *Devaſtavit*, and charge the Enfant of his proper goods; and alſo it ſhould be a wrong which an Enfant cannot do by his Releaſe, becauſe his act is not purſuant to the Office of an Executor who is to do his Office truly, diligently, and faithfully. But it was Reſolved, That upon payment and ſatisfaction to an Enfant-Executor, he may acquit and diſcharge the Debt, for ſo much as he receiveth. Hill. 26 Eliz. in B. R. *Cook* 5. Part, 27. *Ruſſells* Caſe. See Trin. 13 Car. in B.R. *Keyvelon* and *Latham's* Caſe. *Cro.* 1. Part, 352.

12. A. ſeiſed of Lands in Fee, holden of the Queen in Socage, as of her Mannor of C. deviſed the ſame to B. his Baſtard daughter, and her Heirs, and dyed; B. within the age of 21 years, by Deed, made a Feoffment in Fee of thoſe Lands to C. and others, and then dyed within age, without Iſſue; and if the Feoffment ſhould prevent the Queen of her Eſcheat, was the Queſtion. In this Caſe, It was Reſolved, That privies in bloud Inheritable, as general Heir, ſpecial Heir, or as general and ſpecial Heir, ſhould take advantages of the Entancy of his Anceſtor, and may enter upon a Feoffment made by their Anceſtor within age. But privies in Law, as the Lord by Eſcheat, ſhould never take advantage of Enfancy, becauſe he is a ſtranger unto him: And when an Enfant dyeth without Heir, the Feoffment is unavoidable. But in the principal Caſe, becauſe it appeared to the Court, That the Feoffment was executed by Letter of Attorney; it was therefore void, and that the Land ſhould Eſcheat to the Queen. Hil. 25 Eliz. *Cook* 9. Part, 42, 43. *Whittingham's* Caſe. See *Cook* 4. Part, 125. in *Beverleyes* Caſe, &c.

13. Note, It was Reſolved by the Juſtices, That if an Uſurpation was upon an Enfant unto an Advowſon; he was bound by ſuch Uſurpation by the *Com.* and he was put to his Writ of Right of Advowſon; and the reaſon was, becauſe the Encumbent came into the Church by Judicial Act of the Ordinary, *ſcil.* Admiſſion and Inſtitution. But it was Reſolved, That by the Statute of *Weſt.* 2. cap. 5. If an Uſurpation were upon an Enfant who had an Advowſon by Diſcent, That the Enfant ſhould have a *Quare Impedit*, or an Aſſiſe of Darrein preſentment: And ſo the Statute not only reveſted the Right, but alſo gave a poſſeſſary Action againſt every one who gained the Inheritance of the Advowſon by Uſurpation. In which Actions, plenarty was no Plea. Mich. 3 Jac. in B. R. *Cook* 6. Part, 49, 50. *Roſwells* Caſe.

14. A. hath Iſſue, B. and C. Enfants within age: A. Tenant for life is Diſſeiſed, and afterwards releaſes to the Diſſeiſor with warranty, and dyeth; and the warranty diſcendeth upon B. being within age. Afterwards B. dyeth within age, C. being then his Brother and Heir, and within age, upon whom the Warranty doth diſcend; and afterwards C. commeth of age, and after his full age entreth. It was adjudged in the Caſe, That the Entry of C. was lawful: For it was Reſolved, That if the Entry of an Enfant be lawful, and no Lacheſs is to be attributed unto him, and he could not enter in the life of his Anceſtor, that warranty ſhall not bind an Enfant in ſuch Caſe, *à fortiori*, in the Caſe where the warranty diſcendeth upon him, his entry being lawful; but if his Entry were not lawful, ſo as he is put to his Action, there the warranty ſhall bind him. See *Cook* 1. Part, 140. in *Chudleighs* Caſe.

15. Tenant in tail of Lands holden in *Capite* by Deed made a Leaſe of them, not warranted by the Statute of 32 H. 8. and dyed without Iſſue, the Reverſion diſcended to his general Heir, which was in Ward to the King; Office was found, that he dyed ſeiſed of an eſtate tail, and that the Lands diſcended to his general Heir. It was Reſolved in that Caſe, That the King in privity of the heirs in tail, might avoid the ſaid Leaſes during the time that they ſhould be in Ward to the King. But it was further Reſolved in that Caſe, That although the King might avoid the Leaſes for his time, yet the Heirs in tail then within age; when they came of full age, after the Intereſt of the King determined by acceptance of the Rent, might make the Leaſes to have continuance during the Term. And in

that Caſe it was ſaid and agreed, That if Tenant in tail makes a Leaſe for 30 or 40 years, and dyeth without Iſſue, his Wife young with child of a Son, and the Donor enters and avoids the Leaſe, and then the Son is born, the Leſſee enters, and the Son accepts the Rent at his full age, he doth affirm the Leaſe, becauſe the Leaſe was not abſolutely void, but *ſecundum quid* only. *Cook* 7. Part, 3. in the Counteſs of *Bedfords* Caſe.

16. If an Enfant convey Lands unto the Queen by Deed enrolled before the Statute of 18 Eliz. which eſtabliſheth grants made unto the Queen; Or if he levy a Fine of his Lands to the Queen, and afterwards the ſaid Statute is made for the confirmation of Grants made to the King: Yet it was holden by the Court, becauſe the perſon of the Enfant during his minority, is by the Law diſabled to make any conveyance at all of his Inheritances, ſuch Grants were not good, nor ſhould bind him or his Heirs, but the Enfant may reverſe ſuch Fine, by bringing a Writ of Error. *Cook* 11. Part, 77. in *Magdalen* Colledges Caſe adjudged.

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2. *Where a Fine levyed by an Enfant, or a Recovery ſuffered by him, ſhall bind him, where not; And how, and in what time he ought to avoid them: And where Acts of his upon record, are voidable, where not; And of Inſpection of him.*

1. HUsband and Wife, in the time of vacation after *Hill.* Term, by *Dedimus poteſtatem*, acknowledged a Fine of the Lands of the Wife, the Wife being then but of the age of 19 years. The Writ of Covenant bore date in *January* before Returnable *Craſt. Purific.* And the *Dedimus* bare date three dayes after the Original; and the Queens Silver was entred, *ſcil. die veneris in ſeptimana Paſchæ*, which was four dayes before the death of the Wife, but the Fine was not engroſſed till afterwards. The Heir of the Wife in *Eaſter* Term, prayed, that the Fine might not be recorded, nor delivered to the party; but becauſe the Queens Silver was entred, notwithſtanding the under-practice of the Husband, the Fine was engroſſed, and ſo did bind the Heir, notwithſtanding the Wife was within age at the time of the acknowledgment of it. Paſc. 5 Eliz. *Dyer*, 220. *Carells* Caſe.

2. If there be Tenant for life, the Remainder in Fee to an Enfant, and they both levy a Fine, and after the Fine is reverſed as to the Enfant, yet the Conuſee ſhall have the Land for the life of the Tenant for life, becauſe that each of them gave that which he might lawfully give: *Engliſhes* Caſe, *Cook* 1. Part, 76. in *Bredons* Caſe.

3. If an Enfant levyeth a Fine, and doth declare the uſe upon it; It was holden, That the ſame ſhall bind him ſo long as the Fine doth remain in force, becauſe he is admitted by the Juſtices to be of full age to levy a Fine. *Cook* 2. Part, 58. in *Beckwiths* Caſe.

4. If an Enfant doth levy a Fine to the King, the ſame ſhall bind him, and it ſhall not be avoided for his Infancy. See by *Hobart* Chief Juſtice, in *Needler* and the Biſhop of *Wincheſters* Caſe, Hill. 12 Jac. in C. B. 224. And ſee *Cook* 10. Part, 44. in *Mary Portingtons* Caſe. 4. And the Declaration of Uſes, upon ſuch Fine by the Enfant, is good, for that the Law which enables him to the principal, enableth him alſo to declare the Uſes. And if an Enfant acknowledgeth a Statute, or a Recognizance; It is not void, but voidable by *Audita Querela* during his Minority; and the difference is, becauſe of the Inſpection of the Enfant by the Judges in the Caſe of a Fine; but not of every Enfant in Caſe of a Recognizance. But a common Recovery againſt an Enfant, although he appeareth by his Guardian, ſhall not bind him becauſe he hath not a diſpoſing power of the Land, and he is diſabled to transfer it to others during his Minority. *Cook* 10. Part, 43. acc.

5. Note, a common Recovery may be had againſt an Enfant under the age of 21 years, upon examination of him ſole and ſecret, then ſuch Recovery is of his free will, and for his benefit: Whereupon the Enfant was admitted to ſuffer a common Recovery by his Guardians in open Court. Mich. 15 Car. in C. B. *Blounts* Caſe. *Hob.* 169. See here many preſidents vouched, where common Recoveries were had againſt Enfants in the like Caſe.

6. Note, It was ſaid by *Cook* Chief Juſtice, That when he was in the Common-Pleas, It was Reſolved by himſelf, and all the other Juſtices there *una voce*, That a common Recovery againſt an Enfant, was but a common aſſurance, upon which an uſe might be averred, and a forfeiture of an eſtate for life, and that this not to bind or hurt him. Trin. 12 Jac. in B. R. *Bolſtr.* 2. Part, 235.

7. The Caſe was; Tenant in tail, the Remainder in Fee; Tenant in tail levyed a Fine with Proclamations; he in the Remainder dyed, his Heir within age; afterwards Tenant in tail dyed without Iſſue, ſo as the Title did accrue to the Enfant, and five years encurred whileſt he was within age. It was adjudged in this Caſe, That the Statute of 4 H. 7. did ſave unto the Enfant his Action untill his full age; and that then he ſhould have five years more to make his claim, and avoid the Fine. But it was agreed by all the Juſtices, That he might bring his Action within the five years if he pleaſed.

Mich.

4 Mar. *Dyer*, 233. See 2 Mar. *Dyer*, 104. acc.

8. If the Goods of an Enfant eſtray, and be proclaimed according to the Law, if none come to claim them within the year and a day; he ſhall be bounden in ſuch Caſes, for having his Goods: The like Law is of the Goods of an Enfant which are wrecked upon the Sea. See *Cook* 5. Part, 108. in Sir *Henry Conſtable's* Caſe, acc.

9. Error was brought to reverſe a Judgment in a Writ of Entry againſt the Earl of *Newport* an Enfant, where he appeared by his Guardians, wherein they vouched the common Vouchee upon his Default after appearance: The Error aſſigned was, That the Judgment was given by default, he being an Enfant; It was Reſolved by the Court, That it was not Error; for the Judgment is not given upon the default of the Enfant, but upon the departure of the Vouchee is deſpight of Court, and the Court is truſted, that they will not admit a Guardian, but ſuch as ſhall anſwer to the Enfant for his Loſs, if he have any. M. 6 Car. in B.R. *Tho.* Earl of *Newport* and Sir *Henry Mildmay's* Caſe, *Cro.* 1. Part, 224.

10. The Inſpection of an Enfant was taken by one of the Juſtices upon an Eſſoin day: It was the Queſtion, Whether it was good? And the Judgment upon the Inſpection of him was given the ſame day. It was the Opinion of all the Juſtices, That the Judgment was well given. See Trin. 8. Jac. *Poyn's* Caſe, Vouch. in *Bolſtr.* 1. Part, 35. in *Walter's* Caſe. See the original Caſe of *Poyns*. M. 8 Jac. *Cro.* 2. Part, 230.

11. The Court was moved, on the behalf of an Enfant, to diſcharge a Guardian aſſigned by the Court, with an intent to make J. S. an Attorney a Guardian in his Room, and that the former Inſpection of him might be diſcharged; and that the Infant might be inſpected *de novo*, becauſe when the former Inſpection was, and a Guardian aſſigned, there was no Action depending in Court; which the Court held reaſonable, the former Inſpection to be diſcharged, and he to be inſpected *de novo*, and a new Guardian aſſigned. Tr. 1655. in B.R. *Styles*, 456.

12. A woman during Coverture joyned with her Husband in levying a Fine of her own Lands, with her Husband within Age, and ſhe was brought into the Court to be inſpected: Whereupon a *Scire facias* iſſued out to the Terr-Tenants, who came and pleaded that ſhe was of full Age at the time of the Fine levyed; upon which Iſſue was joyned, and a Verdict for the Plaintiff, and now ſhe came and prayed Judgment upon the Verdict: The Court ſaid, We are to judge of the Infancy upon Inſpection, and not the Jury; and upon Inſpection we adjudge her to be within Age, and therefore let the Fine be reverſed. M. 1655. in B. R. *Vidian* and *Fletcher's* Caſe, *Styles*, 474.

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3. Enfant, *How he muſt ſue, or be ſued: Where by Guardian, Prochyn amy, or by Attorney; and where not.*

1. IN a Formedon in the Diſcender, The Plaintiff was admitted before one of the Juſtices of the Common Pleas, to proſecute *in omnibus Actionibus*, which was entred in the Plea-Roll thus, *Conceſſum eſt per Curiam*, That the Plaintiff, by J. S. his Guardian, ſhould proſecute *&c.* And the Philizer's Roll was, That J. Y. by J. S. his Guardian; *ad hoc admiſſus per Curiam, abtulit ſe quarto die*, &c. But there was no Entry in the Philizer's Roll, *Quod conceſſum eſt per Curiam, quod petens ſequatur*, by J. S. his Guardian: Whereupon Error was brought. It was the Opinion of the Court, That notwithſtauding Error was brought, yet it might be amended; becauſe it appears, That the Juſtice admitted the Guardian *ad proſequendum*, and the Philizer's Roll is *obtulit ſe*: So the Admiſſion appearing before the *obtulit ſe*, it was the Omiſſion of the Clark rather than the Act of the Court, wherefore it was amended: And in that Caſe it was doubted, Whether admittance to ſue by Guardian, where it ought to be by *Prochyn amy*, be good or not? The Court delivered no Opinion, but many Preſidents were ſhewed, That ſuch Entries had been both wayes. Mich. 3 Car. in C.B. *Young* and *Young's* Caſe. *Cro.* 1. Part, 61. See *Fitzh. N. B.* 27. And ſee the old Books, 29. *Aſſ. Lit.* Title *Aſſ.* 293. 31 E. 3. Attorne, 94. 3 Hen. 6. 17. by *Markham*. See Mich. 3 Car. *Hutton*, 92. in the ſame Caſe.

2. Note, Error was brought of the Judgment given in the King's Bench, in the Caſe betwixt *Rawlins* Plaintiff, and *Somerford* Defendant; which ſee *Cook* 4. Part, 53, 54. And one Error was, becauſe that *Rawlins* the Plaintiff was an Enfant, and was admitted by his Guardian, but no Record thereof was made as is uſed in C. B. but only recited in the Court. J. R. *per* A.B. *Gardianum ſuum ad hoc per Curiam ſpecialiter admiſſum, Queritur* &c. The Juſtices *prima facie* ſeemed to be of Opinion, That there ought to be a Record made of the ſaid Admittance. But upon ſearch of the Records in the King's Bench, many Preſidents were ſhewed, where Enfants had ſued by Guardian in B. R. and no Record made of their admittance by Guardians, but Recitall as afore-ſaid. Wherefore the Court afterwards diſallowed the Error, and the

the Judgment was affirmed. *Cook* 4 Part, 53, 54. *Rawlin's* Caſe.

3. In Treſpaſs of Battery and falſe Impriſonment, The Plaintiff ſued the Defendant by *prochyn amy*; And upon Not-Guilty pleaded, and Iſſue joyned, it was found for the Plaintiff: It was moved in Arreſt of Judgment, becauſe the Plaintiff ſued by *prochin amy*, where he ought to ſue by his Guardian, and *Jones* and *Simpſon's* Caſe was vouched to that purpoſe. But the Opinion of the Court was, That the Plaintiff may ſue by *prochyn amy*, or by Guardian, but the Defendant ſhall ſue only by Guardian: It was adjudged for the Plaintiff. M. 5 Car in B. R. *Goodwin* and Sir *Rich. Moor's* Caſe. *Cro.* 1. Part, 115.

4. Error in the Exchequer-Chamber of a Judgment in B.R. in an *Ejectione firmæ*, The Error aſſigned was, That the Plaintiff was an Enfant at the time of the Bill brought and ſued by an Attorney where he could not make an Attorney, but ought to have ſued by Guardian: It was the Opinion of all the Juſtices and Barons, That this was an Error in Faict, and that it might be well aſſigned for Error in that Court, although it was alledged, that their Authority given them by the Statute was not to examine matters in Fact, but matters in Law which appeared of Record: Where the Defendant ſaid, That he was of full Age at the time of the Bill brought, and thereupon they were at Iſſue, and *Niſi prius* awarded. Mich. 42 Eliz. in Exchequer. *Rew* and *Long's* Caſe, *Cro.* 2. Part, 5.

5. Error of Judgment in B.R. in *Ejectione firmæ*, becauſe one of the Defendants at the time of the Judgment was within Age, and appeared by Attorney where he ought to have been by his Guardian: The Judgment being upon a Verdict, It was thereupon demurred. All the Judges and Barons held, in regard the Damages & Coſts are entire, that the Judgment is reverſible for both; and was reverſed accordingly. Hill. 8 Jac. in B. R. *King* and *Marleborough's* Caſe, *Cro.* 2. Part, 303.

6. Note, An Enfant was admitted by Guardian to ſue an Accompt againſt his Guardian in Socage, for the Profits received after the Enfant had accompliſhed his Age of fourteen years; and the Action was brought againſt him as his Bayliff, and ſo it ought to be, as it was holden by the Juſtices. Hill. 6 Jac. in B. R. *Cro.* 2. Part, 219.

7. Debt was brought againſt an Enfant Executor, who appeared by Attorney, and pleaded fully adminiſtred, which was found againſt him, and now brought Error; and aſſigned for Error, That at the time of his appearance he was an Enfant, and ought not to appear by his Attorney, but by Guardian: It was objected, That it was not Error, the Action being brought againſt him as Executor, who preſents the Perſon of his Teſtator, who was of full Age, but that he might appear by Attorney. And Trin. 38 Eliz. in B. R. *Bear* and *Starkley's* Caſe was vouched, where an Enfant ſued by Attorney as Executor, and Error aſſigned for that cauſe, and adjudged no Error, and ſo it was holden. Paſc. 37 Eliz. in B.R. in *Bartholomew* and *Deighton's* Caſe. But it was Reſolved by the Court, That an Enfant being ſued, and pleading by Attorney, although he be Executor, yet it is erroneous; for being ſued, he may by a falſe Plea be charged *de bonis propriis*, and by intendment of Law, he cannot inſtruct his Attorney to plead; wherefore the Law requires that although he be an Executor, yet he ought to appear by Guardian; and a difference was taken where an Enfant Executor is Plaintiff, and where Defendant, and being Plaintiff, where he reverſes: For if Judgment be given againſt him where he is Plaintiff, it ſeemeth all one with this Caſe: The Judgment was reverſed by the Opinion of the whole Court. M. 15 Jac. in B. R. *Cotton* and *Weſtcot's* Caſe, *Cro.* 2. Part, 441. See *Popham*, 130. acc. the ſame Caſe.

8. Error of a Judgment in *Durham*, The Error aſſigned was, becauſe in an *Ejectione firmæ* the Father appearing by Attorney, and the Son by the ſame Attorney, *proximum amicum ſuum*, who was admitted *per Curiam* for the ſaid Son, *ad proſequendum*; whereas he ought to have been admitted to plead by his Guardian, and not by *Prochyn amy*, and the admittance ought to be *ad defendendum*, and not *ad proſequendum*: It was moved, It was no Error, for *Prochyn amy* is a Guardian, and a Guardian and *Prochyn amy* be both but one when admitted *per Curiam*, and although the Entry be *ad proſequendum*, yet it is good enough. But the Opinion of the Court was, That it was erroneous for both cauſes; for neceſſity, an Enfant may be admitted to ſue by Guardian or *Prochyn amy*, where he is to demand or to gain; but when he is a Defendant in an Action reall or perſonall, it ought alwayes to be by Guardian, and the Guardian to be admitted by the Court. The Judgment was reverſed. Trin. 20 Jac. in B. R. *Simpſon* and *Jackſon's* Caſe, *Cro.* 2 Part, 641.

9. Error to reverſe a Judgment in C. B. in a Writ of Right, The Error aſſigned was, That the Plaintiff in the Writ of Right did appear by his *Prochyn amy*, and afterwards he came of his full Age and did proſecute his ſuit, and recovered by his *Prochyn amy* being of full Age, whereas he ought to have appeared in proper Perſon, by Baily, or by Attorney: After long Argument, it was the Opinion of the whole Court, That this is not aſſignable now for Error; for that the Court is not to deter-

determine, or to take notice when the Plaintiff there came to his full Age, but this ought to have been pleaded; and if not pleaded then, there is now no time to plead it, being after Judgment, and by his Lacheſſe the benefit is now loſt for ever, and a Writ of Right is a ſpeedy Writ, and ſo ought to have a ſpeedy end; and it is a Rule in Law, That a man ſhall never aſſign that for Error, of which he could not have advantage by way of Plea, nor ſhall a man have advantage by way of Error for an Error in Fait, where he might have had benefit of it by way of Anſwer. Trin. 8 Jac. in B. R. *Stone* and *Marche's* Caſe, *Bolſt.* 1. Part, 24, 25. See Trin. 9 Jac. in B. R. *Bolſt.* 1. Part, 171. acc. *Cro.* 2. Part, 580. the ſame Caſe.

10. Error to reverſe a Judgment in the Common Pleas, The Error aſſigned was, The Action was brought againſt three Perſons, and the one was within Age, and they all three appeared by Attorney, whereas he within Age ought to have appeared by his Guardian, and Judgment was given, which was erroneous as to him, and ſo to the reſt, becauſe it was a Joynt-Judgment: It was the Opinion of the Court, That it being a joynt-Judgment, being naught in part it was naught in all; and therefore the Judgment was reverſed. Hill. 1654. in B.R. *Bocking* and *Symon's* Caſe, *Styles*, 400.

11. Note by *Rolls* Chief Juſtice, One cannot anſwer for an Enfant either in Chancery, or in any other Court, unleſs he he aſſigned Guardian by the Court; for if he might, that were to make himſelf Guardian, which might prove Damage to the Enfant; therefore if one will ſue an Enfant, the Court muſt aſſign a Guardian who may anſwer for him: But an Enfant may ſue by *Prochyn amy*, though his *Prochyn amy* cannot anſwer for him. Paſch. 1653. in the King's Bench, *Styles*, 369.

12. Error was brought by the Daughters and Heirs of J. S. to reverſe a common Recovery had at Law, in a Writ of *Entre ſur Diſſeiſin*, between A. and B. Plaintiffs, and *Robert Leigh* and J. D. Tenants of diverſe Lands in D. and C. in the ſaid County: Wherein the Tenants did vouch, J. N. and K. his Wife, who did appear by their Attorny, who entred to the Warranty *ad damnum* &c. The Error aſſigned was, that K. was within Age at the time of the appearance of her and her Husband, viz. of eighteen years and no more: And if this were an Error to avoid the Recovery, was the Queſtion: Amongſt other Points, It was argued it was Error; for it is a Rule in Law, that in every *Precipe quod reddat*, where Land is demanded, the Tenant ought to appear in perſon, or by one lawfully authorized by him, and an Enfant cannot make an Attorney, as 1 H. 6. 6. is adjudged, and therefore if he ſue by Attorney it is Error, as 22 H. 6. 21. is: and it ſhould be dangerous to permit Enfants to loſe their Lands by their Attorneys, whilſt they have not diſcretion to chooſe ſuch as ſhall be faithful unto them; and therefore the Law hath provided that they appear by Guardian allowed by the Court who ſhall anſwer for them. See 22 H. 6. 31. *Hungerford's* Caſe. It was objected, That in the principal Caſe, The Husband was of full Age, therefore he might make an Attorney for himſelf and his Wife: It was anſwered, that it is likewiſe a Rule in Law, That the Husband cannot give away or loſe the Inheritance of his Wife that is within Age, and therefore becauſe the Inheritance of the Wife is to be loſt by his Recovery, ſhe ought to appear by her Guardian, notwithſtanding the Husband was of full Age: The Court inclined to Opinion, That the conſtituting of an Attorney was utterly void as to the Wife, and that it was ſuch an Error of which every Stranger might take advantage, and is not like the Caſe where an Enfant makes a Feoffment which is but voidable. And *Portington's* Caſe. *Cook* 10. Part, & 37 Eliz. *Bartholomew* and *Dighton's* Caſe were vouched, where an Enfant did ſue by Attorney, and the Judgment was reverſed. In the principall Caſe there was no Judgment, becauſe one of the Plaintiffs in the Writ of Error dyed, depending the ſuit. Hill. 13 Jac. in B.R. *Holland* and *Jackſon's* Caſe, *Bridgman* 69, 70, 71.

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4. *What Priviledges an Enfant ſhall have, What not: And where he is capable of Grants, of Offices for life, or otherwiſe, Where not.*

1. IF Judgment be given *Dum fuit infra ætatem*, or other Action againſt an Enfant by default, after default he ſhall have a Writ of Error, and reverſe the Judgment for his Nonage: Yet if an Enfant after appearance make default, Judgment ſhall be given againſt him, and he ſhall not reverſe it by Error. 2 Ma. *Dyer*, 104.

2. If an Enfant, who was Plaintiff by his *prochin amy*, at full Age maketh an Attorney, and afterwards he is Non-ſuit, he ſhall be amerced; but otherwiſe it is, if he had continued within Age. M. 17 Eliz. *Dyer*, 338.

3. In Aſſiſe of Novel diſſeiſin brought, The Defendant pleaded in Barr a Recovery in a former Aſſiſe againſt the Plaintiff. The Demandant replyed, That he was an Enfant, and that he was not Terr-Tenant at the time of the Recovery, but that J. S. was Tenant, and that it was a Recovery by

default: It was the Opinion of the Court, 1. That a Recovery was not so sacred a thing, but that it might be falsified, as well in point of Recovery for the thing, as also betwixt the same parties. 2. Because in this Case, the Enfant cannot have Error, or Attaint, and therefore he shall falsify; and the rather in this Case, because here is a Title and Judgment pleaded against an Enfant, where as his Title is not discovered: And in that Case, It was said, That if an Enfant in Assise will confesse, the Court shall not receive his Confession; and if he will plead, the Jury shall not enquire upon the Point of Seisin, but at large; and if he make default, and so will not discover his Title, his default is either *mera negligentia*, and that shall excuse him; or it is *negligentia cum contempta*, and is in the same degree as a Departure in despight of Court, and there Judgment shall be given against him. Hill. 15 Jac. in B.R. *Holford's* Case, *Cro.* 2. Part, 466.

4. Note by the Common Law, If one had suffered a Recovery against him in any reall Action by default, (if he were lawfully summoned, and no Error was in the proceedings,) he had no Remedy but by a Writ of Right; but yet in such Case, If the Recovery had been an Enfant, by reason of his tenderness of years, and defect of Understanding, such Recovery by default should not have bound the Enfant. *Cook* 6. Part, 8. in *Ferrer's* Case.

5. If an Enfant maketh default in a *Precipe quod reddat*, upon which a Grand Cape is awarded, he shall not lose his Land by his default, by reason of his Enfancy. 3 H. 6. 12. See 2 Ma. *Dyer*, 104.

6. If an Enfant be Non-suit in a Writ of Right, yet he may have another Writ of the Possession; and if an Enfant prayeth to be received, and sheweth cause, yet he may wave that cause and shew another cause. 42 E. 3. 13. by *Finchden*. See *Dyer*, 104. acc.

7. It was agreed, That where an Enfant is Plaintiff in an Assise, that nothing shall be said to be confessed by him, but the Assise shall be at large, although that the Enfant doth tender a speciall Issue. But see 48 E. 3. 34. a difference is taken, where the Enfant is Demandant, and where he is Tenant: For it is there said, That no Judgment shall be upon a *Nihil dicit* against an Enfant where he is Plaintiff, but contrary where he is Tenant or Defendant: And if an Enfant in an Assise plead *Ne unq; accouplez loyall Matrimonie*, and the same be certified against him, yet he shall not be convicted as a Disseisor by his Plea; but contrary, if it be by Verdict, 41 E. 3. 31: 28. Ass. 52. In a Cessavit brought against an Enfant, he ought to confess the Services, and tender the Arrearages, and so it is in Case of a Writ of Customs and Services brought against him. But see *Cook* 10. Part, in *Conye's* Case, That in a Writ of Customs and Services against a Cessavit upon his own Cesser, although that he hath the Tenancy by Discent yet he shall have his Age, because he cannot know what Arrearages to tender before Judgment, and if he doth not make a true tender, he should forfeit his Lands, *Cook* 10. Part, in *Conny's* Case.

8. An Enfant submits himself to an Award, and binds himself in an Obligation to perform it: It was adjudged in that Case, That the Submission was void, and then the Obligation also was void. Mich. 17 Car. in B. R. *Rudsons* and *Yate's* Case, *Marsh.*

9. If an Enfant maketh a Partition which is not equall, he shall avoid it at his full Age by Entry, yet it is a lawful Act to make a Partition, & a thing which the Law compelleth him to do, 21 H. 7. 29. acc.

10. If an Action be brought against an Enfant, and he demurr in Law to the Declaration, he may afterwards wave his Demurrer, and plead to Issue, 31 E. 3. *Fitzh.* Enfant, 7. And so was it adjudged in *Kirton* and *Elliot's* Case. Hill. 10 Jac. in B. R. An Enfant may wave his Demurrer, at another day after he hath demurred; but this ought to be the same Term, and not at another Term. *Bolstr.* 2. Part, 69.

11. In Dower brought, The Defendant said That her Husband was seised of three Mannors, holden of the King *in Capite*, and that afterwards the Plaintiff brought a Writ of Dower; and that she had one Mannor assigned unto her for her Dower, for all the other Marthnors, the said Mannors being of equall yearly value. The Demandant said, That she was within Age at the time of the Assignment of the Dower: But it was the Opinion of the Court, That the said Assignment should bind him, the same being made in the Court of Chancery. 18 E. 3. 29. *Fitzh.* Dower, 60.

12. Lord and Tenant by Fealty and Rent, the Lord made a Feoffment of the Mannor, the Tenant being an Enfant within Age, having Land by discent attorned: It was adjudged that the Attornment was good, and in that Case it was Resolved, 1. That in *Per quæ servitia* against an Enfant who hath the Tenury by discent, he shall not have his Age, because the Lord at the first departed with the Land, in consideration that the Tenant should hold of him, and pay to him the Rent; and it is presumed, that the Tenant hath a benefit and avail above his Services which he doth, and the Rent which he payeth; and the Tenant shall be distreyned for his Rent during his Non-age, because the

the Law gives him remedy during his Non-age to have an acquittal. 2. Reſolved, That although the Tenant-Enfant in the principal Caſe was not compelled to Attorn, yet becauſe he was by a mean compellable to have Attorned, if a Fine had been levyed, the Attornment of the Enfant was good. And an Attornment is but a bare aſſent, and doth not give an Intereſt, and therefore ſhall bind an Enfant. *Cook* 9. Part, 85. *Conyers* Caſe.

13. If Tenant in Tail of an Acre of Land, according to the Cuſtome of Burrough-Engliſh, makes a Feoffment in Fee within age, and dyeth, the younger Son ſhall avoid, for he is privy in bloud, and claimeth by diſcent from the Enfant. So it is, If Tenant in tail to him, and the Heirs Females of his body, makes a Feoffment in Fee, and dyeth within age, having Iſſue a Son and a Daughter, the Daughter ſhall avoid the Feoffment. *Cook* 1. Part, *Inſtitutes* 337. acc.

14. Enfants ſhall not be amerced, nor ſhall find pledges, by reaſon of the weakneſs of their age; and therefore in ſuch Caſe the Entry is, *Ideo in miſericordia, ſed pardonatur quia Enfans.* *Cook* 8. Part, 61. in *Beechers* Caſe.

15. If an Enfant under the age of Diſcretion, kills a Man, it is not Felony in him, becauſe he wanteth diſcretion and underſtanding; and therefore the Law imputes it to his ignorance which he hath by nature, and ſo no default in him. But Quære of ſuch Caſe, for as the book is, 3 H. 7. *Malitia ſupplet ætatem.* See *Plow. Com.* 19. in *Fogoſſe's* Caſe.

16. Note, it was ſaid and agreed, according to the Book of 31 E. 1. title Diſclaimer, 30. That an Enfant ſhall anſwer to the Seiſin had by his own hands. See *Cook* 9. Part, in *Bucknell's* Caſe. 33. acc.

17. In an Action upon the Caſe, The Caſe was, The Biſhop of *Rocheſter* Granted the Office of Regiſter in *Rocheſter*, to J. S. an Enfant, *Habendum poſt mortem et ſurſum reddit.* J. D. who held it for life, *Habendum per ſe vel ſufficientem deputatum ſuum*; which was confirmed by the Dean and Chapter. It was moved, That this Grant of the Office to the Enfant was void, he being but of the age of 11. years at the time of the Grant, and no more. And although it were granted to him, *Habendum et exercendum per ſe vel ſufficientem ſuum Deputatum*, yet the Grant was void; for that an Enfant cannot make a Deputy: and when he was at the time of the Grant but of the age of 11. years, yet being void at the time of the Grant, it cannot be made good by a ſubſequent act. But it was Reſolved by the Court, That the Grant was good; For the Grant is not void becauſe at that time he was an Enfant, or becauſe an Enfant cannot make a Deputy; For an Enfant who can write and read, and underſtand the Latine Tongue, may be a Regiſter and may have ſufficient knowledg to Regiſter Acts. But in this Caſe, It was granted to him in Reverſion, and being able to exerciſe the Office at the time it fell, it is ſufficient. Mich. 8 Car. in B. R. *Young* and *Stoells* Caſe. *Cro.* 1. Part, 203. See *Young* and *Fowlers* Caſe. Hill. 14 Car. in B. R. rot. 1265. *Cro.* 1. Part, 400. accordingly Reſolved. Notwithſtanding the Opinion cited in *Cook* 1. Part, *Inſtitutes*, 41 Eliz. between *Scambler* and *Walter*, where it was holden, That the Grant of the Office of under-Stewardſhip, in poſſeſſion or Reverſion to an Enfant, was void, becauſe he was incapable to exerciſe the ſame *pro commodo Regis et populi*, which Caſe was denyed for Law, unleſs it were with this difference, where it is granted without a clauſe of exerciſe, *per ſe vel deputatum.* See Trin. 15 Car. in B. R. *Marſh.* 41, 42, and 43. the ſame Caſe.

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5. *Enfant* in ventre ſa mier, *in what Caſes he ſhall be ſaid in* eſſe, *to take, or otherwiſe, and in what not.*

1. NOte, it is ſaid, That a thing which is not in *eſſe*, but in apparant expectancy is regarded in Law; and therefore ſee 8 E. 2. Voucher, 237. and 38 E. 3. An Enfant in his Mothers Belly may be vouched. See *Cook* 10. Part, in the Caſe of *Sutton's* Hoſpital, 3. acc.

2. If an Uſurpation be had upon an Enfant who is *in ventre ſa mier*, at the next Turn after his death, he ſhall be relieved againſt ſuch uſurpation: for ſuppoſe the Heir in *Eſſe* be then a daughter, ſhe were relieveable in reſpect of her Non-age. It is not reaſonable that the ſon which is after born, ſhould loſe that relief, and the Enfant *in ventre ſa mier*, is to be reſpected, by *Hobart* Chief Juſtice. Paſc. 14 Jac. in C. B. In the Lord *Stanhop* and the Biſhop of *Lincolns* Caſe. *Hob.* 240.

3. A deviſe was made to an Enfant *in ventre ſa mier*. It was the Opinion of all the Judges but *Whiddon*, That the Deviſe was not good, and that the Enfant born after, ſhould take nothing by the deviſe; For that ſuch an Enfant is not capable of an Eſtate, notwithſtanding that Charters may be deteyned for ſuch an Enfant. 13 Eliz. *Dyer*, 303.

4. A Copyholder ſurrendred his Copyhold of Inheritance *in manus Domini*, and the ſurrender was to the uſe of an Enfant *in ventre ſa mier* after his birth. The Queſtion was, If the ſurrender were good or not; It was adjudged, That it was void if it had bin in another conveyance, and by the

ſame reaſon it is void alſo in the Caſe of a ſurrender o. a Copyhold eſtate. Paſc. 23 Eliz. in B.R. *Clampes* Caſe.

5. Note, It was holden, That by Cuſtome a Deviſe may be good to an Enfant *in ventre ſa mier*. 9 H. 6. 23. acc. But by the Statute of 32 and 34 H. 8. of *Wills*, ſuch a Deviſe is not good. For the Statutes do not provide for putting of Lands in ab.yance. And the Statute of 27 H. 8. of *uſes*, doth not execute Uſes which are in abeyance; and therefore a Conveyance to the uſe of an Enfant *in ventre ſa mier*, is void, and not executed by the ſaid Statute, as it is Reſolved in *Cook* 1. Part, in *Chadleigh* Caſe.

6. If Tenant in tail maketh a Leaſe for 40 years rendring Rent, which is voidable by the Iſſue in tail; and afterwards Tenant in tail dyeth without Iſſue, his Wife with child with a Son, by which the Donor entreth, and as to him avoideth the Leaſe, and afterwards the Son is born, the Leſſee re-entreth, the Son at his full age accepteth the Rent, the ſame doth aſſirm the Leaſe, for the Leaſe was never abſolutely void, but voidable, and by matter *ex poſt facto*, was defeated for a time. And although *filius in utero Matris eſt pars viſcerum Matris*; Yet the Law in many Caſes hath conſideration of him in reſpect of apparent expectation of his birth. See the Opinion of *Saunders* and *Brown* in *Stowell's* Caſe. *Plow. Com.* for avoiding of a Fine, *Temp.* E. 1. and 31 E. 1. *tit.* Brief. for the Wardſhip of him. 41 E. 3. 13. and 11 E. 3. *Voucher*. he may be vouched in his Mothers belly, 41 E. 3. Detainment of Charters for the Heir in his Mothers belly, 3 Eliz. *Dyer*, 186. An Adulterer doth Counſel the woman to kill the Child when he is born, who doth accordingly; the Adulterer is an acceſſary, yet at the time of the Counſel, the Child was in his Mothers belly. See *Cook* 7. Part, 9. in the Earl of *Bedfords* Caſe. acc.

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6. *What Statutes ſhall bind Enfants; What not: And where they ſhall be included within the words, where not: Where within the Equity of them; where not.*

1. AN Enfant is bounden by every Statute Law if he be not expreſly excepted; as the Statutes of *Forjudger*, *Ceſſavit*, *Fines* with Proclamations. Mich. 2. *Ma.* *Dyer*, 104.

2. Tenant in tail, remainder in Fee to a ſtranger, Tenant in Tail levyes a Fine with Proclamations; he in the Remainder dyes, his Heir within age, & afterwards Tenant in tail dyeth without iſſue, ſo as the title to have a Formedon in the Remainder accrues to the Enfant, who ſuffers five years to paſs after his title accrued, by bringing his Writ, yet he may bring his Action after the five years, becauſe the Statute of 4 H. 7. of *Fines*, ſaves his claim till his full age, and then he ſhall have five years. Mich. 4. *Ma.* *Dyer*, 133.

3. Statutes which give corporal puniſhment, ſhall not extend to Enfants: but contrary of other Statutes. See 36 E. 3. If an Enfant be Keeper of a Priſon, and ſuffer an eſcape, he ſhall be ſubject of the eſcape. See *Doctor* and *Student*. acc.

4. If an Enfant be found a Diſſeiſor, yet it was holden, his Impriſonment ſhould be remitted. But ſee 30 Aſſ. 18. Where an Enfant brought an Attaint, and the firſt Verdict was affirmed, and the Enfant was awarded to Priſon. *Ex quo Nota*, That an Enfant was within a Statute which gave corporal puniſhment. See 43 E. 3. *fitz.* tit. Impriſonment, 16, 17.

5. The Statute of Non-claim ſhall not bind an Enfant, 2. *Aſſ.* 6. But if part of the year be in the time of his Auncеſtor, now if the Heir within age, doth not enter during that year, he ſhould be barred, by the Opinion of the Lord *Dyer*, 370, 371. in *Stowell's* Caſe; but Quære of it.

6. If an Enfant vouch a Record, and fail of it at the day, yet he is not within the Statute of *Weſt.* chap. 21. See *Hob.* 95. 23. Aſſ. 1. 5 H. 7. 11. acc.

7. The Statute of *Weſt.* 2. chap. 11. That if Bayliffs, or Receivers be found in Arrerages upon their account, that the Auditors may ſend them to Priſon to the next Goal. It is the Opinion of *Saunders*, *Plow. Com.* 364. That an Enfant is out of that Statute, becauſe the Statute gives Impriſonment.

8. If an Enfant be convicted of raviſhment of a Ward, he ſhall not be impriſoned for the Kings Fine, yet the Statute of *Merton* is general, *Quicunque Laicus*, &c. See *Plow. Com. ibid.* by *Welſh* and *Saunders*.

9. If a Woman Enfant conſent to a raviſhment, yet the next of bloud ſhall not enter; and yet the Statute of 6 R. 2. is general; That incontinently, thoſe that are next of bloud to enter. But that is to be intended, If they conſent before the age of 12 years, and not after the age of 12 years.

10. An Enfant is within the Statute of Waſte, for Waſte done by himſelf, but not for Waſte done by a ſtranger. See *Cook* 8. Part, 44.

Entendment.

1. *Where a Writ, Plaint, Count, Barr, Verdict, and Endictment, ſhall be good by Intendment, Where not.*

1. SIR *Adam de Clydrow* brought a *Precipe quod reddat* againſt J. *de Clydrow*, and the Writ was, *quod juſte &c. reddat Manerium de* Wicombe, *et duas Carucatas terræ cum pertinentiis in Clybrow*: It was taken in that Caſe, That by Intendment the Town of *Clybrow* did not relate to the Manner; for a Manner may be demanded without mentioning that it lyeth in any Town; but the words *cum pertinentiis* in the Writ, although it cometh after the Town, ſhall relate to the Manner. See *Cook* 8. Part, 119. in Dr. *Bonham's* Caſe.

2. In an Aſſize brought by the Earl of *Rutland* againſt the Earl of *Shrewsbury*, complaining that he diſſeiſed him of the Office of Keeper of the Park called *Clipſon* Park: The Caſe was, That the King by his Letters Patents granted the Office *Parci ſui vocat. Clipſon* Park, to A. for life, and by the ſame Letters Patents granted the Herbage and Pawnage of the ſaid Park to A. for life: And afterwards the King by other Letters Patents, reciting the Eſtate of A. granted to B. *Offic. prædict. Cuſtodiæ Parci prædict. vocat. Clipſon* Park for his life *quam cito per mortem, ſurſum reddit. forisfact. ſeu aliter alio modo vacaverit, adeo plene & integrè prout prædict.* A. *habuit ſive gavisus fuit*: In this Caſe Exception was taken to the Plaint, for as much as in alledging the Grant to the ſaid A. the Plaint is, That the King did grant the Office *Parci ſui vocat. Clipſon* Park (without ſaying *Prædict.*) and therefore it ſhall be intended another Park: But it was Reſolved, That it was the ſame Park, for the Plaintiff doth begin his Plaint *pro titulo liberi tenementi de Officio prædict.* Alſo he ſheweth, That the King was ſeiſed *de Parco prædict.* and ſo ſeiſed, granted *Offic. Parci ſui de Clipſon*: which ought to be intended the ſame Park whereof the Seiſin was alledged at the time of the Grant, and the rather in reſpect of the word [*ſui*], and in all other parts of the Plaint [*prædict.*] is added; wherefore the Exception was diſallowed by the Court. M. 6 Jac. in C. B. The Earl of *Rutland's* Caſe, *Cook* 8. Part, 56, 57.

3. In an Indictment of Murder, Error was alledged, becauſe in the Indictment it was alledged, That the Indictment was taken before W. S. *Coronator. Domina Regina infra libertat. dicta Domina Regina Villa ſua de* Coſſam *prædict. per viſum Corporis*, and it was not alledged to what places the Liberty did extend, nor what part, or any part, of the Town of *Coſſam* was within the Liberty, ſo as it doth not appear that the Coroner had Juriſdiction; and it was ſaid, That Indictments which do concern Life, and which are the King's Counts, ought to have a plain and preciſe certainty, to which the party might anſwer, and ſhould not be taken by Argument. But it was Reſolved by the Court, that the Indictment was good enough: For if an Indictment be to a certain intention in generall, the ſame were good enough. And in this Caſe, The Indictment is certain enough to a generall Intendment, becauſe *Coſſam* is within the Liberty of *Coſſam*; And that the Town it ſelf ſhall be intended to be out of the Liberty of the Town is a ſtrained Conſtruction which the Law will never allow of. *Cook* 5. Part, 120. *Long's* Caſe.

4. In Treſpaſs, The Jury found a ſpecial Verdict to this effect: A. ſeiſed of Land in Fee, holden of T. L. as of his Manner of F. by Fealty, Rent, and rendring the beſt Beaſt after the death of every Tenant in Fee ſimple; By Deed, in conſideration of Fatherly Love to his Son and Heir apparant, and in conſideration of a Marriage betwixt his Son and B. and for the advancement of his Son, enfeoffeed his Son and Heir apparant of the ſaid Land; and afterwards the Son, to the intent that B. ſhould not be endowed of the ſaid Lands during the life-time of the Father, re-demiſed the ſaid Land to the Father for forty years, if he ſhould ſo long live; afterwards the Marriage took effect, the Son did Suit at the Lord's Court; and after the Feoffment the Father paid the Rent to the Lord, and after the Father dyed, and the Lord took a Beaſt for a Herriot *poſt mortem* of the Father; and the Jury found the Statute of 13 Eliz. of fraudulent Conveyances. In this Caſe, It was Reſolved, 1. That becauſe no Fraud is found by the Jurors, that the Court ſhall not adjudge the ſaid Feoffment to be fraudulent; and although the Jurors have found Circumſtances to incite the Jurors to find fraud, yet the ſame is but evidence to the Jurors, and not any matter upon which the Court may adjudge the ſame fraud. 2. The Jurors have not found that the ſaid Feoffment was made to defraud the Lord of his Herriot, and ſo they have not found the ſame within the Statute of 13 Eliz. 3. The Feoffment, being found to be made in conſideration of Marriage, and to that particular intent concerning the Dower of the Wife of the Son ſhall not by Conſtruction of Law extend to any other intent, as in the Caſe 10 Eliz. in the Court of Wards adjudged: Tenant *in Capite*, and his Heir within Age, and indebted to many, enfeoffed divers upon condition, That when he or his Heirs ſhould pay unto the

Feoffees 30 l. that then they ſhould make ſuch Feoffments, to ſuch uſes as he or his Heirs ſhould limit, or otherwiſe the Feoffment ſhould be void; And it is found by *Mandamus*, *Quod nulla alia cauſa, intentio, aut colluſio, ad defraudendum Regem de Cuſtodia Hered. terrarum*; and although that Feoffment was found to be by Fraud and Covin which is illegall, yet becauſe the Fraud was to a particular intent, *ſcil.* to defraud Creditors; It was Reſolved it ſhould not be conſtrued to extend to another intent, *ſcil.* to defraud the King of his Ward. Trin. 10 Jac. in the Common Bench, *Toyer* and *Littleton's* Caſe vouch in *Cook* 10 Part, 54. the Chancellor and Maſter's of the Univerſity of *Oxford's* Caſe.

5. In Replevin, the Caſe was, Awan ſeiſed of Bl. Acre in Fee, and of Wh. Acre for years, by Deed granted a Rent out of both, with Clauſe of diſtreſſe in both: The Rent was behind, and he diſtreyned and avowed in White Acre. It was reſolved in this Caſe, amongſt other things, That when a man grants a Rent out of Lands in Fee, and a Term for years to have for life, the Free-hold of the Rent ſhall iſſue out of the Acre in Fee, and not out of the Term for years, becauſe it is but a Chattell, and the Agreement of the parties cannot charge ſuch a thing with a Rent which is not chargeable in the Law: Alſo in this Caſe, It was adjudged, That the Avowry was inſufficient, 1. Becauſe the Avowant did not make mention of any Land, but of the Land in which he had but a Term for years, whereas he ought to have derived his Rent out of the Land in Fee, and every Avowry which is in the Nature of a Count, ought to have ſufficient matter upon which he may have Judgment to have a Retorn: But if it wanteth only matter of Form, there the Plea of the other party may make it good, but not when it wanteth matter of Subſtance. 2. Becauſe the Avowant pleads a Grant out of a Term for years onely, and concludes *virtute cujus* he was ſeiſed *in Dominico ſuo ut de libero tenemento pro termino vitæ*, which is repugnant to have a Free-hold out of a Term. *Cook* 7. Part, 23, 24. *Butt's* Caſe.

6. In Aſſumpſit, The Defendant promiſed, That if the Plaintiff *ad inſtantiam Defendentis* would marry the Defendant's Daughter, he would pay him 20 l. and give him twenty French Crowns towards their Wedding Dinner; and the Plaintiff alledgeth, he married the Defendant's Daughter, and required him to pay him the 20 l. which he had not payed. Upon *Non Aſſumpſit*, it being found for the Plaintiff, It was moved, The Declaration was not good, for that the Promiſe is but conditional if he *ad inſtantiam* of the Defendant married his Daughter, and ſo he hath not averred the performance of the Condition: But all the Court conceived upon this Agreement to marry the Daughter *ad inſtantiam*, and he marrying her, it ſhall be intended to be *ad inſtantiam*, without averring. Trin. 6 Car. in B.R. *Poynter* and *Poynter's* Caſe, *Cro.* 1. Part, 141.

7. Debt upon an Obligation, The Condition was, Whereas the Defendant had taken A. S. a Widdow to Wife, being poſſeſſed of diverſe Goods, if he ſhould permit his Wife to make a Will, and to diſpoſe in Legacies ſo much as ſhe would, not exceeding 50 l. and pay and perform what ſhe promiſed, that then *&c.* The Defendant pleaded, that ſhe did not make a Will: It was found ſhe made a Will, and diſpoſed of Legacies not exceeding 50 l. & that ſhe was a Feme Covert at the time of making the Will: In this Caſe, it was adjudged for the Plaintiff; for although ſhe being a Feme Covert could not in Law be permitted to make a Will to diſpoſe of any Goods without the Husbands Aſſent, yet it was holden, that is is a Will within the intent of the Condition: for ſuch was the intent of it notwithſtanding the Coverture; and the finding that ſhe was a Feme Covert, is not materiall: Trin. 7 Car. in B.R. *Marriot* and *Kinſman's* Caſe, *Cro.* 1. Part, 159.

8. Debt upon Obligation to perform an Award of J. S. and J. D. ſo they made it before the tenth day of *October* next under their hands and Seals; and if they did not agree, then to ſtand to the Umperage of J. N. ſo he made it in Writing under his Hand and Seal before the twentieth of *October* following: The Defendant pleaded, J. S. and J. D. did not make an Award before the 10th. of *October*: The Plaintiff replies, It is true, but J. N. did make the Umperage and Award before the twentieth of *October*, where, *inter alia*, the Defendant was to pay to the Plaintiff 30 l. upon ſuch a day, at the Houſe of W. S. in C. and for Non-Payment, *&c.* It was moved, the Submiſſion was void and incertain; for it is that if they do not agree, and it doth not appear to what they ſhould agree: But the Exception was diſallowed, for the words [if they do not agree] have the intendment if they do not agree to make their Arbitrement under their Hands and Seals, before ſuch a day, for otherwiſe it is *quaſi* Non-Agreement within the ſaid Condition. 2. It was moved, that the Arbitrement was void, becauſe the Money was appointed to be paid at the Houſe of W. S. a Stranger: But it was Reſolved, The Arbitrement was good; for the Appointment of the payment of the Mony at a Stranger's houſe, (eſpecially in this Caſe, it being a Common-Inn,) cannot be unreaſonable nor an unlawful Act: For by Intendment the Plaintiff ſhall procure ſuch kindneſs, that the Mony may be paid

paid there; Whereupon it was adjudged, That the Arbitrement was good *prima facie*, and Judgment entred for the Plaintiff. M. 7 Car. in B. R. *Taverner* and *Skingle's* Case, *Cro.* 1. Part, 163.

9. In an *Ejectione firmæ*, It was found by Verdict, That A. was seised in Fee, and had Issue by E. his Wife J. and that by Indenture, in consideration of Love to his said Wife, and J. their Son and Heir apparant, and to settle the Land upon him and his Heirs, he enfeoffed J. S. and J. D. to the use of himself for life, and after to his Wife for life, and after to the use of the said J. and the Heirs Males of his Body, *&c.* Afterwards A. by Indenture enfeoffed J. S. with Warranty of the same Land, and dyed. The Question was, If this Warranty should discend upon the said J. the Son, and bind him or not? It was objected, That this Warranty should bind the said J. for it is found, That the Indenture calls him *Filium unicum et Heredem apparentem*, and a plurality of Sons shall not be intended; and in a Special Verdict Intendment sufficeth, especially in this Case, because if he be not Heir, there is no colour to have a Special Verdict: But the better Opinion of the Court was, That although it be found, that A. had Issue by the said E. his Wife the said J. *unicum Filium suum*, yet it is not found, that he is Heir; and it may be he had other Sons by a former *Venter*: And the Court will not intend a Warranty by Supposition, but the rather it shall be intended that he was not Heir, because it is a collaterall Warranty, which is not to be favoured in Law. Trin. 8 Car. B. R. Rott. 678. *Gymlet* and *Sand's* Case, *Cro.* 1. Part, 284.

10. Error to reverse a Judgment in Waste, In Waste the Plaintiff declared, That R. C. was seised in Fee, and 8 Jac. levyed a Fine of the Land to the use of himself for life, and after to the use of E. his Wife for her life, and after to the use of himself and the Heirs Males of his Body, and after to the use of J. C. the Plaintiff, and the Heirs Males of his Body, and after to the use of the right Heirs of the said R. C. And that after H. 8. Jac. the said R. C. levyed another Fine of the same Land to the use of himself for life, and after to the use of J. C. and the Heirs of his Body, and after to the use of the right Heirs of the said R. C: R. C. dyed, and the Wife entred, and was seised for life, the Reversion to the Plaintiff, and that afterwards she did waste *ad exheredit ationem* of the Plaintiff: The Defendant pleaded *Nul Waste fait*, which was found against her. Error was brought, the Error assigned was, That the Plaintiff hath not sufficiently entitled himself to the Reversion, to punish the Waste, because he doth not alledge that R. C. was dead without Issue Male, and if he be not dead without Issue Male, the Plaintiff cannot punish the Waste: But to that it was answered, and such was the Opinion of the Court, That forasmuch as it is said, That she entred and was seised for life, the Remainder to the Plaintiff, it is intended that R. C. is dead without Issue, and he alledgeth it is to be done to his Disenheresin, and that cannot be if the other had any Issue alive, and the Verdict hath found it to be to his Disenheresin, by which it is intended, that R. C. dyed without Issue: Wherefore it was adjudged, That the Judgment should be affirmed. Hill. 10 Car. in B. R. Sir *John Stone-house* and Sir *John Corbet's* Case, *Cro.* 1. Part, 291.

11. In an Assumpsit by an Attorney, Upon a Promise to pay him such Fees as should be due to him as his Attorney, in prosecuting a suit for him in C. B. and such Money as he should lay out in solliciting a suit for him in the Chancery: Upon *Non Assumpsit* pleaded, it being found for the Plaintiff, Error was brought, and assigned for Error, that the Plaintiff did not shew particularly what Sums of Mony he had layed out for him, nor to whom he had paid it: And the Assumpsit being, that he should pay him his Fees so long as he should continue his Attorney, it appears not that he continued to be his Attorney in the suit, wherein he supposeth he prosecuted for him. But both the Errors were disallowed by the Court; for 1. it is not necessary particularly to set down the Sums of Money laid out. And 2. It shall be intended that he continued to be Attorney for him, if it appears that he prosecuted for him. Hill. 1653. in B. R. Rott, 603. *Banks* and *Prat's* Case, *Styles*, 420, 421, 428.

12. In Action upon the Case for scandalous words, *viz.* for calling the Plaintiff *Traitor*, a Verdict was found at the Barr for the Plaintiff, and the Jury gave 1500 l. Damages: And upon a supposition that the Damages were excessive, and that the Jury did favour the Plaintiff, the Defendant moved for a new Triall: It was objected, that after a Verdict, Partiality of the Jury ought not to be objected or questioned, and therefore no new Tryall, *Glyn* Chief Justice. It is in the discretion of the Court to grant a new Tryall, but this must be a judicial and not an arbitrary discretion; And the Court may take Notice of the Miscarriages of Juries, and to grant new Tryall upon them; for a Jury may sometime by indirect dealing be moved to side with one Party, and not to be indifferent betwixt them; but it cannot be so intended of the Court. A new Tryal was awarded. M. 1655. in B. R. *Wood* and *Gunston's* Case, *Styles*, 465.

13. A. seised of a House in *London*, acknowledged a Statute to the *Chamberlain* of *London* for Orphanage Money, according to the Custom; and after-

afterwards acknowledged another Recognizance before the Recorder and Mayor to B: B. ſued Execution upon his Recognizance, and had a *Liberate*; but it was not Returned, and the Sheriff upon that delivered the Houſe in Execution to B. The Succeſſor of the Chamberlain ſued Execution upon his Recognizance, by Elegit to the Serjeant at Mace: Amongſt other matters in this Caſe, it was objected, That here was no Recognizance in the Nature of a Statute found; for the Jurors have found, That A. *venitbat coram Recordatore Civitatis London. et* T. O. *Majore Stapulæ, et recognovit* R. *debere* B. 200 l. and doth not ſay *ſecundum formam Statuti* &c. *nec per ſcriptum ſuum Obligatorium.* Whereas the Statute of 33 H. 8. provideth, That it ſhall be by Bill Obligatory ſealed with 3. Seals: But it doth not appear by the Verdict, that it was according to the Statute, and although that Verdicts, being the words of Lay-men, ſhall be taken according to their meaning, and there needs not ſo preciſe Form in them as in pleading; yet the Subſtance of the matter ought to appear either by expreſs words, or by words equipollent, ſo as there ought to be a convenient certainty; the which if it be falſe, the party for ſuch falſity may have an Attaint. But it was Reſolved, That the Verdict was good: for in as much as they have found a Recognizance before the Mayor and Recorder, &c. It ſhall be in a Verdict of Lay-men intended according to the Statute; for otherwiſe they cannot take any Record: and alſo the ſequel of the Verdict doth imply, That there was a Recognizance in the Nature of a Statute, otherwiſe no Execution could be ſued thereupon. M. 33 Eliz. *Cook* 4. Part, 65. *Fulwood's* Caſe.

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2. *Where Grants of the King, and other Perſons ſhall enure to two Entendments; and where they have two Entendments, which of them ſhall be taken, and how they ſhall be conſtrued.*

1. NOte, It is taken for a Rule in Law, That if the King's Letters Patents may be taken to two Entents, then it ſhall be taken moſt beneficially for the King. But if it may be taken, to one Entent good, and to another Entent void; Then it ſhall be taken to that intent which makes the Grant good, and not to that intent which makes the Grant void, as 2 R. 3. 5. The King granted to the Abbot of *Weſtminſter* to be diſcharged of the Collection of Tenths, granted *per Clerum Angliæ*; It ſhall be taken in the ſence, that the Grant ſhall be good, *ſcil.* of Tenths granted by the Clergy generall, for they never joyn in a Convocation, That is another Rule there taken, That the King's Grant *ex certa ſcientia et mero motu* ſhall be taken ſtrongeſt againſt the King; but it was ſaid, That muſt be entended when the King is not deceived in his Grant: for if the King be deceived in his Grant, although that the Patent be *ex certa ſcientia et mero motu*, yet the Grant is void, and the King's Grant ſhall be conſtrued *ſecundum intentionem Regis, & non in deceptionem Regis.* See the Caſe 15 Eliz. of the Manner of *Torrington* there vouched, The King, ſeiſed of the Manner of *Torrington*, and of a Market in the ſaid Manner every Week, and of a Fair *in Vigilia, Feſto, et Craſtino St. Michael.* by Letters Patents encorporated the Town of *Torrington*, and granted to them *ex ſpeciali gratiâ & mero motu, quod ipſi & Succeſſores ſui poſſint habere & tenere unum Mercatum quolibet die Sabbat. et duas Nundinas ibid. annuatim, viz. unam in Vigilia, Feſto, et Craſtino St. Michael. et aliam in Feſto St. Georgii Martyr. niſi Mercatum et Nundinæ illæ eſſent ad nocumentum vicinorum Mercatorum vel vicin. Nund.* It was adjudged in that Caſe, That the Patent was void, becauſe the King was not appriſed of his own Grant; for his intent was to grant and create one Fair *in Vigilia, Feſto, et Craſtino Michael. niſi ſit ad nocumentum*: And there it was holden, That the Patent being *ex ſpeciali gratiâ, certa ſcientia, et mero motu*, did not paſs the ancient Fair, for that ſhould be againſt the intent and purpoſe of the King, which was to create a new Fair, and not to grant the Fair in *eſſe*. See *Cook* 1. Part, 46. & 52. in the Caſe of *Alton-woods*.

2. A. ſeiſed of Lands in Fee, covenanted with his Nephew to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of his ſaid Nephew in Tail; Proviſo, if the ſaid A. by himſelf, or by any other Perſon, during his naturall life, tender a Gold-Ring, to the intent to make the ſaid uſes void, that then the uſes ſhould be void, 26 Eliz. A. was attainted of Treaſon, and outlawed upon it, The King by Letters Patents lett the Lands to C. and D. for 40 years; the attainder was confirmed by Parliament, and by an Act it was enacted, That the ſaid Act ſhould not extend to make any Leaſe, made by the King after the Treaſon done, void: The King by his Letters Patents reciting the Proviſo, and that the benefit of it was given to him by Act of Parliament, did authorize E. to deliver the Gold Ring to B. to the Entent to make void the ſaid uſes; E. made the tender, and he refuſed it, and the life of A. was averred. It was amongſt other things objected in this Caſe, That although the King had the condition, and by that defeated the Eſtate for life; yet he ſhould not avoid his own Leaſe; As if the Mortgagee makes a Leaſe for years, and the Mortgagor confirms it, and afterwards

words the Condition is performed, the Leaſe ſhall not be avoided. But it was Reſolved, That the Demiſe of the King ſhould not enure to two entents, *ſcil.* to Demiſe the Land, and a ſuſpenſion of the Condition, or unto a Demiſe in reſpect of the preſent eſtate for life, and to a Confirmation in reſpect of the Condition, as it ſhall in the Caſe of a common perſon; For the Kings Grant ſhall be taken according to his entent, and ſhall not be taken by Implication; And when the King hath two Rights, he cannot exclude himſelf of both without ſpecial words. And if the Demiſe ſhould amount to a Confirmation, or a ſuſpenſion of the Condition, it ſhould be to the Kings prejudice, to which intent his Pattents ſhall not be taken. *Cook* 7. Part, 14. *Engleſields* Caſe.

3. King E. 2. by Letters Pattents, Granted the Caſtle and Mannor of *Shipton* to *Robert de Cliſford*, in tail. Afterwards King *Henry* the ſixth, Granted to *Tho.* Lord *Clifford*, who was Heir of the body of the ſaid *Robert de Clifford*, *reverſionem Caſtri, et Maneriі prædict. nec non Caſtrum et Manerium prædict.* It was Reſolved in this Caſe, That the Grant to *Robert de Clifford* was void, and yet the ſaid Caſtle and Mannor did paſs by the ſaid late Grant made to *Tho.* Lord *Clifford* in Fee in poſſeſſion; for the entention of King *Henry* the 6th was, That be it in Poſſeſſion or Reverſion, it ſhould paſs; and the words agree with his entent: for firſt he grants the Reverſion, if the firſt eſtate was good; and if it were not good, he Grants the ſaid Caſtle and Mannor in Poſſeſſion, and ſo the words in the Letters Pattents agree with his entention, and both with the Law: And the Grant ſhall not be any Confirmation which preſuppoſeth that the King had but a Title or a Right not Grantable; but both Eſtates, as well in Poſſeſſion as Reverſion, are Grantable: And when the Kings Grant may be taken by two entents, and both entents are in effect good, it ſhall be taken to ſuch an entent as ſhall be moſt benficial for the King; but if it may be taken to one intent good, and to another intent void, it ſhall be taken to that intent which ſhall make the Kings Grant good. *Cook* 8. Part, 167. the Earl of *Cumberlands* Caſe.

See to this purpoſe, *Cook* 11. Part, 21. in *Pride* and *Nappers* Caſe.

Cook 8. Part, the Earl of *Rutlands* Caſe.

Cook 6. Part, the Lord *Chandois* Caſe.

Cook 6. Part, Sir *John Molins* Caſe.

4. The King Granted the Manner of B. to G. *Chandois* in tail, and then the King reciting that he had ſurrendred his ſaid Pattent, by force whereof he was ſeiſed in his Demeſne as of Fee, gave the Mannor to him and his Wife. It was holden in that Caſe, That it was a good Grant in Law to paſs the Reverſion in Fee only. 1. Becauſe that leſs paſſed then the King meant. 2. Becauſe it was not made part of the conſideration of the Grant, and therefore if the Grant had bin in conſideration, that by the ſurrender of the Pattent the King had bin ſeiſed in Fee in poſſeſſion, he had granted it again, &c. it would have bin void. *Cook* 6. Part, 55. the Lord *Chandois's* Caſe.

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3. *Where the Entention of the parties ſhall direct aſſurances and uſes, and the Entent of the parties more regarded then the words of a Deed.*

1. NOte, It is ſaid in *Cook* 1. Part, 100. in *Shelley's* Caſe. That by the Common-Law, the Intention of the parties was the direction of Uſes. A man being *Ceſtuy que uſe*, and having one ſole daughter, declared his Intent and meaning, that after his deceaſe, his Daughter ſhould have his Land; and a Queſtion thereupon grew in Chancery, Whether he might revoke this limitation of Uſe made to his Daughter. In that Caſe, it was holden for Law, That if *Ceſtuy que uſe* hath Iſſue a Daughter, and being ſick, declareth his intent to his Feoffee, That his daughter ſhall have his Land after his deceaſe; and after he recovereth his health, and hath Iſſue a Son. It was ſaid, In Equity the Son ſhould have the *ſubpena*, for that he was his Heir. 31 H. 6. Tit. *Subpena*. 23. *Statham*, *Conſcience* 1.

2. If a man be ſeiſed of Lands on the part of the Mother, and maketh a Feoffment in Fee, reſerving Rent to him and his Heirs. In this Caſe, by the Rule of Law, the Rent ſhall go to the Heir on the part of the Father. But if a man be ſeiſed of Lands on the part of his Mother, and maketh a Feoffment in Fee hereof to the uſe of him and his Heirs; in this Caſe the uſe ſhall not go to the Heir at the Commonlaw; but forasmuch as the land and living moveth from the part of the Mother, therefore the uſe in Equity, which is nothing but a Truſt and Confidence, ſhall go to the Heirs on the part of the Mother. See 5 E. 4. 9. *Cook* 1. Part, 100. in *Shelley's* Caſe, &c.

3. A ſeiſed of a Mannor to which an Advowſon was Appendant, by Deed Indented, Bargained, and ſold the ſaid Mannor with the appurtenances to B. and his Heirs: And in the Indenture, there were divers Covenants to ſuffer a Recovery, and levy a Fine to the uſes in the Indenture; Proviſo, That B. ſhould give the Advowſon to A. for his life; and if it happen not void, then one time to his Executor. A. and B. levy a Fine afterwards, with a render of a Rent of 40 l. to A. in tail, the Remainder to B. in Fee; B. in his life doth not grant the Advow-

ſon

ſon to A. and dyed, the Church voids. The Son of B. enters into the Mannor: A. enters for the Condition broken. In this Caſe, It was Reſolved, 1. That the Proviſo made a Condition. 2. That the Fine levyed by A. and B. had not extinguiſhed the Condition; for the Fine by the Common-Law, was directed to have ſpecial operation according to the entent of the parties by the general Covenant, and that was, That the Eſtate ſhould be Conditional, and that the Condition ſhould not be touched by the Fine. But it was holden, That the ſame did extinct all Rights and Titles, but only the Condition, *Cook* 2. Part, 75, 76, 77. the Lord *Cromwell*'s Caſe.

4. Husband and Wife ſeiſed of a Mannor, and to the Heirs of the body of the Husband. The Husband by Indenture Bargained and ſold the Land to one in Fee, who ſuffered a Recovery in which the Husband was only vouched, which Recovery was to the uſe of the Husband for life, and after to the uſe of the Wife for life, and for ſix Monethes after, and afterwards to the uſe of A. in tail, and after to the uſe of the Wife in Fee. Provided, that it ſhould be lawful for the Husband and Wife, during their Joynt-lives, by any Deed or writing ſealed and publiſhed in the preſence of three witneſſes, to alter or revoke any of the ſaid Uſes or Eſtates, and that at all times from and after the ſaid Husband and Wife ſhall declare their mind to alter, &c. then, and from thenceforth ſuch of the ſaid Eſtates and Uſes ſhould ceaſe and be void; and that then, and from thenceforth, the ſaid Recovery ſhould be, to the uſe of ſuch perſons, and for thoſe eſtates, as by ſuch Deed or writing ſhould be declared, and not to any other perſons or Uſes: Afterwards Husband and Wife by writing, ſealed and publiſhed *pro ut*, reciting their power; Declare that the ſaid Recovery ſhould be to the uſe of the Husband for life, and after to the uſe of the Wife for life, and ſix Moneths after, and after to the uſe of B. in Fee, and after the Husband and Wife dye. It was Reſolved in this Caſe, 1. That the Antient Uſes were well revoked, and the new Uſes well declared. 2. That although no uſe did ceaſe till the Writing was ſealed and publiſhed, and after the ſealing and publiſhing of it, nothing could be added unto it; yet it well ſtood with the words, and the entent of the parties, that the new Declaration might be in the ſame Deed. And this word [ſuch] in the Proviſo moſt properly extends to the ſame writing in which the Revocation is then to another, for (by ſuch writing) it is as much as to ſay, *per idem, vel hujuſmodi ſcriptum*: And although that the clauſes of creation of the new uſes, and the diſtruction of the Antient uſes are all in one Deed, yet the Law ſhall conſtrue the clauſe of diſtruction to precede the clauſe of limitation of the new uſes, *Cook* 6. Part, 33, 34. *Fitzwilliams* Caſe.

5. A. ſeiſed of Lands in Fee, demiſed the ſame to Husband and Wife, and a ſtranger, *Habendum* to the Husband and Wife for their lives, the Remainder to the ſtranger for his life, rendring during their lives yearly 40 l. rent, at the Feaſts of St. *Mich.* and our *Lady*: the Husband dyed. Afterwards A. by Indenture, in conſideration of 10 l. paid him, did Demiſe, Grant, and to Farm let, the ſaid Lands to J. S. *Habendum*, from the day of the date of the Indenture, for 99 years, yielding and paying during the ſaid Term to the ſaid J. S. the ancient Rent, at our *Lady* and *Mich.* The Wife did not Attorn. It was adjudged in this Caſe, that the words Demiſe and Grant, for conſideration of mony, do amount to a Bargain and Sale for the ſaid years, and ſhall be preſently executed by the Statute of 27 H. 8. and that there needs not any enrolment, becauſe that but a Term for years paſſeth, and there needed no Attornment, becauſe it was preſently executed by the Statute, and the intent of the Grantor was, that it ſhould paſs preſently, becauſe the Rent was payable preſently, and therefore it did not depend upon any Attornment ſubſequent. *Cook* 8. Part, 94. *Edward Foxes* Caſe.

6. In Aſſiſe, the Defendant pleaded, That A. was ſeiſed in Fee, and ſuffered a Recovery to the uſe of himſelf for life, without impeachment of Waſte, and after to the uſe of his eldeſt Son in tail, with divers Remainders over: The Plaintiff confeſſed the Recovery, but ſaid, That the Recovery was to the uſe of him and his Heirs without that, that the Recovery was to the uſes expreſſed in the Bar. It was found by Verdict, That after the Recovery, by Deed Indented between A. and the Recoverers, it was Covenanted and agreed, That the Recoverers ſhould ſtand ſeiſed to the uſes after expreſſed, and expreſſed the Uſes in the Bar. It was objected in this Caſe, That when a Recovery is ſuffered without conſideration, that the Law ſhall adjudg the ſame to be to the uſe of him who ſuffered the Recovery, and his Heirs; which uſe cannot be deveſted by any Declaration ſubſequent; and in ſuch Caſe, an Indenture ſubſequent ſhould not bind the Heir. 2. That this agreement was but an incompleat communication. 3. That the Indenture was but declaratory and directory of the Uſes, and was not of force to raiſe any Uſe. 4. If Indentures ſubſequent ſhould be ſufficient to declare Uſes of a precedent Recovery, eſtates and Intereſts veſted in the mean time, ſhould be defeated. But it was Reſolved by the Court, That the Indentures ſubſequent, were ſufficient to direct and declare the Uſes of the Recovery precedent againſt A. and his Heirs, for ſo was the full intent of the parties, as appears by the Indenture it ſelf; againſt which

which aſſumption and declaration, A. or his Heirs ſhould not be admitted to ſay, that no ſuch Uſes were declared at the time of the Recovery. Alſo Reſolved, here was a certain, compleat, and perfect Agreement and Declaration of Uſes, and it was not an imperfect communication or reference to any thing after to be put in writing. And Reſolved, That the Declaration ſubſequent was to ſtand good, becauſe it appeareth, there was never any other Declaration of any other Uſe. *Cook* 9. Part, 1, 2. *Dewmans* Caſe.

Entre, *and* Entre Congeable.

1. TEnant for life, the Remainder for life, the Remainder in tail, the Remainder in Fee to the Tenant for life. Tenant for life, and he in the Remainder for life, make a Feoffment by Deed. It was the Opinion of the Court, That he in the Remainder in tail might enter; for it is a forfeiture of both their eſtates, for he in the Remainder for life, joyning is *particeps Criminis*; but if the Tenant for life alone had made the Feoffment, he in the Remainder for life could not enter, becauſe he had not an Eſtate of Inheritance. Mich. 17 Eliz. *Dyer*, 339. See *Cook* 1. Part, 76. in *Brydens* Caſe. acc.

2. A Copyholder did ſurrender to the uſe of his Will, and hereby deviſed the Land to his Wife for life, the Remainder to his Son in tail, and dyed, the Wife entred and dyed, a ſtranger intruded and made three ſeveral Feoffments to three ſeveral perſons; he in the Remainder entred upon one of the Feoffees in the name of all the Lands deviſed, and made a Leaſe of them for years. It was adjudged, That it was a good entry into the whole, and a good Leaſe of the whole Land. Mich. 28 Eliz. in B. R. *Troubleſields* Caſe. *Leon.* 36.

3. Tenant for life of Land, made a Leaſe of part thereof at Will, and being poſſeſſed of the reſidue, he levyed a Fine of the whole Land, the Leſſor entred into the Land, which was let at Will, in the name of the whole. It was holden by the Court, That his entre was good for the whole: But it was ſaid, That if a Diſſeiſor leaſeth for years part of the Lands whereof the Diſſeiſin was, and the Diſſeiſee entreth into the Land which continueth in the poſſeſſion of the Diſſeiſor, the ſame entry ſhall not extend to the Land Leaſed, for in the one Caſe the Leſſee is in by Title, in the other Caſe not. Paſc. 29 Eliz. in C. B. *Potter* and *Stedall's* Caſe. *Leon.* 51.

4. A Diſſeiſor of Lands in three ſeveral Counties, A. B. and C. levyeth a Fine of that in A. the Diſſeiſee within the five years, made a Letter of Attorney to J. S. to enter into all the three; the Attorney entred into B. and C. in the name of the whole. It was the Opinion of the Court, That it was not an entry into A. becauſe the Conuſee had a diſtinct Freehold by Title, and for every Freehold a ſeveral entre ought to be made. Trin. 16 Eliz. *Dyer*, 337.

5. Note, If three men Diſſeiſe me of three Acres of Lands in one County, there entre into one Acre in the name of all, doth reduce but the Acre in which I enter. And ſo if a man diſſeiſeth me of three Acres, and leaſeth them ſeveral to three men, my entre into the one Acre in the name of all, doth reduce but that Acre: But if he had let the three Acres to three ſeverally for years, there the entre upon the Leſſee, will reveſt the whole in the Diſſeiſee, becauſe there an Aſſiſe lyeth againſt the Diſſeiſor, becauſe he is ſole Tenant of the Freehold: And alwayes the entre of a man to recontinue his Inheritance or Freehold, ought to enſue his Action for the Recovery of it. Mich. 15 Eliz. in C. B. rott. 1458. the Earl of *Arrundells* Caſe vouch. in *Cook* 1. Part, *Inſtitutes*, 252.

6. Note, there is a difference betwixt ſeveral Rights of Entry, and ſeveral Titles of Entre for Conditions broken. If a man Diſſeiſe one of two Acres, in two ſeveral Counties, at two ſeveral times, here entre into one in the name of both is good. But if a man enfeoffeth one of two ſeveral Acres in ſeveral Counties upon ſeveral Conditions, and both Conditions are broken, there the entry into one Acre in the name of all is not ſufficient, becauſe he there hath but a Title, and ſeveral entries ought to be made in reſpect of the ſeveral Conditions. But there entre into one part of the Land ſubject to the Condition in one County is good, although the parcells are ſeveral, and in ſeveral Towns in the ſaid County. See 36 H. 6. 27. 7. Aſſ. 18. 16 Eliz. *Dyer*, 337. acc.

7. If two Joynt-Tenants or Coparceners joyn in a real Action where their entry is not lawful, and the one is ſummoned and ſevered, and the other purſueth and recovereth the moyety, the other Joynt-Tenant or Coparcener ſhall enter and take the profits with her, becauſe their remedy was one and the ſame. But where two Coparceners be, and they are diſſeiſed, and a diſcent is caſt, and they have Iſſue, and dye; if the Iſſue of the one recover her moyety, the other ſhall not enter with her, becauſe their remedies were ſeveral; and yet when both have recovered, they are Coparceners again. So if two Joynt-Tenants, one of full age, and the other within age, are diſſeiſed, and the Diſſeiſor dyeth ſeiſed, and his Iſſue entreth, the one

Joynt-Tenant being within age, and after he commeth of full age, the Heir of the Deviſor lets the Lands to the ſame Joynt-tenants for their lives. This is a remitter of the moyety to him within age, becauſe his entry was congeable, but the other Joynt-Tenant hath but an Eſtate for life in the other Moyety, becauſe his entry was taken away. See 31 H. 6. *Entre Congeable.* 54. *Cook* 1. Part, *Inſtitutes*, 364. acc.

8. A. ſeiſed of Land, made his Will, and Deviſed the ſame to B. his younger Son when he ſhould accompliſh the age of 24 years, upon Condition that he ſhould pay 20 l. to the Daughter of the Deviſor. And if he dye before the age of 24 years, then C. his eldeſt Son ſhould have the Land, upon Condition that he pay to the ſaid Daughter 20 l. and if both his Sons failed of payment of the ſaid 20 l. to his Daughter, the Land to remain to his Daughter; the Deviſor dyed, the younger ſon B. entred after his age of 24 years, and did not pay the 20 l. to the Daughter; C. the eldeſt Son did enter upon him. It was adjudged in this Caſe, That the entry of C. for the Condition broken, was not Congeable; and that this was a Limitation, and not a Condition, for the intent of the Deviſor appears, That for default of payment the Daughter ſhould have the Land, and therefore the Son ſhall not enter; and if the Heir ſhould enter for the Condition broken, he ſhould utterly deſtroy the intent of the Deviſor. Hill. 43 Eliz. in C. B. *Wiſeman* and *Baldwins* Caſe. *Goldesbr.* 153.

9. The Caſe was, One Deviſed Lands for life, the Remainder to J. S. and his Heirs, paying 10 l. out of the Iſſues and profits of the Lands: He in the Remainder dyed, his Heir within age living Tenant for life. It was found by Office, That the Land was holden of the King in *Capite*; the King ſeiſed the Land, and during the minority, the Heir of the Deviſor entred. It was adjudged in this Caſe, That his Entry was not Congeable, for the ſum being appointed to be paid out of the profits of the Land, it is to be intended when he ſhall receive them; but the King having taken the profits, he ſhall not pay them. Hill. 9 Jac. in B. R. *Slade* and *Thompſons* Caſe. *Cro.* 2. Part, 374.

10. A. Covenanted with B. as well in conſideration of mony paid, as in conſideration of a Marriage betwixt L. his Son, and E. the Daughter of B. to convey Lands to the uſe of the ſaid L. and E. and the Heirs of the body of the ſaid E. and to his right Heirs, the Marriage took effect, A. dyed before the aſſurance; L. makes the aſſurance in performance of his Fathers Covenant. Afterwards L. enfeoffed W. to whom L. and E. his Wife levyed a Fine: A. entred as for a forfeiture by the Statute of 11 H. 7. And if his entry was Congeable, was the Queſtion. In this Caſe amongſt other points, it was Reſolved, That it was not any forfeiture, either within the words, or intent of the Statute; not within the words, for the words be, If any Woman being ſole, or with any after taken Husband, and here the was not ſole, and this Husband who conveyed it, is he who was married to the Wife before the Conveyance. 2. It is out of the intent of the Statute, becauſe the Husband who made the aſſurance, joyned with the Wife in the Alienation. And the Statute did intend to provide, That diſinheſin ſhall not be to the Heirs of the Husband contrary to his intent, but here it being with his intent, it well ſtands, and is not any Alienation againſt the purview of the Statute. It was adjudged for the Defendant, Paſc. 19 Jac. in B. R. *Kirkham* and *Thomſons* Caſe. *Cro.* 2. Part, 474.

11. A. ſeiſed of Lands in Fee, leaſed the ſame to B. C. and D. *Habendum* to them for their lives and for the life of the ſurvivor of them. Provided, and it was agreed between the parties, That the ſaid C. and D. ſhould not take any benefit of the Land during the life of B. And further that D. ſhould not take any benefit during the life of C. B. dyed, C. entred; and afterwards D. entred, and made the Leaſe to the Plaintiff, upon whom D. the Defendant entred; and if his entry was lawful, was the Queſtion. It was adjudged in this Caſe, That the entry of D. was lawful. For it was ſaid, That the Office of the *Habendum* is to limit and explain the eſtate conteyned in the Premiſes, and here the *Habendum* hath done its Office, and made it a Joynt-eſtate, and the Clauſe afterwards comes too late, and is repugnant, and utterly void as to ſuch purpoſe. And it was ſaid by *Wray* Chief Juſtice, that in this Caſe, It is not in this Caſe, That any perſon ſhall take the Remainder, but that any of them ſhall not take the profits during the life of the other. It was adjudged for the Plaintiff. Mich. 31 Eliz. in B. R. *Stovel* and *Cavels* Caſe. *Leon.* 317.

12. An Enfant bargained and ſold his Land, and afterwards was vouched to Warranty, and he came in upon the Voucher, and thereupon a common Recovery was had againſt him. The Queſtion was, Whether it was ſuch a Recovery, that the Enfant could not avoid it by Entry. It was the Opinion of the Court, That an Enfant might avoid a matter in *pais* by entry, but not a matter of Record, and here is a proper way by the Law to avoid it, namely, by a Writ of Error, which is alſo a matter of Record, and of as high a nature as the other; and ſo it was adjudged, That by entry, the Enfant could not avoid the Recovery. Hill. 1650. in B. R. *Ailet* and *Watleſſes* Caſe. *Styles* 246.

1. *Where and in what Caſe the Seiſin and poſſeſſion of Lands, &c. ſhall be adjudged and veſted in him; Who hath Right without an Entry in Fact; where not: And where the King ſhall be preſently in poſſeſſion by Office, and may enter and ſeize Lands by Office without a* Scire facias, *or other proceſs; where not.*

1. TEnant in tail before the Statute of 27 H. 8. of Uſes diſcontinued the tail, and afterwards he made a Leaſe for years, and dyed: The Iſſue in tail, before any entry made upon the Termor, or receipt of the Rent, levyed a Fine of the Land. It was the Opinion of the Court, That the Grantee ſhould not avoid the Leaſe, becauſe the Rent was a recompence to the Iſſue, and his entry was lawful, and the leaſe was not void, but voidable at his Election. Mich. 33 H. 8. *Dyer*, 51.

2. In Treſpaſs, the Caſe was; A man deviſed his Land to his Wife for life upon Condition that ſhe ſhould find his eldeſt ſon at School, and ſhould educate him *in bonis moribus* at her coſt untill his full age of 21 years: And by the ſame Will, he gave the ſaid Lands after the death of his Wife, to his ſecond Son in tail, ſaving the Fee to himſelf, and dyed; the Wife entred, and did not educate, but brake the Condition; the Heir of the Deviſor entred for the Condition broken. It was adjudged in this Caſe, That although the Heir had not made an expreſs entry, yet the ſame was *tacitè* implyed, and the Condition was performable by the Deviſee. For it was agreed in that Caſe, That if Land be Deviſed for life, the Remainder in Fee. Proviſo, that if the Condition be broken, that his eſtate ſhall ceaſe, and he in the Remainder may immediately enter, there he in the Remainder ſhall take advantage of the Condition, although he be a ſtranger to it, becauſe there the eſtate determines without Re-entry. Hill. 2. *Ma. Dyer*, 127. *Warren* and *Lees* Caſe.

3. Grandfather, Father, and Son; the Grandfather Tenant in tail diſcontinued in Fee, to the uſe of himſelf for life, and after his deceaſe to the uſe of a ſtranger in tail, and for want of ſuch Iſſue, to the right Heirs of the Grandfather; the Grandfather dyed, the Father dyed before the Statute of 27 H. 8. afterwards the ſtranger dyed of an eſtate tail, executed by the Statute, without Iſſue; his Wife with Child with a Son; the ſon, as Heir to the Grandfather, entred; and afterwards the Iſſue was born. It was the Opinion of the Court, That the Son was remitted, becauſe by the Statute he was the firſt perſon in whom any remainder in poſſeſſion was veſted. Hill. 1. and 2. *Ma. Dyer*, 129. *Bonvill's* Caſe. See *C.* 1. Part, *Shelleys* Caſe, acc.

4. Tenant for the life of another, made a Leaſe for years, rendring rent to him, his Executors, and Aſſigns, and dyed. It is a Quære, if the Leſſee for years ſhall be occupant, and the Rent extinct; or that the Freehold ſhall revert to the firſt Leſſee, and th. Term ſhould be in *Eſſe*. It ſeemed the Court inclined, That the Rent was extinct. Mich. 16 Eliz. *Dyer*. 329.

5. A Parſon of a Church, of which the Biſhop of L. was Patron and Ordinary, made a Leaſe of his Parſonage for years; the Biſhop only confirmed the Leaſe by a writing under his Seal, without the Dean and Chapter. The Parſon dyed, the Biſhop gave the Benefice to another, who being Incumbent without any entry made upon the Leſſee, made a Leaſe to another, which Leaſe was confirmed by the ſaid Biſhop, and by the Dean and Chapter; and afterwards the Biſhop was tranſlated to Y. It was a Queſtion which of the Leaſes, after the Tranſlation of the Biſhop ſtood good. It was the Opinion of the Court, That the firſt Leaſe did ſtand in force during the life of the Biſhop, and the Succeſſor Incumbent, who found the Church Charged, and that the ſecond Leaſe made by the Incumbent, without his entry upon the Leſſee of the firſt Incumbent, was not good. Mich. 19 Eliz. *Dyer*. 357.

6. Note, It is ſaid, That if a Fine be levyed *ſur Conuſans de droit tantum*, of Lands in poſſeſſion, the Conuſee hath nothing before entry: But if a Fine *ſur Conuſans de droit tantum* be levyed of a Reverſion upon an Eſtate for life, or years, or a thing which lyeth in Grant; there the Reverſion or thing which lyeth in Grant, paſſeth preſently. And ſo it was ſaid, In the Caſe of a common Recovery, or any thing that lyeth in Grant, they are in the Recoveror preſently by the Judgment: As if a man hath Judgment to recover a rent or Common, there the thing is in the Recoveror preſently by the Judgment. *Cook* 1. Part, 79. in *Shelleys* Caſe, acc.

7. Tenant in tail, the Remainder in tail; Tenant in tail Bargained and ſold his Remainder to A. for the life of Tenant in tail, and after his life the Remainder to the King in Fee upon Condition: Tenant in tail ſuffered a common Recovery. The King Granted his Remainder to Tenant in tail, and his Heirs after. Afterwards he in the Remainder Bargained and ſold to B. the Remainder to the King upon Condition. It was argued in this Caſe, If the Remainder ſhould be deveſted out of the King without Petition, or *Monſtrans de droit*,

which point was not Resolved; but there this difference was taken, That when an Estate shall be devested out of a common person, and vested in another without Action, Entry, or Claim, it shall be devested out of the King without Petition, or *Monstrans de droit*, but when in the Case of a common person, the Estate shall not be devested out of him, there it shall not be devested out of the King without Petition, or *Monstrans de droit*. And in that principal Case, it was agreed, That although the Remainder passed by Bargain and Sale; so as in Judgment of Law, a use passed first, and although it was of a thing which lay in Grant, and not in Livery, and that the words were, that upon payment of money, the estate should cease, and should be void, yet the Estate should not be revested again in the Grantor without claimer, for that an Estate of Inheritance cannot be determined by a Condition without Entry or claim; but otherwise it is of a limitation. See *Cook* 2. Part, 52. Sir *Hugh Cholmeyes* Case. *Plow. Com.* 413. acc.

8. A man made a lease for years, rendring rent upon Condition, That if he, his Executors, or Assigns, did Grant, Allien, or Assign any part of the Land, without the assent of the Lessor, his Heirs, or Assigns, that it should be lawful to him, his Heirs, or Assigns, to re-enter; the Lessee Assigned part without the assent of the Lessor, and before re-entry, accepted the Rent. In this Case, amongst other points, it was agreed, That there was a difference betwixt a Lease for life, and a Lease for years. For in Case of a Lease for life, if the conclusion be that the Lease shall be void, there because a Freehold created by Livery, cannot be avoided before entry, acceptance of the Rent at a day after, should bar the Lessor of his Entry, and affirm the Lease; but if the conclusion upon a Lease for years be, that if the Rent be behind, that the Lease shall be void, there no acceptance of Rent, can make the Lease which was void good. *Cook* 3. Part, 65. in *Pennants* Case.

9. A man possessed of a Lease for 40 years, devised the same to J. S. after the death of his Wife; and further, that the said J. S. should not devise or sell it, but should leave the same intirely to discend to his Son, and he made his Wife his Executrix, and dyed. The Wife entred, and said, That if she dyed, that J. S. should have the Term, and then the Wife dyed. It was adjudged in this Case, That J. S. took the Term, not by way of Remainder, but by way of Executory Devise, because it was but of a Chattel, which might vest and devest at the pleasure of the Devisor. And in this Case it was said and agreed for Law, That if a man maketh a Lease for years upon Condition, that if he do not such an Act, that the Lease shall be void, and afterwards Grants the Reversion over, and the Condition is broken, that by the Common-Law, the Grantee should take advantage of the Condition, because the Lease was absolutely void. But if the Lease had bin for life with such a Condition, that there the Grantee should not take advantage of the Condition, because the Freehold is not avoidable but by entry, which cannot be transferred to a stranger. *Cook* 8. Part, 95. *Mannings* Case.

10. A man seised of Land in the Right of his Wife, made a Feoffment in Fee, upon Condition that the Feoffees should lease back the Land to the Husband and Wife for their lives, the Remainder to the Right Heirs of the Husband; the Husband dyed, the Feoffees leased the Land to the Wife for life, the Remainder in tail, the Remainder to the right Heirs of the Wife. In this Case, divers points were Resolved. 1. That for the Condition broken, the Heir of the Husband might enter 2. That when the Heir of the Husband enters for the Condition broken, by that the Feoffment which made the discontinuance, was defeated, and by consequence the discontinuance it self was defeated. 3. That when the Heir enters for the Condition broken, the estate of the Heir doth vanish, and the estate is revested in the Wife without entry or claim. 4. Although that the Wife had accepted of an Estate for life, and so by the Feoffment concluded her self to have any *Cui in vita*, yet when the Estate which she accepted, is defeated by the Condition, the conclusion by the acceptance is also avoided. *Cook* 8. Part, 44. in *Whittingham's* Case.

11. Land was given to Husband and Wife, and to the Heirs of their two bodies, the Remainder to the Husband in Fee, the Husband levyed a Fine with Proclamation to the King, who by his Letters Patents gave the Land to J. S. and his Heirs, the Husband dyed, the Wife within the five years entred, claiming her Estate, J. S. dyed, his Heir reciting the especial tail, granted to the Husband and Wife, by Deed confirmed to the Wife her Estate, To have to her, and to the Heirs of the body of her Husband deceased; The Wife having a Son betwixt her and her Husband, dyed, the Son entred, and afterwards accepted a Fine, *sur Conusans de droit*, of two strangers, with a render for 99 years after the death of A. if B. his Wife so long live: In this Case, It was Resolved, amongst other points, That after the death of the Husband, the Wife had an Estate in special tail, and by the Common Law, in such Case the estate of the Wife should not be changed into an estate for life, and that the allienation of the Husband did not bar the Issue in tail, nor the Wife, because the Husband alone had not *potestatem alienandi*, because he had an individed estate jointly with his Wife. Also it was Resolved in this Case, That one might have an estate tail, and yet his Issue should be barred to

to inherit: As if the Son of Tenant in tail in the life of his Father, levyeth a Fine with Proclamations of the ſame after the death of the Father, ſhall bar the Iſſues, and yet the Father ſhall remain Tenant in tail. And it was Reſolved, That the Confirmation did operate nothing, for when the Wife entred, ſhe was ſeiſed in tail, and no Eſtate was left in the Conuſee, but a poſſibility, and then ſuch a poſſibility could not paſs by the confirmation. *Cook* 9. Part, 141. *Beaumonts* Caſe.

12. Tenant in tail, the Remainder in Fee, Tenant in tail made a Leaſe for life, not warranted by the Statute of 32 H. 8. and afterwards dyed without iſſue, and before any entry, he in the Remainder granted his Remainder by Fine; and whether the Conuſee of the Fine might enter upon the Tenant for life, and avoid the Leaſe, was the Queſtion? It was ſaid by ſome of the Juſtices, That when he had made a Leaſe for life, and dyed without Iſſue living, the Tenant for life, his eſtate was not defeated before the entry of him in the Remainder; and then when before entry he in the Remainder grants his Remainder, the Grantee ſhall have it but as a Remainder, and ſo the eſtate of the Tenant for life, which was but voidable, was made good. But by *Meade* and *Dyer* Chief Juſtice, by the death of Tenant in tail without Iſſue, his eſtate out of which the eſtate of the Tenant for life was derived, was determined; and therefore the eſtate for life was determined, like the Caſe, 21 H. 7. 12. That if a man makes a Leaſe for life upon Condition, that if he pay unto the Leſſee 10 l. ſuch a day, that his eſtate ſhall ceaſe, that by the performance of the Condition, the eſtate is determined without entry. Paſc. 23 Eliz. in C. B. *Goldsbr.* 9.

13. Note, It was ruled by the whole Court, That if there be Copyholder for life, and the Lord leaſeth for years, and the Copyholder commits a forfeiture, that the Leſſee may enter for the forfeiture. It was ſaid by *Foſter* Juſtice, That the reaſon that is given for the entry, for a forfeiture is becauſe the Reverſion or Remainder is deveſted; but in this Caſe it is but *Intereſſe termini*, and nothing is deveſted, for notwithſtanding the Feoffment, the *Intereſſe termini* may be granted. But yet it was agreed in the principal Caſe, the Leſſee might enter for the forfeiture, becauſe the particular eſtate was determined. Paſc. 8 Jac. in C. B. *Meers* and *Bideouts* Caſe. *Godbolt.* 175.

Error.

1. *What ſhall be aſſigned for Error, in Writs, or other matters of Record; what not: And of Errors in Fact, and Errors in Law. Where Error cannot be aſſigned in a thing which is for the advantage of the party, et è contra. And where Errors aſſigned contrary to the Record, are void: And what ſhall be ſufficient Record upon which the party may Aſſign Errors; what not.*

1. UPon Recovery in an Aſſiſe, Error was brought in the Kings Bench, and the Judgment there affirmed: A new Writ of Error was brought in Parliament of the Judgment in B. R. The Chief Juſtice brought the Record in Parliament, and alſo the Tranſcript; and after that examined, remaunded the Record; and divers Errors were aſſigned in the Kings Bench. Hill. 23 Eliz. *Dyer*, 379.

2. A man was outlawed in Debt, where the Plaintiff in the Original was named *Sadler*, and in the *Scire facias* to have Execution, *Salter*. Error was brought, in which he named the Plaintiff *Salter*, by a Writ directed to Sir *Anthony Brown* ch ef Juſtice *de Banco*, who afterwards was removed, and a new Juſtice *de Banco* made, who certified the Record. It was holden, That his Certificate was not good, becauſe there was no Original, and then it is not helped. Wherefore a new Writ was awarded to the new Juſtice, who certified the proceſs of Execution only, and no ſuch Record of the reſt. Mich. 2 Eliz. *Dyer*, 173. See Paſc. 34 Eliz. *Cook* 5. Part, 37. in Biſhops Caſe; variance between the Original Writ, and the Declaration, is not remedied by the Statute of 18 Eliz. And 2. When an Original Writ is removed, (be it before *in nullo erratum*, pleaded, or after) if there appears a material variance, between the Writ and Declaration, the Judgment ſhall be reverſed.

3. A common Recovery was ſuffered to bar the Iſſue in tail: The warrant of Attorney was *Quod Alicia poſuit loco ſuo*, where her name was *Eliz.* alſo the Writ of Error was, *De loquela quæ fuit in Curia noſtra coram Juſticiariis noſtris per brevæ noſtrum.* It is a Quære, if it were amendable, or the Record well removed. 2. *Ma. Dyer*, 105. See this Quære Reſolved in *Cook* 8. Part, 162. in *Blackamores* Caſe.

4. A Re-

4. A Record came out of Auncient Demeſne in *Banco* by Writ of falſe Judgment. The Writ was *ſub ſigillo ſuo et ſigillis 4. legalium hominum ejuſdem Curiæ*; where it ſhould have bin *per 4. legales homines*, *Fitzh. Nat. Br.* 18. The Court doubted if it might be amended. But ſeemed to be of Opinion, That where ſuch matter of ſubſtance wanted in the Original Writ of Falſe Judgment, That the Plaintiff might have a new Writ directed *Juſticiariis de Banco*, commanding them to proceed to diſcuſs the Errors contained in the Record, *Quod penes eos reſidet*. Mich. 5. and 6. *Ma. Dyer*, 164.

5. An Action of Covenant was brought by A. B. Aſſigne of J. S. The Defendant brought Error, and the Writ was *Inter A. B. querentem, et F. G. Defendentem*, omitting the word Aſſignee of J. S. which was in the Writ and Declaration of Covenant. It was ſaid, That the Record was not removed by that Writ of Error, becauſe there was no ſuch Record. But the better Opinion of the Court was otherwiſe, For that A. B. is the whole name and ſurname of the Plaintiff, and it is ſufficiently mentioned in the Writ of Error, to have the Record removed to examine the Errors, Paſc. 19 Eliz. *Dyer*, 356.

6. Note, It was holden by *Fitzh.* That to allow an Eſſoin, where it doth not lye, is not Error; but to deny it where it lyeth, is Error. 21 H. 8. *Dyer*, 26. See *Fitzh. Nat. Br.* 21. acc. See *Cook* 5. Part, 39. in *Teyes* Caſe, acc.

7. Error upon a Judgment in Debt in C. B. the Error aſſigned was, That the Original was againſt A. L. *nuper de* London *Yeoman*, *alias* A. L. *de* Sherborne *in Com.* Eborac. Yeoman. And being condemned, a *Capias ad ſatisfaciendum* iſſued againſt him by the name of A. L. *nuper de* London *Yeoman*, *alias* A. L. *de* Selborne *in Com. Eborac.* It was holden, That foraſmuch as this variance was not in the firſt name, but in the firſt addition; that it was not Error. Mich. 40 Eliz. in B. R. *Latham's* Caſe. *Goldesbr.* 140.

8. It was aſſigned for Error upon a Judgment in C. B. That *Kiſman* was Returned in the *Venire facias*, and *Bidnam* was returned in the *diſtringas & Habeas Corpora*. But it was the Opinion of all the Juſtices of *England*, That it ſhould be amended, inaſmuch as it appeared upon examination, that the ſame party in the *Venire facias* was ſworn, and ſo no damage to any. Mich. 40 Eliz. in B. R. *Brewſter* and *Beautyes* Caſe. *Goldesbr.* 184.

9. A Writ of Error was brought by *Frances Fulgham*, againſt *Serjeant Harris* thus, *Precipe, &c. Quod, &c. Frances Fulgham* Widdow; whereas the form in the Regiſter is, *Quæ fuit uxor*, and not Widdow: And the words of the Original Writ were, *rationabilem dotem tenementorum quæ fuerunt Franciſci Fulgham quondam viri ſui.* It was Reſolved by the Court to be Error, and yet it doth not vary in ſubſtance, and becauſe the form of the Regiſter was otherwiſe, the Court would not amend it. Mich. 6 Jac. in B. R. *Fulgham* and *Harris's* Caſe. *Brownl.* 2. Part, 300.

10. Upon a Fine, The firſt proclamation was made in *Trinity* Term, 5 Jac. the 2. *Mich.* Term, 5 Jac. The third *Hill.* Term, 6 Jac. where it ſhould be *Hill.* Term, 5 Jac. The fourth and fifth in *Eaſter* Term, 6 Jac. It was agreed by the whole Court, That this was palpable Error, for the 4th Proclamation was not entred at all, and the 5th was entred in *Hil.* Term, 6 Jac. whereas it ſhould be in *Hillary* Term 5 Jac. and the Court held, it could not be amended, becauſe it was in another Term, Hill. 7 Jac. in B. R. *Brownl.* 2. Part, 300.

11. Upon a *Venire facias*, the Sheriff returns but 21. and the *Hab. Corpora* was againſt 21 only, and this was alſo returned, and upon that, 10 appeared and upon this, Tales was awarded, and tryal had, and but 10 of the principal ſworn. This was holden to be errour. Mich. 7 Jac. in B. R. *Brownlow.* 274. But ſee *C.* 5. Part, *Gardiners* Caſe. Upon Iſſue joyned, 23 Jurors were only returned, and 12 appeared, and gave a Verdict, and upon great conſideration had, it was Reſolved, That it was remedied by the Statute of 18 Eliz.

12. Upon a Judgment entred by *Non ſum informatus* againſt the Defendant; He brought Error, that the Record was *Fr. Harris de Brownton*, and the Original filed to warrant the Judgment was, *Fr. Harris de Browton*, and for this variance the Judgment was reverſed. Trin. 9 Jac. *Serle* and *Harris's* Caſe. *Brownl.* 1. Part, 59.

13 Debt was brought upon a Bond, and in the Imparlance Roll, the Bond was alledged to be made at *New-Caſtle*, and in the Iſſue Roll, it was alledged to be made at *York*, and tryed; Error was brought, and the Record was certified, and upon a *Scire facias*, that Error was Aſſigned. It was moved, That the Imparlance Roll might be amended; But the Court would not grant it. Mich. 13 Jac. in C. B. *Fetherſton* and *Tapſalls* Caſe. *Brownlow*, 1. Part, 66.

14. Error in the Exchequer Chamber upon a Judgment in the Kings Bench: It was aſſigned, That whereas D. had brought Debt againſt the now Plaintiff, and declared upon divers contracts, *ſcil.* that he had ſold to W. ſuch Merchandiſes for ſo many Portagues, and ſuch Merchandiſes for ſo many Ducats, which in *toto* amount to 700 l. ſterling, which ſum he delivered, *ſcil.* in ſterling money and not in Ducats and Portagues according to the Contract, upon the Declaration, W. demurred in Law, and it was adjudged for the Plaintiff, for it is in his Election to divide his Debt into which of theſe

thoſe Coynes he pleaſed, either in the prop^r Coyn of the Contract, or of ſterling, *ſcil.* in current money: Wherefore the Judgment was affirmed Mich. 29 Eliz. in the Exchequer Chamber. *Wilſaidge* and *Dauidges* Caſe. *Leon.* 41.

15. Error upon a Judgment in the Common-Pleas, in a Replevin removed thither by Recordare out of a Hundred Court; The Error aſſigned was, becauſe it did not appear, That Pledges were returned upon the plaint: It was agreed by the Court, upon *Haſſyes* Caſe, *Cook* 9. Part, 71. That if upon the Original Writ, Pledges be not returned, it is Error; but the Court doubted of it in this Caſe, becauſe the Sheriff may make Replevin without Pledges finding, and peradventure Pledges were found, though not returned. And it is at the Sheriffs perill, if he take not Pledges by the Statute of *Weſt.* 2. cap. 2. Mich. 15 Car. in B.R. *Tregoſe* and *Wennells* Caſe. *Cro.* 1. Part, 431.

16. An Action of Treſpaſs was brought againſt two, and iſſue joyned by two Defendants; after Iſſue joyned, one of the Defendants dyed, notwithſtanding a *venire facias*, was awarded to try the Iſſue betwixt the Plaintiff and the two Defendants; And the *venire facias*, and the *Hab. Corpora*, and the Iſſue joyned mentioned, that it was betwixt the Plaintiff and two Defendants; and therefore it was ſtood upon, that it was Error. But it was Reſolved, That ſuch ſurmiſe needs not to be in Judiciall proceſs to alter it: And therefore although a *venire facias* iſſued againſt a dead perſon, yet one of the Defendants being alive, it is ſufficient, and no Error. See 4 H. 7. 7. Mich. 11 Car. in B. R. *Tyffins* Caſe. *Cook* 1. Part, 308.

17. A Writ of Error was brought to reverſe a Fine, levyed by Husband and Wife, and others. And the Writ of Covenant was directed to the Coroners, with this Clauſe, *Fiat executio Brevis prædict. per Coronator. Ita quod vice comes ſe non intromittat.* (one of the Conuſees being Sheriff). It was ſaid this was Error, becauſe if the Sheriff had bin ſole party to the Fine, yet the Writ ought to be directed to him, becauſe it is but a ſummons, and the Sheriff may ſummon himſelf. But it was Reſolved, That it was Error, becauſe it is a doubt in Law, if the Sheriff as Plaintiff may execute a Writ for himſelf, and as Defendant may execute a Writ upon himſelf; and therefore the general courſe is, to award the Writ to the Coroners, to avoid ſuch doubt. Mich. 11 Car. in B.R. *Doue* and *Smithies* Caſe. *Cro.* 1. Part, 300.

18. Husband and Wife, Tenants for life, the Remainder in Fee to an Enfant, and they three levyed a Fine, and the Enfant only brought Error to reverſe it. It was objected, that they all ought to joyn in the Writ, like the Caſe, 29 E. 3. 14. In Aſſiſe againſt three Coparceners, they plead by Bayliff, *Nul tenent. de Franktenement*, and found two of them were Diſſeiſors and Tenants, and afterwards all three Coparceners brought Attaint, and after appearance, the third ſiſter who was acquit, was Nonſuit. It was holden by the Court in the principal Caſe, The Writ was well brought, for the Error is not aſſigned in the Record, but without it in the perſon of the Enfant, and that is the cauſe of Action for him, and for no other. The Fine was reverſed as to the Enfant only. Mich. 31 Eliz. in B. R. *Pigot* and *Harringtons* Caſe. *Leon.* 317.

19. It was Aſſigned in a Writ of Error, to reverſe a Fine, That the Writ was *Precipe, &c. Quod tenent, &c. de octo Meſſuagiis duobus toftis decem gardinis*; and it was certified *de octo Meſſuagiis, decem gardinis, &c.* It was adjudged no Error. Paſc. 1 Jac. in B. R. The Earl of *Bedford* and *Forſters* Caſe. *Cro.* 2. Part, 77.

20. Error was brought by an Enfant to reverſe a Fine levyed by him and his Father, he being then an Enfant within the age of 21 years. He was inſpected by Juſtice *Crook*, the day of adjournment of the Term, and his Witneſſes examined, and he found within age. It was doubted if the Inſpection was good, and whether any thing could be done the day of adjournment. But afterwards, upon conference with the Juſtices, it was Reſolved, That the Inſpection was good, and the Fine reverſed. Mich. 7 Jac. in B. R. *Poyntz* Caſe. *Cro.* 2. Part, 330. See Paſc. 10 Jac. in B. R. *Batts* and *Jennings's* Caſe. *Bolſtr.* 1. Part, 206.

21. Error to reverſe a Judgment in B. R. The Error Aſſigned was, in entring the Record, which was thus, *viz. Ad quem diem, &c* J. S. J. D. &c. of the principal Pannel, *veniunt et jurati exiſtunt, et quia reſidui* did not appear, &c. W. N. and J. N. *de novo oponuntur, qui ad veritatem de infra content. electi, triati, & jurati, dicunt ſuper ſacrament. ſuum*, omitting theſe words, (*ſimul cum aliis juratoribus prius impanelat.*) And becauſe it was a Verdict given only of thoſe of the Tales only, and not by thoſe with whom they were ſworn, It was holden Error, and the Judgment reverſed. Paſc. 6 Jac. in B. R. *Kempton* and *Battells* Caſe. *Cro.* 2. Part, 207.

22. Error of a Judgment in the Kings Bench. For that the Judgment is *Quod Querens et Plegii ſui in miſericordia pro falſo clamore ſuo*; whereas it ought to have bin, *Qui non proſecuti ſunt*, for it ought not to be *pro falſo clamore*, but where it is after Judgment, or Demurrer. It was adjudged Error, and the Judgment reverſed. Mich. 6 Jac. in B. R. *Cro.* 2. Part, 213.

23. Error of a Judgment in Debt upon an Obligation, the Condition of which was, That if the Defendant did appear in the Kings Bench the next

Term

Term following, and put in good Bail, &c. He Pleaded, That the Term was adjourned to the Caſtle of *Hartford*, and that he there put in good Bail; and being found for the Plaintiff, and Judgment, it was aſſigned for Error, That the *Venire facias* was, *de vicinetio de Hartford*, where it ought to have bin *de Caſtro de Hertford*. It was holden to be Error, for *Caſtrum* is a diſtinct name of a place by it ſelf. The Judgment was reverſed. Paſc. 8 Jac. in B. R. *Cuningham* and *Hares* Caſe, in *Ex. Cro.* 2. Part, 239.

24. Error was brought of a Judgment in *Durham*, becauſe the Defendant was admitted to plead by Attorney, being within age. It was holden by the Court, That the Writ of Error was not well brought, for that the Record could not be examined upon this Writ, for it appears that the Writ of Error was directed to the Biſhop, and eight others, to remove the Record of a Judgment, and 8 of them only certified the Record, and not the 9th, nor doth it appear he was dead or removed. Mich. 7 Jac. in B. R. *Odell* and *Moretons* Caſe. *Cro.* 2. Part, 254.

25. In Debt, the Judgment was *Ideo conſideratum eſt, quod recuperet* 40 s. *pro miſis et Cuſtagiis*, leaving out theſe words (*ex aſſenſu ſuo per Curiam adjudicat.*) It was holden by the Court, That thoſe words were a material part of the Judgment, for a Writ of Enquiry of Damages ſhall iſſue, unleſs the party conſents to take ſo much for damages. The Judgment was reverſed. Hill. 14 Jac. in B.R. *Machins* Caſe. *Cro.* 2. Part, 415.

26. Error was Aſſigned to reverſe a Judgment in an Action upon the Caſe in *Abington* Court, for that the ſaid Court is mentioned to be held before the Mayor *ſecundum conſuetudinem Burgi à tempore cujus contrarium, &c.* and it doth not appear there was any ſuch Cuſtome there. It was the Opinion of the Court, That this Aſſignment being directly againſt the Record, is not receiveable, therefore the Judgment was affirmed. Mich. 12 Jac. in B. R. *Whiſtler* and *Lees* Caſe. *Cro.* 2. Part, 359. *Bolſtr.* 2. Part, 243. acc. the ſame Caſe.

27. Error brought of a Judgment in a *Ceſſavit*, by default. It was moved, If he might aſſign that for Error. *Doddridge* Juſtice, in regard he had no time to plead it in the firſt Action; the firſt Judgment being obtained by falſhood, he conceived he might plead it, That he was not Tenant. *Haughton* and *Montague* contr. becauſe if he were not Tenant, he had no loſs, and being returned ſummoned, and not pleading, it was his folly, not to appear and plead thereto: And this Court cannot take Conuſans of a Reverſal by a Writ of Diſceit. The Caſe was not adjudged, but adjourned. Mich. 17 Jac. in B. R. *Salkeild* and Lord *Howards* Caſe. *Cro.* 2. Part, 547.

28. Upon a *Scire facias* to the Sheriff of S. upon a Recovery in Debt of 400 l. againſt B. the Sheriff returned R. Ter-tenant *omnium terrarum et tenementorum in balliva ſua, quæ fuerant prædict.* B. Judgment was given, That A. ſhould have Judgment and Execution againſt the ſaid R. Whereupon A. prayed an Elegit, which was entred in the Roll thus, *viz. Elegit ſibi liberari medietatem omnium terrarum et tenementorum in Com. S. Tenend. &c. quouſq; &c.* but left out the words (*Quæ fuerant prædict.* B.) For this cauſe, the Judgment was reverſed, *Quoad adjudicationem executionis*, upon the Elegit; yet the Elegit it ſelf, and the Return of it, was well. But where the Roll is faulty, the Writ will not help it. Mich. 5 Jac. in B. R. *Kee* and *Owens* Caſe. *Hob.* 90.

29. A man recovered in an Action upon the Caſe of Trover, and had Judgment. The Defendant brought Error, and aſſigned two Errors, 1. That there was no Bill filed. 2. That there was no Bail, which were certified accordingly. Yet the Judgment was affirmed in the Exchequer-Chamber, for that the want of a Bill, was remedied by the Equity of the Stat. of 18 Eliz. and the want of Bail was not material, the Defendant being at the time of the Bill *in Cuſtodia Mariſchalli*. Trin. 17 Car. in *Ex. Willis* and *Woodbowſes* Caſe. *Hob.* 264, 265.

30. Error to reverſe a Judgment in the Common-Pleas, in a Writ of Right. It was aſſigned for Error, That the party did appear by his *prochein Amy*; and afterwards he came of full age, and proſecuted his ſuit, and recovered by *prochein Amy*; whereas he ought to have appeared in proper perſon by Bail, or Attorney. It was the Opinion of the Court, That the Court ought not to take notice when the Plaintiff came to his full age, and that the Defendant had now ſurceaſed his time; and that this matter might have bin pleaded before Judgment, but not now aſſignable for Error. The Judgment was affirmed, Trin. 8 Jac. in B. R. *Stow* and *Marches* Caſe. *Bolſtr.* 1. Part, 24.

31. Error was brought to reverſe an Amercement being afferred in a Court Leet, becauſe it was unreaſonable. But it was the Opinion of the whole Court, That after an Amercement afferred, a *Moderata miſericordia* doth not lye; and therefore the Amercement was affirmed. Trin. 7 Jac. in B. R. *Stubs* and *Flowers* Caſe. *Bolſtr.* 1. Part, 125.

32. Error brought to reverſe a Judgment againſt the Plaintiff, being an Enfant, becauſe it was againſt him *Quod Capiatur*. It was the Opinion of the whole Court, That there is no Caſe in the Law to warrant ſuch a Judgment; and therefore the Judgment was reverſed. Trin. 9 Jac. in B. R. *Daby* and *Holbrooks* Caſe, *Bolſtr.* 1. Part, 162.

33. In

33. In Error to reverſe a Judgment given for three. It was aſſigned for Error, that one of them was dead, *tempore Judicii reddit.* The other ſaid that he was in full life *tempore Judicii ſcil.* 18. *Auguſti.* It was the clear Opinion of the Court, That the *Scilicet* was void; and the Rule was, that the other Iſſue ſhould ſtand, whether the party were living at the time of the Judgment given. Mich. 10 Jac. in B. R. *Baskerville* and *Henſkams* Caſe. *Bolſtr.* 2. Part, 26.

34. A Judgment was reverſed in an Action upon the Caſe, becauſe the Judgment againſt the Defendant was *Capiatur*, where it ſhould have bin *in miſericordia*, and becauſe the Bail was taken without any *Scire facias* ſued out againſt him, and a *ſuperſedeas* granted to deliver the party out of Execution. Trin. 11 Jac. in B. R. *Kirkby* and *Magles* Caſe. *Bolſtr.* 2. Part, 133.

35. In Error to reverſe a Judgment given in the Common-Pleas. It was aſſigned for Error, That the Judgment there was given againſt a dead man, It being given in Bank againſt the Defendant, who dyed after the day of the *Niſi Prius*, and the day in Bank. It was ſaid, That the day of *Niſi Prius*, and day in B. are all one. The Court was clear of Opinion, That the Judgment was erronious; he being dead, there was no ſuch perſon againſt whom Judgment could be given. Trin. 12 Jac. in B. R. *Fourden* and *Dennis*'s Caſe. *Bolſtr.* 2. Part, 241. Paſc. 36 Eliz. in B. R. *Lewis* and *Smiters* Caſe. And Mich. 28 Eliz. in B. R. *Iſeley* and *Pelhams* Caſe adjudged acc.

36. A. recovered in Debt againſt B. in the Common-Pleas, and took a *Capias* againſt him, and becauſe he could not be taken, a *Scire facias* was Granted againſt the Bail, upon which a *Nihil* was returned. Afterwards the Defendant brought a Writ of Error to reverſe the Judgment, and the Record was removed in B. R. Afterwards a ſecond *Scire facias* was awarded againſt the Bail, who before the return of it, brought in the body of the Principal. It was the Opinion of the Court, That it ſhould not be allowed. And according to that it was ſaid it was adjudged in Sir *George Bowes* Caſe, in the time of Queen *Elizabeth*, in this Court. Paſc. 14 Jac. in B. R. The Spaniſh Embaſſadeurs and *Gifford*'s Caſe. *Bolſtr.* 3. Part, 82.

37. Error brought of a Judgment in a Writ of Partition. If it be brought after the firſt Judgment, and before the ſecond Judgment, it will not lye; for in every Partition, there are two Judgments, the firſt, *Quod Partitio fiat*; the ſecond, *Quod Partitio facta ſit firma*; and if Error be brought before the ſecond Judgment, it will not lye, and ſo it was ſaid it was adjudged in the Lady *Warwicks* Caſe. Trin. 11 Jac. in B. R. *Rawlins* and *Barrets* Caſe. *Bolſtr.* 2. Part, 104. See *Cook* 11. Part, 40. *Metcalfes* Caſe, acc.

38. A. and B. his Wife, levyed a Fine of divers Mannors and Lands to J. S. and J. D. in ſeveral Towns in the County of E. in which divers Grants and renders were made; in the third render, all the Mannors and Lands were rendred to A. and B. and the Heirs of the body of A. and in the 4th render, parcel of the Lands were rendred to B. in tail, the Remainder to the right Heirs of A. It was Reſolved, The ſame was not Error; but that the fourth render, as to that which was conteined in the third render, ſhould be in the quality of Charter, which needs not ſuch preciſe form as a Judgment. And 2. It was Reſolved, That the Conuſor ſhould not aſſign that for Error, becauſe he took an eſtate by it; And a man ſhall not reverſe a thing for Error, unleſs he can ſhew that the Error is to his diſadvantage. *Cook* 5. Part, 38. *Teys* Caſe.

39. If the Court Grant, View, or Aid preyer, where it is not grantable, it is no Error becauſe the demandant is not prejudiced in his right, but only deteined. But if the Court admit a Voucher where it ought not to be, the ſame is Error. So if an Eſſoin be caſt and allowed, where it is not allowable, it is not Error; but to deny it where it ought to be Granted, is Error. *Cook* 8. Part, 59. in *Beecher*'s Caſe.

40. Error to reverſe a Judgment in Debt in an Inferiour Court; the Error aſſigned was, that the Plaint was entred generally *in placito debito*, which was incertain, ſo as the Defendant cannot know what is demanded. The Court held it to be error, and the Judgment was reverſed. Hill. 23 Car. in B. R. *Hales* and *Moves* Caſe. *Styles* 86.

41. Error to reverſe a Judgment in Debt, brought by an Adminiſtrator, becauſe he did not declare that the Adminiſtration was Granted unto him, *per loci illius Ordinarium.* It was the Opinion of the Court, That in a Declaration it was not neceſſary to ſay, that the Letters were Granted, *per loci Ordinarium, aut cui pertinuit*; though they ought to be ſo pleaded in a plea in Bar. Trin. 24 Car. in B. R. *Clemartſon* and *Montfords* Caſe. *Styles* 106.

42. Error to reverſe a Judgment in an Inferiour Court. It was ſaid, That it is ſaid in the Style of the Court, That the Court was holden *per conſuetudinem et literas patentes.* It was the Opinion of the Court, That it was Error; And if a Court be holden by Cuſtome, and after a Patent be purchaſed to hold it, the Cuſtome is gone. Mich. 24 Car. in B. R. *Tompkins* and *Jourdens* Caſe. *Styles* 131.

43. Error was brought to reverſe a Judgment in Debt brought againſt an Executor in *Briſtow* upon a Cuſtome to pay a Debt, *ſur Conceſſit ſolvere*, due

by the Teſtator upon a ſimple Contract. The Court inclined to be of Opinion, That it was Error, and the Cuſtome not good, becauſe it hindred the party to wage his Law; and although ſuch Cuſtome had bin allowed againſt the party that made the contract: Yet it was not good againſt an Executor. Mich. 24 Car. in B. R. *Trigg* and *Roberts* Caſe. *Styles* 155.

44. Error upon a Judgment in an Inferiour Court: For that the Jury in aſſeſſing damages ſay *pro miſis et Cuſtagiis, &c.* but do not ſay, *Circa ſectum expenditis*, and ſo it cannot appear for what the Coſts and Damage were aſſeſſed, the Judgment was reverſed. Mich. 1649. in B. R. *Crible* and *Orchards* Caſe. *Styles* 164.

45. Error of a Judgment in an inferiour Court; the Errour was, Whereas the Iſſue was, *de injuria ſua propria abſq; tali cauſa*; the Jury found, Not-Guilty generally. It was holden to be Error, becauſe the Verdict found the Iſſue but argumentatively, and not directly, and therefore not good, and the Judgment was reverſed. Paſc. 20 Car. in B. R. *Hobs* and *Blanchards* Caſe. *Styles* 167.

46. A Judgment given in the Court of *York*, was reverſed for theſe cauſes; becauſe the time of the Judgment, and of the ſum recovered in Debt, was entred in figures; and alſo becauſe it did not appear that the Action was brought, *infra Juriſdictionem Curiæ*. Paſc. 1649. in B. R. *Jenkinſon* and *Porters* Caſe. *Styles* 187.

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2. *A Writ of Error, Where, and when it lyes; Where not: And upon Judgments in what Courts: And where Judgment given in any Court, may be reverſed in the ſame Court; Where not.*

1. ERror was brought in the Kings Bench, to reverſe a Judgment given by the Juſtices in *Eyre*, in a *Quo warranto*; where the Defendant being a Coparcener, prayed in Aid of the other Coparceners, which was denyed by the Juſtices in *Eyre*, and alſo they forjudged the Defendant of the Franchiſe, becauſe they would not otherwiſe plead; and for theſe cauſes, becauſe the Aide ſhould not have bin denyed, and the Franchiſe ſhould not be forjudged, but only ſeiſed, the Judgment was reverſed. See 2 E. 3. 29. in *Cook* 9. Part, 29. in the Caſe of the Abbot of *Strata Mercella*.

2. In *Audita Querela*, the Plaintiff ſhewed how that a Debt of 200 l. was recovered againſt him, upon which he was Out-lawed, and by *Capias utlagatum* taken in Execution, and ſo being in Execution, the Sheriff ſuffered him to eſcape. The Defendant ſaid, that after the eſcape, and before the *Audita Querela* brought, the Outlawry was declared erronious; ſo no Record of the Outlawry. It was objected, that the Outlawry was not void, but voidable, and that it was in force at the time of the Eſcape, and the Sheriff ſhould not take advantage of Error, but ſhould be charged with the eſcape. But it was Reſolved, That the *Audita Querela* did not lye. And Reſolved, That when an erronious Judgment is given, and afterwards the Judgment is reverſed by Error, collateral Acts Executory, are thereby barred. 2. Becauſe the Judgment to avoid the Outlawry, is declaratory, that the Outlawry is not good, becauſe the Exigent, which is the Warrant of the Outlawry, is defective, this being ſo declared by the Court, makes it void *ab initio*. And this Caſe was vouched to be adjudged: One who had cauſe of Privilege in the Common Pleas, was arreſted in L. Before Judgment, the Defendant delivered a *ſuperſedeas* to the Court of L. yet they proceeded to the Judgment; and the party being taken in Execution, brought a *Habeas Corpus* in the Common Pleas. And it was the Opinion of the Court, That becauſe that after the *ſuperſedeas*, there was a Nullity in the proceedings, that the party ſhould be diſcharged out of Execution, without any Writ of Error brought, for by the Declaratory award, the Judgment and Execution were utterly void. *Cook* 8. Part, 143. In *Drurys* Caſe.

3. Note, It was adjudged by the Court, That a Writ of Error will not lye, untill the Judgment be perfect and compleat: And therefore it was adjudged, That where the Tenant in a Writ of Dower, brought a Writ of Error before the value was enquired of, and Damages found, that the Writ of Error did not lye. Hill. 13 Jac. in B. R. *Clifid* and *Carrs* Caſe. *Brownlow* 1. Part, 127. Trin. 1653. in B. R. *Rawlins* and *Vivers* Caſe. *Style* 385.

4. Note, If an Action be brought againſt two, and one pleads to Iſſue, and the other confeſſeth it good. Judgment paſſeth againſt him, yet he ſhall not have error before the plea be determined againſt the other: becauſe if the Records ſhould be removed before the whole matter be determined, there would be a failer of Right: And the Judges of the Kings Bench cannot in Error brought, proceed upon a matter not determined. *Cook* 11. Part, 36. *Metcalfes* Caſe.

5. In Treſpaſs of Battery againſt two; they plead ſeveral Pleas, one Not-Guilty, the other Juſtifie: ſeveral Iſſues were joyned, and the Jury found both Iſſues for the Plaintiff, and aſſeſſed ſeveral damages, but joynt-Coſts. Afterwards the Plaintiff cauſed *Nolle proſequi* to be entred againſt one, which was

was done accordingly, and took Judgment against the other for the damages found against him, and the Costs. Error was brought, because the *Nolle prosequi* against one before Judgment, was said to be a release to him, which should ennure to the other. The Court inclined to Opinion, That the *Nolle prosequi* was not a Release in it self, but an acknowledgment that he would not proceed against the one, which the Plaintiff might do where the Defendants sever themselves by pleading, and there be several Verdicts against them. It was not Resolved, but the Court would advise. Hill. 6 Car. in B.R. *Walsh* and *Bishop's* Case. *Cro.* 1. Part, 173.

6. Error of a Judgment in *Coventry*, because the Judgment being in Debt, was discontinued, it being by *Nihil dicit*, for the Continuance was taken till the next Court, which is incertain, for it ought to be to a day certain, as 9 Eliz. *Dyer*, 162. But it was said, That in *Coventry* there is no day certain for keeping their Court: for sometimes it is holden within a fortnight, sometimes within three Weeks. Wherefore the Court conceived it to be no Error, and that the Writ did not lye. Trin. 7 Car. in B. R. *Jesson* and *Laxons* Case. *Cro.* 1. Part, 184.

7. Error of a Judgment in C. B. in Assumpsit; The Plaintiff declared, That whereas the Defendant was endebted to him in such a sum, that in consideration that the Plaintiff would *aliquo tempore* forbear, &c. he promised to pay, and sets forth, that he did forbear for a year. It was the Opinion of the Court, That *aliquo tempore* is so short a time, that it is no consideration; and therefore the Writ did lye, and the Judgment was reversed. Trin. 11 Car. in B. R. *Folson* and *Clarks* Case, *Cro.* 1. Part, 316.

8. Error was brought by the Bail in the Exchequer-Chamber, upon the Statute of 27 Eliz. of a Judgment in a *Scire facias* against him. It was the Opinion of the whole Court. That it was not an Action mentioned in the Statute, whereof a Writ of Error did lye in that Court, nor is he a party who can have Error of the first Judgment. And in that Case, It was holden, That a Writ of Error did not lye in the Exchequer-Chamber of a Judgment in this Court, in a Writ of Rescous, for that it is not an Act on named in the Statute. Trin. 5 Jac. in B. R. *Vaughan* and *Williams* Case. *Cro.* 2. Part, 171.

9. Error was brought of Judgment in *Burton* upon *Trent*, because it was not shewed in the Style of the Court, by what Authority it was holden, *scil.* by Charter or Prescription; also the Style is *coram Senescallo et Balivo*, J. S. and doth not express their names. It was holden incurable Error, for that in inferiour Courts, the Authority whereby they are held, and the names of the Judges are to be expressed, otherwise the Kings Courts canno take knowledg of their Authority. Pasc. 4 Jac. in B.R. *Jarret* and *Cadwell's* Case. *Cro.* 2. Part, 184.

10. In a Deed of Covenant, the words were *Conventum et agreatum est* between the parties, That A. and his Wife levy a Fine to J. S. and J. S. to make a Lease to A. and his Wife. Judgment was given for the Plaintiff, and Error brought and assigned, because they did joyn in the Action of Covenant, whereas they ought not to have joyned. It was the Opinion of the Court, That it is a joynt-Covenant, and so the Action of Covenant brought by them joyntly, was well brought. See *Cook* 5. Part, 18 *Slingsbyes* Case, acc. And see *Cook* 5. Part, 22. *Mathewsons* Case, the words of Covenant were *Conveniunt seperatim, &c. ad performationem omnium et singulorum Conventionum, et quilibet Mercator obligat seipsum*; there the word *seperatim*, makes it to be several Covenants, but *Conventum et agreatum est* between the parties, makes it a joynt-Covenant. In the principal Case, it was adjudged no Error, and therefore that the Writ of Error did not lye. Trin. 8 Jac. in B.R. *Yates* and *Rowles* Case. *Bolst.* 1. Part, 26.

11. Error was brought in the Kings Bench, upon a Recovery in Assise, and the Judgment there affirmed. Now a Writ of Error was brought in Parliament of the Judgment in the Kings Bench. And the Error assigned in the Kings Bench was, because the parties were adjourned in a Forrein County to plead, and upon that Issue, the Assise pased without re-summons awarded. See H. 23 Eliz. *Dyer*, 375.

12. A *Scire facias* was brought in Chancery to have Execution of a Recognizance made there; the Defendant pleaded a defeasance made to him by the Plaintiff, which bore date before the Recognizance; which not being good, and Judgment against him, he brought a Writ of Error in the Kings Bench, where the Judgment was reversed. Note, a Judgment given in Chancery, which is before the King himself, reversed in the Kings Bench, which is also before the King himself, and not in Parliament. Trin. 14 Eliz. *Dyer*, 315.

13. Note, The Court of the Marshalsea of the Kings household was a Court of such high Jurisdiction, that before the Statute of 5 E. 3. cap. 2. and Stat. 10 E. 3. cap. 2. No Writ of Error lay of any Judgment there given, but in Parliament. But by the same Statutes, then Errors and Judgments given there shall now be examined and reversed in the Kings Bench. See *Cook* 10. Part, in the Case of the Marshalsea, 69. acc.

14. Error was brought in the Exchequer Chamber, of a Judgment in a *Scire facias* by an Executor in Debt recovered by the Testator. It was moved, That the Writ of Error did not lye upon a Judgment there in a *Scire facias*, because the

Action is not mentioned in the Statute. The Court doubted of it, Whether it will lye or not, because it is grounded upon a Judgment in Debt, if it be not within the Equity of the Statute. Mich. 8 Car. in B. R. *Nevil* and *South's* Case. *Cro.* 1. Part, 208. See Pasc. 9 Car. in B. R. *Lancaster* and *Keyleigh's* Case. *Cro.* 1. Part, 219. See Trin. 12 Car. in B. R. *Cro.* 1. Part, 334.

15. Judgment was given at the Assises against Sir *Christopher Heydon*, and the same Judgment affirmed here in the Kings Bench in a Writ of Error. Afterwards for the reversing of the Judgment here, a Writ of Error was brought by him in the Exchequer-Chamber, and he had obtained a *supersedeas* to stay Execution; and afterwards having notice, That no Writ of Error did lye in the Exchequer-Chamber to reverse the Judgment given here in B. R. he brought a Writ of Error in Parliament, to reverse the Judgment here in the Kings Bench. It was the Opinion of *Coke* Chief Justice, That no Writ of Error lyes in the Exchequer-Chamber, upon a Writ of Error brought here in B. R. but in Trespass, Detinue, *Ejectione firmæ*, where the Judgment is Originally here, and not otherwise. And see in that Case, That the Writ of Error did not agree with the Record; so the Court denyed to grant execution, the Writ of Error not being good, nor any warrant to remove the Record. And see in the book at large, where it is largely debated; Where, and upon what a Writ of Error lyeth in Parliament upon a Judgment given in the Kings Bench; and where the Record shall be hereby removed, and where not. Hill. 11 Jac. in B. R. *Rolls.* 2. Part, 162. to 175. Sir *Christopher Heydons* Case.

16. Error was brought to reverse a Judgment in the Kings Bench in *Ireland*, in an *Ejectione firmæ* of a Lease made by the Earl of *Thomond* of 40 Messuages, 100 Acres of Land, 40 of Meadow, 100 of Pasture, 100 of Bog *in Villis et territoriis* of D. S. and V. It was found by Verdict here, that the Earl seised in Fee, leased it to the Plaintiff for 21 years, rendring rent, with Condition, That if he did let any part of it above three years, the Lease should be void, and he re-enter. He let for three years; and so from three years to three years, during his life, if he lived so long. The Earl accepted the rent of the Assignee, and notwithstanding, re-entred, and made the Lease to the Plaintiff. It was adjudged there, That the same was not a breach of the Condition; and if it was, the Acceptance of the Rent had dispensed with it, and Judgment there given for the Defendant. But the Court Resolved here, That it was a breach of the Condition, and that the acceptance after, might not dispense with the Condition, seeing it was that the Lease should be void, and so utterly determined. And Judgment was given, That the Plaintiff *recuperet Terminum prædict.* It was then moved, How an *Habere satisfaciendum* should be awarded. Whereupon it was Resolved, That there should be a Writ directed to the Chief Justice in *Ireland*, to reverse the said Judgment, and commanding him to award Execution, *Ex quo Cosa Nota*, That the Judgment could not be reversed by the Court of Kings Bench here, but by the Court in *Ireland*. Mich. 13 Car. in B. R. rott. 333. *Malcarry* and *Eyres* Case. *Cro.* 1. Part, 368.

17. Upon a Verdict given, a Rule was given to have Judgment, and within two dayes after, the Plaintiff dyed. It was moved to have a Writ of Error, because it was said, that the party dyed before Judgment, because of course after the Verdict and Rule for Judgment, four dayes are given to speak in arrest of Judgment: and therefore it was moved to have a *supersedeas*. It was agreed by the Court, That it was in the discretion of the Court, *ex officio* to allow a Writ of Error; And that a Writ of Error was a *supersedeas* in it self. But because the Writ of Error was not allowed; And also because no Error appeared to the Court; for what Judgment is entred, it shall relate to the Rule given. It was Resolved no Writ of Error should be allowed, nor any *supersedeas* granted. Mich. 15 Jac. in B. R. The Earl of *Shrewsbury's* Case. *Poph.* 134.

18. Error was brought in the Kings Bench upon a Judgment had upon an Indictment at the Sessions at *Hix-Hall*, for speaking words spoken by Husband and Wife, against the Lord *Fairfax*. The Exceptions they took to the Indictment, were these. 1. That the Justices had not power to hold plea of the words, or for words spoken. But that Exception was over-ruled, because the words tended to the breach of the peace, and the speaking of them was a great misdemeaner. Another Exception was, That it is said, *Juratores jurati electi, triati ad veritatem dicunt*, and the words *ad dicendum*, were left out. The Court held, the want of those words to be Error, and the Indictment was quashed; and the Clerk of the Peace fined 40 l. Hill. 1650. *Williams* and his Wife, and *Custades*, &c. Case. *Styles* 244.

19. An Action of account was brought against a Feme-Covert an Administratrix and her Husband, in the Common-Pleas, and Judgment given *Quod Computent*. The Wife dyed, the Husband brought a Writ of Error in the Kings Bench to reverse this Judgment. It was the Opinion of the Court, That the Writ did not lye, because the Record cannot be removed by it, for that would disturb the proceedings in the Common-Pleas, and the party should have no fruit of his suit if the Record should be removed, nor any remedy to recover the Arrears due unto him. Yet the Original is determined by the

the Judgment *Quod computet*; and a *Scire facias* lyes by the Executor, as the Caſe is here, Trin. 1651. in B. R. *Spitlehouſe* and *Farmery's* Caſe. *Styles* 290.

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3. *Who, and what perſons ſhall have and maintain a Writ of Error; and who, and what perſons not.*

1. A. Was condemned in Debt brought againſt him, and a *Fieri facias* iſſued forth againſt him, who dyed inteſtate, the Sheriff levyed the Execution againſt his Adminiſtrators; Whereupon, they brought a Writ of Error, and reverſed the Judgment. But a Quære is here made of Error brought by Adminiſtrators. Mich. 6 E. 6. *Dyer*, 76.

2. Tenant in tail, the Remainder over, ſuffered a Recovery to the uſe of J. S. and to avoid Error, releaſed all Errors; Afterwards he brought a Writ of Error, and was barred by the Releaſe. But it was holden by the Court, That this was no Bar to the Iſſue, but that he might bring a Writ of Error, becauſe he claimed in, not only as Heir, but alſo *per formam doni*. And it was the Opinion alſo of the Court, That if the Iſſue in tail failed, he in the Remainder might bring a Writ of Error to reverſe the Recovery. Mich. 3 Eliz. *Dyer*, 188. Sir *Ralph Rawlet's* Caſe. See *Cook* 6. Part, 7. in *Ferrers* Caſe, acc. See 4 E. 8. *Dyer*, 1. acc.

3. A. made a Feoffment to the uſe of himſelf, and B. his Wife, and the Heirs of their two bodies, the Remainder to the right Heirs of the Husband; they had Iſſue C. the Husband dyed, B. ſold the Lands in Fee, C. and her Husband joyned in a Fine in confirmation of the Eſtate, and then C. dyed without Iſſue. The Husband of C. and one J. D. Couſin and Heir of C. brought a Writ of Error to reverſe the Fine, and to avoid the ſale made by B. It was holden in this Caſe, (amongſt other points) That the Writ of Error brought by J. D. as Couſin and Heir collateral to C. is not well brought, for the tail is determined by the death of C. without Iſſue, and he had not made himſelf right Heir to A. and then it ſhall be intended, that he had Iſſue another Son or Daughter, and the Writ of Error muſt alwayes be brought by him who is right Heir to him in the Remainder, and not by the Heir general of C. Mich. 1. *Ma. Dyer*, 89. *Varney's* Caſe.

4. A Recovery was had againſt B. in an Action upon the Caſe, for turning a Water-courſe from the Plaintiffs Mill. It being found for the Plaintiff, upon a Writ of Enquiry, he had a *Capias ad ſatisfaciendum* againſt B. who afterwards was Outlawed, and the Outlawry returned in B. R. B. the Defendant *gratis* yielded himſelf to the Marſhalſea, and being in Execution, he ſuggeſted Errors in the Judgment, and had a *Scire facias* returnable two Terms after, and was ſet at liberty upon Bail; and afterwards he ſhewed Error, as well in the Judgment, as in the awarding of the Outlawry, for which Errors the Judgment was reverſed. And in that Caſe, Note, That he who was in Execution, did bring and maintain Error. Hill. 3 Eliz. *Dyer*, 196. *Bateman's* Caſe.

5. See where a Judgment was given againſt the Queen, by the Barons in the Court of Exchequer; That the Queens Attorney-General did cauſe a Writ of Error to be brought for the Queen upon that Judgment in the Exchequer-Chamber. And there, upon a full debate of the Caſe by all the Judges. Judgment was reverſed, and a new Judgment was given for the Queen: *Ex quo, Nota*; That a Writ of Error lyeth for the King or Queen, *Cook* 1. Part, in the Caſe of *Alton Wood*, 41. And ſee *Cook* 3. Part, 1. in the Marqueſs of *Winchester's* Caſe; Where the Queen brought a Writ of Error upon a Recovery had in a Writ of Entry in the *Poſt*, againſt the Marqueſs of *Winchester*, of the Manor of *Marleſton*: But for ſome reaſon alledged in the ſaid Caſe, the Writ of Error was not maintainable, though the Queen might maintain Error.

6. A. brought Debt by *Quo minus* in the Exchequer againſt B. and it was found for the Plaintiff; and for default of a good *Viſne*, the Judgment was Arreſted. Afterwards A. by his Attorney, entred a *Retraxit*, upon which, Judgment was given, That the Defendant *eat ſine die*; and afterwards A. brought a Writ of Error. It was Reſolved in this Caſe (amongſt other things), That if the Tenant do Diſclaim, he ſhall not have a Writ of Error againſt his Diſclaimer, for by his Diſclaimer he hath barred himſelf of right to the Land, and againſt that he cannot have a Writ of Error to have reſtitution of the Land againſt his own Diſclaimer. But it was Reſolved, That although the Plaintiff in the principal Caſe had made a *Retraxit* in proper perſon, yet he might have a Writ of Error, either in the Judgment, or in the proceedings. *Cook* 8. Part, 62. *Beecher's* Caſe.

7. Note, He that hath a Remainder expectant upon an eſtate tail, ſhall have a Writ of Error upon a Judgment given againſt the Tenant in tail, albeit there be no ſuch Remainder at the Common-Law: For when the Statute *De donis conditionalibus* enabled the Donor to limit a Remainder upon an eſtate tail, All Actions which the Common-Law gave to privies in eſtate, are by the ſame Act,

as Incidents implicitely given alſo. And therefore as thoſe in the Reverſion or Remainder expectant upon an eſtate for life, ſhall have a Writ of Error by the Common-Law, of a Judgment given againſt Tenant for life, alt ough they were not made parties by aid, prayer, voucher, or receit, ſo ſince the Statute of *Donis*, ſhall he have who hath a Reverſion, or Remainder expectant upon an eſtate tail. *Cook* 3. Part, 4. in the Marqueſs of *Wincheſter*'s Caſe.

8. A. recovered againſt B. 130 l. in B. R. in which ſuit C. and D. were Bail of B. Upon a *Scire facias* againſt the Bail, Error was brought by the Principal and Bail in one Writ returnable in the Exchequer-Chamber, ſuppoſing Error to be *in reddditione Judicii et adjudicatione executionis ad domumipſorum*. It was the Opinion of the Court, That although the Bail may have a Writ of Error, yet one Writ of Error lyeth not joyntly for the Principal and Bail, becauſe there be ſeveral Judgments given againſt them, and the Damages againſt the one, is not as againſt the other: Wherefore they may not joyn in one Writ of Error. Paſc. 9 Car. in B. R. *Lancaſter* and *Keiteighs* Caſe. *Cro.* 1. Part, 219. See Trin. 11 Car. in B. R. *Buſhell* and *Huſtwayt*'s Caſe. *Cro.* 1. Part, 395. acc.

9. Error was brought, and the Writ ſuppoſed, that Error was in the principal Judgment, and alſo in the Judgment upon the *Scire facias* againſt the Bail. It was the Opinion of the Court, That the Writ was ill brought, becauſe it was brought by the Bail, for Error in the principal Judgment, which the Bail cannot have; for the Bail cannot aſſign Error, nor take advantage of any Error in the principal Judgment. But if the Bail had recited the firſt Judgment, and the Judgment in the *Scire facias*, and had alledged Error in the ſecond Judgment, and the Execution thereof, it had bin well enough. Hill. 12 Car. in B. R. *South* and *Griffith*'s Caſe. *Cro.* 1. Part, 345. See Hill. 15 Car. in B. R. *Smith* and *James* Caſe. *Cro.* 1. Part, 415. acc. See Mich. 11 Jac. in the Exchequer-Chamber. Sir *James Sandeſons* and *Deventon*'s Caſe. *Cro.* 2. Part, 884.

10. Error of a Judgment given againſt the principal in the Court of the City of *Weſtm.tam in reddditione Judicii quam in reddditione Executionis*. The Error was, becauſe a *Capias* was awarded againſt the Bail, and he taken in Execution without a *Scire facias*; the ſame was holden to be Error: But becauſe the Bail cannot have a Writ of Error of the principal Judgment, the Writ was diſallowed. Quære, the Record being removed, if he may have Error, *quod coram vobis reſidet*. Trin. 15 Car. in B. R. 404.

11. If a man be vouched, and entreth into Warranty and looſeth, he may have a Writ of Error, and aſſign the Errors which happened between the Demandant, and the Tenant, and between the Demandant and himſelf the Vouchee: And ſo he in the Reverſion, who prayes to be received for the default of Tenant for life, or for his faint pleading he ſhall have a Writ of Error, and aſſign the Error, between the Demandant and the Tenant, or between the Demandant and himſelf. So if Tenant for life doſeth by default, he in the Reverſion ſhall have a Writ of Error, albeit he never prayed to be received, and this is in reſpect of the privity and Intereſt which the Vouchee and Reverſioner had in the Land ſo recovered by the Judgment, *Fitz. Nat. Br.* 21. acc.

12. In Burrough Engliſh, if the Tenant loſeth the Land by erronious Judgment, the youngeſt Son ſhall have the Writ of Error; ſo he that is Heir in ſpecial tail, and that is in reſpect of the privity, and intereſt which they have in the Land, *Fitz. Nat. Br.* 22. So the Heir ſhall have a Writ of Error to reverſe an Outlawry of Felony pronounced againſt his Father to reſtore him to the privity of bloud between his Father and him, *ibid.*

13. The Succeſſor of an Abbot, Prior, Parſon, &c. ſhall have a Writ of Error upon a Judgment given againſt their Predeceſſors of all things which touch the Succeſſion or Corporation. But if a man recover againſt a Parſon, Biſhop, &c. debt or damages by Judgment, their Executors ſhall have a Writ of Error upon ſuch Judgment, and not their Succeſſors, becauſe their Executors or Adminiſtrators have Intereſt in ſuch things, and not the Corporation. See *Fitzh. Nat. Br.* 22. B. acc.

14. Judgment was given againſt an Enfant upon his default after appearance by Guardian; wherein he vouched the common Vouchee. It was adjudged, That the Writ of Error brought by the Enfant, did not lye. And it was Reſolved, That it was not Error, for the Judgment is not given upon the default of the Enfant, but upon the departure of the Vouchee in deſpight of the Court; and common Recoveries, are common aſſurances, and ought not to be ſhaken. Mich. 6 Car. in B.R. The Earl of *Newport*, and Sir *Henry Mildmayes* Caſe. *Cro.* 1. Part, 224.

15. A. a Frenchman, brought Aſſumpſit againſt Sir *James Sandeland*, and B. his Bail; Judgment was given againſt the Principal in the Kings Bench, and after, by *Scire facias* againſt the Bail, They both joyned in one Writ of Error in the Exchequer-Chamber. Adjudged, The Writ ſhould abate, becauſe they could not joyn. It was moved, That the Bail might have a Writ of Error by himſelf, *Quod coram vobis reſidet*. It was denyed, both becauſe *Scire facias*, is none of the Actions wherein Error is given in the Exchequer-Chamber, and becauſe the

the Record doth not abide before theſe Judges, but in the Kings Bench. Hill. 11 Jac. in B. R. *Forreſt* and Sir *James Sandelands* Caſe. *Hob.* 72. See before, Sect. 9. acc.

16. A. brought Treſpaſs againſt B. C. and D. B. pleaded, Not Guilty, C. and D. made Juſtification; the Iſſue againſt B. was tryed, and damage given againſt him, and Judgment. After Judgment, A. the Plaintiff entred *Nolle proſequi* againſt C. and D. Whereupon they all brought Error againſt A. in the Exchequer-Chamber, and alledged, That the *Nolle proſequi* diſcharged all the Defendants. It was holden by the Court, That if the *Nolle proſequi* had bin before Judgment, it had diſcharged the whole Action, and ſo it had if Judgment had bin given againſt them all, and the Plaintiff had entred the *Nolle proſequi* againſt the two: for Nonſuit or releaſe of one, had diſcharged all the reſt. But becauſe the principal Action was at an end againſt B. and no Judgment againſt the other, they are divided from B. and not ſubject to the damages found againſt him, and ſo it was no Error, and he not diſcharged. Hill. 11 Jac. in B.R. *Parker* and *Lawrences* Caſe. *Hob.* 70.

17. A. ſeiſed of a Mannor in Fee, had iſſue B. who 18 Eliz. was Indicted of Felony, 19 Eliz. the Record of the Indictment was brought in the Kings Bench, and thereupon 20 Eliz. B. was Outlawed. A. dyed ſeiſed, B. entred into the Mannor and Lands as Son and Heir, and being ſeiſed, deviſed the ſame to C. in Fee, who conveyed the Mannor and Lands to J. S. and J. D. the Feoffee of the Lands, brought a Writ of Error to reverſe the Attainder by the Outlawry of B. It was objected, That J. D. was a purchaſor, and although he was not a party to the Record, yet he was grieved by the Record, of which he was to have a benefit; and therefore he ſhould have Error. But the Court inclined to be of Opinion, That J. D. could not have a Writ of Error to reverſe the Record of Attainder of Outlawry, becauſe if he bring Error, and reverſe the Judgment, he muſt reſtore the Heir in bloud, and none can reſtore bloud, but he who is privy in bloud, and that is the Heir, and not a Feoffee. Paſc. 3 Car. in B. R. *Bookers* Caſe. *Godb.* 376, 377.

18. A. ſeiſed of Lands in Fee, made a Feoffment thereof to divers perſons, to the uſe of himſelf for life, and after to the uſe of K. his Daughter in tail, the Remainder to the uſe of the right Heirs of the body of A. (he having then many other Daughters) the Remainder to the uſe of his Heirs, and dyed; K. took Husband, and afterwards ſhe being within age, and her Husband being of full age, levyed a Fine, and ſuffered a Recovery of part of the Lands, with warranty, and afterwards K. dyed without Iſſue of their bodies. Afterwards the Daughters and Heirs of the body of A. brought a Writ of Error, to reverſe the ſaid Recovery. It was holden in this Caſe, That the Writ of Error did well lay, being brought by the Heirs in the Remainder. And afterwards, the ſaid Recovery was reverſed by reaſon of the Non age of K. the Wife, although her Husband who joyned in the ſaid Recovery, was of full age; and notwithſtanding that, they had levyed a Fine of part of the Lands and Proclamations paſſed before the Recovery was ſuffered. Hill. 13 Jac. *Holland* and *Jackſon's* Caſe. *Bridgman* 71, 72.

19. A. had iſſue B. his Son, and three daughters by one *Venter*; and the Plaintiff by another *Venter*, and dyed ſeiſed of Lands to him, and the Heirs Males of his body; B. entred, and made a Feoffment; the Feoffee was impleaded, and vouched B. who loſt the Land by default, and dyed without Iſſue. It was a Queſtion, Whether the daughters which were Heirs general, or the Plaintiff, who was Heir in tail, ſhould have the Writ of Error. It was Reſolved by the whole Court, That the Plaintiff being ſpecial Heir in tail, ſhould have the Writ of Error to reverſe the ſaid Recovery, which was an erronious Recovery. And this was layed for a ground in Law, That in all Caſes where a Recovery is had againſt one by erronious proceſs or falſe Verdict, he which is grieved, ſhall redreſs it, although he be not party or privy to the firſt Judgment. And therefore if a Recovery be had againſt Tenant for life, he in the Reverſion ſhall have Error after his death, and now by the Statute of R. 2. in his life time. Mich. 18 Eliz. in B. R. Sir *Arthur Henningham* and *Windhams* Caſe. *Owen.* 68.

20. Tenant in tail levyed an Erronious Fine with Proclamations, and then as Vouchee did ſuffer an erronious Recovery, and dyed; The Iſſue brought a Writ of Error to reverſe the Fine, the Defendant pleaded the Recovery afterwards, the Plaintiff did alledg a default in the Recovery by which he conceived the Recovery to be void. It was Reſolved, That it was not void, but voidable by Error, and therefore as long as it continued in force, the Iſſue was barred to reverſe the Fine. But it was holden, That writ of Error brought by the Iſſue to reverſe the Recovery, was well brought, and then afterwards he might reverſe the Fine. Mich. 37 Eliz. in B. R. Sir *Richard Shuttleworths* Caſe vouched, in *Holland* and *Jackſons* Caſe. *Bridgman* 72. See the ſame Caſe vouched in *Eyre* and *Mollineux's* Caſe. Hill. 9 Jac. in B. R. *Bulſtr.* 2. Part, 14. And there ſaid, It was adjudged in that Caſe, That a Writ of Error is a Writ which doth run in privity, and cannot be transferred over, and therefore a Feoffee ſhall not have or maintain a Writ of Error. *Quod Quære*, See before.

21. Huſ-

21. Husband and Wife, the Wife being within age, levyed a Fine of the Lands of the Wife. A *Precipe* was brought againſt the Conuſee, who vouched the Husband and Wife, who appeared in perſon, and vouched over the common Vouchee; whereby a Recovery was had. The Wife and her ſecond Husband brought a Writ of Error to reverſe the Fine, and another Writ to reverſe the Recovery, by reaſon of the Non-age of the Woman. The Court was of Opinion to reverſe the Fine, but doubted of the Writ for the Recovery, becauſe the firſt Husband and Wife appeared in perſon, and vouched over, ſo it was a Recovery upon appearance, and not by default. But afterwards upon examination, It was found, That the Recovery was before the Fine; and ſo the Recovery doth not give away the Error in the Fine: And therefore, It was holden, That upon theſe Writs ſo brought, the Fine ſhould be reverſed. Hill. 43 Eliz. in B. R. Sir *Henry Jones* Caſe, *Goldesbr.* 181.

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4. *For what cauſes Judgments and other Proceedings in Courts of Record, or other Courts, by reaſon of Error; and for what not, ſhall be reverſed: And where the Judgments ſhall be reverſed by Plea, and not by Writ of Error.*

1. ERror was brought upon a Judgment given in the Court of Pipowders in *Stanbridg*-Fair, becauſe the Plaintiff declared upon a Contract made there the laſt Fair, and there was no Plaint there begun, and alſo becauſe there is no Judgment of Amercement of the Defendant: Wherefore the Judgment was reverſed. Mich. 3. and 4. *Ma. Dyer*, 132.

2. In an Aſſiſe brought by the Earl of *Arundel*, againſt the Lord *Windſor*. The Plaint was of 13 s. 4 d. of Rent, and afterwards the Plaint was abridged by 20 s. It was holden by the Court, That the ſame was Error, becauſe the Rent is a thing entire, and cannot be abridged as Land and the like. Mich. 3 E. 6. *Dyer*, 65.

3. Error was brought upon a Judgment given in a *Scire facias* upon a Recognizance; and becauſe the Writ bore date *die ſolis*, which is not *dies juridicus*, the ſame was holden to be Error, and the Judgment was reverſed. Trin. 1 Eliz. *Dyer*, 168. *Barrets* Caſe.

4. Error was brought upon a Judgment given in a Writ of *Entre in le quibus*, which bore date, 13. *Feb.* 7 E. 6. and it was Returnable *Craſtino Purificationis*, the ſame year, ſo as the Return was before the Teſte of the Writ, and for that cauſe the Judgment was reverſed. Hill. 5. *Ma. Dyer*, 135. *Marrow* and *Drews* Caſe.

5. In *Ejectione firmæ de Decimis garbarum, quidam horreo, et gardino Rectoriæ*, Judgment was entred that the Plaintiff ſhould recover the Term to come *in Rectoria, horreo, et gardino*. Exception was taken to the Declaration and Judgment, becauſe more damages were found then the Plaintiff counted of: And if it was erronious or amendable, is left a Quære, Hill. 9 Eliz. *Dyer*, 258. See *Co.* 10. Part, *Pilſords* Caſe. In Treſpaſs *Quare clauſum fregit*, the Plaintiff declared to his damage of 40 l. The Jury gave him 49 l. for damages, and 20 s. for Coſts; the Plaintiff did waive the 9 l. for the damages, and preyed but only 40 l. for damages, as he had declared, and demanded Judgment for that, with encreaſe of Coſts, and the Court encreaſed the Coſts to 10 l. In Error brought, It was aſſigned for Error, that the damages and coſts put together, did amount to more then the damages mentioned in the Declaration. In this Caſe, it was Reſolved, That when an Act of Parliament creates, or gives a recompence for a thing where no recompence was before, or gives damages where no damages were given by the Common-Law, there the Defendant ſhall not have coſts and damages alſo: but where a Statute adds but a greater damages, and damages for the ſame was by the Common-Law; there the Defendant ſhall have his damages and coſts. 2. Reſolved, That in ſome Caſes, The Plaintiff ſhall recover more damages then himſelf hath declared of; as in Detinue, he ſhall recover more damages then he hath counted of. *Cook* 10. Part, *Robert Pilſords* Caſe, 116, 117.

6. A. was Indicted for being a common Barretor, and the Indictment found, and Judgment given, That he ſhould pay 100 l. Fine, and be impriſoned for two Moneths, and *ideo in miſericordia*: Upon Error brought to reverſe the Judgment. It was (amongſt other) alledged for Error, becauſe it is, *Ideo in miſericordia*, where it ought to have bin *Ideo Capiatur*, being upon an Endictment upon an Offence fineable. But the Record being viewed; The Record is, *Ideo Committatur Gaolæ* (being) preſent for two Moneths; ſo there needs not an *Ideo Capiatur*, but where the party is abſent. And for the words *Ideo in miſericordia*. It was holden by the Court to be but ſurpluſage. But *Curia adviſare vult*. Hill. 9 Car. in B. R. *Chapmans* Caſe. *Cro.* 1. Part, 248.

7. Error to reverſe a Judgment in *Cornwall* in Debt upon Obligation; the Error aſſigned was, becauſe the Iſſue joyned there, was tryed by ſix Jurors only. It was ſaid, it was no Error, becauſe it was returned to be *ſecundum Conſuetudinem ibid. à tempore, &c.* before uſed; and the Court being by Preſcription, the tryal by the Cuſtome might be by

by ſix Jurors. But the Court held, That ſuch a Cuſtome was void, and againſt the Common-Law. *Jones* Juſtice ſaid, That although in ſome parts of *Wales* there be ſuch tryalls by ſix; That it is by reaſon of an Act of Parliament. The Judgment was reverſed. Mich. 7 Car. in B. R. *Tredymock* and *Perrymans* Caſe. *Cro.* 1. Part, 188.

8. Error of a Judgment in *Leiceſter*, in an Action upon the Caſe. The Error aſſigned was, becauſe the Style of the Court was, *Placitum coram* J. S. *Majore*, and J. C. *Recordatore*, *et* J. D. and J. N. *Aldermannis Burgi prædict. ſecundum conſuetudinem Burgi prædict.* And the Plaint being entred, upon ſummons, a *Non eſt inventus* was Returned at a Court holden *Coram dict.* J. S. *Majore et* J. N. *et* J. D. *Aldermannis ſecundum Conſuetudinem Burgi prædict.* (omitting the Recorder) which was alledged to be Error, *et coram non Judice.* But the Opinion of the Court was, That it was no Error, for it may be, that at the firſt Court holden, the Recorder was there, and at the ſecond Court he was abſent. And the Court is well held by Cuſtome there before the Mayor and Aldermen. Hill. 15 Car. In B. R. *Brian* and *Wikes* Caſe. *Cro.* 1. Part, 413.

9. Error of a Judgment in Waſte in the Common-Pleas, becauſe upon the Writ of enquiry of Waſte, 13 Jurors were Returned to be ſworn, where there ought to be but 12. For it is not like other Writs of enquiry of damages, where it is uſual to have more then 12, or a leſſer number at the pleaſure of the Sheriff, for that is but a meer enqueſt of Office. But here it is a Verdict, and in the nature of a Verdict whereof an Attaint lyes; And of ſuch Opinion was the whole Court. Quære, for afterwards it was holden it was good enough. Trin. 9 Car. in B. R. *King* and *Fitches* Caſe. *Cro.* 1. Part, 229.

10. Error of a Judgment in *Bath*, in an Action upon the Caſe for words. Where the Judgment, after the Verdict for the Plaintiff was given for the Defendant, intending that the Action did not lye for the words. And the Entry is, *Ideo conceſſium eſt, Quod querens nihil capiat per Billam*, which was held a manifeſt Error, for it ſhould have bin *Ideo conſideratum eſt.* Trin. 11 Car. in B. R. *Slocombs* Caſe. *Cro.* 1. Part, 319. See Mich. 8 Jac. in B. R. *Fuller* and *Rightwoms's* Caſe, acc. *Rolſtr.* 1. Part, 125.

11. Error upon a Judgment in the Common-Pleas, in Debt upon a Bond to perform an Award. Upon Demurrer, becauſe it was conceived, the Arbitrament was void. Judgment was given for the Defendant, *Quod querens nihil capiat per breve.* It was aſſigned to be Error, for that the Action was brought by an Attorney by a Bill of Priviledg, which is not an Original; and ſo it ought to be *Quod nihil capiat per Billam.* It was ſaid to be a manifeſt Error, unleſs it be the Entry of the Clark and amendable. But the Court doubted of it, becauſe it was in the Judgment which is by the Court, and not to be accounted the Entry of the Clark only. Trin. 15 Car. in B. R. *Reymond* and *Barbedges* Caſe. *Cro.* 1. Part, 419.

12. Error of a Judgment in the Common-Pleas, becauſe the Plaintiff being an Attorney there ſued an Attachment of Priviledg againſt the Defendant, and Recovered againſt him by *Non ſum informatus*; and becauſe the Plaintiff did not find Pledges, *de proſequendo*, and the ſame was certified, and *in nullo eſt erratum* pleaded, the Judgment was reverſed. Paſc. 11 Jac. in B. R. *De la Hay*, and *Vaughans* Caſe. *Cro.* 2. Part, 319.

Eſcape.

1. *What ſhall be ſuch an Eſcape, as ſhall Charge the Sheriff, or Gaoler in an Action for the ſame; what not: Where and what Action will lye for an Eſcape; by whom, and againſt whom: And what ſhall be an Eſcape, what not.*

1. A. Recovered upon a Plaint in *London* againſt B. and had him in Execution in *Ludgate*. A. dyed inteſtate. B. was permitted by the Keeper of the Goal of *Ludgate*, to go at large into *Southwark* with J. S. the ſervant of the Keeper, and that by the Commandment of the Keeper. The Adminiſtrator of A. brought Debt againſt the Sheriffs of *London* upon the Eſcape. It was adjudged by all the Barons of the Exchequer, That it was an Eſcape. And when the Priſoner came into *Surrey*, he had not any Keeper as a Priſoner for the Debt, for that he that waited upon him in the County of *Surrey*; could not be Officer to the Sheriffs of *London*; for the power of every Sheriff doth not extend beyond his own County, unleſs it be in ſpecial Caſes. And it was holden in this Caſe, that this voluntary ſuffering him to go into another County; when the Baſtard ſervant waited upon him there, the party might have an Action of Falſe Impriſonment againſt him. Paſc. 4 E. 3. *Plow. Com. Plat* and the Sheriffs of *Londons* Caſe. 36. See 3 E. 6. *Dyer*, 166. acc.

2. It was holden by the Juſtices in the Kings Bench; That if a man be arreſted by vertue of a *Capias ad ſatisfaciendum*, or a *Capias utlagatum*

after Judgment; and a Reſcous is made at the ſame time, by reaſon of which, the party Arreſted eſcapes, That the Sheriff ſhall be charged for the Eſcape, with the whole Debt, and he ſhall have his remedy over againſt the Reſcouſor by an Action upon the Caſe, Trin. 7 Eliz. *Dyer*, 241. See 16 E. 4. 2, & 3. But Note, Paſc. 15 Car. in B. R. It was agreed by the Juſtices, That if the Sheriff doth Arreſt a man upon Meſne proceſs, and Return a *Capi corpus*, and that the Defendant was reſcued, that no Action lyeth againſt the Sheriff; but if the party be taken upon an Execution, and be reſcued. An Action upon Eſcape will lye againſt the Sheriff. See *Marſh.* Paſc. 15 Car. in B. R. 1. acc.

3 Debt was brought againſt the Sheriffs of *London* upon an Eſcape of A. and the Plaintiff declared upon an Execution by force of a Recovery, and that the party was in the Priſon of *Ludgate ſub Cuſtodia*, J. S. and J. D. then Sheriffs in 1 H. 8 and that he ſo continued *ſub cuſtodia*, J. B. and J. G. in 2 H. 8. and ſo continued *ſub Cuſtodia* J. N. *et* J. L. in 3 H. 8. and then was ſuffered to eſcape. J. N. *et* J. L. pleaded that before the eſcape at ſuch a day *anno ſuperius in narratione ſpecificato*, the ſaid J. D. and J. S. *ad tunc vicecomites*, ſuffered him to eſcape. This amongſt other points, was holden to be no good plea, becauſe there was three years ſpecified in the Declaration; and it ſhall be taken, that it was 1 or 3 H. 8. when they were out of Office; and yet it is mearly induced by the *ad tunc vicecomites*, which ſhall lead the intendment to be of the year in which the Declaration ſuppoſeth that they were Sheriffs: but that ſufficeth not, but the plea muſt be alledged in fact, and therefore the Defendants meaning to diſcharge themſelves by a former eſcape, which was not in their time, but alledg it preciſely, and for want of that, and for other cauſes, it was adjudged againſt the Defendants. See Mich. 3 E. 6. *Dyer*, 66. Serjant *Mynors* Caſe.

4. A man was in Execution in the *Fleet* for a debt recovered againſt him in the Common-Pleas, he being before condemned in the Kings Bench for another Debt, was by *Habeas Corpus cum cauſa* removed into the Kings Bench. It was holden by the Court, That in this Caſe, he might acknowledg ſatisfaction for both debts in the Kings Bench. That he being in the cuſtody of the Marſhall for both debts; if the Marſhall ſuffer him to eſcape, he ſhall be charged for both the Debts. Mich. 4 *Eliz. Dyer*, 152. See 14 Eliz. *Dyer*, 307. acc.

5. The Marſhall of the Kings Bench ſuffered one who was in Execution, to go at large by the commandment of the Chief Juſtice, the Plaintiff agreeing to it, afterwards the Defendant returned to Priſon, and was in Execution again. It was holden in that Caſe, if after he returns again to Priſon, the Marſhall ſuffereth him to eſcape, that an Action upon the Eſcape will lye againſt the Marſhall. Mich. 10 Eliz. *Dyer*, 275. See 38 H. 8. *Dyer, Co.* acc. See 11 Eliz. *Dyer*, 279. acc. Quere of this Caſe; And ſee the Sheriff of *Eſſex*'s Caſe. *Hob.* 202. where the Caſe was, That a Priſoner having bin in Execution, was willingly let to go out of Priſon by the Goaler, and then came into the Goal again, and ſo remained in the Goal until the time of another Sheriff, and then he eſcaped: Whereupon an Action was brought, and it was adjudged, That the Sheriff or Goaler was not chargeable to this Action: For when the Priſoner was voluntarily let go at large by the Goaler, the Execution was utterly diſcharged, ſo as he could not lawfully be taken again, or adjudged in Execution by Law, although the party would yield himſelf unto it, or the Creditor ſo allow him. See the Sheriff of *Eſſex*'s Caſe, *Hob.* 202.

6. The Duke of *Norfolk* being Marſhall of *England*, and having Authority to make a Deputy, made *Gawdy* his Deputy, who was ſworn in open Court. Afterwards *Gawdy* licenſed a Priſoner who was in Execution to go into *Norfolk* with a Keeper. Debt was brought againſt *Gawdy* for the Eſcape: and it was adjudged, That although he was but Under-Marſhall; And the Action brought in *Middleſex*, ſuppoſing the Eſcape at *Shoreditch*, and not in the County of *Surrey* where the Marſhalſea is; It was adjudged, That the Action did well lye. Mich. 11 Eliz. *Dyer*, 278. *Gawdyes* Caſe.

7. A man was taken in Execution by Bayliffs of a Franchiſe by force of a Warrant upon a *Capias ad ſatisfaciendum*, the Bayliffs before the Return of the Writ in B. R. at the requeſt of the Priſoner, brought him in the interim, before the Return of the Writ, into another County; and after the Return, delivered him again at the Priſon of the Kings Bench. It was adjudged in that Caſe, That it was no Eſcape: And the difference was taken, If the Sheriff, or Bayliff of a Franchiſe, ſuffer one who is in Execution, and under their cuſtody, to go out of the Priſon for a time, and then to Return, although that he Return at the time, yet it is an Eſcape; ſo if he ſuffer him to go by Bail, or Paſton, becauſe the Sheriff ought to keep his Priſoner *in ſalvo et ſta Cuſtodia*. But if the Sheriff hath one in Execution for Debt, and a *Habeas Corpus* iſſueth to have his body in B. R. at a certain day: The Sheriff before the day, brings the Priſoner to an Inn in *Smithfield*, and the Priſoner of his own head, maketh an Eſcape into *Surrey*, which is another County, and the next day comes again to the Sheriff, and the Sheriff at the Return of the *Habeas Corpus*, delivers him to the Court, the ſame is no Eſcape, as it was adjudged, 31 Eliz. in *Charnocks* Caſe. In this Caſe, it was alſo Reſolved, That

if one in Execution eſcapeth, and flyes into another County; if he be re-taken upon Freſh ſuit, the ſame is no eſcape, becauſe the Sheriff hath done all that he could do, and by his Freſh-ſuit, hath re-taken him before any Action brought: And if the Priſoner be re-taken upon Freſh-ſuit, he ſhall not have *Audita Querela* to diſcharge him of his Impriſonment, becauſe he ſhall not take advantage of his own wrong. *Cook* 3. Part, 43. 44. *Boytons* Caſe.

8. A. was in Execution under the Cuſtody of the Sheriffs of *London*, at the ſeveral Suits of B. and C. The old Sheriffs of *London* delivered the body of A. by Indenture to the new Sheriffs, in which the Execution of B. only was mentioned, and the Execution of C. was omitted. A. in the time of the new Sheriffs, makes an eſcape: It was adjudged in this Caſe, That the old Sheriffs ſhould be charged with this Eſcape; For it was Reſolved, That the not delivery of A. to the new Sheriffs in Execution at the Suits of them both, was an eſcape as to one, although that the Priſoner was within the Priſon it ſelf; and untill the Priſoner in Execution be delivered to the new Sheriffs by Indenture, he remaineth in the cuſtody of the old Sheriffs. *Cook* 3. Part, 71. *Weſtbyes* Caſe.

9. In Debt upon an Eſcape; It was holden by all the Juſtices, That if a Priſoner in Execution eſcape, and the Goaler make Freſh-ſuit, and before the re-taking, the party bring his Action againſt the Goaler: Now the Goaler may not take the Priſoner as to be in Execution again for the party, but only for his own Indemnity. But if the party doth not bring his Action, then the Goaler may re-take the Priſoner, and he ſhall be in Execution again for the Plaintiff. Hill. 43 Eliz. in B. R. *Goldesbr.* 180.

10. A man was in Execution for Debt, and brake the Priſon, and eſcaped; and the Sheriff made Freſh-ſuit, and retook him. In that Caſe, it was adjudged, No Eſcape; and in that Caſe, it was Reſolved, That if a Priſoner who Eſcapes be out of ſight, yet if Freſh-ſuit be made, and he re-taken *in recenti ſecutione*, he ſhall be in Execution again, although that he be taken in another County; and he ſhall not take advantage of his own wrong; but otherwiſe it is when a man eſcapes with the conſent of the Goaler, then he cannot re-take him, and if he doth, the other for his diſcharge ſhall have an *Audita Querela*. *Cook* 3. Part, 52. *Rigways* Caſe.

11. If Traytors be impriſoned under the Cuſtody of the Goaler, and afterwards they break the Priſon, and eſcape, the ſame doth not diſcharge the Goaler, but he ſhall be charged with the Eſcape; but it is otherwiſe of the Kings Enemies, for in the one Caſe he hath his remedy over, but in the other not. See *Cook* 4. Part, 84. *Southcotts* Caſe. See 3 E. 6. *Dyer*, 66. acc.

12. A man was arreſted upon a *Latitat* for 100 l. the Plaintiff intending upon his appearance, and Bail put in to declare againſt him for the ſame debt, and being Arreſted by the old Sheriff, and left in Priſon, the new Sheriff ſuffered him to go at large without finding ſureties for his appearance. Whereupon he brought his Action upon the Caſe againſt the Sheriff upon the eſcape. Upon Not-Guilty, this matter was found. It was adjudged for the Plaintiff; For this permiſſion to Eſcape, was a juſt cauſe of Action, for by this means the Plaintiff is defrauded or delayed of his Action. Trin. 12 Jac. in B. R. *King* and Sir *Euſebie Andrews's* Caſe. *Cro.* 2. Part, 380.

13. Action upon the Caſe was brought againſt the Sheriffs of *Middleſex*, for ſuffering one to eſcape who was Arreſted upon a Bill of *Middleſex*, for 33 l. who eſcaped. The Defendants pleaded, That after the Arreſt, leading him towards *London* to the Goal, he was reſcued from their Bayliffs by J. S. and J. D. It was adjudged, That the Arreſt being upon mean proceſs, and not upon Execution, the Sheriffs are not bound to take *poſſe commitatus* with them, and therefore upon ſuch proceſs, a Reſcous is a good Return, and the Sheriffs or Bayliffs are not chargeable upon an eſcape. But upon a *Capias ad ſatisfaciendum*, or *Capias utlagatum* after Judgment, ſuch Return is no excuſe for the Sheriff, for at his perill he ought to keep his Priſoners taken in Execution, for there the proceſs is determined, and being executed, the party can have no new proceſs; but in the other Caſe, there is not any great miſchief, for the party hath only loſt his proceſs, which he may renew, as alſo have an Action upon the Caſe againſt the Reſcouſſors. It was adjudged for the Defendants. *Mo* 7; and *Proby* and *Lumleys* Sheriffs of *Middleſex's* Caſe. Paſc. 13 Jac. in B. R. rott. 101. *Cro.* 2. Part, 419. See before, Caſe 2.

14. In Debt againſt the Marſhall of the Kings Bench; the Plaintiff declared that he recovered againſt Husband and Wife, and had Judgment for 200 l. and the Wife was committed in Execution, and the Defendant 24 *Nov.* 16 Jac. ſuffered her to go at large, his Debt not ſatisfied. The Defendant pleaded, That ſhe brake Priſon, and he took her 21. *Octob.* 17 Jac. in Freſh ſuit, and now hath her in Execution. It was ſaid for the Defendant, That the Repriſal being alledged to be before the Plea pleaded was good, and ſhall excuſe the Defendant of the Eſcape, for that upon the matter, it was no Eſcape, when ſhe was taken upon the Freſh-ſuit. 2. Admitting it was no Plea, yet it was ſaid, That the Action did not lye, becauſe the Eſcape is of a Feme Covert, where her Husband is ſubject to the

Execution, and ſo the party is not totally deprived of his Debt: And here the ſole and principal Debtor did not eſcape. But it was holden by the Court, That the Plea of the Defendant was not good, becauſe the Action is brought, and implyes a voluntary permiſſion *ire ad largum*, which is neither denyed, nor traverſed; and if the Sheriff doth voluntarily let a Priſoner at large, he cannot re-take him, and ſo the Repriſal being after the Action brought, is to no purpoſe. 2. It was holden by the Court, That the Action did well lye, or an Action upon the Caſe at the pleaſure of the Plaintiff, becauſe the Wife was only committed to Priſon, and not the Husband, and ſhe is the ſole Debtor who is Impriſoned. It was adjudged for the Plaintiff. Mich. 20 Jac. in B. R. *Whiting* and Sir *George Reynell*, Marſhall of the Kings Bench, his Caſe. *Cro.* 2. Part, 657, 658. See by *Cook* Chief Juſtice, That the Goaler ſhall be charged for the Eſcape of a Feme Covert taken by her body in Execution. Mich. 13 Jac. in *Wood* and Dr. *Saccliffers* Caſe. *Bolſt.* 3. Part, 150.

15. A. having a Judgment againſt B. Mich. 11 Jac. the Rule of the Court was, That B. ſhould pay to A. ſo much money before ſuch a day; and if he failed, then A. ſhould have him in Execution upon the Judgment; B. failed payment, and was taken in Execution by the Sheriff; and being in Executions he ſued an *Audita Querela* in the Chancery, and upon a ſuggeſtion there made, he obtained an Injunction, and a *ſuperſedeas*, and the party in Execution was bailed and ſet at large, he not being ſatisfyed his Debt. It was ſaid in this Caſe, That this being done after Judgment and Execution, it ſhall be an Eſcape in Law, and the Sheriff ſhall be charged with it, for the party cannot afterwards be re-taken, being once delivered by order of the Court. Trin. 11 Jac. in B. R. *Checo* and *Bakers* Caſe. *Bolſt.* 2. Part, 120.

16. *Stone* an Attorney of the Common-Pleas, was in Execution in *Norfolk*, for 1000 l. He by practice procured himſelf to be removed by *Habeas Corpus* before *Cook* Chief Juſtice at the Aſſiſes in *Lent*, and then eſcaped to *London*; and in *Eaſter* Term following, the Bayliff did re-take him: And thereupon he brought an Action of falſe Impriſonment againſt the Bayliff. And the Opinion of the Court was, That the Freſh-ſuit made, was good, although he retook him in the end of the year, if enquiry was made after him. And ſo by conſequence it was adjudged, That the Action of falſe Impriſonment againſt the Bayliff, did not lye. Mich. 8 Jac. in C. B. *Stones* Caſe. See *Godbolt.* acc.

17. Action brought againſt the Marſhall of the Kings Bench for ſuffering J. S. who was in Execution for 200 l. to eſcape: And the Plaintiff ſhewed, That he recovered againſt J. S. 200 l. in C. B. And that by vertue of a *Capias ad ſatisfaciendum* to the Sheriffs of G. they took him in Execution, who in *exitu ab eorum Officio* by Indenture *debito modo confect.* delivered him to the new Sheriffs, and that they were *amoti ab Officio*, and that by vertue of a *Habeas Corpus*, they Returned *Corpus cum Cauſa*. Whereupon he was delivered to the Marſhal in Execution, who ſuffered him to eſcape. It was excepted to the Declaration, becauſe it was not ſhewed, That the old Sheriffs delivered him in Execution, with the cauſes of his Impriſonment to the new Sheriffs, for otherwiſe it is no eſcape in the old Sheriffs, and not in the Marſhall, for it may be, He was delivered *per indenturam debito modo confectam* for other cauſes, and this not mentioned. See *Cook* 3. Part, 72. *Weſtbyes* Caſe, and although it be ſaid, *virtute cujus*, he was in Execution under the new Sheriffs, yet that doth not help it: And of that Opinion was *Mountague* and *Doddridge* Juſtices, but the other Juſtices doubted of it. It was then prayed, That the Declaration might be amended, for the truth was, he was delivered in Execution, but being after Judgment upon a Demurrer, it could not be. Mich. 18 Jac. in B. R. *Dowſwell* and Sir *George Reynells* Caſe. *Cro.* 2. Part, 587, 588.

18. Debt upon an eſcape for ſuffering J. S. to eſcape, who was condemned in Debt, and Outlawed after Judgment, and removed in B. R. by *Habeas Corpus*. The Defendant ſhewed, That he never was taken in Execution; and that after he had bin impriſoned for two years, he eſcaped; the Plaintiff demurred; Exception was taken, becauſe the Action was not brought *tam pro Domino Rege, quam pro ſeipſo*, for ſuffering a perſon Outlawed to eſcape. But the Exception was diſallowed, for that he might bring his Action of Debt for what he hath loſt. It was adjudged for the Plaintiff. Mich. 19 Jac. in B. R. *Moor* and Sir *George Reynells* Caſe. *Cro.* 2. Part, 619.

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2. *Where it ſhall be an Eſcape, where a Priſoner goes at large with his Keeper, by colour of a* Habeas Corpus: *Where not.*

1. UPon a Conference had between the Lord Keeper and the Judges, Whether it ſtood with Law, or was convenient to Grant an *Habeas Corpus* to the Warden of the Fleet, or Marſhal of the Kings Bench, by their Keepers or others, to have any Priſoner who was in Execution to appear at a certain day the next Term in Court, and ſu-

&c colour thereof, that the Priſoner ſhou'd go at large with his Keeper in the Vacation, or Term time, and return to Priſon at the time appointed. It was Reſolved by all the Judges, That it was not allowable, or juſtifiable by Law; but the Warden, &c. ſhall have only a convenient time to bring the Priſoner into Court, and to carry him back again to Priſon: And that if they ſuffer him to go at large any longer then is convenient (which the Law ſhall judg of), it is an eſcape in them. And to ſuch purpoſes they charged the Warden, &c. that they ſhould not permit Priſoners to go at large upon perill to be charged with Eſcapes. Mich. 1 Car. in C. B. *Cro.* 1. Part, 9.

2. Whereas in *Trinity* Term, the Peſtilence encreaſing in *London*, The Priſoners in the Kings Bench and the Fleet, Petitioned the King for avoiding of the Infection, that they who would give ſufficient ſecurity to the Marſhal or Warden of the Fleet, to be true Priſoners, and to return to Priſon at the dayes to them preſcribed, might go at large by *Habeas Corpus* for that time. It was Reſolved by all the Juſtices and Barons upon a conſultation thereof had with the Lord Keeper. That an *Habeas Corpus* was an Ancient and legal Writ, but under colour thereof, the Marſhal or Warden ought not to ſuffer Priſoners to go at large, for that ſuch permiſſion is an eſcape in the Keeper of the Priſon. But for the ſafeguard of the Priſoners, The Marſhall or Warden, by Rule and Licenſe of the Courts, might keep their Priſoners in any other place in the County to be aſſigned by the Courts unto them, but there they ought to be kept as Priſoners *ſub ſalva et arcta Cuſtodia*, as they ought to be in their proper Priſons. Trin. 12 Car. B. R. *Cro.* 1. Part, 335, 336.

3. In Debt brought againſt the Sheriff of B. for an eſcape of one J. S. his Priſoner in Execution; It was given in Evidence, That the Goaler of the Sheriff having the Priſoner in Execution in his Goal at A. ſuffered him to walk abroad in the ſaid Town, for the moſt part, with a Keeper. It was directed by the Juſtice to the Jury to find, and ſo they found, that it was an eſcape: For although the Sheriff may remove his Goal from one place to another within his Bailywick, yet he muſt keep his Priſoners within it, and not ſuffer them to go at large out of the Priſon, though himſelf be attending on him, without a *Habeas Corpus* from ſome Court of Juſtice. And in this Caſe, directions were given to Keepers of Priſons, when they received *Habeas Corpus* from any Court, to have the body of one in Execution in the Court the next Term, to beware that they do not by colour of ſuch Writs ſuffer the party to go at large all the mean time, for that the Writ warrants no more, but that he be brought out of Priſon only to that purpoſe, and for ſuch time only as the Law ſhall judg convenient, which *in privilegiis otioſis* muſt be taken ſtrict. Mich. 15 Jac. in C. B. *Balden* and *Temples* Caſe. *Hob.*

4. A man was taken in Execution upon a *Capias ad ſatisfaciendum* by the under-Sheriff, who took mony of him for the Execution, and let him go. The Sheriff dyed, and a new Sheriff being made, and the ſame perſon became Under-Sheriff to him alſo, and procured the Plaintiff to take out a new *Capias ad ſatisfaciendum* againſt the party, upon which he was Arreſted again, and afterwards eſcaped. The Court was of Opinion, That the new Sheriff was not anſwerable to the eſcape, becauſe the ſecond taking in Execution was not lawfull. Mich. 15 Jac. in C. B. *Hob.* 202. acc.

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3. *Where for an Eſcape, an Action of Debt lyeth not, but an Action upon the Caſe, et è contra.*

1. IF the Sheriff hath a Priſoner in his Cuſtody for Debt, and ſuffers him to eſcape before the Debt be ſatisfied, he ſhall have an Action upon the Caſe againſt the Sheriff, and yet he may have an Action of Debt againſt him. See *Fitzh. Nat. Br.* 93. acc. An Action of Debt lyeth for an eſcape; but this is to be ſo taken and conſtrued, when the party in Execution who is to ſatisfy the ſame, is ſuffered to eſcape, otherwiſe Debt doth not lye, but an Action upon the Caſe. To have damages for the eſcape; by *Coke*. If two be in Execution of Debt, and one of them is ſuffered to Eſcape, Debt lyeth for this Eſcape, 34 H. 6. acc.

2. In Debt for an eſcape; the Caſe was, A. in the Court of *Norwich*, recovered in an Action upon the Caſe for a Trover and Converſion againſt B. and his Wife, and had Judgment againſt them, and both of them taken in Execution, the Wife was by *Habeas Corpus* brought to the Kings Bench, and committed to the Marſhall, and being in his cuſtody in Execution, he ſuffered her to eſcape; and for this eſcape, brought Debt againſt the Marſhall. It was the Opinion of *Doddridge* Juſtice, That the Action would not lye, for that the Wife cannot be in Execution, but the Husband ſhall ſatisfy all, for the Wife hath nothing; ſhe is to be attached by the goods of her Husband; and he vouched the Caſe of Doctor *Huſſy*, Trin. 9 Jac. in C. B. In a Raviſhment of Ward againſt Husband and Wife, and both found, the Husband only is to make ſatisfaction, and the Wife was out of the Statute of *weſt.* 2. having nothing of her ſelf. But the Opinion of all the reſt of the Judges of the Court was, That the

the Plaintiff had juſt cauſe of Action, and that the Action brought by him againſt the Defendant for this eſcape, was well brought. Paſc. 13 Jac. in B. R. Dr. *Suckliff* and Sir *George Reynell's* Caſe. *Bolſtr.* 2. Part, 320, 321, 322.

3. Error was brought of a Judgment in C. B. becauſe the then Plaintiffs brought Debt againſt the Defendant as Sheriff for an eſcape of one J. S. againſt whom they recovered 80 l. as Adminiſtrators of J. D. and that he being in Execution, the Defendant ſuffered him to eſcape; The Error aſſigned was, for that the firſt recovery was as Adminiſtrators of J. D. and the Debt upon the eſcape, is as Executors of J. D. which cannot be, that one ſhould dye Inteſtate, and have Executors. And this Action brought as Executors, diſaffirms the firſt ſuit, which ſuppoſeth he dyed inteſtate. And the Debt upon the eſcape ought alwayes to purſue the firſt Action: Wherefore it was the Opinion of the whole Court, That the Recovery was erroneous, and the Judgment was reverſed. Mich. 12 Jac. in B. R. Sir *Henry Slingsby* and *Lamberts* Caſe. *Cro.* 2. Part, 394.

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4. *Where a Town or Hundred ſhall be charged with Eſcapes of Felons, or others; Where not.*

1. NOte, It was holden by the Juſtices, That for the eſcape of a Murtherer, the Townſhip ſhall be amerced for the eſcape, although it be done in the day time, and although it be done in a Field, or in a Lane, ſo as they could not have convenient notice of it. Hill. 4 Eliz. *Dyer*, 210. See 21 E. 3. *Cowne* 238. *Dum quis felonice occiſus fuit per diem, niſi felo captus fuit, tota villa illa onerentur.* See *Cook* 11. Part, 43. in *Godfreyes* Caſe. acc.

2. It was Reſolved upon the Statute of 13 E. 1. of *Winchester*, That if a man be robbed in his houſe in the day time, or in the night, and the Robber eſcape, the Hundred ſhall not be charged with the ſame; for ſuch Robbery for which the County ſhall be charged, muſt be openly done, ſo as the Country may take notice of it. *Cook* 7. Part, 6. *Sendills* Caſe. See, a man was Robbed in *January* after Sun-ſet, but during day-light. It was adjudged in that Caſe, for the eſcape of the Felon, becauſe it was in a convenient time for men to travail in. Trin. 18 Eliz. in C. B. *Cook* 7. Part, 6. *Aſbpoles* Caſe.

3. Note, Theſe points were Reſolved by the Juſtices. 1. That for a Robbery done in the morning *ante lucem*, the Hundred ſhall not be charged: And the Statute of *Winchester* doth not extend to Robbery done in the night, becauſe then no purſuit or enquiry can be made after the Robbers. 2. It was Reſolved upon the Statute of *Winchester*, That if divers commit a Felony, the Hundred ought to take all the Offenders, for if they apprehend one of them, the ſame ſhall not excuſe the Hundred, becauſe the words of the Statute are, Offenders. But now by the Statute of 27 Eliz. cap. 13. No Action lyeth upon the ſaid Statute, unleſs the party robbed ſo ſoon as he may give notice of the Felony, to ſome of the Inhabitants of ſome Town or Hundred where the Robbery was done; and if the ſaid Inhabitants do apprehend any of the Robbers, the ſame ſhall excuſe them. Trin. 29 Eliz. in C. B. *Cook* 7. Part, 6, 7. *Milborns* Caſe.

4. The Town of *Green* in *Suſſex*, was amerced for the eſcape of a Felon. The Amercement was grounded upon an Inquiſition taken before the Coroner, by whom the eſcape was found. It was moved to the Court, That here was not any ſuch eſcape found, for which the Town ought to be Amerced. For it is found, that he who eſcaped 10 *Januarii*, 30 Eliz. *circa horam quartam poſt meridiem*, with a Pitch-fork, mortally ſtruck one A. which A. of the ſaid ſtroke, dyed at eight of the evening of the ſame day night, and that then the other eſcaped; which eſcape being made in the night, the Town by Law ought not to be Amerced, for it is not Felony, untill the party dyeth: It was the Opinion of *Wray* Chief Juſtice, That it ſhould be hard, that the Town ſhould be Amerced upon this matter; for although the Town in diſcretion might have ſtayed the Offender before the death of the party, yet they were not bound ſo to do. *Curia aviſare vult.* Paſc. 30 Eliz. in B. R. The Town of *Green* in *Suſſex*'s Caſe. *Leon.* 107.

Eſcheat, Eſcheator, *and Writ of* Eſcheat.

1. *Where the Writ lyeth, and for what Lands: By whom, and for whom; and where to be ſued. And where the Writ ſhall be good; Where not.*

1. WHere a Tenant in Fee-ſimple doth Felony, for which he is hanged, or abjured the Realm, or is Outlawed, for Felony, Murder, or Petty-Treaſon; or if the Tenant dyeth without Heir general, or ſpecial, there the Lord of whom the Lands are holden, may enter by way of Eſcheat; or if a ſtranger doth enter, the Lord may have againſt him a Writ of Eſcheat, *Cook* 1. Part, *Inſtitutes* 13. *Fitzherb. Nat. Brev.* 481. acc.

2. A Writ of Eſcheat doth not lye, but upon the dying ſeiſed of every Tenant: And therefore if the Tenant be diſſeiſed, and the Diſſeiſor entreth; the Lord may enter upon the Diſſeiſor, and ſhall not be put to his Writ of Eſcheat. And where the Lord might have entred at the time of his Tenants death, the Lord may enter if he dyeth without Heir. 32 H. 6. 27. *Comment on Original Writs*, 38.

3. Where the Lord enters by Eſcheat after the death of his Tenant, he who hath title paramount, may enter, becauſe the Lord claims in his Auncient right, and nothing is adjudged in him before entry. But where a Diſcent is to the Heir, it is otherwiſe, for he is in by his Auncеſtor to all Intents, and is adjudged to bring an Action Tenant to all purpoſes; and therefore none can enter upon him. See 37 H. 6 1. acc.

4. Lands ſhall Eſcheat for Felony three wayes. 1. *Quia ſuſpenſus per collum.* 2. *Quia abjuravit regnum.* 3. *Quia eſt utlegatus*; but if a man be hanged by Martial Law, or *in furore belli*, he ſhall forfeit no Land, and the Lands ſhall no Eſcheat to the Lord. *Co.* 1 Part, *Inſtitutes* 13.

5. A man Attainted of Treaſon, or Felony at the Common-Law, had five puniſhments. 1. *Quod ſuſpendatur per collum.* 2. That his Wife ſhould loſe her Dower. 3. That his bloud was corrupted 4. That he forfeit his Lands to the Lord of whom they are holden by Eſcheat. 5. That he forfeit all his goods and Chattells. But now by the Statute of 1 E. 6. the Wife of a perſon Attainted of Felony, ſhall not loſe her Dower. *Cook* 1. Part, *Inſtitutes* 37.

6. Tenant for life of a Mannor, the Remainder in tail, the Remainder in Fee, A Tenant of the Mannor dyeth without Heir; Tenant for life of the Mannor dyeth, the Land ſhall not eſcheat to him in the Remainder, becauſe the Tenant did not hold of him. But if there be Tenant in tail of Land, the Remainder in Fee, and he in the Remainder dyeth in the life of Tenant in tail, and then Tenant in tail dyeth without Heir, in that Caſe, the Land ſhall Eſcheat.

7. If a man be beheaded for Felony, or dye after Judgment, before he be executed by the Officer, the Land ſhall Eſcheat, and the Writ ſhall ſay *Quia ſuſpenſus per collum*; and it is not material if he be hanged or not; And ſo it is if he be delivered to the Biſhop after Judgment. 34 E. 3. *Eſcheat* 10. but contrary where he ſtandeth mute. 4 E. 4. 18.

8. Note, where the Tenant is Outlawed of Felony, the Lord hath election to bring a Writ of Eſcheat, ſuppoſing that the Tenant was Outlawed, or that he dyed without Heir, 48 E. 3. 34. See 12 E. 2. tit. *Eſcheat.* 14. A man abjured the Realm for Felony, and afterwards he returned, and was hanged; and the Lord brought a Writ of Eſcheat, *quia fuit ſuſpenſus*, and becauſe it was not *quia abjuravit regnum*, the Writ did abate.

9. A *Quare impedit* was brought by the King againſt a Clerk within the Biſhoprick of *Durham*, and declared that the Biſhop who is dead, preſented his Clerk, and that the Clerk dyed; and that the Chapter collated a Cardinal, who was deprived for Miſcreancy, and the Temporalities ſeiſed into the Kings hands. It was holden by *Belknap* Chief Juſtice, That Miſcreancy was a good cauſe of forfeiture, and that the Lord ſhould have the Eſcheat; and he ſaid, if a man who is out of the Faith of the King ſhall forfeit his Lands, *à fortiori* he who is out of the Faith of God, ſhall loſe his Lands; and the Lord ſhall have them by Eſchear, and that he ſware to be Law. 5 R. 2. *Fitzh. Tryal.* 54. vouch. in *Carter* and *Croſts* Caſe. Paſc. 27 Eliz. in C. B. *Godb.* 33.

10. If man commits Felony, and before Conviction, the King pardons him; by this pardon the Lord ſhall loſe his Eſcheat, for the Lord can have no Eſcheat before there be an Attainder, but that is prevented before by the pardon. Hill. 41 Eliz. in C. B. in *Smiths* Caſe. *Owen.* 87.

11. In Treſpaſs, the Caſe was, *Roger le Strange* and *Ann* his Wife, were ſeized of the Mannor of D. And one I. S. Abbot of C. was ſeiſed of an Acre of Land in Fee, and held it of the ſaid *Roger le ſtrange*, as of his Mannor of D. 22 H. 7. the Abbot and all the Monks dyed, by which the Land Eſcheated

cheated to *Roger*, and the Manor diſcended to his Heir after his death, who conveyed the Manor of which the Acre was parcel after the Eſcheat to one J. D. in Fee: The Queſtion was in this Caſe, Whether by the death of the Abbot and the Monks, the Land ſhould Eſcheat to the Lord of whom it was holden, or whether it ſhould go to the Donors or Founders. It was objected, and much ſtood upon, That the Lands ſhould go to the Founders and Donors, and ſhould not Eſcheat to the Lord of whom it was holden. As 5 H. 7. If an Annuity be granted to an Abbot in Fee, and the Abbot and all his Monks do dye, the Annuity or Rent is extinct. And ſee *Cook* 3. Part, in the Dean of *Norwiches* Caſe, by the death of the Abbot and his Covent, the Corporation is diſſolved, and then the Poſſeſſions ſhall go to the Founders, and ſhall not Eſcheat to the Lord of the Manor of whom the Lands were holden. And by the Statute of 31 H. 8. of *Monaſteries*, the makers of the Law never meant, that by that Statute any thing ſhould accrue to the Lord by Eſcheat; and therefore they provided only for the Donors or Founders. But it was the Opinion of *Hobart* Lord Chief Juſtice, to which *Windy* Juſtice did agree, That by the death of the Abbot and Monks, the Lands ſhould Eſcheat unto the Lords of whom they were holden, and ſhould not go to the Donors or Founders. And *Hobart* ſaid, That the Writ of *Contra formam Donationis* was given to the Founder or Donor by Statute-Law, and not by the Common. In the principal Caſe, the Court did adjourn the Caſe to adviſe upon it. Mich. 20 Jac. in C. B. *Johnſon* and *Norwayes* Caſe. *Winch.* 37, 38.

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2. *Where Lands ſhall Eſcheat or be forfeited to the King upon Attainder of Treaſon; and what Lands: And where the King ſhall have the Eſcheat of Lands holden of other Lords; where not.*

1. JURA *Regalia* were granted to the Biſhop of *Durham*, in *Ed.* 2d. his time, with Eſcheats for Treaſon, within a certain precinct. Afterwards the Statute of 25 E. 3. gave all forfeitures for Treaſon to the King. And then the Statute of 26 H. 8. is, That he who commits Treaſon, ſhall forfeit to the King, his Heirs and Succeſſors, all Lands in which he hath any eſtate of Inheritance. It was holden by the Juſtices in this Caſe, That the Statute of 25 E. 3. was but an explanation what was forfeited by the Common-Law, and therefore that the grant to the Biſhop was good. But four Juſtices held the grant deſtroyed by the Statute of 26 H. 8. five Juſtices contrary, becauſe there is a ſaving in the Act of Rights to ſtrangers. But it was agreed by all the Juſtices, That Lands entailed, and Lands in the Right of the Church which were not forfeited at the time of the Grant, were now forfeited to the King by the Statute of 26 H. 8. Paſc. 12 Eliz. *Dyer*, 288.

2. King *Henry* the 8th; Tenant in tail to him, and the Heirs Males of his body of the Manor of A. by force of a Fine, 3 H. 7. with the Reverſion to him, his Heirs and Succeſſors by force of an Attainder, and Office found by his Letters Patents, gave the ſaid Manor of A. to W. in tail: And afterwards it was enacted by Parliament, that the ſaid Manor of A. (for divers cauſes) ſhould be re-veſted in the King, his Heirs and Succeſſors. Saving to all, their Rights, &c. W. Bargained and ſold the Land to J. S. againſt whom intruſion was brought. It was Reſolved in this Caſe, (amongſt other points) That if Lands Eſcheat to the King by forfeiture of Treaſon, and after the ſame Land is given to another by Act of Parliament, ſaving to all others their Rents and Services, the ſaving is repugnant and void, becauſe they were extinct by the forfeiture, 27 H. 8. br. Parliament, 77. And therefore it was Reſolved in the principal Caſe, That when the Manor of A. is expreſſly given to the King, the general ſaving cannot extend to ſave the eſtate of him who was ſeiſed of the Land. And although that the Grant to W. was good, and he had an eſtate tail in the Land; yet by expreſs words in the Act, the ſame was given to the King. *Cook* 1. Part, 42. The Caſe of *Altonwoods*.

3. Husband and Wife, Joynt-Tenants of a Manor, and to the Heirs of the body of the Husband, the Remainder to B. in tail, a Recovery is had againſt the Husband alone, in the life of the Wife with Voucher; He in the Remainder is attainted of Treaſon and executed, and by Parliament it is enacted, That he ſhall forfeit all ſuch Manors, Lands, Tenements, Rents, Reverſions, Remainders, Uſes, Poſſeſſions, Offices, Rights, Conditions, and other Hereditaments, which he had or ought to have in Fee, or in tail, in uſe, or in poſſeſſion the day of the Treaſon committed. The Husband dyeth without Iſſue, the Wife dyeth; the Queen reſtored to the ſon of B. the Manor which ſhe had by the Attainder of his Father; and afterwards the Queen brought a Writ of Error to reverſe the Recovery. It was Reſolved in this Caſe, That the Writ of Error was not given to the Queen by any words of the ſaid Act of Attainder, becauſe the Tenant is in by Title, and the Entry of the perſon Attainted was not lawfull: and a Right of Action is not given to the Queen by any words in the ſaid Act: For this was taken for a Rule, That no ſuch Right for which the party hath no remedy, but by

Action

Action to recover the Land, cannot Eſcheat, or be forfeited at the Common-Law. And by a general Act of Attainder, right of Actions were never given to the King, but right of Entries. And it was Reſolved by the Court, That a Right of Action after a Diſcontinuance, Diſcent, &c. where the Entry was not lawful, was not given to the King by any words of the ſaid Act. Note in that Caſe this difference, A Right of Action concerning Inheritances is not forfeit by Attainder. But Obligations, Statutes, Recognizances, and other ſuch things in Action, are forfeited by Attainder, or Outlawry. *Cook* 3. Part, 1, 2, 3. The Marqueſs of *Winchesters* Caſe. See 21 Jac. in the Exchequer-Chamber. The Lord *Sherſtil'd* and *Ratcliffs* Caſe, acc. *Godb.* 301, 302, 303.

4. Husband and Wife, Donees in ſpecial tail, the Husband is Attainted of Treaſon, and Executed, having Iſſue; the Wife dyes: It was holden in that Caſe, The Iſſue ſhall not have the Lands, but they ſhould Eſcheat or be forfeited by the Attainder, becauſe the Iſſue ought to make his conveyance by both of them, and from the one he cannot convey by reaſon of the Attainder. Quære this Caſe: For ſee *Cook* 9. Part, 139. in *Beaumonts* Caſe, It is agreed, That the Eſtate of the Wife is ſaved, by the Statute of 26 H. 8. cap. 13. Paſc. 16 Eliz. *Dyer*, 332.

5. Note, it is put for a Rule, That no Lands or Tenements of which the King is ſeiſed, &c. although it be concealed from the King, can be ſaid in Law ſubſtracted, or detayned from the King, for the King cannot be Diſſeiſed, or deforced of any Lands, &c. But if the Kings Tenant be Diſſeiſed, and dyeth without Heir, in that Caſe, the right Eſcheateth to the King, and in ſuch Caſe the King ſhall have the Lands as an Eſcheat. And by a general grant of the King of Lands, ſuch right which the King hath to the Lands by the Eſcheat, ſhall not paſs. See *Cook* 10. Part, 112.

6. If Tenant in Fee-ſimple of Lands be Attainted of Treaſon, although the Land which ſuch perſon Attainted hath, be not holden of the King, but of a Subject; yet preſently by the death of the perſon Attainted, and without any Office, the Fee and Freehold ſhall be preſently veſted in the King, and ſhall not Eſcheat to the Lord of whom the Land is holden, till Office found; For the Eſcheat of all Lands for High Treaſon, appertaineth to the King only, and to no other, as well of Lands holden of others, as of himſelf, as it is adjudged in Parliament, 23 E. 3. cap. 2. ſo that the Land cannot Eſcheat to the Lord, for Eſcheat in ſuch Caſe is not given to him. *Cook* 3. Part, 10. in *Downies* Caſe.

3. *For what cauſe Lands ſhall Eſcheat to the Lord: Where Lands which come after Attainder of Felony ſhall Eſcheat; and where the Lord ſhall be barred, by Acceptance of Rents or Services, or otherwiſe; Where not.*

1. IF a Copyholder who holds Lands of the Queens Mannor be Attainted of Felony; the Queen ſhall have the Land by Eſcheat, and in ſuch Caſe, the Queens Steward of her Mannor may Grant the ſame over, *ex officio*, without any ſpecial Warrant, for the Cuſtome of the Mannor doth warrant the Steward to do it, and the Cuſtome ſhall bind the Queen and her Heirs. *Cook* 4. Part, 30. In *Havis* and *Joyes* Caſe.

2. If a Baſtard born before Marriage, entreth and hath Iſſue, and dyeth ſeiſed, it ſhall bar the collateral Heir, and the Lord by Eſcheat as well as the *Mulier puiſne*. *Cook* 8. Part, 101. in *Lechfords* Caſe.

3. If a man be Attainted of Felony by Judgment, the Heirs born after the Attainder ſhall be excluded of all manner of Succeſſion of Heritage, as well on the part of the Mother, as on the part of the Father; and the Lands ſhall Eſcheat to the Lord of whom they are holden; and the reaſon is, For that the Son begotten after Judgment, hath not two inheritable bloods in him, for at the time of the begetting of him, the bloud of the Father was corrupted, and the bloud in reſpect of which he ſhould inherite, being corrupted, the Son hath in him but the half bloud, viz. the bloud of the Mother in him uncorrupted; and therefore ſuch Son ſhall not inherite, but rather the Land ſhall Eſcheat to the Lord. See the Rule for this, *Bracton, Lib.* 3. *cap.* 13. *Non valebit felonis generatio, nec ad hæreditatem paternam, vel maternam; Si autem ante feloniam generationem fecerit, talis generatio ſuccedit in hæreditatem patris vel matris, à quo non fuerit felonia perpetrata.* *Cook* 3. Part, 40. in *Ratcliffs* Caſe.

4. A. was Endicted of Felony, and B. as acceſſary in the receipt of A. A. eſſoined himſelf, and was Outlawed; B. was taken, and put himſelf to Tryal, and found Guilty, for which B. was attainted and hanged: And the Lord entred into his Eſcheat. Afterwards A. came and reverſed the Outlawry, and pleaded to the Felony, and was found Not-Guilty, by which he was acquitted: Whereupon the Heir of B. brought a Mort-dauncester againſt the Lord by Eſcheat, who came and ſhewed all this ſpecial matter, upon which there was a Demurrer.

In that Caſe, it was Ruled by the Court, That B. ſhould recover ſeiſin of the Lands, for if B. were alive, he ſhall go acquit by the acquittal of A. becauſe he could not be a Receiver of a Felon, when A. was no Felon. See Tit. E. 1. tit. *Mortdauncestor* 46. vouch. in *Cook* 9. Part, 119. in the Lord *Sanchors* Caſe.

5. Sir *Thomas Wyat* in conſideration of Marriage of his Son, made a Feoffment, and took back an Eſtate to himſelf for life, the Remainder to his Son and his Wife, which ſhould be in tail; the Marriage took effect, the Father afterwards levyed a Fine to the King of the Lands, and bound him and his Heirs to Warranty, and dyed; the Son was Attainted of Treaſon, and executed, living his Iſſue; afterwards the Queen granted the Lands to a ſtranger in tail, and then reſtored the Wife. It was a Queſtion in 3. *Ma. Dyer.* 122. If the Iſſue ſhould inherite after the death of his Father againſt the collateral warranty, Fine, and Attainder of his Father by whom he conveyes, which Queſtion is a Quære not Reſolved: Then the Queſtion was between the Pattentee, If the Wife had Right to the entire Remainder, or but to a moyety, and if ſhe might enter upon the Pattentee without ſuit to the Queen; and for the Reſolve of that part, ſee 18 Eliz. *Dyer*, 351. M. 3 *Mary*, *Dyer*, 122. Sir *Thomas Wyatts* Caſe.

6. If a man hath title to have Lands by Eſcheat. If he do accept homage of the Tenant, he ſhall not afterwards have a Writ of Eſcheat, becauſe he hath accepted him his Tenant; and ſo if he accept Fealty of him, 7 E. 6. br. *Eſcheat* 18. by *Hales*, if he do accept the Rent of him, it ſhall not bar him of his Eſcheat. 11 R. 2. *Eſcheat* 14. acc.

7. Lord and Tenant, the Tenant is Diſſeiſed and dyeth without Heir, the Lord accepts the Rent by the hands of the Diſſeiſor, he is not barred of his Writ of Eſcheat; but contrary, if he avow for the Rent in a Court of Record; or if he hath accepted of Corporal ſervice, as Homage, Fealty, &c. becauſe a Diſſeiſor is in by wrong; But acceptance of Rent by the hands of the Heir of the Diſſeiſor, or of the Feoffee, ſhall bar him of his Eſcheat, becauſe they are in by Title. *Cook* 1. Part, *Inſtitutes*, 268. acc.

8. The Cuſtome of a Mannor was, That if any Copyholder within the Mannor committed any Felony, and the ſame be preſented by the Homage, that the Lord might take and ſeize the Lands: A Copyholder committed Felony, which was preſented by the Homage; and afterwards he was Erdicted, and by Verdict acquit, and the Lord entred. The Queſtion was, If this Verdict and acquittall ſhould conclude the Lord of his Entry. It was argued, That this Cuſtome is a good Cuſtome; for if a man make a Feoffment in Fee upon Condition, That the Feoffee ſhall not commit Felony, the ſame is a good Condition: And it was ſaid, That if the Feoffee committeth Felony, and the Feoffor entreth into the Land, and after the Feoffee is attainted of Felony; that the Lord by Eſcheat ſhall enter, for that the Statute *De quia Emptores terrarum*, prohibits any man to make a Feoffment to the prejudice of the Lord, his Wardſhip, or Eſcheat: And where it hath bin objected, That the Offence is againſt the King, and a common perſon ſhall not have the puniſhment of it; To that it was ſaid, That the King ſhould not have any benefit of it, for that he ſhall not have any Eſcheat of Copyhold-Lands for Treaſon, or Felony: On the other ſide, it was ſaid, That the Cuſtome was not good, for that it was too general, viz. That if any Tenant, &c. which doth not exclude Infants. 2. It includes Petty Larciny and Maims, for theſe are Felonies, and 7 H. 7. is, That in Appeal of Maims, a man ſhall count of Felony, and it ſhall be hard a man ſhould loſe his Lands for theſe Felonies. The Court was of Opinion, That the Cuſtome was good, but did not deliver their reaſons of it, but moved the parties to a compoſition. Hill. 7 Jac. in the Kings Bench. *Gittins* and *Cowper's* Caſe. *Brownlow*, 2. Part, 217.

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4. *How the Eſcheator ought to demean himſelf in taking of Enqueſts, and Return of them: And where tryall ſhall be by examination of the Eſcheator, if Lands be ſeiſed into the Kings hands: And of Eſcheat of Lands in London.*

1. IF the Eſcheator by vertue of a Writ directed to him, doth ſeize into the Kings hands the Lands of any perſon who holdeth of the King in *Capite*, by which the King commits the Wardſhip of thoſe Lands unto another, and he grants them over during the Non-age of the Heir: If the Eſcheator, or his under Eſcheator of his own Authority, returns another Office without Enqueſt, and diſturbeth the poſſeſſion of the ſecond Grantee, he may have an Action of Diſceit, or an Action upon the Caſe againſt the Eſcheator, or his under Eſcheator.

2. In the Caſe of *Altonwoods*. Exception was taken to the Return of the Office taken, 23 H. 8. becauſe it was found *virtute Officii* before the Eſcheator in the Chancery, whereas it ought to be returned in the Exchequer: For Offices found *virtute brevis* returnable in the Chancery, ought to be returned in the Chancery: But Offices found before the Eſcheator, *virtute Officii*, ought to be returned

corned in the Exchequer, to which Court he is properly attendant. But the Opinion of the Court was, That the return of the Office *virtute Officii* in the Chancery, was good. And it was holden by the two Chief Juſtices and the Court, That the Office was ſufficient to entitle the King, though it never was returned, for if upon examination of the Eſcheator, it appears that he hath ſeiſed the Lands into the Kings hands, it is ſufficient. 30. *Aſſ.* 5. *Cook* 1. Part, 42. in the Caſe of *Altenwoods*.

3. When a man is found Idiot *à Naturitate* by Office, he who is ſo found (falſly as he ſuppoſeth) may come perſonally into the Chancery before the Chancellor, and pray, that before him and the Juſtices which he ſhall call to him, he may be examined if he be Idiot, or not; and if it be found upon examination that he is no Idiot; the Office found before the Eſcheator, or by the Kings Commiſſion, is utterly void without any traverſe, *Monſtrans de Droit*, or other ſuit. In an Aſſiſe; If the Tenant ſay, that the Lands are ſeiſed into the Kings hands. It ſhall be tryed by examination of the Eſcheator. See *Cook* 9. Part, in the Caſe of the Abbot of *Strata Mercella*. 31.

4. Note, the King may have a Writ of Eſcheat of Lands in *London* in the Court of Common-Pleas, but that is conceived by his Prerogative to have it in what Court he pleaſeth: But he cannot alter or change the Nature of the Writ, otherwiſe then the Law giveth it to him and others. But if a Forreiner ſueth an Aſſiſe, or other *Precipe* of Lands in *London*, the Mayor and Aldermen may demand Conuſans; and if they do not demand it, then the recovery in the Aſſiſe, or other *Precipe* of Lands in *London* is good, and ſhall bind. And ſee 50 E. 3. That the King ſhall have a Writ of Eſcheat of all the Lands in *London*, Comment upon Originall Writs, 118.

5. See *Cook* 4. Part, in the Caſe of the Warden and Commonalty of *Sadlers*. The Mayor of *London* is Eſcheator of the City of *London*, and an Office found and returned by him is good.

Eſcuage.

1. ESCuage is, where a man holdeth of the King by Knight-ſervice, to which ſervice, Homage, Fealty, and Eſcuage doth belong; and he who holdeth of any Lord by ſuch Service, who holdeth over of the King by the like Services; When the King makes a Voyage Royal againſt the *Scots*, or againſt the *Welch* in proper perſon, or by his Lieu-tenant: Then he who holdeth of the King by Knight-ſervice, ought to go in his proper perſon, or find a man to go to War with the King or his Deputy, for 40 dayes at his own Coſts and Charges. And if he doth not find a man to do the Service for him, then he ſhall pay for his default, and not doing of his Service, ſuch a ſum of money as ſhall be aſſeſſed by Parliament: *ſcil.* For a Knights Fee, ſo much; and for half a Knights Fee, ſo much; and ſo proportionably, according as it ſhall be aſſeſſed by Parliament. But thoſe who do their Services, and go to the War, ſhall not pay any thing. And this ſum of Money is called Eſcuage. *i. e. Servitium Scuti.* Fitzh. Nat. Br. 83.

2. The Kings of *England*, to ſuppreſs the diſorders and Rebellions of the Welch-men, invented *Scutagium*, which was to levy an aid of their Tenants *per ſervitium militare* to ſuppreſs them *tanquam Rebelles, non hoſtes*. See *Dodderidge* in his Book of the Principality of *Wales*, acc. And note, *Litt.* ſaith, 2. When the King makes a Voyage Royal, to ſubdue the *Scots*: See Old Tenures; Eſcuage only lyeth where War is only between *England* and *Scotland*, or *Wales*; for they of right ought to be parcel of *England*: For if the War be between *England* and another Realm, the War ought to be at the Kings Charges.

3. There are two ſorts of Voyages Royal; A Voyage Royal in the time of War is, When the King himſelf, or his Lieutenant, or his Deputy goes to the War. And if it be a Voyage Royal or not, ſhall be tryed by the Judges: Voyage Royal in the time of Peace is, When one goeth with the Kings Daughter beyond the Seas to be married, becauſe the ſame is for the profits of the Kingdome. *Cook* 1. Part, *Inſtitutes* 69. acc. 3 H. 4. 16. 11 H. 4. 7. acc.

4. If the King ſends his Son, it is a Voyage Royal, 11 H. 4. 7. And ſo it is when the Protector goeth, *Fitzh. Nat. Br.* 83.

5. The Lord *Talbot* went with a Company of the men of *England* into *France*, when it was under the Obedience of the King of *England*, and they had protection allowed, 2 H. 6. 16. And ſee, Men of *England* were preſſed into *Guyen*, 32 H. 6. 2. And 44 E. 3. 12. into *Gaſcoigne* with the Duke of *Lancaſter*. *Cook* 7. Part, 7, 8. And ſee 3 H. 6. Protection 2. Where a man had the benefit of a Protection, becauſe he was ſent into the Kings wars *in Comitiva* of the Protector: And *Cook* in *Calvins* Caſe, 7. *errets*, in that he ſaith, They were to do it, *Sans* wages; whereas the words in any of the ſaid Books, are not, without wages. For it is ſaid by *Littleton*, 20. 71. 95. If the Scots Rebel againſt the King of *England*, they ought to go with the King to reduce them to their obedience, and that for 40 dayes at their own Charges, for within ſuch time, they may be ſubdued. But to a Forreign

War, Subjects are not compellable to go with the King, or attend him there without wages. Quære, becauſe by the Statute of 19 H. 7. cap. 1. It ſeems the Lords are bounden to attend the King to war. But note, That that Statute of 19 H. 7. doth extend to Officers and Pentioners only, which are of the Kings gift.

6. Eſcuage certain, is but *Servitium Crumenæ*, which is but Soccage: by which obſerve, that the payment of mony is more baſe, and leſs profitable for the Common-Wealth, then the ſervice which is done by the body of a man. *Cook* 1. Part, *Inſtitutes*, 86.

7. A Rent paid for Caſtle-Gard is, ſocage Tenure, but if a ſum in groſs, or other thing be voluntarily paid or given, and voluntarily received by the Lord in lieu of Caſtle-Gard, the Tenure by Knight-Service, doth remain. *Cook* 1. Part, *Inſtitutes* 87.

8. The Cuſtody of a Caſtle doth countervail and imply Eſcuage, ſo as the Heir ſhall be in Ward for it. See 19 R. 2. *Fitz. tit. Gard.* 195. See *Cook* 4. Part, 88. *Lutterells* Caſe.

9. If there be Lord, and ſeveral Meſnes, and Tenants, and each of them holdeth by Knight-ſervice; If the Tenant peravail doth the Services, and goes with the King to the War, the ſame ſhall excuſe all the other Meſnes, becauſe for one Land, there can be but one Service demanded, and then the going of the Tenant doth excuſe his Meſne, and ſo the Meſne which is paramount him, becauſe the Service is done by the Tenant. *Fitzh. Nat. Br.* 84.

10. When before the Statute of *Quia Emptores terrarum*, the King or other Lords, &c. had given Lands to a Knight, to hold them by Knights-Service, *ſcil.* to go with the Lord when the King maketh a Voyage-Royal to ſubdue his Enemies, for 40 dayes, well and conveniently arrayed for the War; the Law in that Caſe had ſo much regard to the dignity of Knight-hood, that he might find an able perſon to go for him with the King in his War, and that for two cauſes, one by reaſon of the publick Adminiſtration of Juſtice in the time of Peace, and the other in reſpect of the defence of the Realm in the time of War. *Cook* 9. Part, 49. in the Earl of *Shrewsburyes* Caſe.

11. Eſcuage ſhall be apportioned; and ſo Knights-Service which is an entire Service to be done by the body of a man, ſhall be multiplyed by the Alienation of parcel: And although the Lord purchaſeth parcel, the Knights ſervice ſhall not be extinct, but ſhall remain for the reſidue, becauſe it is *pro bono publico*, and defence of the Realm. *Cook* 8. Part, 105. in *Talbots* Caſe.

12. When a Tenant in Fee is to do Eſcuage when it draws Homage to it, but when Leſſee for life doth Eſcuage, it is otherwiſe, 19 E. 3. br. *Tenures* 68. And ſee 19 E. 1. br. *Tenures* 86. A man may make a gift in tail, rendring Eſcuage without Homage, but Quære of that.

13. If the Lord hath an eſtate for years, or for life in the Seignory, if he goeth with the King to War, he ſhall have Eſcuage of all thoſe who hold of him by Knights-Service, but if the Lord doth not go, then the Tenant is excuſed. *Fitzh. Nat. Br.* 84. And ſee 6 R. 2. *Gard.* 122. he ſhall have the Ward, becauſe it is a profit; and he ſhall have the Eſcuage becauſe it is a Suit-Royal, by *Wilby*.

14. If the Kings Tenant goes with the Kings Lieu-tenant to the War, or with his Deputy: the Conſtable of the Hoaſt ought to certify the ſame into the Chancery, before the King ſhall have a Writ to levy the Eſcuage: And ſuch Certificate of the Kings Marſhal of the Hoaſt, is not traverſable, and ſhall bind the parties. *Cook* 7. Part, 14. And if the Tenant agreeth with the King for his going, then the King ought to be certified the ſame in the Chancery by the Treaſurer and Barons of the Exchequer before the King ſhall have a Writ to levy the Eſcuage of the Tenants. 21 E. 4. 17, 2 E. 4. 1. acc.

15. Note, That although Eſcuage incertain be due by Tenure; yet it cannot be aſſeſſed, but by Parliament; And if the Tenant dyeth *in exercitu* no Eſcuage ſhall be paid. *Cook* 1. Part, *Inſtitutes*, 72. acc.

16. A man holds Lands by Homage, Fealty, Eſcuage, and ſuit of Court; the Lord hath ſeiſin of the Fealty only: It was adjudged it was a ſufficient ſeiſin of the Eſcuage, and other Services, for the Seiſin of part of any Service, is the Seiſin of the whole. *Cook* 4. Part, *Bevills* Caſe. Alſo Reſolved, That ſeiſin of ſuperiour ſervices, is ſeiſin of inferiour Services, which are incident to it, as ſeiſin of Homage, is ſeiſin of Eſcuage. *Ibid.*

Eſplees.

1. Eſplees is the ſeiſin of the thing, profit, or Commodity of that that is to be taken: As the Eſplees of Common is the taking of the Graſs or Common by the Mouths of the Cattel that have Common there. Of an Advowſon, the taking of the Tythes by the Parſon preſented to the Church. Of a Mill, the taking of the Toll. And in a Writ of Right of Land; or in a Writ of Right of Advowſon, or the like; the Demandant in his Count, ought to alledg, that he or his Anceſtors took the Eſplees of the thing in demand, or elſe the Plea is not good; *Explets derivatur*

venitur de verbo explco; that is, to fill, or to make up, or compleat, or make perfect. For he who hath a Rent, hath not compleat, or perfect, or expleat eſtate in the Rent, untill he hath had ſeiſin thereof; and when he hath ſeiſin, his Eſtate is compleat and perfect, for he hath reaped the Eſplees, *ſcil.* the fruit and commodity thereof. *Cook* 6. Part, 58. in *Bedimans* Caſe.

2. In a Formedon in the Remainder, the Demandant needs not to alledg Eſplees in the Donor but in the Tenant for life, to prove the gift executed: But in a Formedon in the Reverter, Eſplees ought to be alledged in the Donor, and in the Donee, 9 H. 6. 53. So is 50 E. 3. 1, 2. where he demands Fee-ſimple. But if a Grant of a Reverſion upon an Eſtate for life be made to his Anceſtor in tail, there it is ſufficient to alledg Eſplees in the Tenant for life, as it was holden by the Court.

3. In a Writ of Entry in the nature of an Aſſiſe, Eſplees ought to be alledged, for it is a *Precipe*; but contrary in an Aſſiſe, 21 H. 6. 18.

4. In a *Quod ci deforceat*, the Plaintiff alledged Eſplees in his Anceſtor, and alſo in himſelf, and it was challenged for alledging double Eſplees, and yet the Writ did not abate, becauſe it was but ſurpluſage. 46 E. 3. 21.

5. In a Writ of *Ceſſavit*, nor in a Writ of Eſcheat, Eſplees ſhall not be alledged; and the reaſon is, becauſe they claim by no ſeiſin, but by reaſon of the Seignory. 21 H. 6, 22.

6. In a Formedon in the Diſcender, the Plaintiff declared upon a gift and Eſplees in the Great Grandfather in the time of King *H.* the 6th, and ſhewed in the Conveyance, that the Father of the Defendant dyed within 50 years next, &c. and did not ſhew any Seiſin within that time, nor any of his Anceſtors after the Seiſin in the time of H. the 6th. It was the Opinion of the Court, That a Formedon in the Diſcender was out of the Statute of limitations, 32 H. 8. and was not within any other of the old Statutes of limitations. Mich. 11 Eliz. *Dyer*, 278.

7. *Ceſtuy que uſe* in 12 E. 4. deviſed by his Will, his Land in E. to his Son, to have and hold to him and his Heirs for ever: Provided, that if he dye without Iſſue, or the Iſſue fail, living his Executors, that the Land ſhall be ſold by the Executors, and the Executors dyed before the Deviſee: And the Heir of the body of the Deviſor, ſuppoſing the Deviſe to be an Eſtate in tail, brought a Formedon, and ſuppoſed by his Writ and Count, a general gift in tail, And Eſplees in the time of E. 4. and the Tenant pleaded, *Ne Dona poſſe*. In that Caſe, No exception was taken to the alledging of the Eſplees in the time of E. 4. But the Opinion of the Court was, That it was not any tail, nor any gift of the Land it ſelf. Mich. 19 Eliz. *Dyer*, 354.

8. Note, *per Curiam*: In a *Quare Impedit*, It was ſaid, That if a Biſhop ſuffer an uſurpation, and dyes, the Succeſſor may have a *Quare Impedit*, or preſent to the next Turn by the Statute of 1 Eliz: So if the Biſhop ſuffers ſeiſin and diſcent by Covin, and conſent, or without Covin, or conſent and dyes, the Entry of the Succeſſor is lawful by the Statute of 1 Eliz. But if a man makes a Leaſe to the Biſhop and his Succeſſors, rendring rent, and for default of payment, to re-enter; and the Rent is behind, and the Leſſor re-enter, and the Biſhop dyes, the Succeſſor is not remedied by this Statute, for that the Leſſor hath good title by the Condition annexed to the eſtate, but if the Rent be ſuffered to be behind by conſent, the Succeſſor ſhall be aided by the Statute, becauſe the Biſhop hath new title as to enter for Mort-main, and doth not enter within the year, and dyes, the Succeſſor ſhall not be helped by the Statute. So if the Biſhop purchaſor of an Advowſon, ſuffers an Uſurpation, and dyes: the Succeſſor ſhall have a *Quare Impedit* by this Statute, but he cannot have a Writ of Ejectment, for that the Biſhop himſelf cannot maintain this Action for default of Eſplees. Mich. 21 Jac. in C. B. *Dalon* and *Pamplins* Caſe. *Leon.* 81.

Eſtates.

Where a man ſhall have an Eſtate of Inheritance, without the words [*Heirs*] *or* [*Succeſſors*]; *Where not: And where a man ſhall not have an Eſtate by Feoffment, Grant, &c. although the word* [*Heirs*] *be mentioned in the Deed.*

1. IF a Feoffment be made to one *et hæredibus*, and doth not ſay *ſuis*, yet it is a good Fee-ſimple, becauſe that none takes by the preniſſes of the Deed, but he who takes by the *Habendum*, 22 E. 4. 16. 19 H. 6. 73. 7 E. 4. 11. But contrary if a Feoffment be made to two, *et hæredibus*, for the reaſon of incertainty, they have but an Eſtate for life. See *Cook* 1. Part, 85. in *Corbets* Caſe; but if it be in a Deviſe, it is a good Fee to them both, by reaſon of the intent of the Deviſor, 31 H. 8. br. 165. And if Lands be Deviſed to a man and his Aſſigns *imperpetuum*, he ſhall have Fee: Or if it be deviſed to him in Fee, without ſaying any more, he ſhall have an Eſtate of Inheritance. See *Perkins* 48. And ſo it is, If a man deviſeth his Lands to one to diſpoſe at his Will and pleaſure, it is a good Fee.

2. In every Caſe where there wants the words [his Heirs]

Heirs] if there be words, to have and to hold to him for ever, and that for a reaſonable conſideration and recompence, it is a good Fee; but that is only to be meant, when the Intereſt paſſeth by the conſideration, without any Ceremony in Law. As in the Caſe of Bargain and Sale, where nothing paſſeth but an uſe; in that Caſe, Conſcience being the directer of the Eſtate, ſaith, That he hath as great an Eſtate in the Land as the other could ſell, 27 H. 8. 8. So is a Deviſe to one paying 10 l. to a ſtranger, the ſame is a good Fee for the conſideration paying. *Cook* 6. Part, in *Collyers* Caſe. Otherwiſe it is in Land conveyed by Livery upon conſideration, for there the Livery determines the eſtate of the Grantee, and not the conſideration only. And ſee 1 Eliz. *Dyer*, 169. where it is holden, That if a man for 10 l. makes a Feoffment to A. and B. to have and hold to them, and their Heirs, to the uſe and behoof of A. and B. *imperpetuum*, they have but an Eſtate for their lives, notwithſtanding the conſideration expreſſed.

3. A Rent-charge was Granted to one, his Heirs, Executors, and Aſſigns, to the uſe of himſelf, his Executors and Aſſigns, during the life of J. S. It was the Opinion of the whole Court, That it was a good Fee. Mich. 6 Jac. in C. B. *Whiskeyns* and *Davies* Caſe.

4. The Father enfeoffed the Son, To have to him and his Heirs, and the Son re-enfeoffed his Father as fully, as the Father had enfeoffed him: It was holden in that Caſe, That the Father had a Fee-ſimple without the words [Heirs]. 39. *Aſſ.* 12.

5. If a gift be made in Frank-marriage, the ſame ſhall paſs the Inheritance in tail, without the words, [his Heirs]. See 12 H. 4. 19. And ſee, Mich. 25 Eliz. in the Common-Pleas; in *Web* and *Potters* Caſe adjudged accordingly. *Godbolt.* 18.

6. A Rent is granted by one Coparcener to another for equality of Partition, it is a good Fee, without words of Grant to her and her Heirs. 29. *Aſſ.* 23.

7. Every Conuſans of Right, *come ceo que il ad de ſon done*, is a Fee-ſimple without the word, Heirs; and that by reaſon of the word, *Droit*. 40 E. 3. 6. 19 H. 6. 17. by *Vampage*. 30 H. 8. *Petty book* 146. If Tenant for life levyeth a Fine *come ceo que il ad de ſon done*, without ſaying any more; it is no forfeiture of his Eſtate.

8. Note, It is taken for a Rule, That when the Anceſtor by any gift or conveyance, takes an Eſtate of Freehold; and in the ſame gift or conveyance, an Eſtate is limitted, mediately, or immediately, to his Heirs in Fee, or in tail, alwayes in ſuch Caſe, the words [his Heirs], are words of limitation, and not of purchaſe; but where an Eſtate is limitted to the Anceſtor, the Remainder to another for life, the Remainder to the right Heirs of the Leſſee for years, there the words [his Heirs] are words of purchaſe. *Cook* 1. Part, 104. in *Sh. Ilyes* Caſe.

9. A gift to the King, is a Fee without the words, Heirs or Succeſſors; becauſe the King never dyes, *Cook* 7. Part, in *Calvins* Caſe. *Plow. Com.* the Lord *Berkleyes* Caſe. &c. See *Coo.* 6. Part, 27. in the Caſe of Souldiers, &c.

10. If a man be called to the Upper-Houſe of Parliament by the Kings Writ, he is a Baron, and hath an Inheritance in it, without the word (Heirs). But if he be created by Letters Patents, he ought to have the word (Heirs) in his Letters Patents. *Coo.* 1. Part, *Inſtitutes* 11, 12.

11. A Feoffment made to Mayor and Comminalty, or other Corporation aggregate, paſſeth a Fee without the word (Succeſſors), and in ſome Caſe a Feoffment to a ſole Corporation without the word (Succeſſors), will paſs a Fee as a Feoffment made to a Biſhop, to have *in libera Elemoſina*; is a good Fee. 19 H. 6. 74. 20 H. 6. 36.

12. A Copyholder ſurrendred to the Lord his Copyhold, to the uſe of his Wife and his younger Son, without limitting any Eſtate. It was Reſolved, That they had for life only, for aſwell Eſtates as Diſcents ſhall be directed by the Rules of Law, as neceſſary conſequents upon the Cuſtome within the Manner, except there be a ſpecial Cuſtome, that *ſibi et ſuis*, or *ſibi et aſſignatis*, may create an Eſtate of Inheritance. *Coo.* 4. Part, 29. *Bunting* Caſe.

13. Abbot and Covent made a Leaſe for years, rendring Rent annually during the Term, to the Abbot and Covent, or unto his Succeſſors, upon Condition, if the Rent be behind, to re-enter. It was Reſolved in this Caſe, That the reſervation in the Diſjunctive, was good, for the Law ſhall make ſuch a conſtruction as may ſtand with the intent of the Law, and of the parties. And it was agreed, That rendring Rent annually during the Term, to him and his Succeſſors, and rendring Rent to him during the Term, or his Executors, is all one if the Rent be reſerved to him and his Succeſſors; and although the words be joynt, and in the copulative; yet by conſtruction of Law, the Leſſor ſhall have it during his life, and his Succeſſors after his deceaſe: And theſe words, to him or his Succeſſors, are words only of explanation; For ſuch reſervation had bin good, being reſerved annually during the Term, within the words, to him and his Succeſſors. But if a Feoffment be made, to have to one or his Heirs, he hath but an eſtate for life, becauſe there wants words precedent to direct the words in the diſjunctive, the ſame Law of a Reſervation to one or his Heirs. *Coo.* 5. Part, 112. *Mallories* Caſe.

14. Land was deviſed to Husband and Wife, and after their deceaſe, to their Children, they then having a Son and a Daughter. It was Reſolved, That in that Caſe, the Husband and Wife had an Eſtate but for their lives, with a Remainder to their Children for life, and no eſtate tail, and the intent of the Deviſor ſhall be conſtrued according to the Rules of the Common-Law; and by the Common-Law, if ſuch a conveyance had bin made, the Husband and Wife ſhould have had but for their lives, the Remainder to the Children for their lives. *Cook* 6. Part, 17. *Weilds* Caſe.

15. If A. deviſeth Lands to B. and to his Iſſues or Children; and he hath not any Iſſue at the time of the Deviſe, the ſame is an Eſtate tail for the intent of the Deviſor, is manifeſt and certain, that his Children or Iſſues ſhould take; and as immediate Deviſees they cannot take, becauſe they are not *in rerum natura*, and by way of Remainder they cannot take, becauſe the gift is immediate; and therefore the words ſhall be taken by way of limitation, and ſhall make an Eſtate tail: And a Deviſe to Husband and Wife, and to the Men-Children of their bodies begotten, and they have not any Iſſue at the time of the Deviſe, was adjudged an eſtate tail. See 4 Eliz. in *Bendloes* Reports, acc. But if a man deviſes Lands to one and his Iſſues, and he have Iſſue of his body living, they have but a joynt-eſtate for their lives. *Coo.* 6. Part, in *Weilds* Caſe, acc.

16. Note, It was agreed, That Miſnoſmer of a Corporation in an Act of Parliament, ſhall not make void the Act. For *Parliamentum Teſtamentum, et arbitramentum*, ſhall be taken according to the minds and intents of thoſe who make them: As if one Deviſe Lands to one for life, the Remainder *Sanctæ Eccleſiæ de* St. *Andrews* in *Holborn*, The ſame is a good Deviſe to the Parſon and his Succeſſors, for ſuch deſcription is ſufficient in a Will to expreſs the Parſon and his Succeſſors. 21 R. 2. Deviſe, 27. *Cook* 10. Part, 57. in the Caſe of the Chancellor and Schollers of *Oxford*.

17. A. ſeiſed of Lands in Fee, deviſed the Land to the Father for life, and afterwards to the next Heir Male of the Father, the Father having Iſſue a ſon at the time; the Deviſor dyed, the Father made a Feoffment with warranty, the Son entred, and afterwards the Father dyed. In this Caſe, it was Reſolved, That the Father had but an Eſtate for life expreſſed by the Deviſe; and that his Son being his next Heir Male, could not enter for the forfeiture during the life of the Father. *Cook* 1. Part 63. *Archers* Caſe.

18 Note, It was Reſolved by the Court, That if an Eſtate be made to one and his Heirs during the life of J. S. it is but an Eſtate for life upon which a Remainder may depend by the Common-Law. 2. That an Eſtate made to one and his Heirs on the body of J. S. begotten, is an Eſtate tail, and no Fee-ſimple, againſt the Opinion of *Aſcough.* 20 H. 6. 36. *Cook* 1. Part, 140. in *Chadleighs* Caſe.

19. It is Covenanted by Indenture between A. and B. that the Son of A. ſhall marry the daughter of B. for which B. ſhall give to A. 100 l. And A. Covenants, That if the Marriage do not take effect, That A. and his Heirs will ſtand ſeiſed of certain Lands to the uſe of B. and his Heirs, until A. pay the 100 l. to B. his Executors or Adminiſtrators. Afterwards B. hath Iſſue within age; and afterwards the Marriage doth not take effect, the Eſtate is executed in the Heir of B. and ſhall have relation to the making of the Indenture. But if a man Grant his Reverſion of his Leaſe for life to B. and his Heirs; and before Attornment, the Grantee dyeth, no Attornment can veſt it in the Heir of B. for by the Grant, the Eſtate in Reverſion was not bound, but it is to receive its perfection by the Attornment, and the Grantee may, notwithſtanding ſuch Grant, transfer the Reverſion to whom he will. *Cook* 1. Part, 155. in the Rector of *Chedingtons* Caſe. See 3. *Ma. Br.* Feoffments, to Uſes, 59.

20. A man ſeiſed of Lands in Fee, deviſed the ſame to one, and B. his Son, and to the Heirs of B. *Habendum* for 99. years, and ſo from 99. years, to 99. years, until 300. years were paſt, without impeachment of Waſte, rendring Rent if it was demanded: And Covenanted, That he and his Heirs at the end of thoſe 300. years, would make to the Heirs of the Leſſee ſuch another Leaſe for 300. years, but no Livery was made. The Queſtion was, That becauſe the Fee-ſimple was expreſſed in the premiſes of the Deed, if the limitation in the *Habendum* for years was void, repugnant, and contrary to the premiſes. It was Reſolved in this Caſe, That the *Habendum* was not repugnant to the premiſes: and theſe differences were taken; When things take their effect by the delivery of the Deed, and which lye in Grant without any other Ceremony, there in ſuch limitation to one and his Heirs, *Habendum* for life or years, is void. But when to the Eſtate limitted by the premiſes, a Ceremony is requiſite to the perfection and eſſence of it, and to the Eſtate limitted by the *Habendum*, nothing is requiſite but only the delivery of the Deed (as in the principal Caſe), there, although that the *Habendum* be of a leſſer Eſtate then is mentioned in the premiſes, the *Habendum* ſhall ſtand: And a difference was taken between an Eſtate in the premiſes implyed, and an Eſtate expreſſed. For if A. grant a Rent to B. generally, it is by Implication an Eſtate for life; but if the *Habendum* be for years, the ſame qualifies the generality of the premiſes. And it was Reſolved in this Caſe, That theſe words

(and

(and to the Heirs of B.), upon the conſideration of the whole Indenture were void; and both Leſſees had a good Eſtate for years. And if Livery had bin made, the ſame had not changed their Eſtate. *Cook* 2. Part, 23, 24. *Baldwins* Caſe.

21. A. granted a Rent to F. by Fine *Habendum ſibi et aſſignat. durante vita* B. Wife of the Grantor; and if it be behind, that it ſhould be lawful for F. and his Heirs, during the life of B. to diſtrein. F. deviſed the Rent, and dyed: The Queſtion was, If the Grantor ſhould detain it as an occupant, or that the Deviſee ſhould have it. It was the Opinion of *Dyer*, That the Deviſee ſhould have it by reaſon of the clauſe of Diſtreſs, and that the Grantee had a Fee-ſimple in the Rents determinable upon the death of B. the Wife of the Grantee. Trin. 18 Eliz. *Dyer*, 253. *Swinertons* Caſe. See *Cook* 10. Part, 98. *Seymors* Caſe, acc.

22. If a Diſſeiſor makes a Leaſe for another mans life to one and his Heirs, and the Leſſee dyeth, the Diſcent ſhall not take away the entry of the Diſſeiſee, becauſe he dyed ſeiſed only of the Freehold; and the word (Heirs) was added to prevent the occupancy; for the Heir in that Caſe hath not his Age. Paſc. 16 Eliz. in C. B. *Lambs* Caſe. *Coo.* 1. Part, *Inſtitutes*, 239. So if the Kings Tenant for life be diſſeiſed, and the Diſſeiſor dyeth, the ſame ſhall not take away the Entry of the Leſſee, becauſe the Diſſeiſor had an Eſtate but for the life of the Leſſee, *ibid.*

23. Husband and Wife, and A. purchaſe to them, and to the Heirs of the Husband and A. A. releaſed to the Husband without enlargement; the Husband and Wife made a Leaſe of all, rendring Rent; the Husband dyed. It was a varded, that the Heir of the Husband ſhould have the moyety of the rent, for that the Releaſe did ennure to the Husband alone, and not to the Wife; and in this Caſe, there needed no enlargement, becauſe he had a Fee; but contrary if the Releaſe had bin made to the Wife, who had but an Eſtate for life. Trin. 9 Eliz. *Dyer*, 263. See *Coo.* 1. Part, *Inſtitutes* 185, & 273. acc.

24. A. Deviſed his houſe in which J. inhabited, to his three Brothers, and his houſe in which B. his Brother inhabited, to the ſaid Brother, and he to pay 10 l. to C. or otherwiſe to remain to the houſe. Provided the houſes ſhall not be ſold, but go to the next of the bloud being Male. It was holden, That this was but an Eſtate tail, and ſhall go to the houſe, and ſhall be conſtrued to be to the moſt worthy perſon of the Family, and being Males, it ſhall be conſtrued in the future time. Paſc. 16 Eliz. *Dyer*, 333. *Chapmans* Caſe.

Eſtopel.

1. *Where, and by what, and whoſe act, and by alledging of what thing, a party to a Deed, or Record, ſhall be Eſtopped and Concluded; Where not: And where ſtrangers to a Deed or Record ſhall be Eſtopped by it; Where not.*

1. AN Eſtoppel is, when a man is concluded to ſpeak againſt his own Act or Deed: As if a man be bounden in an Obligation by the name of J. S. and be ſued according to the Obligation by that name, he ſhall not be received to plead, that he is miſ-named; and that he is named R. S. becauſe it is contrary to his own Deed, of which he ſhall not take advantage, although he ſay the truth. But in ſome Caſe, where the truth appeareth upon Record, there the adverſe party ſhall not be Eſtopped to take advantage, and to alledg the truth which appeareth of Record. If an Impropriation be made after the death of the Incumbent to a Biſhop and his Succeſſors: The Biſhop by Indenture demiſeth a Parſonage for years to begin after the death of the Incumbent, the Dean and Chapter confirmeth it, the Incumbent dyeth; this demiſe ſhall not conclude, for that it appeareth that he had nothing in the Impropriation, till after the death of the Incumbent. *Cook* 1. Part, *Inſtitutes* 352. *Cook* 1. Part, 115. acc.

2. In a Replevin, the Lord paramount avowed for the Services of his Tenant behind: The Plaintiff who was a Leſſee, ſaid, That he held of the Tenant for 10 years; whereas in truth he had a Leaſe for 40 years, and prayed in aid of his Leſſor. It was the Opinion of the Court, That that ſhould not conclude him for the reſidue of the Term after the 10 years expired, for that the number of the years in Aid-preyer, is not material nor traverſable. Alſo the Services and not the Land, were in demand, therefore the Eſtoppel is not for the Land; and matter alledged which is not material nor traverſable, ſhall not Eſtop any party. Paſc. 12 Eliz. *Dyer*, 289.

3. In Debt brought, the Plaintiff declared for damages recovered in a Writ of Entry; the Defendant pleaded in bar, That immediately after the Recovery, the Plaintiff ſued forth an Elegit, upon which the moyety of the Land was delivered to the Plaintiff. It was the Opinion of the Court, That it was a good Plea, for that the Plaintiff was Eſtop-

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ped to take out other Execution then that of which he hath made Election upon Record. Paſc. 13 Eliz. *Dyer*, 299.

4. A *Quare Impedit* was brought againſt the Biſhop, Patron, and Incumbent: the Ordinary pleaded, he claimed nothing but as Ordinary; and upon Iſſue joyned by the others, it was found for the Plaintiff, and Judgment was given by the Juſtices of *Niſi prius*, and a Writ awarded to the Biſhop. Afterwards the Record was remanded *in banco*; whereupon a new Writ was awarded to the Biſhop. The Biſhop returned, that depending the *Quare Impedit*, a title was found for the King by Office, by reaſon of minority of the Plaintiff his Ward; and that the King preſented J. S. of whom the Church was full. It was the Opinion of the Court, That the Biſhop was not Eſtopped by the Judgment to make this return, for that the ſame did not amount to any plea of Plenarty; and if the return be falſe, the Plaintiff may have *Quare non admiſit* againſt the Biſhop. Paſc. 9 Eliz. *Dyer*, 260. *Baſſets* Caſe. See *Cook* 6. Part, 52. in *Boſwells* Caſe.

5. A man granted a Rent-charge out of Lands, without the words *pro ſect hared. ſuis*, and dyed, the Grantee brought a Writ of Annuity, and declared againſt the Heir of the Grantor; afterwards he diſcontinued his ſuit, and diſtreyned for the Rent. It was holden, That the diſtreſs was lawful, and that he was not Eſtopped by bringing the Writ of Annuity of the Diſtreſs, nor the Land diſcharged of the Rent. Mich. 18 Eliz. *Dyer*, 344.

6. A man priviledged in Chancery, was ſued in the Common Pleas in an Action of Debt to the Exigent. Afterwards he brought a general *ſuperſedeas*. It was the Opinion of the Juſtices, That he was Eſtopped, and had loſt the advantage of his Priviledg, becauſe it recited his appearance. But if he had firſt ſued his Writ of Priviledg, although ſued after to the Exigent, yet it ſhould have bin allowed, and he ſhould have had a ſpecial *ſuperſedeas*. Paſc. 29 H. 8. *Dyer*, 33. Hill. 4 Car. in the Exchequer. *Crew* and Baron *Vernons* Caſe, adjudged acc.

7. A. brought an Appeal of Murder againſt M. O. Spinſter, of the death of her Husband, whereas the Defendant was Gentlewoman. The Court held it not to be a ſufficient addition. But the Court held to plead that matter in abatement of the Writ, becauſe ſhe had purchaſed a *ſuperſedeas* upon it was not good; Wherefore ſhe pleaded, Not-Guilty. Tr. 7 E. 6 *Dyer*, 82.

8 A man was bounden in an Obligation upon Condition, to ſtand to the award of J. S. ſo as the award be put in writing before *Mich.* the Obligor before *Mich.* revoked the power of J. S. to make any award. In this Caſe, it was Reſolved, 1. That when a man is bound to ſtand to the Arbitrament of J. S. he may afterwards countermand it, for a man by his act cannot give ſuch a power or authority which is not countermandable. But then, 2. It was Reſolved, That the Bond became ſingle and without any Condition, and that the Obligee ſhould take advantage of it. 1. Becauſe the Obligor broke the words of the Obligation. And 2. Becauſe the Obligor by his own act hath made the Condition to become impoſſible, and therefore he ſhall be concluded and Eſtopped by it. *Coo.* 8. Part, 83. *Vyneors* Caſe.

9. Note, It was Reſolved by the Juſtices, 1. That if a man be barred in a perſonal Action, as Debt, acc. &c. the bar is perpetual; But if a man be barred in an Action real, by Judgment upon Demurrer, Verdict, Confeſſion, the ſame is no ſuch Eſtoppel, but that he may have an Action of a higher nature, becauſe the ſame concerns Freehold and Inheritance. 2. Reſolved, That if the Demandant or Plaintiff miſtake his Action, and the Tenant or Defendant pleadeth a plea, which goes to the Action of the Writ, If the Plaintiff in ſuch Suit be Non-ſuit, or his plea be diſcontinued, he is not concluded, but he may bring his right Action. But if the plea be but to the Writ, although it be adjudged againſt the Demandant, or Plaintiff upon a Verdict or Demurrer; yet he may maintain the ſame Writ again, for that the Judgment doth extend but to the Writ. *Cook* 6. Part, 8. *Ferrers* Caſe.

10. If Partition be made by Writ, it ſhall not be defeated, although the parts are not equal, becauſe the Judgment in Partition is, That the Partition ſhall ſtand good for ever: But Partition made by Writ out of the Chancery directed to the Eſcheator, where one is of full age, and ſueth Livery, and the other within age, and hath an unequal part allotted to him, ſhall not bind him at his full age; contrary if his part be equal. See *Coo.* 1. Part, *Inſtitutes* 171. And ſee 6 E. 6. *Dyer*, 73. If the Sheriff return the Partition made by 12 lawful men, the parties ſhall be concluded by it, and cannot ſurmiſe an inequality in it, to have a new Writ.

11. If a man be bounden to pay mony at a day, and place certain, and he pay it before the day, and at another place, by acceptance he is diſcharged. And if in ſuch Caſe, he ſhould plead payment according to the Obligation at the ſame day and place; Yet the Jury is not bounden to find for him, becauſe the truth is otherwiſe. Paſc. 5 Eliz. *Dyer*, 213. See Mich. 29 Eliz. in B. R. *Plymptons* Caſe. *Godbolt*. adj. acc.

12. A man brought an Appeal of the death of his brother, againſt J. S. of M. as principal, and

F. as acceſſary, whereas the name of the Principal was T. S. The acceſſary pleaded, *Nul tiel in rerum natura* as J. S. the day of the Writ brought, nor ever after. It was the Opinion of the Court, That although there be another J. S. in another County, if he be not in the ſame County where the Town of M. is, or if he dye before the Writ brought, the Plea is good. And in that Caſe, that in ſuch Caſe *in favorem vitæ*, a man may traverſe the return of the Sheriff, and ſhall not be concluded by it. See 20 H. 6. 23. Hill. 18 Eliz. *Dyer*, 349. acc.

13. A man having two ſons; And A. and B. two Daughters, gave his Land to his eldeſt Son in tail, the Remainder to his younger Son in tail, the Remainder to A. his eldeſt Daughter, and her Heirs. Tenant in tail in poſſeſſion, levyed a Fine with warranty, he in the Remainder in tail dyed without Iſſue; Tenant in tail in poſſeſſion dyed without Iſſue, the warranty diſcended upon both Daughters, as Siſters, and Heirs. It was Reſolved in this Caſe, That the Heir of A. ſhould be barred for the whole Land. And in this Caſe, A difference was put betwixt a Collateral warranty and Eſtoppells: For a Collateral warranty doth bar the right of him who doth not claim by him who maketh the warranty. But an Eſtoppel doth bar the Heir of him only who claims the right to whom the Eſtoppel was; but in the principal Caſe, the Warranty and Eſtoppel did both deſcend upon the general Heir, to him who made the warranty or Eſtoppell. And in that Caſe alſo a difference was taken betwixt Eſtoppells which ſtood upon recompence, and Eſtoppells which ſtood upon admittance of any matter of Record: As if an Abator doth enter-marry with the right Heir, and hath Iſſue by her; And the Abator makes a Leaſe for life rendring rent, and he and his Wife dye. In this Caſe, the Iſſue hath the meer right in the right of his Mother; yet if he accepteth the Rent, and maketh an acquittance, the ſame ſhall Eſtop him and his Heirs to avoid the Leaſe, in reſpect of the acceptance: But an Eſtoppel which accrues by admittance of Record, ſhall not conclude the Heir who doth not claim the right by the ſame Anceſtor. *Cook* 8. Part, 54. *Syms* Caſe.

14. Debt by an Adminiſtrator upon an Obligation; The Defendant pleaded, That the Inteſtate dyed before the date of the Obligation: So *Non eſt factum*. It was found, That the Deed was delivered in the life of the Inteſtate, and that the Inteſtate dyed before the date of the Deed. In that Caſe, it was adjudged, That it was his Deed; for although that the Obligor in pleading, cannot alledg the delivery of the Deed before the date, becauſe he is Eſtopped to take any averment againſt a thing expreſſed in the Deed: Yet the Jurors who are ſworn *ad veritatem* cannot be Eſtopped thereby, becauſe they are ſworn to ſpeak the truth. But the Jurors cannot find any thing which the parties have affirmed, or admitted, for they are not charged with any thing, but with thoſe only in which the parties do differ. See *Cook* 2. Part, 4. *Goddard's* Caſe.

15. If an Enfant levy a Fine, and declares the uſe thereof, this Declaration ſhall bind him ſo long as the Fine remaineth in force, for inaſmuch as he hath bin admitted by the Judges as a man of full age to levy a Fine, the Law ſo long as the Fine remaineth in force, permitteth him to limit the uſe thereof. *Cook* 2. Part, 58. in *Berkwith's* Caſe.

16. A Woman had Lands conveyed to her for her Joynture, ſhe after the death of her Husband, entred ſecretly into the Lands, and afterwards ſhe brought a Writ of Dower, intending to have her Joynture and Dower alſo. In that Caſe, it was adjudged, That by the bringing of the Writ of Dower, ſhe Eſtopped her ſelf to claim any Eſtate in the Land conveyed unto her before, for thereby ſhe ſecretly agreed, that ſhe had not agreed to any Eſtate made to her before for a Joynture. *Shay* and *Purſlots* Caſe adjudged, vouch. in *Co.* 4. Part, 5. in *Vernons* Caſe.

17. A. who had nothing in the Lands, by Indenture Leaſed the Lands to B. for certain years. Afterwards A. *contra Indenturam ſuam præditam*, entred upon B. In an *Ejectione firmæ* brought, the Jury finding, That A. had nothing in the Lands at the time of the Leaſe made. If the ſame ſhould be a good Leaſe by Eſtoppel, againſt A. was the Queſtion. It was the Opinion of *Periam* and *Anderſon* Juſtices, That this was a good Leaſe by Eſtoppel betwixt the parties; and the Law will not permit a man to ſay any thing againſt his own Deed, being Indented, nor any matter contained in it. Mich. 31 Eliz. in C. B. *Sutton* and *Dickons* Caſe. *Leon.* 287.

18. A. Leaſed Lands to B. for years, and before the expiration of the ſame Term, leaſed the ſame Lands by Indenture to a ſtranger to begin preſently. A. brought an Action of Waſte againſt the ſecond Leſſee, and declared upon a Leaſe made for years, without ſpeaking of the Indenture. It was demanded of the Court, If the Defendant plead, That the Plaintiff had nothing *tempore dimiſſionis*, whereof he had counted, If the Plaintiff might Eſtop the Defendant by the Indenture, although he had not declared upon it; and if ſuch Replication were not a departure. And it ſeemed to the Court, and alſo to the Preignothories, That it was not becauſe it is not contrary to the Declaration, but rather doth enforce the Declaration. Mich. 31 Eliz. in C. B. *Lewis*. 220.

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19. A man made a Leaſe for years of Land to begin at *Mich.* after rendring rent; the Leſſee entred before *Mich.* The Leſſor brought debt againſt the Leſſee, and recovered. The Queſtion was, If the Leſſor might put him out as a Diſſeiſor by reaſon of the recovery in the Action of Debt: Or if the Leſſor dyeth, Whether his Heir ſhall be Eſtopped by the Record, to ſay that he is in otherwiſe then by Leaſe. It was the Opinion of the Court, That by the bringing of the Action of Debt, the Leſſor himſelf was concluded, and that it ſhould bind his Heir alſo, becauſe the Recovery is by Record, which is the ſtrongeſt concluſion that is. Paſc. 3 Car. in B. R. *Green* and *Moodyes* Caſe. *Godbolt.* 384.

20. Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years, the Leſſee entred; Tenant for life granted *Tenementa prædict.* to C. the Leſſee for years attorned, C. entred, and made a Leaſe at Will, to whom the Tenant for life levyed a Fine *come ceo, &c.* he in the Remainder entred. It was in this Caſe, amongſt other points, agreed, That the Fine levyed to the Tenant at Will, was a forfeiture, and that the Tenant for life and the Tenant at Will ſhould be Eſtopped to ſay, that *partes finis nihil habuerunt*, and that of all Eſtoppels of Record which trench to the diſinheritance of thoſe in Remainder, they ſhould take advantage of them, although they be not parties to it. *Co.* 2. Part, 55. *Bucklers* Caſe.

21. One was bound in an Obligation, That he would give to J. S. all the goods which were Deviſed him by his Father. In Debt brought upon this Obligation; It was holden by the Court, That the Defendant was Eſtopped to plead, that he had not any goods Deviſed unto him, becauſe the Bond ſhall conclude him to ſay the contrary. Mich. 8 Jac. in C. B. *Cullingworth's* Caſe. *Godbolt.* 177.

22. If he in the Reverſion ſuffer a Recovery to uſes. It was holden by the Court, That his Heir cannot plead, That his Father had nothing in the Land at the time of the Recovery, for he is Eſtopped to ſay that he was not Tenant to the *Præcipe.* And therefore it was holden, That the Recovery was good againſt him by Eſtoppel. Paſc. 3 Jac. in C. B. *Duke* and *Smiths* Caſe. *Godbolt.* 147.

23. A. and B. were bound in a Bond, joyntly and ſeverally, to J. S. who brought Debt upon the Bond againſt B. in the Common-Pleas, and had Judgment. And afterwards he brought another Action of Debt againſt A. in B. R. Afterwards he ſued forth Execution by Elegit upon the firſt Judgment againſt B. and had his Land in Execution, B. being Leſſee only for the life of another man, who dyed. It was the Opinion of the Juſtices in this Caſe, That J. S. might in this Caſe ſue A. and B. ſeverally, and might chuſe his Execution againſt which of them he pleaſed: But could not have Execution by *Elegit* againſt them both. And therefore, although that by the death of B. the Land was evicted out of the hands of J. S. yet now he could not take out a new Execution againſt A. becauſe by the firſt Execution he had determined his Election, ſo as thereby he had concluded himſelf to take forth a new Execution againſt the other. Paſc. 12 Jac. in C. B. *Cowley* and *Legatts* Caſe. *Godbolt.* 257.

24. The Cuſtome of a Mannor was, That if any Copyholder committed any Felony, and it be preſented by the Homage, that the Lord might ſeize the Land: A Copyholder committed Felony, which was preſented by the Homage; Afterwards the Copyholder was Endicted, and by Verdict acquit, and the Lord entred upon the Land. There were two Queſtions in the Caſe. 1. If the Cuſtome were good. 2. If the Verdict and acquittal ſhould conclude the Lord of his Entry. It was Reſolved That the Cuſtome might be good, and have a lawful beginning. It was argued for the ſecond point, that this Verdict and acquittal ſhould not conclude the Lord, becauſe the Lord is a ſtranger, and in every Eſtoppel, there ought to be matter of Eſtoppel which ſhall bind the right; and it is hard, that this Verdict given perhaps upon faint Evidence ſhould bind, &c. But of this point, the Court did not deliver any Opinion, but moved the parties to a compoſition. Hill. 7 Jac. in B. R. *Giuins* and *Cowpers* Caſe. *Brownl.* 2. Part, 219.

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2. *Where the party to a Fine levyed, his Heirs, &c. or others, ſhall be Eſtopped, by a Fine levyed; or by a common Recovery: and where not. And where the Wife and her Heirs ſhall be Eſtopped by the Act of her and her Husband done during the Coverture, and where not.*

1. LAnds were given to Husband and Wife, and to the Heirs of the Husband, the Husband conveyed the Lands in tail, and dyed; The Wife recovered the Lands againſt the Donee by a *Cui in vita*, ſuppoſing ſhe had the Lands to her and her Heirs in Fee, and after the Recovery, enfeoffed another, and dyed, the Donee in tail dyed without Iſſue: The Iſſue of the Husband and Wife brought a Formedon in Reverter againſt the Feoffee of the Wife. In this Caſe (amongſt other things), it was Reſolved, That although the Iſſue was Heir to the Wife, and thereby Eſtopped by the Recovery in the *Cui in vita*, to ſay, that the Wife had a leſs eſtate

then a Fee-ſimple; yet the Iſſue who claimed the Reverſion of the Lands as Heir to the Husband, ſhould not be bound by that Eſtoppel made by the Wife, although he was Heir to her alſo. *Coo.* 8. Part, 53. *Sims* Caſe.

2. Husband and Wife, Tenants in tail, had Iſſue two Sons; the Husband and Wife made a Feoffment to the uſe of her ſelf for life, and after her deceaſe, to the uſe of the Heirs of the body of her Husband begotten, the Remainder in Fee to J. S. Afterwards ſhe and the youngeſt Son levyed a Fine of that with Warranty of the Wife and her Heirs; the Conuſees rendred to the Son for 60 years, rendring Rent, and then Granted the Reverſion to the Wife, and the Heirs of her body, and of the body of her Husband begotten, the Remainder in Fee to J. S. the eldeſt Son entred, the Wife dyed; the youngeſt Son claimed the Leaſe. It was the Opinion of the Court, That the younger Son had no Title, becauſe by the Entry of the Eldeſt Son, as for a forfeiture at leaſt, all other Eſtates were avoided. Hill. 2. *Mar. Dyer*, 111. *Cowards* Caſe.

3. Tenant in tail levyed a Fine with Proclamations; there was Error in the Proclamations of the Fine. It was the Opinion of the Court, That the Error in the Proclamations was no cauſe to reverſe the whole Fine; but that it ſhould ennure as a Fine at the Common-Law, and that the Fine ſhould notwithſtanding ſtand in force, and make a Diſcontinuance. See Trin. 4 Eliz. *Dyer*, 216. See Mich. 5 Eliz. *Plow. Com. Fiſh* and *Brokets* Caſe. &c.

4. Tenant in tail of Lands, levyed a Fine *ſur Conuſans de droit come ceo, &c.* of it, and took back an Eſtate to him and his ſecond Wife. It was holden by the Court in this Caſe, That the Iſſue of the firſt Wife was Eſtopped, and could not aver continuance of Poſſeſſion againſt the Fine which is a Feoffment upon Record, and a Diſcontinuance. Quære if it were a Fine, *ſur Conuſans de droit tantum.* Paſc. 16 Eliz. *Dyer*, 334.

5. A. ſeiſed of Lands in Fee, by Deed gave the ſame to B. and E. his Kinſwoman, and to the Heirs of their bodies begotten: They had Iſſue C. and D. B. dyed: E. married J. S. And afterwards E. and J. S. her Husband, made a Feoffment of the Lands to C. J. S. dyed, E. re-entred; C. levyed a Fine of the Lands *ſur Conuſans de droit come ceo* to the Defendant. Afterwards E. of thoſe Lands enfeoffed her younger Son D. C. entred, and enfeoffed the Defendant; the Cozen and Heir of A. entred, and let to the Defendant for years. D. entred upon him, and enfeoffed J. N. the Leſſor of the Plaintiff: the Queſtions in this Caſe, were firſt; Whether this was a gift within the Statute of 11 H. 7. for if it be a Joynture within that Statute, then the Feoffment by E. to her ſecond Son D. was a forfeiture, of which C. and his Conuſee might take advantage. It was Reſolved, That it was not a Joynture within that Statute. 2. It was Reſolved, Admitting it was a Joynture within that Statute, yet as this Caſe was, neither the Heir, nor the Conuſee ſhould take advantage of the forfeiture by the alienation to the younger Son. For when the Heir is enfeoffed by the ſecond Husband and the Wife, and the Husband dyeth, and the Wife entreth, ſhe defeats that Eſtate: And when the Heir levyed a Fine to the Defendant, that Fine gave no Intereſt, but only by Eſtoppel, becauſe the Heir had nothing at the time of the Fine, nor the Conuſee; yet the Heir hath given his right to the entail, and concluded himſelf that he cannot enter; And the Conuſee cannot enter, becauſe he hath nothing but by Eſtoppel, and no Reverſion. And therefore it was ſaid, there was a difference betwixt this and Sir *George Browns* Caſe. There the Heir in tail had a Reverſion in Fee expectant, and by his Fine gave that Reverſion to the Conuſee, ſo he had the Reverſion of the Eſtate of the Conuſee, and might well enter in reſpect of the prejudice; but he hath not ſo in this Caſe. Hill. 3 Jac. in the Kings Bench, rott. 1161. In an *Ejectione firm*, *Ward* and *Walthews* Caſe. *Cro.* 2. Part, 173, 174.

6. A Mortgagor made a Leaſe for years by Indenture, and afterwards performed the Condition, and made a Feoffment, the Leſſee for years entred upon the Feoffee, who re-entred, and the Leſſee brought *Ejectione firme*. It was the Opinion of the whole Court, That this Leaſe which did ennure by way of Eſtoppel, ſhould bind the Feoffee, for all who claim under the Eſtoppel, ſhall be bound thereby. Mich. 15 Car. in B. R. *Edwards* Caſe. *Marſh.* 64.

7. Note, It was ſaid in *Cook* 2. Part, 56. in *Bucklers* Caſe. And in *Coo.* 6. Part, 70. in *Henry Finches* Caſe, That if the Diſſeiſee levy a Fine to a ſtranger, that the Diſſeiſor ſhall hold the Land for ever. For the Diſſeiſee againſt his own Fine cannot claim the Land, and the Conuſee cannot enter, and the right which the Conuſor had, cannot be transferred to him, but by the Fine, the right is extinct, of which the Diſſeiſor ſhall take advantage. But Quære of that Caſe: For it was holden by *Reeve* and *Crawley*, Juſtices, That it ſhall not give right to the Diſſeiſor, becauſe that the Fine ſhall ennure meerly by way of Eſtoppel, and Eſtoppells bind only privies to them, and not ſtrangers; and therefore the Diſſeiſor ſhall not take benefit of it: And therefore they did conceive, That the Diſſeiſor ſhould not take benefit of it; and that the Opinion before in *Bucklers* Caſe, was not Law. Mich. 15 Car. in C. B. *Godbolt.* 105.

8. In an *Ejectione firme* brought in the Com-

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mon-Pleas: the Defendant pleaded in Bar a Recovery had in the Kings Bench againſt the Leſſor of the Plaintiff. It was moved, that it was no bar, no more then in Treſpaſs. But the Opinion of the Court was, That it was a good bar, and this is more then in an Action of Treſpaſs, for in this Action, he ſhall recover his Term. It was objected, That the Plaintiff is but Leſſee to him who was barred, and it is not betwixt the parties themſelves. To which the Court anſwered, although it was ſo, yet he claimeth by the Leaſe of him which was barred. *Anderſon* Chief Juſtice, ſaid; I know he ſhall not plead it by way of Eſtoppell, but he ſhall conclude Judgment *ſi actio*: the Court was clear of Opinion, That he ſhould be barred. Mich. 29 Eliz. in C. B. *Clayton* and *Lawſons* Caſe. *Goldsbr.* 43.

9. *Mich.* 29 Eliz. in the Common-Pleas. It was moved, Whether if a Leaſe be made to a man of his own Land by Deed Indented, if this be an Eſtoppel. It was ſaid by the Court, That if the Leaſe be made for life by Indenture. It ſhall be no Eſtoppel, becauſe the Leaſe takes effect by the Livery, and not by the Deed. See in *Coo.* 5. Part, in *Rowlins* Caſe. *Londons* Caſe vouched to be adjudged, 33 Eliz. That if a man takes a Leaſe for years of his own Land by Deed Indented. It is not any concluſion, but during the Term; and after the Term ended, the Leſſor cannot enter, and hold the Land, for that by the determination of the Term, the Eſtoppel is alſo determined. See *Coo.* 1. Part, *Inſtitutes*, 47. acc.

10. A Woman had an Eſtate in ſpecial tail made by her Husband for her Joynture, ſhe and her Husband had Iſſue a Son, the Husband dyed, the Wife took a ſecond Husband, and ſhe and her Husband alliened the Land in Fee, the Son within age, entred by colour of the Statute of 11 H. 7. the ſecond Husband dyed; the Lord of whom the Land was holden, entred upon the Son, and claimed the Wardſhip of him. It was holden in this Caſe, That he ſhould not be in Ward, becauſe he was in by purchaſe during the life of the Wife. Then it was moved, if the Wife contrary to her own allienation by Fine, might enter. It is a Quære in 20 Eliz. *Dyer*, 362. See *Cook* 3. Part, 62. in *Lincoln*-Colledg Caſe. And ſee the Statute. For it ſeems by a Proviſo in the Statute, That the Wife may enter, but it doth not ſpeak of Fines.

11. A Recovery was ſuffered by Husband and Wife, of Tenements in *London*, which by the Cuſtome binds as a Fine at Common-Law, which Recovery was to the uſe of the Recoverors, &c. untill they made a Leaſe for 40 years, and after to the uſe of the Husband and Wife, and the Heirs of the Wife; the Leaſe was made, the Husband dyed, It was holden by the Court, That the Wife ſhould be concluded, and ſhould not avoid this Leaſe, but ſhall hold under the Recovery, ſo as the Leaſe precedes her Eſtate. But Quære what remedy ſhe hath for the Rent, becauſe the Rent was reſerved before her Eſtate by the uſe was created. Trin. 12 Eliz. *Dyer*, 290. See *Coo.* 2. Part, 57. in *Berkwithis* Caſe. See 2 Eliz. *Dyer*, 187.

12. A Woman had a Joynture made to her after marriage by her Husband. Afterwards the Husband and Wife levyed a Fine, *ſur Conuſans de droit come ceo, &c.* It was holden by the Juſtices, That this was no bar of her Dower, becauſe the Election is not given to the Wife to have her Dower or Joynture, till after the death of her Huſband. Trin. 19 Eliz. *Dyer*, 358. acc.

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3. *More concerning Eſtoppells: How far they ſhall Bar and bind the Eſtates thereby; and whoſe Eſtates; Where not. Of what force they are; and divers Rules concerning Eſtoppells.*

1. IN *Ejectione firmæ*, the Caſe was. A. and K. his Wife were Tenants in ſpecial tail, the Reverſion in Fee to A. A. dyed, B. the Son of A. and Iſſue in tail, by his Deed Indented in the life of K. his Mother, made a Leaſe for 40 years to J. S. to begin after the death of K. rendring rent, and dyed: Afterwards the Reverſion came to C. who in the life time of K. levyed a Fine *ſur Conuſans de droit come ceo, &c.* with her Husband of the Land, to J. D. K. dyed. The Conuſee of C. entred, the Leſſee of B. re-entred, and being ouſted by the Conuſee, brought the Action. The Queſtion in this Caſe was, Whether the Conuſee by Fine with Proclamations, ſhould avoid this Leaſe for years made by the Heir in Reverſion, who was inheritable to both the Eſtates, *ſcil.* the Eſtate tail, and the Fee-ſimple. It was ſaid, That he in the Reverſion was heir in tail, and not only heir apparent, but he was actually ſeiſed of the Fee-ſimple, and the Deed Indented by him made, did operate by way of Concluſion. He had a good eſtate to charge the Poſſeſſion whenſoever the ſame ſhould come unto him, and by this he doth charge the Intereſt, and the right of the Reverſion; and ſo it was ſaid, it was a good Leaſe by way of Eſtoppel againſt himſelf, and a good Leaſe by way of Eſtate and Intereſt out of the Reverſion. The Caſe was not Reſolved, but adjourned; and afterwards ended by compoſition. But in this Caſe, It was ſaid by *Cook* Chief Juſtice, That if C. the Daughter had entred, and accepted of the Rent, ſuch acceptance ſhould not have made the Leaſe good. Mich. 10 Jac. in B. R.

Byrington.

Errington and *Errigton's* Caſe. *Bolſtr.* 2. Part, 43, 44, 45, 46.

2. Tenant in tail had Iſſue two Sons, the eldeſt had Iſſue a daughter and dyed, his Wife young with Child of a Son, Tenant in tail ſuffered a common Recovery to the uſe of himſelf for life, and after to the uſe of J. S. for 21 years, and afterwards, to the Heirs Males of his body begotten; and preſently after the Judgment, and before Execution, the ſame day that the Recovery was had, Tenant in tail dyed; afterwards the Recovery was executed, and then the Son was born. It was ſaid in this Caſe (amongſt other points debated), That Execution could not be ſued againſt the Iſſue in tail, becauſe the Iſſue was in *per formam doni* before the Recovery, and ſhould avoid all mean charges done by his Auncеſtors; and therefore he being in *per formam doni* before the bar was compleat, execution could not be ſued againſt him. And ſee, there many Caſes put, where the Iſſue in tail ſhall not be barred by matter of Eſtoppel done by his Auncеſtor. But it was the better Opinion of the Juſtices, That Execution might be ſued againſt the Iſſue in tail, becauſe that the right of the entail was bound by the Judgment given againſt Tenant in tail, and the Judgment to have recompence over in value; and that in favour of common Recoveries, which are common aſſurances of the Lands. *Coo.* 1. Part, 96. *Shelleyes* Caſe.

3. Tenant in tail, the Remainder in tail, he in the Remainder, Bargained and ſold his Remainder to A. for the life of Tenant in tail, the Remainder to the Queen in Fee. Tenant in tail ſuffered a common Recove y; and afterwards dyed without Iſſue. It was in this Caſe (amongſt other points) Reſolved, That the common Recovery did bar the eſtate tail, and the eſtate in the Remainder, although the Remainder was in the Queen, becauſe the Eſtate tail was not within the Statute of 34 H. 8. of the gift of the Queen, or any of her Auncеſtors. *Coo.* 3. Part, 3. The Marqueſs of *Winchеſters* Caſe.

4. A. Tenant for life of Land, the Remainder in tail to B. the Reverſion to B and his Heirs expectant; B. levyed a Fine to C. and D. and to the Heirs of C. to the uſe of them and their Heirs, and had Iſſue and dyed before all the Proclamations paſt; the Iſſue being beyond Sea, the Proclamations paſſed; afterwards the Iſſue Retorned and made his claim. It was adjudged, That the Iſſue in tail was barred by the Fine and Proclamations paſt. And that the Iſſue in tail being Heir and Privy, could not by any claim which he cou'd make, ſave the Eſtate tail which deſcended unto him, for that the ſavings within the Statutes of 4 H 7. and 32 H. 8. did extend to ſtrangers, and not to privies or parties. *Cook* 3. Part, 86. in the Caſe of Fines.

5. In a Fermedon in the Diſcender brought of the Moyety of a Manor; the Defendant pleaded in Bar, That the Grandfather of the Demandant levyed a Fine, *ſur Conuſans de droit come ceo, &c.* with Proclamations of the Moyety of the ſaid Manor, by which Fine it was granted and rendred to the Grandfather and his Heirs, whoſe Eſtate he the Tenant in the Formedon had. The Demandant replyed, That at the time of the Fine levyed, and after, the Demandant was ſeiſed of the Land in his Demeſne, as of Fee. It was Reſolved by all the Juſtices, That the Demandant being Heir in tail againſt ſuch Fine levyed by his Auncеſtor, whoſe Heir he is, was Eſtopped to aver his ſeiſin and continuance thereof in a ſtranger at the time of the Fine levyed, nor to aver *quod partes finis nihil habuerunt.* Againſt which, it was objected. 1. That by the Statute of *Donis*, it is provided, *Quod finis ipſo jure ſit nullus.* 2. That the Statute of 27 E. 1. of Fines, doth not extend to Heirs in tail, but to Heirs in Fee; and that Iſſues in tail are not bound by Fines which ennure by way of Eſtopel. 3. That the ſaid Statute extends to Fines *rite levatis*, and that a Fine is not *rite levatus* when *partes finis nihil habuerunt.* To which it was anſwered and Reſolved, That the Iſſue in tail is not excepted in thoſe Statutes, and therefore is bound by the very Letter of the Acts. 2. That although the Iſſue in tail was not bound by any Fine by his Auncеſtor, until 4 H. 7. yet in ſuch Caſe, he was ouſted to aver, *quod partes finis nihil habuerunt* being privy as Heir to him who levyed the Fine firſt. And 3. That a Fine may be ſaid *rite levatus*, although *partes finis nihil habuerunt*, and it may be *rite levatus*, though it be a Fine meerly by concluſion. Mich. 29 Eliz. in C. B *Zouch* and *Bamfields* Caſe. *Leon.* 75. to 85. See the ſame Caſe. *Coo.* 3. Part, in the Caſe of Fines.

6. Debt upon an Obligation, the Condition was, That if the Obligor pay, or cauſe to be paid yearly to the Obligee, his Heirs, Executors, or Aſſigns, the Rent or ſum of 20 l. at *Michael.* and the *Annunciation*, according to the true intent and meaning of certain Articles of Agreement Indented, made between the parties of the ſame date, that then, &c. The Defendant ſhewed the Articles which were thus, *ſcil.* That the Plaintiff the Obligee had deviſed to the Defendant all ſuch Tenements in Y. of which he ſaid Plaintiff then had an Eſtate for life by Copy: *Copidies* excepe, according to the Cuſtome of the Mannor of Y. And pleaded, That at the time of the making of the ſaid Articles, The Plaintiff had not any Eſtate in Y. for Term of his life, or by Copy, *ſcil Copidies*, and demanded Judgment, if Action. It was holden by *Popham*, That the Defendant cannot plead, That there were not any ſuch Articles contrary to that which is ſpecially compriſed in the Condition. So if a man be

be bound to pay a Rent of 10 l. *per annum* reſerved upon an Indenture of Demiſe made of Lands in D. at ſuch a Feaſt: he cannot ſay, There was no ſuch Demiſe made, nor no ſuch rent reſerved, but is Eſtopped of the one and the other. And Hil. 3 Eliz. A man was bound to pay to A. or the Obligee all ſuch ſums of Mony as T. S. deceaſed, ſtood bound to pay by his Obligation to A. and of one R. P. to the uſe of the Children of ſuch a one, according to the Will of the ſaid party. In Debt brought, he ſaid, That T. S. was never bound in any ſuch writing to the ſaid A. and R. P. &c. to pay *pro uſu filiorum*. It was Reſolved by the Court, to be no good bar, becauſe he is Eſtopped to deny the ſpecial matter, which is matter in writing, and not matter in fact. Mich. 39 Eliz. in B. R. *Strowd* and *Willis*'s Caſe. *Poph.* 114. 115.

7. Tenant for life, and he in the Remainder, joyn in a Leaſe for years by Deed Indented, the Leſſee is ejected, and brings an *Ejectione firme*, and declares upon the Leaſe of Tenant for life, and he in the Remainder. It was adjudged in that Caſe againſt the Plaintiff, for it is only the Leaſe of Tenant for life during his life, and the Indenture cannot be any Eſtoppel, becauſe that an Intereſt paſſeth from both; and when an Intereſt paſſeth from the party, it cannot be an Eſtoppel againſt him. Hill. 44 Eliz. in C. B. *Ellis* and *Chowns* Caſe. See *Cook* 1. Part, *Inſtitutes*, 45, 46. acc.

8. Note by *Hobart* Chief Juſtice, That warranties and Eſtoppells do alwayes diſcend upon the Heirs general, as being to ſimple Heirs. If there be a Warrantor, and he hath Lands in Gavel-kind, the eldeſt Son ſhall be vouched alone, but the Tenants may alſo vouch the others for the Poſſeſſion. 32 E. 3. tit. Voucher, 94. that the Heir general ſhall take advantage of ſuch Warranty, and no other except he come in as vouched by Poſſeſſion with the true Heir. Alſo Eſtoppels fall upon the Heirs at Common-Law. And the Daughter which comes in by *Poſſeſſio fratris*, ſhall eſcape an Eſtoppel of the Father. If I convey Lands which I have on the part of the Mother, or in Burrough Engliſh, unto J. S. and his Heirs, without conſideration, the uſe ſhall be void, and ſo the Land ſhall return again to me and my Heirs, on the part of the Mother, or in Burrough-Engliſh as before, for the Law doth conſtrue the uſe in the ſame eſtate and quality as the Land is. But if I do declare the uſe to me and my Heirs, and upon ſuch a Feoffment, reſerve a Rent to me and my Heirs, it ſhall go to my Heirs at Common-Law, for it is not within the Cuſtome, but is a new thing divided from the Land it ſelf. Hill. 10 Jac. in C. B. in *Cunden* and *Clarks* Caſe. *Hob.* 31.

9. In Treſpaſs for breaking his Cloſe, the Defendant pleaded, That before this, he had brought an *Ejectione firme* againſt the Plaintiff, and recovered, and had Execution, Judgment if Action. It was holden by the Court, That the ſame was a good bar, and that the Concluſion of the Plea was good, Judgment if Action, without relying upon the Eſtoppel. Mich. 32 Eliz. in C. B. *Kempton* and *Coopers* Caſe. *Leon.* 313.

10. A. Tenant for life of a Mannor, the Remainder to B. his Siſter of two parts thereof for her life, the Remainder of the third part to his ſaid Siſter, and the Heirs of her body, the Remainder over. B. the Siſter by Indenture, enrolled, bargained, and ſold to A. all her moyety, part and parcel of the ſaid Mannor. A. afterwards ſuffers a Recovery of the Moyety of the ſaid Mannor with voucher of B. It was held in this Caſe, amongſt other points. 1. That it was a good Recovery of the entire third part, and not of the moyety of the third part. 2. That if one hath intereſt only in a third part of a Mannor, and ſuffers a Recovery of the moyety. It is good for the third part. 3. That whereas one makes a Leaſe for years by Indenture, and hath nothing in the Land, and afterwards purchaſeth the Land, and allieneth it, although it be a good Leaſe by way of Eſtoppel againſt him, and his allienee by way of pleading, yet it ſhall not bind the Jury, but they may find the truth; and if they find the truth, the Court ſhall adjudg it to be a void Leaſe. Paſc. 4 Car. in C. B. *Iſeham* and *Morrices* Caſe. *Cro.* 1. Part, 77.

11. In Covenant the Plaintiff declared, That the Defendant by Indenture, demiſed and granted the Lands to him for 20 years, and that J. S. entred upon him, and evicted him by a rightful Title. The Defendant pleaded a plea with an Inducement to a Traverſe, *abſq; hoc*, that it was paſſed by vertue of a Leaſe. It was Reſolved by the Juſtices in this Caſe, that upon the words (Demiſe and Grant) without any other words, Covenant did well lye, and the Leaſe by Eſtoppel is a good Leaſe to ground ſuch Action upon, upon an Eviction. And that the bar with a traverſe, that he was not poſſeſſed by vertue of a Leaſe, was no plea, againſt the Leaſe by Indenture, which is an Eſtoppel. Tr. 3 Jac. in B. R. *Style* and *Hennings* Caſe. *Cro.* 2. Part, 73.

12. In Dower, the Tenant pleaded, *Ne unq; ſeiſi que* Dower: The Wife ſaid, that her Husband made a Leaſe for life by Deed Indented, long time before the Coverture, ſaving the Reverſion to himſelf, and demanded Judgment againſt the Deed: and it was holden a good plea, though a ſtranger to the Deed. As if a man make a Leaſe for life, and afterwards grants the Reverſion by Fine, who bringeth a *Quid juris clamat* againſt Tenant for life, who ſaith, that the Grantor had nothing in the Tenements; The Grantee may ſay, That the Leaſe

Leaſe was made by Indenture ſhewed, who Granted the Reverſion, Judgment, &c. Mich. 3 H. 4. 6. acc.

13. In an Aſſiſe, the Tenant ſaid, That the Land was parcel of the Mannor of B. which was Auncient Demeſne; and a Fine was pleaded betwixt the Plaintiff and the Tenant of the Land in the Kings Court. It was the Opinion of the Court, That the ſame ſhould bind the Tenant, although there was no tranſmutation of poſſeſſion, becauſe it is a Judgment which makes the Land Frank-Fee; but the Lord, and a ſtranger, are not bound by it; And in the principal Caſe, the Lord was one of the Defendants, and becauſe he pleaded by Baylie, and did not take the Tenancy upon him, It was holden, That the ſame ſhould not Eſtop him in a Writ of Diſceit brought to reverſe the Fine, to make it Auncient Demeſne again. See 21 E. 3. Auncient Demeſne 17.

14. In an Aſſiſe, one accepted the Tenancy upon him, and ſaid that the Land is holden of E. as of his Mannor of B. which Mannor is Auncient Demeſne, and hath bin impleaded by Writ of *Droit*-Cloſe, time out of mind, &c. and pleaded to the Juriſdiction of the Court. The Plaintiff ſaid, That the Land was pleadable at the Common-Law, time out of mind, &c. without that, it had bin pleadable within the Mannor. The Tenant maintained, That the Land was holden of the Mannor which is Auncient Demeſne. It was holden by the Court, That the Defendants plea was not good, for it ſhall not be intended, that the Land is of other condition then the Mannor is, for it cannot be Frank-Fee, without ſpecial matter ſhewed, as by Fine, Feoffment, or the Kings Charter. And in a Writ of *Droit*-Cloſe brought in the Mannor, the Tenant ſhall not remove the Plea upon a ſurmiſe, that the Land is pleadable at the Common-Law, without ſhewing ſpecial matter, which may be tryed by Record, or by Jury. See 3 H. 6. 17. Auncient Demeſne, 2.

15. In a Writ of falſe Judgment, the falſe Judgment was Aſſigned, becauſe the Demandant brought a Writ of *Droit*-Cloſe in the Court of the Lord, in which the Plaintiff recovered and ſued Execution, and he ſaid, that the Land was holden by the Rod, and the Freehold in the Lord, in which Caſe he ought to have ſued by Bill, and not by Writ. It was holden, That the ſame cannot be reverſed by Error, for that thereby the Tenant ſhould be reſtored to the Freehold which he loſt not, and ſo deveſt the Freehold out of the Lord, when he himſelf had ſhewed that the Freehold was in the Lord, ſo as he cannot have falſe Judgment. For although he hath the Inheritance according to the Cuſtome of the Mannor, yet the Freehold is in the Lord, which is proved in this, That when the Tenant will allien his Land, he ought to ſurrender the ſame into the hands of the Lord in Court, but of other Lands it ſhall not be ſo, for that they paſs by Livery to the Feoffee. And the uſe to ſue for theſe Lands by Writ of Right-cloſe, is not good, but by Bill. H. 14 H. 4. 34. acc.

16. A. and B. were joyntly and ſeverally bound in an Obligation to J. S. who brought Debt againſt both: and afterwards J. S. entred a *Retrait* againſt B. It was ſaid, That it was a diſcharge of A. becauſe it amounteth to a Releaſe. But it was holden, That it was not a Releaſe, but *Quaſi* a Releaſe, and goeth only by way of Eſtoppel, and becauſe it is but in the nature of an Eſtoppel, the other ſhall not take advantage of it. Paſc. 17 Car. in B. R. *Pays* and *Dennis*'s Caſe.

17. If an Enfant at full age maketh a defeaſance of an Obligation made by him within age, he ſhall not be Eſtopped to avoid it by way of Enfancy. So it is of an Obligation made by Durreſſe; And afterwards a Defeaſance is made by Indenture, the ſame ſhall not Eſtop the party to ſay, that it was made by Durreſſe. 35 H. 6. acc.

18. Note, In every Eſtoppel, privity is required, for it ought to be reciprocal, *ſcil.* to bind both parties; and therefore regularly, a ſtranger ſhall never take advantage, nor be bound by an Eſtoppel. But privies in bloud, as the Heir; Privies in Eſtate, as the Feoffee, Leſſee, &c. Privies in Law, as the Lord by Eſcheat; Tenant by the Curteſy, Tenant in Dower, the Incumbent of a Benefice, and others that come under by Act of Law, or in the Poſt, ſhall be bound and take advantage of Eſtoppels. *Coo.* 1. Part, *Inſtitutes*, 352.

19. Concerning Eſtoppels, Note theſe Rules. 1. Eſtoppels ought to be reciprocal, and bind both parties, and all privies in bloud, eſtate, and in Law ſhall take advantage, and be bound by Eſtoppells. 2. An Eſtoppell ought to be certain to every intent, and ſhall not be taken by argument, or reference. 3. Every Eſtoppel ought to be a preciſe affirmative of that which maketh the Eſtoppel. 4. A matter alledged, which is not traverſeable, nor material, ſhall not Eſtop. 5. A man ſhall not be Eſtopped by his acceptance before his title accreweth. 6. Eſtoppel againſt Eſtoppel ſhall put the matter at large. 7. Matter alledged by way of ſuppoſal, in Counts and Declaration, do not conclude after Non ſuit, but contrary after Judgment. 8. When the truth is apparent in the Record, there the adverſe party ſhall not be Eſtopped to take advantage of the truth. 9. When the Record of the Eſtoppel runs unto the diſability or legitimation of the party, there all ſtrangers ſhall take advantage of that Record, as of Outlawry, Excommengement, Profeſſion, Baſtardy, Mulierity &c. But of a Record concerning the Name, Quality,

or

or addition of the party, no ſtranger ſhall take advantage of it, or be bound by it. See *Coo.* 1. Part, *Inſtitutes* 352. for theſe Rules.

Eſtovers.

1. ESTovers, is ſometimes taken for allowance in Meat, and Cloath. See Stat. of *Glouceſter.* 6 E. 1. cap. 4. If a man let his Land to Fee-ferm, or to find Eſtovers in meat, or in Cloath, amounting to the fourth part of the very value. Set *Raſtall*, tit. *Ceſſavit*, fol. 55. But commonly Eſtovers are taken to be an allowance, or a profit apprender, to be taken in Wood, or other things upon Lands; and under the name of Eſtovers, are comprehended, Housbote, Ploughbote, Fireboote, Cartboote, Hedgboote, &c.

2. If a man hath reaſonable Eſtovers in the Wood of another to be taken by view and delivery of the Baily of the Manor; If he taketh the Eſtovers without view, or delivery, he is a Treſpaſſor, although he taketh leſs then he ought to have by the delivery of the Baily. But if a man demandeth his Eſtovers, and the owner of the Wood, or his Baily, will not deliver them; he may have an Aſſiſe of the Eſtovers. See *Coo.* 5. Part, 25. in Sir *Thomas Palmers* Caſe.

3. At the Common-Law, a man could not have a Writ of Aſſiſe, *Quod diſſeiſivit eum de libero Eſtoverio.* See *Temps.* R. 2. Grants, 104. But now ſince the Statute of *Weſtm.* the words *de proficuo in certo loco capiendo*, do extend to Eſtovers, and a man ſhall now have an Aſſiſe of them, *de libero tenemento.* And ſee 15. Aſſ. 13. where the writ was general *de libero tenemento*, & to have reaſonable Eſtovers in 300 Acres of Wood, Sc. Houſebote, Heybote, &c. See *Coo.* 8. Part, 48. in *Jehu Webbs* Caſe.

4. If a man hath Common of Eſtovers in the Wood of another in Fee, or for life, and the owner of the Wood, or any other, cutteth down all the Wood, he who ought to have the Eſtovers, ſhall have an Aſſiſe, for that it is a Diſſeiſin of his Common. And if he hath but a Term in the Eſtovers, then he ſhall have but an Action upon the Caſe. See *Fitz. Nat. Br.* 158, 159. See *Coo.* 9. Part, 112. *Robert Maryes* Caſe. And ſee Hill. 5 Jac. in C. B. *Barnolph* and *Kippings* Caſe, there vouched accordingly; for the Action upon the Caſe.

5. If a man have Common of Eſtovers in my Wood, ſo many loads by the year certain, or elſe uncertain, as much as he ſhall ſpend in fires, or repairs of his houſe. If I ſtub up this Wood, ſo as there neither is, nor will be any Wood again; yet the party ſhall have an Aſſiſe from year to year of his Common of Eſtovers, for that the Inheritance of the Common of Eſtovers doth remain notwithſtanding that there are no Eſtovers; and he ſhall recover a Seiſin of thoſe Eſtovers which are not in being, and alſo damages, not according to that that it now yields, but according to the value that it yielded *Communibus annis*, though it were incertain. See by *Hobart* Juſtice. Mich. 10 Jac. in C. B. in *Cowper* and *Andrews* Caſe. *Hob.* 43.

6. If a man hath Eſtovers to his houſe, either by Grant, or by Preſcription, although he altereth the Rooms, or Chambers of his houſe, as to make a Parlour, where it was a Hall, or the Hall where the Parlour was, and the like alterations of Qualities, and not of the houſe it ſelf, and without making of new Chimneyes, by which no prejudice doth accrue to the Owner of the Wood, it is not a deſtroying of the Preſcription. And although he buildeth new Chimneyes, or maketh a new addition to his old houſe, by that he ſhall not loſe his Preſcription, but then he cannot imploy or ſpend any of the Eſtovers in the new Chimneyes, or in the part newly added. See *Cook* 4. Part, 87. in *Lutterells* Caſe.

7. If a man hath Common of Eſtovers to his houſe, and ſuffer his houſe to fall down, he cannot now claim the Eſtovers. And if he bring an Aſſiſe of the Eſtovers, the Defendant in this Caſe may plead, *Nul tort, nul diſſeiſin*; and the Plaintiff ſhall not have Judgment with a *ceſſat executio* till he hath re-edified his houſe; but the Plaintiff ſhall be barred; for at the time of the Action brought, he had no right of Eſtovers, but yet the ſame is not a perpetual bar, for the Eſtovers are only ſuſpended: And if he re-edify his houſe in the ſame place, he ſhall have his Eſtovers again. *Coo.* 4. Part, *Lutterells* Caſe, acc. And ſo if he had pulled down his houſe, and built it up again, *Tamen Quære.* If he bring an Aſſiſe, or *Quod permittat* for his Eſtovers where his houſe is down, and Judgment be paſſed againſt him, if he ſhall not be barred finally. *Hob.* 39, 40.

8. In Treſpaſs brought by a Copyholder: It was alledged, That the Cuſtome of the Manor of A. was, That all Copyholders within the Manor have uſed to take Wood for houſebote, heybote, *et pro ſigno Combuſtibili in dicto Tenemento*; and that ſufficient Wood was not left upon the Tenement for Houſebote; and that thereupon he cut down an Oak, and the Lord came and took it, and carried it away, for which the Plaintiff being a Copyholder, brought Treſpaſs againſt the Lord. In that Caſe it was Reſolved by the whole Court, That of Common right, without a Cuſtome or Preſcription, Trees growing upon the Copyhold Lands, do belong to the Copyholder for reparation, and that he

may take them to that purpoſe, without alledging a Cuſtome. 2. Reſolved, That the Lord cannot take all the Trees upon the Copyhold, without leaving ſufficient for the Copyholder, if there be not a ſpecial Cuſtome ſo to do. 3. That if a Copyholder hath uſed by Cuſtome to take Trees for reparation of his Copyhold; that if he cutteth Trees to that purpoſe, and the Lord taketh away the Trees. That Treſpaſs lyeth by the Copyholder againſt the Lord. 4. That a Preſcription, that the Tenants may take Wood *pro ligno combuſtibili* in their Tenements, is a good Preſcription. Paſc. 8 Jac. in C. B. *Heyden* and *Smiths* Caſe. *Godbolt.* 173. See *Brownl.* 2. Part, 329. the ſame Caſe, acc.

9. In Treſpaſs for cutting of Trees, the Defendant juſtified by Preſcription to have Eſtovers for repairing of the houſes, and for the building of new houſes upon the Land. It was alledged, That the Preſcription to have Eſtovers for the building of new houſes, was unreaſonable. But it was the Opinion of the Court, That the Preſcription was good: For that one may Grant ſuch Eſtovers at this day; and by the ſame reaſon, there may be a Preſcription for them, although it was objected, that then he might cut down all the Wood, and deſtroy it; but notwithſtanding, It was adjudged for the Defendant. Paſc. 2 Jac. in B. R. *Cro.* 2. Part, 33. The Counteſs of *Arundell* and *Steers* Caſe.

10. If Eſtovers be granted to be burnt in ſuch a houſe, the Eſtovers ſhall go to him that hath the houſe, by whatſoever title he hath it, becauſe the one is an inſeperable incident to the other, 12 Eliz. in C. B. adjudged acc. See *Finch.* 78. acc. And ſee Trin. 15 Jac. in the Common-Pleas. It was adjudged, That if I have Eſtovers in Land, and cut down the Eſtovers, and a ſtranger taketh away the Eſtovers: I ſhall have and maintain an Action of Treſpaſs againſt him that taketh them away, although he have Common of Eſtovers there alſo. *Spilmans* Caſe. *Brownl.* 1. Part, 44. acc.

11. The King Granted *Turbariam ſuam* in D. to J. S. rendring rent upon a Leaſe made for 21 years, the Leſſee imployed part of it in Arable Land, and left part of it in *Turbary*. Afterwards the Succeſſor King granted *totam illam Turbariam* demiſed to J. S. It was adjudged in that Caſe, That that paſſed only which was *Turbary*, and that the other part which was converted into Tillage, did not paſs. Mich. 23 Eliz. in C. B. *Farrington* and *Charnocks* Caſe. *Owen.* 67.

Eſtray *and* Waife.

1. *What ſhall be ſaid to be Eſtray; and what Waife; and in whom the property of them is, and where.*

1. ESTray is, when any Beaſt, Horſe, Mare, or other Cattel, is within any Lordſhip and Manner; and none knoweth who is the Owner thereof, then it ſhall be ſeiſed to the uſe of the King, or to the uſe of the Lord of the Manner, who hath Eſtrayes, by grant of the King, or by Preſcription. If the Owner of the Cattel commeth within a year and a day, and makes claim thereunto, he ſhall have his Cattel again, otherwiſe the property thereof ſhall be in the King, or in the Lord, after Proclamation made according to the Law.

2. Waife is, Where a Thief ſtealeth goods, and in purſuit of him, with Hue-and-Cry, leaveth the goods behind; then the Kings Officer, or the Bayliff of the Lord of the Mannor, who hath Waife by Grant or Preſcription, may ſeize the goods to the Kings, or the Lords uſe, who may keep them as their own goods, unleſs the Owner upon Freſh-ſuit, ſue an Appeal, or give Evidence againſt the party upon Endictment and Arraignment of him, in which Caſes he ſhall have reſtitution of his goods. And ſo if upon purſuit of a Fellon with Hue-and-Cry, he leaveth his own goods; they ſhall be forfeited in like manner as goods which are ſtollen.

3. If a man hath Cattel, as Eſtray for three Quarters of the year, and afterwards they Eſtray out of his Lordſhip, and another taketh and ſeizeth the Cattel. The Lord of the firſt Mannor cannot retake them, becauſe he hath not a property in them untill he hath kept them a year and a day, and Proclamation be made in the two next Towns on two Market days, the one in the one Town, and the other in the other, 33 H. 6. 50.

4. In Treſpaſs, the Defendant alledged, That the King had Eſtrayes within the Forreſt of L. and that he as the Kings Officer ſeized the Cattel as Eſtray, to the uſe of the King. *Kirton* took exception to the Plea, becauſe it was not ſhewed, that he was ſeiſed of them a year and a day, nor that it was Cryed in the Church and Market. And although it was in the Caſe of the King, yet the Defendant was enforced ſo to plead. Otherwiſe he hath not gained any property in the Cattel. 39 E. 3. 3. It is there made a Quære, if he ſhall have his Cattel again upon Petition ſued to the King.

5. In

5. In Treſpaſs for taking of his Cattel, the Defendant ſhewed, that he was Sheriff of the County of S. and that he as the Kings Bayliff, ſeiſed the Cattel, as Eſtray to the Kings uſe, and made Proclamation at the two next Towns and Markets, and none came to demand the Cattel, and prayed in aid of the King. It is not determined there, if he ſhall have aid or not, 14 H. 6. 5. And ſee 31 E. 3. *Fitz.* tit. *Eſtray*, 4. That a man cannot entitle himſelf to an Eſtray, untill the year and day be paſt without claim of any one.

6. In a Franchiſe where the Lord had Waife: A Thief ſtole ſheep, and being ſuſpected by ſtrangers, he fled and waived the ſheep, within the Lordſhip; and the ſtrangers purſued him, but could not apprehend him, and in the mean time, the ſheep eſtrayed into the Lordſhip of another, who had eſtrayes; where they were ſeiſed by the ſaid Lords Bayliff, as Eſtrayes. It was the Opinion of *Catlyn* Juſtice, That by the Waiver, the property of the goods was in the King, without ſeizure by his Prerogative, and that for want of ſeizure, the property of the goods was not in the firſt Lord, where the goods was firſt waived. Trin. 16 Eliz. *Dyer*, 338.

7. Wreck, Jetſam, Flotſam, and Lagan, upon the Sea, belong to the King, becauſe when no man can claim property in goods, the King ſhall have them by his Prerogative; and Wreck is a thing *nullius in bonis*: and Wreck is Eſtray upon the Sea, comming to Land, as Eſtray of Beaſts is upon the Land, comming within any priviledged place, in both which Caſes, the Law giveth a year and a day to claim them. *Co.* 5. Part, Sir *Hen. Conſtables* Caſe. 108.

8. A Swan may be an Eſtray, and ſo cannot any other Fowl be. *Cook* 7. Part, 17. in the Caſe of Swans.

9. If there be two Tenants in Common of a Manor, to which Waife and Eſtray do belong, and an Eſtray doth happen, and the one takes the Eſtray, the other hath no remedy, but to re-take it: But if by Preſcription the one is to have the firſt Eſtray, and the other the ſecond Eſtray, there an Action lyeth if the one taketh that which doth belong to the other. *Cook* 1. Part, *Inſtitutes*, 200.

2. *How Eſtrayes are to be uſed; and where the working or uſing of any Eſtray, ſhall give cauſe of Action; Where not.*

1. IN Treſpaſs brought, the Plaintiff declared, That the Defendant with force and Arms, took his Mare, and did ſo ſtrictly fetter her to a Gelding, that by that fettering, the Mare did dye: The Defendant juſtified the taking of the Mare as a ſtray, but did not alleeg that ſhe came as an Eſtray; and therefore the Plea was holden inſufficient; and in that Court and cauſe: It was holden, That the Defendants tying the Eſtray to the Gelding, was not lawful. In that Caſe, it was further agreed, That if I take a Horſe as an Eſtray, and another taketh it from me, the Action lyeth not by the Owner againſt the firſt taker, becauſe the firſt taker hath deveſted the property out of the Owner. Alſo if my Eſtray doth Eſtray out of my Mannor, and goeth into another Mannor, before the year be ended, I cannot enter into the other Mannor to fetch out the Eſtray. Trin. 8 Jac. in C. B. *Harvy* and *Blocklock's* Caſe. *Brownlow.* 1. Part, 236.

2. Treſpaſs for taking and chaſing a Colt, and Fettering of him; with a *continuando* as to the Fettering. The Defendant pleaded, That the Earl of *Hartford* had the Eſtrays within the Mannor; And that the Tythingman for the time being, within the Mannor, ſeiſed the Eſtrays, and proclaimed them at the next Market or Fair, and kept them, till they were claimed or forfeited; And that he as Tythingman ſeiſed the Colt as Eſtray, and becauſe this Colt was ſo fierce that he could not be kept in Paſture, he fettered him, and kept him in his Paſture within the Mannor, for the ſpace of two Weeks, and that the Plaintiff claimed him, and had him delivered. The Queſtion was, If he which hath Eſtrays or Waifes, ſeize an Eſtray which is *ferox*, if he may fetter him. In this Caſe, it was agreed. 1. That if an Eſtray comes into Lands, and is there damage-feaſant, the party may chaſe him out of his ground. 2. That till the Lord or his Bayliff ſeize the Eſtray, it ſhall not be ſaid an Eſtray; but when ſeizure is made, property commenceth thereby, and the Lord is chargeable againſt all others for the Treſpaſs the Eſtray doth: And if the Eſtray within the year, eſtray out of the Mannor, the Lord may chaſe back the Eſtray; but if he be ſeized by another Lord, then the firſt hath loſt his poſſibility of gaining property, and the other Lord ought to proclaim it *de novo*. 3. After ſeizure, if the Lord by negligence ſuffer the Eſtray

to Eſcape, which can never be found; the Owner may have Trover and Converſion againſt the Lord. Quære of that. 4. The Lord cannot work an Eſtray, but may keep him in his Stable. 5. That he may fetter him as he doth his own Horſe. It was adjudged for the Defendant. Hill. 22 Jac. in C. B. *Pleadall* and *Goſmores* Caſe. *Winch.* 124. *Hutton* 67. the ſame Caſe.

3. In a Replevin for taking a Mare and a Colt; The Defendant avowed, for that he as Bayliff to J. S. ſeized them as Eſtrays, and proclaimed them in the three next Market Towns; and ſhewed, That the Plaintiff claimed them as his own, and becauſe he would not prove that they did belong unto him, nor pay him for their meat, he refuſed to deliver them; upon which it was demurred. In this Caſe, it was Reſolved. 1. That Eſtrays are *animalia vagantia*; and when there is none that can make title to them, the Law gives them to the King. 2. That if the Owner can make any reaſonable proof, as if he ſhew the Marks, &c. it is ſufficient, and the party at his peril is to deliver to him the Eſtray. 3. That it is not ſufficient to keep the Eſtray within the Mannor, but it ought to be in a place parcel of the Mannor. 4. That an Eſtray ought not to be wrought, but the party muſt agree for his meat. 5. The Proclamation ought to expreſs of what kind the Eſtray is, whether Sheep, Ox, Hog, &c. Paſc. 5 Jac. in C. B. *Taylor* and *Jones*'s Caſe. *Godbolt.* 150.

4. Treſpaſs for taking and leading away a Gelding. The Defendant juſtified as Bayliff of the Kings Mannor of D. for that he had Waiſes and Eſtrays; and that he took the Gelding as Eſtray, and kept him, till afterwards the Plaintiff re-took him. The Plaintiff replyed, That before the reſeizure, the Defendant laboured the Gelding, riding upon him, and drawing with him; whereby he was damnified. It was ſaid, that the uſing of a ſtray, ſo as he doth not abuſe it, was no cauſe of Action, becauſe he hath a property in it, but a Diſtreſs may not be uſed, becauſe he hath it only by Law as a Gage. But it was holden by the Court, That there is no difference in this Caſe, and the caſe of a Diſtreſs, and the uſer of the Eſtray was an abuſer thereof, for that it is not lawful in any manner to uſe it, but for the benefit of the Owner, as to milk Milch-kine, becauſe otherwiſe they would be ſpoiled, but the uſing of a ſtray-horſe by riding or drawing, is tortious. It was adjudged for the Plaintiff. Hill. 3 Jac. in the Kings Bench. *Barſhaw* and *Gowards* Caſe. *Cro.* 2. Part, 147.

Eſtrepement.

1. A Writ of Eſtrepement is an Original Writ, which a man ſhall have in real Actions, as in a Formedon, *Dum fuit infra Etatem*, Aſſiſe, Writ of Right, depending the Action, wherein he ſhall not recover damages, which is in the nature of a Prohibition, Inhibiting the Tenant that he do not Waſte, or ſtrip depending the Action, and this Writ is properly before Judgment, but it may be in ſome Caſes aſwell after Judgment, as before, and before Execution ſued: And varience in this Writ from the firſt Record in recital of the Name, Town, or the like, ſhall not abate the Writ. *Cro.* 5. Part, 115. *Faliant's* Caſe.

2. In this Writ the party ſhall not have his age, for that it is in the nature of Treſpaſs, and no proceſs of Outlawry lyeth in it, becauſe it is a *Precip*, 3 H. 6. 16. And in an Action of Waſte, the words of the Writ run thus, *viz.* being directed to the Sheriff. *Tibi præcipimus, quod ad Meſſuagium prædictum perſonaliter accedens, totaliter ordinari facias. Quod vaſtum ſeu Eſtrepamentum de eodem Meſſuagio contra formam Statuti, ſcil.* the Statute of *Glouceſter*, *non fiat, pendente placito indiſcuſſ.* See *Fitz. Nat. Br.* 60.

3. A Writ of Eſtrepement was brought againſt Husband and Wife, after Judgment in a *Quid juris clamat*, and before Execution was Awarded. See 15 Eliz. *Dyer*, 325. *Bold* and *Newport's* Caſe.

4. If a Formedon be brought of a Mannor, and after the Eſtrepement is brought againſt the Tenant, a Tenancy doth Eſcheat, and the Tenant doth commit Waſte in that Mannor, he ſhall be puniſhed for the ſame; and yet it is not demanded by the Writ, but ſervices were demanded the Writ in the name of the Mannor, and the Land commeth in lieu of the Services. See 4 E. 3. br. *Eſtrepement.* 12. *Fitz. Nat. Br.* 144.

5. Partition was brought between Coparceners, and depending the Writ, the Tenant made Waſte. It was moved to the Court, to grant a Writ of Eſtrepement. It was the Opinion of the Court, That where the party is to diſprove the Intereſt of the Tenant, there a Writ of Eſtrepement will lye; but in this Caſe, he doth confeſs an equal intereſt with him, and therefore Eſtrepement will not lye. Paſc. 29 Eliz. in C. B. *Goldesbr.* 50.

6. One intruded after the death of Tenant for life, and dyed ſeiſed, and the Land diſcended to his Heir, and a Writ of Intruſion was brought in the

Per

Per against the Heir. A Writ of Eſtrepement was prayed againſt the Tenant: And upon conſideration had of the Statute of *Gloucester*, cap. 1. in the end of the Statute. The Court was of Opinion, That if the Writ be in the *Per*, then the Writ of Eſtrepement lyeth; but if it be not in the *Per*, then the Court doubted of it. Mich. 29 Eliz. in C. B. *Gosbolt*. 112.

7. In Waſte brought againſt Husband and Wife; and a Writ of Eſtrepement for the Plaintiff directed to the Sheriff. It was Reſolved, 1. That a Writ of Eſtrepement lyeth in an Action of Waſte, aſwell at any time before Judgment, as after Judgment, and before Execution. 2. That by force of this Writ, the Sheriff may reſiſt thoſe that would do Waſte, and may impriſon the parties, and make a warrant to others ſo to do, and if it be needful, he may take *poſſe Comitatus* to help him. *Cook* 5. Part, 115. *Fosambs* Caſe.

8. A Writ of Eſtrepement was awarded in an Action of Waſte, brought by the Earl of *Cumberland* againſt the Counteſs Dowager; by which Writ the Coroners were commanded to ſuffer no Waſte to be done in the Lands. It was moved to the Court, That the Dowagers people had done Waſte, after the Writ publiſhed and delivered to them. But becauſe the Writ was not immediately directed to the Counteſs and her ſervants, as it might have bin, and ſo it had bin an immediate contempt to the Court; the Court would not commit them to Priſon, eſpecially becauſe the Coroner himſelf was to provide againſt the Waſte by taking *poſſe Comitatus*, if there was no other remedy. Tr. 12 Jac. in C. B. The Earl of *Cumberland*, and the Counteſs Dowagers Caſe. *Hob.* 85.

Evidence.

1. *What ſhall be good Evidence, given to the Enqueſt, to maintain the Iſſue joyned in Actions at Law; What not.*

1. IN Debt againſt Executors of A. they were at Iſſue; upon fully Adminiſtred pleaded, the Plaintiff gave evidence, that they had goods in their hands. The Defendants pleaded, That they redeemed part of them with their own mony, which goods were pledged by the Teſtator to the full value, and for the reſidue that they had paid for the Teſtator ſo much, to the full value. It was adjudged a good evidence to maintain the Iſſue, for a man ſhall have recompence for that which he hath lawfully paid. Mich. 6 H. 8. *Dyer*, 2. But ſee, Paſc. 29 H. 8. where, upon ſuch Iſſue of fully adminiſtred, the Executors gave in evidence, payment of Debts upon Contracts; the ſame was adjudged to be no good evidence, to prove the Iſſue upon debt brought upon an Obligation, becauſe debts upon Obligations or ſpecialties, ſhall be paid before Debts upon Contract. *Dyer*, 32.

2. In Debt againſt Executors, they were at Iſſue upon Aſſetts in their hands the day of the Action brought, and the Plaintiff gave in evidence, that the ſame day 100 l. was paid to the Executors, and delivered to them by the Order of the Prerogative Court, which mony the ſame day, they paid preſently by the Orde of the ſame Court to a Creditor of the Teſtator. It was holden, That the ſame was no good evidence; but it was ſaid, That peradventure upon pleading of the eſpecial matter, it had not bin Aſſetts. Mich. 4 Eliz. *Dyer*, 208.

3. In Debt againſt an Executor, the Jury found, that the Teſtator dyed in *Ireland*. And in Debt, upon fully Adminiſtred pleaded, the Plaintiff gave in Evidence, Aſſets at *Exeter*, and the Jury found, that the Defendant took the goods of the Teſtator in *Ireland*, and adminiſtred them to the full value of the Debt, and that they did not adminiſter any goods of the Inteſtate, within the Kingdome of *England*. It was objected, that the Jury could not find tranſitory things in another County, or in another Realm. But it was Reſolved. 1. That the Jury might find Aſſetts in any County, becauſe they are things tranſitory. 2. Reſolved, That the Jury had found the ſubſtance of the Iſſue, *ſcil.* Aſſets, and the finding that they were beyond Sea, was but Surpluſage. *Cook* 6. Part, 46, 47. *Dowdales* Caſe. See 10 Eliz. *Dyer*, 271. And ſee Paſc. 15 Car. in B. R. the Earl of *Oxford* and *Waterhouſes* Caſe, adjudged acc. 28 H. 8. *Dyer*, 30. acc.

4. Debt againſt the Son and Heir upon an Obligation by his Father: The Defendant pleaded, Nothing by Diſcent. It was found, That before the Suit brought, the Defendant had made a Feoffment in Fee to defraud the Plaintiff of his Action; but this fraud was not pleaded. It was Reſolved, That the ſaid Fraud might be given in Evidence, and it is not needful that the Statute of 13 Eliz. of fraudulent conveyances be pleaded; becauſe the Statute ſaith, That the eſtate as to the Creditor ſhall be void. Mich. 33 Eliz. in B. R. *Cook* 5. Part, 60. *Gouthes* Caſe. See Trin. 11 Jac. in C. B. *Humberton* and *Howgill's* Caſe. *Hob.* 72. acc.

5. In Treſpaſs for taking away Timber, and the boughs of Trees felled; The Defendant pleaded as to the Timber, Not guilty, and to the Boughs, made a ſpecial Juſtification, That there is a Cuſtome within the Mannor of A, that when the Lord fells any Timber-Trees, that the Lord is to have the Timber,

Timber, and the poor Tenants *in boscagio parte Manerii* came out of mind, claimed to have the branches of the ſaid Trees for neceſſary Eſtovers to be burnt *in neceſſario fosali in terris et tenementis*. It was the Opinion of the Court, That the Cuſtome was not well expreſſed to have Eſtovers to burn *in terris et tenementis*: and therefore whereas the Defendant did entitle himſelf to a houſe and Land, and gave evidence that the Cuſtome did extend to Lands. It was holden, That the evidence did not maintain the Iſſue. Mich. 11 Jac. in C. B. The Biſhop of *Chicheſter* and *Strodwick*'s Caſe. *Godbolt.* 234, 235.

6. Note, It was the Opinion of all the Juſtices in B. R. That a Defendants anſwer in Engliſh, is a good Evidence to be given to a Jury againſt the Defendant himſelf, but it is no good Evidence againſt other parties; And if the Defendants Anſwer be read to the Jury, it is not binding to the Jury, but it may be read to them by the aſſent of the parties. Paſc. 21 Jac. in B. R. *Godbolt.* 326.

7. In Treſpaſs for breaking his Cloſe; They were at Iſſue, If the Lord of the Mannor granted the ſaid Lands *per Copiam rotulorum Curiæ manerii prædict. ſecundum Conſuetudinem manerii prædict.* And it was given in Evidence, That within the ſaid Mannor there were divers Cuſtomary Lands, and that the Lord now of late at his Court of the ſaid Mannor, granted the Land, &c. *per Copiam rotulorum Curiæ*, where it was never granted by Copy before. It was holden by the Court, That the Jury are bound to find, *Dominus non conceſſit.* For notwithſtanding that *Dominus de facto conceſſit per Copiam rotulorum Curiæ*; yet *non conceſſit ſecundum Conſuetudinem Manerii prædict.* for the ſaid Land was not Cuſtomary, nor was it Demiſeable, for the Cuſtome had not taken hold of it. Paſc. 29 Eliz. in C. B. *Kemp* and *Carter*'s Caſe. *Leon.* 55.

8. In a Writ of Forger of falſe Deeds, the Plaintiff counted upon the forger of an Indenture *in quo continetur, quod quidam Abbas Monaſterii de* Glouceſter *demiſit Scitum Manerii de R. et terras dominicales, &c.* The Defendant pleaded, Not guilty. It was given in Evidence on the Plaintiffs part, a Leaſe ſuppoſed to be made and forged, containing that the ſaid Abbot Leaſed the ſaid *Scite*, and all the Demeſnes of the ſaid Mannor *exceptis duabus ſeparalibus clauſuris, &c. vocat.* It was moved that this Evidence doth not maintain the Iſſue. But it was holden, that the Evidence was good enough, for it is not neceſſary to conſtrue *terras dominicales, omnes terras dominicales*; for the Lands not excepted, are *terræ dominicales*, and ſo the Count ſatisfied by that Evidence. Hill. 30 Eliz. in C. B. *Atkins* and *Hales* Caſe. *Leon.* 139, 140.

9. Debt againſt L. Executor of A. for Rent reſerved upon a Leaſe for years made by the Teſtat. The Defendant pleaded fully Adminiſtred; and upon the Evidence it appeared, That the ſaid A. made the Defendant his Executor, and that he meddled with the Teſtators goods and adminiſtred; and then refuſed in Court, and Adminiſtration was committed to B. and that the Teſtators goods came to 1000 l. For the Defendant it was given in Evidence, That he himſelf had paid certain Debts, and that divers perſons had recovered againſt the Adminiſtrator, ſeveral ſums of mony, amounting to 1000 l. *et ultra.* It was a Queſtion, if that Evidence did maintain the Iſſue, becauſe the Defendant had pleaded, *pleinment adminiſtravit*, which implyes an Adminiſtration by himſelf; and upon the Evidence, it appeared that the moſt of the Teſtators goods were adminiſtred by the Adminiſtrators. It was ſaid by *Periam* Juſtice, That if an Adminiſtrator (who is in truth but a ſtranger) pay Debts with the goods of the Teſtator, without commandment of the Executor, the ſame is not an Adminiſtration, and the Executor cannot give ſuch matter in Evidence to prove his plea of fully Adminiſtred. 2. That in the principal Caſe, the Defendant is the very Executor, and he hath Adminiſtred, in which caſe he cannot refuſe; ſo the Adminiſtration is granted without cauſe, and what the Adminiſtrator did, was without warrant; and therefore it was no Adminiſtration to prove the Iſſue. Trin. 32 Eliz. in C. B. *Hawkins* and *Lawſe* Caſe. *Ben.* 134, 135.

10. Waſte was aſſigned in cutting and ſelling of 10 Oaks; and the truth was, that the Defendant had but ſhred and lopt the Oaks. The Opinion of the Court was, That he might plead, No Waſte done, and give the ſpecial matter in Evidence. Mich. 1. *Ma. Dyer*, 92.

11. Waſte for digging a trench in a Meadow: The Defendant pleaded, No Waſte; and it was found, that he made the trench by which the Land was better. Quære if it were good Evidence, or he ought to have pleaded it. Hill. 20 Eliz. *Dyer*, 361. See 12 H. 8. 1.

12. Note, If one commit Waſte, and before any Action brought, the Leſſee doth repair, &c. And afterwards the Leſſee brings an Action of Waſte, there the Action is not maintainable, becauſe the Jurors ought to view the Waſte. But in ſuch Caſe, the Defendant cannot plead, No Waſte done, but he ought to plead the ſpecial matter, and not give the ſame in Evidence. *Cook* 5. Part, 119. in *Whelpdales* Caſe. See 10 Eliz. *Dyer*, 276.

13. In *Rectione firmæ*, the Defendant pleaded the Cuſtome of the Mannor to be, That the Widow of every Copyholder of Fee-ſimple, Fee-tail, or for life, had and enjoyed the Copyhold *pro termino vitæ ſuæ*; and the Cuſtome being traverſed, it

was

was given in Evidence in maintainance of the Cuſtome aforeſaid, That the Defendant claimed but a Widdows Eſtate: It was holden by the Court, That this Evidence did not maintain the Cuſtome before alledged, becauſe it was a leſſer eſtate, then the other Cuſtome, *ſcil. pro tempore vitæ*. Mich 2 Eliz. *Dyer*, 192. *Lynſey* and *Dixons* Caſe. See Paſc. 36 Eliz. in B. R. *Dowse* and *Hawkins* Caſe. *Cook* 4. Part, 30.

14. Note, upon Evidence to a Jury, upon traverſe of a Leaſe for years by word, *ſcil. abſq; hoc quod talis demiſit*. The Court doubted if he might ſay that the Leſſor had not any thing in the Land *tempore dimiſſionis*; but they conceived it is good by way of Evidence. For in a Formedon, if the Tenant traverſe, that the Donor had not any thing in the Land at the time of the gift, the ſame is not good, but he ſhall plead, *Non dedit, &c.* Paſc. 3. *Ma.* *Dyer*, 121.

15. Debt againſt one as Executor, the Defendant pleaded *ne unque Executor*, nor adminiſtred as Executer; the Plaintiff replyed, that he adminiſtred as Executor. For Evidence the Defendant ſhewed Letters of Adminiſtration committed to him, of the goods of the dead, for which he adminiſtred, and that before he did not adminiſter. It was the Opinion of the Court, It was good Evidence to maintain his Iſſue, for he adminiſtred as Adminiſtrator by Authority, and not of his own wrong. Mich. 14 Eliz. *Dyer*, 305.

16. A. endebted to B. by contract, and to C. upon an Obligation, dyed Inteſtate; C. entermedled with the goods, B. brought an Action of Debt againſt him as Executor, of his own wrong: C. *pendente lite*, takes forth Letters of Adminiſtration, and then pleads, that A. was endebted to him by Obligation, in 100 l. and that by vertue of the Letters of Adminiſtration, he did retain the goods of A. to the value of his Debt. The Queſtion was, Whether an Executor of his own wrong, might retain the goods of the Teſtator to ſatisfy his own Debt, or pay the Debt upon the contract. It was urged he could not plead this matter: and *Coo.* 5. Part, *Coulters* Caſe was vouched. But it was agreed by the Court, That he was a legal Adminiſtrator, and he might have retained the good if he had bin a Debtor, but in equal degree with the other, but in this Caſe he is a Debtor in a higher nature, for his Debt is by Bond, and the Law requires his Debt to be firſt ſatisfied; and the Adminiſtration hath purged the wrong which he did as Executor of his own wrongs. It is true, he ſhall not abate the Plaintiffs firſt Writ, by taking the Letters of Adminiſtration, but he may plead this plea in bar to his Action. It was adjudged for the Defendant. Tr. 1652. in B. R. *Williamſon* and *Norwiths* Caſe. *Styles* 337.

17. In Treſpaſs for breaking his Cloſe: The Defendant pleaded, That the place where the Treſpaſs was ſuppoſed, was his Freehold; the Plaintiff ſaid, it was his Freehold, and not the Freehold of the Defendant. In that Caſe, It was the Opinion of the Court, That if the Defendant hath ſix Acres in D. and the Plaintiff other ſix Acres, the Defendant cannot give Evidence that he did the Treſpaſs in his own Land; but it ſhall be intended that his meaning was, the ſix Acres of the Plaintiff, becauſe untill he giveth a name to the place where the Treſpaſs is done; the Plaintiff need not alledg a new Aſſignment, becauſe the Defendant hath not varied from the Plaintiff. Mich. 28 H. 8. *Dyer*, 23.

18. In a Replevin, the taking was ſuppoſed in K. The Defendant ſaid, that the place where is 40 Acres parcel of the Mannor of K. which is his Freehold, and avowed for damage-feaſant: The Plaintiff ſaid, that the place where is parcel of the Mannor of K. in K. and conveyed title to himſelf in that, *abſq; hoc* that the Mannor of K. *unde*, was the Freehold of the Defendant. It was the Opinion of the Juſtices, That the Plaintiff is Eſtopped to give Evidence, that the Defendant had not any Mannor of K. for the words *abſq; hoc*, and *unde*, imply he had ſuch a Mannor, but he ought to have taken it by proteſtation, that the Defendant had no ſuch Mannor of K. in K. *abſq; hoc*, that the 40 Acres was the Freehold of the Defendant. Paſc. 2 Eliz. *Dyer*, 183.

19. In Dower, the Iſſue was upon *nunq; ſeiſit que* Dower; for the Plaintiff, It was given in Evidence, that a Feoffment was made to the Husband in Fee. The Defendant would have given in Evidence, that long before the Feoffment; the Husband was ſeiſed to him and his firſt Wife in tail; and that afterwards he made a diſcontinuance, and took back an Eſtate in Fee, of which Eſtate he dyed ſeiſed, and the Heir was remitted. It was the Opinion of the Court, That this remitter given in Evidence to defeat the Eſtate of the Husband, could not be given in Evidence, but it ought to have bin pleaded: And ſo it is in Caſe of a Condition. Paſc. 30 H. 8. *Dyer*, 41.

20. Upon Iſſue joyned, If a Villain be regardant. It was the Opinion of the Court, That in Evidence given, that he is a Villain in groſs is no good title. Quære, becauſe the charge of the Jury is to enquire of the right of *Villinage*, *ſcil.* If he be Villain, or not. Paſc. 30 H. 8. *Dyer*, 48.

2. *Where*

2. *Where more or new Evidences may be given in an Attaint, or other Action, then was given in the first Action: And what writings and Records, ſhall be good Evidences, and the Jury ſhall have with them.*

1. NOte, It was agreed by the Juſtices, That the Plaintiff in Attaint ſhall not give more in Evidence, nor produce more Witneſſes, then he gave to the Petit Jury; but contrary of the Defendant, he may give more Evidence in affirmance of their firſt Judgment. Trin. 38 H. 8. *Dyer*, 53. See Paſc. 4 Eliz. *Dyer*, 212. in *Paramours* Caſe, acc.

2. In an Aſſiſe, Iſſue was taken, Whether Lands were contained in Letters Pattents, or not, which by the Common-Law were not contained, but by the Statute of 4 H. 8. were contained: The Juſtices of Aſſiſe would not ſuffer that Statute, being not pleaded, to be given in Evidence to the Jury; Whereupon they found, that the Land was not contained; and thereupon an Attaint was brought; and the Court would not ſuffer that Statute to be given in Evidence to the Grand Jury, which was not given in Evidence to the Petty Jury. 3. *Ma. Dyer*, 129. *Ibgrave* and *Heydon's* Caſe.

3. Note, It was ſaid and agreed by the Juſtices, That it is dangerous to ſuffer any, who by the Law in pleading ought to ſhew forth the Deed it ſelf to the Court upon the general Iſſue, to prove in Evidence to a Jury by Witneſſes, that there was ſuch a Deed, which they have heard, ſeen, or read, or to prove it by a Copy. For the imperfections in the Deed in ſuch Caſes, will not appear to the Court, or perhaps the Deed may be upon Condition, limitation, or with power of Revocation. But yet in great, and notorious extremities; as by caſualty of of Fire, that all his Evidences were burnt in his houſe, if the ſame ſhall appear to the Judges, they in favour of him, who hath ſo great a loſs by Fire, may ſuffer him upon the general Iſſue to prove the Deed in Evidence to the Jury by Witneſſes, that affliction be not added to affliction. *Co.* 10. Part, 92. in Dr. *Leyfields* Caſe.

4. In a Writ of Deceit brought for levying a Fine of Lands in Auncient Demeſne, the Iſſue was, Whether the Mannor of B. in *Northampton* were Auntient Demeſne, or not: The Book of Doomſday was brought into Court, and there ſhewed; whereby it appeared, that the Manner of *Bowden* in the County of *Leiceſter*, was Auncient Demeſne, but not ſuch the Manner of *Bowden* in the County of *Northampton*, and ſo the Plaintiff was barred. Trin. 15 Jac. in C. B. *Hob.* 188.

5. Note, by *Rolls* Chief Juſtice, there is a difference between pleading of a Record, and giving a Record in Evidence, If it be pleaded, it muſt be *ſub pede ſigilli*, or elſe the Judges cannot judg it: But if it be given in Evidence, although it be not *ſub pede ſigilli*, the Jury may find it, if they have other good matter to induce the ſhewing of it. Paſc. 23 Car. *White* and *Pinder's* Caſe. *Style*, 22.

6. In Debt, the Plaintiff declared, That A. was ſeiſed, and by Indenture bargained and ſold the Land to him in Fee, *Quæ quidem Indentura, poſt infra ſex menſes*, viz. 7. *No.* 7 Jac. *debito modo irrotulata, juxta formam Statuti.* It was the Opinion of the whole Court, That the Declaration was not good, becauſe it was not ſhewed in what Court the Deed was enrolled; for it ought to appear to the Court, that the Court may know whether it were duly enrolled; as alſo, that the party againſt whom it is pleaded, may know in what place to ſearch for it. Mich. 9 Jac. in B. R. *Warly* and *Purleys* Caſe. *Cro.* 2. Part, 291.

7. In a Writ of Right, If the Miſe be joyned upon the meer right: The Tenant to the Writ ſhall give in the firſt Evidence, for that the Tenant affirms, That he hath more right then the Demandant, and that ought firſt to be enquired of. And ſo it was adjudged in *Heydon* and *Ibgrave* Caſe, in the Common Pleas. And in *Norris* Caſe there alſo. See Trin. 28 Eliz. in C. B. *Goldsbr.* 23.

8. A Church Book being entred and made parcel of the Records, was given in Evidence and good. Trin. 39 Eliz. Viccary and *Farthings* Caſe. See Mich. 5 Jac. in B. R. *Hall* and *White's* Caſe *Brownl.* 1. Part, 207. acc.

Exchange.

1. What ſhall be ſaid a good Exchange; what not: And where it ſhall be void, for want of full execution: Where not.

EXchange is, where 2 men are ſeiſed of Lands in Fee, or other eſtate: and they by Deed Indented, exchange their Lands, ſo as every one of them ſhall have other Lands to him exchanged; either in Fee-ſimple, Fee-tail, or for life; the ſame is properly called an Exchange: and ſuch exchange is good without Livery and Seiſin.

2. If exchange be made of Lands for years, if the Lands do lye in one County, there the exchange by word is good; and ſo if the Lands do lye in ſeveral Counties: but if the exchange be for life, or other eſtate wherein a Freehold doth paſſe, there the exchange muſt be by deed indented; otherwiſe the exchange is not good, 9 E. 4. 39. And if an exchange be of a thing which lyeth in grant, and not in Livery, there the exchange muſt be by deed; although they be of things which lye in the ſame County. *Perkins*, 50.

3. In every Exchange, the word, Exchange, ought to be. *Cook* 4 Part, 121. in *Eaſtlands* Caſe: and therefore if two men ſeiſed of Lands in Fee, which lye in one County; and before Entry, an Indenture is made between them of the ſaid Lands, and there is no word of Exchange in the Indentures, and no Livery and Seiſin is made of the Land, but each deliver the Deeds to the other, and enter into the Land; there they ſhall not take the Lands by exchange, but ſhall be Tenants at Will only of the Lands. But if an exchange be made betwixt two men, of Lands in one County; and then each entreth into the Lands of the other to take Livery and Seiſin, there it ſeems they are preſently ſeiſed by force of the Exchange; becauſe there entry was lawful the one upon the other's Lands; and ſo before the Livery and Seiſin was made to them, each of them was ſeiſed by force of the exchange: and a man cannot take Livery of that of which he is ſeiſed. Quære. 45 E. 3. 20.

4. An Exchange of Lands which lye in another County, is not good without Deed: and yet in ſome caſe, it ſhall not be void. A man brought an Action of Treſpaſſe againſt *F. de A.* for breaking of his Cloſe, and digging his Lands: *ſcil.* 3. acres of Meadow: The Defendant pleaded, That it was his Freehold: upon which Iſſue was joyned, and the Jury found, That the Plaintiff's Anceſtors was ſeiſed of 5. acres of Lands in another County in Fee; and the Anceſtor of the Defendant of three acres; and an Exchange was betwixt them by word, without Deed, *ſcil.* That the Plaintiff's Anceſtor ſhould have the 3. Acres of Meadow in Fee; and the Defendant's Anceſtor the ſaid 5. Acres of Lands: by force of which, each of them did enter, and continued all their lives time, and dyed ſeiſed. After whoſe death, the Plaintiff entred into both; upon whom the Defendant entred upon the Meadow, and was ſeiſed 4. Weeks before the Treſpaſſe. In that Caſe, although the Jury found an Exchange by word, of Lands in ſeveral Counties, which was void in Law, and ſo the entry of the Plaintiff was lawful: yet the Iſſue being joyned upon the Freehold at the time of the Treſpaſſe, it was ſaid by *Hankford*, to the Jury, You have nothing to do, whether the Entry of the Plaintiff was lawful or not; but to ſay, Who was Tenant of the Freehold, at the day of the Treſpaſſe: for which Caſe, they found for the Defendant. See 7 H. 4. 11. *Cook* 9. Part, 12. & 14. in *Dowman's* Caſe.

5. Note, by *Hobart*, Chief Juſtice, That regularly the word (*Pro*) doth not make a Grant defeaſible, although the thing taken in lieu, be either taken away by the giver wrongfully, or by any other perſon upon a juſt title, ſo as the thing given be wholly loſt; And therefore if J. S. gives *White-Acre* to J. N. for *Black-Acre*, and ſo *è converſo*, without the word of Exchange, it will not be defeaſable: nay, If they uſe the proper word, Exchange, and that be executed, a wrongful entry of either party will do no hurt; but a rightful eviction will: but without the proper word of *Exchange*, though perhaps it was meant in the nature of an Exchange, it will not defeat. See in *Cooper* and *Andrews* Caſe, Mich. 10 Jac. in C.B. *Hobart*, 41.

2. Where an Eſtate given in Lands in Exchange, ſhall be void, for want of good execution: And where it ſhall be void, though it be well executed.

1. A Man hath Iſſue two Sons, and Land is given to him and his Wife, and to the heirs males of their bodies lawfully begotten: the eldeſt ſon hath Iſſue a daughter, and dyeth in the life of his Father: In this caſe, if the father exchangeth the Land with another, and the other entreth into the Lands of the Father, but the Father dyeth before entry, the heir may enter into the Land taken

ken in exchange: but if in ſuch caſe, the younger Son entreth into the Lands taken in exchange, he is the firſt in whom the Lands veſt: but becauſe the ſame might have veſted in the Father, and becauſe he cometh to it by words of limitation, the ſon of the eldeſt ſon, ſhall not after enter upon him. *Cook* 1. Part, 98. in *Shelley*'s Caſe.

2. If an Exchange be made betwixt two, and one entreth according to the exchange, and the other Exchanger dyeth before any entry made by him: now he who entred, ſhall not be the firſt perſon who ſhall defeate that Exchange; but if the heir of that Exchanger doth not enter anew into the Land into which the other hath entred by force of the Exchange, and puts him out, as he well may, then he, *ſcil.* he who is ouſted may enter into the Land which he gave in exchange. Paſch. 45 E. 3. Exchange 10. *Perkins*, 57.

3. A. ſeiſed of Black-Acre, and B. of White-Acre, make an Exchange betwixt them; A. before execution of the exchange, levieth a Fine with proclamation to B. of Black-Acre, and 5. years paſſe: Quære, if the ſame be a bar of the execution of the exchange; and if the heir of B. may enter into White-Acre. It was conceived, That the heir was barred of his entry in that Acre. Mich. 10 Jac. in B. R. in *Woodwards* Caſe.

4. The Caſe was; The Husband was ſeiſed of Land in the right of his Wife; the Husband and Wife joyned in exchange of the Lands with a ſtranger for other Land, which exchange was executed: the husband and wife ſeiſed of the Lands taken in exchange, aliened the ſame by Fine. It was holden in that caſe by the Juſtices, That the Wife after the death of her Husband might enter into her own Lands notwithſtanding the Fine. Like the Caſe, 19 Eliz. *Dyer*. The Husband after marriage aſſured to his Wife a Joynture, they both levied a Fine *ſur Conuſans de droit, &c.* of the gift of the husband: And it was holden, The ſame was no bar to the Wife of her Dower, for the Election is not given to the Wife to claim her Joynture or Dower, untill after the death of her husband. Hill. 28 Eliz. in C. B. *Leon.* 285.

5. A. Tenant in tail of certain Lands exchanged the ſame with B: B. entred, and being ſeiſed of other Lands deviſed ſeveral parcels thereof to others, and amongſt the reſt, a particular eſtate to his heir. Proviſo, That he do not re-enter, nor claim of his other Lands in diſtruction of his Will; and if he do, then the eſtate in the Lands deviſed to him to ceaſe: A. dyeth, his Iſſue entreth into the Land in tail, and waves the Lands taken in Exchange, and before any other entry, the heir of B. enters upon the Land which was given in Exchange. It was the Opinion of the whole Court in this Caſe, That it was in breach of the Condition, becauſe it was not the Land of the Deviſor at the time of the Deviſee; and therefore it was out of the Condition. Mich. 29 Eliz. in C. B. *Barbor* and *Topeſfields* Caſe. *Godbolt.* 99, 100.

6. Two Parſons of two ſeveral Churches by one Inſtrument in writing, change their Benefices by way of Exchange, and to that purpoſe reſign them into the hands of the Ordinary, and the Patrons preſent accordingly; and the one of the Parſons is admitted, inſtituted and inducted, and the other is admitted and inſtituted, but dyed before induction: In this caſe it was agreed, That although the Induction of the other was abſolute, yet it ſhall be directed by the precedent agreement which was by way of exchange, which ought to be executed on both parts in the life of the parties: and the Inſtitution and Induction cannot be upon expreſſe condition, nor in other form then was done, and therefore upon that exchange it ſhall be void *ab initio*. See *Cook* 2. Part, 74. in the Lord *Cromwell*'s Caſe, &c. And it was compared to this Caſe, That if a man and his wife enfeoffe two by Deed to have and to hold to them and their heirs, and afterwards the Feoffor and his Wife levy a Fine for *ſur Conuſans de droit* to them and the heirs of one of them, the ſame is no concluſion; but that both ſhall have the Fee-ſimple as they had before: and the Fine is not executory, but to extinct the right of the Wife only; wherefore it is no Eſtoppel. 6 H. 2. Eſtoppel, 2.

7. Husband and Wife ſeiſed of the moyety of the Mannor of J. to them and the heirs of the Husband; the Husband levied a Fine to J. S. who ſuffered a Recovery, in which the Husband was only vouched, and the Recovery was to the uſe of the Conuſee and his heirs. The Conuſee made a Feoffment in Fee to A; who thereof enfeoffed B. and C. in Fee; and after an Exchange was had between A. and B. and C, and was executed, and the Exchange was of the moyty of the Manor of J. for the fourth part of the Manor of D: B. and C. Exchangers of the fourth part enter, and thereof enfeoffe E; the Husband dyed, the Wife entred into the Manor of J: A. re-entred into the 4th part of the Mannor of D; E. entred upon him, and A. brought Treſpaſs. In this Caſe, theſe Points were reſolved: 1. That in every Exchange, the word, *Exchange*, doth tacitly imply a Condition, and alſo a Warranty in Law; which is a ſpecial Warranty in reſpect of the reciprocal Conſideration of the Land; but none ſhall vouch by force of that Warranty, but the Exchangers and their heirs: and no land ſhall be recovered in value, but only the Land put in Exchange; but the Aſſignee ſhall rebut by force of ſuch Warranty, although that

that the Exchange be without Deed. 2. Reſolved, That if A. give 3. Acres to B. for exchange for other 3. Acres, and afterwards one Acre is evicted from B; B. may enter into all his Land, and the exchange is defeated in all by reaſon of the Condition in Law: and a Condition ought to defeat the whole, and not part only. 3. Reſolved, That when the whole eſtate in part is evicted, the whole exchange is defeated. So when the eſtate of Freehold for life, which is but parcel of the eſtate, is evicted in the whole Land, or in part; the whole exchange by a condition in Law is defeated: For although a Reverſion expectant upon an eſtate for life, may be given in exchange for Land in poſſeſſion; yet when the Wife enters, and evicts the eſtate for life, the other may enter into the Land given in Exchange. But in the principal Caſe, by reaſon of the Fine and Recovery, the Wife had but a Right, and the Feeſimple was in B. and C. to whom the warranty and condition in Law upon the exchange was annexed. 4. Reſolved, That although that A. had notice of the right of the Wife, at the time of the Exchange, yet the ſame was not material, but that after by her Entry, the Exchange ſhould be defeated; and that perhaps was the cauſe that he would not purchaſe the Mannor of J. abſolutely, but by way of Exchange, ſo as upon eviction he might have his Land again. *Coo.* 4. Part, 121, 122. *Huſtards* Caſe.

8. If J. S. and J. D. be enfeoffed of an Acre of Land, to them, and the Heirs of J. D. And J. N. gives to them another Acre in Fee, in Exchange for the ſaid Acre, whereof they were joyntly enfeoffed as before. It hath bin ſaid, That this is not a good Exchange, but for the moyety which belonged to J. D. becauſe he had a Fee, but in the moyety whereof they were enfeoffed, as to ſettle the ſame in another perſon by his alienation, *ſcil.* by Exchange or otherwiſe. But Quære of that, for it hath bin ſaid, That the Exchange is good for the whole, becauſe the Feeſimple of the whole Acre was in J. D. and then when J. S. and J. D. joyn in an Exchange of the ſame Acre with J. N. P. the Freehold of the whole Acre with the Feeſimple paſſeth to J. N. ſo as he hath a Fee executed in the ſame Acre; and J. S. and J. D. have the like Eſtate executed in the Acre of Land which J. N. gave to them in Exchange, as they had in the other Lands. Quære not Reſolved. See 30 E. 43. *Perkins* 56.

9. A. ſeiſed of the Mannor of G. with an Advowſon appendant, and B. ſeiſed of the Mannor of D. within the ſame County. It was agreed betwixt them, that there ſhould be an Exchange between them of the ſaid Mannors, and becauſe the Mannor of G. was the better, B. Covenanted with A. and his Son to pay to A. 1200 l. for the ſaid Mannor and Advowſon, and that *Mich.* next, there ſhould be a mutual entry into the ſaid Mannors; and that in the mean time, either of them ſhould take the profits of their own Mannors, and that they ſhould deliver either to other their Evidences, and that aſſurance ſhould be made, as Councel ſhould adviſe: and in an Action of Covenant brought, the Plaintiff declared, that they had performed all Covenants on their part, and that the Defendant had not paid the 1200 l. The Defendant ſaid, That A. after *Mich.* had bargained and ſold the ſaid Mannor of G. to J. S. and his Heirs. It was objected, That the money was to be paid for the Mannor, and becauſe the Defendant could not have the Mannor, he was not to pay the money: But the Court inclined to Opinion, That all was to be done before *Mich.* and the Defendant was to do the firſt act; and that not being done, he had forfeited his Covenant. Out of that Caſe, I do obſerve, That the Exchange was not executed, and therefore it was now void *ab initio*, and that the ſale of the Mannor of G. afterwards by A. was good, and yet Covenant did lye againſt B. the Defendant. Mich. 2 Car. in B. R. Sir *Robert Brown*, and Sir *Robert Strowds* Caſe. *Popham* 198, 199.

10. If an Exchange be made of Lands which lye in divers Counties, if the Land be in view, they are preſently ſeiſed by force of the Exchange, without any Entry, by *Moile* Juſtice, *quod nota*, 9 E. 4. 39. But generally, In Exchange of Lands, the parties have no Freehold in them, in Deed, or in Law, before they execute the ſame by entry, and therefore, if one of them dye before the Exchange be executed by Entry, the Exchange is void, for the Heir cannot enter, and take it as a purchaſor, becauſe he was named onely to take by way of limitation in courſe of Diſcent. See *Coo.* 1. Part, *Inſtitutes*, 15, 16. acc.

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3. *Where in Exchange, the Eſtates ought to be equall; though not the value of the thing equall: And of what things Exchange may be betwixt parties; and how be made.*

1. NOte, In Exchanges, the Eſtates given in Exchange, muſt be equal. And therefore if an Exchange be betwixt Tenant for life, and Tenant in tail after poſſibility of Iſſue extinct, the Exchange is good, becauſe their eſtates are equall. *Cook* 11. Part, 80. in *Lowes Bowles* Caſe.

2 If I be ſeiſed of Land, to which J. S. hath Right of Action, or right of Entry; and I give him Lands in Exchange for a Releaſe of his Right to my Land, ſuch Exchange is good; ſo as he hath

an equal eſtate in the right which he claimeth in my Land, as I have in the Land which I do give in Exchange. 9 E. 4. 36.

3. Exchange may be of Temporal things for Spiritual: And therefore an Advowſon may be given in Exchange for Temporal Inheritances, as it is Reſolved in 9 E. 4. in the Prior of *Sempringhams* Caſe.

4. Exchange of Rent by Deed for Land, is good, 3 E. 4. 10. by *Dawby*. And ſee that Exchange of a Reverſion for Lands in poſſeſſion, is good. *Coo.* 4. Part, 122. in *Baſtards* Caſe. And alwayes the eſtates of both parties in Exchanges, muſt be equal, as if one have an eſtate in Fee-ſimple, or Fee-tail in one Land; the other muſt have the like equal eſtate in the other Land, but it is not neceſſary that the Lands or things be equal in yeaily value, for although that the Land of the one be more in value then the Land of the other, the ſame is not material. *Litt.* 13. acc.

5. If there be Diſſeiſor and Diſſeiſee, and the Diſſeiſee releaſeth all his right to the Diſſeiſor in Exchange for another Acre of Land, the ſame is a good Exchange. But if the Diſſeiſee grants his Right to a ſtranger who hath nothing in the Land in Exchange for an Acre of Land, the ſaid Exchange is not good, becauſe the ſtranger takes nothing by ſuch grant, as it is holden in 3 E. 4. 20. And ſee, that if Tenant in tail give Lands to another in Exchange for other Lands of the ſame eſtate in tail, that ſuch an Exchange is good; for that it is in the election of the Iſſue in tail to make it good; and he may elect to have the one Land, or the other, and till ſuch Election be made, the Exchange ſhall ſtand good. See 15 E. 3. *tit.* bar. 255. *Cook* 5. Part, *Inſtitutes*, 384. *Coo.* 1. Part, 96. in *Shelleyes* Caſe.

Examination.

1. NOte, In a Writ of Entry brought, an Eſſoign was Caſt, for the Defendant of the Kings Service, *in partibus tranſmarinis*: Day was given to the Eſſoignor to bring his Warrant into Court of Eſſoign; and it was then made a Queſtion, If the Eſſoignor ſhould be examined and ſworn, *de veritate Eſſonie*; and it was the Opinion of the Court, That he ſhould be examined, though it was ſaid, That Preſidents of ſuch examination were rare. Mich. 5. *Ma. Dyer*, 154. *Huggard* and *Katvitts* Caſe.

2. A *Quare Impedit* was brought againſt *Blower*, and the Biſhop; and upon default at the grand Diſtreſs, Judgment was given againſt *Blower*, and a Writ iſſued to remove *Blower*, and to admit the Clerk of the Plaintiff. The Biſhop and *Blower* brought a Writ of Diſceit in the Common-Pleas againſt the Preſentee, and the Sheriff and Summoners; and the Summoners appeared: And there by the Rule of the Court, the Summoners were examined upon their Oaths, Whether they did ſummon the Preſentee or not; and they denyed that they gave him any ſufficient ſummons *propter brevietatem temporis, ante diem retorni brevis*. Mich. 19 Eliz. *Dyer*, 353. in *Blowers* Caſe.

3. In a Replevin betwixt *Kemp* and *Markwilliams*, divers of the Hundred which ought ſuit to the Court, in Queſtion, were of the Jury, and challenged by the Plaintiff, as in the diſtreſs of the Defendant, *pro tempore diſſeiſinæ*; the Court was in doubt, If the Challenge in that Caſe was good: Whereupon they were examined upon a *voire dire*, and upon their examination, it appeared, that the ſaid Jurours never did ſuit at the ſaid Court; Wherefore they were admitted and ſworn. Hill. 3 Eliz. *Dyer*, 195. *Kemp* and *Markwilliam's* Caſe.

4. An Information was brought by the King Attorney againſt a Receiver in *Ireland*, for 2000 l. Arrerages of an account adjudged before the Auditors; the Defendant would have waged his Law according to the Statute of 5 H. 4. cap. 8. upon examination of the Attorney of the Plaintiff, in Debt upon Arrerages of account, that wager of Law doth not lye; and therefore the Defendant pleaded, *Nihil debet*; the Iſſue to be tryed *per patriam*. Paſc. 4. *Ma. Dyer*, 145.

5. A Bill of Debt was brought againſt an Attorney of the Common-Pleas, by the name of Huſbandman; upon which he being condemned, brought a Writ of Error; and afterwards by a *Capias ad ſatisfaciendum*, ſealed under the Seal of the Kings Bench, he was taken in Execution; and thereupon he was brought by *Habeas Corpus* to the Bar, and the Plaintiffs Attorney was examined upon the taking forth of this Writ; and the ſame appearing upon his examination, the party was diſcharged out of Execution, and the Attorney of the Plaintiff was committed. Mich. 8 Eliz. *Dyer*, 244.

6. A. was impriſoned in the Counter of *London*, in Execution upon a Statute, and to remove himſelf from thence to the *Fleet*, a Priſon of more eaſe, he made a Bill to one J. S. and cauſed the ſame Bill to be put in ſuit againſt him in the Common-Pleas; where he confeſſed the Action; and in the name of J. S. procured a *Habeas Corpus* to the Sheriff of *London*, and the Court not knowing this ſubtilty, committed A. to the *Fleet*: And it was a Queſtion amongſt the Juſtices, Whether he might be remanded to *London* or not, becauſe the Sheriffs of

London

London were once diſcharged of their Priſoner: But afterwards upon examination of A. himſelf; and the diſclaiming of J. S. in the ſuit in the Common-Pleas; the ſaid A. was remanded to Priſon in *London* in the Counter; and a Fine of 10 l. ſet upon him, and a *vacat* made of the Judgment in the Common-Pleas. Paſc. 8 Eliz. *Dyer*, 249. *Harriſons* Caſe.

7. One was ſued in the Common-Pleas, and as he was comming to *Weſtminſter*, he was Arreſted in *London*; whereupon he had his Writ of Priviledg. It was prayed, That he might be examined, for that ſuch Writ ſhould not be granted, but upon examination, as the book is, 10 H. 6. and 4 H. 4. But notwithſtanding, the Court refuſed to examine him, and allowed the Priviledg, and diſcharged him from the Arreſt. Mich. 30 Eliz. in C. B. *Powells* Caſe. *Goldesbr.* 64.

8. When a man is found Ideot from his birth by Office, he who is found ſo Ideot, may come perſonally in Chancery before the Chancellor, and pray, that before him and the Juſtices and Sages of the Law which he ſhall call to him, to be examined if he be Ideot or not: Or by his friends he may ſue forth a Writ out of the Chancery to bring him into the Chancery *ibid. coram nobis et concilio noſtro examinand.* And if it be found upon ſuch examination, that he is no Ideot, the Office found hereof, and all the examination which hath bin made by force of the Writ, or the Kings Commiſſion, is utterly void, without any traverſe, *Monſtrans de droit*, or other ſuit. *Cook* 4. Part, 31. in the Caſe of the Abbot of *Strata Mercella*.

9. If in Aſſiſe, the Tenant ſaith, That the Lands are ſeiſed into the Kings hands, it ſhall be tryed by Examination of the Eſcheator. 9 H. 4. 1.

10. If at the *Petit Cape*, the Tenant ſaith, That he was impriſoned three dayes before the default, and three dayes after, it ſhall be tryed by Examination of the Attorney. 13. R. 2. *Examination* 22.

11. Not attached by 15 dayes in an Aſſiſe, ſhall not be tryed by Jury, but by Examination of the Bayliff. *Coo.* 9. Part, 32. acc.

12. Note, in a tryal at the Bar upon an Action brought againſt a Hundred, upon the Statute of *Winchester*: It was ſaid by the Court, That if either of the parties to a tryal, deſire that a Juror may give Evidence of ſomething of his own knowledg to the reſt of the Jurors. That the Court will examine him openly in Court upon his Oath, and he ought not to be examined in private by his companions. Mich. 1650. in B. R. *Bennet* and the Hundred of *Hartfords* Caſe. *Styles* 233.

13. In an Action upon the Statute of Hue-and-Cry; the Caſe was, A. did deliver a ſum of money to a Carrier, who put the ſame in his Cart, and ſent a boy of the age of 12 years with the Cart; and afterwards he went, and before he could get to the Cart, the Cart was robbed, and the mony carried away. The Boy made Hue-and-Cry, and came to a Juſtice of Peace, and prayed that he would examine him, but he would not, but the Carryer himſelf would not go to be examined. Wherefore A. went to a Juſtice of Peace to be examined, and was; and afterwards brought his Action. It was holden by the Court, that the Plaintiff had failed of his Action, for want of ſufficient examination, for the ſervant who was robbed, ought to be examined; and the examination of the Owner of the goods, who was not preſent at the Robbery, was to no purpoſe; for the party robbed ought to be examined. Then it was moved, if the Plaintiff might have an Action againſt the Juſtice of Peace who refuſed to examine the Boy. It was Objected, it did not lye againſt him, becauſe he is a Judg of Record, and for ſuch a thing as he doth as Judg, no Action lyeth. But the better Opinion of the Court was, That the examination in ſuch Caſe, was not made by him as Judg or Juſtice of Peace, but as a Miniſter appointed by the Statute for the examination; and therefore conceived, that the Action in ſuch Caſe, might well lye againſt him. Trin. 31 Eliz. in C. B. *Green* and the Hundred of *Buccle-Churches* Caſe. *Leon.* 323.

14. Debt was brought upon Arrerages of account, by the Lady *Aburgavenny*, againſt another; the Defendant pleaded, That he owed her nothing, and was ready to wage his Law; and prayed by force of the Statute of 5 H. 4. cap. 8. that the Plaintiff ſhould be examined, which Statute is general, that examination ſhould be made, which is in ended upon Oath. It is there Ruled, that the Lady of *Aburgavenny* is a Peer of the Realm, and it ſhall not be well to cauſe her to appear to be examined: And it was ſaid, That although the ſaid Act be general, and is for every man, high or low. Yet it is obſerved by the Court, That a Lady who is but the Wife of a Baron, is a Peer of the Realm, and is in Equipage as to Nobility and Priviledg incident to her Dignity as Dukes, or Earls, &c. and therefore by the Rule of the Court, ſhe was not examined. See *Coo.* 6. Part, 53. in *Iſabel* Counteſs of *Rutlands* Caſe. See *Cook* 10. Part, 103. in *Denbawds* Caſe, acc.

15. In a ſuit in the Chancery by Mr. Attorney General on the behalf of the King, and the Lord *Hunſdon* his Farmer, againſt the Counteſs *Dowar* of *Arundel*; The Queſtion was, That whereas the title between the King in the right of *Francis* Lord *Dacres*, ſtood partly upon an Act of Parliament, and partly upon a Feoffment made by *William* Lord *Dacres*, 5 *Mar.* and a re-enfeoffment back again, which

which Feoffment, the Defendants ſaid, was not lawfully executed; and that point had bin examined before the Councel of *York*, in 8 Eliz. The Defendants required the uſe of the ſaid Depoſitions; the Kings Councel prayed that that might not be granted to them. And although it was ſaid that thoſe Depoſitions were allowed and given in Evidence, 36 Eliz. upon an Office taken at *Carliſle*, upon the Attainder of *Francis Dacres*. Yet the Court did refuſe to allow the ſaid Depoſitions to be read in the Cauſe in Queſtion, for many cauſes, and eſpecially for one, becauſe the Originalls of thoſe Depoſitions at *York* were all gone, and there were no exemplifications of them, but in the hands of the Defendants, ſo as the King might fight with weapons aſſigned him by his parties adverſaries: And ſo the Depoſitions taken at *York*, were not to be allowed to be read in Chancery. And afterwards upon hearing of the Cauſe, a Decree was made for the Plaintiffs. Trin. 14 Jac. in *Cancell.* The King and the Lord *Hunſdon*, and the Counteſs of *Arundells* Caſe. *Hob.* 109, 110.

16. A Bill was preferred in the Chancery; The effect of the Bill was, That in the time of Queen *Eliz.* the 18th of her reign, A. the Plaintiffs Father had conveyed the ſubſtance of his whole Inheritance, to the uſe of the ſaid B. the Plaintiff for life, and for default of Iſſue Male of him, and of another brother of his, the Land was limitted to the Father of the Defendant, and the Heirs Males of his body, with a Proviſo to make a revocation by his writing under his hand and Seal, in the preſence of two Witneſſes; and alledged, that he had made ſuch a Revocation. The Defendant denyed the Revocation, which he laboured to be tryed at the Common-Law, but an Injunction was awarded, and Witneſſes examined, and heard before the Lord Chancellor *Egerton*, being aſſiſted with ſome of the Judges; and then the Lord Chancellor dyed before any Decree. Afterwards this cauſe was brought to be heard before the Chancellor Bacon, aſſiſted by the Lord *Hobart*, and the Maſter of the Rolls; and the Queſtion was, Whether this cauſe were examinable in Chancery or not. And it was Reſolved by us all, That this Cauſe was not fit for that Court, but at the Common-Law, except all cauſes were tryable by the Common-Law naturally by Jury, ſhould be made examinable and determinable in Chancery by *Teſtes*, which were to confound all Juriſdictions; Wherefore after a long ſuit in Chancery, the Cauſe was diſmiſſed to the Common-Law. Trin. 14 Jac. in *Cancell. Manwering* and *Dennis*'s Caſe. *Hob* 203. See the like Caſe between *Cavendiſh* and *Woſley*, ibid. 203.

17. Note, It was Reſolved, That a Feme-Covert ſhould not be barred by her confeſſion of her Inheritance, but when ſhe is examined by due courſe of Law: And a Feme-Covert cannot be examined without a Writ, and in caſe of a Fine, there is a Writ upon which ſhe may be examined; If Husband and Wife acknowledg a Statute, it is void as to the Wife, although that ſhe ſurvive her Husband. So if Husband and Wife acknowledg a Deed enrolled, and the reaſon is, becauſe there is no ſuch Writ depending, upon which the Wife may be examined. But if an Infant acknowledgeth a Statute, the ſame is not void, but voidable by *Audita Querela* during his Minority. But if a Feme-Covert levyeth a Fine only, the ſame ſhall bind her and her Heirs, if the Husband doth not enter and avoid the eſtate of the Conuſee, becauſe ſhe was examined, and had power over the Land. *Co.* 10. Part, 43. *Mary Portingtons* Caſe.

18. Husband and Wife make a Deed enrolled of Lands in *London*, and acknowledg the ſame before the Recorder, and one Alderman, and another, and the Wife is examined. It was holden, that the ſame ſhould bind as a Fine at the Common-Law by their Cuſtome, and not onely as a Deed; and it is good without Livery and Seiſin. But a Deed of Husband and Wife ſhall not be enrolled in the Common-Pleas, but by the Husband only, and not by the Wife; nor ſhall ſhe be bounden with her Husband in a Statute-Merchant, nor the like; becauſe in ſuch Caſes ſhe is not examined. 29 H. 8. Mich. 5 E. 4. tit. *Faits* enrolled. 10. 14, 15.

19. A man was arreſted and impriſoned in *London* upon a contract made in *London*. The Defendant brought his Writ of Priviledg, and a *Habeas Corpus* was directed to the Sheriff of L. to bring the Cauſe and Priſoner. The Priviledg by him alledged was, becauſe he was endited in the Kings Bench, of a Treſpaſs done in *Middleſex* againſt the Peace, in which Caſe he ought to pay a Fine to the King. It was ſaid, that the Writ was brought by Covin; but the Court ſaid, it ſhall not be intended to be by Covin, becauſe it was for the King. But in that Caſe, it was holden, if it were a ſuit betwixt party and party, which giveth cauſe of Priviledg, there the Record the ſame Term being in the breaſt of the Juſtices, they will there examine if the ſuit was there by Covin or not, and the warrant of Attorney, and all other the Circumſtances before the Priviledg ſhall be allowed. But if it be in another Term, then the Covin ſhall not be examined, but the Court ſhall believe the Record. See 2. *Aſſ.* 16, 17. acc.

20. Note, the Cuſtome of *London* is, That if any matter be pleaded to Iſſue which cannot be tryed, by thoſe of the City then the party ſhall be examined upon it; and Judgment ſhall be according to that which is found upon the Examination; and if the party refuſeth to be examined; then Judgment hath uſed to be given againſt him. See Bro. *Entries*, 203.

21. So

21. So the Cuſtome of *London* is, That if a Plaint of Debt be entred in the Sheriffs Court, that upon ſuggeſtion of the parties, the Mayor may ſend for them, and examine them upon the truth of the matter before Judgment; and if it be found that the party is ſatisfyed, of ſo much he ſhall be barred, but ſuch Examination cannot be after Judgment. Hill. 10 H. 6. 14, 15.

When and where the Juſtices ſhall go to the Examination of Errors; and when and where not.

1. IF he in the Reverſion bringeth a Writ of Error, the Juſtices muſt go to the Examination of the Errors during the life of the Tenant for life. 20 E. 3. *Fitz.* Error, 2.

2. Error was brought againſt the Heir, being Tenant of the moyety of the Land, and a *Scire facias* was brought againſt a ſtranger of the other moyety; the Heir being in Ward to the King, prayed his age, and had it. Yet it was the Opinion of the Court, that the Juſtices might go to the Examination of the Errors as to the ſtranger; and ſo if the Error be aſſigned in the Writ. 9 H. 6. 46.

3. Error was brought againſt one, who by the Writ was ſuppoſed to be dead; Wherefore a *Scire facias* iſſued againſt the Heir and the Ter-Tenants; the Sheriff returned, that the Heir had not any thing by which he could be warned, and the Ter-Tenants appeared. And if the Juſtices could proceed to the Examination of the Errors, untill the Heir came in and appeared, was the doubt: And at the laſt, becauſe they ſhewed that their poſſeſſion was by Feoffment, and not by wrong; It was Awarded that a *Scire facias* ſhould Iſſue forth againſt the Heir at the Suit of the Feoffees, before they proceeded to the Examination of the Errors; but contrary it had bin if they had entred by abatement, for in ſuch Caſe, they cannot take benefit of any Releaſe made unto the Heir. 8 H. 4. 18. acc.

4. If the Plaintiff appeareth upon the *Scire facias ad errores aſſignand.* the Court ſhall proceed to the Examination of the Errors, but if he maketh default, the Defendant ſhall have Execution for the Court is not bound to examine the Errors, although they be apparent but at the aſſignment of the party, and that was agreed, 20 H. 6. 18.

5. If upon *Scire facias ad audiendum Errores*, the Defendant maketh default, the Juſtices may proceed to the Examination of the Errors, as appeareth by the book of 14 H. 7. 33.

6. The Caſe was; Grandfather, Father, and two Daughters; the Grandfather levyed a Fine *come ceo, &c.* in *Cheſter*, with a Remainder to himſelf for life, the Remainder to the Father, and the Heirs Males of his body, the Remainder to the eldeſt daughter in tail, &c. the Grandfather dyed, the Father dyed without Iſſue Male; the eldeſt daughter entred, the youngeſt in her own name, and in the name of her eldeſt ſiſter, as Couſins and Heirs of the Grandfather, brought a Writ of Error returnable in the Kings Bench to reverſe the Fine, the Writ was directed to the Juſtices, and not *Camerario de Cheſter*, which was returned with the Record, the eldeſt daughter did not appear, whereupon a *Scire facias* iſſued againſt the Heir of the Conuſee to hear the Errors, and none againſt the Ter-Tenant: Two things were moved, wherefore the Juſtices ought not to proceed to the examination of the Errors. 1. Becauſe no Writ of Error was made and brought in *Cheſter*. 2. Becauſe no *Scire facias* is awarded againſt the Ter-Tenant by name, but generally againſt the Ter-Tenants without any name. To the firſt, it was anſwered, That the manner and uſage in *Cheſter* had alwayes bin, That a Writ of Error had bin brought out of the Chancery in *England*, returnable in the Kings Bench, although it was out of the County Palatine, for that in all the Charters of the Kings Granted to *Cheſter*. Writs of Error are excepted; And as to the ſecond point, It was the Opinion of the Juſtices of both Benches, That the moſt perfect and ſure way had bin to award a *Scire facias* againſt the Ter-Tenant before they proceeded to the Examination of the Errors, for it may be that he hath ſomething to plead in bar of the Writ of Error, as a Releaſe or the like, whereby the Court might be eaſed of their labour in examination of the Errors; and although they ſhould reverſe the Judgment againſt the party, yet the Plaintiff cannot be reſtored to all that which he loſt, until the Ter-Tenant be made privy by a *Scire facias*; for if he be otherwiſe ouſted, he may have an Aſſiſe, eſpecially where the parties to the firſt Judgment are dead, as in this Caſe, ſo as the Heir of the one, nor of the other, nor the Ter-Tenant is known. Wherefore a *Scire facias* was awarded againſt the Ter-Tenant. Hill. 15 Eliz. *Dyer.*

7. Error was brought in the Kings Bench upon a Recovery in Aſſiſe, and the Judgment affirmed: A new Writ of Error was brought in Parliament of the Judgment in the Kings Bench; the Chief Juſtice brought the Record and Tranſcript there, and examined that there, and after it was there examined, the Record was remaunded, and thereupon a *Scire facias* awarded. Hill. 1. 23 Eliz. *Dyer*, 375. *Whaleyes* Caſe.

Exonerment,

Excomengment.

1. EXcomengment is, Where a man by Judgment of the Spiritual Court is Excommunicated, or disabled to sue, or bring any Action in any of the Kings Courts: And if the party will remain Excommunicated by the space of 40 dayes, and will not be justified by his Ordinary: Then the Bishop may send his Letters Patents to his Chancellor, to certifie this Excommunication or contempt. And then the Sheriff shall be commanded to attach the body of the party Excommunicated, by a Writ called *Breve de Excommunicato Capiendo*, till he make his agreement with the Church for the wrong or contempt; And when he hath made such agreement, then the Bishop shall by his Letters certify the same to the King: and thereupon a Writ *de Excommunicato deliberando*, shall be awarded to the Sheriff, to set the party at liberty. See Statute 5 Eliz. cap. 23.

2. A man was Excommunicated before the Statute of 21 Jac. upon a sentence in the Spiritual Court for Costs *in Castigationem morum*, and divers Proclamations and penalties; and a *Capias* issued against him according to the Statute of 5 Eliz. and being now taken, as to the penalties and forfeitures, he said, That it is not for any causes within the Statute, and as to the *Excom. Capiendo*, he pleaded, That the offence for which he was *Excomenge*, was before 21 *Jacobi*, and pleaded the general pardon of 21 Jac. For the first, it was the Opinion of the whole Court, That he ought to be discharged: And for the second, the Court held also, That he ought to be discharged by the general Pardon, because by the Pardon, all contempts before the Pardon are discharged, and all the sentences for the crime, the Pardon being general, except only for the payment of the Costs; for they being taxed before the Pardon, the interest of them was in the party, which is not taken away by the general Pardon. And therefore it was Resolved, that for the Costs, he ought to sue forth new process. Trin. 6 Car. in B. R. *Codrington* and *Rodman's* Case. *Cro.* 1. Part, 144. Mich. 2 Car. Rott. 64. in B. R. adjudg. acc. See Trin. 6 Car. in B. R. *Hugh's* Case. *Cro* 11. Part 142.

3. A man was brought and returned upon a *Habeas Corpus* out of the County of *Suff.* because upon a Certificate of the Chancellor of *Suff.* into the Court of Chancery here, he was taken upon an *Exc. Capiendo*. It was pleaded, That the *Capias* was not good, and that the party was not lawfully imprisoned, because by the Statute of 5 Eliz. the Writ ought to have bin brought in the Kings Bench, and to have bin enrolled and delivered of Record in convenient time to the Sheriff; and of that Opinion was the whole Court, and Resolved that he was not duly imprisoned, and therefore he was discharged. Trin. 10 Car. in B. R. *Parkers* Case. *Cro.* 1. Part, 421. See 11 Jac. in B. R. *Cro.* 2. Part, 566.

4. Error brought of a Judgment in the Exchequer; The Defendant pleaded an Excommunication in disability of the Plaintiff, and shewed it under the Seal of the Bishop. The Plaintiff pleaded the general Pardon of 3 Jac. which was subsequent to the Excommengment: The Justices doubted, If an Excommunication might be discharged by the Kings Pardon; and the Plaintiff restored to his suit without absolution and reconciliation to the Church. Mich. 6 Jac. in B. R. *Richardsons* Case. See this Quære Resolved before, C. 2. *Cro.* 2. Part, 212.

5. Note, an Excommunication may be pleaded in disability of the person; yet if the Demandant or Plaintiff purchase Letters of absolution, and shew them in Court, he may have a re-summon, or re-attachment upon his Original, according to the nature of his Writ. *Cook* 1. Part, *Institutes*, 133.

6. Note, it is said, That if an Executor or an Administrator sue an Action; Outlawry in the Plaintiff, shall not disable him, because the suit is *in auter droit, scil.* in the right of the Testator: But if an Executor or Administrator be Excommunicated, he may be disabled, although he sueth in *auter droit*, because, as it is said, they which converse with a person Excommunicated, are Excommunicated also. Quære, *Cook* 1. Part, *Institutes*, 134.

7. In a false Imprisonment brought; The Defendant pleaded, That the Plaintiff was excommunicated for malitious drawing of his dagger in the Church-yard, to the intent to strike A. and is Endicted of that. It is made a Quære, If the words of the Statute of 5 E. 6. that he shall be Excommunicated *ipso facto*, shall be intended without sentence or proof. But it was agreed by the Justices, That without Conviction or Outlawry, the Indictment is not sufficient to make him sustain the corporal punishment in the Statute to lose his Ear. Mich. 10 Eliz. *Dyer*, 275. *Foremans* Case.

8. Excommunication of the party must be in the Diocess where the party dwelleth or inhabiteth; and in the Diocess of the Bishop: For if the Bishop of one Diocess doth Excomenge another in a forein Diocess, the same is void. and *coram non Judice*. Trin. 10 Jac. in C. B. *Fraunces* and *Portell* Case. *Godbolt*. 191.

9. In Tover and Convertion, the part es being at issue, and the Jury at Bar; the Defendant pleaded,

ded, that the Enqueſt ought not to be taken, for that after the laſt continuance, and before Iſſue joyned; The Plaintiff was Excommunicated, and ſhewed the Letters of the Biſhop teſtifying of it; but he did not ſhew in his Plea, nor in the Letters, when he was Excommunicated; and it might be before the laſt continuance, and then it is no Plea. Alſo it is not averred that the party Excommunicate, and the Plaintiff are one and the ſame perſon. The Court held the Plea not good, becauſe the day of Excomengment ought to be ſhewed to the Court, that the Court might adjudg thereupon, and the time is traverſable: In that Caſe Letters of abſolution were ſued for the Plaintiff; but the Court held them inſufficient, being after the Demurrer, and they bare date after the Jury returned. Mich. 3 Jac. in B. R. *Baker* and *Gough's* Caſe. *Cro.* 2. Part, 82.

10. Note, It was Reſolved by the Juſtices, That if a man be Excommunicate by the Ordinary, where he ought not to be; as after a general Pardon, &c. and the Defendant doth not by negligence ſue a Prohibition, but remains excomenge by 40. dayes, and upon a Certificate into the Chancery, he is taken upon an *Excommunicato capiendo*. No Prohibition lyeth in this Caſe; for a Prohibition lies to prohibite Eccleſiaſtical things, and not any thing which is done by force of the Kings Writ. But in ſuch Caſe he may have a Writ to the Biſhop to abſolve him. 2. When a man is Excomenge againſt the Law of the Realm, ſo as he cannot have a Writ *de Cautione admittenda*, for then he ought *parere mandatis Eccleſiæ in forma Juris*, i. e. *Eccleſiaſtica*; where in truth, it is *contra jus, et formam juris*, i. e. *juris communis*. But if he ſhew his Cauſe to the Biſhop, and requeſt him to abſolve him, for that he was Excomenge after the offence pardoned, and he refuſe to abſolve him, an Action upon the Caſe lyeth againſt the Ordinary. Mich. 8 Jac. *Coo.* 12. Part, 76.

11. One was cited before the Dean of the Arches, in cauſe of defamation out of his Dioceſs, contrary to the Statute of 23 H. 8. and the Plaintiff had a ſentence, and the Defendant was Excomenge and ſo continued 40 dayes, and the Defendant was taken and impriſoned by *Excommunicato Capiendo*. It was Reſolved, That in ſuch Caſe he ſhould not have a Prohibition upon the Statute of 23 H. 8. but after the ſentence repealed, a Prohibition lyeth. But yet there is a difference where it appears to the Court, that the matter of the Libel, is not within their Juriſdiction, as of lay-Fee, or lay-Contract, &c. there a Prohibition lyeth. Mich. 8 Jac. *Cook* 12. Part, 77. acc.

12. It was Reſolved by the whole Court, That if a Summoner return one ſummoned upon his Oath in the Spiritual Court, where in truth he is not, and the party is pronounced *Contumax*; and after he is excommunicated, an Action upon the Caſe will lye, for that here is *injuria et damna*; for although the proceedings and Oath, are Eccleſiaſtical, yet the damages are temporal. Mich. 12 Jac. *Coo.* 12. Part, 128.

13. If a man be Excommunicated by the Biſhop, after a Prohibition delivered to him: the party ſhall recover damages againſt the Biſhop. And ſee, where in ſuch Caſe, the party recovered 10000 l. damages againſt the Biſhop, 20 E. 3. rott. 46. in the Treaſury. *Treſils* Caſe. 32 E. 3. rott. 78. Sir *Thomas Seatons* Caſe. And ſee 37 E. 1. Coſts were recovered againſt the Biſhop of *Cant.* 40 l. becauſe he Excommunicated one *pro executione brevis Regis pro manuforta amovenda. Coo.* 12. Part, 129. acc.

Of Certificates in caſe of Excomengement; and who may Certify it; who not; and where ſuch Certificate ſhall be good; Where not.

1. EXcommunication is a Spiritual thing: and if it be pleaded againſt the party in the Temporal Court, it muſt be certified thither by the Biſhop himſelf, for no man can certify an Excomengement, but only the Biſhop, who is immediate Officer to the Kings Courts to this purpoſe. And Quære, Whether Letters of Excomengement may be ſpecial in the Chancery, or whether they ought to be in that Court where the Plea is depending. 20 H. 6. 25. And it ſeemeth by 2 E. 4. 4. That Letters of Excomengement, certified into the Chancery, were ſent into the Kings Bench, and were not allowed there, becauſe the Certificate was to the Chancery only, for which cauſe the party obtained new Letters of Excommunication. *Omnibus Chriſti fidelibus, &c.*

2. A man brought a Writ of Error to reverſe a Judgment in Debt in the Exchequer: The Defendant pleaded an Excomengement of the Plaintiff in the ſaid Writ of Error, and brought Letters of the Excomengement certified by the Official, under the Seal of the Biſhop of D. which recited that they proceeded againſt him for Recuſancy, and for contempt in *non comparendo*, he was Excomenge. The Plaintiff ſaid, That after the Excomengement, the King by his Pardon, 3 Jac. pardoned all contempts, and averred, that neither the Offence, nor the perſon was excepted. In this Caſe, many points were Reſolved. 1. That the Plea of Excomengement was inſufficient, becauſe it is certified by the Official, whereas it ought to be by the

Bishop himself, who is immediate Officer to the Court, for none shall certify an Excomengement whereby the party shall be disabled, but he to whom the Court may write to absolve him. But the Chancellors of the Universities may certify Excomengements, because they have it by the Kings Charter. 2. Resolved, That if the Bishop himself had certified it, it had bin insufficient, because in the principal Case, the Certificate was *singulis Clericis Dioces. Dunelm.* by which direction the Court it self was excluded; and it was not directed to the Court it self. 3. Resolved, That in some Cases, although an Excommunication is a Spiritual thing, yet the Common Law shall adjudg upon the manner of it, and matter of the Certificate. As if a Bishop be sued, and he plead, an Excomengement by himself, or his Commissary, although it be for another Cause that is in Question, the same shall not dis-able the party, because he himself is a party. 4. Resolved, That the Bishop must certify that which is in his own Court, and not that which is in the Court of another; and he cannot certify, that another Bishop hath certified him, or that he hath seen an Excomengement made by another Bishop: But he may certify an Excomengement made by his Commissary, or Official; because he doth it in his Right, and it is in his Court. 5. Resolved, That the Certificate of the Vicar-General shall be allowed, when the Bishop is in *remotis agendis*; and a Bishop Elect, before his confirmation, may certify an Excomengement. 6. Resolved, When a Plea of Excomengement is allowed, the Writ shall not abate, but the Entre is *Quod loquela remaneat quousque.* Co. 8. Part, 68, 69. *Trollops* Case.

Exchequer.

1. *Of the Exchequer, and the Judicial; and Ministers, Officers thereof.*

1. THe Court of Exchequer consisteth of *Scaccarium Superius*, and *Inferius*, called the Higher and lower Court of Exchequer. The Higher Court of such Officers as are employed in the bringing in of the Kings Revenues; and other Debts and Duties belonging to the Crown. As also of a Latine Court, and publick Court of Administration of Justice and Right between the King and his people. And of a Court of Equity, or English Court, called the Exchequer Chamber. The Lower Exchequer consisteth of the Receipt of the Exchequer; wherein is the Court called the Chamberlains Court, and certain other Officers, and Tellers appointed for the receiving of the said Revenues, Debts, and Duties from all Sheriffs, General Receivers, Bayliffs, Farmers, and other Accountants and Debtors, and for issuing the same again towards the supply of his Majesties expences in Houshold, Navy, Wardrobe, Servam, Wages, Pensions, and the like. And in the said Chamberlains Court, are the Proffers held before the Cursiter Baron twice in the year, *viz. Oct. Pasc.* and *Cruc. Mich.* And there also are the Talyes stricken, by the said Chamberlains Deputies for discharge of such Accomptants, or Debtors as pay in any Moneyes to the said Court of Exchequer.

The Principal and Judicial Officers of the Exchequer.

The Lord High Treasurer of *England*, the Treasurer of the Exchequer.
The Chancellor of the Exchequer, the under Treasurer of the Exchequer.
The Lord Chief Baron, and three other Barons: Barons of the Coif.
The Cursitor Baron.
The two Chamberlains of the Exchequer.

Ministerial Officers in the Higher Exchequer, are,

The Kings Remembrancer, under whom there are two Secondaries, having a yearly Fee of the King, and six sworn Clarks or Attorneyes, having several Assignments.
The Lord Treasurers Remembrancer, under whom are likewise two Secondaries, and ten other sworn Clarks or Attorneyes.
The Clark of the Pipe, or Ingrosser of the great Roll, under whom are likewise two Secondaries, and six other sworn Clarks or Attorneyes, having their peculiar Assignments.
The Forreign Opposer.
The Clark of the Estreats.
The Keeper of the Exchequer, an Officer of Inheritance.
The Auditors of the Impress.
Seven Auditors of the Revenues.
The Auditor of the Dutchy of *Cornwall*.
The Remembrancer of the first Fruits.
The Controller of the Pipe.
The Clark of the Pleas, under whom are four Attorneyes.
The Clark of the Nichells.
Two parcel-makers.
The Marshal of the Exchequer.
The Ushers of the Exchequer.

Ministerial

Miniſteriall Officers of the lower Exchequer.

The Auditor of the Receipt, anciently called, *Clericus Theſaurii*, or *Scriptor Talliarum.*
The Clark of the Pell.
The four Tellers of the Receipt.
The Uſher of the Receipt.
Two Deputy-Chamberlains, who ſtrike the Tallyes and keep all the Leagues, Treaties, and other Records in the ſeverall Treaſuries.
Two Deputy-Chamberlains which joyn the Tallyes.
The Tally-Cutter.

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2. *Where, or in what matters and Pleas the Court of* Exchequer *ſhall have Juriſdiction; and of other matters concerning that Court, and the Court of* Exchequer-Chamber.

1. THe King ſeiſed of a Mannor in Fee, in the Right of his Crown, granted Copy-hold Lands parcel of the Mannor to one in Fee, and afterward, by his Letters Patents under the Seal of the Exchequer made Leaſe of thoſe Lands for 21. years the Leſſee granted his Eſtate to the Copy-holder, the King reciting the Leaſe for years, granted the Reverſion in Fee; the years expired, the Grantee of the Reverſion entred upon the Copy-holder. It was adjudged, that his Entry was lawful: For It was Reſolved, that the Leaſe under the Exchequer Seal was good by common Uſage; for that the Cuſtoms of the King's Courts are as Common Law, and the Common Law takes notice of them: And a Leaſe by order of the Exchequer, by the word *commi timus habend. tenend. & reddend.* ſuch a Rent is good by the ancient Uſage here. *Cook* 2. Part. 16. *Lane*'s Caſe.

2. The Queſtion was, Whether a Leaſe by the King, under the Exchequer-Seal, of Lands uſually demiſed to one for life, the Remainder for life, the Remainder to a third for life, reſerving the uſuall Rent, were good or not: It was objected, That a Free-hold could not paſs from the King but under the great Seal. But all the Juſtices held, That Leaſes for life under the Exchequer Seal, being of Lands uſually leaſed, and reſerving the ancient Rent, are allowable, and good for the King's benefit; and it was ſaid, That the Uſage of the Court of Exchequer hath been to demiſe as well for life as for years, and ſuch Leaſes have been always allowed. Hill. 13 Car. in B. R. *Kemp* and *Barnard*'s Caſe. *Cro. el.* Part, 369.

3. A. brought Debt by *Quo minus* in the Court of Exchequer againſt B: It was found for the Plaintiff; and for the default of a good Viſne, the Judgment was reverſed: And afterwards A. by his Attorny entred a *Retraxit*, ſcil. *Fatetur ſe in Curia hic ulterius nolle proſequi*; upon which, Judgment was given, That the Defendant *eat ſine die*, but no Amercement was upon the Plaintiff. And afterwards A. brought a Writ of Error in the Exchequer-Chamber, and aſſigned the Cauſes aforeſaid for Error; and there in the Exchequer-Chamber the Judgment given in the Court of Exchequer was reverſed. *Cook* 8. Part, 58. *Butcher*'s Caſe. See M. 6 Jac. in the Exchequer-Chamber, *Trollop*'s Caſe. acc.

4. It was moved as a Queſtion, Whether an Error in fact be aſſignable in the Exchequer-Chamber upon the Statute of 27 Eliz. becauſe the Statute gives Authority only to examine Errors in Law: It was the better Opinion of the Court, that it may well be aſſignable here. For the Statute, giving the Writ of Error, gives that Authority as well to examine Errors in Fact as Errors in Law: And in ſuch Caſe it was ſaid, It hath been tryed by *Niſi prius* out of the Exchequer-Chamber. M. 14 Car. in B. R. *Cro.* 1. Part, 369. M. 42 & 43 Eliz. B. R. *Rewe* and *Long*'s Caſe. Mich. 10 Car. B. R. *Smith* and *Merchant*'s Caſe. acc. *ibid.*

5. A man brought an Action of Trover and Converſion, in the Exchequer: The Defendant pleaded, that the Plaintiff had an Action depending in the Court of Kings Bench, for the ſame Trover and Converſion: It was Reſolved in this Caſe, That the Bill brought in the Exchequer ſhould abate, becauſe a man ſhall not be twice puniſhed for one and the ſame cauſe. 2. Reſolved, That although the firſt Action was in another Court, yet the Plea was good, becauſe it doth not appear by the Plea, that the Plaintiff or Defendant were priviledged in the Exchequer; and then, by the Statute of *Articuli ſuper Chartas*, it is provided, That no common Plea ſhall be holden in the Exchequer. *Cook* 5. Part, 61. *Sparries* Caſe.

6. Note, It was Reſolved, That if the King's Farmor brings a *Quo minus* in the Exchequer, he ought to alledge that he is Farmor to the King to enable him to ſue there, but he need not to ſhew it to the Court: For it was then Reſolved, That when a Deed or thing is requiſite *ex inſtitutione Legis*, there it ought to be ſhewed to the Court, although it concerneth a thing Collateral, and transfers and conveys nothing: But when a thing or Deed is requiſite *ex proviſione hominis*; there the proviſion of the man ſhall not change the Judgment of the Law. *Cook* 6. Par. 38. in *Bellamyes* Caſe.

7. A Prior Alien Farmor of the King, was indebted to the King for his Farm, and being ſued for the ſame in the Exchequer, he ſhewed to the

Court, That there was a Parſon who held a portion of Tythes, which was parcel of the poſſeſſions belonging to his Farm, and that the Parſon withheld the Tythes from him by reaſon whereof he could not pay the King his Farm-Rent, without having thoſe Tythes which were in the Parſon's hands; and thereupon a *Quo minus* iſſued out of the Exchequer at the ſuit of the Prior and the King, for the Payment of thoſe Tythes to the King. And there it was ſaid by *Skipwith*, that if that which concerneth the King and which may turn to his advantage, and haſten his buſineſs, whether the ſame be Temporal or Spiritual. The Court of Exchequer ſhall have Juriſdiction. 38 E. 3. 20. out of which Caſe obſerve, That ſuit for Tythes was in the Exchequer.

8. Error was brought in the Exchequer Chamber of a Judgment in a *Scire facias*, by an Executor to have Execution of a Debt recovered by the Teſtator: It was moved that no Writ of Error lyeth there; for the Statute gives it in ſeven ſeveral Caſes, *viz.* Debt, Detinue, Covenant, Accompt, Actions upon the Caſe, Ejection, or Treſpaſs; ſo a *Scire facias* is not mentioned. The Court doubted, whether this *Scire facias*, being grounded upon a Judgment in an Action of Debt, be not within the Equity of the Statute. Mich. 8 Car. B. R. *Nevil* and *Delabarr*'s Caſe, in the Exchequer-Chamber. *Cro.* 1. Part, 208. See 10 Jac. in the Exchequer-Chamber. *Forreſt* and Sir *James Sandiland*'s Caſe. acc. *Hob.* 72.

9. A. recovered 130 l. againſt B. in B. R. to which Action J. S. was Bail, Judgment was againſt the Principal; and upon a *Scire facias* againſt the Bail, Error was brought by the Principal and Bail in the Exchequer Chamber, ſuppoſing Error to be *In redditione Judicii & adjudicatione Executionis ad damnum ipſorum.* It was moved, That the Bail might not have a Writ of Error in the Exchequer-Chamber, becauſe it was not one of the Caſes mentioned in the Statute of 27 Eliz. 2. Though the Bail might have a Writ of Error, yet the Principal and Bail could not joyn in one Writ, becauſe there be ſeveral Judgments againſt them; and of that Opinion was the whole Court, and that the Writ did not lye. Paſch. 9 Car. in B. R. *Lancaſter* and *Keyleigh*'s Caſe. *Cro.* 1 Part, 219.

10. Note, An Office was found by the Eſcheator *virtute Officii*, which was returned into the Chancery; and Exception was taken into it, becauſe it ought to have been returned into the Exchequer: For Offices found *virtute Brevis*, returnable in the Chancery, ought to be returned in the Chancery; But Offices found *virtute Officii*, before the Eſcheator, ought to be returned into the Exchequer, to which Court the Eſcheator is properly Attendant. But it was holden by the Court, That the Office was well returned into the Chancery; and it was Reſolved, That if it be found upon the examination of the Eſcheator, that he hath ſeiſed the Land into the King's hand, although the Office be not returned, yet it is ſufficient to entitle the King. *Cook* 1. Part, 42. in the Caſe of *Allenwoods*.

11. A. Receivor of the King, endebted to the King upon his Receipts, ſeiſed of the Manner of B. and C. in the County of *Middleſex*, did convey the ſame to J. S. in Fee, and he conveyed them to the King, his Heirs and Succeſſors, and preſently took it again to him and his Heirs. Afterwards A. became further indebted to the King upon his Accompts: It was a Queſtion made in the Court of Wards, Whether the ſaid Mannors were extendable and lyable to any of the Debts aforeſaid: It was made a doubt by *Tanfield* Chief Baron, in reſpect he ſaid, That the uſe of the Exchequer was, that they ſhould be diſcharged. But it was the clear Opinion of the Lord *Coke* and the Lord *Hobart*, that they were not chargeable; for the Land it ſelf was never chargeable for it ſelf, but in reſpect of the Perſon which was Debtor, and the Land it ſelf in the King's hands is not chargeable, and then when the King conveys the Land over, he cannot againſt his own conveyance charge his Land: And therefore it was agreed, That this Opinion in this Caſe ſhould be made up in the Decree for the Diſcharge of the Land without prejudice to the uſe of the Exchequer for the King's Debt there. Paſch. 13 Jac. in the Court of Wards. Sir *William Fleetwood* and Sir *Roger Aſton*'s Caſe, *Hob.* 45, 46.

12. A. brought Ejectione firme againſt B. upon a demiſe made of certain Lands in W. by J. S. upon Not guilty, it was found for the Plaintiff, and Judgment given, that he ſhould recover the poſſeſſion of his Term, and 18 l. damages and coſts. Error was brought in the Exchequer-Chamber, and Error aſſigned, That J. S. was ſeiſed but in the Right of his Wife, and that he was dead before the day of the Judgment, and ſo the Leaſe determined: Aut by the Opinion of the whole Court the Judgment was affirmed; for though it were agreed, That in the Exchequer-Chamber Judgment may be reverſed for Errors in Fact, as death of the parties, or the like, where the Writ is abſolutely abated; yet there is no colour in this Caſe, where the Error depends upon the death of one that is not party to the ſuit, and upon the Title of the Land; for the Defendant may ſay, That J. S. was ſeiſed in his own Right, or the like, which were to examine the whole Title in a Writ of Error. Paſch. 9 Jac. in C. B. Rott. 101. *Wilks* and *Jordens* Caſe. *Hob.* 5.

Exception.

Exception.

What ſhall be ſaid a good Exception, For ſprize, or Saving, in Feoffments, Grants, Leaſes, &c. Writs or Plaints, Acts of Parliament: And how the words of Exception, &c. ſhall be taken and expounded.

1. A Man ſeiſed of Lands in Fee, covenanted to ſtand ſeiſed thereof, by the name of all his Lands in S. except ſuch as he had deviſed or ſhould deviſe by his laſt Will and Teſtament to the uſe of himſelf in Tail, the Remainder to his Wife for life, the Remainder to J. S. in Tail; and afterwards he made a Feoffment to the uſe of himſelf and his Wife for their lives, for the Joynture of the Wife, the Remainder to J. B. In this Caſe, amongſt other poynts, it was Reſolved, That the Exception was void; for there could be no Land at that time deviſed, and the Exception of ſuch Lands which ſhould be deviſed was repugnant; for that the Covenant was to take effect from the making of the Indenture, and ſuch an exception was an undoing of the whole grant, and croſſes the grant, and therefore is a void Exception. Like the Caſe, If a man make a Leaſe of all his Land in D. except the Mannor of D. and he hath no Land there but the Mannor, the Exception is void, and all will paſs. Hill. 10 Jac. in C. B. Sir *John Shirley* and *Barbara Wood*'s Caſe, *Hob.* 72.

2. The Dean and Cannons of *Windſor* being ſeiſed of a Mannor, did by Indenture make a Leaſe thereof to J. S. for 50 years, and of all Leets, Lawdayes, and Courts there to be held; (all manner of Fines, Herriots, Reliefs, Perquiſites, and Profits of Courts were excepted and reſerved): It was Reſolved, That the Exception of the Courts was void, becauſe the Mannor by that name was granted, which could not be recalled, and a Mannor it could not be without a Court, unleſs it were in the King's Grants. Trin. 13 Jac. in C. B. *Brown* and *Goldſmith*'s Caſe. *Hob.* 108. See Trin. 30 Eliz. in B. R. *Wheeler* and *Two-good*'s Caſe. *Leon* 118. acc.

3. The Queen ſeaſed the Patronage of D. with all the Lands and Woods and Under-woods thereunto belonging, *exceptis omnibus graſſis, arboribus, Boſcis, & maremiis.* It was Reſolved by the whole Court, as to the Under-woods, the Exception was void, for they held that the Exception was only to be intended of great Woods; and the Caſe 9 Eliz. *Dyer*, 265. of a Leaſe of an Houſe and Shops, excepting the Shops, is to be underſtood having reſpect to it ſelf only, and not having relation to any other houſe. Mich. 34 Eliz. B. R. *Keinſham* and *Redding*'s Caſe.

4. In an Ejectione firme in *Lamberhurſt* in the County of *Kent*: It was found by the Jury, That the Maſters and Schollers of *Lonkford* were ſeiſed of the Lands in Queſtion, being part of the Mannor of *Hothley* in *Lamberhurſt*, and that they did demiſe all their Lands in *Lamberhurſt*, excepting the Mannor of *Hothley*, under which the Plaintiff claimed; and they found that *Lamberhurſt* did extend into *Kent* and *Suſſex*, and that the Maſter had no Lands in *Lamberhurſt* but the Mannor of *Hothley*. It was adjudged, That the Leaſe did carry the Mannor of *Hothley*, and that the Exception was void. 18 Eliz. in B. R. *Dorrel* and *Collins* Caſe. *Hob.* 170.

5. The Duke of *Northumberland* was ſeiſed of diverſe Houſes and Cottages in the Pariſh of St. *Sepulchres, London*, and bargained and ſold all his Lands and Tenements in the Pariſh of St. *Andrews Holborn*, in the Tenure of *William Gardiner* to one *Lea*: It was adjudged, that the Grant in that Caſe was void, though thoſe Houſes were in the Tenure of Gardiner, *Cook* 3 Part, 9. *Doughties* Caſe. But where it is added in that Caſe, that the Court was of Opinion, that if he had begun with the Tenure of *Gardiner*, and ended with the Pariſh miſtaken, that the Grant had been good; the Lord Juſtice *Hobart* conceived the contrary, for the ſeveral Circumſtances and Deſcriptions circumſcribe and aſcertain the Grant, and compared it to the Caſe in *Cook* 2 Part, 22. *Doddington*'s Caſe, where the Caſe was King *Henry* 8. was ſeiſed of the Hoſpital of *Wells*, whereof certain Lands in D. out of the Circuit of *Wells*, which were in the Tenure of J. B. were part: And he granted to A. all his Lands in the Tenure of J. B. ſcituate in *Wells* to the ſaid Hoſpital belonging: In that Caſe, It was adjudged, That although the firſt part of the Deſcription, as it was placed in the Patent, in the Tenure of J. B, was true; yet the latter part being falſe, marred all.

6. Sir *Roger Lewkner* ſeiſed of *Wallingford*-Park, made a Leaſe thereof to *Ford* for years, and dyed: The Leſſee granted over his Term, excepting the Wood, the Term expired: In an Action of Waſte brought by the Heirs Coparceners of Sir *Roger*. The Queſtion was, againſt whom the Action ſhould be brought, Whether againſt the firſt Leſſee or the ſecond Leſſee? in which the Queſtion was, If the Exception of the Trees by the Leſſee was good or not. It was the Opinion of the Juſtices in this

this Caſe, that the Exception was a void Exception, and that the Action was well brought againſt *Ford* the firſt Leſſee; and the whole Court was of Opinion, That ſuch a ſpecial property in the Trees and Wood none could have but the Owner of the Land, and therefore the Exception of the Wood by the Leſſee was void. Mich. 29 Eliz. in C.P. The Heirs of Sir *Roger Lewkenor* and *Fords* Caſe. *Godb.* 116,117,118.

7. In an Action of Treſpaſs the Caſe was, The Earl of *Oxford* was ſeiſed of *Holm*-Park in Fee, and 17 Eliz. leaſed to A. B. and C. the ſaid Park, except the Trees, for 21 years: C. aſſigned his Intereſt to J. S. and afterwards the Earl ſold to A. and B. the Trees aforeſaid, who 26 Eliz. leaſed parcel of the Lands of the ſaid Park upon which the Trees did grow to J. D. for 21 years: afterward, A. B. and J. S. ſold the Trees to H. and afterwards J. D. aſſigned his Intereſt to J. N. the Plaintiff, and then H. cut down the Trees. The Point was, when a man leaſeth his Lands for years, excepting the Wood, and afterwards the Leſſor grants the Wood to the Leſſee; if now the Wood be ſo united again to the Land, that by the Leaſe of the Land the Wood ſhould paſs as a thing annexed to it; or if the Wood remains as an intereſt diſtinct and ſevered from the Land: In this Caſe, amongſt other things, It was Reſolved, That if a man makes a Leaſe for years or life, the Leſſee hath but a ſpecial Intereſt in the Trees being Timber, as things annexed to the Land, ſo long as they are annexed to it; but if the Leſſee or any other ſever them from the Land, the Property and Intereſt of the Leſſee is determined, and the Leſſor may take them as things which are parcel of the Inheritance. 2. It was Reſolved, That when the Earl leaſeth the Land, excepting the Trees, by which they were ſevered; then, when after the Leſſor granteth the Trees to the Leſſee, if they be ſo now reunited to the poſſeſſion of the Land, that when the Term endeth, the Leſſor ſhall have them again: And it was Reſolved, That the Leſſee in Judgment of Law had abſolute Property in the Trees, ſo as by Leaſe of the Land they do not paſs; and therefore, if I leaſe you all my Lands, except the Trees, to have to you and your Heirs, the Trees in property are divided from the Land, although they *in facto* remain annexed to the Land; and in the principall Caſe it was holden, That it was againſt reaſon, that the Leſſor ſhould have them again, againſt his own Grant. M. 31 Eliz. in B.R. *Cook* 4. Part, 62. *Herlakenden's* Caſe.

8. A man made a Leaſe for 30 years of a Manor, excepting all Woods and Under-woods growing and being upon the Manor, and afterwards made another Leaſe to the ſame Leſſee of all the Wood and Under-wood growing or being upon the ſaid Manor for 60 years, without Impeachment of Waſte, and afterward a third Demiſe of the ſaid Manor to the Leſſee for 30 years without Exception, to begin at a day to come; ſcil. from the expiration of the ſaid Leaſe for 30 years: the Term for 30 years ended, the Leſſee cut down Trees. In this Caſe Reſolved, 1. That by the Exception of the Wood and Under-wood, the ſoil it ſelf was excepted, and the words [growing or being upon the Land] were ſurpluſage. 2. That notwithſtanding the Exception, the Wood did remain parcel of the Manor, and by demiſe of the Manor would paſs. 3. That by the Acceptance of the future Leaſe to begin diverſe years after: The Leaſe for 60 years was ſurrendred, becauſe the Leſſee by acceptance thereof had affirmed the Leſſor to have Authority to make a new Leaſe. M. 40 Eliz. in C.B. *Cook's* Part, 11. *Iwes* Caſe.

9. The Cuſtom of a Manor is, That every Copyholder, Tenant for life, might take Timber growing upon his Copy-hold, for the reparation of it. The King made a Leaſe of the Manor, of which the Copyhold is parcel for years, except all Woods, Under-woods, and Trees: The Leſſee for years, *Dominus pro tempore* of the Manor, granted a Copyhold upon which were Timber-Trees to one for life, who cut down Trees to repair his Copyhold: It was Reſolved, That notwithſtanding the ſeverance and the Exception, that the Grantee ſhould have the Trees; for the Eſtate of the Copy-holder who comes in by voluntary Grant is not derived out of the Eſtate and Intereſt of the Lord, but the Copyholder is in by the Cuſtom, which is Paramount, and the Lord is but an Inſtrument to make the Grant. *Cook* 8. Part, 63. *Swayn's* Caſe.

10. The King ſeiſed of the Manor of H. made a Leaſe thereof to J. S. for years, *excepta reſervatis groſſis, arboribus, ſuper premiſ. creſcentibus & exiſtentibus.* Proviſo, If that the Leſſee ſhould do voluntary Waſte in any of the Premiſſes the Leaſe to be void; afterwards the King granted the Reverſion to the Lord *Rich* and his Heirs, the Leſſee cut down certain great Trees, which at the time of the Leaſe were but little Trees, but after *tractu temporis* became great, the Lord *Rich* entred for the condition broken. It was moved, If the Exception did extend to the Trees which at the time of the Leaſe were but little Trees; for if ſo, then Waſte cannot be aſſigned for cutting them down, and ſo the condition not broken. But it was the Opinion of the Lord *Anderſon*, that the Exception did extend to Trees which at any time during the Leaſe became great, although at the time they were but little, and ſo the condition was broken; but if the words had been *modo creſcentibus & exiſtentibus*, it had been otherwiſe. Mich. 29 Eliz. in C. B. *Gammock* and *Cliff's* Caſe. *Leon* 61.

11. Action

11. Action of Treſpaſs, for a Treſpaſs done in his Cloſe called the *Frith*-Cloſe and carrying away of certain Loads of Wood. The Defendant ſaid, That A. was ſeiſed of the Mannor of D. of which the place was parcel, and leaſed the ſame to J. S. for years, excepting all Woods, great Trees, Timber-Trees, and Under-woods, and covenanted with the Leſſee that he might take Hedg-bote and Fire-bote *ſupradict. premiſſa*; and ſhewed, that J. S. had aſſigned his Intereſt to the Defendant, and that the Defendant came to the Cloſe called *Frith* Cloſe, and cut the Wood there for Fire-bote, and that A. afterwards granted the Inheritance to the Plaintiff. In this Caſe, It was adjudged for the Plaintiff, as to that Cloſe called the *Frith*-Cloſe; but as to the other Lands, for the Defendant: For the *Frith*-Cloſe was all excepted, *ſcil.* the Wood, and the Soil; and the words *ſuper premiſſa*, ſhall be intended ſuch things as were demiſed and no other; and by the Covenant, the Leſſee hath Power to take the Wood upon the other Lands, although that the Wood be excepted; for the Soil was demiſed, and he ſhall not be puniſhed in Treſpaſs. Trin. 30 Eliz. in B.R. *Cage* and *Paxlin's* Caſe. *Leon.* 117.

12. A man by Indenture demiſed a Houſe and Land, *exceptis omnibus arboribus* &c. *ad tunc creſcent. ultra creſcentiam* 21. *annorum*; *habend. tenementa prædict. cum pertinenciis, exceptis pre-exceptis*, and afterwards by Indenture covenanted to ſtand ſeiſed *de tenementis prædict.* to the uſe of J. S. in Tail, with diverſe Remainders over. J.S. entred and ſhewed Trees to J. D. and commanded them to be cut, being Oaks growing upon the Lands, being above the Age of 21 years. It was Reſolved, 1. That the Trees notwithſtanding the Exception did remain parcel, and did grow out of the Inheritance & were not Chattels, nor ſhould go to the Executors, but ſhould diſcend to the Heir, or go to him in the Reverſion; and therefore, when no Exception is in the Leaſe, the Leſſee hath there a particular Intereſt in the Intereſt, and the Inheritance ſhall go to the Leſſor; and in this Caſe this difference was agreed. If a Wood, whereof a *Precipe* lyeth, be parcel of a Mannor, and a man leaſeth the Mannor excepting the Wood, the Soil is ſelf is excepted; but if a man excepts all Woods which ſhall grow upon any Land or Paſture, there by the Exception of the Trees, the Land it ſelf is not excepted; but ſufficient Nutriment out of the Land is reſerved to maintain the vegetative life of the Trees. *Cook* 11 Part, 48. *Richard Liſord's* Caſe.

13. In an Action upon the Caſe, the Plaintiff declared, That J. S. was ſeiſed in Fee of a Farm, and 100 Acres of Land to the ſame belonging, and covenanted to ſtand ſeiſed thereof to the uſe of himſelf and his Wife for their lives, and after to his Son and Heir, excepting the Timber-Trees, ſaving that his ſaid Wife ſhall have and take the Shrouds and Loppings of them, and dyed; his Wife ſurvived, and married the Plaintiff; and the Defendant as Heir of J. S. cut down five Oaks growing upon the ſaid 100 Acres, whereby the Plaintiff loſt all the benefit which he might have had in the Shrouds and Loppings of the ſaid Trees: Upon not Guilty, it being found for the Plaintiff; It was moved, that the excepting of the Trees, after the limitation of the Uſes was void, but the Exception was not allowed by the Court; for they ſaid, That an Exception might well be to ſhew his intent, that they ſhould not be annexed to the eſtate for life. Hill. 11 Car. in B. R. *Tregmiel* and *Reev's* Caſe. *Cro.* 1. Part, 306.

14. A man made a Leaſe for years of Lands, excepting to the Leſſor all his Woods and Underwoods, Coppices, and Hedg-Rows, ſtanding, growing, and being on and upon the premiſſes. The Leſſee put Cattle into the Coppices, and the Leſſor diſtreyned them: It was ſaid for the Plaintiff, that premiſſes are *predimiſſa*; and by theſe words (growing and being upon the premiſſes,) it ſhall be intended, that the Soil did not paſſe: It was Reſolved, That the Soil it ſelf was excepted by the Exception of the Wood and Coppices. 14 H. 8. 1. and by the reſerving of a Coppice, the Soil it ſelf is excepted, and ſo the Diſtreſs well taken. Trin. 16 Jac. in B.R. *Hide* and *Whiſtler's* Caſe. *Popham*, 146.

15. A man ſeiſed of Lands in Fee, levyed a Fine to A. and B. to the uſe of himſelf, without Impeachment of Waſte, with Power to cut down and carry away the Trees, & to make Leaſes for 21 years, or 3 lives, the Remainder to the uſe of his Son for life, without Impeachment of Waſte, with the ſame Power. The Father made a Leaſe to one for three lives, rendring the ancient Rent, excepting all Trees except thoſe which ſhall be for cropping, lopping, and fewel, and dyed; the Son cut down Trees, J. S. who claimed by the Leaſe of the Father, brought Treſpaſs. Firſt, the Court was of Opinion, that Leſſee for life without Impeachment of Waſte, might make a Leaſe excepting the Trees; and if he aſſign over all his eſtate, yet he might cut down Trees, for he hath Power to diſpoſe of the Trees. 2. Reſolved, That he in the Remainder for life, without Impeachment of Waſte, with power to cut down the Trees, might cut them down during the Leaſe for three lives. Trin. 2 Car. in B.R. *Sacheverel* and *Dale's* Caſe. *Popham*, 194.

16. Tenant in Tail of the Mannor of D. the Reverſion to the King: Afterwards the Mannor by expreſs Name is given to the King by Act of Parliament, ſaving the Right, Title, and Intereſts of all Perſons: It was holden, That the ſaving to the Owner of the Land is Repugnant; and when a

ſaving

ſaving in an Act of Parliament is repugnant to the body of the Act, the ſaving is void. See the Caſe of the Duke of *Norfolk*, *Plow. Com.* 563. *Cook* 1. Part, *Alton Woods* Caſe. 14 Eliz. *Dyer*, 313. acc. And if Land Eſcheat to the King for forfeiture of Treaſon; And after that Land is given to another by Act of Parliament, ſaving to all others their Rents and Services, the ſaving is repugnant and void, for that they were extinct by the forfeiture. 27 H. 8. Br. *Parliament.* 77. *Cook* 1. Part, in the Caſe of *Alton Woods*, acc.

17. The general Pardon made, 28 Eliz. Pardoned all Felonies, &c. in which Burglary was excepted; the Queſtion was, if the Attainder of one for Burglary was excepted. It was Reſolved by all the Juſtices, That it was excepted, becauſe that now his Burglary doth appear of Record by Judgment of Law; and although the Jury hath found the Priſoner guilty of Burglary, and upon that he hath Judgment, yet the Offence of Burglary, is the foundation of all, and therefore if that be excepted, all the proceedings upon it are excepted; And by the exception of the Offence in general Pardons, all dependants upon them are alſo excepted. See *Coo.* 6. Part, Hill. 29 Eliz. in the Caſe of Pardons, 13, 14.

18. A. ſeiſed of the Forreſt of *Hatfield* in Fee, in which Forreſt, J. D. had Common appurtenant to his houſe, and Land for all Beaſts through the whole Forreſt. In performance of an Award, between the ſaid A. and J. S. by Deed Indented, Granted to J.S. and his Heirs, all his Trees, Woods, and Underwoods, which at any time after ſhould grow upon any parcel of the Forreſt, except the ſoil of the ſaid Woad, with liberty to encloſe for preſervation of the Spring of the Wood, as by the Law of the Realm is provided, and to exclude the Deer and all other Cattel out of the ſaid Wood ſo encloſed, which Grant was confirmed by Act of Parliament 27 Eliz. with a ſaving to all ſtrangers. The Queſtion was, If J. D. were barred of his Common, or not, by the Statutes of 22 E. 4. cap. 7. and 35 H. 8. cap. 17. not pleaded. In this Caſe, it was Reſolved. 1. That J. S. had an Inheritance as a profit apprender *in alieno ſolo*; and that the ſoil it ſelf did remain to A. 2. That the ſaid Act of 22 E. 4. did not extend to the Wood of a Subject: For by the Common-Law, he who hath a Wood, in which another hath Common, cannot incloſe it, and exclude the Commoner, be it in a Forreſt, or in a Chaſe, or out of a Forreſt or Chaſe: But he who hath a ſeveral Wood in a Forreſt, may after the cutting down of it, incloſe it for the ſeven years *parvis foſſato et baſſalhais, ſecundum Aſſiſam Foreſtæ*: And the Statute of 22 E. 4. doth extend to ſeveral Woods, and not to Woods in which another hath Common. 3. Reſolved, That Commoners were not parties to the ſaid Act of 22 E. 4. and therefore not excluded of their Common. 4. Reſolved, That the Statute of 35 H. 8. did reſtrain only the Owner of the Wood to cut down his own Wood upon a penalty, but did not extend to exclude a Commoner of his Common. Paſc. 8 Jac. in C. B. *Coo.* 8. Part, 137, 138. Sir *Francis Harrington's* Caſe.

19. Debt upon an Obligation of 40 l. the Defendant pleaded a Releaſe, the Plaintiff demanded *Oyer* of the Releaſe, which was, That the Plaintiff did acknowledg himſelf to be diſcharged of all Bonds, Debts, and Demands, by the Defendant, until the day of the Releaſe; and that the Plaintiff is to deliver all Bonds as he hath yet undelivered to the Defendant, (except one Bond of 40 l. not yet forfeited, in which he and two others ſtand bounden to the Plaintiff;) and the Plaintiff averred that the Bond which was excepted, and that upon which the Action was brought, was one Bond. In this Caſe, it was Reſolved, 1. That when the Plaintiff confeſſeth himſelf to be ſatisfied of all Bonds the ſame is a good Releaſe by the words ſatisfied, and diſcharged, becauſe a man ſhall be but once ſatisfied. 2. Reſolved, That the Exception doth extend to all the premiſes, and not only to the clauſe of delivery, becauſe all the words are but one ſentence, and the one doth depend upon the other, for it is reaſon that Bonds which are ſo ſatisfied and diſcharged, that they ſhould be delivered. 3. It is reaſon that the Bond of 40 l. ſhould be excepted, becauſe the ſame was not due. 3 Jac. in C. B. *Coo.* 9. Part, 53. *Hickmott's* Caſe.

Executors.

1. *What perſons may make Executors, or be Executors; What not: and how, and where the Authority of Executors may be divided by the Teſtator; When not.*

1. NOte by the Common-Law of *England*, any perſon may either be Executor, or make an Executor, unleſs he be defective in his underſtanding, or in power or Intereſt; or in reſpect of place; where he is born, or Calling wherein he is exerciſed: as Infants, Aliens, Ideots, Lunatiques, Women Covert, or Married perſons Outlawed, Attainted, Convicted, Excommunicated, Aliens born, Villains, Monks, Fryars, perſons Deaf or Dumb, or the like.

2. An

2. An Ideot natural cannot make a Will, nor make Executors, nor be Executor, becauſe he wants the uſe of reaſon to conceive what is fit for him to Will, or to do, or be done by him: and this appeareth by 3 Eliz. *Dyer*, 203, 204. where the Caſe was, That Executors recovered in an Action of Account, and the Defendant was taken in Execution for the Arrerages; and afterwards the Will was made void, becauſe the Teſtator was an Ideot natural; and thereupon the party ſued an *Audita Querela*, upon which the Executors did demur in Law. And ſee *Cook* 8. Part, 143. in Dr. *Dowyes* Caſe: where it is Reſolved, that in ſuch Caſe, *Audita Querela* doth lye. But a Lunatique having *Lucida inter vallo*, may in the time of his right mind, make a Will, and Executors. 44 E. 3. 33.

3. An Alien born may make a Will and Executors: and be an Executor, and ſue as Executor, if he be an Allien friend, and not an Allien Enemy; and ſo was it adjudged. 3 Eliz. in *Paſcatia's* Caſe.

4. Perſons Attainted, Convicted, or Outlawed; though they cannot make Executors during their diſabilities; becauſe they have no goods of their own; yet they be Executors to others; and touching ſuch goods as they have as Executors to others; they may diſpoſe of them, by the Wills, and make Executors of them; and ſo is it of Villains, Monks and Fryars: and perſons Attainted; and ſuch Executors may maintain a Writ of Error to reverſe a Judgment given againſt their Teſtator, as it was adjudged. 33 Eliz. in B. R. See Office of Executors. 24. &c.

5. A Will made by a Feme-Covert, is void, nor can ſhe make Executors of it; unleſs it be made with the conſent and aſſent of her Huſband, and it it be ſo made, it is good. And if a Woman ſole make a Will, and make Executors; and afterwards ſhe marrieth, and taketh Huſband; which Marriage continueth till her death, the ſame is a countermand of her Will. Mich. 31 Eliz. in C. B. *Coo.* 4. Part, *Foſſe* and *Hemblings* Caſe.

6. An Enfant may be an Executor, and the Law enableth him to take upon him the charge of the Will, and to prove it, and to bring Action, and to do things which appertaineth to the Office of an Executor. But a Releaſe of a Debt or Duty by ſuch an Executor after he hath proved the Will, is not good, for theſe cauſes. 1. Becauſe it ſhall be a *Deuaſtavit*, and charge the Enfant of his proper goods. 2. It ſhould be a wrong which an Enfant by his Releaſe cannot do. And 3. Becauſe it is not purſuant to the Office of an Executor, but all acts and things which he legally doth according to his Office, and duty of an Executor, ſhall bind him. *Cook* 5. Part, 27. *Ruſſell's* Caſe.

7. It was Reſolved by the Court, That an Alien born may be an Adminiſtrator, and have Adminiſtration of Leaſes, as well as of perſonal things, becauſe he hath them as Executor in anothers Right, and not to his own uſe; and he may Adminiſter, as well as a perſon Outlawed, or Attainted, may be an Executor. And Paſc. 41 Eliz. in C. B. *Beck* and *Philips* Caſe. Debt brought by an Adminiſtrator, the Defendant pleaded, That the Plaintiff was an Alien born and adjudged no Plea. Paſc. 1 Car. in B. R. Sir *Upwell Corams* Caſe. *Cro.* 1. Part, 5.

8. The Teſtator may divide the power of his Executors in divers reſpects: As he may make A. Executor for his Plate and Houſhold ſtuff; B. his Executor for his ſheep and Cattel; C. for his Leaſes, Statutes, Recognizances; and D. for his debts due unto him; he may alſo divide their power locally, as he may make A. his Executor for his goods in *London*; B. his Executor for his goods in *Middleſex*, or in any other County. He may divide the power of his Executors in reſpect of time: As he may make his Wife Executrix during her life, or during the Minority of his Son, or ſo long time as ſhe ſhall continue Widdow, and after, his Son to be Executor. So one may be made Executor as to a particular thing only, viz. as touching ſuch a Bond, Statute, or Recognizance only. And if two be made Executors joyntly and ſeverally; yet their power may be divided by a Proviſo, viz. that at one ſhould not entermeddle during the others life; ſo as they ſhall be Executors ſucceſſively, and not joyntly, provided ſuch Proviſo be not repugnant to the Premiſes of the Will. 32 H. 8. br. Executors. 155. See *Office of Executors*, 19, 20, 21. acc.

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2. *What Goods and Chattels of the Teſtator the Executors ſhall have; What not: And what Actions they may have for the ſaid Goods, and againſt whom: And what Actions are maintainable againſt Executors, upon Contract or promiſe of the Teſtator; What not.*

1. WAſte may be committed in glaſs annexed to Windows, for it is parcel of the houſe, and ſhall deſcend as parcel of the Inheritance to the Heir, and the Executors ſhall not have them: And if Leſſee for years put glaſſe in the Windows, yet the ſame being parcel of the Inheritance, he cannot take it away, nor waſte it: And glaſs annexed to Windows by nails, or in any other manner by the Leſſor or Leſſee, cannot be removed by them, for that without glaſs, it is no perfect houſe, but the ſame will go to the Heirs, and

Post to Executors; And so it is of Wainscot annexed to a House by Nails, Screws, or Irons put through Posts, they cannot be removed, but shall pass to the Heir or Vendee with the house, and shall not go to the Executors of the Lessor or Lessee as Chattels. *Cook* 4. Part, 64. in *Herlakendens* Case. See 21 H. 7. 26, 27.

2. The Executors shall have all such Chattells, which the Testator might have forfeited by Outlawry, or by which the Testator might have bin Attached in any Action brought against him.

3. The Executors shall have the Chest or Box in which the Evidences of the Testator are, unless it be sealed with the Seal of the Testator, for then the Heir shall have it. 36 H. 6. 26, 27.

4. Charters do not properly belong to the Executor, but to the Heir, and yet the Executors shall have an Action for them, if the Charters do concern the possession, or be grounded upon the possession. 43 E. 3. 24. And notwithstanding a Release of all Actions, they may have an Action upon their Possession of them. 39 H. 6. 15, 16.

5. If a Recognizance be enred and acknowledged to the Chamberlain of *London*, and his Successors by Custome, for Orphanage Money, in Case he dyeth, the said Recognizance shall go to his Successors; and the Executors or Administrators of the Chamberlain ought not to entermeddle with such Recognizances, Obligations, &c. which are to be taken by the Chamberlain in his Corporate capacity, and not in his private Capacity. *Coo.* 4 Part, 65. *Falwood's* Case.

6. A. seised of Land in Fee, by Indenture Covenanted with J. S. that if J. S. pay to him, his Heirs, or Assigns, 100 l. such a day, that then he and his Heirs would stand seised of the said Land to the use of the said J. S. and his Heirs; and having Issue a Son, made his Will in writing, and made his Wife, and two others, his Executors; and by the said Will, devised the Land to his Wife, during the Minority of his Son, and dyed, his Son within age, the Wife renounced the Will, and took Letters of Administration. It was Resolved in that Case, That the Wife having but a particular Interest in the Land, was not an Assignee of the Lands within the Proviso. 2. Resolved, That the tender ought to have bin made to the Heir, and not to the Executors, because the Heir was expresly named, which excluded the Executors and Administrators. Mich. 40 Eliz. in B. R. *Coo.* 5. Part, 96. *Goodale's* Case.

7. If a man hath Savage Beasts *ratione Privilegii*, as by reason of a Park, Warren, he hath not any property in the Deer, or Conyes, or Pheasants, or Partridges; and therefore in an Action *Quare Parcum, Warrannum, &c. fregit et intravit, et tres damus Leporis, Cuniculis, Phasianos, Perdices, &c. cepit et asportavit*, he shall not say (*suos*), because he hath not property in them, but they do belong to him *ratione Privilegii*, for his Game and Pleasure, so long as they remain in the Priviledged place. For if the Owner of the Park dyeth, his Heir shall have them, and not his Executors or Administrators. *Cook* 7. Part, 17. in the Case of Swans. &c.

8. A man devised Lands to his Wife for Term of her life, and if she live untill his Son come to the age of 24 years, that then he shall have the Lands; and if he dye before he come to that age, that then J. S. shall have it, untill his Son come to that age, and dyed; then J. S. dyed before the Wife, and after she dyed, before the Son came of 24 years. If the Executors of J. S. should have the Lands untill the Son come to age, or not, was the Question: And the Opinion of the whole Court was, That they should not have it, because their Testator had never any Interest vested in him. Mich. 30 Eliz. in C. B. *Goldsbr.* 64.

9. This Case was moved to the Court; A man had a Rent-service payable at the Feast of St. *Michael*, and about *Michaelmas* day he dyed, about ten of the Clock in the morning. It was demanded, Whether the Heir or Executor should have the Rent: *Anderson*, Hath he not all the day to pay it? And upon Condition to pay such a sum, he may tender it at any time before Sun-set. *Periam*, If the party accept the payment in the morning, it is good. The Court delivered no Opinion in it, because it was a Case which might come before them upon Demurrer. Trin. 30 Eliz. in C.B. *Goldsbr.* 98.

10. A man seised of an Advowson, granted to another the next Avoydance, and after the Church became void, and the other Released to him all his Right, and the Defendant disturbed him. In a *Quare Impedit*, after Issue joyned, it was found for the Plaintiff: It was moved in Arrest of Judgment, That the Release was void, being made when the Church was void, for it was then a thing in Action, and could not be granted over, and so by the same reason, could not be Released. The Opinion of the Court was, That it was an Interest which should go to the Executors, and therefore may be released. Mich. 31 Eliz. in C.B. *Goldsbr.* 112.

11. In Trespass for entring his Close, and taking his Fish out of his Fish-Pond with Nets, and other Engines: The Defendant pleaded, That before the Trespass, A. was seised of the Close and Pond, and put the Fishes in it, and made him his Executor, and dyed, and he as Executor took the Fishes. It was adjudged in this Case, That the Heir shall have the Fishes in the Pond, and not the Executors, for they are Chattels discendable. Hill. 43 Eliz. in in C. B. *Grey* and *Trowes* Case. *Goldsbr.* 129.

12. If

12. If a Diſſeiſor ſoweth the Land of Tenant for life, and the Tenant for life dyeth; the Executors of the Tenant for life ſhall have the Emblements. Hill. 43 Eliz. in C. B. in Sir *Henry Knevet* and *Poolis* Caſe. *Goldesbr.* 145. See in Title Emblements.

13. A man was poſſeſſed of a Term, and made his Wife and J. S. his Executors, and deviſed all his Term to them, and that they ſhall have the Term untill all his Debts and Legacies are paid; the Remainder to J. D. the Queſtion was, Whether the Executors take the Term as Deviſees, or Executors. *Clench* and *Fenner*, they ſhall take as Executors for it; is the proper function of an Executor to entermeddle with the Will. *Gawdy* ſaid, If I make two my Executors, and Deviſe the profits of my Lands to them untill my Debts and Legacies be paid, and untill they have levyed 100 l. after to their own uſe, they ſhall take as Legatees, and not as Executors in reſpect of the 100 l. which they are to have to their own uſes. Hill. 43. in C. B. *Pannel* and *Fens* Caſe. *Goldesbr.* 185.

14. Reſolved, That a man may have a Term in a thing which is a Chattel, and yet the ſame ſhall not go to Executors. The Office of Marſhal of the Kings Bench was granted to Sir *George Reynol* for life, and afterwards was granted to another for 21. years. It was adjudged, That the Grant in Reverſion for years, was void, becauſe it was an Office of Truſt, and perſonal, which ſhould not go to Executors, or Adminiſtrators. *Coo.* 9. Part, 96. Sir *George Rynolls* Caſe.

15. A man ſeiſed of Land in Fee, 1. *Octobet*, maketh a Leaſe of the ſame Lands for 10 years, from the Feaſt of St. *Mich.* laſt paſt, yielding to him and his Heirs 20 l. at the Feaſt of St. *Mich.* the *Arch Angel*, or within one Moneth after, in this Caſe, if the Leſſor dyeth between the Feaſt of St. *Michael*, and the end of the Moneth. It was Reſolved, That the Heir ſhould have the Rent as incident to the Reverſion, and not the Executors, as Rent behind, becauſe it was not due untill the end of the Moneth. See *Coo.* 10. Part, 129. *Clunns* Caſe, acc.

16. Leſſee for life rendring Rent, the Rent is behind, the Leſſor dyeth, his Executors during the life of the Tenant for life, ſhall not have an Action of Debt, but after the Eſtate for life determined, an Action ſhall be maintainable by them. But when a Rent granted for life is arrear, and afterwards the Ter-Tenant alieneth, and afterwards the Grantee dyeth, an Action ſhall be maintainable againſt him who was Tenant, and took the profits when the Rent was arrear.

17. If a man by Deed grant a Rent for life, Proviſo, that he ſhall not charge his perſon. It is a good Proviſo; yet if the Rent be behind, and the Grantee dyeth, his Executors ſhall charge the perſon of the Grantor in an Action of Debt, for otherwiſe they ſhould be without remedy. *Cook* 6. Part, 41. in Sir *Anthony Mildmayes* Caſe.

18. A. & his Wife levyed a Fine to J.S. of a Rectory, who granted and rendred a rent-charge of 30 l. iſſuing out of the ſame to A. for his life to begin after the death of his Wife; Proviſo, that it ſhould not extend to charge the perſons of the Conuſees, but to charge the ſaid Rectory only during the life of A. and rendred the Rectory to A. and his Wife, during the life of the Wife, the remainder to J. D. and his Wife in tail, the Remainder to the right Heirs of the ſaid J. D: A. acknowledged a Statute to B. the Wife of A. dyed, thoſe in the Remainder entred; A. releaſed the Rent to him in the Remainder, the Rent upon the Statute was extended and delivered. For arrerages of the Rent Debt was brought againſt J. D. It was Reſolved in this Caſe, amongſt other points; That the Action of Debt did not lye, ſo long as the extent endured. 2. Reſolved, That although there was an expreſs Proviſo, That the perſon ſhould not be charged in Annuity, yet after the Annuity or Rent determined, the perſon of the Ter-Tenant ſhould be charged in Debt for the Arrerages, becauſe he had no other remedy. 3. Reſolved, That if a man granteth a Rent charge for life out of his Land, the Rent is behind, the Grantor enfeoffeth J. S. the Rent is arrear in his time; J. S. enfeoffeth J. D. the Rent is Arrear in his time, the Grantee dyeth, his Executors ſhall have Debt againſt every of them for the Rent behind in his time, for *Qui ſentit comodum ſentire debet et onus.* *Coo.* 7. Part, 38. *Lillingſtons* Caſe.

19. If a man loſeth Goods which come to the hands of another, and he converteth them to his own uſe, and the Owner dyeth; The Queſtion was, If Trover and Converſion did lye by his Executors. *Periam* doubted it. *Manwood* ſaid, If a man hath another in Execution for Debt, and the Goaler ſuffers him to eſcape, and afterwards the Recoverer dyeth. It was the Opinion of *Anderſon*, *Manwood*, and *Windham*, that his Executors ſhould have an Action againſt the Goaler for the Eſcape. But for Trover in the principal Caſe. It was not Reſolved, Paſc. 30 Eliz. in C. B. *Goldesbr.* 90.

20. A. brought an Action of Debt againſt B. as Adminiſtrator of F. and declared upon a ſimple contract made by the Inteſtate; the Defendant pleaded *plene adminiſtravit*, and it was found againſt him, It was ſaid by *Anderſon* Chief Juſtice; That it appeareth to us, That an Executor or Adminiſtrator, cannot be charged upon a ſimple Contract of the Teſtator, or Inteſtate; and the Court ought to have ſtayed the Judgment, and the Writ at the firſt ought to have abated, and therefore with the aſſen-

of the other Juſtices he gave Judgment, That the Action did not lye, but that the Writ ſhould abate. Mich. 31 Eliz. in C. B. *Hughſons* Caſe. *Goldesbr.* 105.

21. A Writ of Error was brought by an Executor to reverſe an Outlawry of his Teſtator in Felony; It was Objected, That a man Attainted could not make Executors, for he is dead in Law; alſo an Executor cannot have a Writ of Error, but only upon a Judgment given in a perſonal Action; but this Attainder is a thing of a higher nature; and when Error is brought to reverſe Outlawry in Felony, a *Scire facias* ought to be ſued out againſt the Lords mediate, and immediate, which cannot be at the Suit of Executors: It was the Opinion of the Court, That the Executors might have Error to reverſe the Outlawry, and as to that which hath bin Objected, That the party Attainted cannot make Executors, the ſame is no reaſon for the Executors do pretend, that their Teſtator was not lawfully Outlawed, and ſo by this ſuit, they do endeavour to take away that diſability; and therefore it ought not to be Objected againſt the Executor. And if the Teſtator had not any Lands, but only goods, there is no reaſon but that the Executors ſhould have a Writ of Error, otherwiſe the goods of the Teſtator ſhould be loſt, and afterwards the Outlawry was reverſed. Tr. 30 Eliz. in B. R. *Manſhes* Caſe, *Leon.* 325.

22. If the Son be Lord, and the Father Tenant by certain Rent; the Rent is behind, the Tenant dyes, and the Tenancy deſcends to the Son, if the Son dyeth, the Executors of the Son ſhall not have an Action of Debt for the Arrerages incurred in the Sons life, becauſe the Son himſelf by no poſſibility could have ſuch an Action, for that the Tenure was altogether in the realty, and the Tenant could not be charged in any perſonal Action for thoſe Arrerages. *Cook* 4. Part, 49. in *Ognells* Caſe.

23. If A. hath a Rent-ſervice, or a Rent-charge in Fee, or for life, and the Rent is behind, and afterwards A. grants over the Rent unto another, and the Tenant Attorns, and after A. dyes; The Executors of A. in this Caſe ſhall not recover the Arrerages by force of the Statute of 32 H. 8. for by the grant over the Arrerages were loſt, and were not due to the Teſtator at the time of his death, and the Statute is, that the Executors ſhall recover them, in as large and ample manner as the Teſtator might or ought to have recovered them. See *Cook* 5. Part, 12. *Sanders* Caſe.

24. In Debt the Plaintiff Declared, That where the Inteſtate was indebted to J. S. in divers ſums of money for Wares ſold, that J. S. became Bankrupt, and was adjudged Bankrupt by the Commiſſioners; and this Debt was aſſigned to the Plaintiff being a Creditor, and that the Inteſtate dyed, whereupon this Action was brought againſt the Defendant his Adminiſtrator. It was adjudged, That the Action lyeth not, although it was alledged, it is *quaſi* a Debt upon Record, being aſſigned by the Commiſſioners; for the Aſſignment of the Commiſſioners doth not alter the Law, and againſt ſuch Adminiſtrator, this Action lyeth not by the Law. Paſc. 6 Car. in B. R. *Morgan* and *Greens* Caſe. *Cro.* 1. Part, 135.

25. *Aſſumpſit* brought againſt an Executor, and declared, That the Teſtator in conſideration, that the Plaintiff had leaſed to him certain Copyhold Land, aſſumed to pay to him 100 l. the Defendant demurred in Law, for that the Action is not maintainable againſt an Executor upon an *Aſſumpſit* of the Teſtator. *Popham* ſaid, becauſe of the contrariety of Opinion in this Caſe between the Judges of the Common-Pleas and us, we will make it an Exchequer-Chamber Caſe, and try the Law. By which it ſeemed, the point in Law was not then Reſolved. Hill. 43 Eliz. in B. R. *Pine* and *Hide* Caſe. *Goldesbr.* 154.

26. An Executor brought an Action upon the Caſe, againſt an Executor upon an *Aſſumpſit* made by the Teſtator of the Defendant. It was adjudged that the Action was maintainable; firſt, becauſe the Teſtator himſelf in that Action could not wage his Law, the conſideration being grounded upon a *Mutuatus* and promiſe of the Teſtator to pay a Debt, and not to do a Collateral Act. 2. Becauſe after the death of the Teſtator, the Debt remained, and it ſhould be a defect in Law if no remedy ſhould be for the recovery of it. *Co.* 9. Part, 86. *Pinchons* Caſe. See *Cro.* 2. Part, 294. the ſame Caſe.

27. Action upon the Caſe upon *Aſſumpſit* againſt an Executor; the Plaintiff declared, That in conſideration the Plaintiff would marry the Teſtator, he promiſed to leave her worth 500 l. and alledges he did not leave her worth 500 l. It was moved in Arreſt of Judgment after a Verdict for the Plaintiff, that an *Aſſumpſit* did not lye againſt an Executor upon a Collateral promiſe of the Teſtator, and that by the entermarriage, the contract was determined, as if a Releaſe had bin made of it. It was Reſolved, That it never was a duty in the life of the Husband, nor ever could be releaſed by him, wherefore it was adjudged for the Plaintiff, and that the Action will lye againſt the Executors of the Husband. Hill. 17 Jac. in C. B. *Clark* and *Thompſons* Caſe. *Cro.* 2. Part, 571.

28. *Aſſumpſit*, the Plaintiff declared (brought againſt Executors). In conſideration the Teſtator would marry the Defendants Couſin at his requeſt to give him 20 l. and alledges, that at ſuch a day, he married the Teſtators Kinſwoman, and neither the Teſtator, nor the Defendant, although he had

Aſſets

Aſſets, had payed the 20 l. It was moved, That the Action did not lye, becauſe that *Aſſumpſit* is not for Debt, but upon a Collateral promiſe, and that it differs from *Pinchon's* Caſe, *Coak* 9. Part. And two Preſidents were ſhewed, viz. Trin. 13 Jac. *Sanders* and *Eſterby*, where upon an *Aſſumpſit* againſt an Executor, upon a Promiſe of the Teſtator, That the Plaintiff ſhould have as much if he would marry his Daughter, as any of his Children had at the time of his death, and avers, that ſuch a Child had ſo much; and Judgment was given for the Plaintiff, and Error thereupon brought. Hill. 7 Jac. Between *Herman* and *Elliot*, the Promiſe was, in conſideration the Plaintiff would marry his Daughter *Eliot* promiſed 60 l. and 10. Quarters of Barley in Marriage with her; for non-payment, the Action was brought againſt his Executor; And becauſe it was a Collateral *Aſſumpſit*. It was Reſolved by all the Juſtices and Barons of the Exchequer, that the Action did not lye. Trin. 14 Jac. in B. R. *Beriford* and *Woodroffs* Caſe. *Cro.* 2. Part, 405.

29. Error in the Exchequer Chamber of a Judgment in the Kings Bench; in an Action upon the Caſe againſt Executors of a promiſe of their Teſtator, the promiſe was, That he ſhould re-deliver ſuch a Bond, delivered for ſuch a thing, and becauſe the Teſtator did not re-deliver the ſaid Bond the Action was brought againſt his Executor; and after Verdict, Judgment for the Plaintiff, and Error brought, and the Error aſſigned. That this being a meer collateral promiſe made by the Teſtator, and broke by him, the Action did not lye againſt his Executors, and ſo it was ſaid by *Tanfield*, it had bin often reſolved; But it was the Opinion of all the Juſtices and Barons of the Exchequer, that the Action did lye: And they ſaid, It is true, ſuch an Opinion was conceived in the time of Queen *Eliz.* that the Action would not lye. But of late, the Opinion of both Courts, of Kings Bench and Common-Pleas, are reconciled, and Reſolved, That the Action lyeth upon ſuch promiſe againſt the Executors; and in the principal Caſe, the firſt Judgment was affirmed. Hill. 20 Jac. in the Exchequer-Chamber. *Fawcet* and *Charters* Caſe. *Cro.* 2. Part, 663.

30. A. Executrix of B. brought debt upon an Obligation of 200 l. by W. W. The Defendant pleaded, That J. S. late Husband of the ſaid A. and the ſaid W. W. were bounden in the ſaid Obligation to B. and that J. S. dyed, and made the Plaintiff, and the ſaid B. the Obligee, his Executors. B. renounced, and A. Adminiſtred, and that Aſſets came to the Plaintiffs hands: The Plaintiff confeſſed the Will of J. S. and that the ſaid B. renounced, and that A. adminiſtred fully all the goods of J. S. and that afterwards the ſaid B. made the Plaintiff her Executrix, and that neither at the death of the ſaid B. *nec unquam poſtea* any goods of the Teſtators come to the Plaintiffs hands; And upon this, the Defendant demurred in Law. It was inſiſted upon, That when the Obligee makes the Obligor his Executor, it is a Releaſe in Law of the Debt, and by the ſame reaſon, when the Obligee makes the Executors of one of the Obligors who is chargeable to that Debt, his Executor; for he may not ſue him, nor his Companion. But it was agreed by the whole Court, That the Defendant had no cauſe of Demurrer, but that Judgment ſhould be given for the Plaintiff; For they all agreed, That when the Debtee makes the Debtor his Executor, it is not abſolutely a diſcharge of the Debt, for the Debt remains Aſſets in the hands of the Debtor Executor, and it is *quaſi*, a Releaſe in Law, becauſe he cannot be ſued; Or if a man Debtee takes the Debtor to Wife, it is a Releaſe in Law, becauſe they may not be ſued, and perſonal Actions once ſuſpended, are perpetually ſuſpended: But where the Executor of the Debtor is made Executor to the Debtee, he hath nothing thereby in his own right, but is only to uſe an Action in the right of another; And in the principal Caſe, although ſhe be Executrix to J. S. yet when ſhe hath fully adminiſtred all the Eſtate of J. S. before ſhe be made Executrix to B. ſhe hath in a manner diſcharged her ſelf to be Executrix to J. S. hath not any thing of his Eſtate; wherefore in the principal Caſe, ſhe having adminiſtred all the goods of J. S. and not being chargeable to that Debt as Executrix to J. S. ſhe as Executrix to B. may maintain this Action againſt W. W. the other Obligor; wherefore it was adjudged for the Plaintiff. Mich. 9 Car. in B. R. *Dorcheſter* and *Webs* Caſe. *Cro.* 1. Part, 271, 272.

31. Action upon the Caſe by an Executor againſt the Sheriff, for that the Teſtator upon a Recovery, had a *Fieri facias* for Execution, and the Defendant made Execution, and levyed the Debt, and at the Return of the Writ, did not return it, and after the Teſtator dyed; whereupon the Plaintiff ſet that wrong *in vita Teſtatoris*, and for the loſs which came to him, brought the Action upon Not-Guilty: It was found for the Plaintiff; It was moved, That the Action did not lye by an Executor, becauſe it was a perſonal wrong done to the Teſtator; for which he hath no remedy by the Common Law, and it is not maintainable by the Equity of the Statute of 4 E. 3. *de bonis Teſtatoris aſportatis*; and *Levaſton* and *Dickeyns* Caſe, 3 Car. was cited to be adjudged accordingly; the Court in the principal Caſe was divided in Opinion; Wherefore they would adviſe till the next Term, *et adjornatur*. Hill. 8 Car. in B. R. *Cro.* 1. Part, 216. See Mich. 2 Car. in B. R. *Popham* 189. See Trin. 14 Jac.

Probate

Probe and *Mayn's* Case. If the party escape being arrested upon a mean Process, the Sheriff is not lyable for the escape; otherwise, if it be upon an Execution. *Popham*, 192.

32. Note, It was the Opinion of all the Justices, That an Executor shall have an Action upon the Case *de bonis Testatoris*, come casually to the hands and possession of another, and by him converted to his own use in the life of the Testator, and that by the Equity of the Statute of 4 E. 3. cap. 7. *de bonis asportatis in vita Testatoris*. M. 32 Eliz. in Exchequer-Chamber, *Russel* and *Prats* Case. *Leon*, 193.

33. Action upon the Case against an Executor; and declared, That upon Speech had betwixt A. one of the Plaintiffs, and J. S. the Testator; he promised, that if she would marry him, and he dyed before her, he would leave her worth 100 l. and sayes that he did marry her, and that he dyed, and left her not worth 200 l. It was moved, that the Enter-marriage was a Release of the Promise, and of that Opinion was *Hobart* Chief Justice; but all the other Justices were of another Opinion, and said, that the Action could not rise during the Coverture, for it was not to be performed till after the death of him that made the Promise: and Mich. 5 Jac. in B. R. *Belcher* and *Hudson's* Case was put, upon a Promise made to the Wife, That if she would marry one *Mason* at his request, he would give her after *Mason's* death 40 l. In an Action upon the Case for the 40 l. the Defendant pleaded, That *Mason* after Marriage did release unto him all manner of Actions reals and personals, and all Debts, Claims, and Demands: Yet it was adjudged, that none of those words would reach to release the Promise, and therefore the Action did well lye. H. 11 Jac. in C. B. *Smith* and *Stafford's* Case. *Hob.* 216.

34. In an Action of Covenant brought by an Executor, the Case was, A. Feme sole delivered a certain Sum of Money into the hands of J. S. and H. the Defendant thereupon covenanted with the Woman to pay unto A. B. 100 l. a year, so long as the Mony should continue in the hands of J. S. The Woman took Husband, the 100 l. *per annum* is behind; the Husband made his Executor, and dyed, and after his death the 100 l. is behind also: The Executor brings an Action of Covenant, and the Question was, If the Action were well brought; The Court was of Opinion, That the Action did lye, for the Covenant doth concern the Executor, because he presents the Testator. But no Judgment was given, because the Question here was, Whether the Rent due after the death of the Husband ought to be paid? and how it shall be known whether he be dead? For that it is not specially alledged, and if he be not dead, there is no Cause of Action. M. 24 Car. in B. R. *Popham* and *Hart's* Case. *Styles*, 149.

35. In Action upon the Case, by an Executor, he declared, That in consideration the Testator would suffer the Defendant to enjoy such a Close of Land, the Defendant promised to pay 53 s. *per annum*, for the Rent thereof, so long time as he should enjoy it; and for so much Rent in the time of the Testator, and so much Rent since his death due, he brought the Action: Upon Non Assumpsit, found for the Plaintiff; It was moved, that the Action did not lye, it being for not Payment of Rent, which follows the nature of the Land, and sounds in the realty, for which no personal Action doth ly. 2. It is not averred, that the Testator did in her life-time suffer the Defendant to enjoy the Close. It was Resolved, 1. That the Executor might have the Action, for he presents the person of the Testator. And 2. That although an Action upon the Case will not ly for Rent upon a Promise in Law, yet upon a special Promise of the party to pay it, as his Case is, the Action will ly. Mich. 1655. *Lanet* and *Blackmore's* Case, *Sty.* 462.

36. Action upon the Case brought against an Executor, and declared upon a Promise made by the Testator to the Plaintiff, to deliver certain goods in the possession of the Testator unto the Plaintiff upon request; and because he had not delivered them, the Action was brought upon a Verdict for the Plaintiff. It was moved in stay of Judgment, that the breach was in the life of the Testator, and the Action should have been brought against him; also there appears no request by the Testator, as there ought to have been. But Resolved, That the Executor might be charged upon a Collateral Promise, if there were a breach in the life of the Testator, and here is a good request, and goes to all. M. 1649. *Christopher* and *Hewes* Case. *Style*, 158.

37. It was Resolved by the Justices, That an Action doth not ly against an Executor upon a *Contract solvere* of the Testator; for this would be to charge the Executor in an Action, where he may wage his Law, by Law, and an Action of Debt lyes not against an Executor upon a simple Contract made by the Testator; and the reason of Wager of Law is because it is intended, that as well as the Contract to pay Money may be private, so also the Payment may be made in private. Hil. 1649 B. R. *Hodges* and *Janes* Case. *Styles*, 199. See Trin. 1650. B. R. *Orchwick* and *Aumery's* Case. *Styles*, 228. acc.

38. Covenant brought against an Executor of a Lessee for years, for not Payment of Rent upon the general words [yielding and paying], the Lessee having no express Covenant for Payment of the Rent: Resolved,

Reſolved, That an Action of Covenant will ly againſt an Executor upon a Covenant in Law, and in this Caſe, the Reſervation of the Rent doth ſeem to be an expreſs Covenant, for it is the agreement both of the Leſſor and Leſſee. Mich. 1613. B. R. *Fenton* and *Oſborn's* Caſe. *Styles*, 387. See Hill. 1654. B. R. *Porter* and *Swetman's* Caſe. *Styles*, 406. acc.

39. The Queſtion was, If a *Quare Impedit* will ly for an Executor, for diſturbance done *in vita Teſtatoris*, by the Statute of 4 E. 3. *cap.* 7. It was objected, it would not; for that the Statute gives Action for taking of Goods and ſuch like things, but here is no taking, but only a diſturbance which may be done by paroll: But Reſolved by the Court, That the Action did ly; and where the Statute ſaith, taking of Goods, it is but by way of reſemblance, and not that they ſhall have an Action of Treſpaſs for taking of goods only; and whereas it hath been ſaid, that this cannot be Aſſets, the Court ſaid, Put Caſe the Teſtator had Judgment to recover Damages, ſhall it not be Aſſets? And why ſhall not the Grant of an Advowſon be Aſſets in the hands of an Executor, as in the hands of the Iſſue? It was the Opinion of the Court, It ſhould be Aſſets Paſc. 31 Eliz. in C. B. *Sole* and the Biſhop of *Litchfield's* Caſe, *Owen* 99.

40. If the Teſtator dyes within 6. Moneths after an Uſurpation, the Executor ſhall have a *Quare Impedit*. M. 33 Eliz. in C. B. the Biſhop of *Chicheſter's* Caſe, *Poph.* 181.

41. Trover and Converſion *in vita Teſtatoris*, maintainable by Executors. 42 Eliz. in the Counteſs of *Rutland's* Caſe, Reſolved by all the Juſtices.

42. If Leſſee for years deviſeth his Term to another, and maketh his Executors, and dyeth; and the Executors do Waſte, and afterwards aſſent to the Deviſe. In this Caſe, although that between the Executors and the Deviſee it hath relation, and the Deviſee is in by the Deviſor; yet an Action of Waſte ſhall be maintainable againſt the Executors in the Tenuit. Tr. 4 Eliz. in C. B. *Cook* 5, Part, 22. in *Saunder's* Caſe.

43. In an Action upon the Caſe upon Aſſumpſit, the Caſe was, That the Defendant being poſſeſſed of the Intereſt of a Term, as Executor to J. S. who was endebted to the Plaintiff, in conſideration that the Plaintiff would not moleſt him, but would deferr the Payment until *Michaelmas*, promiſed him to pay the Money, or to aſſign to him the ſaid Land at *Mich.* for it: Upon Non Aſſumpſit, it was found for the Plaintiff. The Defendant brought Error, and aſſigned Error, that the Plaintiff did not averr, That the Plaintiff had Aſſets at the time of the Aſſumpſit made: Reſolved, That the Plaintiff in his Count needs not averr Aſſets; for the Law ſhall preſume *prima facie*, he would not leave a greater Charge upon his Executors than he left a benefit to them to diſcharge it: And it was Reſolved, That if there had not been any Debt, and the Executor had not any thing in his hands at the time of the Promiſe, the ſame may be given in Evidence, and the Defendant ſhould be aided thereby, for then there was not any conſideration; for to forbear a Debt, where no Debt is, is no good conſideration. *Cook* 9. Part, 94. *W. Bant's* Caſe.

44. If a man hath a Stock of Cattle, or any other perſonal Goods for a time, and the Leſſee covenants for him and his Aſſignees at the end of the Term, to deliver the Stock at the end of the Term, or ſuch a Sum for them, and the Leſſee aſſigns over the Goods, the Aſſignee ſhall not be charged with this Covenant, for it is but a perſonal Covenant and wants privity; but the ſame ſhall bind his Executors and Adminiſtrators. *Cook* 5. Part, 17. in *Spencer's* Caſe.

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3. *Where an Executor ſhall be charged upon the Deed of the Teſtator, although he be not mentioned in the Deed, Where not; And where the Executor ſhall, upon his pleading or otherwiſe, be charged* de bonis propriis, *and where* de bonis Teſtatoris *only; Where not: Where upon Contract or Promiſe, Where not.*

1. LEſſee for years by Indenture covenanted for himſelf, that within three years he would build a new Houſe upon the Lands, no mention was made of his Executors; the Term expired, and the Leſſee dyed: It was holden by the Juſtices, that his Executors ſhould be charged, though not named in the Covenant. Trin. 28 H. 8. *Dyer*, 14, 23. acc.

2. If a man recite by a Writing, that he hath 100 l. of the Money of J. S. and that he hath paid him 40 l. and ſo there remaineth 60 l. the ſame is a good Obligation, and ſhall bind the Executor; for every word which proves a man debtor, or to have Mony of any Stranger in his Cuſtody, if it be by Bill or Writing, it ſhall make his Executors Debtors, and lyable to pay the Money. Tr. 28 H. 8. *Dyer*, 21. acc.

3. A Covenanter with his Leſſee, without the words Heirs or Executors to pay all the Quit-Rents, and dyed: It is a Quære, If his Executors are lyable to pay them. Paſch. 3 Mar. *Dyer*. 144. and the old Books are, that it is a perſonal Cove-

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nant only, and dyeth with the Perſon, as 49 E. 3. 17. 18 E. 3. 2. *Fitzh.* lib. 1. f. 17. But ſee now *Cook* 5. Part, 16. *Spencer's* Caſe, this Quære is Reſolved, and that the Executors are liable to pay them.

4. Leſſee for life, the Remainder in Fee; Leſſee for life demiſed the Land for 15 years and dyed, he in the Remainder entred, and the Termor brought Covenant againſt the Executor of the Leſſor upon the demiſe, and adjudged it did not ly although the Leaſe was by Indenture, except the Covenant had been broken in the life of the Leſſor, it being but upon a Covenant in Law; otherwiſe, it is of a Covenant expreſſed. But if the Heir ouſt the Termor of his Father: It was holden, that Covenant lyeth againſt him in reſpect of Privity; and it was there holden, That the Aſſignee of a Termor, ſhall have Covenant againſt the Leſſor upon the word Demiſe, without words of Aſſignee. 9 Eli. *Dyer*, 257.

5. A man made a Leaſe of the Houſe by theſe words [Demiſe and Grant], and the Leſſor covenanted, that the Leſſee ſhould enjoy the Houſe during the Term without Eviction by the Leſſor or any claiming under him, and bound himſelf to perform all Covenants, Grants, and Articles, in the Indenture; the Leſſee aſſigned over his Term, a Stranger entred upon the Aſſignee, and made a Leaſe for years, who brought Ejectione firmæ againſt the Aſſignee, and had Judgment and Execution: In Debt brought upon the Obligation, the Leſſee pleaded performance of all Covenants. It was Reſolved, 1. That for this Covenant in Law upon theſe words [Demiſe and Grant] the Aſſignee ſhould have a Writ of Covenant. 2. That by the breach of this Covenant in Law the Obligation was forfeited; for he was bound to perform all Covenants, which extended to Covenants in Law as well as Covenants in Fact. Tr. 41 Eliz. in B. R. *Cook* 4. Part. 80. *Noke's* Caſe.

6. Debt upon Obligation of 100 l. the Defendant Adminiſtrator pleaded a Recovery againſt him in the Court of *Cheſter*, and other Judgments, in all amounting to 500 l. and that he had not Goods of the Inteſtate, *præterquam bona & catalla, quæ non attigerat ad voluntatem prædict.* 500 l. againſt him *in forma prædict. recuperat.* The Plaintiff replyed, that I. S. who recovered, accepted 60 l. in ſatisfaction of the ſaid Judgment, and would have acknowledged ſatisfaction in the ſaid Court of Record, but the Defendant ſuffered the ſaid Judgment by fraud not to be releaſed to the intent to deceive the Plaintiff of his Debt, and ſo ſuffered the other Judgments in like manner: In this Caſe, It was adjudged for the Plaintiff; for an Executor or Adminiſtrator ought to execute his Office, and adminiſter the goods of the Inteſtate lawfully, truly, and diligently; then when he compounds a Debt with one who hath a Judgment of 100 l. for 60 l. and he offers to acknowledge ſatisfaction, and the Executor or Adminiſtrator differs it, to the intent to ſuffer the ſame ſtand in force, the ſame ſhall be fraudulent, and if it be before or after Recovery, the ſame is all one as to a third perſon; and the agreement betwixt them ſhall not hurt the third perſon, but that the Executor or Adminiſtrator ſhall be charged with the Debt. See *Cook* 8. Part, 132. *Farners* Caſe.

7. If an Executor of a Leſſee for years aſſigns over his Intereſt, an Action of Debt doth not lye againſt him for Rent due after the Aſſignment, and the Leſſee for years aſſigns all his Intereſt and dyeth, the Executor ſhall not be charged for Rent due after his death; becauſe the perſonal privity of Contract, as to the Action of Debt, is determined. *Cook* 3. Part, 24. in *Walkers* Caſe.

8. Debt brought againſt two Adminiſtrators for Rent behind, after the death of the Inteſtate, they pleaded, That before the Rent was behind, one of the Adminiſtrators aſſigned all his Intereſt to J. S. of which the Plaintiff had notice, and accepted the Rent by the hands of the Aſſignee, before the day in which the Rent was due. In that Caſe, It was adjudged, That the privity of Contract, as to the Action of Debt, was determined by the death of the Leſſee; and therefore after the Aſſignment, Debt did not ly againſt the Adminiſtrators. 41 Eliz. in C. B. *Marrow* and *Turpins* Caſe, vouch in *Cook* 3. Part, in *Walkers* Caſe.

9. Debt againſt an Adminiſtrator upon a Bond of 600 l. made by the Inteſtate, The Defendant pleaded, that the Teſtator and his Son acknowledged a Recognizance to the King of 100 l. and another of 800 l. to B, and another of 100 l. to M, and divers others; over and above which, the had not Aſſets, and after ſaid ſhe had not ſufficient Aſſets: The Plaintiff replyed, that the Recognizance to B. was for 400 l. which is paid, and the other to M. was for performance of Covenants, none whereof is broken, and that the Recognizance ſtands in force by Covyn of the Defendant. In this Caſe, theſe Points were Reſolved. 1. That the Barr was inſufficient, for that ſhe confeſſed it, that ſhe had ſufficient Aſſets to pay the ſaid Recognizances, and afterwards denyed it. 2. The Plea is too general; but ſhe ought to have ſet forth how much Aſſets ſhe had, becauſe ſhe had knowledge thereof; alſo, the Barr is inſufficient, becauſe the Inteſtate was bound in the Recognizance with another, and the Defendant hath not averred that, that the other had not ſufficient to have ſatisfied them. *Cook* 9. Part, 109. *Meriet Freſham's* Caſe.

10. In Debt brought against an Executor, he pleaded fully administred, and gave in Debts paid upon Contract, whereas the Action was brought upon an Obligation; there the Plaintiff had Judgment against the Defendant, of the Goods of the Testator, for so much as was in the Issue: And it was there holden, That if an Action be once brought upon one Obligation, the Debt upon another Obligation shall not be paid. *Quod Quære* Pasch. 29 H. 8. *Dyer*, 32. And for that see Pasc. 32 Eliz. in the Kings Bench. *Pemberton* and *Barham's* Case. *Cook* 4. Part, 60. acc.

11. Debt was brought against two Executors, one appeared and confessed the Action, the other made default, and Judgment was given to recover the Goods of the Testator in both their hands: To which purpose a *Fieri facias* issued to the Sheriff, the Sheriff returned *Nihil*; but he that made default had Goods of the Testator, and had wasted them before the Receipt of the Writ: Whereupon a *Scire facias* issued forth against him only who had wasted the Goods, and upon a *Scire feci* returned, Execution was awarded against him only of his proper Goods, without any Execution sued against his Companion. M. 4 Eliz. *Dyer*, 210.

12. If a man condemned in Debt dyeth before Execution: It was holden by the Court, that his Administrators are bound to pay this Debt upon Record before Specialties; and if they be sued upon an Obligation they may plead a Recovery against them which is not executed; but if they do not plead it, but suffer a Judgment against them and Execution, before Execution sued of the first Judgment, they shall be charged of their own goods, for that by the first Judgment the goods were charged. H. 5 E. 6. *Dyer*, 80. See *Cook* 5. Part, *Harrison's* Case, acc.

13. Debt brought against J. S. Executor of B. Executor of J. D. upon an Obligation of the first Testator: The Defendant pleaded, That the said J. D. the first Testator was endebted to B. 100 l. and that afterwards goods of 100 l. came to the hands of B. as Executor of J. D. which goods he administred and paid himself by reteiner, & besides the said goods of a value of 100 l. that the said B. had administred all the goods of the said J. D. and so there was nothing in the hands of B. The Plaintiff averred Assets in the hands of B. of the goods of J. D. at the time of his Death, to be administred in L. Upon Issue upon that, It was found for the Plaintiff, viz. That B. had goods which were the said J. D. at the time of his death in his hands: It was adjudged in this Case, That the Plaintiff should recover in this Case against J. S. of the goods of J. D. in the Defendant's hands and damages of the proper goods of the Defendant. Tr. 2 Eliz. *Dyer*, 185. Sir *John Chichester's* Case.

14. Debt against three Executors; one pleaded a Recovery in the King's Bench against him in Barr, the other, that he had fully administred: Against the first the Plaintiff did aver Covyn, and upon the second Plea they were at Issue; the first Issue is found for the Plaintiff, and as to the other, It was found, that the Defendants had Goods in their hands of their Testator not administred, to 30 l. the Debt being 100 l. the Plaintiff had Judgment to recover *de bonis Testatoris*; and now he brought a *Scire facias* against the Executors, supposing many other Goods came to their hands after the Judgment: The Question was, If a *Scire facias* would ly against them, for that upon the Judgment the Original is determined, and so there is no Record upon which a *Scire facias* can be grounded. But it was the Opinion of the Court, Where upon Nothing in their hands pleaded, it is found, That some part of the Sum in demand is in the hands of the Executors, there, upon a Surmise of Goods come to the hands of the Executors he shall have a *Scire facias*; contrary, where upon Issue it is found fully for the Defendants, that they have nothing in their hands. M. 30 Eliz. in C. B. *Bracebridg* and *Baskervile's* Case, *Leon*, 67.

15. Assumpsit, The Plaintiff declared, That he delivered Goods to the Brother of the Defendant, who made the Defendant his Executor and dyed; and with Speech with the Defendant concerning the said Goods, the Defendant promised the Plaintiff, that if he could prove that the Goods were delivered to the Testator, he would pay the value of them to the Plaintiff; Upon Non Assumpsit it was found for the Plaintiff, and in this Case it was Resolved, That if an Action be brought against Executors upon an Assumpsit of the Testator, Judgment shall be of the Goods of the Testator; but, if upon the Promise of an Executor, then of his own Goods. Hill. 30 Eliz. B R. *Howell* and *Trivanian* Case. *Leon*. 93.

16. Debt against the Executors of *Charls* Earl of *N.* for 200 l. The Defendants appeared, and Judgment against them, and 4 l. Costs *de bonis Testatoris*, &c. *Et si* &c. *tunc de bonis propriis*, for the Costs: Upon a *Fieri facias* to the Sheriff of *London*, he returned *Nulla bona Testatoris*, and for the 4 l. *Nulla bona*. And upon a *Testatum* that the Goods were sold and assigned, a new *Fieri facias* issued reciting the former Writ and the Return; wherefore it was commanded, That an Inquisition be awarded to enquire if they had sold the Goods, and if they found it so, a *Scire facias ad respondendum*. The Sheriff returned, that they had found a Sale of the Goods; whereupon Judgment was given, and Execution sued against the Executors *de bonis propriis*. Whereupon Error was brought, and Error assigned in *reddition Executionis*: It

was holden to be no Error, and the Judgment was affirmed. See for the reason of this Judgment, in title of Courts. p. 519. lib. 1. c. 16. *Maunſon* and *Barnet* Caſe. *Cro.* 1. Part, 373.

17. In Debt upon an Obligation for not performance of Covenants in a Leaſe made unto the Teſtator, the breach was aſſigned in the time of the Executor, for not repairing of a houſe; and Judgment was, *Quod recuperet* the Debt *de bonis Teſtatoris, & c. ei ſi non, & c. tunc de bonis propriis.* It was alledged, that inaſmuch as the breach was alledged and declared to be by the Executor himſelf, the Recovery ought to have bin aſs.ll for the Debt as the damages, *de bonis propriis.* But Reſolved, That in Debt by the Covenant made by the Teſtator, the Executor ſhall be charged only *de bonis Teſtatoris*; but where he pleads a falſe Plea, which utterly ouſts him of the benefit of the Teſtament. Mich. 20 Jac. in B. R. *Bull* and *Wheelers* Caſe. *Cro.* 2. Part, 647.

18. Execution was ſued againſt an Executrix, for the breach of a Covenant made by her Husband, the Teſtator, and the breach was by the Executrix in aſſigning over a Leaſe, without giving notice thereof to the Leſſor, and Judgment being for the Plaintiff, *de bonis Teſtatoris, ei ſi non, & c. de bonis propriis*, Error was brought. It was Reſolved by the Court, That although the Defendant her ſelf brake the Covenant, yet ſhe was not chargeable, but in regard of the Deed of the Teſtator, where ſhe ſhall not be chargeable, but *de bonis Teſtatoris*; and in no Caſe of Executors ſhall he be charged *de bonis propriis*, but where he pleads *ne unque Executor*, and it is found againſt him. Mich. 21 Jac. in B. R. *Bridgman* and *Lightfoots* Caſe. *Cro.* 2. Part, 671.

19. Note, an Executor may waive a Term for years, and then he ſhall be diſcharged of the Rent, and ſhall not be charged with any Arrears *de bonis propriis*; but if he once occupieth the Land, he ſhall be then chargeable *de bonis Teſtatoris* if he have any in his hands; and if not, then *de bonis propriis*, for that an Executor is an Aſſignee in Law of the Intereſt of the Term: and upon ſuch occupation, the Action will lye againſt the Executor in the *Debet et Detinet*. Mich. 7 Jac. in B. R. The Lord *Rich* and *Franks* Caſe. *Bolſtr.* 1. Part, 22, 23.

20. Covenant brought againſt A. Executor of J. S. and declared that J. S. in his life time did let to him certain Lands for years, and Covenanted for him, his Executors, Adminiſtrators, and Aſſigns, That the Leſſee ſhould not be put out of poſſeſſion of the Lands, during the Term, and that ſince the death of J. S. his Leſſor, he was put out of poſſeſſion by ſuch a one; and therefore brought the Action; The Defendant pleaded, he had no Aſſets: It was found, That the ſaid J. S. did let the Land *prout*, and under the Covenants *prout*, and made his Will, and the Defendant his Executor, and by his Will gave many Legacies of goods, and that the Defendant before the Plaintiff, was put out of poſſeſſion, did pay all the Legacies in kind, and beſides thoſe goods, he had not Aſſets to perform the Covenant, and whether the Executor ought to have forborn the payment of the Legacies, and to have expected until the end of the Term. or till the Covenant had bin broken, was the Queſtion; and for doing otherwiſe, ſhould not be charged *de bonis propriis*, was the point of Law. The Caſe was often argued, but not Reſolved. Trin. 23 Car. in B. R. *Eelis* and *Lamberts* Caſe. *Styles* 37, 54, 71, 74.

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4. *Where the entermedling with the goods of the Teſtator or the Inteſtate, ſhall be an Adminiſtration to charge them as Executors of their own wrong, what not: And where a man ſhall be Executor of his own wrong: and of ſeveral things done by him; Where they ſhall bind, Where not; Where he may retain, Where not.*

1. A Man poſſeſſed of Goods, made A. his Executor, and dyed; and before the Will was proved, J. S. took the goods of the Teſtator into his hands, and medled with them. Afterwards A. proved the Will. It was adjudged in ſuch Caſe, That *John S.* ſhould be Executor of his own wrong. But when an Executor is made, and he proves the Will, and after a ſtranger takes the goods, claiming them as his own goods, that doth not make him to be Executor of his own wrong: But if a ſtranger taketh the goods, claiming to be Executor, and payes debts, or receives Debts, he ſhall not be charged as Executor of his own wrong. *Cro.* 1. Part, 33. *Reads* Caſe.

2. A Woman Executor took a Husband; afterwards they are divorced, *cauſa præcontractus*; the Woman appealed to the Court of *Delegates*, depending which Appeal; the Husband did entermeddle with the goods, and afterward the Will dyed. It is a Quere in 2 *Ma. Dyer*, if this entermeddling with the goods ſhall make her an Executrix of her own wrong. See *Cook* 5. Part, in *Coulters* Caſe: this Quere Reſolved, that it is an Adminiſtration; for the very entermeddling with the goods, is that which gives notice to the Creditors againſt whom to bring their Actions, and how to ground their Suits.

3. Debt was brought againſt A. as Executor of his own wrong, becauſe he received a Debt, and made

made an Acquittance. It was holden by the Juſtices, That the Action did lye, for that every comming to hands of goods, draweth with it the charge of an Executorſhip; and if one who hath colour by Overſeerſhip, or, by Letters *ad colligendum*, receive goods into their hands, they are Executors in their own wrongs, if they do not plead the ſpecial matter. Hill. 1 *Ma. Dyer*, 166, 167. *Porter's* Caſe.

4. Debt againſt two Defendants as Executors of A. one of the Defendants confeſſed the Action, the other pleaded, That the Teſtator dyed ſuch a day, and that he intending to have Letters of Adminiſtration, cauſed the Corps of the Teſtator to be buried, and his goods to be ſafely kept, and that after Adminiſtration was granted to him by the Arch-Deacon, and that after that, one J. S. brought an Action againſt him as Adminiſtrator, and recovered, and averred, that it was a true Debt, and that he had no goods which were the Teſtators, beſides the goods and Chattels which did not amount to the ſaid Debt, and ſo demands Judgment if Action, upon which the Plaintiff demurred in Law. It was the Opinion of the Court in this Caſe, That the medling here with the goods by the Defendant, made him Executor of his own wrong; and in this Caſe the Defendant hath not ſufficiently conveyed title to himſelf to be Executor, inſomuch as Adminiſtration was committed to him by the Arch-Deacon, and he doth not ſay, that of right the committing of Adminiſtration did belong unto him, inſomuch as he hath but ſubordinate Juriſdiction, of which the Law doth not take notice, and then the recovery by J. S. againſt him was void, and ſo all the goods remain Aſſets in his hands. Trin. 10 Jac. in C. B. *Lawry* and *Aldred's* Caſe. *Brownlow*. 2. Part, 183, 184.

5. In Debt by Executors againſt an Executrix; the Caſe was, The Defendant as Executrix of her own wrong, took divers goods into her hand, of the value of 400 l. and ſold them by the aſſent of J. her Son, who afterwards took Letters of Adminiſtration and payed juſt Debts upon ſpecialties, as far as the goods of the Inteſtate did amount unto, as well to the value of the ſaid 400 l. ſold by his Mother, as of all the goods whereof the Inteſtate dyed poſſeſſed; afterwards an Action was brought againſt the Mother as Executrix of her own wrong, who pleaded Fully-Adminiſtred, and upon Evidence, all this matter appeared; and whether ſhe ſhould be chargeable or not, was the Queſtion. It was adjudged by all the Barons in the Exchequer, That ſhe ſhould not be charged: For this Action being brought after the Adminiſtration committed, and when ſhe was chargeable for thoſe goods to the Adminiſtrator, and when the Adminiſtrator had fully ſatisfied in paying the Debts of the Inteſtate, as far as all the goods of the Inteſtate amount unto. It was not reaſon ſhe ſhould be charged by the Plaintiff for then ſhe ſhould be double charged: But if the Action had bin brought againſt her, before the Adminiſtrator had fully adminiſtred all the Debts, it ſhould have bin otherwiſe; for ſhe having gained the goods into her hands, is chargeable for them as Adminiſtrator of her own wrong, untill ſhe gives due ſatisfaction to the other Adminiſtrator, or the her ſelf ſatisfy for the true debt, to the value. It was adjudged for the Defendant. Mich. 3 Car. in the Exchequer. *Whitmore* and *Porters* Caſe. *Cro.* 1. Part, 62, 63.

6. Debt brought againſt J. S. Executor of the laſt Will and Teſtament of J. N. It was found by Verdict, That J. N. made an Obligation in the nature of a Statute-ſtaple to J. S. and dyed; J. S. as Executor of his own wrong, retained goods in his own hands to ſatisfy the ſaid Debt. It was objected, That he might retain. 1. Becauſe the Plaintiff in his Declaration had affirmed him Executor, and the Jury cannot find againſt that which the parties have admitted in their pleading. 2. Although he cannot retain againſt a lawful Executor, yet he may retain againſt a Creditor. But it was Reſolved, That the reteyner by an Executor of his own wrong, was not good, for the great inconvenience which ſhould follow, for then every Creditor would contend to be Executor, and the Law will ſuffer a miſchief, rather then an inconvenience; and the naming him Executor, doth not prove him to be rightful Executor, for ſo is every Executor of his own wrong named. Mich. 41 Eliz. in B.R. *Cro.* 3. Part, 3. *Coulters* Caſe.

7. Debt againſt an Adminiſtrator, the Defendant ſhewed, that there were divers Judgments had againſt him in *London*, and that there was another debt due by the Teſtator to the King, and ſo pleaded, that he had fully adminiſtred; exception was taken to the pleading, becauſe it was not therein ſhewed, that the King did aſſent to the Aſſignment; and becauſe it was not ſhewed that the Aſſignment was enrolled. The Court took no notice of the ſaid Exceptions; but whereas the Defendant as Adminiſtrator did alledg a retainer in his own hands for a Debt due to himſelf; the Opinion of the whole Court was, That the ſame was good, and that an Adminiſtrator might retain to ſatisfy a Debt due to himſelf. But an Executor of his own wrong could not. M. 11 Jac. in C.B. *Bond* and *Greens* Caſe, *Godbolt*. 217.

8. Debt againſt Executors, the Iſſue being upon Fully-adminiſtred, the Plaintiff gave in evidence, that they had goods in their hands; the Defendants pleaded, that they redeemed part of them with their own Money, which goods were pledged by the Teſtator to the full value, and for the reſidue, that

they had paid for the Teſtator ſo much, to the full value. It was adjudged good Evidence to maintain the Iſſue, for that a man ſhall have recompence for that which he hath lawfully paid. Mich. 6 H. 8. *Dyer*, 2. acc.

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5. *Judgment againſt Executors upon their Confeſſion; Pleas of reins in their hands, fully Adminiſtred*, Ne unque Executoris; Non eſt factum, *and other Pleas found againſt them; and what proceſs ſhall iſſue forth thereupon. And what ſhall be ſaid Aſſets in the hands of Executors; What not.*

1. DEbt againſt two Executors, the one appeared, the Plaintiff declared upon an Obligation; he which appeared, confeſſed the Action, and Judgment was given againſt them of the goods of the Teſtator. 28. H. 6. 3. and there it is ſaid, that in 19 H. 6. It was adjudged, That the Judgment ſhould be *ut ſupra*; and if they had not goods of the dead, then againſt him which confeſſed the Action of his own goods. And ſee 28 H. 6. 31. In a *Rationabili parte Bonorum* againſt three, and one confeſſed the Action, and Judgment was given, *ut ſupra*. See 28 H. 6. Br. Executors, 18. and *vide* before, before *placite*. And 4 Eliz. *Dyer*, 210.

2. In Debt againſt Executors, who plead, Never Executors, nor ever adminiſtred as Executors, the Judgment ſhall be *de bonis Teſtatoris*, if they have goods of the Teſtator; and if not *de bonis propriis*, 11 H. 4. 5. 33 H. 6. 23, 24. 9 H. 7. 15. and there it is ſaid, That if they plead *Non eſt factum*, or other Plea which ſhall bar the Plaintiff for ever, and it is found againſt them, the Judgment ſhall be *ut ſupra*, *Quod Nota*. But Quere of the Plea *Non eſt factum*, for that doth not properly in their notice, if it was the Teſtators Deed or not; but of ſuch things of which they may have perfect notice, and are perpetual bars, or otherwiſe, as if they plead a Releaſe to themſelves, or an acquittance, and the ſame be found againſt them, there the Judgment ſhall be *de bonis Teſtatoris*; *et ſi non de bonis propriis*, but if they plead a Releaſe or an acquittance made to the Teſtator, of which they cannot have perfect notice, there the Judgment ſhall be *de bonis Teſtatoris*. See 6 E. 4. 2, 23 H. 8. br. Executors, 22. See 46 E. 3. 9. & 10. acc.

3. Debt againſt Executors, who pleaded fully Adminiſtred, and it is found againſt them, the Judgment ſhall be of the goods of the dead. 2 H. 6. 12. 9 H. 6. 9. 34 H. 6. 22. for that Plea is no perpetual bar, but is a bar for the time, for if Aſſets happen after, they ſhall be charged; and ſo it is where one Executor pleads Miſnomer, or that another is Executor not named in the Writ, and it is found againſt them. 18 H. 6. Br. Executors, 18.

4. Debt againſt Executors, who pleaded fully adminiſtred, which was found againſt them; and thereupon Judgment was given of the goods of the Teſtator, and a *Fieri facias* was awarded, upon which the Sheriff returned *Devaſtavit*; and thereupon a *Capias* was awarded againſt them, 2 H. 6. 12. But ſee 34 H. 6. 45. A *Capias ad ſatisfaciendum* doth not lye againſt Executors, who plead fully adminiſtred.

5. Debt againſt an Executor upon an Obligation of 40 l. the Defendant pleaded three Judgments in the Court of R. in Debt, and one Judgment in this Court *prout patet per Recorda*, and that he had not Aſſets to ſatisfy thoſe Judgments; the Plaintiff demurred, becauſe he doth not ſay *prout per ſeparalia Recorda*. 2. Becauſe not ſhewed what ſums he had in his hands. 3. Becauſe not averred, that they were *vera et juſta debita*; and for theſe cauſes the Plea was not good. Mich. 19 Jac. in B. R. *Samuis* and *Mercers* Caſe. *Cro.* 2. Part, 625.

6. Debt againſt an Executor upon Plenarty adminiſtred pleaded, the Plaintiff replyed, that he had Aſſets, and afterwards the Defendant confeſſed the Action; and Judgment was given to the Plaintiff *de bonis Teſtatoris*. It was moved, That the confeſſion of the Action ſhould contain that he had goods ſufficient; and it was prayed, that it might be added to the entry; but the Court refuſed ſo to do, becauſe the confeſſion can extend no further then to the Court, which is of the Debt, and not of the Aſſets. Hill. 14 Jac. in C. B. *Bird* and *Calmers* Caſe. *Hob.* 178.

7. *Aſſumpſit*, whereas a Legacy of 40 l. was deviſed to the Plaintiff by J. S. who made the Defendant his Executor, to whoſe hands divers goods came; and the Plaintiff intended to ſue him for that Legacy, the Defendant in conſideration the Plaintiff would forbear his ſuit, promiſed to pay it at ſuch a time; upon *Non Aſſumpſit*, and found for the Plaintiff. It was ſaid, the Declaration was not good, becauſe he doth not aver that he had Aſſets at the time of the promiſe: But the Exception was diſallowed by the Court, for it ſhall be intended, that he had Aſſets, otherwiſe he would not have made ſuch a promiſe. Paſc. 19 Jac. in B. R. *Bothe* and *Crampons* Caſe. *Cro.* 2. Part, 613.

8. Debt brought againſt one as Adminiſtrator of O. who pleaded, that O. ſuch a day and year in his life time acknowledged a Judgment unto him

in B. R. upon an *Indebitatus* of 1500 l. and dyed, and that he retains ſo much of the goods to ſatisfy himſelf, and that *ultra* that 1500 l. he had but 40 s. It was moved, that he ought to have pleaded the general Iſſue, and given this matter in Evidence; but it is a miſchief to the Plaintiff to take Iſſue upon that, for then he ought to ſay, that he had Aſſets. The Court was of Opinion, That he might give it in Evidence, or plead that the Judgment was not ſatisfied, but he may not compel him to change his Plea. Hill. 21 Jac. in C. B. *Bacon* and *Wilſon's* Caſe. *Winch.* 70.

9. Note, It was Reſolved, That if Debt be brought againſt an Executor, who pleads, That he hath fully Adminiſtred, and it is found that he hath Aſſets to 40 l. where the Debt is 60 l. Judgment ſhall be given for the 60 l. againſt the Defendant; and upon that Judgment, if more Aſſets come to the Defendants hands, the Plaintiff may have a *Scire facias*. Mich. 8 Jac. in C. B. *Newman* and *Rebbingtons* Caſe. *Godbolt.* 178.

More concerning Executors.

1. A Man made his Will in theſe words, *viz.* That if the Wife of the Deviſor would permit J. S. to enjoy ſuch a Term for the Term of three years next, that then ſhe ſhould have all the reſidue of his goods, as his ſole Executrix. It was ſaid, ſhe could not be Executrix, for ſhe is to be Executrix upon a Condition precedent, and the Condition is impoſſible to be performed: for how can ſhe permit J. S. to enjoy the Term for three years, when the three years are to be paſt before ſhe hath any power. But it was holden by the Court, That ſhe ſhould be Executrix preſently: for although a grant upon a Condition precedent, doth not take effect till the Condition be performed; yet ſuch conſtruction ſhall be in the Caſe, as the intent of the Deviſor ſhall ſtand; and his intent was, that his Wife ſhould be Executrix immediatly, untill ſhe be diſturbed; for the words of the Will are, If ſhe refuſe to ſuffer J. S. to hold the Term, then his Son ſhould be his Executor; which implies, That by a diſturbance made by the Wife, her Executorſhip ſhould ceaſe, which cannot be, if ſhe were not before Executrix. Paſc. 31 Eliz. in C. B. *Jennings* and *Gowers* Caſe. *Leon.* 228.

2. A man by his Will deviſed his Lands to his four Executors, and willed, that his ſaid Executors ſhould ſell the ſaid Land to J. S. for the payment of his Debts, if J. S. would pay for it before ſuch a day 1000 l. and dyed; J. S. did not pay the money at the day. And one of the Executors refuſed to adminiſter the Will, and the other three entred, and ſold the Lands for ſo much money as they could conveniently get for it: It was Reſolved in this Caſe, That the Sale was good, for it was a Deviſe to him to ſell, and when he refuſeth to ſell, he refuſeth to take, and it is not neceſſary, that he who refuſeth, joyn in the ſale; and ſuch ſale as ſhall be moſt beneficial for the Teſtator, ſhall ſtand good. Paſc. 29 Eliz. in B. R. *Bouſant* and Sir *Rich. Greenfields* Caſe. *Leon.* 60.

3. Debt brought in the *Detinet* againſt a Woman as Adminiſtratrix of her Husband for arrerages of Rent upon a Leaſe for years, *viz.* for a Quarters Rent due in the life of the Inteſtate, and two Quarters in her own time. It was found for the Plaintiff. It was objected, That the Action ought to have bin brought in the *Debet et Detinet*, according to *Hargraves* Caſe. *Cook* 4. Part, 31. But it was Reſolved, That the Action was well brought in the *Detinet*, the having the Intereſt only as Adminiſtratrix. And *Hargraves* Caſe was ſaid to be no Law; and the Judgment in that Caſe was reverſed. Mich. 7 Car. in B. R. *Smith* and *Norfolks* Caſe. *Cro.* 1. Part, 163.

4. Judgment was given againſt an Executor, or Adminiſtrator in Debt; and he brings a Writ of Error, If upon the Statute of 3 Jac. cap. 8. he ſhall find Bail, was the Queſtion: Reſolved, that he ſhould not, for it is againſt reaſon that he ſhould be put to Main-prize, and makes that his proper debt where he only brings the Suit as Adminiſtrator. Wherefore the Error was allowed, and a *ſuperſedeas* awarded for the Execution, without putting in Bail. H ll. 2 Car. in the Exchequer. Sir *Henry Mildmayes* Caſe. *Cro.* 1. Part, 42.

5. A Rent-charge was Granted to the Teſtator for divers years, if he ſo long liv d. In a Replevin, the Executor diſtreyned and avowed: It was Reſolved, That he could not diſtreyn. For that the Statute of 32 H. 8. provides remedy only by diſtreſs, where the Teſtator was ſeiſed of a Rent to him, and his Heirs, or for life: But where he hath remedy by Action of Debt, as in this Caſe the Executor hath, he cannot diſtreyn and avow. Paſc. 13 Car. in B. R. *Turner* and *Lees* Caſe. *Cro.* 1. Part, 339.

6. Debt by Executors upon an Obligation made to their Teſtator for payment of 52 l. the Defendant pleaded, that he paid the 52 l. to one of the Executors in ſatisfaction of the Debt, and all Intereſt and damages upon it, and thereupon he releaſed to him the ſaid Obligation; the Plaintiff replyed, That the Executor who releaſed, was within age. It was holden by the Juſtices, That this Releaſe of an Enfant Executor, ſhould not bar the Enfant. But ſuch Releaſe by an Executor of full age, upon the Receipt of the principal and Intereſt ſhall be Aſſets for the Intereſt and money received only,

only, and ſhall not be a *Deuaſtavit* for the Reverſion. Trin. 13 Car. in B. R. *Kniveton* and *Latham's* Caſe. *Cro.* 1. Part, 352.

7. Treſpaſs brought by an Executor againſt the Defendant, for that he took, chaſed, and eſloyned two Oxen, which were the Teſtators, *tempore mortis ſuæ* to his damage of 40 l. *et in retardatione Teſtamenti*: It was ſaid, That the Action was not well brought, becauſe it ought to have bin mentioned, that they were taken *extra cuſtodiam ſuam*. But the Opinion of the Court was, That the Action was well brought, becauſe ſhe hath election to bring it of her own poſſeſſion, or as Executer: and inaſmuch as by the Teſtators death, the poſſeſſion is caſt upon the Executor, it is to be intended, that the goods were *in Cuſtodia ſua*. It was adjuged for the Plaintiff. Hill. 3 Jac. in B. R. *Adams* and *Chevertt's* Caſe. *Cro.* 2. Part, 113.

8. Debt againſt an Executor upon an Obligation, who pleaded, That the Teſtator at the time of his death was endebted to the King for his Office of Sheriff ſhip; and becauſe it was not averred, that it was *verum et juſtum debitum et minime ſolutum*. It was adjudged for the Plaintiff. Trin. 5 Jac. in B. R. *Woodal* and *Hugates* Caſe. *Cro.* 2. Part, 182.

9. Debt by an Executor upon an Obligation, the Defendant pleaded, *Non eſt factum*, and found for him; It was Reſolved, that the Plaintiff ſhould pay no Coſts within the Statute of 5 Jac. ſuing in another's Right; and ſo it was ſaid it was adjudged in one *Fords* Caſe. Mich. 7 Jac. in B. R. *Hayworth* and *Davids* Caſe. *Cro.* 2. Part, 219.

10. The Caſe was, Leſſee for life of a houſe and Paſture grounds, dyed, his Executors ſuffered the Cattel to go there, for ſix dayes after his death, and then removed them; and in Treſpaſſe brought juſtified for that time, averring, that within that time, he could not procure any other place to put in the Cattel: The Court was of Opinion, That it was but a convenient time for removing of the Cattel. Hill. 5 Jac. in B. R. *Stroddon* and *Harveys* Caſe. *Cro.* 2. Part, 204.

11. It was found by Verdict in Treſpaſſe, That A. Leſſee for 21 years of the Land in Queſtion, deviſed the benefit of his ſaid Leaſe to E. his Wife for ſix years after his death; and that after the ſaid ſix years ended: my ſon J. if he come home, ſhall have the benefit of my ſaid Leaſe during the reſidue of the Term, and if my Son J. doth not then come home, *William* my Son ſhall have and poſſeſſe that Leaſe unto his benefit, untill my Son J. do come home. And deviſed to his Wife, all his goods, &c. and made her Executrix, and dyed. E. entred, claiming *virtute legationis*; W. during the ſix years, (J. not being returned home) made his Will, and deviſed that Leaſe to H. his Wife, and made her his Executrix and dyed: The 6 years ended, J. did not return; H. takes to Husband the Plaintiff; A. takes Husband the Defendant. The Queſtion was, who ſhould have the Term. It was adjudged, That A. had right to the Term: For although it ſhould be a poſſibility in the Teſtator, yet becauſe it is ſuch a poſſibility, that a Term might have veſted in him, if he had lived till after the 6 years expired (the ſaid time E. by her entry, having agreed to the ſaid Legacy). It was held, That that poſſibility might well go to his Executrix, and the Executrix ſhould have it, becauſe it might have veſted in the Teſtator. Trin. 15 Jac. in B. R. *Sheriff* and *Wroham's* Caſe. *Cro.* 2. Part, 909.

12. Debt againſt an Executor upon an Obligation of the Teſtator, the Defendant pleaded, That the Teſtator made him Executor until J. S. ſhould come to the age of 21 years, and in the mean time keep all his goods for him, and then deliver them unto him, and the ſaid J. S. then to be Executor; and ſhewed, that before the Action, J. S. came of 21 years, and he delivered the goods to him, which he accepted. It was debated by the Court, that if the firſt Executor waſted the goods, how the Creditor ſhould relieve himſelf for thoſe goods, the new Executor taking upon him the Executorſhip. It was agreed, That the old Executor did remain Executor as to have an Action againſt them, for againſt the Vendees they can have no remedy. Trin. 17 Jac. in C. B. *Chandler* and *Thompſons* Caſe. *Ibid.* 265.

13. A. and B. Executors of E. brought an Action againſt J. S. upon an Obligation, the Condition was, That J. S. ſhould pay 20 l. to ſuch perſon or perſons as the ſaid E. ſhould by her laſt Will and Teſtament in writing, name and appoint the ſame to be paid, and ſaid ſhe did appoint no perſon to whom it ſhould be paid: the Plaintiffs replyed, that ſhe made her Will, and thereby made them Executors: It was the Opinion of the Court, That the money was not to be paid to the Executors, but there muſt needs be an Aſſignee indeed, who ſhall take it to his own uſe, for that the word paying, carrieth property with it. Trin. 11 Jac. in C. B. *Peaſe* and *Meads* Caſe, *Hob.* 9, 10.

14. A. Executor of B. brought Debt upon an Obligation againſt C. Executor of D. the Defendant pleaded, That the ſaid A. the ſuppoſed Teſtator dyed inteſtate; and, before the Action brought, the Adminiſtration of his goods was committed to J. D. who adminiſtred, and yet doth Adminiſter. The Plaintiff replyed, That W. dyed Inteſtate, and that after his death, and before Adminiſtration granted, divers goods of his, to the value of the Debt, came to the hands of this Defendant, which goods the Defendant as Executor *adminiſtravit ſecu-*

dum

alitèr ad usum suum proprium disposuit et convertit; et hoc, &c. Whereupon Issue was taken, and found it against the Defendant in the Disjunctive. In this Case it was adjudged for the Plaintiff: For although the Verdict be true, that if he did administer, or otherwise convert it to his own use, yet both must be as Executor; and then it is but the same thing spoken two wayes; And since there was an Execution in wrong before the Administration granted, the Plaintiff had cause of Action vested in him, which shall not be taken away by the Administration granted after, though it be before the Action brought. Trin. 11 Jac. in C. B. *Keble* and *Osbaston's* Case. *Hob.* 49.

15. Ejectment, the Case was; A. made a Lease of Lands to B. for 99. years, if B. should so long live, the Remainder after his death to the Executors or Assignees of the said B. for 40 years. B. dyed Intestate, Administration was committed to E. his Wife, who entred, claiming the 40 years. It was the Opinion of the Court in this Case, That the Lessee should have an estate during life, for it is to him for 99 years, if he so long live; and because by common intendment he cannot survive those years, the intent was, that his Executors should have it after his death, and that the certainty of the time might be known, it was limitted for 40 years. Mich. 41 Eliz. in C. B. *Speek* and *Speeks* Case, *Owen* 125.

Executions.

1, *Execution; What it is, and where, when, and against what persons; and upon what Lands, Goods, Chattels, Offices, and Execution may be awarded by* Capias ad satisfaciendum *against the body*; Elegit, Fieri facias, *or other manner of Execution; and how the Sheriff or other Officer is to demean himself in the doing thereof.*

1. EXecution is, Where Judgment is given in any Action, real, personal, mixt, Indictment, &c. That the party shall recover the Land, Possession, Debt, Damages, Goods or Chattels, or receive Corporal punishment by way of Imprisonment, or otherwise, as the Case shall require; and when any Writ is awarded to put the person in execution, by reason of any such Judgment, or to do any other thing whereby the Plaintiff shall be satisfied, either of his Lands and title to them, Debt, Damages, Goods, Chattells. It is called a Writ of Execution, and where he hath the possession of the Land, and is paid his Debt or Damages, or hath the body of the Defendant awarded to Prison, then he is said to have Execution. And see, That in a Writ of Debt, a man shall not have recovery of any Lands, but of them which the Defendant had at the day of the Judgment given; And of Chattels, a man shall have Execution only of the Chattels which he hath at the day of the Writ of Execution awarded.

2. At the Common-Law, If a common person had sued a Recognizance, or had had a Judgment for debt or damages, he could not have had the body of the Defendant, or his Lands in Execution; but he might only have had Execution of his goods and Chattels or of the profits of his Lands, to which purpose he might have had a Writ called *Levari facias* to the Sheriff, *Quod levari faciat de bonis et Catallis ipsius* A. or a *Fieri faciat, de bonis et Catallis*; and these Writs were to be sued forth within the year, after the Judgment obtained: But in Debt against the Heir upon an Obligation made by his Father, Execution might have bin of the Land by the Common Law which the Heir had by Discent; and that was in Case of necessity only, because the goods and Chattels went to the Executors. But in the Case of the Kings accountant at the Common Law, by a Prerogative of the King; the body, Lands, and goods were lyable to Execution. But *Capias* against the body of a man in the Case of a common person, did not lye, untill the Statute of 25 E. 3. cap. 17. *Cook* 3. Part, 12. in Sir *William Herberts* Case.

3. The Heir was condemned upon *Nihil Dicit* in Debt brought upon an Obligation made by his Father. It was the Opinion of all the Justices, That the Plaintiff could not have other Execution, but by a special *Elegit* of all the Lands which discended in Fee to the Heir from his said Ancestor, which he had at the day of the Writ brought. Hill. 7 E. 6. *Dyer*, 81. But see *Plow. Com.* 440. in *Davy* and *Pep's* Case. If the Heir be condemned for default or answer, or by *Nihil dicit*, or by confession, or by any other matter, without certain shewing the Assets, in such Case the Plaintiff shall have Execution of his other Lands, or of his goods and Chattels by *Capias ad satisfaciendum*: And if the Recovery were by *Nihil dicit*, he shall be charged of his own Land, as it was adjudged. Hill. 41 Eliz. in B. R. rott. 447. in *Barker* and *Browns* Case. See 4 *Mr. Dyer*, 149. acc.

4. Debt was brought upon an Obligation against the Daughter and Heir of *Hovingham* upon an Obligation of her Father, the Plaintiff recovered upon *Nihil dicit*, a judgment general was given:

And

And upon a *Scire facias* to have Execution, the Defendant pleaded, nothing by diſcent in Fee at the day of the firſt Writ brought, nor after. It was the Opinion of the Court, That after a Recovery by *Nihil dicit*, or *Non ſum informatus*, or by confeſſion, the Heir ſhall come too late to plead, Nothing by Diſcent; but in ſuch Caſe, Execution ſhall be by *Elegit* of his own Lands. 18 Eliz. *Dyer*, 344.

5. A man recovered in an Action of Debt, his Debt and damages; the Defendant dyed before Execution; whereupon a *Scire facias* iſſued forth againſt the Heir of all the Lands which were to the Defendant the day of the Judgment; and thereupon iſſued an *Elegit*, according to the Statute of *weſt.* 2. of the moyety of the Lands of the Heir: It was there a Queſtion, If a *Scire facias* lay againſt the Executors. It was the Opinion of the Court, That it was not neceſſary, becauſe he had his Election to have Execution by *Elegit*, only againſt the Heir. Mich. 4 Eliz. *Dyer*, 207. *Owin's* Caſe.

6. Debt was brought againſt a Woman as Couſin and Heir of the Obligor; ſhe confeſſed the Action, but ſaid that nothing did diſcend to her, but a Reverſion of 30 Acres of Lands after the death of J. S. And notwithſtanding, Judgment was given, That the Plaintiff ſhould recover his Debt and damages of the ſaid Reverſion to be levyed when it ſhould fall. See 23 Eliz. *Dyer*, 373. See 37 Aſſ. 9. acc. And note in this Caſe, That a Reverſion ſhall be Aſſets in Debt.

7. Debt was brought upon an Obligation; the Defendant pleaded Conditions performed, and being at Iſſue upon a point certain, the Defendant knowing that the Verdict would go againſt him, conveyed away his Lands to others upon payment of 20 l. but he himſelf took the profits of them. It was the Opinion of the Juſtices, That notwithſtanding the conveyance of the Lands, that Execution might be ſued forth of the ſaid Lands in reſpect of the Covin; and that the ſaid Lands were lyable to the Plaintiffs Debt: and an *Elegit* was awarded accordingly. 13 Eliz. *Dyer*, 295. See *Co.* 3. Part, 78. *Twynes* Caſe, acc. See 22. Aſſ. 44. acc.

8. Two men were bound joyntly and ſeverally in a Bond, both of them were ſeverally ſued, and condemned, and ſeverally taken in Execution, the one eſcaped; and the other brought an *Audita Querela*; And it was adjudged, That it did not lye: and it was ſaid, That although there ſhall be but one Execution, yet the ſame ſhall be intended of an Execution with ſatisfaction, for he ſhall have both their bodies in Execution: and the body is no ſatisfaction, but only a pledg for the debt. Mich. 39 Eliz. in B. R. *Cook* 4. Part, *Blunſtith's* Caſe.

9. If the Conuſor of a Statute be taken in Execution, and eſcape; yet his goods and Lands ſhall be extended upon that Statute, for that the Action which the Plaintiff hath againſt the Sheriff, for that eſcape is no ſatisfaction for the debt. Mich. 33 Eliz. in C. B. *Lixneys* Caſe.

10. If a man be taken in Execution for debt, if he dyeth in Execution, yet the Plaintiff may have a new Execution by *Elegit*, or *Fieri facias*. 1. Becauſe that the Plaintiff ſhall not be prejudiced, nor the Defendant benefitted by the Act and wrong of the Defendant in not payment of his Debt, there being no default in the Plaintiff, and he being taken in Execution by due courſe of Law. 2. Becauſe the body is not a ſatisfaction, but a Pledg for the Debt. 3. Becauſe it ſhould be miſchievous to the Plaintiff, to loſe his debt when noe default is in him; and it ſhall be no miſchief, if a new Execution be awarded of his Lands and goods, for that in all Equity, they are chargeable to the payment of his debts; and it is not like an Execution of Lands by *Elegit*, for that when the Plaintiff hath Execution of the Lands by *Elegit*, and afterwards the Lands be evicted; there before the Statute of 32 H. 8. he could not have had any new Execution, becauſe the firſt was a valuable Execution, with ſatisfaction. *Cook* 5. Part, *Blunſields* Caſe, acc.

11. In *Audita Querela*, the Caſe was; *Cowley* and *Bates* bound themſelves joyntly and ſeverally in an Obligation to *Lydcot*; *Lydcot* brought debt upon the Bond againſt *Bates*, and had Judgment in the Common-Pleas. Afterwards he brought debt againſt *Cowley* in the Kings Bench, and obtained a Judgment there againſt him; and afterwards he ſued forth Execution upon the firſt Judgment by *Elegit*, and had the Lands of *Bates* in Execution; and then took forth a *Capias ad ſatisfaciendum*, againſt *Cowley*, and took him in Execution. The Queſtion was, Whether *Lydcot* might have a new Execution by *Capias ad ſatisfaciendum*, after he had Execution executed againſt one of the Obligors, becauſe the Judgments upon which he grounded his Executions, were given at ſeveral times, and in ſeveral Courts. It was Reſolved in this Caſe. 1. That a *Capias* doth not lye after an Execution by *Elegit*, but after a *Capias*, an *Elegit* is grantable; and the reaſon of the difference is, becauſe upon the preyer to have an *Elegit*, it is entred in the Roll, *Elegit ſibi executionem per medietatem terræ*: But if the Sheriff returneth upon the *Elegit*, that the party hath not Lands, then the party may take forth a *Capias*; And it was there holden by the Juſtices, That an *Elegit* in it ſelf is a ſatisfactory Execution, and a man ſhall never have but one Execution with ſatisfaction. Wherefore it was adjudged, That the Plaintiff in the *Audita Querela*, ſhould be diſcharged out of Execution. Trin. 11 Jac. in

B. R.

R. *Cowley* and *Lydcots* Caſe. *Bolſtr.* 2. Part, 79. ſee *Godbolt.* 257. the ſame Caſe.

12. In *Audita Querela*, the Plaintiff ſhewed, how that a Debt of 200 l. was recovered againſt him, upon which he was Outlawed, and after by force of a *Capias utlagatum*, he was taken in Execution, and being in Execution, the Sheriff ſuffered him to eſcape. The Defendant ſaid, That after the ſaid eſcape, and before the *Audita Querela* brought, the Outlawry was declared to be erronious, and ſo no Record of the Outlawry. It was objected, That the Outlawry was not void, but voidable, and that the Sheriff ſhould not take advantage of the Error, but ſhould be charged with the Eſcape notwithſtanding that the Record was Erronious; but it was adjudged, That the *Audita Querela* would not lye. And in that Caſe, a difference was put between mean Acts done in Execution of Juſtice, which are compulſary, and acts voluntary; as if Judgment be given in Debt, and the Sheriff by force of a *Fieri facias*, ſelleth a Term of the Defendants, and afterwards the Judgment is reverſed for Error, the Term ſhall not be reſtored, but only the ſum, becauſe the Sheriff was commanded and compelled to ſell the Term: But if an Outlawry be awarded, by which the Sheriff is commanded to take the body *et bona et Catalla quæ per inquiſitionem venerint in manus noſtras Capias*: If by force of ſuch Writ, the Sheriff ſelleth the goods and Chattels, and afterwards the Outlawry is reverſed, the party ſhall be reſtored to his goods and Chattels, becauſe the Sheriff was not commanded by the Writ to ſell them. *Cook* 8. Part, 141, 142. Dr. *Dwyes* Caſe.

13. A man had cauſe of Priviledg in the Common-Pleas, and he was arreſted in *London*; before Judgment, he delivered a *ſuperſedeas* to the Inferiour Court; yet they proceeded to Judgment, and the party being taken in Execution, was brought by *Habeas Corpus* into the Common Pleas; and becauſe after the *ſuperſedeas* delivered, there was a nullity in the proceeding, the Court awarded, that the party ſhould be diſcharged out of Execution, and that without any Writ of Error; For by this Declarative award, the Judgment and Execution was utterly avoided. 38 H. 6. 4, 12.

14. A. ſeiſed of houſes in *London*, took a Wife, and afterwards acknowledged a Recognizance to the Chamberlain of *L.* for Orphanage money; And ſate words acknowledged another Statute before the Mayor of the Staple to B. B. ſued Execution upon his, and had a *Liberate*, but the ſame was not returned, and the Sheriff delivered the houſes to B. in Execution. The Succeſſor of the Chamberlain ſued Execution upon his Heirs by *Elegit* to the Serjeant of Mace, and had the Moyety of the houſes delivered to him in extent. A. the Conuſor dyed, his Wife entred, claiming her Dower, and dyed. And afterwards the ſeveral Recognizances were aſſigned to ſeveral perſons. In this Caſe, amongſt other points; Reſolved, 1. That the Execution by the Serjeant at Mace was good, for that he was an Officer to the Court. 2. That the Execution upon the *Elegit* was good, without giving notice to B. or without a *Scire facias*, becauſe the firſt was not returned, nor did appear to the Court. 3. Reſolved, That the Execution of the *Liberate* was good, though it was not Returned: and ſo it is of a *Capias ad ſatisfaciendum*, *Habere facias poſſeſſionem*; and of all other Writs, where only Land is to be delivered, ſeiſin had, or goods ſold, they are good, although the Writ be not returned. But otherwiſe it is in Caſe of an Enqueſt, as in Caſe of *Elegit*, the ſame is to be returned, That the Court may judg of the ſufficiency of the Inquiſition. *Co* 4. Part, 64, 65. *Fulwood's* Caſe.

15. Note, Where by Prerogative Writ out of the Exchequer, goods of a Collector for Fifteens, were extended, but the Writ of extent was not Returned by the Sheriff: Yet it was Reſolved, That the Execution for the King was good, although the Writ was not returned; and there it is ſaid, That in caſe of a common perſon, If the Sheriff by force of a *Fieri facias*, levyeth the Debt, and delivereth it to the party, the Execution is good, without return of the Writ; and if the Execution ſhould not be good, the Sheriff would not find buyers upon any Execution, which would be a great delay of Executions; but in ſuch Caſe the Sheriff ſhall be amerced, but the Execution ſhall ſtand good. Mich. 42 Eliz. in *Scaccario*, *Cook* 4. Part, 90. *Hues* Caſe. But a *Capias* in proceſs muſt be returned, becauſe the end of the Arreſt is, that the party may appear and anſwer the party. Trin. 33 Eliz. *Mounts* Caſe, adjudg. acc.

16. If a *Fieri facias* come to the Sheriff to levy money of the goods of a man, and the Sheriff by writing, reciting, that he hath a Term for years, which beginneth 2 *Mariæ*, whereas in truth the Term beginneth 3 *Mariæ*, ſelleth the ſame, the ſale is void, becauſe there is not any ſuch Term; but if the Sheriff ſelleth alſo all the Intereſt which he hath in the Land, the ſale is good. Hill. 39 Eliz. *Cook* 4. Part. 74 *Palmers* Caſe. And ſee there, The Sheriff reciting that a man had a Term in a Parſonage, for the Term of divers years then to come, ſold the ſame by force of a *Fieri facias*: It was adjudged the ſale was good, for by intendment the Sheriff could not know the certainty of the beginning or end of the Term; but it is there agreed, That if he take upon him to recite the Term and do miſtake it, and ſells the Term, the ſale is void. Paſc. 26 Eliz. Sir *George Sydenham's* Caſe.

17. Leſſee for 99 years, by his Will deviſed his Lands by theſe words, *ſcil.* I deviſe my Leaſe to my Wife during her life, and after her death, I Will it to go to her Children unpreferred, and made his Wife his Executrix, and dyed, the Wife entred, and afterwards married with J. S. and afterwards 140 l. debt was recovered againſt J. S. and upon a *Fieri facias*, the ſaid Term was ſold by the Sheriff; and afterwards the Judgment was reverſed for Error; afterwards the Wife Executrix dyed, having Iſſue a Daughter not preferred: In this Caſe, theſe points were Reſolved. 1. That the Executory deviſe of the Leaſe after the death of the Wife, to the daughter unpreferred, was good. 2. That the ſale by the Sheriff upon the *Fieri facias*, did not deſtroy the Executory deviſe, although that the perſon to whom the executory deviſe was, was incertain in the life time of the Wife. 3. That the ſale by the Sheriff ſtood, although the Judgment was afterwards reverſed, becauſe the Sheriff who made the ſale, had a lawful Authority to ſell, and by the ſale, the Vendee had an abſolute property in the Term during the life of the Wife; and although the Judgment which was the Warrant to the *Fieri facias* be reverſed yet the ſale which was a collateral act done by the Sheriff by force of the *Fieri facias*, ſhould not be avoided. Mich. 27 Eliz. in B. R. *Amner* and *Loddington*: Caſe vouched in *Cook* 8. Part, *Matthew Manning's* Caſe. 96.

18. Two Joynt-Tenants of a houſe, one acknowledged a Statute, and dyed poſſeſſed of divers goods in the ſaid houſe; the Sheriff came to extend the goods, and he and the Jury offered to enter the houſe, to extend the goods; and the Defendant intending to diſturb the Execution, ſhut the door, ſo as the Sheriff could not enter to extend the goods: In this Caſe, theſe points were reſolved. 1. That if a Recovery be in a real Action, or in *Ejectione firme*, the Sheriff upon *Habere facias ſeiſinam*, or *poſſeſſionem*, may break the houſe to do Execution, becauſe after the Judgment, it is not the houſe of the Defendant. 2. In all Caſes where the King is party, after the Sheriff hath ſignified the cauſe of his comming, if no door be open, he may break open the houſe to do Execution, but if he may enter without breaking of it, or upon a requeſt, if in ſuch Caſe he break the houſe, he is a Treſpaſſor. 3. In all caſes, in the caſe of a common perſon, if the door be open, the Sheriff may enter the houſe of a Subject to do Execution of the body or goods. 4. That it is not lawful for the Sheriff upon requeſt and denyal, in Caſe of a common perſon, to break the houſe of any Subject to execute any proceſs; and the Sheriff cannot break the houſe by force of a *Fieri facias* but he ſhall be a Treſpaſſor: but if he doth ſo, and doth Execution; the Execution done by him is good. *Cook* 4. Part, 91. *Semmaynes* Caſe. See *Cook* 11. Part, 82. *Bevis* Caſe. See 18 E. 4. 4. by all the Juſtices.

19. An Action of Battery was brought; the Battery was ſuppoſed, 1. *Junii* 1586. and Judgment given 13 *Feb.* the ſame year, upon which iſſued a *Capias pro fine*; and before the return thereof, the King pardoned ſuch Fines, and made all proceſs thereupon void. In this Caſe, it was ſaid by the Court, That if in ſuch Caſe, the Sheriff takes the party by a *Capias pro fine*, that in that Caſe, he is in Execution for the party, and if the Sheriff ſet him at liberty, he ſhall anſwer for the Eſcape. And in the principall Caſe it was Reſolved, That although by the pardon, the proceſs was made void, that the ſame ought to be meant, as to the Intereſt of the King in the Fine; and the vexation of the ſubject by it, but not to the Execution of the party. Paſc. 29 Eliz. in C. B. *Hudſon* and *Leigh* Caſe. *Leon.* 51.

20. Upon a Recovery in Debt by A. he ſued Execution againſt the Defendant by *Elegit*: The Sheriff made return, that he had made partition of the Lands by the Oath of 12 men, but he could not deliver it to the party, for that it was extended upon another Statute. Whereupon the Plaintiff ſued forth a *Capias ad ſatisfaciendum*. It was ſaid, That after *Elegit* returned, the party could not reſort to Execution by *Capias*; and therefore prayed a *ſuperſedeas* of it: But the Court was clear of a contrary Opinion; for upon *Nihil* returned upon an *Elegit*, the Plaintiff may have a *Capias*: And in this Caſe, there is no Execution returned, for after the former extent ended, he ought to have a new *Elegit*: Afterwards the Defendant was taken by the *Capias ad ſatisfaciendum*; and he prayed a *ſuperſedeas* to it, but it was not granted. Hil. 31 Eliz. in B. R. *Palmer* and *Knowlls* Caſe. *Leon.* 176.

21. Debt againſt Executors, who plead fully adminiſtred, which is found againſt them; in that Caſe, no *Capias ad ſatisfaciendum* ſhall iſſue; but contrary, if they plead, Never Executors, never Adminiſtred as Executors, and it is found againſt them, there in regard their plea is falſe, a *Capias* ſhall iſſue forth againſt them, and their bodies ſhall be ſubject to Execution. See 34 H. 6. 45. 48 E. 3. 14. acc.

22. A. became bound in a Statute of 1000 l. to B. B. dyed, the Executors of B. ſued Execution againſt A. and upon *Extendi facias Liberate* iſſued forth, and the Mannor of D. the Lands of A. ware delivered to the Executors, but the *Liberate* was not returned: It was objected, That the Execution was not good, becauſe the *Liberate* was not returned. To that it was anſwered and Reſolved, That there is a difference betwixt a *Liberate*, and a *Capias*

Capias ad ſatisfaciendum, and *Fieri facias*; for theſe Writs are Conditional, *Ita quod habeas Corpus*, or *Ita quod habeas denarios hic in Curia*: but contrary in the Writ of *Liberate* & *Habere facias ſeiſinam*: for in ſuch Writs there is not any ſuch Clauſe; and therefore if ſuch Writs be not returned, the Execution done by vertue of them, is good enough. Hill. 28 Eliz. B. R. *Pennuddock* and *Newman's* Caſe. *Leon.* 279.

23. Debt upon an Obligation of 100 l: The Defendant pleaded, That J. S. was joyntly and ſeverally bound with him in the ſame Bond, and the Plaintiff recovered againſt him, and had him in Execution upon a *Capias ad ſatisfaciendum*: and ſuch a day the Sheriff *libere et voluntarie* ſuffered him to Eſcape. It was adjudged no Bar, but that he might ſue Execution againſt the other; for Execution without ſatisfaction, is no Bar, although he eſcaped voluntarily by the Sheriff's permiſſion: but if he had ſhewed, That the Sheriff let him go at large by the licence of the Plaintiff, it had been a diſcharge, and he might have pleaded it in Barr. Hill. 2 Car. B. R. *Whitacres* and *Hawkinſon's* Caſe, *Cro.* 1. Part, 53.

24. In a *Scire facias* upon a Judgment in Debt, the Defendant pleaded, That at another time, the Plaintiff had ſued a *Capias ad ſatisfaciendum* againſt him, and he was taken in Execution. The Plaintiff Replyed, It was true, that he ſued a *Capias* againſt him, but he preſently reſcued himſelf, and eſcaped. It was Reſolved, That the Plaintiff not having any fruit of his firſt Execution, might have a newer Execution, and the Defendant ſhould not take advantage of his own wrong: and although it be no good return upon a *Capias ad ſatisfaciendum*, that the Defendant reſcued himſelf (for the Sheriff at his own perill is to keep him) not no plea in Debt upon Eſcape: yet the party himſelf ſhall not take advantage of his own tortious act, and the Defendant hath not ſhewed, that the Plaintiff ſued the Sheriff, and recovered againſt him: and it may be the Sheriff is dead, and the Plaintiff cannot ſue his Executors upon the Eſcape. Trin. 6 Car. in B.R. *Robinſon* and *Clayton's* Caſe. *Cro.* 1. Part, 174, 185. acc.

25. *Anne Williams* brought a *Scire facias* againſt J. S. and E. his Wife, who was the Adminiſtratrix of J. D. to have Execution of 88 l. debt and damages recovered againſt J. D. The Defendant pleaded, That the Plaintiff had taken J.D. in Execution by a *Capias ad ſatisfaciendum*, in which Execution he dyed; and demanded Judgment; upon which the Plaintiff demurred. And it was adjudged againſt the Plaintiff in the Kings-Bench, Hill. 4 Jac. which was long after *Blunſild's* Caſe either argued or publiſhed: It being argued, Mich. 39 Eliz. and publiſhed, 3 Jac. Paſch. 43 Eliz. in B. R. rott. 88. *Williams* and *Cuttryes* Caſe. *Hob.* 60.

26. In a *Scire facias* to have Execution of a Judgment of 2300 l. the Caſe was, upon the pleading, this; A man was taken in Execution by a *Capias ad ſatisfaciendum*, and dyed in Execution: and whether the ſame was ſuch an abſolute diſcharge of the debt againſt him, his Executors and Adminiſtrators, that no new Execution could be againſt them, or any of them, was the Queſtion? And upon ſolemn Argument by all the Juſtices, Trin. 13 Car. in the Common Pleas, It was adjudged, That the dying of the party in Execution, was no ſuch diſcharge of the Debt, but that Execution *de novo* might be ſued forth againſt his Executors. *Foſter* and *Faſtſon's* Caſe, *Hob.* 53, 54, 55, 56. where the Caſe is notably argued: and ſo Reſolved. *Quod vide Librum.*

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2. *Where Execution ſhall be awarded in one Court upon a Judgment given in another Court; And where notwithſtanding a Writ of Errour or falſe Judgment depending: Where not. And where after Execution,* Superſedeas *ſhall be awarded: Where not.*

1. A. was in Execution upon a *Capias ad ſatisfaciendum* out of the Kings-Bench. There iſſued a Writ of Prerogative out of the Exchequer to have his body there: the Teſte of which was before the Arreſt, and the return of it before the *Capias*. The Sheriff of *London* where A. was taken, brought his body into the Exchequer, and ſhewed the cauſe of his deteiner; and from thence the Priſoner was committed to the Fleet in Execution for the ſaid debt, as alſo for the debt of the Queen which he confeſſed in the Exchequer. Paſch. 3 Eliz. B. R. *Dyer* 197. Mich. 5 Jac. in Exchequer, The Lady *Sands* Caſe adjudged accordingly.

2. Sir *John Ailiffe* ſued an Attaint in *London*, Judgment was given in the Exchequer: and before Execution, the record was removed in *Banco* by *Certiorari*; and the Plaintiff prayed Judgment upon that, and had it: For an Attaint is not a *Superſedeas*, as a Writ of Errour is; nor doth a *Superſedeas* lye in an Attaint. Hill. 7 E. 6. *Dyer.* 82.

3. A Writ of Falſe Judgment was brought upon a Judgment given in the County Court, upon a Plaint there affirmed in an Action upon the Caſe upon an Aſſumpſit: and to delay the Execution of

the Costs and Damages, was the Writ brought, and the Record was removed, and the Writ ſerved, and the Plaintiff was Nonſuit; upon which the Defendant prayed a *Scire facias* againſt the Plaintiff to have Execution; and by advice of the Court, the ſame was granted: for otherwiſe he could not have any Judicial Writ to have execution; for the Record ſhall not be remanded. Mich. 16 Eliz. *Dyer* 339.

4. A man condemned in the Exchequer for a debt to the Queen, was committed to the Fleet, and afterwards was condemned in the Kings-Bench upon a Bill of Debt, at the ſuit of a Subject; he was brought into the ſame Bench by a *Habeas Corpus*, and by them committed again to the Fleet; as alſo for the debt of the Subject. The Goaler by the Commandment of the Treaſurer, ſuffered the Priſoner to go into the Country with a Keeper, to collect his debts, to ſatisfie the Queens debt: The Subject brought Debt upon Eſcape. It was holden by the Juſtices, That it did not lye: for the Kings-Bench had no authority to commit him to the Fleet; and ſo the Priſoner was never in Execution for the party. Mich. 13 Eliz. *Dyer* 296.

5. A *Fieri facias* was directed to the Sheriff of *Middleſex*, who returned *Quod Cepit bona et catalla* of the Defendant to the value of part of the debt, and that they remained in his Cuſtody for want of buyers. And that before the Retorn of the Writ, a Writ *de non moleſtando*, was directed *quod de ulteriori executione ſuperſedeat*; the which Writ he returned annexed to the *Scire facias*; and this Writ *de Moleſtando* was awarded *in Banco*, by reaſon of a Writ of Errour there brought by the Defendant: but the Record was never removed, becauſe that the retorn of the Writ of Errour was *Craſtino Aſſenſionis et non ante*, and the *Fieri facias* retorned. 15 Paſch. And afterwards a Writ of *Vendi Exponas* was awarded. Paſch. 1 Ma. *Dyer*. 99.

6. Debt againſt two by ſeveral *Precipes*, and ſeveral Iſſues joyned upon *Nul tiel Record*, and ſeveral Judgments given for the failing at the day: and now they brought one joynt-Writ of Errour; and therefore the Certificate was refuſed. In that caſe it was holden, That it was now ſufficient time to enter the Warrant of Attorney for the firſt Suit; but yet the Attorney ſhall forfeit 10 l. by the Statute of Jeofails, becauſe there was an Iſſue joyned before he entred his Warrant of Attorney: although tryable by the Record. Paſch. 2 Eliz. *Dyer*. 180.

7. A. recovered in debt againſt B: B. was brought by his Bail by *Habeas Corpus*, with a purpoſe to ſave themſelves. A. prayed that he might be committed in Execution; and the Bail prayed he might be received in their diſcharge. But it appeared to the Court, That A. had brought a Writ of Errour which was allowed, but the retorn of it was not yet come; ſo as the Court was diſabled either to award Execution, or to put him in Execution; and for that cauſe the Bail could not be diſcharged: for Bail is not only that he bring the body, but that he become ſubject to the Court, which now cannot be, becauſe of the Writ of Errour: therefore Quære, if the Defendant by his act hath not ſo diſabled himſelf, that the Bail is forfeited, though he proceed not in the Writ of Errour. Paſch. 14 Jac. in C. B. *Wickſted* and *Bradſhaw*'s Caſe. *Hob.* 116.

8. Judgment was given in Debt in the Grand Seſſions in *Wales* againſt the Defendant inhabiting in one of thoſe Counties, and the Defendant dyed inteſtate, and one who inhabited in *London*, took Letters of Adminiſtration: The Queſtion was, Whether any Execution may be in *Wales*, becauſe he neither inhabits, nor hath any thing there: and whether the Record may be removed into the Chancery by *Certiorare*, and ſent into the Kings-Bench by *Mittimus*, or into the Common-Pleas, to the intent to take forth a *Scire facias* upon it, have Lands out of *Wales* (or goods in the hands of the Adminiſtrator lyable to it there). It was the Opinion of all the Juſtices and Barons, That it could not; for he may not have a *Scire facias* in any Court but where the Judgment is given: and if ſuch courſe ſhould be uſed, all Judgments in Inferiour Corporations would be removed, and executed here; which would be an inconvenience to the Subject, to make Lands, or perſons lyable to ſuch Judgments in other manner then they were at the time of the Judgment. Paſch. 2 Car. in C. B. *Co.* 1. Part, 23.

9. After a Judgment in an *Ejectione Firmæ*, and *habere facias poſſeſſionem*, a Writ of Errour was brought, and a *Superſedeas* granted, directed to the Sheriff to ſtay Execution; and this Writ of Errour and *Superſedeas* was ſhewed to the Sheriff, who contrary to it, did do execution. It was holden by the Court, to be a great Contempt; and a Writ of Reſtitution was awarded. Hill. 11 Jac. in B. R. *Thomas* and *Owens* Caſe. *Bolſt.* 2. Part, 194.

10. A. was condemned in the Sheriff's Court in *London* for debt, and taken in Execution. Afterwards by *Habeas Corpus* upon Suit in the Kings-Bench, the ſaid Execution, with other Cauſes, were retorned. Whereupon he was committed to the Marſhall for that debt, and other his Executions in the Kings-Bench. Afterwards, all the Executions in B. R. and the Judgment in *London* by a Writ of Errour in the Huſtings, were diſcharged; and how he ſhould be diſcharged of this Execution, was the Queſtion: for that this Court hath no Record.

Record of the Execution, but by the Return of the *Habeas Corpus*. And of the reverſal of the Judgment in *London*, they have not any Record: And they may not award a *Certiorare* to *London*. It was the Opinion therefore of the Court, That all matters here concerning that Execution being diſcharged, he might be remitted to *London*, and there diſcharged. Mich. 4 Car. in B. R. *Cro.* 1. Part, 90. *Cutack*'s Caſe.

11. Upon an *Extendi facias* upon a Statute Staple, the Sheriff extended the Land of the Defendant, and ſold the goods, and returned the Extent in Chancery. Afterwards a Writ of Prerogative iſſued forth, that the Sheriff ſhould firſt levy a debt of 100 l. for the King: and he was driven to execute the Writ of Prerogative; for that till *Liberate*, no property was in the Conuſee. Quære, if upon the Extent, they are not in the Cuſtody of the Law for the party, and therefore privileged from all other Executions. Mich. 3 E. 6. *Dyer*. 69.

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3. *Where a Judgment ſhall not be executed, or an Execution awarded without a* Scire facias. *Who ſhall have a* Scire facias, *And where entry ſhall be lawful upon a Judgment without a* Scire facias: *Where Execution ſhall be upon the firſt* Scire facias, *and* Nihil *returned*; *and where not, but upon two* Nihils.

1. A. Recovered againſt B, in an Action of Debt: A. made his Wife his Executrix, and dyed; the Wife made C. her Executor, & dyed: B. dyed, C. brought a *Scire facias* againſt the heir of B, as heir apparent to the Land diſcended to him from B; who pleaded, Nothing by diſcent from B. It was found, That he had two acres of Land by diſcent. It was prayed, That Judgment might be given againſt the heirs of B. generally: for that his falſe plea ſhall charge him and his own Lands. It was the Opinion of the Juſtices, That execution ſhould be awarded againſt the heir in no other manner then it ſhould be againſt his Anceſtor, or other purchaſor; *ſcil.* of a moyety of that which he had by diſcent: And in this Caſe, It was Reſolved, That the Judgment ſhould be ſpecial, and no Execution ſhould be but upon the Aſſetts diſcended. And in this Caſe, it was ſaid, That there is a difference of debt againſt the heir, and *Scire facias* againſt the heir. And it was holden, That if Aſſetts do afterwards diſcend to the heir: yet if he doth alien the Aſſetts before the Writ be brought, that the heir and his Lands ſhall not be charged with the debt. Hill. 1 Car. B. R. *Bowyer* and *Rivett*'s Caſe. *Popham*, 153, 154.

2. Note: It was holden by the Juſtices, That debt doth not lye againſt the heir of the Gaoler upon an Eſcape; for the heir ſhall not be charged in debt neither by the Common-Law, nor by any Statute but where he is named, nor though it be recovered in the life-time of his father, but by *Elegit*, where he ſhall be charged as Terr-Tenant by a *Scire facias*. Hill. 10 Eliz. *Dyer* 271. 11 E. 3. 15. *Cook* 3. Part, in *Herbert*'s Caſe, acc.

3. Note; That a Judgment given in the Common-Pleas in a *Scire facias* upon a Recognizance was reverſed in the Kings-Bench, becauſe the Execution was awarded upon one *Nihil* returned, where there ought to be two *Nihils*. So in a *Scire facias* to have a Charter of pardon allowed: But in a *Scire facias* upon a Recovery of debt or damages againſt the party who was party and privy to the Judgment, and not againſt his Executor or Adminiſtrator, one *Nihil* is ſufficient. Trinit. 1 Eliz. *Dyer* 168. See 3 Eliz. *Dyer* 198. acc.

4. *Cheney* levied a Fine, and after brought a Writ of Errour to reverſe it, and aſſigned Nonage, and had a *Scire facias* againſt the Conuſee; and upon two *Nihils* returned, the Court proceeded, and by Witneſſes and Inſpection, they reverſed the Fine. *Cheney* ſold the Land to others, upon which the firſt Conuſee entred, and the Vendees brought a Writ of Entry *ſur diſſeiſin*, and againſt the Judgment before the Tenant gave an Exemplification of Witneſſes in the Chancery, proving him to be of full age in Evidence: and although to the Court it ſeemed not avoidable againſt the Judgment, yet the Verdict paſſed with thoſe Witneſſes, which was afterwards affirmed in an Attaint. Tr. 3 Eliz. *Dyer* 303. *Cheney*'s Caſe.

5. Upon a *Fieri facias* to levy the Debt upon a Judgment in the Common-Pleas, againſt two Executors *de bonis Teſtatoris*: The Sheriff returned *Nulla Bona*. Whereupon a Writ iſſued to the Sheriff, to enquire by Enqueſt, If the Executors had waſted; and Judgment was given againſt them *de bonis propriis*. The Executors brought a Writ of Errour in *redditione Executionis*. It was adjudged, That the Execution was erroneous; for when Judgment is given againſt the Executors, and upon the *Fieri facias* the Sheriff returneth *Nulla Bona*, The Plaintiff may have a Special Writ, that the Sheriff levy the money of the goods of the dead; and *ſi ſibi conſtare poterit* that the Executors have waſted the goods, then *de bonis propriis*. And it was holden in this Caſe, Although a *Scire facias* was awarded againſt the Executors; yet upon two *Nihils* returned, they ſhall be condemned and charged of their own goods; and yet perhaps they had

no Notice thereof, which ſhall be miſchievous. And for theſe cauſes, the Execution was reverſed; but the Judgment ſtood good. Mich. 43 Eliz. B.R. *Pettiſor's* Caſe. *Coo.* 5. Part, 32.

6. A. brought an Action of Covenant againſt B. as Executor, and aſſigned a Breach by an Act done by the Executors. It was moved, That after Verdict, it ſhould be *de bonis propriis*, becauſe the breach was by the Executors themſelves: But it was Reſolved, That it ſhould be *de bonis Teſtatoris*. Trin. 17 Jac. C. B. *Caſtilton* and *Smith's* Caſe. *Hutton*, 35 Hill. 33 Eliz. in C. B. *Johnſon* and *Buckers* Caſe, acc.

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4. *Where he who is in Execution ſhall be diſcharged: And what ſhall be a Diſcharge, and where by his own Act, and where by Act in Law; Where not. And where his Lands or his goods, ſhall be lyable to Execution for the duty of another; Where not.*

1. *Trewynyard*, a Burgeſſe of Parliament, was taken upon an *Exigent* after a *Capias*: He brought a Writ of Priviledg of Parliament, and the Sheriff let him at liberty. In this caſe it was Reſolved, 1. That the Priviledg was grantable notwithſtanding the Execution, becauſe the King and Realm hath an Intereſt in the body of every Burgeſſe of Parliament, and the Commonwealth ſhall be preferred before any private perſon. 2. Reſolved, That after the Parliament ended, that he might be taken in Execution again: for that the Plaintiff ſhall not be prejudiced in his Execution by the Act of the Law, which doth not wrong to any one. Paſch. 30 H. 8. *Dyer.* 60. *Trewynyard's* Caſe.

2. A. being in Execution in the Counter of *London*, becauſe the Fleet was the more eaſie Priſon, cauſed himſelf to be removed into the Common-Pleas upon an Obligation of 20 l. and there confeſſed the Action: and being brought by *Habeas Corpus* to the Court, he was committed to the Fleet for both Executions: This matter appearing, and the Obligee not knowing of it; by the award of the Court, the Priſoner was remanded in Execution in *London*, and a Fine impoſed upon him for the fraud. Paſch. 8 Eliz. *Dyer* 250. *Harriſon's* Caſe.

3. A. in Execution for damages in Treſpaſſe, brought an Attaint, and had a Writ *de Manucap.* to the Juſtices of the Bench, to let him to Mainprize to purſue with effect, and to render his body at, &c. It was doubted, becauſe it had not been uſed in the Common-Pleas: but at laſt upon *Minuccaption* taken as well for the King as the party, he was diſmiſſed. Afterwards upon agreement, ſatisfaction was acknowledged, and the Recognizance diſcharged as to the parties: Yet the Court would adviſe of it as to the King. Mich. 3 Eliz. *Dyer* 192.

4. An Attorney of the Common-Pleas ſued an Attachment of Priviledg in Treſpaſſe againſt K. returnable at a certain day, and not at a common day; and the Defendant was afterwards condemned in another Treſpaſſe of Priviledg, and a *Capias ad ſatisfaciendum* iſſued, returnable after the ſaid day: The Sheriff at the firſt day brought the party, and returned both the Writs, but ſaid, his intent was not to return the Execution before the day, and that for policy of Eſcape: Yet at the prayer of the Plaintiff, the Sheriff was diſcharged, and the Defendant committed in Execution to the Fleet. Quære of a *Capias ad ſatisfaciendum* in an Attachment of Priviledg, becauſe a Capias nor Proces of Outlawry lyes in the Original. Mich. 3 Eliz. *Dyer.* 192.

5. A. & B. Joynt-Tenants for life, the remainder over in Fee, Judgment is given againſt A. in Debt; and afterwards he releaſes to his Companion before Execution. It was Reſolved, That although that B. to whom the Releaſe was made betwixt them, is now in by the Leſſor, and not by A; yet as to him who hath the Judgment in the Action of Debt, he by his own wrong ſhall not defeat him of his Execution: But if A. had dyed before Execution, the Survivor ſhould have holden the Land diſcharged. *Cook* 6. Part, 79. The Lord *Abergavenie's* Caſe.

6. An Accomptant of the King being behind in his accompts, and poſſeſſed of a Term for years, for valuable Conſideration of money, bargained and ſold the ſame to J. S. It was Reſolved in that caſe, That the ſale of the Term ſhould bind the King, it being without any Covin. And it was holden, That a ſale of Goods and Chattels *bona fide* after Judgment, and before Execution, is good. And in that caſe, this Caſe was put; A man endebted to the King, took a Leaſe to him and his Wife for years: before Execution, the husband dyed; Execution was ſued againſt the Wife: for it was the Act of the husband, and he had power of the Term at the time of his death: and the woman coming in without conſideration, in a manner continues the intereſt of her husband. *Cook* 8. Part, 171. Sir *Gerrard Fleetwoods* Caſe.

7. Raviſhment of Ward upon the Statute of Weſt. 2. Cap. 35. brought againſt Husband and Wife, and others: The Jury found, that the Wife was guilty of the Raviſhment, but not the husband.

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It was Reſolved, That a married woman was not within the Statute of Weſt. 2. becauſe ſhe is diſabled to ſatisfie for the Raviſhment. And it was holden in this Caſe, That the Lands and Goods of husband who was innocent, ſhould not be lyable by this Statute, to anſwer for the Raviſhment done by the Wife: And the Law will not intend ſo ſevere puniſhment for the not doing of that which the Law hath diſabled him to do. And in the principal Caſe it was holden, That the Plaintiff might have had his Action of Treſpaſſe at the Common-Law againſt thoſe who raviſhed the Heir; or a Writ *de Valore Maritagii* againſt the Heir himſelf. *Cook* 9. Part, 74. Dr. *Huſſey*'s Caſe.

8. A. had a Judgment for 600 l. againſt B; and he acknowledged ſatisfaction for 410 l. of the ſaid debt and damages; and after there was an Agreement between them, That if B. did not pay the reſidue by ſuch a day, that then it ſhould be lawful to A. to take forth Execution againſt B, without ſuing any *Scire facias*, though it was after the year: and afterwards the money not being paid, A. took out a *Capias ad ſatisfaciendum* againſt B. for the 210 l: B. being brought by *Habeas Corpus* to the Bar, It was prayed for a *Superſedeas* for him, becauſe the Writ *Emanavit improvidè*, &c. It was the Opinion of the Court, That it was a Cauſe to diſcharge him of the Execution; for the *Capias* ought to have iſſued out for the 200 l. onely, and he ought to have ſued a *Scire facias*, though it was after the year, becauſe the Proces was not continued. But yet the Court held, That it was in their diſcretion, Whether they would grant a *Superſedeas* or not. Mich. 22 Jac. C. B. *Hickman* and Sir *William Fiſh*'s Caſe. *Winch.* 100, 101.

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5. *What ſhall be ſaid to be a good Execution: and what not. What a good diſcharge of Execution; What not. And upon what grounds an Execution may be ſtayed; What not.*

1. IT was referred to the Secondary of the Court, Whether the party and Sheriff were in Contempt of the Court for taking out an Execution, and executing of it: after a Writ of Errour was brought upon a Judgment; who reported to this effect, That there was a Writ of Errour brought upon the Judgment, before the Execution taken forth; but there was no Notice thereof given to the party, nor any *Superſedeas* taken forth to ſtay the Execution. It was ſaid by the Plaintiff, in the Writ of Errour, That the Execution was awarded *improvidè*, and therefore the Court might reſtore the party to his goods taken in Execution, although the Sheriff was in no default. But the Opinion of the Court was, That the party ought to take notice of a *Recipiatur* upon the Record if it be entred; and if the party take out Execution after the Writ of Errour is allowed, he is in Contempt of the Court, elſe not. And the Attorney is not bound to view the Record, whether a Writ of Errour be brought, but may take out Execution, if there be not a *Superſedeas*, or notice given to the party, therefore there is no help in this Caſe; for here the proceedings have been according to the Courſe of the Court; for by the delivery of the Writ of Errour to the Officer of the Court, the hands of the Court are cloſed. Trin. 24 Car. B. R. *Wians* and *Stebbins* Caſe. *Sty'es* 105.

2. Iſſue was joyned, a tryal had, a Verdict was found for the Plaintiff, and the *Poſtea* was delivered to the Clerk of the Judgments, to enter the Judgment: but through neglect of the Clerk, Execution was taken forth before the Judgment was entred. It was prayed, That the Judgment might not be entred: And it was ſaid, That it was now too late, and therefore a *Superſedeas* was prayed of the Execution. But it was the Opinion of the Court, That this was but the neglect of the Clerk, and that Judgment might be well enough entred, though the Execution was iſſued forth, becauſe the tryal betwixt the parties was right. Trin. 1650. B.R. *Styles* 229.

3. The Court was moved to have Reſtitution of moneys out of the hands of a Sheriff, which he had levied upon an Execution, becauſe it iſſued forth erroneouſly: for before the Execution taken forth, the Defendant brought a Writ of Errour in the Exchequer Chamber, and the Record was removed thither: and although the late Statute ſaith, That a Writ of Errour ſhall be no *Superſedeas* to ſtay Execution; yet the Record being removed into the Exchequer, it is not now before us, nor was at the time of the Execution iſſued forth; and this being after a Verdict and Judgment, the Errour is no *Superſedeas*, ſo it is miſchievous both wayes: Therefore the Court awarded a *Superſedeas, quia erroniceè emanavit*, to ſuperſede the Execution, and awarded the taking of the money out of the Sheriff's hands. Hill. 1650. B. R. in *Wingfield* and *Valences* Caſe. *Styles* 414, 415.

Before

More concerning Executions.

1. THe Case was; Tenant for life, the Remainder in tail of Land, he in the Remainder in tail acknowledged a Statute, and afterwards granted his Remainder; Tenant for life dyed: Whether Execution might be sued of this Remainder, was the Question: It was Resolved, that one might charge a Remainder when it hapneth, and a Statute is in the nature of a Charge: For if he in the Remainder maketh a Lease for years to begin at a day to come; yet if he grant over his Remainder, the Grantee shall hold it charged with the Lease; And every Statute is a Charge Executory. Hill. 43 Eliz. in C. B. *James* and *Balls* Case. *Goldesbr.* 120.

2. In Trover the Case was: A. recovered against J. P. Executer of E. P. 100 l. the Debt of the goods of the Testator, and the damages also, *si quæ fuerint*, and if not of the goods of the Executor: A. procured a *Scire facias* to the Sheriff before Execution: J. P. dyed intestate, and Administration of his goods was committed to the Plaintiff, the Defendants afterwards did Execution of the proper goods of J. P. and sold them, and delivered the money to the Sheriff; and the Plaintiff averred, that E. P. had no goods: The Plaintiff said, That the Sheriff upon the return of the Writ of Execution returned, That the goods of the Testator were wasted: It was holden by the Court, That the false Return of the Sheriff should not prejudice the Defendant: and that the averment that the goods put in Execution, were the goods of the Testator the day of the Execution sued, was a good averment, and that notwithstanding the death of the party against whom the Sheriff might do Execution of the goods in the hands of his Executors, and Judgment was given against the Plaintiff. Trin. 31 Eliz. in B. R. *Park* and *Mosses* Case. *Leon.* 244.

3. Note, It was holden by the Court, That if a *Fieri facias* go to the Sheriff to do Execution, and he levyeth the mony, and delivereth the same to the party, yet if it be not paid here in Court, the party may have a new Execution, and it shall be no plea to say, that he hath paid the money to the party, for it is not of Record, without the bringing of the money into Court. Pasc. 3 Jac. in C. B. *Godbolt.* 147.

4. Debt brought upon several *Precipes*, and Judgment is given, and the Plaintiff takes a *Capias ad satisfaciendum* against one of them, and arrests his body, and after he takes a *Fieri facias* against the other: Whether the several Executions should be allowed, was the Question. It was the Opinion of the Court, they should not, but in the principal Case, (the Debt being 10 l.) because that upon the *Fieri facias*, 5 l. was levyed: if the other who is in Execution, will pay the residue of the money, being 5 l. more, the Court awarded he should be discharged out of Execution. And the Court agreed, That the party could not have a *Fieri facias* against one, and a *Capias* against the other; but he might have a *Capias* against them both. Mich. 11 Jac. in C. B. *Rosser* and *Welden* Case. *Godbolt.* 208.

5. Note, It was agreed by the Court, That if Judgment be given in an Action of Debt against Lessee for years, and afterwards the Lessee alieneth his Term, and after the year, the Plaintiff sueth a *Scire facias*, and hath Execution, that the Term is not lyable to the Execution, if the Assignment were made *bona fide*; and if the Lessee for years assign over his Term by fraud, to defeat the Execution, and the Assignee assigneth the same over to another *bona fide*, that in the hands of the second Assignee, it is not lyable to the Execution. Pasc. 8 Jac. in C. B. *Wilson* and *Wormalls* Case. *Godbolt.* 161.

6. Note, a man shall not have Execution against the Kings Debtor that hath a Protection, because the King ought first to be paid; yet if the Plaintiff will undertake to pay the Kings Debt, in such Case he shall have Judgment and Execution for both the Debts. See *Fitz. Nat. Br.* acc.

7. Judgment was given in Debt for the Husband and Wife, for a Debt due to the Wife as Administratrix of her former Husband; after the Judgment, and before Execution, the Wife dyed: The Husband brought a *Scire facias*, and upon *Scire feci* returned, obtained a Judgment by *Nihil dicit*: It was the Opinion of the Court, That the *Scire facias* ought not to be brought by the Husband; but being sued, and Judgment obtained thereupon, although the Judgment be erroneous, yet it ought to stand till it be reversed by Error. It was a doubt, whether a Writ of Error upon this Judgment did lye in the Exchequer-Chamber *tam in redditione Judicii quam in redditione Executionis*: The Court seemed to incline, That although the Judgment might stand good, yet the Execution might be reversed. Trin. 12 Car. in B. R. Cro. 1. Part, 334.

8. A man obtained a Judgment in the King's Bench, but no Execution was sued forth in a year, the Defendant brought a Writ of Error, but not prosecuting his Writ, the Record was removed into the King's Bench; and the Defendant being imprisoned there for other causes, the Plaintiff prayed he might be in Execution for his Debt; and although the year were past, so as the Plaintiff was put

yet to his *Scire facias*; yet becauſe the Defendant had brought a Writ of Error, he thereby had removed the Record, and then the Record being remanded, the Plaintiff by the courſe of the Court, might have Execution without a *Scire facias*; and ſo it was adjudged, that the Defendant ſhould be in Execution for the Plaintiff. Hill. 12 Jac. in B. R. Sir *Ben. Bellaſis* and *Hanfords* Caſe. *Cro.* 2. Part, 364.

9. Execution was awarded againſt one, and he was taken by a *Capias*, which is returned. It was Reſolved by all the Juſtices, It is an abſolute and perfect Execution againſt him, and no other Execution can be ſued againſt him, his Lands, or goods, and although the Law ſaith, it is not a ſatisfaction in it ſelf, yet it is ſo high, as there cannot be other Execution; and when he dyes, the Execution is determin'd as againſt him and his Lands and goods: But where two are condemned, and one is taken in Execution, and dyes; yet Execution may be againſt the other, becauſe it is not any ſatisfaction, and proceſs is not determined againſt the other, and the one is chargeable aſwell as the other. Hill. 4 Jac. in B. R. *Williams* and *Curties* Caſe. *Cro.* 2. Part, 135, 144. See *Foſter* and *Jackſon's* Caſe, before acc.

10. A man had Judgment againſt one as an Adminſtrator upon a Bond of 200 l. the Action was layed in *Cumberland*: The Plaintiff afterwards brought a *Scire facias* upon the Judgment in *Weſtmerland*, and had Judgment upon two *Nihils*; and the Judgment was reverſed, for that the *Scire facias* muſt be brought in the ſame County where the firſt Action was layed. Trin. 9 Jac. in B. R. *Muſgrave* and *Wharton's* Caſe. *Hob.* 4.

11. In Debt, the Plaintiff declared upon a Recognizance taken before the Lord *Hobart* in *Fleet-ſtreet*, in *Serjeants*-Inn out of Term and layed his Action in *London*: The Queſtion was, Whether the Action ought to be brought in *Middleſex* where the Recognizance is recorded, or in *London*, becauſe the Entry of the Record is, That the Recognizance was acknowledged before the Lord *Hobart*, *ut ſupra*: In this Caſe, it was Reſolved, That though it was not a perfect Record, before it was entred upon the Roll, yet when it is entred, it is a Recognizance from the firſt acknowledgment, and binds the perſons from that time. 2. Reſolved, That a *Scire facias* upon ſuch Recognizance, ſhall be directed to the Sheriff of *London*, and not *to the* Sheriff of *Middleſex*: But if the entry of the Record were general, that the Record was taken before the Lord *Hobart*, then it ſhould be underſtood it was in Court, and then the *Scire facias* was to be brought in *Middleſex*. 14 Jac. in C. B. *Hall* and *Stanſfields* Caſe. *Hob.* 195.

12. A. brought debt againſt B. as Executor of J. S. in *London*, *de bonis Teſtatoris*, and 5 l. damages, *de bonis propriis*, upon a *Fieri facias* in *London*, the Sheriff returned, that he had waſted the goods, and that he had no goods of his own. Whereupon A. took a *Scire facias* againſt him into *Durham*, *de bonis propriis*, upon *Teſtatum* that he had goods there, but no *Teſtatum* was entred on the Roll, nor warrant for the Writ. It was Reſolved, That a *ſuperſedeas* ſhould be awarded; and whereas an Execution was upon the ſaid Writ of the ſale of a Leaſe, the Execution was made void, and the Leaſe diſcharged. Hill. 12 Jac. in C. B. *Leiceſter* and Sir *William Reads* Caſe. *Hob.* 68.

13. Note, It was Reſolved by the Court, That if a man be taken by *Capias utlagatum* at the Kings ſuit, he is in Execution for the Subject but in a ſecond degree, and the King may diſcharge his own Suit; but a protection will not diſcharge ſuch ſuit, eſpecially when it is not delivered, or made known to the Coroners; and then the party is in Execution for the Subject. Hill. 13 Jac. Sir *Thomas Shirleyes* Caſe. *Hob.* 115.

14. In Debt againſt a Sheriff, the Plaintiff declared, That P. and others were bound in a Recognizance of 2000 l. to the Plaintiff, and that after Judgment he delivered a *Levari facias* to the Defendant, who levyed the money, and at the day retorned *paratus habeo*, and yet did not deliver it in Court, The Defendant as to 30 l. pleaded *Nihil debet*; and to the reſt, that before the Retorn he paid it to the Plaintiff, who by his Acquittance reciting the receipt of it, did acquit him of it. In this Caſe, theſe points were Reſolved. 1. That Debt would lye againſt the Sheriff, for although there was no contract, yet there is a kind of contract in Law, for when the money is levyed, the Action ceaſeth againſt the party, and is *ipſo facto*, transferred to the Sheriff. 2. That upon ſuch levy of money, the party may have a *Fieri facias*, or an *Elegit* againſt the Sheriff, to levy as much of his own. 3. That ſince the Defendant by his Retorn hath charged himſelf with the money, *viz. paratus habeo*, he cannot ſay, that it was paid or acquitted before. Trin. 15 Jac. in C. B. *Speck* and *Richards* Caſe. *Hob.* 206. See before, ſect. 3.

15. A man was attainted of Felony by Outlawry, and afterwards an Execution was ſued out againſt him at the ſuit of a common perſon, and he was taken by it; upon a *Habeas Corpus* brought, it was prayed, That he might be diſcharged, becauſe a man Attainted of Felony, hath neither goods nor Lands. But it was the Opinion of the whole Court, That a man attainted, may be in Execution for the party, and his own offence ſhall not help him; And ſo was it adjudged in *Croſts* Caſe, who being Attainted of Felony, was in Execution at the ſuit of a common perſon, and eſcaped out of Priſon, and

an Escape brought against the Sheriff, and a Recovery against him. Trin. 32 Eliz. in B.R. *Trussels* Case. *Owen*. 69.

16. A man in Execution for Debt, brake the Prison, and escaped; the Sheriff made Fresh-suit, and took him again; It was adjudged no Escape: And in that Case, Resolved, That if the Prisoner who escaped, were out of the view of the Sheriff; yet if Fresh-suit were made, and he were taken in *recenti prosecutione*, that he should be in Execution again, although he was taken in another County. *Cook* 3. Part, *Rigways* Case. *Poph.* 41. the same Case.

17. Note, It was Resolved by the Justices, That one may be discharged out of Execution by word only; and therefore if a man be in Execution at my suit, and I go to the Sheriff and command him to discharge the party, this is a good discharge although it be by word only, both to the Sheriff, and to the party. And see 27 H. 8. 24. *Jordens* Case. In an Action upon the Case, the Defendant assumed, that if the Plaintiff would discharge J. T. of such an Execution in which he is bound at the suit of the Plaintiff, that then if J. T. did not satisfy the Plaintiff, by such a day the Defendant would pay the Debt; thereupon *Assumpsit* brought, he need not plead, that it was by writing, because the discharge is good without writing. Trin. 1 Car. in B.R. *Popham* 206. *Bagnots* Case.

18. A. had a Judgment against B. Afterwards Mich. 11 Jac. The Rule of the Court was, That B. should pay A. so much money before such a day, and if he failed, Then A. should have him in Execution upon the first Judgment, he failed payment, and so was in Execution. Afterwards he sued out an *Audita Querela* in the Chancery, and upon a suggestion, he obtained there an Injunction, and a *Supersedeas*, and by an order in Chancery was bailed, and so set at liberty, the Debt not satisfyed: It was moved, That B. might be called into Court to make answer to his not performance of the Order in Court: But the Court said, The Order of this Court was well performed, for by this failer of payment, he was taken in Execution upon the Judgment. The Court advised the party to move his matter to the Court of Chancery, and see what that Court would say to it; For if this be an escape in Law, then the Sheriff is chargeable with it; for the party cannot be taken, being once delivered out of Execution by order of the Court. Trin. 12 Jac. in B.R. *Baker* and *Chews* Case. *Bolstr.* 2. Part, 120.

19. A Judgment was given for the Plaintiff at *Bristol*, Execution taken out, and the goods of the Defendant were attached. It was moved, That Execution might be stayed there, untill a Writ of Error here brought was determined: The Court said, We have not power to hold Plea of Foreign Attachment, because we cannot do Justice there. But in that Case, the Court granted a *Habeas Corpus*: (though *Habeas Corpora* are often for delay of Execution of Justice) but they would do nothing for the staying of the Execution. Mich. 12 Jac. in B.R. *Challoner* and *Petworth's* Case. *Bulstr.* 2. Part, 268.

20. A. is in Execution severally at the suits of B. and C. under the Sheriffs of *London*: The old Sheriffs deliver the body of A. by Indenture, in which the Execution of B. is only mentioned, and the other left out; A. in the time of the new Sheriffs, escapeth. In this Case, these points were Resolved. 1. That the not delivery of A. unto the new Sheriffs in Execution, at the suits of both was an Escape as to one, although the Prisoner was within the walls of the Prison. 2. That the old Sheriffs ought to give notice to the new Sheriffs of all Executions which they had against any person, although that the Executions did remain upon Record. 3. That untill the Prisoners were delivered to the new Sheriffs, they remained in the custody of the old Sheriffs. 4. That if the Sheriff hath Executions against divers persons, and dyeth, the new Sheriffs are at their perills to take notice of all Executions of any Prisoner which is found in the Goal, and that for necessity. 5. If the Sheriff dyeth, and before a new Sheriff is made, a Prisoner escapes, breaking the Goal, the same is no escape in Law, because the Prisoners are in the custody of the Law. *Cook* 3. Part, *Wisbys* Case.

21. Note: It was holden by the Justices, If a *Fieri facias* go forth to the Sheriff, and he levieth the debt of the goods of the Defendant, and dieth not return his Writ; If the Plaintiff sueth another *Scire facias* against the Defendant upon the Judgment, he may plead this matter; for the sale of the Defendant's goods by the Sheriff, is good, and not to be defeated; and so it is a barr of the other Execution. Mich. 40 Eliz. C.B. *Fox* and *Bulin's* Case. *Goldesbr.* 171.

22. In *Audita Querela*, the Case was; A. brought debt against B, who found bail, the Plaintiff and another: A. was condemned and dyed, without paying the Condemnation, or rendring his body, a *Scire facias* was sued against his bail; and upon two *Nihils* returned, Execution was awarded against him: whereupon he brought *Audita Querela*. It was the Opinion of the Court, That it was but reasonable that Execution should not be sued forth against the Bail, untill a default were returned against the Principal: and the Regard of the Bail is to be intended and taken upon Proces awarded against him; and then when no Proces is awarded against the Principal in his life-time, therefore

therefore the bail is diſcharged: And ſo adjudged, the *Audita Querela* did well lye. Hill. 43 Eliz. C. B. *Hobbs* and *Ted-Caſtle's* Caſe. *Goldeſbr.* 175.

23. Judgment was had againſt a man in Debt; and the Plaintiff thereupon took out a *Fieri facias* to the Sheriff, who levied the money, and dyed, the Writ not being returned: Whereupon Debt was brought againſt his Executors. It was the Opinion of all the Juſtices, 1. That Debt will lye againſt a Sheriff, where he ſells goods upon a *Fieri facias*, for that now he is debtor in Law, and the Defendant is diſcharged thereby, as againſt the Plaintiff. 2. It will lye againſt his Executors, in caſe he dyeth, and it is not like the Caſes which are perſonal, where *actio moritur cum perſona*, becauſe in the principal Caſe it appeareth, That the goods came to the Executors hands. And the Executors may not wage their Law in this Caſe, becauſe the debt is grounded upon matter of Record. Paſch. 15 Car. in B.R. *Parkinſon* and *Colliford's* Caſe. *Mayſo* 13.

24. Debt upon a Recovery in a *Scire facias* in *London*, upon a Recognizance taken in the Chamber of *London*; and it was not ſhewed, that it is a Court of Record, and that they have uſed to take Recognizances: and Exception was taken to the Declaration, and upon that, a Demurrer; and divers Caſes were put, That though the Judgment were void, yet Execution ſhould be awarded by *Fieri facias*, and the party ſhall not plead that in a Writ of Errour. But *Periam*, Juſtice, took a difference, Where Execution is ſued upon ſuch a Judgment, and where Debt is brought upon it: For in Debt, it behoves the party that he have good ground for his Action; otherwiſe he ſhall not recover: but upon a voidable Judgment a man ſhall recover, and may take forth Execution; and the ſame ſhall ſtand good untill the Judgment be reverſed. Mich. 24 Eliz. in C. B. *Hollenſhead* and *King's* Caſe. *Leon.* 82. See *Godbolt* 96.

25. Judgment was given upon an Obligation of 4000 l. And a *Scire facias* was ſued upon the Judgment for 3000 l, and the party did not acknowledg that he had received the other 1000 l; It was the Opinion of the Court, That the *Scire facias* ſhould not abate, and that he ſhould have Execution; notwithſtanding he doth not acknowledg ſatisfaction of the other money upon Record. Mich. 29 Eliz. in C.B. adjudged accordingly. See *Godbolt* 79.

26. Note; If the King releaſeth all Suits, the ſame is no Bar of his Execution; becauſe in the Caſe of the King, the Judges *Ex Officio* ought to award Execution without Suit, but contrary in the caſe of a common perſon; but in the Caſe of the King, a Releaſe of all Executions ſhall barr the King of his duty. See *Cook* 8. Part, 153.

27. If the body of a man be in Execution, a Releaſe of all Actions will not diſcharge him: But a Releaſe of the Judgment, and of all debts and duties will diſcharge the body out of Execution. *Cook* 7. Part, *Inſtitutes*, 291.

28. Note: In the Caſe of Homage Auncеſtrel, which is a ſpecial Warranty in Law, all the Land which the Lord had at the time of the voucher, ſhall be lyable to an Execution in value, if he hath it by diſcent or purchaſe, becauſe the voucher is in lieu of an Action. But in the caſe of an Expreſſe Warranty, there the heir ſhall be charged only with that which he had by diſcent from the Auncеſter who created the Warranty: And ſee, that in a *Warrantia Charta*, the Land which the Lord had at the time of the bringing of the Writ, ſhall be charged to the Execution in value. See 28 E. 1. Voucher 291. 9 E. 2. *Warrantia Charta.* 20 *Fitz. Na. Br.* 134. *Cook* 1 Part, *Inſtitutes* 102. See *Hob.* Trin. 9 Jac. Sir *Henry Rolls* and *Oſborn's* Caſe, 22, 23, 24. acc.

29. A Counteſs by marriage or by diſcent, is not to be arreſted upon a *Capias* in Debt or Treſpaſſe: for although ſhe cannot ſit in Parliament; yet ſhe is a Peer of the Realm, and the Law preſumes ſhe hath ſufficient Lands or goods by which ſhe may be diſtrained. But if a *Capias ad ſatisfaciendum* be awarded againſt a Counteſſe out of any of the Kings Courts, the Sheriff, or his Officer by his Warrant, may without offence execute it: for they ought not to diſpute the Authority of the the Court, but they ought to execute the Writs directed to them at their perill; and although it appeareth by the Writ, that the party who is to be arreſted, is a Counteſſe, &c. againſt whom a *Capias* doth not lye in ſuch caſe; yet becauſe that in ſome Caſes (as in caſes of Contempt) a *Capias* lyeth againſt a Peer, the Sheriff, or his Officers ought not to examine the Judicial Act of the Court, but he ought to execute his Writ. *Cook* 6. Part, 52, 53. The Counteſſe of *Rutland's* Caſe.

Extent, Re-extent, & Extendors.

What things are Extendable; What not: And where an Extent ſhall be good; Where not: And other matters concerning Extents.

1. A Man ſhall never have a thing Extended upon an Execution, unleſſe he may grant and aſſign over the ſame thing: and therefore the Office of Fillizer, which is an Office of Truſt, cannot be extended, becauſe not granted over. Paſch. 28 H. 8. *Dyer.* 7.

2. The Lands and goods of a Subject are extendable upon an *Elegit*; and therefore the Lands of the Heir which come to him by diſcent: and it is not needfull, that a *Scire facias* be brought againſt the Executors, no more then upon a Recognizance by the Statute of Weſt. 2. Cap. 18. Mich. 4 Eliz. *Dyer.* 208.

3. The Conuſor of a Statute had a Rent-Charge; and before Extent, he purchaſed parcell of the Land. It was the Opinion of the Court, That the Rent was gone, and ſhall not be in Execution; but otherwiſe if he had purchaſed after Extent of the Rent. Mich. 4 Eliz. *Dyer.* 206.

4. Debt againſt a Woman, as Cozen and Heir, upon an Obligation: She ſaid, That onely a Reverſion diſcended. Judgment was given, That he ſhould recover the Reverſion when it fell, and ſhall have a Special Writ to extend the whole Land. 23 Eliz. *Dyer* 373.

5. The Executors of a Conuſee of a Statute ſued Execution; upon which Writ, the death of the Conuſor is returned, and alſo an Extent of the Manor of B, of which he was ſeiſed the day of the the Recognizance. It was holden, That the Executors, or the Executor of the Executors, if he received no profit of B, he may have a Re-Extent, although a *Liberate* was executed: for it behoves, that the Eſtate be found: for he not being dead, as is retorned; No eſtate is lyable to the Execution, but Fee, and not eſtate tail, nor for life. Paſc. 12 Eliz. *Dyer* 299.

6. Every Extent ought to be found by Inquiſition and Verdict: For the Statute of Weſt. 2. which giveth the *Elegit*, provideth *Quod Vicecomes Liberet ei omnia Catalla, &c. et medietatem terræ ſuæ Quouſq, debitum fuerit Liberatum per rationabile precium.* And ſee 2 Ma. *Dyer* 100. the Extent and appriſement ought to be *per Sacramentum duodecim*; and not by the Sheriff: But Execution may be by *Fieri facias* by the Sheriff, without Inquiſition. See *Co.* 4. Part, 74. And ſee *Co.* 4. Part, in *Fulwood's* Caſe, an Extent made by Inquiſition by *Elegit*, is not good, although the Writ of *Elegit* be not retorned: But in *Fieri facias* made by the Sheriff, the Execution muſt be retorned; becauſe the Writ is *Ita quod habeas denarios hic in Curia.* See *Cook.* 8. Part, 171. acc. And ſee before for this matter in Tit. *Execution.*

7. Upon a Recovery in Debt againſt the Lord *Stafford*, certain of his Lands were extended by *Elegit*. The Queen, becauſe the Lord *Stafford* was indebted to her, by Prerogative ouſted the Lord *Stafford*, by *Elegit*. It was moved to the Court in the behalf of him who recovered, That the Queen was ſatisfied, and therefore prayed a Re-extent: but the Court would not grant it, becauſe they were not certain of the matter; but adviſed the party to ſue his *Scire facias* againſt the Lord *Stafford*, to know and ſhew cauſe, why a Re-extent ſhould not iſſue forth, the Queen being ſatisfied. Mich. 26 Eliz. in C. B. The Lord *Stafford's* Caſe. *Leon.* 279.

8. In *Audita Querela*. An Extent being in time of the heir, upon a Statute made by his Father, ſuppoſing the Land to be intailed, and ſo the Land not Extendable. The Defendant in the *Audita Querela* takes Iſſue, That they diſcended to him in Fee, and traverſeth the Taile. It was found, That all was Fee-ſimple, beſides 500 Acres; and thereupon the Plaintiff in the *Audita Querela* prayed to be diſcharged for thoſe 500 Acres. The Court Reſolved, That the Iſſue ought to be found in every part as he hath pleaded; otherwiſe it is found againſt the Plaintiff in all. Wherefore it was adjudged, That he ſhould not be diſcharged for the 500 Acres, and he ſhould not be Relieved by his *Audita Querela*. Mich. 3 Jac. B.R. Sir *John Aſhburnham* & Lord *St. John's* Caſe. *Co.* 2. Part. 3.

9. The Caſe was; A. and B. became Bankrupts after an Extent: and before *Liberate*, a Sale was made by Commiſſioners of Bankrupts to Creditors, and whether the Sale was good, was the Queſtion. It was ſaid, That the ſale was good; For notwithſtanding the Extent, the property of the goods did remain on the Conuſors, and by the Extent are onely ſeiſed into the Kings hands; but that ſhall not deveſt the property from the Conuſors: and then when the Conuſors become Bankrupts before the *Liberate*, thoſe goods are in the power of the Commiſſioners to ſell and diſtribute

diſtribute amongſt the Creditors. But it was Reſolved, That the goods extended before they became Bankrupts, and delivered by the *Liberate* after they became Bankrupts, could not be ſold by the Commiſſioners, becauſe they being extended, were in *Cuſtodia Legis*: and although by the Extent the Conuſee hath not an abſolute property in them, untill by the *Liberate* they are delivered; and at the retorn of the Writ, he may refuſe them for being over-valued: yet that is but for the advantage of the Conuſee. For the Extent is *Capias in manus noſtras*; and then they be as goods gaged or diſtreined, which cannot be forfeited by Outlawry, or taken in Execution from the party who hath them in gage, or by way of diſtreſſe without payment of the money. Hill. 3 Car. in B. R. *Audley* and *Halſey*'s Caſe, *Cro.* 1. Part, 106.

10. A. recovered againſt B. 4000l. in an Action upon the Caſe. Afterwards A. was Outlawed in a perſonal Action, and dyed; the Queen reciting the Outlawry and death of A, granted all his goods to J. S. to the uſe of M; J. S. aſſigned that Debt and Judgment to J. D; notwithſtanding which, an Extent iſſued in the Kings name, to extend all the Lands which B. had at the time of the Judgment; and the Lands in the poſſeſſion of J. N, which he purchaſed after the Judgment were extended. The Queſtion in the Caſe was, Whether after this aſſignment of this debt by the Queen, the King may extend in his own name for the benefit of the Patentee; and the Patentee thereby might have Suit in the Kings name. It was Reſolved, That this Debt which was forfeited to the King by the Outlawry of A, was well granted, and the Patentee may levy this debt in the Kings name, or by Extent in the Kings name, although he hath not any words in his Grant, to ſue it in the name of the King. But it was Reſolved, That the aſſignment over of his debt by J. S. to I. D. was void: for there cannot by Law be any Aſſignment made by any perſon of this debt. Wherefore it was ſaid, That the Plea was ill, and that the Land ſhould remain in Extent for the King. Trin. 5 Jac. in *Scaccario*. The King and *Twyne*'s Caſe. *Cro.* 2. Part, 179.

11. If Lands be once Extended and delivered upon a *Liberate*; though the Lands be evicted, there can never be a Re-Extent: But if Lands be extended upon a Miſtake, Quære, if in that caſe there may not be a New Extent granted, for it was not Reſolved Mich. 22 Jac. in the Chancery, in the Caſe between *Clark* and *Andrews*. Which ſee, *Cro.* 2. Part, 693, 694.

Extinguiſhment.

Where, and by what, and whoſe Acts, Rents, Commons, Liberties, Seignories, or other the like things, may be extinguiſhed; and what not.

1. EXtinguiſhment is, where any Lord or other hath any Rent or Service going out of any Land, and he purchaſeth the ſame Land, ſo as he hath ſuch an Eſtate in the Land as he hath in the Rent, then the Rent is extinct; for that a man may not have a Rent going out of his own Land. And in caſe of Extinguiſhment, it behoveth that he have as good an Eſtate in the one, as in the other; for if he hath but an eſtate for term of years or life in the Land, and he hath a Fee-ſimple in the Rent, the Rent is not extinct, but is in ſuſpence for a time, and after the Term the Rent is revived. So if there be Lord, Meſne, and Tenant, and the Lord purchaſeth the Tenancy, then the Menalty is extinct; but the Meſne, if there be any Surpluſage of Rent, ſhall have it as a Rent-Seck.

2. Leſſee for years of Lands, the remainder in tail to the heirs of the Leſſee; Leſſee for years made a Feoffment of the Lands to J. S; with a Letter of Attorney, with a Commiſſion to enter into the Land, and to ſeal the Feoffment, and to deliver it in his name to the uſe of him in the Remainder; which was done accordingly. And another by the Commandment of him in the Remainder entred, & received it. It was holden in this Caſe, That notwithſtanding that both the Leſſee and Attorney were both diſſeiſors, yet it was a good Feoffment; for by the Feoffment to the uſe of him in the Remainder; if he in the Remainder enter, he is remitted, and the Eſtate for years is gone; for that in all caſes where the Freehold cometh to the Term, the Term is Extinguiſhed: and therefore if a man Mortgage his Reverſion to the Leſſee for years, and afterwards perform the Condition, the Leaſe for years is extinct. Trin. 30 Eliz. in C. B. *Mounſon* and *Weſt*'s Caſe. *Goldeſbr.* 92.

3. A. ſeiſed of Lands in Fee, deviſed the ſame to his Wife for life; and when J. his ſon ſhould come to the age of 25. years, that then he ſhould have thoſe Lands to him and the heirs of his body, and dyed: J. levied a Fine thereof in Fee, and after came to 25. years, and had iſſue a daughter,

ter, and dyed; the Wife dyed, the daughter entred, and made a Leaſe to the Plaintiff. It was the Opinion of the Court in this caſe, That although the Father had nothing in the Land at the time of the Fine levied; yet the Daughter ſhall not aver *partes finis nihil habuerunt*, for by the Fine, her right was extinct. Hill. 29 Eliz. in C.B. *Johnſon* and *Carliles* Caſe. *Goldesbr.* 107.

4. A man ſeiſed of 140 Acres of Lands, had Common appurtenant to 46. Acres of Land, and the 46. Acres were in the occupation of ſeverall men, viz. two in the Occupation of A, and the other in the Occupation of B; and he who had the Common, purchaſed the ſaid two Acres. It was the Queſtion, If the intire Common were extinct, or not, ſo as they which were Tenants of the reſidue of the 46 Acres, ſhould not take advantage thereof? It was the Opinion of all the Juſtices, That although the Acres be ſeverall, and in ſeveral mens Occupations; yet the Common concerning it is entire: and ſo by the purchaſe of parcel of the Land, the whole Common is extinct. Trin. 29 Eliz. in C. B. *Kimpton's* Caſe, *Goldesbr.* 53. See *Leon.* 44. the ſame Caſe.

5. Note; It was holden, That if the Grantee of a Rent, releaſeth parcel of the Rent to the Grantor or his heirs, the reſidue may be apportioned, and the Land ſhall remain chargeable ſtill; but if he releaſe in one Acre, parcel of the Land charged, the whole Rent is extinct. Mich. 40 Eliz. in C.B. *Goldesbr.* 116.

6. A man ſeiſed of a Yard-Land, to which he had Common of Paſture for all manner of Beaſts Levant and Couchant upon the ſame Land, made a Feoffment of the moyety of it: It was a Queſtion, Whether the Common ſhould be apporcioned, or whether it was extinct? It was the Opinion of the Court, That this was Common appendant; and Common appendant ſhall not be extinct by purchaſe of part of the Land. See Hill. 39 Eliz. in C.B. *Smith* and *Bonſal's* Caſe. *Goldesbr.* 117. And ſee 17 Eliz. *Dyer* 339; Where one had Common appendant in a great Waſte, and the Lord improved parcel of the Waſte, and then made a Feoffment in Fee of that he had ſo improved to the Commoners, that by ſuch Feoffment the Common was not extinct.

7. A Leaſe was made of a houſe with divers Implements rendring Rent; the Leſſor entred, and made a Feoffment: the Leſſee re-entred; and for Rent behind, the Feoffee brought an Action of Debt: And it was adjudged, That the Action was maintainable. And in that caſe it was holden, That the Rent was not extinct, but ſuſpended only, till the Termor by his egreſſe revived the Reverſion. Paſch. 4 Eliz. *Dyer* 212. And ſee, That in ſuch caſe, The Rent did iſſue altogether out of the Meſſuage, and not out of the Implements. 20 Eliz. *Dyer*, 361.

8. It was holden by the Juſtices, If Land be holden of a Subject, and the Tenant paſſes the Land by Fine and Proclamation to J. S. in tail, the remainder to the King in Fee; If the Tenant in tail dyes his Iſſue within age, That the Iſſue ſhall not be in Ward to the Subject, if the King do not aſſent to the Remainder, becauſe that the Tenure and Services are gone and extinct by the Fee-ſimple to the King, who may not hold of any, and ſo the Iſſue in tail ſhall be in Ward to none. Mich. 40 Eliz. in C.B. *Goldesbr.* 149.

9. Husband and Wife, the Wife being within age, levied a Fine of the Lands of the Wife; afterwards a *Precipe quod reddat* was brought againſt the Conuſee, who vouched the husband and wife; they appeared and vouched over the Common Vouchee, who appeared, and after made default, and ſo a Recovery was had: the Husband dying, the Wife took a ſecond husband, and ſhe and her ſecond husband brought one Writ of Errour to reverſe the Fine, and another to reverſe the Recovery, by reaſon of the Non-age of the Wife. The Court was of Opinion to reverſe the Fine; But would adviſe upon the Recovery, becauſe the Husband and Wife both appeared in perſon, and vouched over. And they ſeemed to be of Opinion, That by the general entry into the Warranty, the Errour upon the Fine was gone: As where a man hath cauſe to have a Writ of Right, or to enter for a Condition broken, and he is vouched in a *Precipe quod reddat* of the ſame Land, and enters generally into Warranty, the Condition, or other title is gone. But becauſe afterwards upon Examination it appeared, that the Recovery was before the Fine, It was adjudged, That the Recovery did not give away the Errour in the Fine. Mich. 40 Eliz. in C. B. Sir *Henry Jones* Caſe. *Goldesb.* 181.

10. Leſſee for years granted his Term to J.S. upon Condition, That if the Grantee did not pay yearly 10 l. to J.D, that the Grant ſhould be void: Afterwards the Grantor dyed, and made the Grantee his Executor. It was holden by *Popham* and *Gawdy*, That the Condition was extinguiſhed, becauſe it was impoſſible for the Executor to enter upon himſelf: But ſome other of the Juſtices held the contrary, Becauſe he hath the Term *jure proprio*; and the Condition as Executor, and ſo he hath them as in ſeveral Capacities. Quære, The Caſe was not Reſolved. Paſch. 36 Eliz. in C. B. *Tuthall* and *Smotes* Caſe. *Goldesbr.* 181.

11. A. by Indenture did enfeoffe B. of the Manor of D, rendring to A. and his heirs a Rent, with clauſe of Diſtreſſe; and for not payment, re-entry: and by another Indenture of the ſame day,

A.

A. Covenanted with B. to levy a Fine of the ſaid Manor; which Fine ſhould be to ſuch Uſes, Purpoſes, and Conditions expreſſed in the former Indenture: Afterwards, the Fine was levied accordingly, with uſual words of Releaſe of all his Right. It was Reſolved in this Caſe, That neither the Condition nor the Rent were touched by the Fine levied of the Land, by reaſon of the former Indenture which ruled the Fine; for the ſame rules the Fine, as if there had been an Expreſſe Proviſo, to ſave the Rent. Hill. 5 Ma. *Dyer* 157. *Pattenham's* Caſe. See Trin. 23 Eliz. C.B. *Taſter* and *Bradborn's* Caſe vouch. *Cook* 2. Part, 73. acc.

12. A. ſeiſed of a Manor to which an Advowſon was appendant, by Deed bargained and ſold the Manor, with the appurtenances, to B. and his heirs: in which Deed, there were divers Covenants to ſuffer a Recovery, and to levy a Fine to the uſes in the Indenture. Provided, That B. ſhould give the Advowſon to A. for his life; and if it happen not void, then one time to his Executors: A. ſuffered a Common Recovery according to the Indenture. Afterwards A. and B. levied a Fine, with a Render of a Rent of 42 l. to A. in tail, the remainder to D. in Fee: B. in his life-time granted the Advowſon to A. and dyed, the Church became void: E. the ſon of B. entred into the Manor; A. entred for the Condition broken; and bargained and ſold to the Lord *Cromwell*: It was Reſolved in this Caſe, amongſt many other Points, That the Fine levied by A. and B. had not extinguiſhed the Condition, for the Fine by the Common Law was directed to have a ſpecial operation according to the intent of the parties by the general Covenant; which was, that the Eſtate ſhould be Conditional, and that the Condition ſhould not be touched by the Fine, but the ſame ſhould extinguiſh all other rights and titles, ſaving only the Condition. *Cook* 2. Part, 73. The Lord *Cromwell's* Caſe. See 14 Eliz. *Dyer* 311. acc.

13. The Archbiſhop of *Canterbury* made a Leaſe for years of parcell of the Manor of D. to P; after which, he granted a Rent-Charge to Dr. *Butts*, who after deviſed the ſaid Rent to the Archbiſhop, till 100 l. be levied, the remainder to D, and dyed: the 100 l. is levied, the Rent is behind: D. diſtrained; and if the Rent was extinguiſhed, or ſuſpended only, was the Queſtion? Amongſt other Points, It was ſaid, That by the Re-grant to the Biſhop, it was ſuſpended only: and a perſonal thing or action once ſuſpended by the act of the party, is gone for ever; but otherwiſe it is, if it be by the Act of Law. Hill. 4 Ma. *Dyer*, 140. *Cranmer's* Caſe.

14. If a man holds a Meſſuage, a Yard-Land by Fealty, Suit of Court and Herriot, to be paid after the death of every Tenant dying thereof ſeiſed: and the Lord purchaſeth parcel of the Land, and afterwards, the Tenant enfeoffeth J. S. of other parcel of the Land. It was adjudged in that Caſe, That by the purchaſe of parcel of the Land by the Lord, the Heriot-Service was extinct: But if the Cuſtome of a Manor be, That upon the death of every Tenant of the Manor who dyeth ſeiſed of Lands holden of the Manor, that the Lord ſhall have a Heriot; if the Lord purchaſes parcel of the Term, yet the Lord ſhall have a Heriot by the Cuſtome. *Cook* 8. Part, 134. in *Talbot's* Caſe.

15. Note. It was agreed, That if there be Lord and Tenant by Homage, Fealty, and Suit of Court, which are entire Services, If any parcel of the Land cometh to the Lord, although it be by diſcent, which is the act of the Law, yet the Suit which is an entire Service, is extinct. *Cook* 6. Part, 1. & 2. in *Bracton's* Caſe.

16. Lord Meſne and Tenant, the Meſne holdeth *in Capite*, and the Tenant in Socage, The Meſne grants the Menaltie to the uſe of himſelf for life: the remainder to the Tenant peravail in tail: It was Reſolved, That in this Caſe, that the Menalty was not ſuſpended: For although the Remainder veſts preſently, yet it cannot ſuſpend the Freehold of the Rent, during the life of the Tenant for life, becauſe the Tenant for life, is Tenant to the Lord, and the Lord ſhall avow upon him; and during his life, the heir of him in the remainder ſhall not be in Ward: But if the Meſne grant the Menalty for life, or in tail, the remainder to the Tenant peravaile in Fee, there the Menalty is extinct, becauſe he hath as high an Eſtate in the Menaltie, as he hath in the Tenancy, and there is no poſſibility of reviving the Menalty. *Cook* 9. Part, 134. *Aſcough's* Caſe.

17. The Queen was ſeiſed of *Whaddon* Chaſe; and the Lord *Grey* was Lievtenant there, and he and his Auncеſtors, and their Keepers, had by Preſcription, uſed to hunt vagrant Deer in the Demeans of the Mannor of S. adjoyning as in purlieus: The Mannor of S. came into the hands of the Queen, who granted the ſame to J. S. in Fee with a Free-Warren, within his Demeſnes *Ita quod nullus intret in Warrannum ſuam ad fugand. ſine Licentia.* It was Reſolved by the Juſtices, That the unity in this Caſe, did not extinguiſh the purlieu, and that the Clauſe *Ita quod*, was not to be extended againſt the Keeper of the Queen, but only againſt other ſubjects. Trin. 16 Eliz. *Dyer* 326.

18. In a Replevin, the Caſe was; a Copyholder preſcribed to have Common of Paſture appurtenant to the Copyhold: The other party pleaded an Extinguiſhment of the Common, becauſe the Lord had incloſed Land lying in another Field; to which Field, and in the other Field, the Lord had Common by cauſe of Vicinage. In that Caſe, It

was

was Reſolved, That if a man have Common for cauſe of Vicinage, That if one incloſe part, it is an Extinguiſhment of all the Common. Trin. 12 Jac. in C. B. *Brownlow* 1. Part, *Bacon* and *Palmer's* Caſe. 174.

19. A man made a Leaſe for life, and afterwards made a Leaſe to another for years, to begin after the death of Tenant for life; the Leſſee for years dyed inteſtate, the Ordinary committed Adminiſtration. The Adminiſtrator and the Tenant for life joyned in the purchaſe of the Fee-ſimple; the Queſtions were. 1. If there were a Fee executed in the Tenant for life for any part. It was the Opinion of all the Juſtices, That the Fee was Executed for a moyety. 2. If the Term was extinct. It was the better Opinion, That the Term was not extinct, for that it is not a Term, but *Intereſſe Termini*, which cannot be granted, or ſurrendred: But it was ſaid, That if he had had the Term in his own right, by the purchaſe of the Fee, the Term had bin extinct; but otherwiſe here, becauſe he had it as Adminiſtrator. Paſc. 17 Eliz. in C. B. *Godbolt*. 2. acc.

20. The Caſe was, A Parſon had Common appendant to his Parſonage out of the Lands of an Abby; and afterwards the Abbot had the Parſonage appropriated to him and his Succeſſors: It was a Queſtion, if the Common was extinct: the Lord *Dyer* held that it was, becauſe he had as high an Eſtate in the Common as he had in the Land, like 2 H. 4. 19. Where if a Prior hath an Annuity out of a Parſonage, and afterwards purchaſeth the Advowſon, and then obtains an appropriation thereof, the Annuity is extinct: But it was holden by *Windham* and *Meade* Juſtices, That the Abbot hath not as par-durable eſtate in the one as in the other; For the Parſonage may be diſappropriated, and then the Parſon ſhall have his Common again: as in Caſe, If a man hath a Seignory in Fee, and afterwards Lands diſcend to him on the part of the Mother, in that Caſe the Seignory is not extinguiſhed, but ſuſpended: for if the Lord to whom the Lands diſcend, dyes without Iſſue, the Seignory ſhall go to the Heir on the part of the Father, and not to the Heir on the part of the Mother, and yet the Father had as high an Eſtate in the Tenancy as in the Seignory. Hill. 23 Eliz. in C. B. *Godbolt*. 4. acc.

21. A Feme-ſole was ſeiſed of a Mannor, to which were three Copyholds, one of the Copyholders did entermarry with the Woman; and afterwards he and his Wife ſuffered a common recovery of the Mannor, to the uſe of themſelves for their lives, and afterwards to the uſe of the Heirs of the Wife: It was agreed by the whole Court, That the Copyhold was extinct: And it was ſaid by the Court, That if, a Copyholder will joyn with the Lord in a Feoffment of the Mannor, thereby his Copyhold is extinct; and ſo if he accept of a Leaſe of his Copyhold. Paſc. 24 Eliz. in C. B. *Gaſtin*. 11. Mich. 29 Eliz. in C. B. *ibid*. 101. acc.

22. A Preſcription was alledged for a diſcharge of Tythes in an Abbot, Prior, and Covent, and it was ſhewed, that the Corporation was afterwards diſſolved, becauſe the Abbot and all the Monks dyed: It was in that Caſe holden, that the owner ſhould now pay Tythes, for that the Preſcription continues no longer then the Lands continued in the Abbots and Priors hands. And in that Caſe, It was ſaid by *Cook* and *Warburton* Juſtices, That if a Rent be granted to one and his Succeſſors, and afterwards the Corporation is diſſolved, that the Rent ſhall revert to the Donor. But *Nicholls* Juſtice held, That the Rent extinguiſhes in the Land it ſelf. Mich. 11 Jac. in C. B. The Dean and Canons of *Windſor* and *Webs* Caſe.

23. Leſſee for ten years granted a Rent-charge to his Leſſor for the years; Afterwards the Leſſee granted the Remainder of the Land to the Leſſee for years: It was the Opinion of the whole Court, That the Rent-charge was gone and extinct, becauſe the Leſſor who had the Rent, is a party to the deſtruction of the Leaſe, which is the ground of the Rent. Mich. 31 Eliz. in the Common Plea. *Buckhurſts* Caſe. *Godbolt*. 137.

24. The Earl of *Bedford*, Lord of the Mannor of B. ſold the Freehold of a Copyholder of Inheritance to another, ſo as it was now divided from the Mannor, and afterwards the Copyholder did releaſe to the Purchaſor. It was holden by the whole Court, That by this Releaſe, the Copyhold-Intereſt was extinct and gone; but it was holden, that if a Copyholder be ouſted, ſo as the Lord of the Mannor is diſſeiſed, and the Copyholder releaſeth to the Diſſeiſor *nihil Operatur* by it. Paſc. 30 Eliz. in B. R. *Wakefords* Caſe. *Leon*. 102.

25. Parſon, Patron, and Ordinary; before 13 Eliz. made a Leaſe for 99 years, there being a grant of the next avoydance before this Leaſe. The Parſon who made the Leaſe, dyed, the Grantee of the next avoidance, preſented another, who being inducted, entred, and avoided this Leaſe for his time and dyed; The Patron who joyned in the Leaſe for years, preſented a new Incumbent, who was Inducted; And if he ſhould hold it diſcharged of the Leaſe as his Predeceſſors did, was the Queſtion. It was Reſolved, That the Leaſe was totally avoided by the entrance of the ſecond Incumbent, becauſe the Parſon hath the entire Fee as a Parſon may have of a Rectory preſently, and when he is in, and hath evicted the Leſſee, it is an abſolute eviction of the whole Term, without expectation of reviver; and it is not an eviction for himſelf only, but for all his Succeſſors. Mich. 11

Ca.

Car. in B. R. *Plowden* and *Oldfords* Caſe. *Cro.* 1. Part, 420.

26. A Leaſe for years was made upon Condition, to be void upon payment of 6 d. The Leſſee entred, and aſſigned his Intereſt to a ſtranger, who is diſſeiſed: afterwards the Leſſor paid the 6 d. according to the Proviſo. It was holden in this Caſe, That although the Leſſee was ouſted by a ſtranger, ſo as the Leſſor had but a Right at the time of the payment, yet the payment was good enough to determine the Leaſe. And 2. In this Caſe, it was Reſolved, That where the Husband had a Term for years in his own right, and the Inheritance afterwards Diſcended to the Wife, that that coming to him in *auter droit*, ſhould not drown and extinguiſh the Term for years which he was poſſeſſed of in his own right. Paſc. 9 Jac. in B. R. The Lady *Plat* and *Sleaps* Caſe. *Cro.* 2. Part, 275.

27. In Debt for a Rent reſerved upon a Leaſe for years, the Caſe was; A. let the Lands for years, rendring 200 l. rent: It was afterwards Covenanted betwixt the Leſſor and Leſſee, that a Bargain and Sale ſhould be made, and a Fine levyed to the Leſſee and others, and their Heirs, to the uſe of them and their Heirs, to the intent a common Recovery ſhould be had againſt the Conuſees with vouchers: The Bargain and Sale was made, and the Recovery ſuffered accordingly: whether upon all this matter, the Leaſe for years was extinguiſhed, or not, was the Queſtion; becauſe in this Caſe, the Bargain and Sale was made, and the Fine levyed to the uſe of the Leſſee himſelf; and therefore the Term being extinct for a time, if it ſhould be after revived, was the doubt. It was Reſolved by the whole Court, that it ſhould; For the Bargain and Sale, Fine and Recovery, are all but one aſſurance, and the Recovery being executed, is *quaſi* a Conveyance to the uſe *ab initio*; Wherefore within the Equity and ſaving of the Statute of 27 H. 8. and was all one as a Feoffment to an uſe. Wherefore they Reſolved, That the Term was not extinct, but both rent and Term more revived. Trin. 17 Jac. in B. R. Sir *John Ferrers* and Sir *Richard Fermers* Caſe. *Cro.* 2. Part, 543.

28. In Debt for Rent upon a Leaſe for years rendring rent: The Defendant pleaded, That the Leſſor, and all thoſe whoſe Eſtate, &c. had Common in 10 Acres in E. for all Beaſts, Levant, and Couchant upon the ſaid Lands every year after the Corn ſowen, till the Corn was reaped and carried away; and that before the Rent was due, the Leſſor incloſed 10 Acres, wherein he ought to have had his Common, and thereby the Rent was extinct. It was adjudged, That it was a vain allegation, that by incloſing, the Rent was extinct, for that the Rent is not iſſuing out of the Common, and ſo there cannot be a ſuſpenſion by incloſing of the Land; wherefore it was adjudged for the Plaintiff. Mich. 21 Jac. in B. R. Sir *Nicholas Sanderſon* and *Harriſon's* Caſe. *Cro.* 2. Part, 679.

29. A. poſſeſſed of a Leaſe for 31 years, took Husband J. S. the Husband and Wife Mortgaged their Term to J. D. for 200 l. before the day of payment the Wife dyed, the Husband paid the money; and entred, and made his Wife his Executrix, and dyed, who entred; the Adminiſtratrix of the Wife of J. S. entred upon the Leſſee. It was Reſolved in this Caſe, That though the Leaſe was at firſt the Wives, and the Husband poſſeſſed of it in her right, ſo as though he had purchaſed the Feeſimple, the Leaſe had not bin extinct; Yet by the entermarriage, he hath full power to alien it, and if he ſurvive his Wife, he is to enjoy it againſt her Executors, ſo when he ſurvives, the Condition ſurvives with him, and reſtores him to the Leaſe in ſtate as he ſhould have bin, if it had not bin alliened. Paſc. 11 Jac. in C. B. *Young* and *Radford* Caſe. *Hob.* 3.

30. Sir *Tho. Wyat*, Tenant in Tail, the Reverſion in the Crown, made a Leaſe to *Auſten*, rendring rent, and dyed: Sir *Thomas Wyat* the Son accepted the Rent, and was Attainted of Treaſon, and put to death, leaving *Arthur Wyat* his Son: It was adjudged in that Caſe, That *Auſtens* Leaſe was void; For although it was made good by the acceptance of the Rent, yet by the Attainder, the eſtate tail was barred and extinct, as if *Wyat* the perſon attainted had dyed without Iſſue. See *Plow. Com.* 560. cited in *Walſingham's* Caſe.

31. In an Action upon the Caſe, for ſtopping a Water-courſe, the Plaintiff declared, That he was poſſeſſed of the Rectory of M. of which a Curtilage was parcel: And ſhewed, that in this Curtilage there had bin, time out of mind, a Water-courſe for the watering of the Cattel of the Plaintiff, and others for their neceſſary uſes. And that a Water-courſe time out of mind, had flowed from *Medford* Stream, to the Curtilage, and filled the Pond there, and that the Defendant intending to dim up the ſaid Water-courſe, had built a ſtone Wall thereupon, whereby the Water-courſe was ſtopped to his damage, &c. The Defendant pleaded, that King *Henry* the 8th was ſeiſed of the ſaid Manor and Rectory in Fee, and of a piece of ground lying between the Water-courſe, and the ſaid ſtream, and by Letters Patents granted the ſame to one *Box*, which by mean Conveyances, came to the Defendant, who was ſeiſed, and ſo juſtified the filling up of the Water-courſe. The Queſtion was, Whether the unity of poſſeſſion had extinguiſhed the Water-courſe, or not. And after many Argu-

ments. It was Reſolved, That the Action did lye; and that the Water-courſe was not extinguiſhed by the unity of Poſſeſſion, and that the Preſcription was not gone. Hill. 1 Car. in B. R. *Sury* and *Pigots* Caſe. *Poph.* 166.

32. Note, It was Reſolved, That when a Rent-charge is extinguiſhed by the Grantees purchaſe of parcel of the Land; that in ſuch Caſe, the Grantee ſhall never have a Writ of Annuity, becauſe it was by the grant a Rent-charge, and he hath diſcharged the Land of it by his own Act, *viz.* by purchaſe of part. But if the Rent-charge be determined by the Act of God, or of the Law; yet the Grantee may have a Writ of Annuity: As if Tenant for the life of another man, grants a Rent-charge by Deed to one for 21 years, *Ceſtuy que vie* dyeth, the Rent is determined, yet the Grantee may have, during the years, a Writ of Annuity for the Arrerages incurred after the death of the *Ceſtuy que vie*, becauſe the Rent-charge did determine by the Act of God, and by courſe of Law. See *Cook* 2. Part, *Wards* Caſe vouch. in Sir *Rowland Heywards* Caſe. 32. See *Cook* 1. Part, *Inſtitutes*, 148. acc.

33. A man ſeiſed of Lands in Fee, takes a Wife, and makes a Feoffment in Fee, the Feoffee grants a Rent-charge of 10 l. out of the Land to the Feoffer and his Wife, and to the Heirs of the Husband, the Husband dyeth, the Wife recovers the moyety of the Land in a Writ of Dower by the Cuſtome: In this Caſe, the Rent ſhall not be extinct, albeit by her own act ſhe doth concur with the Act of the Law, but ſhe ſhall diſtreyn for 5 l. which is the moyety of the Rent; and in ſuch Caſe the Rent ſhall be apportioned. *Cook* 1. Part, *Inſtitutes*, 150. acc.

34. An Aſſiſe of *Nuſans* was brought for ſtopping of a way which the Plaintiff had to his Mill; The Defendant alledged unity of Poſſeſſion of the Land and the Mill in W. time out of mind: The Plaintiff ſaid, That after that the ſaid W. had two Daughters, and dyed ſeiſed; and the Mill was allotted unto one in Partition, and the Land to the other, and that the way was reſerved to her who had the Mill, and the Aſſiſe was awarded: And ſo ſee, that by the Partition, the way was revived, and appendant, as it was before, and yet W. the Father had as high an Eſtate in the Land as he had in the way. See 21 E. 3. 2.

35. If an Abbot hath a Parſonage appropriate in D. which is diſcharged of Tythes; and afterwards the Abbot purchaſeth parcel of the Land in the ſame Town where the Parſonage is, now this Land ſo purchaſed, is diſcharged of Tythes in the hands of the Abbot, for the Tythes were ſuſpended during the poſſeſſion of the Abbot in his hands: But after the Abby was ſurrendred into the hands of H. 8. *Anno* 30. of his Reign; and afterwards the ſame poſſeſſions were given to the King by the Statute of 31 H. 8. as they were in the Abbot hands. It was a Queſtion, If the Lands ſo purchaſed by the Abbot before the ſurrender, were diſcharged of Tythes by the Statute or not. It was the Opinion of *Mr. Plowden*, That they were not diſcharged of Tythes by the Statute, for no Land is diſcharged of Tythes by the Statute, but thoſe which were lawfully diſcharged in right by compoſition or other lawful thing, but the Tythes were ſuſpended during the poſſeſſion of the Abbot in his own hands: And ſo he was of Opinion when the Land is purchaſed by one, and the Parſonage by another, the right of Tythes is revived, and the Land charged as before the purchaſe by the Abbot. See Mich. 17 Eliz. *Godbolt.* 2. acc. See *Cook* 11. Part, *Pridle* and *Nappers* Caſe. acc.

36. A man made a Leaſe of a houſe, reſerving Rent: Afterwards he commanded the breaking down of a partition Wall: It was adjudged in the Caſe, That the ſame was not ſuch a Re-entry into the houſe as ſhould amount to an extinguiſhment of the Rent. Mich. 10 Car. in B. R. *Harriſon* Caſe.

37. Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years, who was Diſſeiſed, the Diſſeiſor made a Leaſe for years, his Leſſee ſowed the Land; Tenant for life dyed. It was adjudged in that Caſe, That the meer right of the Corn was in the Leſſee for years of the Tenant for life, and he might have Treſpaſs, and recover the mean profits againſt the Leſſee of the Diſſeiſor: And he had the meer right to the Corn, as thing annexed to the Land, although that his Intereſt in the Land was determined by the death of the Tenant for life. *Cook* 5. Part, 85. Sir *Henry Kelwa* Caſe.

38. If a Corporation hath Franchiſes by Grant or Preſcription, and afterwards they are incorporated by another name, as where they were Bayliffs and Burgeſſes before, they are made Mayor and Comminalty, or Prior and Covent before, and they be tranſlated into a Dean and Chapter, although in theſe Caſes, the name and quality of their Corporations be altered and changed; yet the Franchiſes and Liberties are not extinct, but the new body ſhall have all the Franchiſes, Priviledges, and Inheritances which the old Corporation or body Politick, had either by Grant, or by Preſcription. *Cook* 4. Part, 87. in *Lattrell's* Caſe.

39. When the King grants any Priviledges, Liberties, or Franchiſes, which were Priviledges, Liberties, or Franchiſes in his own hands, as parcel of the Flowers of his Crown, as *bona felonum ſuicidorum, utlegatorum*, Waife, Stray, Deodand, Wreck of the Sea, if they come again to the Crown, they

e drowned and extinct in the Crown: And if reck Goods waived, eſtrayed were before appendant to poſſeſſions, now the appendency is extinguiſhed, and the King is ſeiſed of them in the right of his Crown. But when Liberties, Franchiſes, Priviledges or Juriſdictions, are erected and created by the King, they are not extinct, nor the appendances ſevered from the poſſeſſions; as Mart, Park, Toll, Warren, &c. *Cook* 9. Part, The Abbot of *Strata Mercella*'s Caſe. 25, 26.

42. If a man levyeth a Fine of Lands in Auncient Demeſne at the Common Law to another, the Lord ſhall have a Writ of Diſceit againſt him who levyeth the Fine; and the Conuſor ſhall be reſtored to his poſſeſſion which he had before the Fine: But if the Conuſor after the Fine, releaſe to the Conuſee by his Deed being in poſſeſſion, or by his Deed confirm his Eſtate in the Land, the Conuſee ſhall have and retain the Land, notwithſtanding the Fine be avoided, becauſe that this Releaſe or Confirmation made to him in poſſeſſion, maketh his Eſtate firm and rightfull againſt him and his heirs who releaſeth; and yet after the Fine levied, the Conuſee had not any right in the Land, but a poſſibility to have the Land again after the Fine made void by the Writ of Diſceit brought by the Lord of whom the Land was holden. See *Cook* 10. Part, 50. in *Lampits* Caſe, acc.

Failer of Record.

1. IN a *Formedon* in the Diſcender, a Fine with Proclamations levied in 30 H. 8. was pleaded in barr, and the Iſſue being *Nul tiel Record*, at the day the Tenant had the Record, but in the Proclamations, *viz.* 31. 6. 7. 8. made in Trinity Term, the year of the King was left out. Notwithſtanding, becauſe that in Eaſter Term before, and in Mich. Term after, 30 H. 8. was expreſſed, It was ſaid, It did of neceſſity follow, that the ſaid 4. Proclamations were made in the ſame year; for they being right, by conſequence the other were right alſo. Mich. 7 Eliz. *Dyer* 234.

2. In an Action upon the Caſe brought in J; where according to the Cuſtome, the Defendant was committed for default of Maynpernors, and after upon Verdict was condemned; he was afterwards upon the requeſt of the Plaintiff, committed in Execution: but that was not entred of Record, and then he eſcaped. In Debt brought by the Plaintiff in the Common-Pleas upon the Record, the Defendant confeſſed the Judgment *ut ſupra*, and averred the committing of Execution at the requeſt of the Plaintiff: The Plaintiff ſaid, *Quod non habetur tale Recordum*, of his requeſt; upon which the Defendant did Demur; and the Demurrer was holden good by the Court: for he had not alledged, that it was of Record; and the Plaintiff had good cauſe to demur if the committing in Execution by the Bayliffs out of the Court had been inſufficient. Hill. 22 Eliz. *Dyer* 368.

3. In an Aſſiſe; the Defendant pleaded Outlawry of the Plaintiff: Iſſue was joyned upon *Nul tiel Record*. At the day to have the Record, the Tenour was brought in, which appeared Variance in the day of the Return of the *Exigent*, and in the place where the Outlawry was pronounced. The Plaintiff alſo brought the Tenour by a *Mittimus*; and for both theſe cauſes, it was adjudged a failer. *Dyer* 187.

4. In Debt brought upon the Statute of 24 H. 8. of Apparel, the Defendant pleaded Outlawry on the Plaintiff, Who replyed *Nul tiel Record*, and had day to bring in the Record: Before the day, the Record was removed by a Writ of Errour; and at the day, he brought an Exemplification, without Writ, or without other Seal then that of the Kings-Bench. It was conceived by ſome, That this was a failer of the Record; and ſo it ſhould have been by relation, if the Record had been reverſed, although there was ſuch Record at the time of the Plea. Hill. 6 Eliz. *Dyer*. 227.

5. Debt was brought upon an Obligation; the Condition of which, was, to ſave the Plaintiff harmleſſe of an Obligation, againſt A: The Defendant pleaded, *Non damnificatus*: The Plaintiff ſhewed, That A. recovered upon a Plaint in *London*: Iſſue was joyned upon *Nul tiel Record*, and day was given the Plaintiff to have the Record at his perill; And at the day, by *Mittimus* out of the Chancery, he brought the Tenor of the Record: And it was holden to be ſufficient. Mich. 3 Eliz. *Dyer* 187.

6. Debt was brought againſt two by ſeverall *Precipes*, and ſeveral Iſſues were joyned upon *Nul tiel Record*, and ſeveral Judgments was given for not bringing in the Record at the day: Afterwards a Joynt Writ of Errour was brought; and thereupon the Certificate was refuſed. Paſch. 2 Eliz. *Dyer* 180.

7. In *Audita Querela*, the Plaintiff ſhewed, That a Debt of 200 l. was recovered againſt him, upon which he was Outlawed; and afterwards by force of a *Capias utlagatum*, he was taken in Execution; and ſo being in Execution, the Sheriff ſuffered him to eſcape. The Defendant pleaded, That after the ſaid Eſcape, and before the *Audita Querela* brought, the ſaid Outlawry was declared to be erronious, and ſo *Nul tiel Record* of the Outlawry. In that Caſe, It was Reſolved, That when Erroneous Judgment is given, and afterwards the Judgment is reverſed by Errour, that collaterall acts executory are thereby barred: As if A. be in Execution at the Suit of B, upon an Erroneous Judgment, and after the Judgment is reverſed by Errour, he may plead *Nul tiel Record*; but till the Erroneous Judgment be reverſed, the Sheriff ſhall not take benefit of it; for there he cannot plead *Nul tiel Record*, although there be a manifeſt Errour: but in the ſame caſe, If the Plaintiff bring an Action againſt the Sheriff upon the Eſcape, and hath Judgment and Execution, and afterwards the Judgment is reverſed; yet becauſe that Judgment was executed notwithſtanding the reverſal of the firſt, the ſame ſhall ſtand in force. But it was holden in the principal Caſe, becauſe the Record was reverſed and made void before the Defendant was driven to plead, He might well plead *Nul tiel Record*, *Cook* 8. Part, 142. Dr. *Druries* Caſe.

8. A *Formedon* was brought, of the Manor of *Ilfeild*; The Defendant pleaded in bar a Common Recovery againſt the Donee in tail of the ſaid Manor: The Plaintiff pleaded *Nul tiel Record*, and had day to bring in the Record: and the Record being ſhewed, It was *Iffeild*, for *Ilfeild*: And it was Reſolved by the Court, becauſe it doth appear by the Record, that this was but the Miſpriſion of the Clark; or that it might be corrupted afterwards by drawing a daſh in the Record; It being in a Common Recovery, which is a Common aſſurance of the Realm; That it ſhould be amended, and the ſame was not failer of bringing in or ſhewing the Record for that variance. Trin. 41 Eliz. in C. B. *Cook* 5. Part, 46. *Cook*'s Caſe.

9. In Aſſiſe the Tenant vouched: The Vouchee pleaded, That before the Plaintiff brought an Aſſiſe againſt his Father, who pleaded, That the Plaintiff did enfeoffe him by Deed: and it was ſo found by the Aſſiſe; and he demanded Judgment: and upon Iſſue, *Nul tiel Record*. The Record was, That the ſaid Aſſiſe was brought againſt the Father and Mother. And it was adjudged, That the ſame was no failer of the Record. 16 Aſs. 19. vouched in *Foſter* and *Jackſon*'s Caſe, *Hob.* 55. And ſee there, 36 H. 6. 2. A Recognizance was pleaded, and Iſſue was taken upon *Nul tiel Record*, and the Recognizance was certified to be upon Condition. It was adjudged to be good, and no failer of the Record.

10. If an Enfant plead a Record in an Aſſiſe, and faile of the Record: upon the Statute of Weſt. 2. he ſhall not be adjudged a Diſſeiſee, 36 E. 3. *Fitz.* Title Aſſiſe, 443. *Plow. Com.* 364. acc.

11. A. informed againſt B, upon the Statute of Recuſancy, who pleaded, That he was Indicted in the County of *Middleſex* for the ſame Offence. The Plaintiff ſaid, *Nul tiel Record*, and day given to the Defendant to bring in the Record. Whereupon he took a *Certiorari Juſticiariis pacis*, and at the day brought *tenorem Recordi*, certified by J. L. *Cuſtos Rottulorum*. It was holden in this Caſe, That the Defendant did not need to take his *Certiorari* out of the Chancery, and ſo bring it by *Mittimus*, but this Court might ſend this *Certiorari* immediately to an Inferiour Court: But if it were to Certifie a Record it ſelf, as upon a Writ of Errour, or a *Certiorari* out of the Kings-Bench to a Juſtice of Peace, which removes the very Record it ſelf to hold Plea upon, it is otherwiſe: The Certificate was diſallowed, becauſe it was not made in the name of the Juſtice of Peace it ſelf: And although the Certificate was in it ſelf void, becauſe it was of a Plea before the Juſtices of Goal-delivery; Yet becauſe it was the Award of the Court, it was not made a failer of the Record in the Defendant, though he had it not at the day. Hill. 13 Jac. *Pie* and *Thrill*'s Caſe. *Hob.* 135.

12. In Debt againſt a Bayliff of A. for an Eſcape. The Plaintiff declared upon a Recovery in the Court of A; The Defendant pleaded, *Nul tiel Record*: and in the Record Certified, there were divers differences in the Continuances, and in the Proceſſe: and yet becauſe the Plaint, Count, and Judgment certified, did agree with the Declaration; It was holden to be no failer of the Record for theſe variances; and Judgment was given for the Plaintiff. Hill. 14 Jac. in C. B. *Coatman* and *Halley*'s Caſe, *Hob.* 179.

13. A. informed againſt B. in the Common-Pleas for Non-Reſidency; the Defendant pleaded another Information exhibited in the Exchequer, 28. *Aprilis*, *Anno* 14 Jac. for the ſame abſence: and upon Iſſue, *Nul tiel Record*, It appeared, That the Information in the Exchequer was exhibited 29. *Aprilis*, the ſame year, and it was right for the

matter

matter. And thereupon, It was holden to be no failer of the Record: and Judgment was given for the Defendant. Paſch. 15 Jac. in C.B. *Parry* and *Paris* Caſe, *Hob.* 209.

Falſifying of a Recovery.

Where a Recovery ſhall be falſified, and by whom, and for what Cauſe: and in what Action; and in what not: Or ſhall be barred.

1. A Man ſeiſed of a Manor in Fee, after the Statute of 27 H. 8. of Uſes, enfeoffed divers perſons to the uſe of himſelf, and the heirs males of his body; and for default of ſuch Iſſue, the remainder to divers other in tail, the Reverſion to the Feoffor and his heirs: the Feoffor had Iſſue, and dyed; the Iſſue entred: He in the Remainder granted a Rent-Charge out of the Land; and the Iſſue in tail levied a Fine, and ſuffered a Common Recovery, and afterwards dyed without Iſſue. It was Reſolved, That the Recoverors, nor any which came in under their eſtate, ſhould be ſubject to the charge of him in the Remainder; 1. Becauſe the Recoveror is in of an Eſtate which he hath gained under the Tenant in tail in poſſeſſion, which Eſtate is not chargeable, to the charges of him in the Remainder. And, 2. Becauſe the Remainder can never come in poſſeſſion after the Recovery. *Cook* 1. Part, 61, 62. *Capell's* Caſe. And it was Reſolved, That the Grantee of him in the Remainder could not falſifie the ſaid Recovery.

2. Husband and Wife, Joynt-Tenants of a Manor, and to the heirs of the body of the husband, the remainder to B. in taile; a Recovery is had againſt the Husband alone, in the life of the Wife with voucher: He in the Remainder is attainted of Treaſon; the Husband dyeth without Iſſue of his body, the Wife dyeth: The Queen reſtored the Son of B, and granted him the Manor which ſhe had by the Attainder. It was Reſolved in this Caſe, That ſo long as the Recovery ſtood in force, he in the Remainder had not any right to the Remainder; but the Remainder was barred for a Moyty: but of the other moyety of which the Wife was Tenant for life, the Recovery was not any barr either unto the Eſtate tail, or to the Remainder, becauſe to that moyty ſhe was not Tenant to the *Precipe*, but the Recovery enured by way of Eſtoppel only, which could not bind the Iſſue in tail; and therefore for that moyty the ſaid Recovery might be falſified by the Iſſue in tail, or by him in the Remainder. *Cook* 3. Part, 3. in the Marqueſſe of *Wincheſter's* Caſe.

3. *Ed.* Lord *Zouch* brought a *Formedon* in the Remainder of the moyty of the Manor of C. againſt *Bamfield*, who pleaded, That the Great Grandfather of the Demandant levied a Fine with Proclamations of the moity of the ſaid Manor, with a remainder to the Grandfather and his heirs, whoſe Eſtate the Tenant had: The Demandant Replyed, That at the time of the Fine levied, and at all times after, he was ſeiſed of the Lands in his Demeſne as of Fee. It was Reſolved in this Caſe, That the Demandant being heir in tail againſt ſuch Fine levied by his Auncеſtor, whoſe heir he is, was eſtopped to alledge ſeiſin and continuance thereof in a ſtranger at the time of the Fine levied, or to aver, *Quod partes Finis nihil habuerunt*, nor could falſifie the ſaid Recovery. Paſch. 28 Eliz. in C. B. The Lord *Zouch* and *Bamfield's* Caſe: vouch. in *Cook* 3. Part, in the Caſe of Fines, 88.

4. At the Common-Law, If one had ſuffered a Recovery againſt him in any real Action by default (if he were lawfully ſummoned, and no Errour was in the proceeding) he had not (the caſe of an Enfant only excepted) any remedy but only a Writ of Right; and that was the cauſe, That Tenant in tail, Tenant by the Curteſie, Tenant in Dower, or Tenant for life after Recovery by default, had not any remedy, untill the Statute of Weſt. 2. that gave them a Writ of *Deforcеt*: and therefore before that Statute, If the husband had ſuffered a Recovery by default againſt him and his Wife; the Wife had not any remedy but a Writ of Right: and the ſame Statute gave a *Cui in vita*, to the wife in that caſe; and a Writ of Entry to him in the Reverſion upon a Recovery had by default againſt Tenant for life. And if ſuch particular Tenants loſe by Action, tryed, at this day they are without remedy, and ſhall not falſifie the Recovery. See *Cook* 6. Part, 8. in *Farrer's* Caſe: and the end why ſuch Recoveries were bars in the Caſes above ſaid before the ſaid Statute was, *ut Finis ſit Litium*.

5. A man ſeiſed of Lands in Fee, having a Son by one venter, and a ſon and daughter by a ſecond venter, deviſed his Land to his Wife for life, the remainder to his younger ſon in tail, the reverſion to his Right heirs, a Common Recovery was had againſt Tenant for life, in which he in the remainder in tail was vouched, which was to the uſe of him in the remainder in tail, who after dyed without Iſſue. In this Caſe, theſe Points were Reſolved:

ved: 1. That a Recovery against Tenant for life upon a true Warranty and Recovery in value, should bind him in the remainder. 2. That no Act had been made to preserve Reversion, or a Remainder upon an Estate in tail; but that they were barred by a Recovery, and could not falsifie it. 3. That the Statute of 14 Eliz. of Feigned Recoveries did not extend to preserve any Reversion or Remainder appurtenant upon an Estate taile where Tenant for life is impleaded, and Tenant in taile is vouched. *Cook* 10. Part, 44. *Jenning's* Case.

6. Tenant in tail, the remainder in tail, the reversion to the right heirs of Tenant in tail; Tenant in taile bargained and sold the Land by Deed enrolled to J. S. and his heirs, and afterwards levied a Fine with Proclamations to the Bargainee with Warranty; the Conusee made a Feoffment in Fee: he in the Remainder had Issue, and dyed; Tenant in tail dyed without Issue. It was Resolved in this Case, That the remainder by the Feoffment of the Conusee was not displaced, and put to a right, for the Conusee had a Fee-simple, which was determinable upon the death of Tenant in tail without Issue; and when he made a Feoffment, his determinable Fee in possession, and his absolute Fee in remainder, expectant upon the Estate tail in remainder, passed; and did not devest the remainder: for the Feoffment, which in it self was not tortious, could not be tortious to another. *Cook* 10. Part, 98. *Edward Seymor's* Case.

7. Note: That by the Common Law, before the Statute of 21 H. 8. Tenant for years was subject to the pleasure of the Tenant of the Freehold: For before that Statute he could not falsifie a Recovery of the Freehold, in the respect of the Feebleness of his Estate; For none by the Common-Law could falsifie a Recovery of the Freehold, but he who was Tenant of the Freehold: but now by that Statute he may falsifie a Recovery. *Cook* 6. Part. 57. in *Bediman's* Case.

8. An Enfant brought an Assise in the Kings-Bench, of Lands in *Middlesex*: depending which, the Tenant in the same Assise, brought an Assise for the same Lands in the Common-Pleas: which last Writ bore date, and was Returnable after the first Writ. The Demandant in the second Writ did recover against the Enfant by default: and upon a Plea in Barr of the first Assise of that Recovery, the Enfant by way of Replication set forth all the speciall matter, and that the Demandant at the time of the second Writ brought, was Tenant of the Land: and prayed, that he might falsifie the Recovery. It was adjudged, That he might falsifie the Recovery. For in all Cases where a man shall not have Errour, or Attaint, he may falsifie; and in this Case he could not have Error or Attaint, because the Judgment in the Common Plea was not given only upon the Default, but also upon the Verdict: and it should be vain for him to bring an Attaint, because he shall not be admitted to give other Evidence then was given at the first tryal. And therefore it was adjudged, he might falsifie the Recovery. Hill. 15 Jac. in C. B. *Plotts* Case. *Godbolt.* 271.

9. It was Resolved by the Justices, That if a man recover in an Action personal; as in Debt, Account, or the like, the bar is perpetual; and he shall not satisfy the recovery in another Action personal: But if a man be barred in an Action real, which doth concern Land, by Judgment upon Demurrer, Verdict, or Confession; yet he may have an Action of a higher nature, and therein avoid the Recovery, and shall not be thereby barred: As, if a man be barred in an Assise of *Novel disseisin*, yet he may have an Assise of Mortdauncester; and if he be barred in a Formedon in the Discender, yet he may have a Formedon in the Reverter, or Remainder, because that the Fee-simple is to be recovered. *Cook* 5. Part, *Ferrers* Case.

10. Note, That upon a Recovery had against Tenant for life before the Statute of *Westm.* 2. he could not have entred; but now he may have *Quod ei deforceat*, and falsify. But of a Recovery in an Assise against Tenant in Fee, he shall not falsify the Recovery, although the Recovery be by default, nor hath he any other remedy. See 4 H. 9. 3.

11. Where Lessee for life was, the Remainder in Fee; If a stranger had recovered against the Tenant for life, before the Statute of *West.* 2. he was barred: and if it were by feint Action after the Tenant for life dyed, he in the Remainder was barred, because he never had possession of the Land to maintain an Action: But if he in the Reversion had entred upon Tenant for life, and Disseised him, and after the Tenant for life had re-entred upon him; and dyed, he in Remainder might have had a Writ of Right against him who recovered, because the Mise was joyned upon the meer Right of the thing which was in demand, which of them had meer Right, *scil.* the Demandant or the Tenant, and not whether he hath right to the possession upon that which was defeated by the entry of Tenant for life: For if he could have gotten possession to convey an Action unto him, although the possession afterwards did fail him, yet in tryal his Right did not fail him, but it shall be found that his right is *Eigne*. But a Right without a possession, giveth no Action. But yet at the Common Law, it was said he was not without remedy before the Statute, because he might have had a Formedon in the Remainder, although he never had

had any poſſeſſion by a Recovery in a Mortdaunceſter: And it was ſaid, That if Tenant for life upon a Recovery had againſt him, had dyed before Execution, that he in the Remainder might falſify the Recovery in a *Scire facias*. See 12 E. 4. 21.

12. Note, the Cuſtome of *London* is, Where he in the Reverſion upon a Leaſe for years is impleaded of Lands in *London*, and makes default, the Mayor by Cuſtome is to enquire by Neighbours in the preſence of the Termor and the Demandant, Whether the Plea be moved by a good Right, or by fraud, to make the Termor to loſe his Term; And if it be found upon a good right, the Demandant ſhall have Judgment preſently; and if not, the Termor ſhall have his Term, and the Execution of the Judgment ſhall be ſo ſuſpended. See *Comment on Original Writs*, 133.

13. In an Action of Treſpaſs for breaking his houſe, and ſpoiling of his graſs in W. the Defendant ſaid, That the Land was Auncient Demeſne, and that he the Defendant brought a Writ of Right in the nature of an Aſſiſe againſt the Plaintiff in the Court of the Lord of N. and that the Plaintiff appeared, and that the Defendant here had Judgment, and ſued forth Execution, and ſo entred into the houſe, &c. The Plaintiff ſaid, That as to one parcel a Fine was levyed betwixt the Plaintiff and one Tenant, and of another parcel, another Fine was levyed between the Plaintiff here, and another by which the Tenements were Frank-Fee, and ſo the Recovery was a feigned Recovery in Law. In that Caſe, the Plaintiff was driven to ſhew, That the Treſpaſs was done in every part compriſed within the Fine, otherwiſe the Fines were no bar; and although the Plaintiff in the Action here was a party to the Recovery; yet the Court held not that material to eſtop him to plead the Fines. Mich. 7 H. 4. 3. acc.

14. An Infant Tenant in tail, ſuffered a Recovery by his Guardian: It was Reſolved by the Court, That the ſame ſhould bind him, and he ſhould not falſify the ſame Recovery in another Action brought againſt him, becauſe he might have his remedy over againſt his Guardian by Action upon the Caſe; but otherwiſe it was, if he had ſuffered a Recovery by Attorney, for that had bin void becauſe that he had not any remedy over, as it was adjudged. Mich. 4 Jac. in *Holland* and *Lee*'s Caſe. See Mich. 7 Jac. in C. B. *Zouch* and *Mitchell*'s Caſe, acc.

15. Note, It was ſaid, That if he in the Reverſion doth ſuffer a Recovery to divers uſes, that his Heir cannot falſify the ſaid Recovery, by pleading, That his Father had nothing at the time of the Recovery, becauſe he is eſtopped to ſay, that he was not Tenant to the *Precipe*; and the ſaid Recovery ſhall ennure againſt him by way of Eſtoppel. Paſc. 3 Jac. in C. B. *Duke* and *Smiths* Caſe. *Godbolt*. Quere of that Caſe, for it ſeems not to be Law.

16. A Fine upon a Grant and render was levyed in the time of King E. 4. upon which afterwards, a *Scire facias* was brought, and Judgment given, and a Writ of Seiſin awarded, but not executed. Afterwards a Fine *ſur Conuſans de droit come ceo* with Proclamations, was levyed of the ſame Land; and five years paſſed: And now another *Scire facias* was brought to execute the firſt Fine. To which the Fine *ſur Conuſans de droit, &c.* is pleaded. And whether the Fine *ſur Conuſans de droit, &c.* ſhall bar the *Scire facias* or not, was the Queſtion. It was ſaid, it ſhould not. See *Cook* 1. Part, 96, 97. If a Diſſeiſee at the Common Law, before the Statute of Non-claim, had levyed a Fine, or ſuffered a Judgment in a Writ of Right, until Execution ſued, they were no bars; and a Fine at Common Law, was of the ſame force as it is now, and if in theſe Caſes no bar at Common Law untill Execution. It proves that this Intereſt upon a Fine *ſur Conuſans, &c.* is not ſuch an Intereſt as can bar another Fine not executed: Beſides, it ſhall be no bar, becauſe it is Executory only, and *in Cuſtodia legis*, which doth preſerve it, and a Fine cannot fix upon a thing Executory, and the Eſtate ought to be turned to a Right, to be bound by a Fine, *Cook* 10. Part, 96. and the eſtate of him in the firſt Fine in the principal Caſe, is not turned to a Right by the ſecond Fine: And alſo the Statute of 4 H. 7. is a general Law, and in the affirmative, and therefore ſhall not take away the Statute of *Weſt.* 2. which gives the *Scire facias*. See 39 H. 6. 3. *Cook* 11. Part, 63. 33 H. 8. *Dy* 1, 15. Quere, the Caſe was not Reſolved; But the Court inclined, that he who had the Judgment upon the *Scire facias*, was barred. Paſc. 18 Car. in C. B. *Apſley* and *Boys*'s Caſe, *Marſh.* 194, 195.

17. The Iſſue in tail brought a Formedon in the Diſcender, and the Defendant pleaded in bar, and confeſſed the eſtate tail; but ſaid, that before the death of Tenant in tail, J. S. was ſeiſed of the Lands in Fee, and levyed a Fine to him, and five years paſſed, and then the Tenant in tail dyed: and if it were a bar to the Plaintiff or not, was the Queſtion, and it reſted upon this, Whether J. S. upon this general Plea ſhall be intended to be in by Diſſeiſin, or by Feoffment: For if in by Diſſeiſin, then he is barred, if by Feoffment, not. The Opinion of the whole Court was clear, That he ſhall be intended in by Diſſeiſin, and ſo the Plaintiff is barred. *Cook* 3. Part, 87. acc. And in this Caſe, it was ſaid, That it ſhall not be intended, That Tenant in tail had made a Feoffment to bar his Iſſues, unleſs it be ſued: and a Feoffment is

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as well an unlawful act as a Disseisin, for it is a Discontinuance. Pasc. 18 Car. in C. B. *Taylor's* Case. *Marsh.* 195.

18. Note, it is said; That seisin by the hands of a Disseisor, or by one who hath a defeasible title, shall bind the right of the Disseisee, for that he is Tenant of the Land, and the act is lawful; but encroachment of a Rent by his hands, shall not bind him who hath right: And if there be any Covin between the Disseisor and him who hath the Rent, and that the purpose of the Disseisin was, that the Disseisor should give seisin of the Rent, there such seisin shall not bind the Disseisee, or him who hath right for the Covin, maketh it unlawful. *Cook* 6. Part, 58. in *Brediman's* Case.

19. If Tenant for life, the Remainder to his eldest Son be Disseised by Covin, and afterwards the Disseisor is impleaded in a Writ of Entry in the Post, and voucheth the Tenant for life, who voucheth over the common Vouchee. It was said, That that was out of the Statute of 32 H. 8. because the Tenant for life came in as Vouchee, and the *Precipe* was not brought against him. Trin. 5 Eliz. in *Bendloes* Reports.

20. A. Tenant for life, the Remainder in Fee, bargained and sold the Land to one, who before the Statute of 14 Eliz. suffered a common Recovery, in which A. Tenant for life was vouched; he in the Remainder entred. In that Case, it was Resolved, That the Entry of him in the Remainder was lawful, because that the Recovery suffered by Tenant for life, was a forfeiture, and was to the disinheritance of him in the Remainder; and it was as much as if the Tenant for life had levyed a Fine, and made a Feoffment, and in that Case it was holden, That the Entry of him in the Remainder was lawful, as well after the Execution, as after the Judgment, for it being a forfeiture, the suing of Execution, did not take away the Entry of him in the Remainder. *Cook* 1. Part, 15. Sir *William Pelham's* Case.

21. Debt upon an Obligation against an Administrator, the Defendant pleaded, That J. S. recovered against him 100 l. in the Court of C. and pleaded other Judgments in the same Court, all which amount to 500 l. and that he had not goods of the Intestate *preterquam bona et catalla quæ non attingunt ad valentiam prædict.* 500 l. The Plaintiff replyed, that the said J. S. accepted of 60 l. in satisfaction of the said Judgment in C. and would have acknowledged satisfaction upon Record in the Court of C. but the Defendant suffered the said Judgment by fraud to continue, and not to be released, to the intent to defraud him of his just debt. It was Resolved in that Case for the Plaintiff; for an Administrator ought to administer the goods of the Intestate lawfully, truly, and diligently, and then when he compounded with one who had a Judgment of 200 l. for 60 l. who offered to acknowledg satisfaction upon Record, and the other deferred it, with an intent to defraud a Creditor; were the same before the Recovery had in the Action of Debt, or after, the same was all one to the Creditor, who was a third person, and the agreement betwixt the other two should not prejudice him. Pasc. 8 Jac. in C. B. *Cook* 8. Part, *Turner's* Case. 132.

22. Note, it is agreed in *Cook* 5. Part, 31. in *Coulters* Case: That all lawful acts done by an Abator, Disseisor, &c. are good; and therefore if a Disseisor, or an Abator endoweth a Woman who hath title of Dower, it is good, and shall bind the Disseisee: But if a Woman who hath title of Dower, Disseiseth the Tenant of the Land, she cannot endow her self by way of Retainer. Also if a Woman who hath Title of Dower as Guardian in Socage, in her own right useth the Land, not as Guardian she shall not endow her self *de la plus beal part.* And so if a Woman who hath rightfull Title of Dower, be privy, or party, or consenting to a wrong; the assignment of Dower to her is void, as if she procureth one to Disseise the Tenant of the Land, to the intent to be endowed by him. *Cook* 5. Part, 31. in *Coulters* Case.

23. Note, it is said, That there are some Titles to which a Warranty shall not extend to be a bar, as in Case of a title of discharge, Condition upon a Mortgage, &c consent to a Ravisher, &c. for for these no Action lyeth, in which there may be Voucher or Rebuter; neither shall a Discent take away an Entry in such Cases, and they continue in the same plight and possession as they were by their Original Creation; and they by no act can be displaced or devested out of their Original essence: and see 34 E. 3. garr. 72. A collateral Warranty shall not bar a title of Dower, for the same continueth the beginning according to the Original creation, and yet for the same an Action is given. And therefore there is a difference between a Fine levyed and five years passed, and a collateral Warranty: For upon a Fine and five years, all rights are bound and the title of Dower also, if an Action be not brought within the time prescribed by the Statute. See *Plow. Com.* 373. *Cook* 10. Part, 99. in the end of *Bewsages* Case.

24. A Woman brought a Writ of Dower against her two Daughters, and another, and in truth the third was but a Termor, and the Wife had no cause of Dower, but this was only to make the Termor to lose his Term; and they all have made default at the Grand Cape, and now he prayed to be received, and shewed, that the Husband made a Lease for years, and after the Lessee levyed a Fine to the Lessor, and they granted and rendred the Land

Land back again to the Leſſee, rendring the ſame rent. It was the Opinion of *Anderſon* and *Periam* Juſtices, That a Termor might falſify at the Common Law. And in this Caſe, it was holden, That although his Leaſe was after the Title of Dower, yet if he hath matter to plead which goeth to the deſtruction of the Dower, he may falſify well enough, as if ſhe have Title to Dower, and five years paſs after a Fine levyed. And the Statute of *Glouceſter* was made, that a Termor ſhould not be put out of poſſeſſion, and falſify a Recovery. Paſc. 30 Eliz. in C. B. *Goldesbr.* 87. acc.

25. Note, *Cook* 1. Part, *Inſtitutes*, 46. That the Statute of *Glouceſter* doth not extend to five Caſes. 1. If the Leaſe be by parol, and not by writing. 2. It doth not extend to a Recovery by default. 3. The Termor cannot be relieved by that Statute, if he have not knowledg of the Recovery, and be received. 4. That this Statute doth not extend to Tenants by Statute Merchant, Statute Staple, or by *Elegit*; nor doth this Statute extend to a Guardian. But ſee now the Statute of 21 H. 8. cap. 15. which doth give remedy in all the ſaid Caſes, and gives them power to falſify all manner of Recoveries had againſt the Tenant of the Freehold upon feined Titles.

26. Husband and Wife, and to the Heirs of the Husband, the Remainder in tail, the Remainder to the right Heirs of the Husband, levy a Fine, and a Recovery is had againſt the Conuſee with Voucher, in which the Husband only is vouched, which Recovery is to the uſe of the Husband for life, the Remainder to the Wife for life, the Remainder to the right Heirs of the Husband, the Husband dyeth without Iſſue. It was adjudged in that Caſe, the common Recovery ſhould bar the Remainder in tail, becauſe the Husband came in as vouched, and is lawful Tenant to the *Precipe*, and ſo comes in in privity of the Eſtate, and not of any other eſtate, and the Recovery in value, giveth recompence to the Eſtate tail which the Husband hath, and to the Remainders over; And in this Caſe, it was ſaid, That the Wife had not a joynt eſtate with her Huſband, becauſe ſhe did not come in as Vouchee, and alſo becauſe the Inheritance was in the Husband. *Cook* 3. Part, 6. *Cuppledicks* Caſe. And ſee *Plow.* Com. in *Mounſell's* Caſe, 8. That if there be Tenant in tail, the Reverſion and Remainder in tail; and a common Recovery is had againſt him in the Remainder or Reverſion, that the ſame ſhall not bar the eſtate in tail, becauſe there is not any Tenant to the *Precipe*, but only by admittance and concluſion, which ſhall not bar the eſtate in tail. And ſee 8 Eliz. *Dyer*, 252. Tenant for life, and he in the Remainder in tail ſuffer a Recovery in which both vouch the common Vouchee, the ſame ſhall not bind the eſtate tail, becauſe the Tenant for life was only Tenant to the *Precipe*, and becauſe that he in the Remainder was not ſeiſed by force of the tail. See 41 Eliz. in C. B. *Leach* and *Coles* Caſe adjudged acc.

False Judgment.

1. A Writ of Falſe Judgment is, where falſe Judgment is given in the County, or in the Hundred Court, or in a Court Baron, which is not a Court of Record in a Plea Reall or Perſonal: and the Writ is a Writ which iſſueth out of the Chancery. *Fitz. Na. Br.* 18.

2. By the Common-Law, If falſe Judgment had been given in a Court-Baron, it ſhould have been redreſſed in the Court of the Lord next Paramount, which was an Occaſion of long delayes: and therefore by the Statute of *Marlbridge*, Cap. 20. Falſe Judgment were to be redreſſed in the Common-Pleas, or Kings-Bench: and the reaſon was, becauſe upon a Falſe Judgment, the King was to have a Fine; And a Court-Baron and Inferiour Courts, which were not Courts of Record, could not impoſe any Fine: And becauſe the Suitors were to be annexed to the King, which the Inferiour Courts could not do. See *Britton.* 59. Regiſter. 15. acc.

3. If falſe Judgment be given upon a *Juſticies* directed to the Sheriff, the party grieved ſhall have a Writ of Falſe Judgment, and not a Writ of Errour, 34 H. 6. 42. But if the Writ be removed into the Kings-Bench by a *Pone*, and Judgment be given here, there the party ſhall have Errour, and not Falſe Judgment, becauſe the nature of the Court doth change the nature of the Writ.

4. In a Writ of Falſe Judgment brought, the Tenant did aſſign the falſe Judgment, becauſe the Demandant brought a Writ of Right Cloſe in the Court of the Lord, and thereupon recovered, and had Execution; and ſaid, That the Land was holden by the rodd, and that the Freehold was in the Lord, in which Caſe he ought to have ſued by Bill, and not by Writ. It was the Opinion of the Court, That the Writ of Falſe Judgment would not lye: For if the ſame ſhould be reverſed by Errour, the Tenant ſhould thereby be reſtored to the Freehold which he did not loſe, and ſo the Freehold ſhould be deveſted out of the Lord; whereas the Plaintiff himſelf in his Declaration hath ſhewed, that the Freehold was in the Lord.

And it was ſaid, That although he hath the Inheritance according to the Cuſtome of the Manor; yet the Freehold is in the Lord. See 1 H. 4. and 4 H. 4. 34. Comment on Original Writs, 203.

5. A Writ of Falſe Judgment was brought in the Common-Pleas, of a falſe Judgment given in the Court of Auncient Demeſne in a Writ of *Droit Cloſe* proſecuted there in the nature of a Writ of *Aiel*, one of the Plaintiff's was Non ſuit and ſevered, and the other Suitors would not ſend the Record to the Sheriff; whereupon a Diſtreſſe iſſued againſt them: upon which, they brought the Record into Court, and there aſſigned many Errours in the Record of the Judgment (which ſee *Libr.*) The Court afterwards proceeded to the Examination of the Errours, and awarded, That the party ſhould be reſtored; but the Court gave no Coſts nor damages to the party: but the Suitors were amerced. Trin. 9 Eliz. *Dyer* 262.

6. In a Writ of *Droit Cloſe* brought in Auncient Demeſne, or in other Court which is not a Court of Record; If the Demandant's Writ be abated, and thereupon he bringeth a Writ of Falſe Judgment in the Common-Pleas, and there the Judgment is reverſed, and the Writ awarded good; he ſhall then hold plea of it in the Common-Pleas, in the nature of a Proteſtation made in the firſt Writ: and if the proteſtation in the firſt Writ was in the nature of an Aſſiſe of *Mortdaunceſter*, the Juſtices of the Common-Pleas, ſhall direct a Writ to the Sheriff, to ſummon the Jurours to come out of Auncient Demeſne into the Common-Pleas, and all the matter ſhall be tryed and determined there; and yet in ſuch Caſe, although that the Judgment be given in the Common-Pleas, yet the Land ſhall remain Auncient Demeſne as it was before. Mich. 3 E. 3. *Fitz.* Tit. Falſe Judgment. *Fitzh. Na. Br.* 20. acc.

7. If a Writ of Right be directed to the Lord of a Manor in Auncient Demeſne, or unto the Bayliffs; or a *Juſticies* be directed to the Sheriff; In all ſuch Caſes, the Lord of the Manor, Bayliffs, or Sheriff, although that the Plea be holden before them by the Kings-Writ, yet they are not the Judges, but the Suitors are the Judges: And the reaſon why the Writs are directed to them is, becauſe the Courts do belong to them: and although ſuch Courts do hold plea by Writ of Record, yet they do retain the nature of their former Courts, and they are not Courts of Record: for that upon a Judgment given in ſuch Courts, a Writ of Falſe Judgment lyeth, and not a Writ of Errour. *Cook* 6. Part, *Jenkman*'s Caſe.

8. Tenant in tail levied a Fine of Land which was Auncient Demeſne, with Proclamations; A *Formdon* was brought of that Land within the Court of Auncient Demeſne, and the Defendant pleaded the Fine in barr of the Eſtate tail by the Cuſtome, and Judgment was given there accordingly: Whereupon a Writ of Falſe Judgment was brought in the Common-Pleas. It was a Queſtion in that Caſe, If the averring of the Cuſtome for barring of eſtate tails there was good againſt the Statute of *Donis Conditionalibus*: It was ſaid by the Court, That if the Judgment ſhould be reverſed for that Errour; yet the Judgment given here can be no other, but that the party be reſtored to his Action; and then if he ſhall bring a new Action, they will judg again according to their Cuſtome. Mich. 23 Eliz. *Dyer* 373.

9. A Writ of Falſe Judgment was brought of a Judgment given in the County Court, upon a Plaint there affirmed in an Action upon the Caſe upon Aſſumpſit; which Writ was brought onely to delay Execution of the Coſts and Damages; and the Record was thereupon removed: and afterwards the Plaintiff was Nonſuit; and a *Scire facias* was prayed out of the Common-Pleas to have Execution of the ſaid Judgment: and it was granted by the Court. Afterwards, a new Writ of Falſe Judgment was directed to the Juſtices of the Common-Pleas, *Quod coram vobis reſidit*: and Errour was aſſigned for awarding of Execution in the *Scire facias*. Mich. 16 Eliz. *Dyer* 329. And ſee 21 H. 6. 34. where the party had a *Scire facias* to have Execution out of the Common-Pleas upon a Non-ſuit, in a Writ of Falſe Judgment brought to reverſe a Judgment given in a *Juſticies*.

10. A man ſhall not have a Writ of Falſe Judgment, but in a Court where there are Suitors; for if there be no Suitors there, the Record cannot be certified. See *Fitzh. Na. Br.* 23. acc. And if a man loſeth his Land by Falſe Judgment in a Writ of Right in a Court Baron, he ſhall not have a Writ of Falſe Judgment, upon Judgment given there before the Demandant hath entred upon him. Which ſee, Mich. 38 E. 3:

False Imprisonment: *and* Imprisonment.

What shall be a good Barr, or a good Justification in an Action of False Imprisonment brought; What not. And by whom; and by whom not.

1. IN an Appeal brought, the Defendant was found guilty of Manslaughter; and the King pardoned him his burning in the hand. It was a Question, If thereby he was discharged of his Imprisonment, it being in case of Appeal? It was Resolved, That the Statute of 18 Eliz. did as well extend to the Case of Appeal, as to the Case of Indictment; for otherwise the party might be discharged of his punishment, and yet remain perpetually in prison: which was not the intent of the Statute. Trin. 41 Eliz. B. R. *Cook* 9. Part, 50. *Biggin's* Case.

2. By the Statute of 1 H. 7. Cap. 4. Archbishops, Bishops, and other Ordinaries, having lawful Jurisdiction Episcopal, to punish and chastise Priests, Clarks, and Religious men within their Jurisdiction, as shall be convicted before them by lawful examination, of Adultery, Fornication, Incest, might commit them to ward and prison, there to abide for such time as should be thought to their discretions convenient; and if any False Imprisonment were brought against the said Bishops or Ordinaries for the same, they might well Justifie the said Imprisonments of the said parties. See the Statute, 1 H. 7. Cap. 4. See *Cook* 5. Part, in the Case, of the King's Ecclesiastical Law, 27, 28. acc.

3. If a *Capias* (against whom it doth not lye by the Common-Law) be by the Court awarded to the Sheriff or Officer, against a Countesse or Baron, a Peer of the Realm: He ought not to examine the Judicial Act of the Court: but he ought to execute his Writ or Warrant. And if in such case he doth arrest and Imprison such party; an Action of False Imprisonment will not lye against the Sheriff or Officer; but he may justifie the Arrest or Imprisonment: But if the Sheriff, or his Officer or Minister doth arrest and imprison a Baron, Earl, or Countesse, upon a fained Action entred by them against them; there for such Arrest and Imprisonment, an Action of False Imprisonment will lye against the Sheriff or other his Officer, or Ministers. *Cook* 6. Part, 56. The Countess of *Rutland's* Case.

4. It was Resolved, That if a man be arrested in the Night, at the Suit of a Common person, by the Sheriff, Baily, or other Officer, and the party upon such arrest be carried to prison, the said Arrest and Imprisonment is justifiable; for the Officer or Minister of Justice ought to arrest the party when he can find him: for if he doth not then arrest him, an Action upon the Case will lye against the Sheriff or Officer. But it was Resolved, That the Sheriff, or Officer of arresting and imprisoning of a man, ought to shew unto him at whose Suit the Arrest is made, and out of what Court the Process is; and whether it be for payment of money, or appearance only in Court: but all those Circumstances are intended, when the party submits himself unto the arrest of the Officer: and in all such Cases of lawful arrest and Imprisonment, the same are good causes of Justification, if an Action of false Imprisonment be brought against the Sheriff, or other Officer, *Cook* 9. Part, 66. in *Mackalley's* Case.

5. An Action upon the Case upon an Assumpsit, was brought in the Marshalsey; whereas none of the parties were of the Kings household: The Plaintiff recovered, and the Defendants, by vertue of a *Precipe* in the Nature of a *Capias ad satisfaciendum*, arrested and imprisoned him: whereupon he brought his Action of false Imprisonment. It was Resolved, That the Arrest and Imprisonment were not justifiable, but the Action did well lye against the Defendants; because the Court had not Jurisdiction of the Cause; and so their proceedings were *Coram non judice*: but when the Court hath Jurisdiction of the Cause, although they proceed *inverso Ordine*, there for the Arrest and Imprisonment done by the Officer, an Action of false Imprisonment will not lye. *Cook* 10. Part, 68. The Case of the Marshalsea.

6. In an Action of False Imprisonment, the Case was, King *Henry* the 8th granted to the Colledg of Physitians in *London*, That none should exercise the Art of Physick within 7. or 7. miles thereof, unless he were allowed by the President of the Colledg; and that there should be 4. Censors yearly, who should have the punishment of those who practised Physick within the City, *pro delictis suis in non bene exequendo faciendo, et mendo facultate Medicinæ* by Fines, Amerciaments, and Imprisonments of their bodies. The said Charter was confirmed by Act of Parliament, and thereby further enacted, That no person should be suffered to practise Physick through *England*, untill he be examined at *London* by the President, and 3. of the Censors, Except he be a Graduate of *Oxford* or

Cambridg, who had accomplished his Term without grace. And 1 *Ma.* Enacted, That when the President, or such of the said Colledg should commit any Offender for any offence or disobedience contrary to any Article in the said Grant, the Gaoler or Keeper of the Prison, was to receive such person, and keep them in prison without bail or mainprise. *Bonham*, a Doctor of Physick, Graduate in the University of *Oxford*, practised Physick in *London*, was Convented before the President and Censors, for his practising Physick contrary to the said Letters Patents, who refused to appear before them; but afterwards came before them, and being asked, If he would satisfie the Colledg for his disobedience? He said, That he had practised Physick, and would practise Physick in *London, nulla à Collegio petita venia*: For which, the President and Censors, by a Warrant sent him to the Counter of *London*, to remain without bail or mainprise. And thereupon, *Bonham* brought False Imprisonment. And in this Case, these Points were resolved, amongst others, 1. That the Censors had not power to commit *Bonham* to prison for any of the Causes aforesaid. 2. Because they had not pursued their authority, because by the Act, the Censors have only a power to impose a Fine, or Amerciament; and here President and Censors impose the Amerciaments: and Fines and Amerciaments do belong unto the King, and therefore the Imprisonment of the Plaintiff for not paying it to them in *proximis Comitiis*, was unlawful: also the Imprisonment was by word only, which was unlawful. Also it was said, No imprisonment could be by any but by those who could make a Record of it, which the President and Censors could not, nor their Officer could do in this case. And for these and other Causes, the Imprisonment of *Bonham* was not justifiable: and the false Imprisonment brought, was adjudged to lye well against the Defendants. *Cook* 8. Part, Dr. *Bonham's* Case, 94. to 121.

7. In False Imprisonment; the Defendant justified, That the Queen appointed the Term at St. *Albans*, and that the Mayor and Burgesses with the assent of the Plaintiff, did assesse upon every Inhabitant a certain sum of money for the erecting of Courts there: and if any one refused to pay it, that he should be imprisoned: and because the Plaintiff being a Burgess, did refuse to pay a sum assessed upon him the Defendant as Mayor, justified the Imprisonment of the Plaintiff: In that Case, It was adjudged to be no good Plea, because the Ordinance was made against the Statute of *Magna Charta, Quod nullus liber homo imprisonetur*. But it was Resolved in that Case, That the Mayor and Corporation might have imposed and inflicted a reasonable penalty upon the person by a sum of money, which they might have limited to have been paid by the Plaintiff by way of distress of his goods, by action of Debt, but not by Imprisonment of his person. Trin. 38 Eliz. in C. B. *Cook* 5. Part, *Clark's* Case.

8. If a Burgesse of a Corporation be disfranchised; and a Writ be awarded to the Mayor, &c. of the Corporation to restore the party, or to shew upon the Return of the Writ a sufficient cause; and they return a sufficient cause of his disfranchisement, but the Causes in the return are false: If the party for any of the said Causes returned by them, be committed to prison, or his Shop is shut up, which puts him by his Trade, he may have an Action of False Imprisonment against the Mayor, &c. and the Imprisonment of the party is not Justifiable: but in such Cases, the Causes of the disfranchisement ought to be pleaded. 13 Jac. in B. R. *Cook.* 11. Part, 99. *Boggs* Case.

9. In an Action of Battery and false Imprisonment, the Defendant justified and set forth; That the Mayor of *London* is a Justice of Peace, and that the Defendants were Sergeants of the Mace according to the Custome of *L*; and that A. the Mayor commanded them to arrest the Plaintiff for causes to them unknown, but to him known and to imprison him: In this Case it was holden by the Court, 1. That it doth not appear, whether he gave the command as a Justice of Peace, or as Mayor. 2. That a Justice of Peace cannot command his servant to arrest one without a Warrant in writing, in his absence. And it was said, That the Servant is not an Officer to the Mayor, as he is a Justice of the Peace, but the Constable: and because it did not appear to the Court, by what authority the Command was; *viz.* Whether he did it as Mayor, or as a Justice of Peace; the Imprisonment of the party by the Defendants, was not justifiable: and so the Action of False Imprisonment did well lye against the Defendants. Mich. 3 Jac. in B. R. *Woody's* Case. *Brown.* 1. Part, 204.

10. A Watchman by the Law may arrest and Imprison a Night-walker: and if a Watch-man doth arrest such a one, and he killeth him, the same is Murder, 4 H. 72. *Cook* 9. Part, 68. in *Mackalley's* Case.

11. A. procured one to convey the daughter of a Gentleman, and to marry her to a Ploughman in the night, and he procured a Priest, and was there present; for which he was excommunicate by the Ordinary of the Dioceese: and after absolution, he was for the same cause committed again to prison, by the High-Commissioners. It was holden by the Court in this Case, That matters concerning Tythes, Marriages or Testaments,

are

are not examinable before them: and therefore becauſe the party in this Caſe had ſuffered once Impriſonment for the Offences aforeſaid; the new Impriſonment of the parties by the High Commiſſioners was not juſtifiable, and eſpecially becauſe the Statute of 23 H. 8. nor the Canon did not extend to the High Commiſſioners; and therefore the Court awarded that the Plaintiff ſhould be diſcharged. And in this Caſe, it was ſaid by the the Court, That the party might have maintained Falſe Impriſonment againſt him who arreſted him and Impriſoned him. Hil'. 6 Jac. in C. B. *Perepoints* Caſe. *Godbo't.* 158.

12. A. was committed to the *Fleet* for diſobeying a Decree made in the Court of Requeſts. It was made upon a Bill there containing this matter, viz. the Plaintiff pretending title, which the Defendant held to certain Lands, which were conveyed to him by his Uncle, upon a Petition, the matter was referred to the King, and at the inſtance of the King, the Defendant did promiſe the Plaintiff in the Bill, that if he would not moleſt him for any of thoſe Lands, he would give him 200 l. *per annum*, and to have this promiſe performed, a Bill was preferred in the Court of Requeſts: where, upon the Kings Certificate of ſuch a promiſe, the Decree was grounded, and he was impriſoned, and no other cauſe appeared upon a *Habeas Corpus* brought and returned into the Common-Pleas; the Court would not deliver the party, becauſe there appeared nothing in the Return to warrant the delivery of him, but ſaid, if the Impriſonment was unlawful, the party might have Falſe Impriſonment; and although it appeared that the party had remedy in this Caſe upon the promiſe by Action upon the Caſe; yet becauſe this was a new Caſe never before heard of, they ſaid they would adviſe, and being preſſed to grant a Prohibition to the Court of Requeſts, in this Caſe they refuſed to Grant it. Trin. 10 Jac. in C. B. Sir *Henry Leas* Caſe. *Godbolt.* 199.

13. In falſe Impriſonment, the Defendant juſtified the Impriſonment for ſix hours, by vertue of a Warrant to the Sheriffs Bayliff to arreſt the party, and required the Defendant to be aſſiſting to him, and to detain him, untill diſcharged by the Sheriff. The Defendant demurred upon the Plea, becauſe the Writ being executed, was not returned; and the Writ is Conditional, viz. *Ita quod Habeas Corpus tali die.* The Court diſallowed of the Exception: For although it be true that the Sheriff ought to have returned the Writ, otherwiſe his juſtification is not good. Yet it is not ſo with his Servant, for that he hath no means to enforce the Sheriff to return it, and therefore that which the Defendant did, was legally done. And whereas it was alledged, That his diſcharge by parol was not good, the ſame alſo was diſallowed by the Court: For the Sheriff may diſcharge his Servant by word, that he keep not his Priſoner longer: It was adjudged for the Defendant. H ll. 2 Car. in B. R. *Girlings* Caſe. *Cro.* 1. Part, 322.

14. In Falſe Impriſonment, That within the Court of the Marſhalſea of the *Verge*, there were divers Officers called, *Portatores Virgarum*; and that all Precepts, time out of mind, &c. had uſed to be directed to the Marſhal by himſelf, or by ſuch Officers by word of mouth, and ſhewed that he himſelf affirmed a plaint in the Court of Marſhalſea againſt the Plaintiff, in Treſpaſs within the Verge, and a Precept was award to take the Plaintiff *ad habendum* his body at the next Court, and that the Marſhal commanded one J. S. being *Portator Virgæ* to take the Plaintiff *Ita quod, &c.* and that the Defendant ſhewed the Plaintiff unto him, and came in aid of him, and ſo juſtified: Exception was taken to the Plea. 1. Becauſe the Preſcription is to hold Plea of all cauſes within the Verge, and it is not uſed between what perſons, and therefore not good; and it is againſt the Statute of 27 E. 1. that they ſhould hold Pleas, unleſs betwixt parties of the Kings Houſhold. 2. For that the *Capias* is returnable at the next Court, and it is not upon any day certain, and ſo he might be detained in Priſon a long while, not knowing when the Court would be holden. It was the Opinion of the whole Court, That the awarding of the proceſs was ill, and that he who was ſo Arreſted might maintain, Falſe Impriſonment. Paſc. 9 Jac. in B. R. *Johns* and *Smith's* Caſe. *Cro.* 2. Part, 314.

15. Treſpaſs for Arreſting the Plaintiff, and Impriſoning him, and detaining him in Priſon for the ſpace of a Moneth. The Defendant juſtified, becauſe ſuch a Sheriff of S. iſſued out, to take the Plaintiff till he ſatisfied the Kings Debt. And that by vertue of a *Latitat* at the ſuit of J. D. he took the Plaintiff *in exitu ab Officio*, and left him in Priſon to J. N. his Succeſſor: The Plaintiff replyed, That *Quoad* the Execution out of the Exchequer, there was a *ſuperſedeas* delivered to the Defendant, *quod cum deliberaret ſive de cauſa et non alia fuit impriſonatus*, and *quoad* his impriſonment at the ſuit of J. D. the Plaintiff in that ſuit commanded him to diſcharge him of that Action before his impriſonment, and releaſed the Sheriff of the Suit, and notwithſtanding this, the Defendant detained him. It was Reſolved in this Caſe, That the *Superſedeas* was a good cauſe to diſcharge him, and he ought to obey it at his peril: And whereas it was objected, That the Sheriff was not bound to obey the Plaintiffs diſcharge upon the *Latitat*, becauſe he did not know whether it be the ſame party who made the diſcharge, and brought the Writ. Yet the Court held the Replication to be good.

good. For as well as the Sheriff may take knowledg of the party to Arrest him at his suit, he is to take knowledg of the party to accept of his discharge; And although in this Case, the Arrest was before his time, *viz.* in the time of the former Sheriff, yet in the Laws intention it is all one, and he is bound to take knowledg of the Plaintiff. It was adjudged for the Plaintiff. Hill. 12 Jac. in B. R. *Withers* and *Healeyes* Case. *Cro.* 2. Part, 379.

16. In an Action of False Imprisonment brought, It was the Opinion of the Court, That if an Action be brought against a Widdow, who is found Guilty, and before Judgment takes a Husband; That the *Capias* shall be awarded against her, and not against her Husband: And in this Case of subsequent marriage, If the Sheriff had returned she was now married, he would have falsified all the proceedings; and therefore it was Resolved, That the False Imprisonment was not maintainable. Trin. 11 Jac. in B. R. *Doyley* and *Whites* Case. *Cro.* 2. Part, 323.

17. In False Imprisonment, the Defendant justified, because the Plaintiff brought a Child of the age of six years, and not above, to the Parish Church of W. *et eundem ibidem reliquere voluisset et intendisset* without keeping or nourishing to the danger and destruction of the Child, *et contra pacem*, for which the Defendant being Constable of the Parish, arrested and Imprisoned him untill he did promise to carry the child to the place from whence it came, upon which the Plaintiff demurred. It was holden by the Court to be a great offence of the Plaintiff, but the same ought to be punished according to Law; but the Constable cannot imprison a Subject at his pleasure, but according to Law, that is to bring him before a Justice of Peace, there to be examined: But if the Plaintiff had pleaded, That he stayed the Defendant upon that matter, to have brought him before a Justice of the Peace, it had bin a good Plea: The Justices, though they were of Opinion against the Plea, yet would not give Judgment by reason of the ill example. Trin. 31 Eliz. in B. R. *Beal* and *Carters* Case. *Leon.* 327. See *Popham* 13. the same Case.

18. In an Action of Assault, Battering, and Imprisoning him: The Defendant pleaded, That the Plaintiff *Communitur usus fuit* the Trade of Cheaters, and to cozen the Kings Subjects with false Dice, playing at such Games, and that such a time he came to the house of J. S. being a Justice of Peace; and the Plaintiff playing with the Defendant with false Dice, falsly deceived him of his money; upon knowing of which, he *moliter* layed his hands upon the Plaintiff, to carry him before the said J. S. Justice of Peace to be examined, who there upon examined him; who bound him over by Recognizance to appear at the next Sessions for the County, which was the same Assault and Imprisonment. It was moved in the behalf of the Plaintiff, That the Plea was not good, for one can not without an Officer for any cause, and that upon his own suspition only Arrest or Imprison or stay any one, unless for Felony: But the Court held the Plea to be good; For it is shewed that he was a common Cheater, and that he cozened with false Dice, and therefore the Defendant led him to a Justice, being in the same house; and it appears by the Plea, there was good cause of staying him, for he is afterwards endicted and convicted for the same offence: whereupon Judgment was entred for the Defendant. Mich. 7 Car. in B. R. *Hollyday* and *Oxenbridges* Case. *Cro.* 1. Part, 170.

19. One who was a Prisoner in the Kings Bench for Debt, having agreed with his Creditors, was discharged by them; yet Sir *John Lenthal*, the Keeper of the Prisoner, did keep still the Prisoner in Prison, untill he should pay him Action-money. The Court said to the party who moved that he might be discharged, That he had two remedies against Sir *John Lenthal*, for he might either bring his Action of False Imprisonment against him, or he might endict him for Extortion. Trin. 1655. in B. R. *Webberly* and Sir *John Lenthall's* Case. *Styles* 455.

20. Upon the Retorn of a *Habeas Corpus*, and the Certificate of the Mayor of *Listerre* in the County of C. of the cause of Imprisonment of the Plaintiff, he certified the cause to be *Quia se male gessit*, and for using undecent speeches to him, as calling him Lyar, and that in his Hall with a spit *Insultum fecit et conatus fuit eum vulnerare*. It was holden, 1. That the Retorn was not good for the generality of it; for he ought to have expressed what manner of contempt it was, as *Cook* 5. Part, 58. in *Specots* Case. And *Cook* 8. Part, 68. *Trilops* Case. Also the Retorn of it was not good, for the incertainty of it. It was said by the Justices, That the speeches used by the Plaintiff to the Mayor, were very unseemly speeches, and unfit to be used to such a person in Authority; yet the Mayor ought not to use such a kind of malitious Imprisonment of the Plaintiff in a Dungeon, (as the Case was) there to be kept without any bed to lye upon, or any bread or meat to eat: And it was said in this Case, That if the Constable do Arrest one and put him in the Stocks, yet he ought not to keep him there in the Stocks the space of 1 Week; no more might the Mayor do the Plaintiff so long as he did in this Case. It was the Rule of the Court, That the Plaintiff be set at liberty, and discharged of his Imprisonment. Mich. 11 Jac. in B. R. *Hodges* and *Hawkins* Case. *Bolstr.* 2. Part, 139.

21. In False Imprisonment against four Justices

of the Peace; they justified, That 7. *August* 9 Jac. one *Tompson*, a learned Minister, came into the Church of S. in the County of *York*, to Preach there; and then and there the Plaintiff, with another with him besides the Churchwardens, layed violent hands on the Minister, and hindered his Preaching *violenter et de industria et sic malitiose et contemptuose* they did against the form of the Statute in that Case made and provided: and one of the Defendants said this upon apprehension of the Plaintiff, for this he was brought before him, being a Justice of Peace, and being convicted of the Offence by sufficient Witnesses, they sent him to Prison, according to the Statute; and upon this Replication the Plaintiff demurred in Law: The Case was often debated, and argued by all the Justices *Seretim* (which see in the book at large); and it was afterwards Resolved by the whole Court, That the Plea and justification of the Defendants was good, and the Plaintiff had no cause to demur, and so upon the whole matter, Judgment ought to be given for the Defendants, and against the Plaintiff; and afterwards Judgment was entred accordingly *Quod Querens nihil Capiat per Billam.* Trin. 20 Jac. in B. R. rott. 1647. *Cresswick* and *Rookshyes* Case. *Bolstr.* 2. Part, 47, to 55.

22. In an Action of False Imprisonment, the Defendant justified, and said *London* hath a Court of Record by Prescription, which was confirmed by Act of Parliament, and that he was one of the Serjeants of the Mace of that Court, and had a Warrant directed to him out of the said Court to arrest the Plaintiff *pro quodam contemptu*, for not paying 20 s. to K. B. and in pursuance of the said command, and he did arrest the Plaintiff, and so Justified. It was objected, That the Court was holden *per Consuetudinem*, and the Minister ought to obey their commands, and it is hard he should be punished for it. But the Opinion of the Court was, That the Plea was not good, because too general and incertain to imprison *pro quodam contemptu*. And it is true, That the Officer for doing an Act by the command of the Court, be it just, or unjust, is excused; but that is in Case where the Court hath Jurisdiction; but it doth not appear in this Case, That the Court had jurisdiction of the cause, and then he obeying of the Court by the Officer, when they have not jurisdiction of the Cause doth subject the Officer himself to a false Imprisonment. Mich. 17 Car. in B.R. *Dye* and *Olives* Case. *Mo. fo.* 117.

23. Upon a *Habeas Corpus* by Alderman *Langham*, who was committed to *Newgate* by the Court of Aldermen. It was returned, That in *London* there is a Custome, That if any Freeman be elected Alderman, he ought to take an Oath, to serve the King in the Office of Alderman of a Ward, and he shall not sell Bread, Ale, Wine, Fish, &c. by retail, and if he refuse to take the Oath, That he shall be committed untill he take the Oath, and shewed that *Langham* was a Freeman of the City, & had taken the Oath of a Freeman, and was *debito modo electus* Alderman of such a Ward, and being called to Court, and the said Oath tendred him, he refused to take it, *in contemptum Curiæ, et contra consuetudinem*; and divers Exceptions were taken to the Return; and also it was insufficient for the matter, for he is imprisoned generally, and not untill he takes the Oath, and he Oath is such as takes a way the liberty of a Subject; and it is unreasonable, that he should never sell his goods by Retail; and a Custome to Imprison, is not good, for it is contrary to *Magna Charta*, as is *Co.* 5. Part, *Clarks* Case. 15 Eliz. *Marshalls* Case, in *Mayors* Reports, 15 Eliz. and also here is no notice given him that he was chosen Alderman. But it was Resolved, and many Presidents shewed, That the Custome was good, and that many persons had bin Imprisoned for refusing to take that Oath, as 36 H. 8. *Thomas Whites* Case, 1 Jac. Sir *Thomas Middletons* Case. 3 Jac. Sir *William Bonds* Case, all which persons were Imprisoned by the said Court for the same cause of refusal to take the said Oath: And the Court held, That here being a contempt refusing to take the Oath; the Court might Imprison the body for it without any Custome, for it is incident to a Court of Record to Imprison, and the Court of the Mayor and Aldermen, is a Court of Record; and therefore may Imprison without a Custome: but *à fortiori* where they have a Custome to warrant it; and the Customes of *London* are confirmed by Act of Parliament: Wherefore for these causes, and for many other causes appearing in the book at large, the Prisoner was remaunded. Mic. 17 Car. 1. in the Kings Bench. *Alderman Langhams* Case. *Mayor.* 179.

24. Sir *William Bronker* was brought before a Justice of Peace, and upon Information made, that he had cheated one at play with false Dice, the Justice required him to find Sureties for his good behaviour, and upon his refusal, committed him to Prison: He brought his *Habeas Corpus*, and upon return, all this matter appeared. It was the Opinion of the Court, That a Justice of the Peace cannot bind one to the good Behaviour upon a general Information, or commit him to Prison for refusing to find Sureties for his good Behaviour, upon such a general Information. Pasc. 23 Car. in B. R. Sir *William Bronkers* Case. *Styles* 16.

25. Action of False Imprisonment against the Defendant, and two other Justices of the Peace of the County of E. the Defendants justified by reason of the Statute of 1 *Mariæ*, That it should not be lawful for any person malitiously and contumeliously

liously to moleſt or diſquiet any perſon or perſons which are Preachers, or hereafter ſhould be, *prout* in the Statute. The Plaintiff demurred upon the bar generally, and two Exceptions were taken to the pleading. 1. Becauſe the words of the Statute were miſ-recited, for the words in the Act are in the Diſjunctive, maliciouſly, or contumaciouſly: It was holden by the Court, That when the words precedent, and the words ſubſequent in the Diſjunctive are all one in ſenſe, that the Diſjunctive (Or) is all one with the Copulative (And): but where they are of divers natures, as (by Word or Deed) it is otherwiſe. The ſecond Exception was, That where the words are, By the greater part of the Juſtices, the recital was, By the better part of the Juſtices: But notwithſtanding theſe Exceptions, Judgment was given againſt the Plaintiff. Mich. 11 Jac. in B. R. *Coſs* and *Stanhops* Caſe. See before to the ſame purpoſe.

26. A man was Arraigned upon an Indictment of Murther, and was found guilty of Man-ſlaughter, for which he pleaded the general Pardon of 35 Eliz. The Queens Attorney ſaid, That in the Pardon there is an Exception of all perſons being in Priſon by the commandment of one of the Privy Councel; and ſaid, That the ſaid party was committed by the Lord Chamberlain a Privy Counſellor for ſuſpition of the ſaid Felony, and for the ſame was in Priſon at the time of the Parliament: To which the Defendant ſaid, That before the Parliament, and before the ſaid commitment by the Lord Chamberlain, he was brought by *Habeas Corpus* into this Court, and for the ſaid Offence, was committed to the Court of the Marſhalſea, and there remained till the time of the Parliament. It was the Opinion of the Court in this Caſe, That if a man be committed by a Privy Counſellor, and removed by *Habeas Corpus*, and committed by this Court, he ſhall now be ſaid to be Impriſoned by the commitment of this Court, and not by the Privy Counſellor; and ſo the party was out of the Exception in the general Pardon, and ſhould have advantage of it. Hill. 43 Eliz. in B.R. *Goldesbr.* 133. *Arundells* Caſe.

27. A. being Impriſoned in the Marſhalſea, brought a *Habeas Corpus*, upon which it was returned, that he was committed to Priſon, the 18 day of *Sept.* laſt, by command of the Lords of the Council: The Warrant was, That he was committed for inſolent ſpeeches and behaviour at the Councel Table, the which Warrant was ſubſcribed by the Lord Keeper, and twelve of the Councel; and becauſe it was not mentioned in the return what the words were, that the Court might judg of them, the return was holden to be not ſufficient, and the party was bailed. Mich. 5 Car. in B. R. *Chambers* Caſe.

28. A. having a ſuit in the Kings Bench, coming to *London*, to proſecute his Suit, was committed to *Newgate*. Upon a *Habeas Corpus*, it was returned, That he was committed to his Cuſtody by Warrant from the Lord Chancellor of *England*, for certain matters concerning the King, there to remain till the Lord Chancellor delivered him. It was ſaid, That the Return was too general, for it ſhews not for what cauſes he is committed, and it might be for a cauſe which would not hinder him of his Priviledg. And the Return is, That he ought to remain there till delivered by the Lord Chancellor, which is very incertain in time, for ſo he might remain in Priſon during his life. The Court did not diſcharge the party, but ſaid, They would adviſe of the Return. Hill. 6 Jac. in B. R. *Addis* Caſe. *Cro.* 2. Part, 219.

See more of Impriſonment, in *Lib.* 1. Title, *Corpus cum Cauſa.*

Feoffments.

1. *By Deed; and the effect of them: What good thus, where not. Of the Incidents to Feoffments, Livery and Seiſin: What good; and of what, of what not; and by whom: Where by Attorney; and where all the Land ſhall paſs, by the Feoffment, where part only.*

1. A. Had a Leaſe for years, the Remainder to B. his Son in tail, with divers Remainders over; the Leſſee made a Feoffment to divers, and a Letter of Attorney to others, with Commiſſion to enter into the Land, and to Seal the Feoffment, and deliver it in his name to the uſe of B. his Son in the Remainder, and his Heirs, and another by the command or Letter of Attorney of B. entred in his name. It was holden by the Court, That this was a good Feoffment, notwithſtanding that both the Leſſee, and the Attorney were Diſſeiſors, for it is good between the Feoffer and the Feoffee, for they ſaid, that by the Feoffment to the uſe of him in the Remainder, and his Heirs, if he in the Remainder enter, he is remitted, and the Eſtate for years is gone implicatively, for in all Caſes where the Freehold commeth to the Term, the Term is extinguiſhed.

Trin.

Trin. 30 Eliz. in C. B. *Mounſons* Caſe. *Goldesbr.* 92.

2. If a Feoffment be made of Land, upon Condition to the uſe of another, but no Livery is made upon the Feoffment, but the ſame is enrolled of Record in the Chancery. It was Reſolved by the Court, That the ſame was no good Feoffment to paſſe the Land; but the enrollment ſhall conclude the perſon to ſay, that it was not his Deed. Mich. 35 Eliz. in C. B. *Gibbons* and *Maltycra's* Caſe. *Popham* 6. acc.

3. If a man make a Feoffment in Fee to J. S. upon Condition, that he ſhall not alien, it is a void Condition, but the Feoffment ſhall ſtand good, if Livery be made. But a Covenant made, that he ſhall not alien, may be good. See 13 H. 7. acc. And ſee, Hill. 17 Jac. B.R. *Broad* and *Joyliff's* Caſe, acc. *Cro.* 2. Part, 596.

4. If the Father make a Feoffment of Lands to his ſon and heir for a valuable Conſideration, the ſame is a good Feoffment; and ſhall not be taken to be with the Statute of Colluſion: where a man enfeoffes his Son without a valuable Conſideration. Mich. 9 Jac. in C.B. *Hamond Strange's* Caſe. *Brownlow* 1. Part, 102.

5. Note: There is a difference between Feoffments made at the Common Law, and Feoffments made by *Ceſtuy que uſe*, by force of the Statute of 1 R. 3. In the Caſe of a Feoffment at the Common-Law, the Feoffor ought to be ſeiſed of the Land at the time of the Feoffment; but if a Feoffment be made according to the Statute of 1 R. 3. in ſuch caſe, the Feoffor needeth not be in poſſeſſion of the Land. 2. Feoffments at the Common-Law give away both eſtates and rights; but Feoffments by the Statute of 1 R. 3. give the eſtate, but not the rights. 3. In caſe of Feoffments at the Common Law, the Feoffees are in, in the *Per*; viz. by the Feoffor: but in caſes of Feoffments by the Statute of 1 R. 3. the Feoffees are in, in the *Poſt*; *viz.* by the firſt Feoffees. M. 21 Jac. in the Court of Exchequer, in the Lord *Sheffeild* and *Ratcliff's* Caſe: holden accordingly. *Godbolt.* 318, 319, 320.

6. He in the Reverſion enfeoffed Tenant for life without Deed. It was holden by the Court, That the ſame ſhall enure firſt as a ſurrender of the Leaſe for life, and then as a Feoffment, like the Caſe, where Tenant for life ſurrendreth to the Grantee of the Reverſion. It ſhall enure firſt as an Attornment, and then as a Surrender. Paſch. 19 Eliz. *Dyer* 358.

7. Land was deviſed to the Father for life, the remainder to his firſt heir male: The Tenant for life made a Feoffment in Fee, and dyed; the next heir male was barred of his remainder for ever; for by the Feoffment, the eſtate for life was bound, that the remainder could never riſe during that eſtate; and ſo it muſt needs fall: and a Feoffment is a bar of all rights and poſſibilities of right. See *Cook* 1. Part, 66. See *Albanie's* Caſe, and *Digge* Caſe, *Cook* 1. Part, acc. And ſee, *Hob.* 337, 338. acc.

8. If there be Lord and Tenant, and the Tenant by Deed enfeoffes the Lord and a Stranger, and makes Livery to a ſtranger in the name of both: In this Caſe, If the Lord by word doth diſagree to the eſtate, it is of no validity to deveſt the eſtate; or if he entreth into the Land, and diſtraineth for the Services of his Seignory, it ſhall amount to a diſagreement to the Feoffment, and ſhall not deveſt the Freehold out of him: but if he enter into the Land generally, and take the profits, this act ſhall amount to an agreement to the Feoffment. *Cook* 3. Part, 26. in *Butler* and *Baker's* Caſe. See 10 E. 4. 12.

9. If Tenant for life, and he in the remainder in tail make a Feoffment by Deed, it ſhall not deveſt the reverſion or the remainder depending, becauſe it ſhall amount but to a grant of both their eſtates, and ſo it ſhall be a Feoffment determinable upon both their eſtates, and no abſolute Fee from the one or both, whatſoever the words import, the one conſtruction working by right, the other by wrong, which the Law will not admit, if the other may by any means ſtand. See *Cook* 1. Part, in *Bredon's* Caſe. *Hob.* in the Earl of *Clanrickard's* Caſe. 278. acc.

10. A man made a Leaſe for years of a houſe, and of a Cloſe ſevered from the houſe, and of other Land; and afterwards the Leſſor made a Feoffment of the houſe, and of all the Land demiſed, and made Livery and Seiſin in the Cloſe; the Leſſee being in the houſe. It was adjudged, That the Livery was void as well for the Cloſe, as for the houſe and the other Land. For it was Reſolved, That when a Meſſuage and Land are demiſed together, the Meſſuage is the principal, for the Rent ſhall be there demanded, and the Land is but the acceſſory, ſo as the poſſeſſion of the houſe is the poſſeſſion of the whole Land demiſed with it. 2. Perhaps the Leſſee durſt not come upon the Land to preſerve his poſſeſſion; but the houſe is his Caſtle, and therefore the poſſeſſion of that, is the poſſeſſion of all his other Lands: But if the Leſſee had made a Leaſe to another of any part of the Land demiſed, and the Leſſor had made Livery in that part, it had been good to paſſe that part; otherwiſe, if he had made but a Leaſe at Will of the part of the Lands demiſed. And in this Caſe, It was Reſolved, That by a Feoffment of the houſe *cum pertinentiis*, that the Buildings, Curtilage and Gardens did paſſe. *Cook* 2. Part, 32. *Bettiſworth's* Caſe.

11. Leſſee for years rendring Rent; The Leſſor made a Feoffment of the Land, and Livery: The Termor being upon the Land, and the Termor occupied the Land; It was a Queſtion, If the Feoffee ſhould have the Freehold and the Rent? It was the Opinion of the Court, That the Livery was good, becauſe the Leſſor had the Freehold, and the Leſſee had but a Term; which were diſtinct things: and that the Feoffee ſhould have the Rent; but otherwiſe it is, in the caſe of a Leaſe for life. But *Baldwin* and *Fitzherbert* held, in ſuch caſe, That there muſt be an agreement of the Leſſee for years, becauſe the Leſſor had nothing to do with the poſſeſſion during the Term. Paſch. 29 Eliz. 8. *Dyer* 33. And in this Caſe it was holden, That if the Lord diſſeiſe the Tenant, and maketh a Feoffment in Fee, and the Tenant re-entreth; that the Feoffee ſhall have the Rent. See 46 Eliz. 3. 25.

12. Note: It was ſaid by *Mounſon*, Juſtice, That it was adjudged in the Lady *Simpſon's* Caſe, That if a Feoffment be made by him in the Reverſion, and Livery be made in the abſence of the Tenant for life, that the Fee will not paſſe. Hill. 17 Eliz. *Dyer* 340.

13. In a *Replevin*, the Defendant made Conuſans as Bayliff of J. S. for Damage feaſant, ſuppoſing a Leaſe to be made to his Maſter for years, by King *Ed.* the 6th: The Plaintiff ſaid, That long before the Leaſe, the Abbot of *S.* was ſeiſed in the right of his Church, and with the aſſent of his Covent by Indenture demiſed to him for life after the death of A. and B, and that they dyed; and the Leaſe was Teſtatur; That the Abbot and Covent *demiſerant* to the Plaintiff for life *prout*: the Defendant Demurred upon the Barr to the Avowry, becauſe there was neither Livery, or Attornment pleaded by the Plaintiff; and alſo becauſe the Plaintiff had not alledged, That the Abbot and Covent *demiſerant*, but the Indenture is onely *Teſtatur*: and for theſe defects for want of pleading Livery, and for not pleading the Demiſe, but only Teſtatur; Judgment was given for the Defendant, that he ſhould have Return of the Cattel irrepledgeable. Paſch. 3 Ma. *Dyer* 117. *Sentlers* Caſe.

14. A man delivers a Charter of Feoffment upon the Land; It is made a Quære, 38 Aſs. 2. 39 Aſſ. 12. *Cook* 9. Part, 137. if the ſame doth amount to a good Livery? But if he ſaith, Have and enjoy this Land according to the effect of the Deed, it ſeems to be a good Livery: And ſo it is, If after the delivery of the Deed upon the Land, he ſaith, Enter into this Land, God give you joy of it; It doth amount to a good Livery. See 41 E. 3. 17. 35 H. 6. Br. Feoffments, 74.

15. A man had Iſſue two Sons, and by Deed, in Conſideration of Marriage, gave the Land to his younger Son, and to his heirs after his death, but no Livery was made: the Father dyed; the eldeſt Son entred, and was ouſted by the younger Son. It was Objected, That the Eſtate paſſed to the younger Son by way of Covenant to raiſe an Uſe. But it was Reſolved, That it ſhould not enure by way of Covenant, to raiſe an uſe to the younger Son; but by the word [*Give*] it ſhould be taken to paſſe an Eſtate by way of tranſmutation of poſſeſſion; which is not good, if Livery be not made: But where the Caſe was, Stand forth *Euſtace*, Reſerving an Eſtate to my ſelf and my Wife, I do give thee my Lands: It was the better Opinion of the Court, That the ſame being done upon the Land, had amounted to a Livery, Mich. 26 Eliz. *Callad* and *Callard's* Caſe. And in the principal Caſe, It was adjudged, That if Livery had been made, it had been void, becauſe that an Eſtate of Freehold cannot begin at a day to come. 15 Car. in B. R. *Pitfield* and *Percies* Caſe, *Mich* 50.

16. Tenant in tail of Lands entred into the houſe which was built upon it, and ſaid; Brother, I here demiſe unto you my houſe as long as I live, paying 20 l. a year to me, and finding me my board, and waſhing, and keeping a horſe. It was adjudged in that Caſe, That the ſame was not an Eſtate for life, becauſe there wanted Livery; and to every Livery, an act is requiſite, which the Law ſhall adjudge Livery, or apt words which do amount unto it: but if he had delivered a Twig or any thing which came of the Land, it had been a good Livery. *Cook* 6. Part, 26. *Shef's* Caſe.

17. If a Leaſe be made for years, the Remainder over, and the Leſſee entreth without Livery, the Reverſion is in the Leſſor; otherwiſe it is, when Livery is made: But if a Leaſe be made for years, to begin at *Mich.* following, the remainder in Fee, and Livery be made accordingly; yet it doth not paſſe, becauſe that is no Eſtate preſent upon which the Livery may enure, by *Brown*, Juſtice. *Plo. Com.* 156. a.

18. If Tenant for life maketh a Feoffment in Fee of an Acre of Land, whereof he is ſeiſed in Fee; and of another Acre, wherein he hath an Eſtate but for term of life, and he makes Livery on that of which he is ſeiſed in Fee in the name of both; there the ſame is a good Livery, and both the Acres ſhall paſſe; but if the Livery be made in that wherein he hath but an eſtate for Term of life, the Livery doth not paſſe that Acre. See 9 H. 7. 25. acc.

19. If a man make a Leaſe to another for 40 years to him and his heirs, and makes Livery; It was the Opinion of *Clench*, Juſtice, that the ſame is but a Leaſe for years; for that it is not properly a Livery.

a Livery, but a giving of the poſſeſſion. Mich. 28 Eliz. in B. R.

20. The delivery of the Deed of Feoffment upon the Land, doth not amount to a Livery and Seiſin of the Land, becauſe it hath operation to take effect as a Deed: But if a man delivers the Deed upon the Land, by name of Seiſin of the Lands contained in the Deed; the ſame is a good Livery and Seiſin of the Land: and the delivery of any thing upon the Land in the name of Seiſin of the Land, although it be a thing which doth not concern the Land, as a gold Ring, &c. yet it is a good Seiſin of the Land. See *Cook* 1. Part, *Inſtitutes*, 48. 2.

21. If a man make a Feoffment to J. S. and J. D. and their heirs without Deed; And A. makes Livery to J. S. in the abſence of J. D. in the name of both, and to their heirs; It is a void Livery to J. D, becauſe a man being abſent, cannot take a Freehold by a Livery, but by his Attorney lawfully authorized by Deed to receive the Livery, unleſſe the Feoffment be made by Deed; and then the Livery to one in the name of both, is good, becauſe the Feoffment being made without Letter of Attorney, or Deed, it is uncertain whether or no he conſented thereunto: which is apparent, by ſealing the Letter of Attorney or Deed: and a Livery and Seiſin requires words to expreſſe it, and alſo ceremonies, to the end it may be certainly known what is intended by it. And a man abſent, can neither take nor make Livery without a Deed. *Cook* 1. Part, *Inſtitutes*, 49. and 359.

22. The poſſeſſions of the Abbot of *Combe*, came to King *Hen.* 8. divers parcels of them being in Leaſe for years; The King made a Leaſe for life of them all to the Dutcheſſe of *Richmond*, and dyed: King *Ed.* 6. granted the Reverſion, the Grantee made a Feoffment of the whole, and made a Letter of Attorney to make Livery; the Attorney made Livery in one parcel in Leaſe, in the name of the whole, without attornment or agreement. It was holden by ſome of the Juſtices, That the Attorney was a Diſſeiſor, and the Livery made by him was not good: But other Juſtices held the contrary: So it was not Reſolved, If a good Livery to paſſe the Land. Paſch. 3 Eliz. *Dyer* 130. But now that doubt is Reſolved. For, ſee *Cook* 2. Part, in *Bettiſworth's* Caſe, it is Reſolved, That in that Caſe the Livery was void for the whole.

23. Note. It was holden by *Dyer* and *Wray*, Juſtices, That if Leſſee for years makes a Deed of Feoffment by the words, *Dedi conceſſi & Confirmavi*, and maketh Livery by a Letter of Attorney, the Leſſor being upon the Land, That the Land ſhall paſſe by the Feoffment and by the Livery made by the Attorney: and it ſhall not paſſe as a grant only of the Term. Paſch. 23 Eliz. *Dyer*. 362. 18 Eliz. *Dyer* 354. See 30 Eliz. *Dyer* 272. and *Perkins*, 45. acc.

24. A man made a Feoffment by a Letter of Attorney and Livery of a Meſſuage in D; which was *Robert Cottons*, and in Deed the Meſſuage was *Tho. Cottons*; yet in reſpect Livery was made of it, the Feoffment was holden good; and the miſtake of the name of the perſon ſhall not make void the Feoffment and Livery. Paſch. 23 Eliz. *Dyer* 376. See to that purpoſe, *Cook* 2. Part, 32. *Doddington's* Caſe, and the Opinion of *Hobert*, Chief Juſtices. *Hill* 12. Jac. in C. B. in *Stables* and *Butlers* Caſe. *Hob.* 171.

25. A man who is diſſeiſed, makes a Feoffment in Fee, and makes a Letter of Attorney to enter and take poſſeſſion, and afterwards to make Livery *ſecundum formam Charta*; It was holden by the Court, That the ſame was a good Feoffment, although he was out of poſſeſſion at the time: for the Authority of the Attorney being executory, nothing paſſed untill the Livery and Seiſin was made, Hill. 37 Eliz. in C. B. *Brown* and *Terrey's* Caſe, vouch. in *Cook* 1. Part, *Inſtitutes* 48. b.

26. A. ſeiſed of Lands, made a Feoffment to the uſe of himſelf for life, the remainder to the uſe of J, father of the Plaintiff, in tail: A. dyed, J. entred, and by Indenture by words of Bargain and Sale, without any words of *Dedi & Conceſſi*, conveyed the Lands to the uſe of J. S. in Fee, and in the ſame Indenture was a Letter of Attorney to make Livery; which was made accordingly: and the ſaid J. S. by the Indenture Covenanted, That if J. ſhould dye before ſuch a day, then if J. ſhould pay before ſuch day to J. S. 40 s. that then the ſaid J. S. and his heirs ſhould ſtand ſeiſed to the uſe of the ſaid J. and his heirs: and if the ſaid J. did not pay the ſaid &c. then if J. S. did not pay to the ſaid J. within 4. dayes after 10 l, then the ſaid J. S. and his heirs from thenceforth ſhould be ſeiſed to the uſe of the ſaid J. and his heirs. Each party failed of payment, J. levied a Fine to J. S. without any Conſideration. It was Reſolved by the whole Court, upon this matter, a good Feoffment well executed by Livery, notwithſtanding that the words of the Conveyance are only by Bargain and Sale; and that the Covenant to be ſeiſed to the uſes upon payment, and not payment being in one and the ſame Deed, ſhould raiſe the uſe upon the Contingency, according to the limitation of it. Trin. 26 Eliz. in B. R. *Benecombe* and *Parker's* Caſe. *Leon.* 25.

27. If an Idoot or *non Compos mentis*, make a Feoffment in Fee in perſon, and dyeth his heir within age, he ſhall not be in Ward; Or if he dyeth without heir, the Land ſhall not Eſcheat; but if the Feoffment be made by Letter of Attorney; although the Feoffor ſhall not avoid the ſame;

yet after his death, as to all others in Judgment of Law, the Eſtate was void; and therefore in ſuch caſe, if his heir be within age, he ſhall be in Ward; or if he dyeth without heir, the Land ſhall eſcheat: and ſo it is in the caſe of an Enfant, If he maketh a Feoffment in perſon, if he dyeth without heir, the Land ſhall not eſcheat: but otherwiſe it were, if it were made by Letter of Attorney; but the Enfant himſelf ſhall not avoid it, but others ſhall. *Cook* 4. Part, 125. in *Beverley's* Caſe.

28. If a man make a Leaſe to A. and B. for years, the remainder to C. for life; In this Caſe, the Leſſor ought to make Livery to A. and B. before their Entry; and by the Livery to A. and B, C. ſhall take preſent eſtate by way of Remainder by force of the Livery made to the Leſſee for years. See *Litt.* 12. And it is there ſaid, That there is a difference betwixt two Joynt-Attorneys, who have an expreſſe authority to take Livery and Seiſin by Deed, and two Joynt-Leſſees, who have power to receive Livery for the benefit of another by warrant of Law: for Livery made to one Attorney in the name of both, is not good; for he doth not follow his expreſſe warrant, for he alone hath no warrant, and they both make but one Attorney: But in caſe of two Joynt-Leſſees, there the Livery made to one in the name of both, is good, for they have an Intereſt in the Land before their entry; and Livery to one in the name of both, maketh actual poſſeſſion in both; which is ſufficient to ſupport the remainder in C: and in the one Caſe, the Livery is made to the Leſſees who have Intereſt; and in the other, to him who maketh the warrant of Attorney by his Attorneys which have but a Law-authority. And although Livery cannot be made to one in the name of him that is abſent, whereby any eſtate of Freehold ſhall paſſe to him that is abſent without Deed, becauſe his eſtate is onely to begin by the Livery: yet when a Leaſe is made to two without Deed, the remainder for life, the Leſſees preſently have an Intereſt in the Land before Livery made; and therefore Livery made to one who hath an Intereſt in the name of him, and the other, is good and ſufficient to that purpoſe. Trin. 39 Eliz. in the Exchequer, *Cook* 5. Part, 95. *Barwick's* Caſe.

29. A Copyholder in Fee made a Letter of Attorney to two Tenants of the Manor, to ſurrender his Copyhold to the uſe of J. S. and his heirs, who at the next Court brought the Surrender in Court, and did accordingly; no Cuſtome being found to warrant ſuch Surrender: It was Reſolved, 1. That the Surrender was good, becauſe he might do ſo *de Communi jure* without alledging of any Cuſtome. 2. Reſolved, That the Attorney ought to purſue the manner and form of the Surrender. 3. Reſolved, That when any one hath an authority to do an Act, he ought to do the ſame in the name of him who gives the authority. And it was Reſolved, That in the principal Caſe, the Attorneys had purſued their authority: for when they had ſhewed their Surrender in Court, then *authoritas eis per praedict. Literas attornat.* they Surrendred; which is a good purſuit: for it is no more then if they had ſaid, We as Attorneys do ſurrender, &c. *Cook* 9. Part, 76, 77. *Combes* Caſe.

30. The Lord *Dacres* Caſe was this; *William* Lord *Dacres* made a Feoffment in Fee to *Thomas* and *Leonard Dacres* his Sons, upon Condition, to make a Feoffment over to *Thomas Dacres*, and to one *Middleton*: But it ſo happened, That before *William* had delivered his Deed of Feoffment to *Thomas* and *Leonard*, that they had delivered their Deed to Parſon *Dacres* and *Middleton*, with a Letter of Attorney to one to make Livery. Afterwards, *William* delivers his Deed, Livery was then by vertue of the Letter of Attorney. It was adjudged in this Caſe, That the Livery was void, becauſe at the time of their Feoffment they had nothing to paſſe: For if a man makes a Feoffment in Fee, and a Letter of Attorney to one to make Livery, before himſelf hath any eſtate to paſſe, ſuch a Livery made is cleerly void. The Lord *Dacres* Caſe vouch. in *Butler* and *Finches* Caſe. Bulſt. 2. Part, 302, 303.

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2. *Where a man ſhall plead a Feoffment by the name Compriſed in the Deed, and the Land ſhall paſſe, although miſ-named; Where not. Where, of Acres by the name of a Manor; Where not.*

1. IN a Writ of Entry in *le quibus* of 70. Acres of Lands in H, the Tenant pleaded, That J. S. was ſeiſed in Fee, and demiſed the Land to him for life: The Demandant entituled himſelf, *abſq; hoc quod J. S. demiſit modo et forma.* And it was found, That J. S. and 6. others were ſeiſed of the ſaid 70 Acres, and of a houſe in H. to the uſe of G; which houſe and Lands had been from time to time called by the name of W; and that the ſaid J. S. and the others, joyned in a Leaſe of the ſaid houſe, called W, with the appurtenances to the Tenant: It was holden by the Court, That the ſaid 70 Acres did paſſe with the ſaid houſe, by the *per nomen* of the houſe called W, with the appurtenances. Hill. 5 Ma. *Dyer* 158.

2. An Aſſiſe was brought of Lands in *Middleſex*; The Defendant pleaded a Leaſe for years to him

him made by one *F.* by the name of a Meſſuage in *Surrey*, and of all the Land lately with that demiſed, and averred that to be the Land in the Plaint. It was the Opinion of the Juſtices upon the Leaſe for years, the Lands in both Counties ſhould paſs, but otherwiſe of an Eſtate for life, for that there muſt be ſeveral Liveries: But the Court agreed, It had bin a better form to have pleaded, That *F.* was ſeiſed aſwell of the Lands in view, as of the houſe and demiſed, &c. *per nomen, &c.* Hill. 8 Eliz. *Dyer*, 248. See *Cook* 1. Part, *Inſtitutes* 228. See *Cook* 10. Part, in Dr. *Leyfields* Caſe.

3. A Prior made a Leaſe for life of the Demeans of a Mannor rendring rent; the Priory came to the King by the Statute of Diſſolution: and the King after the Diſſolution, made a Leaſe of the Mannor. It was adjudged in that Caſe, That by the Leaſe of the Mannor, the Rent and the Reverſion of the Demeans did paſs. M. 7 Eliz. *Dyer*, 233.

4. In an *Ejectione firmæ*, a Leaſe was pleaded of a Mannor; and Iſſue was joyned, *Quod non demiſit Manerium*, and a ſpecial Verdict was given, *ſcil.* That there were not any Freeholders, but divers Copyholders of the ſaid Mannor; and that the ſame was known by the name of a Mannor. It was adjudged in that Caſe, That although the ſame was not a Mannor in Law for want of Freeholders, and although the ſame was in pleading in an Action adverſary, and not amicable: Yet becauſe the Iſſue was found, and that in truth the Lands did paſs by the Leaſe, it was adjudged for him who pleaded the Demiſe of the Mannor. 23 Eliz. in B. R. *Vints* and *Durhams* Caſe.

5. The Lady M. Tenant for life of the Mannor of B. the Remainder in Fee to the Lady *Finch*, ſhe, and S. her Husband, and D, levyed a Fine to one of the Demeſnes, who grants and renders to D. for 50 years, the Reverſion to S. and his Wife, and her Heirs, with Proviſo in the Deeds, which directed the Fine, That the Reverſioner ſhall enter and hold Court: And it was averred, That this was known by the name of the Mannor of B. D. maketh his Son of three years of age, his Executor, and Adminiſtration was committed to T. S. and his Wife levy a Fine of all the Lands of the Wife in K. except the Mannor of B. to the uſe of the Wife for life, the Remainder to Sir *Moile Finch*. R. T. demiſeth to P. L. for 10 years: The Lady M. dyeth, P. L. entereth by vertue of a power and Revocation of new Uſes. S. with the aſſent of the Lady *Finch* his Wife, limiteth the Uſes to one who ouſteth P. L. and maketh a Feoffment to the uſe of the Lady *Finch* for life, the Remainder to H. F. in tail. P. L. re-enters, the Lady *Finch* dyeth, and H. F. for Rent behind, diſtreyns. There were many points Reſolved in this Caſe, which ſee *Librum*: amongſt which, one was, That at the time of the making of the Indentures, there was a Mannor in truth in the Lady M. for Term of her life, which was ſufficient to ſupport the name of a Mannor, and to make the Demeans and Services to paſs by that name; and there was no impoſſibility or repugnancy in the averment, that it was known and reputed a Mannor, for the avowant might have preſcribed, that the Demeans and Services have paſſed time out of mind, and have bin known by the name of a Mannor, for before the Fine it was ſo in truth; and after the Fine in reputation, *Cook* 6. Part, 63. Sir *Moile Finches* Caſe.

6. In an *Ejectione firmæ*, the Plaintiff declared of a Demiſe of 300 Acres of Lands *per nomen Manerii, Habendum Manerium, et cætera premiſſ. virtute cujus in Manerium et cætera premiſſ. intravit.* It was the Opinion of the Court, That it was well enough; but it had bin better if he had pleaded that *intravit* into the 300 Acres of Land. Mich. 14 Eliz. *Dyer*, 304.

7. The Mannors of A. and B. did lye in Dale and Sale: A Fine was levyed of the ſaid two Mannors *inter alia*, by the name of the Mannors of A. and B. 50 Meſſuages, 300 Acres of Land, 300 Acres of Meadow, *cum pertinenciis in diſtis villis*, with a render of a Rent of 50 l. *per annum*, with clauſe of diſtreſs *in diſtis Maneriis*, to the ſaid Husband and Wife for their lives, the Remainder to F. their Son in tail, the Remainder to the Wife and her Heirs: The Husband and Wife dyed: the Rent diſcended to F. as Son and Heir of the Wife. It was Objected, That the ſaid Rent was granted out of the ſaid Lands and Mannors, for the Fine is levyed of the two Mannors: And whether the Rent ſhould go out of the two Mannors only, or out of them and the other Lands, was the Queſtion. *Fenner* Juſtice held, That the *Per nomen* ſhould go to the Mannors only, and ſhould not extend to the *inter alia*. For if a man in pleading ſaith, That I. S. was ſeiſed of 20 Acres of Land, and thereof (*inter alia*, did enfeoff him *per nomen* of *Green-mead*) the ſame ſhall not have reference to the *inter alia*, but only to the 20 Acres. But *Clench* and *Gawdy* Juſtices were of Opinion, That the *Per nomen* ſhould go as well to the *Inter alia*, as to the two Mannors, and that the *Per nomen* by the Fine, doth refer to all, which ſhews that other Lands paſſed by the Fines, then the two Mannors; and ſo ſhould be charged with the Rent, as well as the ſaid two Mannors. Trin. 33 Eliz. in B. R. *Weſton* and *Garsons* Caſe. *Lans.* 254, 255.

3. *Feoff-*

3. *Feoffments to Uſes; and to the uſe of his Will, how they ſhall operate, and be taken, and the conſtruction of them.*

1. HE E who is ſeiſed of Land, hath not only the Eſtate of the Land in him, but he hath alſo the right to take the profits, which is in the nature of an uſe: and therefore when he makes a Feoffment in Fee, without valuable conſideration, to divers particular uſes, ſo much of the uſe as he diſpoſeth not of, is to him, as his ancient uſe in point of Reverter: As if a man be ſeiſed of two Acres, the one holden by Knight-Service in priority, and the other by the ſame Service in poſteriority; and maketh a Feoffment in Fee of both Acres, to uſe of himſelf and his Heirs, the old uſe continueth in him, and the priority and poſteriority doth remain. So it is of Lands of the part of the Mother: For if one maketh a Feoffment in Fee of them, to the uſe of him and his Heirs, the uſe ſhall go to the Heirs on the part of the Mother: And ſo it is of Lands of the Cuſtome of Gavelkind, Borough Engliſh, &c. *Cook* 1. Part, *Inſtitutes*, 23. acc.

2. In Debt b ought upon an Obligation, The Condition of which was, to make an aſſurance of ſuch Lands to ſuch uſes as were in the ſaid Condition expreſſed: the Defendant pleaded, That he had made a Feoffment of the ſame Lands to other uſes then were in the Condition expreſſed, which the Plaintiff had accepted of; upon which Plea, the Plaintiff did demur in Law. And it was holden by the Court to be no good Plea, for that he ought not to vary from the uſes limited in the Condition. H ll. 14 Jac. in C. B. *Potter* and *Tompſons* Caſe. *Brownlow* 1. Part, 60.

3. In the Caſe between the Earl of *Bedford*, and *Eliz.* and *Ann*, the Daughters of *John* late Lord *Ruſſell*, the Caſe was: *Francis* Earl of *Bedford* made a Feoffment in Fee of the Manor of D. to the Lord St. *John*, and others, to the uſe of himſelf for 40 years, and after to the uſe of *John* his ſecond Son, and the Heirs Males of his body, and for want of ſuch iſſue, to the uſe of the right Heirs of the Feoffor for ever. Afterward *Edward* Lord *Ruſſell*, Heir apparant of the Earl, dyed without Iſſue of his body, having iſſue the ſaid *Eliz.* and *Ann*. Afterwards the ſaid *Francis* by Indenture between him and the Earl of *Cumberland*, and others for the advancement of the Heirs Males of the body of the ſaid Earl, and eſtabliſhing of his Mannors in his bloud, Covenanted with the Covenanters, to ſtand ſeiſed of the ſaid Mannor, to the uſe of himſelf for life, and after his deceaſe, to the uſe of *Francis* Lord *Ruſſell*, and the Heirs Males of his body; and for default of ſuch iſſue, to the uſe of Sir *William Ruſſell* his youngeſt ſon, and the Heirs Males of his body, with divers Remainders over: Afterwards *Francis* Lord *Ruſſell* dyed, having iſſue *Edward* now Earl of *Bedford*, and after he dyed: and if the Daughters of the ſaid *John* Lord *Ruſſell*, or the now Earl of *Bedford* ſhould have the ſaid Mannor of D. was the Queſtion. This Caſe was long debated in the Court of Wards. It was at laſt Reſolved, That the Daughters ſhould not have the ſaid Mannor, but the now Earl, principally upon this reaſon, That there was no right Heir to take as purchaſor when the mean eſtate tail was determined, which was by the Lord *John* dying without Iſſue Male, for they agreed, that the Remainder to the right Heirs, if it be a Remainder, cannot be preſerved by the mean eſtate for years, for it ought to be a Freehold at the leaſt, which ought to preſerve ſuch a Remainder until there be one to take it by name of a Purchaſor as right Heir. Mich. 34 and 35 Eliz. in the Court of Wards. The Earl of *Bedford* and the Lady *Eliz.* and *Ann Ruſſells* Caſe. *Popb.* 3.

4. A. ſeiſed of Lands holden in Socage, made a Feoffment thereof to F. his Son, in this manner, *viz.* to him and the Heirs of his body, to the uſe and behoof of him and his Heirs for ever: In this Caſe, two points were Reſolved. 1. That this was but an Eſtate in tail, and no Feeſimple. If at the Common Law, If a Feoffment was made to one, and the Heirs Males of his body, it was a Feeſimple Conditional; and afterwards, when the limitation is to the uſe of him and his Heirs, theſe are ſuch Heirs as were named before: and it was ſaid, That if a man be ſeiſed of Land to him and his Wife, and to the Heirs of him; who levyes a Fine without conſideration, it ſhall be to the uſe of ſuch Heirs as the eſtate was before. 2. It was Reſolved in this Caſe, That Tenant in Tail cannot ſtand ſeiſed to an uſe. See *Plow. Com.* 555. In *Walſingham's* Caſe. It is ſaid by *Manwood*, That if one be ſeiſed of Lands in Fee, and at this day makes a gift in tail to one, to the uſe of another in Fee, that the *Ceſtuy que uſe* hath a Feeſimple determinable upon the eſtate tail, and the Donor another. But note there by *Plowden*, that cannot be ſo by Law, for that an uſe cannot be limited upon an eſtate tail. See 24 H. 8. br. *Feoffment to uſes*. 40. See *Cook* 2. Part, 78. acc.

5. Note, by *Cook* Chief Juſtice, if a man make a Feoffment in Fee to the uſe of himſelf for life, and after his deceaſe, to every one of his Iſſues Females, and to the Heirs of their bodies, and after to the

Issue of one Daughter for one time, of a second Daughter at another time, and of another Daughter at a third time; so that this doth vest severally in them; yet afterwards in them all, that in this Case, they are Joynt-Tenants, and yet they come in at several times. See in the Case of *Blanford* and *Blanford*. Mich. 13 Car. *Bolstr.* 3. Part, 101.

6. If a man seised of Lands in Fee, makes a Feoffment in Fee to the use of such person and persons, and for such estate and estates as he shall appoint by his Will: In that Case it was holden, That by operation of Law, the use vests in the Feoffor, and he is seised of a qualified Fee, viz. until declaration and limitation be made according to his power: and so when a man makes a Feoffment to the use of his last Will, he is in the mean time seised to the use of him and his Heirs. *Cook* 6. Part, 18. in Sir *Edward Clere's* Case.

7. Upon Evidence to a Jury upon an Issue, if a Will or no Will; the Case was, A Copyholder surrendred to the use of his last Will, and whether the Land did pass by the surrender, or by the Will, was the Question. It was the Opinion of the Court, That the Will is only Declaratory, declaring the uses of the surrender, and nothing doth pass by the Will, but all by the surrender, like the Case where one Covenants to stand seised to the use of his last Will, or makes a Feoffment to the use of his last Will, nothing passeth by the Will, but by the Feoffment: the Issue in the principal Case was, *Condidit Testamentum necne*, and not *Condidit Testamentum modo et forma*, for *si Condidit tunc declaravit, si non condidit, non declaravit*, as was said by *Williams* Justice: And in the principal Case, the Jury found that he made the Will. Pasc. 10 Jac. in B. R. *Semains* Case. *Bolstr.* 1. Part, 200.

Feesimple. *See more Title* Estates.

What are sufficient words to create a Feesimple; What not. Of Base Fee, and Fee determinable; and where an Estate of Freehold shall be discendable; Where distinct Fees in one and the same Land: And where one Feesimple may depend upon another; where not.

1. A Man had Issue three Children, viz. A. B. and C. and by his Will Devised, That after his Debts paid, he giveth all his Goods, Lands, and Moveables, unto his three Children equally betwixt them. Two points in the Case. 1. What estate the Children had. 2. Whether they were Joynt-Tenants, or Tenants in Common. It was Resolved for the first point, That they have Estates but for their lives: for consideration of bloud is not so effectual consideration, as consideration of money. For if I Bargain and sell my Land for consideration of money, without expressing any estate, the Bargainee hath a Feesimple: but if in consideration of natural affection, I Covenant to stand seised to the use of my Son, and do not express any estate, the Son is but Tenant for life; and the Court doubted if any Land did pass, for the Will is, That after all his Debts paid, he giveth all his Lands; and therefore if any Lands should pass, they were only such as were lyable to debts, and no other should pass; and if the Devisor had a Term, then that no Land at all should pass. But for the second point, all the Court agreed, That they were Tenants in Common; but if the Lands had bin devised to two equally to be divided betwixt them, then they had bin Joynt-Tenants. Mich. 31 Eliz. in C. B. *Dickons* and *Marshes* Case. *Goldesbr.* 183.

2. *Cestuy que use* after the Statute of 27 H. 8. devised Land to his Wife for life, and after her decease, that his eldest Son should have the Land 10 l. under the price it cost, and if he dyed without Issue of his body, then his two Daughters should have the Land, paying the value thereof to the Executors of his Wife. The Question was, What Estate the Son had in the Land after the death of the Wife: It was objected, That he should h[ave]

but an Eſtate in tail in the Land, and that ſubject to the Condition; and *Frenchmans* Caſe, 2 Eliz. *Dyer*, and 34 Eliz. one *Atkins* Caſe, were vouched to that purpoſe; but the Court inclined to be of Opinion, That he had a Feeſimple in the Land diſcharged of the Condition, for that if the Woman had died inteſtate, there was no perſon to whom the payment ought to be made. Hill. 43 Eliz. in C. B.

3. A man ſeiſed of Lands in Socage, having a Wife, 2 Son, and three Daughters, deviſed the ſame to his Son after the death of his Wife; And if my three Daughters do fortune to overlive their Mother, and my Son, then I deviſe the ſame Lands to them for their lives, and after their deaths, I do give them to my Nephews A. and B. and that they and their Succeſſors ſhall pay 3 l. rent yearly to the Company of Merchant Taylors *London* for ever, and if they fail of payment, then I deviſe that the ſaid Company ſhall have the ſaid Lands for ever: The firſt point was, Whether the Son by the Will had an Eſtate tail, or a Feeſimple. It was Reſolved for this point, That the Son had but an eſtate Tail, and not a Feeſimple: For here, when the Deviſe is to the Son after the death of the Wife, and if the three Daughters ſurvive the Wife and the Son, and his Heirs, then the Deviſe is to them for life, with the Remainder over, this had bin a Feeſimple in the Son if it had not bin for the limitation of the Remainder over; but by the limitation of the Remainder over, his intent appears, that it ſhould be an Eſtate in tail in the Son: The ſecond point was, What eſtate the two Nephews had, the deviſe being to them, that they and their Succeſſors ſhould pay ſo much yearly. It was agreed, That the word, Succeſſor, was a good word to make a Feeſimple in a private perſon, becauſe the Heir *ſuccedit patri*: And if a man deviſeth Lands to a private man and his Succeſſors, the ſame is a good Feeſimple, eſpecially in the Caſe of a Deviſe, and alſo they ſhall have a Feeſimple, by reaſon of the words, and annual payment. And of that Opinion was the whole Court, That the Nephews had an Eſtate in Feeſimple, and ſo it was adjudged. Hill. 13 Jac. in B. R. *Web* and *Herains* Caſe. *Bolſtr.* 3. Part, 194, 195.

4. Note, It was agreed by the Court, That if Lands be given to one and his Heir, the ſame is a Feeſimple, becauſe the word Heir, is *Collectivum*. Mich. 6 Jac. in B. R. *Godbolt.* 155.

5. Upon a ſpecial Verdict, the Caſe was; A man ſeiſed of Copyhold Lands in Fee, deviſeable by Cuſtome, deviſed them in this manner, I give and bequeath my Lands, &c. to my Son *Ric.* during his natural life, and after to the Heirs of his body for ever: the Queſtion was firſt: If it was a Feeſimple, being limitted in the ſingular number to the Heir for ever? It was objected, That he hath expreſſed no particular eſtate, but for life; and the word Heir in the Remainder, ſhall not be taken *Collectivè*, but *ſingulariter*: And to that purpoſe, *Cook* 1. Part, *Archers* Caſe was vouched, But it was Reſolved by the Court, That the Deviſe of the Copyhold, is a Deviſe to the Heirs of the Father, and ſo a Feeſimple, and that the party comes not in as a Purchaſor. Paſc. 1650. in B. R. *Powſley* and *Lowdall's* Caſe. *Styles*, 273.

6. In *Ejectione firmæ*, the Caſe was, a man ſeiſed of Lands in Feeſimple, and of Goods and Chattels, to the value of 5 l. only in D. deviſed to his Wife *totum ſtatum ſuum, viz.* his whole Eſtate, paying his Debts and Legacies, and his Debts and Legacies did amount to the value of 40 l. the Queſtions were, 1. Whether the Lands paſſed to the Wife by the Will, or not. 2. What Eſtate paſſeth to her in the Lands. It was the Opinion of the Court. 1. That the Lands did paſs, for ſo he ſaid the common underſtanding imports, and the words do go to the value of the Eſtate. 2. It ſhall be an Eſtate in Feeſimple, and the words paying his Debts and Legacies, doth inforce this conſtruction, for they are to be paid preſently, which cannot be, if the Lands do not paſs in Fee: And the Court ſaid, That when we ſay, A man is a man of great Eſtate, we mean his Eſtate in Lands, as well as in goods. Paſc. 1650. in B.R. *Kirman* and *Johnſons* Caſe, *Styles* 293.

7. Upon a Special Verdict, the Caſe was, A man deviſeth his Lands to his Wife for life, the Remainder to A. B. and C. and their Heirs reſpectively for ever: Whether A. B. and C. were Joynt-Tenants, or Tenants in Common, was the Queſtion. It was objected, That they were Joynt-Tenants; for every Will muſt be clear and conſpicuous, but it is not ſo here; and the word Reſpectively, hath relation to the ſurvivorſhip, which may happen betwixt the parties; and a Deviſe to one and his Heir, is a Feeſimple. But it was the Opinion of the Court, That here is a Tenancy in Common, and that it ſhall go throughout, and ſhall not be divided, and the intent of the Deviſor appears in the Will, that every one ſhall have his part, and their Heirs, for here is a proviſion made for Children, and the word Reſpectively would be idle, if another Conſtruction ſhould be made, and would ſignify no more then what the Law ſayes without it. See 36 and 37 Eliz. *Lewis* and *Dodds* Caſe, which was affirmed, Paſc. 41 Eliz. in the Exchequer-Chamber, equally divided, maketh a Tenancy in Common, and not a Joynt-Tenancy. Trin. 1653. in B. R. *Torret* and *Frampons* Caſe. *Styles*, 434, 435.

8. Tenant

8. Tenant in tail, the Remainder in tail, the Reversion to the right Heirs of Tenant in Tail; Tenant in tail bargained and sold the Land to J. S. and his Heirs, and afterwards levyed a Fine with Proclamations unto the Bargainee with Warranty, the Conusee made a Feoffment in Fee, he in the Remainder had Issue, and dyed, Tenant in Tail dyed without Issue. In this Case, it was Resolved amongst other points, That by the Bargain and Sale, the Bargainee had an Estate in Fee, discendible to his Heirs, determinable upon the death of Tenant in Tail, and had the Reversion expectant upon the Remainder in Tail, and the Wife of the Bargainee should be endowed. *Cook* 10. Part, 98. *Ed. Seymers* Case.

9. Note, It was Resolved in *Cook* 8. Part, in *Mannings* Case, That a man by his Will may create an Interest, which by Grant or conveyance by the Common Law he could not creat in his life: As a man devised a Mannor to his Executors for the payment of his Debts, and untill his Debts were paid: And the Question was, What Estate the Executors had. It was Resolved in that Case, That the Executors had but a Chattel, and no Freehold in the Lands, for if they should have a Freehold in the Lands, then their Estates should be determined by their deaths, and should not go to the Executors of the Executors, and so the Debts should remain not paid, but the Law shall adjudg the same a particular Interest in the Land, which shall go to the Executors of the Executors for the payment of his Debts, but if such an Estate had bin by grant, or conveyance, the Law would have adjudged it a Freehold. 36 Eliz. in C. B. Sir *William Cordells* Case, vouched in *Cook* 8. Part, 96. in *Matthew Mannings* Case.

10. A. Granted a Rent to F. by Fine, *Habendum* to him and his Assigns during the life of C. the Wife of the Grantor; and if the Rent were behind, that it should be lawful for F. and his Heirs during the life of C. to distreyn: F. devised the Rent, and dyed; The Question was, If the Grantor should retain it as occupant, or the Grantee should have it. It was the Opinion of the Lord *Dyer*, That the Devisee should have it, by reason of the Clause of Distress, and that the Grantee had Freehold in the rent, determinable upon the death of C. Hill. 9 Eliz. *Dyer*, 253.

11. A. seised of Lands in Fee, having issue three Sons, viz. B. C. and D. devised his Lands to C. his second Son, and his Heirs *in perpetuum*, paying to his brother D. 20 l. at his age of 21 years; and if C. dyed without Issue living, B. his Brother, that then B. should have those Lands to him and his Heirs and Assigns for ever, paying the said sum as C. should have paid; C. entred, and suffered a common Recovery, to the use of himself and his Heirs, and after he devised the Lands to J. S. and his Heirs, and dyes without Issue, living B. who enters upon J. S. The Questions were these. 1. If C. had an Estate in Fee, or Fee-tail. 2. Admitting he had a Fee, Whether the limitation to B. were good to limit a Fee upon a Fee. 3. If C. hath a Fee, and B. a possibility only to have a Fee, whether the Recovery should bar B. It was Resolved for the first point, That C. had an Estate in Fee, for it is devised to him and his Heirs *in perpetuum*, and also paying D. 20 l. 2. They agreed that it was a good limitation of the Fee to B. by way of contingency, not by way of immediate Remainder, for they agreed it cannot be a Remainder; as if one devileth Lands to one and his Heirs and if he dye without Heir, that it shall remain to another, it is void and repugnant to the Estate; for one Fee cannot be in Remainder after another Fee, but by way of Contingency, or Executory Devise to another, to determine the one Estate, and limit it to another. 3. It was Resolved in this Case, That the Recovery should not bar his Executory Devise to B. Hill. 17 Jac. in B.R. *Pell* and *Browns* Case. *Cro.* 2. Part, 591.

12. A man made a Feoffment in Fee to two, to the use of himself and his Wife for their lives, the Remainder after their decease, to J. the son of the Husband for his life; and by the same Deed *vasit et concedit*, that after their three lives, J. S. and J. D. and other Feoffees should be seised of the same Land to them and their Heirs, to the use of the right Heirs of the body of the Son. It was holden in this Case, That the second Feoffees had not the Fee, because by the first part of the Deed, the Feesimple was given to the first Feoffees, and one Feesimple cannot depend upon another Feesimple; but that after the determination of the former uses for life, the Feesimple should be vested again in the Heirs of the Feoffer, and that the words, That the second Feoffees should be seised, should be void. Pasc. 23 Eliz. in C. B. *Godbolt.* 7.

Fines levied.

Upon what Writs a Fine may be levied; What not. Where, of another thing then the Original makes mention of: Where, by a ſtranger to the Original, and to the party, ſhall be good: Where not conſtrued to other Lands, then are mentioned in the Deed: and to what Towns or Pariſhes a Fine ſhall extend; To what not.

1. BY the Statute *De modo levandi finis*, It appeareth, That a Fine cannot be levied without an Original Writ. And the Law will not ſuffer that a Fine be levied in any of the Kings Court, without an Original Writ. And upon every Original Writ by which the Land is to be charged or bound, or which in any ſort doth concern Land, a Fine may be levied: as in a *Precipe*, in a *Warrantia Chartæ*; in a Writ of *Meſne*, in a *Quid juris Clamat*; in a *Per Que Servitia*; in a Writ *de rationabilibus diviſis*, Covenant, and the like, a Fine may be levied. *Cook* 5. Part, 39. *Ty*'s Caſe.

2. A Fine may be levied upon a Writ of Right Patent, and a Rent which was not in *eſſe* granted thereby; and ſo it may be upon a Writ of Cuſtomes and Services. 19 E. 4. 5. 21 E. 3. 18. *Fitz. Droit.* 10. See Comment, on Originall Writs, 99.

3. Note. It was ſaid by *Knivet*, in caſe of a Record removed out of *Cheſter*; That a Fine levied in Auncient Demeſne, is not good; for that it is no Court of Record: Or if the men of the Town preſcribe to hold Plea, or to make proteſtation in the nature of any Writ they will; yet they cannot levy a Fine in a Writ of Right upon Covenant, &c. for the Action is real, and the Proteſtation is perſonal, and therefore if it be not expreſly to levy a Fine, it is a great Queſtion, if it be good: and yet the Grant there in the principall Caſe, was by Charter, *Quod habeant Executionem prædictorum et quod in omnibus actionibus placitari poſſent*, by Writ of Right Patent, and made proteſtation in the nature of any Writ: And yet the Opinion of the Court was, That they could not levy a Fine there in a Writ of Right, without expreſſe words ſo to do. 44 E. 3. 38. 50 Aſſ. 29. *Fitz. tit. Fines*, 104.

4. A Fine was levied in a Writ of Covenant, of an Advowſon, *ſur Conuſans de Droit tantum*, with a grant and a rendor of the next Preſentation to the Conuſor; and of the ſecond Preſentation to the Conuſee, and ſo to preſent by Turns: and the Fine and Render were holden good. 44 E. 3. 35. in a *Quare Impedit*. See 9 Eliz. *Dyer*. 259. acc.

5. A Fine was levied upon a Writ of Cuſtoms and Services, Where it is repeated, That there was a contention for Mariage and Caſtle gard: the Lord *Conceſſit, quod ſit quietus de prædict. Servitiis ſalvis omnibus aliis ſervitiis, &c.* Paſch. 2 Eliz. *Dyer* 179, 180.

6. A Writ of Right Cloſe was brought, by the Iſſue in tail in Auncient Demeſne, and he made Proteſtation to ſue in the nature of a Writ of *Formedon*: The Defendant pleaded in barr a Fine there upon a Writ of Covenant *ſecundum Conſuetudinem Manerii*: and Judgment was there for the Fine, againſt the Iſſue in tail: Whereupon he brought a Writ of Falſe Judgment in the Common-Pleas: for that ſuch Fine levied there by Cuſtome, was no barr, being againſt the Statute *De donis Conditionalibus*. It was the Opinion of the Court, That if they ſhould reverſe the Judgment, the Iſſue could be reſtored but to his Action there: and if ſo, they would then adjudg again there according to their Cuſtome. Note: In this Caſe, I obſerve, That a Fine there was levied upon a Writ of Covenant brought there in Auncient Demeſne. Mich. 23 Eliz. *Dyer* 373.

7. Tenant for life, the remainder in tail; the remainder in tail Tenant for life levied a Fine with him in the remainder *ſur Conuſans de droit come ceo* of the land to another in Fee, who rendred a Rent of 40 l. unto the Tenant for life, which was another thing then the land, and it was good. And it is there holden, That if Tenant in tail, and one A. levy a Fine of land to a Stranger, who granteth and rendreth the Land to A. for years, rendring Rent, and by the ſame Fine grants the Reverſion to Tenant in tail, and his heirs, it is good, although that all be by one Fine, and at one inſtance. *Cook* 1. Part, 76. in *Bredon*'s Caſe.

8. It is agreed by Indenture betwixt the parties, That a Fine be levied of certain Lands by the name of certain numbers of Acres to divers perſons, and that they ſhall grant and render the land again in Fee-ſimple, which ſhall be to certain uſes: the Fine is levied of the land, but ſome variance is in the number of Acres comprized in the Fine, or the Fine is levied to one of the parties onely who granteth and rendreth the land, ſo as there is variance betwixt the Covenant and the Fine in number and perſon; yet that fine ſhall be good, and ſhall be averred to be to the uſes comprized in the Indenture; for the Original Grant

and Bargain of the parties was declared: and although ſome variance be in Quantity, time, perſon, or the like, yet the Law will ſuffer an Averment to be to agree the Fine and the Indentures, notwithſtanding there be ſome ſmall differences in Circumſtances, times, perſons, and the like. *Cook* 2. Part, 76, 77. in the Lord *Cromwell*'s Caſe.

9. A. and B. ſeiſed for the life of the Wife as her Right, the remainder unto E. in tail, the remainder to the ſaid E. in Fee: A. and B. his Wife levied a Fine *ſur Conuſans de droit come ceo* to E. with Proclamations, who granted and rendred a Rent of 27 l. to the Conuſors for the Term of their lives, with clauſe of diſtreſſe; afterwards E. dyed, & the Lands diſcended to D. her Son and heir in tail, who leaſed the Land to B. for years; and afterwards A. dyed. In this Caſe it was Reſolved, 1. That againſt ſuch Fine accepted by Tenant in tail, the Iſſue might aver continuance of Seiſin by force of the taile; and the Iſſue in tail is not eſtopped by the admittance and acceptance of his Auncеſtor. 2. That the grant and render of the Rent was not within the Statute of 4 H. 7. or 32 H. 8. becauſe the Fine was not levied of the Land it ſelf, but of a Rent created out of the Land. See 3 & 4 Eliz. *Cranſhyes* Caſe, vouch. in *Cook* 5. Part, 98. in the Caſe of Fines.

10. A. ſeiſed of Lands in Fee, levied a Fine to B. and C. and to the heirs of B; who granted and rendred the ſame unto A. and his Wife, who was not party to the Writ or Conuſans, and to the heirs of the body of A: A. ſuffered a Recovery with vouchers in the life of his Wife, and afterwards dyes; the wife dyed: he in the Remainder brought a *Scire facias* to have Execution of the Remainder. In this Caſe it was Reſolved, 1. That the grant and render to the wife was not void, but voidable, although ſhe was not party to the Conuſans, or to the Writ. 2. That this Recovery, had againſt the husband alone, did not barr the remainder, and the Joynture was not ſevered by the Recovery againſt the husband alone. 27 Eliz. in C. B. *Owen* and *Morgan*'s Caſe, vouch. in *Cook* 3. Part, 6. in the Marqueſſe of *Winchеſter*'s Caſe.

11. Note, It is ſaid, That the Law ſuppoſeth the Vouchee is Tenant of the Land, where in truth he is not; but the ſame is to be intended as unto the Demandant himſelf, and to enable him to do all things as to the Demandant; which the Demandant may do to him: and therefore a Fine levied by the Vouchee to the Demandant, Or a Fine or Releaſe from the Demandant to the Vouchee, is good; but a Fine levied by the Vouchee to a ſtranger, is void. 7 E. 4. 13. *Cook* 3. Part, in *Butler* and *Bakers* Caſe, 29. acc.

12. A. and his Wife levied a Fine to J. S. of a Rectory, who granted and rendred a Rent Charge of 30 l. iſſuing out of the ſame to A. for life, to begin after the death of his wife. Proviſo, That it ſhould not extend to charge the perſons of the Conuſees, but to charge the ſaid Rectory only during the life of A, and rendred the Rectory to A. and his wife, during the life of his wife, the remainder to J. D. and his Wife in tail; the remainder to the right heirs of J. D: A. acknowledged a Statute to B: the wife of A. dyed: In this caſe it was Reſolved amongſt other things, 1. That this Fine levied of another thing then was originally mentioned in the Writ, was good. 2. That the Rent extinct ſhould be in *eſſe* as to a ſtranger. *Cook* 7. Part, 38. *Lillingſton*'s Caſe.

13. A man was Tenant in tail of certain Lands called *Eſtons*: and a Fine was levied of Lands in *Eſtlington*, *Eſton*, and *Chilford*: whereas, *Eſton* lay in another Pariſh called *D*: It was ſaid in this Caſe, That the Lands in *Eſton* did paſſe by the Fine, although the Pariſh was not named; for that the Writ of Covenant is a perſonal Action, and will lye of Lands in a Hamlet, or place known, And it was ſaid, That that Plea was only to the abatement of the Writ: but when a Concord is upon it, which admits it good, it ſhall not be avoided afterwards: And 17 Jac. in B. R. it was adjudged in *Monk* and *Butler*'s Caſe, That a Fine being but an Arbitrary Aſſurance, would paſſe Lands in a *View Conuſ.* And it was ſaid, That if a *Scire Facias* be brought to execute a Recovery in ſuch a Caſe, *Nul tiel Ville* or Hamlet, is no good Plea. And of that Opinion was the whole Court. Mich. 8 Car. in B. R. *Eveley* and *Eſton*'s Caſe, *Godbolt* 440.

14. In *Eſſoine Firme*, the Caſe was, There were two Towns, viz. A. and B. in the Pariſh of B; and a Fine was levied of ſuch Lands in B: and whether the Lands in *Walton* in A. did paſſe by that Fine, was the Queſtion? the Action being for them only. It was Reſolved, That they ſhould not paſſe: for B. being a diſtinct Town by it ſelf, and A. being a diſtinct Town by it ſelf, and ſo found by verdict: although B. the Pariſh comprehends both; yet in the Fine, the Lands in A. ſhall not be ſaid to be compriſed, unleſſe A. had been a Hamlet of B, and that the Fine had been levied of Lands in the Pariſh of B; then all had paſſed. Trin. 4 Jac. in B. R. *Stark* and *Fox*'s Caſe. *Cro.* 2. Part, 120.

15. In Treſpaſs: For that in a Cloſe called *Arſcomb* in *Barwick St. John*, he chaſed his Cattel: The Defendant juſtified for Damage Feaſant: The Plaintiff replyed, That the Cloſe contained 100. Acres, and time whereof, &c. was known by the name of *Arſcomb*; and that the Lord *de la Ware*, ſeiſed thereof, granted Common of Paſture to

B.S. and his heirs, for 20 Beasts in *Arscomb*. The Defendant pleaded, That there was no such Vill or Hamlet, or place known out of any Vill or Hamlet, called *Arscomb*. The Question was, Whether a Fine might be levied of a Close by a known name in a Town, without mentioning the Town or Hamlet where it lyes? It was Resolved, The Fine is good enough; for it is but the agreement of the parties, although there be neither Town or Hamlet mentioned where it lyes. Pasch. 17 Jac. in B.R. *Monk* and *Butler*'s Case, *Cro.* 2. Part, 574. See Sect. before.

16. A. and his wife were seised of Lands in St. *Edith*, in the County of C, called K. by the gift of W. D. to them and the heirs of their two bodies begotten between them. Afterwards a Fine *sur Conusans de droit, &c.* was levied by the Son and heir of W. D. to A. of the Manor of *Sale*, and of 100. Acres of Lands, 300 Acres of Pasture in D, and St. *Edith*, and divers other Towns, who granted and rendred the same back to the said Son of D. in tail, with divers remainders over: After which, the possession of K. continued in the heirs of A, according to the first Entail: and the Manor of D, and the Lands in those Towns, to the Son of D, and to his heirs. And upon the Opinion of *Manwood* Chief Baron, by *Nisi Prius*, in the County of C; the Lands in K. were recovered by virtue of the said Fine against the heir of A, because all the Lands which the said Son of D, and the said A. had in the said Towns named in the Fine, were not sufficient to supply the Acres contained in the said Fine. It was agreed by the Chief Justices, and others to whom this Case was referred, That nothing should be said to be rendred, but that which indeed was given by the Fine; and that K. did not passe to the said A: for as to it, the Fine is but as a Release of the Son of D, and therefore shall not be said to be rendred to the said Son by the Fine, where no matter appeareth. Whereby it may appear, that it was the intent of the parties, that this should be rendred. And in this Case it was agreed, That if a man be to passe the Manor of D. to another by Fine executory, and he levy a Fine to him by the name of the Manor of D, and of so many Acres of Land in D. and S, being the Towns in which the Manor lyeth; after which, the Conusor purchaseth other Lands in these Towns, The Fine shall not be executed of those Lands purchased after the Conusans; and the Fine shall work only to those which he had power and intent to passe, and no further. Hill. 38 Eliz. *Kelly*'s Case. *Popham*, 104, 105.

17. A Writ of Covenant to levy a Fine, was prosecuted Jan. 23. returnable *Octab. Purif.* The *Dedimus Potestatem* bore date the 23. of Jan. The Judge certified the Concord taken 14. Feb. which was two dayes after the Term; at which time the Writ of Covenant was not depending: And the Fine was thus; *viz. Hac est Concordia facta in Octab. Purif.* And afterwards it is recorded in Pasc. 15; Yet the Opinion of the Court was, That it was a good Fine, Mich. 3 Car. C.B. Sir *Richard Champion*'s Case. *Hutton*, 135.

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2. *Of the perfecting of Fines: and when they shall be ingrossed; When not. And when a Fine shall not be said perfect for want of Proclamations made upon it: and how imperfect. And when and where Fines shall be well executed; Where not: And what shall be a good Execution of them; What not.*

A Fine *Sur Conusans de Droit* was levied between A. and B, 2 & 3 *Ma.* of certain Lands in W. C. and E: upon which Fine, 4. Proclamations were made every Term; but the 13th Proclamation appeared to be made 7. *Junii* in Trinity Term, 2 & 3 Ma. which in truth was not *Dies juridicus*. And that matter was assigned for Error to reverse the Fine: And, If the whole Fine should be reversed, or the Proclamations only, was the Question? It was the Opinion of all the Justices, That the Fine should stand, and that the Proclamations should onely be reversed: for the Statute of 4 H. 7. doth not ordain any new form of Fine, but the old form doth continue; so as the Fine doth remain as it was before the said Act in form and substance: and when the Statute gives to the party (if he will) Proclamations upon the Fine, the same is to give Notice unto strangers: and the Fine of it self is a matter of Record perfect and full before the Proclamations be passed, and shall bind the parties, and the right of the Land betwixt them. Mich. 5 Eliz. *Fish* and *Brabt*'s Case. *Plow. Com.* 265. See *Dyer*. 181. acc.

2. A Fine was levied by Tenant in tail, with 15 Proclamations only; and one of the Proclamations was made out of Term. In that Case it was adjudged, That the Proclamations only should be reversed, and that the Fine should stand in force, and that it should be a Discontinuance. Trinit. 4 Eliz. *Dyer*, 216.

3. Part of Trinity Term was adjourned: *scil. Octabis 15. & Tres Trinitatis*: so as there was but *two dies juridicus* in that Term. It was a Question, If Fines levied and ingrossed that part of the Term,

Term, ſhould be allowed, as if Proclamations had been made according to the Statute of 4 H. 7. It was Reſolved, That they ſhould, by the Equity of the Statute of 1 Ma. Cap. 1. Mich. 3 Eliz. *Dyer* 186.

4. In a *Formedon* in the Diſcender, a Fine with Proclamations, levied 30 H. 8. was pleaded in Bar: the parties were at Iſſue upon *Nul tiel Record*, and day given to bring in the Record: and at the day the Tenant had the Record; but in the 5, 6, 7, 8. Proclamations which were made in Trinity Term, the year of the King was omitted. It was the Opinion of the Court, That the ſame was no failer of the Record; for it cannot be intended, that the 5, 6, 7, 8. Proclamations could be made in any other year, then in the 30. year of H. 8. For the year of Eaſter Term is expreſſly declared, which did precede the 4 Proclamations of Trinity Term: and the later 8. Proclamations in Michaelmas, and Hillary Term after, are expreſſed to be in Anno 30 H. 8. wherefore it followeth neceſſarily, that the ſaid Proclamations were made in the 30 H. 8. and ſo the party hath not failed of his Record. Mich. 7 Eliz. *Dyer* 234.

5. A Writ of Covenant to levy a Fine, was returnable in *Craſtino Purificat.* one of the middle returns of the Term, and the Concord was made and recorded the ſame *Craſtino*, as it ought to be, and the third day after, *viz.* before the 4th day after the firſt proclamation was made. It was holden to be well; for *die Craſtino* is the return-day; and the 4th day after is but a day of grace: But if it had been returned *Octab. Hill.* then the Court doubted of it, becauſe the Juſtices ſit not, being the firſt return of the Term, till the 4th day: and the Statute of 4 H. 7. is, that the Fine ſhall be levied, and proclamations made in full Court. Hill. 10 Eliz. *Dyer* 269.

6. Note, in the Caſe of Fines, *Cook* 3. Part, 87. It was Reſolved by all the Juſtices, and Barons of the Exchequer; If Tenant in tail levieth a Fine, although by the death of Tenant in tail, a right of the Eſtate tail doth diſcend to the Iſſue; if the Tenant in tail dyed before the Proclamations were paſt; yet when the Proclamations paſſe without any claim made by the Iſſue in tail upon the Land, the right which diſcendeth to the Iſſue is barred by the Statute of 4 H. 7. & 32 H 8. For, although the Fine without the Proclamations, nor the Proclamations without the Fine, can barr an Eſtate tail; and although that after the Fine levied, and before all the Proclamations be paſſed, a right is diſcended to the Iſſue in tail *per formam Doni*, which is paramount the Fines; and there is no Fine with Proclamation levied after the death of Tenant in tail, to barr the right ſo diſcended to the Iſſue in tail: Yet foraſmuch as it is provided by the Statute of 32 H. 8. That all Fines levied with Proclamations of any Lands, Tenements, or Hereditaments ſo entailed to the perſons ſo levying the ſame, or to any of his Auncеſtors in Poſſeſſion, Reverſion, or Remainder, or in Uſe, ſhall be immediately after the Fine levied, ingroſſed, & Proclamations made, adjudged a ſufficient barr againſt the ſaid perſons and their heirs, claiming the ſame only by force of ſuch entail: therfore by the expreſs letter of the ſaid Act of 32 H. 8. the Iſſue in tail ſhall be barred. *Cook* 3. Part, in the Caſe of *Fines*, 87. acc.

7. Tenant in tail, the remainder in tail, the reverſion in fee; Tenant in tail in remainder, levied a Fine to one and his heirs: the Conuſee before the Ingroſſing of the Fine, brought a *Quid juris Clamat* againſt Tenant for life, who pleaded, That the Conuſor was but Tenant in tail in remainder. It was holden in that Caſe, That albeit before the Statute of 4 H. 7. & 32 H. 8. the ſame was a good Plea; yet after the ſaid Statutes, which made a Fine a barr to an Eſtate in tail. It was adjudged to be no Plea: and therefore the Tenant for life was forced to attorn. See 28 Eliz. Juſtice *Windham's* Caſe, vouch. in *Cook* 3. Part, 86. in the Caſe of *Fines*.

8. A Fine was levied of divers Manors, Lands, and Tenements, with divers Renders; and in the third render, all the Tenements were given to one, and in the 4th render, the ſame thing was given to ſeveral Perſons, and for ſeveral Eſtates. The Queſtion was, If the Fine were erronious? It was Reſolved in this Caſe, That the 4th render, as to that which was conveyed in the third render, ſhould be of the ſame Quality, as a Charter, or other Conveyance between party and party, and need not have ſuch a preciſe form as a Writ or a Judgment. And in that Caſe it was ſaid, That there were 5. parts conſiderable in every Fine: 1. The Original Writ; for that upon every Fine there ought to be an Original Writ. 2. There ought to be a Licence to agree; which is a Fine due to the King, and is called the Kings Silver, which he is to [redacted] in when the Land repoſeth. 3. The Concord, which is the Foundation of the Fine: and if upon that, the Kings Silver be entred, although the party dyeth who is the Conuſor, yet the Fine is good, and well levied. 4. There is the Note of the Fine, which is but an Abſtract out of the Original and Concord; and ſom times, the Note is taken for the Concord. And laſtly, there is the foote of the Fine, and that includes the whole Fine; as the day, place, and before whom the Fine was acknowledged. Trin. 34 Eliz. in B. R. *Cook* 5. Part, *Tey's* Caſe.

9. A. made a Feoffment in Fee to the uſe of himſelf, and D. his Wife, and the heirs of their two bodies, the remainder to the right heirs of the husband;

husband; they had Iſſue M; and A. dyed: M. and R. her husband joyned in a Fine in Confirmation of the Eſtate of M, and dyed without Iſſue. Now R. and D. and one J. S. Coſen and heir of M, brought Errour to reverſe the Fine; and aſſigned for Errour, that after the Conuſans, and before that, Certified and Engroſſed, *viz.* the 25th of *March*, which was before the *Teſte* of the *Dedimus Poteſtatem*, M. dyed: It was holden by the Juſtices, That they ſhould not be ſuffered to alledg that for Errour, being contrary to the Record and Certificate of the Juſtices, before whom the Fine was levied. Mich. 1 Ma. *Dyer* 89. *Verney*'s Caſe.

10. In a *Quid Juris Clamat* brought, the Tenant appeared, and claimed Fee in 10 Acres, being part of the Land of which the Fine was levied; and as to the reſidue he attorned: and notwithſtanding that a Preſident was ſhewed, That in a *Per Que Servitia*, Where it was found, That one of the Tenants named in the Writ, did not hold any of the Land, and therefore the Fine was engroſſed only as to the Reſidue: Yet in the principal Caſe it was awarded by the Court, That the whole Fine ſhould be ingroſſed without any forſprize of any of the Land. Paſch. 4 Eliz. *Dyer*, 212.

11. After the Teſte of a Writ of Covenant, to levy a Fine and *Dedimus Poteſtatem* to take Conuſans of a Fine of a *Feme Sole*, and before the day in Bank, to record and engroſſe the Fine, the woman took husband: Notwithſtanding which, It was the Opinion of the Court, That the Fine ſhould be recorded as the Fine of a *Feme Sole*; for ſhe had done all that which was in her to do. And it was holden, That the ſaid Fine ſhould bind her and her heirs: but if ſhe had dyed in that Caſe, It was holden, That the Writ of Covenant ſhould have abated, it being done by the Act of God; but not in this caſe, it being the Act of the party her ſelf. Mich. 8 Eliz. *Dyer* 246.

12. Grandfather, Father, and two Daughters: the Grandfather levied a Fine *come ceo*, with Proclamations in *Cheſter*, with a Render to himſelf for life, the remainder to the Father, and his heirs males, the remainder to the eldeſt daughter in tail, the Grandfather dyed, and the Father dyed without Iſſue male, the eldeſt daughter entred; the youngeſt daughter in her own name, and in the name of her eldeſt ſiſter, as Coſens and heires of the Grandfather brought a Writ of Errour to reverſe the Fine, which was retto ned with the Record; but the eldeſt daughter appeared not; upon which ſhe was ſummoned and ſevered, and a *Scire facias* iſſued forth againſt the heir of the Conuſee. Divers Errours were aſſigned, 1. For default of Entry, and not payment of the Kings Silver in the Roll: But it appeared, that it was aſſeſſed. 2. Becauſe the Concord was not ſigned by the Juſtices, who took the Conuſans as the Courſe is in the Common-Pleas. 3. For default of Entry of the Note of the Fine: as is uſual in C. B. and remains with the Chirographer. In the principal Caſe there was no *Scire facias* againſt the Tenant of the Land. It was holden, That the Plaintiff ought to have had a *Scire facias* againſt the Terr-Tenant; for that if the Tenant be ouſted, without being warned, he might have an Aſſiſe; and perhaps he might have a Releaſe to plead. But nothing was then Anſwered to thoſe Errours aſſigned: But afterwards a *Mandamus* was awarded *Cancellario de Ceſtria*, to warn the Terr-Tenant *ad audiendum* Errors. And afterwards, notwithſtanding the Errors before alledged, the Fine was awarded to be good. Hill. 15 Eliz. *Dyer*, 321.

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3. *Where, and what right in Lands a Fine ſhall bar; what not: And where, and in what Caſe a Fine levyed by Tenant in Tail, with Proclamations, ſhall bar the Iſſue in Tail; what not. Where by Huſband and Wife, ſhall bind the Wife. And where it ſhall bind a Stranger if he make not his claim within five years: Where not.*

1. A. Seiſed of Lands, deviſed them to his Wife for life; and when J. his Son ſhould come to the age of 25 years, then he ſhould have thoſe Lands to him, and the Heirs of his body, and dyed, the Son before he came to the age of 25 years, levyed a Fine thereof in Fee, and after he came to the age of 25 years, and had iſſue a Daughter, the Daughter entred: the Queſtion was, Whether this Fine levyed by the Father, before any thing was in him, ſhould bind the Daughter. It was objected, That this matter being found by Verdict, ſhould not, but otherwiſe if it had bin in pleading. But it was the Opinion of *Anderſon* and the whole Court, though it was found ſo by Verdict, and not in pleading, yet the Fine ſhould bar the Daughter, and ſhe cannot plead, that *partes finis nihil habuerunt*. Mich. 31 Eliz. in C. B. *Johnſon* and *Carliles* Caſe. *Goldesbr.* 107.

2. If the Husband ſell his Land by Fine with Proclamations, and live five years, and after dyes, his Wife being ſole, and of full age, and of ſound memory,

memory, out of Prison, and within the four Seas, and do not make any demand or claim of her Dower within five years after the death of her Husband; It was Resolved by the whole Court, That she shall be barred of her Dower. M. 40 Eliz. in C. B. *Goldesbr.* 148.

3. This Question was demanded of the Court by *Cook*; If there be Disseisor and Disseisee, and during the Disseisin, when the Disseisee hath nothing in the Land but a right, he levies a *Fine* thereof to a stranger: If by this *Fine* the Right of the Disseisee be gon, and if the Disseisor shall take advantage of it. It was the Opinion of *Gawdy* and *Popham*, That it should not bind his Right, and the Disseisor should not take advantage of it. Hill. 43 Eliz. in B. R. *Goldesbr.* 162.

4. A Lease was made of Lands 20 H. 8. for 80 years; afterwards the Lessee dyed intestate, and 4 *Ma.* a Fine was levyed of the Land with Proclamations, the Conusee held the Land untill 37 Eliz. and then Letters of Administration were granted of the goods of the Lessee. It was said in this Case, That the right of a Term is not within the Statute of 4 H. 7. but a Right of Freehold and Inheritance, and so it was said, it was agreed in *Stamfords* Case, 21 Eliz. *Gawdy* and *Fenner* Justices at first held, That a Lease for years should never be bound by the Statute of 4 H. 7. and therefore that the Administrator might lawfully enter. But *Fenner* afterwards demanding the Opinion of the Lord *Anderson* in this Case, he was clear of Opinion, That the Statute of 4 H. 7. did extend to bind a right of a Term, if the Lessee were or might have ever bin in possession before the Fine was levyed. Hill. 43 Eliz. in C. B. *Coots* and *Atkinson's* Case. *Goldesbr.* 171.

5. Husband and Wife, the Wife being within age, levyed a Fine of the Land of the Wife; A *Precipe quod reddat* was brought against the Conusee, who vouched the Husband and Wife, and they appeared in person, and vouched over the Common Vouchee, and after made default. One Writ of Error was brought to reverse the Fine, and another Writ of Error to reverse the Recovery by reason of the nonage of the Woman. The Court was of Opinion to reverse the Fine, but doubted of the Recovery, because they appeared in person and vouched. But afterwards upon Examination, it was found, That the Recovery was before the Fine; and so the Court held, That the Recovery did not give away the Error in the Fine, and afterwards it was reversed. Hill. 43 Eliz. in C. B. Sir *Henry Jones* Case. *Goldesbr.* 181.

6. A Copyhold estate was granted to one for life, the Remainder to another for life, the first Copyholder accepted a Bargain and Sale of the Freehold from the Lord, and after that, levyed a Fine with Proclamations, and five years passed; and if this Fine should be a bar to him which had the Copyhold estate for life in Remainder, was the Question. And it was Resolved by all the Justices, That the Fine should not be a bar to the Copyhold Estate in Remainder, for the acceptance of the Bargain and Sale, doth not determine the first Copyhold Estate for life, as to him in the Remainder, but only as to the first Tenant and the Lord; and here is nothing done to turn the Copyhold Estate in Remainder into a Right, for then it should be barred, otherwise not; and here the first Estate for life shall be said to be in *esse*, notwithstanding the acceptance of the Bargain and Sale as to all strangers, and here the Custome preserves the Copyhold Estate in Remainder, and no act made by the particular Tenant can prejudice that: As if a Copyhold Estate be granted to one for life by one Copy; and after the Lord grants another estate to another for life by another Copy, and then the first Copyholder commits a forfeiture, he that hath the second estate, cannot take advantage of that, but the Lord shall hold it during the life of the first Tenant, for no act of the particular Tenant shall prejudice him in the Remainder. Pasc. 10 Jac. in C. B. *Bicknell* and *Tuckers* Case. *Brownlow*, 2. Part, 153.

7. A seised of Lands in Fee, conveyed them to the use of B. his son, and E. his Wife, and the Heirs of their two bodies for the Joynture of the Wife; A. dyed, B. and E. his Wife enter, and have issue P. their eldest Son, and F. their younger Son. B. dyes, E. takes a second Husband J. S. they for money allien, Bargain and sell all their right to P. and his Heirs, but no Livery is made: P. by Indenture bargains and sells the Lands for money to J. D. and levyes a Fine with Proclamations to the said J. D. to the use of him and his Heirs: The sole Question in the Case was, Whether this Fine by P. the eldest Son, in the life of his Mother, Tenant in tail, and he dying without Issue in the life of his Mother, should bar T. the second Son or not. It was Resolved by the whole Court, and so after confirmed in a Writ of Error brought in the Exchequer-Chamber, That this *Fine* levyed by the eldest Son, who was never seised by force of the intail, should not bar the entail, for that such *Fine* is not within the Star. of 32 H. 8 or 4 H. 7. For although he be inheritable to the tail, and if he had survived, his *Fine*, had bin a bar to his brother; yet forasmuch as he dyed in the life of his Auncestor, and never had the estate tail, the younger brother shall never mention him in a Formedon in the Discender; he never being any Auncestor to whom the Land was entailed. Trin. 11 Car. in B. R. *Braidock* and *Stowells* Case. *Cro.* 1. Part, 314.

8. Note,

8. Note, It was agreed, where one is Leſſee for years, and aſſigns over his Leaſe in truſt for himſelf, and afterwards purchaſeth the Inheritance, and occupyeth the Land, and then levyes a *Fine* with Proclamations, and the Leſſee doth not claim his Leaſe within the five years, this *Fine* and Non-claim ſhall bar the Intereſt of the Leſſee, although he who levyeth the *Fine*, hath the Poſſeſſion by reaſon of the Truſt; but this Truſt is incloſed in the *Fine*, and the Truſtee not making claim, his intereſt is barred thereby. Paſc. 4 Car. in C. B. *Iſcham* and *Morrices* Caſe. *Cro.* 1. Part, 77.

9. A man made a Leaſe for years to begin after the end of another Term for years then in being, the firſt years ended, the ſecond Leſſee did not enter, but he in the Reverſion entred, and made a *Feoffment*, and levyed a *Fine* with Proclamations, and five years paſſed after the Proclamations without entry or claim by the ſecond Leſſee for years. In this Caſe it was Reſolved. 1. That the ſecond Leſſee was barred of his Term by the Statute of 4 H. 7. of *Fines*, for although that Leſſee for years, hath not an eſtate that he may levy a *Fine*; yet becauſe the words of the Statute are general, and extend to all, and the words of the ſaving are (ſuch right claim and intereſt), and he who hath a Term for years, hath an Intereſt, and alſo becauſe he is within the miſchear. It was Reſolved, That his Intereſt, and the Intereſts of all Tenants by Statute-Merchants, Staple, Guardian, or Executors, are bound by the ſaid Act of 5 H. 7. and bound by the *Fine*, for all have Intereſts in the Land. 2. Reſolved, That by the ſaid *Feoffment*, the ſecond Leſſee had but a right, and when his future Intereſt did commence in the Land, then he had a preſent eſtate in the Land, which might be deveſted, and which he might reveſt by his entry. Paſc. 3 Jac. in C. B. *Croke* 5. Part, 123. *Saffins* Caſe.

10. Tenant for life, the Reverſion to W. R. in Fee, an Ideot: A. R. his Uncle levyes a *Fine* with Proclamations to J. S. and had Iſſue J. who had Iſſue W. R. and dyed: W. R. the Ideot dyed without Iſſue, *William* the Defendant entred as Heir to him, *viz.* Son and Heir of J. Son and Heir of A. R. and whether he might claim againſt this *Fine* of his Grandfather, was the Queſtion. It was Reſolved by the Juſtices, That this *Fine* by A. R. the Uncle of *William* the Ideot, who was ſeiſed of the Inheritance, ſhould not bar *William* the Defendant, who was Grandchild of the ſaid A. R. becauſe he claims nothing by or from him, but only from *William* the Nephew of A. (who ſurvived the ſaid *Andrew*), and he makes his title as Heir to the ſaid *William* the Nephew who was laſt ſeiſed, not making mention of A. as one from whom he claims, but only as drawing his diſcent from him by way of Pedigree, and not by way of Title. Trin. 14 Car. in B. R. *Edwards* and *Rogers* Caſe. *Cro.* 1. Part, 377. 390.

11. A. Tenant for life, to him and the Heirs Males of his body, the Reverſion to B. his eldeſt Brother: A. makes a Leaſe for three lives, warranted by the Statute of 32 H. 8. with Warranty againſt all perſons. Afterwards A. levyes a Fine of thoſe Lands with Warranty againſt all perſons to J. S. and afterwards dyes without Iſſue Male, having iſſue E. a daughter. After the death of A. B. dyed without iſſue, the ſaid E. being his Neece and Heir, the Leaſe for three years expired, the Leſſee of J. S. entred. The Queſtions in the Caſe were, 1. Whether this Warranty in the Fine (admitting that it was not with any Proclamations, and no non-claim) ſhould make a Diſcontinuance in Fee, and be a bar to E. or whether the Warranty were determined by the death of A. It was the Opinion of the Juſtices, That the Warranty continued, and was a bar unto her, for by the Eſtate for life, it was diſcontinued, and A. had a new Fee; and then when he by Fine grants that Reverſion with warranty, it is annexed to the Fee, and binds him who hath right, for the Reverſion being deveſted and diſplaced, the *Fine* & Warranty ennures thereupon, and by conſequence, although the Warranty did not diſcend upon B. who had the right of Reverſion, but upon E. yet when B. was dead without Iſſue, the right diſcended to E. and ſhe is barred by the *Fine*. 2. Reſolved, That this *Fine* and Non claim for five years, ſhould bar E. the Daughter. For when B. who had right at the time of the death of A. without Iſſue Male, did not proſecute that title, it is a bar, and he ſhall not have the advantage of entry after the death of the Tenant for life, becauſe he hath then no other Title then he had before, for his Title was by the death of Tenant in tail, without Iſſue Male, and then he might have brought his *Formedon*. Hill. 20 Jac. in B. R. *Salvin* and *Clarks* Caſe. *Cro.* 1. Part, 111.

12. A. ſeiſed of Land, deviſed the ſame to J. an Enfant, of the age of three years in Fee, by the name of his Tenement, called the white *Swan*, and dyed, J. S. enters, and levyes a *Fine* thereof, 16 Jac. with Proclamations in the life of J. being within age, who afterwards dyed, being within age, the Wife of B. being his Siſter and Heir: It was ſaid, That this *Fine*, although five years paſſed without claim, ſhould not hurt the Wife of B. eſpecially ſhe being a Feme-Covert, becauſe ſhe claimed by a Deviſe and before entry, the *Fine* is levyed: But the Court conceived, Though a Diſcent in that Caſe ſhall not bind, yet a *Fine* and Non-claim, which is a binding Law, ſhall bar the Husband who ſuffered the five years to paſs, and all claiming under him, and the Wife during the Coverture. But the Wife ſhall

ſhall have new five years after the death of the Huſband. Mich. 16 Car. in R.R. *Hulin* and *Heylocks* Caſe. *Cro.* 1. Part, 91, and 145.

13. Husband and Wife ſeiſed of Land in the right of the Wife, the Husband and Wife both joyned in an Exchange of the Lands with a ſtranger for other Lands, which Exchange was executed, the Husband and the Wife ſeiſed of the Land taken in Exchange, alliened the ſame by Fine. It was the Opinion of the Juſtices, That the Wife after the death of her Husband, might enter into her own Lands, notwithſtanding the Exchange and the Fine. And it was compared to the Caſe 19 Eliz. *Dyer*, 358. The Husband after Marriage, aſſured to his Wife a Joynture, they both levyed a *Fine ſur Conuſans de droit come ceo, &c.* of the gift of the Husband: Where it was holden, the ſame was not any Bar of her Dower, for that Election is not given to the Wife to claim her Joynture or Dower, until after the death of her Husband. Hill. 28 El. in C. B. *Leon.* 285.

14. Tenant in tail, the Remainder in tail; Tenant in tail in poſſeſſion, made a Leaſe for three lives, according to the Statute of 32 H. 8. and afterwards dyed without Iſſue, he in the Remainder before any entry, levyed a Fine of the Land with Proclamations: It was the Opinion of the whole Court, That the ſame was good: for, by the death of Tenant in tail without Iſſue, the Freehold was veſted in him in the Remainder in tail. Mich. 20 El. in C. B. *Leon.* 268.

15. An Enfant of the age of 20 years, and three Quarters, and who wanted but 9 Weeks of full age; Commiſſioners appointed for the taking of a Fine, took a Fine of him, not having notice that he was within age, and by Inſpection they could not perceive whether he was within age, or not, he being alſo in Ward to the King. In the Exchequer they took a Recognizance of him of a great ſum, that he ſhould not convey his Lands to any one unleſs by aſſent and order of that Court. In this Caſe, it was ſaid, That this was a fault in the Commiſſioners, but not a crime: And as for the Recognizance, it was ſaid, That if he bring an *Audita Querela* upon this, they will redreſs it, for that the Law hath made a kind of perpetuity for the preſerving of the Lands of an Enfant during his Minority, ſo as he cannot during this time convey away his Lands by Fine or otherwiſe. The Fine was reverſed. Hill. 12 Jac. in *Cam. Stellat. Requeſts* and *Regiſters* Caſe. *Tolſtr.* 2. Part, 320.

16. A. and B. his Brother, being Tenants for life, the one in Remainder after the other, the Remainder to T. their Nephew in tail, to bar this entail, 1. *Oct.* 25 Eliz. made a Leaſe for years, with agreement, that the Leſſee ſhould make a Feoffment of this Land, who accordingly made the Feoffment. Afterwards A. releaſed to the Feoffee with Warranty; and afterwards B. releaſed to the Feoffee with Warranty, both which Warranties diſcended upon T. in the Remainder. It was Reſolved in this Caſe, That both the ſaid Warranties did commence by diſſeiſin, the Feoffment being made by Covin. But then it was moved, That if T. in the Remainder after this Diſſeiſin, not knowing of the Diſſeiſin, had levyed a Fine to a ſtranger; Whether that ſhould bar his right, and ennure to the benefit of the Diſſeiſor. It was conceived by the Court, That it ſhould not bar his right, nor ſhould ennure to the benefit of the Diſſeiſor; but it ſhould ennure to the benefit of the Conuſor, for otherwiſe a Diſſeiſin, being ſecret, might be a courſe of Diſinheriſin of any one, who intends to levy a Fine for his own benefit for aſſurance of his Lands upon his Wife and Children, or otherwiſe. Mich. 13 Car. in B. R. Sir *John Fitzherbert* and Sir *Ed. Fitzherberts* Caſe. *Cro.* 1. Part, 347.

17. A. and his Wife acknowledged a Fine, 26. *Martii* 1611. before Commiſſioners by *Dedimus poteſtatem*, and the Wife dyed the next day after in the ſame Moneth, and the 28th day of the ſame Moneth, a compoſition was made in the Alienation Office, upon a Writ of Covenant made in *Hill.* Term before, and the Kings Silver was entred in the Office of the Kings Silver, as of the ſame *Hill.* Term, ſo as the Fine was paſſed and engroſſed. It was moved by the Heir of the Wife to avoid his Fine, as not duly acknowledged and levyed; but upon debate of the Court, it was Reſolved, That the Fine ſhould ſtand, and that it ſhould bar the Heir of the Wife. Mich. 18 Jac. in C. B. *Farmers* Caſe. *Hob.* 330.

18. A Fine was levyed by Tenant in tail after the Statute of 4 H. 7. and Proclamations paſſed, and five years incurred after Tenant in tail dyed: The Queſtion was, Whether the Iſſue ſhould be barred as privy, becauſe he is to make his conveyance by his Father, or that he ſhall not be reputed *per formam doni*; and then his right is ſaved by the ſecond ſaving in the Statute, becauſe he is the firſt to whom the right diſcended after the Fine was engroſſed. It was agreed in this Caſe, That if he to whom the Remainder in tail, or other title firſt accrued ſuffered five years to paſs without claim, that this Lacheſs of the Anceſtor ſhould bar the Iſſue. Paſc. 19 H. 8. *Dyer*, 3.

19. Tenant for life of Land leaſed parcel thereof to hold at Will, and being in poſſeſſion of the reſidue, levyed a Fine of the whole, the Leſſor entred into the Land which was let at Will in point of forfeiture in the name of the whole: In that Caſe it was holden a good entry for the whole. But if the Diſſeiſor leaſeth for years part of the Land whereof the Diſſeiſin was committed, and the Diſ-

ſeiſee afterwards entreth into the Land, which continueth in the poſſeſſion of the Diſſeiſor in the name of the whole, the ſame entry ſhall not extend to the Land leaſed, for here the Leſſee is in by Title, but in the other Caſe not: For when Tenant for life leaſeth it at Will, and afterwards levyes a Fine, the ſame is a determination of the Will. And in that Caſe, it was holden, That if there be Leſſee for life, the Remainder for life, the Remainder in Fee, and Leſſee for life in poſſeſſion levyeth a Fine *ſur Conuſans de droit, &c.* to his own uſe; upon that Fine, a Feeſimple accrues. Paſc. 29 Eliz. in C. B. *Potter* and *Steddalls* Caſe. *Leon.* 51.

20. Tenant in tail, and one A. levyed a Fine to a ſtranger, who granted and rendred unto A. for years, and by the ſame Fine, granted the Reverſion to Tenant in tail and his Heirs. It was adjudged, That the Leaſe was good, and ſhould bind the eſtate tail, for in Judgment of Law, the Leaſe did precede the grant of the Reverſion, although it was by one and the ſame Fine. *Cook* 1. Part, 76. in *Bredons* Caſe.

21. Land is given to the Grandfather and his Wife in ſpecial tail, the Grandfather dyeth, the Father Diſſeiſeth the Grandmother, and levyeth a Fine with Proclamations, the Grandmother dyeth, the Father dyeth: It was adjudged, That the Son was barred, and yet the Father at the time of the Fine levyed, had but a poſſibility to the eſtate tail. 20 Eliz. *Arthers* Caſe, acc.

22. Note, it was Reſolved, That the King, Tenant in tail by the gift of any of his Auncеſtors, being ſubjects, might by Fine levyed upon Grant and Render, bar the Eſtate tail: But in ſuch Caſe, it is good that the Conuſee have Letters Patents to Grant by expreſs words, that he may enter into the Land, for the Fine being Executory upon a Grant and Render, it may be doubted if the Conuſee without ſuch a Grant, might enter upon the King. See *Cook* 7. Part, 32. acc.

23. If one pretending title unto Land, entreth, and diſſeiſeth another, and afterwards to the intent to bind the Diſſeiſee, levyeth a Fine with Proclamations, this Fine ſhall bind the Diſſeiſee if he doth not enter, nor bring his Action within five years, and the ſame cannot be ſaid a Fine levyed by Covin, becauſe the levying of the Fine is lawfull, and the Diſſeiſee may re-enter, or bring his Action within the five years.

24. A Diſſeiſor levyes a Fine with Proclamations, a ſtranger within the five years, enters in the right of the Diſſeiſee, without the privity or conſent of the Diſſeiſee. It was adjudged, That that entry made by the ſtranger, ſhould not avoid the Fine, becauſe it is not a purſuing according to the Statute of 4 H. 7. of Fines. Mich. 38 Eliz. in B. R. *Pollard* and *Lutterells* Caſe. See *Poph.* 108.

25. In a Formedon brought by the Iſſue in tail, the Defendant pleaded in Bar, and confeſſed the Eſtate tail, but ſaid, That before the death of Tenant in tail, J. S. was ſeiſed in Fee, and levyed a Fine to him, and five years paſſed. It was adjudged, That upon this general Plea, it ſhall be intended, That J. S. was in by Diſſeiſin, and ſo the Fine a good bar to the Iſſue. 18 Car. in B. R. *Taylers* Caſe, *Marſh.*

26. A man Bargains and Sells a Reverſion, and afterwards levyes a Fine thereof to the Bargainee and his Heirs, and afterwards the Deed is enrolled. Yet in that Caſe, it was adjudged, That the Bargainee ſhould be in by the Fine, and not by the Bargain and Sale, and the enrollment of the Deed, although the ſame ſhall avoid mean Charges upon the Land, yet it ſhall not deveſt the Eſtate which was ſetled before by the Fine. *Cook* 4. Part, 71. *Hinds* Caſe.

27. Note, It was Reſolved in the Court of Wards, Where there is Tenant for life, the Remainder in tail, and he in the Remainder levyes a Fine to the Tenant for life and her Husband upon a *Conceſſit Tenementa, &c.* to the Husband and Wife, for the life of the Wife, and dyes after Proclamations, That it was not any Diſcontinuance or bar of the tail, but during the life of the Tenant for life, nor is it any bar or alteration of the entail after that eſtate determined. Mich. 1 Jac. in the Court of Wards. The Earl of *Rutlands* Caſe. *Cro.* 2. Part, 40.

28. A. granted a Rent of 20 l. *per annum* out of Lands to B. his Heirs, and Aſſigns, to be paid at two dayes, with clauſe of diſtreſs, and for further aſſurance, covenanted to levy a Fine to J. S. and J. D. which ſhould be to the uſes in certain Indentures: And further Covenanted, That then, and from thenceforth, if the Rent ſhould be behind in part, or in all, and no diſtreſs upon the Land, that then it ſhould be lawful for the Grantee, his Heirs, and Aſſigns, to enter into the Land, and retain the ſame until he ſhould be ſatisfied the Rent; J. S. dyed before the Fine levyed, the Grantee aſſigned the Rent over to W. his Heirs, and Aſſigns, who ſold the ſame to F. afterwards 10 l. of the Rent was behind; and afterwards the Fine was levyed to the ſaid uſes; the Aſſignee of the Rent for the Rent arrear, before the Fine levyed, came to diſtrein. There were many points in this Caſe Reſolved; ſee *Librum* at large: One Queſtion was, Whether the Aſſignee ſhould have benefit of ſuch contingencies as happened in the interim before the Fine levyed; and whether the Aſſignee ſhall now come to have the uſe of the Land to ariſe to him by reaſon of a thing which happened before the Fine was levyed, which was 10 l. Rent behind; And whether he ſhould have ſuch an eſtate in the Land

&c.

of which he might make a Leaſe for years. In all which, the Court was divided in Opinion, and the Point was not Reſolved. Mich. 14 Jac. in B.R. *Magrtill* and *Hores* Caſe. Intratur. Hill. 13 Jac. B.R. rott. 968. *Bolſtr.* 3. Part, 251, 252. See *Cook* 2. Part, 510. p. 22. the ſame Caſe.

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4. *Of what a Fine may be levied, and of what not; and by whom, and by whom not: And where a Fine levied, ſhall be void; Where not: And for what Cauſes, or defects it may or ſhall be reverſed; What not.*

1. A Fine may be levied of an Advowſon: And this appeareth by the Book, of 6 E. 3. 54, 55. Where Controverſie being betwixt the Abbot of S. and *Theobald C.* concerning the Advowſon of the Church of *Preſton*; In 6 R. 1. a Fine was levied before the Biſhop of *Canterbury* and Biſhop of *Rotcheſter*, then Juſtices of the Court of Common-Pleas, betwixt the ſaid Abbot and the ſaid *Theoband*; by which the ſaid Abbot did grant the ſaid Advowſon to the ſaid *Theoband* and his heirs for ever; ſo as upon every Preſentation by *Theoband* or his heirs, they ſhould pay to the Abbot and his Succeſſors, an annuity of 10 l. *per annum*. Upon which Fine afterwards, the Succeſſors of the Abbot brought a Writ of Annuity againſt *Thurſtan de Holland*, Parſon of *Preſton*. See 6 E. 3. 54. vouch. in *Cook* 8. Part, 145. in *Davenports* Caſe.

2. Note: A Fine may be levied of a Rent, and a grant and render made by the Fine of a Rent. *Cook* 2. Part, in the Lord *Cromwell's* Caſe. And it is there ſaid, That at the Common-Law before the Statute of 27 H. 8. of uſes, If a man had made a Feoffment in Fee to another, by Deed indented rendring a Rent, and with Condition to re-enter: And farther it were Covenanted and agreed between the parties, That notwithſtanding any Fine or other Conveyances made by the Feoffor to the Feoffee, by which the Rent and Condition ſhould be extinct, that the Feoffee and his heirs ſhould be ſeiſed, to the intent that they ſhould pay the like rent, and to be ſeiſed of the Land upon the like Condition as they were before, in this Caſe, If the Feoffor had levied a Fine, or releaſed his right, or made any other Conveyance unto the Feoffee, by which the Rent or Condition were extinct: yet by original agreement of the parties a new rent, and a new Condition ſhould riſe, and the Feoffor ſhould have remedy in equity preſently for the Rent. See *Cook* 2. Part, 78. in the Lord *cromwell's* Caſe.

3. A Fine was levied of 40 Meſſuages, 20. Tofts, 1000. Acres of Lands, and 40 s. of Free Rent, with the appurtenances in *Kinſbury*, *Holt*, *Walcot*, and *Swindon*, *Cook* 3. Part, 45. in Sir *George Brown's* Caſe.

4. A Fine was levied of the Advowſon of the Church of *Capel*, and of 4 l. Rent, with the appurtenances in *Stow*, *Capell*, *Brockerton*, &c. *Cook* 1. Part, 54. in Sir *Hugh Capell's* Caſe. See 1 Jac. *Arundell* and *Arundell's* Caſe, acc.

5. A Fine was levied of a Dove-houſe, 2. Gardens, 1 l. 6 s. 4 d. rent, and of the rent of 4. Capons, and one pound of Wax, with the Appurtenances in *Stow* Market, *Newton*, *Gipping*, &c. 7. Part, 38. *Cook* 4. Part, 67. in *Bedons* Caſe.

6. A Reverſion ſhall paſſe in a Fine by the word, *Right*; for that is all the right which he hath to it, 27 H. 6. 5.

7. A Fine was levied of a Rectory, out of which a Rent of 30 l. *per annum* was rendred, *Cook Lillington's* Caſe.

8. A Fine was levied of a Reverſion: and ſee there, how that it muſt mention the particular Eſtates. *Cook* 6. Part, 68. in Sir *Moile Finches* Caſe.

9. If a Fine be levied by an Enfant, if it be not reverſed during his minority, it is unavoidable in Law, and the heirs of the Enfant have not any remedy to reverſe it: and the reaſon of it is, for that the age of an Enfant is not to be tryed, but by Inſpection of his perſon: for if it ſhould be otherwiſe tryed then by Inſpection, no man ſhould be ſure of his Inheritance; for after the death of the Conuſor, averment may be made many years after that the Conuſor was within age at the time of the Fine levied; and ſo Records ſhall be made void by meer averments: But if an Enfant do levy a Fine within age, he may have a Writ of Errour during his Non-age; and reverſe the ſame for the ſaid Cauſe: and it ſhall be tryed by the Inſpection of the Enfant by the Judges of the Law. Mich. 12 Jac. in *Cam. Stellat. Anne Haugates* Caſe. *Cook* 12. Part, 122.

10. *Robert Worſley* and *Katherine* his Wife, his Wife being within age, acknowledged a Note of a Fine before Commiſſioners by *Dedimus Poteſtatem*. It was averred, that the Commiſſioners did know, that the ſaid *Katherine* was within age. Every one of the Commiſſioners was fined: but the Fine ſtood effectuall in Law, Mich. 25 Eliz. *Chandiſh* and *Worſley's* Caſe.

11. One *Alexander Gilderbrand* being ſeiſed of Lands in *Windham* in the County of *Norfolk*: one A. procured one B, who was in his Cuſtody in

his house, to take upon him the name of the said *Alexander Gildebrand*, who was then beyond Sea; and to acknowledg a Fine of the said Lands to the said A: the Parties were fined for that unlawfull Act in the Star-Chamber, in a very great fine to the Queen: but there was no sentence given to draw off the said Fine from the File, or damages awarded to the said *Alexander*, who was the party grieved, Mich. 39 Eliz. in *Cam. Stellat.* See *Cook* 12 Part, 123.

12. A. seised of Lands in Fee, devised the same to B. his son in tail, the remainder to C, and because his Son was within age, he devised the Education of him to J. S, whom he made his Executor: The Son afterwards became a deformed Cripple, and became an Idiot à *Nativitate*: The Infant was taken out of the Custody of his Guardian, and kept in Secret, untill before Justice *Southcote* he acknowledged a Fine to the use of the Conusee and his heirs. This matter was tryed before the Justices of the Common-Pleas, in an Action brought against one *Mansfield*, who claimed the Lands under this Fine. And the deformed Ideot was brought into Court upon mens shoulders to be shewed to the Jurours there. The Lord *Dyer* and the Court by Consent of the parties, caused a Jurour to be withdrawn: but notwithstanding all this, and although the monstrous deformity and Ideocy of B. was apparent; yet the Fine stood good. Mic. 12 Jac. *Cook* 12. Part, 123, 124. *Mansfield's* Case.

13. A. brought a Writ of Errour to reverse a Fine levied by his Auncestor, of 20. Acres of Lands: The Defendant in abatement of the Writ did plead, That the Plaintiff after the death of his Auncestor, did disseise the Defendants of the Land, and made a Feoffment to a stranger, and demanded Judgment of the Writ. The Plaintiff replyed, That they did re-enter upon him, without that, that he did enfeoffe a stranger *modo et forma*. And the Jury souud, That there was a Fine of 20. Acres, and that the Plaintiff being Disseisor of all, made a Feoffment of 6. Acres of it to a stranger. It was Resolved by the Court, That the Feoffment did not destroy the title of the Writ of Errour, for more then so much as the Feoffment was made of; and therefore gave Judgment, That the Fine should be reversed for that part of the Land onely whereof no Feoffment was made, and should stand good for the rest. 37 Eliz. in B. R. *Wright*, and the Mayor and Comminalty of *Wickombs* Case. *Owen*, 21.

14. If a woman who is an Inheretrix, Covenants by Indenture, without the knowledg or consent of the husband, to levy a Fine to certain Conusees and uses in the Indenture mentioned; and afterwards the husband Covenants by another Indenture, without the knowledg and consent of his wife, to levy a Fine to another Conusees and uses in that Indenture mentioned. And afterwards, the husband and wife joyn in a Fine to the Conusees in the Indenture of the Wife mentioned. In this Case, the limitations and declarations of the uses in both the Indentures are void, and the Fine shall be by Construction of Law to the use of the woman and her heirs, as if no use had been declared: For the Wife alone, although she be owner of the Land, yet being *sub potestate viri*, cannot limit the use on the one side: and the husband who hath not any thing in his own right, cannot, without the good liking of the Wife, limit the use of the Wifes Land; so the one is not *sui juris*, and hath an Estate; and the other is *sui juris*, and hath not the Estate; and therefore when they differ in the limitation of the uses, all which they do must be void. *Cook* 2. Part, 57. *Beckwith's* Case.

15. *Chenty* levied a Fine, and afterwards brought a Writ of Errour to reverse it, and assigned Nonage, and had a *Scire facias* against the Conusee; and upon two *Nihils*, the Court proceeded, and by Witnesses and Inspection reversed the Fine, 3 Eliz. *Dyer* 201.

16. Errour brought to reverse a Fine; The Errour assigned was, That the Writ of Covenant, and the *Dedimus Potestatem* were, That a Fine shall be *de Manerio de* P, and of 20 Acres of Land, and 40 s. Rent in P: and the Concord and the Fine is, *Quod Cognovit manerium et Tenementa predict. cum pertinentiis esse jus, &c.* leaving out the Rent; and so it varies from the Writ and Warrant of *Dedimus*. But the Court held it to be no Errour to reverse the Fine; For that the usual course of the Fine-Office is, That where a Fine is levied of a Manor and Rent, if it be under the value of 5 l. they never use to make any mention thereof in the Fine; but if the Rent do amount to 5 l. and more, then they use to mention it in the Concord of the Fine. Another Errour assigned, was, Because the *Dedimus Potestatem* was made *per Rogerum Manwood militem*; and *Roger Manwood*, who took the Fine, was not then a Knight. But this was Resolved to be no Errour, because it is directly against the Record which is not receiveable; for it is recorded as a Fine taken by him: And see in 1 Ma. *Dyer*, in *Venners* Case, An Errour was not suffered to be assigned, That the Conusor was dead before the time that the Conusans was certified to be taken, because it was expresly against the Judges Certificate, Mich. 1 Jac. in B. R. *Arundell* and *Arundell's* Case, *Cro.* 2. Part, 11.

17. Errour, to reverse a Fine levied by *Charls* Earl of *Devon*; the Writ was brought, as Cosen and heir of the Earl, and a *Scire facias ad audiendum*

dum Errores, and doth not ſhew in either of the ſaid Writs, how he was Coſen to the Earl, and for that cauſe the Defendant pleaded alatement of the Writ. But the Opinion of the Court was, That it was good enough, without ſhewing, How Coſen, in the Writ of Errour, or in the *Scire facias*: for the one is but a Commiſſion to hear the Errors, and needs not ſuch Certainty; and the other is but a Writ founded thereupon; nor is it requiſite, that the title be ſhewed therein, unleſſe it be in a ſpecial Caſe varying from the common courſe: And although in ſome Caſes and Writs, it is ſhewen, How Coſen, as in *Vernon's* Caſe, and it is good; yet the Court held, That it is not of neceſſity. Mich. 4 Jac. in B.R. Sir *Rich. Champernon* and Sir *William Godolphins* Caſe, *Cro.* 2. Part, 160, 161.

18. Errour brought by a Woman, to reverſe a Fine levied by her and her husband in the County of *Mountgomery*. The Errour aſſigned, was, That the Writ of *Dedimus Poteſtatem* bore date before the Writ of Covenant, and had a *Scire facias* to warn the heir and Terr-Tenant, and T. B. was returned to be warned as heir and Terr-Tenant, who appeared, and pleaded, That W. B. the Conuſee his Father dyed ſeiſed, which diſcended to him as heir, and that he is Terr-Tenant, and within age, and prayed that the Paroll might demur. The Plaintiff counterpleaded the age, ſhewing, that ſhe was entituled to have Dower before the Fine levied, and is now barred of her Dower: and thereupon it was demurred. It was the Opinion of the Court, That it was no Counter-plea for her, to out him of his age: for it is a Rule in Law, That the heir being within age, and in by diſcent, ſhall have his age in a Writ of Errour. And although it was Objected, That in Dower age is not allowable; as it was adjudged in *Williams* and *Williams's* Caſe, for the Miſchief that the Demandant claiming but an Eſtate for life may dye, and loſe her Eſtate: yet becauſe it is alſo a Rule in Law, That an Enfant by Intendment hath no knowledg to plead and defend his Title: and he might have divers cauſes to plead to avoid the Writ of Errour. It was Reſolved, It was no good Counter-plea. Trin. 10 Jac. B.R. *Herbert* and *Binions* Caſe. *Cro.* 2. Part, 392.

19. Husband and Wife levied a Fine of the Wifes Land, the Wife being within age: both of them brought a Writ of Errour to reverſe the Fine; The Queſtion was, If it ſhould be reverſed as to the Wife only, or againſt both, or againſt the husband only? And after a long debate, it was adjudged, That it ſhould be reverſed as againſt them both: for that it is an entire thing, and cannot be affirmed in part, and diſſolved in part. Trin. 30 Eliz. in B. R. rott. 832. *Charnock* and *Worſleys* Caſe. *Leon.* 115.

20. In an Aſſiſe againſt 3. Coparceners, They pleaded, That there was no Tenant of the Freehold named in the Writ. It was found, That two of them were Diſſeiſors, and that the third had nothing: and afterwards, the three Coparceners brought an Attaint; and after, the third Siſter, who was acquit, was Nonſuit: and by the Rule of the Court, the Writ did abate. And in that Caſe, It was ſaid, That in a Writ of Errour brought to reverſe a Fine by an Enfant, the Caſe was, Huſband and Wife were Tenants for life, the remainder to an Enfant in Fee, they levied a Fine, and the Enfant only brought a Writ of Errour to reverſe the Fine. And it was Objected, That they all three ought to have joyned in the Writ of Errour. But in that Caſe, It was holden, That the Writ was well brought, becauſe the Enfant onely was grieved by the Fine, and the husband and wife had no cauſe of Action. Mich. 31 Eliz. in B. R. *Pigott* and *Harrington's* Caſe. *Leon.* 317.

More of Fines *levied.*

1. THe Father Covenanted with A, That in Conſideration of a Marriage he had betwixt his Son and G, daughter of A, that before ſuch a day he would levy a Fine of Lands, which ſhould be to the uſes of the ſaid Son and daughter in tail, for the Joynture of the daughter. The Fine is levied according to the uſes: The Father dyeth; but no mention is made of the marriage had. It was the clear Opinion of the Court, That notwithſtanding that the marriage was not accompliſhed, yet the Eſtate tail was well enough executed in the Son and daughter; for the Fine without any Conſideration doth carry the uſes: but without a Fine, ſuch a Conſideration would not raiſe an uſe, without accompliſhment of the marriage; for the Conſideration executed, ought to produce the uſe. But in this caſe they are perfected by the Fine. Hill. 30 Eliz. in C. B. *Stephens* Caſe. *Leon.* 138.

2. Lands were conveyed to Sir *Tho. Cotton* for life, the remainder to *William Cotton et primogenito filio ſuo, et hæredi maſculo et ſic. de primogenito ad primogenitum dict. Willielmi*, the remainder to the right heirs of the body of Sir *Tho. Cotton* and *William* lawfully iſſuing, the remainder to the right heirs of Sir *Tho. Cotton*. *William* had Iſſue a ſon here born in *England*, and went beyond

yond Sea to *Antwerp*: there continuing, his Son and heir being within age, Sir *Tho. Cotton* levied a Fine *sur Conuſans de droit* of all the Lands; and afterwards Covenanted, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of *Robert Cotton* his Son in Fee; *William* dyed at *Antwerp*; his Son within age in *England*; Sir *Tho. Cotton* dyed, *Robert* entred. In this Caſe, it was holden by the Court, That Sir *Tho. Cotton* was Tenant for life, the remainder to *William* for life, the remainder to the heirs of both their bodies iſſuing: ſo as to one moyty Sir *Tho. Cotton* had an Eſtate tail dependant upon the Eſtates for life, and ſo the Fine levied by him was a Barr to the Iſſue of *William* for a moyty: And as to the other moyty, the Court held, That the ſame was no Barr, but that the party intereſſed at the time, might at any time avoid the ſame during his Non-age, and 5. years after; for *William* his Father was not bound by the Statute of 4 H. 7. becauſe at the time of the Fine levied, he was beyond the Seas: and although he never returned, but dyed there: yet by equity of the Statute, his Iſſue ſhould have 5. years after his death to avoid the Fine, if he were of full age; and if he were within age then during his non-age, and 5. years after. Mich. 33 Eliz. in C. B. *Cotton*'s Caſe. *Leon.* 211.

3. In a Writ of Errour brought to reverſe a Fine, the Caſe was; *Waterhouſe* levied a Fine in barr, in an Action brought; The Earl of *Oxford* pleaded, That he was beyond Sea at the time of the Fine levied. *Waterhouſe* Replyed, That he came into *England* in Auguſt, within 5. years after the Fine levied: And upon that, they were at Iſſue. And the Jury found, That he came over in July: and notwithſtanding, the Court was clear of Opinion, That the Writ of Errour did not lye: For although the Jury found, that he came over in *July*, yet the ſubſtance of the matter is, He was in *England*; ſo that he might have made his claim: So as the Fine ſhould barr him. And ſo adjudged, That he ſhould be barred, for not making his claim within the 5. years after the Fine levied. Paſc. 15 Car. in B. R. *Waterhouſe* and the Earl of *Oxford*'s Caſe. *Mayſh* 8.

4. Tenant in tail of a Rent iſſuing out of a Manor, levies a Fine of the Manor out of which the Rent is iſſuing, to J. S. and his heirs; And the Queſtion was, Whether this Fine levied of the Manor, ſhall barr the Iſſue in tail of the Rent? It was the better Opinion of the Court, That the Fine being levied with Proclamations *per nomen Manerii*, ſhould bar him of the Rent: for the Fine being levied of the Manors *incluſive*, gives the Rent, and a Fine is a bar to it, as well as if the Fine had been levied of the Rent it ſelf. Hill. 22 Jac. B. R. *Heliot* and *Saunders* Caſe. *Cro.* 2. Part, 699.

5. Note, If one hath right to a Writ of Error, to reverſe a Fine for Errour; and he ſuffereth 5. years to paſſe without bringing his Writ of Errour. It was adjudged, That he ſhall be barred by that Fine, and 5. years paſſed by the word [*Alienavit*] which is in the Statute of 4 H. 7. And ſo it was ſaid, It was adjudged in *Mandeville*'s Caſe, 27 Eliz. upon ſolemn Argument in the Exchequer-Chamber: and ſo was it alſo adjudged, 28 Eliz. in *Barton* and *Harvies* Caſe. See *Cook* 3. Part, the Marqueſſe of *Winchester*'s Caſe, *Cook* 10. Part, 91, 99. *Seymor*'s Caſe. And ſee Trin. 11 Jac. B. R. *Bartholomew* and *Belfield*'s Caſe. *Cro.* 2. Part, 332. acc.

6. In a Replevin, the Caſe was; A. was ſeiſed of Land, and 18 Eliz. by Deed, granted a Rent of 13 l. 6 s. 8 d. thereof to J. S. in Fee, payable at the Feaſt of St. *Peter*, or within 20. dayes after, with a *Nomine pœnæ*, and clauſe of Diſtreſs: J. S. ſeiſed of the rent, dyed, and the ſame diſcended to his daughter, who had a husband, and they being ſeiſed in the right of the wife, levied a Fine of the ſaid Rent to J. D. and J. G. and the heirs of the ſaid J. D. to the uſe of the ſaid J. D. and J. G. and their heirs for ever. It was Reſolved in this Caſe, by all the Judges, That by this Fine granted to J. D. and J. G. and the heirs of J. D. to the uſe of them and their heirs, that they were Joynt-Tenants of the Rent; for otherwiſe, there ſhould be a fraction of the Eſtate, that one ſhould be in by the Common-Law, and the other by the Statute of 27 H. 8. of Uſes, which was not according to the Statute. Hill. 6 Car. in C. B. *Parnell* and *Bridges* Caſe, *Hutton* 112.

7. A. poſſeſſed of divers parcels of Land within the Manor of S. for years at Will, and by Copy, and of others in Fee, there demiſed the whole to B. for life, and then levied a Fine to him and his heirs of ſo many Acres, as amounted to the whole Land, and continued poſſeſſion, and paid the Rents to the Lord as if nothing had been done. In this Caſe, It was adjudged, That although the 5. years paſſed, yet the Lord was not barred: and yet in the Statute of 4 H. 7. the ſaving is of ſuch right as ſhall firſt grow, remain, and be; and there the right firſt accrued to the Leſſor after the Fine: Yet in this caſe, the Lord ſhall not be barred, becauſe A. having Lands within the ſame Manor, and ſtill continuing poſſeſſion, and paying the Rents, the Lord could not poſſibly take notice of the Covin. *Cook* 3. Part, 78. in *Farmar*'s Caſe.

Forcible Entry; *and* Indictment *upon it.*

1. A Writ of Forcible Entry, lyeth upon the Statute of 8 H. 6. where a man is diſſeiſed, or put out of his Lands or Tenements, with force whereof he is ſeiſed of an Eſtate of Freehold, in tail, in Fee, or for life: Or if he be diſſeiſed or put out of his Lands or Tenements peaceably, and afterwards, the Diſſeiſor, or he who ouſteth him, doth detain and keep the Lands or Tenements with force; then he who is ſo put out, may ſue forth this Writ, and he ſhall recover his Damages and his treble Coſts: and none can maintain an Action of Forcible Entry upon this Statute, but he that hath a Freehold, becauſe the words are, *Expulit et diſſeiſivit.* See *Fitzh. Na. Br.* And the Writ lyeth as well of a Rent, as of Lands: But if a man hath been three years in peaceable poſſeſſion without interruption, there he may hold the Lands and Tenements with force, and ſhall not be puniſhed for that force. And as a man may have a Writ of Forcible Entry upon the ſaid Statute of 8 H. 6; ſo a man may be Indicted upon a Forcible Entry, upon the ſame Statute.

2. One was Leſſee for years, and the Reverſion did belong to the Company of Goldſmiths, *London*, and one was Indicted for a Forcible Entry; and the words of the Indictment were *Expulit et diſſeiſivit* the Company of Goldſmiths *Et quendam* J. S. *Tenentem expulit*: Exception was taken to the Indictment, for it was ſaid, that a Diſſeiſin might be to one, although not in poſſeſſion, as to a Reverſioner upon a Term for years, but it could not be *Expulit*, unleſs he were in poſſeſſion, for *privatio præſupponit habitum*, and two cannot be *expulſi*, where one only is in poſſeſſion: and therefore the Indictment ſhould have bin, That the Tenant of the Freehold was Diſſeiſed, and the Termor expelled; but in this Caſe, the word *Expulit* is applyed to both. But to that it was ſaid by the Court, That the Indictment was well enough, for that the poſſeſſion of the Termor, is the poſſeſſion of him in the Reverſion: and as to the other point, *ſcil.* that *quendam* J. S. *Tenentem expulit*, the ſame was but ſurpluſage, as the Juſtices ſaid, and ſo the Indictment was holden good. Mich. 29 Eliz. in B. R. *Godbolt.* 45.

3. A man was Indicted upon the Statute of 8 H. 6. for forcible Entry into a Rectory, and thereof diſſeiſing the Biſhop of C. It was before a general Pardon: and a traverſe was to the Indictment, and a *venire facias* awarded and returned, and then the General Pardon came. It was ſhewed to the Court, That the party Indicted, was ouſted from his poſſeſſion by colour of this Indictment, it being falſe. The Writ of Reſtitution being awarded upon it; wherefore he prayed he might proceed upon it, and he would relinquiſh any benefit of the Pardon, for he had not any other means to be reſtored to his Poſſeſſion. But the Opinion of the Court was, That there ought not to be any proceedings upon this Indictment, the offence being Pardoned by the general Pardon, of which the Court is to take notice, and the party cannot proceed to have reſtitution; when, if it ſhould paſs againſt him, the King ſhould not have any benefit of any Fine. Hill. 4 Jac. in B. R. *Fawcets* Caſe. *Cro.* 2. Part, 149.

4. A man was Endicted of forcible Entry into Tythes; where the party ouſted, prayed Reſtitution: It was ſaid and agreed, That an Aſſiſe did lye for Tythes. It was ſaid, That Endictments ſhould be aſwell allowed for Tythes as for Rent; and for a Rent, forcible Entry lyes, 20 H. 6. 11. *Fitzh. Nat. Br.* And afterwards a Writ of Reſtitution was granted. Mich. 6 Jac. in B. R. *Cro.* 1. Part, 146.

5. A. Tenant for years, the Reverſion to B, paid his Rent to him in the Reverſion for 15 years. Before the end of the Term, J. S. came to A. and told him, that J. D. had title to the Land, and adviſed him to take a Leaſe from him; who took a Leaſe for 10 years, rendring rent, the Rent being at an undervalue, and willed him to hold the poſſeſſion againſt all perſons; he at the end of the Term, kept the poſſeſſion with Guns and other weapons. In this Caſe, it was Reſolved, 1. That this was a forcible detainer, although no perſon offered to enter, for it was holden, That the poſſeſſion of the Termor, was the poſſeſſion of the Reverſioner, or the Leſſor: and when he kept the poſſeſſion againſt him to whom he had ſo long paid the Rent, it was a Detainer with force; and where the Statute is, That whereas one hath the poſſeſſion for three years quietly, he might hold the poſſeſſion with force, it is intended where the Eſtate is continued. Mich. 5 Jac. in *Cam. Stellat.* *Bacon Snigg* and *Shirtons* Caſe. *Cro.* 2. Part, 199.

6. A. was Endicted upon the Statute of 8 H. 6. That he entred with force, and Diſſeiſed H. and held him out with force: The Bill was found *Quoad* the Detainment, and thereupon reſtitution awarded. The Indictment being removed into B. R. It was ſaid, That the Indictment was ill, becauſe it was not found, That he entred peaceably; and thereupon it was prayed, to have re-reſtitution; and

and although F. who had bin 30 years in poſſeſſion ſhould be thereby delayed, and kept out of poſſeſſion, yet becauſe it was but to make re-reſtitution after a reſtitution, the Court awarded re-reſtitution. Hill. 4 Car. in B. R. *Fords* Caſe. *Cro.* 2. Part, 151.

7. Indictment upon the Statute of 8 H. 6. was, ſuppoſing that the party ſuch a day entred with force and arms into ſuch Lands *exiſtent Liberum Tenementum*, J. B. and with force expelled and amoved him; and becauſe it was not alledged to be *ad tunc exiſtens*, the Freehold of J. B. *viz.* at the time of the Entry: It was reverſed. Mich. 6 Jac. in B. R. Sir *Nicholas Points* Caſe. *Cro.* 2. Part, 214. See 20 Jac. in B. R. *Bridges* Caſe. *Cro.* 2. Part, 639. acc.

8. Note, It was Reſolved by the Juſtices, That one may not be indicted nor committed for entering into his own Land with force, or holding his own Land with force againſt a Condition upon the Statute of 15 R. 2. for it ought to be *ubi ingreſſus non datur per legem*, and one in his own land may enter lawfully, and may detain with force againſt any who pretend to have Common there; and the ſaid Statute doth not extend againſt any but him who enters unlawfully, and ouſts another of his lawful poſſeſſion. Mich. 13 Car. in B. R. *Sydnam* and *Parrs* Caſe. *Cro.* 1. Part, 349.

9. Note, It was holden in the Star-Chamber, That he who hath had quiet poſſeſſion three years upon a good Title, if after he be put out with force and reſtored again, yet he may not juſtify to detain with force by the Proviſo in the Statute, becauſe that his poſſeſſion was interrupted, nor may he come with a multitude to put himſelf in poſſeſſion again: And in that Caſe, it was ſaid, That if Termor be expulſed by force, he in the Reverſion may not have an Action upon the Statute of 8 H. 6. for although he be diſſeiſed, yet he is not expelled. Paſc. 4 *Ma. Dyer*, 141.

10. If the Diſſeiſee after that the Diſſeiſor hath peaceably holden the Lands three years, entreth upon the Diſſeiſor, upon whom the Diſſeiſor entreth again, he cannot then hold with force. But if a man be ſeiſed by juſt title three years, and is Diſſeiſed, and afterwards he entreth upon the Diſſeiſor; ſome were of Opinion, That he might hold the Land with force. 23 H. 8. Br. *Forcible Entry*. 22.

11. The Statute of 8 H. 6. of Forcible Entry, giveth power to Juſtices of Peace to make reſtitution, and by that Statute, Juſtices of *Oyer* and *Terminer*, or Goal-delivery, &c. ſhall not make reſtitution as it hath bin adjudged. But yet if an Indictment of Forcible Entry upon that Statute be removed into the Kings Bench *coram rege*, they may thereupon award reſtitution; and ſo it was holden and agreed, 4 H. 7. 18. and 7 E. 4. 18. And ſee accordingly, *Cook* 11. Part, 65. in Dr. *Foſters* Caſe.

Forreſts, Chaſes, Parks, *and* Warrens.

1. *The Definition of a Forreſt, Chace; What they are, what not: Of the Incidents to them; and who may have them, who not.*

1. A Forreſt is a certain Territory of ground priviledged for wild Beaſts, and Fowl of the Forreſt to reſt and abide in the ſafe protection of the King, for his Princely delight and pleaſure, and doth conſiſt of four things. 1. Vert. 2. Veniſon. 3. Particular Laws and Priviledges. 4. Certain Offices. *Manwood* Forreſt Laws, fol. The King and Sir *John Byrons* Caſe. *Bridg.* 26. acc.

2. In a *Quo Warranto* brought by the King againſt *Briſt*, of the Forreſt of *Cleve*. The Defendant ſhewed, That King *Henry* the ſecond was ſeiſed of *Cleeve*, which extended into 21 Towns; and by his Letters Pattents 30 *Hen.* 2. did grant this Forreſt unto *Richard Clifford*, and afterwards the ſame came to the Earl of *Shrewsbury*; and by mean Conveyances the ſame came to the Defendants Father, who thereof dyed ſeiſed, and from him the ſame came to the Defendant in the *Quo Warranto*, and pleaded, That the Kings Attorney General had confeſſed all this matter to be true. It was Reſolved in this Caſe. 1. That no Subject can have a Forreſt, becauſe that a Juſtice ſeat is incident to a Forreſt, and none can make a Juſtice ſeat but the King; and to make a Juſtice ſeat, and the like, are *Jura Regalia*. And therefore whereas Prince *Henry* had a Forreſt granted unto him, there was a power given to him by the King to make a Juſtice in *Eyer*, and a License to keep Courts. 2. It was Reſolved, That this Grant was void, and not to be pleaded, it being time out of mind, in the time of King *Henry* the ſecond, if no allowance hath bin thereof in *Eyre*; and it doth not appear that there hath bin any allowance in *Eyre* of this Charter. 3. It was holden, That if the King hath a Forreſt and grants the ſame to a Subject, this grant is not merely

meerly void, but by this Grant, he shall have a Chace, but no Swanny Moats. Mich. 12 Jac. The King and *Brigs* Case. *Bolstr.* 2. Part, 295, 296, 297. See *Poph.* 150. the same Case.

3. Note, these points were Resolved by all the Justices, upon a Reference to them, concerning misdemeaners done in the Forrest of *Leicest.* and the Forrest of *Bowland*, in the County of *Warwick*. That the appellation of Lands by the name of a Forrest, in Grants, Offices, and Conveyances, is not any proof that the same is a Forrest in Law; but if they are Forrests, it must appear by matter of Record, as by Eyers of Justices; Swanny-Moats, Officers of Forrests, as Regarders, Agisters, Verderors, and if these are not, they are only free Chases, and no Forrests, and he who hath any Freehold in them, may cut his Timber and Wood upon it, or License any, leaving sufficient for Covert, and to maintain the Game of the King. 2. That in a Chase, the owner of the Soil may have Common for his Sheep, and Warren for his Conyes by grant or Prescription, but cannot surcharge them, nor can he erect a new Warren without Charter. 3. That a man may prescribe to cut his Wood upon his own Inheritance within a Forrest, notwithstanding the Statute of 41 E. 1. Pasc. 5 Jac. *Cro.* 32. Part, 22. See *Cro.* 155. in the Case of *Leicester Forrest*, acc.

4. A man was Amerced and Imprisoned, for putting his Sheep in a Forrest to depasture there; whereupon he brought his *Habeas Corpus*. It was agreed in this Case, That by the Forrest-Law, a man cannot have Common of Pasture for his sheep in a Forrest by which the Vert is destroyed, for that Sheep bite very low; and for the justifying of such wrong by Law, he ought to have punishment, but whether he might be Imprisoned for refusing to pay an Amercement imposed upon him, in the Justice-seat there was not Resolved. Trin. 14 Jac. *Webs* Case. *Bolstr.* 3. Part, 213.

5. No man ever made a Park, Chase, or Warren without the Kings License, for that were *quodam modo* to appropriate those which were *feræ naturæ, et nullius in bonis* to himself, and to restrain them of their natural liberty, which he cannot do without the Kings License; but for Hawking, Hunting, &c. which are matters of Pastime and recreation, there needeth not any License, but every one may in his own Land use them without restraint to be made, if it be not by Parliament. *Cook* 11. Part, 87. in the Case of Monopolies.

6. It was agreed by the Court, That a Subject may have a Forrest, but not a Justice-Seat. But he may have a Swanmote-Court, and the other Courts belonging to a Forrest, and Commission to execute them: And it was agreed in this Case, That a Forrest in the hands of the King shall be discharged of Tythes, but if a Forrest be in the hands of a Subject, he shall pay Tythes: for it is only a personal priviledg which extendeth to the person of the King. Mich. 3 Car. in C. B. *Commins* Case. *Hethey* 60. See *Cro.* 1. Part, 67. the same Case.

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2. *What shall pass by the Grant, or Lease of the King of a Forrest: Whether the Grantee may enclose; and what shall be good causes of forfeiture of the Offices of Keeper of a Forrest, Park, &c.*

1. KIng *Henry* 8. made a Lease unto Sir *Richard Cromwell* of the Forrests of *Wayland* and *Saplay*: And the Lessee Covenanted to keep 100 Deer there continually during the Term: and to leave such a number at the end of the Term. And afterwards the King granted the Reversion to the Lord *North*. In this Case, it was Resolved: first, That by the grant of the Forrests, the Deer passed. 2. That the Grantee of the Reversion could not kill the Deer there, for then it is not possible that the Lessee should perform his Covenant, which is for the maintenance of the Game of the Forrest. 2 Eliz. *Dyer*, 149.

2. Note, It was moved to the Justices, That if the King be seised of a Park, and he grant the Herbage, agistment and pawnage of the Park; and the Grantee surchargeth the Park so with Cattel, that the Deer have not Pasture and feeding there; what remedy the grantee hath, because he reserved no Pasture for the Deer there. It seemed to the Justices, that the Grant was void as to that intent, and that appeareth to be so, for that the Grantee was enforced to compound with the King, and gave him 600 l. *pro omnibus dimissis et concessis*. See Hill. 7 E. 6. *Dyer*, 80. in the Lord *Willoughby* and *Fosters* Case.

3. If the King grant the Herbage *Forresta sua*, If a stranger putteth in Cattel, and destroyes the grass; It was the Opinion of the Justices, That the Pattentee might maintain an Action of Trespass *Quare clausum fregit* against the party, or he might distreyn the Cattel there damage feasant: And some of the Justices were of Opinion, That by force of such a grant, the Pattentee might enclose, but by such a Grant, the Pattentee could not take or cut down the Trees, nor the fruit of them. Trin. 11 Eliz. *Dyer*, 287.

4. If a Forrester, or Keeper of a Forrest or Park, fell and cut down the Wood, if not for necessary

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browſe, it is a forfeiture of their Office, for the deſtruction of the Vert, is a deſtruction of the Veniſon. *Cook* 9. Part, 50. in the Earl of *Shrewsburyes* Caſe.

5. The Earl of *Pembroke*, ſeiſed of the Mannor of D. to which Mannor the Office of Keeper of the Forreſt of S. was belonging, granted the Office of Lieutenantſhip and Deputyſhip, and the Keepership of the ſaid Forreſt to Sir *Maurice Berkly* and the Heirs Males of his body. Provided, and the ſaid *Maurice* Covenanted for him, and the Heirs of his body, to preſerve the Game as fair as formerly had bin uſed, and that neither he nor the Heirs of his body ſhould cut down any manner of Wood growing upon any part of the premiſes, but for neceſſary browſe, and ſuch as they might lawfully cut, and was accuſtomed. Sir *Maurice* dyed, and Sir *Henry Berkly* his Son cut down four Oaks, which were Timber, and converted them to his own uſe: And whether this act of his was a forfeiture of the ſaid Office, was a point in this Caſe. It was the Opinion of all the Juſtices and Barons of the Exchequer, That at the Common-Law, aſwell in the Caſe of a Forreſter, as in the Caſe of a Park-keeper, to cut down Trees, was a forfeiture of their Offices; For the Forreſter hath not only the Charge of the Game, but of all that is within the Forreſt, by which the Game is fed, preſerved, or ſucceoured, and they are to feed by the browſe, and ſucceoured by the ſhade: And by the Statute of *Charta Forreſta*, none may cut his Wood within the Forreſt *niſi per viſum Forreſtarii*: and therefore every voluntary Act done by an Officer contrary to that which belongs to his Office, is a forfeiture of his Office; as the voluntary killing the Deer, cutting down the Wood, or the like, and although the cutting of the Trees in the principal Caſe were not many: yet it cannot be intended, but it is ſo much impaired by it, as it ſhould be by the killing of one Buck in the Forreſt; but he hath done a voluntary act contrary to his Office: and therefore the Juſtices held, That it was a forfeiture of his Office. Hill. 38 Eliz. The Earl of *Pembroke* and Sir *Henry Barkleyes* Caſe. *Poph.* 116, 117, 118.

6. *Thomas* Earl of *Lancaſter*, Lord of a Forreſt, did grant leave to one *Harrington* to make a Park within the ſaid Forreſt. It was adjudged in that Caſe, That if the Grantee doth ſo ſlightly encloſe the Park, ſo as the Forreſt-Beaſts may get in there, that it is a forfeiture, and the Lord of the Forreſt may enter and take the Deer. 15 E. 3. vouch. in the King and Sir *John Byrons* Caſe. *Bridgman*, 27.

Forfeiture.

1. *Where, and by what act Tenant for life or years ſhall forfeit their Eſtates by making a Leaſe for years, of a greater Eſtate or other act done by them, and who ſhall take advantage of ſuch forfeiture; where not.*

1. SIR *Wolſtan Dixſey* brought Debt in *London* againſt Alderman *Spencer* for Rent upon a Leaſe for years made to *Spencer* by one *Bacchus*, who afterwards granted the Reverſion to *Dixſey*, and the Tenant attorned, and the Rent was unpaid, &c. *Spencer* pleaded in Bar, That before the grant of the Reverſion, *Bacchus* was ſeiſed, and ſhewed the Cuſtome of *London* to make enrolments of Deeds in *London*, and that before the Bargain and Sale to *Dixſey*, he bargained the Reverſion to him by paroll, and demanded Judgment: This Plea was entred upon Record, and, pendente the ſuit, *Dixſey* entred into the Lands for a forfeiture of the Term, becauſe he claimed a Feeſimple. In this Caſe, upon many other points in the Caſe, It was agreed, this claim of the Feeſimple was a forfeiture of the Term. Mich. 29 Eliz. in C. B. Sir *Wolſtan Dixſey* and *Spencers* Caſe. *Goldsbr.* 40.

2. In *Ejectione firmæ*, the Caſe was, A. made a Leaſe to B. and his Aſſigns for his own life, and for the lives of C. D. and E. and afterwards A. granted the Reverſion to J. S. for 21 years. B. made a Leaſe to J. D. to hold at will, and dyed; and if the eſtate of J. D. was determined by the death of A. was the Queſtion. It was the Opinion of the Court, That if a Leaſe be made to one and his Aſſigns for his own life, and the lives of two others that they might well ſtand together in him *ſimul & ſemel*, for that although the Leſſee may not have that during his own life, yet he may diſpoſe of it and by that means have the benefit of it: And it was adjudged in *Chambers* and *Goſtocks* Caſe, in C. B. where a Leaſe was made to two for their lives, and the life of a ſtranger, and one of the Leſſees dyed: and the ſurvivor granted the Land for his life, and the life of the ſtranger; and it was held in to be no forfeiture: It was the Opinion of the Court, it was a good Leaſe, and if he had granted it over for any of the other three lives, it had been a forfeiture of his eſtate. Hill. 43 Eliz. in B. R. *Roſs* and *Ardwicks* Caſe. *Goldsbr.* 157, 158.

3. Tenant

3. Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years, the Leſſee entred: Tenant for life granted *Tenement. predict.* to C. *Habendum* from *Mich.* next for life; Leſſee for years attorned, C. entred and made a Leaſe at will, to whom Tenant for life levyed a Fine *ſur Conuſans de droit, &c.* and he in the Remainder entred. In this Caſe, theſe points were Reſolved (amongſt other). 1. That when C. entred by colour of the Grant, that he was a Diſſeiſor. 2. That if the Fine had bin levyed to the Diſſeiſor, that he who had the right unto the Remainder, might have entred for the forfeiture: for a right of a particular eſtate might be forfeited, and entry thereby given to him who hath but a right in Remainder. 3. Agreed, That the Fine levyed to the Tenant at will, was a forfeiture of the eſtate of Tenant for life. *Cook* 2. Part, 56. *Buckler's* Caſe.

4. The Father was Tenant for life, the Remainder to his Son and Heir apparent in tail, the Father by Covin made a Leaſe for years to A. to make a Feoffment to B. in Fee, to whom the Father releaſed with Warranty, and dyed; the Warranty diſcended upon the Son: It was Reſolved, That this was a Warranty which did commence by Diſſeiſin, and ſhould not bar the Son; and the Father by his agreement to the ſame, was *particeps Criminis*; and it was a forfeiture of his eſtate, of which the Son being iſſue in tail, might take advantage, and ſhou'd not be barred by the Warranty of his Father. *Cook* 5. Part, *Fitzherberts* Caſe.

5. A. ſeiſed of Lands in Fee, made his Will, and thereby deviſed his Land to R. his younger Son *in perpetuum*, and after his deceaſe, the Remainder to his Heir Male *in perpetuum*, with diverſe Remainders over, limitted *proximo filio ſeniori et hæredi maſculo in perpetuum*. A. dyed, R. his younger Son entred, and made a Leaſe to J. S. for three lives: The doubt in this Caſe was, If *Robert* had an eſtate for life, or in tail; if but for life, then it was ſaid that he had forfeited his eſtate by making this Leaſe for three lives, but otherwiſe if he had an eſtate tail by the Deviſe, then it was no forfeiture. After a long debate, and many Arguments in this Caſe; It was Reſolved by the whole Court, That in this Caſe by the words and meaning of the Teſtator by his Will, R. his Son had a good eſtate tail, and ſo the Leaſe by him made to J. S. for three lives, was a good Leaſe, and no forfeiture; and therefore the Plaintiff claiming under J. S. had a good Title. It was in an *Ejectione firme* brought upon a Leaſe made to the Plaintiff by J. D. the Leſſee for three lives againſt the Defendant. Hill. 9 Iac. in B. R. *Whiting* and *Wilkins* Caſe. *Bulſtr.* 1. Part, 119.

6. Tenant for life, the Remainder in tail, the Remainder in Fee, bargained and ſold the Land to one, who before the Statute of 14 Eliz. ſuffered a common Recovery, in which Tenant for life was vouched, and he vouched over the common Vouchee, he in the Remainder entred, and his entry was adjudged lawful: For it was Reſolved by the whole Court, That the entry of him in the Remainder was lawful, becauſe that the ſaid Recovery ſuffered by Tenant for life, was a forfeiture of his eſtate, and it was to the diſinheritance of him in the Remainder in tail, and it was as much in Law, as if Tenant for life had levyed a Fine, or made a Feoffment. *Cook* 1. Part, 15. Sir *William Pelhams* Caſe. See *Cook* 6. Part, 1. and 60. acc.

7. A man ſeiſed of Lands in Fee, having a Son by one Woman, and a Son and a Daughter by another, Deviſed his Land to his Wife for life, the Remainder to his younger Son in tail, the Reverſion to his right Heirs: A common Recovery was had againſt Tenant for life, in which he in the Remainder in tail was vouched, and that was to the uſe of him in the Remainder in tail, and his Heirs, who dyed without Iſſue. In this Caſe, theſe points were Reſolved. 1. That a common recovery had againſt Tenant for life upon a true Warrant and Recovery in value, ſhould bind him in the Remainder, becauſe that the particular eſtate, and the Remainder was but one eſtate, and the recompence did extend to both eſtates: But a common Recovery had againſt Tenant for life only, is a forfeiture of his eſtate. 2. Reſolved, That the Statute of 14 Eliz. of fained Recoveries, did not extend to preſerve any Reverſion or Remainder expectant upon an Eſtate in tail, where Tenant for life is impleaded, and Tenant in tail is vouched; and there this Caſe was put and agreed; Tenant in tail, the Remainder or Reverſion over, bargaineth and ſelleth the Land by Deed Indented and Inrolled, againſt whom a Recovery is had, and he voucheth Tenant in tail, the ſame is a good Recovery; and yet the Bargainee upon the matter had but an Eſtate for the Term of life of the Tenant in tail: And in that Caſe, it was ſaid, That if Tenant for life be impleaded, and makes default after default, and he in the Remainder in tail is received, and voucheth the common Vouchee, that the eſtate tail, with the Remainder, or Reverſion over is barred. Trin. 38 Eliz. in B. R. *Cook* 11. Part, 44. *Jennings* Caſe. See *Cook* 9. Part, 106. *Podgers* Caſe acc. and ſee 8 Eliz. *Dyer*, 252. in *Knevetons* Caſe. And ſee *Cook* 1. Part, Sir *William Pelhams* Caſe. *Cook* 3. Part, 3. the Marqueſs of *Wincheſters* Caſe, acc.

8. The Caſe was; Land was given to A. for life; the remainder to B. for life, the Remainder to J. S. in Fee: A. and B. being in poſſeſſion, levied a Fine of the Land to a ſtranger *Sur Conuſans de droit*, &c. A. dyed. If J. S. might now enter,

was the Doubt. It was agreed by the whole Court, That by the Fine levied, the remainder in Fee was not touched nor diſcontinued. But becauſe B. in the remainder for life had done as much as in him lay, for the diſpoſing of the Fee-ſimple by the Fine, and had taken upon him to do that; It was holden, That the ſame was a forfeiture of his Eſtate; of which J. S. in remainder might take advantage. Mich. 29 Eliz. in C.B. *Braybrooks* Caſe, *Leon.* 40.

9. Tenant for life of Land, leaſed parcel thereof to hold at Will, and being in poſſeſſion of the reſidue, he levied a Fine of the whole, the Leſſor entred into the Land which was let at Will for forfeiture in the name of the whole. It was the Opinion of the Court, That the ſame was a good Entry into the whole for the forfeiture. But it was holden, That if a Diſſeiſor leaſeth for years part of the Land of which the Diſſeiſin was committed, and the Diſſeiſee afterwards entreth into the Land which continueth in the poſſeſſion of the Diſſeiſor in the name of the whole, the ſame ſhall not extend to the Lands leaſed, for that here the Leſſee is in by title; but not in the other caſe: for when Tenant for life leaſeth at Will, and afterwards levieth a Fine, the ſame is a determination of his Will, and a forfeiture. And in this Caſe, It was holden, That if there be Leſſee for life, the remainder for life, the remainder in Fee: and Leſſee for life in poſſeſſion levieth a Fine *ſur Conuſans de droit come ceo, &c.* to his own uſe, that the Feeſimple thereby accrues to him, and ſuch Fine levied by him, is a forfeiture, of which he in the remainder may take advantage. Paſch. 29 Eliz. in C. B. *Potter* and *Stedal*'s Caſe. *Leon.* 51.

10. A. ſeiſed of Land in the right of his Wife, being her Joynture by a former husband; He and his Wife both made a Feoffment in Fee to a ſtranger and his heirs; *Habendum* to him and his heirs, for the uſe of the Wife only: The Queſtion was, If it were a forfeiture, it being in one ſentence? It was ſaid, It was no forfeiture; for that theſe words, [For the life only] were put into the Deed, to expreſſe the intent of the Parties, and therefore ſhall not be void; but ſhould be taken to exclude the forfeiture. But it was Reſolved by the Court, That it was a forfeiture; for by the Feoffment the Fee-ſimple paſſeth, and that to the uſe of the Feoffor; and the Eſtate and the uſe are ſeverall things, and the limitation to the uſe of the Wife, cannot extend to both. Trin. 30 Eliz. in B. R. *Piers* and *Hors* Caſe, *Leon.* 125. See 31 Eliz. in B. R. Sir *Ralph Egerton*'s Caſe, *Godbolt.* 141. acc.

11. The Caſe was, A man gave Lands in tail to B, upon condition, That if the Donee, or any of his heirs alien or diſcontinue the Land, or any part of it, the Donor to re-enter: The Donee had Iſſue two Daughters, and dyed: One of the Daughters levied a Fine *ſur Conuſans de droit come ceo* to her Siſter. It was the Opinion of the Juſtices, That the ſame was a forfeiture, and that the Donor might enter for the forfeiture: for although they are Siſters to many intents, yet they are both but one heir; and each of them ſhall ſue Livery and if the Siſters be one heir to divers reſpects, then the Fine levied by the one ſiſter is a forfeiture. And ſo it was adjudged, Mich. 27 Eliz. in B.R. *Leon.* 192.

12. A man ſeiſed of Lands in Fee, enfeoffed divers, upon Condition, that they ſhould give back the Lands to himſelf and his Wife in tail, the remainder to his right heirs; they have Iſſue a ſon, the husband dyeth; the ſon and wife levy a Fine with Proclamations to A. in Fee; The Wife enters, and makes a Leaſe for 3. lives, not warranted by the Statute of 32 H. 8; the Conuſee re enters. It was in this Caſe Reſolved, 1. That the Leaſe made by the Wife, although it was without Warranty, was within the Statute of 11 H. 7. for that a Diſcontinuance ſtood in equall Degree with a Warranty or a Recovery. 2. That if he in the remainder had granted over his remainder in Fee only, that he might have entred for the forfeiture by the words of the Statute, and not the grantee of the Remainder. 3. Reſolved, That the Conuſee might enter for the forfeiture, becauſe that by the Fine the Eſtate tail was barred, and now he is that perſon to whom the Intereſt, Title, and Inheritance, after the death of the Wife, doth appertain. And it was agreed in this Caſe, That if a Woman Tenant in tail, doth accept a *Fine ſur Conuſans de droit*, and thereby grants and renders the Lands for 1000 years, that the ſame is an Alienation, and a forfeiture within the ſaid Statute of 11 H. 7. *Cook* 3. Part, 51. Sir *George Browns* Caſe.

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2. *Forfeiture of Copyholds: and where, and for what act, and by whom done, a Copyholder ſhall forfeit his Eſtate: and for what; and where not.*

1. A Woman Copyholder in Fee takes a husband, who makes a Leaſe for years, which by the Cuſtome of the Manor is a forfeiture; the husband dyeth: The Point was, Whether this forfeiture ſhould bind the Wife and her heirs, after the

the death of her husband? It was adjudged, That it should not bind the Wife, but she should have it after the death of her husband. Pasch. 1 Car. in the Exchequer-Chamber. *Severne* and *Smith's* Case. *Cro.* 1. Part, 4. acc.

2. If a man seised of Copyhold Land in the right of his Wife, surrendreth the same to the use of another, and dyeth; Resolved, it is no discontinuance to the Wife, but that the Wife may enter, and shall not be put to a *Cui in vita*, nor her heir to sue a *sur Cui in vita*. Pasch. 35 Eliz. in B. R. *Cook* 4. Part, 23. *Bullock* and *Dobleys* Case.

3. If the Fine of Copyholders of a Manor be uncertain to be paid upon admittance, the Lord cannot demand excessive Fines; and if he do, the Copyholder may deny to pay them, without forfeiture; and if the Lord in case of incertainty of Fines, assesse a reasonable Fine, and require the Copyholder to pay it, he is not tyed to pay it presently, but he shall have convenient time to pay it; and the Fine is not due before admittance: but if after admittance, the Copyholder refuseth to pay the Fine, it is a forfeiture. Mich. 43 Eliz. B. R. *Hubbard* and *Hammonds* Case, *Cook* 4. Part, 28.

4. If the Estate of the Lord of the Manor doth cease by Limitation of an Use, and the Use and Estate thereof be transferred to another, who demandeth Rent of a Copyholder, who refuseth to pay the same; the same is no forfeiture of the Copyhold, without notice given to the Copyholder of the alteration of the Use, and Estate. Hill. 1 Jac. *Berrishaw* and *Southcotes* Case. And so if the Lord bargaineth and selleth the Manor by Deed Indented and enrolled, the bargainee shall not take advantage of a forfeiture of a Copyhold, for denyal of payment of Rent unto him, without Notice given him of the Bargain and Sale. *Cook* 8. Part. 92. in *Fraunces* Case.

5. The Custome of a Manor is, That if a Copyholder in Fee of the said Manor dyeth seised, and the heir doth not come in at the next Court to claim his Lands, and to be admitted, and pay his Fine; that then Proclamations shall be made at 3. Courts holden for the said Manor: and if the heir at any of the said Courts in which the Proclamations shall be made, doth not come and make Claim to the Lands, and pray to be admitted; that then the Lord might seise the Copyhold as forfeit. A Copyholder in Fee dyed seised, his heir being beyond Sea, Proclamations at the three next Courts are made, the heir doth not come to make his Claime to the Lands; upon which the Lord seiseth the Copyhold, and grants the same over to another: the heir returns, and when he hath Notice of the death of his Father, comes to the Lord, and claims his Lands, and prayes to be admitted; and the Lord doth refuse to admit him. It was Resolved in this Case, That this Custome of Non-Claim, shall not bar him who was beyond Sea at the time of the Proclamations made, because by intendment of Law, he who was beyond Sea, could not have Notice of the death of his Father, nor of the Proclamations for him to come in, and make his claim to the Lands. And it was Resolved, That because the Heir was out of the Realm, at the time of the death of his Father, that he should not be barred by the said Custome and Proclamations, nor forfeit his Copyhold thereby. *Cook* 8. Part, 99, 100. Sir *Richard Leathfords* Case.

6. The Summons of a Copyholder to appear at the Lord's Court, was at the Church; and thereupon, the Copyholder did not appear. And it was the Opinion of the whole Court, That the same was no cause of forfeiture of the Copyhold, because it was not specially shewed to be the Custome, and it shall be hard to make it a forfeiture: for perhaps the Copyholder had not Notice of it; and so it was said, It was adjudged in the Lord *Dacres* and *Hurlestons* Case. And in the principal Case it was said, That Notice must be given to the person, and the refusal must be wilful. 30 Eliz. in C. B. Sir *John Braunches* Case. *Leon.* 140.

7. A Woman Copyholder took husband; the husband made a Lease to one, 25. *Martii*, 3 Car. by Indenture for one year, and by another Indenture of the same date, made a Lease to the same party for a year, to begin 27 *Martii*, after the end of the first Lease; And by a third Indenture of the same date, makes to him a Lease for a year, to begin 29. *Martii*, after the end of the second Lease, so betwixt each Lease, two dayes, betwixt the beginning of the new, and the end of the former. And after, the husband surrendred his Copyhold to the Lord, who entred, and lets to another for 40 years; and after during the second Lease, the first Lessee enters, and the Lords Lessee ousts him. The first Question was, Whether the first Leafe be a forfeiture? 2. Admitting it be a forfeiture, yet the Lord taking a Surrender, and not entring for the forfeiture, but making a Lease for years, his Lessee shall not enter for the forfeiture. The Opinion of the Court was, That it was a forfeiture, for the 3. Leases being made all at one time, shall be intended one entire Contract, and not warranted by the Custome. 2. Admitting it is a forfeiture, the Lord's acceptance of the Surrender, not knowing of the forfeiture, is no dispensation therewith; and consequently the Lord's Lessee hath a good Estate and right in him: for which cause, his En-

try

was the Doubt. It was agreed by the whole Court, That by the Fine levied, the remainder in Fee was not touched nor diſcontinued. But becauſe B. in the remainder for life had done as much as in him lay, for the diſpoſing of the Fee-ſimple by the Fine, and had taken upon him to do that; It was holden, That the ſame was a forfeiture of his Eſtate; of which J. S. in remainder might take advantage. Mich. 29 Eliz. in C.B. *Braybrooks* Caſe, *Leon.* 40.

9. Tenant for life of Land, leaſed parcel thereof to hold at Will, and being in poſſeſſion of the reſidue, he levied a Fine of the whole, the Leſſor entred into the Land which was let at Will for forfeiture in the name of the whole. It was the Opinion of the Court, That the ſame was a good Entry into the whole for the forfeiture. But it was holden, That if a Diſſeiſor leaſeth for years part of the Land of which the Diſſeiſin was committed, and the Diſſeiſee afterwards entreth into the Land which continueth in the poſſeſſion of the Diſſeiſor in the name of the whole, the ſame ſhall not extend to the Lands leaſed, for that here the Leſſee is in by title; but not in the other caſe: for when Tenant for life leaſeth at Will, and afterwards levieth a Fine, the ſame is a determination of his Will, and a forfeiture. And in this Caſe, It was holden, That if there be Leſſee for life, the remainder for life, the remainder in Fee: and Leſſee for life in poſſeſſion levieth a Fine *ſur Conuſans de droit come ceo, &c.* to his own uſe, that the Feeſimple thereby accrues to him, and ſuch Fine levied by him, is a forfeiture, of which he in the remainder may take advantage. Paſch. 29 Eliz. in C. B. *Potter* and *Stedal*'s Caſe. *Leon.* 51.

10. A. ſeiſed of Land in the right of his Wife, being her Joynture by a former husband; He and his Wife both made a Feoffment in Fee to a ſtranger and his heirs; *Habendum* to him and his heirs, for the uſe of the Wife only: The Queſtion was, If it were a forfeiture, it being in one ſentence? It was ſaid, It was no forfeiture; for that theſe words, [For the life only] were put into the Deed, to expreſſe the intent of the Parties, and therefore ſhall not be void; but ſhould be taken to exclude the forfeiture. But it was Reſolved by the Court, That it was a forfeiture; for by the Feoffment the Fee-ſimple paſſeth, and that to the uſe of the Feoffor; and the Eſtate and the uſe are ſeverall things, and the limitation to the uſe of the Wife, cannot extend to both. Trin. 30 Eliz. in B. R. *Piers* and *Hore* Caſe, *Leon.* 125. See 31 Eliz. in B. R. Sir *Ralph Egerton*'s Caſe, *Godbolt.* 141. acc.

11. The Caſe was, A man gave Lands in tail to B, upon condition, That if the Donee, or any of his heirs alien or diſcontinue the Land, or any part of it, the Donor to re-enter: The Donee had Iſſue two Daughters, and dyed: One of the Daughters levied a Fine *ſur Conuſans de droit come ceo* to her Siſter. It was the Opinion of the Juſtices, That the ſame was a forfeiture, and that the Donor might enter for the forfeiture: for although they are Siſters to many intents, yet they are both but one heir; and each of them ſhall ſue Livery and if the Siſters be one heir to divers reſpects, then the Fine levied by the one ſiſter is a forfeiture. And ſo it was adjudged, Mich. 27 Eliz. in B.R. *Leon.* 292.

12. A man ſeiſed of Lands in Fee, enfeoffed divers, upon Condition, that they ſhould give back the Lands to himſelf and his Wife in tail, the remainder to his right heirs; they have Iſſue a ſon, the husband dyeth; the ſon and wife levy a Fine with Proclamations to A. in Fee; The Wife enters, and makes a Leaſe for 3. lives, not warranted by the Statute of 32 H. 8; the Conuſee re enters. It was in this Caſe Reſolved, 1. That the Leaſe made by the Wife, although it was without Warranty, was within the Statute of 11 H. 7. for that a Diſcontinuance ſtood in equall Degree with a Warranty or a Recovery. 2. That if he in the remainder had granted over his remainder in Fee only, that he might have entred for the forfeiture by the words of the Statute, and not the grantee of the Remainder. 3. Reſolved, That the Conuſee might enter for the forfeiture, becauſe that by the Fine the Eſtate tail was barred, and now he is that perſon to whom the Intereſt, Title, and Inheritance, after the death of the Wife, doth appertain. And it was agreed in this Caſe, That if a Woman Tenant in tail, doth accept a Fine *ſur Conuſans de droit*, and thereby grants and renders the Lands for 1000 years, that the ſame is an Alienation, and a forfeiture within the ſaid Statute of 11 H. 7. *Cook* 3. Part, 51. Sir *George Browns* Caſe.

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2. *Forfeiture of Copyholds: and where, and for what act, and by whom done, a Copyholder ſhall forfeit his Eſtate: and for what; and where not.*

1. A Woman Copyholder in Fee takes a husband, who makes a Leaſe for years, which by the Cuſtome of the Manor is a forfeiture; the husband dyeth: The Point was, Whether this forfeiture ſhould bind the Wife and her heirs, after the

the death of her husband? It was adjudged, That it should not bind the Wife, but she should have it after the death of her husband. Pasch. 1 Car. in the Exchequer-Chamber. *Saverne* and *Smith's* Case. *Cro.* 1. Part, 4. acc.

2. If a man seised of Copyhold-Land in the right of his Wife, surrendreth the same to the use of another, and dyeth; Resolved, it is no discontinuance to the Wife, but that the Wife may enter, and shall not be put to a *Cui in vita*, nor her heir to sue a *sur Cui in vita*. Pasch. 35 Eliz. in B. R. *Cook* 4. Part, 23. *Bullock* and *Dobleys* Case.

3. If the Fine of Copyholders of a Manor be uncertain to be paid upon admittance, the Lord cannot demand excessive Fines; and if he do, the Copyholder may deny to pay them, without forfeiture: and if the Lord in case of incertainty of Fines, assesse a reasonable Fine, and require the Copyholder to pay it, he is not tyed to pay it presently, but he shall have convenient time to pay it; and the Fine is not due before admittance: but if after admittance, the Copyholder refuseth to pay the Fine, it is a forfeiture. Mich. 43 Eliz. B. R. *Hubbard* and *Hammonds* Case, *Cook* 4. Part, 28.

4. If the Estate of the Lord of the Manor doth cease by Limitation of an Use, and the Use and Estate thereof be transferred to another, who demandeth Rent of a Copyholder, who refuseth to pay the same; the same is no forfeiture of the Copyhold, without notice given to the Copyholder of the alteration of the Use, and Estate. Hill. 1 Jac. *Berrisbow* and *Southcotes* Case. And so if the Lord bargaineth and selleth the Manor by Deed Indented and enrolled, the bargainee shall not take advantage of a forfeiture of a Copyhold, for denyal of payment of Rent unto him, without Notice given him of the Bargain and Sale. *Cook* 8. Part. 92. in *Frances* Case.

5. The Custome of a Manor is, That if a Copyholder in Fee of the said Manor dyeth seised, and the heir doth not come in at the next Court to claim his Lands, and to be admitted, and pay his Fine; that then Proclamations shall be made at 3 Courts holden for the said Manor: and if the heir at any of the said Courts in which the Proclamations shall be made, doth not come and make Claim to the Lands, and pray to be admitted; that then the Lord might seise the Copyhold as forfeit. A Copyholder in Fee dyed seised, his heir being beyond Sea, Proclamations at the three next Courts are made, the heir doth not come to make his Claime to the Lands; upon which the Lord seiseth the Copyhold, and grants the same over to another: the heir returns, and when he hath Notice of the death of his Father, comes to the Lord, and claims his Lands, and prayes to be admitted; and the Lord doth refuse to admit him. It was Resolved in this Case, That this Custome of Non-Claim, shall not bar him who was beyond Sea at the time of the Proclamations made, because by intendment of Law, he who was beyond Sea, could not have Notice of the death of his Father, nor of the Proclamations for him to come in, and make his claim to the Lands. And it was Resolved, That because the Heir was out of the Realm, at the time of the death of his Father, that he should not be barred by the said Custome and Proclamations, nor forfeit his Copyhold thereby. *Cook* 8. Part, 99, 100. Sir *Richard Leathfora's* Case.

6. The Summons of a Copyholder to appear at the Lord's Court, was at the Church; and thereupon, the Copyholder did not appear. And it was the Opinion of the whole Court, That the same was no cause of forfeiture of the Copyhold, because it was not specially shewed to be the Custome, and it shall be hard to make it a forfeiture: for perhaps the Copyholder had not Notice of it; and so it was said, It was adjudged in the Lord *Dacres* and *Hurleston's* Case. And in the principal Case it was said, That Notice must be given to the person, and the refusal must be wilful. 30 Eliz. in C. B. Sir *John Braunches* Case. *Leon.* 140.

7. A Woman Copyholder took husband; the husband made a Lease to one, 25. *Martii*, 3 Car. by Indenture for one year, and by another Indenture of the same date, made a Lease to the same party for a year, to begin 27 *Martii*, after the end of the first Lease; And by a third Indenture of the same date, makes to him a Lease for a year, to begin 29. *Martii*, after the end of the second Lease, so betwixt each Lease, two dayes, betwixt the beginning of the new, and the end of the former. And after, the husband surrendred his Copyhold to the Lord, who entred, and lets to another for 40 years; and after during the second Lease, the first Lessee enters, and the Lords Lessee ousts him. The first Question was, Whether the first Lease be a forfeiture? 2. Admitting it be a forfeiture, yet the Lord taking a Surrender, and not entring for the forfeiture, but making a Lease for years, his Lessee shall not enter for the forfeiture. The Opinion of the Court was, That it was a forfeiture, for the 3. Leases being made all at one time, shall be intended one entire Contract, and not warranted by the Custome. 2. Admitting it is a forfeiture, the Lord's acceptance of the Surrender, not knowing of the forfeiture, is no dispensation therewith; and consequently the Lord's Lessee hath a good Estate and right in him: for which cause, his En-

try was lawful. It was adjudged for the Defendant. Hill. 4 Car. in B. R. *Matthews* and *Whettons* Case. *Cro.* 1. Part, 169.

8. In Treſpaſſe: The Queſtion was, Whether the Lord of a Manor may aſſeſſe two years and a half value of the Land, according to a Rack Rent for a Fine upon a Copyhold Eſtate; and for not payment thereof, enter for a forfeiture. The Court conceived, That one years Rent and a half according to the improved value, is high enough: and the aſſeſſing of two years and a half Rent, is unreaſonable; and conſequently, the Tenant might refuſe payment thereof; and ſo the Entry of the Lord for a forfeiture, not juſtifiable. Hill. 5 Car. B. R. *Dow* and *Golding*'s Caſe, *Cro.* 1. Part, 142.

9. The Lady *Mountagu* ſued for a forfeiture of a Copyhold of a Manor, being part of her Joynture; the Caſe was, A. Copyholder of the Manor, made a Leaſe of his Freehold Lands for 10 year, and to avoid a forfeiture, made a Leaſe of his Copyhold for one year, but Covenanted with his Leſſee, That he ſhould enjoy the Copyhold Lands *de anno in annum* during the 10 years. It was the Opinion of the Court, That if a Copyholder makes a Leaſe for a year, warranted by the Cuſtome, and ſo *de anno in annum* during 10. years, this is clearly a Leaſe for 10 years, and ſhall be a forfeiture. But in this caſe, the Copyhold is not demiſed to hold for a year *et ſic de anno in annum* for 10 years, but onely for a year according to the Cuſtome, and a Covenant to hold it for a longer time at the Will of the Leſſor. 2. Admitting it to be a forfeiture; yet in this Caſe, the Lady cannot take advantage thereof. For if a Copyholder makes a Leaſe of his Copyhold, contrary to the Cuſtome, and the Lord dyes before Entry or Seizure for the forfeiture, he in the reverſion or remainder ſhall never take advantage of the forfeiture done or committed before his or their time. Paſch. 10 Jac. in B. R. The Lady *Mountague*'s Caſe. *Cro.* 2. Part, 301.

10. A Copyholder makes a Leaſe of his Copyhold for a year, excepting the laſt day of the year; and ſo from year to year, excepting the laſt day of the years, as long as he lived: It was the Opinion of the Court, That it was a forfeiture; for it was but a ſhift to avoid a forfeiture: for it is a certain Leaſe for two years, excepting two dayes; and although there be intermiſſion of a day, yet that is not material: for by ſuch means as he may make a Leaſe for two years, he may make a Leaſe for 20 years; which the Law will not permit. Mich. 10 Jac. B. R. *Lutterell*, and *Weſton*'s Caſe, *Cro.* 2. Part, 308.

11. The Lord aſſeſſed a Fine of 12 l. to be paid by a Copyholder, and appointed it to be paid at the Capital Meſſuage of his Manor 3 moneths after; and the Copyholder pretending the Fine to be certain, (*viz.* two years quit Rent) offered at the day of aſſeſſing of the ſaid Fine, to pay the ſaid two years Fine, but at the day at the appointed place cometh not to excuſe his non payment, nor makes any other refuſal. It was holden by the Juſtices, That this was a Cauſe of forfeiture of his Copyhold: but if he had come at the day aſſigned, and had tendered the two years Quit-Rent, being the Fine certain according to the Cuſtome, though not aſſeſſed nor demanded by the Lord, it had been no forfeiture. Mich. 19 Jac. B. R. *Gardiner* and *Norman*'s Caſe, *Cro.* 2. Part, 617.

12. Note. It was Reſolved by the Court, That if the Fine of a Copyholder be aſſeſſed by the Lord, be the Fine reaſonable or unreaſonable, the Lord muſt demand the Fine of the Copyholder, before he can enter upon the Copyhold, as forfeit for not payment thereof: and the reaſonableneſſe, or unreaſonableneſſe, ſhall be adjudged by the Court, Hill. 13 Jac. in C. B. *Downy* and *Lamons* Caſe, *Hob.* 135.

13. In Treſpaſſe, for breaking of his Cloſe; It was aſſigned in an Acre of Paſture, The Defendant ſaid, That it was his Freehold: The Plaintiff ſaid, That it was parcel of the Manor of F. dem ſeable by Copy in Fee-ſimple, and that the Lords of the Manor granted the Tenements to J. S. and his heirs; who ſurrendred them into the hands of the Lord, to the uſe of the Plaintiff and his heirs. The Defendant rejoyned, and ſaid, That at the time of the Admiſſion of the Plaintiff, the Tenements were of the clear yearly value of 53 s. 4 d. and that within the Manor there is a Cuſtome, That upon every Admiſſion of any perſon, a reaſonable Fine ſhould be aſſeſſed by the Lord of the Manor or his Steward: and ſhewed, That the Steward of the Manor at a Court admitted the Plaintiff, and ſet a reaſonable ſum of money, *ſcil.* 5 l. 6 s. 8 d. the value of the Tenements for two years, for a Fine to be paid; and that the Lord afterwards requeſted the Plaintiff to pay the Fine; which he refuſed: for which the Lord entred into the Tenements for a forfeiture. In this Caſe, It was Reſolved, 1. If the Fine aſſeſſed had been reaſonable, yet the Lord ought to ſet a time certain when the ſame ſhould be paid, becauſe it ſtands upon a Point of forfeiture. 2. That the Fine in this caſe was unreaſonable; *ſcil.* to demand for a Cottage and one Acre of Paſture, 5 l. 6 s. 8 d. for the admittance of a Copyholder in Fee-ſimple upon a Surrender. And it was ſaid, It is not like a voluntary grant, for there a fine

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Domini vel æſtimari debet; but when the Lord is compellable to admit him, to whoſe uſe the Surrender is made, there the value of two years is unreaſonable, eſpecially when a Cottage and an Acre of Land at the Reck is 53*s.* *per annum*. Mich. 6 Jac. in C. B. *Willowes* and *Willowes* Caſe. *Cook* Select Caſes, 1.

14. A Copyholder was ſummoned to appear at the Court of the Lord, and to do and perform his Services as a Copyhold Tenant, he made default. It was laid in the Declaration, *Quod ſectam voluntariè & contemptuoſè ſubtraxit, & illam facere recuſavit*; and it was alſo laid in the Declaration, That ſuch a day Notice was given him by the Baily of the Court; but it was not ſaid to be by the Commandment of the Lord. It was the Opinion of the Court, That the Defendants wilfully withdrawing of his Suit and Service which he owes to the Lord at his Court, is a breach of the Cuſtom, and a forfeiture of his Copyhold Eſtate; for he holds his Lands, *per Redditus, Servitia, & Conſuetudines*, which if he break, it is a forfeiture of his Copy Eſtate. Mich. 14 Jac. in B. R. *Hamond* and *Wimbaſhet* Caſe. *Bulſtr.* 3. Part, 268.

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3. *Forfeiture of Offices; and What ſhall be a good Cauſe of forfeiture of an Office What not: and who ſhall take advantage of it; Who not.*

1. UPon a Fine, the firſt Proclamation was made in Trinity Term, 5 Jac. and the ſecond in Mich. Term, 5 Jac. The 3d. in Hillary Term, 6 Jac. whereas it ſhould have been 5 Jac. and 4. and 5th in Eaſter Term, 6 Jac. This was agreed to be Errour; for the 4th Proclamation was not entred at all; and the 5th was entred in Hill. 6 Jac. where it ſhould have been in Hillary Term, 5 Jac. The Court was of Opinion, That it could not be amended, being of another Term: and the Court conceived, That this was a forfeiture of the Office of Chirographer, and the abuſing of it. Hill. 7 Jac. in C. B. *Brownlow*, 2. Part, 300.

2. The Queen recitings That ſhe had granted to J. S. the Office of the Cuſtody of the Caſtle of *Donnington*, with the profits thereto belonging and a yearly Fee for the exerciſing thereof, *Habendum* to him for his life, had granted to her the Reverſion of that Office after the Death, Surrender, or Forfeiture, &c. and ſhewed, that J. S. dyed ſuch a day, and that ſhe exerciſed the ſaid Offices, and that the Defendant did with force, expell and diſſeiſe her of that Office: and ſhe brought an Action upon the Statute of 8 H. 6. againſt the Servants of the Lord Admiral: and the truth of the Caſe was, The Lord *Arundel* having the Inheritance of the houſe granted to him by the Queen, intending to uſe the houſe; and the Lady *Ruſſell* having the Office granted unto her, of Cuſtody of the ſaid Caſtle, with all profits, the Lord Admiral ſent his ſervants with ſtuff to the ſaid houſe, intending to uſe the houſe; and the Lady *Ruſſels* Servants denyed them to enter, pretending, that the Lady was to have the uſe and the diſpoſing of it during her life. In this Caſe, It was ſaid, That a Woman could not have the Office of the Cuſtody of a Caſtle, becauſe it appertains to War: and therefore the grant to the Lady was void. But to this it was Anſwered and Reſolved, That the Grant was good, it being granted to her to be exerciſed, *per ſe vel Deputatum ſuum*; and it doth not appear, that it was a Caſtle of War, but a private houſe. But, 2. The Court Reſolved, That if this diſturbance of the Lady *Ruſſels* Servants of the Lord of *Arundels* Servants, to bring his Stuff into the ſaid Caſtle, had been by the Command of the Lady *Ruſſell*, it had been a forfeiture of her Office; but if the Servants did it of their own heads, it was no forfeiture. Mich. 1 Jac. in B. R. The Lady *Ruſſells* Caſe, *Cro.* 2. Part, 17.

3. It was holden by the Court, That a negligent eſcape ſuffered by the Marſhal of the King's Bench, was not a forfeiture of his Office: for that is but a matter finable by the Court, as the Court ſhall ſee cauſe: but otherwiſe it is, of a voluntary eſcape: for, for ſuch an Eſcape, he ſhall loſe his Office. 39 H. 6. 32. in the Duke of *Norfolk's* Caſe. See Mich. 10 Jac. in B. R. Sir *Tho. Mead*, and Sir *George Reynells* Caſe, acc. *Bulſtr.* 2. Part, 58, 59.

4. See the Caſe between the King and *Brigge*, Tit. *Forreſts*. Sect. 1. C. 2. What ſhall be a Cauſe of the forfeiture of the Office of the Lieutenantſhip, or Cuſtody of a Forreſt, Park, &c. *Popham*, 117.

5. Note. It was holden by the Juſtices, That if the Dignity of an Earldom had been entailed to one, and the heirs males of his body, It might have been forfeited for Treaſon before the Statute of 26 H. 8. Cap. 13. by reaſon of a ſecret Condition in Law annexed to it. For Earls are created for two purpoſes; *viz. Ad conſulendum Regi tempore pacis, et ad defendendum Regem et Patriam tempore Belli*; and therefore they wore a Capp and a Robe in token of Counſel; and are girded with a Sword, to repreſent them Champions and Cavaliers. Now then, when ſuch a perſon,

perſon, againſt his duty, and the end of his Dignity, committeth Treaſon againſt the King; his Dignity (although it were entailed) was forfeited by a Condition in Law *tacite* annexed to his Eſtate. *Cook* 7. Part, 34. in *Nevill*'s Caſe.

6. Note: There are three Cauſes of forfeiture of Offices by matter in fact; *viz.* *Abuſer*, *Non-uſer*, *Refuſer*: *Abuſer*, as if the Marſhall or Gaoler, ſuffer voluntary Eſcapes. *Non-uſer* of the Office of Stewardſhip of a Manor, is no cauſe of forfeiture of ſuch Office, becauſe that the Office is not to be exerciſed, but upon demand or requeſt made by him to whom he is Officer. But *Non-uſer* of Offices which do concern the Adminiſtration of Juſtice, and which require continual attendance; as Chamberlain of the Exchequer, Preignothories, Clark of the Market, &c. there the *Non-uſer* of ſuch Offices, is a cauſe of forfeiture of them: but the not exerciſing of ſome Office, is not a forfeiture of it, if his non-attendance be not any damage to him to whom he is Officer; as the Keeper of a Park, if he doth not attend his Office for two or three dayes, the ſame is no cauſe of forfeiture of it: but if by reaſon of his long abſence, perſons unknown, kill and deſtroy the Deer in the Park, there his non-attendance is a cauſe of forfeiture of his Office. *Cook* 9. Part, 48, 49. in the Earl of *Shrewsburies* Caſe.

7. If the King granteth the Office of Serjeant at Arms, (to attend upon the Lord Keeper for life) the King may by word licence him, that he ſhall abſent himſelf from the execution of that Office for a time; becauſe he is the immediate Officer to the King, and but an attendant upon the Lord Keeper, and the King doth not depart with any Intereſt, but ſuſpends the ſervice of the Sergeant at Arms for a time; and therefore ſuch Licence of the King by word to abſent himſelf, is good. But it was agreed in that Caſe, That Not attendance upon ſuch an Office, is a forfeiture of it, but then it ought to be a voluntary negligence; and not when it is done by the aſſent of the King. Paſch. 21 Eliz. *Stewards* Caſe, vouch. in *Cook* 9. Part, Sir *George Reynells* Caſe.

4. *Where, and What, ſhall be forfeited to the King by Outlawry; What not: and from what time the forfeiture ſhall relate; What not.*

1. A Man had Title to preſent to an Advowſon, the Church being void; and he was Outlawed in a perſonal Action: the Queen brought a *Scire facias*, to ſhew Cauſe, why She ſhould not preſent to the Avoidance, the preſentment being forfeited to her by the Outlawry. It was agreed in that Caſe, That the *Scire facias* did lye for the Queen, and that ſhe had good title to preſent in reſpect of the Outlawry: But then it was ſaid, That the *Scire facias* muſt mention the *Exigent*, and all the proceedings upon it, and the Judgment of the Coroners. And ſee *Book Entries*, 485. where, in a *Quare Impedit* for the King upon ſuch a Title, the King ſhewed in his Count, That A. was ſeiſed of ſuch an Advowſon, and granted the next Avoidance to B; and afterwards, one C. impleaded B. in a Writ of Accompt, and proceeded ſo far, that at the *Exigent* appeared not: and afterwards was Outlawed, and that after the Church became void, and by reaſon thereof it did belong to the King to preſent. And it was in that Caſe, the Opinion of all the Judges, That the *Scire facias* did well lye for the King. Mich. 29 Eliz. in C. B. *Beverly* and *Cornwalls* Caſe. *Leon.* 63. But ſee in that Caſe, It was holden, That if afterwards the Outlawry be reverſed, before the King doth preſent, there the Patron, or he who had the Preſentation, might preſent. *Goldesbr.* 104. in the ſame Caſe.

2. Note. It was ſaid by the Juſtices, That it was clear, That if Tenant for life ſoweth the Land, and afterwards commits a forfeiture, and the Leſſor entreth, That he ſhall have the Corn: And ſo if the Leſſee after the ſowing, ſurrendreth his Term, the Leſſor, or he to whom the Surrender was made, ſhall have the Corn. But if the Tenant for life maketh a Leaſe for years, and afterwards commits a Forfeiture, and the Leſſor doth enter, in that caſe the Leſſee ſhall have the Corn. Mich. 40 Eliz. in C. B. *Goldesbr.* 189. in *Oland* and *Bardwick*'s Caſe.

3. The Father, who hath the Wardſhip of his Son and heir apparent, cannot forfeit the ſame by Outlawry; nor ſhall his Executors or Adminiſtrators have ſuch Wardſhip. 33 H. 6. 55. *Cook* 3. Part, 3[illegible].

33. in *Ratcliffs* Case, acc. *Cook* 7. Part, 12. acc.

4. A. being Endicted for Recusancy, and not coming to Divine Service, and having an intent to fly beyond the Sea, made a Gift of all his Leases and Goods of great value, coloured with feigned Considerations. And afterwards he fled beyond Sea, and afterwards he was Outlawed upon the same Endictment: It was Resolved, That this Guift was void to defeat the Queen of the Forfeiture of his Goods, by the Statute of 13 Eliz. Cap. 5. And that the Queen should have his Goods and Leases by reason of the Outlawry. Mic. 36 Eliz. in the Exchequer-Chamber. *Paunceſoot* and *Blunts* Case, vouch. in *Cook* 3. Part, 82. in *Treyars* Case.

5. Note. It was said, in *Cook* 93. & 95. That Debts or Duties by simple Contract, shall be forfeited to the King by Outlawry, although the party for them might wage his Law: And that in every *Quo minus* brought in the Exchequer by the King's Debtor, against one who is endebted upon a simple Contract, the Defendant shall not have his Law, for the benefit of the King *à fortiori*, when such a debt is forfeit to the King by Outlawry or otherwise, and the King is sole and immediate part. *Cook* 4. Part, 95. in *Slades* Case.

6. Two were bounden in a Recognizance to J. S. of 500 l; afterwards the Conusee was Outlawed; and after the general pardon 39 Eliz. was made: And if the said Debt were pardoned, or not, was the Question? Which consisted upon two Exceptions in the said pardon. 1. Except out of the pardon all Debts which were or be due to the Queen, or to any other to her use by any Condemnation, Recognizance, or otherwise. 2. Except also all Goods, Chattels, Debts, Actions, &c. already forfeited by reason of any Outlawry, whereof her Majesty by her Letters Patents hath before the last day of this present Session made any Grant, Covenant, or Promise to any person or persons. It was in this Case Resolved, That by the later Exception it is proved, That the intent of the Queen was not to include Debts which accrued to her by Outlawry within the first Exception; for that there is a special saving for them in the second Exception. Hill. 41 Eliz. in *Scaccario*. *Cook* 5. Part, 50. *Wyrrall's* [illegible]

7. If a man maketh a Lease at Will, and the Lessee is Outlawed, by which the Lease at Will is determined; the King shall have the profits, yet the Lessee at Will shall have the Corn which was sowed. But if the Lessee at Will be Outlawed, by which the Lease at Will is determined; yet the King shall have the Corn which was sowed. *Cook* 5. Part, 116. *Olands* Case.

8. A man was Outlawed after Judgment before the general Pardon, 43 Eliz. and after the Pardon dyed: Although by the Outlawry the Goods were in the King; yet it was Resolved, That the Executors of the person Outlawed, might come in without proces and plead the General Pardon, with averment, That they are not persons excepted; and the Executors may satisfie the King for the Goods, and have benefit of the Pardon. *Cook* 6. Part, 79. Sir *Ed. Phitton's* Case.

9. In Debt, the Case was, A Woman Executrix took a husband, and then they brought an Action of Debt as Executrix, and recovered, and had Judgment. The Defendant pleaded the Outlawry of the husband. It was adjudged in this Case, That by the Outlawry of the husband, he did not forfeit any of the goods of the Wife which she had as Executrix. Trin. 14 Jac. B. R. *Hix* and *Harrison's* Case. *Bollſt.* 3. Part, 210.

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5. *Where, and in What Cases, a man shall forfeit his Lands, Goods and Chattels for Treason, Felony: and from what time the forfeiture shall be accompted. And where a man shall forfeit his Goods or Lands without Attainder or processe of Law.*

1. IF a Felon or a Traytor committeth Felony or Treason; before his Conviction, he may sell his goods *Bona fide*, be they Chattels real or personal, for his maintenance, and the King shall not be enstated before Conviction to them. See *Cook* 8. Part, in Sir *Gilbert Fleetwoods* Case.

2. If a man at this day be ayding to the King's Enemies, or be killed in open rebell on against the King, he shall not forfeit his Lands or Goods: But if the Chief Justice of the King's Bench in person upon the view of the body of him killed in Rebellion, make a Record thereof, and returneth the same into the Kings-Bench, he shall forfeit his Lands and his Goods; as it was done and Resolved in the time of King *Henry* the 4th, by *Fineux* Chief Justice, *Cook* 4. Part, 57. in the Case of the Warden and Commonalty of Sadlers.

3. The Archbishop of *Canterbury* had *Catalla Felonium de infra manerium de D*, he committed Treason; afterwards the King made a generall Grant in the usual form to the Almoner of Felons goods *de se*, to dispose in Alms. The Bishop is Attainted: H. who had a Lease for years, is there *Felo de se*. The King grants the Term to another: It was the Opinion of the Justices, That the

Grantee ſhould have the Term, and not the Almoner: for the Almoner had not any Intereſt but as a Miniſter; And it appears there, That the Queen ſhall not have the forfeiture for the Archbiſhop's Treaſon, but during his life: Yet it was holden clearly, That the Queen might grant the ſame at Will; for it is a leſſe Eſtate then ſhe hath: And if the Queen do grant the Goods and Chattels of *Felons de ſe*, ſhe need not write the Grant of them made to the Almoner, 2 Ma. *Dyer* 107.

4. A. was Endicted of the death of J. S. before the Juſtices of the Peace in the County of *L*; upon which, a *Capias* was awarded, and upon that an *Exigent*; after which A. dyed before any Attainder: upon Award of the *Exigent*, his Adminſtrators brought a Writ of Error. It was adjudged, That the Writ of Errour did lye; and the reaſon was, becauſe by the awarding of the *Exigent*, his Goods and Chattels were forfeited. Trin. 18 H. 7. B. R. vouch. in *Cook* 11. Part, 41. in *Metcalf*'s Caſe.

5. In a *Monſtrans de Droit*, the Caſe was, *John de Malo Lacu* gave to *Peter de Malo Lacu*, and the heirs of his body, the Manor of *Mulgrave*, which came to Sir *Ralph Bigod*: who, 6 H. 8. made a Feoffment in Fee to W. and others, to the uſe of his laſt Will, and dyed; the right of the Land, together with the Entail, diſcended to Sir *Francis Bigod*, who, 21 H. 8. made a Feoffment to the uſe of himſelf, and K. his Wife, and the heirs of their two bodies, and had Iſſue *Ralph Bigod*, and *Dorothy*: 26 H. 8. Sir *Francis* was attainted of Treaſon, and executed; and 31 H. 8. a ſpeciall Act of Parliament was made of his Attainder and Forfeiture: 6 *Eliz. Ralph Bigod*, Son and Heir of Sir *Francis* and *K.* was reſtored in blood by Parliament, and dyed without Iſſue; *Dorothy* married *Roger Ratcliff*, and they had Iſſue *Francis Ratcliff*: 8 Eliz. *K.* dyed; 33 Eliz. all this was found by Office: 34 Eliz. The Queen granted the Manor of *Mulgrave* to the Lord *Sheffield*, and the heirs of his body. There were 3. Points Reſolved in this Caſe, 1. That the Feoffment gave away all the Eſtate the Tenant in tail had concerning himſelf; but concerning his Iſſue in tail, there remained a right in him by force of the Statute of *Weſt.* 2. 2. Reſolved, That this old right of Entail was forfeited by the Statute of 26 H. 8; for that there was an actual entail in the perſon attainted, at the time of his Attainder. 3. Reſolved, That their rights were bound by the expreſſe words of the Statute, there being no Saving therein for them. Then, 4. When the Office was found, the Iſſue in tail was barred, notwithſtanding any pretended Remitter. Mich. 13 Jac. in the Exchequer Chamber. The Lord *Sheffeild* and *Ratcliff*'s Caſe. *Hobart*, 334. See *Godbolt* 314. acc.

More Forfeiture.

1. A Woman was Tenant for life; the Reverſion in Fee to an Enfant and Ward to the King: The Woman took Husband, they made a Leaſe for 15. years; and afterwards the Husband and Wife levied a Fine of the Land: and by the ſaid Fine, the Lands were rendred to the Leſſee for 15. years, and after to the husband and wife, and to the heirs of the wife. It was a Quere, If this acceptance and render, was a forfeiture of the Eſtate of the Woman? But it was the clear Opinion of *Dyer*, That if the Woman had been Tenant in tail within the Statute of 11 H. 7, and had accepted a Fine, it had been no Forfeiture. Trinit. 4 Ma. *Dyer*, 148. *Penycocks* Caſe. But ſee now, 18 Eliz. in C. B. and *Cook* 3. Part, 51. in Sr *George Brown*'s Caſe, That ſuch acceptance by way of Fine of a Woman, is a Forfeiture; againſt the Opinion of *Dyer*, in the ſaid Caſe of *Penycock*.

2. Tenant for life, the remainder in tail; Tenant for life levied a Fine, *ſur Conuſans de Droit come ceo* of the Land to the uſe of himſelf in Fee: Reſolved, That it was a Forfeiture. Afterwards, Tenant for life and he in the Remainder joyned in a Feoffment, and made a Letter of Attorney to make Livery. It was holden a Diſcontinuance; for it was holden, That it was firſt an Entry for the Forfeiture, and then it was the Feoffment of him in the Remainder, and the Confirmation of the Tenant for life. Paſch. 16 Eliz. *Dyer*, 314. See before, *Cook* 1. Part, in Sir *William Pelham*'s Caſe. *Cook* 2. Part, *Bredons* Caſe. And *Cook* 1. Part, *Inſtitutes*, 251. acc.

3. If a *Feme Covert* doth Convey her Land which is holden in *Capite*, unto the uſe of her ſelf for life, the remainder in tail to her husband; the ſame ſhall not be taken to be an Advancement within the Statute of 32 H. 8; for they ſhall not be intended to advance their husbands, but the Husbands their Wives and Children: and if he make an Alienation of thoſe Lands, the ſame is no Forfeiture, but is out of the Statute of 11 H. 7. 19 Eliz. *Dyer* 354.

4. In a Special Verdict, the Caſe was this in effect; Tenant for life in the right of his Wife made a Feoffment, *Habendum* to the Feoffee and his heirs, to the only uſe and behoof of the Feoffee and his heirs for the life of the Wife; It was adjudged in that

that Case, That it was a Forfeiture; for the *Habendum* is absolute: and the use is another Clause: and although he doth not limit the use but for life; yet the Law limits the remainder of the use to the party who made the Feoffment. Mic. 31 Eliz. in B. R. Sir *Ralph Egerton*'s Case. See before.

5. A Copyholder was Attainted of Heresie in the time of Queen *Mary*, when the Statute of 2 H. 5. was in force: It was made a Question by the Lord *Dyer* and *Welsh*, Justices, If for that cause he should forfeit his Copyhold? And they were of Opinion, That he should not; because Heresie is a Spiritual Crime, of which the Common-Law doth not take notice. Yet *Britton* saith, That by the Common Law, that offence was Capital, for which a man might lose his life: but yet he was of Opinion, That for the same Offence, he did not forfeit any of his Lands; and therefore they are of Opinion, That for Heresie, a Copyholder, although he was burnt for the Heresie, yet it was no Corruption of his Blood, nor Forfeiture of his Lands. Mich. 24 Eliz. in C. B. adjudged.

6. Tenant by the Curtesie makes a Lease for years, upon Condition to have Fee: It hath been made a doubt, If it were a Forfeiture? But the better Opinion hath always been, That it is a Forfeiture, if Livery be made; for that when the Condition is performed, the Fee passeth *ab initio*. But if Tenant in tail makes a Lease, with Condition to have Fee, and dyeth; if the Condition be performed: Yet it is no Discontinuance, because the discent doth prevent the performance of the Condition, because it is not executed in the time of the Tenant in tail. See 32 E. 3. Garr. 31. *Cook* 8. Part, in the Lord *Stafford*'s Case, acc.

7. If Tenant in tail makes a Lease for life, and afterwards grants the Reversion to J. S, unto the use of the Tenant for life with Warranty. It was made a Quære, If it was a present Forfeiture or Discontinuance? It was conceived, That it was not a Discontinuance, because the Warranty did not go to the *Cestuy Que use*. Mich. 21 Eliz. in C. B.

Forgery *of false Deeds, and* Forgery.

1. FOrgery of False Deeds, is the fraudulent making and publishing of False writings, to the prejudice and damage of another mans Right: And if a man do forge a Statute in my name, and thereupon sueth forth a *Capias* against me, I may have a Writ of Deceit against him who forged it, if I be thereupon sued and taken. See *Fitzh. Na. Br.* 96. acc. But if a man maketh an Obligation in my name, in that Case I cannot have a Writ of Forger of false Deeds, or an Action of Deceit against him, because I may plead to it, that it is not any Deed, as the Book is, in 19 H. 6. 44.

2. If a Notary publique, or any other persons by Covin betwixt them, counterfeit the seal of any Parson or Vicar, and forge Letters of Resignation of his Parsonage, or Vicarage, in the name of the Parson or Vicar of his Benefice, he may have a Writ of *Deceit* against them. And so it is, If two men come before the Mayor of the Staple, or before any other; and one will acknowledg a Statute unto another, of the sum of 100 l. in the name of another: and affirm, that he is such a person, whereas in truth he is not that person, but another; and he in whose name the Statute is acknowledged, is afterwards taken in Execution by force of such Statute, the party who is so taken in Execution, may have an Action of *Deceit*, against the said other persons, and therein shall recover his damages. *Fitzh. Na. Br.* 100. acc.

3. In an Action upon the Case; for slandering of his Title, the Plaintiff declared, That there was a Communication betwixt him and R. E. for a Demise to be made unto him of the Manor of D; and that the Defendant knowing thereof, said, I have a Lease for 90 years of the said Manor, and shewed and published a Demise, made by J. S, from whom the Plaintiff claimed; whereas in truth the Defendant knew the same to be a Counterfeit Deed: by reason of which publication, R. E. did not proceed with the Plaintiff, in taking the Lease of the said Manor. The Defendant pleaded, That such an Indenture (as is mentioned in the Declaration) came to his hands by Trover; and traversed, That he knew of the Forgery of it. In this Case it was

Reſolved, That the bar of the Defendant was inſufficient; for when it layed in the Declaration, that the Defendant knew of the communication concerning the taking of the Leaſe; and alſo the Defendant knew that it was forged, as is ſet forth in his bar? and yet publiſhed the Leaſe or Demiſe made by J. S. by which the Plaintiff loſt his Bargain, that the Forgery was not traverſable. *Cook* 4. Part, Sir *Gilbert Gerard* and *Dickenſons* Caſe. 18.

4. Grandfather, Father, and Daughter; Land diſcended from the Grandfather to the Father, who made a Leaſe for 100 years; the Father dyed, the Daughter forged a Will of the Grandfather by which he gave the Land to the Father for Life, the Remainder to the Daughter in Fee, and the ſaid Will was forged to have avoided an Execution of a Statute Staple. And if it were within the Statute of 5 Eliz. was the Queſtion. It was ſaid, That it was within the Statute, within the firſt branch of it, *viz.* If any ſhall forge any Deed, to the intent that the Eſtate of Freehold or Inheritance of any perſon, in or to any Lands or Hereditaments, Freehold, or Copyhold, or right title or Intereſt of any, of, in, or to the ſame, or any of them, may be moleſted, &c. And it was ſaid, That Leſſee for years hath a title, and hath an Intereſt, and a Right, and therefore it was within the Statute: alſo it was ſaid, That it was within another branch of the Statute, *viz.* If any perſon plead, publiſh, or ſhew forth, &c. to the intent to have or claim any eſtate of Inheritance, Freehold, or Leaſe for years. And it was ſaid, That a Statute ſtaple was an eſtate for years, although it was not a Leaſe for years. But to all that it was anſwered, That the words of the Statute are, whereby any Eſtate for years ſhall be claimed, but in the principal Caſe, the Defendant doth not claim, but would defeat an Eſtate for years: And it was anſwered, That a Statute Staple is not a Leaſe for years: and the Statute being a penal Law, ſhall not be taken by Equity: The Caſe was not Reſolved. Mich. 29 Eliz. in B. R. *Sturgies* Caſe. *Godbolt.* 62.

5. A. brought a Writ of Forgery of falſe Deeds againſt H. of *Glouceſter*, and declared upon the forging of an Indenture, *in quo continetur, quod quidam Abbas Monaſterii de* Glouceſter, *demiſit ſcitum mantrii de R. et terras Dominicales*, &c. the Defendant pleaded, Not Guilty. It was given in Evidence on the Plaintiffs part; a Leaſe ſuppoſed to be made and forged, containing that the ſaid Abbot leaſed the ſaid Scite, and all the Demeſne Lands of the ſaid Mannor *exceptis duobus ſeparalibus clauſuris inde*, &c. *vocat*, &c. It was holden by the Court, That this was good evidence, for it is not neceſſary to conſtrue *terras dominicales, omnes terras dominicales*, for the Lands not excepted, are *Terra Dominicales*: and ſo the Declaration was good. Hill. 30 Eliz. in C. B. *Aſkins* and *Holes* Caſe. *Leon.* 139.

6. In an Action of Forgery of falſe Deeds, the Defendant demanded Judgment of the Writ, becauſe the Plaintiff had the like Writ of Forgery of falſe Deeds, to which the Defendant had appeared, and that this Writ was brought depending the other. It was ſaid, That the Writ of Forgery of falſe Deeds was general, *Quare diverſa falſa fecit fabricavit, vel quoddam falſum factum fabricavit*: The Defendant had not pleaded, That the Plaintiff had declared in the firſt Action; and for that cauſe it was adjudged, That the Writ ſhould not abate, but that the Defendant ſhou'd anſwer; for if Writs be brought of Treſpaſs, or other ſuch like Writs, if it doth not appear upon Record, that the Plaintiff hath declared in them, the former Writ brought notwithſtanding the Writ ſhall not abate; otherwiſe, if they be brought after declaration appearing upon Record. See *Cook* 5. Part, 61. in *Sparies* Caſe.

7. Note, It was Reſolved by the Juſtices, That if one be convicted of Forgery, or publication of any writing concerning Freehold, &c. within the firſt branch of the Act of 5 Eliz. or concerning intereſt for Term of years within the ſecond branch of the Act, and be convicted. If afterwards he offend either againſt the firſt branch of the Act, or the ſecond, and be convicted. And afterwards he forgeth a Charter of Feoffment within the firſt branch, or *è converſo*, that that is Felony by the expreſs words of the Act, *viz.* That if any perſon or perſons being hereafter convicted or condemned of any the ſaid Offences, which extends to all Offences in the firſt or ſecond branch. But if one forge a writing in *Anno* 37 Eliz. and afterwards he forge another in 38 Eliz. yet it is not Felony, although he forgeth many writings one after the other, for by the expreſs words of the Act, it is not Felony. Paſc. 7 Jac. Sir *William Read* and *Boothes* Caſe. *Cook* Select Caſe, 34.

8. Note, It was Reſolved by the Juſtices, That if one writeth the Will of a man who lyeth ſick, and after the ſick perſon is ſpeechleſs, he inſerts a clauſe in the Will without any Warrant, that the ſame is not forgery of a Will, within the Statute of 5 Eliz. Paſc. 12 Eliz. *Dyer*, 288.

9. F. was ſued in the Star-Chamber for forging of a Cuſtomary for uſage of Copyholds, which extended to the diſinheritance of the Lord, and put divers Seals to it. It was Reſolved by the Juſtices, That the ſame was a forgery within the Statute of 5 Eliz. by the word writing, within the Statute. And in that Caſe, it was Reſolved That in ſuch Caſe, the King may pardon the corporal puniſhment. Paſc. 15 Eliz. *Dyer*, 322. *Tavernor's* Caſe.

10. A man cut off a dead mans hand, and put a Pen and a Seal in it, and ſo ſigned and delivered a Deed with the dead hand, and ſwore that he ſaw the Deed ſealed and delivered; this was holden by the Court to be forging of a Deed: wherefore the party was fined 100 l. and to ſtand in the Pillory with a Paper on his head, ſhewing the nature of the offence. Hill. 1652. in B. R. *Howell* and Groves Caſe. *Style* 362.

11. A. exhibited a Bill in the Star-Chamber againſt L. for forgery. The Caſe was, A. delivered to L. a Taverner, 1000 l. to be imployed for him for Intereſt; L. ſpent the money, and delivered to A. divers ſeveral Obligations, every one of them containing three ſeveral perſons, well known to be men of great eſtates, and ſufficient, bound in 200 l. for the payment of 160 l. to A. at a day within ſix Moneths then next comming, and delivered them ſealed, and the names of the parties mentioned to be bounden ſubſcribed, and his own name being ſubſcribed as a Witneſs to the ſealing and delivery thereof, as a publick Notary: whereas in Deed the parties mentioned in the Bonds had not any notice of them: but L. had forged and counterfeited them. It was moved to the Juſtices upon this matter, If L. ſhould loſe both his Ears by the Statute of 5 Eliz. or but one Ear, and ſhould pay damages to the party grieved. It was the Opinion of both the Chief Juſtices in the Star-Chamber, That L. ſhould loſe but one Ear, for that it ſhall be taken but as one Forgery, for that it was made all at one time: And it was alſo holden by the ſaid Juſtices, That A. was the party grieved, and that upon that Bill, he ſhould recover his damages. Hill. 8 Jac. in *Cam. Stellat.* *Andrews* and *Ledſams* Caſe. *Brownlow.* 2. Part, 50.

Formedon *in* Diſcender; Remainder *and* Reverter.

1. *Of what, and where it lyeth; and upon what, and for whom it lyeth: And where he who makes Title by a Formedon muſt make himſelf Heir to him who was laſt ſeiſed; where not.*

1. A Man may have a Formedon in the Diſcender of a profit apprender in any Lands or Tenements, or iſſuing out of any Lands or Tenements: As if a man grant 20 l. iſſuing out of any Lands or Tenements to a man, and the Heirs of his body begotten, or to a man in Frankmarriage with his Daughter: If the Donee alien that Rent, or be diſſeiſed of that Rent, and dyeth, his Heir, who is a Son, or Daughter, ſhall and may have a Writ of Formedon in the Diſcender of that Rent. And ſo it is, if a man granteth the profits ariſing out of his Mill unto another, and the Heirs of his body, and the Donee dyeth, and his Heir is put by the profits of the ſame; he may have and maintain a Formedon in the Diſcender of ſuch profits apprender. *Fitzh. Nat. Br.* 112.

2. If a man granteth to one, and the Heirs of his body, Paſture for 20 Oxen, or for 100 ſheep, and the Donee dyeth, and his Son who is his Heir, is Diſſeiſed or deforced of his Paſture, he may have a Formedon in the Diſcender thereof, *viz.* That he render to him Paſture for 20 Oxen, 100 ſheep, &c. But if a man granteth Common of Paſture to one and the Heirs of his body begotten, who hath Cattel, and the Donee dyeth, and his Heir is put by his Common: In that Caſe the Heir ſhall not have a Formedon in the Diſcender for that Condition, but a *Quod permittat* in the nature of a Formedon, and therein ſhall count upon the gift, and the ſpecial matter. *Fitzh. Nat. Br. ibid.*

3. Error was brought to reverſe a Judgment given in a Formedon, which was brought of a Croft and other parcells, &c. The Error aſſigned was, That a Formedon lyeth not of a Croft: and whether if it be reverſed for the Croft, if it ſhall be reverſed for the other parcells. It was the Opini-

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on of the whole Court, That a Formedon lyeth not of a Croft, but an Aſſiſe: And then this Writ being *Brevi Adverſarium*, It is not to be reverſed as to part only *Quoad* the Croft, but the Judgment ſhall be reverſed for the whole. Paſc. 12 Jac. in B. R. *Ellis* and *Wallis's* Caſe. *Bolſt.* 2. Part, 214. See Trin. 23 Car. in B. R. *Stylet* 32. acc.

4. Se: 15 C. 8. Br. Title. Tenant by Copy of Court Roll, Copyhold Lands may be entailed, and a Formedon may well lye of that in Diſcender by Proteſtation to ſue in the nature of a Formedon at the Common Law: And ſo it was holden by all the Juſtices, for although Formedon in the Diſcender was not given by the Statute of *Donis Conditionalibus*, yet now this Writ lyeth, and it ſhall be intended, that it hath bin a Cuſtome time out of mind, that Copyholds might be entailed.

5. It was holden by the Juſtices, That a Copyhold might be entailed, and that it is within the Equity of the Statute *de donis Conditionalibus*; and then a Formedon in the Diſcender might well lye of it. Mich. 35 Eliz. *Grovener* and *Brookes's* Caſe. *Poph.* See Hill. 6 Jac. in C. B. *Rayner* and *Powells* Caſe. *Brownlow*, 2. Part, 43, 44. acc. See *Cook* 3. Part, 9. in *Heydons* Caſe, acc.

6. A Formedon, the Diſcender lyeth of a Stream: but it is there ſaid, that it doth not lye of an Advowſon. *Fitzh. Nat. Br.* 217. B.

7. No Tenant ſhall have a Formedon in the Diſcender, or in the Remainder where he is once in poſſeſſion by force of the tail, or by force of that Remainder, for after that he hath poſſeſſion of that tail, or of that Remainder, if he be put out, he ſhall have an Aſſiſe of *Novel diſſeiſin*, or a Writ of Entry in the *Quibus* in the nature of an Aſſiſe. And if a Remainder be given to two and their Heirs, and one of them dyeth, and the other ſurviveth, and afterwards dyes, his Heir ſhall have a Formedon in the Remainder, without making mention in the Writ, that he ſurvived the other Joynt-Tenant. *Fitzh. Nat. Br.* 219. B.

8. If a man deviſeth Lands or Tenements to one in tail, the Remainder over in Fee to a ſtranger, if he who is Tenant in tail entreth, and is ſeiſed by force of the entail, and afterwards dyeth without Iſſue, he in the Remainder ſhall have a Writ *de Ex gravi Querela*, to execute the ſaid Deviſe: And ſo it is, if a man deviſeth Lands or Tenements to one in tail, and afterwards the Tenant in tail dyeth without Iſſue of his body, in ſuch Caſe, the Heir of the Donor, or he who hath the Reverſion of the Land, ſhall have a Writ *de Ex gravi Querela*, in the nature of a Formedon in the Reverter, to re-continue the poſſeſſion of the Land to him who hath the Reverſion. See ſuch Writ. *Fitzh. Nat. Br.* 199.

9. If the Husband alieneth the Land of his Wife in Fee, and afterwards the Husband and Wife are Divorced; the Wife ſhall have a Writ of *Cui ante divortium* againſt the Alienee. But if the Lands be to the Wife of an Eſtate, and not in Fee, and after they are divorced, and the Wife dyeth; the Heir of the Wife ſhall not have a Writ *de ſur Cui ante Divortium* againſt the Alienee, but in ſuch Caſe the Heir ſhall be put to his Writ of Formedon in the Diſcender. *Fitzh. Nat. Br.* 204. acc.

10. In a Formedon in the Diſcender, the Demandant in the Writ made the Conveyance by J. S. who gave it to J. D. *et heredibus de corpore ſuo legitime procreat.* and ſhewed in the Writ, that he was Heir to the Son and Heir of J. D. Son and Heir of W. D. the Donee. And for that cauſe, it was demanded Judgment of the Writ: The Court was of Opinion, That the Writ was not good, for that he ought not to make mention of the Writ of every Heir, as here he doth, but he ought to make himſelf Heir to him who laſt dyed ſeiſed of the Eſtate tail, as of his Father or other Anceſtor. Hill. 3 Car. in C. B. *Jenkins* and *Dawſon* Caſe. *Hetly* 78.

11. J. and M. his Wife brought a Formedon in the Remainder againſt E. B. of three Meſſuages in D. which J. S. did give to E. C. and the Heirs of her body, the Remainder to J. P. and his Heirs, *quæ poſt mortum prædict.* E. & J. P. *prefat.* J. & M. *filium et hæred.* R. P. brother and Heir, H.P. Son and Heir of the ſaid J. P. *remanere debent in formam Donationis prædict. eo quod prædict.* E. *obiit ſine hered. de corpore ſuo.* The Tenant pleaded in abatement of the Writ, that the Demandant ſhould have ſuppoſed that the Meſſuages *poſt mortem prædict.* E. *et* J. P. *prefat.* J. *et* M. *ut Conſanguin. et hæred. prædict.* J. P. *remanere debet per formam donationis prædict.* But the Opinion of the Court was, That the Writ was good enough, inaſmuch as it appears to the Court by the Pedigree as it is ſet down, That ſhe is and muſt needs be Couſin and Heir unto J. P. And it was ſaid in that Caſe, That in a Formedon in the Diſcender, the Demandant made himſelf Heir to every one that had bin inheritable to the tail, though by the Regiſter he ſhould make himſelf Heir only to them that were laſt ſeiſed by force of the intail; but yet the Writ was holden good. 11 H. 6. 20. Hill. 11 Jac. in C. B. *Freak* and *Binſova's* Caſe. *Hob.* 51.

12. Note, It was ſaid by *Hobart* Chief Juſtice, That the collateral Iſſue claiming by an intail, muſt make mention of every collateral Iſſue inheritable before him, as he is to do in Caſe of lineal Anceſtors: And therefore if the Father being Tenant in tail to him, and the Heirs Males of his body, hath iſſue three Sons, and the ſecond Son levyeth a Fine of the Land in the life of the Father, and then

then the Father dyeth without diſpoſing of the eſtate. It is clear, the eldeſt Son is not barred, becauſe he is not privy to his ſecond brother, though he be within the rigour of the words, for he is Heir to him that levyed the Fine in the life of the Father, and doth claim only by the entail, and above him, and not as Heir, which is the meaning of the Law. Then again, if the ſecond brother dyeth without Iſſue in the life of the elder, or of his Iſſue, the third brother ſhall claim this in tail after the death of the elder Brother, notwithſtanding the Fine of the middle brother, becauſe he doth claim immediatly from his elder brother, and need not convey himſelf by, nor make mention of his middle brother, no not in the Pedigree: But if the elder brother dyeth without Iſſue in the life of the middle Brother, or his Iſſue, without diſpoſing the Eſtate, and then they all dye, now the third brother and his Iſſue ſhall be barred; for although he bring his Formedon in the Diſcender, and lay down the entail, and then bring it to his eldeſt brother that was laſt ſeiſed, and make him immediate Heir to him, without mention of the ſecond Brother: Yet the Tenant in the Formedon may plead the Fine of the middle brother, and that he and his Iſſue did ſurvive the elder and his Iſſue, for by that it appears, that the middle or his Iſſue were the perſons inheritable to the entail before the younger brother in whom the title of the entail had bin totally, but for the Fine which bars him and the whole tail, aſwell againſt the younger brother as againſt his own Iſſue. Mich. 19 Jac. in C. B. *Mackwilliams* Caſe. *Hob.* 333.

13. Land was given to Husband and Wife, and to the Heirs of their two bodies begotten, the Huſband made a Feoffment in Fee, and dyed, having Iſſue, and after the Wife dyed before any entry made. It was Reſolved in this Caſe, That it was a Diſcontinuance to the Iſſue at the Common Law, for the Iſſue ought to claim as Heir of their two bodies individually, and as Heir to one he cannot inherite, and by conſequence cannot enter, for his entry ought to enſue his title and his Action; and the Formedon in the Diſcender in ſuch Caſe is, *Quod* C. *dedit* D. *et* E. *uxori ejus et hæredibus de Corporibus ipſorum* D. *et* E. *exeuntibus: Et quod poſt mortem prædict.* D. *et* E. *prefato* K. *filio et hæredi ipſorum* D. *et* E. *diſcendere debet per formam doni, &c. Cook* 7. Part, 72. *Gretley's* Caſe.

14. In a Formedon in the Reverter, the Donor needeth not ſhew the Pedigrees of the Iſſues of the Donee, nor who was laſt ſeiſed, becauſe he is a ſtranger to the Pedigree, and by intendment, cannot come to the knowledg of it, but it is otherwiſe in a Formedon in the Diſcender. 4 Eliz. *Dyer* 216. Quere if he ſhall ſhew it in a Formedon in the Remainder.

15. A man ſeiſed of Lands in Gavelkind, had Iſſue three Daughters, A. B. and C. and deviſed all his Lands to A. in tail, the Remainder of the one half to B. in tail, the Remainder of the other half to C. in tail: And if B. dyed without Iſſue, the Remainder of her moyety to C. and her Heirs; and if C. dyed without Iſſue, the Remainder of her moyety to B. and her Heirs; the Deviſor dyed, A. and B. both dyed: Now if C. in the Remainder ſhould have one Formedon for this Land, or ſeveral Formedons, was the Queſtion: It was the Opinion of the Court, That one Formedon lyeth well for all the Land, for that it was by one ſelfſame conveyance, though that the Eſtate come by ſeveral deaths; the Action was brought by the Heir of C. after the death of C. Mich. 7 Jac. in C. B. *Buckner* and *Sawyer's* Caſe. *Cook* 8. Part.

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2. *Where the Writ of Formedon ſhall abate; and what ſhall be ſufficient to abate it, What not: And whether a Recovery in a Formedon be a bar in another Writ; and in what Writ, what not: And Pleas in Formedon.*

1. NOte theſe Rules concerning bringing of Writs of Formedon, and the Abatement of them. 1. If a Remainder be executed in a Writ of Formedon in the Diſcender, he ſhall never ſpeak of this Remainder, but the general Writ of Formedon in the Diſcender ſhall ſerve, and he ſhall count of an immediate gift, for he cannot have a Formedon in the Remainder, when the Remainder is once executed. 2. If a man bringeth a Formedon in Reverter or Remainder, the omiſſion of the eldeſt Son who ſurvived his Father, or the like in Pedigree on the part of the Donee, or of him in the Remainder, ſhall abate the Writ. But of the part of the Donee, although that the Donee had many Iſſues in lineal diſcent inheritable to the Eſtate tail, and which extend the Eſtate, the Demandant needeth not to name any of the Iſſues in the clauſe *Et quæ poſt mortem*, but ſhall ſay, *Quæ poſt mortem* of the Donee *ad ipſum reverti debet eo quod* the Donee dyed without Iſſue. 3. In a Formedon in the Diſcender, the Demandant ought to make mention of every one to whom any right did deſcend; as after a Diſcontinuance made by the Father.

on of the whole Court, That a Formedon lyeth not of a Croft, but an Aſſiſe: And then this Writ being *Brevet Adverſarium*, It is not to be reverſed as to part only *Quoad* the Croft, but the Judgment ſhall be reverſed for the whole. Paſc. 12 Jac. in B. R. *Ellis* and *Wallis's* Caſe. *Bolſtr.* 2. Part, 214. See Trin. 23 Car. in B. R. *Styles* 32. acc.

4. Se: 15 C. 8. Br. Title. Tenant by Copy of Court Roll, Copyhold Lands may be entailed, and a Formedon may well lye of that in Diſcender by Proteſtation to ſue in the nature of a Formedon at the Common Law: And ſo it was holden by all the Juſtices, for although Formedon in the Diſcender was not given by the Statute of *Donis Conditionalibus*, yet now this Writ lyeth, and it ſhall be intended, that it hath bin a Cuſtome time out of mind, that Copyholds might be entailed.

5. It was holden by the Juſtices, That a Copyhold might be entailed, and that it is within the Equity of the Statute *de donis Conditionalibus*; and then a Formedon in the Diſcender might well lye of it. Mich. 35 Eliz. *Grevener* and *Brookes's* Caſe. *Poph.* See Hill. 6 Jac. in C. B. *Rayner* and *Powell's* Caſe. *Browlow*, 2. Part, 43, 44. acc. See *Cook* 3. Part, 9. in *Heydons* Caſe, acc.

6. A Formedon, the Diſcender lyeth of a Stream: but it is there ſaid, that it doth not lye of an Advowſon. *Fitzh. Nat. Br.* 217. B.

7. No Tenant ſhall have a Formedon in the Diſcender, or in the Remainder where he is once in poſſeſſion by force of the tail, or by force of that Remainder, for after that he hath poſſeſſion of that tail, or of that Remainder, if he be put out, he ſhall have an Aſſiſe of *Novel diſſeiſin*, or a Writ of Entry in the *Quibus* in the nature of an Aſſiſe. And if a Remainder be given to two and their Heirs, and one of them dyeth, and the other ſurviveth, and afterwards dyes, his Heir ſhall have a Formedon in the Remainder, without making mention in the Writ, that he ſurvived the other Joynt-Tenant. *Fitzh. Nat. Br.* 219. B.

8. If a man deviſeth Lands or Tenements to one in tail, the Remainder over in Fee to a ſtranger, if he who is Tenant in tail entreth, and is ſeiſed by force of the entail, and afterwards dyeth without Iſſue, he in the Remainder ſhall have a Writ *de Ex gravi Querela*, to execute the ſaid Deviſe: And ſo it is, if a man deviſeth Lands or Tenements to one in tail, and afterwards the Tenant in tail dyeth without Iſſue of his body, in ſuch Caſe, the Heir of the Donor, or he who hath the Reverſion of the Land, ſhall have a Writ *de Ex gravi Querela*, in the nature of a Formedon in the Reverter, to re-continue the poſſeſſion of the Land to him who hath the Reverſion. See ſuch Writ. *Fitzh. Nat. Br.* 199.

9. If the Husband alieneth the Land of his Wife in Fee, and afterwards the Husband and Wife are Divorced; the Wife ſhall have a Writ of *Cui ante divortium* againſt the Alienee. But if the Lands be to the Wife of an Eſtate, and not in Fee, and after they are divorced, and the Wife dyeth; the Heir of the Wife ſhall not have a Writ *de ſur Cui ante Divortium* againſt the Alienee, but in ſuch Caſe the Heir ſhall be put to his Writ of Formedon in the Diſcender. *Fitzh. Nat. Br.* 204. acc.

10. In a Formedon in the Diſcender, the Demandant in the Writ made the Conveyance by J. S. who gave it to J. D. *et heredibus de corpore ſuo legitime procreat.* and ſhewed in the Writ, that he was Heir to the Son and Heir of J. D. Son and Heir of W. D. the Donee. And for that cauſe, it was demanded Judgment of the Writ: The Court was of Opinion, That the Writ was not good, for that he ought not to make mention of the Writ of every Heir, as here he doth, but he ought to make himſelf Heir to him who laſt dyed ſeiſed of the Eſtate tail, as of his Father or other Anceſtor. Hill. 3 Car. in C. B. *Jenkins* and *Dawſon* Caſe. *Hetly* 78.

11. J. and M. his Wife brought a Formedon in the Remainder againſt E. B. of three Meſſuages in D. which J. S. did give to E. C. and the Heirs of her body, the Remainder to J. P. and his Heirs, *quæ poſt mortum prædict.* E. & J. P. *prefat.* J. & M. *filium et hæred.* R. P. brother and Heir, H.P. Son and Heir of the ſaid J. P. *remanere debent in formam Donationis prædict. eo quod prædict.* E. *obiit ſine hered. de corpore ſuo.* The Tenant pleaded in abatement of the Writ, that the Demandant ſhould have ſuppoſed that the Meſſuages *poſt mortem prædict.* E. *et* J. P. *prefat.* J. *et* M. *ut conſanguin. et hæred. prædict.* J. P. *remanere debet per formam donationis prædict.* But the Opinion of the Court was, That the Writ was good enough, inaſmuch as it appears to the Court by the Pedigree as it is ſet down, That ſhe is and muſt needs be Couſin and Heir unto J. P. And it was ſaid in that Caſe, That in a Formedon in the Diſcender, the Demandant made himſelf Heir to every one that had bin inheritable to the tail, though by the Regiſter he ſhould make himſelf Heir only to them that were laſt ſeiſed by force of the intail; but yet the Writ was holden good. 11 H. 6. 20. Hill. 11 Jac. in C. B. *Freak* and *Binford's* Caſe. *Hob.* 51.

12. Note, It was ſaid by *Hobart* Chief Juſtice, That the collateral Iſſue claiming by an intail, muſt make mention of every collateral Iſſue inheritable before him, as he is to do in Caſe of lineal Anceſtors: And therefore if the Father being Tenant in tail to him, and the Heirs Males of his body, hath iſſue three Sons, and the ſecond Son levyeth a Fine of the Land in the life of the Father, and then

then the Father dyeth without diſpoſing of the eſtate. It is clear, the eldeſt Son is not barred, becauſe he is not privy to his ſecond brother, though he be within the rigour of the words, for he is Heir to him that levyed the Fine in the life of the Father, and doth claim only by the entail, and above him, and not as Heir, which is the meaning of the Law. Then again, if the ſecond brother dyeth without Iſſue in the life of the elder, or of his Iſſue, the third brother ſhall claim this in tail after the death of the elder Brother, notwithſtanding the Fine of the middle brother, becauſe he doth claim immediatly from his elder brother, and need not convey himſelf by, nor make mention of his middle brother, no not in the Pedigree: But if the elder brother dyeth without Iſſue in the life of the middle Brother, or his Iſſue, without diſpoſing the Eſtate, and then they all dye, now the third brother and his Iſſue ſhall be barred; for although he bring his Formedon in the Diſcender, and lay down the entail, and then bring it to his eldeſt brother that was laſt ſeiſed, and make him immediate Heir to him, without mention of the ſecond Brother: Yet the Tenant in the Formedon may plead the Fine of the middle brother, and that he and his Iſſue did ſurvive the elder and his Iſſue, for by that it appears, that the middle or his Iſſue were the perſons inheritable to the entail before the younger brother in whom the title of the entail had bin totally, but for the Fine which bars him and the whole tail, aſwell againſt the younger brother as againſt his own Iſſue. Mich. 19 Jac. in C.B. *Mathwilliams* Caſe. *Hob.* 333.

13. Land was given to Husband and Wife, and to the Heirs of their two bodies begotten, the Huſband made a Feoffment in Fee, and dyed, having Iſſue, and after the Wife dyed before any entry made. It was Reſolved in this Caſe, That it was a Diſcontinuance to the Iſſue at the Common Law, for the Iſſue ought to claim as Heir of their two bodies individually, and as Heir to one he cannot inherite, and by conſequence cannot enter, for his entry ought to enſue his title and his Action; and the Formedon in the Diſcender in ſuch Caſe is, *Quod* C. *dedit* D. *et* E. *uxori ejus et hæredibus de Corporibus ipſorum* D. *et* E. *exeuntibus: Et quod poſt mortem prædict.* D. *et* E. *prefato* K. *filio et hæredi ipſorum* D. *et* E. *diſcendere debet per formam doni, &c. Cook* 7. Part, 72. *Gretley's* Caſe.

14. In a Formedon in the Reverter, the Donor needeth not ſhew the Pedigrees of the Iſſues of the Donee, nor who was laſt ſeiſed, becauſe he is a ſtranger to the Pedigree, and by intendment, cannot come to the knowledg of it, but it is otherwiſe in a Formedon in the Diſcender. 4 Eliz. *Dyer* 216. Quere if he ſhall ſhew it in a Formedon in the Remainder.

15. A man ſeiſed of Lands in Gavelkind, had Iſſue three Daughters, A. B. and C. and deviſed all his Lands to A. in tail, the Remainder of the one half to B. in tail, the Remainder of the other half to C. in tail: And if B. dyed without Iſſue, the Remainder of her moyety to C. and her Heirs; and if C. dyed without Iſſue, the Remainder of her moyety to B. and her Heirs; the Deviſor dyed, A. and B. both dyed: Now if C. in the Remainder ſhould have one Formedon for this Land, or ſeveral Formedons, was the Queſtion: It was the Opinion of the Court, That one Formedon lyeth well for all the Land, for that it was by one ſelfſame conveyance, though that the Eſtate come by ſeveral deaths; the Action was brought by the Heir of C. after the death of C. Mich. 7 Jac. in C. B. *Buckner* and *Sawyer's* Caſe. *Cook* 8. Part.

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2. *Where the Writ of Formedon ſhall abate; and what ſhall be ſufficient to abate it, What not: And whether a Recovery in a Formedon be a bar in another Writ; and in what Writ, what not: And Pleas in Formedon.*

1. NOte theſe Rules concerning bringing of Writs of Formedon, and the Abatement of them. 1. If a Remainder be executed in a Writ of Formedon in the Diſcender, he ſhall never ſpeak of this Remainder, but the general Writ of Formedon in the Diſcender ſhall ſerve, and he ſhall count of an immediate gift, for he cannot have a Formedon in the Remainder, when the Remainder is once executed. 2. If a man bringeth a Formedon in Reverter or Remainder, the omiſſion of the eldeſt Son who ſurvived his Father, or the like in Pedigree on the part of the Donee, or of him in the Remainder, ſhall abate the Writ. But of the part of the Donee, although that the Donee had many Iſſues in lineal diſcent inheritable to the Eſtate tail, and which extend the Eſtate, the Demandant needeth not to name any of the Iſſues in the clauſe *Et quæ poſt mortem*, but ſhall ſay, *Quæ poſt mortem* of the Donee *ad ipſum reverti debet eo quod* the Donee dyed without Iſſue. 3. In a Formedon in the Diſcender, the Demandant ought to make mention of every one to whom any right did deſcend; as after a Diſcontinuance made by the Father.

Father, if the eldeſt Son ſurviveth his Father, and dyeth without Iſſue, yet the younger brother ought to make mention of him in a *Formedon* in the *Diſcender*: otherwiſe, if the elder brother dyeth without Iſſue in the life of the Father. 4. In a *Formedon* in the *Diſcender*, it behoveth always the Demandant to make himſelf Son and Heir, or Coſen and Heir to him who was laſt actually ſeiſed by force of the ſale, for a later Seiſin in any heir in tail after, ſhall abate the Writ. *Cook* 8. Part, 86, 87. *Buckmer's* Caſe.

2. Note. If the Demandant in a *Formedon* in the *Reverter* be barred of a third part of the Land upon her own ſhewing; as where the Demandant ſheweth, That a Fine was levied of a Third part of the Land; In ſuch Caſe, the whole Writ of *Formedon* brought for the whole Land, ſhall abate; for that the Writ is teſtified by the Demandant's own ſhewing; and that in a ſubſtantial Point. Like as if a man demand a Debt of 20 l. and confeſſeth, that he hath no right to 10 l. of it; or demands 100 Acres of Land, and confeſſeth, he hath no right to 50 Acres of them; the Court *ex Officio*, or the party either by Plea in abatement, or as *amicus Curiæ*, may take knowledg of it, and abate the Writ. Mich. 13 Jac. in the Earl of *Clanrickard's* Caſe. *Hobart*, 279.

3. If the Iſſue in taile in a *Formedon* be barred by Warranty and Aſſetts, and then he alieneth the Aſſetts: yet againſt his Iſſues the barr ſtands good. *Hob.* 40. acc.

4. In a *Formedon* in the *Diſcender* brought by A. B. and C. of Lands in Gavel-kind, the Warranty of their Auncеſtor was pleaded in barr againſt them; upon which they were at Iſſue, If Aſſetts by diſcent? It was found by Verdict, That the Father of the Demandants was ſeiſed in Fee, being of the nature of Gavelkind, and deviſed the ſame to the Demandants, being his heir by the Cuſtome, and to their heirs equally to be divided amongſt them: And if the Demandants ſhall be accounted in of the Lands by diſcent, or deviſe, was the Queſtion? It was the Opinion of the Court, That they ſhould be in by the Deviſe, for they are now Joynt-Tenants, and the Survivor ſhall have the whole: Whereas if the Lands ſhall be holden in Law to have Diſcended, they ſhould be Parceners, and ſo as it were Tenants in Common: And ſo the Opinion of the Court, That Warranty pleaded with Aſſetts, was no barre. Paſch. 30 Eliz. in C. B. *Bear's* Caſe. *Leon.* 113.

5. In a *Formedon* in the *Diſcender*, if the Demandant be barred by Verdict or Demurrer; yet the Iſſue in tail ſhall have a new *Formedon* in the *Diſcender*: So if he be barred in a Writ of Errour upon a Releaſe of his Auncеſtor, his Iſſue ſhall have a new Writ of Errour; for he claims not only as heir, but *per formam Doni*, and by the Statute of *weſt.* 2. ſhall not be barred by ſe ent, or falſe pleading of his Auncеſtors. *Cook* 6. Part, in *Ferrers* Caſe.

6. In a *Formedon* in the *Remainder* brought, the Tenant pleaded, That the day of the Writ brought, and yet he the Demandant is ſeiſed of the moyty of the Land in demand, and ſo pleaded in abatement of the Writ. It was the Opinion of the Court, That it was no good Plea: but if he had ſaid, That he was ſeiſed in his Demeſne as of Fee, or as of Freehold, it had been good. Mich. 19 Jac. C. B. *Gratwick* and *Cratwick's* Caſe. *Winch.* 23.

7. A *Formedon* in the *Reverter* was brought by the Earl of *Clanrickard*, and the Lady F. his Lady, againſt *Robert* Viſcount *Liſle*, of divers Meſſuages and Land in E: which Lands, *Robert* Earl of *Eſſex*, and the ſaid F. then his Wife, did give to B. and C. to the uſe of *Eliz. Sidney*, daughter and heir of Sir *Philip Sidney* Knight, and the heirs of her body; *et quæ poſt mortem prædict. Eliz. ad præfatam F. revertere debent. &c.* The Defendant pleaded in abatement of the Writ, That the ſaid F. at the time of the death of the ſaid *Eliz.* was married to the Plaintiff; ſo that the right of the ſaid Lands *ſi quod, &c.* to her husband and her did revert, and ſo by the Writ it ought to have been ſuppoſed; upon which, the Demandant did demur in Law. It was adjudged, That the Writ was good: and this difference taken, If it were a *Formedon* in the *Diſcender*, upon a Diſcent to the Wife, there the diſcent muſt be made in the Writ to the Wife alone; for the diſcent followeth the blood, and to that the husband is a ſtranger; but in a *Formedon* in the *Reverter*, where nothing is already veſted, but the right only returns, there this right may be layed to return either to the Wife alone, or to the Husband and Wife: 33 H. 6. 54. Mich. 11 Jac. in C. B. The Earl of *Clanrickard*, and the Lord Viſcount *Sidney's* Caſe, *Hob.* 1. and 2.

8. If a Guift be made in tail to D. and his heirs males, the Remainder to A. in tail: D. diſcontinues in the life of A. and dyeth without Iſſue, and the heir of A. brought a *Formedon*, as the immediate guift to A. his Auncеſtor, who never was ſeiſed in his life; and for that cauſe, the Writ was not good, but abated; but if A. had been ſeiſed of the Land, then it had not been neceſſary to ſhew the firſt guift to D. was the Opinion of the whole Court. Mich. 11 Jac. in C. B. *Brownlow* 1. Part, 155.

9. Land

9. Land was given by Feoffment, to the uſe of the Feoffor for life, the Remainder in tail; Tenant for life dyed: Tenant in tail had Iſſue a Son and two daughters: and the Father and the Son joyned in a Feoffment in Fee with Warranty; and after the Father and the Son dyed without Iſſue, and the Daughters brought a *Formedon*; and the Defendant pleaded the Warranty, and pretended the ſame was a Collaterall Warranty: But the Court held the ſame to be a Lineal Warranty; and ſo the Plea not good, nor a bar. Trin. 16 Jac. C. B. *Biſhop* and *Coſſens* Caſe, in a *Formedon*, *Brownlow*, 153.

10. In a *Formedon*, the Caſe was; Husband and Wife were Tenants for life, the Remainder to a ſtranger in Fee, and a *Formedon* was brought againſt the Husband only, who made default after default; the Wife came and prayed to be received to defend her right. But it was denyed her by the Court, for that the Recovery did not bind her, and it was to no purpoſe for her to defend her right in that Action, which cannot be impeached: And thereupon, he in the Remainder prayed to be received. The Court doubted of it at the firſt, becauſe he might falſifie the Recovery, becauſe his eſtate did not depend upon the Eſtates impleaded, as a ſole eſtate; but his Remaind.r did depend upon a joynt-eſtate in the Husband and Wife not named in the Writ: But yet at laſt, the Reſceit was granted. Mich. 30 Eliz. in C. B. *Keys* and *Steds* Caſe, *Leon.* 86.

Founder *and* Foundations.

Where the Grant of the King to found, erect, or incorporate, a Religious Houſe, Colledg, Hoſpital, ſhall be good; Where not. Where the King ſhall be ſaid the Founder; And where a common perſon: And what are ſufficient words to make a Foundation of a Colledg or Hoſpitall: What not.

King *Henry* the 8th tranſlated the Abbot and Prior of *Norwich* by his Letters Patents, and created them by the name of Dean and Chapter, who ſurrendred their poſſeſſion to King *Ed.* 6: and afterwards King *Ed.* 6. Incorporated them by the name of *Decani et Capitali ex fundatione Edi. 6ti.* And afterwards he granted their poſſeſſions to them by the name of Dean and Chapter, *Sanctæ individuæ Trinitat. Norſ.* (omitting theſe words) *ex fundatione Ed.6.* It was adjudged in this Caſe, 1. That all Tranſlations made by King *Henry* 8. of Prior and Covent, unto Dean and Chapters, were good by the Statute of 25 H. 8. 2. Reſolved, That by the Surrender made to *Ed.* 6. That the Corporation of Dean and Chapter was not gone: for although they departed with their poſſeſſions, yet for neceſſity the Corporation did remain, for their aſſiſtance of the Biſhop. 3. Admitting their ancient Corporation was ſurrendred, and the new Corporation made by King *Ed.6.* was good, and that the words omitted, viz. *ex fundatione E. 6.* were material; Yet the Grant made to them was good, notwithſtanding this *Miſnoſmer*, by the Statute of 1 E. 6. Cap. 8. of *Confirmations*. The Caſe of the Dean and Chapter of *Norwich*, *Cook* 3. Part, 74.

2. Pope *Urban*, at the requeſt of the Baron of *Greyſtock* founded a Colledg of a Maſter and 6. Prieſts, and aſſigned to each of them 5. Marks a year, and to the Maſter 10 l. It was holden in this Caſe, That that Colledg was not given to the King by the Statute of E. 6. of *Chauntries*, becauſe it wanted a lawfull foundation at the beginning; and the Pope could not be a Founder of a Colledg, but the King only. 7 E.6. *Dyer*, 81, But ſee 10 Eliz. *Dyer*, 267. The Colledg of *Lawdwybreme*, which continued a Colledg in reputation, was given to the King by the ſaid Statute.

3. King *Henry* 8. by his Letters Patents erected a Colledg of Phyſitians in *London*; and by the ſame Letters Patents granted to them, That none ſhould exerciſe the Art of Phyſick within the City of *London*, or within 7. miles of it, unleſſe they were allowed by the Preſident of the ſaid Colledg: And by the ſaid Letters Patents granted to them, That there ſhould be 4. Cenſors or Governours yearly, who ſhould have the tryal and examination of all Phyſitians which practiſed Phyſick within the City, or 7. miles Liberties thereof; with divers other Priviledges recited in the Charter. See *Cook* 8. Part, 107, 108. Dr. *Bonham's* Caſe.

4. In the Caſe of *Sutton's* Hoſpitall, theſe Points were Reſolved, 1. That the King might Found and Erect an Hoſpital, and give a Name to the Houſe, though it were upon the Inheritance of another man. 2. That the King may give Licence to another, to do that which lyeth in his own power to do: and therefore, the King may Licence another to Found or Erect an Hoſpitatal in his own Lands: and when the King hath given ſuch Licence under his Seal, he cannot afterwards

countermand ſuch Licence. 3. A Name known, is ſufficient to Found an Hoſpital: and therefore in that caſe, the name of the Charter-Houſe, was in it ſelf ſufficient, without preſcribing of it by metes and bounds; and the King by his Letters Patents may create a Manor unto an Hoſpitall. 4. It is not requiſite, that in every Foundation made by the King of a Colledg or Hoſpital, that there be the preciſe words of *Fundo, Creo*; but if there be words which are equivalent, it is ſufficient to make a Foundation. 5. When a Corporation is created by the King's Letters Patents; and by the ſame Letters Patents, power is given to them to chooſe a Mayor, Bayliffs, or Governours; yet they are a Corporation preſently by the Letters Patents, before any Governour is choſen: and it is a Corporation in *abſtracto* and intendment of Law, but not in *Concreto* untill the Governours be choſen. 6. That as to the Foundation, or Creation of a Corporation: a Colledg, or Hoſpital *Poteſtate, Potentia, ſive nomine*, is ſufficient; as one by Letters Patents may be Governour of an Army, before the Army be raiſed. And the Hoſpitals of St. *John* of Jeruſalem, and the Temples, were incorporated long before the Houſes of them were built. 7. Reſolved, That *Quatenus ad Capacitatem et habilitatem*, the Incorporation of a Colledg or Hoſpital, is the Foundation; but *Quatenus ad Donationem*, he who gives the Land, is ſaid to be the Founder of it: and therefore in the ſaid Caſe, *Sutton* needed not to make any Inſtrument of the Foundation; for his giving of the Land being the firſt guift, had made him Founder: And to the Erection of an Hoſpital, there is not any thing requiſite, but the Incorporation and the Foundation. *Cook* 10. Part, the Caſe of *Sutton*'s Hoſpital.

5. In a Writ of Intruſion, ſuppoſing that the Defendants had intruded into the Parſonage of E; It was ſet forth, That the Colledg of St. *Peter* of *Ethelborough* was in the time of *Ed.* 4th, Founded at *Weſtminſter*, by the name of *Decani et Capituli*: and that the Parſonage of *E.* was appropriate to the ſaid Colledg; and by the Statute of 1 E. 6. the ſaid Colledg was diſſolved, and the ſaid Parſonage, amongſt many other things, came to the King's hands, and that the Defendants, 1 Eliz. intruded into the ſaid Parſonage, and took 1000. Sheep *et bona et Catalla provenient. de Decimis prædict. apud Weſtm.* The Defendants pleaded, That the ſaid Colledg of E. was Founded in P. by the name of *Decani Canicorum et Fratrum, &c.* who Leaſed the ſaid Rectory to J. S. for 40. years, who aſſigned the ſame to the Defendants, and juſtified the taking at E. *abſq;* *hoc*, That the Colledg of St. *Peter* in *Ethelborough*, was Founded by the name *Decani et Capituli Sancti Petri de Ethelborough* at *Weſtm.* and *abſq;* *hoc*, that they took the Sheep at *Weſtm*: upon which, the Queens Attorney did Demur in Law. It was Objected againſt the Information, becauſe mention is made in it of a Colledg, and it is not ſhewed what perſon was the Founder; alſo of an Appropriation, and it is not ſhewed who was the Patron. But notwithſtanding, Judgment was given for the Queen: For it was ſufficient to ſhew, That the Colledg was ſeiſed of the Rectory; and to ſhew the Statute of 1 E. 6, and the ſame ſhall make a ſufficient Title for the Queen, for *Non refert quis ſit Fundor.* For whoſoever be Founder, either the King, or a Subject, all is one, the Statute in both caſes gives the poſſeſſions to the King: And as to the pleading of the Appropriation, the ſame is well enough, if it be ſhewed conveniently, that the Plaintiff claims by ſuch Appropriation made, *Concurrentibus hu quæ in jure. &c.* And alſo, It was holden, That the Traverſe in this caſe was not good; but the moſt proper traverſe that the Defendants could have taken, had been, *abſq;* *hoc*, that *Decanus et Capituli Eccleſiæ Collegiatæ de Ethelborough*, was Leaſed, for the Corporation mentioned in the Bill of Intruſion, and that in the barr, are not all one. It was adjudged for the Queen. Mich. 29 Eliz. in the Exchequer. The Queen and the Lord *Vaux* Caſe, and others. *Leon.* 37. 38, 39.

6. Where the King is Founder in the Right of his Crown of any Abby, Priory, or other Religious Houſe, the King ought of Common Right to have a *Corodie* for any of his *Vadelets*; and ſo he ought to have out of every Biſhoprick a Penſion for his Chaplain, untill his Chaplain be promoted by the Biſhop to a Competent Benefice: and ſo it is in caſe of every Common perſon who is Founder, if it be not upon a Guift or Frankalmoigne. 44 E. 1. and 50 Aſſ. acc. *Fitzh. Na. Br.* acc. And if an Abby which is of the Foundation, cometh to the King by Eſcheat, in ſuch Caſe, the King ſhall not have the Corodie which the Common perſon had, becauſe the Abby was not of his Foundation; L. 5. E. 4. 15. Br. Corodie. 16. And yet the King may have a Corody where he is not Founder: but that is, it ſeems, by ſpecial Grant, 1 E. 4. 10. See *Cook* 10. Part, in the Caſe of Sutton's Hoſpital, acc.

Frank-

Frankalmoigne.

1. FRankalmoigne, as Mr. *Littleton* ſaith, is, Where Lands are given to an Abbot, Prior, or other Religious perſons, to hold to them and their Succeſſors in *Liberam Elemoſynam*. *Litt.* 30. But ſee, 39 H. 6. 30. by *Priſott*, the guift muſt be by Deed; otherwiſe it is not good.

2. It was holden by the Lord *Dyer*, If Lands were given to a Parſon, *Habendum ſibi in puram Elemoſynam*, That it was a Feeſimple and Frankalmoigne. See *Dyer* in his Reading. See 7 E. 4. 12. acc. And though it be not given to him and his Succeſſors; yet he hath a Fee, which proves a Parſon to be a Corporation. See 39 H. 6. by *Danby*, acc. And ſee, 8 H. 6. 18. & 19. In Treſpaſſe, ſeveral Grants were pleaded to have been made, to the Chancellor and his Succeſſors of *Oxford*: which was conceived to be given in Frankalmoigne, and that he had a Fee-ſimple in them by vertue of ſuch Grants.

3. If an Abbot, Prior, &c. holds of the Lord to do Divine Service; as to ſay Maſſe, or other Service in his Chappel every day in the Week; the ſame is not Frankalmoigne, but a Tenure by Divine Service: for which Service, he may diſtrain. But if a man doth preſcribe to have certain Divine Service done in his Chappel; there for not doing ſuch Service, he cannot diſtrain, becauſe he doth not claim it by way of Tenure, but by Uſage; and therefore for not doing ſuch Service, he ſhall have his Action upon the Caſe, 22 H. 6. 46. and for ſuch Service, a *Ceſſavit* doth lye at this day; *viz.* If a man giveth Lands to a Religious houſe, or other, to find a Chaplain to ſing Divine Service, if he ceaſeth for two years, the Lord ſhall have *Ceſſavit pro Cantaria*. *Cook* 4 Part, 108. in *Adams* and *Lambert*'s Caſe. But if Lands be given to an Abbot or Prior in Frankalmoigne, if he doth not his Services, but ceaſeth, a *Ceſſavit* doth not lye againſt him. *Fitzh. Na. Br.* 209. L. 7 H. 4. 20.

4. A man at this day may give Lands to a Biſhop, or a Parſon, and their Succeſſors in Frankalmoigne, by Conſent of the King and the Lords mediate and immediate, of whom the Lands are holden, *quia Quilibet poteſt renunciare juri pro ſe introducto*. And at this day a Confirmation may be made to an Eccleſiaſtical perſon, to hold to him and his Succeſſors in Frankalmoigne, becauſe no new Service is reſerved. *Cook* 1. Part, *Inſtitutes*, 98. acc.

5. If a Biſhop or other man of the Church holdeth certain Land of the King in Frankalmoigne, and he maketh a Feoffment to another, and his heirs; the Feoffee ſhall hold by Fealty only; for that is as near the Tenure of Frankalmoigne as may be. *Cook* 9. Part, 123. And ſee, That the Tenure in Frankalmoigne is ſo inſeparable, that it cannot be transferred over, or forfeited: but yet by Releaſe the Service may be extinct.

6. The Templers held divers of their poſſeſſions in Frankalmoigne; And afterwards they were diſſolved, and by Parliament, 17 E. 2. their poſſeſſions were given to the Hoſpitallers, to hold to them in the ſame manner as the Templers held them. It was adjudged in that Caſe, That by thoſe general words, they did not hold in Frankalmoigne, becauſe the privity of the Termor on the part of the Tenure did not Continue, and that Privity being perſonal and inſeparable by thoſe general words, could not be transferred to the Hoſpitallers. 35 H. 6. 56. *Cook* 7. Part, 13. acc. in *Engleſield*'s Caſe.

7. If there be Lord Meſne and Tenant, If the Lord doth releaſe to the Tenant being Abbot, or Confirms in Frankalmoigne, the Meanalty is extinct. 4 E. 3. *Br. Tenures*, 60. But ſee, 15 E. 3. *Fitz.* Confirmation. 8. by *Thorp*, That if the Services of Frankalmoigne be regardant to a Manor; he who is Lord of the Manor ſhall have them.

8. A man ſeiſed of a Manor, doth enfeoffe an Abbot of parcel of it, the ſame is now parcel of the Manor: and if the Manor be recovered, he who recovereth, ſhall have the Frankalmoigne; ſo of the Lord by Eſchear, by *Thorpe*. But *Scroop* held the contrary; for that the Frankalmoigne is and remains in the blood of the Donor; and if he dyeth without heir, yet the Frankalmoigne remains for the ſoul of the Donor. 14 E. 3. *Fitz.* Tit. *Meſne*, 71.

Frankmarriage.

1. FRankmarriage is, when a man ſeiſed of Lands in Fee, giveth the ſame Lands to another man and his Wife, or to the Siſter or Coſen of the Donor in Frankmariage; by vertue of which Guiſt, they have an Eſtate in the ſaid Lands to them and the heirs of their two bodies to hold of the Donor, quit of all manner of Services, untill the 4th Degree be paſt, (Fealty except) themſelves being accounted in the firſt Degree.

2. There are 6. things requiſite in a Guiſt, in Frankmarriage; 1. That the Woman be of the whole blood; as Siſter or Coſen Collateral within the 4th Degree, ſo as they may not entermarry by the Law. 2. That the Reverſion of the thing given do remain in the Donor, or his heires. 3. That the thing which is ſo given, be ſuch a thing as lyeth in Tenure at the time of the Guiſt. 4. That the Donee and their heirs holds the Lands diſcharged and acquitted from all manner of Services (Fealty excepted.) 5. Acquittal from all Lords Paramount of all things which are of Common right; but of things which are againſt Common Right, as a Rent-Charge, Common, and the like, that there be no acquittal of them, becauſe the Reverſion is charged with the ſame. 6. That in caſe they be impleaded, that they may vouch the Donor and his heirs, and recover in value againſt them, if they be impleaded.

3. *John Harris* gave Lands in Frankmarriage to one *White*; The Guiſt was by theſe words; *viz. Dedi et Conceſsi* at *John White in Liberum maritagium Johannæ filiæ ſuæ. Habendum dict. Johanni White et hæredibus ſuis in perpetuum, Tenendum de Capitalibus Domini feodi*, with Warranty to the Baron and his heirs. It was adjudged in that Caſe, That the ſame was not Frankmarriage, nor a Guiſt in tail, but that the ſame was a Fee-ſimple. And it was ſaid in that Caſe, That the uſual words of Frankmarriage are, *cum Johanna filia*, in the ablative caſe. Paſch. 25 Eliz. in C. B. *Webb* and *Potter's* Caſe, *Owen* 26, 27.

4. Note. It was adjudged, That where Lands were given in Frankmarriage, and the Donees had Iſſue, and dyed; and afterwards the Iſſue dyed without Iſſue, that his collaterall heir ſhould not inherit: for the Donor ſhall recover the Land in a *Formedon* in the *Reverter*. And in that Caſe, it was ſaid, That if the Donee hath Iſſue two Sons and dyeth, and the eldeſt Son hath Iſſue a daughter, and dyeth without Iſſue male, the younger ſon ſhall enherit the Land *per formam Doni*, 5 H. 3. *Fitz.* tit. *Formedon*, 64. *Cook* 7. Part, 35. in *Nevils* Caſe.

5. In a *Formedon*, the Plaintiff Counted, of a Guiſt made to J. S. in Frankmarriage with *Jane* the Siſter of the Donor; The Defendant pleaded, That the Tenements were given in Fee-ſimple, and traverſed, That he gave them not as the Writ ſuppoſed: and afterwards by *Niſi Prius*, a Deed was ſhewed in Evidence, That the Donor gave to J. C. in *Liberum maritagium Tenementa prædict. cum Johanna ſorore ſua.* To have and to hold *Tenementa prædict Johanni, et Johannæ et hæredibus ſuis in perpetuum.* And becauſe ſome words in the ſaid Deed were in *Liberum Maritagium*, and ſome were in *feodo ſimplici*, the Jurours prayed the Judgment of the Court: And there upon Advice of the Juſtices, Judgment was given againſt the Defendant, becauſe a Fee-ſimple, and not an Eſtate in Frankmarriage, doth paſſe by the words, 45 E. 3. 20. *Cook* 9. Part, 14. in *Dowmans* Caſe. See *Cook* 10. Part, 118. in *Pilſords* Caſe, It is ſaid, That in the ſaid Caſe of 45 E. 3. *Statham* in abridging the Caſe, ſaith, That it was an Eſtate in Frankmarriage. And *Brook*, tit. *Frankmariage*, 1. makes a Quære of it, becauſe he ſaith, That the Caſe was not adjudged.

6. Note. If Lands be given in Frankmarriage, and the party is impleaded, the Tenant in ſuch caſe ſhall not have Aide againſt the other Parcener: but if ſhe to whom the Land was given in Frankmariage, will put the Lands in Hotchpott, in ſuch caſe ſhe ſhall have aide of the other Coparcener; for that then the Lands are become as other Lands which diſcended from the Common Auncеſtor, *Cook* 1. Part, *Inſtitutes*, 177. And the Lands which are put in Hotchpott, and the Lands which are given in Frankmarriage, ought to diſcend from one and the ſame Auncеſtor; for if they moved from ſeveral Auncеſtors, the Lands cannot be put in Hotchpott.

7. An Aſſiſe was brought by a Woman, and it was found by Verdict, That the Father of the Woman gave the Land to the Defendant with his daughter the Plaintiff in Frankmarriage, when they were *infra annos nubiles* both the one and the other: after at their full age, the Husband ſued a Divorce, and at his ſuit they were divorced; and after the Divorce, the Husband kept the poſſeſſion of the whole Land, and put out the Woman; for which cauſe, ſhe brought an Aſſiſe: and becauſe

the Cauſe of the Guift, and the form of it was taken away by the Divorce at the Suit of the Husband, It was adjudged, That the Woman the Plaintiff ſhould recover the whole Land: for that the Frankmarriage was deſtroyed by the Divorce, and the title of the Husband was gone, 19 E. 3. *Fitz.* tit. *Aſſiſe*, 83. vouch. in *Marſam* and *Hunter's* Caſe, *Baſſt.* Trin. 7 Jac. in B. R. 2. And ſee, That upon a Divorce, the Woman ſhall have her goods again which were given with her in Marriage, which are not ſpent, becauſe they were given for the advancement of the Wife. See 26 H. 8. 7. 10 H. 7. 20. and Trin. 28 H. 8. *Dyer*, 13. acc. 4 Ma. *Dyer*. 147.

8. A Guift in Frankmarriage was, rendring Rent, the Donor granted the Services to a ſtranger; the Donee attorned, and dyed their Iſſue within age: It was awarded by *Wilby*, Juſtice, 26 Aſs. that he ſhould be in Ward to the Grantee. And ſee, 13 H. 4. *Fitz.* tit. *Meſne*, 74. That a Rent may be reſerved upon a Guift in Frankmarriage: But ſee, 4 H. 6. 22. by *Martin*, Such a Reſervation is void; for there the Caſe was, That a man gave Lands with his daughter in Frankmarriage, rendring 20 s. Rent, and the Reſervation was holden void, becauſe it was contrary to the nature of the Tenure, which is, to hold the Land free and quit from all Services, untill the 4th degree be paſt.

9. A Deviſe of Lands in Frankmarriage is not good, becauſe the Deviſee cannot hold of the Deviſor. *Cook* 1. Part, *Inſtitutes*, 20.

10. Note: It was ſaid by *Cook*, 1. Part, *Inſtitutes*, 174. A guift in Frankmarriage was before the Statute of *Weſt.* 2. a Feeſimple; and ſince that Statute, a Fee-tail; ſo that it is true, that the Guifts do continue, but not the Eſtates; for the Eſtates are changed: and although Mr. *Littleton*, Sect. 271. ſaith, That ſuch Guifts have been alwayes ſince uſed and accuſtomed; Yet now they are almoſt grown out of uſe, and ſerve now principally for moot Caſes, and Queſtions in Law, that thereupon were wont to ariſe.

Fraud, Colluſion, and Covin.

1. *What ſhall be Feoffments within the Statutes of* Marlbridg, *and* 32 H. 8. *made to deceive the Lord of his Wardſhip; What not. Where the Lord cannot enter upon the Feoffee, but is put to his Writ of Ward to try the Colluſion: Where not.*

1. IF there be Lord and Tenant, and the Tenant aliens in Fee by Colluſion; the Feoffee reinfeoffs the Feffor for life, the Remainder in tail to the Son; Leſſee for life dyeth; the Heir entreth; a ſtranger by Licenſe of the Heir, puts in his Cattel: the Lord diſtrains them Damage Feaſant; the ſtranger brings an Aſſiſe, and recovered; becauſe he did not aver, that the Feoffment was made by Covin, as well as the firſt: but if he had averred, then the heir ſhould be in Ward; notwithſtanding the particular eſtate for life. But it was ſaid, That if the Tenant Leaſeth for life to a ſtranger, the Remainder in Fee to the Son; or had enfeoffed a ſtranger, to the intent, to let it for life, the remainder to the Son, That that was not within the Statute; becauſe that the ſtranger might live longer than the Son. 33 H. 6. 14. And alſo for another reaſon, becauſe the Colluſion was not alledged in all the Eſtates; and therefore if a man makes a Feoffment by Colluſion, and the Feoffee makes a Feoffment over *bona fide*, the Colluſion ceaſeth. Alſo, if the Tenant alieneth to a Stranger in tail, the Remainder in Fee to the Son, and afterwards the Tenant in tail alieneth to the Son, the ſame is no Colluſion. Alſo, if a Feoffment be made to a ſtranger, to the intent to marry his daughter, and afterwards to reinfeoffe his Son; the ſame is not Colluſion: but contrary, if it were to enfeoffe his heir immediately. Alſo, if a Feoffment be made to enfeoffe the Heir and a Stranger, and to the heirs of the ſon; the ſame is no Colluſion, for the benefit of the ſtranger. *Cook* 1. Part, 122. *Shelley's* Caſe.

2. If the Tenant enfeoffeth a ſtranger, to enfeoffe his Son when he cometh to the age of 21. years, the ſame is no Colluſion, becauſe his Father may live untill he cometh of full age; and alſo

alſo the Feoffee hath an Intereſt for a time, if the Father dyeth before the ſon cometh to the age of 21. yers: But if the Feoffment had been to enfeoffe the Son after the death of his Father, the ſame is Colluſion. See 10 H. 4. 2. 33 H. 6. by *Priſot.*

3. If a man makes a Feoffment and Livery upon Condition, That he ſhall reinfeoffe his Heir when he cometh to his full age; although that the Feoffment be made ſimply, yet the ſame is a Feoffment by Colluſion. 45 E. 3. 22. acc.

4. If the Tenant levieth a Fine with Releaſe, the Lord may aver the ſame to be by Colluſion, 7 H. 4. 15. 12 H. 4. 16. where ſuch a Fine was pleaded, and the Lord averred the ſame to be by Colluſion, to the intent to enfeoffe his Heir at full age. But ſee, 38 E. 3. Pr. Gard. 74. that againſt a Fine *Sur Conuſans de Droit come ceo*, no Colluſion ſhall be averred, becauſe the ſame is executed.

5. A Deviſe is not within the Compaſſe of the Statute; for it ſhall not be intended that the ſame is made by Covin; as it was adjudged in the Lord *Dacres* Caſe. But if a Feoffment be made by the Tenant of his Land, rendring a very ſmall Rent during the time that his Heir ſhall be within age; and when he cometh of full age, then rendring the double Rent; the ſame may be averred to be by Colluſion. See *Old. Ma. Br. 96.*

6. If the Father enfeoffeth his Son and Heir apparant by Colluſion, and dyeth the Son within age; the Lord may enter and ſeiſe the Ward, becauſe there is Colluſion apparant; and it is not within the meaning of the Statute of *Marlbridge*: But if the Father enfeoffeth a Stranger to enfeoffe his heir, there the Lord cannot enter, but is put to his Writ of Ward. The ſame Law is, Where the Feoffees make a Feoffment over; but if the Heir be one of the two Feoffees; and it is averred, That the ſecond Feoffment was by Covin as well as the firſt; in ſuch caſe, the Lord may enter upon the heir who is in by the Feoffment of his Father, or by the Feoffment of the Feoffees, and there the Covin ſhall be tryed, 33 H. 6. 14. acc.

7. If the Father had enfeoffed his ſon, yet if the ſon in his Father's life-time had aliened the Land *bona fide*, it was out of the remedy of the Statute of *Marlbridge*, and in ſuch caſe, the Lord ſhall not have the Wardſhip; ſo if the Son had died in the life of the Father: but if the Conveyance made by the Son, be after the death of the Tenant, then it is otherwiſe, for then the Lord had once cauſe of Wardſhip, and therefore the alienation after, ſhall not take away the benefit of it from him. *Cook* 2. Part, 94. in the Lord *Cromwell*'s Caſe.

8. A man ſeiſed in Fee of a Reverſion expectant upon an Eſtate tail by Indenture, in Conſideration of blood, Covenanted to ſtand ſeiſed of the ſaid Reverſion, to the uſe of his Neece; and afterwards Tenant in tail in poſſeſſion dyed: In this Caſe, It was Reſolved, That the King ſhould not have *Primer Seiſin*, by the Statutes of 32 and 34 H. 8. And in this Caſe, theſe Points were Reſolved; 1. That by the Statute of *Marlbridg*, It was Colluſion apparent for the Tenant to enfeoffe his eldeſt Son: and ſo it had been, if he had enfeoffed his Collateral heir apparant. But it was holden, That no Colluſion might have been averred, when upon an Eſtate for life, or a Guift in tail, the Remainder was limited, or left in another. 2. Reſolved, That if the Father enfeoffeth another for the advancement of his daughters, or of his younger ſons, or for payment of his debts; and afterwards to enfeoffe his heir, the ſame was no Colluſion within the Statute of *Marlbridge*, becauſe the Father was in Law bound to make proviſion for them. 3. Reſolved, If there be Grandfather, Father, and two Sons, and the Grandfather in the life of the Father, Conveyeth his Lands to any of the Sons, the ſame is out of the Statute of 32 H. 8. for that is not vulgar nor uſual; and the Father ought to have the immediate care of his Sons and Iſſues: but if the Father be dead, then the care of them belongeth to the Grandfather; and then, if he doth convey any of his Lands to any of his ſaid Sons, the ſame is within the ſaid Statute. 4. In that Caſe, It was Reſolved, That a voluntary Conveyance to the uſe of any of his Collateral blood, which is not his heir apparent, is not within the ſaid Act; for that none will intend that he would diſ-inherit his heir to take away the Wardſhip of the King. Paſch. 5 Jac. in the Court of Wards, *Cook* 6. Part, 76. Sir *George Curſon*'s Caſe.

9. A. with his own money purchaſed Lands to him and to an Enfant, and to their heirs. It was Reſolved in this Caſe, 1. That this purchaſe cannot be averred to be by Colluſion, to take away the Wardſhip which might accrue after his death, becauſe he never was ſole Tenant, nor in reſpect of the ſurvivorſhip, any Wardſhip could accrue to the Son. 2. That no Feoffment which A. could make of his moyty, could be averred to be by Colluſion to take away Wardſhip or Primer Seiſin after his death, becauſe if no Feoffment were made, no benefit could accrue to the King. 3. That when the Father maketh a Feoffment for the advancement of his Wife, preferment of his Children, or payment of his debts, It cannot be averred to be made by Covin or Colluſion, to give cauſe to the King to ſeiſe the whole Land. 4. That upon the Statute of 32 & 34 H. 8. That in all Caſes when the King's Tenant Conveys his Lands for years, life or,

or in tail to his Children, or when a ſtranger was joyned with the heir in tail, or when the Remainder was limited in Fee, or when an Eſtate was declared by Will, that in all ſuch Caſes by the Statute of 34 H. 8. Covin might be averred by the King, but only for a third part, and not for the two parts, becauſe the Statutes have enabled the party to convey two parts at his Will or pleaſure. Trin. 7 Jac. in the Court of Wards. *Cook* 8. Part, 165. *Mighs* Caſe.

10. Tenant in *Capite* made a Feoffment by Colluſion, to defraud the Executions of his Creditors, with Condition, That when the ſums ſhould be diſcharged, That then the Feoffees ſhould convey the Lands to ſuch uſes as he or his heirs ſhould appoint; which is found by *Mandamus, et quod nulla alia Cauſa aut intentio fuit.* It was Reſolved in that Caſe, That the Queen ſhould not have the Wardſhip of the Heir; for that it was not found to defraud her of her Wardſhip. Mich. 10 El. z. *Dyer*, 268.

11. The Kings Tenant by Knight-Service enfeoffed his brother, to the intent to enfeoffe his heir male at full age; whereas at that time he had no male, but his Wife was with Child; the Father dyed, a Son was born; This was found by Office. It was a Quære, If all the Land, or a third part of the Land ſhould be only in Ward, upon the Statute of 32 & 34 H.8. See *Cook* 1. Part, *Inſtitutes*, 78. It is ſaid, It was Reſolved, That he ſhould in ſuch caſe be in Ward for his body, and but for the third part of the Land.

12. By the Statute of *Marlbridg*, Cap. 6. it is provided, That the Lord by Knights-Service ſhall not loſe the Wardſhip by Feoffment made by Colluſion; *tamen non licet eis hujuſmodi feofat. ſine Judicio deſeiſire, ſed Brevia habeant de hujuſmodi Cuſtodia ſibi reddenda*, as the Statute is: Yet if the Tenant enfeoffeth the Villein of the Lord upon Colluſion, the Lord in ſuch caſe may enter, and expell him, and ſhall not be put to his Action: for the general words of the Act, ſhall not enable the Villein to keep out the Lord: And if the Lord ſhould bring an Action againſt him, the Villein ſhould be thereby enfranchized; which would be a prejudice to the Lord: and therefore in ſuch caſe, the Lord may enter upon the Villein, notwithſtanding the words of the ſaid Statute, and ſhall not be put to his remedy by Action. See *Cook* 11. Part, 77. in *Magdalen* Colledg Caſe, acc. *Cook* 9. Part, 73. in Dr. *Huſſey's* Caſe, acc.

2. *Where a Recovery againſt Tenant for life or years, had by Fraud and Colluſion, ſhall not bind the Termor or he in the Reverſion, but ſhall be falſified and avoided by reaſon of ſuch Covin, Fraud, or Colluſion; Where not. And where Covin not apparent, muſt be averred, and the cauſe of the Covin ſhewed.*

1. A. Poſſeſſed of divers Lands, ſome for years, ſome at Will, and ſome by Copy of Court-Roll, demiſed all of them to another for Life, and then levied a Fine to the Leſſee for life and his heirs, of ſo many Acres as amounted to the whole Land, and yet continued poſſeſſion, and paid the Rent to the Lord, and 5. years paſſed: It was Reſolved in this Caſe, That the Lord was not barred by the Fine, and 5. years paſt: for the Statute of 4 H. 7. never intended, That ſuch a Fine levied by Fraud, and practice of the Tenant for years at Will, &c. who pretend no Title to the Inheritance, ſhould be a barr to them that had the Inheritance: for this were not to avoid ſtrife, to which end the Statute was made, that Fines levied ſhould be a barr, but to ſtir up ſtrife, which the makers of the Statute never intended. *Cook* 3. Part, 77. *Farmor's* Caſe.

2. Seiſin of a Rent given by the hands of a Diſſeiſor, or by one who hath a defeaſible Title, is good, and is ſufficient to bind him that hath right, becauſe he is Tenant of the Land, and the Act is a lawful thing; but if there be any Covin betwixt the Diſſeiſor, or he who hath the defeaſible title, and him who hath the Rent; and to that purpoſe the Diſſeiſin was, that the Diſſeiſor ſhould give him ſeiſin of the Rent, there ſuch ſeiſin given ſhall not bind the Diſſeiſee, or him who hath right, for that the Covin maketh it unlawful. *Cook* 6. Part, 58. in *Bredimans* Caſe.

3. If a Woman who hath rightfull Title of Dower, be party, privy, or conſenting to a wrong, the aſſignment of Dower to her is void, as if ſhe procureth one to Diſſeiſe the Tenant of the Land, to the intent to be endowed by him; in ſuch Caſe, the endowment of her is void: *Cook* 5. Part, 30. in *Coulters* Caſe: And there it is ſaid, That he who is in by wrong, may recoup and retain: As if he who hath a Rent out of Land, diſſeiſeth the Tenant of the Land. In an Aſſiſe brought by the Diſſeiſee, the Diſſeiſor ſhall recoup the Rent which he hath,

hath paid out of the damages; and the reason of that is to avoid circuit of Action; but if there were covin in that Case betwixt the Disseisor and him to whom the Rent was paid for the payment of the Rent to him: in such Case, in an Assise brought against the Disseisor for the Land, he shall not recoup or retain the Rent. *Cook* 5. Part, 31. in *Coulters* Case. acc.

4. A Discent, and the dying seised of a Bastard *Eigne* doth bind the right: and the discent shall not take away the entry only, but the right also; but in such Case, it shall not take away the entry in Case of Disseisin: As a Discent, of Services, Rent, Reversion expectant upon an Estate tail, shall in Case of Bastardy bind the right of the Mulier, but such a Discent shall not take away the entry or claim of the Disseisee. *Cook* 8. Part, 101. in Sir *Rich. Lechfords* Case.

5. Debt was brought upon an Obligation of 100 l. against an Administrator; who pleaded a Recovery of a Debt of 100 l. against him by J. S. in *Chester*, and other Judgments in other Courts; amounting to 500 l. and that he had not goods of the Intestate *preterquam bona et catalla que non attingunt ad valentiam predict.* 500 l. The Defendant replyed, That J. S. accepted of 60 l. in satisfaction of his 100 l. and would have acknowledged satisfaction upon Record of his Judgment; but the Defendant would not suffer it to be done, but continued the said Judgment on foot to deceive the Plaintiff and other Creditors. It was adjudged in this Case for the Plaintiff, for that an Administrator ought to execute his Office, and Administer the goods of the Intestate faithfully, lawfully, truly, and diligently; and then when he compounds with a Creditor who hath a Judgment of 100 l. for 60 l. and satisfaction is offered to be made upon Record; and the Administrator refuseth to accept it; but continues the Judgment on foot, by Covin to deceive other Creditors, whether it be before the Recovery or after, that the fraudulent intent be, yet the same shall not bind other Creditors as to their Debts, nor shall they be prejudiced by such fraud of the Administrator. *Cook* 8. Part, 132, 133. *Turners* Case.

6. Note, It was Resolved upon the Statute of 14 Eliz. of Feined Recoveries, that they did not extend to preserve any Reversion or Remainder which was expectant upon an estate tail, where Tenant for life is impleaded, and Tenant in tail is vouched, for where the Tenant in tail is party to the Recovery, it cannot be said that it is by collusion, *quia jus et fraus nunquam cohabitant. Cook* 10. Part, 45. in *Jennings* Case.

7. A man was endebted to A. and B. in 100 l. and afterwards he became Bankrupt; A Commission was awarded to C. and D. to make off the goods to the Creditors: Afterwards the Bankrupt gave all his goods to another Creditor for the payment of his Debt; and afterwards the Commissioners by vertue of the Commission sold the goods. It was Resolved, That the sale of the Commissioners was good, and that the Bankrupt after the Condition awarded, had not any power to make a sale or distribution of his goods to any one of his Creditors, and therefore although he delivered his goods to one of his Creditors for the payment of his particular Debts, the same was not good: and notwithstanding such delivery of them, the Commissioners might make sale of the goods, and divide them amongst his other Creditors. *Cook* 2. Part, 31. in the Case of Bankrupts.

8. A. seised of Lands in Fee holden of T. L. of his Mannor of H. by fealty Rent, and rendring the best Beast after the death of every Tenant in Feesimple, by Deed, in consideration of love and affection to his Son and Heir apparent, and in consideration of a Marriage betwixt his Son, and B. and for the advancement of his said Son, enfeoffed his Son and Heir apparent of the said Land; and afterwards the Son, to the intent that B. should not be endowed of the said Lands during the life of the Father, re-demised the Land to the Father for 40 years, if he should so long live; the Marriage took effect, the Son did his suit at the Court of the Lord: and after the Feoffment, the Father paid the Rent to the Lord, and after the Father dyed, and the Lord took a Beast for a Herriot after the death of the Father; and the Jury found the Statute of 13 Eliz. of fraudulent Conveyances. It was Resolved in this Case, 1. Because no fraud was found by the Jury, the Court shall not intend the said Feoffment was made by fraud. 2. In regard the Jury have not found that the said Feoffment was made by fraud, with intent to deceive the Lord of his Herriot, it shall not be intended it was fraudulent. 3. The said Feoffment being found to be made in consideration of marriage, and to that particular intent concerning the Dower of the Wife of the Son, shall not by any construction of Law be taken to extend to any other intent, nor to be fraudulent, Trin. 10 Jac. in C. B. *Tyrer* and *Littleton's* Case, vouched in the Chancellor, Masters, and Schollers of *Oxfords* Case. *Cook* 10. Part, 56.

9. A. Tenant in *Capite*, made a Lease for years of the Land to C. for 1000 years, and Covenanted with C. and his Heirs, that upon payment of 5 s. that he and his Heirs would stand seised of the Lands, to the use of C. and his Heirs, and in the Deed were ordinary clauses of Conveyances *inter se*, *viz.* that the Lessee should enjoy the Lands discharged of incumbrances, and that he would make further assurance, C. assigned this Lease to J. S. who

who dyed in poſſeſſion, his Heir within age. It was the Opinion of the two Chief Juſtices, and of the Chief Baron, called to Aſſiſtance to the Maſters of the Wards in this Caſe, that the Heir of the Leſſee who dyed in poſſeſſion ſhould be in Ward; for if a Leaſe for 100 years ſhall be taken for Mortmain, *à fortiori* this Leaſe for 1000 years ſhall be taken to be made by fraud and colluſion as againſt the King; and *à fortiori* in this Caſe, becauſe the Heir had power of the Inheritance upon the payment of 5 l. and although the Leaſe for years be found by Office, and proved by Witneſſes: Yet it was agreed by them, That all Offices that are found to deceive the King of ſuch an Ancient flower of the Crown as Wardſhip, ſhall be taken to be void. Tr. 10 Jac. in the Court of Wards, *Cottons* Caſe. *Godbol.* 191, 192.

10. A man made a Feoffment in Fee of Land upon Condition, That if the Feoffor within a year after the death of the Feoffee, payed to his Heirs, Executors, or Adminiſtrators 100 l. that then the Feoffment ſhould be void; the Feoffee made a Feoffment over, and dyed: Afterwards within the year, it was agreed betw xt the Feoffer and the heir of the Feoffee, that the Feoffer pay the 100 l. and that the Heir repay it all to the Feoffer but 30 l. which is done accordingly. The Feoffer enters into the Lands, pretending the Condition to be perfomed. It was Reſolved in this Caſe, That that payment was not any performance of the Condition, becauſe an eſtate of Inheritance was by the payment of the ſaid money to the Heir, to be deveſted out of the Aſſignee of the Land; and therefore the condition ought to have bin performed in truth and verity, by a true and an effectual payment, and not by a ſhadow or colourable payment; and Eſtates of Lands ſhall not be deveſted by colourable payments, but by true and effectual payments, and Conditions ought to be performed truly and effectually. *Cook* 5. Part, *Goodals* Caſe.

11. Debt upon an Obligation againſt the Heir; the Defendant pleads, That he hath nothing by Diſcent; The Plaintiff ſaith, he hath Aſſets in the County of S. The Defendant ſaith, that before the Action brought, he had enfeoffed A. of thoſe Lands, againſt which the Plaintiff alledged and proved, that the Feoffment was made by fraud; and it was urged, That the fraud ought to have bin ſpecially pleaded, and not given in Evidence. It was agreed by the whole Court, that in that Caſe, the fraud might be given in Evidence, and needed not ſpecially be pleaded, becauſe the Statute of 13 Eliz. provides generally, that the Eſtate as to Creditors ſhould be void, and Acts of Parliament made for the preſervation and ſuppreſſion of fraud, ought to have a benigne interpretation. *Cook* 5. Part, 60. *Couches* Caſe.

12. The Maſter and Fellows of Magdalen Colledg in *Cambridge*, made a grant to the Queen of a houſe in *London*, rendring 15 l. *per annum* upon Condition that ſhe ſhould regrant it to *Benedict Spinola* a Merchant Denizen and his Heirs. It was holden by the Juſtices, That this Grant was void, becauſe they made uſe of the Queens Prerogative to alliein the Lands of a Colledg which was prohibited by the Statute of 13 Eliz. within which Statute the Queen was included. *Cook* 11. Part, 73, 74. *Magdalen* Colledg Caſe.

13. If one Diſſeiſeth the Diſcontinuee of Tenant in tail by Covin, to the intent to enfeoff the Iſſue in tail within age, who hath no knowledg of the Covin, and he enfeoffeth him accordingly: It was holden by the better Opinion in this Caſe, That the Iſſue in tail ſhould not be remitted, notwithſtanding his good title; and the cauſe was becauſe of the Covinous intent, for Covin may alter the matter where the title was good, as it was ſaid in that Caſe. *Plow. Com.* in *Wimbiſh* and *Talbois* Caſe, 51.

14. Upon a Communication of a Marriage betwixt A. and the Lady *Stowell*: A. before Marriage promiſed to aſſure unto her 1000 l. *per annum* for her Joynture, he being ſeiſed of Lands of 1200 l. *p.r annum*, the Lady married him before any aſſurance made. But afterwards he by Deed conveyed Lands of great yearly value to the Ladyes friends, to the uſe of the Lady for 100 years if ſhe ſhould ſo long live, to begin after his death; upon the back of the Deed it was endorſed, that the intent thereof was, that when there ſhould be a Joynture of 1000 l. *per annum* ſetled upon her, that then the Leaſe ſhould be void; and if this was a fraudulent Leaſe or not, was the Queſtion, becauſe it was with a Proviſo to determine at the Will of the Husband. It was the Opinion of the Juſtices, That this Leaſe being made in purſuance of the firſt promiſe, although there was not any mention of any Leaſe to be made, yet it was grounded upon a good conſideration, and not fraudulent: and although the Lady concealed this Leaſe during her Husbands life time: Yet it was holden, That the Leaſe being good at the firſt, the concealment could not make it ill: Then it was objected, That this was the Land of King *Hen.* the 3d. who gave it to *Eleanor* with his eldeſt Son in tail, the Reverſion in the Crown; ſo as A. had not any Title to make this Leaſe: To which it was anſwered, That if there were a gift in tail, the Reverſion in the Crown before the Statute of *Donis*, and the poſſeſſion had bin time whereof in purchaſors. It ſhall be intended to be made *poſt prolem ſuſcitatam*, and before the Statute of *Donis*. The Caſe was ended by compoſition. And in this Caſe it was agreed, That a Leaſe may be determined by a Condition en-

dorſed on the back ſide of a Deed, if it was endorſed before the Sealing and delivery thereof. Mich. 15 Jac. in B. R. The Lady *Griffin* and *Stanhops* Caſe. *Cro.* 2. Part, 544.

See more of Fraud *and* Fraudulent Deeds, *in Title* Deeds, *lib.* 1. *Diviſion.* 7. *Fol.* 603, 604, 605, 606.

Franchiſes *and* Liberties.

1. *Where a man cannot have Franchiſes or Liberties, but by the Grant of the King, or Preſcription; What and by what words in the Kings Grants they will paſs: Where and by what, and whoſe Act they may be determined, ſeiſed upon, or extinct; by what not.*

1. A Man held a Mannor of the King, to which Mannor regal Franchiſes were appendant, *ſcil.* to have Eſcheats of all Treaſons of thoſe which held of the Mannor: One held another Mannor of the ſame Mannor, to which an Advowſon was appendant: And he who held the Mannor of the King, was Attainted of Treaſon, wherefore the King ſeiſed it, and afterwards he who held the other Mannor to which the Advowſon was appendant, was Attainted of Treaſon; wherefore the King ſeiſed it, and afterwards granted the Mannor which was holden of him *cum advocationibus ei idem pertinentibus*. It was the Opinion, That the Advowſon did not paſs with that Mannor, but was appendant as it was before: But in the Caſe it was holden, That the Franchiſes Regal were extinct by the Eſcheat, and reunited to the Crown, from whence they firſt proceeded: For it was holden, That none could grant Franchiſes reall, but the King only. 6 E. 3. Mich. 30 H. 8. *Dyer*, 47.

2. If the King grant to one and his Heirs *bona et catalla felonum et fugitivorum*, or *utlagatorum*, *finet*, *amerciamenta* within ſuch a Town or Mannor; in this Caſe, the Grantee cannot Deviſe them to another, nor leave them to deſcend for a third part, upon the Statute of 32 H. 8. becauſe they are not of an annual value: But if a man be ſeiſed of a Mannor to which a Leet, or Waife, or Eſtray, or any other Hereditament, which is not of any annual value is appendant, or appurtenant; there, by the Deviſe of the Mannor with the appurtenances, theſe ſhall paſs as incidents to the Mannor: for inaſmuch as the Statute enableth him to deviſe the Mannor, by conſequence it doth enable him to deviſe all incidents and appurtenances to the Mannor. *Cook* 3. Part, 32. in *Butler* and *Baker's* Caſe.

3. *Bona fugitivorum*, are goods of a Felon, which are not forfeited untill it be found upon Indictment by matter of Record, that the party fled for the Felony: and therefore they cannot be claimed by Preſcription: But Waife, Eſtray, Treaſure Trove, Wreck of the Sea, which may be gained by uſage without matter of Record, there a man may preſcribe in them. *Cook* 5. Part, in *Foxleyes* Caſe, 109.

4. When the King grants any Priviledges, Liberties, or Franchiſes, which were Priviledges, Liberties or Franchiſes in his own hands, as parcel of the floaters of his Crown, as *bona felonum*, *fugitivorum*, *utlagatorum*, Waife, Stray, Deodand, Wreck of the Sea; there if they come again to the King, they are drowned in the Crown: And if the Wreck, Waites, Eſtrayes, were before appendant to Poſſeſſion, now the appendancy is extinct, and the King is ſeiſed of them in the Right of his Crown: But when a Liberty, Priviledg, or Franchiſe, or a Juriſdiction was erect or created by the King, they are not extinct, nor the appendancy ſevered from the poſſeſſions, as Market, Fair, Park, Warren, &c. *Cook* 9. Part, in the Caſe of the Abbot of *Strat Marcella*.

5. If the King purchaſeth a Mannor to which Franchiſes are regardant, and afterwards gives the Mannor *simul cum libertatibus ad illud ſpectantibus*, if he doth not make mention in the Charter of grant, *cum libertatibus ad illud ſpectantibus*, at the time when the Mannor was in the hands of the Feoffee of the King, the Franchiſes do not paſs by the general grant, becauſe that the Freehold of them of Common right was annexed to the Crown; but if ſuch ſpecial mention of them be made in the Charter of Grant, then the Franchiſes paſs as appendants. 43 Aſſ. p. 10.

6. If the King grant to J. S. and his Heirs *catalla felonum* within his Mannor of D. and afterwards the ſaid J. S. grants to the King and his Succeſſors, the Mannor, with the Franchiſes: And the King by his Letters Patents grants to J. N. and his Heirs, the ſaid Mannor, and further grants to him *tot talia tanta, eadem, et conſimilia priviligia, Libertates & Franchiſias quot qualia, quanta et qua.* the ſaid J. S. had: It was Reſolved in this Caſe, That in a *Quo Warranto* brought againſt J. N. he cannot plead the Grant in ſuch ſort

manner, but he ought ſpecially to alledg the firſt Charter made of the Felons goods, & the Re-grant. *Cook* 9. Part, in the Caſe of *Strata Marcella*.

7. If the King grant the Manner of D. to J. S. and his Heirs, and within the ſaid Manner to have Waife, Strayes, *bona felonum, &c. dicto manerio ſpectantibus et pertinent.* Theſe words (*dicto manerio ſpectant et pertinent.*) in the ſaid Grant, do not refer to Felons goods, which do lye in Charter, and cannot by no uſage, nor time, be appendant to the Manner: But yet they ſhall paſs, although they never were demſed or uſed with the Manner. *Ibid.*

8. When the King grants *bona et catalla felonum*, and divers other Franchiſes to one for life; and afterwards the King grants *tota, talia, tanta, eadem hujuſmodi privilegia* to J.S. and his Heirs, *quod qualia, quanta vel que, aliqui vel aliquis, habuerunt vel habuit.* It was adjudged, That ſuch a grant with ſuch reference is good, and J. S. ſhall have ſuch Privileges as the Tenant for life had, for when a general grant hath reference to other Charters, the ſame is as much in Law, as if all the Charters had bin recited, becauſe they are upon Record. See 40 Eliz. adjudged acc. in *Amerdiths* Caſe, vouch. in *Cook* 9. Part, in the Earl of *Shrewsburyes* Caſe, 52.

9. The King granted to the Earl of *Rutland*, the Stewardſhip of the Mannors of A. B. and C. and it was not expreſſed in the grant in what Counties the Mannors lay; and alſo the grant of the ſaid Office, was to begin at a day to come, *viz.* à *Temporalene ætatis* of the ſaid Earl: and it was not granted in the Letters Patents, That the ſaid Earl might make a Deputy. Yet it was Reſolved, That the Grant was good. 1. Becauſe in the Letters Patents there might be divers circumſtances which might ſufficiently deſcribe what Mannors the King intended in his Grant as in the Tenure, occupation, poſſeſſion, or value. And 2. Reſolved, That although without ſpecial words a Steward cannot make a Deputy, becauſe it is an Office of Truſt and Science: Yet it was Reſolved, when the King Grants to an Earl the Office and Stewardſhip of his Mannors, he ſhall have this Privileg to make a Deputy, though no power to make a Deputy be in the grant, in reſpect of the baſeneſs of the Office, and the great reſpect which the Law hath of the perſon of an Earl who is *Præfectus*, or *Præpoſitus Comitatus*. *Cook* 9. Part, 52. the Earl of *Shrewsburyes* Caſe.

10. Note, It was Reſolved in the Caſe of the Abbot of *Strata Marcella*, *Cook* 9. Part, That Grants of Franchiſes made before time of memory, be they by general, obſcure, and ambiguous words, or by ſpecial words certain, ought to be allowed within time of memory by Juſtices in *Eyre*, or in the Kings Bench, or before the Barons of the Exchequer, or by confirmation upon Record within time of memory; and ſuch Franchiſes ſhall not be allowed, but for ſuch part as have bin ſo allowed or confirmed, although they be all in one Patent. But ſuch ancient, obſcure, and ambiguous Grants ſhall be conſtrued as the Law was when the Charter was made, and according to the ancient allowance upon Record. Alſo Uſage which is matter of fact, will not ſupport a Record before time of memory: But Franchiſes granted within time of memory, are pleadable without allowance or confirmation: And a man may preſcribe in Franchiſes granted by Charter before time of memory, if he hath an allowance of them within time of memory: for a Charter may be before the Conqueſt, and of ſuch Antiquity, that the Charter it ſelf, and every Enrolment of it is loſt, and therefore upon allowance, it is but reaſonable that a man may preſcribe, in Franchiſes granted by ſuch ancient Charters.

11. King E. 1. made a Charter to the Town and Burgeſſes of *Yarmouth* in theſe words, *viz. Conceſſimus pro nobis et hæredibus noſtris, Burgenſibus et probis hominibus de Magna Jernemutha quod omnes illi de villa prædict. oriundi licet ipſi terram et tenementa extra libertatem villæ tenuerint per tale ſervitium per quod manitegia terum ratione minoris ætatis ipſorum ad nos vel hæredes noſtros pertinere deberent ſecundum legem et conſuetudinem Regni noſtri; Nihilominus juxta Libertates villæ prædict. ſe maritare poſſint ſine occaſione, vel impedimento noſtro, vel hæredum noſtrorum in perpetuum.* It was found before the Eſcheator 41 Eliz. That *Roger Drury* was ſeiſed of a houſe in *Yarmouth*, parcel of the diſſolved Monaſtery of *Black Fryars* in *Yarmouth*, and dyed ſeiſed, his Son and Heir of the age of 14 years and ſeven Moneths, and the ſaid houſe was holden of the King by Knight-Service *in Capite*; and alſo that the ſaid *Roger* was ſeiſed of the Mannor of B. holden of the King by Knight-Service, and not in *Capite*, and that the Queen granted the Cuſtody and Ward of the body of the Defendant to the Plaintiff, and that the Plaintiff tendred to the Defendant a marriage, being within age; and that afterwards he married himſelf elſwhere within age. In this Caſe, it was a Queſtion if the ſaid Charter had diſcharged the Defendant from Wardſhip. It was Reſolved by the Juſtices, That it had not. 1. Becauſe the Charter is not an abſolute diſcharge in it ſelf, but hath reference, *ſcil. juxta Libertates villæ*, which ought to be ſhewed. 2. It is not ſet forth, that the ſaid *Roger* was born at *Yarmouth*, for the Charter is, *de villa prædict. oriundi.* 3. Becauſe the Term was created upon a Grant made of the houſe after the diſſolution, and the ſaid grant cannot extend to create a Term:

But in that Caſe, It was holden, That ſuch a Charter made to the ſaid Town, to diſcharge them of Wardſhip, was good. *Cook* 6. Part, 73. Sir *Drue Drwries* Caſe.

12. If a man, or Town have Liberties or Franchiſes, yet if they abuſe ſuch Liberties and Franchiſes, theſe Liberties may be ſeiſed upon and forfeited: As 21 E. 3. Rott. 46. In the Common-Pleas a Prohibition was awarded to the Biſhop of *Norwich*, and he excommunicated the party who brought the Writ, and thereupon the party brought an Action upon the Caſe, and ſet forth the whole matter: and it being found againſt the Biſhop, It was adjudged, That his Temporalties ſhould be ſeiſed, untill he abſolved the party, and ſatisfied the King for the Contempt: and 33 E 1. The Biſhop of *Durham* pretending, That he had ſuch Priviledges, That the Kings Writ ought not to run there, becauſe one brought the Kings Writ thither, he Impriſoned him: & this Offence being proved upon an Information exhibited againſt him, It was adjudged, That he ſhould pay to the King a Fine, and that he ſhould loſe his Liberties; for it was ſaid, That *juſtum, eſt in eo, quod peccat. in eo puniatur.* And ſee, Where the Mayor and Jurates of *Hithe*, being one of the Members of the Cinque-Ports, pretending the Liberties were broken by delivering a Writ of *Certiorari* unto them, for the removing an Endictment taken before them, They ſpeaking contemptuouſly of the Writ, ſaying, It was no time for Green Plums: they were for ſuch Contempt, in danger of loſing their Franchiſes and Liberties. Paſch. 8 Car. in B.R. *Tindall*'s Caſe. *Cro.* 1. Part, 183.

13. It was holden by the Court, That no man can claim to hold a Court of Equity, viz. of Chancery by Preſcription, becauſe every Preſcription is againſt Common Right; and a Chancery is founded upon Common Right. 2. It was holden, That the King by his Charter cannot grant to another any of the Cuſtoms or Franchiſes of *London*, becauſe they are confirmed unto them by Acts of Parliament. But the like Liberties, Franchiſes, and Cuſtoms as *London* holdeth, or uſeth, the King by his Letters Patents may grant. Mich. 13 Jac. in B.R. The Mayor of *York*'s Caſe. *Godb.* 262.

14. The King cannot grant to any ſtranger or other perſons, to make of Strangers born, Denizens, it is by the Law ſo inſeparably and individually annexed to his Royal Perſon: for the Law eſteemeth it a Point of high Prerogative, *Jus Majeſtatis, et inter inſignia ſummæ poteſtatis*, to make Alien born, Subjects of the Realm, and Capable of the Lands and Inheritances of *England*: And therefore by the Statute of 27 H. 8. Cap. 24. many of the moſt ancient Prerogatives and Flowers of the Crown, as authority to pardon Treaſon, Murther, Manſlaughter and Felony; Power to make Juſtices in Eyre, Juſtices of Aſſiſe, Juſtices of the Peace and of Gaol-delivery, having been ſevered and divided from the Crown, were reſumed, and were re-uuited to the ſame; but authority to make Letters of Denization, were never mentioned therein to be reſumed; for that never any claimed the ſame by any pretext whatſoever, being a matter of ſo high a Point of Prerogative. See Cook 7. Part, 25. in *Calvin*'s Caſe.

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2. *A* Quo Warranto *brought; Of Franchiſes and Liberties: And what ſhall be good Pleas in barr to them; What not.*

1. IN a *Quo Warranto*; The Information was, That whereas the Defendant was ſeiſed of a Manor and a houſe within it, that he claimed to have a Court, or View of Frank-pledg *infra Meſſuagium prædict*: and the Writ further was, That *ſint aliqua Conceſſionet ſive authoritate, ut-pavit Libertates prædict*: The Defendant pleaded, That *non uſurpavit Libertates prædict. infra Meſſuagium prædict. modo et forma, &c.* It was the Opinion of the Court, That the Plea was not good, for many reaſons: For the natural Anſwer to a *Quo Warranto*, is either to claim, or diſclaim, and here he doth neither. 2. He ſaith, *Non uſurpavit infra Meſſuagium prædict.* Whereas it ought to be *infra Manerium prædict.* 3. He ought to ſay, *Non uſurpavit Libertates prædictas, aut earum aliquam*, which he hath not done. 4. He doth not ſhew that he hath theſe words, *Libertatem Conceſſionet*, or *authoritate regia*: for if he hath them not by a Royal Authority, then he hath uſurped them. It was the Opinion of the Court, That *non uſurpavit modo et forma*, was no ſufficient Anſwer. Mich. 29 Eliz. in B.R. Sir *Jervis Clifton* Caſe. *Godbolt*, 91, 92.

2. In an Information *Quo Warranto*, the Defendants claimed certain Liberties; the Defendants diſclaimed in all the Liberties but in one, and that was to hold a Court Baron: and for the maintenance of that they pleaded, That I. S. was ſeiſed of a Mannor; of which Manor, the Manor of N. was parcel: and from I. S. conveyed to himſelf an admittance to the Manor of N. in 4 Eliz. ſo likewiſe of two others; *ſcil.* of A. and B. by the name of ſo many Acres; and ſhewing that a Meſſuage and 7. Acres of Cuſtomary Lands did to be demiſed, were conveyed to him by I. S. *tenendum ſecundum conſuetudinem Manerii*: &c.

ſole Queſtion upon this *Quo Warranto*, was, Whether the Defendant by his Plea, hath ſo well entitled himſelf to the Manor of N, as that he may juſtifie the keeping of a Court-Baron? It was Reſolved in this Caſe, That Sir *Henry Nevill*'s Caſe, in *Cook* 11. Part, 18. was good Law, Where it is Reſolved, That there may be a Cuſtomary Manor held by Coppy, and that ſuch a Cuſtomary Lord may hold Courts, and grant Coppies, and that ſuch a Cuſtomary Manor may paſſe by Surrender and Admittance, and that Fines may be paid upon Admittance, as well as upon diſcent. But, 2. It was Reſolved in the principal Caſe, That the Defendant had not a Manor, and therefore could not have ſuch a Court-Baron. Mich. 8 Jac. The King and *Stafferton*'s Caſe. *Bolſtr.* 1. Part, 54, 55, 56, & 57.

3. In a *Quo Warranto* brought againſt the Mayor, Bayliffs, and Jurats of *Maidſtone*, It was Ordered by the Court, That they ſhould have day to plead, untill a fortnight after Trin. Term; and the truth was, that they had not pleaded accordingly: Whereupon Judgment was entred in the Roll, and the Writ of Seiſin awarded. And afterwards by a private Order in the Vacation, It was Ordered by ſome of the Juſtices of the Court, That the Judgment might be ſtayed: and the truth was, it was never entred amongſt the Rolls of the Court; and therefore it was prayed, That the Judgment might not be filed, but that the laſt Order might ſtand, and that the Defendants might mend their Plea. It was a Queſtion, What the Court ſhould do in this Caſe? It was ſaid, and 15 E. 4. vouched, to prove it, that after Judgment entred in a *Quo Warranto*, the Defendant ſhall forfeit the Franchiſes for ever. And it was ſaid in this Caſe, That all Franchiſes in *England* are againſt Common right and execution of Juſtice; and *Wells* Caſe was vouched, Where in a *Quo Warranto* the Defendant had day to plead, or otherwiſe, that Judgment ſhould be entred to ſeiſe, and he failed at the day: and the Judgment was not filed, and yet he could not be releived. It was afterwards Ordered, That the Plea ſhould be received. Trin. 2 Car. in B. R. The Caſe of the Mayor and Bayliffs of *Maidſtone*. *Popham*, 181.

Franktenement, *or* Freehold.

1. TEnant in tail, the Remainder in Fee; Tenant in tail made a Leaſe for life, not warranted by the Statute of 32 H. 8. and afterwards dyed without Iſſue: and before Entry, he in the Remainder granted the Remainder by Fine: And whether the Conuſee of the Fine might enter upon the Tenant for life, and avoid his Leaſe, was the Queſtion? It was ſaid by *Wyndham*, and *Periam*, Juſtices, That it was a Rule in Law, That when a Freehold is given by Livery, it cannot be defeated without an Entry; and therefore in this Caſe, when the Tenant in tail made a Leaſe for life, and afterwards dyed without Iſſue, living the Tenant for life, his Eſtate was not defeated before the Entry of him in the Remainder: and then, when before Entry he in the Remainder grants his Eſtate, the Grantee ſhall have it as a Remainder; for ſo is his grant, and ſo the Eſtate for life, which was but voidable, was made good. But *Meade* and *Dyer* did conceive, That becauſe by the death of Tenant in tail, his Eſtate was determined, the Eſtate of the Tenant for life, out of which Eſtate tail it was derived, was *ipſo facto* determined; *et ceſſante Cauſa, ceſſat effectus*. Paſch. 23 Eliz. C. B. *Godbolt.* 9.

2. In an *Ejectione Firme*, upon a Leaſe made by the Vicars Chorals in *Lichfield*, of parcel of a Meadow in C: upon Not guilty pleaded, the Defendant upon Evidence pretended, That the Leſſors had not the Intereſt of the ſoyl, but that the Freehold was in J. S; and that the Leſſors had onely *primam tonſuram* of the Land, from the Hay inning untill the Crop was mowed and carried away: and that J. S. had all the profit thereof for the reſidue of the year; and then an *Ejectione* brought of it would not lye. It was the Opinion of all the Court, That properly, unleſſe other matter be ſhewed to the contrary, the Freehold is in him who hath the firſt Tonſure, for that is the moſt beneficial part of the year, and thoſe who have the after-Paſture, have but the profits in the Nature of Common: And as the principal Caſe was, the Court conceived, the intire Land for all the year did belong to the Vicars Chorals, and therefore the *Ejectione Firme* brought would well lye,

lye. Pasch. 10 Car. in B. R. *Ward* and *Petifer's* Case, *Cro.* 1. Part, 163.

3. *Tho. Callard* seised of Lands in Fee, called the *Barton* of *Southcote*; and having two sons, the eldest called *Eustace*, and the other *Richard*; his eldest son being to be married, the said *Thomas* in Consideration of the said Marriage, being upon the said *Barton*, said these words, Stand forth *Eustace*, I do here, reserving an Estate for my life and my Wifes, give unto thee and thy heirs for ever, my *Barton* of *Southcote*: after which, the said *Thomas* entreoffied his younger son of the said *Barton*, with warranty from him and his heirs; the eldest Son entred, and let to the Plaintiff; upon whom the Defendant entred. It was moved, That the Plaintiff should be barred, because the Land did not passe by way of Estate, in respect a man could not passe a Freehold from himself to begin at a day to come, and by it to make a particular Estate to himself. And so it was adjudged, Hill. 35 Eliz. in the Kings-Bench: But afterwards upon a Writ of Errour brought in the Exchequer-Chamber, the Judgment was reversed; for the same being done upon the Land, did amount to a Livery; and the intent of the Father was apparant. *Callard* and *Callards* Case, *Popham*, 47, 48, 49.

4. One made a Feoffment of Lands in *London*, *Habendum* to the Feoffee and his heirs after the death of the Feoffor: It was adjudged a void Feoffment. And the reason was, Because an estate of Freehold in Lands, cannot begin at a day to come: as it is Resolved in *Cook* 2. Part, in *Buckers* Case. Mich. 34 Eliz. in B. R. *Warrin's* Case. But in the Kings Bench, the Case was, That one having Leased his Lands to 3. for their lives, granted the Reversion; *Habendum* to the Grauntee for his life, and then added these words, Which said Estate for life to begin after the death of the three first Lessees; And it was adjudged a good Estate in Reversion for life. Hill. 34 Eliz. in B. R. *underbey* and *underboy's* Case. *Hobart*, 171. acc.

See more of *Franketenement* and *Freehold*, in the Title of *Estates*.

Fugitives.

1. A Bill of Intrusion was in the Exchequer Chamber against *Cater*, who pleaded a grant of the Queen: The Plaintiff *replicando* said, That Sir *Fr. Englefield* was seised of the Manor of, &c. and being beyond the Seas; The Queen sent her Letters under the Privy Seal, *Quod ipsum fide et Legiantia quæ dict. Domino tenebatur indevicte redire in Angliam: prædict. tamen Franciscus (spretis Mandatis dict. Reginæ,) venire recusavit*; for which a Certificate was made by the Queen into the Chancery, *Quod dictus Franciscus in partibus transmarin. sine Licentia dict. Regina remansit.* And thereupon a Commission was awarded to seise the Land of the said Sir *Fr.* which was entred in the Replication *in hæc verba*, reciting also the Queens Privy Seal, and that Sir *Fr.* did stay there (*spretis Mandatis*, for which the Queen seised the Land, and granted it to the Plaintiff: after which, the Statutes of 13 & 14 Eliz. were made: Upon which matter, there was a Demurrer in Law, and Judgment given for the Plaintiff. And upon this, *Cater* brought a Writ of Errour in the Exchequer Chamber; and assigned for Errour, 1. That the Record is *Inter Johannem Carter præsent. hic in Curia, & Joh. S. attornatum suum*, which is *oppositum in Objecto*, that one should be present in Court, and also by his Attorney, *simul et semel*. But that was Resolved to be no Errour: for there were many Presidents shewed in the Exchequer, of such Entries. And it was said, If one hath an Attorney in the Kings-Bench of Record, and he himself is in the Marshalsea; there in an Action against him, he is present in person, as also by his Attorney, and good. 2. Errour was, That it is not alledged of what date the Privy Seal was, or that any Notice of it was given to Sir *Francis*. To that it was Resolved, That it needed not any date, because matters under the Privy Seal are not Issuable, nor retornable into any Court, but the Queen her self from whom the Original came, shall receive it and keep it; and thereupon she makes a Warrant to the Chancellor, to award a Commission to seise the Lands. And it was Resolved, That in case of Fugitives, the Queen might seize the Lands, and grant them over to others. Mich. 26 Eliz. in the Exchequer. *Caters* Case. *Leon.* 9.

2. 18 of *Ed.* 2. *Edmund* of *Woodstock* Earl of *Kent*

Kent went beyond Sea without Licenſe of the King, with *Robert de Mortimer*, and the King did certify the ſame into the Chancery, reciting that he had ſent his priry Seal, but that the ſaid *Edmond, Spretis mandatis noſtris redire recuſavit*, upon which iſſued a Commiſſion to ſeize his Lands, *ibid.*

3. See *Cook* 2. Part, 22. in *Lenet* Caſe, That the Kings Privy Signet is ſufficient to prohibite one to go beyond the Sea, or to command a Fugitive who is beyond the Sea, to return.

4. Queen *Mary* gave Licenſe to *Bartue* to go beyond Sea, to recover certain Debts: Proviſo, That if he reſorted to the Fugitives, then his Licenſe to be void. One was ſent with a Privy Seal to command *Bartue* to return, who being miſ-uſed, came back, and certified his reſort to the Fugitives into the Chancery, which by *Mittimus* was ſent into the Exchequer; and from thence iſſued forth a Commiſſion, to ſeize *omnia bona, Terras et Tenementa* of *Bartue*. Afterwards *Bartue* returned, and would have traverſed the Certificate, but the Court held, That that could not be done, becauſe it could not be tryed. It was holden in that Caſe, That the reſorting to the Fugitives did not make the Queens Licenſe void, *ab initio*, but from the time of the reſort only to the Fugitives. Hill. 2 Eliz. *Dyer*, 177.

Gard *or* Ward, *and* Wardſhip.

1. *Where, and in what Caſe, an Heir ſhall be in Ward; or Wardſhip ſhall be due, and for what Land, and where, and for what not.*

1. IT was holden by the Juſtices, That if Lands be holden of a Subject, and the Tenant ſells the Land by Fine and Proclamation to J. S. in tail, the Remainder to the King in Fee, and the Tenant in tail dyes, his Iſſue within age, That the Iſſue ſhall not be in Ward to the Subject, if the King do not aſſent to the Remainder; for that the Tenure and Services are gone and extinct by the Feeſimple coming to the King, who may hold of no perſon: And ſo in ſuch Caſe, the Iſſue in tail ſhall be in Ward to none. Hill. 43 Eliz. in C. B. *Goldsbr.* 149. See 5 *Ma. Dyer*, 154. acc.

2. A. was ſeiſed of Lands in Fee holden by Copy of Court Roll of the Manner of D. of which Manner J. S. was ſeiſed in Fee, J. S. for a conſideration of a ſum of Money to him paid by A. by Deed, Bargained, Sold, enfeoffed, releaſed, and confirmed the ſaid Lands to A, To have and to hold to the ſaid A. and B. his Son and their Heirs; and by the ſaid Deed, Covenanted with the ſaid A. and B. and their Heirs, to make further aſſurance by Fine, Feoffment, Recovery with voucher, Releaſe, Deed, or Deeds enrolled; and that all ſuch aſſurance ſhould be and ennure, to the only uſe of the ſaid A. and B. and their Heirs; and Livery and Seiſin was executed to the uſes aforeſaid upon the back of the Deed: Afterwards A. dyed, B. his Son and Heir being within age; Whether B. ſhould be in Ward for that Land, or any part of it, was referred to the Juſtices. In that Caſe it was Reſolved, That there ought to be no Wardſhip, for that Livery being made *ſecundum formam chartæ*, it ſhall ennure by way of Feoffment, and not by Releaſe or confirmation; yet if it ſhould do ſo, it would be all one, becauſe a Releaſe or confirmation which ennures by way of enlarging an Eſtate, may be aſwell to an uſe, as a Feoffment: And it was further Reſolved in that Caſe, That the ſaid B. by the limitation of the uſe in the *Habendum* did take jointly with the ſaid A. and the Statute of 27 H. 8. made them Joynt-Tenants of the Intereſt, and poſſeſſion; and therefore by the death of A. B. ſhould hold the Land *per jus accreſcendi*, and ſo ſhould not be in Ward. Trin. 7 Jac. *in Curia Ward. Samms* Caſe, *Leon.* 12.

3. A. having a Wife, purchaſed Land holden in *Capite* by Fine and Indenture, to the uſe of the ſaid A. and the Heirs Males of his body which he ſhould beget on the body of any Wife which he ſhould after marry, and for default of ſuch Iſſue, then to the uſe of B. the Son and Heir apparent of the ſaid A. and the Heirs of the body of the ſaid B. lawfully begotten; and for default of ſuch Iſſue, to the uſe of the right Heirs of A. for ever. Afterwards A. dyed, and the Wife which he had at the time of the purchaſe ſurvived him. It was Reſolved, That in this Caſe, no Wardſhip was due, and

and that B. the Son of A. although within age, ſhould not be in Ward. Hill. 7 Jac. in *Curia Ward. Coles* Caſe. *Lea* 20.

4. J. D. Tenant in Fee of Lands holden in *Capite*, in conſideration of marriage of his third Son M. with A. S. conveyed part of his ſaid Land; being of the value of 10 l. *per annum*, to the uſe of the ſaid A. S. the Wife of his Son for life, the Remainder to the Heirs of the body of the ſaid M. the Remainder to the right Heirs of the ſaid M. his Son. Afterwards J. D. the Father dyed ſeiſed of the reſidue: His Son ſued his Livery, and afterwards M. the Son dyed, A. S. his Wife ſurvived him, his Son being within age. The Queſtion was, If he ſhould be in Ward, living the Mother, Tenant for life. It was Reſolved, That he ſhould be in Ward by the equity of the Statute of 32 H. 8. For where two purchaſe Lands to them, and the Heirs of one, and he who hath the Fee dyes, his Heirs ſhall be in Ward. So where the limitation is to one for life, and the Remainder to another in Fee, he ſhall be in Ward by the Equity of the ſaid Statute. Mich. 2 Jac. in *Cur. Ward, Southbies* Caſe. *Cro.* 2. Part, 40.

5. A. ſeiſed in Fee of the Mannor of W. and holden of C. an Enfant in Ward, as of his Manner of Y. levyed a Fine of the Mannor of W. to J. S. *ſur Conuſans de droit come ceo*, with a render to himſelf for life, the Remainder to his Wife for life, the Remainder to the right Heirs of the Huſband: After which, A. dyed, having Iſſue two Sons, both within age, the Wife ſurviving, entred into the Manner of W. and afterwards the eldeſt Son dyed, the younger Son being within age: and if the Queen ſhould have the Wardſhip, and the third part of the Mannor of W. from the Wife, was the Queſtion. It was objected, That the Queen ſhould not have them, becauſe the Statute of 32 H. 8. ſpeaks only of Joynt-Tenancy of Lands holden of the King, and the Feeſimple in one of them, who being dead, that his Heir ſhould be in Ward notwithſtanding the ſurvivorſhip; but ſo it is not in this Caſe, the Lands being holden of C. and not of the King: But it was Reſolved by the Court, That notwithſtanding that, that the King ſhould have the Wardſhip of the Heir, and of the third part of the Land by the Equity of the ſaid Statute. Mich. 2 Eliz. *Dyer*, 172. *Lanes* Caſe.

6. A Tenant in *Capite* by act executed in his life time, ſeiſed of Lands in Fee, conveyed them to the uſe of himſelf, and the Heirs of his body, and for want of ſuch Iſſue, to E. his Siſter, Wife of Sir *Valentine Knightly*, and the Heirs Males of his body, and for want of ſuch Iſſue, to C. the Wife of J. D. and the Heirs Males of his body, the Remainder to the right Heirs of A. E. dyed in the life of A. without Heir Male, having Iſſue three Daughters, F. L. and M. Sir *Valentine Knightly* then living, and having no other Iſſue then the ſaid three Daughters, being his co-heirs apparent. A. dyed without Iſſue, C. F. and L. being of full age, and M. within age, all which was found by Office. It was Reſolved by the Juſtices in this Caſe, That M. ought not to be in Ward for her body during the life of Sir *Valentine* her Father, nor be chargeable to the King for the value of her Marriage; but ſhe might ſue her Livery without compounding for her Marriage, or the value thereof. Paſc. 7 Jac. in *Curia Warder. Mason's* Caſe. *Lea*, 1. and 2.

7. A. Tenant in tail, the Remainder in Fee to B. of Lands holden of the King in *Capite*: B. dyed, his Heir being of full age. A. Tenant in tail, made a Leaſe to W. who being ouſted, brought an *Ejectione firmæ*. It was prayed, That the proceedings might be ſtayed *Regina inconſulta*, becauſe primer ſeiſin was due to the Queen: the Court doubted what to do in the Caſe, but yet ſeemed to ſay, That for ſuch a Reverſion, Wardſhip was due: And it was ſaid in that Caſe, That it had bin adjudged, That Wardſhip ſhould be for a Leaſe for years. See *Warburtons* Caſe. *Noy* 2.

8. It was Reſolved by the two Lord Chief Juſtices, and the Chief Baron, That whereas Sir *W. Lewſon* made a Leaſe for 100 years for the payment of his Debts, and performance of his Will; and afterwards conveyed the Inheritance of his Lands to ſtrangers, and dyed, his Heir within age. It was Reſolved in that Caſe, That the Lands being holden in *Capite*, that the King ſhould have the Wardſhip or Livery as the uſe required by reaſon of that particular eſtate ſo created: It being an Act executed for the payment of his Debts: And although the Heir had nothing in that Caſe, yet it was Reſolved, That the King ſhould not be prejudiced of that which was due unto him. Paſc. 5 Jac. in *Cur. Wardorum*. The Lord *Buckhurſt* and Sir *John Lewſons* Caſe. *Cro.* 2. Part, 157.

9 R. S. ſeiſed in Fee of the Mannor of D. holden of the King in *Capite*. 13 Eliz. levyed a Fine thereof to the uſe of himſelf for life, and after, to the uſe of his younger Son E. S. and A. his Wife, and the Heirs of the body of the ſaid E. lawfully begotten upon the body of A. and for want of ſuch Iſſue, to the Heirs of the body of the ſaid E. the Remainder to R. S. and his Heirs for ever: E. dyed, having Iſſue by A. his Wife L. S. his Son and Heir. L. S. dyed, A. entred for the Remainder. L. S. dyed, having T. S. his Son and Heir within age, A. living. It was a Queſtion, Whether T. S. dying in the life time of A. his Grandmother ought to be in Ward. It was decreed by the Court, by the advice of the Juſtices Aſſiſtants to the Court, That he ought not to be in Ward during the life of

of his Grandmother, in regard ſhe lived till the ſaid T. S. attained to his full age. Trin. 8 Jac. *Sadlers* Caſe, *Lea*, 25.

10. A. B. and C. ſeiſed of certain Lands, ſometimes the Inheritance of the Earl of *Derby*, which Lands were holden of the King by Knight-Service in chief for the conſideration of 700 l. being the money of *Tho.* Earl of *Dorſet*, but to them paid by J. S; did bargain and ſell the ſaid Lands to the ſaid J. S. and his Heirs. It was found by Office, That the ſaid Lands were conveyed to the ſaid J. S. upon truſt and confidence that the ſaid Earl of *Dorſet*, and his Heirs, ſhould take the profits thereof, and that J. S. and his Heirs ſhould aſſure the premiſes to the ſaid Earl and his Heirs at all times upon requeſt; and that J. S. dyed ſeiſed of the ſaid Lands, M. his daughter being within age, and that he dyed ſeiſed of no other Lands. It was Reſolved in this Caſe by the Lord Chief Juſtices, and the Chief Baron in the Court of Wards, That M. the Heir of the ſaid J. S. ought to be in Ward, and to ſue Livery, and that there was no remedy for it. Mich. 10 Jac. in *Cur. Ward. Gawlers* Caſe. *Lea*, 40.

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2. *Where the King ſhall have the Wardſhip of the Heir of the Donee of the Tenant in tail, of the gift of his Tenant: and where the King by his Prerogative ſhall have the Wardſhip of the Heir, and of the Lands holden of other Lords; where not.*

1. A. Seiſed of Lands in Fee holden in *Capite* by act executed in his life time, conveyes the ſame to the uſe of himſelf for life, the Remainder to his Wife for life, the Remainder to his ſecond Son in tail, the Remainder to his third Son in tail, the Remainder over to the Heirs of the body of his eldeſt Son; and for want of ſuch Iſſue, the Remainder to the right Heirs of his eldeſt Son for ever; his eldeſt Son at that time being within age: The eldeſt Son dyed without Iſſue, the Wife dyed, the third Son alſo dyed without Iſſue, the ſecond Son being within age; and if he ſhould be in Ward for his body or Lands, or for no part of it, was the Queſtion. It was Reſolved, That in this Caſe, he ſhould be in Ward for his body, and a third part of the Land, and that by the Statute of 32 H. 8. But at the Common-Law, the Juſtices made a Quere of it. Paſc. 2 Eliz. *Dyer*, 181. *Moodys* Caſe. But ſee that Query now Reſolved in *Cook* 6. Part, 77. in Sir *George Curſons* Caſe.

2. Tenant in *Capite* levyeth a Fine, which by Indenture is declared to be to the uſe of himſelf in tail, the Remainder for want of ſuch Iſſue to the uſe of the Conuſee, and his Heirs; the Conuſor dyeth, his Iſſue within age, he ſhall be in Ward to the King, and not to the Conuſee, although he hath the Feeſimple: for by the limitation, the uſe is as a Remainder, not as a Reverſion in the Conuſee, although by the Fine the Fee paſſed to the Conuſee, and the Conuſee in the Caſe is Donor. Paſc. 20 Eliz. *Dyer*, 362.

3. If Tenant by Knight-Service makes a gift in tail; and the Donee makes a Feoffment, and dyeth, his Heir within age, the Donor ſhall have the Wardſhip, becauſe he is Tenant in *Droit*: But if the Feoffee dyeth, his Heir within age, the Donor ſhall not have the Wardſhip of him, but the Lord Paramount, becauſe he is his Tenant in fact; And ſo it was Reſolved. Trin. 18 Eliz. in C. B. in Sir *Tho. Wyats* Caſe, vouch. *Cook* 1. Part, *Inſtitutes*, 77. See *Cook* 2. Part, 92, 93. in *Bingham's* Caſe.

4. Tenant in *Capite* ſuffered a Recovery to the uſe of his Son, and his Wife, and the Heirs of the body of his Son, without limitting any Remainder over; the Son dyed, having Iſſue within age. And notwithſtanding the Statute of 32 H. 8. it was adjudged, That the Iſſue ſhould not be in Ward during the life of his Mother, for that the ancient Reverſion remained, and the Father who was the Donor, held of the King, and not the Son. Paſc. 35 H. 8. *Dyer*, 55. the Lord *Broughs* Caſe.

5. A. and B. his Wife, ſeiſed of the fourth part of the Mannor of D. holden in *Capite*, levyed a Fine to C. and E. and the Heirs of C. who rendred a fourth part to A. and B. and to the Heirs of A. on the body of B. lawfully begotten; and for want of ſuch Iſſue, unto the right Heirs of A. Afterwards A. and B. levyed a Fine to F. and G. to the uſe of A. and B. for their lives, and afterwards to the uſe of H. their eldeſt Son in tail, and afterwards to the uſe of the right Heirs of A. and B. and for default of ſuch Iſſue, to the uſe of the right Heirs of B. A. dyed, H. his Son being within age, B. being alive. In this Caſe, it was Reſolved (amongſt other points), That the advancement of the Son in Remainder, when the Eſtate for life is out of the Statute of 32 H. 8. ſhould not give to the King Wardſhip, either of the body, or of the Land, becauſe that the Tenant for life was Tenant to the King. But if there be Tenant for life, and the Reverſion be granted to his Wife, or Iſſues, and he dyeth, his Heir within age, there he ſhall be in Ward for body and Land, becauſe he in the Reverſion holdeth of the King. 2. It was ſaid, That if one holdeth of the King, and makes a Leaſe for life, the Remainder to two, and to the Heirs of one of

them, and he who hath the Fee, dyeth, living the Tenant for life, the ſame is within the Statute of 32 H. 8. becauſe a Remainder is an Hereditament, and holden of the King, but it is not immediately holden of the King; and therefore the Heir ſhall not be in Ward during the life of the Tenant for life: But if the Heir of him who hath the Fee be of full age, and dyeth, living the Tenant for life, his Heir within age, he ſhall not be in Ward for his body, for the Heir ought to be immediate Heir, and within age at the time of the death of his Anceſtor. *Cook* 9. Part, 126. *Floyers* Caſe.

6. A man ſeiſed of Lands holden of the King in Knight-Service, to him and his Wife, and to the Heirs of the Husband, on the body of the Wife begotten, the Remainder unto the right Heirs of the Husband: and of other Lands holden in Socage, enfeoffed divers perſons to the uſe of himſelf for life, the Remainder to his younger Son in tail, the Remainder to his own right Heirs, and dyed, his eldeſt Son within age. It was adjudged in that Caſe, That his eldeſt Son ſhould be in Ward for his body, by the Statute of 32 H. 8. And it was ſaid, That where two have an Eſtate, and to the Heirs of one, and afterwards the Son came of full age, and then the Wife dyed, that he ſhould not ſue an *Ouſter le maine* for the Knight-Service Land, becauſe it never was in the hand of the King, but was a bare Remainder during the life of the Wife; and for the Socage-Land, he was not bound to ſue Livery, becauſe the younger Son was alive and had Iſſue. Hill. 7 Eliz. *Dyer*, 237. *Mackwilliam's* Caſe. See before, 2 Eliz. *Dyer*, 172. *Lanes* Caſe.

7. Tenant in *Capite*, hath Iſſue a Daughter within age, who is married to a man of full age, the Tenant maketh a Feoffment to his uſe, and dyeth; in this Caſe, the Feoffees ſhall ſue Livery, for although that the Daughter was not in Ward for her body, yet her Land ſhall be in Ward; and therefore Livery ought to be ſued; but if the Daughter had bin of full age, then no Livery ſhould be ſued. 26 H. 8. 3. Br. *Gard.* 1.

8. Marqueſs *Dorſet*, Tenant in *Capite*, levyed a Fine of Land, with a render of the ſame to him, and the Heirs of his body, the Remainder over to King H. 7. and the Heirs Males of his body, the Remainder for want of ſuch Iſſue, unto the right Heirs of the Marqueſs; the Marqueſs entred, and dyed without Iſſue: King *Hen.* the 7th entred, and dyed ſeiſed, and the Land by mean diſcents came to King E. 6. who dyed without Iſſue; So as the Remainder came to the Lord *Berkley*, as couſin and Heir of the Marqueſs, being within age; and whether he ſhould be in Ward for the Land or not, was a Queſtion, becauſe the Seignory was ſuſpended at the death of King E. the 6th. It was Reſolved by the Juſtices, That he ſhould be in Ward for that Land, becauſe now the ſeignory was revived. Tr. 1 *Ma. Dyer*, 102. Marqueſs *Barkleyes* Caſe.

9. A. held Land in Socage, and other Lands of F. in Knight-Service, as of his Mannor of B. F. held over of the King in *Capite*; F. dyed, his Heir within age, and in Ward to the King. Afterwards A. dyed alſo, and his Heir within age, the Heir of F. ſued his Livery: And it was found by Office, That the Heir of A. was of full age. It was holden in this Caſe, That he ſhould not be in Ward for the Socage-Land, becauſe the Tenant held not immediately of the King, but for the Knight-Service Land he ſhould ſue Livery; and if he had bin within age, he ſhould have bin in Ward to the King. Mich. 3 *Mi. Dyer*, 123. acc.

10. Tenant in tail, the Reverſion to the King, the King doth Licenſe his Tenant to allien in Fee, and to take back an Eſtate to himſelf and his Wife in tail, the Remainder to his right Heirs, and he maketh a Feoffment, and taketh back an eſtate according to the Licenſe, and then he dyeth. It was holden, That notwithſtanding this Licenſe of the King, yet the King during the life of the Wife, ſhould have the Wardſhip of his Heir that is within age, for that the Licenſe doth not give him power to allien the Kings Reverſion; and when the Reverſion cannot be diſcontinued, the Eſtate tail is not diſcontinued, but by his death, the Heir may enter; and then he being within age, ſhall be in Ward. See *Cook* 2. Part, 92, 93. *Fitzh. Nat. Br.* acc.

11. If the Kings Tenant in *Capite* giveth Lands in tail without the Kings Licenſe, and the King accepteth of the Ancient Tenant for his Tenant, and accepteth his Services of the other; and afterwards the Donee in tail dyeth, his Heir within age, yet it was ſaid, That the King ſhall have the Wardſhip of him; and this acceptance of Services of the other, ſhall not conclude the King. But Quere of that Caſe, for it is holden in 4 H. 6. 19. to the contrary. See *Fitzh. Nat. Br.* and ſee 27 H. 8. 26. per *Fitzherbert*. And ſee 35 H. 8. *Dyer* 54 for the Reſolution of this Caſe.

12. Grandfather, Father, and Son, the Grandfather held the Mannor of D. of B. as of his Mannor of S. by Knight-Service, and levyed a Fine to the uſe of himſelf for life, the Remainder to the uſe of the Father in tail, and afterwards to the uſe of the right Heir of the Father, and dyed, his Heir within age. B. the Lord ſuffered a Recovery of the Mannor of S. to the uſe of himſelf and his Wife in tail, the Remainder to the uſe of C. and his Wife in tail, the Remainder to the right Heirs of B. B. and his Wife dyed without Iſſue, C. entred, the Grandfather dyed, his Wife dyed, the Son entred, and made a Leaſe for years; C. re-entred,

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It was Reſolved in this Caſe, 1. That the Grandfather had an eſtate in Fee expectant upon an eſtate tail, as a Reverſion, not as a Remainder. 2. That C. ſhould not have the Wardſhip of the Land, becauſe a Reverſion in Fee was expectant upon it, and the Reverſioner is the immediate tenant to the Lord, and not the Eſtate tail. *Cook* 2. Part, 92. *Bingham's* Caſe.

13. Note, in the Caſe of *Bingham*, this Caſe was put; Tenant by Knight-Service, makes a gift in tail, and afterwards releaſeth to the Donee and his Heirs; now the Donee hath an Eſtate in tail with the Reverſion expectant; and if he dyeth, his Heir within age, that the Lord ſhall have the Wardſhip of the Land: That Caſe was agreed for Law, becauſe that there the Releaſe doth enure by way of extinguiſhment of his eſtate, and the Lord ſhall have the Wardſhip of the Heir, and Land of the Donee, becauſe the Heir claims both Eſtates by Diſcent from the ſame Anceſtor. But it was ſaid, that in *Bingham's* Caſe, the Donee had two diſtinct eſtates deſcend d to him, from two ſeveral Anceſtors, *ſcil.* the Eſtate tail by diſcent from his Father, and the Reverſion as Heir to his Grandfather. But it was agreed, That if Tenant in tail be with a Reverſion expectant to him and his Heirs of Lands holden in Knight-Service of a common perſon, and dyeth, his Heir within age, he ſhall be in Ward for his body, but the Lord ſhall not have the Wardſhip of the Land, becauſe the Reverſion is holden immediately of him, and not the eſtate tail, *ibid.*

14. It was holden, If the Kings Tenant dyeth ſeiſed of Lands holden of the King in Socage in *Capite*, and alſo of other Lands holden in Socage of a cõmon perſon, his Heir of full age, that in ſuch Caſe he ſhall not pay primer ſeiſin of the Lands holden of other perſons, nor of other Lands holden of the King, if they be not holden in *Capite*. Paſc. 4 Eliz. *Dyer*, 213. See 20 Eliz. *Dyer*, 362. 35 H. 6. 52. 32 H. 8. Br. *Gard.* 97. acc.

3. *Where the Lord ſhall have the Wardſhip of the Land, notwithſtanding a Feoffment be made of it by Colluſion; Where not: And where the Lord ſhall not enter upon the Feoffee ſuppoſed by Colluſion; but ſhall be put to his Writ to recover the Land; Where not.*

1. TEnant of the King, of Lands holden by Knight-Service, did enfeoff his brother, to the intent to enfeoff his Heir Male at full age, whereas he at the time of the Feoffment, had not Iſſue Male, but his Wife was then with child; the Father dyed, a Son was born; all this was found by Office: The Queſtion was, the Heir being within age, If he ſhould be in Ward for the whole Land, or for any part of it. It was conceived that he ſhould be in Ward for the whole Land in regard of the Colluſion. 20 Eliz. *Dyer*, 361.

2. Tenant of Lands holden by Knight-ſervice in *Capite*, to defraud an Execution of 300 l. recovered againſt him, made a Feoffment in Fee, upon Condition, that if he or his Heirs payed 20 l. then the ſame to be void, and afterwards he dyed, his Heir within age. It was holden in this Caſe, That the Heir ſhould not be in Ward, becauſe it was not made to avoid the Wardſhip of the King, but only to avoid an Execution of a common perſon, and ſo it was not within the Statute of 32 H. 8. Mich. 3 Eliz. *Dyer*, 193. Se: *Cook* 6. Part, Sir *George Curſons* Caſe. And ſee 10 Eliz. *Dyer*, 268. acc. Se: before, in title Colluſion and Covin, more to this Caſe.

3. If the Father maketh a Feoffment unto his eldeſt Son upon Colluſion; the Lord by the Statute of *Marlbridg* had a poſſibility to have had the Wardſhip of the Son if the Father had dyed, his Heir within age. But in that Caſe, if the Feoffee had made a Feoffment *bona fide* over to another; and after the Father had dyed, his Heir within age, the poſſibility which the Lord had to have the Wardſhip, was deſtroyed, becauſe the ſtranger who had no notice of the Colluſion, came to the Land *bona fide* by purchaſe. *Cook* 1. Part, 122. in *Chudleyes* Caſe.

4. If there be Lord and Tenant by Knight-Service, and the Tenant enfeoffeth his Son and Heir apparent by colluſion, if the Lord accept of the Services by the hands of the Feoffee, he ſhall loſe his Wardſhip: For the Statute of *Marlbridg*, cap. 6. hath

6. hath made the Feoffment in Fee as void, and of no effect, as against the Lord; and therefore if the Lord will affirm the Feoffment, and waive the benefit of the Act, by accepting of the Feoffee for his Tenant, he hath thereby purged the Collusion; and so the Lord shall lose his Wardship. *Cook* 3. Part, 70. in the end of *Pennant's* Case.

5. If the Father Tenant in Knight-Service enfeoffeth his Son and heir apparant within age; the same is Covin and Collusion apparant, and needs not to be averred; and in such case, if the Tenant dyeth the Son within age, the Lord shall have the Wardship of him. *Cook* 7. Part, 40. in *Bedell's* Case.

6. If the Son and Heir purchaseth Lands holden by his Father in *Capite* for money *bona fide* paid to the Father; this shall not be taken to be a Conveyance by Collusion, either within the Statute of *Marlbridg*, or within the Statute of 32. H. 8. so as any Wardship shall accrue either to the King, or unto any other Lord. *Cook* 10. Part, 83. Sir *Nicholas Strange's* Case, vouch. in *Lowes* Case.

See more of this Division, in the Title, *Collusion* and *Covin*.

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4. *Where the Heir of* Cestuy Que Use, *shall be in Ward; Where not. And where one who hath an Estate of Inheritance jointly with one, who hath but an Estate for life shall be in Ward; Where not.*

1. A Man before the Statute of 27 H. 8. had Feoffees in use in Fee, and the Feoffees did execute an Estate to the Wife of A. for life, the Remainder to B. and his Heirs: and B. dyed his heir within age. In that case it was holden, That the heir of B. should be in Ward during the life of his Mother, because the Use limited as a Remainder, was void as a Remainder, and the Land discended in the nature of a Reversion, and not a Remainder. Trin. 28 H. 8. *Dyer*, 10, 11, 12. But see, where a man seised in Fee before the Statute, made a Feoffment to the use of himself and his wife, and to the heirs of their two bodies begotten; and for the want of such Issue, to the use of the Feoffor and his heirs: and after the Statute they had Issue, and the husband dyed the Issue within age. *Dyer* conceived, in that case he should not be in Ward, because the use in Fee-simple was created and raised *de novo* upon a Feoffment of the Land in Fee, which use was never in *esse* before: and if he had limited the use only to the Wife for her life, the remainder to the use of the right heirs of the Feoffor, the Feoffor himself should not have any thing of the use, but his right heir after his death should be in, as a purchase. Mich. 4 Ma. *Dyer*, 134.

2. The King's Tenant in *Capite* being *Cestuy que use*, dyed seised of the Land, and also seised of Lands holden of other Lands in Socage, his heir within age; and no Will was declared by him: It was holden in that Case, That the King should have the Wardship of all the Lands; both of the Lands in use, and of the other Lands: the same being before the Statute of 27 H. 8. Mich. 2 Eliz. *Dyer*, 174. And so it was said, it was adjudged by all the Justices of *England*, in Trin. 8 H. 8. as appeareth by *Kellaways* Reports, in *Conisby* and *Throgmorton's* Case.

3. Note. It is said, That the Statute of *Marlbridg*, which was made, 52 H. 3. gave the Wardship of the heir of the Tenant who held by Knight-Service, notwithstanding a Feoffment made by Collusion: yet till the Statute of 4 H. 7. Cap. 17. which gave the Wardship of the heir of *Cestuy que use*, the Heir of *Cestuy que use* was not in Ward. But yet it is holden in 27 H. 8. 9. That if *Cestuy que use*, after the Statute of 4 H. 7. had made a Feoffment in Fee by Collusion to defraud the Lord of his Ward, such a Feoffment is within the Equity of the said Statute of *Marlbridg*. See *Cook* 4 Part, 4. in *Vernon's* Case.

4. A. seised of Lands holden in *Capite*, made a Feoffment of them to the use of his brother for life, the Remainder to his eldest son in tail, the remainder to his youngest son in tail, with divers Remainders over; and this was by Collusion to deceive the King of his Wardship, and dyed: The Covin was found by Office; the eldest Son before Livery dyed without Issue, the youngest son within age. It was Resolved in this Case, 1. Although that the Collusion was found by Office, yet the King should have the Wardship but of the third part of the profits. 2. That the younger Son within age should not be in Ward, because the Covin could not extend to the younger Son, and the King had once advantage of the Statute after the death of A. the Father; and the youngest Son claims in by force of a Remainder. 3. Resolved, That if the King's Tenant leave a third part for the King, there can be no Collusion averred as to the other two parts. *Cook* 8. Part, 164. *Mich's* Case. See before, Division 2. Sect. 7. *Flinn's* Case, &c.

5. Where

5. *Where the Heir ſhall be in Ward, notwithſtanding he be made a Knight within age; And where not. And where after the death of the Tenant, the Lord is preſently in poſſeſſion of the body of the Ward: Where not.*

1. WHen the Heir apparant is made a Knight being within age in the life of his Anceſtor, and afterwards the ſaid Anceſtor dyeth, his heir within age: Reſolved, he ſhall be out of Ward, and ſhall pay no value of the Marriage; nor ſhall the Lord have the Wardſhip of his Land; for by the making of him Knight in the life of his Anceſtor, he is made as it were of full age, ſo as when his Anceſtor dyeth, no Intereſt either in the body or in the Land, veſts in the Lord: And the Statute of *Magna Charta*, for the Wardſhip of the Land doth not extend to that caſe, for the purview thereof extends only when the heir is made a Knight *infra ætatem*; which ſhall be intended after the death of his Anceſtor. See *Plow. Com.* 268. *Ratcliff*'s Caſe.

2. King *Ed.* the firſt, granted to the Town of *Yarmouth*, *Quod omnes de villa oriundi licet terras, &c. extra libertatem villæ tenuerint in Capite, ſe maritare poſſint juxta Libertates prædict.* *R. Drury* dyed ſeiſed of a houſe parcel of a Monaſtery diſſolved in the time of King *Henry* the 8th, holden in *Capite*; the King grants the Wardſhip of him to the Plaintiff, and makes the Ward a Knight: and afterwards the Plaintiffs bring a Writ *de valore Maritagii*. As to the Charter, this was Reſolved, That it did not extend to the Defendant, becauſe it was not ſhewed, that he was born within the ſaid Town. As to the Points in Law, Reſolved, 1. If the heir in Ward be made a Knight, he is out of Ward for his body, becauſe by intendment of Law, he is able to do Knights Service. 2. That by the death of the Tenant, the value of the Marriage is preſently veſted in the Lord, and afterwards cannot be deveſted by making the heir Knight. 3. If he be Knighted in the life of his Anceſtor, he ſhall not be in Ward at all. 4. If after a Tender and refuſall, if the heir be made a Knight, and he doth marry, he ſhall not forfeit the double value of the Marriage, becauſe he is out of Ward: but yet preſently the Lord may have a Writ *de Valore Maritagii*, for the ſingle value, *Cook* 6. Part, 73. Sir *Drue Drurie*'s Caſe. See *Cro.* 2. Part, 156. the ſame Caſe.

3. Tenant in *Capite* dyed ſeiſed, his ſon and heir within age was made a Knight in the life-time of his Father; the Son tendered his Livery after the death of his Father, before his age of 21. years, and continued the ſame tender. Two Queſtions were moved in this Caſe, 1. Whether the profits of the Land are ſaved to the King by the ſaid tender of Livery and continuance? 2. If the King ſhould have the mean Rates which fell during the 21. years. Both which were Reſolved againſt the King: and the King ſhould have Primer Seiſin only, as if he had been of full age at the time of the death of his father; becauſe the King, by making him a Knight, adjudged him to be of full age, to do Knights-Service. *Cook* 8. Part, 173. Sir *Henry Conſtable*'s Caſe.

4. It was found by Office after the death of A, that he and E. his Wife purchaſed the Manor of D, holden of the King in *Capite* to them and the heirs of A, and that A. dyed ſeiſed thereof, and of two other Manors holden in Socage; and that B. his Son was within age of 21. years, and that E. ſurvived him. Afterwards, 30 *May* 9 Jac. E. dyed: and 30 *Jan.* 10 Jac. B. being within age, was made Knight, and tendered his Livery, and ſued a ſpecial Livery, wherein was a pardon of all Intruſions, Actions, Accompts, and Demands: and notwithſtanding the Auditor rated a Charge upon him for the mean Rates after the death of E, untill his age of 21 years, and proces iſſued againſt him *ad Computandum pro meliori valore*: B. appeared, and ſhewed the day when he was made Knight, and the ſpecial Livery in diſcharge of the mean Rates: The firſt Queſtion was, If he ſhould be charged for mean Rates after he was made Knight, and the death of E? 2. If diſcharged of them, till his attaining his full age? 3. Whether this Charge *ad Computandum pro meliori valore*, were allowable, there being no Office to warrant it? For the laſt Point, it was Reſolved, It was not allowable, becauſe the King cannot impoſe a greater value then is found in the Office; but in his compoſition for committing the Land, he may impoſe what value he pleaſe. 2. Reſolved, he is not chargeable with the mean rates betwixt his being made Knight, and his age of 21. years. 3. That he ſhould be charged with the mean Rates, untill the time that he was made Knight; although there was not any Office found after the death of E: and the reaſon was, becauſe there was Office before finding the Eſtate, by reaſon whereof, he was in Ward for his body, and for the Reverſion. Hill. 13 Jac. Sir *Tho. Pickerings* Caſe. *Cro.* 2. Part, 388, 389. See *Hobart*, 91. the ſame Caſe.

5. Tenant of the King by Knights Service, bargained and ſold his Land to J. S. and his heirs, the bargainee dyed his heir of full age, and then the Deed was enrolled: the Queſtion was in this caſe,

caſe, If the King ſhould have Primer Seiſin? It was the Opinion of all the Juſtices, If the Heir were within age in this caſe, he ſhould be in Ward; and if he were of full age, that he ſhould pay Primer Seiſin: for when the Deed is enrolled, the Land doth paſſe *ab initio*, and then the bargainee ſhall be Tenant *ab initio*. But in that Caſe, all the Juſtices agreed, That in ſuch caſe, the Wife of the Bargainee ſhould not be endowed, and that the Rent paid to the Bargainor after the day encurred, was good; and the Bargainee had no remedy for it, becauſe it was a thing executed. Paſch. 5 Jac. in the Court of Wards, Sir *Henry Dimocks* Caſ. *Owen* 149. Quære, if the Caſe in Paſch. 15 Jac. referred out of the Court of Wards, to the Juſtices, *Dimocks* Caſe, were one and the ſame Caſe. For this the Caſe was, That 13 Jac. A. and B. did by Indenture, 3 July, 13 Jac. bargain and ſell the Manor of D. to Sir *Henry Dimock* and his heirs for money; and it was found by Office, that he dyed 4. *October*, 13 Jac. and after his death, and not before; *viz.* 23. *October* 13. Jac. the Deed was enrolled, and that A. D. was his Coſen and heir, and of full age; and that the Manor was holden in Chief: For in that Caſe, It was holden by the Juſtices, to whom the Caſe was referred, he was to ſue Livery. For they agreed, That this Caſe differed from all the Caſes which are put in *Shellyes* Caſe; Of Recovery by Fine executory, Covenants to raiſe Uſes, as in *Wood's* Caſe there vouched, where the Eſtate veſts in the heir, though *Quaſi* heir, which never was in the Anceſtor: For this upon the Inrollment ſettles in Law, as between the Bargainor and the Bargainee *ab initio*, upon the Statute of 37 H. 8. of Uſes, which doth joyn all the Eſtates to the Uſes *ipſo facto*; onely the Statute of Inrollments ſayes, That in that caſe it ſhall not veſt, except the Deed be inrolled: So that, if it be enrolled, it doth veſt, not by the Statute of Inrollments, but preſently by the Statute of Uſes. Yet in that Caſe it was agreed, That the Bargainee cannot ſell unto another before the Deed be enrolled; as it was adjudged in *Billingbams* Caſe. Paſch. 15 Jac. *Dimocks* Caſe in the Court of Wards. *Hob.* 136.

6. Note. It is ſaid by *Hobart*, Chief Juſtice, That if any Tenant by Knight-ſervice dyeth his heir within age, I am preſently in poſſeſſion of the body without ſeiſure; and the bringing of an Action of Treſpaſſe, or a Writ of Raviſhment of Ward doth not as in other Actions, renounce the property or poſſeſſion of the Ward, but doth only puniſh the *Temeraria Occupatio*, and gives the Plaintiff damages according to his hurt by abuſe or marriage of the Ward: and in that caſe, if another taketh away the Ward from the Raviſher, and marry him, the firſt Raviſher can have no Action againſt the ſecond, but the very Guardian may have an Action againſt them both, and ſhall recover againſt them both for their ſeveral Raviſhments, 8 E. 3. 52. See the Opinion of *Hobart*, Trin. 7 Jac. in C. B. in *Moor* and *Huſſies* Caſe, *Hob.* 98, 99.

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6. *Where a man ſhall have Wardſhip, by cauſe of Priority or Poſteriority: And what ſhall be ſaid Priority, What Poſteriority; What not.*

1. IF a man purchaſeth Lands by Feoffment, which are holden ſeverally of divers Lords by Knights-ſervice, and afterwards dyeth his Heir within age, the Lord who firſt getteth the Ward, ſhall have him, becauſe there is no Priority: But if he purchaſeth Lands which are holden by Knights ſervice of one Lord, and afterwards purchaſeth Knight-ſervice of another, and dyeth his heir within age; that Lord ſhall have the Wardſhip of the Heir of whom the Land firſt purchaſed was holden: for he holdeth of him by the moſt ancient Feoffment and Priority then he holdeth of the other Lord. See 21 H. 8. *Br. Prerogative*, 92. *Fitzh. Na. Br.* 142. acc.

2. In a Writ of Ward brought by the Lord *Roſſe* againſt *Conſtable*; the Defendant pleaded by Proteſtation, That the Anceſtor of the Enfant did not hold by Knights-ſervice of the Plaintiff; but ſaid, That the Anceſtor of the Enfant held certain Lands by Knights-ſervice of the Lord *Dacres* by Priority, and that he enfeoffed certain perſons to his uſe, as well of the Land which the Plaintiff ſuppoſeth he held of him, as of the Land holden of the Lord *Dacres*; for which cauſe, the Defendant becauſe of Priority, ſeiſed the Ward of the body of the Enfant as ſervant to the Lord *Dacres*, and by his Commandment: Upon which, there was a Demurrer. It was argued, If the Lord which firſt happened on the Wards body, ſhould have the Cuſtody of it, becauſe of the equal antiquity of the Tenures; becauſe the Feoffment was made at one time. In that caſe it was ruled, That the Priority of ſeizure ſhould take place, and ſhould be preferred, as well in the caſe of an Uſe, as in caſe of Land. Trin. 28 H. 8. 11. in *Bukenhams* Caſe; and 12. acc.

3. If a man hold Land of the King by Poſteriority, and of another Lord by Priority, and the King granteth the Seignory to the Queen for life, and afterwards the Tenant dyeth his Heir within age;

age; the Queen in ſuch caſe ſhall participate of the Prerogative of the King, and ſhall have the Wardſhip of the body of the Heir of the Tenant within age, not having regard to the Poſteriority, becauſe the Reverſion of the Seignory doth remain in the King: but if the King hath granted the Remainder of the Seignory in Fee to a ſtranger, there the Queen ſhall not have the Wardſhip of the body, for the Seignory of Poſteriority: and the Priority is gone by a Feoffment made of the Land.

4. If a man maketh a Feoffment in Fee of Land which he holdeth by Priority, and takes back an Eſtate again of the ſame; now he holdeth the ſame Land of the ſame Lord by Poſteriority, whereas he held it before of him by Priority: But if the Lord of whom the Tenant holdeth by Priority, grants his Seignory in Fee to another, and takes back an Eſtate in the Seignory to him in Fee, yet the Tenant holdeth of him by Priority as he held before. See 2 E. 2. *Fitz. Garde.* Quære, If at this day he make a Feoffment to his Uſe, if the Priority be gone.

5. If a man holdeth of two; of one by Priority, and of the other by Poſteriority, and dyeth his daughter within the age of 14. years, he of whom he holdeth the Land by Poſteriority ſeizeth, the Wardſhip of the body and Land; and the other ſeiſeth the Land holden of him when the heir cometh of 14 years of age: In ſuch caſe, the daughter Heir may enter into the Land; becauſe in that caſe, none of them ſhall have the Lands till 16. years of the Heir; but ſuch only which may tender a Marriage to the Daughter and Heir. 39 H. 6. 4. acc.

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7. *Where an Enfant ſhall be in Ward, either for Lands which by diſcent come to him; or by purchaſe. And where the King ſhall have the Cuſtody of the Lands of Idiotts and Lunatiques: Where not.*

1. IF a man make a Feoffment in Fee upon Condition, That the Feoffor or his heirs pay the ſum of 20 l. or do any act before ſuch a day they ſhall enter; in that caſe, if the Father dyeth before the day of payment, and the daughter to ſave the Inheritance pay the money, or perform the Condition; peradventure the Son may not deveſt the ſame; for if the daughter had not performed the Condition, the Land had been loſt. But if the Condition was to be performed on the part of the Feoffee, or broken in the life of the Auncеſtor, then it is clear, the Land ſhall go to the Son, and not to the daughter; and the Son if he be within age, in ſuch caſe ſhall be in Ward for the Lands; and ſhall have his age. *Cook* 1. Part, 99. in *Shelly's* Caſe.

2. Tenant in tail had Iſſue two Sons; the eldeſt had Iſſue a daughter, and dyed, his Wife with Child in the life of the Father: Tenant in tail ſuffered a Common Recovery to the uſe of himſelf for life; and after his deceaſe, to the uſe of J. S. for 21. years; and after to the Heirs males of his body begotten, and to the Heirs males of ſuch Heirs males; and preſently after Judgment, and before Execution, Tenant in tail dyed, and afterwards the Recovery was executed: and afterwards a Son was born, the younger Son entred. Many Points were Reſolved in this Caſe; this amongſt the reſt as the chief, That the Uncle was in, in the Courſe of a diſcent; although he ſhould not have his age, nor be in Ward, if he had dyed within age, becauſe the Original Act; *ſcil.* the Recovery out of which the Uſes had their eſſence, was had in the life of the Father, to which the Execution might have a retroſpect. *Co. l.* 1. Part, 110. *Shelleys* Caſe.

3. The Lord *Clifford* held the Sheriffwick of *Weſtmerland* of the King by Grand Serjeanty in *Capite*; the King gave him a Licence, that he might thereof enfeoffe two Chaplains in Fee, ſo as they rendred the ſame to the Lord *Clifford*, and the Heirs males of his body, the Remainder over: the Lord did accordingly enfeoffe the Chaplains; and before they had rendred back the Land, the Lord *Clifford* dyed his Son within age, and in Ward to the King by reaſon of other Lands: and thereupon a *Scire facias* iſſued out to the Chaplain, If they could ſhew any thing why the ſaid Lands ſhould not be ſeiſed into the Kings hands; who appeared, and pleaded the Kings Licence, and the Feoffment of the Lord *Clifford*, and ſo they were the Kings Tenants by his Licence. Afterwards Judgment was given in that caſe, That the Lands ſhould be ſeiſed into the Kings hand, and that he ſhould have the profits thereof from the death of the Lord *Clifford*. 18 Aſs. *ult.* vouch. in *Cook* 2. Part, 80. in the Lord *Cromwell's* Caſe.

4. If a man holdeth an Acre of Land holden by Knight-Service in *Capite*, and 1000. Acres in Socage, and he is diſſeiſed of the Acre holden in *Capite*, and then maketh his laſt Will of all his Socage Lands, and dyeth: It was holden in that caſe, That he was a man not holding Lands in

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Chief within the Statute: for the Disseisee in Judgment of Law, hath the Land to many purposes, as to forfeit; and if he dyeth without Livery, the Land shall escheat: and if he dyeth within age, the Lord shall have the Wardship, and the Lord shall have a Writ of Right of Ward, and the Writ shall say, *terram illam tenuit*. *Cook* 3. Part, 35. in *Butler* and *Baker's* Case.

5. A. an Idiot *à Nativitate*, by force of a Remainder after the death of his Father, was seised with his elder brother for Term of their lives; one did purchase the Estate of the elder b other, and seised the body of the Enfant, and all the profits of his Land: and then the Idiocy *à nativitate* was found by Inquisition. It was holden in this Case, That the King should not have the profits of the Idiots Lands, but from the time of the Inquisition: but to avoid all alienation, incumbrances, and mean acts, done by the Idiot, the Office shall have relation from the time of the Nativity; and there it is said, That the King hath the Custody of Idiots not in respect of any Seignory, but in the right of his Royal Protection, because his Subject is not able to govern himself, nor the Lands and Tenements which he hath. And the Statute of *Prerogativa Regis*, Cap. 9. is, That the King shall have Ward of the Lands of natural Fools, taking the profits, &c. to find them necessaries, &c. *Cook* 8. Part, 170. in *Townsons* Case.

6. If an Idiot or *Non Compos mentis*, maketh a Feoffment in Fee in person, and maketh Livery, and dyeth his Heir within age, he shall not be in Ward; or if he dyeth without Heir, the Land shall not escheat: But if the Feoffment be made by Letter of Attorney, who maketh Livery; although that the Feoffor shall not avoid the same, yet after h's death, as in all others in Judgment of Law, the Estate was void: and therefore in such case, if his Heir be within age, he shall be in Ward; or if he dyeth without Heir, his Land shall escheat. *Cook* 4. Part, 125. in *Beverley's* Case.

See more concerning this last part of this Division, concerning the Wardship of Idiots and Lunatiques; in Lib. 1.

8. *Writ of Right of Ward, of what it lyeth; and where, and against whom: And what shall be said sufficient matter to abate it; What not.*

1. THere are divers Writs of Ward: As, 1. A Writ of Right of Ward. 2. A Writ *de Ejectione Custodiæ*. 3. A Writ of Ravishment of Ward. The Writ of Right, of the Custody of the Land, and of the Heir, lyeth, Where, the Tenant holdeth of his Lord by Knight-Service, and dyeth in his Homage, and a stranger entreth into the Land, and taketh the body of the Heir: in such case, the Lord of whom the Land is holden, shall have that Writ; which is a *Precipe*, that he render to him the Land and Heir of C. because the said C. holdeth of him by Knight-Service. See *Fitzh. Na. Br.* 139. And this Writ of Right of the Land, must be brought in the County where the Land lyeth: As also must all Writs of Ward where the Land is demanded; as a Writ of Forfeiture of Marriage, and the Writ *de valore Maritagii*, 38 H. 6. 14. *Cook* 7. Part, 3. in *Bulwers* Case. See 40 E. 3. 6. A Writ of Wardship of the body, was brought in the County where the Body was, and not where the Land was: But see, *Cook* 7. Part, 2. *Bulwers* Case, Where it is said, That a Writ of Right of Ward of the body, must be brought in the County where the Land is, for that it is in the right and favour of the Land.

2. If the Lord accepteth a Lease for years from the Tenant of his Tenancy; and then the Tenant dyeth his Heir within age. It hath been a Question, Whether the Seignory being suspended by the Act of the Lord himself, it he shall have the Wardship of the Heir of the Tenant within age: It hath been alwayes holden for the better Opinion, That if the Lease for years doth expire during the Non-age of the Heir, That the Lord shall have the Wardship of him: And so it was holden in *Mowt* and *Hussyes* Case, in the Common-Pleas. Mich. 7 Jac. Which, see *Hobart's* Reports.

3. If a Woman Tenant hath Issue, and afterwards entermarrieth with the Lord and dyeth her Issue within age, the Lord shall have the Wardship of the Issue within age: But if the Tenant enfeoffeth his Son, and the son maketh a Lease for life to the Lord, and afterwards the Father dyeth the son within age; Quære, If the Lord shall have the Wardship of the Heir: But if the Lord doth

doth ſurrender, then he ſhall have the Wardſhip of the Heir, and of his Land. If the Tenant doth enfeoffe his Son during his Non-age, who doth Homage to the Lord, and afterwards the Tenant dyeth his Heir within age: The Lord ſhall not have the Wardſhip of him, becauſe he hath accepted him for his Tenant in the life of his Father, 33 H. 6. 16. by *Priſoit*: yet the Lord may take Homage of the Heir before he have the Wardſhip of him; but that is to be intended after the death of the Anceſtor, and not in the life of the Anceſtor. See 31 E. 1. *Fitz.* tit. *Gard.* 155. 14 Aſs. *Br. Aſſiſe*, 192. *Plow. Com.* 133. and 36 E. 3. *Fitz. Gard.* 11.

4. Lord and Tenant by Knights-Service; the Tenant takes the Siſter of the Lord to Wife; the Tenant being within age hath Iſſue; the Lord dyeth without Iſſue, ſo as the Seignorie diſcendeth to the Heir of the Tenant as Son of the Siſter of the Lord, the Tenant being within age. Quære, If he ſhall be in Ward of his Son? It was conceived, That he ſhould be; in the Argument of *Moor* and *Huſſyes* Caſe, 7 Jac. in C. B.

5. In 22 E. 3. 10. A Writ of Right of Ward of Land and Rent was brought, and the Writ was excepted unto, becauſe it was brought of Rent, which did not lye in Tenure: but the Exception was diſallowed by the Court, for that a Writ of Right of Ward doth lye as well of Rent, and Services; as of the Land, and of the body of the heir: and there the Writ was general, *Præcipe quod reddat A. Cuſtodiam: Terræ et hæredis*, notwithſtanding that the Demandant Counted of Rent. See 21 H. 7. 39. acc. And ſee *Fitzh. Na. Br.* 140. Where, the *Præcipe* was, *Quod reddat Cuſtoſtiam 20 ſolidorum Redditus, et Cuſtodiam hæredis de C.* becauſe *C.* held the Tenements out of which the Rent was iſſuing.

6. If a man at this day doth make a Feoffment in Fee to his uſe, and the Lord accepteth the Services of his Feoffees; yet if the Feoffor who hath the uſe, dyeth, his Heir within age, the Lord ſhall have the Wardſhip of his Heir, though he had but an Uſe, by the Statute of 4 H. 7. But *Ceſtuy que uſe* of a Seignory ſhall not have the Wardſhip of the Heir, becauſe the Feoffees before the Statute of 27 H. 8. were the Lords. *Cook* 1. Part, in *Chudleigh's* Caſe, acc. See *ibid. Shelleys* Caſe, acc.

7. If the Tenant of the King gives Lands in tail without Licence of the King where he holdeth Land in *Capite*, and the King accepteth the Ancient Tenant for his Tenant, and accepteth the Services of him, and afterwards the Tenant in tail dyeth his Iſſue within age, there by the Statute of 34 H. 8. the King ſhall have the Wardſhip: and this acceptance of the Services ſhall not conclude the King. See 35 H. 8. *Dyer*, 54. See 27 H. 8. 26. by *Fitzherbert*, contr. And ſee 4 H. 6. 19.

8. The Lady *Bardolph* by Deed granted a Ward to a Woman, who took to Husband J. S: againſt whom the Queen brought a Writ of Right of Ward: the Husband and Wife vouched the Lady *Bardolph*; and afterwards the wife dyed; ſo as the Wardſhip being a Chattel real, did ſurvive to the Husband: The Vouchee appeared, and demanded what he had to Warranty: The Huſband ſhewed, That the Lady had granted to his wife the Ward before Marriage. The Vouchee demanded Judgment of the Writ, for two cauſes: 1. Becauſe the word [Warrant] was not in the Deed. 2. Becauſe the Husband was not Aſſignee to the wife nor Privy. But it was Anſwered, That theſe were no cauſes to abate the Writ; Firſt, Becauſe the word, *Grant*, in the Caſe of Grant of a Ward being a Chattel real, did import a Warranty. And as to the ſecond, It was adjudged, That he ſhould vouch; for that this Warrant implyed in this word *Grant*, is ſo annexed to the Land, that the Husband who cometh to it by act in Law, ſhall take advantage of it: and ſo the Writ did not abate. 30 E. 3. 14. *Simkin Simeons* Caſe, vouch. in the end of *Spencer's* Caſe, *Cook* 5. Part, 18.

9. A Writ of Right of Ward, is an Action real, founded upon a title in the Writ; and therefore one ſhall not have one Writ of Ward of Land founded upon ſeveral Tenures; but in ſuch caſe there ought to be ſeverall Writs, otherwiſe the Writ ſhall abate, as it is holden in 6 E. 3. 48. But a Writ of Ward of Land was founded upon ſeveral Tenures, in 46. E. 3. Br. 619. But there it is holden, That if he had demanded the body, the Writ ſhould have abated. *Cook* 8. Part, 86. in *Buckners* Caſe, acc.

10. Ejectment of Gard, or *Ejectione Cuſtodiæ*, lyeth, where a man is ejected or put out of poſſeſſion of the Land of his Ward, and of the Heir together: If it be brought of the Land onely, the certainty of the Land muſt appear; but if it be of the Body and Land together, then the Writ is general; *viz. de terris et hæredis*, 11 H. 4. 15. 14 E. 3. tit. *Brt. Fitz.* is, that it lyeth of the body and the Land. But ſee, 22 Eliz. *Dyer*. 399. *Ejectione Cuſtodiæ* lyeth of the Land onely. See *Cook* 11. Part, 46. in *Godfreys* Caſe, acc.

11. In this Writ, If the Defendant claimeth Freehold, the Writ ſhall abate, 29 E. 3. 56. by *Wilby*.

12. If one Ejects another, and after aliens; yet this Writ *de Ejectione Cuſtodiæ* will lye againſt him who Ejected him firſt; and yet the party ſhall recover the Land in this Writ, as is ſaid by

Hawkford, in 12 H. 4. 10. But if one Eject the Ejector, he who was firſt Ejected, ſhall not have a Writ of *Ejectione Cuſtodie* againſt the ſecond Ejector, no more then one ſhall have Treſpaſſe againſt the ſecond Treſpaſſer, as it is holden, 29 Aſſ. 9.

13. If the Husband be ſeiſed of a Ward in the Right of his Wife, and they be ejected of the Land, or of the Ward, the Husband alone may have and maintain the Writ of *Ejectione Cuſtodie*, although it be the Right of the wife, for the wrong done to the Husband: By the whole Court, in 22 R. 2. *Fitz.* tit. *Breife* 937.

14. If a Writ of Right of Ward, or an Ejectment of Ward be brought of Land, it muſt not be brought of a Cloſe by a certain name; but it ought to be brought of the certainty of the Acres, containing the Quality of the Land, as Meadow, Paſture, Wood, &c. and the Order of precedency muſt be obſerved in the Writ. *Cook* 11. Part, 55. *Edward Savill's* Caſe.

15. Raviſhment of Ward, is a Writ which lyeth as well for Guardian in Socage, as for Guardian in Knights-Service; and it is properly when one hath the Wardſhip of the body of the Heir within age, becauſe his Anceſtor held of him by Knight-Service, and a ſtranger taketh the Ward out of his poſſeſſion, then this Writ of Raviſhment of Ward lyeth.

16. In a Raviſhment of Ward, the Plaintiff declared, That one A, Anceſtor of the Enfant, whoſe Heir he is, was ſeiſed of certain Lands in Fee, and held the ſame of the Biſhop of *Wincheſter* in Socage, and dyed, his Heir within the age of 14. years, and that the Cuſtody of the Enfant did belong unto him as *Prochin Amy*; by force of which he was poſſeſſed, &c. The Defendant ſaid, That the Land was holden of him by Knights-Service *abſq; hoc*, that it was holden of the Biſhop *prout*. It was moved, that the truth was, That all the Land was holden in Socage, and no part of it by Knights-Service, but part of it is holden of another in Socage. It was the Opinion of the Court, That that did not reach to the Iſſue; for if all be holden in Socage, it is not material, if part of it be holden of another. Paſch. 30 Eliz. in C. B. *Samford* and *Ward's* Caſe, *Leon.* 111.

17. An Executor ſhall have a Writ of Raviſhment of Ward, for the taking of a Ward in the time of the Teſtator, 7 H. 4. 2, & 3. See *Fitzh. Na. Br.* 142. acc.

18. See 31 E. 3. *Fitz.* tit. *Breife*, 319. The Mother who had not any Land, brought a Writ of Raviſhment of Ward of J. her eldeſt Son and Heir, againſt the Grandfather of J, who had Land which might diſcend to J. her ſon. And ſee 30 E. 3. Garr. 33. Treſpaſſe was brought *Quare Conſanguineum et heredem* of the Plaintiff *cujus maritagium ad ipſum pertinet tali loco rapuit et abduxit*. See *Cook* 3. Part, 37. b.

19. A Writ of Raviſhment of Ward was brought upon the Statute of *Weſt.* 2. Cap. 35. againſt Husband and Wife, and others, the Jury found, That the Wife was guilty of the Raviſhment, but not the Husband, and aſſeſſed Coſts and Damages; and found alſo, That the Heir *maritus exiſtet*, and that he was of the age of 16. years at the time of the Marriage, and found the value of the Marriage 800 l: In this Caſe, it was Reſolved, 1. That by the Common Law, for Raviſhment of the Ward, an Action of Treſpaſſe did lye againſt the parties; in which Action, the Plaintiff was to recover his Coſts and Damages: and it lay alſo as well againſt a *Feme Covert*, as againſt the Husband alone: But no Writ of Raviſhment lay at the Common-Law, before the Statute of *Weſt.* 2. 2. It was holden in this Caſe, by *Walmeſley* and *Cook*, Chief Juſtice, That a *Feme Covert* was not within the Stat. of *Weſt.* 2. becauſe ſhe is diſabled to ſatisfie, and the Lands and Goods of the Husband, are not lyable by the Statute to anſwer for a Raviſhment done by the Wife, and the Plaintiff in the Action might have an Action of Treſpaſſe at the Common-Law, againſt thoſe that Raviſhed him; Or a Writ *de valore Maritagii* againſt the Heir it ſelf. 3. It was holden, That the Verdict in this Caſe found, was inſufficient for the incertainty; becauſe it doth not declare, who procured him to be married, *ſcil.* either the Raviſher, or a Stranger; nor when he was married, if before the Raviſhment, or after. 4. Reſolved, That in Raviſhment of Ward brought upon this Statute of *Weſt.* 2. a man ſhould recover Damages. *Cook* 9. Part, 72, 73. Dr. *Huſſey's* Caſe. See *Hob.* 83. to 100, the ſame Caſe.

20. Note. It was holden by the Court, That if the Son be of full age, and he is Raviſhed, the Father ſhall not recover damages, becauſe the ſon being of full age, might marry himſelf. And it was holden in that Caſe, That in a Writ of Raviſhment of Ward, the Jury are to enquire of the value of the Marriage, according to the Quantity of the Land as well Socage, as of the Knight-Service Land, although he doth not hold the 40th part of the Land by Knight-Service. Paſch. 15 Car. in C. B. in Sir *Francis Lee's* Caſe, adjudged. See 15 Eliz. in C. B, adjudged accordingly.

21. If the Lord hath the Cuſtody of the Heir within age, and he tendreth him a Convenient Marriage, and he refuſeth it, and intrudeth upon the poſſeſſion of the Lord, then the Lord ſhall recover againſt him the value of the marriage. See 40 E. 3. 6. 31 Aſſ. *Br. Aſſiſe*, 321.

22. For the Heir female, the Lord ſhall not have the forfeiture of the Marriage, nor the Guardian: for at the Common Law, there was not any forfeiture of marriage, but the ſingle value only; and the full age of ſuch an Heir female, was 14. years: ſo as if ſhe was of ſuch years at the time of the death of her Anceſtor, ſhe was to be out of Ward. But forfeiture of marriage was given by the Statute of *Merton*; which act did not extend to the Heir female; for that extended where the Heir was of 14. years of age *vel ultra*: and an Heir female at ſuch age was out of Ward: Alſo the Statute is, *ultra ætatem* 21. *annorum*, and that is the full age of an Heir male, as to Wardſhip, and not of an Heir female: but before 14. years, the Lord ſhould recover the ſingle value, for that *de mero jure pertinet*. *Co.* 6. Part, Sir *Drue Druries* Caſe.

23. Note. That the Guardian in Knight-Service, ſhall have the ſingle value without a tender. And at the Common-Law, it was in the Election of the Lord, to have the marriage of the Heir, or to permit the Heir to marry himſelf, and to have recompence for it; *ſcil.* the value of the Marriage: And at the Common-Law not only a Writ *de valore Maritagii* did lye; but alſo the Writ *Quare ſi intraſt maritagio non ſatisfacto*. And at the Common-Law, if the Heir within age had been wiſhed, and married, the Guardian ſhould have recovered in Treſpaſſe the value of the Marriage: which is a proof that the value of the marriage did belong unto the Lord without tender. *Cook* 5. Part, 116. *Palmer's* Caſe.

24. In a Writ *de valore Maritagii*, Iſſue was joyned upon the Tenure; and it was found for the Plaintiff, and the Jury aſſeſſed Damages to 40 s; and Coſts 20 s; but did not find the value of the marriage: And for that cauſe, It was Reſolved, 1. That the Verdict was inſufficient, and a new *Venire facias* awarded. 2. It was Reſolved, That although the Iſſue was joyned upon the Tenure, yet the Jury ought to enquire of the Damages and of the Coſts: and if the Jury do aſſeſſe an exceſſive value, or exceſſive damages, an Attaint lyeth. 3. It was Reſolved, That the omiſſion of the value in the Verdict, ſhould not be ſupplyed by a Writ of Enquiry of Damages; for that ſhould prevent the Plaintiff of his Remedy by Attaint. But it was Reſolved in that Caſe, That when the Court *ex Officio* ought to enquire of any thing upon which no Attaint lyeth, there the omiſſion of it may be ſupplyed by a Writ of Enquiry. As in a *Quare Impedit*, to enquire of the 4. Points. *Cook* 10. Part, 119. *Cheneys* Caſe.

25. A man gave Lands in tail to hold by Knight-Service, the Donee dyed his heir within age, the Donor tendred the Heir a marriage, and he refuſed it, and married himſelf without the will of the Donor within age, and after dyed. In that Caſe the Donor held the Land for the double value forfeited according to the Statute; and the next Heir in tail had no remedy againſt him. 1 H. 4. 6. pl. 10. acc.

26. Two Coparceners were within age, and in Ward, the Lord purchaſed the part of her who was of full age; and afterwards he tendred a marriage to her who was within age; who refuſed it: and afterwards the Lord and the Enfant within age, by their friends made partition of the Lands; and afterwards the Enfant did diſagree: yet it was the clear Opinion of the Court, That the Lord ſhould not loſe the value of the marriage, becauſe the ſame was due unto him without tender. 31 Aſs. 26. acc.

27. If the King marries the Daughter which he hath within age, *infra annos nubiles*; and before the age of Conſent, the Husband dyeth; the King ſhall have the marriage again of the Heir, becauſe that the firſt marriage was not compleat. *Cook* 9. Part, 132. in *Holts* Caſe. *Cook* 6. Part, *Ambroſe Gorges* Caſe. Contrary in the caſe of a Common perſon.

Garranty, *or* Warranty; *and* Warrantia Charta.

1. *What it is*: *By what words*; *and whom they ſhall bind. The ſeveral ſorts of Warranty*; *viz. Lineal, Collateral, and which Commence by Diſſeiſin*: *and which ſhall barr, and what not, without Aſſets diſcended*; *and where not. And of Warranties in Fact, and in Law.*

1. A Warranty, is a real Covenant, which ſhall bind a man and his Heirs, to make a Recompence in value; if they have Aſſetts by diſcent, to make recompence withall: and ſuch a Reall Covenant executory, may extend to an Eſtate *in futuro*, having an Eſtate upon which it may operate in the beginning, as well as to an Eſtate in *præſenti*: As if a man makes a Leaſe for life, upon Condition to have Fee, and Warrants the Land in *forma prædict.* The Leſſee performs the Condi-

ion, and hath Fee, the Warranty ſhall extend and encreaſe according to the Eſtate. But if a man granteth a Seignory for years, upon Condition to have Fee, with Warranty in *forma prædict.* there although the Condition be performed, the Warranty ſhall not extend to the Eſtate & Fee; becauſe the Eſtate for years was not capable of the Warranty. See *Cook* 1. Part, *Inſtitutes*, 378. And Note, That a Warranty ſhall not extend to any Eſtate for years, Eſtate by *Elegit*, Statute-Staple, or any other Chattel, but only to Freeholds and Inheritances: and therefore in all Actions which a Leſſee for years may have, a Warranty cannot be pleaded in barr; but in all Actions where the Freehold comes in Queſtion, there a Warranty may be pleaded in barr. See 21 E 4. 18. *Cook* 1. Part, *Inſtitutes*, 389. and *Cook* 10. Part, 97. in *Symor's* Caſe, &c.

2. There is a difference between a Covenant to warrant Land, and a Covenant to ſave harmleſſe: For if a man Covenant only to warrant the Land, to a Leſſee for years, there he ſhall not have an Action of Covenant, if he be wrongfully cuſted: but if the Caſe be to ſave harmleſs, which is of greater force then to warrant; for to warrant Land, is only upon the Title; but to ſave harmleſſe, extends farther: for that comes as well to wrongs by title, or without title. And therefore where a man made a Leaſe for years by Indenture of a Parſonage: and Covenanted to ſave the Leſſee harmleſſe againſt J. S: And in an Action of Covenant brought againſt the Leſſor; Exception was taken to it, becauſe it was not alledged, That J. S. entred by Title; ſo the Covenant was not broken. It was in that caſe adjudged, That the ſame ought not to be ſhewed by the Plaintiff in the Action: For be the Entry of J. S. by title, or without title; the Covenant being to ſave harmleſs, was broken by his entry, and ſo the Action maintainable. Mich. 32 Eliz. in B. R. *Foſter* and *Wilſon's* Caſe. *Owen*, 100.

3. If a man make a Feoffment in Fee by the word *Dedi*, and by an expreſſe Warranty in the Deed: It is in the Election of the Feoffee, to uſe the one or the other: And by Intendment of the Statute of *Bigamis*, the Word *Dedi*, importeth a Warranty; although no clauſe of warranty be expreſſed in the Deed: the words of which Statute are, viz. *In Chartis ubi continetur. Dedi et Conceſſi, &c. ſine clauſula Warrantiæ, ipſe feofator in vita ſua, &c. ſine Warrantia, nequamvis nullam Continet Clauſulam Warrantiæ tenetur Warrantizare. Ex quo Nota*, that the word *Dedi*, is an expreſſe Warranty during the life of the Feoffor. See *Cook* 4. Part, 81. *Noyes* Caſe.

4. If A. enfeoffeth B. of Land with Warranty; and afterwards B. doth enfeaſe C. of the ſame Lands by the word *Dedi*; That in that caſe it was adjudged, That B. during his life, ſhall have all the Deeds which do comprehend the Warranty; becauſe they are neceſſary for the defence of his Title during his life: and the word *Dedi*, implyes a Warranty during the life of the Feoffee and Feoffor. See *Cook* 1. Part, 2. in the Lord *Buckhurſt* Caſe.

5. If a man maketh a Feoffment by the word *Dedi*, which implyeth a Warranty; the Aſſignee of the Feoffee ſhall not vouch by reaſon of that *Dedi*: and the reaſon is, becauſe it is a Warranty for the Feoffee only for life. But if one maketh a Warranty to one, his Heirs and Aſſignes; the Aſſignee of the Aſſignee ſhall vouch, and ſo ſhall every Aſſignee; and every one of them ſhall have *Warrantia Chartæ*: for the Right which was in the Auncеſtor, ſhall diſcend to the Heir in ſuch caſe; without the expreſſe words of Heirs and Aſſigns, But the words, *Conceſſi* or *Demiſi*, in caſe of Freehold and Inheritance, doth not impart a Warranty. *Cook* 5. Part, 17. & 18. *Spencer's* Caſe.

6. If Leſſee for years, Tenant by *Elegit* or Diſſeſor, make a Feoffment in Fee with warranty: if the Feoffee be impleaded, he ſhall vouch the Feoffor, and after him his heir alſo; becauſe it is a Covenant reall, and ſhall bind him and his Heirs to recompence in value, if they have Aſſets by diſcent: For a Feoffment *de facto* made by him who hath an Intereſt or poſſeſſion, is a good barr between the parties againſt all but him who hath right. *Cook* 1. Part, *Inſtitutes*, 367. pl. *Litt. placito*, 698. But if the Tenant makes a Leaſe for years to the Lord; Or if the Lord be Tenant by Statute Merchant Staple, or by *Elegit* of the Tenancy, and he maketh a Feoffment in Fee thereof with warrant; by ſuch Feoffment he extinguiſheth his Seignory; although having reſpect to the Leſſor, it is a Diſſeiſin.

7. If a man enfeoffeth A. and B. to have and to hold to them and their Aſſigns with Warranty, *prædict. A. et B. et eorum hæredibus et aſſignatis* If A. dyeth, and B. ſurviveth and dyeth, and the Heir of B. enfeoffeth C, he ſhall vouch as Aſſignee, and yet he is aſſignee but of the Heir of one of them; and the Aſſigns of Heirs are comprehended within the word Aſſigns, in reſpect of the privity which are comprehended within the words (His Aſſigns). If a man at this Caſe be enfeoffed to him, his Heirs and Aſſignes, and he make a guift in tail, the Remainder in Fee, and the Donee makes a Feoffment in Fee; In this caſe, the Feoffee ſhall not vouch as Aſſignee, becauſe no man ſhall vouch as Aſſignee, but he that cometh in of Privity of Eſtate, but he muſt vouch his Feoffor, and that Feoffor ſhall vouch as Aſſignee. If a man doth warrant Lands to another, without this word

[Heirs,]

[*Heirs*,] his Heirs shall not vouch. For regularly, if a man warraant Land to one, and his Heirs, without naming Assigns, his Assignee shall not vouch: But if the Father be enfeoffed to him and his Heirs, and the Father enfeoffeth his eldest Son, and dyeth Heir, in respect of the Privity, the Law giveth the son the advantage of the Warranty made to his Father; and the rather, because by act in Law, the warranty betwixt the Father and Son, is extinct. See for these differences, *Cook* 1. Part, *Institutes*, 384, 385.

8. In Debt upon an Obligation: the Condition was, That whereas W. had sold to G. certain Lands, That the said W. should warrant the said G. against the Lord, King, and all others: and that he should enjoy the said Lands peaceably to him and his Heirs. The Defendant pleaded in barr, That the Land was Copyhold, parcel of the Manor of M; and the Custome of the Mannor was, That if the Rent were behind, Waste done, &c. that the Lord might enter for the forfeiture; and pleaded, That the said G. had and peaceably enjoyed the Lands, and dyed seised thereof, and that the same discended to his son; and that his son of his own wrong entred contrary to the Custome; and also that the Rent was behind; and for that, the Lord entred for the Forfeiture: upon which, the Plaintiff did demur in Law. In this Case, it was holden, That if a man make a Feoffment in Fee, with a Warranty to the Feoffee only, without speaking of his Heirs, that the Warranty shall endure but for life, because it shall be taken strictly; and yet if the Feoffee recover in value, he shall recover a Feesimple, because he loseth a Fee. 2. That in the principal Case, the Obligor was not bound to warrant the Heir of G, because it did not stretch to his Heirs. 3. They all agreed, That when a man binds him and his Heirs to Warranty, they are not bound to warrant new titles of Actions accrued by the Feoffee or any after the Warranty made, but only such Titles as were in *esse* at the time of the Warranty made: and therefore because that the Title to enter of the Lord by the Custome for not payment of the Rent did begin after the Warranty made; the Defendant was not bound to warranty against that. Mich. 30 H. 8. *Dyer*, 42, 43. *Greatiffs* Case.

9. A Lineal Warranty is, where a man seised in Fee, makes a Feoffment by his Deed, to another, and binds him and his Heirs to warranty, and the Warranty discendeth to his Issue, the same is a Lineal Warranty; and the cause wherefore it is called Lineal, is not because the Warranty discends from the Father to the Son; but the cause is, that if no such Warranty had been made by the Father, then the right of the Tenements should discend to the Heir, and the Heir should enjoy the discent from his Father. *Litt.* 158. *Sect.* 703.

10. If a man hath Issue two sons, and is disseised, and the eldest son releaseth to the Disseisor by his Deed with Warranty, and dyes without Issue, and after the Father dyes, this is a Lineal Warranty to the younger son, because the Land by possibility might have discended from the eldest son to the younger: but in that case, If the younger son release to the Disseisor with Warranty, and dyeth without Issue, that is a Collateral Warranty to the eldest son, and also the Issue of his body, because the eldest son could by no possibility convey the Title of the Land to himself by means of the younger: But in the same case, If the eldest son dye without Issue of his body, then the Warranty is Lineal to the Issues of the body of the younger; and so the Warranty which was Collateral to some persons, may become Lineal to others. And if Tenant in tail hath Issue 3. sons, and discontinueth the tail in Fee, and the second Sons releaseth by his Deed to the Discontinuee with Warranty; and after Tenant in tail dye, and the second Son dye without Issue, this is Collateral warranty to the eldest son: but in case the eldest son dye without Issue, it becomes a Lineal Warranty to the youngest. See *Cook* 1. Part, *Institutes*, 371. acc.

11. A Lineal Warranty with Assetts, is a good barr in a *Formedon* in the *Discender*; but if the Issue in tail alieneth the Assetts, his Issue shall have the Land again, because the Warranty discended to him without the Assetts: But if the Issue in tail to whom the Warranty and Assetts discended, had brought a *Formedon*, and had been barred by Judgment by reason of the Warranty and Assets; in that case, although that he alened the Assetts, yet the Estate tail should be barred for ever. *Cook* 1. Part, *Institutes*, 393. b.

12. Note. If a man be barred in a *Formedon* upon Warranty and Assetts pleaded, It is a perpetual barr, although the Assetts are after evicted. 4 Ma. *Dyer*, 139. in the Comments of *Surreys* Case.

13. If a Recovery were had against Tenant in tail, with Voucher and Recovery in value, the same did bind the Estate tail, notwithstanding the Statute of 13 E. 1. of *Donis Conditionalibus*; And see, 13 E. 3. *Bre.* 324. by Recovery in value by Tenant in tail, the Estate tail is barred, and he shall have a *Formedon* of the Land so recovered in value: And if Tenant in tail alieneth with Warranty, and leaveth Assetts to discend, it is a Barr to the Issue by reason of the Warranty and Assetts discended: but neither the Warranty without Assetts, nor the Warranty and Assetts without Judgment in the *Formedon*, shall barr the Issue in tail: For if the Issue without Judgment given, alieneth

the

the Assets, his Issue shall recover the Land in tail, but after Judgment given, that he shall be barred in a Formedon, the Issue in tail shall be barred. See *Cook* 10. Part, 38. in *Mary Portington's* Case.

14. King E. 3. gave a Mannor to *Edmund* Earl of *Cornwall*, and to the Heirs of his body, saving the Reversion to him, and dyed, the Earl before the Statute of *Donis*, 13 E. 1. gave the said Mannor in Fee to another, with Warranty, in Exchange for another Mannor, and dyed after the Statute without Issue, the Warranty and Assets discended upon E. 1. as Cousin and Heir to the Earl, *viz.* Son and Heir of *Hen.* 3. Son of *Richard* Earl of *Cornwall*, Son of the said *Edmond*. It was adjudged in that Case, That the King by the Warranty and Assets, was barred of his possibility of reverter, although that the King claimed the said Mannor in the right of his Crown, and in his Politick capacity; but of which Case, I do observe, That the King shall not be barred by force of a lineal Warranty, without Assets discended, as a common person shall be. See 45 *Ass.* p. 6.

15. A Devise was made to A. for life, and afterwards to his next Heir Male, he had Issue, and afterwards made a Feoffment with Warranty: It was the better Opinion in that Case, That the Warranty should bind the Remainder, although the Warranty was made before the Remainder vested, because the Remainder had its beginning; by the Devise which was before the Warranty. *Coo.* 2. Part, 67. *Archers* Case.

16. In many Cases, a man shallbe bound by a Warranty, and his right shall be bound, so as by no means he shall defeat it after. As if Lessee for life be Disseised, to whom a collateral Auncestor of the Lessor releaseth with Warranty, and dyeth, he shall be barred. *Cook* 1. Part, 67. 45 E. 3. *Ass.* p. 35.

17. If Tenant in tail suffereth a common Recovery, and a collateral Auncestor of the Tenant in tail, releaseth to the Reversioner with Warranty, and afterwards the Reversioner maketh a Feoffment to uses, which are executed by the Statute of 27 H. 8. and afterwards the collateral Auncestor dyeth. In this Case, although that the Estate in the Land be transferred in the Post before the Discent of the Warranty, yet this Warranty shall bind; and the Ter-tenants may take advantage of it by way of Rebutter. *Cook* 3. Part, 62. in *Lincoln*-Colledges Case.

18. If the Husband doth discontinue the right of his Wife, and an Auncestor collateral of the Wife doth release with Warranty, and dyeth, the Wife shall be barred in a *Cui in vita* by this Warranty, notwithstanding the Coverture, because she is put to her Action by the Discontinuance, for Coverture cannot avoid a Warranty, but where the entry of the Wife is lawful, which is not upon a Discontinuance. 33 H. 8. Br. Tit. *Warrant*, 84.

19. Tenant in Dower enfeoffeth a Villain with Warranty, the Lord of the Villain enters into the Land before the Discent of the Warranty, and then the Wife dyeth, this Warranty shall not bind the right of the Heir, 22. *Ass.* p. 37. So a collateral Warranty is made to a Bastard and his Heirs, and living the Auncestor, the Bastard dyeth without issue, the Lord by Escheat enters, and afterwards the Auncestor dyeth, the Warranty shall not bind. 23 *Ass.* 34.

20. A. hath Issue B. and C. Enfants within age: A Lease is made to A. for life, the Remainder to B. in tail, the Remainder to C. in tail: A. Tenant for life is Disseised, and afterwards releaseth to the Disseisor with Warranty, and dyeth, and the same Warranty discendeth upon B. being within age. Afterwards B. dyeth within age, C. being his brother and Heir within age, upon whom the Warranty doth discend, and afterwards C. commeth of age, and three years after his full age entreth. In this Case, it was adjudged, That his entry was lawful: For it was Resolved, That if the entry of an Enfant be lawful, and he cannot enter in the life time of his Auncestor, and doth not enter, the Warranty shall not bind in such Case, *à fortiori* when the Warranty discendeth upon him, his entry being lawful, and no Lacheſs to be attributed to him; but if his entry were not lawful, so as he was put to his Action, there the Warranty shall bind him. And if a Warranty do discend upon an Enfant, he may enter when he will at his full age, and need not hastily enter, or within convenient time after his full age, but let him take heed that he suffer not a Discent after his full age before his entry, for there the Warranty shall bind him. *Cook* 1. Part, 140. *Chudleighs* Case.

21. The Father, Tenant for life, the Remainder to his Son and Heir apparent in tail, the Father by Covin makes a Lease for years to A. who makes a Feoffment to B. in Fee, to whom the Father doth release with Warranty, and dyeth, and the Warranty discendeth upon the Son. It was adjudged, That in this Case the Son should not be bound by the Warranty: For the Feoffment by the Lessee for years, was a Disseisin, and the Father was *particeps Criminis*; and it was adjudged, That although the Disseisin was made to the Father himself, who made the Release; yet because the Father did agree by consent to the Disseisin, the same shall not hinder, but that it shall be a Warranty commencing by Disseisin. And in this Case, it was said, That a Release made by Tenant for life to a

Disseisor,

Diſſeiſor, or other without Covin, ſhould bar him, for an intent without Covin and Diſſeiſin, ſhall not avoid a Warranty. And it was ſaid, That if the Father in the principal Caſe had made a Feoffment with Warranty, the ſame ſhould bind the Heir, becauſe there no Covin appeared: and a Warranty which begins by wrong, ſhall not be avoid, but otherwiſe of a Warranty which commenceth by Diſſeiſin. *Cook* 5. Part, 81. *Fitzherberts* Caſe.

22. Tenant in tail, the Remainder in tail, the Reverſion to the right Heirs of Tenant in Tail; Tenant in tail by Deed bargained and ſold the Land to J. S. and his Heirs, and afterwards levyed a Fine with Proclamations to the Bargainee with Warranty; the Conuſee made a Feoffment in Fee, he in the Remainder had Iſſue, and dyed, Tenant in tail dyed without Iſſue. It was in this Caſe Reſolved amongſt other points, That the Warranty did not bar the Remainder, becauſe the Warranty was annexed to an eſtate tail, and the eſtate in the Remainder was not deveſted by the Fine, and therefore when the Eſtate to which the Warranty is annexed is determined, the Warranty was alſo determined. But if a man make a gift in tail, and warrant the Land to him, his Heirs and Aſſigns; and afterwards Tenant in tail makes a Feoffment, and dyes, the Feoffee ſhall rebut the Donor by force of that Warranty, which is Law, if it be meant of an eſtate tail, made before the Statute of *Donis*, for then the Warranty was annexed to an eſtate in Feeſimple, and the Donor had but a poſſibility of Reverter, which might be barred by a collateral Warranty. And in this Caſe it was holden, That if a collateral Anceſtor releaſe to my Tenant for life, and dyeth, the ſame ſhall not bind me becauſe the Reverſion did continue in me, but if my Tenant for life had Diſſeiſed me, and my Anceſtor collateral had releaſed to the Diſſeiſor with Warranty, that Warranty had bound me, becauſe aſwell the eſtate of my Tenant for life, as my Reverſion, was deveſted at the time of the Warranty. *Cook* 10. Part, 57, 58. *Seymors* Caſe.

23. Tenant for life of Lands, leaſed the ſame for years by Indenture, with theſe words, I give, grant, bargain, and ſell my Intereſt in ſuch Lands for 20 years, to have and hold in ſuch manner as I did hold the ſame, and no otherwiſe. Tenant for life dyed within the Term, he in the Reverſion entred, and the Leſſee brought Covenant. It was adjudged, That the Action would not lye, for here is not any Warranty, for the Plaintiff is not Leſſee, but Aſſignee, to whom this Warranty in Law cannot extend; but admit the Warranty did extend to the Plaintiff, yet it is determinable with the Eſtate of Tenant for life, and ſo the Covenant ended with the Eſtate. Trin. 31 Eliz. in B. R. *Cheiny* and *Langleys* Caſe. *Leon.* 179.

24. A Warranty which commenceth by Diſſeiſin, is properly when the Diſſeiſin is done immediately to the Heir that is to be bound by it; Yet if the Father be Tenant for life, the Remainder to the Son in Fee, the Father by Covin and conſent maketh a Leaſe for years, to the end the Leſſee ſhall make a Feoffment in Fee, to whom the Father ſhall releaſe with Warranty, who releaſeth accordingly, the ſame is a Warranty commencing by Diſſeiſin. See before *Fitzherberts* Caſe. And ſo it is if one brother makes a gift in tail to another, and the Uncle Diſſeiſeth the Donee, and enfeoffeth another with Warranty; the Uncle dyeth, and the Warranty deſcendeth upon the Donor, and then the Donee dyeth without Iſſue: Here although the Diſſeiſin was done to the Donee, and not to the Donor, yet this Warranty ſhall bind the Donor. So if the Father and Son, and a third perſon be Joynttenants in Fee, and the Father makes a Feoffment of the whole with Warranty, and dyeth, the Son dyeth, the third perſon ſhall not only avoid the Feoffment for his own part, but alſo for the part of the Son, and he ſhall take advantage thereof. *Co.* 1. Part, *Inſtitutes* 366.

25. If the Son purchaſeth Lands, and lets the ſame to his Father for years, the Father enfeoffs another in Fee, and binds him and his Heirs to Warranty, the Father dyes, by which the Warranty deſcends to the Son, this ſhall not bar the Son from his entry or Recovery by Aſſiſe: So if the Father, or other Anceſtor be Tenant by Statute Merchant, or Statute-Staple, and maketh a Feoffment with Warranty as aforeſaid, ſuch Warranty ſhall not bar, becauſe it begins by Diſſeiſin. *Co.* 4. Part, 37. in *Terringhams* Caſe.

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2. *Where, and by what, and whoſe Act, a Warranty ſhall be loſt and extinct in Law, and where it ſhall determine with the eſtate; Where not.*

1. BEfore the Statute of 11 H. 7. cap. 20. If a Woman had bin Tenant for life, the Remainder or Reverſion to the next Heir; and the Woman had alliened in Fee with Warranty, and dyed, this Warranty being collateral, had barred the Heir in Remainder, or Reverſion. But in that Caſe, If the Heir that had the Reverſion or Remainder,

mainder, had by entry in the life avoided the eſtate ſo alliened, the Warranty being annexed to that eſtate, had bin avoided alſo. See *Cook* 1. Part, *Inſtitutes*, 365.

2. If a man at this day makes a gift in tail, and warrants the Land to the Donee, his Heirs, and Aſſigns; and after the Donee makes a Feoffment, and dyes without Iſſue: now the Warranty is expired as to Voucher or Rebutter, for that the eſtate tail, to which the Warranty is knit, is determined; but if ſuch a Feoffment had bin made before the Statute of *Donis Conditionalibus*, it had bin otherwiſe, for that then the Donee or Feoffee had a Feeſimple. See before *Cook* 3. Part, 63. in *Lincoln* Colledg Caſe. And *Cook* 10. Part, 96. in *Seymours* Caſe.

3. If Tenant in tail diſcontinue the tail in Fee, and the Diſcontinuee is diſſeiſed, and the brother of the Tenant in tail, by his Deed releaſeth to the Diſſeiſor all his right with Warranty in Fee, and dyeth without Iſſue, and the Tenant in tail hath Iſſue, and dyeth; the Iſſue in tail is barred of his Action by force of the collateral Warranty diſcended upon him; but if afterwards the Diſcontinuee doth enter upon the Diſſeiſor, then may the Heir in tail have his Action of Formedon, becauſe the Warranty is determined. So if the Diſcontinuee make a Feoffment reſerving Rent, and for default of payment, a re-entry, and a collateral Warranty of an Anceſtor is made unto the Feoffee upon Condition, and then the Anceſtor dyes without Iſſue. If the Diſcontinuee by entry for the Condition broken, doth defeat the eſtate of the Feoffee, the Warranty is alſo defeated, and the Iſſue in tail may bring his Formedon, *ibid.* See *Finch.* 14. acc.

4. If there be Father and Son, and the Son hath a Rent-Service, Rent-charge, Rent-Seck, or common of Paſture iſſuing out of Land, and the Father releaſeth to the Tenant of the Land with Warranty, and dyeth, it ſhall not bar the Son, for of the Rent, or Common, the Son was actually ſeiſed at the time of the Warranty made, and he that is in poſſeſſion needeth not put in his claim: and in that Caſe: although the Son after the Warranty made, be Diſſeiſed of the Rent or Common, and after the Father dyeth, it ſhall not bar him, becauſe the Warranty at the time of the creation of it, did not extend to any eſtate of Freehold, or Inheritance in *eſſe* at the time of the creation of the ſame; but if the Son be Diſſeiſed of the Rent or Common, and affirm himſelf to be Diſſeiſed by bringing an Aſſiſe, and afterwards the Father releaſeth with Warranty, and dyes, there the collateral Warranty ſhall bar the Son of his Rent, or Common, becauſe he had but a bare right at the time of the Warranty made. See *Cook* 10. Part, 97. in *Seymur's* Caſe.

5. Two Joynt-tenants are with Warranty; Partition is made between them by Judgment in a Writ *de partitione faciendâ*. In that Caſe, it was adjudged, That the Warranty remains by force of the Statute of 31 H. 8, becauſe they are compellable by the Statute to make partition; but if they had made Partition by Deed, by conſent, after the Statute; in ſuch Caſe, the Warranty had bin gone: And there it is ſaid, If there be two Joynt-tenants with Warranty, and the one Diſſeiſeth the other, and the Diſſeiſee brings an Aſſiſe, and upon his prayer, hath Judgment to recover in ſeverally that in ſuch Caſe, the Warranty is extinct and gon. *Cook* 6. Part, 13. *Merricks* Caſe.

6. If a Leaſe be made for life upon Condition, That if he do ſuch a thing, that he ſhall have Fee, and he warrants the Land *in forma prædict.* now the Warranty extends to the Fee: But if the Leſſor dyeth, and after the Condition is performed, then if the Warranty be available, is the Queſtion, becauſe the Leſſor was not bound to Warranty, otherwiſe then during his life; and then the Warranty which is annexed to the Freehold, is gon. As if a man deviſeth Land with Warranty, the ſame is void, becauſe the Deviſor is not bound to it. Alſo in the principal Caſe, If the Condition had bin performed in the life of the Leſſor, the Warranty ſhould not extend unto it, for it can be annexed to nothing but to that which is in poſſeſſion: And note, there is a difference where a Leaſe is made for life, and where it is made for years: For if a Leaſe be made for years upon Condition, that if he do ſuch a thing, that he ſhall have Fee, and Warrants the Land *in forma prædict.* the Warranty ſhall not extend to the Fee when the Condition is performed, becauſe that the firſt eſtate was but for years, and of another nature then the Freehold. See *Cook* 8. Part, in the Lord *Staffords* Caſe. See *Cook* 1. Part, *Inſtitutes* 378.

3. *Of Warranties expreſſed and implyed; and where, and in what Caſes they ſhall bind, in what not: And of divers Rules touching Warranties; and of Deraigne of Warranties*

1. IT is holden to be a Maxime in Law, That the Heir ſhall never be bound to any expreſs Warranty; but where the Anceſtor was bound by the ſame Warranty. And therefore if Tenant in tail alieneth his Land to his brother in Fee, and hath Iſſue, and dyeth; and afterwards his brother deviſeth the ſame Land to another in Fee, and binds him and his Heirs to Warranty, and dyes without Iſſue, this Warranty ſhall not bind the Iſſue in tail, becauſe the Warranty did not diſcend to the Iſſue in tail in regard the Uncle of the Iſſue was not bound to the Warranty in his life time, nor chargeable with it; for that the Deviſe takes not effect till after his death: And if a man bind himſelf to Warranty, and his Heirs are not named, Yet a Warranty in Law may bind the Heir, although the Anceſtor was never bound: As if a man deviſe Lands to another for life, or in tail, reſerving a Rent, the Deviſee for life or in tail ſhall take advantage of this Warranty in Law, although the Anceſtor was not bound, and ſuch a Deviſe ſhall bind his Heirs to Warranty, although they were not named. *Cook* 1. Part, *Inſtitutes* 386, upon *Litt. Sect.* 734.

2. Note, touching Warranty, theſe Rules and Concluſions. 1. That a lineal Warranty ſhall bind the right of a Feeſimple. 2. That a lineal Warranty doth not bind the right of an Eſtate tail, becauſe it is reſtreyned by the Statute of *Donis*. 3. That a lineal Warranty with Aſſets, ſhall bind the right of an entail, and the ſame is not reſtreyned by the Statute of *Donis*. 4. That a Collateral Warranty made by a collateral Anceſtor of the Donee, ſhall bind the right of an eſtate tail without Aſſets, becauſe the ſame is not done by the Tenant in tail, as the lineal Warranty is. 5. That the Warranty of the Donee in tail which is collateral to the Donor, or to him in the Remainder, being Heir unto him, ſhall bind without Aſſets, becauſe the ſame is not reſtreyned by the Statute of *Donis*. See *Cook* 1. Part, *Inſtitutes* 374. 15 E. 3. *Gar.* 27. 41 E. 3. *Gar.* 16. *Plow. Com.* 554. acc.

3 Note further, That Aſſets to make a lineal Warranty a bar, ought to have theſe qualities. 1. It ought to be Aſſetts of equall value or more at the time of the Diſcent. 2. It ought to be by diſcent, and not by purchaſe. 3. It ought to be Aſſets in Feeſimple, and not in tail. 4. It ought to Diſcend to him as Heir to the ſame Anceſtor who made the Warranty. 5. It ought to be of Lands, Tenements, Rents, Services valuable, or of profits going out of Lands, Tenements, and not out of Inheritances perſonals, as Annuities. 6. It ought to be an Eſtate or Intereſt, and not in uſe, or a right of Action or entry. 7. A Seignory in Frank-almoigne, or by Homage and Fealty, is no Aſſets, but an Advowſon which diſcends, is Aſſets. *Cook* 1. Part, *Inſtitutes* 374. acc.

4. It is againſt a Rule in Law, that one ſhould vouch himſelf: Yet if a man be enfeoffed to him and his Heirs, of W. Acre, and he is alſo ſeiſed of Bl. Acre in Borough-Engliſh, and having Iſſue two ſons, enfeoffeth his eldeſt Son of W. Acre. If the eldeſt Son in this Caſe be impleaded, he ſhall vouch himſelf, and his younger brother, being Heir in Borough-Engliſh, otherwiſe the eldeſt Son ſhould be without remedy, becauſe the act in Law, *ſcil.* the Diſcent hath determined the Warranty between the Father and the eldeſt Son. So if a man enfeoffeth a Woman with Warranty, and they entermarry, and are impleaded, and upon default of the Husband, the Wife is received, the Wife ſhall vouch her Husband, notwithſtanding that the Warranty was put in ſuſpence by the entermarriage, and notwithſtanding it be againſt a Rule in Law that they ſhould vouch one another. See *Cook* 1. Part, *Inſtitutes* 290.

More Warranty.

1. IN a Formedon, the Caſe was, A Feoffment was made of Land to the uſe of the Feoffer for life, the Remainder in tail; Tenant for life entred, and had Iſſue a Son and two Daughters; and the Father and the Son joyned in a Feoffment with Warranty, and after the Father and Son dyed; and the Daughters brought a Formedon. In this Caſe, it was holden, That the Warranty was a lineal Warranty. Trin. 16 Jac. in C. B. *Biſhop* and *Coſſins* Caſe. *Brownl.* 1. Part, 153.

2. A. exchanged Lands with B. B. afterwards alliened to C. who was evicted by a title paramount. In this Caſe it was adjudged, That a Warranty is implyed in every Exchange, but it runs only in privity, and none ſhall vouch by force thereof, but ſuch only as are parties to the Exchange, or their Heirs, and no Aſſignee: and as an Exchange implies a Warranty, which runs in privity, ſoit implies al-

ſo a Condition, which alſo runs in privity, ſo as none can take advantage of ſuch Condition, but only privies and their Heirs, and therefore in this Caſe, it was Reſolved, That C. in this Caſe ſhould not enter upon the other. *Cook* 4. Part, 121. *Baſtards* Caſe.

3. Note, It was Reſolved in *Dillon* and *Frains* Caſe; which was *Cook* 1. Part, *Chudleighs* Caſe; That a Warranty deſcending upon an Enfant, ſhall not bind him, in caſe that the entry of the Enfant be lawful into the Land to which the Warranty is united; but the Enfant in ſuch Caſe muſt look that he do not ſuffer a diſcent of the Land after his full age, before he hath made his re-entry, for then the Warranty ſhall bind him. *Popb.* 71. in *Dillon* and *Frains* Caſe.

4. A. and B. his Wife, purchaſed Lands joyntly during the Coverture, to themſelves for their lives, the Remainder to C. their eldeſt ſon in tail, the Remainder to D. their ſecond Son in tail, the Remainder to the right Heirs of A. After A. by Deed, with a Letter of Attorney, enfeoffed the ſaid D. and his Wife, and the Heirs of the body of D. the Remainder to the right Heirs of A. with Warranty againſt all perſons, and afterwards levyes a Fine to two ſtrangers of the ſame Land, and their Heirs, with Warranty againſt all perſons, who render it back to D. and the Heirs of the body of D. the Remainder to the right Heirs of A. A. dyes, his Wife B. enters, and dyes; C. the eldeſt Son enters, D. and his Wife enters, and made a Leaſe to the Plaintiff. The Queſtion was, Whether this Warranty made by A. upon the Feoffment, being a collateral Warranty, and diſcending upon C. be totally avoided by the entry of B. and whether the remitter of B. the Wife, be a remitter to C. and the Warranty diſcharged. It was the Opinion of the Court, That it was not, for the Warranty being diſcended and attached before the entry of B. the Wife, although ſhe be free and not bound by the Warranty; yet he in the Remainder being bound, the ſame Eſtops the remitter: Wherefore it was adjudged for the Plaintiff. Mich. 4 Car. in B. R. *Kendall* and *Foxes* Caſe. *Cro.* 1. Part, 193.

5. A man having Iſſue two Sons, and A. and B. two Daughters, gave his Land to his eldeſt Son in tail, the Remainder to his youngeſt in tail, the Remainder to A. his eldeſt Daughter, and her Heirs. Tenant in tail in poſſeſſion levyed a Fine with Warranty, he in the Remainder in tail dyed without Iſſue; Tenant in tail in poſſeſſion, dyed without Iſſue, the Warranty diſcended upon both Daughters, as Siſters and Heirs to Tenant in tail; And if this Warranty was a bar to the eldeſt Daughter A. for the whole, or but for the moyety, was the Queſtion. It was Reſolved in that Caſe, That the Heir of A. ſhould be barred for the whole, for the Warranty is entire, and extends to the whole Land, and it is a bar to every perſon upon whom it deſcends of the whole right which ſhe hath in the ſaid Land: And it was holden, If they have a joynt right, or ſeveral rights, each is bounden, and if one hath right, and the other nothing, ſhe which hath right, ſhall be barred of the whole. *Cook* 8. Part, 51. 52. *Sims* Caſe. See *Cook* 2. Part, 218. the ſame Caſe.

6. A collateral Warranty doth not give right: For if Lands be given to one, and the Heirs Male of his body, and he hath two Sons, and doth alien, and the collateral Anceſtor of the Son doth Releaſe with Warranty to the Alienee, and dyes, and the Donee dyes, now is the eldeſt Son barred, but if he dye without Iſſue Male, leaving Iſſue a daughter, the younger Son ſhall not be barred by the Warranty. 19 H. 6. 59. If Tenant in tail hath Iſſue two Sons by ſeveral Venters, and the Anceſtor collateral of the eldeſt Son doth releaſe with Warranty, and dyes without Iſſue, and the elder Son dyes without Iſſue, the younger Son ſhall recover by a Formedon, becauſe he is not Heir to the Warranty. 28 H. 8. Br. *Formedon* 18. See vouch. in *Holland* and *Jackſons* Caſe. *Bridgm.* 77.

7. The Father, Tenant in tail, had Iſſue two Sons, the Father with the eldeſt Son made a Feoffment in Fee with Warranty; the elder Son dyed, and after the Father dyed, and the younger Son brought a Formedon, and this Feoffment with Warranty was pleaded in bar: and upon demurrer, it was adjudged for the Demandant, for that it was but a lineal Warranty, and then without Aſſets, it was no bar; for although the eldeſt Son dye in the life of the Father; yet the younger Son by poſſibility might have the Land as Heir to him. Mich. 16 Jac. in C. B. *Biſhops* Caſe. *Bulſtr.* 22.

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4. *Warranty upon Contracts: Where neceſſary, where not; and when it is made.*

1. IN an Action upon the Caſe, the Plaintiff declared, That for 201. whereof the moyety was paid, and the reſt agreed to be paid at a certain time, the Defendant promiſed to deliver to the Plaintiff 400 l. of Wax at ſuch a day, and that at the day, he delivered to him 200 pound of ill wax. The Defendant pleaded an Accord between them for the

the ſaid 200 pound of Wax which was inſufficient, which accord he had performed: upon which plea, the Plaintiff demurred, becauſe the Deceit was not anſwered; but the Plea was holden to be good; and it was holden, That the Deceit (*ut ſupra*) was not material to be anſwered; becauſe the Warranty of the ſufficiency was after the contract, and ſo no confidence. 6 E. 6. *Dyer*, 76. *Andrews* Caſe.

2. The Defendant being a *Goldſmith*, and having skill in Jewells and Precious Stones, had a Stone which he affirmed to be a Bezar-ſtone, and ſold it to the Plaintiff for 100 l. whereas in truth it was not a Bezar ſtone; for which Deceit, the Plaintiff brought an Action upon the Caſe againſt the Defendant. It was holden in this Caſe in the Exchequer-Chamber by all the Juſtices of *England*, That the bare affirmation of it to be a Bezar ſtone, without Warranting it to be ſo, was no cauſe of Action: And although he knew it to be no Bezar ſtone, it is not material. For every one in ſelling of his Commodities, will affirm them that they are good; yet if he Warranted them not to be ſo, it is no cauſe of Action: And it was holden, That the Warranty ought to be made at the ſame time of the ſale: Wherefore becauſe no Warranty was alledged, the Court held the Declaration not to be good. Paſc. 1 Jac. in B. R. *Chandler* and *Lopus* Caſe. *Cro.* 2. Part, 4.

3. A man pretended that he was Vicar of N. and had right unto the Tythes there, and upon communication thereof with J. S. ſold the Tythes to J. S. for 30 l. whereas he in truth was never Vicar or Parſon there, never having bin Inſtituted nor Inducted, but the Tythes did belong to J. D. who was Parſon. For which cauſe the Plaintiff brought an Action upon the Caſe in the nature of a Deceit againſt him, and alledged *in facto*, that the Defendant for 30 l. *falſo et deceptive*, ſold him the Tythes, pretending he was lawfull Vicar, whereas he was never Inſtituted nor Inducted. The Defendant pleaded, Not Guilty, which was found againſt him: It was moved in Arreſt of Judgment, that the Action did not lye. For an Action in the nature of a Deceit lyes not; where one ſells a thing in which he hath no property, and although he took upon him in diſcourſe, that he was the owner, and had the right to ſell; yet unleſs he warrants that the other ſhall enjoy them, which Warranty ought to be at the time of the Sale, elſe it is not good: and in this Caſe, here is not any Warranty nor affirmance at the time of the ſale, that he had any right or title to ſell: And for this cauſe, it was the Opinion of the whole Court, That the Action would not lye. But if a man ſells Victuals which is corrupt, without Warranty. It was holden, an Action lyes, becauſe it is againſt the Common-Wealth. Mich. 4 Jac. in the Exchequer Chamber. *Roſwell* and *Vaughans* Caſe. *Cro.* 2. Part, 196.

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5. Warrantia Chartæ, *When, where, and by whom, it lyes: And what ſhall be ſufficient matter to abate it; What not.*

1. *Warrantia Chartæ*, is a Writ, that lyes for him that is enfeoffed with Warranty, and afterwards he is impleaded in an Aſſiſe, or other Action in which he cannot vouch; then he may have this Writ againſt the Feoffor or his Heir, to compell them to warrant the Land to him. *Fitz. Na. Br.*

2. The Writ of *Warrantia Chartæ* doth ſuppoſe that the Plaintiff holdeth of the Defendant; for that the Writ is, *ſcil. Præcip. A. quod juſte, &c. Warrantizet B. unum Meſſuagium cum pertinentiis in D. quod tenet, et de tenere clamat.* And yet if he held the Land of the Lord Paramount, the Writ doth lye. So if the Plaintiff holdeth by Homage Auncestrel of the Defendant any Lands, and he is impleaded for them, and he hath no Charter thereof; yet he may maintain *Warrantia Chartæ* againſt him, and the Writ ſhall ſay, *unde Chartam habet*, although he hath no Charter.

3. A Writ of *Warrantia Chartæ* was brought by A. againſt B. of two Meſſuages, and of the moyty of an Acre of Land, *unde Chartam habet*: And the Plaintiff Counted, That he and B. and one C. was ſeiſed of, &c. and of a piece of Land adjoyning to the ſaid Meſſuages: and that B. and C. did releaſe all their right in, &c. to the ſaid A. and his Heirs, and that B. for him and his Heirs did warrant *Tenementa prædict.* to the ſaid A. and his Heirs? And upon *Oyer* of the Deed, that every of the ſaid B. and C. for them and their Heirs did warrant *Tenementa prædict.* to the ſaid A. and his Heirs: upon which there was a Demurrer. And in this Caſe, theſe Points were Reſolved: 1. That upon ſuch a Releaſe with Warranty, *contra omnes gentes*, a Writ of *Warrantia Chartæ* did lye. 2. Although every one did paſſe his part; viz. a third part; yet the Warranty of each doth go to the whole, the words being general, *Tenementa prædict.* without reſtraint: and it needed not to be ſhewed how they held in Joynture. 3. That the Writ was well brought againſt one of them, becauſe the Warranties are ſeverall. 4. That a *Warrantia Chartæ* doth not lye of a piece of Land, no more then a *Præcipe*. Mich. 5 Jac. C. B. *Briſtt* and *Ballet* Caſe. *Godbolt*, 152.

4. A *Warrantia Chartæ* was brought in the County of *Hertford*; and the Land which was warrantable, did lye in the Counties of *Hertford* and *Bedford*: And the Plaintiff did suppose in his Writ, that he was impleaded by Assise before *Rolt*, *Catlyn*, and *Anth. Brown*. who were Justices of Assise in the County of *Bedford*, but not in the County of *Hertford*. And for that cause, it was holden by the Court, That his Count was not good; and also the Warranty was but against the Grantor and his Heirs. And it was holden, That it lyeth not upon severall Warranties, except there be the words *Dedi & Concessi*, in the Deed. Pasc. 2 Eliz. *Dyer*, 221.

5. If a Warranty be made to one, his Heirs and Assigns, by expresse words, the Assignee shall take benefit of it, and shall have a *Warrantia Chartæ*. See *Cook* 5. Part, 16. in *Spencers* Case.

6. In a *Warrantia Chartæ* brought against the Heir, the Defendant pleaded, he hath nothing by Discent, &c. the Plaintiff shall thereupon recover *pro loco et tempore*; and shall have Judgment presently, and a *Scire facias* upon it, when Assets doth discend. See 21 E. 3. *Br. Warrantia Chartæ*. 30. and *Cook* 5. Part, 134. in *Mary Shipley's* Case.

7. If a Fine or a Feoffment be made of Lands in two Counties with Warranty, the *Warrantia Chartæ* may be brought in any of the Counties. 29 E. 3. 3. *Cook* 7. Part, 3. in *Bulwer's* Case. See 2 Eliz. *Dyer*, 221. before, seemes contrary.

8. A man may have a *Warrantia Chartæ* before he is impleaded, *quia timet implacitari*, and shall recover *pro loco et tempore*, but yet the Writ doth suppose, that he is impleaded: and if the Defendant doth appear, and plead, that he is not impleaded by such Plea, he confesseth the Warranty, and the Plaintiff shall have Judgment to recover his Warranty; so as if the Defendant be after impleaded, and vouch him to Warranty, and he entreth into the Warranty, and pleadeth and loseth, and the Defendant recover in value Lands against the Vouchee; the Demandant upon the bringing of his *Warrantia Chartæ*, shall have in value of the Lands which the Vouchee had at the first time of the first Judgment: And therefore, it is good policy for him to bring his *Warrantia Chartæ* before he be impleaded, to bind the Lands of the Vouchee which he had at that time. See 21 H. 6 41. 2 H. 4. 14. the Land shall be bound by the Judgment. But if a man do recover his Warranty by *Warrantia Chartæ*, and hath bound the Land which the Vouchee had at the time; yet if it be afterwards sued for that Land for which he recovered his Warranty, he ought to vouch him again, against whom he recovered his Warranty; otherwise he shall not have advantage of his recovery in the *Warrantia Chartæ*.

9. If a man recover his Warranty in a *Warrantia Chartæ*, and after he is impleaded in an Action in which he cannot vouch, he must give Notice to him against whom he hath recovered his Warranty, and pray him to shew him what he shall plead to defend the Land, 8 E. 4. 11. 24 E. 3. *Br. Warrantia Chartæ*, 35. And if the Defendant in the *Warrantia Chartæ* doth tender a Plea to the Plaintiff for freedom of the Land, and the Plaintiff will not enter the Plea, nor cause it to be entred, he shall not have advantage thereof in his Writ of *Warrantia Chartæ*. 16 H. 7. 6. & 7. acc.

10. Sir *Henry Rolls* brought a Writ of *Warrantia Chartæ* against Sir *Robert Osborn* and his wife, and Declared, That the Defendants ought to warrant him a Messuage, and 700 Acres of Pasture in K; and shewed, That a Fine was levied to him by the said Sir *Robert Osborn* and his wife of the said Messuage and Lands with warranty to him and his Heirs, and shewed, That afterwards a Writ of Entry *Sur Disseisin*, was brought against the Plaintiff of the said Messuage and Lands; and shewed, that he demanded his Warranty against the Defendant, and that he would administre to him a Plea; which the Defendants refused to do, to his damage of 100 l: The Defendants confessed the Fine and the Warranty; but said, That the said Recovery was had with Vouchers, to other Uses then was in the Fine; viz. to the use of the said Sir *Henry Rolls* for life: and if he did marry with A. S, then to the use of the said A. S. for her life for her Joynture, with divers Remainders over. It was on the part of the Plaintiff argued, That although the Recovery was with voucher, yet the uses upon it, being contingent uses, the first warranty upon the Fine was not destroyed, but did remain. and so the Writ may well be maintainable. But the better Opinion of the Court was, That the Warranty was destroyed, for divers causes: 1. Because Sir *Henry Rolls* came in to the Estate in the *Post*: and he who comes in by the *Post*, and not in *Privity*, shall not have *Warrantia Chartæ*: and although perhaps he may have benefit of a Rent, or a Condition, as is agreed in *Lincoln* Colledg Case, *Cook* 3. Part, yet not of a Warranty. 2. Here the old Estate did not continue, but the Estate was altered, and so the warranty destroyed. And 41 Eliz. it was adjudged in *Bainton* and *Chesto's* Case, If a Feoffment be made with Warranty, and the Feoffee enfeoffe the first Feoffor, because the Estate is altered, the warranty is gone. 3. Every Warranty is a Covenant reall; and if the first Privity be destroyed (as is in this Case), the Warranty is gone; 4. No War-

Warranty shall have but one recompence; and in this Case, there was a recompence by the voucher, and recovery in value; and therefore the Warranty was gone and extinct. Quære, What Judgment was in the Case: It is long argued in *Hobart*, from fol. 20, to fol. 28. But no Judgment is there given in the Case. *Intratur.* Trin. 9 Jac. in C. B. Rott. 2205. S r *Henry Rolls* and S r *Robert Osborn's* Case.

Gardian *in* Knights-Service, *and* Gardian *in* Socage.

1. IF the Lord after he hath the Custody of Body and Land of the Heir as Guardian in Knights-Service, doth release to the Enfant his Ward, all the right which he hath in the Seignory; Or that the Seignory doth discend to the Enfant, he shall in such case be out of Ward, both for his Body and his Land; for he was in his Custody, in respect he was not able to do those Services which he ought to do to the Lord, which now by these Acts are extinct: and then *Cessante causa, cessat effectus.*

2. By the Statute of *west.* 2. Cap. 22. If an Heir female be within the age of 14. years, and not married at the time of the death of her Auncestor, the Lord shall have the Wardship of her as Guardian, untill her age of 16. years, to the end he may within those two last years, tender her a convenient marriage; yet in that case, if the Lord before the age 14. years, granteth over the Wardship of the Body, the Grantee cannot enjoy the benefit of the two years, because he cannot hold the Land over; and the Lord who hath the Wardship of the Land only, shall lose the benefit of the two years, because he hath the Lands onely, and cannot tender any marriage; and therefore in such case, the Heir female shall enter into her Land at 14 years, and ouste the Guardian, *Cook* 1. Part, *Institutes*, 78.

3. A Writ of Dower lyeth against Guardian in Knights Service, although he hath but a Chattel; and it doth not lye against the Heir who hath the Freehold, because the Law hath Trusted the Guardian to plead for the Heir within age: But in such case, the Writ doth not lye against the Guardian before he doth enter. See 44 E. 3. 11. 4 H. 6. 11. *Cook. Institutes*, 37. And if Dower be brought against Guardian in Knights-Service, he may plead in barr the Detainment of the Heir, but he cannot plead the Detainment of the Charters, because they do belong to the Heir himself, and not to the Guardian. See 6 Eliz. *Dyer*, 230. acc.

4. If the Guardian doth assign more in Dower, then the Woman endowed ought to have; the heir in such case shall have a Writ of Admeasurement of Dower: and if the Heir within age, before the entry of the Guardian do assign Overplus in Dower, the Guardian shall have the Writ of Measurement. Quære, If the Heir himself upon his Assignment shall have it. See *Fitzh. Na. Br.* 149. See 2 R. 2. *Admeasurement*, 13.

5. If the Guardian in Knights-Service, doth commit Waste upon the Lands of the Heir; and the Heir brings a Writ of Waste, the Guardian shall lose the Guardianship of the Land, if the Heir be within age at the time of the Writ brought, and Waste committed. But if the Waste be done when the Heir is of full age; there in Waste brought against him by the Heir, he shall recover Damages: but if the Waste be done by a Stranger when the Heir was within age, in such case, the Guardian for such Waste done, shall not lose the Guardianship of the Land. See 44 E. 3. 27. But for Waste done by Guardian in Socage, an Action of Waste doth not lye, but only an Accompt; and he shall recover what is lost in damages. *Cook* 1. Part, *Institutes*, 53, 54.

6. If there be 3. Brothers, and the youngest holdeth Lands in Socage, and hath Issue, and dyeth, his Issue within the age of 14. years; In this case, both the Uncles are in equal degree, and yet the Eldest shall be Guardian, because being in equal degree, the Law preferreth him as the more worthy, *Cook* 1. Part, *Institutes*, 88. But if a man purchaseth at one time several parcels of Lands, which are holden of several Lords by Knight Service, and dyeth his Heir within age, he who can first happen on the body of the Heir, shall have the Guardianship of it.

7. If a man be seised of Lands holden in Socage, of the part of his Father, and of other Lands holden in Socage, of the part of his Mother, and dyeth, his Issue being within the age of 14. years; In this Case, such of the Kin of either side as first happeneth of the body of the heir, shall have the Cuardianship of him: But yet the next of the blood of the part of the Father, shall enter into the Lands of the part of the Father, and the next of Kin of the part of the Mother, shall enter into the Lands of the part of the Father. See 8 Eliz. *Dyer*, 296. And see *Plow. Comment.* in *Carrell's* Case.

8. Where the Father is Guardian of his Son for

for Lands holden in Knight-Service, this is in reſpect of his Paternal natural Guardianſhip: and in ſuch caſe, he ſhall not be accomptable for his Marriage, or for the profits of his Lands received: But where the Father is Guardian of his Son, by reaſon of a Tenure in Socage, there he muſt be accomptable to his ſon both for his marriage, and alſo for the Profits received of his Lands; which he ſhould not be, if he had the Cuſtody of him as his Father in reſpect of Nature. If a Stranger entreth into the Lands of an Enfant within the age of 14. years, and taketh the Profits of the Lands; the Enfant in ſuch caſe may charge him as Guardian in Socage: And this agreeth well with the Writ of Accompt againſt Guardian in Socage; for the words of the Writ are, *ſcil. Idem B. præfato A. rationabilem Compotum ſuum de exitibus proveuientibus de terris et Tenementis ſuis in N. quæ tenuit in Socagio; Et quorum Cuſtodiam Idem B. habuit, dum prædict. A. infra ætatem fuit*; for in Judgment of Law, he is *Tutor alienus*, and hath the Cuſtody of the Lands: Whereas the right of Guardian in Socage, is *Tutor proprius*. *Cook* 1. Part, *Inſtitutes*, 98. b.

9. In a *Replevin*; the Caſe was, Guardian in Socage kept Courts in his own name, and granted Coppies; the Queſtion was, If the Grants were good to bind the Heir? It was Objected, That a Guardian in Socage is but a Servant, and as a Bayly, and not *Dominus*; and he can neither grant nor forfeit the Eſtate, and hath nothing to do with the Manor, but to receive the profits for the uſe of the Heir, and to Accompt for them. But it was Reſolved, That he is *Dominus pro tempore*, and hath Intereſt in the Land; for he may make a Leaſe for years of it. *Plo. Com.* 299. He may avow in his own name and right: He ſhall have Treſpaſſe or Raviſhment of Ward. 15 H. 7. 13. He ſhall have Guard *per cauſa de Guard*: and a Copyholder admitted, is in by the Cuſtome, and not by the Guardian; and he hath an Intereſt *ex proviſione Legis*, although he ſhall not forfeit it, and he ſhall accompt for the Fines which he takes: and it would be inconvenient, if he might not let by Copy; for the Heir cannot: And the Court ought not to be kept in the name of the Heir, but in the name of the Guardian: and if he make a Leaſe for years, his Leſſee ſhall maintain *Ejectione Firmæ*. And a Guardian in Socage hath Intereſt in his own right, although his Executors cannot have it, becauſe it is annexed to his perſons. And for theſe cauſes, the Court held the Grants to be good. Mich. 3 Jac. in C. B. *Sapelane* and *Roydlers* Caſe, *Cro.* 2. Part, 55, 99. See *Owen*, 115. the ſame Caſe.

10. A Guardian in Socage cannot preſent to a Benefice in the right of the Heir, becauſe he cannot be accomptable therefore, for that he cannot make any benefit of it, for that would be Symony, which the Law doth abhor: and therefore the Enfant ſhall preſent himſelf. See 8 E. 2. *Preſent.* 10. acc. But yet ſee the Opinion of *Daniel*, Juſtice, *Cro.* 2. Part, 99. in *Sapelane's* Caſe, That if the Heir be within the age of Diſcretion, there ſuch a Guardian in Socage may preſent.

Gavelkind.

1. IF a man make a gulft in tail of Lands in Gavelkind, to a man and the Heirs males of his body lawfully begotten, and he hath Iſſue 4. ſons: in this caſe, all the ſons ſhall inherit: But if a Leaſe for life be made of Lands in Gavelkind, the Remainder to the right Heirs of J. S; and J. S. hath Iſſue 4. ſons, in this caſe the eldeſt ſon ſhall inherit the Remainder; for there can be but one right heir in caſe of purchaſe. *Cook* 1. Part, 103. in *Shelleys* Caſe.

2. Of Lands in Gavelkind, the ſon cannot endow his wife *ex aſſenſu Patris*, becauſe by poſſibility he ſhall not continue heir. *Cook* 6. Part, 21. in *Ambroſia Gorges* Caſe.

3. Every Preſcription by common intendment, ought to have a lawfull beginning; but otherwiſe it is of a Cuſtome; for that ought to be reaſonable, *et ex certa cauſa rationabili uſitata*, but needeth not have Intendment of a lawfull beginning, as Cuſtome to have Land of the nature of Gavelkind. *Cook* 6. Part, 60. in *Cauſin's* Caſe.

4. A man ſeiſed of a houſe Gavelkind in *Kent*, having Iſſue 3. daughters: A. B. and C. gave the houſe to A, and the heirs of her body, the Remainder of the moyty of that to B. in tail, the remainder of the moyty to C. in tail: and if B. dye without Iſſue, the Remainder of her moity to C, with the like Remainder for want of Iſſue of C, to B: A. Tenant in tail diſcontinued and died without Iſſue; B. dyed without Iſſue, by which the right of her moyty came to C: Afterwards C. died, and her right diſcended to divers heirs in Gavelkind, who brought one *Formedon in Remainder*, and by one Writ demanded ſeveral Remainders. And it was adjudged in this Caſe, When all was given to A. in tail, although that the Donor divided the Remainders by moyties, yet when all the Land did remain unto C, and all the Remainders depend upon one Eſtate, and are derived out of one Root, and commence by gulft

at one time; that in ſuch caſe, the heirs of C. might have one *Formedon*; and were not driven to ſue forth ſeveral Writs of *Formedon*. *Cook* 8. Part, 86. in *Beckmers* Caſe.

5. In a *Formedon* in the *Diſcender* brought by A. B. and C. of Lands in Gavelkind, the Warranty of their Anceſtors was pleaded in bar againſt them; and they were at Iſſue, If Aſſetts by diſcent? And it was found by Special Verdict, That the Father of the Demandants was ſeiſed in Fee, of the Lands to be ſuppoſed to be diſcended to the Demandants being Gavelkind, and deviſed the ſame to the Demandants, being his Heirs, by Cuſtome, and to their Heirs equally to be divided amongſt them: and if they ſhould be accompted to be in of the Lands by Diſcent, or by the Deviſe, was the Queſtion? It was the Opinion of *Anderſon*, Chief Juſtice, That they ſhould be in by the Deviſe, and that they are now Joynt-Tenant, and that the Survivor ſhould have the whole: whereas, if the Lands had diſcended, they ſhould have been as Tenants in Common: and the words in this Caſe equally to be divided amongſt them, doth not make them to be Tenants in Common. Paſch. 30 Eliz. in C. B. *Beares* Caſe, *Leon.* 112.

6. The Cuſtome of Land in Gavelkind, is not changed, though a Fine be levied thereof at the Common-Law; for it is a Cuſtome by reaſon of Land, and runneth alwayes with the Land; but it is otherwiſe of Land in Auncien Demeſne. 6 E. 6. *Dyer*, 72.

7. Gavelkind Land was deviſed to the husband and wife for life, the Remainder *proximo hæred. maſculo de C. viroribus ſuis legitimè procreatis in perpetuum*; the Husband and Wife had Iſſue 3. ſons; If the eldeſt ſon ſhould have the whole, was the Queſtion? It was holden, He ſhould not, but ſhould be divided according to the Cuſtome. 4 Ma. *Dyer*, 133.

8. A man ſeiſed of Gavelkind land in Fee holden in Socage, and of other Land holden in *Capite* by his laſt Will in writing, deviſed his Copyhold Land to his baſe ſon, and the heirs of his body: the only Queſtion was, Whether Lands in Gavelkind holden in Socage, was deviſeable by the Cuſtome, or not? It was Reſolved by the Court, That ſuch Lands holden in Socage, were deviſeable there by the Cuſtome: but then the Court held, That this Cuſtome muſt be pleaded, and that the Lands ſo deviſed, were holden in Socage: For although the Court ſhall take conuſans of the Cuſtome of Gavelkind in *Kent*, without pleading it; yet of this ſpecial Cuſtome to deviſe. Or that the Lands are holden in Socage; Or that the Wife ſhall have the moyty for her Dower, they ought not to take cognizance of them, without ſpecial pleading of the Cuſtome. Mich. 15 Car. in B.R. *Launder* and *Brooks* Caſe, *Cro.* 2. Part, 405.

9. A Cuſtome time out of mind continued, cannot be interrupted by the bare alienation of the Tenure; and therefore if Land auncient Socage and Gavelkind in *Kent*, cometh unto the Crown, and the ſame be delivered out of the Crown again *tenendum in Capite*, or by Knight-Service, yet the Land ſhall Diſcend to all the Heirs males as Gavelkind. 4 & 5 Ma. *Dalſon's* Reports. *Lambert* perambulation of *Kent*, 535. 2.

10. Unity of poſſeſſion in the Lord of the Manor, cannot alter the nature of the Land in Gavelkind, but that it ſhall be partible; and if Gavelkind Land come to the King by purchaſe, If the King granteth the ſame to another and his heirs; yet the Land ſhall be partible amongſt the heirs males, 7 Eliz. *Dyer*, by *Brown*, Juſtice.

See more of Gavelkind, and the Cuſtomes of Gavelkind, in *Lib.* 1. Title, *Cuſtom.* 1.

Grand Serjeanty.

1. GRand Seajeanty, is the moſt honourable Service that a Tenant may do to his Lord; and it is a Service to be done to the King only, as to be his Carver, or Butler at his Coronation, or Leader of the King's Hoaſt in the time of War. *Litt.* 34.

2. It was auncienty holden, That if the King's Tenant by Grand Serjeanty did alien his Lands without Licence, that it was a forfeiture of them, becauſe it was the ſervice to be done by the body of a man, which could not be transferred over. And ſo was it holden, 14 E. 3. *Tit. Quare Impedit*, 54. by *Willy*. But Note: It is now holden by all the Juſtices, That Grand Serjeanty ſhall not be forfeited by an alienation without Licence: and that by the Statute of 1 E. 3. Cap. 12. See *Cook* 2. Part, 81. in the Lord *Cromwell's* Caſe, See 29 Eliz. adjudged acc.

3. *Humphrey de Hobum*, who was Earl of *Eſſex*, held divers Mannors to the King, to be Conſtable of *England*. It was Reſolved, That it was a Tenure by Grand Service, 21 Eliz. *Dyer*, 285.

4. A man holds Land of the King, to find a man by 40. dayes, to ſerve the King in his Wars at his own proper Coſts and Charges: It is holden, The ſame is Grand Serjeanty, becauſe it is ſervice:

ſervice to be done for the King by the body of a man. 24 E. 3. Br. Tenures, 19. See *Plow. Comment.* 321. acc. And ſee 30 H. 8. *Dyer*, 44. Every Grand Serjeanty is a Tenure in Chief.

5. Note, It is vouched out of a Record of 5 R. 2. Rott. *Clauſa.* in 45. That a Citizen, or a Burgeſſe cannot do Grand Serjeanty to the King in perſon; but he muſt do it by his Deputy; And ſo it is of a Woman, or an Enfant, they muſt do the Service by Deputy. But a Knight is ſuch a Dignified perſon, that he may do ſuch Service to the King in his perſon. See *Cook* 1. Part, *Inſtitutes*, 107.

6. Note, It is ſaid in *Cook* 1. Part, *Inſtitutes*, 105. That the Tenure of Grand Serjeanty hath ſeven properties. 1. It ought to be of the King only. 2. It ought to be done when the perſon is able, in proper perſon. 3. This Service is certain and partieular. 4. The Reliefe payable for this Service, differs from the Releaſe payable or due for Knights-Service. 5. The Service is to be done within the Realm. 6. That he who held by this Service, ſhall not pay aid, either to make the Kings Son a Knight, or for the marriage of his Daughter, as it is holden in 11 H. 4. and *Fitzh. Nat. Br.* 83. 7. It ſhall not pay Eſcuage.

7. *Officium Hoſtiarii de Scaccario cum diverſis Officiis eidem ſpectantibus*; is holden of the King by Grand Serjeanty. See 4 Eliz. *Dyer*, 213. *Cook* 1. Part, *Inſtitutes* 106. and 7. *Aſſ. pl.* 12. acc. But if a man hold Land *ad inveniendum unum hominem in Turri* London *cum arcubus et ſagittis, per* 40 *dies tempore guerræ in boriali angulo Turris prædict. pro omni ſervitio*, the ſame is not Grand Serjeanty, though it be to be done by the body of a man, and in time of War; but it is but a Tenure by Knight-Service, *per minorem Serjantiam. Cook* 2. Part, *Inſtitutes*, Hill. 8 E. 1. Rott. 86. *John de Moiles* Caſe.

Grants *of the* King.

1. *Where the Grant of the King ſhall be ſaid by the words* Ex ſpeciali gratia certa Scientia et mero motu: *Where not.*

1. THe Rectory of *Weſt Bodin* to which the Advowſon of the Viccarage was appendant, which was concealed, came to the Queen by the Attainder of J. S. which being found by Office, the Queen for money and other conſiderations by her Letters Pattents *ex certa Scientia ſpeciali gratia et mero motu*, granted the ſaid Rectory, and all the poſſeſſions, *et omnia hæreditamenta ſua quæcunque parcel ſpectan. vel pertinend. dict. Rectorie* (without mentioning the Advowſon) *adeo plenè, et in tam amplis, modo et forma quibus, et conditione* as the ſaid J. S. had it. It was Reſolved by the Juſtices, That by thoſe words the Advowſon of the Viccarage did paſs, and that the Queen was not deceived in her Grant. Paſc. 18 Eliz. *Dyer*, 350.

2. The Office of *Aulnageor*, or Collector of the Cuſtomes, or Subſidy of *Aulnage*, was not to be Granted by divers Acts of Parliament, without the Warrant of the Treaſuror certified into the Chancery. Queen *Mary* by her Letters Pattents *de ſpeciali gratia certa ſcientia et mero motu*, granted the Office aforeſaid to J. S. and conſtituted him Collector of the Subſidy of the *Aulnage* for 21 years, and this was without Warrant of the Treaſurer, who granted and aſſigned it over to J. D. and Covenanted that he was lawfully poſſeſſed of the ſaid Office, by the ſaid Letters Pattents. It was Reſolved, that the ſaid Grant made by Queen *Mary* by the ſpecial words aforeſaid, to the ſaid J. S. was void, and alſo it had bin void, notwithſtanding there had bin a *Non obſtante aliquo Statuto* in the Letters Pattents; and eſpecially becauſe ſuch a clauſe was not ſhewed to the Court to be in the Letters Pattents. Mich. 14 Eliz. *Dyer*, 303.

3. Queen *Mary*; for her, her Heirs, and Succeſſors, by her Letters Pattents *ex ſpeciali gratia certa ſcientia, et mero motu*, granted to J. S. and his Aſſigns, that they might ſell Wines by retail, notwithſtanding the Statute of 7 E. 6. which was made againſt the exceſs, and great prizes of Wines; but in the Letters Pattents it was not limited for how long time the grant ſhould continue, but there

was

was a clauſe in the Letters Patents to permit him for life. It was holden in this Caſe by the Juſtices, That the Grant ſhould be conſtrued only to be *durante beneplacito*; and that both the Letters Patents, and the Commandment, determined by her death. Hill. 10 Eliz. *Dyer*, 270.

4. Queen *Mary* being ſeiſed in the right of her Crown, of the Manner of B. to which the Advowſon of the Hoſpital of St. *Kat.* of B. was appendant by her Letters Patents *ex certa ſcientia et mero motu, &c.* the Hoſpital being void, *tempore vacationis*, granted the ſaid Manner *et omnes advocationes eidem Manerio pertinent. ſive incurrent.* in as ample manner as E. and N. held the ſame: but there was no mention made of the preſent avoidance in the Grant, but the Queen afterwards preſented her Clerk to the ſaid Hoſpital, who was admitted, Inſtituted, and Inducted. It was holden, notwithſtanding the ſaid words in the Grant, That the Preſentation did not paſs by the ſaid Letters Patents. Paſc. 13 Eliz. *Dyer*, 300.

5. An Abbot made a Leaſe for 60 years unto another Abbot, the Abbot who was Leſſee, with the conſent of his Covent, made a Leaſe for 80 years, the Reverſion came to the Queen; the firſt Term for 60 years expired: the Aſſignee of the Term for 80 years did ſurrender to the Queen, *ea intentione* that the Queen ſhould make a new Leaſe to him for 20 years, the Queen reciting the Demiſe for 80 years, and the ſurrender in conſideration thereof by her Letters Patents *ex certa ſcientia et mero motu*, did make the Demiſe for 20 years. It was holden by the Juſtices in that Caſe, That the Demiſe was void, becauſe in truth nothing was ſurrendred, but only in ſhew and appearance. Tr. 18 Eliz. *Dyer*, 352.

6. King *Henry* the 8th, Tenant in tail, to him and the Heirs Males of his body, of the Manner of A. by force of a Fine levyed, 3 H. 7. the Reverſion to him, his Heirs and Succeſſors by force of an Attainder and Office by his Letters Patents *ex gratia ſpeciali, certa ſcientia et mero motu*, reciting (that whereas W. W. had ſurrendred up former Letters Patents of the ſaid Manner to be cancelled, of the ſaid Manner of A.), granted the ſaid Manner of A. unto the ſaid W. W. and E. his Wife, and the Heirs of the body of the ſaid W. W. lawfully begotten; and in truth the ſaid Letters Patents were not ſurrendred, but in ſhew only. In this Caſe, it was Reſolved, That the Grant of the King *ex certa ſcientia et mero motu*, ſhall be taken ſtrongly againſt the King; but that muſt always be intended, when the King is not deceived in his Grant, for if the King be deceived in his Grant, although that the Patent be *ex certa ſcientia et mero motu*, yet the Grant is void; and the Kings Grant ſhall not ennure upon a violent conſtruction: And the Kings Patents ſhall be conſtrued *ſecundum intentionem Domi i Regis, et non in deceptionem Domini Regis. Cook* 1. Part, 43. the Caſe of *Alton Woods*.

7. The King was ſeiſed of the Manner of *Torrington*, and of a Market within the ſaid Manner every Week, and of a Fair holden *in vigilio Feſto' et Craſtino St. Michaelis.* by his Letters Patents incorporated the ſaid Town of *Torrington*, and granted to them *de gratia ſpeciali, ex certa ſcientia et mero motu, quod ipſi et ſucceſſores ſui poſſint habere et tenere, unum Mercatum quolibet die Sabbat. et duas Nundinas ibid. annuatim*, viz. *una in vigilio Feſto, et Craſtino Sancti Michaelis, et alia in Feſto Sancti Georgii Martiri niſi Mercatum et Nundinæ illæ eſſent ad nocumentum vicinorum Mercatorum, et vicinarum nundinarum*: And it was adjudged in that Caſe, That the Grant was void, becauſe the King was not aviſed of his own Grant; for his intent was to Grant and create the Fair *in vigil Feſto, et Craſtino Michaelis, niſi ſit ad nocumentum*: and there the Patent being *ex ſpeciali gratia certa ſcientia et mero motu*, did not paſs the Auncient Fair, for that was againſt the intent and purpoſe of the King, which was to create a new Fair, and not to grant the Fair which was in *eſſe*. 15 Eliz. adjudged in the Exchequer. The Caſe of *Torrington*. See *Dyer*.

8. King *Henry* the 8th by his Letters Patents, *ex certa ſcientia et mero motu ſuis*, for valuable conſideration of mony granted to J. S. and J. D. all thoſe his Meſſuages, Lands, Tenements with appurtenances in the ſeveral tenures or occupations of A. and B. ſcituate, lying, and being in the City of *Wells*, or in the Suburbs of the ſaid City, or within the Juriſdiction of the ſaid City, to the late Priory or Hoſpital of *Wells* belonging or appertaining, lying in the Pariſh of D. and it was found, That the ſaid Lands, &c. were in the Tenures of the ſaid A. and B. but they did lye in S. and not in D. It was Reſolved in that Caſe, That becauſe the ſaid Grant was reſtreined to a certain Town, in which they did not lye; that although the ſaid Grant was general, and the ſaid Lands were in the Tenures of the ſaid A. and B. and that the Grant was *ex certa ſcientia, et mero motu* of the King, and made upon a valuable conſideration; yet the ſaid grant was void, and did not paſs the ſaid Lands and Tenements; and alſo notwithſtanding they were of ſuch value as was mentioned in the particular; for the particular is but *prima intentio Regis*, and the Letters Patents are *ultima intentio Regis*, and the Judges are not to ground their Judgment upon the particular, but upon the Letters Patents. *Cook* 2. Part, 33. *Doddington's* Caſe. See 16 Eliz. *Dyer*, 33. acc.

9. The King gave Lands to the Lord *Lovell*, to have and to hold, to him, and to his Heirs Males, and the Grant was *ex certa ſcientia, et mero motu*: Yet it was adjudged, That the grant was void, for that the King could not grant ſuch an Inheritance in Fee-ſimple, to make the Heirs inheritable, and to exclude the Females. 18 H. 8. br. Tit. *Patents*, 104.

10. The Queen ſeiſed of the Rectory of L. had a portion of Tythes out of it, and by her Letters Patents *ex certa ſcientia et mero motu* granted to A. and B. *totam illam portionem decimarum in L. in Com. noſtro N. cum omnibus aliis decimis in L. in dict. Com. N. tunc in occupatione, J. S.* And further granted by her Letters Patents, that the ſaid Letters Patents ſhould be in force againſt the Queen, and her Succeſſors, notwithſtanding *male nominando vel recitando dict. portionē decimarum: et non obſtante aliquis aliis defectis in non nominando, vel male recitando ali cujus tenentis ſive occupatoris*: And it was found, That there were not any Tythes in L. in the occupation of J. S. and in this Caſe, it was adjudged, That the Letters Patents were void. Firſt, It was Reſolved, That theſe words *illam portionem* were not ſatisfied untill it came to the end of the ſentence, and that refers to the occupation of J. S. for that is uſed only to reduce the Grant of the King to a certainty. 2. That this word (*portio*) ſignifies a part or portion in groſs, and not parcel of the Rectory of L. And the Grant of the Queen ſhall not extend againſt her intention and expreſs meaning in her grant, although it be *ex certa ſcientia et mero motu*. And in the Caſe, the intent of the Queen was to paſs the Tythes in groſs in L. and not to paſs the Tythes parcel of the Rectory of L. *Cook* 4. Part, 35. *Bozoms* Caſe.

11. The King *ex certa ſcientia, et mero motu*, Grants Lands in Fee *Tenendum de nobis et heredibus noſtris per ſervitium unius roſe rubee, annuatim ad Feſt. Nativitat. St.* Johan. Baptiſt *ſolamodo pro omnibus, et omnimodis ſervitiis et demandis*. It was adjudged in that Caſe, That the ſame was a Tenure in Socage in chief: and becauſe Fealty is incident to every Rent-Service, the Law ſhall annex Fealty to the ſaid Rent, ſo as the Tenure ſhall be by a Roſe and Fealty, and then theſe words *pro omnibus aliis ſervitiis* ſhall be intended other Services which the Law doth not imply or add to it, and ſuch conſideration is benigne, and according to the intention of the King. *Cook* 6. Part, 7. *Wheeler's* Caſe.

12. King *Henry* the 7th, *Anno* 19 of his Reign by his Letters Patents granted the Mannor of D. to A. and B. in tail, and afterwards reciting the former Letters Patents, and that they were delivered and ſurrendred to be canceled; the King by other Letters Patents *ex certa ſcientia, et mero motu*, granted to the ſaid A and B. and E. his Wife, *Manerium predict.* and to their Heirs. In this Caſe, it was Reſolved, That the grant was good: and the Reverſion of the Mannor which the King had paſſed, paſſed by the grant, for inaſmuch as the party had truly enformed the King of the eſtate tail, and of the delivery of the Letters Patents to be cancelled, although that the King had miſtaken the Law in a matter in fact, yet the ſame ſhould not avoid the Grant, eſpecially the ſame being *ex certa ſcientia, et mero motu*, which ſhall be taken in the moſt favourable and liberal ſenſe, according to the limitation of the King expreſſed in his Grant, and no default being in the party. *Cook* 6. Part, 55. the Lord *Chandois* Caſe.

13. King *James*, *Anno* 5. of his Reign, by his Letters Patents, of his certain knowledg and mere motion, did Grant unto *Jehu Webb* the Office of the Maſter of the Tennis Playes, aſwell within the Pallace of *Weſtminſter*, as of the Lord the King elſwhere, To have and to hold to him during the life of the ſaid *Jehu*. It was holden in this Caſe, That in that Caſe the ſaid Letters Patents ſhould have a reaſonable conſtruction, not only to extend when the King himſelf Playes, but when any of his houſhould ſhould Play. *Cook* 8. Part, 45. *Jehu webbs* Caſe.

14. Queen *Mary* was ſeiſed of a Park called *Eaſtwood*-Park, and by her Letters Patents granted the ſaid Park to *Henry* Lord *Stafford*, and his Wife, and to the Heirs of the body of the ſaid *Henry*, the Reverſion to the Queen. Afterwards Queen *Eliz.* *Anno* 7. of her Reign, reciting the former Eſtate, and the Reverſion to Her expectant, for the ſum of 53 l. did grant to J. S. the Reverſion of the ſaid Park, to have and hold, to him and the Heirs of his body: And further by the ſaid Letters Patents, declared, That if the ſaid J. S. his Heirs, or Aſſigns, ſhould pay, or cauſe to be paid at the Receipt of the Exchequer, to the ſaid Queen, her Heirs, or Succeſſors, 20 s. beſides the ſaid 53 l. then the ſaid Queen *ex gratia ſpeciali certa ſcientia et mero motu*; granted, That the ſaid J. S. and his Heirs ſhould have and hold, to him and his Heirs for ever, by vertue of the ſaid Letters Patents, the Reverſion of the ſaid Park, with the appurtenances, to have, hold, and enjoy all the premiſes, to him, his Heirs, and Aſſigns for ever. In this Caſe, it was Reſolved (amongſt other points), That when the King ſaith, That he ſhall have *predict. reverſionem*, the ſame ſhall be intended, that he ſhall have ſuch a Reverſion as the King might Grant, and that was the Reverſion in Fee which was in him, and not the Reverſion in tail, for that he had before, for it ſhould be a diſhonourable conſtruction for the King, and a diſadvantage to the party.

party. Cook 8. Part, 74. the Lord Stafford's Caſe.

15. Queen Eliz. ſeiſed of the Mannor of D. to which the Advowſon of the Church of D. was appendant, granted the ſaid Mannor to J. S. for 21 years, excepting the Advowſon; and afterwards reciting the ſaid Leaſe, made another Leaſe of the ſaid Mannor to J. S. with the like exception of the Advowſon: Afterwards King James by his Letters Patents, in conſideration of Service, *Ex certa ſcientia, et mero motu* granted to J. D. *totum illud Maneriam de D. cum pertinenciis, exceptis quæ in eiſdem Litteris Patt. accipiuntur*, reciting the Letters Patents before granted for years, *et ulterius de ulteriori gratia ſpeciali, et ex certa ſcientia, et mero motu*, granted to the ſaid J. D. his Heirs and Aſſigns for ever, *Maneriam prædict. et omnia et ſingula premiſſa cum pertinenciis adeo plenè et integrè, et in tam amplis modo et forma prout omnia ac ſingula premiſſa aut aliqua inde parcella, ad manus noſtras devenerunt, ac in manibus noſtris jam exiſtant.* The Queſtion was, Whether the Advowſon appendant to the Mannor did paſs by the ſaid Letters Patents. It was Reſolved, That the Advowſon did paſs: and in this, 1. That the Advowſon did paſs, for when the Kings Charter in general terms refers to a certainty, the ſame contains as expreſs mention, as if the certainty had bin expreſſed in the Charter, although that the certainty to which the reference is, be not of Record, but lyes in averment by matter in *pais in fait*. 2. That at the Common-Law, if the Queen grant a Mannor to which an Advowſon is appendant, without making mention of the Advowſon or appurtenances, thit the Advowſon doth paſs. 3. Reſolved, That if the ſaid clauſe *adeo plenè et integrè*, had bin omitted, although that the Patent was *ex gratia ſpeciali certa ſcientia et mero motu*, that the Advowſon had not paſſed by the firſt clauſe, but by the addition of it in the latter clauſe, it made the Advowſon to paſs, for by that the Kings intent appeared. Cook 10. Part, 63, 64. *Whiſtlers* Caſe.

16. The King ſeiſed of the Mannor of W. in the right of his Crown, by his Letters Patents under the Great Seal, *Ex ſpeciali gratia certa ſcientia et mero motu*, granted to J. S. *illos duas ſpecies terræ vocat. N. et M. jacent in W. modo vel nuper in tenura J. C. ac nuper Monaſterio de W. ſpectant que quidem omnia à nobis, &c. concelata et detenta fuerant*: And it was found by Verdict, That the Mannor of W. was not concealed, nor detained, but was in *onere et compoto*, but that the Rents of the ſaid two parcels of Lands in N. and M. were not anſwered to the King. In this Caſe (amongſt other things) Reſolved, That although the Grant was, *Ex certa ſcientia, &c.* yet becauſe it was made upon the falſe ſuggeſtion of the party, the Grant was void. And in that Caſe, it was ſaid, That the words *Ex certa ſcientia* importeth, That the King hath knowledg of the thing he granteth, but that muſt be intended of the truth which is the proper object of knowledg, and not of falſity which is *non ens*. 2. The words *ex mero motu*, importeth the honour and bounty of the King; *Ex gratia ſpeciali*, is in reſpect of grace and favour, which the King conceiveth of the Pattentee: all which are of no effect, when the Letters Pattents are obtained upon a falſe ſuggeſtion of the party in diſceit of the King. Cook 10. Part, 109. *Arthur Legats* Caſe.

17. The Prior of *Mountague* was Patron of the Church of F. In 20 H. 8. the King by his Letters Pattents *Ex ſpeciali gratia certa ſcientia, et mero motu ſuis* gave Licenſe to the ſaid Prior, *quod ipſi et ſucceſſores ſui dictam Eccleſiam de T. impropriare conſolidare, amovere et unire, et ſic appropriatam conſolidatam et unitam in proprios uſus poſſint retinere*: The Biſhop of W. with the Dean and Chapter, *aſſenſu Regis Henrici 8. Authoritate, &c.* united and appropriated the ſaid Church, *Ita quod ſtatim, vel decedente Rectore qui nunc eſt ſeu aliter contigerit ipſam Eccleſiam, retinere poſſint*, which endowment of a Viccarage, &c. It was Reſolved in this Caſe, That the Licenſe ſhall be taken to this intent, viz. to take effect after the death of the preſent Incumbent, and ſo much the rather, becauſe the Letters Pattents were *Ex certa ſcientia et mero motu*, and not to extend to an Impropriation in the life of the preſent Incumbent. Cook 11. Part, 12. *Pridle* and *Nappors* Caſe.

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2. *Where the Grants of the King ſhall be void for want of recital, falſe recitall, miſ-recitall, falſe ſuggeſtion of the part, and for Miſnomer of the thing, or party, and where not: Where helped by* Non obſtante.

1. THe King Leaſed *Richmond* Fee, with all Deodands which ſhould fall within it, to C. for years: Afterwards the King granted all Deodands to Dr. *Cox*, the Almoner; the Leaſe of C. expired, and the King made a new Leaſe to C. as before. It was Reſolved in this Caſe, That Dr. *Cox* the *Almoner* ſhould not have the Deodands againſt C. the Pattentee, for that his Grant was void, becauſe the Leaſe for years of C. was not recited in the Letters Pattents. Mic. 6 E. 6. *Dyer*, 77.

2. The Prior of B. demiſed the *Scite*, and the Demeans of the Mannor of D. for life, rendring Rent: Afterwards the Reverſion of the Scite, Demeans and reſidue of the Mannor came to the King by the Statute of *Diſſolutions*: And afterwards the King by his Letters Patents under the Seal of the Augmentation, demiſed and granted the Mannor aforeſaid, with the appurtenances, to J. S. for years. And in the Letters Patents, all Services, Rents, and profits, and Hereditaments of the ſaid Mannor, were expreſly mentioned, but there was no mention made of the Reverſion: Notwithſtanding it was the Opinion of the Court, That by *nomen Manerii* in the Caſe of the King, the Reverſion did paſs, and that the Grantee ſhould have the Rent reſerved. Mich. 7 Eliz. *Dyer*, 238.

3. Queen *Mary* reciting a Grant of the Cuſtody of the Caſtle of C. by King *Henry* the 8th, to the Lord *Darcy* (miſ-reciting the date), which premiſes were in her hands by the forfeiture or ſurrender of the Lord *Darcy*, granted the Cuſtome to K. and did not ſay the Office of Cuſtody. Afterwards the Lord *Darcy* and Queen *Mary* being dead; Queen *Elizabith* by her Letters Patents, *Ex ſpeciali gratia, &c.* granted the ſaid Office to J. S. who entred upon K. In that Caſe, K. was Nonſuit; there 32 H. 8. was miſtaken for 33. And there the ſurrender was of a Patent bearing date 32, whereas in truth it bore date 33 H. 8. and therefore it was holden and adjudged, That the Letters Patents made to K. were void, notwithſtanding the Act of 34 H. 8. and other Acts of Miſ-recital. H. 3 Eliz. *Dyer*, 195. *Kemp* and *Mackwilliams* Caſe.

4. Queen *Eliz.* ſeiſed of the Mannor of *Sutton Galtres* in the County of *York*, demiſed the ſame to H. B. for 21 years, who demiſed divers parcells of it for years. Afterwards the Queen reciting the ſaid Letters Patents, for, and in conſideration of the ſurrender, *totius ſtatus et terminum annorum, de et in præmiſſis per prædict. Literas Patentes eidem* H. B. *conceſſ.* did grant the ſaid Mannor to the ſaid H. B. for 21 years. It was adjudged in that Caſe, That the ſaid ſecond Leaſe made to the ſaid H. B. was void, for all the eſtate and Term demiſed to the ſaid H. B. were not ſurrendred according to the effect of the conſideration, and it was but a ſurrender in ſhew only, and not in ſubſtance. *Cook* 5. Part, *Barwicks* Caſe.

5. See *Cook* 1. Part, in the Caſe of *Alton woods*; where the Grant of the King was void, for a miſ-recital, and not a recital of an eſtate before granted.

6. King *Henry* the 8th, Tranſlated the Abbot and Prior of *Norwich* by his Letters Patents, and created them by the name of Dean and Chapter, who ſurrendred their poſſeſſion to King E. 6. and afterwards King E. 6. encorporated them by the name of Dean and Chapter *ex fundatione* E. 6. and afterwards re-granted their poſſeſſions to them by the name of Dean and Chapter, *Sanctæ et individuæ Trinitat. Norwich*, leaving out the words (*ex fundatione E. 6.*) yet notwithſtanding, it was adjudged a good foundation and Tranſlation; and the re-grant of the poſſeſſion to them was good. 2. It was Reſolved, That admitting that the ancient Corporation was ſurrendred, and the new Corporation made by King E. 6. and that the words *Ex fundatione Ed. 6.* had bin material, were omitted: Yet it was Reſolved, That the ſaid Grant made to them, was good, notwithſtanding the Miſnomer by the Statute of 1 E. 6. of Confirmations. *Cook* 3. Part, 73. The Caſe of the Dean and Chapter of *Norwich*.

7. See Diviſion before, Sect. 10. *Bozouns* Caſe, Where it was Reſolved, That the Letters Patents and Grant there made, was void; and ſee there the difference in Caſes of *Non obſtante* in the Kings Grant: For, note there, When the King by the Common Law cannot make any grant, there a *Non obſtante* of the Common Law, will not againſt the reaſon of the Common Law make the Grant good: But when he may lawfully by the Common Law make a Grant, the Common Law requires that he be inſtructed, and not deceived; there a *Non obſtante* ſupplying it, being with the reaſon of the Common Law, makes the Grant good. 2. When the words of a Grant are not ſufficient *ex ſi termini* to paſs the thing granted, but the thing is utterly void, there an *Non obſtante* cannot make the void grant good, and therefore in that principal Caſe of *Bozonne*, becauſe J. S. never had any parcel of the Tythes, the Grant *ex ſi termini* was void. *Cook* 4. Part, *Bozouns* Caſe.

8. The King granted Licenſe to tranſport Bellmettle *Non obſtante* any Statute made, or to be made. It was the Opinion of the Juſtices, That for the Statutes to be after made, it was void; but the King may diſpenſe in things to come wherein he hath an Inheritance by a ſpecial *Non obſtante*. P. 34 H. 8. *Dyer*, 52.

9. A man held a Menalty of the King by Knight-Service in *Capite*, and the Tenant held certain Lands of the Meſne in Knight-Service, and alſo held other Lands of the Dutchy of *Cornwall* in Knight-Service; The King granted the Dutchy to his eldeſt Son *ſimul cum Wardis et maritagiis Non obſtante* the Statute of *Prerogativa Regis*, the Meſne dyed, and his Heir in Ward to the King; the Tenant alſo dyed, his Heir within age. It was holden in that Caſe, That the King ſhould have the Prerogative of the Ward of the body and Marriage becauſe of the Ward, for that general words in the Kings Patents ſhall not extend to ſpecial Caſes,

ſet, notwithſtanding words of *Non obſtante* be in the Letters Patents. Mich. 10 Eliz. *Dyer*, 269.

10. If A. giveth the Mannor of D. to B. in tail, and afterwards the Donor is Attainted of Treaſon, by which the King is ſeiſed of the Reverſion; and afterwards by his Patent granteth *Manerium de D.* to another and his Heirs; in that Caſe, although the King granteth the Mannor of D. as in poſſeſſion, yet the Reverſion ſhall paſs, for the King had an eſtate (the Reverſion in Fee in him) grantable. And in ſuch Caſe, the eſtate tail by a common perſon, needed not to be recited. *Cook* 6. Part, 56. in the Lord *Chandois* Caſe. And it is not like the Caſe of *Alton woods*, for there the King was not Conuſant, nor enformed of the true eſtate, *ſcil.* that he was ſeiſed in tail with the Reverſion expectant to his Heirs and Succeſſors; and his grant in that Caſe cannot take effect by fractions of eſtates or wrong done. See the Caſe there.

11. King E. 6. was ſeiſed of the Mannor of C. of which a Wood containing 300 Acres was parcel: King E. 6. by his Letters Patents granted the ſaid Wood in Fee, and afterwards the ſaid wood eſcheated to him for Treaſon: Afterwards the Queen granted the ſaid Wood in Fee, and by her Letters Patents granted the ſaid Mannor *et omnes boſcos, modo vel ante hac cognit vel reputat. ut pars, membr. vel parcel ejuſdem Manerii* to the Earl of *Leiceſter* in Fee; although in truth before the ſeverance made of the Wood by King E. 6. It was alwayes parcel of the Mannor, yet in good propriety of ſpeech it was there *cognit ut pars et membrum dict. Manerii*; for although that (*ut*) is a word of ſimilitude, and not of identity; yet truth is the more ſure foundation; and therefore it was adjudged, That the Wood did paſs. 20 Eliz. *Dyer*, 361.

12. See Sect. 16. before, *Legats* Caſe. That when the King grants any thing upon a falſe inſinuation or ſuggeſtion, ſuch a grant of the King is void; and there it is ſaid, That this is a high Prerogative of the King, that when he makes any ſuch Grants upon falſe ſuggeſtions or informations, they are void, *jure regio*. So when upon falſe inſinuations or pretexts, he makes any grant, as of any Monopoly, which in truth is to the prejudice of the King and Commonwealth, the King ſhall avoid ſuch Grant. And note, It is there obſerved, That Grants of Perpetuities, Monopolies, Grants of Concealment, and the like, were born under an unfortunate conſtellation, becauſe ſo ſoon as ever they were drawn in queſtion, Judgment was alwayes given againſt them, and never for them, they having two inſeparable qualities incident to them, *viz.* to be troubleſome and fruitleſs. *Cook* 10. Part, 109.

13. King E. 2. by his Letters Patents granted the Caſtle and Mannor of *Skipton* to *Robert de Clifford* in tail; and afterwards King *H.* 6. granted *Th. Domino Clifford*, who was Heir of the body of *Robert de Clifford*, *reverſionem Caſtri et Manerii pradict. necnon Caſtrum et Manerium pradict.* Reſolved in this Caſe, That admitting that the Grant to *Robert de Clifford* was void; yet the ſaid Caſtle and Mannor did paſs by the ſaid laſt grant made to the ſaid *Tho.* Lord *Cliffo d* in Feeſimple, for that the intent of King *Henry* the 6th was, That be the Mannor in poſſeſſion or Reverſion, that the Mannor ſhould paſs, and with that his intent, the words do agree; for firſt, he grants the Reverſion, if the firſt eſtate tail was good; and if it was not good, then he Grants the Caſtle and Mannor in poſſeſſion; and ſo in that Caſe the words in the Letters Patents agree with the Kings intention, and both agree with the Law. *Cook* 8. Part, 166. The Earl of *Cumberlands* Caſe.

14. Queen *Eliz. Anno* 19 of her Reign, granted to F. G. the Office of Clark of the Councel of the *Marches* of *Wales* for his life; And by another Patent *Anno* 25. Granted to him the Office of Secretary there. The King, 1 Jac. without recital of theſe Patents, Granted the ſaid Offices to Sir F. G. for life. And after 9 Jac. the King reciting the ſaid Grant 1 Jac. Grants thoſe Offices to J. S. for life, when after the death, ſurrender or forfeiture of the ſaid Sir F. G. they ſhould become void. After by other Letters Patents 14 Jac. reciting the Patent of 1 and 9 Jac. and omitting the Grants of 19 and 25 Eliz. the King granted the ſaid Offices to B. and C. *habendum* for their lives *cum poſt mortem* of the ſaid Sir F. G. or J. S. ſurrender, forfeiture, *vel alio quocunque modo* the ſaid Offices ſhould be void, or come to the Kings hands, *Non obſtante male nominando*, or *malerecitando*, or *à male nominando Offic. pradict.* and notwithſtanding any gift or Grant before made of the Offices aforeſaid, It was Reſolved in this Caſe by all the Juſtices and Barons. 1. That the Patent 1 Jac. was void, and that the Patents 19 and 25 Eliz. were good. Then Sir F. G. being Patentee, and he being alive, and he accepting a new Patent in 1 Jac. and not reciting the former, nor any *Non obſtante* being therein, it was clearly void. 2. Reſolved, That the Patent of 9 Jac. reciting the Patent of 1 Jac. is a good Grant, which is void, no *Non obſtante* being therein, was void. 3. Reſolved, That the Patent 14 Jac. was void, becauſe it recites the two Patents which were void, and omits the two Patents of 19 and 25 Eliz. which were good; ſo as the King was deceived in his Grant, and miſinformed; for they were falſe recitals, or falſe ſuggeſtions, and were not made good by the *Non obſtante* in the Letters Patents mentioned. Trin.

6 Car. *Crook* 1. Part, The Lord *Brook* and Lord *Gorings* Case. 143.

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3. *Where the Kings Grant shall be void to all intents, because he was deceived in his Grant, and not appriſed of the Law, or of his Grant: And if the Kings Grant may enure to two intents, to what intent it shall be conſtrued. And where the Kings Grant ſhall be void for incertainty; Where not.*

1. THe King being Tenant in tail of the Manor of A; with the Reverſion in Fee to him and his heirs, by force of an Attainder, by his Letters Patents granted the ſaid Mannor to W. W, and the heirs males of his body: In this Caſe, It was holden, That the Grant was void; for that the intent of the King in his Grant could not take effect: for he intended to grant an Eſtate tail; and that he could not do, becauſe he had but an Eſtate tail himſelf: and the largeſt Eſtate that Tenant in tail may grant, is but for his own life. *Cook* 1. Part, 44. in the Caſe of *Alton Woods*.

2. If the King hath the Cuſtody of Land, or a Leaſe for yeats of Land; and by his Letters Patents grants the Land to another and his heirs, the Grant is void, and by conſtruction ſhall not amount to a grant of his Eſtate or Intereſt. The King licenced his Tenant to alien to two Chaplains, and their heirs; and he who aliened, had but an Eſtate in tail, the Reverſion to the King: and becauſe the King was deceived when he gave the Licence to alien to them and their heirs, in as much as he was not conuſant of his Eſtate, his Licence was utterly void, and the Land was ſeiſed into the Kings hands; and it did not enure to ſo much, as to alien what he might lawfully alien; 21 Aſs. 15.

3. The Kings Grants ſhall be conſtrued *ſecundum intentionem Domini Regis, et non in deceptione Domini Regis*; ſo as if the King be deceived, that his Grant cannot take effect as he intended it, by his expreſſe Grant, it ſhall be void. And therefore it was adjudged, That whereas King *Henry* the 7th was ſeiſed of the Manors of *Ryton* and *Coudor* in the County of *Salop*: and he by his Letters Patents granted *totum illud Manerium de Ryton et Coudor in Com. Salopiæ*, That the Grant was void; becauſe the King was deceived in his Grant. Trin. 29 Eliz. in the Exchequer, adjudged. So 39 Eliz. it was; Where the Queen was ſeiſed of the Mannors of *Milborne* and *Sapperton* in the County of *Lincoln*, and the Queen did grant *totum illud Manerium de Milborn cum Sapperton in Com. Lincoln*, that nothing did paſſe by the Grant; although both the ſaid Grants were made *ex certa Scientia et mero motu*: And yet in the caſe of a Common perſon, ſuch Grants had been good.

See *Cook* 5. Part, 94. *Barwick's* Caſe, Diviſion 2. Sect. 4. before.

4. A Tenant for life of the Mannor of D, to which a Rectory, to which a Benefice with Cure, is appendant, the Remainder to the Queen in Fee: A. preſents D, who is Admitted, Inſtituted, and Inducted, and doth not read the Articles: for which Cauſe, at the Suit of A, he was deprived before the Archbiſhop: and he appealed to the Court of Arches, no Notice being given by the Ordinary, to the Patron, of the ſaid deprivation: A. dyed, The Queen by Title of Lapps preſented E, who was Admitted, Inſtituted, and Inducted: D. dyed; B. preſented, who was Admitted, Inſtituted, and Inducted; B. entred into the Rectory, and took the profits; G. brought Treſpaſſe: In this Caſe (amongſt other Points) it was Reſolved, That if the King be deceived in his Preſentation, or miſtake his Preſentation, that the Preſentation is void: and therefore a Preſentment obtained from the King, depending a *Quare Impedit*, is void, *à fortiori*, when the King hath not Title to preſent by any means: and he preſents *ratione Laſûs*, the Preſentation is void. 2. It was Reſolved, In ſuch Caſes, although the Biſhop Admit, Inſtitute, and Induct the Incumbent, yet the Church remains void. and the lawful Patron is not put to his *Quare Impedit*, to remove ſuch Incumbent. 3. Reſolved, That if a Common perſon uſurp upon the King, and his Clerk is Admitted, Inſtituted, and Inducted; the King in ſuch caſe is put to his *Quare Impedit*, and cannot preſent, untill the Incumbent be removed: but yet in ſuch caſe, the Common perſon doth not gain by his uſurpation the Inheritance of the Advowſon out of the King; for that remains permanent in him; but as to the Preſentment only, the King is put out of poſſeſſion. *Cook* 6. Part, 29, 30. *Greens* Caſe.

5. The Queen, Tenant for the life of another, made a Leaſe for 40. years; It was Reſolved, That although in that caſe, that the Queen having but a Leaſe for the life of another, cannot abſolutely contract for a Leaſe for 40. years; yet without recital or mentioning the Eſtate for life, the Leaſe is good: for the Leaſe for years is in Judgment of Law, leſſe then the Leaſe for the life of another, and the Queen hath not done any wrong or prejudice to any by the demiſe, and is not deceived in her Grant; for in judgment of the Law, it is a Leaſe

Leaſe for 40. years, if *Ceſtuy Que vye*, ſo long live: but if the Queen had granted a greater Eſtate then ſhe lawfully might; as an Eſtate tail, or a Fee; then, becauſe ſhe could not do it, ſhe was deceived, and by conſequence her Grant void. *Cook* 7. Part, 12. in *Englefield's* Caſe.

6. The King by his Letters Patents granted the Office of his Park, called *Clipſon* Park, to A. for life; and by the ſame Letters Patents granted the Herbage and Pawnage of the ſaid Park to A. for his life; and afterwards the King by other Letters Patents reciting the Eſtate of the ſaid A, granted to B. *prædict. Officium Cuſtodis Parci prædict. vocat. Clipſon* Park for his life, *quam cito per mortem, ſurſum reddit. forisfact. aut aliquo modo vacaverit* with all Fees; and by the ſame Letters Patents granted to B. the Herbage and Pawnage for his life (without ſhewing when the Eſtate of the Herbage and Pawnage ſhould begin), *adeo plenè et integrè prout prad ict. A. habuit, tenuit, five poſſeſſus fuit*: In this Caſe, (amongſt other Points) it was Reſolved, That the King was not deceived in his Grant; for, in as much as he recited the Eſtate of the Tenant for life, the Grant ſhould take effect as it could by Law, and therefore it ſhould take effect in Reverſion: and the King miſtook nothing, nor took a greater Eſtate upon him then he might grant; and when the King's Grant may be taken to two Intents, it ſhall be taken to ſuch intent as may make the Grant good: and there was no incertainty in the ſaid Grant of the Herbage and Pawnage, when it ſhould take effect in poſſeſſion; for it ſhall begin, when the firſt Grant ſhall be ended or determined: and although the ſame may happen after death, ſurrender or forfeiture; yet it ſhall determine but once, and when the firſt of them ſhall happen, the Grant ſhall begin. *Cook* 8. Part, 55, 56. The Earl of *Rutland's* Caſe.

See Diviſion 1. Sect. 14. the Lord *Stafford's* Caſe, for this Diviſion.

7. The King, Lord, Abbot, Meſne, and C. Tenant of the Manor of D; the Tenant is attainted of Treaſon, and after Office found, the King by his Letters Patents grants over the Manor to B, and his Heirs, *Tenendum de Nobis et ſucceſſoribus noſtris et aliis Capitalibus Dominis feodi illius per Servitia inde debita, et de jure conſueta*, It was Objected in this caſe, That the Tenure ſhould be of the King, becauſe by the Attainder the Meanalty was extinct, and therefore *nulla ſervitia*, were *debita, aut de jure Conſueta*. And, 2. There is an expreſſe Tenure of the King, and Land cannot be immediately holden of divers perſons. But it was Reſolved in this caſe, 1. That the words were ſufficient to create a Tenure in the Meſne; for ſuch was the intent of the King, that the Meſne who did not offend, ſhould not loſe his Services, and the Grant of the King ſhall be taken moſt beneficially for the honour of the King, and for the relief of the Meſne. 2. It was Reſolved, That the Tenure ſhould be immediately of the Meſne, and of the King as Lord Paramount, as it was before the Attainder. *Cook* 6. Part, 5. Sir *John Molins* Caſe.

See Diviſion 2. Sect. 13. the Earl of *Cumberland's* Caſe, for this Diviſion.

8. In an Information of Intruſion, the Caſe was; The King was ſeiſed of a Rectory, and by his Letters Patents demiſed it to the Wardens of the Church of S. for 21. years; and afterwards the King by other Letters Patents reciting the ſaid Leaſe; which Letters Patents, and all their Eſtate, Intereſt, and Term of years *Gardiani prædict. modo habentes et ea ad præſens poſſidentes nobis ſurſum reddiderant et reſtituerant cancellanda, quam quidem ſurſum redditionem acceptamus, in Conſideratione ſurſum redditionis prædict.* and for the Fine of 20 l. *ad recept. Scaccarii per præfat. Gardianos* at the time of the making thereof, demiſed the ſaid Rectory to the ſaid Guardians of the ſaid Church for 50 years: And it was found, that the Guardians of the ſaid Church at the time of the making of the ſaid Leaſe for 50. years, did ſurrender and yield up the ſaid Letters Patents to be cancelled, and paid the Fees in the Chancery for the Cancelling of them; but no *vacat.* was made of the enrollment of them, and becauſe the Defendants entred into the Rectory by force of the ſecond Leaſe, was the Information: In this caſe, It was Reſolved, 1. That there needed not any actual Surrender, becauſe that theſe words [*modo habentes ut ad præſens poſſidentes,*] proved, that at the making of the ſaid Letters Patents, the Wardens had the Leaſe for years in their hands, and by the accepting of the new Leaſe, their Eſtate for years was ſurrendred; and in Judgment of Law, the Surrender did precede the new Grant, and the King in this caſe was not prejudiced in Eſtate, intereſt, value, or remedy; And a Corporation may by act in Law ſurrender their Term without Writing. 2. Reſolved, That the Delivery made by the Guardians of the Letters Patents in Chancery, to be cancelled by their own hands, without writing, was good, and all they ought to do; and the Lord Chancellor or his Officers, ought to have cancelled the ſame. 3. Reſolved, That the Conſideration of the payment of 20 l. need not to be found; for it is but a thing in the perſonalty, and the King hath affirmed by his Letters Patents to be ſatisfied.

ſatisfied thereof: And ſo it was adjudged, That there was not Intruſion upon the King; nor could the King make void the ſaid Leaſe for 50 years. *Cook* 10. Part, 67. The Caſe of the Wardens of the Church of St. *Saviours* in *Southwark*.

9. The King by his Letters Patents, 9 Jac. granted and aſſigned to J.S. ſuch and ſo many of the debts, duties, arrearages, and ſums of money being upon Record in his Exchequer, Court of Wards, Dutchy, or other Court of Record, in any year, or ſeveral years, from the laſt year of *Henry* the 8th, to the 13th year of Queen *Elizabeth*, as ſhall amount to 1000 l: To have, receive, and recover the ſaid debts, duties, arrearages, and ſums of money to the ſaid J. S. his Executors and Adminiſtrators and Aſſigns. It was Reſolved in this Caſe, That the Grant was void for the incertainty: for, by Grant, no debt incertain may paſſe, if it cannot paſſe by the grant at the beginning: As if the King hath 100. Acres of Land in D, and he granteth a man 20. Acres of the Land in D, without deſcribing of them by the Rent, Occupation, or Name, &c. this Grant is void: and in caſe of the King, the Patentee ſhall not have Election, as he ſhall have in the caſe of a Common perſon; but in the caſe of the King, if the 20 Acres are deſcribed, or by abuttals, or by name certain in the Particular, it is a good demonſtration, which 20. Acres ſhall paſſe. It was Reſolved, 2. That in this caſe by force of the words, Arrearages, he ſhall not have Arrearages of Rents, Reliefs, and mean rates of Lands in the Court of Wards. 3. If there be words in the Letters Patents which do explain what arrearages the King intends; as if he ſay particularly, Arrearages of Rents, Reliefs, Tenths, or annual payments whatſoever, untill 1000 l. be paid; the ſame hath well explained the Kings meaning, and they ſhall paſſe by ſuch Letters Patents. Trin. 9 Jac. in the Court of Wards, *Stockdales* Caſe. *Cook* 12. Part, 86.

4. *What things the King may grant by his Letters Patents; and what not: And where things in action or poſſibility; Where not: And what, and where they ſhall paſſe by general words in the Letters Patents: or muſt have expreſſe words to paſſe there; Where not.*

1. THe King by his Letters Patents, granted *gubernationem et Cuſtodiam* of the Lands of a Lunatique, without an accompt to be rendred for the ſame; but the certainty of the Lands were not found by the Commiſſion: The Grantee was impleaded. It was adjudged in that Caſe, That the Patentee ſhould not have Aide of the King. Hill. 28 H.8. *Dyer*, 25.

2. A man held a Mannor of the King, to which there were Royal Franchiſes belonging, as to have Eſcheat of Treaſons of all thoſe who held of the ſaid Mannor; and one held another Manor of the ſame Manor, to which an Advowſon was appendant; and he who held the Mannor of the King, was attainted of Treaſon; for which cauſe, the King ſeiſed the ſaid Manor; and afterwards he who held the other Manor to which the Advowſon was appendant, was attainted of Treaſon, and the King ſeiſed that Manor; and afterwards the King granted the Manor which was holden of him *cum Advocationibus eidem pertinent.* It was the Opinion of the Court, That the Advowſon did not paſſe with that Mannor, but was appendant as it was before. See 6 E. 3. vouch. Mich. 30 H. 8. *Dyer*, 44.

3. The King made a Leaſe of the Scite of an Abby, by theſe words, *ſcil. Necnon omnia terras, prata, paſtura, et ſubſcript. cum pertinentiis nuper Monaſterio pertinent. viz.* ſuch a Cloſe, ſuch a Cloſe, ſuch a Cloſe; and ſo naming divers Cloſes: and whether the word (*viz.*) ſhould have reference to the word *ſubſcript*, or to the whole ſentence, *viz.* to *omnia*, was the Queſtion? It was the Opinion of the Juſtices, That it ſhould have relation but to the *ſubſcript*, which was the particular Cloſes; and if any other Lands were belonging to the ſaid Monaſtery, that the Grantee ſhould not have them. Mich. 6 E. 6. *Dyer*, 77.

4. Note. It was holden by the Juſtices, That the King by no Grant or means can ſever a Tenure in Chief from the Crown, for that no Subject can take it with ſuch Prerogative. And therefore, if the

the King doth releaſe to his Tenant in *Capite*, to hold by a Grant, and not in *Capite*, it is a void Releaſe, becauſe it is a thing meerly incident to the Perſon and Crown of the King: And if at this day, the King makes a guift in tail, to hold of him in *Capite*, and afterwards grants the Reverſion of that Land to another in Fee, the Tenure nor Service ſhall not paſſe to the Grantee, but ſhall remain to the King, becauſe they are not incident to the Reverſion, but to the perſon of the King. Mich. 30 H. 8. *Dyer*, 45.

5. If a man be in Execution, *ſub ſalva Cuſtodia*; he cannot be diſcharged out of Execution by any Writ of Protection granted by the King. Trin. 5 Ma. *Dyer*, 162.

6. The King, after Inſtitution, and before his Induction of the Clark, may revoke his preſentation, but ſo cannot a common perſon. *Cook* 6. Part, *Greens* Caſe, 18 Eliz. *Dyer*, 348. and 16 Eliz. *Dyer*, 327. acc.

7. A. Tenant of Prince *Arthur* as Earl of *Cheſter* in Knights-Service in *Capite*, dyed; B. his eldeſt Son in Ward; B. dyed without Iſſue: Afterwards upon a *Devenerant*, C. was found brother and heir to B, and within age; C. at full age purſued his Livery, by a Writ to the Eſcheator, by the name of C, ſon and heir of A: It was a Queſtion, If the Lands continued in the Queen, or not; or that the Livery ſued was good? It was adjudged, That they did not; but that it was a good Livery, although he had not been named Heir to any of them: and now in truth he is heir to his Father, his brother being dead without Iſſue: and by making Livery, the King doth not part with any thing which is his own, but doth that thing only which in Juſtice he is bounden to do. And therefore if an Advowſon be appendant to a Manor, and the King makes Livery of the Manor, the Advowſon ſhall paſſe by the Livery, although it ſhall not be expreſly named: which would be otherwiſe in the Caſe of a Grant made by the King. Mich. 20 Eliz. *Dyer*, 360.

8. Before the Statute of *Prærogativa Regis*, by general Grant of the King, Knights Fees, Dowers, and Advowſons, have paſſed: but by the ſaid Statute of *Prærogativa Regis*, Cap. 15. they are reſtrained, if they be not granted by expreſſe words. *Cook* 1. Part, in the Caſe of *Alton Woods*, 50.

9. King *Ed.* 6. by his Letters Patents granted the Mannor of C. to *Owen* in Socage, rendring 9 l. Rent: Queen *Mary* granted parcel of the ſaid Rent to Husband and Wife in tail, the Reverſion in Fee being in the Crown: and afterwards the ſaid Queen reciting the ſaid Grant, granted the Reverſion of the ſaid Rent, to the ſaid husband and wife *Tenendum in Capite*: *Owen* purchaſed the ſaid Rent, by which it was extinct, and dyed ſeiſed of the Manor; his Son by his Will deviſed the ſame for payment of his debts, and dyed, his heir of full age: It was Objected in this Caſe, That although the Rent was extinct betwixt the parties, yet it ſhould be in *eſſe* as to the King for the benefit of his Tenure. Yet it was Reſolved, That the Deviſe was good for the whole Land; For *Owen* was not a perſon having the Rent at the time of the making of the Will; but was a perſon having the Mannor, and that being holden in Socage, the Deviſe was good for the whole. 29 Eliz. in *Cur. Wardorum*. *Carr's* Caſe, vouch. in *Cook* 3. Part, 31. in *Butler* and *Bakers* Caſe.

10. The King ſeiſed of a Mannor to which an Advowſon was appendant, Leaſed the ſaid Mannor (without ſpeaking of the Advowſon) for life; And afterwards granted the Reverſion *Habendum una cum Advocatione*: It was holden in that Caſe, That the Advowſon did not paſſe; for that during the life of the Leſſee, it was not appendant. Out of which Note, That if a man granteth an Advowſon appendant for life, the Reverſion is appendant to the Manor: But when a man Leaſeth the Mannor for life, excepting the Advowſon, the Advowſon in poſſeſſion cannot be appendant to the Mannor expectant upon an Eſtate for life. 38 H. 6. 33. *Cook* 5. Part, 11. in *Ives* Caſe.

11. A Right to certain Lands eſcheats to the King by the Attainder of the Diſſeiſee; the King after the death of the Diſſeiſor, grants by his Letters Patents, *ex gratia ſpeciali certa ſcientia et mero motu*, all the Lands, Tenements, Rights, and Hereditaments, which he hath by the Attainder of the Diſſeiſee. It was adjudged in that Caſe, That a bare right did not paſſe by the general words, but there ought to have been a ſpecial recital of them by expreſſe words. *Cook* 3. Part, 2. in the Marqueſſe of *Winchester's* Caſe. See H. 8. *Br.* Chief in Action, 14. and 8 Eliz. *Dyer*, *Cromers* Caſe.

12. King *Ed.* 6. by his Letters Patents *ex certa Scientia, et mero motu*, did grant to *Crouch*, *Omnes terras Dominicales Manerii de Willow*. It was adjudged, That the Cuſtomary Lands held by Coppy, being parcel of the ſaid Manor, did not paſſe; and yet they are in Law parcel of the Demeans of the Mannor. *Bridgman*, 14. acc.

13. The King ſeiſed of a Mannor to which an Advowſon was appendant, a ſtranger preſented, and his Clark was in by 6. moneths, the King not knowing of it: Afterwards the King by his Letters Patents granted the Manor with the Advowſon to a ſtranger, the Incumbent dyed; If the Grantee might preſent, was the Queſtion? It was holden by the Court, That he might; for the Advowſon was alwayes appendant to the Inheritance, and with that ſhall paſſe to the Grantee: For if a

Common perſon be ſeiſed of a Mannor to which an Advowſon is appendant, and a ſtranger preſents, and his Clark is in by 6. moneths; now the Advowſon is diſcontinued untill the other hath recontinued by a Writ of Right of Advowſon; but it is not ſo in the Kings Caſe: for a man cannot put the King out of poſſeſſion by preſentment or uſurpation; but the Patentee ſhall not have a *Quare Impedit* of the firſt diſturbance, for that remains in the King, becauſe the King hath not given it, being a thing in action, unleſſe he make mention of it in his Grant. And it was agreed in this Caſe, That the Patentee ſhould have the next avoidance, and in a *Quare Impedit* ſhould make his Title by the laſt preſentment of the King, without making mention of the preſentment of the ſtranger. Mich. 14 Eliz. *Hob.* 140.

14. Note. It was holden by the Juſtices, That the King cannot grant, no not to the Queen, to hold a Court in Equity, nor can ſuch Court be holden by preſcription; For the King cannot grant any thing in derogation of the Common-Law, but *tenere placitum*, according to the courſe of Law, may be granted and preſcribed in; and the Chancery of *Cheſter*, and *Durham*, are incidents to a County Palatine, which had *Jura Regalia*. See 13 Jac. in C.B. *Martin* and *Marſhall*'s Caſe. *Hob.* 63.

15. The Eſtates and perſons of Idiots and Lunatiques, are by Law entruſted to the King; and therefore, If the King ſhould grant to one that intrudeth upon the poſſeſſions of an Idiot or Lunatique, or taketh their perſons unlawfully, that he would not meddle with them, but ſuffer them to do their pleaſure; theſe were void Grants. See *Hob.* 155. in *Colt* and *Glovers* Caſe, acc. So if the King having a Lapps, ſhould grant to an Intruder, that he would not preſent to the Church; Or if one ſhould uſurp upon the Kings Lapps, and the King ſhould grant to the Uſurper, that he would not remove his Clark; this were a breach of the truſt repoſed in him as well for the benefit of the true Patron, as for the good of the Church: for by this means the Patron ſhould loſe his Patronage. *Hob. ibid.*

16. A Lapſe cannot be granted over as a grant of the next Lapps of ſuch a Church, before it fall, or after: If the Lapſe Incur, and then the Ordinary dye, the King ſhall preſent, and not the Executors of the Ordinary: for it is rather an adminiſtration then intereſt; and if the Patron preſent, and his Clerk be Inſtituted, and remain without Induction 18. moneths, the King ſhall not preſent him upon Lapps, as he may do upon a direct Patronage accruing to him by guard of Temporalties, or of his Tenants heirs after Inſtitution, and before Induction: and a Lapps is an Act and Office of Truſt repoſed in the King, who is *cuſtumg ſtabilimentum Juſtitiæ*, the end of which Truſt, is to provide the Church of a Rector in default of the Patron: and therefore as the King cannot transfer this Truſt to another, ſo he cannot divert the thing with which he is truſted to any other purpoſe; and therefore although he may ſuffer the Church to ſtand void, which is *culpa*; yet the King cannot grant, or bind himſelf that he will not fill the Church: for that were *Injuria, et malum in ſe*. See in *Colt* and the Biſhop of *Coventry* and *Lichfield*'s Caſe, *Hob.* 154.

17. The Queen granted to Sir *William Cordall*, the Cuſtody of the Heir of one K, *et omnium terrarum* to him diſcending or appertaining as Son and Heir of the ſaid K; if the ſaid K. happen to dye his ſon and heir being within age: Afterwards K. conveyed his Lands to the uſe of himſelf for life, and after his deceaſe, to the uſe of his Wife in tail, the remainder to the right heirs of him and his Wife. Afterwardt K. and his Wife made a Leaſe for 40. years, and ſuffered a Common Recovery for the Aſſurance of the Leaſe: The Husband having Iſſue a Son within age, dyed; after the Wife dyed: all which was found by Office. It was holden in this Caſe, That the Grantee ſhould have the Wardſhip of the body, and Marriage of the Heir, which was veſted immediately after the death of K, by the Saving of the Acts of 32 & 34 H. 8. of title of Ward, to the King; but he ſhall not have the third part of the Lands by the Grant: for he had the tail and Fee expectant now by diſcent from the wife: And it was holden in that caſe, That the Heir muſt avoid the Leaſe, for that the wife had nothing in the Freehold at the time of the Recovery. Trin. 8 Eliz. *Dyer*, 252. *Kniſton*'s Caſe.

18. The Archbiſhop of *Canterbury* had *catalla Felonum* within his Mannor of D; he committed Treaſon; and afterwards the Queen made a Grant to the Almnor of all goods of *Felo de ſe*: after, the Biſhop was Attainted: *Hales*, who had a Leaſe for years, became *Felo de ſe*; the Queen granted the Leaſe: the Queſtion was, Whether the Patentee ſhould have the Leaſe or the Almner? It is left a Quære, in *Dyer*, 308. But ſee that Quære now Reſolved: for it is ſaid in *Cook* 1. Part, 50. that the Patentee ſhall have it, and not the Almner. And in that caſe, it was ſaid, That the King might grant that which was not in him at the time; as the King may grant the Wardſhip of an Heir when it ſhall happen; or the Temporalties of a Biſhop when they ſhall fall. But other Juſtices held, That it was otherwiſe of other Eſcheats. Quære. 2 Ma. *Dyer*, 108. *Hales* Caſe.

19. The Queen under the great Seal of the Court of Wards, granted the Lands of T. her Ward.

Ward to *Willoughby*, To have during the Minority of T, or any other his heir male: It was decreed in that case in the Court of Wards, That the Statute of 32 H. 8. of Erection of the Court of Wards, did not give any authority to grant Wards, which might after happen; but onely Wardships in possession during their minorities, and after untill Livery be sued; Or if the Ward dyeth, untill Office found of the next Ward. Quere; for by the Case next before, It seems that such a grant of a Ward is good, being made by the King. Hill. 2 Eliz. *Dyer*, 178.

20. The King granted by his Charter, That all manner of Ships coming to such a Haven laden with Merchandizes, should be unladen at such a certain place, and not elsewhere, to the intent that the King might be answered his Customes, and the Grant holden good. 2 E. 3. *John de Britains* Case, vouch. in *Cook* 5. Part, 63. in the Case of the Chamberlain of *London*.

21. The King cannot grant to any other to make of Strangers born, Denizens: For the Law esteems it a point of high Prerogative, *Jus Majestatis, et inter insignia summæ potestatis*, to make Aliens born, Subjects and Denizens of the Realm; and it is a thing inseparably and individably annexed to his Royal Person. And therefore, by the Statute of 27 H. 8. Cap. 24. many ancient Prerogatives as Flowers of the Crown, as authority to pardon Treasons, Murder, Manslaughter and Felony; Power to make Justices in Eyre, Justices of Assise, Justices of Peace, *Oyer* and *Terminer*, and of Gaol-Delivery, which had been severed from the Crown, were thereby again re-united to the Crown; but, authority to grant Letters of Denization, was never mentioned therein to be resumed; for that it never had been claimed by any, by any pretext whatsoever. *Cook* 7. Part, 25. in *Calvin's* Case.

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5. *Of Graunts of the King of Offices; and to give Lands in Mortmain, where they shall be good; Where not: And how, and by what words they may be granted; and where for life, lives, or years: And where in Fee; Where not.*

1. IN the time of the vacancy of the Chief Justice of the Court of Common-Pleas: Queen *Mary* granted the Office of Exigenter of *London*: It was holden by the Justices, That the Grant was void, for the said Office was incident to the Office and place of the Chief Justice of the said Court of Common-Pleas, and the Queen her self might not use it, nor grant it. Mich. 2 Eliz. *Dyer*, 175. *Scrogges* Case.

2. The Queen by her Letters Patents granted the Office of the Forrest of W. to A. and B. for their lives; which Letters Patents were enrolled in the Exchequer: A. surrendred the Letters Patents, B. being beyond the Sea, in the Chancery, which was cancelled there, and a remembrance made thereof *in dorso*: but it was not cancelled there. Afterwards, the Queen granted the said Office to J. S, reciting the former Surrender to have been in the names of A. and B: B. returns, and prayed a *Conſtat*, and required the Keeper of the Great Seal to grant a *Certiorari* to remove the Record of the Enrolment out of the Exchequer into the Chancery. And the Opinion of the Court was, That he might have it: by the purview of the Statute of 4 E. 6. Cap 4.

3. If the Patentee of the King be removed, and put out of an Office granted him by the King, by reason of later Letters Patents; the first Patentee shall have a *Scire facias*, to shew cause, why the later Letters Patents should not be revoked: and if upon the Return of the *Scire facias*, he cannot shew any cause why the latter Letters Patents should not be revoked and made void; Judgment shall be given for the forfeiture of his said Office, and that the Letters Patents, and the Enrolment thereof shall be void. Pasch. 3 Eliz. *Dyer*, 197. And see, *Cook* 1. Part, 51. If Letters Patents granted by the King, are void; although that in our Books it appears, that *Scire facias* is brought to have the Letters Patents repealed of Record, and to be cancelled; yet in Law, the Letters Patents and Grants are void *ab initio*.

4. The Queen by her Letters Patents, granted the Office of Clerk of the County Court to *Mitton*, with all Fees for the Term of his life, and afterwards Constituted A. Sheriff of the said County; who claiming the said Clerkship to be incident to his Office, appointed another man to be Clerk there: It was adjudged in that Case, That the Grant of the Queen by Patent was void: For it was Resolved, 1. That the Sheriff is an Ancient Officer of the Realm; and when the King hath made such an Officer, he cannot abridg the Sheriff of any thing which is incident unto or belonging to his Office: Also, the Office of Sheriff is an entire thing, and it cannot be determined in part; for it ought to continue entire without fraction or diminution; unlesse it be divided by Act of Parliament. 2. Resolved, That the County Court is incident to the Office of Sheriff. 3. Resolved, If such grant of the Queen should be good, many Inconveniences would arise, for then the Records

might be imbezelled; and yet the Sheriff, to whom the entry of them doth belong, ſhould be put to anſwer for them: and the Certificate of all Records out of the County-Court doth belong to the Sheriff. *Cook* 4. Part, 33. *Mitton's* Caſe.

5. The King granted the Office of Keeper of his Park of A. to J. S. for his life; and by other Letters Patents granted him the Herbage and Pawnage of the ſaid Park for his life: and after reciting the ſaid Letters Patents, granted the ſaid Office of Keeper to J. D. after the death, ſurrender, or forfeiture, in as ample manner as J. S. enjoyed it. It was adjudged a good Grant, in reverſion of the Park to J. D: And in that Caſe, it was Reſolved, That the King cannot grant the Reverſion of an Office which another hath for his life: But the King reciting the Eſtate which ſuch a one hath for life, may grant the ſaid Office *Habendum poſt mortem, &c.* And when one is Officer for life, if the King without recital grant the ſame to another, the Grant is void: otherwiſe, if the King do recite the particular Eſtate for life. *Cook* 8. Part, 55. The Earl of *Rutland's* Caſe.

6. The King granted the Office of Marſhall of the Marſhalſey of the Kings-Bench to one for life; and afterwards the King granted the Reverſion of the ſaid Office to J. S. for 21. years. The Grantee aſſigned his Intereſt to A: Tenant for life deputed J. D. his Deputy at Will, and dyed: A. by Deed aſſigned the ſaid Office to J. S: It was found by Office, that J. S. committed divers forfeitures, by ſuffering Priſoners to eſcape. In this Caſe, theſe Points were Reſolved. 1. That the King might ſeize the Office for the forfeitures, without ſuing a *Scire facias.* 2. Reſolved, That the ſaid Office being an Office of Truſt, could not be transferred over to another, but ought alwayes to be granted for life, and to be executed by none but by the Grantee: and therefore a Leaſe for years made of that Office is void; for then it might fall into the hands of Executors or Adminiſtrators; and in matters concerning the Adminiſtration of Juſtice, the Law will not repoſe confidence in perſons unknown. *Cook* 9. Part, 96. Sir *George Reynell's* Caſe.

7. Note. It was Reſolved by the Juſtices, That where, the King granted the Office of a Serjeant at Arms (to attend upon the Lord Keeper) to J. S. for life, That the King might by paroll Licence the ſaid J. S, that he might abſent himſelf from the Execution of the ſaid Office for a time; becauſe he is immediately Officer to the King himſelf, and but attendant upon the Lord Keeper: and in ſuch caſe, the King doth not depart with any Intereſt, but ſuſpends the Service of a Serjeant at Arms only for a time; And therefore it was holden, That ſuch a Licence, though but by word only, is good. But it was agreed in that caſe, That the non-attendance upon ſuch an Office, is cauſe of forfeiture of it; but then it ought to be a voluntary negligence, and not when it is with the aſſent of the King. Paſch. 21 Eliz. in *Canc.* Rot. 1. *Mark Steward's* Caſe, *Cook* 9. Part, 99, 100.

8. King *Henry* 8. granted to A. and B. *Officium unius Auditorum Curiæ ſuæ Wardorum, Habendum* to the ſaid A. and B. *conjunctim et diviſim pro termino vitarum ſuarum, et eorum alte ius diutius viventis*: A. dyed; Afterwards B. dyed; Queen *Eliz.* granted to C. and D. *Officium unius Auditorum Curiæ ſuæ Wardorum*; in ſuch manner, and in ſuch words, as the firſt Grant was made to A. and B: Afterwards King *James* granted to E. and F, *Officium unius Auditorum*; *Habendum poſt mortem dict. C. et D. vel eorum alterius diutius viventis, vel à tempore quo Officium illud per foriſfact. ſurſum reddit. vel quomcunq; alium modo vacuerit*, reciting the Grant made to C. and D: E. dyed; And afterwards the King reciting both the ſaid Grants, granted the ſaid Office to G, *Habend. poſt mortem prædict. C. D. et F. vel aliquem eorum eorum qui citius mori contigerit.* C. dyed, living D. F. and G: In this Caſe, theſe Points were Reſolved, 1. That the Letters Patents to A. and B, *de Officio unius Auditorum Curiæ ſuæ Wardorum*, were good: For, although the Statute of 32 H. 8. Cap. 46. enacts, That there ſhall be two perſons which ſhall be called Auditors of the Lands, &c. yet it is but one Office, and both are but *unus Officiarius.* 2. That although that two perſons Auditors, are but one Office, yet the words in the Grant, *conjunctim et diviſim, et alterius eorum diutius viventis*, are material: For if an Office be granted to two for the Term of their lives, without more ſaying, the Grant is void; for being an Office of Truſt, there ſhall be no Survivor of it, and therefore the words in the Grant, *conjunctim, &c.* ſerves to this purpoſe, That the Survivor ſhall be one of the perſons, to whom another ſhall be added. 3. Reſolved, That the ſaid Grant made to E. and F, in Reverſion, was void, becauſe an Auditor is a Judicial Officer, for they are Judges of the Court; and a Judicial Office cannot be granted in *futuro.* 4. Reſolved, That the Grant made to G. was void; becauſe a Judicial Office cannot be granted in Reverſion; and becauſe the ſame recites the Grant made to E. and F. as a good Grant: whereas it was void, and ſo the King was deceived in his Grant. *Cook* 11. Part, 3. & 4. Auditor *Carles* Caſe.

9. If an Office either of the grant of the King, or of a Subject, which concerns the Adminiſtration of Juſtice, or execution of Juſtice, or the Kings Revenue, or the Commonwealth, or the la-

tereſt, benefit, or ſafety of the Subject; be granted to any man that is unexpert, and hath no skill or ſcience, to exerciſe or execute the ſervice, the Grant is meerly void, and the party diſabled by Law, and incapable to take the ſame. So an Enfant is not capable of the Office of the Stewardſhip of the Court of a Manor either in Poſſeſſion or Reverſion; Nor is a man though never ſo skilfull and expert, capable of a Judicial Office in Reverſion, but muſt expect untill it fall in poſſeſſion. Likewiſe hargaining or giving money, or any manner of Reward for Offices, ſhall make ſuch a Purchaſor incapable thereof; becauſe it is preſumed he will by bribery, extortion, or other indirect means, make up his purchaſe, though it be to the prejudice of the Commonwealth. *Cook* 1. Part, *Inſtitutes*, 31. See 15 Car. in B. R *Young* and *Fowlers* Caſe. *Marſh*, 40. Mich. 41 Eliz. *Scamblers* Caſe, adjudged acc. *Crook* 1. Part, 401.

10. The Creation, and alſo the Grant of the Office of *Garter*, King of Arms, belongs to the King onely, and is granted by the Kings Letters Patents: and he receives the ſaid Office and Dignity of King of Arms, with ſeverall Enſigns of Honour and Dignity: and the King in his Patent doth give him the name of *Garter, King of Arms*: for the words in his Patent are, *Nomen tibi imponimus* (viz. *Garter*); and further, the words in his Letters Patents of Creation and Grant, are, *Creamus, Coronamus, et nomen imponimus*: And therefore if he be ſued without theſe additions, of his Office of Dignity, he ſhall be diſcharged. Mich. 33 Eliz. in B. R. *Dethick* King of Arms Caſe, *Leon.* 248, 249.

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6. *Graunts made by the King, under what Seal they may paſſe; and under what not: And where in ſuch caſe they ſhall be good; Where not.*

1. THE Statute of 27 H. 8. which eſtabliſheth the Court of Augmentations, requires, That all Grants for life or years, of all Offices concerning the Land, ſhould be ſealed with the Seal of the ſaid Court: And a Leaſe was made of Lands which was within the Survey of the Court of Augmentations, under the Great Seal, & not under the Seal of the Augmentation Court: It was doubted, 30 H.8. *Dyer*, if the ſaid Statute was not in the Negative, 50. But ſee that Quære more Reſolved, *Cook* 11. Part, 64. in Dr. *Foſter's* Caſe, where it is Reſolved, That the Leaſe under the Great Seal was not void. And there it is ſaid, That if it be enacted, That the younger Son ſhould have an Appeal of the death of his Father, the ſame ſhould not exclude the elder Son: becauſe there are no words of reſtraint. And ſo in the principal Caſe, their being no words of reſtraint, a Leaſe under the Great Seal, was good.

2. If Leaſes be made of Lands and poſſeſſions which are annexed to the Dutchy of *Lancaſter*; and lying within the County Palatine of *Lancaſter*, be made under the Seal of the Dutchy Court at *Weſtminſter*; ſuch Leaſes are void: Becauſe by the Statute of 37 H. 8. Caſe 40. ſuch Lands and poſſeſſions ought to paſſe under the Seal of the County Palatine, and not under any other Seal. Mich. 7 Eliz. *Dyer*, 232.

3. The King ſeiſed of a Mannor in Fee in the Right of his Crown, granted a Copyhold parcel of the ſaid Mannor to one in Fee; and after by his Letters Patents under the Exchequer Seal, made a Leaſe of thoſe Lands for 21. years: The Leſſee for years granted his Eſtate to the Copyholder: The King reciting the Leaſe for years, granted the Reverſion in Fee; the Grantee entred upon the Copyholder. In this caſe (amongſt other things) it was Reſolved, That the Leaſe under the Exchequer Seal, was good by common uſage: For the Cuſtomes of the Kings Courts are a Law, and the Common-Law takes notice of them: And a Leaſe by Order of the Exchequer by the word *Committimus. Habendum tenendum et reddendum*, ſuch a Rent is there good by ancient uſage. And the Law takes Notice of divers of the Kings Seals. The King Licenſeth one to make Attorney under the Privy Seal, it is good. The King may command one, *Quod Ne exeat Regnum* under the Privy Seal, or his Privy Signet: But a Protection is not good under the Privy Seal: The King diſcharged a Debt due to him, under the Privy Seal, and it was not good; but it ought to be under the Great Seal. See *Cook* 2. Part, *Lanes* Caſe.

4. *Robert Everden* Knight, brought a Writ of Privy Seal to the Juſtices, reciting, That he was a Baron, Commanding them to diſcharge him of ſwearing in *Jurat. Aſſiſ. ſeu recognitionibus Quibuſcunque jur.* becauſe the Barons ought not to be of any Enqueſt, or Aſſiſe, without their Will: and upon this Writ under the Privy Seal, upon good advice had, he was by the Juſtices diſcharged: 48 E. 3. 30. *Cook* 6. Part, 53. acc.

5. The King may ſend his Privy Seal to any Subject, to retorn into *England*, and to be under his ſubjection: and if it be certified, that he was ſerved with the Privy Seal, and, *ſpretis mandatis Domini Regis*, refuſes to Retorn, his Lands upon ſuch Retorn may be ſeiſed upon as forfeit for ſuch his contempt; 2 Eliz. *Dyer*, *Barnes* Caſe; and

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no traverſe can be taken upon it, becauſe the Privy Seal it ſelf is not upon Record; but the Queen her ſelf ſhall receive it from whoſe hands it firſt came, as alſo the Meſſage upon it; and the King or Queen her ſelf ſhall be Judge of the Contempt. See 25 Eliz. in the Exchequer-Chamber, *Cater's* Caſe, *Leon.* 9. acc.

6. *Edmond de Wooſtock*, 18 E. 2. went beyond Sea without the Kings Licence, with *Roger de Mortimer*. The King did certifie the ſame into the Chancery, reciting, That he had ſent his Privy Seal, and that the ſaid *Edmond*, *ſpretis Mandatis noſtris redire recuſavit*; whereupon a Commiſſion iſſued forth to ſeize his Lands into the Kings hands. *Leon. ibid.*

7. In 11 Jac. It was a Queſtion, Whether a Preſentation made by the King to an Advowſon appendant to a Manor parcell of the Dutchy under the Great Seal, were good, or not? And whether it ought not to be under the Seal of the Dutchy? It was Reſolved, That the Preſentation was good: For that the Preſentation was but the Kings Commendation of his Clerk to the Ordinary, and was not any Intereſt of the Inheritance of the Advowſon, but a thing concerning the Advowſon onely, and as a fruit fallen from the Tree; and the King might have preſented by word only: and therefore *à fortiori*, a preſentment under any of the Kings Seals, the Great Seal, Privy Seal, or Privy Signet, was good enough. Mich. 11 Jac. in C. B. the King and the Biſhop of *Lincoln's* Caſe. And where the King had an Advowſon in the right of his Ward, and preſented to the Advowſon under the Great Seal, and not under the Seal of the Court of Wards; ſuch Preſentation was likewiſe adjudged to be good. Mich. 8 Car. in C. B. The King and the Biſhop of *Chicheſter's* Caſe. See *Godbolt*, acc. and *Hughes Parſons* Law, 51. See Mich. 3 Car. in C. B. *Stephens* and *Potters* Caſe, adjudged accordingly, *Cro.* 1. Part, 70, 71.

8. A man Covenanted to build 3. new houſes upon ſuch Lands as were demiſed unto him, unleſſe he was reſtrained by the Kings Proclamation: In an Action of Covenant brought, the Defendant pleaded, That ſuch a day the King made a Proclamation to reſtrain buildings. The Plaintiff Demurred, Becauſe the Proclamation was not pleaded to be made *ſub magno ſigillo Angliæ*. The Court was of Opinion, That the Proclamation binds not, unleſſe it be under the great Seal; and if it be denyed, there can be no Iſſue upon it, but only *Nul tiel Record*; which cannot be, unleſſe he plead it to be *ſub magno Sigillo*. Hill. 5 Car. in B. R. *Kyſley* and *Manning's* Caſe. *Cro.* 1. Part, 130.

9. Upon a Special Verdict, The Queſtion was, Whether a Leaſe by the King under the Exchequer Seal, of Lands uſually demiſed to one for life, the Remainder for life, the Remainder to a third for life, reſerving the uſual Rent, was good or not? It was much inſiſted upon, That it could not be good, but under the Great Seal; for that a Freehold cannot paſſe from the King, but by a Patent under the Great Seal. But it was holden by all the Juſtices, That Leaſes for life under the Exchequer Seal, reſerving the ancient Rent, are allowable and good for the Kings benefit, that his Lands ſhall not lye unletten. And *Lane's* Caſe, *Cook* 2. Part, was vouched, That ſuch was the Courſe of that Court. Quære; For in *Lane's* Caſe, it was but a Leaſe made for years. Hill. 13 Car. B. R. *Kemp* and *Barnards* Caſe. *Cro.* 1. Part, 369.

More Grants of the King.

1. THE Lord *Sturton* was ſeiſed of the Manor of *Quincamore*, and was alſo ſeiſed of the Mannor of *Charleton*, which was holden of the ſaid Mannor of *Quincamore*. The Lord *Sturton* was attainted of Felony; Afterwards, Queen *Mary* gave the ſaid Mannor of *Quincamore* to Sir *Walter Mildmay cum omnibus ſuis juribus & parcellis*. It was adjudged, That in this Caſe, the Mannor of *Charleton* did paſſe, becauſe it was now become parcel of the Mannor of *Quincamore*. Sir *Walter Mildmay's* Caſe, *Leon.* 26. vouched in *March* and *Smith's* Caſe. Paſch. 27 Eliz. in C. B.

2. The Queen ſeiſed of a great Waiſt called *Ruddlesdown*, in the Pariſh of *Chipnam*, granted to the Mayor and Burgeſſes of *Chipnam*, the moyty of a Yard-land within the ſaid Waiſt, without certainty in what part of the Waiſt they ſhould have the ſame, or how it was bounded, or without any certain deſcription of it. After, the Queen granted to Sir *Walter Hungerford* the ſaid Waiſt; Afterwards, the Mayor and Burgeſſes by Warrant of Attorney under the Common Seal, authorized H. to enter into the ſaid Waiſt, and in behalf of them to make Election of the ſaid moyty; who did ſo accordingly. In this Caſe, It was Reſolved by the whole Court, That the ſaid Grant to the Mayor, &c. was utterly void, for the incertainty of the thing granted. But if a Common perſon do make ſuch a Grant, it is good enough, and there the Grantee may make his choyce; and by ſuch choice executed, the thing ſhall be reduced to a Certainty. 2. It was holden, That this Grant was not void only againſt the Queen her ſelf, but alſo

alſo againſt Sir *Walter Hungerford* her Patentee. Trin. 27 Eliz. in B.R. Sir *Walter Hungerford's* Caſe, *Leon.* 30.

3. J. S. by Indenture between the Queen of the one part, and himſelf of the other part, reciting, That whereas he is indebted to the Queen in 800 l. to be paid as followeth; *viz.* 20 l. at every Feaſt of St. *Michael*, till the whole ſum be paid; Covenanted with the Queen, &c. to convey unto the Lord Treaſurer and Barons of the Exchequer, and their Heirs, certain Lands to the Uſes following; *viz.* to the uſe of the ſaid J. S. and his heirs, untill ſuch a time as J. S. his Heirs, Executors, &c. ſhould make default in payment of any of the ſaid ſums; and after ſuch default, to the uſe of the Queen, her Heirs, and Succeſſours, untill her Heirs and Succeſſors ſhould have received of the profits of the ſaid Lands ſuch ſums of money as ſhould be behind; and after the Debt ſo paid, then to the uſe of the ſaid J. S. and his heirs for ever: and J. S. levied a Fine to the ſaid Uſes; and afterwards he bargained and ſold the Lands to a ſtranger: default of payment was made; the Queen ſeiſed the Land, and granted it over to J. D. *quoſuq*, the money be paid; and afterwards the money is paid. Upon Conference amongſt the Judges, It was Reſolved in this Caſe, That now J. S. againſt his Indenture of Bargain and Sale, ſhould have his Lands again: for at the time of the Bargain and Sale, he had an Eſtate in Fee determinable upon default of payment *ut ſupra*: which Eſtate only paſſed by the Indenture of Bargain and Sale, and not the new Eſtate, which is accrued unto him by the latter limitation after the debt paid; for that was not in *eſſe* at the time of the Bargain and Sale: but if the Conveyance which was by Bargain and Sale, had been by Feoffment or Fine, it had been otherwiſe; for by ſuch conveyance, all poſſibilities had been carried for the forcible operation of them. Mich. 28 Eliz. at Serjants-Inne. *Leon.* 33.

4. King *Ed.* 6. was ſeiſed of the Manor of *Hackney* and *Stepneth* in *Com. Middleſex*; within which, was a great Marſh, called *Stepneth* Marſh, parcel of the Manor of *Stepneth*, which the King had by exchange of the Biſhop of *London*; and there were alſo 20. Acres of Lands lying in *Stepneth* Marſh, which were known by the name of *Stepneth* Muſh, late parcel of the poſſeſſions of the Priory of Grace; The ſaid King granted to the Lord *Wentworth*, *Dominia ſive Maneria ſua de Hackney et Stepney, necnon omnes Mariſcos ſuos de Stepney in Stepneth prædict. necnon omnia terras et Tenementa et Mariſcos diſtis Maneriis aut certis præmiſſis pertinent.* It was ſaid in this Caſe, That the 20. Acres did not paſſe, becauſe the King here hath theſe two Marſhes by ſeveral Titles; and that Muſh only ſhall paſſe, which was intended to paſſe; *viz.* the great Marſh, and not the 20. Acres which the King had by a ſpeciall Title, although *ex vi termini* the Grant may extend unto it. But it was Reſolved by the whole Court, That the 20. Acres did paſſe, becauſe they are granted by a ſpecial Name; and it is not material what the value is; for who can reſtrain the bounty of the King? If the King granteth the Manor of D. to A, and further ſaith, *Domus et Concedimus*, ſo freely as J. S. had it; and J. S. never had it; yet the Grant is good: And in this caſe the Jury have found, That the 20. Acres are parcel of *Stepney* Marſh: and againſt expreſſe words, no favour ſhall be given to the King. It was adjudged againſt the Queen; An Information being brought, and *Lewis* and *Green*, the Owners and Occupiers of the ſaid 20 Acres. Hill. 30 Eliz. in B. R. rott. 10, The Queen againſt *Lewis* and *Greens* Caſe. *Leon.* 119, 120, 121.

5. The Queen by her Letters Patents granted the Scite of the Manor of B, lying in W; and all Lands, Paſtures, Woods, Underwoods, and Hereditaments, parcell or appertaining to the ſaid Scite, *Exceptis omnibus groſſis arboribus, boſcis, et moremio*: And further in the ſaid Letters Patents, there was a Proviſo, That the Leſſee ſhould have ſufficient Houſeboote and Hedgboote; and If notwithſtanding the ſaid Exception, the Leſſee ſhould have the Underwoods, was the Queſtion? It was ſaid, That the Leſſee ſhould have the Underwoods; for that is granted by expreſſe words: and the Exception extends only to *groſſis arboribus*: for this word [*groſſis*] in the Exception, extends to all that which followes; and if it was in the caſe of a Common perſon, it's clear, the Underwoods are not excepted. But the Court was of Opinion, That the Underwoods ſhould not paſſe to the Leſſee; for the Proviſo is, That the Leſſee ſhall have Houſeboot: which ſhews the Queens intent, that the Underwoods ſhould not paſſe: and if the word [*boſcis*] in the Exception, ſhould not extend to Underwoods, it ſhould be vain, and ſignifie nothing; which were hard, in the Caſe of the Queen. Trin. 33 Eliz. B.R. *Kenſam* and *Rithings* Caſe. *Leon.* 247.

6. Queen *Eliz. Anno* 15 of her Reign, granted to the Earl of *Shrewsbury* the Office of Earl Marſhal of *England*, and now the Earl prayed, that J. S. one of his Servants, to whom he had granted the Office of Marſhall of the Kings-Bench, might be admitted to it, becauſe the ſame is an Office incident to it, and in his power to grant; and that J. S. to whom the Queen had granted the ſaid Office of Marſhal of the Kings-Bench, by the Attainder of J. B, might be removed: And Preſidents were ſhewed, That the ſaid Office was a ſeveral Office from the Great Office. On the

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other ſide, Preſidents were ſhewed; firſt, in the time of E. 2. that Marſhall of the Office of the Kings Bench, was appendant to the ſaid Office of Marſhal of *England*. 8 R. 3. when the ſaid great Office was in the King, he granted the ſaid Office. to the Marſhall of the Kings Bench. But 20 R. 2. both Offices were re-injoyed as they were before And divers Letters Pattents of 4 E. 4. and 19 H. 8. were ſhewed, that the Inferiour Office had bin made part of the great Office. It was moved in this Caſe, That when the ſaid great Office is in the Kings hands, and the King grants the under-Office, if now the ſaid inferiour Office be ſevered from the great Office for ever. *Wray*, It is no ſeverance, for the chief Office is an Office of Dignity, which may remain in the King; but the under-Office is an Office of neceſſity, and the King himſelf cannot execute it, by which of neceſſity he ought to grant it. It was the Opinion of the whole Court, That the Earl ſhould have this Office of Marſhall of the Kings Bench in his power to grant, and ſo much the rather, becauſe it was to be granted but for life. Mich. 31 Eliz. in B. R. *Leon.* 320, 321.

Grants: *and* Graunts *of a* Common perſon.

1. *What is a ſufficient Deſcription of a Graunter, or a Grantee. Of Graunts; What good, what not; and the extent of it: And what things lye in Graunt; What not: And how Graunts ſhall be conſtrued.*

1. THere are many deſcriptions of Grantors, and Grantees. 1. Names, and nominations of perſons, or Bodies Politick or Corporate, whereof there are divers ſorts, as the proper Names, or Sirnames. 2. There are deſcriptions of Grantors, or Grantees, by names of Dignity, Office, and the like: And this will admit a deſcription made good by reputation; as Land will paſs to one by the name of Son, who is a Baſtard; or by the name of Wife, which is not lawful, if they be ſo reputed or known by that name. 3. There are names that have an equivocal anuphibology in them, as the name *Puer*, which may go for Male or Female; and yet if it be no way cleared to the contrary, it will *prima facie*, be taken for a Son. *Hob.* 32. in *Counden* and *Clerk* Caſe. H. 10 Jac. in C. B.

2. A man made a Feoffment in Fee to two, to the uſe of himſelf and his Wife for the Term of their lives, without impeachment of Waſte, during the life of the Husband, the Remainder after their deceaſe, to the uſe of J. his Son, for the term of his life. And further *vult et concedit* by the ſame Deed, that the Husband, Wife, Son, and the other Feoffees ſhould be ſeiſed of the ſame Land to them and their Heirs, to the uſe of the right Heirs of the body of the Son begotten. It was the Opinion of the Court in this Caſe, That there wanted apt words to raiſe the latter uſe. As if a man Bargain and ſell his Reverſion of Tenant for life, by words of Bargain and Sale only, the Reverſion ſhall not paſs, becauſe Bargain and Sell are not apt words to make a Grant. Paſc. 23 Eliz. in C. B. *Godbolt*, 7.

3. Two Joynt-Tenants for years of a Mill, the one grants all his eſtate, and dyes, the other reciting the Leaſe and death of his companion, and that he had all by ſurvivor-ſhip, grants *Molendinum prædict.* to the Plaintiff, and all his eſtate therein, and Covenants, that the Defendant ſhall quietly enjoy it, without any act by him: and bound himſelf in an Obligation to perform the Articles, &c. In debt brought upon the Articles, it was aſſigned for a breach, that the other had not granted the moyety, whereupon it was demurred, and adjudged for the then Plaintiff. Error was brought, and that Aſſigned for Error; for although the word (Grant) implies a general Warranty, yet the laſt clauſe of the Covenant being to enjoy, &c. without any act by him, &c. expounds the firſt. But the Opinion of the Court was, That the breach was well aſſigned; For he reciting that he had the whole, and granting *Molendinum prædict.* it muſt be underſtood and intended the intire Mill, which is the ground and agreement to which the Obligation refers; and the laſt clauſe cannot qualify it. Hill. 7 Jac. in B. R. *Proffer* and *Johnſons* Caſe. *Cro.* 2. Part. 233.

4. In Treſpaſs for cutting down of Trees, and carrying them away; The Defendant juſtified, and ſhewed, That A. was ſeiſed in Fee of the Cloſe where, &c. and by Indenture 21 Eliz. demiſed the ſame to J. S. and others the ſaid Cloſe *inter alia* excepting the Wood, and under-wood thereupon growing, *Habendum* for the life of one E. and Covenanted with them; *quod licetum foret*, for the Leſſees and their Aſſigns, to take upon the premiſes neceſſary Fire-boar, &c. to be expended upon the premiſes, or for the reparation of them. A. dyed,

E. ſurvived him, and took J. D. to Husband; J. S. and the other Leſſees, aſſigned their eſtate to E. and that the Defendants as Servants to J. D. and E. cut down four Trees, and carried them away, and expended them upon the premiſes. It was moved in this Caſe, That this Covenant being without the word Grant (being only *quod licitum foret*) was not good; but the Court was of Opinion, That the Plea was good enough, being in the ſame Deed of Leaſe. Hill. 8 Jac. in B. R. *Pinſtrey* and *Grimes* Caſe. *Cro.* 2. Part, 291.

5. *A.* 39 Eliz. did make a Leaſe and Grant of his Mannor, Farm, and Capital Meſſuage to B. with all the profits and appurtenances, together with all the Woods and under-woods there growing, and all the Trees, excepting ſix of the great Trees, *Habendum* for 40 years, rendring rent, with liberty to ſell, and cut down at any time during the Term, with a Covenant on the part of the Leſſee, to leave Wood on the Land at the end of the Term; this Leaſe by mean Aſſignments, came to the Plaintiff, who aſſigned it over to the Defendant, with an exception of the liberty of felling and cutting down; the Defendant the Aſſignee cut down, and takes away Timber Trees, for which the Action was brought. It was adjudged in this Caſe for the Defendant againſt the Plaintiff. The ſole point reſts upon the conſtruing of the words in the Grant; and how far they ſhall be expounded in point of Intereſt; and whether in this Caſe there be only a liberty or an Intereſt. It was holden by the Court in this Caſe, That by this Leaſe, and the words in the ſame, nothing doth paſſe ſevered from the Land; and the exception of the Trees in this Aſſignment is meerly void; and therefore after ſuch aſſignment made of the whole, he could not make ſuch exception of the Trees, as in this Caſe was made, and the exception being void, the liberty ſhall go with the privity of the Land. Trin. 1 Jac. in B. R. the Lady *Billingſley* and *Herleyes* Caſe. *Baſſ.* 2. Part, 5, 6, 7.

6. A man Demiſed, Granted, and to Farm let, &c. toget er with all manner of Timber-Trees and Under-woods, and Hedg-rowes thereupon appertaining, except all great Oaks growing in a certain Cloſe about t e Farm-houſe, to have and to hold the Farm for 21 years, rendring Rent: the Queſtion was, Whether the Leſſee might cut down and ſell the Timber-Trees not excepted, without being impeached for Waſte. The Lord *Dyer* conceived that he might, by force of this word (Grant), and by the meaning of the exception of great Oaks. But it was the Opinion of three other of the Juſtices, That he could not cut down the Timber, for that they were not ſevered from the Inheritance, nor paſſed by the Grant. Hill. 23 Eliz. *Dyer*, 374. See *Cook* 11. Part, 48. *Liſords* Caſe, acc. And ſee there the word Grant did not alter the Demiſe.

7. If a man doth Demiſe, Give, and Grant to another, and to Farm let, a houſe, and a ſtock of Cattel, and the Houſhold-ſtuff, theſe ſhall not paſſe, nor ſhall the Grant ennure to make the ſame a grant of the Houſhold-ſtuff; he ſhall only have and enjoy the ſame by way of Demiſe, and not otherwiſe. See 35 H. 8. *Dyer*, 56.

8. A. Leaſes for life to B. and afterwards levyes a Fine to the uſe of R. for life, the Remainder to A. in Fee, with a Proviſo or power to make Leaſes for 21 years, or three lives; and that the Conuſees ſhall ſtand ſeiſed to ſuch uſes. And afterwards A. Covenants to ſtand ſeiſed to the uſe of P. in tail, with divers Remainders over. And afterwards A. grants the Reverſion aforeſaid to L. for life, who diſtreynes and avows. In this Caſe, Judgment was given againſt the Avowant. 1. Becauſe by the Covenant, A. had deſtroyed his power to make Leaſes. 2. In this Caſe it was holden, That the pleading was nought, becauſe that he pleaded, That by Grant of *reverſionem prædict.* which was limited to A. himſelf in Fee upon the Fine, for he ought to have pleaded, as by limitation of the Indenture. So if the Reverſion be by Bargain and Sal, or if it be by way of Releaſe: if that be pleaded as a Grant, it is nought. Paſc. 39 Eliz. in C. B. *Cook* and *Bamhill's* Caſe. *Noy* 66.

9. A. Leſſee for life, the Remainder to B. in Fee. *A.* ſurrenders upon Condition to B. and enters for the Condition broken: B. dyes, and his Wife brought Dower againſt A. and the Iſſue was joyned upon *Ne unque ſeiſi que Dower.* It was found againſt A. And it was holden by the Court, That if a man Bargain and ſells his Lands in Fee by thoſe words only, and makes Livery, that yet the Bargainee, although that the Indenture was never enrolled, may plead that: For a Bargain includes a Grant. Paſc. 37 Eliz. in C. B. *Oſmands* Caſe. *Noy* 66. acc.

10. If a man grant an Annuity out of Land, and he hath nothing in the Land, yet the grant is good to charge the perſon of the Grantor in a Writ of Annuity. And if a man grants an Annuity to a Woman who takes Husband; and afterwards Arrerages d ennure, and the Wife dyes, ſo as the Annuity is determined, yet the Husband ſhall have an Action of Debt for the Arrerages. And in that Caſe, it was ſaid, That an Annuity is more then a thing in Action, for it may be granted over, by the Opinion of the whole Court. Mich. 29 Eliz. in C. B. *Sollergers* Caſe. *Goldsbr.* 30, 31.

11. There were four Joint-Tenants of an Advowſon, and one of them granted over his Inte-

ceſt. It was adjudged a good grant, and that the urvivor ſhould not hold place. Quære, becauſe t is a thing entire. Hill. 30 Eliz. in C. B. *Kemp* and the Biſhop of *Wincheſters* Caſe. *Goldesbr.* 81.

12. In Treſpaſs, the Defendant juſtified, That it was uſed within the Manor of D. that every Farmer of ſuch a houſe, had Common in the Lords Waiſt: The houſe came into the hands and poſſeſſion of the Lord, and he granted the houſe and Waiſt to J. S. in Fee. J. S. Bargains and ſells the houſe to J. N. with all Commons, Profits, and Commodities, uſed, occupyed, and appertaining to the ſame; and afterward, grants the Waiſt to another: And if the Grantee of the houſe ſhall have Common in the Waſt, was the Queſtion. It was objected, That he ſhould not, for then it ſhould enure as a new grant, which it cannot do here; and if it be a new grant, yet this hath reference to the uſage; and here the uſage is interrupted, and then the grant having reference to the uſage, and that is a void uſage; for a Leſſee for years cannot alledg an uſage, when nothing doth paſſe by the grant. But it was the Opinion of the whole Court, That the Grantee of the Meſſuage ſhould have Common, for this uſage is not a thing in ſtrictneſſe of Law appertaining to the Land, but this hath gained his reputation, that that ſhall paſs very well in a conveyance by apt words. For if a man make a Leaſe for years to one, and grants him Gommon for all his Kine, &c. and after this Leaſe expires, and he makes a new Leaſe, and grants ſuch Common as the firſt Leſſee had, this ſhall be a good grant of the Common to the Leſſee. So in this Caſe, this grant of the houſe with all profits and Commodities, to the ſame appertaining, ſhall be ſaid a grant of ſuch Common as other Leſſees of this Manor have uſed to have. Hill. 7 Jac. in B. R. *Grymes* and *Peacocks* Caſe. *Brownl.* 2 Part, 222.

13. If a man deviſeth Lands to his Son T. to hold to him, and the Heirs Males of his body for 500 years; his Heir ſhall not have the Lands, but his Executors, for this Term is but a Chattel, and cannot be entailed, and ſuch a Deviſee may alien the Term if he pleaſeth; and ſuch a Deviſe is but an eſtate for years, becauſe it is ſo in expreſs words deviſed, and againſt expreſſe words, no Inference or Interpretation ſhall be admitted. *Cook* 10. Part, 87. in *Leonard Lovets* Caſe.

14. The Earl of *Cumberland* demiſed Land to *Ana*, and one *Anthony Baldwine* her ſon, and to the Heirs of the ſaid *Anthony*, *Habendum* to them, from the date for 99 years. It was adjudged in this Caſe, That here, although that Heirs were mentioned in the premiſes of the Deed of grant, yet the *Habendum* in it was not repugnant, but that they have a joynt eſtate for years, for it cannot be repugnant as to *Anthony*, and yet good to *Ana*. *Cook* 2. Part, 24. *Baldwins* Caſe.

15. Upon a ſpecial Verdict, the Caſe was, A man was ſeiſed of the Manor of D. and of a houſe called W. in D. and alſo of a Leaſe for years in D. and he did Bargain and ſell to another, the Manor of D. and all other his Lands and Tenements in D. and in the Indenture did Covenant, That he was ſeiſed of the premiſes in Fee. And if the Leaſe for years ſhould paſſe by the general words, was the Queſtion. Quære, the Court was divided in Opinion; two Juſtices held, That it ſhould paſs, two other Juſtices held the contrary. Mich. 9 Jac. in B. R. *Edwards* and *Dentons* Caſe. *Godbolt.* 183.

16. A Feoffment was made of an Acre of Land parcel of a Manor, to which a Villain was regardant by theſe words, *viz. dedi unam acram*; And further *Dedi et Conceſſi Villanum meum.* It was holden in that Caſe, That the Villain ſhould paſſe as in groſſe, and that they were ſeveral gifts, although there was but one Deed. 33 H. 8. *Dyer*, 48.

17. The Caſe was, In an *Ejectione firmæ*, this; A. was ſeiſed of a Manor, wherein were Copyholders for life; and Leaſed a Copyhold called *Harris*-Farm, parcel of the Land in Queſtion to B. and C. for eight years, to begin after the death of A. and his Wife, and by their Indenture, leaſed the ſame Manor to them, as before; the Copyholder did ſurrender, and A. granted a Copyhold, to hold according to the Cuſtome of the Manor: A. and his Wife dyed, ſo as the Leaſe to B. and C. was to begin: B. entred, and granted all his Intereſt to a ſtranger, and dyed. C. entred into the whole as ſurvivor, and made the Leaſe to the Plaintiff, and the Copyholder entred, and C. brought his Action. The Queſtion was, Whether C. the Plaintiff ſhould have *Harris*-Farm as in groſſe, or as parcel of the Manor. It was the Opinion of the Court, That he ſhould have it as in groſſe, and ſo he ſhould avoid the eſtate of the Copyholder. Mich. 28 Eliz. in C. B. *Green* and *Harris's* Caſe. *Godbolt.* 127.

18. Husband and Wife were Joynt-Tenants in Fee of a Manor, out of which the Queen had a Rent of 20 l. *per annum*, and ſhe by her Letters Pattents in conſideration of money paid by the Husband; did give, grant, releaſe, and remiſe to the Husband and his Heirs the ſaid Rent of 20 l. *Habendum et percipiend.* to him and his Heirs; The Husband did deviſe the Rent to another and his Heirs, and dyed. It was debated, Whether the Wife ſhould pay the Rent or not. It was holden by

by the Court, That ſhe ſhould pay it: For the Deed having words of Grant and Releaſe, it ſhall be referred to the Election of the Husband, and for his beſt advantage how he will take it, and there is no neceſſity that the Rent be extinguiſhed in his poſſeſſion, for every grant ſhall be taken beneficially for the Grantee; and if it contains words of two intents, he ſhall take that which is beſt for him. Mich. 15 Eliz. *Dyer*, 319.

19. A. had two houſes adjoyning, viz. the Swan, and the red Lyen; A. had the Swan in his own poſſeſſion, and occupied a Parlour, or a Hall (which in truth belonged to the Red Lyen), with the houſe called the Swan; and then Leaſed the Red Lyon houſe; and afterwards by his Will, deviſed his houſe called the Swan. In that Caſe, it was holden, That the rooms in the Red Lyon which A. occupied with the Swan, ſhould paſſe, although of right thoſe rooms did belong to the Red Lyon-houſe. And in the argument of that Caſe, this Caſe, Paſc. 36 Eliz. betwixt *Ewer* and *Hayden* was put. A man hath a houſe and divers Lands in W. alſo a houſe and Land in D. And by his Will he deviſeth all his houſe and Land in W. and D. and there the houſe which is in D. doth not paſſe. But if he had deviſed all his Lands in W. and had not ſpoken of the houſe, the houſe had paſſed. And ſee where the Deviſor had two Farms, and occupyed parcel of one Farm with the other Farm; and deviſed the Farm which he had in his poſſeſſion; the part of the other Farm which he had occupyed with it, did paſſe, as it was adjudged in one *Lyon* and *Bakers* Caſe. See Tr. 21 Jac. in B. R. *Knights* Caſe. *Godbolt*. 352.

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2. *By a Grant of all Lands, Tenements, and Hereditaments; What ſhall paſſe, and where things Appendants ſhall paſſe by the Graunt of the Principall: Where not.*

1. NOte, it was ſaid, That when a man hath any thing apperdant to a houſe, or Mill, the moſt durable thing is the Land, which is the Foundation, and upon which the whole Fabrick doth conſiſt: And in reſpect of that, by the grant of all Lands, houſes, Mills and Woods paſſe. For in a *Precipe* where a houſe or a Mill is demanded, the Warrant of Attorney is *in placito terræ*; and in ſome ſpecial Caſes by a Recovery of Lands, a man ſhall recover houſes. And therefore it was Reſolved in this Caſe, That although the houſe or Mill falleth down by the act or default of the Donor, or by the wrong of another; yet becauſe that the moſt perdurable thing which includes the whole remains, he may re-build it in caſe it fall without loſing of any appendant or appurtenant to it, but then it ought to be upon the ſame place which was the old foundation. *Cook* 4. Part, 86, 8. in *Lutterells* Caſe.

2. In *Nevills* Caſe, there were three Queſtions. 1. Whether a Dignity, as an Earldome, might be entailed. 2. Admitting that it might, if it might be forfeited; by Attainder of Treaſon, by a condition in Law *tacitè* annexed to the Eſtate of the Dignity. 3. If it was forfeited by the Statute of 26 H. 8. of Treaſon. It was objected, That it was not within the Statute of *Donis*, becauſe the Statute ſpeaks of Lands and Tenements. And a Dignity cannot be within the word Tenement; and the grant of a thing which doth not concern Lands and Tenements, nor exerciſable in Lands and Tenements, is not within that Statute as an Annuity. But it was Reſolved. 1. That the name of Dignity, as of an Earl, or Viſcount, might be entailed within the ſaid Statute, becauſe it concerns Land, and every Baron or Earl is created of ſome place. 2. That it might be forfeited by Attainder by a Condition in Law annexed to the Eſtate of the Dignity. 3. Admitting that it could not be forfeited for Treaſon at the Common Law; yet it was forfeitable by the Statute of 26 H. 8. of Treaſon, which gives a forfeiture of all Inheritances: And a Dignity is an Inheritance, and an Hereditament, and ſo within the expreſſe words of the Statute. *Cook* 7. Part, 33. *Nevills* Caſe.

3. A man ſeiſed of a houſe and Land in Fee, made a Leaſe of the houſe and Land for years, if the Leſſee ſhould ſo long live: And afterwards by Deed Indented, granted the houſe and Land to another, to have and to hold, the Reverſion to the Grantee for life, *cum per mortem ſuæ ſum reddit. vel forisfacturam* of the Leſſee, or otherwiſe it ſhould happen; *Reddendo inde annuatim* to the Grantor, and his Heirs *cum reverſio accideret* 10 s. *per annum*; the Leſſee dyed, the Grantor diſtreyned for the Arrerages, aſwell before the death of the Leſſee as after. In this Caſe, amongſt other points, it was Reſolved, That by the demiſe of the houſe and Land for life, the Reverſion did paſſe; but by grant of a Reverſion, the Land would not paſſe. 2. In that Caſe Reſolved, That by the Reſervation, the Rent ſhould not begin before that the Reverſion did fall in poſſeſſion, and theſe words *cum reverſio prædict. accideret*, ſhall be expounded according to the intention of the parties, which was not that the Grantee for life ſhould pay the Rent reſerved be-

fore that he might take the profits to raiſe the Rent out of it. Hill. 23 Eliz. in C. B. *Paſmore* and *Prowſes* Caſe. vouch. in *Cook* 10. Part, 107. in *Loſelds* Caſe.

4. A man by Indenture demiſed a houſe and Land *exceptis omnibus arboribus ad tunc creſcend. ultra creſcentiam* 21 *annorum*, *Habend. tenenta prædict. cum pertinenciis* for life: And afterwards by the ſame Indenture Covenanted to ſtand ſeiſed *de tenementis prædict. cum pertinenciis*, to the uſe of J. S. in tail, with divers Remainder over. In this Caſe, it was Reſolved amongſt other things. 1. That it is true, that a thing appendant in poſſeſſion, cannot be parcel of a Reverſion expectant upon an eſtate for life; but in this Caſe, the Trees growing out of the Land, did paſſe with the Inheritance of the Land, as Charters and Evidences ſhall paſſe attendants upon the Inheritance, becauſe they are the ſinews of the Inheritance; and in all Leaſes made by the King, the Trees are excepted, and yet they ſhall paſſe in the Reverſion as parcel of the Inheritance: As a Milſtone, although it be actually ſevered from the Mill, yet it remains parcel of the Mill, and ſhall paſſe by Demiſe or conveyance of the Mill. 2. Reſolved, When he Covenanted to ſtand ſeiſed *de tenementis prædict. cum pertinenciis ſuperius dimiſſis*, the Inheritance of all the Land did paſſe, and by conſequence the Trees parcel of the Inheritance did paſſe with it as things annexed. *Cook* 11. Part, 50, 51. *Richard Lyſords* Caſe.

5. Note, That before the Act of 33 H. 8. by the general words of any Act of Attainder of all Hereditaments, a Condition was not given to the King; and therefore by the ſame Act, by expreſſe words, Conditions are given to the King, and yet a Condition is an Hereditament: and although that an uſe was an Hereditament (for there ſhall be a *poſſeſſio fratris* of it), yet by the Grant of all Hereditaments, or words of all Inheritances, an Uſe was not given to the King by any Act of Attainder. And note, there is a difference betwixt Inheritances and Chattells. For a Right of Action concerning Inheritance, is not forfeit by Attainder, but Obligations, Statutes, Recognizances, and ſuch other things in Action, are forfeit by Attainder. *Cook* 3. Part, 2. in the Marqueſſe of *Winchellers* Caſe.

6. If a man be ſeiſed of a Mannor to which a Leet, Waife, or Stray, or any other Hereditament which is no of any annual value, is appendant, or appurtenant, there by the Deviſe of the Mannor with the appurtenances, thoſe ſhall paſſe as incidents to the ſaid Mannor; for inaſmuch as the Statute of 32 H. 8. enableth to Deviſe the Mannor by expreſſe words; by conſequence it ſhall enable to deviſe the Mannor with all its incidents and appurtenances: For it never was the intent and meaning of the Parliament, That when the Deviſor had power to deviſe the principal, that he ſhould not have power to Deviſe that which was incident or appendant to it. *Cook* 3. Part, 33. in *Baſter* and *Bakers* Caſe.

7. A man had Common appendant by Preſcription to a houſe, and 40 Acres of Land. He made a Feoffment in Fee of parcel of the Land. It was adjudged, That the Feoffee ſhould have Common for that parcel; for that the Common being appendant, extends to all and every parcel of the Land: As if a man maketh a Leaſe of three Acres each of equall value, rendring Rent: If the Leſſor grant the Reverſion of one Acre, the grantee ſhall have 12 d. of the Rent, for although it be one Leaſe, one Reſervation, and one Rent, yet becauſe the Reverſion to which the Rent is incident, was ſeveral, the Rent ſhall attend upon the Reverſion and every part of it, and ſhall be alſo ſeverable; ſo in the other Caſe, becauſe the Common is a tendant upon the Tenancy which is ſeverable, the alienee of part ſhall have Common. *Cook* 8. Part, 79. *Wyet Wilds* Caſe.

8. In a Writ of Entry in the *Quibus* againſt *Marrow* of 70 Acres of Lands in H. the Tenant pleaded, That C. was ſeiſed in Fee, and demiſed the Land to him for life. The Demandant counted himſelf by the ſaid C. *abſque hoc quod demiſit modo et forma*: And it was found, That C. and ſix others were ſeiſed to the uſe of C. of the ſaid 70 Acres, and of a houſe in H. which houſe and Lands had bin time out of mind, called W. and that the ſaid C. and ſix others did joyn in the Leaſe of the ſaid houſe called W. with the appurtenances, to the Tenant. It was found for the Tenant, and moved in Arreſt of Judgment, That it was not expreſly found, that the ſaid 70 Acres were not appertaining to the ſaid houſe called W. Yet the Opinion of the Court was, That it was good, and that by the Grant of the one, the Grantee ſhould have the other as a thing implyed in the Grant. Hill. 5 *Eliz. Dyer*, 158.

9. *Where*

3. *Where the Grant of a Rent, &c. out of a Reversion, or such thing which doth not lye in Demesne, shall be good; and when begin, where not: And where a Grant of a Rent to begin at a day to come shall be good; Where not.*

1. A Man seised of a Mannor in Fee, made a Feoffment to the use of himself, and the Heirs Males of his body, and for want of such Issue, the Remainder over to another in tail, the Reversion to the Feoffer and his Heirs, the Feoffer had Issue and dyed: He in the Remainder grants a Rent-charge out of the Land; the Issue in tail levyed a Fine, and suffered a Recovery, and afterwards dyed without Issue. It was Resolved in this Case, That the Recoverers, nor any which came under them, should be subject to the Charge of him in the Remainder; for it was Resolved, That a common Recovery had against Tenant in tail, barred not only the Remainder, and all Leases and Charges made by him in the Remainder, but also the Reversion, and all Charges made by him in the Reversion; and another reason was added, viz. The cause why the charge of him in the Remainder might be good in Law, is by reason of the possibility that the Land might come into possession: For a Remainder in it self is not a thing mayntenable, out of which a Rent may be, nor can a distresse be taken for it; and therefore there is a Condition tacitly annexed to the charge of him in the Remainder, to take effect when the same shall come into possession: which Condition, by the Common Recovery suffered, is utterly destroyed: And the Grantee of him in the Remainder cannot falsifie the said Recovery, and therefore the Recovery shall barr and make void all charges made by him in the Remainder. *Cook* 1. Part, 62. *Capell's* Case.

2. If Lessee of a house for 20. years, Leaseth part for two years, and afterwards demiseth the whole unto another for 10. years, rendring Rent; so as this doth enure as a Lease in Reversion, for the part in Lease, and a Lease in possession of the residue. It was Resolved, That the Rent shall issue out of the whole, and the interest of the Term, although it be not any Estate which can be surrendred; and although it be joyned with the Lord in possession, yet the Rent shall go out of the whole. *Cook* 4. Part, 73. *Rawlins* Case.

3. A Bishop after the Statute of 1 Eliz. made a Lease of a Fair parcel of his Bishoprick for three lives, rendring the auncient and accustomed Rent; which was confirmed by the Dean and Chapter: It was adjudged, That in this Case, the Successour should avoid the Lease, because that a Fair is not a Franchize, or Liberty, not Mayntenable, out of which a Rent cannot be reserved; and all Leases of such Inheritances out of which the ancient Rent cannot be reserved, are voidable by the Statute: So if the Lease had been made for 21. years, the Successour should avoid it; for although the Rent was good by way of Contract, yet it is not incident to the Reversion, *Cook* 5. Part, 3. *Jewel's* Case. And see, That a Rent ought to be reserved out of a thing which is Mayntenable, and out of that it shall only go. And therefore, if a Lease be of Land and of Multure rendring Rent, or of Land and a Hundred, or Advowson; the Rent shall issue out of the Land, and not out of the Multure, Hundred, or Advowson. But the King may reserve a Rent out of a Fair. *Cook* 5. Part, 4. The Lord *Mountjoyes* Case.

4. A man seised of Black Acre in Fee, and of White Acre for years, granted a Rent out of both to J. S. for life, with clause of distresse in both Acres; the Rent was behind, J. S. distrained and avowed in White Acre. In this Case, these Points were Resolved, 1. That if Lessee for years grant a Rent out of Land during the life of the Grantee, the same is good during the Term, if the Grantee shall so long live: and if Lessee for years grant the Land to another for life, he hath the whole Term, if he so long live. 2. When a man grants a Rent out of Land in Fee, and a Term for years to have for life, the Freehold of the Rent shall issue out of the Land in Fee, and not out of the Term which is but a Chattel; and the agreement of the parties cannot change such a thing with a Rent, which is not chargeable by the Law; as out of an Advowson, Hundred, Fair, because in an Assise of the Rent they cannot be put in View, nor any distresse taken out of them; and in an Assise, the Acre in Fee shall be only put in view. And if the Grantee of the Rent doth accept a Lease of the Acre for years, by that the Rent is not suspended. 3. Resolved, That White Acre during the Term, shall be subject to the Distresse, although that the Rent did not issue out of it. And it was Resolved, That when Land is charged with a Rent, Goods and Chattels may be charged to the Distresse; and if the Grantee doth take a Lease of part of the Land, the same doth not suspend the Distresse: and a man may distrain in his own possession; but a man cannot have a Rent out of his own Land. *Cook* 7. Part, 23. *Bate's* Case.

5. The Father granted a Rent-Charge out of his

his Land, to his Son in Fee; the Rent was behind, the Father dyed, and the Land diſcended to the Son, by which the Rent by act in Law was extinct. The Son brought an Action of Debt againſt the Executors of the Father, for the Arrearages which did encurre in the life of his Father. In that caſe it was adjudged, That it did not lye as for arrearages of Rent; but as arrearages of an Annuity, an Action was maintainable: for that there the Election, which the heir had now determined, by bringing of his Action. 45 E. 3. Executors, 71. *Cook* 4. Part, in *Ogaell's* Caſe.

6. J. S. Parſon of a Rectory, demiſed the ſame to E. for 80. years, if ſhe ſhould ſo long live; or if ſhe ſhould dye within the ſaid Term of 80. years, or alien, that her Eſtate ſhould ceaſe, and then it ſhould remain to R. *pro et durante, reſiduo termini prædict.* 80. *annorum*, if he ſhould ſo long live, and if he, &c. *ut ſupra*, &c. that then his Eſtate ſhould ceaſe, and that then it ſhould remain to W. *pro et durante tot annis prædict. termini* 80. *annorum ſi, &c* and if he alien, then his Eſtate to ceaſe: and then the ſaid J. S. *conceſſit præmia durante tot annis de prædict.* 80. *annorum quot ex tunc continuerent et remanerent in exipirat.* to F. his Executors and Aſſigns: J. dyed; T. dyed, and R. dyed; the Adminiſtrator of T. entred. In this caſe it was Reſolved, That the Demiſe to R. and W. were void, Becauſe that the Eſtate which E. had, was not for 80. years abſolutely, but *ſub modo*; and then, the Demiſe to them, *pro tot annis quot remanerent poſt mortem dict. E. pro et durante reſiduo Termini* 80. *annorum*, was void; for that there cannot be a Reſidue of the ſaid Term, becauſe the ſame determined by the death of E. 2. Reſolved, That the Leaſe and Limitation to T. was void for the incertainty; for it was uncertain at the time of the making of the Leaſe, how many of the years ſhould be behind at the time of the death of E; and alſo it was not good, becauſe R. and W. did over-live T; which was againſt the expreſſe limitation; for his Eſtate was limited upon two Contingents, and therefore the Leaſe to him was void. *Cook* 1. Part, 154. The Rector of *Chedington's* Caſe.

7. A man poſſeſſed of a Term for 90. years, In conſideration of Marriage, demiſed the Land to his Son for 70. years, to begin after his death; and afterwards the Leſſor dyed; and it was adjudged a good Leaſe; and not void for any incertainty when it ſhould begin, becauſe here it was a Deviſe of the Land it ſelf, and not of the Term. Mich. 35. Eliz. in B.R. *Locroft's* Caſe.

8. Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years, the Leſſee entred: Tenant for life granted *Tenementa prædict.* to C, *Habendum Tenementa prædict.* from the Feaſt of *Mich.* next following; the Leſſee for years attorned; C. entred, and made a Leaſe at Will, to whom the Tenant for life levied a Fine *come ceo.* It was Reſolved in this Caſe, That the Grant to C. was void, becauſe an Eſtate of Freehold cannot begin in *futuro*. 2. Reſolved, That the Grant being void at the beginning, the Attornment afterwards could not make it good; and therefore in this Caſe when C. afterwards entred, that he was a Diſſeiſor. *Cook* 2. Part, 55. *Buckley's* Caſe.

9. The Queen made a Leaſe of the Manor of S. to H. B. for 21. years; who demiſed parcel of the ſame to others for years; and afterwards the Queen in conſideration of a Surrender of all his Eſtate, Term, and Intereſt, granted the ſaid Manor to the ſaid H. B. *Habendum à die Conſeſſionis prædict. Literarum Patt.* for 3 lives: In this caſe, (amongſt other Points) it was Reſolved, That an Eſtate of Freehold cannot begin at a day to come, and therefore becauſe that the Leaſe granted by the Letters Patents which amount to a Livery, could not begin at a day to come: for if the Freehold ſhould paſſe preſently by the Letters Patents, then the Queen ſhould have a particular Intereſt, againſt the Rules of the Common-Law in the mean time. And therefore it was adjudged, That the Letters Patents were void. *Cook* 5. Part, 94. *Barwick's* Caſe.

10. A Leſſee for years of a Term for 1000. years, granted his Term and Intereſt therein to H. his daughter, *Habendum* to the Leſſor and his Wife for their lives; and after their deceaſe, to the ſaid H; and if ſhe hath heir of her body, then to her Executors and Aſſigns. Provided, That ſhe pay to D. her Siſter, after the death of A. the Leſſor and his Wife, 10 l. *per annum* during her life. Provided alſo, That if H. dye unmarried, having no Iſſue of her body lawfully begotten, that then this Grant to H. ſhould be void, and then D. ſhould have the Term. It was Reſolved by the Court in this caſe, That the Grant was good, and the *Habendum* to the Grantor and his Wife for their Lives, and after to H, is void, and becauſe it is repugnant to the Grant: but the *Habendum* ſhews the intent of the parties, That the Executors of H. ſhall not have it, unleſſe ſhe be married, and hath heirs of her body: And the Proviſo (That if ſhe dye unmarried, having no Iſſue of her body lawfully begotten, that it ſhall be void) ſhall have this Conſtruction, That if ſhe dye unmarried or married, having no Iſſue of her body, (for ſhe may not have lawful Iſſue, unleſſe ſhe be married) then it ſhall be void. Paſch. 5 Car. in B. R. *Goſwick* and *Chigwell's* Caſe, *Cro.* 1. Part, 110.

11. A. poſſeſſed of a Leaſe for 100. years, he and his Wife by Indenture, ſealed by the husband, but

but not by the wife, aſſigned all their Eſtate in the Leaſe to J. S. *reddend. et ſolvendo* to A. and his wife *durante termino prædict.* to them and the Survivor of them if they ſhould ſo long live, 10 l. at the Feaſts of *Michael.* and the *Annunciation*; and if the Rent be behind for 40. dayes after, and not paid to him or his Wife, or the Survivor of them, then it ſhould be lawful for the ſaid A. and his Wife, and to the Survivor of them, their Aſſigns to re-enter: J. B. entred; A. dyed, and his Wife ſurvived him; the Rent is behind, and not paid, and the Wife at the laſt day demands it; the Adminiſtrator of A. alſo demands it; the Queſtions were, 1. If the Reſervation were good to the wife, becauſe ſhe never ſealed the Deed? 2. If it be not good to the wife, becauſe ſhe is a ſtranger to the Deed? If it be good to the husband, and his Executors and Adminiſtrators during his wife's life-time? 3. Whether the Adminiſtrator for the benefit of the wife, ſhall not enter into the Land? The Opinion of the Juſtices was, That although the *Reddendo & Solvendo durante termino*, if there had been no more ſaid, had been a good reſervation during the Term; yet when he doth limit the reſt upon the expoſition of the Law, but it is *Reddendo* to him and his Wife, and the Survivor of them, if they ſo long live, that is an expreſſe Reſervation, that it ſhall not be during all the Term, but to him and his wife, and the Survivor of them. 2. That the Reſervation to the Wife is void, becauſe ſhe is no party in intereſt, or to the Deed; and to the ſurviver of them is alſo void to give the wife any privilege thereof: And therefore this Rent endures no longer then during the life of the Husband. Hill. 7 Jac. in B.R. rott. 550. *Bland* and *Inmans* Caſe. *Cro.* 1. Part, 210.

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4. *By a Grant, of* omnia bona et catalla, *What things will paſſe; What not. And of what things a Grant made ſhall be good: and by what words, paſſe; What not: And where by Deed; Where without Deed.*

1. NOte, by *Fitzherbert*, by the Grant of *omnia bona et Catalla*, Obligations will paſſe. Mich. 25 H. 8. 5. Quære; for, 11 Jac. in C.B. it was adjudged to the contrary.

2. The Lord *Latimer* deviſed to his Wife the third part of all his Goods and Chattels; It is a Quæ, in 38 Eliz. *Dyer*, 59. If it ſhall be intended, as they are after his Debts and Legacies paid; or the third part of his Goods, as they then were? See that Quære Reſolved, 5 Ma. *Dyer*, 164. For there a man deviſed the moyty of his Goods to his Wife, Where it was holden, That ſhe ſhould have a moyty of the goods which he had at the time of his death, if his Executors had ſufficient Aſſetts to pay his Debts; otherwiſe not.

2. *Bona et Catalla*, extend not to Charters or Evidences, concerning Freehold, or Inheritance, or Obligations or Deeds, or Specialties, being things in Action: yet in ſpecial Caſes, they ſhall extend unto them: and therefore if one bringeth a Bagg or a Cheſt of Evidences into an Inne, or Obligations, or Deeds, or other Specialties, and by default of the Inn-keeper they be taken away; the Inne-keeper ſhall Anſwer for them: and the Writ ſhall be *bona et catalla* generally, and the Declaration ſhall be ſpecial. *Cook* 8. Part, 33. *Calyes* Caſe.

4. In Evidence given to a Jury in an Action of Debt; It was ſaid by the Lord *Dyer* and *Manwood*, Juſtices, That if Executors grant *omnia bona ſua*, that the goods which they have as Executors, do not paſſe. Which ſee, 10 E. 4. 1. by *Danby*. But the contrary to that was holden by *Wray*, Chief Juſtice of the Kings-Bench, and by *Plowden*, in *Brachridges* Caſe, 18 Eliz. And they denyed the Opinion of 10 E. 4. to be Law; for that by ſuch Grant made by Executors, the goods of the Teſtator do paſſe. Mich. 19 Eliz. in C.B. The Lord St. *John*, and the Counteſſe of *Kent*'s Caſe. *Leon.* 263.

5. It was Reſolved, That if an Executor grant *omnia bona ſua*, that the goods which the Grantor hath as Executor to J. S. ſhall paſſe. See 19 H. 6. 4. *Plow. Com.* 289. Hill. 34 Eliz. in C.B. *Bally* and *Spooners* Caſe. *Noy*, 106.

6. If a man makes a Leaſe for years, or a Grant of a Villein, it cannot be done without Deed, nor can the Leſſee aſſign it over without Deed, becauſe it is derived out of a Freehold which lyeth in Grant, which (indeed) is the materiall cauſe of the Grant: But a Wardſhip, is an Original Chattel (during the minority) derived out of no Freehold, and therefore as the Law createth it without Deed, ſo it may be aſſigned over without Deed. *Cook* 1. Part, *Inſtitutes*, 85. acc.

7. Rents, Advowſons, Conditions, Reverſions, Remainders, and other things which lye in grant, as they cannot be granted without Deed; ſo they may not be ſurrendred without Deed. *Cook* 1. Part, *Inſtitutes*, 338.

8. If the Heir apparant of the Diſſeiſee doth diſſeiſe the Diſſeiſor, and grants a Rent Charge, and then the Diſſeiſee dyeth, the Grantor ſhall hold it diſcharged; for there a new right of entry diſcendeth

cendeth unto him: and there it is re-united, and ſhall hold it diſcharged. So if the Father diſſeiſeth the Grandfather, and granteth a Rent-Charge, and dyeth, the Entry of the Grandfather is taken away; and if the Grandfather dyeth, the Son is remitted, and ſhall avoid the Charge.

9. It was moved, That if a man grants *Veſturam terræ*, what ſhall paſſe: It was ſaid, That one man might have the Veſture, and another the Soile; and that he who hath but *veſturam terræ*, that he cannot dig the Soile. If many have a Meadow together; *viz.* to be divided between them every year by Lots, how much every one ſhall have of graſſe in ſuch a place, how many in ſuch a place, and ſo change every year according to Lots: It was ſaid, That in that caſe they have not the Freehold, but only *veſturam terræ*. Trin. 30. Eliz. in C. B. *Owen*, 37. See *Dyer*, 375. acc.

10. A man granted *Scitum Rectoriæ cum decimis eidem pertinent. Habendum Scitum prædict. cum pertinentiis* for 20. years; the firſt Grantee dyed within the Term: And becauſe the Tythes are not expreſſly named in the *Habendum*, if the Grantee ſhould have them for life only, was the Queſtion? It was the Opinion of the Court in this Caſe, That the Tythes are parcel of the Rectory: and therefore for the nearneſſe betwixt them, *ſcil.* the Rectory and the Tythes, the Tythes upon the matter do paſſe together with the Scite of the Rectory for the Term of the 21. years. Paſch. 28 Eliz. in the Exchequer. *Cary*'s Caſe, *Leon.* 281.

11. A man made a Leaſe for years, reſerving the Wood and Under-Woods; The Leſſee cut down trees. It was holden, That Waſte did not lye againſt him, becauſe the Statute is *in terris boſcis. ſibi dimiſſis.* And it was holden by *Shelley*, The Land paſſed. See 28 H. 8. *Dyer*, 19. 14 H. 8. 1. And *Bacon*, *Maxim.* 11. If I demiſe *omnes boſcos meos* in D. for years, this paſſeth the Soile: but if I demiſe all my Lands in *Dale*, *exceptis boſcis*, this extendeth to the Trees only, and not to the Soil. See *Cook* 5. Part, 11. *Ives* Caſe. *Cook* 11. Part, *Liford*'s Caſe. And ſee 46 E. 3. 22. 43 E. 3. 34. That by the grant of Wood, the Land it ſelf paſſeth, becauſe every mans Deed ſhall be taken ſtrongeſt againſt him that granteth.

12. A man made a Leaſe to A. of White Acre for 10. years, and of Black Acre to B. for 20. years; and afterwards by Deed reciting the ſaid Leaſes, he made a Leaſe to J. S. of both Acres for 40. years, to begin after the end or determination of the ſeveral Leaſes made to A. and B: the Leaſe of White-Acre ended; the Leaſe of Black-Acre continued. It was adjudged, That the Leaſe to J. S. ſhould begin after the ending of the Leaſe of White-Acre; for that every mans Grant ſhall be taken ſtrongeſt againſt the Grantor, and moſt beneficially for the Grantee; and in this caſe it is more benefic ali to J. S. to have the Leaſe begin after the end of the Leaſe of White-Acre, and not to ſtay untill the Leaſe of Black-Acre be ended. See *Cook* 5. Part, 7. Juſtice *Wrabam*'s Caſe. And ſee there the Caſe, Where a man ſeiſed of 3. Acres, maſe a Leaſe to one for life, and of another to B. for life, and of the third to C. in tail; and afterwards Covenanted with his Brother, that after all the ſaid Eſtates ended, that he ſhould ſtand ſeiſed of the ſaid 3. Acres to the Uſe of his brother in tail, that in that caſe, it was adjudged, That preſently by the death of B, one of the Tenants for life, the brother ſhould have that Acre which B. had, and ſhould not ſtay untill all the Eſtates were ended. 32 Eliz. in the Court of Wards, *Pollard* and *Alcock*'s Caſe.

13. A man hath Eſtovers either by Grant or Preſcription to his houſe, although in alteration the Rooms or Chambers of his houſe; as to make a Parlour of a Stable where it was a Hall, and the like alterations of qualities, and not of the houſe it ſelf, and without making new Chimneys, by which no prejudice doth accrue to the Owner of the Wood, it is not any deſtroying of the Preſcription, nor doth it make the Grant void; and the building or addition of new ſtories or Chimneys to the houſe, will not make the Grant or Preſcription void; but he cannot ſpend or imploy his Eſtovers in the new Chimneys, but in the new Additions: for that will make his Grant or Preſcription to be void. *Cook* 4. Part, 87. in *Lutterell*'s Caſe.

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5. *Of Grants made of the next Avoidance of the Church, how they ſhall be taken and conſtrued: And where Grants made, and by whom to charge the Church, ſhall be good; Where not.*

1. IF a man be ſeiſed of an Advowſon, and the Church becomes void, And then the Patron grants *proximam nominationem preſentationem & inſtitutionem cum primò et prompè vacaverit*: It was the Opinion of the Juſtices, That the Grantee ſhould not preſent to that avoidance, becauſe the Patronage remained in the Grantor; but he ſhall have the next after that which is the firſt which can be granted: and the reaſon given, becauſe this Avoidance is a thing in Action. Hill. 28 H. 8. *Dyer.*

Dyer. See *Cook* 1. Part, *Inſtitutes*, 120. The next Avoydance is not a thing meerly in Action; For if a Woman hath an Advowſon, and the Church void, and ſhe being married, dyeth; the husband ſhall preſent to the Advowſon: but otherwiſe it is, of an Obligation made to a Woman, becauſe the ſame is a thing meerly in Action.

2. The Patron of a Church granted *proximam advocationem* to one, and afterwards he granted *proximam advocationem* to another; It was the Opinion of *Fitzherbert*, That the Grant was void, for a man cannot grant that which he hath not: *Shelly*, Juſtice, conceived, That it ſhall be intended the next Avoidance which he could grant; and ſaid, There was no difference betwixt *proximam præſentationem, et proximam advocationem*: which *Fitz.* denyed; but ſaid, Perhaps if he had ſaid, That he had granted *proximam advocationem ſuam*, that the Grant might be good for the ſecond Avoidance. But ſee *Cook* 1. Part, *Inſtitutes*, 378. it is holden, That in this caſe the ſecond grant is meerly void, being the act of the party.

3. If a man be ſeiſed of an Advowſon, and taketh a Wife, and the Husband grants the third Avoidance to a ſtranger, the husband dyeth; the wife ſhall have the third Avoidance, and the grantee ſhall have the fourth Avoidance. So note a difference betwixt a Title by act of Law, and the act of the party; for the act of Law will not work a prejudice to a third perſon. 19 E. 3. *Quare Imp.* 154. acc.

4. In a *Quare Impedit* againſt the Biſhop and the Incumbent; the Plaintiff declared, That the Earl of *Oxford* was ſeiſed of the Advowſon of the Church of *O*, as of an Advowſon in groſſe; and preſented the Defendant Incumbent to the Church; who was Inſtituted: and afterwards, that the Church became void by the Statute of 21 H 8. of *Pluralities*; the ſaid perſon being Inſtituted and Inducted to another Church, of the value of 8 l; not being a perſon qualified within the Statute; and that the Patron granted to the Plaintiff *primam et proximam Advocationem dict. Eccleſiæ cum primo et proximam vacare contigerit.* It was holden in that Caſe, That the preſent Avoidance, which was then by reaſon of the Statute of Pluralities, did not paſſe unto the Plaintiff by that Grant. Paſch. 3 Ma. *Dyer*, 130. *Agards* Caſe.

5. The Church being void, the Patron by Deed made a Grant in this form; viz. *Dedi et Conceſſi* to A; B. *primam et proximam præſentationem et advocationem Eccleſiæ de C. et jus præſentandi ad eandem jam vacantem: Ita quod Licebit* to the ſaid grantee *ad eandem Eccleſiam ideoneam perſonam loci Ordinario hâc unica vice tantum nominare, et preſentare*; and afterwards the Church remained void by 6. moneths: for which the Biſhop collated for Lapſe; and afterwards the Church became void: and if the grantee ſhould have the ſecond Avoidance, or not, was the Queſtion? It was the Opinion of all the Juſtices, That the grant of the preſent Avoidance was void, becauſe it was a meer perſonal thing in expectancy, and a thing in Action; and ſuch a grant in the caſe of a Common perſon, is not good. But they all agreed, That the King might make ſuch a Grant, although it was a thing in Action, and the Grant ſhould be good. Paſch. 11 Eliz. *Dyer*, 283.

6. Leſſee for years of an Advowſon of a Rectory to which an Advowſon of a Viccarage was appendant, granted the next Avoydance of the Viccarage to J. S, if it did happen to be void during the Term in being; the Leſſee dyed inteſtate; his Adminiſtrator ſurrendred the Term of the Rectory to the Leſſor: and afterwards the Advowſon of the Viccarage became void. It was Reſolved in this Caſe, That notwithſtanding the ſurrender, that J. S. ſhould have the next Avoidance, becauſe the ſaid limitation was no more then the Law ſaid: For if Tenant for years grants an Avoidance, the Law implyes this Limitation, if the Church do void during the Term. 2. Becauſe the grantor ſhall not derogate from his own grant, and the grant of every one ſhall be taken ſtrongeſt againſt him, and beneficial for the grantee. 3. Becauſe for the benefit of the grantee, the Term ſhall be ſaid to have continuance. *Cook* 8. Part, 145. *Davenport's* Caſe.

7. In a *Quare Impedit*, The Defendant ſaid That A. was ſeiſed of an Advowſon of the Church of *D*; and by her Deed, 19 Jac. granted to J. S. the next Avoydance, and that J. S. dyed, and made his Executor, who preſented the Defendant to the Church being void. Upon Iſſue *Non conceſſit*, It was found, That A. granted to J. S. *durante vitâ ipſius J. S. primam et proximam advocationem*, and that he dyed before the Church became void: and whether this was an abſolute grant of the next Avoidance, as it was pleaded, was the Queſtion? It was Reſolved by the Court, That it was not; for it is not an abſolute Grant of the next Avoydance to J. S; but it is limited to him to preſent to the Advowſon, if it becomes void during his life; and not that otherwiſe it ſhould go to his Executors: And therefore it was adjudged againſt the Defendant. Paſch. 14 Car. upon a Writ of Errour, in B. R. *Mann* and the Biſhop of *Exeter* and *Hides* Caſe. *Cro.* 1. Part, 363.

8. In a *Quare Impedit*, the Caſe was, A. ſeiſed of an Advowſon in Fee, the Church being full, grants to B. *præſentationem quandocunq; et quomodo Cunq; Eccleſia vacare contigerit pro unica vice tantum*, with this Clauſe in it, *Ac inſuper*

voluit et conceſſit, that this grant ſhall remain in his force *quouſque Clericus habilem et idoneus*, by his Preſentation ſhall be Inſtituted and Inducted, and afterwards he grants away the Inheritance of the Advowſon in Feeſimple, the Church becomes void, the Patron Preſents, the Church becomes void the ſecond time; the Patron preſents again, and upon diſturbance of J. S. a *Quare Impedit* is brought. And in this Caſe, the Queſtions were, 1. Whether the ſaid J. S. not preſenting upon the firſt Avoydance, had not loſt and ſurceſſed his time. 2. Whether the clauſe in the grant *Ac inſuper voluit, &c.* ſhall enlarge the Grant or not. It was Reſolved by the Court, That the Grantee ought to take the firſt Avoydance which ſhall happen, or none. 2. That the clauſe *Et inſuper, &c.* ſhall not enlarge the grant, neither by the intent of the Grantor, nor yet by the Law. Tr. 8 Jac. in B.R. upon a Writ of Error of a Judgment in the Common-Pleas. *Stankey* and *Pools* Caſe. *Bolſt.* 1. Part, 26, 27.

9. Tenant in tail of a Mannor, to which an Advowſon was appendant, grants the next avoidance to J. S. and after dyes, before the Church becomes void: Afterwards the Iſſue in tail grants the next Avoydance of the ſame Church to the ſame Grantee: The firſt Queſtion was, Whether the firſt Grant was void by the death of the Tenant in tail, and the firſt Grant determined, if not, if the ſecond Grant be not a ſurrender of the firſt. It was the Opinion of the Juſtices, That if Tenant in tail be of an Advowſon, and the Church become void, and then he dyes; that by his death, the grant is meerly determined; and then in ſuch Caſe, If the King have title to the Mannor, to which the Advowſon is Appendant; and the Iſſue in tail during the poſſeſſion of the King, doth grant the next avoydance, the ſame is an uſurpation upon the Kings poſſeſſion; and if ſix Moneths do paſs, the King hath no remedy for ſuch an uſurpation upon him, but by bringing his *Quare Impedit*, Trin. 5 Jac. in B. R. upon a Judgment given in C. B. Whereupon Error was brought in B. R. *Walter* and *Boulds* Caſe. *Bolſt.* 1. Part, 31, 32, 33. And ſee Paſc. 25 Eliz. in C. B. where it was adjudged, That by two Uſurpations the King might be put out of poſſeſſion of his Advowſon, and put to his Writ of Right; and a grant made by him afterwards of the Advowſon, was adjudged void. See 47 E. 3, 4. and Mich. 27 Jac. in C. B. adjudged accordingly.

10. Parſon, Patron, and Ordinary, before 13 Eliz. made a Leaſe for 99 years, there being a Grant of the next Avoydance before this Leaſe; After the Parſon who made the Leaſe, dyed, the Grantee of the next Avoydance preſents another, who being Admitted, Inſtituted, and Inducted, entred, and avoided this Leaſe during his time, and afterwards dyed, the Patron who joyned in the Leaſe for years, preſents a new Incumbent, who was Admitted, Inſtituted, and Inducted. It was the Opinion of the Court, That he ſhould hold it diſcharged of the Leaſe for years; and the reaſon was, becauſe the Parſon hath the entire Fee as a Parſon may have of a Rectory Preſentative: And when he is in, and hath evicted the Leſſee, it is an abſolute eviction of the entire Term, without expectation of Reviver, and it is not only an Eviction for himſelf, but alſo for all his Succeſſors. Mich. 15 Car. in B.R. *Plowden* and *Oldfords* Caſe. *Cro.* 1. Part, 420.

11. The Incumbent may charge the Gleab, if the Patron and Ordinary joyn with him in the Grant, or conſent thereunto afterwards by a Licenſe precedent, or ſubſequent confirmation: Yet in that Caſe, If the Patron be but Tenant in tail, or for life; or the Ordinary but Patron, the Charge ſhall not be perpetual. For in the firſt Caſe, the Iſſue in tail, or he in the Reverſion or Remainder ſhall avoid, it and in the other, the Licenſe or confirmation of the Ordinary is not available to charge the Land without the conſent of the Dean and Chapter, but ſhall be avoided by the Succeſſor of the Ordinary. *Cook* 1. Part, *Inſtitutes* 300.

12. A Biſhop who is ſeiſed in the right of his Biſhoprick; or a Parſon who is ſeiſed in the right of his Church, they cannot diſclaim, becauſe they cannot avoid, or make void a thing which is veſted in their Church, unleſſe it be in Caſe of Franchiſes and Liberties, but there in a *Quo warranto* brought againſt them for ſuch Franchiſes or Liberties by the King, they may diſclaim in the Franchiſes and Liberties. *Cook* 1. Part, *Inſtitutes* 102.

13. It is a Rule in Law, That *Prælatus Eccleſiæ ſuæ conditionem meliorare poteſt, deteriorare non poteſt.* And therefore if a Biſhop, Parſon, &c. purchaſeth Lands to him and his Succeſſors, he cannot waive the purchaſe after himſelf, but his Succeſſor upon juſt cauſe ſhewed, *viz.* that the Rent payable upon the purchaſe is of greater value then the Land purchaſed, he may waive ſuch purchaſe made by his Predeceſſor. See 43 E. 3. 23. acc.

14. By the Common Law, Every Biſhop, Dean, Parſon, Vicear, &c. or Corporation Spiritual, might have charged their poſſeſſions, or made Leaſes of their Lands, for lives or years, without number or ſtint of time *Concurrentibus his qui in lege requiruntur.* But now by ſeveral Acts of Parliament, as by the Statute of 32 H. 8. 1 & 13 Eliz. they are reſtreyned to make Leaſes or Grants, but under certain limitations and Proviſos. As, 1. Their Grants or Leaſes muſt be made in Writing by Deed Indented, and not by word only. *Cook* 1. Part,

1. Part, *Inſtitutes* 44. 2. They muſt begin from the day of the date, or a *Confectione inde*. *Cook* 5. Part, the Lord *Mountjoyes* Caſe, 6. 3. The Antient Leaſe muſt be ſurrendred or yielded up, or expired, or ended within a year after the making of the ſecond Leaſe. *Cook* 5. Part, 2. *Elmors* Caſe. 4. There muſt not be a double Leaſe in being at one time. 5. The Leaſe muſt not exceed 21 years or three lives. 6. The Leaſe muſt be of Lands and Tenements maynorable, out of which a Rent may be reſerved, *Cook* 5. Part, 3. *Jewells* Caſe. 7. It muſt be of Lands and Tenements which have uſually been let to Farm 20 years before the Leaſe made, *Cook* 6. Part, 37. the Dean and Chapter of *Worceſters* Caſe. 8. There muſt be reſerved to them and their Succeſſors ſo much yearly Rent, or more, as hath bin accuſtomably uſed to be paid for the ſaid Lands, *Cook* 5. Part, 6. 9. The Leaſe muſt not be made without impeachment of Waſte. *Cook* 6. Part, 37.

15. If a Biſhop make any Leaſe, grant any Rent-charge, enter into Warranty, or doth any other act which tendeth to the diminution of the Revenues, which ought to continue for the maintenance of his Succeſſor, the Succeſſor ſhall avoid ſuch Leaſe, Charge, Grant, or Warranty, &c. But if a Biſhop being Patron and Ordinary, do confirm a Leaſe made by the Parſon, without the Dean and Chapter, and afterwards the Parſon dyeth, and the Biſhop collateth another to the Benefice, and afterwards is depoſed, tranſlated, or dyeth: yet the confirmation of the Leaſe remains good, becauſe there the Revenues which are to maintain the Succeſſor, are not diminiſhed. *Cook* 1. Part, *Inſtitutes* 301.

16. If a Parſon bring a *Juris utrum* for any thing concerning the Church, and the Defendant pleadeth in bar, the Warranty of his Predeceſſor, or Anceſtor; the Plaintiff ſhall not be barred by ſuch Warranty, 27 H. 6. garr. 48. for that the Parſon demandeth the thing in the right of his Church: and ſo it is if the Parſon bring an Aſſiſe, although that thereby he recover the Lands, and himſelf is to take the profits to his own uſe, yet becauſe after the Recovery he is ſeiſed of the Freehold, wherein the Aſſiſe was brought in the right of the Church, a Warranty of his Predeceſſor or Anceſtor pleaded in bar, ſhall not bar him: And ſo it is in Caſe of an Arch-Deacon, Prebend, Vicar, &c. they ſhall not be barred by any Warranty of their Predeceſſors or Anceſtors in any Action brought concerning their poſſeſſion. *Cook* 1. Part, *Inſtitutes* 370. acc.

17. Note all Lands in Feeſimple may be charged with a Rent, or otherwiſe, when all they who have Intereſt in the Land, do joyn in the Grant of it, ſo it be made *Concurrentibus bis*, &c. And therefore if the Patron and Ordinary charge the Gleab in the time of Vacation, it ſhall bind the ſucceeding Parſon, becauſe no other hath Intereſt during the Vacation, but they only. *Cook* 1. Part, 147. in *Meyowes* Caſe.

18. A Prebend made a Leaſe for 70 years, the Biſhop and Dean and Chapter reciting the ſaid Leaſe, confirmed *dimiſſionem prædict. in forma prædict. factam pro termino* 51 years, *et non ultra*: And afterwards the Prebend made another Leaſe to begin after the determination of the firſt Leaſe. It was adjudged in that Caſe, That the ſaid confirmation extended to the whole Term of 70 years, and that the words *pro termino* 51 years, came too late, but if he had confirmed the Land for 51 years, it had bin good, and then there had bin no repugnancy in the confirmation: And it was holden in that Caſe, That the Biſhop who was the Patron, and the Dean and Chapter, have ſuch an aſſent as is apparelled with an Intereſt; and therefore they may confirm a Leaſe or a Grant in part, or in all. And a Releaſe made to them in the time of Vacation, is good, 21 H. 7. and they may charge the Gleab in the time of the Vacation. 31 E. 3. *Grants* 9. *Cook* 5. Part, 81. *Fords* Caſe.

19. A man being Patron of a Benefice in the right of his Wife, granted *proximam advocationem* to another; after which grant, the Incumbent made a Leaſe of the Benefice for 60 years, reſerving rent to him and his Succeſſors under the value in the Kings Books. After the Patron, Grantor, and his Wife, together with the Ordinary, confirmed the Leaſe; and then the Incumbent was deprived, and the Grantee preſented his Clerk, who entred upon the Leſſee to avoid the Leaſe. It was holden in this Caſe, That his entry was lawfull, becauſe the Grant preceded the Leaſe. 3 *Ma. Dyer*, 133.

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6. *Where recitalls in the Caſe of a common perſon in their Grants, ſhall be materiall; and where not: where good without recitall, Where not: and where falſe recitall, or miſrecitall ſhall make them void; where not.*

1. A Man was condemned in Debt by a Verdict which paſſed by *Niſi Prius*, he paid part of the money to the Plaintiff, who made an acquittance of the ſum received in theſe words, Received 10 l. in part of payment of a more ſum, where-

in I am condemned before the Juſtices of *Niſi Prius*; whereas in truth the Judgment was in *Banco*. It was holden by the Court in that Caſe, That the ſame miſrecital of the Judgment was not good, to have him have any relief upon an *Audita Querela*, if Execution were ſued forth for the whole Debt: But it was there ſaid, That if I do releaſe all my right in White Acre, which I purchaſed of J. S. and I had it by Diſcent, ſuch Releaſe is good, becauſe White Acre is certainly named, and the reſt is Surpluſage. Mich. 33 H. 8. *Dyer*, 50.

2. A man by Indenture reciting a former Leaſe to be made, 6. *Aug.* 30 H. 8. *Habendum* from the Feaſt of St. *Mich.* then next following for 21 years, demiſed the ſaid Land to J. S. *Habendum* for 21 years, from the expiration of the former Leaſe: And in truth, the firſt Leaſe was miſrecited in the date, for it was 30 *Aug.* Iſſue was joyned, upon if *demiſit modo et forma*. The Jury found the ſpecial matter. It was the Opinion of the Juſtices, That the *modo et forma* was not material, but only *ſi demiſit*; which being found, the Court held it a good Leaſe notwithſtanding the miſrecital. Trin. 3 *Ma. Dyer*, 116. *Pas* ſee *Cook* 1. Part, *Inſtitutes* 46. If the Husband recites a Leaſe which is not, or which is void, and miſrecites the ſame in a point material, *Habendum* from the expiration of a former Leaſe; in that Caſe the Leaſe ſhall begin from the time of the delivery. See 1 *Ma. Dyer*, 93.

3. A man of late having purchaſed a houſe in D. of T. C. not having any other houſe in D. but only that, made a Deed of Feoffment of it by theſe words; The Meſſuage late of R. C. in D. which was falſe. for there was never any R. C. that had poſſeſſion of it. It was the Opinion of the Court, That the Feoffment was good, notwithſtanding the falſe naming of R. C. for T. C. For if the names of R. or T. had bin omitted, yet the grant by the words *Meſſuagium cum pertinenciis* in D. had bin good enough. Paſc. 23 Eliz. *Dyer*, 376.

4. In an Information upon Intruſion in the Exchequer. It was found, That A. held divers Meſſuages, &c. and by Deed Indented and Inrolled, bargained and ſold all the ſaid Meſſuages, &c. lying in the Pariſh of St. *Andrews* in the Tenure and occupation of J. S. for life, the Remainder to C. in Fee. And it was found that the Meſſuages lay in the Pariſh of St. *Sepulchres*, and that they were in the Tenure and occupation of J. S. It was Reſolved in that Caſe, That nothing paſſed by the ſaid Bargain and Sale, becauſe that the firſt certainty was falſe, *ſcil.* in the Pariſh of St. *Andrew* in *Holborn* was falſe; but if the firſt certainty had bin true, although that the ſecond certainty had bin falſe, the grant had bin good, notwithſtanding the ſaid miſrecital. *Cook* 3. Part, 10. *Dowties* Caſe.

5. The Queen by her Letters Patents granted to B. *totam illam portionem decimand. &c. nuper in occupation.* J. *Corbet* in L. and *John Corbet* had not any Tythes there. It was Reſolved in that Caſe, That nothing paſſed by this miſrecital, although it was in the Caſe of the Queen; and the Grant was *ex ſpeciali gratia, certa ſcientia, & mero motu*; *à fortiori* if ſuch a Grant be made, by a falſe recital, or a miſrecital of the perſon in the Caſe of a common perſon. *Cook* 4. Part, 35. in *Bozouns* Caſe.

6. If a *Fieri facias* comes to the Sheriff to levy monies of the goods of J. S. and the Sheriff by reciting that he hath a Term for years, which began 2 *Ma.* whereas in truth it began 3 *Ma.* ſelleth the ſame Term. It was Reſolved in that Caſe by the whole Court, That the ſale is void, becauſe there is not any ſuch Term, but if the Sheriff ſell alſo all the Intereſt which J. S. had in the Land, then the ſale is good. *Cook* 4. Part, 74. in *Palmers* Caſe. The Sheriff reciting that a man had a Term of a Perſonage for the Term of divers years then to come, ſold the ſame by force of a *Fieri facias* unto another. It was adjudged, That the ſale was good, for perhaps the Sheriff could not come to know the certainty of the beginning, or of the end of the Term. But if he take upon him to recite the Term, and miſrecite it, and ſelleth the Term, there the ſale is void. 26 Eliz. Sir *George Sydnams* Caſe. *ibid.*

7. A Biſhop made a Leaſe of a Manor to A. and B. for 60 years rendring Rent; Provided, That if the ſaid A. and B. dyed within the Term, that preſently after the deceaſe of the ſaid A. and B. and the longer liver of them, that it ſhould be lawful for the Biſhop and his Succeſſors to re-enter: A. dyed, B. ſurvives, the Biſhop dyed, the Succeſſor demiſed the Manor to C. *Habendum cum poſt mortem ſurſumreddit.* or forfeiture of the ſaid B. it ſhould be void, for 60 years, which was confirmed by the Dean and Chapter. It was Reſolved in this Caſe (amongſt other points), That the ſecond Leaſe veſted preſently in intereſt, and did not depend upon contingency to take effect in poſſeſſion: And therefore it was Reſolved in that Caſe, That if a man makes a Leaſe for years to begin after the ſurrender, determination, forfeiture, or end of a former Leaſe, the Leſſee hath not election to have the ſecond Leaſe upon ſurrender, forfeiture, or end, which he pleaſeth; but when any of them ſhall firſt happen, then the ſecond Leaſe ſhall begin in poſſeſſion. *Cook* 6. Part, the Biſhop of *Bathe* Caſe.

8. A Woman Leſſee for years of Lands, took a Husband, he in the Reverſion leaſed the Land for years to begin after the Term demiſed to the Husband (which was a recital); whereas in truth the

ſaſt Term was demiſed to the Wife, and by Act of Law transferred to the Husband. Yet it was Reſolved in that Caſe, That the Lands was by the Woman to have the Leaſe, to have a good beginning. See *Plow. Com. Wrottesly* and *Adams* Caſe. 192. acc.

9. King E. 3. granted to *William* Earl of *Saliſbury* the Son, *Omnes advocationes Eccleſiarum quæ pertinent. ad Prioratum de Mountagu, &c. quas nuper Conceſſimus* to *William* the Earl of *Saliſbury*, Father of the aforeſaid *William*. And in truth the Advowſon of the Church of S. then in Queſtion was not granted to the Father, and notwithſtanding the ſame miſrecital, yet the grant there was holden to be good. 29 E. 3. 9. vouch. in *Cook* 10. Part, 110. in *Legat's* Caſe.

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7. Where Grants made by common perſons; and of what, ſhall be void; where not, and for what cauſe they ſhall be ſaid void; what not.

1. KING *E. 6.* granted to the Biſhop of *Coventry* and his Succeſſors the Advowſon of the Church of D. and that after the death of the Incumbent, it ſhould be *in propios uſus*; the Biſhop by Indenture made a Leaſe to begin after the death of the Incumbent, which was confirmed, and the Incumbent dyed. It was adjudged in that Caſe, That the Leaſe was void, and that the ſame ſhould not take effect by eſtoppel, becauſe it appeared by the Indenture it ſelf, that the Leſſor had nothing at the time of the making of the Leaſe. 7 Eliz. *Dyer*, 244.

2. A man poſſeſſed of a Leaſe for 40 years, granted to B. as many of the years as ſhould be behind at the time of his death. 7 E. 6. br. Grants, 154. It was holden a void grant for the Incertainty. See 4 and 5 *Ma. Dyer*, 150. *Cranmers* Caſe, acc. But where the Caſe was, That one was poſſeſſed of a Leaſe for 90 years, and in conſideration of the marriage of his Son with the daughter of J. S. did demiſe the Land to his Son for 70 years, to begin after his death, and then the Leſſee dyed. It was adjudged in that Caſe, That the Leaſe was good, and the difference between this Caſe, and the Caſe of 7 E. 6. was, becauſe in this Caſe, he demiſed the Land *Habendum* after the death of the Leſſor for 70 years, in which there was ſufficient certainty, and no apparent certainty in the Deed; but in the Caſe of 7 E. 6. he granted ſo much of his Term which was behind at the time of his death, which was incertain in the grant it ſelf. Mich. 35 Eliz. *Lacroſts* Caſe. See *Cook* 2. Part, 155. the Rector of *Cheddingtons* Caſe. See before.

3. The Queen by her Letters Patents granted to *Darcy* the making of playing Cards, and the ſole Importation of all playing Cards into *England* for 21 years; and by the ſaid Letters Patent prohibited, That none ſhould buy, bring in, or ſell any playing Cards within the Realm during the ſaid Term. It was Reſolved, That the grant of ſole making of playing Cards within the Realm was void. 1. Becauſe it was a Monopoly againſt the benefit and Liberty of the Subject. 2. Becauſe the ſole Trade of any Mechanical Artifice is a prejudice to all the Subjects, and a grant made by the King himſelf in the grievance of his Subjects, is void. *Co.* 11. Part, the Caſe of Monopolies, 87. *Darcyes* Caſe.

4. A Right or Title which any man hath to any Lands or Tenements of Inheritance, cannot be barred by acceptance of any manner of collateral ſatisfaction, or recompence: As if A. diſſeiſe B. Tenant for life, or in Fee of the Manor of S. and after gives the Manor of D. to B. and his Heirs in full ſatisfaction of all his right in the Manor of S. though B. accept of it; yet may B. enter into the Manor of S. and recover it in any real Action, for the Right of Inheritance or Freehold which is ſuppoſed originally to begin by Livery, cannot be transferred or extinct without ſome Ceremony, as by re-entry upon the Diſſeiſor, and then by giving Livery, or that which doth amount to as much, *viz.* by releaſe or confirmation to him. *Cook* 4. Part, 11. in *Vernons* Caſe.

5. A. was ſeiſed of a Manor to which an Advowſon was appendant, and dyed, the Manor diſcended to E an Enfant, the Church became void, D. preſented during the Non-age of E. who at his full age enfeoffed F. of the Manor; and afterwards the Church became void again, and F. preſented, whereupon the Aſſignee of D. brought a *Quare Impedit*. It was adjudged in this Caſe, That by the Feoffment of E. when he had attained his full age, the Manor paſſed to the Feoffee, but not the Advowſon, becauſe by the uſurpation, the Enfant was out of poſſeſſion of the Advowſon, and he had but a right to it, the uſurpation being only voidable by Action, which could not be transferred to a ſtranger, and the Advowſon not being at all granted to F. he ſhall not gain it by an uſurpation. *Cook* 6. Part, 52. *Boſwells* Caſe.

6. The Biſhop of S. granted the Office of Surveyor of the Manor of S. to A. and B. for their lives, with the Fee of 6 l. 13 s. *per annum*, whereas the Office was formerly uſed to be granted to one. A. dyed, and alſo the Biſhop, the Fee was behind,

hind: B. diſtreyned for it. It was holden, That the diſtreſs was not good, becauſe the Grant was void by an Act of 1 Eliz. not printed, which reſtreyned Biſhops and other Eccleſiaſtical perſons from making of unuſual Grants. And in that Caſe, it was holden, That although A. was dead, and B. alone had the Office when he diſtreyned; yet becauſe the Grant was void at the firſt, it was not to be made good by any ſubſequent Act that ſhould after happen to bind the Succeſſor. *Cook* 10. Part, 61. the Biſhop of *Saliſbury's* Caſe. See *Cook* 11. Part, 4. And for *Carles* Caſe, &c.

7. A grant was made by the Maſter and Fellows of *Magdalen* Colledg in *Cambridg* to Queen *Eliz.* which was void by the Statute of 13 Eliz. It was adjudged in that Caſe, That ſuch a grant was not made good by the Statute of 18 Eliz. for confirmation of Grants made to the Queen, becauſe that can by no means be made good which was void *ab initio*: And further it was in that Caſe holden, That the general words of the ſaid Statute of 18 Eliz. could not enable any perſon to make any Conveyance, who was diſabled to do it by the Common-Law: And therefore, if an Enfant had conveyed Land to the Queen by Deed enrolled, or had levyed a Fine to her of the Land before the ſaid Act; and then the ſaid Act had bin made, the Eſtate granted had not bin confirmed by the ſaid Act, becauſe the Enfant during his Minority was diſabled to make ſuch a Grant, and he might have reverſed the Fine by a Writ of Error, as it was adjudged. Mich. 33 Eliz. in B. R. in *Vaughans* Caſe. *Cook* 11. Part, 77. *Magdalen* Colledg Caſe.

8. Tenant for life, the Remainder in tail, the Remainder in Fee: Tenant for life bargains and ſells the Land to B. in Fee; who after 14 Eliz. ſuffered a Recovery, wherein Tenant for life was vouched, and he vouched over: and after Judgment was entred, and execution ſued upon the ſame Recovery. In that Caſe it was adjudged, That the entry of him in the Remainder in tail was lawfull; for although the Recovery was not immediately had againſt the Tenant for life; yet it was a forfeiture within the Statute of 32 H. 8. and then being once a forfeiture, it could not be afterwards ſalved, by entring of the Judgment, or ſuing forth Execution thereupon. *Cook* 1. Part, 15. Sir *William Pelhams* Caſe.

9. In Replevin, The Biſhop of C. ſeiſed of a Park in the right of his Biſhoprick, 44 Eliz. made a Grant of the keeping of the Park to J. S. for life, *ut ulterius* granted *pro executione Officii prædict.* five Marks, with clauſe of diſtreſs *una cum* a Livery, and 13 s. 4 d. *necnon Paſturam pro duobus ejus.* which was confirmed in the life time of the Biſhop by the Dean and Chapter: And the Defendant in his Avowry ſhewed, that the ſaid Park had bin antiently granted with the Fee of five Marks; and for the Arrerages of the Fee, the Defendant did avow the taking of the Cattel: The Plaintiff ſet forth the Statute of 1 Eliz. cap. 2f. and ſaid, That this Paſturage was a larger Fee then was ever granted before, upon which the Avowant did demur. The Queſtion was, if this new addition of the Paſturage to the Grant of the Office, made the Grant void. The Court was divided in Opinion, but the better Opinion ſeemed to be, That this Augmentation of Paſturage did not make the Grant void in all, but for the Augmentation only, and that it was ſeveral in *ſpecie* from the five Marks, And that this was out of the Statute of 1 Eliz. and the things are ſeveral, and may be ſeverally recovered as diſtinct things in their natures in the intent of the Grantor: And therefore that the Grant was void *quoad* the Paſturage, but not to make the grant of the Office with the Fee of 5 Marks void. Paſc. 1 Car. in C. B. The Biſhop of *Chicheſter* and *Freelands* Caſe. *Lea* 71, 72.

10. The Queen ſeiſed of the Mannor of *Goſcoigne*, and of the Grange called *Goſcoigne*-Grand in D. did grant all her Lands, Tenements, and Hereditaments in D. It was adjudged in that Caſe, That the Mannor did not paſs: And *Anderſon* Chief Juſtice ſaid, So it is if it were in the Caſe of a common perſon: But he ſaid, That an Advoſon ſhall paſs by the Feeffment of the Mannor without Deed, without the words *cum pertinentiis*, for that is parcel of the Mannor which the whole Court agreed. Paſc. 28 Eliz. in C. B. *Gilts* and *Newtons* Caſe. *Goolbolt.* 136.

11. A. had Iſſue B. his Son, who had Iſſue C. A. was ſeiſed in Fee of divers Lands, aſwell by purchaſe, as by diſcent, in D. and S. in the Tenures of E. F. and G. A. dyed, B. his Son made a conveyance of divers Lands to C. being the Grandchild of A. in theſe words, *Omnia mea Meſſuagia terras et tenementa in D. S. &c. modo in tenura E. F. & G. quæ pater meus A. perquiſivit* from divers men; and alſo conveyed a houſe called the Hart, in the ſaid C. which came to him by Diſcent, which was in the occupation of one J. S. and not in the Tenures of E. F. G. the Queſtion was, Whether all the Lands which he had by diſcent in the ſaid Towns, in the Tenures of the ſaid E. F. and G. did paſs, or only the purchaſed Lands. It was Reſolved, That the Conveyance did paſs only the Lands which he had by purchaſe, except only the ſaid houſe called the Hart, which was preciſely named; and did not paſs the Lands which he had by diſcent. For they ſaid there were three ſeveral reſtrictions in this Caſe: 1. All his Lands in D. S. &c. 2. All his Lands in the Tenures of E. F. G. 3. All his Lands which he had by purchaſe; and the words in the Conveyance, all my Lands, are to be

he intended: All my Lands within the ſaid Reſtrictions. And general words in a Grant may be overthrown by words reſtrictive. Mich. 11 Jac. in C. B. *Clay* and *Barnet*'s Caſe. *Godbolt*, 236.

12. A man ſeiſed in Fee of the Mannor of D, and of a houſe called W. in D; and alſo of a Leaſe for years in D; did by Deed, grant bargain and ſell his Mannor of D, and all his Lands and Tenements in D, and did Covenant in the Indenture, That he was ſeiſed of the Premiſſes in Fee: It was a Queſtion, If by this grant of bargain and ſale, the Leaſe for years did paſſe? It was not Reſolved, the Court being divided in Opinion. Mich. 9 Jac. in B. R. *Edwards* and *Deaton*'s Caſe. *Godbolt*, 183.

13. One who was impleaded in the King's Courts, *viz.* in the Kings-Bench, ſaid, That the King granted to the Burgeſſes of *F*, that they ſhould not be impleaded out of the Walls of the ſame Borough, but before the Mayor, &c. and of things within the Borough; and that he was Bayliff at the time. It was moved, That the Grant was void, if not granted by Parliament, becauſe it is the Subjects Inheritance to ſue by Original, and not in any other Court by Bill or Plaint, where the Defendant hath nothing, and that the ſame was not granted but for the eaſe of the Plaintiff; ſo that if the Grant ſhould not be void, yet he ſhould not be compelled to ſue there, but at his Will. On the other ſide it was ſaid, That the Grant was good, and that Conuſans might be granted out of the Court of the King; and an Exemption might be granted to a Jurour, &c. But it was the better Opinion of the Book, That the principal Caſe was not like to the Caſes of Exemption; for Exemption did not extend but to one; but this ſhould extend to all the Burgeſſes, or people within the Borough; and therefore the Grant was void, in regard of the ſpecial prejudice that the Subject might have thereby, 12 E. 4. 17. See *Cook* 11 Part, in the Caſe of Monopolies, acc. See 8 H. 6. 20. acc.

14. The Father ſeiſed of Land in Fee; he and his ſon and heir Leaſed Lands for years, to begin after the death of the Father, rendring Rent to the Son; the Father dyed, the Leſſee entred; the Rent was behind, and the Son diſtrained for it. It was Reſolved in this Caſe, That the Reſervation was void: for although the ſon did prove heir, it bettered not the caſe, but the Reſervation muſt have been to the heir or heirs of the Leſſor by that name; for that is the only word of privity in Law requiſite in Reſervation of Rents. And a difference was taken in this caſe, where a Rent is reſerved upon a Leaſe of the Auncеſtor to the heir firſt; and where the Auncеſtor grants an Annuity, or makes a Warranty againſt his heirs, firſt omitting himſelf; all ſuch Grants are utterly void: for no man can charge his heir but as a part of himſelf, and therefore beginning with himſelf; and ſuch charges ſtand naked, and have nothing that was firſt in the Father, and comes from him to them whereunto they may cleave; as a Rent to the Reverſion, in the Caſes aforeſaid. Trinit. 12 Jac. in C. B. *Oats* and *Frith*'s Caſe, *Hobart*, 130.

More Grants.

1. A Man poſſeſſed of divers Mannors, and of divers Lands, part in Leaſe for years with Rent reſerved, part Copyhold, for valuable conſideration granted, demiſed, bargained, and ſold the ſaid Mannors with all Rents reſerved upon any demiſe to have after the death of the bargainor for 17. years, rendring a Roſe to his Heir; the Deed was acknowledged to be enrolled: Afterwards, he covenanted to ſtand ſeiſed of the ſaid Manor to the uſe of himſelf and the heirs of his body, no Attornment was had; and afterwards the Bargainor dyed, his heir within age. It was Reſolved in this caſe, That the Leſſees had Election to take the ſame as a demiſe, or as a Bargain and Sale; for when a man for money grants, demiſes, bargains and ſells his Lands, the owner gives Election to the Leſſee, to take it by the one way or the other; for if the Law ſhould enforce the Leſſees to take by demiſe, then they ſhould loſe their Rents reſerved upon Leaſes for years; but if the Intereſt paſſeth by bargain and ſale, then there needs no Attornment, becauſe the Statute of 27 H. 8. of Uſes, doth execute the poſſeſſion to the Uſes. 2. Reſolved, That this Election did remain, notwithſtanding the alteration by the ſecond Indenture, and notwithſtanding the death of the Leſſor; and that the King was entituled to Wardſhip, becauſe they had an Intereſt preſent in them, which they might aſſign over. *Cook* 2. Part, 35, 36. Sir *Rowland Hayward*'s Caſe.

2. Errour was brought to reverſe a Recovery in a Writ of Entry in the *Poſt*; and the Errour aſſigned was, Becauſe the Writ of Entry was *de uno annuali reddito, ſive penſione quatuor marcarum exeunt. de Eccleſia ſive Reſtoria*; and a Penſion is properly demandable in the Spiritual Court, and a Rent is a thing demandable at the Common-Law; and every *Præcipe* ought to be of a thing certain. But it was Reſolved, That the Writ was good enough, for there was not any incertainty in

it; for one of two things is not demanded, but one thing only: for the demand is of Rent, or Penſion of *quatuor* marks; ſo as there is but one 4. marks: And *Reddit us* and *Penſio* are all one; and the words *exeunt. de Reſſoria*, prove it to be a Rent: for if it were an Annuity, the Rectory ſhould not be charged with it; but the perſon of the Parſon in reſpect of the Rectory. *Cook* 5. Part, 40. *Dormers* Caſe.

3. Two Joynt Leſſees for life were; the Reverſion, or Remainder in Fee being in another perſon. He in the Reverſion grants his Reverſion, *Habendum* the aforeſaid Reverſion after the death, ſurrender, or forfeiture of Tenant for life: It happeneth, that the Leaſe determines for the life of the grantee, and remains to another for life. It was Reſolved, That this ſhould be a good grant of the Reverſion, to take effect in poſſeſſion after the death of the Tenant for life, and that it ſhall not be intended to paſſe a future Intereſt. Paſch. 1 Jac. in C. B. *More* and *Dennis* Caſe. *Brown.* 2. Part, 299. See 23 Eliz. *Dyer*, 327.

4. If a man grant a Rent in *Manerio de D. percipiendum* in 100. Acres of Lands parcel of the ſaid Mannor, with Clauſe of Diſtreſſe in the 100. Acres, the Rent ſhall iſſue only out of the 100. Acres, and the general words ſhall be conſtrued according to the ſpecial words; according to the Rule, *Quando Charta continet generalem Clauſulam, poſteaq; diſcendit ad verba ſpecialia, quæ clauſulæ generali ſunt Conſentanea; Interpretanda eſt Charta ſecundum verba ſpecialia.* *Cook* 8. Part, 154. in *Althams* Caſe.

5. If the Donee hold of the Donor by Fealty and certain Rent, and the Donor grant the Services to another; ſome have ſaid, That the Rent ſhall not paſſe, becauſe it cannot paſſe as a Rent ſervice, being granted by the name of Services, and the Fealty cannot paſſe, becauſe it is an Intereſt inſeparable to the Reverſion. But it ſeemeth the Rent ſhall paſſe as a Rent-ſeck, becauſe at the time of the grant it was a Rent-Service in the grantor; and therefore there being words ſufficient to paſſe it to the grantee, it is not of neceſſity, that it ſhall be a Rent-ſervice on the hands of the Grantee. *Cook* 1. Part, *Inſtitutes* 150.

6. There is the King Lord Paramount, the Meſne who holds by Knights-Service in *Capite*, and Tenant paravail in Socage; the Meſne grants the Menalty to the uſe of himſelf for life, and after to the uſe of the Tenant paravail in tail: It was Reſolved in this caſe, That the Menalty is not ſuſpended during the life of the Meſne by force of that Remainder in tail: For a Remainder in tail, or for life expectant upon an Eſtate for life or tail, ſhall never ſuſpend a Menalty. Seignory, Rent, &c. becauſe although the Remainder veſts preſently, yet that cannot ſuſpend the future Freehold; tenement of the Rent during the life of the firſt Tenant for life, who is indeed true Tenant to the Lord, or to the Reverſioner, upon whom Avowry ſhall be made, &c. And as a Seignory, Rent, &c. cannot be ſuſpended in part, and in *eſſe* for part in reſpect of the Land out of which it is iſſuing; So neither can a Seignory, Rent, &c. be ſuſpended in Remainder, and yet in *eſſe* for a particular Eſtate in poſſeſſion: But if the Meſne grant his Menalty to one for life, or in tail, the Remainder to the Tenant paravail in Fee; the Menalty in that caſe is wholly extinct. *Cook* 9. Part, 134. *Aſcough's* Caſe.

7. In Treſpaſſe, the Defendant juſtified, becauſe it was the Freehold of J. S. and he entred by his command. The Plaintiff entitled himſelf, becauſe the place where was Cuſtomary Land parcel of the Mannor of D, whereof J. S. was ſeiſed in Fee, and demiſeable by Copy at Will in Fee, and that J. N. was thereof ſeiſed in Fee by Copy at the Will of the Lord, according to the Cuſtome of the Mannor, and dyed ſeiſed, ſo as it deſcended to two daughters as heirs of the ſaid J. N. And that at ſuch a Court *Dominus Conceſſit eis tam manus ſuas, Habendum et tenend. Tenementa prædict.* to the ſaid two daughters and their heirs, whereby they were ſeiſed in Fee, and demiſed the Land to the Plaintiff for years. It being found for the Plaintiff, It was moved in Arreſt of Judgment, That the Plaintiff had not made a good title; for none can entitle himſelf to Copyhold, but he ought to ſhew a grant thereof: and therefore he ſhewing ſuch a thing, that ſuch a one was ſeiſed in Fee, without ſhewing the grant thereof, it was not good. And of that Opinion was the whole Court: and that the pleading was not good. Paſch. 7 Car. in B.R. *Shepheards* Caſe, *Cro.* 1. Part, 137.

8. Tenant in tail of an Advowſon, and his ſon and heir, joyned in a grant of the next Avoydance; Tenant in tail dyed: It was adjudged, That the Grant was utterly void againſt the ſon and heir that joyned in the Grant, becauſe he had nothing in the Advowſon, neither in poſſeſſion, or right, nor in actual poſſeſſion at the time of the grant. Mich. 10 Jac. in C. B. Sir *Marmaduke Wivills* Caſe, *Hob.* 45.

9. One granted a Rent out of Land to one and his heirs, without ſaying, *pro ſe et hæredibus*; and then the grantor dyed; the grantee brought a Writ of Annuity againſt the heir of the grantor, who appeared and imparled till the next Term; and then the Plaintiff diſcontinued his Suit, and diſtrained and made Avowry: and then the Plaintiff apart impleaded the Writ of Annuity in bar: Whereupon it was demurred. And it was adjudged for the grantee; for the perſon of the heir was not chargeable;

chargeable; and therefore, the Court was of Opinion, That if they proceeded to Judgment in the Writ of Annuity, yet the Land had been ſtill chargeable with the Rent. Mich. 18 Eliz. *Dyer*, 344. But in that caſe, If the Writ of Annuity had been brought againſt the grantor himſelf, it would have bound for ever, and ſo it would have turned the Rent-Charge in fee-ſimple, into an Annuity only for the life of the grantor. See *Hob.* 58. acc.

10. Waſte was brought againſt A. and B. upon a Leaſe made J. S. by J. D. 34 H. 8. of the Manner of S. which had the general words, *boſcis, ſubboſcis, boſcorum venditionibus, magno maremio, minerit Carbonum*, in as ample manner, &c. as th. Leſſor *vel habuit vel habere potuit*, for the Term of 80. years, and conveyed the Reverſion to the Plaintiff, and the Leaſe to the Defendant; and then the Plaintiff aſſigned the Waſte in felling of Oaks. The Defendant pleaded, That he felled thoſe Oaks for the making of Puncheons, Roo's, and Roll-Scoops and other utenſils in and about the Coal-Mines, parcel of the Demiſe; and without which they could not digg nor get the Coals out of the Pits, and did beſtow the ſaid Trees accordingly. The Queſtion was, Whether by Implication of Law, by Leaſing the Coal-Mines, the Leſſor hath power to fell Trees for the uſe of the Coal-Mines? It was agreed in this caſe, That the grant of a thing did carry all things which were included, without which, the thing granted could not be had. But in this caſe, it was adjudged againſt the Defendants: For it was agreed, That this ſhall be taken for a Mine opened ſince the Leaſe, becauſe it ſhall be ſtrongeſt againſt the Defendants that plead it. Now if the Mines had not been granted by ſpecial words, it had been Waſte to open a Mine anew; for the Leſſee had not power to change the nature of the Land: A Leſſee may build a new houſe where none was before, but that muſt be every way at his own charge, for he muſt not take either Timber or other things Waſtable, though it be never ſo needful; and yet if he keepeth it not in repair, Waſte lyeth, though the Writ be in *domibus diminſis*. Now in this caſe, it were no Waſte to open a Mine, as it would have been, if the demiſe had not been of Mines by ſpecial name; yet it is like a houſe new built, for the maintenance of which the Leſſee can fell no Timber; and ſo much the worſe, as a new houſe betters the Inheritance: whereas the digging of Mines decayes the Inheritance; and therefore it is againſt reaſon to do one Waſte, to maintain another. Hill. 15 Jac. in C. B. The Lord *Darcy* and *Aſtwicks* Caſe. *Hob*, 234.

11. In a *Quare Impedit*, the Caſe was; A. was ſeiſed of the Prebend of *N.* in the Collegiate Church of St. *Mary* of *S.* to which the Advowſon of the Vicarage of *S.* was appendant: A. made a Leaſe of ſeveral parts of the Prebend, in the end of which Leaſe, were theſe words, *cum omnibus Commoditatibus emolumentis, pertinentiis et advantagiis cum pertinent. eidem Prebend. ſpectant, ſive aliquo modo pertinent.* The Queſtion was, Whether the Advowſon of the Vicarage did paſſe by this Leaſe? It was adjudged, That it did not paſſe, for all the words do imply things gainfull, which is contrary to the nature of an Advowſon; and the words in Grants ſhall not be conſtrued to a ſtrained and unuſual and unreaſonable Conſtruction: As an Appropriation will not paſſe by the name of an Advowſon; So where the King grants the Monks ſhall have all their poſſeſſions of the Abbey in the time of Vacation for their ſuſtinance, they ſhall not have an Advowſon, becauſe no ſuſtentation did ariſe from thence. Note in that Caſe, two Points Reſolved; 1. That the Advowſon of a Vicarage may be appendant to a Prebend. 2. That if an Advowſon be once appendant, it will not paſſe without ſpecial words of grant of it. Mich. 16 Jac. in C. B. rot. 1877. *John London*, and the Collegiate Church of St. *Mary Southwell's* Caſe, *Hob.* 303, 304.

11. Upon a Special Verdict in an *Ejectione Firmæ*, the Caſe was; A man being ſeiſed of a Manner, and of a Tenement in Feeſimple, and poſſeſſed alſo of a Leaſe for years in the Town of *D.* by Deed of Bargain and Sale, he doth give, grant, bargain, ſell, enfeoffe, and confirm unto another, the Mannors, Tenements, and all other the Lands and Tenements which he hath in the Town of *D*; The Queſtion was, Whether by this Deed of Grant, Bargain and Sale, the Term of years paſſed, or not? It was Reſolved by the whole Court, That by theſe general words of grant, bargain and ſell, the Leaſe for years did not paſſe. See 37 H. 8. *Brooks* Caſe, 67 pl. 301. If a man grant *omnia Terras ac Tenementa ſua* in *D*; by this a Leaſe for years doth not paſſe: otherwiſe, if he had granted *omnes firmas ſuas*. The Predeceſſor of the Biſhop of *Ely* had made a Leaſe of his Mannor houſe, of the Scite thereof, and of certain particular Cloſes and Demeans by particular name, and all other his Lands and Demeans. Upon this, a Queſtion was, Whether an Ancient Park, and Copyhold Land there ſhould paſſe. And it was the Opinion of the Court, That neither of them did paſſe by thoſe latter general words; for neither the Park, nor the Copyhold could be intended for the Demeans: and in ſuch caſes, a Grant ſhall not be conſtrued by any violent Con-

ſtruction, but according to the Intention of the Law. Mich. 18 Eliz. The Lord *North*, and the Biſhop of *Ely*'s Caſe. Trin. 8 Jac. in B. R. Sir *William Turpine* and *Forreyners* Caſe. Bulſt. 1 Part, 99, 100.

Habèas Corpus. See *Lib.* 1. Title, *Corpus cum Cauſa.*

Habere facias ſeiſinam; and, *Habere facias poſſeſſionem.*

Habere facias ſeiſinam, and *Habere facias poſſeſſionem*, are Writs Judicial, and lye where one hath recovered certain Lands in any of the Kings Courts, in Actions real, or *poſſeſſorie*; then he may have this Writ directed to the Sheriff, commanding him thereby to go to the Land, and there to give him Seiſin or poſſeſſion of the Lands recovered.

2. It was holden by the Juſtices, That if the Writ of *Habere facias poſſeſſionem*, doth contain more Acres of Lands then are contained in the Declaration, That it is Errour. And if the Sheriff doth give poſſeſſion of more Land then is contained in the Writ of *Habere facias poſſeſſionem*, an Action upon the Caſe will lye againſt the Sheriff, or an Aſſiſe will lye for the Lands. And in this Caſe, it was agreed, That if a Judgment given in the Kings-Bench, be affirmed in a Writ of Errour brought of it in the Exchequer-Chamber; yet they cannot grant out Execution there; but it muſt be ſued out in the Kings-Bench. Mich. 1650. in B. R. *Lumley* and *Nevill*'s Caſe. *Styles*, 238.

3. In an *Ejectione Firme*, the Plaintiff recovered, and had Judgment: And a Writ of *Habere facias poſſeſſionem* to the Sheriff of *C*, who returned, That he offered the Plaintiff the poſſeſſion, and he refuſed it, and to accept of it. It was the Opinion of the Court, That in that caſe, the Plaintiff cannot have another Writ of *Habere facias poſſeſſionem*; forasmuch as it appears by the Record, that he hath refuſed to have the poſſeſſion. Paſch. 12 Jac. in C. B. *Fetherſton*'s Caſe. *Brownlow*, 2. Part, 168.

4. A. had Judgment in an *Ejectione Firme*, and was put in poſſeſſion by a Writ of *Habere facias poſſeſſionem*, and after the Defendant entred again within two weeks after Execution, and the Writ was returned, but not filed. It was moved, That he might have another Writ of Execution. It was the Opinion of the Court, That he could not have a new Writ, but he was put to his new Action, and the filing of the Writ is not material; for it is in the Election of the Sheriff if he will file, or Return it or not. But it was ſaid, That if the Execution had not been fully made; as the Caſe late was, Where the Sheriff made Execution by an *Habere facias poſſeſſionem* of a houſe, and there were ſome perſons who hid themſelves in the upper Lofts of the houſe, and after the Sheriff was gone, they came down, and *ouſted* thoſe that the Sheriff had put in poſſeſſion before; in that caſe, a new Writ of Execution was awarded, becauſe there a full execution was not made. Hill. 7 Jac. in B. R. *Styles* Caſe. *Brownlow*, 2. Part, 216.

5. Tenant in tail had Iſſue two ſons, the eldeſt had Iſſue a daughter, and dyed, his Wife with Child in the life of his Father; Tenant in tail ſuffered a Recovery to the uſe of himſelf for life, and afterwards to the uſe of J. S. for years, and after to the uſe of the heirs males of his body begotten, and the heirs males of ſuch heirs males; and preſently after the Judgment, an *Habere facias ſeiſinam* was awarded; and before Execution executed the ſame day in which the Recovery was ſuffered, Tenant in tail dyed, and afterwards the Recovery was executed. It was the Opinion of the Juſtices in this caſe, 1. That Execution might be ſued againſt the Iſſue in tail, becauſe that the right

right of the tail was bound by the Judgment had againſt the Tenant in tail. 2. That the Reverſion was not executed preſently in the Recovery by the Judgment, untill the Execution was ſued forth. *Cook* 1. Part, 93. *Shellys* Caſe.

6. Note. It was Reſolved, That when a houſe is recovered by real Action, or by *Ejectione Firmæ*, that the Sheriff in ſuch caſe may break the houſe, to deliver poſſeſſion to the Demandant or Plaintiff; for the words of the Writ are, *Habere facias ſeiſinam*, or *poſſeſſionem*; and after Judgment, it is not the houſe, in right and Judgment of Law, of the Defendant or Tenant. *Cook* 5. Part, 90. *Semaynes* Caſe.

7. If a Writ of *Habere facias ſeiſinam* be directed to the Sheriff, the Sheriff cannot retorn upon it, that another is Tenant of the Land by right; for that cannot come in Iſſue betwixt the Demandant and him: but he muſt execute the Writ, and leave the right to be determined by the Law. *Cook* 6. Part, 52. in *Boſwell's* Caſe.

8. Errour was brought in the Kings-Bench, of a Judgment in *Ireland*, in an *Ejectione Firmæ*, of a Leaſe made by the Earl of *Thomond* there, of 40. Meſſuages, 500. Acres of Land, 20 Acres of Paſture, 500 Acres of Bogg, 100 Acres of Heath, in *villis et territoriis de A. B. et C*: And the Plaintiff declared accordingly. Exception here was taken to the Declaration, becauſe it was of 100 Acres of Bogg: for that there is not any ſuch word as Bogg known. It was ſaid, It was an uſual word there, and well known; and if it were not, then the Plaintiff might releaſe his demand as to that Land, and have his Judgment for the Reſidue. Another Exception was, becauſe it was in *villis et territoriis*, but that was holden good enough, for that they have but one ſenſe. And Judgment being given, *Quod recuperet*: It was moved, How Execution ſhould be? and how *Habere facias poſſeſſionem* ſhould be awarded? To which it was anſwered and Reſolved, That there ſhould be a Writ awarded to the Chief Juſtice of *Ireland*, to reverſe that Judgment, commanding them to award Execution. Mich. 13 Car. in B. R. *Mulcary* and *Eyres* Caſe. *Cro.* 1. Part, 368.

Habendum. See *Lib.* 1. title *Deeds*; Diviſion 3.

More Habendum.

1. IF a man give Lands to two, *Habendum* to them; *ſcil.* the one moyty to the one, and the other moyty to the other, it is good; and the *Habendum* good, and the Eſtate granted good. See *Litt.* 66. *Hob.* 172. acc.

2. If a grant be made to the King of the Mannor of *Dale*; or by the King *Habendum* to him *cum Sale*, the *Habendum* is void: And ſo likewiſe is the Grant. *Cook* 1. Part, in *Shelley's* Caſe. *Hob.* 231. in *Nettler* and the Biſhop of *Wincheſter's* Caſe, acc.

3. In an *Ejectione Firmæ*, upon a Special Verdict, it was found, That the Lord *Sturton* was ſeiſed in Fee; and 24. *Maii*, 28 H. 8. by *quoddam ſcriptum ſuum Indentatum, ſigillo ſuo ſigillat. demiſit* certain Lands to T. H. *Habendum eidem* T. H. *et* N. H. *ac quibuſdam* J. H. *et* H. H. *filiis præfat.* T. H. *pro termino vitæ eorum, et alterius eorum ſucceſſive viventis.* The Lord *Sturton* granted the Reverſion to J. S. and his heirs, who ceviſed the ſame to J. D. and his heirs: T. H. and H. H. dyed; N. H. and J. H. ſurvived: J. S. entred, and made the Leaſe to W. the Plaintiff; and N. H. entred. In this Caſe, Judgment was given for the Plaintiff; for that none could take by the Deed immediately but T. H, becauſe he was only party to the Deed, and the reſt not named but by the *Habendum*, and then they cannot take by way of Remainder, which cannot be joynt, becauſe of the word, *ſucceſſivè*; and in ſucceſſion, they cannot take for the uncertainty who ſhall begin, and who ſhall follow. Trin. 27 Eliz. in C. B. *Windſmore* and *Hobart's* Caſe. *Hob.* 313. See *Godbolt*, 51. the ſame Caſe.

4. A. was poſſeſſed of a Leaſe for 1000 years, and granted all his Term, Eſtate, and Intereſt therein to H, his daughter, *Habendum* to the ſaid A. and his Wife for their lives; and after their deceaſe, to the ſaid H: and if ſhe hath heir of her body, then to her Executors and Aſſigns. Provided, That ſhe ſhall pay to D. her ſiſter, after the death of A. and his Wife, 100. l. *per annum* during

ring her life: Provided, That if H. dye unmarried, having no Iſſue of her body lawfully begotten; then D. ſhould have the Term. It was adjudged, That the Grant in this caſe was good, and the *Habendum* to the grantor and his wife after the death of H. was void, becauſe it was repugnant to the grant. Paſch. 5 Car. B. R. *Goſhawke* and *Chiggell*'s Caſe. See before, in title, *Grants*. *Cro.* 1. Part, 110.

5. See Hil. 10 Car. in the Exchequer-Chamber. *Miller* and *Manwaring*'s Caſe. *Cro* 1. Part, 289, 290. in *Lib.* 1. Title, *Deeds*. Diviſ. 7. Sect. 4. to this Diviſion.

6. A man ſeiſed of Lands in Fee, demiſed the ſame to one, and B. his ſon, and to the heirs of B. *Habendum* for 99. years, and ſo from 99. years, to 99 years, untill 300 years were paſſed. The Queſtion was, foraſmuch as the Fee-ſimple was expreſſed in the premiſſes of the Deed, if the Limitation in the *Habendum* was repugnant? It was Reſolved, It was not; And there theſe differences were agreed: When things takes their eſſence and effect by delivery of the Deed, without any other ceremony, there ſuch a limitation to one and his heirs, *Habendum* for life, or years, is void: But when to an Eſtate limited in the premiſſes of the Deed, a ceremony is requiſite to the perfection of it, and to the Eſtate limited by the *Habendum*, nothing is requiſite, but only the delivery of the Deed, there although the *Habendum* be of a leſſer Eſtate then is limited by the premiſſes, yet the *Habendum* ſhall ſtand: and therefore in that caſe, *viz.* the principal Caſe, It was holden to be a good Leaſe. See *Cook* 2. Part, 23. *Baldwin*'s Caſe.

7. A man gave Land to J. S. in the premiſſes of the Deed; *Habendum* to him and 3. others for their lives *et eorum diutius viventium ſucceſſive*: It was Reſolved in that caſe, That J. S. had but an Eſtate for his own life, for that he cannot have an Eſtate for his own life, and for anothers life, where the intereſt of both began at one inſtant, and the *Habendum* by no means can make a Remainder: And it was holden, That they in the Remainder took no thing, for that they were not named in the premiſſes of the Deed. Paſch. 27 Eliz. in C.B. *Owen*, 38, 39.

8. A. was ſeiſed of a Rectory, and Leaſed a Barn and Tythe parcel of the ſaid Rectory to B. his Wife, and ſon, *Habendum* to B. for his life, the Remainder to the Wife for the Term of her life, the remainder to the ſon for life: B. Covenanted to render to the Vicar of *L.* and his Succeſſor, 4. Quarters of Wheat; which not being paid, the Vicar Libelled for them in the Spirituall Court againſt D. only. In this caſe, it was Objected, That he ſhould have Libelled there againſt them all; *viz.* B, his Wife, and the ſon, for that they were joynt Farmers of the Tythes in poſſeſſion, and not againſt B. only, for that the *Habendum* had not ſevered their Eſtates which were joynt before. But the Opinion of the Court was, That the *Habendum* had ſevered the joynt Eſtates limited by the premiſſes, and had diſtinguiſhed it into Remainders, But the Court agreed, That if the *Habendum* had been ſucceſſive, the Eſtate had remained joynt. Trin. 26 Eliz. in C.B. *Sutton* and *Dowſes* Caſe. *Leon.* 10.

9. A man ſeiſed of Lands, made his Will in manner; *viz.* I bequeath to my Wife Black Acre for her life, the Remainder to my ſon T. in tail: *Item*, I Will to my ſon T. all my Lands in D; alſo my Lands in S; and alſo my Lands in V: alſo I give to the ſaid T. my ſon, all my Iſland, or Land incloſed with water, which I purchaſed of J. S; To have and to hold all the ſaid laſt before deviſed premiſſes to the ſaid T. my ſon, and the heirs of his body; The Queſtion was, If the *Habendum* ſhould extend to the Iſland only, in which caſe T. ſhall have but for life the Lands in D. S. and V? or unto the Iſland, and alſo the Lands in D. S. and V? It was Reſolved by all the Juſtices, That the laſt thing deviſed by the Will, was an Iſland, in the ſingular number, which cannot ſatisfie the *Habendum*, which is in the plural Number: and therefore to verifie the plural number, the *Habendum* by fit conſtruction ſhall extend to all the Lands in D. S. and V; and that the *Habendum* ſhould not ſtraiten the Deviſe only to the Iſland. Trin. 28 Eliz. C. B. *Wiſeman* and *Wiſeman*'s Caſe, *Leon.* 57.

10. In *Ejectione firmæ*, the Caſe was; A. ſeiſed of Lands, made a Leaſe to B. C. and D. *Habendum* to them for their lives, and for the life of the ſurvivor of them. Provided, and it was Covenanted betwixt the parties, That the ſa'd C. and D. ſhould not take any benefit or commodity of the Land during the life of B. And further, That the ſaid D. ſhould not take any benefit during the life of C. &c. B. dyed, C. entred, afterwards D. entred, and made the Leaſe to the Plaintiff; and if the entry of B. was lawfull, it was the Queſtion. It was agreed in this Caſe, That the Office of an *Habendum* is to limit and explain the eſtate in the premiſes: And in this Caſe, the *Habendum* hath done its Office, and made it a joynt eſtate; and therefore the ſubſequent clauſe comes too late, and is repugnant and utterly void: And in this Caſe, it is not that any ſhall take in Remainder, but that any of them ſhall not take the profits during the life of the other. It was adjudged for the Plaintiff. Mich. 31 Eliz. in B.R. *Stowel* and *Cavell*'s Caſe, *Leon.* 317.

Herit.

Herriot.

1. IN Treſpaſs for taking of an Ox, the Defendant juſtified the taking of it, and alledged the Cuſtome of the Mannor to be, That the Lord was to have the beſt Beaſt of every Tenant who dyed ſeiſed of any Meſſuage holden of the ſaid Mannor after the death of ſuch Tenant: and further alledged the Cuſtome of the ſaid Mannor to be, That if the Beaſt was eſloyned before the Lord or his ſervant could ſeize it, that then the Lord had uſed to take the Beaſt of any other Levant and Couchant upon the ſame Land; and ſaid, that the Tenant dyed ſeiſed, and that before the Lord could ſeize the Herriot, it was eſloyned off the Land; wherefore he juſtified the taking of the Plaintiffs Ox, being Levant and Couchant upon the Land, but did not ſay, That he ſeiſed it *nomine Herrioti*: It was the Opinion of the Juſtices, That the Cuſtome was not good in that Caſe, neither for the matter, nor the form as it was laid; for it was ſaid to be an unreaſonable Cuſtome. Paſc. 3 Eliz. *Dyer*, 199. And ſee Sir *John Davis* Reports, in the Caſe of *Taveſtry*. That ſuch a Cuſtome to take the Cattel of a ſtranger, Levant, or Couchant, for a Herriot is a void Cuſtome. See Hill. 17 Car. in B. R. in *Thurt* and *Tylers* Caſe, *Maſſ.* 165. It was the Opinion of *Brampton* Chief Juſtice, That a Cuſtome that the Lord may diſtreyn the Cattle of a ſtranger, which are Levant upon the Land; for a Herriot is a good Cuſtome, becauſe the diſtreſs is only as a pledg and means to gain the Herriot.

2. In Treſpaſs for taking of an Ox in Dale in Black Acre: upon the new aſſignment, the Defendant juſtified the taking there for Herriot-Service. It was the Opinion of the Juſtices, That the Lord might ſeize for Herriot-ſervice, and that when the Lord had once ſeiſed, that it is a ſufficient ſeiſin by the hands of his Tenant. M. 40 Eliz. in C. B. *Goldsbr.* 189.

3. In the County of *Lancaſter*, there is a Cuſtome there, upon the death of every Tenant at Will, to pay a Herriot, and ſuch a Cuſtome was adjudged a good Cuſtome, and ſo it was alledged to be, to pay a Herriot upon the death of a Tenant for years. See Hill. 11 Jac. in B. R. in *Hix* and *Gardiners* Caſe. *Bolſtr.* 2. Part, 196.

4. A man held a houſe, and a half yard Land of Meadow Paſture of the Lord by Fealty ſuit of Court, and a Herriot to be paid upon the death of every Tenant thereof dying ſeiſed: the Lord purchaſed parcel of the Land; and afterwards the Tenant enfeoffed J. S. of another part of it. It was adjudged in that Caſe, That by the purchaſe of parcel of the Land by the Lord, the Herriot-Service was extinct. But there it was Reſolved, That if the Cuſtome of a Mannor be, That upon the death of every Tenant of the Mannor who dyeth ſeiſed of Lands holden of the Mannor, that the Lord ſhall have a Herriot there, although the Lord purchaſeth parcel of the Tenancy, yet the Lord ſhall have a Herriot by the Cuſtome. *Cook* 8. Part, 105. *Talbots* Caſe.

5. A. ſeiſed of Lands in Fee holden of T. L. as of his Mannor of H. by Fealty rent, and rendring the beſt Beaſt after the death of every Tenant in Feeſimple by Deed, in conſideration of paternal love to his Son and Heir apparent; and in conſideration of a Marriage betwixt his Son and B. and for the advancement of his Son, did enfeoff his Son and Heir apparent of the Land. Afterwards the Son, to the intent that B. ſhould not be endowed of the ſaid Lands during the life of the Father, redemiſed the Lands to the Father for 40 years, if he ſhould ſo long live; and afterwards the Marriage took effect: the Son did ſuit at the Court of the Lord, and after the Feoffment, the Father paid the Rent to the Lord; and afterwards the Father dyed, and the Lord took a beaſt for a Herriot after the death of the Father; and the Jury found the Statute of 13 Eliz. of Fraudulent Conveyances. In this Caſe, amongſt other points, it was Reſolved, That if the Son had dyed in the life of the Father, that upon his death the Lord ſhould have had a Herriot. And 2. Becauſe the Jury have not found any fraud, the Court ſhall not adjudg the ſaid Feoffment by the Father to the Son to be fraudulent. Trin. 10 Jac. in C. B. *Tyrer* and *Littletons* Caſe, vouched in the Chancellor of *Oxfords* Caſe. *Cook* 10. Part, 55, 56.

6. In a Replevin, the Defendant made Conuſans as Bayliff of J. S. and ſhewed, that the ſaid J. S. was ſeiſed of the Mannor of D. and that one B. was ſeiſed of a Tenement holden of the ſaid Mannor by Rent, and Herriot-Service payable after the death of the Tenant, and that B. dyed poſſeſſed *de animalibus et cattallis*, and becauſe the Herriot was not paid, he by the command of J. S. diſtreyned. Exception was taken to the Avowry, becauſe he did not ſhew what was the beſt Beaſt, nor the kind thereof, nor the price of it, nor can the Plaintiff know what to offer to have his Cattel again. But it was Reſolved by the Court, That the Avowry was good, for perhaps he doth not know what was the beſt Beaſt, and the Plaintiff having eſloyned it at his perill, ought to tender ſufficient recompence; and ſo it was ſaid it was adjudged. Trin.

38 Eliz. in *Dicker* and *Higgons* Case. Hill. 5 Car. in B. R. *Mayor* and *Brandwoods* Case. *Cro.* 1. Part, 189.

7. In a Replevin, the Defendant made Avowry for the Herriot-Service, the Plaintiff pleaded in bar, That the Tenant at the time of his death *nulla habuit animalia*, upon which the Defendant did demur. It was adjudged for the Plaintiff, because the Avowry was insufficient, for that it did not set down in certain what the Herriot should be, *scil.* Beast, or other thing Mich. 14 Jac. in C. B. *Shaw* and *Taylor's* Case. *Hob.* 176. See *Hutton* 4. the same Case.

8. In a Replevin for taking a Colt, and a Cow, the Defendant as Servant avowed the taking of them *nomine Heriotorum*; and shewed, That J. S. was Lord of the Mannor, and the Father of the Plaintiff was a Free Tenant, and held several parcells of Land of the Lord by Fealty and Herriot, and set forth the Custome of the Mannor to be, That the Lord of the Mannor for the time being, used to have a Herriot for each parcel of Land thus held, and that the Father dyed seised of several parcells of Land, and that by his death, a Herriot was due to the Lord, in whose right he did take the Colt and Cow, *nomine Heriotorum*. Divers exceptions were taken to the Avowry, because it being for several Services, he doth not shew in particular what he took for one, and what for the other; and also he doth not shew of what estate he dyed seised; for in one Case, a Herriot Custome may be due, and in another it may be a Herriot-Service. But it was the Opinion of the whole Court, That the Avowry was good, for that it is sufficient to say generally, That of every Tenant dying *Dominus Manerii* is to have a Herriot. See Fitz. Title Avowry. 177. Trin. 8 Jac. in B. R. *Sylliards* Case. *Bolstr.* 1. Part, 101.

9. In Trover and Conversion, the Case was, The Bishop of *Gloucester* was seised of the Mannor of D. and let 20 Acres thereof to A. and B. during the lives of three of their Children, rendring 27 s. rent *per annum*, and also paying and delivering to the Bishop and his Successors, two of the best Beasts upon the death of every one of the *Cestuy que vies*: and afterwards, the Bishop let all the Mannor to J. S. rendring the auncient Rent, and after one of the *Cestuy que vies* dyed. It was Resolved in this Case. 1. That when the Bishop let parcel, as 20 Acres for life, and after he lets the Mannor to another rendring Rent: that in this Case, the Rent issues out of the intire Mannor. 2. They held that the Herriot reserved should go with the Reversion: And if this do not go with the Reversion of the Mannor to the Lessee, yet the Plaintiff should not have the Herriot. And if the Herriot did appertain to the Bishop, Plaintiff; yet he should not have Trover and Conversion for it, because the Defendant had the first possession of it. Mich. 20 Jac. in C. B. The Bishop of *Gloucester* and *Woods* Case. *Winch.* 57.

Heir and *Heirs.*

1. *The force of the word Heirs; and how it shall be expounded, in Deeds, Grants, and Wills. And where a Fee-simple will passe without the word (Heirs); and where it will not passe, although it hath the word (Heirs) in the Deed.*

1. THE word [Heir] is sometimes taken absolutely, or *simpliciter*; sometimes *secundum quid*, or by *Accident*; sometimes in *abstracto* standing naked by it self, sometimes in *concreto*, cloathed with Land, or Rent, in respect of which, he may be Heir who is not right Heir. As for example, The younger brother in Borough-English is Heir, and all the Sons in Gavelkind, whereof the reason is, because the Custome is, and so must be pleaded, that they must discend to the younger Son, or all the Sons. So they are Heirs *secundum quid* of those Lands in point of discent, or when they discend, for then they are within the Custome that gives the Inheritance. But make the limitation even of Land of that nature to Heirs not in point of discent, and it will be otherwise. And therefore if I give Land in Gavelkind, or Borough English to one for life, the Remainder to the right Heirs of J. S. the true Heirs shall take it, for it is out of the Custome, and so must run to the Heir at the Common Law. See 10 Jac. in C. B. in *Camden* and *Clarks* Case. *Hob.* 31.

2. *Haeres est alter ipse et filius est pars Patris*, and it is said, *Mortuus est Pater, et quasi non mortuus, quia reliquit similem sibi filium. Coke* 3. Part, 12. in Sir *William Herberts* Case.

3. A gift made to one and his Heir in the singular number, is but an estate for life; and so is it of a gift to one, *Habendum* to him and his Heirs, he hath but an estate for life, for the reason of the incertainty. So it is of a gift to two *et haeredibus*, without saying *suis*, is a good estate in Fee. *Coke* 1. Part, *Institutes*, 8.

4. A. seised of Lands in Fee, devised the Land to the Father for his life, the Remainder to the next Heir Male of the Father, the Father having Issue a Son at the time. It was Resolved, That the

the Remainder limitted to the right Heir of the Father, was good, although he could not have right Heir during his life. *Cook* 1. Part, *Archers* Case.

5. Note, there is a difference, where a Reservation is to an Abbot in the disjunctive to him in the disjunctive: As where a Lease is made for years by an Abbot and Covent, rendring Rent to the Abbot and Covent, or his Successors; and where a Feoffment is made to one or his Heirs in the disjunctive, in the first Case; his Successors shall have the Rent; but in the other Case of Feoffment, the Heir shall not have the Fee, but an estate shall passe only for life: And so it is where a Reservation is to one or his Heirs, the Reservation is void as to the Heirs. See *Cook* 5. Part, in *Mallories* Case. And *Plow. Com.* 248. in *Chapmans* Case.

6. If Land be given by Deed to two, to have and to hold, to them *et hæredibus*. It is void for the insensibility and incertainty; and although he add a clause of Warranty to them and their Heirs, the same will not make the first words which are incertain to be of force and effect in Law, although his intent appeareth, but his intent ought to be declared by words certain and consonant to the Law. But if a man deviseth Lands to one for ever, there he hath a Feesimple, and his Heir shall take, although he be not certainly mentioned Heir, for that such an estate might be conveyed by act executed. But if he further Devise, That if the Devisee do not such an Act, that another shall have the Land to him and his Heirs, the same is void, for that such a limitation, if it were by Act executed, were void. *Cook* 1. Part, 85, and 86. in *Corbets* Case.

7. See *Littleton*, where he saith, That a man by a Feoffment or grant, shall not have a Feesimple without the word Heirs: yet the Law is clear, That if a man before the Statute of 27 H. 8. had bargained and sold his Land for money without the word (Heirs) the Bargainee hath a Feesimple, the reason is, because by the Common Law, nothing passeth from the Bargainor, but an use, which is guided by the intent of the parties, which was to convey the Land wholly to the Bargainee, and forasmuch as the Law intends, That the Bargainee dash pay the very value of the Land, therefore in equity, and according to the meaning of the parties, the Bargainee had the Feesimple without the word Heirs. See 27 H. 8. 5. *Cook* 1. Part, 100. in *Shelleyes* Case.

8. Note, It was Resolved, That when a Copyholder surrenders to the Lord, to the use of his Wife, and his younger Son, without limitting any Estate, they have for life only; for aswell Estates as Discents shall be directed by the Rules of Law, as necessary consequents upon the Custome, except there be a special Custome within the Manour; that *sibi et suis*, or *sibi & assignatis* may create an Estate of Inheritance. *Cook* 4. Part, 29. *Buntings* Case.

9. A Copyholder in Fee of Lands discendable in Borough-English, having three Sons and one Daughter, devised his Land to his eldest Son, paying to his Daughter, and every of his other Sons, 40 s. within two years next after his decease; and made a surrender to the use of his Will, and dyed; the eldest Son was admitted, and did not pay the money within the two years, the youngest Son entred. It was adjudged, That his entry was lawful: For it was Resolved, That the Law shall construe in this Case, the word paying, to be a limitation, of which the younger brother in Borough-English, might take advantage, and to amount to as much as if he had made the devise of the Land to his eldest Son untill he should make default of payment. Mic. 33 Eliz. in B. R. *Wellock* and *Hemonds* Case, vouch. in *Cook* 3. Part, in *Bracflours* Case.

10. See *Cook* 1. Part, 140. in *Chudleighs* Case, where it is Resolved, That an Estate made to one and his Heirs, during the life of J. S. is but an estate for life, upon which a Remainder may depend: And that an Estate made to one and his Heirs on the body of J. S. begotten, is an estate tail, and no Feesimple, against the Opinion of *Ascough* 20 H. 6. 36.

See more for this Division, before, in the Title ESTATES.

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2. *Where the Heir and his Lands shall be charged for the Debt of his Father, or other Ancestor; where not: And what shall be a good bar pleaded by him in such Action; what not: and where he shall be relieved against such Charge of his Ancestor; where not.*

1. A. acknowledged 5 Statute of 3000 l. to the King, and dyed; after his death, a *Scire facias* issued forth against the Executors of the last Will and Testament of the said A. and the Heir of the Lands and Tenements which were his: At the day, the Sheriff returned, That he had not Executors, but that *Scire feci tr. militi filio et hæred. dict. A. quod sit, &c.* who made default, whereupon Judgment was given for the King, that he should recover

recover againſt the ſaid W. Whereupon he brought a Writ of Error. It was Reſolved in this Caſe (amongſt other points), That if Lands of the Heir be ſeized in Execution upon a Recognizance of his Auncеſtor, he ſhall not have contribution againſt a purchaſor of his Auncеſtor, although he come in without conſideration, and although the Heir be not charged as Heir, but as Ter-Tenant; but one Purchaſor ſhall have contribution againſt another Purchaſor, and one Heir againſt another Heir, becauſe they are *in equali jure*: And therefore in this Caſe, the Writ which iſſued out in this Caſe againſt the Heir, without naming the Purchaſors, was good, although he was charged as Ter-Tenant. 2. If divers acknowledg a Recognizance, the Charge doth not ſurvive, and the Land of the one ſhall not be put in Execution, but all their Lands equally. In the principal Caſe, three Errors were aſſigned. 1. That the *Scire facias* was ſeized *hæredes terrarum & tenementi*. which is unproper, for that one is Heir to his Auncеſtor, and not to the Land. 2. That the Return did not anſwer the Writ. And 3. Becauſe the Judgment was given generally, where it ought to have bin ſpecial, for by ſuch Judgment, his own Land ſhould be charged: but theſe Exceptions were not anſwered, nor Reſolved. 26 Eliz. in the Exchequer Chamber. Sir *William Herbert's* Caſe. *Cook* 3. Part, 11.

2. If a man by Deed Granteth a Rent-charge to one and his Heirs, and doth not ſay for him and his Heirs, and dyeth, now the time of Election to make it an Annuity is paſt; and therefore if the Grantee bringeth a Writ of Annuity againſt the Heir, it ſhall not diſcharge the Land, becauſe when no Election doth remain, it is as much in Law as if the Election had never bin. 17 Eliz. *Dyer*, 344.

3. A *Scire facias* upon a Recognizance in Chancery, the Defendant was returned dead: whereupon a ſecond *Scire facias* iſſued againſt the Heir of C. and againſt the Tenants of the Lands of C. which he had *tempore recognitionis vel poſtea*: Whereupon the Sheriff returned F. Ter-Tenant of ſuch Lands, and omitted to return any thing concerning the Heir; Upon this the Defendant pleaded, That C. had nothing in the Land at the time of the Recognizance, or ever after; which being tryed, it was found, that C. was ſeiſed, and a Verdict for the Plaintiff. It was moved in Arreſt of Judgment, That there was nothing returned concerning the Heir, and therefore no Judgment could be given. It was Reſolved by the Court, That although the Return had bin better, if he had found who was Heir, and that he was warned, or that there was not any Heir in the ſaid County. Yet it was holden good enough: For anciently the *Scire facias* was only againſt the Ter-Tenant; and the Heir was not charged in the *Scire facias* but as Ter-Tenant; and if the Return be not good or formall, yet it was helped by the Statute of Jeofailes; and miſ-return, and inſufficient Return, *quoad* the Heir is but a Diſcontinuance which is helped by the Statute: Wherefore Judgment was given for the Plaintiff. Trin. 9 Car. in B. R. *Eyres* and *Taunions* Caſe. *Cro.* 1. Part, 215. and 228. And Hill. 1 Car. In a *Scire facias* againſt the Heir, and Ter-Tenant, he is only charged as Ter-Tenant: And by pleading *riens* by diſcent, and found againſt him, the Execution was againſt the moyety of his Land, and not of all, as the Heir ſhould have bin upon a falſe Plea. Hill. 1 Car. *Bowyer* and *Rivets* Caſe. *Cro.* 1. Part, 215. See *Poph.* 153. acc.

4. Debt againſt an Heir, who pleaded Riens by Diſcent the day of the Action brought: The Plaintiff pleaded, That before he brought another Writ againſt the ſame Heir, upon the ſame Bond in this Court, and the Defendant was Outlawed, which Outlawry, for the inſufficiency of Proclamations, was reverſed, and he freſhly brought this Writ, and averred, that the Defendant had Aſſets the day of the firſt Writ: Whereupon the Defendant demurred. It was the Opinion of the Court againſt the Plaintiff, for that the Defendant had alienced the Aſſets before the ſecond Writ was brought, and then he is not chargeable. The like hath bin pleaded againſt the Executor, but no Judgment hath bin given in theſe Caſes. Hill. 12 Jac. in C. B. *Spray* and *Sherrots* Caſe. *Hob.* 248.

5. Debt brought in *London* againſt the Heir upon an Obligation made by his Father, who pleaded, Nothing by diſcent at the time of the Writ brought; and the Plaintiff did aver Aſſets by diſcent in *London*, in the Pariſh and Ward aforeſaid. And in Evidence, gave Aſſets in *Cornwall*; and if it were good Evidence, or the Jury might find it, was the Queſtion. It was conceived, That it was not good Evidence, nor the Jury could not find it, being a local matter, 10 Eliz. *Dyer*, 271. But ſee *Cook* 6. Part, 47. that being but for conformity and neceſſity of tryall to alledg a certain place. Yet it was Reſolved, That the Jurors might find Aſſets by diſcent in any other County within *England*: And the Law is, That in ſuch Caſe the Plaintiff ſhall have in Execution all the Lands which the Heir hath, and perhaps he hath Lands in divers Counties; and therefore although that one place be named for neceſſity, yet the Jurors may find all that which by Law ſhall be chargeable in ſuch Caſe, in what Towns or Counties ſoever it lyeth. *Cook* 6. Part, 47. *Dowdall's* Caſe.

6. If a man binds himſelf in an Obligation and his

his Heirs, and he hath Lands and heirs on the part of his Father, and alſo on the part of his Mother; one of the heirs and his Land ſhall not be only charged, but the Heirs and Lands of both parts ſhall be equally charged. *Cook* 2. Part, 25. in the Caſe of Bankrupts, &c.

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3. *Where, and what Chattels or other things perſonall, the Heir ſhall have after the death of his Anncestor; What not.*

1. IT was adjudged in the Common-Pleas, That Waſte might be committed in glaſſe annexed to Windowes, for it is parcel of the houſe, and ſhall diſcend as parcel of the Inheritance to the Heir, and the Executors ſhall not have them: and although that the Leſſee himſelf at his own Coſts, put the glaſſe in the Windowes; yet the ſame is parcel of the houſe, and he cannot take it away, or waſte it, but he ſhall be puniſhed in Waſte. *Cook* 4. Part, 63. in *Herlakenden's* Caſe.

2. It was Reſolved by the whole Court, That glaſſe annexed to Windows by nayls, or in other manner by the Leſſor or Leſſee, cannot be removed by the Leſſee; for without glaſſe, it is an imperfect houſe, and by Leaſe or grant of the houſe, it ſhall paſſe as parcel thereof, and the heir ſhall have the glaſſe, and not the Executors; and there is no difference, if it be faſtned by Nayls, Screws, or Irons through the Poſts or Wales; and ſo it is of Wainſcot by any of thoſe wayes; they are parcel of the houſe, and the heir ſhall have them as parcel of his Inheritance. Mich. 42 Eliz. in C.B. *Warner* and *Flettwood's* Caſe. *Ibid.*

3. A man hath not an abſolute property in things which are *feræ naturæ*; but he may have a Qualified property in them: If a man hath Beaſts which are ſavage, *ratione privilegii*, as by reaſon of a Park, Warren, there he hath not abſolute property in the Deer, for in treſpaſſe he ſhall not ſay *ſuos*; but in ſuch caſe they belong to him *ratione privilegii*: and they ſhall not go to his Executors, but the Heir ſhall have the Deer. And ſee, that the Heir may have an Inheritance in a Swan-mark; and that appears in *Stew. v. l's* Caſe; viz. *Notum ſit omnibus, Quod ego Johannes Steward Conceſſi ſ'lio meo primogenito et hæredibus ſuis Cigni notam meum armorum meorum prout in margine lateralı pingitur quæ mihi jure hæreditari diſcendebat poſt mortem patris mei, Habendum ſibi et hæredibus ſuis una cum omnibus Cignis, et cygnicalis, &c.* *Cook* 7. Part, 17. in the Caſe of Swans.

4. In Treſpaſſe for entring into his Cloſe, and taking of Fiſh out of his Fiſh-Pond with Nets and other Engines; the Defendant pleaded, That A. was ſeiſed of the Cloſe and Pond, and put the Fiſhes into the Pond, and made the Defendant his Executor, and dyed; and that he as his Executor took the Fiſhes. It was adjudged in that caſe, That the heir ſhould have the Fiſhes in the Pond, and not the Executors, for that they are Chattels diſcendable. *Clench* ſaid, But it is Felony to take them. *Popham*, If they be in a Trench, ſo as they may be taken with the hands of men, without Nets, or other ſuch Engines, it is Felony: otherwiſe not. Hill. 43 Eliz. B. R. *Girley* and *Trewes* Caſe. *Goldesbr.* 129.

More Heirs.

1. IN a *Formedon* in the *Diſcender*, it behoves the Demandant to make himſelf Son and Heir, or Coſen and Heir to him who was laſt actually ſeiſed by force of the tail; for a later Seiſin in any heir in tail after, ſhall abate the Writ: and it behoveth him who was laſt ſeiſed, to make himſelf Heir to the Donee; or otherwiſe the Writ is naught, and it is not ſufficient that he be named Son; for he may be Son, and not Heir. *Cook* 8. Part, 88. in *Buckmers* Caſe.

2. A man mortgaged Lands, upon Condition, That if he or his heirs repay 100 l. at ſuch a day, he ſhall re-enter: he dyes, leaving Iſſue a daughter only, his wife being privily enſient with child of a Son; the daughter and heir at the day payes the 100 l; and afterwards the Son is born: Whether the Son ſhould enter upon the Siſter, or that ſhe ſhould retain the Land for ever, was the Queſtion? It was the Opinion of the greater part of the Juſtices, That the Siſter ſhould retain the Land againſt the Son born; for in as much as ſhe paid the money, (and if ſhe had not paid it, the Land had been loſt) if ſhe could not retain the Land againſt the Son, ſhe hath no remedy for the money: and by payment thereof, ſhe hath gained the Land, and is in as a Purchaſor, although ſhe was entituled to it by a Condition, and as heir: Some other Juſtices held contrary, becauſe ſhe hath it as heir, and then the nearer heir being born, ſhall defeat her. And her payment was voluntary, which ſhe might have omitted. Mich. 13 Car. in the Court of Wards. *Kirtons* Caſe. *Cro.* 1. Part, 61.

3. Theſe Points were Reſolved by the Juſtices, in a Caſe referred unto them, out of the Court of

Wards: 1. That a Divorce being by Sentence in the Spiritual Court, between K. and his Wife, *Cauſa præcontractus*, the parties being dead between whom it was, the Court of Wards cannot now examine, to prove another heir, againſt that Sentence. 2. That one being by Office found heir, another exhibiting his Bill to traverſe that Office, ſhall not be admitted thereunto, untill he hath another Office finding him to be Heir. 3. That where a Bill is to be admitted to a Traverſe which abates by the death of the Defendant, and a Bill of Reviver is exhibited, which abates by death or marriage of the Plaintiff, that there cannot be any Bill of Reviver: For a Bill of Reviver cannot be after a Bill of Reviver. Mich. 5 Jac. in B. R. *Robertſon* and the Lady *Stalleges* Caſe. *Cro.* 2. Part, 186.

4. In *Ejectione Firmæ*, The Cuſtome of a Mannor was, That upon the death of every Copyhold, his Heir ſhould pay ſuch a Fine as ſhould be reaſonably aſſeſſed: and further the Cuſtome was, That if a Copyholder dyed, and the Heir cometh not the next Court to be admitted, Proclamation ſhall be made; and if after 3. Proclamations, the Heir cometh not in, the Lord ſhall ſeize the Copyhold: A. Copyholder dyed, his death was preſented, and that W. was his Heir, and Proclamations were made at 3. Courts, and the Heir did not come, and therefore the Lord ſeiſed the Copyhold: It was ſhewed. That the heir at the time was beyond the Seas; and afterwards having Notice of the death of his Anceſtor, he tendered his Fine, and entred, and let the Land to the Plaintiff: The Queſtion was, Whether his being beyond Sea, ſhould excuſe him of the Forfeiture? It was Reſolved by the Juſtices, That it was no Forfeiture; for the Heir being beyond the Seas, ſhall not be intended, to have knowledg of the diſcent, nor of the Proclamations, and therefore is excuſable, as well as if being beyond Sea, he ſhall be excuſed from an Outlawry, from a Diſcent, which takes away an entry, and from a Non-claim upon a Fine at the Common Law. It was adjudged for the Plaintiff. Mich. 7 Jac. in B. R. *Sanderbill* and *Kelſeys* Caſe. *Cro.* 2. Part, 226.

5. It was Reſolved by the Juſtices, That Coats of Arms placed in any Window, or Monument in the Church or Church-yard, cannot be beaten down and defaced by the Parſon, Ordinary, Churchwardens, or any other: And if they be, the Heir by diſcent intereſſed in the Coat, may have an Action of Treſpaſſe. 9 E. 4. 14. Sir *William Witches* Caſe. And ſo it was Reſolved in *Pymm* and *Garrens* Caſe, 11 Jac. in C. B. for the Heir as well inheritable to Arms, as to Heireloones, Hill. 12 Jac. in B. R. *Francis* and *Leyt* Caſe. *Cro.* 2. Part, 367.

6. A man made a Leaſe for years, Reſerving a Rent to him, his Executors, and Aſſigns, during the Term; the Leſſor dyed; and his Heir who had the Reverſion, brought Debt for the Rent: It was urged, That the Rent was incident to the Reverſion, and therefore the heir ſhould have an Action of the Rent. But it was Reſolved, That the Action would not lye by the heir: For when a man paſſeth Lands from himſelf, the Law gives him liberty to paſſe them in ſuch manner as he will; and this liberty ought to take effect according to the expreſſe words; for the Law will not extend them farther: for his intent ſhall appear by the words; and then it cannot be intended that the Heir ſhould have the Rent, becauſe the words are not ſufficient to give it to the Heir. Hil. 33 Eliz. in C. B. *Richmonds* Caſe, *Owen* 9.

7. It was found by Office, That J. S. who held the Mannor of D. of the Queen, dyed without Heir: whereupon W. S. as Heir to him, did traverſe the ſaid Office; and was at Iſſue with the Queen, If Heir or not? (depending which Suit) he made a Feoffment in Fee, with a Letter of Attorney to make Livery. It was found againſt the Queen, and Judgment given againſt her; and before *Amoveas Manum*, the Attorney made Livery. It was adjudged good; for by the Judgment againſt the Queen, her poſſeſſion was utterly defeated, and the poſſeſſion was in the party before any *Amoveas Manum* is ſued forth: for that ſerves but to compell the Eſcheator to avoid the poſſeſſion, if he holds the Land after the Judgment; and in ſuch caſe, no Livery is neceſſary to be ſued: and therefore, the Feoffment in the principal Caſe is good, and ſhall bind the Heir. Mich. 37 Eliz. in C. B. *Brown* and *Hervyes* Caſe. *Owen*, 115.

8. In *Ejectione Firmæ*, the Caſe was; A. ſeiſed of the Land in Queſtion, and of 20. Acres of Lands more in Fee, had Iſſue 3. ſons, *James*, *William*, and *Anthony*; and gave to W. his ſecond ſon, 10 Acres of the 20; and to *Anthony*, other 10 Acres, and gave to *James* his eldeſt ſon, the Land in Queſtion, and willed, That when *James* ſhould dye without heirs of his body, that W. ſhould be his heir, and *Anthony* ſhould have his part; and if either the ſaid *William* or *Anthony* ſhould dye, that then one of them ſhould be the others Heir; and dyed: *James* dyed without Iſſue; *William* dyed, having Iſſue R. under whom the Defendant claimed: upon whom *Anthony* entred, and made the Leaſe: It was adjudged, That the Plaintiff ſhould be barred: for the laſt clauſe, That W. and A. ſhould be the others heirs, was to be applyed only to the 20. Acres, which either of them might take from the other; and not to the Lands given to *James*: Then touching thoſe, ſince there was no

Eſtate

Eſtate given to *James*, and that for default of Iſſue, W. ſhould be his Heir, that gave W. an Eſtate of Inheritance either in Fee-ſimple, or ſuch entail as *James* had: for although none can be truly Heir, but ſuch as the Law makes Heir, yet there is an Heir by appellation, and vulgar acceptance; and therefore if by my Will I appoint that J. S. ſhall be Heir of my Land, he ſhall have it in Fee; for ſuch Eſtate as the Anceſtor hath, he is to inherit: And therefore in the principal Caſe, the word Heir, in the later clauſe between W. and A. ſhall give him but an Eſtate for life, becauſe the brother to whom he is made Heir, had but an Eſtate for life before. Hill. 11 Jac. in C.B. *Spark and Parnell's Caſe. Hob.* 75.

9. Upon a Special Verdict, upon the words of a Will; The words were theſe; I make my Coſin *Giles Bridges* my ſoll ayere and Executor: the Queſtions were; 1. Whether any Eſtate paſſed by the words of the Will. 2. What Eſtate paſſed. And, 3. Whether the falſe Orthography did hurt the Will. It was Objected, That the Lands did not paſſe: and if they did paſſe, yet they paſſed but an Eſtate for life. And it was Objected, That there is no neceſſary implication, that the Teſtator intended to deviſe his Lands, and the Will doth not ſay, he makes him his Heir of his Lands, but generally his heir: which by the Civil Law may extend to goods. But it was Reſolved by the Court, That here although the words of the Will be not proper, yet we may collect the Teſtators meaning to be, by making of the party his Heir, that he ſhould have his Lands: and it is all one, as if he had ſaid, Heir of my Lands. And here he not only makes him his Heir, but his Executor alſo; and therefore if he ſhall not have his Lands, the word [*Heir*] is meerly nugatory, and to no purpoſe; for by being Executor only, he ſhall have the goods: and he is in this caſe, *hares factus*, though not *hares natus*. And the word Heir, implyes two things: 1. That he ſhall have the Lands: 2. That he ſhall have them in Fee-ſimple. Hill. 1650. in B. R. *Taylor* and *Webb's* Caſe. *Styles*, 301, 302, 307, 308, 319.

10. Note: There is a difference between Lineal and Collateral heirs: If a man be ſeiſed of Lands in Fee-ſimple, and his eldeſt ſon be attainted of Felony, and dye in the life of his Father without Iſſue; the ſecond brother ſhall immediately inherit from the Father: but otherwiſe it will be, if the Elder brother or his Iſſue ſurvive the father. 32 H. 8. *Dyer*, 48. *Mar.* 334. in *Mack-Williams* Caſe, &c.

Homage and Fealty; *and* Homage Auncestrel.

1. THere is a two-fold Homage; viz. *Homagium Ligeum*; which is that which we call Legiance, which is that which *Bracton* ſaith, *Soli Regi debetur ſine Dominio ſeu Servitio*: It was an Oath, which the *Saxons* long before the Conqueſt, took of their Subjects and Vaſſals, Sir *Ed. Cook*, *Lib.* 7. in *Calvin's* Caſe, ſaith, It was inſtituted firſt by King *Arthur*: for amongſt the Laws, *Sancti Edwardi Regis, Cap.* 35. it is, *Quod Omnes Principes et Comites, Proceres, Milites et liberi homines debent jurare, &c. in Falkmote. Et ſimiliter, omnes Proceres, et Milites, et liberi homines univerſi totius Regni Britannia, facere debent in pleno Falkmote fidelitatem Domino Regi. Hanc legem invenit Arthurus, qui quondam fuit Inclitiſſimus Rex Britanniæ. Hujus Legis authoritate expulit Arthurus Rex Saracenos, et inimicos, à regno ſuo, &c. Et hujus Authoritate Ethelredus uno et eodem die per univerſum ſuum Regnum Danos occidit.* But long before that time, you ſhall find, That the Oath of Fealty and Allegiance was in ure: For *Malmesbury* Reports that in the Life of King *Edgar*, That there came to the Court, *Kenadie* King of *Scots*, *Malcolme* King of *Cumberland*, The Arch-Pirate *Macteff*; all the Kings of the Welſh, *Duſual*, *Griffeth*, *Hoel Dha*; whom King *Edgar* bound to himſelf in a perpetual Oath of Fealty. See *Selden. Title of Honour.*

2. *Homagium Feudale*, had his Original upon the Creation, of Feuds, or Tenures, which alſo was in the *Saxons* time, long before the *Norman* Conqueſt: For, it is found, that in the *Saxons* time King *Alfred* at Peace with *Gauthurn* the *Dane*, whom he wonne over to the Faith, gave him the Province of the Eaſt Angles, and *Northumberland*, to be poſſeſſed by a feodall and hereditary right; viz. under Fealty of the King, that he might preſerve that by hereditary right, which he had invaded by robbery. *Melmesbury de rebus geſtis.* See *Concill. Sax.* 379.

3. *Homagium Ligeum*, is inſeparable from the perſon of the King; nor can it be reſpited: but

Homagium feudale may be reſpited. *Cook* 7. Part, in *Calvin's* Caſe.

4. Mr. *Littleton*: Homage is the moſt Honourable, and the moſt humble Service that the Tenant can do to his Lord; for when the Tenant ſhall do Homage to his Lord, he ſhall kneel upon both his knees ungirded, bare-headed; and the Lord ſhall ſit, and hold the hands of his Tenant between his hands; and the Tenant ſhall ſay, *Jeo devenge voſtre home*; *i. e.* I become your man from this day forward for life and member, and ſhall bear to you faith, for the Lands which I claim to hold of you: ſaving that Faith which I owe to our Lord the King. See *Litt.* 18 & 29 E. 3. 49. by *Mowbray*, for the manner of doing Homage.

5. Where Homage is done to the perſon of the King; It is done in theſe or the like words: See the Homage of *Oneal*; *Ego Nolanus Oneal Senior tam pro meipſo, quam pro filiis meis, et tota Natione mea, et Patentelis meis et pro omnibus ſubditis meis devenio Legeus homo veſter.* Sir *John Davis*, *Lib.* 1. of the Conqueſt of *Ireland*, 48.

6. The Kings Chamberlain may receive Homage for the King: but then it muſt be by a Privy Seal directed unto him from the King to receive it, 12 H. 4. Tit. *Livery*, 4.

7. When the Tenant doth Fealty to the Lord, he taketh an Oath, that he ſhall be faithful and loyal to the Lord, and bear faith to him for the Tenements which he claimeth to hold of him. Homage is the moſt honourable, and the moſt humble Service that the Tenant can do to his Lord; but Fealty is a more ſacred ſervice then Homage: for that it is made upon Oath, and the other not: and the words in the Oath of Fealty; *ſcil.* to be faithful and loyal, and to bear faith for the Tenements which he claimeth to hold of him, are alſo parcel of the words of doing of Homage. And that is the reaſon, that the Law maketh ſo great account of the Seiſin of thoſe ſervices of Homage and Fealty; for Seiſin of them is ſo inеſtimable in the Law, that no diſtreſſe for them of any goods, or Chattels (of what value ſoever), is exceſſive in Judgment of Law; and although that the Lord often diſtrain for them, ſo that the Tenant cannot till his Land; yet the Tenant ſhall not have an Aſſiſe of Sovent diſtreſſe, as he ſhall have for Rent and other profits: And Seiſin of Homage, is Seiſin of Superiour and Inferiour Services. *Cook* 4. Part, 8. *Bevill's* Caſe.

8. A man may hold by Homage and Fealty, and yet they ſhall never be done by him: As if Lands holden by Homage and Fealty, be conveyed to Mayor and Commonalty, or to other Corporation aggregate of many perſons; in this caſe they ſhall hold by Homage and Fealty, but they ſhall never do them. And yet in ſuch caſe, although they have enjoyed the Lands above 60 years; yet if they alien the Land, the Lord may diſtrain for the Homage and Fealty. 33 H. 8. *Br. Fealty*, 15.

9. If the King grant to me at this day, *Quod Ego, et hominis mei*, ſhall be acquitted from the payment of Toll; I and my men, Villeins and Homages, ſhall be acquitted by that Grant: for that the words of *Homageres* are, I become your Man; as *Littleton* is, 14 H. 6. by *Choine* and *Junc. Fitz.* tit. *Grants*, 9.

10. A man ſhall do Homage but once: And therefore, If Lands diſcend to me, which is holden of the ſame Lord by Homage; I ſhall do Fealty again to him; but I ſhall not do Homage again: and if both Lands are holden of the King by Homage, he ſhall not ſue reſpite of Homage in the Exchequer, but for one Homage only. 24 H. 8. *Br. Fealtie*, 8.

11. Note. It is holden, 14 H. 4. 5. by *Hankford*, That an Enfant may do Homage, and it is ſufficient for the Lord to avow upon that Seiſin. And ſee, 32 E. 3. *Fitz.* tit. *Age*, 80. by *Thorp*, A man may ſee, That an Enfant ſhall do Homage by his Friends: Yet there in a *Per Que Servitia* againſt an Enfant of the age of 3. years. It was ſaid by the Court, That he ſhould be attendant by Fealty and other Services by which he held of the Conuſor, and ſhould not do homage: yet the Plaintiff there declared, That he held by Homage.

12. The Husband ſeiſed in the right of his wife, ſhall not do Homage untill Iſſue had, and then he alone ſhall do the Homage. 7 E. 4. 12. 10 H. 6. 24. but after the death of the Wife, he ſhall not do Homage. And ſee, whereas it is ſaid in *Litt.* that, Mich. 15 E. 3. it hath been ſeen, that the husband and wife have done Homage in the Common-Pleas. See for that, *Fitzh. Na. Br.* 217. That the wife ſhall not do the Homage with her husband, becauſe the Homage is left for the time, *Cook* 1. Part, *Inſtitutes*, 66.

13. It is regularly true, That when a Tenant hath once done Homage to his Lord, he is excluded for the Term of his life, to do Homage to any other alience, or heirs of the Lord: but in ſome caſe, the Rule faileth; as in the Caſe following; *viz.* A. holdeth of B. as of his Manor of D. whereof B. is ſeiſed in tail; B. diſcontinueth the Eſtate tail, and taketh back an Eſtate in Fee-ſimple: A. doth Homage to B; B. dyeth ſeiſed, and the Iſſue in tail entreth. In this caſe, A. ſhall do Homage again to the heir of B, becauſe he is remitted to the Eſtate tail, and the Eſtate in which his Father had (in reſpect whereof the Homage was done) is vaniſhed.

vanished, and therefore the homage it self is also vanished; for the heir in tail is in of a new Estate, in respect whereof, A. ought to do a new Homage. And so it is when the Tenant hath done his Homage, and the Mannor is afterwards recovered from the Lord in a *Precipe* by a stranger, the Tenant shall do Homage again to the stranger, because the Estate of him who received the first Homage, is defeated by the Recovery. *Cook* 1. Part, *Institutes*, 103.

14. See Temps. E. 1. title, *Jurisdiction*, 13. It is holden, That a Parson shall not take Homage; but contrary of a Bishop.

15. The Tenant for life of Seignory, shall have the Wardship of the heir of the Tenant, because it is a profit; but he shall not have his Homage or Escuage, because it is a Real Service. 6 E. 2. *Gard.* 122. by *Wilby*.

16. 19 E. 2. tit. *Fines*, 71. Tenant for life may hold by Knights-Service, and do Escuage, but he cannot do Homage: the Case there was, Of a Lease for life to hold by Knights-Service; the Remainder in tail by Socage. And it was holden to be a good reservation, although the Tenant for life held by one service, and he in the Remainder by another service.

17. Homage Auncestrel is, Where a man and his Auncestors time out of mind did hold their Land of the Lord by Homage; If such Lord hath received Homage, he is bound to acquit the Tenant against all other Lords above him of every manner of Service: And if the Tenant hath done Homage to his Lord, and is impleaded, and voucheth his Lord to Warranty, the Lord is bound to warrant the Lands to him; and if the Tenant loseth, he shall recover in value against the Lord, so much as he hath at the time of the voucher, or any time after.

18. Where there is Homage Auncestrel betwixt an Abbot and Covent, and their Tenant, If the Abby be dissolved, although that a new one be founded of the same name, and all the possessions be granted unto them; yet the Homage Auncestrel is gone. So it is, If a man in his Natural Capacity holds by Homage Auncestrel, and sells the Lands to another, although he repurchase the Lands again, yet is the Homage Auncestrel destroyed. *Cook* 1. Part, *Institutes*, 102. and 202.

19. Tenant by Homage Auncestrel, maketh a Feoffment in Fee on the part of the Feoffor; the heir performs the Condition, and enters; the Homage is destroyed in respect of the Interruption of the Continuance of the privity betwixt the Lord and the Tenant: But if the Recovery be against the heir by feyned title, and he recover the Land again, the Auncient Tenure doth remain, because the right was a sufficient means to continue the privity. Mich. 14 Eliz. agreed in the Lord *Cromwell*'s Case.

20. In case of Homage Auncestrel, there is a speciall Warranty in Law, That all the Land which the Lord hath at the time of the voucher, shall be lyable to Execution in value, whether he hath the Land by discent, or by purchase, because the Voucher is in the place of an Action; but in case of an Expresse Warranty, the heir shall be charged only with the Land which he had by discent by the Auncestor who created the Warranty. See 28 E. 1. *Voucher*, 291. 9 E. 2. *Warr. Charta*, 20. *Cook* 1. Part, *Institutes*, 103.

21. If the Lord grant the Services of his Tenant by Homage Auncestrel, the Tenant shall not be compelled in a *Per Que Servitia* to attorn, unlesse upon a grant of the Seignory, he will grant in Court to warrant the Land to him: And if the Tenant vouch by force of this Warranty in Law; It is a good Counter-Plea, that the Tenant or any of his Auncestors *recepit de servitio suo, et fecit servitium A. B. sine aliquo conditione de sua propria voluntate.* 18 H. 6. 2. by *Newton*.

22. The Service of Homage is so near annexed to the person as well of the Lords side as of the Tenant, that the Tenant ought to seek the Lord, to the end that he may do him homage, if the Lord be within the Realm. And see *Bracton*, *Lib.* 2. *Cap.* 8. *Sciendum est quod ille qui homagium suum facere debet obtentum reverentia quam debet Domino adire debet Dominum suum. ubicunq; fuerit inventus in regno vel alibi, si possit commode adiri, et non tenetur Dominus quærere Tenementum suum, et sic debet homagium suum facere.* See *Cook* 1. Part, *Institutes*, 104.

23. If the Tenant who holdeth by Homage Auncestrel, maketh a Feoffment in Fee of the Land, to his own use; the Acquital is gone and destroyed: as it was holden 21 Eliz. in the Reading of *Windham*; and so if he alien upon Condition, and after doth enter for the Condition broken, the Acquittal is destroyed. Like the Case of Coparceners; If one of them after partition made, makes a Feoffment in Fee, and takes back again to her and her heirs; yet the privity of Estate to have Aide, or to deraigne the Warranty, paramount is destroyed.

24. Note. Although it be said by *Littleton*, 33. that if the Tenant hath done once Homage to the Father; that he shall not do Homage to the Son again: Yet see *Brook*, Tit. *Homage and Fealtie*, 4. The Tenant may cause the Son to receive his Homage by a Writ *de Homagio Capiendo*, to have the benefit of his Warranty. See 45 E. 3. 23. acc.

Homage

Honnors.

2. A Copyholder of the Mannor of *Tuddington*, where the Cuſtome was, That any Copyholder might ſurrender out of Court into the hands of two Tenants of the Mannor, to the uſe of any other) ſurrendred into the hands of two ſuch Tenants of the ſaid Mannor, to the uſe of B. and C. ſon of the ſaid B. and the longeſt liver of them both: and for want of Iſſue of the body of C. the Lands to remain to the uſe of M. Wife of J. S. this ſurrender was preſented: B. and C. his Son were admitted accordingly. Afterwards B. and C. his Son dyed without Iſſue. The Verdict found, That the Land was cuſtomary Land of the Mannor of *Tuddington*, and that the ſurrender ought to be into the hands of two Tenants of the ſaid Mannor; but the Copy of the ſurrender was found *in hec verba Tuddington*, in the Margent, *viz.* at the Court Baron of the Honnor of *Hampton*; J. S. and J. D. Tenants of the Honor of *Hampton* do preſent, That A. did ſurrender into the hands of two Tenants of the Honor, &c. *ut ſupra*. It was objected, That that being a Court of the Honor, and the ſurrender being into the hands of the two Tenants of the Honor, was not good. But it was holden by the Juſtices, That the ſurrender was good enough: For *Tuddington* being in the Margent, it ſhall be ſaid a diſtinct Court by it ſelf. For an Honor conſiſts of many Mannors; yet all the Courts of the Mannors are diſtinguiſhed, and have ſeveral Copyholders; and although there is for all the Mannors but one Court, yet they are *quaſi* ſeveral and diſtinct Courts: whereupon it was adjudged, That the ſurrender was good, and Judgment given for the Plaintiff. Mich. 8 Car. in B.R. *Seagood* and *Honts* Caſe. *Cro.* 1. Part, 267.

2. In a *Quo Warranto*, for uſing Liberties within the Town of *Petworth*, and in keeping a Fair and Market, and taking of Toll, the Defendant juſtified under the Title of the Earl of *Northumberland*; and ſhewed, That 5 *Mariæ*, the Honor of *Petworth* was conveyed by Act of Parliament to the Earl of *Northumberland*, and the Heirs Males of his body, the Remainder to H. P. in tail, with all Markets, Fairs, Tolls, &c. and that the ſaid Earl dyed, and that the ſame diſcended to the now Earl of *Northumberland*, ſon of the ſaid H. P. and ſhewed, that there was an Officer called the Baylift and Portreen of *Petworth*, that uſed to take Toll of every one, by reaſon whereof he did take Toll of ſome of the Tenants of the Earl of *Arundel*; and the Queſtion hereupon came betwixt the two Earls, Whether the Mannor of *Petworth* be within the Honor of *Petworth*: And whether this Honor of *Petworth* was holden of the Honor of *Arundel* or not. In proof that *Petworth* was an Honor, was ſhewed, the grant or confirmation of *Hen.* 2. *Dux Normandiæ, de Honore de Petworth*. In the time of R. 2. it was called an Honor and Barony; and a gift made to *John* Duke *Holland* of *Exeter*, of all his Honors, Mannors, and Barronies of *Petworth*: and divers other Preſidents were ſhewed, where it was called the Honor of *Petworth*; 19 E. 4. *Magnum Dominium de Petworth*. It was objected, That H. 2. *Dux Normandy* was but a Subject, for by the mediation of *Maud* the Empreſſe, the Dukedome of *Normandy* was granted to him; and it was granted him by the name of *Dux Normandiæ et amicus noſter*, but he did not name himſelf King: And it was ſaid, an Honor could not be granted by a Subject, but by the King himſelf. But the Opinion of the Court was, That a man might have an Honor, a Barony, or an Earldome by Preſcription: On the other ſide, It was ſaid, That *Petworth* was no Honor, but that the ſame was parcel of the Honor of *Arundell*; and a Book called *Extenta terrarum, Comitatum* of the Earl of *Arundell*, and of eight Hundreds there named to be belonging to the Earl of *Arundell*, whereof *Petworth* was one; and it was ſaid, That one Honor cannot be holden of another. But the Jury found *Petworth* to be an Honor, and that the Mannor of *Petworth* was parcel of the Honor of *Petworth*, and that they had the ordering of a Fair, Market, and uſed to take Toll of all, except of the Earl of *Arundell's* Copyhold-Tenants, and Free Tenants. And the Court did all agree, That the Jury had done well, and had given a good Verdict; for the Jury found, That they had Toll of ſtrangers, but not of others, *ſcil.* of the Tenants of the Honor of the Earl of *Arundell*. Paſc. 10 Jac. The King and *Levets* Caſe, *Bulſt.* 1. Part, 195, 196, 197.

3. King H. 6. by his Letters Patents, in conſideration of the good Service of *John* Earl of *Shrewſbury* in the City of *Waterford* in *Ireland*, *et pro eo quod terra prædict. noſtra in Hibernia contra inimicorum et Rebellium noſtrorum inſultus potentias defendat.* created him Earl of *Waterford*, to him and the Heirs Males of his body: and further granted him the Caſtles, Honors, Mannors of *Dungervan*, to hold by Homage and Fealty; and by the Service to be his Majeſties Seneſchal of the Realm of *Ireland*. Afterwards in the Parliament of *Abſentees*, 10 *May*, 28 H. 8. by the long abſence of *George* Earl of *Shrewſbury*, Heir Male of the ſaid Earl. It was enacted, That the King ſhould have and enjoy in the right of his Crown, all He-

nors, &c. and all and ſingular the poſſeſſions Spiritual and Temporal whatſoever of the ſaid *George* Earl of *Shrewsbury* and *Waterford*. King *Hen.* 8. reciting the ſaid Act *Des Abſentees*, *Nottatur ſtatum & Dignitatem prædicti Comitatus diminute ſed amplius augere*, did grant to the ſaid Earl and his Heirs, divers Mannors and Lands within the Counties of *Nottingham*, *York*, and *Derby*. The Queſtions were, 1. Whether by the long abſence of the Earl of *Shrewsbury* out of *Ireland*, the ſaid Title of Honor of Earl of *Waterford*, were loſt or forfeited. 2. If by the ſaid Act of Abſentees, the title of Dignity of Earl of *Waterford* be taken away as well as the ſaid Mannors, Lands, and other Hereditaments. It was Reſolved, 1. That foraſmuch as it doth not appear what defect was requiſite, and that the conſideration Executory was not found to be broken, that the ſaid Earl did remain Earl of *Waterford*. 2. It was Reſolved, That the ſaid Act *Des Abſentees*, did not only take away the poſſeſſions which were granted him at the time of his Creation, but alſo the Dignity it ſelf; for although one may have a Dignity without poſſeſſions, yet it was very inconvenient that Dignity ſhould be cloathed with Poverty. And the Duke of *Bedford* (*George Nevil*, by Act of Parliament 17 E. 4. was degraded, becauſe the ſaid *George Nevil* had not by inheritance any livelihood to ſupport the Name, Title, and Dignity of a Duke. 12 Jac. referred to the Juſtices. The Earl of *Shrewsbury*'s Caſe. *Cook* 8. Part, 106, 107, 108.

4. The Counteſs *Rivers* was arreſted by a Bill of *Middleſex*, and prayed her Privilege; ſhe being created a Counteſs under the Great Seal; but becauſe the Letters Patents did not mention any Inſtance of her, nor name her Counteſs of any place, nor ſhe never had reference to Parliament; nor to any other publick ſervice; for theſe cauſes, the Privilege to be free from Arreſt, was denyed her by the Court. Hill. 1650. in B. R. The Counteſs *Rivers* Caſe. *Styles* 252.

5. It was Reſolved, That the name of a Dignity; as of an Earl, Viſcount, &c. might be entailed by the Kings Letters Patents, to one and the Heirs Males of his body, and that it is not within the Statute of *Donis Conditionalibus*; and every Earl, Viſcount, or Baron, is created of ſome place certain; and ſuch Dignity might be forfeited by an Attainder of Treaſon at the Common Law, by reaſon of a Condition *tacitè* annexed to the Dignity; and alſo ſuch a Dignity is forfeitable for Treaſon by expreſs words within the Statute of 26 H. 8. of Treaſon. 7. Part, *Nevills* Caſe.

Hoſteler, Inkeeper, or *In-holder.*

1. IN an Action upon the Caſe againſt an Inholder upon the Cuſtome of *England* for not ſafe keeping of the Plaintiffs goods, the Caſe was, The Defendant pleaded, That they were not carried away by the default of him or his ſervants. It was found upon the Evidence, That the Gueſt came to the Inn to lodg there, and the Inkeeper ſaid, That his houſe was full with Gueſts, and did not admit him; and the party ſaid he would make ſhift amongſt his other gueſts, and he was there robbed of his goods. It was adjudged in that Caſe, That the Inkeeper ſhould not be charged with the goods loſt, becauſe he refuſed the gueſt: But in that Caſe, it was holden, if the cauſe of refuſal was falſe, then an Action upon the Caſe would lye againſt the Inholder. Paſc. 5 *Ma. Dyer*, 158.

2. An In-holder commanded his gueſt to put his goods into ſuch a place under lock, otherwiſe he would not Warrant them; the gueſt ſuffered them to lye in the outward Court, where they were taken away. It was the Opinion of the Court, That the Inkeeper ſhould not be charged with the goods. Mich. 10 *Eliz. Dyer*, 266.

3. An Action upon the Caſe lyeth againſt an Inn-keeper, who denyes lodging to a Traveller for his money if he hath ſpare lodging, becauſe he hath ſubjected himſelf to keep a common Inn: But in ſuch Action brought, the Plaintiff needeth not ſhew that the Inn-keeper hath a License to keep the Inn. And in this Caſe, it was holden, That if an Inn-keeper doth take down his Sign, and yet keepeth an Hoſtery, an Action upon the Caſe will lye againſt him if he do deny lodging to a Traveller for his mony, but if he taketh down his Sign, and giveth over the keeping of an Inn, then he is diſcharged from giving lodging. It was holden in this Caſe, That it is lawfull to erect an Inn, if it be not *in Nocumentum*: And if one be endicted for erecting of a common Inn, if the endictment be not *ad Nocumentum*, it is inſufficient, and not good. Tr. 21 Jac. in B. R. *Godbolt*. 340.

4. In an Action upon the Caſe againſt a common Inn-keeper, theſe points were Reſolved. 1. That if a man commeth to a common Inn, and giveth his Horſe to the Hoſtler, and requires him to put him to Paſture, and he doth ſo, and the Horſe is ſtolen;

ſtolen, the Hoſtler ſhall not anſwer for it, becauſe it is not *infra hoſpitium*; but if the Inn keeper put the Horſe to graſs without requeſt, which is *Poſſea*, he ſhall anſwer for it. 2. Reſolved, That if a man be lodged with any who is not an Inn-keeper, upon requeſt, and his goods be ſtole by Servants; the party who lodged him ſhall not anſwer for them: And in a Writ brought againſt an Inn-keeper, the Writ needs not to mention, that he keeps a common Inn. 3. Reſolved, That an Inn-keeper ſhall not anſwer for the goods, unleſſe there be default in him in the ſafe keeping and cuſtody of them. And it is no plea in an Action brought againſt him, to ſay that he delivered the key of the Chamber to the Gueſt: And he ſhall be charged, although that the goods were not delivered to the Inn keeper, or that the party did not acquaint him with them; but if the ſervant of the Gueſt, or other at the requeſt of the Gueſt lodgeth with him, who ſteals the parties goods; the Inn-keeper ſhall not be charged with them. *Cook* 8. Part, 1. *Calyes* Caſe.

5. In Trover and Converſion, the Caſe was; One poſſeſſed of five Kine, delivered them to Paſturage to the Defendant, and agreed to pay him 12 d for every Cow weekly as long as they remained with him at Paſture. Afterwards he ſold them to the Plaintiff, who required them of the Defendant, who refuſed to deliver them to the Plaintiff, unleſs he would pay for the Paſturage of them for the time they had bin with him, which came to 10 l. Afterwards J. S. paid to him the 10 l. by the appointment of the firſt owner; whereupon he delivered them to B. It was holden in this Caſe, That this denyal upon demand and delivery of them to J. S. was a Converſion, and that he might not detain the Cattel againſt him that bought them, but is put to his Action for the Paſturage. And it is not like to the Caſe of an Inn-keeper, for he may retain the Horſe delivered unto him, untill he be ſatisfied for his Paſturage, or other meat. Hill. 7 Car. in B. R. *Chapman* and *Allens* Caſe. *Cro.* 1. Part, 197.

6. In Trover and Converſion, the Caſe was this: A ſtranger came to an Inn with a Horſe, without the knowledg of the owner, and there left him to ſtand at Hay: The horſe eat out his price and value, the party which left him, came not to pay for him. Afterwards the true owner of the horſe hearing of him, came to the Inn, and finding his horſe there, demanded him of the Inn-keeper, who refuſed to deliver him, unleſſe the mony there owing for him, was paid: And whether the Inn-keeper might keep the horſe until he was paid and diſcharged for his meat, in regard he who left the horſe there, was not the true owner of the Horſe; the Court was divided in Opinion, two of the Juſtices were of Opinion, That he might keep him for his meat; two other of the Juſtices, That he might not keep the horſe, but was left to his Action againſt him that left him there for his meat. The Caſe was not adjudged, but after agreed betwixt the parties. Trin. 9 Jac. in B. R. *Shipwiths* Caſe. *Bolſt.* 1. Part, 170. See Mich. 14 Jac. in B. R. *Robinſon* and *Walters* Caſe, this doubt Reſolved, viz. that the Inn-keeper may keep the horſe till he be ſatisfied for his meat.

7. Note, It was agreed by the Juſtices, That if an Inn do uſe the Trade of an Ale houſe, it is within the Statute of Alehouſes; and no perſon is to erect an Inn without Licenſe of the King; And the Statute of Alehouſes includes all excepting only Booths in Fairs, not to keep an Inn and an Alehouſe, but to be ſuppreſſed. But a man may keep a common Inn for the relief of Travellers, Paſc. 9 Jac. in B. R. *Bolſtr.* 1. Part, 109.

8. In an Action upon the Caſe againſt an Inn-keeper, for not ſafely keeping the Plaintiffs goods, the Caſe was: The Plaintiff being a Gueſt in the houſe, went from thence to *London*, and left his goods with the Defendant, ſaying he would return within two or three dayes: He returned accordingly within the three dayes, and in the interim, his goods were ſtolen while he was abſent: And whether the Defendant as an Inn-keeper ſhall be chargeable without any ſpecial promiſe for the ſafe keeping of them, was the Queſtion. It was objected, That in Sir *Edwin Sands*'s Caſe, it was adjudged, Where he came to an Inn, and lodged, and went out thereof in the morning, and left his Cloak-bag there, intending to return at night, and at night he returned accordingly, and in the Interim his Cloak-bag was ſtolen; that he might have his remedy upon an Action grounded upon the Cuſtome againſt the Inn-keeper. But in the principal Caſe it was Reſolved, Where he leaves goods to keep, whereof the Defendant is not to have any benefit, and goeth from thence two or three dayes, although he ſaith he will return, yet he is at his liberty, and therefore is not any Gueſt during that time: nor is the Inn-keeper chargeable as a common Hoſtler for the goods ſtolen during that time, unleſs he make an eſpecial promiſe for the ſafe keeping of them. Paſc. 4 Jac. in B. R. *Gelly* and *Clarks* Caſe. *Cro.* 2. Part, 188, 189.

9. In an Action upon the Caſe againſt the Defendant an Inn-keeper, the Plaintiff declared upon the Cuſtome, That Inn-keepers ought to keep the goods of their gueſts ſafely; and ſhewed, That J. S. ſervant of the Plaintiff, was lodged at the Defendants houſe, and that he having there a bag, with 60 l. in money of the Plaintiffs therein, *quidam malefactores* unknown to the Plaintiff, the ſaid bag of money in the ſaid Inn being, in default of the Defendant

ſendant and his Servants carried away: Upon Not Guilty found againſt the Defendant. In Arreſt of Judgment, it was moved, That the Action ought to have bin brought by J. S. the ſervant, and not by the Maſter. 2. The Maſter was not a Gueſt. But the Exceptions were over-ruled by the Court, for that the Action did well lye by the Maſter, and the Cuſtome well alledged. Trin. 7 Jac. in B. R. *Beedle* and *Marris*'s Caſe. *Cro.* 2. Part, 224.

10. A. brought an Action upon the Caſe againſt B. for goods imbezelled out of his Inn; and it was found for the Plaintiff. In arreſt of Judgment it was excepted unto, becauſe he had not alledged it to be *in Communi Hoſpitio*; yet becauſe the Declaration layed the Cuſtome for common Inns, and then layed, That he was *Hoſpitatus in Hoſpitio*, the Plaintiff had Judgment, for it ſhall be intended, that it is *Domus non Hoſpitium*, if it be *non Commune*. Trin. 16 Jac. in C. B. *Maſon* and *Graftons* Caſe. *Hob.* 245.

11. In Trover and Converſion of a horſe, a Saddle, a Bridle, and a Saddle cloath. The Defendant pleaded, That he did keep a common Inn called the Sword and Buckler in *Holborn*, and that before the time of the Converſion, one J. S. was poſſeſſed of the ſaid horſe, and came riding upon him into the ſaid Inn with the ſaid horſe, and did requeſt the Defendant to keep the horſe there at meat, and he did ſo for the ſpace of ſeven Weeks; and that afterwards the Plaintiff came thither, and demanded his horſe, the Defendant ſaid, that if he would pay him for his meat, he would deliver him, which he refuſed, and for his ſatisfaction, he detained the horſe. It was the clear Opinion of the whole Court, That the Defendant might keep the horſe untill he was paid for his meat. Hill. 14 Jac. in B. R. rott. 650. *Stirt* and *Drungolds* Caſe. *Bolſtr.* 3. Part, 289. See before, Sect. 6. *Skipwiths* Caſe, the doubt there Reſolved: and ſee before, ſect. *ibid. Robinſon* and *Walters* Caſe. See *Poph.* 127. acc.

12. An Inn-keeper was Indicted upon the Statutes of 13 R. 2. and 4 H. 4. whereas the common price of Oats in B. betwixt the 1. of *March*, 15 Jac. and 1. *Marcii*, 17 Jac. was not above the rate of 20 d. *pro quolibet modio*, that the Defendant *exiſtens communis ſtabularius*, ſold *diverſis ſubditis Domini Regis in Manſionalem* in *Holborn* 200 Buſhells of Oats for 21 s. 8 d. the Buſhel *contra formam Statuti in hujuſmodi Caſu edit et proviſ.* Diverſe Exceptions were taken to the Indictment. 1. Becauſe it is *Quod Commune pretium in Mercatu, &c.* was not *ultra* 20 d. the Buſhel, which is incertain. 2. That it is *Quod commune pretium pro quolibet modio avenarum non fuit ultra, &c.* where it ought to have bin *pro modio*, or *pro aliquo modio*, and not *pro quolibet*. 3. Becauſe it is *Quod Johes Johnſon exiſtens communis Stabularius* ſold, which infers, that he was a common Inn keeper at the time of the Indictment, and not at the time of the offence committed. 4. Becauſe it is, That he ſold within his Manſion houſe, and doth not ſay within his Inn. 5. Becauſe it is, he ſold *diverſis ſubditis Domini Regis*, and doth not ſay *Hoſpitibus*; for otherwiſe it is no offence. But all the Exceptions were diſallowed by the Court; wherefore it was adjudged for the King, That the Indictment was good. Hill. 18 Jac. in B. R. *Johnſons* Caſe. *Cro.* 2. Part, 609.

13. The Caſe was; A. purchaſed Copyhold-Land 9 Jac. to him and his Son for their lives, the Remainder to his Wife; and two years after, he became an Inn keeper and received all the profits of the Land till 4. *Aug.* 4 Car. at which time he became Debtor, and committed divers acts which declared him to be a Bankrupt. And 5 Car. upon a Petition to the Lord Keeper, that he ſaid A. was a Petit Chapman, and did get his living by buying and ſelling, and was endebted to divers, and became Bankrupt, they prayed a Commiſſion of Bankrupts againſt him, which was granted, and the Commiſſioners adjudged him a Bankrupt, and ſold this Copyhold-Land. Afterwards A. dyed, and his Wife, and B. his Son entred, and made the Leaſe to the Plaintiff. The points in this Caſe, were three, 1. Whether an Inn-keeper might be a Bankrupt within the Statutes of 34 H. 8. 13 Eliz. 21 Jac. It was Reſolved by all the Juſtices, That an Inn-keeper *quatenus* an Inn-keeper, was not within the ſaid Statutes, becauſe he doth not ſell any thing, but offer it: He that ſells any thing, doth it by contract, but the Inn-keeper doth not contract with his Gueſts, but provides for them, and cannot take unreaſonable rates as he that ſells; and if he doth, he may be endicted for extortion, as a ſeller cannot be. 2. Reſolved, That he is not within the words of the Statute 6, which are, If the Offender purchaſe, but here he was not an Offender at the time of the purchaſe. It was Reſolved and adjudged againſt the Defendant, That he was not a Bankrupt within any of the ſaid Statutes, and that the purchaſe was well made, and not to be avoided. But it was Reſolved by them all, That Copyhold-Lands were Lands within the ſaid Statutes, which might be ſold by the Commiſſioners. Hill. 10 Car. in B. R. rott. 73. *Criſp* and *Pratts* Caſe. *Cro.* 1. Part, 395. See *Marſh.* 34. the ſame Caſe.

Huy-and-Cry; and *Hundreds*, and *Hundredors.*

1. *Where the Hundred shall be charged in Actions brought upon the Statute of* Winchester, *and other Statutes of Huy-and-Cry; Where not.*

1. NOte, It was adjudged in the Kings Bench, That an Action upon the Statute of Huy-and-Cry againſt an Hundred, will never lye by Bill, but ought to be ſued by Writ; and the reaſon is, becauſe the Action is brought againſt Inhabitants, which are a multitude, and for that it cannot be *in Cuſtodia Mariſchalli* as another private perſon may be. Hill. 43 Eliz. in B. R. *Goldesbr.* 148.

2. One *Combford* was robbed within the Hundred of O. in *Staffordſhire*, and he and his Servants purſued the Fellons into another County, and there one of the Fellons was taken, and the Hundredors did nothing. It was moved, That he might have his Action againſt the Hundred, although that he himſelf was reſident within the ſame Hundred: But the Opinion of the Court was, That he ſhould not: for they ſaid, That if a ſtranger make Huy-and-Cry, ſo that the Fellons be taken, the Hundreds are diſcharged. Trin. 29 Eliz. in B. R. *Combford* and the Hundred of *Offlayes* Caſe. *Goldesbr.* 55.

3. Note, It was Reſolved in an Action brought upon the Statute of 13 E. 1. againſt the Hundred of *Evenger* in *Hampſhire*, That although that the Statute be general, and no time be limitted in it; yet the Robbery ought to be done in the day time, and not in the night: And there the Caſe was, That one was robbed in *January* after Sun-ſetting during day light; and it was adjudged, That the Hundred ſhould be charged, becauſe it was a convenient time for men to travail, and to be about their buſineſſes. *Cook* 7. Part, *Aſhpools* Caſe.

4. A. was robbed in the County of *Buckingham*, and thereupon he brought his Action againſt the Hundred, who pleaded, Not Guilty. The Jury found a ſpecial Verdict, That he was robbed the day and year in the Declaration; but they found both the Pariſhes were within the ſame Hundred. It was the clear Opinion of the Juſtices, That the Plaintiff ſhould have Judgment, for it is not material within what Pariſh he be robbed, ſo it be within the ſame Hundred. Trin. 29 Eliz. in C. B. *Barnells* Caſe. *Goldesbr.* 58.

5. An Action upon the Statute of *Winchester* was brought againſt a Hundred in *Glouceſterſhire*, and the Jury found a ſpecial Verdict, That the money was delivered to a Carrier to carry to *London*, who packt it up: And as he was on his Journey, certain Malefactors came to him in another Hundred, and there took his Horſe and Pack, and led him into a Wood within this Hundred, where the Action was brought: And if this Hundred was guilty, the Jury prayed the advice of the Court. It was agreed by the whole Court, That this was Robbery within the firſt Hundred, and not in the ſecond, for upon the firſt taking, he was robbed; but if the Carrier had led the Horſe himſelf, then it ſhould be adjudged in his own poſſeſſion, and no robbery untill he came into the ſecond Hundred: And if a man have money, and the Malefactors take him in one Hundred, and carry him into another Hundred, and there riffle him, this ſhall not be robbery in the firſt, but only in the ſecond Hundred, for he was always in poſſeſſion *per Curiam*. A mans Purſe was picked in the Kings Bench, and the Thief taken with the manner; but a Key being faſtned to the Purſe, ſtill ſtuck in the pocket. It was the Opinion of two Juſtices, That he was ſtill in poſſeſſion; and ſo it was no Robbery. Paſc. 30 Eliz. in C. B. *Goldesbr.* 86.

6. An Action upon the Statute of Huy and Cry was brought againſt Inhabitants in *dimid. Hundredi de Waltham*, and the Defendants found guilty. It was moved in Arreſt of Judgment, That the Action would not lye, becauſe it was not brought againſt the whole Hundred. It was Anſwered on the Plaintiff's behalf, That the half Hundred is a Hundred by it ſelf. It was the Opinion of the Court, That the Writ ſhould have been brought againſt them in this manner; *Inhabitantes in Hundredo de W.* called the half Hundred of *Waltham*. But yet the Court held the Writ to be good: For the Writ is, and ſo it ſhall be intended, to be brought againſt the men inhabiting within the half Hundred of *W.* It was adjudged for the Plaintiff. Trin. 15 Jac. in C. B. *Conſtable* and the Hundred of *Walthams* Caſe. *Brownlow*, 2. Part, 158.

7. In an Action upon the Statute of Huy and Cry brought againſt an Hundred, It was Reſolved by the Court, That if one be aſſaulted to be robbed in one Hundred, and he eſcape and flyeth into another

another Hundred, and the Theeves instantly purſue him, and rob him there, It was the Opinion of the Court, That the Hundred in which he was robbed, ſhall be only charged. Mich. 10 Car. *Dent* Caſe. *Hutton*, 125.

8. In an Action brought upon the Statute of *winchester*, and 27 Eliz. of Huy and Cry, The Plaintiff declared upon the ſaid Statute; and ſhewed alſo, How that within 20. dayes before the Action brought, he was ſworn before a Juſtice of Peace, that he was robbed of ſo much money, and that he did not know any of the Felons, and concluded, that the Defendants had not taken any of the Felons, nor ſatisfied him *contra formam Statut. prædict.* It was moved, That the Concluſion was not good. But it was adjudged by the Court, upon View of Preſidents, That the Concluſion was good, and the beſt form; and not to conclude *contra formam Statutorum prædictorum*, becauſe the Action was grounded upon the Statute of *Winchester*, which gives only the penalty and remedy, and the other Statute ſhews, how only the Examination ſhall be, but gives not any Action. And the words in the principal Caſe, *Statuti prædict.* refers only to the Statute of *Winchester*. Trin. 5 Jac. in B R. *Andrews* and the Inhabitants of *Lenknors* Caſe. *Cro.* 2. Part, 187.

9. An Action upon the Statute of *Winton.* was brought againſt the Hundred of *W*, ſuppoſing that the Plaintiff was robbed of 80 l. in money, and of divers other things: and that he made Huy and Cry. Upon Not-guilty, It was found, *Quod quoad depredationem et ſpoliationem infra ſcript.* 80 l. that the Defendants were guilty, and damages aſſeſſed to 90 l. *Et quoad reſiduum infra ſcript.* Not guilty. And Judgment for the Plaintiff for ſo much as was found for him; and that the Defendants, *ſint in miſericordia. Et quoad reſiduum Quod Querens nil Capiat per breve.* Errour was aſſigned; for that the Hundred cannot be guilty *de Captione, &c.* but they are to be found guilty for not taking the Theeves, and not Anſwering of the money. But it was Reſolved, That the Declaration was good enough, for ſo much as was proved whereof the Plaintiff was robbed: and although the Plaintiff had put in divers things in his Declaration; yet it was good for ſo much as was proved. And the finding that they were guilty of the *Captio*, is as much as to ſay, that the Plaintiff was robbed of ſo much, and that they had not made him amends. And whereas it was ſaid, That the Judgment ought to have been *Quod Capiantur*, becauſe they did it in Contempt. It was Reſolved, That this only is a *malefeſance*, and therefore the Judgment ſhall be in *miſericordia*. Trin. 12 Jac. in B. R. *O'dfield* and the Hundred of *Witherley's* Caſe, *Cro.* 2. Part, 350.

10. In an Action upon the Statute of *Winton.* ſuppoſing that he was robbed in ſuch a High-way in *Diviſis Hundredorum*, and that he gave notice to the Inhabitants of the Hundred near to the place where he was robbed. It was ſaid, That the Declaration was not good, becauſe he doth not ſhew, that the High-way was within any Hundred; and it ought, that Notice be given to the Inhabitants of both Hundreds. But the Opinion of the Court was, That if Notice be given to the Inhabitants of either of them, it is ſufficient. Wherefore it was adjudged for the Plaintiff. Paſch. 21 Jac. in B. R. *Foſter* and the Inhabitants of the Hundreds of *Specher* and *Iſlieworth*. *Cro.* 2. Part, 675.

11. In an Action upon the Statute of 27 Eliz. of Huy and Cry, the Caſe was this; Money was delivered to a Carrier, who put the ſame in his Cart, and ſent his Boy with the Cart; but before he could get to the Cart, it was robbed, and the money carried away. The Boy made Huy and Cry, and came before a Juſtice, and prayed he would examine him; who would not: but the Carrier would not go to the Juſtice to be examined; but the Plaintiff went to him, and was examined; and afterwards brought his Action againſt the Hundred. In this Caſe, It was the Opinion of the whole Court, That the Plaintiff had failed in his Action for want of ſufficient examination; and the Examination of the Maſter, or of the Owner of the goods, was to no purpoſe. It was then moved, If an Action framed upon this Statute would lye againſt the Juſtice of Peace who refuſed to examine the Boy? It was the better Opinion of the Court, That it would lye; For that the Examination is to be before him by the Statute not as a Judge, but as a Miniſter appointed by the Statute. Trin. 31 Eliz. in C. B. *Green* and the Inhabitants of the Hundred of *Buckle-Churches* Caſe. *Leon.* 323.

12. *Reymond* brought an Action upon the Statute of *Winton.* againſt the Hundred of *Okieg*; and ſet forth, That J. S. his ſervant was robbed of 68 l. by perſons unknown within the ſaid Hundred, and that he made Huy and Cry: and that the ſaid J. S. had made Oath before ſuch a Juſtice of the Peace of the ſaid County next adjoyning to the ſaid Hundred, within 20. dayes before the Action brought, That he did not know any of the parties who robbed him, and that the Hundred had not made him any recompence. It was moved, That the Action did not lye, becauſe the Plaintiff himſelf was not ſworn, That he did not know any of the parties: For it is not ſufficient, that the ſervant who was robbed was ſworn: For by the Statute of 27 Eliz. the party who brings the Action, ought to make the Oath. And it was ſaid, That the ſer-

vant who was robbed, ought to have brought the Action, and then his Oath would have been sufficient; but when the Master brings the Action, he himself ought to be sworn. But it was Resolved by the Court, That the Action well lyes for the Master, and that the Servants Oath was sufficient; for it is properly in his Notice that he was robbed: and the Master knowes it not that he was robbed, or who were the parties, but by the report of his servant: and it would be inconvenient, if the Master should not bring the Action, but the servant; for the servant might release, or compound, or discontinue the Suit, and so the Master should lose by his falshood: therefore the Master shall bring the Action, and have his servant who was robbed to be his witnesse. Trin. 2 Car. in C.B. *Reymond* and the Hundred of *Okings* Case. *Cro.* 1. Part, 26.

13. An Action was brought upon the Statute of *Winton.* against a Hundred; the Plaintiff declared upon the Statute, and further shewed, that he took his Oath before J. S. Justice of Peace within the County of B, in which the Robbery was supposed to be, and Inhabiting within the Hundred within 20 dayes before his Action brought, That he was robbed, and did not know any of the parties according to the Statute of 27 Eliz. upon a Special Verdict it was found, That the Oath was taken before the said J. S. at his Chamber within the Middle Temple *London*: And whether he took the Oath before the said J. S. Justice of Peace of the said County, and inhabiting in the said County *secundum formam Statuti*, was the Question? It was said, That a Justice of Peace hath his Jurisdiction within the County where he is a Justice of Peace, and not elsewhere, and may not elsewhere exercise his Jurisdiction. And the Statute of 27 Eliz. appoints the Oath and Examination to be taken by the Justices of Peace Inhabiting in or near the Hundred; and what he doth out of the County, is *Corem non Judice*, and their Jurisdiction is a private Jurisdiction. This Case being propounded to the Justices of the other Courts, and Barons of the Exchequer, It was the Opinion of this Court, and of all the other Justices, That this Examination taken at *London* by a Justice of the Peace of the County Inhabiting within the Hundred, was good enough. And it was said by them, That the Act of 27 Eliz. was not an Act of exercising Jurisdiction, but rather a direction, That such an Oath and Examination shall be taken; and which may be as well taken in other place, as within the County. And the Court said, There is a difference where a Justice of Peace doth an act to compell another to perform, as to imprison one for not performance; or to command one for an Offence to be imprisoned; such acts Acts cannot be done, but where his Jurisdiction extends: But Justices of Peace may take Informations against Offenders in any place out of the County, to prove offences in the County where they are committed; but they cannot compell any of the County out of the County to make a Recognizance, for they cannot use any coercive power out of the County. It was adjudged in the principal Case, That the taking of the Oath and Examination was well executed, within the meaning of the Statute of 27 Eliz. Pasch. 7 Car. in B. R. *Helies* and the Hundred of *Banhurst* Case. *Cro.* 1. Part, 153, 154.

More Hundred and Hundreders.

1. IT is said, in the *Mirrour of Justices*, and 12 H. 7. by *Fineux*, That *Alfred* King of the *West Saxons* divided this Land; first into Counties and Shires: and committed the Government of Trust of each County or Shire, to one particular man thereof, who was called the Sheriff: but this being found to be too large a Circuit for one man. Counties were afterwards divided into Hundreds, Ridings, Laches, Wapentakes; all purporting one and the same Jurisdiction in point of substance, though distinguished by several Nominations; of which the chief Officer was the Constable, or the Constable of the Hundred, 12 H. 7. 17, 18. Afterwards about 4 E. 3. there were Constituted Petty Constables or Headborough. See Stat. 4 E. 3. Cap. 3. and *Lambert Constables*, 9.

2. A Hundred might be let for years; for it was an Hereditament, of which a Lease might be made. 15 H. 7. 8.

3. If a man hath a Hundred, with the goods of Felons, Outlawes, Fines, Amerciaments, Returns of Writs, and such casual hereditaments within the Hundred; such Hundred with the Casual hereditaments, may be let to Farm under yearly Rent: and such demise of the Hundred and of them shall be good. *Cook* 3. Part, 33. in *Baker* and *Bakers* Case.

4. Note. The King by his Writ cannot alter the Jurisdiction of the Hundred Court, Court Baron, County Court, and the like, which are Courts at the Common-Law: and all things determinable in the Hundred Court, or such like Courts, are determinable by the proper Judges of the said Court; And the Lord of the Hundred, or of the Court-Baron, where a Plea is holden before them by Writ of Right, Writ of Admeasurement, or the like,

like, are not the Judges thereof, but the Suitors are the Judges thereof there. *Cook* 6. Part, 11. *Jentleman's* Caſe.

5. If a man have a Hundred, Fair, Market, Warren, Park, which are appendants to Manners, or in groſſe, if afterwards they come back to the King, they are not drowned, nor extinguiſhed in the Crown, but they remain as they were before in eſſe. *Cook* 9. Part, 25. in the Caſe of the Abbot of *Marcella*; and ſee there: How that a man may have Waife, Eſtray, *Catalla Felonum*, and other Franchiſes, within a Hundred.

6. If the Jury in a Hundred or a Leet, tax an Amercement, the ſame is ſufficient without other Affirment, for the Amercement is the Act of the Court; but if the Steward afferr an Amercement upon the preſentment of the Jury, the ſame is void, and ſhall not bind. But the Court ſhall aſſeſſe Fines, and the ſame ſhall not be afferred by any other; and that for Contempts and miſdemeanors in Courts.

7. If the Lands in Queſtion upon a tryall, and *Venire fac as* returned, do lye in four Hundreds; if 4. of any Hundred do appear, it is ſufficient: And if a Jury be of two Counties returned, and both Arrays are challenged, two of the one County ſhall try the Array of that County, and two of the other County ſhall try the Array of the other County, and they ſhall not joyn until they be ſworn of the principal; and two of one Hundred, and two of the other Hundred do ſuffice. Mich. 2 Jac. in C. B. *Freſhwater* and *Rens* Caſe. *Brownlow.* 1. Part, 193.

See for Challenge to the Hundred and Hundreds, in title *Challenge*, *Lib.* 1. Diviſion 4. Sect. 7. And ſee after, Title, *Tryall.*

Ideots and *Lunatiques.* See before, in titles, *Gard*, and *Enfants.*

Idemptitate Nominis.

1. THE Writ of *Idemptitate Nominis* lyeth; Where in a Writ of Debt, Covenant, Accompt, or any other perſonal Action, a man is ſued: And upon the *Capias* or *Exigent*, another man is taken, who beareth the ſame name; Then he who is arreſted, may ſue forth this Writ of *Idemptitate Nominis*: And it ſhall be ſued forth to the Sheriff, if he be arreſted by him; and this Writ is in the nature of a Commiſſion, to make Enquiry if he be the ſame man or not; and if he be not found the ſame party, then he ſhall go without day. See *Fitzh. Nat. Br.* acc.

2. If a man be taken by a *Capias utlagatum*, He may ſue forth a Writ *de Idemptitate Nominis* in the Chancery directed, either to the Juſtices of the Common-Pleas, or Juſtices of the Kings-Bench, out of which the proceſſe doth iſſue, commanding them to make Enquiry as before is ſaid And thereupon, the Juſtices ſhall award this Writ which is a Commiſſion to make the Enquiry, and to know the truth. But if a man be Outlawed in the Common-Pleas, and be taken by a *Capias*, he may come into the Court of Common-Pleas, and pray a Writ of Enquiry, Whether he be the ſame perſon, without ſuing the Writ *de Idemptitate Nominis.*

3. If an Exigent be awarded upon an Indictment, If one come and ſaith, he hath the ſame name as he againſt whom the Proces upon the Indictment is awarded, and prayeth that the King's Attorney may put a difference of their names; the ſame ſhall not be done, becauſe that ſhould change the Indictment, becauſe the Proces ought to be made according to the Indictment: but if he be grieved by the Proceſs, he muſt ſue forth the Writ

Writ *de Idemptitate Nominis*; and he hath not any other remedy. And the party may have this Writ to the Juſtices of Peace, if they award proceſſe of Outlawry upon Indictments taken before them; and alſo to Juſtices of Goal-delivery. *Regiſter* 195, 196.

4. Note. It was holden by the whole Court, That a man ſhall not have a Writ *de Idemptitate Nominis*, where there are two names of Baptiſm; but it lyeth only of ſirnames. Mich. 25 H. 8. *Dyer*, 5.

5. A. brought a Writ of ſecond Deliverance againſt *Ralph Stubbs*; and after Verdict, had a Judgment to recover Coſts and Damages, amounting to 16 l: and had a *Capias utlagatum* directed to the Sheriff of *York*, to take the ſaid *Stubbs* in Execution: and after the ſame Term, one *Ralph Stubbs* the younger, brought a Writ of *Idemptitate Nominis*, unto the Juſtices, and had a *ſuperſedeas* to the Sheriff, to forbear any Execution againſt the ſaid *Ralph* the younger: and divers Preſidents were ſhewed of like Writs brought in caſe of Outlawry, where one was taken upon a *Capias utlagatum*, for another of the ſame name; *ſcil.* 36 H. 6. rott. 411. *John Skyers* Caſe. 10 H. 7. rott. 137. *Fuller* and *Ayres* Caſe. But notwithſtanding theſe Preſidents, the Court was of Opinion, That in the principal Caſe, the *ſuperſedeas* thereupon was not warranted, but that the Defendant *Stubbs* the younger might have his Action of Falſe Impriſonment; For that the Defendant being named *Ralph Stubbs*, without addition, ſhall never be accounted the younger, but alwayes the elder of the two of that name; Nevertheleſſe for the avoiding of multiplicity of Suits, It was Ordered, That the Defendant ſhould appear to the *Sci e facias* upon the *Idemptitate Nominis*, and plead, and go to tryal; and if upon tryal he was found to be the ſame man, then the money remaining with the Sheriff to be delivered to the Plaintiff. Trin. 19 Jac. in C.B. *Wilſon* and *Stubs* Caſe. *Hobart*, 330, 331. See *Hutton*, 45. the ſame Caſe.

Ignorance *and* Notice.

Where Ignorance of the Law ſhall not excuſe: But Ignorance of matter of fact; Where it ſhall excuſe the party; Where not: And where a man is to take Notice of a thing at his peril; Where not.

1. NOte. In an Evidence given to the Jaquiſt; It was holden by the Juſtices, That if a man hath a Dogg which killeth Sheep, the Maſter of the Dogg being ignorant, and having no knowledg of the Condition or property of the Dogg, ſhall not be puniſhed for the killing of them: otherwiſe it is, if he did know of the Condition of the Dog. Hill. 28 H. 8. *Dyer*, 25.

2. The King preſented (by reaſon of the Temporalties of a Biſhop were in his hands) to a Prebend, and afterwards he repealed his Preſentation; Notwithſtanding the Clerk was Inſtituted & Inducted by the Dean & Chapter, Guardians of the Temporalties during the Vacation: Afterwards the King reciting that he was *canonicè inſtitutus*, ratified the preſentment; after, a Biſhop is created, and the Incumbent dyed: It was the Opinion of the Court, That the King ſhould have the Preſentation now; for by reaſon of Repeal, the Church was not full before: and then if the Preſentment was void, the Confirmation of it was void alſo. But it was holden, That a common perſon could not repeal his Preſentment. It was a Quære in this Caſe of the King, If it needed to be averred, That the Guardians of the Spiritualties had Notice of the Kings Repeal? It was holden, That they were to take notice of it, being matter of Law, and not of fact. Trin. 12 Eliz. *Dyer*, 292.

3. An Action upon the Caſe was brought by *Mildmay* againſt *Standiſh*, becauſe he had openly ſaid and publiſhed, That certain Lands which lawfully appertained to the ſaid *Mildmay*; were lawfully aſſured for the Term of 1000 years, to J. T. and O. his wife, and that they of the Intereſt of that Term were lawfully poſſeſſed; and ſo for ſlandering his Title, and ſhewing all in certain, and how he was prejudiced by ſpeaking thoſe words, he brought his Action.

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The Defendant *Standish* in his Plea juſtified the words; Upon which the Plaintiff demurred. In that caſe it was adjudged for the Plaintiff. For although *de facto* the ſaid J. T. and O. his Wife, had a limitation of thoſe Lands by the Will of J. D. for 1000 years, which was the Occaſion that the ſaid *Standiſh*, being a man not learned in the Law, affirmed and publiſhed the ſame; yet becauſe he had taken upon him the knowledg of the Law, and interpoſed himſelf in a matter which did not concern him; and had publiſhed, That the ſaid T. and O. had an Eſtate for 1000 years in the ſaid Lands in ſlander of the Plaintiff's Title: for this cauſe, Judgment was given for the Plaintiff. See *Mildmay* and *Standiſh*'s Caſe. *Cook* 1. Part, 177. in the end of *Mildmay*'s Caſe.

4. A man made a Feoffment in Fee of his Land, and for the better aſſurance, bound himſelf in an Obligation, That he and his ſon ſhould do all acts deviſed by the Obligee; The Obligee deviſed a Deed of Releaſe; the Father delivered it as his Deed, but the Son did not deliver it; but becauſe he was not learned, he required the Obligee to read the ſame unto him, or to have the Deed to be read unto him; which he refuſed, and brought his Action againſt the Father upon the Obligation, & adjudged, That the Action was maintainable. And in this Caſe it was Reſolved, 1. That if a man who is not learned, be bounden to make a Deed, he is not bound to deliver it, before it be expounded to him; and if it be in a Language which he doth not underſtand, he is not bound to deliver it, unſill it be expounded to him. 2. Reſolved, That if a man be bounden, yet if the Deed be in ſuch a Language that the party doth not underſtand, If he demand that the writing be read unto him, or expounded unto him, and he is ready to do it, he may refuſe to deliver it. And ſo *Nota, ignorantia facti, ſcil. Leſſionis et Linguæ excuſat, ſed ignorantia Legis non excuſat.* *Cook* 2. Part, 2. & 3. *Manſers* Caſe.

5. If a man bargain, ſell, and grant by Deed Indented and enrolled, Lands unto a common perſon for life, the Remainder to the King in Fee; and afterwards the King makes a Leaſe for life or years, without reciting the particular Eſtate, the Leaſe is void; for the Subject is tyed to take Notice of this Inrollment, as well as of the enrollment of the Letters Patents; and the rather, becauſe by the ſame Deed enrolled, the Kings Eſtate is created. *Cook* 1. Part, 45. in the Caſe of *Altonwoods*.

6. Note. It was Objected in *Cook* 4. Part, 10. in Bevil's Caſe, That the words in the Statute of 32 H. 8. Cap. 2. (Actual Poſſeſſion or Seiſin) did exclude Seiſin in Law; and therefore hath altered the common Law. For although at the Common-Law, Seiſin in Law was ſufficient to make Avowry; yet the ſaid act doth allow only of actual poſſeſſion and ſeiſin: and the reaſon of that was, becauſe actual Seiſin is the ſure Cognuſans of right: and therefore it was ſaid, That that Act by expreſs words, extended only to actual poſſeſſion, and not to relieve thoſe who for a long time of 60. years had neglected to have actual Seiſin of their ſervices: and eſpecially of ſuch which ought to have been done twice every year. And it was ſaid, That that was *Craſſa et ſupina negligentia*, which the Law did never intend to relieve. But it was Reſolved by the Court, That Seiſin in Law was ſufficient to make Avowry within the meaning of the ſaid Statute: For the intent of the Act was, to limit time, within which Seiſin ought to be had, and not to exclude any Seiſin which was a lawful Seiſin by the Common-Law: Alſo it is not againſt the Letter of the Act; for the 3. firſt branches extend to actual Seiſin; and the 4th extends as well to actual, as to Seiſin in Law: The ſaid words in the Act; *ſcil.* Actual Poſſeſſion or Seiſin in the diſjunctive, maketh diſtinction between actual poſſeſſion, which referreth to the firſt 3. branches; and a Seiſin, be it actual or in Law, which referreth to the 4th branch: ſo that actual is coupled with poſſeſſion, and ſeiſin, is diſjoyned by the word [*Or*] and ſtands of it ſelf indefinitely; and ſo *reddendo ſingula ſingulis*, all ſtands well together. *Cook* 4. Part, 10. in *Bevil*'s Caſe.

7. A man ſeiſed of divers Lands holden in *Capite*, deviſed parcel of the ſaid Lands to divers perſons to have and hold to them and the Survivor of them, untill ſuch time and term as 800 l. by them, or the Survivor of them be levied, and that to imploy for the preferment of his daughter, and dyed; his ſon and heir took the Will into his hands, and entred into the ſaid Lands, and received the profits of them for his life: afterwards the Deviſees entred and received the profits, and levied of them 640 l. according to the Will: And if the profits taken by the Heir, and which the Deviſees might have received, ſhall be accounted parcel of the ſaid ſum of 800 l. was the Queſtion? It was Reſolved in that Caſe, That where the words are, Untill the ſaid ſum of 800 l. be levied; the ſame is as much to ſay in Law, as if the words had been, ſhall or might be levied; for otherwiſe it ſhould be in the power of thoſe who have levied the money to exclude him in the Reverſion or Remainder to take the profits. And in this caſe, It was ſaid and agreed, That if the Conuſee of a Statute Merchant or Staple, neglect to the profits, yet when the Conuſee might have been ſatisfied all his debt, according to the extent; and he by

his Negligence, or Ignorance refuſed the ſame; the Conuſor ſhould have his Lands again. *Cook* 4. Part, 82. Sir *Andrew Corbett's* Caſe.

8. It was Reſolved in the Counteſſe of *Rutland's* Caſe, Where a *Capias* was awarded againſt the Counteſſe out of the Court of Common-Pleas, That the Sheriff or his Officer might without any eſſence by a Warrant arreſt the perſon of the Counteſſe; for he is not to diſpute the Authority of the Court, in awarding Proceſſe, but he is to execute the Writs to him directed, to which he is ſworn: and although it appeared in the *Capias*, that ſhe was a Counteſſe, againſt whom *Capias* did not lye, and *Ignorantia juris non excuſat*, and eſpecially Sheriffs and other Miniſters of Law and Juſtice, as was Objected: yet foraſmuch as in ſome Caſes, a *Capias* lyeth againſt a Counteſſe, as for a Contempt; for that cauſe, It was Reſolved, That the Sheriff or his Officer ought not to examine the act of the Court, but ought to execute the Writ. But becauſe in the principal Caſe, there the Sergeants did arreſt the Counteſſe upon a feigned Action of their own heads without any Warrant; in that Caſe, it was adjudged to be falſe Impriſonment. *Cook* 6. Part, 54. The Counteſſe of *Rutland's* Caſe.

9. A Leaſe for years was made rendring Rent, and with Condition, That if the Leſſee ſhould aſſign his Term, that the Leſſor ſhould re-enter; and the Leſſee aſſigned his Term. It was adjudged in that caſe, That although the Leſſor accepted the Rent by the hands of the Leſſee; yet becauſe the Leſſor had not Notice of the Aſſignment, the acceptance of the Rent ſhould not conclude him of his entry. Hill. 38 Eliz. in C. B. rott. 1302. *March* and *Curtis* Caſe, vouch. in *Cook* 3. Part, 65. in *Pennants* Caſe.

10. If the Leſſor in the abſence of the Leſſee entreth, and maketh a Feoffment in Fee, and the Leſſee re-entreth, although the ſame doth amount to an Attornment in Law, yet without Notice given of this Feoffment to the Leſſee, the Feoffee ſhall not make demand of the Rent reſerved upon the Leaſe for entry for Condition broken. True it is, that the Feoffee may diſtrain, or have an Action of debt for the Rent, but in his Avowry, or Count, he muſt allege the Feoffment to be whereof the Leſſee had Notice: But if he demand the Rent upon Condition, without Notice, it is not poſſible the Leſſee ſhould know to whom to pay the Rent, without Notice, to ſave his Term. So if the Leſſor bargain and ſell the Reverſion by Deed Indented and enrolled, The Bargainee ſhall never take benefit of a Condition, upon a demand, without giving Notice to the Leſſee of the Bargain and Sale; for although the bargain and ſale be by Deed Indented and enrolled on Record; yet foraſmuch as it may be enrolled in ſo many Courts in ſecret manner, the Law will not compell the Farmors who have conditional Leaſes, to make ſuch infinite ſearch to ſave their Terms: but the Law for the preſervation of the Term and Intereſt of the Leſſee, will compell the Bargainee to give Notice to the Leſſee who is a ſtranger to it. And although *Littleton* ſaith, That the Leſſee ſhall not be miſconuſant of Feoffments made upon the Lands, the ſame is to be intended as to Diſtreſſe, Action of Debt and Waſte: in which caſe the Law doth compell the Feoffee in his Avowry to give notice: but *Littleton* is not to be intended as to demand of Rent, to have advantage of a Condition without Notice thereof given. *Cook* 5. Part, 113. in *Mallories* Caſe.

11. A man by his Will deviſed Lands to A. his ſon for 60 years, after the death of the Deviſor, if the ſaid A. ſhould ſo long live; and after to the uſe of B. his ſon for life, and after to the Heirs males of the body of A, with divers Remainders over. Provided, That if A. do not ſuffer his Executors quietly to carry away all the goods in his houſe, or doth any thing to hinder the intent of his Father, that then the uſes limited to A. and his Heirs ſhould ceaſe; the Deviſor dyed, the Executors came to the houſe, and would have carried away the goods, and A. would not ſuffer them to carry them away, but forbade them: he in the Remainder entred for the Condition broken. It was Reſolved in this caſe, (amongſt other Points) That although a particular diſturbance by a ſpecial act had been ſhewed; yet A. ſhould not loſe his Eſtate: For none ſhall loſe any Eſtate or Intereſt which he lawfully had, without an act and default in himſelf: and therefore in as much as A. was a ſtranger to the Feoffment, yet he ſhould not loſe his Eſtate, without Notice given him of the Proviſo, and of the Will of his Father. And in this Caſe, the Caſe put by *Popham*, in *Cook* 5. Part, *Malloriet* Caſe, Grantee of a Reverſion, or Feoffee ſhall not take advantage of a Condition for non-payment of Rent upon a demand, without Notice given to the Leſſee. And the Caſe of 1 Jac. in C. B. betwixt *Beconſhaw* and *Southcot*, That if the Eſtate of the Lord of a Manor ceaſe by limitation of an uſe, and the uſe and eſtate is transferred to another who demands Rent of a Copyholder, who denyes to pay it, the ſame is no Forfeiture, without notice given to the Copyholder of the alteration of the uſe and eſtate, were affirmed for Law. But it was agreed, That if a man be bound to keep the Award of J. S. and J. S. maketh an Award, the Obligor ought to take Notice of that at his peril, becauſe he hath bounden himſelf unto it. *Cook* 8. Part, 90, 91, 92. *Fremans* Caſe.

12. In

12. In an Action upon the Case, the Plaintiff declared, That he was seised of the Mannor and Castle of H. in Fee by purchase, and that he was in speech to demise the same to R.E. for 21. years, under 200 l. Fine, and 100 l. Rent; And that the Defendant (*præmissorum non ignara*) said, I have a Lease of the Mannor and Castle for 90. years, and then published a Demise supposed to be made by *George* Lord *Audley* (Grandfather of the said *George* who sold the Lands to the Plaintiff) for 90. years to E. D. her Husband; whereas the said Lease in truth was counterfeited. The Defendant pleaded in barr, That such an Indenture came to her hands; and traversed, that she knew of the Forgery. In this Case it was Resolved, 1. That if the Defendant had affirmed and published, that the Plaintiff had not any title to the said Mannor and Castle, but that she had right to them, because she pretendeth that she hath right to them, although in truth she had no right; yet no Action lyeth. 2. It was Resolved, That there was other matter in the Declaration to maintain the Action, because it is alledged in the Declaration, that she knew of the Communication of the making of the Lease to R. E; and also that she knew that the Lease was forged and counterfeited, and yet (against her own knowledg) she published, that it was a good and true Lease, by which the Plaintiff was defeated of his bargain. 3. Resolved, That the Barr was insufficient; for the knowing of the Defendant of the Forgery was not traversable. Mich. 33 Eliz. *Cook* 4. Part, 18. Sir *Gilbert Gerrard* and *Mary Dickensons* Case.

13. If a man who hath cause to bring an Action of Accompt against one as his Bayliff or Receiver, doth make his Executors, and dyeth: In that case, his Executors shall have an Action against him, because the Executors may by Rentalls or otherwise know how to charge him. But an Action of Accompt doth not lye against the Executors of a Bayliff, or Receivors for the Receit, or Occupation of their Testator, because they being ignorant of Accompts of their Testator are not able to defend themselves. *Fitzh. Na. Br.* 117. acc.

14. In Assumpsit, the Plaintiff declared, That he was possessed of a heap of Woad, containing 10 Tuns, and that the Defendant in Consideration that the Plaintiff would set and deliver him one Tun of the said Woad, he would pay him for it within 6. moneths after the rate that he should sell the rest, and shewed that he sold and delivered to the Defendant one Tun; and afterwards sold to J. S. the residue at the rate of 23 l. the Tun; and the Defendant paid him not the 23 l. according to his promise: And thereupon Judgment was given for the Plaintiff. And Errour brought in the Exchequer Chamber, and there the Judgment was reversed, because the Plaintiff had not alledged, that he had given Notice to the Defendant of the sale and prize of the rest, being a thing of his private knowledg; and the Defendant could not, being a stranger, take notice what the price was for which the rest was sold. Trin. 12 Jac. in C.B. *Holmes* and *Twists* Case, *Hob.* 51.

15. If the Patron who is a Lay-man, presents his Clerk to the Ordinary, and he is not well learned, it is lawful for the Ordinary to refuse him, and of it to give notice to the Patron, to present another before there be any Collation by Lapps, because the Patron could not have Conusance whether he were a fit Clerk or not: But if the Patron be a spiritual man, and one not well learned is presented, and the Ordinary refuseth him, in such case it hath been said, That the Ordinary needeth not to give Notice to the Patron of the Inability of the Clerk, because it is intended, that a Clerk may have cognizance of the sufficiency of the other, before he presented him to the Bishop. 18 H. 7. 49. by *Frowch* in *Kellaway*.

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2. *Where the Judges of the Civil Law ought not to be misconusant of the Common-Law; nor the Judges of Common-Law, of the Civil Law: And where Ignorance of an Act of Parliament shall excuse; Where not.*

1. A. and B. did contract Marriage betwixt them *per verba de præsenti tempore*; and afterwards the said B. took to Husband J. S; and afterwards A. Libelled against B. upon the said Contract, in the Court of Audience; upon which Libell it was Decreed, That the said B. should *subire matrimonium* with the said A. *Et insuper decretum et declaratum fuit dictum matrimonium fore nullum*: And further decreed, That the said A. and B. should entermarry; which they did, and had Issue C. the Plaintiff J. S: In this case (amongst other things) it was Resolved, That although the said J. S. being *de facto* the Husband of the said B. was not party to the Suit, nor to the Sentence in the Spiritual Court, which dissolved the marriage between him & B; yet the sentence against B. being but Declaratory, was good, and should bind the Husband *de facto*. And it was said, That forasmuch as the Conusance of the right of Marriage doth belong to the Ecclesiastical Court; and the same Court hath given sentence in this Case, the Judges of the Common Law (although it be

againſt the reaſon of that Law) are to give faith and credit to their proceedings and ſentences, and to think that their proceedings are Conſonant to the Law of the Church; for *Cuilibet in ſuâ arte perito eſt credendum. Cook* 4. Part, 29. *Bunting* and *Lepingwell's* Caſe. See *Cook* 5. Part, 5. in the Caſe of Eccleſiaſtical perſons. acc.

2. A. ſeiſed of a Manor holden by Knights-Service in *Capite*, took B. to wife, who betwixt them had Iſſue C; afterwards the Marriage betwixt A. and B. in the Court of Audience by ſentence is declared to be void, becauſe they married *infra annos nubiles*; and they are divorced: A. takes to Wife D: and afterwards before Commiſſioners Eccleſiaſtical, the marriage betwixt A. and B. is declared lawful by Sentence. It was Reſolved in this caſe, That againſt the ſaid firſt Sentence of Divorce, the parties ſhall not be received, ſo long as the ſame remains in force to aver, That they agreed, or conſented to the Marriage, 1. Becauſe the Eccleſiaſtical Judge hath declared the ſame to be void; and although that they were of the age of conſent, yet if the original Contract was void, then there was juſt cauſe of Divorce. 2. Becauſe that the Eccleſiaſtical Judg, is Judg as well of the aſſent as of the Contract: and although he ſhew cauſe of his Sentence, yet the Temporal Judges ſhall not examine the cauſe, Whether it be true or not. *Cook* 7. Part, 43. 44. *Kenns* Caſe.

3. In Debt, the Defendant pleaded an Excommengenient of the Plaintiff; and the Excomengement was Certified by the Official, under the Seal of the Biſhop of *Durham*; and it was *univerſis et ſingulis Clericis et Literatis quibuſcunq; per totam Diœceſim Dunelm.* In this Caſe, theſe Points were Reſolved, 1. That the plea of Excommengement was inſufficient, becauſe the Excomengement was certified by the Official, whereas it ought to be by the Biſhop himſelf, who is immediate Officer to the Court. 2. If the Biſhop himſelf had certified it, yet it had been inſufficient, becauſe it was particularly directed *univerſis et ſingulis Clericis per totam Diœceſim. Dunelm.* by which the Court was excluded, and was not directed to the Court it ſelf. 3. Reſolved, That in ſome caſes, although that an Excomengement be a ſpirituall thing, yet the Common Law ſhall adjudge upon the manner and matter of the Certificate of the Excomengement. As if a Biſhop be ſued, and he plead an Excomengement of the party by himſelf, or his Commiſſary, although it be for another cauſe then is in Queſtion, yet the ſame ſhall not diſable the party, becauſe that he himſelf is party. 4. The Biſhop ought to certifie that which is in his own Court, and not that which is in the Court of another: and he cannot Certifie, that another Biſhop hath Certified him, Or that he hath ſeen an Excomengement made by another Biſhop: but yet he may Certifie an Excomengement by his Commiſſary, if it be in his own Court. *Cook* 8. Part, 68, 69. *Trollops* Caſe.

4. Debt was brought by an Adminiſtrator upon an Adminiſtration granted by an Inferiour Ordinary; The Defendant pleaded, That before Adminiſtration granted to the Plaintiff, Adminiſtration was committed unto him by the Guardian of the Spiritualties *ſede vacante* of the Archbiſhop, becauſe the Inteſtate had *bona notabilia* in ſeveral Dioceſſes. The Plaintiff pleaded, That before the Writ purchaſed, the ſaid Adminiſtration in the Prerogative Court was repealed and annulled. It was Reſolved in this Caſe, (amongſt other things) That foraſmuch as the Eccleſiaſtical Judge had pronounced the Adminiſtration to be void, that it ſhall be intended, that they were void *ab initio*. Alſo Adminiſtration is but an Authority which may expect and commence *in futuro*, and therefore ſhall be ſuſpended, untill the other be repealed. *Cook* 8. Part, 135. Sir *John Nutton's* Caſe.

5. J. B. Judge in the Prerogative Court, took Bond of *S.* upon granting of Adminiſtration, that the Adminiſtrator ſhould diſpoſe of the Surpluſage of the goods after Debts and Legacies paid, according to the direction of the Court. The Judge finding a Surpluſage, did give ſentence, That the Adminiſtrator ſhould give certain portions to the Kindred of the Inteſtate, not being his Children. In this caſe, It was the Opinion of the Juſtices, That whereas the Statute of 21 H. 8. appoints the Adminiſtration to be granted; and that the Ordinary may take Sureties for the Adminiſtration of the goods of the dead, That the Ordinary may not impoſe any other or further Condition upon the Bond: and although the Ordinary will pretend, That the Statute is to be extended as well to the diſpoſition of the Surpluſage as to the Debts and Legacies; Yet it was Reſolved, That that is not under their Judgment, for they muſt take their Bond according to the Law: and when it is ſued, the meaning and expoſition of the Statute, and of the Condition of the Obligation are both to be judged by the Courts of Common-Law. And it is not in the power of the Ordinary to give the Surpluſage where he will. Trin. 12 Jac. in C. B. *Slawney's* Caſe. *Hob.* 83.

6. If a man who is *non compos mentis*, give himſelf a Mortal Wound; and before he dyeth, he becometh of ſane memory, and afterwards dyeth of the ſame wound: In this Caſe, although that he dyeth of ſane memory, yet becauſe the Original Cauſe of his death was, when he was not *Compos mentis*, and ignorant of what he did, he ſhall not be *felo de ſe*, becauſe the death, &c. hath relation

lation to the Original act, which was the ſtroke or wound which he gave in the time of his Ignorance, and when he was *Non Compos mentis*. 22 E. 3. *Corone.* 244. *Cook* 1. Part, 99. in *Shelly's* Caſe. See *Cook* 4. Part, in the Caſe of Appeals, 42. *Heydons* Caſe, acc. And ſee *Cook* 4. Part, 125. in *Beverley's* Caſe, All Acts done by a Lunatique, or by one who is *non Compos mentis* during his Lunacie; are equivalent to acts done by an Ideot, and are voidable, but all acts done by himſelf *inter lucida intervalla*, when he is of ſound memory, ſhall bind him.

7. A. Tenant for life, the remainder in tail to B, the Reverſion to B. and his Heirs expectant: B. levied a Fine to C. and D, and to the Heirs of C. unto the uſe of them and their Heirs, and had Iſſue and dyed before all the Proclamations paſt, the Iſſue then being beyond Sea, the proclamations paſſed, and after the Iſſue returned, and made his claim to the Remainder. In this Caſe, amongſt other Points, it was Reſolved, That although that the Iſſue in tail be beyond Sea, yet in as much as he is privy, and out of all the Savings in the Statute of 4 H. 7. he is bound, although he be beyond Sea. And it was holden, That the entry and claime of the Iſſue in tail before all the Proclamations paſſed, is not material: For if the entry and claym of the Iſſue in tail ſhall be of any force, then it ſhall be hard to bind them for want of claym, which have not power or intelligence to make entry or claym: And if Infancy, Coverture, Non ſane Memorie, or Impriſonment of the Heir in tail, in ſuch caſe ſhould give power to him to avoid a Fine, in no caſe a man ſhould be aſſured of Lands which are conveyed unto him by Fine. *Cook* 3. Part, 91. in the Caſe of Fines.

8. The King ſeiſed of a Mannor in Fee in the right of his Crown, granted Copyhold Lands parcel of the Mannor to one in Fee; and afterwards by Letters Patents under the Seal of the Exchequer, made a Leaſe of theſe Lands for 21. years. The Leſſee granted his Eſtate to a Copyholder; The King reciting the Leaſe for years, granted the Reverſion in Fee. the Leaſe for years expired: the Grantee of the Reverſion entred upon the Copyholder. In this Caſe, it was, amongſt other things, Reſolved, That the Leaſe under the Exchequer Seal was good by common uſage. For that the Cuſtomes of the Kings Courts are a Law. And it was holden, That every Court at *Weſtminſter* ought to take Notice of the Cuſtomes of other Courts there; but otherwiſe it is of Courts in the Country. *Cook* 2. Part, 16, 17. *Lanes* Caſe.

9. A. was in Execution ſeverally under the Cuſtody of the Sheriffs of *London*, at the Suits of B. & C: the old Sheriff did deliver the body of A. by Indenture, in which the Execution of B. only was mentioned, and the other omitted: Afterwards A. in the time of the new Sheriffs, made Eſcape. In this Caſe it was Reſolved, That the old Sheriffs ought to give notice to the new Sheriffs, of all Executions which they had againſt any parties, although that the Executions were of Record; For the new Sheriffs are not compellable to take knowledg of them at their perils. And it was Reſolved, That untill the Priſoners are delivered to the new Sheriffs, they do remain in the Cuſtody of the Old Sheriffs; notwithſtanding the Letters Patents of the new Sheriffs, and the Writ of Diſcharge, and the Writ of Delivery. But if the old Sheriff hath divers perſons in his Cuſtody in Execution, and dyeth, the new Sheriffs at their perils ought to take Notice of all Executions againſt any perſons which they find in the Goal; and that for neceſſity ſake, *Cook* 3. Part, 71. *Weſtbies* Caſe.

10. A man is Inducted in a Benefice with Cure, of the value of 8 l. *per annum*, and accepts another Benefice; and afterwards he is made Biſhop: and before Creation and Inſtallation, the King by his Letters Patents grants to him a Plurality, and that he ſhall hold both Benefices beſides his Biſhoprick; and afterwards pretending his Letters Patents to be void, the Preſentee of the King for Lapps Libels againſt him for Tythes in the Spiritual Court; and upon a Prohibition awarded, he prayes a Conſultation, but makes no mention of the Statute of 21 H. 8. 13. of Pluralities, in his Plea. In this Caſe, theſe Points were Reſolved; 1. That before the Statute of 21 H. 8. If a man hath a Benefice with Cure, and takes another Benefice with Cure, that the firſt was void, but that was by the Spiritual Law, and not by the Common-Law; and therefore no Lapps ſhould encurre without Notice, and yet the Patron might preſent, and take upon him Notice of the Avoidance if he would: But now by the Statute of 21 H. 8. if the firſt Benefice be of the value of 8 l. the Patron at his peril ought to preſent unto it: For in as much as to an Avoydance by Act of Parliament, every one is party, every one ought to take Notice of it at his peril. 2. Reſolved, That the Statute of 21 H. 8. was a general Act, of which the Judges ought to take Notice *Ex Officio*; and ſo ought the Judges to take Notice of all general Acts: but contrary of particular Acts; and therefore of the Statute of 18 Eliz. concerning Colledges in the Univerſities, &c. the Judges are not to take Notice, becauſe they are particular Acts. But the Statute of 13 Eliz. Cap. 10. & 18 Eliz. Cap. 11. concerning Colledges, Deans, Chapters, Hoſpitals, Parſons, Vicars, or any other perſon having Spirituall or Eccleſiaſtical Livings, are generall

Acts, whereof the Judges ſhall take knowledg. But the Statute of 1 Eliz. concerning Leaſes made by Biſhops, is a ſpecial Act, becauſe it concerns the Biſhop only; and of that, the Judges ſhall not take Notice *Ex Officio*: Of every Act which toucheth the King, the Judges *Ex Officio* are to take Notice, becauſe every Subject hath intereſt in the King. *Cook* 4. Part, 75, 76. *Hollands* Caſe.

11. Two Joynt-Tenants were with Warranty; Partition was made betwixt them by Judgment in a Writ *de Partitione faciendâ*, by force of the Statute of 31 H. 8. cap. 1. It was adjudged that the Warranty did remain, becauſe by Writ they are compellable by the Statute to make Partition; and the party hath purſued his remedy according to the Act, and therefore none can have wrong by the operation of the ſaid Statute, to which every one is a party. But if they had made Partition by Deed by conſent after the ſaid Act, although by Writ they were compellable to make Partition; yet forasmuch as they have not purſued the Statute to make Partition by Writ in ſuch Caſe, ſuch Partition doth remain at the Common Law, and by conſequence the Warranty is gone. *Cook* 6. Part, 12. *Morrices* Caſe.

12. Divers Souldiers who were preſſed, and went towards *Ireland* to ſerve the Rebells before they had ſerved in the Wars, departed and eſſoyned themſelves; and upon conſideration of the Statutes of Captains and Souldiers, it was Reſolved by all the Judges, That the Statute of 18 H. 6. cap. 19. was of little force, becauſe the ancient manner of retaining of Souldiers was now changed. But it was Reſolved by them, That the Statutes of 7 H. 7. cap. 1. and 3 H. 8. cap. 5. were ſpecial Acts of Parliaments, and were not made for the Reigns only of the ſaid Kings. For that the general word (King) in the ſaid Statutes, did extend to all his Succeſſors; and according to this Reſolution, divers Souldiers who departed were attainted and executed. See *Cook* 6. Part, 27. The Caſe of Souldiers.

13. See, that the Act of 35 H. 8. which concerneth the capacity of the Queen, was Reſolved to be ſuch an Act of which the Judges ought to take knowledg, becauſe the ſame concerneth the Kings Wife, which in ſome ſort doth participate of the Honour of the King. See *Plow. Com.* 231. in the Lord *Berkeyes* Caſe. *Cook* 7. Part, 28. in the Princes Caſe, &c.

14. Note, It was Reſolved, That the Statute of *Weſt.* 1. *de Miſefactis in parcis*. The Statute *de Forreſta*. The Statute of 22 E. 4. and 35 H. 8. concerning Forreſts, are general Acts of Parliament, of which the Judges are to take notice. *Cook* 8. Part, 137. Sir *Francis Barringtons* Caſe.

Jeofailes.

What things are holpen by the Statutes of Jeofailes; What not.

1. ACTION upon the Caſe upon Aſſumpſit; the Defendant pleaded, *Non Aſſumpſit*, and the Iſſue was found for the Plaintiff. It was moved, That the Plaintiff had alledged no place of the Aſſumpſion. And it was ſaid, That when an Iſſue is miſ-tryed, it is not helped by the Statute, and here no place is alledged, whereupon the tryal may be. It was the Opinion of the Court, That the Statute ſhall be taken liberally, ſo that if a Verdict be once given, it ſhall be a great cauſe that ſhall hinder the Judgment. Yet when it is tryed and found, the Plaintiff ought to have Judgment. Tr. 29 Eliz. in C.B. *Goldesbr.* 48.

2. Action upon Aſſault and Battery, the Defendant was condemned by *Nihil dicit*, and a Writ of enquiry of damages went forth, and then the Attorney of the Plaintiff dyed, and another Attorney without warrant, prayed the ſecond Judgment and Execution. It was the Opinion of the Court, That if in an Action after Judgment, the Attorney dye, a new Attorney may pray Execution without Warrant, but in this Caſe, becauſe he dyed before the ſecond Judgment, it ſeems he ought to have a Warrant of Attorney. The Preignotaries ſaid, That if after Judgment one of the parties dyed, the Writ ſhould abate: And it was agreed, That this was not within the Statute of Jeofailes, for a Verdict is that which is put in Iſſue by the joyning of the parties. Trin. 29 Eliz. in C.B. *Goldsbr.* 49.

3. Error, for that the Action was brought in the time of Queen *Eliz.* and the parties then at Iſſue, and a *Venire* returned. Afterwards in the time of King *James*, an *Habeas Corpora* was awarded with a *Tales*, which recited, *Quod habeat Corpora Juratorum ſummonit. in Curia nuper Reginæ*. And becauſe the Jurors were never ſaid to be ſummoned *in Curia Reginæ*, it was held Error, and the Judgment reverſed. And it is not holpen by the Statute of Jeofailes 32 H. 8. nor 18 Eliz. for the ſame proceſs ought to Warrant the other, which was not done in this Caſe. Mich. 3 Jac. in B. R. Sir *Fran-*

ch Knowls and *Reckingſhaws* Caſe. *Cro.* 2. Part, 83.

4. Treſpaſs, for that he took and carried away three load of Wheat, being ſevered for Tythes *conpacum*, omitting the words *vi et armis*. After Verdict, It was moved, That the Bill ſhould abate, for it is the eſſential part of the Declaration, which induceth to have a Fine for the King. And ſuch was the Opinion of the whole Court; and that it is not holpen by the Statutes of Jeofailes. And ſo was it adjudged. Hill. 13 Jac. in *Wilſh.* and *Taylers* Caſe, where Judgment was reverſed for taking a bag of money, becauſe *vi et armis* was omitted. Paſc. 17 Jac. in B. R. *Willis* and *Neidlers* Caſe. *Cro.* 2. Part, 526.

5. A Writ of Right againſt Husband and Wife, of two parts of 40 Acres of Lands in S. they pleaded, That J. S. was ſeiſed, and deviſed it to his Wife, one of the Tenants for life, the Remainder to B. in Fee, which was his Heir, and dyed, and they prayed in aid of B. who joyned to them, and thereupon they came and pleaded to the grand Aſſiſe, and the firſt day of the Term, the Aſſiſe appeared, and 16 were ſworn, whereof four were Knights, and the reſt were Squires and Gentlemen, and the Title was all one as before, in Trin. 28. For this ſame B. was Tenant in that other Action for the third part. It was the Opinion of the Court, That it was not aided by the Statute, for there is not any certainty in the Grant, but if he had given it a certain name, as Green Acre, then although he had miſtaken the Pariſh, yet it had bin good enough. Trin. 30 Eliz. in C. B. *Ibgraves* Caſe. *Goldsbr.* 90.

6. Debt was brought in the Kings Bench upon four Obligations to pay money. Three of them were tryed in *London* in *Trinity* Term, the fourth was tryed at Lent Aſſiſes after, and there was not any continuance from Trinity Term, to Lent Aſſiſes, which was much inſiſted upon: yet Judgment was given for the Plaintiff. Paſc. 10 Jac. rott. 104. See Paſc. 17 Jac. in B.R. *Smith* and *Bowyers* Caſe. *Cro.* 2. Part, 528. acc.

7. In an Action brought in the Common Pleas, In Arreſt of Judgment, it was moved, That the *Venire facias* did vary from the Roll in the Plaintiffs name, for the Roll was *Peter Percy*, and the *Venire facias*, *John Percy*, and the *Poſtea* was according to the Roll, which was his true name. It was holden, That in Caſe no *Venire facias* iſſueth, the ſame is holpen by the Statute of Jeofailes, and this Caſe is in effect, as if no *Venire facias* had iſſued forth. It was the Opinion of the Court, That if there be no *Venire facias*, nor *Habeas Corpora*: yet if the Sheriff doth return a Jury, the ſame is helped by the Statute of Jeofailes. Trin. 10 Jac. in C. B. *Godbolt.* 194. Trin. 7 Jac. rott. 787. in the Exchequer, *Herenden* and *Taylor* Caſe adjudged accordingly. See *Cook* 5. Part, *Biſhops* Caſe.

8. It was moved in Arreſt of Judgment, That the *Venire facias* wanted theſe words, *Et habeas ibidem Nomina Juratorum*, but the words *Venire facias Duodecim, &c.* were inſerted. It was the Opinion of all the Juſtices, That it was good, and that the firſt words are ſupplyed in the laſt, and that they are holpen by the Statutes of Jeofailes, after Verdict. Paſc. 12 Jac. in C. B. *Bude* and *Stabbings* Caſe. *Brown.* 2. Part, 167.

9. In an Action for words brought in the Chancery by a Clark there; A *Venire facias* was awarded, returnable in the Kings Bench. The Writ was, *Venire facias 12 Quorum quilibet habet 4 l. terrarum aut minus, &c.* It was moved in ſtay of Judgment, that the *Venire facias* was ill, for that the Statute of 27 Eliz. cap. 6. extends only to Writs of *Venire facias* in the Kings Bench, Common Pleas, Exchequer, Juſtices of Aſſiſe, and no other Courts, and the Chancery is omitted, and therefore the *Venire* was not Warranted by the Statutes. But it was the Opinion of the Court, That this clauſe inſerted in the Writ (although it was not Warranted by the Statute, as it was agreed by all the Juſtices upon peruſal of the Statute) yet it is not prejudicial to any, but makes the better tryal; and by the Common Law, Judges may direct a *Venire facias, tales quorum quilibet habeat tantum de terris*: And Preſidents were ſhewed out of Chancery, where the *Venire facias* was, as in this Caſe. And the Opinion of the Court was, That if it was not good at the Common Law, yet it was now clearly made good by the Statute of 32 H. 8. wherefore it was adjudged for the Plaintiff. Mich. 21 Jac. in B. R. *Pollot* and *Feilds* Caſe. *Cro.* 2. Part, 672. See Hill. 33 Eliz. in B. R. rott. 92. *Morrice* and *Thomas*'s Caſe, adjudged acc.

10. A *Scire facias* in Chancery upon a Recognizance of 300 l. by one C. the Defendant was returned dead; Whereupon a ſecond *Venire facias* iſſued againſt the Heir of C. and againſt the Tenants of the Lands of C. which he had *Tempore recognitionis*, whereupon the Sheriff returned Ter-Tenants of ſuch Lands, and omitted to return any thing concerning the Heir; upon this, the Defendant pleaded, That he had nothing in the Lands, at the time of the Recognizance, nor ever after. It was found for the Plaintiff, That C. was ſeiſed. It was moved in ſtay of Judgment, becauſe nothing was returned againſt the Heir, viz. that there was not any Heir, or that the Heir had nothing; and it is a Non-return of the Sheriff, and

and not a miſ-return, and is not helped by the Statute of Jeofailes. But it was agreed by the Court, although the return had bin better, if it had bin found who was Heir, and that he was warned, or that there was not any Heir in the ſaid County, yet it was well enough; and the miſ-return, or inſufficient return of the Sheriff *quoad* the Heir (becauſe he is not named in the return) is but a Diſcontinuance, which is helped by the Statute of Jeofailes. Trin. 9 Car. in B. R. *Eyres* and *Tauntons* Caſe. *Cro.* 1. Part, 215. and 228.

11. *Ejectione firmæ* of ſix Meſſuages, 100 Acres of Land, 300 Acres of Paſture; after Verdict, it was found for the Plaintiff. It was moved, That this ſuit is by Original Writ, and the Original doth not Warrant the Declaration, for the Original is of one Meſſuage and 60 Acres of Land, and ſo varies from the Original in the number of the Meſſuages and the Lands. It was the Opinion of the Court, That this ſhall not be intended, the Original upon which the Plaintiff declared, but that there was another Original, which is imbeſſeled. 1 Becauſe the Writ bears *Teſte* 18 *Aprilis*, returnable 15 Paſc. and this Declaration is in Trinity Term, and here is no continuance upon this Writ. 2. The Writ is againſt the Defendant and a Copyholder; and in this Declaration there is no name of the Copyholder, wherefore it ſhall be intended that this Declaration is grounded upon another Original. And this want is holpen by the Statute of Jeofailes. Trin. 9 Car. in B. R. *Johnſon* and *Davy's* Caſe. *Cro.* 1. Part, 238.

12. A. brought a Formedon againſt B. in C. B. and there was a ſpecial Verdict found, and Judgment given, Error brought and alledged for Error, That after Verdict given, no default in the Writ ſhould prejudice the party by the Statute of 18 El. It was the Opinion of *Popham* Chief Juſtice, That if there be no Writ, it is holpen by the Statute, but it is otherwiſe if there be an inſufficient Writ in matter. And in every Writ of Formedon, there are two things requiſite, the one is the gift, the other is the conveyance to the Defendant, and if either of theſe two fail, the Writ is inſufficient in ſubſtance, and is not holpen by the Statute. Hill. 43 Eliz. in C. B. *Dewnalt* and *Cattesbyes* Caſe. *Goldesbr.* 126.

13. In Debt, the Plaintiff declared upon a Demiſe for Rent; The Defendant pleaded, That before the Rent due, the Plaintiff did enter upon him, but did not ſay, that he did expel, or hold him out; and ſo iſſue was taken, *Non intravit*, and found for the Defendant, and Judgment was given for him; for although the plea in bar was inſufficient, yet the Verdict was full to the Iſſue. Trin. 17 Jac. in C. B. *Reynolds* and *Bucklet* Caſe. *Hob* 326.

14. A. brought Debt againſt B. upon the Statute of 21 H. 8. The Writ was *Precipe* B. *quod reddat nobis et A. qui tam pro nobis quam pro ſipſo ſequitur* 110 l. *quas nobis et præfat. A. debet*; and declares for the taking to Farm of 6 Acres of Lands, and holding the ſame ſix Moneths, &c. And for 60 l. and for further taking to Farm other Lands, and holding the ſame five Moneths *per quod alias, &c.* for 50 l. The Defendant pleaded, *quod ipſe non debet præfat. A. qui tam, &c.* the aforeſaid 110 l. *neq; aliquam inde denariam in forma quo, &c.* Iſſue was joyned, and found that the Defendant did owe 30 l. and for the reſt *quod non debet*. Exception was taken, for that the Verdict expreſſes not for which Farm, nor for which of the Moneths the 30 l. was due. But this exception was diſallowed, becauſe the demand and Iſſue was for 110 l. in general, though it had bin more formal to have diſtinguiſhed them. Another exception was, That the Defendant hath not anſwered the Writ and Declaration. For the Plea ought to have bin as the demand is, *Quod ipſe non debet diſt. Domino Regi et præfat. A. qui tam*; this was holden a good exception, becauſe the Statute of Jeofailes excepts penal Statutes, Paſc. 18 Jac. in C. B. *Star* and *Lewis* Caſe. *Hob.* 327. See Trin. 7 Jac. in C. B. *Hob.* 101. *More* and *Huſſeys* Caſe, where the Judgment was reverſed, becauſe there were no *plegii de proſequendo* entred for the Plaintiff; for they took it not to be within the remedy of the Statute of Jeofailes, becauſe they held it a penal Law, and ſo excepted. See *Lib. ibid.*

15. Treſpaſs was brought for taking of a Kettle at *Weſtowne*; the Defendant juſtified by reaſon of a Cuſtome in the Mannor of T. and the Plaintiff joyned iſſue *de injuria ſua propria abſq; tali cauſa*. The *Venire facias* was awarded *de vicineto de Weſtowne et Manerio de T.* by the Roll, and a Verdict for the Plaintiff, and although the Plaintiff ſhould not have traverſed the cauſe generally, but the Cuſtome, yet that was adjudged holpen by the Statute of Jeofailes, as matter of form, becauſe *abſque tali cauſa*, contained the Cuſtome and more. Trin. 12 Jac. in C. B. *Banks* and *Parker's* Caſe. *Hob.* 76.

16. In Trover and Converſion againſt the Defendant, the Declaration upon the Imparlance Roll had ſpaces for the day and year of loſing, finding, and Converſion of the goods, but the Iſſue, Roll, and all the reſt was perfect in this point. It was the Opinion of the Court, That the Imparlance Roll could not be amended and made perfect by the Iſſue Roll, becauſe it was the Original, and was the Warrant to the other. But yet becauſe

cauſe upon Iſſue, Not Guilty, Verdict was given for the Plaintiff; this Court gave Judgment for him, becauſe the Declaration, as it was found in the Imparlance Roll, was good enough in matter; for the Trover and Converſion was layed in the Preterperfect Tenſe, and ſo before the Action brought, and ſo the fault in the Declaration being but in form, was holpen by the Statute of Jeofailes. Mich. 12 Jac. *Parker* and *Parkers* Caſe. *Hob.* 76.

17. Treſpaſſe brought for entring into an houſe, and breaking of his Cloſe in D. the Defendant ſaid, That the ſaid houſe and Cloſe contains 20 Acres, and is, and at the time of the Treſpaſſe ſuppoſed, was his Freehold: The Plaintiff replyed, *Quod locus et clauſa in quo ſupponitur Tranſgreſſio eſt unum Meſſuagium*, and makes him a title to it; and for that the Plaintiff by his Replication made to him Title to a Meſſuage, and did not maintain his Declaration, which was for the Meſſuage and Cloſe. It was awarded *Quod querens nil capiat per billam.* Quære if this do not amount to a Diſcontinuance of the Cloſe only, and ſo is helped by the Verdict. Hill. 43 Eliz. in C. B. *Goldesbr.* 158.

18. Error brought to reverſe a Judgment; the Error aſſigned was, That the Suit was commenced 35 Eliz. and the *Venire facias* to try the Iſſue, bore date 33 Eliz. It was adjudged by the Court, That a *Venire facias* which bears *Teſte* 33 Eliz. cannot poſſible be to try an Iſſue in 35 Eliz. which is two years after; and therefore here was no *Venire facias*, and ſo it was helped by the Statute of 18 Eliz. after Verdict. Hill. 43 Eliz. in C. B. *Bowyer* and *Jenkins* Caſe. *Goldesbr.* 188. *Tanfield* ſaid, That it was adjudged in this Court, in *Yorks* Caſe, That it was not holpen by the Statute.

19. A. brought Treſpaſſe of Battery againſt B. the Defendant made juſtification, by conveying himſelf an Eſtate by Copy in a piece of Ground, parcel of the Mannor of D. whereof J. S. was ſeiſed: and the Plaintiff came upon it, and he laid his hands upon him *Moliter*. The Plaintiff replyed, and conveyed himſelf alſo an eſtate by Copy, of another piece of the ſame Mannor, and then layed, That the ſaid J. S. Lord of the ſaid Mannor, had had for him and his Tenants of this piece of ground, a way over the Defendants piece, &c. And thereupon Iſſue was taken and found for the Plaintiff. The better Opinion of the Court in this Caſe was, That this was not holpen by the Statute, becauſe in deed this was no Iſſue at all, nor thing, nor poſſible iſſuable; and therefore the Verdict muſt alſo be void, for a Verdict cannot make that good, that the Court ſees cannot be in Law, ſo that this is the Office of the Court to judg. Hill. 13 Jac. in C. B rotr. 2311. *Tasker* and *Salters* Caſe. *Hob.* 112, 113.

20. In Treſpaſs by A. againſt B. and C. Iſſue was taken, That J. S. Prebend of the Prebendary of P. in the Church of S. and all his Predeceſſors, Prebendaries, &c. had uſed time out of mind to keep a Shepheard for certain Sheep of theirs, following the ſame ſheep, for the better keeping of them, feeding together in a certain Paſture from the Sheep of *Tho.* Earl of *Suffolk* in the ſame place, and Iſſue was found accordingly. It was moved that this was a void Verdict, for the Preſcripion was ſenſleſs, and could not ſtand, that the Sheep could be kept time out of mind from the Sheep of the Earl of *Suffolk*, being but one mans life. But yet by the Rules of the Court, Judgment was given according to the Verdict, for the Plaintiff, for the ſubſtance of the Iſſue was the keeping of the Sheep of the Prebendary feeding together; and the other part was but a conſequent of it, that thereby they were kept from the Sheep of the Earl. Trin 14 Jac. in C. B. *Nepper* and *Jaſper* and *Georges* Caſe. *Hob.* 117.

21. Treſpaſs, *Quare clauſum fregit, et alia enormia ei intulit*; upon Not-Guilty, and damages 400 l. in reſpect of the abuſe of the Plaintiffs Wife. It was moved, That upon the Return of the *Venire facias*, there wanted theſe words *Quilibet Juratorum per Plegios*, ſo it is as if there had bin no return of this Writ. But the Court held, That it was not as a blank return, where no return is at all, or that the name of the Sheriff is omitted, but here is an inſufficient Return, which is helped by the Statute of Jeofailes. For the omiſſion of the Pledges is but matter of form, and not like to *Huſſeys* Caſe, where there was want of Pledges upon the Original. Paſc. 17 Jac. in B. R. *More* and *Blackwells* Caſe. *Cro.* 2. Part, 534.

22. The Plaintiff exhibited a Bill againſt the Defendant, one of the Clarks of the Kings Bench, for money due upon an Obligation: And Iſſue was joyned, and the cauſe tryed, and a Verdict for the Plaintiff. The Defendant moved in Arreſt of Judgment, That the Bill was not filed, and that it was not helped by the Statute of Jeofailes, nor within the Statute. But afterwards the Court granted, That a new Bill ſhould be filed, ſo that the matter might be put to Arbitrament. But the Court ſeemed to be of Opinion, That the want of a Bill was not holpen by the Statute. Trin. 14 Jac. in C. B. *Weeks* and *Wrights* Caſe. *Brownlow*, 1. Part, 81.

23. An Action was brought for an Aſſault and Battery in *Surrey*. The Defendant pleaded a plea of Juſtification in *Middleſex*. The Plaintiff replyed, that he beat him in *Southwark* which is in *Surrey*, *de injuria ſua propria abſque tali cauſa*. And this

this Iſſue was tryed by a Jury in *Middleſex*, and found for the Plaintiff, and Error brought. It was ſaid, That the tryal was not good; becauſe the *Venire facias*, was here from one place, where it ſhould have bin from both places, for here two Iſſues are to be tryed, and ſo it is not within the Statute of Jeofailes. But the Court held, That the tryal was well enough. Here are two Iſſues, but you have made them one by pleading, and ſo it is within the Statute of Jeofailes, and helped by it. Mich. 1649. *Hill* and *Blunden's* Caſe. *Styles* 206.

24. One exhibited a Bill *in placito debiti* againſt *Wilſon* an Attorney of the Common-Pleas. And after Verdict it was moved in Arreſt of Judgment, That the Original Bill was not filed with the *Cuſtos Brevium*, as it ought to be. But it appeared to the Court, That the Tenor of the Bill was entred of Record *in hæc verba*. It ſeemed to the Court, That this was remedied by the Statute of Jeofailes, as being in the nature of a want of an Original after Verdict. Yet the Court would adviſe of it, becauſe it had otherwiſe bin ruled in one *Roods* Caſe, an Attorney of this Court. Trin. 12 Jac. in C. B. *Wilſons* Caſe. *Hob.* 130.

25. A. brought an Action of Trover and Converſion of good againſt W. in the Kings Bench, the Defendant pleaded, Not Guilty, and the Plaintiff had a Judgment; the Defendant brought Error, and aſſigned two Errors. 1. That there was no Bill filed. 2. That there was no bail; and upon a *Certiorari*, it was returned. It was certified there was neither Bill nor Bail filed: And the Judgment, notwithſtanding thoſe Errors aſſigned, was affirmed in the Exchequer Chamber. For 1. The want of a Bill, being the Original, was taken to be within the meaning and intent of the Statute of 18 Eliz. and remedied to the equity of that Statute. 2. The want of a Bail was not material, becauſe it might be that the Defendant was in *Cuſtodia Mariſchalli* at the time of the Plaintiffs Bill exhibited, according as the Bill ſuppoſeth. Trin. 17 Jac. *Willis* and *Woodhouſes* Caſe. *Hob.* 264.

26. Treſpaſs for taking and carrying away 100 Loads of Turf, the Defendant pleaded *quod locus in quo* (whereas there was no place aſſigned), was two Acres called B. in L. which was his Freehold, and that he digged the Turf there, and carried them away *prout*. The Plaintiff ſaid, That *locum in quo* was a piece which contained 20 Acres in L. *alia quam, &c.* and the Defendant *quoad aliquam tranſgreſſionem in prædict.* 20 Acres; pleaded Not Guilty; Whereupon Iſſue was taken, and found for the Plaintiff. It was moved, That this was no Iſſue, for there was no 20 Acres, nor place certain in the Declaration. Yet the Court gave Judgment for the Plaintiff, for although it was not in the Declaration, yet it was no departure from the Declaration, for both parties agreed that the Treſpaſs was done at L. and ſo it is not a Verdict out of the matter, and ſo no Iſſue, but is a Verdict holpen by the Statute of Jeofailes. Hill. 14 Jac. in C. B. rott. 861. *Plant* and *Thorleyes* Caſe. *Hob.* 176.

27. In a Writ of Error of a Judgment in the Common Pleas in an *Ejectione firmæ*; It was aſſigned for Error, That the Declaration was, That J. S. 21. *Martii*, 6 Jac. let Lands to the Plaintiff for ſeven years, by vertue of which he entred, and was poſſeſſed untill the Defendant *poſtea ſcript. anno ſexto prædict.* ejected him. After Imparlance, the Plaintiff made a ſecond Declaration, and there the Ejectment is ſuppoſed to be 26. *Maii anno ſupradict.* And the Writ was brought of that Ejectment. It was found againſt the Defendant, and Judgment for the Plaintiff: And whether it was erronious, becauſe no day was mentioned in the firſt Declaration, was the Queſtion. It was agreed in this Caſe, That the firſt Declaration is the principal Declaration, and if any matter of ſubſtance be omitted in it, it cannot be helped or amended by the ſecond, for that is but a meer recital: And therefore if the firſt be not good, the tryal is erronious. But the Court held in the principal Caſe, That the firſt declaration was good; for he declares of a Leaſe 25 *Martii*, 6 Jac. which is the firſt day of the year. And the *Poſtea, ſcil.* 6 Jac. that the Defendant directed him, is certain enough, for the year when he made the Ejectment, and the day of the Ejectment, is not material, it being before the Action brought. Hill. 9 Jac. in B. R. *Merrill* and *Smiths* Caſe. *Cro.* 2. Part, 211.

28. Account was brought againſt J. G. of divers Receipts and parcells, to all which, except one, the Defendant pleaded to Iſſue, and for one parcel, pleaded nothing. It was moved, That the Plea was diſcontinued, becauſe he did not anſwer to parcel. And it was ſaid, That the Diſcontinuance was not aided by the Statute of 32 H. 8. becauſe no anſwer was given to one parcel, and of parcel the Plaintiff could not have Judgment according to his Declaration, for of the parcel to which no anſwer was made, no Judgment could be given. But it was Reſolved by the whole Court, That the Statute of 32 H. 8. did extend to it, for it is thereby enacted, That after Verdict found, Judgment ſhall be given, any Diſcontinuance notwithſtanding. Mich. 29 Eliz. in B. R. *Gomerſall* and *Gomerſalls* Caſe. *Godbolt.* 55.

29. In Treſpaſs for entring his houſe and Cloſe at G. the Defendant juſtified, That a *Capias utlagatum* was by a Warrant from the Sheriff directed to him, to execute upon one J. S. and becauſe it was the common voice that J. S. was at the Plaintiffs houſe, he went in a foot path through the ſaid Cloſe to the ſaid houſe, and asked leave of the Plaintiff to enter

enter his houſe to ſearch for the ſaid J. S; and that the Plaintiff gave him leave: Whereupon he entred, and not finding J. S. he returned the ſame way. Iſſue was joyned upon the Licence; And it was found for the Plaintiff. It was moved in Arreſt of Judgment, That there was not any Replication for the Cloſe, nor any Iſſue joyned thereupon, ſo that all was diſcontinued. But it was the Opinion of the Court, That Judgment ſhould be given for that which was found, and that the diſcontinuance for the other was helped by the Statute of *Jeofails*. Mich. 12 Jac. in B.R. *Watts* and *Kings* Caſe, *Cro.* 2. Part, 353.

Impriſonment. *See more upon title,* Falſe Impriſonment.

Who have power to impriſon mens perſons; Who not: And in what Caſe, and for what Cauſe, and by what and whoſe Warrant or Command, a mans perſon may be impriſoned; What not.

1. IMpriſonment is nothing elſe but the reſtraint of a mans perſon, ſo as he cannot freely go at all times to all places, without bail or mainprize; and may be as well in a man's own houſe, as in a Common Priſon, Goal, or other place whatſoever; in ſome Caſes, and for ſome Cauſes it may be lawful; and in ſome Caſes, and for ſome Cauſes, ſuch a Reſtraint may be unlawful; and then it is called, Falſe Impriſonment.

2. In all Actions, *Quare vi et Armis*, as *Raſcous, Vi et Armis*, &c. If Judgment be given againſt the Defendant, he ſhall be Fined and Impriſoned: For to every Fine, Impriſonment is incident; and alwayes when the Judgment is, *Quod defendens impriſonetur*; it is as much as to ſay, *Capiatur uſq; finem fecit. Cook* 8. Part, 59.

3. In an Attaint, If the Plaintiff be Nonſuit, or barred, he ſhall be Fined and Impriſoned; ſo if the Attaint paſſe againſt the Defendant, if he were party to the firſt Record, he ſhall be Fined and Impriſoned: but if he were not party to the firſt Record, as Tenant by Reſceit, or other Tenant, he ſhall not be Fined nor Impriſoned. 42 E. 3. 26. 14 Aſs. 2.

4. For Contempts done to any Court of Record againſt the Kings Command, by Writ under the great Seal, the Defendant ſhall be Fined and Impriſoned; as in a *Quare non admiſit*, *Quare Incumbravit*, Attachment upon Prohibition, &c. *Cook* 8. Part, 60. *Beechers* Caſe.

5. If Judgment be given againſt one in the Common Pleas, in a Writ of Recaption; he ſhall be Fined and Impriſoned; but if the Writ be *Vicontiel* in the County, there he ſhall not be Fined and Impriſoned, becauſe the Court is not of Record; and Regularly thoſe that cannot make a Record, cannot Fine and Impriſon. *Cook* 8. Part, 120. in Dr. *Bonham's* Caſe.

6. The Statute of *Weſt.* 2. Cap. 11. makes the Auditors before whom an Accompt is taken Judges of Record, becauſe they have power thereby to commit the Defendant to priſon; which cannot be done, if they be not Judges of Record. But if the Accompt be before one Auditor, the ſame is out of the Statute; for he cannot commit the Defendant to priſon, 10 H. 6. 14. So if the Lord be found in Surpluſage, the Statute is made againſt the Accomptant only, and the Lord cannot be committed to priſon. *Cook* 10. Part, 103. in *Denbawds* Caſe.

7. Note, *per Curiam*, That of Courts, ſome may Fine, and not Impriſon; as the Court-Leet: Some cannot Fine, nor Impriſon, but Amerce; as the County Court, Hundred, Court Baron, &c. No Court can Fine and Impriſon, which is not a Court of Record. Some may Impriſon, and not Fine; as the Conſtable at the Petty Seſſions, for any Fray made in diſturbance of the Court, may Impriſon, but not Fine. Some Courts cannot Impriſon, Fine, nor Amerce; as the Eccleſiaſtical Court holden before the Ordinary Arch-Deacon, &c. or their Commiſſaries, or the like, who proceed according to the Canon, or Civil Law. Some Courts may Fine, Impriſon, and Amerce, as the caſe requireth; as the Courts of Records at *Weſtminſter*, or elſewhere. *Cook* 11. Part, 41. in *Richard Godfreys* Caſe.

8. A. the Executor of the Will of J. S. ſued a Writ of Accompt againſt B, Receiver of the moneys of the ſaid J. S; The Defendant pleaded, Never his Receivor to render an accompt: which was found for the Plaintiff, and Judgment given, That the Defendant ſhould Accompt. And upon that, a *Capias ad Computandum* was awarded: upon which the Defendant being taken, being in Cuſtody, did accompt, and was found in arrears, and his body was Impriſoned in Execution. Afterward, the Will was annulled in the Spiritual Court, becauſe

the ſaid J. S. the Teſtator was an Ideot born, which was Certified into the Chancery, and from thence ſent into the Kings-Bench, where the Accompt was brought: He who was in Execution, brought an *Audita Querela*. Trin. 3 Eliz. *Dyer*, 203. See *Cook* 8. Part, 143. in Dr. *Darcies* Caſe, It was ſaid, That 35 H. 8. it was adjudged, That in ſuch Caſe an *Audita Querela* did lye.

9. A man Outlawed upon a Judgment in Debt, the Chancellor not being certified, that the Plaintiff was ſatisfied, had pardoned the Outlawry, *Ita quod ſtet reſt.* where it ſhould have been, That he ſatisfied the Plaintiff; and upon two *Nihils* returned, it was allowed. See there, where one is Outlawed for a Fine to the King in Treſpaſſe, he ſhall not have a pardon till the Chancellor be aſſured that the party is ſatisfied. After the year, the Plaintiff ſued a *Scire facias*, and had Execution by default, and a *Capias*, and an *Exigent*; and if upon the *Capias utlegatum*, the Defendant ſhould avoid the Outlawry by Plea, is a Quære, in 3 Eliz. *Dyer*, 172.

10. An Information of Perjury was brought againſt *Bronker* in the Star-Chamber, for returning one who was not choſen a Knight of the Parliament, he was fined and impriſoned according to the Statute for the falſe Return. But it was further ſaid in the Caſe, That it appeared that he took not his Oath at the entry of his Office by the perſwaſion of J. D. to whom a *Dedimus Poteſtatem* was given to take it: and in that caſe they were both Fined and Impriſoned for the Contempt. Trin. 1 Eliz. *Dyer*, 168. *Bronkers* Caſe.

11. The Statute of *Weſt.* 2. of Raviſhment of Wards, is, *Si ille qui rapuit non habens jus in Maritagio, licet poſtea reſtituit puerum non maritatum, vel de Maritagio ſatisfecerit, puniatur tamen pro tranſgreſſione per priſonam duorum annorum.* And the Caſe was, A Writ of Raviſhment of Ward upon this Statute was brought againſt Huſband and Wife, and others; The Jury found, That the Wife was guilty of the Raviſhment, but not the Huſband; and aſſeſſed Coſts and Damages. It was, amongſt other things, Reſolved in this Caſe, That a *Feme Covert* was not within the ſaid Statute, becauſe ſhe is diſabled to ſatisfie; and the goods of the huſband who is innocent, are not lyable by the Statute, to anſwer for the Raviſhment done by the Wife: and the Law did not intend ſo ſevere a puniſhment as Impriſonment for two years, for the not doing of that which the Law had diſabled the party to do. *Cook* 9. Part, 72. Dr. *Huſſyes* Caſe.

12. The Queen granted a Commiſſion to ſeveral perſons, to Order the Intereſt of the Office of the Ex'genter of *London*, which the Queen did pretend did belong unto her. Whereupon a Bill was exhibited before them, againſt *Scroggs*; who demurred upon their Juriſdiction, and would not Anſwer; and thereupon they committed him to the priſon of the *Fleet*. But in that caſe, The Juſtices of the Common-Pleas, granted a *Habeas Corpus*, and diſcharged him of his Impriſonment, becauſe the Office was incident to the Chief Juſtice of that Court, and he was a neceſſary Officer, whoſe attendance was neceſſary in Court. Mich. 2 Eliz. *Dyer*, 176. *Scroggs* Caſe.

13. A. arraigned upon an Indictment of Murder of one J. S. was found Not guilty of the Murder, but guilty of Manſlaughter; for which he pleaded the General Pardon of 35 *Eliz.* The Attorney General for the Queen ſaid, That there was an Exception in it of all perſons being in Priſon by the Commandment of the Privy Councel: and ſaid, That the ſaid A. was committed by the Lord Chamberlain for ſuſpition of the ſaid Felony, and for the ſame in priſon at the time of the Parliament, and ſo a perſon Excepted. To which it was ſaid, That before the ſaid Parliament, and after the ſaid Commitment by the Lord Chamberlain, he was brought into the Kings-Bench by a *Habeas Corpus*, and was for the ſaid offence committed by the ſaid Court to the Marſhalſey, and there was remaining at the time of the Parliament by force of the Commitment of that Court. In that caſe, It was the Opinion of the Court, That if a man be committed by a Privy Councellour, and removed by *Habeas Corpus*, and committed by that Court, he ſhall now be ſaid to be impriſoned by the Commitment of that Court, and not of the Privy Councellor. Mich. 40 Eliz. in B.R. *Arrundel's* Caſe. *Goldeſbr.* 133.

14. In an Action of Falſe Impriſonment againſt two; the Defendants juſtified, and ſet forth, That *London* was an Ancient City; and that the Mayor of *London* is a Juſtice of Peace, and that the Defendants were Sergeants of the Mace according to the Cuſtom of *London*; And that *L.* Lord Mayor commanded the Defendants to arreſt the Plaintiff for cauſes unknown to them. It was holden by the Court, That the Arreſt and Impriſonment was not juſtifiable: For here it is ſhewed, That the Mayor is a Juſtice of Peace, and it doth not appear, whether he did it as a Juſtice of Peace, or Mayor: and a Juſtice of Peace cannot command his Servant to Arreſt one, without a Warrant in writing. And it was ſaid in this caſe, That although the Judges knew the Authority of the Mayor by which they arreſted men, yet becauſe it did not appear to them judicially as Judges, it muſt be pleaded. And it was ſaid, That the Servant is not an Officer to the Mayor as he is a Juſtice of the Peace, but the Conſtable: And it was ſaid, that the Plea in this Caſe was, That the Mayor commanded to

Impriſon

Impriſon him preſently, without ſhewing any cauſe; which is not good: For the Judges cannot impriſon without ſhewing cauſe; But they and the Mayor both may command an Officer to arreſt a man, without ſhewing cauſe for elſe, before he ſhall be examined, he may invent and frame an excuſe. It was adjudged for the Plaintiff. Mich. 3 Jac. *Brody's* Caſe, in B. R. *Brownlow*, 1. Part, 204.

15. Sir *William Chauncy* being committed to the *Fleet* by a Warrant from the High-Commiſſioners in Cauſes Eccleſiaſtical, was brought to the bar by *Habeas Corpus*: the Return of which was *in hæc verba*, We require you to take into your Cuſtody, the body of Sir *William Chauncy*, letting you to know, That the cauſe of his Commitment is, That he being convented before them for Adultery, and for expelling his Wife from his company, without allowing her any maintenance; and upon his own confeſſion convicted thereof, He was by Order of the Court enjoyned to allow his Wife a Competent maintenance according to his ability; and to perform ſuch ſubmiſſion and other Order for his Adultery, as by Law ſhould be enjoyned him; which he refuſed to do. It was Reſolved in this caſe by all the Juſtices, amongſt other things, That the Impriſonment by the High-Commiſſioners was not lawful. And it was agreed, That if a perſon be impriſoned which hath the priviledg of this Court, This Court may deliver him without bail; For the King is the Supream Head by the Common-Law, as to the Coercive power; and that the Letters Patents of the King cannot give power to Impriſon, where they cannot Impriſon by the Common-Law. And ſo it was adjudged in *Simpſon's* Caſe, 42 Eliz. who was cited before the High-Commiſſioners for Adultery with *Fifts* Wife, and adjudged, that they could not impriſon for that. And afterwards, Sir *William Chauncey* was bailed; and afterwards by the Mediation of the Metropolitan, he was reconciled to his Wife. See Paſch. 9 Jac. in C.B. Sir *William Chauncy's* Caſe. *Brownlow*, 2. Part, 18, 19. And *Cro.* 2. Part, 82, 83. acc.

16. Two Juſtices of Peace may view a force, and make a Record of it, and commit the offendors to priſon; but that muſt be done *in flagrante Oriente*: For if they do not commit thoſe immediately upon the View, they cannot commit them afterwards. See 27 H. 6. 9. *Brownlow*, 2. Part, 166. acc.

17. A. was Excommunicated by the Ordinary of the Diocels, for an Offence in procuring a Prieſt to marry a Gentlewoman to a Ploughman: And after Abſolution, he was committed to priſon for the ſame Offence by the High Commiſſioners. It was holden in this caſe, That the matters concerning Marriages, Tythes, were examinable before the Ordinary, and not before them: and because he had ſuffered Impriſonment before for the ſame cauſe; and that neither the Statute of 23 H. 8. nor the Canon doth extend to the High Commiſſioners: The Court ſet the party at Liberty, if the High Commiſſioners refuſed to do it. Hill. 6 Jac. in C. B. *Pierpoints* Caſe. *Godbolt*, 158.

18. A man brought a Child of the age of ſix years, into the Pariſh of W, and there would have left it without keeping or nouriſhment, to the deſtruction of the Child *contra pacem*. For which the Defendant being Conſtable of the Pariſh, arreſted the Defendant and put him into Priſon, till he did agree to carry away the Child from thence to the place from whence it came. In an Action of Falſe Impriſonment, The Defendant Juſtified for that cauſe: and it was moved, That the Juſtification was good, for that every Subject might do it, *à fortiori* the Conſtable. And it was ſaid, that it was holden, 20 Eliz. That if in ſuch caſe, the Child had famiſhed for want of ſuſtenance, it had been Murder. The Court was of Opinion, That it was a great offence in the Plaintiff who brought the Action for the Falſe Impriſonment; and he could not obtain Judgment in it. But the Court held, That the Offence ought to be puniſhed according to Law; But the Conſtable could not impriſon a Subject at his pleaſure, but according to Law ſtay him, and bring him before a Juſtice of the Peace, to be there examined: and if he had pleaded, That he had ſo done, his Plea had been good: Or if he had pleaded, That the Plaintiff refuſed to carry away the Child. But as the Plea was, it was not good. Trin. 31 Eliz. in B.R. *Beal* and *Carter's* Caſe. *Leon.* 327. See *Popham*, 35 Eliz. 13. p. 3. a Caſe adjudged contrary to this Caſe.

19. See before, Mich. 7 Car. in the Kings-Bench, *Holyday* and *Oxenbridges* Caſe. *Cro.* 1. Part, 170. in title, *Falſe Impriſonment*.

20. *T. Harriſon* was Indicted; for that 4. *May*, all the Courts at *Weſtminſter* ſitting, he ruſhed to the Bar of the Court of Comon-Pleas, and in diſturbance of the Juſtices, and of the Court and Adminiſtration of Juſtice, and againſt the King and his regal Majeſty, he publickly and malitiouſly intending to draw Juſtice *Hutton* into diſpleaſure of the King, and to bring him in danger of his life, and forfeiture of his goods, ſpake theſe words of him, *I accuſe Mr. Juſtice of High Treaſon.* And he being found guilty, The Judgment was, That he ſhould pay a Fine to the King of 5000 l. and be impriſoned during the King's pleaſure. It was Informed in that Caſe, by the Clerk of the Crown, That Impriſonment during the King's

pleaſure, is uſually entred; and not Impriſonment during life, but where there is an Awarding of forfeiture of Lands during life. Mich. 14 Car. in B.R. *Harriſons* Caſe, *Cro.* 1. Part, 362.

21. Upon a *Habeas Corpus* returned, of the caute of Impriſonment of ent *Hodges* by the Mayor of *Liskerrit*, in the County of C; The Mayor Certified the cauſe to be, That he impriſoned him (*Quia male ſe geſſit*) and for uſing undecent ſpeeches to him, and that, in his Hall, with a Spit, *inſultum fecit, et conatus fuit eum verberare*, : and for theſe cauſes, he juſtified the Impriſonment. Divers Exceptions were taken to the Retorn; 1. It is too general; *ſcil. Quia ſe male geſſit*: Alſo if there was any juſt cauſe of Impriſonment for undecent words by him uſed, his Impriſonment ought to have been preſently, as is Reſolved in *Cook* 8. Part, in *Bonham's* Caſe: but here he was not Impriſoned till after a month after the words were pretended to be uſed. It was the Opinion of the whole Court in this Cauſe, That the Impriſonment was unlawful; for not being ſhewed *Quouſq;* and for what cauſe certain he was Impriſoned by him; and he ought not to impriſon him for ever: and alſo becauſe it was not mentioned in the Retorn for what time he Impriſoned him. And the Court held, That for *male geſtures*, as ſaying to him, *He lyed*, he could not Impriſon him. And the Court held, That it was a very barbarous courſe, for the Mayor to have Impriſoned the party in ſuch a manner, as to be kept in a Dungeon without Bed, Bread, or Meat, for a months ſpace, and that without any juſt cauſe at all. And Impriſonment ought to be only according to the Quality of the Offence. Stat. *Marlbridg*, Cap. 1. *ſecundum quantitatem, et qualitatem delicti*. And therefore the whole Court was clear of Opinion, That the Impriſonment was unjuſt and unlawfull; and ſo the party ought to be diſcharged. Mich. 21 Jac. in B. R. *Hodges* and *Hawlin* the Mayor of *Liskerrit's* Caſe, *Bulſtr.* 2. Part, 139.

22. Sir *Henry Lea* was committed to the *Fleet* for diſobeying a Decree made in the Court of Requeſts: And having Suits in the Common-Pleas, he prayed a *Habeas Corpus*; upon the Retorn of which, the Cauſe of his Impriſonment appeared to be for a Contempt for not performing the ſaid Decree, and no other cauſe appeared in the Retorn. The Court was of Opinion, That they could not deliver him, becauſe no cauſe appeared in the Retorn to warrant their Delivery of him. It was informed the Court, That the Decree was made upon a Bill containing this matter; *viz.* H.L. pretending title unto Lands which Sir *Henry Lea* held by Diſcent, ſhewed his Title to the Kings Majeſty, and thereupon the King upon the Petition of H. L. ſent for Sir *Henry Lea*, and had ſpeech with him, that he would give to the ſaid H. L. ſome recompence for his title which he pretended to have to the ſaid Lands; and thereupon Sir *Henry Lea*, at the inſtance of the King, did promiſe the King, That if the ſaid H. L. would not moleſt him for any of the ſaid Lands, that he would give the ſaid H.L. 200 l. *per annum*. And for not performance of his promiſe, H. L. exhibited his ſaid Bill in the Court of Requeſts, upon which the Decree was grounded. Sir *Henry Lea* Anſwered, That he did not know of any ſuch promiſe he made to the King, and pleaded to the Juriſdiction of the Court. And upon Certificate made to the Court, that he made ſuch a promiſe to him, The Court made the ſaid Decree. And it was moved to the Court, That becauſe it appeared, that H. L. had remedy at Law upon the promiſe, that the Court would grant a Prohibition, and deliver the party from his Impriſonment. But the Court would not ſo do, but ſaid, They would adviſe of the Caſe: but without the parties to an Agreement. And *Cook*, Chief Juſtice, ſaid to H. L. he had learned a Rule in his Youth, which was this, *Cum pare luctari dubium, cum Prelate ſtultum eſt, Cum puero puna, cum muliere pax*. Trin. 10 Jac. in C. B. Sir *Henry Lea* and *Lee's* Caſe. *Godbolt*, 199.

23. A. was committed by the High-Commiſſioners to the *Gate-Houſe*, becauſe before that time he had been ſentenced and enjoyned penance for incontinency, and was fined to the King, and that he ſhould pay Coſts: And for not performance of all, he was committed. It was the Opinion of the Court, That the High-Commiſſioners cannot impriſon a man for a Fine Impoſed, nor take an Obligation for it to the uſe of the King, but they ought to eſtreat it into the Exchequer. But for the Penance or Eccleſiaſtical Cenſure lawfully made, they may commit the perſon to priſon, untill he conforms himſelf to their ſentence. Mich. 3 Jac. in B. R. *Williams* Caſe. *Noy*, 17.

24. In Action of Treſpaſſe, for Aſſault, Battery, and Impriſonment at *D*: The Defendant as to the Aſſault and Battery pleaded Not guilty; and as to the Impriſonment, he juſtified the ſame at *S.* in this manner, That there the Court was held before him for the Stannery, he being the Steward of his Court, in which Court there was a Suit betwixt the now Plaintiff and another for debt; which Suit there went againſt the now Plaintiff, who was condemned in the Suit, and taken by his Command in Execution for this, untill he ſhould pay it and his Fine, which is the ſame Impriſonment, and ſo juſtifies, *abſq; hoc*, that he was guilty at any place, *extra Curiam Stannaria*. It was the Opinion of the whole Court, That the Plea and Traverſe was not good; The Plea is repugnant in it ſelf, having firſt to all the Treſpaſſes pleaded

pleaded, Not guilty; and afterwards unto pareell made a Juſtification: alſo the Traverſe is not good. The place where the Court was is *D*; and the Juſtification is local at *S*; and you ought in your Traverſe to have ſaid, *abſq; hoc*, that you were guilty at *D*, or in any other place *extra Juriſdictionem Curiæ Stannariæ*. Alſo the Traverſe here is not good, for by this it doth not appear what the Juriſdiction of the Court of Stannery is, nor how far the ſame doth extend it ſelf. Judgment was given for the Plaintiff. Trin. 12 Jac. in B.R. rott. 983. *Bury* and *Stanley's* Caſe. *Bulſtr.* 2. Part, 326, 327.

25. A Priſoner was brought to the Bar by *Habeas Corpus*, who was committed by the Committee of Plundered Miniſters to priſon; and theſe Exceptions were taken to the Return, 1. There was no time expreſſed, how long the party ſhould ſtand committed, ſo as he is committed without limitation of time, which is illegal. 2. He was committed by the name of *Mr. Smith*, and his name of Baptiſm was omitted, which ought not to be. And for theſe cauſes, the Commitment was adjudged illegal, and the Priſoner was diſcharged. Hill. 23 Car. B.R. *Smiths* Caſe. *Styles*, 90.

26. A. & B. Surveyors of the High-Wayes, were committed by an Order made in Seſſions, until they ſhould pay the arrearages of moneys collected by them upon the Statutes of 2 & 3 Phil. & Mar. cap. 8. for amending of High-Wayes: Theſe Exceptions were taken to the Order, 1. To the *Mittimus*, becauſe the parties were not convicted before the Juſtices as they ought to be. 2. The *Mittimus* is repugnant in it ſelf. For they are committed for not payment of illegal Rates levied upon the Pariſhioners; and if they be illegal, then they are not to be paid. 3. They are committed for not payment of all the money by them levied; whereas they are to deduct 8 d. in the pound out of it for their pains in collecting of it; and ſo they are committed for more then is due. It was the Opinion of the Court, That becauſe it was an Order for repairing of High-wayes, which was for the good of the Commonwealth, that they ſhould have time to maintain and make good their Order. Mich. 1653. in B.R. *Styles*, 399, *Wades* Caſe.

27. Sir *William Bronker* was brought before a Juſtice of Peace, upon an Information, That he had cheated one at Play with falſe Dice; The Juſtice required him to find Sureties for his good behaviour: and upon his refuſal, committed him to priſon. And upon a *Habeas Corpus* brought by him, he prayed to be delivered, becauſe there appeared no matter ſufficient upon the Return, why he ſhou'd be committed. It was ſaid by the Court in that Caſe, That a Juſtice of Peace cannot bind one to the good behaviour upon a general Information; Or commit him to priſon for refuſing to find Sureties for his good behaviour upon ſuch Information. Paſch. 23 Car. in B.R. Sir *William Brookers* Caſe. *Styles*. 16.

28. A. and 7. others were committed by the Mayor of *London* to *Newgate*, for refuſing to enter into a Recognizance to appear before the Lords of the Councel. Upon an *Habeas Corpus* returned, it appeared, That by an Order from the Councel Table, they were to come before the Mayor to treat of Forrein matters; and when they appeared, being required by the Mayor being in Commiſſion of *Oyer* and *Terminer* for the City, to perform the Order of the Lords of the Councel, and to enter into a Recognizance; they refuſed ſo to do. Whereupon he commited them. It was ſaid in this caſe, That the Return was not good, becauſe it did not mention the Order, nor ſhew what the Order was; ſo as the Court might judg thereof. And alſo becauſe the Recognizance is demanded of them to appear before the Lords of the Councel, no time nor place being appointed, nor cauſe ſhewed why it was demanded. Trin. 15 Car. in B.R. *Wolnoughs* Caſe, *Cro.* 1. Part, 397.

29. The Court was moved on the behalf of W: that whereas he being a Priſoner in the Kings-Bench Priſon for debt, and having agreed with his Creditors for their debts, he was diſcharged by them, that the Marſhall of the ſaid Bench, did keep him ſtill Priſoner there for the payment of Action money. The Court would not diſcharge the Priſoner, but ſaid, he had two remedies againſt the Marſhal, for he might either bring his Act on of Falſe Impriſonment againſt him; Or he might Indict him for Extortion: But yet they give Order that the Marſhall ſhould diſcharge him paying his Fees. Trin. 1655 *Webbely* and Sir *John Lenthall's* Caſe, in B. R. *Styles*, 454.

30. A man was committed to Priſon for ſpeaking words againſt the Parliament; Whereupon he was Endicted and Convicted and Fined 100 l. and ordered to lye in priſon till he could find Sureties for his good behaviour. Upon a *Habeas Corpus*, being brought into Court, he prayed that he might be diſcharged, becauſe he was pardoned by the Act of Oblivion. The Court ſaid, That it doth not appear to us, That he is not Excepted, and therefore we cannot deliver him. Whereupon a *Certiorari* was awarded to remove the Record hither, whereby he ſtands Convicted, and he might enter the Suggeſtion upon it, that he is pardoned by the Act. Trin. 1655: in B. R. *Maurice's* Caſe *Styles*, 454.

See more of Impriſonment, in the Title *Corpus cum Cauſa, Lib.* 1. and in the Title, *Falſe Impriſonment.*

Implication.

1. A Man maketh a gift to the Husband and Wife, and to the Heirs of the body of the Husband, and if the Husband and Wife dye without Iſſue of their bodies, that then it ſhall remain over: in this Caſe, although the Will of the Donor appear, that the Wife ſhall be alſo Donee in tail; yet foraſmuch as by the order of the Common Law, ſhe could not have the eſtate of Feeſimple conditional, for the ſame cauſe ſhe could not have an eſtate tail by the Statute, 12 E. 3. Variance 77.

2. If a man make a Feoffment in Fee, *Ita quod* the Feoffee ſhould do ſuch an Act. In this Caſe Mr. *Littleton* ſaid, It is commonly uſed in ſuch Caſes, to have theſe words (and if the Act be not done, that it ſhall be lawful for the Feoffor to reenter), which he ſaid was more then needed, for the firſt words are ſufficient in Law, and include them, yet he ſaid they are well put in, to declare and expreſs the Law to the people. *Cook* 1. Part, 104. in *Shelleyes* Caſe.

3. A man deviſed Lands to another man and his Heirs, and the Deviſee dyed in the life of the Deviſor, and then the Deviſor dyed. It was adjudged in that Caſe, That the Heir ſhould not take by the Deviſe; for in that Caſe, the Heirs are not named as words of purchaſe, but only to expreſs and limit the eſtate which the Deviſee ſhould have, for without theſe words (Heirs), the Deviſee could not have the Feeſimple, and the Heirs are named only to convey the Lands in Feeſimple, and not to make any other to be purchaſor then the firſt Deviſee. See *Brett* and *Rigden's* Caſe. *Plow. Com.* 342.

4. If a man bind himſelf and his Heirs in an Obligation, and dyeth ſeiſed of Lands aſwell on the part of the mother, as on the part of the Father, the Law implyeth, that neither the Heir on the part of the Father, nor the Heir on the part of the Mother ſhall be only charged, but both Lands ſhall be charged, 11 H. 7. 12. So if two men allien with Warranty, the Lands of one ſhall not be only rendred in value, nor if one dyeth, the Land of the ſurvivor ſhall not only be rendred in value, but the charge ſhall be equal upon, for ſo much is implyed in the lien. And ſo if two bind themſelves to Warranty, and both dye, both their Heirs ought to be vouched, and they ſhall be equally charged. *Cook* 3. Part, 14. in Sir *William Herberts* Caſe.

5. A. ſeiſed in Fee by Indenture in conſideration of bloud, Covenanted with B. his Nephew, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of B. in tail, the Remainder to the right Heirs of B. Proviſo, That if the ſaid A. by himſelf, or by any other during his natural life, tender to the ſaid B. a Ring of Gold, to the intent to make void the ſaid uſes, that then the ſaid uſes ſhould be void. Afterwards A. was attainted of Treaſon, The King by his Letters Pattents made a Leaſe to C. and D. of the Lands for 40 years. The Attainder was confirmed by Act of Parliament, 28 Eliz. And by another Act at the ſame Parliament it is enacted, That all perſons which claim any eſtate or Intereſt in the Lands of any perſon attainted, not inrolled ſince 28 Eliz. ſhall within two years after the Seſſion of this Parliament, bring into his Majeſties Court of Exchequer his or their Grant, conveyance or aſſurance, there the effect thereof to be enrolled on Record, or elſe the conveyance to be void: The King by his Letters Pattents reciting the ſaid Proviſo, and that the benefit of the ſame is given to him by Parliament, did Authorize Eto tender the Ring of Gold to B. to the intent to make void the ſaid uſes; who makes the tender to Accordingly, which he refuſeth to accept of. In this Caſe (amongſt many other points) theſe were Reſolved. 1. That Conditions which are perſonall, and in privity, and inſeperably annexed to the perſon, cannot be performed by another, and ſuch a Condition is not given to the King by the Statute of 33 H. 8. cap. 20. 2. It was Reſolved, That the Condition in the principal Caſe, *ſcil.* the tender of the Ring of Gold was not annexed to the perſon of A. but any other might make the tender, and the ſame was given to the King by the Statute; and when the Statute gives the Condition it ſelf to the King: It was Reſolved, That the performance of it, which was the ſubſtance of it, which was not inſeperably annexed unto the perſon, was implicatively given to the King. *Cook* 7. Part, 12, 13. Sir *Francis Englefields* Caſe.

6. The King made a gift in tail of a Park, and afterwards granted the Reverſion thereof to J. S. in tail; and if the Donee of the Reverſion paid 10 l. at the Receipt of the Exchequer to the uſe of the King, that then he ſhould have *pradictam reverſionem* to him and his Heirs. In this Caſe (amongſt other points) it was Reſolved, That if he who had the Reverſion in tail had dyed before the Condition performed, his Heir or his body might have performed the Condition, and had Fee, for that power implicatively diſcended to the Heir, as an Inheritance annexed to the foundation; and in that Caſe, after the Condition performed, he ſhall

ſhall have the Fee *quodam modo* by diſcent. *Cook* 8. Part, 75. The Lord *Staffords* Caſe.

7. A man made a Leaſe of a houſe by theſe words (Demiſe and Grant), and the Leſſor Covenanted that the Leſſee ſhould enjoy the houſe during the Term, without ejection by the Leſſor, or any claiming under him; and bound himſelf to perform all Covenants and Grants, Articles, and Agreements in the Indenture. The Leſſee aſſigned over his Term, and a ſtranger entred upon the Aſſignee, and made a Leaſe for years, who brought Ejectment againſt the Aſſignee and recovered; and in Debt upon the Obligation, the Leſſor pleaded performance of all Covenants, &c. It was in this Caſe a point Reſolved, That the expreſs Covenant did qualify the generality of the Covenant in Law, and did reſtreyn the ſame by mutual aſſent of the parties, that it did not extend further then the expreſs Covenant. Trin. 41 Eliz. in B. R. *Cook* 4. Part, 80, *Nokes's* Caſe. Note, in that Caſe it was ſaid, That if a man maketh a Leaſe for life, and binds himſelf and his Heirs to Warranty, that here the expreſſe Warranty, doth not take away the Warranty in Law; for if he in the Reverſion grant over his Reverſion, and the Leſſee attorn, and is afterwards impleaded, he may vouch the Grantee by the Warranty in Law, or he may vouch the Leſſor by the expreſs Warranty; And if a man make a Feoffment by the word *Dedi*, and with an expreſs Warrant in the Deed, he may uſe the one or the other at his election: But if a man maketh a Feoffment by this word *Dedi*, which implyes a Warranty, the Aſſignee of the Feoffee ſhall not vouch. See *ibid.* *Cook* 1. Part, *Buckhurſt's* Caſe. *Cook* 5. Part, *Spencers* Caſe. 20 E. 3. Counterplea of Warranty 7. 31 E. 3. Voucher, 289. for theſe differences.

8. Husband and Wife made a Leaſe for years by the word Demiſe, by Indenture, and the Leſſee Covenanted for himſelf, his Executors, and Adminiſtrators, That he, his Executors, Adminiſtrators, or Aſſigns, would build a Brick Wall upon the Land Demiſed. The Aſſignee aſſigned over his Term, and for not making the Brick Wall, the Covenant was brought againſt the Aſſignee. In this Caſe, it was Reſolved, That when a Covenant extends to a thing in *eſſe* parcel of the Demiſe, that that ſhall bind the Aſſignee, although he be not bounden by any expreſs words. But when the Covenant extends to a thing which is not in *eſſe* at the time of the Demiſe made, the ſame ſhall bind the Leſſee, his Executors and Adminiſtrators, but not the Aſſignee. 2. Reſolved, That if a man maketh a Feoffment by this word *Dedi*, which implyeth a Warranty, the Aſſignee of the Feoffee ſhall not vouch. But if a man maketh a Leaſe for years by the words *Conceſſi*, or *Demiſi*, which implyeth a Covenant, if the Aſſignee of the Leſſee be evicted, he ſhall have a Writ of Covenant: For the Leſſee and his Aſſignee hath the yearly profits of the Land, which ſhall grow by his labour and induſtry for annual rent, and therefore it is reaſon, that when he hath ſpent his labour, and imployed his coſt upon the Land, and be evicted, whereby he loſeth all, that he take ſuch benefit of the Demiſe and Grant, as the firſt Leſſee might, and the Leſſor hath no other prejudice then his ſpecial contract, which the firſt Leſſee hath bound him unto. *Cook* 5. Part, 17, 18. *Spencers* Caſe.

9. Husband and Wife ſeiſed of the moyety of the Mannor of J. to them, and to the Heirs of the Husband: the Husband levyed a Fine to J. S. who ſuffered a Recovery, in which the Husband only was vouched, which Recovery was to the uſe of the Conuſee and his Heirs. The Conuſee made a Feoffment to A. who thereof enfeoffed B. and C. in Fee; and afterwards an Exchange was had betwixt A. and B. and C. and is executed, the Exchange was of the moyety of the Mannor of J. for the 4th part of the Mannor of D. B. and C. the Exchangees of the fourth part enter into that, and thereof enfeoff E. the Husband dyeth, the Wife entreth into the moyety of the Mannor of J. A. re-enters into the fourth part of the Mannor of D. In this Caſe, theſe points, amongſt others, were Reſolved. 1. That in every Exchange, the word (Exchange) *tacitè* implyes a Condition and a Warranty in Law, which is a ſpecial Warranty in reſpect of the reciprocal conſideration of the Land, but none ſhall vouch by force of ſuch Warranty, but the Exchangers or their Heirs. 2. Reſolved, That if A. gives three Acres to B. in exchange for other three Acres; and afterwards one Acre is evicted from B. B. may enter into all his Land, and the Exchange is defeated in the whole, by reaſon of the Condition in Law; and a Condition ought to defeat the whole eſtate, and not parcel of it, and there is no difference between things entire, as a Mannor, and ſeveral things given in Exchange. Paſc. 1 Jac. in B. R. *Cook* 4. Part, 121. *Baſtards* Caſe.

10. The Son is Lord, and the Father is Tenant by certain Rent, the Rent is behind, the Tenant dyeth, the Tenancy diſcendeth to the Son; in that Caſe, the Rent is determined by the Act of Law, and the Executors of the Lord ſhall not have Debt for the Arrerages, becauſe that the Lord himſelf could not have an Action for them. But if a Woman be endowed of a Rent, or if a Rent be granted for life, and the Tenant Attorneth, and the Rent is behind, and afterwards the eſtate in the Rent determines by death: The Executors of the Tenant in Dower, or the Grantee ſhall have an Action for the Arrerages, becauſe by poſſibility the Teſtator himſelf might have had an Action, for if he had ſurren-

dred

dred his eſtate to him in the Reverſion, he ſhall have debt for the Arrerages incurred before. 2. Becauſe that theſe particular eſtates, with attornment, amounts to a real contract, which realty when the eſtate is determined, reſolves it ſelf into a perſonalty. *Cook* 4. Part, 59. in *Ognell's* Caſe.

11. The Father granted a Rent charge out of his Land to his Son in Fee, the Rent was behind, the Father dyed, the Land diſcended to the Son by which the Rent was by act in Law extinct, the Son brought Debt againſt the Executors of the Father for the arrerages encurred in the life of the Father. It was adjudged in that Caſe, That it did not lye as for Arrerages of Rent, but as Arrerages of an Annuity, the Action was maintainable, for there the Election did remain, which the Heir had not determined by bringing his Writ. 45 E. 3. Executors 71. *ibid.*

12. A man by Deed Indented, demiſed a houſe and Land (*Exceptis omnibus arboribus &c. adtunc creſcent. ultra creſcentiam* 21 *annorum* : *Habendum tenementa prædict. cum pertinentiis exceptis præexceptis* for life. And afterwards by the ſame Indenture he covenanted to ſtand ſeiſed *de tenementis prædict.* to the uſe of J. S. in tail, with divers Remainders over. J. S. entred and ſhewed unto J. D. Trees, and commanded him to cut them, being Oaks growing upon the Lands, being above the age of 21 years. It was Reſolved in this Caſe, amongſt other points, That when the Leſſor excepted the Trees, and afterwards had an intention to ſell them, the Law gave him and them who would buy, power as incident to the exception, to enter, and to ſhew the Trees to thoſe who would have them, for without ſight, none would buy them, and without entry, they could not ſee them. As in 9 H. 6. 29. A man ſeiſed of a houſe in a Borough deviſeable, deviſed the ſame to a Woman in tail, and if the Woman dyed without Iſſue, that the Executors might ſell and diſpoſe of it for his ſoal. In that Caſe, it was adjudged, That the Executor might by Law enter into the houſe, to ſee if it were well repaired or not, to the intent to know at what value the Reverſion is to be ſold. And the Law giveth power to him who ought to repair a Bridg, to enter into the Land. And to him who hath a Conduit within the Land of another, to enter into the Land, and mend it when cauſe requireth. 9 E. 4. 35. See *Cook* 11. Part, 52. *Richard Lyſords* Caſe.

13. *Vaux* was Indicted of Poyſoning *N. Ridley*. It was Reſolved, That the Indictment upon which he was Arraigned, was inſufficient, becauſe it was not expreſly alledged that the ſaid *Ridley* received and drank the ſaid poyſon. For the Indictment is, *Quod prædict. Nicholaus Ridley ſcicns prædictum potum cum veneno ſore intricatum, ſed ſidem adhibens perſwaſioni dict. T. recepit et bibit per quod, &c.* So that it doth not appear what thing he drank, for theſe words (*venenum prædictum*) were left out in the Indictment, and the ſubſequent words, *ſcil. per quod prædict. N.* immediate *poſt receptionem veneni prædict. &c.* which words imply receipt of poyſon, are not ſufficient to maintain the Endictment. For the matter of the Indictment ought to be fully expreſſed and certain, and ſhall not be maintained by Argument or implication. Paſc. 33 Eliz. in B. R. *Cook* 4. Part, 44. *Vaux's* Caſe.

14. Sir *Walter Rawleigh* was Indicted of Treaſon at *Wincheſter*, 1 Jac. before Commiſſioners. It was Reſolved, That he could not be executed by a Privy Seal, or Great Seal, without being demanded, What he could ſay. Wherefore he was brought by *Habeas Corpus* to the Kings Bench, and there demanded, Whether he had any thing to ſay for himſelf. He ſhewed, That the King had imployed him as General in a Voyage, and had given him power *de vita, et membris* of others. Mr. Attorney General ſaid, The King pardoned no Treaſon by Implication, but it ought to be by ſpecial words. He was afterwards executed at *Weſtminſter*. Mich. 16 Jac. Sir *Walter Rawleigh's* Caſe. *Hutton* 21.

15. Note, It was Reſolved, That if a Rent-charge be granted, payable at two Feaſts; and if it be behind for a Moneth after the Feaſts, that he might diſtrein, that there needs no demand, but the very diſtreſs is a demand of it ſelf. Trin. 16 Jac. *Kind* and *Ammeyes* Caſe. *Hutton* 23. See 31 Eliz. *Boſden* and *Downs* Caſe contr. See 3 Car. *Coppleſton* and *Langfords* Caſe. See Mich. 8 Car. in B. R. *Lamb* and *Weſt's* Caſe. *Hutton* 114. acc.

16. The King Grants to J. S. ſo many of the Debts, Duties, Arrerages, and ſums of mony, being of Record in our Court of Exchequer, Court of Wards, &c. in any year, or ſeveral years, from the laſt year of *Hen.* the 8th, to 13 Eliz. as ſhall amount to 1000 l. It was Reſolved in this Caſe, That by the words of this Graunt (*Arrearia*) the Grantee ſhould not have Arrerages of Rents, Reliefs, and mean Rates of Lands in the Court of Wards Trin. 9 Jac. in *Cur. Ward. Stockdales* Caſe. *Cook* 12. Part, 86.

17. In Debt upon an Obligation, the Condition was, That if the Defendant ſuffer the Plaintiff his Executors, &c. not onely to threſh Corn in the Defendants Barn, but to carry it away from time to time, and at all times hereafter convenient, &c. The Defendant ſuffered the Corn to lye there two years, in which time a part of it was eaten with Rats, and then the Defendant threſhed it. It was Reſolved in this Caſe, That the Bond was forfeited:

tad: For the words are not that he ſuffer the Plaintiff in convenient time to come and threſh. But the words (at all convenient times) ſhall be conſtrued at all times when it pleaſeth the Plaintiff, unleſs in the Night, and Sabbath dayes. Mich. 30 Eliz. in C. B. The Earl of *Kent* and *Byars* Caſe. *Owen* 55.

18. The Plaintiff brought an *Ejectione firmæ*, and a ſpecial Verdict was found upon a ſurrender of Copyhold Lands, which was to the uſe of the ſecond Son for life, after the death of the Tenant and his Heire. It was adjudged, It was not good in a ſurrender; for although it be good in a Will, yet Implication is not good in a ſurrender. And in Copyhold Caſes, a ſurrender to the uſe, &c. this is no uſe, but an explanation how the Land ſhall go: And if the Lord grant the Land in another manner then I appoint, it is void. Hill. 5 Jac. in C. B. *Allen* and *Najbes* Caſe. *Brownlow*, 1. Part, 127.

19. In a Formedon in the Diſcender, the Writ was general, and the Count was upon a Feoffment made after the Statute of Uſes: upon a ſpecial Verdict, it was found, That the words were to the uſe of G. and D. and of the Heirs Males of the bodies of the ſaid G. and D. lawfully to be begotten, and for default of ſuch Iſſue Male of both the bodies of the ſaid G. and D. or either of them lawfully to be begotten, then to the uſe of, &c. It was holden in this Caſe, That this was but a gift to a man and his Iſſue, for this is but to both of them for life. And by a Deed, an Implication cannot be intended, if there be not apt words for it; but otherwiſe it is in a Will. Mich. 15 Jac. in C. B. *Nevill* and *Nevills* Caſe. *Brownlow*, 1. Part, 153.

20. A. Copyholder of the Mannor of T. (where the Cuſtome was, That any Copyholder might ſurrender into the hands of two Tenants, Copyholders of the ſaid Mannor, to the uſe of any other) ſurrendred into the hands of two Tenants his Copyhold Lands, to the uſe of F. R. and J. R. Son of the ſaid F. R. and of the longeſt liver of them both, and for want of Iſſue of the ſaid J. R. the ſon of his body, the Lands to remain to M. S. wife of W. S. this ſurrender not to ſtand and be in force untill after the death of A. A. dyed, and the ſurrender was preſented the next Court, F. R. and J. R. Son of the ſaid F. R. were both admitted to them, and the longer liver of them, and to the Heirs of the body of the ſaid J. R. the Son, the Remainder to the younger Son of the ſaid M. S. It was found, That F. and after J. R. dyed without Iſſue, and that H. S. was the younger Son of M. S. at the time of the ſurrender, who was admitted Tenant. It was a Queſtion in this Caſe, Whether upon this ſurrender J. F. had an eſtate for life only, or an eſtate to him and the Heirs of his body. It was Reſolved, That J. R. had but an Eſtate for life, and being an eſtate for life by expreſs limitation, it ſhall not be an Eſtate to him higher by Implication. And although peradventure it might be further enlarged by Implication in a Deviſe; yet it ſhall not be ſo in a ſurrender or Conveyance, in paſſing of which, the party ought or might have had ſufficient Counſel to direct him. Mich. 8 Car. in B. R. rott. 195. *Sergood* and *Hones* Caſe. *Cro.* 1. Part, 267. See *Naſh* and *Allens* Caſe before, ſect. 18. acc.

21. Action upon the Caſe upon *Indebitatus Aſſumpſit* to pay him 2 s. a peece for every cloath he ſhould buy for the Defendant: the Plaintiff declared for ſo much money due to him, and had a Verdict. The Defendant in Arreſt of Judgment ſhewed, That it is not averred by the Plaintiff, That he gave notice to the Defendant how many Cloaths he had bought for him, and ſo it is not certain what is due to him. It was anſwered, That the Cloaths were bought for the Defendant himſelf, and he may very well take notice of them, without any notice given him. 2. It was ſaid here is a requeſt ſet forth for the payment of the money, and this implyes a notice. It was the Opinion of the Court, That the requeſt doth not imply a Notice, and ſo it was ſaid, it was Reſolved in *Twiſts* Caſe; beſides the notice ought not to be by Implication, but muſt be averred certainly. Mich. 23 Car. in B. R. *Tazner* and *Lawrences* Caſe. *Styles* 53.

22. In *Ejectione firmæ*, It was found by ſpecial Verdict, That A. having two Sons, B. his eldeſt, and C. his younger, by Indenture Covenanted to ſtand ſeiſed of the Lands in Queſtion, to the uſe of himſelf for life, and after his deceaſe to the uſe of B. his Son and Heir, and the Heirs of his body, the Remainder to his own right Heirs. Provided, nevertheleſs, That if A. the Father ſhould at any time during his life, be minded upon any occaſion to make void or change the uſes, that then it ſhould be lawful for him, being in perfect health and memory by writing under his hand and Seal, and by him delivered in the preſence of three credible Witneſſes, to declare that his Will and pleaſure is, That the ſaid uſes, or any of them ſhould be altered and made void; and that then, and from thenceforth, the ſaid uſes ſhall be void, and that the ſaid A. and all other ſhall ſtand ſeiſed to ſuch uſes, as by ſuch writing ſhall be limitted, That A. made his Will in writing under his hand and Seal, and thereby did deviſe the ſaid Lands to C. and the Heirs of his body; and for want of ſuch Iſſue, to his Son B. in tail, the Remainder to his Daughter in Fee, and that the Will was Seal'ed in the pre-

ſence of four credible Witneſſes. A. dyed, C. entred, and made the Leaſe to the Plaintiff, upon whom B. entred, and ejected him. In this Caſe, it was agreed by the Juſtices, That although the Verdict doth not find, That A. the Father was in perfect health and memory, yet it was good enough, for it ſhall be ſo preſumed, unleſs the contrary be ſhewed. 2. That all forms and circumſtances preſcribed, muſt be obſerved. But it was Reſolved, Though Revocations muſt obſerve the Circumſtances which the owner impoſeth upon himſelf; yet no more ſhall be impoſed upon him, but his power ſhall be taken favourably agreeable to a Rule, that every man may have power over his own, which is the reaſon that the latter Act, which cannot ſtand with the former uſes, is conſtrued a Revocation, although according to expreſs words and vulgar ſenſe it is none. And for the clauſes, *ſcil.* then and thenceforth, they are ſuperfluous and of no force, for the power of Revocation is perfect and compleat before they come to thoſe words: And then words needleſs ſhall not impeach a clauſe which is certain and perfect without them: And therefore he ſhall have power to declare the uſes void, according to the nature of his Declaration in Law, which in Caſe of a Will, is from his death, or according as he ſhall expreſly appoint the time. And therefore in this Caſe, If A. had made a ſimple Declaration in writing, and not in a manner of a Deed to any perſon certain, that the uſes ſhould be void, and had Signed, Sealed, and Delivered it in the preſence of three Witneſſes, and had either in the body of the Deed, or verbally declared, That it ſhould take effect upon 100 l. paid, or at his death and not before, this Revocation ſhould be good. Trin. 17 Car. in C. B. *Kibbet* and *Lees* Caſe. *Hob.* 312, 313.

23. Leſſee for years of a Term upon Condition, That he ſhould not allien to any, but to his Children; the Leſſee deviſed part of the Term to H. his Son after the death of his Wife, and made J. S. and another his Executors, and dyed: the Leſſor entred for breach of the Condition. It was ſaid, That it was a forfeiture; for that by the Deviſe to his ſon, after the death of his Wife, is an Intereſt in the mean time, thereby given to the Wife. But the Opinion of the Court was, That it was not a breach of the Condition; For this Deviſe of the Land to the Son, is but a demonſtration when his eſtate ſhall commence, and in the interim, the Executors may well have it; and the Law will not conſtrue it to be a Deviſe by Implication, in deſtruction of an eſtate to make a breach of a Condition. But if the Deviſe had bin to the Executors after the death of the Wife, that peradventure might by Implication carry the Term to the Wife, for his intent was, That his Executors ſhould not have it untill after his Wives death, and none other could have it in the interim. But they all agreed, That a Deviſe to his Heir of his Land after the death of his Wife, is a good Deviſe by Implication to the Wife. Trin. 2 Jac. in B. R. *Horton* and *Horton's* Caſe. *Cro.* 2. Part, 74, 75.

24. In Aſſumpſit, the Plaintiff declared, Whereas he had ſold to the Defendant certain Cloaths for 370 l. one moyety of the money to be paid within 14 dayes, and the other moyety to be paid at the end of three Moneths; whereof the Defendant had paid the one moyety at the end of fourteen dayes. The Defendant, 20 *May*, In conſideration that the Plaintiff would accept his Bill for 137 l. to be paid the firſt day of *December* following, aſſumed to pay the 137 l. and alledgeth he accepted his Bill, and that he had not payed the 137 l. nor the 40 l. reſidue of the ſaid moyety. Upon *Non Aſſumpſit* pleaded, and found againſt the Defendant, and Judgment. Error was brought and aſſigned, becauſe there is not any promiſe alledged for the payment of the 48 l. and he hath alledged the breach, as well in not payment of the 48 l. as for the non-payment of the 137 l. But the Court ſaid, That by the ſale of the Cloath for 370 l. to be paid by moyeties at certain dayes, there is an implyed promiſe to pay the ſums at thoſe dayes: and then the breach alledged in non-payment of the ſaid 137 l. according to the other promiſe, and the delivery of the 48 l. which is upon the promiſe before, is well enough aſſigned: And in this Caſe, although there were ſeveral promiſes, yet it was holden, That *Non Aſſumpſit* extended to the ſeveral promiſes. Mich. 17 Jac. in B. R. *Heath* and *Dauntleyes* Caſe. *Cro.* 2. Part, 544.

Incidents.

See Lib. 1. Title *Appendant*, and *Appurtenant*.

Indict-

Indictments.

1. *What perſons have power to take Indictments, what not; and where, and what Indictments taken before them ſhall be good, where not.*

1. AN Inquiſition was taken at *Biſingſtock* in *Com. D.* 21. *die Decembr. coram I. S. Gener. uno Coronator. Dom. Regina, in Comitatu prædicto ſuper viſum corporis* E. S. *Generoſ. tunc & ibidem mortui jacent per Sacramentum, &c.*. Exception was taken againſt this Indictment, becauſe the Indictment was taken before J. S. *Coronator in Com. prædict.* and doth not ſay, *Coronator Comitatus prædict.* nor *de Com. prædict.* and every Coroner of a County, is a Coroner in every County of *England*, but not of every County. But the Exception was diſallowed, for the Court ſaid, That the Coroner in the County, &c. ſhall be in all reaſonable intendment taken, to be Coroner of the County; and that is proved by the Writ *de Coronatore eligendo*; which is, *Quia I. nuper unus Coronat. noſtr. in Comitat. tuo diem clauſit extremum &c.* and ſo it is taken in the Lord *Willoughbies* Caſe. *Plo.* Com. 71. *Cook* 4. Part 41. *Heydon's* caſe.

2. In an Appeal of Murder, the Defendant pleaded, that *Autrefoits* by Inquiſition taken before the Coroner of the Queens houſhold, and B. B. one of the Coroners of *Middleſex*, he was indicted of Man-ſlaughter, which Inquiſition was certified to *Newgate* at the Goal delivery, and the Defendant was thereupon arraigned, and confeſſed the felony, and had his Clergie: In this caſe (amongſt other points) it was reſolved, That at the Common Law, the Coroner of the Houſhold had an exempt Juriſdiction within the Verge, and the Coroner of the County could not meddle, as appears by *Articuli ſuper Chartas*: And ſo it was adjudged in *Swift's* caſe, where a Coroner of a County took an Inquiſition within the Verge, and it was avoided by Plea, and that the one could not meddle within the power of the other; but it was agreed, That the Juſtices of the King's Bench, Juſtices of Oyer and Terminer, &c. may enquire, hear, and determine all murders, &c. within the Verge, for their authority is general through all the County. 2. Reſolved, That the Indictment was inſufficient, for it doth not appear, that Dale, where the ſtroke was, was within the Verge; and though it was, yet it ought to be found by the oath of the Indictors, and it cannot be ſupplyed by an averment, and it ſhall not be void as to the Coroner of the Houſhold, and good before the Coroner of the County, and the Defendant hath averred that Dale was within the Verge; ſo the Coroner of the County could not take the Indictment only. *Cook* 4. Part 46. *Wrote* and *Wiggs* caſe.

3. Upon the Statute of 2. *E.* 6. cap. 24. where Juſtices of Goal delivery, or of Oyer and Terminer, have power to proceed to the tryal of Acceſſaries, where it is certified, That the Principal is attainted, convicted, or otherwiſe diſcharged by courſe of Law. It was a queſtion, if the Juſtices of the King's Bench were within the words, Juſtices of Goal delivery, or Oyer and Terminer. It was objected, That the King's Bench is the higheſt Court of ordinary Juſtice within the Realm, and above the authority of Juſtices of Goal delivery, and Commiſſioners of Oyer and Terminer, and is more then the Eyre; for that they may examine the Errors of Juſtices in Eyre, Goal delivery, and Oyer and Terminer; and therefore they being paramount all other Juſtices, cannot be included within their Inferiors, *viz.* Juſtices of Goal delivery, and Oyer and Terminer: But it was reſolved, That the Juſtices of the King's Bench are the ſoveraigne Juſtices of Goal delivery, and of Oyer and Terminer, and therefore they are included within the ſaid words: See 4. H. 7. 15. That if an Indictment of Forcible Entry be removed into the King's Bench, the Juſtices of the Bench ſhall award Reſtitution; and yet the Statute of 8 H. 6. cap. 9. ſpeaketh only of Juſtices of Peace; and there in the principal caſe, the Juſtices of the King's Bench did write to the Juſtices of Oyer and Terminer, and Goal delivery in *London*, before the Principal was arraigned, to certifie the Record, who certified the ſame accordingly; upon which the Lord *Strachey* was arraigned, *Cook* 4. Part 118. the Lord *Sanchar's* Caſe.

4. By the Statute of 1 *E.* 6. It is Enacted, That in all caſes where any perſon or perſons heretofore have been, or hereafter ſhall be found guilty of any manner of Treaſon, Murder, Man-ſlaughter, Rape, or other Felony whatſoever, for which Judgement ſhall or may enſue, and ſhall be reprieved in priſon without judgement, That the Juſtices of Goal delivery ſhall have full power and authority to give Judgement of death againſt ſuch perſon ſo found guilty, and reprieved, &c. It was holden by the Juſtices, that before that act at the Common Law, if a man had been Indicted and Convicted by Verdict or Confeſſion before any Commiſſioners, and before Judgement, the King had dyed, that in that caſe no judgement could be given, for the King for whom

the judgment ſhould be, is dead, and the authority of the Judges which ſhould give Judgement, is determined; but that now is remedied by the ſaid Act. *Cook* 7. Part 21. in the caſe of Diſcontinuance of Proceſs. And ſee there, If a man be Indicted in the time of one King, and pleads to Iſſue, and the King dyeth, that he ſhall plead *de novo*. See 3 & 4 Mar. *Dyer*. *Smiths* Caſe. See 1 & 2 Eliz. *Palmer's* Caſe adjudged, &c.

5. Error to reverſe a Judgement given upon an Indictment of one a common Barrettor, before Juſtices of Aſſize, who upon the Indictment, Proceſs being awarded, he appeared *gratis* at the following Aſſizes, and pleaded Not guilty, and then a *Venire Facias* was awarded returnable the ſame Aſſizes, and thereupon he was tryed and found Guilty. For Error, it was alledged, That this *Venire Facias* was miſawarded to make it returnable the ſame Aſſizes, where it ought to have been returnable at the next Aſſizes, ſo as there ought to be fifteen dayes between the Teſte of the Writ, and the day of Return, and not to be made returnable the ſame day: And it was ſaid, It is true, when the party is in the Goal, ſuch Tryal may be the ſame Aſſizes; but not when the party is at large, and comes *ingratis*. But it was Reſolved by the Court, that the Tryal was good, and they might try the party at the ſame Aſſizes, and there is no difference where the party is at liberty, and comes in *gratis*; and where he is *in Cuſtodia*, in the Goal. *Hill* 9 Jac. in *B. R. Chapman's* caſe, *Cro.* 1. Part 248.

6. A. was Indicted for Extortion by two ſeveral Indictments; one, that he was Bayliffe to the Sheriffe of W. had received 20 s. from one *extorſivè colore Officii*; the other, that *extorſivè* he took 6 s. 8 d. Theſe Indictments were before Juſtices of the Peace at their Seſſions in the County; and he thereupon being committed to priſon, was enforced preſently to plead to thoſe Indictments, and the ſame day they were tryed, and he convicted, and Judgement againſt him at one and the ſame Seſſions: whereupon he brought Error, and Error was aſſigned, becauſe the Indictment and the Tryal was at one and the ſame Seſſions: It was the opinion of the Court, That Juſtices of Goal delivery may take an Enqueſt the ſame day, but it is not ſo of Juſtices of Peace. *Hill* 11 Car. in *B. R. Bemſteads* caſe, *Cro.* 1. Part. 318, 323.

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2. *What is a good Indictment, what not; and for what things or cauſes a man may be Indicted, what not; and where ſuch Indictment ſhall be good, where not.*

1. A Man was Indicted for ſtealing a Hat and a Band, and other ſuch things; The Priſoner ſaid, That he was before that time Indicted for goods ſtollen the ſame day and time, and acquitted; It was the opinion of *Gawdy* and *Chench*, Juſtices, That he might not ſeverally be Indicted for goods ſtollen at one time; as if a man ſteal a dozen of ſilver ſpoons, he may not be Indicted for two in one Indictment, and for two other in another Indictment. *Fenner* contrary, for he ſaid it was one *Cobham's* Caſe, who was Indicted for goods taken in two ſhips, and acquitted; and afterwards he was condemned for other goods taken at the ſame time. Mic. 40. Eliz. B. R. *Goldsbr.* 132.

2. A man was Indicted becauſe he ſpoke againſt the Book of Common Prayer; and alſo the Indictment was, *Quod recuſavit uti communi precatione & adminiſtrare Sacramenta.* Divers Exceptions were againſt the Indictment, 1. The Indictment it appears was taken before the Lord *Anderſon* and Baron *Gent*, Juſtices of Goal delivery, and it is not ſhewed that they are Juſtices of Oyer and Terminer, nor of Aſſize. 2. The Indictment is, *recuſavit uti &c. prout*, and doth not ſay, appointed by the Book of Common Prayer. 3. The Defendant was twice Indicted, and upon the ſecond Indictment the Judgement was given before the ſaid Juſtices, That he ſhould be deprived of his Benefice: The Court conceived the Indictment was not good, and that eſpecially for two cauſes. 1. Becauſe they gave Judgement of Deprivation; for although the Statute ſaith, That the Offender ſhall be deprived *ipſo facto*, yet they cannot give Judgement of Deprivation, which is a Spiritual Act in which the Judges are not to deal with. And 2. for that it doth not appear whether the Defendant was Curate of the Pariſh where he refuſed to ſay Divine Service, or not; and if he were not, then he was not puniſhable by the Statute. Mic. 40. Eliz. in B. R. *Goldesbr.* 162.

3. Error brought in R. B. upon a Judgement given at the Seſſions at *Hicks*-Hall upon an Indictment for words ſpoken againſt the Lord *Fairfax*. Divers Exceptions were taken to the Indictment: 1. That the ſaid Juſtices had no power to hold plea for words ſpoken. 2. It is *Juratores jurati, ſtatim, triati,*

triati, ad voluntatem dicunt, and the words *ad dicendum* were left out. 3. There iſſued a *Capias pro fine* againſt the parties, where no fine was ſet. 4. The Indictment was joynt, whereas they ought to be ſeveral Indictments. 5. It doth not appear that the Parties were tryed in Court, for it is only ſaid, that they were *ducti ad Barram*; and then that they were removed from *Hicks* Hall to *Newgate*. All the Exceptions were over ruled by the Court; but the ſecond Exception where it wanted the words *ad dicendum*, and that the Court held to be a good Exception, and the Clark of the Peace fined 40 l. Hill. 1650. in B. R. *William's* Caſe, *Styles* 244.

4. A. and B. were joyntly Indicted for blaſphemous words ſeverally ſpoken; 1. Upon the late Statute made againſt Blaſphemy, and were convicted: It was ſaid, that the Indictment was not good, becauſe joynt; for the words being ſpoken ſeverally, they ought to have been ſeverally Indicted, and ſeveral Indictments againſt them: *Rolls* Chief Juſtice, the Indictment is good enough, although it be joynt, the Indictment is upon one and the ſame Statute, and for one and the ſame offence; as in caſe of ſeveral Perjuries, and ſeveral Batteries, where a joynt Indictment doth lye; although it doth not for ſeveral Felonies; and the words ſhall be taken *reddendo ſingula ſingulis*, *i. e.* the words to each of them, as they ſpoke them. Hill. 1651. in B. R. *Tawney* and *Norwood's* Caſe, *Styles* 312.

5. Action upon the Caſe brought for cauſing him to be Indicted for ſtealing of a Mare; found againſt the Defendant. It was moved in Arreſt of Judgement, That upon the preferring of the Bill to the Grand Jury, they found an *Ignoramus*, and ſo there is a Repugnancy in the Declaration, which ſets forth, That the Plaintiff cauſed him to be Indicted. Another Exception was, That all the Proceedings mentioned in the Declaration, are expreſſed to be before the Judges as Commiſſioners for Goal Delivery, and not as Commiſſioners of Oyer and Terminer. The Court ſaid, That they will intend, That the Indictment was before them as Juſtices of Oyer and Terminer; and it is not material before what Authority he was Indicted, and the trouble the party is put unto by reaſon of this Judgement, is the cauſe of his Action: and the words here are to be conſtrued according to common Intendment, *viz.* That he was Indicted, though the Indictment was not found but an *Ignoramus*; and ſo by conſequence it was no Indictment upon which he could be tryed to come in danger of his life. Trin. 1653. in B. R. *Styles* 372.

6. A man was Indicted for Forging and Publiſhing of Letters of Credence to gather money, and he was Convicted, and Judgment given againſt him upon his own Confeſſion, and a Fine ſet upon him of 160 l. *& quod Capiatur*. It was Excepted againſt the Indictment, being it did not appear that he received any money upon thoſe counterfeit Letters, nor at what time; and it is not ſaid, *quod counterfecit falſo*: It was Reſolved that the Indictment was good, for the ſubſtance of the Offence for which he was Indicted, was, the Forging and Publiſhing the Letters, and not the collecting of the money: and the word *counterfecit* neceſſarily implies the word *falſo*: It was holden that the Indictment was good, Paſc. 23. Car. in B. A. *Savage's* Caſe, *Styles* 12.

7. Appeal of Murder againſt W. the Writ was to anſwer to A. B. *alias dicti* A. C. *Fratris & Hæredi.* of the dead: Upon this Indictment the Defendant was diſcharged, becauſe the name of Brother, which enabled him to bring the Appeal, was in the *alias dictus*: for that the *alias dictus* is no part of his name. Alſo the Declaration in the Appeal was not good, for it was *Quod Defend. percuſſit*, 1 Maii, whereof he languiſhed at D. three weeks, and there dyed; and ſo the Defendant *die & anno murdravit*. Quere, Becauſe *Dies & pradict.* was the day of the ſtroke, and not of the death: But for the firſt cauſe the Plaintiffe was diſcharged, Mi. 33. H. 8. *Dyer* 50.

8. A man was Indicted, and the Indictment was, That *A. apud D. inſultum fecit in pradict. B.* who was murdered, *& ipſum eum quodam cultello felonicè percuſſit, occidit, & murdravit*: without ſaying *ex malitia præcogitata*: Alſo the Inquiſition was *Berk. Inquiſitio capt. ibid.* without ſhewing where the Inquiſition was made. The Defendant was Outlawed upon the Indictment, and the Outlawry was reverſed for theſe Errors in the Indictment. It was holden in this Caſe, that the word *Murdravit* implyed *ex malitia præcogitata*. Paſc. 7. E. 6. *Dyer* 68, 69.

9. There was a general Pardon in which Murder was excepted. A man was Indicted, *Quod ipſe ex malitia præcogitata*, in L. D. *inſultum fecit, & ipſum L. D. Felonicè percuſſit dans ei unam plagam mortalem &c.* without ſaying *& ſic pradict.* A. *ipſum L. D. interfecit & murdravit*, and there wanted the word *Murdravit* in the Indictment; it was adjudged in this Caſe, that without the word *Murdravit* in the Indictment, it was but Man-ſlaughter, and ſo within the general Pardon. Mich. 14 Eliz. *Dyer* 304. See 1 Mo. *Dyer* 99. acc.

10. Exception was taken to an Indictment of Murder, it being *Quod percuſſit*, and doth not ſay *Felonicè percuſſit*; It was urged, that the Indictment was good enough, for that the word *Murdravit* was in the Indictment, which doth ſupply *felonicè*, 5 E. 6. *Dyer* 69. But it was the opinion of the whole Court, that the Indictment was inſufficient; and the omiſſion of the word *felonicè* was not ſupplied by the word *Murdravit*; and the Book of 5 E. 6.

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was denyed for Law; and it was holden, that where an Indictment was, *Quod furatus fuit unum equum ad valent.* 10 s. That the Indictment was not good, becauſe the word *felonicè* was omitted, and that the word *furatus* did not comprehend nor imply *felonicè*. M. 8 Jam. in B. R. *Penruddock* and *Langford*'s Caſe, *Bolſtr.* 1 Part, 93.

11. Exception was taken to an Indictment of Murder, it was thus, That the aſſault and affray is therein expreſſed to be 13 Febr. at O. and that he gave him a blow on the right ſide, in this manner expreſſed, ſcil. *Dans eadem unam plagam mortalem, & adtunc & ibidem*, without ſhewing of any time certain when this blow was given. It was, that he being then ſtruck, *Languebat a* 12. *die Feb. uſque* 13 *die Feb.* and ſo (*a*) doth exclude 12 *die*, and ſo no day layed at all. 3. So the ſaid *prædict. &c. prædict.* 13 *die Feb.* did kill and murder him. It was holden in this Caſe, That becauſe there was no place laid where the ſtroke was given, the Indictment was inſufficient. And as to the point of time, it was ſaid, That theſe words *ad tunc & ibidem*, refers to all the whole ſentence: As to the words, (*inter horas*) by theſe words there is a diſtinction of time denoted, as time paſt, and time to come: Here it is ſaid, That he killed him the 13 day, which cannot be as it is layed, ſo as this is a fault incurable; The Indictment was quaſhed, Paſc. 10. Jac. in B. R. The King and *Clarke*'s Caſe, *Bolſt.* 1 Part, 203.

12. In an Indictment of Murder, divers Errors in it were alledged, 1. Becauſe in the Indictment it was alledged, That the Indictment was taken before W. S. *Coronator Reginæ infra Libertatem dicto Dominæ Reginæ Villæ ſuæ de Coſſam prædict. ſuper viſum corporis*; and it is not alledged to what places the Liberty doth extend, nor whether part, or any of the Town of *Coſſam* be within the Liberty, and ſo it doth not appear that the Coroner had Juriſdiction, and Indictments, which are the Kings Counts, ought to have a full and preciſe certainty; But Reſolved, the Indictment was good enough; for if Indictments be to a certain intent in general, it is good enough: and here is a certain Intendment in general, that *Coſſam* is within the Liberty of *Coſſam*. 2. It was ſaid, That there was no ſuch word as *Manillam*, and it ought to be *Mammillam*. Reſolved, That falſe Latine ſhould not quaſh Indictments. 3. That the length and depth of the word was not ſhewed: Reſolved, that when the wound pierceth the whole body, the length or depth of it is not to be certain ſhewed. 4. Objected, There wanted *Percuſſit* in the Indictment; and for that cauſe it was Reſolved, that the Indictment was not good. *Coke* 5. Part, 120. *Longs* Caſe.

13. One who had killed his Maſter, was indicted of it as of a voluntary Murder, without the *Proditorè* in the Indictment, and upon the Evidence it appeared, that the Offence was Petit Treaſon, and upon this Indictment of Murder, he was found Guilty; and yet the Priſoner was reprieved, and had not Judgement, for want of the word *Proditorie* in the Indictment, M. 7 Eliz. Dyer, 235.

14. One was Indicted, *Quod Burgliter fregit Eccleſiam in noctè ad ſpoliandum & depredandum bona Parochianorum in eadem exiſtent.* but he took away nothing; yet it was holden Burglary, and the Indictment good. Paſch. 1 Ma. *Dyer* 99.

15. An Indictment was, *Quod Felonicè cepit bona & catalla cujuſdem hominis ignoti*: It was holden by the Judges that the Indictment was good, becauſe it may be that the goods are carried into another County, ſo as the proper Owner of them could not be found; and ſo it was holden, That an Indictment *de morte cujuſdem ignoti*, was good. 5 Aſſ. M. 1 Ma. *Dyer* 99.

16. A. B. was arraigned upon an Indictment of the Rape of one of the age of 7. years, and not above, and the Indictment was, *Quod ipſam felonicè rapuit & carnaliter cognovit*: The Court doubted whether there might be a rape of a Girl of ſo tender years, but they held that if ſhe were of the age of 9. years, it were otherwiſe: The party ſaid, he was a Scot born, and therefore prayed his Tryal *per mediatem Linguæ*, but the Court denyed it, for that he is not accompted an Alien, nor the Scottiſh Language a ſtrange Language, but meer Engliſh, Mic. 14 Eliz. *Dyer* 304. See M. 9 Car. in B. R. *Martin Pages* Caſe, *Cro.* 11 Part, 142. to the firſt point of this Caſe.

17 A man was Indicted of an Aſſault and Battery upon one J. Pariſh Prieſt, without naming him by his Sir-name; It was holden that the Indictment was good; for if it had been, *in quendam ignotum*, it had been good, as a Murder or Robbery, *de quodam ignoto*; and it was holden, That if he be vexed upon an Indictment in which his very name is put, he may aver, that it was one and the ſame Aſſault, Tr. 11 Eliz. *Dyer* 285.

18. A. was Indicted for ſpeaking ſlanderous words of the Queen three moneths paſt, *contra formam diverſorum Statutorum*, generally, without ſaying *unde ſcandalum in Regno, inter Dominum Reginam & Magnat. vel Populum ſuum oriri poterit*: He was Arraigned, and found Guilty. The Queſtion was, what Judgement he ſhould have, and by what Law, for he is not puniſhable by the Statute of 1 & 3 Ma. becauſe the three moneths are paſt; and the Statutes of 2 and 12 R. 2. extend only to puniſhing of ſlander of the Nobles: Wherefore it was Reſolved by the Juſtices, That he was puniſhable by the Statute of Weſt. 1. *cap.* 4. and accord-

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ing to that Statute he had Judgement of Fine and Impriſonment at the Queens pleaſure, M. 5 Ma. *Dyer* 155.

19. A an Iriſhman was arraigned upon the Statute of 25 H. 8. of Treaſon, for that he being the Kings Subject 9. *Julii*, 7 Car. at *Lisbon* in *Spain*, uſed theſe words [*I will kill the King*] *innuendo Dominum Carolum Regem Anglia, if I may come unto him.* And 9. *Aug.* 9 Car. he came into *England* for the ſame purpoſe. He pleaded, Not guilty. It was proved, That he ſpake the words on Shipboard in *Spain* in great heat: and that he added theſe words, [*Becauſe he is an Heretique,*] And for that his trayterous intent and imagination of his Heart is declared by theſe words; It was holden to be High-Treaſon by the Common-Law: And upon tryall by a Jury of *Middleſex*, he being found guilty: He had Judgment. And it was holden, That although this and his returning into *England* were Treaſon by the Statute of 23 Eliz. yet the Kings Attorney proceeded againſt him for that cauſe upon the Statute of 25 E. 3. of Treaſon. Mich. 9 Car. in B. R. *Arthur Crobagoes* Caſe. *Cro.* 1. Part, 242.

20. A man was Indicted in *London*, That he being poſſeſſed of a Leaſe of a houſe for 6. years; the Reverſion to the Corporation of Haberdaſhers in Fee; that he 3. *Aprilis*, 7 Car. the ſaid houſe *Felonicè, voluntariè, et malitioſè combuſſit, ea intentione ad eandum domum Manſionalem, necnon diverſas Domus Manſionales diverſorum legeorum Domini Regis ibidem contiguè adjacent. ad tunc et ibidem felonicè et malitioſè totaliter comburendo, et igne conſumendo contra pacem.* It was agreed, That it was *Capitale crimen, et ſelleo animo perpetratum*; eſpecially it being done *felonicè et malitioſè*, in deſtruction of the houſes in a ſtreet of the City. But it was the Opinion of the Court, That it was not Felony to burn a houſe whereof he was in poſſeſſion by vertue of a Leaſe for years; and that burning of houſes was not felony, unleſſe they were *ædes alienæ*: and though it was ſaid in the Indictment, That it was *ea Intentione, ad Comburendum felonicè*, the houſes of divers others *Contigue adjacentes*; yet being an Intent only without fact, it was not Felony: and it cannot be ſaid to be done *Vi et Armis*, when it is in his own poſſeſſion. But becauſe it was an Exorbitant Offence, and found, the Court Ordered, He ſhould pay 500 l. to the King, and be Impriſoned at the Kings pleaſure. Mich. 10 Car. in B. R. *Holmes* Caſe, *Cro.* 1. Part, 274.

21. A man was Indicted and arraigned, That about 12. of the Clock in the Forenoon, he broke open *Domum Manſionalem Hugonis Audley* in the Inner Temple, no perſon being in the ſaid houſe, and ſtole from thence 40 l: It was Reſolved, 1. That a Chamber in an Inns of Court, may be ſaid to be *Domus Manſionalis*, of him who is the Owner of the Chamber. 2. That the breaking of ſuch a Chamber, and taking away 40 l. was Burglary: of which, Clergy was taken away by the Statute of 39 Eliz. 13 Car. in B. R. *Evans* and *Finches* Caſe, *Cro.* 1. Part, 340.

22. A man was Indicted upon the Statute of 2 E. 6. That in the Church yard ſuch a day *extraxit gladium* againſt J. S. *et ipſum percuſſit.* And becauſe the Statute was, If any malitiouſly ſtrike another, or ſhall draw any weapon with intent to ſtrike any perſon; And the Indictment was, *Quod extraxit*, but doth not ſay, *ad percutiendum*: And becauſe it is *percuſſit*, without ſaying *malitioſè*, the party was diſcharged. Trin. 4 Car. in B. R *Noy*, 171.

23. Note. It was Reſolved by all the Judges, *nullo contradicente*, That if any Sheriff, Under-Sheriff, Sergeant, or Officer, who hath execution of Proceſs, be ſlain in the doing of his duty, it is Murder in him that kills him, although there was not any former malice betwixt them: for the execution of Proceſs, is the life of the Law; and ſuch offence is *contra poteſtatem Regis et Legis*; and therefore in ſuch caſe, there needs not any enquiry of Malice. 2. Reſolved, If there be Errour in awarding of Proceſs, or in the miſtake of one Proceſs for another, and an Officer be ſlain in the Execution thereof, the Defendant ſhall not have advantage of ſuch Errour: But the reſiſting of an Officer who comes to make an Arreſt, if he be ſlain, is Murder. 3. It was Reſolved, That when an Officer is ſlain, there needs not any ſpeciall Indictment upon all the matter to be drawn, but a a general Indictment, That ſuch a party *Ex malitia ſua præcogitata percuſſit, &c.* and although there be not proof made of any precedent malice, yet the Indictment is good; for the Law preſumes malice. Paſch. 9 Jac. in B. R. *Mackally's* Caſe: *Cro.* 2. Part, 281.

24. Upon an Indictment of Murder, the Caſe was; A. ſon of J. S. fighting with B. in the fields; and the ſaid B. beating him ſo as his Noſe bled. He thereupon went to his Father, telling him, and complaining of that Battery. The Father inſtantly finding B. in the Field, called him Villain, and ſtruck him with a little Cudgel, of which ſtroke B. afterwards dyed. It was Reſolved by the Court, That this was not Murder, but Manſlaughter; for he going upon the complaint of his ſon, not having any malice before, and without anger beating him, of which ſtroke he dyed, the Law ſhall adjudge it to be upon that ſudden occaſion and ſtirring of blood, and will not preſume it to be upon any former Malice, unleſſe it be found: and although the place where his ſon complained, was a Mile, it was not materiall, being all upon one paſſion.

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Wherefore it was adjudged, It was not Murder; and being before the General Pardon, was discharged thereby. Hill. 9 Jac. in B.R. *John Royley's* Case. *Cro.* 2. Part, 296.

25. Exception was taken to an Indictment of a *Rescous*, because it wanted the word *Vi et armis*, and because the place where the *Rescous* was made, was not certainly expressed; it was holden by the Court, That for the place, it shall be taken to be where the Arrest was; and it is good enough without the words, *vi et armis*; for *percussit*, implyes it to be done with force. Pasch. 12 Jac. B. R. *Cramlington's* Case. *Cro.* 2. Part, 345. A man was Indicted *De verberatione et vulneratione* of J. S: and the words, *Vi et armis* were omitted in the Indictment. It was adjudged, That the Indictment was good, and that it was helped by the Statute. Pasch. 16 Jac. in B.R. *Godbolt*, 272.

26. The Mayor of *Lyn* was Indicted, for that he had received 24 s. of one A. for giving Judgment in an Action of Debt depending before him against B; and he was Indicted thereof of Extortion *in Contemptum Dominæ Reginæ et contra formam Statuti*. It was holden, That the Indictment was insufficient; for that there is not any Statute to punish any Judge for any such matter; *Et satis pœnæ est Judici quod Deum habet ultorem*. But it was said by some of the Justices, If in the Indictment there be words of Extortion, or Bribery, although such an Offence in a Judg be not materially Extortion, if the words *Contra pacem*, be in the Indictment, it is good. Hill. 27 Eliz. in B. R. The Mayor of *Lyn's* Case. *Leon.* 295.

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3. *Indictments upon Statutes and Acts of Parliament for several Crimes and Offences: And where such Indictments are good, for the matter or form of them; Where not.*

1. S. And others were Indicted upon the Statute of 8 H. 6. of Forcible Entry, because they had expulsed A. out of his Land, and disseised the Mayor and Comminalty of *London*, who were in Reversion. The Indictment being removed into the Kings-Bench, Restitution was prayed for the City; And the Lessor prayed, That no Restitution might be, because they had let the house to another, and that he who had procured this Indictment, claimed in by a Custome of *London*, That the Executor of the last Termor should not be put out, if he shall give as much for it as any other will; whereas in truth, there is no such Custome. It was the Opinion of the Court in this case, That Restitution shall be always made to him in the Reversion, and not to the Lessee for years, for that he who is disseised, shall be restored; and then the Lessee may re-enter. Trin. 31 Eliz. in B. R. *Sovers* Case, *Leon.* 327.

2. In an Indictment upon the Statute of 8 H. 6. of Forcible Entry, the Case was, One was Lessee for years, the Reversion did belong to the Company of Goldsmiths: And the Indictment was, That A. *expulit et disseisivit* the Company of Goldsmiths, *et quendam J. S. tenentem expulit*. It was said in Exception to the Indictment, That a Disseisin might be to one, although not in possession as to a Recoveror upon a Term for years, but he could not be expulsed, if he was not in possession: for *privatio præsupponit habitum*. Also it was Excepted, That there was no place shewed where he expelled him. The Court was of Opinion, That for the place it was not material, for he could not expell him at any other place then upon the Land. And as to the Objection, That the Indictment is, That he disseised and expelled the Tenant of the Freehold out of the possession of the Freehold. It was Answered, That the possession of the Term, is the possession of him in the Reversion. Mich. 29 Eliz. in B.R. *Godbolt*, 45.

3. A. and B. and two other persons, were Indicted upon the Statute of 23 Eliz. of Recusancy, the words of the Indictment were, *Quod illi nec eorum uterq; venerunt* to any Parish Church. It was said, That the Indictment was not good; for *uterq*, doth refer to one of them, and not where there are many, and so is an Insensible word; and so upon the matter there is no offence laid to their charge. And the Opinion of the Grammarians was, That the word *uterq*; doth aptly signifie one of them. *Gawdy*, Justice, said, That the Opinion of Grammarians was not to be asked in this case; for that the word *uterq*; is not an unusual word in our Law. 28 H. 19. *Obligamus nos et utrumq; nostrum*. And see 16 Eliz. *Dyer*, 337. a Covenant to others, *et eorum utriq*; to make assurance; and there *uterq*; doth amount to *quilibet*. *Wray* said, Although it be sometimes so taken in an Obligation, yet it shall not be so in an Indictment. But all agreed at last, That the word *uterq*; was but matter of Surplusage, and therefore should not hurt the Indictment. Mich. 33 Eliz. in B.R. *Sheldon* Case. *Leon.* 241.

4. A. was Indicted upon the Statute of 23 Eliz. Cap. 1. for withdrawing divers persons her Majestics Subjects from the Religion established in *England*, and to promise Obedience to the Church of *Rome*; and for that he himself was withdrawn from the Obedience of the Queen. Exception was

was taken to the Indictment, because the Indictment was not found within the year after the Offence committed: For there is a Proviso in the Act, That all Offences against the Act, shall and may be enquired within a year and a day after the Offence committed. It was the Opinion of the Court in this case, That this Case was not within the Proviso of that Statute: For that the words in that Proviso refer only to such Offences contained in the Act, which toucheth the Supremacy and causes Ecclesiastical, and such Offences ought to be enquired of within one year and a day. But this Indictment doth consist upon other matter, for the withdrawing himself from the Obedience of the Queen, which is an offence out of the compasse of the Proviso, and therefore the Enquiry of it not restrained to any time; and of the offences of Treason withdrawing himself, &c. are not restrained to time within the said Act. Mich. 33 Eliz. in B.R. *Guilfords* Case, *Leon.* 238.

5. Errour brought to reverse a Judgment upon an Indictment of Recusancy against the Lord *St. John*. The Errours assigned were, 1. The Indictment is, *apud Castrum Winton.* and doth not say in what Parish or County *Winton* is. 2. It is *Coram J. F. &c. Justicior. de Goala deliberand.* And doth not say, *Justicior. ad Assisas et ad Goalam deliberand.* 3. The Indictment is against *Dominum St. John*, without addition. 4. It is *Quod non accessit ad A. Ecclesiam Parochialem praedict.* and there is not any Church mentioned before. The Court over-ruled all the said Exceptions, and said, It was a doubt whether any Exception be good upon Conviction of Recusancy: For the Statute of 3 Jac. is precisely, That it shall not be void or discharged for default of Form or other matter, untill after conforming himself by coming to the Church. But because in the Judgment, there was not *Capiatur*, the omission of which was apparant prejudice to the King; for this cause, the Judgment was Reversed. Mich. 14 Car. in B.R. The Marquesse of *Winchester's* Case. *Cro.* 1. Part, 362.

6. Indictment of Forcible Entry into Tythes, where the party ousted prayed Restitution. It was moved, If an Indictment were maintainable for entry in Tythes? It was agreed, That Assise lyeth for Tythes as a Lay-Inheritance; and that Indictments should be allowed for them, as well as for Rents: and for Rents, a Forcible Entry doth lye, *Fitzh. Na. Br.* Whereupon afterwards a Writ of Restitution was awarded. Mich. 6 Car. in B. R. *Cro.* 1. Part, 246.

7. A. was Indicted upon the Statute of 1 Jac. of Felony, for having two husbands. It was found, That A. was lawfully married to P; and before the Judge in the Audience, she sued a Divorce against P. *propter saevitiam*; whereupon it was Decreed, That *propter saevitiam* of her husband, she should be separated *à mensa et thoro.* And it was expressly in the Sentence, that she should not marry any other during the life of P: she afterwards, P. living, and she knowing thereof, took to husband J. S; and if this was Felony within the Statute, was the Question. It was said in this case, That this being a Divorce *ex causa subsequente*; *scil. Causa Adulterii*, was but a separation *à mensa et thoro*, and is no dissolution *à vinculo Matrimonii*; and therefore notwithstanding such Divorce, that the Marriage continued betwixt them. And the Case, 40 Eliz. in B. R. was vouched; and Trin. 2 Jac. *Stowel's* Case, That after such a Divorce, the Wife should have Dower of the Husband's Lands. The Proviso in the Statute being, That the Parties Divorced by Sentence, If he take another Wife, or she take another Husband: The Court doubted, If this extends to every manner of Divorce; But inclined to be of Opinion, That she was not within the Proviso; for if this should be suffered, many would be Divorced upon such pretences. Wherefore the Court advised the Woman to procure a Pardon to avoid the danger of the Statute. Pasch. 12 Car. in B. R. *Porters* Case.

8. A. and others were Indicted in the Kings-Bench upon the Statute of 4 and 5 *Ma.* because they took away F. the daughter of J. S. under the age of 16. years, in the Custody of her Father, without his Consent, *et contra formam Statuti*: A. was found guilty. It was moved in Arrest of Judgment, That the Indictment was *Coram non Judice*; because the words of the Statute are, The party offending shall be punished by two years Imprisonment, and pay such Fine as the Star-Chamber shall appoint; and that the Council in the Star-Chamber, and the Justices of Assise, shall have power to determine, &c. And whether this shall extend to the Justices of the Kings-Bench, This was doubted by the Court, because there be no Justices of Assises for *Middlesex*, unlesse the Justices of the Kings-Bench. 2. Admitting they might hear and determine; If they might impose a Fine, or only give Judgment for the Imprisonment, because the Fine by the Statute is appointed to be assessed in the Star-Chamber, and in no other place. Quære. The Points were not Resolved. Trin. 12 Car. in B. R. *Mary Smiths* Case, *Cro.* 1. Part, 335.

9. A. and B. were Indicted upon the Statute of 8 H. 6. For that they such a day and year at D. *intraverunt in unum Messuagium existens Liberum Tenemento cujusdem J. S. et ipsum Libero*

Tenemento ſuo injuſtè et ſine judicio diſſeiſiverunt, et ipſum ſic inde expulſum extra poſſeſſionem inde vi et Armis et manu forti extra tenuerunt et alia, &c. Exception was, That it is alledged, *Quod intraverunt*; and it is not ſaid, *pacifice*: For otherwiſe it might be, that the Entry alſo was with force; and every Indictment ought to be certain; and all Indictments mentions the Entry to be either *pacificè* or forcibly. But it was the better Opinion of the Court, That the Indictment was good. For an Indictment upon this Statute may be upon both branches thereof, for the entring with force, and the detaining with force, or upon any of them, by it ſelf; Then when the Indictment mentions that he entred generally, It ſhall never be intended to be with force, unleſſe it be ſhewen. And an Indictment which chargeth any with a Tort, ought to be preciſe in the point of charging. But where it is not to charge him for his entring, but for his forceable detaining onely, it is good; for no force ſhall be intended, unleſſe preciſely alledged. Mich. 1 Jac. in B. R. Sir *William Fitzwilliams*'s Caſe, *Cro.* 2. Part, 19.

10. Indictment upon the Statute of 8 H. 6. againſt J. S. and others; for that they, 16 July, 44 Eliz. *Vi et Armis et manu forti diſſeiſiverant J. D.* of ſuch Lands *et adhuc extra tenent, eundem J. D. contr. pacem dict. Dominæ Reginæ*: the Indictment was found at Lent Aſſizes, 1 Jac. Two Exceptions were taken to the Indictment. 1. The Indictment is *diſſeiſiverunt*, and doth not ſay, *Expulerunt*. 2. Becauſe it is alledged, *Quod adhuc detinent*, which is a Tort, and yet it is not ſaid, *Contra pacem Domini Regis*. For the firſt Reſolved, That *Diſſeiſiverunt*, implyes *Expulerunt*. For the ſecond, Reſolved, That the Deteiner may be without force, and not againſt the Peace. Wherefore the Indictment was held to be good, and Reſtitution was awarded. Trin. 2 Jac. B. R. *Andrews* and the Lord *Cromwell*'s Caſe, *Cro.* 2. Part, 31.

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13. A. was Indicted upon the Statute of 8 H. 6. of Forcible Entry. Exception was taken to it, becauſe the Statute was miſrecited; alledging in the Indictment, That the Fine mentioned in the Statute, was by the Statute given *dict. Domino Regi*; whereas the words in the Statute are *Domino Regi*, without the word *dicto*. The Court was there of Opinion, That it was a good Exception; and ſo by Rule of the Court, the party was diſcharged, and a Writ of Reſtitution awarded. Trin. 10 Jac. in B. R. The King and *Coles* Caſe, *Bolſtr.* 1. Part, 218.

14. Exception was taken to an Indictment upon the Statute of 8 H. 6. of Forcible Entry, becauſe the Indictment was *fortitudine, et potentia magnâ*; but there was no *manu forti*. It was holden by the Court to be a good Exception; and the Indictment for that cauſe was Quaſhed. Trin. 12 Jac. in B.R. The King and *Cox*'s Caſe. *Bolſtr.* 2. Part, 258.

15. A. was Indicted for building of a Cottage *pro habitatione* contrary to the Statute of 31 Eliz. Cap. 7. The Exception was taken to it, That it was not ſhewed, that any one did dwell in it. But it was Over-ruled by the Court; and that the Indictment was good and ſufficient, the ſame being only for the building of the Cottage. Trin. 12 Jac. B.R. The King and *Phillips* Caſe. *Bolſtr.* 2. Part, 264.

16. Upon an Indictment upon the Statute of 23 Eliz. Cap. 10. for taking of Partridges. Exceptions was taken to the Indictment, the the taking therein being layed to be *cum retiis, &c.* whereas there is no ſuch words, *cum retiis*; and for that cauſe Ruled, That the Indictment was not good. Paſch. 14 Jac. in B. R. The King and *Rivets*'s Caſe. *Bolſtr.* 3. Part, 178.

17. In

17. Indictment upon the Statute of 8 H. 6. ſuppoſing that ſuch a day and year he entred with force and arms into ſuch Lands *exiſtens Liberum Tenementum* J. B. and him with force expelled. Exception taken, becauſe not alledged *adtunc exiſtens*. It was holden by the Court, a good Exception: for it may be at the time of the Indictment, it was the Freehold of J. B. but not at the time of the Entry. Mich. 6 Jac. in B. R. Sir *Nicholas Points* Caſe. *Cro.* 2. Part, 314.

18. W. P. was Indicted upon 8 H. 6. in this manner; *Ad Seſs. Pacis, &c. Per Sacrament 12. Juratorum exiſtit præſentatum. Quod W. B. nuper de Moſton juxta Tuthury in Com. &c. Cleric. 1. Julii, &c. vi et armis in unum Meſſuagium exiſtens* the Vicarage-houſe in *Moſton prædict. adtunc exiſtens Liberum Tenementum*. H. T. Vicar there *intravit, et ipſum H. vi et armis ac manu forti expulit.* 1. Exception, It doth not ſay, *proborum et legalium hominum*; but *non allocatur*; for they ſhall be ſo intended, if not ſhewed to the contrary. 2. It doth not appear in what County *Moſton* is; for the words, *in Com. Derbie*, refer to *Tuthury*; *Non allocatur*; for it ſhall be intended one intire Name. 3. There wants the uſual words, *adtunc et ibidem*, as 6 E. 6. 69. It was ſaid, That the reaſon in 6 E. 6. was, becauſe the offences there was of ſeverall natures: But in an Indictment of Treſpaſſe, as here, it is otherwiſe: The Rule was, That the Indictment was good; and Reſtitution awarded. Hill. 1 Jac. in B.R. *Bawds* Caſe. *Cro.* 2. Part, 41.

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20. R. F. R.B. and J. H. Were Indicted, *de eo quod Sarah Cox* being a perſon, and having a Portion of 1300 l. for lucre of gain of the ſaid Portion, they took her at *Newington* in the County of *Middleſex* againſt her Will, and carried her to St. *Saviours* in the County of S; and there the ſaid R. F. by the abetment and procurement of the ſaid R. B. and others, married the ſaid *Sarah* in the ſaid Pariſh of St. *Saviours* in the County of *Surrey*, againſt the form of the Statute in that caſe provided. Upon this, the R. B. and J. H. were arraigned. It was much inſiſted upon, and many Preſidents ſhewed, That the taking away of a Woman, unleſſe ſhe be married or defiled, is not felony. See 13 Jac. in the Star-Chamber, *Bruton* and *Morris* Caſe. And ſee 16 Eliz. in the Lord *Anderſon*'s Reports, where was agreed by the Juſtices, That if a Woman be taken againſt her Will, and enforced to contract her ſelf in marriage, yet is not married, it is no felony: But if ſhe be married, or defiled, it is Felony. But after many Arguments and debate of the matter, It was Reſolved, That Judgment ſhould be given againſt the Defendant. And whereas it was Objected, That the Statute upon which they were Indicted, was an Obſolete Statute. It was ſaid, It was a good Statute, and in uſe, but many had not been executed thereupon, becauſe they had their Clergy: for the taking away whereof, the Statute of 39 Eliz. Cap. 8. was made. And whereas it was pretended, That the ſaid *Sarah* was married with her conſent, and therefore not within the Statute. The Court ſaid, That the taking being unlawful, and againſt her Will, although the marriage was with her Will, yet it was Felony within the Statute. (Note, The Statute upon which the Indictment was, was 3 H. 7. Cap. 29.) And although this was not a Marriage *de jure*, becauſe ſhe was in a fear, that ſhe knew not what ſhe anſwered or did; Yet it is a Marriage *de facto*, and it is Felony within the Statute. And Judgment was given, That they ſhould be hanged. Mich 13 Car. in B. R. The Caſe of the Lady *Fulwood* and others. *Cro.* 1. Part, 347, 348, 350, 364.

4. *Where Indictments ſhall be void for Incertainties, repugnancy, and other Imperfections: And where, and for what Cauſe Indictments ſhall be Quaſhed; for what not.*

1. EXception was taken to an Indictment upon the death of a man, becauſe theſe words, *in pace Dei et Domini Regis*, were omitted: And although in Indictments theſe words are uſually inſerted; yet the Exception was not allowed, becauſe ſuch words, are not words of ſubſtance, but only inſerted by way of amplification, to aggravate the hainouſneſſe of the Crime. *Cook* 4. Part, 41. in *Heydon's* Caſe.

2. H. was Indicted before the Coroner of D. of Murder; Exception was taken to the Indictment, becauſe the ſtroke was ſaid to be *ſuper ſiniſtram partem lateris*; and doth not ſhew in what part, and ſo Incertain. But the Court held it to be certain enough; for *Latus*, is a place known. Mich. 3 Jac. in B.R. *Hall's* Caſe. *Cro.* 2. Part, 97.

3. An Indictment was, for ſtopping of a Water-Courſe; and it was Quaſhed as inſufficient, the words being, *Quod Quadam pars aquæ*, was by him ſtopped; which words are too incertain: For it ought to have been *Quadam pars terræ aqua co-operta*: or *Magna pars aquæ*; as *Cook* 4. Part, *Lutterell's* Caſe; Whereupon the party Indicted was diſcharged of the Indictment. Mich. 11 Jac. in B. R. The King and *Sorrels* Caſe, *Cro.* 2. Part, 324.

4. A. was Indicted of Man-ſlaughter, and afterwards of Murder, the Indictment was removed into the Kings Bench; and Exception was taken, being that *ad tunc & ibidem cum pugione in ſiniſtra parte Collis percuſſit*, where it ſhould have been *Colli*. The Court held this to be a good Exception: It was then moved, That this Exception ought not to be allowed him, becauſe the Party was Out-lawed upon this Indictment before the Coroners. The Court ſaid, If that be ſo, then the Exception is not to be allowed, and then he hath no remedy but a Writ of Error, Paſc. 9 Jac. in B. R. The King and *Lemmans* Caſe, *Bolſtr.* 1 Part, 109.

5. A great multitude of Welſhmen were Indicted for the death of a man by an Inquiſition taken before the Coroner of the County of *Mountgomery* in *Wales*: It was Reſolved in this Caſe, That the Coroner cannot take any Inqueſt, unleſs it be *ſuper viſum Corporis*; and that is the reaſon, That if a man drown himſelf, and cannot be found, the Coroner cannot enquire of the death of that man: but for the King to have a forfeiture of his goods, an Inquiſition ought to be taken before the Juſtices of the Peace. The Indictment was quaſhed by the Rule of the Court. Hill. 2 Car. in B. R. *Poph.* 200.

6. An Indictment againſt A. a Baker was quaſhed, for theſe cauſes. 1. The Indictment was for uſing *facultatem Piſtoris*, and doth not ſay *Panis Humani*. 2. Becauſe it was for baking *Panis tritici, Anglicè*, Houſhold-Bread, whereas it ſignifies only Bread made of Wheat, and not Houſhold Bread, for that may be made of any Corn, Paſch. 23 Car. in B. R. *Styles* 24.

7. A. was Indicted before B. and C. Juſtices of *Oyer and Terminer*, for ſpeaking theſe words againſt the Queen Mother of *France*; The Queen Mother is a Whore of Babylon; ſhe is a Whore, and hath had a Baſtard; upon which Indictment, Judgment was given againſt the Defendant. And Error brought. 1. Error was, that he ought not to be Judged for the words, becauſe they are ſpoken neither againſt the Common Law, nor againſt any Statute. 2. The Proceedings were againſt Law; for that he was Indicted and Tryed in one day, whereas there ought to have been 15. dayes between the Indictment and the Tryal. 3. It doth not ſay that the words were ſpoken *contra Pacem*. 4. Becauſe the Judgement was, That he ſhould be Impriſoned for a year without Bail, which ought not to be. It was holden by the Court, That Juſtices of Oyer and Terminer cannot try an Indictment the ſame day; nor Juſtices of the Peace in the ſame Seſſions in which it was preferred: Nor can Juſtices of Oyer and Terminer proceed upon an Indictment which is not taken before themſelves, but Juſtices of Goal-delivery may. 2. The Court held, That there ought to have been 15. dayes between the Indictment and the Tryal: And it was Ordered, That the Kings Attorney ſhould ſhew cauſe why for theſe Errours the Judgement ſhould not be reverſed: Trin. 23 Car. in B. R. the King and *Plats* Caſe. *Styles* 28, 29.

8. A man was Indicted before Commiſſioners of Sewers, for a Nuſance made on the High way, by opening of water in the River, at his Mill, whereby the water overflowing the Banks, did annoy the way: It was the opinion of the Juſtices, that the Commiſſioners of Sewers have no power to meddle with ſuch Nuſances in the way, but only with paſſages by water; wherefore the Indictment was quaſhed. M. 23 Car. in B. R. The King and *Hides* Caſe. *Styles* 60.

9. Indictment againſt A. and B. for that they *inſultum fecerunt* upon J. S. *in Eccleſia in Shoreditch*

dicto prædict. & prædict. J. S. adtunc & ibidem in Eccleſia de St. prædict. verberaverant, vulneraverant, &c. contra formam Statuti, &c. The Grand Jury found *Bill a vera* as to A. and *Ignoramus* for B; A. appeared and pleaded, and it was found againſt him. It was Excepted unto, that it was *contra formam Statuti*, for that this is an offence not puniſhable by Statute, unleſs he ſmote with a weapon, or drew a weapon in the Church or Churchyard to that intent, which is not ſaid in the Indictment: And by the ſecond clauſe in the Statute, for ſmiting and laying violent hands, it is Excommunication *ipſo facto*, and it is not mentioned how he ſtruck in the Indictment. It was agreed by the Juſtices, that for an Offence at the Common Law, as this was, the Indictment concluding *contra formam Statuti*, was not good: Alſo the offence is alledged to be in *Eccleſia de St. prædict.* and S. was not named before; wherefore Ruled, that the Indictment was void, and the party was diſcharged. Tr. 12 Car. in B. R. *Cro.* 1 Part, 334. *Chomleys* Caſe.

10. J. S. and 27. others were Indicted, for that they engroſſed *magnam quantitatem ſtraminis & feni*, at C. with an intent to ſell it, and make it dearer; It was Reſolved, That the Indictment that they engroſſed *magnam quantitatem ſtraminis, &c.* was altogether incertain, not mentioning how many Loads of Hay, and how many of ſtraw, they engroſſed; and the Indictment was quaſhed. M. 10 Car. in B. R. *Cro.* 1 Part, 277.

11. A. was Indicted, That he was *Communis Barrator litium, & diſcordiarum inter Vicinos ſeminator, & pacis Regis perturbator, in magnum contemptum Domini Regis*: omitting the words *contra Pacem Domini Regis, vel contra formam Statuti*: for that cauſe the Indictment was holden inſufficient and and quaſhed, for it is an eſſential part of the Indictment, Paſch. 17 Jac. in B. R. *Palfreyes* Caſe, *Cro.* 2 Part, 527.

12. Sir *William Read*, a man aged 90 years, infirme, and who had kept his chamber for a year and more for Infirmity, was Out-lawed upon an Indictment, for not repayring a Bridge; and being admitted to bring Error, it was moved, that he might appear and put in Bayl by Attorney, and not in Perſon: But it was replyed, that he could not ſo do, being againſt the Courſe of the Court; nor would the King's privie Seal help him therein: wherefore being brought upon mens ſhoulders to the Bar, he aſſigned for Error in perſon, That he is named in the Indictment, *William Read de Com. Middleſex*; whereas it ſhould have been of ſuch a place in *Com. Middleſex.* and for that cauſe the Outlawry was reverſed. Tr. 19. Jac. in B. R. Sir *William Reads* Caſe, *Cro.* 2 Part, 616.

13. A. was Indicted of Felony, and Arraigned for killing a woman within the Verge, The truth was, he beat the woman at D. within in the Verge; but ſhe died at S. out of the Verge. Divers Exceptions were to the Indictment. 1. It doth not ſay, upon which part of the body the woman was wounded; but generally, that it was upon the hinder part of her body. 2. It is not ſhewed, of what length and bredth the wounds were; ſo as it cannot be known whether the wounds were mortal or not. 3. That the Coroner of the County, and the Coroner of the Verge, ought to coyn in taking the Iſſue, *ſuper viſum corporis*; which was not done, but the Inquiſition taken by the Coroner of the Verge only: It was adjudged by the Court, that for theſe cauſes the Indictment was not good. Hill. 23 Car. B. R. The King and *Savages* Caſe, *Styles* 76.

14. A. C. a woman, Indicted at S. in *Suffolk*, for Felony and Witchcraft, brought by *Habeas Corpus*, was Arraigned at the Bar: Exception was to the Indictment. 1. That it doth not ſay that the Juſtices before whom it was taken, were *Juſticiarii ad pacem tenend. in prædict. Villa.* 2. That it was too general; for it ſayes, that the Priſoner *Practicavit Artes Diabolicas*; but doth not expreſs what: Both Exceptions were over-ruled by the Court, for it was ſaid, that the employing of wicked Spirits to any intent whatſoever, is Felony within the Statute: But becauſe the party had been acquited upon ſeveral Indictments for the ſame matter, and it appeared that this Indictment was proſecuted for malice, the Priſoner was Bayled. Trin. 24. Car. in B. R. The King and *Camells* Caſe, *Styles* 116.

15. An Indictment of Perjury was, That it was *in plena Seſſione*, generally; but it did not appear in what Seſſions it was, whether it was the Quarter Seſſions, or not, as it ought to be by the Statute; and alſo it doth not ſhew, that any of the Juſtices before whom it was taken, were of the *Quorum*: And for theſe cauſes, the Indictment was quaſhed. Trin. 24 Car. in B. R. *Styles* 124.

16. Indictment of Forcible Entry made upon a Leſſee for years, upon the Statute of 21 *Jac.* Exception was taken, that it doth not appear by the Indictment that the Leſſee had any Title to the Land at the time of the Force committed, for the force is ſuppoſed to be done before the Leaſe began. 2. The Leaſe is ſuppoſed to be a Leaſe for ſo many years, if J. S. ſhall ſo long live; and it was not averred that J. S. was alive, at the time of the Forcible Entry made; and it was adjudged in the Lady *Morleys* Caſe, that there ought to be an allegation of the life of J. S. The Indictment was quaſhed by the Rule of the Court. Mich. 24 Car. in B. R. The King and *Brays* Caſe, *Styles* 147.

17. Indictment was againſt the Inhabitants of *Mile-end*, within the Pariſh of S. for not Repairing the High way. Exception was taken, that *Mile-end* was but a Hamlet within the Pariſh, and a Hamlet within

within a Parish, cannot be charged to repair a High way, except it be by Preſcription; for of common right the whole Pariſh is charged with it; The Exception was allowed by the Court, and the Indictment quaſhed. 1. Mich. 1649. B. R. *Styles*, 163.

18. An Indictment of Aſſault and Battery was quaſhed, becauſe the Indictment was taken before the Juſtices of Aſſizes and Goal delivery, and Oyer and Terminer; but it doth not appear by what Commiſſion it was taken; and the Court ſaid, That ought to be ſhewed particularly, Trin. 1650. B. R. *Falconbridges* Caſe, *Styles*, 228.

19 An Alien born, was Indicted for uſing a Trade, upon the Statute of 22 H. 8. cap. 13 The Indictment doth not ſay, that he is *Alienatus extra Angliam*; for this cauſe the Indictment was quaſhed. Paſch. 1651. B. R. *Horman* and *Jacobs* Caſe, *Styles*, 256.

20. An Indictment was for a private Treſpaſs, viz. for ſtopping an ancient Water-courſe; and the Indictment did not conclude *ad Commune Nocumentum*, but *ad grave damnum*: The Court was of opinion, That a man may be Indicted for a private Treſpaſs, but becauſe the party here hath made to himſelf no Title to the Water-courſe, the Indictment was quaſhed. Hill. 1651. B. R. *Styles*, 314.

21. In an Indictment for not repairing a Highway; the Indictment did conclude, that the party ought to repair it by reaſon of his Tenements: It was Reſolved, That that was uncertain; for it ought to have ſaid, That he, and all thoſe whoſe Eſtate he hath in the Tenements, uſed to repair it. And 2. It ſhould have ſaid, That by reaſon of the Tenure of his Tenements he ought to repair it, and not by reaſon of his Tenements; and for theſe imperfections the Indictment was quaſhed. Hill. 1653. in B. R. *Styles*, 400.

22. A man was Indicted upon the Statute of 5 *Eliz.* for uſing the Trade of a Draper, not having ſerved an Apprentice in that Trade, according to the Statute. There were two Exceptions taken to it. 1. It is ſaid, That he uſed the Trade in the year 1653. and doth not ſay, The year of our Lord. 2. It is not ſaid, That the Jury was Returned. Both the Exceptions were held good, and the Indictment quaſhed, Paſch. 1655. in B. R. *Styles*, 448.

23. Four Indictments were preferred againſt one man, two, for erecting Purpreſtures; the other two for continuing of them: Upon Tryal, the party was found Guilty, not of the erecting of them, and therefore it was ſaid, he could not be guilty of continuing of them: The Court ſaid, You may be guilty of continuing of that which another did erect, and not you; But if the Erecting and Continuance be mentioned in one Indictment, you cannot be Guilty; wherefore the Court adviſed the party to plead to the Indictment; for nothing appears in the Record, but only that you kept the High-way ſtopped, but ſayes not who ſtopped it. Paſc. 1655. in B. R. *Gunters* Caſe, *Styles*, 148.

More Indictments.

1. A Man was Indicted upon the Statute of 1 Eliz. cap. 2. for omitting of the Croſſing of a Childe in Baptizing of him. The Caſe was, That a Miniſter out of his Cure, at another Church, *viz.* at *Chelmsford* in *Eſſex*, did Baptiſe a Childe, without the ſigne of the Croſs, for which he was indicted: There were many Exceptions taken to Indictment, which were not ſpoken unto, or elſe were over-ruled, *vide Librum* at large. 1. One Exception amongſt the reſt was, That the Indictment doth not ſhew where the Chriſtning was, but generally at *Chelmsford*. This Exception was ſaid by the Court to be material, and iſſueable; and for not ſhewing this, the Indictment was quaſhed. Hill. 29. Eliz. in B. R. *Goldeſbr.* 119.

2. A. and B. were Indicted for not Repairing ſuch a Bridge: Exception was taken to the Indictment; 1. Becauſe it is not alledged in the Indictment, that the Bridge is over the Water, and ſo needful to be amended. 2. It doth not appear in the Indictment, that at that time the Bridge was ruinous or decayed. 3. The Indictment is, That A. and B. *debent & ſolent reparare Pontem*; but it is not ſhewed that their charge of repairing of it is *ratione tenura*; and it was ſaid, That a Preſcription cannot be that a common perſon ought to repair a Bridge, unleſs it be by reaſon of his Tenure. The Exceptions were allowed by the Court, and the Indictment quaſhed. Trin. 21 Jac. in B. R. *Bridge* and *Nicholls* Caſe. *Goldeſ.* 346.

3. Serjant *Hoskins* was Indicted for not paving the Kings High way in the County of *Middleſex* in St. *Johns*-Street, *ante Tenementa ſua*; In the Indictment it was not ſhewed, how he came to be chargeable to repair the ſame: Nor was it ſhewed, that he was ſeized of any houſe there, nor that he dwelt there, nor was it averred that he had any Tenements there; and for theſe incertainties, the Indictment was quaſhed. Paſch. 3 Car. in B. R. Serjant *Hoskyns* Caſe. *Goldeſb.* 400.

4. Four men were Indicted for erecting and keeping four ſeveral Inns in B. Exception was taken to it, becauſe it was not layed to be *ad Nocumentum*; for if it be not ſo layed, it is not punishable: but if the ſame be an annoyance, and inconvenient for the Inhabitants, the ſame ought particularly

ularly to appear, otherwiſe it is lawful to erect an Inn. It was agreed by the Court, if an Indictment be for an offence, which the Court *ex Officio* ought to take notice of, there the Indictment being general, *ad nocumentum, & contra Coronam & dignitatem*, is ſufficient: But in this caſe, becauſe the Indictment wants the words *ad Nocumentum*; the Court gave order that the Indictment ſhould be quaſhed, Trin. 21 Jac. in B. R. *Goldesb.* 345.

5. J. S. was Indicted, for that he at S. in the County of *Middleſex*, had erected a Barn upon parcel of the High-way, leading from &c. *ad grave damnum, & nocumentum omnium Legeorum & ſubditorum Domini Regis per viam prædict. cuntium tranſeuntium & equitantium*; but it was not ſaid in the Indictment to be *contra pacem*; for which cauſe the Indictment was inſufficient. The queſtion then was, whether it ought to be quaſhed: *Berkley* Juſtice ſaid, it ought not to be quaſhed till a Certificate be made that the Nuſance is removed. *Croke* Juſtice was of opinion; becauſe it was certified by the inhabitants that there was never any ſuch Nuſance erected, and becauſe the Indictment was vitious, that it ought to be quaſhed; for to Traverſe it, and to try it, were a charge to no purpoſe: Quære, Trin. 16 Car. in B. R. *Leytons* Caſe. *Cro.* 1 Part, 422.

6. A. was Indicted, for that he took upon him to be a Juſtice of Peace in the County of B. not having Lands of 40 l. *per annum*, and that he ſent his Warrant to have one before him to finde Sureties for the Peace. Exception was, That the Statute appoints a penalty, therefore not by Indictment; and of that opinion was the Court, That when the Statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it ſhall be Recorded; it ſhall be puniſhed by that meane, and not by Indictment; alſo it is not ſhewed that he had any Commiſſion, or did act by vertue of a Commiſſion: and for theſe cauſes the Indictment was holden to be ill. Mich. 20 Jac. in B. R. *Caſtles* Caſe. *Cro.* 2 Part, 643.

7. Error brought to reverſe a Judgement upon an Indictment before Juſtices of Peace, for theſe ſcandalous words; *ſcil.* That the Religion now profeſſed, was a new Religion within 50 years; Praying was but prating; and hearing of Sermons more edifying then two hours preaching: The Defendant being Convicted, was fined 100 l. This being aſſigned for Error. That this was not an Offence inquirable by Indictment, and before Commiſſioners of the Peace, but only before the High Commiſſioners: The Court was of that opinion, but yet would adviſe upon it. Paſc. 15 Jac. in B. R. *Atwoods* Caſe. *Cro.* 2 Part, 421.

8. H. and eighteen others were Indicted for Ryot in Lincolnſhire, and J. S. of *Huttoft*, Yeoman: Exception was taken for want of addition of the place, for *Huttoft* was only to J. S. laſt named: It was holden by the Court, That the word Yeoman went to them all, but the place named *Huttoft* did not go them all; and therefore for want of addition of a place where the other parties Indicted did dwell, the Indictment was quaſhed, and the parties diſcharged, Paſch. 10 Jac. in B. R. *Haſtings* Caſe. *Bolſtr.* 1 Part, 183.

9. The Lord *Vaux* was Indicted for his refuſal to take the Oath of Allegiance, being lawfully offered unto him, he being of the age of 18 years, or more; the ſame being certified to the Court under the hands of divers of the Privie Council: The Lord *Vaux* after the Oath was read to him in Court, prayed that Counſel might be aſſigned to him: But the Court ſaid, They could not aſſigne him Counſel in this Caſe: Being much preſſed to plead to the Indictment, he refuſed ſo to do; but afterwards he did confeſs the Indictment: whereupon Judgement was prayed for the King. *Yelverton*, one of the Juſtices, ſaid to the Lord *Vaux*, That nothing was tendred to him to do, but the ſame which ought to be tendred to all the Kings Subjects, and further he ſaid unto him, That he, and all thoſe who ſhould offend in this manner, have incurred the danger of a *Præmunire*, the which he hath here by his refuſal to take this Oath of Allegiance, being duely tendred unto him; and therefore he pronounced Judgement againſt him, according to the Statute of 16 R. 2. *viz.* To be out of the Kings Protection, his Lands, Tenements, Goods and Chattels to be perpetually forfeited to the King, and for to be impriſoned during his life: Paſch. 10 Jac. B. R. The King and the Lord *Vaux* Caſe, *Bolſtr.* 1 Part, 197, 198.

10. A man was Indicted for Perjury in an Affidavit made before Sir *Robert Rich*; and becauſe it is not layed; That Sir *Robert Rich* is a Maſter of the Chancery; and becauſe it is no perjury within the Statute of 5 Eliz. cap. 6. and becauſe the Indictment concludes thus, to be *contra formam Statuti of 5 Eliz.* for Perjury in this Affidavit which is not within the Statute, the Indictment was quaſhed, and the party diſcharged. Hill. in 1 Car. B. R. The King and *Bell*'s Caſe, *Bolſtr.* 3 Part, 332.

11. In an Indictment, Exception was taken to it, for that it was, That the ſaid F. who was murthered ſuch a day, *apud quendam Down. vocat Weſton Down. in Com. H. inſultum fecit, & quod ibidem habuit & tenuit quendam Gladium* in his right hand, *& pradict. Franc. percuſſit*, and doth not ſay *ibidem percuſſit*; for it is not a neceſſary intendment that the proſecution was at the ſame place; Alſo it was, whereof *inſtanter obiit*, and that is no certainty; and for theſe cauſes the Indictment was inſufficient, and quaſhed, M. 3 Car. in B. R. *Goodridges* Caſe, *Hetley* 35.

12. A.

12. A. was Indicted for drawing his Sword in *Weſtminſter*-Hall, the Court then ſitting, in reſiſting the Sheriff who was making an Arreſt: And being found Guilty, it did appear that the fact was done upon the ſtairs of the Court of Requeſts, out of the view of the Courts: Yet it was holden, That being in the Hall, it was as much as if it had bin in view of the Court; but becauſe the Indictment was not good, for it wanted *Coram Regina*; he had Judgment only of perpetual Impriſonment, and to pay 1000 l. Paſc. 37 Eliz. in B. R. *Carns* Caſe. *Owen.* 120.

13. A man was Indicted at the Aſſiſes in *Kent*, upon the Statute of Ingroſſers and Regrators, for Ingroſſing of Apples, Pears, and Cherryes. It was Objected, That they were Victualls intended within the Statute of 2 E. 6. For there Coſtermongers are called ſellers of Victualls. But the better Opinion of the Court was, That they were not within the Statute of Ingroſſers; And ſo it was ſaid it was adjudged, 4 Jac. and affirmed upon a Writ of Error brought in the Exchequer-Chamber; and they ſaid, If they ſhould be adjudged Victualls, the Trade of Coſtermongers would be deſtroyed; wherefore the ſaid Indictment was not holden to be good. Hill. 1649. in B. R. *Styles* 190.

14. R. was Endicted in *Durham* for Murder: Afterwards the Indictment was removed into the Kings Bench; where he pleaded the Kings Pardon, in theſe words, *viz. Homicidium felonium, Interfectionem necem, &c. ſeu quocunque alio modo ad mortem devenerit.* And there was a *Non obſtante* in the Pardon of any Statute made to the contrary. It was ſaid the King might diſcharge it; and that it is a Prerogative which is not taken away by the Statute of 2 E. 3. cap. 2. or 13 R. 2. cap. 11. and the eſpecial words, *quocunque alio modo ad mortem pervenerit* did extend to all deaths whatſoever. On the other ſide, it was ſaid, That the King could not Pardon Murder, for that it is *contra juſticiam*, which the King cannot do, as is ſuppoſed. And a Pardon of all Felonies, will not extend to murder; and the King cannot diſpenſe with the Statute of 13 R. 2. by a *Non obſtante*, becauſe that Act binds the King in point of Juſtice. Quære, the Caſe was not Reſolved by the Court. Trin. 18 Car. in B. R. *Rickbyes* Caſe. *Mar.* 213.

15. A. was Indicted of Man-ſlaughter, and found Guilty: It was ſaid, That the Indictment was inſufficient, becauſe there was *dans*, &c. without *adtunc et ibidem*, and alſo becauſe it was *plagam ſeu contuſionem*, which is incertain; alſo that the party killed *langu bat à predict.* 15. *die uſque decimam ſextam*: and there was no time between thoſe dayes, but it ought to have bin, that he languiſhed from ſuch an hour to ſuch an hour: And it was ſaid, That where an Indictment was, That A. killed B. *inter horam decimam et undecimam*. It was adjudged, That it was naught. But all the Exceptions were diſallowed by the Court, and the Indictment ſtood good. Wherefore the party prayed his Clergy, which was allowed him. Paſc. 17 Car. in B. R. Sir *Matthew Minches* Caſe.

Informations.

1. *Informations upon ſeveral Acts of Parliament, Statutes, and Penall Laws for ſeveral Crimes and offences: Where, and in what Courts to be brought, and what ſhall be a good Bar in them; What not.*

1. AN Information was againſt J. S. upon the Statute of 4 H. 7. cap. 9. for bringing in of *Gaſcoigne* Wines in a ſtrange Ship. The Defendant pleaded as Aſſignee of part of a Licenſe granted by the King, but ſhewed not the Letters Patents, nor averred the life of the Patentee, nor did he ſhew the Deed of Aſſignment; but averred, that there was a Cuſtome amongſt Merchants to aſſign by word: And afterwards he waved his Plea, and pleaded the Statute of 32 H. 8. The Queſtion was, if that took away the Licenſe before. But for the inſufficiency of the Defendants Plea for the matters aforeſaid, Judgment was given againſt the Defendant. Paſc. 34 H. 8. *Dyer*, 53. See *Cook 6.* Part, in *Bellamys* Caſe. Where the Aſſignee ſhall ſhew the Deed where not.

2. An Information in the Exchequer was, upon the Statute of Uſury: The Defendant pleaded, Not Guilty. The Informer gave in Evidence, an uſurious contract upon a Bargain of Wares. And although it was the Opinion of the Court, That the Information being for the loan of money, that the Evidence was not purſuing to the Iſſue. Yet the Jury found the Defendant Guilty againſt the Opinion of the Court. Whereupon it was moved in Arreſt of Judgment, That there was no proof of the Iſſue; for there are three words in the Statute, Bargain, Loan, and Chevifance, which are ſeveral things. And if the Confirmation be conceived upon Loan, and the Informer giveth in a corrupt bargain for Cloath, the ſame doth not maintain the Information. So if the Information be

be grounded upon uſurious contract by way of Mortgage, and an uſurious loan be given in Evidence, the ſame doth not maintain the Iſſue. But if the Information had bin generally upon an uſurious Agreement, and the Informer giveth in Evidence a Loane, that perhaps may be good, becauſe every loan is an agreement. Alſo it is not alledged any place where the contract was made, ſo that no tryal can be had thereof. It was the Opinion of the Court againſt the Informer: Whereupon after Error was brought; and much inſiſted upon, that it needed not be alledged the place in the Information where the corrupt Bargain was, or where the contract was, For that the Offence puniſhable by the Statute, was the receipt of the exceſſive loan, and not the contract. The Caſe was not then Reſolved. Mich. 29 Eliz. in the Exchequer. Sir *Wolſtan Dixſy's* Caſe. *Leon.* 96.

3. Information upon the Statute of Uſury by an Informer, *Qui ſequitur tam pro Domina Regina, quam pro ſeipſo.* The Queens Attorney entred, *Non vult ulterius proſequi*, and the ſame was pleaded in bar againſt the Informer. And it was adjudged by the whole Court, That the ſaid entry by the Attorney General was no bar againſt the Informer, and ſo it is if the Queen be Non-ſuit. And *Wray* Chief Juſtice ſaid, That ſuch was the Opinion of the Lord *Anderſon*, and *Gawdy* Juſtices. Trin. 30 Eliz. in B. R. *Shilton* and *Taylers* Caſe. *Leon.* 119.

4. An Information was exhibited upon the Statute of Uſury, and ſhewed the uſurious contract in certain, upon which it appeared, that the ſum of 10 l. was reſerved, and received for the loan of 100 l. againſt the form of the Statute, &c. And although it appeared that the ſame, and that he concluded *contra formam Statuti*. Yet becauſe he did not expreſly ſay, that the ſame was *per corruptam commendationem*, according to the words of the penal Statute, it was adjudged that the Information was inſufficient. Paſc. 20 Eliz. in the Exchequer, vouch. in *Cook* 11. Part, 58. in Dr. *Foſters* Caſe.

5. In an Information upon the Statute of Uſury: It was found, that *quoad corruptam agreementam*, the Defendant was guilty; and that he took the profits of the Land for performance of that corrupt agreement to 60 l. but it was not found that he lent the 100 l. as in the Information. It was Reſolved, That the Verdict was void. Whereupon a *Venire facias de novo* was awarded; and the Plaintiff after Evidence, was Non-ſuit, and Judgment given, and 40 l. Coſts to the Defendant. Error was brought, and aſſigned for Error, that the Verdict was well enough, and ſo there ought not to have bin a new Tryal. But the Court held, That the Tryal was ill and imperfect, and the firſt Judgment was affirmed. Mich. 6 Jac. in B. R. *Cook* and *Lovedayes* Caſe. *Cro.* 2. Part, 210.

6. Information in the Exchequer, That the Defendant by way *corrupta bargania et chevanſa facta* betwixt the Defendant and one J. H. received of E. H. Adminiſtrator of J. H. betwixt the 23. of *June*, 14 Jac. 65 l. *viz.* for the uſe and occupation of a houſe in D. in the County of M. from *Midſummer* 14 Jac. unto *Mich.* 14 Jac. 15 l. *et pro abſtentione et detentione ſolationis* 1000 l. from 16. *Aprilis* 1614. for ſix Moneths then following, 50 l. *ubi revera praedict. Meſſuagium tunc valebat dimittendo per annum* 20 l. *et non ultrà*, and thereupon demanded 3000 l. After Verdict for the Plaintiff; It was moved in Arreſt of Judgment, That the Information was not good, becauſe he doth not ſhew in certainty what the Bargain was, but *per viam corrupta, &c.* The Exception was not allowed, for that ſo was the uſual courſe of the Exchequer, and that is to be proved in Evidence. It was agreed in pleading to avoid a Bond, or an Aſſurance, it ought to be particularly ſhewed, for that the party is privy to his own contract, but the Informer is not privy to it; and therefore it ſufficeth for him to ſhew the particulars upon the Evidence. 2. It was ſaid, That it was not good for the incertainty, for there are three times alledged, and it doth not appear to which of thoſe times the *actunc valebat* refers, and if it refers to the laſt time, then it is no Offence, and ſo the Information not good, for that the Defendant ought to be certainly and preciſely charged who is to be fined and impriſoned. And ſo it was ſaid it was adjudged. Trin. 13 Eliz. in *Farnaby* and *Bethe* Caſe. Trin. 43 Eliz. in *Harriſon* and *Bagſhaws* Caſe. But notwithſtanding theſe Exceptions, it was adjudged for the Plaintiff. Mich. 15 Jac. in B.R. *Peto* and *Sanderſons* Caſe. *Cro.* 2. Part, 400.

7. An Informer ſued a Recuſant for the penalty of 20 l. the Moneth, for not repairing to a Parish Church, nor other Chappel, or uſual place of Common Prayer, or Divine Service. The Defendant pleaded the Statute of 23 Eliz. That every Recuſant, being a Recuſant convict, ſhould forfeit to the King for every offence 20 l. and pleaded the Statute of 28 Eliz. That every Offender againſt the Statute of 23 Eliz. ſhould pay for every Month after ſuch Conviction, without any other Indictment, 20 l. to the King at the Exchequer; and pleaded the Statute of 35 Eliz. *quod unus pars* by the ſaid Statute, ſhould be paid to the Informer. It was in this Caſe (amongſt other points) Reſolved. 1. That the Statute of 28 Eliz. had not taken away the liberty which the Informer had by the Act of 23 Eliz. becauſe the ſaid Act did not extend to any abrogation, but rather to a more ſpeedy Execution of the Act of 23 Eliz. and the

Statute is in the affirmative, and Regularly, Statutes in the affirmative, do not take away precedent Acts in the affirmative. 2. That the Act of 35 Eliz. did not abrogate the Statute of 23 Eliz. as unto an Action popular; for the purpose of that Act was only to ouſt delayes, and for more ſperdy remedies for the recovery of the forfeitures made by married Women. 3. Reſolved, That after an Action popular begins, although the Kings Attorney will enter an *ulterius Nolle Proſequi*, nor Reply, yet the Informer might proſecute for his part, as it was Reſolved in *Stretton* and *Taylers* Caſe. *Cook* 11. Part, 58. Dr. *Foſters* Caſe.

8. In an Information againſt Husband and Wife, for that the Wife being above the age of 16 years, did not repair to any Church, &c. Whereupon the Informer (*qui tam quam, &c.*) demanded 120 l. The Husband and Wife appeared, and the Wife pleaded, Not Guilty; which was found againſt her. It was moved in Arreſt of Judgment, That an Information lyes not againſt Husband and Wife, for Recuſancy of the Wife to recover 20 l. *per menſem*: For that the Statute of 7 Jac. cap. 6. appoints, That if a Feme Covert be convicted, that ſhe ſhall be committed to Priſon, and if her Husband redeem her out of Priſon, he ſhall pay 10 l. *per menſem*, ſo as this latter Law doth abrogate the firſt, that the Husband ſhall not be charged for the Recuſancy of his Wife. But the Exception was diſallowed. For the Court was of Opinion, That this Act of 7 Jac. doth not alter any former Law, but preſcribes, That a Feme-Covert, being convicted, if the after 3 Months doth not conform her ſelf, ſhe ſhall be committed to Priſon, unleſs the husband will pay 10 l. for every Month that ſhe ſhal be out of Priſon, and not conformed. Paſc. 17 Jac. in B. R. *Parker* and Sir *John Curſons* Caſe. *Cro.* 2. Part, 529. See *Cro.* 480. acc.

9. Information for the King, and Informer, ſuppoſing, That after the end of the Seſſion of Parliament, 3 Jac. was a Recuſant convict, and after his Conviction for two years before, 31. *Oct.* 9 Jac. at the Pariſh of D. *ſe conformavit*, and came to Church, and there continued during the time of Divine Service, That notwithſtanding, for three years next after, 31. *Oct.* 9 Jac. he had not received the Sacrament of the Lords Supper in that Church, nor in any other place, *contra formam Statuti*. Upon Not Guilty found againſt the Defendant; It was moved, That the Information was uncertain, becauſe no certain time of the Conviction is ſhewen, nor how, nor in what Court, nor before whom: Nor is it ſhewed before whom he conformed himſelf. But the Exceptions were overruled by the Court; for by his pleading Not Guilty, all thoſe things were admitted, and it is only to be given in Evidence; and the matter of fact is only tryable, Whether he hath received the Sacrament. 2. It was excepted, That no Informer can demand a penalty upon a penal Statute, but by an Information exhibited within one year after the Offence; but the Court held it good enough; for although it was not good for the Informer, yet it was good for the King. Hill. 12 Jac. in the Exchequer, *Sywedale* and Sir *Edward Lethalls* Caſe. *Cro.* 2. Part, 365.

10. In an Information upon the Statute of 32 H. 8. of Maintenance; the Caſe was, as it was found by Verdict, That A. was ſeiſed, and made a Feoffment in Fee to the uſe of himſelf and B. whom he then intended to marry, and to the Heirs of A. The Marriage took effect: A. enfeoffed a ſtranger and dyed: B. not having bin in poſſeſſion, nor being in poſſeſſion by Indenture, demiſed the Land to the Defendant, being brother of her half bloud, for years. It was Reſolved, That this was a good Leaſe, though made off from the Land to paſs an Intereſt within the Statute. It was, 2. Objected, Becauſe the Entry of the Wife was now lawful by the Statute of 32 H. 8. that then ſhe might diſpoſe of the Land. But it was Reſolved by the Court, That the meaning of the Statute was to repreſs the practices of many, that when they thought they had right to Lands, they for the furtherance of their pretended right, conveyed their Intereſt to great perſons, and with their countenance did oppreſs the poſſeſſors: And in this Caſe they Reſolved, That although this Leaſe was made to her Brother of the half bloud, yet it was in danger of the Statute; and Judgment was given for the Plaintiff. Mich. 32 Eliz. in C. B. *Skyright* and *Pages* Caſe. *Leon.* 166.

11. The Queens Attorney proſecuted a *Premunire* for the Queen and J. S. againſt the Dean of *Chriſt-Church* in *Oxford*, and others, becauſe they did procure J. S. to be ſued in the City of *Oxford* before the Commiſſioners there in an Action of Treſpaſs according to the Eccleſiaſtical Law. In which ſuit, J. S. pleaded, his Freehold, and ſo in the Juriſdiction of the Court, and yet they proceeded, and J. S. was condemned and Impriſoned: And after that Suit, the Queens Attorney withdrew the Suit for the Queen. It was holden by the Court in this Caſe, That if the Queens Attorney will not proſecute, the party grieved cannot maintain this ſuit; For the principal matter is the *Premunire*, the Conviction, and the putting of the party out of the Protection of the King, and the Damages are but acceſſary, and then the Principal being releaſed, the Damages are gone. Mich. 27 Eliz. in B. R. The Queen and the Dean of *Chriſt Church* in *Oxfords* Caſe. *Leon.* 292.

12. A. informed againſt B. upon the Statute of 13 Eliz. cap. 5. That whereas the ſaid A. had a Plaint of Debt againſt J. S. in the Guild-

Hall

Hall of N. upon which iſſued out an Attachment againſt J. S. by which the Sheriff being ready to attach J. S. the Defendant in diſturbance of the Execution, did publiſh and ſhew to the Sheriff a Conveyance by which he claimed the ſaid goods, as conveyed to him by J. S. and averred the fraud, &c. It was the Opinion of the Juſtices, That this was within the Statute, and the words of it faith, delay, hinder, or defraud Creditors, for here is a delay, for want of ſerving the ſaid Execution, and attachment; and the appearance of J. S. to the ſuit of the Plaintiff is delayed, which miſchief is within the remedy of the Statute. Mich. 29 Eliz. in C. B. *Pendleton* and *Gamſton's* Caſe. *Leon.* 47.

13. Note, In all Caſes where the King is meerly a party, or when the Information is *tam pro Domino Rege, quam pro ſeipſo*, when the King dyeth before Judgment, all the proceedings upon the Information, are utterly abated and loſt, *quia Rex, fait pars, Qui mortuus eſt.* Mich. 6 Ed. 6. rott. 15. An Information preferred by the Kings Attorney, only againſt *Michael Harcourt*, upon the Statute of Maintenance. Hill. 5 E. 6. rott. 22. in the Exchequer. In an Information upon the Statute of 32 H. 8. of buying of Tythes *tam pro Domino Rege, quam pro ſeipſo*; after iſſue joyned, the King dyed, and the Defendant appeared upon the Attachment, and pleaded *de novo*. See *Cook* 7. Part, 31. in the Caſe of Diſcontinuance of Proceſs.

14. A. not being a party grieved, exhibited a Bill in the Star-Chamber againſt B. for Extortion, Oppreſſion, and other Offences. It was Reſolved in that Caſe, That when a Bill contains any particular Offences, and after the ſame Bill contains general words, which include many Offences of the ſame kind; and the Plaintiff proves the particular Offences, he may examine other particular Offences included in the general words in aggravation of the particular Offences; and if they be proved, the Court will give the higher ſentence againſt the Defendant. But if the Plaintiff hath not proved any of the Offences particularly expreſſed in the Bill, the Defendant ſhall not be cenſured by the particulars grounded upon the general words of the Bill. Paſc. 10 Jac. in *Cam. Stellat.* Dr. *Manning's* Caſe. *Brownl.* 2. Part, 151.

15. In the Statute of 21 H. 8. cap. 13. there is a Proviſo, That every Parſon promoted to any Parſonage, ſhall be perſonally reſident, and abiding in, or upon his ſaid Benefice; and in Caſe any ſuch Parſon keep not reſidence at his Benefice, but doth abſent himſelf wilfully by the ſpace of a Moneth together, or two Moneths at ſeveral times in any one year; he ſhall forfeit for every default, 10 l. one half to the King, and the other half to the Informer. A. was Incumbent of the Rectory of S. in the County of K. and he was ſeiſed of a houſe in S. aforeſaid, ſcituate within 20 yards of the ſaid Rectory, and held that houſe in his own occupation, and he did not let it to any other, and he inhabited in the ſaid Meſſuage, and not in the Parſonage houſe: And for his non reſidency upon the ſame, an Information was brought againſt him upon the ſaid Statute. It was ſaid in this Caſe, there were two cauſes of making of the ſaid Statute. 1. Hoſpitality. 2. Relief of the poor. And for that cauſe, it was Reſolved, That he ought to be reſident upon the Parſonage houſe, and ſo was it Reſolved by the Court, and that the reſidence within his houſe adjoyning, was no reſidence within the ſaid Statute. But by the mediation of *Cook* Chief Juſtice, the Caſe was compounded. Hill. 8 Jac. in C. B. Dr. *Newman's* Caſe. *Brown.* 2. Part, 54.

16. Information was upon the Statute of 5 and 6 E. 6. for buying of Seed Corn, having ſufficient of his own, and not bringing of ſo much unto the Market of his own Corn. In that Caſe, it was ſaid by the Juſtices for Law, That a Contract for Corn in the Market, or which was not there that day, is not within the breach of the Statute. But if Corn or Grain be in the Market, although that the contract be made in a houſe out of the Market, and delivered to the buyer out of the Market, yet it is within the Statute: And in that Caſe, it was ſaid by the Court, That the Market ſhall be ſaid the place in the Town where it hath bin uſed to be kept, and not every place of the Town. H. 29 Eliz. in C. B. *Gatbolt.* 131.

17. Information was before the Juſtices of Aſſiſe in the County of *Eſſex*, upon the Statute of 21 H. 8. cap. 13. for Non-reſidency upon his Parſonage houſe for 11 Moneths, *viz.* the Church of B. in the ſaid County. The Defendant pleaded the ſaid Statute of 21 H. 8. That one who hath two Benefices, may be reſident upon the one; and alledged, That he was Inſtituted, and Inducted, as well to the Vicarage of E. in the County of *Middleſex*, as unto the ſaid Church of B. in the County of *Eſſex*. It was demurred unto, becauſe he did not ſhew a diſpenſation for Pluralitv. But it was Reſolved by the Juſtices, with conference with the other Juſtices, That the Information did not lye before them as Juſtices of Aſſiſe, or of *Oyer* and *Terminer*; and the Statute giveth it onely in the Kings Courts, where they may be Eſſoigned, Wager their Law, &c. Wherefore it was adjudged againſt the Plaintiff, for the Defendant. Mich. 4 Car. in B. R. *Green* and *Gay's* Caſe. *Cr.* 1. Part, 104.

18. Information was againſt the Defendant upon the Statute of 5 Eliz. cap. 4. for exerciſing the Trade and Occupation of a Brewer for 12 Moneths, he having not bin brought up as an Apprentice ſeven years in the ſaid Art, *contra formam Statuti.* Being found againſt the Defendant, it was moved in Arreſt of Judgment. 1. That a Brewer is not

of ſuch a Trade as is prohibited by the Statute. 2. That by the Statute of 31 Eliz. cap. 5. Offences againſt the Statute of 5 Eliz. are to be enquired of only in the Seſſions of Peace, or Leets within the Counties where the Offences are committed. But upon conſideration had of the Statute, it was adjudged. 1. That a Brewer was within the expreſs words of the Statute. 2. That although the Statute mentions ſuch Courts there named, yet it not in the negative (and not in any other Court), but not in another County; and this being a Suit for the King brought in the Kings Bench, this Information is maintainable, for it is in the moſt proper Court for him. And ſo it was adjudged. Paſc. 3 Jac. in B. R. for uſing the Trade of a *Spurrier*. Alſo the Kings Bench ſitting in *Middleſex*, they had the power of the Seſſions there. Mich. 4 Jac. in B. R. *Sheyle* and *Taylors* Caſe.

19. Error was brought of a Judgment given in an Information in the *Guild-Hall* of *London*, becauſe the Information was brought in *London* upon the Statute of 5 Eliz. for exerciſing a Trade wherein he was not bound Apprentice. It was Reſolved, That this being a penal Law, ought not to be ſued, but in the Kings Courts at *Weſtminſter*, where the Kings Attorney is to acknowledg or deny. *Cook* 6. Part, 19. and therefore was not ſuable at *London*. Wherefore the Judgment was reverſed. Trin. 17 Jac. in B. R. *Miller* againſt the King. *Cro.* 2. Part, 578.

20. The Statute of 39 Eliz. for Tillage is, That Lands converted before the Statute, ſhall be reſtored into Tillage before the firſt day of *May*, 1599. and being ſo reſtored, ſhall ſo continue for ever. In an Information upon the ſaid Statute, it was found, That Land was auncient Tillable Land, and alſo uſed for Tillage 13 years before the Converſion, and converted before the Statute, and not reſtored, *ſ. May*, 1599. and that the Defendant was only an occupier for the laſt year, but never before. It was a Queſtion, Whether he were puniſhable as an Offender within the Statute. It was Reſolved, That although he was out of the words of the Statute, yet he was within the intent thereof, for it extends to puniſh the Occupier and continuer thereof in Paſture, and not the Converter only of it, for then all Lands which were converted before 19 El. to 1. *Maii*, 1599. ſhould be out of the Statute. Hill. 14 Jac. in B. R. *Parker* and *Sanders* Caſe. *Cro.* 2. Part, 419.

21. An Information was exhibited upon the Statute of 2 H. 6. cap. 15. for Fiſhing, which are, That every perſon which ſetteth or faſteneth in the River of *Thames*, any Nets, or Engines called Trincks, or any manner of Nets to any Boats, Poſts Anchors, or the like thing, to ſtand continually day and night, forfeiteth to the King 5 l. for every time, &c. and the Defendants having ſet and faſtned Nets called Trincks in the River of *Thames*, &c. to Boats Day and Night, ſo long time as the Tide did ſerve, and not continually. It was Reſolved, That the ſame was within the Statute, for the Nets called Trincks cannot ſtand, but for ſo long time as the Tyde ſerveth; and the word continually, ſhall be taken for ſo long time as they may ſtand, and as the time of Fiſhing endures, be it in the day or night. Mich. 9 Jac. in B. R. *Cook* 12. Part, 89.

22. An Information was upon the Statute of 5 Eliz. That the Defendant received an Apprentice, who departed out of his Maſters Service, and reteined him without a Teſtimonial. The Queſtion was, Whether the ſaid Statute as to that clauſe, did extend to Apprentices, or to other Trades mentioned in the Statute. It was the Opinion of *Hobart* Chief Juſtice, and of the other Juſtices, That it never was the intent of the Statute to make an Enfant who was an Apprentice, to be within the danger of that Statute, for an Enfant at the age of 14 years, may be bound an Apprentice: And the puniſhment which is given by the Statute is, That ſuch perſon ſhall be whipt as a Rogue, which plainly proves, the Statute intends only thoſe who are of full age, and if other conſtruction ſhould be made, perchance the Son of a Gentleman may be puniſhed as a Rogue by ſuch departure. Mich. 19 Jac. in C. B. *Winch.* 25.

23. In Information upon the Statute of 27 Eliz. of Fraudulent Conveyances. It was ſaid to have bin adjudged in *Woodyes* Caſe. Where one after Marriage aſſigned a Leaſe for years *quaſ* in Joynture for his Wife, and afterwards ſold it to one who had no notice of this Conveyance, that it was within the Statute, although at firſt it was not made upon any truſt, or any clauſe of Revocation thereof, becauſe it was a voluntary Conveyance at firſt, and ſhall be intended fraudulent at the beginning. But if at the time of the marriage or afterwards, by reaſon of a Portion given by his Wives friends in recompence thereof, and for a proviſion for the maintenance of his Wife, he had made an Aſſignment of ſuch a Leaſe to his Wives friends, and had afterwards taken the profits thereof; and then had ſold that Term, then it had not bin within the ſaid Statute. Paſc. 5 Jac. in B. R. *Colvile* and *Parker's* Caſe. *Cro.* 2. Part, 158.

24. An Information was exhibited by the Attorney General, againſt divers Juſtices of the Peace, upon the Statute of 13 H. 4. Cap. 9. for that they did not make Enquiry of a notorious Ryot done by divers perſons in the County of L. in burning of hedges, within one moneth after the Ryot done. The Juſtices inclined to be of Opinion, That they were not within the Statute, if Notice were not given them of ſuch Ryot, See Mich. 4 Eliz. *Dyer*, 210. It is there a Quare.

See

See for the Reſolution of it. *Dalton*, Juſtices of Peace, 25. 2.

25. An Information of Perjury was exhibited in the Star-Chamber againſt a Sheriff, for returning one who was not Elected, to be a Knight of the Parliament. It appeared, that he did not take his Oath at entrance of his Office, by the perſuaſion of J. S: Yet he and J. S. were both Fined and Impriſoned by Sentence of that Court for their Contempts. Trin. 1 Eliz. *Dyer*, 168. *Brookes* Caſe. And ſo it was done, Hill. 5 Car. in the Star-Chamber, in *Long*'s Caſe.

26. An Information was exhibited againſt the Mayor and Comminalty of *London*; for that they did not ſuppreſſe an unlawfull Aſſembly in the City made in *June* 4 *Car.* in the day-time, where Dr. *Lamb* was ſlain in a Tumult, nor any of the offenders taken or Indicted for that Felony. The Mayor and Commonalty appear, and confeſſed the Offence *et poſuerunt ſe in gratiam Curiæ*. They were Fined 1500 Marks; for it was conceived to be an Offence at the Common-Law, to ſuffer ſuch a Crime to be committed in a Walled Town *tempore diurno*, and none of the Offenders taken or Indicted for it. And a Preſident, 21 H. 6. was ſhewed; againſt the Town of *Norwich*, That there was a great Riot in *Norwich*; and one *Gladman* took upon him to be King, and went with a Crown of paper in a Riotous manner to the Priory of *Norwich*; and for that, their Liberties were ſeiſed: although afterwards regranted unto them. Paſch. 18 Car. in B. R. The King and the Mayor and Comminalty of *London*'s Caſe, *Cro.* 1. Part, 183.

27. In an Information for ſtopping a High-Way; It was ſet forth, That time out of mind there was a Common High-way for Horſe, Foot, and Carriages in ſuch a Lane leading to divers Market Towns; and that the Defendant with Hedges and Ditches ſtopt it, and incloſed it, and ſo held it. The Defendants confeſſe the old Way; but ſay, It was ſo foul and drowned with water, and dirt, that Paſſengers could not paſſe it; and that for the profit and eaſe of the Paſſengers, J. S. ſeiſed of a Cloſe adjoyning, layed out another Way more Commodious for the people: and before the laying out of it, a Writ of *Ad quod damnum* iſſued to enquire, Whether it were to the damage of, &c. and it was found, that it was not to the damage. It was holden by the Court, That this was no good Plea, both for the matter and the form of it, becauſe in the Plea it did not appear by what Authority J. S. did it: for it is but at his pleaſure, and he may ſtop it when he will; and by the laying out, the Subjects have not any Intereſt therein; nor is it ſuch a Way as Inhabitants are bound to Watch it, or to make amends, if a Robbery be done in it. And the pleading of the *Ad quod Damnum*, and the Inquiſition upon it, is to no purpoſe, when he doth not plead, That he obtained the Kings Licence for the doing of it. Trin. 8 Car. in B. R. The King and *Ward*'s Caſe. *Cro.* 1. Part, 193.

28. An Information was exhibited in the Court of Common-Pleas againſt Sir *Francis Lovel*; for that he had not repaired to Church for 11. moneths together; upon which Information, a Judgment was for the King and Informer for 220 l: It was moved in Arreſt of Judgment, That the Information did not lye in the Common-Pleas, but was by the letter of the Statute of 27 Eliz. reſtrained unto the Court of Kings Bench only: And this, Counſel took life, upon ſome words of *Coke*, Chief Juſtice, in *Cook* 11. Part, in Dr. *Foſter*'s Caſe, Where he ſayes, That the Statute of 28 *Eliz.* had reſtrained the Informer only to the Kings-Bench. But it was Reſolved by the Court, That the Information exhibited in the Common-Pleas, did lye: For the reſtraint to the Kings-Bench only extends to the King alone in Caſe of Indictments: But by another Clauſe of the Statute, It is by Action of Debt, Bill, Plaint, or Information in any Court of Record of the Queen, for the Informer and the Poor; ſo as the Informer is enabled by the Statute, to exhibit his Information in the Court of Common-Pleas, Mich. 15 Jac. in C. B. *Fye* and *Lovell*'s Caſe. *Hob.* 205.

29. The Kings Attorney did Inform in the Star-Chamber, againſt J. S, ſuppoſing that he had forged a Leaſe of divers Lands, parcel of the poſſeſſions of *Sherborn*, in the name of Sir *Walter Rawleigh* when he had it. The Information was of divers things, of which *Long Meare* was one named in it. Now it appeared, that *Long Meare* was not named neither in particular, nor in the general, but all the reſt were in it. The Defendant pleaded, Not guilty. It was adjudged, That as the Bill was layed, he was not guilty; for it is not the ſame Leaſe, and the unneceſſary Curioſity of the party in laying his Information, as was Reſolved, had ſpoyled his Caſe: Whereas if the Information had been general, it had been good. Paſch. 16 Jac. in *Canc. Stellat. Meyres* Caſe. *Hob.* 272.

30. A. did Inform againſt W. Inn-holder, for uttering of Fleſh 30. dayes forbidden, *unde Petit adviſamentum Curiæ, et quod forisfaciat* 5 l. for every offence *unde Ipſe petit mediatatem*. It was the Opinion of *Hobart*, Chief Juſtice, That the Information was inſufficient: For an Information hath not only ſomewhat in it of an Indictment to lay down the offence in it, but hath alſo the nature of an Action, for the party to demand his due, as in

in another Action which is but his Office to demand certain, and not the Court to assign; therefore if he make no demand, or demands that which appears not to be due, his Information is insufficient. Trin. 16 Jac. in C.B. *Pye* and *Wesly*'s Case. *Hob.* 245.

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2. *Informations of Intrusion upon the possessions of the King or his Committee, where good; Where not: And what shall be good barrs thereto; What not. And in what Courts; In what not.*

1. JOhn Lord **Bourcher**, having Feoffees to his use of his Mannor of O, and other Mannors, 23 H. 8. made his Will in this manner, *viz.* I beseech the King to be gracious to me for the 500 l. which I owe him, and to accept, after the death of my Wife, my Mannor of O, To have and to hold to him and his Heirs for ever, such sums of moneys as shall please his Highnesse, to mine Executors over and above the said 500 l. towards the performance of his Will. Afterwards, meant betwixt the making of his Will and his death; he did request his Feoffees to enfeoffe others to the use of himself for life; the remainder to B. his Bastard Son, and the heirs of his body; the remainder to his right heirs: He and his Wife dyed; B. after the Statute of 27 H. 8. bargained and sold the said Mannor of O. to J. D, and suffered a Common Recovery to the use of J. D. and his heirs; who entred, and took the profits: And this Will being found by Office *prout*, Intrusion was brought by the Attorney General against J. D, and it was averred, That the said Lord **Bourcher** and his Wife were both dead: and all this matter was pleaded in Barr, and Judgment demanded of the Intrusion. Divers Exceptions were taken to the Information: 1. The Will was not found by Office; and the King cannot take but by matter of Record. 2. It was, That the King by his Will *dedit* the Mannor of O, &c. to the King; and *Cestuy que use*, cannot devise by the Statute of 1 R. 3. 3. The words in the Will were, paying to his Executor: and being a Condition, it ought to have been shewed to be performed. 4. A use or possession of a Freehold may not be settled in the King, without matter of Record. 5. The Command that he made, That his Feoffees should make a Feoffment to Uses, was a Countermanding of the Will. To these Exceptions, there is no Answer or Resolution; by which it appeared, that they were good: and so the Information not good. Mich. 6 E. 6. *Dyer*, 73, 74.

2. In a Writ of Intrusion brought in the Exchequer, for Intrusion upon the possessions of the Queen; the Case was, That King *Ed.* 6. was seised of the Mannor of C, of which a great Wood was parcel; and granted the said Wood in Fee: afterwards the Wood came to the Crown by Escheat for Treason; and then the Queen granted the Mannor *et omnes boscos ante hac usitata vel reputat. ut parcel. &c.* It was adjudged in this Case against the Queen in the said Information; and that the said Woods passed to the Patentee by the words, *Ante hac, &c.* Pasch. 20 Eliz. *Dyer*, 362. See *Cook* 6. Part, in Sir *Moile Finch*'s Case.

3. In an *Information* of *Intrusion* brought in the Exchequer against J. P. for *Intruding* in a Wharf and a house called *Wolley Key* in *London*; the Case was; J. P. seised of a Wharf and a house holden in bargayn, devised the same to his Wife and her heirs, upon Condition, That his Wife by the advice of Learned Counsel, within convenient time should assure the same for the maintenance of a Free-School, and Almes-men and Almes-women for ever; and that his Wife should have the Issues and Profits of them during her life, bearing the Charges of the same School, &c. and made his Wife his Executor, and dyed; she entred, and was seised, and afterwards made a Lease for years of them: and the heir entred for the Condition broken. It was Resolved, 1. That these Lands did not come to the King, by the Statute of 23 H. 8: for that Statute gave the Lands which were given to superstitious uses, to the King: but these uses were good uses, and not given by that Statute, or any other Statute which gave Lands to superstitious uses. 2. It was Resolved, That the Statute of 32 H. 8. of Wills, did take away the force of the said Act of 32 H. 8. And therefore it was said, That a Devise made 4 and 5 *Ma.* to the Masters and Fellows of Trinity Colledg in *Cambridg*, to find a Grammer School, was good, by the Statute of 1 & 2 *Ph.* & *Mary*; which enabled a Devise to Spiritual Corporations. 3. It was Resolved in this Case, That the Condition was broken; and that the Wife had disabled her self to perform the Condition, by making the Lease for years. and therefore the Entry of the Heir was lawfull. *Cook* 1. Part, 23, 24. *Porter*'s Case.

4. In an *Information* of *Intrusion* in the Exchequer, for intruding upon the possessions of the King: the Case was, That the Guardian and Chanoes Regular of a Colledg, seised of divers Lands ancient Copyholds of the Mannor of D, granted parcel

parcel of thoſe Lands to A. and B. for their lives by Copy, according to the Cuſtome of the Manor. And afterwards, 30 H. 8. they by Deed Indented, made a Leaſe to C. of the ſaid parcels of Lands for 80. years, rendring the auncient Rent; and afterwards ſurrendred their Colledg to the King: and afterwards the Statute of 31 H. 8. was made: A. and B. dyed; C. the Leſſee entred: Whereupon the Information of Intruſion was brought. In this Caſe it was adjudged, That the Leaſe made to C. of the ſaid Lands, whereof A. and B. were ſeiſed by Copy, was void. And it was Reſolved, That the ſaid Copyhold Eſtate, was an Eſtate for life within the Statute of 31 H. 8. Cap. 13. Sect. 9. for the intention of the Act was to avoid doubling of eſtates, and to have but one ſingle eſtate in *eſſe* at one time. 2. Reſolved, That the Statute of *Weſt.* 2. *de Donis Conditionalibus* did not extend to Copyholds. It was Reſolved, That although it was not found, That the ſaid Rents were the uſual Rents, and accuſtomed Rents to be reſerved within 20 years before the Parliament; yet in as much as the Jury have found, That the accuſtomable Rent was reſerved, and a Cuſtome goeth to all times before, it ſhall be intended, that that was the accuſtomable Rent. Judgment was given for the Queen. Paſch. 26 Eliz. in the Exchequer. *Cook* 3. Part, 7. *Heydon's* Caſe.

5. Note. It was Reſolved by the Juſtices, That when the King's Tenant ſeiſed in Fee-ſimple, dyeth without heir, that the Fee and Freehold is preſently after his death, and before Office found thereof, caſt upon the King. For in ſuch caſe it ought to be in ſome perſon; and if any perſon entreth into the Land, and take the profits thereof, An Information of Intruſion for the King, may be preferred againſt him before Office or Seizure; for the King preſently by the death is in actual poſſeſſion, and hath not a Freehold in Law, as a Common perſon in ſuch caſe hath. *Cook* 4. Part, 58. In the Caſe of the Warden and Commonalty of Sadlers.

6. In an Information for Intruſion upon the poſſeſſions of the King, exhibited in the Exchequer; the Caſe was, A man ſeiſed of houſes in Fee, Deviſed them to his wife being an Alien born, The King by his Letters Patents under the Great Seal made the Wife a Denizen, the Devſor dyed; the Wife took another Husband, and the Letters Patents being naught in the *Teſte*, they obtained an Exemplification of the Inrolment of the Letters Patents under the Great Seal, which was with a true *Teſte*; And afterwards Office was found before Commiſſioners, by force of a Commiſſion directed unto them under the Exchequer Seal; by which it was found, that the wife was an Alien born. In that caſe, theſe Points were Reſolved, 1. That an Office found by Commiſſion under the Exchequer Seal, is not ſufficient to entitle the King to the Lands of an Allien born; but ſuch Office ought to be found under the Great Seal. 2. That in Caſe of an Allien, perſon attainted, ſo long as he liveth, Villain of the King, Alienation in Mortmain, and the like, the Inheritance or Freehold of the Land doth not veſt in the King, untill Office found under the Great Seal. 3. Reſolved, That the exemplification of the Inrollment of the Letters Patents of Denization, were pleadable by the husband and wife, by the Statute of 13 Eliz. Cap. 6.

7. In an Information of Intruſion into a houſe, and certain Lands in *Sutton Galtres*, againſt P. B. and others, the Caſe was; King *Ed.* 6. demiſed the Manner of *Sutton Galtres* to T. F. for 31. years. The Queen having the Reverſion by her Letters Patents reciting the ſaid Leaſe, demiſed the ſaid Mannor to H. B. for 21. years in Reverſion. H. B. granted parcel of the Mannor to a ſtranger; and afterwards the Queen by her Letters Patents reciting the ſaid Leaſe to H. B. *pro et in conſideratione ſurſum-reddicionis totius ſtatus, tituli termini annorum et inter eſſe de et in præmiſſis per prædict. Literas Patt. eidem H. B. conceſſ.* demiſed the ſaid Mannor to the ſaid H. B. for 21. years *Habendum à die Confectionis prædict. Literarum Patent.* for the lives of 3. others. In this Caſe, It was Reſolved, amongſt other Points, That the ſaid Grant made by the Queen to H. B. for three lives, was utterly void, for that the Queen was deceived in the Conſideration; for all the Eſtate and Term demiſed to the ſaid *Humphry B.* by the Queen, was not ſurrendred according to the Conſideration; and it was but a ſurrender in ſhew, and not in ſubſtance; the ſaid H. B. having made Demiſes of parcels thereof before to ſtrangers. Wherefore it was adjudged for the Queen againſt the ſaid P. B. and others, who claimed under the ſaid Letters Patents. *Cook* 5. Part, 44. *Barwick's* Caſe.

Mary

More Informations.

1. ERrour was brought to reverſe a Judgment given in the Common Pleas, upon an Information there exhibited, for ſelling of Wine without Licence contrary to the Statute: The Errour aſſigned, was, Becauſe the Information was in the Court of Common-Pleas; and the Offence was at *Lambeth* in *Surrey*. It was Objected, That by the Statute of 21 Jac. the Information was to be in the County where the Offence was committed. It was Reſolved, That the Statute of 21 Jac. is not to put the party without remedy; and if the party cannot bring his Action by the Statute of E. 6; then the Statute of 21 Jac. barrs him not to prefer an Information in any other County. And it was holden, That by the Statute of 21 Jac. no Juriſdiction is given to Juſtices, where they had not power before: And the Courts of Record in the Statute of 7 E. 6. ſhall be intended the Courts at *Weſtminſter*, and not a Court of Record elſewhere. Mich. 1652. Rott. 177. in B. R. *Buckſtone* and *Shurlocks* Caſe. *Styles*, 342.

2. An Information was exhibited for the King, the City of *London*, and the Informer, upon the Statute of 1 Jac. Cap. 22. For that the Defendant being a Currier, brought two Hides of Tanned Leather, and ſold them unwrought, and not converted into made Wares, to one J. S. a Shoomaker in *London*, and thereupon demanded a third part for the King, a third part for the City, and a third part for himſelf. It was found by Verdict, That the Defendant being a Citizen and Inhabitant of *London* bought the ſaid two Hides of perſons unknown, and Curried them with Oyl and Tallow, and ſhaved and dyed them; and being ſo wrought, ſold them to the ſaid J. S; and if this be a buying and ſelling againſt the form of the Statute, was the Queſtion? It was Reſolved by the Court, That it was an Offence againſt the Statute of 21 Jac. and the value forfeited by the Statute, for this ſelling by a Currier, not being cut out and made into Wares, is againſt the meaning of the Statutes of 6 E. 6. Cap. 15. 27 Eliz. Cap. 17. & 1 Jac. Cap. 21. And in this Caſe, It was alſo Reſolved, That a Currier may not buy nor ſell by the whole ſale. It was adjudged for the Plaintiff. Trin. 15 Car. in B. R. *Lodge* and *Hollowell*'s Caſe. *Cro.* 1 Part, 425.

3. Error becauſe of a Judgement in *Coventry*, upon an Information upon the Statute of 5 Eliz. for exerciſing the Trade of an Ironmonger not being Apprentice: It was aſſigned for Error, That the Statute of 21 Jac. appoints, That every Common Informer ſhall be ſworn before his Information be received, which this Informer was not. 2. Becauſe Informers cannot ſue upon that Statute to have the moyty; for by the expreſs words of the Statute, the forfeiture is given to the Corporation, and for the benefit of the poor. For the firſt, it was Reſolved, That the firſt is no parcell of the Record, but is only a direction to the Officers, That none be received unleſs he be firſt ſworn. And for the ſecond, Although the Statute gives one moyty to the King, and the other to the Informer, except in Corporate Towns, it is to be underſtood, That in that caſe the forfeiture given to the King, belongs to the Corporation, and the Informer is to have but part ſtill; the Judgement was affirmed, Trin. 9 Car. in B R. *Cro.* 1 Part, 230.

4. Error brought to reverſe a Judgement given upon an Information of Extortion, exhibited at *Oxford* at the Aſſizes there, for taking more money of one that was bound Apprentice with him, being by Profeſſion a Taylor, then by the Law he ought. It was aſſigned for Error, That Juſtices of Aſſize have no power to determine offences of that nature: To which it was anſwered, That as Juſtices of Oyer and Terminer, they have power to determine of offences of that nature: But becauſe it did not appear by vertue of which Commiſſion they tryed the Offence, but both Commiſſions are jumbled together in the Record, and they have not authority by all their Commiſſions: and becauſe the Judgement is, *Ideo Conſideratum eſt*, and doth not ſay, *per Curiam*; the Judgment was reverſed. Hill. 1654. in B. R. *Richardſon*'s Caſe, *Styles*, 430.

5. A Joynt Information was exhibited againſt A. and B. two Juſtices of the Peace, for not enquiring of a Ryot, and a Verdict found againſt them. It was moved in Arreſt of Judgment, That there ought to have been ſeveral Informations, becauſe their Offences were ſeverall; and the one is here acquitted, and ſo Judgment cannot be given againſt the other, who is found guilty. It was Reſolved by the Court, That as an Attachment in a Prohibition is ſeveral; ſo execution here may be ſeveral, and it is not materiall, though one be acquit, and the other found guilty. Hill. 1650. in B. R. *Maine* and *Serjant*'s Caſe. *Styles*, 245.

6. An Information was exhibited upon the Statute of 5 E. 6. Cap. 14. for Ingroſſing of Corn, divers ſtacks of Corn, and it was by the word *Cumulus*: It was ſaid by the Court, That they

they did never ſee an Information in this kind, but for ſo many Loads of Corn, or Quarters of Corn, but never with this word *Cumulus*, being altogether uncertain; for the ſame might be a heap threſhed or in ſhocks: And therefore can be no good barr to this Information, which is framed upon a Penal Law. Wherefore the whole Court were of Opinion, That the Information here was not good, for the incertainty. The King and *Whichers* Caſe. Hill. 12 Jac. in B. R. *Bolſtr.* 1. Part, 317.

7. One Information was exhibited againſt two Perſons, upon the Statute of 21 H. 8. Cap. 13. for Non-Reſidence, and for taking a Farm; The one of them pleaded Sickneſſe, and that by advice of his Phyſitians, he removed in better Ayr for the Recovery of his health: The Court held this Plea to be good and Juſtifiable. See *Cook* 6. Part, 21. *Butler* and *Goodale's* Caſe. The other pleaded, That he took the Farm onely for the maintenance of his houſe and family; This Plea alſo was holden good by the Court. It was moved to the Court; That in regard the Plaintiff was a Common Informer, and that this Information was exhibited only to draw ſome Compoſition from the Defendants, as formerly he had done from others, for which Bills of Indictment were proſecuted againſt him upon the Statute of 18 Eliz. Cap. 5. That the Informer might put in Sureties to anſwer Coſts, if the matter went againſt him. The Court ſaid, That could not be done, but gave a Rule, That the Defendants ſhould not anſwer the Information, untill the Informer appeared in perſon. Mich. 10 Jac. in B. R. *Martin* and *Gunneſtones* Caſe, *Bolſtr.* 2. Part, 18.

8. The King's Attorney in the Star-Chamber *Ore Tenus* informed againſt *Goodrick* and others, and charged them, that they had ſpoken and publiſhed of the Earl of *Northampton*, one of the Peers of the Realm, Lord Privy Seal, and Warden of the Cinque Ports, divers falſe and horrible ſcandals; *ſcil.* That more Jeſuits, Papiſts, &c. have come into *England* ſince the Earl was Warden of the Cinque-Ports, then before. 2. That the ſaid Earl had written a Book onely againſt *Garnet*, but ſecretly he did write to *Bellarmine*, intimating, That he wrote the ſaid Book *Ad placandum Regem ſive ad ſciendum populum*, and requeſted him, that this Book might be Anſwered. The Defendants confeſſed the relating of the words, which they ſaid they heard by hear-ſay from ſeveral perſons. In this Caſe, It was Reſolved by all the Judges of *England* called to aſſiſt the Court, 1. That the publiſhing of falſe Rumours concerning the King, or the Grandees of the Realm, was puniſhable either by the Common Law, or in the Star-Chamber, *ore tenus*. 2. That ſuch Rumours ought to be falſe and horrible, to the ſubverſion and deſtruction of the Realm, according to the Statute of 2 R. 2 Cap. 53. 3. Reſolved, That if one hear ſuch falſe and horrible Rumours, it is not lawful for him to relate to others, that he hath heard J. S to ſay ſuch falſe and horrible words. 4. Reſolved, That if A. ſay to B. Did you not hear that C. is guilty of Treaſon? This Tant amounts as to a ſcandalous Publication; and in a private Action for ſlander of a common perſon: If J. S. publiſh, that he hath heard J. N. ſay, that J. G. was a Traytor or a Thief, in an Action upon the Caſe, if the truth be ſuch he may juſtifie: But if J. S. publiſh generally, That he hath heard generally without a certain Author, That J. S. was a Traytor, there an Action upon the Caſe lyeth. 5. Reſolved, That in caſe of *Scandalum Magnatum*, the party may have his Action to recover his damages; or a Bill may be exhibited in the Star-Chamber againſt him for the ſame, in which the King ſhall have a Fine, and the party ſhall be Impriſoned. Mich. 10 Jac. in the Star-Chamber, Book 12. Part 132, 133. The Earl of *Northampton's* Caſe.

Inrolments.

Inrolment of Bargains and Sales within the Statute of 27 Hen. 8. how Conſtrued; and when a Deed is Inrolled, to what time it ſhall relate; And where the Inrolment ſhall avail as much as the Deed it ſelf.

1. A Man ſeized of divers Mannors and Lands, part in Leaſe for years, with Rent reſerved, part Copy-hold, for valuable Conſideration Demiſed, Granted, Bargained, and Sold the ſaid Mannors &c. with all Rents reſerved upon any Demiſe, to J. S. after the death of the Bargainor, for 17 years: The Deed was acknowledged to be Inrolled; and afterwards he covenanted, to ſtand ſeized of the ſaid Mannors and Lands, to the uſe of himſelf, and the Heirs of his body, no Attornment was had to the Bargainees, and afterwards the Bargainor dyed. It was Reſolved in this caſe amongſt other points, That the Leſſees had election, to take the Land by Demiſe, or by Bargain and Sale; and the Law will not enforce them to take by Demiſe, for then they ſhould loſe the Rents reſerved upon the Leſſees for

years, but the Intereſt paſſeth to the Bargainee, for the Statute of 27. H. 8. doth execute the poſſeſſion to the uſes, and the Deed needs not to be Inrolled; for that the Statute of 27 H. 8. of Inrolments, doth not extend to it, becauſe no Freehold paſſeth, but only an Eſtate for years. *Cook* 2 Part 36. in *Rowland Heywards* Caſe.

2. A man made a Leaſe for years, and afterwards Bargained and Sold the Reverſion to one, and his heirs, and before the Deed Inrolled, he levied a Fine of the ſaid Lands to him and his heirs, and afterwards the Deed was Inrolled within the ſix moneths: It was adjudged in that caſe, That the Conuſee ſhall be in by the Fine, and not by the Deed Inrolled; for when the Fee-ſimple paſſeth by the Fine to the Conuſee and his heirs, the Inrolment of the Indenture of Bargain and Sale, cannot deveſt the Eſtate which is ſettled in him by the Fine; and it was holden in that caſe, that it might be averred that the Deed was Inrolled ſuch a day after the Fine levied. *Cook* 4 Part, 71. *Hind's* Caſe.

3. If a man covenanteth to ſtand ſeized to the uſe of his Wife, Son, or Couſin, without any expreſs words of conſideration, there the uſe ſhall riſe, for ſufficient conſideration appeareth, and Fatherly love and affection appeareth: But if the Father by Deed Indented, in conſideration of 100 l. paid, covenanteth to ſtand ſeized to the uſe of his Son, there no uſe ſhall be raiſed to the Son, if the Deed be not Inrolled, for that the ſame is in the nature of a Bargain and Sale, and there *expreſſum facit ceſſare tacitum*. *Cook* 7 Part, 40. in *Bedell's* Caſe. See *Cook* 11 Part, 25. in *Harpers* Caſe acc.

4. A. ſeized of Lands in Fee, Demiſed the ſame to Huſband and Wife, and a Stranger, *Habendum* to the Huſband and Wife for their Lives, the remainder to the Stranger for his life, rendring during their lives yearly Rent at two Feaſts, Michaelmaſs and our Lady; the Huſband dyed, A. by Indenture in conſideration of 100 l. to him paid, Demiſed, Granted, and to Farm let the ſaid Lands to J. S. *Habendum* to him, from the day of the date of the Indenture, for 99 years; the Wife did not Attorne: It was Reſolved in this caſe, 1. That the words (Demiſe and Grant) for conſideration of money, did amount to a Bargain and Sale for the ſaid years, and that there needed no Inrolment of the Deed, becauſe but a Term for years paſſed: But 2. It was Reſolved, That if a man covenants in conſideration of money, to ſtand ſeized to the uſe of his Son in Fee, if the Deed be Inrolled, it is a good Bargain and Sale, without the words *Bargain* and *Sale*, becauſe they amount to ſo much: So if a man alien and give Lands to one and his heirs by Deed Indented and Inrolled, it amounts to a Bargain and Sale, and the Lands ſhall paſs without Livery and Seiſin. *Cook* 8 Part, 94. *Foxes* Caſe.

5. The Father was Tenant for life of Copyhold (where the Guſtome was to have for two or three Lives *ſucceſſive*) the remainder to his eldeſt daughter for her life, the remainder to his ſecond daughter for her life, *poſt mortem* of the one or the other; the Father Tenant for life, by Bargain and Sale Inrolled, purchaſed the Inheritance of the Copy hold of the Lord, who levied a Fine of the ſame to his Son and his heirs with Proclamation, according to the Statute of 4 *H.* 7. the Father dyed, the Son Entred, the Wife Entred; the Queſtion was, Whether the eldeſt daughter in remainder might enter, or if ſhe were barred by the Fine. It was Reſolved in this caſe (amongſt other Points) That no Fine or Warranty ſhould bar any Eſtate in Poſſeſſion, Reverſion, or Remainder, which is not deveſted, and put to a right uſe; and in the principal caſe, the Bargain and Sale did not deveſt the Eſtate of them in the remainder: 1. Becauſe the Lord did that which was lawful for him to do by Law, and the Copy-holder did accept that which he well might do. 2. Becauſe the Copy-holder was in poſſeſſion, and ſo was only paſſive, and not active, and therefore cannot divert the Eſtate of thoſe who had the Freehold and Inheritance. 3. Becauſe the Bargainee was in by the Statute of Inrolments, and an Act of Parliament can do no wrong; *Cook* 9. Part, 104, 105. *Margaret Padgers* Caſe.

6. Note, It was ſaid by the Lord *Dyer*, That it was adjudged in the Common Pleas, That if a man Bargaineth and ſelleth his Reverſion of the Tenant for life, by words of Bargain and Sale only, and the Deed is not Inrolled within ſix moneths, and after the Tenant for life doth Attorn; yet notwithſtanding that, that the Reverſion ſhall not paſs, becauſe Bargain and Sale are not apt words to make a Grant, Paſch. 23. Eliz. in C. B. *Godbolt*, 7.

7. A Recognizance was acknowledged before J. S. one of the Maſters of the Chancery, the Recognizee dyed before the ſame was Inrolled, It was a Queſtion whether at the Petition of the Executors it might be Inrolled; It was agreed by all the Juſtices in that caſe, That the ſame might be Inrolled: for it was like the Conuſans of a Fine before a Judge, which muſt be removed out of the hands of the Judge by a *Certiorari*, and yet it is no Record until it be perfected. Mich. 30 Eliz in C. B. *Haltods* Caſe, *Godbolt*, 141.

8. A man Bargained and Sold Land by Deed Indented, Dat. 11. Jun. 1 Jac. Afterwards 12 Jun. the ſame year, Common was granted to the Bargainee for all manner of Cattel Commonable; 15. Junii, the Deed of Bargain and Sale was Inrolled: it was adjudged in that caſe a good Grant of the Common; and the Inrolment ſhall have relation as to that, although to collateral things it ſhall not

have

have relation. Mich. 15. Jac. in B. R. *Ludlow* and *Stacies* Caſe. *Godbolt*, 270.

9. Note, Upon an Evidence at the Bar in an *Ejectione firmæ*, where the Caſe was, That *Ed.* Earl of *Salop*, was Tenant for life of the Manner of A. the Remainder to *Grace* Lady *Chandiſh* his Siſter, of two parts thereof for life, the Remainder of the third part to the ſaid *Grace*, and the heirs male of her body the Remainder over, &c. and ſhe by Indenture Inrolled, Bargained and Sold to the ſaid *Edward*, all her moyty, part and property of the ſaid Mannor, and Covenants to ſuffer a Recovery for further aſſurance; and after a Recovery is had, with Voucher of the ſaid *Grace*, it was Reſolved by all the Juſtices, 1. That this was a good Recovery of the whole third part, and not of the moyty of the third part. 2. That where bargainee by Indenture, after the Sealing and Delivery of the Indenture, and before the Inrolment, letts the Land for years, and afterwards the Indenture is Inrolled ſix moneths; yet the Leaſe is void, and the Relation of the Inrolment ſhall not make it good. 3. That where one by Indenture Bargaineth and Selleth, Demiſeth, and Granteth Lands, and the next day after by Indenture reciting that Grant, Grants the Reverſion to divers uſes, the Leſſee Attornes, it is a good Grant of the Reverſion, although there was not any proof that the Bargainee for the moyty entred, before the Grant of the Reverſion, or that the Bargainee waved the poſſeſſion; for the Leſſee ſhall be adjudged in actual poſſeſſion, by the Statute of 27 H. 8. of Uſes, and the Reverſion is immediately devided from the Poſſeſſion, and he hath a good Reverſion; but in caſe of a Leaſe for years at the Common Law, until the Leſſee enters, or the Leſſor wave the poſſeſſion, the Reverſion is not divided, nor paſſeth by the words of Grant of a Reverſion, Paſch. 4 Car. in C. B. *Iſeham* and *Morrice*'s Caſe. *Cro.* 1 Part, 77.

10. A. bargained and ſold by Indenture 8 July, 20 Jac. the Deed was acknowledged 10 July, the 9 of October following, the Bargainor ſuffered a Judgement to be had againſt him in C. B. and 18. October the Indenture was Inrolled; The Queſtion was, whether the Bargainee was ſeized at the time of the Judgement; for if the Inrolment ſhall have Relation to the Sealing and Delivery of the Indenture, then the Bargainor was not ſeized at the time of the Judgement: All the Court agreed, That the Inrolment of the Deed within the ſix monethes, relates to the Sealing of the Deed, and makes the Bargainee in, to avoid all incumbrances made unto ſtrangers after the Enſealing. But *Jones* Juſtice conceived, that in *rei veritate*, the Bargainor ſhall be ſaid to be ſeized alwayes until the Inrolment, and nothing paſſeth to the Bargainee, until the Inrolment; for it is ſo expreſly appointed by the Statute, and it is *quaſi conditio præcedens*, and until it be performed, nothing veſts in the Bargainee: And he cited *Bellingham* and *Alſops* Caſe to be ſo adjudged, 2 Jac. *Crook* Juſtice was of opinion, that when the Inrolment is within the ſix moneths, he is in *ab initio*, and the Fee veſts in the Bargainee *ab initio*, and the Statute of 27 H. 8. executes the poſſeſſion to the uſe; but that is ſtopped until the Deed be Inrolled, and when it is Inrolled, it is within *ab initio*: Whereupon the Court would further adviſe of the Caſe, Hill. 4 Car. in B. R. *Rott.* 687. *Flower* and *Baldwin*'s Caſe. *Cro.* 1 Part, 158.

11. The Caſe was upon a ſpecial Verdict, That A. ſeized of Land in Fee by Indenture 27 Feb. 38 Eliz. for money Bargained and Sold the Land to B. and C. in Fee, who by Indenture, Date 28. Feb. 38. Eliz. reciting, whereas A. by Indenture 27. Feb. 38. Eliz. had ſold them all ſuch Lands, they in conſideration of ſuch a ſum of money, Bargained and Sold to the ſaid A. and his heirs, all their Eſtate which they had by the ſaid Indenture Enrolled, of and in the ſaid Lands, to him and his heirs. Afterwards 5 May 38 Eliz. the firſt Indenture was Enrolled, and afterwards 6 Auguſt 38 Eliz. the ſecond Indenture was Enrolled; Whether this ſecond Indenture had well conveyed the Land, was the Queſtion: *Daniel* and *Kingſmith* Juſtices held, That the Land was well conveyed; for when the firſt Indenture is Enrolled, it being betwixt Privies, ſhall have relation to the Enſealing and Delivery of it; and the words in the ſecond Indenture are apt enough to paſs the Land: *Anderſon* Chief Juſtice, and *Warburton*, *contr.* That it was againſt a Rule in Law, to paſs that which a man hath not; and until the words of the Statute be performed, that is, until the Deed be Enrolled, they have nothing at all, and therefore can paſs nothing: *Walmeſley* agreed, That the Lands did not paſs becauſe of the miſrecital of the ſaid Deed, to be Enrolled, where there was not any ſuch, otherwiſe the Land would have paſſed; for he conceived the Land to be in the Bargainee after the Inrolment *ab initio*. It was adjudged for the Defendant. Paſch. 2 Jac. in C. B. Rott. 1618. *Bellingham* and *Alſops* Caſe. *Cro.* 1 Part, 52, 53.

12. In a Replevin, the Caſe was; A man ſeized of Lands in Fee, is bound in a Recogniſance of 200 l. and then Bargains and Sells all his Lands, and then the Recogniſance is forfeited, and the Conuſee ſues out a *Scire facias* againſt the Conuſor, before the Deed was Enrolled, and had Judgement to have Execution; The Queſtion was, if the Bargainor was a ſufficient Tenant againſt whom the Execution was ſued? It was the opinion of the Juſtices, That when the Inrolment came, the Bargainee was not in *ab initio*, and that then the *Scire*

facias was not well awarded; and Judgement was given againſt the Defendant, and for the Plaintiff, in the Replevin. Trin. 42 Eliz. in C. B. *Mallory* and *Jenning's* Caſe. *Owen* 69.

13. The Kings Tenant by Knight Service, Bargained and Sold his Lands to Sir *Henry Dimmock*, and his heirs, Sir *Henry Dimmock* dyed, his Heir within age, and then the Deed was Inrolled; The Queſtion was, If the King ſhould have Primer Seiſin; It was objected, that he ſhould not, becauſe Sr *Henry* did not dye within his Homage, but the Land was in the Bargainor: But all the Juſtices held, that his Heir ſhould be in Ward, and ſhould pay Primer Seiſin if he were of full age; for the Statute ſayes, That no uſe ſhall be, unleſs the Deed be Enrolled; but if it be Enrolled, then the Bargainee ſhall be Tenant *ab initio*: But all the Juſtices held, That the wife of Sir *Henry* ſhould not be endowed; and that the Rent paid to the Bargainor at the day incurred after the Bargain and Sale, is good, and the Bargainee hath no remedy for it, becauſe it is a thing executed. Paſch. 5 Jac. in Car. Ward. Sir *Henry Dimmocks* Caſe, *Owen* 149. *Hob.* 130.

14. The Caſe was, A. and his Wife being ſeized of the Parſonage of H. to them, and the heirs of J. did grant the ſame to King *Hen.* the 8. and his heirs, by their Deed, date 31. *H.* 8. And then the King by his Letters Patents, 21 July, 31 *H.* 8. did Grant the Parſonage of B. to which the Vicarage belonged, to them, and the heirs of A. in conſideration of the Parſonage of H. Given and Granted by them to him, not ſaying by Deed, nor by what means: Then after, 26 July, the Deed was acknowledged by A. and his Wife, and Enrolled *ſecundum formam Statuti*: It was holden in this caſe, That although the Deed to the King was not acknowledged, nor Enrolled at the time of the Grant made by the King, yet the relation of the Inrolment, and the operation of the Law, ſhall make the Conſideration true, and in effect ſufficient, as touching the Husbands Eſtate, and the King not deceived: and although it be true, that it was not compleat nor perfected for want of Inrolment, at the time of the King's Grant, yet when the Inrolment came upon it, it takes his effect neither from the Inrolment, nor by it, but from and by the firſt Act; and therefore between the Parties it ſhall binde, to all purpoſes, *ab initio*: And therefore if J. give Lands to the King by Deed, and after charge the Land, and then J. levie a Fine to the King of the ſame Land, and then the Deed is Enrolled, the King ſhall hold the Land diſcharged. Hill. 12. Jac. in C. B. Rott. 1844. by *Hobart* Juſtice, in the argument of *Needler* and the Biſhop of *Wincheſters* Caſe, *Hob.* 211, 212.

15. Note, It was agreed by all the Juſtices, That if a man Bargains and Sells his Lands by Deed Indented to be Enrolled, and before the Deed be Enrolled, he maketh Livery to the Bargainee, and after the Indenture is Enrolled, that in caſe the Livery doth prevent the operation of the Inrolment, and the party ſhall be accounted in by the Livery, and not by the Bargain and Sale; for Livery is the more worthy, and the more worthy Ceremony to paſs Eſtates, and therefore it ſhall be preferred, Mich. 26 Eliz. in B. R. *Stonly* and *Brackbridges* Caſe. *Leon.* 5.

16. In an *Ejectione firme*, the Defendant pleaded a ſpecial Bar, which was inſufficient: The Plaintiff conveyed the Land to his Leſſor by Bargain and Sale, acknowledged before J. S. Juſtice of Peace of the Weſt-Riding in Yorkſhire, and J. D. Clerk of the Peace there, and Enrolled within ſix moneths. The Plea was holden inſufficient, becauſe it did not appear that the Land in queſtion which was conveyed, did lye within the Weſt-Riding: But it was holden, That although the words of the Statute be before Juſtices of the Peace of the County, yet it will ſerve before a Juſtice of the Peace of the Weſt Riding, if the Land lye there. Hill. 13 Jac. C. B. *Perkin* and *Perkins* Caſe, *Hob.* 128.

17. In Debt, the Plaintiffe declared upon a Recognition taken before the Lord *Hobart*, Lord Chief Juſtice of the Common Pleas, in Fleetſtreet, in Serjants Inn, out of Term, and laid his Action in *London*; The Queſtion was, Whether the Action ought to be brought in Middleſex, where the Recognizance is Recorded and Enrolled, or in *London*; becauſe the Entry of the Record is, That the Recognizance was acknowledged before the Lord *Hobart*, *ut ſupra*: In this caſe it was agreed, That although it was not a perfect Record before it was entred upon the Roll, yet when it is entred, it is a Recognizance from the firſt acknowledgement, and bindes the perſon as a Recognizance from that time. 2. It was Reſolved, That the *Scire facias* upon ſuch a Recognizance, ſhall be directed to the Sheriffs of *London*, and not to the Sheriffs of *Middleſex*: But if the Entry of the Record were general, That the Record was taken before the Lord *Hobart*, then it ſhould be underſtood it was in Court; and then it was Reſolved, that the Action was to be brought in *Middleſex*, Mich. 14 Jac. in C. B. *Hall* and *Winckfeilds* Caſe. *Hob.* 195.

See more of *Inrolments*, in *lib.* 1. in the Title *Deeds*, and *Bargain* and *Sale*; and *poſtea* in the Title *Relation*.

Joynder in Action.

Joynder in Action; and who ſhall, or may, or muſt joyne in Actions, who not; And where one Action muſt be brought againſt the perſon, or where ſeveral Actions; And in what Writs they may joyn, in what not.

1. ONe Action upon the Caſe was brought by two ſeveral men for calling them falſe Knaves and Thieves: It was adjudged, That they cannot joyne in one Action, becauſe the Defamation of the one, is not the Defamation of the other; and ſo it is in caſe of Falſe Impriſonment, Trin. 28 H. 8. *Dyer*, 19.

2. A. one of the Clerks of the Chancery, married a woman who was Executrix to her Husband, In an Action of Debt brought againſt them in the Common Pleas; the Husband brought a Writ of Priviledge to have removed the ſaid Action into the Chancery; and by all the Juſtices the Writ was diſallowed, and the Defendant Ruled to anſwer there, becauſe the Wife was joyned with the Huſband in the Action there, and ſhe could not have the priviledge, and therefore not the Husband; and ſo it was adjudged by the whole Court: But ſee 27 H. 8. 20. Where a man brought an Action in the Common Pleas againſt Husband and Wife, and at the *Pluries* Retorned, he and Wife were Arreſted into an Inferiour Court *veniendo* to *Weſtminſter*, and becauſe the Husband had Priviledge there, the Wife had it; but *Dyer* ſaid, That the reaſon of that was, becauſe the Wife came in aid of her husband, Mich. 24 Eliz. in C. B. *Pole's* Caſe, *Godbolt* 10. See Trin. 17. Car in B. R. *Levit* and Sir *Simon Fanſhawes* Caſe, acc.

3. One charged two men as Receivors; The Queſtion was, if one of them might plead, *Ne unque ſon Receiver*? It was ſaid, he could not; but *Ne unque ſon Receiver abſque hoc*, That he and his Companions were Receivers: It was holden by the Court, that it was well without Traverſe; See 10. E. 4. 8. An Accompt was brought againſt one, ſuppoſing the Receipt of 200 l. by the hands of J. P. and R. C. the Defendant as to 100 l. pleaded, That he received it by the hands of J. P. *tantum*, without that, that he received it by the hands of J. P. and R. C. and as to the other 100 l. he received them by the hands of R. C. only. It was there doubted if it was good or not: but See *Fitz.* Acc. 14. If an Accompt be brought againſt two, and one ſaith, he was his ſole Receivor, and hath accompted before ſuch an Auditor; if the Plaintiff anſwer to his Bar, he ſhall abate his Writ, becauſe the Receipt is ſuppoſed a joynt Receipt, Mich. 29 Eliz. in B. R. *Godbolt* 43.

4. If two men be partners of Merchandizes in one ſhip, and one of them appoints and makes a Factor of all the Merchandizes; it was moved, and not denyed by the Juſtices, that both of them may have ſeveral Writs of Accompt againſt him, or they may joyn in one Writ of Accompt if they pleaſe, Mich. 29 Eliz. B. R. *Godbolt* 90.

5. A. and others, brought Treſpaſs againſt B. for breaking their Cloſe, and carrying away their Corn: It was found by Verdict, that A. was ſole ſeized of the Cloſe, where &c. and ſo ſeized, *expoſuit ad Culturam*, to the others; *viz.* That the ſaid A. ſhould find one half of the Corn ſowed, and the other parties the other half; and that the ſaid Land ſhould be Plowed and Tilled, and the Corn thereof coming be reaped and cut at the charges of the other parties. It was the opinion of the Court, That notwithſtanding the words *Expoſuit ad Culturam*, that no Eſtate therein paſſed to the other parties, but the ſaid A. did remain ſole ſeized, as before; and therefore it was adjudged, That they could not joyn in the Action of Treſpaſs for breaking of the Cloſe; and therefore it was adjudged, *Quod* the Plaintiffes *nihil Capiant per Breve*. Hill. 20 Eliz. in C. B. *Hare* and *Okelies* Caſe, *Leon.* 325.

6. Husband and Wife were Tenants for life, the remainder to an Infant in Fee, and they three levied a Fine, and the Infant only brought a Writ of Error to Reverſe it: It was objected, That they all three ought to joyn in this Writ, and that the Husband and Wife ought to be ſummoned and ſevered: But it was the opinion of the Court, That the Writ was well brought; for the Error is not aſſigned in the Record, but without it in the perſon of the Infant, and that is the cauſe of the Action by them, and for no other: Two Infants levie a Fine, although they joyn in Error, yet they ought to aſſigne Errors ſeverally, and they may Sue ſeveral Writs of Error: Afterwards it was holden by the Court, That the Writ was well brought, and the Fine was reverſed as to the Infant only; Mich. 31 Eliz. in B. R. *Piggot* and *Harringtons* Caſe, *Leon.* 317.

7. A. was bound in a Recognizance to B. in 1000 l. and afterwards he enfeoffed the Conuſee of part of the Land; and conveyed the reſt of the Land to C. his Son, and E. his Wife, for the joynture of the Wife; the Conuſee ſued forth Execution upon his Statute; and thereupon C. alone, without

without mentioning his Wife, brought an *Audita Querela*. It was the Opinion of the Court, That the not naming of the Wife in the Writ, did not prejudice the Plaintiff, but that the Writ was well brought. Mich. 3 Eliz. *Dyer*, 194.

8. A Replevin was brought against six, the one avowed, and the other five made Conusors as Bayliffs to the first, for an Amercement for the breaking of a By-law in a Leet. Judgment was given against them, and Costs and damages: And they six brought a Writ of Error, and the Defendant in the Writ of Error, pleaded the Release of one of the five in Bar. It was Resolved in that Case, That because the Law compelled the Defendants to joyn in the Writ of Error, to reap no benefit, but to discharge themselves of a charge imposed upon them, that the Release of the one did not bar the other. See *Cook* 6. Part, 25. *Ruddock's* Case. See there, In an appeal, four men were Outlawed, they all four joyned in a Writ of Error, two appeared, and two made default. It was agreed, it was the default of them all, because it was their folly that they joyned in the Writ, for they might have had several Writs; but in *Ruddock's* Case they were compelled to joyn, and so no folly in them, *ibid.*

9. Debt was brought by six Executors named in the Writ, and after three of them being summoned and severed, the three others bring Debt upon an Obligation made to the Testator: Upon *Non est factum* pleaded, Judgment was given for the Plaintiff. Error brought and assigned, for that there was no mention in the Writ of those who were summoned and severed; for they being alwayes Executors, ought to be named in the Judgment. It was said by the Preignothories, That the course was, That upon summons and severance, that Judgment should be only for those who prosecuted; which course the Court approved, and to be no cause of Error, for that they who were severed, never proved the Will, or it may be, never will prove it, or administer; and therefore Judgment shall be only for those that prosecuted. Mich. 11 Car. in B. R. *Price* and *Packhurst's* Case. *Cro.* 1. Part, 303.

10. A man Covenanted to stand seised of a Farm, and 100 Acres of Lands thereunto belonging, to the use of himself and his Wife for their lives, for the Joynture of the Wife, and after to the use of his Son and Heir, excepting the Timber-Trees, saving that his Wife shall have, and take the shrowds and loppings of them, and dyed, the Wife survived, and took to Husband the Plaintiff. The Defendant as Son and Heir, cut down five Oaks growing upon the said 100 Acres, whereby the Plaintiff lost all the benefit he might have of the loppings: Upon Not Guilty, being found for the Plaintiff. It was moved (amongst other exceptions), That the Action here is brought by the Husband and Wife, whereas the Husband alone should have brought the Action, for he only might have released the damages, and the wrong is to his possession. But the Court disallowed of the Exception, for the Husband having the Land in the right of his Wife, he may well joyn her with him in suing for the damages, and she shall have the damages, and the Action also, if she survive her Husband. Hill. 11 Car. in B. R. *Trigmiel* and *Reeves* Case. *Cro.* 1. Part, 316.

11. Two were joyntly convicted in a Bill of Trespass of a Rescous in *Middlesex* in the Kings Bench, to the damages of 40 l. they joyned in an attaint. It was holden in that Case, That although the Fine and Imprisonment be several, yet they may well joyn in an Attaint against him, inasmuch as the Plaintiff hath joyned them in one Action. 30. *Ass.* 49. In a Court Baron, If two are amerced for one Trespass outragiously, they shall not joyn in a Writ *de Moderata Misericordia*, for they should be amerced severally, although the Trespass be made joyntly. See *Fitzh. Nat. Br.* 75. *Cook* 11. Part, 43. in *Godfreyes* Case.

12. *Audita Querela* was brought by three to avoid a Judgment against the said three, where one of them was only taken in Execution upon the Judgment, the others not being touched, Exception was taken to the Writ, because he who was in Execution, ought only to have had the *Audita Querela*, and the others who never yet were grieved, ought not to joyn with him. But the Court was of Opinion, That the Writ was well brought, for they being parties to the Judgment, and lyable to the Execution, although it was never had against them, yet for their Indemnity, might well have an *Audita Querela*, and joyn with him who is in Execution. Hill. 11 Car. in B. R. *Corbet* and *Bates* Case. *Cro.* 1. Part, 320.

13. A man held by Herriot Customs of divers Lords; and he made a Fraudulent Conveyance of 20 Horses: One of the Lords brought debt for him and the Queen for the value of the 20 Horses, upon the Statute of 13 Eliz. It was the Opinion of *Dyer* and *Harper*, that the Action was maintainable; but *Manwood* held the contrary, because the other Lords were grieved as well as he; and the Statute shall not be construed to aid only one concerning his Grief. And *Harper* Justice held, That all the Lords might joyn in one Action; but Quære *hoc*. Trin. 18 Eliz. *Dyer*, 351.

14. Debt upon an Obligation of 40 l. the Defendant pleaded a Release, the Plaintiff demanded *Oyer* of the release, which was, That the Plaintiff acknowledged himself to be discharged of all Bonds, Debts, and Demands by the Defendant, untill the day of the Release; and that the Plaintiff is to deliver

liver all Bonds as he hath yet undelivered to the Defendant, except one Bond of 40 l. not yet forfeited, in which he and two others ſtand bounden to the Plaintiff; and the Plaintiff averred, That the Obligation which was excepted, and whereupon the Action is brought, is all one Bond; upon which the Defendant demurred in Law. It was Reſolved in this Caſe, amongſt other points, that the Plaintiff had miſconceived his Action, for that it appeareth upon his own confeſſion, that the Bond of 40 l. excepted, was a Joynt-Bond; and therefore his Writ did abate, becauſe he had brought his Action againſt one only. *Cook* 9. Part, 53. *Hickmots* Caſe.

15. A man ſeiſed of a houſe in Gavelkind, having Iſſue three Daughters, A. B. and C. gave the houſe to A. and the Heirs of her body, the Remainder of the moyety to B. in tail, the Remainder of the other moyety to C. in tail; and if B. dye without Iſſue, the Remainder of her moyety to C. with the like Remainder for want of Iſſue of C. to B. A. Tenant in tail diſcontinued, and dyed without Iſſue. B. dyed without Iſſue, by which the right of her moyety came to C. afterwards C. dyed, and her right diſcended to ſeveral Heirs in Gavelkind, who brought one Formedon in the Remainder, and by one Writ demanded ſeveral Remainders. In this Caſe, it was adjudged, That when all is given to A. in tail, although that the Donor divides the Remainders by moyeties: Yet when all the Land doth remain to C. and all the Remainders do depend upon one eſtate, and are derived out of one root, and begin by gift at one time, the Heirs of C. might have one Formedon in the Remainder, and ſhall not be driven to ſue ſeveral Formedons in the Remainder. In this Caſe, it was further holden for Law, That in all real Actions founded upon Title; If there be two ſeveral diſtinct gifts to one, with ſeveral Remainders over to one; there, becauſe the Foundation of them is the gift, which was ſeveral, there ought to be ſeveral Writs; but if the Foundation be one, at one time, and out of one root, there, although that they are ſeveral Inheritances, yet one Formedon lyeth, and not ſeveral Formedons. Alſo in all real Actions founded upon Tort, and not upon Title; The Demandant may demand by one Writ divers Lands which come to him by ſeveral Titles. As if divers Remainders diſcend from divers and ſeveral Anceſtors, and I be Diſſeiſed of them, I may have one Writ of Right, or Entry, in the nature of Aſſiſe, comprehending all the Rights in one Writ, becauſe that in theſe Caſes, no title is made in the Writ: But if I bring a Writ of Entry upon a Diſſeiſin made to my Mother and my Aunt, Coparceners in Feeſimple, the Writ ſhall abate, for that their Title is to be made in the Writ. *Cook* 8. Part, 68, 69. *Buckmers* Caſe.

16. Three Coparceners and a ſtranger, purchaſe the part of one of them, he and the other cannot joyn in a Writ *de Partitione facienda* againſt the third, neither by the Common Law, nor by the Statute of 32 H. 8. cap. 32. becauſe the one may have a Writ at the Common-Law, and the other by the Statute Law, and ſo they have ſeveral remedies, and therefore they ſhall not joyn in one Writ. *Cook* 1. Part, *Inſtitutes*, 175. See Mich. 8 Eliz. *Dyer*, 243. acc.

17. Three Coparceners are of a Reverſion, one alieneth her part; the particular Tenant dyeth, the eldeſt entreth into the whole. It is the better Opinion of the Book, that the Grantee, and the other Coparcener, cannot joyn in a Writ *de Partitione facienda* againſt the third. 3 *Ma. Dyer*, 128.

18. Note, It hath bin taken for a Rule in Law, That Tenants in Common ſhall joyn in ſuch Actions where the Recovery of the one ſhall give advantage to the other: As in an Aſſiſe of *Nuſans*, the thing which is done to the Nuſance ſhall be removed, and ſhall be an advantage to them both. And ſo it is *in Secta ad Molendinum, Quare Impedit, &c.* But in a Writ of Forger of Falſe Deeds, they ſhall not joyn, for there the Recovery of the one, ſhall not give advantage to the other, for nothing ſhall be recovered but damages, and that the Deed ſhall be cancelled. And ſo in a *Curia Claudenda*, or in a Writ of Cuſtomes and Services, they ſhall joyn for the reaſon aforeſaid. *Fitzh. Nat. Br.* acc.

19. If two men be robbed of one joynt ſum of money: It was holden that they might joyn in an Action upon the Statute of *Winchester*; but contrary if it was of ſeveral ſums. Paſc. 22 Eliz. *Dyer*, 370.

20. Error was brought of a Judgment upon a Demurrer in the Common Pleas: The Error aſſigned was, becauſe the Record was, *Ad reſpondendum Domino Regi, et Præſidenti Collegii, &c. Qui tam pro Domino Rege, quam pro ſeipſo ſequitur quod reddat ei 60 Libras, unde idem Præſidens, qui tam, &c.* whereas the Action ought to have bin brought by the Preſident only, *qui tam, &c.* and not by the King and Preſident. But the Exception was diſallowed by the Court: For being an Original Writ, the Writ is moſt often ſo, and ſometimes it is otherwiſe, and the Court conceived it was good both wayes. But the Court ſaid, That Informations are alwayes, That the party, *qui tam*, for the King *quam pro ſeipſo ſequitur, &c.* Trin. 8 Car. in B. R. *Butler*, and the Preſident of the Colledg of Phyſitians Caſe. *Cro.* 1. Part, 186.

21. A. and B. ſued in the Admiral Court before the Lieutenant of the Admiral J. S. for a thing done upon the body of the County. J. S. brought his Action

Action upon the Case in *London* against A. only, and the Writ was brought upon the Statutes of 13 R. 2. and 2 H. 4. *ad respondendum tam Domino Regi et Dominæ Reginæ quam* J.S. and declared against A. only, with a *simul cum prædict.* B. and upon this Count and Declaration, it was demurred in Law; and one point was, If the Action brought by the King, and the party grieved, were good, and that depended upon this matter, if this suit and vexation by two were not several in themselves, and in the Election of the party, whether he would sue both in one Action, or not; for it was conceived, That this contempt *contra prohibitionem actus*, was a crime and contempt to the Crown, and in this Offence, each of them is principal: And divers Precedents were shewed, where the like Action was so brought, *viz.* 1 *Ma.* in B. R. by *Swinton*; *Qui tam pro Regina quam pro ipsâ.* See 4 *Ma. Dyer*, 159.

22. Note, none shall have an Action of Waste, but he who hath the immediate estate of Inheritance in him, but another may joyn in an Action of Waste with him for conformity: As if a Reversion be granted to two, and to the Heirs of one of them, they shall joyn in the Action. The same Law is of the surviving Coparcener, and the Tenant by the Curtesy. *Cook* 1. Part, *Institutes*, 53.

23. So note, when a Right discends to Parceners from one Action, there they shall joyn in Actions real auncestrel, although they are in several degrees from the same Auncester, but their Issues shall not, because a several Right doth discend from several Auncestors to every one of them. *Cook* 1. Part, *Institutes*, 164. See before *Cook* 8. Part, *Buckners* Case, &c.

24. Note, for things entire, Tenants in common shall joyn in Actions, but for things severable and realls, they shall have several Actions real; but they shall joyn in personal Actions. *Cook* 5. Part, 21. *Cook* 1. Part, *Institutes* 196.

25. Three Covenanted joyntly and severally, with two severally, and afterwards one of the Covenanters married with one of the Covenantees. It was the Opinion of the Justices in that Case, That a man might Covenant with two severally, for that a Covenant sounds only in damages, and it differs from the Case of a Bond; but the Court held clearly, That they ought not in such Case to joyn in an Action of Covenant. Trin. 17 Car. in C. B. *Marsh.* 103.

Joynture.

1. *Joynture; What it is; What shall be said to be a good Joynture within the Statutes of* 11 *H.* 7. *cap.* 20. *The Statute of* 27 *H.* 8. *What. And where the acceptance of a Joynture shall bar the Wife of her Dower; where not.*

1. A Joynture is a competent livelihood of Freehold for the Wife, to take effect presently after the death of her Husband, if she be not the cause of determination, or forfeiture thereof: and therefore if the Husband maketh a Feoffment in Fee to the use of his Wife for another mans life for her Joynture, the same is not a Joynture within the said Statutes; for that the estate is not for the Wives life. But if a man maketh a Feoffment in Fee to the use of himself for life, and after to the use of his Wife during her Widdowhood for her Joynture, the same is an estate to her for her life, and it cannot determine without her own act, and therefore it is a Joynture within the said Statutes. *Cook* 4. Part, 3.

2. A. seised of the Mannor of T. in Fee, and A. and his Wife seised of the Mannor of H. to them, and the Heirs of their two bodies begotten, by an estate made to them before the Coverture for the Joynture of the Wife, the Reversion to A. in Fee: F. amounting to the value of two parts, and H. to the third part, both holden in *Capite*. A. by his Will devised the Mannor of F. to his Wife for life, upon Condition that she should not take her former Joynture in H. with divers Remainders over; the Wife by word in *pais*, waived her estate in H. and agreed unto the Mannor of T. and entred into it. In this Case (amongst other) these two points were Resolved. 1. If Lands in the Common-Law were given to Husband and Wife in tail, or in Fee, and the Husband dyed, the Wife could not devest the Freehold out of her, by any verball waiver or disagreement in *pais*; but if she agreed to the estate by word in *pais*, then she might waive such estate afterwards in a Court of Record. 2. Resolved, That an Estate created by limitation of use, before the Statute of 27 H. 8. of uses, could not be waived by word in *pais*. But it was Resolved in the principal Case, the refusal in *pais* to have the Mannor of A. and the entry and agreement

agreement to the Manner of T. was a good agreement to the one, and a refusal to the other, and thereby the Inheritance devested by the Statute of uses; by which Statute a Woman may refuse her Joynture in *pais*, and be endowed by consent in *pais*, or by Writ of Dower. *Cook* 3. Part, 28, 29. *Butler* and *Bakers* Case.

3. The Husband seised in Fee, made a Feoffment to the use of himself, without impeachment of Waste, and after his decease, to the use of his Wife for her Joynture, upon Condition that she should perform his last Will; the Husband dyed, the Wife entred, and agreed to that estate, and afterwards brought a Writ of Dower. In that Case, these points were Resolved. 1. That by the Common Law a Right or Title which a Woman had to an Estate of Inheritance, or Freehold, could not be barred by acceptance of any collateral satisfaction or recompence, if it be not by Release, Confirmation, or a thing which did amount to as much. 2. That the Estate limitted in Remainder to the Wife for her life, is a good Joynture within Statute of 27 H. 8. but such estate ought to take effect immediately after the death of the Husband. 3. That an estate limitted to the Wife upon Condition, is a good Joynture within the said Statute, if the Wife after the death of the Husband accept of it. 4. Resolved, That if a Joynture be made to a Woman before Coverture, that after the death of the Husband, she cannot waive the same and take her Dower as she may of a Joynture made to her during the Coverture; but if Lands be conveyed to a Woman before Coverture for part of her Joynture; and after marriage more Land is conveyed unto her for her full Joynture, and in satisfaction of her Dower; if after the death of the Husband, the Wife waives the Land conveyed to her after marriage, she shall retain the other Land and her Dower also, for that the Land conveyed to her in part of her Joynture, is not a bar of Dower for the incertainty of it. 5. Resolved, That no estate made to a Woman upon Condition to perform his Will, may be averted to be for the Joynture of the Woman. *Cook* 4. Part, 1. *Vernons* Case.

4. The Duke of *Somerset* purchased Lands to himself, and to the Dutchess his Wife, and to the Heirs Males of their two bodies, which is not mentioned to be an Estate mentioned within the Statute of 27 H. 8. to be a Joynture which shall be a bar in Dower; yet it was adjudged to be a good Joynture within the intent of the said Statute. Hill. 1 Eliz. *Dyer*, 96.

5. A. seised of Lands in performance of Covenants of Marriage of his Son with one B. made a Feoffment to the use of B. for life for her Joynture; the Marriage took effect, and the Father dyed. It was found by Office, That the Son was seised of the Land in Fee *ut supra*, and of other Lands holden of the King in Knight-Service, as of his Dutchy of *Lancaster*, his Heir within age, the Wife sued to have her Dower of the other Lands. It was the Opinion of the Justices, That this was a good Joynture to B. within the intent of the Statute of 27 H. 8. and yet the Estate was made before Marriage, so as there was not any Husband or Wife at the time of the making of the Estate, and the Estate made, was only to the Woman. Mich. 7 Eliz. *Dyer*, 228. *Ashtons* Case.

6. It was concluded and agreed by Indenture, between Sir *Maurice Dennis*, and E. S. aswell in consideration of Marriage after to be had betwixt them as for other considerations, that the said Sir *Maurice* and his Heirs, would from thenceforth stand seised of divers Lands to the use of himself and his Heirs, untill the said Marriage solemnized betwixt them, and after the Marriage to the use of the said Sir *Maurice* and *Eliz.* and their Heirs; the Marriage took effect, Sir *Maurice* dyed. It was Resolved in that Case, That although it was an Estate in Feesimple which was conveyed to the Wife; yet it was a good Joynture within the Statute of 27 H. 8. for it is a competent livelihood to the Wife, to take effect immediately after the death of the Husband, which is within the definition of a Joynture. Hill. 8 Eliz. *Dyer*, 248. Sir *Maurice Dennis*'s Case.

7. If a man deviseth Lands to his Wife generally, it cannot be averred to be for the Joynture of the Wife, and in satisfaction of her Dower; because a Devise cannot be averred to another use then to the Devisee, if it be not expressed in the Will. But if a man deviseth Lands to a Woman for Term of her life, or in tail, &c. for her Joynture, and in satisfaction of her Dower. It was Resolved, That the same is a good Joynture within the Statute of 27 H. 8. for as an estate for life made be to a Woman before Marriage, when she is not his Wife, is within the equity of the Statute, so an Estate made to a Woman for her life, which taketh effect presently after the death of her Husband, when the Marriage is dissolved, is within the equity of the said Statute. Mich. 39 Eliz. in the Court of Wards, *Leake* and *Randalls* Case, vouch. in *Cook* 4. Part, 4. in *Vernons* Case.

8. If a Woman hath Lands conveyed unto her for her Joynture, and she enters, and claimes them for her Joynture, and after the death of her Husband, she brings a Writ of Dower, intending thereby to have her Joynture, and Dower also. It was adjudged in that Case, That by the bringing of her Writ of Dower, she estopped her self to claim any

eſtate in the Land conveyed to her before, as it was Reſolved in *Purſlow* and *Sharps* Caſe. See *Cook* 4. Part, 5. acc.

9. In Dower, the Defendant pleaded in Bar, That the Father of the Husband of the Demandant was ſeiſed of Lands in Fee, and made a Feoffment to the uſe of himſelf for life, and after to the uſe of the Husband and his Wife for their lives for the Joynture of the Wife, the Remainder to their right Heirs; and that afterwards the Father dyed in the life of the Husband, and after the Husband dyed. It was adjudged, That this was no Joynture to bar the Dower, becauſe the Eſtate of the Wife at the commencement, took not effect immediately after the death of the Husband, *et quod ab initio non valet, tractu temporis non convaleſcit*: And it was ſaid, That if a Feoffment be made unto the uſe of the Husband for life, the Remainder to J. S. for years, the Remainder to the Wife for her Joynture, this is not a Joynture to bar her Dower. Trin. 20 Jac. in C. B. *Sherwells* Caſe. *Hutton*, 51.

10. An Aſſurance was made to a Woman, to the intent it ſhould be for her Joynture, but it was not ſo expreſſed in the Deed. The Opinion of the Court was, That it might be averred, that it was for a Joynture, and that ſuch an averment was not traverſable: And ſo it was ſaid it was adjudged in a Caſe between the Queen and the Lady *Beaumont*. Trin. 7 Eliz. *Owen* 33.

11. A. ſeiſed of Lands in Fee, having Iſſue three daughters: By Indenture betwixt him and B. in conſideration of 200 l. paid by the ſaid B. and in conſideration of a marriage betwixt C. the Son of the ſaid B. and M. the Daughter of A. and for the eſtabliſhing of all his Lands in his bloud, to have continuance for ever, Covenanted to aſſure a moyety of ſuch Lands to the uſe of the ſaid C. and M. his Wife, and the Heirs of her body, begotten by the ſaid C. the Remainder over. And of the other moyety of his Lands, to the uſe of the ſaid C. and M. and the Heirs of her body, *ut ſupra*, the Remainder over; and of the reſidue of the ſaid A. for life, the Remainder *ut ſupra*, with Proviſo for A. to make Leaſes for 21 years. The Conveyances were made accordingly. C. dyed, M. took a ſecond Husband, they by Fine conveyed the Land to the Defendant, upon whom the Iſſue entred, as upon a forfeiture by the Statute of 11 H. 7. It was adjudged in this Caſe, That M. was not any Joyntreſs within that Statute, for it is an advancement by the Anceſtors of the Woman, and it is not of the purchaſe of the Husband, or his Anceſtors, nor is it aſſured by the Anceſtors of the Husband; And although money is found to be paid, yet it is not found to be of the value of the Land, nor of what value the Land was; and it is immediately for the life of the Husband, which may be an Eſtate ſufficient for the money. Trin. 6 Car. in B. R. *Copland* and *Pyatts* Caſe. *Cro.* 1. Part, 177.

12. A. ſeiſed of Lands in Fee, Covenanted with B. aſwell in conſideration of 200 l. paid by B. as in conſideration of Marriage betwixt L. his Son, and E. the Daughter of B. to convey Lands to the uſe of L. and E. and the Heirs of the body of E. to be begotten, and to his right Heirs; the Marriage takes effect, the Father dyes before the aſſurance: L. in performance of his Fathers Covenants, makes the aſſurance, and afterwards they have Iſſue. Afterwards L. makes a Feoffment to W. to whom L. and E. his Wife levyed a Fine: A. enters as for a forfeiture, by the Statute of 11 H. 7. Reſolved, 1. That although this was a Conveyance aſwell for money, as in conſideration of Marriage; yet it being by the Husband or his Anceſtors, it was a Joynture within the Letter and meaning of the Statute of 11 H. 7. The ſecond point was this, being a Joynture within the ſaid Statute, if the alienation by the Wife with her firſt Husband be a forfeiture within the Statute. It was Reſolved it was not any forfeiture within the words, nor within the intent of the Statute. Not within the words, for the words be, If any Woman being ſole, or with any after taken Husband, and here ſhe was not ſole, and this Husband who conveyed it, is he who was married to the Wife before the Conveyance: Alſo it was out of the intent of the Statute, becauſe the Husband who made the Aſſurance, joyned with the Wife in the alienation, and this Statute is to be taken ſtrictly. Paſc. 16 Jac. in B. R. *Kirkman* and *Thomſons* Caſe. *Cro.* 2. Part, 474, 475.

13. In a Writ of Error to reverſe a Judgment in a Writ of Dower in the Common-Pleas, there were two Queſtions. 1. If a Feme-Covert hath an eſtate limitted to her by her Husband for life, the Remainder to a ſtranger in tail, and afterward the Husband alters this eſtate, and limits to the Wife another Eſtate; Whether the Wife hath Election which Eſtate ſhe will have, and waive the remitter, and ſo prejudice him in the Remainder, or if for the benefit of him in the Remainder, ſhe ſhall be remitted *volens nolens*, notwithſtanding her claim to take by the ſecond Eſtate limitted. It was adjudged in the Common-Pleas, that ſhe was remitted for the benefit of him in the Remainder. And upon this Writ of Error brought. It was the Opinion of the Juſtices in this Court alſo, That ſhe is remitted inſtantly by her entry; and that it is not any Joynture, becauſe it is an Eſtate for life, limitted to begin after an Eſtate tail: And although the

the eſtate tail be ſpent by the husbands death without Iſſue, ſo as her Eſtate begins preſently by the death of her husband; yet forasmuch as whatſoever happens, it could not be ſaid to be a Joynture at the beginning, what afterwards happens, ſhall not make it to be a Joynture. See the Caſe at large, Trin. 16 Jac. in B. R. *Barbara Wood*, and Sir *John Shurley* and his Wives Caſe. *Cro.* 2. Part, 489.

14. A. ſeiſed of Lands in Fee, having Iſſue two Daughters M. & E. Covenants with J. K. in Conſideration of Marriage betwixt the ſaid J. K. and the ſaid M. his Daughter; and in Conſideration of 100 l. to be paid by the ſaid J. K. at ſuch a day, to aſſure thoſe Lands by Fine to the uſe of himſelf for life, and after to the uſe of the ſaid J. K. and M. and the heirs of their bodies, the Remainder to the ſaid E. and her right heirs: the Marriage takes effect; J. K. and M. had Iſſue R; J. K. dyed; M. took a ſecond husband, and aliened the Land by Fine to the Defendant: R. enters for the forfeiture. It was the Opinion of all the Barons in the Exchequer in this Caſe, That this is not any Joynture within the Statute of 11 H. 7. becauſe the Land moved from the Wives Father, and her advancement in Marriage, is intended to be the cauſe of the guift, and not the money; and this appears by the limitation, becauſe it is to her and her husband in ſpecial tail, and after to the wife in general tail; and for want of her Iſſue to her ſiſter in Fee: and although the husband paid the 100 l. that is not to be intended a valuable Conſideration for the Land; but for the eſtate limited to him. Mich. 19 Jac. in the Exchequer. *Xynſton* and *Lloyd*'s Caſe. *Cro.* 2. Part, 624. See *Copland*s Caſe before.

Joynt-Tenants, Joynt Tenancy, *and* Tenants *in Common.*

1. *Where, and by what Feoffment, Graunt, Guift, Will, Deviſe or Limitation, by Deed, or without Deed, men ſhall be ſaid to be Joynt-Tenants, or Tenants in Common: And by what not.*

1. A Man deviſeth Lands to his eldeſt Son, and to his youngeſt Son; *Gawdy*, Juſtice, conceived, That they were Tenants in Common, becauſe the eldeſt ſon ſhould take by Diſcent. But the Opinion of the Court was, That they were Joynt-Tenants: For if a man make a Guift in tail to his eldeſt ſon, the Remainder in Fee, he ſhall be in by Deviſe for the benefit of the Iſſues, and ſo in the other caſe he ſhall take by the Deviſe for the benefit of him in the Remainder: and ſo in both Caſes, they ſhall be Joynt-Tenants: And ſuch was the Opinion of the whole Court. Mich. 29 Eliz. in C. B. *Goldeſbr.* 28.

2. If a man ſeiſed of Lands in Fee, hath Iſſue two Daughters, and he Deviſeth his Lands to his Daughters in Fee; The Opinion of the Court was, That they are in by Deviſe, and not by diſcent, and ſo they be Joynt-Tenants, and not Parceners: Otherwiſe it ſhall be, if there were but one Daughter, and the Father Deviſeth the Land to her: ſo if he deviſe the Land to his ſon and heir in Fee. Mich. 40 Eliz. in C.B. *Goldeſbr.* 141.

3. A. let Land to two, *Habendum vis ad terminum vita eorum (conjunctim) et alterius diutius viventis et aſſignis ſuis qui primus eorum decedere contingent. durante vita ejus qui ſuperſtes, et non aliter*: In that Caſe, the Opinion of the Court was, That they were Joynt-Tenants. Then the Queſtion was, If he which dyed firſt, doth aſſign all? If the whole ſhall paſſe, or but a moyty? Mich. 31 H. 8. *Dyer*, 46. See *Cook* 1. Part, *Inſtitutes*, 187. he can aſſign but a moyty, becauſe he hath but a moyty in right.

4. If a man give Lands to a man, and to ſuch a Woman as ſhall be his Wife, the man taketh the whole; but if a man maketh a Feoffment in Fee,

to the uſe of himſelf and his Wife that ſhall be, the Wife ſhall take joyntly with him, notwithſtanding that at the firſt all veſts in the husband. See *Cook* 1. Part, 101. in *Shelleys* Caſe. See 17 Eliz. *Dyer*, 340. acc.

5. If a Leaſe be made to A. during the life of B. and C, without ſaying, [And during the life of the Survivor of them] if one of the *Ceſtuy que uſes* dyeth, the Eſtate is not determined; but A. ſhall have the Term during the life of the Survivor of them: And ſo it was Reſolved. Mich 5 & 6 Eliz. at St. *Albans* Term. For one had a Freehold by way of Limitation of Eſtate during the life of two men, and by conſtruction of Law during the life of the ſurvivor of them. *Cook* 5. Part, in *Brudnell's* Caſe.

6. A Copyholder ſurrendred to the uſe of a *Feme Covert* for life, the Remainder to the right heirs of the husband and wife; the Wife dyed, having Iſſue by a former husband: afterwards the Husband dyed, and his heir brought a Plaint in the nature of an Aſſiſe againſt the Heir of the husband. *Raſtall* demanded of the Juſtices, What the Law was in that caſe. It was the Opinion of the Juſtices, That for one moyty it was executed to the Wife in her life (as Tenant for life; the Remainder to his right Heirs, hath a Fee executed) and for the other moyty it ſhould be alſo to the Heir of the wife by way of Remainder, for the husband cannot; for it was limited, to their right heirs, and he who firſt could ſhould have it; but if both had been dead during the life of the Tenant for life, they ſhould take entirely as purchaſors. But if the husband dyed firſt, his heirs ſhould have one moyty as a purchaſor; and the heir of the wife the other moyty as executed in the life of his Mother. Mich 4 & 5 Eliz.

7. A Rent of 10 l. *per annum* is granted to A. and B. *Habendum* to them; *viz.* to A. untill he marry) and to B, untill he be preſented to the Church of D: It was holden, That in this caſe they are Joynt-Tenants, notwithſtanding the ſeveral limitations; and if one of them dyeth before marriage, or preſentment, the Rent ſhall ſurvive. *Cook* 1. Part, *Inſtitutes*, 180.

8. If Lands be given to two men, and to the heirs of their bodies, the Remainder to them and their heirs, they are Joynt-Tenants for life, Tenants in Common of the Eſtate tail, and Joynt-Tenants of the Fee-ſimple. *Cook* 1. Part, *Inſtitutes*, 183. acc.

9. A man poſſeſſed of a Term for years, deviſeth the ſame to his two ſons equally; It is a Quære in 27 H. 8. *Dyer*, 25. If they be Joynt-Tenants, or Tenants in Common. Hill. 29 Eliz. in the Caſe between *Cook* and *Petwell*, this Quære was Reſolved, That they are Tenants in Common. See *Cook* 3. Part, 33. in *Ratcliff's* Caſe, acc. that theſe words [Equally deviſed] make a Tenancy in Common.

10. Land was given to the Father and Son in tail, the Remainder over; the father dyed, the ſon is his heir in tail, and he diſcontinued the Land, and dyed without Iſſue; there is a Quære in 4 *Ma. Dyer*, 145. Whether he in the Remainder ſhould be put to ſue ſeverall *Formedons*; or have one *Formedon*? But that Quære is Reſolved, in the Caſe, 4 Ma. *Dyer*, 149. where the Caſe was, That before the Statute of 27 H. 8. of Uſes, an uſe of Lands was limited to A. and J. S. in ſpecial tail, they intermarried, and then the Stat. of 27 H. 8. was made, that made them Joynt-Tenants by individed moyties, for that executed the poſſeſſion in ſuch form, quality and condition as the uſe was: and therefore in that Caſe, It was holden, That when the husband did alien the whole to one of the Feoffees; that the wife might have her *Cui in vita* of the moyty; and that if ſhe dyed, the ſon might maintain one *Formedon* of the whole. Trin. 4 Ma. *Dyer*, 149.

11. If one Coparcener grants a Rent to the other two Coparceners for equality of partition, although that the words are joynt, yet they ſhall have the Rent in the degree and quality of Coparcenary, and not joyntly; and if two Coparceners make a Feoffment in Fee, rendring Rent to them and their Heirs, the Heirs of the one and the other ſhall inherit, becauſe that their right to the Land was ſeveral. 15 H. 7. 14. *Plow. Com.* 134. b. *Cook* 5. Part, 8. in Juſtice *Wisdom's* Caſe.

12. If Lands be given to a married man, and a married woman, and to the heirs of their two bodies, it is a good Eſtate tail, and it is a Common poſſibility, that one ſhall dye before the other, ſo that marriage may follow: but if Lands be given to a man and two women, there the Law doth not intend, that he ſhall firſt marry the one, and then the other: and therefore in ſuch caſe they are ſeverall Inheritances at the beginning: As if Lands be given to two men and their wives, and to the heirs of their two bodies begotten; in this caſe, the Law ſhall not expect ſecond marriages; but in this caſe they ſhall have joynt Eſtates for their lives, and the one husband and wife ſhall have one moyty in tail in Common with the husband and wife of the other moyty, and ſo ſeverall Inheritances; otherwiſe there ſhall be a poſſibility upon a poſſibility. *Cook* 10. Part, 50. in *Lampits* Caſe.

13. If a man make a Leaſe of Land to two men during their lives, and they aſſign their Eſtate over, the aſſignee hath an eſtate for the life of the two men; and if one dyeth, he ſhall have it during the life of the other, which is the ſurviour: But if a man deviſeth Lands for 100 years, if A. and

and B. ſo long live, and one of them dyeth, the Leaſe is determined. See Hill. 7 Jac. in C. B. *Hughes* and *Cranmers* Caſe. *Cook Select Caſes*, 66. acc. And the reaſon there given is, for that the life of a man is more collateral unto the Eſtate for years. See 3 E. 6. *Dyer*, 67. *Farringtons* Caſe, There the Caſe was, A Leaſe for years to two, Proviſo, That if they dyed within the Term, that it ſhould ceaſe: they made partition, and afterwards the one dyed. It was there holden, That the Executor of him that dyed ſhould have it; which Caſe ſeems contrary to the Caſe before.

14. Lands were given to three by the premiſſes of a Deed, *Habendum* to one for life, the Remainder to another for life, the Remainder to the third for life: this being found by a Special Verdict, It was the Opinion of the Court, That they were not Joynt-Tenants, but that they ſhould take ſucceſſively. Paſch. 5 Ma. *Dyer*, 160.

15. The next Avoidance was granted to three, *Habendum eis et uni eorum conjunctim et diviſim*; the firſt preſented the third, who was Admitted, Inſtituted, and Inducted. It was adjudged to be good; but if the Biſhop had refuſed his ſole preſentment, It was conceived he might have failed in the *Quare Impedit*; becauſe it was conceived, that the ſeverance by the *Habendum* was void in Law. See 21 E. 4. 18. Mich. 14 Eliz. *Dyer*, 304.

16. A man deviſed Lands to his two daughters in tail; they by word made partition, and then the one dyed. It was the Opinion of the Court, That they were Joynt-Tenants, and that the other ſhould have the whole by Survivorſhip, and that the partition made by word, was not good. But it was there ſaid, Peradventure, if it had been of a Term, it had been good by word. Paſch. 18 Eliz. *Dyer*, 350.

17. A Leaſe to the Mother and Son, to have to them for Term of life, *five uni eorum poſt alterum, ſicut nominantur in Indentura, et non Conjunctim*. It was adjudged, That they were not Joynt-Tenants, but the ſame took by remainder. Mich. 20 Eliz. *Dyer*, 361.

18. A. deviſed Lands to B. and C, and to 4. other perſons, *Habendum* to them, their Heirs and Aſſigns, *in perpetuum et quod eorum omnes haberent equalem et conſimilem partem*; part and part like, and every of them to have as much as the other. It was adjudged in this caſe, That by reaſon of theſe words [part and part like,] and being deviſed to them, their heirs and aſſigns; and being in a Will, it was a Tenancy in Common, and not a Joynt-Tenancy. Trin. 3 Car. in C.B. *Thorowgood* and *Collins* Caſe. *Cro.* 1. Part, 53.

19. A. B. and C. being Joynt-Tenants for years; C. let her part to A; afterwards A. and B. make a Leaſe: and in an *Ejectione Firmæ*, the Plaintiff declared upon the Joynt Leaſe of them both. *Popham* and *Fenner*, Juſtices, held, That this Leaſe well warranted the Declaration; for that upon the matter, they both let the Inheritance. But *Tolverton* and *Williams*, Juſtices, held the contrary, becauſe the Declaration ſuppoſeth, That they both let the Inheritance as Joynt-Tenants, which appears to be falſe; For they two let but two parts joyntly; and the one of them having a third part as Tenant in Common, let that part only; and ſo the Declaration ought to have ſhewed the truth, and the ſpecial matter: It was adjourned. Mich. 3 Jac. in B.R. *Jurdain* and *Steeres* Caſe. *Cro.* 2. Part, 83.

20. In Treſpaſſe, the Caſe was; One deviſeth his Lands to his two ſons, and to the heirs of their bodies; and ſaith, That his Executor ſhall have them, untill they come to their ſeverall ages of 21. years: One attains the age of 21. years; Whether he might enter, was the Queſtion? It was ſaid, It was a joynt Eſtate to them, and that the Survivour ſhould hold place for the Freehold; which cannot be, if they ſhould have ſeveral Commencements, and that the Executor ſhould hold them, untill they both came of full age. But the Opinion of the Court was to the contrary; for the words being, untill they accompliſh their ſeverall ages; that is, *reddendo ſingula ſingulis*, when either of them came to the age of 21. years, he ſhould then have his part and poſſeſſion, and yet the Joynture ſhould hold place. Mich. 8 Jac. in B. R. *Aylor* and *Chepe* Caſe. *Cro.* 2. Part, 259.

21. If before the Statute of 27 H. 8. of Uſes, a Feoffment be made to a man and a woman, and their heirs, and they entermarry, and then the Statute is made; In that caſe, they hold by moyties; for if the husband alieneth, it is good for a moyty, becauſe the Statute executes the poſſeſſion according to ſuch quality, manner, form and condition, as they had in the uſe. *Plow. Com.* 58. in *Talbot's* Caſe. But if a Reverſion be granted to a man and a woman, and their heirs, and before Attornment they entermarry, and then Attornment is had, in that caſe the husband and wife ſhall have no moyties, no more then where a Feoffment is made to a man and a woman, and their heirs, with a Letter of Attorney to make Livery, they entermarry, and then Livery is made *ſecundum formam Chartæ*; in that caſe they have no moyties. *Cook* 2. Part, 68. in *Tookers* Caſe. *Plow. Com.* 483. in *Nicholls* Caſe.

22. A. ſeiſed of Lands in Fee, levied a Fine thereof to B. and C, and to the heirs of B, who granted and rendred the Land to A. and his Wife, (who was not party to the Writ of Diſtreſs, and

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to the heirs of A: A. ſuffered a Recovery with vouchers in the life of his Wife, and afterwards dyed; the Wife dyed: he in the Remainder brought a *Scire Facias* to have Execution of the Remainder. It was adjudged, That it did lye. And in this caſe, theſe Points were Reſolved: 1. That the grant and render to the Wife was not void, but voidable, although ſhe was not party to the Conuſans, nor to the Writ. 2. That this Recovery againſt the husband only ſhould not bind the Remainder; for between husband and wife, there are no moyties, and the Husband hath not power to ſever the Joynture, nor to diſpoſe of any part of the Land, and he during the Wifes life, is not ſeized by force of the Taile, and by no act that he can do, can he execute it for any part; ſo that the *Precipe* being brought againſt him alone, the recompence for any part cannot enure to the Eſtate Taile, or to the Remainder, for to the whole Eſtate it cannot enure, becauſe the Wife hath a joynt Eſtate with him in poſſeſſion at the time of the Record, or who was not party to it, and for a moyty it cannot be good, for there are no moyties between Husband and Wife, and the Eſtate of him in the Remainder doth depend upon the entire Eſtate made to the Husband and Wife, and not upon any part made to the Husband alone; & the Joynt-Tenancy between the Husband and Wife cannot be ſevered by the Judgement given againſt the Husband; and although the Husband hath the whole Eſtate of Inheritance, yet becauſe by no poſſibility it can be executed, nor the Joynture ſevered during the Wives life; in this caſe it is as much as if the Husband alone had had a Remainder in Tail, exportant upon an Eſtate for life, in which caſe Common Recovery againſt him ſhall not binde, becauſe he was not Tenant to the *Precipe*; but the Recovery as to the Eſtate of the Husband took effect by Eſtoppel and Concluſion: Trin. 39. Eliz. in *Owen* and *Morgans* Caſe. Vouch in *Cook* 3. Part, 5. in the Marqueſs of *Wincheſters* Caſe.

23. A. ſeized of Lands holden by Knights Service *in Capite*, by Indenture made between him and B. and did Bargain, Sell, Grant, Releaſe and Confirm unto the ſaid B. Son and Heir apparent of the ſaid A. the Land, to have and to hold to the ſaid B. and C. and their Heirs and Aſſigns, to the only uſe and behoof of the ſaid A. and B. their Executors and Aſſigns for ever; and Covenanted to make further Aſſurance; and Livery and Seiſin was made according to the intent of the Indenture, to the Uſes within mentioned; A. the Father dyed, B. his Son within age: And whether B. ſhould be in Ward to the King was that Queſtion: The chief Queſtion was, if the Father and Son were Joynts or Tenants in Common: It was Objected, That the Father was in by the Common Law in the *Per*, and the Son, as to the other moyty, ſhould be in by the Statute in the *Poſſ*, and ſo Tenants in common; But it was Reſolved by the Court, That they were Joynt-Tenants, and that the Son ſhould have the Land by Survivor; and becauſe the Father and Son were Joynt-Tenants by the original Purchaſe, that the Son being in by Survivor, ſhould not be in Ward, Mich. 7 Jac. in *Cur. Ward. Sammes* Caſe. *Cooks* Select Caſes, 55, 56, 57.

24. If a man and his Wife Enfeoffe two by Deed, To have and to hold, to them and their heirs, and afterwards the Feoffer and his Wife levie a Fine *Sur Conuſans de Droit*, to them, and the heirs of one of them, yet both have the Fee ſimple as they had before; and therefore the fine ſhall but enure as a Releaſe. 2. The Fine *Sur Conuſans de Droit* may ſtand with the Eſtate which they had before, for the Tenements are the right of the one and the other, and the Fine is not Executory, but to extinct of the Right only of the Wife, and therefore it is no Eſtopel. 6 R. 2. Eſtopel. 2 *Cook* 2 Part, 74. in the Lord *Cromwel's* Caſe.

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2. *Where, and by what, and by whoſe Act, and when the Joynt-Tenancy betwixt Joynt-Tenants ſhall be ſevered, and when, and by what not.*

1. TWo Joynt-Tenants are for life, and one makes a Leaſe of his part or moyty for years, reſerving to him and his heirs a Rent; the Leſſor dyeth: if the Term was gone by his death, or that the Survivor ſhould hold the whole Freehold diſcharged of the Term; and admit that the Term did continue, if the Survivor ſhould have the Rent, was a doubt. It was the Opinion of the whole Court, That the Term did continue, but that he ſhould hold it diſcharged of the Rent. Mich. 3 Eliz. *Dyer*, 187. Sec 2 Mar. *Plow.* Com. *Fulmerſton* and *Steward's* Caſe, 101 and *Dyer* 103. acc.

2. A Leaſe is made to two for Term of their lives (this Clauſe being added and expreſſed, *& diutius eorum viventi*) and afterwards they make partition, and one dyed, and he in the Reverſion entred, and his Entry was adjudged lawful, notwithſtanding the word, *& diutius eorum viventi*, for without them ſo much is implyed by the Law, and the partition did not make a ſeverance, as it was holden. 30. Aſſ. 8.

3. Two Joynt-Tenants of a Leaſe for 21 years, one Leaſeth his part for ten years. In that Caſe it was

was holden, That the Joynture is ſevered for the whole; becauſe a Term for a ſmall number of years is as high an Intereſt, as a Term for many years, Hill. 18 Eliz. in C. B. adjudge acc. *Cook* 1 Part, Inſtitutes, 191.

4. Two Joynt-Tenants, one makes a Leaſe for life, the Remainder to his Companion in Fee, it is a ſeverance of the Joynture, and it is a good Remainder, 38 H. 6. 24. So if two Joynt-Tenants be of 20 Acres, and one makes a Feoffment of his part in 18 Acres; the other cannot releaſe unto him his entire part, but only in the two Acres reſidue; becauſe for the 18 Acres the Joynture is ſevered. *Cook* 1 Part Inſtitutes 193.

5. If a Tenant for life grant his Eſtate to him in the Reverſion, and a Stranger; It is a ſurrender for a moyty, for by acquiſition of the Reverſion, and of the particular Eſtate at ſeveral times, his Reverſion expectant upon his particular Eſtate for life, drowns the other, and it cannot remain diſtinct in Law and Grantable over, *Cook* 2 Part, 61. acc. *Weſcots* Caſe.

6. If a Feme ſole, and J. S. purchaſe a Term joyntly, and afterwards they Intermarriage, It was adjudged in *Bracebridges* Caſe, that it was no ſeverance. See 14 Eliz. Dyer 318.

7. A man makes a Leaſe to two for twenty years, and afterwards confirms the Eſtate of one of them for life; *Quare*, If it be a ſeverance of the Joynture, 32 Eliz. *Fitz. Quid juris clamat*, 5. *Br.* Joynt-Tenants, 57.

8. Two Joynt-Tenants and a Releaſe is made to one of them, with Warranty, the ſame is a ſeverance of the Joynture, 24 E. 3. *Quare*, If a Fine executory be a Severance before Execution. See 41 E. 3. 326. per *Perſey*, that it is.

9. Two Joynt-Tenants, one within age, and the other of full age, make a Leaſe for life, and after he of full age dyeth, and the other recovers the moyty in *dum fuit infra ætatem*. Tenant for life dyeth, the heir of the other entreth; the Infant ouſted him, and he brought an Aſſize. *Quare*, If it be maintainable; for when he of full age dyed, the Reverſion ſurvived to him within age: But when he brings *dum fuit infra ætatem*, and recovers his own moyty, and makes it as a Leaſe of the moyty by him in full age: But becauſe it is a priviledge which goes only to his perſon; It was the opinion That the ſurvivor ſhould have the whole; and if he had not brought this Writ, all was once in him by the Survivor.

10. A. and B. Joynt-Tenants for life, the Reverſion over in Fee; Judgement is given againſt A. in Debt, and he Leaſeth to his Companion before Execution; It was Reſolved in this Caſe, That although that A. between whom the Releaſe is made between them, is in by the Leſſor, and not by A. yet as to him who had the Judgement in the Action of Debt, he by his own act ſhould not defeat him of his Execution, but as to him the eſtate of A. hath continuance; but if A. had dyed before Execution, the Survivor ſhould hold the Land diſcharged of the Execution. *Cook* 6 Part, the Lord *Abergevenies* Caſe.

11. Two Joynt-Tenants, one makes a Leaſe for years to the other, and afterwards releaſeth to him for life: *Quare*, How the ſam. Releaſe ſhall enure; if upon the poſſeſſion of the Termer, or upon the joynt Freehold, 40 Edw. 3. 41. 33 Hen. 6. 5.

12. Two joynt Tenants are with Warranty; and the one diſſeiſeth the other, and the Diſſeiſee bainge an Aſſize, and upon his Prayer hath Judgement to recover in Severalty; in ſuch caſe the Warranty is gone. But *Coke* Chief Juſtice ſaid, That he conceived, that the Judgement ſhould not be in ſuch caſe to hold in Severalty, 1. Becauſe the Plaintiffe in an Aſſize ought to Recover according to his Plaint, and that is of nothing in Severalty. 2. Becauſe he ought to recover by the view of the Recognitors, and that is of nothing in Severalty. And 3. It ſhould be prejudicial to the Plaintiffe, as well for the Survivorſhip, as for the Warranty; and the Prayer of the Party cannot alter the Judgement of the Law in ſuch Caſes.

13. If two Joynt-Tenants be within age, and one maketh a Feoffment in Fee of his moyty, and dyeth, the Survivor cannot Enter, by reaſon of the Infancy of his Companion, for by his Feoffment the Joynture was ſevered, ſo long as the Feoffment doth remain in force; and therefore in ſuch Caſe, the heir of the Feoffer ſhall have *Dum fuit infra ætatem*, or ſhall Enter in the moyty: But if two Joynt-Tenants be within age, and they joyn in a Feoffment, in ſuch caſe a joynt right doth remain in them; and therefore if one dyeth, the Right ſhall ſurvive, and the Survivor ſhall have the Right of the Land as from the firſt Feoffor, *Cook* 8 Part, 43. in *Whittingham* Caſe.

14. A. and B. his Wife being *Ceſtuy que* uſe in ſpecial Tail, the Remainder to the uſe of A. in general Tail, the Remainder to the uſe of C. in Fee, A. 26. H. 8. did Enfeoffe J. S. who before the Statute of 27 H. 8. Enfeoffed L. who Enfeoffed C. in Fee, who 3 E. 6. Enfeoffed J. D. in Fee; A. dyed, the ſurviving Feoffee Entred for the reviving of the Uſes; and it was adjudged, that his Entry was lawful, for he had joyned his ancient Fee-Simple; for it was agreed by all the Juſtices, that the Feoffment of C. was not within the Statute of 1 R. 3. becauſe he had onely an uſe in Remainder, and he who hath but an Eſtate in uſe in Remainder, or in Reverſion, cannot make an Eſtate o-

ver by the Statute of 2 R. 3. nor make a Feoffment and Grant of the Fee-simple of the Land, he cannot make; for then would follow fraction of the Estates of the Feoffees and particular Estates without Donor or Lessor: And if there be two joynt Feoffees to the use of another, and the one disseiseth the other before the Statute of 27 *H.* 8. and after the Statute is made, there shall not be Fraction of Estate of the Feoffee for one moyty, nor a breach of the Joynture; for the Statute of 27 H. 8. saveth the Warranty, which by such Fraction of Estate should be lost. Mich. 10 Eliz. *Plow.* Com. *Delamore* and *Bernard*'s Case, *Cook*, 350. 1 Part, 128. acc.

15. If before the Statute of *Westm.* 2 *de Donis*. Lands had been given to Husband and Wife, and the heirs of their two bodies begotten, and they have Issue, and the Husband *post prolem suscitatam*, alieneth the Land, and dyed before the Statute, and the Wife survived, and dyed before the Statute, the Issue should have a Formedon: For notwithstanding the same alienation, a right doth remain; for as much only as the husband aliened, which Right is entailed by the Statute, and before the Statute, the Issue in such case might have a *Sur Cui in vita*, and claim as Heir of the body of both, for the Feoffment was no Bar, but a discontinuance: And in all cases where the wife may have a *Cui in vita* by the Law, she shall enter by force of the Statute of 32 H. 8. and where the Issue cannot have a *Sur Cui in vita*, or a Formedon, there he shall not enter within the Remedy of the Statute; and therefore if the Husband hath Issue, and alieneth, and the Wife dyeth, the Issue shall not Enter during the life of the Husband, because at the Common Law he had no remedy to recover the Land during the Husbands life; but if the husband alieneth, and then the Wife is divorced *Causa praecontractus*, or any other Divorce which dissolveth the Marriage, *a Vinculo Matrimonii*, then the Wife during the life of the Husband may Enter, *Cook* 8 Part, 73. in *Grevolies* Case.

16. Two Joynt-Tenants for life, one made a Lease for 60 years, if he and his Companion live so long, afterwards he surrenders his moyty, and takes back an Estate, and dyes: If this Lease shall endure as long as his Companion lives, or did determine by his death, was the Question. It was Resolved by the Court in this Case, That the Lease determined by the death of any of them; for it is, if they two live so long. And 2. That the Lease is chiefly determined by the death of him that made it; for it hath no continuance no longer then the Joynture continues. Hill. 12 Jac. in B. R. *Daniel* and *Waddingtons* Case. *Cro.* 2 Part, 377. See 3 Eliz. *Dyer*, 187. and 37 Eliz. *Harbin* and *Bolton*'s Case, adjudge acc.

17. In Trespass the Case was, Husband and Wife in the right of the Wife and a third person, were Joynt-Tenants for the lives of the Wife and the third person; the Husband and Wife by Indenture let the moyty for 21 years; the Wife dyed, the surviving Joynt-Tenant entred, and drave out the Cattel, and the Lessee brought Trespass: It was Objected, That the Lease should not binde, because the Husband was not Joynt-Tenant, unless in the Right of his Wife, and had not power to contract for any longer time then during the life of the wife, and the Wife here is dead. But it was the Opinion of the whole Court, that the Lease was good, and is as a Lease made by her, until she after the Coverture, or one who claims in privity by her, avoid it by Entry; for it is not void by the death of the Husband, but voidable only; and the avoidance ought to be by Entry, and which cannot be by the Joynt-Tenant survivor, for he is in paramount the Wife, and not under her, and therefore the Lease is good, and shall binde as long as any of the Joynt-Tenants be alive. Mich. 13 Car. in B. R. *Smalman* and *Agborowes* Case. *Cro.* 2 Part, 417. *Bridgeman* 43. acc.

18. Two Joynt-Tenants, Copyholders in Fee, one surrenders into the hands of two Tenants to the use of his last Will, and makes his Will of the Land, and dyes, the surrender is afterwards presented. It was Resolved by the Court, That the same should binde the survivor; for being presented, it must relate to the first time of the surrender. Mich. in B. R. *Porter* and *Packers* Case *Cro.* 2 Part 100.

19. In a second Deliverance, the Case was, J. S. and E. a Feme sole, were Joynt-Tenants for life, the woman took a Husband, who by Fine grants to J. S. *Tenementa praedict. & inter, & quicquid habeat pro termino vitae* of the said E. *& illa ei reddidit, Habendum* to him and his Assign for the life of the said E. and whether this should enure by way of Release, or by Grant of the Estate, and severance of the Joynture of the moyty, so as this Estate should endure during the life of E. was the Question. It was Resolved in this Case, That it should enure by way of Release, by reason of the words *ei reddidit*, and both Estates being in him, the Law shall vest that in him, as if he had it from the Feoffer: And it was said, That by whatsoever means he comes to the Estate of his Companion, it shall enure by way of Release, and that he shall be said in of the entire Estate, as by the Feoffment: And if one Joynt-Tenant bargains and sells by Deed Enrolled unto his Companion, although that vests the Use, and the Statute the possession, yet being in him, the Law shall construe it to be entirely in him, and not by division of Estate; Wherefore in the principal case it was Resolved by them all, That there was no Occupancy for that moyty of E. but

but is determined by the death of J. S. Mich. 22 Jac. in B. R. *Enflace* and *Stevens* Case. *Cro.* 2 Part, 649.

20. E. R. poſſeſſed of a Leaſe for 31 years, married J. S; then he and his wife mortgaged their Intereſt and Term of years to J. D. and after and before the day of payment, E. R. dyed; J. S. the Husband paid the money at the day, in redemption of the Mortgage, and Entred, and made A. his wife his Executrix, who Entred; C. took Letters of Adminiſtration of the goods of E. R. and Entred upon the Leſſee, upon whom A Entred, and made the Leaſe to the Plaintiffe. It was adjudged in this Caſe, That the Plaintiffe ſhould recover; the reaſon was, That although the Leaſe was at firſt the Wifes, and the Husband poſſeſſed thereof in her Right, yet by the Inter-marriage he had full power to alien it; and if he ſurvive his Wife, he is to enjoy it againſt her Executors: Like the Caſe where the Husband and Wife and a third perſon purchaſe Lands joyntly, the Husband alieneth the whole Land, and then the Wife dyeth, the third perſon ſurviving ſhall have an Aſſize of the whole. Mich. 11 Jac. in C. B. *Young* and *Radfords* Caſe, *Hob.* 3.

21. A man Deviſed Lands to A. and B. his ſons, to be equally and indifferently divided between them. In this Caſe it was the Opinion of the whole Court, That they are Tenants in Common, and not Joynt-Tenants: And in this Caſe it was Agreed alſo by the Court, That if a Reverſion do deſcend upon one Joynt-Tenant, by this the Joynture is ſevered, and by operation of Law, they are now become Tenants in Common: But if Lands be given to two, and to the heirs of one of them, and after the Reverſion deſcends upon one of them, this ſhall not ſever the Joynture. Paſch. 9 Jac. in B. R. *Newman* and *Edward's* Caſe, *Bolſtr.* 2 Part, 113.

22. Two Joynt-Tenants for yeers of a Mill, the one of them grants his Eſtate, the other ſuppoſing that all comes to him by Survivorſhip, and as he took the Law to be; Grants, Bargains, and Sells the ſame to J. S. by the name and words of *Molendinum ſuum* generally, and all his Eſtate, Right, Title, and Intereſt, and Covenants to ſave harmleſs the Vendee from all acts done by him, or diſturbances, and bound himſelf in an Obligation, to perform all the former Articles and Agreements: The Vendee being evicted out of part, brought Debt upon the Bond in the Common Pleas, and had Judgement; and now Error was brought, and aſſigned for Error generally. That Judgement was given there for the Plaintiff, where it ought to have been given for the Defendant. It was Objected in this Caſe, That nothing hereby paſſed, but what he had rightfully in him to paſs. The words of the Grant are *Molendinum ſuum*, and all his Eſtate in the ſame; the which general word *Molendinum ſuum* is afterwards bounded and reſtrained by the ſubſequent words, viz. (all his Eſtate) and he had not any intent to paſs any more then he had in him to paſs; And it was ſaid, Joynt-Tenants as to the poſſeſſion of a thing in Joynture, are ſeized by Entireties of the whole, and of every part equally; but in right only of a moyty, and by a Grant of the whole by one of them, there doth only paſs a moyty. It was the Opinion of the whole Court, That the Bond was forfeited, for that here the Covenant is generally to paſs the whole Mill, and the money was paid for the whole Mill: and it was ſaid, That if two Joynt-Tenants be, and the one grants all which he hath by ſurvivorſhip, all paſſeth; for his judging and miſtaking the Law, cannot alter his firſt Grant; and this word (all his Eſtate) cannot prejudice and diminiſh his firſt Grant, eſpecially when he takes upon him to paſs the whole. The Judgement in the Common Pleas was affirmed. Hill. 7 Jac. in B. R. *Proctor* and *Johnſons* Caſe. *Bolſtr.* 1 Part, 3.

23. A Leaſe was made by Sir *Richard Waynman* unto one *Trupenny*, in this manner; *Habendum* for 40 years, if *Trupenny*, his wife, or any children of his ſo long ſhould live. It was adjudged in that Caſe, That the laſt [or] did disjoyn all, the copulative there diſjoyned by the Disjunctive ſubſequent, Paſch. 29 Eliz. in C. B. *Baldwine* and *Cox* Caſe, See *Godbolt*, *Trupenny's* Caſe.

More Joynt-Tenants.

Where one may prejudice his Company, where not.

1. TWo Executors of a Term, and one granted all that to him appertained; It was the Opinion of the Court, That the whole ſhould paſs, becauſe one Executor had an entire authority; but it was contrary holden of Joynt-Tenants. 28 H. 8. *Dyer*, 23. See *Cook* 1 Part, Inſtitutes, 184.

2. Note, It is put for a Rule, That every act done by one Joynt Tenant for the benefit of him and his Companion is good; but one Joynt-Tenant cannot prejudice the other in any matter of Inheritance or Free-hold; but as to the profits of the Free-hold, one may prejudice the other, becauſe there is privity and truſt betwixt Joynt-Tenants, and it was a folly in him to joyn in Eſtate with him who would break the Truſt. *Cook*, 2 Part, in *Tooker's* Caſe.

3. If there be Lord and two Joynt-Tenants by

certain services, and the Seignory is granted over, and one Joynt-Tenant attorneth, it is as good as if both had attorned, because the Seignory is entire: But if the Reversion of two Tenants for life, or the Rent or Seignory of two Joynt-Tenants be granted by Fine, there, in a *Quid Juris clamat*, *Quem reddium reddit*, or *Per quæ Servitia*, the one shall not be suffered to attorn without his companion. 1. Because the Plaintiff ought to have attornment in such manner as he demanded it. 2. If one attorne only, he may prejudice his companion, as if he will not claim to be unpunished for Waste, or a Condition to have Fee; for upon a general Attornment in a Court of Record, the Lesse shall lose all advantages which are not claimed of Record: But in case of a Grant by Deed, no such prejudice can happen; and therefore in such case, the Attornment of the one shall binde the other, because it cannot prejudice his Companion. *Cook*, 2 Part, 67. in *Tooker's* Case.

4. In personal Actions one Joynt-Tenant may release the whole, but not where the personalty is mixed with the realty; and therefore in a Writ of Ward brought for the Body, and two Joynt-Tenants, the Release of the one shall not prejudice the other, but shall give the whole Wardship to his Companion: But in an Action of Waste brought by Joynt-Tenants, there the Intent of the one, shall bar the other, because the personalty and the damages is the principal. 9 H. 7. 15. *per Curiam*.

5. The three daughters and heirs of the Lord *Latimer*; and their Husbands brought a *Quare Impedit* against *Hall* and others; the Defendants pleaded a Release of one of the Husbands of one of the daughters, pendant the Writ; upon which the Plaintiffs did Demur. It was adjudged in that Case, That the Writ should abate, but as to that Husband and Wife only, and not as to the rest: And there in that case it was layed as a Rule, That in all cases, as of a thing entire, and in the realty, as Presentation to a Church, Wardship of the body, &c. the Release of the one shall enure to the benefit of the other; Then it was moved, that the Count was insufficient, because the Plaintiffs in their Counts, entitle themselves that the Lord *Latimer* was seized in Fee of the Advouson, and granted the next Avoydance to J. S. and afterwards the Church became void, and that J. S. presented, and to convey the descent to them, without alledging any presentment in the Lord *Latimer*, or in any other but in the Grantee of the next Avoydance: But the Court Resolved, That that was a sufficient Title, because he did it in the Right and Title of the Grantor, and therefore shall serve for him to make a Title in a *Quare Impedit*. Mich. 40 Eliz. in C. B. The Countess of *Northumberland's* Case. 97.

6. In a Replevin against B. one attorn'd, and the other made Consuans as Bayliffes to the first, for an Amercement for the breaking of a By Law in a Leet, and judgement was given against them, costs and damages, and they all six brought a Writ of Error; the Defendant in the Writ of Error pleaded the Release of one of them in Bar. It was Resolved, That because the Law did compel the Defendants to joyn in the Writ of Error, not to reap any benefit thereby, but to discharge themselves of a charge imposed upon them, that the Release of the one should not bar the others, Cook 6 Part, 25. *Ruddock's* Case.

7. A. and B. two Joynt-Tenants for life, the Reversion over in Fee; Judgement is given against A, in debt, and afterwards he Releaseth to his companion before Execution. It was Resolved in this Case, 1. That although that B. to whom the Release was made, as betwixt them, is in by the Lesse, and not by A; yet as to him who hath the Judgment on the Action of Debt, he by his own wrong shall not defeat him of his Execution; But if A. had dyed before Execution, the survivor should hold the Lands discharged. 2. It was Resolved, That when the Release is made to B. and he dyeth, and he in the Reversion enters, and is in of his ancient estate, yet as to him who hath the Judgment, the Estate of A. hath continuance during his life; and if Husband and Wife seized of a rent or Common in Fee, doth Release to the Tenant, the Rent is extinct, yet having regard to the Wife, it hath continuance, for that she shall be endowed of it. *Cook*, 6 Part, 78. The Lord *Abergavenny's* Case.

8. Two Joynt-Tenants of a Term, the one grants to J. S. that if he pay him 10 l. before Mich. that then he shall have his Term; the Grantor dyes before Mich. J. S. payes the money to his Executor, yet he shall not have the Term, but the same shall go to the Survivor, because it was but in the nature of a Communication; but if he had made a Lease for years to begin at Michaelmas, the same had bound the Survivor: See *Plo.* Com. 263. in *Hales* Case. *Cook*, 1 Part, Institutes, 184. acc.

9. If two Joynt-Tenants be, and the one is indebted to the King, and dyeth, the other shall hold the Land discharged against the King; But if the Husband and Wife purchase a Term jointly for 60 years, and the Husband being indebted to the King dyeth, now this Term shall be subject to the Kings debt, because the husband might have disposed of the whole Term. *Plow.* Com. 321. *Fitz Nat. Br.* 149.

10. If there be two Joynt-Tenants, one cannot Enfeoffe his Companion; but if there be two Joynt-Tenants, one of them may Release unto the other; Tenants in Common may Enfeoffe one another, but

but Co-partners may both Releaſe and Enfeoff one another, 10 E. 4. 3.

11. A Leaſe was made to A. and B. his Wife, and C. their eldeſt Son, for their lives, and the Survivor of them; B. dyed, and A. Leaſed his part to C. and D. his younger ſon, for 8 years immediately after the death of A. if C. ſhould ſo long live, with divers remainders over depending upon the life of C: A. dyed, C. ſurvived him. It was adjudged in this Caſe, That the Leaſe remains in force for the life of C. becauſe that every one had an Intereſt for the life of the other; and therefore if one Joynt-Tenant for life, makes a Leaſe for years in poſſeſſion, and dyes, the Leaſe continues. Trin. 37 Eliz. in B. R. *Hobbia* and *Charts* Caſe. *Popham 96. 2.*

12. If Husband and Wife, and a third perſon, had purchaſed Lands to them and their heirs, and the Husband before the Statute of 32 H. 8. had alienes the whole Land unto a ſtranger in Fee, and dyed; in this Caſe the Wife, and the other Joynt-Tenant were Joynt-Tenants of the Right, but by ſeveral manners, *viz.* the Wife had right of action, and the other Joynt-Tenant right of Entry: For at the Common Law, the alienation of the Husband was a diſcontinuance to the Wife of the one moyty, and a Diſſeiſin to the other Joynt-Tenant of the other moyty; and yet theſe rights differing, might ſtand well in Joyncure; for they are Joynt-Tenants of the Right, becauſe they may joyn in a Writ of Right, *Cook*, 1 Part, Inſtitutes, 188.

13. A Writ of Right of Advowſon was brought againſt A. B. and others, upon a Verdict by the Grand Aſſize; It was ſhewed, That the Tenants were Copercenters, and that one of the Tenants was dead after the *Darrein* continuance, which was pleaded in abatement of the Writ; the Kings Attorney traverſeth, that they were Percenors; upon which it was demurred. It was the Opinion of the Court, were it admitted that they were not Copercenors, but Joynt-Tenants, yet the death of the one ſhould abate the Writ, being in a Real Action; and it is not like an Aſſize of *Novel Diſſeiſin*, *Mordancestor*, where the death of one of the Tenants ſhall not abate the Writ as long as there is a Tenant living. Hill. 15 Car. in B. R. The King and Sir *John Drydons* Caſe.

14. A. and B. Joynt-Tenants for years: B. ſuffers C. to occupy his moyty with him, A. brings a Writ of Partition, but B. and C. ſuppoſing that B. had granted a moyty of his part to C; C. ſhewed that he was but Tenant at Will to B. and thereupon the Writ was abated, and Reſolved, that A. might have a new Writ of Partition againſt B. by Joyners accompts, Hill. 6 Jac. in B. R. *Beedle* and *Clark's* Caſe. *Cro.* 1 Part, 218, 219.

15. A. and B. Joynt-Tenants of a Leaſe made by J. S. A. doth Aſſent, and Covenant, and Agree, that B. ſhall occupy all the Land, and ſowe it with his own Corn: After the Land is ſowed, B. dyeth, A. the ſurvivor grants the Corn to J. S. It was agreed, That if there be two Joynt-Tenants, and one grants to the other that he may ſow the Land, yet may the other occupy with him, for thoſe words do not transfer any ſole Intereſt; but if he ſaith, that he ſhall occupy all the Land, and ſhall ſow it ſolely, that doth exclude him for having any Intereſt with him. Paſch. 35 Eliz. in B. R. *James* and *Portmans* Caſe. *Owen*, 102.

16. Debt upon an Obligation; the Condition was, That whereas J. S. was Leſſee for years of ſuch Lands, that if the ſaid J. S. upon the Feaſt day of S *Mark*, 12 Jac. upon requeſt of the Leſſor, his Heirs, or Aſſigns, ſhould deliver the poſſeſſion of the ſaid Farm to the Leſſor, his Heirs, or Aſſigns, to have and enjoy the ſame after ſuch Requeſt, that then &c. And the Caſe was, That J. S. being in poſſeſſion, and the Plaintiffe the Leſſee ſeized in Fee of the Reverſion, the Plaintiff the Leſſor by Deed Indented and Enrolled, Bargained and Sold to C. and D. the Reverſion; *Habendum*, to them and their Heirs; and afterwards, the next day after the Feaſt of S *Mich.* the Bargainees did requeſt the ſaid J. S. to deliver the poſſeſſion to them; and it was found, That one of the Bargainees did alone come to the Capital Meſſuage, without any notice before given of his coming, and there as Aſſignee of the Plaintiffe, did require the ſaid J. S. to deliver the poſſeſſion according to the effect of the Condition. The Queſtion was, If this Requeſt was a legal Requeſt of the delivery of the Poſſeſſion or not. It was Reſolved that it was, being made by one of the Joynt Bargainers Aſſignes, and that notice in this caſe was not material; and if it was, the Defendant ought to have pleaded, That he had not notice of the Aſſignement, or Bargain and Sale. And it was ſaid in this Caſe, That every Act done by a Joynt-Tenant for the benefit of him and his Companion, ſhall binde; and if there be two Joynt-Tenants in Fee, and one ſeized in the right of his Wife, of Land to which the Wife hath Title of Dower, the one Joynt-Tenant, or the Huſband, may aſſigne the Dower; becauſe when the Husband, or one Joynt Tenant doth any thing out of Court that they are tyed to do, it ſhall be intended to be the act of the one and the other. It was adjudged for the Plaintiff. Trin. 15 Jac. in B. R. *Hogen* and *Paynes* Caſe. *Owen*, 129, 130.

17. A man ſeized of Lands in Fee, by Will deviſed all his Lands to C. his Wife, for life; and after her deceaſe, to his three daughters, A. B. and C. and to the heirs males of their bodies lawfully begotten; and for want of ſuch Iſſue, to the heirs females of their ſeveral bodies; Provided, That if

any of their Children, or any of their Heirs of their ſeveral bodies iſſuing, ſhall at any time alien, ſell or diſcontinue any of the ſaid Lands to them given, whereby the ſame may not continue as the ſame is appointed by his Will; the perſons ſo offending for ſo much of the premiſes as they ſhould offend in, from thenceforth to be excluded, and dyed. The Wife dyed, A. and C. dyed; Whether D. ſhould have all as ſurvivor during her life, was the Queſtion. It was Reſolved by the two Lord Chief Juſtices, and Chief Baron in the Court of Wards, That the ſaid Daughters were Joynt-Tenants for life, and that the ſurvivor ſhould have the whole during her life, and that touching the Inheritance, they were ſeveral Tenants in tail. Trin. 9 Jac. in the Court of Wards. *Fletchers* Caſe, *Lea* 47.

Iſſues joyned.

Iſſues joyned in ſeverall Actions: Where, what, and where they ſhall be good; when, and where not: and when the party ought to take a Traverſe to the Declaration, Replication, Conveyance, or other matter: and what traverſe ſhall be good; What not: and where the Evidence doth maintain the Iſſue; where not.

1. IN an Action of Debt brought upon the Statute of Purveyors, becauſe he had cut down certain Trees contrary to the Statute of 5 Eliz. The Defendant pleaded, Not Guilty. It was holden by the Court, to be no good Iſſue; but the Court commanded the party to plead, *Nil debet*. Trin. 28 Eliz. *Goldesbr.* 39.

2. Debt upon the Statute of Uſury; The Writ was, *ad reſpondendum tam Domino Regi* as to the party, *quod reddat tam Domino Regi quam* to the party 98 l. *quas præfat. Domino Regi quam* to the party *detinet ratione cujuſdam attempt. contra formam Statuti.* And Declared of the loan of 95 l. for a Moneth, for 20 Marks Intereſt and Uſury to be paid at the end of the Moneth; and declared That the Defendant *habuit et recepit* the ſaid Uſury, *ultra ſortem, contra formam Statuti.* The Defendant pleaded *Non habuit, nec recepit pro accommodatione dict. ſum* 95 l. *ſcil.* the ſaid 20 Marks *ultra prædict.* 95 l. *contra formam Statuti.* Iſſue being joyned, upon that it was found for the Plaintiff. It was ſaid in Arreſt of Judgment, That the Plea made a Jeofail, becauſe the Statute doth not ſpeak of any receipt of Uſury, but forbids the loan for Uſury. It was the Opinion of the Court, That the Plaintiff ſhould recover, although the Statute of Jeofailes was not made: And it was holden, That when the Defendant traverſeth the ſurpluſage, *ſcil.* the Receipt of the Intereſt, *ſcil.* the 20 Marks, *ultra, &c.* that that was a Negative *pregnans*; and implyed, That the money was delivered for Uſury. Mich. 1 *Ma. Dyer*, 95. *Wiltons* Caſe.

3. A. was ſued by *ſubpœna* out of the Common Pleas, by Bill upon an Information of Uſury, *contra formam Statuti*; The Defendant by his Attorney pleaded Not Guilty. It being found againſt him, It was moved in Arreſt of Judgment, That the proceſs was no lawfull proceſs, and that the Plea of Not Guilty in this Action, was not an apt Iſſue; and alſo it is not expreſſed againſt what Statute, but generally *contra formam Statuti.* But all the Exceptions were diſallowed by the Court: And at laſt *per ſtatutum de Jeofails*, which ſpeaks of miſ-continuance of proceſs, Judgment was given againſt the Defendant. Hill. 18 El. *Dyer*, 346, 347.

4. In Treſpaſs upon the Statute of 5 R. 2. for entry into three Acres of Lands *ubi ingreſſus non datur per legem.* The Defendant as to two Acres, conveyed to himſelf a title by a guift in tail, and gave colour, and for the third Acre, he entituled himſelf by an Allotment upon a Partition; the Plaintiff intituled himſelf, and traverſed the gift in tail, and alſo traverſed the Allotment upon the Partition for the three Acres, upon which they were at Iſſue. And it was found by Verdict given in open Court for one of the two Acres, for the Defendant, *ſcil.* the gift in tail. And for the other, It was found for the Plaintiff, *ſcil. Nt dona poſſe*; and for the three Acres, *ſcil.* upon the allotment, they were not agreed; wherefore, by leave of the Court, they went from the Bar to enquire of the allotment; and afterwards they returned and gainſaid their Verdict given in open Court for the Defendant, and found for the Plaintiff, as alſo for the ſecond Acre, and aſſeſſed damages accordingly; and this latter Verdict for the allotment only, they affirmed in open Court the next morning, without ſpeaking any thing of their alteration. Notwithſtanding, upon great deliberation had thereof by the Court, Judgment was given for the Plaintiff. Mich. 4 Eliz. *Dyer*, 204.

5. In a Writ of Ward of the Land, and of the Heir of R. C. the Defendant pleaded, That R. C. levyed a Fine to the Defendant *cum ceo, &c.* who rendred the Land to him in tail, ſaving the Reverſion to the Defendant, and ſo R. C. the Donee

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hold of him: To which the Plaintiff replyed, That the Defendant releaſed to R. C. all his right, and ſo R. C. became his Tenant; to which the Defendant by way of Rejoynder ſaid, That he did not Releaſe, upon which they were at Iſſue. It was holden no good Iſſue, for which he ſaid he did not Releaſe, but continued his Eſtate at all times in tail by force of the Fine, and thereupon Iſſue was taken: Upon which it was inferred, That forasmuch as the Writ of Ward was brought, aſwell for the Land, as for the Heir, that the Replication ſhall not be good, if not that the Lord have the Wardſhip of the Land in the ſame Caſe, 38 E. 37. Note, the reaſon of that book is, becauſe it appeareth by the joyning of the Iſſue. It was pretended, That by the Releaſe, the eſtate tail was extinct; for the Iſſue is, Whether he continued his Eſtate tail by force of the Fine, and that without doubt he did, although the Releaſe was made. *Cook* 2. Part, 92. in *Bingham's* Caſe.

6. In a Replevin, the Defendant avowed for Rent, For that E. E. was ſeiſed in Fee, and took to Husband T. P. and had Iſſue by him J. P. and dyed: and T. P. being Tenant by the Curteſy, the Reverſion to J. P. J. P. granted a Rent-charge to the Defendant for life, and ſhewed the death of the Tenant by the Curteſy, and ſo avowed. The Plaintiff ſaid, That E. E. was ſeiſed in tail, and ſo conveyed it to J. P. in tail, and that J. granted the Rent, and dyed, and that the Land diſcended to the Defendants Wife as Heir in tail, *abſque hoc*, that E. E. was ſeiſed in Fee; upon which, Iſſue being joyned, it was found for the Defendant. In ſtay of Judgment it was ſaid, That this Iſſue was not well joyned; For the ſeiſin in Fee of the Grantor ought to be traverſed, and not of any Anceſtor paramount. But it was holden by the Juſtices, in regard the ſeiſin in Fee is ſpecially alledged in E. E. and the continuance of the Reverſion in T. P. therefore the ſeiſin alledged in her might be well traverſed; and if it be not an apt Iſſue, it is helped by the Statute of 32 H. 8. For it is an Iſſue, although it be not an apt Iſſue. Mich. 2 Jac. in B. R. *Piggot* and *Piggots* Caſe. *Cro.* 2. Part, 44.

7. In Debt upon an Obligation, the Defendant pleaded payment of 50 l. 14 *Junii*, 11 Jac. according to the Condition of the Bond; the Plaintiff ſaid *Quod non ſolvit* the ſaid 50 l. the ſaid 14 day of *Auguſt*, *Anno ſupradict. quas ei ad eundum diem ſolvere debuiſſet.* And Iſſue being joyned in this manner, the Verdict found *Quod non ſolvit predict.* 14. *Junii prout Defendens allegavit.* Judgment was given for the Plaintiff, and Error brought and aſſigned, that there was not any Iſſue here joyned, for the Defendant pleading payment at one day, and the Plaintiff replying to another day, and concluding, *et hoc petit quod inquiratur, &c.* it is not to that which the Plaintiff concludes, and ſo there is not a Negative and an affirmative; and of that Opinion was *Haughton*, one of the Juſtices; but the Court held the Iſſue joyned well enough, and that the word (*Auguſt*) was ſuperfluous and void, and that *predict.* 14 *die*, without more, had bin ſufficient. Mich. 12 Jac. in B. R. Sir *Nicholas Hill* and *Bonython's* Caſe. *Cro.* 2. Part, 549, 550.

8. In Debt, the Defendant pleaded, *Plenè adminiſtravit*: The Plaintiff ſaid, That at another time he brought an Action of Debt againſt the now Defendant; whereupon ſhe was Outlawed upon the mean proceſs, and ſhe brought Error, and reverſed the Outlawry. Whereupon he preſently brought his Action, and that at the time of the firſt Writ brought, ſhe had Aſſets, *Et hoc petit quod inquiratur per Patriam et Diſcendens ſimiliter.* And hereupon a Verdict was found for the Plaintiff, and Judgment: And Error brought and inſiſted upon, That here is not any Iſſue at all joyned, and therefore not helped by the Statute of Jeofails; for here is a matter affirmed by the Plaintiff, which ought to be anſwered unto by the Defendant by confeſſion or denyal, but here the Plaintiff doth not expect the Defendants anſwer, but concludes his Plea with *Hoc petit, &c.* whereas he ought to have averred his Plea, and the Defendant then have anſwered; ſo as here is a Tryal without any Iſſue, which is not good: And of that Opinion was the whole Court, and the Judgment reverſed. Trin. 18 Jac. in B. R. *Aldrich* and *Wallhall's* Caſe. *Cro.* 2. Part, 597, 580.

9. Debt brought in *Hilary* Term 22 Jac. upon an Obligation dated 20 *Maii*, 20 *Regis nunc*; the Defendant imparled: And in *Eaſter* Term 1 Car. the Declaration and Plea of the Defendant was entred, and he declared thereon, upon an Obligation 20 *Maii*, 27 *Regis nunc.* Afterwards by order, it was amended, and made *Regis Jacobi*: and the Defendant pleaded thereunto a Judgment upon another Bond of 500 l. dated 5 *Regis nunc.* (which was miſtaken, for it ought to have bin *Regis Jacobi*) and that he had not any thing in his hands, but only to ſatisfy that Judgment. The Plaintiff joyns Iſſue, that the Recovery was by fraud and Covin, and found for the Plaintiff. In Arreſt of Judgment, it was moved, That this Plea was repugnant and impoſſible, That a Recovery ſhould be *Anno quinto Regis nunc.* But the Court was of Opinion, That forasmuch as there was a default in the Defendants Plea, though the Plaintiff had joyned Iſſue thereupon, and the Defendant hath not confeſſed Aſſets in his hands, but only for that Judgment; yet the Plaintiff having a good Declaration, ſhould have Judgment, and Judgment was for the Plaintiff accordingly. Mich. 1 Car.

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in B. R. *Knight* and *Harveys* Caſe. *Cro.* 1. Part, 18.

10. In a *Scire facias* upon a Recognizance againſt J. H. and others his Sureties for the good behaviour; For that the ſaid J. H. with other perſons riotouſly at 11 at night *illicitè*, entred into a Cloſe of one J. D. called L. and cut up a Quick-ſet hedg in the ſaid Cloſe. The Defendant pleaded to all the Offences, but the entring of the ſaid Cloſe, and cutting down of the Quick-ſet hedg, Not Guilty, and juſtified, for that the ſaid Cloſe is, and was a High way leading from S. in the ſaid County over the Cloſe to N. and becauſe the ſaid Way was ſtopped up with the Quick-ſet hedg, he cut it up, to uſe the ſaid Way. The Plaintiff replyed, That the ſaid J. H. *de injuria ſua propria et ex malitia ſua precogitata*, with others cut down the ſaid Quick-ſet hedg *prout* is alledged, upon which Iſſue was joyned, and found for the Plaintiff. It was moved in ſtay of Judgment, That there was not any Iſſue joyned. For *de injuria ſua propria* where one juſtifies for a Way, or ſuch particular cauſe, is no Iſſue, but he ought to traverſe the Preſcription; and alſo he ought to ſay *abſque tali cauſa*; and of that Opinion was the whole Court. It was Objected, That there was an Iſſue of Not Guilty, which is for the riotous entry, and riotous aſſembly, which is a breach of the good behaviour. But the Court held, That that tryal of the Iſſue of Not Guilty, is but matter of form, and the ſubſtance is upon the ſpecial matter found. It was adjudged for the Defendant, and that he ſhould be diſcharged. Mich. 18 Jac. in B. R. The King and *Hoppers* Caſe. *Cro.* 2. Part, 599.

11. Treſpaſs wherefore he broke his Cloſe; The Defendant Juſtifies for a Way, the Plaintiff replyed, That he did the Treſpaſs of his own wrong without any cauſe alledged, and ſo an Iſſue joyned, and after a Verdict. It was moved in Arreſt of Judgment, That the Iſſue was not well joyned, and prayed a new Tryal, becauſe the Iſſue ought to be ſpecial; but the Exception was diſallowed, and the Opinion of the whole Court was, That it was helped by the Statute of Jeofails. Trin. 14 Jac. in C. B. *Swoff* and *Solley's* Caſe. *Brown.* 1, Part, 200.

12. Treſpaſs Wherefore with force and Arms he took the goods and Chattells of the Defendant and Impounded them, the Defendant pleaded, the common bar, and the Plaintiff aſſigned a place; and at Iſſue upon that. After Verdict, it was moved, That there was no Iſſue joyned, becauſe the Lands are not in Queſtion, and ſo no Aſſignment neceſſary: Notwithſtanding Judgment was given for the Plaintiff, becauſe it was holpen by the Statute of Jeofailes. Hill. 6 Jac. in B. R. *Plaint* and *Thorley's* Caſe. *Brown.* 1. Part, 200. And ſo it was ſaid, It was adjudged. Trin. 4 Jac. in C. B. Rot. 1131.

13. In Debt upon an Obligation, with a Condition to pay ſuch a ſum of money at ſuch a Feaſt next after the day of the date of the Obligation; and the day of the date of the Obligation was omitted in the Record of the *Niſi Prius*, ſo as it doth not appear which ſhall be the Feaſt at which the money ought to be paid after the date. It was the Opinion of all the Juſtices, That that was no perfect Iſſue, and for that, the Juſtices of *Niſi Prius* have no power to proceed upon it, for that it ſhall not be amended. Hill. 8 Jac. in C. B. *Brown.* 2. Part, 47.

14. Debt upon an Obligation of 40 l. for the payment of 20 l. The Defendant pleaded, That he had payed the 20 l. according to the Condition upon which they are at Iſſue: And at the *Niſi Prius*, the Defendant gave Evidence, That he paid the money to the Plaintiff before the day, and that the Plaintiff had accepted of it. It was the Opinion of the whole Court, That the payment before the day, was a ſufficient diſcharge of the Bond, but becauſe the Defendant had not pleaded the ſame ſpecially, the Opinion of the Court was, The Jury muſt find for the Plaintiff. Mich. 24 Eliz. in C. B. *Godbolt.* 10.

15. Debt upon an Obligation, the Condition was, That whereas the Plaintiff was in poſſeſſion of ſuch Lands, If J. S. nor J. D. nor J. G. did diſturb him by any indirect means, but by due courſe of Law, that then, &c. The Defendant pleaded, *quod nec J. S. nec J. D. nec J. G.* did diſturb him by any indirect means, but by due courſe of Law. Exception was taken to it, That he hath pleaded *neque* ſuch, nor ſuch, nor ſuch, had diſturbed him by any indirect means, but only by due courſe of Law; and that cannot be tryed, neither by Jury, nor by the Judges: Not by the Jury, becauſe it is not to be put to them, Whether they had diſturbed him by indirect means, or by the due courſe of Law, for they ſhall not take upon them the conſtruction, What is an indirect means, or by due courſe of Law, for it appertaineth to the Judges to adjudg that; Not by the Judges, becauſe he hath not put it in certain, that it was a due courſe of Law by which he diſturbed him; And of that Opinion was the whole Court, and the Exception allowed. Mich. 29 Eliz. in B. R. *Deighton* and *Clarks* Caſe. *Godbolt.* 62.

16. In an Action upon the Caſe, for that the Defendant ſaid, That the Plaintiff is a perjured Knave, and that he would prove, that the Plaintiff *ſcil.* the ſaid T. B. had forſworn himſelf in the Exchequer: The Plaintiff layed it, and ſuppoſed in his Declaration, the words to be ſpoken in *London*. The Defendant pleaded in bar of the Action, That

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the ſaid T. B. being one of the Collectors of the Subſidies before the ſpeaking of the ſaid words, Mich. 27 Eliz. did exhibite a Bill againſt the Defendant, containing, That the Defendant being aſſeſſed in 10 l. goods, the Plaintiff came to him, and demanded 16 s. 8 d. which he did refuſe to pay, and that demand and refuſal was ſuppoſed to be in *London*, in ſuch a Pariſh, *Et pro verificatione præmiſſorum uſitanc et ibidem Sacrament. Corporale per Barones præfat. T. B. præſtitit.* The ſaid T. B. ſwore the ſaid Bill in ſubſtance was true, *ubi revera*, the ſaid Defendant did not refuſe *per quod*, the ſaid Defendant *poſtea*, viz. *prædict. tempore quo dixit de eadem T. B. prædict. verba prout ei bene licuit.* The Plaintiff replyed, That he ſpake the words *de injuria ſua propria abſque tali cauſa per priſat.* the Defendant *ſuperius allegat.* Upon which Iſſue is joyned, and a *Venire facies* was awarded to the Sheriff of *London*, and it was found for the Plaintiff, and damages 400 l. In Arreſt of Judgment, it was moved, and ſo afterwards Reſolved, That here was no good tryal, nor no good iſſue joyned, for the Iſſue doth conſiſt upon two points tryable in ſeveral Counties, *viz.* the Oath which was in the Exchequer, and that ought to have bin tryed in *Middleſex*, and ſecondly, the matter which he affirmed by his Oath, *viz.* the demand and refuſal to pay the Subſidy, and that was alledged to be in *London*, and there to be tryed: and the Iſſue *de injuria ſua propria, &c.* goeth to both, and the *ubi revera* will not amend the Caſe, and both are material. But the Court was of Opinion, That if this Iſſue could have bin tryed by any one of the Counties, it had bin moſt properly and naturally to be tryed where the Oath was, and that was in *Middleſex*. It was adjudged againſt the Plaintiff, and Judgment ſtayed: And the Court was of Opinion, That this was not helped by any of the Statutes of Jeofailes. Mich. 29 Eliz. in C. B. *Box* and *Mounſlows* Caſe. *Godbolt.* 107, 108.

17. A man in conſideration of Marriage, doth aſſume and promiſe to do three ſeveral things: For non performance of one of them, the party to whom the promiſe is made, brings an Action upon the Caſe, and to enable him to the Action, ſayes, That the Defendant in conſideration of Marriage, did promiſe him to perform the ſaid thing for which the Action is brought, without ſpeaking of the other two things. The Defendant pleads in bar *Non Aſſumpſit modo et forma!* It was the Opinion of the Court, That it was a good Iſſue. For the Contract being entire, if it be not a good Plea, the Defendant might be charged for the ſeveral things, which cannot be, being one contract by word. But it is otherwiſe of ſeveral contracts in Writing. Mich. 5 Jac. in C. B. *Godbolt.* 254.

18. In Aſſumpſit, the Plaintiff declared, Whereas he ſold to the Defendant certain Cloaths for 170 l. one moyety to be paid at the end of 14 dayes, the other moyety at the end of three Moneths. The Defendant in conſideration the Plaintiff would accept of his Bill for 137 l. to be paid the firſt day of *December* following, promiſed to pay the 137 l. and alledgeth, that he accepted his Bill, and that he had not paid the 137 l. nor the 48 l. reſidue of the ſaid moyety, contrary to his promiſe. The Defendant pleaded *Non Aſſumpſit*, and found againſt him, and damages entire, and Judgment for the Plaintiff. Error brought in the Exchequer Chamber: It was alledged, That this Iſſue *Non Aſſumpſit* generally, is not good, for here being ſeveral promiſes, he ought to have traverſed them ſeverally. But all the Juſtices held, That *Non Aſſumpſit* generally, extended to all the ſeveral promiſes, and the Judgment was affirmed, Mich. 17 Jac. in the Exchequer Chamber, *Heath* and *Danatley's* Caſe. *Cro.* 2. Part, 544. Note, in that Caſe, it was ſaid by *Tanfeild* Chief Baron, That upon an Information in the Kings Bench, where ſeveral Contracts upon Uſury being alledged, Iſſue was joyned, Whether it were *corrupte agreatum modo et forma prout.* And it was Reſolved by all the Juſtices of *England*, to be an ill Iſſue, for he ought to have traverſed the agreements, becauſe they were ſeveral. *Paramore* and *Robinſons* Caſe, in B. R.

19. Debt brought upon the Statute of 2 E. 6. for not ſetting forth of Tythes; The Defendant pleaded *Nihil debet*, and adjudged a good Iſſue. Mich. 15 Jac. in C. B. *Bawtry* and *Iſteds* Caſe. *Hob.* 218.

20. In a Replevin, the Defendant avows for Damage-feaſant; The Plaintiff in Bar ſayes, That A. was ſeiſed of a houſe and Land whereunto he had Common, and demiſed the ſame to him, to him 30. *Martii* 11 Jac. to hold from the Feaſt of St. *Mich.* for a year: the Avowant traverſeth the Leaſe *modo et forma*: whereupon Iſſue was taken, the Jury, That the ſaid A. made the Leaſe to the Plaintiff 25 *Martii*, for one year. In this Caſe, although this be not the ſame Leaſe that the Plaintiff pleaded, nor was to take his limitation, but from the day excluded: Yet the Court gave Judgment for the Plaintiff; For the ſubſtance of the Iſſue is, Whether the Plaintiff have ſuch a Leaſe or no from A. as by force thereof he might Common at that time, which appeared for him in this Caſe; and the *modo et forma* in the reſt, is not material; Yet it muſt not depart altogether from the form of this Iſſue; for if it had bin found, That he had right of Common by a Leaſe from another, or as an Owner, it would not have ſerved his turn, for that had bin clear out of the Iſſue, both in matter and form. Tr. 12 Jac. in C. B. *Pope* and *Skinners* Caſe. *Hob.* 72. 73.

21. In

21. In Treſpaſs, the Defendant pleaded, That J. H. was ſeiſed in Fee, and granted a Rent of 4 l. to J. D. with clauſe of diſtreſs, and conveyes the Rent to the Defendant, for which he diſtreyned; the Plaintiff replyed, That before the Grant, W. H. was ſeiſed, and had Iſſue J. H. the elder, and J. H. the younger, and that he deviſed his Lands to his ſaid two Sons in tail, and dyed, and J. the eldeſt dyed without Iſſue, and J. the younger had Iſſue A. and dyed, and that A. gave leave to the Plaintiff to put in his Horſe, *abſque hoc quod prædict. J. H. Pater fuit ſeiſitus in Dominico ſuo ut de feodo prout.* Upon which Iſſue was joyned, and found for the Plaintiff. It was moved, That there was no Iſſue, for it was not pleaded, That J. H. *Pater* was ſeiſed in Fee as the traverſe was: But notwithſtanding, Judgment was given for the Plaintiffs for although *Pater* be added, yet *prædict. J. H. prout* the Defendant had alledged, binds it to that perſon that the Defendant had pleaded, and that *Pater* is but *John*, and cannot do hurt, eſpecially ſince it may ſtand true that he was *Pater*. Trin. 14 Jac. in C. B. *Blackford* and *Atkins* Caſe. *Hob.* 217.

22. Action upon the Caſe, for that the Defendant did cauſe the Plaintiff to be Arreſted for the felonious ſtealing of five Heifers, and cauſed him to be brought before J. S. Juſtice of the Peace, and at the Seſſion at the *Guild-Hall* in *London*, cauſed him to be endicted maliciouſly and falſly for the Felony of ſtealing the ſaid five Heifers, and cauſed him to be detreyned in Priſon, til at the Goal delivery 13 Jac. he was legally acquitted: The Defendant ſaid, That 18. *Nov.* 13 Jac. he was poſſeſſed of the Heifers, and certain Malefactors ſtole them from him at B. in the County of D. and 22. *Nov.* 13 Jac. the Defendant purſued them to *London*, and found them in the poſſeſſion of the Plaintiff, and required him to ſhew them unto him; and becauſe the Plaintiff denyed and refuſed to let him ſee them, and gave uncertain anſwers, and the Defendant did ſuſpect he had committed the Felony, to have examination of the premiſes, he did procure a Warrant from the ſaid J. S. Juſtice of Peace: whereupon he was brought before him, and examin'd; and becauſe the ſaid J. S. did ſuſpect him, he bound him in a Recognizance to appear at the next Goal delivery, and bound the Defendant in a Recognizance to proſecute: Whereupon he did exhibite his Bill, and gave in Evidence, That the Cattel were ſtolen from him, and gave in Evidence *ut ſupra*. The Plaintiff replyed, That T. B. was poſſeſſed of the ſaid five Heifers at C. in the County of *Middleſex*, and did ſell them to the Plaintiff, being a Butcher, in open Market, and he paid Toll and he drave them home to his houſe, and killed four of them; and then 22. *Nov.* the Defendant came to his houſe to ſearch for the ſaid Cattel, and he did ſhew to him the Steer that was then living; and the Defendant had ſufficient notice that the Plaintiff had bought them in open Market: and that although the Defendant did know that the Plaintiff had bought them, yet out of Malice and againſt his knowledg, he did charge the Plaintiff with the Felony, *abſque hoc*, that the Plaintiff did refuſe to permit the Defendant *habere viſum* of the ſaid five Heifers, or to ſhew how he came by them. The Defendant demurred, and ſhewed, That the matter of inducement to the Traverſe, was inſufficient, and not traverſable. This Caſe being oftentimes argued; It was the Opinion of the Juſtices, That Judgment was to be given againſt the Plaintiff, becauſe that all that was done after J. S. his Warrant, was illegal. But they agreed, That the Plaintiff might have had an Action for the charging of Felony; and all that was done before the ſaid Warrant, *Houghton* Juſtice only diſagreed, for he conceived Judgment ſhould have bin given for the Plaintiff, for that the Plea of the Defendant was no juſtification for what was done before the Warrant. Trin. 14 Jac. in B. R. *Weal* and *Wells* Caſe. *Bridgman* 60, 61, 62, 63.

23. Error to reverſe a Judgment given for three: The Error aſſigned was, That one of them was dead *tempore Judicii redditi*: The other anſwers, That he was in full life *tempore Judicii, ſcil.* at ſuch a day, *ſcil.* 18. *Auguſti*. The whole Court was clear of Opinion, That the *ſcilicet* was idle, and the other Iſſue good, that he was of full life; the ſole and material Iſſue here being the time of the Judgment: And the Court ſaid, There is no book wherein mention is made of ſuch an Iſſue joyned upon a *ſcilicet*, and ſo by the Rule of the Court, the *ſcilicet* was void, and the other Iſſue to ſtand good, whether the party was living at the time of the Judgment given, or not. Trin. 10 Jac. in B. R. *Barkerville* and *Henſkam* Caſe. *Bolſtr.* 2. Part, 26, 27.

24. In an Action upon Aſſumpſit. the Caſe was; the Father in Conſideration that his ſon the Plaintiff would pay ſuch a ſum for him, did promiſe, that he would ſuffer his Land to deſcend upon him. And the Plaintiff ſet forth in his Declaration, That the money was paid by him in ſatisfaction and diſcharge of the debt; and for breach, he ſet forth, That he did not ſuffer his Land to deſcend upon him. It was demurred upon, That this was no good Iſſue. But the Court Reſolved, That this was a good Iſſue, and ſaid, The difference will be, where the Caſe ariſing upon the Aſſumpſit, is in the Affirmative, and where in the Negative: where it is in the Affirmative, it ought to be averred *in facto*, that the Land did deſcend: but otherwiſe

wiſe it will be, where it is in the Negative; for there it is good and ſufficient to ſay, *Quod non permiſit*; that he did not ſuffer the Land to diſcend: Judgment was for the Plaintiff. Hill. 9 Jac. in B. R. *Gray* and *Gray's* Caſe. *Bolſtr.* 2. Part, 18.

25. In an Action upon the Caſe, the Plaintiff declared, That whereas he and one A. were joyntly and ſeverally bound to a ſtranger for the debt of the ſaid A: which A. dyed, and the Defendant married his wife, and ſo the goods of A. came to his hands; yet the Plaintiff 1. *Maii*, after which was the day of payment of the money, paid 25 l. for avoiding of the forfeiture; and that the Defendant as well in conſideration of the premiſſes, as that he peaceably enjoy the goods, promiſed to pay the ſaid ſum *cum inde requiſitus fuerit*: The Jury upon Iſſue joyned, found the payment of the ſaid ſum, and all the ſpecial matter. It was moved in Arreſt of Judgment, That although the Jury have found ſufficient cauſe of Action, yet if the Declaration be not according, the Plaintiff ſhall not have Judgment: and here the Plaintiff hath declared upon two Conſiderations, and the Jury hath found but one; *ſcil.* if he peaceably enjoy the goods of the Teſtator: and alſo the Plaintiff declared of a ſimple promiſe, and the Jury have found a Conditional promiſe, *ſi gaudere poteſt, &c.* and ſo the promiſe ſet forth in the Declaration, is not found in the Verdict. The Juſtices were of Opinion, That the firſt Conſideration was good, and then the promiſe is good. But the ſecond Conſideration is void; *ſcil.* That the Defendant ſhall enjoy the Teſtator's goods: and therefore the Court was clear of Opinion, That the promiſe found by the Jury, was not the promiſe alledged in the Declaration, and ſo the Iſſue was not found for the Plaintiff. Wherefore the Judgment was ſtayed. Hill. 31 Eliz. in B. R. *Muſted* and *Hoppers* Caſe. *Leon.* 173.

26. In Treſpaſſe of Aſſault and Battery againſt P. and S; the Defendants ſaid, That they were Leſſees of certain Lands of the Plaintiff; and that the Plaintiff came and took away certain Poſts which were upon the Lands, and they joyntly took them from him: S. pleaded, That he found the Plaintiff and P. contending for the ſaid Poſts, and he to part them *moliter*, put his hands upon the Plaintiff, which is the ſame, &c. The Plaintiff Replyed, *de injuria ſua propria abſq; tali cauſa pro ipſis P. et S. allegat.* Upon which, Iſſue was joyned; which was found for the Plaintiff. It was moved, That here was not any Iſſue; for the Plaintiff ought to plead ſeverally to both Pleas; for here are ſeverall cauſes of juſtification, and that *abſq; tali cauſa*, doth not anſwer to both. The Court was of Opinion, That both Pleas depend upon one matter, but are ſeveral cauſes; for two juſtifie by reaſon of their Intereſt, and the third for the preſervation of the Peace: And the Court held, That although it be not a good form of pleading, yet by reaſonable Conſtruction, this word [*Cauſa*] ſhall be referred to every cauſe, and ſo the pleading ſhall be maintained. It was adjudged for the Plaintiff. Trin. 30 Eliz. in B. R. *Engliſh* and *Pollitony* and *Smith's* Caſe. *Leon.* 124.

27. A. brought a Writ of Forger of falſe Faits againſt H. of *Glouceſter*, and declared upon the forger of an Indenture, *in quo Continetur, Quod quidam Abbas Monaſterii de Glouceſt. Demiſit Scitum Manerii de R. et terras Dominicales, &c.* The Defendant pleaded, Not guilty. And it was given in Evidence on the Plaintiff's part, a Leaſe ſuppoſed to be made and forged, containing, That the ſaid Abbot Leaſed the ſaid Scite, and all the Demean Lands of the ſaid Mannor *exceptis duobus ſeperalibus clauſuris inde, &c. vocat. &c.* It was holden, That this Evidence was good enough to maintain the Iſſue; for it is not neceſſary to conſtrue *terras Dominicales, omnes terras Dominicales*: for the Lands not excepted are *terræ Dominicales*: and ſo the Count is ſatisfied by the Evidence. Hill. 30 Eliz. in C. B. *Athins* and *Hales* Caſe. *Leon.* 139.

28. An Action of Aſſault and Battery was brought againſt *W. Malin* of *Langley*: and in the Record of *Niſi Prius*, It was *William Langley* of *Malin*. And this being moved in Arreſt of Judgment, It was the Opinion of the whole Court, That it ought to be amended; for it is a miſpriſion apparantly of the Clerk, and the whole Record beſides is right; and the Record of *Niſi Prius* ought to be amended by the Record in *Banco*, according to 44 E. 3. But if the Iſſue had been miſtaken it had been othe wiſe. Mich. 6 Car. in C. B, *Malins* Caſe, *Hetley*, 64.

29. Errour of a Judgment in the Court of *Beverley* in Debt, where the Plaintiff declared in Debt of 20 l: *viz.* 16 l. upon an Obligation, and 4 l. upon a *Mutuatus*. The Defendant pleaded *Quoad* the 4. *Non debet et de hoc ponit ſe ſuper Patriam, et prædict. Querens ſimiliter*: and as to the other, he demands *Oyer* of the Obligation and Condition; which was to pay 8 l. at a day, and he pleads payment at the day, *Et de hoc ponit, &c.* and the Plaintiff *ſimiliter*; and a Verdict was for the Plaintiff *quoad* the Bond, and *quoad* the other for the Defendant, and the Plaintiff had Judgment, It was aſſigned for Errour, That there was not any Iſſue, for the Defendant ought to have pleaded, *Quod ſolvit et hoc paratus eſt verificare*; and the Plaintiff ought to have Replyed, *Non ſolvit et hoc petit. &c.* ſo there had been an Affirmative and a Negative; but as it is here,

there is no Iſſue at all, and not aided by the Statutes. But the Court held, That forasmuch as the Defendant pleads payment, *Et de hoc, &c.* and the Plaintiff joyns with him, That the Jury ſhall enquire whether he hath paid: and the Jury finding, that he hath not paid, it is good enough, and ayded by the Statute of *Jeofailes*. Mich. 8 Car. B. R. *Parker* and *Taylor's* Caſe. *Cro.* 1. Part, 231.

30. In an Action of Aſſault and Battery, the Defendant pleads a ſpecial Plea, and Juſtifies; the Plaintiff Replyes, *de Injuria ſua propria*: and upon this an Iſſue is joyned; and a Verdict for the Plaintiff. The Defendant moved in Arreſt of Judgment, That the Replication was not good, becauſe it anſwers not the ſpecial matter, nor takes any traverſe by an *abſq; tali cauſa*, as it ought to do, and ſo there is no Iſſue joyned, and conſequently there can be no Judgment. It was the Opinion of the Court, That where there is an immaterial Iſſue, there ought to be a Repleader, and it is not helped by the Statute; and there can be no Judgment, for that the matter is not put in tryall; and for that cauſe it would be unreaſonable to give Judgment. And it was holden, That the Iſſue in this caſe was an Immaterial Iſſue, and therefore a Repleader was awarded: And the Court held in this caſe, That if there be two or three things in a Declaration upon which an Iſſue may be joyned, if an Iſſue be joyned upon any of them, it is well. And alſo they held, That an Affirmative and an Implyed Negative, do make a good Iſſue, although it be not an expreſſe Negative. And ſo it was adjudged, Trin. 8 Car. in this Court, in *Taylor* and *Sparks* Caſe, Mich. 24 Car. in B. R. *Jennings* and *Lees* Caſe. *Styles*, 351, 210, 211.

31. A. as Executor brought Debt upon divers Obligations, The Defendant pleaded, That he did pay a leſſer ſum then is expreſſed in the Obligations to the Teſtator during his life, and that he did accept thereof in full ſatisfaction of the ſaid Obligations. It was Demurred upon the Plea. The Queſtion here is, Whether the payment, or the acceptance of the money, be to be traverſed? The Court held, It was indifferent, to traverſe either of them; but ſaid, It was more proper to joyn Iſſue upon the payment: But the Court would adviſe. But in this caſe, it was ſaid, That if he do receive it, it ſhall be adjudged in ſatisfaction of the Obligation; for he muſt receive it, upon ſuch Terms as the other will pay it. Mich. 1650. in B. R. *Bois* and *Cranfields* Caſe. *Styles*, 239.

32. N. brought Debt upon an Obligation againſt M. as Executor; the Defendant pleads generally *pleinement adminiſtravit*: and after Iſſue joyned, he gives in Evidence, a Judgment of the Teſtator, to make his Plea good: upon which, a Special Verdict was found. It was argued, That a *Pleinement Adminiſtravit*, is a Plea in barr, although it be not a perpetual barr; and it is a general Iſſue, becauſe it comprehends many things which may be given in Evidence. *Rolls*, Chief Juſtice, ſaid, If upon the general Iſſue, one ſhould give in Evidence, *Non eſt factum*, would it be good? And he ſaid, Certainly this is not the general Iſſue intended by the Statute (meaning the Meal Act), although it be a common Iſſue; for the general Iſſue intended, ought to be an Iſſue proper to the Action that is brought, and which might have been pleaded at the beginning, and who can tell upon this Plea, what you will give in Evidence, and ſo the Plaintiff can never be provided for you at tryal: and therefore you muſt rely upon your ſpecial Plea of Fully Adminiſtred, and not vary from it by ſhewing new matter. It was adjudged for the Plaintiff. Trin. 1653. B.R. *Newman* and *Maſſey's* Caſe, *Styles*, 328.

33. In Treſpaſſe for a Way, the Defendant did juſtifie, and ſaid, He had a Way not only *ire, equitare, et averia ſua fugare*, but alſo *carucis et carretagiis carriare*. The Plaintiff traverſed it *abſq; hoc*, that he had a Way not only *ire, equitare, &c.* in the words aforeſaid; and thereupon they were at Iſſue, and found for the Plaintiff. It was moved, That the Iſſue was ill, becauſe it was not a direct Affirmative, but by inducement onely: But *non allocatur*: And *Jones*, Juſtice, ſaid, That if I ſay, not only J. G. hath been at ſuch a place, but alſo J. N; it is a good Affirmative, that both have been there. And the Court ſaid, The pleading is more elegant then formal. Mich. 15 Car. in B.R. *Hicks* and *Wibbs* Caſe, *Marſh*, 55.

34. A man was bound to keep a Pariſh harmleſſe from a Baſtard-Child; and for not performance thereof, the Obligee brought Debt upon the Obligation. The Defendant pleaded, That he had ſaved the Pariſh harmleſſe, and did not ſhew how. The Plaintiff Replyed, and ſhewed, How that the Pariſh was warned before the Juſtices of the Peace at the Seſſions, and there ordered by Record, to pay ſo much for keeping of the Child; and becauſe the Defendant had not ſaved harmleſſe, &c. The Defendant pleaded *Nul tiel Record*. Upon which, the Plaintiff did demur. In this Caſe, It was Reſolved, 1. That the Plea *Nul tiel Record*, upon an Order at Seſſions of Peace, is a good Plea; becauſe an Order at Seſſions is a Record. 2. That notwithſtanding Judgment ought to be given for the Plaintiff, becauſe the Defendant's bar was not good, in that he hath pleaded in the affirmative, That he hath ſaved the Pariſh harmleſſe; and doth not ſhew how, as he ought to do. But if he had pleaded, *Non damnificatus*, that had been good, without

without further ſhewing; which he hath not done. And it was agreed, That the ſame was not helped by the Demurrer, becauſe the ſame was matter of ſubſtance; but the Plaintiff might take advantage of it. It was adjudged for the Plaintiff. Mich. 17 Car. in B. R. *Maſſo*, 121.

See more of *Iſſues joyned*, in Title, *Pleadings*.

Judgments.

1. *Where upon an Original, Judgment ſhall be of Part at one time, and of Part at another; Where not. And where, and in what Actions a man ſhall have ſeverall or double Judgments upon one Original: Where not.*

1. A *Formedon* was brought againſt A, B, and C; A. and B. confeſſed the Action; C. pleaded Joynt-Tenancy with B, without ſaying, that A. had any thing. The Demandant maintained his Writ; *viz.* That they all three were Joynt-Tenants: and upon that, Iſſue was taken, and the Court held the Iſſue to be good. But in that caſe, 'although the Action was confeſſed; yet the Demandant ſhould not have Judgment for part, untill the Iſſue was tryed. Mic. 26 H. 8. *Dyer*, 6.

2. Husband and Wife brought a *Scire facias* to have Execution of a Recovery in a Writ of Dower; where the Demand was of 6. Meſſuages, and 100 Acres of Lands, in *Littleton* and *Stanwell*, in *Com. Midd.* As to the third part of the Lands in *L*; the Tenant confeſſed the Action, and Judgment was given for that, That the Plaintiffs ſhould recover Seiſin: and as to the Tenements in *S*, the Defendant pleaded to Iſſue. Afterwards the Plaintiff waived that, and prayed Execution of the third part of the Lands in *L*; And upon advice of the Court, and Preignothories, a ſpecial *Scire facias* was ſued forth, reciting the Record as it was pleaded, commanding the Tenant to ſhew cauſe, wherefore the Demandants ſhould not have Execution of the third part of the Tenements in *L*: and upon default of the Tenant, upon a *Scire facias* returned, the Demandants had a ſpecial Writ of Seiſin of the third part of the Tenements in *L*. Paſch. 29 H. 8. *Dyer*, 34 *Soper's* Caſe.

3. A Writ of Dower was brought againſt 8. ſeveral perſons; Two of them confeſſed the Action, and the reſt pleaded in barr. Judgment was preſently given, That the Demandant ſhould recover the third part of two parts in 8. parts, to be divided; and afterwards the barr being againſt the Defendants, the demandant had Judgment to have Seiſin againſt them, of the third part of the 6. parts of the premiſſes in 8. parts, to be divided. See 10 Aſs. 2. 17 E. 3. 4. Mich. 3 Eliz. *Dyer*, 187.

4. A Writ of Entry in the *Quibus* in the nature af an Aſſiſe, was brought againſt the mother and her two ſons who were within age; the mother appeared by Attorney, and the two ſons by their Guardian; and ſhe pleaded, *Quod non diſſeiſivit*, which was found againſt the mother, that *diſſeiſivit*, but the Sons did not diſſeiſe the Demandant. It was the Opinion of the Court, That Judgment ſhould be given againſt the Mother for the whole: and that the Plaintiff as to the ſons ſhould be in *miſericordia*. And Judgment was given accordingly. Trin. 12 Eliz. *Dyer*, 312.

5. In a *Quare Impedit* brought, the Iſſue was found for the Plaintiff, and the value of the Church and Rectory, but the Jury was not charged of 3. Points; *ſcil. De plenitudine, Ex cujus Preſentatione, Si tempus ſimeſtre tranſierit*; as it ought to have been. *Cook* 10. Part, 118. in *Cheney's* Caſe. And alſo no Judgment was given by the Juſtices of *Niſi Prius*; as there might have been by the Statute of *Weſt.* 2. Now upon the return in *Banco*, The Plaintiff prayed a Writ to the Biſhop, to enquire of thoſe 3. Points. But at laſt, upon the Plaintiff's relinquiſhing of his Damages, he had Judgment; and had a Writ to the Biſhop *ſuo periculo*. Mich. 4 Ma. *Dyer*, 135. *Poyner's* Caſe.

6. An *Ejectione Firme* was brought againſt two; the one appeared, and pleaded the general Iſſue: afterwards the other appeared, and pleaded an Entry after the laſt Continuance in abatement of the Writ, upon which the Plaintiff Demurred; and afterwards the Iſſue was found for the Plaintiff: Yet the Opinion of the Court was, That he ſhould not have Judgment, becauſe by his Demurrer he confeſſed the Entry, and thereby abated his own Writ; and the reaſon is given, becauſe in his Action the Term is to be recovered: but if he had only Imparled to the Plea, it had been otherwiſe. Hill. 6 Eliz. *Dyer*, 226.

7. A Writ of Partition was brought againſt two, one of them confeſſed the Partition; the other pleaded to Iſſue. In the Record of *Niſi Prius*, the name of the Defendant was omitted by negligence of the Clerk, and written *prædict. ſimiliter*, and no more: and alſo the Jury was ſummoned between the Plaintiff and both the Defendants; whereas one of them was no party to the Iſſue. The

Opinion of the Court was, That it was miſpriſion of the Clerk only: and therefore it was amendable; and awarded the Amendment of it; and then Judgment was given againſt the Defendants. Paſch. 9 Eliz. *Dyer*, 261. *Wotton* and *Cook*'s Caſe.

8. In a Writ of Accompt, Judgment was given *quod Computet; Et Ideo in miſericordia, quia non prius Computavit.* The Defendant brought Errour; and the Queſtion was, If after that Judgment, Errour did lye or not? It was Reſolved, That a Writ of Errour upon that Judgment *quod Computet.* did not lye before the final Judgment given: 1. Becauſe the Record ſhall not be removed, untill the whole matter of the Accompt be determined, and that cannot be, untill Judgment be given of the Arrearages and Damages. 2. Becauſe the Writ of Errour ſhall be intended not only *de principali et Integro*, but *de judicio graviter damnoſo*, and that ſhall be intended the Judgment by which he ſhall recover the Arrearages and Damages. 3. Becauſe the award *quod Computet*, is but an Award which is Interlocutory, and not definitive. 4. Becauſe till the latter Judgment, the parties have day in Court by the Roll; which proves, that the Plea is not fully determined. *Cook* 11. Part, 38. *Metcalf*'s Caſe.

9. The Lady *Willoughby*, wife of the late Sir *Francis Willoughby*, ſued in Chancery as Adminiſtratrix of her late Husband, againſt P. W. who had married one of the daughters of the ſaid Sir *Francis*. The Defendant pleaded, That before Adminiſtration committed to the Plaintiff, he himſelf put in a Caveat in the Spiritual Court; hanging which Caveat, ſhe obtained Letters of Adminiſtration; whereupon he hath appealed; which appeal is not yet determined, and demanded Judgment, if hanging this Appeal, the Plaintiff ſhould be received to ſue in this Court as Adminiſtratrix. It was the Opinion of *Egerton*, Lord Keeper of the Great Seal, That the Defendant's Plea was good to ſtay the Suit, untill the Plea be determined: But not to be diſmiſſed out of Court. And he ſaid, There is a difference between an Appeal in the Spiritual Law, and a Writ of Errour: For by the purchaſing of a Writ of Errour, the Judgment is not impeached, untill the Record be Reverſed. But the very bringing of an Appeal, is a ſuſpenſion of the firſt Judgment in the Spiritual Court for the principal matter, but not for the Coſts. Hill. 43 Eliz. in *Cancel.* The Lady *Willoughbyes* Caſe. *Baldiſon.* 119.

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2. *Where the Plaintiff ſhall have Judgment to recover, but there ſhall be a* ceſſat executio *for a time, and for what cauſe, and where not.*

1. IF one hath a Reverſion with Warranty; and upon Aid preyer, Receit, or Voucher, the Land is loſt, and Judgment is given to recover in value; yet Execution ſhall ceaſe, as to have the Land in value untill the death of the particular Tenant. Hill. 4 Ma. *Dyer*, in the Counteſs of *Surrey*'s Caſe, 139.

2. A Writ of Partition was brought by *Wotton* againſt *Cook* and *Temple*; they appeared, and confeſſed the Partition. In that Caſe, Judgment was given, with a *ceſſat Executio*; and there they made ſeverally Title to the Lands, and traverſed the ſuppoſal of the Writ and Count. Paſc. 9 Eliz. *Dyer*, 260. See ſect. before, *Wotton* and *Cook*'s Caſe.

3. A. brought a *Quare Impedit* againſt the Biſhop of *London*, and J. S. Declared, That *Henry* Earl of S. was ſeiſed of the Manner of W. to which the Advowſon of the Church of W. was appendant, who preſented J. S. one of the Defendants, who was Admitted, Inſtituted, and Inducted, and afterwards the Earl dyed ſeiſed, after whoſe death the Manner diſcended to R. Earl of S. who levyed a Fine of the ſaid Advowſon to J. D. in Fee, who granted the next avoydance to the ſaid A. the Plaintiff: And afterwards J. S. reſigned to the Biſhop, the other Defendant, by which the Church became void by the ſaid reſignation, and ſo it belonged to the Plaintiff to Preſent. The Biſhop pleaded, That he claimed nothing in the Church but the Admiſſion, Inſtitution, &c. and demanded Judgment *ſi abſque ſpeciali impedimento, &c.* I. S. pleaded, That before the Writ brought, he was in the ſaid Church by the ſpace of ſix Moneths of the Preſentment of *Hen.* Earl of S. *abſque hoc* that the Church was void *modo et forma*, as the Plaintiff declared. In that Caſe, as to the Plea of the Biſhop, the Plaintiff prayed a Writ to the Biſhop, and the ſame was granted to him by the Statute, but with a *Ceſſat Executio*, untill the Plea between the Plaintiff and the other Defendant was determined. And as to the Plea of J. S. the Plaintiff did maintain, That the Church was void *modo et forma, &c.* upon which they were at Iſſue; and at a *Niſi Prius*, it was found for the Plaintiff. Mich. 3 Jac. in B. R. *Cook* 6. Part, 48. *Boſwells* Caſe. See

Cook

Cook 7. Part, 25. *Hall's* Caſe, acc.

4. A. brought an Action of Debt upon a Bond of 200 l. againſt B. and E. his Wife, Executors of J.S. The Defendants pleaded fully Adminiſtred, and ſo nothing in their hands; the Plaintiff replyed, That they had Aſſets: The Jury found, That there was Aſſets, to the value of 172 l. and Judgment was given to recover the whole Debt of 200 l. and Coſts and Damages of the goods of the Teſtator, &c. and if not, then the damages of their own goods. Upon a Writ of Error brought upon the ſame Judgment in the Exchequer Chamber, the Judgment was affirmed: For upon the Bar, the effect of which is nothing in their hands, the Plaintiff might have prayed her Judgment preſently, for thereby he confeſſeth the Debt, but he cannot have Execution, untill the Defendants have goods of the deceaſed, *Cook* 8. Part, 134. *Mary Shipley's* Caſe.

5. If a man have Common of Eſtovers to his houſe, and ſuffer his houſe to fall down, he can now claim no Eſtovers, and if he ſue for them, and the other plead, That his houſe is down; he ſhall not have Judgment with a ceaſing of Execution, till he have re-edified his houſe, as in a *Warrantia Chartæ*, or a Writ of Meſne, where the Defendant pleads, That he is not ſued nor diſtreyned, he ſhall have Judgment but no Execution for the preſent: So in a Writ of Dower againſt the Heir, If he plead, That the Demandant detains the Evidences, he ſhall have Judgment preſently, with a *Ceſſat Executio*. But in the Caſe of Eſtovers, the Plaintiff ſhall be barred, for at the time of the Action brought, he hath no right of Eſtovers, but it is in ſuſpence; and therefore it is not a perpetual, but a temporal bar, and if he do re-edify his houſe in the ſame place, he ſhall have his Eſtovers again. Quære, If he bring an Aſſiſe, or a *Quod permittat* for his Eſtovers where his houſe is down, and Judgment paſs againſt him, if he ſhall not be barred finally, rather then where Iſſue in tail is barred by Warranty and Aſſets, and then alliens the Aſſets againſt his Iſſues, yet the bar ſtands, which ſhould not but for the Judgment. See *Cook* 4. Part, *Lutterells* Caſe. And the Opinion of *Hobart* Chief Juſtice, in the Argument of *Cooper* and *Andrews* Caſe. Mich. 10 Jac. in C. B. *Hob.* 139.

3. *Where the Plaintiffe ſhall have Judgement to Recover, although the Iſſue be found againſt him, where not; And where he ſhall have Judgement, though his Declaration be found by Verdict to be Falſe, where not; And where Judgement ſhall not be given, although the Party hath right.*

1. LEſſee for years Covenanted by Deed with his Leſſor, that he would not cut down any Trees from off the Land, and bound himſelf in an Obligation to perform the Covenants. In Debt brought upon the Obligation by the Leſſor, he aſſigned a breach, That the Leſſee had cut down 20 Oaks. The Defendant pleaded, That he did not cut down the 20 Oaks, nor any of them. The Plaintiffe replyed, That he cut down 20 Oaks; and the Jury found that the Defendant had cut down 10 Oaks: It was doubted, if upon the Verdict, Judgement could be given for the Plaintiffe: But at laſt, it was the Opinion of the Court, That the Plaintiffe ſhould have Judgement, for that the Covenant was broken by the cutting down of ten, and that the alledging of the reſt was ſurpluſage. Paſch. 4 *Mar. Dyer*, 115.

2. An Action upon the Caſe by Sir *John Bridges*, for theſe words, There is a great Neſt of Thieves at P. and Sir *John Bridges* is a maintainer of them, and he is a ſtrong Thief himſelf. The Defendant made a Juſtification of certain words which he ſpake, ſounding to a ſuſpition that he was a Favourer of Thieves, *abſque hoc*, That he *propalavit dicta verba in Narratione ſpecificat. modo & forma prout.* It was found by Verdict, That he ſpake all the ſaid words, except the word [ſtrong.] It was moved upon this Verdict, That there might be no Judgement, becauſe the matter is not proved in ſuch manner as the Plaintiffe Declared: But after a great debate at the Bar, the Plaintiffe had Judgement. Mich. 6 E. 6. *Dyer*, Sir *John Bridges* and *Warenfords* Caſe.

3. If a man bring an Action of Debt, and Declare, That the Defendant 4 *Aprilis*, 24 Eliz. made a Bond bearing date the ſame day and year; and the Defendant plead *Non eſt factum*; and it is found that the Bond was Delivered at another day (before or after) than the Plaintiffe hath declared: It was holden by the Court, That yet Judgement ſhall be given for the Plaintiffe, for as much as the Date is not material, and the Defendant cannot be twice charged,

charged. *Cook* 2. Part, 5, in *Goddards* Caſe.

4. It was Reſolved by the Court, That if the Principal be pardoned, or hath his Clergie, the Acceſſary cannot be Arraigned; and none can be Principal, before he be adjudged ſo by Law, and by Judgement upon a Verdict, or Confeſſion, or by Outlawry; and it is not enough that he be Principal, and the acceptance of a pardon, or prayer of Clergie, is an Argument, but no Judgement that the party is guilty: But if the Principal after Attaindor be pardoned, or hath his Clergie, the Acceſſory may be arraigned; for that it appears judicially that there was a Principal. Trin. 32 Eliz. *Cook* 4 Part, 43. *Eyers* Caſe.

5. In a Writ of Entry in the *Quibus* of 70 Acres of Land in H. the Tenant pleaded, That one C. poſſeſſed in Fee, and Demiſed the Land to him for life, the Defendant Entituled himſelf to the Land, *abſque hoc quod demiſit, modo & forma*: It was found, That C. and ſix others were ſeized to the uſe of the ſaid 70 Acres, and of a houſe in H. which Houſe and Lands had been from time to time called W. and that the ſaid C. and the other ſix, joyned in a Leaſe of the ſaid Houſe called W. with the appurtenances to the Tenement. It was holden by the Court, That this Demiſe will not maintain the Iſſue for the Tenement; and though it was not found expreſly, that the 70 Acres were appertaining to the Houſe called W. which was found to be Demiſed, yet Judgement was given for the Plaintiffe. Hill. 5. *Mar. Dyer*, 158.

6. Note, It was ſaid and agreed in the Caſe between *Vere* and *Jeoffries*, That where one had goods only in an Inferiour Dioceſs, and yet the Metropolitan of the Province, pretending that he had *bona Notabilia in diverſ. Dioceſ.* committed Adminiſtration, that this Adminiſtration was not void, but voidable only by ſentence, becauſe the Metropolitan hath Juriſdiction over all the Dioceſſes in his Province, and therefore it cannot be void; but if Judgement be given upon ſuch Adminiſtration, it is not void, but voidable: But if an Ordinary of a Dioceſs committeth Adminiſtration of goods, where the party hath *bona Notabilia in diverſ. Dioceſ.* ſuch Adminiſtration is meerly void, as well to the goods in his own Dioceſs, as elſewhere, becauſe he can by no means have Juriſdiction of the Cauſe; and a Judgement given upon ſuch an Adminiſtration, is utterly void. *Vere* and *Jeoffries* Caſe. Vouch in *Cook*, Part, 30. in *Princes* Caſe.

7. In a Replevin, the Plaintiffe entituled himſelf to have Common of Paſture to his Copyhold; It was found by Verdict that he ought to have the ſame Common, but that every Copyholder had uſed to pay time out of minde &c. *pro eadem Communia unam Gallinam, & quinque ova annuatim*; and yet notwithſtanding that Verdict, the Plaintiffe had Judgement; and the reaſon was, becauſe the ſame was not a mannor of Commoning, but a collateral recompence to be paid for the Common. Trin. 37 Eliz. in *Cook* 5 Part, 70. *Gray's* Caſe: And in that caſe, this Caſe was put by *Popham*, A man preſcribed to have Pot water out of a River, and the Jury found that he had had, paying 6 d. yeerly. In which caſe he ſaid he had failed of his preſcription, for he preſcribed abſolutely; and the Jury found a Preſcription *ſub modo*, and therefore in that caſe he could not have Judgement.

8. In a Replevin, the Defendant made Conuſans as Bayliffe of J. S. of the Mannor of H. ſuppoſing that the Land was holden of the ſaid J. S. by Fealty, and Rent of 20 d. and Suit of Court, and alledged Seiſin of all the ſaid Services within 50 years; the Plaintiffe made and conveyed to himſelf Title to the Land, and ſaid, That he held by Fealty, and 12 d. and Suit of Court, *pro omnibus Servicius*, and had ſeized the ſeizin of the Fealty, 20 d. rent, and Suit of Court; and the Jury found the ſeiſin of the 20 d. rent, *prout*. It was Reſolved by the Court, That in this caſe no Judgement could be given, becauſe all the ſervices and things compriſed in the Traverſe *abſque hoc*, were not found for the party affirmatively. Mich. 16 Eliz. *Dyer*, 33. See *Cook*, 4 Part, 9. in *Bevills* Caſe, That ſeiſin of Rent, is a ſeiſin of Fealty, Homage, and other annual Services on Land, but not an actual ſeiſin.

9. Debt againſt J. S. Sheriffe of the County of D. and the Plaintiffe ſet forth, That he Recovered in B. R. 309 l. againſt J. D. and that the body of the ſaid J. D. was taken in Execution by the ſaid J. S. Sheriff of D. at S. in the ſaid County, and that afterwards the ſaid J. S. ſuffered him to eſcape in the pariſh of B. in *London*; The Defendant pleaded in Bar, That the ſaid J. D. was in his Cuſtody in Execution, until afterwards at S. he brake Priſon, againſt the Will of the ſaid J. S. and eſcaped; upon which he made freſh Suit, and he retook him; The Plaintiffe by Proteſtation, That he did not make freſh Suit, that after the eſcape, and before he retook him, he ſuffered him to be one whole day and a night at *London*, out of his View; Whereupon the Defendant did demur in Law. In this Caſe, amongſt other things, it was Reſolved, That the Defendants Bar was inſufficient, for the Plaintiffe hath Declared of an eſcape in L. and the Defendant juſtifies the retaking him at S. and ſo the eſcape at *London* is not anſwered; but for as much as the Plaintiffe doth not deny the freſh Suit, but by proteſtation hath relyed upon that matter only, that the Priſoner was out of his ſight, and the Court ſhall not intend other matter to maintain his Action then he himſelf hath ſhewed: and now upon the Record it doth not appear that the Plaintiffe hath cauſe of Action; for that cauſe the

Plaintiffe

Plaintiffe perceiving the opinion of the Court, did discontinue the Suit. But it was agreed by the Court, That if the Plaintiffe had Demurred upon the Bar, that he should have had Judgement. *Cook* 3 Part, 52. *Rigemayes* Case.

10. In a Replevin, the Plaintiffe Declared, R. F. was seized of the Land, where &c. in Fee, and made his Will, and thereof made B. C. and D. his Executors, and thereby devised the said Lands to J. F. his eldest son, for 60 years, if the said J. F. should so long live; the remainder to F. F. his son for life, the remainder to the heirs males of the body of J. F. with divers Remainders over, and dyed, and that J. F. entred, and made the Lease to the Plaintiffe, who put in his Cattel, &c. In Barr of which the Defendant said, and confessed the seisin of R. F. and that he made his Will *prout*, but said further, After the making of the said Will, he made a Feoffment of the said Lands (*inter alia*) to J. D. and J. G. and their heirs, to the use of the said J. F. after the Devisors death, for 60 years, if he should so long live; and after to the use of the said T. F. for life, and after to the use of the heirs males of the body of the said J. F. with divers remainders over: *Proviso*, That if the said J. F. should disturb his Executors, and should not suffer them to take away the goods of the said R. F. which should remain in his dwelling house, &c. that then the uses limitted to the said J. F. and his heirs should cease, and shewed that R. F. dyed possessed of goods which were in the said House at the time of his death, and that the said J. F. would not permit the Executors to take and carry them away, by which the said Term limitted to the said J. F. did cease, and he the said T. F. being in remainder did Enter. Upon which the Plaintiffe did demur in Law. In this Case (amongst many other points) it was Resolved, That although it now appeareth, that although the Title by which the Plaintiffe claimeth, was destroyed, (for the Plaintiffe claimed by the Will of R. F. the Father, which Will was after wards countermanded by the Feoffment) yet the Plaintiffe should have Judgement, because his Declaration is good, and the Avowant in his Replication hath done two things; One, He hath destroyed the Title which he made by Will; the other, he hath given to the Plaintiffe another Title, viz. To have the Land for 60 years, by force of the uses declared upon the Feoffment: So that now upon the whole Record (upon which the Court ought to judge) the Plaintiffe hath a lawful Term in the Lands, and so Judgement is to be given for the Plaintiffe, although that the Title which he made for himself was destroyed: and Judgement was given accordingly. Mich. 7 Jac. in C. B. *Cook* 8 Part. 90, 91, 92. *Frances* Case.

11. Debt for arrearages of Rent; The Defendant pleaded *Nil debet*; It was found for the Plaintiff, and in arrest of Judgement, Exception was taken, that it appeared upon the Plaintiffs own shewing, that he demanded more then was due; and then the Verdict is not given for the thing demanded, and it doth appear that here is an unjust demand, and if the Defendant had demurred upon the Declaration, it would have been adjudged no good Declaration, and the Plaintiffe here hath falsified his own Writ. But the Opinion of the Court was, That the relinquishing of part, is not falsifying his own Writ, although the thing demanded be entire; and here the Plaintiffe desires Judgment only for what is due, and he may as well Release after the Writ brought, as before; and he may release or relinquish as well where there is an ill demand, as where there is a good demand: wherefore Judgment was given for the Plaintiffe. Hill. 24 Car. in B. R. *Barber* and *Pomeroyes* Case. *Styles*, 175.

12. In an Action upon the Case for speaking of these words of the Plaintiffe, having speech of a Cow of the Defendants; He and his fellows have stollen her, and I do charge him with flat Felony. The Defendant pleaded in Bar an Award made by two Justices of Peace between the Parties: It was said for the Plaintiffe, That the Award did not binde the Plaintiffe, for the Award concerned only the speaking of the words, but spake nothing of the Imprisonment, which the Plaintiffe layed in the Declaration. It was the Opinion of the Court, That the Declaration was ill, and the Plea also; for the Plea is entire, and yet goes not to all the matter alledged in the Declaration, but the Plea is only to part of them; and therefore, if any part of the Declaration be good, Judgement ought to be given against the Defendant for that part, and the Plea in Bar is naught; and so Judgement was given for the Plaintiffe, Trin. 1650. B. R. *Denton* and *Cabors* Case. *Styles*, 247.

13. Debt against an Administrator; He pleaded several Recoveries had against him in the Court of *Chester*, which amounted to all which he had in his hands. The Plaintiffe replyed, That one of the said Recoveries was by Covin, and that the other Recoverer had accepted of a Composition, and that the Defendant delayed to accept of Release of it, to delay the Plaintiffe. In this Case, amongst other things, it was Resolved, 1. That the Barr was insufficient, because he did not shew that the Court of *Chester* had power to hold Plea of Debt, nor doth he shew that the Testator was bound in an Obligation; and if it were upon Contract, the Administrator was not chargeable in Debt. Also the Court held, That the Replication was ill: Yet because the Barr was insufficient, although that the Replication was ill, yet the Court was of opinion

nion that the Plaintiffe should have Judgement, because he had not shewed any thing against himself; But if it had appeared by the Replication, that he had no cause of Action, then he should have been barred, and should not have had Judgement, *Cook*, 8 Part, 134. *Turners* Case.

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4. *Judgement against Executors; where it shall be of their own goods, where not; and what manner of Judgement it shall be.*

1. IN Debt brought against an Executor, he pleaded that he had fully Administred, and gave in evidence, That he had paid debts upon Contracts made by his Testator, upon which the Plaintiffe did Demur in Law: The Court was of Opinion, That the same was no cause to delay Judgement, because he was not compellable to pay such debts; and admit that the Debtees had Obligations, yet because the Defendant hath not shewed, that he paid the said debts before this Action brought (for if he pay them pendant the Writ, the same is no Administration) there they gave Order that Judgement should be Entred against the Plaintiffe, and that the Judgement should be but of the goods of the dead, *quod nota*, Pasch. 28 H. 8. *Dyer*, 32.

2. Debt against two Executors, one appeared and confessed the Action, the other made default, and Judgement was given to recover of the goods of the Testator in both their hands; and to that end, Issued forth a *Scire facias*, upon which the Sheriffe returned *Nihil*, but that he that made default had wasted the goods before the Receipt of the Writ; upon which a *Scire facias* issued only against him who had wasted, and upon default upon the *Scire facias* returned, Execution was awarded of his proper goods only who made default. 4 Eliz. *Dyer*, 210.

3. Debt against J. S. Executor of B. Executor of A. upon an Obligation of A; the Defendant said A. did owe upon a Statute to B. 100 l. after whose death, goods of the value of 100 l. came to the hands of B. as Executor of A. with which he paid himself, &c. *& ultra*; the said goods the said B. *in vita sua* fully administred, and so nothing in the hands of B. &c. The Plaintiffe said, Assets in *London*, *ultra. &c. tempore mortis* B. It was found for the Plaintiffe, and he had Judgement of the goods of A. in the hands of the Defendant, and damages of the proper goods of the Defendant. The Sheriff returned *Devastavit* against the Defendant, because he found Assets in the hands of B. *tempore mortis*; upon which Judgement was given that Execution should be of the proper goods and chattels of the Defendant; and if *nulla bona* were returned, then the Plaintiffe might have a *Capias* or an *Elegit* at his Election. Trin. 3 Eliz. *Dyer*, 185. Sir *John Chickens* Case.

4. A Termor covenanted for him and his Executors to repair, uphold, and sustain a house at his own costs and charges, principal Timber (*in casu vel in defectu reparationis*, or otherwise in default of the Lessee) only excepted, and dyed, the house was burnt through the default of the Executors; It was adjudged in that case, That an Action of Covenant did lye against them, and dammages recovered of the goods of the Testator, and not conditional, if they had not of their proper goods; and such Judgement was given upon great advisement had by the Court. Pasch. 15 Eliz. *Dyer*, 324.

5. It was Resolved by the Court, That if A. be bounden in a Recognizance, or in a Statute Merchant, or in a Statute Staple; and afterwards a Recovery is had against A. in an Action of Debt, and A. maketh his Executors, and dyeth, his Executors are bound by the Law to pay the debt due upon the Recovery, although it be *puisne*, before the debt due by Recognizance or Statute; because although that both are Records, yet the Judgement in the Kings Court upon Judicial and Ordinary Proceeding is more notorious and conspicuous, and of more high and eminent a degree, then a Statute or recognisance taken in private, and by consent of the parties, and therefore preferred in Judgement of Law before a Statute or Recognizance, Pasch. 32 Eliz. in C. B. *Pemberton* and *Barhams* Case. Hill. 42 Eliz. in B. R. *Bearblock* and *Reads* Case. Vouched in the Case of the Warden and Commonalty of *Sadlers* Case. *Cook* 4. Part, 60. Set 40 Eliz. in C. B. *Harrisons* Case, *Cook* 5 Part, acc.

6. An Executor brought an Action upon the Case against another Executor, upon an *Assumpsit* made by the Testator: It was adjudged that the Action was maintainable, because after the death of the Debtor, the debt doth remain, and it should be a defection in the Law, if there should be no means for the recovery of it. And in that Case, It was Resolved, That the Plaintiffe needed not to aver, That the Defendant had Assets to pay Legacies, for that Debts upon simple Contracts are to be paid before Legacies, and debts upon simple contract shall be paid before the reasonable part of the Wife or children. *Cook* 9 Part, 91. in *Pinchon's* Case.

7. In *Assumpsit*, the case was, The Defendant being possessed of an Interest of a Term as Executor

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to J. S. who was indebted to the Plaintiffe, in conſideration, that the Plaintiffe would not moleſt him, but would defer the payment till Michaelmas, did promiſe to pay him the money, or to aſſigne the ſaid Term to him for it at Michaelmas next: Being upon *non Aſſumpſit* found for the Plaintiffe, and Judgment given: Error was brought, and aſſigned for Error, that the Plaintiffe had not averred, that the Executor had Aſſets at the time of the Aſſumpſit: It was Reſolved in this Caſe, That the Plaintiffe in his Declaration needed not to aver that the Plaintiffe had Aſſets, for the Law ſhall preſume *prima facie*; that the Teſtator would not leave a greater charge upon his Executors, then he would benefit for them to diſcharge it, and therefore Aſſets ſhall be intended. 2. Reſolved, That the money which the Executor ſhall pay upon ſuch general Aſſumpſit, in ſatisfaction of the debt of the Teſtator ſhall be allowed unto the Executor upon his Accompt: And in that caſe, It was ſaid by *Cook* Chief Juſtice; If there had not been any debt, and the Executor had not any thing in his hands at the time of the promiſe, that the Defendant might give the ſame in Evidence, and ſo helps himſelf, for then there was not any conſideration to ground the Aſſumpſit upon, *Cook* 9 Part, 94. *Banes* Caſe.

8. Debt againſt an Adminiſtrator upon an Obligation made by the Teſtator of 600 l. the Defendant pleaded in bar, a Recognizance to the King, of 100 l. and another Recognizance of 809 l. *pro vero et juſto debito*, and another Recognizance to J. D. 1000 l. *pro vero et juſto debito*, and pleaded divers other Recognizances of great value, and that ſhe had fully Adminiſtred, *et quod nulla habet bona* which were of the Inteſtate in her hands *praterquam bona et catalla ad valentiam* of the ſaid Recognizance to the King, and the other Recognizances, and averred, the ſaid Recognizances were in force, *et quod ipſa nulla alia ſive plura habet bona praterquam bona* not ſufficient to ſatisfy the aforeſaid ſeveral Debts. The Plaintiff replyed, That the Recognizance to J. S. was for the payment of 400 l. which the Teſtator paid in his life time, which J. S. received; and that the other Recognizances were for performance of Covenants, all which were performed, and the ſaid Recognizances were kept on foot by fraud of the Adminiſtrator, and averred that the Adminiſtrator had goods in her hands *praterquam bona ad valent. pradict.* 100 l. due to the King. In this Caſe, it was Reſolved, That the bar was inſufficient. 1. Becauſe it was repugnant, for firſt, ſhe pleads ſhe had not goods and Chattels *praterquam bona et catalla ad valentiam* of the ſaid Debt to the King, and the other ſeveral Recognizances, and afterwards ſhe pleads, That ſhe had not *bona et catalla, qua non ſufficiant ad ſatisfaciendum pradict. ſeparalia debita*, which is repugnant. 2. For that the Defendant hath not averred, That A. who was joyntly bound with him in the ſaid Recognizances, had not payed the debts; and when a bar is inſufficient in matter, and the Writ and Declaration is good, and the Replication ſuperfluous, there the Plaintiff ſhall have Judgment. *Cook* 9. Part, 108. *Marial Triſh on's* Caſe.

9. Error of a Judgment in C. B. the Error aſſigned was, for that in Debt againſt Husband and Wife as Adminiſtratrix, the Defendant pleaded payment by the Wife after the death of the Inteſtate, according to the Condition of the Bond; and Iſſue was joyned and found thereupon for the Plaintiff, and Judgment given *quod recuperet debitum* againſt them *de bonis teſtatoris et ſi non, &c.* the damages *de bonis ſuis propriis*, where it being a falſe plea, the Judgment ought to have bin for the Debt, *de bonis propriis*. 2. The Judgment ought to have bin for the damages of the goods of the Husband, only for that a Feme Covert can not have goods. But Reſolved, That the Judgment was well given, for although the Plea is falſe, yet he is not altogether a ſtranger to the Teſtator. 2. Although the Wife hath not goods during the Coverture, yet becauſe the Husband is charged only in reſpect of the Wife, and ſhe might have goods if ſhe had ſurvived, and Execution might be then taken againſt her, therefore the Judgment is good; and the Judgment was affirmed. Trin. 5 Jac. in B. R. *Johns* and *Adams* Caſe. *Cro.* 2. Part, 191. See the Lord *Mounſon* and his Wife, and *Bourne* Caſe. Mich. 15 Car. in B. R. *Cro.* 1. Part, 373. and 379. acc.

See more concerning this Diviſion, in *Lib.* 1. Title *Aſſets*; and before, in the Titles of *Executors, Adminiſtrators*, and Title *Execution*.

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5. *Where Judgment ſhall be given againſt the Verdict for a Cauſe which appears to be matter of Record, or that the Verdict is found againſt the Law; Where not.*

1 EXception was taken to an Indictment of Murder; of Principal and Acceſſaries, becauſe the wound was given the 4th day of *Auguſt*, and the death was the 19th day of *December* next following; and the Indictment ſaith, That T. M. and W. M. (who were the Acceſſaries) *tempore felonia et Murdri pradict.* ſcil. 4 *Auguſt, &c. felonice fuerant preſentes, &c. ad felonias et Murtrum pradict. in forma pradict. faciend.* And it was ſaid in maintenance of the ſaid Indictment by the Kings

Councel, That the death hath relation to the ſtroke; for if a man *Non Compos mentis* ſtrike himſelf, and afterwards becommeth of *ſane memorie*, and dyeth, the death hath relation to the ſtroke, and he forfeiteth not: Alſo it was ſufficient, becauſe it is the Office of the Jury to find *veritatem facti*; and becauſe they have found all the circumſtances, and truth of the Fact, although they conclude againſt the Law, yet their finding is good. But it was Reſolved by the Court, upon conference had with the other Juſtices, That the ſaid Indictment was repugnant and inſufficient as to the ſaid T.M. and W.M. for that no Felony was committed till the death, and none ſhall be adjudged a Fellon by relation. *Cook* 4. Part, 42. *Heydons* Caſe.

2. A man brought an Action upon the Caſe in the County of N. againſt S. and declared, That H. recovered againſt him in the Common Pleas, and after Judgment, and before Execution, H. dyed, and that the Defendant knowing it, and malitiouſly, and deceitfully plotting and contriving to Outlaw the Plaintiff, in the name of H. took out a *Capias ad ſatisfaciendum*, directed to the Sheriff of *London*; and there purchaſed an Exigent, and afterwards a *Capias utlagatum* directed to the Sheriff of N. by force of which he was taken and Impriſoned in the County of N. and forfeited his goods and Chattels, until he had purchaſed his Pardon. And upon that Declaration, the Defendant did demur in Law, becauſe that the Action ought to have bin brought in the County of *Middleſex*, where the wrong began, for there the Defendant purchaſed the *Capias*, *Exigent*, and *Capias utlagatum*, and thereby all his goods were forfeited But it was Reſolved by the Court, That the Action was well brought in N. For that it is a Maxime in Law, that *ibi ſemper debet fieri triatio ubi Juratores melioren habere poſſunt notitiam*; and the viſible wrong was in the County of N. for there the Plaintiff was Impriſoned, and when matters of Fact are mixt with matters of Record, and when the matter in one County depends upon matter in another County, there the Plaintiff may chuſe in what County he will to bring his Action. As if a man conſpire to endict one in one County, and afterwards doth execute the ſame in another County, there the party is at his Election to have his Action in what County he pleaſeth. *Cook* 7. Part, 1. *Balmers* Caſe.

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6. Where a Judgment may be reverſed in part, and ſtand good for other part; Where not: And where no Judgment can be given.

1. AN Act on upon the Caſe was brought for words ſpoken at two ſeveral times: Judgment was for the Plaintiff, and ſeveral damages being found by the Jury, one entire Judgment was given for the damages and Coſts. And now upon Error brought, That for the firſt words, the Action did not lye (the words were), He hath poyſoned J. S. *quendam J. S. adtunc defunctum innuendo*; and he did not aver that he was dead at the time of the ſpeaking of the words. It was the Opinion of the Juſtices and Barons in the Exchequer Chamber, That the Action did not lye, and that the Judgment was erronious. And then it was a Queſtion if it were reverſable for all, or only *quoad* the Judgment for thoſe words. It was the Opinion of the Court, That the Judgment ſhould be reverſed only *quoad*, the damages for the words for which the Action did not lye, and ſhould be affirmed *quoad* the Coſts, and the reſidue, for that Coſts are due where part of the words are found. Paſc. 11 Jac. in B. R. *Jacob* and *Mills* Caſe. *Cro.* 2. Part, 343. See *Hob.* 6. the ſame Caſe.

2. Error upon a Judgment in C. B. upon a Formedon; The Judgment was upon a Verdict found, *Quod recuperet ſeiſinam de uno Meſſuage, et de duobus acris terre et Paſture*, not mentioning the quality of the Land, nor the quality of the Paſture, which being ill for the incertainty. It was moved, That the Judgment ought to be affirmed for the Meſſuage. It was holden by the Court, That the Court of Common Pleas might have given Judgment for the Meſſuage only. Yet when they have given one intire Judgment for the Meſſuage and Land, this being ill in part, ought to be reverſed for the whole, and cannot be affirmed for part, and reverſed for the reſidue. Hill. 11 Car. in B. R. *Gosdier* and *Platts* Caſe. *Cro.* 1. Part, 338.

3. A. recovered 400 l. Debt againſt B. who dyed; upon a *Scire facias* into the County of S. the Sheriff returned R. Tertenant *omnium terrarum et tenementorum in Balliva ſua quæ fuerunt prædict.* B. Judgment was given, That A. ſhould have Execution againſt the ſaid R. Whereupon A. prayed an *Elegit* entred upon the Roll, *Elegit ſibi liberari medietatem omnium terrarum et tenementorum in Com. S. tenend. &c. quousque, &c.* and left out *quæ fuerunt prædict. B.* and for that cauſe, the

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Judgment was reverſed *quoad adjudicationem Executionis*; and yet the Writ of *Elegit*, and the return of it were well in that point. Mich. 5 Jac. in B. R. *Reeve* and *Gwens* Caſe. *Hob.* 90.

4. In an *Ejectione firmæ*, the Caſe was, A. being ſeiſed of Lands in Feeſimple, conveyed his Land by Deed of Feoffment unto T. his Son, in this manner, *ſcil.* to him, and the Heirs of his body, *Habendum*, to the uſe of him and his Heirs for ever, who afterwards deviſed all the Lands by his Will; under whom the Plaintiff claimed: the Queſtions were, 1. What Eſtate *Thomas* had by this Feoffment, if tail, or Fee. 2. If tail, Then whether Tenant in tail might be ſeiſed to another uſe. It was Reſolved in this Caſe, That he had an Eſtate tail, and that Tenant in tail could not ſtand ſeiſed to an uſe, according to 24 H. 8. br. Feoffments to uſe, 40. And therefore it was adjudged in this Caſe, That whereas the Plaintiff in the *Ejectione firmæ* claimed the whole, in regard but one moyety did belong to the party under whom the Plaintiff claimed, That Judgment ſhould be entred only but for a moyety for the Plaintiff. Trin. 13 Jac. in B. R. *Cowper* and *Franklins* Caſe. *Bolſtr.* 3. Part, 185.

5. Error upon a Judgment in C. B. in an Action upon Aſſault and Battery; the Error was, that the Action was brought againſt three, who all appeared, and pleaded, Whereas one of them was an Infant within age, and Judgment entirely was given againſt them all, which muſt be void againſt the Infant. It was the Opinion of the Court, That for an Error in Law againſt ſome of the Defendants, it is reverſed in all of them, otherwiſe of an Error in *fait*. It was the Opinion further, That the Judgment in this Caſe was entire, and was to be reverſed for the whole, although it be good in ſome part. Trin. 24 Car. in B. R. *Aylet* and *Oats* Caſe. *Styles* 121, 125.

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7. Where a Judgment ſhall not be given, although the party hath right: Where given, though there be no Original ſued out; and where no Judgment can or may be given: And where, if given, not to be reverſed, but by Error or Attaint.

1. If the point in Iſſue be found againſt the Plaintiff, there the Plaintiff cannot have Judgment, although he hath right; This appeareth in *Cook* 3. Part, 42. in *Ratcliffs* Caſe, (ſee the Caſe at large) There the Iſſue was, Whether *Elizabeth* the Mother, had the cuſtody of *Martha* at the time of the Contract of Marriage. There, upon the ſpecial Verdict, divers things were found without Warrant, and which were not material to the Iſſue joyned. And although in that Caſe it appeared, That the Plaintiff had right againſt the Defendant; yet becauſe the Iſſue was found againſt him, Judgment was given, That the Plaintiff ſhould not take any thing by his Writ. *Cook* 3. Part, 42. *Ratcliffs* Caſe.

2. Upon a ſpecial Verdict, the Caſe was, Tenant for life, the Remainder in Fee to the Plaintiff; Tenant for life leaſeth for years, the Leſſee is ouſted, and the Tenant for life diſſeiſed: The Diſſeiſor maketh a Leaſe for years, and his Leſſee ſowed the Land, and Tenant for life dyed, he in the Remainder in Fee entred; the Defendant took the Corn ſowed, and he in the Remainder brought Treſpaſs. It was Reſolved in this Caſe, That the Defendants claiming by the Leſſee of the Diſſeiſor, had not the meer right in them, but in reſpect of his poſſeſſion, ſhould bar the Plaintiff, but the meer right was in the Leſſee of the Tenant for life, and he might have an Action of Treſpaſs, and recover all the mean profits againſt the Leſſee of the Diſſeiſor; therefore he in the Reverſion ſhall not have remedy for them alſo, for then the Leſſee of the Diſſeiſor ſhould be twice charged; but as to the entry into the Lands, and taking of the Corn, it was good matter of juſtification by the Defendants; but becauſe they pleaded Not Guilty, the Plaintiff had Judgment for the Entry, but was barred for the reſt. *Cook* 5. Part, 85. Sir *Henry Knivets* Caſe.

3. Treſpaſs of Aſſault and Battery was brought and tryed in *Middleſex*, and the Bill upon the File was in *London*. It was Reſolved, That it was a Declaration and Tryal without Bill, which was aided by the Statute of Jeofailes, Hill. 20 Jac. in B. R. *Col brop* and *Culpepers* Caſe. And Judgment in that Caſe was for the Plaintiff. So, where Debt was brought in *Exeter*, and the Writ ſuppoſed to be within the County of *Devon*. After Verdict, it was held, That the Writ in one County, cannot be for an Action in another County, and therefore it was a tryal without an Original; and that is helped by the Statute. But ſee [the Caſe, where Error was brought upon a Judgment in *Ejectione firmæ*, for that the Original bore date 24. *Jan.* 6 Car. and the Ejectment was ſuppoſed 31. *Jan.* And after Verdict, upon Not Guilty pleaded, it was found for the Plaintiff, and Judgment entred; and the ſame was aſſigned for Error. It was Reſolved in that Caſe, That the Judgment was Erronious, becauſe the Original was certified as an Original in that Action which was between the ſame party, and the ſame Term; but becauſe it was

taken out before the cauſe of Action; it was holden to be a vitium and ill Original, not helped by the Statute, and the Judgment therefore was reverſed. Hill. 8 Car. in B. R. *Jobs* and *Steyners* Caſe. *Cro.* 1. Part, 98, 205.

4. Error brought of a Judgment in C. B. in an Action upon the Caſe for words; the words were, Thou was forſworn in a Court of Record, and that I will prove. Judgment was given there, That the Action would not lye for the words, becauſe he did not ſhew in what Court of Record he was forſworn. The Error aſſigned was in the matter of Law, That the Judgment there was given for the Defendant, where it ſhould have bin for the Plaintiff. It was the Opinion of the Court, That the Action well lay for thoſe words; and it ſhall be taken that he ſpake the words malitiouſly, accuſing him of perjury, and upon a falſe Oath, upon judicial proceeding in a Court of Record: Wherefore the Judgment was holden to be erronious, and it was reverſed. Hill. 13 Car. in B.R. *Cecly* and *Hoskins* Caſe. *Cro.* 1. Part, 366.

5. Debt upon an Obligation dated 20 *Maii*, 21 Jac. and the Plaintiff declared upon an Obligation of 20 *Maii Regis nunc*, which after was amended, and made 20 *Jacobi*; the Defendant thereunto pleaded a Judgment upon another Bond of 100 l. dated *Anno* 5 *Regis nunc*; and that he had nothing in his hands upon which Iſſue was joyned, and found for the Plaintiff. It was moved, That the Plea was repugnant and impoſſible, That a Recovery ſhould be of 5 *Regis nunc*; and therefore the Iſſue joyned, was naught, and no Judgment could be given upon it. But the Court was of Opinion, That ſo much as there was a default in the Defendants Plea, although the Plaintiff hath joyned Iſſue thereupon, which is found falſe; yet the Plaintiff having a good Declaration, ſhould have Judgment. Mich. 1 Car. in B. R. *Knight* and *Harpers* Caſe. *Cro.* 1. Part, 18 See before, in Title Iſſue joyned, the ſame Caſe.

6. The Caſe was, A Copyho'd was ſurrendred to J. S. in truſt, that ſo an Allien might take the profits thereof to his own uſe. Upon this an Inquiſition was taken for the King: whereupon the Lands were ſeized into the Kings hands. It was moved in this Caſe, That the Record was not removed out of the Chancery, but only an extract out of the Record in Chancery: and therefore Judgment could not be given upon it in the Kings Bench; but Judgment muſt be given upon the Record it ſelf; and the Court of Chancery is the only Judg of the Inquiſition, and ſo there might be one Judgment in the Chancery, and another here, if the Record be not removed here: And it was ſaid, There is a difference where a Tranſcript of a Record is removed out of a Court which cannot proceed upon the Record it ſelf; and when it is a Tranſcript of a Record, the Court may proceed in: And it was ſaid, That the Court here cannot judg, if the Commiſſion and the Inquiſition upon it were well executed or not: and therefore there could not be any Judgment given upon it here. But the Court was of Opinion, That they might give Judgment againſt the King, without the Inquiſition, and the Record is tranſmitted hither to determine whether the King or the party hath right, and the Chancery cannot entermeddle with it: And it was ſaid, That if an Office be found to entitle the King in Chancery, and it be tranſmitted hither, and it appears to this Court, That the Office is not good, that this Court might give Judgment againſt the King. Paſc. 24 Car. in B.R. the King and *Hollands* Caſe. *Styles* 21, 41, 90, 95.

7. By a private Act of Parliament in 5 and 6 *Ed.* 6. That the Quarter-Seſſions for the County of *Angleſey* in *Wales* ſhould be holden at *Beaumaris*, except in time of Plague, or other contagious Sickneſs; which being a private Act, it was exemplified and ſhewed to the Juſtices at their Seſſions under the Great Seal; and yet they proceeded, and took divers Indictments at N. another place within the ſaid County. It was the Opinion of all the Juſtices, That all the ſaid Indictments taken before them were void, *et coram non Judice*; for which the ſaid Juſtices were fined for their contempts. Mich. 4 Ma. *Dyer*, 135.

8. A Fine *ſur conuſans de droit come ceo*, was levyed of certain Lands in W. C. and E. upon which Fine four Proclamations were made every Term, but the 13 Proclamation was made 7. *Junii* in *Trinity* Term, whereas in truth, it was *Dies Dominicus*. Whereupon Error was brought to reverſe the Fine; and whether the whole Fine ſhould be reverſed or no, or the Proclamation only, was the Queſtion. It was Reſolved by the Juſtices, That the Fine ſhould ſtand in force, for the Fine is a matter of Record perfect and full before the Proclamations, and ſhall bind the right of the parties, and the Proclamations are another matter of Record which ſhall have another entry on Record after the Fine, ſo as they are ſeveral matters of Record, and therefore an Error in the Proclamation, is no Error in the Fine: And therefore the Proclamations were reverſed only, and not the Fine: And note, it was ſaid in that Caſe, That there needed not any Writ of Error to have bin brought to reverſe the Proclamations, becauſe they might have bin avoided by Plea. Mich. 5 Eliz. *Plow. Com.* 265. *Fiſh* and *Brockets* Caſe.

9. A Recognizance was made to Sir *Nicholas Bacon*, Keeper of the Great Seal, and to two others, and the ſaid Recognizance was taken before Sir *Nicholas Bacon* himſelf. It was the Opinion of the Juſtices,

Juſtices, That the ſame was void as to Sir *Nicholas Bacon*; but it was good to the other two. Paſc. 5 Eliz. *Dyer*, 220.

10. In a *Quo Warranto* againſt the Mayor, Bayliffs, and Jurats of *Maidſtone* in *Kent*, the Caſe was: In the *Quo Warranto* brought againſt them. It was Ordered by the Court, That they ſhould have day to plead until a fortnight after *Trinity* Term, and they had not pleaded accordingly: Whereupon Judgment was entred in the Roll, and the Writ of ſeiſin awarded, and Execution thereupon. Afterwards by a private Order in the vacation by the Lord Chief Juſtice, and another Juſtice. It was Ordered, That the Judgment ſhould be ſtayed; and the truth was, it was never entred in the Rolls of the Court, and therefore it was prayed, That the Judgment might not be filed, but that the laſt Order might ſtand. It was Objected, That that could not be, for that by the Judgment given, the King was entituled to have the profits of the Franchiſes, which he ſhould not loſe; and after Judgment entred, there can be no plea. And one Sir *John Wells* Caſe was vouched; where in a *Quo Warranto*, the Defendant had day to plead, otherwiſe Judgment ſhould be entred to ſeize, and he failed to plead at the day, and the Judgment was not filed, and yet he could not be relieved. The Court ſaid, This was a Caſe of great extremity, and they would adviſe of it; and in the mean time, that the plea ſhould be Recorded. And in this Caſe, it was ſaid, That the Kings Bench cannot reverſe a Judgment, although it be the ſame Term without a Writ of Error but that is where Error lyes in the ſame cauſe in the ſame Court, as upon an Outlawry, but if no Error lyes in this Court for the ſame cauſe, but in Parliament, then the Kings Bench may reverſe the Judgment without a Writ of Error, being in the ſame Term: And it was ſaid by them, That the Judgment was here never of Record, for the Roll, until it be fixed to other Rolls, is no Record. Trin. 2 Car. in B. R. The Caſe of the Mayor and Bayliffs of *Maidſtone*. *Poph.* 181.

8. *Several Caſes; where Judgments have bin Arreſted and ſtayed; and if Judgment have bin given, where they have bin reverſed, and the ſeveral Cauſes of ſtaying, or reverſing of ſuch Judgments.*

1. IN Debt againſt an Adminiſtratrix; the Caſe was, The Plaintiff had Judgment againſt the Husband, and ſued him to Outlawry: He brought a Writ of Error, and removed the Record into the Kings Bench, and reverſed the Judgment for the Outlawry, but the firſt Judgment was affirmed, and then he aſked wledged a Statute, and dyed: His Wife took Letters of Adminiſtration. The Statute is extended upon the Wife, and all the goods which ſhe had of the Inteſtates taken in Execution. After which, the Plaintiff in the Kings Bench ſued a *Scire facias* upon the Judgment againſt the Wife, ſhe pleaded the Statute in Bar, and the Extention, and more then that, ſhe had nothing to ſatisfy. Upon this Plea, the Plaintiff demurred in Law: The Court ſeemed to incline, That this was no bar, for although the Wife hath not any means to help her ſelf, or to prevent the extent of the Statute; yet it ſeemed to the Court, That this would not avoid the Execution: And the Wife might have an *Audita Querela* againſt the Conuſee of the Statute, and ſo make the extent void. Hill. 8 Jac. in C. P. *Beu-block* and *Reads* Caſe. *Brownlow*, 2. Part, 39, 40.

2. An Action of Battery was brought in the Court of *Plymouth* before the Mayor and Bayliffs. Judgment was given for the Plaintiff, and a Writ of Enquiry of damages was awarded to the Serjeant of the Mace, That by the Oath of twelve men, he ſhould enquire which Writ was returnable at the next Court before the Mayor and Bayliffs: Upon Error brought, it did appear by the Record certified, That the Writ to enquire of damages, was taken before the Mayor who was Judg of the Court. And for that cauſe, the Judgment was reverſed, for the Writ warrants an enquiry before the Serjeant at Mace, who is a diſtinct Officer, and ſo the Enquiry before the Mayor not warranted by the Writ. Trin. 3 Jac. in C. B. *Bayly* and *Moons* Caſe. *Brown.* 2. Part, 203.

3. Aſſumpſit, for that the Defendant in conſideration of ſuch a ſum of money paid to him, promiſed to aſſure ſuch Copyhold Lands to the Plaintiff, in ſuch manner as J. S. ſhould adviſe. And

ſhewed,

ſhewed, That J. S. adviſed, that he ſhould make a ſurrender of that Land at the next Court of the Manner, to the uſe of the Plaintiff and his Heirs, and ſhould enter into a Bond of 40 l. for the enjoying of it againſt all perſons, all which he had not done: Upon *Non Aſſumpſit* found for the Plaintiff, It was moved, That this breach in not entring the Bond, was ill; and damages being given for that as for the other, no Judgment might be entred, and of that Opinion was the whole Court: For the Order that J. S. made, That the Defendant ſhould enter the Bond, was out of the *Aſſumpſit*; and the damages being given entire, was ill alſo: And ſo the Judgment was ſtayed. Paſc. 4 Jac. in B. R. *Stainroide* and *Lacocks* Caſe. *Cro.* 2. Part, 115.

4. Aſſumpſit, the Plaintiff declared, Whereas the Defendant was endebted to him 15 l. the Defendant promiſed to pay it by 21 s. the Quarter, and to enter Bond upon requeſt for the payment of ſuch ſums; and alledged a requeſt to enter Bond, which requeſt was made after the end of the Quarter. After a Verdict for the Plaintiff, it was alledged, That the requeſt to enter Bond of 30 l. and refuſal of it, was no breach, for there was not any promiſe to enter any Bond certain. But the Court ſaid, It was good enough, for it ſhall be intended a Bond of double the Debt, which is uſual. But becauſe the requeſt is alledged to be after a Quarter day, and if there ſhould be a Bond for the payment of it, it would be forfeited preſently for that cauſe. It was adjudged for the Defendant. Paſc. 4 Car. in B. R. *Gregory* and *Wikes* Caſe. *Cro.* 2. Part, 136.

5. Error of a Judgment in a *Quod ei deforceat* in the nature of a Writ of Right. The Writ was general, and the Count was of a Meſſuage, 29 Acres of Land, 30 Acres of Meadow, 40 Acres of Paſture, and 20 Acres *de Jampna et bruaria*, which ought to have bin alledged in certain. But it was holden by the Court to be good enough, for that *Jampna & bruaria* are not intended Lands of ſeveral ſorts, but of one and the ſame kind and Land; and ſo it was ſaid it was adjudged in the Lady *Howard* and *Candiſh* Caſe. 2. It was ſaid, That the Iſſue was not well joyned, becauſe he pleaded, That he had *majus jus tenendi tenementa praedict.* then the Plaintiff, and he doth not ſay *ſibi et haeredibus ſuis*. But *non allocatur*. For the Court intended not he ſhould have a leſſer eſtate then Fee, and if he were but Tenant for Life, it was at his perill to take ſuch a pleading, for that it is a forfeiture of his Eſtate. The Judgment was affirmed. Hill. 5 Car. in B. R. *Griffith* and *Jukins's* Caſe. *Croke*, 1. Part, 329.

6. Error brought by the Principal and Bail, and and the Error was aſſigned aſwell in the principal Judgment, as in the Execution againſt the Bail. It was the Opinion of the Court, The Writ was not well brought. Then they brought ſeveral Writs *quae coram vobis reſidunt*; the Error Aſſigned by the Principal was, That the Declaration was ill: And upon reading of the Record, it appeared, That the Action was brought before there was any cauſe of Action. Wherefore the Court held the Declaration to be ill, and erroneous: and therefore the Judgment was reverſed, and then the Writ of Error by the bail fell of it ſelf. Hill. 15 Car. in B R. *Smith* and *James* Caſe. *Cro.* 1. Part, 415.

7. Error of a Judgment in Debt upon an Obligation upon a Demurrer, becauſe Judgment was given for the Defendant, *Quod querens nihil Capiat per breve*. It was aſſigned for Error, That the Action was brought by an Attorney there by Bill of Priviledg, and not by Original Writ; ſo the Judgment ought to have bin *nihil Capiat per billam*, and not *per Breve*. The Clarks held it to be Error; but the Court doubted of it, becauſe it was in the Judgment which was by the Court; and therefore the Court would adviſe of it. Trin. 25 Car. in C.B. *Reymound* and *Barbeges* Caſe. *Cro.* 1. Part, 419.

8. Error in the Exchequer of a Judgment in B. R. in *Aſſumpſit*; Whereas the Plaintiff ſold him 29 peeces of Prunes, conteyning 189 hundred, and 21 l. weight at the rate of 18 s. 8 d. the hundred, *which in toto ſe attingunt* to 174 l. 19 s. 8 d. The Defendant in conſideration thereof, promiſed to pay him at the end of a Moneth, the ſum of 174 l. 19 s. 8 d. Upon *Non Aſſumpſit*, and Judgment for the Plaintiff. It was aſſigned for Error, That the ſum contracted for, was more then 174 l. 19 s. 8 d. according to 18 s. 6 d. the Hundred weight. It was holden by all the Juſtices and Barons, to be Error; and although it was alledged, That the promiſe might be leſs then was agreed to be paid for; the Court held, That ſuch an intendment perhaps might be, when a leſſer ſum is promiſed, but when the promiſe here is to pay the ſaid ſum of 174 l. 19 s. 8 d. that refers to that ſum which is caſt up, which is apparently falſe; therefore the promiſe cannot be in ſuch a manner; and it is impoſſible to pay that which is not the Bargain. Trin. 8 Jac. in B. R. *Anderſon* and *Dunſa's* Caſe. *Cro.* 2. Part, 247.

9. Errour of a Judgment given in a Writ of Right of Lands in *Durham*. The Writ was, *Quia Dominus remiſit nobis Curiam*. The Defendant imparled, and after divers Imparlances, made default; and thereupon Judgment final was given in *Durham*. It was aſſigned for Errour, 1. That the Writ ought to be returnable *coram Juſticiariis de*

et Banco, and not *coram Juſticiariis Itinerant.* in *Durham*; but that was ſaid to be the Courſe, and therefore *non allocatur.* 2. Error, becauſe final Judgement was given upon a default after Imparlance, whereas it ought only to have been a *Petit Cape*; for, no final Judgement thereupon after a plea pleaded, and Iſſue joyned, or Demurrer: It was ſaid, That that is true, that after a plea pleaded, &c. no final Judgement ſhall be, but a *Petit Cape*; but a default after Imparlance, and before a Plea pleaded, is *Quaſi* a departure in deſpight of the Court: The Court did not give any Reſolution in the Caſe, but ſeemed to incline, That a Judgement final ſhould not be given, unleſs upon a departure in deſpight of the Court, which is upon a default of the ſame Term after Imparlance; otherwiſe, if day be given to another Term, and then the Tenant makes default. 3. Error was, That the Writ bore date 20 *Feb.* 6 Jac. and in the Declaration, the Expleas were alledged in the time of Queen Eliz. in the ſeizin of the Defendant himſelf: and by the Statute of 32 H. 8. of Limitation, a Writ of Right of his own ſeizin cannot be but within 30 years before that time, and this ſeizin alledged may be before that time; and for that Error, the Judgement was reverſed. Mich. 9 Jac. in B. R. *Lilborne* and *Heroes* Caſe. *Cro.* 2 Part, 392.

10. In Treſpaſs, the firſt Declaration wanted the words *vi & armis*; but the ſecond Declaration which was after Imparlance, had thoſe words. It was Reſolved by the Court, That the words *vi & armis*, were matter of ſubſtance, which could not be amended, and for that cauſe the Judgement was reverſed, Trin. 17 Jac. B. R. *Ford* and *Fords* Caſe. *Cro.* 2 Part, 597. See 37 Eliz. in B. R. *Sheer* and *Bridges* Caſe, where an Action of Battery was brought, and the Declaration was, *Quod cum*, the Defendant did aſſault and beat him, without affirming *vi & armis*, and for that cauſe the Judgement was reverſed, *ibid.*

11. In Detinue of a Bond, it was found for the Plaintiffe, and damages aſſeſſed 7 l; and if the Bond cannot be reſtored, then they aſſeſſed damages beſides the 7 l. 20 l. more; and thereupon it was adjudged, that he ſhould pay the 7 l. and the ſaid Bond of 20 l. And a *Diſtringas* was to the Sheriffe to diſtrein for the ſaid Bond, or 20 l. It was alledged for Error, That the Judgement ought to be conditional; viz. the ſaid Bond, or if he cannot have the ſaid Bond, then the 20 l. and thoſe conditional words were omitted. And although it was urged that it ſhall be intended conditional, yet the Court was of Opinion, that the Judgement was erroneous; for by that Judgement and awarding of the *Diſtringas*, the Sheriffe might diſtrein for the one or the other at his choice, which ought not to be, but he ought to diſtrein for the thing it ſelf, and if he cannot have it, then for the 20 l. The Judgement was reverſed, Trin. 21 Jac. B. R. *Peters* and *Heywards* Caſe, *Cro.* 2 Part, 681.

12. Accompt brought againſt a Feme-Covert, and her husband, as Adminiſtratrix, and Judgment was given *Quod computent*; the Wife dyed, and the Husband brought a Writ of Error to reverſe this Judgment. It was the Opinion of the Court, That the Writ of Error did not lye, becauſe the Record cannot be removed by it, for that would diſturb the proceedings in the Common Pleas, and the party would have no benefit of his Suit, if the Record ſhould be removed, nor any remedy for the recovery of the arrears due unto him. Trin. 1651. B. R *Spittlehouſe* and *Farmoryes* Caſe, *Style*, 290.

13. In an Action upon the Caſe, for words after a Verdict found and the Plaintiff, Judgment was given for the Defendant; and therefore the Entry was, *Ideo conceſſum eſt, quod Querens nihil capiat per Billam.* It was holden to be a manifeſt Error by the Court; for the Entry ought to have been, *Ideo conſideratum eſt.* Hill. 11 Car. B. R. *Slotorats* Caſe, *Cro.* 1. Part, 319.

14. Error brought of a Judgement in an Inferior Court, the Entry being *Ideo Conceſſum eſt per Curiam quod praedict. J S. recuperet*: It was Objected, that the word *Conceſſum*, it is a Form of Entry, and ſo is *Cook*, 1 Part, *Allenwoods* Caſe for the Queen; *Cook* 1 Part, *Porters* Caſe. againſt the Queen; *Cook* 8 Part, the Princes Caſe; and *Cook* 10 Part, *Suttons* Caſe. But it was Reſolved, That the Entry was not good, for that it ought to be *Ideo conſideratum eſt per Curiam*; for the word *conſideratum eſt*, is very ſignificant, and implies two conſiderations. 1. To be a granting of an Award of the Court. 2. That this was done by them upon very good conſideration. Paſch. 13 Jac. B. R. *Robins* and *Sambeths* Caſe. *Bolſtr.* 8 Part, 92. 93.

15. Upon Covenant upon Articles, one of which was to allow ſuch a ſum of money to an Under-Clark of the Six Clarks Office by the ſheet for every Quire of paper he ſhould write in Copying and Engroſſing of Bills, Anſwers, &c. as was expreſſed in the ſaid Articles; The Plaintiff obtained a Verdict againſt the Defendant: In arreſt of Judgment it was inſiſted upon, that there was more found in the breach of the Covenant aſſigned, than was contained in the Covenant it ſelf; for it was found that he had not payed for 72 ſheets, which was five quire and a half, and ſo damages were given for more than ought to be, for the Covenant was to pay ſo much the Quire, and mentions not the half. The Court held the ſame a good cauſe to ſtop the Judgment; for they ſaid, the Law will not

ſupply

ſupply a Caſe, nor deſire to bring it within the Covenant to ground a breach thereupon. Paſch. 23 Car. B. R. *Needler* and *Gents* Caſe, *Styles*, 2.

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9. *Where Judgement ſhall be that the Party ſhall be in* Miſericordia; *and where* Capiatur, *& contra.*

1. DEbt by an Executor, The Defendant pleaded a Releaſe of the Teſtator made unto himſelf, and upon *Non eſt factum*, pleaded and found againſt him: Judgement was in *Miſericordia*; and thereupon Error was brought, and the Judgement was reverſed, becauſe it ought to have been *Capiatur*, for that he pleaded a falſe Deed, Paſch. 7 Jac. B. R. *Gibſon* and *Harbottles* Caſe. *Cro.* 2 Part, 255.

2. Trover brought againſt Husband and Wife, of a Trover and Converſion of the Wife during the Coverture. Upon Not Guilty, It was found againſt them for part, and for other part it was found for the Defendant; and the Judgement was, *Quod Quatens recuperet* his damages, and that the Wife *ſit in Miſericordia*, and that the Plaintiff. *Quoad reſiduum unde defendentes in quietati ſint ſit in Curia*; In Error brought, it was aſſigned for Error, becauſe the Judgment is, that the Wife *ſit in miſericordia*, whereas it ſhould have been, that the Husband and Wife *ſint in Miſericordia*, for that ſhe cannot pay without her Husband: And it was ſaid, That it was the uſual courſe for Treſpaſſes done by the Wife during Coverture, if they were Convicted, to have Judgement *Ideo Capiantur* againſt both; yet there is no offence by the Husband himſelf. For the firſt cauſe, the Court held the Judgment to be Erroneous, and ſo it was reverſed. Mich. 15 Jac. in B. R. *Wood* and Dr. *Suckling's* Caſe. *Cro.* 2 Part, 437.

3. Error was brought upon the removal of the Record into the Common Pleas, of a Judgement given upon an Information before the Mayor of *London*, upon the Statute of 5 Eliz. for uſing a Trade, whereby they demanded 40 s. for every moneth: The Error aſſigned was, That it being a penal Law, ought not to be Sued but in the Kings Courts at *Weſtminſter*, where the Kings Attorney is to acknowledge or deny. *Cook* 6 Part, 19. Alſo the Judgement was, *Quod eſſet in miſericordia*; where it ſhould be, *Quod Capiatur*. It was Reſolved, That for theſe Errors, the Judgment ſhould be reverſed, and was reverſed accordingly. Trin. 17 Jac. in B. R. *Miller* and the Kings Caſe. *Cro.* 2 Part, 538.

4. A Judgement in the Court of *Derby*, in Debt upon an Obligation, and *Non eſt factum* pleaded, was Entred thus; *Quod Capiatur*; but the Judgement certified was in this manner, *Ideo in miſericordia Capiatur*, without aſſigned for Error; It was moved to the Court, that the words [*in miſericordia*] were ſtricken out, and the Judgement is only *Capiatur*, and a *Certiorari* was awarded, which certified, that the words [*in miſericordia*] were not in the Judgement but a *Capiatur* only. It was the Opinion of the Court, That a *Certiorari* ſhould not have been awarded to an Inferiour Court, to certifie that which the Record ſhould certifie; and becauſe the Record certified had the words in it, and the line was underneath drawn, and for that the *Capiatur* was written with another hand, the Judgment was reverſed. Hill. 14 Jac. B. R. *Dryſcat* and *Heatons* Caſe. *Cro.* 2 Part, 542.

5. Debt upon the Statute of 2 Mar. for taking 10 d. for a Diſtreſs, *ſub pœna forisfacturæ* of 5 l. The Defendant pleaded *Nihil debet*; and the Jury found *Debet*, and aſſeſſed damages 2 d. and coſts 53 s. 4 d. The Coſts were increaſed by the Court to 7 l. and Judgment given, that he ſhould have a Writ for the 5 l. and damages and coſts, and the Defendant to be in *miſericordia*. Error was brought. 2. Errors aſſigned. 1. That the Judgment ought to be *Capiatur*. To that it was anſwered and Reſolved, That the Judgment was well; for that the Judgment was for Debt upon the Not payment, and not upon the Statute, being a penal Law. 2. Error was, that no damages or coſts ought to be given, becauſe it is a penal Statute, and the penalty is given by the Statute, and therefore he ought to have no more for coſts and damages. But Reſolved, That the Judgment was good, notwithſtanding that Exception, for when a Statute gives a penalty certain, and gives an Action of Debt, there if the Defendant doth not pay it upon demand, but forceth the party to a Suit, there he ſhall recover damages, and he ſhall alſo recover his coſts; but where the Duty is uncertain, there the Statute intends to give the treble value, and not any coſts; the Judgment was affirmed. Trin. 14. Car. B. R. *North* and *Wingates* Caſe. *Cro.* 1 Part, 403, 404.

6. Error brought to reverſe a Judgement given for the King, upon an Indictment againſt the Marquiſs of *Winchester*, upon the ſtatute of Recuſancy, for his abſence from Church for two moneths. It was found by Verdict, that he was abſent for one moneth, parcel of the time, and not Guilty for the other moneth; whereupon it was adjudged, that he ſhould forfeit 20 l. Divers Errors were aſſigned, 1. That the Indictment was *ad Caſtrum Wiston.* and doth not ſay in what Pariſh or County *Wiston* is. 2. It is againſt him by the name of *Dominum St. John*, without addition. 3. That *non acceſſit ad*

Eccleſiam

Exclesiam prædict. where no Church was mentioned before. All which Errors were disallowed by the Court: But because the Judgement was not *Idem capiatur*, the omission of which is apparent to the Kings prejudice, and in every Conviction upon Inditement, the Judgement is *Quod capiatur*; for this cause the Judgement was reversed. Mich. 14 Car. B. R. The Marquess of *Winchesters* Case. *Cro.* 1 Part, 362.

Mort Judgements.

1. THe Consisee of a Statute Staple in a Writ of Detinue upon the same Statute upon Garnishment, recovers by erroneous Judgement against the Garnishee, and hath the Statute delivered unto him; the Garnishee brings a Writ of Error, and the Consisee sues Execution upon the Statute, and hath it: In this case, although the Garnishee reverseth the Judgement, yet in as much as the Statute was executed, the Execution shall not be avoided by the reversal of the Judgement, because the Judgement was only to have the Statute delivered, and the Execution upon the Statute is a thing executed, and doth not at all depend, but the Judgement; and yet the Garnishee shall have remedy upon the reversal of the Judgement by *Audita Querela*. See *Cook* 8 Part, in 142. in Dr. *Drories* Case. &c.

2. Debt brought by an Executor upon an Obligation made to his Testator; the Defendant pleaded in Bar a Recovery by the Testator in his life time, upon which there was a Demurrer in Law upon Error brought. It was Objected, That it was in the Election of the Plaintiff either to Sue Execution upon that Judgment, or to have a new Action; for the Deed was not changed notwithstanding the Judgement. 2. That it was against reason to compel the Plaintiff to Sue Execution upon the first Judgement, which perhaps was erroneous, and reversable by Error or Attaint. But it was Resolved, That so long as the first Judgement did remain in force, he could not have a new Action upon the same Obligation: for when a man hath debt upon an Obligation, and by ordinary course of Law hath Judgement upon it, the Contract by Specialty, which is the most base in nature, is by the Judgement changed into a matter of Record, which is of a more high nature. And 2. If he might have a new Action, he might have infinite Actions and Judgements, and upon every Judgement the Defendant should be amerced, which would be very mischievous to the party. 3 Jac. in C. B. *Cook* 6 Part, 44. *Hogans* Case.

3. A. recovered against B. 60 l. in an Action upon the Case upon a promise, against which B. C. brought a Plaint of Debt in *London*, and Attached the said money in the hands of B. and had Execution according to the Customs of *London*: Now A. Sued a *Scire facias* against B. upon the said Judgement, who pleaded the said Execution by Attachment; upon which A. did Demur in Law. It was in that Case holden by the Court to be no Plea, for a Duty which accrueth by matter of Record, cannot be Attached by the Customs of *London*, and notwithstanding that the Customs be layed generally in *aliquo debito*, and damages recovered are *quoddam debitum*, yet the Law is clear, That Judgements given in the Courts of the King, cannot by such particular Customes be defeated and avoided; and in the argument of that Case, it was agreed by all the Justices, and by *Bromley* Lord Chancellor, and so said to be adjudged, That where a Merchant having in an Action recovered damages, became Bankrupt, upon which a Commission issued forth upon the Statute of 13 Eliz. of Bankrupts, That the Commissioners could not intermeddle with such damages to dispose of them to the Creditors, according to the Statute. Trin. 27 Eliz. in B. R. *Flood* and Sir *John Perrots* Case. *Leon.* 19.

4. A. brought a *Scire facias* against B. Administrator of J. S. upon a Recovery had against the Intestate in an Action of Debt; The Defendant pleaded, That before the said Judgement was given, the Testator did acknowledge a Statute unto one J. D. and that the same was not paid in the life of the Testator, and that he had not any goods of the Intestate in his hands, beyond what would satisfie the said Statute. It was Resolved by the Court to be no Plea, because that a Statute is but a private and pocket Record, as they call it, and shall not be satisfied before a Judgement had in a Court of Record. Trin. 33 Eliz. in B. R. *Read* and *Bayliss* Case. *Leon.* 328. Mich. 32 Eliz. in B. R. in *Coury* and *Barhams* Case adjudged acc.

5. In an Act on upon the Case, it was agreed by the whole Court, That where Judgement is given that the Plaintiff shall recover; and because it is not known what the damages are, therefore a Writ issueth to enquire of the damages. That it is not a perfect Judgment before the damages returned and adjudged; and therefore after such an Award of the Court, such matter may be shewed in Arrest of Judgement: And *Periam* Justice said, That the difference is, where damages are the principal thing to be recovered, and where not: for if they be the principal, full Judgement is not to be given before they be returned; but it is otherwise in debt, where an entire sum is demanded. Pasch. 35 Eliz. in C. B. *Bigbton* and *Sawles* Case. *Leon.* 309.

6. Debt againſt an Executor, upon fully adminiſtred; the Plaintiff replyed, that he had Aſſets, and the Defendant *relicta verificatione* confeſſed the Action, *nec quia ipſe detinet*; and Judgement was given againſt the Defendant *de bonis Teſtatoris*, which was entred in the Roll: It was moved to the Court, That his Confeſſion ſhould contain that he had Aſſets ſufficient, and that it might be added to the Entry: But the Court refuſed ſo to do, for that naturally the Confeſſion can extend no farther then the Count, which is the *Debet*, and not the Aſſets, Hill. 14 Jac. C. B. *Bird* and *Cumins* Caſe. *Hob.* 178.

7. Debt upon an Obligation, Conditioned for the payment of a leſſer ſum; the Defendant pleaded a Tender at the day, and that he was *tunc tempꝰ priſt.* The Plaintiff received the ſum in Court, and Judgement was given to acquit the Defendant of the ſum received; The Plaintiff to have damages, alledged a demand of the money from the Defendant; upon which it was Demurred, and Judgment was given againſt the Plaintiff; for if the Plaintiff would have damages, he ought not to have received the money, but to ſuffer it to remain in Court: For after Judgment, *Quod eat ſine die*, no Iſſue can be taken. Paſch. 4 Jac. C. B. *Harold* and *Charworthies* Caſe. *Cro.* 2 Part, 126.

8. Error to Reverſe a Judgement given againſt the Plaintiff being an Infant; The Error aſſigned and inſiſted upon, was, Becauſe that the Judgment given againſt him, was, *Quod Capiatur*, which ought not to be: Upon the Book of 17 Eliz. *Dyer*, 388. Where if an Infant be Plaintiff by his *Prochin Amy*, after his default makes an Attorney, and afterwards become Non-ſuit, he ſhall not here be amerced, for that he was within age; and if ſo, then no *Capiatur* ought to be awarded againſt an Infant. See 14 E. 3. 18. Two were found Diſſeiſors with force and Armes, the one of them was an Infant but of 18 years of Age, therefore he was not Impriſoned, but the other was: and ſee Paſch. 43 E. 3. *Fitz.* Impriſonment 16. In an Aſſize. It was found for the Plaintiffe, and adjudged that he ſhould recover ſeiſin of the Land, and that the Tenant ſhould be amerced, and taken; but becauſe that it appeared that he was within age, he was neither to be amerced nor Impriſoned: And in the principal Caſe the Court was of Opinion, That there was no Caſe in Law to warrant ſuch Judgement, that the Infant ſhould be amerced, or a *Capiatur* awarded againſt him, and therefore the Judgement was reverſed. Trin 9 Jac. in B. R. *Daly* and *Hilbrooks* Caſe. *Bolſtr.* 1 Part, 172.

9. Error to reverſe a Judgement in C. B. in Debt, againſt the Defendant, as Adminiſtrator of J. S. who pleaded, that before the Writ purchaſed, the Adminiſtration to him was revoked, and committed to another, and ſaid, that at the time of the Writ brought, he had then in Aſſets in his hands, to the value of 200 l. but before the Judgment given, he had delivered it over to the new Adminiſtrator; and all this being ſo confeſſed, the Plaintiffe ſaid, that this Revocation, Aſſignation, and all that was Acted, was by fraud between him and the party to whom the ſecond Adminiſtration was granted: Upon which Iſſue was joyned, and the Jury did finde the Covin, and a Verdict was for the Plaintiff, and Judgment, *Quod recuperet de bonis Teſtatoris* abſolutely. Error was brought and aſſigned, becauſe the Judgment was given abſolute, whereas it ought to have been conditional. It was the Opinion of the whole Court, That the Judgement being abſolutely given, was good, and not erroneous, and they were not reſtrained, as the caſe was, to give Judgment conditional; and afterwards the Judgment was affirmed. Mich. 9 Jac. in B. R. *Morgan* and *Sayer* Caſe. *Bolſtr.* 1 Part, 187.

10. A *Scire facias* by A. againſt B. to have Execution of a Judgement, which was for 20 l. which Judgement was *de Octab. Hill.* 2 *Car.* One being returned Terr-Tenant pleaded, That after the Judgment, *viz.* 22 Jan. he againſt whom the Judgment was, acknowledged a Statute, and that by that the Land was extended, and, after *Liberate*, delivered in Execution, and demanded Judgment: upon which the Plaintiff did Demur in Law: And the Queſtion was, to what day the Judgement ſhould have relation, for it appears in the Pleading, that the 20 day of Jan. was the day of Eſſoin. It was the Opinion of the Court in this Caſe, That the Judgement ſhould have relation to the firſt day of Term, as well as if it had been a Returne in the Term, for otherwiſe it ſhould be incertain. See 5 Mar. *Dyer* 200. And one *Gilliaghams* caſe was vouched, *viz.* a Releaſe of all Judgements before the fourth day, and after the day of Eſſoin, would not releaſe this Judgement, which was *de Octab. Hilarii*: And it was holden, That if a Writ of Error be brought after the *Octab.* and before the 4 *die poſt*, it is good, and ought after Judgment: It was adjudged for the Plaintiff in the *Scire facias*. Hill. 3 Car. in C. B. *Sandford* and *Cooper's* Caſe. *Hutton*, 95.

11. A Judgement was given in the Common Pleas againſt the Principal, without an Original; and upon this Judgment there Iſſued forth a *Scire facias* againſt the Bail, and two *Nichills* returned, and thereupon Judgement was given againſt the Bail. Error was brought by the Bayl to reverſe this Judgement: It was ſaid, that the Judgement was erroneous, becauſe being upon a *Scire facias*, which is a Judicial Writ, it ought to be grounded upon an Original, and it not being ſo here, it is

Error,

Error in *fact*, although not Error in Law. It was Reſolved, That *two Nichils* returned upon a *Scire facias* do amount to a *Scire feci*, and a Judgement given thereupon is good, and therefore it is too late now to ſay, That the *Scire facias* was not well executed. The Judgement was affirmed, Trin. 1651. B.R. *Barrak* and *Thompſons* Caſe. *Styles*, 288.

See more of *Judgements* in the Titles of *Errors* and *Executions*.

Jurours.

1. *Who is a ſufficient Jurour, who not; When, and at what day the Jury is to be demanded: Where to be examined and ſworn. And where a Juror ſhall be withdrawn, and when: and where not. And for the finding of the Jury.*

2. IN an Information for the Queen againſt J. S. A Juror, was Challenged for want of Freehold. And upon Examination, it was found, That he had 20 s. *per annum* Land, It was doubted by ſome of the Juſtices, if the Challenge was not good, becauſe the Statute is made for the benefit of the Common-wealth, and therefore the Queen ſhould be bound by it, although ſhe is not named, according as *Gawdy* conceived, he ought to have 20 s. *per annum* at leaſt by the Common-Law. Yet *Popham* commanded the Jurour to be ſworn, although the other Juſtices would have ſent to the Juſtices of the Common Pleas for their Opinions therein. Hill. 43 Eliz. in B. R. The Queen and Sir *Chriſtopher Blunts* Caſe. *Goldesbr.* 137.

2. A. being Indicted and Arraigned for Murder before the Coroners, and upon that Enqueſt; Pleaded for matter in Law to the Endictment, That he ought not to be Impeached upon that Indictment, and pleaded the Statute of 14 H. 4. cap. 9. That none ſhould be put upon any Pannel of Enqueſt, unleſs by the Bayliffs and Miniſters of the Sheriff known, and that the ſaid Jurours ſhould be *probi et legales homines*: and ſhewed, That one of the Jury nominated himſelf to be one of the Jury, and was not returned by any of the Sheriffs Bayliffs, nor by the Bayliff of any Franchiſe who ought by Law to return them: and for that, that two of the ſaid Jurors were Outlawed in Actions of Debt, and averred the Outlawries were in force, and not reverſed or vacated. There were two Queſtions. 1. If the Statute of 14 H. 4. extended to Enqueſts taken before Coroners, or only to Endictments before Juſtices of the Peace, and of *Oyer* and *Terminer*. 2. Whether it extended to perſons Outlawed in perſonal Actions, or only to perſons Outlawed for Felony or Treaſon. All the Juſtices of *England*, and Barons of the Exchequer, being aſſembled together to reſolve theſe doubts: The greater part of the Juſtices and Barons were of Opinion, That the Statute of 14 H. 4. extended aſwell to Endictments taken before Coroners; as before Juſtices of Peace, &c. 2. That it extends to perſons Outlawed in perſonal Actions, becauſe a man Outlawed in a perſonal Action, is not *probus et legalis homo*. But it was holden by the Court in this Caſe, That whereas a man is not convicted or acquitted, he might be Arraigned upon a new Indictment; and the party being Arraigned upon a new Indictment, pleaded *Autrefoits* acquitted upon an Indictment found before the Coroners, but the Court ſaid, it was no Plea; wherefore he was commanded to anſwer. Hill. 4 Car. in B. R. Sir *William Withypoles* Caſe. *Cro.* 2. Part, 95, and 105.

3. In a Writ of Right brought by the Lord *Windſor* againſt Husband and Wife, the four Knights and 15 others of the Grand Jury appeared; but the Tenants made default. It was ſaid in that Caſe, That the Jurours ſhall not be demanded, but the default of the Tenants only recorded, for that the Enqueſt ſhall not be taken by default in this Writ, as it ſhall be in other perſonal Actions. But it was ſaid, That the default of the Demandant, or of the Tenant after the Miſe joyned, was peremptory; and then a Queſtion was, Whether the Demandant ſhould have ſeiſin of the Land without a *Petit Cape*. Paſc 1 *Ma. Dyer*, 98, and 103. The Lord *Windſors* Caſe.

4. A Jury of *Middleſex* was demanded the firſt day of the Term in the Common Pleas; ſome of them appeared, and ſome not, ſo as the Jury was not full, and the Defendant did not appear, either in perſon, or by his Attorney. It was the Opinion of the Court, That the Enqueſt ſhould be taken by default, becauſe the parties are alwayes demandable before the Jurors. And it was ſaid in that Caſe, That if in ſuch Caſe the Plaintiff make default, he ſhall be Non-ſuit. Mich. 9 Eliz. *Dyer*, 265.

5. Note, It was holden by *Leonard* chief Clark, and by all the Prothonotories in the Common Pleas, That if the Jury appear at the day of the Return of the *Habeas Corpora*, or *Diſtringas*, and the Plaintiff doth not appear, nor any Writ is returned, yet the Plaintiff is demandable, and if he

doth not appear, he shall be Nonsuit, because the parties have day by the Roll. But it was much doubted, if the course was such in the Kings Bench. Hill. 12 Eliz. in C. B. *Dyer*, 286.

6. If a Jurour do happear at the bar upon return of the Writ, and after is adjorned upon a pain, and afterwards makes default; in that Case, he shall not be fined presently by the Court, because he shall be fined according to the value of his Land, and that shall be enquired of by the other his companions of the Jury, because the Court cannot know the same. 4 E. 4. 6. 20 Ass. 11. *Cook* 8. Part, 43. in *Grisleys* Case.

7. In an Attaint in the Kings Bench, the Grand-Jury did appear, and one Challenged himself, forasmuch as his Ancestors had bin Barons and Lords of Parliament, and that they had place in the same house of Parliament. This matter was tryed by six Tryers of the same Jury, for the which he prayed allowance of his Challenge, and that he ought to be discharged. But in that Case, the Chief Justice said, We cannot allow it, without a Writ testifying the same, for we ought to be informed of your Challenge by matter of Record, otherwise we cannot allow it, which the whole Court assented unto. 35 H. 6. 46. See in *Cook* 6. Part, 53. in the Countess of *Rutlands* Case.

8. Note, In an Action of Waste, the Jury is to have the view of the place, and thing wasted. And in an Action of Waste brought for uncovering of a Barn, by which the Timber was become rotten, and in the destroying of the stocks of Elms, Ashes, &c. and upon the general Issue, it was found for the Plaintiff: And in this Case amongst other things, it was agreed by the whole Court, That if six of the Jury be examined upon a *voire dire*, if they have seen the place wasted, it is sufficient; and the rest of the Jury need not to be examined upon a *voire dire*, but only to the Principal. 2. If the Jury be sworn, that they know the place, it is sufficient although they be not sworn that they saw it; and although that the place wasted be shewed to the Jury by the Plaintiffs servants; yet if it be by the commandment of the Sheriff, it is as sufficient as if it had bin shewed unto them by the Sheriff himself. Mich. 11 Iac. in C. B. Sir *John Gage* and *Smiths* Case. *Godbolt*. 209.

9. In Detinue of a Chain of Gold; the Plaintiff declared, That A. his brother was possessed thereof, and dyed Intestate, and that the Bishop of *Cork* in *Ireland*, granted him Letters of Administration, and that he as Administrator was possessed of the Chain in *London*, and that it came to the Defendants hands, who detayned it, the Defendant pleaded the general Issue, and the Jury gave a special Verdict, and found that the Administration was committed to the Plaintiff at *London* by the Bishop of *Cork* in *London*, but did not find that the Plaintiff was possessed of it at *London*. In this Case (amongst other points) it was holden by the Court clearly, That upon the general Issue pleaded, the Jury may find a Forrein matter, as a thing done out of the Realm, but it shall not abate the Writ if it be not matter of substance and pleaded before; but it was said, That in the principal Case, the finding of the Letters of Administration was more then they had in Issue, and it was but matter of Evidence, for the substance of the Issue in this Case, was the possession, and not the Administration, & for that the Plaintiff might have an Action of his own possession, without shewing the Letters of Administration. It was adjudged for the Plaintiff. Pasc. 27 Eliz. in C. B. *Carter* and *Crosts* Case. *Godbolt*, 33.

10. In an Action upon the Case, the Plaintiff declared to pay money upon a Request, but did not alledg any Request in certain: The Jury finds the Assumpsit, and so for the Plaintiff. It was said in this Case, That notwithstanding that the Jury find the Assumpsit, yet that doth not reach to the request, and without that, the Assumpsit is void, and 5 E. 4. was cited, That if a Declaration be vitious in a point material, and the Issue is taken upon another point, there the finding of it by the Jury doth not make the Declaration good. So that in the principal Case, Judgment was given for the Defendant: And in this Case, it was agreed, That if a man bring Trover and Conversion, and doth not alledg a place where the Conversion was, although that the Issue for the Trover be found by the Jury for the Plaintiff; yet he shall not have Judgment. Hill. 16 Iac. in B. R. *Hill* and *Wades* Case. *Godbolt*. 274.

11. Error brought to reverse a Judgment given in the Court of *Lincoln* in an Action of Trespass. One Error assigned was; because it appeared, That 18 Jurours were only returned upon the Panel, whereas they ought to have bin 24 returned by the Statute of *Westminster*, 2. cap. 38. And for that cause, it was ruled by the Court to be an insufficient return. Pasc. 2 Car. in B. R. *Holms* and *Wrengreves* Case. *Godbolt*. 370.

12. *Hopefull Tilden* was Arraigned at the Bar of the Kings Bench for a Buggery supposed to be done at *Hide*, one of the Cinque Ports; and the Record being removed into the Kings Bench by a *Certiorari* directed to the Mayor and Jurats of the said Town, and not to the Lord Warden of the Cinque Ports. The Prisoner Challenged one of the Jurats, being the Foreman, who was sworn and marked; and he was sworn and marked before the Challenge was heard by the Court, The Court therefore without the assent of the Kings Attorney, who was there present, would not alter the Record; and

and becauſe he would not conſent to alter the Record, the Challenge was diſallowed. Hill. 8 Car. in B. R. *Hopeſhill Tilden's* Caſe.

13. In Waſte, the Plaintiff declared, That the Defendant was ſeiſed in Fee, and made a Feoffment to the uſe of himſelf for life, the Remainder to the Plaintiff in Fee, after which he committed Waſte. The Defendant ſaid, That he was ſeiſed in Fee, without that, that he made the Feoffment as the Plaintiff declared: upon Iſſue joyned, it was found, That the Defendant was ſeiſed in Fee, and that he made a Feoffment to the uſe of himſelf for the life of J. S. without Impeachment of Waſte, the Remainder *ut ſupra*. It was ſaid by the Juſtices, That the Jury had found ſuch an Eſtate as was alledged by the Plaintiff, which although that they found this Priviledg to be diſpunithed of Waſte, which upon the matter, proves that the Plaintiff hath no cauſe of Action; yet becauſe the Tenant may chuſe whether he would take hold of this Priviledg or not, the Jury cannot find a thing which is out of their Iſſue, and whereof the Defendant will not take advantage by pleading; and for that cauſe, it was holden by the Juſtices, That the Verdict was void. Paſc. 25 Eliz. in C. B. *Keyre* and *Davarts* Caſe. *Owen* 91.

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2. *When, and where Jurors ſhall be returned* de Circumſtantibus; *and a Tryall and Verdict by them, good; when and where not.*

1. IN a Writ of Entry in the *Quibus* of 70 Acres of Lands in H. the parties were at Iſſue, and found for the Plaintiff: And in Arreſt of Judgment, it was moved, amongſt other things, That a Jurour who had made his appearance, and his appearance was Recorded, and who was not diſcharged by any Challenge; and he being ſworn upon another Inqueſt, three other *de Circumſtantibus* were put to make up the twelve a full Jury; whereof one was in his place, by whom after, the Iſſue was tryed. It was the Opinion of the Court, That it was well enough; and the tryal good. Hill. 5 Ma. *Dyer*, 158.

2. At the *Niſi Prius*, a full Jury appeared; but yet but two Hundredors, the two Hundredors were ſworn; and the Plaintiff had a *Tales de* 12 *Circumſtantibus Hundredorum*, and they were ſworn annexed to the 8 Principal in the Pannel; and that was admitted by the Court, and the Plaintiff had not a *Decem tales de Circumſtantibus*, becauſe the Principals were holden to be indifferent, ſaving only that it failed of Hundredors, who after were returned as aforeſaid, and ſo it was a full Jury. Paſc. 3 Eliz. *Dyer*, 200.

3. Upon the Statute of 35 H. 8. cap. 6. It was holden by the Juſtices, That one of the Principal Pannel may be joyned to 12 *de Tales de Circumſtantibus*, or upon the *Tales* joyned to the 12 of the Principal Pannel; and yet the words of the Statute are in the Plural number, *ſcil.* proceed with thoſe added. Alſo it was holden by the Juſtices, That if two of the Principal Pannel do appear, that *Tales de* 12 *Circumſtantibus*, ſhall be granted; and if the two be withdrawn, the Tryal may be only by the *Tales*. Mich. 8 Eliz. *Dyer*, 245.

4. In Treſpaſs upon the general Iſſue at the Aſſiſes, one of the Jurours upon the Principal Pannel appeared only, and at the prayer of the Plaintiff, a *Tales de Circumſtantibus* was returned by the Sheriff in this manner, the title was *Nomina* 10 *Talium*; and under it he returned 11 Jurours. In this Caſe, theſe points were Reſolved. 1. That when but one of the Principal Pannel appeareth, the Court may award 11 *Tales* by the Statute of 35 H. 8. cap. 6. 2. That a *Tales* is to be granted when the Tryal is *per mediatatem linguæ*, although an Allien hath no Freehold nor Iſſues, ſhall not be returned upon him, and although there be not any County, and that for the ſpeedy Execution of Juſtice. 3. That the miſpriſion of the Sheriff in the Principal Caſe ſhould be amended, and *Decem* put out of the Title, and then the Title ſhall be *Nomina Talium* only. 4. If at the time of this granting of the *Tales*, the Principal Pannel ſtands, and is afterwards quaſhed, yet the *Tales* ſhall ſtand; for it is ſufficient if there were *Tales* at the time of the granting of it. 5. That if one of the Jurours dyeth before appearance, or if one dyeth before the Verdict be given after he is charged, That a *Tales* ſhall be awarded. 6. That the *Tales* ought to be under the number of the Principal Pannel, and that now by the Statute, *Tales* may be of an uneeven number. 7. That in every new *Tales*, the number ſhall be leſſened, as if the firſt be *Decem Tales*, the next ſhall be *Octo Tales*. But if a *Tales* be awarded, and afterwards quaſhed by Challenge, there he may have a new *Tales* of the ſame number. 8. Reſolved, That if the Principal Pannel be quaſhed, the Tryal may be by *Tales* only, and if the *Tales* do not amount to make a full Enqueſt, a *Tales* to ſupply the firſt *Tales*, may be awarded. Mich. 10 Jac. *Cook* 10. Part, 103, 104. *Denbawdes* Caſe.

5. Error of a Judgment at the Grand Seſſions in the County of *Pembroke* in an Aſſiſe of Darrein Preſentment; among others, one Error was aſſigned, That *Tales de Circumſtantibus* was awarded, which ought not to be in an Aſſiſe, but upon *Niſi Prius*,

Prius. It was the Opinion of the Juſtices, That it had bin a manifeſt Error if it had bin ſo. But upon view of the Record, there were not *Tales de Circumſtantibus, ſed quod habeat Decem Tales ſecundum formam Statuti*; and therefore the Exception was diſallowed. Hill. 8 Car. in B. R. *Cort* and the Biſhop of S. *Davids* Caſe. *Cro.* 1. Part, 249.

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3. *Where the Juſtices may take notice of the Offences and miſdemeanors of the Jurors; and where they ſhall be fined to the King for ſuch Offences, where not: And where their Verdict ſhall be void by reaſon thereof; where not.*

1. IN Treſpaſs, the Jury being charged, and Evidence given, they being retired to a houſe to conſider of their Evidence, they remained a long time without concluding any thing; The Officer who attended them conſidering their delay, ſearched them if they had any thing about them to eat, upon which ſearch, it was found that ſome of them had Figs, and others Pippins, which being moved to the Court, the Jurors were examined upon Oath. Two of them did confeſs that they had eaten Figs before they had agreed of their Verdict, and three of them confeſſed, That they had Pippins, but did not eat them, and that they did it without the Wills or knowledg of any of the parties to the ſuit. The Court impoſed a Fine upon each of them that had eaten, to 5 l. a peece, and upon the others that had not eaten, 40 s. But notwithſtanding the ſame miſdemeanor of the Jury, the Court held their Verdict to be good. See 35 H. 8. 55. Where the eating and drinking of the Jury at their own Coſts, was holden only Fineable. And ſee Book *Entries* 251. The Jurors after they went from the Bar to be adviſed of their Verdict, *comederunt quaſdam ſpecies, ſcil.* Raiſins, Dates, &c. at their own Coſts, aſwell before, as after they were agreed of their Verdict; they were committed to Priſon, but their Verdict was good, although it was given againſt the King. Hill. 30 El. in C. B. *Mounſon* and *Wells* Caſe. *Leon.* 132, 133. See 29 H. 8. *Dyer*, 38.

2. In Debt brought upon an Obligation, in the Caſe betwen Sir *John Smith*, and *Peaze*; which ſee, Paſc. 26 Eliz. in B. R. *Leon.* 17. *Lib.* 1. Title Covenant, Sect. 1. In Arreſt of Judgment in that Caſe, it was moved, That J. S. Sollicitor of the Plaintiff in that Suit, had given 8 s. to the Jurors money, betwixt their Charge and their Verdict, which matter was teſtified by the Oath of two men; upon which the Court examined J. S. who upon his Oath denyed the matter, as alſo did the Foreman of the Jury, to whom it was ſuppoſed the money was given. It was moved, If the Receipt of the money by any of the Jurors ſhould make the Verdict void. It was the Opinion of the greater part of the Juſtices, That for that cauſe the Verdict was void, and for that cauſe the Judgment was reverſed. Paſc. 26 Eliz. in B. R. Sir *John Smith* and *Peazes* Caſe. *Leon.* 17.

3. In *Ejectione firmæ*, it was found for the Defendants: Three of the Jurours had ſweet-meats in their Pockets, and thoſe three were for the Plaintiff untill they were ſearched, and the Sweetmeats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Juſtices, That whether they eat or eat not, they were Fineable for having of the Sweetmeats with them, for that it is a very great miſdemeanor: and becauſe this matter was moved after the Jurors departed from the bar, and the Court cannot know which of the Jurors the three were, nor know for which three to ſend for; and for that the nine drew the three who had the Sweetmeats to their Opinion, the Court ſaw no cauſe to ſtay the Judgment; contrary, if the three had drawn the nine to them, to be of their Opinion: and therefore Judgment was given for the Defendant according to the Verdict. Trin. 21 Jac. in B. R. *Sely* and *Flaples* Caſe. *Godbolt.* 353.

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4. *Of what things the Jury may properly enquire, and of what not: Where one Jury may try a Cauſe twice, where not; and where once they give their Verdict, they ſhall not be ſworn again: And of Miſtryall.*

1. UPon the view of an Enfant brought into Court to be inſpected, who had during the Coverture joyned with her Husband in levying a Fine of her Lands, ſhe was by the Court adjudged within age: Whereupon a *Scire facias* iſſued out to the Tert-Tenants, who came in and pleaded, That ſhe was of full age at the time of the Fine levyed; upon which Plea, Iſſue was joyned, and a Tryall had at the Aſſiſes, and a Verdict for the Plaintiff, who now came in Court, and prayed Judg-

Judgment upon the Verdict. In this Caſe, it was ſaid by the Chief Juſtice, That the Court is to Judg of the Infancy, and not the Jury, and therefore you have not proceeded duly, but the proceedings do no hurt, for that we adjudg ſhe was within age; and gave order that the Judgment ſhould be reverſed. Mich. 1655. in B. R. *Vidian* and *Fletchers* Caſe. *Styles* 472.

2. In Trover, and Converſion of a Bag of money; upon a ſpecial Verdict, the Caſe was, A. recovered of B. 40 l. in the County Court; a *Capias* iſſued againſt B. and *non eſt inventus* returned by the Defendant, Sergeant at Mace; a *Scire facias* is iſſued againſt W. one of the pledges of B. and upon this, three Butts of Sack of the goods of W. were taken in Execution; the Plaintiff being preſt at to ſtay the Sale of the goods ſo taken in Execution, paſſed the ſaid Bag of money, and ſo left it in the hands of the Defendant, to the end that he ſhould keep the ſame until the next Court day, and this only as a pledge, for the redelivery of the goods to the Defendant, upon his requeſt, if W. in the interim ſhould not obtain from A. the ſparing of the Execution; and the Jury found no requeſt made, nor W. had ſtayed the Execution, but found the Requeſt of the Plaintiff to the Defendant, to deliver the Bag of money, and his refuſal to do it: It was the Opinion of the Court in this Caſe, That this being a Bailment, and the Writ of Execution being expired, and the time paſt limitted to the Defendant by the Writ to ſell the goods, it was impoſſible to have the goods again, but he was to have the Bag of money which was pledged for them, and that this Reteyner of the Bag of money, though upon requeſt, was no Converſion: And whereas the Jury in this Caſe finde the Defendant Guilty, *de Inventione & Converſione*, The Court was of Opinion, That this finding of theirs was not material; and it was ſaid, That the Jury is only to finde matters of Fact, but are not to meddle with the matters here of a Converſion, being matter of Law, this only being to be determined by the Judges. Trin. 11 Jac. in B. R. *Iſoack* and *Clift* Caſe. *Bulſtr.* 2 Part. from 307. to 314.

3. A. ſeized of Lands holden of the King, as of his Manor of S. by Knight-Service, Suit of Court, dyed ſeized thereof, B. his Son and Heir being an Infant; whereupon in an Office after his death it was expreſſed, That A. at the time of his death, held *Tenuram. prædict. de Domino Rege, per Servitium Militare, & per Liberum, & Annuatim reddium* of 2 ob. and by the Service at his Court at S. The Court of Wards upon view of former Offices, Records, and other Evidences concerning the ſaid Lands, Ordered, That B. ſhould be admitted to Traverſe the Office in point of the Tenure *in Capite*, which was admitted, ſo that B. at his full age Sued a general Livery; and then after B. did ſell ſome part of the Lands to J. S. who dyed thereof ſeized, his ſon and heir being of full age. One Queſtion in this Caſe was, Whether now B. yet living, may proceed in the ſaid Traverſe, the Traverſe being made 5. Eliz. It was Reſolved by the Juſtices Aſſiſtants of the Court of Wards, That ſuch Jury as ſhou'd hereafter enquire of the Tenure of the ſaid Lands, are not, nor ſhould not be eſtopped and concluded by the Suing of the ſaid Livery, and finding of the ſaid Office, but that they may finde the truth of the Tenure, notwithſtanding the Suing of the ſaid Livery, and finding of the ſaid Office: Whereupon a Decree paſſed accordingly. Trin. 8 Jac. *in Cur. Ward. Scourfields Caſe. Leon.* 22.

4. Note by *Rolls* Chief Juſtice, That if there be a Tryal, and a Verdict upon it, the ſame Iſſue cannot be tryed again by the ſame Jury, although the Chancery do Order ſuch Tryal; but if there be a miſ-Tryal, the party muſt move the Court where the Action was Commenced firſt, for a *Venire facias de Novo*, to ſummon a new Jury. Paſch. 1655. B. R. *Styles*, 445.

5. Error of a Judgement in C. B. in a Writ of Annuity; The Error aſſigned was, becauſe a Juror was returned upon the *Venire facias*, *Hugh Meilby*, and upon the Diſtringas *Hugh Melihy* was returned. It was holden by the Court, to be a manifeſt Error, unleſs it might appear by Examination of the under Sheriff, that he was the ſame perſon; and although this was in the time of another Sheriff, who was diſcharged, and the under-Sheriff alſo, yet he being in Court, he was Examined, and the Juror himſelf, if he were ſworn; and it appearing that he was the ſame perſon ſo named, it was awarded it ſhould be amended. Hill. 15 Jac. in B. R. Sir *Philip Stanhope* and *Stanhopes* Caſe. *Cro.* 2 Part, 457.

More Jurors.

1. ERror to reverſe a Judgement in the Exchequer, upon an Information upon the Statute of Uſury; The Jury upon Not Guilty pleaded, found *Quod quoad corruptum agreamentum*, the Defendant was Guilty, and took the profits of ſuch Land, and took the profits to the value of 60 l. But it was not found that he lent the 100 l. *prout* the Information. It was Reſolved in the Exchequer, That the Verdict was void; whereupon Error was brought, and aſſigned that the Verdict was good, and ſo there ought not to be a new Tryal, as

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was there awarded. And 2. In regard the Verdict was but imperfect, he ought not to have a *Venire facias de Novo*, but *Distringas Juratorum*, to make their Verdict perfect. But it was the Opinion of the Justices, That the Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue, unless it be in case of Assize, where they are to recover upon view of the Jurors. Mich. 6 Jac. in B.R. *Cook* and *Lovedayes* Case. *Cro.* 2 Part, 210.

2. Debt upon an Obligation of 40 l. by *Edmond* S. upon Oyer of the Deed and the Condition. It was Entred, *Noverint univ.rsi &c. me Edwardum teneri*, and he subscribed it by the name of *Edmond*, which was his true name: The Jury found it was the Deed of *Edmond*: It was the Opinion of the Court, That although it be subscribed by the name of *Edmond*, yet that is no part of the Bond; which being apparent, the Plaintiff cannot have Judgement; and it was said by the Court, That although the Jury have found it to be the Deed of *Edmond*, yet that will not help it. It was adjudged against the Plaintiff. Trin. 20 Jac. in B. R. *Mayby* and *Shepherds* Case. *Cro.* 2 Part, 640. See *Dyer*, 279. acc.

3. If Jurors are sworn to enquire, and after some of them are discharged by the Justices, they shall not be charged for any matter which they did when they were sworn; and if after a Conspiracy, the Conspirators are sworn upon the Enquest, to enquire &c. and they with the others of the Jury do Indict him against whom they do conspire; No Writ of Conspiracy will lye against them, because such thing cannot be false, or malicious, because they do it upon their Oaths, and that with divers others beside themselves; Mich. 13 Jac. in B. R. *Agard* and *Wilds* Case. *Bridgman*, 130, 131.

Furis Utrum.

Juris Utrum: *Where it lyeth, for whom, and against whom it lyeth: Barr in it; and of divers other Matters concerning it.*

1. *Juris utrum*, is a Writ of Right in its nature, and the *Mise* shall be joyned therein. *Fitz. N.B.* 49 It is a Writ of the highest nature that a Parson can have, and lyeth properly where the Lands or Tenements of the Parsonage are aliened by his Predecessors; or where a Recovery is had of Lands or Tenements against his Predecessor by Default, or by Reddition, or for want of pleading of his Predecessor, where he hath not prayed in aid of the Patron and Ordinary: So if a man do Recover by Action tryed against the Parson, or his Predecessor, Lands or Tenements, by Verdict; and the Parson doth not pray in aid of the Patron and Ordinary, to administer a Plea to defend the right of the Land; his Successor in such case shall have a Writ of *Juris utrum*. See *Nat. Brev.* 28. and 38 E. 3. Tit. Incumb. 1.

2. If an Annuity be recovered against a Parson, in that case his successor shall not have *Juris utrum* upon that Recovery; for that nothing is taken out of his possession, but it is a charge only upon the Person, which shall not binde the successor, 19 H. 6 40.

3. In a *Juris utrum*, the Tenant pleaded, That his father was seized, and dyed seized, and that the Predecessor of the Plaintiff did abate, against whom the Tenant brought a *Mort dauncester*, and recovered, and he entred, and so it is his Lay-fee, and not the Frankalmoign of the Church of the Plaintiff; and it was holden to be a good Plea, and not a double Plea by alledging the Recovery, and Lay-fee; for that it is a Writ of Right, where the party ought to conclude to the Right, *viz.* That he hath more right to hold the Land in manner and form, &c. then the other hath to demand in the form he hath demanded it, as the conclusion is in a Writ of Right. See 19 H. 6. 8. acc.

4. The Provost of *Wells* Parson in Parsonet of the Parsonage of W. let the Tythe for 50 years, rendring rent, which Lease was confirmed by the Dean and Chapter, but not by the Patron and Ordinary, afterwards the Provostship was by Parliament united to the Deanry, *cum primo vacare contigerit*; the Provost dyed, and the Dean accepted the Rent: It was adjudged in that case, that the Lease was void by his death; for that a Parson or Prebend cannot make any discontinuance; but in such case their Successors shall have and maintain a *Juris utrum*. Trin. 7 Eliz. *Dyer* 239.

5. The Writ of *Juris utrum* lyeth for the Parson, Prebend, &c. upon an Alienation or Discontinuance of the Lands of his Parsonage, or Prebendary, *quatenus* he is Parson only; and therefore if an Abbot or a Prior be Parson *imparsonee*, and alieneth the Land of the Rectory, his Successor shall have *Juris utrum*, but then it must be brought as Parson. But yet upon a Disseisin made to himself, a Parson may have an Assize of the Lands or Tenements of his Rectory, or a Writ of Entry in the *Quibus* in the nature of an Assize, or a Writ of Entry in the *Per* or *Cui* or in the *Post*: But in Disseizin made to his Predecessor, he is alwayes put to his Writ of *Juris utrum*.

6. If a Writ of Right be brought against a Parson,

Parſon, and after a *Miſe* joyned he maketh default, and Judgment be given againſt him upon his default, this ſhall not binde his ſucceſſor, but the ſucceſſor ſhall have a *Juris utrum*, becauſe the Parſon did not pray in aid of the Patron and Ordinary, and he had not the meer Right in him to loſe by his default: And in that caſe, the Parſon himſelf might have a *Juris utrum*, notwithſtanding the Bar in the former Action; becauſe that is his Writ of Right, and a Writ of the higheſt nature which a Parſon can have; as is ſaid by *Littleton*, Sect. 646.

7. A Parſon alienated the Right of his Church with Warranty, and afterwards the Alienee was impleaded, and he vouched the Parſon, who entred into the Warranty, and loſt by Action tryed: Yet it was holden in that caſe, that his ſucceſſor ſhould have a *Juris utrum* of the Seizin of his Predeceſſor, which he had before the Alienation. See 40 E. 3. 17. 11 H. 4. 17. *Juris utrum* 19. 7. Eliz. *Dyer*, 239, 240. before.

8. Note, There is a difference in Real Actions, between ſuch Parſons as have not the meer Right in them, but a qualified Right, and ſuch as have the meer Right in them; for in the firſt caſe, although they be barred on real Actions, (without making them parties who have Intereſt) they ſhall not binde the ſucceſſors, as in caſe of Parſon Prebendary; for in ſuch caſe, in a new Action of the ſame nature, by the Succeſſor, he ſhall falſifie the Recovery; for that the Recovery is not any diſcontinuance, but the Succeſſor may Enter. And it hath been adjudged, That in a Writ of Right, againſt a Parſon who joyned the *Miſe* upon the meer Right, and afterwards made a default, and Judgement was given againſt him; yet his Succeſſor had a *Juris utrum*, becauſe he had not the meer Right, nor prayed in aid of the Patron and Ordinary. See *Cook*, 6 Part, 8. in *Ferrors* Caſe.

9. If a Writ of Annuity be brought againſt a Parſon, or Vicar, upon a feigned Preſcription, or by a Grant made by the Patron and Ordinary, before the Statute of 13 Eliz. and he prayeth in aid of the Patron and Ordinary, and loſeth by Action tryed; and all the ſame is framed to make an evaſion out of that Statute. It was holden, that ſuch Intention was taken to be within the Equity of the Act; for although the Annuity charge the Parſon, or Vicar, and not the poſſeſſions, yet it was holden to be within the miſchief of the Statute, *ſcil.* Impoveriſhing of the Succeſſor, Cauſe of Dilapidations, and decay of Spiritual Livings, which are miſchiefs mentioned in the preamble of the Statute. Paſch. 24 Eliz. in C. B. *Eintries* Caſe. Vouch. in the Caſe of Eccl. ſiaſtical perſons. *Cook*, 5 Part, 15.

10. A Recovery had in a *Ceſſavit* againſt a Parſon by default, ſhall not bar his Succeſſor, but he muſt have his *Juris utrum* againſt him who recovered. See 7 H. 4. *Juris utrum*, by *Haulford*.

11. If a Parſon be Tenant in Common of a Wood, or other Land, in the Right of his Church, with another, and the other doth waſte in the Wood or Land, the Parſon ſhall have a Prohibition; but if a Parſon be Patron of a Vicarage, and the Vicarage doth void, and a Stranger doth preſent, the Parſon ſhall have a *Quare impedit*, or *Darein* Preſentment; But if the ſix moneths be paſt, he ſhall not have a Writ of Right of Advowſon, becauſe that Writ is given only for him who hath the entire Fee and right in him; and the Parſon hath not the ſame, for the Right is in the Patron and Ordinary. See *Cook* 12 Part, 40. *Fitz. Nat. Brev.* 40. acc.

12. If a *Juris utrum* be brought by a Parſon of a Church, a collateral Warranty of his Anceſtor is no Bar; for that he demandeth the Land in the Right of his Church, in his Politique Capacity, and the Warranty deſcendeth on him in his Natural Capacity. See *Cook*, 2 Part, *Inſtitutes*, 370.

Juſtification.

Where in Treſpaſs, Falſe-Impriſonment, or other Action, brought againſt a Sheriff, Officer, or other Miniſter, a Juſtification made by them ſhall be good, where not:

1. NOte in ſome caſes a man may juſtifie the doing of a wrong, viz. in caſes which ſound for the Common-wealth. As a man may juſtifie the making of Bulworks in the Lands of another, for the good of the Common-wealth, without licence; So a man may juſtifie the pulling down of a Houſe which is on fire, for the ſafeguard of the Neighbours houſes: So if the Sheriffe purſueth a Felon to a Houſe, and to have the Felon, he breaks the Door of the Houſe, the ſame is juſtifiable, becauſe it is for the good of the Common-wealth that Felons be taken. But it is otherwiſe in particular caſes, and therefore if the Sheriff breaks the Houſe to Arreſt a man who is in the Houſe, by virtue of a *Capias*, in Debt or Treſpaſs, he ſhall be puniſhed for it, becauſe it is a particular caſe, and not for the Common-wealth.

Trin. 23 Eliz. 8. *Dyer*, 37. Trin. 38 H. 8. *Dyer* 60. acc.

2. *Twynnard* being a Burgeſs of the Parliament, was taken and Arreſted upon a *Capias utlagatum* after a *Capias*; and having a Writ of Priviledge of Parliament, he afterwards ſuffered him to eſcape. The Queſtion was, Whether he ſhould be charged: It was holden by the Juſtices, That he ſhould not be charged, for that where no default nor Lacheſs can be aſcribed to the Sheriff, there is no reaſon to charge him: For the Office of the Sheriff is chiefly in the ſerving and executing the Writs and Proceſs of the Court, to which he is an immediate Officer, and which he is ſworn to do; & he is to execute the Writs which come unto him, and is not to diſpute the authority of the Court, whether it be lawful or not; and therefore, if a *Capias* come to him without an Original, and he execute the ſame, he is excuſable in a Falſe Impriſonment. Trin. 38 H. 8. *Dyer*, 60, 61.

3. The Factor of the Plaintiff, and the Sheriff did Arreſt a man who was condemned in debt, without a Writ, and he being in the Cuſtody of the Sheriff, the Sheriff and Factor procured a *Capias ad ſatisfaciendum* to be ſued out againſt him, and by that Writ they Arreſted the Priſoner again: The Priſoner being brought into Court upon the Retorn of the Writ, the matter was examined, and found *ut ſupra*: But becauſe it was found clear, that the Plaintiff was free from the covin and fraud of the purchaſing the Writ, the Defendant was committed to priſon in Execution, and both the Sheriff and the Factor were amerced for their miſdemeanor by the Court. Mich. 8 Eliz. *Dyer*, 243.

4. In an Action upon the Caſe, for calling the Plaintiff Murderer and Thief; the Defendant juſtified as to the Murther, becauſe he was Indicted of Murder at *Cheſter*: and for Thief, the Defendant juſtified, becauſe there was a Robbery done, and the common fame was, that the Plaintiffe was guilty of it. The Court held the Juſtification not to be good, neither the one nor the other; But they ſaid, That if it were in a Falſe Impriſonment, there the arreſting of the Plaintiff, and the bringing him to priſon to anſwer to the Law upon common fame, there ſuch Juſtification might perhaps be allowed as good. Mich. 7 Eliz. *Dyer*, 236.

5. The Caſe was, Two Joynt-Tenants were of a Houſe, one of them acknowledged a Statute, and dyed poſſeſſed of goods in the ſame houſe; the Sheriff with the Jury came by Proceſs of Law to extend the goods, and they offered to enter into the ſaid Houſe, to extend the ſaid goods; and the Defendant *præmiſſorum non ignarus*, intending to diſturb the Execution, the door being open, ſhut the door, by reaſon of which, the Sheriff could not extend the ſaid goods. In this Caſe, (amongſt other things) it was Reſolved, That if any houſe be recovered in any real Action, or by *Ejectione firmæ*, the Sheriff upon an *Habere facias ſeiſinam*, or *poſſeſſionem*, may juſtifie the breaking open of the houſe for to do Execution, for that after Judgment it is not his houſe. 2. In all caſes in which the King is party, the Sheriff, after he hath ſignified the cauſe of his coming, if no door be open, may break the houſe, and do Execution; but in caſe, where he may enter without breaking of the houſe, or upon requeſt, there if he breaketh the houſe, he is a Treſpaſſer. 3. That in all caſes, where the door is open, the Sheriff may enter into the houſe to do Execution at the ſuit of a Subject, either of the body or goods. 4. It is not lawful for the Sheriff upon requeſt, and denyal made, in the caſe of a common perſon, to break the houſe of any Subject, upon the inconveniencies of Murthers and Robberies, under colour of doing Execution; and the Sheriff cannot break the houſe by force of a *Fieri facias*, but he is a Treſpaſſer; and yet the Execution which he there doth, is good. That in the principal caſe, the Sheriff had not done his duty; for it doth not appear that he had made any requeſt to open the door, and therefore the party might lawfully ſhut the door of his own houſe. It was adjudged againſt the Plaintiff. Mich. 2 Jac. in B. R. *Cook* 5 Part, 91. *Semaynes* Caſe.

6. In a *Quare Impedit*, the Plaintiff declared, That A. was ſeized of a Mannor in Fee, to which the Advowſon of a Church was appendant, and preſented J. S. who was Admitted, Inſtituted, and Inducted; A. died, his heir levyed a Fine of the Mannor, to which &c. to B. in Fee, who granted the next Avoydance to the Plaintiff, and that J. S. had reſigned, and ſo it belonged to him to preſent. The Defendant pleaded, That before the Writ brought, he was in by ſix moneths of the Preſentment of the ſaid A., without that, that the Church was void, *modo & forma*, as the Plaintiff had declared, and for that they were at Iſſue, and found for the Plaintiff. And the Jury *ex Officio* found, that the Church was full of J. D. by the Preſentment of the King, depending the *Quare Impedit* between the Plaintiff and the ſaid J. D. and that the Church was of the value of 80 l. *per annum*, and that the Action was brought within the ſix moneths after the Avoydance: Upon which, Judgment was given for the Plaintiff. That he ſhould recover his Preſentment to the Church againſt the ſaid J. D. although that it was full of the Preſentment of the King; and alſo, that he ſhould recover againſt him damages *ad valorem Eccleſiæ*, half a year; and had a Writ to the Biſhop, and that he admit *idoneam perſonam* to the ſaid Church, at the Preſentation of the Plaintiff. And upon this Judgment, Error was brought. And in this Caſe (amongſt many other points) it

was

Reſolved, That although that it was found *ex Officio*, that the Church was full of J. D. who was a ſtranger to the Writ, and it doth not appear that he came in by better Title then the Plaintiff had; yet the Plaintiff ought to have a Writ to the Biſhop generally, and then prevail who can; and the Biſhop ought to execute the ſame; for he cannot return the Writ that the Church is full of another, for no Iſſue can be taken between the Plaintiff and him, for he hath no day in Court; and although a third perſon hath right, yet the Biſhop is excuſed, becauſe he hath his Warrant by Proceſs of Law; no more then the Sheriff can upon an *Habere facias Seiſinam*, return that another is Tenant of the Land by Right. *Cook* 6 Part, 52, and 54. *Boſwell's* Caſe.

7. It was Reſolved by the Juſtices, and Barons of the Exchequer, that although it be apparently erroneous, yet if the Miniſter of Juſtice in the execution of an Arreſt of a man, by vertue of his Proceſs be killed, that the ſame is Murder; for the Miniſter is not bound to diſpute the authority of the Court which awardeth the Proceſs, but his Office is to execute the Proceſs; and therefore if a *Capias* be awarded againſt a Baron, Counteſs, or other Peer of the Realm, which is erroneous, becauſe their bodies by the Law are priviledged in ſuch caſes, yet if the Officer be killed in the Execution thereof, it is Murder. *Cook* 9 Part, 69. *Mackalleys* Caſe: and ſee there the difference put, when the Court hath Juriſdiction of the Cauſe, but proceeds *inverſo ordine*; there if the Officer arreſteth the party, he may juſtifie the ſame, and an Action will not lye againſt the Officer; and therefore if in Debt againſt a Duke, he Arreſt him by vertue of a *Capias*, he may juſtifie it, and he is not puniſhable for it: But when the Court hath not Juriſdiction of the Cauſe, then all the Proceedings before them, is *Coram non Judice*, and the Officer is not to obey them who are not Judges of the Cauſe; and therefore if ſuch Officer by Warrant or Proceſs from them, doth Arreſt a man, the ſame is not juſtifiable, but an Action of Falſe Impriſonment will lye againſt ſuch Officer. *Cook* 10 Part, 70. The Caſe of the Marſhalſey.

8. The Caſe was, The Steward of a Court Leet impoſed a Fine joyntly upon A. B. and C. chief pledges, becauſe they refuſed at the ſaid Court Leet to preſent that they ought to pay at every Leet, *pro certo Letæ*, 10 s. to the Lord; and becauſe the ſame was not payed, the Lord Diſtreined, and Juſtified and Avowed the Diſtreſs: In this Caſe, amongſt other things it was Reſolved, 1. That the Lord cannot diſtrein for Head-ſilver, or *pro certo Letæ*, becauſe it is a thing againſt Right, and for the private of the Lord, which thing alſo he cannot have without Preſcription; and therefore as he cannot preſcribe in the Principal, ſo he cannot preſcribe in the Diſtreſs for it, and therefore the Avowry and Juſtification was Reſolved not to be good. *Cook*, 11 Part, 44. *Godfreyes* Caſe.

9. A Juſtice of Peace made a Warrant to a Conſtable under his Seal, to bring the Wife of J. S. before any Juſtice of the ſaid County, to find Sureties for the good behaviour; J. S. and J. D. offered a Recognizance to another Juſtice of the ſame County who did not make the Warrant, to appear at the Seſſions; the Conſtable brought the party before the Juſtice who made the Warrant, who refuſed to finde Sureties, for which the Conſtable brought the Party to priſon, and he brought an Action of Falſe Impriſonment. In this Caſe it was Reſolved, That the ſaid Warrant made *Coram aliquo Juſticiorum*, it was in the Election of the Conſtable, to bring the party attached before what Juſtice he pleaſed; for in preſumption of Law, he is the more indifferent then the Offender himſelf. 2. That when the Officer in this caſe had the party before the Juſtice, and he refuſed to find Sureties, the Officer might without a new Warrant carry the Party to Priſon, and that by the words of the Warrant, *Etſi hoc facere recuſaverit*, then he is to carry him to the next Goal, and his Juſtification thereof is good. *Cook* 5 Part, 59. *Foſters* Caſe.

10. Trover and Converſion of two Steers; The Defendant being an Attorney of the Common Plea, Juſtifies the taking of them as Under-Sheriff, by reaſon of Proceſs from the Exchequer, to levie of the Occupiers of the Lands of divers perſons, in a Schedule in the Writ named, the debts therein ſpecified, and doth not recite the Schedule; and that he being Under-Sheriff, took the two Steers in the lands of the Plaintiff, which was lately the land of one J. S. who was debtor to the King in 50 s. being behind upon the Land. Exception was taken, becauſe it was not ſaid, that the Land ſuch a day was the Land of J. S. It was the Opinion of the Juſtices, That it was a good Warrant to levie the money of the Occupiers of the Lands that were the Lands of J. S. and ſo the Juſtification was good. Mich. 16 Jac. in C. B. *Caſford* and *Oſmonds* Caſe. *Brownlow*, 1 Part, 17.

11. In Treſpaſs for an Aſſault, Wounding, Taking, and Impriſoning: The Defendant pleads, *Quoad* the Aſſault and Wounding, Not Guilty; and *Quoad* the Taking and Impriſoning, he Juſtifieth by a Warrant he had from the Mayor of *London*, but doth not ſhew in his Plea any time when the Warrant was made, nor yet the place where it was made: And in his Juſtification of Taking and Impriſoning, he leaves out the Aſſault. It was the Opinion of the Court, ſeveral Aſſaults are here layed, *ſcil.* The Aſſault in the Wounding, and the Aſſault in the Taking; and here in his perſon he

hath Juſtified *Quoad Captionem & Impriſonamentum*; but in his Juſtification he hath left out his Aſſault, which is the principal Cauſe of the Demurrer; Wherefore it was the Opinion of the Court, That for the Omiſſion of the Aſſault in the Taking and Impriſoning, that his Juſtification was not good. Hill. 12 Jac. in B. R. *Wilſon* and *Dodds* Caſe. *Bolſtr.* 335, 336. See *Cook*, 4 Part, 62. *Herlakendens* Caſe, acc.

11. An Action upon the Caſe was brought of Falſe Impriſonment by the Husband againſt the Defendant for making an Aſſault in and upon his Wife, and Impriſoning of her. The Defendant juſtified, That a Warrant was directed unto him to take *Julian Doyley* Widdow, who by force thereof did take her, being the Plaintiffs Wife; and the Judgment was *Quod caperet* Julianam *prædict. per nomen* Julian Goddard *ad ſatisfaciend.* to Leonard Loves *pro damnis*; and the truth was, That at the time of the Warrant iſſuing out againſt her, ſhe was then *Julian Goddard* Widdow, but at the time when ſhe was Arreſted and Impriſoned, the Wife of the Plaintiff, called *Julian Doyley*, and the firſt Action was brought againſt her by the name of *Julian Goddard* Widdow. In this Caſe, the Court was clear of Opinion, That here was a good diſſignation of the party in nomination that was to be taken: And upon this *Capias*, If the Sheriff had returned, *Non eſt inventus*, it would have bin an ill return, and falſifyed all the proceedings; and ſo the Opinion of the Court was, That the Action of Falſe Impriſonment brought by the Husband, was not maintainable. Hill. 6 Jac. in B. R. *Doyley* and *Whites* Caſe. *Bolſtr.* 2. Part, 80, 81. *Cro.* 2. Part, 313. the ſame Caſe.

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2. *Where a man juſtifies the entring into the Lands of another; and where the entermedling with the goods of another: Where ſuch Juſtification ſhall be good, and where not.*

1. A. Brought an Action of Waſte, and declared, That he let a houſe and ſix Acres of Land, and ſix Acres of Wood to the Defendant, who committed Waſte, cutting down and ſelling 20 Oaks, growing *ſparſim* in the ſaid Wood, the Defendant as to ten of the ſaid Oaks, ſaid, That the ſaid houſe *tempore quo* was in decay of the Timber, and that he cut down the ſaid ten Oaks, and beſtowed them upon the reparation of the ſaid houſe; and that for the other ten, that they grew upon an Acre of the Lands aforeſaid, which ſometimes had bin Arable, and for the bettering of the Lands, he cut them down, and ſo juſtified, That although in this Caſe the Leſſee had repaired the houſe of the Leſſor with the Trees, which was to his profit; yet becauſe he exceeded his Office and Authority, and took upon him the Authority of the Leſſor, without his requeſt, his Juſtification was not good, but he was puniſhable; like the Caſe of 21 H. 7. Where a Parſon brought an Action of Treſpaſs for carrying away his Corn; The Defendant ſaid, That the Corn was ſevered in nine parts, and was in danger to be eaten and deſtroyed by Cattel, where he took and carryed them into the Plaintiffs Barn, and there left them. In that Caſe, It was adjudged to be no Plea, and yet the Plaintiff had no damage, but rather benefit thereby. Trin. 29 H. 8. *Dyer*, 36, 37.

2. A man ſeiſed of 200 Acres of a Common Moor, made a Feoffment of 50 Acres of that Moor lying towards the North, unto another; the Feoffee put his Cattel into the 50 Acres, and for want of Incloſure, the Cattel eſtrayed into the reſt of the Moor, and there they were diſtreyned by the Lord of the Moor, Damage feaſant. It was the Opinion of the Juſtices in that Caſe, That the Diſtreſs of the Lord was good and juſtifiable, becauſe the Purchaſor was bound by Law to incloſe his Land, or elſe to keep his Cattel within the ſaid 50 Acres; and ſo it was ſaid the Lord ought to do for his Cattel within the reſt of the Moor. Mich. 23 Eliz. *Dyer*, 372.

3. In Treſpaſs for breaking of his Cloſe at S. and fiſhing in his ſeveral Piſcary, and Aſſaulting and wounding of the Plaintiff, the Defendant as to the Aſſault and wounding, pleaded Not Guilty: the Plaintiff upon the new Aſſignment, ſaid, That the Cloſe and place aforeſaid was four Acres of Meadow called B. in S. aforeſaid, and his ſeveral Piſcary in the Water of A. in S. aforeſaid on the part of the Eaſt. The Defendant pleaded in Bar, That he was ſeiſed of the Mannors of D. and S. upon A. in the County of N. and of a ſeveral Piſcary in the River and Water of A. part of the ſaid four Acres of Meadow called B. running in S. aforeſaid, aſwell as in the ſaid Mannor of D. and S. in the County of N. and preſcribed to have a ſeveral Piſcary in the ſaid Water of A. at S. aforeſaid, as appurtenant to his Mannors of D. and S. and to go upon the ſaid peece of Meadow to draw his Nets when he fiſhed there; this was holden to be a good Preſcription, and the entry upon the four Acres to draw his Nets, was holden juſtifiable. Mich. 10 El. *Dyer*, 267.

4. Note, It was Reſolved by the Juſtices, That if two Lords of Mannors have Common for their Tenants by reaſon of Vicinage; the one of them

may

may encloſe againſt the other, but the Tenants of one Mannor cannot put in their Cattel into the Waſte of the Lord of the other Mannor; but they ſhall be excuſed when they come there by Eſcape, and that is by reaſon of auncient uſage which the Law alloweth them. *Cook* 4. Part, 38. in *Terringhams* Caſe.

5. Note, In *London* they have a Cuſtome, That one may enter into the houſe of another man, which is his Caſtle: For there the Cuſtome is, That when a Chaplin or a Prieſt hath a Woman in his houſe or Chamber, and one hath an ill ſuſpition thereof, he who hath ſuch ſuſpition, may come to the Conſtable of the Ward, and with him may enter into the houſe and Chamber of the Chaplin or Prieſt, and may commit the Offender to Priſon; And ſuch Cuſtome hath bin adjudged a good Cuſtome. *Cook* 8. Part, 126. in the Caſe of the City of *London*.

6. Six Carpenters came to a Tavern in *London*, and called for a Quart of Wine, and drank it, and upon requeſt made, refuſed to pay for it. The Queſtion was, If the denyal to pay for the Wine, made their entry into the Tavern to be wrongfull *ab initio*. And in this Caſe it was Reſolved, That when entry, Authority or Licence is given by the Law, and the party doth abuſe it, he ſhall be a Treſpaſſor *ab initio*; but where an entry or Authority is given by the party, and he abuſeth it, there he ſhall be puniſhed for his abuſe, but ſhall not be a Treſpaſſor *ab initio*; and the reaſon of the difference is, That in Caſe of a general Authority or Licenſe, the Law will adjudg by the ſubſequent act, *quo animo* he doth enter. But when the party giveth an Authority to do a thing, he cannot puniſh that Act which is done by his own Licenſe, and the Law giveth Authority to enter into a common Inn or Tavern. But if he who entreth into a common Inn, or Tavern doth a Treſpaſs, as if he carry away any thing, the Law in that Caſe will judg, That he entred for that purpoſe, and he ſhall be a Treſpaſſor *ab initio*. 2. Reſolved, That the not doing of a thing cannot make the party who hath an Authority to enter to be a Treſpaſſor *ab initio*, ſo as in the principal Caſe, the not paying for the Wine, the Defendants ſhall not be Treſpaſſors, for the not paying for the Wine is no Treſpaſs, and therefore they cannot be Treſpaſſors *ab initio*. Mich. 18 Jac. *Cook* 8. Part, 146. The ſix Carpenters Caſe, 33 H. 6. 47. acc.

3. *Where, and in what Actions, and for what Cauſes a Juſtification pleaded ſhall be good; and where, and for what not; Where it ſhall be ſpecial, where not, and where he that juſtifies by a Deed, ſhall ſhew it; Where not.*

1. IN *Trover* and *Converſion*, the Defendant pleaded, That before the Plaintiff ſuppoſed the goods to come to the Defendants hands, That J. S. was poſſeſſed of the goods, and amongſt other goods, ſold them to the Defendant, but kept them in his own hands, and afterwards ſold them to the Plaintiff, by reaſon whereof the Plaintiff was poſſeſſed, and afterwards loſt them, and after they came to the Defendants hands, who converted, as was lawful for him to do. It was the Opinion of the Court, That this was no good Plea, becauſe it amounts but to Not Guilty; and a Writ of enquiry was awarded. Trin. 10 Jac. in C. B. *Auſtin* and *Auſtins* Caſe. *Brown.* 1. Part, 5.

2. Act or upon the Caſe for ſaying, That the Plaintiff was perjured: The Defendant juſtifies, That it was found by Verdict, That the Plaintiff was perjured, but no Judgment was entred upon that Verdict. Whether it was good, becauſe there was no Judgment, was the Queſtion. Reſolved, it was no bar, becauſe no Judgment was given in the firſt Action. Paſc. 16 Jac. in C. B. *Cruttal* and *Hoſeners* Caſe. *Brown.* 1. Part, 11.

3. In Treſpaſs for breaking his Cloſe, and ſpoyling his Graſs: The Defendant pleaded, That in the Cloſe where, &c. time out of mind, &c. there hath bin a Foot way for all people, in, by, and through the ſaid Cloſe untill ſuch a day, and that ſuch a day, the Plaintiff Plowed up the ſaid Foot way, and ſowed it with Corn; and that the Plaintiff before the Treſpaſs ſuppoſed, ſet out another Footway for all people, which ſince it had bin layed forth, had bin uſed by all Foot Paſſengers; by reaſon whereof, the Defendant went in the ſaid new Foot way to ſuch a place; upon which the Plaintiff demurred, and it was adjudged againſt the Plaintiff, becauſe the Plaintiff did the firſt wrong by ſtopping the firſt way, and had aſſigned a new way for Paſſengers; and therefore it was adjudged, That the Defendants Plea was good by way of excuſe againſt the Plaintiff, for it is not fit he ſhould puniſh the Defendant againſt his own agreement. Mich. 6 Jac. in C. B. *Horn* and *Widlakes* Caſe. *Brown.* 1. Part, 212.

4. Action upon the Caſe for aſſaulting and wounding of the Defendant in ſuch a Pariſh in *London*. To the force, the Defendant pleaded, Not Guilty, and for the reſt ſhewed, That the Defendant at *Graveſend* being poſſeſſed of a Gelding, the Plaintiff came to him to hire him for 4 s. for two dayes, in which the Plaintiff would ride from *Graveſend* to N. and from thence to G. back again, within the ſaid two dayes, by reaſon whereof, the Defendant lent the Gelding to him, who in a direct way for the ſpace of a Mile, rode towards N. but afterwards to deceive the Defendant of his Gelding, rode out of his way to N. towards *London*; Whereupon the Defendant with his Servant came to the Plaintiff, riding upon the ſaid Gelding, and deſired the Plaintiff to deliver the Gelding, which he refuſed to do, by reaſon whereof, he and his Servant, to repoſſeſs himſelf of the ſaid Gelding, layed hands upon the Plaintiff, and took him from the Horſe back, and would have taken the Gelding from the Plaintiff, and that the Plaintiff did Aſſault the Defendant, and by ſtrong hands kept the Gelding, by reaſon whereof, the Defendant did defend the poſſeſſion of the Horſe againſt the Plaintiff, and if any damage was to the Plaintiff, it was of his own Aſſault; upon which the Plaintiff demurred, and it was adjudged for the Plaintiff, for that it appeared by the Defendants plea in Bar, That the Plaintiff had hired the Gelding for two dayes, and that within thoſe two dayes the Defendant did diſturb the Plaintiff of the poſſeſſion of the Horſe, and thruſt him off his back, which was not lawful, for that the Plaintiff had a good ſpecial property for the two dayes againſt all the World; and if the Plaintiff hath miſ-behaved himſelf in riding the Gelding, he was puniſhable by an Action upon the Caſe. Hill. 7 Jac. in C. B. *Lee* and *Atkinſons* Caſe. *Brown.* 1. Part, 218.

5. Trover and Converſion of goods in *Ipſwich*, The Defendant pleaded, That the goods came to his hands at *Dunwich* in the ſame County, and the Plaintiff gave unto him the goods which came to his hands in *Dunwich*, *abſque hoc*, that he was guilty of any Trover and Converſion of Goods in *Ipſwich*. It was the Opinion of the Court, That the ſame was a good manner of pleading, by reaſon of the ſpecial Juſtification; but when the Juſtification is general, the County is not traverſable. Mich. 28 Eliz. in B. R. *Strangden* and *Barnells* Caſe. *Godbolt.* 137.

6. It was agreed by the Juſtices, That if a man in his pleading is to ſet forth the Juriſdiction of the Court of the Juſtices in *Eyre*, or of any other Court, if he ſay *Curia tenenta*, &c. he need not to ſet forth all the formalities of it: and that if a man do juſtify for divers cauſes, and ſome of the cauſes are not good, the ſame doth not make the whole Juſtification to be void, but it is void for that only, and good for the reſt. Hill. 16 Jac. in B. R. *Webb* and *Tuck's* Caſe. *Godbolt.* 277.

7. In Falſe Impriſonment, the Defendant juſtified, becauſe the Plaintiff brought a Child of the age of 16 years, and not above, into the Pariſh Church of W. *et eundem ibidem relinquere voluiſſet et intendiſſet*, without keeping or nouriſhment, *contra pacem*; for which the Defendant being Conſtable of the ſaid Pariſh, Arreſted the Plaintiff, and put him in Priſon until he did agree to carry the Child from whence it came. It was moved to be a good Juſtification for every ſubject *à fortiori* for a Conſtable. It was the Opinion of the Court, That the ſame was a great Offence in the Plaintiff; but yet he ought to be puniſhed according to Law, but the Conſtable cannot Impriſon a Subject at his pleaſure, but according to Law, to ſtay him, and bring him before a Juſtice of Peace, to be there examined, and if he had ſo pleaded, it had bin good; but ruled the Juſtification as pleaded, not to be good. Trin. 31 Eliz. in B. R. *Beal* and *Carters* Caſe. *Leon.* 327.

8. In Treſpaſs for cutting his Nets and Oars; The Defendant juſtified, for that he was ſeiſed in Fee of a ſeveral Piſcary, and that the Defendant with others, endeavoured with his Oars to row upon his Water, and with his Nets to catch his Fiſh, and for ſafeguard of his Fiſhing, he cut the Oars and Nets; upon which the Plaintiff demurred, and it was adjudged to be no good plea of Juſtification, for he cannot by ſuch colour cut the Nets and Oars; but he might have taken and detained them as damage feaſant to the ſtop of their further Fiſhing. *Cro.* 1. Part, 165. Mich. 7 Car. in B. R. *Reynell* and *Champernoons* Caſe.

9. In Treſpaſs of Aſſault, Battery, and wounding, 1. *Aug.* 13 Car. The Defendant juſtified in his own defence by reaſon of an Aſſault made by the Plaintiff. Iſſue being thereupon, the Defendant gave in Evidence Aſſault and Battery by the Plaintiff, 2. *July*, 13 Car. before, and that it was in his own defence, and produced Witneſſes to prove it. The Plaintiff ſhewed, That the Battery which he intended, was 9 *July*, 13 Car. It was inſiſted upon by the Defendant, That it was no Evidence, for the Plaintiff ought to have made a ſpecial Replication, and ſhewed that ſpecial matter. But the Court was of Opinion, That that was not requiſite, and if another day had bin ſhewed, it had bin a departure, but it ſufficeth to ſhew it in Evidence at another day without his Aſſault, for the day is not material. Judgment was for the Plaintiff, and 100 l. damages. Paſc. 14 Car. in B. R. *Thornton* and *Lyſters* Caſe. *Cro.* 1. Part, 370.

10. Treſpaſs againſt two, for taking of a Gun and

and a Dagger from him; one of the Defendants juſtifies, becauſe the Plaintiff aſſaulted J. S. with it, and for preſervation of the Peace, juſtifies, and for ſafeguard of the life of J. S. the other pleads, Not Guilty: The Plaintiff replyes againſt him that juſtified *De ſon tort demeſne*: the Jury found againſt him that pleaded, Not Guilty, That he was guilty, and aſſeſſed damages and Coſts. It was ſaid, That the Action being brought againſt both joyntly, and the juſtification is found for the one, the other cannot be guilty. But notwithſtanding, the Plaintiff had Judgment, for that he is found guilty, and cannot take advantage of the Juſtification, for it ſhall be intended, he took it at another time without cauſe. But if one Defendant juſtifies by the gift of goods, if it be found for that Defendant, the Plaintiff cannot have Judgment, becauſe it appears to the Court, he had no cauſe of Action. Mich. 14 Jac. in B. R. *Marler* and *Ayliffs* Caſe. *Cro.* 2. Part, 134.

11. Treſpaſs of Aſſault and Battery in *London*, the Defendant juſtifies in the County of N. by vertue of a Warrant from the Sheriff of N. upon a *Latitat*; *qua eſt eadem tranſgreſſio, abſque hoc* that he is guilty in *London, vel alibi extra Com.* N. It was demurred upon, 1. Becauſe he did not ſhew the Warrant *hic in Curia*. 2. Becauſe he juſtifies, and alſo traverſes; the firſt Exception diſallowed by the Court, becauſe the Warrant is executed and returned to the Sheriff, and ſo he cannot ſhew it; and for the ſecond, it is well enough; for the juſtification being in another County, the County where the Actions brought is to be traverſed. Trin. 13 Jac. in B. R. *Bateman* and *Woodcocks* Caſe. *Cro.* 2. Part, 372.

12. In an Action upon the Caſe for words, which were, The Plaintiff is a Thief to you and to me, and hath ſtolen 20 l. from me, and 40 l. from you. The Defendant ſaith, That the Plaintiff was a Thief, and ſtole two Hens from her ſuch a day and year feloniouſly, and ſo juſtifies; the Plaintiff demurred, becauſe it is not any cauſe of juſtification of all the words, nor of any part of the laſt words: And of that Opinion was the Court, for the laſt are as ſlanderous as the firſt, and there is not any juſtification or anſwer of them. Mich. 21 Jac. in B. R. *Hilſden* and *Meretts* Caſe. *Cro.* 2. Part, 676.

13. In an Action upon the Caſe, the Plaintiff declared, That whereas he was poſſeſſed of a Meſſuage for years, which had ancient lights; and the Defendant had a houſe adjoyning, and a Yard; the Defendant upon the ſaid Yard, had erected a houſe, and ſtopped his lights. The Defendant pleaded the Cuſtome of *London*, That every one might build upon an old Foundation; and if there be not any agreement or Covenant, might ſtop the Windows of his Neighbour, and ſo juſtified. It was adjudged for the Plaintiff againſt the Defendant, for that the Defendant in the pleading of his juſtification, did not ſet forth by way of pleading, that he did erect this new building upon the old Foundation, as he ought to have done. And in this Caſe, it was holden by the Court, That a man might build upon an old Foundation, and darken all the Lights of his Neighbour which were adjoyning to it; and that if he maketh new Windows higher, his Neighbour might alſo build his houſe higher, and ſtop thoſe new Windows. But a man cannot build a houſe upon a place where none was before, as in a Yard, and ſo thereby darken his Neighbours Lights: And ſo it was adjudged in *Altham's* Caſe; and Mich. 29 Eliz. in B. R. in *Bland* and *Moſs* 's Caſe. It was ſaid by *Coke* Chief Juſtice in this Caſe, That one Preſcription might be pleaded againſt another, where one might ſtand with the other, as it was adjudged in *Wright* and *Wrights* Caſe. *Intratur.* Trin. 7 Jac. in B. R. rott. 1590. *Hughes* and *Keymes* Caſe. *Bolſtr.* 1. Part, 115, 116.

14. A ſpecial Action upon the Caſe was brought againſt the Defendant, for ſtopping three anncient lights which had bin there time out of mind, and that the Defendant ſtopped them *totaliter ad damnum*. The Defendant pleads in bar, and doth confeſs the ſtopping of two of the lights, and part of the third light, and juſtifies, and afterwards takes a Traverſe in this manner, *abſque hoc* that he ſtopped up the three lights; and in his Juſtification, ſhews the Cuſtome of *London*, That one may build upon an old Foundation, and upon his own Land, which he had done, and ſo juſtifies. It was the Opinion of the Court, That in this Caſe, he ought not to have taken any traverſe: and that the traverſe, as it is taken in this Caſe, goes only to part; and as to the other part, there is no anſwer at all; for where three wrongs are layed to be done, (as in this Caſe) and the Defendant makes anſwer only to two of them, and ſaith nothing to the third it is not a good anſwer: And ſo in this Caſe, for default of pleading, Judgment was given for the Plaintiff. Mich. 10 Jac. in B. R. rott. 597. *Newall* and *Barnards* Caſe. *Bolſtr.* 1. Part, 116, 117.

15. In Treſpaſs for comming upon, and digging and breaking of his Land; the Defendant pleaded in Bar by way of Juſtification; and ſet forth, That the common voice was, *Quod quidam mulis*, a noyſome Vermine called a Badger was there, and had done much hurt there, and therefore he came with his Dogs, and did hunt him, and in purſuit thereof *et ad malum prædict. interficiendum* he did follow him with his Dogs, and did catch him in the Plaintiffs ground, and there he came and digged him out of the ground, and killed him, and this

this he pleaded by way of Juſtification, *quoad* the breaking *et loci prædict. foſſionem, et foſſam eam terræ prædict. implevit.* It was holden by the Court, That this was not a good Plea, and the difference was agreed, where a man enters firſt into another mans ground to find ſuch Beaſts and Vermine, and where ſuch entry is by way of purſuit, for in the firſt Caſe, the aſſent of the owner of the Land is firſt to be had, or elſe he will be a Treſpaſſor, in the ſecond not ſo, but will be juſtifiable. But all the Judges clearly agreed, that in the principal Caſe, the plea and juſtification of the Defendant was not good, for he cannot juſtify the digging, for he might uſe other means to kill him. Tr. 10 Jac. in B. R. *Gedge* and *Minns* Caſe. *Bolſtr.* 2. Part, 60, 61, 62.

16. Treſpaſs, *Quare clauſum et liberum Warrannum fregit et intravit*, and for digging of the ground; the Defendant pleaded, Not Guilty to part, and juſtified in this manner, That the place where is a Common, and that the Plaintiffs Father did ſtore this place with Conies, which came to the Plaintiff who had Conies there, and made holes, that the ſheep of the Defendant, and of other the Commoners, often fell into thoſe holes, and were hurt, by reaſon whereof, the Defendants came with Ferrets, and did chaſe the Conies, and digged down the burrows, and filled up the holes for the better preſervation of their Cattel, and enjoyment of their Common, and ſo juſtify, upon which it was demurred in Law. The Queſtion was, if it was a good Juſtification. The Court was clear of Opinion, That the Plea and Juſtification of the Defendants was not good, for that here by their Plea, the Defendants have confeſſed the Plaintiff hath a Free Warren: And if the King Grant to J. S. a Free Warren in his Lands, and afterwards J. S. makes a Feoffment in Fee of this Land, excepting the Warren, J. S. may afterwards make Cony-burrows in this Land *de novo*, and ſtore the ſame with Conyes. A Commoner hath no remedy but to take his Common with the mouths of his Cattel; and a Commoner cannot diſturb the Lord of the ſoil; He may diſtreyn the Cattel of a ſtranger being upon the Common, but not ſo the Cattel of the Lord, neither may he chaſe them, though they ſurcharge the Common, but the remedy which the Commoner hath, is by Action upon the Caſe, or Aſſiſe. Mich. 10 Jac. in B. R. *Carrell* and *Parks* Caſe. *Bolſt.* 2. Part, 115, 116.

17. In Trover and Converſion of his Goods, of ſuch a quantity of Corn, the Defendant pleads and juſtifies the taking of it at ſuch a place at L. as Bellman there, by Cuſtome to take out of every bag of Corn holding a Buſhell, and no more, one Pint, and if it held more, then a Quart: and ſhewed, that he was choſen Bellman, *et tempore quo*, he did take the ſame as by Cuſtome belonged to him to do, and layes the taking at one place, and the Converſion at another; upon this Plea and Juſtification, the Plaintiff demurred in Law; and the Queſtion amongſt other things was, Whether this were a good Cuſtome, and ſo the Juſtification good. It was the Opinion of all the Juſtices, That the Cuſtome was good and reaſonable, and ſhall be conſtrued to have a reaſonable commencement: For the Office of a Bellman is to cleanſe and pave the Streets, and *pro labore* he had this allowance, and it is *pro bono publico*; and the Converſion in this Caſe is the point, and the Trover but the inducement to the Action, and he ſheweth that he hath not converted the goods of the Plaintiff, but his own goods when he conveyes to himſelf a property, and then converts. It was adjudged againſt the Plaintiff a good Cuſtome, and the Juſtification was good. Paſc. 12 Jac. in B. R. *Hill* and *Hawks* Caſe. *Bolſtr.* 2. Part, 201, 202, 203.

18. In Treſpaſs upon an Arreſt in the Caſe of the Marſhalſey, the Caſe appeared to be this. A man was arreſted to appear upon a Proceſs in *Placito Tranſgreſſionis*, at the Court of Marſhalſey, *ad proximam Curiam ibidem Tent.* And the Defendants ſhew and Juſtifie, That the Court of Marſhalſey is an ancient Court, and that they ought to hold Plea, and to have Juriſdiction of all manner of Actions *infra Virgam*; and ſet forth, that they had *Portatores Virgarum, ſcil.* Tipſtaves, who uſe to ſerve the Proceſs, and arreſt the parties; and that by their Command, the Defendant *Portator Virgæ*, did arreſt the Party to appear; but in his Plea and Juſtification, doth not ſet forth when the next Court was to be held; for to ſay, at the next Court, is too general, and ſo the party may be detained 40 years, before any Court may be holden: It was the clear Opinion of the Court, That it ought to have been certainly ſhewed, at what Court the party thus arreſted ought to appear, and when the ſame Court ſhould be held: and for the omiſſion of that, the Court were of Opinion, That the Plea by way of Juſtification of the Arreſt, was not good; and by Rule of the Court, the Party was diſcharged from the Arreſt. Trin. Jac. in B. R. *Jones* and *Smiths* Caſe. *Bolſtr.* 2 Part, 36, 37.

19. In Treſpaſs, for Aſſaulting and Wounding of his ſervant to his damage of 40 l. The Defendant as to the Battery, and vi & armis, pleaded Not Guilty; and as to the Aſſault, he Juſtified, and ſhewed, that he was poſſeſſed of a Houſe, and had a light time out of mind, and that the ſervants of the Plaintiff did intend and endeavour to erect another houſe upon a certain piece of ground adjoyning to his houſe, and had erected certain Timber for the houſe; the which houſe (if the ſame had been erected) would have ſtopped up his ancient

ancient light; and for the cauſe that this would have been to his Nuſance, he ſtood in his own houſe, and with a ſtaff thruſt away the Plaintiffs ſervants, and did then throw down the Timber ſo erected; upon which Plea the Plaintiff did Demur in Law. It was holden by the Court, That in this caſe the Plea in Bar was not good for many cauſes: Firſt, Becauſe in this caſe, the principal cauſe of the Action is the loſs of his ſervice, and the Defendant doth Juſtifie as to the Battery, but doth ſay nothing to the loſs of his ſervice; and where the party doth not anſwer to all, it is no anſwer at all; and the loſs of his ſervice, which is the ground of the Action, ought to be confeſſed, avoided, or denyed. 2. The Juſtification is not good, for the Defendant ought to have *damnum & injuriam*; and if he have none of theſe, his Juſtification is not good: and it doth not appear that he hath any damage; and a man cannot juſtifie the beating of one for an endeavour only. It was adjudged for the Plaintiff, and that the Plea and Juſtification was not good. Mich. 10 Jac. B. R. *Mawrice* and *Bakers* Caſe. *Cro.* 3 Part, 196, 197.

20. In Treſpaſs layed to be done 1 *Maii*, the Defendant pleaded a Releaſe made 1 *Junii*, and traverſes *abſque hoc*, that he was guilty at any time after 1 *Junii*. In this Caſe the Queſtions were, 1. Proceſs was directed to B. or to any one of them, to arreſt the Party, and two of them did execute the ſame; whether this was well executed or not? The Court held it was well Executed, and ſo it was adjudged, 45 Eliz. in B. R. in *Hobbs* and *Kings* Caſe. 2. Whether the Traverſe in this Caſe was good. It was Reſolved, That in this Caſe the Traverſe was not good, becauſe he did not ſay *abſque hoc* that he was Guilty before or after. Trin. 14 Jac. in B. R. *Amſon* and *Walots* Caſe. *Bulſtr.* 3. Part, 209.

21. In Treſpaſs for breaking of his Cloſe and aſſaulting his Servants, the Plaintiff for Title ſhews, That it was parcel of a Mannor of which one J. S. was Lord, and that J. S. granted this Copyhold to the Plaintiff and his Heirs. The Defendants as to the Aſſault plead, Not Guilty; and as to the Treſpaſs in the Cloſe, B. the Defendant the Maſter, and the other Defendants juſtify, *ſcil.* they confeſs the Cloſe to be Copyhold; but plead, that long before it was parcel of the Mannor of D. and that long before the Treſpaſs, J. D. and his Wife was Lord of the ſaid Mannor in the right of his Wife for life, the Remainder in tail to S. one of the Defendants who made a Leaſe to the other Defendant, by force of which he was poſſeſſed, and he cut down the Timber Trees, and carried them away, and ſo juſtifies his Plea in bar, but doth not ſhew how S. came to this Eſtate for life, the Remainder over. It was agreed by the Court, That this Plea in Bar was not good, becauſe it is not therein ſhewed how this particular Eſtate came to J. D. and his Wife, they claiming under a derivative Eſtate for years, made by J. D. and his Wife, ought to have ſhewed how J. D. and his Wife came to that Eſtate for life, the Remainders over, and therefore Judgment was given for the Plaintiff. Trin. 14 Jac. in B. R. *Sanford* and *Stevens's* Caſe. *Bulſtr.* 3. Part, 281.

22. In an Action of Conſpiracy for cauſing him to be endicted for ravithing his Daughter, and that he was acquitted: The Defendant pleaded, That his Daughter did complain unto him, upon which he complained to a Juſtice of Peace, who upon examination bound him over, and the Defendant to proſecute, this was adjudged by the Court to be a good cauſe of excuſe, and the Traverſe of the Felony not good. Hill. 4 Jac. in B. R. Rott. 886. *Cox* and *Wirralls* Caſe. See Trin. 14 Jac. in B. R. *Weal* and *Wells* Caſe adjudged acc.

23. Trover and Converſion for taking his Cattel by way of Diſtreſs, and ſelling of them by vertue of a Warrant of Commiſſioners of Sewers, for not paying of a Tax ſet by them towards the reparation of the Sea walls, the Defendant pleaded all the ſpecial matter by way of Juſtification; upon which plea, the Plaintiff did demur. And divers Exceptions were taken to the Plea. 1. That the Plea ſets not forth, that there was any notice given to the Plaintiff of the Tax before the Diſtreſs taken as there ought to have bin. 2. It doth not appear by the Plea, That the Land taxed was within the Levell. 3. That he cannot ſell the goods of a ſtranger for the Tax, as the Plaintiff is, for any thing appears in the Plea to the contrary. And for theſe cauſes, amongſt others, the Plea and Juſtification were Reſolved not to be good, and Judgment was for the Plaintiff. Paſc. 23 Car. in B. R. *Whetley* and *Fawſetts* Caſe. *Styles* 13. See Mich. 17 Car. in B. R. *Marſh.* 179. acc.

24. In Treſpaſs for taking of a Mare and a Colt, and Impounding them till the Plaintiff paid 10 l. The Defendant pleaded by way of Juſtification, That he did diſtreyn her by vertue of an Order made by Commiſſioners of Sewers for a Tax aſſeſſed upon the Plaintiff. The Plaintiff demurred to the Plea for divers cauſes. 1. That it doth not appear that the Commiſſioners who impoſed it, had power to do it, for it ought to be by ſix of them; and it doth not appear they were more then four in number. 2. It doth not appear that they were all of the *Quorum*, as they ought to be. 3. There doth not appear to be any fault in the Plaintiff. 4. It doth not appear that the Land doth lye within the Juriſdiction of the Commiſſioners, and alſo the number of the Acres do not appear upon which the

the Tax was layed, all which were holden to be good Exceptions where the Plea and Juſtification were by the Court held not to be good. Mich. 1649. in B. R. *Brangy* and *Lees* Caſe. *Styles* 178.

25. Treſpaſs for chaſing of his ſheep, the Defendant pleaded, That they were Treſpaſſing upon certain Lands, and he with a little Dog chaſed them out, and as ſoon as the Sheep were out of the Land, he called in his Dog. Upon this the Plaintiff demurred. The point was ſingly this, I chaſe the Sheep of another out of my ground, and the Dog purſues them into another mans Land next adjoyning, and I chide my Dog, and the Owner of the Sheep brings Treſpaſſe for chaſing of them. It was the Opinion of the Juſtices, That he might well drive out the ſheep with the Dog, and he could not withdraw his Dog in an inſtant; and here was no hedg, and when he ſaw them out of his own ground, he rated the Dog; And in the time of *Popham* Chief Juſtice, the Caſe was adjudged in this Court. Treſpaſſe was brought for hunting and breaking his Hedges, and the Caſe was, That a man ſtarted a Fox in his own Land, and his Hounds purſued him into another mans Land: And it was holden, That he might juſtify the Hunting and purſuing him in any mans Land, becauſe a Fox is a noyſome Creature of the Common-wealth. Hill. 22 Jac. in C. B. *Millen* and *Faudryes* Caſe. *Poph.* 161. See before *Gedge* and *Mynns* Caſe, ſeems to be contrary to this Caſe.

26. In Treſpaſſe of Aſſault and Impriſonment, ſuppoſed to be done at ſuch a Pariſh and Ward in *London*, 20 *Marcii*, 35 Eliz. The Defendant Juſtified, by reaſon of an Execution upon a Recovery in the Court of S. within the Cinque Ports, and traverſed *abſque hoc*, that they were Guilty in *London*. The Plaintiff replyed and maintained the Aſſault and Impriſonment, and traverſeth *abſque hoc quod habetur aliquod tale Recordum loquela prout*; The Defendant hath alledged, *Et hoc paratus eſt verificare per Recordum illud*, and upon this the Defendant demurred in Law. The Court was of Opinion, That the Defendants Plea *prima facie* was good, becauſe it was a ſpecial manner of Juſtification, which cannot be pleaded and alledged to be in any other place then where it was done. But it was ſaid in this Caſe, That if the ſpecial matter alledged in the Forrein County be falſe, as here, the Plaintiff may maintain his Action, and traverſe the ſpecial matter alledged by the Defendant, and ſo a Traverſe in ſuch a Caſe may be upon a Traverſe where falſity is uſed to ouſt the Plaintiff of that benefit which the Law gives him. Mich. 38 Eliz. in B. R. *Paramour* and *Veryalds* Caſe. *Popham*, 103.

27. Treſpaſs for cutting down four Aſhes in a Cloſe called Cave-Cloſe, and carrying them away; the Defendant ſaid, That before the Plaintiff had any thing, &c. J. S. was ſeiſed in Fee of the Cloſe, in which, &c. and by Indenture demiſed the ſaid Cloſe *inter alia* to J. D. and others, excepting the Wood and Underwood thereupon growing, for the life of A. and Covenanted, That it ſhould be lawful for the Leſſees and their Aſſigns, to take, upon the premiſes, neceſſary Fireboot, and Houſeboot, to be expended upon the premiſes, or for reparation of the premiſes. J. S. dyed, A. ſurvived, and took to Hurband J. N. and that the Leſſees aſſigned their Eſtate to A. and that the Defendants took the four Aſhes for neceſſary Cartboot, &c. and averred the life of A. It was adjudged, That the Plea and Juſtification was ill, for that the Servant Juſtifying under the Title of his Maſter, and medling with the Title, ought to ſhew the Deed, for that is the ſubſtance of the Title, and without ſhewing it, he cannot juſtify. 2. It was not good, becauſe not ſhewed, that the Maſter expended them for thoſe purpoſes. Hill. 8 Jac. in B. R. *Pwſrey* and *Gymes* Caſe. *Cro.* 2. Part, 291.

Judges, Juſtices, *and* Juſtices *of the* Peace.

1. SEE before, *Lib.* 1. Title *Courts*, the Juriſdiction, Power, and Authority of the Juſtices of the Kings Bench, Common-Pleas, Exchequer, Juſtices of *Oyer* and *Terminer*, Juſtices of Aſſiſe, Juſtices of Goal-delivery, and the Caſes there put.

2. Juſtices of Goal-delivery who had commanded the reſpite of a Priſoner from Execution, may in the Vacation after the adjournment of their Commiſſion, command the Sheriff to reſpite over the firſt day, and this they may do by the Cuſtome of the Realme. Mich. 4 Eliz. *Dyer*, 205.

3. Juſtices of Aſſiſe hold Plea *de appelis de Roberia* by vertue of a Commiſſion, but of an Appeal of Murder, they may hold Plea by the Statute of 3 H. 7. by the expreſſe words of the Statute Mich. 1 Ma. *Dyer*, 99.

4. In a *Quare Impedit* againſt the Biſhop of *Saliſbury* and the Incumbent, Verdict paſſed before the Juſtices of Aſſiſe for the Plaintiff; Judgment

was

was given before them, and a Writ to the Metropolitan awarded, and for damages, a *Fieri facias* to the Sheriff. The Defendant upon a Writ of Error, removed the Record into the Kings Bench, and had a *ſuperſedeas* to the Metropolitan made in the Common Pleas. Afterwards the Plaintiff ſued a *Scire facias* to have Execution, becauſe the Defendant did not aſſign Errors. And ſee there, that exception was taken to the Writ of Error, becauſe the Writ of Error was *in recordo proceſſu, et redditione Judicii ſequelæ quæ fuit coram nobis, &c.* which was falſe. Mich. 6 E. 6. *Dyer*, 76.

5. In a Writ of Entry brought upon the Statute of 5 R. 2. *ubi ingreſſus non datur per legem*; the parties were at Iſſue; which was tryed by the Juſtices of *Niſi Prius*; and the Jury having their charge given them, retorned, and ſaid, That they were all agreed of their Verdict but one of them, who had eat and drank, and would not agree: whereupon at the requeſt, they were remaunded, and afterwards found for the Plaintiff. The Juſtices there did not impoſe the Fine upon the Jurour who had eaten and drank, but gave him day in Bank by the advice of *Fitzherbert* one of the Juſtices; and there a Fine was aſſeſſed upon the ſaid Jurour of 20 s. and Judgment was there given for the Plaintiff. Mich. 5 Eliz. *Dyer*, 218.

6. It was moved as a doubt, If an Offence be made by Statute, which was no Offence at the Common Law. And by the Statute, if a penalty be appointed of a ſum of money to be recovered in any of the Courts of Record of the King: Whether this Offence and penalty may be heard, determined and puniſhed by Commiſſion of *Oyer* and *Terminer* in the Countrey. It was the Opinion of all the Juſtices (being aſſembled by the command of the Queen to deliver their Opinions therein) that the ſame could not, but comes to be puniſhed, and the penalty to be recovered only in one of the four Courts of Record at *Weſtminſter*. But if no Court be appointed for determining of the ſame, then the King by his Authority and Prerogative may appoint what Court he pleaſeth to hear and determine the ſame. Mich. 7 Eliz. *Dyer*, 236.

7. Note, by the Juſtices, That at the Common Law, the Coroner of the County could not entermeddle with the death of a man within the Verge, but the Coroner of the Houſhold of the King only: and ſo it was adjudged, Paſc. 24 Eliz. in B. R. in *Swifts* Caſe, where he was endicted before the Coroner of the County of *Middleſex* of a Murder done at *Tuthill* in the ſaid County of *Middleſex*, and the Indictment being removed into the Kings Bench, he there pleaded, That *Tuthill* was at the time of the Murder, and yet is within the Verge, where it was adjudged, That it was a good Plea, and he diſcharged of the Indictment: But it was Reſolved, That the Juſtices of the Kings Bench, Juſtices of *Oyer* and *Terminer*, Juſtices of Goal delivery, and Juſtices of the Peace may enquire of, hear, and determine, all Murders and Felonies within the Verge, becauſe their Authority and Juriſdiction are general throughout the whole County; and ſo it was adjudged in *Holcroft's* Caſe. *Cook* 4. Part, 46, 47. in *Wrotes* Caſe.

8. In all Commiſſions of Aſſiſe, of Goal-delivery, of *Oyer* and *Terminer*, and of Juſtices of Peace; Power and Authority is given them by the King to execute Juſtice, *ſecundum legem, et conſuetudinem Regni noſtri Angliæ*. *Cook* 7. Part, 12. in *Calvins* Caſe.

9. The King, R. 3. by his Letters Patentes Granted to the Burgeſſes of *Glouceſter* and their Succeſſors, that the Town of G. ſhould be a County of it ſelf, ſeveral and diſtinct from the County of G. for ever, and no part of the County ſhall be called the County of the Town of G. ſaving and reſerving to him and his Heirs, That the Juſtices of Aſſiſe in the County of G. the Juſtices of Goal-delivery, and of the Peace, in holding of their Seſſions, and the Sheriff of the County of G. in holding of their County Courts, may enter the ſaid Town, and keep their Seſſions, and County Courts, of, or for any matter ariſing out of the ſaid County of the Town of G. and within the ſaid County of G. as before time they had accuſtomed to hold them there; and further Grants them, That the Miniſters of the Sheriff of the County ſhall not afterwards enter to do or execute any thing there which to their Office of Sheriff appertaineth; except only for the Sheriff of the County of G. to hold there County Courts as aforeſaid. It was a Queſtion moved, Whether by the ſaving of the Charter, they have power reſerved to them to ſit within the Town, and to enquire there, of the Felonies done in the County of *Glouceſter*; and ſo for the Aſſizes of *Niſi Prius*. 2. If the Sheriffs may execute their Warrants there made at the time of the Aſſiſes or Goal-delivery, notwithſtanding the Exemption given them by the Letters Patents. It was agreed by all the Juſtices, That the ſaving in the Patent is ſufficient of Aſſiſe and Goal-delivery to ſit there for the things which happen within the County of G. for as the King may by his Letters Patents make a County, and exempt this from another County, ſo he may in the making of it ſave and except to himſelf and his Succeſſors, ſuch part of the Juriſdiction or Privileg which the other County from which it is exempted, had in it before; and although the words being in the Patent, (ſaving to him and his Heirs,) yet it ſhall be for a perpetual ſaving going to his Succeſſors. But it was the Opinion of the Juſtices, That by a Commiſſion to the County, a thing which happens in the Town of

G. cannot be determined, albeit it be committed in the Hall during the Seſſions, but by a Commiſſion for the Town it may. See Hill. 35 Eliz. *Popham* 17, 18.

10. W. S. and others were endicted upon the Statute of 4 and 5 Ma. cap. 8. in *Com. Middleſex*, before the Juſtices of the Kings Bench, becauſe they took away F. the Daughter of J. S. under the age of ſixteen years unmarried, and in the cuſtody, and under the Government of her Father, without his conſent *contra formam Statuti*. It was moved, That this Judgment was *coram non Judice*, becauſe the Statute appoints, That for this Offence, the party offending ſhall be puniſhed by two years Impriſonment, or pay ſuch a Fine as the Star-Chamber ſhall appoint. And the words of the Statute are, [the Juſtices of Aſſiſe by Inquiſition or Indictment, ſhall have power to hear and determine, &c. whether this ſhall extend to the Juſtices of the Kings Bench, or only to Juſtices of Aſſiſe: And whether the Juſtices of the Kings Bench be not Juſtices of Aſſiſe. 2. Admitting they may hear and determine, Whether they have any power to impoſe a Fine, or only give Judgment for the Impriſonment, the Court doubted of both points, and gave no Reſolution, *Ideo Quæ.* Trin. 12 Car. in B. R. *Mary Smiths* Caſe. *Cro.* 1. Part, 335.

The Power and Authority of Juſtices of the Peace, and what they may do within their Seſſions; and what out of Seſſions. And what Acts or things done by them, are good; What not.

1. NOte, It was holden by the Juſtices, That a Juſtice of Peace may enquire of Murder becauſe it is Felony contrary to the Opinion of *Fitzherbert* in *Bucklers* Caſe. Mich. 5 E. 6. *Dyer*, 68.

2. If a Juſtice of Peace maketh a Warrant to Arreſt one for Felony who is not endicted, although that the Juſtice erre in his Warrant, yet he who maketh the Arreſt by force of this Warrant, ſhall not be puniſhed by Writ of Falſe Impriſonment, becauſe he is not Judg of the cauſe. But if one be Endicted before Juſtices of the Peace, and confeſſeth the Felony, and hath a Coroner, and becommeth an Approver, and maketh an Appeal, ſuch Appeal was adjudged void, becauſe the Commiſſion of Peace extendeth only *ad inquirendum, ſcil.* to enquire before them *audiendum et terminandum*, and ſo the Appeal of the Approver is out of their Commiſſion, becauſe the Approver doth not make his Appeal before the Juſtices, but before the Coroner, and the Coroner Recordeth the ſame to the Court; and the reaſon why Juſtices of the Peace have not power to aſſign him a Coroner is, becauſe it is not within their Commiſſion. See *Cook* 10. Part, 77. in the Caſe of the Marſhalſey.

3. Action was brought againſt a Hundred upon the Statute of *Winton*; the Plaintiff ſhewed, that he took his Oath before J. S. Juſtice of Peace within the County of *Berks* (in which the Robbery was ſuppoſed to be), and inhabiting within the Hundred within 20 dayes before his Writ brought, That he was robbed, and did not know any of the parties according to the Statute of 27 H. 8. Upon a Special Verdict, it was found for the Plaintiff. The Oath was taken before the ſaid J. S. at his Chamber in the Middle Temple, *London*; and whether he took his Oath before J. S. Juſtice of the Peace of the ſaid County, and Inhabiting in the ſaid County *ſecundum formam Statuti*, was the Queſtion. It was ſaid in this Caſe, a Juſtice of Peace hath his Juriſdiction only within the County wherein he is a Juſtice of Peace, and not elſwhere, and may not elſwhere exerciſe his Juriſdiction. But the Opinion of the Court was, the Caſe being propounded to all the Juſtices of the other Courts and Barons of the Exchequer, That this Examination taken at *London* by a Juſtice of the Peace of the County, inhabiting in the Hundred, was good enough: And it was ſaid by them, That the Act of 27 Eliz. was not an Act of exerciſing Juriſdiction but rather a direction that ſuch an Oath and Examination ſhall be taken, and which may be aſwell taken in any place, as within the County, and there was a difference when a Juſtice of Peace doth an Act to compell one to perform, as to Impriſon one for not performance, or to command one for an Offence to be Impriſoned, ſuch Acts cannot be done, but where their Juriſdiction extends; but Juſtices of Peace may take Informations againſt Offenders in any place out of the County, to prove Offences in the County where they are committed. But they cannot compell any of the County to make a Recognizance, for they cannot uſe any coercive power out of the County. Wherefore it was adjudged in the principal Caſe, That the power of the ſaid Juſtice of Peace, for the taking of the ſaid Oath and Examination, was well executed within the meaning of the Statute of 27 Eliz. And Judgment was given for the Plaintiff. Paſc. 7 Car. in B. R. *Hellier* and the Hundred of *Perſhonds* Caſe. *Cro.* 1. Part, 153, 154.

4. It appeared upon the Return of a *Habeas Corpus*, That A. the Priſoner upon the complaint at *Lincoln* of two Juſtices of Peace of the County adjoyning to the place, was Ordered to keep a

Watch

ſtard child, being the reputed Father. From this Order he appealed to the Quarter Seſſions of the Peace, where the matter being examined, he was diſcharged, and the firſt order diſcharged. After at another Seſſions of the Peace, the matter being re-examined. It was ordered, according to the firſt order, That he ſhould be accounted the reputed Father, and ſhould keep the Baſtard, and if he did not perform it, that he ſhould be committed; and he was thereupon committed: all which matter appeared upon the return of the *Habeas Corpus*. The Court in this Caſe were of Opinion, That he being diſcharged at the next Quarter Seſſions, to which he appealed according to the Statute of 18 Eliz. the ſecond Seſſions had no power to alter it: Wherefore he was diſcharged of it, and of his commitment. Trin. 9 Car. in B. R. *Pridgeons* Caſe. *Cro.* 1. Part, 248, 255. See 19 Car. in B. R. *Slaters* Caſe. *Cro.* 1. Part, 337. in *Lib.* 1. Diviſion 5. Sect. 2. acc.

5. Information was in the Kings Bench againſt the Defendant, upon the Statute of 23 H. 8. cap. 4. for ſelling Beer at another price then is appointed by the Statute: being found for the Plaintiff, It was ſaid in Arreſt of Judgment, That the Information was not maintainable in this Court by the Statute of 21 Jac. which appoints, That Informations ſhall be before Juſtices of Peace for ſuch matters whereof they have power to enquire, and not in the Courts at *Weſtminſter*; and the Statute is in the Negative. But it was Reſolved, That the Information was well brought: And it was Reſolved, That the Statute of 21 Jac. makes not any new Law to enable Juſtices of Peace to intermeddle with Informations which were not before appointed by them to be enquired of, but only appoints, That where Informations may be brought before them, or at the Courts at *Weſtminſter* at their Elections; there they ſhall be brought into the Seſſions of the Peace, before the Juſtices of Aſſiſe, or *Oyer* and *Terminer* in the Counties where the offences were committed, and that for the eaſe of the Subject. 2. Reſolved, That the Statute of 33 H. 8. cap. 20. extended not to give them Authority to receive Informations upon the Statute of 23 H. 8. and that Brewers ſhall not be ſaid Victuallers within the ſaid Statute; for the words, Victualls, and Victuallers, are properly applyed and extended againſt Ale-houſe keepers, who ſell by Retail, and keep not the Aſſiſe. Trin. 4 Car. in C. B. *Cro.* 1. Part, 79. *Farrington* and *Krymers* Caſe.

6. A Bayliff of the Sheriff of D. was endicted before Juſtices of Peace in their Seſſions upon two Indictments of Extortion. One, That he as Bayliff *colore Officii*, had extorted 20 s. 8 d. *extorſive*. The other, That he took *extorſive* 20 *colore Officii*. upon which Endictments, he was enforced to plead preſently, and the ſame day they were tryed, and he convicted, and Judgment given at one and the ſame Seſſions, that he ſhould be Impriſoned and fined to the King, 40 l. Upon theſe Indictments, Error was brought; And it was the Opinion of the whole Court in this Caſe, That Juſtices of Peace ought not to try and determine civil Offences in one and the ſame day, for the party ought to have a convenient time to provide for tryal; and for that cauſe (amongſt other) the Judgment was reverſed. Hill. 11 Car. in B. R. *Cro.* 1. Part, 317. *Bampfields* Caſe.

7. A Souldier who had received Preſs-money of the King to ſerve in his Wars, and was enrolled, taken pay, and delivered over amongſt other Souldiers to a Conductor to be brought to the Sea ſide, run away without Licenſe. This Caſe, by his Majeſties command, was referred to the Juſtices to conſider if it were Felony. It was Reſolved by them, That it was Felony. Then it was moved, How this Felony, and before whom it ſhould be tryed, becauſe it is a new Law, which makes a new Felony, and the Statute of 7 H. 7. or 3 H. 8. cap. 1. that it ought to be tryed before the Juſtices of the Peace at their Seſſions: Whereupon a doubt did ariſe, Whether Juſtices of Aſſiſe, or Juſtices of *Oyer* and *Terminer* may by their Commiſſion try it or not; there was not any reſolution given in the Caſe. But the greater Opinion of the Juſtices was, That the Juſtices of *Oyer* and *Terminer* might try it by their Commiſſion. Paſc. 3 Car. in B. R. The Caſe of Souldiers. *Cro.* 1. Part, 51.

8. A man was committed to the Goal by Juſtices of the Peace at their Seſſions, untill he ſhould obey an order of taking the Office of Conſtable upon him, for that he being an Inhabitant within the Hundred of C. within the Liberty of St. *Albans*, refuſed to take upon him the Execution of the ſaid Place; and becauſe the Court was informed, that he denyed to be within the Liberty, but affirmed, That he was within the County of H. out of the Liberty: The Court were of Opinion, That they ought not to have committed him, but have cauſed him to be endicted upon his refuſal, and then if he were found to be within the Liberty, ſhould have aſſeſſed a good Fine, and then have committed him; but the Impriſonment as it was, was unlawful: therefore the Court diſcharged him without Bail. Hill. 15 Car. in B. R. *Crawlies* Caſe. *Cro.* 1. Part, 409.

King, &c.

KING.

1. *Where the King cannot be a Diſſeiſor, or wrong doer; and therefore cannot be impleaded by* Precipe, Quare Impedit, &c. *but by Petition. And where, and in what Caſes the King may be put out of Poſſeſſion, and of what; and have redreſs by Action; Where not.*

1. IT was found upon a Writ of *Mandamus*, That *T. Cox*, was ſeiſed of certain Meſſuages in *London*, and dyed without Heir; which were holden of the King in Socage: And the Corporation of Sadlers came and ſhewed their right, That one *Robert Mylard* was ſeiſed of thoſe Meſſuages in Fee. And by his Will in writing, deviſed the ſaid Meſſuages to the Wardens of the Comminalty in Fee, and that they were Diſſeiſed by the ſaid *Tho. Cox*, who dyed without Heir; and ſhewed the Cuſtome of *London*, That a Freeman might deviſe in Mortmain. The Queſtion in this Caſe was, if *Monſtrans de droit* did lye, or that they were put to have a Petition. And in that Caſe, theſe points were (amongſt others) Reſolved. 1. That at the Common Law, where the King was ſeiſed of any eſtate of Freehold or Inheritance by matter of Record, were it by Judicial, Miniſterial, or Conveyance of Record, or by matter in *fait*, found by Office of Record, he who had right, could not have any traverſe, upon which he was to have *Amoveas manum*, but was put to his Petition of Right. But when the King is entituled by matter in *fait*, and found by Office of Record, if in the ſame Office the Title and Intereſt of the party were found, there the party grieved, at the Common-Law might have a *Monſtrans de droit*, and was not put to Petition. 2. That in all Caſes at the Common Law, when the Title of the King did accrue to him by Judicial Record, or by Judgment of Record; there although the King granted his Eſtate over, the party grieved was put to his Petition, and to have a *Scire facias* againſt the Pattentee. But when the King was entituled by Conveyance of Record; as if a Diſſeiſor conveyed Lands to the King by Fine, Deed Inrolled, and the like; there although that the party was put to his Petition againſt the King; yet if he granted the Land over, the Diſſeiſor might enter, or have an Action againſt the Pattentee. *Cook* 4. Part, 55. The Wardens and Comminalty of *Sadlers* Caſe.

2. If the Queen uſurpeth, and a *Quare Impedit* is brought againſt her Incumbent (for it doth not lye againſt the Queen) and pendant the Writ, the Queen preſenteth another, who is Inſtituted and Inducted, he ſhall be removed, for he commeth in under the Title of the Plaintiff. But if a ſtranger to the Writ, who hath good right, preſenteth pendant the Writ, and his Clark is admitted, and Inſtituted, he ſhall not be removed; for then by ſuch Deviſe, his rightful Patron might be defeated of his Preſentment: And note in this Caſe, it was ſaid, That the King ſhall not recover damages in a *Quare Impedit*. 1. Becauſe at the Common-Law no damages were recoverable in a *Quare Impedit*. 2. Becauſe the King is not within the clauſe of *Weſt.* 2. concerning damages, becauſe he could not loſe his Preſentment, and therefore he could not recover damages. *Cook* 6. Part, 52. in *Boſwells* Caſe.

3. If the King Preſenteth where he hath no right or Title, and his Clark is Inſtituted and Inducted, a *Quare Impedit* lyeth againſt the Biſhop, and the Incumbent only for neceſſity, becauſe a *Quare Impedit* doth not lye againſt the King, for that he cannot be in law a diſturber. But it is ſaid in that Caſe, That a *Quare Impedit* brought by the King againſt the Incumbent ſolely, is good, without naming the Patron in the Writ, but it is not ſo in the Caſe of a common perſon, for there if the Patron be not named in the Writ, the Writ ſhall abate. *Cook* 7. Part, 26. in *Halls* Caſe.

4. Note, It was Reſolved, That the King, Tenant in tail by the gift of any of his Auncеſtors, being Subjects, might by a Fine levyed upon a Grant and render, bar the Eſtate tail. 1. Becauſe the King is bound by the Statute *de Donis*; and it is reaſon, That the King take benefit of the Statute of 4 H. 7. and 32 H. 8. which enables Tenant in tail to bar his Iſſues, and it ſhould be hard that the King ſhould be in worſe caſe then a common perſon. 2. A difference was taken when the King claimeth in his natural capacity as Heir of the body

per formam Doni, for there he ſhall be bound by the Act of Parliament; and when the King claims in his Politick capacity, there a general Act ſhall not bind the King, unleſs he be particularly named. But in the principal Caſe, it was thought neceſſary, after the Render made, to have Letters Pattents, to grant to the Conuſee that he might enter into the Land, for otherwiſe the Fine being Executory upon grant and render, it might be doubted if the Conuſee without ſuch a Grant, might enter upon the poſſeſſion of the King. *Cook* 7. Part, 32. in the Caſe of Fines levyed by the Kings Tenant in Tail.

5. This Caſe was in the Court of Wards, The King was ſeiſed of the Mannor of B. in the County of *York* in Fee in the right of his Crown: A ſtranger erected a ſhop upon a vacant place of the Manner, and took the profits thereof without paying any Rent to the King for the ſhop: and afterwards the Queen granted the Mannor in Fee to the Earl of *Leiceſter*, who never entred into the ſhop, nor took any Rent for it; afterwards the Occupier thereof dyed in poſſeſſion. It was the Opinion of the Juſtices in that Caſe, That the ſame was not any Diſcent againſt the Pattentee, becauſe it was no Diſſeiſin to the Queen. Mich. 10 Eliz. *Dyer*, 266. See *Fineh.* 11. acc. And ſee Paſc. 20 Eliz. in C. B. in the Caſe of one *Garbery* adjudged acc. in the Court of Wards.

6. At the Common Law, If one had uſurped upon the poſſeſſion of the King to his Advowſon, and his Clerk had bin admitted, Inſtituted, and Inducted: this ſhould not have put the King out of the poſſeſſion of his Advowſon, by reaſon *Quod nullum Tempus occurrit Regi* by his Prerogative, but the King might have recovered his Preſentation by a *Quare Impedit*, for that the King was not bound by the Plenarty; but yet without a *Quare Impedit* brought, the King could not have removed the Incumbent who was in the Church, 18 E. 3. *Quare Impedit*, 151. 35 H. 6. 30. The King was not within the Statute of *Weſt.* 2. and an Uſurpation did not put him out of Poſſeſſion, for the words of the Statute are, *per fraudem et negligentiam*, *&c.*

7. If the King hath an Advowſon in the right of his Ward, and a Stranger uſurps, and his Clark is in by ſix Monethes before the King bring his *Quare Impedit*, yet this Plenarty ſhall be no good Bar againſt the King, and the reaſon thereof is, becauſe the King ſhould be otherwiſe without remedy: For a Writ of Right of Advowſon he cannot have, having an Eſtate in the Advowſon but as Gardian; and therefore in that Caſe *nullum tempus occurrit Regi*, for otherwiſe a ſtranger might hold a thing againſt him only by wrong, without any good ground; yet in that Caſe the King ſhall not put out the Incumbent, without a *Quare Impedit* brought, for ſo it is provided by the Statute of 13 R. 2. cap. 1. *Stamford* 32, and 33. But if the King hath Title to preſent by reaſon of Laps, and the Patron uſurps, and preſents his Clerk to the Ordinary, who is admitted, Inſtituted, and Inducted, and then dyes. The King hath loſt his Preſentation, and ſhall not have the ſecond Preſentation by his Prerogative, for there *Tempus occurrit Regi*, and the Kings Intereſt was ſpecially limitted, and the ſix Moneths was the ſubſtance of his Title. *Cook* 7. Part, in *Baskervilles* Caſe.

8. Note, It was holden by the Juſtices, That by two Uſurpations, the King might be put out of poſſeſſion, and put to his Writ of Right: And that a Grant after two Uſurpations by the King of his Advowſon, was void. 47 E. 3. 46. Paſc. 25 Eliz. in C. B. and Mich. 13 Jac. in C. B. adjudged acc.

9. The King ſeiſed of the Mannor of W. in the right of his Crown by his Letters Pattents under the Great Seal *ex certa ſcientia*, *&c.* granted to J. S. *illos duas peciastorra vocat. N. et M. jacent. in W. modo vel nuper in Tenura J. C. ac nuper Monaſterio de W. ſpectant. qua quidem omnia a nobis concelata et detenta fuerant.* And it was found by Verdict, That the Mannor of W. was not concealed, or detained, *ſed fuit in onere et computo*, but that the Rents of the two parcells of Lands, N. and M. were not anſwered to the King. In this Caſe (amongſt other points), It was Reſolved, That the ſaid Grant of the ſaid two pieces of Land was void, for this reaſon (amongſt many others) becauſe that no Land of which the King is ſeiſed, although it be concealed from the King, can be ſaid ſubſtracted or detteyned from the King, for that the King cannot be deforced out of, or diſſeiſed of any Land, *Cook* 10. Part, 112. *Arthur Legats* Caſe.

10. In a *Quare Impedit*, the Caſe was, King E. 6. was ſeiſed of the Advowſon of the Vicarage of D. in the right of his Crown. The Church became void. J. S. by Uſurpation Preſented J. D. the Advowſon came and Diſcended to the Queen. J. D. ſurrendred. Afterwards J. D. Preſented B. who was Inſtituted and Inducted, who reſigned alſo. And then J. S. again by uſurpation Preſented T. who was admitted, Inſtituted, and Inducted, and afterwards deprived; and before any new Preſentment, the Queen dyed; and the King Preſented, and upon a Diſturbance brought a *Quare Impedit*. It was ſtrongly Objected, That as the King cannot be diſſeiſed, No more might he be put out of Poſſeſſion of an Advowſon, for it was ſaid, It was a Rule, That of things Tranſitory, the King may be put out of poſſeſſion, but not of things permanent, or from an Inheritance: And in this Caſe, the King

had

had an Inheritance; and so it was said it was adjudged in the Common Pleas, 25 Eliz. But it was Resolved by the whole Court against the King. For the King as to the Advowson, hath no greater priviledg then another person, for ot necessity the Cure must be served; and therefore the Law doth not give any Priviledg to the King to avoid the Incumbent, who is no more then to a common person. And it differs from Land; for of Land, the King cannot put a man out of possession, nor can he be put out of possession thereof, but of an Advowson, as he may gain the possession by a Presentation, so he may be put out of Possession by two Usurpations. See 18 Eliz. *Dyer*, 351. Mich. 2 Jac. in C. B. the King and the Bishop of *Winchesters* Case. *Cro.* 2. Part, 53, 54.

11. In a *Quare Impedit* by the King; and shews, That A. was seised of the Mannor of H. to which the Advowson of the Vicarage was appendant, and that the Church became void by a Simonaical agreement, betwixt J. S. and the Wife of A. that A. the Patron should Present him, and set forth the particular Simony, and that A. Presented accordingly, so as the Church was void by the Statute of 31 Eliz. and so it did belong to the King to Present. The Defendant pleaded, That Queen *Eliz.* was seised in Fee of the Rectory of H. whereout the Advowson of the Vicarage apperta ned, and dyed seised, and that the Parsonage came to the King by discent; and that A. Presented the Defendant by Usurpation, who was Admitted, Instituted, and Inducted. And that afterwards the King Presented the Defendant to that Advowson of the Vicarage, and that he was Inducted of the Kings Presentation, and traverseth, That the Advowson of the Vicarage was appertaining to the Mannor. Whereupon it was demurred for the King. In this Case, It was adjudged, That the Plea of the Defendant was not good. 1. It was Resolved, when one is Inducted upon the Presentation of a common person, although it were by Usurpation upon the King; yet the King cannot Present another, the Church being full, without removing the Incumbent by a *Quare Impedit*. 2. That if a stranger without the Privity of the after Incumbent, procures the Patron to Present one upon a Symoniacal contract, if such Presentation be made, the Church is *ipso facto* void; and it belongs to the King to present, and that the Presentation upon the Symoniacal contract of the Wife in the principal Case, was within the Statute, and the King had Title to Present. 3. That although the Incumbent afterwards procured a Presentation *de Novo* from the King, that such Presentation was void, for that the Statute of 31 Eliz. disables him to have the same Church during his life. It was adjudged for the King. Pasc. 13 Jac. in C.B. rott. 21. The King and the Bishop of *Norwiches* and *Coles* Case. *Cro.* 385. See *Bolstr.* 3. Part, 90. acc.

12. In a *Quare Impedit*, it was holden clearly by the Court, That if Title of Laps accrue to the King, and the Patron Presents, yet the King may Present at any time as long as that Presentee is Parson: But if the Presentee dyes, or resigns before the King hath Presented, the King hath lost his Presentation otherwise if the Resignation be by Covin. 2. If the King hath Title by Lapps, by reason of taking of a second Benefice. If the Parson dyes, or resigns the first Benefice, and the Patron presents, whose Presentee resigns by Covin, or dyes; the King hath lost that Presentment, for Laps is but *unica et proxima vice*. Trin. 6 Jac. in C. B. *Cumber* and the Bishop of *Chichesters* Case. *Cro.* 2. Part, 216.

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2. *The Priviledges, Preheminencies, and Prerogatives which the King hath beyond common persons; in his Grants, Pleadings: and in several Acts done by him; and of the several capacities of the King.*

1. IT hath bin taken for a Rule and Maxime in the Law, That a common person cannot revoke, repeal, or make void, or vary from his first Presentation made by him to an Avoydance of a Church; because thereby he hath put it out of himself, and thereby given power to the Bishop to perfect what was by him begun. 38 E. 3. 35: *Fitzh. Nat. Br.* 34. 17 Eliz. *Dyer*, 348. But if the King doth present to a Church, and his Clark be admitted, and Instituted, the King may before Induction repeal or make void his first Presentation by Presentment of another Clark to the Bishop, and the very Presentment of the second Clark, without any more signification thereof to the Bishop, is in Law a repeal of the first. 13 Eliz. *Dyer*, 293. 22 Eliz. *Dyer*, 360. Mich. 8 Jac. in C. B. *Walters* Case adjudg. acc.

2. The Vicarage of *Yatton* in the County of S. came to the Queen by Lapps: The Ordinary of the Diocesse collated A. to the Vicarage. Afterwards the Queen Presented B. who brought a *Quare Impedit* against the Bishop and the Incumbent; pendant which suit, A. by Covin and fraud obtained a Presentation from the Queen, without making any mention of the pleasure of the Queen to revoke or repeal the first Presentment. It was in that Case holden by the whole Court, That the second

ſecond Preſentation in it ſelf, had bin ſufficient, and had bin a repeal of the firſt, if it had not bin obtained by Covin. Mich. 17 Eliz. *Dyer*, 339. Mich. 4 Jac. in C. B. *Williams* and the Biſhop of *Bangor's* Caſe adjudged accordingly. See *Godbolt*.

3. If the King hath cauſe to Preſent by reaſon of Lapſe or otherwiſe, and Preſents J. S. to the Biſhop. And before J. S. be Inſtituted and Inducted, the King dyes: And the Succeſſor King without reciting or making mention of the Preſentment of his Predeceſſor, preſents J. D. to the ſame Church. It was adjudged in that Caſe, That the Demiſe of the King did determine the firſt Preſentment; for that the Preſentation was but a power given to the Ordinary, which was countermandable and revocable; and by the Preſentation of him, J. S. had *nequit Officium nequit Beneficium*: And in that Caſe it was Reſolved, That the firſt Preſentation was repealed, although it was not recited by the King, and was not within the Statute of 6. and 8. cap. 15. that the King ought for to recite the ſame. For it was agreed, That that Statute went only to Leaſes, and not to Preſentations to Churches. Mich. 8 Jac. in the Exchequer, in *Calvert* and *Kitchins* Caſe adjudged. See 16 Eliz. *Dyer*, 327. acc.

4. Note, it was agreed by the Juſtices, That if one wrongfully taketh the Rents and Profits of the Kings Lands; yet the ſaid Rents cannot be ſaid to be deteyned, and with-holden from the King; for the King may charge him who taketh the profits of the Rents or Lands as Bayliff, for in the Kings Caſe, the Law in ſuch Caſe maketh a Privity to charge the party in accompt. *Cook* 19. Part, 114.

5. It is a Rule in Law, That the Executors of a common perſon cannot be charged in an Action of account, but it is otherwiſe in the Kings Caſe. For if the Kings Steward aſſeſſeth Fines upon Copyholders upon their Admittances; and underhand takes great ſums of money of the Copyholders to his own uſe in diſceit and prejudice of the King, he may be charged in account for the whole, and if he dyeth, his Executors in the Kings Caſe, may be charged in an account. *Cook* 11. Part, 91. acc.

6. The Earl of *Devonſhire*, Maſter of the Ordinances pretended, That the old broken and unſerviceable Ordnance did belong unto him, by reaſon of his Office, and thereupon procured a Privy Seal: and afterwards he diſpoſed of the ſaid Ordnances, and made his Executors, and dyed. It was Reſolved, That the Executor of the ſaid Earl might be charged to the King for the Converſion of the ſaid Ordnance; and an account would lye by the King againſt his ſaid Executors. *Cook* 11. Part, 89. the Earl of *Devonſhire's* Caſe.

7. Sir *Walter Mildmay* was Chancellor of the Exchequer, and ſuggeſted to the Lord Treaſurer of *England*, that his Office was of great attendance; and deſired the Lord Treaſurer that he would be pleaſed to allow unto him 100 l. for his Dyet, and 40 l. *per annum* for his attendance, which the Lord Treaſurer did grant unto him, and he enjoyed it accordingly; and he afterwards made his Executors, and dyed. In that Caſe, his Executors were forced to account for it, and to pay back the money for all the time that their Teſtator received it. Mich. 38 Eliz. in the Exchequer. rott. 312. Sir *Walter Mildmayes* Caſe.

8. Sir *William Chandiſh* was Treaſurer of the Chamber of King *Hen.* 8. *Ed.* the 6th, and Queen *Mary*, and he was endebted to King *Ed.* 6. and Queen *Mary* in great ſums of money, and being ſo endebted, he purchaſed divers Lands, and afterwards alliened them, and took back an eſtate therein to himſelf and his Wife; and afterwards dyed without rendring any account. In that Caſe, the Ter-Tenants of the Lands were charged to the Queen for the money, to which they pleaded the eſpecial Pardon of the Queen. It was ſaid in that Caſe, That the Pardon was a matter of ſpecial Grace, but in Law the Ter-Tenants ſhall be chargeable to the Queen for the Monies. *Cook* 11. Part, 91, 92.

9. *William Porter*, Maſter of the Mint, did Covenant with the King by Indenture enrolled, That for all the Bullion which ſhould be delivered *ad Cambium Regis pro moneta faciend.* that money ſhould be delivered for it within 8 dayes, which Covenant he had broken; and therefore the King paid the Subject for the Bullion. And afterwards becauſe J. W. and R. P. *dumerant et preſentaverant dict.* William Porter in *Officium illud tanquam ſufficientem; Ideo Conſideratum eſt quod prædict. J. W. et R. P. erga Dominum Regem onerentur*: And afterwards they were charged to ſatisfy the King for all the monies which the King had paid for the ſaid *William Porter*. Mich. 30 E. 3. rott. 6. vouched, in *Cook* 11. Part, in the Earl of *Devonſhires* Caſe.

10. It is the Prerogative of the King, That the King ſhall have his Debt paid before the Debt of any Subject is paid, except in ſpecial Caſes. *Laſſells* was taken in Execution upon a *Capias utlagatum* out of the Kings Bench for 312 l. at the ſuit of the Lord *Dacres*, before the day of the Return of the Writ, there came a Writ of Prerogative out of the Exchequer, reciting a Debt of 300 l. to be due by *Laſſells* to the Queen, and a *Habeas Corpus* was awarded to the Sheriff of *London*, which Writ bore date a day before the Arreſt. The Sheriff by vertue thereof brought the body of *Laſſells* into the Exchequer, and being there examined upon the

Queens Debt, and that he could not deny it. It was awarded by the Court, That he ſhould be committed to the *Fleet* in Execution for both Debts; the Debt to the Queen to be firſt ſatisfied. Paſc. 3 Eliz. *Dyer*, 179. *Laſſells* Caſe. And ſo it was adjudged, Mich. 5 Jac. in the Exchequer, in the Lady *Sands*'s Caſe.

11. Upon an *Extendi facias* upon a Statute Staple, the Sheriff extended the Lands of the Defendant, and ſold the goods, and returned the extent into the Chancery. A Writ of Prerogative iſſued forth, That the Sheriff ſhould firſt levy 100 l. for the Kings Debt. In that Caſe, the Sheriff was driven to execute the Writ of Prerogative firſt: For notwithſtanding the extent, yet it was holden, That till a *Liberate* directed to the Sheriff, the property of the goods was not in the Conuſee, and then the Debt of the King was firſt to be ſatisfied. Mich. 3 Ed. 6. *Dyer*, 67. *Stringfellows* Caſe. See *Cook* 1. Part, *Inſtitutes* 131.

12. By the Common Law, the King might Grant a Protection to his Debtor, That no man might ſue him before the King was ſatisfied his Debt. And the Protection did run thus, *Et quia Nolumus ſolutionem debitorum Noſtrorum cæteris omnibus prout ratione Prærogativæ noſtræ totis temporibus retroactis, &c.* But that grew ſuch a grievance to the Subject, that the Statute of 25 E. 3. cap. 19. was made. And now by that Statute, a common perſon may lawfully ſue to Judgment, but he cannot proceed to Execution (and ſo the Kings Prerogative is ſaved) unleſs the Plaintiff who ſueth, will give ſecurity to pay firſt the Kings Debt. For otherwiſe, If the party doth take forth Execution upon his Judgment, and doth levy the money, the ſame may be ſeized upon to ſatisfy the Kings Debt. 45 E. 3. Tit. *Decies Tantum* 12.

13. Queen *Eliz.* by her Letters Patents did grant to Sir *Chriſtopher Hatton* the Office of Remembrancer or Collector of the Firſt Fruits for life; To have to him after the death of one *Godfrey*, who held the Office in poſſeſſion. Sir *Chriſtopher Hatton* thus ſtated in Reverſion of the ſaid Office, and being ſeiſed in Fee of divers Mannors, Lands, &c. did Covenant to ſtand ſeiſed of the ſaid Lands to the uſe of J. H. his ſon in tail, with Remainders to his other Sons, the Remainder to the right Heirs of J. H. in Fee, with a Proviſo of Revocation at his pleaſure during his life. G. dyed, and Sir *Chriſtopher* became Officer, and afterwards became endebted to the Queen by reaſon of the ſaid Office. The Queſtion in this Caſe was, Whether the Mannors and Lands which were ſo conveyed by Sir *Chriſtopher*, might be extended for the ſaid Debt due to the Queen by reaſon of the Proviſo and Revocation in the conveyance of the ſaid Lands. The Debt due to the Queen was aſſigned over, and the Lands extended, and the extent came to Sir *Ed. Coke*. The Heir ſued in the Court of Wards to avoid the extent. It was agreed by the Juſtices, Aſſiſtants to the Maſter of the Court of Wards, and by the Maſter of the ſaid Court, That the ſaid Mannors and Lands were lyable to the ſaid extent; for the power of diſpoſe of the ſaid Lands was in Sir *Chriſtopher* the Debtor, and the Lands which ſuch Debtor hath in his power, although he hath not an Eſtate in the Lands, ſhall be lyable to pay the Debt to the King; and he had a Fee in them to the time of his death by reaſon of the Proviſo and Revocation. Alſo he had the Lands when he was aſſured of the Office, although he had not the poſſeſſion of it; and he had a time in which he might let the Land to paſs, and yet he had a power to pull it back again at his pleaſure: And if he had bin living (being endebted to the King) the King might have extended the Lands, becauſe that then he had the poſſeſſion of them. And any Lands be the Lands in uſe, upon truſt, or under power of Revocation, the Kings debt ſhall be taken to extend unto them. Paſc. 21 Jac. in the Court of Wards. *Godbolt*. 292. to 300. Sir *Edward Cokes* Caſe.

14. The Caſe was 3 A. recovered againſt B. in an Action upon the Caſe 500 l. Afterwards B. and C. purchaſed Lands in Fee, and afterwards alliened them to J. S. A. was Outlawed, and ſo his Debt became forfeited to the King. The Queſtion was, Whether the King ſhould have Execution of the moyety of the moyety of B. or of the entire moyety. And it was Reſolved, That he ſhould have the entire moyety, although that A. ſhould have had but the moyety of the moyety, but the Debt comming to the King, he ſhall by his Prerogative have Execution of the entire moyety. Trin. 15 Jac. in the Exchequer: The King and *Deaths* Caſe. *Cro.* 2, Part, 513.

15. A. in Execution for a Debt due to the King by a Judgment in the Exchequer, was condemned in Debt by a Judgment in B. R. and being brought by *Habeas Corpus* to the Bar, it was prayed he might be charged in Execution for that Debt alſo. It was Reſolved by the Court, That it could not be: For that by the Statute of 25 E. 3. cap. 19. A common perſon ſhall not have Execution againſt the Kings Debtor, untill he makes agreement for the Kings Debt. But foraſmuch as he had not a Writ of Protection, it was further Reſolved, That he was out of the Statute, and thereupon it was awarded, That he ſhould be in Execution, as well for the party, as for the King. Mich. 10 Car. in B. R. *Stevenſons* Caſe. *Cro.* 1. Part, 283.

16. A common Recovery in a Writ of Entry was drawn againſt J. S. of the Mannor of D. wherein the Tenant prayed in aid of the King by reaſon

of

of a Warranty whereby he Warranted that Land, this Aid Prayer was in ſtead of Voucher. It was drawn in Paper, and the Kings Attorney (by Warrant from the King) entred into Warranty, and prayed, That the Defendant might Count. But this being peruſed by the Court, becauſe that ſuch a courſe had not bin ſeen, or any Preſident ſhewen, That ever any ſhould Count againſt the King as Vouchee, therefore the Court would not ſuffer the Recovery to paſs, for that the King ſhall never render in value upon Voucher, but in ſuch Caſe they ought to ſue to the King by Petition to have in value, and not by Voucher. Mich. 3 Car. in C. B. *Cro.* 1. Part, 68.

17. The King had the Advowſon of the Vicarage of D. by reaſon of Wardſhip; the Church voided, during the minority of the Heir, the Heir ſued his Livery; The King Preſented under the Great Seal, and afterwards without mentioning the firſt Preſentment, Preſented another under the Seal of the Court of Wards, who is admitted, Inſtituted, and Inducted by the Biſhop. Afterwards the King brought a *Quare Impedit* againſt the firſt Preſentee. It was adjudged it did not lye, for it was within the Diſpoſition of the Court of Wards, although it was after Livery, becauſe it was a Chattel veſted. And it was ſaid, That the ſecond Preſentation under the Seal of the Court of Wards was good, for that the King might Preſent by word, for nothing is Granted or given by Preſentation, for it is but a commendation or Declaration of the Kings Will, which may well be by word: And if the King hath an Advowſon in the right of the Dutchy, which becomes void, he may Preſent to it in the right of the Crown. Trin. 8 Jac. in C. B. The King and the Biſhop of *Chicheſters* Caſe. *Cro.* 2. Part, 247, 248.

18. By command from the King, It was propounded to all the Juſtices of *England*, with divers of the Nobility, Whether the Deprivation of Puritan Miniſters by the High Commiſſioners, for refuſing to conform themſelves to the Ceremony appointed by the late Cannons was lawful. It was anſwered by them all, That it was, becauſe the King hath the Supream Eccleſiaſtical power which he hath delegated to the Commiſſioners, whereby they had power of Deprivation by the Canon Law of the Realm. And the Statute of 1 Eliz. doth not confer any new power, but explain and declare the Auncient power. And they held it clear, That the King without the Parliament, might make Orders and Conſtitutions for the Government of the Clergy by his own Prerogative, and might deprive them if they obeyed them not; And ſo the Commiſſioners might deprive them, but they could not make any Conſtitutions without the King. Trin. 2 Jac. *Cro.* 2. Part, 37.

19. Note, It was Reſolved by the Juſtices, That in Caſe of a common perſon, If the Plaintiff in Evidence ſhew any matter in Writing, or of Record, upon which a Queſtion in Law doth ariſe, and the Defendant offereth to demur in Law, the Plaintiff cannot refuſe to joyn in Demurrer, but he ought to joyn, or elſe waive his Evidence. But if Evidence be given for the King, and the Defendant offereth to demur upon it, the King is not bounden to joyn in Demurrer, but the Court may direct the Jury to find the ſpecial matter, and upon that they ſhall judg according to Law: And in that Caſe, it was ſaid, That the King by his Prerogative might waive his Demurrer, and take Iſſue at his pleaſure. Trin. 42 Eliz. in B. R. *Cook* 5. Part, 104. *Bakers* Caſe.

20. In an Information againſt the Defendant, for uſing the Trade of a *Goldſmith* upon the Statute of 5 Eliz. not being an Apprentice: The Defendant pleaded the Cuſtome of *London*, That one having bin an Apprentice for ſeven years, and made Freeman of *London* of any Trade, may uſe any other Trade in the ſame City, and ſhewed he was bound Apprentice in the Art of a Cordwainer, and ſerved ſeven years, and was made a Freeman, and ſo juſtified. It was objected, That the matter of the Plea was not good, becauſe a Cuſtome cannot be alledged againſt a Statute. To which it was anſwered, That being the Cuſtome of *London*, which Cuſtomes being confirmed by Parliament, it was good, but the Court gave no Reſolution of that point, becauſe the Kings Attorney this Term waived the Demurrer, and took Iſſue upon the Cuſtome, and prayed that the Defendant might rejoyn; and thereupon the Defendant prayed, That he might waive his Plea, and plead, Not Guilty. But the Court doubted, Whether he might do it without the aſſent of the Attorney General, who would not aſſent; whereupon the Defendant was enforced to rejoyn. Hill. 9 Car. in B. R. The King and *Bagſhaws* Caſe. *Cro.* 1. Part, 253.

21. Queen *Eliz. Anno* 43. of her Reign, made mixt monies in the Tower of *London*, and ſent it over into *Ireland* with Proclamation, that the ſaid money ſhould be currant in that Realm, and ſhould be accepted and received by all her Subjects uſing Trade and Merchandiſing within the ſaid Realm, with puniſhment for contempt of thoſe which ſhould refuſe it, and by the ſame Proclamation, made all other Coynes currant in that Realm of no eſteem. The Caſe proceeded further. But concerning this of monies, It was Reſolved. 1. That the ſtandard of money certain was neceſſary in every Common Wealth, becauſe there cannot be any equality in Contracts without money, and for the eaſe of commerce, money was invented. And *Moneta eſt juſtum medium et Menſura rerum commutabilium.*

bilium. 2. Reſolved, That it belongs only to the King of *England* to coyn money within his Dominions; and no other can make it without ſpecial Licenſe or command, and if any doth it of his own head, it is High Treaſon. And it was ſaid, That the King by his Proclamation may make any Coyn lawful money of *England*, *à fortiori* he may eſtabliſh the ſtandard of money within his own Dominions. 3. Reſolved, That the King may change his money in ſubſtance, or abaſe the value of it, or utterly decry it and annul it, as he did in the principal Caſe, and this by his Prerogative, and ſuch changes have bin by Authority of the King without Parliament in all ages. See Sir *John Davis's* Reports, the Caſe of mixt monies. See *Cook* 5. Part, 114. *Wades* Caſe, acc.

22. In all Originalls brought by a Subject, wherein Pledges *de proſequendo* are to be found, the preamble of the Writ is *Rex vicecom. ſalutem. Si A. fecerit te ſecurum, &c. tunc ſummoneas, &c.* But at the Kings ſuit, the preamble ſhall be *Rex vicecom. ſalutem. Summoneas per bonos ſummon. &c.* and ſhall not be *Si Rex fecerit te ſecurum, &c.* for the King ſhall not be bound to proſecute, becauſe he is ſubjected to be amerced if he do not proſecute, neither can he be Non-ſuit, becauſe he is alwayes preſent in Court. *Fitz. Nat. Br.* 31. *Cook* 1. Part, *Inſtitutes* 127. See *Cook* 8. Part, 61. acc. in *Butlers* Caſe, the King ſhall not find Pledges, becauſe he cannot be amerced; no more ſhall the Queen, becauſe ſhe partaketh of the Kings Prerogative.

23. The King made a Leaſe for years, rendring rent, payable at the Receipt of the Exchequer, *ſeu ad manus Baliworum, ſeu receptorum* with Condition to be void for non-payment; and afterwards Granted over the Reverſion; And whether he ſhall demand the Rent, and take advantage of the Condition, was the Queſtion. It was Reſolved in this Caſe, 1. That if a common perſon reſerve a Rent upon a Demiſe payable at a place from of the Land, he who will take advantage of the Condition for not payment of the Rent, ought to demand the Rent at the place where it is limitted to be paid. But if the King makes a Leaſe for years, rendring Rent, with ſuch Condition, the King may take advantage of the Condition, without a demand, becauſe it is not for the Honour and Dignity of the King to demand Rent of his Subject; but the Law appoints the Subject to attend upon the King, and therefore the Subject ought to do the firſt act, either to pay or tender the Rent. But it was Reſolved, That this Prerogative was perſonal only, and therefore if the King Grant over the Reverſion, the Patentee ought to make demand of the Rent if he will take advantage of the Condition. Paſc. 38 Eliz. in B. R. *Cook* 4. Part, 73. *Boroughs* Caſe. See *Cook* 5. Part, 56. in *Knights* Caſe adjudged acc.

24. If a common perſon taketh an Allien born to Wife, and dyeth: If he were ſeiſed of Lands in Fee in tail, yet the Wife ſhall not be endowed of the Lands; but if the King taketh to Wife an Allien born, ſhe ſhall be endowed by the Law of the Crown. *Cook* 1. Part, *Inſtitutes* 31. See 26 E. 1. Rott. Par. 1. *Edmond*, brother to King E. 1. married the Queen of *Navar*, and dyed. It was in that Caſe Reſolved by all the Judges, that ſhe ſhould be endowed of all his Lands of which he dyed ſeiſed in Fee-ſimple.

25. If a Villain purchaſeth Lands, and allieneth the ſame before the Lord doth enter, the Lord is barred for ever, for before entry, the Lord hath neither *jus in re, nec ad rem*: But if the Kings Villain purchaſeth Lands, and allieneth before the King (upon an Office found for him) doth enter, yet the King after Office found, ſhall have the Land, *quia Nullum Tempus occurrit Regi*; And yet after Office, the King ſhall not have the mean profits, becauſe the Title commeth by ſeizure; but it is otherwiſe of goods or Chattels, for there the property of them is in the King, before any ſeizure or Office. *Cook* 1. Part, *Inſtitutes* 110. See *Litt.* Sect. 177, 178.

26. By the Common Law, the Wife of the King is an exempt perſon from the King, and is capable of Lands and Tenements of the gift of the King, as no other Feme Covert is, and ſhe may ſue and be ſued without the King, ſhe ſhall find no pledges, for ſuch is her Dignity, that ſhe ſhall not be amerced, and ſhe in many Caſes pertakes of the Prerogative of the King; and therefore if a *Quare Impedit* be brought by her, It hath bin the Opinion of our books, That Plenarty is no good Plea againſt the Queen. See *Cook* 1. Part, *Inſtitutes* 119. and *Cook* 4. Part, 23. in *Clark* and *Pennyfathers* Caſe, acc.

27. If a Villain remain in auncient Demeſne of the King a year and a day, without claim or ſeiſure of the Lord, the Lord cannot have a Writ of *Nativo habendo*, or ſeize him ſo long as he remains and continues there, and this Priviledg he hath in reſpect of the Service which he did the King in plowing the Kings Land, and other labours of Husbandry, which was for the Kings benefit. *Fitz. Nat. Br.* 79.

28. The Common Law gives to the King all ſuch things which are *Nullius in bonis*; as Wreck, which is, when goods by Shipwrack are caſt upon the Land; *Flotſan*, which is when a ſhip is drowned, and the goods float upon the Sea: *Jetſan*, when a ſhip is in danger to be drowned, and to diſburthen the Ship, the goods are caſt into the Sea, and afterwards the Ship periſheth. *Legan*, when the

the goods are ſo ponderous, that they ſink, and the Mariners when they find them, faſten a Cork, or a Buoy to them, to diſcover whereabouts the goods do lye. All theſe do belong to the King *Jure Prærogativæ*; and ſo it is of all other goods and Chattels; wherein none can claim a property, the King ſhall have them by his Prerogative. *Cook* 5. Part, 106. in Sir *Henry Conſtables* Caſe.

29. All White Swans not marked, which have gained their Liberty, and ſwim in an open and common River, may be ſeized upon to the uſe of the King by his Prerogative. *Cook* 7. Part, 16. the Caſe of Swans.

30. When the King hath any Prerogative, Eſtate, Right, or Title, he ſhall not be barred of the ſame by the general words of an Act of Parliament: And the King hath a Prerogative, That *Nullum Tempus occurrit Regi*; and therefore the general Acts of Limitations, Plenarty ſhall not extend to the King. So the King by his Prerogative may ſue in what Court he pleaſeth; and therefore he ſhall not be barred of this Prerogative by the Statute of *Magna Charta*. *Cook* 10. Part, 74. in *Magdalen* Colledges Caſe. *Fitz. Nat. Br.* 7. and 32. acc.

31. Note, It is ſaid in the Regiſter, That the King may joyn with another in a *Quare Impedit*: and *Fitz. Nat. Br.* 32. ſets down the Writ, *viz. Precipe R. de C. quod juſte, &c. permittat nos et P. de F. præſentare idoneam perſonam ad Eccleſiam de R.* But it is there ſaid, That notwithſtanding that Writ, That the King alone ſhould have the Preſentation; and to that purpoſe; ſee 11 E. 3. *Fitz. Quare Imp.* 73. But the Opinion of Mr. *Fitz.* himſelf is, That it ſtands with reaſon that the King and another might joyn in the Writ; as in popular Actions, where the party ſueth for the King and himſelf; and there the words of the Writ are, *Qui tam pro Domino Rege, quam pro ſeipſo ſequitur*; And it is ſaid by him there, That it is the common experience, That another man may now hold Lands in common with the King; and therefore it is reaſon, That they may preſent to an Advowſon in Common. But Quære *Fitz. Nat. Br.* 32. *G.*

32. The Caſe was, A. was Indicted of a *Premunire* upon the Statute of 13 Eliz. and afterwards made a gift in tail of that Land, and after was Attainted by Verdict, and had Judgment for that Offence. It was afterwards found by Commiſſion out of the Exchequer. That A. was ſeiſed in Fee of thoſe Lands at the time of the offence committed, and that the Queen by her Letters Patents had granted thoſe Lands to J. S. under whom the Leſſee of the Plaintiff claimed; and the Defendant under the Title of the Tenant in tail. There were two points in the Caſe. 1. Whether an Attainder in a *Premunire* ſhall have relation to the Offence, for the forfeiture of the Lands, or only to the time of the Judgment. This being a matter of great difficulty, the Court gave no Reſolution in it. 2. Admitting it to be a forfeiture, Whether the Patents after the Inquiſition by Commiſſion under the Exchequer Seal (no Offence being found by Commiſſion under the Great Seal) were good by the Statute of 18 Eliz. which makes Patents upon valuable conſideration good, notwithſtanding there be not any Inquiſition found under the Great Seal. For this, the Court Reſolved, That by this Judgment he ſhould forfeit, &c. That in that Caſe, nothing veſted in the King untill Office found: for the Freehold being in the party offending at the time of the Attainder, it ſhall not be deveſted from him; and in the King without Office under the Great Seal, which is only an Office to entitle the King; and not by vertue of a Commiſſion under the Exchequer Seal, which is but Inſtruction and Information to the King, and for his Officer to put the Lands holden of the King in charge. But here the Lands are not come unto the King, untill Office found; Therefore for this point only, it was adjudged for the Defendant: and it was agreed, That this is out of the Statute of 18 Eliz. Hill. 1 Car. in C. B. *Groſt* and *Gayes* Caſe. *Cro.* 1. Part, 123. See *Cook* 1. Part, 42. *Cook* 3. Part, 10. and *Cook* 5. Part, 52. acc.

33. *Reges Sacro oleo uncti Spiritualis Juriſdictionis ſunt capaces.* And 10 H. 7. *Rex eſt perſona mixta cum ſacerdote*: And whereas by the Common Law, no perſon was capable of Tythes, nor could ſue for Tythes, but in the Spiritual Court. Yet the King by his Prerogative (and ſo may his Pattentees under him, and the King) might ſue for Tythes in other Courts. See 22. *Aſſ.* 75. The King having Tythes in the Forreſt of *Rockingham*, did by his Letters Pattents, Grant the ſame to the Provoſt of C. who thereupon brought a *Scire facias* againſt the Occupiers of the Lands within the Forreſt, to have Execution of thoſe Tythes, and the Writ was allowed.

34. In 16 E. 3. *Quare Imp.* 147. The King brought a *Precipe quod reddat* of the fourth part of the Tythes and Offerings of the Church of Sr. *Dunſtans* in the *Weſt*; and it was adjudged, That the Action brought by the King, did lye.

35. If Tythes do lye in any Forreſt, as in the Forreſt of *Sherwood*, *Windſor*, *&c.* which is out of any Pariſh, the King ſhall have them by his Prerogative, and not the Biſhop of the Dioceſs, or the Metropolitan of the Province, as ſome have thought. 14 H. 4. 17.

36. A Prior Allien, Farmer of the King, was endebted to the King for his Farm, and being ſued for the ſame in the Exchequer, he ſhewed unto the Court,

Court, That there was a Parſon who held a portion of Tythes which was parcel of his poſſeſſions belonging to his Farm, and that the Parſon withheld the Tythes from him, ſo as he could not pay the King his Farm without having thoſe Tythes which were in the Parſons hands; whereupon a *Quo minus* iſſued forth out of the Exchequer at the ſuit of the King. In that Caſe, it was ſaid by *Skipwith*, That by Prerogative of the King, That for whatſoever concerneth the King, and may turn to his advantage, and may haſten his buſineſs, be the thing Spiritual or Temporal, that the Juriſdiction thereof did belong to the Exchequer; but it was there agreed, That ſuch ſuit was by Prerogative only. For it was there agreed, That ſuch ſuit for Tythes did not fall into the Juriſdiction of the Kings Bench or Common Pleas. 38 E. 3. 20. See 44 E. 3. 43, 44. acc.

37. It is taken for a ground in Law, *Cook* 11. Part, in *Pridle* and *Nappers* Caſe, That no man can make any Appropriation of any Church, having Cure of Souls, the ſame being a thing meer Eccleſiaſtical, and to be made to ſome Eccleſiaſtical perſon, but he only that hath Eccleſiaſtical Juriſdiction: And therefore in all Appropriations, the Inſtrument of Appropriation is by the Biſhop or Ordinary, and runs in this form, *viz. Authoritate noſtra Ordinaria Eccleſiam Parochialem de B. &c. Priori et Conventui, &c. annectimus appropriamus, et unimus.* But yet it is Reſolved, That the King is ſuch a Spiritual perſon, that he of himſelf may appropriate any Church or Advowſon, becauſe he hath the Eccleſiaſtical Juriſdiction in him. And no perſon within the Realm or without, but the King, or the Ordinary, by Authority derived from the King, can make any Appropriation. *Cook* 5. Part, 10. in *Cawdries* Caſe. *Cook* 11. Part, *Pridle* and *Nappers* Caſe. Trin. 16 Jac. in B. R. *Wards* Caſe. *Popham* 144, 145. acc.

38. If an Allien purchaſeth Lands; upon Office found, the King ſhall have it: and ſo it is if he purchaſeth a Leaſe for years. But if an Allien Merchant purchaſeth a houſe for habitation, becauſe of Commerce and Traffique, the King ſhall not have it: but if afterwards he relinquiſheth the Realm, or dyeth during the Term, the King ſhall have the Leaſe, and not his Executors. Mich. 29 Eliz. Sir *John Croſts* Caſe. *Cook* 1. Part, *Inſtitutes*, 2. acc.

39. The King by his Letters Patents Granted, That the Town of *Dungannon* in *Ireland*, ſhould for ever be a Free Borough, and be a Body Corporate, conſiſting of one Provoſt, and twelve Free Burgeſſes, and Commonalty: And in the Patent, was this clauſe, *Quod ipſi prefati Propoſiti et Burgenſes et Succ. ſui in perpetuum habeant poteſtatem et Authoritatem*, of chuſing of Burgeſſes for the Parliament of *Ireland*: And whether this Letters Patent had ſufficiently enabled them to ſend Burgeſſes to Parliament, was a doubt, becauſe the Corporation being Proveſt, Free Burgeſſes, and Commonalty, this Priviledg was neither Granted to them, nor paſſed by the word Grant. And in this Caſe, it was Reſolved. 1. That the King by his Letters Patents might ordain, That from a Town not Corporate, ſhould come Burgeſſes to be choſen by the Inhabitants, and that this Liberty could not commence by Grant, but by Ordinance; As the King may erect a Fair, or a Market, Park, Forreſt, Chaſe, Warren, by Ordinance, without Granting it to any. 2. Reſolved, That when there was a Corporation made by Charter, and by the ſame an Ordinance, That the Provoſt and Burgeſſes only ſhould chuſe, &c. the Law veſts this Priviledg in the whole Corporation in point of Intereſt, though the Execution of it be committed to ſome perſons, members of the ſame Corporation. Paſc. 11 Jac. The Caſe of Burgeſſes of Parliament. *Hob.* 14, 15.

40. Note, That in a Caſe in Chancery, concerning a promiſe ſuppoſed by the Plaintiff to be made to him of aſſurance of Lands upon the Marriage of his Lady, being the Daughter and Heir of the Lord *Cliſton*, and his Lady; The King by his Letters under his Signet Manuel, certified to the Lord Chancellor, the ſubſtance of the promiſe, as it was made to his Majeſty; and in that caſe, the Certificate of the King upon the hearing of the Cauſe, was admitted as good proof of the ſaid promiſe. Mich. 9 Car. in Cancell. The Lord *Abiguy* and *Cliſtons* Caſe. *Hob.* 213.

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3. *Where the King ſhall have a* Scire facias; *Where he may enter and ſeize, without a* Scire facias; *and where, and in what Caſe not: And what other Acts or things done by the King, ſhall be good; Where not.*

1. MAtthew Herbert acknowledged a Recognizance of 3000 l. to the King, and dyed: And after his death, a *Scire facias* Iſſued againſt the Executors *Teſtamenti et ultimæ voluntatis prædict. Matthei, et hæred. terrarum quæ ſua fuerint*: and at the day, the Sheriff returned, That he had not Executors, but *Scire feci* Willelmo Herbert *militi filio et hæredi*

hæredi diff. Matthei quod ſit, &c. William made default, and Judgment upon that default was given for the King. It was Reſolved in this Caſe, amongſt other points, That at the Common Law, the Body, Lands, and goods of the Accomptant, or Debtor of the King was not lyable to Execution; for *Theſaurus Regis, eſt vinculum pacis, et bellorum Nervi.* There were three Errors aſſigned in the *Scire facias*: Firſt, that the *Scire facias* was *hæred. terrarum et tenementorum*, which was improper for one who is Heir to the Auncеſtor, & not to the Land. 2. That the Retorn did not anſwer the Writ, for he doth not retorn him Heir of the Lands, as the Writ requireth, and every Retorn ought to anſwer the point of the Writ. 3. Becauſe the Judgment is general where it ought to have bin ſpecial; for by this Judgment his own Lands ſhould be charged, which in Law ought not to be. Theſe points were not Reſolved. But afterwards upon a Petition, Sir *William Herbert* compounded with the King. *Cook* 3. Part, 12, 18, 19. Sir *William Herlons* Caſe.

2. In the Caſe of the Warden and Commonalty of *Sadlers*; theſe points amongſt others, were Reſolved, That at the Common Law, If the King was by a Falſe Office poſſeſſed of the Cuſtody or Intereſt of Land, by reaſon of Ward, Idiocy, or the like, although the Office was Falſe; yet the party could not have traverſed it, but was put to his Petition. But where the King by Office was only entituled, and could not make a ſeizure without ſuit; there in a *Scire facias* brought by the King, the party might traverſe the Office, becauſe that nothing was in the King by the Office. 2. That when the Kings Tenant ſeiſed in Fee, dyed without Heir, the Fee and Freehold was preſently in the King without Office, if the Tenant was in poſſeſſion at the time of his death; but when a ſtranger was in poſſeſſion at the time of the Eſcheat, there the King ſhould not be in poſſeſſion untill that ſeiſin and poſſeſſion were removed; and when no man is in poſſeſſion, the Law ſhall adjudg the King in poſſeſſion. 3. Reſolved, That when a common perſon againſt another common perſon is put to his real Action; in ſuch Caſe, he ſhall be put to Petition, which is his real Action againſt the King: And the difference was taken, where the Auncеſtor of the King diſſeiſeth another perſon, and dyeth, and the Lands diſcends to the King; there, becauſe by the Diſcent, the entry of the Diſſeiſee is taken away, the party ſhall be put to Petition; but in Caſe of Eſcheat, when the Diſſeiſor dyeth without Heir, if it were in Caſe of a common perſon, the entry of the Diſſeiſee was not taken away, and therefore there in that Caſe, in caſe of the King, the party ſhall not be put to Petition. 4. Reſolved, That in all Caſes at the Common Law, when the Title of the King accrued to him by Judicial Record, or by Judgment of Record, there although the King granteth his eſtate over, the party grieved was put to his Petition; and to have a *Scire facias* againſt the Pattentee; but when the King was entituled by Conveyance of Record, there although the party was put to Petition as againſt the King, yet if he Granted the Land over, the Diſſeiſee might enter, or have an Action againſt the Pattentee, becauſe a Judicial Record ſhall be preferred, before a Conveyance by Record by Aſſent. *Cook* 4. Part, 57, to 60. The Warden and Commonalty of *Sadlers* Caſe.

3. An Idiot above the age of 21 years, makes a Feoffment in Fee of his Lands: If it be demanded how, and in what manner it may be avoided during his life. The anſwer is, That if it be found by Office at the Kings ſuit (who hath the Cuſtody and Government of Lands of Idiots) that he was Idiot *à Nativitate*, and that he hath alliened his Lands, then upon a *Scire facias* againſt the Alliance, the Lands ſhall be ſeiſed into the Kings hands, and thereby the Inheritance ſhall be reveſted in the Idiot. For the Statute ſaith *Quod poſt mortem eorum reddat eam rectis hæredibus*; which the King cannot do, nor can the King have the poſſeſſion of the Land to his own uſe, if not, that by Office, and ſeizure, ſuch conveyance made by the Ideot be deſtroyed; and ſuch Office when it is found, ſhall have relation *à tempore Nativitatis* of the Idiot to avoid all mean Acts made by the Ideot, as Feoffments, Releaſes, &c. *Cook* 4. Part, 127, 128. in *Beverleyes* Caſe.

4. The King granted the Office of Marſhalſey for life; and afterwards Granted the ſame in Reverſion for 21 years; the Grantee of the Reverſion aſſigned his Intereſt to A. Tenant for life deputed J. S. at Will, and dyed. A. by Deed aſſigned the ſaid Office to J. S. Office found, That J. S. committed divers forfeitures of the ſaid Office by ſuffering voluntary eſcapes. In this Caſe, it was Reſolved (amongſt other points), That the King might ſeize the Office without ſuing of a *Scire facias*: And in that Caſe, theſe differences were taken by the Court. 1. That in ſome Caſes, the King ſhall be in poſſeſſion by ſeizure without Office, as in the Caſe of the Temporalties of the Biſhop, or Prior Alliens, becauſe the certainty thereof appeareth in the Exchequer. 2. In ſome Caſes the King ſhall be in poſſeſſion by the Office without ſeizure; as of Lands, Offices, Ward of Lands, whereof continual profits may be taken; as where it is found by Office, That a Condition is broken, or that a perſon Attainted is ſeiſed of Lands. 3. In ſome Caſes, The King ſhall be in Poſſeſſion by ſeizure and Office: As in Caſe of an Advowſon, the rightfull Patron ſhall not be cuſted

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poſſeſſion of it, by falſe Office found of it untill the King hath Preſented, and his Clark be admitted and Inſtituted. For if the King brings a *Quare Impedit*, in that Action he may traverſe the Office. 4. In ſome Caſes, the King ſhall be in poſſeſſion without Office, or ſeizure, as where the Kings Tenant dyeth without Heir. 5. In all Caſes, when a common perſon is put to his Action: There upon Office found, the King is put to his *Scire facias*; but when a common perſon may enter or ſeize, there Office found without a *Scire facias*, is ſufficient for the King. *Cook* 9. Part, 97, 98, 99. Sir *George Reynells* Caſe.

5. If Office be found againſt the King: and a *Melius inquirendum* awarded: and in that it is found for the King, but the *Melius* is void for incertainty in the Writ, a new Writ of *Melius inquirendum* ſhall be awarded; but if upon the Writ of *Melius* it be found againſt the King, there the King ſhalll not have a new Writ of *Melius inquirendum*, for then there ſhould be no end; but Writs infinite ſhould iſſue. And if an Office be found for the King, the party grieved may traverſe it, and if the Traverſe be found againſt him, it makes an end of the buſineſs: So if it be found for him that traverſeth, the King is bound thereby. See *Cook* 8. Part, 169. *Paris Stoughters* Caſe. And in that Caſe, it was further Reſolved, That the Eſcheator before Office found at this day, cannot ſeize any Lands into the Kings hands; but the ſeizure ought to be after the Office found.

6. A. brought a *Quare Impedit* againſt B. the Preſentee of the Queen, and the Plaintiff had Judgment to recover: Whereupon the Queen brought a *Scire facias*, and ſhewed, That after the ſaid Judgment, A. was Outlawed in an Action of Treſpaſs at the ſuit of J. S. and prayed, That the Writ to the Biſhop might be ſtayed: and a *Scire facias* iſſued *ad reſpondendum Quare dicta Domina Regina* ſhould not have Execution of the ſaid Judgment by reaſon of the Outlawry aforeſaid. It was objected, That the *Scire facias* did not lye for the Queen, for that Writ alwayes runs in privity of the Record upon which it is grounded, to which Record the Queen is a ſtranger; and by Outlawry in an Action perſonal, no Action real ſhall Eſcheat: And therefore this *Scire facias* which is a real Action, or at the leaſt, a mixt Action, ſhall not be forfeited: And it were abſurd now to Grant a Writ to the Biſhop for the Queen, whereas Judgment was given againſt the Queen. But it was the Opinion of all the Judges, That upon this matter, the *Scire facias* lay well enough: And it was good diſcretion in the Court, to award ſuch a Writ. And it was ſaid by *Rhodes* Juſtice, That if two Coparceners of an Advowſon, make compoſition to preſent by Turns; and afterwards one of them dyeth, her Heir within age, and in Ward to the King, the Church voideth, and the King is diſturbed in his Preſentment, he ſhall have a *Scire facias* upon ſuch compoſition, notwithſtanding that he be a ſtranger to it. Afterwards the *Scire facias* was awarded to be good. Mich. 29 Eliz. in C. B. *Beverly* and *Cornwalls* Caſe. *Leon.* 63. See *Goldesbr.* 44. the ſame Caſe.

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4. *Where the Reverſion or the Remainder of the King ſhall be Diſcontinued by the Act of a ſtranger, where not: and of other things by the King, and to the King.*

1. SEE, It is Reſolved in *Cook* 1. Part, 16. in Sir *William Pelhams* Caſe, That a common Recovery by aſſent without Title, ſhall not deveſt a Reverſion or Remainder out of the King, becauſe the ſame being ſuffered by aſſent of the parties, without Title, is but a Conveyance. See 25 E. 3. 48. acc.

2. Tenant in tail, the Remainder in Fee, he in the Remainder, by Deed Indented, and Enrolled, Covenanted in Conſideration of Bloud, and other good conſiderations, to ſtand ſeiſed to the uſe of himſelf in tail, the Remainder to the Queen and her Heirs and Succeſſors, Kings and Queens of *England*. Tenant in tail ſuffered a common Recovery. It was adjudged, That the Iſſue in tail was barred by this Recovery. And in this Caſe, it was Reſolved amongſt other points. 1. That no Eſtate tail is preſerved by the Statute of 34 H. 8. but that which is created by Letters Patents of the King, or that which is of the Proviſion of the King; and an Eſtate tail created by a common perſon is not preſerved by that Statute. And therefore it was Reſolved, That if a gift be made by a common perſon, and afterwards the Crown diſcendeth unto him, the ſame is out of the Statute of 34 H. 8. But when the King in conſideration of money, or for other conſideration, procures a Subject to make a gift in tail to one of his Servants; the Remainder to the King, the ſame is ſaved by the Statute. 2. It was Reſolved, That by the Statute of 34 H. 8. A common Recovery did bar an Eſtate in tail which was created by the Kings Letters Patents, although that the Reverſion was in the King. *Cook* 2. Part, 16. *Wiſemans* Caſe. See *Cook* 1. Part, *Capells* Caſe, acc.

3. Tenant in tail, the Remainder in tail; he in the Remainder bargained and ſold his Remainder

to

to A. for the life of Tenant in tail, and after his death, the Remainder to the King in Fee, upon Condition; Tenant in tail ſuffered a Recovery. The King Granted his Remainder to Tenant in tail and his Heirs: Afterwards he in the Remainder Bargained and ſold to B. the Remainder to the King upon Condition: Another common Recovery was had; Tenant in tail dyeth without iſſue. It was adjudged in this Caſe, That he in the Remainder, and all claiming by him, were barred by the Recovery. And in this Caſe, divers other points were Reſolved. 1. That the Grant to A. was not good, becauſe he took no particular Eſtate, and then the Remainder to the Queen upon it was void by way of Remainder, becauſe the ſame could never come in poſſeſſion, and the Grantee ſhall never have any benefit of it; but a Grant of the Reverſion during the life of Tenant in tail, is good, becauſe he ſhall have the Services which Tenant in tail ought to do. 2. Reſolved, That the common Recovery did bar the Eſtate tail, and the Eſtate tail of A. in Remainder, although the Remainder was in the King, becauſe the eſtate tail was not within the Statute of 34 H. 8. of the gift of the King, or of any of his Auncеſtors, or Progenitors. *Cook* 2. Part, 53. Sir *Hugh Cholmleyes* Caſe.

4. King *Hen.* the 7th, *Anno* 19. of his Reign, Granted by his Letters Patents the Mannor of D. to A. and B. in tail; and afterwards reciting the Letters Patents, and that they were ſurrendred and delivered to be cancelled; the King by other Letters Patents, *ex certa ſcientia, &c.* Granted to the ſaid B. and E. his Wife *manerium prædict.* and to their Heirs. In this Caſe, it was Reſolved, That the Grant was good, and that the Reverſion of the Mannor which the King had paſſed by the Grant. For inaſmuch as the party had truly enformed the King of the Eſtate tail, and the delivery of the Letters Patents to be cancelled, although that the King had miſtaken the Law in matter in fact; yet the ſame ſhall not avoid his Grant, eſpecially the ſame being *ex certa ſcientia, &c.* which ſhall be taken in the moſt favourable and liberal ſenſe, according to the intent of the King, expreſſed in his Grant. 2. Reſolved, That by the Grant of the Mannor, without the word Reverſion, the Reverſion did paſs: For this word, Mannor, doth include all Eſtates and Degrees of Eſtates, of or in the Mannor. As if A. give the Mannor of D. to B. in tail; and afterwards the Donor is attainted, and the King ſeiſed of the Reverſion by his Letters Patents, Grants *Manerium de D.* to another and his Heirs, although that the King Grants the Mannor of D. in poſſeſſion; yet the Reverſion ſhall paſs, becauſe the King hath an Eſtate, *viz.* the Reverſion in Fee Grantable in him; and the Eſtate tail Granted by a common perſon, needs not to be recited. *Cook* 6. Part, 55. The Lord *Chandois* Caſe.

5. Grandfather, Father, and Son; the Grandfather ſeiſed of Lands in *Capite*, by act executed, conveyes part of his Lands to the uſe of the Father, and his Wife for their lives, the Remainder to the Son in tail, the Remainder to another in tail, the Remainder to the Grandfather for life, the Remainder to the right Heirs of the Grandfather: and conveyes other Lands holden in *Capite*, to the uſe of himſelf for life, the Remainder to other of his ſons for their lives ſeverally, the Remainder to the Father for life, the Remainder to the Son in tail, with divers Remainders over, the Reverſion to the right Heirs of the Grandfather, the Grandfather dyeth, the Father of full age, who tenders his Livery, and dyeth before Livery ſued, or Office found; the ſon of full age, and the Wife, and other Sons living. It was Reſolved in this Caſe. 1. That by the death of the Grandfather, before Livery ſued, the King had loſt his Primer ſeiſin after the death of the Grandfather, but the King ſhall not loſe the mean Rates, if any be, becauſe they are abſolutely veſted in the King. 2. That the ſon ſhall not ſue Livery, nor pay Primer Seiſin, becauſe he is out of the Statute of 32 and 35 H. 8. and the Primer Seiſin was due by the Father, and the King ſhall have but one Seiſin by the Statute. 3. That the King ſhould have Primer Seiſin of all the Lands conveyed to the younger Sons, becauſe they are within the Statute. 4. Reſolved, That the King ſhould not have Primer Seiſin of this dry Reverſion, and that by the Statute of *Prerogativâ Regis*, for when no Rent is reſerved, the King cannot take *exitus*; but yet it was agreed, That for ſuch a Reverſion, a man ſhould be in Ward. *Cook* 9. Part, 132. *Holts* Caſe.

6. Upon a ſpecial Verdict: the Queſtion was, Whether a Leaſe by the King under the Exchequer Seal of Lands uſually demiſed to one for life, the Remainder for life, the Remainder to a third for life, reſerving the uſual Rent, ſhould be good or not. It was the Opinion of all the Juſtices, That Leaſes for life under the Exchequer Seal, being of Lands uſually Leaſed, and reſerving the Auncient Rent, are allowable and good for the benefit of the King, that his Land ſhall not lye unletten. Hill. 13 Car. in B. R. *Kemp* and *Barnards* Caſe. *Cro.* 1. Part, 369.

7. In Treſpaſs, the Caſe was, *Henry* the 8th, ſeiſed of the Mannor of B. and of divers Lands in B. parcel of the Priory of S. by Indenture under the Great Seal, Bargained and ſold to J. S. the Mannor of B. and all his Lands in B. rendring 50 s. rent *Tenendum*, by the 10th part of a Knights Fee. Afterwards *Henry* the 8th, under the Great Seal, Grants to J. S. the Mannor of B. and all his Land

n B. *aut alibi in dict. Com. dict. Manerio ſpectant.* Queen *Eliz.* ſuppoſing that the Lands in B. which were not part of the Mannor, had not paſſed, Granted them to Dr. *Atkins.* It was Reſolved in this Caſe, That the Lands paſſed by the firſt Indenture. For although it was held, That neither by the Common Law, nor by the Statute of 27 H. 8. Lands cannot paſs by Indenture of Bargain and Sale enrolled in the Caſe of the King, becauſe there cannot paſs an uſe: For the King cannot be ſeiſed to an uſe: Yet it appears, That the intent of the King was to paſs it. And the Statute of 34 H. 8. makes all the Kings Grants by Letters Pattents to be good, or by Indenture to be good, which otherwiſe were not good. Some held, That they paſſed by the Letters Pattents. For when he Granted the Mannor, and all the Lands in B. *et alibi dict. Manerio ſpectant.* Thoſe words do not extend, but to Lands *alibi in dict. Com.* Trin. 44 Eliz. in C. B. Dr. *Atkins* and *Longvilles* Caſe. *Cro.* 2. Part, 50, 51.

8. Note, It was ſaid by *Cook* Chief Juſtice, That it was adjudged, 30 Eliz. in *Bawdes* Caſe, That where an Enfant, or Husband and Wife make a conveyance to the Queen by Bargain and Sale, That it was not aided by the Statute of 18 Eliz. For that helps only in Caſes when there is an imperfection in the conveyance; and not where there is a diſſability in the perſon who makes the Conveyance. But when Tenant in tail makes a Conveyance by Deed, that is helped by the Statute, for he may make a Conveyance by Fine. Hill. 12 Jac. in B. R. *Cro.* 2. Part, 364.

9. The Caſe upon an Appeal concerning the Juriſdiction of the Kings Court of Delegates in Chancery, was this; One dyed Inteſtate in the County of *York*, and a ſtranger prayed Letters of Adminiſtration to be granted unto him, which was repealed by the Delegates at *York*. There was an Appeal to the Delegates in Chancery, who did repeal the former ſentence at *York*, and adjudged, that the party made no Will, and Granted Letters of Adminiſtration to him who appealed to them. The Arch-Biſhop of *Canterbury* Granted Letters of Adminiſtration of a ſecond perſon, and the Arch-Biſhop of *York* to a third perſon, who made a Releaſe unto the Debtor of the Inteſtate; upon which Releaſe, Debt was brought by the firſt Adminiſtrator againſt the Defendant, who pleaded the Releaſe made unto him. And whether this Grant of Letters of Adminiſtration by the Kings Judges Delegates, were good or not, was the Queſtion. It was very much inſiſted upon, That this ſentence given by the Kings Court of Delegates, was not to be remaunded to the Court at *York*, for if there were any nullity or iniquity in the ſentence at *York*; by this they have loſt their Juriſdiction; and the Biſhop hath in this offended his Superiour, who is repreſented as Supream Ordinary in the perſon of the Delegates; and the Letters of Adminiſtration Granted by the King by his Judges Delegates, are well Granted, and ſo the ſubſequent Grant by the Ordinary, is not good, and many Preſidents were ſhewed to that purpoſe. But the better Opinion of the Court was; That the Letters of Adminiſtration which were Granted by the Kings Judges Delegates, were not good; but there being *bona Notabilia*, the Adminiſtration was to be Granted by the Arch-Biſhop; and it was ſaid, That although the King be Supream Ordinary, and may do many Acts by his Delegates: Yet the Court of Delegates cannot do this, nor have any power to prove a Will: For the power of the Judges Delegates, *ſis poteſtas delegata corrigere, non exequi*, to examine, and not to correct. And it was ſaid, That the ſame had bin adjudged in one *Brackenburies* Caſe. That Judges Delegates had not power to Grant Letters of Adminiſtration. Mich. 10 Jac. in B. R. *Stevenſon* and *Wood's* Caſe. *Bolſtr.* 2. Part, 3, and 4.

10. A. had a Statute made unto him of 1000 l. by J. S. Afterwards A. was a Fugitive beyond the Seas, and after, and before Office found, he returned, and releaſed this Statute. It was adjudged in this Caſe, That this Releaſe ſhould not bar the King; for the King was entituled to the Statute by the Flight; and it was in him before Office found. 2. Reſolved, That whereas the King had Granted this Statute to J. D. and Liberty for him to ſue it in the Name of the King, and his Succeſſors, ſuch a Warrant was good, and all proceſs ſhall be made in the Kings Name, as if there had not bin any Grant thereof. Mich. 3 Jac. in the Exchequer. The King and Sir *Rich. Wedmans* Caſe. *Cro.* 2. Part, 82, 83.

11. In Debt the Defendant pleaded the Letters Pattents of the King, of Protection, reciting, That whereas he was endebted to the King in 200 l. the King for the more ſpeedy payment of his Debt, received *Garret Malins* into his Protection, and that none ſhould meddle with him, or with his goods, or implead him in any Court for any Debt or Treſpaſs, untill the King was ſatisfied, and ſo demand Judgment if he ſhould anſwer. But becauſe *Gerrard Malins* is impleaded, and this Protection is of *Garret Malins*, the Protection was diſallowed: And whereas it was alledged, That by the Statute of 25 E. 3. cap. 19. that none ſhould be delayed upon them; but the parties ſhould anſwer, and go to Judgment, but Execution ſhould ſtay: the Court for that cauſe alſo held, That this Protection was not allowable; but when it came to Execution, they would adviſe upon it. Paſc. 16 Jac. in B. R. *Travers* and *Malins* Caſe. *Cro.* 2. Part, 477.

12. The

12. The Queen made a Leaſe for years to J. S. who was Outlawed, rendring Rent: afterwards he was Outlawed again, and before ſeizure, there is a general Pardon of all goods and Chattells forfeited. In this Caſe, It was Reſolved, 1. That a man Outlawed, may be capable of a Leaſe, and to be Farmer to the King. 2. That by the Pardon with reſtitution, it was ſufficient to revive the Term which was forfeited by the ſecond Outlawry. Mich. 30 Eliz. in the Exchequer. *Knowls* and *Powells* Caſe. *Owen* 116.

13. The King Granted the Rape of H. *et bona et catalla fugitivorum* of all Reſients, and non-Reſients, to J. S. A man ſeiſed of a Manor unto which an Advowſon was appendant, holden of J. S. as of his Rape of H. was Outlawed, and then the Church became void. J. S. Preſented; It is a Quære, and not Reſolved, If the Advowſon did paſs by the Grant of *omnia bona et catalla*. 31 Eliz. in C. B. The King and the Biſhop of *Canterburies* Caſe. *Owen* 155.

14. Note, It was Reſolved by the Court, That the Grant of a new Office made by the King for the Regiſtring of all ſtrangers within the Realm: Except Merchant ſtrangers to be at *London*, with a Fee, or without a Fee, was utterly void in Law. And ſee there, where new Offices may be Granted by the King, and where not. Paſc. 12 Jac. Sir *Walter Chutes* Caſe. *Cro.* 12. Part, 117.

15. The King Grants, That the Inhabitants *villæ de D. ſint unum corpus corporat. per nomen Prepoſiti et 12 Burgenſium et Communitatis D. Et quod ipſi prædict. Præpoſiti et Burgenſes et Succeſſores ſui habeant poteſtatem Eligendi duos Burgenſes ad Parliamentum, &c.* It was Reſolved in that Caſe, That this Grant of the King was void: For this power to Elect Burgeſſes, is an Inheritance, and ought to be veſted in the Provoſt, Burgeſſes, and Commonalty, and not in the Provoſt and Burgeſſes only. 2. Reſolved, That in the Kings Caſe, the word *volumus* was a good word of Grant, and that the word *Conceſſimus* ſhould extend in the Grant, to the whole body of the Commonalty. Paſc. 12 Jac. *Cook* 12. Part, 120.

16. Note, it was Reſolved by the Juſtices, That the King may create a name of Dignity which was not before, as a Dignity by the name of a Barronet. 2. That if he do not create him of ſome place, he ſhall not have an Eſtate in tail, but a Fee Conditional, which ſhall be forfeited for Felony. If he Create him of a place, the King may Grant him and his Heirs Males precedency before Knights Barronets, and other Knights. 3. Reſolved, That this Creation of this Dignity of a Barronet, ſhall not diſcharge the Heir to be in Ward, as if the Heir be made a Knight, for that the Dignity of a Knight is not Diſcendable. Paſc. 9 Jac. *Cook* 12. Part, 84, 85.

17. Note, It was Reſolved, That if the King hath Title to Preſent for Lapps, by reaſon of Plurality; and before he Preſents, the Patron Preſents J. S. who is Admitted, Inſtituted, and Inducted, and refuſeth to pay his Firſt Fruits, by which the Church *ipſo facto*, is void: If the Patron Preſent, his Preſentment ſhall not take away the Title of the King, becauſe the Church became void by the Act of the Incumbent himſelf, which may be done by Colluſion to deprive the King of his Title to Preſent by Laps. But in ſuch Caſe, if the Church become void by the death of the Incumbent, the King in that Caſe cannot Preſent. Mich. 30 Eliz. in C. B. The Biſhop of *Lincolns* Caſe. *Owen* 5.

18. The King Granted the Cuſtody of *Putney* Park: with an annual Fee of 3 l. with the Windfalls, &c. to J. S. The King diſpoſed of the Park, and afterwards Granted all the Deer to J. D. It was Reſolved in this Caſe, That by the diſ-parking of the Park, the Office of Keeper was determined, for *ſublata cauſa tollitur effectus*. 2. Reſolved, That the King might diſcharge the Patentee of his Office, though the Park continued. 3. Reſolved, That the annual Fee did remain, although the Patentee was diſcharged of the Office, or the Park diſ-parked. Hill. 2 Car. Sir *Charls Howards* Caſe. *Hutton* 86.

19. It was found by Office, 17 Eliz. That A. ſeiſed in Fee of Lands holden in *Capite* in 35 H. 8. deviſed all his Lands from his right Heir to ſtrangers; and afterwards in 2 E. 6. dyed ſeiſed of the Premiſes, C. his Couſin and next Heir being of the age of 35 years; and that J. S. received the profits of the Lands during the minority of C. the general Pardon of 5 Eliz. is Granted. It was Reſolved in this Caſe, That the taking of the profits during the minority of C. was no Intruſion, becauſe there was no Office then found for the King; and the Lands could not be the Wards Lands at the time of the Pardon, becauſe there was no ſeizure of them, nor Office found to entitle the King, and the profits during the minority of C. are diſcharged by the Pardon. Mich. 12 Jac. *in Curia Wardor.* Sir *Warham St. Leigers* Caſe. *Lea* 48.

20. The Debtor of the King ſeiſed in Fee of divers Mannors, conveyed the ſame to A. and his Heirs, who by Deed Indented, did Grant the premiſes to the King in Fee. Afterwards the King did re-grant the ſaid Mannors and Lands to A. and his Heirs, rendring Rent, *pro omnibus Serviciis et demandis*: And afterwards the ſaid Debtor became further endebted to the King. It was Reſolved in this Caſe, That the ſaid Mannors were not

extendable, or lyable to any Debt of the Kings, but were diſcharged in Law by the poſſeſſion of the King. Paſc. 13 Jac. Sir *John Molins* Caſe. *Lea* 50.

21. A man claimed to have the hedging, ditching, and fencing of 300 Acres of Lands within the Kings Forreſt, and to keep Deer there, and to have and kill all Deer that ſhall come within the ſaid Land. In a *Quo Warranto* for the King brought againſt him. It was alledged, That he kept the Fencing and Hedges ſo low, that the Kings Deer entred the ſaid Lands. In this Caſe, It was Reſolved, That ſuch claim to have the Fencing, Incloſing of Land, and to uſe the ſame as a Park, and to kill all the Deer that come there, is not good, but they ought to make Title to a Park by Preſcription. 2. Reſolved, That none can pretend to have profit or pleaſure in a Forreſt which tends to the deſtruction of the Forreſt; and one cannot preſcribe to have Common in a Forreſt for Sheep, &c. 3. That a man may have a Park in a Forreſt by Preſcription, or Grant, but then he ought to keep it ſo incloſed, that the Beaſts of the Forreſt cannot enter it, which if he do not, it is a forfeiture of the Liberty of a Park. The King and Sir *John Byrons* Caſe, *Bridgman* 23, 24.

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5. *Where, and what Statutes ſhall bind the King; What not: And of what Statutes he ſhall take benefit, although he be not named in them; And of what not.*

1. KIng *Henry* 7th ſeiſed of the Mannor of W. to him and the Heirs Males of his body, Granted the ſame to Queen *Katherine* for life, and having Iſſue King *Ed.* 6. dyed. And King E. 6. Granted the ſame to the Earl of *Pembroke* in Fee, and dyed without Iſſue Male. It was adjudged in that Caſe, That the King was bound by the Statute *de Donis Conditionalibus*; and there Grants, both of *Hen.* the 8th, and E. 6. are none of them good, but were determinable by the death of the King that Granted them. See *Plow. Com.* 233. in the Lord *Berkleyes* Caſe. See *Cook* 1. Part, 48. in the Caſe of *Alton Woods* acc.

2. In a *Quare Impedit*, the Caſe was; A Counteſs being a Widdow, did retain two Chaplins, and afterwards retained a third Chaplin, which third Chaplin purchaſed a Diſpenſation to have two Benefices, with Cure, and was advanced accordingly, whereof the firſt was above the value of 8 l. *per annum*. It was adjudged, That he was not lawfully qualified within the Statute of 27 H. 8. of Pluralities, by which the firſt Benefice is void by taking of the ſecond Benefice; and the Title accrued to the Queen by the Statute to Preſent. *Cook* 10. Part, 89. *Druries* Caſe.

3. The Maſter and Fellows of *Magdalen* Colledg in *Cambridg*, after the Statute of 13 Eliz. by Indenture enrolled, conveyed a houſe parcel of their poſſeſſions of the Colledg, to the Queen in Fee, rendring rent at *Mich.* with clauſe of diſtreſs. Proviſo, That the Queen ſhould convey the ſame to J. D. in Fee. The Queen by her Letters Patents conveyed the ſame to J. D. according to the Proviſo, who levyed a Fine with Proclamations: The Maſter dyed, the Succeſſor accepted of the Rent. In this Caſe, theſe points (amongſt others) were Reſolved, 1. That the Maſter and Fellows were reſtreyned by the Act of 13 Eliz. to convey any of their Poſſeſſions to the Queen, although the Queen was not a perſon expreſly named in the Act; but the King is in the general words of the Act. 2. Reſolved, That general Statutes which provide neceſſary and profitable remedy for the maintainance of Religion, advancement of Learning, and Relief of the Poor, ſhall be expounded generally according to the words, and the King ſhall not be exempted out of them by any conſtruction of Law, and the Act of 13 Eliz. is ſuch an Act. 3. Reſolved, That the King ſhall not be exempted out of general Acts of Parliament made to ſuppreſs wrongs. And the Statute of 13 Eliz. was made to ſuppreſſe wrongs, *ſcil.* Dilapidations, and Diminution of Spiritual Livings; and the King cannot do wrong, and therefore is within the Act. 4. Reſolved, That general words of a Statute which tend to perform the Will of the Founder, or Donor, ſhall bind the King, although he be not named. *Cook* 11. Part, 68, 70, 71. *Magdalen* Colledg's Caſe.

4. If one who intendeth to ſell his Land by fraud and Covin, conveyes the ſame to the King, and afterwards he ſells the Land to another for valuable conſideration, the Purchaſor ſhall hold the Land againſt the King by the Statute of 27 Eliz. So if there be Tenant in tail, the Remainder in tail, or Fee, and he in the Remainder knowing that Tenant in tail will allien the Land to the intent to bar the Tenant in tail from ſuffering of a Recovery, which he may do by Law; Grants his Remainder to the King by Deed Inrolled, and afterwards Tenant in tail ſuffers a Recovery, and dyeth without Iſſue, the Purchaſor ſhall enjoy the Land againſt the King by the Statute of 27 Eliz. *ibid.*

5. Sir

5. Sir *Tho. Cecil* entred into Communication with one *Foſter* to exchange parcel of the Lands of the Mannor of D. whereof he was ſeiſed in Fee, for certain Lands which the ſaid *Foſter* had within the ſame Town, and before the Exchange perfected, Sir *Tho. Cecil* by Deed Inrolled, conveyed the ſaid Mannor of D. and the ſaid Lands of F. to the King; and Covenanted with the King, That he was ſeiſed aſwell of the ſaid Mannor, as of the ſaid Lands, late *Foſters*, of a good eſtate in Fee, and bound himſelf in a Bond of 10000 l. to perform the ſaid Covenants. Sir *Tho* exhibited a Bill into the Exchequer Chamber, ſetting forth all this matter, and prayed to be releived againſt the ſaid Bond given to the King by force of the branch of the Statute of 37 H. 8. cap. 34. and made full proof of all the parts of his Bill: and in this Caſe, it was Reſolved by all the Juſtices, That the ſaid Sir *Tho.* ſhould be relieved upon all the ſaid matter within the equity of the ſaid Act: and that the Court of Exchequer might upon an Engliſh Bill, make a Decree in that Caſe. And 3. That although the Obligation was for performance of Covenants, yet after the ſame was broken, it was a Debt to the King by Obligation within the ſaid Act. *Cook* 7. Part, 19. Sir *Tho. Cecills* Caſe.

6. The King Granted a Licenſe to tranſport Bell metal, notwithſtanding any Statute made, or to be made. It was the Opinion of the Juſtices, That the Diſpenſation for Statutes made after, was void: But the King may diſpence in things to come wherein he hath an Inheritance, as Subſidies, or Taxes, Paſc. 34 *Hen.* 8. *Dyer*, 52.

See more of this Diviſion, in Title Statutes, after. And ſee more of Title King: In the Title Grants of the King.

Knights.

1. IT was Reſolved by the Juſtices, That when the Heir within age is made a Knight in the life of his Anceſtor; and afterwards his Anceſtor dyeth, the ſaid Heir within age, That he ſhall be out of Ward, and ſhall pay no value of Marriage, nor ſhall the Lord have the Cuſtody of his Land; for by the making of him Knight in the life of his Anceſtor, he is made as of full age; ſo as that when his Anceſtor dyeth, no Intereſt, either of the body, or of the Land, veſts in the Lord: And the Statute of *Magna Charta* for the Cuſtody of the Lands, doth not extend to it, for the perview of that Statute extends only, when the Heir is made Knight *infra ætatem*, which ſhall be intended after the death of his Anceſtor. *Plow. Com.* 268. *Ratcliffs* Caſe. And ſee *Cook* 6. Part, in Sir *Drue Druryes* Caſe, acc. and ſee there, That when the King makes the Heir in Knights Service, being in Ward a Knight, he is out of Ward for his body. But if the King creates ſuch an Heir within age, Duke, Marqueſs, or Baron; yet he ſhall be in Ward notwithſtanding that Dignity.

2. It was Reſolved, That when the Heir within age is made Knight, after tender of Marriage made unto him, although he within age marry himſelf elſwhere, yet he ſhall not pay forfeiture of Marriage. For none ſhall pay forfeiture of Marriage, but when after refuſal he marries himſelf elſwhere during the time that he is under the Cuſtody and Wardſhip of the Lord, which he cannot be when he is made a Knight. See Stat. *Magna Charta*, cap. 6. *Cook* 6. Part, in *Druryes* Caſe, acc.

3. Tenant in *Capite* dyed ſeiſed: His Son and Heir within age is made a Knight in the life of his Father, the Son tendered his Livery after the death of his Father, before his age of 21 years, and continued the ſame. Two Queſtions were in the Caſe. 1. Whether the profits of the Land are ſaved to the King by the ſaid tender. 2. Whether the King ſhould have the mean Rates within the age of 21 years. It was Reſolved in both againſt the King; and that the King ſhould have Primer ſeiſin, as if the Heir had bin of the age of 21 years at the time of the death of his Father, becauſe the King by making of him Knight, had adjudged him to be of age to do Knights Service. *Cook* 8. Part, 173. Sir *Henry Conſtables* Caſe.

4. Note, That the fourth part of the Revenue (which

(which Revenue is 20 l. *per annum* for a Knight) ſhall be paid to the King for a Relief; and for a Baron 100 Marks, which is the fourth part of the Revenue of a Baron; and for an Earl, 100 l. which is the fourth part of an Earls Revenue; and for a Duke 200 l. which as appears by the Records of the Exchequer, is the Revenue yearly of a Duke. *Cook* 9. Part, 34. in *Nevills* Caſe. See *Cook* 9. Part, 124. *Anthony Lowes* Caſe, acc.

5. If the Plaintiff be made a Knight pendant the Writ, the Writ ſhall abate. 36 H. 8. *Dyer*, 55. and ſee *Cook* 6. Part, 10. acc. and it ſeemeth by the Book, That he ſhall not have a new Writ by *Journeys Accompts*.

6. Error was brought of a Judgment given in *Aſſumpſit*. The Error aſſigned was, That he the now Plaintiff at the time of the Defendants bringing his Action againſt him, was, and yet is a Knight of the *Bath*, in which Caſe, the then Plaintiff ought to have brought his Bill againſt him by the name of F. *Forteſcue* Knight of the *Bath*, and not by the name of Knight and Barronet. But forasmuch as he had appeared to that Name, and pleaded thereto: the Court was of Opinion, That he had concluded himſelf, and ſo the Judgment was affirmed by ſeven Juſtices at Serjeants Inn in *Fleet-ſtreet*. Paſc. 16 Jac. in B. R. Sir *Francis Forteſcue* and *Markhams* Caſe. *Cro.* 2. Part, 482.

7. In an Action of Covenant, the Plaintiff declared, That Queen *Eliz.* was ſeiſed in Fee of a Capital Meſſuage, and of the Scite of the Manner of Y. and by her Letters Pattents, *Anno* 29. demiſed them to the Defendant for 21 years, who was tyed to repair them, and to leave them ſufficiently repaired; and that afterwards the Queen by her Letters Pattents, Granted the Reverſion to A. and B. and their Heirs, who by Indenture enrolled by them of the one part, and *Ralph* Lord *Ewre*, by the name of *Ralph Ewre* Knight, Bargained and ſold the Reverſion to the ſaid *Ralph* Lord *Ewre*; and for not repairing the ſaid houſes, the Action was brought. The Defendant pleaded, That at the time of the Bargain and Sale, the ſaid *Ralph* Lord *Ewre* was not Knight. Whereupon it was demurred. It was Reſolved in this Caſe, That a Bargain and Sale made to one by the name of a Knight, who is not Knight, is good enough; for a conveyance ſhall not be avoided for ſuch cauſes, eſpecially when he is before ſufficiently deſcribed by the name of *Ralph* Lord *Ewre*, which is a greater Dignity. 2. It was Reſolved in this Caſe, That the clauſe of not repairing, ſhould be taken as a Covenant on the Leſſees part, and ſhould bind him and his Aſſigns, and the words for the keeping and leaving of the houſes in reparations, are as ſpoken by him, and that it is a Covenant which runs with the Land. Paſc. 7 Jac. in B. R. *Ralph* Lord *Ewre* and *Strickland's* Caſe. *Cro.* 2. Part, 240, 241.

Lacheſſe.

1 *Where Lacheſſe of Entry, or making claime of a man to Lands or Tenements, ſhall be a barr to him, of the ſaid Lands; or of his right to them: And where not.*

1. AT the Common Law, in a Recovery by Writ of Right, where the Tryal was by Battail, or Grand Aſſiſe, it was peremptory to every ſtranger, if they made not their Claim within a year, if they were not within age, or had other defects: As, where the Diſſeiſor joyned the Miſe in a Writ of Right brought by a Stranger, the Diſſeiſee was barred after the year, *quia vigilantibus et non dormientibus ſubveniunt jura.* And Battaile and Grand Aſſiſe are famous and more notorious then Trials in other Actions: But it behoveth them, that there be an execution by Suit, or Entry; for tranſmutation of the poſſeſſion, is one part of the Notice by which thoſe who have right may make their Claim. And where Judgment final is in a Writ of Right by default, there Proclamation muſt be made before Judgment, that the people may thereby have the better Notice. And ſo it was of a Fine, If Claime were not within a year, if it were executed, by ſuch Fine levied betwixt Strangers, and ſuffered by Tenant for life, he in the Reverſion or Remainder was barred after the year, by the Non-claim of the Tenant for life: and that was one of the principal Cauſes wherefore the Statute of 34 E. 3. Cap. 4. of Non-claim was made: But as to a Reverſion upon an Eſtate taile, the Statute of *Weſt.* 2. provided well enough for him in the Reverſion; that he needed not make any claime. Hill. 11 Eliz. *Plo. Com.* 358, 359.

2. In a *Formedon*, The Tenant ſaid, That the Land in demand was holden of the Mannor of B; which Mannor is Auncient Demeſne, and pleadable by Writ of *Droit Cloſe*, and pleaded to the Juriſdiction. This Plea was pleaded after the View, and yet it was allowed to be good: for it ariſeth upon the View; and doth not affirm the Juriſdiction of the Court; for the nature of the Tenancy is perceived upon the View: But of a Franchiſe, it is otherwiſe; for the Lord of the Franchiſe is to claim it: ſo as if he do not claim it before the Iſſue the firſt day, he ſhall loſe his Franchiſe, becauſe it is no miſchief to the Tenant where he is impleaded; for he ſhall be in the ſame plight here, as in the Franchiſe. See 50 Ed. 3. 10. acc.

3 The Caſe was; Grandfather, Father and Son; The Grandfather held of the King, the Father took a Wife; the Grandfather dyed; the Father had iſſue, and dyed before any Office found, and before any Entry; and afterwards an Office was found for the King, that the Grandfather was ſeiſed, and that he had Iſſue, who had Iſſue the heir within age; the King ſeiſed the Ward, and committed him *durante minori ætate.* The Wife of the Father brought Dower againſt the Committee. It was the Opinion of the Court, becauſe the Tenancy lawfully diſcended upon the husband, that the Wife was Dowable: and although the King hath an Intereſt when it is found, yet it ſhall not bar or exclude the wife of her Dower. And it was holden further in that caſe, That the Lacheſſe of entry of the husband ſhould not prejudice the wife where he might enter. See 1 H. 7. 17, 18. Hill. 4 H. 7. 1. acc.

4 The Committee of the King of a Ward committed Waſte, and afterwards tendered a Marriage to the heir, who refuſed, and married elſewhere; and afterwards the Waſte was found by Office: and afterwards the Committee brought forfeiture of Marriage. It was holden, That it did lye. For it was ſaid, If there be Lord, Meſne, and Tenant, and the Meſne grants his *Menalty* in Mortmain; the Lord may claim the Menalty by reaſon of Mortmain within the year and day; and if the Tenant dyeth his heir within age, and an Abbot ſeiſeth the Ward before the Claim of the Lord, the Abbot ſhall have the Marriage as a thing veſted. Hill. 28 H. 8. *Dyer*, 163.

5. A Fine was levied by Tenant in tail after 4 H. 7. and Proclamations paſſed, and 5. years paſſed, after Tenant in tail dyed; the Queſtion was, Whether the Iſſue ſhould be barred as Privy, becauſe he is to make his conveyance by his Father; or that he ſhall not be reputed privy, becauſe he claims *per formam Doni*: and then his right is ſaved, by the ſecond Saving of the Statute, becauſe he

he is the firſt to whom the right diſcends, after the Fine ingroſſed. See Statute, 32 H.8. But in that caſe, It was agreed, That if he to whom the Remainder in tail, or other title firſt accrued, ſuffered 5. years to paſs without claim, that this Lacheſſe of the Anceſtor ſhould bar the Iſſue. Paſch. 19 H. 8. *Dyer*, 3.

6. The Husband alone levieth a Fine with Proclamations of the Land of his Wife, and dyeth, and 5. years paſſes without any Action brought, or Entry made by the Wife. It was the Opinion of the Court, That ſhe was barred by the Statute of 4 H. 7. and that ſhe was not aided by the Statute of 32 H. 8. becauſe the Statute doth not ſpeak of Fines with Proclamations. Mich. 6 E. 6. *Dyer*, 72. See *Cook* 8. Part, 72. in *Greenleys* Caſe, acc. See 5 Eliz. *Dyer*, 224. acc. See *Cook* 2. Part, 93. in *Bingham's* Caſe, acc.

7 Land was given to Husband and Wife, and to the heirs of their two bodies begotten; the husband made a Feoffment in Fee, and dyed having Iſſue; and afterwards the Wife before any Entry made by her, dyed. In this caſe, theſe Points were Reſolved: 1. That at the Common-Law, this Feoffment was a Diſcontinuance to the Iſſue; for the Iſſue ought to claim as heir of their two bodies immediately; and as heir to one onely, he cannot inherit, and ſo cannot enter. 2. That although the Husband and Wife have a joynt and undivided Eſtate; that this Eſtate was within the Statute of 32 H.8. becauſe ſhe had the Freehold, although not the ſole Freehold; and by that Statute, the Entry of the Iſſue in tail were lawful. 3. That the ſaid Statute of 32 H. 8. extended only to Diſcontinuances, and not to future bars. And therefore it was holden, That if the Husband in ſuch caſe levieth a Fine with Proclamation to another, and dyeth, the Wife may enter, for her right remains, which ſhe may recontinue by her Entry; but if ſhe forceaſeth her time, and 5. years paſſe, there the Fine ſhall bar her and her right, ſo as ſhe cannot enter. *Cook* 8. Part, 72, 73. *Greenleys* Caſe.

8 If Tenant in tail be diſſeiſed, and levieth a Fine to the Diſſeiſor without Warranty, and dyeth, if the Iſſue in taile enter, and be ſeiſed by force of the taile before all the Proclamations be made, although the Proclamations be afterwards made, yet the ſame ſhall not bar the Iſſue. So if Tenant in tail levieth a Fine, and diſſeiſeth the Conuſee, and dyeth before all the Proclamations be paſt; and after the Proclamations in the time of the Iſſue in tail paſſe, yet the Iſſue is not bound thereby: and yet the words of the Act of 32 H. 8. are, That all Fines after Proclamations ſhall bar, but it hath alwayes been holden, That if the Iſſue in tail be reyniſted and ſeiſed by force of the taile, before the barr is compleat; *ſcil.* before all the Proclamations be paſt, the Iſſue is not bound. See *Cook* 1. Part, 97. in *Shelley's* Caſe, acc.

9 A. ſeiſed of the Mannor of D, leaſed a Meſſuage parcel of the ſame Mannor, to B. for years, rendring Rent; who held other Lands of him, parcel of the Mannor, at Will; and by Copy by ſeveral Rents: B. ſeiſed of other Lands within the ſaid Mannor in his own right in Fee, made a Leaſe for life to C. of the ſaid Meſſuages, Lands at Will comprehending all the ſaid Lands: and afterwards levied a Fine of all the ſaid Lands by Covin, to bar him who had the Inheritance, and 5. years paſſed. In this Caſe, It was Reſolved, 1. That A. was not barred by this Fine and Proclamations, although the 5. years were paſſed, by the Statute of 4 H.7. For when Leſſee for years makes a Feoffment by Covin, which amounts to a wrong and diſſeiſin, a Fine levied by him who is *particeps Criminis*, and who pretends no right to the Land, ſhall not bar the Leſſor. 2. Reſolved, That where Tenant for life levieth a Fine, and 5. years paſſe in his life, the Leſſor ſhall have 5. years to make his claim after the death of Tenant for life; and if Tenant for life maketh a Feoffment to one who hath Land in the ſame Town, and the Feoffee levieth a Fine with Proclamations, the ſame ſhall not bind the Leſſor, but he ſhall have 5. years after the death of the Leſſee. 3. That if Leſſee for years makes a Feoffment in Fee by practice, that the Feoffee levy a Fine with Proclamations, to one who hath Land in the ſame Town, and the Leſſee continually payeth the Rent; the ſame ſhall not bind the Leſſor. 4. If A. purchaſt Lands of B. by Feoffment, or Bargain and Sale enrolled; and afterwards perceiving that B. hath but a defeaſible Title, and that C. hath right to the Land, levieth a Fine to a Stranger with Proclamations; this Fine by conſent ſhall bind: So when a Diſſeiſor levieth a Fine, and 5. years paſſe, the ſame ſhall bind; for the Diſſeiſee cometh *tanquam in aretra*; and it is not poſſible but that the Diſſeiſee to whom the wrong is done, ſhall have knowledg of it; and therefore it ſhall be his folly and Lacheſſe, that he did not make his claim within the 5. years. *Cook* 3. Part, 78, 79, 80. *Fermor* Caſe.

10. The Cuſtome of a Mannor is, That if a Copyholder of the ſaid Mannor dyeth ſeiſed, and the Heir doth not come at the next Court to claim the Lands, and pray to be admitted, and pay his Fine; that then Proclamations ſhall be made at 3. Courts holden for the Mannor, and if the Heir at ſome of the ſaid Courts doth not come and claim the Land, and pray to be admitted, that then the Lord ſhall ſeiſe the Copyhold as Forfeit. A Copyholder in Fee dyed ſeiſed, this Heir beyond Sea,

Procla-

Proclamations were made according to the Cuſtom, and the Heir did not come to claim the Lands; the Lord ſeiſed the Copyhold: the Heir returned, and when he had Notice of the death of his Father, he came to the Lord and claimed his Lands, and prayed to be admitted; which the Lord refuſed to do. In this caſe it was adjudged, That this Cuſtome and Non-claim ſhould not bar him who was beyond Sea at the time of the Proclamations of his Inheritance; becauſe by intendment of Law, he who is beyond Sea, cannot have knowledg of the death of his Father, nor of the Proclamations made to warn him to come in to make his claim, and pray to be admitted. And Non-claim upon the Statute of 18 E 3. of *Fines*; and upon the Statute of 23 E. 1. *de Donis*, although they be in Courts of Record, ſhall not barr him who is out of the Realm, *à fortiori*; nor Proclamations made in a baſe Court, ſhall not barr. But in this Caſe, It was Reſolved, That if the Heir had been within the Realm at the time of the firſt Proclamations, and afterwards had gone out of the Realm, that the Proclamations ſhould have bound him; for that he ſhall not defeat the Lord of his Fine or forfeiture by his own act. *Cook* 8. Part, 100. Sir *Richard Lechford*'s Caſe.

11 The Father Tenant for life of a Copyhold, (where the Cuſtome was, to have for two or three lives *ſucceſſivè*) the Remainder to his eldeſt daughter for her life, the Remainder to his ſecond daughter for life: the Father Tenant for life by Bargain and Sale enrolled, purchaſed the Inheritance of the Copyhold of the Lord, who levied a Fine thereof to the Father and his Heirs with Proclamations according to the Statute of 4 H. 7; the Father dyed, his ſon entred, and levied a Fine thereof to the uſe of himſelf and his wife, and his Heirs, and dyed; 10 years paſſed, the wife entred, and the Queſtion was, If the daughter in Remainder were barred by the Fine. In this caſe (amongſt other things) it was Reſolved, That if a Copyholder or Leſſee for years by Covin to ſerve the Lord, or the Leſſor, levy a Fine, the ſame ſhall not barr them. 2. Reſolved, That if Leſſee for years, or a Copyholder be ouſted, and the Leſſor or Lord diſſeiſed, and the diſſeiſor levieth a Fine, and 5. years paſſe; the Leſſor or Lord are barred by the firſt Saving in the Act of 4 H. 7. becauſe that preſently they might have their Action, and recover the Land; and therefore if 5. years paſſe before Entry or Claim, they ſhall be barred. But he who hath the Reverſion, or the Lord of the Manor, may enter in the name of his Leſſee, or his Copyholder, as well to ſave their Inheritances, as the particular Eſtates, and that they may do without requeſt precedent, or conſent ſubſequent. and ſuch an Entry is lawful within the Statute; but a ſtranger of his own head cannot enter in the name of him who hath right to preſerve the Eſtate, and avoid by his claim ſuch a Fine without commandment precedent or aſſent ſubſequent; as it was adjudged. Mich. 39 Eliz. in B. R. in the Lord *Audley*'s Caſe. *Cook* 9. Part, 105, 106. *Margaret Podgers* Caſe.

12 Lands were given to Husband and Wife, and to the Heirs of their two bodies, the Remainder to the Husband in Fee; the Husband levied a Fine of the Lands with Proclamations to the King, who by Letters Patents gave the Lands to J. S. and his heirs; the Husband dyed, the Wife within the 5. years entred, claiming the Eſtate; J. S. dyed; his Heir reciting the Eſtate in ſpecial tail, granted to the Husband and Wife, and that the Wife was ſeiſed of the Eſtate tail by Deed, did confirm to the Wife her Eſtate, To have to her and the Heirs of the body of her Husband deceaſed; the Wife having A. a ſon betwixt her and her Husband, dyed: A. the ſon entred, and afterwards accepted a Fine *ſur Conuſans de Droit tacitum* from two ſtrangers, with a render for 99. years after the death of A, if B. his Wife ſhould ſo long live; the Proclamations paſſe; A. dyeth, having Iſſue two Sons; the eldeſt in Ward to the King at his full age, Covenanted to ſtand ſeiſed to the uſe of himſelf, and the heirs of his body, with divers Remainders over. The eldeſt ſon dyed without Iſſue male, having a Daughter within age. It was Objected, That by the Fine levied by the Husband, the Eſtate tail was barred according to 18 Eliz. *Dyer*, 351. becauſe the Iſſue ought to claim as Heir to both their bodies; that the Eſtate tail was extinct, and the Eſtate of the Wife changed into an Eſtate for life diſpunihable of Waſte. 2. Admit the Wife had an Eſtate in tail, her Iſſues ſhould be inheritable by the Confirmation; for by the Confirmation J. S. hath excluded himſelf and his heirs by expreſſe words, as long as the Wife hath Iſſue of her body to claim the Land; and the Confirmation doth alter and qualifie the Eſtate of the Wife, and incorporate a new quality in the Eſtate. But it was Reſolved by the whole Court, 1. That the Wife after the death of her Husband, had an Eſtate in ſpecial tail; and by the Common-Law, the Eſtate of the Wife in ſuch caſe ſhould not be changed into an Eſtate for life: For by the Common Law, if it had been given to Husband and Wife, and to the Heirs of their two bodies, and after Iſſue, the Husband had aliened and dyed, the alienation ſhould not have barred the Wife, nor the Iſſue in tail, becauſe the Husband alone had not *poteſtatem alienandi*, becauſe he had an undivided Eſtate joyntly with the Wife: and to the caſe in *Dyer*, there the Wife entred, and claimed an Eſtate by the Deviſee; which proves, That if ſhe had not

waived the Eſtate tail, that ſhe ſhould have had it, and not an Eſtate for life. 2. Reſolved, That the Confirmation did work nothing; for when the Wife entred, ſhe was ſeiſed in tail, and no Eſtate was left in the Conuſee, but only a poſſibility; and then when the Husband had the Remainder in Fee, the Confirmation made by the Heir of J.S. can paſſe nothing in reſpect of the poſſibility, which was gained by the Fine before the continuance of the Eſtate tail; but it ought to be extracted out of the Remainder in Fee, and that it cannot be, becauſe no Eſtate tail is created by the Confirmation, but the Eſtate confirmed; and a Confirmation cannot add a diſcendible quality to him who is diſabled to take by diſcent: and if a Confirmation ſhould add to the Eſtate of the Wife a diſcendable quality, it ſhould repeal the Statutes of 4 H. 7. & 32 H. 8. by which the Eſtate tail to the Iſſue is barred. *Cook* 8. Part, 138. *Beaumont's* Caſe.

13 In a *Quid Juris Clamat* brought by an Enfant, The Tenant ſaith, That he holds the Land for term of life of a Leaſe by the Enfants Auncеſtor, who granted unto him, that he ſhould not be impeached of Waſte by Deed; which Deed he ſhewed forth. In this Caſe, It was adjudged, That becauſe the Plaintiff was within age, and ſo could not acknowledg the Deed during his Nonage. It was adjudged, He ſhould ſtay untill his full age: Nevertheleſſe, in the principal Caſe, If when the Enfant attains his full age, the Defendant attorns by Judgment of Court, it ſhall not any way trench to the Enfants prejudice. For albeit the Attornment was after his full age; yet in as much as there was no Lacheſſe in the Enfant, but that he brought his *Quid Juris Clamat* to force the Tenant to attorn, the delay which was till his full age, ſhall not turn to his prejudice: and therefore by Judgment of Law, (which doth wrong to none) he ſhall have as much advantage as well for the Arrearages of Rent as for Waſte done, as if the Tenant had attorned at the time of the Plea pleaded. *Cook* 9. Part, 85. in *Conys* Caſe.

14 A. hath Iſſue B. and C. Enfants within age; A Leaſe is made to A. for life, the Remainder to B. in tail, the remainder to C. in tail; A. Tenant for life is diſſeiſed, and afterwards releaſeth to the Diſſeiſor with Warranty, and dyeth, and the Warranty diſcendeth upon B, being within age. After B. dyed within age; C. being then his brother and heir within age, upon whom the ſaid Warranty doth diſcend, and afterwards C. cometh of age, and 3. years after his full age, entreth. It was adjudged in this caſe, That his Entry was lawfull: For it was Reſolved, That if the Entry of an Enfant be lawful, and he cannot enter in the life of his Auncеſtor, and doth not enter, the Warranty ſhall not bind in ſuch caſe, *à fortiori* when the Warranty diſcendeth upon him, his Entry being lawful, and he cannot enter in the life of his Auncеſtor, and doth not enter, no Lacheſſe ſhall be attributed unto him: but if his Entry were not lawful, ſo as he was put to his Action; there the Warranty ſhall bind him. *Cook* 1. Part, 140. *Chudleigh's* Caſe.

15 If a Felon ſteal any goods, and bringeth them into his houſe within the Mannor, and there leaveth them, or in the houſe of any other, or in the Cuſtody of any other, or hideth them in the ground, or other ſecret place, and afterwards flyeth: It was Reſolved, That theſe goods are not forfeited, nor ſhall be ſaid Waiſe in Law, when the Felon in purſuit waveth the goods; or when the Felon, for fear to be apprehended, thinking that purſuit was made, having the goods in his poſſeſſion, flyeth, and waiveth the goods. In this caſe, they ſhall not be ſaid waived in Law; but the Owner may take them when he will upon the purſuit. But otherwiſe, if he hath not the Goods, with him when he flyeth. But if the Thief in his flight waiveth them, there the goods are forfeited by the Common Law, if the Felon upon the purſuit, was not attainted at the ſuit of the Owner of the goods: And the reaſon, that Waiſe is given to the King, and the party ſhall loſe his property, is for default of the Owner, That he doth not make freſh ſuit to apprehend the Felon; and therefore the Law hath impoſed this penalty upon the Owner, That if the Thief by his Induſtry and Suit, be not attainted, he ſhall for his default loſe all his goods which the Thief at the time of the flight doth waive. *Cook* 5. Part, 109. in *Foxly's* Caſe.

16. A man was Outlawed after Judgment before the General Pardon of 43 Eliz. and after the Pardon, dyed; his Executors made ſatisfaction upon Record; and without Proces, they pleaded the General Pardon, with an Averment, That they are not Perſons Excepted. In this caſe, It was Reſolved, 1. Although the words in the Proviſo in the Pardon are, [Untill ſuch time as the perſon ſo Outlawed, ſhall ſatisfie] the ſame is ſuch an an Intereſt in the perſon Outlawed, that although he dyeth after the pardon, yet his Executors may ſatisfie, and have benefic of the Pardon. 2. Reſolved, That foraſmuch as no *Scire facias*, nor other Proces lyeth againſt the Executors, they may *gratis* come in, and plead the general Pardon, with averment, that they are not perſons excepted. *Cook* 5. Part, 79. Sir *Ed. Phittons* Caſe.

17. If an Alien born, pray not *medietatem linguæ*, before the *Venire facias* be awarded, he comes too late after; for that it doth not appear

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to the Court, that he is an Alien born. 19 Eliz. *Dyer*, 357. *Spinalots* Caſe.

18. If one be bound by Preſcription, to keep the Sea-Bank in good repair; and by a ſudden and unuſual Courſe of Waters it is beaten down. It was holden by the Juſtices, That in ſuch caſe, the Commiſſioners of Sewers, by the Statute of 23 H. 8. Cap. 5. may charge all other perſons, and their Lands, that may receive any leſſe or damage thereby: But if any default or negligence be found in him that ſhould repair it, as that the danger was not ſo inevitable, but that he might have prevented it, the Commiſſioners may charge him only with the repair thereof. And if by his Lacheſſe or negligence, the danger becometh inevitable, or that he be not able to repair it, ſo as the Charge is layed upon others; each perſon charged may have an Action upon the Caſe againſt him. *Cook* 10. Part, 129. *Knightleys* Caſe.

19. If there be Father and Son, and the Father be diſſeiſed, and maketh his Claim, and the Diſſeiſor dyeth, and then alſo the Father dyeth: It was ſaid, That in that caſe, the Heir may enter, becauſe the diſcent was caſt in his Fathers time; and the right of Entry which the Father gained by his claim, ſhall diſcend to his Heir. But if the Father maketh continual Claim, and dyeth, and the Son maketh no continual Claim, and dyeth within a year and a day after the claim made by the Father, and the Diſſeiſor dyeth, this ſhall take away the Entry of the Son, for that the diſcent was caſt in his time; and the claim made by the Father, ſhall not avail him that might have claimed himſelf, becauſe no Continual Claim can avoid a Diſcent, unleſſe it be made by him who hath Title to enter, and in whoſe life, the dying ſeiſed was, *Cook* 1. Part, *Inſtitutes*, 25. acc.

20. Note: It is put for a Rule in Law, That no Lacheſſe, or negligence ſhall be imputed in Enfants, or Feme Coverts, for not entry or claim to avoid a Diſcent: Yet it hath been holden, That Lacheſſe ſhall be imputed to them, for not performance of a Condition annexed to the Eſtate of the Land: For if a woman be enfeoffed either before or after Marriage, reſerving Rent; and for default of payment, a re-entry: In ſuch caſe, the Lacheſſe of the Husband ſhall diſinherit the Wife for ever. And ſo it is in caſe of an Enfant; and therefore, If a man makes a Feoffment to another reſerving Rent; and if he pay not the Rent within a moneth, that he ſhall double the Rent, and the Feoffee dyeth his Heir within age, the Enfant payeth not the Rent: although the Enfant at this day ſhall not forfeit any thing; yet in ſuch caſe a Feme Covert ſhall: and the reaſon is, for that the Enfant is provided for by the Statute of *Merton*, Cap. 5. but before that Statute, he could not have avoided ſuch penalty. *Cook* 1. Part, *Inſtitutes*, 296. acc.

21. A. ſeiſed of divers Lands in *York* holden *in Capite*, dyed ſeiſed, 40 Eliz. and the ſame diſcended to B. his Son; preſently after his death, it was found by Office in *Com. Midd.* that B. was a Lunatique, and ſo had been before the death of his Father, and that he was ſeiſed of the ſaid Manors; and the Queen granted the Cuſtody of him and his Lands to J. S: Afterwards, 42 Eliz. there was an Office found in the County of Y. of the ſeiſin of A; his death, and Livery, and that he was of full age. It was Reſolved in this Caſe, That the King was not to have any mean Rates for default of Livery ſued or tendred, becauſe no Lacheſſe could be imputed to the Heir, being a Lunatique, before, and ever ſince the death of his Anceſtor, and the Lacheſſe of his Friends ſhall not hurt him. Otherwiſe it had been, if he had been at any time *ſana memoria* ſince the death of his Anceſtor. Paſch. 15 Jac. in the Court of Wards, *Bourchers* Caſe, *Hobart*, 137. See Mich. 10 Jac. *ibidem*. *Vaughans* Caſe, accord.

22. A man diſſeiſeth the King's Tenant, and the Diſſeiſor is attainted of Felony: and before Office, the Diſſeiſee entreth upon the Land (as he may); in ſuch caſe clearly the Diſſeiſee is remitted, and then Office is found for the King. It was agreed in that caſe, That the Remitter was defeated, and that the poſſeſſion and Land is given to the King as it was in the perſon attainted, and the right remains to the Diſſeiſee, to be purſued and recovered againſt the King; and ſo every man hath his due: for the Kings Title to the Land was by the Attainder, and not by the Office, which did but find the Title, and not give it; and the Diſſeiſees due was the right which remained in him, notwithſtanding the Diſſeiſin, and the Attainder, and the Office. And it is againſt reaſon, ſince the Office is deviſed by Law for a means to bring the King to Land by matter of Record, that he ſhould not enter and ſeiſe the Lands of the Subject; and ſhould be ſo bound by times, that if he keep not his Inſtants, he ſhould loſe the Land for ever. 3 E. 3. 25. the Earl of *Northumberland's* Caſe. See *Plow. Com.* 489. *Hobart* 348. in the Lord *Sheffield's* and *Ratcliffs* Caſe. *Godbolt*, 326 acc.

23 If a man makes a Feoffment in fee of lands, and makes Livery in the view of the Land, and the Feoffee dares not enter into the ſaid Land for fear,

but claims the land by force of the Feoffment, by ſuch claim the Inheritance of the Land is veſted in him, although by the Livery no eſtate paſſed unto him, neither in fait, nor in Law; and ſo note, that a Livery in Law is executed by an entry at Law, *Cook*, 1 Part, *Inſtitutes* 48.

24 If the Lord make claim to the goods of a Villain, which are in his view, the ſame amounts to a ſeiſure of the goods; and ſo it is if the Lord by word claims the Ward who is in his view, it is a ſeiſure of the Ward: And the claim of the Lord, of the goods of the villain, doth veſt all the goods which the villain hath, or which he ſhall after acquire in his own right, in the Lord. But if the villain of the King get any goods or chattels, the property of them is in the King preſently, without any claim, ſeizure, or office, *quia nullum tempus occurrit Regi*. If the villain of a Lord purchaſeth a Common without number, or a Coredie incertain, the Lord ſhall not have it: And ſo if a Warranty be to a villain and his heirs, the Lord ſhall not vouch by reaſon of ſuch Warranty: But a Seignory Rent common, purchaſed by the villain out of the Land of the Lord, ſhall be extinct, without claim made by the Lord, *Cook* 1 Part. *Inſtitutes*. 118.

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2. *Where the King by reaſon of his Prerogative, ſhall not be prejudiced by* Amy Lacheſſe *of claim or entry*: Et e contra.

1 IF the Kings villain purchaſeth lands, and alieneth the ſame before an Office be found for the King, yet the King after Office found, ſhall have the land; yet after Office found, the King ſhall not have the mean profits, becauſe the Kings Title commenceth by ſeizure. But it is otherwiſe of goods, for there the property of them is in the King, without any ſeizure or Office found. See the Caſe before, *Cook*, 1 Part, *Inſtitutes* 118. and ſee *Litt.* Sect. 178. acc.

2 In a Writ of Right of Advowſon brought by the King, the Tenant ſhall not tender the demy mark to enquire of the ſeiſin; and therefore the King ſhall alledge, that he or his Progenitor was ſeized, without ſhewing any time: But it is otherwiſe in the caſe of a common perſon; for there the Tenant ſhall tender a demy Mark againſt him who brings the Writ to enquire of the ſeiſin alledged in the Count, *Fitz. Nat. Brev.* acc. *Cook* 1 Part, *Inſtitutes*. 294.

3 Before the Statute of *Weſt.* 2. If an uſurpation had been upon an Infant, or a Feme Covert, or upon Tenant for life, the Infant, Feme Covert, or he in the Reverſion was put to bring a Writ of Right of Advowſon; But if ſuch an uſurpation had been upon the King, and the Clerk had been admitted, inſtituted, and inducted, for without Induction, the Church was not full againſt the King, the King might have removed him by a *Quare Impedit*, and have been reſtored to his Preſentation, without other act done by him. *Cook*, 6 Part, 85. in *Boſwell's* Caſe.

4 A Tenant for life of the Mannor of D. to which a Rectory, which was a Benefice was appendant, the remainder to B in Fee; A. preſented D. who was Admitted, Inſtituted, and Inducted; and he did not read the Articles for which cauſe he was deprived at the Suit of A. before the Biſhop, and he appealed to the Court of Arches, but no notice was given by the Ordinary, to the Patron of this deprivation: A. dyed, the Queen *Jure Prærogative*, by her Letters Patents, by reaſon of Lapps, preſented J. S. who was admitted, inſtituted, and inducted; D. dyed, B. preſented J. D. who was admitted, inſtituted, and inducted. In this caſe (amongſt other things) it was Reſolved, 1. That the Church was void *ipſo facto*, by the Statute of 13 *Eliz.* 2. If the King Preſent, his Preſentment is void; and ſo if the King hath not any Title to preſent by any means, and he preſent by reaſon of Lapps, his Preſentation is void. 3. That if a common perſon uſurp upon the King, and his Clerk is admitted, inſtituted, and inducted, the King is put to a *Quare Impedit*, and cannot preſent, until the Incumbent be removed; but in ſuch caſe, the common perſon by his uſurpation, doth not get the Inheritance of the Advowſon out of the King, becauſe the ſame is permanent in him; but as to the Preſentment, the ſame is tranſitory, and therefore the King is put to his *Quare Impedit*, to remove the Incumbent. *Cook* 6 Part, 29, 30. *Green's* Caſe.

5. If the King hath Title to preſent for Lapps, and the Patron preſents his Clerk, who is admitted, inſtituted, and inducted, and dyeth: It was adjudged in that Caſe, That the King hath loſt his Preſentment, and the King ſhall not have the ſecond Preſentation; and the Statute of *Prærogativa Regis*, *Quod nullum tempus occurrit Regi*, is to be intended, when the King hath an Intereſt certain and permanent, and not when his Intereſt is ſpecially limitted, for time is the ſubſtance of his Title, and in ſuch caſe *Tempus occurrit Regi*. *Cook* 7 Part, 28. in *Baskervile's* Caſe. See 28 *Eliz.* in C. B. the King and *Bewleyes* Caſe, adjudged acc.

6. King *Henry* the 8. granted a Mannor to the Queen his Wife for life; in that caſe it was Reſolved,

ſolved, 1. That the Queen was a ſole perſon exempt from the Common Law, and might make a Leaſe or Grant without the King. 2. That where the Queen was Tenant for life of the Mannor, and a Copy-hold eſcheated to her, there the Queen might grant the ſame to whom ſhe pleaſed, and it ſhould binde the King, his Heirs, and Succeſſors for ever, for ſhe was *Domina pro tempore*, and the Cuſtome of the Mannor ſhall binde the King: And every one who hath a lawful eſtate in the Mannor, is *Dominus pro tempore*, and may grant Copy-hold Eſtates. *Cook* 4 Part, 23. in *Clark* and *Pennyfathers* Caſe.

See more of this Section before, in Title *King*.

Law.

1. *Wager of Law, where it lyeth, where not; who may wage his Law, and for what; and in what Action wager of Law lyeth, and in what not.*

1 IN Debt againſt J. S. for 4 l. and the Plaintiff Declared, That he bought a certain quantity of Wood of the Defendant; and the truth of the Caſe was, That the Wood was ſold to him upon condition, that if the Plaintiff did not prove it to be good and ſufficient Wood, that then the Defendant ſhould pay nothing for it: And this appearing by the Defendant upon his wager of Law, The Court ſaid, If the Caſe was ſuch, then he might wage his Law, and the Plaintiff muſt have Detinue for the Wood. Mich. 30 *Eliz.* in C. B. *Millington* and *Burges* Caſe. *Goldesbr.* 65.

2. The Plaintiff and another made a Joynt Contract with the Defendant, and the Plaintiff alone brought an Action of Debt upon the Contract: It was the Opinion of the Court, That in that caſe the Defendant might wage his Law, becauſe it is not upon the ſame Contract; See 20 H. 6. Accompt was before Auditors, and the Action ſets it forth where it was before one Auditor, and he was admitted to wage his Law. See 35 H. 6. acc. And ſo it was adjudged in the principal Caſe, Hill. 30 Eliz. in C. B. *Boſtocks* Caſe. *Goldesbr.* 51.

3. In Debt, The Defendant pleaded *Nihil debet per Legem*; and in truth, the money was due to the Plaintiff, but the Plaintiff was alſo indebted to the Defendant in the like ſum, and before the Action brought they were agreed, that each of them ſhould be acquitted againſt the other, and thereupon the Defendant would have waged his Law. *Anderſon* and *Periam* Juſtices, doubted whether he might do ſo or not, for accord without ſatisfaction is no plea; and debt cannot be diſcharged by word: But *Rhodes* Juſtice ſaid, It was good by conſent of parties, with which *Fenner* agreed. See 22 & 37 H. 6. where payment by way of Retainer is good. Hill. 30 Eliz. in C. B. *Sanderſons* Caſe. *Goldesborough* 80.

4. Note, It was the Opinion of the Juſtices in the Starchamber, That if in an Action at the Common Law, a man wage his Law, although he makes a falſe Oath, yet he ſhall not therefore be impeached by Bill in the Starchamber. Then it was demanded by the Juſtices, If he were diſcharged of the debt by his Wager of Law? To whom the Judges anſwered, That he was; and *Manwood* ſaid, That it was the folly of the Plaintiff, becauſe he might have changed his Action into an Action upon the Caſe upon *Aſſumpſit*, wherein the Defendant cannot Wage his Law. Paſch. 29 *Eliz.* in Starchamber. *Goldesborough*, 51.

5. Debt was brought againſt J. R. of W. in the County of L. Chapman: The Defendant appeared by his Attorney, and offered to wage his Law, and was eſſoined; and at the day, the Plaintiff appeared, and the Defendant being ſolemnly called, one J. R. came to anſwer the Plaintiff, and offered to wage the Law. The Plaintiff ſaid, That J. R. now appearing to wage his Law, was not to be admitted, becauſe the ſaid J. R. is not that perſon which the Plaintiff proſecutes; becauſe the ſaid J. R. appearing, is J. R. of W. in the County of L. *Junior*, Chapman; and he who the Plaintiff ſues, is J. R. of W. in the County of L. *Senior*, Chapman, both of them at the time of the Writ brought, living at W. and that he agreed with the Defendant ſo to do; therefore becauſe J. R. of W. &c. had not appeared to wage his Law, he prayed Judgement: The Defendant confeſſes ſuch matter, and ſays, That he believing that the Writ was brought againſt him, appeared by his Attorney, and offered to wage his Law, and prays to be diſcharged; and the other J. R. being called, appeared not. In that Caſe, the Court ſaid they would adviſe, but gave no Judgement for the Plaintiff. Mich. 4. E. 4. rott. 144. C. B. *Brownlow.* 1. Part, 55.

6. Debt againſt an Adminiſtrator, that where the Inteſtate was indebted to J. S. in divers ſums of money for wares ſold, that J. S. became Bankrupt, and by Commiſſioners of Bankrupts was ſo adjudged, and that this debt amongſt other, was aſſigned to the Plaintiff, being a Creditor, and that the Inteſtate died; whereupon he brought this Action againſt his Adminiſtrator; upon which it

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was demurred in Law. It was ſaid, That this debt being aſſigned by Commiſſioners, is *quaſi* a debt upon Record, and the Plaintiff is enabled to the ſuit by Act of Parliament: And it was ſaid, That for a debt forfeited to the King, no wager of Law lay. But notwithſtanding the Opinion of the Court was clear, That the aſſignement by the Commiſſioners did not alter the Law, but that againſt this Aſſigament, the party might wage his Law; and that debt did not lie againſt an Executor or an Adminiſtrator upon a ſimple Contract of the Teſtator: It was adjudged for the Defendant. Paſch. 6 Car. in B. R. *Cro.* 1 Part, 135.

7 Two men were Partners in goods, the one of the Partners ſold unto J. S. at ſeveral times, goods of the value of 100 l. and for the goods at one time he paid the money, afterwards an Action was brought by one of the Partners for the reſt of the money, and the Plaintiff Declared upon one Contract for the whole goods, whereas in truth they were ſold upon ſeveral Contracts made; and the Defendant in that caſe would have waged his Law: But the Court adviſed the Plaintiff to be Non-ſuit, and to bring a new Action; becauſe that Action was not well brought; for it ought to have been a ſeveral Action upon the ſeveral Contracts: And in this Caſe it was agreed by the Court, That the ſale of one Partner is the ſale of them both; and therefore, That although one of them ſelleth the goods, or merchandizes with them, yet the Action muſt be brought in both their names; and then in ſuch caſe, the Defendant ſhall not be received to wage his Law, that the other Partner did not ſell the goods within, as is ſuppoſed by the Declaration. See Sect. before. See Hill. 11 Jac. in C. B. *Lamberts* Caſe. *Godbolt*, 244.

8. Note, That *Hobart* Chief Juſtice ſaid, That it was adjudged Mich. 15 Jac. in C. B. That in an Action of Debt brought upon a Contract, the Defendant cannot wage his Law for part, and confeſs the Action for other part. And ſo it was adjudged in one *Tucks* Caſe: And a Contract cannot be divided, and ſo it was adjudged in this Caſe. Paſch. 21. Jac. in C. B. *Godbolt*, 327.

9. Dower by M. and his wife againſt J. S. who appeared upon the Grand Cape, &c. And it was, becauſe J. S. was but Leſſee for years of the Land of W. &c. in which caſe he might plead Non-Tenancy: And the Queſtion was, if now he might wage his Law of Non Summons, ſo as the Writ be abated: And it was ſaid, That by Wager of Law, he hath taken upon him to be Tenant, and affirmed himſelf to be Tenant: It was ſaid by the Juſtices, That here the Tenant being but Leſſee for years, is not at any miſchief; for if Judgement and Execution be had againſt him, he might afterwards enter upon the Demandant. Mich. 30 Eliz. C. B. *Mitchel* and *Hides* Caſe. *Leon*, 92.

10 A. brought debt againſt B. as Adminiſtrator of C. and Declared of a Contract without a Specialty. The Defendant pleaded, That he had fully Adminiſtred; which was found againſt him. It was moved in ſtay of Judgment, That upon the matter, the Action of Debt did not lie againſt an Executor or Adminiſtrator, which was granted by the Court: but the doubt was, If now, for as much as the Defendant by pleading the Plea above, hath admitted the Action, whether he ſhall take advantage of the Law in that point: Some of the Juſtices doubted of it, That the Defendant by his Plea had admitted the whole matter upon the ſpecial Plea pleaded, and had taken notice of the Debt: But it was the Opinion of the Court, That Judgment ſhould be entred againſt the Plaintiff, *Quod nihil capiat per Billam*; becauſe it is apparent to the Court, That the Action doth not lie, and the reaſon why the Action doth not lie, is, Becauſe the Teſtator himſelf might have waged his Law, if he had been impleaded upon it; and by intendment of Law, the Executor or Adminiſtrator cannot have notice of ſuch Debt, or of the diſcharge of it, afterwards *ex aſſenſu* of the other Juſtices which doubted: Judgment was entred againſt the Plaintiff. Mich. 31 Eliz. in C. B. *Henſon* and *Wits* Caſe. *Leon.* 165.

11. C. brought Debt againſt O. for a Pain aſſeſſed againſt him in a Court Baron, and declared that the Defendant was preſented there for ſuch an Offence, and if he did not amend it before the next Court, he ſhould pay ſuch a pain; which not being done, Debt was brought for the pain: and now the Defendant would wage his Law. It was much doubted whether wager of Law did lye in the Caſe. But it was the Opinion of the Court, That the Defendant might wage his Law, being for a pain, not in a Court of Record: And a Preſident of 6 Eliz. was ſhewed, where debt was brought by Sir *Thom. Tyadall*, upon a pain forfeited for breaking a By-law in a Court Baron againſt one *Tyler*, and the party was received to wage his Law. Paſc. 31 Eliz. in C. B. *Caſtle* and *Goldmans* Caſe. *Leon.* 203.

12. Divers Debts were aſſigned to the Plaintiff, and others, being Creditors, by the Commiſſioners of Bankrupts, upon the Statute of 13 Eliz. and they brought an Action of Debt in their own names for the ſaid debts. It was the Opinion of the Court, That it well lies; for it is a Debt tranſferred by Parliament, and being upon a Contract, the Defendant waged his Law, and was admitted thereunto; for although the Parliament tranſferred the Debt, yet it is not any Debt of Record, but as he might have waged his Law againſt the Bankrupt, ſo he may againſt the Plaintiffs. Mich. 9 Jac. in C. B. *Braiſhaws* Caſe. *Cro.* 2 Part, 105.

13. A. brought an Action against B. and Declared upon the Customs of Merchants, That if any Merchant over Sea do deliver any money to a Factor, and make a Bill of Exchange under his Seal, and this is subscribed by the Master, or any of the Company of such Merchants, That the Merchant himself, or all the Company, or any one in particular may be charged to pay it, and shewed, that M. was Factor of the Company, of which the Defendant was one; and that the said M. did substitute one G. to whom the Plaintiff delivered 100 l. to which one B. who was one of the Company, set his hand in *England*; and so the Action accrued to the Plaintiff. The Defendant pleaded *Nihil debet per Legem*: Upon which the Plaintiff demurred. The Question was, whether the Defendant might wage his Law: In this Case it was said by *Hobart* Chief Justice, Two Merchants Trade over the Sea, who made a Factor there, who takes money there, and gives a Bill, and this is subscribed by one of the Company; That this should binde all, or any of the Company, is not a good Custome; and the Custome of Merchants is part of the Law of this Kingdom: And he was of Opinion, That the Defendant ought to be admitted to wage his Law, for the delivery of the money made a Contract in Law: And as he may have an Action of Debt, so without Question he may have an Action upon the Case, and so Declare upon a Promise, and then the Defendant may not wage his Law. Mic. 19 Jac. in C. B. *Van Heath* and *Turners* Case. *Winch.* 24.

14. Debt brought against the Defendant for money won of him at play; The Defendant prayed that he might be admitted to wage his Law, which was granted him, and day given him to perform it: At the day assigned, he moved that he might have the benefit to wave his Law, and to have the matter to be tryed by the Country, which the Plaintiff refused to consent unto: And therefore he being called by the Court, and not appearing, his non-appearance was entred of Record, and a *defect in Lege* entred. And Note, It was said by one of the Clerks of the Court, That by the course of the Court, the Defendant might at any time, without the consent of the Plaintiff, have waved his Law, and stood to Tryal in the Countrey. Pasch. 10 Jac. in B. R. *Harrison* and *James* Case. *Bolstr.* 1 Part, 186.

15. Note, *per Curiam*, That in an Action of Debt, where the Defendant may wage his Law, if he confesseth part of the Debt, and wageth his Law for the residue, and a Judgement is given, and entred for the Plaintiff for that which is confessed, after this Judgment, the Plaintiff cannot be Nonsuited as to the residue, but he ought to appear when the Defendant comes to wage his Law for this part of the debt. Pasch. 10 Jac. *Bolstr.* 1 Part, 194.

16. Debt upon a *simul computaverunt*, was brought by A. against B. T. and others, of an Arrear of 800 l: B. was Outlawed, and T. and the rest appeared. T. alone tendered his Law, that he with the rest did not owe; and the others not Outlawed, did plead to the Countrey. It was Objected, That T. was not to be admitted to his Law alone, because they were all charged as one Defendant: But upon divers Presidents shewed of 12 and 13 Jac. where one of the Defendants alone waged his Law, that he and the rest did not owe, and the rest *Nihil dicunt, & paretur judicium*, till the Law made, or the party fail; and after the Law being made, Judgment was against the Plaintiff. *Scil.* in the principal case, T. was received to wage his Law, and the Plaintiff was Nonsuit. Mich. 16 Jac. in C. B. *Essington* and *Bourchers* Case, *Hob.* 244, 245.

17. In debt, the Defendant had day given him by the Court to wage his Law; at the day, it was moved, that he was sick of a Fever, and another day prayed for him to come and wage it, which was offered to be made good by Affidavit; yet the Court refused to receive it, but advised him to plead *ad Patriam*. Mich. 14 Jac. in C. B. *Binions* and *Bakers* Case. *Bolstrode*, 3 Part, 263.

18. A. borrowed 100 l. of F. and at the day of payment, brought it in a Bag, and cast it upon the Table before F; and F. said to A. being his Nephew, I will not have it, take it you, and carry it home again with you. The Court held this to be a good gift of the money by parol, being cast upon the Table, for that it was then in the possession of F. and A. might well wage his Law in an Action brought for it; but if it had been only offered to F. then it had been otherwise, not given by Writing, for then it was but a thing of Action. *Flowers* Case. *Noy* 67.

19. Note, It was Resolved by the Court, That an Action doth not lye against an Executor upon a *Concessit Solvere* of the Testator upon a special Custome, for this would be to charge an Executor in debt, where he may by the Law wage his Law; And it was said, That the occasion of wager of Law is, because it is intended, That as well as the Contract to pay money may be made in private, so may the payment be made in private also. Hill. 1649. B. R. *Hodges* and *Jones* Case, *Styles*, 199.

20. Debt was brought against one for 50 l. due for divers pieces of Cloth sold to the Defendant: The Defendant was ready at the Bar to wage his Law: The Court being informed that the Defendants wife kept a shop, and used to buy and sell by her husbands privity, and consent and allowance, and that these parcels of cloth were bought

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by her to furniſh her ſhop; and although her huſband was a Seaman, and medled not in buying and ſelling, yet his wife did it by his allowance: The Chief Juſtice adviſed the Defendant to take heed that he waged not his Law, for that he could not do it with Conſcience, in regard of his allowance; for the allowance of his Wives buying, made it as his own buying: Wherefore the Law was waved by conſent of the parties. Paſch. 1652. in B.R. *Styles* 322.

21. An Executor brought an Action upon the Caſe againſt an Executor, upon an *Aſſumpſit* made by the Teſtator of the Defendant: It was adjudged, That the Action was maintenable, for theſe cauſes. 1. Becauſe the Teſtator himſelf in this Action, could not have waged his Law. 2. Becauſe that after the death of the Debtor, the debt did remain; and it ſhould be a defect in the Law, if no remedy ſhould be provided for it. And 3. Becauſe it is conſonant to Juſtice, that the debts ſhould be paid, then that the Executors ſhould convert the goods to their own uſes. 2. It was Reſolved in this Caſe, That debt doth not lye againſt an Executor, for meat and drink of the Teſtator; and the reaſon is, Becauſe in an Action againſt the Teſtator, he might have waged his Law. But if a man be Impriſoned in the Tower of London, The Lieutenant ſhall have debt againſt his Executors who dyeth in the Tower, for meat and drink, becauſe that in ſuch caſe the Teſtator himſelf could not have waged his Law. But if A contract with B. for his Commons for a moneth, there in debt againſt A. he ſhall wage his Law, becauſe he is not compellable to deliver it, until he be paid for them in hand. *Cook* 9. Part, 82. 87. *Pinchons* Caſe. See *Cook* 4. Part, 93. *Slades* Caſe, &c.

22. Note, That there is not any Act of Parliament which by expreſs words takes away Wager of Law in an Action of Debt upon Arrearages of Accompt, but at the Common Law, the Defendant ſhall have his Law in an Action of Debt upon arrears of Accompt, whether the Account be before one Auditor, or many: But the reaſon why the Defendant ſhall not wage his Law, when the Account is made before Auditors, is, upon the *Stat.* of *Weſt.* 2. cap. 11. For now this Statute hath made the Auditors Judges of Record, becauſe they have power thereby to commit the Defendant to Priſon, which none can do, if they be not Judges of Record; and for this cauſe he was ouſted of his Law by all the Juſtices in ſuch caſe; But if an Accompt be before one Auditor only, the ſame is out of the Statute; for he cannot commit the Defendant to Priſon, and therefore it remaineth at the Common Law: And it appeareth by Judgment of the whole Court in 5 H. 48. That in an Action of Accompt before Auditory, that the Defendant ſhall not wage his Law, but there the remedy is given by examination, to diſcern if the matter lye in Account, and if not, there to allow the Defendant his Law. *Cook* 10. Part, 103. in *Berbowches* Caſe.

23. Note, That debts or duties due by ſimple Contract, ſhall be forfeited to the King by Curtaſy, although that the party for them might have Waged his Law: And Note there, That in every *Quo minus* brought in the Exchequer by the Kings debtor, againſt one who is indebted upon a ſimple Contract, the Defendant ſhall not have his Law for the benefit of the King, and here the King is no party *a fortiori*, where ſuch a debt or duty is forfeited to the King, and the King is the ſole and immediate party. *Cook*, 4. Part, 95. in *Slade's* Caſe.

24. In Debt, the Plaintiff Declared upon a ſale of certain Wood for 20 l. The Defendant pleaded *Non debet per Patriam*; and upon the evidence it appeared, that the Bargain was for twenty Marks. It was the Opinion of the Court, That the Jury ought to give their Verdict for the Defendant, becauſe it cannot be intended one and the ſame Contract, and that the Defendant in this caſe might have waged his Law, notwithſtanding that the Plea is *Non debet* the ſum, *nec aliquem denariam inde*, See 22 E. 2. in Detinue of a Chain of three Links, weighing three ounces, and in truth it was but of a chain of two Links, and containing but two ounces, that in ſuch caſe the Defendant might wage his Law; otherwiſe, if the variance had been only in the price and value, Mich. 5 Eliz. 6. *Dyer*, 219.

25. An Action of Detinue was brought for 40 Quarters of Wheat. And the Plaintiff declared upon an abſolute contract. The Defendant ſaid, That he was to pay for it when it was delivered to the Plaintiff, the Plaintiff was to pay for it, or otherwiſe, it ſhould be void: and ſaid, That the Plaintiff had received 30 Quarters of him, and paid him for it, and at another day he came to receive the ten Quarters reſidue, and did not pay for them, and ſo the contract was void, and demanded Judgment of the Action. It was the Opinion of the Court in that Caſe, That the Plea was good without any traverſe, that the contract was ſimple, for the traverſe ought to be of the other part, viz. that it was abſolute without that, that it was upon condition. But in this Caſe, it was agreed, That the Defendant might either wage his Law, or plead, *Non Detinet per Patriam*. Hill. 28 H. 8. *Dyer*, 30.

26. A man brought Debt upon a contract before the Mayor and Recorder of *London*; the Defendant tendred to wage his Law: the Plaintiff ſaid, That in *London* there is ſuch a Cuſtome, That if a man

man hath put his Seal to a Paper, teſtifying the Contract, that the party ſhall be ouſted of Wager of Law; and upon that there was a Demurrer. In that Caſe, it was adjudged, That that matter did not alter the nature of the contract, becauſe it was only a teſtimony of the contract; and ſo in that Caſe, the Defendant might wage his Law. 30 H. 6. vouch. in Tr. 28 H. 8. *Dyer*, 22.

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2. *Conſtruction of Law: Where it conſtrueth things according to common intendment, or poſſibility; the Original Cauſe and beginning of them; the equality of reaſon and moderation; the ſubject matter, and always to the beſt.*

1. A Warranty which ſeemeth literally to be entire, ſhall by act of the party, and conſtruction of the Law be divided, where it cannot take effect according to the entire words. As if I enfeoff H. of 100 Acres of Lands in Fee, to the uſe of himſelf of 50 Acres, or of the Feoffer, or of a ſtranger of the other 50 Acres certain, and Warrant the Lands to the Feoffee and his Heirs; this Warranty is clearly divided by the meaning from the Letter for the Warranty, for ſo much as is to the uſe of the Feoffer himſelf, and his Heirs that doth Warrant, never took effect; and when it is divided to two, that Warranty which ſeemed entire at the firſt, is taken by conſtruction of Law to be *reddendo ſingula ſingulis*. Trin. 9 Jac. in C. B. Sir *Henry Rolls* and Sir *Robert Osborns* Caſe. *Hob.* 24.

2. *William* Lord *Dacres* made a Deed of Feoffment of Lands in divers Counties, dated the 13th of *October*, 4 Mar. upon Condition, That the Feoffee ſhould enfeoff him of all the ſaid Lands within 20 dayes after the date of the Deed. It was in this Caſe Reſolved, That if *William* Lord *Dacres* did make his Feoffment but of part within the 20 dayes, the Condition was not broken, though all were not re-conveyed within 20 dayes, according to the Letter of the Condition, which is entire as the Warranty; and the reaſon was, becauſe it was his own fault that it was not conveyed, without which it could not be re-conveyed, and therefore the Letter was abridged, the Condition being taken, that he ſhould re-convey ſo much as was conveyed. 26 Eliz. the Lord *Dacres* Caſe, *ibid.*

3. T. M. Debtor of the King, brought *Quo minus* in the Exchequer, and declared, That W. M. 5. *Maii* 10 Jac. leaſed to him a Meſſuage and 40 Acres of Land, with the appurtenances in C. *Habendum* from the Feaſt day of the Annunciation of our Lady laſt paſt, for 21 years then next enſuing. The Ejectment upon this Leaſe was alledged to be 5 *Maii* 10 *Regis*. Upon Not Guilty, It was found, That before the ſaid demiſe, the ſaid W. M. was ſeiſed of the ſaid Lands in Fee, and ſo ſeiſed the ſaid W. the ſaid 5 *Maii* 10 *Regis*, *ſupradict.* made a Leaſe to the ſaid T. M. in *hac verba*, ſcil. *demiſit Tenementa prædict. Habendum* the ſaid Meſſuage, with the appurtenances, from the Feaſt of the Annunciation of the Virgin laſt paſt, for, and during the Term of 21 years next enſuing the date hereof, to be compleat and ended: And whether the Defendant was guilty of the Ejectment in the Declaration mentioned, was the Queſtion, *ſcil.* If the Leaſe found by the Indenture, did agree with the limitation in the Declaration for a Term of years or not, becauſe the Leaſe by the Declaration was a Leaſe made 5 *Maii* 10 *Regis*, *Habendum* from the Feaſt of the Annunciation then paſt, for 21 years, *extunc, ſcil.* from the ſaid Feaſt of the Annunciation next following; but the Leaſe found by the Jury, was a Leaſe made 5 *Maii* 10 *Regis*, *per Indent. dat.* 5 *Maii Anno* 10 *Regis*; *Habendum de feſto Annunciationis Beatæ Mariæ, tunc ultimè præterito pro termino* 21 *annorum proximè ſequent. dat. dict. Indenturum.* In this Caſe, it was adjudged for the Plaintiff in *Scaccario*; and afterwards affirmed in a Writ of Error. *Moor* and *Musgraves* Caſe, in *Scaccario*, *Hob.* 18, 19.

4. Note, the Law ſhall conſtrue a Priority to be in an inſtant. And therefore in a Replevin, the Caſe was, A. ſeiſed of Land in Fee, Granted a Rent of 6 l. *per annum* out of the ſame to B. and C. his Wife for the life of C. payable at *Mich.* and our Lady day, or within ten dayes after: And if the Rent be behind, that he ſhould forfeit 10 l. by way of a pain after any of the ſaid Feaſt-dayes being lawfully demanded, and that then, and ſo often, it ſhould be lawful for B. and his Wife to diſtreyn, and the ſame to detein, untill the ſaid Rent and pain were ſatisfied: and ſhewed, that 54 l. was behind in the life of B. and unpaid, and that therefore he diſtreyned. It was moved, That the Rent behind in the life of B. did not belong to the Wife as Adminiſtratrix, but in her own right. But it was anſwered, That ſhe might diſtreyn in her own right, and ſo the Conuſans good, as Bayly to her. Then Exception was taken, That it was not averred, That the Rent was demanded before the diſtreſs, as it ought to be by the expreſs words. To that it was ſaid, That the Clauſe of diſtreſs is no otherwiſe to be extended then as the Grantor gives it; and therefore if the clauſe were, That if the Rent be behind, being demanded at another place beſide the

Land, or of his perſon, then he may clearly diſtreyn, without ſuch demand firſt made; for there the demand is no other then the Law requires. But where the clauſe is no more but if the Rent be behind, being lawfully demanded, then he may diſtreyn, for it is no more then the Law ſpeaks, and therefore the diſtreſs implying a demand, and a diſtreſs one before the other, by operation of Law, ſatisfies it; but if he would have diſtreyned for the pains, he muſt have made an actual demand at the end of the ten dayes, for then it grew due. Trin. 15 Jac. in B. R. *Brown* and *Danneryes* Caſe. *Hob.* 208.

5. In an account brought againſt J. D. upon the Receipt of 200 l. by the hands of J. S. for 200 l. The Defendant pleaded he was not Receiver to render account. It was found by Verdict, That J. S. was endebted to the Plaintiff in 200 l. and that the Plaintiff required the Defendant to demand the ſaid 200 l. and that the Defendant required J. S. to pay it, and J. S. upon requeſt to him made, deſired the Defendant to borrow 200 l. of any perſon, and to pay the Plaintiff; and he thereupon borrowed 200 l. of one B. and received it of him to pay over to the Plaintiff; and J. S. gave Bond to B. for the payment of it, and the Defendant appointed his Wife to pay it over to the Plaintiff. In this Caſe it was adjudged by the whole Court, That the Action was well brought againſt the Defendant, for that the Defendant took upon him aſwell to be ſervant to the Plaintiff to ask, and receive the 200 l. of J. S. as to J. S. to borrow where he could the 200 l. and that not only with an intent to pay it over to the Plaintiff, but with an expreſs Commiſſion, to pay it over. So that although B. lent the money to be paid over to the Plaintiff. Yet it is found, That the Defendant received it as lent to J. S. whereby it became J. S. his money, and the rather, when he had given Bond for it. And ſo Judgment was given, That the Defendant was a Receiver. And in that Caſe, it was agreed for Law by the Juſtices, That if A. deliver money over to B. to deliver and pay over to C. That in ſuch Caſe, B. is anſwerable to two Actions of Account conditionally. Hill. 10 Jac. in C. B. *Harrington* and *Deans* Caſe. *Hob.* 36.

6. That the Law conſtrueth thus according to common Intendment, or poſſibility: As if a Diſcent be caſt when the Diſſeiſee is out of the Realm, albeit he be not there in the Kings Service, that Diſcent ſhall not take away the entry of him that hath right, becauſe he who is out of the Realm, cannot by Intendment have knowledg of the Diſſeiſin, no more then a thing done out of the Realm can be tryed by a Jury of 12 men; but otherwiſe it is, if ſuch Diſſeiſee were within the Realm at the time of the Diſſeiſin, or the Diſcent caſt. *Cook* 1. Part, *Inſtitutes* 261.

7. The Husband and Wife levy a Fine of Land, whereof they are ſeiſed in the right of the Wife; and the Husband only declares the uſe of the Fine, this Declaration ſhall bind the Wife, if her diſaſſent appear not. For when ſhe joyns with her Husband in the Fine, it ſhall be intended (if the contrary appear not) that ſhe joyned with him in agreement for the Declaration of the uſes of the ſaid Fine. So if the Husband and Wife ſell the Lands of the Wife for money, by word, and afterwards levy a Fine to the Vendee of the ſame, and his Heirs, this ſhall bind the Wife without any writing, proving her aſſent. *Cook* 2. Part, 57. in *Berkwiths* Caſe.

8. A. ſeiſed of Lands in Fee, by Indenture Inrolled, Covenants with B. That if B. ſhall pay to A. his Heirs or Aſſigns 100 l. ſuch a day at ſuch a place, that then A. and his Heirs ſhall ſtand ſeiſed of the Lands to the uſe of B. and his Heirs: Before the day of payment, A. having Iſſue a Son, makes his Will in Writing, and his Wife Executrix thereof, and dyeth, the Wife renounceth the Executorſhip, and then takes Letters of Adminiſtration. In this Caſe, it was Reſolved, That this word (Aſſigns) ſhall be only intended of the Aſſigns of the Eſtate of A. for he hath an Eſtate in him aſſignable; and the Law will never ſeek an Aſſignee in Law, when there may be an Aſſignee in fact. But if A. in ſuch Caſe had made a Feoffment in Fee upon Condition, That the Feoffee ſhall pay the money to the Feoffer, his Heirs, or Aſſigns, &c. there, becauſe he hath departed with the whole eſtate in Fee, and hath but a naked condition, which cannot be aſſigned over; the Law, which never rejects any word, will make conſtruction what perſon ſhall be moſt apt (as aſſignee in Law) to receive the money, and thoſe the Law adjudgeth to be his Executors, becauſe they repreſent the perſon of the Teſtator for all goods and Chattels, and in ſuch Caſe, the Feoffor cannot have any Aſſignees in *fait*. *Cook* 5. Part, 96. in *Goodalls* Caſe.

9. If Lands, of the value of 3 l. *per annum* be deviſed to A. and that A. ſhall pay out of it 50 s. *per annum*: In this Caſe, it was holden, That A. hath but an Eſtate for life, for that he may pay it out of the profits of the Land, and is ſure to be at no loſs. But if it be deviſed to B. for life, the Remainder to A. paying 50 s. *per annum* out of it, in that Caſe, A. hath a Fee-ſimple, becauſe after the payment thereof, A. may dye before he can receive ſatisfaction for the ſame out of the profits of the Lands; and therefore ſuch a Deviſe ſhall be a Feeſimple, becauſe the Law intends, That the Deviſe was for his benefit, and not for his prejudice. *Cook* 6. Part, 16. in *Colthyers* Caſe.

10. C.

10. C. and *Eliz.* were Divorced in the Court of Audience, *ratione ætatis minoris* of E. after they had lived 10 years together, and had Iſſue a Daughter. Afterwards C. marrying another Wife, by another ſentence in the Eccleſiaſtical Court, the firſt marriage was declared void, and the ſecond good, and liberty given them *ad exequenda conjugalia obſequia*. The ſecond Wife dyed. C. married a third Wife, and had iſſue another Daughter. The laſt Daughter is found Heir by Office, the firſt Daughter traverſeth the Office in the Court of Wards. In this Caſe, it was Reſolved, That although in truth the firſt was a lawful Marriage, yet the ſentence of Divorce being in force, no averment could be admitted againſt it, becauſe the Spiritual Judg having Juriſdiction thereof before the ſentence was repealed, it was intended by Law to be juſt, and our Law gives credence to it. *Cook* 7. Part, 43. *Kenns* Caſe.

11. In an *Ejectione firme* at the Common Law, Auncient Demeſne is a good plea to the Juriſdiction of the Court, becauſe by common intendment, the right and title of the Land will thereby come in debate: and where the realty comes in debate, it ſhall be but reaſon, That thoſe who beſt know to try it, and determine it, ſhall have Conuſans of it, otherwiſe the Auncient Priviledges which are much favoured in Law, ſhould be taken away. And ſo it is in a Replevin, Writ of Meſne, Writ of Ward; Account againſt Guardian in Socage. Auncient Demeſne is a good Plea for the appearance and common intendment, that the realty will come in debate. *Cook* 5. Part, 105. *Aldens* Caſe.

12. The Guardian ſhall have the Cuſtody of the Land untill the Heir come to his full age of 21 years, becauſe by Intendment of Law, the Heir is not able to do Knights Service before that age, which is grounded upon apparent reaſon.

13. The Law conſtrueth things according to the Original cauſe, and the beginning of them: And therefore if Lands be given to a man and a Woman in ſpecial tail, and they are Divorced *cauſa præcontractus*, both ſhall hold the Lands for their lives. But in Caſe of Frankmarriage, if they be Divorced, the Woman ſhall have the whole Land, becauſe ſhe was the cauſe of the gift. So if Lands holden in Socage be given in ſpecial tail, and the Donees dye, the Iſſue being within the age of 14 years, the next of kin of the part of the Father, or of the part of the Mother, which can hap the Cuſtody, ſhall have it, but in Caſe of Frankmarriage, the Heir of the part of the Mother ſhall have it, becauſe ſhe was the cauſe of the Grant. *Cook* 1. Part, *Inſtitutes* 21. and 88.

14. When divers accidents are requiſite to the conſummation of a thing, the Law hath more reſpect to the beginning and Original cauſe, then any thing elſe: And therefore if a man preſents to another mans Church in the time of War, and the Preſentee be Admitted, Inſtituted, and Inducted into the Church in the time of Peace; yet the Law gives ſuch regard to the Original Act, *ſcil.* the Preſentation, that all which follows thereupon, although it be done in the time of Peace, ſhall be avoided. 6 E. 3. 41. *Cook* 2. Part, 93. in *Bingbams* Caſe. *Cook* 1. Part, 106. in *Shellyes* Caſe, acc.

15. If the Son purchaſeth Lands, and lets the ſame to his Father for Term of years, the Father enfeoffs another in Fee, and binds himſelf and his Heirs to Warranty, the Father dyes, by which the Warranty diſcends upon the Son; yet this Warranty ſhall not bar the Son from his entry, or Recovery in an Aſſiſe, becauſe this Warranty begins by Diſſeiſin. So if the Father, or any other Anceſtor be Tenant at Will, Tenant by *Elegit*, Statute Merchant, or Staple, and make a Feoffment in Fee with Warranty, as aforeſaid, ſuch Warranty ſhall not bar, becauſe it commenceth by Diſſeiſin; and the Law looks upon the firſt and Original cauſe. *Cook* 4. Part, 37. *Terringhams* Caſe.

16. A. brought Covenant againſt B. for not repairing of a houſe. The Defendant pleaded an accord betwixt him and the Plaintiff, and Execution of it; upon which the Plaintiff demurred in Law, It was objected in this Caſe, That this Covenant being founded upon the Deed, could not be diſcharged, but by matter of as high nature, *viz.* by Deed, and not by any Accord or matter in *pais*. But it was Reſolved, That the Plea of the Defendant was good. For it was ſaid, There is a difference when a duty accrues by the Deed in certainty, *tempore conſtitutionis*, as by Covenant, Bill, Obligations to pay a ſum of money; here this certain duty takes his eſſence and operation Originally only from the writing, and therefore ought to be avoided by a matter of as high nature; but when no certain duty accrues by the Deed, but a wrong or default ſubſequent, doth give an Action to recover damages, which are only in the perſonalty, for ſuch wrong or default Accord with ſatisfaction, is a good Plea. *Cook* 6. Part, 43. *Blakes* Caſe.

17. If a Clerk be Preſented to a Biſhop to be admitted unto a Benefice, and he refuſeth him upon pretence of inſufficiency, or other defect. In a *Quare Impedit* brought, the Biſhop ought to alledg ſome particular crime why he did not admit him, and cannot alledg generally, *quod non eſt idoneus*, or *quod eſt Criminoſus*, or *Sciſmaticus inveteratus*: For although it doth not belong to the Kings Courts to determine of Schiſms, or Hereſies: yet the Original cauſe of the Suit being matter whereof the Kings Court hath Conuſans, the cauſe of the Schiſm or Hereſy for which the Preſentee is refuſed, ought to be alledged in certain,

to the intent that the Kings Court may conſult with Divines to know whether it be a Schiſm or not; and if the party be dead, the Kings Court may direct the Jury which is to try it. *Cook* 5. Part, 58. *Specots* Caſe.

18. Note, It is ſaid, That neither *Cælum* or *ſolum*; but it is *Legiantie, et Obedientia*, which makes one to be a Subject born. For, if Enemies come into the Realm, and poſſeſs a Town, or Fort, and have Iſſue there, that Iſſue is no Subject to the King of *England*, although he be born upon his Soil, and within his Kingdome, becauſe he was not born under the Allegiance of a Subject, or under the Protection of the King. And therefore when *Stephano Ferrara de Gama*, and *Emanuel Lewes Tinoco*, *Portugales* born, comming into *England* under Queen *Eliz.* ſafe conduct, and living here under her Protection, joyned with Dr. *Lopez* in Treaſon in this Realm againſt the Queen. In that Caſe, two points were Reſolved. 1. That the Indictment ought to begin, That they intended Treaſon *contra Dominam Reginam*, omitting theſe words (*naturalem Dominam ſuam*) and ought to conclude *contra legiantiæ ſuæ debitum*. But if an Allien Enemy come to invade this Realm, and be taken in War, he cannot be Indicted of Treaſon, for the Indictment cannot conclude, *contra legiantiæ ſuæ debitum*, becauſe he never was in the Kings Protection, but ſuch Enemy ſhall be put to death by Marſhal Law. *Cook* 7. Part, 6. in *Calvins* Caſe.

19. A Barroneſs in her Widdowhood, retain'd one C. to be her Chaplain, who according to the Statute of 21 H. 8. purchaſed a Diſpenſation to have Plurality; and before Preſentment, the Baroneſs took to Husband the Lord *Compton*, being a Baron of the Realm; and afterwards the Chaplain was Admitted, Inſtituted, and Inducted into a ſecond Benefice; and the Queen brought a *Quare Impedit*. In this Caſe, it was Reſolved, That the Chaplain after the ſecond Marriage, might accept the ſecond Benefice, for the Retainer was not countermanded by the entermarriage; and it is not requiſite that ſhe be Widdow at the time of the acceptance of the ſecond Benefice; and the power of purchaſing of Licenſe, is annexed to the Retainer; and although that Husband and Wife are one perſon in Law, yet it is not reaſon that her Retainer of a Chaplain to inſtruct her Soul, ſhould be countermanded by that entermarriage: And in that Caſe, If the Husband had dyed after the marriage, yet the Retainer of the Chaplain by the Baroneſs, was good; for that the Law had a reſpect to the Original Cauſe. *Cook* 4. Part, 117, 118, *Actons* Caſe.

20. The Law conſtrues things, *ſecundum æquitatem rationis*. If two men, 4 Eliz. joyn in a Recognizance, being ſeverally ſeiſed of Lands, all the Lands muſt be equally charged. So upon a Recognizance acknowledged by the Auncеſtor. Or if a Judgment be given in an Action of Debt againſt him, if he dye ſeiſed of two Acres of Lands, whereof the one is holden in Borough English, or having Iſſue two Daughters who make Partition. Or if he dyeth without Iſſue, whereby part of his Lands diſcendeth to the Heir of the part of the Fathers ſide, and a part to the Heir on the part of his Mother: In all theſe Caſes, if one only be charged, he ſhall have contribution againſt the other, becauſe they are in *æquali jure*. *Cook* 3. Part, in Sir *William Herberts* Caſe.

21. If a man, ſeiſed of divers Lands, of ſome in Feeſimple, and of the reſt in Tail; makes a gift in tail, or a Leaſe for life, or years of all, reſerving a Rent, and dyeth: In this Caſe, If the Iſſue in tail avoid the Leaſe, or gift, as to the entailed Lands, the Rent ſhall be apportioned; for ſeeing the Rent is reſerved out of, and for the whole Land, the Law ſaith, That when part thereof is evicted by an Eigne Title, That the Donee or Leſſee ſhall not be charged with the whole Rent, but that it ſhall be apportioned according to the value of the Land. *Litt.* Sect. 222. *Cook* 1. Part, *Inſtitutes*, 148. acc.

22. A man is indebted to A. and B. in 100 l. and afterwards he becomes Bankrupt, and a Commiſſion is awarded under the Great Seal, according to the Statute of 13 Eliz. to C. and D. to make ſale of the goods to the Creditors; afterwards the Bankrupt gives all his goods to another Creditor, for the payment of his debt, and afterwards the Commiſſioners ſell the goods joyntly. It was adjudged, That the ſale by the Commiſſioners was good, and according to the Statute; for the intent of the Statute was to relieve the Creditors equally, and that there ſhould be an equal and rateable proportion obſerved in the diſtribution of the goods to the Creditors; and ſuch a conſtruction is made by the Common Law, and divers Statutes, That every one ſhall be in *æquali jure*. A man ſeized of three Mannors, holden of three ſeveral Lords by Knights Service, (each Mannor being of equal value:) He cannot by the words of the Statute of 32 H. 8. Deviſe two Mannors, and leave the third Mannor to Diſcend; but he ought to deviſe but two parts of each Mannor, ſo as there ought to be equality: *Cook* 2. Part, 25. The Caſe of Bankrupts.

23. If a man make a Charter of Feoffment of an Acre of Land, to A. and his Heirs, and alſo another Deed of the ſame Acre of Land to A. and the Heirs of his body; and deliver and ſeizin according to the effect of both Deeds: In this caſe he cannot take a Fee-ſimple only, becauſe Livery was made according to the Deed in fact, as well as to

to the Charter in Fee: Neither can the Livery enure only to the Deed of an Eſtate Tail, with a Fee-ſimple expectant, becauſe Livery is made as well upon the Deed in Fee ſimple, as upon the Deed in Tail: But in that caſe it ſhall enure by moyties, *viz.* to have an Eſtate Tail in the one moytie with the Fee expectant, and a Fee ſimple in the other moyty, and ſo the Livery ſhall work immediately upon both the Deeds. *Cook* 1. Part, *Inſtitutes*, 21.

24. If a man be ſeized in Fee, or in Tail, of three Acres, each Acre of equal value, and dyes; and the Heir endowes the Wife of the third Acre; and afterwards the Wife is Impleaded by one that hath Title Paramount, and ſhe voucheth the Heir: In this caſe ſhe ſhall not recover according to her loſs, but only the third part of the two Acres which remain; for by the Law ſhe ought to have but the third part of that which her husband might keep and enjoy by good Title *Cook* 4. Part, 122. in *Buſtards* Caſe.

25. Tenant of the King of Lands in Knights Service, Conveyeth half his Land for the Joynture of his Wife that ſhall be; and after the marriage, he demiſeth the other moyty for years, for the payment of his debts and legacies, and deviſeth 1000 l. to his younger children. In this Caſe it was Reſolved, That for as much as the advancement of his Wife is within the Statute of 27 H. 8. as the payment of his debts, and the preferment of his children; and for that the operation of that Statute doth principally take effect by the death of the Kings Tenant, for that cauſe, although the Eſtate of the Wife hath the Precedency, yet the Kings third part ſhall be taken equally out of both thoſe halfs, and not out of the half demiſed only: And ſo it was Reſolved. Mich. 42 Eliz. in *Kynding* and *Savages* Caſe. *Cook* 8 Part, 173. *Virgil Packers* Caſe.

26. A Parſon of a Church, and A. be Tenants in Common of a Wood; A. endeavoureth to commit waſte in the Wood; The Parſon for preſervation of the Timber-Trees, ſhall have a Prohibition againſt him that he ſhall not make Waſte; and the reaſon thereof is, becauſe if the Parſon of a Church will waſte the Inheritance of the Church to his private uſe, the Patron may have a Prohibition againſt him, for the Parſon is ſeized in the Right of the Church, and the Glebe is the Dower of his Church, for thereof he is ſaid to be endowed; and therefore, for as much as a Prohibition lyeth againſt him, it is but reaſon that he ſhall have like remedy againſt him who holds in common with him. See *Fitzh. Nat. Br.* 49. *Cook* 11. Part, 49. in *Liſords* Caſe.

27. The Law conſtrueth things to the beſt. If an Abbot who holds in Frankalmoigne together with his Covent, alieneth the Lands to a ſeculas perſon, the Alienee cannot hold as they held, *ſcil.* in Frankalmoigne: yet becauſe of neceſſity he muſt hold of ſome perſon, and by ſome ſervice, the Law in ſuch caſe creates a Tenure, and appoints him the eaſieſt Tenure; that is, *viz.* to hold the Land of the Lord by Soccage Tenure only, and Fealty, which is incident to every Tenure. So if there be Lord Meſn and Tenant, and the Tenant is an Abbot who holds of the Meſne in Frankalmoigne: In that Caſe, if the Meſne dyeth without heir, and the Menalty eſcheats to the Lord Paramount, the Abbot ſhall hold of the Lord Paramount by Fealty only, becauſe he cannot hold of him in Frankalmoigne. *Cook* 1 Part, *Inſtitutes*. 98, 99. acc.

28. If a man make a Leaſe to A. for the life of B. and afterwards releaſeth to A. all his Right in the Land, by this A. hath an Eſtate in the Land for his own life; for a Leaſe for the term of his own life, is higher and better in the Judgement of Law, then an Eſtate for the life of another man: So if a Releaſe be made to Tenant by Statute Merchant *Elegit*, by him in the Reverſion of all his right in the Land, by this a Freehold paſſeth to him for the Term of his life; for that is the beſt and greateſt Eſtate that can paſs, without the words of Inheritance, *viz.* Heirs. *Cook*, 1 Part *Inſtitutes*. 273.

29. Queen *Eliz.* ſeized in Fee of a Reverſion expectant, upon an Eſtate Tail in the Lord *Staſford*, Granted it to T. in Tail, upon condition to have *prædictam Reverſionem* in Fee. It was Reſolved in that Caſe, That the words *prædictam Reverſionem*, ſhould not be conſtrued to extend to the Eſtate Tail, Granted before to T. but to the Reverſion in Fee. *Cook* 8. Part, 77. The Lord *Staſfords* Caſe.

30. Note, It was Ruled to be the courſe in the Kings Bench, That although the Defendants Bail be taken, and Entred, but the laſt day of the Term, and the Bill be put in any time before in that Term, it is good enough; yet from the time of the Bail, the Defendant is anſwerable, as in *Cuſtodia Mariſchalli*, and not before, in ſtrictneſs of Law. Trin. 12 Jac. in B. R. The Lady *Plaee* and *Plawmers* Caſe. *Hob.* 70.

3. *Where*

3 *Where the Law favoureth Common right, publique quiet; Poſſeſſion where right is, Certainty, Things done in truth, and for the Commonwealth, and for publique Trade and Commerce, much more then things done to the contrary.*

1. THe Plaintiff in a Writ of *Meſne* made his Title by Preſcription, that the Defendant and his Auncеſtors had acquitted the Plaintiff and his Auncеſtors, and the Terr-Tenant of the Land time out of mind, &c. the Defendant took Iſſue, That the Defendant and his Auncеſtors had not acquitted the Plaintiff and his Auncеſtors, and the Terr-Tenant. By a Special Verdict it was found, That the Grandfather of the Plaintiff was enfeoffed by one A; and that A. and her Auncеſtors was acquitted by the Auncеſtors of the Defendant time out of mind before that time; ſince which time, the Acquittal had been. It was adjudged in that caſe, and afterwards affirmed in a Writ of Errour, That the Plaintiff ſhould recover his Acquittail; for that there was once a Title of Preſcription veſted: which cannot be taken away by a wrongful Ceſſer to acquit of late time: And in that caſe, although the Verdict found againſt the Letter of the Iſſue; yet becauſe the ſubſtance of the Iſſue was found; *ſcil.* a ſufficient Title by Preſcription. It was adjudged (as before) for the Plaintiff. *Cook* 1. Part, *Inſtitutes*, 114.

2. In a Prohibition, a *Modus Decimandi* was alledged time out of mind for Tythes of Lands, and thereupon Iſſue was joyned; and the Jury found, That before 20. years laſt paſt, there was ſuch a Preſcription, and that for 20 years he had payed Tythe Lamb in *ſpecie*. It was ſaid in that caſe, 1. That the Iſſue was found againſt the Plaintiff, for that the Preſcription was general for all the time of the Preſcription, and 20 years did faile thereof. 2. That the party by payment of Tythes in *ſpecie*, had waived the Preſcription. But it was adjudged for the Plaintiff in the Prohibition; for although the *Modus Decimandi* had not been paid by the ſpace of 20 years, yet the Preſcription being found, the ſubſtance of the Iſſue was found for the Plaintiff. And if a man hath Common by Preſcription, and taketh a Leaſe of the Land for 20. years, whereby the Common is ſuſpended. It was holden, That after the years ended, he may claim the Common generally by Preſcription; for that the ſuſpenſion was but to the poſſeſſion, and not to the right, and the Inheritance of the Common did alwayes remain: and when a Preſcription or Cuſtome doth make a Title of Inheritance, the party cannot alter or waive the ſame *in pais* Mich. 44 Eliz. in B.R. *Nowell* and *Hicks* Caſe. See 10 Jac. in C. B. *Cowper* and *Andrews* Caſe. *Hob.* 37,38. acc.

3. If the Diſſeiſee entreth upon the Heir of the Diſſeiſor, (which Entry is a Diſſeiſin) and the Heir bring an Aſſiſe, or a Writ of Entry in the nature of an Aſſiſe, he ſhall recover: But if the Heir bringeth a Writ of Right againſt the Diſſeiſee, he ſhall be barred, becauſe in the Writ of Right, the Charge of the Grand Aſſiſe upon their Oath, is upon the mere right, and not upon the poſſeſſion: and yet (in that caſe) the Heir in Aſſiſe, or a Writ of Entry, &c. may regain the poſſeſſion from the Diſſeiſee; and yet that the Diſſeiſee ſhall revive his auncient right, and thereupon again may regain the poſſeſſion of the Land from the Heir in a Writ of Entry in the *Per*, for the Diſſeiſin made unto him by the Auncеſtor of Heir, or otherwiſe he may recover it in a Writ of Right. *Cook* 1. Part, *Inſtitutes*, 266. 2. acc.

4. Note; where the right is equal, there the Law favoureth the poſſeſſion: And therefore if Lands which are holden in Soeage, are given to a man and the heirs of his body, and he dyeth his Heir within the age of 14. years, the next Coſen of the part of the Father (although he be the worthier) ſhall not be preferred before the next Heir of the part of the Mother, but ſuch of them as firſt ſeizeth the Heir, ſhall have the Cuſtody of him. See *Plow. Com. Carell's* Caſe. *Cook* 1. Part, *Inſtitutes*, 88.

5. Note. It is ſaid, That Seiſin by Incroachment ſhall be avoided in an Aſſiſe, or *Ceſſavit*, but not in Avowry. And if the Lord diſtrain for Rent due, and the Incroachment, the Tenant may tender the whole Rent which is due, and make Reſcous, if the Lord will not accept of it: but if the Lord encroach more Rent then he ought to have by Coertion of Diſtreſs, and not upon voluntary payment, the Lord ſhall avoid the ſame Seiſin in Avowry: But if the Lord by voluntary payment of the Tenant happeneth Seiſin of more Rent, then he ought to have, In that caſe, the Law ſo favoureth ſeiſins and poſſeſſions, that the Tenant ſhall not avoid this Seiſin had by Incroachment in an Avowry. *Cook* 4. Part, 11. in *Bevill's* Caſe.

6. If a man declare upon a Statute, he muſt recite it truly; for mentioning the Statute, and miſ-reciting of it, cauſeth Errour, although as to the ſubſtance of his Declaration he might have omitted it: and the reaſon is, becauſe a Declaration muſt neceſſarily have two things: 1. Certainty, ſo as the Defendant may know to what to make

make Anſwer: and therefore when of neceſſity a Deed or thing certain muſt be ſhewed in a Declaration, it muſt be by no means omitted. 2. Verity, which ought to be joyned with the certainty; for if it appeareth to the Court, that falſhood is produced in the ſtead of truth, the party who ſheweth it, prejudiceth and hurteth himſelf thereby. See *Plow. Com.* 84. in *Partridge* and *Strange's* Caſe.

7. A Merchant obtained a Licence to him and his Aſſigns, to Import any Wines in any Ship or Veſſel beſides Engliſh, notwithſtanding the Statute of 4 H. 7. Cap. 10. In an Information brought againſt the Aſſignee of the Patentee, he pleaded the Letters Patents, and ſhewed his Aſſignment, but he produced not the Letters Patents in Court; and for that cauſe it was adjudged againſt him, That his Plea was inſufficient. 34 H.8. *Dyer*, 54. And ſee, that the Leſſee or Aſſignee of a Patentee ſhall not juſtifie his Eſtate, by producing only his Leaſe or Aſſignment; but he ought to ſhew the Original Letters Patents, or a true Copy thereof proved by oath, to the end the Judges and Jury ſeverally may give certain Judgment of the ſufficiency, or the inſufficiency thereof. See 28 H. 8. *Dyer*, 29. *Cook* 1. Part, *Inſtitutes*, 226. *Cook* 10 Part, 92. in Dr. *Layfield's* Caſe.

8. The Law favoureth things for the Commonwealth: And therefore it is ſaid, That of a Caſtle which is only maintained for the private uſe and habitation of the Owner, a woman may be endowed: But of a Caſtle which is only maintained for the neceſſary defence of the Realm, a woman ſhall not be endowed: And ſo it was adjudged in C. B; where in a Writ of Dower, the demand was, *de tertia parte Caſtri Hilderker in Com. Northumb.* which was a Caſtle for the defence of the Realm. And the words of the Statute of *Magna Charta, Cap.*7. ſcil. *Niſi domus illa ſit Caſtra*, is to be underſtood of a Caſtle for the neceſſary and publique defence of the Kingdom. *Cook* 1. Part, *Inſtitutes*, 31. And if a Caſtle that is uſed for the neceſſary defence of the Realm, diſcend to two or more Coparceners; this ſhall not be divided amongſt them in Rooms and Chambers, becauſe it is *pro bono publico, et defenſione Regni*: But Caſtles of habitation for private uſes, may be parted amongſt Coparceners as well as other houſes; and Wives thereof may be endowed. *Cook* 1. Part, *Inſtitutes*, 165.

9. A man may Juſtifie a wrong, which tends to the good of the Commonwealth: As in time of Warr, a man may juſtifie to make Bulwarks in the Lands of another man, without Licence: ſo a man may Juſtifie to pull down a houſe which is on Fire, for the ſafeguard of the Neighbouring houſes. And ſo the Sheriff may Juſtifie the purſuing of a Felon, into a houſe, and breaking of the houſe or door for the apprehending of him; for that all theſe are for the good of the Commonwealth. 29 H.8. *Dyer*, 36.

10. If the Tenant holdeth by Fealty and a Buſhell of Wheat, or a pound of Pepper, or the like. If the Lord purchaſeth part of the Land, there ſhall be an apportionment as well as if the Rent were in money; and yet if the Rent were by one grain of Wheat, or one Pepper Corn or other intire ſervice by purchaſe of part, the whole ſhould be extinct: But yet if ſuch an entire ſervice be *pro bono publico*; as Knights Service, Caſtle-gard *pro Defenſione Regni*; or to repair a Bridg, or to keep a Beacon, or to keep the Kings Records; or for the Advancement of Juſtice and Peace; Or to be High Conſtable of *England*; in ſuch caſe, although the Lord purchaſeth part of the Land, yet the entire ſervice doth remain. *Cook* 6. Part, 1. in *Bruerton's* Caſe. *Cook* 8. Part, 105. *Talbot's* Caſe. acc.

11. Note: It was Reſolved by the Juſtices, That Inhabitants of a Town, without any Cuſtome, may make Ordinances and By-Lawes for the repair of the Church, or of any High-way, or any the like thing which is generally for the good of the Commonwealth; and in ſuch caſe, the greater part ſhall bind the leſſe without any Cuſtome. And all Corporations may make Ordinances and Conſtitutions (without Cuſtome, or the Kings Charter) for things which concern the Commonwealth; as reparation of the Church, Common High-wayes, or the like. 44 E.3.19. 21 E.4.34. 21 H.7.20. *Cook* 5. Part, 63. in the Chamberlain of *London's* Caſe.

12. The Term being appointed to be kept St. *Albans*, a Conſtitution was made there for aſſeſſing of a ſum of money, for repairing of the Courts and other the neceſſaries for the ſaid Terme and every Inhabitant was enjoyned to pay his reſpective Aſſeſsment upon pain of Impriſonment. J. S. an Alderman (who conſented to the Aſſeſsment) refuſed to pay his proportion: Whereupon he being Impriſoned by the Mayor, brought an Action of Falſe Impriſonment, and had Judgment to recover, becauſe the Conſtitution was againſt *Magna Charta*; *Nullus liber homo impriſonetur*. But it was there Reſolved, That if the Conſtitution had been upon a pain of a reaſonable ſum of money, and diſtreſſe, or Action of Debt for the Recovery thereof, the Mayor might well have Juſtified the Diſtreſſe or Action, becauſe it was *pro bono publico*. See *Cook* 5. Part, 64. *Clark's* Caſe. *Cook* 8 Part, 127. b. acc.

13. An Ordinance was made by the Corporation of *Ipſwich*, That none ſhould exerciſe any Trade there, unleſſe he had ſerved 7. years as an Apprentice,

Apprentice in the ſame, and ſhould be approved by them to be skilful therein. It was holden, That ſuch Conſtitution was not good, becauſe it was againſt the Common Law, which reſtraineth no man from exerciſing any Trade; and alſo it was prejudicial to the Commonwealth; for that it put a greater reſtraint upon Tradeſmen, then the Statute of 5 Eliz. Ordained. *Cook* 11. Part, 54. The Taylors of *Ipſwich*'s Caſe.

14. If an Alien taketh a Leaſe for years of Lands, &c. Or being no Merchant, taketh a Leaſe for years of a houſe for habitation, upon Office found, the King ſhall have them: For although he be capable of ſuch a Leaſe, or Lands to him and his Heirs; yet upon Office found, the King ſhall have them by his Prerogative. But an Alien being a Merchant, may take a Leaſe for years of an houſe for his habitation, as incident to commerce; for without habitation, he cannot Merchandize or Trade: But if he be no Merchant, or being a Merchant, departeth the Realm, the King ſhall have the Leaſe; or if he dye poſſeſſed thereof, neither his Executors nor Adminiſtrators ſhall have it, but the King; for he had it only for his habitation as neceſſary to his Trade and Traffique. *Cook* 1. Part, *Inſtitutes*, 2.

15. Trin. 44 Eliz. The Grant of the ſole making of Playing Cards, was adjudged void, becauſe it reſtrained Trade and Traffique, which are the very life of every Commonwealth. *Cook* 8. Part, 125. in the Caſe of *London*. And the ſame reaſon is of all other Monopolies. *Cook* 11. Part, 87. in the Caſe of *Monopolies*.

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4. Where the Law hath more reſpect to Life, Liberty, Freehold and Inheritance; matters in the realty; matters of Record, and the ſubſtance of the matter: Then to poſſeſſions, Chattels, and things in the perſonalty, matters not of Record; or the Circumſtances of the matter.

1. IF a Villain be once enfranchiſed or manumitted, although he afterwards becometh ungratefull to the Lord in the higheſt degree; yet the manumiſſion and enfranchiſement remaineth good, and that by the Common Law *in favorem Libertatis*, wherein it differeth from the Civil Law: for *Libertinam ingratam Leges Civiles in priſtinam relignt ſervitutem: ſed Leges Angliæ ſemel manumiſſum ſemper Liberum judicant, gratum, et ingratum.* *Cook* 1. Part, *Inſtitutes*, 137.

2. The Law in general doth much tender the Liberty and Freedom of the Subject in general: And therefore if the Lord of a Mannor will preſcribe, that there is a Cuſtome within the Mannor, That every Tenant that marrieth his daughter to any man without the Lords Licence, ſhall pay a Fine to the Lord; this is adjudged to be a void Cuſtom to bind a Freeman: and therefore to claim ſuch a Cuſtome, will hold againſt Villeins, or men that hold in Villenage. *Cook* 1. Part, *Inſtitutes*, 139.

3. In an Appeal of Murder, the Defendant pleaded Not guilty, and was found guilty of Manſlaughter, and had his Clergy. Afterwards, he was Indicted of Murder, and thereupon arraigned at the Queens Suit, and he pleaded the former Conviction in the Appeal at the Suit of the party: It was adjudged by the Court, a good barr; and thereupon he was diſcharged: for it was a bar at the Common Law, which is not reſtrained by any Statute, becauſe the life of a man ſhall not be twice put in jeopardy for the ſame offence. Paſch. 35 Eliz. *Withered* and *Barleys* Caſe. *Cook* 4. Part, 40.

4. All acts which a man *Non Compos mentis* doth in a Court of Record concerning his Lands and Goods, ſhall bind him and all other perſons for ever; alſo all acts which he doth concerning his Lands and goods *in pais*, in ſome caſes ſhall bind him only during his life; and in ſome caſes they ſhall bind him for ever. But as for his life, the Law of *England* is, That he ſhall not loſe it, although he killeth a man, and thereby make him ſubject to be Indicted of Felony, or Murder. *Cook* 4. Part, 124. in *Beverleys* Caſe.

5. One Joynt-Tenant ſhall not prejudice his Companion as to any matter of Inheritance of Free-hold, but as to the Profits of the Free-hold the one may prejudice the other; for there is a Privity and Truſt between them: And therefore if one of them take all the profits of the Lands, or all the Rent, the other hath no remedy. *Cook* 2. Part. 68. in *Tooker*'s Caſe.

6. All Corporate Inheritances, which may be held under the word (Tenements), may be entailed within the Statute of Weſt. 2. *cap.* 1. And not thoſe only, but alſo all Inheritances iſſuing out of thoſe Inheritances, or concerning, or annexed, or exerciſed with the ſame, may be entailed, although they lye not in Tenure; as Rents, Commons, and other Profits going out of Lands, Uſes, Offices, Dignities; and the reaſon is, becauſe they ſavour of the Realty. But if the Grant be of an Inheritance meer Perſonal, or to be exerciſed about Chattels, and is not to be iſſuing of Lands, nor to be exerciſed conderning the ſame, ſuch Inheritances cannot be entailed, becauſe they ſavour nothing of the Realty. *Cook* 1. Part. *Inſtit.* 19.

7. 18. E. 3, 27. The Office of the keeping of the Church of L. may be entailed, and a *Formedon* will lye of it. 10 E. 4. 14. The Office of Marſhall of *England* was Intailed. 11 E. 4. 1. The Office of one of the Chamberlains of the *Exchequer* was entailed. 1 H. 7. 18. The Office of Fofterſhip was entailed. 19 H. 8. 3. an Uſe was entailed. The Name of Duke, Baron, Earl, Marqueſs, or other Name of Dignity, may be entailed. *Cook* 7. Part. 34. *Nevil*'s Caſe. But if a man grant to a man and the Heirs of his Body, to be Keeper of his Hounds, Maſter of his Horſe, they cannot be entailed; for that they are not iſſuing out of Lands or Tenements, but concern Chattels, and ſavour nothing of the Realty; and ſo is it of an Annuity, which only chargeth the Perſon, and concerneth not Land. *Cook* 7. Part. 33. 34. in *Nevil*'s Caſe.

8. An Eſtate of Free-hold or for life is a greater Eſtate in the Eye of the Law than any Leaſe for years, although it be a Leaſe for 1000 years, which is in Law but a Chattel; which is leſs favoured than Free-hold. *Cook* 8. Part. 70. *Whitlock*'s Caſe.

9. By the Common Law, and before the Statute of 32 H. 8. of Partition, Joynt-Tenants poſſeſſed of a Leaſe for years might have made Partition of it by word; but if they had been ſeiſed of an Eſtate of Inheritance or for life, they could not have made Partition without Deed. *Cook* 1. Part. *Inſtit.* 187.

10. Alſo the Law provideth greater ſafety and remedy for matters of Free-hold and Inheritance than for Chattels; for in perſonal Actions, as in Debt accompt the Bar is perpetual, becauſe the Plantiff cannot have an Action of higher Nature. But if a man be barred in a real Action upon Judgment by Verdict, Demurrer, or Confeſſion; yet he may have an Action of higher Nature, and the Barr is not perpetual, becauſe the ſame concerneth Free-hold and Inheritance; and therefore, If a man be barred in an Aſſiſe of *Novel Diſſeiſin*, yet he may have and maintain an Aſſiſe of Mortdanceſter, Writ of *Aiel*, or any other Writ which is of higher Nature. *Cook* 6. Part. 7. in *Ferrer*'s Caſe.

11. A. makes a Leaſe for years, upon condition, That if the Leſſee doth ſuch an Act, that the Leaſe ſhall be void, and after the Leſſor grants the Reverſion over, and then the Condition is broken: The Grantee of the Reverſion ſhall by the Common Law take advantage of the Condition, becauſe thereby the Leaſe is abſolutely void: But if a Leaſe for life had been made by A. upon ſuch a Condition, the Grantee of the Reverſion in ſuch Caſe ſhould not have taken benefit of the Condition broken, becauſe a Free-hold (whereof a *Precipe* lyeth) cannot ſo eaſily ceaſe, but is voidable by Entry after the Condition broken, which could not by the Common Law be transferred over to a Stranger. *Cook* 8. Part. 95. in *Manning*'s Caſe.

12. If Lands be given to Husband and Wife in Tail or in Fee, and the Husband dyes; the Wife in ſuch Caſe cannot deveſt the Free-hold out of her, by her ſaying, That ſhe will have nothing to do with the Land; and ſo if the Husband alliens the Land, and takes back an Eſtate to himſelf and his Wife in Tail; and the Husband dyes, and the Lords of whom the Land is holden by Knights Service, ſuppoſing that the Husband dyed ſole ſeiſed, aſſign Dower to the Wife which ſhe accepteth of; this refuſal of the Inheritance, and acceptance of the Dower, ſhall not deveſt the Free-hold out of the Wife; and the reaſon is, becauſe an Eſtate of Free-hold cannot be put out of a man by any verbal Waiver, Diſclaymer, or Diſagreement *in pais*, or otherwiſe than in a Court of Record: But a man may diſclaim or diſagree to an Intereſt in Chattels, in *pais*, and no ſuch diſagreement in a Court of Record is neceſſary. *Cook* 3. Part. 36. in *Butler* and *Baker*'s Caſe.

13. If Leſſee for years or a Copy-holder be ouſted, and the Leſſor or Lord be diſſeiſed, and the Diſſeiſor levyeth a Fine, and five years paſs; the Leſſor or Lord are barred by the firſt, ſaving in the Statute of 4 H. 7. becauſe preſently they might have had a real Action to have recovered the Land, and therefore if five years paſs before Entry or Claim they are barred; and a meer Stranger of his own wrong cannot enter in the name of him who hath Right, and avoid the Fine by Commandment precedent, or Aſſent ſubſequent, within the five years. *Cook* 9. Part. 106. in *Margaret Podger*'s Caſe, &c. But he who hath the Reverſion, or the Lord of the Mannor, may enter in the name of the Leſſee or his Copy-holder, aſwell to ſave the Inheritance as the particular Eſtates, becauſe they are privy in Eſtate, and that they may do without any Requeſt precedent, or Aſſent ſubſequent, and that is a lawful Entry within the Statute. Mich. 39 Eliz. in B. R. the Lord *Audley*'s Caſe, ibid.

14. Note, That a Claim or Diſclaim of an Eſtate in *pais*, and a Claim and Diſclaim upon Record in *pais* ſhall not hinder a Remitter; but a Claim and Diſclaim of Record ſhall, becauſe the one worketh a Concluſion, the other not; and therefore, If the Diſſeiſor letts Lands to the Diſſeiſee for years, who enters and diſclaims by word *in pais* to have any thing but the Leaſe for years in the Land; yet the Diſſeiſee is in his Remitter, notwithſtanding ſuch Diſclaimer *in pais*; but if he diſclaimeth in a Court of Record, that he hath not any Eſtate, but only ſuch an Eſtate for years, ſuch Diſclaimer in a Court of Re-

cord ſhall conclude him. *Cook* 1. Part. *Inſtit.* 364. acc.

15. Note, There is a difference between matters of Record done or ſuffered by an Enfant, and matters in fait: For matters in fait, he ſhall avoid either within Age, or at his full Age: But matters of Record, as Statutes Merchants, and of the Staple, Recognizances, acknowledged by him; and a Fine levyed by him, or a Recovery againſt him by default in a real Action, muſt be avoided by him, *viz.* Statutes, Recognizances, *&c.* by *Audita Querela*, and the Fine, and Recovery by a Writ of Error during his Non-Age; and the reaſon thereof is, becauſe they are judicial Acts, and taken by a Court, and before a Judge of Record. *Cook* 1 Part. *Inſtit.* 380.

16. If a Fine be levyed of certain Lands by a certain number of Acres to diverſe perſons, that they ſhall grant and render the Land again in Fee-ſimple, which ſhall be to certain Uſes; and the Fine is levyed of the Land, but there is ſome variance in the number of Acres compriſed in the Fine, or the Fine is levyed to one of the parties only, who grants and renders the Land, ſo as there is variance between the Covenant and Fine in the number of Acres and Perſon yet in this Caſe. It was adjudged, That the Fine ſhall be averred to be to the Uſes compriſed in the Indentures: For the Original bargain and agreement of the parties was declared by writing, and although there be ſome little variance found in quantity of Acres, perſon, time, or the like, or ſuch other Circumſtances: Yet the Law, which in common Conveyances hath great regard to the intent of the parties, and to the ſubſtance and effect of their original bargain and agreement, will permit an Averment to agree the Fine and the Indenture, notwithſtanding thoſe little Circumſtances of number of Acres, Perſon, *&c.* eſpecially when the party averrs, that there was not any new conſideration or new agreement betwixt the parties; but that the Fine was levyed according to the ſaid Indenture, and to the Uſes conteined in the ſame. *Cook* 2. Part. 76. in the Lord *Cromwell's* Caſe. *Cook* 5. Part. 26. in the Earl of *Rutland's* Caſe. acc.

17. When the King hath Right of Entry for default of Payment of a Quarters Rent, and by Office it is found, That more Rent is arrears than the Quarters Rent doth amount unto: Yet it is ſufficient for the King, when the Office hath matter of ſubſtance; for the ſole and ſubſtantial Poynt which makes the Breach of the Condition, is The not Payment of the Rent, or any part thereof; and it is not material when the Rent was Arrear, for if any part thereof be behind it is ſufficient. *Cook* 5. Part. 56. in *Knight's* Caſe.

18. An Obligation was made and drawn thus, *Ad quam quidem ſolutionem bene & fideliter faciendam, Obligo me per preſentes*, leaving out the words, *Sigillo meo ſigillat.*; and alſo the words, *In cujus rei Teſtimonium.* Yet it was the Opinion of the Court, That it was good enough if the Bond was Sealed, for that is the ſubſtance, and the other are but circumſtances. 28 H. 8. *Dyer* 19. *Cook* 2. Part, *Goddards* Caſe acc.

19. A Writ of Summons of Parliament was awarded, 1 *Mar.* and theſe words, *viz. Supremum Caput Eccleſiæ Anglicanæ* were omitted, contrary to the Statutes of 26. and 35 H. 8. Yet it was the Opinion of the Juſtices, That the Summons was good enough, becauſe thoſe words was but an addition of Circumſtance, and were not parcel of ſubſtance of the name of the King, and ſo it was Reſolved 1 Eliz. by all the Juſtices alſo, Paſch. 1 Ma. *Dyer* 98.

20. The Dean and Chapter of *Windſor* were Incorporated by Act of Parliament, 22 E. 4. by this name, *viz.* The Dean and Channons of the Kings Free-Chappel of S. *George* the Martyr within the Caſtle of *Windſor*; and in the time of Queen *Mary* they made a Leaſe of certain Lands by this name, *viz.* The Dean and Channons of the King and Queens Free-Chappel of S. *George* within the Caſtle of *Windſor*. In this Caſe there were three variances obſerved. 1. Becauſe it was named the King and Queens Free-Chappel; whereas it ſhould only have been named the Kings. 2. It ought to have been S. *George* the Martyr, whereas the word (Martyr) was omitted. 3. It was ſaid, *within the Caſtle*; whereas it ſhould have been *within the Kings Caſtle*. It was the Opinion of the Juſtices, That in this Caſe the firſt Exception was only material, and of ſubſtance; but the other two were only matter of circumſtance, and not material; and ſo for the firſt Exception the Leaſe was adjudged to be void. *Cook* 10. Part, 124. *Hall* and *Wingates* Caſe. Mich. 30 Eliz. Vouch. in the Mayor and Burgeſſes of *Lynns* Caſe.

21. A Corporation was Incorporate by the name, *Majoris & Burgenſium Burgi Domini Regis de Lyn Regis*; and it is granted to them, that they ſhall be called by the ſame name only, and not by any other name; and an Obligation was made to them by the name *Majoris & Burgenſium de Lyn Regis*, leaving the words (*Burgi Regis*) out of the Obligation. It was Reſolved in that Caſe, That the Obligation was good notwithſtanding that miſnoſmer; And it was holden, That it needs not that the name of the Corporation be in Grants or Conveyances *idem ſyllabis & verbis*, but it is ſufficient if it be the ſame *vero ſenſu*: And in the principal Caſe, the variance is only in ſyllables and

and words, and not in ſenſe, and in the thing it ſelf. And it was holden, That theſe words, *Burgenſes de Lyn Regis* implyed, that *Lyn Regis* is *Burgus*, for *Burgus & Burgenſes ſunt conjugata*; for of the Boroughs come the Burgeſſes: So as it was Reſolved, That the name in the Obligation, by matter apparent in it, did imply a ſufficient certain demonſtration of the true name of the Corporation; and where the true name of the Corporation, and the name in the Leaſe, Grant, or Obligation, are all one in effect, the ſame will much ſtrengthen the matter, although in the words there ſeems to be ſome ſhew of difference: But if the eſſential and ſubſtantial part of the name of the Corporation be omitted, or the Corporation miſtaken in any eſſential part of it, the ſame makes the Leaſes, Grants, and Obligations void. Mich. 10 Jac. in C. B. The Caſe of the Mayor and Burgeſſes of *Lyn Regis*, *Cook* 10 Part, 123, 124.

22. In Debt upon the Statute of 32 H. 8. for granting a Leaſe for years of Lands, whereof the Leſſor had a defective Title: The Plaintiff declared, That the Defendant had demiſed the Lands for Term of years, without naming how many years: Exception was taken to it, becauſe the number of the years were not expreſſed in certain: But it was the Opinion of the Court, That it was not neceſſary to expreſs the number of years, becauſe the Term was but conveyance to the ſum in demand; and then that which is nothing elſe but Conveyance, ought not to be ſo certainly ſhewed, as that which was matter of ſubſtance. Hill. 6. E. 6. *Plo. Com.* 81. *Strange* and *Partridges* Caſe.

More, The Law: And ſome Rules and Maximes of the Law; and ſome Caſes put upon the ſaid Rules and Maximes.

1. IN an Action brought for a Deceit: The Caſe was, ; A. being a common Carrier: The Defendant having a Load of Woad to be carried, came to A. and bargained with him for the carriage of it, from ſuch a place to ſuch a place; and by agreement, he was to give him 2 s. for every hundred weight; and the Plaintiff demanding how many hundred weight it did contain, he ſaid it was about 800 weight; A. giving credit to the Defendant, put it into his Cart, and by the hardneſs of his weight and draught, two of the Plaintiffs Horſes were killed; and then the Plaintiff did weigh the Woad, and found it to be 2000 weight; and for this deceit, by which he was much damnified, he brought his Action: All which matter being found, upon Not Guilty pleaded by the Defendant, It was the Opinion of the Court, That the Action did not lye, for that it belonged to the Carrier to have weighed it firſt; and it was his own default if his Horſes were killed with the weight of it, becauſe it was his default that he did not weigh it, and the Law gives no remedy for voluntary negligence. Trin. 13 Jac. in B. R. *Bayley* and *Merrels* Caſe. *Cro.* 2 Part, 386, 387.

2. In Debt upon an Obligation of 20 l. Judgment was obtained before the Mayor of N. and Execution had thereupon; and becauſe the Obligation was not quaſhed (as it ought to have been, the uſe then being ſo) the Plaintiff had Judgment in another Action upon the ſame Obligation; and the Defendant in pleading the firſt Judgment could not be relieved, becauſe it was imputed his negligence that he did not procure the Obligation to be cancelled upon the firſt Judgment. 17 E. 3. 24. *Cook* 6. Part, 45. in *Higgins* Caſe.

3. Upon a Suit in the Court of Admiralty, the Caſe was, A. was Owner of a Ship, and ſent her to *Spain*, and made W. Maſter of her, who upon the high Sea did borrow of B. 50 l. for the payment of which he pawned the Ship; and afterwards returning, and the Ship being in the River of Thames, B. by Warrant from the Admiralty, arreſted the Ship; whereupon A. the Owner came there, and claimed his propriety in her, denying that W. was Owner of it: And the Court there proceeded to Judgment againſt the Ship for his debt: and thereupon a Prohibition was awarded. In this Caſe, It was ſaid by *Hob.* Chief Juſtice, That the Court of Admiralty hath no power over any Cauſe of Land, and is only to meddle with things ariſing upon the high Sea: But yet he was of Opinion, That the Admiral Law was reaſonable; That if a Ship be at Sea, and take Leak, or otherwiſe want Victual, or other neceſſaries, whereby either her ſelf be in danger, or the Voyage defeated, That in ſuch caſe of neceſſity, the Maſter might pawn her for money, or other things to relieve ſuch extremities; for he is the perſon truſted with the Ship and Voyage, and therefore reaſonably might be thought to have that power given him: But he ſaid, That in the Principal Caſe, neither the Contract, nor the Impawning were alledged to be for any ſuch cauſe, nor was the Impawning ſaid to be at Sea; and therefore he was clear of Opinion, the Prohibition ſhould ſtand. But if the Cauſe had been within the Juriſdiction of the Admiralty, he ſaid, he would not prohibite them, becauſe they gave ſentence againſt our Law in this point of Impawning: for it ſhall be preſumed according to their Law: Hill. 11 Jac. in C. B. *Bridgmans* Caſe. *Hob.* 11, 12.

1. *De Minimis non curat Lex.*

1. THe Law favours Eſtate tailes in poſſeſſion, but gives no regard to remainders or Reverſions upon an Eſtate in Tail; Therefore if Tenant in Tail ſuffereth a common Recovery, that ſhall not only bar the Eſtate Tail, and the Remainder and Reverſion, but alſo a Rent which he in the Reverſion or Remainder hath Granted. *Cook* 6 Part, 42. in Sir *Anthony Mildmayes* Caſe: And ſee, That a Reverſion or a Remainder expectant, upon an Eſtate in Tail, ſhall not be Aſſets to the Heir in Debt upon an Obligation made by his Father. 12 Eliz. in B. R. *Tirling* and *Treffords* Caſe acc. So if there be Tenant in Tail, the Remainder to the right Heirs of J. S. and Tenant in Tail ſuffer a common Recovery, J. S. being then alive, this ſhall bar the Remainder, although it were in Abeyance, which the Law uſually favours: but *de Minimis non curet Lex.* Hill. 14 Eliz. in C. B *Copwoods* Caſe.

2. If a Keeper of a Park doth not attend on his Office, one, two, or three dayes, this is no forfeiture of his Office; but if in his default any Deer be killed, whereby a damage cometh to the Lord, the ſame is a forfeiture of it; And non-Uſer of it ſelf, without ſome ſpecial damage, is no forfeiture of private Offices; but the non-Uſer of Publique Offices, which concern the Commonwealth, or the Adminiſtration of Juſtice, is of it ſelf a cauſe of forfeiture of ſuch Offices. See *Cook* 1. Part, *Inſtitutes.* 233.

3. A man deviſeth a Rent of 10 l. *per annum*, out of his Mannor, to A. for life; and by the ſame Writ deviſeth the Mannor to B. for years: the Deviſor dyeth, the Leſſee for years pays the Rent to the Deviſee of the Rent, during the Term; the years expire; the Deviſee of the Rent demands it at the day, which is not paid, and thereupon brings an Aſſize. It was Reſolved in this Caſe, 1. That this payment by the Deviſee for years was not a ſufficient ſeizin to maintain an Aſſize againſt the Ter-Tenant after the years expire, in reſpect of the imbecility of the Eſtate of the Leſſee for years, which cannot prejudice nor draw in queſtion the Freehold. And 2. For that it ſhould be inconvenient, that he who had not a Freehold, ſhould give a Freehold; for then Tenant by Statute Merchant, *Elegit*, or other Owner of the Land might put the Lord in ſeiſin of a Rent, of which they never had any ſeiſin or poſſeſſion within the time of limitation, which ſhould be cauſe of Suits and Troubles. *Cook* 6. Part, 57. *Bredimans* Caſe.

4. If a Recovery be had againſt a man in a *Precipe* by default, when he is out of the Realm, he ſhall not avoid it by a Writ of Error, for ſo a man might be infinitely delayed of his Freehold or Inheritance, whereof the Law hath ſo great a regard; But Outlawry in a perſonal Action ſhall be avoided in that Caſe, becauſe otherwiſe he ſhould be without remedy, *& de minimis non curat Lex*; but in the other Caſe, the Tenant may reſort to his Writ of higher nature, or have a *Quod ei deforceat*, for his remedy. *Cook*, 1 Part, *Inſtitutes* 260.

5. A. brought an *Aſſumpſit* againſt B. and Declared, That B. had ſold him ſo many Oats, as according to the rate of 10 s. 9 d. for every Quarter, ſhall amount to 52 l. to be delivered ſuch a time; which money the Plaintiff promiſed to pay ſuch a time: And that the ſaid Oats, after ſuch a rate, came to 96 Quarters, and 6 Buſhels; which the Defendant hath not delivered, to his damage; Upon *Non Aſſumpſit*, it was found for the Plaintiff. Whereupon Error was brought, and Error aſſigned, That 96 Quarters and 6 Buſhels of Oats, after the rate aforeſaid, came to 52 l. and 3 farthings, and ſo no breach, becauſe he was not bound to deliver ſo many. But the Judgment was affirmed, both becauſe it was not certain whether it amounted to any more, and alſo becauſe it was not poſſible in effect to mince the meaſure ſo, as it ſhall hit the juſt ſum, as the odd hours were not mentioned in the year, *& de minimis non curat Lex*: Hill. 11 Jac. in the Exchequer Chamber, *Laſlow* and *Thomlinſons* Caſe, *Hob.* 80.

2. *Lex non Cogit ad Impoſſibilia, nec præcipit Inutilia.*

1. NOte, It was Reſolved by the whole Court, That where the Condition of an Obligation doth conſiſt upon two parts in the diſjunctive, and both are poſſible at the time of the making of the Obligation, and afterwards one becomes impoſſible by the Act of God, the Obligor is not bounden to perform the other, for the Condition is for the benefit of the Obligor, and ſhall be taken beneficially for him, and he hath election to perform the one or the other, for the ſaving of the penalty of his Bond, and ſo when one part becomes impoſſible by the Act of God, which by no Induſtry he could then perform, his Bond is ſaved. Trin. 37 Eliz. B. R. *Cook*, 5. Part, 22. *Laughters* Caſe.

2. A

2. A Copyholder in Fee ſurrendred to the uſe of J. S. and his Heirs, upon condition, That if he paid to the Mortgage 250 l. of lawful money of *England*, at the Manſion houſe of the Obligee, that the ſurrender ſhould be void: At the laſt inſtant of the day, the Mortgager tendered the whole ſum of money to the Mortgagee in a Bag, which he refuſed to accept of. It was Reſolved in that Caſe, amongſt other things, That the Tender was good, being made in convenient time, before the Sun was ſet, and that the tender of it in the Bag was good, if the true ſum was in it, and that without ſhewing and numbring of the money: And in that Caſe, It was holden by the Court, That if a man be bounden to pay 40000 l. at ſuch a day, if he tender it in Bags, it is ſufficient, for that it is not poſſible that it ſhould be numbred in one day. *Cook* 5 Part, 125. *Wades* Caſe.

3. If a man by Preſcription be bounden to repair a Wall *contra fluxum Maris*, and he keeps it in good Repair, and afterwards by ſudden Floods, the Wall is thrown down: It was holden in this Caſe, That by the Statute of 23 H. 8. the Commiſſioners of Sewers ought to tax all perſons which have any Lands or Tenements Common, of Paſture, or profit of Fiſhing, or who may have loſs or damage; to repair the Wall or Banks, according to the quantity of their ſeveral Lands, becauſe it was not through the default of him who ought to repair it, but it was by the Act of God, which the party was impoſſible to prevent, and therefore that in Law did excuſe him: But if it was by reaſon of any neglect of the party, that any default was in him, there if by his default the danger become inevitable, or that he be not able to repair it, ſo as the other Tenants are charged for the ſame, there an Action upon the Caſe lyeth by every ſuch Tenant againſt him who ought to repair the Wall: And ſo it is, if Tenant for life or years do not repair the Wall, for which cauſe the Land is drowned, or becomes impaſſible, it is waſte: But if the Land be drowned by ſudden violence of the Sea, which is the Act of God, the ſame is not waſte. *Et Lex non cogit ad Impoſſibilia. Cook* 10. Part, 139. in *Leighs* Caſe.

4. If there be Lord and Tenant by Rent-Service, and the Lord releaſeth unto his Tenant for ſo long time as J. S. hath Heirs of his Body, and 60 years paſs; and afterwards J. S. dyeth, without Heir of his Body: In that Caſe, although 60 years were paſt, ſo as the Lord could not have ſeizin of the Rent; yet in that Caſe it was holden, That he might diſtrain for the Rent-ſervice, becauſe it was impoſſible that he ſhould gain any ſeiſin of the Rent or Service within that time. *Et impotentia excuſat Legem. Cook* 4. Part, in *Bevils* Caſe.

5. The Lady M. Tenant for life of the Manner of B. the remainder in Fee to the Lady *Finch*, ſhe and S. her Husband, and D. levied a Fine to one of the Denizens, who grants and renders to B. for 50 years, the reverſion to C. and his wife, and their Heirs, with Proviſo in the Deeds which directed the Fine, that the Reverſioner ſhall Enter, and hold Courts: And it was averred, That this was known by the name of the Manner of B; D. maketh his Son of the age of three years, his Executor: Adminiſtration was committed to R. T; S. and his wife levie a Fine of all the Lands of the Wife in R. except the Manner of B. to the uſe of his Wife for life, the remainder to S; M. F. R. T. demiſe to P. L. for 13 years. The Lady M. dyeth; P. L. entreth by vertue of a Power and Revocation and Limitation of new uſes: S. with the aſſent of the Lady F. his Wife, limited the uſes to one who ouſted P. L. and maketh a Feoffment unto the uſe of the Lady F. for life, the remainder to H. F. in tail, P. L. re-enters, the Lady F. dyeth, and H. F. diſtrains for the Rent. In this Caſe, amongſt many other points, It was Reſolved, 1. That when the Reverſion is ſetled in any in Judgment of Law, and he hath no poſſible means to compel the Tenant to Attorn, and no Lacheſſe is in him, that in ſuch caſe he ſhall avow, and have an Action of Waſte without Attornment. That in this Caſe there was no Lacheſſe in the Conuſee to have Attornment, although he hath recited the particular eſtates in the Fine, for preſently after the Conuſans, and before the Fine engroſſed, the Reverſion paſſed to the Conuſee, *& eo inſtante*, was executed by the Statute of 27 H. 8. of Uſes; ſo as it was not poſſible to have a *Quid Juris clamat*, nor other remedy, to compel the Tenant to Attorn; and for as much as by the execution of the poſſeſſion to the uſe, the benefit of the Conuſee to have *Quid Juris clamat*, is taken away: and it was but reaſon that the Act of Parliament ſhould not turn to the prejudice of any; for *impotentia excuſat Legem*, and an Act in Law ſhall not prejudice any one. *Cook*. 6 Part, 63. Sir *Moyle Finches* Caſe.

6. Tenant in *Capite* dieth, his Heir within age, the Heir at his full age tendred his Livery, and was admitted to it; and within the time given him to proſecute his Livery, he bargained and ſold the Lands to another in Fee, and within that time alſo dyed. In this Caſe it was Reſolved, That when the Heir at his full age tendreth his Livery, that is all that the Heir can do, Then when he dyeth within the time given him to proſecute his Livery, ſo as the ſuing of it is become impoſſible by the Act of God, the Intereſt which the King had, is determined by the death of the Heir, and the Bargainee may enter and hold the Land, without any *Monſtrans de Droit*, or *Amoves Manum*. *Cook* 8 Part, 171. *Hales* Caſe.

7. In

7. In a *Quod permittat*, the Plaintiff Declared, That the Defendant erected upon his Free-hold, a Houſe ſo neer the Houſe of the Plaintiffs, *Quod pars ejuſdem Domus, ſuperpendit* the Houſe of the Plaintiffs *in Latitudine* 17. inches, and in length 17 Feet, *ad nocumentum lib. tent. ſui.* It was Objected in that Caſe, That the Plaintiff ought to alledge a Nuſance certain, ſo that the rain did fall from the Houſe newly erected, upon the Plaintiffs houſe, or that his Houſe was ſpoiled with the rain. But it was Reſolved, That the Plaintiffs in their Declaration needed not to alledge any ſpecial Nuſance, becauſe that in this Caſe, the Plaintiff had erected a new Houſe which hung over the Plaintiffs houſe, ſo that of neceſſity the rain which falls, muſt fall upon the Plaintiffs Houſe: *Et Lex non requirit verificari, quod conſtat Curiæ. Cook* 8. Part, 53. *Bottens* Caſe.

8. A man having three ſons by his Wife ſeiſed of Lands in Fee, in conſideration of Natural Affection, and to the end that the Tenements might continue in his Name, Covenanted by Indenture, That he and his Heirs would ſtand ſeiſed of the ſaid Lands, to the uſe of himſelf, for life; and after his deceaſe, to the uſe of his Wife for life; and after their Deceaſes, of the moyty to the uſe of his ſecond ſon in Tail, and of the other moyty of the third Son in Tail. It was Reſolved in this Caſe, That a Conſideration which ſtands with the Deed, and was not repugnant to it, might be averred. 2. Reſolved, That admit that another Conſideration then is expreſſed, might be averred, yet in this caſe, here is an expreſs Conſideration in it ſelf; for when he limits it to the uſe of his Wife for her life, the ſame implies a ſufficient conſideration in it ſelf, and needs not any averment; *Et manifeſta probatione non indigent. Cook* 7. Part, 140. *Bedells* Caſe.

9. If an Action upon the Statute of 32 H. 8. of buying of pretended Titles, be brought; if the Plaintiff ſheweth in his Declaration, that neither the Defendant, nor any of his Anceſtors, nor any other by whom he claims, were in poſſeſſion of the Land, &c. by the ſpace of a year, the Plaintiff in ſuch caſe need not aver the Title to be pretended; for the Statute it ſelf maketh the right of him which hath not been in poſſeſſion, to be pretended; and therefore to aver that which appears plainly by the Statute it ſelf, and by the Declaration, is vain and needleſs. See *Plow. Com. Strange* and *Partridges* Caſe. 87.

Note, It was Reſolved by the Court, That if the King be Tenant in Tail, by the Gift of any of his Anceſtors being ſubjects. That upon a Fine levied upon a Grant and Rendee he may bar the Eſtate Tail; and in ſuch Caſe, no averment by the Iſſue in Tail, *Quod partes finis nihil habuerunt*, ſhall be good: And it is reaſon, That if the King ſhall have benefit of the Statute of 4 H. 7. and 32 H. 8. And when the King claims in his Natural Capacity, *per formam Doni*, he ſhall be barred by the ſaid Act: But in that Caſe it was ſaid, It was neceſſary to have Letters Patents to Grant to the Conuſee that he may enter into the Land; for otherwiſe the fine being executory upon a Grant and Render, it might be doubted if the Conuſee without ſuch Grant, might enter upon the King. *Cook* 7. Part, The Caſe of Fine levied by the King, Tenant in Tail. 32.

10. The Cuſtome of *London* was ſet forth to be, That no perſon whatſoever, not being Free of the City, ſhall by any colour, way, or means whatſoever, directly or indirectly, by himſelf, or by any other, keep any ſhop, or any other place whatſoever, inward or outward, to put to ſale any Wares, or Merchandizes, by way of Retail; or uſe any Trade, Myſterie, or Handicraft, for hire, gain, or ſale within the City; upon pain of forfeiture for every time 5 l. In this Caſe, The City having ſet forth their Charter, It was Objected, That they had not averred the ſaid Conſtitution to be according to their Charter, the ſame conſiſting of divers miſchiefs and remedies, which ought to have been averred: But the Opinion of the Court was, That the Conſtitution there made, being agreeable to their Charter, and warranted by their Charter, the ſame needed not to be averred: And See, there No prize of money ſhall be expreſſed in the Writ, becauſe it appeareth of it ſelf, 46 E. 3. 16. So 11 H. 4. 17. If the Son within age bringeth an Aſſiſe of *Mortdanceſter*, he need not aver that it is within the time of Limitation, becauſe it appeareth to the Court. *Cook* 8. Part, 126. The Caſe of the City of *London*.

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3. *Expreſſio eorum, quæ tacitè inſunt, nihil operatur.*

1. A Poſſeſſed of a Leaſe for 15 years, of the Rectory of S. to which a Vicarage was Appendant, Granted the next avoidance of the Vicarage to B. if it ſhould become void during the ſaid term, and dyed Inteſtate; His Adminiſtrator ſurrendred the Rectory to him in the Reverſion, and then before the expiration of the ſaid term of 15 years, the Vicarage became void: It was Reſolved in this Caſe, That notwithſtanding the ſaid ſurrender, that B. ſhould have the next avoidance, becauſe the Limitation before *ſcil.* if it ſhould become void, imported no more then what the Law would

would have ſaid, if it had been omitted. *Cook* 8 Part, 145. in *Davenports* Caſe.

2. Queen *Eliz.* made a Leaſe for years, rendring Rent, payable at the Receipt of the Exchequer at *Weſtminſter, ſeu ad manus Baliorum, ſeu Receptorum*, with Condition to be void for non-payment of the Rent, and afterwards Granted the Reverſion, and when the Patentee ſhall demand the Rent, to take advantage of the Condition, was the queſtion. And in this Caſe it was Reſolved, 1. That if a Common perſon reſerve a Rent upon a Demiſe, he who will take advantage of the Condition for non-payment of the Rent, ought to demand the Rent at the place where it is limitted to be paid; for the payment of the Rent off from the Land, doth not alter the Quality of the Rent. 2. That if the King makes a Leaſe, rendring Rent with ſuch Condition, the King ſhall take advantage of the Condition, without any demand; but that is by his Prerogative, which is perſonal only: But if the King Granteth over the Reverſion, the Grantee or Patentee ought to demand the Rent upon the Land; and the limitting of the payment of the Rent at the Receipt of the Exchequer in the Kings Caſe, is no more then the Law would have Ordered, if no place at all had been named in the Patent; But Reſolved, That the Patentee ought to demand the Rent upon the Land; *Et expreſſio eorum quæ tacitè inſunt, nihil operatur. Cook* 4. Part, 72. *Boroughs* Caſe.

3. A Leaſe is made to two, for Term of their lives, *& diutius eorum viventi*, and afterwards they make partition, and the one dyeth, and he in the Reverſion entereth: It was holden, That his Entry was lawful, notwithſtanding thoſe words, *Et diutius eorum viventi*; for without thoſe words, ſo much was implyed in Law. 17 E. 3. *Hall's* Caſe. Upon which *Cook* obſerveth, That in caſe of a Leaſe for life, it is more beneficial for the Leſſee to have the Joynture ſevered, then to have it to continue; but otherwiſe it is in a Leaſe for years: for if a man makes a Leaſe for years to two, with a Proviſo, that if the Leſſee dyeth within the Term, that the Term ſhall ceaſe, the Leſſees make partition, or one alieneth his part, and dyeth, the Leſſee ſhall not enter into his part that is dead, but the Grantee, or the Executors of the Leſſee, ſhall have it: *Cook* 4. Part, 73. acc.

4. A. ſeized of Lands in Fee, deviſeth the ſame to Husband, and Wife, and a Stranger, *Habendum* to the Husband and Wife for their lives, the Remainder to the Stranger for his life, rendering, during their lives, yearly 40 l. rent at Mich. and our Lady; the Husband dyeth, afterwards A. by Indenture in Conſideration of 10 l. to him paid, Demiſeth, Granteth, and to Farm Letts, the ſame Lands to J. S. *Habendum* to him, from the day of the date of the Indenture, for 99 years, rendring and paying during the ſaid Term to J. S. &c. the yearly rent of 40 s. at the Feaſt of our Lady, and S. Mich. and the Wife did not Attorn. It was Reſolved in this Caſe, 1. That the words of [Demiſe and Grant] for conſideration of money, did amount to a Bargain and Sale of the ſaid Lands for years, and it ſhall be executed preſently, by the Statute of 27 H. 8. and that there needed no Inrolment of it, becauſe but a Term for years paſſed; and there needed no Attornment, becauſe it was executed by the Statute, and the intent of the parties was, that it paſs preſently, becauſe the rent was to be paid preſently, *Cook* 8 Part, *Edward Foxes* Caſe.

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4. *Quilibet poteſt renunciare juri pro ſe introducto.*

1. LOrd and Tenant by Fealty, and 20 s. Rent: the Lord by his Deed confirmeth the eſtate of his Tenant to hold by 12 d. This is a good diſcharge to the Tenant of all the other Services, and he ſhall render nothing to the Lord but what is compriſed in the Confirmation. For the Lord by his Confirmation to hold by leſs Services, hath abridged himſelf of the power and intereſt which was before lawfully veſted in him. *Litt.* 538. *Cook* 1. Part, *Inſtitutes* 305.

2. The Father ſeiſed of Lands in Fee, made a Feoffment to the uſe of his Son and Heir apparent, upon Condition. Afterwards the Father and the Son joyned in a Grant of a Rent-charge, the Condition was broken, and the Father entred: the Queſtion was, if the Father ſhould hold the Land charged. It was Objected, That the Grant of the Father was pleaded as a Confirmation, and a Confirmation cannot make an eſtate which is ſubject to a Condition, abſolute. But it was Reſolved, That the Charge was good. For it was Reſolved, That it is a Rule in Law, That all Lands in Feeſimple may be charged one way or other, and therefore when all thoſe who have Intereſt in the Land joyn in the Grant of the Rent; the Grant is good. *Cook* 1. Part, 146. *Anne Mayors* Caſe.

3. A man at this day, may give Lands to a Biſhop, Parſon, and their Succeſſors in Frankalmoigne by conſent of the King, and of the Lords mediate, and immediate, of whom the Lands are holden, becauſe *Quilibet poteſt renunciare juri pro ſe introducto*; And a Confirmation may be at this day to any Eccleſiaſtical perſon, to hold to him and his Succeſſors in Frankalmoigne, becauſe no new Service is reſerved. *Cook* 1. Part, *Inſtitutes* 98.

4. If

4. If a man make a gift in tail to one of Lands upon Condition, That he ſhall not make a Leaſe for three lives, or 21 years, which otherwiſe he might do by the Statute of 32 H. 8. this is a good Condition to reſtrein him from making of ſuch Leaſes. For notwithſtanding that the Statute doth give him power to make ſuch Leaſes; yet that power may be reſtreyned by his own agreement, becauſe the power is not incident to the eſtate, but is given him collaterally by the Act of Parliament. *Cook* 1. Part, *Inſt.* 203.

5. A. ſeiſed of two Mannors, enfeoffed thereof divers perſons, to the intent that they ſhould reconvey them to A. and B. whom he intended to Marry, and the Heirs of the body of A. A. and B. married, and had iſſue C. A. dyed, C. in the life of B. Tenant of the Freehold, ſuffered a common Recovery, with ſingle voucher, to the intent that the Recoverers make a Feoffment to uſes, which Feoffment and Releaſe with Warranty, were made accordingly. And whether the collateral Warranty was a bar unto the Demandant, who was Heir in tail, or was void by the Statute of 11 H. 7. cap. 20. was the Queſtion. It was Reſolved in this Caſe, amongſt other things, That when the Heir in tail conveyes the Land unto another, and the Releaſe or Confirmation of the Wife with Warranty, is but to perfect and ſtrengthen the eſtate which the Heir in tail hath made, ſuch a Warranty is not reſtreyned by the Statute of 11 H. 7. cap. 20. becauſe it ſhall be intended to his benefit, and not to his prejudice: And in this Caſe, it was ſaid, That the Wife with the Heir might have barred, the Eſtate tail by Fine, and then the Statute will not reſtrain the Warranty made by the Wife to him who hath the Land by the Conveyance of the Tenant in tail. *Cook* 4. Part, 60. *Lincolne* Colledges Caſe.

6. A man poſſeſſed of a houſe, and of half an Acre of Land for 5000 years, by his Will did Deviſe the ſaid houſe and Land to A. his Father for the Term of his life, and after his deceaſe, the Remainder of the ſaid houſe and Land to B. Siſter of the Deviſor, and to the Heirs of the body of B. and made A. his Executor, and dyed: A. proved the Will, and entred. B. took Husband, the Huſband and Wife at the requeſt of A. did Grant, Releaſe, Surrender, Aſſign, and yield up to A. the ſaid houſe and Land, with all their Right, Intereſt and Term in the Premiſes; *Habendum præt. durante reſiduo Termini dict.* 5000 years then to come. A. Deviſed the houſe and Land to C. for 10 years, the Husband dyed, B. took another Husband: A. dyed, the Wife and the ſecond Husband entred into the houſe and Land. It was Reſolved in this Caſe, That ſuch a poſſibility (as was in the Caſe at bar) might be extinguiſhed by Grant, or Releaſe to him who is in poſſeſſion, becauſe it is a Maxime in Law, That every Right, Title, or Intereſt *in præſenti, vel in futuro*, by the joyning of all thoſe who may claim any ſuch Right, Title, or Intereſt, may be barred, and here both conſent to it, the one in Releaſing, the other in accepting of it, therefore the Right of B. is extinct, and the Intereſt of A. which was determinable by his death, is by this Releaſe made abſolute during the Term. *Cook* 10. Part, 48. *Lampits* Caſe.

5. *Fortior eſt diſpoſitio Legis quam Hominis.*

1. If a Reverſion of Tenant for life be granted by Fine to another and his Heirs, and the Grantee before Attornment, dyeth without Heir, ſo as the Reverſion Eſcheats to the Lord. If afterwards the Tenant for life doth commit Waſte, the Lords ſhall have an Action of Waſte againſt him, although he never attorned to the Grant: and the reaſon is, becauſe the Lord is in by Eſcheat, which is a meer act in Law. So it is when the party is in partly by act of Law, and partly by the Grant of the party. As where the Conuſee of a Statute Merchant, or of the Staple extendeth a Seignory, or a Rent, he ſhall diſtrein without an Attornment, becauſe he is in by force of the Statute. And ſo it is if a man makes a Leaſe for life, or years, and afterwards levyes a Fine to A. to the uſe of B. and his Heirs, B. ſhall diſtrein, and have an Action of Waſte, although the Conuſee never had any Attornment, becauſe the Reverſion is veſted in him by force of the Statute, and he hath no means to compel the Leſſee to Attorn. *Cook* 5. Part, 113. in *Malories* Caſe.

2. If a man maketh a Leaſe for years of Lands to begin at *Mich.* next, this is but a future Intereſt which cannot be ſurrendred, becauſe there is no Reverſion wherein it may be drowned. But yet in ſuch Caſe, by a ſurrender in Law, it may be drowned. And therefore in ſuch Caſe, If before *Mich.* the Leſſee taketh a new Leaſe of the ſame Land, either to begin preſently, or at *Mich.* it is a ſurrender of the former Leaſe. So as a ſurrender in Law is of greater force then a ſurrender in fact. *Cook* 6. Part, 96. in Sir *Moile Finches* Caſe.

3. If the Father enfeoffeth his Son and Heir apparent with Warranty, and dyeth, the Heir being in truth Aſſignee, ſhall vouch, for the Law which hath determined the Warranty of the Father to the Son, will give the Son the benefit of the firſt Warranty.

rant. And ſo if A. Leſſee for 50 years demiſeth to B. for 10 years, and then he in the Reverſion levyes a Fine to B. and his Heirs, who enſeoffs J. S. who outs B. and B. re-entreth upon J. S. then entry of B. is a good attornment in Law, and ſtronger then an expreſs Attornment. *Cook 6. Part, 96. ibid.*

4. In an Information upon Intruſion, it was found, That the King was ſeiſed of a Rectory, and by his Letters Patents demiſed the ſame to the Wardens of the Church of S. for 21 years. And afterwards the King by other Letters Patents reciting the ſaid Leaſe, which Letters Patents, and all their Eſtate, Intereſt, and Term of years, *Gardiani prædict. modo habentes, et ad preſens poſſidentes nobis ſurſum reddiderunt, et reſtituerunt cancelland. quam quidem ſurſum-redditionem acceptamus in conſideratione ſurſum-reddit prædict. et pro ſine* 20 l. *ad recept. Scaccarii per præfat. Gardianos ſol.* demiſed the ſaid Rectory to the Guardians of the ſaid Church for 50 years. And it was found, That the Guardians of the ſaid Church at the time of the making of the ſaid Leaſe for 50 years, ſurrendred and yeilded up the ſaid Letters Patents, cancelled, and paid the Fees in Chancery for the Cancelling of them, but no *vacat* was made of the Enrolment of them, and that the Defendants entred into the Rectory by force of the ſecond Leaſe. In this Caſe, thoſe points were Reſolved. 1. That in this Caſe, there needed not any actual ſurrender, becauſe that theſe words (*modo habentes, et ad preſens poſſidentes*) proved, That at the making of the ſaid Letters Patents, the Guardians had the Leaſe for years in them; and by the acceptance of the new Leaſe, the Eſtate for years was ſurrendred: And in Judgment of Law, the ſurrender doth precede the new Grant, and that the King is not prejudiced in his Eſtate, Intereſt, or value, or remedy: And although a Corporation cannot make an expreſs ſurrender without Deed under their Seal, yet they may by Act in Law, ſurrender all their Term without writing, *Et fortior eſt diſpoſitio legis quam hominis. Cook* 10. Part, 67. The Guardians of the Church of St. *Saviours* in *Southwarks* Caſe.

5. The Eſtate of a Tenant in tail, after poſſibility of Iſſue extinct, ought to be the reſidue of an Eſtate tail by the Act of God, and not by limitation of the party; *ex diſpoſitione legis, non ex proviſione hominis.* And therefore, If a man make a gift in tail upon Condition, That if he do ſuch an Act, that then he ſhall have it but for life, he is not Tenant in tail after poſſibility of Iſſue extinct, for this is *ex proviſione hominis*, not *ex diſpoſitione legis*, but it ought to be the reſidue of an Eſtate tail, and that by the Act of God. *Cook* 11. Part, 80. in *Lewis Bowles* Caſe.

6. If a man be taken in Execution, and be ſuffered to eſcape by the Sheriff, this is an abſolute diſcharge of the Debt, and the Plaintiff is no have his remedy againſt the Sheriff by Action of Debt. But if a Member of Parliament be Arreſted by a Sheriff, upon an Execution, and afterwards he be freed by Priviledg of Parliament, which the Law gives him, this is no diſcharge of the Debt, but that when he ceaſeth to be a Member, he may be Arreſted again upon the ſame Judgment. 35 H. 8. *Dyer*, 60.

7. If a man maketh a Leaſe for Term of years upon Condition, That if the Leſſee Aſſign the Term without aſſent of the Leſſor, That then the Leſſor may re-enter, and the Leſſee deviſeth his Term by his Will to another without aſſent; It was the Opinion of the Juſtices, That this was a forfeiture, becauſe the Deviſee ſhall be ſaid to be in by the Aſſignment, that the Deviſor made during his life; but if the Executor had enjoyed the Term, it had bin no forfeiture, becauſe in that Caſe, the Law makes the Aſſignment. 31 H. 8. *Dyer*, 45.

8. If the Diſſeiſee releaſeth all Actions to the Heir of the Diſſeiſor in Judgment of Law his right is gone, for when a man hath not any other means to come by his Land, but only by way of Action. If he releaſe all Actions, his right inclusive in Judgment of Law is gone, becauſe by his own Act, he hath barred himſelf of all means to recover it. But if the Heir of the Diſſeiſor maketh a Leaſe for life, the Remainder in Fee, and the Diſſeiſee Releaſeth to the Tenant for life all Actions which he hath againſt him; and after Tenant for life dyeth, the Diſſeiſee ſhall have an Action notwithſtanding ſuch Releaſe againſt him in the Remainder, for he did but releaſe the Action, and the Law will not extend the Act of the party more largely then his expreſs words. As if the Lord Diſſeiſe his Tenant, and maketh a Leaſe for life; This Releaſe in Law ſhall not extend further then for the life of the Leſſee: For as it is true, *Fortior et potentior eſt diſpoſitio legis quam hominis*; So it is as true, *Fortior et æquior eſt diſpoſitio legis quam hominis. Cook* 8. Part, 152. in *Edward Allhams* Caſe.

Thus far of ſome Rules and Maxims in Law, and Caſes upon them.

Leaſes.

1. *What ſhall be ſaid a Leaſe for years, or for life; and by what Deeds or Words, what not: Where a Leaſe for years may be by Fine. Of Leaſes at Will; and what ſhall be ſaid a good Leaſe at Will; and what a Determination of it.*

2. J. S. Parſon of a Rectory, demiſed the ſame to E. for eighty years, if the ſhould ſo long live, and if ſhe dyed within the ſaid Term of 80. years, or alliened, that then her eſtate ſhould ceaſe, and then the ſame ſhou'd remain to A. for and during the reſidue of the ſaid Term of 80 years, if he ſhould ſo long live. And that if he *ut ſupra, &c.* that then his Eſtate ſhould ceaſe, and that then it ſhould remain to W. *pro et durante totanuis dicti Termini* 80 *annorum.* If, &c. And if he alliened *ut ſupra*, that then his Eſtate ſhould ceaſe; And then the ſaid J. S. *conceſſit premiſſa durante tot annis de prædict.* 80 *annis quæ ad tunc continuerunt et remanerunt inexpirat.* to T. his Executors and Aſſigns. J. S. dyed, T. dyed, E. and R. dyed, the Adminiſtrator of T. entred, and aſſigned the ſame over. In this Caſe, it was Reſolved, That the demiſes to R. and W. were void, becauſe the Eſtate which E. had, was not for 80 years abſolutely, but *ſub modo.* Then the Demiſe to them *pro tot annis quod remanerent poſt mortem dicta E. pro et durante reſiduo Termini prædict* 80. *annorum*, was void, becauſe there could not be a Remainder of the ſaid Term, becauſe the ſame determined by the death of E. 2. Reſolved, That the limitation to T. was void for the Incertainty, for it was incertain at the making of the Leaſe, how many years ſhould be remaining at the time of the death of E. S. 7 E. 6. Br; *Leaſes* 154. But it was holden, That where a man was poſſeſſed of a Term for 90 years, and he in conſideration of Marriage, Demiſed the Land to his Son for 70 years, to begin after his death, and after the Leſſor dyed. It was adjudged, That the ſame was a good Leaſe, becauſe in that Caſe he Demiſed the Land, and not the Term; and in the Demiſe of the Land, there was ſufficient certainty, 35 Eliz. in B. R. *Lecroſts* Caſe. 3. Reſolved, That the Demiſe and limitation to T. was not good, becauſe that R. and W. ſurvived T. which was againſt the expreſs limitation, for his Eſtate was limited upon two Contingents; and for that cauſe the Leaſe to him was void. *Cook* 2. Part, 154, 155. The Rector of *Chedingtons* Caſe.

2. A man ſeiſed of Lands, had Iſſue two Sons, A. and B. A. had Iſſue two Daughters, and B. had Iſſue C. a Son, and he deviſed his Lands to his Executors for the payment of his Debts, untill C. being of the age of 9 years ſhould come to his age of 21 years, and when C. commeth to the age of 21 years: That then he ſhould enjoy the Lands to him and his Heirs, and dyes. C. before he came of the age of 21 years, dyed; his Heir entred, and made a Leaſe for years, the two Daughters entred, and the Heir re-entred; and his entry was adjudged lawfull. In this Caſe, it was Reſolved, That the Intereſt of the Executors ſhould not ceaſe, although that C. dyed before the age of 21 years. For in Wills, the Intent of the Deviſor ſhall be conſidered. And when he Deviſeth the Lands to his Executors for the payment of his Debts, it is intended that he hath made computation, That the profits of the Lands for 12 years, would ſuffice to pay his Debts; and therefore he did not intend that the ſame ſhould determine by the death of the Son: And this was taken for a Rule, When the Deviſor might by apt words, by good advice, make his Will good and ſufficient in Law, according to his intent, there although the Deviſor being hindred by ſickneſs, makes his Will in diſordered manner, and by unapt words; yet the Law ſhall reduce theſe words into good Order, according to his intent; and therefore theſe words, (untill ſuch time as C. ſhall come to the age of 21 years,) ſhall be conſtrued, untill ſuch time as C. ſhould have come to his age of 21 years. And in this Caſe, it was alſo adjudged, That the Remainder was good. *Cook* 3. Part, 19. *Borraſtons* Caſe.

3. Tenant in tail of certain Lands, entred into a houſe built upon the Land, and ſaid, Brother, I here demiſe unto you my houſe, as long as I live, paying 20 l. *per annum* to me, and finding me my Boord and waſhing, and keeping a horſe. It was adjudged by the whole Court, That that was not any Leaſe, for life becauſe it wanted Livery, for to every Leaſe is requiſite, either an Act which the Law ſhall adjudg Livery, or apt words which amount unto it; but if he had delivered a Turf, Twig, or any thing which came of the Land, it had bin a good Livery. So if he had ſaid, Enter into the Land, and enjoy it during your life, the ſame is a good Livery. *Cook* 6. Part, 26. *Sharps* Caſe. See Hil. 35 Eliz. in B. R. *Callard* and *Callards* Caſe. *Poph.* 47.

4. The Biſhop made a Leaſe of a Manner to A. and B. for 60 years, without impeachment of Waſte, rendring Rent. Proviſo, That if the ſaid

A.

A. and B. dyed within the ſaid Term, and preſently after the deceaſe of the ſaid A. and B. and the longer liver of them, that it ſhould be lawful for the Biſhop and his Succeſſors to re-enter. A. dyed, B. ſurvived, the Biſhop dyed: The Succeſſor leaſed the Mannor to C. *Habendum cum, poſt, five per mortem ſuſum-reddit*, or forfeiture *prædict.* B. it ſhould be void for 60 years, which was confirmed by the Dean and Chapter, and afterwards Granted the Reverſion to D. in Fee. In this Caſe, it was Reſolved, 1. That every Leaſe for years ought to have a certain commencement when it ſhall take effect in Intereſt or poſſeſſion. Alſo every Leaſe ought to have a certain continuance, and a certain end, but that is to be intended when a Term is made certain by expreſs numbring of the years, or by reducing of it to a certainty by matter *ex poſt facto*. 2. Reſolved, That the ſecond Leaſe veſted preſently in Intereſt, and did not depend upon any contingency to take effect in poſſeſſion, or with the end of the firſt Term, if by none of the three former means the firſt Leaſe became void in the mean time. And therefore it was Reſolved, That if a man maketh a Leaſe for years to begin after the ſurrender, determination, forfeiture or end of the firſt Leaſe, the Leſſee hath an after Election to have the ſecond Leaſe, either upon ſurrender, or forfeiture, or end, which he ſhall pleaſe, but which of them ſhall firſt happen; the ſecond Leaſe which before conſiſted in Intereſt ſhall begin in poſſeſſion. *Cook* 6. Part, 35. The Biſhop of *Bathes* Caſe.

5. If a man Deviſeth, That J. S. ſhall have the Occupation and profits of his Land, the ſame is a good Leaſe of the Land, and he who hath the Occupation and profits, may Plow and ſow the Land. *Plow. Com.* 541. But the King cannot Plow and Sow the Land which he hath, by reaſon of Outlawry in a perſonal Action, for the King ſhall have but the profits which do ariſe of themſelves of the Land, without Plowing or Sowing of it. 5 H. 7. 1. And if a man do Covenant by Indenture, That he will permit that J. S. ſhall Occupy his Land from *March* next following, for ſeven years, or till the end of ſeven years; this is no Leaſe, becauſe it is but a future act, as it was holden by *Manwood* Juſtice. Mich. 20 Eliz.

6. A man makes a Leaſe for life by Deed. Proviſo, That if the Leſſee dyeth within 60 years, That his Executors ſhall have ſo many of the 60 years as ſhall be to come at the time of his death; the ſame was holden by the Juſtices to be but a Covenant, and not a Leaſe by reaſon of the incertainty. 3 and 4 Ma. *Dyer*, 150. *Gravener's* Caſe.

7. If a man maketh a Leaſe to one for 21 years the firſt day of *May*, and he makes the ſame day another Leaſe to another for 21 years, to begin preſently alſo, the ſame is void, if it be not by Deed Indented, or Fine, although the Termor who had the firſt Leaſe ſurrenders during the Term: And if it be made by Deed Indented, or Fine, then the Leſſor is eſtopped to ſay, that he had not the Land in poſſeſſion at the time of the ſecond Leaſe. 15 Eliz. *Plow. Com.* 434. in *Smith* and *Stapleton* Caſe.

8. A man had Iſſue two Sons, and, by Deed, in conſideration of Marriage, gave Lands to his younger Son, and to his Heirs after his death, but no Livery was made; the Father dyed, the eldeſt Son entred, and being ouſted by the younger, brought an Action. It was Objected in this Caſe, That the Eſtate paſſed to the younger Son by way of Covenant. But it was adjudged, That it did not enure by way of Covenant to raiſe an uſe to the younger Son; but by the word (Give) it ſhall be conſtrued to paſs an Eſtate by tranſmutation of poſſeſſion, which is not good, if Livery be not made. Mich. 15 Car. in B. R. *Pirſield* and *Percies* Caſe. *Marſh.*

9. Although that every Leaſe for years ought to have a certain beginning, and a certain end; yet the continuance of it may be uncertain, becauſe it may ceaſe and revive again. As if Tenant in tail maketh a Leaſe for years, and dyeth without Iſſue, his Wife with child with a Son, and he in the Reverſion entreth, the Leaſe as to him is void, but after the Son is born, the Leaſe is revived again, and ſtands good againſt him. Paſc. 2 Ma. in the Exchequer. *Cook* 1. Part, *Inſtitutes* 46. acc.

10. A Leaſe is made to Huſband and Wife for their lives, the Remainder to the Executors of the ſurvivor of them; the Huſband Grants away the Term and dyes. It was adjudged, That the ſame ſhould not bar the Wife, becauſe it had but a poſſibility, and not an Intereſt. Hill. 17 Eliz. in B. R. adjudged. *Cook* 1. Part, *Inſtitutes* 46.

11. If Tenant in tail, and one A. levyeth a Fine to a ſtranger of Lands, who Granteth and reſdreth to A. for years, rendring Rent, and by the ſame Fine, grants the Reverſion in Fee to Tenant in tail, and his Heirs, this is a good Leaſe for years: and although that all be by one Fine in one Inſtant, yet in Judgment of Law, the Leaſe doth precede the Grant of the Reverſion. And ſo it was adjudged in *White* and *Whites* Caſe. Mich. 42 Eliz. in C. B. *Cook* 1. Part, 76. in *Bredons* Caſe. *Cook* 1. Part, 174. *Diggs* Caſe, acc.

12. A man ſeiſed of Land in Fee, enfeoffed ſeveral perſons, upon Condition, That they ſhould give back the Land to him, and his Wife in tail, the Remainder to his right Heirs; they have Iſſue a Son, the Husband dyeth; the Son in the life of

the Wife levied a Fine with Proclamations to A: the wife entred, and made a Leaſe for 3. Lives not warranted by the Statute of 32 H. 8: the Conuſee re-entred; and his Entry was adjudged lawfull. It was Reſolved in this caſe, That the Leaſe made by the wife, although it was without warranty, was within the Statute of 11 H. 7. Cap. 20. for a Diſcontinuance ſtands in equall degree with a Warranty. 2. Reſolved, That the Conuſee might enter for the Forfeiture, becauſe by the Fine, the Eſtate tail is barred, and now he is ſuch perſon to whom the Intereſt, Title, and Inheritance after the death of the wife, doth appertain. And in this Caſe, it was agreed, That if a Woman Tenant in tail accept a Fine *ſur Conuſans de Droit come ceo.* and thereby grant and render the Land for 1000. years, that the ſame is an Alienation within the Statute of 11 H. 7. Cap. 20. Note out of that Caſe, That a Leaſe may be made by years by Fine. *Cook* 3. Part, 51. in Sir *George Brown's* Caſe. See 3 & 4 Mar. *Dyer*, 148. and Hill. 18 Eliz. in C.B. by all the Judges adjudged accordingly.

12. A Mannor which did conſiſt of Free-Rents of 7 l. Copy-Rents of 3 l. and of Demeaſns which had uſed to be demiſed for ſeveral Rents and Fines of 7 l. To which Mannor an Acre of Waſte parcel of the ſaid Mannor of the value of 12 d. Heriots, Court Baron, Leet, and perquiſites of Court, which were never demiſed for Life, Years, or otherwiſe, was by a private Act of Parliament in 27 H. 8. given to A. and B. in Tail, with diverſe remainders over. By which Act the Donees were reſtrained, *Quod non faceret aliquod ad Nocumentum*, or Diſenhereſon of the Iſſue in Tail, or of them in Remainder, and that they ſhould have power to make a Leaſe for life, years, or at Will, rendring the true and ancient Rent, and that all other Acts ſhould be void. Tenant in Tail accepted a Fine of a Stranger *ſur conuſans de droit*, by which he granted and rendred the Mannor for 300 years rendring Rent, yearly amounting to the Free, Copyhold, and firme Rents, and 18 d. more, and 12 d. for the Waſte to be paid at two Feaſts, whereas the ancient Rent was payable at four Feaſts. Tenant in Tail dyed, and if the Leaſe for 300. years, was to be avoided by the Clauſe in the Act of Reſtraint, was the Queſtion. In this Caſe, It was Reſolved, 1. That this Leaſe was good againſt Tenant in Tail himſelf, but ſhould be avoided by the Iſſues. 2. That the Rent being entire, (the Acre of Waſte not being before demiſed) could not be ſaid to be the true and ancient Rent. 3. That the Reſervation at two Feaſts, where the ancient Rent was at four Feaſts, was void, for that it was *ad Nocumentum* of the Iſſues in Tail, and all Beneficial Qualities of the Rent ought to be reſerved and obſerved. 4. Reſolved, That although there might be an apportionment of the Rent, after the death of the Tenant in Tail; yet that would not make the Leaſe by the Grant and Render to be good: for that if the true and ancient Rent was not reſerved yearly during the life of the Tenant in Tail, the power which the Tenant in Tail had, was not purſued. *Cook* 3. Part. The Lord *Mountjoy's* Caſe.

13. *R.* Earl of *Suſſex*, ſeiſed in Fee of the Mannor of B, made a Leaſe of the ſame to the King for 21. years, and dyed; the Mannor diſcended to *T.* Earl of *S*: *Anno* 5 *Mar.* it was Enacted by Parliament, That the Lady *Frances*, Wife of the ſaid *R*, ſhould hold and enjoy the ſame during the Widowhood of the ſaid Lady *F*: Provided, That it ſhould be lawful for the ſaid Earl by writing Indented, to make Leaſes for one and twenty years, rendring the Auncient Rent. Afterwards, the ſaid Earl made a Leaſe of the ſaid Mannor for 21 years, to begin at the Feaſt of St. *Michael* then next following. In this Caſe, although that the power was general, to make Leaſes for 21. years, without being reſtrained to make them either in poſſeſſion or reverſion, or to any number of years; yet it was adjudged, That the ſaid Leaſe was void, for two cauſes: 1. If by the ſaid power he may make any future Leaſe or Leaſes in Reverſion, he may make a Leaſe for 21. in poſſeſſion, and afterwards infinite Leaſes in Reverſion for 21. years, which was contrary to the meaning of the parties; and ſo the expreſſing of the 21. years was in vain, and the Proviſo ſhould alſo be idle and vain. 2. Becauſe the Proviſo ſhall be taken ſtrict, and not extend beyond the letter and meaning of the parties: And if I be bound to make a Leaſe to you for 21. years indefinitely, the Leaſe ought to begin preſently, and not *in futuro*. See *Cook* 6. Part, 34. in *Fitz-Williams* Caſe. Trin. 21 Eliz. in B.R. *Leeper* and *Wyatts* Caſe. *Leon.* 35.

14. In a *Replevin*, the Caſe was; The Lady *Moyle* ſeiſed of the Mannor of B. in the County of K. for life, the Remainder to *K.* Lady *Finch* in Fee: the Lady *F.* took to husband *Nicholas Saint Leger*; and afterwards he and his Wife, and one J. D. levied a Fine of all the Demeſnes of the ſaid Mannor (by certain quantity of Acres which did include all the Demeans) to F. and his heirs, who granted and rendred the Demeſnes of the Mannor to the ſaid J. S. for 50. years, from the Feaſt of St. *Mich.* then laſt paſt, rendring Rent, and granted the Reverſion to *St. Leger*, and the Lady *Finch*, and to the heirs of the Lady *Finch*: which Fine was levied according to certain Indentures between the parties, to certain uſes. In this caſe, amongſt many other Points, it was Reſolved, That the ſaid Leaſe for 50 years made by

Gears

Grant and Render by the ſaid Fine, was a good Leaſe for years. *Cook* 6. Part, 63. Sir *Moyle Finch*'s Caſe.

15. Leſſee for 40. years of a houſe deviſed the ſame to J. S. without limiting any eſtate: It was Reſolved in this Caſe, That the Deviſee ſhould have the whole Term; for he cannot have it for life, nor at Will; nor for leſſer Terms of years. Hill. 14 Eliz. *Dyer*, 307.

16. A. and B. Joynt-Tenants for life; A. by Indenture Covenanted, granted, and agreed with J. S. the Defendant, that he ſhould hold and enjoy from and after the death of B, the moity of all thoſe Lands which ſhe holdeth in Joynture with B. for 60. years, if the ſaid A. ſhall ſo long live, and doth demiſe and grant the other moyty of the ſaid Lands from and after the death of the ſaid A. for 60 years, if ſhe the ſaid B. ſhall ſo long live: B. ſurvives A: The Queſtion was, If it were a good Leaſe againſt A. for any part? It was agreed by the Court, 1. That if there be two Joynt-Tenants for life, and one maketh a Leaſe for years to begin after his death, it is good to bind his Companion; and *Harvy* and *Boltons* Caſe adjudged acc. 2. Reſolved, That the words, Covenant, Grant, and Agree, that he ſhould have the Land for ſo many years, ſhall enure as a Leaſe. 3. That it was a good Leaſe of the part of A, if ſhe had ſurvived B: but that never happened, for it was to commence after her death, and to continue for 60 years, if B. lives ſo long, which never happened by the Act of God. 4. That A. had no power to charge or contract for that which belonged to B; and that her power as for that part, was void. Trin. 2 Jac. in B.R. *Whitlock* and *Horton*'s Caſe. *Cro.* 2. Part, 91, 92.

17. A. poſſeſſed of a Leaſe for 76. years, Let it unto B. from the day of his death, untill the 1. of *May*, 1629. (which was 3. moneths after the end of the Leaſe) if D. his wife lived ſo long. Afterwards he deviſed, That W. his ſon, and his Aſſignes, ſhould have the Tenements and the Reverſion of them, and all his Title and Intereſt in them, for all the other of the ſaid 76 years which ſhould be unexpired at his wives death: Provided, That if W. dyed without Iſſue, living at the time of his death, that T. his ſon ſhould have all the reſidue of the ſaid Term of 76. years, from the death of his ſaid Wife and of W, without Iſſue. And if he dyed without Iſſue, then his Daughters; and made his Wife his Executrix, and dyed. The Wife aſſented to the Legacy; W. aſſigned this Leaſe and his Intereſt to D. the Wife; who aſſigned it to the Defendant: D. dyed; W. dyed without Iſſue: T. the Deviſee entred, and made the Leaſe to the Plaintiff. In this Caſe it was Reſolved, That Leſſee for years letting it after his death, untill the firſt of *May*, 1629, It was a good Leaſe, which began immediately after his death, he dying within that time. 2. That the Leaſe being made 12. *Aug.* 1553, if D. his Wife ſhould ſo long live, he did not thereby convey the Intereſt and the remainder of the Term; viz. from 1. *May*, 1629, unto 12. *Aug.* 1629: which Intereſt and poſſibility he might Deviſe unto W. his Son. 3. This deviſe being to W. and his Aſſigns, with a Proviſo, That if he dyed without Iſſue living, that T. ſhould have it, and afterwards he alienes it, and dyes without Iſſue, that this Alienation ſhould bind T; for when he limited it to him and his Aſſigns; the Proviſo there added to reſtrain the Alienation, is void. Hill. 15 Jac. in B. R. *Child* and *Bayliss* Caſe. *Cro.* 2. Part, 459, 460, 461.

18. *In Ejectione Firme*, the Caſe was; A. ſeiſed of Land leaſed to N. B. and his Aſſignes for his own life, and for the lives of T. A. and J. B: afterwards the Leſſor Leaſed the Reverſion to the Plaintiff for 21. years. N. B. made a Leaſe of the ſame Lands to T, to hold at Will, and dyed: and if the Eſtate of T. was determined by the death of N. B, was the Queſtion? The Points were, 1. If by this word, Aſſignee, an Occupant ſhall have the Land. 2. When a Leaſe is made to one, and his Aſſigns, for his own life, and the life of two others, if his own life drown and confound the lives of the two others; for that it is greater to the Leſſee, then the other two liver. It was Reſolved in this caſe, That a Leaſe made unto one for his own life, the remainder to him for anothers life is good, for that he may grant it over; and ſo it was Reſolved, Mich. 32 Eliz. in C. B. in *Faudel*'s Caſe. And ſo adjudged in *Chambers* and *Goſt eks* Caſe, where a Leaſe was made to two for their lives, and the life of a ſtranger, and one of the Leſſees dyed, and the Survivor granted the Land for his life, and the life of the ſtranger; and it was holden to be no forfeiture. For the other Point, it was Reſolved, That there was no queſtion, but that the Eſtate of him that firſt entred, is better then the Eſtate of him that enters under the Eſtate of the Leſſor. Hill. 43 Eliz. in B. R. *Roſſe* and *Ardwicks* Caſe. *Goldeſb.* 157, 158.

19. A Leaſe was made of Land to two, *Habend. eis ad terminum vitæ eorum (conjunctim) et eorum diutius vivent. et aſſignatis ſuis qui primus eorum decedare contigerit, durante vita ejus qui ſuperſtes et non aliter*: It was a Quære, 32 H. 8. *Dyer*, 46. If he that firſt dyed, ſhall aſſign all, if it be good by the words aboveſaid, or for a moyty or no? But it hath been ſince Reſolved, That he hath right but in a moyty, and that he can aſſign but the moyty;

mayty; but if he make no Aſſignment at all, the Survivor ſhall have the whole. See 9 H. 6. 63. See *Cook* 1. Part, *Inſtitutes*, 187.

20. The Prior of St. *Johns* of *Jeruſalem*, and his Brethren, made a Leaſe by Indenture to three at Will; one dyed: the Leſſors, 4 H. 8. by Indenture reciting the death of one, and that the firſt Indenture was ſurrendred and cancelled, they made an Eſtate to the Survivors, *Habend.* to them *et hæredibus*; but there was no Letter of Attorney to make Livery: and it was adjudged void; for by the ſurrender of the Indenture, the Eſtate at Will was determined, and ſo the ſecond Grant could not enure to them by way of Confirmation. It was there a Quære, If the death of one do not determine the Will? for that an Eſtate at Will may not ſurvive. Hill. 10 Eliz. *Dyer*, 269. See *Cook* 5. Part, 10. in *Henſleds* Caſe, where this Quæry is Reſolved, That the Eſtate at Will is not determined.

21. Note: It was holden by *Bromley*, and other Juſtices, That if the Queen at this day by her Charter grant Lands *probis hominibus de J.* without ſaying, To have and hold to them and their Succeſſors) rendring a Rent, That the ſame is a good Corporation perpetual to that purpoſe only, and not to other Intents, becauſe a Rent is reſerved. But in that caſe they conceived, That they were but Tenants at Will; and that if the Queen Releaſe or give to them the ſaid Rent, and Fee-Farm, thereby the Corporation is *ipſo facto* diſſolved; for the Rent and Farm was the cauſe of inabling them to be a Corporation. Trin. 1 *Mar. Dyer*, 100.

22. When a man gives Lands by Deed to one in Fee in the premiſſes of a Deed, *Habend.* to the Feoffee for life, the *Habend.* is void; and untill Livery be made, the Feoffee hath but an Eſtate at Will. *Cook* 2. Part, 24. in *Baldwins* Caſe.

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2. *Where a Leaſe for years made by him in the Reverſion to begin preſently, or at a day to come, (another Leaſe being in being) ſhall begin; and when it ſhall begin: And where a Leaſe for life cannot commence at a day to come.*

1. NOte, by *Mountague*, Juſtice, Where a man makes a Leaſe for years, rendring Rent; and after makes a Leaſe of the ſame Land to begin during the firſt Term; It is a good Grant of the Reverſion, and he ſhall have the Rent being but a Chattel which is granted in Reverſion without Attornment. But *Baldwin* and *Shelley* held the contrary. See *Br.* Caſes. 37 H. 8. 63. 2 E. 6. *Br.* 379. See *Plow. Com.* 432. in *Brathwaigets* Caſe.

2. A man made a Leaſe for life unto A. by Indenture, and afterwards reciting the ſaid Leaſe, he demiſed the Remainder to B, *Habendum* the ſaid Remainder after the determination of the firſt Leaſe for 20 years. It was a Quære, 32 Eliz. *Dyer*, 46. If the Reverſion did paſſe by the name of Remainder; and if there needed any Attornment? It ſeemeth it doth paſſe, and that there ought to be Attornment. See 14 H. 8. 2. 27 H. 8. 15. And ſee *Bacon. Maxims* 16. If a man grants Lands to J. S. and to the heirs of his body; and for want of ſuch Iſſue, that the Land ſhall revert to J. N; that by theſe words, the Remainder ſhall paſſe.

3. A man ſeiſed of divers Mannors, and of divers Lands, part in Leaſe with Rent reſerved, part in Copyholds, upon valuable Conſideration, demiſed, granted, bargained and ſold the ſaid Mannors, Lands, &c. with all Rents reſerved upon any Demiſe, To have after the death of the Bargainor for 17. years, rendring a Roſe to his heir; the Deed was acknowledged to be enrolled; and afterwards he Covenanted to ſtand ſeiſed of the ſaid Mannors and Lands to the uſe of himſelf, and the heirs of his body, no Attornment was to the Bargainees; and afterwards the Bargainor dyed: It was Reſolved in this Caſe, That the Leſſees ſhould have the Rent upon the Bargain and Sale without Attornment. And it was Reſolved, That the Leſſees had Election to take the ſame either by Demiſe, or by Bargain and Sale; for when a man for money demiſeth, granteth, bargaineth and ſelleth his Lands for years, the owner giveth election to the bargainee to take one way or the other: and if the Law ſhould enforce them to take by demiſe, then they ſhould loſe the Rents reſerved upon the Leaſes for years; but if the Intereſt paſſeth by Bargain and Sale, then there needs no Attornment by the Statute of 27 H. 8. of *Uſes*, becauſe the Statute executes the poſſeſſion to the uſe. *Cook* 2. Part, 35. Sir *Rowland Heywards* Caſe.

4. A man by Indenture reciting a former Leaſe made by him 6. *Aug.* 30 H. 8. *Habendum*, from the Feaſt of St. *Mich.* next enſuing, for 21. years demiſed the ſame Land to J. S. for 21. years, from the expiration of the ſaid firſt Leaſe; and the truth was, that the firſt Leaſe was the 30th of *Auguſt*. In pleading the ſecond Leaſe being in Queſtion, the firſt Leaſe was ſhewed to be made the 30. of *Auguſt*; and Iſſue was joyned, if he *de-*

miſe

miſit modo et forma? The Jury found the ſpeciall matter. It was holden, That the *modo et forma* was not materrial; but if *demiſit*, or not? It was holden to be a good Leaſe. Paſch. 3 Mar. *Dyer*, 116. See *Cook* 1. Part, *Inſtitutes*, 46. If a man recieeth a Leaſe which is not, or which is void, or miſrecites it in a point material which is in *eſſe*, *Habend.* from the Expiration of the former Leaſe, the Leaſe ſhall begin from the time of the delivery. See 3 E. 6. *Br. Leaſes*, 62. acc.

5. Note. It was Reſolved in *Cook* 4. Part, 52. in *Rawlyn's* Caſe, 1. That if Leſſee for 20 years makes a Leaſe for 2. years, and afterwards grants all his Term and Intereſt to another, and the Leſſee attorneth, the Intereſt in Reverſion paſſeth: and the Grantee ſhall have the Lands after the two years paſſed. 2. That if Leſſee for 20 years Leaſeth part of it for two years, and after Leaſeth the whole to another for 30. years, rendring Rent, ſo as the Leaſe enures as a Leaſe in reverſion for part, that the Rent ſhall iſſue out of the whole. 3. That if a man takes a Leaſe for years by Indenture of his own Land, the ſame is no concluſion or eſtoppell but during the Term; and after the Term ended, the Leſſor may enter, and occupy and hold the Land; for by the determination of the Term, the eſtoppel is determined. *Cook* 4. Part, 53.

6. A man made a Leaſe to A. of White-Acre for 10. years, and of Black Acre to B. for 20 years; and afterwards by Indenture reciting the ſaid Leaſes, made a Leaſe to J. S. of both Acres for 40. years, to begin after the end or determination of the ſaid ſeverall Leaſes made to A. and B: The Leaſe of White Acre determined, and the Leaſe of Black Acre continued in being. It was adjudged in this Caſe, That the Leaſe made to J. S. as to White Acre, did commence preſently after the firſt Leaſe made of it. *Cook* 5. Part, 7. Mich. 32 Eliz. in B.R. Juſtice *Windham's* Caſe.

7. A man ſeiſed of 3. Acres, made a Leaſe of one of them to A. for life, and of another of them to B. for life, and of the third Acre to C. in tail; And afterwards by Indenture covenanted with his brother, That after the ſaid Eſtates ended and determined, That he and his heirs would ſtand ſeiſed of the ſaid 3. Acres to the uſe of his brother in tail. It was adjudged in this caſe, That preſently by the death of B, one of the ſaid Tenants for life, that the brother ſhould have the Acre of B, and ſhould not ſtay untill all the Eſtates were ended: For by the Covenant, the Eſtate in the ſeverall Acres veſted preſently in the brother. 32 Eliz. in the Court of Wards, *Pollard* and *Alcock's* Caſe.

8. The Queen ſeiſed of the Manor of S, demiſſed the ſame to H. B. for 21. years, who made ſeverall Leaſes of ſmall parcels of it for years: Afterwards the Queen reciting the ſaid Letters Patents, in Conſideration of a ſurrender of all his Eſtate, Term, and Intereſt, granted the ſaid Manor to the ſaid H.B. *Habendum* from the day of the making of the ſaid Letters Patents for 3. Lives. It was Reſolved in this caſe, amongſt other Points, That an Eſtate of Freehold cannot begin at a day to come, becauſe he cannot make Livery preſent to a future Eſtate; and an Eſtate for life cannot paſſe without Livery. See *Cook* 2. Part, *Buckers* Caſe, acc. And therefore the Grant by the Letters Patents, which amount to a Livery in Law, cannot begin at a day to come: For if the Freehold ſhould paſſe preſently by the Letters Patents, then the Queen ſhould have a particular Intereſt or Term without a Donor or Leſſor, againſt a Rule in Law. And therefore it was adjudged, That the Leaſe for 3. Lives was void. *Cook* 5. Part, 94. *Berwicks* Caſe.

9. A man made a Leaſe for years, to begin after the end of a Term for years then in being; the firſt years determined, and the ſecond Leſſee did not enter, but he in the Reverſion entred, and made a Feoffment, and levied a Fine with Proclamations, and 5. years paſſed without Entry or claim made by the ſecond Leſſee for years: It was Reſolved in this Caſe, 1. That the ſecond Leſſee for years was barred of his Term, by the Statute of 4 H. 7. For although the Leſſee for years had not an Eſtate that he might levy a Fine; yet becauſe that the words of the Statute are general, he ſhall be bound by the Fine levied by the Terr-Tenant. 2. It was Reſolved, That by the ſaid Feoffment, the ſecond Leſſee had but a Right, and when his future Intereſt commenced in the Land, then he hath a preſent Eſtate in the Land, which may be deveſted, and reveſted again by his Entry: As if a man maketh a Leaſe for years, and before that, the Leſſee entreth, the Leſſor dyeth, yet the Leſſee may enter, for he hath right preſently according to the form of his Leaſe; ſo as his Intereſt is accompanied with a preſent Entry, and ability to take the profits. Paſch. 3 Jac. C. B. *Cook* 5. Part, 123. *Saffyns* Caſe.

10. A man made a Leaſe by Indenture for Term of 10. years, the Term to begin preſently; and afterwards the Leſſor Leaſeth the ſame Land by Indenture for the ſame Term of 16. years to a ſtranger, the Term to begin at the Feaſt of St. *Michael* next following: and afterwards the firſt Leſſee purchaſeth the Fee-ſimple, ſo as his Term is drowned. In this caſe it was adjudged, That the ſecond Leſſee might enter after the Feaſt of St. *Michael*, and enjoy his Term. Hill. 2 Mar. *Dyer*, 112.

11. A Parſon made a Leaſe for 40. years, the Biſhop of *London* being Patron and Ordinary, Confirmed it under his hand and Seal, without the

the Dean and Chapter; the Incumbent dyed; the Biſhop collated another, who made a new Leaſe, which is well confirmed: afterwards the Biſhop is tranſlated. It was a Queſtion, Which of the Leaſes was good? It was the Opinion of the Juſtices, The firſt, and not the ſecond during both the Lives of the Biſhop and Incumbent, which found the Church charged. Paſch. 19 Eliz. *Dyer*, 359.

12. A man ſeiſed of Lands in Fee, made a Leaſe of them for life; and afterwards by Indenture Covenanted to convey and aſſure the ſaid Lands to the uſe of himſelf for life, the remainder to his ſon in tail, with divers remainders over; and by the ſame by Indenture covenanted and agreed, That it ſhould be lawful for him at any time after to make of the ſaid Lands any Leaſes, or Grants, not exceeding the number of 3. Lives, or 21. years in Poſſeſſion or Reverſion; ſo as upon every ſuch Leaſe or Grant, the auncient Rent be reſerved during the ſaid Leaſe or Grants. Afterwards he levied a Fine according to the Uſes in the Indenture, and afterwards made a Leaſe of the ſaid Lands to J. S. to him and his Aſſigns for 99. years, if the ſaid J.S. and J. D. ſhould ſo long live, to begin after the death, or the determination of the Eſtate of the Tenant for life, yielding yearly after the beginning of the ſaid Leaſe to him, his heirs, or Aſſigns, or ſuch perſon to whom the Inheritance of the premiſſes after his death, ſhould appertain during the ſaid Term 14 s. at the four uſual Feaſts yearly to be paid. In this caſe, it was Reſolved, 1. That the power which the Leſſor had, was well reſerved and purſued: for his power in the beginning, was abſolute to make Leaſe or Leaſes, Grant or Grants in Poſſeſſion or Reverſion, and the generality was by the Proviſo reſtrained, that the Leaſe do not exceed 3. lives; and when the Leaſe is made for 99. years determined upon 3. Lives, the ſame doth not exceed his power. 2. Reſolved, That the reſervation of the Rent was good: for the Leaſe had not his eſſence from the Eſtate of the Leſſor, which he had for life, but the Leaſe had his eſſence out of the Fine, and in Conſtruction of Law, preceded the Leaſe for life, and all the remainders. *Cook* 8. Part, 70. *Whitlocks* Caſe.

See before, *Cook* 8. Part, 93, 94. to this Diviſion, *Edward Fox's* Caſe.

3. *Where a Leaſe made by him who hath power to make Leaſes for Lives or Years, or who hath but a particular Eſtate, ſhall ſtand, although the Eſtate of the Leſſor be determined, or doth ceaſe; Where not. And where Leaſes, Bargains and Sales made by Commiſſioners, ſhall ſtand good againſt the Owners; and where voidable by Entry: Where not.*

1. NOte: There is a difference betwixt a general abſolute power and authority as owner of the Land, and a particular power and authority by him who hath but a particular Intereſt, and ſo makes Leaſes for lives or years. If a man hath an abſolute power and authority over the Land; there he may make leaſes for life or years by Attorney: but otherwiſe it is, of him who hath but a particular Intereſt: And therefore if A. be Tenant for life, the Remainder in tail; and A. hath power to make Leaſes for 21. years, rendring Rent; he in that caſe cannot make a Leaſe for 21. years by Attorney, by force of his power, becauſe he hath but a particular power which is perſonal to him: And ſo it was adjudged, 24 Eliz. in the Lady *Greſhams* Caſe. And ſome Powers and Authorities are ſo perſonal, that they cannot be transferred over to another: If the Lord diſtrain the Cattle of his Tenant, though nothing be behind, The Tenant for and in reſpect of the duty which he oweth to the Lord, ſhall not have an Action of Treſpaſs againſt him *vi & armis*: But if the Lord commandeth his Bayliff, or Servant, in ſuch caſe to diſtrain where nothing is behind, The Tenant ſhall have an Action of Treſpaſs *Quare vi et armis* againſt the Bayliff or Servant. 2 H.4.4. 1 H.6.6. 9 H.7.14. acc.

2. Husband and Wife were ſeized of Tenements in *London*, to them, and to the Heirs of the Husband; and the Husband Covenanted by Indenture, in conſideration of 20 l. That he and his Wife would ſuffer a Common Recovery, by Writ of Right, according to the Cuſtome of *London*, which bindeth as a Fine at the Common Law, and that the Recovery ſhould be to the uſe of the Recoverors, until they had made a good and ſufficient Leaſe by Indenture for 40 years; and after the making of the ſaid Leaſe, then to the uſe of the Husband and Wife, and the Heirs of the Husband; and the Recovery was had accordingly. It was the Opinion of all the Juſtices in that Caſe, That the

the Leaſe was good, and not defeaſible by the Wife, who ſurvived her Husband; and ſo it was adjudged in the Kings Bench. 12 Eliz. *Dyer*, 290. See *Cook* 2 Part, 57. in *Beckworths* Caſe.

3. Note, It was Reſolved, *Cook* 10. Part, 85. in *Leonard Lovies* Caſe, That if a man limitteth an eſtate by Indenture, to the uſe of himſelf for life, with power to make Leaſe for life or years, or to ſuch perſons as he ſhall name by his laſt Will, of any eſtate or eſtates, the Remainder to A. in Tail, with divers Remainders over; That theſe remainders are in contingencies, and do not veſt in them preſently by the Statute of 27 H. 8. until the contingence fall, becauſe it is a doubt whether the Eſtates in future ſhall ever veſt. See Paſch. 36 Eliz. B. R. *Action* and *Hares* Caſe, *Cook* 3. Part, *Borraſtons* Caſe, &c.

4. A. ſeized of two Mannors, enfeoffed divers perſons of them, to the intent, That they ſhould give them back again to A. and B. his Wife, whom he intended to marry; the remainder to the heirs males of the body of B: A. and B. marry, and have Iſſue C; A. dyeth, C. in the life of B. ſuffers a Common Recovery with Voucher, to the intent that the Recoverors ſhould make a Feoffment to uſes, and that the Wife, Tenant for life, Releaſe with Warranty; which Feoffment, and Releaſe with Warranty, was made accordingly. It was Reſolved in this Caſe (amongſt other things) That although the Statute of 11 H. 7. *cap.* 20. made the Diſcontinuance, Allienation, Warranty, and Recovery void: Yet thoſe general words have been ſo expounded, that they are not void amongſt the parties themſelves, but ſhall ſtand in force amongſt themſelves, and againſt all other perſons, but only ſuch to whom the Intereſt, Title, and Inheritance, after the death of ſuch woman ſhall appertain, and they only may make them void by their Entry. *Cook* 3. Part, 60. Lincoln Colledge Caſe.

5. A man ſeized of Lands in Fee, made a Leaſe for years, rendring Rent, upon condition, That if he, his Executors, or Aſſigns Granted, Alliened, or Aſſigned any part of the Land without the aſſent of the Leſſor, his Heirs, or Aſſigns, that it ſhould be lawful for Him, his Heirs, or Aſſigns to re-enter: The Leſſee aſſigned part of it without aſſent; The Leſſor before notice, and before re-entry, accepted the Rent, and afterwards re-entred. It was adjudged, That his re-entry was lawful: And in this Caſe, amongſt other points, it was Reſolved, That if the Concluoſin of a Leaſe for years is, , That if the Rent be behinde, that the Leaſe ſhall be void, that no acceptance of the Rent can make the void Leaſe good; but if the Leaſe be but voidable by Entry, there acceptance can make it good. 2. That there is a difference betwixt a Leaſe for life, and a Leaſe for years; for in a Leaſe for life, if the concluſion be, that the Leaſe ſhall be void; that becauſe a Freehold created by Livery cannot be avoided without Entry, acceptance of Rent due at a day after, ſhall bar the Leſſor of his Entry, and affirm the Leaſe; for he cannot receive the ſame upon any Contract, as in the Caſe of a Leaſe for years, but he ought to receive it as a Rent, and then he affirms the Leaſe to continue, and therefore the acceptance of the Rent ſhall bar him of his Entry. *Cook* 3. Part, 65. in *Penman's* Caſe.

6. If a Parſon, Vicar, or Prebend maketh a Leaſe for years rendring Rent, and dyeth, and the Succeſſor accepteth the Rent, the ſame is nothing worth, becauſe the Leaſe was void by his death, otherwiſe if it were a Leaſe for life. But if a Biſhop, Abbot, or Prior, maketh a Leaſe for years, and dyeth, and the Succeſſor accept the Rent, he ſhall never avoid the Leaſe, becauſe the Leaſe was but voidable, *ibid.*

7. Note, It was Reſolved, That every one who hath a lawful Eſtate in a Mannor, be it in Fee, in tail, in Dower, or by the Curteſy, or for life or years, or as Guardian, or Tenant by Statute, Elegit, or at Will; If a Copyhold Eſcheat or come to their hands during their time, every one of them at their Will may Grant the ſame, rendring the Ancient Rent, Cuſtomes, and Services, and the ſame ſhall bind the Lord who hath the Inheritance or Freehold of the Mannor, for every one is *Dominus pro tempore*, and within the Cuſtome. And this difference was alſo agreed and Reſolved, That if a Diſſeiſor, or Feoffee of a Diſſeiſor, or any other who hath a tortious or defeaceable Eſtate or Intereſt ſubject to the Action or entry of another hold Court, and make any voluntary Grant, upon Eſcheat or forfeiture of a Copyhold; ſuch voluntary Grant ſhall not bind him who hath right, when he hath re-continued the Mannor by Action, or entry. But if ſuch a Lord who hath a wrongful and deforcible Title, admit any upon a ſurrender made to the uſe of another, or admit the Heir upon a Diſtent, ſuch Admittances are good within the Cuſtome: For ſuch acts are lawful, and which he may be compelled and forced in a Court of Equity to do; and therefore ſuch Admittances ſhall bind him who hath right. Trin. 26 Eliz. in B. R. *Cook* 4. Part, 23. *Pennyfathers* Caſe.

See before, *Cook* 5. Part, 124. *Saffyns* Caſe; to this Diviſion.

8. Tenant in tail of divers houſes, and of other Lands holden in *Capite* in Fee, by Indenture made a Leaſe of the Lands of which he was ſeiſed in tail for years, not Warranted by the Statute of 32 H. 8. and dyed without Iſſue, the Reverſion diſcended to his general Heir, who was in Ward to the King. Office was found that he dyed ſeiſed of an Eſtate

the Dean and Chapter; the Incumbent dyed; the Bishop collated another, who made a new Lease, which is well confirmed: afterwards the Bishop is translated. It was a Question, Which of the Leases was good? It was the Opinion of the Justices, The first, and not the second during both the Lives of the Bishop and Incumbent, which found the Church charged. Pasch. 19 Eliz. *Dyer*, 359.

12. A man seised of Lands in Fee, made a Lease of them for life; and afterwards by Indenture Covenanted to convey and assure the said Lands to the use of himself for life, the remainder to his son in tail, with divers remainders over; and by the same by Indenture covenanted and agreed, That it should be lawful for him at any time after to make of the said Lands any Leases, or Grants, not exceeding the number of 3. Lives, or 21. years in Possession or Reversion; so as upon every such Lease or Grant, the auncient Rent be reserved during the said Lease or Grants. Afterwards he levied a Fine according to the Uses in the Indenture, and afterwards made a Lease of the said Lands to J. S. to him and his Assigns for 99. years, if the said J.S. and J. D. should so long live, to begin after the death, or the determination of the Estate of the Tenant for life, yielding yearly after the beginning of the said Lease to him, his heirs, or Assigns, or such person to whom the Inheritance of the premisses after his death, should appertain during the said Term 14 s. at the four usual Feasts yearly to be paid. In this case, it was Resolved, 1. That the power which the Lessor had, was well reserved and pursued: for his power in the beginning, was absolute to make Lease or Leases, Grant or Grants in Possession or Reversion, and the generality was by the Proviso restrained, that the Lease do not exceed 3. lives; and when the Lease is made for 99. years determined upon 3. Lives, the same doth not exceed his power. 2. Resolved, That the reservation of the Rent was good: for the Lease had not his essence from the Estate of the Lessor, which he had for life, but the Lease had his essence out of the Fine, and in Construction of Law, preceded the Lease for life, and all the remainders. *Cook* 8. Part, 70. *Whitlocks* Case.

See before, *Cook* 8. Part, 93, 94. to this Division, *Edward Fox's* Case.

3. *Where a Lease made by him who hath power to make Leases for Lives or Years, or who hath but a particular Estate, shall stand, although the Estate of the Lessor be determined, or doth cease; Where not. And where Leases, Bargains and Sales made by Commissioners, shall stand good against the Owners; and where voidable by Entry: Where not.*

1. NOte: There is a difference betwixt a general absolute power and authority as owner of the Land, and a particular power and authority by him who hath but a particular Intereſt, and so makes Leases for lives or years. If a man hath an absolute power and authority over the Land; there he may make leases for life or years by Attorney: but otherwise it is, of him who hath but a particular Intereſt: And therefore if A. be Tenant for life, the Remainder in tail; and A. hath power to make Leases for 21. years, rendring Rent; he in that case cannot make a Lease for 21. years by Attorney, by force of his power, because he hath but a particular power which is personal to him: And so it was adjudged, 24 Eliz. in the Lady *Greshams* Case. And some Powers and Authorities are so personal, that they cannot be transferred over to another: If the Lord distrain the Cattle of his Tenant, though nothing be behind, The Tenant for and in respect of the duty which he oweth to the Lord, shall not have an Action of Trespass against him *vi & armis*: But if the Lord commandeth his Bayliff, or Servant, in such case to distrain where nothing is behind, The Tenant shall have an Action of Trespass *Quare vi et armis* against the Bayliff or Servant. 2 H.4.4. 1 H.6.6. 9 H.7.14. acc.

2. Husband and Wife were seized of Tenements in *London*, to them, and to the Heirs of the Husband; and the Husband Covenanted by Indenture, in consideration of 201. That he and his Wife would suffer a Common Recovery, by Writ of Right, according to the Custome of *London*, which bindeth as a Fine at the Common Law, and that the Recovery should be to the use of the Recoverors, until they had made a good and sufficient Lease by Indenture for 40 years; and after the making of the said Lease, then to the use of the Husband and Wife, and the Heirs of the Husband; and the Recovery was had accordingly. It was the Opinion of all the Justices in that Case, That the

the Leaſe was good, and not defeiſible by the Wife, who ſurvived her Husband; and ſo it was adjudged in the Kings Bench. 12 Eliz. *Dyer*, 290. See *Cook* 2 Part, 57. in *Beckworths* Caſe.

3. Note, It was Reſolved, *Cook* 10. Part, 85. in *Leonard Lovies* Caſe, That if a man limitteth an eſtate by Indenture, to the uſe of himſelf for life, with power to make Leaſe for life or years, or to ſuch perſons as he ſhall name by his laſt Will, of any eſtate or eſtates, the Remainder to A. in Tail, with divers Remainders over; That theſe remainders are in contingencies, and do not veſt in them preſently by the Statute of 27 H. 8. until the contingence fall, becauſe it is a doubt whether the Eſtates in future ſhall ever veſt. See Paſch. 36 Eliz. B. R. *Acton* and *Hores* Caſe, *Cook* 3. Part, *Boraſtons* Caſe, acc.

4. A. ſeized of two Mannors, enfeoffed divers perſons of them, to the intent, That they ſhould give them back again to A. and B. his Wife, whom he intended to marry; the remainder to the heirs males of the body of B: A. and B. marry, and have Iſſue C; A. dyeth, C. in the life of B. ſuffers a Common Recovery with Voucher, to the intent that the Recoverors ſhould make a Feoffment to uſes, and that the Wife, Tenant for life, Releaſe with Warranty; which Feoffment, and Releaſe with Warranty, was made accordingly. It was Reſolved in this Caſe (amongſt other things) That although the Statute of 11 H. 7. *cap.* 20. made the Diſcontinuance, Allienation, Warranty, and Recovery void: Yet thoſe general words have been ſo expounded, that they are not void amongſt the parties themſelves, but ſhall ſtand in force amongſt themſelves, and againſt all other perſons, but only ſuch to whom the Intereſt, Title, and Inheritance, after the death of ſuch woman ſhall appertain, and they only may make them void by their Entry. *Cook* 3. Part, 60. Lincoln Colledge Caſe.

5. A man ſeized of Lands in Fee, made a Leaſe for years, rendring Rent, upon condition, That if he, his Executors, or Aſſigns Granted, Allened, or Aſſigned any part of the Land without the aſſent of the Leſſor, his Heirs, or Aſſigns, that it ſhould be lawful for Him, his Heirs, or Aſſigns to re-enter: The Leſſee aſſigned part of it without aſſent; The Leſſor before notice, and before re-entry, accepted the Rent, and afterwards re-entred. It was adjudged, That his re-entry was lawful: And in this Caſe, amongſt other points, it was Reſolved, That if the Concluoſin of a Leaſe for years is, , That if the Rent be behinde, that the Leaſe ſhall be void, that no acceptance of the Rent can make the void Leaſe good; but if the Leaſe be but voidable by Entry, there acceptance can make it good. 2. That there is a difference betwixt a Leaſe for life, and a Leaſe for years; for in a Leaſe for life, if the concluſion be, that the Leaſe ſhall be void; that becauſe a Freehold created by Livery cannot be avoided without Entry, acceptance of Rent due at a day after, ſhall bar the Leſſor of his Entry, and affirm the Leaſe; for he cannot receive the ſame upon any Contract, as in the Caſe of a Leaſe for years, but he ought to receive it as a Rent, and then he affirms the Leaſe to continue, and therefore the acceptance of the Rent ſhall bar him of his Entry. *Cook* 3. Part, 65. in *Pennan's* Caſe.

6. If a Parſon, Vicar, or Prebend maketh a Leaſe for years rendring Rent, and dyeth, and the Succeſſor acceptech the Rent, the ſame is nothing worth, becauſe the Leaſe was void by his death, otherwiſe if it were a Leaſe for life. But if a Biſhop, Abbot, or Prior, maketh a Leaſe for years, and dyeth, and the Succeſſor accept the Rent, he ſhall never avoid the Leaſe, becauſe the Leaſe was but voidable, *ibid.*

7. Note, It was Reſolved, That every one who hath a lawful Eſtate in a Mannor, be it in Fee, in tail, in Dower, or by the Curteſy, or for life or years, or as Guardian, or Tenant by Statute, Elegit, or at Will; If a Copyhold Eſcheat or come to their hands during their time, every one of them at their Will may Grant the ſame, rendring the Ancient Rent, Cuſtomes, and Services, and the ſame ſhall bind the Lord who hath the Inheritance or Freehold of the Mannor, for every one is *Dominus pro tempore*, and within the Cuſtome. And this difference was alſo agreed and Reſolved, That if a Diſſeiſor, or Feoffee of a Diſſeiſor, or any other who hath a tortious or defeaceable Eſtate or Intereſt ſubject to the Action or entry of another hold Court, and make any voluntary Grant, upon Eſcheat or forfeiture of a Copyhold; ſuch voluntary Grant ſhall not bind him who hath right, when he hath re-continued the Mannor by Action, or entry. But if ſuch a Lord who hath a wrongful and deforcible Title, admit any upon a ſurrender made to the uſe of another, or admit the Heir upon a Diſtent, ſuch Admittances are good within the Cuſtome: For ſuch acts are lawful, and which he may be compelled and forced in a Court of Equity to do; and therefore ſuch Admittances ſhall bind him who hath right. Trin. 26 Eliz. in B. R. *Cook* 4. Part, 23. *Pennſathers* Caſe.

See before, *Cook* 5. Part, 124. *Saffyns* Caſe; to this Diviſion.

8. Tenant in tail of divers houſes, and of other Lands holden in *Capite* in Fee, by Indenture made a Leaſe of the Lands of which he was ſeiſed in tail for years, not Warranted by the Statute of 32 H. 8. and dyed without Iſſue, the Reverſion diſcended to his general Heir, who was in Ward to the King. Office was found that he dyed ſeiſed of an Eſtate

tail of the houſes, and that they diſcended to the Heir general. It was Reſolved in this Caſe, That the King in privity of the Heir in tail, ſhould avoid the ſaid Leaſes during the time that they were in the Wardſhip of the King. 2. Reſolved, That although the King had avoided the Leaſe for his time, yet the Heir in tail, after the Intereſt of the King determined, by acceptance of the Rent, might make the Leaſe to have continuance. And to that purpoſe, ſee 2 Ma. *Dyer*, 119. *Auſtins* Caſe. Tenant in tail, the Reverſion to the King; Tenant in tail makes a Leaſe for years, and dyeth, his Iſſue of full age; the King entreth and avoideth the Leaſe for his Primer ſeiſin, the Son ſues his Livery, and accepts the Rent, and afterwards was Attainted of Treaſon. It was adjudged, That by the acceptance of the Rent, after the Livery, by the Iſſue in tail, the Leaſe was affirmed, becauſe the Leaſe was avoyded by the King but for part of the Term. And further in that Caſe, it is put and agreed, That if Tenant in tail doth diſcontinue the tail, and takes back an Eſtate in Fee, and afterwards makes a Leaſe for years rendring Rent, and dyeth, the Iſſue before Entry levyeth a Fine; the Grantee ſhall not avoid the Leaſe, for although that the Son was remitted, yet the Leaſe was not meerly void without actual entry by the Iſſue. *Cook* 7. Part, 8. The Earl of *Bedfords* Caſe.

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4. *Of Leaſes made by Biſhops, Deans, and Chapters, Prebendaries, Parſons, Vicars: Where their Leaſes are good by the Statutes of* 32 H. 8. 1 *and* 13 Eliz. *and other Statutes; where not. And where their Leaſes, Charges, or Grants were, or now are good, without Confirmation; Where not.*

1. EVery Archbiſhop, Biſhop, Arch-Deacon, Dean, Prebendary, Parſon, Vicar, and other Corporation Spiritual, by the Common Law, might have made Leaſes *concurrentibus his qui in lege requiruntur* for lives, or years, without limitation or ſtint of time: but they are now by the Statute of 32 H. 8. and 1 and 13 Eliz. and other Statutes reſtreyned to make any Leaſe of their Lands or poſſeſſions belonging to the Church, but according to ſuch limitations, and under ſuch Proviſoes as are mentioned in the ſaid Statutes. See *Cook* 5. Part, 14. in the Caſe of Eccleſiaſtical perſons. *Cook* 10. Part, 60. *Cook* 1. Part, 66. acc.

2. Note, That by the Statute of 32 H. 8. which is an enabling Statute. A Biſhop by his Deed, without the Dean and Chapter. A Parſon ſeiſed in Fee in the right of his Church, may make Leaſes; but then ſuch Leaſes muſt be made under theſe Cautions and Proviſoes following, *viz.* 1. The Leaſe muſt be made in Writing, by Deed Indented, and not by word only. 2. The Leaſe muſt begin from the day of the date thereof. 3. The Auncient Leaſe muſt be ſurrendred, expired, or ended within one year after the making of the ſecond Leaſe, and ſuch ſurrender muſt be abſolute, and not Conditional. 4. There muſt not be a double Leaſe in being at one time. 5. The Leaſe muſt not exceed 21 years or three lives from the making thereof. 6. The Leaſe muſt be of Lands or Tenements Manorable, out of which a Rent may be reſerved. 7. The Leaſe muſt be of Lands and Tenements which commonly have bin letten to Farm by the ſpace of 20 years next before the Leaſe made. 8. There muſt be reſerved to them and their Succeſſors, ſo much yearly Rent, or more, which hath bin accuſtomably uſed to be paid for the ſaid Lands or Tenements within 20 years before the Leaſe made. 9. The Statute of 32 H. 8. doth not extend to any leaſe to be made without impeachment of Waſte. *Cook* 1. Part, *Inſtitutes* 44. All which are proved and made good by the Caſe in this Diviſion enſuing.

3. A Manner which conſiſted of Free Rents 7 l. Copy-Rents, 3 l. and of Demeſnes which had uſed to be Demiſed for ſeveral Rents, to which Manner, an Acre of Waſte was parcel, of the yearly value of 12 d. Heriots, Court Leet, &c. which were never demiſed for life or years, is given to A. and B. in tail, by a private Act of Parliament made 27 H. 8. by which Act the Donees were reſtreyned, that they ſhould not do any thing *ad nocumentum*, or diſinheriſin of the Iſſue in tail. Tenant in tail accepted a Fine *ſur Conuſans de droit*, by which they granted and rendred the ſaid Manner for 300 years rendring Rent, amounting to the Free, Copy, and Farm Rents, and 18 d. more, and 12 d. for the Waſte, payable at two Feaſts, whereas the Antient Rent was payable at four Feaſts. In this Caſe, theſe points were Reſolved. 1. In reſpect the ſaid Waſte was never demiſed before, the Rent which is entirely reſerved out of the whole, cannot be ſaid to be *verus et antiquus redditus*. 2. That the reſervation of the Rent at two dayes, whereas the Ancient Rent was payable at four dayes, made the Leaſe by Grant and Reſider void. 3. Reſolved, That if Tenant in tail reſerve a leſſer Rent during his life, and a greater Rent after his death, then the Ancient Rent after his death, the ſame is not

good, but maketh the Leaſe to be void, *Cook* 5. Part, 6. The Lord *Mountjoyes* Caſe.

4. A Biſhop after the Statute of 1. *Eliz.* made a Leaſe for years, and afterwards ouſted the Leſſee, and made a Leaſe for three lives, yeilding the ancient and accuſtomed Rent. It was Reſolved in this Caſe, That this Leaſe was voidable by the Succeſſor. 1. Becauſe the Statute is in the diſjunctive for 21 years, or 3 Lives. 2. Becauſe the Rent reſerved, was not payable within the meaning of the Statute; for the Statute was to maintain Hoſpitality, and to avoid Dilapidations; and that cannot be but by a continual Revenue yearly paid, and not in expectancy, and *in futuro*: And if this Leaſe ſhould be good, the Leſſees for life ſhould have the Rent reſerved upon the Leaſe for years. 3. Reſolved, Where the Statute ſaith, That the old Leaſe be ſurrendred within one year, that a Conditional Surrender is not within the Statute. *Cook* 5. Part, 3. *Elmors* Caſe.

5. A Biſhop after the Statute of 1 *Eliz.* made a Leaſe of a Fair for three Lives, rendring the ancient Rent, which was confirmed by the Dean and Chapter. It was adjudged in that Caſe, That the Succeſſor ſhould avoid the Leaſe; becauſe a Fair is but a Franchiſe, or a Liberty not Maynorable, out of which a Rent cannot be reſerved; and all Leaſes of ſuch Inheritances, out of which the ancient Rent cannot be well and lawfully reſerved, are voidable by the Statute. *Cook* 5. Part, 3. *Jewel's* Caſe.

6. Copyholder for life of Land, rendring the ancient rent of 8 s. 8 d. quarterly, and heriotable; where the Cuſtome was, That a Leaſe might be made of the Copyhold for three lives; A Dean and Chapter, Lords of the Mannor, made a Leaſe of the Copyhold Lands for the lives of A. B. and C. and the Survivor of them; and if this Leaſe might be avoided by the Statute of 13 *Eliz.* cap. 10. was the Queſtion. In this Caſe it was Reſolved, 1. That Deans and Chapters by the equity of the ſaid Statute, are reſtrained to make Leaſes, without Impeachment of Waſte. 2. Reſolved, That Leaſes for the lives of others, are within the Statute of 32 H. 8. of Leaſes, made by Tenant in Tail, as well as within the Statute of 13 *Eliz.* 3. That the ſaid Eſtate granted by Copy, was in judgment of the Common Law, an Eſtate at Will, and ſuch lands are accuſtomable to be letten to Farm within the ſaid Act. 4. Reſolved, That the Statute of 13 *Eliz.* did not make the Leaſe void, if the accuſtomed yearly Rent, or more, be reſerved, and in the principal Caſe; becauſe the Heriot was not a thing annual, nor a thing depending upon the Rent, it was ſufficient if the yearly Rent was reſerved. 5. It was ſufficient if the yearly rent was reſerved at one time; for that the words of the Statute of 13 *Eliz.* are, (whereupon the accuſtomed Rent, or more ſhall be reſerved) and the Statute is ſatisfied by the word [yearly.] And therefore it was Reſolved, That this Caſe differs from the Lord *Mountjoyes* Caſe; becauſe in that caſe there wanted the word [yearly.] *Cook* 6. Part, 37. The Dean and Chapter of *Worceſters* Caſe.

7. A Biſhop of *London* leaſed parcel of the poſſeſſions of his Biſhoprick for 21 years, and afterwards ouſted the Leſſee, and leaſed the lands to another for three lives, rendring the ancient and accuſtomed rent, which was confirmed by the Dean and Chapter; afterwards A. was tranſlated: It was holden in this Caſe, That the leaſe was warranted by the Statute of 1 *Eliz.* At the Common Law a Biſhop might make an Alienation in Fee ſimple, being confirmed by Dean and Chapter: But by the Statute of 32 H. 8. Biſhops without Dean and Chapter, or their Confirmation, may make a leaſe for 21 years; but with their Confirmation, may make a leaſe for 1000 years: But by the Statute of 1 *Eliz.* the power of Biſhops in that Right is much abridged: for that now with Confirmation or without Confirmation, they can diſpoſe of their poſſeſſions but for 21 years, or three lives; and this leaſe is in all points according to the Statute; for 1. It begins preſently upon the making of it. 2. The ancient Rent is reſerved yearly, during the Term; for although there be an old leaſe in *Eſſe*, yet the Rent reſerved upon the ſecond leaſe, is payable during the ſecond Term; for *Payable*, is a word of Power, and not of Action. See the words of the Statute of 32 H. 8. [Rent reſerved yearly during the ſaid leaſe, due and payable to the Leſſor, &c.] ſuch Rent &c. and yet by the ſaid Statute, ſuch leaſes may be good, although there be a former Intereſt for years in being, if the ſame be expired, ſurrendred, or ended within one year after the making of ſuch new leaſe, and ſo not expreſly payable *in rei veritate*, annually during the Term. Paſch. 29 Eliz. in B. R. *Bunny* and *Wright's* Caſe. *Leon.* 59.

8. In an *Ejectione firmæ*, the Caſe was: The Warden and Fellows of All-Souls Colledge, 10 *Eliz.* leaſed to the Plaintiff divers lands, To have and to hold, from the Feaſt of the Annunciation next following, to the end of 20 years; and made a letter of Attorney to one, to enter into the ſaid Mannor, and to Seal and Deliver the Deed of the ſaid Leaſe in their names, to the Plaintiff, who by force thereof, entred into part of the demiſed premiſſes, and did there Seal and Deliver the ſame. But it was not found, that any Rent was reſerved thereupon: It was Objected, That this leaſe was void, for that it was not warranted by the Statute; for the Statute of 13. is other then for 21 years: But it was anſwered and holden, That it was not

the intent of the Statute, but only to abridge the great and long leaſes heretofore made by Colledges, and to limit ſuch leaſes to a certain meaſure and time, for 21 years, or three lives, but on this ſide as much as they would. 2. It was Objected, That it was not found that the due Rent was reſerved upon the ſaid Leaſe (accuſtomed yearly rent or more.) But to that it was ſaid, It was good enough; for if the other party will take advantage of ſuch defect, he ought to ſhew the ſame, otherwiſe it ſhall be intended, becauſe it is found, That ſuch a leaſe was made, that it was made according to the Statute. It was alſo holden, That that leaſe was not void againſt the Warden that made it, but againſt his Succeſſor, although no Rent be reſerved upon it, notwithſtanding that percloſe of the Statute, [utterly void, and of none effect, to all intents, conſtructions, and purpoſes.] And it was ſaid in this Caſe by *Anderſon* Chief Juſtice, If ſuch a Leaſe ſhould be void, great miſchief would fall to the Colledge, for whoſe benefit this Statute was made; for if ſuch leaſe be made, rendring a ſmall rent, then if before the default be found or eſpied, the Rent was arrear, the Colledge could not have remedy for that rent. It was the Opinion of all the Juſtices, That the leaſe was not void, but voidable; and Judgment was given for the Plaintiff. Mich. 31 Eliz. in C. B. *Carter* and *Claycobbs* Caſe. *Leon.* 314, 315.

9. In Trover and Converſion of 20 Loads of Wheat, upon a ſpecial Verdict; The Caſe was, A. leaſe was made by a Biſhop for three lives, *viz.* to one for life, the remainder to a ſecond for life, the remainder to a third for life; ſo not warranted by the Statute of 1 *Eliz.* and the Succeſſor accepted the Rent: Whether this was a good Leaſe againſt the Succeſſor himſelf, who accepted the Rent, and ſhall binde him during his time, ſo as he cannot enter, and avoid it, and make a new Leaſe, was the Queſtion. It was Reſolved, That the acceptance of the Rent by the Biſhops Succeſſor, ſhould binde him for his time, ſo as he ſhall not avoid that Leaſe, which was otherwiſe voidable. 1 Hill. 2 Car. in C. B. *Owen* and *Thomas Ap Rees* Caſe. *Cro.* 1 Part, 67.

10. In an *Ejectione firme* for an Acre of Land in M. It was found upon a Special Verdict, That the Biſhop of G. was ſeiſed in Fee of the Manor of M. whereof the Acre was parcel; and by Indenture 8 Eliz. demiſed the Acre to J. D. and W. D. *Habendum* to the ſaid J. *à die datus Indenturæ* for his life, the Remainder to W. for his life, rent dring 3 *s.* 2 *d. per annum* at *Mich.* and our Lady: the Biſhop dyed, G. was created Biſhop, and having notice that divers Rents of the ſaid Mannor were due and unpaid, commanded J. S. Bayliff of his Mannor to receive the Rents arrear, whereof the Rent of the ſaid W. was amongſt other paid to the Biſhop, the Bayliff not giving notice particularly to the Biſhop, that it was the Rent of W. and that the Biſhop 43 Eliz. accepted of all the ſaid Rents by the hands of his Bayliff, and the Statute of 1 Eliz. was found, and that the ſaid G. was Biſhop of *Glouceſt.* 44 Eliz. and demiſed to the Plaintiff the ſaid Acre, and all the Tythes growing thereupon for 21 years. In this Caſe, Judgment was given for the Defendant: And it was Reſolved, That although the Leaſe be for life, *Habendum à die datus*, yet being found *Quod Epiſcopus demiſit*, It ſhall be intended, that Livery was made after the day, and that it was a good Leaſe. And 2. That this acceptance of the Biſhop ſhould bind the Biſhop. Paſc. 5 Jac. in C. B. rott. 1041. *Wheeler* and *Danbyes* Caſe. *Cro.* 1. Part, 67.

11. In Treſpaſs, the Caſe was; J. Biſhop of *Carliſle* let a portion of Tythes to A. B. and C. for their lives ſucceſſively, rendring the Auncient Rent, and dyed: His Succeſſor accepts the Rent for divers years, and afterwards made a Leaſe of thoſe Tythes for 21 years, which Leſſee took the Tythes, and A. the Plaintiff brought Treſpaſs. It was Reſolved firſt, That it was a void Leaſe, for no Leaſe is good, unleſs the auntient Rent be reſerved, and annually due and payable according to the reſervation; but this Rent being reſerved upon a Leaſe of Tythes for life, there is not any remedy for it by Diſtreſs or Aſſiſe, ſo as the Leſſee is not compellable to pay it; and becauſe it is not payable as the Law appoints, it is therefore void. 2. Reſolved, That the Leaſe being void, the acceptance ſhould not make it good, for it was abſolutely void by the Statute againſt the Succeſſor, but not againſt the Biſhop himſelf; and it is not like Leaſes made by Biſhops at the Common Law for three lives, there it is not void, but voidable, which may be made good by acceptance of the Rent. Trin. 5 Jac. in B. R. *Rickman* and *Garths* Caſe. *Cro.* 2. Part, 173.

12. In an *Ejectione firme*, it was found by Verdict: A Prebend makes a Leaſe for years of Lands parcel of his Prebendary, with an Exception of great Woods, *viz.* Oaks, Aſhes, which Leaſe was confirmed by the Archbiſhop, Patron, but not by the Dean and Chapter. Afterwards he made a ſecond Leaſe, without Exception, being before demiſed with the Exception; and whether this Leaſe ſhould be good to bind the Succeſſor, was the firſt Queſtion: the ſecond Queſtion was, Whether the ſecond Leaſe were a good Leaſe within the Statute of 13 Eliz. In this Caſe, it was Reſolved, That the Confirmation by the Archbiſhop, Patron, was good without the Dean and Chapter. 2. It was Reſolved, That this ſecond Leaſe made without Exception, was a void Leaſe

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by the Statute of 13 Eliz. and ſo Judgment was given for the Plaintiff againſt the ſecond Leaſe. Hill. 13 Jac. in B. R. *Smith* and *Bowles* Caſe. *Bolſtr.* 3. Part, 290.

13. In a *Replevin*, the Caſe was; The Predeceſſor of the Biſhop of *Chicheſter*, ſeiſed of a Park in the right of his Biſhoprick by Deed. 44 Eliz. made a Leaſe of keeping of the ſaid Park, and all the profits appertaining to it to J. F. for life, *et ulterius* granted *pro executione Officii, præſcit.* 5. marks, with clauſe of Diſtreſſe, *una cum.* a Livery, and 13 s. 4 d, *necnon Paſturam pro duobus equis*, together with the Windfalls, which was confirmed in the life-time of the Biſhop by the Dean and Chapter: And the Defendant in his Avowry ſhewed, That the ſaid Park had been anciently granted with the Fee of 5. Marks; and for arrears of the Fee, the Defendant did avow the taking of the Cattel. The Plaintiff pleaded the Statute of 1 Eliz. and ſaid, That this Paſturage was a larger Fee then ever was granted before: Upon which, the Avowant did Demur: And the Queſtion was, if this new Addition of the Paſturage, to the Grant of the Office of Keeper, made the Grant void? The Court was divided in their Opinion: But the better Opinion ſeemed to be, That this Augmentation of Paſturage did not make the Grant void in all, but for the Augmentation only; and that it was ſeveral in *ſpecie* from the 5. Marks; and that this was out of the Statute of 1 Eliz. and the things are ſeveral, and may be ſeverally recovered as diſtinct things in their nature, in the Intent of the Grantor; and therefore the Grant was void, *quoad* the Paſturage, but not to make the Grant of the Office void with the Fee of 5. marks. Paſch. 1 Car. in C. B. The Biſhop of *Chicheſter* and *Freeland*'s Caſe. *Bridgman*, 29, 30.

14. By the Statutes of 1 & 13 Eliz. and 1 *Jacobi*, Biſhops and other Eccleſiaſtical perſons are reſtrained to alien or diſcontinue any of their Eccleſiaſtical Lands or Livings; and if they alien their lands or poſſeſſions, although that it be to the King himſelf, the ſame is void in Law: For although the King be not expreſly named in the Act of 1 Jac. Yet the ſaid Statute being made to ſuppreſs Alienations, Diſcontinuances, and Wrongs done to their Succeſſors, the King is included in the general words of the Statute, (perſon or perſons) *Cook* 11. Part, in *Magdalen* Colledge Caſe.

15. If a Biſhop had been Patron of a Church, the Biſhop could not have made any Grant made by the Parſon of any Lands of his Parſonage good, either by Licence precedent, or Confirmation ſubſequent, which ſhould have bound the Succeſſors of the Parſon, without the Confirmation of the Dean and Chapter. 31 H. 8. *Br. Charge* 40. But if there had been Parſon, Patron, and Ordinary, and the Patron and Ordinary had given Licence by their Deed to the Parſon, to grant a Rent-Charge out of his Glebe, and the Parſon had made ſuch a Grant, this ſhould have bounden the Succeſſors of the Parſon at the Common-Law before the reſtraining Statutes, and although it had not been confirmed afterwards, by reaſon of the Licence precedent, 7 H. 4. 15. *Cook* 1. Part, *Inſtitutes*, 300. And in that caſe, the Ordinary alone might have agreed to ſuch a grant of a Rent by his Licence precedent, or Confirmation ſubſequent, without the Confirmation of the Dean and Chapter, becauſe in that caſe, the Dean and Chapter had not to do with any thing which the Biſhop did as Ordinary; for that did not concern their poſſeſſions: But yet in ſuch caſe, The Licence or Confirmation of the Patron, had not been good to have made the Charge perpetual, unleſs the Patron had had a Fee-ſimple in the Patronage; Which if he had, Then the grant of the Rent by the Parſon *conſuetudine hic, &c.* had been good, and ſhould have bound the Succeſſors of the Parſon at the Common Law, before the reſtraining Statutes. See 31 E. 3. *Br. Grants* 61. 9 Eliz. *Dyer*, 252.

16. If a Biſhop before the reſtraining Statutes of 1 Eliz. and 1 Jac. had made a Feoffment in Fee of Lands parcel of his Biſhoprick, and the Dean and Chapter had Confirmed the Deed of the Biſhop, the ſame had been good; and Livery and Seiſin made upon the firſt Deed had been good, after the ſaid Deed had been confirmed. So if a Biſhop by Deed enrolled, had conveyed Lands to the King, and the Dean and Chapter had confirmed the Deed of the Biſhop, it had been ſufficient to have confirmed the Lands to the King, although that the Deed of the Dean and Chapter had not been enrolled: For the aſſent was to be made to the act of the Biſhop, and to him, and not to the King. *Cook* 1. Part, *Inſtitutes*, 301.

17. If the Parſon and Ordinary make a Leaſe for years of the Glebe to the Patron, and afterward the Patron aſſign and grant this Leaſe over unto another perſon, the Aſſignment is good; and a Confirmation of the firſt Leaſe made unto himſelf, and the Deed of the Patron in ſuch caſe doth enure to a double intent, both to make the Aſſignment of the Leaſe good, and to a Confirmation of that Leaſe to the Aſſignee. *Cook* 5. Part, 15. acc.

18. If a Biſhop have two Chapters, (as there may be two or more Chapters, to one Biſhoprick) both the Chapters muſt confirm Leaſes made by the Biſhop: But if one of the Chapters after the date or making of the Leaſe be diſſolved, there a Confirmation made by the Chapter which is in being, is ſufficient to make the Leaſe good; and in ſuch caſe there needeth not any Confirmation of the

the King, who is Supream Patron of all the Dioceſſes in England. *Cook* 1. Part, *Inſtitutes*, 31. 11 Eliz. *Dyer*, 282.

19. If a Dean of one Cathedral Church be elected Biſhop of another See, with Diſpenſation *retinere Decanatum in Commendam*. If after the Biſhop of that See whereof he was the Head and Dean, do make a Leaſe of parcel of the Poſſeſſions of the Biſhoprick, the Confirmation of that Leaſe by the Commendatory Dean, is good. Paſch. 3 Jac. in B.R. *Evans* and *Aſcues* Caſe, adjudged acc.

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5. *Of Leaſes, Grants, and Diſcontinuances, made by Tenant in tail, or others within the Statute of* 32 H. 8. *What ſhall be good; What not.*

1. IF Tenant in tail maketh a Leaſe for Lives, according to the Statute of 32 H. 8. Cap. 28. and afterward dyeth without Iſſue, this Leaſe being derived out of the Eſtate tail, ſhall not continue longer then the Eſtate tail. *Cook* 8. Part, 34. in *Payns* Caſe.

2. Sir *Richard Bridges* ſeiſed of certain Lands, made thereof a Feoffment to W. and others, upon Condition, That they ſhould give the ſame to him and his wife, and to the heirs of their two bodies begotten; the remainder, to the right heirs of Sir *Richard*; which was done accordingly: they had Iſſue *Anthony Bridges*: Sir *Rich.* dyed; *Anthony* in the life of his Mother levied a Fine with Proclamation to Sir *George Brown* in Fee; the Wife, living the ſaid *Anthony*, made a leaſe for 3. Lives: It was Reſolved, 1. That that Leaſe was not good, nor warranted by the Statute of 32 H. 8. 2. Reſolved, That the ſaid Fine levied by the ſaid *Anthony*, ſhould barr the Iſſue in tail: and yet in that caſe, the Wife doth remain Tenant in tail. *Cook* 3. Part, Sir *George Brown*'s Caſe. *Cook* 9. Part, 140. in *Beaumonts* Caſe, acc.

3. A Guift was made to Husband and Wife, and to the heirs of the body of the Survivor of them: In this Caſe, as to the Eſtate tail, there is incertainty in the perſon; And therefore if they make a Leaſe for 21. years, obſerving all Circumſtances required by the Statute of 32 H. 8, yet this Leaſe ſhall not bind the Iſſue; for that for the incertainty of the perſon of the Survivor, the Eſtate tail was not veſted. See Regiſter Orig. 239. *Cook* 10. Part, 51. in *Lampits* Caſe.

4. The Earl of *Bridgwater*, Tenant in tail before the Statute of 32 H. 8. was bound in a Recognisance to him in the Remainder, That he ſhould not make any Eſtate longer then for his own life. It was holden in this caſe, That if after the Statute he makes a leaſe for 21. years or 3. Lives, he forfeits his Recognizance. In that caſe it was ſaid, That he in the Reverſion or Remainder ſhould not avoid ſuch leaſe, if Tenant in tail dyed without Iſſue. Paſch. 33 H. 8. *Dyer*, 48. But for this latter point, ſee the contrary before. *Cook* 8. Part, 34. Sect. 1.

5. A Guardian during the minority of the Iſſue in tail, which is but of the age of one year, makes a Leaſe for 20 years of the Lands; the ſame was holden to be no good Leaſe warranted by the Statute of 32 H. 8. to bind the Iſſue in tail; and ſo it is in caſe of a Tenant in Dower: Tenant by the Curteſie, or of the husband ſeiſed in the right of his wife, becauſe they have no Inheritance. Hill. 10 Eliz. *Dyer*, 271. See *Cook* 6. Part, in the Dean and Chapter of *Worceſters* Caſe, and *Cook* 1. Part, *Inſtitutes*, 44, acc.

6. Tenant in tail maketh a Leaſe to begin at *Mich.* next enſuing for 20. years; It was holden to be a good Leaſe by the Statute of 32 H. 8. 8 Eliz, *Dyer*, 246. And ſo is a leaſe for 10 years, and afterwards for 11. years, and yet the Statute is in the Negative. Trin. 31 Eliz. in B. R. in *Read* and *Naſbes* Caſe. *Leon.* 147.

7. In Debt for Rent, the Caſe was; Land was given to husband and wife, and to the heirs of their bodies; and the Plaintiff declared, That the Wife leaſed the Lands to the Defendant, and that the Donees were dead, and that the Plaintiff as heir brought an Action of Debt for the Rent behind: Upon *Non demiſerunt*, the Jury found, That the husband and wife demiſed by Indenture; and afterwards the husband dyed, and the wife entred, and within the Term dyed. In the Caſe, It was adjudged for the Defendant; for that it is now no Leaſe *ab initio*, becauſe the Wife by her diſagreement to it, and occupation of the Land after the death of her husband, made it the leaſe of the husband only. Mich. 32 Eliz. in C.B. *Thurſord* and *Thurſords* Caſe. *Leon.* 192.

8. A purchaſed Lands to him and his Wife, and their heirs; and afterwards A. (without his wife) let the Lands to J. S. for 60. years, if they lived ſo long, rendring 280 l. yearly rent, at two uſual Feaſts during the Term; A. dyed: and whether this Leaſe ſhould bind the Wife by the Statute of 32 H. 8. was the Queſtion, becauſe the Wife was not named a party to the Indenture: It was the Opinion of the Juſtices, That it ſhould bind her. For it is a good Leaſe within the body of the Act, and is not within the Proviſo; for that it is out of the words and intent of the Proviſo.

After,

Afterwards, upon the Evidence it appeared, That the Land anciently was in leaſe, and occupied by two Tenants, the one paid 60 l. and the other 180 l; and ſo for both 240 l. Rent yearly onely, and now they are joyned in one Leaſe, and 280 l. yearly reſerved, which is more by 40 l. a year then both the Leaſes were before: and whether this was a good Leaſe within the Statute, was another Queſtion? But the Point was not Reſolved; but the Caſe ended and agreed by Arbitrament. Mich. 1 Car. in C.B. *Smith* and *Trinders* Caſe. *Cro.* 1. Part, 15, 16.

9. Note. It was Reſolved, That the Statute of 32 H.8. Cap.28. which confirmeth Leaſes for 21 years made by Tenants in tail, or of the huſband and wife of the Lands of the wife, touch not Copyholds: For that Statute warrants only the leaſing of ſuch Lands as are grantable by Deed; but ſuch are not Copyhold lands: For although by the Lords licence they may be demiſed by Indenture; yet in their nature they are only demiſeable by Copy, and therefore out of the general purview of that Statute. Trin. 18 Jac. in C. B. *Rowden* and *Mulſters* Caſe. *Cro.* 1. Part, 30, 31.

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6. *Upon Exception in Leaſes; of Woods, underwoods, &c. What is thereby excepted; What not: Whether the Intereſt in the ſoile be excepted, or not. And of divers other Exceptions in Leaſes*, quid Operatur.

1. A Leaſe of lands was made, excepting Timber wood and underwoods: The Queſtion was, Whether Trees *Sparſim*, growing in Hedgrowes and Paſtures, did paſſe? It was holden, That by Timber woods, nothing but Timber growing, did paſſe: That it was moved, Who ſhould have the Tops and fruits of them; and alſo the ſoile under the Woods? And a difference was taken, Where the words are general, All Woods; and where they are, His Woods growing; But this Point was not Reſolved then. But in that Caſe, It was holden and agreed, That if a Stranger cutteth down Woods in a Forreſt, and there is no fraud betwixt him and the Owner of the Land, that the Owner of the ſoile ſhall have them, and not the King; and yet the Owner of the Soil could not cut them down; but is to take them by one appointed by the Statute for the delivery of them. Mich. 28 Eliz. in C. B. *Godbolt*, 98, 99.

2. A man made a Leaſe for years of a Mannor, reſerving Woods, and Underwoods; the Leſſee cut down Trees, and the Leſſor brought an Action of Waſte: It was holden, That Waſte did not lye, becauſe the words of the Statute are, *in boſcis ſibi dimiſſis*; but an Action of Treſpaſſe did lye. It was holden by *Shelley*, That by reſervation of Woods, the land was not reſerved, but the Tenant ſhall have the herbage: But by a grant of Woods, the land it ſelf ſhall paſſe, becauſe the Deed of every man ſhall be taken ſtrongeſt againſt himſelf. And it was ſaid, That in a Writ of Entry, where demand is of 20 Acres of Wood, the land it ſelf ſhall be recovered. Trin. 28 H.8. *Dyer*, 19. See *Cook* 5. Part, 11. *Ives* Caſe. And *Cook* 11 Part, *Lyſords* Caſe.

3. A man ſeiſed of a Mannor, in which there was a Wood containing 30. Acres, within which, and in divers other parts of the Mannor, there were great Trees; He made a leaſe of the Mannor, excepting Timber-Trees, and great Woods: It was the Opinion of the Juſtices, That by this leaſe, Herbage and the Underwoods ſhould paſſe: For by the word [*Great*] appears the intent of the Leſſor, that he reſerved thoſe Woods only, and not the other Woods. Hill. 7 E 6. *Dyer*, 79. See *Cook* 1. Part, *Inſtitutes* 4. 14 H. 8. 1. acc. *Cook* 11. Part, *Lyſords* Caſe, acc.

4. In an Action of Waſte brought for Cutting down and ſelling of 30 Oaks, &c. the Defendant ſaid, That the Plaintiff ſold unto him *omnes arbores creſcentes ſuper, &c. quæ poſſint rationabiliter parcari*: and he ſhewed, that thoſe Trees might be ſpared, and therefore he cut them down: Upon which, the Plaintiff did Demur in Law. It was holden in this Caſe, That by the Grant of the Plaintiff *de arboribus ſuis*, they did not paſſe, for not being excepted, the Leſſor during the Term, had but a right in them, and not any property; and a Right could not be granted but by Deed. Alſo it was holden, That the Grant was void for incertainty, becauſe it did not appear how many might be ſpared; but if it had referred to the Arbitrament of another, whereby it might have been reduced to a certainty; in ſuch caſe, the Grant had been good. Mich. 1 Mar. *Dyer*, 91. See *Cook* 4. Part, 62. *Herlakendens* Caſe.

5. A man made a Leaſe of lands for years, Excepting the Woods; and afterwards the Leſſor granted the Woods to the Leſſee: If the Wood be ſo united to the land again, that by Leaſe of the land, that the Wood ſhall paſſe as a thing annexed unto it; or if the Wood remain as an Intereſt diſtinct and ſevered from the land, was the Queſtion? And in this caſe, it was Reſolved, That Leſſee for life either hath a ſpecial Intereſt or a property in the Trees as things annexed to the land, as long as they

they are annexed to the land: But if the Leſſor or other ſevereth them from the Lands, the property or Intereſt of the Leſſee is determined; and the Leſſor may take them as things annexed to the Inheritance. 2. Reſolved, That if a houſe falleth down by tempeſt, or by the Act of God, the Leſſee hath a ſpecial Intereſt to take the Timber to build the houſe again: but if the Leſſee pulleth down the houſe, the Leſſor may take the Timber as a thing annexed to his Inheritance, and the Intereſt of the Leſſee is determined. *Cook* 4. Part. 63. *Herlakendens* Caſe.

6. A man made a leaſe for 30. years, of a Manor, excepting all Woods, and Underwoods, growing and being upon the Mannor; and afterwards made another leaſe to the ſame Leſſee, of all the Woods and Underwoods growing and being upon the Manor for 60 years, without impeachment of Waſte; and afterwards made a third leaſe to the ſaid Leſſee, of the ſaid Mannor for 30 years, without any exception to begin at a day to come; *viz.* from the expiration of the firſt leaſe for 30. years: the Term of 30 years expired, the Leſſee cut the Trees, and he in the Reverſion brought an Action of Waſte. It was Reſolved, 1. That by the Exception of the Wood and Underwood, the Soil it ſelf was Excepted; and the words [growing or being upon the Manor] were ſurpluſage; for by Demiſe of all Wood upon the Manor, all Woods growing or being upon the Mannor, paſſe. 2. Reſolved, That notwithſtanding the Exception, the Woods remained parcel of the Mannor, becauſe the Freehold remained entire, and the Leſſor is Tenant to every *Precipe*. Mich. 40 Eliz. in C.B. *Cook* 5. Part, 11. *Ives* Caſe.

7. Tenant for life without impeachment of Waſte, the Reverſion expectant, cut down the Trees growing upon the land: In this Caſe, it was Reſolved, 1. That if the Eſtate had been made without ſuch Clauſe [Without impeachment of Waſte], that he in the Reverſion ſhould have the Trees as parcel of his Inheritance. 2. That this Clauſe [Without impeachment of Waſte] did not give to Tenant for life a greater Intereſt in the Trees, but ſhould ſerve only that he ſhould not be impeached in an Action of Waſte. *Cook* 6. Part, Sir *Moile Finches* Caſe.

8 A man by Deed Indented, demiſed a houſe and land, *exceptis omnibus arboribus, &c. adtunc creſcen. ultra creſentiam 21. annorum, Habendum Tenementa prædict. cum pertinentiis (exceptis præ-exceptis)* for life, and afterwards by Deed Indented, Covenanted to ſtand ſeiſed *de Tenementis prædict.* to the uſe of J. S. in tail, with divers Remainders over: J. S. entred, and ſhewed Trees to J. D. and commanded them to be cut, being Oaks growing upon the land above the growth of 21. years: In this caſe, it was Reſolved, 1. That the Trees notwithſtanding the Exception, did remain parcel, and growing out of the Inheritance, and were not Chattels which ſhould go to Executors, but ſhould diſcend to the heir, or go to him in the Reverſion, becauſe the Law doth not favour fractions and ſeverance of the Trees from the Freehold and Inheritance of the land, becauſe by that means the Trees ſhould be waſted and deſtroyed. 2. It was Reſolved, That the Leſſor might give or command the Leſſee by word of mouth to cut down the Trees, in reſpect of the Inheritance which he hath in them; but he cannot give them to a Stranger during the life of Leſſee for life, for the particular prejudice which might happen to the Leſſee. 3. Reſolved, That if a Wood, whereof a *Precipe* lyeth, be parcel of Mannor, and a man Leaſeth the Mannor, excepting the Wood, the ſoil it ſelf is excepted: But if a man exceepteth all Trees, which ſhall grow upon any Land or Paſture, there by the Exception of the Trees, the ſoil it ſelf is not excepted, but ſufficient nutriment out of the Land is reſerved to ſuſtain the vegetive life of the Trees: And if the Leſſor by Licence of the Leſſee, root up the Trees, the Leſſee ſhall have the ſoil. *Cook* 11. Part, 47, 48. *Lyſords* Caſe.

9. A man demiſed a Farm, with all manner of Timber, Wood, Underwood, and Hedg-rowes, except great Oaks growing in a Cloſe about the Farm houſe: It was adjudged in this Caſe, That the Leſſee could not cut down the Timber-Trees not excepted, for that they were not ſevered from the Inheritance, nor paſſed by the Grant. 2. Becauſe the Leſſee for life or years hath but a particular Intereſt to have the Maſt, fruit, and ſhadow of the Trees, and the Intereſt of the body of the Trees are to the Leſſor as parcel of his Inheritance; and therefore when no Exception is in the Leaſe, the Leſſee hath the particular Intereſt, and the Inheritance of them is in the Leſſor. 23 Eliz. *Dyer*, 374.

10. A. ſeiſed of the Mannor of D. in Fee, Covenanted to ſtand ſeiſed thereof to the uſe of himſelf and B, who he intended to marry, for Term of their lives, without impeachment of Waſte; and after their deceaſe, to the uſe of their firſt Iſſue male, and to the heirs males of ſuch Iſſue male: and for want of ſuch Iſſue, to the uſe of the heirs males of the body of the ſaid A. and B. begotten; and for want of ſuch Iſſue, to the uſe of C. in tail, with divers remainders over: They marry, and have Iſſue D: Afterwards A. dyeth without any other Iſſue of the body of B, but the ſaid D: B. enters; A Barn *per vim venti* was thrown down; B. took the Timber of the Barn, and converted it to her own uſe, and dyed; and the Aſſignee brought an Action of Trover and Converſion againſt the

Executors

Executors of B. for the Timber? It was adjudged, That the Action did well lye. In this caſe, It was Reſolved, amongſt other things, That if Tenant for life, or years, cut down Timber Trees, or throw down the houſes, that the Leſſor ſhall have the Timber; for the Leſſee had them not but as things annexed to the Lands: and therefore when they were ſevered from the Land, the property was in the Leſſor, and the Leſſee had but a particular profit in them; but the general property was in him who had the Inheritance. 2. Reſolved, That in this caſe, by force of the Clauſe [Without impeachment of Waſte], had ſuch a power and priviledg, that although that no waſte was made, and although that the houſe was overthrown with the wind, that yet ſhe ſhould have the Trees which was parcel of it; and therefore when they are ſevered from the houſe or Land by act in Law, of God, or of the party, the property of the Trees are in her by force of the ſaid Clauſe, Without impeachment of Waſte. *Cook* 11. Part, 82, 83, 84. *Lewis Bowls* Caſe.

11. Note. It was Reſolved by the Juſtices, where Leſſee for life makes a leaſe for years, excepting the Wood, under-wood and Trees growing upon the Land, That it is a good Exception, although he hath not any Intereſt in them but as Leſſee, becauſe he remains always Tenant, and is charged in an Action of Waſte; to prevent which, he may make ſuch an Exception: But if the Leſſee for years aſſigns over his Term, with ſuch an Exception, it is a void Exception. Hill. 9 Jac. in B.R. *Baton* and *Girlings* Caſe. *Cro.* 2. Part, 296.

12. In a *Replevin*, upon a Special Verdict, the Caſe was; A. ſeiſed of the Mannor of D, whereof 20 Acres of Coppice Woods were parcel, & wherein divers Timber Trees were *Sparſim* growing within the Mannor, made a Leaſe of the Scite and Demeſnes of the Mannor, *Exceptis et ſemper reſervat. omnibus boſcis, ſubboſcis*, Coppices, and Hedg-rowes, which then were, or at any time after during the Term, ſhould be in or upon the premiſſes, with egreſſe to fell and carry away the ſame, ſo as he leave ſufficient Free-boot, Plough-bote, &c. the Queſtion was, Whether the Soile of the 20 Acres were let to the Leſſee, or excepted to the Leſſor. It was adjudged, That the ſoil it ſelf was excepted, and that it paſſed not with the Fee: and difference was taken betwixt Exception of Wood and Underwood, and the Exception of all Timber Trees; for in the firſt, the ſoil it ſelf of the Wood and Underwood is excepted, but in the laſt no ſoil is excepted, but only ſo much as is ſufficient for the vegetive life of the Trees. Trin. 16 Jac. in B.R. *Whiſſler* and *Paſtowes* Caſe. *Cro.* 2. Part, 487. See Hill. 16 Jac. in B. R. *Pincomb* and *Thomas* Caſe. *Cro*, 2. Part, 524. acc.

13. A. had a piece of ground, for a Garden Plat, and let it to B: Afterwards B. aſſigned his Leaſe to C, who built upon the Garden Plat two houſes, leaving a ſufficient Garden. Afterwards, A. let to D. all that Garden-Plat or piece of Ground late in the Tenure of B, and now in the Tenure of C: The Queſtion was, Whether the Garden-Plat and houſes then in the Tenure of C, or ſo much of the Garden-Plat as was not built upon, did paſſe? It was holden by the Court, That all the Garden as it was in the Tenure of B, (although it was afterwards built upon) did paſſe: for the Leſſor doth not take knowledg what is done by an under-Tenant; but by intendment Leaſed it as entirely as he Leaſed it to B; and ſo the houſes built upon it, did well paſſe. Mich. 20 Jac. in B. R. *Barton* and *Browns* Caſe, *Cro.* 2. Part, 648.

14. A. and B. Tenants for life of a Tenement called R. the remainder to A. in Tail, the remainder to B. in Tail, the remainder to the right heirs of A; A. and B. his Wife, by Indenture, demiſed the Tenement to J. S. for divers years to come, excepting all Trees of Timber, Oaks, and Aſhes; with liberty to carry them away, rendring Rent: A. dyed, having Iſſue a Daughter, married to Sir *Allen Piercy* Knight; Afterwards J. S. demiſed the Tenement to Sir *Allen* for 7 years. The Queſtion was, Whether Sir *Allen* having the Inheritance in the Right of his Wife, expectant upon the eſtate of B, and having poſſeſſion by the Demiſe, might cut down the Timber Trees, &c. It was Reſolved in this Caſe, That if Tenant for life maketh a Leaſe for years, excepting the Timber Trees, &c. It is a good Exception; for otherwiſe if the Leſſee cutteth down the Trees, the Tenant for life ſhould be puniſhed in Waſte; and the Trees remained annexed to his Freehold, and he may command the Leſſee to take them for neceſſary reparations. Mich. 7 Jac. in *Cur. Ward.* Sir *Allen Piercies* Caſe; *Cook*, Select Caſes, 60.

15. A Leſſee for years opens a Mine, and afterwards aſſigns over his whole Term in the Land, with all profits, excepting the profit in the Coal Mine: The Aſſignee digs the Coal-Mine, and the Leſſor brings Waſte. In this Caſe, theſe points were Reſolved, 1. That if a man hath land, in part of which there is a Coal Mine, which is open, and he leaſeth the land for life, or years, that the Leſſee may dig the Mine; and if the Mine be open, yet if he leaſe the land, with all Mines, the Leſſee may dig it; but if it be not open, there upon a Leaſe of the land, the Leſſee cannot make new Mines. 2. Reſolved, That the Exception was void, for that a man cannot except a thing which doth not belong unto him, and by the Exception of the Mine, the land it ſelf is not excepted: And ſee

there in 28 Eliz. in C. B. *Foſter* and *Speners* Caſe. Leſſee for years aſſigns over his Term, excepting the Timber Trees, that it was a void Exception; and the Aſſignee cutting the Trees, was charged in Waſte. *Cook* 5. Part, 12. *Saunder's* Caſe.

16. A. made a Leaſe and Grant of a Mannor, Farm, and Capital Meſſuage to B. with all emoluments, profits, and appurtenances, together with all the Woods, and Under-woods there growing, and all the Trees, excepting ſix of the great Trees, *Habendum* for 40 years, rendring Rent, with liberty to fell and cut down at any time during the Term, with Covenant on the part of the Leſſee to leave Wood on the land at the end of the Term, to the value of 10 l. the Leſſee aſſigned over his Eſtate, and by mean aſſignment the ſame came to the Plaintiff, who aſſigned it over to the Defendant, with an Exception of the liberty of felling and cutting. It was objected, That by the word Grant, in the Leaſe, the Leſſee had an abſolute Intereſt in the Trees, either to fell, or make other diſpoſition of them. But it was Reſolved, That by the word Grant in the Leaſe, no Intereſt paſſed, but he hath only a liberty to fell during the Term, and the Trees remain annexed and united to the Inheritance; and the liberty which is given him to fell, amounts no more then to this, to make him diſpuniſhable in an action of Waſte for his ſo doing: And there the Caſe was put; If Tenant in Tail do give or ſell Trees growing upon the land, and dies before the ſeverance of them, and his Iſſue enters, the Donee or Vendee ſhall not have them againſt the Iſſue, and if he cutteth them down, an Action of Treſpaſs lyeth againſt him, ſo as no property by the gift or ſale is in the party to whom the gift or ſale is made before actuall ſeverance of them. Trin. 9 Jac. in B. R. The Lady *Billingſly* and *Herſeys* Caſe.

6. *Where Leaſes ſhall be void, or voidable by falſe recitall, miſrecital, Miſnoſmer of the Leſſor, Leſſee, or thing Leaſed, or other Incertainty; and where not. And where by a Leaſe of one thing, other things parcel, appurtenant, or implyed, will paſs; and where not.*

1. A Man made a Leaſe for 30 years, and four years after, made another Leaſe by theſe words, *Noverint, &c. nos dict. 30. annis finitis dediſſe et conceſſe B. Habendum à die Confectione preſent. termini prædict. finit. uſque ad terminum 31 annorum*; and the words (*à die Confectione*) were drawn through with a line by the Leſſee, but yet remained legible. It was holden in this Caſe, That the Leaſe begins at the end of the 30 years, and not before; and this clauſe *à die Confectionis preſentium*, is but a Declaration of the firſt ſentence, which is obſcure to ſome intent, and if it ſhould not be ſo expounded, the Leſſee ſhould have but a Term for four years, which was not the intent of the parties. 2. Reſolved, That the Indenture had loſt its force and validity by the drawing of the line by the Leſſee, although it was not in a place material, and that the ſame made the Leaſe void. Paſc. 9 Eliz. *Dyer*, 261, 262.

2. A Corporation by the name of Dean and Chapter, *Eccleſia Cathedral. Sanctæ et individuæ Trinitat. Carlile*, made a Leaſe by the name of *Decanus Eccleſia Cathedral. Sanctæ Trinit. in* Carlile, *et totum Capitulum de Eccleſia prædict.* It was the better and greater Opinion of the Juſtices, That notwithſtanding this variance which was not in the ſubſtance of the name, that the Leaſe was good enough. Mich. 11 Eliz. *Dyer*, 274. But ſee Trin. 4 Ma. *Dyer*, 150. whereas the Colledg of *Eaton* was founded by King *Henry* the 6th, *per nomen Prepoſiti et Collegii Regalis Collegii Beatæ Mariæ de Eaton juxta Winſor*: And in the time of King E. 6. Sir *Tho. Smith* being Provoſt there, a Leaſe was made, *per nomen Prepoſiti et Sociorum Collegii Regalis de Eaton*, leaving out *Collegium Beatæ Mariæ*, and the Opinion of all the Juſtices was, That it was a void Leaſe.

3. A man ſeiſed of a Mannor, demiſed 10 Acres of the Demeſnes of it for 10 years, rendring Rent, and afterwards he leaſed the whole Mannor by the name of *Manerii ſui de, &c.* for 20 years, the Term to begin at the Feaſt of St. *Mich.* then next following.

following. Now whether a Leaſe and Intereſt of 10 years in the ſaid 10 Acres paſs to the Leſſee of the Mannor, after the expiration of the firſt ten years, although no Attornment was had by the firſt Termor, or not, was the Queſtion. It was the Opinion of the Juſtices, That it did paſs, not as a Reverſion, but as a Member and parcel of the Mannor, for the 10 Acres, were never ſevered from the Mannor, but alwayes remained parcel, and member of the body, and named the Mannor. Paſc. 18 Eliz. *Dyer*, 350.

4. The Pariſh of H. did extend into two Counties, *viz. Berks* and *Buck.* and a man made a Leaſe of a Cloſe of Land called *Cattis*, in the Pariſh of H. in the County of *Berks*, whereas in truth the Cloſe was in the County of *Buck.* It was Reſolved in this Caſe, That notwithſtanding the Miſnomer, that the Leaſe was good. Trin. 13 Eliz. *Dyer*, 292. And it was ſaid, That this was not like the Caſe, Where a man leaſed a houſe in the Pariſh of St. *Buttolphs extra Aldgate*, late in the Tenure of R. and the houſe was in the Pariſh of St. *Buttolph* without *Aldersgate*, that there the Leaſe was void, becauſe in that Caſe he had not given any particular name to the houſe, but only that it was in the Pariſh, which was miſtaken. See 2 E. 4. 19. *Plow. Com.* 399. 22 Eliz. *Dyer*, 376.

5. A man poſſeſſed of Lands for 60 years, in conſideration of a Marriage to be had betwixt his Son, and the Daughter of another, demiſed the Land to his Son for 70 years, to begin after his death; and after the Leſſor dyed. In that Caſe, it was Reſolved, That the Leaſe was good, becauſe when the Land is demiſed after the death of the Leſſor, there is a ſufficient certainty, and no incertainty in the Deed. Mich. 35 Eliz. *Locroft's* Caſe adjudged. But if a man be poſſeſſed of a Leaſe for 40 years, and he Grants to B. ſo many of the years as ſhall be unexpired at the time of his death, the ſame is void for the incertainty. 7 E. 6. Grants. 154. *Cook* 1. Part, 155. in the Rector of *Cheddington's* Caſe.

6. In *Ejectione firmæ*, the Plaintiff declared, That whereas J. S. and others at S. in the County of D. did Demiſe, Grant, and to Farm Let, to the Defendant, one Meſſuage, four Gardens, 200 Acres of Land, 20 Acres of Meadow, 80 Acres of Paſture, &c. with the appurtenances, called *Eaſt Dizard* in the ſaid County, to have and to hold for five years, &c. The Defendant pleaded Not Guilty, and Judgment was for the Plaintiff, and Error brought and Aſſigned for Error, that the Plaintiff in his Declaration did not ſhew in what Town, Parſh, Hamlet, or place the ſaid Tenement called the *Eaſt Dizard* did lye, but in the general County aforeſaid; and for that cauſe the Judgment was reverſed in the Exchequer Chamber. Hill. 5 Jac. in C. B. rott. 1284. *Rich* and *Sheres* Caſe. *Hob.* 89.

7. In a *Quare Impedit*, the Caſe was, a Leaſe was made 2 E. 6. A Leaſe was made of all Hereditaments Scituate, lying and being in D. And the Queſtion was, Whether the Advowſon of the Vicarage paſſed. It was the Opinion of the Juſtices, That it did paſs, for although the Advowſon be not viſible nor palpable, nor lyeth in Livery. Yet in a Writ of Right of Advowſon, the Church ſhall be put in view; ſo as it hath a being in the Town and Church. Paſc. 15 Eliz. *Dyer*, 323.

8. An Aſſiſe was brought of Land in *Middleſex*: The Defendant pleaded a Leaſe for years to him made by one F. by the name of a Meſſuage in *Surrey*, and of all Lands lately with that demiſed, and averred that to be the Land in the plaint. It was the Opinion of the Juſtices upon the Leaſe for years, That the Lands in both Counties ſhould paſs, but otherwiſe it was of an Eſtate made for Term of life; for in ſuch Caſe, there muſt be ſeveral Liveries. But in the principal Caſe, It was ſaid by the Juſtices, That it had bin a better form of pleading, if it had bin pleaded, That F. was ſeiſed aſwell of the Lands in view, as of the houſe, and leaſed the ſame *per nomen, &c.* Hill. 8 Eliz. *Dyer*, 246, 247.

9. King *Henry* 8. being ſeiſed of a Grange called S. in the Pariſh of B. in the County of B. to which divers Lands and Tenements, as well in the ſaid Pariſh, as in another Pariſh within the ſaid County were appertaining. By his Letters Patents Granted the ſaid Grange with the appurtenances in the ſaid Pariſh, and divers particulars expreſſly named in the ſaid Pariſh, with a general clauſe of all other Lands and Tenements in the Pariſh of great B. aforeſaid, to the ſaid Grange belonging, not mentioning the other Pariſh; and yet reſerving the 10th of all as it was rented. And if the Patentee ſhould have the Lands in the other Pariſh by the Statute of 38 H. 8. cap. 21. was the Queſtion. It was the Opinion of divers, That nothing paſſed in the other Pariſh, for that the Statute of 34 H. 8. did not aid No naming. The Caſe afterwards agreed by Arbitrament. Hill. 16 Eliz. *Dyer*, 331.

10. A Leaſe for years was made of a Farm with divers Cloſes belonging to it, by the words, Demiſe, Grant, and to Farm let, together with all manner of Timber-wood, Under-wood, and Hedg-rowes (except and reſerved all manner of great Oaks growing and being in one of the Cloſes by name about the Farm houſe), To have and hold the Cloſe with the Appurtenances to the Leſſee, &c. for 21 years, rendring a yearly Rent. It was the Opinion of *Dyer*, That by force of the word Grant, the Leſſee might cut down the Timber Trees. But three other Juſtices, *viz. Windham*, *Periam*, and *Meade*, were againſt it: Wherefore in waſte brought, Judg-

ment was given againſt the Defendant. Hill. 23 Eliz. *Dyer*, 374.

More, *Title Leaſes.*

1. IN Debt for Rent, it was found by Verdict That J. N. had iſſue a Son and a Daughter, and deviſed that his Son ſhould have his land at the age of 24 years, and gives 40 l. to his Daughter, to be paid at the age of 22 years, and appointed that *Carpenter* ſhould be his Executor, and ſhould repair to his houſes, and have the overſight and doing of all his lands and moveable goods, until the ſeveral ages aforeſaid, and dyed: *Carpenter* makes a Leaſe to *Collins*, at Will to be holden from *Mich.* as long as both parties ſhould agree; the Leſſee entred, and continued the poſſeſſion from *Mich.* for one year, and more; and finding that within the year, the Daughter entred, and that the Defendant Attorned to the Daughter, and refuſed to continue Tenant to the Plaintiff. In this Caſe, Judgment was given againſt the Plaintiff; for the Plaintiff took no Intereſt in the land by the Will, for the overſight and doing of his land, ſhall be intended but in the right of the Heir, and to his uſe; becauſe the Teſtator thought not his Son of diſcretion, until the age of four and twenty years, and in the mean time, appointed the Executor to overſee the land, to the profit of the Heir; and then the Executor having no Intereſt in the land, the Leaſe was determined, and Debt brought by him, would not lye. Mich. 3 Jac. in B. R. *Carpenter* and *Collins* Caſe. *Brownlow*, 1. Part, 88.

2. In an Ejectment, the Caſe was, The Abbot of C. before the Diſſolution made Leaſe to W. D. and J. his Wife, and F. their Daughter, for their lives by Indenture; and by the ſame Indenture, Covenanted and Granted to the ſaid three Leſſees, that the land ſhould remain to the Aſſignee of the Survivor of them, for 99 years; F. ſurvived, and took to husband one H. who 20 *Eliz.* Granted their Eſtate to J. S. and all their Intereſt in the Remainder, and all their power, for all the Term; and this by mean aſſignment came to the Defendant; and whether any Intereſt in Remainder paſſed by the Leaſe of the Abbot, was the Queſtion. It was the Opinion of all the Juſtices, and they held it to be a good Intereſt in poſſibility, and to be reduced into certainty in the perſon of the Survivor. Paſch. 4 Jac. in B. R. *Clark* and *Sydenhams* Caſe. *Brownlow*, 1. Part, 136.

3. A Man made a Leaſe for life, and afterwards made a Leaſe to another for years, to begin after the death of Tenant for life; the Leſſee for years dyed Inteſtate; the Ordinary committed Adminiſtration; the Adminiſtrator and the Tenant for life joyn in purchaſe of the Fee: Two points were moved, 1. If the Fee were executed in the Tenant for life for any part. 2. If the Term were gone in part, or in all. It was the Opinion of *Manwood* Juſtice, That if the land be to one for life, the remainder for years, the remainder to the firſt Tenant for life in Fee, there the Fee is executed; ſo as if he loſe by default, he ſhall have a Writ of Right, and not a *Quod ei deforceat*; and that the Term ſhall be no impediment that the Fee ſhall not be executed. And for the ſecond point, he was of Opinion, That the Term was not extinct, for that it is not a Term, but *inter eſſe Termini*, which cannot be Granted nor Surrendred; *Dyer* doubted of it, but ſaid it was a good point. Paſch. 17 Eliz. in C. B. *Godbolt*, 1.

4. A Copyholder in Fee did ſurrender his Copyhold unto the uſe of another, and his heirs, which ſurrender was into the hands of two Tenants, according to the Cuſtome of the Manner, to be preſented at the next Court: And no Court was holden for the Manner for the ſpace of 30 years, within which time, the Surrenderor, the Surrenderee, and the two Tenants, all dyed: The Heir of the Surrenderor entered, and made a Leaſe for years of the Copyhold, according to the Cuſtome of the Manner. It was the Opinion of the Court, That it was a good Leaſe. Mich. 24 Jac. in B. R. *Godbolt*, 268.

5. Leſſee for 100 years, made a Leaſe for 40 years to T. S. if he ſhould ſo long live, and afterwards he leaſed the ſame to J. his Son, *Habendum* after the death of T. S. for 23 years, to be accounted from the date of theſe preſents. The Queſtion was, when the Term ſhould begin. It was the clear Opinion of the Juſtices, That the Leaſe to J. ſhould not be accounted from the time of the date, but from the end of the Term of T. S. becauſe that when by the firſt words of limitation, it is a good Leaſe to begin after the Term of T. S. it ſhall not be made void by ſubſequent words. Paſch. 8 Jac. in C. B. *Stamans* Caſe. *Godbolt*, 166.

6. In an Action of Waſte brought, the Writ was, That the Abbot and Covent had made a Leaſe for years; It was holden by the Court, That it was good; although the Court ſaid, It had been better if the Writ had been, That the Abbot, with the aſſent of the Covent made the Leaſe, for that is the uſual form; but in ſubſtance the Writ is good, becauſe the Covent being dead perſons in Law, by no Intendment can be ſaid to make a Leaſe. But the Dean and Chapter muſt of neceſſity joyn in making of a Leaſe, becauſe they are all able perſons to

And

And if the Dean make a Leaſe without the Chapter, it is not good *per Curiam*, if it be of the Chapter lands. Mich. 11 Jac. in C. B. *Ireland* and *Barkers* Caſe. *Godbolt*, 231.

7. Certain lands with a ſtock of Sheep were Leaſed by Indenture; and the Leſſee did covenant by the ſame Indenture, to reſtore to the Leſſor at the end of the Term, ſo many Sheep in number as he took in Leaſe, and that they ſhould be between the age of two and four years; afterwards the Leſſor Granted the ſame ſtock unto E. the Wife of A; whereas in truth, the ancient ſtock was ſpent. It was the Opinion of all the Juſtices, That when a ſtock of Sheep is leaſed for years, the principal property doth remain in the Leſſor as long as thoſe Sheep which were in *eſſe* at the time of the Leaſe ſhould live; but if any of them do dye, and other do come in their rooms, then the property of thoſe Sheep doth come and belong unto the Leſſee; and therefore they held, that the ſecond Leſſee ſhould have as many of the Sheep as were left, and did remain at the end of the Leaſe, and no other; although it was ſtrongly objected, That the ſtock was entire, and that as ſoon as any other came in the rooms of the ancient ſheep that were dead, they were accounted part of the ſame ſtock. Mich. 29 Eliz. in C. B. *Wood* and *Aſbes* Caſe, *Godbolt*, 113.

8. A man demiſed a houſe for years, and the Leſſee covenanted for him and his Aſſignes to repair the houſe from time to time, and to leave it at the end of the Term ſufficiently repaired, and aſſigns the breach in not repairing of it; The Defendant pleaded, That by Indenture he aſſigned all his Eſtate and Intereſt in the Term to J. S. ſuch a day and yeer who entred and payed his Rent ſuch a day to the Plaintiff the Leſſor, who accepted thereof; and that there was not any default in reparations, before the aſſignment: Upon which it was demurred. It was adjudged for the Plaintiff, That the Action did well lye againſt the Leſſee, notwithſtanding this acceptance of the Aſſignee to be his Tenant, or againſt the Aſſignee at the Election of the Plaintiff. Hill. 15 Car. in B. R. *Norton* and *Ackland's* Caſe. *Cro.* 1 Part, 419. Hill. 19 Jac. *Brett* and *Cumberlands* Caſe adjudge acc.

9. Error brought of a Judgment in *Ireland*, in *Ejectione firmæ*, of a Leaſe made by the Earl of T. of 40 Meſſuages, 500 Acres of lands, 500 Acres of Paſture, 100 Acres of Bog, *in Villis & Territoriis de* A. B. C. Whereupon Not Guilty. It was found, that the ſaid Earl let them to the Plaintiff for 21 years, rendring Rent, with condition that he ſhould not let or alien any part above three years; and if he did that the Leaſe ſhould be void, and he re-enter: The Defendant let for three years, and ſo from three years to three years, during his life, if he lived ſo long: The Earl accepted the Rent from the Aſſignee, and notwithſtanding re-entred, and made the leaſe to the Plaintiff: The Queſtion in *Ireland* was, Whether it were a breach of the Condition. And 2. Whether the acceptance of the Rent by the hand of the Aſſignee, made it good, and diſpenſed with the breach, the acceptance being at another Rent day: And it was there adjudged for the Defendant: And upon Error brought here, It was Reſolved to be a plain breach of the Condition, and that the acceptance after, might not diſpenſe with the condition, ſeeing it was, that it ſhould be void, and ſo was abſolutely determined. Then Exception was taken, That the Leſſors Action was not good, of 100 Acres of Bog, for it is a word unknown; But the Court held, it was well known there, and the Plaintiff might releaſe his demand as to that Land, and have Judgment for the reſidue. And another Exception was, That it was *in Villis & Territoriis*: But that was holden good enough, for that they are of one ſenſe. Mich. 13 Car. in B. R. *Mulcarry* and *Eyres* Caſe. *Cro.* 1 Part, 38.

10. Error to reverſe a Judgment in *Cheſter*. The Caſe was, The Earl of *Oxford*, and E. his Wife, were ſeized of the Manor of B. in Fee, and had Iſſue *John*: Afterwards the ſaid Earl of O. by Indenture let the ſaid Manor to F. S. for 30 years, E. dyed, J. Earl of O. dyed; *John Emſon* by Indenture, reciting the Leaſe to A. S. to be dated 20 Feb. 2 H. 8. let the ſaid Manor to J. S. *Habendum*, after the end, ſurrender, or forfeiture of the ſaid F. S. for 31 years: Then it was found, That after the making of the ſaid Indenture, the words 28 H. 8. were razed, and made 27 H. 8. and afterwards 36 H. 8. the ſaid *John* Earl, by Indenture betwixt him and J. D. reciting the Leaſe to A. S. to be 27 H. 8. Granted the Reverſion of the Manor and Premiſſes to the ſaid J. D. *Habendum* the ſaid Manor and Premiſſes from ſuch time as the ſame ſhall revert and come to the poſſeſſion of the ſaid Earl, or his Heirs, by ſurrender, or forfeiture, or otherwiſe, for 60 years. 4 Eliz. *John* dyed ſeized, and the Manor deſcended to his Son, *Edw.* Earl of *Oxford*: He by Indenture 14 Eliz. reciting, whereas *John* his Father by Indenture 3 July 35 H. 8. demiſed to J. S. the Manor of B. for 30 years, from the end and determination of the Leaſe made to J. S. which was dated 30 Feb. 28 H. 8. regranted the Leaſe to J. D. for 60 years, to begin after the Surrender, Determination, or Forfeiture, omitting the word [otherwiſe] of the Leaſe of A S. The ſaid Earl demiſed the ſaid Manor to J. S. *Habendum* from the end of the ſaid Leaſes for 50 years. The Queſtion was, Whether any of theſe Leaſes to J. D. or J. S. be good, or were in *eſſe* at the time: Judgment was given for

for the Plaintiff in *Chester*: Upon which Error was brought, and it was Resolved, That the Judgment given there, should be affirmed. The Question in this Case was, 1. If the Lease to A. S. was determined after the death of *John* Earl of O. who was seized thereof in the right of his wife, and he Tenant by the curtesie, or only determinable by the Entry of the Heir: All the Justices agreed, That it was determined by the death of *John* Earl of O. Tenant by the curtesie, and there A. S. was but Tenant at sufferance, and the Freehold was in the Earl. The second Question was, When the Lease to J. S. began. Resolved, That it began presently from the time of the Sealing; because no such Lease was in *esse* to A. S. The third point The Lease to J. S. being razed in a material point, after the Sealing and Delivery thereof, whether it be a cause to make the Lease void. Some of the Justices said, That the Deed was void by the razure, but the Lease was good, and remained in *esse*, notwithstanding the razure; and took a difference when an Estate loseth its essence by a Deed, and when it may have essence without a Deed; where it may not have an Essence without a Deed, there if the Deed be razed after the delivery, it determines the Estate, and makes it void: but when an Estate may have an Essence without a Deed, there although it be created by Deed, and the Deed be razed afterwards by the party, or a stranger, it shall not destroy the Estate, though it destroy the Deed. The third point was, If the Lease to J. D. were good, or void. Resolved, It was void; for the Grant in the premisses is only of the Reversion, and it was the intent of the parties to pass the Reversion only ex vi termini upon the former Leases, and then when there is not any such Lease, it cannot pass the Lands in possession. Hill. 30 Car. in Exchequer Chamber. *Miller*, and *Johns*, and *Manwaring's* Case. *Cro.* 1. Part, 289, 290.

11. Lessee for years, rendring rent at Mich. and our Lady, upon condition of re-entry for default of payment, is ousted by a stranger, the disseisin continues till the day of payment; the Lessor demands the Rent, and the Lessee refuseth to pay it. It was the Opinion of the whole Court, That notwithstanding the disseisin, the Lessor may enter upon the land for the condition broken, or he may distrain for the Rent, for the land leased shall be subject to those lawful remedies which the Lessor provides for the recovery of his Rent, or Possession, in whose hands soever the Land comes; and the Act of a stranger cannot deprive the Lessor to take advantage of a Condition which is annexed to the Estate of the Lessee, Pasch. 19 Jac. B. R. *Humphry* and *Damions* Case. *Cro.* 2. Part, 201.

12. In Debt for Rent, upon a Lease made to an Infant, The Question was, Whether the Lease was void. It was the Opinion of the whole Court, That it was voidable only at his Election; for if it was for his benefit, it shall be no wayes void: And because it was not shewed in the principal Case, that the Rent was of greater value then the Land, and so the Lease might be for his benefit: And also, because it appeared that he was of full age before the day the Rent became due. It was adjudged for the Plaintiff. Pasch. 11 Jac. in B. R. *Kriseys* Case. *Cro.* 2. Part, 320.

13. The Case was, Upon a communication of a mariage betwixt Sir *Rob. Griffith* and the Lady *Stowell*, The said G. promised to assure her 1000 l. *per annum* for her Joynture, his Estate being 12000 l. *per annum*; upon this confidence, she married him before any assurance: Afterwards he by Deed Conveyed Lands of great value to some friends of the Lady, then his Wife, to the use of the Lady, for the Term of an hundred years, if she should live so long, to begin after his death; and it was endorsed upon the back of the said Deed, that the Intent thereof was, That when there should be a Joynture of 1000 l. *per annum* setled upon her, that then the Lease should be void: And if it was a fraudulent Lease or no, was the Question; Because it was with a Proviso, to determine at the Will of the Husband. It was the Opinion of the Court, That this Lease being made in pursuance of the first promise, although there was not any mention of any Lease to be made; yet it was grounded upon a good consideration, and was not fraudulent, and although it was concealed by the Wife, during the life of her Husband, yet the Lease being good at the first, the Concealment cannot make it ill: And in this Case it was said, That a Lease may be determined by force of a Condition endorsed upon the back-side of it, if it be before the Sealing and Delivery, as well as by force of a Condition within the Deed. Mich. 15 Jac. in B. R. The Lady *Griffith* and *Stanhopes* Case, *Cro.* 455.

14. In a *Replevin*, the Case was; The King seised in Fee of a Farm, *Anno* 2. of his Raign, Let it the Earl of N. and others for 100 years, if F. the Wife of the Lord C. should so long live, to begin after the death of H. Lord C: and afterwards in the same year, granted the land in Fee to C. B; who 6. *Decemb.* 4 Jac. let it to B. for 21. years. Afterwards, 5 Jac. the Earl of N. and the other Lessees granted that Term to C. B: 5 Jac. C. B. granted a Rent of 20 l. *per annum* to J. S. and others, during the life of the said F: Afterwards, H. Lord C. dyed, the Grantees distrained upon P. the Lessee for this Rent: The Question in this case was, Whether the Lease for 100 years was in *esse* in C.B. who had the Inheritance, and granted the Rent? or if it was drowned in the Inheritance? It was Resolved, That it was drowned in the

the Inheritance: for if it were not drowned, then it ſhould avoid the Leaſe for 21. years which was before this Rent-charge granted; and this Term being in the Grantor who granted it, is lyable to the payment of the Rent. And it was Reſolved, It was drowned in the Inheritance: For notwithſtanding this Leaſe for 21. years, it is not ſo ſevered from the Reverſion, but by grant thereof to him who hath the Inheritance, the future Term is drowned, and never ſhall riſe again, and by conſequent this Rent ſhall not charge the poſſeſſion of the Termor. It was adjudged for the Defendant. Trin. 19 Jac. in B. R. *Salmon* and *Swan* Caſe. *Cro.* 2. Part, 619.

15. A. poſſeſſed of a houſe in *London* for 31. years, deviſeth, That J. his Wife ſhall enjoy the profits thereof *durante viduitate*, and that then the reſidue of the Term ſhould remain to B, and dyes; J. by Livery of the Executor, enters into the houſe, and purchaſeth the Fee, and then marries C: whereupon B. enters. It was Reſolved, That his Entry was lawful; for although the whole Term was in J. *quoad &c.* ſo as by the purchaſe of the Fee-ſimple, the Intereſt of J. was extinct; yet that ſhould not defeat the Intereſt executory of B; but that after the marriage of J, and not before, he may well enter. *Cook* 10. Part, 52. *Hardington* and *Ridyers* Caſe. Trin. 28 Eliz.

16. A man letteth Lands for life, upon Condition to have Fee, and afterwards warranteth the land *in forma predict.* afterwards the Leſſee performeth the Condition, whereby the Leſſee hath Fee: In this Caſe, it was holden, The the Warranty ſhall not extend and encreaſe according to the Eſtate: For a Warranty being a Covenant reall, executory may extend to an Eſtate *in futuro*, having an Eſtate upon which it may work in the beginning: But if a man granteth a Seignory for years, upon Condition to have Fee, with a Warranty *in forma predict*: and after the Condition is performed, this ſhall not extend to the Fee, becauſe the firſt Eſtate was but for years, which was not capable of a Warranty. And ſo it is, if a man make a Leaſe for years, the remainder in Fee, and warrants the land *in forma predict.* he in the Remainder cannot take benefit of this Warranty, becauſe he is not party to the Deed: and immedia ely he cannot take, if he were party to the Deed, becauſe he is named after the *Habendum*, and the Eſtate for years is not capable of a Warranty. *Cook* 1 Part, *Inſtitutes*, 378.

17. Leſſee of a Manner for 99. years, takes a Leaſe of the Bayliwick of the ſaid Manner for 21. years: If it be a ſurrender or determination of the firſt Leaſe, was the Queſtion? It was argued, That it was not a Surrender, becauſe it was of another thing, and of another nature, and may well ſtand with the Leaſe of the Manner: but if he had taken a grant of a Rent-Charge, Common, Eſtovers, or any parcel of the Mannor, it had been a Surrender. It was ſaid on the other ſide, that it was agreed, That if he take *Cuſtodiam* of it, it is a Surrender *à fortiori*, of the Bayliwick; for a Bayliwick hath a greater Intereſt then he who hath a Cuſtody: If Leſſee for years takes a new Leaſe for a leſſer Term, it is a Surrender of the firſt Leaſe, Mich. 37 Eliz. in C. B. *Jeffs* Caſe, adjudged acc. 45 Eliz. in a *Quare Impedit*, *Thompſons* Caſe; Leſſee for years of an Advowſon was preſented to the Church; It was adjudged a Surrender: and if a Copyholder in Fee takes a Leaſe for years of the ſame land, it is an extinguiſhment of his Copyholder. The principal Caſe was not Reſolved. Trin. 3 Jac. in B. R. *Gibſon* and *Stark* Caſe, *Cro.* 2. Part, 84.

18. In Debt for 100 l. The Plaintiff declared upon a Leaſe made at *London* of the Mannor of *L. R.* in the County of S; and of a Capital Meſſuage, and 4. Cloſes of Paſture to the ſaid Meſſuage adjoyning, rendring 120 l. *per annum*, with a *Nomine Pœnæ* of 8 l. a day, for non-payment: and ſhewed, that 60 l. was behind for the half year; and ſo remained by the ſpace of 100 dayes, making 40 l; and ſo together 100 l: The Defendant confeſſed the Leaſe, and plead d an Extent of the land by a Stranger upon a Statute before the Leaſe: but ſhewed, that the *Liberate* was executed after the Rent day, and the Rent due: upon which the Plaintiff demurred. In that caſe, Judgment was given for the Plaintiff for the 60 l. Rent, becauſe it was due before the *Liberate* executed: But for the 40 l. paid, it was adjudged againſt the Plaintiff, becauſe the Plaintiff layed no demand of his Rent at the day, without which a pain is not forfeited. Hill. 10 Jac. in C. B. Sir *Richard Grobham* and *Thornborough* Caſe. *Hob.* 28.

19. In an *Ejectione Firmæ* for a Chamber, the Caſe was; A Leaſe was made of the Rectory of C. in the County of *Eſſex*, and of the Gleabe, Excepting the Parſonage; Saving and allowing unto the Leſſee a Chamber over the Parlour next the Church: It was adjudged, That the Leaſe of the Chamber was good; For as well as a man may by his Exception, except part of a thing, ſo as it ſhall be intended, that it was never let or granted: ſo in this Caſe, when he ſayes, *Except the Parſonage houſe, Saving and allowing to the Leſſee a Chamber*; this *Saving*, makes the Chamber, as it were, excepted out of it, as if it had been Leaſed. So a Saving out of a Saving, is as much as if there had been no Saving at all, and then this Chamber not being excepted out of the Leaſe, It ſhall paſſe by the Leaſe of the Rectory. Mich. 36 Eliz. in B. R. *Leighs* Caſe. *Owen*, 20.

20. A.

20. A. ſeiſed of Lands holden in Socage, made a Leaſe of them for divers years to J. S. and dyed his heir within age; his Wife being Guardian in Socage, leaſed the ſame Lands by Indenture to the ſame J. S. for years: If the firſt Leaſe was ſurrendred, or determined, was the Queſtion? It was the Opinion of *Anderſon*, Chief Juſtice, That it could not be a Surrender, becauſe the Guardian in Socage had not a Reverſion capable of a Surrender, but only an authority to take the profits to the uſe of the heir: but perhaps it is determined by operation of Law; As if A. make a Leaſe to B. for 100 years, and afterwards granteth the Reverſion to C. who Leaſeth to B. for two years, who accepteth the Leaſe, the ſame is not a Surrender, becauſe a Leaſe for 100 years cannot be drowned in a Reverſion for two years; and yet the firſt Leaſe is determined: which *Periam*, Juſtice granted. Hill. 31 Eliz. in C. B. *Willis* and *Whitewoods* Caſe. *Leon.* 322, 323.

21. A. ſeiſed of Lands, Leaſed the ſame to B. C. and D. for their lives, and for the life of the Survivour of them: Provided, and it was Covenanted betwixt the parties, That C. and D. ſhould not take any benefit or profit of the Lands during the life of A: and further, that D. ſhould not take any benefit of them during the life of C: A. dyed; C. entred: Afterwards D. entred, and made a Leaſe to the Plaintiff: If the Entry of D. was lawful, was the Queſtion? It was Reſolved, That they took in this caſe as joynt Tenants, & not by way of Remainder; and that the *Habendum* in this caſe had done its Office, to explain the Eſtate, and make it a joynt Eſtate; and therefore the clauſe afterwards comes too late, and in truth is repugnant and void, as to the dividing of the Eſtate by way of Remainder. Mich. 31 Eliz. in B.R. *Scovell* and *Cavils* Caſe. *Leon.* 317.

22. In Treſpaſſe, the Caſe was; A Leaſe was made of a houſe for 7. years, rendring Rent at the *Annunciation* and St. *Michael*, with Condition, If the Rent was behind by the ſpace of 10. dayes, the Leſſor to re-enter: After *Annunciation*, the Rent was behind; and the 10th day after, the Leſſor came to the houſe a quarter of an hour before the Sun-ſetting, and demanded the Rent in theſe words, I demand 3 l. 10 s. for a half years Rent of this houſe now due; and continued there till Sun was ſet, but no Rent was paid. The Iſſue was, If he came to the houſe half an hour before Sun-ſet, and there continued demanding the half years Rent: Alſo the Iſſue was, If the demand were of the Rent due at the Feaſt of the *Annunciation* paſſed: and the Verdict is for Rent due at the time of the demand. The Court was of Opinion, That the Verdict was well found for the Plaintiff. But it was agreed by all the Juſtices, That if in demand of Rent, the Leſſee or any for him, doth demand one penny more or leſſe then is due, or in his demand doth not ſhew the certainty of the Rent, and the day of payment; the demand is not good. Mich. 32 Eliz. in C. B. *Fabian* and *Winſors* Caſe. *Leon.* 305.

23. Indentures of a Leaſe were engroſſed, bearing date 26. *Maii*, 25 Eliz. To have and to hold for 3. yeats from thenceforth; and the Indentures were delivered at 4. of the clock in the afternoon, 28 *Jan. Anno* 25 Eliz. It was Reſolved in this Caſe, 1. That (*From henceforth*) is as much as to ſay, from the delivery, or from the making. 2. Reſolved, That in this caſe, the day of the delivery of the Leaſe ſhall be taken *inclusivè*; and the day it ſelf no parcel of the Demiſe: But if a Leaſe be made to begin a *die Confeſſionis*, or a *die datus*, there the day of the date is excluded. *Cook* 5. Part, 1. *Clayons* Caſe.

24. If a Woman ſeiſed *durante viduitate*, makes a Leaſe for years, and the Leſſee ſoweth the Land with Corn or Grain; and afterwards the Wife taketh Husband: In that caſe, the Leſſee ſhall not have the Corn; for although his Eſtate be determined by the act of a ſtranger; yet he ſhall not be in better caſe then his Leſſor from whom he derives his Intereſt. And therefore the principal caſe, That a Woman Copyholder *durante viduitate* ſowed the Land, and before the ſeverance took husband. It was adjudged, That the Lord ſhould have the Corn ſowed, and not the husband. *Cook* 5. Part, 116. *Olands* Caſe.

25. Debt upon a Leaſe for years for Rent, the Plaintiff declared upon a Leaſe for Rent, for twenty yeares by Indenture, Rendering forty pounds *per annum* at two Feaſts, *Mich.* and our *Lady*, or within 10. dayes after every Feaſt; and for 8 l. due at *Mich.* the Action was brought. Upon Not Guilty, it was found for the Plaintiff. It was the Opinion of all the Juſtices, That the Rent was due at *Mich.* and the Leſſee might then tender it to the perſon of the Leſſor; but yet he hath Election whether he will pay it untill the tenth day be determined: And by a Releaſe before the 10th day, the Rent is releaſed. Hill. 7 Jac. in B.R. *Barwick* and *Foſter's* Caſe. *Cro.* 2. Part, 227, 233. See Trin. 34 Eliz. *Clark* and *Bovendens* Caſe, acc. *Ibid.*

26. A Tenant for life of the Manor of D. then in Leaſe for years, levied a Fine thereof to the uſe of her ſelf for life, and after to the uſe of her eldeſt ſon in tail, reſerving power to her at any time to make Leaſes for 21. years: The former Leaſe being in being, ſhe made a Leaſe to J. S. for 21. years, to begin after the determination of the former Leaſe. It was adjudged, That the ſecond Leaſe was not good; for that it ought to have

have been a Leaſe in poſſeſſion, and not in reverſion or *in futuro*: for ſo ſhe might make infinite Leaſes, and thereby detain the poſſeſſion long from him in the Reverſion; which were unreaſonable. Hill. 10 Jac. in B.R. *Shelcomb* and *Hawkins* Caſe. *Cro.* 2. Part, 318.

27. In a Prohibition to the Councel of the Marches in *Wales*; the Caſe was; J. ſeiſed of Land, made a Leaſe for life; and afterwards levied a Fine of all his Lands, to the uſe of J. D. for 15. years, and afterwards to the uſe of himſelf for life, with a power for him to make Leaſes for 21. years or 3 Lives in poſſeſſion. It was agreed by the Juſtices, That this Term of 15. years is preſently ſubject to the power to make Leaſes for years: and that the firſt Leſſee ſhould have the Rent reſerved during the Term of the 15 years limited to him: And that the Court of Marches ought not to entermeddle therewith; and a Prohibition was granted. Paſch. 12 Jac. in B. R. *Fox* and *Prickwoods* Caſe, 349.

28. In *Ejectione Firmæ*, The Plaintiff declared of a Leaſe made 12. *December*, *Habendum à primo die*: The Jury found, it was dated 1. *Decemb.* *Habendum* from henceforth, but delivered 12. *Decemb.* It was Reſolved, That from the date, and from henceforth, are all one, being a Computation of time paſt, and both ſhall be pleaded to begin from the day of the date: But if a man declares of a Leaſe of the 1. *December*, *Habendum à die datus*, the Ejectment cannot be alledged the ſame day; contrary, if it be from henceforth. Trin. 8 Jac. B.R. *Lewellyn* and *Williams* Caſe. *Cro.* 2. Part, 258. Hill. 3 Jac. *Oſborn* and *Ryders* Caſe. *Cro.* 2. Part, 135. acc.

29. A man ſeiſed of a Manner, and of a Tenement in Fee-ſimple, and poſſeſſed alſo of a Leaſe for years in the Town of D, by Deed of Bargain and Sale, doth give, grant, bargain, ſell, enfeoffe and confirm to J.D. the Manner, Tenement, and all other the Lands and Tenements which he hath in the Town of D. It was the Opinion of the Juſtices in this Caſe, That by the general words in this Deed of Bargain and Sale, the Leaſe for years did not paſſe. And it was compared to 18 Eliz. the Lord *North* and the Biſhop of *Ely's* Caſe, Where the Predeceſſor of the Biſhop had made a Leaſe to him of his Mannor-Houſe and Demeſnes by particular name, and all other his Lands and Tenements, that in that caſe, an Ancient Park and Copyhold Land did not paſſe; for neither could be intended Demeſnes: and a Grant ſhall not be conſtrued by any violent conſtruction, but according to the Intention of the Law. Hill. 8 Jac. in B.R. Sir *William Turpine* and *Forteynes* Caſe. *Bolſtr.* 1. Part, 99.

30. The Dean and Chapter of *Worceſter* were Incorporated by the name of *Dean and Chapter of the Cathedral Church of Chriſt and the Bleſſed Virgin Mary of Worceſter*: And they made a Leaſe for Life by the name of *the Dean of the Cathedrall of Chriſt, and of our Bleſſed Lady the Virgin of Worceſter, and the Chapter there*, *Habendum* from the day of the date; and made a Letter of Attorney to one to make Livery *ſecundum formam Chartæ*; the Attorney made Livery the next day after; And the Jury find the Leaſe to be made the 25th day of, &c. and that the Livery by the Attorney was made *poſt vigeſſimum quintum diem præfix.* It was the Opinion of the Juſtices in this Caſe, That as it was found, the Leaſe was not good: And if it be not good in it ſelf, It is not in the power of the Attorney by his Livery to make it good: but if this Leaſe were delivered after the firſt day: then clearly the Grant was good. Trin. 12 Jac. in B.R. *Butler* and *Finchers* Caſe. *Bolſtr.* 2. Part, 303, 304, 305.

31. If the King maketh a Leaſe for years, rendring Rent, with a Proviſo, That if the Rent be not paid at the day limited, that the Leaſe ſhall ceaſe, without making any mention that it was to be paid at the Receipt. It was the Opinion of all the Juſtices, That in this caſe, *ipſo facto*, upon default of payment, the Leaſe is determined; and that there needs not any Office to be found of it in that caſe. Trin. 36 Eliz. *Finch* and *Roſeley's* Caſe. *Popham* 53. Trin. 32 Eliz. in the Exchequer-Chamber, Sir *Moile Finch* and *Throgmorton's* Caſe, adjudged acc.

32. The Lady *Cromwell* was poſſeſſed of divers Leaſes, and conveyed them in truſt; and afterwards ſhe entermarried with Sir *John St. John*: afterwards ſhe received the moneys which came of the Truſt, and with part of it ſhe bought Jewels, and other part of it ſhe left in ready money. Sir *John St. John* took Letters of Adminiſtration of the goods of the Wife: The Eccleſiaſtical Court would have him accompt for the Jewels and money, and have compelled him to have put them into the Inventory. But the Court granted a Prohibition to the Eccleſiaſtical Court. And the reaſon was, becauſe the money received upon the Truſt, was the money of the husband. And in this Caſe, It was agreed by the Juſtices, That if a woman doth convey a Leaſe in truſt for her uſe, and afterwards marrieth, That in ſuch caſe, it lyeth not in the power of the husband to diſpoſe of it; and if the wife dye, the husband ſhall not have it, but the Executor of the wife: And ſo it was ſaid, It was Reſolved in the Chancery. Trin. 15 Car. in B.R. Sir *John St. John's* Caſe. *Marſh* 44.

33. A Leaſe is made for years; and that the Leſſee ſhall have *convenient Lignum, non ſuccidendo*,

da, &c. vel vendenda arbores; the Leſſee cut Trees, and the Leſſor brought an Action of Covenant: Reſolved, That the Action would well lye; for it is a Covenant on the part of the Leſſee, becauſe the Law gives him reaſonable Eſtovers: and by this Covenant he abridgeth his Priviledge. Paſch. 15 Car. in B.R. *Mayſo 9.*

34. In *Ejectione Firmæ*, The Plaintiff declared, That *W. More* 5. *Maii*, 10. Jac. leaſed to the Plaintiff a houſe, 40 Acres of Land, 50 Acres of Paſture, with the appurtenances in C. *Habendum* from the Feaſt of the *Annunciation* of the Bleſſed Virgin St. *Mary* laſt paſt for 21 years next enſuing; And the Ejectment was alledged to be 5. *Maii*, 19 Jac. And the Jury found, That W. was ſeiſed of the ſaid Lands; And the ſaid 5. *Maii*, 10. *ſupradict.* Demiſed the Tenements aforeſaid to the Plaintiff, *Habendum* from the Feaſt of the Virgin, &c. laſt paſt, for and during the Term of 21. years next enſuing the date to be compleat and ended. The Queſtion was, Whether the Leaſe found by the Jury, did agree with the Leaſe mentioned in the Declaration; becauſe the Leaſe by the Declaration, was a Leaſe made 5. *Maii*, 10. *Jac. Habend.* from the Feaſt of the Annunciation then laſt paſt; and the ſenſe found by the Jury, was a Leaſe made 5. *Maii*, 10. *Jac. per Indent. dat.* 5. *Maii*, 10. *Jac. Habend. de feſto Annunciationis, &c. tunc proximo* for 21 years *proximè ſequend. dat. diſt. Indenturæ.* It was adjudged for the Plaintiff in the Exchequer; and afterwards affirmed in a Writ of Errour. Mich. 10 Jac. in C.B. *Moore* and *Muſgraves* Caſe. *Hob.* 19. See Paſch. 24 Car. in B. R. *Corniſh* and *Cowpers* Caſe. *Styles*, 118, 119. acc.

35. In *Ejectione Firmæ*, the Caſe was; J. S. being ſeiſed of the Lands in Queſtion in Fee, made a Feoffment thereof unto A. and B. and their heirs, untill they ſhould make a Leaſe of the ſaid Lands for divers years to certain uſes, to begin at the Feaſt of *Philip* and *Jacob* next coming; the Feoffees entred, and made a Leaſe for years of the Lands, to begin from the Feaſt of *Philip* and *Jacob* next. The Queſtion was, If the Feoffees had made ſuch a Leaſe as the Deed of Feoffment directed, and ſo the uſes are raiſed thereby? or whether it ſhall be intended another Leaſe not warranted by the Feoffment, and ſo no Uſes raiſed? It was holden, 1. That here was a good Conſideration to raiſe an uſe. 2. It was holden, That here was only a matter of Truſt in the Feoffees; and the intent was not, that the Feoffees ſhould have any thing by the not performance of the Truſt, but that the uſe ſhould be to the Feoffor. 3. It was holden, That this Leaſe was made to begin from the Feaſt of *Philip* and *Jacob*: and here it is made for a day longer then was agreed upon by the Deed: yet becauſe the intent of the parties is performed, it ſhall be conceived to be a good Leaſe according to the Agreement. Trin. 24 Car. in B.R. *Watts* and *Dixes* Caſe. *Styles*, 188, 205.

36. In *Ejectione Firmæ*, the Caſe was, That a man being Leſſee for 99. years of Lands, devi-ſed the Term to his Wife for life, with power to make ſuch Eſtates in as ample manner as he himſelf might have done during her life; the remainder in tail to his Daughter, and dyed: the Wife proved the Will, and accepted of the Legacy, and afterwards made a Leaſe for 99. years of the Land, and dyed; the Daughter brought the *Ejectione Firmæ*: In this Caſe, the Court was divided in Opinion; For *Rolls*, Chief Juſtice, held, That the Leaſe was good; for a Will ought to be interpreted, That all the parts of it might ſtand together; and if the Wife have not a power to make the Leaſe, the Clauſe of giving her this Leaſe, is idle: And without doubt, the Wife hath the ſole Eſtate in Law in her; and the power given, &c. is but a reſtoring of her to that which ſhe had before by the Law; and her conſenting to the Legacy doth not take away her power to make Eſtates, and this power and the remainder might well ſtand together, for it might be the Wife would not make ſuch a Leaſe, and then the Daughter ſhould have the Land in tail: To all which, *Jermyn* agreed. But *Ashe* and *Nicholls*, Juſtices, held, The Wife could diſpoſe of the land but during her life, by the expreſs words of the Will. The Caſe was not adjudged. Mich. 1651. *Heal* and *Greens* Caſe, in B.R. *Styles*, 315. & 275.

37. The Mayor and Comminalty of *London* brought an Action of Covenant upon a Leaſe, for non-payment of Rent upon a Leaſe for years made to the Defendant, of the Gaolers Office: The Defendant pleaded, It was an Office of Truſt repoſed in the City, and could not be let for years, and ſo no ground for an Action: And the Office it ſelf is not veſted in the Mayor, and that therefore he could not grant. On the other ſide, it was ſaid, That they had a Fee-ſimple in the Office by their Charter, and that this Leaſe was but a Deputation; and the Leſſee by taking the Leaſe, and entring into the Covenant, ſhall barr himſelf of this Plea. Quære; for the Caſe was not Reſolved. Mich. 1652. in B.R. The Mayor and Comminalty of *London*, and *Hutton's* Caſe. *Styles*, 317.

38. In *Ejectione Firmæ*, the Caſe was; A. ſeiſed of Lands in Fee, made a Leaſe thereof to J.D. at Will; A. D. put the Tenant at Will out of poſſeſſion, and afterwards the Tenant at Will entred, and took a Leaſe of the ſame land of him that put him out of poſſeſſion: It was Reſolved in this Caſe, That if one make a Leaſe at Will to one;

ons, and he be ouſted, and then again enters, and takes a new Eſtate, the Will is determined. But it was ſaid, A Stranger cannot determine his Eſtate without his Conſent; but in this caſe he hath determined his firſt Eſtate by his Contract with the Diſſeiſor of his Leſſor. Hill. 1652. B. R. *Locky* and *Dumſowes* Caſe. *Styles*, 383.

39. Note. In *Ejectione Firmæ*, It was agreed by the Juſtices, 1. That to make a ſuſpenſion of a Rent reſerved upon a Leaſe for years, the Leſſor muſt ouſt the Leſſee of part of the thing Let, and hold him out till after the day that the Rent is made payable by the Leaſe; and if the Leſſee re-entreth, the Rent is revived. 2. That if one taketh a Leaſe for years of Land by Deed; and during the Term, the Leſſee accepts to hold the land for a leſſer Term by word, this is a ſurrender of the Leaſe by Deed. 3. If there be a Leaſe for years, rendring Rent at a day, with clauſe of re-entry for non-payment. If the Leſſor do enter into part of the lands let before the day of payment; and at the day, he make demand of the Rent; and in default of payment, he re-enters: yet this re-entry ſhall not make the Leaſe void; for the Rent was ſuſpended at the time of the demand. Paſch. 1655. in B. R. *Timbrell* and *Bullocks* Caſe. *Styles*, 448.

40. A. ſeiſed of Lands in Fee, by Deed granted a Rent to C. his ſon, to begin after the death of the Grantor: B. ſon and heir of A, entred into the land, and demiſed part of the land to C. for 500 years, who entred; and before any part of the Rent was arrear, C. ſurrendred the Leaſe to B: to which Surrender, B. agreed. It was Reſolved in this Caſe, That the Rent though once ſuſpended, was revived, and the Contract now determined: And it was agreed, That where Leſſee for years ſurrenders, to which the Leſſor agrees, and accepts of it, the poſſeſſion and Intereſt is in him without Entry. Hill. 3 Car. in C.B. *Peto* and *Pemberions* Caſe. *Hutton*, 94.

41. Note. It was Reſolved by the Court, That if a man hath a Leaſe for years which is good in Law, that the taking of a new Leaſe of the ſame land, which is void in Law, is no ſurrender of the former Leaſe which is good: So if Leſſee for years take a new Leaſe after the death of his Leſſor of the Guardian in Socage, it is no Surrender: but if Leſſee for 20 years of an Advowſon, when the Church is void, takes a Preſentation of himſelf of the Leſſor, and is Admitted and Inducted; It is a ſurrender of his Leaſe. Hill. 3 Car. in C.B. *Baker* and *Willoughby's* Caſe. 42 Eliz. in C.B. Sir *Arthur Capell's* Caſe. acc.

42. A. and B. a woman, are Joynt-Tenants for life, the woman takes husband; and the husband and wife by Indenture do leaſe their moyty for years; Reſolved, That this Leaſe is voidable by the wife only, if ſhe over-live her husband, and not by the other Joynt-Tenant, but ſtood againſt him after the death of the wife. Mich. 13 Jac. in C.B. *Smallman* and *Agborowes* Caſe. *Bridgman*, 44, 45.

43. Leſſee for 99 years of a houſes, deviſeth them to his Wife for all the Term, if ſhe be ſo long continued unmarried; and after her death to B: and if the Wife marry, ſhe ſhall have one houſe, and 20 l. *per annum*, and not all other his Lands, and then B. ſhall have the other houſe, and makes his wife his Executrix, and dyes; the Wife enters, claiming by the Deviſe, and then marries; and then the husband and wife claim to have the houſe deviſed unto her after her marriage: B. by aſſent of the Executor, enters into the other houſe; the wife dyes: Reſolved in this caſe, That becauſe the wife took the whole Term as Executrix, that ſhe could not have the Rent out of it, becauſe that the Rent was extinguiſhed by the unity of the poſſeſſion. Quære, If the Rent ſhall be determined by the death of the wife. Trin. 12 Jac. in B. R. *Gouge* and *Heywards* Caſe. *Bridgman*, 54, 55.

44. Leſſee for years of 20 Acres of land, rendring Rent, granted all his Eſtate in one of the Acres to J.S: the Leſſor confirmed the Eſtate of J. S: It was Reſolved in this caſe, That the whole Rent was gone; for being an entire Contract, by his one Act, there can be no occupation for part, and extinguiſhment for other part; and no Contract ſhall be apportioned. Mich. 43 Eliz. in C.B. *Goddards* Caſe, *Owen*, 10.

45. Two Coparceners of a houſe; each of them lets her part to ſeveral ſtrangers; then both Leaſes come to one hand; and then one Coparcener bargains and ſells her Reverſion to the other; the Leſſee commits Waſte, and the Grantee brings an Action of Waſte. It was Reſolved in this caſe, 1. That although at the firſt, the Leſſors were entituled to ſeveral Actions; yet by matter *ex poſt facto*, the Actions may be united. 2. That the Action was well brought, though the other Coparcener joyned not in it. Mich. 34 Eliz. in B. R. in *Wardfords* Caſe. *Owen*, 11.

46. Leſſee for 99 years of lands, grants parcel of the lands to B for the whole Term; They are both ſued in the Eccleſiaſtical Court for Tythes: It was Reſolved, That they might both joyn in one Prohibition, and the death of one of them, ſhould not abate the Prohibition. Hill. 36 Eliz. in B.R. *Bartues* Caſe, *Owen*, 13.

47. The Queen as Dutcheſs of *Lancaſter*, made a Leaſe to B. of parcel of the Dutchy lands, who was ouſted: B. makes a leaſe to C, who being ouſted,

brings an *Ejectione Firme*: It was Reſolved in this Caſe, That the Leſſee being ouſted, his Term is turned into a Right, and therefore an *Ejectione Firme* lyeth by him and his Leſſee. Paſch. 36 Eliz. B. R. *Leigh's* Caſe. *Owen*, 13.

48. *Ejectione Firme* was brought, of an Ejectment of him out of certain pieces of lands; The Plaintiff declared, but did not ſet forth the Quantity of the land pieces. It was Objected, That *Ejectione Firme* is in nature of Treſpaſs, and damages are the principal; But becauſe the particular quantity of the pieces were not ſet forth: Whereas Judgment was given for the Plaintiff in the *Ejectione Firme* in the Kings-Bench: Upon a Writ of Errour thereupon brought in the Exchequer-Chamber, the Judgment was reverſed. Paſch. 36 Eliz. in B. R. *Palmer* and *Humphryes* Caſe. *Owen*, 18.

49. The ancient Rent of 20 Quarters of Corn reſerved to a Priory, came to the Crown by the Statute of Diſſolution: The Queſtion was, Whether a Leaſe made of this Rent Corn to J. S. for years, was a good Leaſe, within the Statute of 27 H 8. Cap. 21. It was Objected, It was neither Land, Tenement, nor Hereditament, but a Chattel. But it was Reſolved by the Court, That a Leaſe made of it, was good within the word [*Hereditament*]; for it may diſcend, or eſcheat; and the wife may be endowed of it, and a Rent may be reſerved out of Corn; and a man may reſerve a Rent upon a leaſe of a Rent. Paſch. 7 Eliz. *Owen*, 32.

50. A man was Leſſee of a Parſonage; And Tythes being ſet forth, a ſtranger carried them away: It was Reſolved, That an Accompt doth not lye againſt him, becauſe there is no privity betwixt them: But Treſpaſs lyeth, becauſe by the very ſetting out, the Tythes were in the Leſſee. Mich. 15 Eliz. *Owen* 35. acc.

51. A Leaſe is made to A. and B. his Wife, *et primo genito*, *Habendum* to them *et diutius eorum vivanti ſucceſſivè*, and then they have Iſſue a daughter. It was Reſolved in this Caſe, That the Daughter had no Eſtate, becauſe ſhe was not in being at the time of the Leaſe made, and a perſon not in *eſſe*, cannot take any thing by Livery, where the eſtate is not limitted by way of Remainder, and the word *ſucceſſivè* will not alter the Caſe. Mich. 29 Eliz. in C. B. *Stephens* and *Leytons* Caſe. *Owen* 40.

52. In a Replevin, the Defendant avowed for Rent: The Caſe was, Leſſee for 99 years, if A. and B. ſo long lived, granted a Rent out of the Land to J. S. his Executors, &c. for the reſidue of the Term to be paid at the houſe of A. in S. and if it were behind 28 dayes demanded at the ſaid houſe, 20 s. every day *nomine pœnæ*; and if behind ſix Moneths demanded at the ſaid houſe, then to diſtreyn for it, and the *Nomine pœnæ*. In this Caſe, it was Reſolved, 1. That it was a Rent-charge, and a Diſtreſs incident to it. 2. That the Grantee might diſtreyn firſt without a demand. But if the Avowry had bin for the *Nomine pœnæ*, there ought to have bin an actual demand: And it was Reſolved in this Caſe, although it be reſerved to be paid at another place, it changeth not the Rent, but it is iſſuing out of the Land, and diſtreynable there. Mich. 8 Car. in C. B. *Lamb* and *Weſt* Caſe. *Hutton* 114.

53. Leſſee for years of Lands buyes the Trees growing upon the Lands, with liberty to cut them down within 8 years, and afterwards purchaſeth the Inheritance of the Lands, and deviſeth the Land to his Wife for life, and makes her his Executrix, who cuts down the Trees. It was Reſolved in this Caſe, That an Action of Waſte lyeth againſt her; for although the Trees were once Chattells in the Leſſee, yet by the purchaſe of the Inheritance, they were again united to the Land. Paſc. 36 Eliz. *Owen* 49.

54. A Leaſe was made to two *Habendum*, to them, and to two other for their four lives, and the longer liver of them. It was Reſolved in this Caſe, That the two named in the *Habendum*, took nothing, and that if the firſt of the two dyeth, there ſhould be no Occupancy, for that the lives of them in the *Habendum* was intended to be an Eſtate to them by way of limitation, and not a limitation during the Eſtate of the two firſt lives only. Mich. 30 Eliz. in C. B. *Kirkman* and *Reignolds* Caſe.

55. A Leaſe for years was made of Lands upon Condition, That he ſhould not grant over his Eſtate by his Will, or otherwiſe: He Deviſed the ſame to A. and B. his Executors who entred and claimed the Lands only as Executors, and not as Deviſees. Yet it was Reſolved in that Caſe, That it was a breach of the Condition, becauſe he had done as much as he could in Law to Deviſe the Land. Hill. 19 Eliz. in B. R. See 31 H. 8. *Dyer*, 45, *Parry* and *Herberts* Caſe, acc.

56. A man deviſed his Land to his Son T. and to the Heirs Males of his body for 500 years. Provided, That if T. or any Iſſue Male of his body, did allien, give, or grant the Land, but only by Leaſe or otherwiſe determinable upon three lives, reſerving the ancient Rent; or if that he dyed without Iſſue Male, that then the Land ſhould remain to W. in tail. T. had Iſſue a daughter, and W. and T. made a Leaſe for 500 years. It was ſaid, That this was an Eſtate tail in T. But the Court was clear againſt it, That it was but a Term for years in T. and not any Eſtate tail. Mich. 7 Jac.

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in C. B. *Love* and *Goddards* Caſe. And it was ſaid, That it was ſo Reſolved in *Higgins* and *Mills* Caſe in the Chancery. And it was ſaid in this Caſe, That if the Heir in this Caſe doth enter by colour of this Deviſe, that he was no Diſſeiſor.

57. Note, it was agreed by the whole Court upon Evidence given to the Jury in an Action of Waſte, That if Leſſee for years cutteth down Aſhes, that the ſame is Waſte. And if Leſſee for years cuts a Tree in the middeſt, and afterwards it is grubbed up by him, it is two Waſts. But it was agreed by them, and all the Serjeants at the Bar, That the cutting down of the Underwoods is not Waſte done by Leſſee for years, unleſs he utterly deſtroy the Wood by eradicating of it. And in this Caſe, it was further agreed, That if in Waſte brought, the Leſſee pleadeth, That the Leſſor had nothing in the Land, it is no good plea; for by that, by Implication he confeſſeth that he is Leſſee, and the Jury are not to enquire of another matter; but if Waſte be done or not. Paſc. 27 Eliz. in C. B. *Beaumont* and *Steward's* Caſe.

Legacies.

I. *What they are, of what things Legacies may be, of what not: and in what Court they are ſuable for, in what not; and when and how they are to be payed.*

1. LEgacy, called by the Civilians (*Legatum*), is by the Common Law, a Deviſe of lands or goods, or Chattells which any one ſhall make unto another perſon by his laſt Will, or Teſtament, either in Writing, or *Nuncupative*. But moſt properly (under the word Legacy) is a bequeſt made by Will or Teſtament, of Chattells real or perſonal to take effect after the death of the Teſtator in ſuch manner as he ſhall appoint, with the aſſent of the Executor.

2. All perſons who have ability to Grant, have like ability to make his laſt Will and Teſtament; and of all Chattells real or perſonal; as Leaſes, Plate, Cattel, moveable goods; a Deviſe may be thereof made, or a bequeſt, and the Deviſee ſhall have and take the ſame by way of Legacy. But then the Deviſor muſt have a right or property in the thing bequeathed in his own right. For if he hath Goods, Chattells, or Credits, as Executor to another man. He cannot by his Will or Teſtament bequeath thoſe goods, unleſs he alter the property of them, for that he hath them not to his own uſe, but to the uſe of the Teſtators Will: This only he may do, he may make a Continuation of them in his Executor; and then his Executor ſhall have them as Executor of the firſt Teſtator, but ſubject ſtill to the payment of the Legacies, and to the performance of the Will of the firſt Teſtator.

3. The Grandfather of the Defendant being Leſſee for years of a Term, ordained T. his Son his Executor, and dyed: T. entred as Executor to the Grandfather, and by his Will deviſed the ſame to V. the Defendant, his Son, and made four men his Executors, and dyed; the Defendant by the Executors entred into the Land. It was the Opinion of all the Juſtices, That the Deviſe by F. the Executor of the Grandfather, was void, becauſe he had the Term as Executor, and a man cannot deviſe any thing but that only which he hath to his own uſe, and although the Deviſee entred by the aſſent of the latter Executors, the ſame could not be taken as a Grant of the Term by them, but only an aſſent that the Defendant ſhould have that which the Teſtament gave him; and then, if the Deviſe was void in Law, the aſſent alſo was void; and ſo it was adjudged, That the Defendant took nothing by the Deviſe. Paſc. 20 Eliz. in B. R. *Barnby* and *Granthams* Caſe. *Plow. Com.* 525, 526.

4. If a man have Debts owing unto him, or money be owing to him upon a Mortgage of Lands; theſe are properly things in Actions, and cannot be given as Legacies, becauſe they are not aſſignable; and they are lyable and ſubject to the payment of the Teſtators Debts. Yet if the Teſtator doth bequeath ſuch a Debt to A. as a Legacy, and ſuch a Debt to B. as a Legacy, although they be things in Action: yet if there be ſufficient other Aſſets to pay and ſatisfy all the Teſtators Debts, the Legatee may in the Executors name ſue for ſuch a Debt, and may recover the ſame, and retain it as their Legacy; and an Acquittance or Releaſe made by the Executor to the Debtor or Mortgager of ſuch a Debt or ſum of money, will be good in Law: And when ſuch Debts are recovered in the Executors name, the Legatees may compel the Executors to deliver ſuch Legacy bequeathed unto them, by a ſuit in the Eccleſiaſtical Court brought againſt them for the ſame. See 48 E. 4. 14. 11 E. 3. *Fitz.* Tit. Condition 9.

5. If one be poſſeſſed or eſtated in, or of a Leaſe for years, a Wardſhip, or an Extent, or of the next Avoydance of a Church, and all of them in the right of his Wife; theſe being Chattel reall, cannot

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not be diſpoſed by the Husband by his Will or Teſtament unto other perſons as Legacies: for that upon his death, they ſhall return and remain again to the Wife, and yet the Husband might have given and diſpoſed of them in his life time by his gift, and ſuch gift ſhould bind the Wife, and carry away the Intereſt from her: But the Goods, Chattells, and other Moveables, and perſonal Eſtate of the Wife, and which is veſted in the Husband by the Intermarriage; the abſolute Intereſt and property is in the Husband of them; and ſuch Goods, Chattells, &c. may be bequeathed by his Will or Teſtament, to other perſons as Legacies. Trin. 15 Car. in B. R. in Sir *John St. John's* Caſe. *Marſh.* 44, 45.

6. Legacies are moſt properly and frequently recoverable by ſuit in the Eccleſiaſtical Court; Yet the Common Law takes ſuch notice of them, that in many Caſes ſuits have bin in the Courts of Chancery and of Equity; and where Suits have bin for them in the Eccleſiaſticall Courts, Prohibition hath bin Awarded: As, *viz.* in the Caſes following.

7. A. lying on his Death bed, made his Will and made Executors thereof; and afterwards ſaid to his Executors named in the Will, *I will that B. ſhall have 20 l. more if you can ſpare it.* The Executors anſwered and ſaid, *Yes forſooth*; but no Codicill was made of the ſame Legacy: A Bill was preferred in the Spiritual Court for the Legacy. Whereupon the Executor prayed a Prohibition. In this Caſe, it was holden by the Court, That although this Court hath not power to hold Plea of the thing Libelled there in the Spiritual Court, yet it hath a power to limit the Juriſdiction of other Courts; and if they abuſe their Authority to grant a Prohibition, 2 H. 4. 10. acc. But it was doubted as this Caſe was, Whether the Spiritual Court might give remedy to the perſon for the Legacy; for the ſame not being annexed to the Will by a Codicil, it was but *fidei Commiſſum*; and ſo the doubt was, Whether the Spiritual Court might hold Plea of it: For if it cannot hold Plea of it, then in this Caſe, a Prohibition may be lawfully granted, although this Court have not power or Juriſdiction of the thing it ſelf. The Court would adviſe of it, and it was adjourned. Paſc. 12 Jac. in B. R. *Cartwright's* Caſe. *Godbolt.* 247.

8. Note, It was the Opinion of the whole Court, That if a Legacy be granted out of Land, this ſhall not be ſued for in the Spiritual Court. But if one by Will deviſeth Land to be ſold for the payment of his Debts, this may be ſued for in the Spiritual Court, *per Curiam.* Paſc. 10 Jac. in C. B. *Brownlow*, 1. Part, 32. And note further, it was Reſolved in that Caſe, That where the Commiſſary did grant Adminiſtration of the Inteſtates goods to the Wife, and did make a dividend of ſome of his Eſtate to the reſt of his Kindred, that the ſame was not Warranted by Law, and it was more than the Ordinary could do, becauſe the Adminiſtratrix is chargeable to pay all Debts and Promiſes and Legacies, and to bring up the Children of the Inteſtate, with the goods of the Inteſtate, which ſhe cannot do if the goods be taken away, and diſpoſed to others. Paſc. 10 Jac. *ibid.*

9. In a Prohibition by an Executor, the Caſe was this; One A. deviſed, That the Teſtator and three others ſhould ſell Lands, and ſhould diſpoſe the money to the Defendant, and three others equally. The Land was ſold accordingly, and the Defendant ſued this Executor in the Spiritual Court for the fourth part of the money. It was the Opinion of the Court in this Caſe, That neither the Land nor the money was Teſtamentary, as this Caſe was. For it was not Aſſets to Debts, but a ſum ariſing of Land, and appointed to ſpecial uſes in way of Equity, and not as a Legacy, and therefore is not to be ſued for there, but in a Court of Equity; nor can that Court hold Plea of a Legacy in Equity, but where it is a Legacy in Law in Deed, for they muſt hold Plea by their Law, as our Courts of Law do. Trin. 17 Jac. in C. B. *Edwards* and *Graves* Caſe. *Hob.* 265.

10. Note, It was Reſolved by the Juſtices, That all manner of Debts, whether they be due by matter of Record; Obligation, or by contracts, are to be paid before Legacies, for which remedy is given in the Eccleſiaſtical Court: and Debts by ſimple contract, ſhall be paid before the reaſonable aid of the Wife, and the Children. 2 E. 4. 2. *Cook* 9. Part, 88. in *Pinchons* Caſe.

11. In an Action of Covenant, the Caſe was; A. made a Leaſe of certain Lands to B. by Deed, and Covenanted for him, his Executors, &c. that the Leſſee ſhould peaceably and quietly enjoy the Lands let during all the Term: The Leſſor made his Will, and thereby made L. the Defendant his Executor, and dyed; And by the Will divers goods in *ſpecie* were deviſed to ſundry perſons: L. the Executor delivered the goods in *ſpecie* to the Legatees. B. was ouſted of the Land, and thereupon brought Covenant againſt the Executor: And the Queſtion was, Whether the payment of theſe Legacies by the Executor, were a *Deveſtavit* or not, and ſo the Executor chargeable *de bonis propriis* to ſatisfy the Covenant broken. This Caſe was often argued at the Bar, and the better Opinion of the Court ſeemed to be, That it was no *Deveſtavit* in the Executor, nor he chargeable *de bonis propriis*, for being Covenants to be performed, and none

some broken before the Legacies paid, they might perhaps never come to be broken, and so the Legatees should be for ever delayed of their Legacies, and perhaps some of them being *bona peritura*, might perish for want of keeping of them, and the Legacies thereby lost. But the Case was not Resolved. Mich. 23 Car. in B. R. *Estes* and *Lamberts* Case. *Styles* 37, 38, 54, 55.

12. Note, It was agreed by the whole Court, That if a man Devise unto his Daughter 100 l. when she shall marry; or to his Son when he shall be of full age, and they dye before the time appointed, that their Executors shall not have the money: otherwise if the Devise were to them to be paid at their full ages, and they dye before that time, and make Executors, there the Executors may recover the Legacy in the Spiritual Court. Mich. 9 Jac. in C. B. *Godbolt*, 182. Pasc. 1654. in B. R. *Domlawes* Case adjudged acc.

13. A Woman was possessed of a Term for divers years, and had Issue two daughters, the one Married to A. the other to B. A. had Issue four daughters, and B. had Issue also. The Woman devised Legacies to the Children of A. out of the Rent reserved upon a Lease, and made B. her Executor, and dyed: A. required B. in the behalf of his Children, to pay the money to him, which he refused to do; and thereupon he sued him in the Spiritual Court. B. moved for a Prohibition, and alledged for ground of it, that he was Executor, and chargeable in account for the money. But because he came after sentence, and also after he had appealed to the Court of *Delegates*; and because he did refuse to give security for the payment of the Legacies, no Prohibition was granted. Hill. 11 Jac. in C. B. *Aylffe* and *Brown's* Case. *Godbolt*, 243.

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2. *Whether any Right or Property of a Legacy bequeathed, be in the Legatee before assent of the Executors: Where the Executor may assent; and upon what Terms; and what shall be said a sufficient assent of the Executors to vest the Legacy in the Legatees, or Devisee; What not.*

1. IN no Case can a Legatee or a Devisee take the Legacy given unto him by the Will, lawfully, but by the assent of the Executor first had, nor is such Legacy really vested in him as to dispose thereof before the assent had to it of the Executor: And therefore if a house, peece of Plate, or other known thing in being, be by express words of the Will given to J. S. as a Legacy; yet J. S. cannot take the same, but by reason of the consent of the Executor: And the reason thereof is, because a Chattel shall not be transferred to a stranger, without the Executors assent. Nay, If a Devise be to the Executor himself; yet the thing Devised is not in him, till he elect to take it as a Legatee, and till such Election be may, it remains in him as Executor; and so it is adjudged. Pasc. 20 Eliz. in *Welden* and *Elkingtons* Case. *Plow. Com.* 516.

2. A Term for years was devised to an Executor, he entred into the land, and dyed before Probate of the Will. It was the Opinion of the Justices in that case, That his Entry was a good execution of the Legacy, and that his Administrator should have the Term. Mich. 22 Eliz. *Dyer* 367.

3. A Lessee for years devised his Term to one for his life, the Remainder to another, and made the Devisee his Executor, who proved the Will, and entred, and made his Executor, and dyed; and the Executor entred, and took the profits for a year; against whom he in the Remainder brought an Action of Accompt as Bayliff: It was the Opinion of the Justices, That the Action did not lye 1. For want of Privity. 2. Because the Executor had not declared to have the Term as Devisee, or as Executor, and then it shall be intended that he took it as Executor untill the contrary be shewed; and then the Accompt will not lye against him for the want of Privity. Trin. 10 Eliz. *Dyer*, 277. See *Cook* 9. Part, in *Lampits* Case, the 5th Resolution, adjudged accordingly.

4. A man possessed of a Term for divers years, devised the profits thereof to one for life; and after his devise to another for the residue of the years, and dyed; the first Devisee entred by the assent of the Executors; and afterwards he in the Remainder during the life of the first Devisee, assigned it to a stranger; and after, the first Devisor dyed: It was adjudged in this case, That the Assignment was void; for he in the Remainder had but a possibility during the life of the first Devisee: For it is as much in Law, as if the land had been devised to him for so many years as he should live; or for all the Term if he should live so long, so as the Interest of the Term is *sub modo* in him, and he in the remainder hath but a possibility, which he cannot grant over. *Cook* 6. Part, 66. in *Fulwoods* Case.

5. A. possessed of a Lease for 1000 years, devised the same to *Eliz.* his Daughter for life, the remainder to J. H. and made J. S. the husband of his

his daughter, his Executor, and dyed: J. H. deviſed his Intereſt to *Henry* and *George H*, and made J. D. and other his Executors, and dyed: Afterwards J. S. ſpake theſe words, *If* Eliz. *my Wife were dead, my Eſtate in the premiſſes were ended, and then it remains to the* Hollowayes: *Eliz.* dyed, The Executors of J. H. made a Leaſe to the Plaintiff, upon whom the Leſſee of J. S. entred: The Queſtions in this Caſe were; 1. If the words ſpoken by J. S. the Executor, be a ſufficient aſſent to the deviſe? 2. Whether this aſſent came in due time as to the Intereſt of J. H. in the remainder, becauſe he dyed before the words ſpoken, which ſhould make the aſſent? In this caſe, It was Reſolved by all the Juſtices, 1. That J. S. had made a ſufficient Declaration to take the Term as Deviſee in the right of his Wife, and that it was a ſufficient aſſent; and the words, [*viz. Then it remains to the Hollowayes*] is a proof, that he took notice of it as a Legacy. 2. Reſolved, That the aſſent came time enough after the death of J. H; for otherwiſe it ſhould be a great inconvenience, for by that means it ſhould be diſtinctive to all Legacies; for of neceſſity there muſt be an Aſſent of the Executors to a Legacy: and if he will not Aſſent, and the Legatee dyeth before he can compell him to aſſent; Or dyeth immediately after the Deviſor, before any aſſent to the Legacy; In the firſt caſe, it would be in the power of the Executor to prejudice the party; or in the other caſe, the Act of God would prejudice him; which is againſt Law. Mich. 17 Car. in B.R. *Southward* and *Millards* Caſe. *Marſh*, 135, 136, 137.

6. If there be two Executors of the Will, one of them may aſſent to a Legacy thereby given to the Legatee; and ſuch aſſent ſhall be good: For one Executor may give any goods of the Teſtator, or releaſe any debt which is due unto him *a fortiori*, he may aſſent to a Legacy; which is no more or greater work in effect then an Attornment of one Leſſee upon the grant of the Reverſion where it is a Joynt Leaſe: and if in ſuch caſe there want goods ſufficient to pay the Teſtators debts, he only who aſſented ſhall be anſwerable of his own goods, and not his companion: But if ſuch Executor be under the age of 17. years, or under Coverture, ſuch Executor is unable to give any aſſent to bind him or her ſelf or others; but if the Executrix be a *Feme Covert*; in ſuch caſe, the aſſent of her husband ſhall both bind her ſelf and him. And ſo it was adjudged, Hill. 9 Jac. in the Kings-Bench, in *Retorick* and *Chappells* Caſe.

7. In Treſpaſs, the Caſe was; A. poſſeſſed by Leaſe of the Manor of D, and of the Park there for 77. years, by his Will deviſed all his Leaſes to T, his eldeſt ſon for the whole Term, if the ſaid T. ſhould ſo long live; and if he dyed before he had Iſſue of his body, then he deviſed the ſame to J. his younger ſon, with divers Remainders over: And further declared, That his Will was, that his Wife ſhould have the occupation and profits of the Lands, untill T. came of the age of 21. years; and if he dyed, then till J. came to that age, to the intent, that with the profits of the Leaſes, ſhe might bring up his children, and ſee his Will performed; and made his Wife his Executrix, and dyed. The Wife took upon her the Will, and entred, and alwayes after during her Widowhood, brought up the Children; and afterwards ſhe took husband J. G: T. being of the age of 23, entred, and made the Leaſe to the Plaintiff. After long Argument in this Caſe, It was Reſolved, That the Deviſe and Legacy the wife, by her occupation, and bringing up of the Children at all times after the death of her husband the Teſtator, was an execution of the Eſtate given as well to the Wife, as of the Remainder to the ſon, and ſo by Conſequence the Entry and Grant of the Son to the Plaintiff was good; and Judgment was given for the Plaintiff. Hill. 21 Eliz. *Paramour* and *Yardleys* Caſe. *Plow. Com.* 540, to 546.

8. Note; Theſe Points were Reſolved by all the Juſtices; 1. That if a man hath Lands in Fee-ſimple, and Lands for years, and he deviſeth all his Lands and Tenements, that the Fee-ſimple Lands only paſſe, and not the Leaſe for years. 2. If a man hath a Leaſe for years, and no Freehold, and deviſeth all his Lands and Tenements, the Leaſe for years paſſeth. 3. That if one deviſeth his Land which he hath by Leaſe, to his Executor for life, the remainder over, that there ought to be a ſpecial Aſſent thereunto by the Executors, as to a Legacy; otherwiſe it is not executed. Trinit. 7 Car. in B. R. *Roſe* and *Bartlets* Caſe. *Cro.* 1. Part, 213.

9. An Executor may aſſent unto a Legacy, upon a Condition precedent; but not upon a Condition ſubſequent, nor can he alter the guiſt of the Legacy by his conſent. If a man deviſeth a Term to one for Term of years, or bequeath other Goods or Chattels: The Executor may aſſent to this Legacy, in this manner; *viz.* I give my conſent upon Condition, That if you get me in ſuch an Obligation wherein the Teſtator ſtood bound unto J. S, that then you ſhall enter into the Term, or take the thing bequeathed unto you: Or if you pay the arrearages of the Rent due by you to the Teſtator in his life-time; ſuch is a good aſſent: but if it be upon a Condition ſubſequent, it is otherwiſe: for an Aſſent cannot make that Legacy conditional, which the Teſtator gave abſolutely: So if a man deviſeth a Term to J. S. and the Executors aſſent and agree, That J. S. and J. D. ſhall have the Term; this ſhall be an Aſſent, That J. S.

ſhall

ſhall have the Term alone, and is a void agreement as to J. D; for that after the Executors have once aſſented to the Legacy, the Deviſee or Legatee is in by the Deviſor. See *Cook* 4. Part, 29. acc.

3. *What ſhall paſſe by Bequeſts, and How equeſts ſhall be expounded.*

1. A. Poſſeſſed of a Leaſe of a houſe for 40. years, Deviſed the houſe to J. S. without limiting any Eſtate. It was the Opinion of the Juſtices in that caſe, That the Deviſee ſhould have the whole Term for 40 years: For he could not have it for life, nor at Will, nor for a leſſer Term of years, and therefore he ſhould have the whole Term. Hill. 14 Eliz. *Dyer*, 307.

2. The Lord *Latimer* deviſed to his Wife, the third part of all his Goods and Chattels: It was taken in that caſe to be the third part after Debts and Legacies paid, and not the third part of the whole, as it then was. 36 H. 8. *Dyer*, 59. And ſee, 5 Mar. *Dyer*, 164. where a man deviſed the moyty of his goods to his Wife. It was holden in that caſe, If the Executors have ſufficient Aſſetts, ſhe ſhall have the moyty of them, as they were at the time of his death.

3. If one ſeiſed of lands in Fee-ſimple, bequeath it to his Executors to pay debts, the Executors have no Eſtate of Freehold in the Land; for if they ſhould, then it ſhould be either for life, which might end before the debts be paid; or in Fee-ſimple, which would carry away the Land for ever from the heir: whereas perhaps within a few years, the debts might be paid out of the profits of the Lands.

4. A man poſſeſſed of Leaſes for years, and of moveable goods, grants *omnia bona et Catalla ſua*: It is holden in 4 E. 6. *Br. Done.* 43. That the Leaſes for years do not paſſe; for that the word (*bona*) comprehendeth onely moveable Goods. And ſo it was adjudged, Trin. 37 Eliz. in *Portman* and *Syms* Caſe. But if a man by his Will deviſeth or bequeath *bona et Catalla ſua*, the Leaſes for years will paſſe; for that by the Spiritual Law, where Legacies are demandable *bona et Catalla*, are taken to be all one. See 13 H. 7, *Kelway* 35. acc.

5. If a man maketh his Will in theſe words, viz. I give, grant, will, and bequeath to T. all my Mannors, Lands, &c. To have and to hold to T. and the heirs of his body, for and during the Term of 500 years, the ſame is but an Eſtate for years determinable upon the limitation for default of Iſſue, by *Cook* and *Winch*, Juſtices. See *Cook* 10. Part, in *Lovies* Caſe: But if one hath a Term for years, and deviſeth the ſame to one, and the heirs of his body, his heir ſhall not have it, but it ſhall go to his Executors; becauſe a Term which is but a Chattel, cannot be entailed, Paſch. 28 Eliz. *Peacocks* Caſe; and 21 Eliz. *Higgins* and *Mills* Caſe, adjudged acc.

6. A. poſſeſſed of a Leaſe for 60 years, Deviſed that B. his brother ſhould have the uſe and occupation of it, and take the profits thereof during his life; and after his death, the uſe and occupation thereof ſhould remain to the Wife of B. during her Widowhood; and after her Widowhood, the occupation and profits of the premiſſes to remain to the eldeſt ſon of B, which he ſhall happen to have during his life; and after ſuch ſon dying without any heir male, to any other ſons which B. ſhall have, one after the other: and if B. dye without heir male of his body; for that I purpoſe to have the Leaſe kept in my name, My Will is, That the uſe, profits, and occupation of the ſame, ſhall remain and be to C, and ſo to D. in the ſame words. It was Reſolved by the Juſtices in this caſe, That the Deviſe of a Term in this manner to make a perpetuity of it, could not be good: For that to limit a poſſibility after a poſſibility, and to limit a remainder of a Term after a dying without Iſſue, could not ſtand by the Rules of Law. Trin. 5 Car. in B. R. *Sanders* and *Cornifhes* Caſe. *Cro.* 1. Part, 166.

See more of *Legacies*, Lib. 1. in the Title of *Deviſes*; and in Title *Executors*, before.

Leet.

The Beginning of them; Who are the Judges there; What things are inquirable there; What not: Where, and at what time to be holden: And of Amerciaments there, and Avowry for them: And of severall other things touching the Leet.

1. SEe, Leets were derived out of the Sheriffs Torns, 28 H.8. *Dyer*, 13. And see *Mirrour of Justices*, 9. where it is said, The Torns of Sheriffs and Views of Frankpledges were ordained: And it was Ordained, That none of the age of 14. years or above, was to remain in the Realm above 40 dayes, If he were not first sworn to the King by an Oath of Fealty, and received into a Decennery. And see there, the Articles of the Leet, *Mirrour*, Sect. 17.

2. *Leets* were divided in *Decuriae*, or *Decennae*, *unde dicitur Decennarii*; and out of every 10; and one of them being pledg for the other, from whence the Court was called *Curia visus Franci pledgii*: one was called *Capitalis pledgius*, or *Primarius fidejussor*: And by the Statute of 18 E. 2. it ought to be enquired at the Leet, If all the Chief Pledges with their Decenners, *viz.* with the other 9. did appear; so as the 10th man was called, the Chief Pledge. See *Lambert. de priscis Anglorum Legibus. Mirrour, ubi supra. Fleta. Lib.* 2. *Cap.* 43.

3. A man had a Leet within his Mannor, and in a special Verdict it was found, That the Plaintiff was Resiant within the Mannor, , and that he was Certified at the Leet to be Chief Pledg; but he made default, and was Amerced for his default 2s. 6 d. but it did not appear, that he was sworn Chief Pledge. It was the Opinion of the Court, That they could not adjudge him to be Chief Pledge by that Verdict. But in that Case, It was agreed, That the Lord of a Leet might well have a certain sum as 10 s. *pro certo Lete* of all Resiants within his Leet, because the same might have a reasonable being, that they need not go to the Sheriffs Torn, but do their service at the Lords Court-Leet. Pasch. 5 Jac. *Cook* 6. Part, 77. *Batens* Case.

4. If the Jury in a Leet refuse to make a Presentment, The Steward may assess a Fine upon each of them for his contempt. 10 E. 4. 8. *Avowry*, 155. And if the Homage in a Court-Baron do refuse to make a Presentment, if they be Copyholders, it is a forfeiture of their Copyhold. Hill. 4 Eliz. *Dyer*, 211. and so it was adjudged in the Earl of *Arundels* Case, in the Star-Chamber.

5. In a *Replevin*; where the Defendant avowed, for 5 l. a Fine imposed in a Court-Leet, these Points were Resolved; 1. That if any disturbance or Contempt to a Court of Record, be committed in any Court of Record, that the Judges may impose upon the Offenders a Reasonable Fine: And a Leet is a Court of Record in which the Steward is Judge; and for a Contempt to the Court before himself, he may impose a reasonable Fine. 2. If any Fine be imposed by the Steward in any Court-Leet, it is good, although it be not afferred nor assessed by the Jury: For a Fine is imposed by the Court. But by the Statute of *Magna Charta*, and *west.* 1. Amerciaments ought to be taxed by the County: And therefore in Cases where the Plaintiff is Nonsuit, or Judgment given against the Defendant, the Justices do not assesse any Amerciament certain, but the Entry is, in *Misericordia* generally. 3. That the Amercement of any who is an Officer of Justice, or who hath execution of the Kings Writ, shall be by the Judges of the Court where the case dependeth. 4. If a Jury in a Leet tax an Amercement, it is sufficient without other afferment, for the Amercement is the Act of the Court. But if the Steward afferr an Amercement upon Presentment of the Jury, it is void, and shall not bind; but the Court shall assesse Fines, and they shall not be afferred by any. 5. That the Lord of the Leet may distrain as well for a Fine imposed by the Steward for a Contempt, as for an Amercement. *Cook* 8. Part, 38. *Greisleys* Case.

6. In Trespasse, the Defendant justified, That the Plaintiff was a Common Baker dwelling in T; and that it was presented in the Leet in T. that he sold Bread against the Assise *in locis vicinis*, whereupon he was Amerced, and the Amercement afferred to 10 s. and that by Precept out of the Court, he did distrain the Plaintiff: In this case, the Court gave Judgment for the Plaintiff, because it did not appear, that the Offence was committed within the Jurisdiction of the Leet; which shall not be presumed, unlesse it be specially pleaded. But it was said, That perhaps the Presentment in the Leet is good, without special mention in the Presentment, that it was done in the Jurisdiction, if the truth were so. But note; It was Observed, That the Plea was naught and absurd: For it is said, He was amerced, without saying [*what*,] and that

that the Amercement was afferred to 10 s: Now the Jury muſt amerce to a certain ſum, which may be mitigated and afferred. Paſch, 14 Jac. in C.B. *Wilſon* and *Hardingham's* Caſe, *Hob.* 129.

7. *Replevin* againſt two; One pleads Not guilty; the other Juſtifies by reaſon of an Amercement in a Leet: Whereupon it was Demurred, and adjudged for the Avowant. And the Iſſue was afterwards tryed and found for the Defendant, and Damages and Coſts aſſeſſed for both. It was moved, That no Judgment ſhould be for the Damages and Coſts, for that it is out of the Statute of 7 & 21 H.8. But upon Conſideration of the Statute, the Court was of Opinion, That the Avowant ſhould have Coſts, but adviſed him to releaſe his Damages. Hill. 16 Jac. B. R. *Samuel* and *Hoders* Caſe. *Cro.* 2. Part, 520. *James* and *Tutneys* Caſe. *Cro.* 1. Part, 357, 383. acc.

8. The Steward of a Leet impoſed a Fine joyntly upon A. B. and C. Chief Pledges, becauſe they refuſed at a Leet to Preſent, that they ought to pay at every Leet *pro certo Lete* 10 s. to the Lord; and becauſe it was not paid, the Lord diſtrained: In this caſe, It was Reſolved, 1. That the Fine ought to have been aſſeſſed upon them ſeverally and not joyntly, becauſe the refuſal of them was ſeveral and perſonal. 2. Reſolved, That the reaſonableneſſe of the Fine ſhall be adjudged by the Juſtices, and if the Fine be exceſſive, it ſhall not bind: For *exceſſus in re qualibet reprobatur.* 3. Reſolved, That when a Fine is impoſed againſt Law, as joynt, where it ſhall be ſeveral, if it be unreaſonable, it may be avoided by Plea or Judgment of the Court in which the ſuit depends; for no other remedy is given to the party. 4. Reſolved, That the Lord cannot diſtreyn for Head-ſilver, becauſe it is againſt common right, and for the private uſe of the Lord, which he cannot do without Preſcription; and then as he ought to preſcribe in the Principal, *ſcil.* the Head-ſilver, ſo he ought to preſcribe in the diſtreſs. And note, in that Caſe, it was ſaid, That for an Amercement in a Court Baron, the Lord cannot diſtreyn without a Preſcription. But for a Fine or an Amercement in a Leet, diſtreſs is incident of common right. *Cook* 11. Part, 42. *Godfreys* Caſe.

9. In Treſpaſs, the Caſe was, A Freeholder within the Mannor of J. of which the Earl of *Northumberland* was Lord, and had a Leet erected, a new Dovecote thereon, and ſtored them with Pigeons, and ſuffered them to fly out, which was Preſented in the Leet as a common Nuſance, and an Amercement of 40 s. aſſeſſed for this Offence, and a pain of 10 l. impoſed, that he ſhould ſtop it up before ſuch a day, which he did not do: Whereupon it was Preſented the next Court, and the pain impoſed, and for non-payment thereof, a diſtreſs was taken. He entred Bond for the payment of the Fine, and brought Treſpaſs for taking of his Cattel, and detreyning them untill he had entred Bond. It was holden in this Caſe by all the Juſtices, That the erecting of a Dovecote by a Freeholder who is not Lord of the Mannor, nor owner of the Rectory, and replenishing the ſame with Doves, is not any Nuſance enquireable or puniſhable in a Leet: And if it were a common Nuſance, neither the Lord of the Mannor, nor the Parſon could erect a Dovecote there more then any other Freeholder. For that none can preſcribe to make a common Nuſance; and the Common Law doth not look upon the erecting of a Dovecote as a common Nuſance, but makes proviſion againſt them that deſtroy Doves near a Dovecote. It was further adjudged in this Caſe, That the Avowry as it was made, was not good: For as they have pleaded it, they have not made it enquirable in the Leet: For they ought to enquire of publick Nuſances made within the Leet, and not of Nuſances made in the County, out of the Juriſdiction of the Leet; but in this Caſe they ſay, That he erected a Dovecote within the Leet, *Et quod Columbæ volabant, et revolabant,* and conſumed the Corn *ad Nocumentum totius patriæ,* but they do not ſhew that they conſumed any Corn within the Leet; and therefore the Avowry was not good. Trin. 16 Jac. in B. R. *Dewell* and *Saunders* Caſe. *Cro.* 2. Part, 491. See *Popham* 141. the ſame Caſe under the name of the Earl of *Northumberlands* Caſe.

10. In a Replevin, the Defendant made Conuſans, That the Lord P. was ſeiſed of the Mannor of W. and that he and all thoſe, &c. have had within the Mannor, a Leet, of all the Reſients *ſemel in anno.* upon *Munday* next after *Whitſonday*, and all Amercements in that Leet: and that the Plaintiff was amerced for not comming to the Leet; and for the ſaid Amercement, the diſtreſs was taken: Upon Iſſue upon the Preſcription, the Jury found, That the Lord P. and all, &c. had a Leet, *ut ſupra verbatim.* But they further find, That the Warden and Colledg of New-Colledg in O. are ſeiſed in Fee of the Mannor of the Rectory of W. called *Romans-Fee* in W. and that they and all thoſe, &c. have had a view of Frank-pledg of all the Inhabitants and Reſients within the ſaid Mannor of R. *ſemel in anno in feſto Commemorationis Pauli tenend.* as to their Mannor of R. belonging. The point intended was, becauſe the Plaintiff was Reſient within the Leet of the Colledg; Whether alſo he might be Reſient within another Leet, and ſo chargeable to two Leets. The matter in Law was never debated, becauſe the Court upon the

opening of the Verdict, held, That forasmuch as the Verdict hath found the Issue *verbatim* to be for the Avowant, the finding of the other matter after is not material, and so Judgment was given for the Avowant. Hill. 1 Car. in C. B. *Eyre* and *Wrights* Case. *Cro.* 1. Par. 54.

11. Note, it was Resolved by the Justices, That when the King Grants any Priviledges or Franchises which were in his own hands as parcel of the Flowers of the Crown; as *Bona felonum, utlagatorum*, Waife, Estray, in such Case, if they come again to the Crown, they are drowned and extinct in the Crown. But when Franchises or Liberties were created and erected by the King, there such Liberties or Priviledges are not extinct, nor the appendancy severed from the possessions, although they come again to the Crown: As if the King Grant a Market, Hundred, Leet, &c. *Cook* 9. Part, 25. In the Case of the Abbot of *Strata Marcella.*

12. Three Coparceners of a Mannor were, The King Granted to one of them a Leet: afterwards they made Partition of the Mannor. Yet it was holden, That he should have the Leet, and if the King grant to me a Leet within my Mannor, and I do afterwards enfeoff the King of the Mannor without the word appurtenances, I shall still hold the Leet: And the Court was clear of Opinion, That a man might have a Leet in the Lands of another man. Hill. 28 H. 8. *Dyer*, 30.

13. A Leet cannot be appendant to a Church, because it is of another nature. 10 E. 4. *Cook* 4. Part, 37.

See more of *Leet*, in *Lib.* 1. Title *Courts*: and after, in Title *Mannor.*

Libels *and* Libelling.

IT was Resolved by the Justices, That every Libel which is called *Libellus famosus*, is made either against a private man, or against a Magistrate; and if it be against private persons, it deserves severe punishment, because it is the cause of sedition, quarrel, and contention, which lead to the breach of the Peace, and shedding of blood: But if it be against a Magistrate, the offence is the greater, because the same scandals the Government. 2. A Libeller, who is called *Famosus Defamator*, shall be punished either by Indictment at the Common Law, or by Bill; if he deny it; or *Ore tenus*, by his own Confession; either by Fine, or Imprisonment; and if the Case be exorbitant, by Pillory, and loss of Ears. 3. Resolved, That a scandalous Libel in Writing, is, when an Epigram, Rhyme, or other Writing, is composed or published to the disgrace of another, by which his Credit or Dignity shall be prejudiced; and a Libel without writing, may be *Signis, aut Picturis. Cook* 5. Part. 124. in the Case *De Libellis famosis.*

2. If a man finde a Libel, if it be composed and made against a private man; he which findeth it, may burn it, or may presently deliver it to a Magistrate: But if it be against a Magistrate, he ought to deliver it to a Magistrate, to the intent that the Author may be punished. 44 Eliz. *in Cam. Stellat. Halywoods* Case.

3. In a Bill preferred in the Star-chamber, for the publishing of a Libel, It was Resolved, 1. That every one Convicted in such case, ought to be either Contriver of the Libel, or a Procurer of the Contriving of it, or a malicious Publisher of it. 2. Resolved, That if a man read a Libel, or hear it read, the same is no Publication of it; but if after it is read, he repeat part of it in the hearing of another, the same is a Publication of it. 3. Resolved, If a man writeth a Copie of a Libel (knowing it to be a Libel) if he do not deliver it to a Magistrate, to examine of it, it is a great evidence of Publishing of it. *Cook* 9. Part. 59. *Lamb's* Case.

4. W. P. being general Heir to R. P. who was seized of lands of Inheritance of 900 l. *per annum*; Sir *George Reynel*, who married the daughter of Sir E. P. who was a younger Brother of R. P. and R. P. having a purpose to settle his land upon the said W. P. to remove the affection

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of the ſaid R. P. from his Heir, and to ſettle the ſame upon himſelf, wrote a letter to the ſaid R. P. containing, That W. P. the Plaintiff, was not the Son of a *Peacock*, but was a Hunter of Taverns, and that divers women followed him from *London* to the place o his Dwelling, and that he did deſire to hear of the death of the ſaid R. and that all h s Inheritance would not be ſufficient to ſatisfie his debts; with other matters concerning h's credit and Reputation. It was Reſolved in this Court, That this letter was a Libel, for which Sir *G. Reynell* was Fined and Impriſoned, although he ſubſcribed it with his Name, and directed it to R. P. himſelf: But if the letter had been directed to the Plaintiff, W.P. himſelf, and not to a third perſon, it ſhould not have been a libel; or if it had been directed to a Father, for reforming any of his children, it ſhould have been no libel, for it was but for Reformation, and not for Defamation, nay though it had contained ſcandalous matter concerning his children; but where a man intends his own profit. as in the Principal Caſe, there it is otherwiſe, Paſch. 10 Jac. in C. B. *William Peacock*, and Sir *George Reynel's* Caſe. *Brownlow*, 2. Part, 151, 152.

5. J. was Indicted for that he exhibited an Infamous Libel directed to the King, againſt the Chief Juſtice of the Kings Bench, and the Court, for a Judgment given in the ſaid Court in *Magdalen* Colledge Caſe; affirming the ſaid Judgment to be Treaſon, and calling the Chief Juſtice Traytor, perjured Judge, and ſcandalling all the Profeſſors of the Law: And this Libel he fixed upon the Gate entring *Weſtminſter* Hall, and divers other places. Being rated to plead to the Indictment, he put in a ſcandalous plea, affirming he would not plead otherwiſe. It was adjudged, That he ſhould be committed to the Marſhal, ſtand upon the Pillory, with paper mentioning the offence, ſubmit himſelf to every Court, bound to his good behaviour during life, and pay 1000l. Fine to the King. Mich. 1 Car. in B. R. *Jeff's* Caſe. *Cro.* 1. Part[e] 125.

6. Sir *Baptiſt Hix* having done many Charitable Acts, as erecting of an Hoſpital at C. Repairing of the Pariſh Church, and of the Seſſions Houſe in *Middleſex*; J. S. a Copyholder of his Mannor of C. out of a private malice, framed and Writ a Malicious and Invective Letter to him, in which in an Ironical and Deriding manner, he ſaid, That the ſaid *Baptiſt Hix* had done theſe charitable works, as the proud Phariſee, for vain glory and oſtentation, and to have popular applauſe; and further, in opprobrious manner, taxed him with divers other unlawful Acts. It was Reſolved by the Court, That for ſuch a private letter, an Action upon the Caſe did not lye at the Common Law, for he cannot prove the publiſhing of it; But becauſe it tends to the breach of the Peace, is to be puniſhed in the Starchamber, and ſo much the rather, becauſe it tends to a Publique wrong; for if it ſhould be unpuniſhed, it would diſcourage, not him only, but others, who were well diſpoſed to do ſuch pious Acts. Trin. 16 Jac. in the Starchamber. Sir *Baptiſt Hix's* Caſe. *Poph.* 139, 140. *Hob.* 215. The ſame Caſe.

7. *Wotton*, a Doctor in Phyſick, wrote to *Edwards* a Phyſitian, an infamous, malicious, ſcandalous, obſcene Letter, to which he ſubſcribed his name, and this he Sealed, and directed thus, *To his loving Friend*, M. *Edwards*, Speed This. And after the Doctor publiſhed and diſperſed to others a great number of Copies of the ſaid Letter. It was Reſolved by the Lord Chancellor *Egerton*, the two Chief Juſtices, and the whole Court of Starchamber, That that was a ſubtle and dangerous Libel; in as much as the Writing of a private Letter to another, without any other Publication, the party to whom it is directed, cannot have an Action upon the Caſe, and ſo the Doctor thought, that this could not be puniſhed in any manner: Yet it was Reſolved, That the writing of the ſaid ſcandalous Letter (which in Law is a Libel) ſhould be puniſhed in the Starchamber; for that it is an offence to the King, and is a great motive to revenge, and tends to the breaking of the Peace: And it was Reſolved, That the diſperſing of Copies of it, or the publication of the effect of it, aggravates the offence, and makes it a new offence, for which the party may have an Action upon the Caſe. Trin. 3 Jac. in *Cam. Stellat.* *Edwards* and *Wotton's* Caſe. *Poph.* 35, 36. Trin. 13 Jac. *Barton* and *Lewellins* Caſe. *Hob.* 62. acc.

8. Secretary *Lake* exhibited a Bill againſt *Luke Hatton*, containing, That the ſaid *Luke Hatton* had delivered to the Lady R. his daughter, a writing, Importing a Conference had between the Counteſs of E. and him, wherein ſhe ſhould determine to give a Dram to the Lady R. and to make away the Secretary her Father, and to charge him with a plot againſt a King, in the time of the late Q. E n. This Writing coming to the Secretaries hand, he required *Luke Hatton* to confeſs the delivery of it; which he denyed, and had publiſhed and given out, That the ſaid Secretary himſelf, or the Lady R. or ſome other by their procurement, had deviſed it themſelves: *Hatton* (being the only Defendant) denyed the deviſing or delivering of it, and that he had at any time been with the Lady R. Exceptions were taken to the Bill. 1. That the Writing being a Libel againſt the Counteſs of E. and the wrong inſeparable to her, no other perſon could complain of it, having no Intereſt in it; and to

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That purpose *Lambs* Case was vouched. 2. Exception, The Charge was in the Disjunctive, and so uncertain. For the second Exception, It was overruled, That the Bill was good. But to the first Exception, Sir *Edw. Coke* Chief Justice of Common Pleas agreed to it, and added a further reason of his own, *viz.* That the Countesses of E. honour and dishonour was handled and traversed betwixt two strangers, whereunto she was made no party, which might be turned to a practise; but the Plaintiff might have made the Countess a Defendant with *Hatton*, or else have joyned her against *Hatton*. To which it was answered by the Kings Attorney General & the Chief Justice, That this was not like *Lambs* Case, for there *Lamb* had nothing to do in the Libel, but here the Plaintiff (the Secretary) was charged with a Plot against the King. 2. It was against Reason and Justice to have made the Countess a Defendant, because the Bill layes nothing against the Countess, and against Justice to enforce the Plaintiff to accuse her of those foule faults, whereof perhaps he hold her Innocent: And where it was said by *Coke*, That if the matter had been true, *Hatton* might have justified the Libel, that was denyed: for a Libel, although the Contents be true, is not to be justified. *Lake* and *Hattons* Case in the *Star-Chamber*. *Hob.* 252. 253.

9. *Waller* spake these words to one *Bostock*. I *heard that five or six of the Lords of the Council have kneeled to the King for Toleration of Religion.* And *Bostock* writ to another, That his Warden, the Arch Papist, and five or six other of the Council, had kneeled to the King for Toleration of Religion; That the Prince that was the Pillar, is now gone, and that *Northampton* would now shew himself what he hath been. These Speeches, Declaration, and Writing and Publishing of these matters in Letters, were holden by the whole Court, to be infamous Libels and Scandals; and *Waller* and *Bostock* were both punished by Sentence, with loss of their Ears, Whipping, Imprisonment during life, and each fined in great Fines to the King. Pasch. 1 Jac. in *Cam. Stellat.* The Earl of *Northamptons* Case.

2. *Libels in the Spiritual Court.*

1. S. Vicar of L. libelled in the Spiritual Court against D. and shewed, That upon his Endowment, four Quarters of Corn were assigned to the Vicar of the Tythes of the Parsonage of L. and that the Pastor or Farmer of the said Parsonage of L. had alwaies paid the said Corn to the Vicar and his Predecessors; and shewed, That the Lord *Sands* was seized of the Parsonage, and leased a Barn and Tythe-Corn, parcel of the said Parsonage, to D. his Wife, and Son: *Habendum* to D. for his life, remainder to his Wife for life, the remainder to his Son for life: And that D. Covenanted with the Lord *Sands*, to render the said four Quarters of Corn, to the Vicar and his Successors: And after a Prohibition procured, S. prayed a Consultation. It was Objected against the Consultation, That it was grounded upon a Covenant. But the Opinion of the Court was, It was not grounded upon the Covenant, but upon the Title of Endowment. 2. Objected, That the said D. his Wife and Son, were joynt Farmers; for the *Habendum* had not severed their Estate, and so the Libel should have been against them all: But that Exception was over-ruled by the Court. 3. It was Excepted, That the Parson, or Farme, ought to pay the said four Quarters of Corn; and that the Lease to D. and his Wife, and Son, was but of part of the Parsonage, *viz.* the Barn, and Tithe Corn, parcel of the Rectory, and that the rest of the Rectory did remain with the Lord *Sands*, and so the Vicar should have Libelled against the Lord *Sands*, and D. and for that cause the Consultation was denyed. And Note, In this case it was agreed, That if upon a Libel the Defendant maketh a surmise in *Banco* to have a Prohibition, if such surmise be insufficient, the other party needeth not to Demur upon it, but as *Amicus Curiæ*, he shall shew it to the Court, and the Court shall discharge the Prohibition. Mich. 26 Eliz. in C. B. *Sutton* and *Dowses* Case. *Leon.* 10, 11.

2. A Parson Libelled in the Spiritual Court against the Defendant, and shewed, That the Custome of the Town of L. was, That the Parson should have for his Tythe the tenth Land sowed with any manner of Corn, beginning to reckon at the first Land which was next the Church; and shewed, That the Defendant by Covin had sowed every tenth Land very ill, and with a small quan-

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tity of Grain, and did not manure it as he did the other nine parts; ſo as where every other of the ſaid lands yeilded eight Cocks, the tenth never yeilded above three Cocks; and for abuſing of the Cuſtome, the Parſon prayed Tythes in kinde. It was the Opinion of the Court, That the Cuſtome was againſt reaſon, and ſo void; but if the Cuſtome were good, the Parſon might have his Action upon the Caſe. Paſch. 30 Eliz. in B. R. *Stebbs* and *Goodlacks* Caſe. *Leon.* 99.

3. The Parſon of B. Libelled in the Spiritual Court for the Tythe Milk of eight Kine, depaſturing within ſuch a field within his Pariſh. The Defendant ſaid, That he, and all thoſe he had uſed, time out of minde, to pay every year a certain ſum of money to the Parſon, for the Tythe of the ſame Field. Whereupon he had a Prohibition, and no Injunction to the Judges in the Spiritual Court. Afterwards the ſame Parſon libelled there again for the ſame Tythes, againſt the ſame Pariſhioner; and in both Libels there was no difference, but that in the latter it was for a leſs number of Kine: And thereupon an Attaint upon a Prohibition was Granted by the Court; for otherwiſe a Prohibition would be to no purpoſe. Paſch 30 Eliz. in C. B. *Staffords* Caſe. *Leon.* 111.

4. A Parſon libelled in the Spiritual Court for Tythes in kinde, in the year 1610. a *Modus Decimandi* was pleaded, and thereupon a Prohibition Granted: Afterwards he libelled there for Tythes in kinde, in the year 1611. It was the clear Opinion of the whole Court, That if he libelled the ſecond time for thoſe Tythes *in ſpecie*, for which before he was prohibited; or if he that ſueth again, &c. Attachment lyeth: But for other Tythes due for another year, he is not prohibited, but only to ſue again for the ſame thing; but if for any other Tythes, he is left at liberty to ſue for them: And ſo the Rule of the Court was, That if the Libel be for the ſame Tythes in the former Prohibition, That an Attachment be Granted for his Contempt. And in this Caſe *Cook* Chief Juſtice ſaid, That he had ſeen a Record in the time of King *Edward* 3. That if a Court do proceed contrary to a Prohibition, that not only an Attachment ſhall be Granted for the King, but a Special Action upon the Caſe will lye for the party; for *ubicunque eſt injuria, ibi damnum ſequitur* to the party; for which he ſhall have his Action upon the Caſe. Mich. 12 Jac. *Downes* and *Hakebies* Caſe. *Bulſtrode* 2. Part, 289.

5. The Parſon of *North Lyn* libelled in the Spiritual Court againſt P. for Tythes of certain Paſtures. The Defendant to have a Prohibition, ſurmiſed, that he is Inhabitant of *South Lyn*, and that time out of minde, every Inhabitant there, having Paſture in *North Lyn*, had paid Tythes *in* kinde for them to the Vicar of *South Lyn*, where he is non reſident; and that the Vicar, time out of minde, paid to the Parſon for the time being, 2 d. for every Acre. It was ſaid, That this Preſcription did ſtand with Reaſon; for ſuch benefit hath the benefit of *North Lyn*, if any Inhabitant hath any Paſtures in *South Lyn*. But the Court was againſt the Prohibition; for *Modus Decimandi* ſhall never come in debate upon this matter; but who ſhall have the Tythes, the Vicar, or the Parſon; Alſo the Court held the Preſcription not to be reaſonable. Trin. 30 Eliz. in B. R. *Gatſould* and *Penns* Caſe. *Leon.* 128.

6. B. libelled in the Spiritual Court againſt G. for Tythe-Hay; G. ſurmized that there was an agreement betwixt the ſaid parties, that for the yearly ſum of 7 s. to be paid by G. to B; B. promiſed that he ſhould have the Tythes of the Land during his life: And upon an Attachment upon a Prohibition brought by G. he Declared, That for the ſaid yearly ſum, B. leaſed to him the Tythes for his life: And upon the Declaration, B. demurred in Law, for the variance between the Surmiſe and the Declaration; for in the Surmiſe, a Promiſe is ſuppoſed; and in the Declaration a Leaſe: It was the Opinion of the whole Court, That the Surmiſe is as a Writ, for which, if variance be betwixt the ſame and the Declaration, all is naught. Trin. 30 Eliz in B. R. *Gomerſal* and *Bſhops* Caſe. *Leon.* 128.

7. C. libel'ed in the Spiritual Court againſt P. an Attorney of the Court, for a Seat in the Church of D. The Court was moved to Grant a Prohibition for this reaſon, That the Defendant is ſeiſed of a Houſe in the ſaid Pariſh, and that he, and all thoſe whoſe Eſtate he hath in the ſaid houſe, have had a Seat in the Iſle of the Church. And in this Caſe it was Reſolved by the Court, That if the Lord of a Mannor, or other perſon, who hath a Houſe and Land in the Pariſh time out of minde, had a Seat in an Iſle of the ſame Church, ſo as the Iſle is ſole and proper to his family, and they have maintain'd it at their own charges, That if the Biſhop would diſpoſſeſs him, he ſhall have a Prohibition; for it ſhall be intended, that the Parties Anceſtors, or thoſe whoſe Eſtate he hath, have erected and built the Iſle, with the aſſent of the Parſon, Patron, and Ordinary, to the intent to have it only to himſelf. But for a Seat in the body of the Church, if a Queſtion ariſeth concerning it, it is to be decided by the Ordinary; becauſe the Freehold is to the Parſon, and the place is dedicated and conſecrated to the Service of God, and is common to all the Inhabitants, See *Garvens* Caſe. *Cook* 12. Part. 105.

8. It was Reſolved in the Court of Star-chamber, That if a man have a Houſe in any Pariſh, and time out of minde, he and all thoſe whoſe Eſtate he hath, have uſed to have a certain Pew in the Church; That if the Ordinary will diſplace him, he ſhall have a Prohibition; for if he hath it by Preſcription, he hath as good right in the Seat, as he hath in his houſe; but then he muſt claim it as belonging to his Houſe, and not in other manner, for properly it belongs to the Inhabitants in the Manor houſe, if any Manor be, and not to the Manor which includes other Tenants, Farmers, and Inhabitants. Paſch. 10 Jac. in *Cam. Stellat.* The Lady *Huſſey* and *Leytons* Caſe. *Cook* 12. Part, 106.

9. E. libelled againſt A. in the Spiritual Court, pretending that a Seat which A. claimed, belonged to his Houſe? and Sentence was given in the Spiritual Court againſt E. and coſts, *pro falſo clamore*, he appealed to the Arches, and there when they were ready to affirm the Sentence, he prayed a Prohibition: It was prayed it might be Granted, and Mich. 33 Eliz. *Treſhams* Caſe was vouched, where in ſuch a Caſe a Prohibition was Granted after an Appeal. It was the Opinion of the Court, That if a Title be made there by Preſcription, it is meerly *coram non Judice*; and if they cannot meddle with the Principal, it is not reaſon that they ſhall tax Coſts; and a Prohibition was Granted. Paſch. 4 Car. in C. B. *Eaton* and *Ayliffs* Caſe. *Hetley* 94.

10. One libelled in the Spiritual Court againſt another man for the Tythe of two Pecks of Apples, and for feeding Cattel upon the ground. The Defendant for the Apples anſwered, That there were two pecks only growing in his Orchard, and that they were ſtollen, and never came to his hands. And for the Cattel That they were old milch beaſts, and were dry, and that for a moneth they paſtured with other Heifers, and that after he fed them with hay in his houſe. It was ſaid by *Yelverton* Juſtice, That if I ſuffer one to pull my Apples, the Parſon ſhall have Tythes, but if they be taken by perſons not known, the Parſon ſhall not have Tythes of them; for they are not Tythable before plucking: But if the party ſuffer them to hang ſo long by negligence after the time, ſo as they are imbezelled, the Parſon ſhall have Tythes for them: and for the other point, The Court was clear of Opinion, That the Parſon ſhould have Tythe of the Cattel, for ſo long time as they were in the Paſture with the Heifers. Trin. 4 Car. in C. B. *Annonymus* in the Caſe of a Prohibition. *Hetley*, 100

See more of this Diviſion, in the Titles of *Conſultation*, and *Prohibition*.

Licence.

Where the King may Licence a man to do divers Acts or Things which are contrary to Statutes, Where not: And what Acts the King's Tenants, or other Perſons, may do without Licence, what not: And where, and how long ſuch Acts ſhall binde, and be good, and where not.

1. THe King had Granted to one a Licence to carry Bell-metal out of the Realm, notwithſtanding any Statute made, or to be made; After the Licence Granted, it was Enacted by Parliament, That no perſon ſhould carry or convey Bell-metal beyond the Seas, upon a certain pain. It was the Queſtion, If by this Act the ſaid Licence was revoked: It was the Opinion of the Juſtices, That it was; becauſe the party is a party to the Act; as alſo, becauſe the King cannot diſpenſe with a penal Law to be after made, as he may do in ſome things of Inheritance; for if the King do grant to one to be diſcharged of all Taxes and Subſidies, Granted, or to be Granted; ſuch a Grant is void. Hill. 33. H. 8. *Dyer*, 52.

2. It was Enacted 4 H. 7. cap. 9. That no man ſhould Import Gaſcoign Wines into the Realm of *England*, but only in Engliſh Ships, and where the Maſter and Mariners were Engliſh, upon pain of forfeiture; Afterwards the King that now is, gave Licence to a man to Import 600 Tun of Gaſcoigne Wine in any Ship, notwithſtanding the Statute. Afterwards J. S. was ſued in the Exchequer by Information, for bringing in a quantity of Gaſcoigne Wines, contrary to the ſaid Act of Parliament. He pleaded the Licence of the King, as Aſſignee of the Patentee, but did not ſhew the Letters Patents; but he averred, That there was a Cuſtome amongſt Merchants, That every one having ſuch a Licence, might aſſigne part of it to others by word only. The Juſtices doubted of the matter in Law, Whether the Licence ſtood good or not: But they were clear of Opinion, That the Plea was not good, without ſhewing the Letters Patents. Mich. 34 H. 8. *Dyer* 54.

3. Queen *Mary* Granted to one a Licence to ſell Wines by Retail, with a *Non obſtante* the Statute

tute of 7 E. 6. but it was not mentioned in the Licence how long the Licence ſhould continue, only there was a Commandment in the Patent, that the Officers ſhould permit him for life. It was the Opinion of the Juſtices in this Caſe, That the Licence ſhould be only *Durante bene Placito* of the Queen; and that by the death of the ſaid Queen, the Licence was determined. Hill. 10 Eliz. *Dyer* 290.

4. *Cox*, The Chaplain of the Archbiſhop of *Canterbury*, having a Benefice of the gift of the Queen, he procured a Diſpenſation from the Archbiſhop, to have a Third Living, the which Diſpenſation the Queen confirmed in theſe words, *ſcil. Ita quod omnibus & ſingulis in eiſdem Litteris ſpecificat. frui & potiri valeat libere & quiete abſque impedimento aliquo Statuto, Actu vel reſtrictione in contrarium edit. & proviſ. aut aliquare, cauſa, vel materia quacunque Non obſtante*: And by force thereof he obtained three Benefices incompatible: and whether the firſt of the three was void by the Statute of 21 H. 8. was the Queſtion. Trin. 18 Eliz. *Dyer*. 341, 342.

5. King E. 6. Granted unto Merchant ſtrangers, to tranſport all Merchandizes paying *pro Cuſtumis tot & tantas denariorum ſummas quot & quantas* any Engliſh Merchant or Denizen paid *& non ultra*. It was the Opinion of the Juſtices, and ſo adjudged, That this Grant was good for the Cuſtome, though it was not Granted *pro ſe & hæredibus*, becauſe the King hath an Inheritance in the Cuſtomes as a Prerogative annexed to the Crown. But in that Caſe it was ſaid, That if the King Grant a Licenſe to one to carry out of the Realm 1000 Tun of Beer, *aliquo Statuto vel reſtrictione in contrarium non obſtante*, and doth not grant the ſame for him, his Heirs, and Succeſſors, that ſuch Grant is determined by the death of the King, becauſe it is but a Licenſe diſpenſative, and revocable before the Execution of it. Mich. 1. *Ma. Dyer*, 92.

6. In an Information for ſtopping of a Highway; It was ſet forth, That time out of mind, there was a common High way for Horſe, Foot, and Carriages in ſuch a Lane, leading to divers Market Towns, and that the Defendant with Hedges and Ditches ſtopped it, incloſed it, and ſo held it. The Defendants confeſs the old way, but ſay it was ſo foul and drowned with Water and dirt, that Paſſengers could not paſs it; and that for the profit and eaſe of the Paſſengers, J. S. ſeiſed of a Cloſe adjoyning, layed out another Way more commodious for the people: And before the laying out of it, a Writ of *Ad quod damnum* iſſued to enquire, Whether it would be to the damage of, &c. if the King ſhould grant ſuch a Licenſe to the Defendants, and that an Inquiſition was taken that it was not to the damage, &c. It was the Opinion of the Court in this Caſe, That the Plea was not good, both in matter and form, becauſe in the plea it did not appear by what Authority J. S. did it, for it is but at his pleaſure, and he may ſtop it when he will; and by that laying out, the Subjects have not any Intereſt therein: And the pleading of the *Ad quod damnum*, and the Inquiſition upon it is to no purpoſe, when he doth not plead, that he obtained the Kings Licenſe. Trin. 8 Car. in B. R. The King and *Wards* Caſe. *Cro.* 1. Part, 193.

7. Every Grand Serjeanty is a Tenure in *Capite*, 30 H. 8. *Dyer*, 44. And in 14 E. 3. *Quare Imp.* 54. It is ſaid by *Wilby*, That if Tenant by Grand Serjeanty alieneth his Lands without Licenſe, the ſame is a forfeiture, becauſe the ſervice of the body cannot be transferred over to another. But notwithſtanding the Opinion of *Wilby*, It was holden by all the Juſtices, Mich. 39 Eliz. That at this day Grand Serjeanty ſhall not be forfeited by Alienation without Licenſe, and that by the Statute of 1 E. 3. cap. 12. See *Cook* 2. Part, in the Lord *Cromwells* Caſe, 81, 82.

8. It was found by Office, That T. by Licenſe of the King, did marry the Kings Neif, and that certain Lands diſcended to the ſaid Neif, which her Husband aliened without the Kings Licenſe to another; and for this cauſe, the Land was ſeiſed into the Kings hands. The Alience thereupon came into the Chancery, and ſhewed all this matter, *viz.* 1. That the Neif was married with the Kings Licenſe. 2. That the Diſcent to the Neif appeared by Office: Whereupon it was awarded, That the Husband might hold the Land by the Curteſy, and by ſuch Alienation put the Wife to her Action, and thereupon the Alienee had reſtitution; out of which Caſe, the Lord *Coke* obſerved, That the Wife being married with the Kings Licenſe, it is an Enfranchiſement to her during the Coverture; for if ſhe ſhould remain Neif, then the Husband ſhould not be Tenant by the Curteſy 33 E. 3. Tit. *Traverſe*, 36. *Cook* 4. Part, 59. acc.

9. Note, by *Cook*, in *Cook* 7. Part, 22. in *Calvins* Caſe, That an abſolute Monarch, or Prince, cannot come into *England* without Licenſe of the King; but a Subject being in League, may come into this Realm without Licenſe of the King. And ſee there, *Artold* King of *Man* ſued to King *Hen.* 3. to come into *England* to confer with him: And thereupon the King 34 of his Reign, at *Weſtminſter* by his Letters Pattents gave Licenſe to *Artold* King, as followeth; *Sciatis quod Licentiam dedimus, &c.* Artoldo *Regi de* Manna *veniendi ad nos in*

Angliam, ad loquendum nobiſcum et ad faciendum nobis quod facere debet. *Cook* 7. Part, *Calvins* Caſe, 21.

10. No Subject can make a Park, Chace, or Warren, within his own Lands without the Kings Licenſe: and if he do it of his own head; In a *Quo Warranto*, they ſhall be ſeiſed into the Kings hands. *Coke* 11. Part, 86. in the Caſe of Monopolies.

See more of this Diviſion, in *Lib.* 1. Title *Alienation without Licenſe*; and before, in Title *Grants by the King.*

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2. *Where a Licenſe to do a thing by word, ſhall be good, and ſhall be pleaded without ſhewing a Deed; where not: What ſhall be a good Licenſe; what not: Where countermandable; where not: and by what acts it ſhall be countermanded: and the difference betwixt Licenſes in fact, and Licenſes in Law.*

1. IN Treſpaſs by an Aſſignee of a Leaſe for years; The Defendant pleaded, That the Leaſe was made upon Condition, that the Leſſee ſhould not aſſign it over without the Licenſe by Deed of the Leſſor, and that the Leſſee aſſigned it over; The Plaintiff pleaded a Licenſe by Deed by the Leſſor, without ſaying (*in Curia probat.*) It was Reſolved, That the Plaintiff needed not to ſhew it, becauſe the Plaintiff doth not claim by the ſaid Deed of Licenſe any Intereſt in the Land, but the Licenſe is only collateral to it, and pleaded only to excuſe the forfeiture of the Leaſe; and it is not like to a Releaſe or confirmation, for they transfer a Right. 2. Reſolved, When a Deed is requiſite, *ex inſtitutione Legis*; there it ought to be ſhewed to the Court, although it concerns a collateral thing, and conveyes nothing but when it is requiſite *ex proviſione hominis*, there the proviſion of man ſhall not change the Judgment of the Law. 3. Reſolved, That in the principal Caſe, the Licenſe was executed, and had not continuance. *Cook* 6. Part, 38. *Bellamyes* Caſe. See *Cro.* 2. Part, 103. the ſame Caſe.

2. Note, It was Reſolved by the Juſtices, That if the King granteth the Office of Serjeant at Arms (to attend upon the Lord Keepe) for life, That the King may Licenſe him by word, that he may abſent himſelf from the Execution of that Office for a time, becauſe he is immediate Officer to the King, and is but attendant upon the Lord Keeper, and the King thereby doth not depart with any Intereſt, but doth ſuſpend the Service of the Serjeant at Arms for a time; and therefore the Licenſe by word is good enough. But it was agreed, That Non-attendance upon ſuch an Office, is a forfeiture of it, but then it ought to be voluntary negligence, and not when it is done by diſpenſation or aſſent of the King by his Licenſe. Paſc. 21 Eliz. *Stewards* Caſe. *Cook* 7. Part, 39, 100. in Sir *George Reynells* Caſe.

3. In Treſpaſs for entring his Cloſe, the Defendant pleaded, That J. S. was ſeiſed of the Land wherein, &c. and demiſed the ſame for years to the Plaintiff, reſerving Rent, in which Deed was a clauſe of re-entry for non-payment of the Rent and afterwards made his Will in writing, and by his ſaid Will gave the Land *in qua, &c.* to the Defendant, and after the Rent was behind, and that he for non-payment of the Rent, according to the Covenant in the Deed, entred; upon which Plea the Plaintiff demurred. In this Caſe it was adjudged againſt the Defendant, That the Plea was not good, becauſe he doth not ſhew in it, that he did enter into the Land by the leave and Licenſe of the Executor, which he ought to have done; for although the Land was deviſed to him by Will, yet he cannot enter into it without the leave of the Executor. Trin. 23 Car. in B. R. *Matthew* and *Herles* Caſe. *Styles* 65.

4. In Treſpaſs, *Quare clauſum fregit*, the Defendant made a ſpecial Juſtification, That he did enter into the Plaintiffs Cloſe to ſearch for ſheep which were ſtollen from him. The Plaintiff demurred upon the Plea, for that the Juſtification was not good, for it is not ſaid, That the Plaintiff had ſtolen his ſheep, or that he had ſuſpition that he had ſtole them; and ſo the entry to ſearch without Licenſe of the Plaintiff was not juſtifiable. And in that Caſe, it was ſaid, That if Cattel be ſtolen and put into my ground, I may take them damage feaſant, or bring an Action of Treſpaſs againſt the Owner, and the Owner cannot take them away without the Licenſe of the Poſſeſſor of the ground, for if he might, by that means the poſſeſſor of the ground would be without means for the damages the Cattel hath done. It was adjudged for the Plaintiff. Mich. 24 Car. in B. R. *Teplady* and *Stayles* Caſe. *Styles* 165.

5. In an *Ejectione firme* brought by the Leſſee of a Copyholder. It was ſaid by the Court, That if the Plaintiff declare generally, without mention of a Licenſe; If the Defendant pleadeth Not guilty, It is ſufficient if the Plaintiff ſheweth the Licenſe in Evidence. But if the Defendant doth plead

plead ſpecially, then the Plaintiff ought to plead the Licenſe certain in his Replication. In the Principal Caſe, the Plaintiff replyed, That a Copyholder by Licenſe then firſt had of his Lord, did demiſe, but did not ſhew what eſtate the Lord had, nor the place nor time when it was made, and therefore it was agreed, That it was not good. For if a Copyholder without Licenſe of the Lord, maketh a Leaſe for years, the Leſſee who enters by force of it, is a Diſſeiſor, and a Diſſeiſor cannot maintain *Ejectione firmæ*. And the Lord of a Copyholder cannot give a Licenſe to make a leaſe for a longer time then he himſelf hath in the Seignory. Hill. 8 Jac. in C. B. *Petty* and *Evans* Caſe. *Brownlow*, 2. Part, 40.

6. In Treſpaſs, the Caſe was, A. Licenſed B. to lay his Hay upon the land of A. untill he could conveniently ſell it. B. made a leaſe of the land to P. who put in his Cattel, and they eat up the Hay, and it was two years betwixt the Licenſe, and the putting in of the Cattel, and yet B. brought an Action of Treſpaſs againſt P. But in this Caſe, it was Reſolved, That B. had a convenient time, *ſcil.* two years for the removing of his Hay, and therefore Judgment was given againſt him; but admit there had not bin a convethient time, yet the Court was clear of Opinion, That B. ought to have encloſed the land at his peril, for the Preſervation of his Hay. And in that Caſe it was agreed, That a Licenſe is countermandable, although it be concerning profit or pleaſure, unleſs there be a certain time in the Licenſe. Hill. 17 Jac. in B. R. *Web* and *Paternoſters* Caſe. *Poph.* 151.

7. The Queen gave Licenſe to *Bartue* to go beyond Sea to recover Debts; Provided, That he reſort not to the Fugitives; if he do, the Licenſe to ceaſe. One was ſent with a Privy Seal to command him to return, who returned, and certified a reſort, which being certified into the Exchequer, they there made out a Commiſſion to ſeize all his Lands and goods; and afterwards *Bartue* returned. It was holden in this Caſe, amongſt other things, That the Queen might not revoke the Licenſe, becauſe it was for a certain time, and that the reſort to the Fugitives did not make the Licenſe void from the beginning, but from that time only. 2 Eliz. *Dyer*, 176, 177. *Bartues* Caſe.

8. A Licenſe to come to my houſe to ſpeak with me, 9 E. 44. Goods bailed over to deliver to J. S. or elſe to beſtow them in Alms. A Letter of Attorney to deliver Seiſin. All theſe may be countermanded before they be done. But if I preſent J. S. to a Church, I cannot afterwards vary in my Preſentment, and preſent another; becauſe by the Preſentment to the Ordinary, I have put the Intereſt out of my ſelf, to the Ordinary. So if I deliver a Bond into a ſtrangers hand, as an Eſcrow, to be delivered to the Obligee upon a Condition to be performed, this cannot be countermanded afterwards by me, for that upon the delivery, there paſſeth a kind of Intereſt to the Obligee. See *Finch* 32.

9. A Leaſe was made to A. B. and C. upon Condition, That they, nor any of them ſhould allien without Licenſe; and the Leſſor afterwards gave Licenſe, That A. B. or C. might allien. It was the Opinion of the Court, That the ſame was a good Licenſe, and diſpenſation of the Condition, notwithſtanding the incertainty of it, and that thereby they had ſeveral Authorities to Allien. As a Letter of Attorney to A. or B. to make Livery. But it was holden by them, That a gift to A. or B. was void for the incertainty of it. Mich. 29 Eliz. in C. B. *Lords* and *Comptons* Caſe. *Godbolt*, 93.

10. Six Carpenters came to a Tavern, and called for a Quart of Wine, and drank it, and upon requeſt, refuſed to pay for it. In this Caſe, it was Reſolved, That when Entry, Authority, or Licenſe is given to any one by the Law, and he doth abuſe it, he ſhall be a Treſpaſſor *ab initio*. But where an Entry, Authority, or Licenſe is given by the party, and he abuſeth it, there he ſhall be puniſhed for his abuſe, but he ſhall not be a Treſpaſſor *ab initio*; the reaſon is, In Caſe of a general Authority or Licenſe in Law, the Law will adjudg by the ſubſequent Act, *quo animo* he doth enter. But when the party giveth Authority or Licenſe to do a thing, he cannot by any ſubſequent cauſe puniſh that which is done by his own Licenſe or Authority: and in the principal Caſe, the Law giveth Authority or Licenſe to enter into a common Tavern; and therefore he ſhall not be a Treſpaſſor *ab initio* for his firſt Entry. *Cook* 8. Part, 146. The ſix Carpenters Caſe.

Lieu, *ſcil.* Place, *or* County.

1, *In what Place, or County Writs ſhall be brought. Where one Writ for things in ſeveral Counties. Where in Pleading, the Place muſt be ſhewed: And where the Place ſhall be alledged after Iſſue joyned, to have and try all by* Viſne; *Where not.*

2. A Man brought an Action upon the Caſe in the County of N. and declared, That A. recovered againſt him 20 l. in the Court of Common-Pleas: And after Judgment, and before Execution, A. dyed, and that the Defendant knowing it, and malitiouſly intending to Outlaw the Plaintiff, brought in the name of A. in the County of *Middleſex*, a *Capias utlagatum*, directed to the Sheriff of *London*, and there ſued an *Exigent*, and took forth a *Capias utlagatum* to the Sheriff of N. by which he was taken and Impriſoned in the County of N. and the Plaintiff layed his Action againſt the Defendant in the County of N. upon which the Defendant did demur in Law, becauſe the Action ought to have bin brought in the County where the wrong did begin, and that was in *Middleſex*, for there the *Capias Exigent*, and *Capias utlagatum* were firſt ſued. But it was Reſolved, That the Action was well brought in the County of N. for the viſible wrong was in the County of N. for there the Plaintiff was Impriſoned; and when matter in fact is mixt with matter of Record, and the matter in one County doth depend upon the matter in another County, there the Plaintiff may chuſe in what County he will bring his Action. *Cook* 7. Part, 1. *Bulwerts* Caſe. And in that Caſe, theſe two Rules for bringing of Actions were put and agreed. 1. That in all Caſes, when an Action is founded upon two things, and both are material and traverſable, and the one without the other will not maintain the Action, there the Plaintiff may chooſe to bring his Action in what County he pleaſeth; As if a man be Arreſted in one County, and eſcapeth into another. 2. In all Actions Realls, If any Iſſue riſe upon the Land, or in any Action wherein the poſſeſſion of the Land, or a thing local is to be recovered: All theſe muſt be brought in the County where the Land lyeth: As a Writ of Ward of Land, Writ of Intruſion, Forfeiture of Marriage. But a Raviſhment of Ward ſhall be brought where the Raviſhment was. So a *Quare Impedit*, or *Quare Incumbravit* ſhall be brought where the Church is, *ibid.*

2. If a man hath a Rent iſſuing out of Land in two Counties, and he is diſſeiſed of it, he cannot have an Aſſiſe in one County, becauſe the whole muſt be put in view. But if a man makes a Leaſe for the life of another of Lands in two Counties, rendring Rent, and the Rent is behind, and the *Ceſtuy que vie* dyeth, the Leſſor in that Caſe ſhall have Debt in what County he pleaſeth, becauſe it is now changed into Debt, and there the perſon ſhall be charged: And if a Rent be granted to one out of the Lands of B. in two Counties, rendring Rent, and the Rent is behind, and the Grantee dyeth, his Executors upon the Statute of 32 H. 8. may have debt in the one County, or in the other, See 18 E. 3. 2. Aſſ. 380. 10. Aſſ. 4. 22 H. 6. 9, and 30. by *Newton* and *Paſton*.

3. Error of a Judgment in the Court of *Sudbury* in debt upon a Leaſe for years by an Aſſignee of the Reverſion. The firſt Error aſſigned was, That the Court is holden by Letters Patents, and proceſs is awarded *ſecundum conſuetudinem Curiæ*, which cannot be where the Court is erected within time of memory. 2. The Action is brought, ſuppoſing a Demiſe of Lands in D. whereas it ought to have bin brought in D. being brought upon privity of the Eſtate. 3. Becauſe he claims by grant of a Reverſion, and doth not ſhew a Deed; and without a Deed, or Fine, a Reverſion cannot paſs. For theſe Errors, the Judgment was reverſed. Trin. 4 Car. in B. R. *Long* and *Neiberets* Caſe. *Cro.* 1. Part, 101.

4. Error of a Judgment in C. B. in Debt, the Error aſſigned was, becauſe the Debt was brought in *London* by an Aſſignee of J. S. of a Reverſion of Lands in the County of S. upon a Leaſe made thereof in *London* for two years Rent behind after the Aſſignment of the Reverſion and Attornment thereunto, whereas the Action ought to be brought in the County of S. where the Land lyeth: It was the Opinion of the Court in this Caſe, That forasmuch as the privity of contract is gone by the Aſſignment of the Reverſion, and the Attornment, and the Rent followeth the Land, the Plaintiff being only entituled thereunto by reaſon of having the Land, therefore the Action ought to be brought in

in the County where the Land lyeth; the Judgment was reverſed: Paſc: 6 Car. in B. R. Sir *Stephen Bard* and *Cudmores* Caſe. *Cro.* 1. Part, 132.

5. In Trover of goods, the Defendant pleaded a Bargain and Sale in Market overt: Upon which Iſſue was joyned, and found for the Plaintiff. It was moved in Arreſt of Judgment, becauſe the Plaintiff had ſhewed no place of Converſion. Yet it was the Opinion of the Court, That the Plaintiff ſhould have Judgment. And it was ſaid, If in debt upon an Obligation, the Plaintiff doth not ſhew the place, yet if the Defendant pleadeth a collateral bar as a Releaſe, or ſuch like, Judgment ſhall be given for the Plaintiff, if it be found for him by Verdict. Trin. 29 Eliz. in C. B. *Goldesbr.* 54. See 36 Eliz. in C. B. rott. 266. acc.

6. In Error brought of a Judgment given in B. R. This Queſtion was moved to the Juſtices by *Coke*. If a man loſeth his goods, which come to the hands of another, and after, the Owner dyeth, Whether his Executors ſhall have an Action of the Caſe for this Trover, and whether he ought to ſhew the place and day of Converſion or not. The Court was of Opinion, That he ought to do it: And ſo it was ſaid it was adjudged, Where an Alderman of *London* brought an Action upon the Caſe of Trover and Converſion againſt *Stranſham* of an Obligation, and it was found that he had broken the Seals, and becauſe he did not ſhew the time and place of the Converſion, the Plaintiff could never get Judgment. Paſc. 31 Eliz. in C. B, *Goldesbr.* 89, 90.

7. *Ejectione firmæ* of a houſe in *Winton*, the Ejectment was layed to be of a houſe in *auſtrali parte vici anglice* the High-ſtreet. It was holden, it was well layed, not if it had bin *ex auſtrali parte vici*. It was moved, That the *Venire facias* was 12 *liberos et legales homines de Winton*, and doth not ſay of any Pariſh in *Winton*. But that was holden good, and it was ſaid, That it was not like *Arundells* Caſe, for there the Offence was layed to be done in *Parochia Sanctæ Margaret. de Weſtminſt.* therefore the Viſne ought to be of the Pariſh, but in this Caſe being layed generally in *Winton*, it is ſufficient that the Viſne come out of *Winton*. Judgment was for the Plaintiff. Trin. 20 Jac. in B. R. *Hewet* and *Byes* Caſe. *Godbolt*, 335.

8. In an Indictment of Murder, the Murder was alledged to be done *apud Civitatem de Weſtminſt. in Com. Midd. in Parochia Sanctæ Margaret.* And for the Tryal, a Jury was returned *de vicineto Civitatis Weſtminſt.* It was Reſolved, That the Tryal was inſufficient, for the Viſne ought to be from the Pariſh, and not of the City, for a Pariſh is to be intended more certain then a City; and when a Pariſh is alledged to be in a City, the Viſne ſhall come out of the Pariſh; and alwayes the Tryal ſhall be from ſuch a place which by preſumption may have the beſt knowledg of the matter of fact. *Cook* 6. Part, 41. *Arundells* Caſe.

9. Action upon the Caſe was brought for calling the Plaintiff perjured Knave; the Defendant juſtified, becauſe the Plaintiff had ſworn in the Exchequer, That the Defendant had refuſed to pay the Subſidy, whereas in truth he had not ſo done. The Plaintiff replyed, *de injuria ſua propria abſque tali Cauſa*. The Action was brought in *London*, and there tryed for the Plaintiff. It was moved in ſtay of Judgment, becauſe the Tryal was in *London*; whereas the perjury was ſuppoſed to be in the Exchequer. The Court ſaid, the matter is tryable in both Counties. It was then ſaid, That *London* cannot joyn with other Counties. Then the Court ſaid, the Iſſue was ill joyned, for when an Iſſue is tryable by two Counties, if they cannot joyn, you ought then to make ſuch an Iſſue as may be tryable by one County only. And all the Court was of Opinion, That this Iſſue ought to have bin tryed in *Middleſex*, for there the perjury is ſuppoſed to be committed. Mich. 28 and 29 Eliz. in C. B. *Goldesbr.* 28. See Mich. 29 Eliz. in C. B. *Bate* and *Mountſtowes* Caſe, the ſame Caſe.

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2. *Where a Condition to be performed in one place, may be performed at another: Where no place is alledged; where it is to be performed: And how performed at the day and place by tender; Where not.*

1. THE Queen made a Leaſe for yeers rendring Rent, payable at the Receipt of her Exchequer at *Weſtminſter, ſeu ad manus Baliorum ſeu Recepturum*, with Condition to be void for non-payment of the Rent; and afterwards granted over the Reverſion. In this Caſe it was Reſolved, 1. That if a common perſon reſerve a Rent upon a Leaſe payable at a place off the Land, he who will take advantage of the Condition for not payment of the Rent, ought to demand the Rent at the place where it is limitted to be paid. 2. Reſolved, If the King makes a Leaſe for years reſerving rent, with ſuch Condition, the King may take advantage of the Condition without any demand, but that is only

only by a perſonal Prerogative annexed to the perſon of the King. And 3. Reſolved, If the King make ſuch Leaſe rendring rent, and no place is limitted for the payment of it, the Leſſee ought to pay it in the Exchequer, or unto the hands of the Bayliff or Receiver of the King. *Cook* 4. Part, 73. *Boroughs* Caſe.

2. A Copyholder in Fee ſurrendred to the uſe of J. S. and his Heirs upon Condition, That if he paid to the Mortgagee 250 l. of lawful money of *England*, at the Manſion houſe of the Mortgagee. That the ſurrender ſhould be void: at the day and place he tendred the money for the Mortgage in bags which he refuſed. In that Caſe, it was Reſolved, That if tender be made to him who ought to receive it at the place at any time of the day in which it ought to be paid, and the other refuſeth it, the penalty is ſaved, and the Mortgager need not make a new tender before the laſt inſtant of the day. 2. Reſolved, That the tender in bags was ſufficient if there be the whole ſum. And in that Caſe, A Caſe was put, where it was Reſolved, That if the Leſſor demands his Rent of his Leſſee, and the Leſſee payeth the Rent to the Leſſor, and he accepts of it, and puts it into his purſe, and after he finds that he hath received counterfeit money, and refuſeth to carry it away, That in ſuch Caſe he ſhall not enter for the Condition broken, for when he hath once accepted of the money, it was at his perill, and after ſuch allowance, he ſhall not except againſt it, and ſo enter for the Condition broken. *Cook* 5. Part, 114. *Wades* Caſe.

More Lieu *or Place.*

1. NOte. It was Reſolved by the Court, That if a man dwelleth in the Pariſh of S, and hath divers Lands in his own poſſeſſion in the Pariſh of D; that by the Law he is a Pariſhioner of D; for the place where he lyeth, doth not make him a Pariſhioner: but whereſoever he occupieth and manureth Land, he is a Pariſhioner, and he ſhall be ſubject to all Taxes and Aſſeſſments within the ſaid Town: But if he hath a Fermor there in D, and he himſelf receiveth the Rent, this receipt of Rent will not make him chargeable, becauſe there is an Inhabitant who may be charged. Mich. 32 Eliz. in B. R. *Cook* 5. Part, 66. *Jeffery's* Caſe.

2. In Debt againſt an Executor, the Jury found, That the Teſtator dyed in *Ireland*, and that the Defendant took divers goods of the Teſtator in *Ireland*, and adminiſtred them to the value of the Debt; and that he did not adminiſter any Goods of the Inteſtate *infra Regnum Angliæ*. It was Objected in this caſe, That the Jury cannot find tranſitory things in another County, or other Realm, becauſe by Preſumption of Law, they cannot have knowledg of the thing; and a thing meerly done beyond Sea, ſhall not be tryed here. But it was Reſolved, That the Jury might find Aſſets in another County, for they are tranſitory things. In Debt againſt the heir, he pleads Nothing by Diſcent; the Plaintiff for Conformity and neceſſity of tryal, ought to alledg Aſſets in a certain place; and yet the Jurours may find Aſſets in another County well enough. But it was Reſolved, That when the place is material, and made parcel of the Iſſue, there the Jury cannot find the Point in Iſſue in another place; for by ſpeciall pleading, the Point in Iſſue is reſtrained to a certain place. 2. It was Reſolved, That upon every general Iſſue, the Jury may find things Local in any other County, which are material in Law for the matter in Queſtion, as Warranty and Aſſets in another County: and ſo when Land is exchanged for Lands in another County. 3. Reſolved, That in the principal caſe, the Jury have found the ſubſtance of the Iſſue; *ſtil.* Aſſets: and the finding that they were beyond the Sea, was ſuperfluous. *Cook* 6. Part, 46, 47. *Dowdales* Caſe. See Paſch. 15 Jac. in B.R. The Earl of *Oxford* and *Waterhouſe's* Caſe, adjudged accordingly.

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3. The ſole Queſtion of the Caſe at Barr was, If a *Quare Impedit* did lye againſt the Ordinary and the Incumbent only, without naming the Patron? And it was adjudged, That it did not lye; 1. Becauſe the Patronage ſhould be recovered againſt him who had nothing in the Patronage. 2. Becauſe at the Common Law, the Incumbent could not plead any plea which concerned the Patronage, and therefore it ſhould be againſt all right, that he only ſhould be named in the Writ, who could not defend the Patronage. But now by the Statute of 25 E. 3. the Incumbent may plead all common Pleas, which go not to the right of the Patronage. And in this Caſe, this difference was agreed, That when the Inheritance or Intereſt of the Patron in the Patronage is not to be deveſted by the Judgment in the *Quare Impedit*, but the Preſentment only to be recovered, there the lawful Patron needs not to be named in the Writ. But if a *Quare Impedit* be brought againſt the Patron and the Incumbent, and depending the Writ, the Patron dyeth, the Writ ſhall abate: But where the King Preſents, and his Clerk is Inſtituted and Inducted, a *Quare Impedit* may be brought againſt the Biſhop and the Incumbent only for neceſſity, becauſe it will not lye againſt the King. *Cook* 7. Part, 46, 47. *Hall*'s Caſe.

4. An Action was brought upon the Statute of 1 & 2 *Ph.* & *Mar.* The Statute is, That no diſtreſſe ſhall be driven out of the Rape, Hundred, Wapentake, or Laith, where ſuch diſtreſſes ſhall be taken, except it be to the Pound which is within the ſaid County, not exceeding 3. miles diſtant from the place where the Diſtreſſe was taken. And the Plaintiff declared of a Diſtreſſe taken in a Hundred in ſuch a County, and that he drove it 6. miles out of the County: And becauſe a Hundred may be in divers Counties, and the Statute is, That the driving ought not to be more then 3. miles out of the Hundred, and that it might be, that the driving was 6. miles from the place where the Diſtreſſe was taken in another County, and yet not 3. miles from the Hundred where the taking was; For that cauſe it was not adjudged againſt the party. Mich. 24 Eliz. in C. B. *Godbolt*, 11.

5. One had certain Mineral Lands Leaſed to him for years, with liberty to digg and make his profit of the Mine. The Leſſee afterwards digged for Mine, and ſold the gravel which came of the place. It was the Opinion of the whole Court in this caſe, That the ſale was no Waſte; for no Sale is Waſte, if the firſt act be not waſte. As the ſale of Trees by Tenant for life or years, is not Waſte, if the cutting and felling down of them was not Waſte before; for the vendition is but a ſecondary act, and ſubſequent to the act precedent; which act if it were lawful, the ſale alſo is lawful; for the Sale alone is no Waſte. But it was ſaid, That if the Leſſee ſell or cut down Timber-Trees, and ſell them, it is waſte *non quia vendidit, ſed quia ſcindebat.* But in the principal caſe, becauſe he ought to digg the Land, and that was lawful for him to do, the ſubſequent cannot be unlawful: and ſo it was adjudged, That the Action of Waſte brought would not lye. Mich. 27 Eliz. in C. B. *Godbolt*, 28.

6. In Debt upon an Obligation; the Condition was, That if the Plaintiff did bring ſuch a Ship to ſuch a place in *Greece*, and at the ſame place ſhould ſtay for the ſpace of 40 dayes, or ſo long of the 40 dayes as ſhould pleaſe the Defendant, ſo as he might freight the Ship, the Defendant ſhould freight the Ship within 40 dayes, and ſhould bring it to ſuch a Port in England. And becauſe he had not freighted the Ship, and the Ship was there by the ſpace of 40 dayes, the Plaintiff brought the Action upon the Bond. The Defendant pleaded, That within thoſe 40 dayes, *viz.* by the ſpace of 24 dayes, the Ship was Laden with Hoops, ſo as the Defendant could not freight it; upon which Plea, the Plaintiff did Demur in Law: For the Plaintiff it was ſaid, That the Defendant had not anſwered to all the time, and that he had ſufficient time, although the Ship was laden with Hoops for 24 dayes. For the Defendant it was ſaid, That the Ship was to remain there to be freighted, for ſo many dayes as it ſhould pleaſe the Defendant; and therefore the firſt act was to ariſe on the Plaintiff's ſide, and that ought to have been ſhewed to have been done. Alſo it is not ſhewed, That the Ship was ready there by the ſpace of 40. dayes. And it is a Rule in Conditions, That if the Plaintiff himſelf be cauſe of diſablement ſo as the Condition cannot be performed, that he ſhall not take advantage of the Condition. The Court inclined to be of Opinion, That becauſe it is not averred, that the Ship was there at the place by the ſpace of 40 dayes, that the Condition was not broken: but no Judgment was given in the Caſe Mich. 29 Eliz. in B. R. *Taylor* and *Ribera*'s Caſe *Godbolt*, 74, 75.

7. In a *Replevin*, the Plaintiff declared, That the Defendant *cepit averia* of the Plaintiff *apud Oteuld*, and did not ſay, *in Quodam loco*: Upon which the Plaintiff did Demur in Law. The Queſtion was, Whether the expreſſing of the place where the taking and diſtraining of the Cattle was, was material in the Plaintiff's Declaration, or not? It was Objected for the Defendant, That the Auncient form of the Regiſter ought to be obſerved; and in the Regiſter, the place in which the taking

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7. In a *Replevin*, the Plaintiff declared, That the Defendant *cepit averia* of the Plaintiff *apud Ocould*, and did not ſay, *in Quodam loco*: Upon which the Plaintiff did Demur in Law. The Queſtion was, Whether the expreſſing of the place where the taking and diſtraining of the Cattle was, was material in the Plaintiff's Declaration, or not? It was Objected for the Defendant, That the Auncient form of the Regiſter ought to be obſerved; and in the Regiſter, the place in which the taking

is, is ſet forth. And 35 H. 6. 40. Exception was taken to the Declaration, becauſe the Plaintiff in the *Replevin* did not alledg the place where the taking was. In this Caſe, it was ſaid by *Coke*, Chief Juſtice, to which the other Juſtices inclined, That the effect of the ſuit in this Caſe, is not the ſhewing of the place, but the taking of the Cattel: and it is on the part of the Defendant, to ſhew where he took the Cattel; for perhaps the Plaintiff doth not know where he took them; and if he did know the place where they were taken, yet perhaps he hath no Witneſſe to prove the ſame, and ſo by this means the Plaintiff ſhould be at a miſchief, and delayed in his Suit: whereas a *Replevin* is *feſtinum remedium*, to have his Cattle again, which perhaps are the Cattle of his Plough. And in this caſe, upon the matter, the Avowant is the Actor, and he beſt knowes the place where he took the Cattel: And it is no reaſon that the Plaintiff miſſing of the place, not being matter of ſubſtance, ſhould be tricted for that. In this Caſe, divers Books were vouched, where the taking was alledged to be in a Town, without ſaying, *in Quo dam loco, &c.* and was good. 4 E. 3. 13. 44 E. 3. 14. 21 H. 7. 22. In a *homine Replegiando*. The Caſe was not adjudged, but Adjourned. Trin. 10 Jac. in C. B. *Read* and *Hawes* Caſe. *Godbolt*, 187, 188.

8. In an *Ejectione Firmæ*, the Caſe was, J. S. Tenant in tail of a Meſſuage and Lands called *Eſtons*, lying in B, levied a Fine thereof by the name of a Meſſuage, 200 Acres of Land, 50 Acres, &c. in *Eſſington*, *Eſton*, and *Chilford*, to the uſe of himſelf and his heirs: and the Jury found, That there was not any Vill, Hamlet, or place known by the name of the Meſſuage or Tenement called *Eſtons*, out of the Vills or Hamlets, and that none of the ſaid Tenements either be or were in *Eſſington*, or in *Chilford*: And whether a Fine levied of Lands in places known in a Vill, not mentioning of the Vill or Hamlet where the Land is, be good, was the Queſtion? It was Objected, That the Fine was not good; That a Fine cannot be of Lands in a Vill or Hamlet, by the name of a place known; for the Vill being the principal, ought to be named, and the place known, may be known by one name one day, and at another day by another name: and a Fine ought to be levied by a name certain. On the other ſide it was ſaid, That the Fine was good: For a Fine is but an Aſſurance by agreement of the parties, which may be by ſuch names as the parties agree; and the Fine is drawn according to the Writ of Covenant; and the Writ of Covenant is guided by the Indentures of agreement of the parties, and it ought not to vary from it. The Caſe was argued by all the Juſtices ſeverally, and they were all of Opinion, That the Fine being levied and recorded, was good enough: For a Fine being but an Aſſurance, is favourably to be taken. As a Recovery of an Advowſon or Penſion, although it be not proper, yet being ſuffered, hath been adjudged good, becauſe it is but a Common Aſſurance. Hill. 6 Car. in B. R. *Fawly* and *Eaſtons* Caſe, Cro. 1. Part, 196. and 201.

Limitation.

Where one ſhall take Lands by way of Limitation; Where not. What words make a Limitation: What ſhall be ſaid a Limitation of an Eſtate; and what a Condition: And the difference between Limitation and Condition.

1. A. Being *Ceſtuy que uſe* of certain Lands before the Statute of 27 H. 8. Deviſed the ſame to his Wife for her life; and that after her deceaſe, B. his eldeſt ſon ſhall have the Land 10 l. under the price it coſt: and if he dyed without Iſſue, that then C. his ſecond Son ſhould have the Land 10 l. under the price it coſt: and if he dye without Iſſue of his body, then his two Daughters E. and F. ſhall have the Land, paying the value thereof to the Executors of his Wife, and by the ſame Will he deſired his Feoffees at the requeſt of his Wife to make Eſtates accordingly: The chief Queſtion was in this Caſe, If B. the Deviſee hath an Eſtate tail, or not. And whether the payment is to be precedent the Eſtate, or ſubſequent? It was ſaid, That he ought to have the Lands before the payment; for the words imply ſo much, and that he ſhall have the Land by courſe of Limitation, and that if he do not pay the money, that C. ſhall have the Land, as here by Limitation. And it was ſaid, That B. ſhould have an Eſtate tail in the Land. And ſo it was ſaid, it was adjudged, 32 Eliz. in *Wallock* and *Hammonds* Caſe. Hill. 43 Eliz. in C. B. *Ballys* and *Bulleyns* Caſe. *Goldsbr.* 134.

2. A man deviſed his Land to his younger ſon, when he ſhould accompliſh the age of 24. years, upon Condition, That he ſhould pay 20 l. to the Daughter of the Deviſor; and if he dye before

before the age of 24. years, then his Eldeſt Son ſhall have the Land, upon Condition, that he pay the ſaid 20 l; and if both the ſons failed, that then the Land ſhould remain to his Daughter, and dyed; the younger ſon after 21 years entred, and did not pay the 20 l. to the Daughters; the elder Brother entred upon him: It was by the whole Court Reſolved in this Caſe, That the ſame was a Limitation, and not a Condition; and therefore the Entry of the Elder Brother was not lawfull. Hill. 43 Eliz. in B. R. *Wiſeman* and *Baldwin's* Caſe. *Goldesbr.* 152.

3. The Caſe was; A. gave Lands to B. and his Wife; *Habendum* to the Husband and Wife, to the uſe of them, and the heirs of their bodies: and for want of ſuch Iſſue, to the uſe of C. and his heirs. Whether the Husband and Wife have an Eſtate tail, or but for their Lives, was the Queſtion? It was Objected, That the Eſtate out of which the Uſe ſhould riſe, was but for their Lives; and the uſe cannot make the Eſtate longer then the Limitation; as where Lands are given to two for their Lives, to the uſe of another for his life; if the Leſſees dye, the uſe to him to whom it is limited, is determined. But it was holden by the Court, That there is a difference where an Eſtate is limited to one, and the uſe to a ſtranger, there the Uſe ſhall not be larger then the Eſtate out of which it is derived. But when it is limited to two, *Habendum* to the uſe of the heirs of their bodies, this is no Limitation of the Uſe, but a Limitation of the Eſtate to them and the heirs of their bodies, and they are in by the Common Law, and ſhall take it as a remainder to them and the heirs of their bodies, with the remainder over, that the Deed may be conſtrued according to the intent of him that made it. Paſch. 6 Car. in B. R. *Jenkins* and *Youngs* Caſe. *Cro.* 1. Part, 167.

4. In Treſpaſſe, the Caſe was very long, and was this; Sir G. M. Mayor of London, ſeiſed of divers Meſſuages in London, erected an Almshouſe and School-houſe in W. in the County of *Eſſex*; and by his Will deviſed (whereof one was now in Queſtion) to B. and G. and 4. others, whom he made his Executors; *Habendum* to them, their heirs and Aſſigns: Reciting, That whereas he had erected thoſe Almeſ-houſes and School-houſe for 13 Poor, and a School-houſe and a Chappel; he deviſed the ſaid Meſſuages to the ſaid 6. perſons, and to their heirs and aſſignees, upon Condition, that they ſhould pay out of the Iſſues and profits of them; *viz.* to the School-Maſter, 6 l. 13 s. 4 d; and to the Poor weekly 7 d. a piece; and to pay to a Clerk to help to teach the Children 26 s. 8 d; and if any of the purpoſes remained unperformed, Then he deviſed the ſame to W. M. and to the heirs males of his body, to perform all the Truſts and Purpoſes aforeſaid: and if they failed, then he deviſed them to the Mayor and Comminalty of *London* upon the ſame Conditions: and if they failed, that his heir ſhould enter, and perform the ſame; and appointed, That none of the Deviſees ſhould hold by Survivour, but that the Heir of him who dyed ſhould have his part by Survivourſhip. It was found, That Sir G. M. dyed ſeiſed in Fee; that the Deviſees entred, that none of them paid the ſum appointed to the Clerk; That G. dyed; That H. his heir entred into his part, but had not performed the Truſt: That 5 Eliz. the heir of Sir G. M. entred for breach of the Condition; That the heir of G. entred upon him, and purchaſed the other parts of the Deviſees; but upon the Truſts he ſhould perform the Purpoſes aforeſaid: Who being in poſſeſſion, 35 Eliz. a Fine for Releaſe with Proclamation was levied unto him, and that he continued poſſeſſion, and dyed ſeiſed: And it was found, That the 26 s. 8 d. was never paid to this day. Three great Queſtions were made in this Caſe, 1. Whether this was a Condition, or a Limitation appointed by the Will. 2. Admitting it to be a Limitation, and after the firſt Limitation, to the heir of Sir G. M, Whether ſuch a Limitation may be good to the Mayor and Comminalty, being but a poſſibility? 3. Whether they not entring for not performing of the Truſts, but ſuffering a Fine with Proclamations, and 5. years paſſed, whether it be not a barr to their Entry? Many of theſe Points were not Reſolved: But it was Reſolved in this caſe, That the Fine with Proclamations, and the 5. years paſſed, had abſolutely barred the Plaintiff's Eſtate: And the Court conceived, That it was a void Limitation to the Mayor and Comminalty, being a poſſibility upon a poſſibility: And afterwards in this Caſe, Judgment was given againſt the Plaintiff. Hill. 15 Car. in B. R. The Mayor and Comminalty of *London*, and *Alford's* Caſe. *Cro.* 1. Part, 417.

5. In an *Ejectione Firmæ*, the Caſe was; A man deviſed his Meſſuages in *London* in this manner; *viz. I bequeath to F. my Son, my houſes in* L. *after the death of my Wife: and if my three Daughters* R. E. *and* J, *and either of them do overlive their Mother, and* F. *their Brother, and his heirs, then they to enjoy the ſame for the Term of their Lives: And the ſame Houſes thus I give to*

my Sisters Sons R. *and* G. *and to pay yearly to the Batchelours Company of Merchant Taylors* 6 l. 10 s; *And if they or their Successours deny the payment of the said summe, Then it shall be lawfull for the Wardens of the said Company to enter, and discharge them for ever.* The Devisor dyed; the Son and Heir of the Sisters dyed without Issue; the Wife survived them, entred, and dyed: the three Sisters survived, entred, and dyed, having Issue the Defendant: The Question in this Case was, Whether F. the Son had a Fee or a Fee tail by this Will? It was Resolved, That he had but a Fee-taile: For it was impossible, that the Son should dye without heirs, as long as his Sisters were alive: For heirs in this place, is intended heirs of his body; and it is necessarily to be intended, that if he should dye without Issue of his body, for his Sisters are his heirs collateral. Hill. 14 Jac. in B. R. *Webb* and *Hearing's* Case. See Mich. 15 Jac. in B. R. *King* and *Rumball's* Case. *Cro.* 2. Part, 248. acc.

6. In *Ejectione Firme*, the Case was; A Lease was made to a Woman a Widow for 40 years *sub hac tamen Conditione quod si ipsa tamdiu sola fuerit et inhabitaverit* in the same house: The woman continued a Widow all her life, and dwelt all her time in the said house, and dyed within the Term, The Question was, Whether the Term ended or not; and whether the words make a Condition, or a Limitation? The Court in this case was of Opinion, That the words were insensible, and that it was neither a Condition, nor a Limitation: But if the word [*Si*] had been omitted, it would have been a Condition. And in this case it was said, That if J. make a Lease for 40 years, if the Lessee dwell upon the thing let, during the Term thereof, the Lessee dyeth, the Lease is determined: But if it be a Lease for 40 years, if the Lessee dwell upon it during his life there, if he dyeth, the Lease continueth. The Opinion of the Court in the principal Case was, That the Term did continue, and Judgment was for the Plaintiff. Hill. 43 Eliz. in C. B. *Sayer* and *Hardies* Case *Goldesbr.* 179.

7. A man seised of Copyhold Borough English, devised the same to H. his Grandchild, and to his Heirs; and if he dye during the life of his Mother, the Remainder to J. his younger Brother, and his heirs: The Question was, If this were an Estate tail in H, or a Fee Executory. It was the Opinion of the Court, That if it was an estate tail, then the Devise was not good, because it is of a Copyhold: but if it be a Fee-simple, then it is a good Devise. And in this Case it was said, That a Limitation of an Inheritance after a Fee-simple, is not a good Limitation; for this would be to make a perpetuity, which the Law will not admit: but if it be upon a Contingent Fee-simple, it is otherwise. And so it was said, it was adjudged, Mich. 37 & 38 Eliz. in C.B. rott. 1149. And it was said in this Case, That if there could be such a Devise of other Lands; Yet Copyhold Lands cannot be so devised, for there cannot be so much as a possibility of Reverter; for there is no Custome to warrant it: and though there might be a Reverter, yet the party cannot devise it by Will; and if he could, yet the Conveyance is here made up by Surrender and Admittance and Devise; and the party is in by the Surrender, and not by the Devise. Trin. 1651. in B.R. *Jay* and *Jay's* Case. *Styles*, 258. & 275.

8. A man made his Will, in these words, *viz.* I give and bequeath one half of my Lands to my Wife; and after her death, I give all my Lands to the heirs males of any of my Sons, or next of Kin. It was Objected, That in this case, that the words, The heirs males of any of his Sons, are certain enough to create an Estate tail; for it is all one as if he had said, To the heirs males of any of his Sons, if they have heirs males, or to those who have heirs males; and the words, *Or to the next of Kin*, are certain enough, being joyned with the precedent words, and shall be meant to the next of Kin, and the heirs males of their bodies, if they have heirs males. But it was the Opinion of the Court, That the intent of the Testator was here *caca et ficca*, and sensesse, and cannot be known, and then the Court ought not frame a sense upon the words of a Will, where the meaning of the Testator cannot be found out. And it was the Opinion of the Court, That the Devise was void for incertainty. Mich. 1650. in B. R. *Beal* and *Wymans* Case. *Styles*, 240. And so it was said, It was adjudged. Hill. 2 Car. in C.B. in *Hunt* and *Fishers* Case.

9. A. having Lands in Fee-simple, and Goods and Chattels of the value of 5 l. onely in F, by Will devised to his Wife *totum statum suum*, paying his Debts and Legacies; and his Debts and Legacies did amount to 40 l; The Questions were, 1. If the Lands passed to the Wife by the Will? 2. What Estate passed to her? It was the Opinion of the Court, 1. That the Land did passe; for so the common understanding of the words [*all his Estate*] imports; and the words go to the value of the Estate. 2. A Fee-simple passeth;

ſeth; and the words, *paying his Debts and Legacies*, doth import ſuch a Conſtruction, for they are to be paid preſently; which cannot be, if the Lands paſſe not in Fee: and the words, *paying his Debts and Legacies*, are words of Condition, and not of Limitation; as it was adjudged, Mich. 24 Eliz. in *Denham* and *Bakers* Caſe. And in this Caſe, *Riches* Caſe was vouched, Mich. 45 Eliz. in C. B. where it was holden, That a Deviſe of all his Rents, was held to paſſe all the parties Lands. Trin. 1651. in B. R. *Kyman* and *Johnſons* Caſe, *Styles*, 293.

10. In *Ejectione Firmæ*, the Caſe was; A. ſeiſed of Lands, upon the Marriage of F. his Son with E. C. levied a Fine of the ſaid Lands to the uſe of himſelf, during his own life, and the life of the ſaid F. his Son, and after during the life of E. C. the Wife of F; the remainder to the uſe of the heirs to be begotten upon the body of E. by F. her husband: The Queſtion in this Caſe was, Whether the word *Heirs*, ſhall be intended the Heirs of F, and E. his Wife? Or whether the Eſtate ſhall be intended to be limited to the Heirs only, and that F. ſhall have barely an Eſtate for life in the Land? It was Objected, That the word [*Heirs*] relate only to the heirs of E. and not to the heirs of F; for it is limited to no perſon certain, but is left to the Conſtruction of Law, and that doth apply it to E, to whom A. who ſettled the Land, expreſſed moſt affection; and A. did not intend to advance the Husband, but E. his Wife onely: for the words of the Limitation; *ſcil. upon her*, is as much as to ſay, *of her*. But it was the Opinion of the whole Court, That it was not the opinion of the Donour, to apply the word *Heirs*, to the body of E. only; but the word *Heirs*, according to *Littleton*, is to be applyed to Heirs of both parties: and we are not to frame a meaning againſt plain words, which ſhew the Intent of the Donour. It was adjudged for the Defendant, Paſch. 1652. in B. R. *Goſſage* and *Taylors* Caſe. *Styles*, 325, 326.

11. Copyholder in Fee of Lands deviſeable in Borough Engliſh, having 3. Sons and a Daughter, Deviſed his Lands to his eldeſt Son, paying to his Daughter and to his other Sons, 40 s. within two years after his death; the Deviſor ſurrendred to the uſe of his Will, and dyed: the eldeſt Son was admitted, and did not pay the money within the two years: It was adjudged in this Caſe, That although the word *paying*, maketh a Condition, yet in this caſe of Deviſe, the Law conſtrues it to be a Limitation: And the reaſon thereof is, For that if it ſhall be conſtrued to be a Condition, then it ſhall diſcend upon the eldeſt Son, and then it ſtands at his pleaſure, if his Brother and Sifters ſhall be paid, or not. See *Wellock* and *Hammonds* Caſe, vouch. *Cook* 3. Part, 20. And ſee, If a man ſeiſed of Land, Deviſeth them to one for life; and that he ſhould be Chaplain, and pray for his Soul all his life: and that after his deceaſe, the ſame ſhall remain to the Comminalty of ſuch a Town, to find a Chaplain perpetual; to that intent, this ſhall not be a Condition of which the Heir ſhall take advantage, but a Limitation, upon which the remainder ſhall take effect. *Plow. Com.* 412. in *Newes* and *Scholaſticus* Caſe.

12. A man by Deed, Covenanted to ſtand ſeized of Lands to the uſe of himſelf for life, and after to the uſe of divers of his ſons, and the heirs males of their bodies; Proviſo, That if they, or any of their heirs males, ſhould attempt any Act by which the limitation of the ſaid land, or any Eſtate Tail ſhould be barred, determined, or diſcontinued; that after ſuch act done or executed, that the uſes, as to ſuch perſon attempting, ſhould ceaſe, as if ſuch perſon were naturally dead; The eldeſt ſon ſuffered a Common Recovery, the younger ſon entred. It was Reſolved in this Caſe (amongſt other things) That the Proviſo to ceaſe on Eſtate limitted to one, and the heirs males of his body, as if Tenant in Tail were dead, was repugnant, and impoſſible, and againſt Law; for the death of Tenant in Tail, is not the ceaſing of the Eſtate Tail, but the death without Iſſue of his body is the determination of it, and before Iſſue, the Tenant hath an Inheritance, which by poſſibility may continue for ever. *Cook* 1. Part, 83, 84. *Corbets* Caſe.

13. Tenant in Tail had Iſſue two ſons; the eldeſt had iſſue a daughter, and dyed, his Wife young with childe in the life of his Father, Tenant in Tail ſuffered a Recovery to the uſe of himſelf for life, and after his deceaſe, to the uſe of J. S. for 21 years, and after to the heirs males of his body begotten, and to the heirs males of ſuch heirs males; and preſently after the Judgment, and before Execution, the ſame day in which the Recovery was ſuffered, Tenant in Tail dyed; and after the Recovery was executed, and after the ſon who was in his mothers belly was born, the younger ſon entred; and if his Entry was lawful, was the Queſtion. In this Caſe (amongſt other things) it was Reſolved, That the younger ſon, the Uncle, was in the courſe and nature of a Deſcent, although he ſhould not

have his age, nor be in Ward. 1. Becauſe the Original Act, *ſcil.* the Recovery, out of which all the uſes had their eſſence, was had in the life of the father, to which the Execution might have a retroſpect. 2. Becauſe the uſe and poſſeſſion might have veſted in the father, if the Execution had been ſued forth in his life. 3. Becauſe the Recoverers by their entry, nor the Sheriff in making the Execution, could not make inheritable whom they pleaſe And 4. Becauſe the Uncle claimed the uſe by words of limitation, and not by words of purchaſe. *Cook* 1. Part, 98. *Shelly's* Caſe.

14. If a maketh A. Feoffment in Fee to the uſe of himſelf, and his wife in Tail, and to the uſe of the husband in Fee, and hath Iſſue a daughter, his wife with childe with a ſon, by which the Reverſion deſcendeth to the daughter; the wife before the birth of the ſon, levieth a Fine, or ſuffereth a common Recovery; in this Caſe, although the daughter enter or not, and although the daughter had joyned in the Fine, or been vouched in the Recovery, yet no act that ſhe can do, can bar the ſon againſt the Eſtate Tail: and it is not like the caſe in 5 E. 4. 16. Where by the Statute of 6 R. 2. cap. 6. it is provided, *Quod proximus de ſanguine eorum rapientium & raptorum cui hæreditas deſcendere, vel diſcendere deberet poſt mortem rapitatis, vel raptæ habitat titulum immediate, &c. de tenore in Statut. Hæreditor.* Becauſe in that caſe, the Daughter by the Statute hath the Land meerly as a Purchaſor; but when the daughter entereth by force of the Statute of 11 H. 6. ſhe is in of an Eſtate Tayl, *per formam Doni*, and ſo in nature of a Diſcent, and *per formam Doni*, the ſon after born is to be preferred. *Cook* 3. Part, 6. in *Lincoln Colledge* Caſe. Look the Principal Caſe of *Lincolne* Colledge.

15. Note, It is put for a Rule, in *Cook* 10. Part, in *Portingtons* Caſe, That there are in Law, apt and Legal words, as well of limitation, as of Condition: Apt words of Limitation are, *Quamdiu, Dummodo, Dum Quonſque, Durante*; as a Rent Granted out of the Mannor of D. *quamdiu* the Grantor ſhall remain there: A man makes a Leaſe of Lands, *Dummodo*, the Leſſee ſhall pay 20 l. A man maketh a Feoffment in Fee, *Quouſque* the Feoffee hath paid him a certain ſum of money: A Leaſe of Lands during Coverture; All theſe are words of Limitation, by which the Eſtate is determined before Entry or Claim. *Cook* 10. Part, 44. In *Portingtons* Caſe.

16. A man deviſed Lands to his youngeſt ſon, Proviſo, That if any of his ſons, or any of their Iſſues, demiſe any of the Lands before the age of 30 years, then the other ſhall have the Eſtate: the eldeſt ſon made a Leaſe thereof before his age of 30 years, the younger ſon entred, and before 30 years alliened the Land; the eldeſt ſon re-entred; It was Reſolved, 1. That it was a Limitation. 2. When the younger brother hath once entred for the allienation, then the Land is diſcharged of the Limitation to the Will. Hill. 30 Eliz. in C.B. *Spittles* Caſe. *Owen* 8.

17. A man Deviſeth Lands to his Wife for life, the remainder to F. his ſon, and the heirs of his body; Alſo he deviſeth to F. his ſon, Lands in B. and his Lands in C. and alſo he gives his Land called O. to the ſeed of his ſon, *Habendum* all the deviſed premiſſes to F. his ſon, and the heirs of his body. The Queſtion was, If F. have an Eſtate Tail in the Lands of B. and C. It was Reſolved in this Caſe, That the Limitation ſhall go to all, and that he ſhall have an Eſtate Tail in all. Trin. 29. Eliz. *Wiſeman* and *Roſſes* Caſe. *Owen* 140.

Limi-

Limitation of Actions.

1. BY the Statute of 32 H. 7. cap. 2. of Limitations. In an Avowry or Conusance for real Suit or Services, the seisin shall be within 40 years before such Avowry or Conusance: Yet it is Resolved, That that Act shall not extend to such Rent or Service as by common possibility may not happen, or become due within 40 years: As if the Seignory consist of Homage and Fealty only, in this case the Tenant may live 40 years after they are made. In like manner, If the Service be to cover the Hall of the Lord, or to march with him when there shall be War betwixt the King and any of his enemies, such casual services by common possibility, cannot happen within 40 years, and therefore are not within the said Act. *Cook.* 4 Part, 10. in *Bevils* Case.

2. The Statute of *Weſt.* 1. *cap.* 38. Ordaineth, That the Writ of Assize of *Mort dauncestor*, have the Term of Limitation from the Coronation of King *Henry* the third. Yet it hath been adjudged, That if an Infant bringeth an Assize of *Mort dauncestor*, of the possession of his Mother or Father, he needeth not to alledge that it was after the Coronation of King *Henry* the third, because the same evidently appeareth, and *manifesta probatione non indiget.* *Cook* 7. Part, 40. in *Bedell's* Case.

3. A. seized of a Manor, by Deed Indented Enfeoffed thereof J. S: and his Heirs, rendring yearly to A. his Heirs and Assigns, ten pounds Rent; A. dyed seized, the Rent descended to his son and heir, who dyed Intestate, his Administrators distrained, and avowed for the Rent: It was Resolved in this Case, upon the Statute of 32 H. 8. cap. 37. which gave Distress to an Executor or Administrator, in like manner and form as the Testator might and ought to have done, and upon another clause of the said Statute: That the Administrators were not driven in their Avowry for the Rent, to alledge any seisin within 40 years; for in case of reservation, or Grant of a Rent, there the Deed is the Title, and the Commencement of it appeareth to be within time of memory, and no encroachment in such case shall hurt, neither is any seisin material: But the Statute shall be intended, when the Avowant was driven to alledge seizin by force of any uncertain Statute of Limitation; and that was, when the seizin was material, and of such force, as that it should not be avoided in an Avowry, although it was by encroachment. *Cook* 8. Part, 40. Sir *William Foſtes* Case.

4. Note Reader, Although the purview of the Act of 21 H. 8. cap. 19. be general, That the Lord avow, &c. as in Lands within his Fee and Seignory, alledging the same lands to be holden of him, yet all necessary Incidents are intended; and therefore the Avowant ought to alledge seisin by some hands: but the ancient form of alledging of seisin, shall not be altered; and therefore the Avowry shall be made generally after the Statute of 32 H. 8. cap. 2. as it was used before: But the Plaintiff in Bar of the Avowry, may plead *Ne unque seiſi*, within 40 years. See *Cook* 9 Part, 36. in *Bucknel's* Case.

5. In a *Formedon* in the Discender, the Plaintiff counted upon a Gift, and Explees in the Great Grandfather in the time of *Henry* 6. and shewed in the Conveyance, that the Father of the Demandant dyed within 50 years last, but did not shew any seisin in fact within that time, nor of any other Ancestor after the seisin, in the time of *Henry* the sixth. It was the Opinion of the Justices in this Case, That this *Formedon* was out of the Statute of 32 H. 8. and the seisin of the Donee was never Traverseable, nor intended to be within the ancient Statute of Limitations; for that the Formedon was given after the Statute of *Westminster* 1. ten years. Mich. 11 Eliz. *Dyer* 278. *Whitton* and Sir *Henry Cromptons* Case.

6. B. entred upon certain Lands of C. in the County of S. as in Lands purchased by his Villeyn, and made a Lease for years to his servant, who was ejected by C. against whom he brought the Action; the Defendant pleaded *Not guilty*; and upon the Evidence, the Question was moved, If there be Grandfather, Father, and Son; and the Grandfather is a villeyn regardant, and the father departs out of the Realm, and remains there without returning to the Mannor for the space of 60 years, and dyeth, without any seizure of him, or without doing any villeyn service; and beyond Sea hath Issue a son, who also remains there where his Father dyed, for the space of forty years, and more, and is there taken and reputed for a Freeman, which

Without any ſeizure of his body, or claim by the Lord, ſo as the Writ of *Nativo habendo* fails, by reaſon of the Statute of Limitation; if now he were ſeizable by the Lord as his villeyn, or not. It was the Opinion of the Court that he was not: *Et hoc in favorem Libertatis*; and thereupon it was found for C. the Defendant, and Judgement was againſt the Plaintiff. Mich. 10 Eliz. *Dyer. Butler* and *Crouches* Caſe. See Paſch. 11 Eliz. *Dyer* 383. the ſame Caſe.

7. Note, In a *Formedon* in the Reverter, or Remainder, the Demandant needed not alledge any ſeizin within 50 years, upon the Statute of 32 H. 8. Nor in a *Scire facias*, to execute a Fine of ſuch nature, for they ſhall come in upon Traverſe of the part of the Tenant is in Avowry; *ſcil.* Not ſeiſed of the ſervices after the limitation. Trin. 13 Eliz. *Dyer*, 315.

8. In Avowry for Fealty, 10 s. Rent, and ſuit of Court, they alledged ſeiſin within 50 years: The Plaintiff ſaid, That he held by Fealty, and twelve pence, and Suit, *abſque hoc, &c.* And it was found, That he was ſeized of the Rent, but not of the Fealty, and Suit of Court. It was the Opinion of the Court, That he could not have Judgment, for that all was not found in that Caſe: It is a Quære, If he muſt not alledge a ſeizin with 50 years. Mich. 16 Eliz. *Dyer* 330. See *Cook* 4. Part, *Bevils* Caſe.

9. In *Aſſumpſit* after Verdict, It was moved in ſtay of Judgment, That the promiſe is alledged to be made beyond the time limitted in the Statute of 21 H. 8. and the Action is not brought within the time limitted thereby. It was the Opinion of the Court, That if it appears ſo by the Plaintiffs owne ſhewing, the Plaintiff cannot maintain the Action, but Judgment ſhall be given againſt him: But if the Contract for the *Aſſumpſit* or Debt, be alledged to be within the time limitted by the Statute, and upon *Non debet*, or *Non Aſſumpſit* pleaded, It doth appear upon the Evidence, That the *Aſſumpſit* or Contract was beyond the time limitted, and ſo the Evidence cannot maintain the Action, the Defendant ſhall take the advantage thereof; for the Statute is in the Negative, That he ſhall not maintain Action, but within ſuch a time limitted by the Statute. Trin. 4 Car. in C. B. *Brown* and *Hancocks* Caſe. *Cro.* 1 Part, 81.

10. In *Aſſumpſit* the Caſe was, The Defendant had a Dog which did kill five of the Plaintiffs ſheep, and the Defendant in conſideration the Plaintiff would not ſue him for the ſaid ſheep, and alſo in conſideration the Plaintiff would ſuffer the Defendant to do away the Sheep, promiſed to give him recompence for the ſaid ſheep upon requeſt; and the Plaintiff alledged the Promiſe to be made 18 Jac. and that afterwards 2 Car. he did requeſt ſo much of the Defendant for the Sheep. The Defendant pleaded the Statute of 21 Jac. cap. 16. of Limitation of Actions; and alledged, That the Action was not brought within ſix years of the Cauſe of the Action accrued, which was the promiſe. But it was adjudged, That the Plea was not good; for it was Reſolved, where a thing is to be done upon requeſt, that there, till requeſt, there is no cauſe of Action, and the time and place of the Requeſt is Iſſueable; and the meaning of the Statute was, but to bar the Plaintiff from the time that he had compleat Cauſe of Action, and that was not until the Requeſt was made; and in the principal Cauſe, the Cauſe of Action is the Breach, and that cannot be till after the requeſt made; and where a requeſt is material, it ought to be ſhewed in pleading. Judgment was entred for the Plaintiff. Mich. 4. Car. in B. R. *Shelford* and *Boroughs* Caſe, *Godbolt*, 437. 1 Car. in B. R. *Perks* Caſe. Hill. 13 Jac. in B. R. *Hill* and *Wades* Caſe, adjudged accordingly.

11. A. at the requeſt of a Feme Covert, took up certain pieces of Stuffe, the Husband did aſſume and promiſe to pay ſo much for it, as upon Requeſt, it was worth. A. brought an Action upon the Caſe againſt the Husband, and averred the ſum did amount to 40 l. and alledged the Requeſt. The Defendant pleaded the Statute of 21 Jac. of Limitation of Actions, and that the Plaintiff had not proſecuted any Action upon that Promiſe within ſix years after the promiſe made. Whether the Cauſe of Action ſhall be upon the Requeſt, or upon the Promiſe, was the Queſtion. It was Objected, This was a Contract by the Husband, whereupon he might have an Action of Debt, and then the Requeſt is not the Cauſe of the Action. But it was Reſolved in this Caſe, That no Action of Debt lay againſt the Husband upon this promiſe, but only an Action upon the Caſe upon the *Aſſumpſit*. Mich. 5. Car. in B. R. *Bill* and *Lakes* Caſe. *Huston* 105.

12. It was Reſolved, That Debt brought for Arrearages of Rent upon a Leaſe for years by Indenture, is out of the Statute of 21 Jac. of Limitation of Actions. 2. Reſolved, That a Rent charge which is founded upon a Deed, or a Reſervation of Rent upon a Fee-ſimple by Deed, are both

both out of the Statute of 32 H. 8. of Limitations, Mich. 5. Car. in C. B. *Freeman* and *Stathes* Case. *Hutton*, 109.

Livery and Seisin.

See for it, *Title* Feoffments.

More.

1. NOte, It was agreed by the Court, That if a man bargaineth and selleth his Lands by Deed Indented to be Enrolled, and before the Deed Inrolled, he maketh Livery to the Bargainee, and after the Indenture is Enrolled, that in that Case, the Livery doth prevent the operation of the Enrolment, and the party shall be accompted in by the Livery, , and not by the Bargain and Sale; for Livery is the more worthy, and the more worthy Ceremony to pass Estates, and therefore shall be preferred. Mich. 26 Eliz. in B. R. *Stoneley* and *Bracebridges* Case. *Leon.* 5.

2. In Dower, the Case was, Land was given to the Father for life, the remainder to his Son and Heir for life, the Remainder to the right Heirs of the body of the Father; the Father and the Son joyned in a Deed to the Fathers brother, being Uncle to the Son in Fee, the Uncle took a Wife, the Father dyed, the Son being his Heir in Tail, the Uncle dyed without Issue, so as the Land did descend to the Son, as Heir to the Uncle, against whom the Wife of the Uncle brought Dower. It was moved, If the Son being Heir in Tail to the Father, and Heir also to the Uncle, of the Land, was remitted; for if there be a Remitter, then no Dower accrueth to the Wife of the Uncle; because the Estate of which she claims Dower, is gone: But if the Livery in which the Son joyned with the Father, be the Livery of the Son, then the same doth prevent the Remitter during his life, and he shall be adjudged seised in Fee by discent from the Uncle. The Court doubted of the Case, and gave no Opinion in it. Therefore Quære. Mich. 29 Eliz. in C. B. *Partridg* and *Partridges* Case. *Leon.* 37.

3. In a Second Deliverance, the Case was 1 A. seised of Lands, Leased the same for years, and afterwards made a Feoffment thereof to B; and made a Letter of Attorney to the Lessee and C. and D. *conjunctim et divisim in omnia et singulas terras, & Tenementa intrare, & seisinam in de &c. secundum formam Chartæ, &c.* The Lessee for years by himself makes Livery and Seisin in one part of the Land, C. in another part, and D. in another part by himself. It was Resolved in this Case, 1. That by the Livery in that Case by the Lessee for years, his Interest in the Term was not determined; for what he doth, he doth as Servant, or Attorney to the Lessor. 2. Resolved, That these several Liveries were good, and warranted by the Letter of Attorney, by reason of these words, *Et omnia & singulas, &c.* so as all of them, and every of them enter and make Livery in all and every part of the Land. Mich. 32 Eliz. in C. B. *Petty* and *Trivillians* Case. *Leon.* 192, 193.

4. Note, It was agreed by the Court, That if a Feoffment be made of a House, and the Deed be delivered in the House without other Circumstance, the same doth not amount to Livery of Seisin; but if he doth any act by which the intent of the Feoffer appeareth, that the Feoffee should have Livery and Seisin; as if the parties go of purpose to the place intended to pass, to the intent that the Deed may be delivered in that kinde, the same doth amount to a Livery. Pasch. 31 Eliz. in C. B. *Mills* and *Shombals* Case. *Leon.* 207.

5. The Case was, Lessee for life, the Remainder for life, the Remainder in Tail, the Remainder in Fee: The two Tenants for their lives made a Feoffment in Fee of the Lands. It was Objected, That it was the Livery of the first Tenant for life, and the Confirmation of him in the Remainder: But it was the Opinion of the Court, That by this Livery, the Remainder for life passed, and that it shall be as well the Livery of him in the Remainder, as of the Tenant in possession; and although where an Estate is lawfully made by many, it shall be said, the Livery of him who lawfully may make Livery; yet where an Estate is wrongfully made, it shall be accounted in Law, the Livery of all who joyn in it; and in this Case, the Remainder for life extinguished by the Livery in the Feoffee, and the Livery of him in the Remainder shall be holden a void Livery, especially when he joyneth with such a person, who hath not authority to make Livery: As if the Lord and a Stranger disseize the Tenant, and make a Feoffment over, the whole

Seignory

Seignory is extinct, as if he soly had been seised; So it he in the Reversion, and a stranger, disseise Tenant for life, and make a Feoffment over, the Seignory is gone, and yet it is the Livery onely of the Lessee. It was therefore in the principal Case adjudged, That the Entry of him in the Remainder in tail was lawful. Mich. 20 Eliz. in C. B. *Leon.* 262.

6. The Warden and Fellowes of *All-Souls* Colledg in *Oxford*, Leased Lands to J. S. To have and to hold from the Feast of the Annunciation next following for 20 years, The Lease bare date 1. *July*, 10 El z. and made a Letter of Attorney to J D. to enter into the Mannor, and to seal and deliver the said Deed in their names to the Plaintiff J. S: J. D. by force thereof entred into part of the demised premisses, and did there seal and deliver the Lease: But it was not found, that there was any Mannor. It was Objected, That because the Letter of Attorney was to enter into the Mannor, and all the Lands and Tenements of this Colledg in such a Town, and to seal the Indenture of the Lease in the name of the Lessors, and to deliver it to the Plaintiff as their Deed; That the Attorney in executing the Warrant had not pursued it, for that he only entred into the Lands, and it is not found, that he entred into the Mannor, and so the Lease is void: and if J. Lease two Acres in two several Counties, rendring for one Acre 10 s. Rent, and for the other 10 s, and make a Letter of Attorney to make Livery in both; if the Attorney entreth into one Acre, and makes Livery, it is void, for that the Attorney hath not pursued his Warrant; for peradventure J. would not have Leased the Acre of which Livery is made for such a Rent of 10 s, being perhaps of greater value, but with the other Acre which was of lesse. But it was Resolved by the Court, That it doth not appear upon the special Verdict, but that the Colledg was in possession at the time of the Lease made, and then there needed not such Entry, but a bare sealing and delivery of the Indenture, and that by the Attorney had been good enough: And it doth not appear, that the Colledg had any Mannor: Put if it had been found, that the Colledg had had such a Mannor there, then the Entry into the Land only, without meddling with the Mannor; and the Livery made accordingly should not have been good. It was adjudged, That the Warrant of the Attorney was well executed. Mich. 33 Eliz. in C. B. *Carter* and *Claycocks* Case. *Leon.* 260.

7. Note, It was Resolved by the Court, That if the Wife of a Lessee for years doth assent to a Livery of a house made in the absence of her husband: although the Servants and Children be and continue in the house; yet it is a good Livery. But Quære, if the Wife notwithstanding her assent, doth continue the possession of the house: But if a man doth commit his house to his Servants, and the one doth assent to the Livery, and departeth from the house, and the other do continue there, and Livery be made, it is no good Livery, for that the possession of the Servants, is the possession of the Master himself. Mich. 6 Jac. in B.R. *Godbolt*, 158.

8. A. and his Wife, seised of Land in the right of his Wife by Indenture, with a Letter of Attorney Let the said Land, *Habendum à die datus*, for the life of the Lessee rendring Rent. The Attorney made Livery the same day *secundum formam Chartæ*; the Lessee entred, and paid the Rent which was always reserved; the Wife dyed: It was the Opinion of the Court, That the Lease was void, and that Livery made the same day it beareth date, is void to make it a good Lease. Mich. 10 Car. in B. R. *Bull* and *Wyats* Case. *Cro.* 1. Part, 282.

9. The Case was; Enfant Tenant in tail of Land in Gavelkind, (where the Custome was, That at the age of 15, he might make a Feoffment of his Land, and bind himself) made a Feoffment of the Lands entailed: It was the clear Opinion of all the Justices, That this Feoffment was void, and was not any discontinuance to bind the Enfant; and that the Custome was a void Custome. And in this case, It was holden, That if a man makes a Deed of Feoffment of Land, and delivers the Deed, and saith no more, but, Take and enjoy the Land; Or, Take the Land according to the Deed; and such words, which amount to a Livery when he delivers the Deed, that nothing passeth: for that the Law requireth more Ceremony, then the delivery of the Deed upon the Land. Mich. 3 Jac. in B. R. *Vaughan* and *Holds* Case. *Cro.* 2. Part, 80. See *Cook* 1. Part, *Institutes*, 48. *Cook* 9. Part, *Thorowgoods* Case, acc. 137.

10. The Case was in *Ejectione Firmæ*, A. and E. his Wife seised of Land in Fee in the right of the wife, Let the same to J. S. and K. his Wife, and F. their daughter, *Habendum* to them *et eorum diutius viventi successivè* from *Mich.* for the Term of their 3. Lives, rendring yearly during their Lives 13 s. 4. d. at two usual Feasts, and a Heriot after the death of every of them: After A. and

A. and E. his Wife made Livery to J. S. and K. his daughter, according to the Indenture: After A. dyed, and E. his Wife accepted the Rent of J. S. Afterwards J. S. died ſeized; K. his Wife entred, and dyed; F. entred, upon whom E. entred. The firſt Queſtion was, Whether this Leaſe, *Habendum*, from Mich. for three lives, and Livery made from Mich. *ſecundum formam Chartæ*, were good or not: It was Reſolved it was good enough; for in this Caſe, there was not any intention that the Livery ſhould operate futurely, but that Livery ſhould be made when it ſhould operate, and the Eſtate ſhould be good preſently. The ſecond Queſtion was, Whether the Leaſe made by Husband and Wife, of Lands whereof he is ſeized in the Right of his Wife, can be good againſt the Wife, to binde her, although ſhe accept the Rent. It was Reſolved, That it ſhould; for it was holden, That the Livery alone did not make the Leaſe, but the Livery and the Deed, and it took its operation by both; and the Livery being made after Mich. it is made a good Leaſe by the Deed and Livery, and not by any of them ſolely; for the Livery in this Caſe is but the Execution of the Deed, and it is a ſufficient Witneſs of their agreement, which is the cauſe it ought to be by Deed, to prove the Agreement of the Wife, and all Reſervations and Covenants in the Deed are good, and the Leſſees and Leſſors bound by them. And ſo the Opinion of the Court was, That the Leaſe was a good Leaſe. Trin. 17 Jac. *Greenwood* and *Tylers* Caſe. *Cro.* 2. Part, 563. See *Hob.* 314. The ſame Caſe.

11. A. by Indenture 10 *Junii*, 44 Eliz. demiſed a houſe to B. *Habendum à die dat. Indenturæ prædict.* for life, with a Letter of Attorney to make Livery. The Attorney made Livery 13 *Julii* after the day of the date. It was holden by the Juſtices, That the Licenſe was void, becauſe it was made by Attorney, who had not any ſuch Warrant. But if the Deed had bin delivered after the day of the date, and then the Livery had bin made by Attorney, it had bin good enough, and ſo it was adjudged. Paſc. 5 Jac. in B. R. *Hennings* and *Panchardens* Caſe. *Cro.* 2. Part, 153.

12. A Prebend had uſed to be let with the Exception of all Crab-Trees, and ſuch like Trees; and a Leaſe was made unto B. of the ſaid Prebendſhip, omitting the Exception *Habendum à die Conſectionis* for three lives, rendring the ancient Rent, the Leaſe was made 6. *Aug.* 6 Jac. and Livery was made 9. *Sept.* 6 Jac. It was Reſolved in this Caſe firſt, That the Livery made after the day, was good enough, and did not work *in futuro*. 2. Reſolved, That the omitting of the Exception, made the Leaſe void, for that there was more let then was anciently, and ſo the Leaſe is void by the Statute of 13 Eliz. for that it is not the ancient Rent, where there is more let then there was before. H. 11. 15 Jac. in B. R. *Smith* and *Boles* Caſe. *Cro.* 2. Part, 458, 459.

See *Cook* 6. Part, 16. *Sharps* Caſe, before in Title *Feoffments*: and the Caſes there vouched.

13. Tenant in Fee enfeoffeth one by Deed Indented, and delivereth it upon the Land by name of Seiſin, this is good, and hath a double operation at one inſtant. 1. To deliver the Deed as a Deed. 2. To deliver Seiſin of the Land according to the Deed. 2. Reſolved, That the bare delivery of the Deed upon the Land, doth not amount to a Livery and Seiſin; but otherwiſe if he deliver it in the name of Seiſin. *Cook* 9. Part, 137. *Thorowgoods* Caſe.

14. If a man be Diſſeiſed, and maketh a Deed of Feoffment, and a Letter of Attorney to enter and take poſſeſſion, and after to make Livery, *ſecundum formam Chartæ*, it is a good Feoffment, although he be out of poſſeſſion at the time of the Charter made for the Authority given by the Letter of Attorney is Executory, and nothing paſſed by delivery of the Deed till Livery and Seiſin was made. But if a man be Diſſeiſed, and maketh a writing, purporting a Leaſe for years, and delivers the Deed, and afterwards he delivers it upon the ground, the ſecond delivery is void; for that the firſt delivery made it a Deed, and it is much as the Leaſe for years muſt take effect by the delivery of the Deed, therefore the Deed delivered when he was out of poſſeſſion, was void. But it is not ſo of a Deed of Feoffment, for that that takes effect by the Livery and Seiſin. *Cook* 3. Part, 35. *Jennings* and *Braggs* Caſe.

15. See, That when a Deed of Feoffment is void in it ſelf, If Livery be made *ſecundum formam et effectum Chartæ*, the Livery is alſo void: As if A. by Deed give Land to B. to have and to hold after the death of A. to B. and his Heirs, this is a void Deed, becauſe he cannot reſerve to himſelf a particular Eſtate, and if Livery be made according to that Deed, the Livery is alſo void, becauſe it refereth to a Deed which hath no effect in Law. *Cook* 1. Part, *Inſtitutes* 48.

16. A Livery within the view (which is called a Livery in Law, is good to convey the eſtate to the Feoffee, &c. if he make entry, and ſo the eſtate be executed during his life, and the Life of the Feoffer,

but if either of them dyeth before entry, the Livery is void. But if a man makes a Deed of Feoffment, and delivers Seisin within the view, and the Feoffee dares not enter for fear of death, this shall vest the Freehold and Inheritance in him, although by the Livery nothing passed to him in Deed, or in Law, so as for necessities sake, a Livery in Law shall be perfected and executed by an Entry in Law. *Cook* 1. Part, 48. acc.

17. A man made a Lease for years of a house, and of a Close severed from the house, and of other Lands. The Lessor made a Feoffment of the house, and of all the Land, demised, and made Livery and Seisin in the Close, the Lessee being in the house It was adjudged in this Case, That the Livery was void, aswell for the Close, as for the house and other Lands. For when a house and Lands are let entirely together, the Messuage or house is the principal, and there the Rent shall be demanded, and the Land is but the accessary, so as the possession of the house is the possession of all the Lands demised with it. But if the Lessee had made a Lease unto another of any part of the Land demised to him, and the Lessor had made Livery in that part, it had bin good to pass such part; but otherwise it had bin if he had made a Lease at will of it. *Cook* 2. Part, *Bettiſworths* Case.

18. If A. be to make a Feoffment to B. and C. and their Heirs, without D. e], and A. makes Livery to B. in the absence of C. in the name of both, and to their Heirs; the Livery made to C. is void, because a man being absent, cannot take a Freehold by a Livery, but by his Attorney lawfully authorised to receive Livery, unless the Feoffment be made by Deed; and then the Livery made to the one in the name of both, is good; and the reason is, because the Feoffment, being made without Letter of Attorney, or Deed, it is uncertain whether he consented thereunto, which is apparent by his sealing of the Letter of Attorney, or Deed. And note there, that a Deed may take effect by delivery, without words, but Livery and Seisin requireth words to express it. And also note, That a man absent can neither take, nor make Livery without Deed. *Cook* 1. Part, *Inſtitutes*, 339. acc.

19. The Bishop of *Worcester*, and the Dean and Chapter there, made a Lease for life, *Habendum*, from the day of the date, and made a Letter of Attorney to one to make Livery *ſecundum formam Charte*, the Attorney makes Livery the next day after. The Jury find the Lease for life the 25th day of Dec. and that the Livery by the Attorney was made *poſt viceſſimum diem prædict.* and if this Lease thus made and executed, was good or not, was the Question. This Case was argued long at the bar, and after at the Bench. And it was the Opinion of the Court, That the Lease was not good; and if the Lease be bad in it self, that then it was not in the power of the Attorney by his Livery to make it good. And the Opinion of the Court was, That the Jury having not found the certain time when the Lease was delivered *Juratores male fecerunt in Veredicto ſuo dando*, and a *Venire facias de novo* was awarded. Trin. 12 Jac. in B. R. *Butler* and *Firaters* Case. *Bolſtr.* 2. Part, 303.

20. A man dyed seised of Lands holden of the King, having an Heir; It was found by a false Office, that he dyed without Heir, the Heir afterwards tendred his traverse to the Office, and depending that, he made a Feoffment in Fee of the Land, and a Letter of Attorney to make Livery: afterwards upon the Traverse, it was adjudged for the Heir, and then the Attorney made Livery. It was adjudged in this Case, That the Livery was good, and yet at the time of the Feoffment, and Letter of Attorney made, he had but a right, and that in that Case he took by [the Livery from the time of the Livery made.] Mich. 38 Eliz. in C. B. *Brown* and *Tyrreyes* Case.

Livery and Ouſter le mayne.

1. *Of Livery and* Ouſter le mayne; *What they are: Of what Lands they ſhall be ſued. Where* cum exitibus; *where* ſine exitibus, *and the manner of ſuing thereby; and what the value of the Livery paid to the King ſhall be: And where a man cannot have his Land without ſuing Livery, et è contra.*

1. LIvery, or that which is called ſuing of Livery, is nothing else but the Heir's ſuing to the King to have ſuch Lands re-delivered unto him by his Highneſs, which have bin ſeiſed by the Eſcheator into the King's

Kings hands upon Office found, by which Office the King is in poſſeſſion of the Lands, and ſhall be anſwered all the profits thereof ſince the death of his Tenant, untill the Heir ſueth his Livery, and doth his homage, and hath the Land delivered to him out of the Kings hand, and payeth his Primer-Seiſin. And note, That Livery ſhall not be ſued, but where the Kings Tenant dyeth ſeiſed of Lands holden by Knights Service in *Capite*, or Socage in *Capite*. *Cook* 1. Part, *Inſtitutes* 77.

2. *Ouſter le mayne* is a Writ which is directed to the Eſcheator, to deliver Seiſin or poſſeſſion out of the Kings hands unto the party that ſues the Writ, for that the Lands ſeiſed, are not holden of the King, or for that he ought not to have the Wardſhip of them, or for that the Kings Title is determined, &c. It is alſo the Judgment that is given in a *Monſtrans de droit*, or upon a Traverſe or Petition, for when it appears upon the matter diſcuſſed, That the King hath no right or Title to the thing here ſeiſed, then Judgment ſhall be given, That the Kings hands be amoved: and thereupon an *Amoveas manum* ſhall be awarded to the Eſcheator, which is as much as if Judgment were given, That the party ſhould have his Lands again. *Stamford*, *Prerogat.* 24.

3. If the Heir be in Ward by reaſon of a Tenure in *Capite*, there at full age he ſhall ſue Livery. But if the Tenure be of an Honor or of a Mannor, there he ſhall not ſue Livery, but at his full age he ſhall have an *Ouſter le mayne una cum exitibus*, although he hath not made any tender, and that by the uſage of the Court of Wards. Trin. 1 Eliz. *Dyer*, 168. *Cook* 8. Part, 172. in *Hales* Caſe. *Cook* 1. Part, *Inſtitutes* 77. acc.

4. A. held Land in Socage, and other in Knight-Service of F. as of his Mannor of S. and F. held over of the King in *Capite*; F. dyed, his Heir within age, and in Ward to the King: F. alſo dyed, his Heir within age. The Heir of F. ſued his Livery. And it was found by Office, That the Heir of A. was of full age. The Queſtion was, if he ſhould ſue Livery, or *Ouſter le mayne*, and if aſwell for the Land in Socage, as for the Land in Knight Service: It was a Quære. But it was the Opinion of the Court, That for the Socage Land, he ſhould not be in Ward, becauſe the Tenant held not immediately of the King. Mich. 3 Ma. *Dyer*, 123. *Davies* Caſe. And ſee, That if the Heir of Tenant in Socage in Chief, be within the age of 14 years at the time of the death of his Anceſter, he ſhall not ſue Livery, nor pay Primer Seiſin, becauſe the Cuſtody of the body doth appertain to the *Prochin Amy* as Guardian in Socage: 38 H. 8. br. *Livery*, 60. acc. 4 Eliz. *Dyer*, 213. acc. 20 Eliz. *Dyer*, 362.

5. Tenant in *Capite* makes a Feoffment in Fee to the uſe of the Feoffee and his Heirs, untill the Feoffor pay 100 l. to him or his Heirs, and then to the uſe of the Feoffer and his Heirs; the Feoffee dyeth, his Heir within age; the 100 l. is paid to the Heir, and all this is found by Office. It was holden in this Caſe, That although the Heir was in Ward; yet upon a *monſtrans de droit*, the Wardſhip ſhall be deveſted out of the Kings hands, and the King ſhall not have the value of the Marriage upon a tender of Marriage made to him. See Hill. 13 Eliz. *Dyer*, 298. *Cook* 1. Part, 133. in *Chudleighs* Caſe, acc.

6. Mortgagee of Land holden in *Capite*, dyed, his Heir within age; the King ſeiſed the Ward, and alſo certain Lands which were holden in Socage. The Mortgager afterwards performed the Condition. It was the Opinion of the Court, That the Mortgagor might enter, and ſo deveſt the Wardſhip out of the King both of the body, and the Land Paſc. 22 Eliz. *Dyer*, 369. *Knightleyes* Caſe.

7. Tenant in *Capite* dyeth, his Heir within age, the Heir at his full age, tendred his Livery, and was admitted to it, and within the time given him for the proſecution of it, he bargained and ſold part of the Lands to another in Fee, and within the ſame time alſo dyed. In this Caſe, it was Reſolved, That when the Heir at his full age tenders his Livery, it is as much as the Heir can do, and then when he dyeth within the time given him for the Proſecution of his Livery, ſo as the ſuing of it is become impoſſible by the Act of God; the Intereſt which the King hath, is determined by the death of the Heir, and the Bargainee may enter and occupy the Land without a *Monſtrans de droit*, or *Ouſter le mayne*. *Cook* 8. Part, 172. *Hales* Caſe.

8. The Lord *Paget* levyed a Fine of Lands holden in Knight Service in *Capite*, with a render to himſelf for life, the Remainder to his eldeſt Son and his Heirs Males, the Remainder to his younger Son and his Heirs Males, the Remainder to his own right Heirs, and dyed; the eldeſt Son entred, and at his full age, ſued Livery of the third part, upon the Statute of 32 H. 8. becauſe it was a diſpoſition for the advancement of Children, and after he paid the value of the third part in poſſeſſion; and for the Remainder to the right Heirs, he ſued Livery, as he that had a Remainder by Diſcent from his Father, and paid the value of the moyety

of the Remainder in Fee, according to the usual rate. After he had Issue a Daughter, and dyed without Issue Male, the Daughter being in Ward, for the Remainder to the right Heirs. The younger brother entred for his Remainder in tail, the Daughter dyed without Issue, the younger brother being her Heir. It was said, That he ought not to sue Livery of the third part, as the eldest Son did, because the Statute is satisfied with one Livery, and the Statute extends not when there is many Issues advanced one after the other, that every one after another sue Livery, but Livery once for all. And as to the Remainder to the right Heirs, the younger brother sued Livery, for though he took as Heir to his Father, yet because the Kings Tenant is dead, and another is in by Discent, the King shall have that which is due to him. Pasc. 14 Eliz. *Dyer*, 308. the Lord *Pagets* Case.

9. Grandfather, Father, and Son; the Grandfather seised of Lands in *Capite* by act executed, conveyed part of his Lands to the use of the Father and his Wife for their lives, the Remainder to the Son in tail, the Remainder to the Grandfather for life, the Remainder to the right Heirs of the Grandfather; And conveyed other Lands holden in *Capite*, to the use of himself for life, the Remainder to his younger Sons for their lives severally, the Remainder to the Father for life, the Remainder to the Son in tail, with divers Remainders over, the Reversion to the right Heirs of the Grandfather, the Grandfather dyed, the Father of full age, who tendred his Livery, and dyed before Livery sued, or Office found, the Son of full age, and the Wife and the younger Sons being all alive. In this Case it was Resolved. 1. That by the death of the Father before Livery sued, the King had lost his Primer Seisin after the death of the Grandfather. 2. That the Son should not sue Livery, nor pay Primer Seisin, because he is out of the Statutes of 32 and 34 H. 8. And the Primer Seisin was due by the Father, and the King shall have but one Primer Seisin by the Statute. But it was Resolved, That the King should have Primer Seisin for the Lands conveyed to the younger Sons, because they are within the Statutes. *Cook* 9. Part, *Holts* Case.

10. The Lord *Powes* conveyed Lands in *Capite* to one *Gray* his Bastard in Remainder after his death. The Lord *Paget* dyed. It was holden by the Justices, *Dyer*, and *Saunders*, That the Bastard should not sue Livery for the third part, for that he was not a lawful Child within the Statute. Trin. 14 Eliz. *Dyer*, 313.

11. A man seised of a Reversion in Fee expectant upon an Estate tail by Indenture, in consideration of bloud, Covenanted to stand seised of the Reversion to the use of his Neece; And afterwards Tenant in tail in possession dyed. It was Resolved in this Case, That the King should not have Primer Seisin by the Statutes of 32 and 34 H. 8. 2. Resolved, That if the Father enfeoffeth another, either for the advancement of his Daughters, or of his younger Sons, or for payment of his Debts, and afterwards enfeoffeth his Heir, that the same is no Collusion, for that he is bounden to provide for them. 3. Resolved, That the saving in the Acts of 32 H. 8. of Wardship and Primer Seisin, shall have relation only to Acts executed, and not to Wills. 4. Resolved, That if there be Grandfather, Father, and two Sons; And the Grandfather in the life of the Father, conveyeth his Lands to any of the Sons, the same is out of the Statute of 32 H. 8. because the same is not vulgar, nor usual, and the Father ought to have the immediate care of his Issues, but if the Father be dead, then the care of them belongs to the Grandfather, and then if he conveyeth any of his Lands to any of his said Sons, the same is within the Statute. But a collateral conveyance to any of his collateral bloud, who is not his Heir apparent, is not within the said Act. *Cook* 6. Part, Sir *George Cursons* Case.

12. A. by Deed Indented, for consideration of money, Bargained and sold Lands to D. and his Heirs; D. dyed 4. *October* 13 Jac. and after his death, the same day, *scil.* 4. *October*, 13 Jac. the Deed was enrolled, E. Cousin and Heir of D. being of full age, the Land being holden in *Capite*. It was Resolved in this Case, That E. was to sue Livery. And it was said in this Case, That this differs from all the Cases of Recovery by Fine Executory, and Covenant to raise uses, and the Estate vests in the Heir, though *quasi* Heir, that never was in the Auncestor, for this upon the Inrolment settles in Law, as between the Bargainor and the Bargainee *ab initio*, upon the Statute of uses, which doth joyn all the Estates to the uses *ipso facto*: And that Statute of Enrolments sayes, That in that Case, it shall not vest, except the Deed be enrolled; so that if it be enrolled, it doth vest, not by the Statute of Inrolments, but by the Statute of uses presently. And yet the Bargainee cannot bargain and sell to another before his own Deed be enrolled. Pasc. 15 Jac. *Dimocks* Case. *Hob.* 136.

13. A. was seised of Lands holden of the King in *Capite*, and dyed, B. his Son being a Lunatique. It was found after the death of A. That he was seised of the same Lands; the Queen Granted the Custody of B. to J. S. Afterwards by another Office

fice, it was found, That B. was of full age. It was Resolved in this Case, That the King was not to have any mean rates for default of Livery sued, or tendred, because no Lacheſs could be imputed to the Heir, being Lunatick before, and ever since the death of his Auncestor, and the Lacheſs of his friends should not prejudice him; otherwise it were if at any time he had been *sane memoriæ* since the death of his Auncestor. Pasc. 15 Jac. *Butcher's* Case. *Hob.* 137.

14. If the King hath a Ward, for cause of Ward, and after maketh Livery to the first Ward, the second Ward shall not sue Livery. *Finch.* 9.

15. A. seised of the fourth part of the Manner of D. holden of the King in *Capite*, made a Feoffment thereof to the use of himself for life, and after to the use of B. his Son in tail, and afterwards to the use of C. his younger Son in tail, and for want of such Issue, to the right Heirs of A. A. dyed, W. being his Son and Heir of full age. B. entred, as into his Remainder: All this was found by Office. The Question was, If the King ought to have Primer Seisin in this Case, or that Livery or *Ouster le mayne* should be sued by the Statute of 32 H. 8. It was Resolved by the Justices, That it should not, although A. had a Reversion which discended to *William* his eldest Son and Heir; and two Presidents were shewed of the like Resolution. The one, Trin. 16 Eliz. *Staveleyes* Case. The other, Pasc. 37 Eliz. in the Court of Wards, *Allets* Case. Trin. 7 Jac. in *Cur. Ward. Wills* Case. *Cook* Select Cases, 50, 51. *Lea*, 8. the same Case.

2. *Where an* Ouster le Main, *or a* Monstrans de Droit *will serve, and the party needs not to sue Livery; And where a man may Enter, and avoid the Possession of the King, or his Patentee, without* Ouster le Mayne, *or other Act done; where not.*

IN a Replevin, The Case, It was Enacted 11 E. 3. That the County of *Cornwal* should be a Dutchy, and that the Eldest Son of King *Edw. 6.* should be Duke of *Cornwal*, and so every Eldest Son, being Heir apparent of the Kings. *Ed.* 3. by Patent granted the Manner of M. which he had in the Right of his Crown, to be holden inseparably, and to go as the Dutchy went: Afterwards all escheated to King E. 3. and by discent came to King *Henry* the 8. who before, and also after the birth of E. 6. made a Lease of the Manner of *Mere*, and dyed. It was holden in that Case, That King E. 6. could not avoid that Lease; 1. Because it was but an Estate at Will in the Son of E. 6. 2. Because the limitting how it should go, and the annexing of it to the Dutchy, could not be by Charter without Act of Parliament. 3. Upon the Escheat, E. 3. was seized in his old first Estate, and a Son born after should not devest it. 4. Because no Livery was sued, or *Ouster le Mayne* by E. 6. when he was Prince, and now he should not avoid it, when he took upon him the Dignity of King. Mich. 1. *Mar. Dyer, Chasties* Case. But see *Cook* 8. Part, in the Princes Case. It was adjudged contrary: 1. That it was an Estate of Inheritance, by force of the Charter; which Charter was an Act of Parliament; for if it was not an Act of Parliament, such an Estate by the Rules of Law, could not have been Granted: And the reason of the Judgment in *Chasties* Case was, Because the Charter was not pleaded as an Act of Parliament, and that was the reason of that opinion in that Case, That the King had but an Estate at Will: Also in that Case it was holden, That *to instaute* that E. 6. was made Prince, that there needed no Livery, or *Ouster le Mayne*, to have the Lands out of the Kings hands. Also in that Case it was held, That by the Charter, the Prince had a Fee simple. *Quare* If for the Land Livery shall be sued; for that it appeareth 38 H. 6. Rott. Parliament, That *Edw.* 4. Son of *H.* 6. sued Livery for his Dutchy Lands. See the Case, 1 *Eliz. Dyer*, 168. to this Division.

2 A.

2. A. had Lands in Knight Service, to him, and his Wife, and the Heirs of the Husband, upon the Body of the Wife, the Reversion to the Right Heirs of the Husband, and Lands holden in Soccage in *Capite*, and made a Feoffment to divers persons, to the use of himself for life, the Remainder to his younger Son in Tail, the Remainder to his own right Heirs, and dyed; the eldest son for his Body was in Ward, and after the son came of full age, and then the Wife dyed. It was adjudged, That he should not sue Livery for the Knight Service Land, because it never was in the Kings hands; and for the Soccage Land, he was not to sue Livery, because the younger son was living, and had Issue. Pasch. 7 Eliz. *Dyer*, 326. 237. *Mack William's* Case.

3. Tenant in *Capite* made a Feoffment to the use of his Feoffees, and their Heirs, untill the Feoffor paid 100 l. to him and his Heirs; and then to the use of the Feoffor and his Heirs: the Feoffee dyed, his Heir within age, the 100 l. is paid to the Heir: By a *Monstrans de Droit*, the Lands were removed out of the King. In this case, it was holden, That although the Heir was in Ward, yet the Land shall be devested out of the King, and he should not have the value of the marriage upon tender. Hill. 13 Eliz. *Dyer*, 299.

4. A seised of Land, had Issue two Daughters, and made a guift in tail to the eldest, the remainder to his own right heirs, and dyed; the eldest Daughter entred, and afterwards was attainted of Treason. Afterwards, 31 H. 8, It was Enacted by Parliament, That the should forfeit, &c. which Act saved to strangers their Rights and Titles, reversions, remainders; but there was no word of Entry in the Act. It was Resolved in that Case, That the Entry of the other Daughter for her moyty, was lawful upon the Kings Patentee, and that her Entry was good, without either Petition or *Monstrans de Droit*. Trin. 16 Eliz. *Dyer*, 325. *Sayes* Case.

More Livery *and* Ouster-le Mayne, *and* Primer Seisin, *and* Meane Rates.

1. NOte. It was Resolved, That Mean Rates, and not suing of Livery by the Heir of full age after the death of his Auncestor, who held in *Capite*, were not pardoned by the General Pardons of 27 & 29 Eliz. Pasch. 7 Jac. in the Court of Wards. *Portmans* Case. *Lea*, 6.

2. A man seised of Lands in the right of his Wife in *Capite*, having Issue by his Wife, aliened the Land in Fee, then the Wife dyed, her heir of full age; the Alienee held the Lands for 10 years, after which, Office was found. It was in this case Resolved, That the husband Tenant by the Curtesie did passe a good Estate to the Alienee during his life, and not avoidable by the Heir, and that Mean Rates were not payable for that time. And it was Resolved, That Mean Rates are not chargeable upon the Land till Entry was made by the Heir, which was not before the Office found. Trin. 7 Jac. in the Court of Wards. *Sparrowes* Case. *Lea*, 10.

3. It was found by Office, 17 Eliz. That A. seised of Lands in Fee, holden in *Capite*, 35 H. 8. devised all his Lands from his right Heir to strangers; and afterwards 2 E. 6. dyed seised of the premisses, C. his Cosen and next heir being of the age of 37 years, and that J. S. received the profits of the Lands during the minority of C; The general Pardon of 5 Eliz. was granted. It was Resolved in this Case, That the taking of the profits of the Lands during the minority of C, was no Intrusion, because there was no Office then found for the King: And the Lands could not be the Wards Lands at the time of the Pardon, because there was no seizure of them, nor Office found to entitle the King; and the profits during the Minority of C. are discharged by the Pardon. Mich. 12 Jac. in Cur. Ward. Sir *Warham St. Leger's* Case. *Lea*, 48.

¶ 4. A. Tenant of a Messuage and Lands in *London* holden in *Capite*, made her Will, and thereof made B, C, and D. her Executors: and by her said Will charged the said Messuage and Lands; *viz.* She gave to E. her Son and his Heirs 30 l. *per annum* for ever, and to F. her Grand-Daughter 10 l. *per annum*, and her Heirs for ever: And devised to her Executors, and to the Heirs of her Executors for ever, all her Free-hold Lands, Leases, Goods, &c. Except such and so much Lands as should amount yearly to 20 l. *per annum*, payable betwixt her Son and Grand-Daughter, and dyed. The Executors entred into the Messuage and Lands, the Daughters of E. her Son being her Co-heirs: It was Resolved in this Case, That all the Lands by the Will passed to the Executors, and were well devised, as also the Rents and Legacies out of the Lands to the Legatees, by the Custome of the City of *London*; and that there was no *Livery*, *Primer Seisin*, nor *Meane Rates*, due in respect of the said Devise. Pasch. 17 Jac. in Cur. Ward. *Rigbeys* Case, *Lea*, 61. Trin. 13 Jac. in *Cur. Ward. Whitneys* Case. *Lea*, 53. acc.

5. Note.

5. Note, It was Reſolved by the Court, That if Land holden in *Capite* diſcend or come to a Lunatique, who is of full age at the death of his Anceſtor, and ſo continueth, That in that caſe, the King ſhall not have Mean Rates for lack of ſuing Livery, becauſe he remaineth a Lunatique, and ſo is diſabled to ſue his Livery. Paſch. 15 Jac. in the Court of Wards. *Metcalf* and *Barrington's* Caſe. *Lea*, 56.

6. Tenant in *Capite* conveyes his Land by Act executed in his life, to the uſe of himſelf for life, the remainder to his Son and Heir in tail, with divers Remainders over, and after is attainted of Treaſon, and dyeth: It was Reſolved, That in that caſe, the King ſhould have neither Wardſhip, nor Primer Seiſin: for the King ſhall not have Wardſhip, nor Primer Seiſin, but where there is an Heir general or ſpecial; For Wardſhip or Primer Seiſin ought to be of ſome Land of ſome Anceſtor who hath an Heir; and a perſon attainted hath no Heir: yet in ſome caſes, the King ſhall have Wardſhip and Primer Seiſin, although the Father be attainted of Treaſon. And therefore if Tenant in tail of the Guift of the King by Knights-Service, before the Statute of 26 H. 8. is attainted of Treaſon, and dyeth, his Son within age; In that caſe, although the Blood be corrupted, yet by force of the Statute of *Donis*, the Son ſhall be in Ward, and in ſuch caſe ſhall pay Primer Seiſin. *Cook* 3. Part, 165. *Digby's* Caſe.

7. Grandfather, Father, and Son; the Grandfather ſeiſed of a Houſe holden of the King in *Capite*, and of other Lands holden in Gavelkind, of other Lands in Socage, Deviſeth part of his Lands to his Son in tail, and other part of them he deviſeth for the advancement of his Children, and dyeth, his Son within age, all the Grand-Children being alive: It was Reſolved in this Caſe, 1. When he Deviſeth to his Son, in ſuch caſe, the [ſaving] in the Statutes of 32 H. and 35 H. 8. gives to the King Wardſhip, and Primer Seiſin; and therefore the King ſhall have the third part of the whole. 2. The King ſhall have the third part out of every ſeveral part, ſo as the charge ſhall be equal. *Cook* 9. Part. *Matthew Mewes* Caſe.

8. Tenant in *Capite* dyeth, his Son and Heir is made a Knight in the life of his Father, the Son tenders his Livery after the death of his Father, before his age of 21 years, and continues it. Two points were, 1. Whether the profits of Lands were ſaved to the King by the Tender and Continuance. 2. Whether the King ſhould have the Mean Rates within the age of 21 years: Both which points were Reſolved againſt the King: And the King ſhould have Primer ſeiſin, as if he had been of 21 years, at the time of the death of his Father; becauſe the King by making of him Knight, had made him to be of full age. *Cook* 8. Part, Sir *Hen. Conſtables* Caſe.

9. If the Son and Heir, or any other Son, purchaſeth Lands of his Father (*bona fide*) for money, this is no preferment of a childe, within the Statutes of 32 and 34 H. 8. and therefore there ſhall be no third part taken of theſe Lands for Wardſhip, or Primer Seiſin, becauſe it was Land purchaſed by the childe, and not given by the Father to prefer him. *Cook* 2. Part, in *Butler* and *Bakers* Caſe.

10. If a man have Lands holden in *Capite*, of the yearly value of 20 l. and Soccage Lands of 10 l. yearly value; He in ſuch caſe may deviſe all the Lands holden, and leave the Soccage Land wholly to deſcend for Wardſhip and Primer Seiſin, and the Heirs ſhall Sue Livery for one of the Acres holden, though no land deſcend to him, if the Land be holden of the King by Knight Service in *Capite*. 20 Eliz. *Calthrops* Caſe, vouch. in *Cook* 3. Part, *Butler* and *Bakers* Caſe.

11. A. Tenant in Fee of a Manor holden in *Capite*, lying on the North ſide of the River of S. and B. owner of the Manor of D. holden in Knight Service, parcel of the Dutchy of C. the River on the South ſide running in a crooked manner and courſe, between the two Manors; the Lords of the Manor by conſent, cut a Courſe for the Water to run ſtreight: The Owner of the Manor of B. by conſent with A. took the profits of the ſeveral crooked Necks of the South-ſide of the ſaid ſtreight Brook: And the Owner of S. took the profit of the Nooks of the North ſide; A. dyed, his Heir of full age; B. continued in Poſſeſſion, and took the profits in the South; and then B. dyed his Heir of full age. The Queſtion was, If there were ſuch a thing ſeized of the South ſide of the ſtreight River, as ſhould cauſe the Heir of B. to ſue Livery. It was Reſolved, That B. was but a Tenant at ſufferance, and that there is no Deſcent of Nooks of Lands ſo exchanged. Hill. 16 Jac. in *Cur. Ward. Green* and *Lapworths* Caſe. *Lea.* 6.

12. A. ſeized of the Mannor of D. holden of the King in *Capite*, dyed, having Iſſue B. his Son, who was in Ward to the King. It was found by Office, that B. dyed being in Ward, and that L. and E. were his Siſters, and of full age; L. departed out of the Realm, and became a Nun profeſſed, contrary to the Statute of 3 Jac. And it was found, that by reaſon thereof, L. ought to take no profit of the Land by Conveyance or Diſcent, till ſhe returned; but that E. being her next of Kin and Blood, ought to receive all the profits of the ſaid Land. It was Reſolved in this Caſe by the

two Chief Justices, and Chief Baron, Assistants to the Court of Wards, That E cannot as next of Kin to the said L. challenge of Right to have Livery out of the Kings hands of the part of L. by vertue of the Statute of 3 Jac. neither by the words nor intent of the said Statute, but that the King may retain the moyty of the said L. in his own hands, until she return, and take the Oath appointed by the Statute. Pasch. 15 Jac. in *Cur. Ward. Tredways* Case. *Leon.* 59.

13. A. seized of the Mannor of D. holden in *Capite*, sold the same to B. and E. his Wife, and the heirs of B. to the use of the said B. and E. and the Heirs and Assigns of the said B; B. and E. his Wife levyed a Fine of the said Mannor to C. and D. to the use of B. and E. during their lives, the remainder to the use of J. S. and the Heirs of his body, upon the body of the said E. to be begotten, and for want of such Issue, to the use of J. D. and the heirs of his body, with divers Remainders over. The Question was, If E. after the death of B. should be enforced to sue Livery, for that third part of the said Lands, by reason of the Fine levyed. It was Resolved in this Case, That after the death of B. found in the Office, there needed not at all any Livery to be sued or tendred, for that the Lands being purchased in the Names of B. and E. E. joyning in the Fine, had no greater Estate then she had before, and then the latter Estate was no Conveyance for the advancement of the said E. within the Statute of 32 H. 8. Trin. 15 Jac. in *Cur. Ward. Mansfields* Case. *Leon.* 51.

14. A. seised in Fee of the Mannors of B. and C. in the County of G, and of the Advowson of the Parish Church of A; and of, and in, the Mannor of H. in the said County, with the Appurtenance, and in divers Messuages, Tythes and Hereditaments in C, D, and H, being several in Deed, Use, and Occupation, parcel of the said Mannors, or to them belonging, or thereof occupied; dyed seised, N. his Son and next heir within age, part of the said Lands being holden in *Capite*: It was Resolved in this Case, That the said Office as touching any Tythes, was in part void, in regard the word [*Reamos*] was so general and uncertain, and that Tythes cannot be parcel of a Mannor; and therefore that the Office doth not entitle the King to any Tythes in Fee. Hill. 9 Jac. in *Stephens* Case.

See more of *Livery* and *Ouster le Mayn*, in the Titles of *Gard*, and *King*.

London.

SEE for *London*, *Lib.* 1. Title *Courts*, and Title *Customes*.

Maintenance.

Maintenance.

Maintenance what: and of how many ſorts. What ſhall be ſaid to be Maintenance; what not, And what ſhall be Maintenance within the ſtat. of 32 H.8. c. 9. *what not.*

1. MAintenance is of two kinds; viz. *Maintenetio Ruralis*, with a maintening of Quarrels or ſides in pleas, in taking poſſeſſions, or keeping poſſeſſions, and this kind of Maintenance is puniſhable only at the Kings ſute; The other which is called *Maintenetio Curialis*, that is for Quarrels or ſides in Courts, is Maintenance by Champerty, to have part of the Land or thing in ſute, or any thing out of it, and Embracery, which is labouring the Juries, and theſe may be puniſhed, either at the Kings ſute, or at the ſute of the party. M. 7 Jac. in Cam. Stellat a djudge, 13 E. 4. 16. *Cook* 1. *p.* Inſtit. 368.

2. Note, It was reſolved by the Court, That a if man do aſſign an Obligation to another for a precedent Debt, due to him by the Aſſignee, in that caſe it is not Maintenance, but if he aſſign it for a Conſideration then given by way of Contract, that is Maintenance. Vide 34 H. 6. 30. M 38 Eliz. in Co. B. *Noy* 52.

3. If a man Covenant to have a Rent out of the Land of another, which is not in ſute, this is not Champerty or Maintenance: but if he do maintain, an Action of Maintenance lyeth againſt him, but not a Writ of Champerty: but if the Officers of any Court do maintain any plea in their Courts to have part of the ſame, or other profit by the Recoverie in that Action, the party grieved may maintain an Action of Maintenance or Champerty for ſo doing: and therefore Vide 18 E. 4. 2. by *Pigot*. If a Iuror giveth his Verdict, and after the Verdict given he requireth the Steward of the Court, that he give judgement in the Action for the Plaintiff, this is a ſpecial Maintenance.

4. It was ſaid by the Court, That an Attorny oweth to his Client fidelity, ſecrecy, skill, and diligence, that he oweth him not any diſhoneſt or undue practice: for by the general Obligation to Iuſtice, and the Court where he ſerveth, he is forbidden to do any thing to pervert Iuſtice, and therefore if he take a Bribe or Reward to raſe a Record, or cauſe another Attorney to appear on the other ſide, and confeſs the Action, or the like, he is puniſhable for it. M. 11 Iac. in Co. B. *Yardley* and *Elliot's* Caſe *Hob.* 9.

5. An Attorney brought an Action upon the Caſe againſt another for theſe words, *viz.* Thou art a common maintener of ſutes and a Champerter; and it being found for the Plaintiff, judgement was given only upon the word Champerter, for it was ſaid that there is maintenance lawful and unlawful; and an Attorney may and ought by his Office to maintain his Clients Cauſe; and yet if in ſuch Caſe an Action of Maintenance be brought againſt him, he cannot plead Not guilty, but he muſt juſtify; and an Attorney may be well ſaid a common Maintainer, becauſe he is common to as many as will receive him; but to be a Champerter is an Offence againſt his vocation, and it was the opinion of *Hob.* Chief Iuſtice, that if an Attorney follow a Cauſe to be paid in groſs when it is Recovered, that is Champerty, for which an Action lieth againſt him. Fi. 14 Iac. in Co. B. Bar and *Barnabies* Caſe, *Hob.* 117.

6. W. brought an Action upon the Caſe againſt G. and declared, that whereas he at the requeſt of the Defendant did ſollicite and proſecute an Action of Treſpaſs between the ſaid G. plaintiff, and I. S. defendant; the ſaid G. did promiſe to pay the ſaid W. 100 *l.* the Defendant pleaded *Non aſſumpſit*, and it was found for the Plaintiff. It was moved in arreſt of judgment that the Sollicitng and the proſecuting of another mans ſute was not lawful for any, but for an Attorney or Councellor at Law. But the Court did all agree, That it is lawful to be a Sollicitor, if it be not for Maintenance, or that he lay not out money for Maintnance. M. 23 Eliz. in B. R. ſee *Worthington* and *Gaſtons* Caſe *Hob.* 67.

7. Note, It was holden by *Cook* and *Hobbart* Chief Iuſtices in the Star-Chamber, That where the Tenants of the Mannor of Gilſeland, claiming to hold by Tenant Right, were impeached by the L. *W. Howard* Lord of the Mannor in the Star-Chamber, who ſuppoſed their Eſtates to be void in Law, That they might all joyn together in a peaceable manner to defend the Cauſe being common to them all; and therefore although ſome particular perſons were ſued, yet they might defend the ſute upon their own Charges, becauſe that ſince the Title was one againſt all it was in effect but one defence, and one Defendant for the Tryal in one mans Cauſe tryed all; but in ſuch Caſe they muſt not joyn themſelves together by Oath. Paſch. 14 Iac. in the Star-

Chamber. The Lord *St. Howard* against *Bell*, *Dawes* and others. *Hob.* 92. and ſo it was adjudged Mich. 14 Iac. in *Beech* and *Bamſter's* Caſe. Vide ibid.

8. It was Reſolved by the whole Court of Star-Chamber, That if a man doth aſſiſt one who is Plaintiff in that Court, that it is not Maintenance, becauſe it is for the benefit and advantage of the King: But if a man doth aſſiſt an Informer in another Court in an Information upon a Penal Law, the ſame is ſuch a Maintenance for which he may be puniſhed in this Court. M. 6 Iac. in the Star-Chamber, *Godb.* 159.

9. Note, That Maintenance doth not lye, for Maintenance in the Spiritual Court, neither by the Statute of 32 H. 8. nor by the Statute of 1 H 2. cap 4 and ſo it was ſaid it was adjudged in *Couſtantine's* Caſe, vid *Fiſdail* and *Bevington's* Caſe, *Noy* 68 vid. M. 40 Eliz. in Co. B. *Goldſbrough* 113. the ſame Caſe.

10 In Debt upon the Statute of 32 H. 8. c 9. of pretenſed Titles, the Plaintiff declared that the Defendants did grant, bargain, and to ferm let a Meſſuage and 11 acres of Lands appertaining to it, for years, of which Lands and Tenements the Defendants nor any of their Anceſtors were in poſſeſſion of thoſe Lands nor of the Reverſion nor remainder of them, nec took the Rents or profits of them the ſpace of a year next before the ſaid grant, bargain, or demiſe made upon which Declaration the Defendant did demurr in Law, and diverſe Exceptions were taken to the Declaration: one was, becauſe the Plaintiff had not ſet forth the certain number of years: It was Reſolved in that Caſe, That all as to promiſe for years was againſt the Statute, and ſhall be intended within the danger of the Statute: but becauſe the Plaintiff had not averred, that the Title and Right of the Defendants was pretenſed: the better opinion of the Court ſeemed to be, that it ſhall be intended that the Defendants were in poſſeſſion of the Land, becauſe it is ſhewed that they made the leaſe, and he that makes a leaſe ſhall be intended in poſſeſſion, and if it be ſo, although it be but poſſeſſion for an hour it is out of the danger of the Statute. Hill. 7 E. 6. Plow. Co. 78. 79.

11. A. Covenanted which his eldeſt Son and two others do ſtand ſeiſed to the uſe of himſelf for life, the remainder to his elder Son in tail, the remainder to himſef in tail, the remainder to B. his Baſtard Son in tail, and if any in the remainder ſhall make diſcontinuance or prejudice to any of the remainders his eſtate ſhall ceaſe and they ſhall ſtand ſeiſed to the uſe of the next in remainder. A. ſurrendred and granted all his Eſtate to to the eldeſt Son, who levyed a Fine with proclamations, and five years paſſed, B. the Baſtard ſuppoſing he had title in the entire, made a Leaſe to try the title, and within the year an information upon the Statute was exhibited. It was the opinion of all the Juſtices, that it being but a Term, that it was within the Statute according as it was holden in *Patrider's* Caſe M. 23 El. *Dyer* 374. *Worſley's* Caſe. But vide Mich. 31 Eliz. in Co. B. Rott. 2811. *Finch* and *Cockham's* Caſe, where it was adjudged, That a leaſe for years to try a title is out of the Statute, becauſe it is in courſe of Law. Vide *Cook* 1. p. Inſtitut. 369. acc.

12. If one who hath a pretended Right or Title to Copyhold Land bargains and ſells the ſame to another, it was holden it is within the Statute of 32 H. 8. For the Statute ſaith, If any buy, bargain, ſell, &c. any Right or Title in or to any Lands or Tenements: So as theſe words any Right or Title, extends to all manner of Rights and Titles, and ſo by conſequence to Copyholders. Paſch. 31 Eliz. in B. R. *Kite* and *Quenton's* Caſe, *Cook* 4. p. 25. 26.

13. In an Information upon the Statute for buying of Titles, It was found by Verdict, That Lands were conveyed by the Husband, to the uſe of himſelf and his wife in ſpecial tail, the remainder to the husband in general tail, the remainder to the wife in Fee, and after the husband enfeoffed diverſe men thereof, and the feoffees continued in poſſeſſion diverſe years, and after the husband died, and then the wife by Indenture ſealed and delivered from off the Land, made a Leaſe to the Defendant, which well knew all this matter for 60. years if ſhe ſhould ſo long live, and that the wife was Siſter to the Defendant by the Mother: and if this was a Leaſe within the Statute of 32 H. 8. was the Queſtion. It was the opinion of the Juſtices, that it was, for the miſchief was, That when a man had title to Land he would let it to another to have maintainance, and imbracery, and make contentions and ſuits, for remedy whereof the Statute was made. For if a man have a Title he may recover according to his Title: But it was ſaid, That if a man doth recover by Formedon or *Ceſſavit*, and makes a leaſe, this is not within the Statute, although he hath not been in poſſeſſion by a year: It was Objected out of 6. E. 3. That if one Brother maintain the other this is not within the Statute of Champerty; The Court agreed that one Brother might maintain another: But ſaid, If he take a leaſe of him he is within the Sature of 32 H. 8. for this Statute is to prevent a general miſchief. And it is as great a miſchief, if one Brother takes a leaſe of another as if a ſtran-

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ger take it. It was adjudged againſt the Defendant, Mich. 31 Eliz. in Co. B. *Slywright* and *Page*'s Caſe. *Goldesbr.* 101. 102.

14. An Information was by the Kings Attorney againſt H. and others upon the Statute of 32 H. 8. of Maintenance, where the point was, A man was out of poſſeſſion, and recovered in an *Ejectione firmæ* in May. 2. Car. and *Habere faciat poſſeſſionem* was awarded. And 29. Sept. 4 Car. he ſold the Land, and whether he might ſell preſently or not, was the Queſtion. It was holden that he being put in poſſeſſion by Writ, might ſell preſently, and ſo it was ſaid, It was adjudged in Sir *John Offley*'s Caſe 7 Car. in this Court. *Barkley* Juſtice, If a Diſſeiſor doth recover in an *Ejectione firmæ*, it he ſell the Land it is a pretended Title. *Jones* Iuſtice, vouched *Page*'s Caſe. That if a man be put out of poſſeſſion for 7. years, and after he doth recover in a Formedon, that he may ſell the Lands preſently. And in this Caſe Mr. *Brownlow*'s Caſe in the Star-Chamber was put, That a ſute in Chancery cannot make a Title pretended, nor Maintenance. Hill. 8 Car. in B. R. the King and *Hill*'s Caſe. *Godb.* 45.

15. One A. bought a Title thus, That if he could recover it he ſhould pay 100 *l.* otherwiſe nothing: He was ſued in the Star-Chamber for the buying and maintenance of ſutes after: The buying was layd upon the Statute of 32 H. 8. after the year, ſo as for that part he could not be puniſhed there. For the Maintenance, the Defendants council ſaid it was lawful, becauſe he had taken the Eſtate of the Land, ſo he maintained but his own Cauſe. But is was the opinion of the Court, till he had recovered it, it was not in effect and truth his, becauſe he was to pay nothing if he recovered it not, and it was not meant to be given him freely, ſo all the while he maintained the Title at the peril of the Owner. It being a meer deviſe to transferre to himſelf another mans Title to follow upon a caſual match, was to be met withall in time: and ſo he was ſentenced. Hill. 13 Iac. in Star-Chamber. *Flowr*'s caſe. *Hob.* 115.

16. Note, Upon the Statute of 32 H. 8. c. 9. of Maintenance and buying of Titles, theſe points have been adjudged. 1. That if A. be Owner of Land in poſſeſſion, and B. who hath no right, contracteth with another for the Land, although that the grant upon it be meerly void, yet the grantor and grantee are both within the Statute. 2. That if the Diſſeſſee being out of poſſeſſion, contract with another for the Land, he thereby makes his Right which was good, a pretenſed Right, and the Grantor and Grantee are both within the Statute. 3. That he who hath the abſolute Owners ſhip of the Land, ſuch an Owner may at his pleaſure bargain or contract for the Land, and needs not tarry a year before he makes ſale of it, or a contract for it, and therefore the Mortgager who redeems his Lands may ſell it within the year: And if the Diſſeiſee releaſeth to the Diſſeiſor, the Heir of the Diſſeiſor, although that he hath an antient Right, yet becauſe his poſſeſſion is not lawful, if he bargaineth and ſelleth the Land before he hath been in poſſeſſion by the ſpace of a year, he is within the Statute, becauſe the Heir of the Diſſeiſor hath right to the poſſeſſion. 5. That the buying of a leaſe for years is within the Statute, and the Defendant ſhall forfeit the value of the Land. But if a man makes a Leaſe for years to try a Title in an *Ejectione firmæ*, the ſame if out of the Statute, becauſe it is in courſe of Law. But if he makes it to a Great man, or to another to ſway and countenance the Cauſe, the ſame is within the Statute. 6. A Cuſtomary Right, or pretence to it, is within the Statute. 7. If there be Tenants for life the remainder in Fee by good Title, he in the remainder may obtain the pretended Right or Title of a ſtranger, becauſe the ſame is a means to extinguiſh ſutes and troubles, and cannot prejudice any. 8. If a Diſſeiſor makes a Leaſe for life, or years, the remainder for life in Tail, or in Fee: he in the remainder cannot take any promiſe or covenant that when the Diſſeiſee hath entred upon the Land and recovered it, that then he ſhall convey the Land to him in the remainder towards the particular Eſtate, becauſe the ſame is not lawful nor a reaſonable means, and the words (Reaſonable Means) in the Statute are intended to be Releaſe confirmation, or conveyance, or which doth amount to ſo much. *Cook* 1. p. Inſtit. 369. acc.

17. It was reſolved by the Iuſtices, That if a man makes a Leaſe for 3 years, or ſuch a ſmall time to his ſon, or ſervant, to try the title in an *Ejectione firmæ*, or if it be made to another inferior, by a ſuperior, who cannot countenance the ſute, it ſhall not be intended maintenance, nor buying of Titles which ſhall be puniſhed within the Statute. *Fr.* 7 Iac. in Co. B. *Brownl.* 2. p. 271.

18. In an Action upon the Caſe brought by an Attorney, for words ſpoken of him, the words were theſe, *viz.* He, meaning the Plaintiff, ſtirs up men to ſutes, and promiſeth, that if he recovereth it not for them, he will take no Fees; and yet in a ſute which he undertook for me wherein I was overthrown, he took charges of me. It was moved in arreſt of judgment, that the words were not actionable, becauſe that an Attorny may ſtir up

men to ſutes, if their ſutes be lawfull, 17 Car. in B. R *Gibſon* and *Baxter's* caſe acc. Alſo an Attorney may preſent his Clients cauſe without Fees, and yet it is not maintenance. *Fr.* 16 Car. *Hall* and *Saad's* caſe. But in the principal caſe, it was adjudged, That the words are actionable, for the words here ſpoken, are, that he ſtirred up ſutes unlawfully, and ſtirring up of ſutes, and making of bargains unlawfully, is in it ſelf unlawful, and great inconveniences grow by ſuch manner of practizings; and the words are actionable, becauſe they tend to the ſlander of the Plaintiff in his Livelyhood and Practice. And in this caſe it was ſaid, That Attorneys ought not to go to Market to get Practice. M. 1749. in B. R. *Smith* and *Andrew's* caſe. *Styles* 184.

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2. *Maintainance of Writ.*

1 A Formedon was brought againſt B. C. and D. by A. B. and C. appeared by one Attorney, and D. by another Attorney, and afterwards B. and C. confeſſed the action; D. ſaid, that he held joyntly at the time of the Writ brought with B. without that that A. had any thing in the Land, at the time of the Writ brought; and as to his moyte of the Tenements he vouched a ſtranger; the demandant maintained his Writ ſcil. that the 3 were joyntenants as the Writ ſuppoſed: and the ſame was holden to be a good manner of pleading; and thereupon Iſſue being taken, it was holden by the Court to be a good Iſſue. M. 26 H. 8. *Dyer* 6.

2 Husband and wife *Ceſtuy que uſe* before the Stat. of 27 H. 8. After the Statute, A Writ of entry in the Poſt was brought againſt the Husband only who pleaded joyntency with his Wife, the Queſtion was, If he ought to ſhew the Statute, It was the opinion of the Court, that he ought to do it as at the Common Law he ought to ſhew of whoſe feoffment. Then it was moved, whether the demandant might aver the Husband *Perſon* of the profits only, it was the opinion of the Court, that all pernancie of profits was taken away by the Statute. *Peſe.* 28 H. 8. *Dyer* 32.

3. In a Formedon in the remainder by F. 1. The Tenant for the moity vouched B. as Son and Heir of A. Son and Heir of C. It was holden, That is no good counterplea to the vouchee, That C. the Grand-father of the vouchee nor any of the Anceſtors of the vouchee whoſe Heir &c. never had any thing except joyntly with M. who ſurvived, with averment the Grand-father aliened not &c. without counterpleading alſo the ſeiſin of the vouchee himſelf, except he be vouched as within age, 2 As to the other moity (except the moity of 7 houſes) he pleaded a Fine with proclamations and 5. years encurred in bar, the Plaintiff counterpleaded that he had nothing. 3 As to the forſpriſe, pleaded joyntency by Fine which ſhall abate the Writ preſently, except the Demandant can conſeſſe and avoid it But as to that, It was the opinion of all the Iuſtices, joyntenancy of parcel ſhall not abate all the Writ, although the demand be of an entire thing, as of a Mannor, but otherwiſe it is of Non-tenure, becauſe the Writ ought to have a forſpriſe there; contrary of joyntency: and it was holden that becauſe in the principal Caſe, joynttcury was pleaded after voucher and barr, it was prepoſterous, and was not to be regarded. Trin. 12 Eliz. *Dyer* 291. *Fitz-William's* caſe.

3. In a Writ of Entry in the *Quibus* by K. againſt B. and T. B. pleaded Non-tenure in abatement, F. took the Tenancy upon him, and pleaded in bar the Feoffement of one W. and H. to him in Fee. The Demandant as to the Plea of B. in abatement of the Writ, averred him a T. to be tenants of the Freehold; upon which Iſſue was joyned, and as to the plea of T. he ſaid, That his Father was ſeiſed, until by the ſaid Feoffor diſſeiſed, who ſo in by diſſeiſin enfeoffed T. and that afterwards his Father died, and that he as Son and Heir entred upon T, and was ſeiſed in Fee in his Remitter, untill by the Tenants diſſeiſed, and did not averr, *Et hoc paratus eſt verificare.* T. rejoyned and traverſed the Diſſeiſin by the Feoffors to the Father of the Demandant, upon which they were at Iſſue: At the day of appearance the Demandant would have relinquiſhed his firſt Iſſue, becauſe the Demandant was not bound to maintain his Writ, but he might have demurred upon the plea of Non-tenure, but he was not permitted ſo to do: and upon the Evidence it appeared, that B. before the Entre of the Demandant was Leſſee at Will to T. and payed him Rent, and that he entred upon the Demandant, claiming his former Eſtate. And is was the opinion of the Court, that they were Diſſeiſors and Tenants, and that the Termor could not qualify his own wrong: and it was found for the Plaintiff: and judged accordingly. M. 4 Ma. *Dyer* 134.

Mannor

Mannor.

Mannor, what it is. Of what it Consists, and of the Incidents to it, what will passe by the Grant of the Mannor. Of the several kinds of Mannors. Nominal or in Reputation; and what time shall be sufficient to make it a Mannor in Reputation.

1. A Mannor is a Lordship or Seignory which doth consist of Demeans and Services; and of Tenants to the same, either Freeholders or Copyholders, which hold by certain Rents or Services. Or a Mannor is a Seignory Compounded of divers things, Houses, Lands Arrable Pastures, Meadows, Woods, Rents, Advowsons, Services of Freeholders, Copyholders, To which a Court Baron is incident; Such a Mannor cannot be erected at this day, but it ought to be of long continuance of time, unlesse it be in the Case of the King, (who as some hold) may create a Mannor at this day. In the Court of the Mannor the Freeholders and Suters are the Judges; And if there be not four Suters at least, a Court for it cannot be holden; for it must be before Suters, and therefore where there is but only one Freeholder it cannot be properly said a Mannor; For if all the Freeholds Escheat to the Lord; or all the Tenants of the Mannor die except one; the Mannor is gone, and cannot be revived again.

2. A Case was pleaded of a Mannor, whereof the Tenements in which were parcell, & issue was joyned *quod non dimisit Maurium*; and the Jurors found that there were not any Freeholders; but divers Copyholders of the said Mannor, and that it was known by the name of Mannor. In that case it was adjudged, That although the same was not a Mannor in law for want of Freeholders and because an issue is triable by lay gents, and that in truth the Tenements in which passed by the Lease; It was adjudged for him who pleaded the Demyse of the Mannor, 23 Eliz. *Vines* and *Durhams* Case, vide *Cook. 6.* Part 67. acc.

3. The Tenancy being a Mannor holden by 12*d.* of a Mannor, which is a Menalty, and holden by 6. *d.* and the Mesne Enfeofs the Tenant of the Mannor, which is the Menalty, now he holds both the Manors of the Lord Paramont by Joyntency by 6. *d.* and the Lord shall avow upon the Tenant because that both the Mannors are holden, of him by 6.*d.* So it had been if that the Tenancy had Escheated to the Menalty: and one Mannor had been parcel of another Mannor; and there the Tenancie hath not lost the name of a Mannor for the Tenements which were holden of the Tenancie are not now holden of the other Mannor which was the Menalty, and note, that it was there adjudged, That one Mannor might be parcel of another Mannor, vide 32. H. 6. 9. acc.

4 A Prior made a Lease for life of the Demeasns of a Mannor, rendring Rent, The Priorie came to the Crown by the Statute of Dissolution, and after the Dissolution the King made a Lease for years of the Mannor, it was adjudged in that Case, That by the name of the Mannor the Rent, and the Reversion of the Demeasns did passe; and though there was a severance for a time; yet the name of a Mannor did remain. M. 7. Eliz. *Dyer.* 233. vide *Cook. 6.* Part. 66. in Sir *Maile Fincher's* Case acc.

5. Note. It was resolved, that when the Lord of a Mannor having many antient Copy-holds in one Town granteth the Inheritance of all the Copy-holds to another, That in such Case the Grantee may hold a Court for the Copy-hold Tenements, and take surrenders to the use of others; For although it is not a Mannor in Law, because it wanteth free Tenements, yet as to the Copy-hold Tenements the Grantee of such a Mannor may hold a Court to make Admittances and grants Copy-holds: For every Mannor which consisteth of Free-hold and Copy-hold Tenements comprehendeth in it self 2. Courts; one called the Court Baron, which is the Court of the Free-holders, in which Court the suters with the free Tenants are Judges, another Court is for the Copy-holders, and there the Lord, or the Steward of the Mannor is the Judge: and therefore in the principal Case, when the Lord Grants the Inheritance of his Copy-holds to others such a Grantee hath a Copy-hold Mannor and may grant Copyholds; and it was holden in this Case, That although the Lord by his own Act cannot make of one Mannor after the Common Law sundry Mannors consisting of Demeasnes and Free-holds, yet he may make a Customary Mannor as before is said Pasc. 3. Eliz. in B. R. *Melwich* and *Luthers* Case. *Cook.* 4. Part 26.

6. The Case was thus, A man seised of a Mannor made a Lease of 10. Acres parcel of the Demeasnes for 10. years rendring Rent, and afterwards he demised the whole Mannor by the name *Manerii sui de* D. *&c.* for 20. years, the Term to begin at Mich. next following. Now whether the Interest, or Lease of 10 years in the said 10.

Acres

Acres does passe to the Lessee of the Mannor after the expiration of the first 10. years, although no Attornment was had by the first Tenant was the question. It was holden by the Iustices that it did passe, but not as a Reversion, but as a Member and parcel of the Mannor, for the 10. Acres were never severed from the Mannor, but the Freehold and Fee of them remained alwayes parcel of it, and of the body of their Mannor. Pasc. 18. Eliz. *Dyer* 350.

7. A man seised of a Mannor, made a Lease of it for years excepting one Acre. *Bromly* conceived, that this Acre was not now parcel of the Mannor, but severed from it, and become in grosse, as of an Advowson except, where the whole Mannor is Leased the Advowson is become in grosse: and if the Mannor be recovered against the Lessee the Acre excepted is not recovered. But *Portman* held the contrary, and took a difference betwixt a Lease of the Mannor for life with such exception, and a Lease for years. M. 2. Ma. *Dyer* 103. vide the Case before for the Resolution of this.

8. In an *Ejectione firme*. It was assigned for Error, because the Writ was in *Manerium de A. ac in unum Messuagium, unum Horreum, &c.* and in the Declaration it appeared that the Demyse was *per hæc verba. Totum Manerium de A. Cum suis pertinentiis & in Domibus terris arrabilibus, &c. Advocatione Ecclesiæ ibid. Wardis, Heriotis, perquisit Curiæ boscis subs Maerio pertinent. exceptis & reservatis*: So as it appeared the whole Mannor was not Let: Also the *habendum* in the Deed was but *dictum manerium cum omnibus suis pertinent.* without speaking *de cæteris præmissis*: In that Case it was holden by the Iustices, that the Exception of the Advowson, and other things was void, and that all the Services of the Mannor passed, because it is part, and the substance is the Mannor, and the Lease is *Manere o specificat*; and that th. Rent is but parcel of the Mannor. Hill. 1. M. *Dyer* 96. in *Cliffords Error.*

9. A Formedon was brought of Lands in A. B. and C. The Defendant pleaded a Fine of all by the name of the Mannor and Tenements in A. and B. It was Objected that he said nothing to the Land in C. But the opinion of the Court was that by the name of the Mannor, the Land in all the Villages should passe, and that the Defendant may if he will plead as to the Land in C. that it was not Comprised in the Fine. M. 15. Iac. in Co. B. *Bromlo.* 1. Part 155.

10. A. Was seised in Fee of a Capital Messuage, and 100. Acres of Land, known time out of mind by the name of the Mannor of F. to which the Advowson of the Church was appendant, which by mean conveyances came to I. S. who without deed did Enfeoff I. D. of the Mannor, and made Livery and seisin upon the Demeasnes. I. D. by Deed made a Grant of the Advowson, and afterwards the Tenant attorned to I. D. It was the opinion of all the Iustices, That the Advowson was Appendant to all the Mannor, but most properly to the Demeasnes out of which it was at the beginning derived, and that the attornment afterwards should have relation to the Livery, and the Advowson should passe inclusive in the Livery, and that the Grant of the Advowson made mean between the Livery and Attornment was void. M 33. Eliz. in Co. B. *Long* and *Hennigs* Case. *Leon.* 107.

11. A. Seised of the Mannor of *Castard* in Fee, which Mannor did extend into *Daston, Northkelsey, Southkelsey* D. and C. and had Demeans and Services in each of the said Towns parcel of the said Mannor, being so seised Granted *totum Manerium suum de Northkelsey* in *Northkelsey* to B. and his Heirs, and Granted further all his Lands Tenements and Hereditaments in *Northkelsey*, and to that Grant, the Tenants in *Northkelsey* did attorn And in a Replevin brought the Land in which the distresse is taken is alleged to be in *Northkelsey*. The onely question in this Case was, If by the Grant to B. a Mannor passed or not. It was Objected that no Mannor passed, for before the Grant there was no Mannor of *Northkelsey* or in *Northkelsey*, but the Lands in *Northkelsey*, and the Services shall passe as in grosse; for they were not known by a Mannor but for parcel of a Mannor. And a Manor is a thing which cannot be so easily created, for 'tis an Hereditament incorporated together before time of memory, of many things together, And a Court Baron is incident to a Mannor which cannot be created at this day: But it was the opinion of the Court, that in regard, That A. had before the Grant as well Demeasnes as Services in *Northkelsey*, it may be said he had a Mannor there, and although *premise loquendo* that *tempore Concessionis*, No Mannor was in *Northkelsey*, Yet now by operation of law upon this grant a new Mannor shall arise. Also it was holden by them, that the words (*de Northkelsey*) were void, and the Grant shall be construed as if the words had been *Manerium suum* in *Northkelsey*, and a Manor is such a thing, as may be determined, divided and suspended: and as to the Court Baron there needs not any Erection of any new Court, but because as before the Grant the Court might be by Law holden in any place within the Mannor, therefore every part of the Demeasnes is capable of a Court to be holden there: It was adjudged for the Defendant. Pasc. 27. Eliz. in Co. B. *Mosse* and *Smiths* Case. *Leon.* 216. 27.

12. Note. It was holden by the Iustices, That a Parsonage may be a Mannor, as if before the Statute

Statute of *Quia Emptores terrarum*, The Parſon with the Patron and Ordinary Grant parcel of the Gleab to divers Perſons to hold of the Parſon by divers Services, the ſame makes the Parſonage a Mannor; alſo they hold that a Rent-charge by preſcription might be parcel of a Mannor and ſhall paſſe without the words *cum pertinentiis*. As if two Copertenors be of a Mannor and other Lands, and they make Partition, by which the eldeſt ſiſter hath the Mannor, and the other hath the other Lands, and ſhe who hath the other Lands Grants a Rent-charge to her ſiſter who hath the Mannor for equalitie of Partition. Paſc. 22. Eliz. in Co. B. *Godbt.* 3.

13. A Woman, having cauſe to be endowed of a Mannor in which are Copy-holds, doth demand her Dower by the name of the third part of certain Meſſuages, certain Acres of Lands, and certain Rents, and not by the name of the third part of the Mannor, and ſhe doth recover and keep Courts and Grants Copy-holds. It was holden by the Court, that in ſuch Caſe the Grants were void, for ſhe hath not a Mannor, becauſe ſhe hath made her demand as of things in groſſe. Otherwiſe. If the demand had been of the third part of the Mannor, for then ſhe had a Mannor, and might have kept Courts and Granted Copy-holds. And it was holden, that ſhe pleading that ſhe did recover the third part of the Mannor *per nomen* of certain Meſſuages, &c. was no recovery of the third part of the Mannor. M. 29. Eliz. in Co. B. *Bagg* Caſe. *Godbt.* 135.

14. A. Seiſed in Fee of the Mannors of Great *Milton* and Little *Milton*: and of the reputed Mannors of Great *Chilworth* and Little *Chilworth* in in the Pariſh of M. and of diverſe Lands in *Chilworth* purchaſed of I. D. 30. Eliz. and of other Lands purchaſed 1. Jac. In conſideration of a marriage betwixt B. his ſon, with one E. R. Covenanted to ſtand ſeiſed of the Mannors of Great M. and Little M. and of divers particular cloſes by name in *Chilworth*, and of all other his Lands to the ſaid Mannors appertaining, or uſed or occupied with them, to theſe uſes, viz. Of the Mannor and premiſſes to the uſe of himſelf for life. And afterwards of ſuch a Mannor and ſome of the Cloſes in *Chilworth* to the uſe of A. his wife for her Joynture, and of other particular Cloſes to the uſe of E. for her life for her Joynture: and after the deceaſe of him A. his wife and E. to the uſe of B. his ſon and the Heir Males of his body, the remainder to his right Heirs: Afterwards A. and B. his ſon bargain and ſell the Mannors of *Milton* and *Chilworth*, and all his Lands thereunto belonging or reputed as part of the ſame, or within the ſame, and they levied a Fine by the name of the Mannors, 10 Meſſuages, 600 Acres of Land, 100 Acres of Meadow, 600 Acres of Paſture, which quantity compriſed as well the Freehold Lands as the Mannors. The queſtion was whether the parcels of the Lands divided from the Mannor by the Intail and the Freehold Land ſhould paſſe. It was reſolved by the Juſtices, That the Lands Intailed which are parcel of the Mannor ſhall not be ſaid to be ſevered from the Mannor. For the Freehold never being ſevered and remaining entire in A. during his life ſhall paſſe as parcel of the Mannor, For the Freehold bought in and occupied with the Mannor, although it was but for two years before the bargain that ſhall paſſe being ſaid and reputed parcel, and by that name. And the Fine is well guided by the Indenture for the Mannors and for the Freehold purchaſed, although it was not in *rei veritate* parcel of the Mannor: and a litle time is ſufficient, for the gaining of Reputation. Paſc. 9. Car. in *Cancellaria*. Sir *George Symonds*, and Sir *Michael Green* Caſe. Cro. 1. Part 224.

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2. *Where one Mannor may be holden of another, and where there may be one Mannor with another, where it may be out of any Town; And when the Viſne ſhall come from the Mannor, when from the Town. And where a Mannor once deſtroyed may be revived again, where not.*

1. ERror of a Judgement in Co. B. in a Replevin. The Error aſſigned was becauſe the Plaintiff alleged the taking to be *apud Waſfield* in a place called E. The Defendant ſaid; that *Locus in quo* was 3 Acres of Land in *Wargrave*. The Plaintiff Replies, and Entitles himſelf to that land as a Copy-hold parcel of the Mannor of *Wargrave*. Upon the pleading the Iſſue was, Whether *talis Manerium de Wargrave talia habeatur conſuetudo*. That the ſaid Land in *Waſfield* is a Mannor of *Waſfield* demyſed & demiſable by Copy of Court Roll *prout*. It was tried by a *Venire facias de vicineto manerio de Wargrave*, and found for the Plaintiff, That there was with the Mannor of *Waſfield* ſuch a Cuſtomary Mannor; In this caſe it was reſolved by the Court. 1. That within one Manner there may be another Mannor demiſeable by Copy; and that within that Mannor there may be Cuſtomary Tenants, for as well as there may be a Tenant at Will of a Mannor at a Common-Law, ſo there may be a Tenant at Will according to the cuſtom of the Mannor. 2. The Iſſue being

ing whether within the Mannor there be ſuch a cuſtom, The *Venire* ſhall be onely of the Mannor, and *Warfield* being parcel of the Mannor, it ſhall be included within it, the Judgement was affirmed M. 11. Jac. in B. R. *More* and *Goodgroves* caſe. Cro. 2. part 326. vide *Cook* 11. part 17. Sir *Henry Nevils* caſe, the ſame caſe.

4. A. Seiſed of the Mannor of S in O. in the County of D. in Fee, and alſo of other Lands in O. aforeſaid, ſuffered a Common Recovery of all, and declared the uſe by Indentures, That the Recoverer ſhould ſtand ſeiſed of all the Lands and Tenements in O. to the uſe of A. and his Wife, and the Heirs of their bodies begotten, and further, that the Recoverer ſhould ſtand ſeiſed to the uſe of him, and the Heirs of his body, and died, and the Wife ſurvived, and entred into the ſaid Mannor by force of the ſaid general words; It was adjudged, that they did not extend to the ſaid Mannor which was ſpecially named. Hill 34. Eliz. in Co. B. rott. 120. *Carter* and *Ringſteads* Caſe.

5. Sir *Adam de Clydrow*, Knight, brought a *Precipe quod reddat*, againſt *I. Clydrow*, and the Writ was *quod juſte*, &c. *reddat Manerium de Wicombe, & duas Carucatas terræ in Clydrow*, it was holden in that Caſe, That the Town of *Clydrow* did not relate to the Mannor, for that a Mannor may be demanded without mention that it lieth in any Town, vide 6. E. 3. 12. *Cook* 8. Part. 119. in *Dr. Bonhams* Caſe.

6. If a Mannor extendeth into divers Towns, Or if it be out of any Town, as in a Forreſt, it ſhall be demanded by the name of a Mannor, becauſe it is an Entire thing. But if the demand ſhould be of that which lyeth in one Town, it ſhall be demanded by the name of a houſe, and ſo many Acres of Land, and not of a Mannor in ſuch a Town. 4. E. 4. 15. *per Curiam:* and yet where demand is of the Mannor of D. in D. he cannot recover the part which is in another Town: But by gift of a Mannor generally, that which is in both Towns ſhall paſſ. 9.E.4.17 r.

7. A Mannor deſcended to 2 Coperceners, and ſome of the Tenants ought to do ſute at the Court of the Mannor, and upon Partition the ſervices are allotted to one, and the Demeaſnes to the other. It was holden, that ſhe which had the ſervices oneiy could not have the ſute, becauſe by the Partition the ſervices were ſevered from the Mannor. But it was holden in that Caſe, that if one of the Coperceners had died without iſſue, the other ſhould have a Mannor, and ſhould have the ſute, for that the ſame was but ſuſpended and not extinguiſhed, and then when the ſervices and Demeaſnes are again united, the ſute ſhall be revived. Vide Comment. on Original Writs. 47. 12. H. 4. 20. acc.

8. Where an Acre Land is holden of the Mannor of D. which Mannor is holden of the Mannor of S. and afterwards the Mannor of D. eſcheats. In that Caſe the Acre is not holden of the Mannor of S. but of the Mannor of D. ſo was the name of the Mannor is not altered thereby: And it was holden & agreed, That one Mannor may be parcel of another Mannor, and holden of it; and divers Mannors may be parcel of one M. 32. H. 6. 9.

9. A man was ſeiſed of a Mannor in the right of his Wife, and afterwards the Husband and Wife Leaſed four Acres parcel of the Mannor for life, ſaving the Reverſion to the Wife, and afterward the Husband Granted the Reverſion of the four Acres unto a ſtranger in Fee to whom the Leſſee for live atturned. Afterwards, the Grantee of the Reverſion purchaſed the reſidue of the Mannor of the Husband and Wife, and levied a Fine ſur *Conuſans le droit come ceo*, &c. who rendred the Mannor to the Husband and Wife for life, the remainder to A. in Tail, and after the Leaſe for life expired, the Husband and Wife aliened, and the Donee in Tail entred into the whole for a forfeiture. In that Caſe it was holden by the Court, that his entry was lawfull, for the Reverſion was parcel of the Mannor, and paſſed by the Fine by the name of the Mannor, ſo as he needed not in demand of the Mannor to make any exception; and in that Caſe, If no Fine had been levied, and the Wife had brought her *Cui in vita*, it was holden ſhe ſhould have recovered as well the Land in Reverſion as the Mannor it ſelf which was in poſſeſſion; But it was holden in that Caſe, That if the Fine had been upon a Render of the Mannor, nothing had paſſed but that part which was in poſſeſſion, and the Heirs of the Wife ſhould have had the four Acres by reaſon of the ſaid Reverſion *quod Nota*. 18. Aſſ. 2. acc.

10 Note, That a Man held Land of a Mannor by Knight ſervices, and alſo by the Rent that 2.s.6.d. *annuatim ad finem quorumcunque ſeptimanarum pro Cuſtodia Caſtri de* D. which Mannor the Lord held over of the Caſtle by the ſame rent of 2 s.6.d. *Conſimili modo ſolvend:* Book Entries 516. in a Replevin.

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3. *More Mannor.*

1. NOte, It was ſaid by the Court, That if I. S. doth Lett the Scite of his Mannor, with all his Lands to the ſame appertaining, that thereby

thereby all the Demeaſnes do paſſe, but if it were with all the Lands appertaining to the ſaid Scite, there nothing paſſeth but the Mannor-place. M. 7. Eliz. in Co. B. *Owen.* 31.

12. In a Replevin, the Caſe was; A. ſeiſed of the Mannor of B. in the County of Lincoln, which Mannor extended into four Towns, *viz.* C. N. D. & S. there were Demeaſn Land and Freeholders in each of the ſame Towns, and the Plaintiff held the Land where the taking was by Fealty and Sute of Court to the Mannor of C. and the Lands did lye in N. A. ſold to the Defendant *Totam illud Manerium ſive Dominium de* N. *cum pertinentiis in* N. *ac omnia & ſingula Meſſuagia reddit. heriot.* withall Courts, *Habend.* to the Vendee and his heires, to whom the Plaintiff attorned. It was Objected, That by the Feoffment and Attornment, the Tenancies and Services paſſed but not as a Mannor, for a Mannor is an entire thing, and cannot be divided no more than other Liberties. And if a Mannor doth extend into two Towns, And I grant my Mannor unto you in one Town, you ſhall have no Mannor, but the Lands and Services in groſſe. But it was holden by the Court, That where he grants his Mannor of N. in N. it ſhall be conſtrued his Mannor in Reputation: And although a Mannor cannot be created at this day, yet is is not ſo entire, but that it may be divided. Tr. 25 Eliz. in Co. B. *Morſe* and *Page's* caſe. *Owen* 138.

13. A Court Baron is incident to a Mannor, and a Court of Pipowder to a Fair; a Court Baron cannot be ſeparated from the Mannor, for it is annexed to the Mannor, and by grant of the Mannor *cum pertinentiis* the Court paſſeth, for it is an incident inſeparable from the Mannor, and a Man cannot grant his Court, but he may grant the profits of his Court. Tr. 13 Jac. in Co. B. *Brown* and *Goldſmiths* caſe. *Brownl.* 1. part, 175. M. 1 Jac. the King and *Staffarton's* caſe, *Bolſtr.* 1. p. 55, 56. acc.

Marſhal *and* Marſhal-Sea.

The Antiquity, Authority and Juriſdiction of the Court of Marſhalſea: And in what Actions they may hold plea, in what not, by the Common, and ſince the Statute of Articuli ſuper Chartas.

1. THe Court of Marſhalſea is as Ancient as any of the Kings Courts, 4 H. 6. 8. And for the Honour of the Court, *Fleta* lib. 2. c. 2. ſaith, Next after the High Court of Parliament, addeth, the King *Habet & Curiam ſuam coram Seneſchallo ſuo in aula ſua &c.* And vid Diverſity of Courts. Firſt, The Court of Marſhalſea is an Ancient Court, and made for the ordering of the Kings Houſe, and for the preſervation of the King and his Servants, and this Court hath its bound within which it hath Juriſdiction, and not without.

2. Note, As to the Dignity of this Court, It is to be agreed, That the ſame is of as great Antiquity as any Court, vid. l. 5. E. 4. 124. where it was ſaid, That the Marſhalſea was and is one of the ancienteſt Courts within the Realm: This Court *ſequitur perſonam Regis.* For as *Fleta* ſaith, It followeth the perſon of the King, be he within the Realm, or out of the Realm, for there the King being in *France*, *in alieno Regno*, he notwithſtanding there did juſtice upon an Offence done within the *Verge*; and though it be of ſuch Dignity, yet it is not to be compared with the Court of Kings Bench; the difference of them is, the one of them, as before is ſaid, *ſequitur perſonam Regis*; but the other is *Coram Domino Rege & coram ipſo Rege.* Hill. 5 Iac. in B. R. in *Cox* and *Gray's* Caſe. *Bolſtr.* 1. p. 208.

3. An Action of Trover and Converſion was brought in the Maſhalſea, where none of the parties were of the Kings Houſhold. And upon judgment given there, a Writ of Error was brought in the Kings Bench: It was Reſolved in that Caſe, That the judgement ſhould be reverſed; and it was there ſaid, That for the Nature of the Actions, they ſhall hold plea in Treſpas, Contract and Covenant, and of no Action which concerns Free-hold, or the Realty; and in Treſpas within the *Verge* it is ſufficient, if one

of the parties be of the Kings Houſhold, but in Contract or Covenant, both parties ought to be of the Houſhold. *Cook* 6. p. 20. *Mitchelbourn's* Caſe, and vid. there 32 H. 6. Rott. 27. In Treſpas brought in the Marſhalſea, no other Error was aſſigned but only that none of the parties were of the Kings Houſhold, *Read* and *Purchaſe's* Caſe.

4. That: The Marſhall of the Kings Houſe had Juriſdiction of a Felony done in the Kings Houſe out of the Realm, vid. *Fleta* lib. 2. cap. 14 where treating of the Kings Court of Marſhalſea, it is ſaid: *Et hæc omnia ex officio ſuo licite facere poteſt (ſc. Seneſchallus aulæ Hoſpitii Regis) Non obſtante alicujus Libertate etiam in alieno regno dum tamen rem in Hoſpitio Regis potuit invenire. Secundum quod Contigit Anno* 14 E. 1. *de Engelramo de Nogent. Capto in Hoſpitio Regis Angliæ (ipſo Rege tunc apud Pariſiam exiſtente) cum diſcis argenti furatis recenter ſuper factio Rege Franciæ factio præſente, Et unde licet Curia Regis Franciæ de præd. Latrone per Caſtellanum Pariſ. petita fuerit habitis hic & inde tractatibus in Conſilio Regis Franciæ tandem conſideratum fuit; Quod Rex Angliæ illa regia prærogativa & hoſpitii ſui privilegio uteretur & gauderet, Qui, coram Roberto Fitz-John milite tunc Hoſpitii Regis Angliæ Seneſchallo de latrocinio convictus per conſiderationem ejus Curiæ fuit ſuſpenſus in Patibulo S. Germani de Pratis.* Cook 7. p. 15. in *Calvin's* Caſe.

5. Note, It was adjudged upon a Writ of Error brought of a judgment given in the Court of Marſhalſea, In an Action of Trover and Converſion of goods, That if none of the parties be of the Kings Houſhold, and judgment be given there, that the ſame is Error, and for that cauſe the judgment was reverſed, Hill. 9 Jac. in Co. B. *Cox* and *Gray's* caſe. *Godb.* 184 vid. the ſame Caſe argued at large and adjudged in *Rolſtod* 1. p. 207, 208, 209, 210.

6. In an Action of Treſpas, Battery, and Falſe Impriſonment, the Defendant as to the whole Treſpas except the Battery and Impriſonment, and keeping of the party in priſon, pleaded Not guilty: And as to that, pleaded, That the Marſhals Court, is an ancient Court &c. and ſo juſtifies becauſe the Plaintiff was the Bail of T. C. to the Defendant in an Action upon the Caſe upon an *Aſſumpſit* general, and thereupon a judgment was againſt T. C. and a *Capias* awarded, and a *Non eſt inventus* returned; and thereupon a *Capias* was awarded againſt the Plaintiff, the Bail, according to the Cuſtome, by vertue whereof the Plaintiff was taken and detained, and traverſeth that he was guilty of any Impriſonment before ſuch a day, and avers they are the ſame perſons. The Plaintiff replied, That none of the parties were of the Kings Houſhold; upon which the Defendant did demurr. Vid. the Caſe, thus put, in *Brownlo* 1. p. 199. but ſee the Caſe more at large, *Cook* 10. part, 66. And in this Caſe, theſe points were Reſolved. 1. That at the Common Law, the Steward and Marſhal of the Marſhalſea had two Authorities to hold Courts, one as Juſtices in Eyre, by which Authority they held plea of Treſpas and of the Crown, and of other Real Actions; The other as Judges of the Marſhalſea of the Kings Houſhold, by which Authority they held plea only in Debt, Treſpas *Vi & armis*, and Covenant, and not in any perſonal Action or mixt. 2. That this appeareth by the ſtyle of the Court of the Marſhalſea, *Placita coronæ aulæ Hoſpitii*, that of the leaſt the one or the other of the parties ought to be of the Kings Houſhold, for otherwiſe to what purpoſe ſhould the plea be diſcontinued by the remove of the King, unleſſe the parties were of the Kings Houſhold. 3. Reſolved, That *Articuli ſup. Chartas*, was but an Explanation of the Statute of *Magna Charta*, and *Charta de Foreſta*; and the 3. chapter of *Articuli ſup. Chartas*, is but an explanation of the 29. chap. of *Magna Charta*, as to the Juriſdiction of the Court of Marſhalſea. 4. Reſolved, That the Common Law, and 28. E. 1. did extend to Treſpaſs *ſimpliciter*, and not to Treſpas *ſecundum quid*, as an Action upon the Caſe, upon *Aſſumpſit*, and Action upon Trover and Converſion. The ſecond point of the Caſe was, If the Deffts. having the Warrant of the ſaid Court, ſhould be puniſhed, for the Falſe Impriſonment. And it was Reſolved, that the Action did lye againſt the Deffts, becauſe all the proceedings was *Coram non Judice*, and it is not neceſſary to obey them which are not Judges of the Cauſes, no more than a Stranger. M. 10 Jac. in Co. B. *Hall* and *Stanley's* caſe, *Cook* 10. part, 69. the caſe of the Marſhalſea. *Brownlo* 2. part, 125, 126. the ſame caſe.

2 *In what Courts Error in the Marſhalſea ſhall be reverſed. VVhether The Office of the Marſhalſea may be granted for years: and touching the Priſon of the Kings Bench and of the Marſhalſea, and to what Courts it is a Priſon, to what not. What perſon is Judge there, and the Authority of the Coroner of the Kings Houſhold.*

1. NOte, It was Obſerved for the Honor of the Court of Marſhalſea; That the Judges hold the Kings place. And that a Man of Great Dignity, as the Earl of *Norfolk*, hath been Marſhal of the Kings Houſhold: and that Court was of ſuch High Juriſdiction, That before the the Statute of 5 E. 3. cap. 2. and 10 E 3. cap 2. That no Writ of Error lay of any judgment there given but in Parliament; But by the ſame Statutes, their Errors ſhall now be examined and redreſſed in the Kings Bench. *Cook* 10. part, 69. acc.

2. The King granted the Office of the Marſhalſea for life, and afterwards granted the ſame in Reverſion for 21. years, the grantee of the Reverſion aſſigned his intereſt to A. Tenant for life deputed I. S. at Will and died, A. by deed did aſſign the ſame Office to I. S. Office found that I. S. committed diverſe Forfeitures of the Office, by ſuffering eſcapes: In this caſe many points were Reſolved. 1. That in this caſe the King might ſeize upon the Office without ſuing out a *ſcire facias*. 2. That the ſaid grant of the ſaid Office in Reverſion for years was void; 1. becauſe this is an Office of Truſt, which is individual and perſonal, and cannot go to Executors, or Adminiſtrators. 2. becauſe it is an Office of attendance in Court, and if the Leſſee dieth inteſtate, there ſhould not be an Officer untill Adminiſtration were granted by the Ordinary. 3. Such Officer ought to be admitted and allowed by the Court, and if he dieth, his Executors ſhould be Officers without allowance or admittance. 4. Such Office hath alwayes been granted for life or at Will, ſo as the perſon was certainly known, and was never granted for years. 5. If it ſhould be granted for years, it ſhould be Aſſets to Executors, or it might be forfeited by Outlawry, upon which many Queſtions may ariſe: but it was agreed in that caſe; That by an Act in Law, a Term which is but a Chattel might be in ſuch an Office: as if the King ſeize ſuch an Office during the minority of the heir. Note, that the opinion in the caſe of 1 E. 4. 3. that ſuch an Office might be granted for years, was denied for Law. *Cook* 10. part, 67, 70, 71. Sir *George Reynell's*.

3. In an Action upon the Caſe for diſturbing him to execute the Office of Marſhal of the Kings Bench, granted unto him by Patent for years, The ſole Queſtion was, Whether a Patent of this Office granted for years be good, or not: It was Reſolved by the Court, *Nullo contradicente*, that it could not, and that judgment ſhould be for the Defendant; and the reaſons of their judgment were (as is in Sir *George Reynel's* Caſe) for that being an Office of Truſt and Confidence, and of Attendance in Court, many inconveniences would enſue, if it might be granted for years. And whereas it was Objected, That it may be granted in Fee or in Tail, and ſo deſcend to an Enfant, and aſwel therefore for years; It was anſwered, that the Court hath uſually put in another fit perſon for the time. M. 16 Car. in B. R. *Meade* and Sir *John Lenthal's* caſe. *Cro.* 1. p. 425.

4. The Duke of *Norfolk* being Marſhal of *England*, and having Authority to make a Deputy, he made one *Gawdy* his Deputy, who was ſworn in Court. Afterwards *Gawdy* licenced a Priſoner who was in Execution to go into *Norfolk* with a Keeper, For which the Plaintiff brought an Action of Debt againſt *Gawdy*, for the Eſcape, and he had judgment and recovered, Notwithſtanding that he was but the Under-Marſhall, and notwithſtanding that the Action was brought in *Middleſex*, ſuppoſing an Eſcape at *Shorditch*, and not in *Surrey* where the Priſon of the Marſhalſea is. M. 11 Eliz. *Dyer* 28. *Gawdy's* caſe. *Cook* 3. part, 52. in *Rigeway's* caſe acc.

5. Note, It was Reſolved by the Juſtices, That the Priſon of the Kings Bench is not any local Priſon confined only to one place; but that every place, where any perſon is reſtrained of his liberty, is a Priſon. Hill 6 Car. B. R. in Sir *Miles Howard* and *Strowd's* caſe. *Cro.* 1. p. 152.

6 Upon a Petition to the Kings Majeſty in the time of Peſtilence increaſing in *London* by the Priſoners of the Kings Bench and of the Fleet, for the avoiding of infection of the Plague much encreaſing, That they who ſhould give ſufficient ſecurity to the Marſhal, or to the Warden of the Fleet, to be true Priſoners, and to return to Priſon at the dayes to them preſcribed, might go at large by *Habeas corpus* at that time. The matter was referred by his Majeſty to all the Juſtices and Barons of the Exchecquer, to

conſult of the matter what courſe was to be taken in the ſame: Whereupon it was Reſolved by them, That an *Habeas corpus* was an Antient and Legal Writ, but under colour thereof the Warden of the Fleet and Marſhal of the Kings Bench ought not to ſuffer Priſoners to go at large, but ſuch permiſſion was an abuſe of the Writ, and an Eſcape in the Keeper. But it was Reſolved by them, That for the ſafeguard of the Priſoners, The Warden of the Fleet, or Marſhal of the Kings Bench by Rule or Licence of the Courts may keep their Priſoners in any other place of the County to be aſſigned by the Courts unto them. But there they ought to be kept as Priſoners *ſub ſalva & aſta cuſtodia*, as they ought to be in their proper Priſons; which Reſolution of the Juſtices was certified to the Kings Majeſty. Tr. 12 Car. in B R. *Cook* 1. part, 335 336.

7. The Wife brought an Appeal of Murder of her Husband. The Defendant pleaded that another time, *viz.* 8. *Octob.* 32 Eliz. by Inquiſition taken before the Coroners of the County at S in the ſaid County, It was preſented, That the Defendant 23. *Sept.* 32 Eliz did ſtrike, &c. whereof he died 24. *Sept.* following; and ſo he was Indicted of Man-ſlaughter. Which Inquiſition being certified by the Juſtices of Gaol-delivery at New-gate, he was arraigned upon the ſame Indictment, and confeſſed the Felony, and had his Clergy: and pleaded over to the Felony: and it appeared that the ſaid Arraignment, Confeſſion and Clergy was after the Writ of Appeal brought and returned: In this caſe amongſt other points it was Reſolved: 1. That by the Common Law the Coroner of the Kings Houſhold had an exempt Juriſdiction within the *Verge*, and that the Coroner of the County could not intermedle with the death of a Man within the *Verge*; and ſo it was adjudged 24 Eliz. in *Swiff's* caſe. 2. Reſolved, That the Indictment taken before the Coroner of the Kings Houſhold, and the Coroner of the County was inſufficient, becauſe it doth not appear, that S. was within the *Verge*, and it cannot be ſuppoſed, by an Averment of the party. 3. Reſolved, That the Indictment being inſufficient, notwithſtanding ſuch conviction the party might be arraigned and impeached again for the ſame Offence, as was Reſolved 28 Eliz. in *Heydons* caſe. Mi. 34 Eliz. in B. R. *Cook* 4. part 45. *Wrote* and *Wigg's* caſe.

Mariage, Matrimony, and Inter-Marriage.

Mariage, what it is; what ſhall be ſaid a lawful Mariage: and how the Loyalty of the Mariage and by whom it ſhall be tryed; and when, and by what Act, Mariage may be aſſented unto, or avoided.

1. MAriage, by the Civil Law, according to *Juſtinian* in his Inſtitutes, is *Nuptiæ Mariti & Fœminæ conjunctio individua, continens vitæ ſocietatem, individuam dico, quia non niſi morte aut divortio ſuperandam:* and therefore by the Civil Law, if the parties *non attigerent annos Nubiles Nuptiæ eſſe non poſſunt*, but only *Sponſalia*, which is but a ſtep to Mariage. And vid. *Juriſprudentiæ Romanor.* lib. 1. cap. 13. *Societas, & Conſortium, omni vitæ jure Maritum & Fœminam ad coeubitum*; which is, *Societatis hujus conſummatio.* But by the Common Law, Mariage is not to be conſidered according to the Rules and Grounds of the Canon or Civil Law. For, by the Common Law, Mariage is to be conſidered, either in the right, or in the poſſeſſion; Mariage in poſſeſſion, is ſufficient in perſonal things and cauſes, eſpecially where the poſſeſſion of the Wife is in Queſtion, but where the Mariage of the Husband is in Queſtion, there Mariage in right ought to be; and where Mariage in poſſeſſion falls in averment there it ſhall not be tryed by the Biſhop, as in caſe of a Mariage of Right. Paſc. 29 Eliz. in Co. B. *Leon* 53.

2. A brought an Action of Treſpas againſt B, and C. and B pleaded that C. is Wife of the Plaintiff, and demanded judgement of the Writ; The Plaintiff by Replication ſaid, Never accoupled in lawful Matrimony; in that caſe the plea was not allowed; but he was driven to ſay, Not his Wife: For if C was the Wife of the Plaintiff in Poſſeſſion, or in Right, it is ſufficient to abate the Writ, and vid. 29 E. 3. 18. by *Belknap*; the Right of Eſpouſals is alwayes to be tryed by the Biſhop, but the Poſſeſſion of the Mariage not. Vid. 50 E. 3. 20. adjudge acc.

3. In Debt upon a Recog. the caſe was. A. ſeiſed of Lands, had Iſſue E. his Daughter and Heir

Heir: and by Indenture 19 Eliz. granted, *Custodiam, gubernationem, educationem & maritagium dict.* E. to T. L. which T. L. afterwards assigned his said *custodie* and all his Interest to I. S. Afterwards I. S. assigned his Interest to I. H. and covenanted with L. That T. H Son and Heir of the said I. H. and Heir apparent of the said I. H. *maritaret, & in uxorem duceret prædict.* E. *ad vel antequam dict.* E. *& T. H. implerent suas separales ætates* 12. *annorum si dict.* E. *ad id condescendere & agreare vellet*; And afterwards before the said T. H. and E. *suas separales ætates implevissent*, &c. 8 Sep. 10 Eliz. the said T. H. took to Wife the said E, the said T. H. being then of the age of 12 years, and 9. months, and the said E. being of the age of 9. years and no more, and T. H overlived: and pleaded further, that the said T. H. afterwards attained his full age of 14. years, and before any agreement it to the said Mariage aforesaid betwixt the said T. H. and E. had, at or after the said T. H. came to his age of 14. years, 10. Sept. 22 Eliz. *ad dictum maritagium disagreavit, & maritagium illud recusavit.* And all his matter being pleaded in Bar, in performance of the covenant in the said Indenture of defeasance upon the said Recognizance, demanded Judgment of Action; The Question was, If this Mariage had in manner as aforesaid were such a mariage as was intended by the Covenant, so as the Covenant be performed or not. It was Resolved by the Court in this case, That it was a sufficient mariage in performance of the Covenant: For H. is bound for the performance of this Covenant, and that his Son and Heir apparent *maritaret & in uxorem duceret dict.* E *ad vel ante &c.* which is executed accordingly, and he is not bound for the continuance of the mariage; but the same ought to be left to the Law, which gives the parties liberty to continue the mariage by agreement or to dissolve it by disagreement. If I. be bounden to you, That I. S. who is an Infant shall levy a Fine before such a day which is done accordingly. If afterwards the Fine be reversed by Error, yet the condition is performed: It was adjudged for the Defendant against the Plaintiff. Pasc. 29 Eliz. in Co. B. *Leigh* and *Hannets* case. *Le*. 565

4. In Covenant brought against Husband and Wife, the Plaintiff declared, that one E. the first Husband of the Wife was indebted to the Plaintiff in 20. *l.* and that one G. A. was indebted to the said E in the sum of 20. *l.* and that the said E. made his said Wife his Executor, and died; and afterwards his Wife, *dum sola fuit*, for the satisfaction of his Debts, appointed the Plaintiff *Attornatum suum irrevocabilem &c.* in her name to receive of the said G. A. the said 20. *l.* And the said Wife covenanted, *quod ipsa ad requisitionem* of the Plaintiff, from time to time would maintain all Sutes which the Plaintiff should bring in the name of the said Wife against the said G. A. to the use of the Plaintiff, and not to be Non-sute, or to make any discontinance, Release or Revocation without the assent of the Plaintiff, and shewed, that he had brought a sute against G. A. for the Debt; and that the said Wife depending the said sute had taken to husband the Defendant without the Plaintiffs consent, and if by the mariage the sute were countermanded was the Question: In this case it was holden by the Court: 1. That the Declaration was insufficient, for that there is not any Request surmised in it. For the words of the Covenant are, *Quod ipsa ad requisitionem &c.* and so the Plaintiff ought to have notified to the Wife that he had commenced such sute, otherwise the Action did not lye. 2. It was holden, That here is not any countermand, for by the taking of the Husband, the Writ is not abated, but is only abatable; and therefore the Plaintiff ought to have shewed, that by the Inter-mariage and her taking of a second Husband that the Writ was abated, otherwise it is not a countermand. M. 31 Eliz. in Co. B. *Lee* and *Madox*'s case. *Le*. 108.

5. A. maried one within age, and after disagreed, so as they might marie elsewhere, and the first Wife had Issue by other Husbands and died. A was sued in the Ecclesiastical Coure by an Informer, supposing he had maried a Woman living his first Wife, A. there proved the disagreement: and thereupon had sentence for him against the Informer. And yet they in the Ecclesiastical Court taxed A. to give 20. *l.* to the Informer for Costs: In this case it was Resolved, That by the disagreement within age, the first mariage was determined, and so no cause of sute there by the Informer; and it was holden to be Injustice in the Court there to allow Costs to one who had vexed a Man without cause; especially when they had given Sentence against the Informer: and therefore a Prohibition was granted by the Court. M. 8 Jac. in Co. B. *Blackden*'s case, *Rowle* 2. p. 36.

6. Note, It was said by *Dyer* Justice, That if a Woman hath a Term, and takes a Husband who purchaseth the Fee, that the Term is extinct. *Manwood* agreed that the Law might be so in such case, because the Husband had done an Act which destroyed the Term; But he said, That if the Woman had Inter-maried with him in the Reversion there the Term should not be extinguished, for the Husband hath not done an Act to destroy the Term; but the

the marriage is the Act in Law. Pasc. 17 Eliz. in Co. B. *Godbt.* 2.

7 Note, A woman hath 6. ages, 1. At the age of 7. years to have Aid to be maried. 2. At 9. years to have Dower. 3. At 13. years to Assent or Dissassent to mariage. 4. At 21. years to make Alienation of her Lands. 5 At 14. years to be out of Ward. 6. At 16. years to forfeit her mariage; But a Man hath but 2. ages. 1. At 14. years to have his Lands holden in Socage and to assent to mariage. 2. At 21. years to make an Alienation and to be out of Ward. H. 35. H. 6. 41. acc.

8. In Writs of Dower, and other Writs, If the Issue be joyned, That the parties were never lawfully joyned in Marriage, The Tryal must be by the Bishop in his Court, by Inquisition taken before him, and the Witnesses examined there by him, and published, and after they are published, they are sent to the Kings Court, where the Issue was joyned, and such Certificate usually is general. That *copulata vel non copulata fuit in Legitimo matrimonio.* 14 Eliz. *Dyer* 303. And after such Certificate there shall be no Appeal, but the same Certificate shall be a Barre and conclude all parties whatsoever. 15 H. 7. rot. 303. Book Entries 223.

9. A Writ of Dower was brought against the Bishop of N. and others, by several Precepts. They pleaded that the parties *ne unque fuerunt accouple en loyal matrimonie*; It was holden in that case that although the Bishop was a party to the Writ, and a Defendant in the cause, yet he himself should try the Loyalty of the Matrimony, because other persons were parties as well as himself, who shall be bounden by his Certificate. But if the Bishop alone were partie & Defendant, then the Tryal should be by the Metropolitan. 10 R. 2 Tryal 100. But if an Issue were joyned; If the Wife of I. S. or not, the same shall not be Tryed by the Certificate of the Bishop, but by a Jury at the Common Law. 139. E. 15. acc.

10. In a Writ of Dower brought by *William* C. and M. his wife against T. of the 3. part of the Manor of T. of the Endowment of R P. her late Husband. The Tenant said, That M. took to Husband C. Defendant, & that afterwards C. was long absent, and that in his absence she was married to P. R. and that afterwards C. Defendant returned home to his house, and sued a Divorce, and that the said C. Defendant is yet living; and demanded Iudgement of the Writ which supposed her to be the Wife of *William* C. And because it could not be Tryed here whether she was the lawfull Wife of *William* C. or not; and the Issue was joyned upon *Ne unque accouple en loyal matrimonie*, It was directed by the Court that the Tryal should be by the Bishop; and he to Certifie the Matrimony accordingly. But it was said, If the Issue had been whether she was his Wife or not, the same might have been Tryed by the Common Law. vide 34 E 3. 15 and 16. acc.

11. A Man promised a Woman, That if she would marry with him, that if he died, and she did survive him, that he would leave unto her 100. *l.* they Intermarried, and then the Husband died, not performing his promise, The Wife sued the Executor of her Husband upon the said promise, and whether the duty did survive with the Wife, or was extinguished by the Intermarriage was the question: The Court was divided in opinion, *Hobart* and *Warburton* held the Intermarriage was a release and discharge of the 100. *l. Winch* and *Hutton* contrary: Hill 15. Iac. in Co. B. *Hall* and *Stafford's* case. *Godbt.* 271. vide *Hutton* 17. the same case.

12. In *Ecclesione fine* the case was. A. a Woman possessed of a Lease of Lands of the Demyse of the Dean and Chapter of *Westminster*, beginning 5. *December* 35 Eliz. married one I. H. and then he and his Wife Mortgaged the interest herein to E. for 200 *l.* and before the day of payment A. died, and I. H. paid the money at the day in redemption of the Mortgage and entred, and then K. took Letters of Administration of the goods of A. and entred upon the Lessee. The Wife of I. H. entred, and made the Lease to the Plaintiff. It was adjudged in this case that the Plaintiff should recover, for although the Lease was at first the Wives, and that the Husband was possessed in her right; yet by the Intermarriage he had full power to Alien, and if he survive his Wife he is to enjoy it against her Executors and Administrators, and so when he survives, the condition survives to him restores him to the Lease in State as it should have been if it had not been Aliened. Pasc. 11 Iac. in Co. B. *Yong* and *Hadsonds* case. *Hob* 3.

13. A Covenant was, That the Defendant should assure such a Copy-hold to the Plaintiff, if he married with his Daughter *secundum leges Ecclesiasticas*; and he alleged, That he *rite & legitime* espowsed the Daughter of the Defendant, &c. and Issue being thereupon, It was found for the Plaintiff. Exception was taken to it, because it ought to have been Tryed by the Certificate of the Bishop, and not by a Tryal by Jury: but the Exception was disallowed by the Court, for the marriage is onely in Issue, and not if he were lawfully espowsed. M. 3. Iac. in Co. B. *Fletcher* and *Lyfeld's* case. *Cro.* 2. part. 102.

What

1. *Where the Intermarriage of a Woman to a Husband is an abſolute gift of all her Goods and Chattels to the Husband, and where not; And where it is but a ſuſpenſion of a Promiſe; and where a Releaſe of it, where not.*

1. A Communication between I. S. and A. was of the marriage I. S. being poſſeſſed of a Term for years, and of certain goods promiſed to A. that if ſhe would be married to him, and they had Iſſue a Son, that he ſhould have the Term, if a Daughter, that ſhe ſhould have the Moyety of his Goods, ſhe Intermarried and had Iſſue B. a Daughter, the Husband died, B. brought an action upon the caſe againſt the Adminiſtrator of I. S. upon the promiſes. The Court held it would not lye unleſſe as Adminiſtratrix of A. or in the name of A. And *Staffords* caſe was put, where there was a Communication between *Stafford* and a Woman, that if ſhe would marry him he would at his death leave her 100*l.* that after the Intermarriage and death of the Husband, the queſtion was, If the promiſe was by the Intermarriage extinct? And after a long debate, It was Reſolved, That the Intermarriage was but a ſuſpenſion of the promiſe. Paſc. 3. Car. in C. B. *Heley* 12.

2. T. B. and E. his Wife brought an Action upon the caſe againſt E. H and declared that in conſideration that the ſaid E. at his Requeſt would take one T. M. his familiar friend to her Husband, he promiſed, That if the ſaid E. ſurvived the ſaid T. M. that he would pay her 40. *s.* yearly for her maintenance, and ſhewed that thereupon ſhe did take the ſaid T. M. to her Husband, and ſurvived him, and then married with the Plaintiff, the Defendant pretended a Releaſe from T. M. of all Actions and Demands: It was in that caſe adjudged to be no ſufficient Releaſe; but the Lord *Hobart* ſaid, that if he had Releaſed all promiſes it would have diſcharged the Debt. vide 4 Eliz. Releaſe of all Actions, ſutes, quarrels, doth not Releaſe a Covenant before it is broken but other it is of a releaſe of all Covenants. *Dyer* 57. Hill. 6. Iac. in B. R. *Belcher* and *Hudſons* caſe. *Hutton.* iij. And *Smith* and *Staffords* caſe. Hill. 15 Iac. Ibid.

3. Note, What things of the Wife are given to the Husband by his Intermarriage with her. 1. If a Woman hath a Term for years, or other Chattels reall, and taketh a Husband, he is poſſeſſed of the ſame in the Right of his Wife, and may diſpoſe of the ſame by Grant, or demiſe, or forfeit the ſame by Attainder or Outlawry, and ſuch a Term may be extended for the Debt of the Husband; but the Husband cannot diſpoſe of the ſame by his Will. vid. C. 8. part. 96. M. 17. Eliz. *Amner* and *Luddington's* his caſe. 2. If the Husband chargeth the Chattel real of his Wife, the ſame ſhall not bind the Wife if ſhe overliveth her Husband. 3. If a Woman hath a Right of Action to, or for a Chattel real, and takes a Husband and dieth, the Husband who ſurviveth her ſhall not have it by the Intermarriage, but the Executors, or Adminiſtrators of the Wife; and ſo is the Law, If the Wife hath but a poſſibility to a thing. 4. If a Woman hath Chattels real in the Right of another as Executor or Adminiſtrator, or as Gardian in Socage, theſe are not given to the Huſband by the Intermarriage, although that he overliveth the Wife. 5. If a Woman granteth a Term to her uſe, and afterward taketh a Huſband and dieth, the Husband ſhall not have the Truſt, but the Executors and Aminiſtrators of the wife, becauſe the ſame conſiſts in privitum Hill. 38. Eliz. in Canc. *Waterhowſes* caſe adjudge. acc. 6. Chattels real of a mixt nature, vid. part in poſſeſſion and part in Action which happen during the Coverture the Husband ſhall have by the Intermarriage if he over liveth the Wife as Arrearages of Rent incurred during the marriage, but if the Wife ſurviveth ſhe ſhall have them; and now by the Statute of 32. H. 8. cap. 37. the Husband ſhall have the Arrearages incurred before the marriage if he ſurviveth the Wife. 7. All the Chattels perſonal in poſſeſſion of the Wife in her own right are given to the Husband if he over liveth the Wife or not. But Chattels perſonal in Action, the Husband ſhall not have them, if he and his Wife do not recover them in the life of the Wife. 8. If the Wife hath but a bare poſſeſſion of Chattels perſonal as by Trover or Baylment, theſe are not given to the Husband by the Intermarriage, but for them Detinue lieth againſt the Husband and the Wife. *Cook* 1. part Inſtitut. 351. 352.

4. In Debt the caſe was. A man poſſeſſed of a Term for 30. years in the Right of his Wife made Leaſe for 10. years rendring Rent to him his Executors and Aſſigns, and died. The queſtion was if the Executors of the Husband or the Wife ſhould have the Rent. It was the opinion of *Haughton* and *Crook* Juſtices that the Rent was gone. But it was agreed by them all that the executors of the Husband ſhould not have the rent. But *Haughton* Juſtice ſaid that the wife ſhould have it. But it was agreed, That if Leſſee for 20. years make

makes a leaſe for 10. years, and then ſurrenders, that the Rent is gone, and yet the Term of 10. years continueth. And in the principal caſe, It was ſaid, That if the Husband after the leaſe made, had granted over the Reverſion, that his Aſſignee ſhould not have the Rent. But *Haughton* Juſtice ſaid, that in that caſe, the Wife in Chancery ſhould be relcived for the Rent. Tr. 16 Jac. in B. R. *Blackſton* and *Heape's* Caſe. *Godbt.* 279.

5. Ifa Women who is ſole brings an Aſſiſe, and after Verdict before judgment, ſhe maries and takes a Husband, this Intermariage is no cauſe to hinder the judgment, for that this cannot be avoided but by plea, and the party hath no time to plead this between the Verdict, and the judgment: as it was holden by *Crook* Juſtice, In the Earl of *Shrewsbury* and Earl of *Rutland's* caſe. Paſch. 7 Jac. in B. R. *Bolſtr.* 1. p. 5.

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3 *To whom the Mariage of perſons belongs: and of the Writs* de Valore Maritagii: *and* Maritagio non ſatisfacto; *and wherefore the value of the Mariage tender ſhall be requiſite, where not.*

Mr. *Littleton* ſaith, That the Father ſhall have the Marriage of his Son and Heir apparent during his life, and the reaſon thereof is, For that all the Eſtate of the Anceſtors, and the eſtabliſhing of his Inheritance, principally conſiſteth in providing a Covenable marriage for his heir apparent; And hence it is that every Anceſtor, Male, or Female, ſhall have Treſpas, or a Writ of Raviſhment of ward againſt a Stranger, who wrongfully Raviſheth the heir apparent of any perſon, be they Male or Female, and the Writ ſhall ſay, (*cujus Maritagium ad ipſum pertinet*, and it is not material of what age the heir apparent is; and the Cuſtodie and mariage of the Son and Heir apparent is inſeparably veſted in the Father, preſently after the Birth of the Son, *Jure Naturæ*; but after the death of the Father, the marriage doth belong to the Lord, by reaſon of the Tenure. And an Action of Raviſhment of Ward lyeth not againſt the Guardian in Knights Service by any Anceſtor, but only for the Father and for him the Action lieth againſt the Lord of whom the Land is holden in Knight Service, where his Son and Heir apparent is Raviſhed by him. Vid 9 E 4. 53. 32 E. 3. *Cook* 3. part, 39. in *Ratcliffs* caſe.

2. A. brought an Action upon the caſe againſt B. *Quare filium ſuum & hæredem rapuit & maritavit*; and there upon obtained Verdict. In arreſt of judgment, diverſe exceptions were taken to the Declaration. 1. That he doth not ſay, *Hæredem apparentem*, but *Filium & hæredem*. 2. Doth not ſay, *Contra voluntatem ſuam rapuit*. 3. Becauſe it doth not ſay, *Cujus maritagium ad ipſum pertinet*. And 35 Eliz. in B. R *Child* and *Tower's* caſe vouched for it; It was the opinion of the Court, That an Action *quare filium ſuum rapuit* will lye by the Father, although the Heir be of full age, or if he be within age; and that the Father hath the marriage of his Son *Jure Naturæ*, although he have no Eſtate to leave him. Paſc. 1649. in B. R. *Wood* and *Topham's* caſe. *Styles* 216, 235, 236.

3. If Tenant by Knight Service dieth his Heir within age, preſently the value of the mariage of the Heir takes effect and is veſted in the Lord: So as, although ſuch an Heir be within age, and be made a Knight, and to that purpoſe in the judgment of Law be eſteemed to be of full age, yet ſhall the Lord have the value of his marriage aſwell as the Cuſtodie of his Land until his age of 21. years. *Cook* 6. p. 74. Sir *Drue Draw's* caſe.

4. If the Lord hath the Cuſtodie of the Heir within age, and tendreth him a convenient mariage, and he refuſeth it, and intrudeth upon the Land, the Lord ſhall have a Writ againſt him to recover the value of the mariage, and alſo to recover the Land. 40 E. 3. 6. 2 H. 7. 9. C. B. 141. acc.

5. Note, It was Reſolved and adjudged by the Court, That the Guardian in Knight Service ſhall have the ſingle value of the Mariage of the Heir without tender of mariage to him; and that by the Common Law, it was in the Election of the Lord to have the mariage of the Heir, or permit the Heir to marry himſelf, and to have recompence ſuit to the value of it. And at the Common Law not only a Writ *de valore Maritagii* lay, But alſo, the Writ *quare ſe intruſit maritagio non ſatisfacto*: And at the Common Law, If the Heir within age had been Raviſhed and maried, the Guardian ſhould recover in Treſpas the value of the marriage, and in ſuch Caſe a Tender of mariage for the ſingle value was not neceſſary. *Cook* 5. p. 116. *Palmer's* caſe.

6. In a Writ *de valore Mariagii*, The Defendant tendered a Traverſe upon the Tender of mariage alleged in the Count, upon which it was demurred in Law; It was adjudged, That the tender

tender was not traverſable in this Action; For that *Maritagium de mero jure pertinet Domino*; and if tender ſhould be neceſſary, the Lord might be defeated of the marriage by the Heirs going beyond Sea, or places unknown. But it was ſaid, that for an Heir female, becauſe the Lord hath two years after her age of 14. years to make tender of marriage. *Warburton* Juſtice ſaid, that in that caſe, the tender is traverſable. Tr. 4. Jac. in Co. B. The Lord *Darcy* and *Pages* caſe. Cro. 2. part. 15.

7. In a Writ *de Valore Maritagii*, It was moved, If the Lord ſhould recover his damages according to the value of the Land held of him onely, or according to all his Lands held alſo of others. It was the opinion of the Iuſtices, that the value of the marriage ſhould be accounted as well in reſpect of the Lands held of him as of other Lands held of other Lords by Poſteriority or in Socage, for there the Woman by the marriage to him ſhall be more advanced, and the better the advancement is, the better is the marriage to the Heir, and the perſon more to be eſteemed. M. 3. Car. in Co. B. *Wrabely's* caſe *Hetley* 15

8. It was found by Office, that Sir *John Puckering*, late Keeper of the Great Seal, and the Lady *Jane* his Wife were joyntly ſeiſed to them and to the Heirs of him of the Mannor of *Weſton*, in the County of H. & of the Mannor of K. in the County of L. by purchaſe of the ſaid Lord Keeper: And that he was ſeiſed of B. in the ſaid County of H. and of the Mannor of C. in the County of W. and 38 Eliz. ſo died ſeiſed; and his Lady ſurvived him, and that the Mannor of *Weſton* was holden onely in *Capite*, and the reſt were holden of the Queen in Socage, and that T. his Son and Heir was of the age of four years; the Lady 19. *May* 9. Iac. died, T. the Heir. 3. *Junii* 10. Iac. was made Knight, and 3. *December* accompliſhed his true full age, tendred, and ſued forth a ſpecial Livery, in which Livery was contained a Releaſe and Pardon to the Heir of all Entries, Intruſions, and a Pardon & Releaſe of all Accompts, Actions, and Demands: The Auditors ſince the ſpecial Livery impoſed ſeveral Charges upon the Heir; and amongſt other, not of a ſum in particular, but to bring the Heir *ad Computandum pro meliore valore*. Upon a demurrer to his charge, the queſtion was: Whether this charge were lawfully impoſed or not, in regard it is general *ad Computandum pro meliore valore*; not being grounded upon an Office, or Warranted by any Preſident in Court. In this caſe it was reſolved, That the Auditor can ſet no charge, nor award Proceſſe to anſwer any charge, but upon a Record as an Office, or the like; the 2. Queſtion was, whether the King could be entituled to any mean rates, between the death of the Lady and the Knighthood of T. or between his Knighthood and full age, no Office being found of the death of the Lady, nor any charge impoſed before the Knighthood. It was reſolved, That if the Feodaries Certificate of the Ladies death were in Court before the Livery granted the mean rates encurred from the death of the Lady till the Knighthood; but thoſe which encurred ſince his Knighthood were diſcharged by the Livery, or rather by the Knighting of him, and tender of his Livery, which he might tender ſo ſoon as he was Knighted: But it was holden, that for the value of his marriage that he muſt anſwer, becauſe it was fully veſted in the King by his Nonage before. Hill. 13. Jac. Sir *Tho. Puckerings* caſe. *Heb.* 91. 92.

Maſter and Servant.

Where the Maſter ſhall be Charged for the Act, Offence, Wrong or negligence of the Servant: and where an Action lieth againſt the Maſter for it, where not; & & converſo.

1. THe Queen by her Letters Patents Granted the Office of Clerk of the County Court of D. to M. with all the Fees for his life; And afterwards conſtituted A Sheriff of the ſaid County of D. who claiming the ſaid Clerkſhip to be incident to his ſaid Office of Sheriff, appointed another to be Clerk there; In this Caſe it was reſolved, that the Grant of the Queen was void, for when the Queen hath conſtituted a Sheriff who is the immediate Officer to her Court of Juſtice, ſhe cannot abridge him of any thing which is incident to his Office; And the Sheriff is anſwerable and chargeable with all things which are done by vertue of his Office; and if ſuch Grant of the Queen ſhould be good, If the Records of the Court ſhould be imbeſilled by the Grantee or other, the Sheriff ſhould be charged with the ſame, which were unconſcionable, the ſaid Clerk not being made and appointed by him. And the Sheriff himſelf is to certifie all the proceedings out of the County Court: and is to anſwer for all Wrongs and Offences done by the Clerk there. 2. In that caſe it was reſolved, That the cuſtodie of Gaols of the County do of right belong unto the Sheriff, and are incident and annexed

nexed to his Office by the Statute of 4. Ed. 3. cap. 10. and therefore he ſhall anſwer for all Eſcapes and other Offences done by the Gaolers and the Keepers of them. *Cook* 4. part, 33. *Mittons* caſe.

2. Note, In the Grant of an Office, there is a difference betwixt an Aſſignee and a Deputy, for an Aſſignee is a perſon who hath an Eſtate and Intereſt in the Office it ſelf, and doth all things in his own name, and for whom his Grantor ſhall not anſwer if it be not in ſpecial caſes: but a Deputy hath not any Intereſt or Eſtate in the Office, but is but the Officers ſhadow, and doth all things in the name of the Officer himſelf, and nothing in his own name; for whoſe Offences and Miſdemeanor of his Office, his Grantor ſhall anſwer. *Cook* 9 part, 49. in the Earl of *Shrewsbury*'s caſe.

3. The King Granted the Office of Marſhalſea for life, and afterwards Granted the ſame in Reverſion for 21 years, the Grantee of the Reverſion Aſſigned his Intereſt to A. Tenant for life deputed I. S at Will Officer, and died. A by Deed Aſſigned the ſaid Office to I. S. and it was found by Office that I. S. committed ſeveral forfeitures of the ſaid Office, by ſuffering priſoners in Execution to eſcape (ſee the caſe in the Book at large.) In this caſe amongſt many other points it was reſolved, That although the Office was *ipſo facto* in the poſſeſſion of the King by the forfeiture; yet there ought to have been a Writ of diſcharge, for that untill he be actually removed he ſhall anſwer for eſcapes: and he who hath the keeping of a Gaol, or Priſon, either wrongfully or of right, ſhall be chargeable for the eſcape of Priſoners; and he who hath the cuſtody of a Gaol, or Deputy to another, if he be not ſufficient to anſwer for the eſcapes, he, who hath the Inheritance of ſuch Office, and appointed ſuch Deputy, ſhall be charged and chargeable with them *Cook* 9. part, 98. in Sir *George Reynel*'s caſe.

4. Tenant at Will ſuffered *permiſſive* waſt the Leſſor brought an action upon the caſe againſt him; it was adjudged that the Action did not ly againſt him, becauſe in ſuch caſe there was not any confidence repoſed in him by his Leſſor, and it was his own folly that he did not reſtrain him from doing evil: But in that caſe, It was reſolved, that where a truſt and confidence is put in the party, there for the breach of ſuch truſt and confidence an action upon the caſe will be; As if a man deliver a horſe to I. S. to keep, and for want of keeping of it the horſe dieth, there an action upon the caſe lieth: And ſo an action upon the caſe lieth againſt a Shepheard if by negligence the ſheep of his maſter be drowned, becauſe in ſuch caſe there is a truſt and confidence put by the maſter in the ſervant for the keeping of them. *Cook* 5. part 13. and 14. The Counteſſe of *Shrewsbury*'s caſe.

5. A man was taken in Execution by Bayliffs of a Franchiſe by force of a Warrant upon a Writ of *Capias* & *ſatisfaciendum*, the Bayliffs before the Return of the Writ in B. R. at the Requeſt of the Priſoner brought him before the Return into another County, and after the Return delivered him again to the Kings Bench. In that caſe it was adjudged no eſcape in the Bayliffs: and in that caſe, this difference was taken. If the Sheriff or Bayliff of a Liberty ſuffereth one in Execution, and who is under his cuſtody, to go out of the Gaol for a time, and then to return, although that he returneth at the time, yet the ſame is an eſcape for which the Sheriff ſhall anſwer: ſo if the Sheriff ſuffereth one to go by Bayl or Baſton; for the Sheriff ought to keep the Priſoner *in ſalva & arcta Cuſtodia*. But when the Sheriff hath one in Execution for Debt, and a *Habeas Corpus* iſſues out of the Kings Bench, to have his body in Court at a certain day, and the Sheriff before the Return of the Writ brings the Priſoner to an Inn in another County, and the Priſoner of his own head goeth abroad without any one to Guard him into another County, and returns again to the Sheriff, who at the return of the *Habeas Corpus* brings the party into Court, it was adjudged in that caſe the ſame is no eſcape; and if the ſervant in ſuch caſe by negligence ſuffer the party to go at liberty, yet the Sheriff his Maſter ſhall not be puniſhed for the ſame. *Cook* 3. part, 43, 44. *Boyſe*'s caſe.

6. A. Was in Execution ſeverally under the cuſtodies of the Sheriffs of *London*, at the ſutes of A. and B. the old Sheriffs delivered the body of A. by Indenture in which the Execution of B. only was mentioned, and the other left out, A. in the time of the New Sheriffs eſcaped; It was adjudged, That in this caſe the Old Sheriffs ſhould be charged with the eſcape, & the not delivery of A. in Execution to the New Sheriffs was an eſcape in the Old Sheriffs: although A. was in the Priſon it ſelf. 2. Reſolved, that the Old Sheriff ought to give notice to the new Sheriffs of all Executions which he hath againſt every perſon in his cuſtody, and the new Sheriffs are not to take notice of them at their perils; but if the Sheriffs hath divers perſons in his cuſtody in Execution and dieth, there the new Sheriffs are at their perils to take notice of all Executions againſt any parties which he ſhall find to be in the Gaol. But if the Sheriff dieth, and before another is made Sheriff one who is in Priſon in Execution doth eſcape, the Gaoler ſhall not be charged with ſuch eſcape, nor the Sheriff himſelf,

ſelf, becauſe that then the Priſoners are in the cuſtody of the Law. *Cook* 5. part, 72. *Weſtnes* caſe.

7. In *Audita Querela*, the Plaintiff ſhewed, How that a Debt of 200. *l.* was recovered againſt him, upon which he was Outlawed, and afterwards by *Capias utlagatum* was taken in Execution, and being in Execution the Sheriff ſuffered him to eſcape, The Defendant pleaded, That after the ſaid eſcape, and before the *Audita Querela* brough the Outlawry was declared to be erronious, & ſo pleaded *Nul tiel Record* of the Outlawry. In this caſe amongſt other points it was reſolved. 1. That when an Erronious Judgement is given, and afterwards the Judgement is reverſed by Errour, collateral Acts are thereby barred: As if A. be in Execution at the ſuite of B. upon an Erroneous Judgement, and eſcapes, & afterwards the Judgement is reverſed by error, he may plead *Nul tiel Record*, but untill the Erronious Judgement be reverſed, the Sheriff ſhall not take benefit of it. But in the ſame caſe, if the Plaintiff bringeth an Action againſt the Sheriff upon the eſcape, & hath Judgment and Execution, and afterwards the Judgment is reverſed for Error, yet becauſe the Judgment is executed, notwithſtanding the revertal of firſt, the ſame ſhall ſtand in force. 2. Reſolved, that becauſe the Judgement to reverſe the Outlawry is declaratory, which declares the Outlawry to be of no effect; becauſe the Exigent which was the Ground of the Outlawry wanted ſubſtance, that when the ſame is ſo declared by the Court it is void *ab initio*. *Cook* 8. part, 141. 142. in Dr *Downes* caſe.

8. In an action upon the Caſe brought againſt a Common Inn-keeper it was reſolved, That if a man cometh to a Common Inn, and giveth his horſe to the Hoſtler, and requires him to put him to Paſture, which he doth, and the horſe is ſtollen, the Inn-keeper ſhall not anſwer for it, becauſe it is not *infra Hoſpitium*: but if the Inn-keeper putteth the horſe to graſſe without requeſt, and the horſe *is* ſtollen, the Inn-keeper ſhall anſwer for it. 2. Reſolved, that if one be Lodged with one who is not an Inn keeper upon requeſt, and the goods of the party Lodged be ſtollen by the ſervants of him who Lodgeth him, the Maſter ſhall not anſwer for ſuch goods 3. Reſolved, That an Inn-keeper ſhall not anſwer for goods unleſſe default be in him, or his ſervants in the ſafe cuſtody of them; for an In-keeper ought to keep ſafe all the goods of his Gueſts which come into his houſe; and in an Action brought for ſuch goods loſt, it is no plea for him to ſay that he delivered the Key of the Chamber to the Gueſt, and he in ſuch caſe ſhall be charged although the goods were not delivered unto him; But if a ſtranger at the requeſt of the Gueſt Lodge with him, and then the goods be ſtollen, or loſt, in ſuch caſe the Inn-keeper ſhall not be charged with ſuch goods, *Cook* 8. part, 32 *Calyes* caſe.

9. A. Delivered money to his ſervant to provide Victuals, the ſervant bought the Victuals in his Maſters name, and paid not for them, and afterwards an Action was brought againſt the Maſter for the money, and her would have waged his Law; It was the opinion of the Court, that he could not ſafely wage his Law, becauſe the Victuals came to his own uſe, and therefore he is chargeable for them, and muſt have his remedy againſt his ſervant: But it was holden, That if a Maſter doth forbid a Tradeſman to deliver wares to his man, except his man paid for them, In ſuch caſe, If the Tradeſman doth deliver wares to the ſervant, who payes not for them, in ſuch caſe in an Action brought againſt the Maſter for the wares he may wage his Law, as it was adjudged in Sir *Henry Countons* caſe. Paſc. 10 Jac. in Co. B. Sir *Hen. Downys* caſe. *Brownlo* 1. part, 64.

10. In an action upon the caſe, the caſe was. The Defendant being a Goldſmith in *London*, and having counterfeit Jewels, knowing them to be counterfeit, ſent his ſervant I. S with them to the Plaintiff being a Merchant in *Barbary*, to make ſale of the Jewels to the King of *Barbary*, to whom the Plaintiff ſold them for 800 *l.* I. S. having the money went from thence, The Jewels afterwards being diſcovered to be counterfeit, the party being impriſoned for the ſale of them was forced to make reſtitution to the King of *Barbary*: It was agreed by the Juſtices in this caſe, That although the Defendant did not command I. S. his ſervant to make uſe of the Plaintiff, and although that the Jewels were of ſome value, *viz.* 100 *l.* yet that the Action did well lye againſt the Maſter, and that the Maſter ſhould anſwer for his ſervant; In that caſe, It was ſaid, That if a Goldſmith makes Plate wherein he mingles droſſe, ſo as it is not according to the Standard, and ſends his ſervant to a Fair to ſell it, who ſelleth it for good plate according to the Standard, that in this caſe an action upon the caſe lieth againſt the Maſter. Tr. 16. Jac. in B R. *Pooh.* 143. *Southcot* and *Hare*'s caſe. Cro. 2. part, 469. the ſame caſe 1. vide *Bridgeman* 128 the ſame caſe.

11. In an Action of Debt brought by an Attorny againſt the Sollicitor of I. S. for Monies due to him for his Fees, It was thus. The Defendant being a Sollicitor retained the Plaintiff as Attorny, and for Fees unpaid, the Plaintiff brought Debt againſt the Sollicitor who retained him: It was moved in Arreſt of Judgement, That the judgment was Erronious: for although an Attorny may

have Debt for his Fee and Monies which he diſburſeth, yet it ought to be againſt him for whom he is Attorny, who is the Maſter, and not againſt the ſervant or Sollicitor who onely retained him, nor hath any profit thereby. But it was overruled upon reading of the Record, that the ſervant retaining him, *Capiendo* of him the ſaid Fees, It is a good Contract, and that the Action well lyes againſt the Sollicitor or ſervant: and it was compared to the Caſe, *Simſon's* Caſe, where one promiſed a Taylor, That if he will make a Garment for one of his ſervants, he will pay him, that an Action of Debt or Aſſumpſit lyes in that Caſe againſt the Maſter. Hill. 16. Iac. in B. R. *Bradford* and *Woodhouſe's* Caſe. *Cro* 2. part, 520. 521.

12. In an Action upon the Caſe upon an Aſſumpſit, the Plaintiff declared of an Aſſumpſit made to the Plaintiff, and the Jury found, That the promiſe was made to I. S. who the Plaintiff ſent, and appointed *ad Compoundum & agreandum* the Debt between the Defendant and the Plaintiff. Whereupon, the Defendant made the promiſe to the ſervant. In this Caſe, It was adjudged, that it was a promiſe to the Maſter himſelf. For it was ſaid, That an Aſſumpſit to the ſervant for the Maſter, is good to the Maſter; And an Aſſumpſit by the appointment of the Maſter of the ſervant ſhall bind the Maſter: And if my Bayliff of my Mannor buy Cattel to ſtock my grounds, I ſhall be chargeable in an Action of Debt for the money. 27. Aſſ. acc. And if my Bayliff ſells Corn, I ſhall have an Action of Debt for the money. For whatſoever comes within the compaſſe of the ſervants ſervice I ſhall be chargeable with, becauſe I have advantage of the ſame. If a ſervant ſelleth a Horſe with Warranty, it is the ſale and Contract of the Maſter; but it is the Warranty of the ſervant, unleſſe the Maſter giveth him authority to Warrant it, for a Warranty is void, which is not made and annexed to the Contract; but if the Maſter do agree after to it, it ſhall be ſaid the Warranty of the Maſter *ab initio*. It was adjudged for the Plaintiff. Tr. 21. Jac. in B. R. *Sigaior* and *Woolmers* caſe. *Godbt.* 360.

13. In an Action upon the Caſe, the Plaintiff declared, That he was poſſeſſed of an Ewer of ſilver of the value of 500. *l.* and did give the ſame to A. to tranſport beyond ſea, and to ſell the ſame there, and to give an accompt thereof to him. And ſhewed that A. had broken it, and converted it to his own uſe, whereupon the Plaintiff brought his Action againſt A. *ad damnum* 400. *l.* upon which they were at Iſſue, and the Jury gave damages but 200 *l.* In this Caſe it was adjudged, That the Action would not lye, and chiefly becauſe the value of ſuch things are ſo uncertain, that ſome perſons value them higher than others. M. 39. Eliz. in Co. B. *Davenport* and *Simpſons* caſe. *Bridgeman* 129. vid. before *Southern* and *Howes* caſe.

14. In an accompt the Plaintiff charged the Defendant was Bayliff of his ſhop *curam habens & adminiſtrationem omnium bonorum*; the Defendant anſwered to the goods onely, and not to the ſhop: It was the opinion of the Court that it was not good, but that he ought to anſwer to all, and in that caſe this difference was taken for Law. That if one chargeth me as Bayliff of his goods *ad Mercatandum*, that in ſuch caſe I ſhall anſwer for the encreaſe; but if he chargeth me as Receiver *ad Computandum*, I ſhall anſwer but for the money or the bare thing which was delivered M. 29. E. in B. R. *Gomerſall* & *Gomerſall's* caſe, *Godbt.* 55. 56.

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1. *In what Caſe the Maſter may bring an Action for a wrong done to his ſervant: where Treſpaſſe lieth by him for taking away his ſervants: And what Acts or things the ſervant may do, and juſtifie in the right of his Maſter: And where, and for what an Action lieth by the ſervant, or other his friends againſt the Maſter.*

1. IN an action upon the caſe the Plaintiff declared upon the cuſtom of the Realm, that Inkeepers ought to keep their Gueſts goods ſafely without ſubſtraction, and the Plaintiff ſhewed, that A. his ſervant Lodged at the Defendants houſe being a common Inn; and that he having a Bag of Money there of the Plaintiffs of 60. *l.* *Quidam Maleſactores* in default of the Defendant, and his ſervants, carried the ſame away: It being upon a Not guilty found for the Plaintiff and Judgement, Error was brought, and aſſigned for Error, That the Action ought to have been brought by the ſervant and not by the Maſter. But it was reſolved, that although the Maſter was not here the Gueſt, but the ſervant; yet that the Action was well brought by the Maſter: and ſo it was ſaid, It had been oftentimes reſolved: The Judgement was affirmed in the Exchequer Chamber. Tr. 7. Jac. *Beadle* and *Morrices* caſe. *Cro.* 2. part, 223. 224 vide *Cook* Entry 347.

2. In Treſpaſſe, *Quare vi & armis*, ſuch a one being his ſervant *cepit & abduxit* at D. in the County of E. The Defendant pleaded that he was a Vagrant in the ſame County, and how he not having notice that he was ſervant to another, he retained him. It was moved, If I retain a ſervant of another man in the ſame County where I and his Maſter inhabit, that this is not juſtifiable, though

though in truth I had not notice of that, vide 19. E. 3. 48. *Hob.* Chief Juſtice ſaid, perhaps the Book may be ſo, and not Law, for it is a hard matter to make me take Notice of every ſervant which is retained in the ſame County, and yet perhaps if this retainer be upon the Statute of Laborers, I ought to take Notice of that at my peril, but it is otherwiſe of a private retainer, for although it be within the County, yet being a private matter in fact the Law will not compel me to take Notice of that at my peril, to which *Winch* Juſtice agreed. It was ſaid in this caſe by the Juſtices, That the receiving and retaining of a Servant, may not be ſaid to be *vi & armis*. M. 20. Jac. in Co. B. *Winch* 51.

3. In Debt upon ſeveral accompts of diverſe ſorts of Wares ſold at ſeveral times, and upon ſeveral retainers at ſeveral days to do ſeveral ſorts of works. One was alleged that he ſhould retain I. S. the Plaintiffs ſervant, to work with him for four days, *Capiendo pro ſalario ſuo quolibet die* 2 *s. per quod ille accrevit*, to demand 10 *s.* The action was brought by the Maſter, the Defendant pleaded *Non debet*; Judgement was for the Plaintiff, and Error brought. For Error it was aſſigned, That the Action lies not for the Maſter for the retainer of the ſervant. And it is not alleged that he did the ſervice for his Maſter, but for himſelf, and the retaining of the ſervant is for his own proper labour; It was the opinion of the Court, that the Action did not lye, and the judgement was reverſed. Hill. 20. Jac. in B. A. *Treſwell* and *Middleton*'s caſe. *Cro.* 2 part, 653.

4. In Treſpaſſe of Aſſault and Battery, the Defendant juſtified in defence of his ſervant, that the Plaintiff Aſſaulted his ſervant, and would have beaten him; upon which the Plaintiff demurred. It was the better opinion of the Court, that the Barr was good, for the Maſter may defend his ſervant, for otherwiſe he may loſe his ſervice. And a man may uſe force in defence of his goods if another take them, and ſo a man may defend his ſon or ſervant, but he cannot break the peace for them, vide 19. H. 6. 31. 9. Eliz. 4. 43. Tr. 12. Jac. in B. A. *Seaman* and *Coppledicks* caſe. *Owen* 151.

5. In an Action brought the Plaintiff declared, that the Defendant ſuch a day did aſſault, and beat his Wife, of which ſhe dyed ſuch a day following, to his damage of 100. *l.* In this caſe, It was agreed for Law, That if one beat the ſervant of I. S. ſo that he dyeth of that beating, the Maſter ſhall not have an Action againſt the other for that Battery, and loſſe of his ſervant, for that the ſervant dying of the extremity of the beating it is now become an Offence againſt the Crown and turned into Felony, and this hath drowned the particular offence & prevails over the wrong done to the Maſter before: And ſo in the principal caſe the Action is gone by the death of the Wife, and turned into Felony, and if the Woman had not died, yet the Action brought by the Huſband alone had not been good, but it ought to have been brought in both their names. Tr. 4. Jac. in B. R. *Higgons* and *Butchers* caſe. *Rowl.* 2 part 205.

6. In Debt upon an Obligation; The condition was, That whereas I. S. had bound himſelf Apprentice to the Defendant for 8. years; the Defendant did Covenant with the Plaintiff, that he would retain, teach, keep, and imploy the ſaid Apprentice in his own houſe and ſervice in the Art of Chirurgery during the Term; and ſhewed, that within the Term, the Defendant ſent the Apprentice in a Voyage to *Bantam* in the Eaſt-Indies; which the Defendant pleaded to be in the Company of expect Chirurgeons the better to learn the Art: upon which the Plaintiff demurred; In this Caſe, It was adjudged for the Plaintiff, for it was expreſly againſt his Covenant; for although the Covenant were not ſo reſtrained to his houſe, but that he might ſend him to other places about his Cures: yet he muſt ſtill be one of his houſhold, and not put over to others; and in this caſe it was holden, That no man can force an Apprentice to go out of the Kingdom, except it be ſo expreſly agreed, or that the nature of the Apprentiſhip doth import it, as to be Apprentice to a Merchant Adventurer, Sayler, or the like Hill. 13. Jac. in Co. B. *Coventry* and *Woodhalls* caſe, *Hob.* 134.

7. In an Action for a falſe Impriſonment for ſix dayes, The Defendant juſtified by a Warrant from the Sheriff of S. who directed his Warrant to his Bayliff to execute it, who arreſted the Plaintiff, and required the Defendant to be aiding and aſſiſting to him which is the ſame. It was demurred upon the Plea, becauſe it was not pleaded, that the Writ was executed and returned, for the Writ is Conditional, *Ita quod Habeas Corpus in Curia tali die, &c.* And therefore if the Sheriff himſelf will juſtifie, it is no Plea without ſhewing the Return of the Writ, and the Bayliff ſhall not be in better condition than his Maſter. The Court ſaid, It is true, the Sheriff ought to Return his Writ, otherwiſe his Juſtification is not good; but it is not ſo with his Bailiff, or Servant; for he hath no means to enforce the Sheriff to make Return thereof; and that which he did was legally done, and it ſhall not be made illegal by the Sheriffs Act in not returning the Writ. Hill. 11. Car. in B. R. *Cro.* 1. part, 322. *Gerlings* caſe.

8. A Copy-holder in Fee, made a Letter of Attor-

Attorney to two Tenants of the Mannor to surrender his Copy-hold to the use of I. S. and his Heirs, who at the next Court brought in the surrender in Court, and did accordingly, no custom being found to Warrant such surrender; It was resolved, that the surrender was good, because he might so do *de communi jure*, without any custom. But it was there resolved, That when any one hath any Authority, either as Attorney, or Servant to any other to do any Act, there he must pursue it in the name of him who giveth him the Authority, and not in his own name. *Cook* 9. part, 75. 76. in *Combes* case.

9. In Trespasse, the Plaintiff declared of breaking of his Close, and beating of his Servant, and did not say *per quod servitium amisit*. The Defendant pleaded Not guilty, and the Jury found him guilty generally, and assessed damages entirely, whereupon Error was brought, and that assigned for Error, because No damages ought to have been given for the battery of the Servant, because he did not allege that thereby he lost his service; and it was adjudged Error, for when damages are entirely assessed, it shall be intended for all that which the Plaintiff complains of; and in that case the Jurors ought to have assessed the damages severally, and particularly for the breaking of the Close entire, and then it had been good. 15. Eliz. in B. R. *Pate* and *Osbornes* case. Vouch in *Cook* 1. part, 130. 131. in *James Osbornes* case.

Vid. Where the Law giveth Liberty, and where the servant may justifie the entrie into a Park with his Master to Hunt in the said Park. *Cook* 9. part, 49. in the Earl of *Shrewsbury's* case.

Melius Inquirendum.

Where it lieth, where not: And for what Cause awarded; and what is to be found upon it, and where it shall be void, where not.

1. *Melius Inquirendum* is a Writ, which is directed unto the Escheator for a second Enquiry to be made, when there is any doubt made of the partiality of any Enquiry made upon a *Diem clausit extremum*, after the death of the Kings Tenant. Also this Writ lieth, Where the Escheator in the Inquisition doth not specify, what Estate the Tenant had in the Lands; Or because he doth not shew in the Office of whom the Lands are holden, or doth not mention the true value of them, and the King is informed that they are of greater value than they are certified by the Office: And this Writ lieth upon a surmise that the Tenant was seised of other Lands, or of other Estate than what is mentioned in the Office. *Fitz.* N. B. 255.

2. Upon a Commission in the nature of a *Diem clausit extremum*, A Tenure was returned of the Queen as of the Barony of S. in Socage. After a second Commission a Tenure was found by Knights Service as of the said Barony. After that a third Commission issued, reciting, *quod Compertum est per Inquisitionem capt. post mortem A. tempor.* H. 5. that the said Land was holden of the King in *Capite*, *prout per praefat. Inquis. tempor.* H. 5 *liquet*: In this case it was holden by the Court, that the Heir needs not to traverse the two last Inquisitions for that they were without warrant, but the first Office though against the Queen shall be allowed till disproved by a *Scire facias*. Pasc. 8. Eliz. *Dyer* 248. *Bassets* case.

3. Upon a *Diem clausit extremum*, It was found that the Lands were holden of the King, but by what Services the Jurors do not know. Whereupon a *Melius inquirendum* issued, and upon that It was found that the Lands were holden of a Subject; It was the opinion of the Court, that in that case, the first Office needed not to be traversed, for that it was void by the Statute of 2 and 3 E. 6. cap. 8. and in that case, It was said, That the *Melius* is in the nature of the first *Diem clausit extremum*. Tr. 13 Eliz. *Dyer* 292.

4. King *Hen.* the 8. gave Lands in tail to T. C. the remainder to I. C. T. C. was attainted of Treason, & by Parliament the Lands were given to the King without Office saving all Rights &c. of Strangers. The King seised of the Land granted the same to B. in Fee. T. C. died without Issue, I. C. entred, and being ousted by B. brought a Writ of *Entre sur Disseisin* and counted that he was seised *at de libero tenito*, B. shewed all this matter and of the descent of the Seignory to Ed. 6 and prayed in aid of him, and there were four searches in Chancery. Depending which a *Mandamus* issued at the suit of B. upon which the grant in tail to T. C. was only found: and a false Date of the Letters Pat. and the attainder, and that the King was seised and granted to B. Afterwards upon a *Melius &c.* the very Date was found,

found, but the attainder and execution were found before the grant upon a miſpriſal of the change of the year the raign, upon which Retorn, for the manifold untruths a *Procedendo* was awarded. The Plaintiff took a Traverſe, That the Queen was not ſeiſed in *Dominico ſuo ut de feodo*: upon which they were at Iſſue. It was the opinion of the Court, that the matter in Law did maintain the Iſſue; For the baſe Fee of the King was determined by the death of J. C. without Iſſue, and that he was not ſeiſed in point of Reverter, becauſe of the mean Intereſt, and the remainder and entry of the Demandant was ſaved by the Act; wherefore the Defendant afterwards confeſſed the Action. Tr. 2 Ma. *Dyer* 101. *Culpepers* caſe.

5 It was found by *Diem clauſit extremum*, after the death of R. W. that the ſaid R. the day that he died was ſeiſed of the moity of the Mannor of *Trewalliard*, and of ſuch Eſtate died ſeiſed. and that the ſaid moity of the ſaid Mannor, 19 E. 3. was then holden of the Prince as of his Caſtle of D. parcel of the Dutchy of *Cornwall* by Knigh Service, as appeareth by an exemplification of D. 19 E. 3. and the Words of the extent were; VV. *de* T. *tenet duo feoda & domid. multis apud* P. Strickleſtone & Frewalliard *per Servitium Militare & per reddit. per ann.* 8 *d.* It was reſolved by the Juſtices in this caſe, That the Office concerning the Tenure was inſufficient and void, becauſe the Verdict of a Jury ought to be full and direct, and not with a *prout*, for upon that the whole force of their Verdict lieth upon the extent, which if it be falſe, he who is grieved hath no remedy by traverſe, for they have not found the Tenure indefinite which might be traverſed, but with a *prout patet*; which makes the Office in that point inſufficient. But upon that the Court was of opinion that a *Melius Inquirendum* ſhould be awarded. Tr. 7 Jac. in Cur. Ward. *Cook*, Select caſes 72. vid. *Leo.* 16. accord. the ſame caſe.

6. Note, It was reſolved by the Juſtices, That if an Office be found againſt the King, and a *Melius Inquirendum* is awarded, and in that the finding is for the King, but the *Melius* is void for repugnancy in the Writ; that there a new Writ of *Melius* ſhall be awarded; but if upon the Writ of *Melius* it be found againſt the King, there the King ſhall not have a new Writ of *Melius Inquirendum*, for then there would be no end of ſuch Writs; And if an Office be found for the King, the party grieved may traverſe it, and if the traverſe be found againſt him, it makes an end of the buſineſſe; So if it be found for him who traverſeth it, it ſhall bind the King. In that Caſe, it is put: If a *Diem clauſit extremum*, or a *Mandamus* be awarded, and it is found againſt the King, No new Writ of *Diem clauſit &c.* or *Mandamus* ſhall iſſue forth: But a *Melius Inquirendum* ſhall iſſue: But no *Melius* ſhall be awarded after Office found againſt the King without view of ſome Record, or other pregnant matter for the King, for avoiding vexation of the Subject. *Cook* 8 part, 169. *Pain Staughters* caſe, vid. *Leo.* 8 Jac. in Cur. Ward, 26. *Gardiner's* caſe, acc.

7. Upon a *Diem clauſit extremum* 32 Eliz. It was found that A. S. was ſeiſed in Fee of three Meſſuages &c. and ſo ſeiſed, made his laſt Will in writing, *in hac verba*, Item I give &c. and after the Jury found ſeveral Tenures in Socage of Common perſons, and no Lands holden of the King: then they ſay further, that *predict.* A. S. *obiit circa* 23. *diem Aprilis ultimo praeterit.* and that T. S. is his Son and next Heir. Afterwards 5 Jac. a Writ of *Mandamus* is awarded, whereby part of the ſaid Lands are found to be holden at the death of the ſaid A. S. of the late Queen in *Capite* by Knights Service, and at the time of the taking of the ſaid Laſt Inquiſition, were holden of the King by Knights Service: the Queſtion was, whether the firſt Office were void, or only voidable no dying ſeiſed being found. 2. Whether the *Mandamus* was well awarded before the firſt Office was avoided by matter of Record; It was Reſolved, That the Office finding no dying ſeiſed, and only a Tenure of common perſons was meerly void, but if a Tenure had been found of the King in *Capite*, or Knights Service, if no dying ſeiſed had been found, yet the Office had been but voidable; And a *Melius inquirendum* ſhould have been awarded to Enquire of the Eſtate whereof he died ſeiſed; Otherwiſe it is where no Tenure is found of the King: In the principal caſe it was holden the firſt Office was void; the *Mandamus* well awarded, and the ſecond Office good. Paſc. 9 Jac. in Cur. Ward. *Shallock's* caſe.

8. Upon a *Mandamus* after the death of *J. Fotz.* It was found that *die obitus*, he was ſeiſed in Fee of the Mannor called *Sattons* Mannor in B. and being ſo ſeiſed, *poſtea*, ſc. 10. Martii 42 Eliz. he did thereof infeoff one W. to the uſe of himſelf for life, the remainder to C. in Fee; and then concludes *Quod predict.* I. Ion. *de omnibus dict. præmiſſ. ſic. modo & forma ſic ſeitus de tali ſtatu ſuo in eiſdem obiit inde ſeitus* 12. *Martii* 2. Jac. It was reſolved by the Juſtices, that this Office was bad for repugnancy of the finding of the Eſtate whereof he died ſeiſed. Tr. 12 Jac. in Cur. Ward. *Fotz* caſe, *Holt* 38.

9. Ac-

9. An Office was found by Commissioners after the death of W. B. at C. whereupon a *Melius &c.* went forth and recited but thus, *Cum per quandam Inquisitionem captam apud* C. *coram eis existit*, and doth not say that it was either by Commission or Writ, or before whom &c. It was the opinion of the Justices that it was void; and the Office that was taken upon the *Melius*; For by the *Melius* it must appear that the first Office was by Warrant; But if it had been *Virtute Commissionis, or De Mandato nostro*, which is understood by Writ, it would have been good, although it be not said before whom. Tr. 12 Iac. in Cur. Ward. *Dawtrye's* case, *Hob.* 38.

10. And Office was found by *Mandamus* before the Escheator of L. in *Cornwall*, after the death of C. that he died seised of certain Lands (*sed de quo, vel de quibus, vel per quæ servitia ignorant*) whereupon a *Melius* was awarded reciting the place and time of the former Inquisition *virtute Brevis de Mandamus*, and that *Ignorant* was found of the Tenure, and say not that it was found before the Escheator, and then proceed, *Et quia accepimus*, that the said Lands or some of them were holden by Knights Service in Chief, *Tibi Præcipimus*, that you enquire whether the said Lands or any of them be so holden. It was the opinion of the Justices that the want of *coram* was not enough, because it was *Virtute Brevis*, which must be before the Escheator: But they held the Writ vicious because in an *Ignavimus*, the Enquire of the Tenure ought to be free and at Large, and not to be restreined to the Kings Tenure only. Tr. 12 Iac. in Cur. Ward. *Castices* case, *Hob.* 73.

11. Note, It was agreed by the Council of the Court of Wards, That what the Statute of 32 H. 8 gives Wardship in case where Land is conveyed for the advancement of the Wife or Infants, or for satisfaction of the Debts and Legacies of the partie by implication of the same Statute, that this may be found by inquisition; And if it be omitted in the inquisition, it may be found by a *Melius Inquirendum*, but not come in by a bare surmise; and therefore if in the Inquisition it be found, that the Ancestor conveyed his Land, by the *Melius Inquirendum* it may be found that it was for the payment of his Debts or Legacies, Or that the party to whom, or to whose use it was made, was the Son, or Wife of the party that made it. And so it shall be if one be found to be Heir on the part of the Mother, but they know not who is Heir to the party of the Father; a *Melius Inquirendum* may be awarded in such Case. Tr. 36 Eliz. in the Court of Wards, *Smiths* case, *Pasch.* 54 55.

See more of *Melius Inquirendum*, in the Titles of Gard, Livery, and Office before the Escheator.

Mesne *and* Meanalty.

Mesne, For whom and against whom it lieth, and where the Mesne shall put in his Cattel in the pound for the Tent, and for what it lieth, and for what not.

1. THe Writ of Mesne lieth; in Case where there is Lord, Mesne, and Tenant, and each of them holdeth by ouelty of services, as by Homage, Fealty and 20. s. Rent or the like, yearly to be paid: Now if the Tenant be distreyned by the Lord Paramount for the services of the Mesne which are behind, Then the Tenant may have a Writ of Mesne against his Lord who is the Mesne; and if he be distreyned, he shall herein recover his damages, otherwise not.

2. If there be Lord, Mesne and Tenant, and the Tenant is distreyned by the Lord for the default of the Mesne, and his Cattel be impounded, for which he brings a Replevin, and the Lord avoweth upon a Stranger: In that Case the Tenant may have a Writ of Mesne against his Lord the Mesne, and yet the Mesne cannot joyn with the Tenant in pleading because the avowry is made upon a Stranger. 13 Ed. 4. 6. acc. And a man may bring a Writ of Mesne before he be distreyned, and the Writ is maintainable, but then he shall not recover damages: For the Writ is brought only to recover the Acquittaile 7 H. 4. 12. But if the Mesne hath paid the services, to the Lord Paramount, yet if the Tenant be afterwards distreyned for those services, he shall have a Writ of Mesne; and in that Case, though it hath been a Question, if he shall recover damages; yet the better opinion of the Books hath been, that he shall have damages, because the Mesne shall have damages against the Lord Paramount, if he will put his Cattel in the Pound for the Tenant, and for

ſue a Replevin. Vid. 38 H. 6. 12. by *Priſot* 50 E. 3. 23. And, Note, that the Meſne cannot have a Writ of Meſne againſt his Lord, till the Tenant hath brought his Writ of Meſne againſt him.

3. The Writ of Meſne lieth, and is maintenable, againſt the heir of the Meſne, where his Anceſtors have granted the Services of the Tenement by Fine, if the Tenant hath not attorned according to the Fine: for he ſhall not be compelled to attorn without granting Acquittal unto him, 40 E. 7. 7. 12 E. 4. 4. by *Brian*. But if there be Lord, Meſne, and Tenant, and the Meſne grants the Meanalty for life, the remainder over, and the Grantee brings a *Per quæ ſervitia*, againſt the Tenant to attorn, and the Tenant is ready to attorn, ſaving to him the advantage of his Acquittal: And the Tenant attorns, and afterwards the Grantee for life dieth. The Grantee in the remainder ſhall not diſtreyn the Tenant for the Services, until he hath granted him Acquittal, becauſe otherwiſe he ſhould be twice charged, *viz.* by the Lord and the Meſne, and he ſhould never have his Acquittal, 18 E. 4. 7. acc.

4. Note, when there is Lord, Meſne, and Tenant, and the Meſne payeth the Rent, and doth the Services to the Lord, and yet the Lord diſtreyneth the Tenant *per avail* for them, and impoundeth his Cattel, In this Caſe the Tenant may preſently repair to his Meſne, and relate the caſe to him, and pray him to acquit him; & thereupon the Law giveth power unto the Meſne, to go to the Pound, and to take the Cattel of the Tenant *per avail* out of the Pound, and to put his own Cattel in the Pound inſtead of them, and to ſue a Replevin and ſo make him parly, and then if the Lord will avowe upon a Stranger, he may ſhew the truth of the matter, and abate his feigned avowry made upon the Stranger, and compel the Lord to avow upon him as his very Tenant in Law: And although not diſtreyned in his default is a good plea in a Writ of Meſne, yet if the Meſne will not do it upon Requeſt, the Tenant upon the matter is diſtreyned in his default; and if the Lord in ſuch Caſe will not ſuffer the Meſne to take the Cattel out of the Pound, he is a Treſpaſſer *ab initio*. *Cook* 9. part, 22. in the caſe of Avowry.

5. If there be Lord, Meſne, and Tenant, and the Meſne doth his Services to the Lord Paramount, and yet the Lord doth diſtreyn the Tenant for them, Now the diſtreſs is tortious, and the Tenant is not diſtreyned in default of the Meſne: but in this Caſe, If the Tenant *per avail* Requeſt the Meſne to to take his Cattel not of the Pound, and put in his own Cattel in lieu of them, Or if the Tenant hath a Replevin of his Cattel, and Requeſteth the Meſne to joyn and acquit him, and he refuſeth, now by this matter, *Ex poſt facto*, the Law ſhall adjudge, that the Tenant was deſtreyned on the default of the Meſne, and if in a Writ of Meſne he pleads Not diſtreyned in his default, it ſhall be found againſt him, otherwiſe the Tenant ſhould be in no default and and ſhould have wrong, and yet be without remedy for the wrongfull diſtreſs. *Cook* 9. part 110, 111. in *Ateziel Treſham's* Caſe, in fine.

6. Note, by *Hobart* Chief Juſtice in the Caſe of Sir *Hen. Rolls* and *Osborn*. Tr. 9 Jac. *Hob.* 21. That a Second and Third Meane Lord, may have a Writ of Meſne as well as the Tenant in Demeſne. And if in a Writt of Meſne, The Defendant plead, Not diſtreyned in his default, if he will proceed to prove that he was diſtreyned in his default and fail, he ſhall be barred. *Hob.* 193. in *Burkhead* and the Arch-Biſhop of *York's* Caſe.

7. If a Seignory be granted to Husband and Wife, and to the Heirs of the Husband, and in a *Per quæ ſervitia* ſued againſt them, the Tenant will not attorn, unleſſe they will grant to acquit him, For which the Husband grants for him and his Heirs, to acquit the Tenant and his Heirs, and afterwards the Husband dieth, The Tenant may bring a Writ of Meſne againſt the Heir of the Husband during the life of the Wife, who was Tenant for life, and it ſhall be good. Vid. *Fitz.* N. B. acc.

8. In a Writ of Meſne brought againſt Huſband and Wife, they made default at the Grand Diſtreſſe, upon which the Plaintiff ſued Proclamation, and at the day the Proclamation was teſtified, and the Husband and Wife were demanded and appeared not. For which the Plaintiff prayd that they might be forejudged. It was ſaid by the Court, that it was not reaſon that the Wife ſhould be forejudged of her Seignory for the default of the Husband, eſpecially where he may have his Action at the Common Law. *Cook* 9. part 73. in *Faſton's* Caſe.

2. *Where upon the Determination of the Meanalty the Tenant ſhall hold by the ſame Services as the Meſne held, where not; And where by purchaſe of the Tenancy the Meanalty ſhall be extinct, and what ſhall follow upon it.*

1. THe King Lord, Meſne and Tenant: The Meanalty is a Mannor and holden of the King in *Capite*. *Le Tenant Per avail* who holdeth of the Mannor by Socage-tenure, obtayns a Releaſe of the Meſne. It was the opinion of the Juſtices in that Caſe, his Tenure ſhould be immediately of the King in *Capite*, as the Tenure of the Mannor was. Mich. 20 Eliz. *Dyer* 359.

2. If there be Lord and Tenant, and the Rent is behind, and the Tenant makes a Feoffment in Fee, If the Lord accept the Rent or Service of the Feoffee, he ſhall loſe all the arrerages in the time of the Feoffor, although he make no Acquittance, for after ſuch acceptance he ſhall not avow upon the Feoffor at all, nor upon the Feoffee, but for the Services which incurred in his time. But if the Feoffor dieth, although that the Lord accept of the Rent or Services by the hand of the Feoffee, he ſhall not loſe the Arrerages, for that now the Lord cannot avow upon any other but the Feoffee; And ſo it is, If there be Lord, Meſne, and Tenant, and the Rent due by the Meſne is behind, and afterwards the Tenant doth forjudge the Meſne, and the Lord receiveth the Services of the Meſne, which now iſſue immediately out of the Tenancy, yet he ſhall not be barred of his Arrerages which iſſued out of the Meanalty. *Cook* 3. part, 66. in *Penant's* Caſe.

3. If a Menalty become Rent-ſeck by ſurpluſage, It is ſaid that the Antient ſeiſin is ſufficient, For the Meanalty is extinct by the Act of the Lord, and the Tenant *per avail*, and the nature of the Rent of the Meſne is not altered by his own Act, but by the Act of others, and therefore although the Rent be become ſeck, yet he ſhall diſtreyn for it. 2 E. 2. Extinguiſhment 6. *Cook* 4. part, 9. in *Bevils* Caſe.

4. The King Lord, two Tenants in Common Meſnes, and Tenant, One of the Meſnes made a Feoffement of the moity of his Meanalty, to the uſe of himſelf for life, the Remainder to his Son in Tail, the Remainder to his Right Heirs; The Tenant made a Feoffement of the Tenancy to the Son; and afterwards the Son by Colluſion betwixt him and the Father enfeoffed the Father and his Heirs to the intent to defraud the Meſne of the ward, and died his Heir within age: It was Reſolved in this Caſe (amongſt other points) That by the Feoffment of the Tenant the Meanalty was extinct, becauſe the Feoffee had the Reverſion of the Meanalty, and the Reverſion being extinct no particular Eſtate of the Meanalty, either for life or in tail can remain. Paſch. 9 Jac. in Car. Ward. *Cook* 9 119. *Quick's* Caſe.

5. The Caſe was, the King Lord, Meſne, and Tenant, The Meſne held in *Capite*, and the Tenant in Socage, The Meſne granted the Meanalty to the uſe of himſelf for life, the Remainder to the Tenant *per avail* in Tail: It was Reſolved in this Caſe, That the Meanalty was not ſuſpended, for although the Remainder veſted preſently, Yet that could not ſuſpend the Franktenement of the Rent during the life of the Tenant for life, becauſe that the Tenant for life is Tenant to the Lord, and the Lord ſhall avow upon him during his life, and during his life, the Heir of him in the Remainder ſhall not be in Ward: But if the Meſne grant his Meanalty for life, or in Tail, the Remainder to the Tenant *per avail* in Fee, there the Meanalty is extinct, becauſe he hath as great Eſtate in the Meanalty as he had in the Tenancy, and there is no poſſibility of Reviving the Meanalty. *Cook* 9. part, 133. *Aſtrey's* Caſe.

6. Lord, Meſne, and Tenant, The Meſne held of the King in *Capite*, in Socage, and the Tenant held of the Meſne in Socage, the Tenant is attainted of Treaſon, the King ſeiſed, and by his Letters Patents granted the Tenancy to I. S. *Tenend. de nobis & hæred. noſtris per ſervitium Militare & faciendo alia Capitalibus Dominis feodi ſi qui fuerint reddita & ſervitia que inde debebantur antequam ad manus noſtras taliter devenerunt*; It was Reſolved in this Caſe, That the Tenure of the Meſne ſhould be Revived, although that the King by his Letters Patents in the firſt place had reſerved to him other Services, becauſe the King for his honor and for the advancement of ancient Right expreſſely intended that the Meanalty ſhould be revived, and therefore the Clauſe of the Revivor of the Meanalty ſhall be preſerved, and the Tenant *per avail* ſhall hold of the Meſne, as he held before the attainder, and the reſtitution of the antient right ſhall be preferred.

Note,

7. Note, There is a difference between Actions real which are founded upon a Title in the Writ, and Actions meerly founded upon Wrong and Deforcement. Real Actions which are founded upon Title; Writs, where in the titles are, are Writs of Eſcheat, Writs of Ceſſavit, Writs of Meſne &c. Writs of Formdon, in the Remainder, Deſcender, and Reverter; If before the Statute of *Quia Emptores terrarum*, B. had Enfeoffed A. of black Acre to hold by Fealtie, and 8. *d.* & afterwards by another Deed had Enteoffed him of white Acre to hold by Fealtie, and 6. *d.* And afterwards A. had died without Heir, B. ſhould not have one Writ of Eſcheat for both theſe two Acres, but the demandant is driven to ſeveral Writs upon the ſeveral Tenures: So upon ſeveral Tenures the Tenant ſhall have ſeveral Writs of Meſne againſt the Meſne, and ſhall not joyn them in one Writ. 2. H. 5. 2. *Cook* 8. part, 86. in *Backmers* caſe.

8. Note, It was the opinion of *Priſot*, and of all the Court in 39. H. 6. 30. That in a Writ of Meſne the Plaintiff ought to ſurmiſe the Tenure, between the Lord Paramount and the Meſne, as between the Meſne and the Tenant, *Cook* 4. part, 93. in *Sladers* caſe.

9. In a Writ of Meſne, the Proceſſe by the Common Law was Diſtreſſe infinite; and although the Statute of *weſt.* 2. cap. 9. giveth more ſpeedy Proceſſe, and in the end for judger. Yet the Plaintiff in that Action may take what Proceſſe he will, either at the Common Law, or upon the Statute, becauſe both are in the affirmative. Vide *Cook* 11. part, 64. in Dr. *Foſters* caſe.

10. If a man have his judgement to recover his Acquital in a Writ of Meſne, if he be not after acquitted, he ſhall have a *Diſtringas ad acquietandum* againſt the Meſne, if it be ten years after the judgement given. F. B. 137. And a *Scire facias* againſt the Lord. 14. E. 3. Fitz. Meſne 7.

11. If the Meſne do acknowledge Acquital by Fine, and after he ſueth a *Scire facias* thereupon, and he appeareth not at the Return of the Writ, Then ſhall iſſue forth a Writ of *Diſtringas ad acquietandum*, and ſo Writs infinite until he appear, and if he come in upon the Diſtringas, and cannot plead any thing, but that he ought to acquit him, then the Plaintiff ſhall recover dammages; But if upon the Diſtringas he come in and plead that he was not diſtrained in his default, which is found againſt him, he ſhall be for judged. 13 E. 2. fits Meſne 69.

12. In a Writ of Meſne brought by an Enfant, the paroll ſhall not demur for the Nonage of the Plaintiff, becauſe it is not reaſon that the Enfant ſhall be diſtrained for the ſervices of the Meſne during his Nonage, and ſhall not have any remedy till his full age, but for as much as his Nonage doth not priviledge him from the payment of Rent during his Nonage, the Law alſo will give remedy unto him during his Nonage. *Cook* 1 part, 85. in *Conys* caſe. vide *Cook* 6 part, 3. in *Markall's* caſe. acc.

13. Note, *Cook* 5. part, 105. in *Aldens* caſe, In a Replevin, In a Writ of Meſne, and in a Writ of Right of Ward, and in an Accompt againſt Gardian in Socage, It was reſolved, That Antient Demeſne was a good Plea, becauſe by common intendment the Realty may come in debate. Vide 8. E. 3. 26. Fitz. title Meſne 19. acc.

14. If there be Lord, Meſne, and Tenant, and Tenant is an Abbot, who holdeth of the Meſne by certain ſervices yearly, who hath not cauſe to have acquital againſt his Meſne by bringing a Writ of Meſne, In this caſe, If the Meſne confirmeth the eſtate which the Abbot hath in the Land, To have, and to hold in Frank almoigne; It is a good Confirmation, and then the Abbot ſhall hold of the Meſne in Frank almoigne, and the cauſe is, becauſe no new ſervice is reſerved, for all the other ſervices ſpecially mentioned are extinct; and no Rent is reſerved to the Meſne, but onely that the Abbot ſhall hold the Land of him, and that he did before the Confirmation. For he who holds in Frank almoigne ought not to do any Corporal ſervice, ſo as by this confirmation it appeareth that the Meſne did not reſerve to him any new ſervice, but that the Tenements are holden of him as they were holden before: and in this caſe the Abbot ſhall have a Writ, of Meſne, If he be diſtrained in his default, where as perhaps before he could not have any ſuch Writ. Vide 4. E. 3. br. Tenures 60. Fitz. Title Meſne. 41. 33. H. 6. 22. vide for the Expoſition of this caſe, *Cook* 1. part Inſtitutes 305.

Miſnoſmer.

VVhere Writs ſhall abate by the Miſnoſmer of the County, Town, Perſon, or Place, where not, and who ſhall plead it, who not.

1. AN Aſſiſe was brought in the County of *Middleſex* in the Common Pleas, and the Writ was *de libero tento* in *Cowly*, and the Plaint was of 100. Acres of Land, 10. Acres of Meadow, 80. Acres of Paſture, and 10. Acres of Wood with the appertenances, &c. It was pleaded, that the Tenements, &c. were in *Hellindon*, and not in *Cowly*; and Judgement was demanded of the Writ, It was a queſtion if the Writ ſhould abate, The Court inclined to opinion it ſhould not, becauſe the Writ is but a ſuppoſal, *ſcilt. de libero tento.* M. 6. E. 6. *Dyer* 72.

2. In an Aſſiſe the Plaint was in D. *tantum*, and there are two Ds in the ſame County, and none without Addition; It was ſaid, that the Aſſiſe and Plaint was good enough, and the reaſon is, becauſe the Judgement in an Aſſiſe differs from other Writs, for that he ſhall recover ſeiſin of the thing put in Plaint by the view of the Recognitors of the Aſſiſe, and if the thing in the Plaint be ſo certain, that the Recognitors may put the Plaintiff in poſſeſſion of it, it is ſufficient. Paſc. 7. E. 6. *Dyer* 84.

3. A Writ of Partition was brought againſt the Duke of *Suffolk*, and his Wife, and others, *per Randulphum Howard Armigerum, & Domi nam Annam Powes uxorem ejus*, and ſo ſhe was named in the Writ: and Exception was taken to it Miſnoſmer of the Wife, becauſe ſhe ought to have been named onely by the name of her husband, and not otherwiſe. And it was the opinion of the whole Court that it was a good Exception, becauſe by the Law of God, the Wife is *ſub poteſtate viri*: and alſo her name of Dignity ſhall be changed, according to the degree of her Husband. Notwithſtanding the Curtiſie to the Ladies of Honour of the Court. Whereupon the Writ was abated, and a new Writ brought, to anſwer *Randulpho H. & Annæ uxori ejus.* Hill. 7. E. 6. *Dyer* 76.

4. A. Brought an Appeal of Murder of the death of her Husband againſt *Margaret Old Caſtle*, Spinſter; ſhe before the Return of the Exigent, appeared, and pleaded that ſhe was a Gentlewoman, and not Spinſter, and in truth ſhe was the Daughter of Sir *Edw. Gorge* Knight, and her husband was alſo a Gentleman: It was the opinion of the Court that it was not a ſufficient Addition; but becauſe ſhe had appeared, and purchaſed a Superſedeas to that Writ, the Court was of opinion that ſhe was eſtopped to plead that to the Writ: whereupon ſhe ſeeing the opinion of the Court pleaded Not guilty to the Felony. Tr. 7. E. 6. *Dyer* 88. *Old Caſtles* caſe.

5. A. Brought an Appeal of the death of his brother againſt I. S. of M. &c. as principal, and one *Fortescue* as acceſſary: whereas in truth, the Chriſtian name of the principal was T. S. the acceſſary F. appeared and pleaded, that there was no ſuch as I. S. *in rerum natura*, at the time of the Writ brought, nor ever after; It was the opinion of the Juſtices in this caſe, That although there be another I. S in another County, if the ſame be not in the Town of M. Or if the party were dead before the Writ brought, that the Writ was not good: and that the Plea was a good Plea. Hill. 13. Eliz. *Dyer* 349. vide 20. H. 6. 33. acc.

6. Note, It was reſolved by the Juſtices; That when a Writ abates by the Act or default of the Demandant himſelf as in miſinformation of the true name of the Defendant, or of the Town, Country, &c. there the Writ is abſolutely abated, and the Demandant ſhall never have a new Writ by Journeys Accompts: which is as it were but a Continuance of the firſt Writ: But where the Writ abates by the Default of the Clerk, as for falſe *Latine*, or other matter of Form, for that that is the Default of the Clerk, and not of the Demandant himſelf, there the Plaintiff may have a new Writ by Journeys Accompts. *Cook* 6. part, 10. in *Sparrow's* Caſe.

7. Note, It was ſaid, That the Law doth not favour Advantages of Miſnoſmer more than the ſtrict Rule of Law doth require, neither in Writs which ſhall be abated & new brought; nor in grants, or in other Conveyances in which the party hath not any remedy to have newer: And therefore if two be joyned in one Writ, the one ſhall not plead Miſnoſmer of the other.

In

In an Action brought againſt Husband and Wife the one ſhall not plead the Miſnoſmer of the other. In 33 E. 3. An Action of Treſpas was brought of a Treſpas in H. *apud* W. The Defendant pleaded, That it was nor Town, Hamlet, nor place known &c. The Plaintiff pleaded that it was, without ſhewing in certain, that it was either Town, Hamlet, or Place known; and taken to be good, in deteſtation of nice and dilatory Exceptions. Vid. *Cook* 6. part, 64. in Sir *Malle Finches* Caſe.

8. A Writ was brought *Ad reſpondendum* I. S. & *Fidei Uxori ejus*: The Defendant pleaded in Abatement of the Writ: Becauſe the Wife was named *Faith*, in Engliſh: It was adjudged in that Caſe, that the Writ ſhould not abate. And *Rhodes* Juſtice ſaid: That he knew a Woman, who was called *Truth*, in Engliſh; And in Latine, ſhe was called *Tretha*; And a Writ brought in againſt her, by that Name; and it was holden that the Writ was good, and ſhould not abate. Paſc. 30 Eliz. in Co. B. *Godeſbr.* 85.

9. In Attaint: One of the Jurors was returned by the name of *Alexander Poreſtat*. In the Reſummons (which was in the Nature of a *Diſtringas*) It was *Alexander Beſcott*, and he was ſworn by that name, And the Verdict of the Petit Jury was affirmed by them: In Areſt of Iudgement, It was moved, that it was tryed by a wrong Perſon, and therefore the Verdict not helped by the Statute. It was Reſolved by the Court, That this was not aided by the Statute of 18 Eliz. or 21 Jacobi, for thoſe Statutes extend to the Sirnames of Jurors, where there additions are miſtaken; and not where the Chriſtian name of a Juror is miſtaken. M. 6 Car. in B. R. *Downs* and *Wateſfords* Caſe. *Cro.* 1. part, 147. *Cook* 5. part, 42. *Goldwell* and *Parker's* Caſe.

10. *William Dethick*, King at Armes, was Indicted upon the Statute of 5 E. 6. for ſtriking I. S. in Saint *Paul's* Church-yard, London. The Defendant pleaded, That before the Indictment, he was Created, and Crowned by the Queens Letters Patents, Principal King of Arms, and it was granted by the Letters Patents, that he ſhould be called, *Garter*, and that that name was not in the Indictment; And ſo demanded Judgment of it: It was Objected, that the ſame was but a name of Office, and not a name of Dignity: But is was the opinion of the Iuſtices, That the word *Coronamus* in the Letters Patents implyed Dignity: And the words in the Patent, *Nomen tibi Impoſimus* (Garter), That thereby it was parcel of his Name: And therefore, the ſame being omitted out of the Indictment, it was not good; and the Indictment was holden void; and *Dethick* was diſcharged. M 33. Eliz. in B. R. *Dethick* King of Armes Caſe. *Lion.* 148.

11. If *William* Abbot of *Worceſter* purchaſeth a Writ by the name of *Thomas* Abbot of *Worceſter*, the VVrit ſhall abate, becauſe he may have another VVrit. But if he, with the conſent of the Covent, grants to the Burgeſſes of *Worceſter* Common of Paſture out of certain Lands, by the name of *Thomas* Abbot of *Worceſter*, when his name is *William*, the grant is good, becauſe there is certainty enough to make certain the name of the Grantor, *viz.* Abbot of *Worceſter*: And *Nihil facit error Nominis cum conſtat de perſona. Cook* 6. part, 65. in Sir *Malle Finches* Caſe.

12. A man was bound in an Obligation, by the name of *Edmond*, whereas his true name was *Edward*, In Debt brought againſt the Executors of *Edmond*, upon the ſaid Bond, the Defendant pleaded, That it was not the Deed of the Teſtator; And upon Iſſue joyned, It was found to be the Deed of *Edmond*: It was Reſolved, and adjudged in this Caſe, That the Plaintiff ſhould take nothing by his Bill; But that ſuch Miſnoſmer ſhould make the Action not to be well brought; And it was ſaid, That in the Caſe of a VVrit of Error in the Exchequer Chamber the party upon ſuch a Miſnoſmer after Verdict, did reverſe the Iudgment for Error. Tr. 20 Iac. in B. R *Godet.* 383.

13. Debt againſt the Defendant as Executor of I. S. the Defendant pleads, *Plaiement* Adminiſtred, The Plaintiff replies, *Et prædict.* VV^mus *dicit, quod prædict.* VV^mus *habet bona*, and miſtakes *VV^m for John. Et prædict.* Iohannes *ſimiliter*. Being found for the Plaintiff. It was moved, that by the Miſnoſmer and Miſpriſion of the Name, there was not any Iſſue joyned, and ſo all was void. But the Court held, That it was but Error and Miſpriſion of the Clerk, and that the Verdict was good, and that it was amendable, and judgment was given for the Plaintiff. Paſc. 3 Iac. B. R. *Briton* and *Mawdet's* Caſe. *Cro.* 2. part, 67.

See more for this Diviſion, *Cook* 8. part, 159. *Blakmore* Caſe.

Vid. Lib. 1. In title Abatement of VVrit, } many caſes upon this Diviſion.

Vid. Lib. 1. In title of Amendments, }

2 *VVhere Feoffments, Grants, Leaſes, Releaſes, Bonds, and other Deeds and Conveyances ſhall be good, and ſtand good; Notwithſtanding that the thing granted &c. or the perſon be Miſnamed, where not.*

1. IN an Aſſiſe brought by the Husband and VVife, againſt M. *de Libero tenu* in S. the plaint was of a Meſſuage, 40. Acres of Meadow, 40. Acres of Paſture, *cum pertinentiis*, the Defendant pleaded a Leaſe for years, made by I. P. by Indenture at S. by the names of a Capital Meſſuage called B. in N. in the County of H. and of all Lands and Tenements, & Hereditaments, which were demiſed with the ſaid Capital Meſſuage called B. which before were in the Tenure or Occupation of I. P. or his Aſſigns, and averred, that the Tenements in the plaint were Occupied, and went with the ſaid Meſſuage, called B. late in the Occupation of the ſaid I. P. upon which plea, It was demurred; It was Objected, that the Houſe and Lands were in ſeveral Counties, and that the *per nomen* is not well pleaded; But it was the opinion of the Iuſtices, that upon a Leaſe for years, the Lands in both Countries ſhould paſs, but otherwiſe of an Eſtate for life, for that there muſt be ſeveral liveries; And the Court ſaid, That it had been a better form to have pleaded, That I. S. was ſeiſed as well of the Lands put in view, as of the Houſe, and Demyſed &c. Hill. 8 Eliz. *Dyer* 246. *Carew* and *Marſh's* Caſe.

2. Error of a judgment in *Ejectione firmæ*; diverſe Errors aſſigned. 1. The VVrit was in *Manerium de A. & unum Meſſ. unum &c.* and the Count was of the Demyſe of the Mannor *(advocat Eccleſiæ, reddit Aſſiſ. &c. dicto Manerio excep.)* 2. The *Habend.* is of the Mannor, without ſpeaking of the Meſſuages. 3. The VVrit ſuppoſeth a Demyſe, by the Abbot of C. and the Count is, that the Abbot and Covent of C. *Demiſerunt*: Reſolved to the firſt, it was a void exception of ſervice, which were parcel of the Mannor; To the ſecond, that the reſt beſides the Houſe might be known by the name of the Mannor; And to the third, that it was a good name of grant, becauſe he departed but with a Term, and the Covent do not demyſe, but only give conſent. Hill. 1. Mar. *Dyer* 97. *Cliffords* Error.

3. A Prior made a Leaſe for life of the Demeſnes of a Mannor rendring Rent; the Mannor came to the King by the Statute of Diſſolutions. And afterwards the King made a Leaſe for years of the Mannor. It was adjudged in that Caſe, That by the Leaſe of the King of the Mannor, the Rent and the Reverſion of the Demeans did paſſe. M. 7. Eliz. *Dyer* 233. vid *Cook* 6. part, 66. Sir *Moile Finch's* Caſe.

4. A. brought an Action of Waſte and counted, That an Abbot was ſeiſed &c. of a Houſe and 30. Acres of Lands &c. and demiſed them to the Defendant; and that afterwards by Surrender and the Act of 31 H. 8. of Diſſolutions, the King was thereof ſeiſed, and granted to the Plaintiff and his Heirs, the aforeſaid Tenement by the name of the Mannor of C. with the appertenances; Exception was taken by the Court, that there were not any words in it, which were ſufficient to convey the Lands to him, for the *per nomen* cannot maintain the grant of the Land without averrment, that the Lands in Leaſe were parcel of the Mannor of C. But it was the opinion of *Dyer*, That *Manerium* is *nomen Collectivum*, and comprehends and contains in it, Meſſuages, Lands, Gardens, Woods: and ſo the Lands in Leaſe paſſed by the name of the Mannor: But the grant went further, of all Meſſuages and Toſts, in &c. which being a diſtinct ſentence by it ſelf, It did convey the Lands in Leaſe, although they were not parcel of the Mannor, and ſo it was adjudged. But Error was brought. M. 4. Eliz. *Dyer* 207.

5. The King by his Letters Patents for valuable conſideration granted to one, *Omnia illa meſſuagia, terras, &c. in tenura* I. S. ſituate in W. *nuper Priorat. de* W. *ſpectant*, and it was found that the Lands were in the Tenure of I. S. but lay in D. It was adjudged in that Caſe, becauſe the words were general in the Grant, and reſtreined to a certain Town, the Grant was void, by the Common Law. 2. It was adjudged, that although the Lands were in the Tenure of I. S. and were parcel of the value mentioned in the particular to the Patentee, Yet this Miſpriſion of the Town was not helped by the Statute of 34 H 8. cap. 21. becauſe general Grants are not helped by that

that Statute, but Grants which do contein convenient certainty. *Cook* 3. part, 39 *Doddington's* Caſe.

6. The Caſe was: A. was ſeiſed of diverſe Meſſuages, Lands, &c. And by Deed Indented and Enrolled, &c. bargained and ſold all his Meſſuages, Lands, &c. lying in the Pariſh of Saint *Andrew* in Holborn in the Tenure and Occupation of I. S. to B. for life, the Remainder to C. in Fee, B. entred, and took Husband, who made a Leaſe for years of the ſame; A. was attainted of Treaſon, the King granted the ſaid Meſſuagues to D. and his Heirs, provided that if they were not concealed that then the Letters Patents ſhould be void, And it was found that the Lands lay in the Pariſh of Saint *Sepulchers*, and that they were in the Tenure and Occupation of I. S. In this Caſe, amongſt other things it was Reſolved, that nothing paſſed by the ſaid bargain and ſale, becauſe the firſt certainty, ſc. in the Pariſh of Saint *Andrew* Holborn was falſe; but if the firſt certainty had been true, although the ſecond certainty had been falſe, the Grant had been good. *Cook* 3 part, 10. *Dowties.* Caſe.

7. The Queen ſeiſed of the Rectory of L. had a portion of Tythes appertaining to it, And by her Letters Patents granted to A. and B. *totam illam portionem Decimarum in L. in Com. N. cum omnibus aliis decimis in L. in dict. Com. N. tunc in occupatione* I. S. And further granted by her Letters Patents, That the ſaid Letters Patents ſhould be in force againſt the Queen and her Succeſſors, *Non obſtante male nominando vel recitando prædict. portionem decimarum. Et non obſtantibus aliquibus defectis in eo nominando vel male nominando aliquos tenentia vel occupatoris*, And it was found, that there was not any Tythes in L. in the Occupation of I. S. It was adjudged in this Caſe, that the Letters Patents were void; For in as much as I. S. never had any parcel of Tythes, the Grant *ex vi termini* was void, and when the Grant is not ſufficient to paſſe the thing granted, there any *Non obſtante* cannot make ſuch a Grant good. *Cook* 4. part, 53. *Bonnus* Caſe.

8. In a Replevin, the Caſe was, A. 4 E. 6. was poſſeſſed for 30. years of a Farm, called, *Creſwell field Grange*, which conſiſted of diverſe parcels, known by the ſeveral names of Hobsfield, and Parkfield, and diverſe other, and made his Will, and made H. his Son his Executor, and 4 Ma. demyſed all the ſaid Grange, except Hobsfield, to B. for 23. years; and demyſed Hobsfield to C. for 23. years, and afterwards granted all the Reverſion of his Term in the whole Grange to the ſaid B. and C. He in the Reverſion, 3 Eliz. granted a Rent-charge in Fee iſſuing out of all his Lands commonly called Creſwel field Grange, Some time in the Tenure of A. and then in the Tenure or Occupation of B. or his Aſſignees: It was Reſolved in that Caſe, (amongſt other points:) That Hobfield was not charged with the ſaid Rent; For although it be parcel of Creſwell field Grange; And that B. and C. had the Reverſion of the Term, and ſo the ſaid may be ſaid to be in Rent Tenure, yet for as much as B. had not then Hobsfield in his Occupation, Hobsfield is out of the ſaid Words, by reaſon of the ſaid laſt Clauſe, *Et ad tunc in tenura & occupatione* B. *Cook* 4 part, 50. *Ogull's* Caſe.

9. The Dean and Chapter of *Winſor* were Incorporated by Act of Parliament made 22 E. 4. by the name of Dean and Chanons, of the Kings free Chapel of St. *George* the Martyr, within his Caſtle of *Winſor*, and they made a Leaſe by the name of the Dean and Chanons of the King and Queens Free Chapel of S. *George* within the Caſtle of *Winſor*, It was adjudged in that caſe, That for one of theſe differences, ſc. of the King and Queens Free Chapel, that the Leaſe was void, for the Corporation ought to be ſuch as was given by the Foundor, and ſhall not be altered by alteration from the Name of the Foundor; but notwithſtanding the other differences in the Miſnoſmer, if the other had been true, the Leaſe had been good. For St. *George* implies St. *George* the Martyr; *Et parum differunt, quæ ſe concordant.* M. 30 Eliz. in B. R. *Hill* and *Winyates* caſe. Vid. alſo the caſe between *Fiſher* and *Boys*, 30 Eliz. in Co. B. called *Merton* College Caſe. Vide *Cook* 10. part 122.

10. The Provoſt, Fellows, and Scholars of Queens College in *Oxford*, are Guardians of the Hoſpitall or *Meaſon de Dieu*, in *Southampton*, and they made a Leaſe of Land, parcel of the ſaid Hoſpital to H. for Term of years, by the name of *Præpoſitus, Socii, & Scolares Collegii Reginalis in Oxon.* and in an *Ejectione firmæ* upon that Leaſe, It was found for the Plaintiff, It was moved in ſtay of Judgement, That the word *Gardianus*, ought to be *Gardiani*, for the College doth conſiſt of many perſons, and every perſon is capable; and it is not like the Caſe of Abbot and Covent: But it was the opinion of the Court, that the Exception was not good, but that as well the Leaſe, as the Declaration was good; for the Col-

College is one body, and as one perſon. Hill. 30. Eliz. The caſe of the Provoſt and Scholars of Queens College in *Oxford*. *Leon.* 134.

11. The true name of the Incorporation of Queens College in *Oxford* is *Præpoſitus & Scholares Aulæ Scholarium Reginæ de Oxon.* And they confirmed a Leaſe by name of *Præpoſit. & ſociorum, & ſcholarium Aulæ vel Collegii Reginæ in Univerſitate Oxoniæ.* It was adjudged in that caſe, That notwithſtanding that variance, that the Confirmation was good, for the College is named by ſuch names as it may be diſtinguiſhed from any other College in the ſame Univerſity; And it was there holden, that although the name of a Corporation is like the name of Baptiſm; yet if the perſons be ſo deſcribed, that they may certainly be diſtinguiſhed from other perſons, the Omiſſion, or Miſpriſion of their true names ſhall not make void their Acts. *Cook* 11. part, 19. Dr. *Anays* caſe.

12. In an *Ejectione firmæ*, it was found, That A. was ſeiſed in Fee of the Lands in queſtion, and thereof made a Feofment to the uſe of himſelf for life, and afterwards to the uſe of his two Daughters, *Joan* and *Alice* in Fee, and died, *Joan* entred into the Land, and by Indenture by the name of *Jane* let the Land to the Plaintiff for three years, and it was found, that *Joan* intended in the Feofment, and *Jane* who Leaſed were one and the ſame perſon. It was ſaid by *Wray* Chief Juſtice, that it had been agreed by good advice and conference with *Grammarians*, that *Joan* and *Jane* are but one name, and that women, becauſe that *Joan* ſeemed to them a homely name, would not be called *Joan*, but *Jane*, wherefore the opinion of the Court was, that this was not ſuch a Miſnoſmer as did make the Leaſe to be void; It was adjudged for the Plaintiff. Tr. 31. Eliz. in B. R. *Hedd* and *Challoners* caſe. *Leon.* 146. 147.

13. In an *Ejectione firmæ*, by Husband and Wife, the Plaintiff declared upon a Leaſe made by the Maſter of the Houſe, or College of St. *Thomas de Acons* in *London* to I. S. who aſſigned it over to K. who by his Will deviſed it to his Wife whom he made his Executrix & died. Upon Not guilty they were at Iſſue. And it was given in Evidence, That the Leaſe given in Evidence was not the Leaſe of which the Plaintiff declared. For the Original Leaſe ſhewed in Court is Maſter of the Houſe or Hoſpital, where the Leaſe ſpecified in the Declaration is Maſter of the Houſe or College. 38. E. 3. 28. It was the opinion of the Court, that the ſame was not any material variance: for they ſaid, College and Hoſpital they conceived to be all one. M. 33. Eliz. in Co. B. *Cheney* and *Smiths* caſe. *Leon.* 215.

14. In an *Ejectione firmæ*, the Caſe was: King *Hen.* the ſeventh in the fourth year of his Reign Erected and founded an Hoſpital by the name of the Maſter and Chaplains of the Hoſpital of King *Hen.* the ſeventh *de le Savoy*, and afterwards in the time of Queen *Mary*, the ſaid Maſter and Chaplains being ſeiſed, Leaſed, &c. to the Defendant by the name of W. H. Maſter of the Hoſpital *nuper Regis Henrici ſeptimi vocat le Savoy & Capellani Hoſpitalis prædict*; and afterwards by the former name which was the true name Leaſed the ſame to I. S. who Leaſed the ſame to the Plaintiff, and if the Leaſe made to the Defendant by that name was a good Leaſe was the queſtion. It was adjudged in the Court of Exchequer that the Leaſe made to the Defendant was void utterly by reaſon of the Miſnoſmer: upon which judgement a Writ of Error was brought in the Exchequer Chamber, and there long debated; and the better opinion ſeemed to be, that the Leaſe was void for the Miſnoſmer: and that there was great difference between the words, (*De le Savoy*) and (*vocat*) the *Savoy*: See the Caſe, learnedly debated. M. 31 Eliz. in the Exchequer Chamber, *Muriot* and *Paſcalls* Caſe. *Leon.* 159. to 165. And in the Argument of that Caſe, this Caſe was put by the Lord *Burleigh*, Lord Treaſurer. The Guild of *Boſton* in *Lincolnſhire* was incorporated by the name of St. *Nicholas*, and our Lady the Virgin *Mary*, &c. And they made a Leaſe for years by the name of the Guild of our Lady the Virgin and St. *Nicholas*, *religioſæ quadam motus, ut nomen Virginis Mariæ in charta dimiſſionis præponeretur nomini S. Nicholai*, and in that Caſe it was adjudged a void Leaſe for the variance.

15. If A. Levieth a Fine of Lands to W. his Son and his Heirs, upon this Fine the Iudges cannot make any queſtion to whom the Lands do belong; but if the party cometh and averreth that A. hath two Sons named W. the elder and the younger, and that his intent was to Levy the Fine to W. the younger, this averment out of the Fine is good of this matter of fact, and the ſame ſhall be tried by the Countrey. But if a man by Deed giveth any goods to one of the Sons of I. S. who hath divers ſons, here he ſhall not averre which Son he intended, for that in judgement of Law upon this Deed the Deed is void for incertainty, which cannot be made good by averment. So if a man Levy a Fine of the Manor of S. or of the Mannor of D. to two and their Heirs, and in truth there is the Mannor of North S. and South S. or great D. and little D. in this Caſe Iſſue may be taken, of which Mannor the Conuſor intended to paſſe, for that the ſame is matter

matter of fact not apparent in the Fine whereof the Iudge cannot take Conuſance, but it ſtands well with the Fine, and ſhall be tried by the Iury. *Cook* 5. part, 155. in *Edward Altham's* Caſe.

16. A Corporation is incorporated *nomen Maioris & Burgenſium Burgi Domini Regis de Lyn Regis*, and it is granted to them, that they ſhall be called and named by the ſame name onely, *& non per aliud nomen*. An Obligation is made to them by the name of *Maioris & Burgenſium de Lyn Regis*, omitting the words *(Burgi Regis)* It was reſolved, That the Obligation was good notwithſtanding that Miſnoſmer, and it is not requiſite that the name of a Corporation be in Grants or Conveyances *Idem verbis & ſyllabis*, but it is ſufficient if it be *idem re & ſenſu*, and in this Caſe the variance is onely in ſyllables and words, and not in ſenſe. But it was reſolved, That if an eſſential part of the name of a Corporation be omitted in any Grant or Leaſe, or the Corporation miſnamed in any eſſential part of it, it makes their Leaſes and Grants void. *Cook* 10 part, 122. The Caſe of the Mayor and Burgeſſes of *Lyn Regis*.

17. In an *Ejectione firmæ* the Caſe was, That the Hoſpital of *Donnington* in the County of *Berks*, 16. R. by the Licence of the King was founded by Sir *Rich. Abberbury* Knight, by the name of *Miniſter Dei pauperis domus de Donnington*; and Lands were given to it. And afterwards one T. L. was made Miniſter there, and he and his Conferes by the name of T. L. Yeoman Miniſter of the Almeſhold of God beſides *Newbury* in the County of *Berks*, made a Leaſe of the Lands: and whether this Leaſe was made according to the name of the Corporation or not was the queſtion. This Caſe came in queſtion, Tr. 39. Eliz. between *Sherborn* and *Lewis*, where the Caſe being long debated it was not reſolved, but the better opinion ſeemed to be that the Leaſe was good, vide Tr. 39 Eliz. in B. R. *Sherborn* and *Lewis* Caſe. *Gold.* 120, 121, 122. Afterwards, The ſame came in queſtion again, Tr. 12. Iac. Rot. 2187. in Co. B. between *Pitts* and *James*: where it was much inſiſted upon, that whereas the true name of the foundation was *Miniſter Dei pauperis domus* It was made Miniſter *Pauperis Domus Dei* in the Leaſe, which was ſaid not onely to be an inverſion not onely of the words and Order, but of the ſenſe and matter; But it was then the greater opinion of the Court, that the Leaſe was good; for there is no material variance, for variance in letter and not in ſubſtance ſhall not hurt, and ſuch conſtruction ought to be made if it may be that the Leaſe may ſtand good; and interpoſition of a word ſhall not alter the Leaſe, and the word *Miniſter* is *vox æquivocum*, and the words *Miniſter Dei & Miniſter pauperis*, are words convertible, for whoſoever miniſters to the poor miniſters to God, as *Hobert* Chief Juſtice ſaid, and ſo the Leaſe was holden to be good. Tr. 12. Iac. in Co. B. *Hob.* 121, 122, 123.

18. In an *Ejectione firmæ*, the Caſe was, The Dean and Chapter of Chriſts-Church in *Oxford* were incorporated by King *Hen.* the eighth, by the name of the Dean and Chapter of the Cathedral Church of Chriſt in *Oxford* of the foundation of King *Hen.* the eighth, and were ſeiſed of a Houſe and certain Lands in H. and ſeiſed by the name of Dean and Chapter *Eccleſiæ Cathedralis Chriſti in Academia Oxon. ex fundatione Hen.* 8. made a Feofment of the ſaid Lands to the Lord *North* and his Heirs; who Entred; who Leaſed the ſame to the Plaintiff, & he was ouſted by the Defendant, claiming the ſaid Houſe by a Leaſe made by the Dean and Chapter made in the time of the late Queen *Eliz.* And it was found by the Verdict, That the Citie of *Oxford*, and the Univerſity of *Oxford* was all one, and that the Town of *Oxford* was made a Citie by the Charter of *Hen.* 8. It was Objected, that the Feofment made to the Lord *North* was void, for that *Academia & villa de Oxon.* are diverſe in Name and diverſe in Nature, for the Univerſity is to the Scholars there, and the Town for the Inhabitants, and the name of a place is the principal in a Corporation, which ought to be preciſe according to the Letter of the Charter. But is was the opinion of the Court, That this was not ſuch a miſnaming of the place which ſhall make the Feofment void, and if it had been *Decanus & Capit. Eccleſiæ Cathedralis Chriſti in Civitate Oxon.* it had been good, for *Oxon. & Civitas Oxon.* are all one. And in caſe of a Corporation it ſufficeth to have a ſufficient Demonſtration of the place where the Corporation is, albeit it be not by the preciſe words compriſed in the Charter, as naming *Academia Oxon.* pro *villa Oxon.* and a College Erected in *Academia Oxon.* or *Cantabrig.* is good. M. 37. Eliz. in B. R. *Button* and *Wrightman's* caſe. *Poph.* 56, 57.

19. The Caſe was, King *Hen.* the eighth Incorporated the Scholars of Trinity College in *Cambridge* by the name of Maſters, Fellows, and Scholars, *Collegii St. & individuæ Trinit.* in the Town an Univerſity of *Cambridge*, & in 6 E 6. they made a Leaſe by the name of Mr. and Fellows of Trinity College in *Cambridge*, leaving out the Univerſity, and whether the Leaſe were good or not was the queſtion. This Caſe was argued by the Iuſtices, *Croſt* and *Williams* Iuſtices were of opi-

non that the Leaſe was good. But *Fenner* and *Yelverton* held the contrary. And *Fleming* Chief Juſtice argued that the Leaſe was not good, but ſaid it ſhould not be abſolutely his opinion; but moved the parties to a compoſition, and for maintenance of the opinion of *Crook* and *Williams*, the Caſe of 7. Eliz. *Dyer*, and *Cook* 1. part, *Porters* Caſe was put. No Judgement was given in the Caſe, Paſc. 7. Iac. in the Kings Bench Trinity College Caſe, *Brownlo* 2. part, 243. Vide before, The Caſe of the Mayor & Burgeſſes of *Lyn*, & vid. *Cook* 11. part, 18. Doctor *Ayres* Caſe, and the Caſes there vouched for this Caſe, and vide *Buttons* Caſe, next before.

Miſ-tryal.

1. IN an Action upon the Caſe: The Plaintiff Declared, Whereas the Office of the under Stewardſhip of the Courts of the Mannor of K. and other the Mannors of the Biſhop of *Gloucr.* were Grantable for life with a Fee of 6. *l.* 3. *s.* and 8. *d. per annum*; and a Grant was made by the Biſhop of the ſaid Office for life, with the Fee, &c. that he being ready to keep the Courts of the now Biſhop, the Defendant pretending a Grant made to him, diſturbed him: upon not guilty, and found for the Plaintiff; It was moved in Arreſt of Judgement, that there was a Miſ-trial, the diſturbance being alleged to be in the Court of K. and ſo in the other Mannors where no Vills are, and the Tryal being *per Vicinetum* of the Mannors, whereas it ought to be of the Vills where the Mannors are, and therefore not helped by the Statute of 21. Jac. But it was holden by the Court, that in regard ſome of the ſaid Mannors are alleged to be within thoſe Vills, and the Venue being of the Mannors, It ſhall be good by the Statute, although it were in fewer or more places than it ought to be. M 1. Car. in C. B. *Cook* and *Youngs* caſe. Cro 1. part, 12.

2. In Action upon the Caſe, the Plaintiff declared, Whereas he at *London* ſuch a day and year lent to the Defendant a Gelding *ad equitandum ab London uſque civitatem Exonie & ibidem ſalvo redeliberandum* to the Plaintiff, that the Defendant to deceive the Plaintiff rid upon the ſaid Gilding from *London* to *Exon.* and from *Exon.* to *London*; and ſo abuſed him thereby that he became of little value, and notwithſtanding that at *Exon.* ſuch a day and year he required him to redeliver him, yet he refuſed to redeliver him, and the ſame day converted the Gelding to his own uſe. Upon Not guilty being found for the Plaintiff: It was moved in ſtay of Judgement that here was not a good Tryal, becauſe the bargain was at *London*, and the fact alleged in riding back to *London* that the Tryal ought to have been at *London* where the beginning of the Contract was, and not at *Exon.* where the Condition was alleged. But it was the opinion of the Court, that the Tryal was good *de vicineto de Exon.* becauſe the wrong is ſuppoſed to be done there, and not at *London*. M. 1. Car. in Co. B. *White* and *Ryſdens* caſe. Cro. 1. part 15.

Vide M. 6. Car. in B. R. *Downes* and *Waterfloods* caſe, in title of Miſnoſmer: before Sect. 9.

3. Debt upon the Statute of 2. E. 6. for not ſetting forth of Tythes, The Defendant pleaded *Nihil debet* which was found againſt him. It was moved in ſtay of Judgement, that it was Miſ-trial without ſufficient Warrant for the *Jurat.* upon the *Niſi Prius* is, *Jurat. poterunt in reſpectum inter* the Plaintiff and the Defendant in *Placito Tranſgreſſionis uſque Oct. Mich. Niſi Prius*, ſo as by this *Jurat.* there is not any Authority to the Juſtices to Try the Iſſue: which was in *Placito debiti*: It was holden it was a miſpriſion of the Clerk: But the queſtion was if it were amendable; the Court gave no reſolution in the point: but would adviſe of it. Tr. 7. Car. in B. R. *Le Merchant* and *Rawſon's* Caſe. Cro. 1. part 200.

4. In Aſſumpſit declared, That whereas D. was ſeaſed in Fee of Lands in C. in the County of K. 21 *May* 1631. and was in Communication with the Plaintiff to ſell the ſame for ſuch a ſum, that the Defendant *ad tunc & ibid. ſcil. prædict.* 21 *May* 1631. *apud London in Parochia S. Ma. &c.* In conſideration of ſuch a ſum promiſed: upon *Non Aſſumpſit* the Tryal was in *London*: It was the opinion of the Court that it was a Miſ-trial, for it ought to have been Tryed in K. where the Land lies, and where by the *ad tunc & ibidem* the promiſe is, and the Venue cannot be altered; and that the *videlicet* was Idle, and might not alter it. M. 8. Car. in B. R. *Delves* and *Clerk's* caſe. Cro. 1. part: 107.

5. Er-

5. Error to reverſe Judgement in a Replevin, The Error was, becauſe the Iſſue being whether Lands in B. were holden of the Mannor of W. by ſuch ſervices, the *Venire facias* was awarded *de vicineto de B.* where it ought to be *de vicineto* of the Mannor, or of B. and the Mannor. The Court held that by the Common Law, the Tryal ought to have been *per vicinetum* of both: But now by the Statute of 21. Jac. if the Tryal is to be of ſeveral places, it ſhall be Tryed *per vicinetum* of any of the places. Hill. 12. Car. in A. R. *Cro.* 1. part, 345.

6. In an Appeal of Maheim, A Juror in the Pannel of the *Venire facias* was named *Palas Cheale*, and in the *Diſtringas* and *Poſtea*, he was named *Paulus Cheale*, and becauſe the name of the Juror was miſtaken, eſpecially in the *Venire facias*, and that in his Chriſtian name, It was reſolved that the Judgement ſhould be reverſed; but if he had been well named in the Pannel of the *Venire facias*, and miſnamed in the *Diſtringas* or *Poſtea*; upon Examination, it ſhould be amended. *Cook* 5. part, *Colwills* caſe. Vide M. 35. Eliz. in B. R. The Counteſſe of *Rutlands* Caſe. *Cook* 5. part, &c.

7. Action upon the Caſe for a promiſe made to C. for the delivery of a Mare which the Plaintiff delivered to the Defendant to plow his ground in P. and ſhewed, that the Defendant did ſo exceſſively work and labour the Mare, that the Mare died. The Defendant confeſſed the promiſe, and ſaid, that the Mare at the time of the delivery was infirm and that he worked her not, and traverſed the exceſſive labouring. Being found for the Plaintiff; It was the Opinion of the Court, that it was miſ-tryed becauſe the *Venire* was of C. and there was no place alleged where the exceſſive labouring was: for the *Venire* ought to come from that place where the labouring was. Tr. 11. Iac. in Co B. *Keymes* and *Morchams* Caſe. *Brownlo* 1. part, 17.

8. Treſpaſſe for taking twenty Loads of Wheat in F. the Defendant as to all but two Loads pleaded Not guilty: and as to them, Pleaded that the Town of E. is in the Pariſh of W. and that I. S. was ſeiſed in Fee of the Rectory of W. and by his Will deviſed it to the Defendant in Fee, and died; and that he Entred, and that the Corn was the Tythes ſevered. The Plaintiff by proteſtation, that E is not within the Pariſh of W. ſaid, That I. S. was ſeiſed of the Rectory in Fee, and thereof died ſeiſed without Iſſue, which deſcended to the Plaintiff as his Coſen and Heir: and traverſed the Deviſe, whereto Iſſue was joyned, and a *Venire facias* was awarded to Trye theſe two Iſſues *de vicineto Parochiæ de W.* and the Jury found the Iſſue of Not guilty for the Defendant, and the other Iſſue for the Plaintiff: It was the opinion of the Court: that it was a Miſ-tryal, and although the Defendant is found not guilty as to one Iſſue, that doth not help it, for being Miſ-tryal it is a void Tryal of that Iſſue; and the *Venire facias* ought to be as well of E. as of W. for where there are two Iſſues riſing from both places, the Tryal ought to be *per Vicinetum* of both places, wherefore being adjudged a Miſtrial, a *Venire facias de Novo* was awarded. M. 3. Iac. in B. R. *Lapworth's* caſe. Cro. 2. part 99. 86, 87.

9. In an Action upon the Caſe the Plaintiff declared, That he was a Citizen and Merchant of *London*, and uſed to Traffick into the parts beyond the Sea, and 20 *Martii* 32. Eliz. he took his journey from *London in partes tranſmarinas* to Merchandize; and the ſame 20 *Aprilis*, 32. Eliz. in the Pariſh of *Aldermanbury* in the Ward of C. he did truſt the Defendant as his ſervant to receive in his abſence, and when he ſhould be in his journey, all Merchandizes of the Plaintiffs to the Plaintiffs own uſe, or which were conſigned unto him, and to pay the Cuſtom and the Subſidies for them Due and payable, and to convert them to the Plaintiffs uſe; and that to the Plaintiff in his abſence twenty pieces of Velvet, of the value of 800 *l.* were conſigned by one B. his Factor in S. beyond Sea, which by way of Merchandize were brought into *England* in a ſhip to a Port in *London*; and that the Defendant having Notice thereof, and that the Subſidy was due to the Queen for the ſame, and yet deducted from the Plaintiff ſo much as ſhould be due for the Subſidy as if he had paid it, cauſed the goods to be unladen and put aſhore, the Subſidy due for them not being paid, nor the Collector agreed with, whereby the Goods were forfeited and ſeiſed for the Queen. The Defendant pleaded Not guilty, which was found againſt him: It was moved for the Defendant in Arreſt of Judgement, that in this caſe there was a Miſ-tryal, for the Action being maintained againſt him for his *Malefeiſance* in taking the Goods out of the ſhip, which was ſayd to be in the Pariſh of St. *Peters* in the Ward of Queen *Hithe*, The *venire* ought to have been from that *viſne* and Pariſh onely: And it was awarded as well from

that Pariſh and Ward, as from the Pariſh of *Aldermanbury* and Ward of C. and being made of two Pariſhes and Wards where it ought to have been but of one only, It is as well a Miſ-tryal, as when it is of one Town where it ought to be of two. And of that opinion was all the Court, and that it was a Miſ-tryal. And a *venire facias de novo* was awarded M 8 Jac. in B. R. *Lewſon* and *Rolls* caſe. *Cro.* 81 p. 265, 266.

10. In a *Scire facias* upon a Recognizance for breach of the good behaviour: and for tiotouſly entring at eleven of the clock at Night into a Cloſe of I. S. at L. and cutting up a Quickſet hedge of the ſaid Cloſe. The Defendant as to all the Offences, but entring the Cloſe and cutting down the Hedge, pleaded, Not guilty; and as to that juſtified, That in the ſaid Cloſe was a High-way, leading from S. in the ſaid County over the ſaid Cloſe to N. and becauſe it was ſtopped up with Quickſet, he cut it up to uſe the ſaid Way: The Plaintiff ſaid *De injuria ſua propria*; It was the opinion of the whole Court; That, admitting it was a good Iſſue *de injuria ſua propria*, yet there was a Miſ-tryal: For the *venire facias* was only from L. where the Cloſe is, where it ought to have been from S. and N. from which places and to which places the Way is ſuppoſed to lead, Then it was moved, That there was an Iſſue of Not guilty for the tiotous Entry and Aſſembly which is a breach of the good behaviour, wherefore the Iſſue was well tryed and joyned for that. But the Court held that that tryall of that Iſſue was but matter of form, and the ſubſtance is upon the ſpecial matter found, It was adjudged for the Defendant. M. 18 Jac. in B. R. the King and *Hoppers* caſe. *Cro.* 2. p. 399.

11. Treſpas for entring his Houſe and Cloſe at G. the Defendant Juſtified that a *Capias* was directed to the Sheriff of S. againſt one I. S. who made his Warrant to the Defendant to execute it: and becauſe it was the common voice that I. S. was at the Plaintiffs Houſe, he went in a Foot-path thorough the Cloſe to the ſaid Houſe, and asked leave of the Plaintiff to enter his Houſe and to ſearch for the ſaid I. S and the Plaintiff gave him leave, whereupon he entred, and not finding I. S. he returned the ſame way, It was found for the Plaintiff, and amongſt other things, in arreſt of Judgement, it was moved, That it was a Miſ-tryal; For that *John White-head* of *Whitehead* was returned, and *John White-head* of *Whitehill* was ſworn. But the Exception was diſallowed by the Court; and the Court held that the alteration of the name of the Vill was not material M. 12 Jac. in B. R. *Watts* and *King*'s caſe. *Cro.* 2. part, 353.

12 Debt upon an Obligation for payment of 31 *l.* at C. Iſſue was taken that the money was paid at C. and yet by the conſens of the Parties, the Iſſue was tryed at *London*, and found for the Plaintiff, and judgment given, and upon a Writ of Error brought in the Eſch quer Chamber, the judgement was reverſed for miſtryal, for that the conſent of the Parties might not change the Law. Paſc. 7 Jac. in Exchequer Chamber. *Hob.* 5

13. In Debt for Rent upon a Leaſe for years, the Caſe was; The Grandfather of the Plaintiff ſeiſed of Lands in *Southwark*, made a Leaſe of the ſame to the Defendant at *London* Rendring Rent; Afterwards he deviſed the Reverſion to the Plaintiff in Fee, and in his Will declared his intent to be, That his Executors ſhould have the Reverſion during the Term, upon the condition, that they enter Bond to pay 42 *l.* per an. at uſual Feaſts, and deviſed that this Bond ſhould be made by the adviſe his of Overſeers, all this to be done within ſix Moneths after his deceaſe, And if his Executors refuſe, his Will was, That the Overſeers ſhould take the profits upon the ſame condition; the Deviſor died, No Obligation was made within the ſix Moneths; The Plaintiff required the Executors to enter Bond and to pay the Rent, which was not done: Whereupon he brought his Action in *London*, and not in *Southwark*, where the Land doth lye. It was agreed in this Caſe, that the Plaintiff had good title to have the Rent, but becauſe the Plaintiff had miſtaken in laying of his Action, It was holden to be a Miſ-tryal, and for that cauſe only adjudged againſt the Plaintiff. H. 21 Jac. in Co. B. *Tethern* and *Clayhook*'s Caſe. *Winch* 69.

14. In an Action upon the Caſe in the nature of a Conſpiracy for conſpiring to endite Plaintiff of Felony, ſuppoſed to be done at *Weſtbrummidge* at Cawcit-hills, upon Not guilty pleaded: At *Stafford* Aſſiſes the Indictment was preferred to the Grand Jury, who found an *Ignoramus*; And the *Venire facias de Weſtbrummidge* and *Stafford*; It was ſaid, that this was a Miſ-tryal, for that the *Venire facias* ought to have been alſo of Cawcit-hills: It was the opinion of the Court, If nothing had been done by him at *Stafford*, but that which he was bound before to do by the Law, The *Venire facias*

facias being awarded *de Stafford* is not well awarded; The Recognizance only was for him to appear at the Aſſiſes, and there to anſwer to ſuch matter as ſhould be layd to his charge, but no other matter was there done by the Defendant at that time, for he did not only there preſent his Bill of Endictment to the Grand Jury, but he did there alſo take a falſe Oath againſt the Plaintiff, but the Iury did not believe him. And ſo for this cauſe the *Venire facias* was well awarded *de Stafford*, and the other place not material. Vid. *Librum.* Hill. 12. Jac. in *B. R. Hercot* and *Underhill's* Caſe. *Bulſtr.* 2. part, 331, 332.

15. In an Action of Treſpas and Ejectment brought by C. againſt A. & B. They both pleaded Not guilty, The Award upon the Roll was againſt both the Defendants, The firſt proces, ſc. the *Habeas corpus* was againſt them both, But the *Venire facias* was againſt one of them only, one of them being only named, in this they proceeded to tryal, and a Verdict was for the Plaintiff againſt both the Defendants. It was the opinion of the Court, that this was amendable though it was after the Verdict, and the *Venire facias* is well amendable where it is miſtaken, and is to be made agreeable to the plea Roll, and by the plea Roll it is to be *inter partes prædictas*; Wherefore it was Ruled by the Court, tho ſame was to be amended, And a *ſuperſedeas* granted to ſtay, the former *ſcire facias* had had upon the Writ of Error, *quid improvidè emanavit*, and the party to proceed on his Writ of Error and to aſſigne his Errors without delay. M. 1 Car. in B. R. *Craufild*, and *Turnor*, and *Collins* Caſe. *Proſtr.* 3. part, 311.

14. In Debt upon an Obligation, The Condition was, That the Defendant ſhould pay ſo much in a Houſe of the Plaintiffs at *Lincoln*, The Defendant pleaded payment at *Lincoln* aforeſaid. Upon which they were at Iſſue, and the *Venire facias* was *De vicineto Civitatis Lincoln*, and found for the Plaintiff: In arreſt of Judgement it was moved, That it was a Miſ-tryal, becauſe the *Venire facias* ought to have been of the body of the County, and not of the City, which was alſo a County of it ſelf: But was Reſolved by the whole Court, that the tryal was good: vid. 34 H. 6. 49. and 50. p. 17. And it was taken for a Rule, That where it doth not appear upon the Record, that there is a more proper place for tryal, than where the tryal was, that there the tryal is good, and here the tryal was in the moſt proper place. M. 17 Car. in Co. B. *Thorndike* and *Turpingtons* caſe. *Winch.* 125.

15. In a Prohibition the caſe was, Queen Eliz. was ſeiſed of the Mannor of N. which extended into four Pariſhes, ſc. S. and three other: and the Plaintiff ſhewed, That he was ſeiſed of three Cloſes in S. and preſcribed, that the Queen and all thoſe whoſe eſtate he had, had a *Modus Decimandi* and payable for all the ſaid three Cloſes, and for all other the Demeans in the ſaid Mannor in the ſaid Pariſh of S. And if the *Venire facias* ſhould be *De Parochia de S.* or of the Mannor, was the Queſtion. It was Reſolved by the whole Court, That the *Venire* ſhould be of the Pariſh, and not of the Mannor; And a difference was taken, when one claimes any thing which goeth to the whole Mannor, and when only to parcel of it, for in the one caſe the *viſne* ſhall be from the Mannor, in the other not. Vid. 9 Eliz. *Dyer.* But it was ſaid, That the *Modus* in this caſe went only to things in S. and therefore the viſne ſhould be of S. only; And *Nichols* Juſtice ſaid, That although the Pariſh be a Town, and they are both of one name, yet the *Venire facias* ſhould be *De Parochia*, to which the Court agreed. M. 11 Iac. in Co. B. *Norton* and *Lyſters* caſe.

16. A had judgment to recover in an Action upon the caſe at the Aſſiſes, and damages given him 30. *l.* It was after moved in arreſt of Iudgment, That the *Venire facias* was *de* 12. and one did not appear, So as the Iſſue was tryed *De Circumſtantibus*, and yet the Entry in the Rott. was, That the ſaid Iuror being called, appeared, alſo the words *juratus* was omitted; and for theſe defects it was the opinion of the Iuſtices that the tryall was not good, and the judgment ſhould be ſtayed. M. 8 Iac. in Co. B. *Quods* caſe.

17. The Vicar of *Pancras*, leaſed all his Vicaraige to I. S. viz. the Gleab Land the Church and all things appertaining to it, excepting the Houſing: rendring 20 *l.* Rent yearly, at two Feaſts, and if the Rent was behind by the ſpace of a Moneth, that it ſhould be lawful for him to diſtreyn; and the Leſſee bound himſelf to perform all Covenants, Articles, and Agreements, conteyned or recited within the Leaſe, and for Rent behind 25 Eliz. the Vicar brought Debt: To which the Defendant pleaded, that the Rent was not demanded at the day: upon which they were at Iſſue; The Iury being ready at the Barr, It was moved againſt the taking of the Enqueſt, for three cauſes. 1. For that he had made a Leaſe of the Parſonage, except the Houſing, and the Plaintiff had

had alleged the demand generally *ſuper terras glebales*; and had not ſhewed where. As to that it was ſaid by the Iuſtices, that it had been better to have ſaid, At ſuch a Gate, Hedge, or High-way, but that Exception was diſallowed, for if it was not well demanded, it ought to have been ſhewed on the other ſide. 2. Exception was, becauſe the Enqueſt was all *De vicineto de Pancras*, and it might be that ſome part of the Lands which did appertain to the Vicaraige, did extend to *Iſlington*: but that alſo was diſallowed. 3. Becauſe the *Venire facias* did not well recite the Iſſue, for in that the Houſing was omitted, It was the opinion of the Iuſtices, that that need not to be that all be recited, But if another Iſſue then that upon which they were at Iſſue had been recited, that ſhould not have been good: but had made the tryal void, and afterwards the Enqueſt was taken, and found for the Plaintiff. Paſch. 26 Eliz. in Co. B. *Buſhey* Vicar of *Pancras* caſe. *Godbt.* 22.

Modus Dec. Vid. Lib. 1. Diſmes, or Tithes.

Mort Dauncester.

What it is, of what, and for whom it lieth, and againſt whom, and of what Eſtate; what and where not.

1. THe Writ of Mortdaunceſter lieth, Where a Mans Father, Mother, Brother, Siſter, Uncle, Aunt, or other of the Blood and Kindred dieth ſeiſed of Lands, Tenements, Rents or other Hereditaments in Fee; and a Stranger, after the death of ſuch Anceſtors, abateth and entreth into the Lands, or receives the Rents, or profits thereof: then, he who is next Heir to the Anceſtor ſhall and may have an Aſſiſe of Mortdaunceſter againſt ſuch Stranger, who ſo abates and receives the profits of the Lands. Vid. 22 E. 4. 13.

2. If the Anceſtor were ſeiſed of Lands, the day that he died, although that a Stranger entreth upon the Land that day, and diſſeiſed the Anceſtor of the Land; yet the Heir may maintain Aſſiſe of Mortdaunceſter, becauſe the Writ doth not ſuppoſe, that the Anceſtor died ſeiſed: But the Writ is ready upon Oath to recogniſe, If W. Father of the ſaid A. was ſeiſed in his Demeſne as of Fee of one yard Land with the appurtenances in D. the day which he dyed. Vid. F. B. 190. And vid. That in an Aſſiſe of Mortdaunceſter, It was a good plea to ſay, That the day that the Anceſtor died, that the Anceſtor did enfeoff the Tenant of the Lands.

3. Note, The words in the Writ of Mortdaunceſter are, If A. be his next Heir, For *viz.* If a Man hath Iſſue a Son, and his Wife dieth, and he taketh another Wife, and hath Iſſue a Son, and Lands are given to him and his ſecond Wife in ſpecial tail before the Statute of *Donis Conditionalibus*; If a Stranger in ſuch Caſe had abated, No Writ of Mortdaunceſter did lye. Vid. 10 E. 2. In Formedon 55. vid. *Plow.* Com. 239. acc.

4. Note, That by the Common Law, a Mortdaunceſter did not lye for Lands which were deviſeable by Will, and the reaſon thereof was, becauſe the Title of the Land might fall to another, who is not Heir by the Will of the Anceſtor, and yet the Anceſtor was ſeiſed of the Lands the day that he died, as the Writ ſuppoſeth. Vid. 23. Aſſ. acc. But contrary it is at this day of Lands deviſeable by the Statute, and ſo it was adjudged in Co. B 20 Eliz.

5. If Lands be given to one in tail, the Remainder to his right Heir; and he dyeth ſeiſed without Iſſue, and a Stranger abateth: the opinion of ſome have been heretofore, as in 21 E. 3. and 5 H. 4. that if the Remainder be to his right Heirs, that then he ſhall not have and maintain Mortdaunceſter, others have holden, that if the gift hath been to him, and the Remainder to him and his right Heirs, that he in the Remainder ſhould maintain an Aſſiſ, becauſe he hath the Remainder in Fee to him: Mr. Fitz in his *Natura Brevium* 195. conceiveth that he ſhall not have an Aſſiſe of Mortdaunceſter in the one Caſe, or in the other; for that the Words of the Writ are, *Si Pater &c. fuit ſeiſitus die quo obiit in Dominico ſuo ut de feodo*, and in both Caſes he was ſeiſed in Demeſne, *ut de feodo tatiato* but he leaves it: Quære, and vid. 33 E. 3. ſc. Title Mortdaunceſter. Land was given

given to one in tail, and for want of ſuch Iſſue the Remainder to his right Heirs, he died without Iſſue, and his Heir collateral brought an Aſſiſe of Mortdaunceſter; and there holden good; but if he had Iſſue, the Iſſue ſhould have but a Formedon, becauſe he had but tail.

6. A Mortdaunceſter was brought of 2. parts of the moity of a Mil, without ſaying in 3. parts undevided, altho gh there was no partition of that part: and of the Moity of the Moity *unius carucatæ terræ*, and good, 11. Aſſiſ. 20. and vid. in 6 E. 3. ſc. Demand 41. It was brought of 8. feet of Land in length, and of 6. feet in breadth, without ſpeaking of a place containing ſo many feet.

7. A Mortdaunceſter was brought of a Bailiwick, without ſaying that he was ſeiſed thereof in *Dominico ſuo ut de feodo* in the Writ, for that that it was not accounted a Freehold, at the Common Law. 10. Aſſiſ. p. 11.

8. An Aſſiſe of Mortdaunceſter is mainteable by an Infant upon an Abatement made after the death of his Anceſtor by a Stranger, 40 E. 3. acc. But if an Infant bringeth an Aſſiſe of Mortdaunceſter of the poſſeſſion of his Father or Mother, he need not allege in the Writ, that it was after the Coronation of King *Hen.* the 3. which is the time of limitation appointed by the Statute of Weſt. 1. cap. 38. for that the ſame appeareth. *Cook* 7 part, 40 in *Bedell's* Caſe. *Cook* 8. part, 126. in the Caſe of the City of *London* acc.

9. If there be Tenant for life of Lands, the Remainder to B. and his Heirs in Fee, and he who hath the Fee dieth, and afterwards the Tenant for life dieth, and a Stranger abateth: It was Reſolved, that in that Caſe, It is in the election of the Heir, to have a Mortdaunceſter (which proveth his Anceſtor died ſeiſed in Fee) or a *Scire facias*, or a Formedon in the Remainder at his pleaſure. *Cook* 2. part, 61. in *Wiſcotts* Caſe.

10. Note, When any one bringeth an Aſſiſe of *Novel diſſeiſin*, Aſſiſe of Mortdaunceſter, or a Writ of Entry *Sur diſſeiſin*, or any other real Action, and he be barred by judgment upon Demurrer or Verdict, the Demandant and his Heir are not only barred of the ſame Action, but alſo as long as the judgment ſtandeth in force, he and his Anceſtors are barred of their Entry, and are put to their Action of a higher Nature; as Aiel, Beſaiel, Coſinage, &c. *Cook* 6 part, 7. and 8. *Ferrer's* caſe.

11. Note, For a Rule in pleading in an Aſſiſe of Mortdaunceſter; That if the Tenant of the Land or the Tenant by Warranty, plead a barr to the Aſſiſe viz. matter of Record, Releaſe, Collateral Warranty, &c. and it paſs againſt the Tenant the ſame is peremptory to the Tenant. But if he pleadeth in abatement of the Writ or Vouchee, which is Counterpleaded and found againſt him, there theſe three points ſhall be further inquired of: viz. If the Anceſtor died ſeiſed; If the Demandant is next Heir; and, If the Anceſtor died within 50. years; and theſe ought alſo to be found for the Demandant, otherwiſe he ſhall not recover; And if Iſſue be joyned upon one of the ſaid 3. points, and one of them is found againſt the Tenant, yet the other two points are to be enquired of; and in the principal Caſe no plea in barr was pleaded, but one of the points only traverſed. Paſc. 14 Eliz. *Dyer* 311. *Repingale* and *Cooks* caſe.

Monſtrans de Droit.

Where and to whom it lyeth; and where not; And where a Man may enter upon the Poſſeſſion of the King without Monſtrans de Droit, *or other Proces, or Sute, where not.*

1. *Monſtrans de Droit*, is given by the Statute of 34 E. 3. cap. 13. and is a ſute for the Subject in the High Court of Chancery; where Lands are by Office found before the Eſcheator ſeiſed into the Kings hands; by which Office the King is entituled to them, to the Freehold or Inheritance of them; there upon ſhewing of his Right in Chancery, if there be juſt cauſe, the Subject ſhall be reſtored to his lands and poſſeſſion. Vid. the Statute 34 E. 3. cap. 13. *Raſtal* Title Eſcheator. 4 *Cook* 4 p. The *Sadlers* caſe.

2. Te-

2. Tenant in tail, the Remainder in tail, he in the Remainder bargained and ſold his Remainder to A. for the life of the Tenant in tail, and after his death the Remainder to the Queen in Fee upon condition. Tenant in tail ſuffered a common recovery and died without Iſſue, It was adjudged that he in the Remainder and all claiming under him were barred by the Recovery; and in that caſe it was argued, If the Remainder ſhould be diveſted out of the Queen without Petition or *Monſtrans de Droit*; and upon that, This Difference was taken, *viz.* When an Eſtate ſhall be diveſted out of a common perſon and veſted in another without Action or Entry, or Claim, there it ſhall be diveſted out of the King without Petition or *Monſtrans de Droit*, but when in ſuch caſe of a common perſon, the Eſtate ſhall not be deveſted out of him, there it ſhall not be diveſted out of the King without Petition or *Monſtrans de Droit*. *Cook* 2. p. 53. Sir *Hugh Cholmley*'s caſe.

3. One deviſed Houſes in *London* deviſeable by the cuſtome and holden of the King in tail, and if the Donor died without Iſſue, that the Lands ſhould be ſold by his Executors, and died, the Deviſee died without Iſſue, the Land eſcheated to the King, Yet it was holden in that caſe, that the bargain and ſale of the Executors ſhould deveſt the Kings Eſtate without Petition or *Monſtrans de Droit*, and that by the bargain and ſale, the Bargainer was in paramount the eſcheat to the King. Vid. 39 Ed. 3. *Iſſabell Goodcheaps* Caſe.

4. A Diſſeiſor makes a Leaſe for life the Remainder to the King, If the Diſſeiſee or he who hath good right, recovereth againſt Tenant for life and entreth, It was holden that by that Recovery, the remainder was defeated, but if the Recovery be in feigned and upon no title, there the Remainder of the King is not touched, and ſo if the Diſſeiſee if he entreth he ſhall defeate the Remainder of the King. Vid. 25 E. 3. 48. *Plo.* Com 489. and 513 acc. acc. *Cook* 2. part, 113.

5. Vid. For proof of the Rule in Sect. 3. before. A man ſeiſed of Lands in Fee for diverſe conſiderations Covenanted to ſtand ſeiſed thereof to the uſe of himſelf for life, and after to the uſe of his eldeſt Son in tail. *Proviſo* that at any time during his life with the conſent of diverſe by deed indented to be Inrolled in any of the Kings Courts to revoke any of the ſaid uſes, Eſtate, and to Limit uſes, And afterwards by deed Indented, and Enrolled in the Chancery, he revoked the uſes, and in part of the Land, and limited the ſame to him and his heirs, and afterwards by another deed he declared, that from the time of the Inrollment of that deed in the Chancery all the firſt uſes in the firſt Indenture ſhould be void, and that the Land ſhould be to the uſe of himſelf in Fee; and afterwards he levied a Fine of all the Land, and afterwards the deed was Enrolled in the Chancery: and after he entred and made claime and died: In this Caſe amongſt other things, it was Reſolved, That if the Fine had not been levied there by the Revocation the antient uſes were determined without entry or claim, becauſe he himſelf was Tenant for life of the Land, ſo that he could not enter upon himſelf, and claim he need not when he himſelf is ſeiſed of the Land, and makes an expreſſe Act of Revocation, which is as ſtrong as a claim can be. And ſo it was Reſolved, that the uſes in the principal Caſe did ceaſe without Entry or Claim. *Cook* 7. part, 174. *Digs* Caſe.

6. It was found by *Mandamus*, That A. was ſeiſed of certain Meſſuages &c. in *London*, and died without Heir, the Lands being holden of the King in Socage. The Corporation ſhewed their Right. That T. M. was ſeiſed of them in Fee, and by his Will deviſed them to the Wardens and Company of Sadlers: and that they were diſſeiſed by A. who died without Heir, and ſhewed that by the Cuſtom of *London* a Free-Man might deviſe his Lands in Mortmain. The Queſtion was, if *Monſtrans de Droit* did lye: Or they put to their Petition: And in that Caſe, it was Reſolved, 1. That at the Common Law when the King was ſeiſed of any Eſtate of Freehold by matter of Record were it by Judicial, Miniſterial, by Conveyance of Record, Or by matter in fact and found by Office of Record, He who had right could not have any Travers upon which he was to remove the Kings poſſeſſion, that was put to his Petition of Right: But when the King was entituled by matter in Fact, and found by Office of Record, If in the ſame Office the Title and Intereſt of the party was found there the party grieved might have *Monſtrans de Droit*. 2. Reſolved, That when the Kings Tenant dieth without Heir, The Fee and Freehold is preſently in the King without Office if the Tenant was in poſſeſſion at the time of his death, but when a ſtranger was in poſſeſſion at the time of the Eſcheate, there the King ſhould not be adjuged in

in poſſeſſion untill that ſeiſin and poſſeſſion was removed: and when no Man is in poſſeſſion the Law will adjudge the King in Poſſeſſion according to his Title. 3. Reſolved, That when a common perſon againſt another common perſon was put to his real Action; In ſuch Caſes. In Caſe of the King he ſhould be put to his Petition, which is in the nature of a Real Action againſt the King. And it was reſolved in the principal Caſe; That although it ſhould be admitted, that the Corporation of Sadlers could not have a *Monſtrans de Droit* before Office found, yet when an Office is once found, the ſame ſhall have relation to the death of the Tenant without Heir, and then the Statute of 36. E. 3. cap. 13. extends unto it. *Cook* 4. part, 55, 56, 57, 58. The Caſe of the Warden and Commonalty of Sadlers.

7. Note, It was the opinion of *Popham* Chief Juſtice, That if the Heir of the Mortgager is in Ward to the King; and the Mortgager payeth the money, that his Entry is not lawfull upon the King, but in that Caſe he is put to his Petition, or *Monſtrans de Droit*. Hill. 43 Eliz. in B. R. *Goldesbr.* 125.

8. In a *Monſtrans de Droit* brought by *William Paget*, ſon of *Tho.* Lord *Paget*, the Caſe was this; *Tho.* Lord *Paget* ſeiſed of divers Mannors by Deed Indented Covenanted with I. S. That in conſideration of diſcharge of his Funeral, payment of his Debts and Legacies, and advancement of his ſon, & others of his blood, to ſtand ſeiſed of the ſaid Mannors to the uſe of the ſaid I. S. for the life of the Lord *Paget*, and afterwards to the uſe of C. P. and others for 21 years, and after the expiration of the ſaid Term of 21 years, to the uſe of *William Paget* his Son in Tail: Afterwards the Lord *Paget* was attainted of Treaſon: The firſt Queſtion was, if the uſes limited to I. S. and others were good or not; It was Reſolved, That they were void, becauſe there wanted a good conſideration, but if he had made the executors and chargeable to the payment of the Debts, then the ſame had been good. But the ſecond great Queſtion in the Caſe was, If the uſe limited to *William Paget*, ſon of the ſaid Lord *Paget* ſhould begin preſently after the death of the Lord *Paget*, or ſhould expect untill the 24 years were encurred, after the death of the Lord *Paget*, or not at all. This Caſe was very learnedly argued at the Barr, and the better opinion ſeems to be that it ſhould be in *William Paget*, preſently before the 24 years were expired: The Caſe was not Reſolved, but adjourned. *Ideo* Quære the Law in it. Mich. 32. Eliz. in the Exchequer Chamber. *Leon.* 195. 196. to 202.

9. In a *Monſtrans de Droit*, ſued by *Roger Ratcliffe*, the Caſe was this, *Anno* 17. E. 2. *John de Mulo Laco*, ſeiſed in Fee of the Mannor and Caſtle of *Malgrave*, gave the ſame to *A. Bigod* in Tail, which by diverſe deſcents came to *Ralph Bigod* in Tail, who 6. H. 8. made a Feoffment to the uſe of his laſt Will, and thereby after his Debts paid declared the uſe unto his right Heirs in Fee, and 9. H. 8. died, the Will was performed, *F. Bigod* Entred being Tenant in Tail, and 21. H. 8. made a Feoffment to the uſe of himſelf and K. his Wife, and to the Heirs of their two bodies. Then came the Statute of 26. H. 8. by which Tenant in Tail is to forfeit his Lands for Treaſon, which he hath in Tail. And then the Statute of 27. H. 8. of uſes is made. Then 28. H. 8. *F. Bigod* did commit Treaſon, and 29. H. 8. he is attainted and executed. A. 31 H. 8. A private Act of Parliament was made which did confirm the Attainder of *Francis Bigod*, and that he ſhould forfeit to the King (word for word as the Statute of 26. H. 8 is) ſaving to all ſtrangers, except the Offender and his Heirs, &c. 3 E. 6. The Heir of *F. Bigod* is reſtored in blood; K. Entred into the Mannor and died ſeiſed. 8. Eliz. the Iſſue Entred and maried with *R. Ratcliff*, who is Heir in Tail to *Raph Bigod*, and they continue poſſeſſion till 32. Eliz. And then all this is found by Office, and the Land ſeiſed for the Queen, who Granted the ſame to the Lord *Sheffield* in Tail: *R. Ratcliff* ſued a *Monſtrans de Droit*, whereupon a *Scire facias* Iſſued forth againſt the Lord *Sheffield*. And Judgement being given for *Ratcliff* in Court, The Lord *Sheffield* brought Error in the Exchequer Chamber. This Caſe was learnedly argued by the Councel at Bar and afterwards all the Judges: And for the ſaid *Ratcliff*, it was Objected, and ſaid. 1. That the old right could not be forfeitable to the Crown by the Statute of 26. H. 8. 2. That the perſon attainted had not that right by reaſon of the Feoffment, and therefore could not forfeit it. 3. The Heir was remitted by the deſcent of the Land. But it was reſolved by the Judges, *nua voce*, that becauſe here was an Actual Eſtate in Tail in the perſon attainted at the time of his Attainder, that that Eſtate was plainly forfeited by the Statute of 26. H. 8. 2 Reſolved, That the rights of him and his Heirs had been bound by that Law if there had been no ſaving; and there

was no ſaving for them, becauſe they were excluded expreſly by the Act, and 3. Reſolved, That when all this appeareth by Office, then the Iſſue in Tail is barred notwithſtanding the Remitter. Wherefore Judgement was given for the King and the Lord *Sheffield*, and that the former Judgement given in the Court of Pleas ſhould be reverſed. Vide this Caſe, and the Arguments in it, Paſc. 21. Iac. in the Echequer Chamber, The Lord *Sheffield* and *Ratcliffs* caſe. *Godbt.* 300. to 318. And *Hob.* 334. to 348.

Vide More of *Monſtrans de Droit.* In the Titles before of Gard, Livery and *Oyer le Mayne.*

Monſtrans de faits, *or of Deeds.*

1. *Where a Man ſhall make Title, maintain an Action, or Juſtifie by the Kings Letters Patents without ſhewing of the Letters Patents be he party, Privy, or Eſtranger to them, where not.*

1. IN Treſpaſſe, The Defendant pleaded, that the King was ſeiſed of the Lands, where, &c. in Fee of the right of his Crown, and by his Letters Patents Granted the Land to I. S. for life, who lett the ſame to the Defendant for years, and averred the life of the Grantee: It was the better opinion of the Juſtices, that he need not ſhew the Letters Patents, and ſo it is of an Under Sheriff, Subcollector, Incumbent, becauſe they have no means to come to the poſſeſſion of them: But if the Patentee had Granted all his Eſtate to the Defendant, then the Defendant ought to ſhew the Letters Patent, Hill. 28. H. 8. *Dyer* 29.

2. An Information was againſt I. S. upon the Statute of 4. H. 7. cap. 9. for bringing in *Gaſcoin* Wines in a ſtrange ſhip. The Defendant pleaded as Aſſignee of part of a Licence of the King by Patent; but did not ſhew the Letters Patent, nor that the Patentee was alive, nor did he ſhew the Deed of Aſſignment, but averred, that there was a Cuſtom amongſt Merchants to Aſſign by word. Afterwards, it was Enacted by Parliament that the Statute of 4. H. 7. ſhould ſtand in force: It was the opinion of the Barons in the Exchequer that the Plea was not good without ſhewing the Letters Patents: but whether the Licence was determined by the ſaid Act of Parliament was not reſolved. M. 34. H. 8. *Dyer* 54.

3. In Treſpaſſe by an Aſſignee of a Leaſe for years, The Defendant pleaded that the Leaſe was upon Condition that the Leſſee ſhould not Aſſign it over, but by the Licence of the Leſſor by Deed, and that the Leſſee did Aſſign it over. The Plaintiff pleaded a Licence by Deed of the Leſſee without ſaying *hic in Curia prolat.* It was reſolved in that Caſe that the Plaintiff needed not to ſhew it, becauſe the Plaintiff did not claim by the ſaid Deed of Licence any Intereſt in the Land, but the Licence was only Collateral to it, and pleadable only to excuſe the forfeiture of the Leaſe, and it is not like a Leaſe or Confirmation which transferre a Right. 2. Reſolved, That when a Deed is requiſite *ex inſtitutione Legis*, there it ought to be ſhewed in Court, although it concern a Collateral thing, and transfer, or convey nothing. But when a Deed is requiſite *ex poſitione hominis*, there the Proviſion of man ſhall not change the Judgement of Law. As if the Farmer of the King bring *Quo minus* in the Exchequer, He ought to allege that he is Farmer of the King to enable him to ſue there, but he need not to ſhew the ſame to the Court. *Cook 6.* part, 33. *Bellamys* caſe.

4. In Treſpaſſe the Defendant juſtified and pleaded, That the King was ſeiſed of a Rectory in Fee, and demyſed the ſame to the Plaintiff for life, without ſhewing the Letters Patents to the Court; and that the Plaintiff demyſed the ſame to I. S. for eight years if he lived ſo long, and that he as ſervant to I. S. took the Tythes; upon which the Plaintiff did demurr. In this caſe amongſt other points it was reſolved, 1. That he who is party or privy in Eſtate or Intereſt, or he who juſtifies in the right of him who is party or privy muſt ſhew the Deed, although he doth not claim but parcel of the Original Eſtate, that is

it may appear to the Court if it be legal or not; and that it may appear to the Jury that it is ſealed, it ought to be ſhewed in Court. 2. Reſolved, That where a man is a ſtranger to a Deed, or doth not claim any thing compriſed in the Grant, nor any thing out of it, nor doth any thing in the Right of the Grantee, there he may plead the Patent or Deed without ſhewing the ſame. 3. Reſolved, That the not ſhewing of the Letters Patents in the principal Caſe was matter of ſubſtance, and not of form. 4. Reſolved, That whereas an Eſtate is Created by Act in Law, and not by the Act of the party, there he ſhall not be compelled to ſhew the Deed as Guardian, Tenant in Dower, Tenant by Elegit, &c. *Cook* 10. part, 88. Dr. *Leyfields* caſe.

5. King E. 6. ſeiſed of the Advowſon of the Church of S. parcel of the Poſſeſſions of the Earl of *Salisbury* attainted of Treaſon, by his Letters Patents he Granted *proximam advocationem, Nominationem, Jus Patronatus Eccleſiæ prædict.* to two *conjunctim & diviſim. Ita quod bene licceret eiſdem, N. M. ad Eccleſiam prædict. cum primo vacare contigerit præſentare Loci illius Ordinario*; and at the next Avoydance they preſented the ſame N. M. who was Admitted and Inſtituted. Afterwards the King Granted the Advowſon to the Duke of *Somerſet*, and he Granted it over before his Attainder to I. S. & then the Church became void; and if the ſaid I. S. might make to himſelf a good Title to the preſentment by the preſentment aforeſaid, without laying a Preſentment in the King was a Queſtion in that Caſe. But vide now *Cook* 5. part, 98. in the Earl of *Northumberlands* Caſe that Quære Reſolved. 2. It was doubted in that caſe, The principal caſe, ſc. if the Grantee of the Advowſon in Fee ought to ſhew the firſt Deed of Grant of the next Avoydance: and *vide* that point alſo reſolved in *Cook* 8o. part, 88. in Dr. *Leyfields* Caſe.

See more upon this Diviſion, Lib. 1. Title Deeds Sect. 4.

M. 8. Jac. in B. R. *Purſey* and *Gryvies* Caſe. *Cro.* 2. part, 291, 292.

Tr. 32. Jac. *Barret* and *Wiſcombs* Caſe. *Hob.* 38.

M. 17. Jac. in Co. B. *Holland* and *Shelleys* Caſe. *Heb.* 303.

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2. *Where the Deviſee, or Grantee of the Executors ſhall ſhew the Will of the Deviſor, where not. Where Executors, or Adminiſtrators ſhall ſhew the Will, or where they may have an Action of their own poſſeſſion, without ſhewing the Will, or Letters of Adminiſtration,* & è contra.

1. IN a *Quare Impedit* the Plaintiff intituled himſelf to the next Avoydance by the Grant of the Patron made to a ſtranger, who made two Executors and died; and the Executors Granted the ſaid next Avoydance to the Plaintiff, and all their Intereſt in it, and then ſhewed that the Church was void, and averred that Avoyance to be the next Avoydance, and did not ſhew forth the Teſtament. It was the opinion of the Court that he needed not ſo to do, for that the Grant was good although they never proved the Will; and it is an Adminiſtration. M. 4. Ma. *Dyer* 135. *Smithley* and *Cholmleys* caſe.

2. Note, It is ſaid and Reſolved by the Juſtices in *Cook* 9. part, 38. That as to bringing of Actions in the Kings Courts, The Judges do not admit the Executors to ſue for things in Action if they ſhew not the Teſtament duly proved under the Seal of the Ordinary: But alwayes the Kings Courts have uſed to allow the probate of any of the Executors to inable them to bring Actions; and further in that Caſe, It was reſolved, That probate of Wils did but of late times belong to the Ordinary, & if an Iſſue be joyned that Adminiſtration was not committed to the party, or that the Teſtament was not proved before the Ordinary, the ſame ſhall not be tryed by the Certificate of the Ordinary but by the Countrey, becauſe that Originally probate of Wills and Teſtaments did not belong to the Eccleſiaſtical Conuſance or Juriſdiction. *Cook* 1. part, 38. *Henſlows* caſe.

3. A. brought Detinue of a Chain againſt B. and declared that his brother was poſſeſſed thereof and died Inteſtate and that the Biſhop of *Cork* Granted him Letters of Adminiſtration, and that the ſame came to the Defendants hands by Trover, and declared that he

was as adminiſtrator poſſeſſed thereof at *London*: The Defendant pleaded the general iſſue, and it was found by ſpecial Verdict, That the Biſhop of *York* in *Ireland* being in *England*, granted Letters of Adminiſtration; In this caſe amongſt many other points, it was Reſolved, That upon the general Iſſue pleaded, the Jury might find a forein matter as a thing done out of the Realm. But the finding of the Letters of Adminiſtration was more than they had in Iſſue, and it was but matter of evidence, and the ſubſtance of the Caſe was the poſſeſſion and not the Adminiſtration, for he might have an Action of his own poſſeſſion without ſhewing the Letters of Adminiſtration. P. 27 Eliz. C. B. *Carter* and *Croſs* caſe. *Godb* 331. vid. Tr. 12 Jac. in Co. B. *Cap* and *Lenyats* caſe. lib. 1. title Deeds.

4. Treſpas by Husband and Wife againſt I. S. the Defendant pleaded, That A. was ſeiſed of the Lands, and that they came to him by deſcent, The Plaintiff replyed that before one B. was ſeiſed, and made a Leaſe to one I N. who died, Inteſtate and Adminiſtration was committed to the Wife Plaintiff, and traverſed the dying ſeiſed, and found for the Plaintiff it was moved in ſtay of judgement that the Plaintiff ſhould have ſhewed the Letters of Adminiſtration; But the Court gave judgment for the Plaintiff, becauſe his poſſeſſion which is confirmed by the Verdict, was his title, and the Adminiſtration was but inducement to the traverſe. Hill. 15 Jac. in C. B *Cheſter S. Georges* caſe. *Hob.* 218

5. Error of a judgment in Co. B. in Debt, Where the Plaintiff declared, that the Defendant 8 May 4 Car. *conceſſit ſe teneri.* to I. C in 280. *l.* to be paid upon requeſt, *Et profert in Curia ſcriptum prædict. quod debitum prædict. in forma prædict. teſtatur.* The Defendant pleads payment, and iſſue being found judgement was given for the Plaintiff. And Error aſſigned becauſe he doth not declare according to the uſual courſe, *Quod ſcriptum Obligatorium conceſſit*; nor any writing is mentioned in the Declaration, and that being faulty in ſubſtance it cannot be made good by plea or Verdict. But the opinion of the Court was, becauſe he ſhewed the writing, and the Defendant by his plea ſhewes, that it is an Obligation with a condition, and iſſue is thereupon, and found for the Plaintiff. That the Declaration was good enough; and it appears to the Court, the Plaintiff hath a juſt Debt, the judgment was affirmed. H. 6 Car. in B. R *Courtney* and Sir *Rich. Greenvils* caſe. *Cro.* 1. part, 101.

6. In Treſpas, the Defendant pleaded that A. was ſeiſed in Fee and died ſeiſed, and the Lands deſcended to two Daughters and Juſtifies by their command; The Plaintiff replyes, That A. was ſeiſed in Fee, and by Indentures covenanted with I. S. to ſtand ſeiſed, to the uſe of himſelf and the Heirs Males of his body, and for want of ſuch iſſue to the uſe of A. for life, the remainder to his eldeſt Son in tail, with diverſe remainders over are in tail, the remainder to the right Heirs of A. and died ſeiſed of ſuch eſtate without iſſue Male, R. entred, and the Plaintiff by his Licence put in the Cattel, and traverſed that A. died ſeiſed in Fee; The Defendant demurred becauſe the Plaintiff claiming by the deed of uſes doth not ſhew the ſame: But it was holden by the Court that the plea was good without ſhewing the Deed; 1. Becauſe it belongs not to him but to the Covenanters; 2. Becauſe it is an Eſtate executed by the Statute of uſes, and 3. Becauſe it is but an Inducement to the traverſe. Tr. 11. Car. in B. R. *Cro.* 1. part, 301. *Stafford* and *Hamilton* caſe.

7. The Queen granted Lands to the Earl of *Lincoln* by Letters Patents, the Patentee made a Leaſe of the Land to another, it was moved to the Court if the Patentee ought to ſhew the Letters Patents, It was Objected he ought not, becauſe they belong to the Earl. And *Wogan's* caſe, *Plo.* Com. 148. was vouched. Where an Abbot made a Leaſe to I S and afterwards the ſame Abbot made a Leaſe to another to begin after the expiration of the firſt Leaſe made to I S And exception was taken that he ought to have ſhewed the Deed of the firſt Leaſe, but the exception was diſallowed. But the opinion of the Court in the principal Caſe was, that becauſe the Leſſee deriveth his Intereſt from the Letters Patents, that he ought to ſhew them. M. 25 Eliz. in Co. B. *Godb.* 111, 112.

8. In an Action upon the Caſe the Plaintiff declared, that he was poſſeſſed of certain goods, *viz.* ſuch &c. at *London*, and in conſideration of 2. *s.* the Defendant at *London* did promiſe to carry the ſaid goods aboard ſuch a ſhip, if the Plaintiff would deliver the goods to him; and he ſhewed, that he had delivered the goods, and that he had not carryed them aboard: being found for the Plaintiff, It was moved in arreſt of judgment, that he did not ſhew when and where he delivered the ſaid goods to the Defendant, but only ſaid that *deliberavit*; It was the opinion of the Juſtices, that it was enough, for that the

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ſhewing of that was but matter of Inducement to the promiſe, and ought not be ſhewed ſo preciſely. Paſc. 3 Car. B. R. *Mole* and *Caters* caſe. *Godb.* 41.

9. In Debt upon a Bond, the caſe was, A man was bound in a Bond, that he ſhould obſerve perform and keep the Rule, Order and final end of the Council of the Marches of *Wales*; In Debt brought upon the Bond, The Defendant pleaded, That the Council of the Marches *Nullam ſicuram ordinem*, The Plaintiff replied *Quod fecerunt ordinem*: The Queſtion was in this caſe, If the Plaintiff in his Replication ought to ſet forth and ſhew the Names of the Councellors by their proper names, It was ſaid for the Plaintiff, that he ought not: And Sir *Rob. Bucklys* caſe, *Pla. Com.* 126. was vouched, That the number of the Eſſoins ought not particularly to be ſhewed by their names. But in an Action brought upon the Statute of 23 H. 6. he may declare generally, that he was choſen *per majorem numerum*, and good: and 10 E. 4. 15. where the Defendant is bound to ſerve the Plaintiff in *omnibus mandatis ſuis licitis*, The Defendant did ſet forth that he did ſerve the Plaintiff ſuch a day, that he is not compellable to ſet forth the particular of the ſervices: On the other ſide, it was ſaid, That he ought to name, and ſhew the Council by their particular names. As if a man plead a Divorce, he muſt ſhew before what Judge, and ſo of a Fine; Alſo they ſaid, that the Replication was not good, becauſe the Plaintiff did not ſhew, that the Order was made by the Preſident: for by the Statute of 34 H. 8. It ought to be made by the Preſident and Council: The Court delivered no opinion in the caſe but it was adjourned. M. 4 Car. in B. R. *Hill* and *Farleyes* caſe. *Godb.* 436, 437.

10. In an Action brought upon the Statute of 32 H. 8. againſt ſuch as buy pretended Titles, If it be for the Demiſe of a Leaſe, the Plaintiff ſhall not be compelled to ſhew the Term, Rent, or any other circumſtance thereof, becauſe he is a ſtranger thereto, and (by intendment) can by no means come to the knowledge thereof. And vid. 35 H. 6. 8. where an Action is brought for goods carried away, the Defendant juſtifies, for that at the time of the Treſpas, he was Maior of the Town of C. and that the King had granted to the Defendant (being then Major) and to the Commonalty and their Succeſſors all goods of Outlawed perſons within the ſaid Town, and ſhewed that the Plaintiff was Outlawed, and ſo juſtifies, And by the better opinion of the Bench the plea was holden to be good without ſhewing the Letters Patents, becauſe they now belong to his Succeſſors and not to him, and he is now become a ſtranger to them, although he was once privy to them being Maior. Vid. *Plo. Com.* 80. in *Patridge* and *Straoges* Caſe.

11 Debt by an Adminiſtrator upon an Adminiſtration granted by an Inferior Ordinary the Defendant pleaded, that before the Adminiſtration granted to the Plaintiff, Adminiſtration was committed to him by the Gardian of the Spiritualties *ſede vacante* of the Archbiſhop, *to quod* the Inteſtate had *bona notabilia* in diverſe Dioceſes; The Plaintiff replied, That before the Writ brought the ſaid Adminiſtration in the Prærogative Court was revoked and annulled. It was Reſolved in that caſe, That becauſe the Defendant had not ſhewed in his bar that the Inteſtate had *bona notabilia* in certain, It ſhould be intended that Adminiſtration was granted when the Inteſtate had not *bona notabilia* in diverſe Dioceſes; But ſuch an Adminiſtration was not void but voidable. Vide *Cook* 8. part, 135. Sir *John Needham's* Caſe.

12. In an Action of Aſſault and Battery, the Defendant juſtified as Servant to I. S. becauſe the Plaintiff came to Fiſh in the ſeveral Piſcary of his Maſter, Judgment was for the Defendant and Error brought, and 2. Exceptions taken, 1. Where as the Defendant had in his plea of Juſtification entituled his Maſter to the ſeveral Piſcary by the K. Letters Patents, he had not ſhewed that the King was ſeiſed thereof *Jure Coronæ*, and ſo it might be that the King had not power to grant it. 2. Becauſe he did not ſhew the Letters Patents which he ought to do: It was the Rule of the Court, that Cauſe be ſhewed by a day, wherefore for theſe Cauſes the judgment ſhould not be reverſed. Paſc. 23 Car. in B. R. *Jones* and *Young* Caſe, *Styles* 15.

13. Upon a judgment given in an Action upon the caſe brought by an Adminiſtrator, Exceptions were taken, 1. That the Plaintiff did not ſhew his Letters of Adminiſtration. And 2. That there was no good Conſideration ſet forth to ground the *Aſſumpſit* upon; It was the opinion of the Court, that it was not neceſſary to ſet forth the Letters of Adminiſtration, becauſe they were but Inducements to the Action and not the ground of it; and for the ſecond, the Court held the Conſideration ſet forth to be good. Paſc. 1651. in B. R. *King* and *Weekes* caſe.

14. Treſpas

14. Trespasse for taking and carrying away four Ashes in a place called Car Close, The Defendant said that I. B. was seised of the Close in which, and by Indenture 21 Eliz. demysed the same to I. D. and others *(inter alia)* excepting the Wood and underwood there growing, to have for the life of one A. P. and Covenanted that it should be lawfull for the Lessees, and their Assigns to take necessary Firebote, Housebote, &c. to be expended upon the premisses. I. D. died, A. P. survived him, and took to husband I. N. and that the Lessees Assigned over their Estate to the said A. and the Defendant as her servant took the four Ashes for necessary housebote, and averred the life of A. It was thereupon demurred, because he justifies by force of a Covenant in an Indenture, and doth not shew the Indenture, it being a thing that cannot be granted without Deed. It was said for the Defendant, that in regard he justifies onely as servant, and doth not claim any title, that he needeth not shew the Deed of Covenant: But all the Court held the plea to be ill, for a servant justifying under the Interest of his Master, ought to shew the Deed, for it is the substance of his title, and without shewing it he cannot justifie, and it is his folly to justifie under one who neither could nor would shew the Deed. M. 8. Jac. in B. A. *Pusey* and *Grimes* Case. Cro. 2. part, 291 292.

15. L. brought a *Scire facias* in the Chancery against D. to avoid a Statute, the Case was this: H. acknowledged a Statute to D. and afterwards conveyed part of the Land lyable to the Statute to I. S. who conveyed it to L. the Plaintiff. Afterwards the Conusor conveyed other part of the Land to D. the Defendant who was the Conusee by Bargain and Sale, the Conusee extended the Lands of L. the purchaser, who thereupon brought the *Scire facias* to avoid the Statute because the Conusee had purchased part of the Land, and so extinguished his Statute. This Case coming by *Mittimus* in B. R. It was moved for the Defendant D. in Arrest of Judgement. That, the Bargain and Sale *is* alleged to be made to D. but it was not shewed that it was by Deed Enrolled: Yet it is pleaded, that *virtute cujus* of the Bargain and Sale the Conusee was seised, and doth not say that he Entred. The Question in the Case was, whether an Inrolment shall be intended without pleading of it: In which case this difference was taken by the Justices, where a man pleads a Bargain and Sale to a stranger, and where to himself. In the first case he needs not to plead an Inrolment, but contrary in the latter case: And another point was, what Estate he had before the Inrolment, if an Estate at Will, or if he were a Desseisor the better opinion seemed to be he had an Estate at Will by reason of the possibility of the Inrolments. M. 15. Car. in B. R. *Leake* and *Danes* case, Marsh. 62. 63.

Monopolies and *new Inventions.*

1. NOte, That every Gift or Grant of the King hath this Condition, either expressly or tacitly annexed to it, *Ita quod Patria per donationem illam magis solito non oneretur seu gravetur*, and therefore every Grant made in grievance and prejudice of the subject is void. Vide F. B. 222. in the Writ of *Ad Quod Damnum*, acc.

2. *Coke* in 1. part Institutes 379 saith, That new Inventions are full of Inconveniences, and therefore he saith, that when any Innovation or new Invention starteth up, the best way to trye it is by the Rules of the Common Law (which are indeed the Maxims of Reason) which being applied to such Novelties it doth utterly crush them, and bring them to nothing; and the Antient Judges and Sages of the Law have ever suppressed Innovations and Novelties so soon as they have offered to creep up, lest the quiet of the Commonwealth might be disturbed. *Coke* 1 part Institutes 181. 203. and 379. acc.

3. In a *Quid Juris Clamat* brought against E. F. she said, that she ought not to Attorn, because she was Tenant in Tail, and also because she was so weak and old that she could not Travel to the Court, she Prayed a *Dedimus Potestatem*: whereupon a *Dedimus* was awarded to *Saunders*, one of the Justices to receive an Attorney to appear for her; But because the same was conceived to be an Innovation and a new Invention, and that no President could be produced for the Warranting of it; Yet in regard of the Gentlewomans age

age and infirm; the ſame was allowed of by the opinion of the Court in that caſe of neceſſity; though it was ſaid, it was rare to allow of ſuch proceeding without Warrant. Paſc. 4. Ma. *Dyer* 135.

4. Queen *Eliz.* by her Letters Patents Granted to *Darcy*, the making of playing Cards, and the ſole importation of all playing Cards into *England* for 21. years: And further by the ſaid Letters Patents prohibited, That no other perſon ſhould buy, import, or ſell any playing Cards within the Realm during the ſaid Term: A Citizen and Freeman of the Citie of *London* ſold a groſſe of playing Cards made within the Realm: In this caſe theſe points were Reſolved. 1. That the Grant of the ſole making of playing Cards within the Realm was void, 1. becauſe it is a Monopoly which is againſt the benefit and Liberty of the Subject, 2. becauſe the ſole Trade of any Menachical Artifice is a prejudice to all the Subjects, and only for the private Commodity of the Patentee, and a Grant of the King which is a prejudice to the Subject is void. 2. Reſolved, That the King cannot ſuppreſſe the making of playing Cards within the Realm, no more than the making of Dice, Bowls, Bells, Bales, &c. which are works of labour and skill, although that they ſerve for pleaſure or recreations: which cannot be ſuppreſſed but by Acts of Parliament. 3. Reſolved, That the Diſpenſation or Licenſe to have the ſole Importation and Merchandizing of Cards is void, and againſt Law: And in this Caſe, It was ſaid, That *Privilegia quæ revera ſunt in præjudicium reipublicæ magis ſpecioſa habeat frontiſpicia, & boni publici prætextum, quam bona & Legales Conceſſiones, ſed prætexta Liciti non debet admitti illicitum.* *Coke* 11. part, 74. The caſe of Monopolies.

5. The Company of Merchant Taylors of *London* having power by Charter to make Ordinances for the better Rule and Government of the ſaid Company made an Order that every brother of the ſame ſociety who ſhould put any Cloath to be dreſſed by any Cloath worker not being a Brother of the ſame ſociety ſhould expoſe one half of his Cloaths to any Brother of the ſame ſociety, who exerciſed the Art of a Cloath-worker, upon pain of forfeiting 10. *l.* &c. and to diſtrain for it. It was adjudged in that caſe, That that Ordinance although it had the countenance of a Charter was againſt the Common Law, becauſe it was againſt the Liberty of the Subjects, for every Subject by the Law hath Freedom and Liberty to put his Cloath to be dreſſed by what Cloath-worker he pleaſeth; and cannot be reſtrained to any perſons, for that in effect ſhall be a Monopoly. Tr. 21. Eliz. in B. R. *Davenant* and *Hurdis* caſe.

6. King E. 3. by his Letters Patents Granted to I. P. the ſole importation of ſweet Wines into *England* or *London*, It was holden at the Parliament holden 50. E. 3. that this Grant was void as a Monopoly. Vide 50. E. 3. Rot. Parliament Membr. 33. vouched in *Coke* 11. part, 87.

7. Queen Eliz. anno 43. of her Reign Granted to A. and B. by her Letters Patents the ſole Coynage, re-emption and tranſportation of all the Tin within the Counties of *Devon.* and *Cornwall* for 21 years under the Rent of 2010 *l. per ann.* to be paid yearly at the Receipt of the Exchequer. And Covenanted with the Patentees, that they ſhould hold and enjoy the ſame againſt the Queen her Heirs and Succeſſors during the ſaid whole Term of 21 years; the Patentees upon theſe Letters Patents diſburſed 100000. *l.* for the getting of all the Tin in their hands: The Rent of 2010. *l.* was unpaid, and King *James* in the firſt year of his Reign called in the ſaid Letters Patents, and then Granted the Arrearages of Rent to *James Lewſton* a Gentl. of his Bedchamber, who ſued the Patentees for the Arrearages of the Rent in the Exchequer, upon hearing of which caſe, It was reſolved in the Exchequer, that the ſaid Letters Patents for the ſole Coynage, re-emption, & tranſportation of the ſaid Tin was a Monopoly, and void, and yet the Patentees notwithſtanding their great diſburſments of the ſaid great ſums of monies which were to their utter undoings were compelled to pay the ſaid Arrearages of Rent: and had no relief againſt the Crown upon the ſaid Grant made by the ſaid Queen. 13. and 14. Iac. in the Exchequer. *Bigham, Heydon,* and *Lewſton's* caſe.

8. By the Rule of the Common Law, All Inheritances were Fee ſimple, ſo as neither the Lords ſhould be defeated of their Eſcheats, Wards, &c. nor Purchaſers or Fermers loſe their Eſtates and Leaſes; To ſubvert this Rule of the Common Law, and the policy of it, The Statute of 13. E. 1. of *Donis conditionalibus* was made, which Ordained a general Perpetuity by Act of Parliament, By this Act of Perpetuity being a new Invention, Eſtate Tailes were not forfeitable for Felony or Treaſon, the Sales, Alienations, or Incumbrances of their An-

Anceſtors did not bind the Iſſue in tail: but this new invention of perpetuity continued from the time of E. 1. untill 12 E. 4. when the Iudges upon conſultation had did Reſolve that this Perpetuity of an Eſtate tail might be docked by a Common Recovery, and that by reaſon of the Intended Recompence the Common Recovery was not within the reſtreint of the ſaid Perpetuity made by the ſaid Statute of 13 E. 1. Vid. *Cook* 6. part, 40. in Sir *Anthony Mildmayes* Caſe. *Cook* 9. part, 128. in *Soudayes* Caſe. And Vid. *Cook* 8. part, 37. in *Mary Portingtons* Caſe. That cutting off the Intail by a common Recovery in 12 E. 4. was no new Invention, but was conſonant to the opinion of the Sages of the Law, even from the making of the ſaid Statute of *Donis*: as appeared by the Authorities of 43 E. 3. 33. 44. E. 3. 21, 22. *Oſtavian Lambards* Caſe, and 48 Ed. 3. 11. *Brothers* caſe, which Reſolutions and opinions of the ſaid Sages of the Law, with diverſe other Authorities did produce the ſaid Judgment in 12 E. 4. *Cook* 10. part, 37. in *Mary Portingtons* Caſe.

9. Upon a *Fieri facias* of the Goods of the Teſtator, the Sheriff returned, *Nulla bona*, And thereupon another Writ Iſſued forth to him to enquire by the Enqueſt, whether the Executors had waſted the Goods or not, The Sheriff returned *Devaſtavit*, whereupon execution was awarded of the Executor's own Goods, It was Reſolved in that Caſe, that the Execution ſhould be reverſed, becauſe the awarding of ſuch Execution was but a new Invention, of late dayes taken up, where as the ancient courſe was to ſue forth a *Fieri facias* to the Sheriff, to levy the Debt &c. of the Teſtators goods, and if it did appear unto him that the Executors had waſted the Teſtators Goods, the execution to be of their own Goods. *Cook* 5. p. 32. *Pettiſers* Caſe.

Mortage, Mortagior, and Mortgagee.

Mortgage, what it is: And how a Condition for payment of Monyes upon a Mortage ſhallbe ſaid to be performed, how not; where the payment ſhall be by the Heir and where by the Executor; And what Intereſt the Mortgagee hath in the Lands by the Mortage.

1. Mr. *Littleton* ſets forth a Mortage to be this, That if a man maketh a Feoffment in Fee of his Lands, upon condition, that if the Feoffor payeth unto the Feoffee a certain ſum of Money at a day certain, that then it ſhall be Lawfull for the Feoffor to re-enter; That in that caſe, the Feoffee is called Tenant in Mortgage, ſc. *Mortuum vadium*, and the cauſe why he is called Tenant, in Mortgage is, becauſe it is doubtful if the Feoffor will pay the Money at the day or not, and if he pay it not then is the Land forfeited for ever, and dead in Law as to the Mortgageor; and if the Feoffor pay the money at the day; then is the Land dead as to the Mortgagee: and by him Lands may be Mortgaged in tail for life or years: and all ſuch Tenants are called Mortgagees. *Litt.* Sect. 332, 332.

2. A bargained and ſold Lands to L S *proviſo*, That if the Bargainor paid to him his Heirs or Aſſignes 10. *l.* before *Mich* that the bargain and ſale ſhould be void, the Bargainee died, and the Bargainor paid the Money to his Executors, viz. 2 Eliz. *Dyer* 180, 181. It is a Quære if it was good, becauſe it is contrary to the expreſſe words, and the words Aſſignes will not help it, for although that an Executor be an Aſſignee in Law, yet he is not Aſſignee of the Land.

3. A man made a Feoffment in Fee of Land, upon condition, that if the Feoffor within a Moneth after the death of the Feoffee paid to his

his Heirs, Executors, or Administrators 100. *l.* that then the Feoffment should be void, the Feoffee made a feoffment over and died, and afterwards within the year, It was agreed betwixt the first Feoffor and the heir of the Feoffee, that the Feoffor should pay the 100 *l* and that the heir should pay back all to the Feoffor but 20. *l.* which was done accordingly; the Feoffor entred the Lands pretending the condition to be performed; In this Case, these points were resolved. 1. That that payment was not any performance of the condition, because an estate of Inheritance was to be made by the payment of the said Money to the Heir, was to be divested out of the Assignee of the Land, and therefore the condition ought to have been performed in truth and verity, and not by a shadow or colour of payment; and estates of third persons shall not be divested by colourable payment, but by true and effectual payment. 2. It was Resolved, That the Feoffor should not have paid the Money unto the Assignee of the Land, for the Heirs, Executors and Administrators were expressed in the condition and not the Assignee. But the Assignee of the Land although he is not named in the condition amongst the Persons who shall pay the money, yet he may well pay the money for the safeguard of his Term: and so vid. the Quere in 1 Eliz. *Dyer* 180. before Resolved *Cook* 5. p. 96. *Goodale's* case.

4. Note, this difference was agreed by the Court for Law, That if a man makes a Feoffment upon condition that the Feoffee shall pay to the Feoffor his Heirs or Assignes 20. *l.* at such a day, and before the day the Feoffor makes his Executors and dies, the Feoffee may pay the money either to the Heir or to the Executors, because they are Assignees in Law to that purpose; But if the condition was, that if the Feoffor pay unto the Feoffee his Heirs or Assignes 20. *l.* at such a day, and before the day the Feoffee makes his Executors & dieth, there the Feoffor ought to pay the money to the Heir, and the reason of the difference is, because in the first Case the law for necessity ought to bind Assignes, because there cannot be Assignees in fact, because the Feoffor had but a bare condition and no estate in the Land, which he might assign over, but in the latter case, the Feoffee hath an estate in the Land which he may assign over, and where there may be Assignes in fact, the Law shall never appoint Assignees in Law, and although that the Feoffee made no Assignees of the estate, yet the Executors could not be Assignees, because Assignees were intended by the condition to be Assignees of the estate. M. 23 and 24 Eliz. in Cur. Ward. *Randall* and *Barwas* case. Vid. *Cook* 1. part, Institutes 210.

5. A man Mortgaged his Land, and the condition was, that he pay to the Mortgagee his Heirs Executors or Assigns, a certain sum of money at a certain day; the Mortgagee died and made his Heir within age his Executor, and the mortgagor paid the money at the day to the Heir, It was moved in that case, If the money should be assets in the hands of the Heir as Executor or not, It was the opinion of the Justices that it should be assets, and that he should not have the money as Heir; and although that he was within age, that he should be charged with it. M. 15 Eliz. in B. R. adjudge.

6. If the Feoffee in Mortgage before the day of payment which should be made unto him make his Executors and dieth, and his Heir enters into the Lands as he ought to do, In this case the Feoffor ought to pay the money at the day appointed to the Executors and not to the Heir of the Feoffee, because that the money at the first accurred to the Feoffee in the nature of a duty, and it shall be intended that the estate was made by reason of the lending of the money by the Feoffee, or in respect of some other duty. *Cook* 1. Institut. 219.

7. In Trover and Conversion of a Hatband beset with Perles and Diamonds, It was found by special Verdict, the Case was, A. pawnd a Hatband beset with Diamonds to B. a Goldsmith for 20 *l.* but no certain time appointed for the Redemption of it. B. being sick, his Wife in his presence and with his assent delivered it to D. the Defendant, and afterwards he made his Wife his Executrix and died, she Wife proved the Will, the Plaintiff tendred to the Executrix the 20 *l.* who refused it, and afterwards he demanded the Hatband of D. the Defendant, who refused to deliver it, but converted it to his own use; The first Question in this Case was, whether there being no time appointed for the redemption, whether it might be made after the death of him to whom it was pawned, or ought to be in the life time of both parties, It was Resolved, that it might well be made after the death of him to whom it was pledged, but not after the death of him that pledged it. For the pledge delivered is but a security for his money lent, so as he who borrows the money is to have again his pledge when he repays it, and

his Tender gives him intereſt therein; and there is a difference betwixt Mortgaging of Lands and pledging of Goods, for the Mortgagee hath an abſolute intereſt in the Land, but the other hath but a ſpecial property in the goods, *viz.* to detain them for his ſecurity 2. In this Caſe it was Reſolved, that the tender of the money ought to be to the Executrix; and 3 when he tendred the money to the Executrix and ſhe refuſed it, it was as good as payment, and the eſpecial property of the good reverted on the Plaintiff. Hil. 9 Jac. in B. R Sir *John Ratcliff* and *Davies* Caſe. *Cro.* 2. part, 244, 245.

8. In *Ejectione firmæ* the Caſe was, A. ſeiſed of Lands in Fee 10. *Octo.* 16 Jac. by Indenture of Feoffment mortgaged them to I. S. and his Heirs, upon condition that if he or his Heirs paid to I. S. and his Heirs 160. *l.* upon the 20. *Octo.* 1624. that he might reenter. Afterwards 30 *Martii* 1619 I. S. dyed, and by his Will gave to R. K. all his Goods, Monies, Bills, Bonds, Mortgages, or ſpecialties for Monies, and made him his Executor and died, and the 100. *l.* not being paid, R. K. entred and let the Land to the Plaintiff; It was Reſolved by the whole Court in this Caſe, That thoſe words, *viz.* All my Mortgages made a good deviſe of the Lands Mortgaged, and ſo judgment was given for the Plaintiff. Tr. 1 Car. in Co. B. *Cripps* and *Gayſels* Caſe. *Cro.* 1. par, 36.

In an *Ejectione firmæ*, the Caſe was, A. ſeiſed of diverſe Lands in A. B. and C. the Lands in C. being in him upon a Mortgage forfeited Deviſed the Lands in A. and B. to ſeveral perſons: and then adds this Clauſe in his Will, All the reſt of the Goods, Chattels, Leaſes, Eſtates, Mortgages whereof he was poſſeſſed, he deviſed to his Wife after his Debts and Legacies paid, and made his Wife his Executrix and died, the Wife entred into the Mortgaged Lands and deviſed them to the Defendant and his heirs and died: The Queſtion was whether the Fee paſſed to the Wife by this deviſe, by the name of all his Eſtates, Mortgages &c. It was ſtrongly urged, That in reſpect he had diſpoſed of his other Lands to his other Friends, and had not made any diſpoſing of the Mortgaged forfeited Lands, that it being in a Will his Wife had a Feeſimple in them: But it was the opinion of the whole Court, that an Eſtate for life only paſſed to the Wife, and it doth not appear that he intended to paſſe, but ſuch things to her whereof he was poſſeſſed, and of Freehold, whereof he was ſeiſed; and peradventure he was not poſſeſſed of this Land, For it is not found that the Mortgagee entred and was poſſeſſed, and commonly in Mortgages the Mortgagor reteines the poſſeſſion until the Mortgagee enters for a forfeiture, where Judgment was given for the Plaintiff. But it was agreed, That if he had deviſed all his Eſtate in ſuch Land, Or had mentioned, that he had ſuch Lands Mortgaged in Fee and deviſed this Mortgage, the Fee had paſſed. Tr. 10 Car. in B. R. *Wilkinſon* and *Maryland* Caſe. *Cro.* 1. p. 323, 324.

10 A man Mortgaged his Lands upon Condition, that if he or his Heirs repaid 100 *l.* at ſuch a day, that he ſhall reenter, he died leaving Iſſue a daughter only his Wife with Child with a Son, the Daughter and Heir at the day payes the 100. *l.* and afterwards the Son is born: The Queſtion was if the Son ſhould enter upon the Siſter, or if ſhe ſhould retain the Lands for ever, vid. *Coke* 1. part, 99. in *Shelley's* Caſe. This Caſe being referred to all the Judges out of the Court of Wards, four of the Juſtices doubted of it, and enclined: That becauſe ſhe hath it as Heir, that the neerer Heir after born ſhould have it out of the Daughter. But the greater part of the Juſtices, *viz.* ſix in number, were of opinion, that the Siſter ſhould retein the Land againſt the Son born after the performance of the Condition, For in as much as ſhe paid the money (and if ſhe had not paid it the Land had been loſt) if ſhe could not retain the Land againſt the Son ſhe had no remedy for the money, and by payment thereof ſhe gained the Land and is in as a purchaſor, although ſhe were entituled thereunto by a Condition; and ſhe ſhall retain it as ſhe ſhall the perquiſite of a villany, and as Land gained by her vigilance, for otherwiſe it ſhould be loſt to both, and ſhe ſhould loſe both Land and Money. M. 3 Car. in the Court of Wards, *Kirton's* Caſe. *Cro.* 1. p. 61, 62.

11. Note, by *Williams* Juſtice. A man pawns Goods, afterwards he is Outlawed, during this his Outlawry he cannot redeem them, and Mortgaged Goods if they be not redeemed, they ſhall not be forfeited by Outlawry, and if money be tendred to redeem them, and a Refuſal be to deliver them, this hath been adjudged to be a Converſion. Vid. Tr. 8 Jac. in B. R. *Ratcliff* and *Davies* caſe. *Bulſt.* 1. part, 29.

a *White*

2. *Where upon a Mortgage of Lands for payment of money, tender and refusal shall be sufficient to save the forfeiture; and when and where the tender must be made.*

1. NOte, It was Resolved by the Justices, If upon Mortgage tender of the money be made to him who ought to receive it at the place specified in the condition at any time of the day, and the Mortgagee refuseth the money, the condition is saved for ever; and the Mortgagor (or Obligor, in case it be upon payment of money upon an Obligation) need not to make a tender of it again, at the last instance of the day, for that by the express Letter of the condition the monies are to be paid upon the day indefinitely: But if a tender be made in the place both parties being present, and the Mortgagee refuseth the money, there needs not any new tender within convenient time. Vid. 6 E. 6. br. Tender 41. *Pla. Com.* 173. *Cook* 1. p. 114. *Walter* case.

2. If a man be bounden to pay 20 *l.* at such a place, who tenders it accordingly, In an Action after brought against him for the money there needs not any other tender of the money in Court, because a tender in the place limited is sufficient. Vid. 7 H. 4. As in a Replevin the Defendant avowes for Rent, it is sufficient for the Defendant to say, that he tendred it upon the Land, and the Defendant refused it, without tendring it again in Court, and herewith agrees 12 E. 4. by *Choke*, but vid. 7 E. 4. 3. 19 H. 6. 12. 21 H. 6. 27 by *Newton* contrary: and according to that the Law seems to be, for that the sum conteyned in the Obligation is a present duty: But if the Obligation be to do any collateral duty or thing, there in such case there needs no any Tender as the old Books seem to be and agree. Vid. 47 E. 3. 26.

3. If a man enfeoff th another by Deed upon condition, that the Feoffor shall pay a certain sum of money, the Feoffor by accord betwixt them may give to the Feoffee a House, or a Ring of Gold in satisfaction, and yet the money is collateral in such case, having respect unto the Land, for if tender be made and refusal, he shall never pay the money. So if a man by Obligation be bound in 100 Quarters of Wheat, upon condition to pay 50 Quarters; he cannot give money or other thing in satisfaction thereof, because the contract was not originally for money but for a collateral thing, and in such case, If the Obligor tendreth it at the day, and the other refuseth it, he shall plead the same that he is yet ready, because that corn is *bonum portatum*, and it is a charge to the Obligor to keep it. *Cook* 9. p. 79. *Peytoes* case.

Mortmain.

1. NOrtmain is where Lands were given to any Religious House, or other Company who are not incorporated by the Kings Grant without Licence: In this case, the Lords of whom the Lands were holden mediate and immediate might enter into the Lands; and for default of such entry within the year and day the King might enter into the Lands; and such gift or alienation of Lands, is called Mortmain; as much as to say, that the Lands are put into dead hands: See for that the Statutes of *Magna Charta* cap. 36. West. 2. cap. 32. and the Statute of 7 E. 1. *de Religiosis*: And vid. the Statute of 15 H. 2. Cap. 5. That if a Feoffment in Fee, or other conveyance be made to the use of any Religious persons, or to the use of any Guild or other Fraternity or body Corporate without Licence, the same is Mortmain: and the same shall be subject to the Pains and Penalties of the Statute of 7 E. 1 *de Religiosis*, vid. *Rastall* Statutes, Tit. Mortmain, Sect. 1. 2. 9.

2. Lord, Mesne, and Tenant, the Tenane is an Abbot, and the Mesne is an Abbot, and the Tenant alieneth to the Mesne without Licence. It is a Question, If the Lord Paramount may enter, because the alienation is not to the prejudice of the Lord: vid. *Cook* Reports 11. part, 37. but I conceive it is a Mortmain within the expresse words of the Statute *de Religiosis*, the words of which Statute are, *Quod nullus Religiosus ratione alicujus tituli cujuscunque terras &c. ab aliquo &c. recipiat, aut appropriare presumat.*

3. If an Abbot hold Land of another by a certain Rent, and the Lord releaseth to the Abbot the Rent without the Kings Licence; it is the opinion of *Fitzherb.* in his N. B. 123. that the same is Mortmain, and that in such Case, a Writ of *Ad quod damnum* is to Issue forth, to whose prejudice it is; but vid. the old Books 38. Assiz. 5. br. *Mortmain* 20, 21 E. 3.

18. Br. Mortmain 31. that in that caſe it is not Mortmain, becauſe the Rent is extinct. vid in this Caſe *Cook* 7. part, 39. that although the Rent be extinct by the releaſe as betwixt the parties, yet as to the Lord Paramount it is in conſtruction of the Law *inveſſe* and the Lord ſhall have it.

4. If the King be Lord, and there be Meſne and Tenant, and the Tenant holdeth of the Meſne by homage and 20. ſhillings, and the Meſne holdeth of the King in *Capite*, and afterwards the Meſne doth Releaſe to the Tenant the 20. ſhillings to hold to him and his Heirs by homage and a penny: and this is done without Licence of the King, the King may ſeiſe the Lands for thoſe ſervices, and if in ſuch caſe, the King will grant and make reſtitution to the Tenant *per avail*; It ſhall not be good, unleſs it be enquired by Writ of *Ad quod damnum*, to whoſe prejudice it is.

5. The Friers *Carmelites* who had not any place of Habitation obteined of I. S. who was ſeiſed of 10. Acres of Lands holden of the Biſhop of *W.* to have the ſaid 10. Acres of Lands to build a Houſe upon for their habitation, and becauſe the ſaid I. S. could not grant them the ſaid 10. Acres by reaſon of the Statute of Mortmain; the ſaid I. S. to make an evaſion out of the Statute of Mortmain, conveyd the ſaid 10. Acres to the King and his Heirs, whereby the Biſhops Seignory was extinct, to the intent the King might grant the ſame to the ſaid Friers *Carmelites*, which the King did accordingly; It was adjudged in this Caſe, that the Kings Grant to the Friers ſhould be called in and cancelled. For being to a Religious Profeſſion, who had no Houſe of Habitation, and ſo might ſeem to be a work of Piety and Charity; yet the ſame was void, and the Letters Patents to them void, and the King could not be an inſtrument to take away the Right of the Biſhop: but in ſuch Caſe, if the Kings Licence only had been granted to the ſaid I. S. to have given the ſaid 10. Acres for to erect upon a Houſe for the Habitation of the ſaid Friers, and a Writ of *Ad quod damnum* had iſſued to inquire, to whoſe prejudice it ſhould have been, perhaps ſuch Grant made by the ſaid I. S. might have been good. Vid. 17 E 3. 59. *Cook* 11. part. 74. *Magdalen*-College caſe.

6 Vid. Where Lands given to charitable uſes, are not Mortmain, notwithſtanding, the Statute of Mortmain; and the Statute of 23 H 8. cap 1. which makes all Grants to perſons Incorporate or Corporate given to ſuperſtitious uſe to be utterly void: and Gifts and Grants made to Colleges, for the Education of youth in Learning, or to find Grammar-Shools And Lands given for the maintenance of Almſmen, and Almſwomen, are good uſes, and are out of the ſaid Statute of 23 H. 8. cap. 10. *Cook* 1. part, 23 H. 4. 25. in *Porter's* caſe. And *Cook* 11. part, in *Magdalen*-College Caſe.

7. Note, That in the Kings Licence to grant Lands to a Corporation, there needs not any *Non obſtante* the Statute of Mortmain, for that the King ſhall not be intended to be miſcony-ſant of the Law, and when he Licenceth expreſſely to alien to an Abbot (which is Mortmain) there needs no *Non obſtante*, for that it is apparent to be granted in Mortmain. *Cook* 1 p. Inſtit. 99. acc.

8 The King brought a *Quare impedit* againſt W. H of the Church of R. and made Title, for as much as the Biſhop of R. had preſented to the ſaid Church by uſurpation being void, (the Advowſon of which did of right appertain to three Daughters and Heirs) his Clerk who was admitted Inſtituted and inducted and he died, by which it belonged to the King to preſent, for as much as the Biſhop had gained that Advowſon to him and his Succeſſors without Licence, by which the Advowſon was become in Mortmain. The Defendant pleaded, That he is Parſon of the preſentation of W. Predeceſſor of the Biſhop that now is *Thomas* by name, ſo as the Patronage is in *Thomas* who was not named in the Writ. It was adjudged, in that caſe, that the Kings Writ was good enough againſt the Incumbent alone; becauſe he may give by the Statute what anſwer he will all one of the poſſeſſion of the Church. *Cook* 7. part, 27. in *Halls* caſe.

9 If a Church be appropriated to a Houſe of Religion, as to an Abby, &c. without Licence of the King, the ſame is Mortmain, and the King ſhall take advantage of it: A Writ of Right of Advowſon was brought againſt a Prior, The parties joyned the Grand Aſſiſe upon the meer Right, and the Demandant was *Nonſuit*, It was prayed, that judgment finall might be given againſt the Demandant. *Hankford* looked upon the Record and after ſaid, That the Prior claimed the Advowſon in the Right of him and his Succeſſors, and it is not declared, whether he held the ſame to his own uſe by Appropriation as Parſon by Licence of the Pope, or that he held the Advowſon as his Lay Fee by the Grant of the Patron and the Licence of the King. *Horton* we claim to hold the ſame to our proper uſe by the Appropriation of the Pope. Then the Juſtices ſaid that was not good, for that the Appropriation of the Pope cannot be good without the Kings Licence, and therefore it

it was adjudged, That in regard the Licence of the King was not Recorded; ſo as it was an Alienation in Mortmain, without the Kings Licence, That a Writ ſhould be awarded to the Biſhop for the King. Tr. 11. H. 4. 87. Vouch. in *Davies* Reports in the Caſe of *Commendam*.

Murther and *Manſlaughter*.

1. MUrther is when any one of malice prepenſed, or forthought doth kill another felloniouſly. A. was Woodward of the Woods in a Park. B. with others entred into the Park to cut Wood, and B. climed up a Tree, and with a Hatchet cut down ſome boughs thereof. A. came riding into the Park, and ſeeing B. in the Tree, commanded him to come down, and he deſcending from thence, A. ſtruck him two blows upon the back with a Cudgel, and B. having a Rope about his middle, the one end of the Rope hanging down, A. tied the end of the Rope to his Horſes tayl, and the Horſe ran away with him, drew him upon the ground three furlongs, and by this means brake his ſhoulder whereof he inſtantly died, And A. caſt him over the Park pales into certain Buſhes: It was referred to all the Judges of *England*, If this was Murder in A. or not: And it was the opinion of all the Judges and Barons that it was Murder, for when the Boy who was cutting on the Tree came down from thence upon his command & made no reſiſtance, and A. ſtruck him then two blows, and tied him to the Horſes tayl, and then ſtruck him again, whereupon the Horſe ran away, and he by that means ſlain, the Law implyes Malice, and it ſhall be ſaid in Law pretenſed Malice, he doing it to one who made no reſiſtance: And A. had Judgement and was hanged for the Murder. M. 4 Car. in B. R. *Hollowayes* caſe. *Cro.* 1. part, 93.

2. Upon the Araigment of A. for the Murder of B. the Caſe upon the Evidence was this: B. was a Bayly ſworn to the Dean and Chapter of *Weſtm.* and he having the Sheriffs Warrant upon a *Capias* out of the Common Pleas to Arreſt A. ſeeing him within the Liberty of *Weſtm.* The ſaid A. ſeeing him come towards him, drew his ſword, and B. approaching to lay hold upon him, A. ſaid ſtand of, come not near me, I know you well enough, come at your peril, and B. taking hold of him, he thruſt him with his ſword that he died immediately: In this Caſe it was holden by all the Court that it was Murder. For he coming as an Officer to Arreſt, and not offering any other violence or provocation, although he uſed not the words I Arreſt you, or ſhewed him any Warrant becauſe he had not time, which was demanded the Caſe, the Law preſumes it to be Malice and Murder to him that ſo kills one being an Officer and tending to execute Proceſſe. Paſc. 6 Car. in B. R. *Pew's* caſe. *Cro* 1. part, 132.

3. Upon an Indictment of C. of the Murder of M. It was found, That M. was the Sheriffs Bayly, and had a *Capias ad ſatisfaciendum* againſt C. and his father, directed to him and other Bayliffs, who by colour thereof Entred C. Stable, and Outhouſe, and hid them there all night, and at 8 in the morning came to the dwelling houſe, and called him to open his doors, and ſuffer them to enter, becauſe they had ſuch Warrants upon ſuch Writs at the ſute of ſuch perſons to Arreſt him; But C. demanded them to depart, telling them they ſhould not enter. Whereupon they brake a Window, and afterwards came to the door of the houſe, and offered to force that open, and broke one of the hinges. Whereupon C. diſcharged his Musket at M. and ſtroke him, of which ſtroke the day following he died: It was reſolved by all the Juſtices in this Caſe, That it was not Murder but Manſlaughter onely: For although he killed a Bayliff, yet he killed him not in the duely executing of the Proceſſe, for it is not Murder unleſſe there be *Malitia præcogitata*, or *Malitia implicita*, as to Murder one ſuddenly, or in reſiſting of an Officer doing his Office, but here M. the Bayly was ſlain in doing an unlawfull act, in ſeeking to break open the houſe to execute Proceſſe, for a ſubject, which he ought not to do by Law. *Cook* 4. part, 91. *Seaman's* Caſe; and although he might have entred if the door had been open and Arreſted the party, yet he ought not to break open the houſe, for that is not warranted by Law; But the Court held the ſame to be Manſlaughter. Paſc. 15 Car. in B. R. *Cooks* caſe. *Cro.* 1. part, 386, 387.

4. Note, It was adjudged upon the Statute of 1. Jac. of deſperate ſtabbing to be Felony without Clergy, That becauſe that the party had a Cudgel in his hand, That that was a Weapon drawn within the Intent of the Statute, and the party was thereupon Araigned of Felony and not of Murder, and admitted to his Clergy. M. 5. Jac. At the Seſſions at Newgate. Vide *Goabt.* 154.

5. Note, It was reſolved by all the Judges in *Mackalleys* caſe, which ſee *Cook* 9. part, 66. That

if

if any Sheriff, Undersheriff, Servant, or Officer, who hath Execution of Proceſſe be ſlain in doing his duty, it is Murder in him who kills him, although there was not any former Malice betwixt them: For the Executing of Proceſſe is the life of the Law; and therefore he who kills him ſhall loſe his life. For that Offence is *contra poteſtatem Regis, & legis*, and therefore in ſuch Caſe there needs not any enquire of Malice: The Law is the ſame, If any Juſtice of Peace, Conſtable, or other Officer, or any other, who comes in their aſſiſtance for the preſervation of the Peace be ſlain in executing that Office, it is Murder. So if a Watch-man be killed in ſtaying Night-walkers it is Murder. 2. It was reſolved in that Caſe, That if there were Error in awarding of the Proceſſe, or in the miſtake of one Proceſſe for another, and an Officer be ſlain in the Execution thereof, the Defendant ſhall not have advantage of ſuch Error: But the reſiſting of an Officer when he comes to make an Arreſt in the Kings name is Murder. 3. Reſolved, that the Arreſt made in the night, and alſo upon the Sunday was good, and 4. it was holden that when an Officer is ſlain, there needs not any ſpecial Indictment upon all the mattet to be drawn, but a general Indictment that ſuch a party *ex Malitia ſua præcogitata* &c. *ſet*, &c. and although there be not Proof made of any precedent Malice, yet the Indictment is good, for that the Law preſumes Malice. *Cook* 9. part, 66. *Mackalley's* caſe. *Cro.* 2. part, 280. the ſame caſe.

6. Upon an Indictment of I. R. of the Manor of W. D. the Caſe was this, W. R. ſon of I. R. fighting with I. D. in the field, and the ſaid I. D. beating him ſo as his Noſe bled; he thereupon went to the father, telling him of the ſaid battery, whereupon he inſtantly went into the field, and finding him, called him Villain, and ſtruck him with a little Cudgel whereof he inſtantly died. It was reſolved by the Iuſtices that this was but Manſlaughter and not Murder, for he came upon the complaint of his ſon, not having any Malice before, and in that anger beating of him, of which ſtroke he died, the Law ſhall adjudge it to be upon that ſudden occaſion and ſtirring of blood, being alſo provoked at the ſight of his ſons blood, and will not preſume it to be upon any former Malice, and although the diſtance of place where his ſon complained was a Mile from the place the ſtroke was given it is not material, being all upon one paſſion. H. 9. Jac. in B. R. *Royſyer* caſe. *Cro.* 2. part, 296.

7. Note, It was agreed by the Juſtices, and ſo reſolved: That if two do quarrel and fall out, and one of them doth give the cauſe and provocation, and ſends a Challenge to the other, and the other accepts of it, and upon this they enter Combat, and he which ſends the Challenge is killed, this is clearly Murder in the other, for it is not material in the Law who begins the quarrel (ſo as there was a former quarrel) and the Malice ſtill continuing untill the laſt ſtroke given: For the difference will be this, If they are once reconciled for the firſt matter, and afterwards they happen to fall out again ſuddenly, and do fight, and one kills the other, it is but Manſlaughter: But where time and place is appointed upon a Challenge, and the parties ſleep upon it, and ſo they fight, and he who doth not give the provocation, nor ſends the Challenge kills the other, the ſame is Murder, and where there is a mutual conſent to go to a place, and there to perform a fight, where they were not for their defence but to fight, each of them carries Malice with him, and then if the one is killed, the other is guilty of the Murther. Paſc. 14. Jac. in B. R. The King and Taverners Caſe. *Bolſtr.* 3. part, 171, 172. Vide Tr. 8. Jac. in B. *Morgan* and *Egertons* Caſe. *Bolſtr.* 1. part, 86, 87. to the ſame purpoſe. acc.

8. Divers men playing at Bowls at M. in the County of K. two of them fell out, and quarrelled the one with the other, and a third man who had not any quarrel in revenge of his friend ſtruck the other with a Bowl of which blow he died: This was holden by the Iuſtices to be but Manſlaughter, for that, that it happened upon a ſudden motion in revenge of his friend. Tr. 9. Jac. in B. R. *Cook* 12. part, 87.

9. If a man who is *Non Compos mentis* gives himſelf a mortal wound, and before he dieth he becomes of ſave memory, and afterwards dieth of the ſame wound, In this Caſe, although he dieth of ſane memory, yet becauſe the Original cauſe of his death, viz. the ſtroke was when he was *Non Compos mentis*, he ſhall not be *felo de ſe*, becauſe the death hath relation to the Original act which was the ſtroke: And ſo, if a ſervant hath an intent to kill his Maſter, and before execution of his intent leaveth his Maſters ſervice, and being out of his ſervice executeth his purpoſe and killeth him who was his Maſter, the ſame is Petit Treaſon, for the Execution doth look to the Original cauſe, which is the Malice which was conceived when he was with his Maſter; and yet if the Law ſhould in ſuch Caſes make conſtruction according to the ſeverall times, it would be clear, it would be no

Petit

Petit Treaſon. *Cook* 1. part, 99. in *Shellcys* Caſe.

10. In Treſpaſſe of Aſſault and Battery, The Defendant pleaded that he was amongſt others by the Command of the Lords of the Councel a Trained Soldier in *London*, in the Band of one A. a Captain, and ſo was the Plaintiff, and that they were skirmiſhing with their Muskets charged with powder, for their exerciſe, in *re militari*, againſt another Captain and his Band, and as they were skirmiſhing, the Defendant *caſu lato & per infortunium, & contra voluntatem ſuam* in diſcharge of his Piece did wound and hurt the Plaintiff, *abſque hoc* that he was guilty *aliter*, or *alio modo*. And upon Demurrer Judgement was given for the Plaintiff: For although it was agreed, That if men Tilt, or Turney in the preſence of the King; Or if two Maſters of Defence playing their Prizes kill one another, it is not Murder, Manſlaughter, or Felony; Or if a Lunatique kill a man, or the like; becauſe Felony muſt be done *animo felonico*. Yet in Treſpaſſe which tends onely to give damages according to the hurt, or loſſe, it is not ſo, and therefore if a Lunatique hurt a man, he ſhall be anſwerable in Treſpaſſe; But it was agreed that in the principal Caſe, if the Defendant had ſaid that the Plaintiff ran croſſe his Piece when it was diſcharging, or had ſet forth his caſe with the Circumſtances, ſo as it had appeared to the Court, that it had been inevitable, & that the Defendant had committed no neglect to give occaſion to the hurt: in ſuch caſe perhaps it might have been that no Judgement ſhould have been for the Plaintiff. Paſc. 14. Jac. in B. R. *Weaver* and *Watts* Caſe. *Hob.* 134.

11. This Caſe was at the Seſſions in the Old Bayly. One *Lovel* had two Maid-ſervants, one of them without his knowledge had received into the houſe a Chair-woman, who, (all being in their beds) by her negligence let a Thief into the houſe, and afterwards called out Thieves, Thieves; Afterwards *Lovel* came out of his bed with a ſword in his hand, and the Chair-woman calling to mind that ſhe was there without his privity, or his Wives, hid her behind the Dreſſer, and *Lovel*'s Wife eſpying her there, cried out Thieves, Thieves; For which *Lovel* came and run her into the breaſt with his ſword: It was the opinion of all the Juſtices in this Caſe, That it was neither Murder nor Manſlaughter; Not Murder, becauſe there was no forethought of Malice; Not Manſlaughter, becauſe he ſuppoſed her to be the Thief, and if ſhe had been the Thief, then it was clear that it was not Manſlaughter. Tr. 15. Car. at the Seſſions at the Old Bayly, *Lovel*'s Caſe. Marſh 5. Vide the like Caſe, P. 15. Car. in B. R. *Cro.* 1. part, 387. It was holden that in ſuch a Caſe, it was Manſlaughter.

12. Note, It was reſolved by all the Juſtices in this Caſe: That if a man putteth poyſon into an Electuary Potion, or other thing, to the intent to poyſon I. S. That although another man comes and drinks of it by accident, or ſtirs it with his knife and eats of it, ſo as he dieth of it, that the ſame ſhall be adjudged Murder; for the King, by the putting in of the poyſon with a Murderous intent, hath loſt a ſubject: But if one prepareth poyſon, or Ratsbane for to kill Ratts, and layeth the ſame in a certain place for that purpoſe with no ill intent, and another man finding of it, eateth of it and dieth, the ſame is no Felony, becauſe that he, who prepared the poyſon had no Felonious intent. *Cook* 9. part, 81. *Anne Gooſes* Caſe.

13. A. was Indicted of Murder of E. his Daughter, becauſe he gave to her two pieces of a roaſted Apple mixt with poyſon, called Arſnick, whereof ſhe died, and B. was Indicted as Acceſſary, becauſe that he *prædict. A. ad murdrum prædict. faciend. & perpetrand. Felonice procuravit & conſuluit*; upon Evidence given to the Jury the matter appeared to be this. A. had a purpoſe to kill his Wife, and he declared his purpoſe to B. and he counſelled him to poyſon her, and to that intent B. bought Arſnick, and delivered the ſame to A. to give to his Wife, and afterwards he gave it to his Wife lying ſick in a roaſted Apple, and the Wife eat a little of it, and gave the reſt to the ſaid E. the Daughter being of the age of three years. And A. ſeeing it ſuffered his daughter to eat of it, and the daughter died of the poyſoning: The Juſtices were clear of opinion, That A. was guilty of the Murder of E the daughter, for he had a Malicious intent to kill and poyſon his Wife when he delivered her the ſaid poyſoned Apple, and when that upon a Contingent afterwards killed his daughter though he intended not to kill her, yet his Offence was as great as if he had intended it: But if B. ſhould be adjudged guilty as Acceſſary to that Murder the Juſtices doubted of it: And afterwards upon Conference had with all the reſt of the Juſtices, they agreed not to give Judgement againſt B. becauſe they took the Law to be, that he could not be Acceſſary to the ſaid Offence of Murder, becauſe he did not aſſent that the daughter ſhould be poyſoned, but his procurement and aſſent was, that the Wife onely ſhould be poyſoned, which aſſent could not be

be drawn further then he gave it, for the poyſoning of the daughter was a diſtinct thing to which he was not privy: and therefore he could not be Acceſſary to it. Hill. 8. Eliz. *Saunders* caſe. *Plo.* Com. 473. K. 476. H.

14. Divers perſons having a Malicious intent to kill Dr. *Ellis*, killed his ſervant unto whom they bore no former Malice; Yet it was adjudged Murder, becauſe of their Murderous intention which was the cauſe of his death, but it is otherwiſe when one having no Malicious intent joyns himſelf with others that Commit a Murder, for that is but Manſlaughter in him that ſo ſuddenly joyns with them. *Plo.* Com. Matters of the Crown 99. acc.

15. Upon an Affray made, the Conſtable, and others in his Aſſiſtance came to ſuppreſſe the Affray, and in doing of their Office, the Conſtable, or other of his Aſſiſtants are ſlain, this is Murder in Law, although that Murderer doth not know the party that was ſlain, and although the Affray was ſudden, becauſe the Conſtable and his Aſſiſtants come by Authority of Law to keep the Peace, and therefore the Law adjudgeth it Murder. *Cook* 4. part, 51. *Longs* caſe.

See more of Murder and Manſlaughter, in the Title of Indictments before.

Natu-

Naturalization.

1. NOte, A man cannot be naturalized with limitation for life, or intail, or upon condition; for that is against the absolutness or indelebility of natural allegiance.

2. If an Alien be made a Denizen by Letter Pattent, if he had issue born in *England* before his denization, that issue is not inheritable to his Father; but contrary, if the Father be naturalized; But if an English man hath issue born beyond sea, if the issue be naturalized by Act of Parliament, he shall be inheritable to his Father; but if he be only made Denizen by Letters Pattent, then he shall not inherit his Father. *Cook. 1. part. Institut. 128.*

3. A man may be an Alien although he be born under the allegiance of the King; but if a man be born *sub fide, allegientia, obedientia domini Regis*, he is a natural born subject; *vide Cook. 7. part.* in *Calvins* Case 22. All such persons as were born in *Normandy*, *Gascoigne*, *Acquittaine*, *Callice*, &c. whilst they were in the dominions of the Kings of *England*, were natural born subjects. *cap. 7. part. 22. &c.*

4. *Stephano Ferrara de Gama & Emanuel Lewes Fineco* who were Portugals, being in *England* and under the Protection of the Queen, joyned in treason within the Realm with Dr. *Lopez* who was also an Alien born, it was resolved in this case, that although the said parties owed to the Queen a local Allegiance; yet the Indictments of them could not conclude that they committed treason *contra dominam suam naturalem*, because they were not her natural subjects; but their Allegiance was due only *ratione loci*; and therefore it was resolved, that the conclusion of their Indictments should only be *contra allegientiæ suæ debitum Kill.* 36. Eliz. in B. R. *Cook 7.* part 6. in *Calvins* case.

5. C. G. an Alien of *Spain* had issue D. born beyond sea under the Allegiance of the King of *Spain*, 4. Eliz. they came both into *England*, and the Father was made Denizen, and here had issue C. his yonger son; 3. years D. was naturalized by Act of Parliament, and afterwards purchased Copyhold lands, and dyed without issue; whether C. the younger son should inherit this land, was the question. The words of the Act of Naturalization were, that D. shall be enabled to purchase, inherit, have and enjoy, and demand as heir to any ancestor lineal or collateral: and that he be adjudged a natural subject of the Kingdom of *England* in every respect, condition and degree, to all intents, constructions and purposes; The doubt grew upon this, because it is enacted that he shall be heir to his ancestor lineal or collateral, but it doth not say, that they shall be heirs to him: and it was objected, that at the time of the Fathers death the eldest son had no inheritable blood in him: but it was resolved, that the Law respects not the blood where there is not any Allegiance; but in this case it is as if an Alien hath a son who is an Alien, and after the Father is made a Denizon, then hath another son born here, the second son shall inherit, although the eldest son be alive. And in this case it was resolved, that there needed not any blood from the Father, because the land came not from the Father, but by the purchase of D. and therefore it was adjudged that the younger son should inherit the land; and in this case it was said, that Naturalization is alwaies by Parliament, and perpetual. Tr. 17. Jan. in B. R. *Godfrey* and *Dixons* case. Cro. 2. part 539.

6. Note, that although (since the time that King *James* took upon him the Crown of *England*) a *Postnatus*, or a Man born in *Scotland*, or any of his posterity, be the heir of a Noble man in *Scotland*, and by his birth is legitimated in *England*, so as he may inherit lands as any other natural born subject; yet he is none of the Peers or Nobility of *England*: for his natural allegiance and obedience due by the Laws of nature, maketh him a subject, and no Alien in *England*; but that subjection maketh him not Noble within *England*; because Nobility hath it is original by the Kings Creation, and not by nature. *Cook. 7.* part 15. in *Calvins* Case.

See more of Naturalization in the titles of Alien and Denizen, and title Legiance.

Name.

1. *What it is what are names of Dignity: and where the parties ought to be named by such Names, where not: where a Name of Dignity shall be lost by intermarriage, taken for them where not, where it shall discend; and where it may be lost, or suspended, and of other things touching Dignities.*

1. NOmen is *quasi rei notamen*: and *Nomina sunt nota rerum*: and were invented to made a distinction betwixt person and

perſon, and betwixt one thing and another. *Cook.* 11. part 20. in Dr. *Aries* Caſe.

2. *Nomen dicitur a Noſcendo, quia Notitiam facit. Cook.* 6. part 65. in Sir *Moile Finches* Caſe. And *Nihil facit Error Nominis, cum de corpore conſtat. Co.* 11. part 21. in *Ayries* Caſe.

3. Duke, Earl, Dutcheſs, Counteſs, Baron, Baroneſs, Viſcount, Viſcounteſs, are names of Dignity: and the Caſe was, *Ann* Barroneſs of *Mountgeale* being a Widdow, did retain a Chaplain, who did purchaſe a diſpenſation to have a plurality; and before that he was preſented, the ſaid Baroneſs took to husband the Lord *Compton* being a Peer of the Realm, and afterwards the Chaplain was admitted, inſtituted and inducted into the ſecond benefice: It was reſolved that the Chaplain might obtain a ſecond benefice, and that the detainer was not countermanded by the intermarriage. *Cook* 4. part 117, 118. *Athons* Caſe.

4. It was reſolved, that the perſon of one who is a Counteſs by marriage, or by diſſent, cannot be arreſted for debt or treſpaſs; for although ſhe cannot ſit in Parliament, yet ſhe is a Peer of the Realm, and ſhall be tryed by her Peers; and the Law preſumes that ſhe hath ſufficient in which ſhe may be diſtrained: And the wife of an Earl, in a Writ ought to be named Counteſs by her name of Dignity. 2. It was reſolved, that the perſon of a Baron who is a Lord of Parliament, cannot be arreſted by his body in debt or treſpaſs; for he ſhall be tryed by his Peers; and by reaſon of his Dignity ſhall be intended to have ſufficient to anſwer the party: And Barons who are Peers of the Realm, may not be ſworn upon inqueſts without their wills. But in that Caſe it was ſaid, that if a Baroneſs, or a Counteſs by marriage doth marry another again under the degree of a Noble man, ſhe hath loſt her name of Dignity; *quia ſi mulier nobilis nupſerit ignobili, deſinit eſſe nobilis; & eodem modo quo quicquid conſtituitur diſſolvitur*: But if a woman be Noble by birth, and diſſent, who ever ſhe after marries, yet ſhe remains Noble, for that birthright, is *Character indelibilis. Cook* 6. pt. 53, 54. *Iſabel* Counteſs of *Rutlands* Caſe

5. The Caſe was in 21. R. 2. *Ralph Nevil* Lord of R. was created Earl of *Weſtmerl.* to him and the heirs males of his body, which *Ralph* by M. S. his firſt wife had iſſue *Ralph*, to whom *Charles* late Earl of *Weſt.* was lineal heir male of the body of the firſt Donee: The ſaid *Ralph* the firſt Donee, by the daughter of *John* of *Gaunt* had iſſue *George* Lord *Latimer* from whom is diſcended *Edward Nevil*, who is the next iſſue male of the firſt Doner; *Charles* was attainted by Act of Parliament, and dyed without iſſue: The queſtions in the caſe were, 1. If the ſaid dignity upon the firſt creation were an eſtate taile within the ſtatute of Donis, &c. 2. If it were forfeited by the ſtatute of 26 H. 8. cap. 13. of treaſon: in this Caſe it was reſolved. 1. That the name of dignity of an Earl, Viſcount, *&c.* might be entailed in one and the heirs males of his body, and was within the ſtatute of Donis, becauſe it concerned lands; and every Earl was created of ſome place; *vide* 32. H. 6. 28 2. Reſolved, that that dignity (if the ſtatute of 26. H. 8. had not been made) might be forfeited by attaindor of treaſon, by a condition in Law being annexed to the dignity, becauſe the ſame is an office of great truſt repoſed in him by the King; and when ſuch a perſon againſt his duty and the end of his dignity, commits treaſon, and is attainted for it, by that condition in Law *tacite* annexed he hath forfeited the dignity. 3. It was forfeited within the ſtatute of 26. H. 8. becauſe a dignity is an hereditament, within the ſaid ſtatute. *Cook.* 7. part 33, 34. *Nevils* Caſe. *vide Cook.* 8. part 16, & 17. the Princes caſe, where a dignity was created to go by way of diſcent, to the firſt begotten ſon only of the Kings of *England*; which grant, was, by Act of Parliament 11. E. 3. to the eldeſt ſon of the King created Duke of *Cornwall*.

6. Note the King by his Letters Pattents, may create an Earl for life, in tail, or in fee; But the King cannot by his Letters Pattents grant to one that he, his Executors and Adminiſtrators ſhall be Earls for years; for then his Executors or Adminiſtrators, one being appointed by him, and the other by the ordinary, ſhould be Earls. *Cook.* 9. part 97. in Sir *George Reynelds* Caſe.

7. In debt upon an obligation the defendant pleaded, that after the firſt continuance, the Plaintiff was made a Baronet; and whether the Writ ſhould abate or not, was the queſtion: for the ſtatute of 1. E. 6. recites the dignities of Dukes, Earls, Barons, *&c.* but mentions not Baronets, whereby it ſeems it was not a dignity known at the time of the making, & that ſtatute, the Court doubted If it were a dignity created after the ſtatute, whether the ſaid ſtatute ſhould extend unto it in equity; and the Court decreed that the Plaintiff ſhould demur thereupon. But in regard it was pleaded only in the abatement of the Writ, and it would be but a *Reſpondes Ouſter*, though judged for the Plaintiff, the Plaintiff offered to bring a new Original, & the defendant was contented to appear gratis to it, and plead in bar, and ſo the doubt was not reſolved. *Hill.* 3. *Car.* 5. Br. R. Sir *Simon Bennets* Caſe. *Cro.* 1. part 74.

8. Sir *Hen. Ferrers* was indicted by the name of Sir *Hen: Ferrers* as acceſſary to the murder of one I. S. Upon the indictment he being arraigned, ſaid, that he was never Knighted; wherefore he was indicted *de novo* by the name of Sir *Hen. Ferrers* Baronet; and he pleaded not guilty: upon the evidence

evidence it appeared he was arrested for debt, and that his servant seeking to rescue him, killed the said I. S. but because the Warrant to arrest him was by the name of Sir *Hen. Ferrers, &c.* it was held by the Court that it was such an essential variance of part of his name, that they had no authority by that name to arrest Sir *Hen. Ferrers* Baronet; so the killing of the officer in executing the Warrant could not be murder. Also it appeared upon the evidence he obeyed the arrest, and was in the house before the fighting betwixt the officer and servant; wherefore he was found not guilty of murder and manslaughter. Pas. 11. Car. in B. R. Sir *Hen. Ferrers* Case. Cro. 1. part 271.

9. The Case was, the Grandfather was summoned to Parliament by Writ, and dyeth. Afterwards the Father is disabled by Parliament during his life to claim any dignity or Seignory by discent, or otherwise: After the Father is called to another Parliament by a Writ of summons, and dyeth; The question was, if the Son should be restored to the seat of his Grandfather in Parliament, or unto the seat of his Father. It was resolved, that he should be restored to the seat of the Grandfather; and a difference was taken betwixt a disability personal and temporary, and a disability absolute and perpetual: As if one be attainted of felony or treason, the same is a perpetual disability and corruption of the blood for any of his posterity to claim any hereditament in fee as a son and heir to him, or to any Ancestor above him. But when one is but disabled by Parliament (without any attainder) to claim a dignity for his life, the same is a personal disability for life only, and his heir after his death may claim as heir to him or any Ancestors above him. 2. It was resolved, that the acceptance of the new creation by the Father, could not hurt the Son, because the Father at that time was disabled; nor was a Baron but an Esquire, so as when the old and new dignity discend together, the old shall be preferred. *Cook* 11 part 1 the Case of the Lord *De la Ware*.

10. Sir *John Savile* was sued in Co. B. for battery and wounding, and found guilty, and damages 3000. l. upon a Writ of Error before judgement was executed, he procured a Writ out of the Chancery to the Justices of the Kings Bench: and shews, that Sir *John Savile* his Father was created Baron for his life, and afterwards the Barony was limited to him, and the heirs males of his body, and the Writ recites that he is a Peer of Parliament, and therefore it commands that no proces be awarded against him, but what is awarded against a Peer of the Realm. It was prayed on his behalf that the said Writ might be recorded, and offered a plea concerning such matter; and prayed that no proces of execution might be against him, but what ought to be against a Peer of the Realm. The Court appointed the Writ to be recorded; but for the plea, because there never was any such president, and for that he is not defendant in the Action, for he is plaintiff in the Writ of Error, and hath no day to plead, the plea was rejected, and the judgement was affirmed, and the Court would advise what the execution should be. M. 6. Cor. in B.R. The Lord *Savils* Case. Cro. 1. part 149.

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2. *Where the mistaking of the true Name in Writs, Grants, Pleas, or other things, shall make them void and of no effect: what shall be a sufficient Name to purchase or Grant, what not.*

1. ERror of a judgement in Co. B. in an *ejectione firme*; where judgement being given against one of the defendants, it was assigned for Error, because in the *Venire facias Constantinus Callard* was returned and so named in the *Distringas*, but in the Pannel annexed thereunto by the Sheriff *Constantius Callard* was returned and sworn; and so returned by that name upon the back of the *Postea*; and that Error being assigned *ore tenus*, the record of *Venire facias* and *Distringas* being removed before, it was holden by the Court to be a manifest Error, for that they are distinct names of baptisme, and there cannot be any amendment, as this case is. M. 2. Jac. in B.R. *Blunt* and *Snedstons* Case. Cro. 2. part. 116.

2. In *Audita Querela* the defendant pleads that the plaintiff was not to be answered, because he was outlawed by the name of *Peter Griffith*. It was demurred thereunto, because *Peter* and *Peirs* are two names of baptisme; so it cannot be averred to be one and the same person: and, 2. or that the outlawry in this suit is not pleadable; but it was adjudged, 1, That they are but one name; for so it appears by *Peirs Gaveston*, who in some Acts of Parliament is so named, and in some other *Peter Gaveston*, and yet but one person. 2. Resolved, that the outlawry is not well pleaded in this suit; for a person outlawed is not receivable to sue in any Court, unless it be to redress his own outlawry. Case. 15. Jac. in B.R. *Griffith* and *Middletons* Case. Cro 2. part. 425.

3. In trespass upon not guilty, and found for the plaintiff, it was moved in stay of judgement, that upon the *Venire facias*, there wanted these

words *Qui fuit Juratus per plegios*, ſo it is as if there had been no return of the Writ. 2 Exception was taken that a Jurour was named *Franciſcus* in the *Venire facias*; and upon the *Diſtringas Francus*. To the firſt, It was holden by the Court, that it was not as a blank return; or that the name of the Sheriff is omitted; but here it is an inſufficient return, which is helped by the Statute of Jeofals: and as to the ſecond exception, the Court held that they were both one name abbreviated. Paſc. 17. Jac. in B. R. *More* and *Blacwells* Caſe. Cro. 2. part 435.

4. Debt upon an obligation by *Edmund Shepheard*, upon *Oyer* of the obligation, it was, *Noverint, &c. me Edwardum Shepheard teneri, &c.* and he ſubſcribed it by the name of *Edmund*, which was his true name: It was moved upon verdict found for the plaintiff in ſtay of judgement, that judgement ought to be given againſt the plaintiff; for he declares upon a Bond by *Edmund*, and ſhews a Bond of *Edward*, which is another perſon, and they never were the ſame but diſtinct; and although it be ſubſcribed by the name of *Edmund*, yet that is no part of the Bond, which being apparent, the plaintiff cannot have judgement; and of that opinion was the whole Court: wherefore it was adjudged, that the plaintiff take nothing by his Writ. Tr. 10 Jac in B. R. *Moby* and *Shepheards* Caſe. Cro. 2. part 640. *vide* Hill. 17. Jac. in the Exchequer Chamber. *Watkins* and *Olivers* Caſe. Act. Cro. 2. part 558.

5. In a Replevin, the defendant made Conuſance as bayliff, for an Amercement in a Leet, and being at iſſue it was found for the plaintiff, and damages and coſts: he ſurmiſed that the ſuit was againſt *Ralph Stubbs Senior*, and execution being ſued, the Sheriff endeavoured to levy the damages and coſts upon the goods of *Ralph Stubbs Junior*, whereupon he prayed a Writ of *Identitate Nominis*; which the Court allowed of although it was after verdict. M. 14. Jac. in B. R. *Stubbs* and *Cooks* Caſe. Cro. 2. part 623.

Vide M. 6. Car. in B. R. *Downs* and *Winterfloods* Caſe. Cro. 1. part 147. in title *Miſnomer*. Sect.

6. Error of a Judgement in the Grand Seſſions in *Wales* in the County of *Flint*: It was aſſigned for Error, becauſe the *Venire facias* was returned *per Thomam Hammond Militem, nuper Vicecomitem* of the ſaid County; So it was not returned by the Sheriff, but by one who was late Sheriff, and it appears not that he was Sheriff at the time of the Pannel made; for he ought to have ſubſcribed his name *Tho. Hamond Vicecomes*: But the Exception was diſallowed by the Court; for although the Writ be returned by *J. S.* the Sheriff at the time of the Grand Seſſions, when the action was tried, with a Writ delivered to you by *Tho. Hamond* his predeceſſor *in exitu ab Officio*. Yet it might be very well intended, That the Pannel was made and annexed in the time when he was Sheriff; and this addition *nuper vicecomitem*, is ſufficient proof of it, when one is diſcharged of his Office; the Judgement was affirmed. Hil. 9 Car. in B. A. *Tabels* Caſe. Cro 1. pt. 411.

7. In a Writ of Error of Judgment, the Error aſſigned was, That in the Writ of *Venire facias* to the Sheriff of S. the word *Vicecomiti* was omitted; and yet the Sheriff of *S.* retorned the Pannel, and his name was endorſed; and after the *Habeas Corpus*, the Jury appearing, Judgement was for the Plaintiff; and this was aſſigned for Error: It was holden by the Court to be Error; but becauſe upon the Roll, the Writ was awarded *vicecomit.* S. and the omittance of the Sheriffs name is the default of the Clerk: It was agreed that it ought to be amended; and the Judgment was affirmed H. 16. Car. in B. A. *Sloper* & *Childs* Caſe, ſp. B. 1.

8. One had houſes and Lands which were in the Tenures of thoſe which had the houſes, and he deviſed his houſes with the appurtenances; It was holden and adjudged by the whole Court, That the Lands did paſs by the name Appurtenances; for it was in a Will in which the intent of the Deviſor ſhall be obſerved. Hill. 28. Eliz. in B. A. *Harwood* & *Hiſhams* Caſe. *Godbt.* 4.

9. *A.* had a houſe called *Jacks*, uſually occupied with a houſe & 100. acres and he leaſed in 40. acres, parcel of the ſaid 100. acres to *J. S.* for life, and reſerved the other to himſelf, and afterwards made his Will, by which he doth deviſe the Houſe and all the Lands called *Jacks* in the occupation of *J. S.* to his wife for life; and after her deceaſe the remainder of that and all his other Lands appertaining to *Jacks*, to *B.* who was his ſecond ſon. Whether the wife ſhould have that of which her husband died ſeiſed of for her life, or whether the eldeſt ſon ſhould have it, and what eſtate he ſhould have in it, was the queſtion. The opinion of the Court was, that the younger ſon ſhould have the Reverſion; for although it doth not paſs by theſe words, Uſually occupied: yet becauſe the Deviſe cannot take other effect, and it appeareth his intent was to paſs the Land, the younger ſon ſhould have it: And *Anderſon* Chief Juſtice ſaid *Jacks* is the entire name of the houſe and Lands; and then the words where they have reference to an entire thing called *Jacks*, and is known by the name of *Jacks*, it ſhall paſs to the younger ſon: And if a man hath Lands called Mannor of *D.* &c. and he deviſeth his Mannor of *D.* to one, the Land ſhall paſs although it be not a Mannor. And if I be known by the name of *Edward Williamſon*, and my name is *Edward Anderſon*, and Lands are given to me by the name of *Edward Wil-*

Williamſon, the ſame is a good name of purchaſe. It was the opinion of the whole Court, That the Reverſion of the Land ſhould paſs to the younger ſon: Paſch. 25. Eliz. in Co. 1. B. *Higham's* Caſe. *Godb.* 17.

10. An Aſſiſe was brought for the Maſterſhip of an Hoſpital: Exception was taken to the Writ becauſe the Aſſiſe was brought under the name of Maſters: therefore he ought not to name him Mr. and the exception allowed. 10. H. 7. 18. So Abbot and Covent, the Abbot is preferred, and the Covent elected another Abbot: and the Patron brought a *Quare Impedit* to defeat the Election. It was allowed by the Court; becauſe he goes about to overthrow the Election, he need not name him Abbot. Vide 18. E. 4. 4. ac. Vid Paſc. 3. Car. in B. R. *Brookers* Caſe. *Godlt* 379.

11. Error to reverſe a judgement in debt upon an obligation, brought by the Mayor, Commonalty, and Citizens of *London*; The Error aſſigned was, becauſe the Judgement is, That the Mayor, Commonalty, and Citizens of *London* ſhould recover the debt, and 6 l. coſts, *eiſdem Majori & Communit. adjudicat.* omitting the word (*Civibus*) and ſo no ſuch Corporation: It was the opinion of the Court that the ſame was Error; but afterwards upon peruſal and examination of the Docket Roll, where it appeared to be well. It was awarded to be amended. Hill. 15. Car. in B. A. *Heeling* and the Mayor and Commonalty of *London's* Caſe, Cro. 1. pt. 413, 414.

12. In an *Ejectione firme*; It was found by verdict, That the Prior of *Launceſton* was ſeized in Fee of 4. Cloſes in *North Drocomb* in *Launceſton*: and 27. H. 8. deviſed them to *I. P.* by the name of four Cloſes in *Drocomb, infra Burgum de L.* for 99. years, rendring Rent. After the Priory came to Hen. 8. by ſurrender, and to Queen Eliz. who the 24. of her Raign by her Letters Patents granted to *F.* and *W.* and their heirs, *Totum illud Meſſuagium & Fentuum vocat. Drocombs*, &c. *Prata ac omnia ter. tent. dicto Meſſuagio ſpectan. vel cum eodem dimiſſ. jacen. &c. exiſten.* in *Launceſton*, *nuper Prioratui de L. ſpect.* And that theſe Lands by mean Conveyances came to the leſſor of the Plaintiff, and it was found before the leaſes *Viz.* 21. Eliz. A houſe was erected upon a Rod of Land, parcel of the ſaid Cloſes by the occupiers thereof, and that the ſaid Tenent *in narratione nominata eodem Meſſuagio ſpectabat*, and was always known and called by the name of *Drocombs*: and that the ſaid Prior had not other Lands in *Launceſton* called *Drocombs*, beſides his Lands in the Declaration: And that King *James* the 8. of his Raign demiſed the Lands to *I. B.* for 60. years, by the name of the 4. Cloſes late in the tenure of *I. P.* in *North Drocombes*. The Queſtions in this Caſe were. 1. Whether (the Leaſe made by the name of the 4. Cloſes in *Drocombs*, there being then no other name known when they came to H. 8.) the Pattent of Queen Eliz. by another name might be good, for that the Queen was not well informed. 2. The Patent being of a Meſſuage and Lands thereunto belonging, and the Meſſuage was newly erected after 1. Eliz. Whether the Lands ſhould paſs: It was the opinion of the whole Court, That the Letters Pattents were good for the Meſſuage and all the Lands. For although the Land was not built upon, when it was demiſed, and when it came to the King, and that afterwards a Meſſuage was erected thereupon; yet it ſhall be called as it is, and by ſuch name as it is known at the time of the Letters Patents; and although it varies from the firſt name in the Leaſe, yet being found to be all one, it paſſeth well by the Letters Patents: and the Court was of opinion, That Lands may be ſaid to be appertaining to a Houſe as well in the Kings Caſe as in the Caſe of a common perſon, where it hath been let and occupied to others by a convenient time. Hill. 3. Car. in B. R. *Gennings* and *Lafes* Caſe. Cro. 1. pt. 120, 121.

See more of Name, and of this Diviſion in the titles before of Capacity, Grants, Writs, Corporations, Meſſuages, and Grants of the King.

Neceſsity and Impotency.

Where the Law favours things which are done Cauſa neceſſitatis; ***And where and what Acts or things ſo done, ſhall be good, what not.***

1. IF a man Leaſe Land unto another for term of life, ſaving the reverſion to himſelf, and a villain purchaſeth the reverſion of the Leſſor: In this Caſe the Lord of the villain may preſently come upon the Land, and claim it as the reverſion purchaſed by his villain; and by ſuch claim the reverſion ſhall be veſted on the Lord; for in that Caſe, the Lord cannot enter during the life of Tenant for life; and if he ſtay till after his death,

death, he may perhaps come too late; for the Villain may have given the Reverſion over unto another; and therefore for neceſſities ſake the claim of the Lord ſhall veſt the Reverſion in him preſently. Vide Co 1. & pt. Inſt. 119

2. If a *Quare Impedit* be brought againſt the Biſhop and Incumbent, without naming the Patron in the Writ, the Writ ſhall abate: But if the King preſenteth to a Benefice, and his Clerk be admitted and inſtituted: In this Caſe a *Quare Impedit* may be brought of neceſſity againſt the Biſhop, and the Incumbent alone; for that it lyeth not againſt the King. Cook 7. pt. 26. in *Hales* Caſe.

3. Debt againſt Executors, the Defendant pleaded fully Adminiſtred; the Plaintiff replied that he had Aſſets in *Exeter*, and the Jury find Aſſets in *Ireland*: and it was adjudged for the Plaintiff; for when the place is in tryal, and it is parcel of the Iſſue, there the Jury cannot finde the point in Iſſue or any other place. But when the place is only named for neceſſity and conformity, and is alſo parcel of the Iſſue, there the Jurors may find Aſſets in any other County, or place, then where they are alledged in the Replication. Cook 6. pt. 47. *Dowdals* Caſe. Vide 10. Eliz. *Dyer* 27.

4. If a man by his Will in Writing deviſeth, That his Executors ſhall ſell his Lands, and dieth: In that Caſe, the Executors in their own names may ſell the Land for neceſſity, becauſe he that gave them authority by his will (which takes no effect till after his death) is dead; and yet in ſuch Caſe, the Deviſee is in by the Deviſor. Cook 9. pt. as in *Combes* Caſe.

5. If a Felon breaks the Priſon, and eſcapeth, it is Felony by the Statute *de frangentibus priſonam*: But if the Priſon be on fire, and they who are within the priſon break the priſon, and go out of it for the ſafety of their lives, this will be excuſed for the cauſe of neceſſity, in Plow. Com. in *Fogoſſes* Caſe, &c. and Vide the Caſe, where the Jurors who were ſworn upon an Iſſue, for fear of a great Tempeſt forſook the houſe where they were, and diſperſed themſelves; and afterwards they came thither again, and gave their verdict, and they were not amerced for their dividing & diſperſing themſelves, becauſe it was in caſe of neceſſity; and afterwards they gave their verdict. 14 H. 18. &c.

6. *A.* was Owner of a Ship, and ſent her into *Spain*, and made *W.* Maſter of her, who upon the high Sea did borrow of *I. S.* money of the value of 50 l. and for payment thereof did pawn the Ship, and returning home, had the Ship lying in the River of *Thames*. *I. S.* by a warrant out of the Admiralty arreſted the ſaid Ship, whereupon the Owner of the Ship came and claimed property in the Ship. In that caſe, it was ſaid, that by the Civil Law, the Maſter of a Ship hath power to pawn the Ship and Tackle, in caſe of neceſſity, when he hath no other means to provide ſuch things as are neceſſary for her. And *Hobart* Chief Juſtice was clear of opinion, That the Admiral Law was reaſonable, That if a Ship be at Sea, and take rack, or otherwiſe want victual, or other neceſſaries whereby either her ſelf be in danger, or the voyage defeated, that in ſuch caſe of neceſſity the Maſter may impawn the Ship for money or for other neceſſaries to prevent ſuch extremities; for he is a perſon truſted with the Ship and Voyage; and therefore reaſonably may be thought to have power given him implicitely, rather then to ſee the Ship and the whole Voyage loſt. Vide Hill. 1. Jac. in Co. B *Bridgemans* Caſe. Hob. 11.

7. If the Husband giveth part of his Manner of *D.* to hold of him in tail and dieth, the wife may bring her Writ of Right of Dower in the Court of the heir of the husband againſt the Donee in tail, and the Writ ſhall be to the heir. But if the husband giveth all his Lands in tail, and dieth, ſo as the heir cannot keep a Court becauſe he hath but a Seignory in groſs, & in ſuch caſe ſhe may have her Writ of Dower to the Sheriff againſt the Donee in tail, returned into the Common Pleas, with this clauſe in the Writ, *Quia B. Dominus feodi nobis remiſit curiam ſuam*; and in ſuch caſe the Lord ſhall not ſue a prohibition to the Court of Common Pleas; for that the wife in ſuch caſe is forced of neceſſity to ſue there becauſe the heir of the husband can keep no Court, having but a Seignory in groſs, Vide *F. M.* 8. acc.

8. If a man by preſcription be bounden to repair a Wall of the Sea-bank, againſt the Sea, and the overflowing of the Salt water. In ſuch caſe if through his own default the water breaks in and drowneth the Lands of other men within the Level, he ſhall repair it at his own charge, and the other parties intereſſed in the Level ſhal have their Action againſt him, and ſhall recover their damages. But if he doth maintain the Bank or Wall at the uſual height, and in good repair, and by a ſudden & unuſual encroach or riſing of the waters of the Sea, the Wall or banks are thrown down, or the waters overflow the Banks, by reaſon whereof the reſt of the Lands in the Level be drowned; This being done inevitably, the Commiſſioners of Sewers by the Statute of 23. H. 8. are to Tax all the perſons who have lands within the Level, according to their ſeveral Qualities of their lands, towards the repair of the Banks and Wals; and in ſuch caſe no Action will be againſt him who ought to have repaired them, or by any of them. Cook 10. pt. 139 *Keyles* Caſe.

9. Note, it was reſolved by the Court, That when

when a Reverſion is ſetled in any one by Judgement of Law, and he hath not any poſſible means to compell the Tenant to Attorn; and there is no Lacheſſe in himſelf; there in ſuch Caſe he ſhall avow and have an action of Weſt. without an attonement, and that for neceſſity; and alſo becauſe it is a rule in Law, *Quod remedio deſtituitur, ipſa re valet, ſi culpa abſit*: and therefore vide 20. E. 3. *Contra formam Collationis*, becauſe the Founder cannot have a *Contra formam Collationis* of an advowſon, he ſhall preſent without ſuit. Cook 6 pt. in Sir *M. Finches* Caſe, &c.

10. If two Joyntenants be of Lands and to the heirs of one of them, they ſhall not joyn in a Writ of Right. But if two Joyntenants, and to the heirs of one of them be of an Advowſon, they ſhall joyn in a Writ of Right of Advowſon; and the reaſon of the difference is becauſe in the firſt caſe they have ſeveral ways and means and remedies, as it is agreed. 46. E. 3. 21. but in the other Caſe, if Tenant for life ſhall not joyn with him that hath the Fee, neither the one nor the other ſhall have any remedy, and therefore in this caſe of neceſſity they ſhall joyn in the Writ. Cook 5. pt. 40. acc.

11. If a Biſhop granteth an Annuity out of his Biſhoprick, the ſame is reſtrained by the Statute of 1. Eliz. But if a Biſhop granteth an Office to one only that is not reſtrained by the Statute, becauſe ſuch grants are for neceſſity; for if the Biſhop ſhould not have power to grant ſuch offices of ſervice and neceſſity for the life of the Granter, no ſufficient perſons would ſerve them in ſuch Offices, or at leaſt, would not diſcharge it with ſuch alacrity, if they had no eſtate for their lives, but that their eſtates did depend upon incertainties, as death, or tranſlation of the Biſhop. Cook 101. pt. 61.

12. A man muſt not diſtrein in the Night for Rent behind; yet when there is a neceſſity of doing things they may be done in the Night time: as an arbitirement made and delivered in writing the laſt day after ſun ſetting is good enough; for Judgments and Arbitraments require long advice: and ſo goods may be diſtrained in the night for damage Feaſants: and a man may be arreſted in the night: for otherwiſe perhaps he may not be taken at all. Co. pt. 66. in *Mackallyes* Caſe. Vide Cook 71. pt. 7. in *Milbornes* Caſe. Vide 12. E. 3. to diſtreſs, 170. 11. H 7. 5 ac.

13. *Foraſſa* a Merchant Stranger ſhipped 4500. Kentals of Woad and brought them towards *England*: A great tempeſt did ariſe upon the Sea, ſo as the Ship was in danger to be ſunk; and for the ſafety of the lives of them that were in the Ship, the Maſter of the Ship and the Mariners caſt into the Sea a great part of the woad: Afterwards the Ship came to Port with the reſidue, and becauſe the certainty of the woad which was in the Ship was not known, the Defendant came to the Collectors of the Cuſtoms and ſhewed them all the matter: and ſaid he conceived there was 2000. Kentals left in the ſhip: and upon an uncertain agreement made with the Collector he landed the reſidue of the woad; and there was then found to be 1693. Kentals more: and upon a pretence that the ſaid goods were forfeited by the Statute of 1. E. 6. an Information was exhibited into the Exchequer: It was the opinion of the Juſtices in this caſe, when by reaſon of the tempeſt a great part of the woad was caſt into the ſea for neceſſity of ſaving the lives of the men in the Ship; and ſo thereby the quantity remaining could be by no means diſcovered before it was landed and weighed; and therefore the uncertain account made with the Collector before the landing, by reaſon of that neceſſity, was adjudged good; and the rigor of the Tempeſt did take away the rigour of the Statute. Hill, 4. E. 6. *Reneger* and *Foraſſas* Caſe: Plow. Com. 1. to 10.

14. The King granted to the Earl of *Shrewsbury* the Stewardſhip of the Mannors of *A.* and *B.* but in the Letters Patents, power of making a Deputy was omitted. It was reſolved in this caſe (amongſt other points) That although without ſpecial words, a Steward cannot make a Deputy, becauſe it is an office of truſt, ſecrecy, and diſcretion, and theſe qualities are ſo individually annexed to him that he cannot make a deputy, nor aſſign the ſame without ſpecial words: Yet it was reſolved, that when the King grants to an Earl, who is a Peer of the Realm, the office of Stewardſhip of his Mannors, he may make a Deputy in reſpect of the baſeneſs of the Office; and the great reſpect which the King hath of the perſon of an Earl, who is *præfectus*, or *præpoſitus Comitatus*, and therefore for conveniency he may make a Deputy, although there be no expreſs words in his Letters Patents. And alſo for neceſſity; for he ſhall be intended to be converſant about the great affairs of the Realm, and cannot attend upon ſuch an inferiour Office. Cook 9. pt. 49. the Earl of *Shrewſburies* Caſe.

15. Error was brought upon a Judgement given in a Writ of Entry in the Poſt, upon which a common Recovery was had in the Common Pleas: The Error aſſigned was, becauſe the Writ of Entry, was *de uno annuli reddita ſine pencione, 4. marcarum exeunt. de Eccleſia, ſive Rectoria, &c.* In that caſe it was adjudged, That although a Writ of Entry in the Court cannot be of an Advowſon, Rent, Common of Paſture and the like: Yet it was reſolved, That for the ſuffering of a Common Recovery which is a common aſſurance of the

Realm

Realm by conſent of parties to cut off an entail, the Law for neceſſities ſake will permit a Writ of Entry in the Poſt to be brought in ſuch Caſe: For otherwiſe there could be no aſſurance of an Advowſon: Common in groſs, to bar a remainder upon an eſtate in tail. Cook 5. pt 40. *Dorners* Caſe.

16. Error was brought to reverſe a Judgement in Debt in the Exchequer: the Defendant pleaded an Excommunicat. of the Plaintiff in the Writ of Error; and brought the Excommunicat. certified by the Official of the Biſhop under the ſeal of the Biſhop of *Durham*, which recited that he was excommunicat. for contempt, in *non comparendo*. In this Caſe amongſt other things it was reſolved, That Excommunication is a ſpiritual thing; and if it be pleaded in diſability of the party in the Temporal Court, the ſame muſt be certified thither by the Biſhop himſelf: for that no man can certifie an Excommunication, but only the Biſhop, who is immediate Officer to the Court, to whom the Court may write to abſolve the party, if there be occaſion. But yet in that Caſe it was reſolved, That if the Biſhop be in *remotis agendis, viz.* beyond Sea in the Kings ſervice, or *ſede vacante* of the Biſhop, and the ſame appeareth by matter of Record, and not upon ſurmiſe of the party; then for neceſſities Caſe, (which is always the Law of time) the Certificate of the vicar-general who is Guardian of the Spiritualities for the time, ſhall be allowed, becauſe that no other can do it. Cook 8. pt. 69. *Trollops* Caſe.

17. The Queen was ſeized of a Reverſion expectant upon an eſtate tail, and upon her Letters Patent ſhe granted it to *I.S.* in tail upon condition that if he pay 20.s. at the Precept of the Exchequer, that then he ſhall have the ſaid Reverſion in Fee. *I S.* paid the 20.s. according to the Condition. The queſtion was, whether by the Condition performed, the Reverſion paſſed to *I S.* It was reſolved by the Court, that preſently upon the payment of the 20. s. by operation of Laws, the Reverſion was deveſted out of the Queen, and ſetled in *I S.* and this was for neceſſity; for if it ſhould not veſt at the time of the condition performed, it ſhould never veſt; and that in this caſe, neither office, petition or *Monſtrans de Droit* was requiſite: *vide* Plo. Com. The Lord *Lovels* Caſe ac. where it is ſaid, that when the condition is performed, the feeſimple ſhall be immediately out of the King without petition, *Monſtrans de droit* or other circumſtances, for if he muſt ſtay till ſuch circumſtances are done, then it cannot veſt preſently; and if an eſtate cannot be enlarged at the time of the enlargement appointed, it ſhall never be enlarged; and therefore in ſuch caſes of neceſſity the feeſimple paſſeth out of the King preſently, and doth veſt in the Pattentee upon the performance of the condition. Cook 8. part. the Lord *Staffords* Caſe.

18. In treſpaſs, the defendant juſtified and pleaded that the King was ſeiſed of a rectory in fee, and demiſed the ſame to the plaintiff for life (without ſhewing the Letters Pattent in Court) and that the plaintiff demiſed the ſame to I. S. for eight years if he ſhould ſo long live, and that he as ſervant to I. S. took the tythes: it was reſolved in this caſe (amongſt other things) That he who is party or privy in eſtate, or intereſt, or he who juſtifies in the right of him who is party privy, muſt plead and ſhew the deed, although that he who is privy, *&c.* claims but parcell of the original eſtate, that it may appear unto the Court if it be a legal deed or not; and alſo becauſe it may appear to the Jury if he ſealed it or no, yet it was reſolved, that upon a great neceſſity and extremity, as if all the evidences be burnt by a fire, thereupon the general iſſue pleaded, a deed may be proved in evidence by the teſtimony of Witneſſes given to the Jury, *ne afflicto addatur afflictio*. Cook. 10. part 92. in Dr. *Leyfields* Caſe.

19. Note, it was reſolved by the Court, that where the condition of an obligation doth conſiſt upon two parts in the disjunctive, and both are poſſible at the time of the obligation made, and afterwards one of them becomes impoſſible by the act of God: in that Caſe the obligor is not bounden to perform the other; for the condition is for the benefit of the obligor, and ſhall be taken beneficially for him, and he hath election to perform the one or the other; and ſo when it becomes impoſſible to be performed by the act of God, and now by no induſtry of him he can perform the ſame, his obligation is ſaved. Cook. 5. part 21. *Laughters* Caſe.

20. *Tenant in capite* dyeth, his heir within age; the heir at his full age tenderet'h his Livery and was admitted to it, and within the time given him for to proſecute his Livery, he bargained and ſold part of the lands to another in fee, and within that time alſo dyed: in this caſe it was reſolved, that when the heir at his full age tendered his Livery, the ſame was as much as he could do, and then when he dyed within the time given him for the proſecution of his Livery, ſo as the ſuing of it became impoſſible, the intereſt which the King had was determined by the death of the heir; & in that caſe it was reſolved, that the bargainer might enter and occupy the lands, without ſuing an *Ouſter le Maine* or a *Monſtrans de Droit*. Cook 8. part 172. *Halls* Caſe.

21. If a man dyeth ſeiſed of lands in feeſimple, and theſe lands diſcend to a daughter, and ſhe taketh

taketh a husband and hath iſſue, and dyeth before entry, the husband in ſuch caſe ſhall not be Tenant by the curteſie, becauſe it was in the power of the husband to have entred: but if a man be ſeiſed of an advowſon or of a rent, and hath iſſue a daughter who is married, and hath iſſue, and dyeth ſeiſed before the rent become due, or the Church becometh void; in ſuch caſe the husband ſhall be Tenant by the curteſie of it, becauſe he could by no induſtry enter, or attain to any other ſeiſin, then to a ſeiſin in Law, or bring it to an actual ſeiſin. *Cook* 1. part Inſtitut. 29. acc.

22. If there be Lord and Tenant by rent and ſervices, if the Lord doth releaſe unto his Tenant ſo long as I. S. hath heirs of his body, and ſixty years paſſe, and then I.S. dyeth without heir of his body; in this caſe it was holden, that although the ſixty years be paſſed, yet the Lord may diſtrain and avow: for it was impoſſible that he ſhould attain to any ſeiſin within that time; and therefore the Act of Limitation made 32. H. 8. doth not extend to ſuch rent or ſervices, that by common poſſibility could not happen or become due within ſixty years Cook. 4. part 11. in *Bevills* Caſe. And ſo if land holden by Homage and Fealty be conveyed to Mayor and Commonalty, &c. in this caſe they cannot do their Homage and Fealty; yet although they have enjoyed the lands above ſixty years, yet if they after alien the land, the Lord may diſtrain for the Homage and Fealty. 37. H. 8. tit. Fealty 15.

23. In a Prohibition the caſe was, The Lord *de Laware* was ſeiſed of 140 Acres of land in *Cowfeld*, parcel of an ancient Park repleniſhed with Deer, and preſcribed that all the Farmers and occupiers thereof time out of minde had uſed to pay to the Vicar of *Cowfeld* two ſhillings a piece, and a ſhoulder of every third Deer which ſhould be killed in the Park in full ſatisfaction of all tythes ariſing upon the ſaid 140. Acres of land; The Vicar by proteſtation denying the preſcription ſaid, that the Deer in the ſaid Park were utterly deſtroyed by the owners and occupiers of the ſaid 140. Acres of lands, and the lands were converted into arable ground, and ſo prayed tythes in kind of the lands: In this caſe it was holden by *Hobert* Chief Juſtice, that if all the Deer dye of ſome diſeaſe by the act of God, yet the owner is not bound to repleniſh the Park with Deer again to maintain the *Modus decimandi*; and yet he held in that caſe, that the *Modus decimandi* ſhould continue, becauſe the failing of the Deer was by the act of God, which ſhould not prejudice the parties in their preſcription. M 10. Jac. in Co. B. *Cowper* and *Andrews* Caſe Hob. 40.

24 A rent cannot be reſerved upon an eſtate for life upon an incorporal inheritance, as Advowſons, Offices, Corodies, Multure of a Mill, Tythes, Markets, Priviledges, Franchiſes or the like, becauſe the leſſor cannot have reſort or recourſe to diſtrain for the rent arere; and in ſuch caſe, if the rent be reſerved upon a houſe for years, yet he ſhall have but an action of debt for the rent, becauſe he hath no means to come and diſtrain for ſuch rent or for the arrerages thereof; but yet a reverſion, or a remainder of lands or tenements, may be granted reſerving a rent, for the apparent poſſibility that the ſame may come into poſſeſſion, and then there may be a diſtreſs taken for the rent. Cook 1. part Inſtitut. 47.

25. If a man be ſeiſed of a houſe, and of divers ſeveral Cloſes in the ſame County in fee, and he maketh a leaſe thereof for years, and afterwards maketh a feoffment in fee of the ſame, and makes livery and ſeiſin in the Cloſes, the leſſee or his wife, or ſervants being in the houſe: In this caſe it was adjudged, that the livery and ſeiſin was void for the whole, becauſe it was impoſſible for the leſſee to be upon every part of the land to him demiſed for the preſervation and continuance of his poſſeſſion therein; and therefore his being in the houſe or any part of the land to him demiſed, is ſufficient to preſerve and continue his poſſeſſion in the whole from being outed and diſpoſſeſſed thereof. Cook. 2. part 31. *Bettiſworths* Caſe.

Ne injuſte vexes.

1. THE Writ of *Ne injuſte vexes* lyeth where there is Lord and Tenant, and the Tenant holdeth of the Lord and his Anceſtors by fealty, and 20. s. rent yearly; and the Lord of late time hath gotten ſeiſin of greater or more rent of the Tenant, by payment of the Tenant, of his own agreement without coertion or diſtreſs; if the Lord will diſtrain the Tenant for this ſurpluſage of rent, the Tenant cannot avoid the Lord in an avowry, in regard of the ſeiſin which the Lord hath had by the payment of the Tenant of his own agreement: But in ſuch Caſe, the Tenant may ſue *Ne injuſte vexes* directed to the Lord, which is in the nature of a prohibition to the Lord, that he do not diſtrain his Tenant to do other ſervices then of right he ought to do.

2. This Writ is a Writ of Right; and is grounded upon the Statute of *Magna Charta* cap. 10. the words of which are, *Quod nullus diſtringatur ad faciendum majus ſervitium de libero Tenemento quam inde debetur*: and therefore leſſee for life, or

Donee in tail, ſhall not have *Ne injuſte vexes* againſt the Doner; for in as much as the reſervation is his title, no incroachment upon them ſhall hurt them; and they ſhall avoid the ſame in an avowry. Cook. 8. part 65. in Sir *William Foſters* Caſe.

3. *Monſtraverunt* was brought againſt the Biſhop of *Exeter*, and the plaintiffs counted, that ſome of them held a verge of land by certain ſervices, and ſome of them held by ſuch other ſervices, and that all of them held a Piſcary in common by 20. s. and that the Biſhop demanded 40. s. of them, and diſtrained them wrongfully; and in a ſecond plea by them it was, that they held by certain ſervices, and that the Biſhop did demand other ſervices, *&c.* Exception was taken to it, that a Piſcary doth not lye in tenure; to that it was ſaid, that that went to the action and not to the count, and it may be that the ſoil doth belong to the plaintiff as the water. It was the opinion of the Court, that the plaintiffs need not to ſhew that they held ſo much land *aqua cooperta*, as they are to do in an aſſiſe: Quere of that. It was ſaid in this Caſe, that they had no remedy at the Common Law: and that this Writ was in the nature of *Ne injuſte vexes*: and ſo if ſuch Tenants have common of paſture in ancient demeſne paying a certainty for every beaſt, and the Lord demandeth more, they may maintain ſuit againſt the Lord by *Monſtraverunt*, and that they ſhould not be put to an aſſiſe at the Common Law, of which opinion was *Thorpe* Chief Juſtice: but *Kirton* ſaid, that Piſcary or Common of paſture could not be ancient demeſne: for that nothing could be ancient demeſne, but what is holden or lyeth in Tenants: but in the principal Caſe, becauſe the plea was to the action, *Finchden* awarded, that the defendant ſhould plead to the reſt. M. 40. E. 3. 44, 45, 46.

4. If there be Lord and Tenant, and the Tenant holdeth by fealty and two ſhillings rent, and the Lord by encroachment and voluntary payment of the Tenant, had ſeiſin of more then he ought to have: the Law ſo greatly favoureth ſeiſins and poſſeſſions, that the Tenant ſhall not avoid this ſeiſin had by encroachment in an avowry, if it be not in caſe of a ſucceſſor, as in 4. E. 2. to avowry 204. is agreed; and in caſe of iſſue in tail as is holden in 20. E. 3. Avowry 131. But ſeiſin by encroachment ſhall be avoided in an Aſſiſe and Ceſſavit: and if the Lord diſtrain for the rent behind, and the encroachment alſo for the whole rent behind, the Tenant may tender that which is due of right, and may do reſcous if the Lord will not accept it, and the Tenant ſhall not be driven to a *Ne injuſte vexes*; but it ſhall be avoided in an action brought by the Lord for the reſcous, or in treſpaſs brought by himſelf for the diſtreſs for the ſum which was encroached, and which of right was not due. Cook. 4. part 11. *Bevils* Caſe. Cook 9. part 34. in *Buckells* Caſe.

5. The donor or leſſor ſhall not need in an avowry alledge ſeiſin, nor encroachment upon them ſhall bind them, becauſe the reſervation is their title: but if there be Lord and Tenant, and the Tenant maketh a gift in tail, or a leaſe for life, there remainder in fee, there encroachment upon the donee or leſſee ſhall bind them; for the Lord needs not to ſhew the commencement of the Seignory, but it ſhall not bind the iſſue in tail: ſo when the Law doth create a Tenure: as if Lord and Tenant be by fealty and the yearly rent of a Lamb; and the Tenant maketh a gift in tail to two men, and to the heirs of their two bodies without any reſervation, then the donees ſhall hold of the donor by the like ſervices as he held ever; yet if the donees having iſſue die, their ſeveral iſſues ſhall pay but one lamb; for the doner or his heirs in avowry ought to ſhew the tenure betwixt the Lord and the Tenant, and the gift in tail, ſo that it will appear to the Court, that but one Lamb at the time of the gift was due; and the Law, to the prejudice of the heirs of the donees, ſhall not encreaſe it. Cook 10. part 108. in *Hamfrey Lofields* Caſe.

6. In a *Ne injuſte vexes*, iſſue may be joyned betwixt them; and the defendant may put himſelf upon the grand aſſiſe, and judgement final ſhall be given in this Writ after the miſe joyned, if it paſs againſt either party, demandant or defendant, or if any of them be nonſuit or make default after the miſe joyned; but if after the miſe joyned the parties imparle untill another term and day, and after at that day the Lord who is the defendant makes default, it is a quere F. B. 11. If judgement final ſhall be given upon this default without any proces: It ſeemth to *Fitzherbert*, it ſhall: and ſo if the plaintiff at the day maketh default, he ſhall be nonſuit.

Niſi

Niſi Prius.

1. *Where it lyeth; and when. And where it lyeth in the Diſcretion of the Juſtices to grant it: where granted with a Proviſo, where not. And what Plea ſhall be allowed at the day of* Niſi Prius; *What not.*

1. A Man was wounded in one County, and died in another; and the heirs brought an appeal in the County where the death was, the defendant pleaded not guilty: It was holden by the Juſtices, that the Viſne ſhould come out of both Counties, and that the Viſne of each County ſhall be of the body of the County; and that the tryal ſhall be in the Kings Bench, and not by *Niſi prius*. M. 31. H. 8. *Dyer* 46.

2. In Debt upon a Bond of 40 l. for the payment of 20 l. at a day and place certain, The Defendant pleaded that he had paid the ſaid 20 l. according to the condition, upon which they were at Iſſue, and at the *Niſi Prius*, the Defendant gave in evidence that he had paid the money to the Plaintiff before the day, and that the Plaintiff had accepted of it; It was ſaid by the Court, That the payment before the day was a ſufficient diſcharge of the Bond; but becauſe the Defendant had not proved the ſame particularly but generally, the Court was of opinion, that they muſt find againſt the Defendant. M. 24. Eliz. in Com. B. *Gadst.* 10.

3. *A.* brought Debt againſt Sir *John Chicheſter* Executor of *Windham* Executor of *Lutterel*, upon an obligation of *Lutterel*; the Defendant pleaded that the ſaid *Lutterel*, the firſt Teſtator, was indebted upon a Statute of an 100 l. to *Windham*, and that after his death, goods of the value of 100 l. came to the hands of *Windham* as executor to *Lutterel*, which goods he adminiſtred and payed himſelf by way of Retainer: *Et ultra dicta bona ad valentiam* 100 l. &c. and ſo nothing in his hands. The Plaintiff averred Aſſets in the hand of *Windham* of the goods of *Lutterel*, *ultra* the ſaid 100 l. in *London*. And by *Niſi Prius* in *London*, Iſſue was found for the Plaintiff, that *Windham*, *tempore mortis ſuæ* had *diverſa bona* of *Lutterel*, &c. It was ſaid that this Iſſue was a jeofail, becauſe *Chicheſter* the Defendant anſwers nothing to the adminiſtration by them of the goods of the firſt Teſtator *L.* after the death of *Windham*; for it might be, that although *Windham* adminiſtred all the goods of *L.* which came to his hands; that yet the defendant *Chicheſter* might come to divers goods by ſeiſure, or action, which he ought to adminiſter: It was the opinion of the Court, that although this might be true; yet ſuch exception at the day of *Niſi prius* was not good, by reaſon of the uſage, and common courſe, to diſallow the exception at the day of *Niſi prius*. Tr. 2. Dyer 185. Sir *John Chicheſters* Caſe.

4. Note, It was holden by the Juſtices, that a *Venire facias*, with a Proviſo, is not grantable to the Defendant, but where he is actor or otherwiſe where there is Laches in the Plaintiff; but one Laches is ſufficient for all the ſuit: But if after the *Venire facias*, with Proviſo purſued by the Defendant, the Plaintiff ſueth another which is returned, and not that of the Defendant, becauſe here the Laches of the Plaintiff appears not upon Record, the Defendant ſhall not have a *Habeas Corpora, cum Niſi prius* with Proviſo, except that there be a new Laches in the Plaintiff. Tr. 4. Eliz. Dyer 225. 3. Eliz. Dyer ac.

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2. *Of the Record of* Niſi Prius *in what Caſes it ſhall be amended, and what not. And touching the day of* Niſi Prius, *and the day in Bank, and the Relation betwixt them.*

1. IN *Ejectione firmæ* againſt Huſband and Wife, of the ejectment of the wife; Not guilty being pleaded and tryed: It was moved in arreſt of Judgement, becauſe the Iſſue was pleaded in this manner: *Et dicunt quod ipſi in nullo ſunt culpabiles, &c.* And the Ejectment was made by the woman alone; and ought to have been, that ſhe was not guilty: And upon examination of the Plea Roll, and of the Record of *Niſi prius*, it appeared to the Court, that the Plea Roll was right; but the Record of *Niſi prius* miſtaken. In that caſe, it was ordered by the Court, that the Record of *Niſi prius* ſhould be amended, and made according to the Plea Roll: Tr. 9. Jac. in Coi B. *Coffe* and *Randals* Caſe. Brownlo. 1 pt 133.

2. In Action upon the Statute of *Winchester*, brought againſt the Hundred of T. The Plaintiff in his Declaration had miſtaken to allodge the very day of the Robbery; for he ſhewed the Robbery to be committed in *Octobet*, whereas in truth

it was committed in *September*: The Court was moved, That the Record which was taken out for tryal, but never put in, might be amended; for the notice given to the Hundred as the Record is, would appear to be before the Robbery; and the Court granted that it ſhould be amended. Th. 15. Jac. in Coi. B. *Cambyn*, and the Hundred of *Featrings* Caſe *Brownlo.* 1. ſt. 156.

3. Note the year of the Reign of the King was miſtaken in the Record of *Niſi Prius*; but the Record which remained in Court was very well: It was ruled by the Court that it ſhould be amended, for in as much as it was a ſufficient and certain Iſſue; this was ſufficient authority to the Iuſtices of *Niſi prius* to proceed; and nothing being miſtaken but the year of the Reign of the King, it ſhall be amended; for it is only miſpriſion of the Clerk. Hill. 8. Iac. in Coi. Br. Brownlo. 41. Vide 9. Eliz. Dyer 260. ac.

4. In *Trover* and *Converſion* of many parcels of goods (amongſt the reſt) the Plaintiff declared that he was poſſeſſed *de uno Spadone una equa precii* 53. 4. *d*: ſo as there was not any price at all for the Gelding: *Poph.* and *Yelverton* Juſtices, held the Declaration to be ill; for that to every thing there ought to be added the value, if it be a dead thing; and if it be alive, the price, which this wanted: But the other Juſtices held the contrary, and ſaid that that was not neceſſary, eſpecially where the thing is not demanded, but damages; and they held it was but a default of Form, which was aided by the ſtatute of 18. *Eliz.* but the other Juſtices, ſaid it was matter of ſubſtance. Afterwards upon viewing of the Roll in Court, although the Record of *Niſi prius* was ſo: yet the Roll is *de uno ſpadone & una equa precii* 53. 4. *d.* ſo that the price extends to both. Wherefore all agreed that it was good enough, and awarded that the Record of *Niſi prius* ſhould be amended according to the Roll; and judgement was given for the Plaintiff: M. 4. Jac. in B.R. *Wood* and *Smith* Caſe. Cro. 2. pt. 129, 130.

5. In Treſpaſs for breaking his Cloſe in the Pariſh of *Pancras* abutting upon Grays Inn Lane; the Defendant pleaded not guilty: and the Record of *Niſi prius* was Graves-Inn Lane; by reaſon of this miſpriſion, the Plaintiff was non-ſuit. Now in regard the Paper Book, and the Roll were good, viz. Grays Inn Lane, which was the true place, and it was but a miſpriſion in the Record of *Niſi prius*, which was void being variant from the Record here: A *Venire facias de novo* was prayed to try the Iſſue: And upon a Preſident ſhewed of Tr. 7. Jac. rot. 430. between *Farthing* and *Dupper*: Where in an action upon the Caſe, upon a Promiſe, in conſideration that he promiſed to pay 10 l. within ſix weeks, the Defendant aſſumed to do ſuch a thing, and for non-performance, brought the action; and upon *Non Aſſumpſit* pleaded, the parties being at Iſſue, the Record of *Niſi prius* was for conſideration that he promiſed to pay 10 l. within ſix moneths: And for this variance being againſt the truth and the former Record, the Plaintiff was non-ſuit: and upon adviſement of the Court upon 2. preſidents, produced, A *Venire facias de novo* was awarded. And for that reaſon, and upon the ſaid Preſident ſhewed it was ſo awarded in the principal Caſe Tr. 21. Iac in B.R. *Young* and *Eaglefields* Caſe: Cro. 2. pt. 670. vide *Godm.* 328. the ſame Caſe.

6. Error to reverſe a Iudgement in Co. B. the error aſſigned was, becauſe the Iudgement was there given againſt a dead man, the Defendant dying after the *Niſi prius*, and before the day in Bank: It was urged, that the day of *Niſi prius*, and the day in Bank were all one: and to warrant this, was vouched, 46. E. 3. 38. p. 12. that the day of *Niſi prius* and the day in Bank is all one in Law; It was the opinion of the whole Court: That the Iudgment given was erronious, becauſe the Iudgment is not true, the ſame being given at the day in Bank againſt ſuch a one, and there was no ſuch perſon, he being dead before; and ſo by the Rule of the Court the Iudgement was Reverſed. Tr. 12. Iac. in B.R. *Sourdes* and *Deanys* Caſe. Bolſtr. 2. pt. 141. vide Paſc. 36. Eliz. *Lewis* and *Smiths* Caſe, ac. *ibid.*

Nonſuit.

1. *Where the Plaintiff or Demandant ſhall be Nonſuit, and in what Actions, and where and in what Actions it ſhall be peremptory, and in what not: And when after Verdict, where not.*

1. NOnſuit is the relinquiſhing, or renouncing of a Suit, commenced and brought by the Plaintiff or Demandant, againſt the Defendant or Tenant, after the Defendant or Tenant hath appeared, and the matter proceeded in in ſome degree, tending to an Iſſue betwixt the parties.

2. The Queen brought a *Quare Impedit* againſt the Biſhop and the Incumbent; and they pleaded ſeveral Pleas. The Queen did not proſecute her Suit, but let it long depend; it was prayed, that ſhe

ſhe might be called Nonſuit. It was the opinion of all the Court, and alſo of the Preignotories, that the Queen cannot be Nonſuit; but the Suit after a year may be diſcontinued upon the prayer of the party; and in the Caſe of a common perſon, the Plaintiff may diſcontinue it within a year, but the Defendant cannot diſcontinue it till after the year: Fr.29 Eliz. in Co.B. The Queen and *Leigh's* Caſe, Goldesbr. 53.

3 Note, It was agreed by the whole Court, That in a Replevin, the Plaintiff cannot diſcontinue his ſuit without the privity of the Court; for that, as the *Caſus Brevium* ſaid, the entry is *Recordatur per Curiam*: And if the Plaintiff would diſcontinue without moving the Court, the Defendant may enter the Continuance, if he will. Alſo it was holden in this Caſe, that where an original is diſcontinued, the Defendant ſhall not have coſts; but if the Plaintiff be Nonſuit, the Defendant ſhall have coſts by the Statute of 31. H.8. cap.16. But after diſcontinuance in a Latitat, the Defendant ſhall have coſts by the ſtatute of 8 Eliz. cap.2. And in this caſe, it was alſo agreed, that the Plaintiff may be Nonſuit after a Demurrer: M.30. Eliz. in Co. B. *Bear* and *Underwoods* Caſe, Lion 105.

4. In Debt for 10.l. the Defendant as to 5.l. confeſſed the debt; and for the other 5. l. pleaded that he owed the Plaintiff nothing, and would have waged his Law; and at the day of wager of Law, the Plaintiff would have him nonſuited: But it was agreed by all the Court, that if the Plaintiff be Nonſuited, he ſhall loſe all, as well the debt confeſſed, as the other: M.8. Iac. in Co. B. Brownlo, 2.pt.41. vide Paſc.19. Iac.Bolſtr.1.pt. 194. ac.

5. In Treſpaſs for a way: The Defendant pleaded a Plea in Bar, which was inſufficient, and after the Plaintiff was Nonſuited: It was reſolved in this caſe, that the defendant ſhould have his coſts againſt the Plaintiff: But it was holden by the Court, that if a default be in an Original Writ, and afterwards the Plaintiff is Nonſuited, there the Defendant ſhall not have coſts, becauſe where the original is abated, it is as if no ſuit had been: M. 11. Iac. in Co. B. *Laiſons* Caſe Godbt 220.

6. Vide. The Caſe of *Young* and *Engleſield*: Tr.21.Iac. in B.R. Godbt. 328. in the Title *Niſi prius* before: Where the Record of *Niſi prius* is miſtaken; that there before the Iury be ſworn, the Plaintiff may be nonſuit; and a new *Venire facias* to try the Iſſue betwixt the parties, may iſſue forth *de Novo*.

7. Debt was brought upon an Obligation, and the Defendant pleaded a plea, and after it was demurred upon; and the caſe being argued by Counſel at the Bar, the opinion of the Court was againſt the Plaintiff: and a Rule given, that Iudgement ſhould be entred for the Defendant: and thereupon the Plaintiff prayed that he might be Nonſuited; and becauſe he had the ſame Term appeared, and had argued his caſe by his Counſel, and had prayed Iudgement, it was the opinion of the Court, that he could not be Nonſuited the ſame Term: Fr.2. Iac. in B.R. *Adderley* and *Adderleys* Caſe: Cro.2.pt 35. The ſame point adjudged the ſame Term in *Philps* and *Richards* Caſe: *ibidem*.

8. If at the day of the Return of the *Habeat Corpora*, or the *Diſtringas*, the Iury and the Defendant do appear, although the Writ be not returned; If the Plaintiff doth make Default, he ſhall be Nonſuited, becauſe the parties had day in Court by the Roll; and ſuch was the opinion of the Court: Hill.12. Eliz. Dyer 28.b. Vide 4. Eliz. Dyer 214. ac. And vide, That where the Iury was called, and did not appear full, and the Defendant did not appear: it was the opinion of the Iuſtices, that the Enqueſt ſhall be awarded by default, becauſe the parties are demandable before the Iury do appear: and if the Plaintiff had made default, he ſhould have been Nonſuited: M. 10. Eliz. Dyer.265.

9. A *Venire facias* was returned *Quinq; Paſch.* the parties appeared, but the Sheriff did not return the Writ; therefor a *Venire facias* was awarded *de novo* returnable, as at firſt, and their continuance made upon the plea Roll: and yet at the *Quinq; Paſch.* the defendant was eſſoined: and upon the *Venire facias*, the Plaintiff appeared not, being demanded, made default; and this Nonſuit was entred upon the Eſſoin Roll: and notwithſtanding that Nonſuit, the Plaintiff proceeded in the Iſſue, which was found for him; and that was by the advice of the Court; for that the recording of the appearance of the parties in Court, at the day when the eſſoin was caſt, did confound the eſſoin without any challenge or exception to it: and in the Caſe where the *Venire facias* is ſerved, and returned at the firſt day, and then the Defendant is eſſoined, it ſhall ſerve to no purpoſe: 1. Paſ.5.Eliz. Dyer 224.

10 At a Plures Repleg. returnable in Banco, the Sheriff returned, *Quod Catalla elongata, &c. & quod nullam aliud breve &c.* Whereupon a Withernam was awarded: The Sheriff returned the Withernam, and that according to the Writ, the Plaintiff had found Sureties to proſecute; and in the return had alſo returned that he took ſix beaſts in Withernam, which he delivered to the Plaintiff *quoſque, &c* and that he had attached the defendant: and he returned that the defendant had nothing upon which he might be attached: Now the Plaintiff

plaintiff appeared not, but the defendant did appear gratis, and prayed that the plaintiff might be demanded; and if he will not appear and prosecute, that the defendant might have a special Writ to the Sheriff to make deliverance; for he said that in truth the propriety of the cattel was in him: It was debated in Court, if the plaintiff upon this Plures might be nonsuit, as if it were upon a *Replegiare*; but at last both parties appeared: it was said by *Lennard Prothonotarie*, that notwithstanding the first return, that yet the Sheriff had made Replevin; and in a Replevin, the plaintiff cannot be nonsuit: wherefore the Withernam was well awarded. M. 2. El. Dyer 189.

11. In a Replevin, the defendant avowed for damage feasant, and after issue joyned, the plaintiff was nonsuit: it was a doubt if the defendant should have costs and damages; because the Statute of 7. H. 6. c. 4. speaks only where the plaintiff is barred, and where the Avowry is for rent, customes or services; but it was resolved, that the Statute of 21. H. 8. extended to nonsuits, as well as where the plaintiff was barred. Pasc. 4. M. Dyer 141. vide Plo. Com. 82. in *Partridge* and *Strangers* Case &c.

12. Note that regularly, that upon a nonsuit the demandant or plaintiff may bring another action of the like nature, &c. but yet in an attaint, if the plaintiff after appearance be nonsuit, it is peremptory, and he is for ever barred from bringing any attaint against the first Jury, and the reason is for the faith which the Law gives to the verdict, and for the terrible and fearful judgement which should be given against the first Jury if they should be convicted, and therefore upon the nonsuit, the plaintiff shall be imprisoned, and his pledges amerced. Cook 1. part Institut. 139.

13. If damages be recovered against divers in a Writ of Conspiracy; in that case it was adjudged that they all ought to joyn in an attaint; and in such case it was said, that the nonsuit of one of them should not hurt the other no more then in an *Audita Querela*, or a *Scire facias* upon a release. 35. H. 6. 19. Cook 6. part in *Ruddocks* Case.

14. The plaintiff was nonsuit in a *Quare impedit* after appearance; it was holden by the Court, that the same was a good bar in another *Quare impedit*, brought within the six months, and that the defendant should have a Writ to the Bishop; and so it was said is the Law, if the plaintiff discontinueth his suit; but if the Writ abateth for false Latine, or for insufficiency of forme, there the defendant shall not have a Writ to the Bishop; *vide* Cook 7. part 27. Sir *Hugh Portmans* Case.

15. A Writ of false judgement was brought of a judgement given in the County Court upon a Plaint there in an action upon the Case upon an Assumpsit: The Writ was brought to delay the execution of the costs and damages: The record was removed, and the Writ served; and the plaintiff was nonsuit, whereupon the defendant prayed a *Scire facias* against the plaintiff, to have execution of the judgement; and upon good advice of the Court, the Writ was granted; for otherwise he should have no judicial Writ to have execution. M. 16. Eliz. Dyer 329.

16. Three copartners were; one aliened her part, the other two brought a Writ of Partition against the alienee; the opinion of the Court, that the Writ should abate, because she might have a Writ in such case by order of the Common Law: but if the two copartners had joyned against the aliened, and one of them had been nonsuited, she should be summoned and severed, and her part should be parted and severed as well as the two other parts. M. 8. Eliz. Dyer 243.

17. An Infant plaintiff appeared by his Attorney, and afterwards became nonsuit in the action, and costs given against him according to the Statute of 4. Jac. He moved the Court to have some mitigation of the costs, because that his appearance was by Attorney; but the Court denyed to mitigate the costs: for that after nonsuit and costs given according to the statute, the parties are out of Court, and the plaintiff hath now pretermitted his time; and he being plaintiff, it is his own act to be nonsuit; and therefore they declared, that after his nonsuit, they could not give him any remedy. And whereas it was said privately that they would have a Writ of Error, *Mas Secondary* made answer to them, that by a Writ of Error in that Case they could not have any benefit after a nonsuit. Hill. 9. Jac. in B. R. *Hawkes* and *Hawkes* Case. *Bolst.* 1. part 199.

18. Trespass against A. B. and C. A. pleaded not guilty, B. and C. justified, the plaintiff replyed, a demeaner was joyned, depending which the issue was tryed against A. and damages and judgement against him. After judgement the plaintiff entred *Nolle prosequi* against B. and C. this being in B. R. they all brought Error in the Exchequer Chamber, and assigned for Error, that the *Nolle prosequi* discharged all the Defendants: It was agreed by the Court, that if the *Nolle prosequi* had been before judgement, it had discharged the whole action, and so it had been if judgement had been given against them all, and then the plaintiff had entred *Nolle prosequi* against the two as before for nonsuit, or release, for discharge of one discharges the rest: but because in this case the action was at an end against A. and no judgement against the other two, so as they are divided and not subject to the damage found against him, it was adjudged that he was not discharged. Hill. 12. Jac. in B. R.

Parker

Parker and Sir *John Lawrence* Caſe. Hob. 70.

19. In treſpaſs againſt I. S. for beating and wounding him, the plaintiff had judgement, & upon error brought in the Exchequer Chamber, upon an occaſion of aſſignment of error, the Court took this difference: that where a man hath a perſonal action againſt two defendants, if they plead ſeverally, and he be nonſuit againſt the one, before he hath judgement againſt the other, that he ſhall be barred againſt both, for that it works in the nature of a releaſe of the whole; but where there is but one defendant, and he pleads to one party in iſſue, and the other demurres, the plaintiff may be nonſuit for one point, and proceed for the other. Tr. 12. Jac. *Slowley* and *Eveleys* Caſe. Hob. 180.

20. In an action upon the Caſe for words, *viz.* I arreſt you for felony, the plaintiff was nonſuit: it was moved, that the defendant was to have no coſts, becauſe the words were not actionable, and ſo judgement was for that, and not for the nonſuit: and ſo it was ſaid, it had been ruled in B R. But Hob. Chief Juſtice was of opinion, that the defendant ſhould have coſts upon the nonſuit, for that the vexation was the more groſs if there was no cauſe of action. Hill 15. Jac. in Co. B. *Drury* and *Fitcher* Caſe. Hob. 219.

21. Note in all actions perſonal, as debt, detinue, and the like actions without force, or deceit to the Court, and alſo in actions which comprehend force or deceit to a Court of Record, if the plaintiff be barred, nonſuit, or the Writ abate becauſe vitious in matter or form, the plaintiff ſhall be amerced only; but if the Writ abateth by the death of one party, or if one party appeareth, and the other be nonſuit, (which in Law in a perſonal action is a nonſuit of both) he who ſurviveth, and appeareth, ſhall not be amerced; for no default is in him, but in him who appeareth not. Coo. 8. pt. 61. in *Beechers* Caſe.

22. Note, there is difference in real actions and perſonal, between a plea to the action of the Writ and a plea to the Writ; for if the demandant or plaintiff hath miſtaken his action, ſo as the plea of the Tenant goeth to the action of the Writ, as Formedon in the Reverter, where it ſhould be Formedon in the Remainder, ſuch action without judgement upon verdict or demurrer, *&c.* doth not bar the demandant of his rightful action; and therefore if the demandant in ſuch caſe be nonſuit, or the plea be diſcontinued, he may bring his rightful action; but if the plea be but to the Writ, in ſuch caſe although the plea to the Writ be adjudged againſt the demandant upon demurrer or verdict; yet he ſhall maintain the ſame Writ again, ſo that the judgement doth extend but to the Writ. Cook 6. part 7, and 8. in *Ferrers* Caſe.

23. A. and B. were bound joyntly and ſeverally in an obligation to I. S. who afterwards brought debt upon the bond againſt both: After appearance I. S entred a Retraxit againſt B. and if this was a diſcharge of A. alſo was the queſtion: It was ſaid that it was a diſcharge; for it doth amount to a releaſe, and it is clear, a releaſe to one is a releaſe to both; and of that opinion was *Barkley* Juſtice; for by his releaſe he doth confeſs he hath no cauſe of action. *Croke* Juſtice ſaid it was not a releaſe, but *quaſi a Releaſe*; and if the obligee ſueth one, and covenanteth with him that he will not ſue the other, the ſame is in the nature of a releaſe, and yet the other ſhall not take advantage of it; and in this caſe becauſe it is but in the nature of an Eſtoppel, the other ſhall not take advantage of it. Paſc. 17. Car. in B. R. *Payne* and *Bennit* Caſe. Miſh. 95.

Non eſt factum.

Vide Lib. 1. fol. 598. in title Deeds, Sect. 1, 2, 3.

1. DEbt upon a bill, the defendant pleaded *Non eſt factum*, and it was found a joynt bill made by him and another: it was adjudged for the plaintiff: and it was reſolved, that when two are joyntly bound in an obligation, none of them can plead *Non eſt factum*, for they have ſealed and delivered it, and therefore if the one appeareth, and the other maketh default and is outlawed, he who appeareth ſhall be charged with the whole. 2. It was reſolved, that when a deed is voidable, and ſo remaineth at the time of the pleading, in ſuch caſe he cannot plead that it is not his deed, but ſhall avoid it by ſpeciall pleading judgement of action; the ſame Law, if it be void by an Act of Parliament, he ſhall not plead *Non eſt factum*, but he ſhall ſhew the ſpecial matter for his advantage and demand judgement of action. Cook 6. part 119 *Whelpdales* Caſe. vide Cook 3. part 39. in *Lincoln* Colledge Caſe. act.

2. If an obligation be delivered to another to the uſe of the obligee, and it is tendered to him and he refuſeth it, now the delivery hath loſt its force, and the obligee can never agree to it afterwards: and therefore to ſuch deed the obligor may plead *Non eſt factum*: and ſo it is if an obligation be delivered to a *feme covert*, and the husband doth diſagree to it, the obligor may plead *Non eſt factum* to it: vide 1. Eliz. Dyer 167. cont. & vide Cook 3. part

3. part 26. in *Butler* and *Baker's* caſe, by the opinion of Cook: that if an obligation be made to A. and delivered to B. to the uſe of A. this is the deed of the obligor preſently, and although it loſe its force afterwards by the refuſal of A. yet the obligor cannot plead *Non eſt factum* to it.

3. In debt upon an obligation, the defendant pleaded *Non eſt factum*, and before the day of appearance of the enqueſt, the miſe had eaten the label unto the which the ſeal was fixed, by the negligence of the Clerk in whoſe cuſtody it was; in that caſe, the Juſtices charged the Jurours, that if they found the deed to be the deed of the defendant at the time of the deed proved, they ſhould then give in a ſpecial verdict, which they did accordingly. 36 H. 8. *Dyer* 59.

4. A man ſeiſed of a houſe and other lands holden in Capite, by his deed gave the ſaid houſe and lands to I. S. to have to him and his heirs, and in the houſe delivered the deed to A. in name of ſeiſin of the ſaid meſſuage and lands contained in the ſaid deed; it was reſolved, that the actual delivery of a deed to the party himſelf is a good delivery of a deed, and againſt it he cannot plead *Non eſt factum*, and it was reſolved, that a writing may take effect by words only without any actual delivery of it: and in that caſe, it was holden, that if A. maketh a writing or deed to B. and ſeal and deliver it to B. as an eſcruple to take effect as his deed upon a condition to be performed, that the ſame is the deed of A. preſently, and againſt ſuch deed he cannot plead *Non eſt factum*; for the Law reſpects the delivery to the party it ſelf, and the other words ſhall be taken to be but ſurpluſage: Cook 9. part 137. *Thoroughgood's* Caſe.

5. I. S. was Sheriff of *Oxford*, and an obligation was made to him thus, *Noverint univerſi per præſentes me I. S. teneri I. S. armigero*, in 60. l. and after the delivery of the deed, theſe words, *viz. vicecomit. Oxon*) before the words (in 60. l.) and after the words (I. S. Eſquire) were enterlined without notice of I. S. it was adjudged in that caſe, becauſe that addition was without the privity of the party in a place not material, that the obligation was good: and in this caſe, it was reſolved, that when a lawfull deed is raſed, by which it becomes to be void, that in ſuch caſe, the obligor may plead *Non eſt factum* to it, or may give the matter in evidence, that at the time of the plea pleaded it was not his deed. 2. That when a deed is altered by the plaintiff himſelf, or a ſtranger in a point material by addition, alteration, interlining, raſure or other means, the deed is void, and the party may plead *Non eſt factum* to it; but if a ſtranger without the privity of the party alter a deed in any of the ſaid wayes by interlineation, raſure, &c. in a point not material, the ſame ſhall not make void the deed. Cook 11. part 27. *Henry Pigot's* Caſe.

6. A Charter party indented between the Maſter and Owners of a Ship of the one part, and divers Merchants of the other part, was made; by which the Maſter and owners covenant to ſhip over certain merchandizes at ſuch a port beyond ſea, and to tranſport them to the City of *London*; for which the merchants covenant ſeverally, that the one merchant ſhall pay 3. l. and another 5. l. &c. and to the performance of all and ſingular the covenants, *quilibet mercator obligat ſeipſum* in double the freight; the ſeal of one of the merchants was broken from the deed: it was reſolved in this caſe, that although the merchants do joyn in covenant, yet this word (*ſeparatim*) makes them ſeveral covenants. 2. Reſolved, that although the covenants of the Maſter and owners were joynt, yet the covenants on the parts of the merchants were ſeveral, and for that cauſe, if the ſeal of one of the merchants was broken from the deed, the ſame did not make the whole deed void, but only againſt him; but if any of the ſeals of the Maſter and owners had been broken from the deed, all the covenants had been avoided, and againſt ſuch deed they might have pleaded *Non eſt factum*. Cook 5. part 23. *Matthewſons* Caſe.

7. Debt upon an obligation againſt an Executor, the defendant pleaded *Non eſt factum* of the teſtator upon a ſpecial verdict; the caſe was, the teſtator with two others were joyntly and ſeverally bound in an obligation, and afterwards the ſeals of the two others were eaten with Mice and Rats; and whether that was the bond of the teſtator was the queſtion: it was objected in this caſe, that the obligation was good, becauſe that where they are bounden joyntly and ſeverally, it was all one as if they had been ſeveral obligations according to *Matthewſons* Caſe. And Tr. 2. Car. in B. R. *Bunting* and *Symonds* Caſe was vouched, where twenty eight merchants were bounden joyntly and ſeverally, and three of their ſeals were broken from the deed, and reſolved, that the deed did remain good againſt the others; on the other ſide it was ſaid, that the whole deed was avoided, and that the defendant might plead *Non eſt factum* to it; for where it was joynt at the firſt, note if the deed ſhould ſtand good againſt the defendant only, whereas it was his bond and the bond of others at the firſt, and ſo now the ſame bond. And whereas it was objected this is a caſualty, and ſhall not prejudice the plaintiff; it was anſwered, the ſame ſhall not help him, becauſe it was his own Laches and default; and where the bond is altered in a material point or place by a ſtranger, the ſame ſhall avoid the deed in all: and this caſe differs from *Matthewſons* caſe, becauſe there the cove-

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names were several and not joyne as this obligation is. The whole Court was strongly inclined, that judgement in the principal case should be given for the defendant; and their reason was, that if the obligor by his act, or by his own Laches discharge one of the obligors, where they are joyntly and severally bounden, the same shall discharge them all: but the case was adjorned. Mich. 17. Car. in B. R. *Bayly* and *Garfords* Case, Mich. 125, 126, 127.

8. Debt against I. S. the plaintiff declared, that the defendant stood bound to him in *septingent. & quinquagint. libris*, and produced the writing obligatory, whereof the words were *septuagint & quinquagint libris*: whereupon the defendant pleaded the variance, and thereupon a demurrer, and it was adjudged for the plaintiff that it was no cause to abate the Writ; and thereupon the defendant pleaded *Non est factum*, and the Jury found the writing aforesaid *obligatorie de summa septuagint. & quinquagint. librarum per quod predict.* the plaintiff *per breve suum predict. exigit de predict. I. S. septingent. & quinquaginta libras*, sealed and delivered by I. S. to the plaintiff as his deed, and prayed the advice of the Court; the Court adjudged the plaintiff should recover the 750. l. demanded and damages and costs: note there was nothing either pleaded by the party or found by the Jury, that it was meant for 7000 l.: error was afterwards brought upon the Judgement. Tr. 44. Eliz. in C. B. 1931. *Walter* and *Pigots* Case. Hob. 216.

9. A man was bound in an obligation by the name of *Edmund*; and his true name was *Edward*: an action of debt was brought upon the bond against his executors by the name of *Edmund*, who demanded *Oyer* of the obligation, and then pleaded *Non est factum* of their Testator: and it was found by an enquest in *London*, that it was his deed, *viz.* the deed of *Edmund*; it was moved in arrest of judgement: *Quod curtess nihil caperat per Billam*: & such was the judgement of the Court: and it was said that the plea was a good plea, and that so it had been adjudged in the Exchequer Chamber, by reason of the misnaming of the party: But quere of it. Tr. 20. Jac. in B. R.

Non residency.

1. THe Statute of 21. H. 8. c. 13. sect. 10. is, that every spiritual person or persons, promoted to any dignities, benefices, with any Parsonage or Vicarrige, shall be personally residente and abiding, in, at or upon his said dignity or benifices, or at one of them at the least: and in case such spiritual person keep not residence at one of his said benifices, but absent himself willfully by the space of one month together, or by the space of two months, to be accounted at several times within one year, and makes his residence and abiding in any other places, then he shall forfeit for every such default 10. l.

2. In trespass brought the defendant pleaded not guilty; the Jury found the defendant Vicar of D. and that he such a day leased his Vicaridge to I. S. for three years rendring rent, which I. S. assigned one acre thereof to the plaintiff, and the Def. was absent several months in one year: *viz.* sixty dayes in every quarter: but they do not finde the Statute of 13. Eliz. c. 12. of Leases: in this case, it was adjudged for the defendant; for the Statute of 13. Eliz. is a general Law; for although it extends but to those who have care of souls; yet in respect of the multiplicity of Parsonages and Vicariges in *England*, the Judges must take notice of it generally according to the Statute. Vide Cook 4. pt. *Hollands* case, and so must they of the Statute of 21. H. 8. c. 13. of *Non Residence*: M 5. Jac. in Co. B. *Jennings* and *Hethersaits* Case. *Brownlo* 1. part 102.

3. In an information upon the Statute of 21. H. 8. c. 13. upon a special verdict it was resolved by the Court, That the Parson ought to abide upon his Rectory, *viz.* the Parsonage house, and not in any other house, although it be within the same parish; for the Statute is intended not only for the serving of the cure and for hospitality, but also for the managing of the houses, not only for himself, but also for his successors, that they also may keep hospitality there: and in that case it was resolved, that lawful imprisonment without covin was a lawful excuse of *Non residencie*, and so if there be not any house there: also sickness without fraud is a good excuse, if the patient remove by the advice of his Physitian. Cook 6. part 21. *Goodale* and *Butlers* Case.

4. The Case was: Dr *Newman* was incumbent of the Rectory of S in the County of *Kent*, and was also seised of a house in S. aforesaid for lease within twenty yards of the said Rectory: the Mansion house of the Rectory was in good repair, and Dr. *N.* held that in his own hands, and did not let it to any other: and he inhabited in the said messuage and not in the Parsonage house: and if in that case the Dr. was *Non residens*, and incurred the penalty of the Statute of 21. H. 8. was the question: It was said in his behalf, that it appears by the verdict, That the Dr. held the Parsonage house in his own hands; upon which it was gathered that his servant was resident in it, which is the

reſidency of the Maſter: and it was alſo ſaid, that by the council of *Lateran* all the Pariſh is made the Benefice of the Parſon, and therefore he might reſide in any part of the Pariſh: and it was ſaid, that this caſe differed from *Fuller* and *Goodales* caſe; for that there the Parſon demiſed all the Parſonage houſe, but only one chamber, and was not reſident in that, but in his copy-hold within the Town. In this it was anſwered, that although all the Pariſh may be ſaid the benifice of the Parſon; yet that is not the benifice which the Statute intended; for the cauſes of making of the Statute were, hoſpitality, and relief of the poor, and reparation; and that it be done in and upon the Parſonage houſe: but the opinion of the Court was, that this reſidence of the Dr in his own meſſuage was not a reſidence intended by the Statute: there was no judgement in the caſe, the matter being compounded by the Lord *Cook* H. 8. Jac. in Co. B. *Lowning* and Dr. *Newmans* caſe. *Brownlo* 3. part 54, 55.

5. It was covenanted between A and B that A ſhould preſent B to the Church of D and that afterwards B. ſhould leaſe the Parſonage to A. or to any other perſon named by him, and that he ſhould not reſign: and B. was bound to perform theſe covenants: B. is preſented to the benifice, A. brought an action of covenant, pretending that he could not enjoy his leaſe by reaſon of the abſence of the Parſon, *&c.* and the leaſe was made to the Curate at the nomination of A: B the Parſon ſaid, that the obligation to perform the covenants was void, for that the Statute of 14. E. c. 11. ſaith that all leaſes, *&c.* made by any Curate ſhall be of no better force, then if they had been made by the benificed Parſon himſelf. It was ſaid by *Tanfield*, that by the Statute of 13. Eliz. when a Parſon leaſeth to his Curate, who leaſeth over to another, that the Statute doth not make the leaſe void by the abſence of the Parſon, but of the Curate by fourty dayes: quere of that, for it ſeemeth, that by the Statute of 14. Eliz. the Curate cannot leaſe, *&c.* Paſc. 30. Eliz. in B.R. St. *John* and *Pettits* Caſe. Leon 100.

6. The Prior of *Bath* was ſeiſed of a Grange, or Farm called *Barton* near *Bath* in fee, and he and the Covent leaſed that by deed indented to H. B. and to his wife for life, the remainder to W. B. their ſon for his life, *ſi ipſe inhabitare vellet & reſidens eſſe omnino de & ſuper prædict. Grangium.* It was the opinion of the Juſtices in that caſe, that the leſſee might be reſident in any other place then in the Grange houſe, then by poſſibility it might be intended, that the leſſor might be defeated in his intent, which was, that the Grange houſe ſhould be repaired: *Plow. Com. Calthorpe* and *Bejopſions* Caſe. act. And ſo it was ſaid, that that might be the reaſon that moved the makers of the Statute of 21. H. 8. to be of opinion that the Parſons ſhould be reſident upon the Parſonage houſe, for that by that means the Parſonage houſe ſhould be well kept and maintained in reparations, and ſhould not be left to the ſucceſſors in dilapidations: And it was ſaid, that the Proviſo in the cloſe of the Statute of 21. H. 8. which is, that it ſhall be lawful for any ſpiritual perſon to take to farm any Manſion houſe having but an Orchard or Garden in any City, Borough or Town, ſo that by that Proviſo, they have no colour to be *Non reſident* upon the Parſonage houſe: but it was ſaid, that *Non reſidencie* by compulſion was not within the Law. *vide* Mich. 40. Eliz. *Gatheſtr.* 170. act.

7. A Parſon made a leaſe by Indenture for twelve years, and covenanted to ſuffer the leſſee and his aſſignes to enjoy for thoſe years and that he would not do any act, by which the benifice ſhould become void. And that one A a farmer of part of the tythes, ſhould pay 8 l. yearly for ſeven years, and he was bound to perform the covenants: now in debt brought upon the obligation, he pleaded performance of the Covenants on his part to be performed till 20 Eliz. at which time he himſelf was abſent by the ſpace of 80 dayes generally, but he did not ſpeak of the St. of 13. E. c. 117. and 14. Eliz. c. 11. and as to the covenant in the negative, he ſaid nothing: in that caſe it was holden, that he needed not to expreſs that the farmer paid the 8. l. becauſe it is implyed, in that he performed the covenants by him to be performed; but it is a quere in that caſe, if the covenants and obligation were void *ab initio*; or from his *Non reſidencie* only before: and *vide* 23. Eliz. *Dyer* 372.

Notice.

1. *Where Notice is requiſite, where not? where it is to be given of a thing done, or to be done. To whom, and when to be given: And what ſhall be a ſufficient Notice, what not?*

1. IN a Caſe in the Chancery, this queſtion did ariſe: If *A.* be ſeized in truſt and confidence to the uſe of *B.* and his heirs: and *A.* ſelleth the Land to one who hath Notice of the Truſt, to whoſe uſe ſhall the vendee be ſeized? and if one before the ſale cometh to the Vendee, and ſaith to him Take heed how you buy ſuch Land;

Land; for *A.* hath nothing in it, but in truſt to the uſe of *B.* and another comes to the Vendee, and ſays to him, It is not as he is informed; for *A.* is ſeized of this Land abſolutely: If this Caveat given to him, *ut ſupra*, be a ſufficient Notice of the Truſt, or not: It was ſaid, That it was holden in the Star-chamber in *Booths* Caſe, That if a man ſay to another, Take heed how you publiſh ſuch a writing, for it is forged; and notwithſtanding the party doth publiſh it: it is a ſufficient Notice to the publiſher, that the Deed was forged: And *Popham* Chief Juſtice put this Caſe. If any one ſay to me, Take heed how you entertain *A. B.* for he hath committed ſuch a Felony, and I giving no credit to the report receive the party, where in truth he had committed the Felony, that in this caſe I am acceſſory to the Felony: *Egerton* Lord Keeper ſaid, He would not draw blood upon ſuch an opinion: and in the principal Caſe he ſaid, That the Caveat given was no notice; for flying reports are many times Fables, and not truth; and if it ſhould be admitted for a ſufficient Notice, then the Inheritance of every man might eaſily be ſlandred. Hill. 43. Eliz. in Cancel. *Wildgoſe* and *Waylands* Caſe. Goldesb. 147.

2. In an *Aſſumpſit* the Caſe was, *R.* bought 2. weighs of *Barly* of the Plaintiff, and promiſed to pay for them as much as the Plaintiff ſhould have of another, abating one penny only in every Buſhel. The Plaintiff ſhewed, that after the agreement, he ſold to *I. S.* 2. weighs for 18 l. with abating one penny in every buſhel only by 17 l. 10 s. It was the opinion of the Court, that becauſe it did not appear in the Declaration, that notice was given to the defendant, that I. S. had given 18 l. the judgement was reverſed: and this difference was taken, if the agreement be, that he ſhall pay ſo much as I. S. in particular paid there, *quia tenetur de perſona*, the defendant at his peril ſhall enquire of him, and the plaintiff is not bound to give notice; but when the perſon is altogether uncertain, there the plaintiff, to entitle himſelf to the action, ought to give notice. Tr. 15. Jac. in B. R. *Holdings* Caſe. Cro. 2. part 412.

3. Debt upon an obligation; the condition was, whereas I. S was become Apprentice to the plaintiff, if he at any time during his apprentiſhip imbezeled any of his Maſters goods, that if the defendant after proof thereof made by the confeſſion of the ſaid I. S. or otherwiſe, and notice thereof given, ſhould make ſufficient recompence for ſuch things ſo imbezeled, that then, &c. The defendant pleaded that no proof was made by the confeſſion of I S. or otherwiſe: the plaintiff replyed ſuch a day and year *probatio facta fuit*, that I. S. had imbezeled 4 l. of his Maſters goods, and that the ſame day, the plaintiff gave notice thereof to the defendant, it was demurred upon, and the demurrer ruled good for theſe cauſes, becauſe it is not alledged in fact, that he imbezeled ſo much. 2. The condition is, if he imbezel, and it be ſufficiently proved; and it is not ſufficient to ſay that proof was made, but he ought to alledge the fact, that there was ſuch an imbezelling. 3. Becauſe it is not alledged how the proof was made; for the defendant hath three months after proof and notice to make ſatisfaction: it was adjudged for the defendant. Tr. 16. Jac. in B R *Lee* and *Fudges* Caſe. Cro. 2. part. 488.

4. The ſummons of a coppyholder to appear at the Lords Court was at the Church; and there upon the coppyholder did not appear: it was the opinion of the Court, that the ſame was no cauſe of forfeiture of his coppyhold, becauſe it was not ſpecially ſhewed, that it was the cuſtom; and it ſhall be hard to make it a forfeiture; for perhaps the coppyholder had not notice of it; and ſo it was ſaid, it was holden in the Lord *Dacres* and *Hurlſtons* Caſe; and the Court held, that notice ought to be given to the perſon, and the refuſal muſt be wilfull. M. 31. Eliz. in B. R. Sir *John Branches* Caſe. Leon. 104.

5. In an action upon the Caſe, the plaintiff declared, that the defendant in conſideration of the love which he bare to his Father, did promiſe, that if the plaintiff would procure a diſcharge of a debt of I.S. which his father did owe to I.C. that he would ſave the plaintiff harmleſs againſt I.S. and proteſted that he had diſcharged the father of the debt, and is become bounden to the ſaid I. S. in a bond for the ſaid debt, upon which bond I. S. hath ſued the plaintiff, and he recovered and had execution: it was ſaid the declaration was not good, becauſe the plaintiff hath not ſhewed that he had given notice to the defendant of the ſaid obligation, or of the ſuit brought againſt him: but the opinion of the Court was, that the declaration was good, notwithſtanding the exception; and in that caſe it was ſaid, that if I be bounden to you to make ſuch an aſſurance as I. S ſhall adviſe, I am bound at my perill without notice; but if I be bounden to make ſuch aſſurance as your counſel ſhall adviſe, there notice ought to be given unto me. M 30. Eliz. C. R. *Atkinſon* and *Rolfs* Caſe. Leon. 105.

6. Error of a judgement in C B. in Aſſumpſit: where the defendant aſſumed in conſideration of divers ſums of money paid to him, that if C. affirmed at his return from beyond ſea, that he received of the plaintiff 20. l. that the defendant would pay the 20. l. upon *Non Aſſumpſit* adjudged for the plaintiff. Error brought, and aſſigned for Error that it is not ſhewed before whom he affirmed, nor that the defendant had notice given him of the affirmation: it was reſolved, that the

defendant is to take notice of the affirmation at his perill, and the plaintiff is not bounden to give him notice; for the act being to be done by a ſtranger, the conuſance thereof lyeth as well in the notice of the defendant as of the plaintiff, and therefore the plaintiff needs not to give him notice. Tr. 16. Jac. in B R *Powle* and *Haggers* Caſe. Cro. 2. p. 492.

7. In *Ejectione firme*: it was found by verdict. That A. was ſeiſed of lands in fee, and by E his wife had iſſue I, and by Indenture in conſideration of love to his wife, and to I their ſon and heir apparant, and to ſettle the lands upon him and his heirs, enfeoffed I S and I D and others to the uſe of himſelf without impeachment of waſt, and after to his wife for her life, and after to the uſe of the ſaid I and the heirs males of his body, the remainder to his right heirs. Afterwards A. 5. Jac. enfeoffed I N of the ſame lands with warranty againſt all perſons, and 6. Jac. dyed. E the wife entred; I the ſon of I N enters upon I N and enfeoffed the leſſor of the plaintiff, with warranty I N enters the leſſor enters, and makes the leaſe to the plaintiff; the defendant as ſervant to I N enters and outs him: and it was found, that E the wife of A. was alive: two points were reſolved in this caſe; that this warranty was no bar to I, becauſe it was not found that he was heir, and it ſhall be intended that he is not heir, becauſe it is a collateral warranty which is not favoured; and it may be A had elder ſons by another venter, or there might be an attainder. 2. It was reſolved, that if the warranty had been well found, that the eſtate of the ſon had been bound: and her joyning in the feoffment with the ſon is a forfeiture, as if ſhe had joyned with a ſtranger who had nothing to do, and ſhe at her perill ought to take notice of the ſaid feoffment, becauſe the Livery is a notorious and publick act & the feoffment, is a forfeiture at the Common Law, and ſhe ought at her perill to take notice of this act upon the land, none being bound to give notice. Tr. 8. Car. in B R *Gimlet* and *Sands* Caſe. Cra. 1. pt. 285.

8. *Aſſumpſit*. The defendant in conſideration of a ruff Bond delivered to him, promiſed to pay to the plaintiff at the day of the plaintiffs marriage 5. l. and the plaintiff alledged that he was married ſuch a day, and *licet ſæpius requiſitus*, he had not paid the 5. l. It was moved in ſtay of judgement, that the declaration was not good, becauſe it was not alledged that he gave notice of his marriage before he married; and that reſts in the privity and knowledge of the plaintiff, and the defendant is not bound to take notice thereof; and it cannot be a breach of promiſe unleſs the plaintiff had given notice of the marriage: and one *Morſes* Caſe was alledged, where for not alledging ſuch notice, a judgement was reverſed. But it was the opinion of the Court, that the defendant at his perill ought to take notice, and the plaintiff needed not to ſhew that he gave notice of the marriage; and *poſtea requiſitas*, alſo is ſufficient without ſhewing the day of the requeſt. Paſc. 2. Car. in Co. B. *Crane* and *Cromtons* Caſe. Cro. 1. pt. 23. vide *Hutton* 8. the ſame caſe.

9. *Aſſumpſit*. The plaintiff by the Kings licence having in ſeveral places of his own land erected ſeveral Locks upon the River of *Ouſe*, for the heightning of the water for the paſſage of boats: and there being conditions betwixt the plaintiff and the defendant and others, what ſums ſhould be paid for ſuch paſſage, upon a Petition to the Lords of the Counceil, it was referred to the Earl of N. to ſet down what rates thoſe which paſſed through the ſaid Locks ſhould pay: the defendant in conſideration that the plaintiff would permit him to paſs through the ſaid Locks, 20. *October* 3. Car. promiſed the plaintiff that he would pay unto him ſuch ſums as the ſaid Earl ſhould appoint; and ſheweth, that between 20. *Octob.* and 23. *April* following, the defendant paſſed through the ſaid Locks with 1120. Tuns of Coals; and 24. *April* the Earl ſet down and ordered, that 2.d. ob. ſhould be paid for every Tun; according to which rate the defendant ought to pay him 11. l. which 29. *April* he requeſted him to pay him and he refuſed: upon *Non aſſumpſit* being found for the plaintiff, it was moved in ſtay of judgement, 1. That here was no conſideration, becauſe the River was a common River, and it is not lawful for any to make ſtops upon it, or to take ſums of mony for paſſage through the Locks; but that was diſallowed, becauſe it was made upon the plaintiffs own lands and his coſts for the making of the River Navigable for veſſels of burthen: 2. Exception was, becauſe the defendant had not any notice given him of the Earl of Ns. order; but that was diſallowed alſo, becauſe he was to pay ſo much as he ſhould appoint, and the defendant is to take notice of the order as well as the plaintiff, he being a ſtranger to both: alſo the plaintiff alledged, he required the ſum according to the order which is an implyed notice. Tr. 4. Car. in B. R. *Juxon* and *Thornhills* Caſe. Cro. 1. pt. 93.

10. In *Ejectione firmæ*, the Caſe was, a leaſe was made upon condition, that if the leſſee his executors or aſſignes did not repair the houſe within ſix months after notice and warning given, that the leaſe ſhould be void: the leſſee made a leaſe of it for ten years: the aſſignee of the reverſion comes to the tenement and gives notice to I S the occupier of the houſe under the leſſee for ten years, that the houſe was defective in reparations, and ſhews wherein, and becauſe not repaired within

within six months he reteres: it was resolved in this case, that this notice to a person who is not interessed in the land, although it was the land, was not sufficient; for he is bound to repair it under forfeiture after notice; and here the notice at the land, being to a wrong person, is void: like a demand of the rent upon the land any time of the year, but not at the last day, is a void demand. Hill. 44 Eliz in B R *Swetman & Cushes* Case. Cr. 2. pt. 9.

11. Vide M. 3. Jac. in B R *Gold* and *Deaths* Case: Cro. 2. pt. 381. which agreed with *Lee* and *Fidges* Case in the principal matter: But in *Golds* Case, upon a Writ of Error brought in the Exchequer Chamber, An Exception was taken to the Replication that it was not alledged, that notice was given to the defendant, after the death of the testator; for if it were in his life time, it was to no purpose, and the strongest shall be taken against him who pleaded it; and all the Justices and Barons held it to be a material exception, for it shall not be helped by Judgement: and for that cause the judgement was reversed. See the Cause at large. Cro. 2. pt. 382.

12. The defendant upon a lease of a house let him by the plaintiff, covenanted that he would from time to time during the term after three months warning sufficiently repair it, and after the end of the term leave it sufficiently repaired; and for not leaving it repaired covenant was brought, and shewed in what parts it was defective; the defendant demurred, because he for three months before did not give notice to him of the defaults; It was resolved, the declaration was good, notwithstanding the exception; for the clause to leave it well repaired at the end of the term, is distinct by it self, and doth not depend upon the former clauses; for he ought to leave it sufficiently repaired, without notice at his perill. Tr. 20. Jac. in B R *Hanslet* and *Butchers* Case. Cro. 2. pt. 644.

13. *Assumpsit*, the plaintiff declared, that whereas he at the defendants request demised to one I S his house in L rendring 5. s. quarterly; the defendant promised, that if I S did not pay the rent, he would pay it, and alledged that I S *virtute demissionis* entred and was possessed and had not paid the rent; upon *Non assumpsit* found for the plaintiff and judgement, Error was brought, and amongst other, it was assigned for Error, because it was not alledged that notice was not given that the other had not paid it; but the exception was disallowed, for he at his perill ought to take conusance of the non payment, and pay the rent, otherwise the promise was broken: Hill. 21. Jac. in Exchequer Chamber; *Brooksbank* and *Taylers* Case. Cro. 2. pt. 684.

14. The Case was, a lessee for years was bound in a bond to give up the possession to the lessor or his assignes at the end of the term; the lessor assignes over his interest, and the assignee requires the lessee to perform the condition, who answers that he knew not whether he were assignee, and thereupon refused: It was adjudged, that he had broken the condition; for he had taken upon him so to do; and it is not like *Greens* Case, Cook 6. pt. where the Patron presented his Clerk upon a deprivation, yet the ordinary ought to give the Patron notice of the deprivation, because it is a thing spiritual, of which a lay-man shall not be bound to take notice. Pasc. 16. Jac. in Co. B. *Pasham* 136.

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2. *Where notice is requisite before action brought, where not.*

1. A Was bound to B to pay him 1000. l. after he had married his daughter; Afterwards he married her, and brought debt upon the bond, and it was not avered, that he had given him notice of the marriage; it was objected that he ought to give notice; otherwise this mischief would ensue, that if he had not married her, and yet had demanded the money, he ought to pay it; and where an act is to be done by a stranger, there the plaintiff or defendant ought to take notice thereof at their perill; as where a man is bound to stand to the award of I S. But where it lyes properly in the conusance and notice of the plaintiff, there he ought to give notice thereof to the defendant. Cook 5. pt. *Mapories* Case; On the other side, it was said that here was an implyed notice, because the marriage was at the instance of the defendant which implyes a notice: It was the opinion of the Court, that there needed no notice in this Case, and judgement was given for the plaintiff; 1. Hill. 22. Jac. in Co. B. *Hodges* & *Mores* Case. Paph. 165.

2. Action upon the case against the defendant as executor upon a promise made by the Testator for a marriage portion; upon *Non assumpsit*, being found for the plaintiff, it was moved in arrest of judgement, that this action doth not lye against the executors, because this is a matter matrimonial with which the executor is not chargeable at the Common Law without a deed. Vide Fitz. 45. E. 3. 24. act. Jurisdict 15. and title Executors 4. In debt, the plaintiff counted, that a covenant was made between him and the defendant, that if he did take to wife the daughter of the defendant, that then he would be bound to him in 100. l. and shewed that he did take her to wife; exception

was

was taken, becauſe this debt was demanded upon a covenant, touching matrimony, which ought to be tryed in the ſpiritual Court; but becauſe he demanded the debt upon a deed, by which it became in Law to be a Covenant, it was therefore ruled maintainable, otherwiſe if without deed: And M. 13. Jac. in B R *Sanders* and *Eſtarlies* Caſe was vouched: There an action upon the caſe againſt an Executor for a marriage portion did not lye againſt an Executor: Alſo *Hurlan* and *Elyets* caſe, where the promiſe by the Teſtator was, That in conſideration that he married his kinſwoman, he promiſed to give him ſo much; and it was holden in the Exchequer that the Executor was not charged with the promiſe made by the Teſtator, the promiſe being to pay 10 l. quarterly in *Mavitagium*. Alſo it was objected, That no notice was given to the defendant of the marriage; The Court doubted at the firſt, if notice of the marriage ought to have been given in this caſe: But afterwards upon view of the Preſidents of *Hodges* caſe, and of Tr. 7. Jac. in B R of the caſe between *Bready* and *Cobb*; and becauſe there is a difference where a collateral thing is to be done upon a marriage day; there notice ought to be given of it; but where the thing to be performed is a due debt to the party, although not demanded, it remains a debt, and no notice is to paſs in that caſe for bringing of an action: for theſe cauſes, and other, it was reſolved in the principal caſe: 1. That the action lyeth againſt the defendant being Executor upon this *Aſſumpſit* of the Teſtator. And, 2. That no notice here was requiſite to be given of the marriage: M. 14. Jac. in B R *Bereſford* and *Goodricks* caſe. Bolſtr. 3. pt 135, 136. vide Tr. 1. Car. in B R *Alfrey* and *Blackamors* caſe. Bolſtr. 3. pt 326. ac. Vide M. 12. Jac. in B R *Selby* and *Wilkenſons* caſe. Bolſtr. 2. pt. 254. ac.

3. In *Aſſumpſit* the caſe was: There being a difference between the plaintiff and defendant, concerning the quantity of rent to be paid by the defendant; The defendant ſaid, that if I S would ſay, that the rent reſerved upon the leaſe was, 6 l. he did there promiſe to double it to the Plaintiff; I S did affirme the rent to be 6 l. upon *Non aſſumpſit* and verdict for the Plaintiff, it was ſaid the declaration was not good, becauſe that no notice is ſaid therein to be given of this to the defendant: it being ſaid only in the declaration, that I S affirmed the rent to be 6 l. and notice is requiſite, becauſe no notice there is ſet down, but is here indefinite; and it being to be done by a ſtranger and under the penalty of doubling the rent, notice of it ought to be given to the defendant of it: but it was reſolved by the Court, that the declaration was good, although no notice was layed in it to be given to the defendant; and the difference was taken, where one is ignorant of a thing to be done by him, there notice is to be given him of the ſame; but if a man undertakes to do a thing, there he alſo undertakes to perform all circumſtances incident to the doing of the ſame, and that without notice. It was the opinion of the Court, that the declaration was good without expreſſing any notice. M. 11. Jac. in B R *Childe* and *Hordens* caſe. Bolſtr. 2 pt. 143, 144.

4. In Trover and Converſion for taking the Plaintiffs cattel by way of Diſtreſs, and ſelling them by virtue of a Warrant of Commiſſioners, of Sewers for not paying of a tax by them impoſed for the reparation of the Sea walls; the defendant pleaded all the ſpeciall matter by way of juſtification; the Plaintiff demurred to the plea, and took ſeveral declarations to it; one amongſt the reſt was, that it is not ſaid that he had notice of the tax: It was holden by the Court, that that was a good exception, for that there ought to have been notice given of the tax and of the demand of it, before any diſtreſs might be taken for it; and for that cauſe amongſt others it was adjudged for the Plaintiff. Vide Libro. Paſc. 23. Car. in B R *Whittes* and *Fauſetts* caſe. Stubs 13.

5. Action upon the caſe, upon an *Indebitatus Aſſumpſit* to pay 20 s a piece for every cloth he ſhould buy of the defendant; the plaintiff declared for ſo much money due unto him, and had a verdict: It was moved in ſtay of judgement that it is not averred by the plaintiff, that he gave notice to the defendant how many cloaths he had bought for him; It was objected, that the cloaths were bought for the defendant himſelf, and he may well take notice of the number of them without notice given him; and here is a requeſt for the payment of the money which implies a notice; The Court inclined to opinion that the requeſt implyed not a notice, and that the notice ought not to be by implication, but to be avered certainly: M. 23. Car. in B R *Tanner* and *Lawrences* Caſe. Styles 53.

6. Debt; the condition was that the obligor ſhould make an eſtate of inheritance to the obligee of ſuch lands at ſuch a day and place; the defendant pleaded that he was ready at the day and place to make the aſſurance, and to make the plaintiff an eſtate of inheritance of the lands: The plaintiff demurred upon the plea, for that the defendant doth not ſhew that he gave notice to the plaintiff of the day and place, and alſo had not ſhewed that he gave the plaintiff notice what eſtate of inheritance he would make; for the firſt, the Court held it not to be neceſſary to give notice of the day and place; but for the ſecond, that he ought to have ſhewn, that he gave notice what eſtate he would make him. Tr. 23. Car. in B R *Brack* and *Brookes* caſe. Styles 61.

7. Aſſump-

7. Aſſumpſit, The plaintiff declared, That the defendant in conſideration that the Plaintiff ſold and delivered unto him ſuch a number of pieces of ſtuff, the defendant did promiſe to the plaintiff to deliver to him the value of the ſtuff in ſuch pipes of wine lying in L. Celler in *London* as the Plaintiff ſhould make choice of. A Verdict being for the Plaintiff, the Defendant moved an Arreſt of Judgement, That the Plaintiff doth not aver, that he made any Election of the Pipes of Wine, and before Election he was not bound to deliver them: 2. He doth not aver, that he gave notice to the plaintiff of his Election, and there being a condition precedent to be performed on the plaintiffs part, it is implied that the defendant cannot perform the bargain without notice of that performance: It was the opinion of the Court, that the defendant ought to have ſhewed the Plaintiff the Wines without which the Plaintiff can make no Election, and ſo the giving notice of his Election was impoſſible, and not material: M.23. Cor. in B.R. *Parmiter* and *Creſſys* Caſe. *Stiles* 74.

8. Aſſumpſit in conſideration that the Plaintiff ſhould let to the Defendant a Booth in *Sturbridge* Fair, he did aſſume and promiſe to pay the Plaintiff 16 l. for the ſame, and to pay the Plaintiff for all ſuch Wine and Hops as ſhall be ſpent in the Booth, during the Fair; A Verdict and Judgement was for the Plaintiff, and Error brought, and aſſigned for Error that the Plaintiff doth not expreſs in his Declaration, that he gave notice how much Wine and Hops he layed into the Booth during the Fair, and ſo the defendant could not know how much money he ſhould pay: It was the opinion of the Court that the Declaration was too general, and that he ought to have given notice of that; and for want of ſo doing, the Judgement was reverſed. M. 1649. in B R. *Harris* and *Gibbons* Caſe. *Stiles* 172.

9. Aſſumpſit; and declares, that the defendant in conſideration that ſhe the Plaintiff would leave her Fathers houſe, and come to the houſe of the defendant in ſuch a place, did promiſe unto her that he would marry her, and that thereupon ſhe did leave her fathers houſe, and come to the defendants houſe, *& obtulit ſe in mortagium conjungi*: and becauſe he had not performed his promiſe unto her, upon Iſſue joyned, it was found for the Plaintiff: In ſtay of Judgement it was ſhewed that the plaintiff did not ſhew in her Declaration when ſhe left her Fathers houſe, nor that ſhe gave him any notice thereof. Againſt which it was ſaid, that *obtulit ſe in mortagium Conjungi*, implyed Notice; and beſides no notice is requiſite; for the Aſſumſit is, that if ſhe will come, he will marry her, ſo as he is bound by his promiſe to take notice of her coming; It was the opinion of the Court, that there was a notice implyed here in theſe words. *Obtulit ſe in mortagium conjungi*; And there could not be a Marriage, if the party was not there; It was adjudged for the Plaintiff; M. 1651. in B.R. *Peck* and *Ingram* Caſe, Styles 173.

10. Error brought to reverſe a judgement in action upon the Caſe in Co. B. The Caſe was, that the Defendant did promiſe to pay ſuch a ſum of money to the Plaintiff, when he ſhould return from *London*; the Plaintiff did ſhew that he came from *London*, and the money was not paid him. Upon *Non Aſſumpſit*, judgement was for the Plaintiff, and Errour brought. It was aſſigned for Error, That there was no ſpecial requeſt of payment laid in the Declaration; nor was there any notice layed to be given to the defendant of the Plaintiffs return to *London*: It was the opinion of the Court, that the Declaration was not good for that cauſe: and the difference will be this, when it reſts upon a matter to be done between the parties themſelvs, there notice is to be given to the party who makes the payment; otherwiſe where it is to be done by a ſtranger; for there he hath aſſumed upon himſelf to take notice, and ſo there it is at his perill: and in this caſe the act to be done before the payment of the money, being to be done by the party himſelf, to whom the money by promiſe is to be paid, he himſelf is to give notice of the time of the performance of this act to the party who is to make the payment; and there being no notice laid in the Declaration, tis not good: and therefore the Iudgement is erroneous. And the Iudgement was reverſed by the Rule of the Court, Mich. 8. Iac. in B. R. *Gobit* and *Moſſes* Caſe. Bolſtr. 1. pt. 44.

11. Aſſumpſit: the Plaintiff declared, That whereas there was a ſpeech of Marriage between the Plaintiff and the Defendant; the Defendant did aſſume to the Plaintiff, that he would marry her; and that afterwards the Defendant in conſideration that the Plaintiff would diſcharge the Defendant of this promiſe, did promiſe that he would pay her 1000 l. and ſays that ſhe did diſcharge the Defendant of his promiſe of Marriage. Upon *Non Aſſumpſit* found for the Plaintiff: It was alledged in ſtay of Iudgement, that it is uncertain to which promiſe the Declaration relates: and alſo there is no conſideration temporal alledged, but only a promiſe to diſſolve a Contract of Marriage, which is a thing illegal. The opinion of the Court was that the Engagement to marry is not meerly a ſpiritual matter; and this action is not to compell the Marriage, but to recover damages for not doing it; and the Court was of opinion, that the diſagreement ſhall be intended to the party himſelf, and that in this Caſe, there needed no expreſs notice to be given to the party of it: Fr. 165.

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in B.R. *Baſer* and *Smiths* Caſe. St.295.

12. The Caſe was, A. being a Coach-man, by careleſs driving of his Coach brake a Pipe of Wine of B which lay in the Street, whereby much of the wine run out and was loſt. B. apprehended A. who thereupon promiſed, That if he would forbear to ſue him for the wine, he would pay him as much as he was damnified: In an action upon the Caſe a Verdict was found for the Plaintiff. It was moved in reſt of Iudgement, that the Plaintiff had not averred how much the wine was worth which was ſpilt, ſo as he could not know what to pay in ſatisfaction of it, for he knows not the value, and it doth not appear that there was found any requeſt of ſatisfaction. It was the opinion of the Court, that the Declaration was good; for there doth appear apparent damage, and the defendant is bounden to take notice of the damage; and the Plaintiff is not bounden to give him notice of it. Tr.1655.B.R. *Folk* and *Preſdals* Caſe. Styles 458.

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3. *Where the Obliger ſhall be bound to perform the Condition without Notice: And where Notice of the Award, or matter of the Condition, ought to be given to the Plaintiff, and how and by whom it ought to be given, and what ſhall be a good Notice, what not.*

1 SIr *Andrew Corbet* ſeized of divers Lands holden in *Capite*, deviſed parcel of them to divers perſons to have to them, and the ſurvivor of them until ſuch time and term as 800 l. of them, and of the profits of them be levied, and to imploy the ſame for the ſervice of his daughter, and died; his ſon and heir took the Will into his hands, and entred into the ſaid Lands, and took the profits of them during his life; and afterwards the Deviſees entred and received the profits; and levied 640 l. according to the Will, and if the profits taken by the heir, and which the Deviſees might have taken, ſhould be parcel of the 800 l. was the Queſtion. It was reſolved in this Caſe, amongſt other points, That although the Deviſees had not notice of the Deviſee: yet if a ſtranger had occupied the Land, yet the Deviſees ought to take notice of the ſame at their peril; for *vigilantibus & non dormientibus jura ſubveniunt.* Cook 4 pt.83. Sir *Andrews Corbets* Caſe.

2. A man bound himſelf in an Obligation, to ſtand to the award of I.S. ſo as the award be put in writing before Mich. the Obligor before Mich. revoked the power of I. S. to make the award: It was reſolved, in this caſe amongſt other things, That by this countermand the obligation became ſingle; and the Obligee ſhould take advantage of it; and it was alſo reſolved, That in debt brought by the Obligee upon the ſaid obligation, that the Plaintiff needed not to aver that the Arbitrator had notice of the Countermand; for that was implyed in theſe words, *renunciavit omnem authoritatem*, &c. and it was ſaid that when two things are requiſite to the performance of an Act, both things are to be done by the ſame perſon, as a Demiſe, Revocation, Countermand, there notice is implyed: otherwiſe where the things are to be done by ſeveral perſons: Cook 8. pt.82. *Viners* Caſe.

3. A man ſeized of Land in Fee, by his Will, deviſed the ſame to I. his eldeſt ſon for ſixty years after the death of the deviſor, if the ſaid I. ſo long lived, and after to the uſe of B. his ſecond ſon for life; and afterwards to the heirs males of the body of I. provided that if I. did not ſuffer his Executors quietly to carry away all his goods in his houſe, or ſhall do any act to hinder the intent of his father, that then the uſes limited to I. and his heirs ſhould ceaſe; and died: The Executor came to the houſe, and there would have carried away the goods, and the ſaid I. would not ſuffer the executors to carry them away, but forbade and hindred them to carrie away the goods out of the houſe: It was reſolved in this caſe amongſt other points, That although the defendant had particularly ſhewed a ſpecial act of diſturbance againſt the Proviſo: Yet it was reſolved, that I. ſhould not loſe his Term; for none ſhall loſe any eſtate or Intereſt which he lawfully hath, without ſome act and default in himſelf; and therefore forasmuch as I. was a ſtranger to this Feoffment, he ſhall not loſe his eſtate without notice given him of the proviſo, and of the Will of his Father: for *Quod noſtrum eſt ſine facto, ſine defectu noſtro amitti, vel in alium transferri non poteſt*: vide Cook in *Malories* Caſe, 5. pt. The Feoffee of Land or bargain of a Reverſion ſhall not take advantage of a condition for non payment of Rent, reſerved upon a Leaſe upon a demand by them without notice thereof given to the Leſſee: Cook 9 pt.32. *Frances* Caſe.

4. A Fine was tryed of Lands by I.S. to A.D. to uſes in an Indenture, where there was a Proviſo, That if I.S. pay or tender 20 l. during his life at the Font ſtone of the Church of S. to A. that it ſhould be to the uſe of I.S. in Fee. It was holden in this caſe, that becauſe the day is not limited, that tender ſhall not be to purpoſe, except I. S. give notice to A.B. that he or his deputy may be there to receive the money: M. 19. Eliz. Dyer 354.

5. A

5. A. Licenced B. to lay his Hay upon the Land of A. until he could conveniently ſell it; afterwards A. did make a Leaſe of the Land to I.S. who put in his cattel, and they eat up the Hay; It was two years between the Licence, and the putting in of the cattel; B. brought Treſpaſs againſt I S. In this caſe it was reſolved; 1. That B. ſhould have a convenient time to ſell his Hay; 2. That the Leſſee ought to give notice to B. before he ought to put in his Cattel into the ground of the Leaſe; as alſo that he took away his Hay: M.17.Iac. in B. R. *Web* and *Paternoſters* Caſe; Poph.151.

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4. *Where notice ought to be given by the Ordinary of an Avoydance, and of what manner of Avoydance: where not: And what ſhall be a ſufficient Notice; what not.*

1. A. & B. were ſeiſed of an Advowſon to preſent by turns; A. preſented I.S. who was Inſtituted and Inducted and died; B preſented I.B. who was afterwards lawfully deprived by the Biſhop of *Coventry* and *Lichfield*, without giving any notice to A. who had the next turn; The Biſhop Collated I N. and after Collation, A. ſold his moyetie to I.G. and I. G. to the Earl of *Shrewsbury*: In this Caſe, the Court did incline that by the Collation the turn was loſt; but clear, if it had been by an uſurpation: and in this caſe, the court ſaid, that yet upon the deprivation the Patron ought to have had notice: Hill.43. Eliz in Com B. *Langfords* Caſe, Goldesbr. 142.

2. Note *per Curiam*, That if a Church become void and a ſtranger enters a Caveat with the Regiſter of the Biſhop, that none be inſtituted to that Church, until he be made privy thereunto, & the Biſhop before he hath notice of the Caveat, Inſtitute an Incumbent; the Inſtitution is meerly void in the Spiritual Law, as was ſaid by Dr. *Amy*; for that the Regiſter ought to notifie the caveat to the Biſhop, and his negligence in that ſhall not prejudice him who entred the Caveat; and if the Biſhop have notice of the Caveat, and gives day to him that puts it in, and before that day he Inſtitutes an Incumbent, that entring of the Caveat is a *Superſedeas* in our Law: Hill.43. Eliz. in Coi. B. in the Lord *Zouches* Caſe. Goldesbr 146.

3. If the Biſhop or Ordinary doth refuſe a Clerk which is preſented unto him; for that he is a Turk, Infidel, Heretick, Schiſmatick, perjured perſon, baſtard, illiterate, or for that he is a meer Lay man, or for other ſufficient cauſes of diſability, as villein, &c. In all ſuch Caſes he muſt give notice to the Patron, of the cauſe of ſuch his refuſal; and the particular crime muſt be ſet forth and proved, that the Patron may preſent another fit Clerk to the ſame Church; for if no notice be given, and the 6. moneths paſs, the Laps ſhall not incur to the Biſhop or Ordinary, for that he ſhall not take advantage of his own wrong, in not giving notice thereof to the Patron: Cook 5. pt 58. in *Specots* Caſe.

4. A Patron preſented a meer Lay perſon, and the Ordinary refuſed him; It was ſaid, that in that caſe he need not give notice to the Patron, becauſe it is notorious, that he is not capable; but if he refuſeth one becauſe he is criminous, or becauſe of inability, in ſuch caſe, it behoves the ordinary to give notice; But if a Lay man be admitted, inſtituted, inducted, this is a plenary and the Church is full, for he is Incumbent *de facto*; & here behoveth to be an annullation by ſentence before a new preſentation be made; and of that the Ordinary muſt give notice to the Patron, as in other avoidances where the Biſhop is party. M.13. Eliz. Dyer 292.

5. If the Church do become void by the death of the Incumbent, the 6. moneths ſhall be accounted from the time of his death, of which avoidance the Patron at his peril is to take notice, and to make his preſentment unto the Biſhop accordingly; and ſo if the Church do become void by Creation, as by making of the Incumbent Biſhop, or by Ceſſion, whereof the Patron at his perill is to take notice: But if the Church do become void by Reſignation, which is the Act of the party Incumbent himſelf (and which Reſignation muſt of neceſſity be made to the Biſhop or Ordinary) or by Deprivation which is the Act of the Law, there, although the 6. moneths incur before the Patron preſent, yet the Biſhop ſhall not preſent, unleſs the Biſhop upon the Reſignation or Deprivation had given notice to the Patron of the ſame avoydance; for in ſuch and the like caſes the 6. moneths ſhall be accompted from the time of the notice given by the Ordinary to the Patron: vide M 16. Eliz. Dyer 327. ac.

9. In a *Quare Impedit* againſt the Biſhop of St. *Aſaph*, the defendant juſtified for Laps; the Plaintiff Replyed, that he preſented one I.S. a Maſter of Arts, and an allowed Preacher: The Defendant rejoyned, that the Pariſhioners were *Homines Wallici*, or *Wallicam loquentes linguam & non aliam*; and that I. S. could not ſpeak the Welch language, for which he refuſed him, upon which the Plaintiff demurred; It was ſaid for the

Plaintiff that the ſame was no ſufficient cauſe of refuſal, becauſe the language might be learned in a ſhort time, and proviſion was made for tranſlating the book of Common Prayer, Epiſtles and Goſpels into Welch; and alſo men were capable of Benifices with cure: on the other ſide it was ſaid, that in the ſtatute of 5 Eliz. the miſchief was recited; That the inhabitants of Wales did not underſtand Engliſh; and therefore it was provided that the Biſhop of Wales ſhould procure Bibles and books of Common Prayer to be tranſlated into the Welch language, and ſo upon that ſtatute, the imperfection of not having the Welch language was a good cauſe of refuſal; This point was debated, but not reſolved. 2. It was ſaid, that no ſufficient notice was given to the Patron after the refuſal; for the Church being void 14. *March*, the plaintiff did preſent 13. *Auguſt*, 29 *Auguſt*; the ſix moneths ended the fourth of *September*, the defendant gave notice to the Patron, and the 14. of *September* was the collation; It was adjudged in this caſe, that the defendant was a diſturber; and in this caſe it was ſaid, That it was adjudged in the Lord *Mallineux* caſe, That if the Patron doth preſent, and the Ordinary doth refuſe, he ought to give notice to the parſon of the Patron if he be within the County, and if not, at the Church it ſelf which is void. Tr. 27. Eliz. in C B *Albany* and Biſhop of St. *Aſaphs* caſe, Leon. 31, 32.

7. By the Statute of 21. H. 8. c. 13. If a man had taken a ſecond Benifice with cure without any diſpenſation, the firſt Benifice had been void without any ſentence, and of the ſame avoydance the Patron is to take notice at his peril: vide 7. Eliz. Dyer 237. Cook 4. pt. 79. But if a man hath a Benifice with cure of ſouls of the value of eight pound, and doth not read the Articles, and takes a ſecond Benifice without diſpenſation, and afterwards dyeth; The Inſtitution and Induction of him into the ſecond Benifice are meerly void, and the firſt Benifice is void by his death, and not by the Statute of 21. H. 8. for that he was never lawfull incumbent of the ſecond Benifice; 23. Eliz. Dyer 377.

8. Note that if a Church, become void by reſignation or upon the Statute of 21. H. 8. for that no notice is given to the Patron; In ſuch caſe although the lapps encur to the King, yet he ſhall not preſent; for then the Kings prerogative ſhould do wrong; adjudged in the Exchequer: vide 18. Eliz. Dyer 347. *Weſtons* Caſe.

9. A man is inducted into a Benifice with cure, of the value of eight pound *per annum* in the Kings books, and he accepts another Benifice, and then is made a Biſhop; and before Creation and Inſtallation, the King by his Letters Patent grants to him a Plurality, and that he ſhall hold both Benifices above his Biſhoprick; and afterwards pretending the Letters Patent to be void, the preſentee of the King by lapps, libels in the Spiritual Court for tythes, and makes no mention in the libel of the ſtatute of 21. H. 8. In this caſe amongſt other points it was reſolved: That before the ſtatute of 21. H. 8. If a man had a Benifice with cure, and took another Benifice, that the firſt Benifice was void, but that was void by the Spiritual Law, but not by the Common Law, and therefore no lapps encurred without notice, as upon Deprivation, or Reſignation, and yet the Patron might preſent, and take upon him notice if he pleaſed, ſo as for the benifit of the Patron, the Church was void in the principal caſe if he pleaſed: But now foraſmuch as it is affirmed by the ſtatute of 21 H. 8. If the firſt Benifice be of the value of eight pound, the Patron at his perill ought to preſent to the ſame, becauſe to an avoidance by Act of Parliament to which every one is party, every one ought to take notice of it at his perill: But if the firſt Benifice be not of the value of eight pound, it is otherwiſe; for then it is meerly void by the Eccleſiaſtical Law, of which the Patron needs not to take notice at his perill: Cook 4. pt. 75. *Holands* Caſe.

9. A Tenant for life of the Mannor of D to which a Rectory which is a Benifice with cure is appendant, the remainder to B in fee, A preſented D, who is admitted, inſtituted, and inducted, and doth not read the Articles, for which cauſe at the ſuit of A he was deprived before the Biſhop, and he appealed to the Court of Arches, no notice being given by the Ordinary to the Patron of this Deprivation: It was in this caſe amongſt other things reſolved; 1. That although the Patron took notice that D did not read the Articles, yet after ſuch notice lapps ſhould not encur, but ſpecial notice of not reading of the Articles ought to be given to him by the Ordinary, and after ſuch notice the lapps ſhould be accounted, and none ought to give notice but the Ordinary, and the notice which he giveth ought to be certain in particular, and that he hath not read the Articles, for which cauſe he is deprived, and general notice is not ſufficient: 2. It was reſolved, that the Church was void preſently by the ſtatute of 21. H. 8. c. 13. without any declaratory ſentence: and that if ſuch a Parſon ſued his Pariſhoners for tythes, they might plead againſt him the not reading of theſe Articles: Tr. 44. Eliz. in B R Cook 6. pt. 29. *Greens* Caſe.

10. Two men pretend right to preſent as Patrons to an Avoidance of a Church: If one of them preſenteth to the Ordinary, and the Ordinary makes doubt of his title, he may enquire of it for

for his ſatisfaction by *Jure Patronatus*: But put caſe that the Parſon is deprived by the Ordinary, or reads not his Articles, in which caſe notice muſt be given to the very Patron for that time, or elſe the lapps encurs not; the quere is, how the Ordinary ſhall now aſſure himſelf of a ſufficient notice; for if he giveth notice to him that is not Patron for this very turn, his notice is vain; and the Patron perhaps knows not of the Deprivation, or if he knows, yet needs not preſent without notice; It was the opinion of *Hobert* Chief Iuſtice, that where the enquire is made by *Jure Patronatus* who is Patron; and the Ordinary gives that party notice, that if he preſents not within ſix months, the Ordinary may collate to the Church; and although ſuch collation ſhall not binde the very Patron, yet it ſhall excuſe the Ordinary of diſturbance upon the ſpecial matter ſhewed; and although in that caſe, if the ſix months encur, the Patron without notice is not bound by the Lapps; yet that is nothing to ſave the uſurpation of another pretended Patron who is not ſubject to give notice; Vide Paſc. 17. Iac. in C B in Sir *William Elvis*, and the Archbiſhop of *Yorks* Caſe. Hob 315, 316, 317.

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5. *Where Notice is neceſſary to be given to change the Avowry, and for what thing the Avowant diſtrains, and to whom given, and what ſhall be ſufficient, what not.*

1. IF there be Lord and Tenant, and the Tenant maketh a feoffment in fee; In this caſe betwixt them, for the arrerages due as well before the feoffment as after untill notice is only privity as to avowry, and not any privity in eſtate, or in tenure, which privity ſhall not go with the eſtate: and before, the Statute of *Quia emptores*

If the Tenant maketh a feoffment in fee to hold of the chief Lord; the feoffee by no tender that he can make ſhall compell the Lord to avow upon him, but the Lord may avow upon the feoffee, for that by his own act he cannot change the avowry of the Lord, although that in ſuch caſe the Lord hath notice, or taketh notice of the feoffment. Cook 3. pt. 13. in *Walkers* caſe.

2. If there be Lord and Tenant by knight ſervice, and the Tenant infeoffable his ſon and heir with no age by colluſion; If the Lord accept of the ſervices by the hands of the feoffee, it was ſaid, that he ſhall loſe the Lordſhip: But againſt that was objected, 1. That the feoffee might compell the Lord to avow upon him by giving notice and tender of the arrerages; and that which the law enforceth him to do ſhall not prejudice nor eſtopp him. 2. That acceptance doth not conclude before title accrued, and no title of wardſhip was in this caſe accrued to the Lord at the time of the acceptance, but it came after the death of the feoffer: To the firſt objection, it was anſwered, That by no notice that he can give or tender that he can make, or compell the Lord to vow upon him; for the Lord may ſhew, that the feoffment was by colluſion againſt the Statute of *Marlebridge*, and therefore he ſhall maintain his avowry upon the feoffee; for the law doth not compell him to accrew upon the feoffee to his prejudice. 2. It was anſwered, that the Statute of *Marlebridge* hath made ſuch feoffment by colluſion void and of no effect as to the Lord: Vide Cook 3. pt. 66. in fine, *Pennants* caſe.

3. A man ſeiſed of lands in fee made a leaſe for years rendring rent upon condition, that if he, his executors, adminiſtrators or aſſigns did grant, alien, or aſſign any part of the land without the aſſent of the leſſor, his heirs or aſſigns, that it ſhould be lawful for him, his heirs or aſſigns to out the leſſee; the leſſee aſſigned part of it without the aſſent of the leſſor; the leſſor before notice and before reentry accepted the rent, and afterwards reentred. In this caſe amongſt other things it was reſolved, That the condition being collateral might be ſo ſecretly contrived, that it is impoſſible to come to the notice of the breach of it, and there notice was material in this caſe: But in a condition annexed to rent, although that he accept of the rent at the day for which demand was made, yet he may reenter and have debt for the rent, upon the contract betwixt him and the leſſee. 2. Reſolved, that in a condition annexed to the rent, if the Lord diſtrain for the ſame rent for which demand was made, by that he hath affirmed the leaſe; for a diſtreſs for rent affirmes the leaſe to have continuance after the rent received; for after the leaſe detained he cannot deſtrain: Cook 3. pt. 65. *Pennants* Caſe.

6. Where every perſon privy to acts of Parliament and matters of Record, muſt take Notice of them at their perills: and of what Acts the Judges are to take Notice ex officio, of what not.

1. IF the King makes a leaſe for years or for life, of lands, and afterwards grants the land unto another in fee or in tail without reciting of the leaſe; the laſt grant is void, and that for two cauſes: firſt, becauſe the King grants an eſtate in poſſeſſion where he had but a reverſion; and ſo is deceived in his grant: And, 2. Becauſe the ſubject had a means to come to the knowledge of the ſaid leaſe; for every Patent ought to be enrolled in the Chancery to which all ſubjects may have acceſs; but otherwiſe it is of leaſes which are not of Record: Cook 1. pt. 45. in the Caſe of *Attonwoods*, Vide ibid. 50. acc.

2. A man is indebted to A and B in 100. l. and afterwards becomes Bankrupt; a commiſſion is awarded under the great Seal according to the Statute of 13. Eliz. cap. 7. to C and D to make ſale of his goods to his creditors; afterwards the Bankrupt gives all his goods to another creditor for the payment of his debt, and afterwards the commiſſioners ſell the goods: It was adjudged in that caſe, that the ſale by the commiſſioners was good; for the intent of the Statute was to relieve the creditors equally, and that there ſhould be an equal proportion obſerved in the diſtribution of the goods; ſo as every creditor ſhould be in *æquali jure*: And it was reſolved, that the aſſignment of the Bankrupt after the commiſſion awarded under the great Seal was void: for that the commiſſion is matter of Record, of which every one is to take notice. Tr. 31. Eliz. Cook 2. pt. 25. the Caſe of Bankrupts.

3. A was in execution, ſeveral under the cuſtody of the Sheriffs of *London* at the ſuit of B and C the antient Sheriff delivered the body of A by Indenture, in which the execution of B was only mentioned; in the time of the new Sheriff A eſcaped: 1. In this caſe, it was reſolved that it was an eſcape in the old Sheriff. 2. Reſolved, That the old Sheriff ought to give notice of all executions which he hath againſt any perſon who is in the Goal to the new Sheriff; for although the executions be upon Record, yet the new Sheriffs are not bound to take notice of them at their perills: But it was reſolved, That if the Sheriff hath executions againſt ſeveral perſons in his cuſtody and dyeth; that the new Sheriff in ſuch caſe ought to take notice of all executions againſt all perſons who are in the Goal at his perill; the ſame being matters of Record, and that for neceſſity: Cook 3. pt. 71. *Weſtbies* Caſe.

4. Note; It is a rule in Law, That of general Statutes the Judges ought to take notice, although they be not pleaded; but otherwiſe it is of ſpecial and particular Statutes: And it was reſolved, that the Statute of 31. H. 8. c. 13. was a general Statute, for that it concerned all the ſpirituality in general: Cook 4. pt. 75. in *Hollands* Caſe. The Statute of 18. Eliz. concerning the Colledges in the two Univerſities, and the Colledge of *Eaton* and *Wincheſter* were but particular acts; of which the Judges were not to take notice unleſs they were particularly pleaded; But the acts of 13. Eliz. c. 10. 18 Eliz. c. 11. concerning Colledges, Deans, and Chapters, Hoſpitals, Parſon, Vicar, or any other having any Spiritual or Eccleſiaſtical living, are general acts of which Judges are to take notice: But the Act of 1. Eliz. concerning leaſes made by Biſhops, was but a ſpecial Act concerning the Biſhops, and of that Act the Judges are not to take notice unleſs it be ſpecially pleaded, as it was adjudged in *Elmers* Caſe. Tr. 30. Eliz. vide Cook 5. pt. *Elmers* Caſe. acc.

5. A man made a leaſe for years to begin after the end of a Term for years then in eſſe; the firſt years ended, and the ſecond leſſee did not enter, but he in the reverſion entred, and made a feoffment and levyed a fine with proclamations, and five years paſſed after the Proclamations without entry or claim made by the ſecond leſſee for years: It was reſolved in this caſe, That the ſecond leſſee was barred of his Term by the Statute of 4. H. 7. of Fines: for although that leſſee for years hath not an eſtate that he may levy a fine; yet becauſe that the words of the Statute are general and extend to all, and the words of the ſaving are (ſuch right claim and intereſt) and he who hath a Term for years hath an intereſt, and alſo becauſe he is within the miſchief: It was reſolved, that his intereſt, as alſo the intereſts of all Tenants by Statute merchant, *Elegit*, Guardian or Executors, are within the Statute, and bound by the Fine: Alſo he only that hath a naked right or title to an inheritance, cannot levy a Fine; and yet he ſhall be bound by a Fine levyed by the Tenant of the land, Paſc. 3. Jac. in Co. B. Cook. 5. pt. 123. *Saffyns* Caſe.

6. Divers Souldiers who were preſt and went to ſerve the Queen againſt the Rebells in *Ireland*, before they ſerved in the war, departed from their Captains; and upon conſideration of the Statutes of Captains and Souldiers, it was reſolved by all the Judges upon a Reference unto them; that the Statute of 18. H. 6. c. 19. was now of little force, becauſe

becauſe the manner of relieving Souldiers was altered. But it was reſolved, that the Statutes of 7. H. 7. c. 1. and 3. H. 8. c. 5. were ſpecial Acts of Parliament, and not made for thoſe times of thoſe Kings only; but did extend to all ſucceſſion; of which Acts the ſubjects are to take notice; and that the word (King) in thoſe Acts, did include all his Succeſſors; and upon the departure of divers Souldiers from their Captains, divers Souldiers were attainted and executed; Cook 6. pt. 27. the Caſe of Souldiers.

7. Queen Eliz. Anno 37 of her Raign granted 3. Mannors, parcel of the Dutchy of *Cornwall* to H L and G M. The King at the ſuit of the Prince of *Wales*, brought a *Scire facias* againſt the ſaid H L and G M to make levy to the Prince by force of the Statute of 11. E. 3. being the Charter of the creation of the Prince and Duke of *Cornwall*; The which Charter was the *Communi conſenſu & conſilio Prelatorum*, and in the end of it, it was *per ipſum Regem & totum conſilium in Parliamento* H L pleaded *Nul tiel record*: the others pleaded ſeveral other pleas *(vide librum)* In this caſe, it was reſolved (amongſt many other points) That the ſaid Charter of Creation of the Prince Duke of *Cornwall*. was an Act of Parliament; for that the lands could not be ſo annexed to the Dutchy without Act of Parliament, nor ſuch eſtate given, but by Act of Parliament. 2. Reſolved, that againſt a general Statute (as this Charter was) *Nul tiel record* ſhall not be pleaded; for although that the Charter may be loſt, yet the Iudges ought to take notice of it, eſpecially the ſame concerning the Prince, Cook 8. pt. 1. The Princes Caſe.

8. Vide and note: That the Statute of *Weſt.* 2. *De Malefactoribus in parcis*: The Statute *de Charta de Forreſta*: The Statute of 22. E. 4 c. 7. and the Statute of 35. H. 8. c. 17. were general Acts of Parliament of which the Iudges *ex officio* ought to take notice without pleading of them; and reſolved that the ſaid Statutes of 22. E. 4. and 35. to H. 8. did not extend to take away the Common of the Subjects which they had in the woods mentioned in the ſaid Statutes; Cook 8. pt. 137, 138. in Sir *Francis Barrington's* Caſe, vide the Caſe at large.

7. *Where and of what things, Iurours or Enqueſts are to take notice, where of things done in another County; and where they finde matter of record, they muſt take notice of it on pain of attaint, where not, where take notice of ſome things.*

1. A Prior ſeiſed of divers houſes made a leaſe of them for years with the conſent of his Covent, rendring the ancient rent of 5. l. 10. s. 11. d. at the four Feaſts of the year uſual in the City of *London*; 5. for the one houſe 3. l. 11. d. for another 20. s. and for other houſes ſeveral rents reſidue of the ſaid 5. l. 10. s. 11. d. with condition, that if the 5. l. 10. s. 11. d. are behinde in part or in all at any of the ſaid Feaſts, then the Prior and his ſucceſſors to reenter. The Priory came to the King by ſurrender, who by his Letters Pattent under the great ſeal granted one of the houſes, to the leſſee and another in fee; and afterwards it was found by commiſſion under the Exchequer ſeal, that parcel of the ſaid rent of 5. l. 10. s. 11. d. was behinde at one of the ſaid Feaſts, *viz.* at the Feaſt of St. *Michael*; and it was found that the Feaſt of St. *Michael* was one of the four uſual Feaſts at *London*; In that caſe (amongſt other points) it was reſolved, that although it was found that there was 37. s. and 5. d. was behind at *Michael*, which was more then the rent for one quarter of a year; that it was not material how much was behind; for if any part was behind, it was a breach of the condition, and ſufficient for the King, the ſame being found by office. 2. It was reſolved, that the Iurors of *Middleſex* might finde which were the uſual Feaſts in *London*, being another County: Cook 5 pt. 56. *Knights* Caſe.

2. In debt againſt Executors, the Iury found that the Teſtator dyed in *Ireland*, and that the defendant took divers goods of the Teſtator in *Ireland* and adminiſtred them to the value of the debt, and that he did not adminiſter any goods of the Inteſtate *intra regnum Angliæ*; In this caſe, it was reſolved, that when the place is material and made parcell of the iſſue, there the Iurors cannot finde the point in iſſue in any other place; for by the ſpecial pleading the point in iſſue is reſtrained to a certain place. 2. Reſolved, that upon every general iſſue, the Iurors may finde all locall things in another County, which are material in Law for the matter in queſtion. 3 It was reſolved, that in the principal caſe the Iury had found the ſubſtance of

of the Iſſue Aſſets; and the finding that the ſame was beyond the ſea in *Ireland* was but ſurpluſage: Cook 6. pt. 46. *Dowdalls* caſe. Vide there 28. Eliz. *Gyas* and *Conſtantines* caſe: and vide Paſc. 15. Jac. in B R The Counteſs of *Oxford* and *Waterhouſes* caſe; *Marſh* acc.

3. A ſued an Appeal of robbery in the County of W. where the robbery was done againſt B and C as acceſſaries, and declared that the principals named in the Writ, and who were attainted, did the robbery in the County of W. and that the defendant feloniouſly at *London* did abet him to it. It was reſolved in that caſe, That although the Plaintiff cannot have but one Appeal againſt the principals and acceſſaries, and againſt the principals it ought of neceſſity to be brought in the County of W. yet becauſe thoſe of the County of W. cannot enquire of a thing done in *London*, and *London* by the cuſtom cannot joyn with them; for in caſe of felony which concerneth a mans life every act ſhall be tryed in the County where the act was done: It was adjudged, that in that caſe, The Appeal brought againſt the acceſſaries ſhould abate: Vide 29. H. 8. 38. Dyer *Gawyns* Caſe.

Vide more upon this diviſion: Cook 7. pt. *Bulwers* caſe lib. 1. title Acceſſaries and Appeal, p. 76, and p. 536.

4. It was reſolved by the whole Court, That if the Plaintiff in evidence ſheweth any matter in writing or of record, or any ſentence in the Eccleſiaſtical Court, upon which a Queſtion in Law doth ariſe, and the defendant offereth to demur in Law upon it, the Plaintiff cannot refuſe to joyn in demurrer; but he ought to joyn, and wave his evidence, becauſe the Jury cannot try it; ſo if the Plaintiff produceth Witneſſes to prove matter in fact, there alſo the Defendant may demur upon it; but then he is to admit the evidence given in by the Plaintiff to be true; that the matter of Law may not be tryed by the Jury who are laymen: And ſo in the like caſe, the Plaintiff may demur upon the Defendants evidence. But if evidence be given for the King in an *Information* or other ſuit, and the Defendant doth offer to demur upon it, the Kings Councell are not compelled to joyn in demurrer: But the Court ought to direct the Jury to finde the ſpecial matter; and upon that they ſhall judge according to Law; but that is by the Kings prerogative: It was alſo holden in this caſe, That the King may wave his demurrer and joyn iſſue when he pleaſeth: Cook 5. pt. 109. *Bakers* Caſe.

5. In an Aſſiſe the Defendant pleaded, That A was ſeiſed in fee and ſuffered a recovery to the uſe of himſelf for life without impeachment of waſt, and afterwards to the uſe of his eldeſt ſon in tail with divers remainders over; The Plaintiff confeſſed the recovery, and ſaid, that it was to the uſe of him and his heirs, *abſque hoc*, that the recovery was to the uſes expreſſed in the Bar; Iſſue being joyned upon that, it was found by ſpecial verdict, That after the recovery by deed indented between A and the ſaid recoverors, it was covenanted and agreed, that whereas a recovery was had, *&c.* that the recoverors ſhould ſtand ſeiſed, to the uſes and intents hereafter expreſſed, and expreſſed the uſes in the Bar: It was a point in this caſe amongſt others, if upon a ſpecial point in iſſue, upon an *abſque hoc* the Jury might give a ſpecial verdict; It was objected that Jurors cannot give their verdict at large, but where the general iſſue is pleaded, and not when an iſſue is joyned upon a certain point, and upon a collateral matter from the general iſſue; for there they ought to find the iſſue preciſely without giving a ſpecial verdict: But it was reſolved, That in all pleas as well of the Crown as of Common pleas between the King and party, or between party and party, the Iurors may finde the ſpecial matter which is pertinent, and tendeth only to the iſſue joyned, and may pray the advice of the Court, and that they may do by the Common Law; But when the Iury finde matter of fact at large which is not pertinent nor tending to the iſſue upon which they are to give their verdict, there the Court ought to diſallow of it: Cook 9. pt. 3. in *Downants* Caſe. Vide 11. Eliz. Dyer 283, 284. vide Cook 9. pt. 3. and 8. acc.

More Notice.

1. A Writ of diſcharge of the old Sheriff of the County was brought and delivered to the Clerk of the County Court ſitting in Court in the abſence of the Sheriff; It was the opinion of the Iuſtices, That this being a commiſſion, and directed *nuper vicecomiti*, reciting the words of the Patent of the new Sheriff, with a command to the old Sheriff to deliver to him the cuſtody of the County *cum omnibus rotulis, &c.* there by ſuch publick delivery of the Writ of diſcharge in the County Court, the authority of the old Sheriff did ceaſe, and that every man of the County was to take notice of it: Hill. 19. Eliz. Dyer 355.

2. Note: It was holden by the Court, That an ordinance made by cuſtom in a Court Baron for the government of the Common upon a forfeiture being

being proclaimed in Court, is good and ſhall bind the Commoners, and they are to take notice of ſuch ordinances at their perill: Vide Hill. 1. Car. in B. R. *James* and *Turacys* caſe. Cro 1 pt. 357. Vide their caſe at large lib. 1. title Amercements 171. ſect. 3.

3. Action upon the Statute of Hue and Cry, ſuppoſing he was robbed in a high-way in *diverſ. hundredorum*, and that he gave notice thereof to the inhabitants of the Hundred near the place where he was robbed: It was ſaid the Declaration was not good becauſe it doth not ſhew that the high-way is in any Hundred; and in truth it ought to be given to the inhabitants of both hundreds: But the exception was diſallowed; for it was the opinion of the Court, if notice be given to the Inhabitants of either Hundred, it is good: Paſc. 21. in B. R. *Foſter* and Inhabitants of the Hundred of *Speaſor* and *Iſlworths* caſe. Cro 2. pt. 695.

4. *Aſſumpſit*: The Plaintiff declared that he was poſſeſſed of a heap of woad containing ten Tunns, and that the defendant in conſideration that he would ſell and deliver him one Tunn of the ſaid woad, promiſed to pay him within ſix months after the rate that he ſhould ſell the reſt; and he delivered him the Tunn, and ſhewed that he ſold the reſt to I S for twenty three pound the Tunn; upon *Non Aſſumpſit* judgement was for the Plaintiff; and upon a Writ of Error brought in the Exchequer Chamber, the judgement was reverſed, becauſe the Plaintiff had not alledged, that he had given notice to the defendant of the ſale and price of the reſt, it being a thing in his private knowledge: Tr. 12. Jac. in B R rot. 1758. *Holmes* and *Tweſt* Caſe Hob 51.

5. *Aſſumpſit* ; The Plaintiff declared, That whereas he had informed in the Exchequer againſt one I S for engroſſing of corn and was ready for tryal; the defendant in conſideration that the plaintiff would not proceed to tryal, but ſhould deſiſt, and alſo ſhould deliver him a note of his coſts and charges expended in the ſuit, did promiſe to pay him ſuch charges expended in the ſuit, at the Plaintiffs firſt coming into *Somerſetſhire*, and layed the performance on his party, and that ſuch a day he came to T in *Somerſetſhire*, and the defendant had not paid his charges of ſuit being ſix pound; Upon *Non Aſſumpſit* found for the plaintiff, it was the opinion of the Court, that judgement ſhould be arreſted in this caſe, becauſe the plaintiff had not given notice unto the defendant of his firſt coming into *Somerſetſhire*, the ſame being a thing which lay beſt in his own notice; and alſo becauſe the defendant undertook not the payment by bond, but by *Aſſumpſit* only: Hill. 12. Jac. in Co B. rot. 790. *Richards* and *Carvanels* Caſe. Hob. 68.

6. The caſe was: *Ceſtuy que uſe* in tail to him and the heirs males of his body, the remainder in tail to his daughter; the remainder in fee to the uſe of the right heirs of the firſt *Ceſtuy que* uſe (which was the Earl of *Ormond*) upon a recovery had; Afterwards, the firſt *Ceſtuy que* uſe and the recoverers, did make a feoffment over to three perſons and their heirs, and did limit new uſes; two of the feoffes having notice, and the three having no notice of the firſt uſes, and the firſt *Ceſtuy que* uſe afterwards dyed; This caſe by the King was referred to three of the Juſtices; *Mountague*, *Hob* and *Doddridge*: It was in this caſe agreed by all the Juſtices, That upon the new uſes declared upon the laſt feoffment by the recoveries, and the Earl being *Ceſtuy que* uſe, the new feoffees could not be ſeiſed but to the new uſes. But yet they held that the two feoffees that had notice of the firſt uſes were bound to make recompence for the wrongful change of the old uſes, and becauſe that turned to the benefit of the Earl, that his eſtate might well be anſwerable for it; and for the other third part which is in the third feoffee that had no notice, there was no remedy at all: This caſe afterwards was ended by the award of the King amongſt other things; and the King by his award gave the Lady *Dingwell*, the daughter of the Earl of *Ormond*, who was the *Ceſtuy que* uſe, three Mannors for her part, five Mannors being controverted upon this point for her part; 15. Jac. upon a reference to the Judges: The Earl of *Ormond* and the Lord *Dingwells* caſe: Hob. 348, 349.

7. In treſpaſs againſt the Corporation of Butchers, They pleaded, that they had power to make Bylaws, and did ordain, That no Butcher or perſon being a ſtranger ſhould ſell any Veal within the City of *London*, unleſs they did dreſs the kidneys of the Veal in ſuch manner as the kidneys of the ſheep were dreſſed, and if they did otherwiſe to forfeit for every time ſix pence, and if he refuſe to pay it, then to forfeit the Veal: It was holden by the Court, That a ſtranger is not bound to take notice of a private Ordinance made in a Corporation: 2. That ſuch a By-law was not good to reſtrain ſtrangers; but the ſame had been good if made to ſuppreſs fraud, or any other general inconvenience uſed by forreiners, as corruption or the like in the ſale of their meat, and then they ought to take notice of the ſame: Hill. 7. Jac. in B R *Franklin* and *Greens* Caſe. Bolſtr. pt. 11.

8. In *Aſſumpſit*; The Caſe was, H did promiſe to I S that if he did borrow of P 100. l. that he would repay this to him upon the ſame day, and upon the ſame conditions as they between them ſhould agree upon; I S borrowed the money and agreed

agreed, to be repaid at a day certain; before the day I. S. died, and made L. his Executor; the day paſſed, the money not paid, P. brings his action againſt L. and recovers; and L. as Executor of I.S. brings his action upon the Caſe upon the promiſe, againſt K. and had judgement to recover in Co. B. H. brings Error, and aſſigned for Error, that no notice was alledged to be given to him before the day, which agreement was made between them, and without notice thereof given, he was not bound by his promiſe: and of that opinion was *Williams* Juſtice; who took a difference where the thing is executed, and where executory; where executed, no notice is to be given; but otherwiſe where it is executory, as 4 H 7. But all the other Juſtices were of a contrary opinion; and ſaid that where a penalty is to be recovered, that notice is requiſite to be given; but where damages are to be recovered there no notice is to be given; and in an action upon the Caſe, he is only to recover damages; and the party hath ſufficient notice given him by the Declaration againſt him: and for want of notice the party is not diſcharged of his promiſe, for he ſhall pay the principall, and the notice is no parcel of the promiſe. It was the opinion of the Court that the Declaration was good, and the Plaintiff had Judgement to recover the principal, but not damages, the Judgement was affirmed. Paſch. 6. Jac B R. Ret. Com. Bolſtr. 1. pt. *Beverley* and *Leightons* Caſe 12. & 13.

9. Leſſee for 20 years of a houſe upon Condition that if he did not repair within ſix moneths after warning the Leas to be paid, the Leſſee ſuffered I.S. to occupy the houſe: It was reſolved in this Caſe, That notice given to I.S. to repair it is not ſufficient, but it muſt be to the party aforeſaid in the Term, and it muſt be to his perſon, and not left at the houſe. Hill 44 Eliz. *Stretman* and *Evereſleys* Caſe: Owen 114.

10. A. brought action againſt the Hundred of O. for a Robbery done upon Red Hill in the County of *Surrey* the Robbery was upon his Man, and 400.l. taken from him: In this caſe, it was agreed by the Juſtices, that although there be a remiſneſs in the party that was robbed in purſuance of the Theeves; yet this doth not take away his action or excuſe the Hundred, if notice be given with as much convenient ſpeed as may be for them to make Hue and Cry: And notice given in a Hundred five miles from the place where the party was robbed is ſufficient, becauſe the party, who perhaps is a ſtranger to the Country, cannot have knowledge of the neereſt place or Town; and notice given at one Town, and Hue and Cry levied at another, is good: Paſc. 15. Cer. in B.R. Sir *John Compſons* Caſe. Marſh. 20. 21.

11. An award was made that the Defendant ſhould pay to the Plaintiff 8.l. or 3.l. and Coſts of ſuit as ſhould appear under a Note of the Attorneys hand of the Plaintiff: In this Caſe it was reſolved, That although the Attorney, as in ſome reſpect, he was a ſervant to his Mr. yet to this purpoſe he is a meer ſtranger, and therefore the Plaintiff was not bound to make any tender of that Note, but the Defendant ought to have required the Note and Coſts of ſuit of him that he might have his Election to pay the 8 l. or the 3 l. and coſts of ſuit: And in that caſe it was agreed, That when it is a thing, which lyeth in the knowledge of the Plaintiff, which is to be done, there he ought to make the tender and give notice: but in the principal Caſe, it did not lie in the knowledge of the Plaintiff, and he could not compell the Attorney to do it. Hill. 17. Car. in B.R. *Dewel* and *Miſons* Caſe, Marſh. 156.

12. In Covenant; the Caſe was, Leſſee for 90. years made an Aſſignment for 10. years, and the Aſſignee Covenanted to repair, &c. the firſt Leſſee deviſed the reverſion of the Term and died, the Deviſee brought covenant againſt the Aſſignee for 10. years. There was a Queſtion in this Caſe, If the action would lie becauſe there was no notice given of the grant of the Reverſion: It was the opinion of the Court there needed no notice in this Caſe; becauſe there is not any penalty in the Caſe; and it differs from *Mallories* Caſe; for there was a Condition: Paſc. 3. Jac. in Com. B. *Briſtow* and *Briſtows* Caſe: Godbolt. 160.

13. Note, that in every attorement expreſs (which is but an aſſent to a Grant) it behoves that the Tenants, or he who ought to attorn have Notice of the Grant; And every attorement expreſſed, or implyed, ought to be according to the grant, as an attorement to the grant of a Reverſion, or on a Rent, in the abſence of the grantee is good. Cook 1. pt. Inſt. f. 310.

14. A. ſeiſed in Fee of Lands of the nature of *Gavelkind*, had Iſſue three ſons, B. C. and D. and demiſed them to E. his wife for life; and that E. after the deceaſe of his Mother, ſhould have them to him and his heirs for ever; and if B. die without iſſue of his body begotten, then that the lands ſhould remain to C. and his heirs for ever: And if B. and C. die without Iſſue of his body begotten, then that the Lands ſhould remain to C. and his heirs for ever; and if B. and C. die before they have iſſue of their bodies, then the Lands to remain to D. and his heirs for ever: And if B. ſhall enjoy the Lands, then he ſhall pay out of them to C. and D. 20.l. 13.s. 4 d. at his firſt entry to pay to C. 40.s. and ſo yearly, until 13 l. 6.s. 8 d. be anſwered, and then to pay to D. 40.s. &c. in like proportion, as aforeſaid; and if B. ſhall re-

ſuſe

fuſe to pay to C. and B. the ſaid ſumm in manner as it is limited; then the Lands to remain to C. and his heirs for ever, paying to B. and C. 13.s. 6.d. &c. And if C. ſhall enjoy the Lands, that he pay to D. his brother the whole ſumm of 26.l. 13. s. 4.d. * A. died, E. entred, in whoſe life time B. died without iſſue; After D. made his Will, and made M. his Wife his Executrix, and died, having iſſue a daughter F. E. died; C. entred, and was ſeiſed in tail; M. proved the Will of D. her huſband, and M. did not pay the ſaid 26.l. 13 4 d. to F. the daughter and heir of D. The main queſtion in this caſe, was; If the eſtate limited to C. be conditional, as the eſtate limited to B. was; *Popham* conceived that it was not conditional, but that the payment by C. unto F. was only a truſt repoſed in C. and not a condition; But if it ſhould be taken to be a condition; then he held in that caſe, that C. ought to have given notice to M. the Executrix of D. before his entry into the Lands when he intended to make his entry, ſo as the Executor might be there to demand the money, becauſe without a demand a Refuſal cannot be, and the Executor is excuſed to make demand when he had no notice of the time; and in this Caſe, if notice had been given to the Executrix, and ſhe had demanded the money and C. had ſaid nothing to it, but had omitted to pay it, yet this had been a Refuſall in Law, which would have made his eſtate, if conditional, void; A 35. Eliz. *Ward* and *Brownings* Caſe, *Popham* 12.13.

15. In *Ejectione firmæ*, upon ſpecial Verdict, It was found 1. that I.S. was ſeized of Land in Fee, and made a feoffment to divers to the uſe of A. his Wife for life, the remainder to him & his right heirs in Fee, and died; the reverſion deſcended to R. his ſon and heir, he being ſeiſed of the Reverſion by Indenture between him and A. his mother; a Fine was levyed to the uſe of A. and her heirs for ever, if R. did not pay to her 10 l. upon the firſt of *Sept.* next; and if he did, then to the uſe of A. for her life of part of the Lands, and of the reſt to the uſe of R. and his heirs: R. died at the age of 20. years, and that was before *Septemb.* C. and D. being ſiſters, and heirs of R. under whom the Plaintiff did claim; and it was found that they had not notice of the leaſe, nor of the Indenture, and they did not pay the money upon the firſt of *September*, but afterwards they entred and made the leaſe to the Defendant; and whether any notice was requiſite to be given to the heirs in this caſe, or not, was one queſtion amongſt others. Of the one part, It was ſaid, that the heir was bound to take Notice; for the heir is privy to the Condition which doth deſcend to him, and therefore he ought to take notice of it; and if a man be not bounden to give notice at the time of making of a Deed, he ſhall not be bound to give notice by any matter *ex poſt facto*, vid. Cook 8. pt. *Frances* Caſe. There the heir was bound to take Notice of the Proviſo in the Feoffment, without notice given him: Note, the difference was taken, where it is an hereditary Condition or limitation, and where it is collateral; and where there was an Original Notice upon the agreement, which is hereditary and deſcends to the heir, that ſhall enforce the heir to take notice of it at his peril; but if it be collateral to the Father, there it ſhall not binde the ſon, without expreſs notice: vide *Cook* 8. pt. in *Frances* Caſe, ac. The point was not reſolved. *Idem Quære*: M. 22. Jac. in Com. Br. *Cowper* and *Edgers* Caſe, Winch. 108, 117, 118.

Nuſance, and Aſsiſe of Nuſance.

1. *Where, for what, and in what Caſe, and by whom it lyeth: Where not, and where, and in what Caſe, and by whom, it ſhall be abated, what not.*

1. TEnant for life of a houſe brought an Action upon the Caſe, againſt one who ſtopped a way in his Land, which time out of minde, &c. had been a paſſage between the houſe and a Park; the Park was belonging to the Leſſor: It was holden in that Caſe, that an action upon the Caſe did not lie; but an Aſſiſe of Nuſance. Paſc. 8. Eliz. Dyer 250.

2. Action upon the Caſe was brought againſt a woman for the diverſion of part of a Water-courſe which ran from &c. to the Plaintiffs houſe: It appeared that the diverſion was of a Main pipe, but the husband did make a quill with a Cock to ſerve his houſe with water in his life time: It was the opinion of the Court, that becauſe it was with a Cock, ſo as every opening of the Cock was a new diverſion, the Court held that the action upon the Caſe would lie againſt the wife: But the Plaintiff could not obtain Judgement for a long time, becauſe he did not ſhew that he was ſeized of the houſe, to which, &c. at the time of the diverſion, but only thus, *Quod cum ita ſit*, &c. M. 15. Eliz. Dyer 319. the Lady *Browns* Caſe.

3. An Aſſiſe of Nuſance was brought for ſtraight-

ning a way which the Plaintiff ought to have to his Mill; the Defendant did alledge unity of possession of the Land, and of the Mill in W. and demanded Judgement of the Writ; the Plaintiff shewed, That afterwards W. had two daughters, and died seized, and the Mill was allotted to one of them in partition, and the Land to the other, and the way was reserved to her that had the Mill; The Assise was awarded; for by the Partition the way was revived and appendent as it was before, vide 21. E. 3. 2. ac.

4. Action upon the Case, against an In-keeper for not scowring of a Ditch which ran between his house and the house of another man, judgement was given for the Plaintiff against the Defendant; and Error brought; and divers Errors assigned. 1. The Plaintiff doth prescribe that the Inhabitants of the house called the Bel had used to scowr the gutter, and that was not good, as 12. H. 7. ac. title prescription 16. where the Plaintiff said, That the Defendant, *Et omnes alii terram illam prius habentes mundare debuerre & consuevere talem fossatum*; and the Writ was abated, for it ought to have been, *Quod ipsi & predicessores sui de tempore cujus contrarium, &c.* 2. Because the prescription was uncertain; for it is that all Tenants; which extendeth to Fee, Fee tail for life and years; and the prescription being the ground of the action ought to be certain: 3. Because the Plaintiff hath not alledged, that the Defendant was Tenant at the time of the action brought: 4. Because it was for scowring of a Gutter betwixt the houses and ditch, not saying that the house was *contigue* adjacent to his house. It was the opinion of the Court, that these were good causes of Exception, and therefore the Judgement was reversed, M. 29. Eliz. in B. R. *Joyces* Case. Godbolt, 54. 55.

5. Assise was brought against the Defendant because that *Levavit quendam Domū ad Nocumentum, &c.* and shewed that he had a Wind-Mill, and that the Defendant had built the house, so as it hindred the Mill. The Jury found, that the Defendant *Levavit Domum*, &c. and that two foot of it did hinder the Plaintiffs Mill, and is *ad Nocumentum*. In that Case, it was the opinion of the Court, That Judgement should be, That but part of the house should be abated; viz. that which was found to be *ad Nocumentum* only, though it was said, That the Assise is such a Writ which extends to the whole house, and therefore that the whole house should be abated according to the Writ. But difference was taken betwixt the words *Erexit, & Levavit*; for *erexit* is but when parcel of a house is set up *ad Nocumentum, &c.* but *Levavit* is when an entire house is levied from the ground; The Judgement was, That that only should be abated which was found to be *ad Nocumentum*, &c. M. 11. Jac. in Com. B. *Traherns* Case, Godbolt 133.

6. A. levyed upon his own Free-hold a house so neer the Curtilage of the house of I. S. *quod Domus illa superpendat magnam partem*, viz. 3. *pedes curtilagii predict.* I. S. and afterwards A. conveyed the house to B. I. S. conveyed his house to C. who brought *Quod permittat* against B. and declared, that the water distilled and descended from that house to the Nusance of his Curtilage and house: and if the *quod permittat* did lie by the Feoffee, or not, was the question: It was objected that it did not lie, because that he to whom the wrong was done, had conveyed over the house, and so the wrong was remediless; for he shall take the house in the same plight as it was when it was conveyed unto him. But it was Resolved, That the distilling of the water in the time of the Feoffee was a new wrong; so that the permission of the wrong by the Feoffor or Feoffee to continue to the prejudice of the other, should be punished by the Feoffee of the house to which the Nusance is done: and if it be not reformed after request made, a *Quod permittat* lyeth by the Feoffee against the Feoffee, and he shall recover damages but against him that did the Nusance; It was resolved, 1. *Quod permittat* lyeth without request. 2. Resolved, that the Feoffee might abate the Nusance as the Feoffor it self as well in the hands of the Feoffee, who did not the Nusance, as in the hands of him who did the wrong. 3. Resolved, that the Feoffee to whom the Nusance was done, might abate the Nusance before he had any prejudice; for that he might prevent his prejudice. Tr. 40. Eliz. Com. B. Cook 5. pt. 101. *Penruddocks* Case.

7. Action upon the Case for assaulting and beating of his servant, *per quod servitium amisit*; the Defendant as to the Assault, justified, and shewed that he was possessed of a house, and had a right to it time out of minde, and that the servant of the Plaintiff did intend and endeavour to erect another house upon a certain piece of ground adjoyning to his house, and had erected certain timber for a house, which house if it had been erected, it would have stopped up his said ancient light; and for this cause that this would have been to his Nusance, he stood in his own house, and with a staff did thrust away the Plaintiffs Servants by him imployed in the building, and did then throw down the timber so erected: upon which barr, the Plaintiff did demur in Law: It was holden by the Court, that this plea in barr was not good, for many causes: 1. Because in this Case the principal cause of the Action is the losse of his service, and the Defendant doth justifie as to the battery and assault, but saith nothing to the loss of

of his service. 2. The plea amounts but to the general Issue: 3. The justification is not good; for the Defendant ought to have *damnum & injuriam*, and if he have none of these, his Justification is not good, and it doth not appear that he hath any damage; and a man cannot justifie the assaulting or beating of one for an endeavour only: Judgement was given for the Plaintiff. M. 10. Jac. in B. R. *Morice* and *Bayers* Case. Rolstrode 3. part 196, 197, &c.

8. An Action upon the Case, the Plaintiff declared, that the Defendant, *malitiose intendens* to deprive the Plaintiff of the profits and easements of his house, erected a Wood-pile so neer the Hall and Parlour of the Plaintiff, that he was barred of his light; and also erected a Hogstie so near the said Hall, that by the stink of it he could not endure his house. It was resolved in this Case, that the action was maintainable for the erecting of a house by which another is barred of his light: 2. It was resolved, that for the erecting of a Hogstie, action lyeth; for that by the stink of it the house is corrupted: The same Law is of a Lime Kill; for although it be profitable to the Common-wealth; yet if it be a Nusance to the party, an action lyeth: the same Law, if a Tanner or Dyer doth corrupt the waters which ran to my house, an action lyeth against them. Cook 7. part 51. *Aldreds* Case.

9. A man prescribed that he and all those whose estate he had in a house had used to have seven windows towards a piece of Land adjoyning to the said house, by which windows they had used to have divers wholsom easements and commodities by reason of the open ayre and light; and that the Defendant intending to deprive him of the Easements, *& obscurare Messuagium predict. horridis tenebris*, erected a building upon the said piece of Land, by which he lost the said easements, *Et maxima pars Messuagii predict. horrid. tenebritate obscurata fuit*: The Defendant pleaded in bar a custom of the City of *York*, *quod si aliquis habuerit visum per fenestras versus terram vicini sui, vicinus vel aliquis illarum fenestrarum obstruere solebat*. In that Case it was adjudged for the Plaintiff; for when a man hath a lawfull Easement by prescription, or custom, another custom cannot take away the same, because one custom is as ancient as the other: also it might be that the owner of the house have given consideration to the owners of the piece of Land, to have the windows without stopping, and so his prescription might have lawfull beginning: But it was resolved that for the stopping of a prospect, which is only matter of delight, and not matter of necessity, no action lyeth: Tr. 29. Eliz. in B. R. *Mosley* and *Blands* Case.

Vide M. 9 Jac. in B. R. *Hughes* and *Keimes* Case: Lib. 1. Title, Customs, pag. 537. Sect. 9. to this division.

10. A man seised of two old ruinous Fulling Mills, prescribed, *quod magna pars aquæ cujusdam rivuli* ran from a place called D. to the said Mills, and that there was a Bank to receive the water within the Current; and that he pulled down the two Fulling Mills, and conveyed them to Corn Mills; and that the Defendant brake the bank, and turned the water from the Mills; the Defendant pleaded Not guilty, which was found against him, upon which, the Plaintiff had Judgement: The Defendant brought Error, and assigned for Error: 1. That by the building of the new Mills, that he had destroyed his prescription: 2. That it was uncertain what quantity of water should be comprehended in these words, *Magna pars aquæ*: It was resolved, 1. That the prescription extended to the new Grist Mills, because in general the Mill is the substance, and the alteration was not of the substance, but of the Quality; and if one be to demand a Grist Mill, or a Fulling Mill, the Writ shall be *de una Molendina* generally without any addition: For the second point it was resolved, although the Declaration might have been better, yet in substance it was good enough; and it was said, that an Assise of Nusance was brought *pro diversione majoris partis aquæ*; and it was holden good. Pasc. 43. Eliz. in B. R. Cook 4. pt. *Lutterels* Case.

11. In an Action upon the Case, It was, that 2. E. 6. the Dean and Chapter of *Wyton*, leased two houses in L. to I. S. for 60. years, who leased one of them to A. and covenanted that it should be lawfull for the said A. his executors and assigns to make a window in the shop of the house to him assigned: Afterwards in the time of Q. *Mary*, a window was made where no window was there before. A. assigned the house to the Plaintiff: The defendant having a house adjoyning, erected a new building, *super solum ipsius domus ex opposito* the said house and new window, so as the new window was then stopped. Upon Not guilty being found for the Plaintiff; In stay of Judgement, it was said, that there was no cause of Action; for the windows upon the Plaintiffs own shewing, appears to be of late erected, and in the time of Queen *Mary*; the stopping of which by any act upon the parties own Land was lawfull; and such was the opinion of the Court. But if it were an ancient window time out of memory, then the light or benefit of it, ought not to be hindred by any act whatsoever. But it was holden, That if the Case had been that the house and soil upon which the defendant had erected the building, had been under the estate of I. S. who covenanted; then the defendant could not have justified the Nusance. 1 M 31.

Eliz. in Com. B. *Bewry* and *Popes* Caſe, Leon 268.

12. In Treſpaſs for pulling up, cutting, and caſting down a Gate; the queſtion was, Whether the erecting of a gate croſs a high way which may be opened and ſhut at the pleaſure of the paſſengers, be a common Nuſance in it ſelf: 2. admitting it to be a Nuſance, whether every one may pull up and caſt down the ſaid Gate at their pleaſure: It was objected, that being ſo ſmall a trouble, but much for the publique good, that there ſhould be encloſures for preſervation of Corn & Graſs from Cattel ſtreying into it, it ſhould not be Nuſance; and 2. E. 4. 2. erecting a gate upon the high way is pleaded and admitted lawfull. But it was the opinion of the Court, that the erecting of a gate, although it be not locked or tyed, but that every Subject may open it, and have paſſage at pleaſure, is a Nuſance; for it is not ſo free and eaſie a paſſage as if no ſuch encloſure had been. 2. Reſolved that the cutting of the Gate was lawfull; and in this caſe it was ſaid, That ancient gates upon high wayes, that it ſhall be intended that they were by Letters Patent of Licence from the King, and upon *Ad quod Damnum* ſued out. Paſc. 6. Cur. in B. R. *James* and *Haywards* Caſe. Cro. 1. pt. 333.

13. In Action upon the Caſe, the Plaintiff declared, That whereas he was Owner of a Common Inn in D. the defendant malitiouſly erected a Tallow Furnace, and boyled therein much ſtinking Tallow, to the great annoyance of him and his Gueſts, by reaſon whereof many of his Gueſts left his houſe, and many of his family became unhealthfull: It was objected, that a Tallow Chandler is a Trade, and a man ought to uſe his Trade, which cannot be ſaid a Nuſance: But it was reſolved, that as the Declaration is laid, the action was maintainable; for every man ought *ſic uti ſuo quod alienum non Ledat*; and when the Plaintiff is an Inn Keeper, the defendant erecting a Tallow Furnace, annoying his houſe with ſtenches, eſpecially with boyling ſtinking ſtuff, it is a Nuſance: Tr. 14. Car. in B.R. *Morley* and *Progats* Caſe. Cro. 1. pt. 367.

14. In a *Quod permittat prolevare quandam Domum*, that by being new built hindered the light of the houſe adjoyning by over hanging: Upon the Iſſue and Verdict, it appeared, that the defendant had built the ſaid houſe upon the old foundation of an houſe which had been there built before, and had been pulled down, becauſe it was ruinous by one who was then owner of both houſes. It was the opinion of the Court in that Caſe, that the unity of poſſeſſion of both houſes in one man did ſuſpend that eaſement; ſo as the Defendant could not be charged with any damage but for what ſhould be cauſed by making it hang over more then what it did before; for that eaſement being once ſuſpended, is gone for ever, although the houſes afterwards come to ſeveral mens hands. Hill. 13. Jac. in Com. B. *Robins* and *Barnes* Caſe. Hob. 131.

15. In Treſpaſs the Caſe was A. a Free-holder within the Mannor of I. of which the Earl of N. was Lord and had a Leet, erected a new Dove-Cote thereupon, and ſtored it with Pigeons, and ſuffered them to flie out, which was preſented in the Leet as a Common Nuſance, and an amerciement of 40 s. aſſeſſed and aſſerred for this offence, and a paymynt of 10 l. impoſed, that he ſhould ſtop it up before ſuch a day, and he did not ſtop it. Whereupon it was preſented the next Court, and the pain impoſed to 12 l. and for not paying of it a diſtreſs was taken; the defendant entred bond for the payment of the 12 l. and afterwards he brought treſpaſs for taking of the Cattel, and detaining them until he had entred bond; all this appearing by way of Plea; it was demurred upon: It was the opinion of all the Juſtices in this Caſe, That the erecting of a Dove-Cote by a Freeholder who is not Lord of the Mannor, nor Parſon of the Rectory, and the repleniſhing it with Doves is not a Nuſance enquireable and puniſhable in a Leet. And if it were a common Nuſance, whether the Lord of the Mannor, or the Parſon could erect a Dove Cote, more then any other Freeholder, for that none can preſcribe to make a common Nuſance; and the common Law doth not look upon the erecting of a DoveCote as a common Nuſance, but makes proviſion againſt them that deſtroy Doves neer a Dove houſe; wherefore it was adjudged for the Plaintiff; and further in this Caſe it was adjudged, that the Avowry made was not good; for as they have pleaded, they have not made it appear it to be within the Leet; for they ought to enquire of publique Nuſances made within the Leet, and not of Nuſances made in the County out of their Juriſdiction; but in this caſe they ſay, That he erected a Dove Cote within the Leet, *& quod Columbæ volabant, & revolabant*, and conſumed the Corn: *Al nocumentum totius patriæ*, but they do not ſhew, that they conſumed any Corn within the Leet. Tr. 16. Jac. in B.R. *Dewell* and *Sanders* Caſe. Cro. 1. pt 491. Vide Poph. 141. the ſame Caſe.

16. Action upon the Caſe for laying in the high-way leading from G to B divers loads of logs whereby the way was much ſtraitned, ſo as the plaintiff riding in that way in the evening, his horſe ſtumbled upon thoſe blocks, and much hurt him: The defendant ſaid, that the Town of G was an ancient Town, wherein all the inhabitants having ancient houſes time out of minde uſed to lay logs in

in waſt places of the ſaid high way before their doors for their fuel, leaving ſufficient paſſage for Carts, horſemen, and footmen; and the plaintiff riding upon the way *improvidè*, turned his horſe upon the blocks and fell: It was adjudged for the plaintiff, becauſe he having ſpecial damage had good cauſe of action, although it were a publick Nuſance; and in this caſe it was holden that the preſcription was void in law: Tr. 15 Jac. B. R. *Fowler* and *Sanders* Caſe. Cro. 2. pt. 446.

17. Action upon the Caſe, the plaintiff declared, That he was poſſeſſed of a meſſuage for forty years, in which he and his family dwelt, and kept an office of regiſter there; and that the defendant had erected a Brew-houſe, and a privy houſe to the ſaid houſe, and burned ſea-coal in the ſaid Brew-houſe, ſo as by the ſmoak, ſtench, and unwholſome vapours he and his family could not dwell in the ſaid houſe without danger of their healths: It was reſolved in this caſe; That although ſea-coal be neceſſary fuel to be uſed, and Brew-houſes neceſſary, and ſo as Chimnies, Dye-houſes, and Tanfats; yet the Law is, *ſic utere tuo ut alienum non lædas*; and becauſe it was found that the Brew-houſe and privy houſe were erected to deprive the plaintiff of the benefit of his houſe and office; It was adjudged that the action would lye againſt the defendant: M. 4. Car. in B R *Jones* and *Powells* caſe. Hutton 134.

18. In action upon the caſe the plaintiff declared, That he was ſeiſed of two Acres of medow in D. and I S was ſeiſed in fee of a watermill in D. whereunto the water run out of the river of S by the ſaid two Acres, and that the defendant erected *ripas ſtagnum molendin. prædict.* ſo high that by the exaltation of the water it overflowed the two Acres, and yet overflows them: upon not guilty found for the plaintiff, it was moved, that there was no place mentioned where *ſtagnum molendini* ſhould be, and there is the Nuſance done, and it may be in another Town. 2. The requeſt to abate it is layed to be to the leſſee, where it ought to be to him who had the freehold; But the exceptions were diſallowed by the Court; for it was holden, that the continuance of it was a Nuſance by him, againſt whom the action did lye. M. 17. Jac. in B R *Brent* and *Haddons* Caſe. Cro. 2. pt. 555.

19. Action upon the caſe for ſtoping his water-courſe; the plaintiff declared, that 22. Iac. he was poſſeſſed of the Rectory of M. of which a Curtilage was parcel, and that in his Curtilage is, and time out of minde hath been a water-courſe for the watering of the cattel of the plaintiff and others, and other neceſſary uſes, and that a certain water-courſe time out of minde flowed from M ſtream to the Curtilage and filled the pond; and that the defendant knowing this, intending to dam up the ſaid water-courſe, built a ſtone wall there upon, whereby the water-courſe was ſtope to his damage, and layed it to be with a *Continuando*. The defendant ſaid, That King H 8. was ſeiſed of the Mannor and Rectory in fee, and of a piece of ground lying between the watercourſe and the ſaid ſtream; and by Letters Patent from the King they both came to one B. and from him by mean conveyance to the defendant who was ſeiſed, and ſo juſtified the filling up of the ſaid water courſe: The queſtion was, whether the unity of poſſeſſion had extinguiſhed the water-courſe or not; and after much argument it was adjudged, that the action did well lye, and that the water-courſe was not extinguiſhed by the unity of poſſeſſion, and that the preſcription was not gone: Hill. 1. Car. rot. 142. B R *Bury* and *Pigots* caſe. Poph. 166.

Obligation.

1. *Obligation: what words are Obligatory, what not; and what words make it joynt, or ſeveral: Where ſued jointly or ſeverally: How the Executions upon them ſhall be ſued, and where in ſeveral Courts, where not.*

1. OBligation is defined to be the right of a perſon by which he hath another perſon bound to him, to pay that which he oweth; or to do that thing which is to be done; and they are either ſimple Obligations without conditions, or conditional: In every Obligation, there is two things conſidered; the creditor is he to whom any thing is due by Obligation, the debtor is he who is bounden.

2. Debt againſt A. the Adminiſtrator of W. the Plaintiff declared upon ſuch a Bill, Be it known to all men, *&c.* that I G have received 20. l. of A. to bear the adventure to R. and there to beſtow it in Pruins, and to ſee them ſhipped; and A to bear the adventure home: It was objected, that this Bill did not make the Inteſtate a debtor, becauſe it wanted words obligatory; but it was the clear opinion of the Court, That the words *recepiſſe* 20. l. made the bill obligatory; and ſo it doth if the words be *me debere*, or *teneri*: Or where a man reciteth, that whereas he hath 100. l.

100. l. of the money of I S he hath paid him 40. l. and so there remains 60. l. the same is a good obligatory, and shall binde the executor; for every word which proves a man to be debtor, or to have the money of any stranger in his custody, if it be by bill, it shall make his executors debtors also. Tr. 28. H. 8 Dyer 20, 21. ac. 22.

3. Debt upon an Obligation of 40. l. the defendant pleaded a release; the plaintiff demanded *Oyer* of the release, which was, That the plaintiff acknowledged himself to be discharged of all bonds, debts, and demands, to the day of release; and that the plaintiff is to deliver all bonds that he hath yet undelivered to the defendant, except one obligation of 40. l. not yet forfeited, in which he and two others stand bound to the plaintiff; and the plaintiff averred, that the obligation which was excepted, and that upon the action was brought, all one: In this case, it was resolved; That when the plaintiff confesseth himself to be satisfied and discharged of all bonds, that the same is a good release by the word discharge and satisfied; for by what words a debt may be created, by the contrary words it may be discharged: 2. Resolved that the plaintiff had mistaken his action; for it appeareth upon his own confession, that the obligation of 40 l. excepted was a joynt bond, and therefore because he had brought his action against one, it was adjudged that his action should abate. Cook 9. pt. 53. *Hichmots* case.

4. Three were bound in an obligation by these words, *Obligamus nos & utrumque nostrum*: It was objected, that the bond was not several, because the word *utrumque* hath reference to two persons: and it ought to have been *quemlibet*: But the opinion of the Court was, that the words *utrumq; nostrum* makes it several, as well as the words *quemlibet nostrum* Tr. 28. 18. Dyer 19.

5. Three were bound in an obligation by the words *Obligamus nos & utrumque nostrum per se pro toto & in solido*; Two of them were impleaded, and pleaded *Non est factum*; which was found against them; it was said in arrest of judgement, that one or all should be sued, and not two; but because it appeared not to the Court upon view of the roll, which was, *quod quidam p scalit script predict. quod debitum, &c. testatur, &c.* that three were obliged, judgement was given for the plaintiff: Pasc. 14 Eliz. Dyer 312.

6. A B and C purchased lands joyntly in fee, and each covenanted with other, and his heirs and assignes *& alterique eorum* to make such conveyance to the others heirs as should first dye as they should devise; A and B dyed; The heir of B. devised on Indenture of bargain and sale, and tendred it to C to seal and deliver; who required time to conferr with his Council; the heir brought Covenant and recovered; In this case it was resolved, that the word *alterique* made it as several, as the word *alter, &c.* 16. Eliz. Dyer 338. Cooks Case.

7. An Obligation of 200. l. was made to two, *solvendum eis*, viz. 100. l. to the one, and 100. l. to the other; one of the obligees dyed, his executor sued for 100. l. Pasc. 28. Eliz. 35. quere if it shall survive. Vide Hill. 32. Jac. in *Stuckley* and *Butlers* Case; by *Hobart* this quere is resolved, that the *solvendum* is void, and the duty shall survive: Hob. 172.

8. In an action of covenant brought upon an Indenture tripartite, it was resolved, That when it appeareth by the declaration, that each of the covenanters hath, or is to have a special interest or estate there, when the covenant is made with the covenanters, *& cum quolibet eorum*, these words *cum quolibet eorum*, makes the covenants several in respect of their general interests: A man by Indenture demised to A black acre, to B white acre, to G green acre; and covenants with them, *& quilibet eorum*, that he is owner of the land, there the covenant is severall: but if he demiseth the acres to them joyntly, then these words *cum quolibet eorum* is void, and the covenants are not several; for a man cannot make a thing first joynt and afterwards several: 2. Resolved, that an interest cannot be granted joyntly and severally; as if a man makes a lease for years to two joyntly & severally, the words *& severally* are void: but a power or authority as to make Livery, or to sell, may be joynt and several, because there they have not any interest, or act on, but are as servants to another. Cook 5. pt. 19. *Slingsbys* Case.

9. A Charter party indented was made betwixt the Master and owners of a ship of the one part, and divers Merchants of the other part, by which the Master and owners covenanted to ship certain merchandizes from such a Port beyond sea, and to transport them to the City of *London*; and by the same Indenture, The Merchants covenanted *separatim*, that the one merchant should pay 3. l. and another 5. l. and for the performance of all and singular the covenants *quilibet mercatorum* obliged himself in double the freight: It was resolved in this case, That although the Merchants joyn in covenant, yet the word *separatim* makes them several covenants 2. Resolved, that although the covenants of the part of the Master and owners were joynt; yet the covenants on the party of the Merchants were several; and therefore the breaking off of one of the seals of the Merchants from the deed, did not make the deed void, but against that party only. H. 29 Eliz. in Co. B. Cook 5. pt. 23. *Mathewsons* Case.

10. A had judgement in debt against B. A by deed

deed enrolled and assigned the same to the Queen in satisfaction of a debt due to her as Collector of the Fifteens; Provided that if the Lords, Peers, or the Barons of the Exchequer, or any two of them for any reasonable cause shall disallow of the assignment, and reverse it by writing, that then the assignment should be void: It was in this case amongst other points resolved, that the revocation by three of them had been sufficient; but if the words of the revocation had been by them by words joyntly, or severally, then the third of them could not have done it, for that the same had been neither joyntly nor severally: M. 41. Eliz. in Exchequer. Cook 5. pt. 91. *Hues* Case.

11. Debt upon Obligation: The condition was to perform the arbitrement between the plaintiff on the one part, and A and B on the other part, *Ita quod arbitrium predict. fiet & deliberatur utrique partium predict.* The defendant pleaded, that the arbitrement was delivered to one of the parties only; It was adjudged, that the action did not lye: For it was resolved, that this word *uterque* in this case should be taken *collective*; and it is but reason, that every one who is subject to the penalty and danger, have the arbitrement severally delivered to him. 2. Resolved, that if two be of one party, and two of the other party, and the words are *quod deliberetur utrique partium*, the delivery to one of the one party and one of the other party, is not sufficient. Tr. 44. Eliz. in Co. B. Cook 5. pt. 103. *Hungates* Case.

12. In debt upon an Obligation, the defendant pleaded *Non est factum*; and it was found a joynt bill made by him and another: it was adjudged for the plaintiff; for when two are joyntly bound in an obligation, none of them can plead that it is not his deed, because they have sealed and delivered it, and therefore if in such case, the one appeareth, and the other maketh default, and is outlawed, he who appeareth shall be charged with the whole. Cook 5. pt. 119. *Whelpdales* Case.

13. If three distinct obligations are written upon one and the same piece of Parchment, and one of them is only read to the obligee, and he being a man not lettered seals and delivers the whole, this is good for that obligation which was read, and void for the rest; So if there be two absolute and distinct clauses in a deed, and one of them is read to him, he not lettered, and the other not, it is good for the clause that was read, and void for the other *ab initio*. Cook 11. pt. 27. in *Piggots* Case.

14. Note by *Hobert* Chief Justice: If two be bounden to me joyntly and severally, and I sue them joyntly, I may have a *Capias* against them both, and the death or escape of the one shall not discharge the other; but I cannot have a *Capias* against the one, and another kinde of execution against the other, because though they be two several persons, yet they make but one debtor when I sue them jointly; But if I sue them severally, I may sever them in the tryals of their executions; for although the obligation be but one, yet the originals, the suit, pleadings, judgements and executions are so diverse, as if they were upon several obligations: But yet so, as if once a very execution be had against one, or against the Sheriff upon an escape of one, the rest may be relieved upon an *Audita querela*. Vide Hill. 10. Jac. in Co. B. in *Foster* and *Jacksons* case. Hob. 59

15. Note by *Cook* Chief Justice in Co. B. That when two are bound in an obligation joyntly and severally, and the obligee sueth one of them in Co. B. and the other in the Kings Bench; and hath against him in the Kings Bench a *Capias*, and taketh him in execution, and afterwards taketh an *Elegit* against the other, and his lands and goods are thereupon delivered in execution, that in such case, the other in execution by his body might well have and maintain an *Audita querela*, and be delivered: because the judgement in that case must be, that he be delivered and discharged of the execution, and then he shall never be taken again, although the land delivered in execution be afterwards everted: Vide Hob. 2. ac. vide Pas. 12. Jac. in B R *Cowley* and *Legats* Case. Godl. 257. accordant.

16. Debt upon obligation: the Case was, two bound themselves or any of them, their heirs, executors, or either of their heirs, executors, &c. the action was brought against one of the obligors only, the other then living; whether this obligation be joyne and several, or only a joynt obligation to be sued against them both, was the question: It was urged that the obligation was sealed and delivered by both of them joyntly; and that the words subsequent, (or either of us) in respect one of the obligors was to be discharged there, and it being uncertain which of them, was void: and it was said that it differs from the Case. 28. H. 8. Dyer 19. which see before: But it was the opinion of the Court, that the acceptance here is not material as to the Election; but it still remains at the pleasure of the obligee to sue them joyntly and severally; and the joynt delivery of the bond shall not make it to be a joynt obligation, and not several; the same being by the Law joyne and several; and it was resolved in this case; that the words *et* and *vel*, are all one, whereupon judgement was given for the plaintiff: M. 10. Jac. in B. R. *Hawkinson* and *Sandilans* Case. Cro. 2. pt. 322.

2. *Obligation: where it shall be good, and where not, where void, and for what cause void, for what not: where for false Latine, Misnosmer, &c.*

1. DEbt upon an obligation upon condition that if the defendant did personally appear in the Kings Bench a day there, *&c.* The defendant pleaded the Statute of 23. H. 6. and said that he was taken by the plaintiff being Sheriff by force of a Latitat, and that the bond was not made according to the Statute; for being made for his deliverance, this word Personally was inserted in the condition more then is in the Statute: It was the opinion of *Anderson* Chief Justice, that the Obligation was void, for that it varies from the expres's form limited by the Statute; but all the other Justices were of opinion against him; for they said, That a man ought to appear in proper person upon a Latitat, where it was adjudged for the plaintiff. Pas. 29. Eliz. in Co. B. *Lassels* Case. Mic. 28. Eliz. in B. R. *Sackford* and *Cats* Case. ac. *Goldesbor* 54 and 61.

2. In debt upon an Obligation: the Case was this, A man was bound to another to appear at his suit in the Kings Bench; and doth not so; the question was if this Obligation shall be avoided: It was the opinion of the Court, that it was not within the Statute of 23. H. 6. and therefore it was adjudged for the plaintiff. M. 30. Eliz. in Co. B. *Raven* and *Stockdale's* Case. *Goldesbr.* 66.

3. Debt upon an Obligation by husband and wife; The bond bore date 13. *Octob.* 31. Eliz. and the condition was, that if the defendant did pay 8. l. *&c.* in the year of our Lord God 1599. at or upon the 13. day of *Octob.* which shall next ensue the date hereof; The defendant pleaded, That the day of payment was not come: The question was when the money should be paid; *Gawdy* he was of opinion, that it should be paid the 13. of *Octob* next after the date; and that the subsequent words in the year 1599. were void: *Fenner* Justice, the payment shall be in the year 1599. for where a certainty appears, although afterwards an incertainty come, the certainty shall stand, and the incertainty shall be void. *Popham.* It shall be paid 13 *Octob.* next after the year 1599. for the words are, that the obligor shall pay 8. l. in the year of our Lord 1599. and if the payment shall be before this time, none may know what money shall be currant that year before the year come, and it is impossible to pay that before: it was not resolved. *Ideo quere.* M 40. Eliz. in B. R. *Sharples* and *Hardinsons* Case. *Goldesbr.* 187.

4. Error to reverse a judgement in Co. B. the Case was: A. came before the Mayor of L. and put his seal to a statute, and also the Kings seal was put thereunto, but one part did not remain with the Major according to the statute of *Acton Burnel:* the question was, whether it was a good obligation against the party; it was adjudged in Co. B. it was: and upon error brought, it was the opinion of the Justices in B. R. that it was hard to make it an Obligation; for in every contract the intent of the parties is to be respected; and here it was to make it a statute, for the Kings seal is put to it; and a statute needs no delivery, but an Obligation ought to be delivered; otherwise it is not good; and being void as a Statute, it is void in all: The judgement was reversed. M. 40. Eliz. in B. R. *Ascough* and *Hollingworths* Case. *Goldesbr.* 190.

5. I. S. was arrested by force of a Latitat out of B. R. at the suit of I. D. the Sheriff took an Obligation of him with two sureties upon condition, to appear such a day in B. R. and also that *ad tunc & ibidem* he answer to I. D. in a plea of Trespass. It was objected the Obligation was void by the Statute of 23. H. 6 by which Statute no Obligation shall be good if not for appearance only, and this is to appear and also to answer, which is another thing: The Court was clear of opinion that the Obligation was good, because the words of the Writ to the Sheriff, are *Ita quod Habeas corpus ejus hic* such a day *ad respondendum tali*; and so nothing is contained in the bond which is not comprised in the Writ; but if any other collateral thing be put in the Obligation, then it is void for the whole. Pasc. 23. Eliz. in C. B. Godbolt. 136.

6. If one be bounden in an Obligation, That he will give to I. S. all the goods which were devised to him by his Father, this is a good Obligation: and in debt brought upon such Obligation, the defendant cannot plead that he had not any goods devised unto him, for that the Obligation shall conclude him to say the contrary: Pas. 8. Iac. in C. B. *Cullingworths* Case. Godb. 177.

7. Debt upon an obligation; the defendant pleaded that the bond was made upon condition, that if he paid 10. l. to him whom the Obligee should name by his last will, that then, *&c.* and said that the Obligee made his will, and made executors, but did not name thereby any person certain to take the 10 l. It was the opinion of the whole Court, that the executors should not have the 10. l. for that they were but named in the Will for such purpose, viz. to take the 10. l. for it was said, it was requisite that there should be an express naming who should take it; otherwise the bond could not be forfeited. Tr 10. Iac. in Co. B. *Meades* Case Godbolt 192.

8. Debt

8. Debt brought upon an Obligation of 20. l. upon *Oyer* of the bond, it appeared that the defendant was only bound in it, and the condition was, that one M. whom the Sheriff had arrested by a Latitat out of the Kings Bench, ſhould appear in perſon at the day contained in the Writ; and pleaded the ſtatute of 23. H. 6. that the obligation was taken in other form then the act preſcribed: It was objected, that there were three variances from the form in the ſtatute; one in the Obligation, the ſecond in the condition; in the Obligation becauſe the plaintiff took but one ſurety, and the ſtatute is, reaſonable and ſufficient perſons in the plural number, and ſo there ought to be two ſecurities at the leaſt. vide Plo. Com. *Dive* and *Maningham's* Caſe. acc. In the condition, that the priſoner ſhall appear in perſon: and 2. It is ſaid *ad reſpondendum*, which is more then the ſtatute preſcribeth: it was reſolved that the Obligation was not void by that firſt; for the branch which preſcribeth the form, requireth the Obligation be made to the Sheriff himſelf by the name of his office, and that the priſoner do appear, in which branch no mention is made of ſureties: and peradventure it may be better for the Sheriff ſometimes to take one ſurety who is ſufficient, then two others; and the ſame is at the peril of the Sheriff, and left to his diſcretion; and if the ſureties are not ſufficient, yet the bond is good enough; and the words in the ſtatute are for direction and counſel for the Sheriff, and are not words of reſtraint. 2. When by any Writ, the defendant is commanded by any Writ to appear in perſon, he ought by the Common Law to appear in perſon; and therefore the addition *ad reſpondendum* is not material; for he who ought to appear, ought to appear *ad reſpondendum, parum differunt quæ in re concordant*: Vide Tr. 27. Eliz. in B.R. *Darby* and *Hallcates* Caſe. If the Sheriff or Coaler for the eaſe or enlargement of any who is in his Ward, take a promiſe to ſave him harmleſs, although the ſtatute doth not ſpeak but only of an Obligation with condition, yet the ſame is an equal miſchief: Paſ. 27. Eliz. in B.R. Sir *Will. Dauches* Caſe. vouched in Cook 10. pt. 101. in *Bunſages* caſe.

9. A man ſued an Executor in the Spiritual Court for a Legacy, where the Executor bound by his deed Obligatory to the party at ſuch a day certain; before which day ſuit was begun in the Spiritual Court: The Executor moved for a Prohibition, and it was granted; for by taking of the Obligation, the Legacy was extinct; but if the bond had been made to a ſtranger, then the opinion of the Court was that the Legacy had not been extinct. M. 8. Iac. in B.R. *Brownlo* 2. pt. 11.

10. Debt upon an Obligation for performance of covenants; the covenants were: That T.B. the ſon of W. B. ſhould marry the daughter of the defendant; in conſideration of which marriage the defendant covenanted to pay 300. l. and W.B. covenanted to aſſure ſuch lands to T.B. and his wife for her joynture; and the defendant covenanted, that he would procure the ſaid T.B. to be preſented and inducted into ſuch a benefice upon the next avoydance of the Church: and a breach was aſſigned for not performance of that covenant; The defendant demurred, becauſe the covenant is againſt Law, being a Simonaical agreement, and an Obligation for performance thereof is not good. It was the opinion of the Court, that if it had appeared to have been, that in conſideration of the marriage of his ſon, &c. he would procure him to be preſented, inſtituted, and inducted into ſuch a Church; that had been a Simonaical contract, and had avoided the Obligation: but here the covenant is not in conſideration of the former covenants, nor depending upon them; but it is a meer diſtinct covenant in it ſelf, and without ſpecial verdict, or ſhewing that it was a Simonaical contract, it ſhall not be ſo intended; but it may be a covenant upon a good conſideration; it was adjudged for the plaintiff. M. 11. Car. in B.R. *Ryale* and *Mannings* Caſe. Cro. 1. pt. 307.

11. Debt upon an Obligation conditioned, whereas the plaintiff intended to preſent the defendant to ſuch a benefice, That if the defendant at any time after his admiſſion, inſtitution, induction, at the plaintiffs requeſt reſigned the ſaid benefice into the hands of the Biſhop of *London*, that then, &c. The defendant upon *Oyer* of the Writs demurred generally, and the cauſe was, for that the condition of the bond being to reſign upon requeſt, it was Simony againſt Law: It was the opinion of the whole Court, That if the plaintiff had averred, that the Obligation was made to binde him to pay ſuch ſum, or to make a leaſe or other act which appears in it ſelf to be Simony, then upon ſuch a plea, peradventure it might have appeared to the Court to be Simony: but as it is pleaded by way of demurrer upon the *Oyer* of the deed, it doth not appear that there is any Simony; for ſuch a bond to cauſe him to reſign, may be good, and upon good reaſon and diſcretion required by the Patron: viz. if he became reſident, or take a ſecond benefice by qualification: and 8. Jac. in B.R. in *Jones* and *Lawrence* caſe, it was adjudged, That a bond made to reſign a benefice upon requeſt, was adjudged good, and affirmed in a Writ of Error brought in the Exchequer Chamber by all the Judges of *England*. Hill. 5 Car. in B.R. *Bebington* and *Woods* Caſe. Cro. 1. pt. 129.

12. Debt upon an Obligation of 30 l the condition was, that if R.B. ſon of the defendant, did uſe the trade of a Haberdaſher, as Journy man-

ervant, or Apprentice, or as a Maſter, within the County of K. within the Cities of C or R. within four years after the date, that then if he pay 20. l. upon requeſt, &c. It was agreed by all the Juſtices, that the condition was againſt Law, and then all is void; for it is againſt the liberty of a Freeman, and againſt the ſtatute of *Magna Charta*; and it is againſt the Commonwealth: M. 44. Eliz. in Co. B. *Claygat* and *Batchelor's* Caſe. *Owen.* 143.

13. Debt upon an Obligation, the defendant pleaded the ſtatute of 23 H. 6. That an Obligation taken *Colore officii* of any one in their cuſtody with any other condition then for appearance, ſhall be void: and ſhewed, That an Extent iſſued out of the Chancery to extend the lands of I. S. upon a ſtatute of 12000. l. in which he was obliged to the plaintiff; and that A. was Sheriff, and B. was his Underſheriff, and ſhewed an extent of the land returned; and before any Liberate, it was agreed that the defendant ſhould pay to B. the Underſheriff 32. l. 10. s. and that he ſhould be bound to the plaintiff his brother for the payment thereof to the uſe of the ſaid B. Underſheriff, and thereupon he entred the ſaid Obligation, which by the ſtatute is void; The plaintiff replyed, that upon the execution of the extent he agreed to pay him the ſaid 32. l. 10. s. and pleaded the ſtatute of 29. Eliz. c 4. 6. upon which the defendant demurred: and it was adjudged againſt the plaintiff, for that this Obligation is extortion, and *Colore officii*, and void by the Common Law. Vide Cook 10. pt. 100. Dyer 144. And in this caſe it was agreed, That by the ſtatute the Sheriff ought to have 6. d. in the pound where the ſum exceeds 100. l. for all, and not 12. d. in the pound. Hill. 27. Jac. *Empſon* and *Bathurſts* Caſe. Hutton. 53.

14. Debt upon an Obligation: The condition was, Whereas he had taken A. S. a widdow to wife, being poſſeſſed of divers goods, if he ſhould permit his ſaid wife to make a Will, and to diſpoſe in Legacies ſo much as ſhe would, not exceeding 40 l. and pay and perform what ſhe appointed, ſo as it did not exceed 40. l. that then, &c. the defendant pleaded that ſhe did not make any Will; It was found that ſhe made a Will, and thereby diſpoſed of divers Legacies not exceeding 40. l. but that ſhe was a *Feme Covert* at the time of the making of it: In this caſe it was adjudged for the plaintiff; for although ſhe being a *Feme covert* could not in Law be permitted to make a Will, or diſpoſe of any goods without the husbands conſent; yet it is a Will within the intent of the condition; and it is but her appointment which the husband by his Obligation is bound to perform, for which the finding that ſhe was a *Feme Covert* was not material; It was adjudged for the plaintiff. M. 5. Car. in B. R. *Mariot* and *Kinſmans* Caſe. Cro 1. pt 159.

15. Debt upon an Obligation conditioned, That whereas the defendant ſhould marry ſuch a widdow, who was poſſeſſed of divers goods which were her fore-husbands and his childrens; That her husband ſhould not meddle with them, but that ſhe and her children might enjoy them without claim or interruption of the defendant: the defendant pleaded performance of the Covenants, the plaintiff aſſigned a breach, that the firſt husband was poſſeſſed of Sheep, Oxen, &c. and that the wife had them before marriage; and that after the marriage ſuch a day the defendant took the ſaid goods into his hands, and yet detains them: upon iſſue joyned, found for the plaintiff; It was moved there was no ſufficient breach alledged; for it is not ſhewed that the defendant the husband made any diſturbance: But the Court was of opinion that there was a breach; for by the allegation, That he took the goods into his hands & detained them, is ſuppoſed a taking and denying them from the wife; and the iſſue being found for the plaintiff, the Court cannot intend, but that it was an unjuſt caption and detention contrary to the agreement: wherefore it was adjudged for the plaintiff M. 6. Car. in B. R. *Crowle* and *Dawſons* Caſe. Cro. 1. pt. 148.

16. Debt upon a bond *de quinquaginta duobus libris*: the defendant pleaded *Non eſt factum*, the Jury finde the bond to be *quinquaginta duobus libris*, with a condition to pay 26. l. and that the defendant delivered it as his deed to the plaintiff: The Court in this caſe held it to be found for the plaintiff, for *quinquaginta* is all one with *quinquaginti*: It was adjudged for the plaintiff. M. 11. Car in B. R. *Down* and *Hathwaits* Caſe. Cro. 1. pt. 301.

17. Debt upon an Obligation, and demands 6 l. 13. s. 4. d. The Obligation was *Noverint, &c. teneri in viginti Nobilis, &c.* and being entred in *hac verba*: it was thereupon demurred: It was moved, That *Nobilis* is not of any ſenſe: The Dictionary of *Tho. Thomaſius* was ſhewed, wherein *Nobilis* is ſet down for a Noble, as alſo for the ſum of 6. s. 8. d. wherefore reſolved, that the bond was good: *Williams* Juſtice ſaid, That whereas one was bound in *viginti liberis*, for *libris*, It was adjudged in B. R. that it was a void Obligation. Hill. 3. Iac. B. R. *Burching* and *Vaughans* Caſe. Cro. 2. pt. 203.

18. Debt upon an Obligation dated 22 *Jan.* 1608. the defendant demands *Oyer*, which was entred in *hac verba*, *Noverint univerſi per preſentes me Keys teneri W. Dobſon in decem libris bene & fideliter ſolvend. Dat. tres viginti dies Januarii, Anno Domini* 1608. and ſigned *Bolt Keyes*: It was adjudged to be good, for it is but falſe Latin, which will not make a bond void, and the name of the Obligo

Obligor ſubſcribed is ſufficient, though there be a blank for his Chriſtian Name in the bond. Tr. 7. Jac. in B. R. *Dobſon* and *Kyes* Caſe. Cro. 2. pt. 261.

19. Debt brought upon an Obligation for 60 l. The bond was in *Italian*, and the ſum therein expreſſed was in theſe words, *viz. in ceſſanta libris*. It was adjudged to be a good Obligation. Tr. 6. Jac. in B. R. *Parſer* and *Kenadays* Caſe. Cro. 2. pt. 208.

20. Debt upon Obligation: The plaintiff declares, *quod conceſſit ſe teneri in quinquaginta libris*: The bond was entred, *Noverint, &c. teneri in quinquageſſimis libris*. It was objected that the words in the bond have a conſtruction, that he bound himſelf in fifty pounds and not fifty pounds: Reſolved, That *quinquageſſimi* and *quinquaginta* in an Obligation ſhall be conſtrued to be all one in ſenſe; adjudged for the plaintiff. Tr. 9. Jac. in B. R. *Els* and *Chardes* Caſe. Cro. 12. pt. 29.

21. Debt upon an Obligation; which was entred: *Noverint, &c. Teneri, &c. in triginiate libris* for *triginta*, whereas the demand was 30. l. for the variance, It was demurred upon: But afterwards, It was adjudged for the plaintiff, that the declaration was good, and that it was a good Obligation. M. 9. Jac. in B. R. *Biggins* and *Tythertons* Caſe. Cro. 2. pt. 309, 355. Hob. 18. acc.

22. Debt upon an Obligation for 33. l. The Obligation was *Noverint, &c. Teneri, &c. interregentate libris*: It was demurred upon, becauſe the words are inſenſible, and cannot be taken for 33. l. It was holden by the Court to be a void bond. Tr. 18. Jac. in B. R. *Hills* and *Cowpers* caſe. Cro. 2. pt. 602.

23. Bill Obligatory demanding 32. l. 4. s 7. d. The bill was threty two ponds four ſhillings and ſeven pence: ſo threty for thirty, and ponds for pounds: and yet adjudged that the bond was good. Vide Cook 10. pt. 133. *Osborns* caſe. M. 14. Jac in B. R. *Hobbert* and *Longs* caſe. Cro 2. pt. 607.

24. Debt upon an Obligation, and demands 80. l. and upon *Oyer* of the bond it was found, *Teneri & firmiter obligari in octogeſſimis libris*: quere if good, not reſolved. Paſc. 12. Jac. in Co. B. *Verner* and *Onſlows* caſe. Hob. 75.

25. Debt; the plaintiff declared that the defendant ſtood bounden unto him in *Septingent. & quinquaginti libris*, and upon *Oyer* the words were *Septuagent. & quinquagint. libris*; and upon a demurrer, it was adjudged, that ſuch variance was no cauſe to abate the Writ. Tr. 44. Eliz. in Co. B. tot. 1031. *Walter* and *Pigots* caſe. Hob. 116.

26. Note an Obligation made beyond the ſeas may be ſued here in *England* in what place the plaintiff will; as if it bear date at *Burdeaux* in *France*, it may be alledged to be made in *quodam loco vocat Burdeaux* in *France*, in *Iſlington* in the County of *Middleſex*, and there it ſhall be tryed; for whether there be ſuch a place in *Iſlington* or not, is not traverſable in this caſe, becauſe the place where it was made is only circumſtance, and not the ſubſtance of the Obligation: Cook 1. pt. Inſtitutes 261.

More Obligations, and Obligor, and Obligee.

1. IT was covenanted betwixt A. and B. that A. ſhould preſent B. to the Church of D. and that afterwards B. ſhould leaſe the Parſonage to A. or to any other perſon named by him, and that the ſaid B. ſhould not be abſent by 80. dayes, and that he ſhould not reſign; B. was bound in an Obligation to perform thoſe covenants, and was preſented to the benefice; A. brought an action upon the Obligation, pretending that he could not enjoy his leaſe by reaſon of the abſence of the ſaid Parſon: and the leaſe was made to the Curate at the Nomination of A. B. the Parſon pleaded, That the Obligation was void by the Statute of 14. Eliz. c. 11. Vide the ſtatute: All leaſes made by any Curate ſhall be of no better force then if they had been made by the beneficed Parſon; It was ſaid in this caſe, when the Parſon leaſeth to his Curate who leaſeth ever, the ſtatute doth not make the leaſe void by any abſence of the Parſon, but of the Curate by 40. dayes; quere, for it ſeemeth that by the ſtatute of 14. Eliz. the Curate cannot leaſe. Paſc. 30. Eliz. B. R. St. *John* and *Peters* Caſe. Leon. 100.

2. A. was bound in an Obligation to B. upon condition that if A. deliver to B. twenty quarters of Corn the twenty ninth day of *Feb.* next following *datum preſentium*, that then, &c. and the next moneth had but 28. dayes: It was holden by the Court, That A. cannot be bounden to deliver the Corn, untill ſuch a year as is a leap-year, for then *Feb.* hath 29. dayes; and the Obligation was holden to be good. Paſc. 10 Eliz. in B. R. Leon. 101.

3. Debt upon an Obligation; upon *Non eſt factum* pleaded, the Jury found that the defendant ſubſcribed and ſealed the ſaid bond, and caſt it upon a certain table, and the plaintiff took it without any other delivery, or any other thing amounting to a

delivery. It was the opinion of the Court, that upon the matter the Jury had found againſt the plaintiff, and ſaid; It was not like the caſe adjudged, where the defendant the obligor ſubſcribed and ſealed the Obligation, and caſt it upon a table, ſaying, this will ſerve; the ſame was holden to be a good delivery, and the bond a good bond, for here is a circumſtance the ſpeaking of words by which the will of the Obligor appeareth that it ſhall be his deed, but not ſo in the principal caſe. Hill. 30. Eliz. in Co. B. *Chamberlain* and *Stanton's* caſe. Leon. 140.

4. In *Aſſumpſit*, the plaintiff declared of an *Aſſumpſit*, 1. May 32. Eliz. and counted upon a *mutuatus* of twenty ſhillings, and *Indebitatus Aſſumpſit* of four pound; The defendant pleaded that he being indebted to the plaintiff in five pound, and that in another five pound they became bounden to the plaintiff in twenty pound for the payment of ten pound, in ſatisfaction of the ſaid ſum of five pound, and five pounds; and that the Obligation was ſealed before the day of the *Aſſumpſit* ſuppoſed; and averred it to be the ſame debt, and that the Obligation was made for the ſame debt: It was the opinion of the Court, that the plea was not good; for an Obligation cannot determine a contract after made. But in that caſe, it was holden, that the defendant might plead the ſpecial matter *abſque hoc*, that the Obligation was made after the *Aſſumpſit*, *abſque hoc quod Aſſumpſit*. Tr. 30. Eliz. in Co. B. *Jennings* and *Winches* caſe. Leon. 154.

5. I. ſtole plate of *Trinity* Colledge in *Oxon*: It was concluded and agreed, That no evidence ſhould be given againſt him at the ſuit of the Colledge; and that the Colledge ſhould be recompenced for the loſs: And A. and B. were bound to the Rector of *Lincoln* Colledge in *Oxford* to the uſe of the Maſter and Schollars of *Trinity* Colledge, upon condition, that if the ſaid Obligors paid fourty pound within ſix moneths then next after, the ſaid I. ſhould be acquitted and releaſed of the troubles wherein he now is, with the ſafety of his life, that then, &c. In debt upon the Obligation the defendant pleaded, That he was endicted at the Aſſiſes at *Oxon*, and arraigned upon it, for the ſtealing of the ſaid plate, and found guilty, and had his Clergy, and demanded judgement of action, upon which it was demurred. It was adjudged for the plaintiff: But in this caſe; if the defendant had ſhewed the ſpecial matter, and pleaded that the Obligation was made for the diſcharge of a Felon, and ſo againſt Law, ſuch plea had been good; but now the defendants cannot take advantage of it. Hill. 31. Eliz. in Co. B. *Jones* caſe. Leon. 203.

6. Error of a judgement in debt in B. R. upon an Obligation, that the Obligor ſhould at all times well and truly pay, perform and keep all and ſingular the rents, covenants, grants, &c. on his part to be performed, contained in ſuch an Indenture of leaſe: The defendant pleaded generall performance of all covenants, &c. The plaintiff replyed, and ſhewed a breach for not payment of the rent at ſuch a time, and doth not ſhew any demand of that rent, and thereupon the defendant demurred, and it was adjudged for the plaintiff, and error brought, and aſſigned for error, that in as much as the condition of the Obligation is generally for the performance of all the covenants, and not particularly for the payment of the rent, the rent is not payable without demand, and therefore the breach was not well aſſigned: But all the Juſtices and Barons in the Exchequer Chamber held, that the judgement was well given; for the pleading the performance of the payments, covenants, and agreements, it ſhall be intended he had really performed them, and had payed all the rents: And when the plaintiff replies, he hath not paid ſuch a rent, he needs not alledge a demand, for the defendant may not ſay it was not demanded, for then it ſhould be a departure from his plea. But yet the Court held, That the Obligation being general for performance of covenants, doth not alter the nature of the rent, but that it ought ſtill to be demanded. Tr. 3. Car. in Exchequer Chamber. *Chapman* and *Chapman's* caſe. Cro. 1. pt. 54.

7. Debt upon an Obligation of 300. l. The defendant pleaded that it was agreed betwixt the plaintiff, and divers of the creditors of the defendant, That the defendant by Indenture of bargain and ſale ſhould aſſure divers lands in the County of L. to certain of the creditors to be ſold by them, and the money to be paid amongſt them: and that he aſſigned to them a leaſe for years of the cuſtoms of Wines, and certain other ſums of monies which the creditors by the ſaid Indenture accepted of: And ſaid *de facto*, that by the ſaid Indenture he ſold the ſaid lands to the ſaid perſons, and made them a letter of Attorny to receive the ſums of money. It was reſolved in this caſe, that forasmuch as the Indenture ſounds in the nature of a Covenant, it ſhall not be adjudged to be accepted of in ſatisfaction, nor pleaded in ſatisfaction in the action: and further admit it had been in ſatisfaction if performed; yet being not performed, it is no bar to the action, although the ſaid Indenture was accepted of by the creditors. Hill. 3. Iac. in B. R. *Simonds* & *Mideſworths* caſe. Cro. 1. pt. 119.

8. Debt upon Obligation to perform the Award of I. S. & I. D. ſo they made their Award before *Octob.* 10. under their hands and ſeals, and if they did not agree, then to ſtand to the umperage of

I. N.

I. N. ſo as he made it in writing under his hand and ſeal before *Ollob.* 20. The defendant pleaded, That neither the Arbitrators, nor the Umpire made Award before the ſaid dayes. The plaintiff replyed, true, the ſaid I.S. & I.D. did not agree, nor made any arbitrement before *Ollob.* 20. but I. N. the umpire did make the Award before *Ollob.* 20. where he Awarded (*inter alia*) that the defendant ſhould pay to the plaintiff 30. l. at the houſe of A. in C. being the ſign of the Cock; and for non-payment alledged the breach. It was objected, that the ſubmiſſion was void and incertain; for it is, if they do not agree, and it doth not appear to what they ſhould agree: and alſo the Arbitrement by the umpire was void, becauſe he appoints the money to be paid at the houſe of a ſtranger, where by intendment, the defendant hath not intereſt, nor can compell the owner of the houſe to ſuffer the money to be paid there; for ſo the defendant might be a treſpaſſor: But it was agreed by the whole Court that the Arbitrement was good, and the appointment of the payment of the money at a ſtrangers houſe, which ſhall by intendment be taken to be a Common Inn, ſhall not make it an unlawful act, and the plaintiff by common intendment may procure ſuch kindneſs of a ſtranger. M. 7. Car. in B. R. *Taverner* and *Skingles* Caſe. Cro. 1. pt. 193.

9. Covenant brought, for that the leſſee covenanted for him and his aſſigns to repair and maintain the houſes in reparations from time to time during the term, and ſhewed that the leſſee aſſigned all his term to the defendant, and for not repair, the action brought againſt the aſſignee; The defendant pleaded, That after the day, he made ſuch a concord, that the plaintiff ſhould have 30. s. and ſuch goods in ſatisfaction to that deſtruction, and ſhewed it to his executor, upon which it was demurred: It was moved for the plaintiff, that it was not any plea; for the action being grounded upon a deed, cannot be diſcharged by a contract, as an Obligation upon a condition cannot be diſcharged by a contract: But it was holden by the Court that the plea was good, for it is not pleaded in diſcharge of the Covenant, but for the damages which are demanded by reaſon of the breach of the covenant, and the covenant remains, and it is not like to the caſe of an Obligation, for there it is a duty certain, and it is not any plea, although it be before or after the day of payment. Paſc. 3. Jac. in Co. B. *Alden* and *Blagues* Caſe. Cro. 2. pt. 99, 100.

10. *Aſſumpſit*: Whereas ſpeech was betwixt the plaintiff and defendant concerning an Obligation of 40. l. wherein the defendant and his father were obliged to one N. in conſideration the plaintiff would at the defendants requeſt pay to the ſaid N. 20. l. in diſcharge of the ſaid bond of 40. l. promiſed he would aſſure the plaintiff ſuch a copyhold for 21. years by ſuch aſſurance as I. S. ſhould deviſe; and that he paid the 20. l. to N. before the day of diſcharge of the bond of 40. l. and that I. S. deviſed a Letter of Attorny for the defendant to two of the tenants to ſurrender the ſaid 21. years, and an Obligation for the quiet enjoying, and tendred to the defendant the Letter of Attorney, which he refuſed to ſeal; upon non *Aſſumpſit* found for the plaintiff, it was moved, the declaration was not good, becauſe it is not alledged that he diſcharged him: And, 2. Becauſe I. S. deviſed two things to be done, and he alledges the requeſt of one of them only; but the exceptions were diſallowed by the Court; for he cannot diſcharge the bond but to pay in diſcharge: And, 2. The plaintiff may alledge the breach in the one, although the other be performed, and it is in his election when he will demand. Hill. 4. Jac. in B. R. *Stainoid* and *Locorks* Caſe. Cro. 2. pt. 194.

11. Debt upon Obligation, ſet forth to be made *Nov.* 15. 25. Eliz. the defendant pleaded *Non eſt factum*. The Jury found that it was dated *Nov.* 15. 23. Eliz. but was not ſealed or delivered till *No.* 18. 26. Eliz. It was reſolved by the Court in this caſe, That this verdict was found for the plaintiff, for the iſſue being generally *Non eſt factum*; it appears to be his deed; but peradventure by ſpecial pleading he might have helped himſelf. M. 4. Jac. in B. R. The Lady *Platt* & *Pledals* Caſe. Cro 2. pt. 136.

12. Debt upon an Obligation for the payment of 7. l. at the birth of the plaintiffs child. The defendant pleaded that before the birth of it, it was agreed betwixt them, That whereas the plaintiff was to have a load of Lime of the defendants, for which he ſhould be endebted unto him, that the defendant ſhould acquit him thereof, and accept of that debt in ſatisfaction of the ſaid Obligation; and that the plaintiff at ſuch a day and place accepted of the ſaid load of Lime in ſatisfaction of the ſaid Obligation; upon which plea the plaintiff demurred. Two exceptions were taken to the plea. 1. That nothing can be taken in ſatisfaction of the 7. l. it not being a duty, but a ſum payable in future and upon contingency. But of that the Court doubted; for if one be bound by Obligation conditioned to pay money when I. S. comes from beyond ſea, it is a duty preſently. 2. The defendant pleaded, that the plaintiff accepted the load of Lime in ſatisfaction of the bond, which cannot be; for it ought to have been pleaded in ſatisfaction of the ſum mentioned in the condition of the bond; for the bond it ſelf cannot be diſcharged without a ſpecialty; and that the Court held

held to be a good exception, and ſo the plea not good, and it was adjudg d for the plaintiff. Tr. 8. Jac. in B. R. *Neale* and *Sheffields* caſe. Cro. 2. pt. 254.

13. Debt upon an Obligation to perform covenants, The defendant ſhewed that the deed was a deed of feoffment, wherein was contained, that he for 110. l. had enfeoffed the plaintiff in ſuch land, with a Proviſo, That if the defendant paid ſuch a ſum at ſuch a day, the feoffment ſhould be void, and he might re-enter with covenants to ſave harmleſs from incumbrances, and to make further aſſurance; and that he had performed all the covenants on his part to be performed. The plaintiff aſſigned breach, that he did not pay ſuch ſums at ſuch a day, according to the Proviſo. It was reſolved, That in as much as there is not any covenant to pay that ſum; it is a Proviſo in advantage of the feoffor, that if he paid the money, he ſhould have the land again, and it is in his election, to pay the money, or to loſe the land, and therefore the condition of the bond doth not extend thereunto, but extends to perform other covenants, as the covenants to ſave harmleſs from incumbrances; wherefore, it was adjudged againſt the plaintiff. Tr. 9. Jac. in B. R. *Briſcoe* & *Kings* Caſe. Cro. 2. pt. 281.

14. Debt upon an Obligation with condition to pay 140. l. *May* 15. next enſuing; the date being *May* 1. whether it ſhould have relation to the moneth of *May* next following, and ſo a year after; or to the ſame wherein the bond was made, was the queſtion: It was adjudged it ſhould be referred to the fifteenth day of the ſame moneth, being a fortnight after the date, and not to *May* in the next year following. M. 20. Iac. in B. R. *Preſcots* Caſe. Cro. 2. pt. 647. vide Tr. 20. Iac. in B. R. 101, 32. *Buckley* & *Gulbards* Caſe. Cro. 677. ac.

15. In debt the caſe was; Two were bound to a third perſon joyntly and ſeverally; the Obligee made the wife the one of the Obligors his executrix, who adminiſtred; then the husband, the Obligor made her his executrix and dyed, having aſſets to pay the debt; then ſhe dyed; and the plaintiff took letters of Adminiſtration of the goods of the Obligee not adminiſtred, and brought debt againſt the defendant, being the ſurviving executor: It was adjudged in this caſe, that the action would not lye, for that at the leaſt the action was ſuſpended; and a perſonal action once ſuſpended is extinct: But 2. When the Obligee made the executrix of the Obligor his executrix and left aſſets, the debt was preſently ſatisfied by way of retainer, and ſo no new action could be had for that debt. Hill. 11. Iac. in Co. B. *Fryer* & *Gelbridges* Caſe. Hob. 10.

16. A. recovered in debt againſt B. and had judgement who dyed, and upon a *Scire facias* againſt the Terr Tenant, the Sheriff returned that B. tenant of an houſe that was his at the time of the judgement: I. H. came in and pleaded, that B. enfeoffed him long before the judgement in fee, *abſque hoc* that he was ſeiſed at the time of the judgement, or at any time after: whereupon iſſue being taken, the Jury found the feoffment, and ſaid, it was made by covin to defraud the plaintiff and other creditors: it was adjudged for the plaintiff; for B. remained ſtill ſeiſed, as to the creditors, notwithſtanding the feoffment; but if the iſſue had been taken directly, enfeoffed or not enfeoffed, it had been found againſt the plaintiff; for in that caſe he muſt avoid the feoffment by covin eſpecially pleaded; for it is a feoffment *tiel queil.* Tr. 12. Iac. in Exchequer Chamber. *Humberton* & *Horgills* Caſe. Hob. 72.

17. Debt upon an Obligation, The condition was, that if the defendant ſhould at any time or times after the making of the Obligation by any way or means be ayding or aſſiſting to I. S. or any other perſon or perſons for him the ſaid I. S. in any actions, ſuits, *&c.* to be commenced or proſecuted againſt the plaintiff, his wife, children, or aſſignes: Then, *&c.* the plaintiff aſſigned a breach, That he brought an action againſt I. S. and the defendant had judgement for ſuch damages againſt I. S. and 2. l. damages againſt the defendant; and 8. l. coſts againſt them both, and that thereupon after the making of the bond, I. S. and the defendant brought a Writ of Error, and ſo hindred the plaintiff of his execution upon his judgement, upon which the defendant demurred in Law: it was adjudged by the Court to be no breach of the condition; for although the defendant might by himſelf act to bring a Writ of Error expreſſly, yet ſuch general words as theſe ſhall not enforce it ſo; for the ſenſe of the condition is, That he ſhall not maintain I. S. in any his proper ſuits againſt the plaintiff, which is juſt and rationable; but it is not reaſon that he ſhould be barred to defend himſelf by joyning with I. S. againſt unjuſt proceedings of the defendant againſt him; and therefore in this caſe, if the plaintiff after judgement had releaſed, and yet have taken forth execution, the defendant might have joyned with I. S. in an *Audita querela*; for it is his own defence againſt unjuſt proceedings and ſuits. M. 16. Iac. in Co. B. *Lamb* and *Thompſons* Caſe. Hob. 304. See *Hatton* 40. the ſame caſe.

18. I. S. was Sheriff of *Oxford*, and an Obligation was made to him thus, *Nouerint, &c. me teneri* I. S. *arniger* in 60 l. and after the delivery of the Deed, theſe words, *viz.* (*Vice-Comit. Oxon*) before the words in 60. l. and after the

words

words I.S. *armigero* were enterlined without the notice of I.S. It was adjudged in that Case, that because that addition was without the privity of the parties in a place not material, that the Obligation remained good: and in this Case, It was resolved. 1. That when a Lawfull Deed is rased, by which it becomes void, that the Obligor may plead *Non est factum*, and give the matter in evidence, that at the time of the plea pleaded, that it was not his Deed. 2. That when a deed is altered by the Plaintiff himself, or a stranger in a point material by addition, interlineation, rasure, or other means, the Deed is void: But if a stranger without the privity of the parties alter a Deed by any of the said ways in a point not material, the same shall not make the Deed void. Cook 11. pt. *Henry Pigots* Case.

19. Debt upon an Obligation of 20.l. Conditioned, that if the Obligor shall deliver to the Obligee before such a day, a powder of Lead, that then, &c. The defendant pleaded in Bar, That after the entring of the Bond, and before the day for the delivery of the Lead, at the request of the plaintiff himself, he paid unto I S 10.l. for another powder of Lead; for which the plaintiff was indebted to him; and this he paid in full discharge of the first Bond, and that the plaintiff had so accepted of it: It was the clear opinion of all the Court, that the plea of the Defendant was not good; and Judgement was given for the Plaintiff; and in this case, It was said, that these three differences were warrantable by the Books 1. Where the condition of a bond is for payment of money, this may be performed by the payment of another thing, because it is of value certain, and therefore may be performed by any collateral thing, otherwise it is, where the condition is to do a collateral thing. 2. Three are bound to do a collateral thing; they pay money for this, this is no good satisfaction, notwithstanding that *Numus est mensura rerum commutandarum*. 3. A man is bound to pay a sum of money, or a powder of Lead; if he deliver this to any other, by, and with the consent of the Obligee, this is a good performance of the condition: M 12. Jac. in B.R. rot. 474. *Moorwood* and *Dickens* Case. Bolstr 3.pt. 148, 149.

20. In an action of Covenant for payment of money; the Case was, The Covenant was that a stranger should pay yearly 8 l. to one of the Covenantees, and to one F.I. a stranger, and F.I. took to husband I. S. who did release this payment: The question was, whether by this Release by him thus made, the defendant shall be discharged of this payment or not. It was the clear opinion of the Court in this Case, that the release he made to I S. was a void Release, and could not discharge the payment covenanted to be paid, and that Judgement ought to be given for the Plaintiff against the defendant for not paying the money according to his Covenant: And in this case it was said, That if the Obligee be the cause of the non performance, he shall have no advantage of any forfeiture. M. 13. Iac. in B.R. *Quick* and *Ludbarrows* Case. Bolstr. 3.pt. 28, 29.

21. Debt upon an obligation to perform an Award, the condition was, the Arbitrators to award for all actions, and demands in variance between the parties to the date of the obligation; so as, *&c.* the defendant pleaded, *Nul Arbitrement*, the plaintiff replyed, that the Arbitrators did award, That the defendant should pay to the plaintiff 20.l. in full satisfaction of all such moneys as the plaintiff did claim of the defendant as administrator of the goods of I. and that each of the parties upon payment of the said 20 l. should make generall acquittances of all actions and demands to the day of the making of the said Acquittances: It was objected, that the Award was void. 1. Because they had no power to discharge any action accrued to any of the parties as Administrators: 2. Because by the Release the Bond it self to stand to the Award is discharged: It was resolved, that the Award was good as to all that which was submitted to, and void for the rest; and a breach assigned in a matter submitted to, gives good cause of Action. Tr. 14. Iac. *Vautore* and *Dribles* Case: Bridgeman 58.

22. Debt upon an obligation; the condition was, That whereas the Plaintiff devised Lands to I. S. until the Feast of *Mich.* next; If upon the said Feast day, or after, upon request made by the plaintiff, his heirs or assigns, the said I.S. should deliver up the possession to the Plaintiff, his heirs or assigns, that then, &c. The defendant said, That the plaintiff or his assigns did not make any request, and the case was, that the Plaintiff had bargained and sold the reversion to B. and C. and the day after *Mich.* C. one of the bargainers came to the Lands, and required I.S. to deliver the possession, which he refused: It was resolved in this Case, That the request made by one of the joynt bargainers was good, and so the Obligation forfeited Tr. 13. Iac. *Lingen* and *Paias* Case. Bridgeman 129. Godbolt 272. the same Case.

23. Note it was resolved by the Court; if a Statute Merchant be acknowledged, and it doth not limit any day of payment, it is a void Statute, and an extent upon it is void. But if upon an Obligation no day of payment is limited, the money is payable presently. M. 18. Iac. in Com. B. *Davies* Case. Hutton 42.

24. In Debt upon Obligation, the condition was, That if I.S. and his wife did before Easter Term, levy a Fine of certain Lands to the Plaintiff,

tiff, that, &c. The defendant pleaded, that before Easter Term, the plaintiff did not purchase a Writ of Covenant. In that case, It was holden by *Hobert* Chief Justice, that the Plaintiff ought to sue forth the Writ of Covenant, to make himself capable of the Fine, and if it were that the Defendant should acknowledge the Judgement, the Plaintiff ought to have purchased an Original: 2. Resolved that the Condition was to levy a Fine before Easter Term, and before Easter I.S. and his wife had carried away the Land by Fine, to a stranger, that by that the Obligation was forfeited according to *Maynes* Case. Cook 1.pt. 21. Hill. 19. Jac. *Westrond* and *Hills* Case. Hutton 48.

25. A. at the instance of a Feme Covert took up certain stuffs amounnting to 40.l. the husband did assume to pay so much for it as it was worth upon request: A. brought an Action upon the Case against the husband, and averred the summ did amount to 40.l. and alledged the request: The defendant pleaded the Statute of 21. Jac. of limitation of actions, and that the plaintiff had not prosecuted any action upon this promise within six years after the promise made, whether the cause of action shall be upon the request, or upon the promise, was the question. It was objected, that this was a contract by the husband, whereupon he might have an action of Debt, and then the request is not the cause of the action: It was resolved in this case, no action lay against the husband upon this Assumpsit, but only an action upon the Case upon the request. M.5. Cor. in Com. B. *Bill* and *Lakes* Case. Hutton 106.

26. Debt upon an Obligation, after Issue joyned, one of the Seals was taken off from the Bond; yet it was resolved, that it was a good Obligation, and debt did lye upon it. M.30. Eliz. in Com.B. *Mitchels* Case. Owen 8.

27. Note it was resolved by the Court: That if a man have Judgement in Debt upon an obligation, but no Execution, That he may commence a new Action of Debt upon the same obligation. Tr.30 Eliz. Viscount *Bintons* Case. Owen 37.

28. Debt upon an obligation, the condition was, That if the Defendant suffer the Plaintiff, his Executors, &c. not only to thresh Corn in the Defendants Barn, but to carry it away from time to time, and at all times hereafter convenient, &c. the Defendant suffered the Corn to lie there two years, in which time a great part of it was eaten with rats, and then the defendant threshed it. It was resolved in this Case, that the obligation was forfeited; for the words are not, that he suffer the plaintiff in convenient time to come and thresh. But the words are at all times convenient, which shall be construed at all times, when it pleaseth the plaintiff, unless in the night, and upon Sabbath-days. M.30. Eliz. in Com.B. The Earl of *Kent* and *Byans* Case. Owen 55.

29. Debt upon an obligation to perform an Award; the defendant pleaded, That the Arbitrator made no award. It was found by special verdict, That the defendant, and one W. submitted themselves to Arbitrement, and found that the Arbitrators made an Award *in hæc verba*; but further found, that W. one of the Obligors was an Infant within age at the time of the submission, and that the Arbitrators awarded (amongst other things) that W. the Infant should pay 5.l. to the other party for Quit Rents, and other small things: And in this case, these points were resolved: 1. That the submission of an Infant to an Award was utterly void. 2. That the Award was void, because of the uncertainty of these other small things, it not appearing what these other things were; and it might be they were such things for which an Infant by the Law might not be chargeable; and also for that by the reason they have assessed 5.l. for the Infant to pay, they might have assessed 50.l. 3. Resolved that the whole award was void, and that as well against the defendant, as against the Infant; for the submission is an entire thing, and void in part, is void in all: And so the obligation taken to perform the Award, was also void. Tr.17.Car.B.R. *Ruslone* and *Yates* Case. Marsh.111.& 141.

30. Debt upon an obligation: the condition was, that the defendant should not keep a Mercers shop in the Town of T. and if he did, that then within three moneths he should pay 40.l. to the plaintiff: It was said, that the Condition was good, because the restraint is but to a certain place, and not a general restraint of his Trade: But it was the opinion of all the Justices, that the condition being against the Law, all was void; nor the condition only, but the obligation also: and so it was said, It was adjudged. M.44. Eliz. in Com. B. rot 3715. in *Clegat* and *Batchelors* Case. Pasc. 18. Cor. in Com. B. *Barrow* and *Woods* Case. Marsh.191.

31. Note, It was holden by the Court, that if I be bounden that my Lessee shall take, reap and carry his Corn away peaceably, and afterwards in the time of Harvest, when he is reaping the corn, I came upon the Land, and say to him that he shall not reap any corn there, but otherwise I do not disturb him; that for these words spoken by me upon the Land, I have forfeited my obligation; and yet it was strongly urged, that I was bound to suffer him to do three things, viz. to take, to reap, and to carry, and all these things he hath done. Vide 47. E.3.22. where the saying to a Tenant by one Copartner, that he ought not to pay nothing to the other, was a disseisin. Hill.26.Eliz. in Com.B. Godbolt 22.

32 Debt

32. Debt upon an obligation; the condition was for performance of Covenants: A. being high Sheriff of the County of H. made C. his undersheriff; who by Indenture, (amongst other Covenants) did Covenant that he would not execute any extent, *Liberate Elegit*, or any other execution for any suit above the summ of 20.l. before he had made known the nature and quality of the said Writ to the high Sheriff: The plaintiff upon the defendants plea, that he had performed all Covenants, replied, that I.S. had recovered against B. in the Common Pleas 200.l. and died, and that I.D. the Executor of I.S. sued forth a *Scire facias* against B. for the said summ, by force of which C. undersheriff arrested him in execution; and afterwards B escaped, the debt not satisfied, upon which the Plaintiff did demur in Law: In this case, It was Resolved, That although the Covenant was, That he should not serve or execute any process or execution, was a void Covenant in Law; yet the obligation was good for the rest of the Covenants which were agreeable to Law, and a difference was taken between a Bond made void by the Statute, and a Bond made void by the Common Law: For upon the Statute of 23. H 6. If the Sheriff will take a Bond for a point against Law, and also for a due debt, the whole Bond is void by the Letter of the Statute, but the Common Law doth divide according to common reason, and having made that void which is against Law, doth make the Bond to stand good for the residue; and in this case, It was lawfull for the Sheriff to take a Bond of his undersheriff to save him harmless against Escapes: and therefore, although that in this case, the condition of the Bond was as to one serving of Executions void as being repugnant to the office of a Sheriff; yet for the breach of the other Covenants, the bond and condition was both good, and so there being an escape, the bond put in suit for breach of the Covenant was lawfull. M.11. Iac. in Com.B. Sir *Daniel Norton* and *Syms* Case. Godbt.212. Hob.14. acc.

33. If a man be bound to A. in an obligation, upon condition to enfeoffe B. who is a meer stranger before a day; the obligor doth offer to enfeoffe B. and he refuseth, the obligation is forfeit, for the obligor hath taken upon him to enfeoffe him, and his refusal cannot satisfie the condition, because no feoffment is made, but if the feoffment had been by the condition to be made to the Obligee, or to any other for his benefit or behoof, in that case a tender and refusall shall save the Obligee, because he himself upon the matter is the cause wherefore the condition could not be performed; and therefore shall not give himself cause of action. Cook pt.31. in *Boothes* Case.

34. Note, it was said by the Court, that the Book 17.E.3.24. was in debt upon an obligation of 20.l. obtained against the Mayor of N. and execution had thereupon, because the obligation was not cancelled (which after Iudgement had was the usual course in those days) the plaintiff had judgment in another action upon the same obligation, and the defendant by pleading the first Iudgement, could not be reversed, because he did not procure the obligation to be cancelled. But it was said, That now of latter time, men growing more contentious and not satisfied with any tryal or Iudgement, the Iudges have thought it dangerous to order the Bond to be cancelled either where the Plaintiff recovers, or where he is bound by the Iudgement; for in both cases the Iudgement may be reversed by Errour or Attaint. Cook 6. pt. 44. in *Higgens* Case.

35. If a man be bound in an obligation, upon condition to account before Auditors to be assigned by the Obligee when he shall be required thereunto; and to pay the arrearages found upon such account; In debt brought upon such an Obligation, the Obligor shall at his peril take notice of the arrearages found before the Auditors; for he having bound himself to satisfie them, shall also enquire after them to know what they are, because he hath bound himself to it, and if he do not, for such his neglect his obligation shall be forfeited: Cook 8.Pt 92. in *France*, Case.

36. Debt upon an obligation, The condition was, That if R.R. after marriage had between him and I.G. widow, together with the said I.G. alien in Fee or in tail all that great Messuage of the said I. in L. in the tenure of I.S. then if the said R.R. in his life time purchase to the said I.G. and her heirs, Lands of good right and title, and of as good value as the money raised upon the alteration of the said Messuage; or leave to the said I.G. after his decease, so much money as he shall receive upon the said sale, that then &c. R.R. married I.G. and sold the Messuage for 22.l. After which I.G. died, no Lands being purchased to her by the said R.R. It was Resolved in this Case, That when the condition of an obligation doth consist on two parts in the disjunctive, and both are possible at the time of the obligation made, and afterwards the one becomes impossible by the Act of God, the Obligor is not bounden to perform the other; for the condition which is for the benefit of the obligor shall be to him most beneficially for him, and he hath election to perform the one or the other for the saving of the penalty of the Obligation; and so when it becomes impossible by the act of God, which by no industry he can perform it, the Obligation shall be saved. Cook 5. pt. 21. *Laugters* case. Poph. 98. acc.

37. In Debt by husband and wife as Executors

upon an Obligation: the Case was, A. was seised in Fee of the Scite of the Mannor of G. 27. Eliz. demised it to R.H. for 17. years from the last day of *November*; the defendant entred the next day, and was possessed: and the last day of *November* 28 Eliz. entred an obligation to A. with condition, that if he, his heirs, executors, or any of them, should pay to D.G. widow, or her assigns at the said Mannor house of G. for the term of 17. years from the Feast of St. *Mich.* last past, one annual Rent of 20. marks at the Feasts of the Annunciation, and St. *Michael*, if the said D.G. should so long live; and the said R.H. or his Assigns, or any claiming by or under the said R. or his assigns shall or may occupy or use the said Scite of the Mannor of G. that then, &c. After which until 9. *May* 29. Eliz. the defendant enjoyed the Scite, and paid the said Annual Rent, and then surrendred his estate in the same to the said R. and after did not pay the said Annual Rent, and yet continued the possession of the said Scite: It was the opinion of all the Justices, that notwithstanding the said surrender made to the obligee himself, he ought to have continued the payment to D.G. for albeit the Term be drowned and merged in the Reversion, and so hath no continuance as to him in the Reversion; yet as to any thing heretofore done by the defendant, who was the Tenant and Termer in Judgement of Law, it is to be said to have continuance. Hill. 36. Eliz. in B.R. *Forth* and *Holborough's* Case. Poph 39,40.

Occupant, and Occupancie.

1. *Who and where a man shall be said Occupant of an estate in Lands, and of what things there may be an Occupancy, of what not.*

1. A Man made a Lease for years to two; provided that if they die within the Term, that the Term shall cease; the Termors made partition, and afterwards one of them died: It was holden in this case, that his Executor should have it, because there is no occupancy in this Case; and it shall not cease during the life of his Companion: But if it were a Lease for life it should be determined. M. 36. *Dyer* by *Farrington's* Case.

2. A woman Copyholder for life, took husband; the Reversion of the said Copy-hold was granted to A.B. and C. *cum accideret post mortem sursum reddit*, or forfeiture for their lives successively according to their custom; the husband surrendred to the use of A. for life, to whom the Lord granted a Copy for the life of A. and B. died; It was the opinion of the Justices in that case, That C. should not be admitted, for that after the death of the husband, the wife might enter, or have her plaint in the nature of a *cui in vita*; & it was holden, that during the life of the husband, the Lord should not have it in the nature of an Occupant: After the husband the wife would have released to C. and the Lord would not hold his Court, till he was enjoyned to hold Court, or avoid the possession. Tr. 9. Eliz. Dyer 264.

3. A Lease was made to one, his Executors and Assigns, for the life of another; the Lessee made a Lease for years rendring rent to him, his executors and assigns, and died: It was a Quere, if the Lessee for years should be Occupant; and if the Rent was extinct, or that the Freehold should revert to the first Feoffor, and the Term be in *esse*. The Court conceived that the Rent was extinct: Tr. 16. Eliz. Dyer 328. the other point is not resolved here: vide Cook 1. pt. Institut. 41. this Quere resolved.

4. A. grants a Rent to F. by Fine, during the life of C. wife of the Grantor, and if it was behinde, that it should be lawfull for F. and his heirs during the life of C. to distrein: F. devised the Rent and died. If the Grantor should detain the Rent as an Occupant, or that the Devisee should have it, was the question? It was the opinion of *Dyer*, that the Devisee should have it; for that the cause of Distresse made that the Grantee had a Fee determinate upon the death of C. Tr. 9. Eliz. Dyer 253. *Cassandras* Case.

5. If a Disseisor makes a Lease for the life of another to one and his heirs, and the Lessee dieth, the discent shall not take away the entry of the Disseisee, because he died seised only of the Freehold, and the word (Heirs) was added to prevent the Occupancy; for the heir in that case shall not have his age. Cook 1. pt. Institut. 238. P. 16. Eliz. in Com. B. *Lambs* Case.

6. Tenant for life of another man of a Mannor, makes a Lease for years of the Freehold, of which a stranger hath a Copy-hold estate for life *in esse*; the Lessee dieth, the Copyholder in this case shall not be an Occupant; for Occupancy ought to be *vacua possessio*: And therefore, it was adjudged 10. Eliz. in *Adams* Case: Where a man makes a long lease for years, and afterwards intending to avoid this Lease, makes a Lease to another old man for anothers life, to the intent that the Lessee for years should be Occupant when the old

old Leſſee died, and ſo drowned his Term; and after the Leſſee died: It was reſolved, in that caſe, that the Leſſee for years ſhould not be Occupant, in ſo much as there was not *vacua poſſeſſio*; and therefore if Leſſee for another mans life makes a Leaſe for years and dies, that the Leſſee for years ſhall not be occupant, notwithſtanding that he make ſpecial claim; but if Leſſee for another mans life makes a Leaſe at Will and dies, there the Leſſee at Will ſhall be an Occupant: Tr. 10. Jac. in Com. B. by *Cook* Chief Juſtice in *Rolls* and *Moſons* Caſe. Brownlo 2. pt 202.

7. In *Ejectione firme*, the Caſe was, A. ſeized in Fee, made a Leaſe to B. and his aſſigns for his own life, and for the lives of C. and D. and afterwards A. the Leſſor leaſed the Reverſion to the Plaintiff for 21. years; and afterwards B. made a Leaſe to C. to hold at Will, and died. If the eſtate of C. was determined by the death of B. was the Queſtion: The Caſe is but this, a Leaſe is made to one and his Aſſigns for his own life, and the life of two others, whether they may both ſtand together? It was the opinion of the Court, that they might well ſtand together; for although that the Leſſee may not have it during his life; yet he may diſpoſe of it; and an eſtate for the life of another ſhall be *in eſſe* for the benefit of the Occupant; and many inconveniences would be if the eſtate ſhould not endure for all their lives. And where a Leaſe was made to two for their lives, and the life of a ſtranger; and one of the Leſſees died, and the ſurvivor granted the Land for his life: it was adjudged in that caſe to be no forfeiture, in *Chambers* and *Goſtocks* Caſe in Com. B. and M. 32. Eliz. in Com. B. *Bordels* Caſe was, a Leaſe was made to him for his own life, and for the lives of two others. and it was adjudged a good Leaſe for all their lives: 1. Hil. 43. Eliz. in Com. B. *Roſſe* and *Ardwicks* Caſe, Goldesbr. 157.

8. Note by three Juſtices in the Common Pleas, That if a Rent be granted to one, and his heirs for the life of another man, and the Grantee dyeth, that his heir ſhall not be an Occupant of the Rent, but that he ſhould have it as a Freehold diſcended; but not in the nature of an Inheritance. Paſc. 8. Jac. in Com. B. Godbolt 172.

9. The Biſhop of W. made a Leaſe to I.S. for the life of him, and two others his ſons; he let the Land to I.D. at will, rendring Rent, and afterwards died: I. D. holds himſelf in, but mentions not he claims as Occupant or otherwiſe. B. one of the ſons of I.S. being one of the *Ceſtuy Que uſes enters*, as Occupant, and let the Land to the Plaintiff: the defendant by the command of I.D. outs him; Whether I.D. were the Occupant without claiming it as Occupant, was the doubt: It was adjudged for the defendant, that the Leſſee was the Occupant; for he being in poſſeſſion, the Law caſts the Freehold upon him, unleſs he wave it, and it is not requiſite that he claim as Occupant. Hill. 15. Jac. B.R. *Skelliton* and *Hayes* Caſe. Cro. 2. pt. 554.

10. A Tenant for life granted by Fine his eſtate to B. and by Indenture limited the uſe to B. for the life of A. and B. & if he died living A. that it ſhould remain to C. Afterwards B. died leaving C. entred, and Let the Land to D. for years and died, leaving A. whether the Leſſee ſhould return the Land as an Occupant living A. or that A. ſhould have it again, was the queſtion: it was adjudged, That C. ſhould have it as an Occupant, and his Leſſee ſhould hold it as an Occupant, and that A. had not any reſidue of the uſe in him; for when Tenant for life, or he who hath a particular eſtate, grants his eſtate by Fine, and limits the uſe for years, or for a particular time, it ſhall not return unto him, but be to his Conuſee, although the Fine were without any conſideration; becauſe he who hath the particular eſtate by Fine, is ſubject to the ancient rent and forfeiture, which is a ſufficient conſideration to convey the eſtate unto him; and although it was objected, That there ſhall not be an Occupant of an eſtate veſted to an uſe: Yet it was ſaid that there may be an Occupancy; for that the uſe and the Land are incorporated now, and of one nature. 1. M. 15. Jac. in Com. B. *Caſtle* and *Dods* Caſe. Cro. 2. pt. 200.

11. If a man deviſeth Lands to one, and his heirs, during the life of I.S. or Tenant for life granteth his eſtate to one, and his heirs; in theſe caſes, the Leſſee or Grantor hath an eſtate of Free hold deſcendible, but no eſtate of inheritance; for he ſhall be puniſhed for waſte; and he in the Reverſion or Remainder ſhall enter for a forfeiture, and his heirs ſhall not have his age; for he is in a manner but a ſpecial Occupant. Cook 10. pt. 98. in *Seymors* Caſe.

12. A Leaſe was made to I.S. by deed; *Habendum*, to him, his wife, and his daughter, *ſucceſſive ſicut ſcribuntur & nominantur in Ordine*, I.S. died, and then his wife died: If it was a good remainder to his daughter, was the Queſtion: It was ſaid that the remainder was void, for the incertainty: And 29. Eliz. in B.R. *Windſmore* and *Halborts* Caſe was vouched. Whereas Indenture was to one, *Habendum* to him, and his wife, and a third perſon *ſucceſſive*; and it was holden it was void by way of remainder to any of them; and there reſolved that they did not take preſently; 2. That they could not take as Occupants, becauſe that the intent of the Leſſor was, that they ſhould take but as one eſtate: But in the principal Caſe it was reſolved, That the daughter had a good eſtate in remainder; and that it did not differ from

the Case in *Dyer*, where a Lease was made by Indenture to one, to have to him and to another, *successive sicut nominatur in charta*, that those words *sicut nominatur in charta* did make the estate certain enough. M. 11. Jac. in Com. B. *Hill* and *Grubhams* Case, Godbolt 120.

13. In an *Ejectione firmæ*, the Case was A. and B his wife Tenants in tail to them, and the heirs of their bodies of the gift of I.F. the remainder to the right heirs of A. the said A. having issue betwixt them. 6 E.6. Levied a Fine to the King with Proclamations: The King, 7. E.6. granted the Lands to *Francis* Earl of *Huntington*, and his heirs. Afterwards 1. M.2. A. died; E. entred: *Francis* Earl of *Huntington* died, seized of the Reversion, which descended to H. his son, who by Indenture betwixt him and B. reciting that the said B. held the Tenants in tail of the gift of I H. the remainder expectant to the right heirs of the Earl of H. ratified, confirmed and allowed to the said B. all her estate, title, &c. *Habendum* to the said B. and the heirs of her body, and the body of A. begotten, with warranty to the said B. and the heirs of her body by A. begotten, against him and his heirs: B. died 29. Eliz. *Francis* entred, and had issue Sir *Henry Beamont*, Sir *John Beamont*, and F.B. 41. Eliz. died: Sir *Henry Beamont* covenanted to stand seized to the use of himself, and the heirs male of his body; the remainder to Sir *John* B. his brother, and the heirs males of his body, and afterwards dies without issue male, his wife with childe of a daughter, the wife of the Lessor: Afterwards Sir *John B.* died and had issue I. his son: It was said in this Case, that the Issue tail in this case was so barred by the Fine, and the Acts of 4. H.7. and 32. H.8. that he cannot claim; for he is a person disabled by the Act of Parliament; and that *Nihil operatur* by the confirmation to B. nor to the heirs of the body of her and *John B.* because he in the Reversion had but a possibility to have it after the death of *John B.* without issue, and till the time he had issue, he might not claim, and a possibility cannot be transferred; and he in the Reversion cannot have it so long as there is any heir of the body of *John B.* and B. in *esse*; and that any who enters, shall have it as an Occupant; for the Case was not resolved. Pasc. 2. Car. in B.R. *Baker* and *Willis* Case. Cro. 1. pt. 343.

14. Error to reverse a Judgement given in Com B. in a Replevin; The Case was, A Rent was granted to one, and his heirs *Habend.* for his own life, and the life of three others: What estate this should be was the Question. It was the opinion of all the Justices, That if a Rent be granted to one and his heirs, to have to him, for his own life, and for the life of two others, his own life is greater then the lives of the others (where the same is by way of present interest, but whereas in this case it is) by way of limitation, that he shall have this after his own life, of that also, this kinde of limitation is good in Law, shall this Rent here in this case go back again after the death of the first grantee, and during the other lives: clearly shall not, for there is here one particularly limited to take this, and accordingly he shall have it, and his heir in this case is not so to have the same, as heir by descent, but by way of limitation, and that for to prevent Occupancy. M.8. Jac. in B.R. *Bowles* and *Poores* Case. Bolstr. 1. pt. 135, 136.

15. In Covenant the case was; A. Tenant for three lives (his own life being one of them) makes a Lease to E. for six years, who made a Lease at Will to two men; A. who was the Tenant for three lives died; the two Tenants at Will be then in the possession of the Lands; the Tenant for years, for and in consideration of 400.l. to him paid by the Plaintiff, sells all his estate to the plaintiff, shewing the whole matter unto him, and how the two Tenants at Will, did claim only at Will, and to his use; And then sets forth the death of A. who was the Tenant for three lives, and that he *virtute cujus* was seized of the Freehold for the term of other lives as an Occupant; and he being so seized, did Assign, set over, bargain, and sell to the Plaintiff all his estate, right, title, and interest in the Land, to have, and to hold to him, for the lives then in being; and covenanted that he had such an estate in Law, as would warrant the Sale so by him made: The Question in Law in this case was, Whether upon the death of A. the Tenant for three lives E. the defendant had any greater estate in him then for years? It was adjudged, that he had only an estate for years; and that the Tenant at Will should be the Occupant: And upon that the Action of Covenant was brought by the Plaintiff against E. for not performing his bargain and sale to him, good according to his Covenant: and it was adjudged for the Plaintiff: Tr. 10. Jac. in B.R. *Chamberlane* and *Ewers* Case. Bolstr. 2. pt. 11, 12, 13.

Offices and Officers.

1. *Particular Offices, grantable and by whom, and for what estates; where for life, years, in Fee, or at Will, and what Act shall be a determination of forfeiture of such Offices: And of Judicial, and Ministerial Offices; and the difference betwixt them.*

1. IN the time of vacancy of the Office of chief Justice of the Common Pleas, Queen *Mary* granted the Office of Exigenter of *London* to *Scrogs*; It was holden by the Court in that case, that the grant was therefore void, because it was incident to the Office of Chief Justice of the Common Pleas, which Office the Queen could not have; and therefore it was holden, that the Chief Justice should avoid the grant: 2. Eliz. Dyer 175. *Scrogs* Case

2. The Queen by her Letters Patent, granted the Office of Clerk of the County Court to M. with all Fees, for the term of his life, and afterwards constituted A. Sheriff of the same County, who claiming the same to be incident to his Office, appointed another to be Clerk: It was adjudged in this case, that the grant of the Queen by her Letters Patent was void: and in that case, it was resolved, that the Sheriff is an ancient officer of the Realm, and when the King hath appointed such an officer, he cannot abridge the Sheriff of any thing incident, or appertaining to his office: Also the office of the Sheriff is entire, and cannot be determined for part; for it ought to continue his entirely without fraction or disjoyning, unless it be by Act of Parliament. 2. Resolved, that the County Court is incident to the office of Sheriff. 3. Resolved, that if such grant should be good, many inconveniences would rise and follow; for if the Records be imbezzelled, the Sheriff should answer for them; and the entry of the proceedings of that Court doth belong to the Sheriff: and also that the Certificate of the Records out of the County Court doth appertain to the Sheriff. 4. Resolved, that the custody of the Courts of the County doth belong to the Sheriffs; Pasc. 26. Eliz. Cook 4. p. 33. *Mittons* Case.

3. King Hen. 8. by his Letters Patents granted the office of Clerk of the Hampire to Sir R.S. I.H. for the term of their lives, and the longest liver of them; of which grant there was two Patents, of the same form, one of them called a Duplicate, and that was in the custody of I.H. but the principal Patent was by warrant of the Privy Seal *Authoritate Parliamenti*, and that remained with Sir I.B. I.H. being beyond Sea: Sir I.S. surrendred his Patent, which was cancelled; but no vacat was made of the Inrolment of it; I.H. returned, and claimed his joynt estate in the said office, and shewed the Duplicate undefaced. Queen *Mary* reciting the first Patent and the surrender, granted the said office to the said Sir I.S. and I.B. It was the opinion of all the Justices in this case, that when the original Patent is cancelled, the Duplicate hath no force, but is gone in Law; and so the 2. Grant of Queen *Mary* was good. Pasc. 2. Eliz. Dyer 179. *Kempe* and *Males* Case.

4. The Office of Marshall of the Marshall Sea cannot be granted for years, but ought always to be granted for life, and always to be executed by the Grantee himself; because it is an office of great trust conferred to the person, and concerns the Administration of Justice, and the life of the Law, which is to keep such as are in execution in *salvâ & arctâ custodiâ*, to the end they may the sooner pay their debts: and this trust is individual and personal, and therefore cannot be transferred to Executors or Administrators: Cook 4. pt. 96. Sir *George Rexels* Case.

5. *Brook* Lord Chief Justice of the Common Pleas, to whom the grant of the office of Chief Preignathory did appertain, did revoke a grant which was made by himself before to one *Gutear* his wives brother; because the grantee, was *indoneus*; and granted the same to I.S. who executed the said office under his grant. *Ex quo vide*, that the grant of the said Office was incident, and did belong to the Chief Justice of the Bench: And vide there a President of 1. E. 4. Where the King granted the Office of Clerk of the Crown in the Kings Bench to I.S. and another. I.S. died, and because the said other person was unable to execute and exercise the said office of Clerk of the Crown, upon a Certificate made by the Lord Chief Justice of the disability of the said person, the King *ore tenus* commended another man to the said office, and commanded the Chief Justice to admit and swear him in the same; *Ex quo nota*, also that the said office is in the Kings Grant, M. 5. Ma. Dyer 110.

6. An Assise was brought of the Office of the Register of the Admiralty; And it was prescribed that *Quilibet hujusmodi persona*, which shall be named by the Admiral, shall be register of the Admiralty for life; and it was found that the Admiral named two by Deed, *Habend.* for life, and that one of them was dead; It was there a Quære if *Quilibet* shall be taken singularly, or *collective*, or if when one dies; so that the other ought to claim it by the first Grantor, as by a Grant made

to

to him alone; and if that did maintain the preſcription: The opinion of the Book ſeems to be, it ſhall be, Vide Ma. Dyer 153. *Hunts* Caſe. But note, that although the proceedings in that Court be according to the Civil Law; yet the offices are determinable by the Common Law; Cook 8. pt. 47. on *John Webs* Caſe.

7. The Lord Admiral did grant the office of Regiſter of the Admiral Court to P. and H. for their lives, & *eorum diutius viventi*: H. bound himſelf in an obligation of 50 l. that P. ſhould enjoy the office, *cum omnibus proficuis*, during his life. Afterwards H. did interrupt P. in his office, upon which he brought debt upon the obligation; The defendant pleaded, That ſuch is the cuſtom, That the Admiral might grant the ſame office for the life of the Admural only, and that he is dead, and ſo the office void, and that he did interrupt him, as it was lawfull for him to do; and demanded Judgement of Action; It was demurred upon the defendants plea for theſe cauſes. 1. For that he hath pleaded a cuſtom, ſo as that no Iſſue can be taken upon it; for he ſaith, *Quod ufitatum eſt quod Admiralis pro tempore exiſtent non poteſt concedere officium predict. niſi pro termino vitæ ſuæ*; and doth not ſay where the Court is holden; nor ſay, *Quod talis habetur conſuetudo in Curia*, as he ought to do. 2. He doth not ſay, That *Curia Admiralis* is an Ancient Court; for where a Preſcription is alledged and pleaded in a Court, he ought to ſay it is an ancient Court: *in qua talis habetur conſuetudo*, &c. 3. Becauſe in the Condition of the Bond, it is ſaid, that they are ſeized of that office to them for their lives, & *eorum diutius viventi*: therefore he ſhall be eſtopped to ſay, That the grant was good only for the life of the Admiral, becauſe he hath bound himſelf that the other ſhall enjoy it all his life without interruption; wherefore although the office become void by forfeiture, or otherways he cannot have it againſt his own bond: All which Exceptions were allowed of by the Court; and ſo Judgement was given for the Plaintiff. M. 19. Eliz. in B.R. *Parker* and *Heroldes* Caſe Godbolt 47.

8. A ſuggeſtion was made to the Court, That a Coroner had not ſufficient Lands within the Hundred; for which a Writ iſſued forth to chooſe another, and one was choſen; it was moved to the Court, if the firſt Coroner did ceaſe to be a Coroner preſently, untill he be diſcharged by Writ: It was the opinion of the Iuſtices, that he ceaſeth preſently; for otherwiſe there ſhould be two officers of one Corenerſhip, which cannot be. Alſo the Writ is, *Quod loco* I. S. *Elegi faciat*, &c. *aliam Coronatorem*, &c. And he cannot be in place of the firſt, if the firſt do not ceaſe to be Coroner. M 29 Eliz. in Com. P. Godbolt 105.

9. In an Action of Falſe Impriſonment, it was agreed by the Court, that a Fine may be aſſeſſed for Vert and Veniſon; and it was ſaid in this caſe by the Iuſtices, that a Regardor is an officer of whom the Law taketh knowledge; and ſo are Iuſtices in Eyre. 2. It was agreed, that of ſuch things of which the Law takes notice, they ought to be pleaded. 3. That if a man in his pleading is to ſet forth the Iuriſdiction of the Iuſtices in Eyre; If he ſay *Curia tenta*, &c. he need not ſet forth all the formalities of it; and in this caſe alſo, it was ſaid, that if a man doth juſtifie for divers cauſes, and ſome of the cauſes are not good, the ſame doth not make the whole juſtification to be void, but it is void only for that, and good for the reſt. Hill. 26. Iac. in B.R. *Web* and *Tucks* Caſe, Godbolt 277.

10. Queen Eliz. An. 15. of her Raign granted to G. Earl of *Shrewsbury* the Office of Earl Marſhal of *England*; The Earl came now and prayed that I.S. one of his ſervants, to whom he had granted the office of Marſhal of the Kings Bench, becauſe it is an office incident to his office, and in his power to grant might be admitted ſo to do. And that one K. to whom the Queen had granted the ſaid office of Marſhall of the Kings Bench, might be removed; and a preſident 14. & 11. Eliz. betwixt *Gawdy* and *Verney* was ſhewed, Where it was agreed, That the ſaid office, was a ſeveral office, and not incident to it. On the other ſide, Preſidents was ſhewed of the times, H. 2. and R. 2. When the ſaid great office was in the King, he granted the ſaid office of Marſhall of the Kings Bench; and it was moved, that when the great office is in the Kings hands, and the King grants the ſaid under-office, if this office be not ſeverd from the great Office for ever: *Wray* Chief Juſtice ſaid it was no ſeverance; for the chief office is an office of Dignity, which may remain in the King; but the under officer is an officer of neceſſity, and the King himſelf cannot execute it; by which of neceſſity he ought to grant it: vide 16. E. 3 60. The King ſeized of the Honour of *Pickering*, to which a Forreſt was appendant; the Bayliffwick of which Forreſt he granted in Fee, rendring rent; and afterwards he granted the Honour with the Appurtenances, and afterwards the Baily committed a forfeiture, and that was found in Eyre; It was holden the Grantee of the Honour ſhould ſeize it: Yet the King ſhould have the Rent; In the principal Caſe it was holden, that the Earl of S. ſhould have this Office in his power to grant, and ſo much the rather, becauſe it was granted but for life. Tr. 31. Eliz. in B.R. The Earl of *Shrewsburies* Caſe, Leon. 321.

11. Hen. 8. granted to A. & B. *Officium unius Auditer. curiæ ſuæ Wardorum*, *Habend* to them

etc.

conjunctim & divisim pro termino vitarum suarum & eorum alterius diutius viventis, A. dyed, and then B. dyed. 31. Eliz. the Queen granted to C.D. *Officium unius Auditor. curiæ suæ Wardorum: Habend.* to the said C. & D. *& cuilibet eorum conjunctim & divisim pro termino vitarum suarum, & eorum alterius diutius viventis*, 4. Jac. the King granted to E. and F. *Officium unius Auditor Habend. post mortem dicti C. & D. & eorum diutius viventis vel a tempore quo Officium illud per surrend. vel quemquam alium modum vacaverit*, reciting the grant made to C. and D. E. dyed, Afterwards the King reciting both the said grants, granted *Officium prædict.* to G. *Habend. post mortem C. D. & F. vel aliquem duorum eorum qui citius mori contigerit*: C. dyed D. F. & G. living: in the case it was resolved: 1. That the said Letters Patent to A. and B. *de Officio unius Auditorum*, were good; for although the Act of Parliament of 32. H. 8. c. 46. enacts, that there shall be two persons who shall be called Auditors of the lands, *&c.* Yet it is but one office, and both are but one officer. 2. That although that two persons called Auditors are but one officer; yet the words in the grant, *Conjunctim & divisim & eorum alterius diutius viventis* are material; for if the office be granted to two without more for term of their lives, and one dyeth, the grant is void, for being an office of trust, no survivor shall be of it, and therefore the word *Conjunctim* serves to that purpose, that the survivor shall be one of the persons. 3. Resolved, That the grant made by the King to E. and F. in reversion was void, because an Auditor is a judicial officer, for they are Judges of the Court; and a judicial office cannot be granted in reversion. 4. Resolved, That when one of the persons dyeth, the King might add another to him, and untill another be added, his voyce is suspended, for that both are but one officer. 5. Resolved, That the grant made to G. was void, 1. Because a judicial office cannot be granted in reversion: And, 2. Because the same recites the grant made to E. and F. to be good where it was void; and so the King was deceived in his grant. Cook 11. pt. Auditors. *Curtes* Case.

12. The King granted unto *John Webb*, *Officium Magist. pilarum palmar Anglice*, the office of the Master of the Tennis Plays of the King in *Westminster*, To have and to hold the said office of Master of the Tennis, as well within the Pallace of *Westminster*, as of the said Lord the King elsewhere, for and during the term of his natural life; and to take, receive the profits thereof unto his own use; It was resolved, that this was a good grant to him made for life: And of such office it was resolved, no assise of *Novel disseisin* did lye: Cook 8. pt. 45. *John Webb* and the Lord *Kaevills* Case.

13. In an action upon the case for disturbing him to execute the office of Register, it was found by special verdict, That the Bishop of *Rochester* for the time being had used to grant the office of Register within his Dioces, as well in possession as in reversion for life, to be exercised by such person to whom such grant was made, when it should come in possession *per se vel per sufficientem deputatum*: And that the Bishop of *Rochester* before had granted the said office to one W. for life, which grant was confirmed by the Dean and Chapter; and the then Bishop dyed: And that the Bishop of *Rochester* that now was, had granted the said office of Register to *John* his son the plaintiff in reversion; who was then an Infant of the age of eleven years at the time of the grant; and they found that the plaintiff was of full age before the tenant for life dyed: And they found, that the Bishop dyed, and that his successor granted the said office to the defendant, who executed many things concerning the said office. 1. It was resolved by all the Justices, That this grant of the office in reversion after the death of the tenant for life, to an Infant of the age of eleven years to be exercised by him and his sufficient deputies, was good. And *Scamblers* case. 41 Eliz. Cook 1. pt. Instit. 3. where the grant of an office of the Undersheriff, Stewardship, in possession or reversion to an Infant, is void, because he is uncapable thereof, not having knowledge to execute it *pro commodo Regis & populi*; was denyed to be Law, unless it be with this difference, where it is granted without such clause to exercise the same by himself or his sufficient deputy. 2. It was resolved, That it being found, to be an office usually granted in possession for life, or in reversion for life, that every Bishop for his time might grant the said office, because it is a necessary office, and ought alwayes to be full; and there is not any prejudice to the successor by any such grant, for that he takes not any matter of profit from him: Hill. 14. Car. in B. R. *Young* and *Fowlers* Case. Cro. 1. pt. 401. vide Mash. 38, 39. the same case, vide M. 8. Car. B. R. *Young* and *Stoells* case. Cro. 1. pt. 103, acc.

14. In an action upon the case, for disturbing the plaintiff to exercise the office of official of an Archdeacon, and of the office of a Commissary of the Bishop, The questions were: 1. If the Patent made to the plaintiff being a Lay person, and not a Doctor of Law of the said offices for life, were good, or were restrained by the statute of 37. H. 8. It was resolved as to that point, that the said statute was but an assistance of the Common Law, and that any Lay person might have hold and enjoy such an office, and that the same was not restrained to Doctors of Law only: but that such

persons

persons as have held and been imployed in such offices: And Hill. 35. Eliz. in B. R. in *Pratt* and *Stocks* case, a Commissaryship was granted to one who was but a Batchellor of Law, and he granted Administration, and they were holden good: wherefore for that point it was resolved, that the grant was good: The second point was, If the said offices be grantable by the statutes of 1 & 13. Eliz. because it was pretended, they were not parcel of the possession of the Archdeacon or Bishoprick; and so the statutes do not restrain the grants of such offices. But it was resolved that they were within the words and intent of the statutes for they be hereditaments; and resolved, That the grant of the said offices to two where they were before granted but to one for life, and being in reversion, was a void grant by the said statutes against the successor. For the statutes restrain all grants of any thing, unless grants of necessity, and leases for three lives, or twenty one years, upon which the ancient rent is referred; and all other grants, as well of offices as of other things, are void against the successor by the said statutes. Tr. 7. Car. in B. R. *Walker* and Sir *John Lambs* Case. Cro. 1. pt. 187.

15. Articles were exhibited before the Commissioners Ecclesiastical against Dr. *Sutton*, because he being a Divine and having a benefice with cure, and never brought up in the Science of the Civil or Canon Law, nor having knowledge in them, took upon him the office of Chancellor of the Bishop of *Glocester* against divers Ecclesiastical Canons, and constitutions, and directions from the King, That none should be admitted to the office of a Chancellor of a Bishop, unless he were learned in the Civil and Canon Laws: He being examined, here confessed himself to be a Divine, and that he had a benefice; but shewed that the said office of Chancellorship was granted to him by such a Bishop of *Glocester* for life, which grant was confirmed by the Dean and Chapter; and therefore prayed a prohibition: but it was denyed by the Court to be granted; for if he be a person unskillfull in those Laws, and by Law ought not to enjoy it, they may examine that there; for although a Lay person by his admission and institution to a benefice hath a freehold; yet he may be sued in the Spiritual Court and be deprived; for that cause the prohibition was denyed. Hill. 2. Car. in Co. B. Dr. *Suttons* Case. Cro. 1. pt. 47. vide Godbolt. 390, 391.

16. It was resolved by all the Justices, That the offices of Register, Chancellor, and Commissary, of Ecclesiastical Courts, were offices within the statute of 5. E. 6. for although they concern principally matters *pro salute animæ*, yet they concern also Matrimony and Legitimation, and matters of Legacies for chattels real and personal, and in that respect are Courts of Justice: And therefore those offices in those Courts, are within the said statute which restrains the buying of offices, as in other Courts of the Common Law. Hill. 8. Jac. in B. R. Dr. *Ferrers* Case. Cro. 2. pt. 269.

17. Note, It was resolved in the case of Sir *Arthur Ingram*, who bought the office of Coferer, being an office handling the Kings revenew; that he was not only removeable for the present, but for ever after incapable of that office by the statute of 5. E. 6. though he had a *Non obstante* of the statute in his Patent, for the person being disabled by the statute, could not be enabled by the King. vide Hob. 75. acc.

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2. *More diverse cases, concerning Offices, Officers, and the grants of them, and the forfeiture of them; and of the punishments of the misdemeanors, in the executing of them: and divers other cases concerning them.*

1. IT was found by office in Iac. 9. that Sir *George Reynell* had forfeited the office of Marshalsey of the Kings Bench by suffering divers voluntary escapes: It was resolved in that case, That the King might seise that office without suing forth a *Scire facias*. Cook 9. pt. 95. in Sir *George Reynells* Case.

2. If the King grants the office of Stewardship of the Mannors of D. and S. to an Earl without power to make deputies; nevertheless, in respect of the meanness of the office, to be exercised in a base Court, and the dignity of the person of an Earl, for conveniency it is implyed in Law that he may make a deputy for whom he will answer, so as no prejudice may happen to the King; and the deputies shall execute *officium liberum*, to hold the Courts and to enter the pleas: And if a Fostership be granted unto an Earl without words to make a deputy, yet he may keep it by his servants: And if a Duke have licence to hunt in a Park, the Law will allow him attendance suitable to his condition. Cook 9. pt. 49. in the Earl of *Shrewsburies* Case.

3. If an office either of the grant of the King or Subject, which concerns the Administration, proceeding, or execution of Justice, or the Kings revenew, or the Commonwealth, or the interest, bene-

fit,

fit, or ſafety of the ſubject, be granted to a man who is unexpert, and hath no skill nor ſcience to exerciſe, or execute the ſame; ſuch a grant is meerly void, and the party diſabled by Law, and uncapable of the ſame: So an Infant or Minor is not capable of the Stewardſhip of a Court, either in poſſeſſion or in reverſion: Nor is a man though never ſo skillfull and expert, capable of a judicial office in reverſion. Alſo the bargaining, or giving of money, or any manner of reward for offices, ſhall make the purchaſes of them void; becauſe it is preſumed he will by bribery, extortion, or other means, make that good to him again, which he layed out and expended in the purchaſe of it, and that with greater advantage. Cook 1. pt. Inſtitutes 3. acc.

4. An action was brought for 20. l. *per annum* which was agreed to be paid to a Juſtice of *Wales* for the office of Clerk of Fines; it was reſolved in that caſe, that the action would not lye, for that the *Aſſumpſit* to pay the money in ſuch caſe was void by the ſtatute of 5. H. 6. for that it is not lawfull to ſell ſuch an office. M. 43 Eliz. in Co. B. *Walter* & *Walters* caſe. Goldesbr. 180.

5. Error brought of a judgement in *Northampton*, becauſe the Court being holden before the Mayor and two Bayliffs, the *venire facias* upon the iſſue was awarded to the two Bayliffs to return a Jury before the Mayor and Bayliffs *ſolam conſuetudinem*; which being returned, judgement was given, and that matter aſſigned for error: it was objected, that the Bayliffs being Judges of the Court, could not be officers: but it was reſolved, that it might be good by cuſtom; for the Judges be not the Bayliffs only, but the Mayor and Bayliffs; and one may be Judge and officer in diverſe reſpects, as in Rediſſeiſin the Sheriff is Judge and officer; the judgement was affirmed. M. 4. Car. in B. R. *Evans* and *Hollands* Caſe. Cro. 1. pt. 98.

6. Aſſiſe brought by Sir *I. B.* of the office of the Chancellor of the Biſhop of *York*: An injunction was prayed for the defendant; becauſe the ſaid Sir *I. B.* was by ſentence and decree in the Star Chamber for bribery and other miſdemeanors, made uncapable of any office of Judicature; and ſo diſabled to hold the office in queſtion: day being given him to ſhew cauſe, he ſhewed a pardon from the late King after the ſentence, wherein was recited all the briberies and offences contained in the decree, and all the penalties and puniſhments by reaſon thereof, and all diſabilities and incapacities by the ſaid pardon were pardoned him, except againſt the fine of 20000. l. granted to the King: it was referred to all the Juſtices and Barons of the Exchequer to conſider of the ſaid decree and pardon, and to certifie the ſame: it was reſolved by all the Juſtices and Barons, That this pardon hath taken away the force of the ſentence in the Star Chamber, except for the 20000. l. fine, and all diſabilities are diſcharged thereby, and that the ſentence never took from him the office, but the execution thereof, or gave authority to place another therein: but it was holden, that if the Biſhop before the pardon and after the ſentence, had appointed him to execute his office, and he did not do it, perhaps the Biſhop for his non attendance might have ſeiſed the office, and have granted it to another; but the ſentence by it ſelf cannot take away the office which is a freehold; and the pardon having taken away all the offences, all the Juſtices were clear of opinion, that the Plaintiff might proceed in his aſſiſe. M. 2. Car. Sir *John Bennet* and Dr. *Eaſtedales* Caſe. Cro. 1. pt. 40.

7. In an Action againſt Sir *George Reynell* for a forfeiture of his office, for ſuffering a priſoner to eſcape, the caſe was, The number of priſoners encreaſing and wanting room in the Marſhalſea, the defendant cauſed a new building adjoyning to the Marſhalſea to be erected, but within the precinct of the ſame, and removed I. S. thither, who was a priſoner in his cuſtody in execution: The queſtion was, whether this was an eſcape in Law or not, and a forfeiture of the defendants office: It was the opinion of the Juſtices, that it was no eſcape, and it was their opinions, That all non-uſes, miſuſes, or miſdemeanors of the officers of their Courts, both in eſcapes and otherwiſe ought to be examined only by the Court; Vide 39. H. 6. 32. ac. and therefore whereas in this caſe all the matter of miſdemeanor was examined in the Chancery, upon iſſue there agreed upon, the Court agreed in this, that all which was done there in Chancery, was only ſo there done *ad informandum*, and not in any other manner, and not to foreclose and to foreclude this Court of that juriſdiction which doth properly belong to the Court, and to its juriſdiction as to have the examination of all their peculiar offices, in ſuch matters eſpecially as do trench to a forfeiture of their offices; upon which the Jury having received their charge and directions from the Court, found the defendant not guilty of the eſcape for to cauſe a forfeiture of his office. M. 10. Jac. in B. R. Sir *Thomas Mead* and Sir *George Reynell's* Caſe. Bolſt. 2. pt. 58, 59.

8. In an Action of falſe impriſonment brought by the plaintiff againſt the defendant, being a Conſtable, for arreſting and impriſoning him; the queſtion was, whether a Conſtable may make a deputy to arreſt one upon a Writ to him directed by a Juſtice of the peace, the Conſtable himſelf being ſick: and whether ſuch a deputy Conſtable upon an action brought againſt him, and found for him, be ſuch a perſon as may plead, and by

pleading may have the benefit of the ſtatute of 7. Jac. c. 5. to have double coſts. It was reſolved in this caſe by the whole Court, That a Conſtable may well make a deputy, and a deputy is within the meaning of the ſtatute of 7. Iac. for he is a Conſtable *pro tempore*: And it was ſaid in this caſe, That Magiſtrates may make deputies: and it was agreed in this caſe, That there are two ſorts of officers, Iudicial and Miniſterial; a Iudicial officer cannot make a deputy, becauſe he is called to do Iuſtice; but it is otherwiſe of a Miniſterial officer, and yet all returns made by a Miniſterial officer ought to be in the name of the principal officer. Hill. 9. Iac. in B.R. *Phelps* and *Winſcombs* caſe. Bolſtr. 3. pt. 77.

9. In an Action upon the caſe; the caſe was, The Earl of *Pembrook* granted the office of the Leiutenancy of the Forreſt of C. to Sir *Maurice Berkley* and the heirs males of his body, and in the ſaid deed of grant were theſe words, *viz.* Provided alwaies, and the ſaid Sir *Maurice* doth covenant and grant, that it ſhall be lawfull for the Earl, his heirs and aſſigns, to have the preheminence of the ſame. Provided alſo, and the ſaid Sir *Maurice* doth covenant and grant to and with the ſaid Earl, that neither he nor his heirs ſhall or will cut down any timber trees growing in the ſaid walk, *&c.* Sir *Maurice* dyed, his ſon cut down timber trees; It was reſolved in this caſe, That although the Proviſo was repeated with an expreſs covenant of the grantee, and every condition ought to be created by the words of the Grantor; yet it was ſaid, that the word Proviſo in this caſe was a condition, although it was mixt with the word covenant: And, 2. In this caſe, it was reſolved, that the cutting down of the ſaid timber trees by the ſon was a breach of the condition, and ſo a forfeiture of the ſaid office: vide Hill. 38. Eliz. The Earle of *Pembrook* and Sir *Maurice Berkleys* caſe. Poph. 117, 118.

10. In a *Replevin*. A. Biſhop was ſeiſed of a Park in the right of his Biſhoprick, and by deed granted the office of keeping of the Park and all profits to it to I. F. the defendant for life, *Et ulterius conceſſit pro executione officii predicti.* 5 marks, which clauſe of diſtreſs, *non cum a Livery, nec non paſturam pro duobus equis una cum* the windfalls, which grant was confirmed by the Dean and Chapter in the life of the Biſhop; and ſhewed that this Park had been anciently granted with the fee of five marks and for 33 s. 4 d behinde; avowed the taking of the cattel, The plaintiff ſhewed the ſtatute of 1. Eliz. and ſaid that this paſture was a larger fee then was ever granted before, and upon that the Avowant demurred in Law: This caſe depended long and was argued by the Juſtices; and at laſt it was reſolved for the Avowant, that the grant was good and ſtood good for the old and ancient fee of five marks and other profits: and was void only as to the paſturage of the two horſes: Paſ. 1. Car. in Co. B. The Biſhop of *Chicheſter* and *Freelands* caſe. Lea. 78.

11. Note, It was holden in the Exchequer Chamber: That whereas the Queen had granted to one *Pelham*, That he ſhould not be Bayliff, Conſtable, nor other officer, nor Miniſter, *Licet eligatur*; That if the king make him Sheriff of a County, that he ſhall not be diſcharged by that Patent, for that ſuch offices do not extend to Royal offices: As a grant of Amercements ſhall not extend to Amercements Royal: and alſo the making of a Sheriff is not by election, but only by denomination of the Queen. So that if he have not theſe words, *licet eligatur per nos*, he ſhall be Sheriff: and it was ſaid that ſuch alſo was the opinion of *Bromley* Lord Chancellor Paſ. 14. Eliz. in Exchequer Chamber. *Pelhams* caſe. Godb. 11.

12. In treſpaſs, it was found by ſpecial verdict, That A. was Churchwarden of the Pariſh of H. and B. was overſeer of the poor of that Pariſh. That a rate was made by the inhabitants of H. for a relief for the poor of the Pariſh: That the plaintiff was an inhabitant of T. not having lands in H. but having lands in T. and was rated to the relief of the poor of H. which rate was allowed by Juſtices of the Peace of the County, according to the ſtatute; and the plaintiff refuſing to pay it by warrant from the Juſtices of the Peace, they diſtrained the plaintiffs goods and ſold them, *&c.* And it was found, that the Town of T. was anciently parcel of the Pariſh of H. and that there was not any legal act to ſever them from the ſaid Pariſh. And that there is no Parſon of T. and that the Parſon of H. uſed to finde a Curate at F. It was found, that at the time of the making of the ſtatute of 43. Eliz. for relief of the poor, and ever ſince, the Town of T. was reputed a Pariſh of it ſelf, and had Conſtables, Churchwardens & Overſeers of the poor, and that ratements, levies, and aſſeſſements had been made there for the relief of the poor of F. which were levyed by the proper officers without payment of the poor of H. or joyning in any aſſeſſement with the Town of H. and had alſo all particular rights; and that the inhabitants of T. have not uſed to contribute to the reparation of the Church of H. It was reſolved in this caſe, That F. being ſo long a Pariſh in reputation before the ſtatute, it ſhould not be now charged to H. And whereas it was ſaid, that the defendants were not guilty, becauſe what they did, they did by Warrant from the Juſtices of Peace, ſo they did it as officers and ſo excuſable: The exception was diſallowed; for the rate being unduely taxed, the Warrant of the Juſtices of Peace will

will not excuſe; and it is not like where an officer makes an arreſt by Warrant out of the K. Courts, which if it be erroneous, the officer muſt not contradict, becauſe the Court hath the general juriſdiction: but the Juſtices of Peace have but a particular juriſdiction; it was adjudged for the plaintiff. Tr. 10. Car. in B. R. *Nicols* and *Walkes* Caſe Cro. 1. pt. 286, 287.

See more of offices and officers, in the titles before of Grants of the King, and Grants of common perſons, and other titles.

Office before the Eſcheator.

1. Where the King ſhall ſeiſe lands without office: and when and where the poſſeſſions ſhall be veſted and ſetled in the King preſently upon office: and what ſhall be ſaid to be a good office to entitle the King, what not.

1. KIng Hen. 8. gave lands to *Tho. Culpeper* in tail, the remainder to I. C. in tail; T. C. is attainted by Parliament, and the actual ſeiſin of the land given to the King without office, ſaving rights, title, reverſions, &c. to ſtrangers: The King afterwards granted the land to B. in fee: T. C. dyed without iſſue; I. C. entred, and ouſted by B. he brought *Entre ſur diſſeiſin*; and counted *ut de libero tenemento*; B. ſhewed the whole matter and diſcent of the Seignory to E. 6. and prayed in aid of him dependant which a *Mandamus* was awarded at the ſuit of B. and upon that, the grant in tail to T. C. was only found, and a falſe date of the Letters Patent; after upon a *melius inquirendum*, the very date was found; but the attainder and execution was found before the grant upon a miſtake to the year of the raign, for the apparant untruth of which the demandant was put to a Petition, or *Monſtrans de droit*; the plaintiff traverſeth that the Queen was not ſeiſed in *Dominio ſuo ut de feodo*; and iſſue being joyned upon that, it was the opinion of the Court, that the matter in law would not maintain that, for that the Kings baſe fee was determined by the death of T. C. without iſſue: and the King was not in poynt of Reverter becauſe of the mean intereſt; and it was holden, that the entry of the demandant was ſaved by the Act of Parliament. M 8. M. Dyer 100.

2. A man purchaſed lands of the Queen which was parcel of the poſſeſſions of the Duke of S. who was attainted of Treaſon; of which purchaſe the office was found; and if the Patent was void by the ſtatute of 18. H. 6. c. 6. which is, that no Letters Patent ſhall be made to any perſon or perſons of any lands before inquiſition of the Kings title found and returned in the Chancery or Exchequer, if the Kings title in the ſame be not found of record; and if any Letters Patent be made to the contrary, they ſhall be void and holden null. Notwithſtanding that the Act of his attainder veſts the actual and real poſſeſſion in the King without office: it was holden that the Letters Patent in the principal caſe were good; becauſe the Act of attainder is found in the Chancery and Exchequer on record; and it was holden that that ſtatute of 18. H. 6. c. 6. was made to reform grants and leaſes made by the Chancellor, Treaſurer, or other Officers mean between the finding of the offices, and the return of them; and that the ſame did not extend to grants made in feeſimple, or in feetail Paſ. 1. M. Dyer 145, 146.

3. King E. 6 granted to Sir *Robert Cheſter* the office of receiver of four ſeveral Counties: In 4. H. 6. he was found in arreares upon his account before the Auditor, and did not pay in the arreares according to an Ordinance made for the payment of the ſame within certain dayes: It was holden by the Court in this caſe, that there needed not any office to be found of this to repeal the Letters Patent; but yet the ſtatute was not found: for he being an officer of record, there ought to be a *Scire facias* upon record to repeal the ſame. Hill. 4 Eliz. Dyer 211. Sir *Robert Cheſters* Caſe.

4. A. Tenant in Knights Service of Lands holden of C. as of his Mannor of D. which Mannor was holden *in Capite*, levied a Fine thereof, and by the ſame took back an eſtate to himſelf for life, the remainder to his wife for life, the remainder to the right heirs of the husband, C. being within age: It was found by office in the County of *Middleſex*, that he held the Mannor of B. &c. and that he was not in Ward. The King granted the Wardſhip during the Minority to P. except *Maridis & maritagiis*; A. died having two ſons, his wife entred; the eldeſt ſon died, the youngeſt Son within age: It was holden in this caſe (amongſt other points) that the grant made by the King to P. was void, becauſe no office was found in the County where the Mannor did lye. M. 2. Eliz. Dyer 171. *Lanes* Caſe.

5. I. S. ſeiſed of Land, having iſſue two daughters, made a gift in Tail to his eldeſt daughter, the

remainder to his own right heirs, and died; the daughter entred, and was attainted of Treaſon, 31. H. 8. by Parliament, and it was enacted, that ſhe ſhould forfeit, &c. ſaving to ſtrangers, their rights, titles, reverſions, and remainder, but there was no word of (entries) in the Act. It was reſolved in this caſe (amongſt other things) that the entry of the other daughter, for her moyetie was lawfull upon the Patentee of the King, becauſe the Act of Parliament had not put the King in poſſeſſion without office found. Tr. 16. Eliz. Dyer 325. Sir *William Sayes* Caſe.

6. Note, it was holden, That if the King under the Great Seal, or under his Privy Seal, doth command one who departed beyond Sea without Licenſe to return by a certain day within the Realm, and he refuſeth to return; In that caſe he ſhall forfeit his Lands, Goods, & Chattels, and they ſhall be ſeized into the Kings hands for his contempt, although it be not found by office, or otherwiſe. Vide 19. E. 2. *William de Bretaigne* Caſe. Hill 3. Ma. Dyer 128.

7. A Thief ſtole goods in a Franchiſe, where the Lord had Waiſe and Eſtrayes; and before they were ſeized by the Lord, or his Bayliff, the goods (being ſheep) eſtrayed into the Franchiſe of another Lord, who likewiſe had Waiſe and Eſtrays; the Queſtion was, to which Lord they did appertain; it was ſaid, that the property of them ſhould be in the firſt Lord, as it ſhould have been in them, to whom the property of them did belong without any ſeizure; But *Catlyn* Juſtice ſaid, that that was in the King by his Prerogative only; but that Prerogative was grantable to any other; and therefore conſented that the paſture of the ſheep was in him who made the ſeiſure of them. Tr. 11. Eliz. Dyer 288.

8. A. being Sheriff of the County of D. for the term of his life, was endicted for the eſcape of felons, *felonice & voluntarie*. It was the opinion of the Juſtice, that the ſaid office of Sheriffrick, might be ſeiſed in the Kings hands *quouſque, &c.* without any *Scire facias*, or other proces awarded againſt the party. M. 4. M. Dyer 151. Sir *Johs Savages* Caſe.

9. In Intruſion it was found, that A. was ſeized of divers Meſſuages, &c. and by Deed Indented, &c. enrolled, bargained, and ſold all his Lands, Meſſuages, &c. lying in the Pariſh of St. *Andrews* Holborn in the tenure and occupation of I.L. for life, the remainder to C. in Fee; B entred, and took husband, who made a Leaſe for years: A. is attainted of treaſon; the King granted all the ſaid Meſſuages to D. and his heirs; Proviſo, that if they were not concealed, that the Letters Patents ſhould be void. It was reſolved in this caſe (amongſt other things,) 1. That by the common Law the Lands in Fee-ſimple, and by the Statute of 26. H. 8. for Lands in tail, the actual poſſeſſion was not in the King by attainder before office: But when Tenant in Fee ſimple is attainted of Treaſon, and dyeth, there the Fee and Freehold ſhall be in the King for neceſſity, without office found, becauſe a Freehold cannot be in abeyance; but otherwiſe it is if Tenant in tail be attainted, the ſame ſhall deſcend to his Iſſue until office be found; for the Act of 26. H. 8. gives only forfeiture, and attainder is no corruption of blood for lands in tail, until the ſtatute of 33. H. 8. cap. 20. 2. Reſolved, that although by the Statute of 33. H. 8 the King ſhall be in actual poſſeſſion without Office; Yet when the Diſſeiſee is attainted of Treaſon, preſently by the attainder the King had but a Right; and if the Diſſeiſee at the Common Law be attaintod of Treaſon, and the ſeiſin and diſſeiſin be found by office, the poſſeſſion ſhall not be in the King without a *Scire facias* or ſeizure at the leaſt, becauſe when a ſtranger is ſeiſed at the time of the office found, the King ſhall not be in poſſeſſion without ſeizure: Cook 3. pt. 10. & 11. *Downes* Caſe.

10. Note it was reſolved (amongſt other points) That when the Kings Tenant in Fee dieth ſeiſed without heir, the fee and the Freehold is preſently in the king without office found of the Kings Tenant was in poſſeſſion at the time of his death; but where a ſtranger is in poſſeſſion at the time of the Eſcheat, there the King ſhall not be adjudged in poſſeſſion until this ſeiſin or poſſeſſion be removed; and when no man is in poſſeſſion, the Law will adjudge the King in poſſeſſion according to his title; but if the heir be diſſeiſed, and dyeth without Iſſue, or if an Alien born, or villein of the King be diſſeiſed, there the King ſhall not be in poſſeſſion, untill the poſſeſſion of the Diſſeiſor be removed: Cook 4. pt. 56. in the Caſe of the Ward and Commonalty of Sadlers.

11. The King granted the office of Marſhal-Sea of the Kings Bench for life, and afterwards granted the Reverſion of it for 21. years, he in the reverſion aſſigned his Intereſt: Tenant for life deputed I.S. in the office, who permitted ſeveral priſoners in Execution to eſcape; which was found by Office: In this caſe theſe points (amongſt others) were reſolved: 1. That in this caſe the King might ſeize the office, without ſuing forth a *Scire facias*; And in this caſe, theſe differences were taken and agreed: 1. That in ſome caſes, the King ſhould be in poſſeſſion by ſeizure without office, as in the Caſe of the Temporals of a Biſhop or of Prior Aliens, becauſe the certainty thereof appears in the Exchequer. 2. In ſome caſes the king ſhall be in poſſeſſion by the office, without

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any ſeizure, as of Lands, Offices, Cuſtody of Lands, &c. whereof continual profit may be taken, as where it is found by office that a Condition is broken, or that a perſon attainted was ſeiſed of lands; 3. In ſome caſes, the king ſhall be in poſſeſſion by ſeizure and office, as in caſe of an Advowſon, the rightfull Patron ſhall not be ouſted of it by a falſe office found of it before the king hath preſented, and his Clerk admitted, and inſtituted; for if the king bring a *Quare Impedit* in that caſe, the party may reverſe the office. 4. In ſome caſes the king ſhall be in poſſeſſion without office or ſeiſure; as where the kings Tenant dyeth without heir: And 5. In all caſes where a common perſon is put to his action, there upon an office found, the king is put to his *Scire facias*; but when a common perſon may enter or ſeize, there an office without a *Scire facias* will ſuffice for the king. Cook 9 pt. 95, 96. Sir *George Reynels* Caſe.

See for this point of this diviſion, Cook 11. pt. 12. in *Priddle* and *Nappers* caſe: where the poſſeſſion ſhall be veſted and ſetled in the king, his Heirs, and Succeſſors, without ſeizure or office found.

12. A. ſeiſed of Lands in Fee, by Indenture, in conſideration of blood Covenanted with B. his Nephews, to ſtand ſeiſed to the uſe of himſelf for life; and afterwards to the uſe of B. in tail, the remainder to the right heirs of B. Proviſo if the ſaid A. made by himſelf, or by another during his natural life, tender to the ſaid B. of a Ring of Gold to the intent to make void the ſaid uſes, that then the ſaid uſes ſhould be void. Afterwards A. 26. Eliz. was attainted of Treaſon done beyond Sea, and outlawed for it; the king by his Letters Patents Let the Lands to C. and D. for 40 years; the attainder was confirmed by Act of Parliament, 28. Eliz. and by another Act of the ſame Parliament it is enacted, That the ſaid Act ſhould not extend to make any leaſe made by the king after the Treaſon committed, void: And by another Act of the ſame Parliament it is enacted, That all perſons which claim any eſtate or intereſt in the lands of any perſon attainted, not revoked ſince 28. Eliz. ſhall within two years after the Seſſion of Parliament, ſhew and bring into his Majeſties Court of Exchequer, his, or their Grant, Conveyance, or Aſſurance, then the effect thereof to be entred and enrolled of Record, or elſe the conveyance and aſſurance to be void. The king in his Letters Patents reciting the ſaid Proviſo, and that the benefit of it is given him by the Act of Parliament, authoriſed E. to deliver the Ring of gold to B. to the intent to make void the ſaid uſe: He reads the Patent to B. and makes a tender of it to him, which he refuſeth; and certifies the whole matter into the Exchequer. It was reſolved in this caſe (amongſt other things) that this condition was given to the Queen by the attainder of A. as well by the Act of his attainder, as by the ſtatute of 33. H 8. which gives the forfeiture of conditions by expreſs words, in caſe of Treaſon; and whereas it was objected, that there ought to have been an office for the finding the performance of the condition according to the warrant; To that it was anſwered and reſolved, that that needed not, becauſe when any man is to do a thing by warrant of Letters Patent for the Queen to be returned in any Court, it ſufficeth for him to return it, which in this caſe he hath done according to the Letters Patents, with the warrant it ſelf; and then that which is returned is as well of Record, as if it were found by office, and returned of Record; and ſo it was ſaid it was adjudged. 16. Eliz. in *Edward Becks* Caſe (ſee the Caſe *ibidem*:) vide Sir *Francis Engleſields* Caſe in Popham 19. vid. Cook 7. pt. the ſame caſe.

13. One N.M. ſeiſed of lands in Fee, took a wife and levied a Fine of the ſaid lands with Proclamation, and afterwards was indicted, and outlawed of High Treaſon, and died. The Conuſees convey the lands to the Queen, who is ſeiſed: the 4. years paſs after the death of the husband; the daughters and heirs of the ſaid N.M. reverſe the attainder by Error in B.R. the wife thereupon ſueth to the Queen (who was ſeized of the land as aforeſaid) by Petition, containing all the ſpecial matter: viz. the Fine, the death of her husband, the attainder, and the reverſal of it, and her own title; viz. her marriage, ſeiſin of her husband before the Fine. The Queen upon the Petition, endorſeth *Fiat Brevi*; it was objected in this caſe, that the wife could not have any Petition, becauſe there was not any office by which her title of Dower was found: viz. her marriage, ſeiſin of the husband, and death: But it was reſolved, that it needed not in this caſe, becauſe the title of Dower ſtood with the Queens titles; and affirmed it otherwiſe of the title of the Demandant, in the Petition had diſaffirmed the Queens title: alſo in this caſe the Queen was not entituled by any office, that the wife ſhould be driven to traverſe it; for there ſhe ought to have an office to finde her title: But in caſe of Dower, although that office had been found for the Queen, which doth not diſaffirm the title of Dower, in ſuch caſe the wife ſhall have her Petition without office, becauſe the Dower is favoured in Law. ſhe claiming only for term of life, and affirming the title of the Queen: Hill. 27. Eliz. in the Chancery: *Nixons Mervils* Caſe. Cook's Seleſt Caſes 19, 20, 21.

14. The king in the right of his Dutchy of L. (Lord)

(Lord) R. H. ſeized of the Mannor of M. in the County of L. holden of the king as of his Dutchy, (Meſne) R. M. ſeiſed of Lands in M. holden of the Meſne, as of his Mannor, by Knights Service: (Tenant) R.H. died, 31.H.8. It was found, that he died ſeiſed of the ſaid Menalty, and that it deſcended to E. his ſon and heir, &c. and during the time he was within age, R.M. the Tenant died: After which 35. H.8. it was found, that R H. died ſeiſed of the ſaid Tenement, & that the ſame deſcended to R. H. his ſon and heir within age; and that the Tenancy was holden of the king as of his Dutchy of L. by Knights ſervice, whereas in truth the ſame was holden of *Ed. Holme*, then in Ward to the king as of his Menalty; for which cauſe the king ſeiſed the heir of the Tenant. Afterwards 4. Jac. after the death of R.H. it was found, that the ſaid Rich. died ſeiſed of the ſaid Tenancy, and held the ſame of the king by Knights ſervice, his heir within age. Whereupon the Coſen and heir of Rich. preferred his Bill to be admitted to traverſe the office 4. Jac. The Queſtion was, whether the office found 35. H.8. be an Eſtoppel to traverſe the laſt office 4. Jac. It was reſolved by the Juſtices, Aſſiſtants to the Court of Wards, that the ſaid former office found 35.H.8. was no concluſion or Eſtoppel to the Plaintiff to traverſe the ſaid office, becauſe king Hen.8. had received the fruit and benefit which was then due to him by the former office: And in this caſe, it was further reſolved, That when the king cometh to the poſſeſſion by a falſe office, or other means upon a pretence of right, where in truth he hath no right, if it appeareth, that the king hath any other right or intereſt to have the Land, none ſhall traverſe the office or title of the king. M.7. Jac. in the Court of Wards. *Holmes* caſe. Cook's Seleſt Caſes 61. Lea 13. the ſame Caſe.

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2. *Where an Office found ſhall be void for incertainty, repugnancy, or for other defects in it; where not; and where void for other inſufficiencies; where not.*

1. A Man ſeiſed of lands holden of the Queen in *Capite*, conveyed the ſame in his life time by Act executed to his Baſtard ſon, and d'ed: Office is found of this eſtate, but it was not found by the office that he was Baſtard, or that he was heir to the Donor. It was holden in this caſe, that the 3. part ſhould not be in Ward; for that a Baſtard is not within the ſtatute of 32. H.8. for the children within that ſtatute are intended lawfull children, and a Baſtard *eſt nullius filius*. But whereas it was not found in the office, that he was heir of the Donor, it was holden that the defect of that might be ſupplied by an averment; and ſuch ſuggeſtion ſhall not be repugnant, but a ſupplement to the office. M.13. Eliz. Dyer 296.

2. It was holden by office found *virtute brevis*, before the Eſcheator, That I.S. was ſeiſed of a Mannor, and held the ſame of the Queen by knights ſervice; the heir alſo was found within age. It was alſo found before the Eſcheator in another County, that the ſaid I.S. died ſeiſed of another Mannor, and held the ſame of B.C. by knights ſervice. The queſtion was, If B.C. might not traverſe the firſt office; the opinion of the Court was, that if the truth be ſuch, that the firſt Mannor was not holden in *Capite*; that in ſuch caſe the ſaid R.C. ſhould be put to his Traverſe; becauſe the beſt ſhall be intended for the king, viz. that it is a Tenure in chief; and the office firſt found ſhall not be void. Tr. 4. Ma. Dyer 761.

3. Upon a *Diem clauſit extremum*, a Tenure is found; but by what ſervice, the Jury are ignorant, whereupon a *Melius inquirendum* iſſued; and upon that it was found that the Tenure was of a ſubject. It was the opinion of the whole Court, that the firſt office needed not to be traverſed, but that it was void by the ſtatute of 1. E.6. cap 8. and it was holden, that the *Melius inquirendum* is but in the nature of the firſt *Diem clauſit extrem* m. Tr. Eliz. Dyer 291.

4. If an office be found againſt the king, and a *Melius inquirendum* is awarded, and in that, It is found for the king; but the *Melius* is void for repugnancy in the Writ; a new Writ of *Melius inquirendum* ſhall be awarded: But if upon the Writ of *Melius*, it be found againſt the king, there the king ſhall not have a new Writ of *Melius*, for then there ſhould be no end, but Writs infinite; and if the office be found for the king, the party grieved may traverſe it; and if the traverſe be found againſt him, the ſame makes an end of the matter, and he is concluded by it; and ſo it is that if it be found for him that traverſeth, it ſhall binde the king. Cook 8. part 168. *Stoughtons* Caſe.

5. It was found by office, 32. Eliz. That A. was ſeiſed of three Meſſuages, and made his Will in writing, and gave *in hac verba*, &c. and found ſeveral Tenures of common perſons, and no lands holden of the king, and then they finde that

An.

An. 23. *Aprilis* died, B. his ſon within age. Afterwards 5. Jac. a *Mandamus* is awarded after the death of A. whereby part of the Lands are found to be held at the death of A. of the late Queen by knights ſervice in *Capite*; and at the taking of the ſaid laſt inquiſition, where held of the king in *Capite* by knights ſervice, and *Ignoramus* of the reſt. It was the opinion of the Juſtices, Aſſiſtants to the Court of Wards, That the office finding no dying ſeiſed, and only a tenure of common perſons, was meerly void. But they ſaid, if any tenure in *Capite*, or by knights ſervice had been found for the king, and no dying ſeiſed; yet the office had not been void, but only voidable; and that a *Melius inquirendum* ſhould be awarded, to enquire of what eſtate he was ſeiſed. Paſc 9. Jac. in Cur. Ward *Shellocks* Caſe. Lea. 36.

6. Upon a *Mandamus*, after the death of *Jo. Foss*, it was found that he was ſeized in his demeſn as of Fee of the Mannor of S. in B. and that he being ſo ſeiſed, *poſtea* 10. *Martii*, 43. Eliz. did thereof enfeoff W. to the uſe of himſelf for life, the remainder to in Fee; and then the office concluded: *Quod predict. J. Foss ſic de omnibus præmiſſis modo & forma ſuprædict. ſeiſitus exiſtens de tali ſtatu de eiſdem obiit inde ſeiſitus*, 12. *Martii* 8. Jac. It was the opinion of the Juſtices in this caſe, that this office was void for repugnancy of finding of the eſtate, whereof he died ſeiſed. M. 10. Jac. Cur. Ward. *Foss* Caſe. Hob. 38.

7. An office was found by Commiſſioners after the death of W. D. Eſquire at *Chicheſter*, where a *Melius inquirendum* went forth, and recited but thus, *Cum per quandam Inquiſitionem captam, apud C. compertum exiſtit*, and doth not ſay, that it was either by Commiſſion or Writ, or before whom it was taken: Whereupon the opinion of the Juſtices was, that it was void; for by the *Melius* it muſt appear, that the firſt office was by warrant: But they were of opinion, That if it had been *virtute Commiſſionis*, or *de Mandato noſtro*, it had been good enough, although it had not been ſaid before whom. M. 10. Jac. in Cur. Ward. *Dawtries* Caſe. Hob. 38.

8. It was found by *Mandamus*, 6. Jac. That *George* Earl of *Cumberland* was ſeized to him, and the heirs Males of his body of the Mannors of A. and B. the remainder to I. C. in tail with diverſe rem. over the rem. to the right heirs of H. Earl of C. Father of the ſaid *George*: and that G. ſo ſeized by Fine and Recovery, conveyed them to the uſe of himſelf, and M. his wife for their lives for the joynture of the ſaid M. the remainder to the heirs male of the body of *George*, and for want of ſuch iſſue, to *Francis* Earl of C. and the heirs males of his body, the remainder to the right heirs of *George*: And afterwards by another Indenture conveyed the Fee-ſimple to *Francis* Earl: Afterwards 4. Octob. 3. Iac. *George* died without heir Male of his body, and it was found that M. Counteſs of C. was alive, and took the profits from the death of *George*. It was objected, That here was no dying ſeiſed found by office; and therefore the office was inſufficient. It was anſwered, and reſolved, That by this office the king was not enetituled by the Common Law; for then the finding of a dying ſeiſed was neceſſary: But this office was to be maintained upon the ſtatutes of 32. and 34. H. 8. by force of which no dying ſeiſed is requiſite, if the land be conveyed to the wife: and ſo it was ſaid it was reſolved, 23. Eliz. in *Vincents* caſe; where all the land in *Capite* was conveyed to the younger ſon, and yet the eldeſt ſon was in Ward. 2. Reſolved that this office was ſufficient *prima facie* for the king, becauſe it is a thing collaterall and no point of the Writ; and if any ſuch alienation be (which ſhall not be intended) the ſame ſhal come in of the other part of the alienee by a *Monſtrans de Droit*: Tr. 7. Iac. in the Court of Wards. The Earl of *Cumberlands* Caſe. Cook's Seleſt Caſes 49.

9. By *Diem clauſit extremum*, it was found that I. B. was ſeiſed of a Meſſuage, or Tenement of and in a 4th. part of an acre of Land parcel of the Demeans of the Mannor of N. in Fee: It was holden by the Chief Iuſtices, and Chief Baron in this Caſe, 1. That the words, *Meſſuagium vel Tenementum*, were uncertain, and therefore the office void for incertainty. 2. That it was void for the whole, becauſe that no Town is mentioned in the office, where the Meſſuage, or Tenement, or 4th. part of the Acre doth lie; and upon a Viſne from the Mannor none can come, becauſe it is not affirmed by the office, that they are parcel of the Mannor, but *nuper* parcel of the Mannor, which impleyth, that they now are not parcel: But a *Melius Inquirendum* was awarded, becauſe the whole office was void and incertain. Tr. 7. Iac. in Cur. Ward. *Baylies* Caſe. Cook's Seleſt Caſes 48.

10. The Queen brought a *Quare Impedit* againſt the Biſhop of *London* and *Scot*. the Caſe was this, A. ſeized of an Advowſon in groſs holden of the Queen in chief, aliened the ſame by Fine without Licence, the Church became void; the Conuſee preſented; the Queen without office found brought a *Quare Impedit*: It was agreed by the Iuſtices in this Caſe; that if the alienation had been by deed only, that the Queen without office found, ſhould not have had the preſentment; for upon ſuch alienation by matter in fact without licence, no *Scire facias* ſhould iſſue out without office found of the alienation. But upon an alienation without licence by matter of Record a *Scire facias*

(Lord) R. H. ſeized of the Mannor of M. in the County of L. holden of the king as of his Dutchy, (Meſne) R. M. ſeiſed of Lands in M. holden of the Meſne, as of his Mannor, by Knights Service: (Tenant) R.H. died, 31.H.8. It was found, that he died ſeiſed of the ſaid Menalty, and that it deſcended to E. his ſon and heir, &c. and during the time he was within age, R.M. the Tenant died: After which 35. H.8. it was found, that R H. died ſeiſed of the ſaid Tenement, & that the ſame deſcended to R. H. his ſon and heir within age; and that the Tenancy was holden of the king as of his Dutchy of L. by Knights ſervice, whereas in truth the ſame was holden of *Ed. Holme*, then in Ward to the king as of his Menalty; for which cauſe the king ſeiſed the heir of the Tenant. Afterwards 4. Jac. after the death of R.H. it was found, that the ſaid Rich. died ſeiſed of the ſaid Tenancy, and held the ſame of the king by Knights ſervice, his heir within age. Whereupon the Coſen and heir of Rich. preferred his Bill to be admitted to traverſe the office 4. Jac. The Queſtion was, whether the office found 35. H.8. be an Eſtoppel to traverſe the laſt office 4. Jac. It was reſolved by the Juſtices, Aſſiſtants to the Court of Wards, that the ſaid former office found 35.H.8. was no concluſion or Eſtoppel to the Plaintiff to traverſe the ſaid office, becauſe king Hen. 8. had received the fruit and benefit which was then due to him by the former office: And in this caſe, it was further reſolved, That when the king cometh to the poſſeſſion by a falſe office, or other means upon a pretence of right, where in truth he hath no right, if it appeareth, that the king hath any other right or intereſt to have the Land, none ſhall traverſe the office or title of the king. M.7. Jac. in the Court of Wards. *Holmes* caſe. Cook's Seleſt Caſes 61. Lea 13. the ſame Caſe.

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2. *Where an Office found ſhall be void for incertainty, repugnancy, or for other defects in it; where not; and where void for other inſufficiencies; where not.*

1. A Man ſeiſed of lands holden of the Queen in *Capite*, conveyed the ſame in his life time by Act executed to his Baſtard ſon, and died: Office is found of this eſtate, but it was not found by the office that he was Baſtard, or that he was heir to the Donor. It was holden in this caſe, that the 3. part ſhould not be in Ward; for that a Baſtard is not within the ſtatute of 32. H.8. for the children within that ſtatute are intended lawfull children, and a Baſtard *eſt nullius filius*. But whereas it was not found in the office, that he was heir of the Donor, it was holden that the defect of that might be ſupplied by an averment; and ſuch ſuggeſtion ſhall not be repugnant, but a ſupplement to the office. M.13. Eliz. Dyer 296.

2. It was holden by office found *virtute brevis*, before the Eſcheator, That I.S. was ſeiſed of a Mannor, and held the ſame of the Queen by knights ſervice; the heir alſo was found within age. It was alſo found before the Eſcheator in another County, that the ſaid I.S. died ſeiſed of another Mannor, and held the ſame of B.C. by knights ſervice. The queſtion was, If B.C. might not traverſe the firſt office; the opinion of the Court was, that if the truth be ſuch, that the firſt Mannor was not holden in *Capite* that in ſuch caſe the ſaid R.C. ſhould be put to his Traverſe; becauſe the beſt ſhall be intended for the king, viz. that it is a Tenure in chief; and the office firſt found ſhall not be void. Tr. 4. Ma. Dyer 761.

3. Upon a *Diem clauſit extremum*, a Tenure is found; but by what ſervice, the Jury are ignorant, whereupon a *Melius inquirendum* iſſued; and upon that it was found that the Tenure was of a ſubject. It was the opinion of the whole Court, that the firſt office needed not to be traverſed, but that it was void by the ſtatute of 2. E.6. cap 8. and it was holden, that the *Melius inquirendum* is but in the nature of the firſt *Diem clauſit extremum*. Tr. Eliz. Dyer 291.

4. If an office be found againſt the king, and a *Melius inquirendum* is awarded, and in that, It is found for the king; but the *Melius* is void for repugnancy in the Writ; a new Writ of *Melius inquirendum* ſhall be awarded: But if upon the Writ of *Melius*, it be found againſt the king, there the king ſhall not have a new Writ of *Melius*; for then there ſhould be no end, but Writs infinite; and if the office be found for the king, the party grieved may traverſe it; and if the traverſe be found againſt him, the ſame makes an end of the matter, and he is concluded by it; and ſo it is that if it be found for him that traverſeth, it ſhall binde the king. Cook 8. part 168. *Stoughtons* Caſe.

5. It was found by office, 32. Eliz. That A. was ſeiſed of three Meſſuages, and made his Will in writing, and gave *in hec verba*, &c. and found ſeveral Tenures of common perſons, and no lands holden of the king, and then they finde that

An.

An. 23. *Aprilis* died, B. his ſon within age. Afterwards 5. Jac. a *Mandamus* is awarded after the death of A. whereby part of the Lands are found to be held at the death of A. of the late Queen by knights ſervice in *Capite*; and at the taking of the ſaid laſt inquiſition, where held of the king in *Capite* by knights ſervice, and *Ignoramus* of the reſt. It was the opinion of the Juſtices, Aſſiſtants to the Court of Wards, That the office finding no dying ſeiſed, and only a tenure of common perſons, was meerly void. But they ſaid, if any tenure in *Capite*, or by knights ſervice had been found for the king, and no dying ſeiſed; yet the office had not been void, but only voidable; and that a *Melius inquirendum* ſhould be awarded, to enquire of what eſtate he was ſeiſed. Paſc 9. Jac. in Cur. Ward *Shellocks* Caſe. Lea 36.

6. Upon a *Mandamus*, after the death of *Jo. Jons*, it was found that he was ſeized in his demeſn as of Fee of the Manor of S. in B. and that he being ſo ſeiſed, *poſtea* 10. *Martii*, 43. Eliz. did thereof enfeoff W. to the uſe of himſelf for life, the remainder to in Fee; and then the office concluded: *Quod predict. J. Jons ſic de omnibus præmiſſis modo & forma ſupradict. ſeiſitus exiſtens de tali ſtatu de eiſdem obiit inde ſeiſitus*, 12. *Martii* 8. Jac. It was the opinion of the Juſtices in this caſe, that this office was void for repugnancy of finding of the eſtate, whereof he died ſeiſed. M. 10. Jac. Cur. Ward. *Joas* Caſe. Hob. 38.

7. An office was found by Commiſſioners after the death of W. D. Eſquire at *Chicheſter*, where a *Melius inquirendum* went forth, and recited but thus, *Cum per quandam Inquiſitionem captam, apud C. compertum exiſtit*, and doth not ſay, that it was either by Commiſſion or Writ, or before whom it was taken: Whereupon the opinion of the Juſtices was, that it was void; for by the *Melius* it muſt appear, that the firſt office was by warrant: But they were of opinion, That if it had been *virtute Commiſſionis*, or *de Mandato noſtro*, it had been good enough, although it had not been ſaid before whom. M. 10. Jac. in Cur. Ward. *Dawtries* Caſe. Hob. 38.

8. It was found by *Mandamus*, 6. Jac. That *George* Earl of *Cumberland* was ſeized to him, and the heirs Males of his body of the Mannors of A. and B. the remainder to I. C. in tail with diverſe rem. over the rem. to the right heirs of H. Earl of C. Father of the ſaid *George*: and that G. ſo ſeized by Fine and Recovery, conveyed them to the uſe of himſelf, and M. his wife for their lives for the joynture of the ſaid M. the remainder to the heirs male of the body of *George*, and for want of ſuch iſſue, to *Francis* Earl of C. and the heirs males of his body, the remainder to the right heirs of *George*: And afterwards by another Indenture conveyed the Fee-ſimple to *Francis* Earl: Afterwards 4. Octob. 3. Jac. *George* died without heir Male of his body, and it was found that M. Counteſs of C. was alive, and took the profits from the death of *George*. It was objected, That here was no dying ſeiſed found by office; and therefore the office was inſufficient. It was anſwered, and reſolved, That by this office the king was not entituled by the Common Law; for then the finding of a dying ſeiſed was neceſſary: But this office was to be maintained upon the ſtatutes of 32. and 34. H. 8. by force of which no dying ſeiſed is requiſite, if the land be conveyed to the wife: and ſo it was ſaid it was reſolved, 23. Eliz. in *Vincents* caſe; where all the land in *Capite* was conveyed to the younger ſon, and yet the eldeſt ſon was in Ward. 2. Reſolved that this office was ſufficient *prima facie* for the king, becauſe it is a thing collaterall and no point of the Writ; and if any ſuch alienation be (which ſhall not be intended) the ſame ſhal come in of the other part of the alienee by a *Monſtrans de Droit*: Tr. 7. Jac. in the Court of Wards. The Earl of *Cumberlands* Caſe. Cook's Select Caſes 49.

9. By *Diem clauſit extremum*, it was found that I. B. was ſeiſed of a Meſſuage, or Tenement of and in a 4th. part of an acre of Land parcel of the Demeans of the Mannor of N. in Fee: It was holden by the Chief Juſtices, and Chief Baron in this Caſe, 1. That the words, *Meſſuagium vel Tenementum*, were uncertain, and therefore the office void for incertainty. 2. That it was void for the whole, becauſe that no Town is mentioned in the office, where the Meſſuage, or Tenement, or 4th. part of the Acre doth lie; and upon a Viſne from the Mannor none can come, becauſe it is not affirmed by the office, that they are parcel of the Mannor, but *nuper* parcel of the Mannor, which implyeth, that they now are not parcel: But a *Melius Inquirendum* was awarded, becauſe the whole office was void and incertain. Tr. 7. Jac. in Cur. Ward. *Bayliss* Caſe. Cook's Select Caſes 48.

10. The Queen brought a *Quare Impedit* againſt the Biſhop of *London* and *Scot.* the Caſe was this, A. ſeized of an Advowſon in groſs holden of the Queen in chief, aliened the ſame by Fine without Licence, the Church became void; the Conuſee preſented; the Queen without office found brought a *Quare Impedit*: It was agreed by the Juſtices in this Caſe; that if the alienation had been by deed only, that the Queen without office found, ſhould not have had the preſentment; for upon ſuch alienation by matter in fact without licence, no *Scire facias* ſhould iſſue out without office found of the alienation. But upon an alienation without licence by matter of Record a *Scire facias*

facias lyeth before office; and in the laſt caſe the Queen ſhall have the mean profits from the time of the *Scire facias* returned, but in the firſt from the time of the office found. M. 29. El. in Co. B. The Queen and the Biſhop of *London* and *Scots* caſe. Leon. 40.

11. In a *Quare impedit*, the plaintiff counted, That R. G. was ſeiſed of the Mannor in the right of B. his wife and ſo ſeiſed, he and his wife levied a fine thereof to a ſtranger *ſur conuſant de droit, &c.* who rendred it to the husband and wife for their lives, the remainder to the heirs of the body of the husband, the remainder to the right heirs of the husband; and they ſo ſeiſed, the husband alone levyed a fine to a ſtranger, who rendred it to the husband and wife in tail, the remainder to the heirs of the body of the husband, the remainder to the right heirs of the husband: the husband dyed ſeiſed, the wife entred and leaſed the Mannor to the plaintiff, and then the Church became void: Now on the behalf of the Queen, an office was ſhewed into the Court, which office did purport, That the ſaid R. G. was ſeiſed of the ſaid Mannor, and held the ſame of the Queen by knights ſervice in chief, and that the ſaid R. G. dyed, *ſed quis ſit propinquior hæres penitus ignorat*, and therefore prayed a Writ to the Biſhop for the Queen: exceptions was taken to the office, becauſe it was not found that the ſaid R. G. dyed ſeiſed, and it might be that after the ſaid fine he had conveyed his eſtate in the lands to others, or that he was diſſeiſed. But to that it was anſwered and reſolved, that the defect of the office was ſupplyed by the Conut, for there it is expreſly alledged that the ſaid R. G. dyed ſeiſed. 2. Objected, that no heir was found by the ſaid office; it was anſwered, that perhaps the ſame had been a good exception at the Common Law; but that is remedied by the ſtatute of 34. H. 8. and therefore as to the wife, the Queen is entituled to *Primer ſeiſin*, becauſe the conveyance was made for her advancement; and it was in this caſe reſolved, that it was in the election of the wife, which eſtate ſhe would have; either that by the firſt fine, or that by the ſecond: and the Court was clear of opinion, that upon the matter a Writ ought not be granted to the Biſhop for the Queen; and it was holden by the whole Court, that the Tenure alledged, *modo et forma*, could not be a Tenure in chief, for that it is ſaid, that the land is holden of the king, as of the Caſtle of *Dover* in Capite. M. 30. Eliz. in Co. B. *Moile* and the Earl of *Warwick's* Caſe. Leon. 65, 66.

3. *Offices, where they muſt be indented, and how the Eſcheator muſt demean himſelf in and about the inquiſition; where found by Commiſſioners, are as equivalent as taken before the Eſcheator: where found* virtute brevis, *and where* virtute officii, *good, where not; and where found in one County, not good for lands in another County.*

1. A Writ of *Mandamus*, after the death of the Lord *Powes*, was awarded to the Eſcheator; the Jury being agreed of their verdict, delivered it to the Eſcheator in paper before the engroſſing and ſealing of it: a *Superſedeas* came to the Eſcheator: there was a miſtake in the word *Superſedeas*; for it was in the Writ *Superdeas*, omitting *ſe*: It was holden by the Court, that the office ought to be delivered by Indenture under the hands and ſeals of the Jurors; and it was holden, that the Eſcheator in that caſe, do make return of it in the Chancery, and of all the ſpecial matter: and then vail *que vail parvit*. But afterwards it was ruled, that a *Superſedeas* did not lye in this caſe; nor in a *Diem clauſit extremum*: M. 2. Eliz. Dyer 170.

2. In the caſe of *Altonwoods*, exception was taken to an office, found (to entitle the king:) before the Eſcheator *virtute officii*, becauſe the ſame was returned into the Chancery, whereas it ought to have been returned into the Exchequer; for it was ſaid, That offices found *virtute brevis* returnable in the Chancery, ought to be returned in the Chancery; but offices found *virtute officii*, found before the Eſcheator, ought to be returned into the Exchequer: but the exception was diſallowed by the Court upon the view of infinite preſidents of offices found *virtute officii* returned into the Chancery: and it was found in that caſe by the Juſtices, that the office was ſufficient to entitle the king, although it were never returned; for upon examination of the Eſcheator, if it appeareth that he hath ſeiſed the lands into the kings hands, it is ſufficient. Cook 1. pt. 42. in the caſe of *Altonwoods*. vide Cook 4. pt. 57. in the caſe of the Wardens and of Sadlers. acc.

3. An office was found at W. in the County of *Dorſet* 32. Eliz. before Sir *Matthew Arrundell*, and others Commiſſioners under the Great Seal. *Dicit villa de Abbotsbury in dict. Com. uſque mare per totum de Portland in eodem Comitat. eſt quedam æſtuaria, Anglice a Mere or Fleet in quam Mare fluit & refluit, in qua quidem æſtuaria ſunt 500. ogn*

querum

quorum 410. *ſunt albi, &* 90. *cygnetti, &* [redacted] *omnes predict. cygni & cygnetti ſunt in poſſeſſione I. P. & I. D. & quod quilibet eorum eſt valoris* 2. s. 6 d. *quadr. major pars tempore captionis dict. inquiſitionis minime fuer. ſignat.* And this office was certified into the Exchequer, and good; And thereupon a Writ was directed to the Sheriff of the ſame County to ſeiſe all the ſaid white Swans not marked. Cook 7. rr. 16. The caſe of Swans.

4. Note the difference betwixt an office of Inſtruction, and an office entituling: for it was ſaid by the Iuſtices, That a condition under the Exchequer ſeal, and a return thereof was ſufficient to inſtruct the kings officers to ſeiſe a Mannor and certain parcells of lands, which were pretended to be concealed from the king; and that the ſame ſerveth for a ſufficient record for that purpoſe: but an office found by force of a Commiſſion under the Exchequer ſeal, was not ſufficient to entitle the king in caſe of attainder of felony, *Mortmain, Ceſſavit* or the like. Cook 10. pt. 115. in the end of *Legats* Caſe.

5. It was found by office taken before the Eſcheator *vi. tutæ brevis*, That A. dyed ſeiſed of lands holden of the king by knights ſervice, and that his heir was within age: It was the opinion of the Iuſtices, that in that caſe it ſhall be intended in Capite; but whereas it was found before the Eſcheator in another County, That the ſame A. held of B. other lands by knights ſervice, there it was holden that B. was put to his traverſe of the tenure in Capite at the Common Law. Paſ. 5. M. Dyer 161.

6. It was found by office taken at B. in the County of H. That Sir *John P.* knight, and the Lady I. his wife, were joyntly ſeiſed to them and their heirs of the Mannor of D. in the County of H. and of the Mannor of K. in the County of L. and ſo ſeiſed, that the ſaid Sir I. P. being likewiſe ſeiſed of the Mannor of S. in the ſaid County of H. and of the Mannor of T. in the County of W. dyed ſeiſed, that the Lady I. his wife ſurvived him, and that the Mannor of D. was only holden of the king in Capite, and that the reſt of the Mannors were holden in ſocage, and not of the king in Capite or knights ſervice, and that T. P. was his ſon and heir of the age of four years, That the Lady I. dyed 9. Iac. T. P. 10. Iac. was made knight, and 19 Iac. he was of full age and tendred his Livery, and ſued forth a ſpecial Livery; no office being found of the death of the Lady I. and upon the ſpecial Livery there was a ſpecial pardon of all entries and intruſions: The Auditors ſince the ſpecial Livery impoſed charges upon the heir; One was *ad computandum pro meliore valore*: It was reſolved by the Iuſtices in this caſe, That the Auditor can ſet no charge, nor award proces to anſwer any charge, but upon a record, as an office or the like: But yet if an office be found only in one County of all the lands, lying as well in other Counties as there, which in Law is no office, but for the proper County; yet by the courſe of the Court of Wards, this is allowed as an office to all to ground a charge and proces upon, and this is beneficial to the ſubject, who elſe by divers offices would be put to intolerable charges. Hill. 13. Iac. Sir *Tho. Peckerings* Caſe. Hob. 90, 91.

More Office found, &c. where it relates.

1. IF an Ideot above the age of twenty one years, being an *Ideot a Nativitate*, maketh a feoffment in fee of his inheritance, if it be found by office at the kings ſuit, That he was *Ideot a Nativitate*, and that he hath aliened his lands, then upon a *Scire facias* againſt the alienee, the lands ſhall be ſeiſed into the kings hands, and the inheritance ſhall be reveſted in the Ideot; for the ſtatute is, *Quod poſt mortem eorum reddatur eam rectis hæredibus*, which the king cannot do, nor can the king have the poſſeſſion of the lands to his own uſe, if not that by office and ſeiſure ſuch conveyance made by the Ideot be deſtroyed: But when all is found by office, by inquiſition at the kings ſuit, ſuch office when it is found, ſhall have relation *à tempore nativitatis*, to avoid all mean acts made by an Ideot as feoffments, releaſes, &c. Alſo by the Common Law, The king ſhall have as great protection of the goods and chattels of an Ideot as of his lands; and as after office found, he cannot alien, give, &c. ſo alienations gifts made before office found, ſhall be avoided after office found, for that no lacheſe ſhall be accounted in the king; nor no prejudice thereby ſhall accrue to the Ideot for not ſuing the office before the feeoffment or gift; but if the Ideot dyeth before office found, after his death no office can be found, and without office, the king cannot be entituled. Cook 4. pt. 127. in *Beverlies* Caſe.

2. A Prior ſeiſed of divers houſes, with the conſent of his covenant made a leaſe of them for years, rendring rent of 5. l. 10. s. 11. d. at four uſual Feaſts, upon condition that if the rent were behinde in part or in all, at any of the ſaid Feaſts, then he and his ſucceſſors to reenter: The Priory came to the king by ſurrender; the king by his

Letters Pattent under the great ſeal, granted one of the houſes to the leſſee, and another in fee; and after, it was found by commiſſion under the Exchequer ſeal, that parcell of the ſaid rent was behinde at one of the ſaid Feaſts; The king before the commiſſion returned, granted the reſt of the houſes to I. S. in fee. It was reſolved in this caſe amongſt other points, That although without office the leaſe was not void, and that although the office was not returned before the date of the Letters Pattent made to I. S. yet foraſmuch as the office was found before the grant, and afterwards it was returned of record; it was holden, that the grant was good, and that in this caſe of reentry without ſeiſure, the leaſe was void. Cook 5. pt. 56. *Knights* caſe.

3. A Ideot *à Nativitate*, by force of a remainder after the death of his Father was joyntly ſeiſed with his elder brother; for term of their lives the leſſor did purchaſe the eſtate of the elder brother, and took the body of the Ideot and the profits of his lands; and afterwards it was found by inquiſition that he was an Ideot; it was reſolved in this caſe amongſt other things, That the office ſhould have relation from the time of the Nativity, to avoid alienations, incumbrances, and mean acts done by the Ideot; but for the mean profits that it ſhould not have relation, but from the time of the office found. Paſ. 8. Iac. Cook 8. pt. 170. *Tourſons* caſe.

More Office found before the Eſcheator.

1. IF the kings tenant by knight ſervice dyeth, his heir within age, and upon office found the king ſeiſeth the body and lands, yet the heir during the poſſeſſion of the king may ſell the land by deed enrolled, or make a leaſe of ſuch lands, and the ſame ſhall binde the heir notwithſtanding the poſſeſſion of the king; but if he maketh a feeoffment in fee, it is utterly void, for that it is an incruſion upon the kings poſſeſſion; but where the king by office found is intituled to the inheritance, as that his tenant dyeth without heir (whereas it is falſe) for which the king ſeiſeth in ſuch caſe, the kings tenant before his *Ouſter le main* ſued cannot make a leaſe for years, or ſell the land by deed inrolled; The principal caſe was; The king by colour of a falſe office which doth falſly intitle to the inheritance, is ſeiſed of certain land; he who had right, leaſed the ſame for years by deed indented. and then an *Ouſter le main* was ſued, and he enfeoffed a ſtranger. It was holden that the leaſe ſhould not binde the feoffee, although it was by deed indented; for the feoffee is a ſtranger to the Indenture, and therefore ſhall not be eſtopped by it. M. 31. Eliz. in Co. B. Leon. 157.

2. A tenant in Capite made a leaſe to B. for 1000. years, and covenanted with B. and his heirs, that upon payment of 5. s. that he and his heirs would ſtand ſeiſed of the lands to the uſe of B. and his heirs, and in the deed were the ordinary clauſes of a conveyance *bona fide*, *viz.* that the leſſee ſhould enjoy the lands diſcharged of all incumbrances, and that he would make further aſſurance. B. aſſigned his intereſt to C. who dyed in poſſeſſion, his heir within age: and in two offices the Jury would not finde a Tenure becauſe of the leaſe for years; but in a *Que plura*; the matter came in queſtion in the Court of Wards: It was the opinion of the two Chief Juſtices and Chief Baron, aſſiſtants to the Court of Wards, That becauſe That it was found by offices, that C. dyed in poſſeſſion, that the ſame was ſufficient to entitle the king to the wardſhip of the lands: and they were clear of opinion, that ſuch an heir ſhould be in Ward; and it was ſaid and agreed by them, That all offices found to deceive the Crown of ſuch an ancient flower of the Crown as Wardſhip, ſhould be void as to that purpoſe, and taken moſt beneficial for the king. Vide 36. H. 6. acc. Tr. 10. Jac. in Cur. Ward. *Cottons* Caſe. Godb. 191.

3. In *Monſtrans de droit*, the caſe was, *John de Malo Lacu*, gave to *Peter de Malo Lacu*, and the heirs of his body, the Caſtle and Mannor of *Malgrave*, which afterwards came to Sir *Ralph Bigod*: Sir *Ralp.* 6. H. 8. made thereof a feeoffment in fee to W. and others, to the uſe of his will, and dyed; the right of the land together with the entail and the uſe diſcended to Sir *F. Bigod*: who 21. H. 8. made a feeoffment to I. S. and others to the uſe of himſelf and K. and his wife, and the heirs of their two bodies, who had iſſue *Ralph* and *Dorothy*, 26. H. 8. the ſtatute of forfeiture for Treaſon was made: 29. H. 8. Sir *Francis* was attainted of Treaſon and executed; K. ſurvived him; 31. H 8. a ſpecial Act was made for his attainder, and forfeiture, *&c.* 6. Eliz. *Ralph* ſon of Sir *Francis* and K. was reſtored by Parliament in blood, and after dyed without iſſue. *Dorothy* married *Roger Ratcliff*, and they had iſſue *Fr. Ratcliff*; 8. Eliz. K. dyed, *Francis* entred: 33 Eliz. all this matter was found by office. 34. Eliz. the Queen granted the Caſtle, Mannor, *&c.* to *Ed.* Earl of *Mulgrave* and the heirs males of his body: *Roger Ratcliff* brought his *Monſtrans de droit* and had judgement: whereupon

upon Error was brought in the Exchequer Chamber. There were two queſtions in this caſe. 1. Whether *Fr. Bigod*, who had an eſtate in ſpecial tail in poſſeſſion, had alſo the right of an old entail in him at the time of the attainder; or whether it was in abeyance in reſpect of the feoffment made by him 21. H. 8. The opinion of the Court in this point was, That the feoffment gave away all the eſtate the tenant in tail had concerning himſelf, or any benefit that he might receive thereby, but as concerning his iſſue inheritable to that entail, and to him in the reverſion, and for their good there ſtill remained in him a right of that entail by force of the ſtatute of *weſt.* 2. for the good of thoſe that are ſaved by that ſtatute; but whether it were in the feoffer himſelf ſheeping till there be an heir of the tail, or in abeyance, or in conſideration of the Law, was a queſtion, but not reſolved. 2. It was reſolved, that the old right of the entail was forfeited to the Crown by the ſtatute of 26. H. 8. for that there was an actual eſtate tail in the perſon attainted at the time of the attainder; and the right bound by the expreſs words of the ſtatute there being no ſaving to the heirs, *&c.* 4. Reſolved, that when the office was found, the iſſue in tail was barred notwithſtanding any remitter pretended to be in the caſe, and that office ſhould relate to that purpoſe: wherefore the judgement given in the Court of Exchequer was reverſed: 13. Jac. in the Exchequer Chamber; the Lord *Sheffeild* and *Ratcliffs* caſe. Hob. 334. Godbt. 314. the ſame caſe.

4. It was found by office by force of a *Diem clauſit extremum*, that one held houſes of the king in *London*, and that the tenant dyed without heir: whereupon the king granted them to P. P. for life, who ſued a Writ to the Major to put him in poſſeſſion; he returned, that the tenant made his will, and gave them to his wife for life, who was yet alive, and ſeiſed of the ſaid houſes together with one I. D. her then husband; P. P. ouſted I. D. who thereupon brought a *Scire facias* againſt P. P. who demanded judgement of the Writ, becauſe he being tenant for life, and the reverſion in the king, they ought to ſue to the king by petition; It was in this caſe adjudged by all the Juſtices that the Writ ſhould abate; and that I. D. and his wife ſhould ſue to the king by Petition, becauſe forasmuch as the kings title was found by enqueſt of office upon Oath, the title of the ſubject ought alſo to appear by record of as high a nature, *viz.* by like office upon oath, and not by the return of the Major only; for although that return be matter of record, yet it is not of ſo high regard, as an office found upon oath. 39. Aſſ. 21. *Pierce Patiſeilds* caſe. Vouch in Cook 4. pt. in the Warden of *Sadlers* caſe.

5. It was found by office: That A. by the kings licence married the kings Neece, and that lands deſcended to the ſame Neece, which the husband had alienedwithout the kings licence to another, for which cauſe the lands were ſeiſed into the kings hands: The alience came into Chancery and ſhewed all the ſpecial matter as it was found in the office; and becauſe that all the truth of the matter did appear in the office, it was adjudged in that caſe, that the husband ſhould hold the land as Tenant by the Curtiſee, and the alienee had reſtitution made to him of the land, during the life of the husband. 33. E. 3. to Traverſe 36.

6. It was found by office, That I. held lands of the king, and that M. his daughter and heir was of full age and had Livery: and by another office it was alſo found that I. had another daughter named K. who was yet within age, whereupon a *Scire facias* iſſued forth againſt M. and her huſband, *&c.* who ſaid, that the ſaid lands were given to the ſaid I. and to his firſt wife the mother of the ſaid M. in tail, and that K. was his daughter by another wife: It was awarded by the Juſtices, that the lands ſhould be ſeiſed into the kings hands, becauſe the entail was not found by any office, but only that M. was general heir. 30. Aſſ. pt. 28. Cook 4. pt. 46. acc.

7. An office by vertue of a *Mandamus* was found before the Eſcheator of L. in the County of C. after the death of I. S. that he dyed ſeiſed of certain woods (*ſed de quo, vel de quibus, vel per quæ ſervitia ignorant*) A *Melius* was awarded reciting the place and time of the inquiſition, and that Ignoramus of the Tenure, and ſay not that it was found before the Eſcheator; and then proceeded, that the ſaid lands or ſome of them were holden by knights ſervice in chief or otherwiſe. *Tibi Præcipimus*, that you ſhall enquire whether the ſaid lands or any of them be ſo holden; It was the opinion of the Juſtices, that the want of *Coram* was well enough, both becauſe it was *virtute brevis*, which muſt be before the Eſcheator, and becauſe alſo there is a *Melius inquirendum*: But the Juſtices held the Writ to be naught, becauſe in an *Ignoramus* the enquiry of the Tenure ought to be at large, and not to be reſtrained to the Kings Tenure only. Tr. 12. Iac. in Cur. Ward. *Curtices* caſe. Hob. 73.

8. The Chancellor, *&c.* of the Univerſity of *Cambridge* brought a *Quare Imp:* againſt A. B. and C. and claimed the preſentation to the Church of D. by the ſtatute of 3. Iac. becauſe B. being Patron of the Church at the time of the avoidance by the death of I. S. the laſt incumbent was then a Popiſh Recuſant: All the defendants pleaded; but A. pleaded, and did confeſs that B. was ſeiſed of the Mannor of *S.* to which, *&c.* in his demeſne

as of fee, and that he was a Popiſh Recuſant; but ſaid that for non payment of 20.s.a month by condition and inquiſition upon it, it was found that the ſaid B. was ſeiſed at the time of his Conviction of the ſaid Mannor, to which, &c. and that thereupon the Courts did ſeiſe two parts of the ſaid Mannor into the Kings hands, and that the King under the ſeal of the Exchequer demiſed the ſaid two parts to C. for twenty one years, *ſi tam diu*, &c. and he ſhewed that the Church became void, by reaſon whereof he preſented his Clerk, *Abſque hoc*, that B. was Patron at the time of the avoidance. It was the opinion of the Court upon this plea, that the title to this avoidance did appear to be in the King, for the ſtatute gives him two parts of all Recuſants poſſeſſions; ſo that although there be no mention made in the Inquiſition of the Advowſen ſpecially, yet the two parts ſhall follow the two parts of the Mannor, and then the King will preſent alone: 2. Point, That there are no words in the Kings grant to A. to carry the Advowſen from the King: But becauſe this ſerved only to prove the Kings title againſt the defendants, the Court would not award a Writ to the Biſhop for the King (being no party to the action) except his title were clear: But yet the plaintiffs were demanded of the Court, if they had any thing to ſay why a Writ to the Biſhop ſhould not be awarded for the King; it appearing upon the defendants plea, the King had title; whereupon the plaintiffs did diſclaim, and a Writ to the Biſhop was awarded for the King. M. 14. Iac. in Co. B. The Chancellor of *Cambridge*, &c. and *Walgraves* caſe. Hob. 326, 127.

9. The Queen made a leaſe for years rendring rent, with a Proviſo, that if the rent be not paid at the day limited, that the leaſe ſhall ceaſe without making mention that it was to be paid at the receit; the queſtion was, whether the leaſe ſhould ceaſe upon the default of payment, before office found thereof: ſome of the Iuſtices held it ſhould not ceaſe untill an office was found, becauſe it is matter of fact which determines it, *viz.* non payment; and that it ſhall be taken; as if it had been that the leaſe ſhall be forfeited, in which caſe it is not determined till reentry made for the forfeiture, which in the Queens caſe ought alwaies to be by office: But the greater part of the Iuſtices and Barons reſolved, That *ipſo facto* upon default of payment the leaſe was determined according to the purport of the contract, beyond which it cannot have any being, and that there needs no office in the caſe; but they agreed, that where it is that it ſhall be forfeited, or that ſhe ſhall reenter, there untill advantage be taken of the forfeiture in the one caſe, and of reentry in the other, the Term continues by the contract, and where in the caſe of a common perſon there is need of a reentry to undo an eſtate, there in caſe of the King there needs an office to determine the eſtate; for an office in the Kings caſe countervails a reentry. Tr. 36. Eliz. in Co. B. *Finch* and *Riſeleys* caſe. Poph. 53. vide M. 32. Eliz. Eliz. in Setio. Sir *Motle Finds* and *Throgmortons* caſe adjudge. acc.

10. A man being ſeiſed of three houſes in fee, demiſed them to his wife being an alien born; the King by his Letters Patents under the great ſeal, made the wife a Denizen; the deviſor dyed, the wife took another husband, and the Letters Patents being falſe in the Teſte, they obtained an exemplification of the enrolement of the Letters Pattent under the ſeal of the Exchequer which was with a true Teſte; and afterwards office was found by force of a Commiſſion to them directed under the Exchequer ſeal; by which it was found, that the wife was an alien born: It was reſolved in this caſe, That an office found under the Exchequer ſeal is not ſufficient to entitle the King to the lands of an alien born; but ſuch office which concerns fee and freehold, ought to be by force of a Commiſſion under the great ſeal: and in this caſe it was ſaid, that there are two kinds of offices; offices of entituling which veſt the eſtate and poſſeſſion of land in the King where he hath but a right or title before, and ſuch office ought to be found by commiſſion under the great ſeal; offices of inſtruction, when the eſtate of land is in the king before, but the particularity of it doth not appear of record ſo as it may be put in charge, and that may be under the Exchequer ſeal. Cook 5. pt. 53. *Pages* caſe. Vide Tr. 8 Iac. in B. R. *Walter* and *Boalds* caſe. Bolſtr. 1. pt. 31, 33. acc.

11. It was found by office after the death of W. B. by virtue of a *Mandamus*, that the ſaid W. B. dyed ſeiſed in his Demean as of fee of and in two Meſſuages or Tenements in M. in the ſeveral tenures of C. and D. holden of the king as of his honour of T. parcell of his Dutchy of L. by knights ſervice: It was reſolved that the ſaid office was meerly void, both in the dying ſeiſed, and tenure by knights ſervice thereby found, for it findes a dying ſeiſed of two Meſſuages or Tenements, which are not certain; and it is not found in what Pariſhes the Meſſuages do lye. M. 9. Iac. in Car. Ward. *Barkers* caſe. Lea. 43.

See more of this title, in the title before of Guard and Livery.

Office of the Court.

1. *Of what things the Court ought to take notice* Ex Officio, *of what not; and where they ſhall abate the Writ, though admitted good by the Plaintiff, and ſhall not give Judgement of any thing which is naught in the Count, or Writ; although it be found for, or againſt the Plaintiff or Defendant.*

1. DEbt brought by the Abbot of W. againſt the Executors of L. upon an Obligation dated 10. *Nov.* 12. H.8. the defendant pleaded an Indenture of Defeaſance of the ſame date, by which the Plaintiff demiſed to L. the Rectory of A. And A. Covenanted that he and his aſſigns would diſcharge the Abbot of all charges and burthens ordinary and extraordinary; and would repair, &c. during the term; ſo as he do not alien without the Licenſe of the Abbot; the defendant pleaded, that he entred and held the land till 1. *Aug.* 21. H.8. during which time he paid the Rent; and paid 5. marks due *per appropriat. Rector. predict. quæ ſunt omnia onera tam ordinaria quam extraordinaria, uſque diem dict. quo die ſtatum ſuum conceſſit quidam* P. and demanded Judgement of the Action; upon which the Plaintiff demurred. It was reſolved in this caſe, amongſt other things; that although the Statute of 21. H. 8. doth countervail a Licence: Yet it was holden that the ſaid Statute ought to have been pleaded; and the Court is not bounden to take notice of it; becauſe the ſame is a particular Statute; but contrary where a ſtatute is general, there the ſame needs not particularly be pleaded; but the Court ought *ex officio*, to take notice of it. Hill. 28. H.8. Dyer 27. ac. Vide M.2. Ma. Dyer 119 ac.

2. *Ejectione firmæ* brought againſt two, one appeared and pleaded the general Iſſue, proces continued againſt the other, who appeared & pleaded entry after the laſt continuance in abatement of the Writ; upon which the Plaintiff demurred. After the Iſſue aboveſaid was found for the Plaintiff. It was the opinion of the Court, that he ſhould not have judgement; for that by the demurrer he confeſſeth the entry, and thereby ſhall abate his own Writ, becauſe in this action the Terme is to be recovered. M. 6. Eliz. Dyer 226.

3. Note, there is a difference, when in an action brought, the Plaintiff doth reply to a plea in bar, and by his Replication it appeareth that he hath no cauſe of Action, there he ſhall never have Judgement; But when a bar is inſufficient in matter, or amounteth to a confeſſion of the point of the action, and the plaintiff replyeth, and ſhews the truth of the matter to enforce his caſe, and in judgement of Law it is not material, yet the Plaintiff ſhall have judgement given for him *ex officio Curiæ*; for it is true, that ſome times the Count ſhall be made good by the bar, and ſometimes the bar by the Replication; but the difference is, that when the Count wanteth time, perſon, or other certainty, it may be made good by the bar, and ſo the bar by the Replication, but when the Count wants ſubſtance, no bar can make it good. But when the Plaintiff replies, or makes ſur-rejoynder, and thereby it appeareth that upon the whole matter and Record, that the Plaintiff hath no cauſe of action, there he ſhall never have judgement, although there the bar or rejoynder be inſufficient; for that the Court ought to judge upon the whole Record, and every one ſhall be intended to make the beſt of his own caſe. Cook 8. pt. 12. in Dr. *Bonhams* Caſe. Vide Cook 8. pt. 133. *Turners* Caſe, acc.

4. Debt by Adminiſtrators upon an Obligation, the defendant pleaded that the Inteſtate died before the date of the obligation, and ſo *Non eſt factum*; the Jury found, that the deed was delivered in the life of the Inteſtate, and that the Inteſtate died before the date of Deed. It was in that caſe ſaid, that it was his deed; for although the Obligor in pleading cannot alledge the delivery before the date, becauſe he is eſtopped; to take any averment againſt a thing expreſſed in the Deeds; yet the Jurors are not eſtopped by it, or concluded to ſpeak the truth; but the Jury cannot finde any thing which the parties have affirmed or admitted if it be of Record: and in that caſe, it was reſolved, That the Juſtices *ex officio* ought to give judgement for the Plaintiff, becauſe the date of the obligation is not material; and many times Bonds are delivered at other times then they bear date. Cook 2. pt 5. *Goddards* Caſe.

5. Debt againſt the Sheriffs, for letting C. who was in Execution to eſcape: The Defendant pleaded and confeſſed that C. was in Execution, 20. *Aprilis* 33. Eliz. and ſo continued till *December* following, at which time he brake priſon, and eſcaped, and that he being Sheriff *recenter*

infectus

inſecutus eſt, & in recenti inſecutione of the ſaid C. 11. *December* retook him in Execution at S. It was adjudged in this caſe againſt the defendant; for the Plaintiff hath declared of an eſcape at *London*; and he juſtifieth the retaking him at *S.* ſo as the eſcape at L. is not anſwered: but in that caſe, foraſmuch as the Plaintiff not denying the freſh ſuit, but by pleading hath relyed upon that matter, that the priſoner was out of his fight, and the Court ſhall not intend other matter to maintain his Action then he himſelf hath ſhewed; and upon the record it doth not appear that the Plaintiff hath cauſe of action: Wherefore the Court in that caſe could not give Judgement for the Plaintiff; but if the Plaintiff had demurred upon the bar, he ſhould have had Judgement. Cook 3. pt. 52. *Rigeways* Caſe.

6. In Appeal of murder by I.G. of his brother A.G. againſt B. as principal, and H. as acceſſary before, and D. as acceſſary after &c. The principal pleaded, Not guilty; and by *Niſi prius* in the County of M. he was found guilty of Manſlaughter, and had his Clergy; It was (amongſt other points) reſolved in this caſe, That although the principal were convicted by verdict; yet foraſmuch as he had his Clergy before Judgement; for this cauſe, it was awarded, that both the Acceſſaries ſhould be diſcharged; for none can be a principal before he be adjudged ſo in Law, and that ought to be upon Judgement upon a verdict, or by confeſſion, or by Outlary; for it doth not ſuffice, that there be a principal, unleſs it doth appear by judgement of Law; and therefore where the principal is pardoned, or hath his Clergy before Judgement; in that caſe the acceſſory ſhall never be arraigned; and therefore the acceſſary ſhall be diſcharged. Paſc 39. Eliz. Cook 4. pt. 44. *Bibithes* Caſe. Tr. 32. Eliz. ibid. *Sytes* Caſe, acc.

7. In a Replevin, the plaintiff entituled himſelf to have Common of Paſture to his Copy hold; and it was found, that he ought to have Common; but it was further found, that every Copy-holder had uſed to pay time out of minde, &c. *pro eodem Communi nuam gallinam, & quinque ova annuatim*: Yet the Plaintiff (againſt his own ſaying) had Judgement; for that the ſame was not a matter of Commoning, but a collateral recompence to be had for the Common: But it was reſolved, That if the Jury had found that the plaintiff was to have Common, paying ſo many Hens and eggs, the Iſſue had been found againſt him, becauſe that is parcel of the Cuſtom. Cook 5. 61. 78, 79. *Grays* Caſe.

8. In Treſpaſs for breaking of his Cloſe, and beating of his ſervant, and doth not ſay, *per quod ſervitium amiſit*; the defendant pleaded, not guilty, and the Jury found him guilty, and aſſeſſed damages entirely; and becauſe the Plaintiff had no cauſe of action for beating of his ſervant, becauſe he hath not averred that he left his ſervice; for this cauſe, the plaintiff could not have judgment, but judgement was, that the Plaintiff take nothing by his Bill. M. 15. Eliz. in B.R. *Podey* and *Osbornes* Caſe. Vide Cook 5. pt. 10. B. in Sir *Henry Conſtables* Caſe.

9. Action upon the Caſe upon Aſſumpſit, where the defendant promiſed to do divers things, and the plaintiff alledged two breaches, whereof one was inſufficient; The defendant pleaded *non Aſſumpſit*; the Jury gave damages generally: It was in this caſe reſolved. 1. That it ſhall be intended, that they give damages for both. 2. that foraſmuch as the plaintiff had no cauſe of damages to ſue the one; for this caſe, where judgement was given for the plaintiff in the Kings Bench, the judgment was reverſed upon a Writ of Error in the Exchequer Chamber. M. 29. Eliz. in B.A. Ret. 476. More and *Bedels* Caſe. Cook 5. pt. 108. acc.

10. In an action upon the Caſe, the caſe was A. Copy-holder in Fee did preſcribe to have Common in B. and he alledged that the defendant put in his cattel into the Common, and that they had deſtroyed the Common, ſo that he could not have any benefit of his Common; the defendant pleaded not guilty; and the Jury found, that for the putting in he was not guilty; but as to the feeding and the conſuming of the graſs he was guilty. It was objected for the defendant, that the wrong found by the Jury, was not the wrong of which the Plaintiff complains in his action; for he hath complained of a miſ-doing, and the Iury have found a not doing, which is againſt the Plaintiff; for he hath declared that the defendant, *poſuit averia, &c.* which is wrong and miſ-doing, and the Iury have found, *Quod non poſuit, &c.* but that his cattel have paſtured: But it was reſolved, that notwithſtanding that, that the action was maintainable; for the Iudges in finding of verdict do reſpect the ſubſtance, rather then the circumſtances; and therefore amongſt other things it was adjudged for the Plaintiff. Cook 9. pt. 112. *Robert Marys* Caſe.

11. Treſpaſs of Battery againſt A.B. and C. A. appeared, and the plaintiff declared againſt him, *ſimul cum, &c.* and he pleaded, not guilty: Afterwards B. appeared, againſt whom the Plaintiff declared *ſimul cum, &c.* And upon not guilty pleaded, a *Venire facias* was awarded, and both Iſſues tryed at the Aſſiſes; and the Iſſue againſt A. being firſt tried, the Iury upon that Iſſue aſſeſſed for the Plaintiff damages 200. l. Afterwards the Iſſue was tryed againſt B. and 50. l. damages aſſeſ-

assessed by the second tryal: C. appeared, and confessed the action; and a Writ of Enquiry of damages was awarded by the Roll, but none Issued. It was resolved in this case: 1. When in Trespass against divers defendants they plead not guilty, in several pleas, and the Iury finde in all for the plaintiff, the Iurors cannot Assess several dammages against the defendant, because all is but one trespass, and made joynt by the Writ and Count. But if the Iury finde one guilty at one time, and another at another time, there several damages may be taxed: But if the Plaintiff confesseth that they have committed the Trespass severally, there the Writ shall abate. 2. Resolved, that the Defendant who last pleaded, shall be charged with the damages taxed by the first Iury: and the 2. Enquest shall not assess damages, but the party shall be contributary to the damages assessed by the first Enquest; and if the Damages assessed by the first Enquest be excessive, it was the opinion of the Court in such case, the party to the second Trial should have an Attaint against the Iurors. And it was holdsn in this case, that for saving of a discontinuance, if one of the Defendants makes default, a Writ of Enquiry of Damages shall be awarded by the Court, but none shall issue forth. Cook 11.pt.8. Sir *John Heydons* Case.

See more of Office of Courts, the titles of Courts; and in title Iudgements, und Iudges.

Ordinary.

1. *The causes of which Bishops and Ordinaries have Ecclesiastical Jurisdiction: And of the Power of Ordinaries in Granting of Administrations.*

1. Ordinary by the Common Law is properly taken for the Bishop of the Dioces, who is the true Ordinary, to whom the Courts of common Law do write, to certifie spiritual acts done in the Ecclesiastical Courts within the particular Dioceses; as *Excommunication*, Loyalty of Matrimony, Deprivation, &c. Yet some time Ordinary is taken for the Commissary or Official of the Bishop, or other Ecclesiastical Judge that hath Judicial authority within their Jurisdictions. Vide Cook 9.pt.26.ac.

2. Now the General Causes Ecclesiastical, of which Bishops and Ordinaries have Jurisdiction, are these, viz. Blasphemy, Apostacy from Christianity, Heresie, Schisms, Ordaining, Institutions of Clerks, Celebration of Divine Service, Rights of Matrimony, Divorces, general Bastardy, Substraction, & right of Tithes, Obventions, Oblations, Dilapidations, Reparation of Churches, Probate of Testaments, Administrations, and accounts for the same, Symonie, Incests, Fornications, Adulteries, Sollicitation of Chastity, Pensions, Proclamations, Appeals in Causes Ecclesiastical, Commutation of Pennance, &c. The Conusans of which doth not belong to the Common Law; and therefore they are determined by Bishops and Ordinaries in their Ecclesiastical Courts: Cook 5.pt. 5. & 6. in the Case of Ecclesiastical persons. *Cawdries* Case.

3. If the Incumbent of a Church, with cure of souls dyeth, If the Patron of that Church present not within six moneths, the Bishop, the Ordinary of the Dioces ought to collate, to the end the Cure may not be destitute of a Pastor; and if he neglect to present to the Church within the space of six moneths, then the Arch-bishop, who

is ſupream Ordinary and Metropolitan of the Dioceſs, ſhall collate one to that Church: and if he do not collate within ſix moneths, then the King as ſupream Ordinary of all the Dioceſſes of *England*, ſhall provide a Competent Paſtor for that Church.

4. In the Kings Courts of Record, where Felonies are determined, the Biſhop or his Deputy ought to give their attendance, to the end that if any who is indicted and arraigned for felony, do demand the benefit of his Clergy, that the Ordinary may inform the Court of his ſufficiency, or inſufficiency; *viz.* whether he can read as a Clerk or not, whereof notwithſtanding the Ordinary is not to judge, but is a Miniſter to the Kings Court; and the Iudges of that Court are to judge of the ſufficiency or inſufficiency of the party, whatſoever the Ordinary doth inform them: and upon due examination of the party may give Iudgement againſt the Ordinaries Information; for the Kings Iudges are Iudges of the cauſe: Vide Hob. 290.

5. A Parſon of D. brought a Prohibition againſt W. and Declares, reciting the Statute of 18 Eliz. of Clergy. That whereas he was Parſon of D. he was Indicted at the Aſſiſes for manſlaughter for the death of one I. S. and convicted for the ſame and that at the next Aſſize he was allowed his Clergy; but was not burnt in the hand, becauſe of his Orders, but by Iudgement of the Court was enlarged and delivered out of priſon, by which Iudgement he was purged and acquitted of the felony; and that yet the defendant pretending him to remain ſtill convicted of the Felony, and thereby deprived of his Benefice, and ſo the Church void (which was not ſo) that the Patron preſented him to the Church, and drew him in Plea before the Chancellor of *London*; and thereupon he prayed a prohibition againſt the Defendant. It was the opinion of the Iuſtices in this caſe, after long arguments, that the Plaintiff being convict and diſcharged by the ſaid Statute, that he could not be queſtioned for it again in the Eccleſiaſtical Court as an offence, to make the Church void by ſentence of Deprivation, and that a man might have benefit of that Statute, although he was not burnt in the hand. Tr. 16. Iac. in Com. B. *Spark* and *Williams* Caſe. Hob. 2. 88. 290. And ſo was it reſolved alſo. M. 28. Eliz. in Com B. in *Nicholls* and *Chaffes* Caſe. Where the Plaintiff was convicted of Felony, and burnt in the hand, and afterwards was impeached by the Defendant in the Eccleſiaſtical Court, *Contra debitam legem hujus Regni Angliæ formam*: affirming that the Vicaridge was void by reaſon of the Conviction; and that he was preſented thereunto by the Queen; and in that Caſe a Prohibition was awarded. *Ibid.* 294.

6. In a Prohibition upon the Statute of 23. H. 8. cap 3. for citing one out of the Dioceſs, the caſe was, the Chancellor of the Inferior Ordinary did make requeſt to Doctor *Dunn*, Dean of the Arches to take the Cauſe to his hearing; and the reaſon was, that the Cauſe (being indeed a Cauſe of *Modus Decimandi*) was ſo difficult that the Plaintiff could have no ſufficient Councel there: the Queſtion was, whether this transferring of this cauſe were warranted by the exception in the Statute; which exception is of two ſorts, the one for ſpecial cauſe particularly here expreſſed (whereof this is none) the other a general Clauſe, *viz.* That in caſe, that any Biſhop, or any other inferiour Iudge, having under him juriſdiction in his own right and title, or by Commiſſion, make requeſt to the Archbiſhop or other Superiour Ordinary to take, treat, examine, or determine the matter before him or his ſubſtitute; and that to be done in caſes only where the Civil Law doth affirm execution of ſuch requeſt, or juriſdiction to be lawfull or tolerable; upon pain to forfeit, &c. double damages, &c. It was the reſolution of the Iuſtices in this caſe, That to expound the Statute, That the Ordinary may at his will and pleaſure ſend the Subjects from one end of the Kingdom to another, without cauſe, is both againſt the Letter of the Statute, and it eludes it utterly: Alſo the referring was not according to the form of the Statute, the referring being from a Chancellor to a Delegate; and not from Biſhop to D. and it was reſolved in this caſe, That a Prohibition lyes upon this Statute, becauſe it hath words prohibitory, as well as a penalty of 10 l. Tr. 15. Iac. in Com. B. *Jones* and *James* Caſe. Hob. 185. Vide Brownl. 2. pt. 28.

7. Note, If a Lay man be Patron of an Hoſpital, he may viſit the ſame, and depoſe or deprive the Maſter for good cauſe; but if he be deprived without juſt cauſe, and that by colour thereof he be put out, he ſhall have an Aſſiſe, becauſe he hath no other remedy: But if the Ordinary depriveth a Maſter, who is Eccleſiaſtical, without cauſe, he ſhall not have an Aſſiſe, for that he hath other remedy by Appeal. Cook 11. pt. 99. in *Baggs* Caſe.

8. In Treſpaſs brought for the Tithes of the Church of B. it was found by ſpecial verdict, That the defendant was Collated to the Church of B. being a Donative by A. and B. the Patrons; and that the Church was exempt from the juriſdiction of any Ordinary: The defendant reſigned to A. and C. who was a ſtranger, who had no Intereſt

Intereſt in the Church of B. with all right afterwards the Church comes to D. who collates and intereſts the plaintiff in the Church; by reaſon whereof he ſeiſed the tythes in queſtion, and the defendant took them: and then the Jury concluded upon the matter, that if the Reſignation be good, then they finde for the plaintiff; otherwiſe for the defendant. It was the opinion of the whole Court in this Caſe, That judgement ought to be given for the plaintiff; for it being a Donative, and exempt from all Ordinary juriſdiction, the Reſignation muſt be into the hands of the Patron, and the Incumbent ſhall not be conſtrained to keep the Church whether he will or no if the Patron will not accept of it; and becauſe in this caſe there is no perſon to whom the Reſignation can be made, but only into the hands of the Patron, it is good; and although the Reſignation be but to one Patron and to a ſtranger, yet it is good to both Patrons; and then when D. hath the eſtate of both Patrons, the veſting of the plaintiff in the Church is good to give him power to take the profits by reaſon of the primer poſſeſſion, and ſo the action is well brought. Paſ. 3. Jac. in B.R. *Fairchild* and *Gayers* caſe. Broun. lo. 1. pt. 201.

9. Note, The opinion of the Court was, That if a ſuit be before an Archdeacon, whereof by the ſtatute of 23. H. 8. the Ordinary may licence the ſuit to a higher Court; That the Archdeacon cannot in ſuch caſe balk his Ordinary, and ſend the cauſe immediately to the Arches; for he hath no power to give a Court, but to remit his own Court, and leave it to the next, for ſince his power was derived from the Biſhop to whom he is ſubordinate, he muſt yeild it to him of whom he hath received it; and ſo it was ſaid it had been before adjudged. Vide Hob. 16. acc.

10. A. brought a *Quare Impedit* before the Judges of Lanc. the caſe was, That he had preſented one R. his Clerk to the Biſhop of *Cheſter* being Ordinary, who refuſed his Clerk; thereupon he complained to the Archbiſhop of *York*, who ſent a *Monition* to the Biſhop to receive the Clerk within a time, or to appear before him and anſwer, who did neither: The Archbiſhop did receive the Clerk and inſtitute him: Now the Biſhop and one K. preſented by the King, ſued in the Delegates, ſuppoſing that the inſtitution by the Archbiſhop was void; and ſo by conſequence meant to avoid the induction, as being without Warrant, becauſe the Archbiſhop did inſtitute here in *London*: It was the opinion of the Court, that this ſuit ought to be prohibited; for ſince by induction which is a temporal act, the Church is full; it is not to be avoided, but by a *Quare Impedit*, and not to be determined by alledging inſtitution inſufficient in the Eccleſiaſtical Court; and it was ſaid by the Court, that if this courſe might be admitted, they might avoid all plenarties in the Eccleſiaſtical Court, or queſtion there the inſtitution. Tr. 10. Jac. in Co. B. Sir *Timothy Huttons* Caſe. Hob. 15.

11. This caſe was moved to the Court: whereas the Dioceſs of *Winchester* did extend it ſelf to the borough of S. as part of the County of S. Dr. *Jones* Judge of the Audience of the Archbiſhop of *Canterbury*, did of late ſometimes keep a Court in S. and call a man thither from the remoteſt part of the Dioceſs of W. being ſixty miles, and if they kept not their day of appearance, they were excommunicated, and could not be abſolved unleſs they would yeild to the tranſmitting of the cauſe into the Archbiſhops Court; whereby the ſtatute of 23. H. 8. was eluded: and a Prohibition was prayed: It was anſwered, that no ſuch Act of Tranſmitting was uſed; but that ſuch Courts had been kept there; and that by Law they might be kept; for the Archbiſhop may ſit in any Dioceſs within his own Province, and might there hear cauſes by his Prerogative; for that he hath a concurring juriſdiction with the inferior Ordinary; and ſo it was ſaid the Biſhop had no wrong; nor the party called out of his Dioceſs: But it was the opinion of the Court, That ſuch Tranſmitting of cauſes was expreſly againſt the ſtatute, and that the party in this caſe hath a kinde of wrong: for whereas the Biſhop of W. himſelf would not draw the people out of the heart of the Dioceſs wherein he lives himſelf; the Archbiſhops officers would draw them thither as more commodious for them; and alſo it deprive the Subject of an Appeal which he ſhould have had if the cauſe had began with the inferior Ordinary; a Prohibition was awarded. M. 19. Jac. Co. B. Dr. *Jones* Caſe. Hob 17.

12. Before the ſtatute of 31. E. 3. when a man dyed inteſtate, and did make no diſpoſition of his eſtate, *viz.* of his goods, nor committed his truſt in that behalf to any, the King in ſuch caſe (who is *Parens Patriæ* hath the Supream power to provide for all his ſubjects) did uſe by his Miniſters to ſeiſe the goods of the inteſtate, to the intent that they might be preſerved and beſtowed for the burial of the dead, for the payment of his debts, and for the advancement of his wife and children; and if not, then for thoſe of his blood: This care and truſt of the

King, was by him committed to the Ordinarie, for there could be found none more fit for such a care then he, who all his life time had the care and charge of their souls, and therefore the Ordinary was in that case appointed in *Loco parentis*: But no power was given to the Ordinary to sell or dispose of the goods, either to his own use or to the use of any other, and yet he hath a propriety in the goods of the intestate, but that is only *secundum quid* and not *simpliciter*. Cook 4. pt. 39. in *Heasfloets* Case.

13. If debt be brought against the Ordinary, for the debt of the intestate; it was holden by the Court, that after notice, that he cannot dispose of any of the goods to others before he hath satisfied that debt for which the action was brought against him. Vide 7. Elizabeth, Dyer 252.

14. The Commissary of the Bishop of a Diocess granted Letters *ad colligendum & ad vendendum ea quæ peritura sunt, & computum inde faciendum*: and he to whom the Letters were granted, sold things that would perish: In this Case, it was holden that he was an Executor of his own wrong, for that the Ordinary himself had not such power and authority to sell the goods. M. 9. Eliz. Dyer 256. vide Cook 5. pt. 27. acc.

15. The Bishop who is an Executor appointed by Law, cannot by Law make a release of a debt or a gift of the goods of the intestate; for he hath a special propriety in the goods only for the benefit of the intestate, and nothing to his own use: and *vide* the statute of West. 2. which is, That *Bona quæ veniunt ad manus Ordinarii dispenda*: viz. for the good of the dead; and he is like to an Administrator *durante minori ætate*, who hath a special power committed to him to dispose of the goods, and to do nothing to the prejudice of the Executor. Cook 8. pt. 135. in Sir *John Needhams* Case.

16. In a Prohibition, the case was; A. had issue four sons viz. B. C. D. and E. and dyed intestate. Administration was committed to B. and C. E. had issue nine children, and D. had issue three children; the Fathers dyed, the children infants. The Administrators upon their account before Sir *John Bennet* by his mediation and not judicially, were content to make a distribution of the estate of the intestate *per capita, non per stipites*; or *è converso*: for and on the behalf of the infants it was appealed to the Delegates, and a Prohibition was granted in this case, because the Ordinary hath no power to make distribution of the surplusage, nor to take bond for it by the true meaning of the statute of 21. H. 8. which intends a benefit to the Administrator and not an unprofitable burthen. Tr. 15. Jac. in Co. B. *Tooker* and *Lessees* case. Hob. 191. vide Hob. 83. *Sherwins* case. acc.

17. A man dyed intestate; and there being a controversie between the widdow of the intestate and one of the kindred about the Administration, it was agreed, that the widdow should have the Administration, and should enter bond in the Prerogative Office to make an equal distribution of the goods of the intestate amongst the kindred; and she entred bond, and had her Administration: Afterwards the bond was sued against her in the Spiritual Court; It was objected, That in regard the Administration was granted to one to whom the Ordinary was not bound to grant it, that such bond taken for an equal distribution was good: But it was resolved by the whole Court, that the taking of the bond was not lawfull; for when the Ordinary hath once committed the Administration to the party, his power is determined, and he cannot grant Letters of Administration upon a condition; wherefore a Prohibition was granted to stay the proceedings in the Spiritual Court upon the bond. Pas. 1655. in B. R. *Davies* and *Matthews* case. *Sty'es* 456.

18. Note by *Hobart* Chief Iustice, that it was his opinion and the opinion of the whole Court in one *Barows* case in Co B. that if Administration be committed by force of the statute of 21. H. 8. and the Administrator pay all the debts and legacies, that in such case, the Ordinary had not power to dispose of the rest of the goods to the children of the intestate, but that they shall remain to the Administrator, and that by the very intention of the statute of 21. H. 8. vide Pasc. 19. Iac. in Co. B. Winch. 11.

19. The case was this; one dyed intestate in the County of Y. and a stranger prayed Letters of Administration to be granted unto him, which was repealed by the Delegats at Y. There was an appeal to the Court of Delegats in the Chancery, who did repeal the former sentence at Y. and adjudged that the party made no Will, and granted Letters of Administration to him who appealed to them. The Archbishop of *Canterbury* granted Administration to a second person, and the Archbishop of *York* to a third person, who made a release unto the debtor of the intestate: upon which release debt was brought by the first Administrator against the defendant, who pleaded the release made unto him; and whether this grant of Letters of Administration by the Iudges Delegates was good, or not, was the question: The better opinion of the Court was, That the Letters of Administration which were granted by

by the Delegates was not good; but there being *Bona Notabilia*, the Adminiſtration was to be granted by the Archbiſhop; and then it was ſaid, That the party who dyed inteſtate, had goods in ſeveral Dioceſſes, both the Archbiſhops there having a peculiar might, granted Letters of Adminiſtration; and although that the King be Supream Ordinary, and by Delegates may do many acts; yet the Court of Delegates cannot do this nor have they power to prove any Wills: for the power of the Iudges Delegates, is *poteſtas delegata corrigere, non exequi*, to examine and not to correct, and the Court ſaid that it was adjudged in *Bracktenburies* caſe, That the Iudges Delegates had not power to grant Letters of Adminiſtration. M. 10. Iac. in B. R. *Stevenſon* and *Woods* Caſe. Bolſtr. 2. pt. 3, and 4.

20. In a Prohibition to the Eccleſiaſtical Court the caſe was: a widdow Adminiſtratrix of the goods of her husband made an Inventory; and in the Inventory ſhe put in all the goods that her husband had, and therein ſhe did miſtake her ſelf, and did put in ſome goods which her husband the Inteſtate had given away and diſpoſed of in his life time to a younger childe: In her account in the Spiritual Court ſhe ſhewed to them a deed of gift made of them by the Inteſtate in his life time of thoſe goods in particular to his daughter E. they being in her cuſtody; and ſhe pleaded there this gift, but they rejected her plea; wherefore ſhe prayed a Prohibition; it was agreed by the whole Court in this Caſe, That a Prohibition to prohibite them did lye as this caſe was, but with an exception of other debts which were then in action, and afterwards a Prohibition was granted accordingly. Hill. 12. Iac. in B. R. *James* and *James* Caſe. Bolſtr. 3. part 315, 316.

21. The Commiſſary of the Biſhop of *London* granted Adminiſtration by word, and gave Oath to the Adminiſtrator, and entred the ſame in the Regiſter; the Adminiſtrator ſold the goods and dyed, and a new Adminiſtrator to whom Letters of Adminiſtration were granted, ſued for the goods; and the iſſue joyned was *ſi Epiſc. London commiſit adminiſtration*, it was doubted if the Adminiſtration committed by word was good. M. 13. Eliz. Dyer 294. vide 21. E. 4. 10. Adminiſtration cannot be granted without deed. Vide Cook 9. pt. 41. in *Henſloes* Caſe. And Cook 8. pt. acc. vide 21. H. 6. 29.

2. *Where, and what action is maintenable by the Ordinary, what not; and where and what Action lyeth againſt him; where he ſhall be charged upon a Devaſtavit of his own goods, where not; And where an Adminiſtration committed by him ſhall be void, where not.*

1. THe cuſtom of *London* is, that if any contract be made by a Citizen of *London* to pay ſo much money to another Citizen, and he who ought to pay the money dyeth inteſtate, that his Adminiſtrator ſhall be bound to pay it as well as upon an Obligation: It was adjudged in this caſe, to be a good cuſtom; for although that none was chargeable at the Common Law by the name of an Adminiſtrator; and a cuſtom cannot begin within time of memory; yet becauſe they were chargeable at the Common Law as Executors, for every Executor is an Adminiſtrator; for the pleading is, *Neque Executor, neunque Adminiſt. come Executor.* and the Adminiſtrator hath the office and quality of an Executor; therefore it was reſolved, that ſuch a general cuſtom is good. 2. Reſolved, that if the Ordinary taketh the goods into his cuſtody, he ſhall be charged by the Common Law. Cook 5. part 83. *Suellings* Caſe.

2. Note that the Ordinary cannot releaſe any debt, nor make a gift of any of the goods of the Inteſtate; and if he doth, *Devaſtavit*, or other action lyeth againſt him; for he hath but a ſpecial property in the goods of the dead, and nothing to his owne uſe; neither can the Ordinary give authority to another to ſell the goods, becauſe he hath not any ſuch authority himſelf. Cook 8. pt. 135. in Sir *John Needhams* caſe.

3. Leſſee for years had iſſue a ſon and a daughter both within age, and deviſed his Term to his ſon, and made his daughter his Executrix. Adminiſtration *durante minore ætate* of the daughter, was committed to the Mother, who took a husband who ſold the Term: It was reſolved in this caſe, That the Adminiſtrator *durante minore ætate*, cannot ſell any of the goods of the dead, unleſs it be for neceſſity of payment of debts; and if he doth, it is a *Devaſtavit* in him, and an action lyeth againſt him: nor can ſuch an Adminiſtrator do any thing to the prejudice of the infant. Cook 5. pt. *Princes* caſe.

3. *For what cauſes he may refuſe a Clerk preſented unto him, and where he muſt give notice; and what power the Ordinary hath in, or for the doing of other things.*

1. BEfore a Clerk preſented to a Benifice, be admitted and inſtituted into the ſame, the Ordinary is to examine him of his ability; and if he be found upon his examination, to be unable, or to be criminous, the Ordinary may refuſe to admit him: But then this examination is to be done at a convenient time within the ſix moneths; for he cannot refuſe to examine him all the ſix moneths, and ſo ſuffer a Laps to encur to himſelf, for he ſhall not take advantage of his own wrong; But if the Ordinary, when the Clerk comes to be examined, *Sedet circa curam paſtoralem*, he is not bound preſently to leave his buſineſs in hand, and go to examine the Clerk, but the Ordinary may appoint a convenient time and place for the examination of him. Vide 14. H. 7. 22. M. 15. Eliz. in Co. B. adjudg. acc.

2. Note, if the Ordinary doth demand of the Clerk preſented unto him his Letters of Orders, and alſo his Letters of Teſtimonial of his good behaviour; and the Clerk requires time for the ſpace of a week to ſhew them, but doth not return within the time, and thereupon afterwards the Ordinary doth refuſe him, and preſents another to the benifice: In a *Quare Impedit* brought upon ſuch a Caſe, it was adjudged, That the Ordinary was a Diſturbor; and the reaſon is, becauſe the ſtatute doth not compell the Clerk who is preſented, to ſhew the Ordinary either his Letters of Ordination, or his Letters of Teſtimonial of his good behaviour: Paſ. 33. Eliz. in Co. B. in *Palmer* and the Biſhop of *Peterboroughs* Caſe. adjudg.

3. If two men preſent one man ſeverally to the Ordinary, the Ordinary cannot admit him generally to the Church: But he muſt admit him incumbent of the preſentation of one of them;

them; and if they do preſent claiming by ſeveral Patrons, the Ordinary is to award his Writ *de Jure Patronatus*; for that in that caſe the Church is Litigious. Vide 37. H. 6. 41. 21. H. 6. 44. 7. E. 4. *Quare Imp.* 100. But *Quere*, If the Ordinary be to award the *Jure Patronatus*, at the requeſt of the parties, and at their coſts, or at his own charges; Some old books hold, (as 5. H. 7. 22. by *Brian* 36. H. 6. 3[illegible]) that it muſt be ſued forth at the coſts of the Ordinary, becauſe it is for his excuſe, and ſo for his advantage: But other books, viz. 34. Hen. 6. 41. 18. E. 3. 8. E. 4. 24. ſeems to be contrary; for it was not adjudged in the principal caſe, which was M. 8. Jac. in Co. B. *Danby* and *Liſleys* Caſe.

4. If a Clerk be preſented by the Patron to the Ordinary, and he doth refuſe to admit and inſtitute him into the Benifice, The Ordinary muſt ſhew the particular cauſe why he refuſeth him; and muſt not ſhew for cauſe of refuſal generally, that the Clerk preſented is a man unfit, uncapable, or criminous; but he muſt certifie the particular crime, incapacity and inability; 38. E. 3. 2. in the Earl of *Arrundells* Caſe. Cook 5. pt. 58. *Specots* Caſe. And *vide* there what are ſufficient cauſes of Refuſal for the Ordinary to certifie, what not.

5. If the Patron preſenteth a Clerk to the Ordinary, and the Ordinary upon enquiry finde that he hath a Plurality; It was holden that that was no ſufficient cauſe of refuſal; becauſe it is at the peril of the Incumbent if that he keep two livings; becauſe that then both Benifices are void, 14. H. 7. 28. But if the Clerk preſented be a Villain, Heretick, Schiſmatick, &c. then the Ordinary may refuſe him; but of ſuch his refuſal he muſt give notice to the Patron, be he either a lay or a Spiritual perſon. Vide 14. H. 7. 28. 15. H. 7. 8. 12. Eliz. Dyer 291. acc.

6. If a Church do become void by the death of the Incumbent, the Patron is to take notice of the avoidance at his perill, and the Ordinary is not bounden to give him notice thereof; and ſo it is, if it do become void by creating the Incumbent Biſhop, or by ceſſion: But if a Church do become void by Reſignation, which is an act of the Incumbent, and which of neceſſity muſt be to the Ordinary, or by deprivation which is the act of Law; in ſuch caſe the Ordinary ſhall not preſent in caſe of Lapſe, unleſs upon the Reſignation, or Deprivation notice had been given of the avoidance to the Patron by the Ordinary; and the ſix moneths for the Lapſe ſhall be accounted from the time of the notice. Vide 28. H. 7. 49. in *Kellaway*, 16. Eliz. Dyer 327. 13 Eliz. Dyer 293. And vide Tr. 27. Eliz. in Co. B. in *Albany* and the Biſhop of Saint *Aſaphs* Caſe. Leon. pt. 39. where it was ſaid, That it was adjudged in *Mallineux* Caſe, That if the Patron doth preſent, and the Ordinary doth refuſe, he ought to give notice to the Patron if he be reſident within the County; and if he be not, then he is to leave a Certificate of notice at the Church, that the Church is then void.

7. If a Parſon be deprived by the Ordinary, or reads not his Articles, in which Caſe the Church is void, yet notice muſt be given to the very Patron for that time, or elſe the Lapſe incurs, which is very inconvenient for the Church, and a prejudice to the Ordinary: How ſhall the Ordinary aſſure himſelf of a ſufficient notice? for if he giveth notice to him who is not very Patron, his notice is vain; and the Patron perhaps knows not of the Deprivation, or if he knows it, yet he needs not to preſent without notice given him; therefore in this Caſe, the Ordinary is to award a *Jure Patronatus*, with ſolemn premonition *quorum intereſt*, and the enquiry being made who is Patron, to give him notice, and if he preſent not within ſix moneths, then the Ordinary may collate; although that ſhall not bind the very Patron, yet it ſhall excuſe the Ordinary from being a diſturber upon the ſpecial matter ſhewed: But if the other Patron preſent, and the ſix moneths incur, yet in that caſe although the Patron is not bound by the Lapſe, yet that is nothing to ſave the pretended uſurpation of another pretended Patron, who is not ſubject to give notice. Vide by *Hobert* Juſtice, in the Caſe of Sir *William Elvis*, and the Archbiſhop of *York*. Hob. 318.

8. A. Executor of B. brought a Prohibition againſt C. and his ſurmiſe was, That whereas I. S. was ſeiſed of the Mannor of D. and that he and thoſe whoſe eſtate he hath in the ſame, had uſed time out of minde to have a Pew in the body of the Church, and that the defendant by ſuit in the Eccleſiaſtical Court ſought to poſſeſs them of the ſame: It was the opinion of the Court in this Caſe, that this was no good ground for a Prohibition; for although the Church and Churchyard be in Law the ſoil and freehold of the Parſon; yet the uſe of the body of the Church, and the repair and maintenance of it is common to all the Pariſhioners; and for avoiding confuſion, the diſtribution and diſpoſing of ſeats, and charges of repair, doth belong to the Ordinary; and therefore no man can challenge a peculiar ſeat without reaſon: But if it had been preſcribed, That I. S. had uſed time out of minde,

minde, at his own only costs to maintain that Pew, and had therefore had the sole use of it, the preseription might have stood, and been a Warrant for a Prohibition, although the Pew were in the body of the Church. M. 12. Jac. in Co. B. *Boothby* and *Bayleys* Case. Hob. 69.

9. *Garven* libelled against *Pym*, for a seat in the Church, before the Bishop of *Exeter*, which was removed by appeal into the Arches; The defendant surmised, That he and his Ancestors, had used time out of minde to have an Ile with a seat in the said Church for him and his family; and thereupon prayed a Prohibition: But because it appeared upon the examination of the party himself, that the Parish had used to repair the said Ile and seat, the Court would not grant a Prohibition; for that proved, that his Ancestors were not the founders of the said Ile and seat: But it was said by *Cook* Chief Justice, That if a Gentleman by assent of the Ordinary hath built an Ile adjoyning to the Church, and put convenient seats there for him and his family, and hath alwayes repaired it at his proper costs, In such Case, if the Ordinary do place another within him to sit in the same seat, he may have his action upon the Case against the Ordinary; and if he be impleaded in the Spiritual Court for that seat, he shall have a Prohibition. Tr. 10. Jac. in Co. B. *Garvens* and *Pyms* case.

10. Note upon consideration had by all the Justices, in the time of Parliament 4. Jac. it was holden by all the Justices, That the Ordinary cannot constrain any man Ecclesiastical or Temporal to swear generally to answer to such Interrogatories as shall be administred unto them; but ought to deliver him the Articles upon which he is to be examined, to the intent that he may know whether he ought by Law to answer to them: and no Ecclesiastical man or Temporal shall be examined upon secrets of heart, or of his secret opinion, but something ought to be objected against him what he hath spoken or done: And vide 1. Eliz. one *Leigh* an Atturney of the Common Pleas was committed to the Fleet by the High Commissioners in Causes Ecclesiastical for this, that he had been at Mass, and refused to swear to certain Articles to be proposed to him; and although that in such case by the statute of 1. Eliz. they have Ecclesiastical Jurisdiction; yet it was resolved, that in that case they ought not *ex officio* to examine the party upon oath. Vide Cook 12. part 26, 27. acc. See more of Ordinary, in the titles of Advowson, and Administration. Liber. 1.

Vide in the titles of Gard. and Livery, for *Oster le Meyne*.

Outlawrie.

Where an Outlawry ſhall be avoided by Plea, or otherwiſe, without bringing a Writ of Error, and where not. And for what Cauſes Outlawry ſhall be reverſed.

1. A Writ of Proclamation was returned upon an Exigent by the Sheriff, who was out of his office at the time of the Return of it: It was adjudged in that caſe, that the Outlawrie was void by the Statute of 6. H. 8. Paſc. 30. Eliz. Dyer 42.

2. When a man pleads an Outlawry in diſability of the perſon, he ought to ſhew the ſame under Seal, unleſs it be in the ſame Court; and the Exigent ought to be duly returned, and appear upon Record; and the purchaſing of a *Superſedeas*, is an appearing upon Record; and although it be not delivered to the Sheriff before the 5. *exactus*; yet it ſhall avoid the Outlawry. Cook 1. pt. Inſtitutes 128. Tr. 44. Eliz. in Com. B. *Meere* and *Dalbwist* Caſe, acc.

3. A. was Indicted in the Kings Bench for the death of a man; Whereupon an Exigent was awarded into the County of *Lincoln*, A. died, and was never Convicted, nor Attainted; It was the opinion of the Court, that his Executors are to bring a Writ of Error to reverſe the Outlawry; for that the King being entituled by matter of Record, the Outlawry ought to be avoided by matter of as high nature. *Eatons* Caſe, vouch. in *Cook* 5. pt. 111. in *Foxleys* Caſe.

4. A *Capias Utlagatum* was awarded to the Sheriff of *London* againſt F. B. by the name of F. B. of *London*, Gent. He came in *gratis* at the day of the return, and pleaded in diſcharge of the Outlawrie, that he was Commorant at C. in the County of B. at the time of the Writ brought, and not at *London*: It was the opinion of the Court, that he ſhould not have the plea; for that the Plaintiff is out of Court; and becauſe it is not known to the Court, if he be the defendant, or not, becauſe he comes in *gratis*, and not by the return of the Sheriff of *Cepi Corpus*. M. 2. Eliz. Dyer 192. *Browns* Caſe.

5. Note, an Outlawrie was reverſed upon the Statute of 8. H. 6. without a Writ of Error brought, becauſe the uſual words which we put in the writ of Proclamation, viz. *facias, tribus ſeperatis diebus, ande una proclam.* who omitted not of the proclamation, ſo as there was not ſenſe in the Writ. M. 3. Eliz. Dyer, 206.

6. If an Action be brought in *London*, or *Middleſex*, and the Exigent be awarded there: In ſuch caſe, it behoves that the Writ of Proclamation go to the place where the defendant is abiding at the time of the Exigent awarded, and that by the Statute of 6. H. 8. But if he be named *Nuper* of L. *alias dict.* of N. in the County of K. Gent. there if the Proclamation go into K. whereas in truth the Defendant is dwelling in *Middleſex*, he ſhall in ſuch caſe without a Writ of Errour avoid the Outlawrie by the Statute of 6. H. 8. Becauſe the *alias dictus* is no part of his name. Paſc. 4. Eliz. Dyer 214.

7. A. was Outlawed in Detinue *de* 3. *pixid. & una bag. cum chartis, &c.* and that was at the County 19. *Octobor*; The Exigent was returnable *Cro. animarum*; on which day the Sheriff did not return the Outlawry, but that the defendant at the ſaid 19. day which was the 5th. County, the defendant appeared and brought a *ſuperſedeas*, and offered to appear by his Attorney; the Teſte of the *ſuperſedeas* was 12. *Octobor*, which was a week before the 5th. County; and upon a ſuggeſtion that the defendant was 5. *exactus*, a *Certiorari* was directed to the Coroner of the County of Y. who returned that he was Outlawed; and returned the Record of the exigent *verbatim*, by reaſon of which return the defendant was arreſted in his body and goods. In this caſe, it was agreed by the Court, 1. That proces of Outlawry doth not lie in Detinue of Charters. 2. That the return of the Coroners was not a ſufficient Record to make the party Outlawed, and therefore the Outlawry was reverſed, without a Writ of Error; and a Writ of Reſtitution was awarded of the goods of the Defendant

ſendant. Paſch. 5. Eliz. Dyer. 223. *Prellers* Caſe.

8. If a *Capias utlagatum* be awarded, whereby the Sheriff is commanded to take the body, &c. *& bona & catella, quæq; in inquiſitione inveniret in manus noſtras capiat ut de vero valore*, &c. and by force of the Writ the Sheriff taketh the goods of a man Outlawed, and ſelleth them, and afterwards the Outlawry is reverſed: In ſuch caſe, the party ſhall be reſtored to his goods and chattels, becauſe the Sheriff was not commanded nor compelled by the Kings Writ to ſell them. Cook 8. pt. 143. in Dr. *Druries* Caſe. M. 27. Eliz. *Amner* and *Laddiegtons* Caſe: adjudg. acc.

9. One who had the priviledge of the Common Pleas, was arreſted in *London*, and before Iudgement, the defendant delivered a Writ of *ſuperſedeas* to the Inferiour Court, and notwithſtanding he proceeded in *London* to Iudgement, and afterwards he was taken in execution; and he was brought into the Common Pleas by *Habeas Corpus*, and becauſe it appeared to the Court, that by the *Superſedeas*, there was a Nullity as well of the Iudgement as of the execution, the party was diſcharged of the execution, and that without ſuing any Writ of error to reverſe the Iudgement: vide Cook 8. pt. 143. in Dr. *Druries* Caſe.

10. In Debt brought againſt 3. Heirs in Gavelkind upon an Obligation of their Anceſtor, one of them being within age, they were Outlawed; the two who were of full age purchaſed their charter of Pardon; and upon a *Scire facias* the plaintiff declared againſt them altogether: It was holden in this caſe, that the plea ſhould not demur for the nonage of the third, becauſe by the Outlawry the original is determined againſt him; and it is not void becauſe he was an Infant, but voidable only by Writ of error. Tr 7. *Eliz.* Dyer 229.

11. A man was Outlawed in Iudgement upon debt, and procured a pardon of the Outlawry, it not being certified by the Chancellor that the plaintiff was ſatisfied, and the pardon was *& quod ſtet reſtus*: where it ſhould be *ſatisfac. quærenti*: upon two Nichels, the pardon was allowed; After the year the Plaintiff ſued a *Scire facias*, and had execution by default, and a *Capias*, and an Exigent; and if upon the *Capias Utlagatum* the defendant ſhould avoid the Outlary by plea, was a Quære. M. 2 Eliz. Dyer. 172.

12. Debt upon an Obligation: the Defendant pleaded that the plaintiff ought not to be anſwered, becauſe he was Outlawed, and ſhewed the Outlary by the name of I. S. of D. the plaintiff ſhewed that at the time of the ſuit begun againſt I. S. upon whom the Outlawry was pronounced, the ſaid I. S. now Plaintiff was dwelling at S. *abſque hoc* that he who dwelling at D. It was holden to be a good Replication to avoid the Outlawry M. 29. Eliz. in Com. B, Leon 87.

13. The Queen brought a *Quare Impedit* againſt the Biſhop of *Canterbury*, and the Incumbent and others; and counted that A. was ſeiſed of the Advowſon, and that he was Outlawed in an action perſonal, at the ſuit of ſuch a one, and ſhewed the whole Outlary certain; Exception was taken to the Court, becauſe in ſetting down of the Outlawry, the partie is alledged to be returned by the Sheriff, but the name of the Sheriff is not there expreſſed: It was agreed in this caſe, That the Sheriffs in their returns do put their names to their returns: but the Court ſaid, it is not requiſite ſo to plead it; for that the omitting thereof doth not make the Return void; but only that the Sheriff for not ſo doing ſhall be amerced. Hill. 30. Eliz. in Com B. The Queen and the Biſhop of *Canterburies* caſe: Leon. 139.

14. Error brought to reverſe a judgement in the Common Pleas in a Bill of Priviledge brought by an Attorney of the ſaid Court upon an obligation, and upon the judgement iſſued forth proceſs of execution, upon which the defendant was outlawed, and the error was aſſigned in this, that upon that Iudgement, proceſs of Outlary doth not lie; for *Capias* is not in the Original Action: And of that opinion was the whole Court, being upon a Bill of Priviledge: and the Outlawry was reverſed. Tr 31. *Eliz.* in B.R. *Crew* and *Baites* caſe 229.

15. A. brought Debt in the Common Pleas, & in the action demanded 40 l. and upon his Declaration he did confeſs himſelf ſatisfied of 20 l. and thereupon error was brought in B.R. and the Iudgement was reverſed becauſe by his Declaration he had abated his VVrit, and he ought to have Iudgement according to his VVrit, and not according to his Declaration: the error was aſſigned in the Outlary; It was holden by all the Iuſtices, that if the principal Record be reverſed for error, that the Outlawry which is grounded upon it ſhall be reverſed alſo. Hill. 29. *Eliz.* B.R. *Warrens* caſe: Gold.

16. A man was outlawed, and the Sheriff returned the Proclamation (*tali die anuæ & ſingulas proclamationes fieri feci*) and did not return that ſuch a day he made the firſt, and ſuch a day the ſecond, &c. and this was aſſigned for error: It was the opinion of the Court that it was

was Error; and the Outlary was reverſed. Tr. 30. Eliz. in Com. B. Goldesbr. 97.

17. A. brought a *Quare Impedit* againſt the Ordinary and the Incumbent, which was in of the preſentation of the Queen; and upon pleading there was a demurrer, and before the ſame was diſcuſſed, A. was outlawed at the ſuit of another in an action of debt; then the Incumbent reſigned his Benefice, and the Queen preſented him again, whereupon he was admitted, and inſtituted: A. brought a Writ of Error in the Kings Bench, and reverſed the Outlary, becauſe he was named of *Hamby*, when there was two Towns of the ſame name, and neither of them without addition; and now he brought a *Scire facias* to execute the firſt Judgement againſt the Incumbent, who pleaded all the ſaid ſpecial matter in bar; and whether by the Outlawry of the plaintiff the Preſentation was forfeited to the Queen, was the point debated: But the better opinion of the Court was, that by the Plaintiffs reverſal of the Outlawry he ſhould have his Preſentation again, and it was a practiſe of the defendant to reſign; for otherwiſe the Queen could not have preſented; wherefore Judgement was entred for the Plaintiff. M. 31. Eliz. in Com. B. *Beverley* and *Cornwall's* Caſe: Goldesbr. 103. Leon. 63. the ſame Caſe.

18. A Judgement was had in an action of debt of 80 l. and the Plaintiff had a *Fieri facias*, and the Sheriff levyed 20 l. of the goods of the defendant, and returned that of Record, but *non conſtat* by the Record whether the Plaintiff had received the 20 l. or not. The Plaintiff took forth a *Capias ad ſatisfaciendum* for the whole execution, being 80 l. and upon that the defendant was outlawed, and therein he brought error to reverſe that Outlawry; and it was reverſed, for that it appeared upon Record that execution was made by *Fieri facias* of 20 l. of the 80 l. and that the *Capias ad ſatisfaciendum* ſhould have been but 60 l. M. 40. Eliz. in Com. B. Goldesbr. 148.

19. Debt brought by husband and wife as Executrix, the defendant pleaded in Bar an Outlawry of the Teſtator by a ſtranger, which ſtands in force upon a Demurrer and ſolemn debate. It was adjudged to be no plea. Tr. 37. Eliz. in Com. B. *Wilkies* Caſe, vide. An Adminiſtrator of I. S. exhibited a Bill againſt F. an Attorney of the Common Pleas; and he pleaded in bar an Outlawry againſt the Adminiſtrator, and adjudged no plea. *Dixon* and *Fawdas* Caſe, ibid.

20. An action of Accompt was brought againſt two; one was outlawed, the other comes in by the Exigent, and enters the Accompt; he who was outlawed, obtained his Charter of pardon, and for that the proces was determined againſt him, and the Plaintiff hath choſen to have his action againſt the other, he prayed he might be diſcharged: but it was reſolved, that the proces was not determined, nor he which was outlawed ſhall not be diſcharged till the plaintiff be ſatisfied, viz. 41. E. 3. 13. Brownlo. 2. pt. 313. ac.

21. If a Recovery be had againſt a man in a Precipe by default, when he was *extra* 4. *Maria*, it ſhall not be reverſed by a Writ of Errour for that cauſe; for that he is not left without remedy, but may have his Action of a higher nature, for a *Quod ei deforceat* lyeth. But if a man be Outlawed in a perſonal action, being then *extra* 4. *Maria*, he may reverſe it by a Writ of Errour; for otherwiſe he ſhould be without remedy. Cook 1. pt. Inſtitutes 260.

22. If the defendant plead indiſability of the perſon an Outlary in the ſame Court, he ſhall not need to ſhew it forth preſently; or if he plead an outlary in bar, and it be denied, then he ſhall have a day to bring it in. But if he plead an Outlary, and offer withall to ſhew it to the Court, he muſt ſhew forth the Record of the Outlary preſently, *ſub pede ſigilli*; becauſe it is but a delatory Plea. Cook 1. pt. Inſtitutes 128.

23. A. was arraigned upon an Indictment of Murder found by Commiſſioners of Oyer and Terminer; which being certified by *Certiorari* into the Kings Bench, and he was arraigned upon it, and he alledging that he had matter of Exception in Law againſt the Indictment, had Counſell aſſigned him, and his Counſell of Exception for the Indictment, took Exception to it, that one of the Indictors was Outlawed in Treſpaſs: But becauſe he had not the Record ready, and the Court conceiving it to be alledged only for delay of Juſtice, and for that if it had been produced, it would not have been material, the Outlary not being for felony, the exception was by the Court diſallowed; and the defendant ordered to plead. 1. Hill. 4 Cor. in B. R. Sir *William Withirs* Caſe 105.

24. Debt upon a Contract, the defendant after imparlance pleaded an Outlawry in Bar; the plaintiff says, *Nul tiel* Record: and the defendant had day to bring in the Record, and fails of it, The Question was, what Judgement should be given: It was said, by the secondary of the Court, that it had been adjudged in that Court, That if the defendant after imparlance plead an Outlawry in Bar, and the defendant says, *Nul tiel* Record; and the defendant hath day to bring it in, and fails of it, That Judgement should be given absolutely, and not *Respondeat Ouster*; and such was the opinion of the whole Court in this case, and judgement was given accordingly. M. 15. Cor. in B. R. *Dawson* and *Lees* Case, 1. pt. 408.

25. Error to reverse an Outlawry for Murder, The Errour assigned was, That *tempore promulgationis utlagariæ, & die antea & post*: he was beyond Sea; viz. at H. in *Holland*: And the Attorney General confessed it: It was moved that this Assignment of Errour was ill; for that he ought to have said at the time of the Exigent awarded, and not at the time of the Judgement of the Outlawrie: It was said in this Case *per Curiam*, That if a man Commits a Murder, and after Exigent awarded he flyeth out of the Realm, and afterwards is outlawed, he shall not reverse this Outlawry for that cause; for he departed, *obstinato Consilio*, upon a set purpose to avoid the Law; and therefore by his absence he shall not have benefit of the Law: But in the principal Case, because the Attorney General had confessed, *Et non Constat Curiæ*, that he departed; for that cause, the Outlawry was reversed, and he pleaded to the Indictment. Hill. 15. Jac. in B. R. *Carters* Case. Cro. 2. pt. 464.

26. Error to reverse a Judgement in *Ejectione firmæ*, the defendant in the Writ of Error pleads an Outlawry against one of the parties, Plaintiffs: It was demurred, because this is an Action not to recover any thing, but to restore them to what they lost, and to discharge them of damages: It was the opinion of the Court in this Case, That this being a suit by way of discharge wherein they shall recover nothing; and they being enforced to joyn because one of the Plaintiffs was a Defendant in the former Action; and it would be very mischievous in case of Error, Attachment, or *Audita Querela*, which is only by way of discharge, if it should be any Bar, this Writ being but a Commission: It was agreed by all the Court, that it was no plea; and therefore awarded, the defendant should answer to the Errour. Tr 19. Iac. in B.R. *Bythell* and *Harris* Case. Cro. 2. pt. 616.

27. Error to reverse an Outlawry was, because the *Capias* was awarded against five, viz. three men, and two women, and so the exigent; and the Return was, *quod ad quantum Comitatum &c. non comparu erunt*, and doth not say, *nec aliquis eorum comparuit*: also the exigent is returned, *quod Judicio Coronatorum utlagati sunt*, and doth not shew, that there is any Coroner of his name; also it was *utlagati existant*; whereas for the women, it ought to have been *waviata existant*; for those Errors the Outlawry was reversed. Tr. 11. Jac. in B. R. *Middletons* Case. Cro. 2. pt. 358.

28. A. was outlawed upon a *quo warranto* brought against him for keeping of an Inn; and he brought error to reverse the Outlawry; the error assigned was, because he was outlawed *per Judicium Coronatorum*, and he doth not shew the names of any of the Coroners; the Judgement was reversed. Pasc. 17. Iac. in B. R. *Patrichs* Case. Cro. 3. pt. 528. vide Pasc. 17. Iac. in B.R. *Gerrards* Case. ac. vide Dyer 317.

29. Error to reverse an Outlawry in Debt after Judgement: Diverse errors assigned: 1. The Writ of exigent, being directed to the Sheriffs of the City of *Lincoln*, the Writ is, *quod Capias Corpus ejus, ita quod habeas*; whereas it ought to have been *Capiatis & habeatis*. 2. Because in the original, and all the proceeding he was called A. G. of L. in *Com. Eborum*, and in the exigit, she is named *Naper de K.* 3. Because the Writ mentions, *Quod recuperavit versus eam*, rather it ought to be *eum*. 4. Because there was not any Proclamation in the County where she inhabited: For these second and third Errors; the Judgement was reversed. Tr. 19. Iac. in. R. B. the Lady *Gargrave* and *Marchams* Case. Cro. 2. pt. 576.

30. Error of a Judgement in the Common Pleas upon the Outlawry in the said Judgement; The error in the Outlawry was, 1. for that

that the former Hustings were *de Communibus placitis*; and this is *de placitis terræ*; and 2. because this was returned upon the same day that it bears date; for that cause it was holden that it was not good, and the Judgement reversed; but of the first error, the Court doubted. Hill. 20. Iac. in B. R. *Archer* and *Dalbies* Case. Cro. 2. part 660.

31. *Audita Querela* brought to avoid a Statute upon the Statute of Usury; the defendant pleaded, that he ought not be answered because he was outlawed at the Suit of T. M: by the name of *Peter Griffith*, whereas his name was *Piers Griffith*; it was therefore thereupon demurred: 1. Because *Peter* and *Piers* are two names of Baptism, and so it cannot be averred to be one and the same person. 2. For that this Outlawry, which is only by way of discharge is not pleadable: But it was adjudged for the Defendant. 1. That it was but one name. 2. That it is well pleadable in this Suit; for a person outlawed is not receiveable to sue in any Court, unless it be to reverse his own Outlary; for it was said, where the action is *ad lucrandum*, there ought to be ability in the person; and it is all one to gain by way of discharge, as by provision; it was adjudged for the Defendant, and that the plaintiff take nothing by his Writ. Pas. 15. Iac. in B R. *Griffith* and *Middletons* Case: Cro. 2. pt. 425.

32. Note exceptions was taken to avoid an Outlary in husband and wife: 1. Because the wife cannot be outlawed but Waive. 2. It was *Comparant* for *Comparuerunt*: it was much questioned, if this Outlawrie might be avoided by way of exception upon a Motion; the Clerks of the Court affirmed, that by the course of the Court in the same Term such an Outlawry might be avoided upon exception by a Motion in Court, but this being in another Term it could not, but by Writ of Errour brought, and not otherwise; all which was affirmed by the Court. Tr 14. Iac. in B.R. Bolstr. 3. part 213.

33. A. brought debt upon a bond against B. The Defendant pleaded that the Plaintiff was Outlawed, and a day was given him to bring in the Record, at which day he made default: it was prayed, that the judgement for the Plaintiff in this case should be, that the defendant should answer; for the Plea of Outlawry was but a dilatory plea, and no plea in bar. but this difference was taken by the Court: In an Action of debt upon a bond, Outlawry of the Plaintiff is a Plea in barr: and the reason is, because all the debts in specialities are forfeited to the King by reason of the Outlawry; and because the King is to have them, it is a good plea in bar. But in Trespass, or in debt upon a contract, the Outlawrie is but to the abatement of the Writ, and the King shall not have the debts upon simple Contracts; but after the Outlawrie pardoned the Plaintiff may have an action for them again. M. 38. Eliz. in B. R. *Owen* 22. *Barnards* Case.

34. A. brought debt upon an obligation against B. Administrator of G. the defendant pleaded, that the Plaintiff, was outlawed at the suit of I.S. after Judgement, and pleaded it specially, and being so outlawed died, and that Outlawrie is of full force. Iudgement of action. Upon which the plaintiff demurred: Upon the reading of the Record, It was the opinion of the Court, that it was no plea; (or it is only by Implication; also the Executor or Administrator may have diverse things which are not forfeitable; as if the Testator had Mortgaged his Lands upon condition that if the Mortgagee pay not such a day to him, his heirs, &c. an hundred pound, then it shall be lawfull for him, his heirs, executors, &c. to re-enter, and before the day the Testator is outlawed, and makes his executor, and dies; yet at the day the Mortgagee payes the money to the Executors, that is affers, and not forfeited to the King. And in this case, it was agreed, That an Executor, or an Administrator might bring a Writ of Error for the Reversall of an Outlawrie, and the Outlawrie is not a barr to him; and it was adjudged, Tr. 37. Eliz. in *Woodley* and *Bradwells* case, in Com. B. rot. 2954. accordingly that it was no plea; for it is a plea but by Argument. Vide 3. H. 6. 14. & 32. And it was said, That a man outlawed may make an Executor, and this Executor may have a Writ of error to reverse the Outlawrie; and upon view of the president of *Wolbies* Case, the Court gave Iudgement that

that it was no plea. M. 20. Iac. in Com. B. *Baker* and *Gervis* case, Hutton 53.

35. In Debt, the Defendant said, that he is attainted of Felony, that the attainder yet continues, and demands Iudgement, if he shall be put to answer: It was adjudged, he shall answer, and may be taken in execution; and none attainted or outlawed may be put to answer in any action against them, but in an action brought by them, they shall not be answered. Note this Iudgement was much against the opinion of *Walmsley* Iustice, who said it was in vain to put a man to answer, who in truth hath nothing to be taken in execution: Vide *Hasting* and *Blakes* case: Noy 1. acc.

Pardons.

Pardons.

1. *General Pardons: what things shall be pardoned by it, what not: how they shall be expounded: to what things they shall extend, to what not; and to whom; and where to be pleaded and allowed, where not.*

1 A Was indicted, that he the 12 day of *February* 13 *Eliz.* gave to *B.* a mortal wound, whereof he died the 18 of *June* the same year. Upon his Arraignment, he pleaded the General Pardon 13 *Eliz.* of all Felonies, Offences, Misdemeanours, in the Act not excepted before and until the 14 of the said month of *February*; and averred, that neither he nor the offence was excepted in the said Pardon; and prayed to be discharged. It was the opinion of all the Justices, that the Pardon did discharge him, because the stroke given was the cause of the Felony; the giving of which wound, was the offence and misdemeanour against the Queen, which is pardoned by the Act of Parliament; and by that all things ensuing the said offence are pardoned. *Mich.* 13 *Eliz. Plow com.* 401 *Eales* Case; and so the Quere in 1 *Eliz. Dyer* 19 is resolved. See *Co.* 2 part 42. *Heydons* Case, *&c.*

2. *A.* who had practised Multiplication, which is Felony by the Statute of 4 *H.* 4. cap. 41. was pardoned by the General pardon; but *B.* who was Accessary was excepted, as one of those who was in the Tower. It was a Question if he should be discharged by the Pardon. It is a Quere in *Pasch.* 7 *E.* 6. *Dyer* 88. But see for the Resolution of this Quere, *Stanf.* 47, 48. *Lamb.* Justice of peace, 279, 280, and *Dalton* 284. by which Books the Quere seems to be resolved, That he shall be discharged.

3. If a man killeth his Master, and Petit treason is pardoned by the general Pardon, and Murder is excepted; yet he shall be discharged, for that Petit Treason is Murder, and more. 1 *Eliz. Dyer* 274. and see 33 *H* 8. *Dyer* 50. If Murder or Petit Treason be made High Treason, thereby the Murder or Petit Treason is extinct, for that High Treason doth drown every less offence.

4. *A.* Parson of *B.* was deprived of his Benefice, *anno* 12 *Eliz.* for Adultery committed *anno* 11 *Eliz.* and after by the General Pardon of 2 *Aprilis* 13 *Eliz.* the offence of Adultery amongst other was pardoned before the 14 of *February* last past. It was resolved in that case, That the said *A.* who was deprived, by force of that Pardon is now become Parson again; and the sentence declaring the said deprivation was holden void: for by the Pardon the Adultery, which was the cause and foundation of the sentence, is discharged, and by consequence all that dependeth upon it is also discharged. See *Cook* 6 part 13. *Bartons* Case vouched in the Case of Pardons.

5. *A.* being indicted of Piracy, stood mute, and would not plead, and had Judgment to be pressed. The Parliament pardoned all pains, contempts and execution, *&c.* and excepted Piracies. It was the opinion of the Justices, that he might be indicted again of the same Piracie, or of any other Piracie committed at the same time; for that the Judgment was not for the conspiracie, but for the contempt. *Pasch.* 14 *Eliz. Dyer* 308. *Cobhams* case.

6. An Act on upon the Case was brought for these words, *viz. He is a Thief; and why will you take a Thief's part?* The words were spoken 1 *Maii* 10 *Jac.* the Defendant justified the words, because the Plaintiff stole Sheep: the Plaintiff by way of replication, set forth a general pardon granted such a time; and further said, That if any Felony was committed, it was before the general pardon made, upon which the defendant did demur. It was the opinion of the Court, that by the pardon both the punishment and the fault was taken away, and that the wrong was done to the King by the Common Law; and the King if he pardons, the party is cleared of the offence and wrong. *Tr.* 12 *Jac.* in C. B. *Cuddington* and *Wilkins* Case. *Bowalow* 1 par. 10.

7. A sentence was given in the Spiritual Court in the case of Tythes against the defendant, and an Appeal sued thereupon, and *I. S.* made thereby a party, as procurator of the Suit, who was not any

arty thereto. The firſt ſentence was confirmed in *November* 1621. and Coſts then awarded to *I. S.* but not taxed till *Hillary*-Term 1623. and afterwards comes the general pardon, which pardons all offences before *December* 1623. by which it was pretended that the Coſts given in the Spiritual Court were pardoned, and a Prohibition prayed: but the Prohibition was denyed by the Court: for thoſe Coſts being awarded to the party before the Pardon, although they be taxed afterwards, be not taken away by that Pardon. *Paſch.* 1 *Car.* in C.B. Dr. *Brikendens* Caſe. *Cro.* 1 par. 6.

8. Upon a ſuit before the Commiſſary of the Biſhop of *N* for Defamation, the plaintiff had ſentence, and 6 *l.* Coſts. The defendant appealed to the Arches: which ſuit was depending 1622. and by the general pardon of 21 *Jac.* the defamatory words were pardoned; which was pleaded in the Spiritual Court of Arches, and notwithſtanding they proceeded in the Appeal, where the ſentence was reverſed, and in that 16 *l.* Coſts for the Appellant; whereas by the Law they ought not to have proceeded, nor given coſts: and a Prohibition was prayed. But it was reſolved, There was no cauſe of Prohibition: for although the Pardon hath diſcharged the offence of Defamation, without puniſhment to be inflicted by way of penalty or otherwiſe; yet the Coſts aſſeſſed before the day to which the Pardon relates, are not diſcharged: and if they be not duly aſſeſſed, the Court may well proceed in the Appeal, to diſcharge the parties of them: for the pardon doth not extend to ſtop the proceedings in the Appeal. *Trin.* 2 *Car.* in C.B. *Baldry* and *Kicks ds* Caſe. *Cro.* 1 par. 33.

9. *Note*, It was reſolved and adjudged, 1. That in all caſes depending betwixt party and party, in the Spiritual Court, where the ſuit is only *pro ſalute animæ*, or *reformatione morum*, as for defamation, laying of violent hands upon a Clerk, *&c.* there the Kings pardon is a bar of the ſuit: for the ſuit is not to recover any damages, but to inflict puniſhment upon the offender. But if one Libelleth there for Tythes, or for a contract of Marriage, or for any thing wherein the plaintiff hath an intereſt, then the King cannot pardon it either before or after the ſuit begun. 2. Reſolved, although that the ſuit be for the King, yet when ſentence is given, and Coſts taxed for the party, the pardon ſhall not diſcharge them; contrary if the pardon had been before the ſentence given. 3. That although the party Appeal, ſo as to divers purpoſes the ſentence is ſuſpended; yet by the firſt ſentence the party hath an intereſt in the Coſts, which cannot be diſcharged by the Kings pardon. *Trin.* 20 *Jac.* in C.B. *Cook* 5 par. 11. *Halls* Caſe.

10. *A.* and *B.* exhibited a Bill in *Mich.* Term 19 *Jac.* againſt the Biſhop of *C.* and *I. S.* which was ſcandalous, and a Libel againſt the Biſhop. 21 *Jac.* came the general pardon, where all offences (not Treaſon) were pardoned. 22 *Jac.* it was moved, that the Bill againſt the Biſhop being ſcandalous, might be taken off the File; which was done accordingly, and the plaintiff fined 100 *l.* to the King, and 100 *l.* damages to the Biſhop. Now the plaintiff prayed to have benefit of the pardon, and to be diſcharged of coſts to the party. It was Reſolved in this Caſe, That this general pardon intervening betwixt the Bill and the Sentence for the Fine and Coſts, the plaintiff ought to be diſcharged of the Fine and Coſts by reaſon thereof, and becauſe he hath not any means now to plead the pardon. *Mich.* 3 *Car.* in the Star-chamber. The Lord *Morley* and the Biſhop of *Chicheſters* caſe. *Cro.* 1 par. 48.

11. The King brought a *Quare impedit* againſt the Biſhop of *C.* and one *P.* and made title by the Statute of 21 *H.* 8. For that *A.* being Vicar of *I.* a Benefice with cure above 8 *l.* 15 *Jac* took a ſecond Benefice, *viz.* the Vicarage of *H.* in the county of *D.* being alſo a Benefice with cure; whereby the firſt benefice became void, and remained void for two years; and that the preſentation from King *James* accrued to the King. The defendant *P.* pleaded the general pardon of 21 *Jac.* and that *A.* was not a perſon excepted out of the pardon, nor the ſaid cauſe of lapſe excepted; and that the ſaid *A* ſo being incumbent, reſigned the benefice of *I.* and gave title to *I. D.* to preſent, who upon the ſaid Reſignation preſented *P.* the defendant, who was admitted and inducted before the Writ brought. The Atterney-general for the King replyed; ſhewing the Exception in the Pardon, where is excepted all Titles and Actions of *quare impedit*, other then ſuch Actions of *quare impedit* which the King hath or may have *ratione lapſi* incurred *ultra* three years laſt paſt, for or concerning any benefice whereof an Incumbent then was, or at the laſt day of the Parliament ſhould be in actual poſſeſſion by the preſentation of any Patron, or the collation of any Ordinary: and that the ſaid Church being ſo void by lapſe, *I. D.* preſented, and traverſed, that the Vicarage of *I* did become void by the Reſignation of the ſaid *A.* and upon the Replication, the defendant demurred in Law. In this caſe it was reſolved by all the Juſtices and Barons in the Exchequer chamber (amongſt other Points) That it was not the intent of the ſaid general Pardon to diſpenſe with Pluralities; and alſo, that the general words in a Pardon ſhall not extend to make a Diſpenſation; and the Church being once void, ſhall not be full, without a new preſentation; and that the words of exception in the general Pardon do not extend to *A.* for that extends onely to thoſe who are in as Incumbents, (which

(which *A.* is not) and not to thoſe who are in as Incumbents by uſurpation: and it was ſaid, That ſince the Statute of 21 *H.*8. there have been divers general Pardons, and no Pluralities were ever conceived to be within them. It was adjudged for the plaintiff. *Hill.* 9 *Car.* in the Exchequer-chamber. The King and the Biſhop of *Carl.* and *Pryſls* caſe. *Co.* 1 par. 258, 259, 160, 161.

12. A Bill was exhibited into the Star-chamber for a Riot five years before the general pardon of 35 *Eliz.* and the pardon excepted all penalties, forfeitures, due, or which ſhall or may be due for or by reaſon of any offence, miſdemeanour, and for which any Bill or Information within eight years before the laſt day of this preſent Parliament, hath been or ſhall be exhibited. Upon that pardon, it was agreed, That the Queen might proceed for the Fine, but the party ſhould not ſuffer impriſonment or any corporal puniſhment, for that is not excepted. But if the Bill had been exhibited within four years, the offence it ſelf had been excepted by the pardon, and ſo all incidents depending upon it, as well corporal puniſhment as pecuniary, had been excepted. *Mich.* 30 *Eliz.* in *Cam. Stell. Co.* 1 par. 46. *Erankyns* Caſe.

13. The Exception in the general pardon of 35 *Eliz.* was: *Except out of this General Pardon all Offences, whereof, or for the which no Suit by Bill, &c. at any time within four years of this preſent Parliament, is or ſhall be commenced in the Court of Star-Chamber, and now is, and at the laſt day of this preſent Seſſion ſhall be there depending.* A Bill was exhibited before the Parliament, and proceſs awarded, which was returnable after the Parliament ended: And if that ſhall be ſaid depending, was the Queſtion: and it was reſolved, that the ſuit was depending; and it was ſaid, There is a great difference betwixt an Original Writ out of the Chancery returnable in the Common-pleas, or Kings Bench, for there the original comes out of another Court, and therefore the Court hath no Record of it before it be returned: but in the Star-chamber the proces iſſueth out of the ſame Court, and is returnable in the ſame Court, and therefore the ſuit ſhall be ſaid there depending before the return of it *Mich.* 34 *Eliz.* in *Cam. Stell. Co.* 5 par. *Gilbert Littletons* caſe 47.

14. A man was plaintiff in the Star-chamber againſt *I. S.* for a Ryot by Bill brought before the beginning of the Parliament, and afterwards the general pardon of 34 *Eliz.* was made; and afterwards the plaintiff died: and the Kings Attorney-general informed againſt the defendant for the offences, and proſecuted upon the firſt ſuit. It was reſolved in this caſe, That the ſaid offences were pardoned; and theſe words in the exception *(remaining to be proſecuted)* ought to be conſtrued, to be proſecuted by the party. *Paſch.* 42 *Eliz.* in *Cam. Stell. Co.* 5 par. 47. *Drywoods* caſe.

15. In a Writ of Entry in the *Quibus* brought in *Wales*, the Defendant pleaded *Non diſſeiſivit*, and pendant that plea the general pardon of 35 *Eliz.* was made, by which all Fines, amerciaments and contempts were pardoned; and afterwards the iſſue was found for the demandant, and Judgment given; but *non miſericordia, quia pardonatur.* And in Errour brought, Errour was aſſigned, becauſe that the defendant ought to have been amerced, becauſe the general pardon did not diſcharge the amerciament. But it was Reſolved, that the original cauſe of the amerciament was the wrong and contempt of the tenant, that he did not render the Land to the demandant; and the original cauſe being pardoned, the amerciament by conſequent was pardoned; and a general pardon ſhall be taken beneficial for the ſubject, and moſt ſtrongly againſt the King. *Mich.* 40 *Eliz.* in B. R. *Co.* 5 par. 49. *Vaughans* caſe.

16. Two are bound in a Recognizance to *I. S.* of 500 *l.* afterwards the conuſee is outlawed, and after the general pardon of 39 *Eliz.* is made: and if the ſaid debt were pardoned or not, was the Queſtion, which conſiſted upon two exceptions in the ſaid pardon, *viz. Except out of this Pardon all debts which were or ſhall be due to the Queen, or to any other to her uſe, by any condemnation, Recognizance, or otherwiſe: And alſo except all goods, chattels, debts, actions, &c. already forfeited by reaſon of any Outlawry, whereof her Majeſtie by her Highneſs Letters Patents hath before the day of this preſent Seſſion made any Grant, Covenant or Proviſo to any perſon or perſons.* It was reſolved in this caſe, that by the latter exception it was proved, that the intent of the Queen was not to include debts which accrued to her by Outlawry within the firſt exception, for there is a ſpecial ſaving, and in a ſpecial manner for them by the latter exception. And alſo the Pardon is to be taken moſt beneficially for the ſubject and moſt ſtrongly againſt the Queen. *Hill.* 41 *Eliz.* in *Scac. Wyrralls* caſe. *Co.* 5 par. 50.

17. In an Appeal the defendant was found guilty of Manſlaughter. The Queſtion was, if the King might pardon the burning in the hand. It was reſolved, that he might, becauſe that the burning of the hand is not parcel of the Judgment; for then the King could not pardon it, becauſe the defendant hath an intereſt in the Judgement; and the burning in the hand is to no other purpoſe but to notifie to the Judge, whether he hath had his Clergie before, or not. But it was objected, that although the King might pardon the burning in the hand, yet the defendant might be impriſoned at the ſuit of the party; for in caſe of Indictment before the Statute of 18 *Eliz. cap.* 17. the King

might pardon the Impriſonment, but not in an Appeal. But it was Reſolved, that the Statute of 18 *Eliz.* did extend as well to an Appeal as to an Indictment, otherwiſe the party ſhould be lawfully diſcharged of his impriſonment, and yet remain perpetually in priſon; which was not the meaning of the makers of the Statute. *Trin.* 41 *Eliz.* in B. R. *Cok.* 5 par. *Biggs* his caſe. See 3 *Ma. Dyer* 201. 9 *Eliz. Dyer* 261. in *Muſgraves* caſe. 15 *Eliz. Dyer* 323. *Taverners* caſe.

18. The general pardon of 28 *Eliz.* did pardon all Felonies, *&c.* in which Burglary was excepted. The Queſtion was, If the Attainder of one for Burglary was excepted. It was reſolved, that it was excepted, becauſe that now this Burglary appears by Record of Judgement in Law: and although the Jury hath found the priſoner guilty of Burglary, and upon that he had Judgement; yet the offence of Burglary is the foundation of all, and therefore if the ſame be excepted, the whole proceeding upon it is excepted; and by the exception of the offence in a general pardon, all dependencies upon it are alſo excepted. *Hill.* 19 *Eliz. Cok.* 6 par. 13. the caſe of Pardon.

19. A man was outlawed after Judgement before the general pardon 43 *Eliz.* and after the Judgement died; his Executors made ſatisfaction upon Record; and without any proces they pleaded the general pardon, with an Averment that they were not any of the perſons excepted. In this caſe, it was reſolved, 1. that the Executors ſhould take advantage of the general pardon. 2. that although the words in the proviſo in the pardon are *(until ſuch time as the perſon ſo outlawed ſhall ſatisfie)* that is ſuch an intereſt in the perſon outlawed, that although that he dieth after the pardon, yet his Executors may ſatisfie, and have benefit of the pardon. 3. Reſolved, that becauſe no *Scire facias* nor *Capias utlagata*, nor charges lyeth againſt the Executors, they may *gratis* come in for neceſſity without proces, and plead the general pardon, with averment, that they are not any perſons except. *Cok.* 6 par. 79, 80. Sir *Ed. Pbittons* Caſe.

20. Proces iſſued out of the Kings Bench for a Cart and Horſes which were the cauſes of a mans death, as a *Deodand*. It was moved, that there had been a general pardon by Parliament ſince that time, by which *Deodands* were pardoned; and therefore it was prayed, that the proces might be ſtayed. The Court demanded if there be not an exception in it of the Almoners intereſt, and by what words in the pardon *Deodands* are pardoned. It was anſwered, By no particular, but by the general words: whereupon it was ordered that the proces ſhould ſtay until the Almoner was heard what he could ſay in the caſe.

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2. *Of ſpecial Pardons: what good, what not: what things ſhall be pardoned by them: how they ſhall be extended: how far, and to what things extended: and of divers other things ariſing by Pardons.*

1. TWo were outlawed in an Appeal of Murder; they purchaſed a Pardon, and had a *Scire facias* againſt the Plaintiff, and Loſes mediate and immediate, and the Pardon agreed not with the Indictment in the addition. Alſo the Pardon was, *Pardonamus* A & B. *omnes utlag. verſus præfat* A. & B *ſeu alterum eorum promulgat*: and although that the words of the Pardon were joynt, and they are joyned in the words of the Pardon, whereas the felony of the one is not the felony of the other; yet it was holden, that the enſuing words made it ſeveral; and therefore it was holden notwithſtanding the Exceptions, that the Pardon was good, and ſhould be allowed. *Paſc.* 29. *H.* 8. *Dyer* 34. See 22 *E.* 4. 7. &c.

2. *A.* and *B.* as Principals, and *C.* an his Wife as Acceſſaries, were found guilty in the procurement of the death of *I.S.* at the ſuit of the Queen; and the Principals were executed, and *C.* the Acceſſary, for his Clergy was taken away by Parliament. The Queen pardoned the Wife: it was a Quere, if an Appeal did lie againſt them; it ſeemeth it doth not, for that the principal was not named in the Appeal, nor was alive. *Mich.* 1. *Ma. Dyer* 132.

3. A man indebted to the Queen in 200 *l.* upon a Recognizance, was attainted of Treaſon; the Queen pardoned the Treaſon, and gave, granted and reſtored all his Goods, Chattels, *&c.* which he had forfeited by the Attainder: it was the opinion of the Juſtices, that in this caſe the debt was not gone by the pardon. *Mich.* 3. *Ma. Dyer* 124

4. *A.* purchaſed Lands *in Comite* to him and his Wife, and the heirs of the Husband, without licence: the Queen pardoned all offences *pro quacunq; alienatione ſibi facta*; the pardon was allowed, and the party was diſcharged in the Exchequer, although in the pardon there was no mention made of the wife. *Hill.* 3 *Eliz. Dyer* 196. Sir *Robert Catlins* Caſe.

5. *A.* brought debt upon an Obligation againſt *B.* the Defendant pleaded, that after the making of the Obligation, the Plaintiff was attainted of coyning, and pleaded the Attainder at length: the Plaintiff confeſſed the Attainder; but ſaid, that afterwards the Queen by Letters patents did pardon him,

him, and did reſtore unto him *omnia bona & catalla ſua*; and thereupon the Defendant did demur in Law: the Queſtion was, If the debt by ſpecialty be included in thoſe words. Quere, The point was not reſolved. *Mich.* 40 *Eliz.* in C. B. *Goldesbr.* 114, 115.

6. *A.* was ſeiſed of the Mannor of *W* holden of the King *in Capite*, the ſame being in Leaſe to ſeveral Tenants for years, for ſeveral Rents, and died ſeiſed, 26. his Heir without tendring any livery, entred, and took the profits to this time to his own uſe, no Office being found. The Heir being called into the Court of Wards, to know what he could ſay why an Office ſhould not be found, and he ſue his Livery pleaded the general pardon made 5 *Eliz.* and if any words in that Pardon were ſufficient to diſcharge him of the intruſion, and of the mean profits, and ſuing of Livery, was the Queſtion. It was reſolved by the Court, That the pardon did diſcharge all entries and intruſions, and ſo by conſequent all mean Rates, and ſuing of Livery: but if he had once tendred his Livery, then by the Proviſo he ought to have ſued it forth. *Paſch.* 8 *Eliz. Dyer* 249.

7. *A.* being ſeized of two Mannors, one in poſſeſſion, the other in reverſion, died 2 *Eliz.* An Office was found of the Mannor in poſſeſſion, and that it was holden of a ſubject in Socage; and nothing found of the Mannor in reverſion, which was upon Extent, the heir being of full age, took the profits of the Mannor in poſſeſſion, and then ſold them both to a ſtranger, who took the profits till now: and 11 *Eliz.* a new Office was found, by which the Mannor in Extent was found to be holden of the Queen by Knights ſervice *in capite*, and the ſeiſin and dying ſeized of *A.* Whether the leaving out of the Mannor *in capite* in the firſt Office, and the taking of the profits of the other, be an Intruſion, before the laſt Office found; and if it be, if it be pardoned by the general pardon of 5 *Eliz.* was the Queſtion; and alſo, if the ſuing of Livery was alſo gone; and if the ſuing of Livery be not gone, then whether the intruſion was pardoned by the general pardon of 5 *Eliz.* It was the clear opinion of the Court, That for the Socage Mannor, the pardon did diſcharge the entry and intruſion; the other the Court doubted. But the better opinion ſeemed to be, That it was alſo diſcharged by the pardon. *Trin.* 11 *Eliz. Dyer* 281, 285.

8. *Hill.* 22 *H.* 7. the Kings tenant died ſeized, and an Office was found accordingly, and that the heir entred and took the profits before the Office found and after; and afterwards the King pardoned him *omnes intruſiones*. It was holden, that the ſame was not good, without the words *exitus & proficuas, &c. Trin.* 12 *Eliz. Dyer* 280.

9. Errour brought to reverſe a Judgement in Debt againſt him in the Exchequer; The defendant pleaded an Excommunication of the plaintiff in the ſaid Writ of Errour, and brought the Letters of the ſaid Excommunication certified by the Official under the Seal of the Biſhop of *D.* which recited, that they proceeded againſt him for Recuſancie, and for contempt in *Non Compariendo*, he was excommunicate. The Plaintiff ſaid, That after the Excommunication, the King by his general pardon, 3 *Jac.* pardoned all contempts; and averred, that neither the offence nor the perſon was excepted. It was in this caſe reſolved, that the plea of Excommunication was inſufficient, becauſe it was certified by the Official or Commiſſary, whereas it ought to have been certified by the Biſhop himſelf. The other chief point of Law was, whether the Pardon had not diſcharged the Excommunication: it was not reſolved; but the Court ſeemed to be of opinion that it was, becauſe the Defendant was ruled to anſwer over. *Cook.* 8 *par.* 68, 69. *Trollops* caſe.

10. Sir *John Bennet* by ſentence and decree in the Star chamber for bribery and miſdemeanour in his Office of Judge of the Prerogative-Court, was fined 20000 *l.* and cenſured to be impriſoned, and made uncapable of any Office of Judicature: The Defendant obtained the ſaid Office; Sir *John Bennet* brought an Aſſize of the Office; the Defendant upon pretence of this ſentence and decree, would have ſtayed his proceedings; and Sir *John* having day given to ſhew cauſe, ſhewed a pardon of the late King after the ſentence, wherein all the matter was recited which was contained in the decree, and all penalties and puniſhments by reaſon thereof, and all diſabilities and incapacities, except the fine of 20000 *l.* This Caſe was referred to all the Juſtices to conſider of; it was reſolved by all the Juſtices and Barons, That the pardon had taken away all force of the ſentence, except for the fine of 20000 *l.* and all inhabilities were diſcharged thereby; and that the ſentence took not from him his Office; and the pardon having taken away all offences, all the Juſtices were of opinion that he might proceed in his Aſſize. *Mich.* 2 *Car.* Sir *John Bennet* and Doctor *Eaſedales* caſe. *Cro.* 1 *par.* 40.

11. *Excommunicato Capiendo*, upon a ſentence in the Delegates for coſts *in caſtigatione morum*, the ſentence being before 21 *Jac.* divers *Capias* iſſued according to the Statute of 5 *Eliz.* The Defendant being taken, pleaded *quoad* all the penalties, that it is not any of the cauſes within the Statute; therefore of them he ought to be diſcharged: and *quoad* the *Excommunicato Capiendo*, he pleaded the general pardon of 21 *Jac.* upon which it was demurred. It was the opinion of the Court, That this

this Excommunication was diſcharged by the pardon; and all contempts before the pardon, are diſcharged; and all the ſentences for the crime, except onely the coſts: for the payment of which, the party ought to have new proceſs. *Tr. 6 Car.* in *B. R. Codrington* and *Rodmans* caſe. *Cro.* 1 *par.* 144.

12. Sir *Matthew Mints*, who was convicted of Manſlaughter, and had his Clergy, his burning in the hand was reſpited: He now came and pleaded his pardon, whereby the burning of the hand for the Manſlaughter, and all other felonies by him committed, *& alia mal. facta*, before the eighth of *July*, were pardoned; and there was a ſpecial clauſe in it, that *He ſhould not finde ſureties for his behaviour*; the pardon bore date the 31 of *October*. It was the opinion of the Court, that although there were divers miſdemeanours committed by him after the ſaid eighth day of *July*, for which he deſerved to be bound to the good behaviour, yet his pardon was allowed, and he diſcharged for finding ſureties. *Mich.* 16 *Car.* in *B. R.* Sir *Matthew Mints* Caſe. *Cro.* 1. *par.* 433.

13. *A.* was indicted that he feloniouſly 8 *Jac.* ſtole plate from King *James*, whereas in truth it was the plate of Queen *Anne*, and ſtolen from her; for which he obtained his pardon by the means of the Queen. Now he was indicted again for ſtealing the ſame plate; whether he ſhould have the benefit of the general pardon of 21 *Jac.* was the doubt, without pleading it, and praying a diſcharge, becauſe of the ſpecial Exception in it of the goods of the King: the Court doubts of it, and conceived it excepted; and therefore they adviſed him to plead. *Hill.* 11 *Car.* in *B. R. Belts* caſe. *Cro* 1 par. 324.

14. Prohibition to the Court of High Commiſſion for one *W.* Parſon of *S.* who was there deprived for incontinency, and another preſented to his Benefice; whereupon he procured a pardon to be reſtored: this pardon was before ſentence thereupon, and afterwards they proceeded there againſt him for Coſts of ſuit. The pardon was allowed by the Court; for altho gh another be Plaintiff in the Spiritual Court, as High Commiſſion, or Star-chamber; yet they be the Kings ſuits, and he may pardon them; and if the pardon be before ſentence given, they ſhall give no Coſts. *Hill.* 11 *Jac.* in *B. R. Watts* caſe. *Cro.* 2 par. 335.

15. An Indictment was drawn againſt Sir *Anthony Mildmay*, upon the Statute of 27 *E.* 3. *Cap.* 1. for a *Præmunire* for his illegal acting as a Commiſſioner in the Commiſſion of Sewers, and committing one to priſon without baile, becauſe he would not diſcharge a Judgement given for him in the *Kings Bench* againſt ſome of the Commiſſioners Officers: for which offence he was fined: he procured the Kings pardon; which was in theſe words: *Pardonamus omnes & ſingulas tranſgreſſiones, offenſiones, & contemptus*: and whether by this pardon the *Præmunire* were releaſed, the Judgement of a man attainted in a *Præmunire*, being that he is to loſe his lands, goods, liberty, and to be out of the Kings protection, was the queſtion; and upon divers Preſidents ſhewed in Court, that the Kings by ſuch words have heretofore pardoned the offence of a *Præmunire*, the Court ordered the pardon to be read, and allowed of the ſame. *Mich.* 12 *Jac.* in *B. R.* Sir *Anthony Mildmay*'s caſe. *Bolſtr.* 2 par. 299.

16. One killed a man with a Gun by miſadventure; the Queſtion was, whether in this caſe he might plead the general pardon, and ſo be diſcharged: it was ſaid by the Court, That if one kill another by doing an act which was needleſs for him to do, it is manſlaughter; and ſo it was adjudged in Sir *John Chichſters* caſe, who killed his man by miſadventure in fencing with him: but if he kill another in doing an act which belongs to his calling, it is not manſlaughter; for men muſt be wary not to do things which concern them not to do: it was reſolved in the principal caſe, That this act was not within the general Pardon, but the party muſt purchaſe his pardon. *Tr.* 1652. in B. R. *Style* 337.

17. *A.* was plaintiff in the Star-chamber, againſt *B. C.* and others, by Bill exhibited 16 *Jac.* and was for ſcandalous matters not examinable in that Court, and for other matters which were examinable here; and Witneſſes were examined and publiſhed, 19 *Jac.* 21 *Jac.* the general Pardon by Parliament was made, by which all offences, contempts and miſdemeanours from 20 *December* before (except ſuch offences, contempts, &c. whereof or for which any Suit or Bill within eight years before was exhibited into the Star-chamber, and there remaining to be proſecuted this laſt day of this preſent Parliament) Afterwards, 1 *Car.* the cauſe came to hearing at the ſuit of the defendant; and upon the hearing, the defendant was fined 200 *l.* and for abuſe of the Court, for exhibiting the ſcandalous matter, the plaintiff was fined 500 *l.* and damage to the defendant 200 Marks. By reaſon of the diverſity of opinions of the Court of Star-chamber, this caſe was referred to all the Juſtices; and they all agreed, that the contempt and offence for exhibiting the ſcandalous Bill, was pardoned, and not within the Exception: for it cannot be intended that the plaintiff exhibited a Bill upon which he ſhould not be fined; but this exception was of that which was laid to the charge of the defendant, and the defendant

dant may have his remedy at the Common Law; and the contempt, which is accidental to the offence, is pardoned; and so by consequence, the fine also is pardoned. *Hill.* 1 *Car. Beverly* and *Powers* Case. *Hutton* 79.

Parliament.

See for Parliament, *Lib.* 1. *Title* Acts of Parliament.

Parson *and* Vicar, Patron *and* Ordinary.

1. A Parson is inhibited by the Archbishop, that he shall not intermeddle with the Benefice; by means whereof, the Parson is absent by the space of fourty days. The Question was, If such absence should make a Lease made by the Parson void. It was agreed by all the Justices, in this case, That such absence doth not make the Lease void: for it must be a voluntary absence, for such absence the Statute intendeth; and this absence is by reason of an inhibition. *Mich.* 40 *Eliz.* in C. B. *Goldesbr.* 163.

2. In a *quare impedit* the case was: *A.* was outlawed in Debt; *B.* Incumbent of the Church resigned his Benefice to the Queen, and the Queen presented him again; whereupon he was instituted and inducted. Then *A* brought a Writ of Error in the Kings Bench, and reversed the Outlawry, and brought a *Scire facias* to execute his first Judgement against *B.* who pleaded all the special matter. It was holden in this case, that the plaintiff should be barred: for by the Outlawry of the plaintiff, the presentation was forfeited to the Queen, although it was but a thing in Action; and by the reversal of the Outlawry, he shall not be restored to the presentation, because it was a thing once lawfully executed, and vested in the Queen. *Mich.* 31 *Eliz.* in C.B. *Beverly* and *Cornwallis* case. *Goldesbr.* 103, 104.

3. *Note:* There is a difference betwixt persons who have the meer right of the land or thing in demand in them, and them which have it not: those who have not the meer right in them, but a qualified right, although they be barred in Real Actions, yet the same shall not binde the successor, as Parson, Prebendary, *&c.* For in such case, in a new Action of the same nature by the successor, he shall falsifie the Recovery; and the Recovery in such case doth not make any discontinuance, but that the successor may enter. *Cok.* 6 part 8. in *Ferrers* case.

4. If a Writ of Annuity be brought against a Parson or Vicar, upon a feigned prescription, or by agreement, by the Parson, Patron and Ordinary, supposed to be before the Statute of 13 *Eliz.* and the Parson prayeth an Aid of the Patron and Ordinary, and loseth by Action tryed; and all this is feigned to make an evasion out of the said Act: It was Resolved, that this intention was taken to be within the Act: for although the Annuity charge the Parson or Vicar, and not the possessions, yet it is within the mischief of the Statute, *viz.* the impoverishing the successor, cause of delapidations, and decay of Spiritual livings, mentioned within the preamble of the Act. *Cok.* 5 part 15. in the case of Ecclesiastical persons. *Pasch.* 14 *Eliz.* in C.B. *Eitrues* case.

5. *Note:* The Incumbent may charge the Glebe, if the Patron and Ordinary joyn with him in the Grant, or consent thereunto either by license precedent, or confirmation subsequent: yet if the Patron be but tenant in tayl or for life, or the Ordinary be Patron, the charge shall not be perpetual: for in the first cause, the issue in tail, the reversioner or he in the remainder shall avoid it; and in the other case, the license or confirmation is not available to charge the Church without the consent of the Dean and Chapter, but shall be avoided by the successor of the Ordinary. *Cok.* 1 part Institutes 300.

6. *Note:* It was holden by the Justices, That a Parsonage may be a Mannor: as if before the Statute of *quia emptores terrarum*, the Parson with the Patron and Ordinary grant parcel of the Glebe to divers persons, to hold of the Parson by divers services; the same makes the Parsonage a Mannor. *Pasch.* 22 *Eliz.* in C.B. *Goldsbr.* 3.

7. A Parson, to the end that he may give his continual attendance upon his Function, is freed from all personal charges which may hinder him in his Calling; and therefore he shall not be chosen a Bayliff, Reeve, Beadle, or other Officer, for land annexed to his Church: and if a Parson have a Benefice, and taketh another without a dispensation, the first Benefice is void, and the Patron may present: for this avoidance is called *Cession*, because the taking of the last makes him neglect the first. See

8. *I. S.* brought an Action of Debt againſt *I.* Rector of *F.* in the County of *B.* The Defendant pleaded, that the day of the Writ brought he dwelt at *D.* in the County of *N.* It was adjudged to be no Plea; for a Parſon ſhall be intended by Law to be always reſident upon his Benefice for the cure of ſouls which he hath there; and the Parſon who hath the cure of ſouls, and is not reſident upon his Parſonage, *Non eſt diſpenſator, ſed diſſipator.* Cook. 11 par. upon *Magdalen Colledge* caſe.

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1. *What right the Parſon or Vicar have to the Church. Of the Rights of the Patron and Ordinary. In whom the Fee-ſimple of the Glebe of the Parſonage and Vicaridge is: And who ſhall be ſaid to be Patron of a Vicaridge endowed.*

1. THe Rights of the Parſon, Vicar, Patron and Ordinary to the Church, and Glebe Lands to it belonging, are of ſeveral natures: The Parſon hath *jus poſſeſſionis*, a right unto the poſſeſſion of the Church and Glebe-Lands, for that the Parſon hath in him the Freehold, and is to receive the profit of the Church and Glebe, the Oblations, Tythes and Offerings, to his own uſe. The Patron hath *jus preſentationis*, a right of preſentation of his Clerk to the Ordinary, to be admitted and inducted into the Church: The right of the Ordinary is *jus ordinationis*, a right of enabling and inveſture of the incumbent, and to ſee the cure to be ſerved. The Parſon hath *jus habendi, jus retinendi, jus poſſidendi*; he may have and receive the profits to his own uſe, without the Patrons and Ordinaries conſent; and nothing can be done by them to charge the Church during his Incumbence, without his conſent and agreement. But the Rights of the Patron and Ordinary are only Collateral Rights; for none of them can retain or poſſeſs the Glebe; and yet they have a kinde of *jus diſponendi*, a kinde of diſpoſition in the Church, for that no charge could have been layed upon the Church in perpetuity, to have bounden the ſucceſſors of the Patron, unleſs the Patron and Ordinary had agreed thereunto. *Cok.* 1 par Inſtit. 119.

2. If a Writ of Annuity had been brought againſt the Parſon, and he had prayed in aid of the Patron and Ordinary, and the Patron had made default, and the Ordinary appeared and confeſſed the action; or if the Ordinary had made default, and the Patron had confeſſed the action; this ſhould have bound the ſucceſſours of the Parſon, 12 *H* 8. 7. 29 *H.* 6. 75. 2. *H* 6. 3. 39 *H.* 6. 50. 28 *H.* 8. 1 & 2. But if the Parſon himſelf, with the conſent onely of the Ordinary, had granted an Annuity out of the Glebe, having *quid pro quo* in conſideration thereof; this by the Common Law ſhould have bounden the ſucceſſors of the Parſon, without the conſent of the Patron. 16 *E.* 3. *Annuity* 24. 7 *E.* 4. 40. 40 *E* 3. 30. *Cok.* 1 par. Inſtitutes, 343, 344.

3. At the Common Law, if a Recovery had been had by Act on tryed againſt the Patron, where the right of the patronage had been in queſtion; the preſent incumbent ſhould not have put the right again in tryal: nor was he helped by the Statute of 25 *E* 3. cap. 7. If the Patron had not pleaded faintly, but the Parſon ſhould have been bounden by the Judgement 28 *E.* 3. *Quare imp.* 66. Yet ſee F.B. 49. *a.* The ſucceſſor of the Parſon after ſuch Recovery had againſt his predeceſſor by Action tryed, might have had a *Juris utrum*, notwithſtanding ſuch Recovery

4. *Note:* It hath always been holden, that the Free hold of the Glebe, and of the Church and Church-yard, is in the Parſon; of which if he be put out of poſſeſſion, or diſſeiſed, he may have or maintain an Aſſiſe: ſee 28 *H.* 6. 16, 67 *Markham.* If the Parſon be ejected, he ſhall have treſpaſs; or he may have an Aſſize if he be diſſeized of the Church-yard. And ſee 13 *R.* 2. *Fitz.* title *Juriſdiction:* The Vicar ſhall have an Aſſiſe of the Church-yard, but not againſt the Parſon. And ſee 17 *H.* 3. *Prohibition* 26. where it is agreed, That for ſuch things as are annexed to the Church or Glebe, the Parſon ſhall have an Aſſize, or his Action of Treſpaſs, for that the right and intereſt of them is in him See 11 *H.* 4. 12. accordingly.

5. The Free-hold of the Church and Glebe being admitted to be in the Parſon or Vicar; it is controverted in old Books, in whom the Fee ſimple of the Parſonage and Vicarage, and of the Glebe is. Some are of opinion, that the Parſon hath the Fee ſimple in him; and that for theſe Reaſons. 1. A Parſon is a Spiritual Corporation, and lands may be given to him in *Frankalmoigne*; and every gift in *Frankalmoign* doth ſettle the Fee-ſimple in the Donee; and in ſuch a gift the Fee doth paſs without the word *Succeſſors* 2. A Parſon hath brought a Writ of Right in the nature of a *quod permittat* of a Common, 3 *E.* 1. *quod permittat* 8. and counted that he was ſeized in *Fee & droit*; and the Writ hath been admitted good. F.B. 50. Alſo a Parſon brought a *quod permittat* of the ſeiſin of his predeceſſor in *Eſtovers*, and counted of a ſeiſin in Fee, and joyned the Aſſize upon the meer Right. And ſee 8 *H.* 6. 24. by *Paſton.* A parſon may

may joyn the Aſſize upon the meer Right. Alſo if the parſon dieth, the Glebe is not in the patron. And it is ſaid, 8 *H.* 6. 24. That in a *Precipe quod reddat*, or in a *Scire facias* to execute a Recovery in a *Ceſſavit*, he ſhall not have aid. If a parſon doth make a Leaſe for his own life, that he hath a Reverſion in him, and may be vouched. See 9 *E* 3. *Juris utrum* 18. and *Aid* 19. A Formdon was brought againſt *I S* the defendant pleaded that *W.* was Vicar of the Church of *S.* and made a Leaſe to him for life; and vouched the Vicar, who entred into the Warranty, and pleaded that he found the Church ſeized of the Lands as parcel of the Glebe of the Vicarage, and that *A.* was Parſon of the Church; and prayed in Aid of him, which was granted: and Voucher and Aid prayer ſhall not be but of them that have a Fee-ſimple; alſo the Writ of *Juris utrum* is, *viz. utrum ſit Eleemoſyna Eccleſiæ de* B. and not of the Patron. *Co.* 1 par. Inſtit. 341.

6. But notwithſtanding the reaſons and authorities in the Section next above, yet the Law is taken to be at this day, That the Parſon hath not the abſolute Fee-ſimple of the Glebe in him; and that he hath but a qualified Fee-ſimple at the moſt in it; and that the abſolute Fee, according to *Littleton*, is in *Nubibus*, that is, in conſideration of the Law; and that it was provided that it ſhould be ſo, by the wiſdom and policie of the Law, to the end that the Parſon & Vicar, who have *curam animarum*, and are bound to celebrate Divine Service, and adminiſter Sacraments, might have ſomewhat ſtill to live upon; and therefore the Law provided that the Fee-ſimple of the Glebe ſhould be out of them, ſo as no alienation or diſcontinuance thereof made by them might be a bar to the ſucceſſor, and leave him deſtitute of maintenance; and for that by the wiſdom of the Law, they cannot make any diſcent of the Lands, for every Diſcontinuance giveth a Fee; therefore it neceſſarily followeth, that the abſolute Fee of the Glebe is not in him.

7. An Aſſiſe of *Novel diſſeiſin* was brought againſt a Parſon of part of the Glebe-lands; and he pleaded that he was preſented to the Church by the King; and prayed in Aid of the King, and Aid was granted: and Aid ſhall never be granted to one that hath the abſolute Fee-ſimple of the lands in him, 43 *Aſſ.* 15.

8. If a Writ of Right be brought againſt a Parſon, and after the Miſe joyned he makes default, and Judgement be given againſt him upon his default; this ſhall not binde the ſucceſſor, but the ſucceſſor ſhall have a *Juris utrum*, becauſe the Parſon did not pray in Aid of the Patron and Ordinary, and he had not the meer right in him to looſe by his default: and in that caſe the Parſon himſelf might have had a *Juris utrum*, notwithſtanding the bar in the former Action, for that is his Writ of Right, and a Writ of the higheſt nature that a Parſon can have. See *Co.* 6 part, in *Ferrers* Caſe. *Co.* 1 par Inſtit. accordingly. *Littleton* Sect 646 accordingly.

9. In Treſpaſs the caſe was, *A.* Prebend of the Prebendary of *P.* and *F.* was ſeized of the Rectory of *P.* in the right of his Prebend, and 13 *Eliz.* did demiſe the ſame to *I S.* and *I D.* for 70 years. *A.* Biſhop of *L.* Patron of the Prebend, and Ordinary of the Dioceſs, granted the next avoidance to *D.* which Grant was confirmed by the Dean and Chapter. Afterwards *D.* did confirm the Leaſe made by *A.* to *I.S.* and *I.D.* the ſaid *I.S.* being then alive: then *I.S.* died; and the next Avoidance being come to *E.* and *G.* they preſented *I. N.* who was admitted, inſtalled and inducted into the Prebend. *L.* ſucceeded him; then died *I. N.* *L.* did collate *K.* to the Prebend, who was inſtituted and inducted, and entred into the Parſonage, and Leaſed the ſame to *W.* for years; which Leaſe came to the plaintiff; upon which the defendant, as ſervant to one who claimed under the Leaſe made by *A.* to *I.S.* and *I.D.* entred. In this caſe it was adjudged for the plaintiff. For although *B.* the Prebendary came in after and under the confirmation of the Leaſe; and although the Leaſe made by *A* for 70 years were not expired; yet *I. N.* the Prebendary before him came in by a Grant of the next Avoidance, made, confirmed and perfected before the confirmation of the Leaſe, and ſo conſequently was not ſubject to do it: and then when he entred upon the Parſonage, he was ſeiſed in his demeaſne as of Fee, and ſo did defeat the Leaſe totally, ſo as it could never take effect or force againſt any ſucceſſour whatſoever. And in this caſe it was ſaid, That although *Littleton* ſeems to be of opinion that the Parſon hath not the right of the Fee-ſimple, that muſt be intended as to the bringing of a Writ of right; but otherwiſe it is, that the act of the Parſon it is that chargeth the land; and it ſufficeth that the Patron and Ordinary, or either of them, licenſe or aſſent. *Trin.* 11 *Jac.* in C. B. *Spendlowes* and *Barketts* Caſe.

2 *Of the Vicar and Vicarage: in whom the Fee-ſimple of the Glebe of the Vicarage is, being a Vicarage endowed; and who ſhall be ſaid to be Patron of the Vicarage; if the Patron of the Parſonage, or the Parſon: and of the Endowment of it.*

VIcarages were originally endowed out of Parſonages; and the Vicar was to have aid of the Parſon, if he were impleaded for any thing concerning his Vicarage; and the Parſon was ſubject to every charge of the Vicarage. 31 *H.* 6. 27. by *Yelverton*; and ſee 9 *Aſſi.* 2. The Vicar in ancient time was not eſteemed the tenant of the Freehold of the Lands of the Vicarage, but the Freehold of the Lands was in the Parſon; and the Vicar himſelf was not ſuch a perſon againſt whom the Land of the Vicarage could be demanded; neither did any *Precipe* lie againſt him as Vicar, nor could he maintain an Aſſize in his own name. See 8 *Aſſ.* 36. 15 *Aſſ.* 8.

2. A Writ of Intruſion was brought againſt a Vicar; who pleaded unto the Writ, That the Freehold was in the Parſon: and notwithſtanding that plea, the Writ did not abate: but the reaſon of that caſe was, for that the intruſion was a tortious act, and a perſonal wrong, and therefore the perſon of the Vicar was charged therein. And note in that caſe, that the Vicar had aid of the Patron and Ordinary; by which it appeareth, that it was ſuppoſed that the Free-hold was in the Vicar, but not the Fee-ſimple of the Glebe of the Vicarage. See 4 *E.* 3. *Fitz. brc.* 704.

3. An Aſſize was brought againſt a Vicar: he pleaded that he had nothing but as Vicar; and demanded Judgement of the Writ. The plaintiff ſaid that he was ſeized until diſſeized by him. It was held in that caſe, that if he had found the Vicarage ſeized, that then it was a good plea: but there it is holden, that a Vicar ſhall not have an Aſſize in his own name. See 12 *E.* 3. See *Brief* 256. accordingly.

4. *Note.* It is holden for Law at this day, That the Free-hold of the Glebe of the Vicarage is in the Vicar himſelf, and not in the Parſon; for that the poſſeſſions of the Vicar and Parſon are ſevered, and every of them ſhall have ſeveral Writs concerning the rights which do appertain unto them, and ſhall not joyn in any Writ; and they ſhall pay their Tenths and other charges charged upon their ſeveral Lands, ſeverally by themſelves. And the Vicar at this day ſhall have and maintain a Writ of *Juris utrum* againſt the Parſon who is the Patron of the Glebe of the Vicarage. Upon which it appeared, that upon the very endowment of the Vicarage of any lands, the Free-hold is in the Vicar. And for the abſolute Fee-ſimple of the Glebe of the Vicarage, it is holden at this day that the ſame is in the conſideration and intendment of the Law in ſuch manner as the Fee-ſimple of the Glebe of the Parſonage is, in the caſe of a Parſon, as before is ſaid.

5. If there be Parſon and a Vicar endowed of lands in one Church, and the Vicarage doth become void; it hath been ſtirred a Queſtion in this caſe, who ſhall be the Patron of the Vicarage, whether the Patron of the Parſonage, or the Parſon. Upon which Queſtion, conſider theſe books and authorities following. In 17 *E* 3 51. ſome of the Judges are of opinion, that the Advowſon of the Vicarage doth appertain to the Parſon: others hold that it belongeth to the firſt Patron: and the Court was divided in opinion.

6. *Mich.* 16 *E.* 3. *quare imp.* 145. by *Parning* and *Hall*, The Ordinary cannot make a Vicar without the aſſent of the Patron.

7. 5 *E.* 6. *Quare imp.* 165. puts the caſe, That although the Vicarage be made with the aſſent of the Patron and Ordinary, yet the Advowſon of the Vicarage doth remain in the Parſon, becauſe the ſame is parcel of the Advowſon of the Parſonage.

8. 16 *E.* 3. *Grants* 56. 13 *R.* 2. *Juriſdiction* 19. 16 *E.* 3. *Monſtrens defaits* 166. it was a Queſtion, If by the grant of the Advowſon of the Church, the Advowſon of the Vicarage did paſs: and there by *Stone* it doth paſs as incident to the Parſonage.

9. The King was ſeiſed of the Rectory of *D.* and of the Advowſon of the Vicarage of *D.* and granted *Rectoriam prædict. cum pertinent. ac etiam Vicariam Eccleſiæ prædict.* It was adjudged, that by thoſe words the Advowſon of the Vicarage did not paſs. But if the King had granted *Eccleſiam ſuam de D.* the Advowſon of the Vicarage had paſſed, by *Walmſly* Juſtice, *Mich.* 31 *Eliz.* in C. B. *Aſhgell* and *Dennis* caſe. *Leon* 191.

10. See 31 *H.* 6. 13 & 14. by *Hengiſton*. The Parſonage and Vicarage are all one; and he who is Patron of the Parſonage, is Patron of the Vicarage.

11. But notwithſtanding all the Books and Authorities aforeſaid, yet it is conceived at this day, That the Parſon is the rightful Patron of the Vicarage, unleſs upon the endowment by the Ordinary it be otherwiſe provided. See *F. B.* 33. That the preſentation of the Vicarage doth *de communi jure* belong unto the Parſon, if it be not otherwiſe agreed. See 2 *H.* 3. *Grants* 89. *Perkins* 121.

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If a man by Fine grant the Parſonage, ſaving the preſentation to the Vicarage, it is a good ſaving, and the Parſon ſhall preſent when the ſame is void. 2. Common experience is, That when there is an Appropriation, and a Vicar endowed, that the Parſons to whom the Appropriations were made, were always accounted Patrons of the Vicarage and Benefice. See 50 *E.* 3. 26. An Abbot who had an Advowſon appropriate, upon which Appropriation there was a Vicar endowed, did preſent to the Vicarage. See 17 *E.* 2. *Quare imp* 178. accordingly. 3. It is manifeſt by Reaſon: for as the Patronage of the Church doth appertain unto him who was the firſt Founder of the Church, and firſt endowed the ſame with Lands: ſo in regard the endowment of the Vicarage is taken out of the Parſonage, and out of the eſtate of the Parſon, and if he be impleaded of his Glebe, he ſhall have aid of the Parſon; and alſo if the Vicarage be diminiſhed, the Parſons conſent with the Ordinaries act may endow the ſame *de novo* out of the Parſonage, as the Book of 31 *H.* 9. 13. is. And again, becauſe the Vicar is but ſubſtitute to the Parſon, and his endowment at the firſt was onely for the eaſe of the Parſon; and alſo becauſe it belongeth to the Parſon to ſee that the Cure be ſerved with a fit and honeſt man, of whoſe care and learning he was to be aſſured, & ſufficiencie to officiate the Cure: for theſe and many other cauſes, it is conceived at this day, That the Patronage of the Vicarage doth *de communi jure* belong unto the Parſon, and not to the Patron of the Parſonage.

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8 *Where Leaſes made by Parſons, Vicars, Prebendaries, ſhall be void by death, Reſignation, Non-reſidence, and for other cauſes, where not: And where and what act of the Patron may extinguiſh a charge going out of the Church, and where, and what not.*

A Parſon 28 *H.* 8. made a Leaſe for life of Land, rendring rent; and it was of lands which were given to him and his ſucceſſors to finde lights, *&c.* The rent was employed accordingly, until the Statute of 1 *E.* 6. after which Statute, the ſucceſſor accepted the rent. It was the opinion of the Court in this caſe, That the Patentee of the King might enter upon the Leſſee, and avoid the Leaſe, as the ſucceſſor of the Parſon might have done before the Statute, if he had not accepted of the Rent; and the acceptance of the rent aforeſaid, *ut ſupra*, was void as to the affirming of the Leaſe. But it was ſaid in that caſe, that the acceptance before the Statute by any ſucceſſor, ſhould binde the Patentee by the ſaving of the ſaid Act. See *Trin.* 16 *Eliz. Dyer* 337. See *Cok.* 1 par. 41. in the caſe of *Alton*-woods accordingly.

2. *I S.* Parſon of a Parſonage, demiſed the ſame to *E.* for 80 years, if he ſhould ſo long live; and if he died within the ſaid term of eight years, or ſhould alien it, that her eſtate ſhould ceaſe, and that then it ſhould remain to *R. pro & durante reſiduo prædict. termini* 80 *annorum*, if he ſhould ſo long live; and if he ſhould die, *&c.* that then his eſtate ſhould ceaſe, and that then it ſhould remain to *W. prædict. durante tot annis de prædict. termin.* 80 *annorum, &c.* and if he ſhould aliene, *ut ſupra*, that his eſtate ſhould ceaſe. And then the ſaid *I.S. conceſſit premiſ. durante tot annos de prædict.* 80 *annorum quæ adtunc continuarent & remanerent inexpirat*, to *F* his Executors & Aſſignes. *I.S.* died, *T.* died, *E.* and *R.* died; the Adminiſtrator of *T.* entred, and aſſigned the ſame over. In this caſe it was reſolved, 1. That the demiſe to *R.* and *W.* were void, becauſe that the eſtate which *E.* had was not for 80 years abſolutely, but *ſub modo*; and then the demiſe to them *pro toto anni quod remanerent poſt mortem dictum E. pro & durante reſiduo termino prædict.* 80 *annorum*, was void, becauſe there could not be a reſidue of the ſaid term, becauſe the ſame determined by the death of *E.* 2. Reſolved, that the Leaſe and limitation to *T.* was void for the incertainty; for it was incertain at the making of the Leaſe, how many years ſhould be behinde at the death of *E.* *Cok.* 1 part. the Rector of *Chiddingtons* caſe.

3. *Note*, That all Leaſes made by Parſons, Vicars, Prebendaries, and others having Eccleſiaſtical livings, are void by the Statutes of 32 *H.* 8. *cap* 1. and 13 *Eliz.* and other reſtraining Statutes; unleſs the Leaſes be made with theſe cautions, and under theſe limitations following: 1. The Leaſe muſt be made in writing by Deed Indented, and not by word. 2. The Leaſe muſt begin from the day of the date thereof, or from the making thereof. 3. The old Leaſe muſt be ſurrendered, expired, or ended within one year, at the making of the ſecond Leaſe; and ſuch ſurrender muſt be abſolute, and not conditional. 4. There muſt not be a double Leaſe in being at the ſame time. 5. The Leaſe muſt not exceed 21 years, or three Lives, from the making thereof. 6. The Leaſe muſt be made of Lands and Tenements mainorable, and out of which a rent may be reſerved. 7. The Leaſe muſt be of Lands or Tenements which commonly have been letten to farm by the ſpace of twenty years next before the Leaſe made.

8. There muſt be reſerved to them and their ſucceſſors ſo much yearly rent, or more; which hath been accuſtomably uſed to be paid for the ſaid Lands and Tenements within twenty years before the Leaſe made. And 9. The Leaſe muſt not be made without impeachment of Waſte. *Note*, theſe Rules reſolved for Law in the caſes following. See *Coke*. 1 par. the Lord *Mountjoys* caſe. *Coke*. 1 par. *Elmers* caſe. *Coke*. 5 par. 3. *Jewels* caſe. *Coke*. 4 par. 37. the Dean and Chapter of *Worceſters* caſe. *Co*. 4 par. Inſtit. 44.

4. If a Parſon, Vicar or Prebend make a Leaſe for years rendring rent, and dieth, and the ſucceſſour accepteth the Rent, it is nothing worth, for that the Leaſe was void by his death: but otherwiſe it is of a Leaſe for life. And if a Biſhop, Abbot, Prior, and ſuch-like, maketh a Leaſe for years, and dieth, if the ſucceſſor accepteth the rent, he ſhall never avoid the Leaſe, for that the Leaſe was but voidable, and not void *Co*. 3 par. 65. in *Penants* caſe.

5. *Note*. It was reſolved upon the Statute of 21 *H*. 8. of Non-reſidencie, That the Parſon ought to dwell and remain upon his Parſonage-houſe, and not in any other houſe, although it be within the ſame pariſh. For the Statute is intended not onely for the ſerving of the Cure, but alſo for the maintenance of the houſing, and the reparation of them alſo for the habitation of the ſucceſſor, and that he may keep Hoſpitality there. But it was agreed, that lawful impriſonment is a good cauſe of excuſe of Non-reſidence, and ſo is ſickneſs, if it be without fraud, and the patient be removed out of his houſe for the taking of air, by the advice of his phyſician. *Co*. 6 par. 61. *Baxter* and *Goodales* caſe.

See more of this Diviſion, in the title of Leaſes *and* Grants.

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3 *Of Uſurpation, and where the ſame ſhall put the lawful Patron out of the poſſeſſion of his Church or Advowſon, where not.*

1. USurpation is, where a ſtranger who hath no title to the Advowſon, the Church being void, doth preſent his Clerk to the Biſhop or Ordinary, and the Ordinary doth thereupon admit the Clerk preſented into the Church: this preſentation is a diſturbance and uſurpation, and doth put the rightful Patron out of poſſeſſion of the Church. This appeareth by the Statute of *Weſtm*. 2. *cap*. 5. *Cum aliquis jus preſentandi non habens, preſentaverit ad aliquam Eccleſiam, cujus preſentatus eſt admiſſus*. For no man can be put out of the poſſeſſion of his Advowſon, but upon admiſſion, and inſtitution upon a preſentation onely. For if a Biſhop doth collate to the Church without title, and his Clerk be inducted, this doth not put the Patron out of poſſeſſion, for that it ſhall be taken onely provi ſionally made for the celebration of Divine Service, until the Patron doth preſent. See *Coke* par Inſtit. 344. *Coke*. 6 par. 20. *Mich*. 30 *Eliz*. in C. B. *Jurdens* caſe, accordingly.

2. *Note*, by the Juſtices, Collation cannot gain any patronage, & cannot be an Uſurpation againſt a common perſon, *& à fortiori*, not againſt the King. And it was there holden, that Collation is a giving of the Church to the Parſon; perſentation is an offering of the Parſon to the Church. *Paſch* 30 *Eliz*. in C. B. the Queen and the Biſhop of *York*'s caſe. *Leaſe* 126.

3. If Tenant for years or Guardian bring a *Quare impedit*, although that the defendant have a Writ to the Biſhop againſt the Tenant for years or Guardian, and his Clerk be inducted, yet the ſame is no ſuch uſurpation, as ſhall put the tenant of the Free-hold out of the poſſeſſion. 50 *E*. 3. by *Fulthorp*.

4. At the Common Law, if *A* being ſeiſed of an Advowſon, had levied a Fine thereof to *B*. and his heirs, and afterwards the Church had become void; and *A*. had preſented by uſurpation his Clerk unto the Ordinary, who had been admitted, inſtituted and inducted: this ſhould have put the Parſon out of poſſeſſion. And ſo it was, if *A*. had recovered againſt *B*. in a Writ of Right of Advowſon, and had had final judgement, and afterwards the Incumbent had died, and *B*. by preſentation had preſented his Clerk to the Church, who had been admitted and inſtituted, and afterwards *B*. had died; this ſhould have put *A* out of poſſeſſion, and the heir of *B*. ſhould not have been bounden by the Judgement either in bloud or eſtate, but that he ſhould have preſented. And the reaſon of both the ſaid Caſes was, Becauſe that every preſentation did put the rightful Patron out of poſſeſſion; and therefore although that in both the ſaid Caſes the Uſurpation was before execution; yet the rightful Patron was put out of poſſeſſion, and the uſurper had gained the inheritance of the Advowſon thereby, and the preſentment of the rightful Patron *pro hac vice* loſt for ever. See 44 *E*. 3. *quare imp*. 179. *Co*. 1 par. Inſtit. 279.

5. At the Common Law, if an Uſurpation had been made upon an Infant Patron of the Church, or a *feme covert*, they had been put out of poſſeſſion, and had been put to their Writs of Right of Advowſon: the reaſon thereof was, becauſe the Incum-

Incumbent came in by Judicial act of the Ordinary; and it was preſumed, that the Ordinary would not have done any act, or aſſented to any wrong to be done to the patronage of the Church. B. If one had uſurped upon the poſſeſſion of the King, this at the Common Law ſhould not have put the King out of poſſeſſion of his Advowſon, though the Clerk had been inſtituted and inducted; becauſe by prerogative, *Nullum tempus occurrit Regi*; but the King might have recovered by *quare impedit*, for that he was not bound by the Plenarty. See *Cok.* 6 par. in *Boſwels* caſe. See 35 *H.* 6. accordingly.

6. *Note.* It was holden by the Juſtices, that by two uſurpations the King might be put out of poſſeſſion of his Advowſon, and put to his Writ of Right; and that a grant after two uſurpations upon the King, made by him of his Advowſon, ſhould be void. *Paſch.* 25 *Eliz.* in C. B adjudged. *Hill.* 13 *Jac* in C. B. adjudged accordingly. See 47 E 3, 4. accordingly. See *Cok.* 6 par. 29, 30. *Greens* caſe.

7. If the King hath an Advowſon in the right of his Ward, and a ſtranger uſurps, and his Clerk is in by ſix months before the King brings his *quare impedit*, yet this Plenarty ſhall be no good bar againſt the King: the reaſon is, becauſe the King ſhall be otherwiſe without remedy; for a Writ of Right of Advowſon he cannot have, having an eſtate in the Advowſon but as Guardian, and therefore *Nullum tempus occurrit Regi*; yet in that caſe the King ſhall not put out the Incumbent admitted without a *quare impedit*, for that ſo it is provided by the Statute of 13 *R.* 2. cap. 1. See *Stamf.* 31, 32. accordingly. But if the King hath title to preſent by reaſon of lapſe, and the Patron doth uſurp, and doth preſent his Clerk, who is admitted, inſtituted and inducted, and then dies, the King hath loſt his preſentation, and ſhall not have the ſecond preſentation by his prerogative; for there *Tempus occurrit Regi*, and the Kings intereſt was ſpecially limited, for ſix months was the ſubſtance of his title. *Cok.* 7 part, *Rutervils* caſe.

8. If an Uſurper preſent unto a Church in time of War, and the inſtitution and induction of the Clerk (which are but executions of the preſentment) be in time of peace; yet the ſame ſhall not hold good, but ſhall be avoided by the rightful Patron; becauſe the Law looks back unto the original act, which was the preſentation; for, *Cauſa & origo eſt materia negotii.* See 6 *E.* 3. 44. *Cok.* 1 par. 99 in *Shelleys* caſe. *Cok.* 2 par. 93. in *Bagshaws* caſe accordingly.

9. *Note:* It was reſolved, That if a common perſon uſurp upon the King, and his Clerk is admitted, inſtituted and inducted, the King is put to his *quare impedit*, and cannot preſent until the Incumbent be removed. But in ſuch caſe the common perſon doth not gain by his uſurpation the inheritance of the Advowſon out of the King, becauſe the ſame is permanent in him; but as to the preſent act, the King is put out of poſſeſſion, for that is tranſitory; and he cannot remove the Incumbent but by a *quare impedit.* See *Cok.* 6 par. in *Greens* caſe. 18 *Eliz. Dyer* 351. accordingly.

10. *A.* ſeiſed of the Mannor of *B* to which an Advowſon was appendant, preſented *C.* and afterwards died ſeiſed, having iſſue three daughters, *viz. M.* married to the Earl of *Eſſex*, and *Anne* married to the Lord *Mountjoy*. The Mannor of *B.* upon partition was allotted to the Earl of *Eſſex*, and *M.* his wife, for her part, who both died having iſſue *E.* who took to husband the Earl of *Northampton*. Afterwards, 33 *H.* 8. Fine was levied of the ſaid Mannor, with a render to the Marqueſs for his life, the remainder to *E.* his wife in tail, the remainder to King *Hen.* 8. in Fee. The Marqueſs was attainted of Treaſon; *E.* died without iſſue, the Church voided, and the Queen preſented. The defendent did confeſs the ſeiſin of *A.* and the whole matter in the Count till the Attainder; and pleaded, that after the Attainder the Queen, to whom the Mannor was come, Leaſed the Mannor with the Advowſon to *I. S.* and *I. R.* for 40 years, if the Marqueſs ſhould ſo long live in their poſſeſſion: the Church did become void, and one *I. N.* did preſent the defendant, who upon his preſentment was inſtituted and inducted: upon which the Queen did demur in Law. In this caſe it was adjudged againſt the Queen; and the reaſon of the Judgement was, for that here is not onely a bare preſentation pleaded againſt the Queen, but alſo an eſtate, *viz.* a Leaſe for years, in this Advowſon, derived from Queen *Mary*; and that the Avoidance upon which the Action is brought, falleth within the ſaid term, ſo as the Queen who is plaintiff is encountred with a Leaſe of the Anceſtor, againſt which ſhe cannot make title to preſent, without ſpecial matter. *Mich.* 29 *Eliz.* in C. B. the Queen and *Middletons* caſe. *Leon* 45, 46.

11. If a man be ſeiſed of an Advowſon in Fee, and grants three Avoidances unto one man, one after the other, and the Church becomes void, and the Grantor himſelf preſents his Clerk, who is admitted, inſtituted and inducted; and afterwards the Church doth become void again, the Grantee ſhall preſent to the ſecond Avoidance, for that he was not put out of poſſeſſion by the firſt preſentment, for the Grantee had the Frank-tenement and Fee of the Advowſon in him, ſo as he could not make any uſurpation to gain any eſtate to put the Grantee out of poſſeſſion; and alſo in reſpect,

reſpect of the privity of contract betwixt the Grantor and the Grantee, the uſurpation of the Grantor doth not put the Grantee out of the two laſt avoidances. *Cap.* 1 par. Inſtit. 249.

12. Two Coparceners be of an Advowſon; they make compoſition to preſent by turns, and one of them uſurps in the turn of the other: this uſurpation doth not put the other out of poſſeſſion, becauſe they claim both by one title. 12 *H.* 8. 1. in *Kelway.* 22 *E.* 4. 4. So it is if two Joyntenants be of an Advowſon, and the one preſents his Clerk, who is inſtituted and inducted, this doth not put the other out of poſſeſſion: but if the Joyntenant who preſented dieth, his preſentation ſhall ſerve for a Title in a *quare impedit* brought by the ſurvivor. See 35 *H.* 8. *Br.* 370. 17 *E.* 3. 37. 15 *E* 3. *Darrein preſentment* 11. accordingly.

13. If an Advowſon be granted to one for life, the remainder to another in Fee, and the tenant for life dieth, and afterwards a ſtranger uſurps, and ſix months paſs; in this caſe he in the remainder was without remedy by the Common Law, for that he could not have a Writ of Right of Advowſon: for that Writ was not maintainable but of his own poſſeſſion, or of his Anceſtors: and an Aſſiſe of *Darrein preſentment* he could not have, becauſe the ſix months were paſt: and ſo although he had the right of the Advowſon in him, yet this uſurpation ſhould have bounden him, and gained the poſſeſſion from him, for that he had not any Action for the recovery of his right. See 18. 4. 3. by *Skreen.* 22 *H.* 6. 26. accordingly.

14. If Tenant for life of a Manor to which an Advowſon is appendant, had ſuffered an uſurpation, and the tenant for life had died; he in the remainder at the Common Law, had no remedy for this uſurpation: and although the words of the Statute of *Weſtm.* 2. *cap.* 5. are, *Habeant eandem Aſſiſam & recuperationem per Breve de advocatione poſſeſſorium, quam haberet ultimus anteceſſor*; yet it is conceived that at this day they ſhall be aided by this Statute of *Weſtm.* 2. notwithſtanding the uſurpation was upon tenant for life. For ſee 7 *E.* 2. *Statham, quare impedit* 31. A Purchaſor was received in an Aſſiſe of *Darrein preſentment*, to avoid an uſurpation had upon tenant in Dower. See 17 *E.* 3. 19. It is admitted for Law, That if tenant for life ſuffereth an uſurpation, he in the Reverſion ſhall avoid it after the death of tenant for life. 45 *E.* 3. by *Finchden.* If a ſtranger uſurp upon my tenant for life, and afterwards the tenant confirms his eſtate in Fee, and the ſtranger doth preſent two or three times, and tenant for life dieth, and the Church void, I ſhall preſent; and upon any diſturbance, I ſhall have a *quare impedit.* For the Statute of *Weſtm.* 2. being made for to ſuppreſs wrong doing, ſhall be taken largely. And ſo it was adjudged in the Court of Common Pleas, where the caſe was, That a Prior did grant the next Avoidance, and the Grantee ſuffered an uſurpation; and it was adjudged that the Prior himſelf might have been aided by the Statute of *Weſtm.* 2. *cap.* 5. and had a *quare impedit*: and ſo was the Law there taken for every Leſſor, upon an uſurpation upon his Leſſee. *Paſch* 14 *Jac.* in C. B. The Lord *Stanhope*, and the Biſhop of *Lincoln*, and *Williams* caſe. *Hob.* 137 to 144.

15 Errour was brought of Judgement given in the Common Pleas in a *quare impedit*; the Queſtion being, Whether a double uſurpation ſhould put the King out of poſſeſſion, and put him to a Writ of Right of Advowſon. And it was there adjudged, That the King was put to his Writ of Right, and could not maintain a *quare impedit.* But it was reſolved, That the King might well maintain a *quare impedit*; for the King hath ſuch priviledge, that he cannot by any act be put out of his Inheritance, unleſs by his own Patent. And *Mich.* 38 *Eliz. Haſſets* caſe was avouched, where it was reſolved, That two or three uſurpations upon the King doth not gain ſuch a poſſeſſion againſt him, but that the Advowſon remains always in him, which he may grant, and upon avoidance may preſent thereunto, and maintain a *Quare impedit* upon diſturbance. And ſo the Judgement given in the Common Pleas was reverſed, *Mich.* 2 *Jac.* in BR. the King and *Champion* caſe. *Cro.* 2 par. 123.

16. In a *quare impedit* brought, theſe Points were reſolved by the Court: 1. When one uſurps upon a Leaſe for years, that this uſurpation gains the Fee, and puts the very Patron out of poſſeſſion. And although by the Statute of *Weſtm.* 2. *cap.* 5. he in the reverſion after the Leaſe may have a *quare impedit* when the Church is void, or may preſent; and if he preſent, & his Clerk is inducted, that then he is remitted: yet till it be recovered, or his Clerk be in, the uſurper hath the Fee, and againſt him lieth the Writ of Right. 2. When the King preſents one by lapſe, not having any title of lapſe, and a Recovery is had againſt him in a *quare impedit*, by one which had no title; that this doth not gain the Patronage, and yet he is Incumbent as to Eccleſiaſtical matters, *viz.* to have Offerings, Tythes, *&c.* but as to the rightful Patron of it, no gaining of the Patronage. 3. When one having good title to preſent, & an Incumbent by uſurpation is admitted, inſtituted and inducted; and after that the Patron preſents, and the Biſhop refuſeth; and after the Patron recovers, and then he which had the preſentation exhibits it to the Biſhop; this is now a good preſentation, and the Patron cannot revoke, or give him a new preſentation: but if the

the Patron before the death of the Incumbent make Letters of preſentation, that is void, becauſe he had no title to preſent. *Mich.* 20 *Jac.* in C.B. *Rudd* and the Biſhop of *Lincolns* caſe. *Hutton* 66.

17. *Note:* It was reſolved by the whole Court, That if a Biſhop ſuffereth an uſurpation, and dieth, the ſucceſſor may have a *quare impedit*, or preſent to the next turn, by the Statute of 5 *Eliz.* And ſo it is if a Biſhop purchaſe of an Advowſon, and ſuffers an uſurpation, & dies; the ſucceſſor ſhall have and maintain a *Quare impedit*. *Mich.* 21 *Jac.* in C.B. *Dalton* and *Pamplins* caſe. *Leon* 80, 81.

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4 *What Remedy the Patron hath for the recovery of his Advowſon or Preſentment, upon an Uſurpation had thereof.*

1. THe Writs which the Law hath given to the Patron for the recovery of his Advowſon or Preſentment upon uſurpation or otherwiſe, are, *A writ of Right of Advowſon*, *A Writ of Darrein preſentment*, or *A quare impedit*.

2. The Writ of *Right of Advowſon* lieth onely for him who hath a Fee-ſimple in the Patronage, and doth not lie for him that hath but an eſtate in tail, or any other inferiour or particular eſtate. For if a man have an Advowſon to him and the heirs males of his body, and for default of ſuch iſſue, the remainder to him and his heirs; if an uſurpation be had upon him, he ſhall not have a Writ of *Right of Advowſon*, and recover the Fee-ſimple. That appeareth by the Book of 4 *E.* 3. 48. *by Willy*, where ſuch a tenant in tail brought a Writ of *Right*, and recovered but an eſtate tail. But yet ſuch a tenant in tail may have an *Aſſiſe of Darrein preſentment*, or a *quare impedit*, at his election. And in a Writ of *Right of Advowſon*, a man muſt Count, either of his own poſſeſſion of the Advowſon, or of the poſſeſſion of one of his Anceſtors: for if a man purchaſeth an Advowſon to him & his heirs, and afterwards the Church becomes void, and then a ſtranger who hath no right preſents to the Avoidance, and his Clerk be inſtituted and inducted, and afterwards the Church becomes void again; there the Parſon by this uſurpation is put out of poſſeſſion of the Church, and cannot maintain a Writ of *Right of Advowſon*, becauſe therein he cannot count of his own poſſeſſion, or of the poſſeſſion of any of his anceſtors. 21 *E.* 4. 1. 22 *E.* 4. 9. *Cok.* 1 par. Inſtit. 336, and 365. accordingly.

Note: There is a difference in the form and frame of the Writ of *Right of Advowſon*: for there is *Advocatio medietatis Eccleſiæ*, and *Medietas Advocationis Eccleſiæ*. *Advocatio medietatis Eccleſiæ* is, where there be two Patrons of one Church, and every of them hath a right to preſent a ſeveral Incumbent, one to one moyety of the Church, and the other to the other moyety. If in ſuch caſe an uſurpation be had upon any one of them, or if one of them be diſturbed in his preſentment, he ſhall have his Writ *de Advocatione medietatis Eccleſiæ*, or his *Quare impedit preſentare ad medietatem Eccleſiæ*. But *Medietas Advocationis Eccleſiæ* is, where two Coparceners be of one Advowſon, and they make compoſition to preſent by turns; here each of them in truth hath a right but unto the moyety of the Church, for that there is to be but one Incumbent of the time; and if one of them be to bring a Writ of Right upon any uſurpation, the Writ muſt be *de Medietate Advocationis Eccleſiæ*: but if any of the ſaid Coparceners be diſturbed in her preſentment, ſhe may bring a *Quare impedit præſentare ad Eccleſiam*, for that that Writ is not grounded upon the right of the Patronage. 36 *H.* 6. 12. and 36. *Cok.* 5 par. 102. in *Wiſors* caſe.

4. A man cannot have a *Quare impedit de advocatione medietatis Eccleſiæ*, or *de medietate advocationis Eccleſiæ*: and therefore if two have an Advowſon in common, or joyntly, and one preſents, the other hath no remedy, becauſe the preſentment is but a perſonal thing, which is entire. And if two Patrons make a conſolidation or union of two Churches, if one of them be diſturbed, he muſt have a *Quare impedit præſentare ad Eccleſiam*, and not *ad advocationem medietatis*, or *ad medietatem advocationis Eccleſiæ*. See 33 *H.* 6. 12. & 36. by *Priſot*. And ſo, if there be two Patrons of two Churches adjoyning, and the Incumbent of one Patron demandeth Tythe in the Spiritual Court, againſt the Incumbent of the other; and the one of the Patrons ſueth a Writ of *Indicavit*, to ſtop his proceedings againſt the other, becauſe the right of the Patronage cometh in queſtion: in ſuch caſe, the Patron of the Clerk prohibited by the Writ of *Indicavit*, may have a Writ *de Recto advocationis Decimarum*, in this form: *Præcipe A. quod reddat B. advocationem Decimarum, tertiæ vel quartæ partis unius carucatæ terræ, &c.* See 38 *H.* 6. *Br. droit de Recto* 8. *Cok.* 2 par. Inſtit. 364. accordingly.

5. *Aſſiſa ultimæ preſentationis*, and *Quare impedit*, are Writs grounded upon the poſſeſſion, which the Patron upon an uſurpation had upon his own poſſeſſion or his anceſtors, or upon a ſpecial diſturbance, may have and maintain, and thereby recover the preſentment, and remove the Incumbent. Yet there is a difference between the Writs of *Darrein preſentment* and *Quare impedit*: For,

1. Where-

3. Where a man may have an Aſſiſe of *Darr in preſentment*, there he may have a *Quare impedit*; but not *è contra*. 2. A man may have a *Quare impedit* without alleadging any preſentment in a perſon certain: but a man cannot have an Aſſiſe of *Darr. preſentment*, but therein he muſt alleadge the preſentment in a perſon certain. See 20 *E* 3. *Fitz. Darr. preſent.* 13. accordingly 3. Leſſee for years, Guardian, or tenant at will, may have a *Quare impedit*; but they cannot have or maintain a *Darrein preſentment*, becauſe that no perſon can maintain an Aſſize, but he that hath a Free-hold. 5 *H* 7. 14. by *Fauſax.* 50 *E.* 3. 14 by *Holt.* 4. If the husband be ſeized of an Advowſon in the wives right, he may have a *Quare impedit* in his own name, without naming the wife in the Writ; for that the diſturbance is perſonal, which falls in damage to the husband: but he cannot have an Aſſize of *Darrein preſentment* wherein the Advowſon is to be recovered, but the wife muſt be joyned and named in the Writ.

6. *Quare impedit* is a Writ poſſeſſory, and muſt be brought againſt the Patron, Ordinary, and Incumbent: for if it be brought againſt the Ordinary and Incumbent onely, without naming the Patron in the Writ, the Writ ſhall abate. *Cok.* 7 par. 26. in *Halls* caſe. But yet it ſtands upon this difference, *viz.* If the Inheritance of the Patron in the patronage be to be deveſted by the judgment to be given in the *Quare impedit*, then the Patron is to be named in the Writ: but where the Inheritance is not to be recovered by the Judgment, but the preſentment onely to be recovered; there it is not neceſſary that the Patron be named in the Writ. See 7 *H.* 4. 25. 13 *H.* 8. 13. *Cok.* 7 part. *Halls* caſe accordingly.

7. If *A.* hath the nomination to a Church, and a Biſhop the preſentation, and the temporalities of the Biſhop come to the King, and afterwards the King doth preſent without the nomination of *A.* and his Clerk be inducted, the *Quare impedit* muſt be brought againſt the Biſhop and the Incumbent onely, becauſe the King cannot be a diſturber; and the Writ will not lie againſt him, becauſe he can do no wrong: but the Biſhop muſt be named in the Writ, for that the Incumbent could not come into the poſſeſſion of the Church, but by the admiſſion of the Biſhop; and the Biſhop may be a ſpecial diſturber. And therefore it is ſaid, that it is good policie upon every preſentation by uſurpation, or other diſturbance, to bring a *Quare impedit* as ſpeedily as may be, and to name the Biſhop in the Writ; for then he ſhall not collate for lapſe, if the Church void during the ſix months: neither ſhall the Metropolitan, if the time be come to him, collate for the ſame lapſe, for that it is a Rule in Law, That the Metropolitan ſhall never collate for lapſe, but when the immediate Ordinary might have collated for lapſe, and hath forceaſed his time; and in ſuch caſe the Ordinary cannot collate, becauſe he is made a party to the Writ. *Mich.* 3 *Jac.* in *Lancaſter* and *Lowes* caſe adjudged accordingly. See *Cok.* 1 par. Inſtit. 344. See 38 *H.* 8 *Dyer* 48.

8. If two Tenants in common, or Coparceners, be of an Advowſon, and a ſtranger uſurps, ſo as their right is turned into Action, and they bring a *Quare impedit*, and ſix months paſs, and then one of the plaintiffs dieth; the Writ ſhall not abate, but the ſurvivor ſhall recover; otherwiſe there would be no remedy to redreſs this wrongful uſurpation: but in ſuch caſe, they muſt joyn in the firſt Writ; for if the Writ be brought by one of them, the Writ ſhall abate. 10 *Eliz. Dyer* 274. *Cok.* 1 par. Inſtit. 198. *Fitz.* 35. accordingly. But if a *Quare impedit* be brought againſt the Patron and the Incumbent, and pendant the Writ the Patron dieth, there the Writ ſhall not abate. *Cok.* 7 par. *Halls* caſe.

9. The Biſhop of *Coventry* and *Lichfield* was Patron of two Prebends, and granted the next Avoidance *alterius eorum primo vacant.* which was confirmed by the Dean and Chapter: the Biſhop died, and one of the Prebends voided, and the ſucceſſour of the Biſhop preſented; and afterwards the Grantee brought a *Quare impedit* within ſix months; and two years after, the iſſue was found for the plaintiff, and the Biſhop died, and yet the plaintiff had his Judgement, and had a Writ to the Biſhop to remove the Incumbent preſented by the ſucceſſor of the firſt Biſhop. 3 *Eliz. Dyer* 194.

More, Parſon, Vicar, and Patron.

Where they may Unite or Appropriate, where not.

1 A Parſon or a Vicar of a Church becauſe he is ſeized in the right of his Church, for the benefit of his Church and ſucceſſor, in ſome caſes ſhall be eſteemed to have a Fee ſimple qualified: but to do any thing

thing to the prejudice of his ſucceſſour, the Law in many caſes adjudgeth him to have but an eſtate for life. And it is a Rule in Law, *Meliorem facere poteſt conditionem Eccleſiæ, deteriorem nequaquam.* Cook. 1 par. Inſtit. 342.

2. In debt upon Obligation which was conditioned, That whereas the Plaintiff intended to preſent the Defendant to ſuch a Benefice, that if the Defendant at any time after his admiſſion, inſtitution and induction, at the Plaintiffs requeſt, reſigned the ſaid Church to the hands of the Biſhop of *London*, that then, *&c.* It was ſaid on the part of the Defendant, That this Condition to reſigne to the Patron upon requeſt, was Symony, and ſo the Bond void in Law. It was the opinion of the Court, That if the Plaintiff had acknowledged, that the Obligation was made to bind him to pay ſuch a ſum of money, or to make a Leaſe or other act, which appears in it ſelf to be Symony, then upon ſuch a plea peradventure, it might have appeared to the Court to have been Symony, and ſo the Bond voi'd: But as it is pleaded by way of Demur, upon the Oyer of the Condition, it doth not appear that there is any Symony; for a Bond to cauſe him for to reſigne, may be good, and required by the Patron upon good diſcretion. *Hill.* 5 *Car.* in B. R. *Babington* and *Woods* Caſe. *Cro.* 1 par. 129.

3. Errour to reverſe a Judgement in C.B. the Caſe was, Parſon, Patron and Ordinary, before 13 *Eliz.* made a Leaſe for ninety nine years, there being a Grant of the next avoidance before this Leaſe. Afterwards the Parſon who made the Leaſe, died; the Grantee of the next avoidance preſented another, who being admitted and inducted, avoided this Leaſe during his time, and afterwards died: the Patron who joyned in the Leaſe for years, preſented a new Incumbent, who was admitted, inſtituted and inducted; whether he ſhould hold it diſcharged of the Leaſe for years as his predeceſſor did, was the Queſtion; it was adjudged, that he ſhould, for that the Leaſe was utterly avoided by the entry of the ſecond Incumbent, and not void for his time onely: and the reaſon was, becauſe the Parſon hath the entire Fee as a Parſon may have of a Rectory Preſentative: and when he is in, and hath evicted the Leſſee, it is an abſolute eviction of the entire term; and it is not onely an eviction for himſelf, but for his ſucceſſour. *Mich.* 14 *Car.* in B. R *Cro.* 1 par. 420. *Plowden* and *Oldfields* caſe.

3. In Treſpaſs for taking of 200 Loads of Woad, it was found by the Jury, that if they were *Minutæ Decimæ*, then they found for the Plaintiff; if otherwiſe, for the Defendant: It was ſaid for the Plaintiff, That without more circumſtances it ſhall not be intended that they were *Minutæ Decimæ*; for it may be a great quantity of Woad may be ſowen, and the greateſt part of the commodity of the Parith might conſiſt of it; for *Decimæ Minutæ* are but of ſmall conſideration in a Pariſh, as the tythe of herbs in a Garden, and ſuch like; and therefore Woad ſowed in a Field, is not *Decimæ Minutæ*. But it was reſolved by the whole Court, That Woad growing in the nature of an herb, the tythe thereof ought to be accounted *Decimæ Minutæ*, and belonging to the Vicar; and *Paſch.* 42 *Eliz.* was vouched to prove it: where the tythe of forty Acres of Lands ſowed with Saffron, did belong to the Vicar, and not to the Parſon, as was adjudged, becauſe they were *Minutæ Decimæ*. *Hil.* 1 *Car.* in C. B. *Udal* and the Vicar of *Altoncaſe*. *Hutton* 77.

4. A Prohibition was prayed to the ſpiritual Court, for that *I. S.* Parſon, being convicted of Homicide, and allowed his Clergy, was ſued in the ſpiritual Court by Libel, that whereas he was convicted of Homicide, it ſhould be a cauſe to deprive him of his Benefice. But it was reſolved, That no Prohibition ought to be granted: for although the Statute of 18 *Eliz.* ordains, that after Clergy the party ſhall be ſet at liberty, and ſhall not be put to his Purgation; yet that doth not diſ-affirm the Judgment, but the rather affirm it: and it was ſaid to be a Rule, Not to grant a Prohibition where the proceedings of the Eccleſiaſtical Court are not againſt the Law of the Land, nor the liberty of the Subject. *Tr.* 15 *Jac.* in B. R. *Searles* caſe. *Cro.* 2 par. 430.

5. If a meer Lay-man, or a man utterly illiterate, be preſented to a Benefice, and be inſtituted and inducted; this is not a meer Nullity, but he is Parſon *de facto*; for he hath all the Ceremonies to make him a Parſon; and his inſufficiency muſt receive examination. And yet although a Lay-man be a Parſon *de facto*, yet no diſpenſation can make him a lawful Parſon not ſubject to deprivation, becauſe it is *malum in ſe*, even as a man may get Land by diſſeiſin *de facto*, but no licence can make it lawful. 13 *Eliz.* *Dyer* 292. *Hut.* 149. accordingly.

6. It hath been a Queſtion, If an Union may be made of one Chappel or Church to another Church or Chappel by the Parſon, Patron and Ordinary, without the Kings licence or conſent: it hath been the opinion of divers, that it may well be, for that the Union is the act of the Ordinary: for, *unio eſt actus ſpiritualis*; and *Manus Epiſcopale eſt unire, quia tota Dioceſis eſt Cura Epiſcopi*; and the licence of the King is not ſo neceſſary in caſe of Union as in caſe of appropriation; and in caſes of Union, the licence of the King is not pleaded, but it is onely ſaid, That the Union was made by the Patron and Ordinary *concurrentibus his qui in Lege re-*

requisitum, and see 9 *Eliz. Dyer* 259. The Parish-Churches of *Ilesfield* and St. *Maties* in the County of *Southampton*, were united by the Ordinaries, by the consent of the Patrons, but it doth not appear that there was any licence of the King. 9 *Eliz. Dyer* 259.

7. *Note*, That by the Statute of 37 *H.* 8. *cap.* 21. it is enacted, That whereas there be many poor Parishes within one mile of another, the Tythes and Revenues whereof are not sufficient to maintain the Curate, and for the maintenance of the Reparations, Ornaments and Duties belonging to the Church, That an Union or Consolidation of two such Churches may be made one by the consent of the Ordinaries, and lawful Patrons and Incumbents. In that Statute there is no mention made of the licence of the King to be had, or that the Union must be with his consent; which if it were requisite, the Makers of the Law would not have omitted; and the King doth not lose any thing by such Union, for that all Tenths and first-fruits of Churches or Chappels united according to that Statute, are thereby saved & reserved to the Crown. And it was a Question of late years, *viz. Tr.* 9 *Car.* in C. B. Doctor *Rawlins* and Sir *Henry Yaxley's* case, for the Church of *Bowthorp* in *Norfolk*. Whether by the said Statute of 37 *H.* 8. a Parochial Church might be united to a Church Collegial, and whether the same might be by the Parson, Patron and Ordinary, without the Kings licence; but the case was not resolved. And see 21 *H.* 7. 9. that after an Union made, the King granted his pardon, which was holden a Subsequent assent, and sufficient to make an Union good: and so it was adjudged, That the confirmation by the Kings Letters patent of an Union made by the Parsons, Patrons and Ordinaries of the Parish-Church of *Ashe*, unto the Deanery of *N.* after the Union made, was sufficient. *Tr.* 37 *Eliz.* in C. B. *Austin* and *Twyses* case. But an appropriation of an Advowson cannot be made by the Parson, Patron and Ordinary, or by their consents, without the Kings licence first obtained, for that every Appropriation is a Mortmain, and the Patronage of the Advowson is thereby lost and extinguished. See 25 *H.* 8. *c.* 19. 8 *H.* 4. 15. 21 *H.* 7. 9 accordingly. See *Cook.* 11 par. in *Pridie* and *Nappers* case accordingly.

See more of Parson, Vicar, Patron, *in Lib.* 1. *in the Title of* Advowsons, *and after in Titles* Quare impedit, *and* Presentation.

Partition and Parceners.

1 *What and where partition of Lands*, &c. *is good, what and where not: where between Joynt-Tenants, Parceners, Tenants in common, Leases for life or years, are good, where not: how made by Writ; and what persons were compellable to make partition by the common Law, what by the Statute: where if unequal made by the Sheriff, what remedy for the party.*

1. A Man seised of Lands in Fee, devised them to his two Sons and their heirs, and they made partition by Word: It was the opinion of the whole Court, That the Sons were Joyntenants, and not Tenants in common; and that the partition of the Lands being in case of inheritance by Word, was not good. *Mich.* 29 *Eliz.* in *C. B. Goldesb.* 18. See 18 *Eliz. Dyer* 350. A man devised his Lands to his two Daughters in tail, they make partition by Word, and the one of them died: It was the opinion of the Court, That the Survivor should have the whole Land.

2. Of things which lie in grant, as of Rent, Commons, Advowsons, partition may be made by Parceners by Word without Deed: but Joyntenants or Tenants in common cannot make partition without Deed; but Tenants in common may make partition of Lands by Word, if it be executed by Livery. *Cook.* 1 par. Instit. 168.

3. Two Joynts are with warranty, and partition was made between in a Writ *de Partitione facienda*, by force of the Statute of 31 *H.* 8. *cap.* 1. It was resolved in that case, That the warranty did remain, because by Writ they are compellable by the Statute (to which every one is a party) to make partition, and the party hath pursued his remedy according to the Act: but if they had made partition by Deed, by consent after the said Act, although they were compellable by Writ to make partition, yet for as much as they have not pursued the Statute to make partition by Writ, in such case such partition doth remain at the common Law, and by consequence the warranty is gone. *Pasch.* 27 *Eliz.* in *C. B. Cook.* 6 par. *Morrices* Case.

4. If the Queen grant to three Coparceners of three Mannors the liberty of Warren in all the ſaid three Mannors, and afterwards they make partition, ſo as each of them hath a Mannor, and the one of them grants her Mannor, the other ſhall have VVarren. But if the Queen grant a Leet, *(ut ſupra)* and the Coparceners make partition, and each of them hath a Mannor, ſhe ſhall not have alſo a Leet; but the Leet which was granted doth remian in common, and there ſhall not be there upon ſuch partition, three Leets. Alſo if two Coparceners be of a Mannor, if to each of them upon partition be allotted demeans and ſervices, each of them hath a Mannor; for they were compellable to make partition by the common Law, being in by deſcent. 26 *H.* 8. 4. But contrary of Joyntenants, for they are in by purchaſe, and were not compellable by the common Law to make partition; and therefore upon a partition betwixt them, a Rent cannot be reſerved for equality of partition. *Paſch.* 27 *Eliz.* in C. B. *Maſſy and Smiths* Caſe. *Leon* 26.

5. In Treſpaſs the caſe was, That two were Tenants in common of a Houſe, and of a Cloſe adjoining to the Houſe, and they being in the Houſe, make partition without Deed of the Houſe and Cloſe. It was objected, That 2 *E.* 4. 9 and 10. is, That partition without Deed upon the Land is good enough, and partition upon the Lands amounts to a Livery. It was the opinion of the Court in this caſe, That partition by Tenants in common without Deed, whereſoever it is made, is good: but in this caſe it appears, that the parties who made the partition were in the Houſe, (for they were Tenants in common of the Meſſuage and Cloſe adjoyning) and made partition that one ſhould have the Houſe, and the other the Cloſe, ſo as they were not upon the Cloſe when they made the partition, and then it was void for the Cloſe; and if it was ſo for the Cloſe, then alſo for the Houſe. *Paſch.* 30 *Eliz.* in B. R. *Dollon* and *Preiſts* Caſe. *Leon* 103.

6. Errour brought upon a Judgement given in a VVrit *de Partitione facienda*, two Errours were aſſigned: 1. That the party doth not ſhew in his VVrit, nor in his Declaration, upon what Statute he grounds his Action; and there are two Statutes, viz. 31 *H.* 8. *cap.* 1. and 32 *H.* 8. *cap.* 32. and he grounds his Action upon one of the Statutes. 2. Errour was, that the Declaration doth ſhew, *quod tenet pro indiviſo*, and doth not ſhew what eſtate they held *pro indiviſo*; and the one Statute, viz. 31 *H.* 8. gives partition of the eſtate of inheritance, and 32. *H.* 8. gives partition of eſtate for life or years; and it was ſaid, That the party ought to ſhew that he is ſeiſed of ſuch an eſtate, of which by the Statute he may have a VVrit of Partition; for that in many caſes there ſhall be Joyntenants, & yet the one ſhall not have a Writ of Partition againſt the other. As if a Statute-Merchant be acknowledged to two, and they ſue forth Execution upon it; in ſuch caſe the one ſhall not have partition againſt the other. So if two Joyntenants be of a Seignory, and the Tenant dieth without Heir, ſo as the Lands eſcheate, they are Joyntenants, and yet partition doth not lie betwixt them by any Statute. It was the better opinion of the Court, 1. That he ought to ſhew upon what Statute he grounded his Action; and 2. That he ought to have ſhewed of what eſtate they were ſeiſed *pro indiviſo*: and whereas it was objected, That he cannot know the eſtate of the other his Companion, for that he might ſecretly change it; it was anſwered, That he muſt take notice of it at his peril: for if he cannot take knowledge of his eſtate, there cannot be any partition upon any of the Statutes. Quere, for the caſe was not reſolved. *Mich.* 29 *Eliz.* in B. R. *Straſſon* and *Colburns* Caſe. *Goldsbr.* 84. 85.

7. Three Coparceners are, and one of them alieneth all that which belongs to her in Fee; and afterwards one of the other Coparceners brings a VVrit of Partition againſt the other, and the Alienee upon the Statute; and the opinion of the Court was, That becauſe in this caſe ſhe might have a VVrit at the common Law, it was holden that the VVrit ſhould abate: but if the two Coparceners had joyned againſt the Alienee, if one of them had been non ſuit, ſhe ſhould have been ſummoned and ſevered, and her part ſhould be parted and ſevered as well as the two other parts; it was holden in this caſe, that if the Huſband of one of the three Coparceners purchaſeth the part of one of the other, he and his wife ſhould have a joynt VVrit ſpecial at the common Law againſt the other. So if one of the three purchaſe of the other her part, the Purchaſor might have ſuch VVrit againſt the third. *Mich.* 8 *Eliz.* *Dyer* 243.

8. A man made a Leaſe for years to two, provided, that if they die within the term, that the term ſhall ceaſe: the Termors made partition, and afterwards one of them died. It was holden in that caſe, that his Executors ſhould have it, becauſe there was no *Occupant* in that caſe, and it ſhall not ceaſe during the life of his Companion: but if it were a Leaſe for life, it ſhould be determined. *Mich.* 2 *E.* 6. *Dyer* 97. See *Cook* 4 par. 73. in *Barrough's* Caſe accordingly.

9. In partition the caſe was, *A.* and *B.* were Joyntenants for years: *B.* ſuffered *C.* to occupy his Moyety with him. *A.* brings a VVrit of Partition againſt *B.* and *C.* ſuppoſing that *B.* had granted

a Moyety of his part to *C.* *C.* ſhews that he was but Tenant at Will to *B.* whereby the VVrit abated: and then it was a Queſtion, if *A.* might have another VVrit of Partition againſt *B.* by *Journey*'s accompt, it was reſolved that he might; for that the poſſeſſion of *C.* was good colour for bringing the VVrit of Partition, and *A.* could not take notice what eſtate *C.* had, *&c.* *Hill.* 6 *Jac.* in B.R. *Beadle* and *Cloke*'s Caſe. *Cro* 2 par. 218.

10. A VVrit of Partition was brought upon the Statute of 32 *H.*8. and the partition was confeſſed; by which it was awarded, *quod Partitio fiet:* upon which a VVrit was awarded to the Sheriff to make equal partition, who returns the partition made by twelve lawful men: one of the Defendants was grieved with the partition, becauſe it was of ſo little value, and would have avoided the ſame, and had a new VVrit of Partition: It was a Quere, if he ſhould have. *Tr.* 6 *E.*6. *Dyer* 73. and ſee *Dyer* 92. But ſee that this Quere is reſolved now, That if the partition be made without VVrit, if it be unequal, the ſame is avoidable onely by entry: but if it be by VVrit, it is then unavoidable. *Cook.* 1 par. Inſtit. 171.

11. *Note:* If there be two Siſters Coparceners, and they take Husbands, and partition is made by the two Husbands in the life-time of their Wives Coparceners; yet if ſuch partition be unequal, it is not good, but voidable: for if after the deceaſe of the Husband, the VVife cometh into the unequal part, and agreeth thereunto, this ſhall binde her and her heirs for ever. *Cook.* 1 par. Inſtit. 170

12. Partition made by VVrit, ſhall not be defeated, although it be unequal; becauſe the Judgment in the VVrit of partition is, That *a Partition ſhall ſtand firm for ever.* But partition made by VVrit out of the Chancery, directed to the Eſcheator, where one is of full age, and ſues Livery, and the other within age who hath an unequal part allotted to her, ſhall not bind her when ſhe comes of full age: contrary if ſhe have an equal part upon the partition. See 21 *E.*3. 31. 9*H.*6. 6. *Fitz* 256. accordingly.

13. *A.* and *B.* Tenants in common of a Mannor: *A.* purchaſed a Freehold, ſo mixed with the Demeaſns of the Mannor, that it was unknown: *B.* brought a VVrit of partition, and Judgement was given that they ſhould make partition; and to that purpoſe a Writ was directed to the Sheriff. It was holden in that caſe, That *A.* ought to ſhew the bounds of the Frank-tenement ſo purchaſed, and the ſaid *B.* needs not to ſhew the bounds of the Mannor to the Jury: But in ſuch caſe, if evidence be given on no part, if the Jury make partition of ſuch a quantity, it ſufficeth, for that they are compellable to ſerve the Law and the Court, and at the appointed time to deliver in their verdict. *Mich.* 10 *Eliz.* *Dyer* 265. *Cooke* and *Watſons* caſe.

14. In a VVrit of partition, the VVrit was of two parts, without ſaying *In three parts divided:* It was moved that it was Errour: but it was the opinion of the Court, that it was good; and the difference was taken, that if there be but three parts, and two are demanded, that it is good without ſaying *In three parts to be divided:* for when parts are demanded, it is intended all the parts but one, and that it is onely one which remains: and ſo it was ſaid it was adjudged in the *Kings Bench* in *Jordens* caſe: ſee *Thelwell* in his *Digeſt* of Writs, 146. *Mich.* 7 *Jac* in C. B. *Baylie* and Sir *Henry Clerks* caſe. *Brownlow* 2 par. 275.

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2 *Of what things partition may be made by Parceners, &c. and of what not; and how made. Where a Rent granted by one in allowance of Surpluſage, ſhall be good: and where Entre betwixt Coparceners ſhall not be taken away by reaſon of privity of blood.* Et è contra.

1 PArtition may be made betwixt Coparceners of Inheritances which are entire and diviſible: as of a Villain, Advowſon, Rent-charge; and there each of them ſhall have their turns: but of Inheritances entire indiviſible, as of a Corody incertain, Piſcary incertain, Common without number, or other ſuch uncertain profits out of Lands, they cannot be divided between them, but the eldeſt Coparcener ſhall have them, and the others ſhall have contribution from her. But if in ſuch caſe, no other inheritance is left by the Anceſtor out of which there may be a contribution, then the one Coparcener ſhall have the Corody incertain, Piſcary or Common, *&c.* for one time, and the other for another time. See *Cook.* 1 par. Inſtit. 165. 5 *Ma. Dyer* 153. *Mich.* 25 *Eliz.* in the Earl of *Huntingtons* caſe adjudged accordingly.

2. If a Dignity, as an Earldome or a Barony, do deſcend to Coparceners, the poſſeſſions of the ſame ſhall upon partition be divided amongſt Coparceners; but the King may confer the Dignity upon which of them he pleaſeth: but if a man hath but one Daughter, the ſaid Dignity ſhall deſcend to that Daughter. *Sampſon Leonards* caſe.

caſe. *Cook.* 1 par. Inſtit. 161. accordingly. But if an Office of Honour, as the Office of Conſtable of *England*, doth deſcend to two Coparceners, and the one taketh a Husband, the Husband of the eldeſt Siſter ſhall execute the Office onely: but if they are unmarried, they both may joyn and make a Deputy to execute the ſaid Office. See 11 *Eliz. Dyer* 285. *Humfrey de Bohun* caſe. *Cook.* 1 par. Inſtit. 107. accordingly.

3. A Caſtle which is *pro bono publico*, & *pro defenſione Regni*, ſhall not be parted or divided betwixt Coparceners: but a Caſtle which is for private uſe of the Anceſtor, and for his habitation, if the ſame do deſcend to Coparceners, partition may be made of it betwixt them: and if two Coparceners be of Lands with Warranty, and they make partition, the Warranty by the partition is not deſtroyed, but doth remain. 29 *E.* 3. *Grants* 70. accordingly.

4. If an Advowſon be appendant to a Manor which deſcends to divers Coparceners, and the Coparceners make partition of the Manor to which, &c. without ſpeaking of the Advowſon, the Advowſon notwithſtanding the diviſion and ſeverance from the Manor to which, doth remain ſtill appendant, and they ſhall preſent by turns. *Cook.* 8 par. 79. in *Hat wilds* Caſe.

5 If two Coparceners be of an Advowſon, and they agree to preſent by turns; this is a good partition of the Advowſon as to the poſſeſſion: but notwithſtanding that, if they be put out of the Inheritance, they ſhall joyn in a Writ of Right. So a partition made betwixt them, that one ſhall have the Land from *Eaſter* to the firſt day of *Auguſt* in ſeveralty; and that the other ſhall have the ſame from the firſt day of *Auguſt* until *Eaſter*: this is a good partition as to the poſſeſſion, but it is not a ſeverance of the eſtate of inheritance. *Cook.* 1 par. 87. in *Corbets* caſe.

6. *Note:* It was adjudged in the Lord *Mountjoy's* caſe, That of Franchiſes entire, as *de bonis felonum & utlagatorum*, Waifs, Eſtreys, and ſuch like Hereditaments which are caſual, partition cannot be made betwixt Coparceners within the Statute of 32 *H.* 8. And therefore if a man hath three Mannors, and in each of them ſuch Franchiſes, each Mannor being of equal value, he cannot demiſe one Mannor and the Franchiſes which he hath in it. *Paſch.* 25 *Eliz.* in C. B. *Goldesbr.* accordingly.

7. If there be divers Parceners of an Advowſon, the Eldeſt hath the prerogative to make the firſt preſentment; but that is not in reſpect of her perſon, but in reſpect of her eſtate: and ſo if one Coparcener hath a Rent granted to her for owelty of partition, ſhe may diſtrain for the ſame of common right without any words of diſtreſs, and ſo ſhall her Grantee; and the reaſon thereof is, becauſe the Rent is not annexed to her perſon onely, but to her eſtate. See 5 *H.* 5. 10. *Cook.* 3 par. 22. in *Walkers* caſe.

8. One Coparcener granteth a Rent to two other Coparceners for owelty of partition: in that caſe it was reſolved, That although the words are joynt, yet the cauſe of the Grant ſhall be reſpected, and the Rent ſhall be of the quality of the Land; and therefore they ſhall have the Rent in degree and quality of Coparceners and not joyntly. And if two Coparceners do make a Feoffment in Fee, rendring Rent to them and their Heirs, the Heirs of the one and the other ſhall inherit, becauſe their right in the Land is ſeveral. See 15 *H.* 7. 14. 39 *E.* 3. 26. *Cook.* 5 par. 8. in Juſtice *Windhams* caſe.

9. If two Coparceners be, and they make partition of the Lands; if one of the parts be evicted by Eigne Title, ſhe that loſeth her part ſhall enter upon the reſt to have recompence, becauſe the privity which the Law creates betwixt them, doth ſtill remain: but if one of the Coparceners ſells her part, and then the other part which the other Coparcener hath, is evicted; in that caſe the Coparcener who ſo loſeth her part, ſhall not enter upon the Alienee, becauſe that by the Alienation the privity is deſtroyed. *Cook.* 1 par. Inſtit. 173. And therefore if a man hath Lands in Taile, and as much in Fee-ſimple, and hath iſſue two Daughters, and dieth, and the Daughters make partition, ſo as the Entail Lands is allotted to the eldeſt, and the Fee-ſimple to the youngeſt; in this caſe if the youngeſt Daughter alieneth the Fee-ſimple Land to another in Fee, and hath iſſue, and dieth, the iſſue may enter into the entailed Lands, and ſhall hold it with her Aunt; yet ſhall not the eldeſt Daughter enter in the half of the Land in Fee-ſimple upon the Alienee, becauſe that by the Alienation the privity of eſtate was deſtroyed.

10. If a man be ſeiſed of a Carue of Land by juſt title, and diſſeiſeth an Infant within age of another Carue of Land, and hath iſſue two Daughters, and dieth, and the Carue by good title is allotted to the eldeſt, and the other to the youngeſt, who alieneth it to another in Fee, and afterwards the Infant at full age entreth upon the Alienee; in this caſe the youngeſt Daughter hath excluded her ſelf from having any part of the Carue by good title, for that by her Alienation the privity was deſtroyed: But if the youngeſt Daughter before the entry of the eldeſt, had granted it only for years of life or entail, ſaving the Reverſion, then it had been otherwiſe, becauſe the privity was not utterly deſtroyed, ſhe having reſerved the Reverſion to her ſelf in Fee. *Cook.* 1 par. Inſtit. 173.

3. Where

a Moyety of his part to *C.* *C.* ſhews that he was but Tenant at Will to *B.* whereby the Writ abated: and then it was a Queſtion, if *A.* might have another Writ of Partition againſt *B.* by *Fourney*'s accompt, it was reſolved that he might; for that the poſſeſſion of *C.* was good colour for bringing the Writ of Partition, and *A.* could not take notice what eſtate *C.* had, *&c.* *Hill.* 6 *Jac.* in B.R. *Beadle* and *Clerks* Caſe. *Cro.* 2 par. 218.

10. A Writ of Partition was brought upon the Statute of 32 *H.*8. and the partition was confeſſed; by which it was awarded, *quod Partitio fiet:* upon which a Writ was awarded to the Sheriff to make equal partition, who returns the partition made by twelve lawful men: one of the Defendants was grieved with the partition, becauſe it was of ſo little value, and would have avoided the ſame, and had a new Writ of Partition: It was a Quere, if he ſhould have. *Tr.* 6 *E.*6. *Dyer* 73. and ſee *Dyer* 92. But ſee that this Quere is reſolved now, That if the partition be made without Writ, if it be unequal, the ſame is avoidable onely by entry: but if it be by Writ, it is then unavoidable. *Cook.* 1 par. Inſtit. 171.

11. *Note:* If there be two Siſters Coparceners, and they take Husbands, and partition is made by the two Husbands in the life-time of their Wives Coparceners; yet if ſuch partition be unequal, it is not good, but voidable: for if after the deceaſe of the Husband, the Wife cometh into the unequal part, and agreeth thereunto, this ſhall binde her and her heirs for ever. *Cook.* 1 par. Inſtit. 170

12. Partition made by Writ, ſhall not be defeated, although it be unequal; becauſe the Judgment in the Writ of partition is, That *a Partition ſhall ſtand firm for ever.* But partition made by Writ out of the Chancery, directed to the Eſcheator, where one is of full age, and ſues Livery, and the other within age who hath an unequal part allotted to her, ſhall not bind her when ſhe comes of full age: contrary if ſhe have an equal part upon the partition. See 21 *E.*3. 31. 9 *H.*6. 6. *Fitz.* 256. accordingly.

13. *A.* and *B.* Tenants in common of a Mannor: *A.* purchaſed a Freehold, ſo mixed with the Demeaſns of the Mannor, that it was unknown: *B.* brought a Writ of partition, and Judgement was given that they ſhould make partition; and to that purpoſe a Writ was directed to the Sheriff. It was holden in that caſe, That *A.* ought to ſhew the bounds of the Frank-tenement ſo purchaſed, and the ſaid *B.* needs not to ſhew the bounds of the Mannor to the Jury: But in ſuch caſe, if evidence be given on no part, if the Jury make partition of ſuch a quantity, it ſufficeth, for that they are compellable to ſerve the Law and the Court, and at the appointed time to deliver in their verdict. *Mich.* 10 *Eliz.* *Dyer* 265. *Cooke* and *Wrights* caſe.

14. In a Writ of partition, the Writ was of two parts, without ſaying *In three parts divided:* It was moved that it was Errour: but it was the opinion of the Court, that it was good; and the difference was taken, that if there be but three parts, and two are demanded, that it is good without ſaying *In three parts to be divided:* for when parts are demanded, it is intended all the parts but one, and that it is onely one which remains: and ſo it was ſaid it was adjudged in the *Kings Bench* in *Jardens* caſe: ſee *Thelwell* in his *Digeſt* of Writs, 146. *Mich.* 7 *Jac.* in C. B. *Baylie* and Sir *Henry Clerks* caſe. *Brownlow* 2 par. 275.

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2 *Of what things partition may be made by Parceners, &c. and of what not; and how made. Where a Rent granted by one in allowance of Surpluſage, ſhall be good: and where Entre betwixt Coparceners ſhall not be taken away by reaſon of privity of blood.* Et è contra.

1 PArtition may be made betwixt Coparceners of Inheritances which are entire and diviſible: as of a Villain, Advowſon, Rent-charge; and there each of them ſhall have their turns: but of Inheritances entire indiviſible, as of a Corody incertain, Piſcary incertain, Common without number, or other ſuch uncertain profits out of Lands, they cannot be divided between them, but the eldeſt Coparcener ſhall have them, and the others ſhall have contribution from her. But if in ſuch caſe, no other inheritance is left by the Anceſtor out of which there may be a contribution, then the one Coparcener ſhall have the Corody incertain, Piſcary or Common, *&c.* for one time, and the other for another time. See *Cook.* 1 par. Inſtit. 165. 5 *Ma.* *Dyer* 153. *Mich.* 25 *Eliz.* in the Earl of *Huntingtons* caſe adjudged accordingly.

2. If a Dignity, as an Earldome or a Barony, do deſcend to Coparceners, the poſſeſſions of the ſame ſhall upon partition be divided amongſt Coparceners; but the King may confer the Dignity upon which of them he pleaſeth: but if a man hath but one Daughter, the ſaid Dignity ſhall deſcend to that Daughter, *Sampſon Leonards* caſe.

caſe. *Cook.* 1 par. Inſtit. 161. accordingly. But if an Office of Honour, as the Office of Conſtable of *England*, doth deſcend to two Coparceners, and the one taketh a Husband, the Husband of the eldeſt Siſter ſhall execute the Office onely: but if they are unmarried, they both may joyn and make a Deputy to execute the ſaid Office. See 11 *Eliz. Dyer* 285. *Humfrey de Bohun* caſe. *Cook.* 1 par. inſtit. 107. accordingly.

3. A Caſtle which is *pro bono publico*, & *pro defenſione Regni*, ſhall not be parted or divided betwixt Coparceners: but a Caſtle which is for private uſe of the Anceſtor, and for his habitation, if the ſame do deſcend to Coparceners, partition may be made of it betwixt them: and if two Coparceners be of Lands with Warranty, and they make partition, the Warranty by the partition is not deſtroyed, but doth remain. 29 *E.* 3. *Grants* 70. accordingly.

4. If an Advowſon be appendant to a Manor which deſcends to divers Coparceners, and the Coparceners make partition of the Manner to which, &c. without ſpeaking of the Advowſon, the Advowſon notwithſtanding the diviſion and ſeverance from the Manner to which, doth remain ſtill appendant, and they ſhall preſent by turns. *Cook.* 8 par. 79. in *Hill Wolds* Caſe.

5 If two Coparceners be of an Advowſon, and they agree to preſent by turns; this is a good partition of the Advowſon as to the poſſeſſion: but notwithſtanding that, if they be put out of the Inheritance, they ſhall joyn in a Writ of Right. So a partition made betwixt them, that one ſhall have the Land from *Eaſter* to the firſt day of *Auguſt* in ſeveralty; and that the other ſhall have the ſame from the firſt day of *Auguſt* until *Eaſter*: this is a good partition as to the poſſeſſion, but it is not a ſeverance of the eſtate of inheritance. *Cook.* 1 par. 87. in *Corbets* caſe.

6. *Note*: It was adjudged in the Lord *Mountjoy's* caſe, That of Franchiſes entire, as *de bonis felonum & utlagatorum*, Waifs, Eſtreys, and ſuch like Hereditaments which are caſual, partition cannot be made betwixt Coparceners within the Statute of 32 *H.* 8. And therefore if a man hath three Mannors, and in each of them ſuch Franchiſes, each Mannor being of equal value, he cannot demiſe one Mannor and the Franchiſes which he hath in it. *Paſch.* 25 *Eliz.* in C. B. *Goldesbr.* accordingly.

7. If there be divers Parceners of an Advowſon, the Eldeſt hath the prerogative to make the firſt preſentment; but that is not in reſpect of her perſon, but in reſpect of her eſtate: and ſo if one Coparcener hath a Rent granted to her for owelty of partition, ſhe may diſtrain for the ſame of common right without any words of diſtreſs, and ſo ſhall her Grantee; and the reaſon thereof is, becauſe the Rent is not annexed to her perſon onely, but to her eſtate. See 5 *H.* 5. 10. *Cook.* 3 par. 22. in *Walkers* caſe.

8. One Coparcener granteth a Rent to two other Coparceners for owelty of partition: in that caſe it was reſolved, That although the words are joynt, yet the cauſe of the Grant ſhall be reſpected, and the Rent ſhall be of the quality of the Land; and therefore they ſhall have the Rent in degree and quality of Coparceners and not joyntly. And if two Coparceners do make a Feoffment in Fee, rendring Rent to them and their Heirs, the Heirs of the one and the other ſhall inherit, becauſe their right in the Land is ſeveral. See 15 *H.* 7. 14. 39 *E.* 3. 26. *Cook.* 5 par. 8. in Juſtice *Windhams* caſe.

9. If two Coparceners be, and they make partition of the Lands; if one of the parts be evicted by Eigne Title, ſhe that loſeth her part ſhall enter upon the reſt to have recompence, becauſe the privity which the Law creates betwixt them, doth ſtill remain: but if one of the Coparceners ſells her part, and then the other part which the other Coparcener hath, is evicted; in that caſe the Coparcener who ſo loſeth her part, ſhall not enter upon the Alienee, becauſe that by the Alienation the privity is deſtroyed. *Cook.* 1 par. Inſtit. 173. And therefore if a man hath Lands in Taile, and as much in Fee-ſimple, and hath iſſue two Daughters, and dieth, and the Daughters make partition, ſo as the Entail Lands is allotted to the eldeſt, and the Fee-ſimple to the youngeſt; in this caſe if the youngeſt Daughter alieneth the Fee-ſimple Land to another in Fee, and hath iſſue, and dieth, the iſſue may enter into the entailed Lands, and ſhall hold it with her Aunt; yet ſhall not the eldeſt Daughter enter in the half of the Land in Fee-ſimple upon the Alienee, becauſe that by the Alienation the privity of eſtate was deſtroyed.

10. If a man be ſeiſed of a Carue of Land by juſt title, and diſſeiſeth an Infant within age of another Carue of Land, and hath iſſue two Daughters, and dieth, and the Carue by good title is allotted to the eldeſt, and the other to the youngeſt, who alieneth it to another in Fee, and afterwards the Infant at full age entreth upon the Alienee; in this caſe the youngeſt Daughter hath excluded her ſelf from having any part of the Carue by good title, for that by her Alienation the privity was deſtroyed: But if the youngeſt Daughter before the entry of the eldeſt, had granted it only for years of life or entail, ſaving the Reverſion, then it had been otherwiſe, becauſe the privity was not utterly deſtroyed, ſhe having reſerved the Reverſion to her ſelf in Fee. *Cook.* 1 par. Inſtit. 173.

11. *Where*

3 *Where one Coparcener alone shall not deraign the Warranty without her Companion. Where aid shall be to deraign the Warranty, where not. Where a stranger shall have the like advantage of a Partition, as she who is privy in blood: And where the Judgement in Partition shall be to hold in severalty, where not.*

1. NOte: there is a difference between a Warranty in Law upon an Exchange, and a Warranty in Law upon a partition as to the recovery in value: for in case of Exchange, he who voucheth shall recover in value according to the value which he lost; but it is not so in case of a Partition: for if a man seised of six Acres in Fee, every one of equal value, dieth, having issue two Daughters, and upon partition each hath three Acres; and after one Sister is impleaded for one Acre by one who hath title Paramount, and prayeth in aid of her Coparcener; she shall not recover an Acre, but an half Acre, so as each of them shall have an equal part: for in as much as both claim in by discent, which is an act in Law, and by Law each of them ought to have equal part of the inheritance of her Ancestor: for this cause she shall recover in value, but the moyety which she lost; so that the loss shall be equal. *Cook.* 4 par. 121. in *Bastards* case.

2. If one Coparcener maketh a Feoffment in Fee, and after her Feoffee is impleaded, and voucheth the Feoffor; she may have aid of her Coparcener to deraign the Warranty paramount, but never to recover *pro rata* against her by force of the Warranty in Law upon the partition; for by her Alienation, the *Unitas juris* that was betwixt them, is severed, and she hath dismissed her self to have any part of the Land as Coparcener, and as Coparcener she must recover *pro rata* upon the Warranty in Law, or not at all. *Cook.* 1 par. Instit. 171.

3. If a man hath issue two Daughters, *Bastard Eigne & Mulier puisne*, and they enter and occupy as Heirs; the Law in favour of Legitimation will not adjudge the whole possession in the *Mulier*, who then hath the sole right, but in both; so that if the Bastard dieth seised, her issue shall inherit: and if in the same case the Daughters, viz. the *Bastard eigne* and *Mulier puisne* enter, and make partition, this shall binde the *Mulier* for ever: but if partition be made betwixt two Daughters, where one hath no colour, there the partition is void. *Cook.* 8 par. 101. in Sir *Rich. Lechfords* case.

4. When Lands and Warranties descend to two Coparceners, and one of them is impleaded, he shall not vouch alone, but shall pray in aide of his Companion; and so they shall put themselves in representation of one Heir, and shall vouch together: but if one Coparcener alieneth his part, or maketh default upon Aid-prayer, the other shall vouch alone. And if a Coparcener maketh a Feoffment in Fee with Warranty, and comes as Vouchee, he shall have aid to deraign the Warranty paramount as if he were in possession. See *Tr. 9 Jac.* in C. B. Sir *Henry Rolls* and Sir *Robert Osborn* case. *Hob.* 21. and 26. accordingly. See 20 *H.* 6. 2. and 43 *E.* 3. 23.

5. *Note:* A Warranty must remain entire as it was created, without the voluntary division of the party; and therefore if Lands be given to two joyntly, with Warranty, if one of them maketh a Feoffment with Warranty of his part, he hath lost his Warranty, but the other may vouch for his moyety; but if they make partition, both have lost it by the common Law. *Hob.* 25. accordingly.

6. If there be two Joyntenants with Warranty, and the one doth disseise the other, and the Disseisee bringeth an Assize, and upon his prayer hath Judgement to recover in severalty: in this case the Warranty is gone: for although he hath partition by Judgement, yet he who is bound by the Warranty is not party nor privy, nor consenting to it, as he is when partition is made according to the Statute. *Cook.* 6 par. 12. in *Morrices* case. Note there by *Cook*, That although some Books are, that Judgment shall be given to hold in severalty in the case of Joyntenants, as to *E.* 1. 40. yet by him it shall be hard to maintain the Judgement; for that 1. The Plaintiff in his Assize ought to recover according to his plaint, and that is nothing in severalty. 2. In the Assize he ought to recover upon the view of the Recognitors, and they have not the view of any thing in severalty. And 3. it shall be to the Plaintiffs prejudice as well for the Survivor as for the Warranty, and the like. And 38 *Ass.* 15. it was adjudged by the Court, That the Plaintiff shall recover generally, although the Plaintiff himself prayeth that the Judgement might be that he might hold in severalty; for the prayer of the party shall not alter the Judgement of the Law. *Cook.* 6 par. 13. in fine of *Morrices* case.

7. Two Coparceners were, one made a Feoffment, the other being impleaded, prayed in aid of her Sister to deraign the Warranty paramount: it

it was there ſaid, That ſhe might deraign the Warrantry ſole, by *Finchden* and *Kurvit*; wherefore the Tenant pleaded over. 38 *E.* 3. 20. But ſee 38 *E.* 3. 23. in Plow. Com. in *Maxwells* caſe 7. Two Coparceners made partition, the one enfeoffed his Son and Heir apparent of his part, and died; the other made a Feoffment with Warranty, and died having iſſue: the Feoffee was impleaded in a *Precipe*, who vouched the Son, and he prayed in aid of the Heir of the other Parcener; and notwithſtanding the Alienation of his Grandmother, he had aid to deraign the Warranty paramount. See Plow. Com. in *Maxwells* caſe 7. accordingly, and ſee 22 *H.* 6. 47. If Coparceners preſent by turns, and one of them preſents, and the incumbent is impleaded, it was the opinion of the Court, That he ſhall have aid of all the Coparceners.

8. *Note:* Partition is an Eſtoppel betwixt privies in blood, and therefore ſee 22 *E.* 2. *Fitz.* Baſtardy. Between *Baſtard eigne* and *Mulier puiſne*, partition is an Eſtoppel; but ſuch partition betwixt privies in blood, ſtands upon this difference: If the partition be voluntary, then it is an Eſtoppel betwixt privies; but if it be compulſary, then it is no Eſtoppel. As if a man hath iſſue a Son and a Daughter by one woman, and a Daughter by another, and dieth ſeiſed, and the Son entreth and dieth ſeiſed, & the Daughter or Heir to him entreth, and the other Siſter by the other woman brings a *Nuper obiit*, and is found, and they make partition betwixt them; now notwithſtanding the partition, yet a Writ of Errour lieth to reverſe the Judgment; and the Judgement being reverſed, the privity ſhall be deſtroyed; for it was a compulſary partition by reaſon of the Judgement in the *Nuper obiit* See 19 *H.* 6. 26 and 27. accordingly.

9. If two Coparceners be of Land, and they make partition, and afterwards a Writ of Dower is brought, and a Recovery is had in the Writ of Dower: It is a Quere 22 *Aſſ.* 22. *Br. Errour* 131 If the ſame ſhall make void the partition, becauſe the ſame doth not avoid the partition for the whole, but for part, *i. e.* the Freehold onely But ſee 10 *E.* 4. 7. That if a ſtranger enters, or recovers part by an *Eigne* title, there the ſame doth diſ-affirm the firſt partition; but the Parceners cannot themſelves avoid the partition by entry. And ſee 9 *E.* 4 That if the Recovery be by colluſion, or a Title *puiſne* to the partition, the ſaid Recovery ſhall not make void the partition.

More, Partition and Parceners.

1. IF there be three Coparceners, and they make partition, & one of them grants 20 *l per an.* out of her part to her two Siſters and their heirs for equality of partition; the Grantees are not Joyntenants of this Rent, but the Rent is in the nature of Copercinary; and after the death of the one Grantee, the moyety of the Rent ſhall deſcend to her iſſue in courſe of Copercinary, and ſhall not ſucceed to the other, for that the Rent doth come in recompence of the Land, and therefore ſhall follow the nature of the Land. *Cook.* 5 par. in Juſtice *Wiadhams* caſe.

2. If two Coparceners have iſſue, each of them a Son, and dieth, and the Sons before partition are diſſeiſed; in that caſe they ſhall joyn in an Aſſize: for although they claim by ſeveral Titles in reſpect of their Mothers, yet becauſe the Land deſcended intirely from their Grandfather to their Mothers, they are in Law accompted Parceners, and a Writ of Partition doth lie betwixt them: and ſo they ſhall have but one Aſſize. *Cook.* 7 par. Inſtit. 9c.

3. *Note:* Partition amongſt Coparceners makes no diſcontinuance; and therefore if Lands be given to a man in Taile, who puts as much Land in Fee-ſimple, and he hath iſſue two Daughters, and dies, and the Daughters make partition, ſo as all the Fee-ſimple-lands are allotted to the younger Siſter, and the Intailed Lands to the eldeſt; yet in ſuch caſe, after the death of the youngeſt Siſter, after the alienation of the Fee-ſimple-lands by her Mother, her iſſue may enter into the Intailed Lands, and hold them with her Aunt, becauſe the iſſue had no recompence for the Intailed Lands; and ſuch partition made no diſcontinuance, becauſe in that caſe it paſſed not by Livery and ſeiſin: and the partition is leſs then a Grant, and each Coparcener is in by diſcent from the common Anceſtor. *Cook.* 1 par. Inſtit. 173. accordingly

4. It was found upon a *Diem clauſit Extremum*, 2 *Jac.* That *A.* the Kings Tenant *in capite*, died ſeiſed of Lands, and that *B.* an Infant was his Son and Heir; and it was found 13 *Jac* upon a *Devenerunt* after the death of the ſaid *B* that he died the Kings Ward, and that *L.* and *E.* were his Siſters

Sisters and Co-heirs, Coparceners of full age, and that *L.* the eldest Sister, in the life-time of her Brother, to prevent religious Education, went into *Flanders*, and there remained a Nun professed, contrary to the Statute of 3 *Jac.* and it was found, that by reason thereof the said *L.* ought not to take any benefit of the Lands by conveyance or discent, until she returned, and took the Oath prescribed by the Statute; but that *E.* being the next Heir of blood, and no Recusant, ought to receive the profits of all the Lands by force of that Statute: the Question was, Whether *E.* the youngest Sister and Coparcener, should sue Livery of all the Lands out of the Kings hands, as Sister and Heir of *B. L.* being alive. It was resolved in the Court of Wards by the Judges Assistants to that Court, That the said *E.* could not as next Heir to *L.* demand of right to have Livery out of the Kings hands of the part of the Lands of the said *L.* neither by the words, or by the intent of the said Statute of 3 *Jac.* but that the King might retain the moyety of *L.* until such time she returned and took the Oath prescribed by the Statute. *Pasch.* 15 *Jac.* in Car Ward, *Trediways* case. *Lea.* 59. See *Hob.* 73. the same case.

5. *Note:* It was resolved by the Court, That in a Writ of Partition upon the Statute brought against an Infant, that the Defendant should not have his age. *Mich.* 14 *Jac.* *Poyns* and *Gibbons* case. *Hob* 179. See *Cook.* 6 par. 4. in *Markalls* case accordingly.

6. Errour brought of a Judgement in C. B. the case was, Two Coparceners of a house, one of them let her part to a stranger, and the other let her part to a stranger also, and both Leases came to the hands of one *H.* Then one of the Copaceners bargained and sold her Reversion to the other Coparcener: the Lessee committed waste, and the Grantee of the Reversion brought an Action of Waste. The Errours assigned were, 1. That he ought to have brought two Actions of VVaste; but against that it was resolved, That although at the first the Lessors were entituled to several Actions, yet by matter *ex post facto*, the Actions might be united. 2 Errour, Because the other Coparcener was not joyned with him in the Action: but it was resolved it was good enough; and the difference is when both parties have an equal Estate and Inheritance, and when one of them hath but a particular Estate; where they had equal Estate of Inheritance as Coparceners, or two Tenants in common, and one makes a Lease, and the Lessee commits Waste, there the Writ shall be brought by the Lessor onely, and the Statute gives the place VVasted and Damages, and it is a mixt Action, and therefore both shall not joyn. 3 Errour, That the VVaste is a permissive VVaste, and no such VVaste lies between Coparceners; for every of them are bound to contribution and reparation: the Court took no notice of that Errour, but the Judgement was affirmed. *Mich.* 34 *Eliz.* in B. R. *Wardfords* case. *Owen* 11.

7. *Note:* It was resolved by the Court, That in a Writ of Partition no damages shall be recovered, nor any enquire of them; and yet the VVrit and Count is *ad Damnum*, &c. *Mich.* 3 *Car.* in C. R. *Hetley* 34. See *Noy.* 68. The Countess of *Warwick* and the Lord *Barkley*'s Case accordingly.

8. In a *Partitione facienda* by one Tenant in common against the other, an Estrepment was granted for all that the Plaintiff had confessed to be held in common, and not for more; for by such means a man may be inhibited to cut his own Boughs according to his occasion, although it was objected out of *Bendloes Reports*, That an Estrepment doth not lie between Tenants in common; but 6 *Jac.* it was adjudged contrary. And *Mich.* 5 *Jac.* in the case between the Lady *Lucy* and *Oxenbridge*, an Estrepment was granted in a Writ *de Partitione faciendâ*, because it is a real Action, and no damages are to be recovered in it. See in *Noys Reports* 143. *Bayly* and *Knightons* case.

9. A Writ of Partition was brought, and Judgment *quod Partitio fiat*; and before it was executed in the Country by the Sheriff, Errour was brought: It was said by the Court, That it doth not lie upon such a Judgement before the Partition be made and returned by the Sheriff. And Judgement was given, *quod Partitio Stabilis maneat*; for this is not like to other real Actions, where Errour lies before the *Habere facias seisinam* be returned; for it is a final Judgement, and no other is to be given. Also there needs no return of an *Habere facias seisinam*, for that the party who recovers may execute his Judgement by entry. See *Noy* 71. The Countess of *Warwick* and the Lord *Barkleys* case.

Pay-

Payment.

1 *What ſhall be ſaid a good payment of money, what not: Where a good plea, where not: To what, and how far it ſhall extend, to what not.*

1. DEbt was brought by *G.* for 200 *l.* upon this Bill; *Be it known*, &c. *that I* E. W. *of* H. *in the County of* M. *do acknowledge my ſelf to be indebted to* G. *in* 200 l. *for the payment whereof, I, mine Heirs and Aſſignes, do licence the ſaid* G. *to have the uſe of the Bayliwick of* D. *to the uſe*, &c. *until*, &c. The Defendant pleaded in Bar, that the Plaintiff had uſed the ſaid Bayliwick; nor ſaid no more, nor at what place he had received the money. It was the opinion of the Court, That the plea was not good in bar of this ſpecialty, for payment is no plea upon a ſingle Bill, and this licence is no condition; and he might have brought his Action upon this Bill, without uſing the Bayliwick. *Mich.* 30 *Eliz.* in C. B. *Goore* and *Winkfields* caſe. *Goldesbr.* 73.

2. Husband and Wife brought Debt upon Obligation againſt *N. H.* the Obligation bore date 13 *Octob.* 31 *Eliz.* The Condition was, *That if* N. H. *did pay* 81 *of lawful money in the year of our Lord God* 1599. *at, or upon the* 13 *day of* October *which ſhall next enſue the date hereof.* The Defendant pleaded that the day of payment was not come: *Gawdy* Juſtice, conceived that the payment is to be the 13 of *October* next after the date of the Obligation, and the words *In the year* 1599. are void: But *Fenner* and *Popham* Juſtices, That the payment ſhould be in the year 1599. for when a certainty appears, although afterwards an uncertainty come, yet that ſhall not hurt the certainty, but the firſt certainty ſhall ſtand. *Popham* conceived the payment ſhould be the 13 day of *October*, *proxime poſt* 1599. for the words are, *That Obligor ſhall pay* 81 *l. of lawful money of* England *in the year of our Lord* 1599. and if the payment be made before this time, none may know what money ſhall be currant in *England* that year, before the year come, and it is impoſſible to pay that before. *Hill.* 43 *Eliz.* in B. R. *Sharples* and *Hankinſons* caſe. *Goldesbr.* 187.

3. Debt upon an Obligation to perform an Arbitrement, the Defendant confeſſed the Arbitrement, but pleaded in Bar, That the Plaintiff did not require him to make payment: upon which the Plaintiff did demur. It was adjudged no plea; for the Defendant at his peril ought to make payment, and the Plaintiff ought not to make a requeſt. *Mich.* 30 *Eliz.* in B. R. *Brett* and *Audes* caſe. *Brownlow* 1 par. 49.

4. In Debt againſt Executor, the Defendant pleaded divers Statutes to divers perſons. The Plaintiff ſhewed that ſome were by fraud, and others were for performance of Covenants that were not broken, and for other Statutes that they are ſatisfied; and the Defendant in pleading a Statute by three, ſays two of them did not pay, and doth not ſay that the three, or any of them, have not paid. It was holden, that in pleading of a Statute it muſt be generally pleaded; and one may plead generally that the Statute was acknowledged by fraud, without ſhewing the ſpecial matter. *Tr.* 9 *Jac.* in C. B. *Brokesby* and *Treſhams* caſe. *Brownlow* 1 par. 41. accordingly.

5. Debt brought upon an Obligation, the condition was to perform an Award which was good in part, and void in part, and the breach was aſſigned upon the good part; and the Award was to pay money, but no time of payment was appointed; and afterwards the money was demanded. It was the opinion of the Court, That it was a good Award, and that the money was to be paid upon demand. *Paſch.* 16 *Jac.* in C. B. *Rayſon* and *Winders* caſe. *Brownlow* 1 par. 53. See *Tr.* 31 *Eliz.* in B. R. *Frond* and *Batts* caſe accordingly. *Leon* 320.

6. If Debt be due by Obligation, and another Debt be due by the ſame Debtor to the ſame Debtee of equal ſum, and the Debtor payeth one ſum generally: It was adjudged that it ſhall be intended a payment upon the Obligation. *Mich.* 11 *Jac.* in C. B. *Brownlow* 2 par. 107.

7. Debt upon an Obligation of 40 *l.* for payment of 20 *l.* at a day and year certain: The Defendant pleaded that he had paid the ſaid 20. according to the condition: upon which they were at iſſue; and at the tryal gave in evidence that he had paid the money to the Plaintiff before the day, and that the Plaintiff had accepted of it. It was the opinion of the whole Court, That payment before the day was a ſufficient diſcharge of the Obligation; but becauſe the Defendant had not pleaded the ſame ſpecially, but generally, that he had paid the money according to the condition, the opinion of the Court was, That the Jury muſt finde againſt the Defendant, for that the ſpecial matter would not prove the

iſſue. *Mich.* 24 *Eliz.* in C. B. *Godb.* 10.

8. Errour to reverſe a Judgement in C. B. The Errour aſſigned was for that in Debt upon an Obligation, the Condition being for the payment of 60 *l.* upon the 25 day of *June*, 12 *Jac.* at his houſe in *F.* the Defendant pleaded that he paid the money the 20 day of *June*, 12 *Jac.* at the ſaid houſe, *ſecundum formam & effectum indorſamenti prædict.* The Plaintiff replyed, That he did not pay it the ſaid aforeſaid 20 *Junii*, and a Verdict found that he did not pay it the 20 of *June*, and Judgement thereupon, and Errour for that cauſe aſſigned; for the iſſue is taken *debors* the matter of the condition, and ſo an ill plea, and avoid iſſue: for it may be he did not pay it the 20 day of *June*, yet it may be paid upon the 25 of *June*. And although it was ſhewed to be an ill plea, yet it ſhall be helped by the Statute of 32 *H.* 8. But it was reſolved, That it was not aided, for it is meerly void, and no iſſue; for it may be the Obligation was not forfeited notwithſtanding this Verdict. But if the Verdict had been found for the Defendant, that the payment was the 20 day of *June*, peradventure the Verdict had made it good: for payment before the day is a good payment at the day, and the Plaintiff hath not cauſe of Action; but non-payment at the day, before the true day in the Condition, is not a payment at the day; for it may be that he paid it upon the 25 day, although it were not paid before the Judgement was reverſed. *Hill.* 14 *Jac.* in B. R. *Holmes* and *Brokets* caſe. *Cro.* 2 par. 434. 435.

9. In an Action upon a Bill of Exchange brought by a wrong perſon, by a perſon to whom the Bill belonged not, and a Verdict found for the Defendant; It was holden by the Court, That if money be paid to a wrong perſon upon a Bill of Exchange, if the wrong perſon do ſhew the Bill, there, by the cuſtome of Merchants, this is a good payment, and the party that paid it ſhall not be charged again: and this being found by Verdict to be a good Cuſtome, Judgement was given accordingly. *Hill.* 1652. in B. R. *Styles* 366.

10. In *Aſſumpſit*, the Plaintiff declared that the Defendant in conſideration that the Plaintiff would marry *E.* his Siſter, he would give his Siſter 300 *l.* for her marriage-portion, upon his marriage with her; and upon this promiſe the Plaintiff obtained a Verdict: the Defendant in arreſt of Judgement, ſaid that the breach was not well aſſigned, for it recites another promiſe then that upon which the Plaintiff declared; for he declares of a promiſe made to give 200 *l.* in marriage to the Plaintiff with his Siſter *E.* and he aſſignes the breach in not paying the 300 *l.* unto the Plaintiff; ſo that the breach doth not anſwer the promiſe: for if the money be paid to the Wife, (as it may be) the promiſe is not broken. But it was the opinion of the Court, That it was all one as if he had expreſſed the very words of the promiſe; for the Husband is to give the Acquittance for the monies, and the monies are to be paid to the Husband, and the Verdict findes they are not paid: Judgement was entred for the Plaintiff. *Mich.* 1653. in B. R. *Bedwell* and *Fenwicks* Caſe. *Styles* 393.

11. By Articles of Agreement indented between *A.* and *B. A.* did Article to pay to *B.* 110 *l.* at a day certain; and *B.* did Article that upon the receipt of the 110 *l.* by him from *A.* that he would give unto *A.* an Acquittance, and would alſo enter into an Obligation of 400 *l.* unto *A* to ſave him harmleſs from all claims which ſhould be made unto certain Lands in the poſſeſſion of the ſaid *A.* In purſuance of theſe Articles, *A.* doth tender the 110 *l.* unto *B.* at the day; but *B.* refuſeth to receive the 110 *l.* of *A.* and to give him an Acquittance, and alſo to enter into the Bond of 400 *l.* Whereupon *A.* brings Covenant againſt *B.* and upon iſſue joyned, a Verdict being found for the Plaintiff, it was moved in arreſt of Judgement, that here was no breach alleadged by the Plaintiff; for the Declaration is, *That the Defendant upon the payment of the* 110 *l. was to give the Acquittance, and enter the Bond of* 400 *l.* and it was in the Defendants election; and here is no payment, but onely a tender and refuſal of the 110 *l.* It was the opinion of the Court, That here was no breach of Covenant; for the Articles expreſs, that upon the receipt of the 110 *l.* the Defendant ſhould give the Acquittance, and enter Bond: and the breach is, that the Plaintiff tendered it at the day, and the Defendant refuſed to receive it, and hath not ſealed the Acquittance, nor given the Bond; and it may be it was the intent of the parties that it ſhould be in the election of the Defendant either to receive the 110 *l.* or not to receive it; and the Plaintiff is not prejudiced by the Defendants not receiving of it; for if he ſhould ſue for the 110 *l.* the Plaintiff may plead this tender and refuſal againſt him, and that will be adjudged a payment; and where he ſues you for the 110 *l.* you may ſue him for the Acquittance and Bond. It was adjudged againſt the Plaintiff. *Tr.* 1655. in B. R. *London* and *Cravens* caſe. *Styles* 481.

12. *Note:* It was reſolved by the Court, That if a Deed expreſs a conſideration of a ſum of money upon a purchaſe made to be paid in the Deed; yet upon a Tryal this is no proof of payment of the monies; but the payment of the monies muſt be proved by Witneſſes. *Mich.* 1655. in B. R.

Thus

Thorn and *Madisons* Case. *Styles* 462.

13. *Scire facias:* Whereas the Wife *dum sola fuit*, recovered in B. R. in an Action upon the Case, 26 *l.* 13 *s.* 4 *d.* for damages and costs, and had Execution, and yet is thereof possessed: And whereas afterwards the said Judgement was reversed by Errour, and restitution awarded, and afterwards the Wife took the Defendant to Husband: upon this the Plaintiff brought his *Scire facias* to have restitution. The Defendant pleaded that after the reversal had, and before the Writ brought, he paid the Plaintiff the said 26 *l.* 13 *s.* 4 *d. absque hoc*, that the Defendants were possessed of the money. It was the opinion of the Court, That the pleading of the payment was not good, because it is grounded and affirmed against the Record; and a payment being against matter of Record, cannot be a discharge unless by matter of Record, or specialty.: and as in a *Scire facias* to have Execution, payment is no plea in discharge thereof; no more is it in a *Scire facias* to have restitution. But some of the Justices held, That payment had been a good plea if the Defendant had relyed thereupon, because he averred thereby that the Plaintiff is satisfied; and in divers cases matter of Fact may be pleaded in discharge; but yet Judgement was given for the Plaintiff. *Hill.* 8 *Car.* in B. R. *Vesey* and *Harris* case, *Cro.* 1 par. 239.

14. Debt upon an Obligation conditioned for the saving of the plaintiff harmless from the payment of all Legacies; the plaintiff by way of breach setteth forth, That there was a Suit commenced against him in the Chancery for a Legacie. It was moved, that the Declaration was not good, because he doth not set forth that any Legacie was given at all, nor what it was; nor doth shew the place where the Chancery was. It was the opinion of the whole Court, that the plaintiff ought to have reduced his general allegation in a more special and peculiar manner; and to have set forth *in facto*, that such a particular Legacie was given and devised, and that he had not saved him harmless from the payment thereof; and also he ought to have shewed the place where the Chancery was. Wherefore it was the Rule of the Court, that the plaintiff *Nil capiat per Billam*. *Mich.* 10 *Jac.* in B.R. *Dowty* and *Farrar* case. *Bolst.* 2 par. 19.

15. Debt upon an Obligation, the Condition appeared to be for the payment of childrens portions when they married, or came to their full age of 21 years. The defendant pleaded that he had paid the same, *cum & quam cito* they came to their age, generally, without shewing how. It was the opinion of the Court in this case, If there had been a day certain set down in the Condition, then to plead payment, *secundū formam & effectū Chartæ*, had been good: but here the time being uncertain, he ought to have shewed in his Plea, the time when the children came of the age of 21 years, and when he paid this money, that so upon this issue might have been taken: and he ought to have shewed who made the Will, and how he had performed the same; that it might appear judicially to the Court whether he had performed it or not. See 22 *E.* 4. 25. Sir *James Harringtons* case. 22 *E.* 4. 40, 41. the Lord *Lisles* case. *Trin.* 12 *Jac.* in B.R.. *Haulsey* and *Carpenters* case. *Bolst.* 2 par. 266, 267.

16. In Debt, the defendent pleaded payment at the day, and gave in evidence payment at another day before the day of payment; and so it was found by the Jury in a special Verdict. It was the opinion of the Lord *Anderson* and the rest of the Justices, That Judgement should be against the plaintiff: for payment before the day, is payment at the day. And Judgement was given, that the plaintiff should be barred. *Mich.* 31 *Eliz.* in C B. *Bond* and *Richardsons* case *Owen* 45.

17. In Action upon the Case upon *Assumpsit*, it was, the defendant did promise to the plaintiff, in consideration that the plaintiff would permit him to occupie certain Lands for the space of five years, that he would pay him at the Feast of *All Saints* next coming, and so yearly, 20 *l.* at the Feasts of the *Annunciation* and *All Saints*, by equal portions, during the term aforesaid; and alleadged, that he had enjoyed the Land for the space of half a year, and so brought his Action. It was the opinion of the Court, that they were several Duties, and so several Actions maintainable. And *Gascoignes* case was vouched by *Rodes* Justice; which was thus: *Gascoigne* promised in consideration of a Marriage of his daughter with such a mans son, to give him 700 *l.* and to pay 100 *l.* every year till all the sum were paid. And in that case it was holden clearly by the Court, That a several Action might be brought for every 100 *l.* but because an Action was brought for the whole 700 *l.* before the seven years were out, Judgement was given against him. For if a man be bound in a Bond of 100 *l.* to pay 20 *l.* for so many years; he shall not have an Action of debt until the last year expired. *Mich.* 20 *Eliz.* in C. B. Roll 2248. *Gascoignes* case. Note, the principal case was *Hill.* 30 *Eliz.* in C. B. Roll 1732. *Hunt* and *Thorneys* case. *Owen* 42.

18. *A* seised of lands in Fee, did acknowledge a Statute-Merchant to *B.* of 500 *l.* to be paid to the consusee, *&c.* without expressing any day of payment. The consusor made a Lease of the lands to *E.* for years, who grants his estate to *I.S.* The consusee dies Intestate; his Administrator extends the lands; whereupon the Assignee of the Land is

brings *Audita querela*; and, if it would lie, was the Queſtion; the onely matter being, whether this Statute, being without any expreſs day of payment, be good or not, and warranted by the Statute of *Action Eurnel & de Mercatoribus*, or not. It was the opinion of the Court, That the Statute was a good Statute; and the Queſtion is no more but this, If there be a ſufficient time limited for the payment, and ſuch a time as the Mayor may certifie to be incurred, if it be ſo required: and the Court conceived, that there is: for when he acknowledgeth the debt to be due, and no time is expreſſed, the Law appoints the payment to be immediately, and that is ſuch a time as the Mayor by his Certificate may take notice of: and the Statute intends onely to provide aſſurance to the Merchant for his debt, and not to give any day of payment to the defendant, but leave that to the agreement of the parties And there is a Rule in Law, That *every Leaſe ought to have a certain time of beginning, and alſo of ending*: yet if one make a Leaſe for twenty years, and doth not ſay when it ſhall begin, this is a good Leaſe, for the Law will ſuppoſe the Leaſe to begin preſently. *Trin.* 18 *Jac.* in C. B. *Meskin* and *Hickfords* caſe. *Bridgman* 19,20.

19. Debt againſt an Adminiſtrator of a Bond of 100 *l.* made 1 *Aug.* 10 *Jac.* The defendant pleaded, That the Inteſtate 20 *Nov.* 11 *Jac.* was bound to *A.* in 100 *l.* which was unpaid at the death of the Inteſtate. That *A.* married *B.* and that the ſaid *A.* and *B.* brought Debt in *London* for the ſaid 100 *l.* and recovered by default, and had Execution of 55 *l.* 8 *s.* 5 *d.* and acknowledged ſatisfaction. And further pleaded, That the Inteſtate, 11 *Jan.* 7 *Jac.* did acknowledge in Chancery, that he owed to the Chancellour and Maſter of the Rolls 500 *l.* which Recovery and Recognizance did come to 600 *l.* 8 *s.* 6 *d.* And that the defendant for the payment of the Execution, and for payment of divers debts of the Inteſtate, *plene adminiſtravit omnia bona Inteſtatoris, præterquam bona ad valentiam* 100 *l.* which were liable to the ſaid Recovery and Recognizance: and that he hath not once had at the time of Action brought, any other goods, *&c.* ſaving to the value of 55 *l.* 8 *s.* 5 *d.* and the ſaid 100 *l.* And averred, that the debt recovered was a true debt. The plaintiff by Replication ſaid, That the Obligation upon which the Recovery was had, was made for the ſecurity of 55 *l.* and that the ſaid *A.* and *B.* did accept the ſaid 55 *l.* 8 *s.* 5 *d.* in full ſatisfaction of the ſaid Judgement; and offered to make a Releaſe, and acknowledge ſatisfaction; which the defendent did defer, to defraud the plaintiff, and ſuffered the ſaid Judgement to ſtand in force. The defendant as to the reſidue of the debt, and the acceptance of the 55 *l.* 8 *s.* 5 *d.* *&c.* did Demur in Law: and as to the Recognizance he ſaid, that a Condition was annexed to it, That if the Inteſtate, his Executors, *&c.* ſhould pay 100 *l.* with the increaſe, to *I. D.* an infant, when he ſhould come of the age of 21 years, then the Recognizance to be void; and did aver, that *I. D.* was alive and within age, and that the ſaid 100 *l.* was not paid. The plaintiff to this did joyn in Demurrer, and to the other plea did Demur; and the defendant did joyn in Demurrer. In this caſe, after long Argument, it was adjudged, That for the firſt matter, Judgement ought to be given for the plaintiff; and for the laſt matter, *Montague* Chief Juſtice held for the defendant, but *Dodd* and *Haughton* Juſtices, contrary; and *Dodd* and *Haughton* Juſtices, agreed, That the plea of the defendant was naught, becauſe he ſaid *a Condition was annexed* to the Recognizance, and did not ſay that it was *upon Condition*. See *Cook.* 8 par. *Turners* Caſe. *Hill.* 13 *Jac.* in B. R. *Robinſon* and *Francis* Caſe. *Bridgeman* 79, 80, 81.

20. Debt upon an Obligation of 10 *l.* the defendant pleaded, that at the inſtance of the plaintiff before the day, he paid to the plaintiff 5 *l.* which he accepted of in full ſatisfaction. It was reſolved in this caſe, 1. That payment of a leſs ſum at the day in ſatisfaction of a greater ſum, cannot be any ſatisfaction; but the gift of a Horſe, or other thing, may be a ſatisfaction for it. 2. That payment and acceptance of a leſſer ſum before the day, or at another place, is a good ſatisfaction for a greater ſum; for perhaps it may be more beneficial for him. But in the principal caſe the plaintiff had Judgement for the inſufficient pleading of the defendant; for he pleaded not that he had paid the 5 *l.* in full ſatisfaction, but pleaded generally that the plaintiff accepted it in full ſatisfaction; and always the manner of tender and payment ſhall be made by him who makes the tender and payment, and not by him who accepts of it in ſatisfaction. But it was agreed in that caſe, That if a man doth acknowledge himſelf to be ſatisfied by Deed, although he receive a leſſer ſum, the ſame ſhall be a good bar; and ſatisfaction acknowledged by a Deed, is good, although the party receiveth nothing. *Trin.* 44 *Eliz.* in C. B. *Cook.* 5 par. 117. *Pinnells* Caſe.

21. A man by Indenture is bound to pay a ſum of money; and in an Action upon that Deed, the defendant ſaith that he hath paid the ſum, but ſheweth no Acquittance. It was holden that in ſuch caſe the plea is not good; for this Indenture is like to a ſingle Obligation, where payment is no plea without an Acquittance. 28 *H.* 8. *Dyer* 15. See *Doctor* and *Student*, *Lib.* 1. *Cap.* 12. An Obligation,

ligation, or other matter in writing, cannot be diſcharged by an agreement by word.

22. If a Rent be reſerved to be paid at the feaſts of *Michael* and the *Annunciation*, or within a month after the ſaid feaſts, and if it happen the Rent to be behinde after any the ſaid feaſts and day by the ſpace of eight weeks, that then, *&c.* In this caſe it was the opinion of ſome of the Juſtices, That the eight weeks ſhould be accompted from the 28 day after the feaſts, becauſe that makes for the benefit of the Leſſee, and againſt the Leſſor who grants; and the 28 day is a day of payment at the election of the Leſſee, as well as the firſt feaſt and day. *Tamen quære*, becauſe no feaſt and day certain is mentioned before, but the feaſt day, and the month is not any day, nor comprehends any day in certain. 4 *Ma. Dyer* 142. But ſee, Where a Rent is reſerved to be paid out of the Land at *D.* upon *Michaelmas* day, and if it be behind forty days after, that then it ſhall be lawful for the Leſſor to re-enter; In that caſe it ought to be tendered at *D.* a convenient time ſet upon the laſt day of the forty days; for although that it be not by expreſs words, That if the Rent be behinde and unpaid at *D.* by the ſpace of forty days; yet it ſhall have relation to the place firſt named; and ſo the Law ſaith, the Rent ſhall be paid the laſt of the forty days, although it be not ſo expreſſed by plain words. See Plow. Com. 70. in *Kedwellies* and *Brands* caſe accordingly.

23. *Note:* In the caſe of a Dean and Chapter, the Queſtion was, That if Leſſee for years be tendring Rent with clauſe of re-entry for non-payment, and then the Reverſion or Rent be extended by a Statute, or ſeiſed into the Kings hands for debt; if the Leſſee ſhall pay the Rent according to the extent, and the ſame be no breach of the condition although he pay it not to the Leſſor: In that caſe it was the opinion of the Chief Baron, That it ſhall be no breach of the condition, becauſe he is now compellable to pay it according to the extent, or into the Exchequer for the Kings debt. See *Tr.* 30 *Eliz.* in the Exchequer. *Owen* 38.

24. Debt upon an Obligation, the Condition was, That if the Obligee ſhall pay the Rent of 37 *l.* yearly at two feaſts, according to the true intent of certain Articles of Agreement made between the Obligor and the Obligee during the term, *&c.* that then, *&c.* The defendant pleaded, that the Articles contain, That the Obligee *demiſit & ad firmam tradidit*, to the defendant, *Omnia talia Domus, tenementa & terras in parochia de* P. *de & in quibus* the ſaid Obligee had an eſtate for life by Copy, according to the cuſtome of the Mannor of *D. Habendum* for 21 years, if the Obligor ſhould ſo long live, rendring to the ſaid Obligee during the ſaid term, 37 *l.* to be paid at the Caſtle of *C.* and pleaded further, That at the the time of the making of the ſaid Articles, that the Obligee had not any eſtate in any Lands, Tenements, *&c.* in *P.* for the term of his life holden by Copy. Upon which plea the plaintiff demurred, and Judgement was given for the plaintiff. There was two points in the caſe; 1. If nothing paſs by the Articles, and ſo the reſervation of the Rent is void: 2. If the Obligation for payment of the ſaid Rent be void. It was ſaid, and ſo reſolved upon the firſt point, That no Rent is reſerved; for the Leaſe, in the caſe, did never begin, and therefore the Rent ſhould not. For the ſecond point, Whether the Rent ſhould be paid by reaſon of the Bond as a ſum in groſs, or not, the Court differed in opinion; for *Fenner* Juſtice held, The Condition of the Bond is to pay the Rent according to the Articles, which is, That if the Leſſee have not the Land, the Leſſor ſhall not have the Rent. *Popham contra*, That the Obligor is bound to pay it, athough nothing were demiſed to him, for that by the Bond he hath made it a ſum in groſs; and it is altered from nature of a Rent, and he is bound to pay the Rent or ſum: and if this be either of them, he muſt pay it. Quere, for there was no Judgement in the caſe. *Paſch.* 38 *Eliz.* in B. R. *Strowd* and *Welles* caſe. *Owen* 110, 111.

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2 *Where a man ſhall not have Debt for payment of monies till all the days be paſt*, & è contra: *and if a Condition be to pay money to a man, his Heirs or Executors, how the ſame ſhall be ſaid to be performed, how not.*

1. NOte: There is a differance in payment of money or rent, or in bringing of debt for the ſame between perſonal contracts and real contracts; as if a man ſelleth goods for monies to be paid at a day certain, although that the goods be taken away by one who hath right unto them before the day of payment, yet the Vendor ſhall have an Action of Debt for the money againſt the Vendee, by reaſon of the contract: but if a man maketh a Leaſe for years, rendring rent, if before the rent-day encurred, the Land be evicted by an Eigne Title; there the Leſſor ſhall not have an Action of Debt againſt the Leſſee for non payment of the rent in reſpect of the contract, becauſe it is a real contract, and followeth the nature of the

the Land; and the rent iſſueth out of the Land, and the perſon is not the Debtor but in reſpect of the Land. *Cook.* 3 par. 10. in *Walkers* caſe.

2. If the Executor of a Leſſee for years rendring rent, doth aſſigne over his intereſt, and after the Aſſignement the rent is unpaid; in that caſe an Action of Debt will not lie againſt him for the rent behind unpaid after the Aſſignement: and if the Leſſee for years doth aſſigne over his whole intereſt, and maketh his Executor, and dieth, and the rent is behind and unpaid; the Executor of the Leſſee ſhall not be charged with the rent due and behind after his death, becauſe the perſonal privity of the contract betwixt the Leſſor and the Leſſee as to the Action of Debt, was determined. 37 *Eliz.* in B. R. *Overton* and *Sydalls* caſe.

3. Debt brought againſt Adminiſtrators for rent behinde after the death of the Inteſtate, the Adminiſtrators pleaded that before the rent was behinde, one of the Adminiſtrators aſſigned over all his intereſt to *I. S.* of which the Plaintiff had notice, and accepted the rent by the hands of the Aſſignee before the day that the rent was due: It was adjudged in that caſe, That the privity of contract as to the Action of Debt, was determined by the death of the Leſſee; and therefore after the Aſſignement, Debt did not lie againſt the Adminiſtrator: and in that caſe it was adjudged, That when the Leſſor hath election to charge the Leſſee or the Aſſignee for the rent behind unpaid, then if he accepteth the rent of the Aſſignee, he hath determined his election, and he ſhall not have an Action of Debt againſt the Leſſee for the rent behinde after the Aſſignement. 41 *Eliz.* in C. B. *Marrow* and *Turpins* caſe. See 8 *Eliz. Dyer* 247. the Quere reſolved.

4. The caſe was this: Leſſee for years of a Cloſe of Land, ſowed the ſame with Corn; and at the requeſt of *I. S.* bargained and ſold to the ſaid *I. S.* the ſaid Corn growing upon the ſaid Land; who promiſed to pay to him for the ſaid Corn, the ſum of 16 *l.* at ſuch a Feaſt; and for non payment, he brought an Action upon the Caſe upon the promiſe: In this caſe it was reſolved, That although that Debt did lie upon the contract, yet in this caſe the bargainee might have an Action upon the Caſe, or an Action of Debt at his Election: for it was reſolved, That every contract executory, did import in it a promiſe: for when one agreeth to pay money, or to deliver any thing, thereby he promiſeth to pay or deliver it. And therefore when one ſelleth goods to another, and agreeth to deliver them at a day to come, and the other in conſideration thereof promiſeth to pay ſo much money to the other; this mutual agreement executory of both parties, importeth in it ſelf reciprocal Action of Debt, or upon the Caſe. See *Plow. Com.* 128. And it would be miſchievous in this caſe, if an Action upon the Caſe ſhould not lie like as in the Caſe, where *A.* and *B.* bargaineth together that *A.* ſhall deliver to *B* twenty Quarters of Barley yearly during his life; if the ſame be not delivered in one year, an Action upon the Caſe lieth; for if *A.* ſhould be driven to an Action of Debt, then he himſelf ſhall never have it, but his Executors or Adminiſtrators, for that Debt doth not lie in ſuch caſe until all the days be encurred, and that ſhould be contrary to the bargain, and the intent of the party. *Cook.* 4 par. 94. in *Stades* caſe.

5. If I ſell you any thing for 100 *l.* to be paid 20 *l. per annum* for five years, I ſhall not have an Action of Debt till all the years be encurred, becauſe all is but one contract. But if a man makes a Leaſe of Lands for five years, rendring every year 20 *l.* that in the caſe of a Leaſe for years, the years are ſeveral, and he ſhall have an Action of Debt for every year. 45 *E.* 3, 8. adjudged. See *Cook.* 5 par. 81. in *Fords* caſe.

6. A man made a Leaſe to *I. S.* for fifty years, if the Leſſor ſo long lived, rendring rent at the four Feaſts, or within thirteen days after every of the Feaſts, by even portions, after one of the Feaſts, *i.e.* the *Annunciation*. The Leſſor died, his Executors brought Debt for Rent due at the ſaid Feaſt. It was reſolved in this caſe, That the Action did not lie, 1. Becauſe the payment being limited in the Diſ-junction, the moſt beneficial time ſhall be taken for the Leſſee; and before that time, the Leſſee is diſcharged by the Act of God, and the moſt extream time is the moſt legal time. 2. Becauſe that when the Leſſee doth not make payment at the firſt day, the Election is paſt; and then the rent is abſolutely due at the ſecond day, and the ſecond day is as well parcel of the reſervation as the firſt day. 3. The rent is not due until the day of payment encurred, becauſe it is to be raiſed out of the iſſues and profits of the Lands; and therefore if the Land be evicted before the legal time of payment, no rent ſhall be paid. *Mich.* 11 *Jac.* in B. R. *Cook.* 10 par. 127. *Claans* caſe.

7. A man made a Feoffment of Land, upon condition, that if the Feoffor within a year after the death of the Feoffee, paid to his Heirs, Executors or Adminiſtrators 100 *l.* that then the Feoffment ſhould be void: the Feoffee made a Feoffment over, and died; and afterwards within the year, it was agreed between the firſt Feoffor and the Heir of the Feoffee, that the Feoffor pay the 100 *l.* and that the Heir ſhould repay it all to the Feoffor except 30 *l.* which was done accordingly. The Feoffor

Feoffor entred into the Lands, pretending the condition to be performed. It was reſolved in this caſe, (amongſt other points) That the payment was not any performance of the condition, becauſe an Eſtate of inheritance was by the payment of the ſaid monies to the Heir, to be deveſted out of the Aſſignee of the Land, and that ſo the condition ought to be performed by a true and effectual payment, and not by a ſhadow or colour of payment; and the Eſtates of third perſons ſhall not be deveſted by colourable payments, but by true and effectual payments. 2. It was reſolved, That the Feoffor could not have paid the monies unto the Aſſignee of the Lands, for that Heirs, Executors and Adminiſtrators were expreſſed in the condition, and not Aſſignes: but the Aſſignee of the Land, although he be not named in the condition amongſt the perſons who ſhall pay, yet he may well pay the monies for the ſaving of his Term. *Mich.* 40 *Eliz.* *Cook.* 5 par. 97. *Goodales* caſe.

8. *A.* ſeiſed of Lands in Fee by Deed enrolled, covenanted with *B.* That if *B.* paid to him, his Heirs or Aſſignes 100 *l.* ſuch a day, that then he and his Heirs ſhall ſtand ſeiſed of the ſaid Land to the uſe *B.* and of his Heirs. Before the day of payment, *A.* having iſſue a Son, made his Will in Writing, and thereof made his Wife his Executor: the Wife renounced the Executorſhip, and took Letters of Adminiſtration. It was the opinion of the Court in this caſe, That the word *Aſſignees*, ſhall be intended onely the Aſſignees of the Eſtate of *A.* for that he hath an Eſtate aſſigneable, and the Law will never ſeek for an Aſſignee in Law, when there is an Aſſignee in fact. But in that caſe it was ſaid, That if *A.* had made a Feoffment in Fee, upon condition that the Feoffee ſhould pay again to the Feoffor, or his Heirs or Aſſignes; there, becauſe he hath departed with his whole eſtate, and hath but a naked condition which cannot be aſſigned over, the Law will make conſtruction (what perſon) as moſt apt, ſhall be his Aſſignee in Law to recover the money; and thoſe perſons the Law adjudgeth to be his Executors, becauſe they repreſent the perſon of the Teſtator for all goods and chattels; and in ſuch caſe the Feoffor cannot have an Aſſignee in fact. See *Trin.* 24 *Eliz.* in the Court of Wards, *Randals* caſe. See *Cook* 5 par. 97. in *Goodales* caſe accordingly.

See more of Payment in the Titles of Conditions, Rents, Debts, Actions upon the Caſe, Covenants *and* Contracts.

Patents *and* Patentees.

1. THe Queen granted to *I. S.* that he ſhould not be Bayliff, Conſtable, Miniſter, or other Officer, *Licet eligatur.* It was holden by the Juſtices, That if the Queen make him Sheriff of ſuch a County, that by thoſe Letters patents he ſhall not be diſcharged of that Office, for that ſuch Letters patents do not extend to Royal Offices; as grant of Amerciaments ſhall not extend to Royal Amerciaments; and the making of a Sheriff is not by election, but by the denomination of the Queen: ſo that if he have not theſe words in the Patent, *Licet eligatur per nos*, he ſhall be Sheriff. *Paſch.* 25 *Eliz.* in Exchequer-Chamber, *Pelhams* caſe. *Godb.* 21.

2. The Wardens of Cloath-workers of *I.* brought Debt againſt *I. S.* and declared that the King had incorporated them by the the name of, *&c.* and had granted to them by Charter, *quod nullus exerceat artem ſive occupationem in aliqua ſhoppa, domo ſive camera infra prædicti villam*, of a Cloath-worker or Taylor, *niſi ante eos vel duos eorum probationem faceret quod Apprentionem fuit per ſpacio 7 annorum, & per eos ſive per duos eorum ſit approbat*, under the pain of 8 *l.* 13 *s.* 4 *d.* *pro quilibet ſeptimana qua exerceat prædictam artem contra hanc conſtitutionem*: and layed *de facto*, that the Defendant had uſed the Trade of a Taylor for the ſpace of, *&c.* againſt, *&c.* The Defendant pleaded that he was retained in ſervice with one *I D* Gent. of *I.* and been an Apprentice for the ſpace of ſeven years, *in tali loco*, &c. and had made Garments for his Maſter, his Wife and Children, *infra*, &c. *quæ quidem ex recitio, eſt eadem exercitio artis*, ſuppoſed in the Declaration; upon which the Plaintiff did demur in Law. In this caſe theſe points were reſolved: 1. That the King might make Corporations, and grant them that they might make Ordinances for the Ordering and Government of any Trade; but they thereby cannot make a Monopoly, for that is to take away Free Trade, which is the birth of the Subject. See 9 *H.* 5. *c.* accordingly. 2. It was reſolved that the Clauſe in the Letters patents was void; but it was agreed, That where it is either by preſcription or cuſtome which is confirmed by Act of Parliament, ſuch an Ordinance may be good, *quia conſuetudo Legales olus valet quam Conceſſio Regalis.* 3. Reſolved, That the Charter was void, becauſe

of

of the words, *viz. Nisi ante tres vel duos eorum probationem fecerit*; for it was agreed, That the proof cannot be upon Oath, for such a Corporation cannot administer an Oath to the party, and then the proof must be by his Indentures and Witnesses; and perhaps the Corporation will not allow of any of them; for which he hath no remedy but his Action at Law; and in the mean time he should be barred of his Trade and Maintenance, to which he had been Apprentice for seven years: and if such Patent should be good in this point, they should be Judges in their own cause; which is against the Law. It was adjudged for the Defendant. *Pasch.* 12 *Jac.* in B. R. The Cloathworkers of *Ipswiches* Case. *Godb.* 252.

3. In *Ejectione firmæ*, the Case was, The Prior of *Launceston* was seised of four Closes in *North-Dracomb* in *Launceston*; and 27 *H.* 8. demised the same to *I. S.* by the name of four Closes in *Dracomb infra burgum de* Launceston, for 99 years. The Priory and the possessions came to King *Henry* the eighth by the Statute of *Dissolution*: afterwards Queen *Elizabeth* by her Letters patents, *anno* 21. of her Reign, granted to *B.* and *C.* and their heirs, *totum illud Messuagium sive Tenement' vocat* Dracombs *alias* Dratons, *& omnia terras, Tenementa dict. Messuagii spectant vel cum eodem dimiss' situat, jacent & existat in* Launceston *super Priorali* Launceston *spectant*: But before this grant, *anno* 25 *Eliz.* a house was erected upon a Rood of Land, parcel of the said Closes, by the Occupiers thereof; and it was found, The *Tenementa in Narratione mencionatur eidem Messuagio spectant*, and was demised and granted with the said Messuage, and was called by the name of *Dracombs* as as well as by the name of *North-Dracombs*. It was a Question in this case, the Patent being made of a Messuage and Lands thereunto belonging, this Messuage being newly erected after 1 *Eliz.* whether the Lands should pass; for it was said, that although in a common persons case, Lands may pass by the name of Lands appertaining to a house, yet it cannot do so in the case of the King; for it ought to be for a longer time then twenty years, if you would have it obtain reputation of passing by the word *appertaining*. But it was resolved by the whole Court, That the Patent was good for the Messuage and the Lands, for although the Messuage was not built upon it when it was demised, and that afterwards a Messuage was erected upon it; yet it should be as it is, and by such name as it is known at the time of the Letters patents: And the opinion of the Court in this case was, That Lands may be said to be appertaining to a house as well in the Kings case as in the case of a common person, when it hath been let and occupied by a convenient time. *Hill.* 3 *Car.* in B.R. *Gennings* and *Lakes* case. *Cro.* 1 par. 120, 121, 122.

4. The case was, Queen *Elizabeth*, *anno* 19. granted to *F. Grivel* Esquire, the Office of Clerk of the Council of the Marches of *Wales* for his life; and by another Patent 25 *Eliz.* granted to him the Office of Secretary there. King *James*, *anno* 1. without recital of these Patents, grants the said Office to the said *F. Grivel*, then Sir *F. Grivel*, for life. After, 9 *Jac.* the King reciting the Patent of 1 *Jac.* granted those Offices to *A.* for his life, when after the death, surrender or forfeiture of the said Sir *F. G.* they should be void. And after, 14 *Jac.* by another Patent, omitting the Grants of 19. and 25. *Eliz.* granted the said Office to *I. S.* and *I. D. Habendum* for their lives *cum post mortem* of the said Sir *F. G.* or *A.* surrender, forfeiture, or other determination, *vel aliatum modo*, the said Offices should be void, with a *Non obstante male nominando vel male recitando prædict. Offic. & non obstante male nominando vel male recitando, vel non recitando, aliquod donum vel concessionem præsentes factum de Officio prædict.* This Case being referred to all the Justices, it was by them all agreed, 1. That the Patent of 1 *Jac.* was void, for it was agreed that the Patent of 19. and 25 *Eliz.* were good: and then Sir *F. G.* being Patentee, and alive, and he accepting a new Patent, 1 *Jac.* without reciting the former Patent, and not any *Non obstante* therein, it is void. 2. Agreed, that the Patent of 9 *Jac.* reciting the Patent 1 *Jac.* as a good Grant, which is void, and no *Non obstante* therein; this Patent was void. 3. Resolved, that the Patent 14 *Jac.* was void, and the *Non obstante* therein did not make it good, by reason of those miss-recitals, which are not properly miss-recitals, or false recitals, but rather false informations, or suggestions, whereby the King was deceived: for by intendment, the King conceived those Grants were good which are void, and granted those Offices after the determination of those Grants *vel alio quocunq; modo*, so as the King is deceived, and a *Non obstante* shall not help such false informations or suggestions. *Trin.* 6 *Car.* Lord *Brook* and the Lord *Gorings* case. *Cro.* 1 par. 142, 143.

5. In a *Replevin* in B.R. upon a Demurrer, the case was, Sir *T. Wyat*, tenant in taile to him and the Heirs Males of his body, the Reversion in the Crown, 31 *H.* 8. infeoffed *G. M.* and his Heirs, to the use of him and his Heirs: he had issue *G. Wyat*, who had issue Sir *Fr. Wyat*, in whose name the defendant made conusance. The Plaintiff shewed that Sir *T. Wyat* made his Feoffment *Ma.* and was attainted of Treason, and executed; and the Attainder confirmed the same year by Act of Parliament. And that he should forfeit all his Lands, Tenements,

Tenements, *Jura, conditiones & hereditamenta ſua*; and that they ſhould be veſted in the Queen without Office. The Queſtion was, Whether after this Feoffment by Sir *Thomas Wyat*, he had any eſtate or right remaining in him, which is not forfeited and given to the Queen by his attainder and Act of Parliament. This caſe was adjourned into the Exchequer-Chamber, and there argued by all the Judges and Barons; and it was reſolved, that for the Reaſons given in Plow. Com in *Walſingham's* caſe, That Sir *Thomas Wyat* againſt his Feoffment, had no right remaining in him, *nec jus ipſe, nec ad rem:* and for that cauſe, and for many other cauſes which ſee in the Caſe at large, Judgement was given for the Plaintiff: But the two Exceptions were taken to the pleading: 1. Becauſe there was no ſeiſin pleaded in the Queen, and then Sir *Fr. Wyats* title is good till ſeiſin, for that he had the firſt poſſeſſion; but that exception was diſallowed: for after the Attainder, by the Act of Parliament the Land was in the Queen without Office, and the Queen granted it by Patents to him under whom the Plaintiff claimed, who entred, and was ſeiſed till Sir *Fr. Wyat* entred; and ſo he had the priority of poſſeſſion and right. The ſecond Exception was, That the Indictment was by vertue of a Commiſſion granted to divers perſons, and doth not ſay that it was *ſub magno ſigillo*; and if it was not ſo, it was not good. But all the Court to that agreed, That it had been better to ſhew that it was *ſub magno ſigillo*; yet being omitted, it was well enough, and good both ways; and there, according to the Judgement in the Exchequer-Chamber, Judgement was entred for the Plaintiff. *Paſch.* 7 *Car.* in Exchequer-Chamber. *Stout* and *Newmans* caſe. *Cro* 1 par. 308, 309, and 329.

6. In debt for Rent, the Defendant pleaded Letters patents of protection, dated 5 *Jac.* reciting, *whereas he was indebted to the King in* 200 l. *the King for his more ſpeedy payment of his debt, received the Defendant into his protection, and that none ſhould meddle with his perſon or goods, or ſue or implead him in any Court for any debt or treſpaſs, &c. until the King was ſatisfied*, &c. It was the opinion of the Court, That by the Statute of 25 *E.* 3. theſe Protections are expreſſly, that none ſhall be delayed upon them, but the party ſhall anſwer and go to Judgement, but Execution ſhall ſtay; and therefore the Court was of opinion, That this Patent of Protection was not allowable; but when it came to execution, they would adviſe; and therefore ordered that the Defendant ſhould anſwer. *Paſch.* 16 *Jac.* in B. R. *Travors* and *Malyns* caſe. *Cro.* 2 par. 477.

7. King *H.* 7. *anno* 19. by his Letters patents granted the Manor of *B.* to *Giles Bridges* in taile; and afterwards, *anno* 24. recciting the former Letters patents of the Eſtate taile, and that they were ſurrendred and cancelled, granted *ex certa ſcientia*, &c. to the ſaid *G. B.* and *J.* his Wife, *manerium prædict.* without granting any Reverſion of the ſaid Mannor, *Habendum* to the ſaid *G. B.* and *E.* and their Heirs. It was adjudged in that caſe, that the Reverſion paſſed by that Grant: for in as much as the party had truly informed the King of the Eſtate taile, and of the delivery of the Letters patents to be cancelled, although that the King hath miſtaken the Law in matter of fact, yet the ſame ſhall not make void his Grant by Patent, no default being in the party: And in that caſe it was reſolved, That by the Grant of the Mannor without ſpeaking of the Reverſion, that the Reverſion did paſs; for this word *(Manor)* includes all manner of Eſtates of, or in the Mannor; as if *A.* gives the Mannor of *D.* to *B* in taile, and afterwards the Doner is attainted of Treaſon, and the King levieth the Reverſion, and by his Letters patents grants *Manerium de D.* to another and his Heirs: although in that caſe the King grants the Mannor of *D.* as in poſſeſſion, yet the Reverſion ſhall paſs; for the King hath an Eſtate, *i. e.* the Reverſion in Fee in him, which is grantable; and the Eſtate taile granted by the common perſon, needs not to be recited. *Cook.* 6 par. 55. the Lord *Choudoes* caſe.

8. A falſe recital in the Kings Letters patents, doth not make his Letters patents void. *Cook.* 1 par. 43.

9. The Letters Patents of the King ſhall not be made void upon conſtruction upon inferences and arguments, without expreſs and direct matters contained in the Letters Patents themſelves. *Cook.* 11 par. 43. in the caſe of *Altonwoods*.

10. If the Grant of the King cannot take effect according to his intent expreſſed in his Letters Patents, his Grant ſhall be void, and ſhall not be extended to paſs any other Eſtate then he intended to grant. 21 *E.* 4. 47. the Earl of *Kents* Caſe.

11. It is enacted by the Statute of 31 *H.* 8. *cap.* 13. That all houſes of Religion, and their poſſeſſions then after to be diſſolved, ſhall be in the King in the ſame eſtate and condition as they were at the making of the ſaid Act, ſaving to all ſtrangers their intereſts. The Abbot of *Ramſey* granted a next Avoidance, and afterwards the Abby was diſſolved, and came to the King by the ſaid Act: and it was adjudged, that the King ſhould have the ſaid Avoidance, and the ſaving in the Act a void ſaving. See 7 *Eliz. Dyer* 231. 27 *H.* 8. Br. to Parliament 77. and ſee *Cook.* 1 par. 47. in the caſe of *Altonwoods*, That if Lands be given to the King by Act of Parliament, ſaving

the Rights of all persons, it is a void saving, for then the Act should be but a vain Act.

12. The King granted *omnia illa Messuagia in tenura* I. S. situate in *W. nuper Priorat. W. spectant.* in truth the Lands lay in *D.* It was adjudged in that case, that the Kings grant was void by the common Law, because the grant is general, and is restrained to a certain Town; and therefore the Patentee or Grantee shall not have any thing which is out of the Town. See *Cook.* 2 par. 33.

13. By attainder of a Disseisee, a right to certain Lands escheates, and is forfeited to the King; and afterwads, *viz.* after the death of the Disseisee, the King by his Letters Patents grants all the Lands, Tenements and Hereditaments which he had by the attainder of the Disseisee. It was adjudged in that case, that a naked Right doth not pass by the said general words; but if such a Right may be granted at all, it ought to be with a special Recital by expres and special words. 8 *Eliz. Cromers* Case. *Cook.* 3 par. 46.

14. The Queen grants *Portionem decimarum & garbarum suarum* in *L.* It was adjudged in that case, that it shall be intended of Tythes in gross, according to the usual signification of the word *Portion*, and not of Tythes, parcel of the Rectory of *L.* And further note, That in that case this Rule was taken; That when the King by the common Law cannot make a Grant good, there a *Non obstante* of the common Law will not make the Grant good. As if the King grant a Protection in a *quare impedit*, or in an *Assize*, the Grant is void; but when the King by the common Law may lawfully make a Grant, but the common Law requires that he be instructed, that he be not deceived; there a *Non obstante* supplying the same, will make the Grant good. *Cook.* 4 par. 35. *Bozouns* Case.

15. The King by his Letters Patents granted to *Darcy*, that he should have the sole traffick of playing-Cards within the Realm in such manner as *A. B.* had it before. It was adjudged in that case, That the Letters patents to make playing-Cards only, and to restrain Trade, was void, because Trade and Traffick is the life of every Commonwealth, and especially of an Island. *Cook.* 8 par. 125.

16. Note for a Rule of Law, That Patents of the King grounded upon his prerogative, although they have a shew to be for the good of the Commonwealth; yet if they tend to charge the Subject, they are not good without the assent of the Subject. The King grants the Office of measuring of Cloath in *London* to *I. S.* with a Fee to be received for the measuring of it; there, although the Office tendeth to the furtherance of Commutative Justice; yet because this Fee tends to the charge of the Subjects, it was adjudged that the Patent was void.

17. The King by his Letters Patents granted a Protection to *A. B.* his servant, *Quia profecturus* in a Voyage to *Rome* for the service of the King, and of the Commonwealth, to continue there for three years: Such protection was disallowed by the Judges, notwithstanding the Kings Letters patents, because it was for three years, whereas by the Law it ought to be but for one year; and also because there was no exception in it of Dower, Assize, and *Quare impedit*, which ought to be excepted. 39 *H.* 6. 37. accordingly.

18. A Commission was awarded to divers persons to hear the cause concerning the Office of the Exigenter of *London* granted to *Scroggs*, and it was with a power, that if he refused to submit himself to their Order, then to commit him to prison: he refused to submit to their Order, and they committed him to prison: but upon a *Habeas Corpus* brought, he was discharged of his imprisonment, because the Commission was not good nor legal, and because his imprisonment by vertue of such Commission, was unlawful. 2 *Eliz. Dyer* 176.

19. The King seised of a Mannor in which were Copyholds, granted a Copyhold to one generally: It was adjudged in that case, That the Grant was good, notwithstanding that the King did not recite in his Grant that the Land was Copyhold. *Pasch.* 18 *Car.* in B. R. *Faliamb* and *Faliambs* Case adjudged.

20. In a *Quo warranto* against Sir *Arthur Capel* for claiming a Market, he pleaded to it that he claimed the same by Letters Patents of King *E.* 3. who granted this *per literas suas Patentes* unto the Abbot of *Glastonbury*; but doth not say *hic in Curia profert.* as he ought to do; and the Kings Attorney did confess all this to be so: Whereupon it was moved to have Judgement for the Defendant. It was the opinion of the Court, That after the Confession of the Attorney, the party cannot recover; but as *Amicus Curia*, he may shew any matter in Law to the Court. And it was the opinion of the whole Court in this case, That the plea in Bar was not good, neither in the manner nor in the matter of it; and caused a Rule to be so entred, for that otherwise hereafter this matter might be evidence against the King; for the preventing of which, the Rule was entred accordingly by the direction of the Court, That the Confession of the plea might not in time after be a bar to the King. *Trin.* 13 *Jac.* The King and *Capels* case. *Baldr.* 3 par. 58.

21. *Note:* It was holden by the Court, That the King by his Letters patents cannot grant to a Corpo-

Corporation to hold a Court of Equity; and à *fortiori*, that a Court of Equity cannot be by preſcription, being Juriſdiction derived from the Crown: and it was ſaid, That it was reſolved by *Popham*, *Anderſon*, *Gawdy* and *Wilmeſley* Juſtices, That the King could not grant to the Queen his Wife to hold a Court of Equity, for that the King cannot by his Letters patents grant any thing in derogation of the Common Law; but *tenere Placita*, according to the courſe of the Common Law, may be granted and preſcribed in. And in this caſe it was ſaid, That the Chancery and *Durham* were Courts incident to a County Palatine, which had *Jure Regalia*; and *London* and the Cinque-Ports have Acts of Parliaments for the holding of their Courts. *Trin.* 13 *Jac.* in C.B. *Martin* and *Marſhall's* Caſe. *Hob.* 63.

22. In a *quare impedit* upon a ſpecial Verdict, the Caſe was, *A.* and *B.* his Wife, were ſeiſed to them and the Heirs of *A.* of the Rectory of *H.* in the County of *Suſſex*; and 10 *May*, 31 *H.* 8. by Deed of that date, did give the ſame Rectory to King *Hen.* 8. and his Succeſſors; and King *Hen.* 8. being ſeiſed of the Rectory of *D.* to which the Advowſon was appendant, by his Letters Patents dated 21 *July*, 31 *H.* 8. *In conſideratione prædict. Reſtavit de* H. &c. *per prædict.* A. & B. *eidem Regi hæredibus & ſucceſſoribus ſuis dat. & conceſſ. de gratiam ſpeciali*, &c. *dedit & conceſſit prædict.* A. & B. the ſaid Rectory of *D.* and the Advowſon, &c. *Habendum* to *A.* and his Wife, and the Heirs of *A.* and afterwards, that is to ſay, 26 *July*, 31 *H.* 8. and not before, the ſaid *A.* and his Wife came into the Chancery, and did acknowledge their ſaid Deed; which Deed was afterwards duly enrolled; and then the Jury found the Conveyance of the Parſonage of *D.* to which, &c. to *A.* and his Heirs. The Queſtion in this caſe was, 1. Whether the Conſideration in the Kings Grant were true, and good in Law, or not: 2. If the Kings Grant were good, notwithſtanding that the Conſideration be falſe and void. And after a very long Argument of this caſe, it was amongſt other things reſolved, That the Kings Grant 21 *July*, in Conſideration of a Grant made to him 10 *May* before, and the Deed of 10 *May* not being enrolled till the 26 of *July*, which was after the Kings Grant of the Rectory of *D.* to *A.* and *B.* and the Heirs of *A.* that the Grant of the King was good. See *Hill.* 12 *Jac.* in C. B. *Needler* and the Biſhop of *Wincheſters* Caſe. *Hob.* 120. to 132.

23. A Manor with an Advowſon appendant, is in the Kings hand; the Church voids; the King grants the Manor with the Advowſon: It was reſolved in this caſe, That the Avoydance ſhall not paſs, becauſe it is veſted in the King. *Mich.* 30 *Eliz.* in C.B. Sir *Tho. George*, and the Biſhop of *Lincolns* Caſe. *Owen* 53.

24. *Note:* It was reſolved by the Juſtices, 1. That the King by his Proclamation cannot create an Offence which was not an offence before; and the King cannot alter the Law of the Land by his Proclamation. 2. That the King hath no prerogative but what the Law allows him. 3. That the King for the prevention of Offences, may by Proclamation admoniſh his Subjects to keep the Laws, and that they do not offend them upon puniſhment. 4. That if an Offence be not puniſhable by Law, a Proclamation cannot make it puniſhable in any Court. *Cook.* 12 par. 74. in the Caſe of Proclamation concerning Buildings.

25. The King granted *bona & catalla Piratorum*, and alſo *bona & catalla depredata*; i. e. Goods robbed from others: It was reſolved in that caſe, That if the King by his Letters patents grant *bona & catalla felonum*, he ſhall have the Goods of the Felon himſelf, but not the Goods which the Felon ſtealeth from others. 2. Reſolved, The Goods taken from others the King cannot grant; but the King may ſeiſe ſuch Goods till proof be made who hath lawful property in them; and if they be *bona peritura*, the King may ſell them; and upon proof made, reſtore the value of them. *Trin.* 8 *Jac.* in C. B. *Cook.* 12 par. 73.

26. The King granted by Letters patents the cuſtody of *Putney*-Park, with the annual Fee of 3 *l.* with the Wind-falls, &c. to *I. S.* The King diſparked the Park, and afterwards by Patent granted all the Deer to *I. S.* It was reſolved in this caſe, That by the diſ-parking of the Park, the Office of Keeper was determined. 2. Reſolved, That the King might diſcharge the Keeper of his Office, although the Park continued. 3. Reſolved, That the annual Fee did remain, although the Patentee was diſcharged of his Office, or the Park diſparked. *Hill.* 2 *Car.* Sir *Charles Howards* Caſe. *Hutton* 86.

See more of Patents *and* Patentees *in the Title of* Grants of the King, *and Title* Prerogative.

Pleas *and* Pleadings.

What Pleas shall be good, what not. The various forms of pleading in several Actions; where construed strongly against the pleader, where not: Where the place, year, day, &c. must be shewed in the Count, Bar, Replication, where not: and of other Pleas, where, and what shall be good, what not.

1. DEbt by the Abbot of *W.* against the Executors of *L.* upon an Obligation dated 10 *Novemb.* 11 *H.* 8. The Defendant pleaded an Indenture of Defeasance dated the same day and year, by which the Plaintiff demised to *L.* the Rectory of *A.* and *L.* covenanted that he and his Assignes would discharge the Plaintiff *de omnibus oneribus ordinariis & extraordinariis*; and during the term to repair the Building, &c. and that it should not be lawful to alien without the licence of the Plaintiff; and he shewed that he entred and paid the Rent, and paid 5 Marks *debit appropriat. Reflorie praedict. que sunt omnia onera tam ordinaria quam extraordinaria*, and demanded Judgement of Action; upon which Plea the Plaintiff demurred: and because the Defendant did not shew the date of the Indenture, nor did shew the place where the five Marks were paid; It was amongst other things adjudged, that the plea of the defendant was insufficient; and Judgement was given for the Plaintiff. *Hil.* 28 *H.* 8. *Dyer* 27, 28.

2. *T. C.* Archbishop of *Canterbury*, 25 *H* 8. by Indenture made a Lease of the Mannor of *H.* to *P.* for forty years; which Lease was confirmed by the Dean and Chapter. Afterwards, 30 *H.* 8. he granted a Rent-charge of 10 *l. per annum* to Doctor *Butts* for fifty years, which was also confirmed. Doctor *B.* by his Will, 27 *H.* 8. devised, that the said Archbishop should retain so much of the said Annuity, with the Arrears of 25 *l.* of it, as should amount to 100 *l.* and if he died, or left his Bishoprick, that the residue of the Annuity which should be to come, should remain to *E. B.* his Nephew, and died. *P.* let the Land to the *L. North* for one year: after the year expired, *E. B.* distrained the Cattel of the *L. North*, and avowed for one year and a half for the said Annuity, (after the levying of the 100 *l.* by way of Retainer.) The *L. North* pleaded the former Lease made to *P.* without shewing the counter-part of the Bishop; and upon the Bar the Avowant demurred; and because no place was alledged where the confirmation was made, and because he did not shew the original Lease, but onely pleaded *pont in eodem scripto Confirmationis dat. apud Cant. in Domo Capitulari*, and it might be delivered by the Prior and Chapter in another place; and also because it was not pleaded that the Assignment of this Rent was by Deed; and a Rent cannot be assigned or granted over without Deed: For these causes it was adjudged, That the pleading was not good; and because the pleading was insufficient *ex utraq; parte*, the Court awarded a Repleader. *Hill.* 4 *Mar. Dyer* 139, 140. *Cranmers* Case.

3. Debt brought by *M.* in the Exchequer against the Sheriffs of *London* upon an Escape of *A.* and declared, That *A.* was in execution in *Ludgate* in the time of four Sheriffs, till the Defendants 15 *Decemb.* 3 *E.* 6. &c. The Defendants pleaded, That before the said 15 *Decemb.* viz. 23 *Sept.* 1 *E.* 6. the said *A.* being then in the custody of *I. S.* and *I. D.* then sheriffs, they at *Lambeth* let him at large: Upon which plea the Plaintiff demurred. It was holden that the plea was not good; 1. Because it might be before 3 *E.* 6. and yet the year after *I. S.* and *I. D.* were out of their Office. 2. It is repugnant that the said Sheriffs suffered him to escape in *Surrey*, he being then in their custody in *London*. And, 3. Because it ought to have been alledged certainly that he was in their custody in *Surrey*; for otherwise it is an escape. For the insufficiency of the Pleas, it was adjudged against the Defendants. *Mich.* 3 *E.* 6. *Dyer* 66, 67.

4. In *Ejectione firmæ*, the Plaintiff declared of a Lease for forty years to begin at *Michaelmas* next after the death of *I. S.* and averred that *I. S.* died, and he entred: Upon *Non ejecit* it was found for the Plaintiff. Error brought, and for Error assigned, that it was not shewed when he entred, so as it may be the term is ended; nor the time of his entry; for if he entred before *Michaelmas* after the death of *I. S.* he was a Disseisor, and not a Termor: for these causes the Judgement was reversed. *Trin.* 7 *E.* 6. *Dyer* 83. *Clifords* Error.

5. The Abbot of the Monastery of *Tewksbury*, in Com. G. seised of a Messuage and Lands in the said County, in a place called *D.* by Deed Leased the said Messuage and Lands to *A.* and *E* his Wife, and *I* their Daughter, for their lives, and the life of the longer liver of them. Afterwards, 17 *H.* 8. by an Indenture under the Covent-Seal, they demised to *I D.* and *M.* his Wife, the Re-

Reverſion of all their Meſſuage, *&c.* in *D.* together with the Chappel there, which the ſaid *A.* and *E.* his Wife, and *I.* their Daughter, held for their lives, to have to the ſaid *I. D.* and *M.* his Wife, and their Aſſignes, from the feaſt of *Michaelmas* next following after the death, ſurrender or forfeiture of the ſaid *A. E.* and *I.* or by what means ſoever the ſaid Reverſion ſhould happen, for 21 years. Afterwards *E.* and *I.* died: *I. D.* granted his Eſtate to *W. C.* Afterwards the ſaid Reverſion came to *Hen. 8.* by ſurrender. After which *A.* died. *W. C.* entred. The King granted the Reverſion to *F.* the Defendant in Fee. *W. C.* granted his Eſtate to the Plaintiff; who being poſſeſſed, put in his Cattel, and the Defendant *F.* took them damage Feaſants. And all this matter being pleaded in Bar to the Avowry, the Defendant *F.* did demur in Law. Divers Exceptions were taken to the Avowry: 1. Becauſe the Plaintiff had not ſhewed the Deed of Leaſe made to *A. E.* and *I.* for if there be no Deed, there is no Leaſe, and ſo no Reverſion. 2. Becauſe he hath not ſhewed that Livery and Seiſin was made by the Abbot by Letter of Attorney. 3. Becauſe the place is not alledged where the ſecond Leaſe was made. 4. Becauſe the Grant of the Eſtate to *W. C.* is not ſet forth to be by Deed. 5. Becauſe it is not averred that *A. E.* and *I.* held the Tenements for their lives, becauſe the Leaſe for years is of the Reverſion; and if no ſuch Leaſe, then no Reverſion. But all theſe Exceptions were anſwered and over-ruled by the Court; and afterwards upon the matter in Law, Judgement was given for the Plaintiff. *Mich.* 3 *Mr. Dyer. Throgmortons* and *Tracies* caſe. Plow. Com. 115. to 164.

6. In a *Replevin*, the Defendant made conuſance as Bayliff of *I. S.* for damage feaſant, ſuppoſing that King *E. 6.* d miſed the Land, *&c.* to *A.* for years, who granted parcel of the years to his Maſter, *&c.* The Plaintiff ſaid, That before King *E. 6.* had anything, one *I.* Abbot of, *&c.* was ſeiſed of the Land in the right of his Church; and with the aſſent of the Covent by Indenture dated 14 *H. 7.* witneſſeth the ſaid Abbot demiſed to him for life, *Habendam poſt mortem A.* and *E.* they died, and he put in his Cattel, *&c.* and they were at iſſue upon traverſe of the Leaſe of the Abbot, and the Jury gave a ſpecial Verdict; which becauſe they might not do upon a ſpecial iſſue, a Repleader was awarded; which began at the Avowry, who pleaded as before; and the Defendant demurred upon the Bar to the Avowry, 1. Becauſe there is neither Livery nor Attornment pleaded by the Plaintiff; and, 2. He hath not pleaded preciſely that the Abbot demiſeth, but that the Indenture witneſſeth, *&c.* Upon which, Judgement was given for the Defendant, that he ſhould have Retorne Irreplegeable; and a *Retorna habendo* was awarded accordingly. *Trin.* 3 *Mr. Dyer* 118. *Scatlocs* caſe.

7. *A.* was bound in a Recognizance to *B.* to perform Covenants; whereof one was, That the ſaid *A.* ſhould permit the ſaid *B.* and all the Tenants in *D.* to have Common of Paſture for their Cattel in the open Fields of *D.* when they ſhould lie fallow. Another Covenant was, That the ſaid *A.* ſhould not do, ſuffer, or cauſe to be done, any act or thing to alter the courſes of the Fields in *D.* In a *Scire facias* brought upon this Recognizance, the Defendant as to the firſt Covenant, pleaded that he had permitted the ſaid *B.* and all the Tenants in *D.* to have Common in the ſaid Fields when they ſhould lie fallow. To the ſecond Covenant he pleaded in Bar generally, That he had not altered the courſe; and if this general pleading were good in Law, or not, was the Queſtion: it was the opinion of divers of the Juſtices that it was good; but *Harper* Juſtice was againſt it, that it was not good. *Mich.* 11 *Eliz. Dyer* 279. See 26 *H.* 8. 5. 3 *H.* 6. 8. 33 *Eliz. Dyer* 297. accordingly.

8. In an Information againſt *W.* upon the Statute of Uſury, the Information was, That the ſaid *W.* at *Weſtminſter, per viam corupte accommodationis*, 8 *die* Septemb. *anno, &c. habuit & recepit de quodam* E. *quinq; libras legalis, &c. pro lucro & advantagio ſuo, pro abſtinentia & donatione die ſolutionis quinquagint. librarum à 4 die* July, *anno ſupradict. uſq;* 8 *diem* Septemb. *proxima ſequend. viz. ultra ratam.* 10 *l. in centum per an. contra formam Statuti*: and upon iſſue joyned, being found for the Plaintiff, Exceptions in arreſt of Judgement were taken to the Declaration, becauſe it is not expreſſed that the Plaintiff lent to the Defendant 50 *l.* alſo no place is aſſigned where, alſo it is not expreſſed upon what Statute the Information is grounded: but all the Exceptions were diſallowed by the Court, becauſe the Declaration is made according to the tenor and form of the Statute of 37 *H. 8.* which is a general prohibition, That no perſon, *&c.* and contrary to that, the Defendant had taken Uſury, *per viam corupte mutationis*; and of neceſſity is as implyed there, that the 40 *l.* was lent: Judgement was given againſt *W. Hill.* 18 *Eliz. Dyer* 346, 347. *Wilans* Caſe.

9. *A.* granted the Stewardſhip of a Mannor for life with the Fee of 40 *s.* and afterwards the Grantor by another Deed reciting *quod cum* the firſt Grantee *habet & tenet Offic. Senſchalli*, &c. for the term of his life, he granted the Reverſion of the ſaid Office, *per nomen Reverſionis*, &c. after the death *prædict.* the firſt Grantee *was tum ſtodo* 40 *s* with clauſe of Diſtreſs. After the death of the firſt Grantee, the ſecond Grantee held the

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Courts for eight years, and for the Arrerages he avowed and distrained. It was the opinion of the Court, That the Grant *per nomen Reversionis* was void, because no Reversion was of it in any person, and none can be Steward but one, *i. e.* He who executes the Office, no more then of a Corody; and if the Grant of the Office be void, the Grant of the Fee for the executing of it, is void: Also it was not alledged by matter in fact, that the Office was first granted by matter in fact, *pro termino vitæ*, so as the Grantors might make a Grant of the Reversion, but onely reciting, *quod cum ut supra*: and for these causes the Plaintiff demurred upon the Avowry: and it was the opinion of the Court, that the Avowry was not good. *Pasch.* 9 *Eliz.* *Dyer* 219. Sir *John Savages* Case.

10. In Battery the Action was laid in *London*, and in truth the Battery was committed at *Uxbridge*, in the County of *Middlesex*. The Defendant pleaded that such a day and year at *A.* in the County of *H.* the Plaintiff made an assault upon him, and the hurt, *&c. absque hoc*, that he is guilty in *London*. It was objected that the Traverse was not good; but it was the opinion of the Court, That it was a good plea to bar the Plaintiff. See 2 *E.* 4. 6. accordingly. *Pasch.* 28 *Eliz.* in C. B. *Webster* and *Paines* Case. *Goldesbr.* 2 par. 5. See *Mich.* 29 *Eliz.* *Goldesbr.* 43. accordingly.

11. Debt upon an Escape against a Sheriff, the Defendant pleaded that the Plaintiff *dedit Consensum eidem* Jacob. that the Plaintiff should go at large, whereby he did so. It was objected, That he ought to have pleaded it by way of licence, and not by consent: but the Court held the plea good, and that he might take issue upon it. *Hill.* 30 *Eliz.* in C. B. *Cussing* and Sir *James Harringtons* Case. *Goldesbr.* 81.

12. *A.* brought a Formdon in the Discender, and declared of a Gift in taile made to his Father, who died; and the Land descended to the elder Brother of the Demandant, who also died without issue, and so coveyed himself as Heir in taile. The Tenant pleaded, That the elder Brother had issue a Daughter, who levyed a Fine to him, and relyed upon the Fine and Proclamations. It was objected that the plea was double, the one the Issue, the other the Fine; but the Court held the plea to be good, and not double, because he cannot come to the one without shewing the other: also here he relyeth upon the Estoppel. *Pasch.* 30 *Eliz.* in C. B. *Whites* Case. *Goldesbr.* 88.

13. In Trespass the Defendant pleaded that the place is Copyhold, and pleaded a Grant to *S.* who granted it to him. The Plaintiff said, That before the Grant pleaded by the Defendant, *A.* was Lessee for life according to the custome of the Mannor; and that the custome of the Mannor is, that the Lord may grant Copies as well in Reversion as possession, and that *I. S.* was Lord of the Mannor, and 5 *Eliz.* granted to him a Copy in Remainder before the Grant made to *S.* and that he entred. The Defendant Rejoyned, that the Lord may grant Copies in Reversion, with the agreement and consent of the Tenant in possession, and that such Grants shall be allowed, *absque hoc*, that they are demiseable, *modo & forma*: upon which the Plaintiff demurred. It was holden in this case, that the plea of the Defendant was repugnant; for these words, *If any may be granted*, implyeth there is such a custome; and then when he saith, *Absque hoc*, that there is such a custome, the Traverse is void: also it was holden to be a void custome. *Mich.* 31 *Eliz.* in C. B. *Plympton* and *Dobyetts* Case. *Goldesbr.* 103.

14. Debt upon a Bond of 40 *l.* for the payment of 20 *l.* at a day and place certain. The Defendant pleaded that he had paid the money according to the condition; and upon issue joyned, the Defendant gave evidence that he had paid the money to the Plaintiff before the day, which he accepted of. It was the opinion of the Court, That the payment of the money before the day, was a sufficient discharge of the Bond; but because the Defendant had not pleaded the same specially, but generally, that he had paid the money according to the condition, the plea was not good; and Judgement was against the Defendant. *Mich.* 24 *Eliz.* in C. B. *Godb.* 10.

15. One charged two men as Receivers: The Question was, Whether one might plead *Ne unq; fuit Receiver*; it was moved that he could not, but he ought to say, *Ne unq; fuit Receiver absque hoc*, that he and his Companion were Receivers: It was the opinion of the Justices, That it was well without a Traverse. See 10 *E.* 4. 8. Accompt was brought against one supposing the Receipt of 200 *l.* by the hands of *I. P.* and *I. D.* The Defendant as to 100 *l.* pleaded that he received it by the hands of *I. P. tantum*, without that, that he received it by *I. P.* and *I. C.* and there doubted if it were good enough: But see *Br.* in the end of the Case, *Accompt* 14. If an accompt be brought against two, and one saith he was sole his Receiver, and hath accompted before such an Auditor, if the Plaintiff answereth to his bar, he shall abate his Writ, because the Receipt is supposed of a joynt Receipt. *Mich.* 29 *Eliz.* in B. R. *Godb.* 43.

16. In Covenant, the Case was, Lessee for ten years did Covenant to build a House upon the Lands within the first five years. The Defendant pleaded

pleaded that the Leſſor did enter, and had the poſſeſſion for part of the fifth year; whereby the Covenant was diſcharged. It was the opinion of the Juſtices in this caſe, That the Defendant ought to have pleaded that the Plaintiff held him out with force, and would not ſuffer him to build it. And ſo it was ſaid it was adjudged this Term in the Common Pleas, where the caſe was, That Leſſee for years covenanted to build a Mill within the Term; and becauſe he had not done it, the Leſſor brought Covenant, and the Defendant pleaded that within the laſt three years the Leſſor forcibly held him out, ſo that he could not build it: And it was the opinion of the Court, that ſuch plea was good, but otherwiſe not. See 35 *H. 6. Tit. Bar.* If one be bound to enfeoff one of ſuch Lands before *Michaelmas*, there the Obligor in debt brought upon the Bond, pleaded that the Obligee (before the day) had entred with force upon the Land, ſo as he could not enfeoff him: In that caſe it was holden, that the Defendant ought to prove that he was holden ought by force: in the principal caſe *Curia aviſer vult*. *Mich.* 29 *Eliz.* in B. R. *Barker* and *Fletwells* Caſe. *Godb.* 69, 70.

17. Note by *Popham* Juſtice: If a man find my Horſe, and after ride him, and then deliver the Horſe to me, and I bring an Action of Trover for the Converſion; it is no plea that you have delivered me the Horſe before the Action brought, but you ought to anſwer to the Converſion. *Mich.* 40 *Eliz.* in B. R. *Goldesbr.* 155.

18. Debt againſt Husband and Wife, the Executrix of the laſt Will of *H. G. nuper dict. G. H.* of *London*, Taylor. The defendants pleaded in Bar a Recovery had againſt them in B. R. as Executors *Teſtamenti* G. H. *nuper dict.* G. H. of *London*, Barber-Chyrurgion; upon which the Plaintiff demurred; and whether this were good or no, was the Queſtion. It was objected, that it ſhall be intended one and the ſame perſon; and a Preſident was ſhewed, 16 *Eliz.* where an Action was brought againſt the Adminiſtrator of *F. F.* Mercer, and they pleaded likewiſe a Recovery in the Kings Bench againſt them as Adminiſtrator of *F. F.* Grocer, and allowed good: But the Court ſaid, They did not allow of that Preſident, if it do not appear if Exception was thereunto taken. And the opinion of the Court was, That in the principal caſe the plea was not good, and that it ſhall not be intended to be one and the ſame perſon. *Mich.* 31 *Eliz.* in C. B. *Hooker* and *Gomerſals* caſe. *Goldesbr.* 111.

19. *A.* High-Sheriff brought debt upon an Obligation againſt *B.* his Under-Sheriff: the condition was to perform Covenants in an Indenture; and one Covenant was, That the Under-Sheriff ſhall keep all the priſoners committed to his charge, until they be delivered by Law, and alſo to ſave *A.* harmleſs of all Eſcapes: the defendant pleaded performance of all Covenants. It was the opinion of the Court, That the plea was not good, for that one part is in the Affirmative, and the other in the Negative: but the defendant ought to have pleaded *Non damnificatus*. *Mich.* 40 *Eliz.* in B. R. *Peytons* Caſe. *Goldesbr.* 157, 158.

20. Debt upon an Obligation, the Condition was, That whereas the Plaintiff at the requeſt of the Defendant ſtandeth bounden with the Defendant to *I. S.* in an Obligation for the payment of 11*l.* the 15 day of *May*, (which *May* was before the date of the Obligation whereof the Action was brought.) If the Defendant do ſave and keep harmleſs the Plaintiff of and from the ſaid Obligation, that then, &c. The Defendant pleaded payment *ſecundum formam & effectum Conditionis prædict.* It was upon a Demurrer adjudged to be no good plea, but the Defendant ought to have pleaded *Non damnificatus*. *Mich.* 30 *Eliz.* in B. R. *Allen* and *Abrahams* caſe. *Goldesbr.* 158.

21. Debt upon an Obligation, the Condition was, That the Defendant ſhould diſcharge or ſave harmleſs the Plaintiff of an Obligation for which the Plaintiff, as Surety with the Defendant, was bound to *I. S.* The Defendant pleaded in Bar, That the Obligation made to *I. S.* by him and the Plaintiff, was upon a corrupt and uſurious Bargain, and pleaded the Statute of Uſury, and ſo *Non damnificatus*. It was objected, That if this plea be not allowed, the Statute of Uſury would be utterly defeated; for by compact betwixt the Surety and the Uſurer, the Surety ſhall pay the Uſurer; and the Surety by the Counter-Bond ſhall have double recompence; which would be miſchievous. But it was the opinion of the Court that it was no good plea, for that the Condition is, That the Defendant ſhall diſcharge and ſave harmleſs. *Mich.* 40 *Eliz.* in B. R. *Robinſon* and *Mayes* caſe. *Goldesbr.* 174.

22. In an Action upon the Caſe, the Plaintiff declared that the Defendant in conſideration that he had retained the Plaintiff to go from *London* to *Paris*, to merchandize divers Goods for the profit of the Defendant, promiſed to give him ſo much as ſhould content him, and alſo to give him all and every ſuch ſum of money which he ſhould expend there in his affairs; and declared that he was contented to have 25*l.* for his labour, which the Defendant refuſed to pay: Exception was taken to the Declaration, becauſe it is not ſet down any place or time of Notification of his Contentment; for the ſame is traverſable: and it was ſaid, That if one aſſume to pay one 20*l.* upon requeſt, although

although the Defendant plead *Non Assumpsit*, yet if the place and time of the request be not shewed, Judgment shall be stayed; for no Action without a request: So here without Notification of his contentment, no Action; and therefore he ought to shew it: That Case was agreed: But here in this Case it was holden by the Court, it being but conveyance, the certainty of the time and place is not necessary to be shewed, but the general form shall serve, for that is but inducement. It was adjudged for the Plaintiff. *Pasch.* 30 *Eliz.* in B.R. *Dellaby* and *Hassalls* case. *Leon* 113.

23. Debt upon an Obligation; the Defendant pleaded that it was upon Condition for performance of certain Covenants within certain Indentures, and shewed what, &c. and further alleadged, that in the Indenture there was a Proviso, That if *aliqua lis vel controversia oriatur in posterum*, by reason of any Clause, Article or Agreement in the said Indenture, that then, before any suit thereupon attempted, the parties shall chuse four indifferent persons for the ending thereof; which being done, the Indenture and Obligation shall be void; and said, that *Lis & Controversia* groweth upon the same Indenture. It was the opinion of the Court, That because the Defendant hath not shewed specially what Controversie and Strife, and upon what Article certain, that the plea in Bar was not good: and the Court was of opinion, That the Proviso did not extend to submit to the breach of every Article in the Indenture, but onely where Strife and Controversie doth arise upon Construction of any Covenant; so as the Defendant ought to have shewed such matter as fell within the Arbitrement: Judgement was given against the Defendant. *Tr.* 28 *Eliz.* in B. R. *Parmort* and *Griffiths* case. *Leon* 37.

24. Debt upon an Obligation against *Oliver St. John*, and *Alice* his Wife as Heir to her Father: The defendants pleaded *Non est factum* of the Father: It was found by Verdict that the Bond was made by the Father of the Wife to the Plaintiff, whereas in truth the Plaintiff declared upon an Obligation made to himself onely, without speaking any thing of the other joynt Obligor, and that the Plaintiff as Survivor hath brought the Action: and if upon the matter it shall be said the Deed of the defendant in manner as the Plaintiff declared, the Jury refer to the Court: it was ruled in this case, That the Plaintiff upon the Verdict should not recover; but the best way for the Plaintiff was to sue the Defendant by the name by which he is bound; and then, if he appear and plead, *ut supra*, he shall be concluded by the Obligation, as the case is put, in *Dyer* 10 *Eliz.* 273. And in the principal case the Court was clear of opinion that the Plaintiff ought to have declared upon the special matter. *Mich.* 31 *Eliz.* in C. B. *Dennis* and *St. John's* case. *Leon* 322.

25. In Debt upon a Bond for performance of Covenants, it was holden by the whole Court, That if the defendant doth plead generally the performance of the Covenants, and the plaintiff doth demur generally upon it, that Judgement shall be given according to the truth of the case; for that default in pleading is but matter of form, and is helped by the Statute of 18 *Eliz.* But if any of the Covenants be in the Disjunctive, so as it is in the election of the Covenantor to do the one or the other, then it ought to be specially pleaded, and the performance of it; for otherwise the Court cannot know what part hath been performed. *Pasch.* 23 *Eliz.* in C.B. *Oglethorpe* and *Hides* case. *Leon* 311.

26. In Debt upon an Obligation with Condition to perform Covenants in an Indenture, the defendant pleads performance of all the Covenants generally; and it appears to the Court, that divers of them are in the Negative, or the Disjunctive: It was holden that the plea being general in the Affirmative, is insufficient: but yet in that case, if the Plaintiff reply, and sheweth a breach of one of the Covenants, which by his own shewing is not a breach, upon which the defendant demurs: In that case Judgement shall be given against the plaintiff, because upon the whole Record it appears that the Plaintiff had no cause of Action; and it will be always intended that every one will make the best of his own cause. *Cook.* 8 par. 123. in *Turners* case.

27. In Debt against an Administrator, upon an Administration committed by the Bishop of *L.* The defendant pleads an Administration committed to himself by the Archbishop of *Canterbury*, because the Intestate had *bona notabilia*. The Plaintiff replyed, That the Administration was repealed: It was holden in that case, because the defendant did not shew in his bar that the Intestate had *bona notabilia* in certain, it shall not be intended that he had *bona notabilia* in divers Dioceses; and yet the Administration committed by the Archbishop of *Canterbury*, is not void, but voidable. *Cook.* 8 par. 135. in Sir *John Needhams* case.

28. A Submission was to an Award by Obligation, so as it be made and yeilded in Writing at or before *Michaelmas*. The Plaintiff said, That the Arbitrator before the Arbitrement in Writing *fact. & partibus*, before the day *deliberat.* made an Award, and assigned a breach: upon which the defendant demurred. In that case it was adjudged against the Plaintiff: 1. Because it is not direct, but

but an argumentative affirmance, that the Arbitrators delivered the Award. 2. Because he should have pleaded the delivery according to the condition, *viz.* that it was delivered *at or before*, &c. and not before onely. *Mich.* 8 *Eliz. Dyer* 243.

29. Note for a Rule, Every Count or Declaration ought to contain two things: *viz.* certainty and verity; because it is the foundation of the suit, whereunto the adverse party must answer, and whereupon the Court is to give their Judgement. And know, that there are three kindes of certainties: 1. To a common intent; and that is sufficient in a Bar, which is to defend or excuse. 2. A certain intent in general; as in Counts, Replications, and other pleadings of the plaintiff, and also in Indictments. 3. To a certain intent in every particular; as in *Estoppels*, in resp & they conclude a man to alleadge the truth, they ought to be certain to every intent, and not to be taken by argument or inference. *Cok.* 1 par. instit. 303. See *Plow.* Com. *Partridges* and *Strangs* case accordingly.

30. If a Messuage be demised to *A.* for life, the remainder to *B* for life, *si ipse* B. *vellet habitare in Messuagio prædict &c.* In this case, in an Action brought by the Lessor for the recovery of the Messuage *&c.* and upon a condition broken, it is a good Bar to say, That after the death of *A.* he entred; without averring the time of his entry, *viz.* immediately after the death of *A.* because by intendment of Law, it will be presumed he did so enter. So if one plead in bar, that *A.* died seised, and that *B.* entred as son and heir to *A* this is a good bar, and yet it may be that he was not his heir: for it is not expressly said that he is his son and heir, but that he entred as son and heir: and yet because he pleads it by way of bar, the best shall be intended for the defendant. See *Plow.* Com. in *Coltburst* and *Brinsdons* case 28 and 31. accordingly.

31. Debt against an Administratrix: she pleaded in bar, *quod ipsa plene administravit omnia bona, &c. que fuerunt, &c. & quod illa nulla habet bona, &c. que fuerunt, &c. nec habuit die impetrationis brevis, &c. præter bona & catalla que non sufficiunt ad satisfaciend. prædict. seperalia debit.* by which she confesseth that she had sufficient in her hand to satisfie the Kings debt and Recognizances; and then she pleads further, *quod ipsa nulla fuit plura habet bona, &c. que fuerunt, &c. preterquam bona & catalla que non sufficiunt ad satisfaciendum prædict. seperalia debit.* which is repugnant to what she said before: wherefore it was adjudged, that her plea in bar was no good plea, but utterly insufficient. *Cok.* 9 par 109. *Meriel Treshams* case.

32. In Covenant, the plaintiff declared, That the defendant being possessed of an Advowson in gross for term of years, covenanted that he would not grant nor assigne his interest to any, without offer thereof first to the plaintiff; and that he should have it 5 *l.* better cheap then any other: and alleadged that he granted the said Advowson and his term therein over, without offering it to the plaintiff. Issue being joyned upon *Non concessit*, it was found for the plaintiff. It was moved in stay of Judgement, that the Grant upon which the issue is joyned, is not alleadged to be by Deed. But it was the opinion of the Court, That that was made good by the Verdict: for it being a perfect Grant, it shall be intended that at the Evidence a Deed was shewed; as upon an Issue joyned of the Grant of a Reversion, where it is not alleadged that it was by Deed, or that the Tenant attorned; yet if it be found by Verdict, it shall be good. *Mich.* 2 *Jac.* in C. B. *Lightfoot* and *Brightmans* case. *Hutton* 54,55.

33. In Trespass for assaulting and beating of his servant, *per quod servitium amisit*, the defendant as to the Battery *vi & armis*, pleaded Not guilty; and as to the Assault, he justified, and shewed, that he was possessed of a house, and had a Light time out of minde, and that the plaintiffs servants did intend and endeavour to erect another house upon a certain piece of ground adjoyning to his house, and had erected certain timber for the house; the which house, if the same had been erected, would have stopped the said ancient Light: and for this cause, that this would have been to his Nusance, he stood in his own house, and with a staff did thrust away the defendants servants by him employed in the said building, and did then throw down the timber so erected. Upon which plea in bar, the plaintiff did demur in Law. It was the opinion of the whole Court, That the plea in bar was not good, for many causes: 1. Because in this case, the principal cause of the Action is the loss of his service; and the defendant doth justifie as to the Battery, but doth say nothing to the loss of the service, which is the ground of the Action, which ought to be confessed, traversed, or denyed. 2. For that the plea amounts to the general issue. 3. The plea of justification is not good: for the defendant ought to have *damnum & injurium*: and if he have none of these, his justification is not good; and it doth not appear that he hath any damage. It was adjudged for the plaintiff. *Mich.* 10 *Jac.* in B. R. *Morris* and *Bikers* case. *Bulstr.* 3 par. 196, 197.

34. In a false imprisonment, the defendant justifies, That *A.* being Maior, and Justice of peace within the citie of *London*, commanded him, being a Sergeant of the Mace, *tro diversis certis videlicet Majori bene cognitis*, to imprison the plaintiff. In this case it was holden, That the plea of justifica-

tion was not good, for that he ought to ſhew the cauſe of the impriſonment, ſo as the Court might judge whether it were lawful or not: and where one is impleaded in an Action, he ought to ſhew the cauſe, otherwiſe the plea is not good. *Mich.* 3 *Jac.* in B. R. *Bouchers* caſe. *Cro.* 2 par. 81.

35. In Covenant brought, for that the defendant let him a Meſſuage for years, and covenanted that he was lawfully ſeiſed in Fee of an indefeiſible eſtate; and laid, that at the time of the making of the Indenture, he was not lawfully ſeized in Fee. The defendant pleaded *Non eſt factum*, which was found againſt him. It was moved in ſtop of Judgement, That the Declaration was not good, becauſe the breach is too general, not ſhewing that any other was ſeized, nor any cauſe why the defendant was not ſeized. But the Court held the Declaration to be good: and the Covenant being general, the breach may be aſſigned generally, and eſpecially where the defendant hath made the Declaration good by pleading *Non eſt factum*; ſo as he allows of the breach ſo as it had been his deed: adjudged for the plaintiff, *Hill.* 12 *Jac.* in B.R. *Muſcot* and *Ballets* caſe. *Cro.* 2 par. 369.

36. Treſpaſs *quare clauſum fregit*, 8 *Maii* 43 *Eliz.* *averia depaſcendo*, *viz.* *equis*, *bobus*, & *vaccis*, *continuando uſque* 25 *diem Julii* following. The defendant pleaded, that the place where was 1000 acres of meadow, and pleaded that he and all thoſe whoſe eſtate, &c. time out of minde have had paſture in the ſaid, &c. for two Geldings every year, from the firſt of *May*, until the graſs there grown be cut and made into hay, as to his Manor appertaining; and juſtifies the putting in of the two Geldings to uſe the paſturage, and their continuance there until the 20 of *June* aforeſaid; and avers the graſs was not cut down until the aforeſaid 20 of *June*. It was the opinion of the Court, that this might be a good preſcription: but the Court was of opinion, that the plea of the defendant was not good, for theſe cauſes: 1. Becauſe the Action is brought for the treſpaſs *cum equis*, *bobus*, *vaccis*, &c. and the defendant juſtifies for two horſes, and ſpeaks nothing of the reſidue. 2. Becauſe the treſpaſs is alleadged 8 *Maii*, with a *continuando* unto the 25 *Junii*; and the defendant juſtifies from the 8 of *May* to the 20 of the ſaid *June*, but ſpeaks nothing of the four laſt days. 3. Becauſe he claims this Paſturage to the Manor of *S.* and doth not ſhew in what County the Manor lies. And for theſe cauſes, the pleas of the defendant were not good, and Judgement for the plaintiff. *Hill* 43 *Eliz.* in B. R. Sir *John Thorall* and *Laſſells* caſe. *Cro.* 2 par. 27.

37. In treſpaſs the caſe was, Leſſee for life of a houſe and paſture-lands, died; his Executors ſuffered Cattel to go there for ſix days after his death, and then removed them: and for that time the defendant juſtified the going of the Cattel there, upon an Averment, that in that time they could not procure any other place for putting in of the Cattel. It was the opinion of the Court, That the Law allows a convenient time for the removing of the Cattel; and that ſix days was but a convenient time for the doing of the ſame: But becauſe the defendant pleaded onely a Leaſe of the Houſe, and not of the Land in the Declaration mentioned, it was adjudged againſt the defendant. *Trin.* 5 *Jac.* in B. R. *Stodden* and *Harveys* caſe. *Cro.* 2 par. 204.

38. In *Ejectione firmæ*, the Plaintiff declared of Lands in *K.* and two other Villages: the Defendant pleaded *Not guilty*; and at the *Niſi Prius* pleaded, That the Plaintiff after the Darrein continuance, entred into a Cloſe, parcel of the Premiſes, and expelled him; upon which it was demurred: and the cauſe of the Demurrer was, becauſe he doth not ſhew in which of the Villages the Cloſes lay. It was the opinion of the Court, That the plea was ill in ſubſtance, becauſe it is uncertain, and there cannot be a tryal for want of the place. *Mich.* 8 *Jac.* in B. R. *Hawkins* and *Mores* caſe. *Cro.* 2 par. 261.

39. Treſpaſs for entring his Cloſe, *averia depaſcendo*, and chaſing the Plaintiffs Cattel in the ſame. The Defendant as to the entry and chaſing of the Cattel with two horſes, pleaded that *A.* was Parſon of *K.* within which Pariſh the Cloſe was; and by Deed under his hand, and ſealed ſuch a day, let the Tythe of the ſaid Cloſe to *I. S.* for three years; and the Defendants as his ſervants entred the Cloſe with their Horſes, and chaſed the Cattel in the ſaid Cloſes, to ſee what Tythes were due for them: whereupon it was demurred, becauſe he juſtifies by vertue of a Leaſe for years of Tythes, and ſhews not the Deed of the Leaſe. It was the opinion of the Court, That becauſe he had not pleaded by Deed *hic prolat.* that the plea was not good; alſo the plea was not good, for that they cannot juſtifie the Riding upon the Land, nor chaſing the Cattel up and down to ſee what Tythes were due, for there were other means to come to the knowledge thereof. *Mich.* 12 *Jac.* in B. R. Sir *Hen. Rolls* and *Boultings* caſe. *Cro.* 2 par. 360.

40. Debt upon an Obligation, the Defendant pleaded, that the Plaintiff in the Kings Court at *P.* brought Debt upon the ſaid Obligation againſt *T.* who was joyntly and ſeverally bound with the Defendant, and recovered and had him in execution, and that the Goaler voluntarily ſuffered him to eſcape. It was the Opinion of the Court, That

this plea was not good for two cauſes: 1. Becauſe he doth not ſhew that the ſaid Court of *P.* being a private Court, had power to hold plea: 2. The plea was not good in ſubſtance; for the eſcape of the Priſoner, (although it be by a voluntary permiſſion of the Goaler) is not any diſcharge of the Debt, and by conſequence the Action lies againſt the other. See *Cook.* 5 par. 86 *Blumfields* caſe. *Hill.* 16 *Jac.* in B. R. *Pendavis* and *Kenſhams* caſe. *Cro.* 2 par. 531.

41. Errour of a Judgement in a falſe impriſonment: the Errour aſſigned was, becauſe in the Battery and falſe impriſonment, the Defendant as to the Battery pleads *Not guilty*, and as to the impriſonment juſtifies: And it was adjudged, that the plea was ill: whereupon the Plaintiff prayed his Judgement, and a *Nolle proſequi* entred for the reſidue, and he had Judgement: And becauſe as to the *Nolle proſequi* Judgement was not entred *quod eſt ſine die*, ſo as there was not any diſcharge of the Defendant; It was objected to be erroneous: but the Court was clear of opinion, That where there be two Defendants, and the one pleads *Not guilty*, and the other pleads another plea, whereupon it is demurred, and Judgement is againſt him who demurred, and a *Non proſequi* for the other; there it ought to be *ſine die*: but where it is againſt one, there the Preſidents are both ways. The Judgement was affirmed. *Trin.* 12 *Jac.* in B. R. *Eaſty* and *Sloleys* caſe. *Cro.* 2 par. 439.

42. *Note*: Upon an *Aſſumpſit* of a Promiſe made by a Woman *dum ſola fuit*, the Husband and Wife appeared; and the Wife ſaid and pleaded *quod ipſa Non Aſſumpſit*: and this being tryed, and found for the Plaintiff, upon arreſt of Judgement prayed, it was the opinion of the whole Court, That the plea of a *feme covert* without her Husband, is no plea at all; and an iſſue joyned upon ſuch plea, is idle, and not helped by the Statute of *Jeofails*, *Mich.* 9 *Jac.* in B. R. *Tamplon* and *Newſons* caſe. *Cro.* 2 par. 288.

43. In Treſpaſs againſt *A. B* and *C.* for taking a Cup-board, and other Goods. *A.* pleaded *Not guilty*. *B.* as to the entry and taking the Cupboard, juſtified by reaſon of an Extent, and a Liberate thereupon: and *C.* pleaded the like plea, and thereupon was pleaded *Nul tiel record*; and the Defendant had day to bring in the Record *uſq; Craſt. Purif.* and at the day the Defendant failed of the Record: whereupon it was adjudged againſt him *quoad* that, and a *Venire facias* awarded *ad inquirendum de executione predict. quam de damnis, retor. quinq; Paſch.* and then the Record is *poſtea continuat in proceſſu in predict. Placito, uſq; Octab. Mich. Niſi Prius*; and upon the retorn of the *Poſtea*, Judgement was, Errour was brought for that there was not any continuances, either upon the Plea-Roll, or the Roll of the *Venire facias*, after iſſue joyned between the Term of *Paſch.* and *Trinity*, nor from *Trin.* to *Mich.* and there being this diſcontinuance, there was a Failer of the Record: whereupon the Enqueſt is but an Office which is a diſcontinuance not aided by the Statute: and of that opinion was the whole Court: and upon that the Judgement was reverſed. *Mich.* 10 *Jac.* B. R. *Miles* and *Peatts* caſe. *Cro.* 2 par. 303.

44. In an Action upon the Caſe for an Eſcape for ſuffering one to eſcape being arreſted upon a Bill of *Mid.* The Defendants pleaded that after Arreſt they leading the Priſoner to *London* to the Goal, he was reſcued from their Bayliffs by *I. S.* and *John*; and without argument it was adjudged a good plea; for upon mean proceſs they are not bounden to take *Poſſe Comitatus* with them; and the party is at no loſs, for he hath loſt onely his proceſs, and he may have an Action upon the Caſe againſt the Reſcuſſors; otherwiſe it was if the Priſoner be in the cuſtody of the Sheriff upon an Execution, and the party be reſcouſed, there an Action upon the Eſcape will lie againſt the Sheriff, for that the Sheriff is at his peril to ſee that his Priſoner be kept in ſafe execution: and therefore it was adjudged that the Defendants plea in Bar was a good Plea. *Paſch.* 13 *Jac.* in B. R. *May*, and *Proby*, and *Lumleys* caſe. *Cro.* 2 par. 419. and ſo was it adjudged. *Paſch.* 15 *Car.* in B. R. See *Marſh* 1.

45. Debt upon an Obligation, the Condition was, That whereas the Defendant by Indenture bargained an Advowſon to the Plaintiff and his Heirs, if he acquitted, diſcharged, and ſufficiently ſaved harmleſs the Plaintiff from all Bargains, Incumbrances, Statutes, Charges, *&c.* The Defendant pleaded that he ſaved harmleſs the Plaintiff and the Advowſon from Harm, as in the Condition. It was adjudged by the Court, That it was no plea, becauſe he did not expreſs how he diſcharged him, which ought to be particularly ſhewed. See 32 *E.* 4. 4. *Trin.* 5 *Jac.* in B. R. *Alington* and *Yearthacres* caſe. *Cro.* 2 par. 165.

46. Debt upon an Obligation for payment of 500 *l.* ſuch a day: the Defendant pleaded tender of the ſaid 500 *l.* at the day and place of payment, and that none was there to receive it, and that he is yet ready to pay: it was demurred unto, becauſe it was not pleaded *Tout temps priſt*? It was doubted by the Court if it ſhould be a good plea: wherefore the Defendant durſt not inſiſt upon his plea, but paid a ſum of money to the Plaintiff in ſatisfaction of the ſaid debt over and above the 500 *l.* But ſee 21 *H.* 7. where it is holden that ſuch plea is good. See *Dyer* 300. *Mich.*

19 *Jac.* in B. R. *Steward* and *Coles* case. *Cro.* 2 par. 617.

47. Accompt was brought against *I. G.* of divers receipts and parcels of Goods; to all which, except to one, the defendant pleaded to issue, and for one parcel pleaded nothing; and the issues were found for the plaintiff: it was moved that the plea was discontinued, because he did not answer to parcel; and it was said, that the discontinuance was not remedied by the Statute of 32 *H.* 8. because no answer was given to one person; and of parcel the plaintiff could not have Judgement according to his Declaration. But it was resolved by the whole Court in this case, That the Statute of 32 *H.* 8. *cap.* 30. did extend to it; for it is thereby enacted, That after Verdict found. Judgement shall be given, any discontinuance notwithstanding. *Mich.* 29 *Eliz.* in B. R. *Gomersall* and *Gomersalls* case. *Godb.* 55.

48. Accompt brought against one as Receiver, issue was joyned, *Ne unq; Receiver* for *Accompt render.* Before Auditors the defendant pleaded, That by the appointment of the plaintiff he paid the money to *I. S.* It was adjudged no plea, and against his former issue: but it was holden it had been a good plea in bar of the Accompt. *Hill.* 12 *Car.* in C.B. *Hughes* and *Drinkwaters* case. *Hutton* 133.

49. Debt against an Administrator upon an Obligation of the Intestate, the Defendant pleaded, That the Intestate was outlawed at the suit of *I. S.* and died outlawed. It was the opinion of the Court, that it was no plea, for that it is a forfeiture by implication onely; and money may be in an Administrators hands, and shall be Assets, and not forfeited by Outlawry of the Intestate; and the Administrator may bring a Writ of Error to reverse the Outlawry. *Mich.* 20 *Jac.* in C.B. *Bullen* and *Gevis* case. *Hutton* 52. See *Tr.* 37 *Eliz.* in C.B. *Wooley* and *Bradwells* case *ibid.* accordingly.

50. Action of Debt brought for 100 *l.* against B and others, and declared upon a Lease made at *London* of the Mannor of *L.* in Com. S. and four Closes of pasture to the said Mannor adjoyning, lying in *L.* in the said County of *S.* rendring 120 *l. per annum*, with *Nomine pœnæ* of 8 *s.* a day for non-payment, and shews that 60 *l.* was behinde for the half year at such a Feast, and so remained by the space of 90 days, making 40 *l.* so in all for 100 *l.* The defendant confessed the Lease, and pleaded an Extent of the Land by a stranger upon a Statute before the Lease, and shewed that the Liberate was executed after the Rent due: upon which the Plaintiff demurred. It was adjudged for the plaintiff for the 60 *l.* because it was due before the Liberate; and although the Lease was ill laid in the Declaration, because the Capital Messuage is laid in the Town; yet it was holden, that that being but default of a Visne, was cured, because the Defendant confessed the Lease: but for the 40 *l.* paid, it was adjudged against the plaintiff, because he layed no actual demand of his Rent at the day; without which, a pain is not forfeited. *Hill.* 10 *Jac.* in C. B. Sir *Rich. Grobham* and *Thornboroughs* Case. *Hob.* 82.

51. *A.* and *E.* his Wife, late Wife of Sir *H. B.* brought Dower against *C.* Widow, of Lands in *H. ex datatione* H. B. *quondam viri sui.* The Tenant pleaded, That the said *H. B.* being seised of the Mannor of *W.* in the same County, made a Feoffment thereof to the use of himself and the said *E.* his then Wife for their lives, for the Joynture of the said *E.* therein to *I. D.* and died, and the said *E.* held her in by Survivor, claiming the said Estate. The Demandant replyed, that before the said Feoffment made, the said *H. B.* being seised of the said Mannor, did covenant to stand seised thereof to the use of himself in taile, the remainder to his said Wife for life, the remainder to *I. N.* in taile, and afterwards made the Feoffment *prout*, and then died without issue; and that she entred, and was seised by force of the Remitter: whereunto the Tenant rejoyns, That she held herein, claiming her Estate by the Feoffment and Joynture, and demands Judgment whether against that claim she could be remitted: upon which plea the Demandant did demur. It was the opinion of the whole Court, That the Tenants plea was insufficient; and it was holden, That the Remitter could not work to the Woman till her Husbands death without issue, because till then the possession and right did not meet together; also because both Estates were made unto her during Coverture: therefore upon the death of her Husband she might claim which Estate she would. *Hill.* 10 *Jac.* in C.B. Sir *John Shirley* and *Barbara Woods* case. *Hob.* 71.

52. An Action of Detinue was brought of a Horse: the Defendant pleaded that the now Plaintiff was *autrefoits* barred in trespass for the same thing. It was the opinion of the Court, That it was a good plea; and Judgement was given for the Defendant, for that bar by Judgement amounts to a Release in Law. Sir *Humfrey Ferris* and *Wignalls* case. *Noy* 18.

53. *A.* seised in Fee of Acre and a half of Land holden of the Queen as of her Fee at *C.* did procure licence from the Queen, and suffered a Recovery thereof, whereby he made a Joynture to his Wife; after which, *A.* died seised, and the Land descended *(inter alia)* to his heir, who sold the same to *I. D.* which discended to *W. D.* his son

ſon. It was found by Office after the death of *I. D.* that the ſaid Acre and half of Land was holden of the Queen *in capite*. It was reſolved in this caſe in the Court of Wards, That the ſuing of the licence of Alienation was no concluſion to the party, that the Lands ſhould become to be holden *in Capite*: And ſo it was reſolved, *Trin.* 40 *Eliz.* where the Alience by ſuch a licence came into the Exchequer, and pleaded his licence upon a *ſuo titulo*; and in that caſe it was reſolved, That neither the licence of Alienation, nor the pardon of it, nor the pleading of any of them, was any concluſion to ſtop and binde the party touching a Tenure *in Capite*, becauſe it hath relation to the licence or pardon onely: but otherwiſe it is where the party being directly charged with a Tenure, by plea ſaith, That *bene & verum eſt*, &c. for that ſuch a plea is a concluſion to the party. Wherefore in the principal caſe it was holden, that the Tenure ſhould be taken to be a mean Tenure, and not a Tenure *in Capite*. *Mich.* 7 *Jac.* in Cur. Ward. *Daviſon* and *Dymocke* caſe. *Lea.* 17.

54. In an Appeal of Mayhem, brought by *A.* againſt *B.* and others, one of the Defendants plead *Nul tiel in rerum natura*, as another of the Appellees; and if that be not found, then to the Felony and Mayhem, *Not guilty*. It was reſolved by the Court, That ſuch a manner of pleading was not good in an Appeal of Mayhem, becauſe no Life is in danger by the ſuit, notwithſtanding ſome books of Law have admitted of ſuch plea. *Mich.* 39 *Eliz.* in B. R. *Kirton* and *Hoxton's* caſe. *Poph.* 105.

55. In a *Replevin*, the defendant avowed and pleaded, that *I. S.* was ſeiſed in *Jure Collegii*, but did not ſay that he was ſeiſed *in dominico ſuo ut de feodo*; and the plaintiff demurred upon the Avowry. It was the opinion of all the Juſtices, That the defendant ought to have pleaded that they were ſeiſed in Fee; for although a Dean and Chapter in point of Creation, or a Mayor and Commonalty take a Fee, yet in pleading they ought to ſhew their Eſtate ſpecially, for that they may have an Eſtate *pour autre vie*: And this caſe is in Avowry, which ſhall be taken ſtaightly *Mic.* 2 *Car.* in B. R. *Moſſe* and *Newmans* caſe. *Poph.* 165.

56. In Treſpaſs, the plaintiff ſuppoſed the Treſpaſs to be done in breaking of his houſe and cloſe in ſuch a Town: the defendant juſtified in the ſame houſe and cloſe, to put the plaintiff to a new Aſſignment: the plaintiff replyed, That the houſe and cloſe of which he complained, is ſuch a houſe, and gives it a ſpecial name. It was adjudged againſt the Plaintiff: for although a houſe may have a Curtilage which paſſeth by the name of a Meſſuage with th'Appurtenances; yet this ſhall not be in this caſe; for by the Bar the Plaintiff is bound to make a ſpecial demonſtration in that Meſſuage, as to ſay that the houſe hath a Curtilage the which he brake; and it ſhall not be taken by Intendment, that the Meſſuage hath a Curtilage to it, if it be not ſpecially named. *Mich.* 39 *Eliz.* in B R. *Poph.* 109.

57. In an *Ejectione firmæ*, the Plaintiff declared upon a Leaſe made of a Meſſuage and forty Acres of Land in the Pariſh of *S.* in the County of *S.* The defendant imparled until another Term, and then pleaded, That within the Pariſh of *S.* there are three Villages, *A. B.* and *C.* and becauſe the plaintiff did not ſhew in which of the Villages the Lands did lie, demanded judgement of the Writ: the plaintiff demurred upon the plea. In this caſe it was adjudged for the plaintiff, for that after imparlance, the Defendant could not plead in abatement of the Writ, becauſe he hath admitted it to be good by entry into defence, and his imparlance. And, 2 The plea is not good, becauſe the Defendant hath not ſhewed in which of the Villages the Meſſuage and forty Acres of Lands did lie; and he ought to have done that. It was the opinion of the Court, the plea in bar was not good *Mich.* 5 *Jac.* in C. B. *Tompſon* and *Colliers Brownlow* 1 par. 139.

58. Debt upon an Obligation to perform covenants in an Indenture; which covenants were, 1. That he ſhould marry *S.* the plaintiffs daughter before ſuch a day. 2. That *I S.* and his wife ſhould levie a Fine of ſuch lands to the defendant and the ſaid *S.* the plaintiffs daughter, and the heirs of their two bodies. 3. Whereas he had granted a Leaſe for years of part of *M.* to the plaintiffs daughter, that he had not made any former grant, nor would afterwards make any grant thereof without the plaintiffs aſſent; The defendant as to the laſt covenant in the negative, pleaded that he had not made any former grant of the ſaid Leaſe; nor any grant after the obligation, without the plaintiffs aſſent; and to all other covenants, he pleaded that he had performed them. It was adjudged againſt the defendant, that the plea was not good, becauſe he hath not pleaded how he had levied the Fine, and not to plead general performance: for it being an act of Record, it ought to be pleaded how ſpecially done; therefore the plea is not good, that he did not grant without the plaintiffs conſent, becauſe ſuch is a Negative pregnant. *Trin.* 18 *Jac.* in B R. *Lea* and *Luthells* caſe. *Cro.* 2 par 559.

59. Judgement was given againſt the Principal, and a *Scire facias* brought againſt the Bayl, who pleads *Nul tiel Record* of Judgement againſt the Principal; and had day to bring the Record

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in Court; at which day, the Principal tenders his body, to ſave his Bayl. It was the opinion of the Court, that ſuch dilatory plea was not good: for by that means the plaintiff ſhould loſe his coſts of ſuit againſt the bayl. But *Crawley* Juſtice ſaid, That the bayl might at any time before Judgment bring in the body of the principal; but could not plead ſuch a dilatory plea as this is. *Hill.* 17 *Car.* in B. R.

60. A man ſeiſed of a Mannor to which an Advowſon was appendant, deviſed the ſame to his wife for life, and died: the wife took another huſband, and they preſented *I. S.* who is admitted, inſtituted and inducted, and then died: the Church voided again, and he preſented *I. D.* to the Church to the Biſhop, who refuſed him, becauſe upon examination of him, he ſaid, that he was *Schiſmaticus inveteratus*; upon which the plaintiff did demur, in C. B. and ſince it was adjudged for the plaintiff, becauſe that plea of *Schiſmaticus inveteratus* was too general. Whereupon Errour was brought, and two errours aſſigned: 1. Becauſe no preſentment was alledged in the deviſor: but that was reſolved to be no errour; for the preſentment of a Leſſee for life is a ſufficient title in it ſelf. 2. Becauſe the plea of the Biſhop was good, and that the Biſhop ought not to alleadge any particular Schiſm. But it was reſolved, that the plea of the Biſhop was inſufficient: for by the Statute of *Articuli ſuper Chartas*, cap. 13. there ought to be a reaſonable cauſe; *& cauſa vaga & incerta non eſt rationabilis.* *Hill.* 33 *Eliz.* in B. R. *Cok.* 5 par. *Speots* caſe.

61. An Action upon the caſe upon *Aſſumpſit*, for divers Wares and Medicines to the value of 20 *l.* The defendant pleaded, that he had paid to the plaintiff *tot & tantas denariorum ſummas*, as the Medicines were worth; and did not ſhew any certain ſum. It was adjudged in that caſe, that the plea was not good. *Trin.* 16 *Jac.* in *C. B.* adjudged.

62. The caſe was: *A.* and *B.* on the one part, and *C.* on the other part, ſubmitted to ſtand to an Award. The Arbitrators awarded, that *B.* ſhould pay a certain ſum of money to *C.* In Debt upon this obligation, the defendant pleaded *Nihil debet*; and a Verdict was found for the plaintiff. It was moved in ſtay of Judgement, that the Award was but of one part, and ſo not binding to all the parties ſubmitting. It was the opinion of the Court in this caſe, that here was a good Award between two of the parties that ſubmitted, but there appears not to be any Award as to *H.* the third party; for it doth not appear that he can take any benefit by the Award of the money to be paid by *B.* or that it can be any ſatisfaction for him, but onely for *B.* wherefore it was adjudged for the defendant. *Mich.* 1655. in *B. R. Morden* and *Horn* caſe. *Styles* 471.

63. In Treſpaſs for an Aſſault, Battery, Fining and falſe impriſonment, at *C.* The defendant as to the Aſſault and Battery pleaded Not guilty: as to the impriſonment, juſtified at *H.* in this manner, *viz.* that there the Court was holden before him for the *Stannery*, he being Steward of the Court; in which Court there was a ſuit depending betwixt the now-plaintiff and another for debt; which ſuit went againſt the plaintiff, who was condemned in it, and taken in execution by his command, and till he ſhould pay his Fine; and ſo juſtifies *abſque hoc*, that he was culpable in any place *extra Curiam Stannariæ.* It was the opinion of the Court, that the plea was not good, for that it doth not appear what the Juriſdiction of the Court of *Stannary* is, nor how far the ſame doth extend it ſelf. The Treſpaſs for the impriſonment is laid to be at *C.* and he pleads a ſuit between the plaintiff and another at *A. abſque hoc* that he was guilty *alibi extra Curiam* of the *Stannaries*: this is not good: for by this plea in this manner, *abſque hoc* that he was guilty in any place in the county of *D.* out of the Juriſdiction of the *Stannaries*, it doth not appear whether *C.* be within or without the *Stannaries*, but is altogether uncertain. Therefore it was the opinion of the whole Court, that the plea and traverſe was not good; and Judgement given for the plaintiff. *Trin.* 13 *Jac. B. R. Evely* and *Showleys* caſe. *Bolſt.* 2 par. 326, 327.

64. In Treſpaſs for aſſaulting, wounding, taking and impriſoning: the defendant pleads *quoad* the aſſault and wounding, Not guilty; and *quoad* the taking and impriſoning, he doth juſtifie by force of a Warrant he had from the Lord Mayor of *L.* but doth not ſhew in his plea any time nor place where the Warrant was made: he doth juſtifie in this manner, *quoad Captionem & Impriſonamentum*; but in his Juſtification he leaves out the Aſſault. It was ſaid by the Court, There are ſeveral Aſſaults here laid, *i. e.* The Aſſault in the wounding, and the Aſſault in the taking: he hath in his plea *quoad Captionem & Impriſonamentum*, but in his Juſtification he hath left out the Aſſault, which is the chief cauſe of the Demurrer; And for this cauſe the Court held the plea not to be good. *Hill.* 12 *Jac.* in B. R. *Wilſon* and *Dodds* caſe. *Bolſt.* 2 par. 335.

More,

More, Pleas *and* Pleadings.

The Form of pleadings of ſeveral things, and the Form of pleadings in ſeveral Writs and Actions.

1. DEbt upon an Obligation for performance of an Award to be made and delivered in Writing. The Defendant pleaded that the Arbitrators made no Award: The plaintiff ſhewed the Award made *de & ſuper premiſſis in conditione*, &c. in Writing: *i. e.* That the Defendant ſhould depart from the houſe where ſhe dwelt, and other things which concerned not the Plaintiff, and ſhould pay the plaintiff 3 *l.* 10 *s.* The Defendant replyed, That the Arbitrators made no ſuch Award: Whereupon iſſue was taken, and found for the plaintiff; and yet it was adjudged againſt him, becauſe it was an Arbitrament but onely on one ſide: for in this caſe there was nothing awarded for the Defendant, and the 3 *l.* 10 *s.* appointed to be paid, is not ſaid for what; ſo that it can imply nothing, nor can it be helped by any Averment. *Hill.* 12 *Jac.* in C. B. *Nichols* and *Granmors* caſe. *Hob.* 49. See *Cook.* 8 par. *Dreſpotes* caſe.

2. Treſpaſs *quare clauſum fregit*, at *B.* The Defendant pleaded that he was ſeiſed of an houſe in *C.* in the ſame County, and preſcribed to have a Way from the ſaid houſe over the Land in Queſtion to a Common Way leading to the City of *N.* Iſſue being upon the preſcription, the Viſne from *B.* and *C.* found for the plaintiff. It was moved in ſtay of Judgement, becauſe there was no place aſſigned where that Way leading to *N* lay, which is now made part of the preſcription and iſſue; and therefore muſt have his *venue* and tryal, though the material part of the Way was onely whether it lay over this Ground, or no. But the opinion of the Court was, that the plaintiff ſhould have Judgment: for though a Way muſt be pleaded *à quo termino ad quem*; yet becauſe the Viſne here is from all the places named in the Record, the tryal ſhall not be avoided by a meer imagition, that the High-Way lay in another Town. *Trin.* 15 *Jac.* in C. B. *Gogles* caſe. *Hob* 189.

3. Debt againſt an Executor upon an Obligation of the Teſtator, the Defendant pleaded that the Teſtator made him Executor till *I. S.* ſhould come of the age of 21 years; and in the mean time to keep all his Goods for him, and then to deliver them to him, and the ſaid *I. S.* then to be Executor: and ſhewed, that before the Writ brought, *I. S.* was of the age of 21 years, and that he delivered him the Goods, which he accepted, *abſque hoc quod ipſe eſt die impetrationis*, &c. Executor. It was debated in this caſe by the Court, If the firſt Executor ſold or waſted the Goods, how the Creditor ſhould relieve himſelf for thoſe Goods, the new Executor taking upon him the Executorſhip; for the Goods never came to the hands of the new Executor, though perhaps he may have an Action againſt the former Executor for ſo much as he did not lawfully adminiſter; for againſt the Vendees he can have no Action: or elſe that the old Executor may remain an Executor ſtill for theſe Goods. Quere, the caſe was not Reſolved. *Trin.* 7 *Jac.* in C. B. *Chandler* and *Thompſons* caſe. *Hob.* 265.

4. Treſpaſs for taking a Bag of Nutmegs: the Defendant pleaded, That the City of *L.* is an ancient City time out of minde, and that the Mayor, Citizens and Commonalty had been a body politick time out of minde, and ſeiſed of a VVharf in *L.* called *Queen-Hithe*; and by all that time had uſed to take for Goods laid upon the ſaid VVharf, and to be conveyed from thence of perſons not lawfully diſcharged, VVharfage: *i. e.* 1 *d.* for every Porters Burthen; and upon non-payment, to diſtrain for ſuch VVharfage upon the ſaid VVharf: and ſhewed, that two Porters Burthens of the Plaintiffs Nutmegs, (being no perſon diſcharged) was laid upon the VVharf to be conveyed by water; and the Defendant being the Collector, demanded the VVharfage; and becauſe the ſame was not paid, he diſtrained the Bag of Nutmegs. The Plaintiff by Reply, ſaid, That within the ſame City there was, and time out of minde had been, a cuſtome, That all the Free-men of the City had been, and ought to be diſcharged of the payment of the ſaid Warfage; and averred, he was a Freeman of the City. The Defendant ſaid, there was no ſuch cuſtome within the City; and then ſays, That the cuſtome in the City hath been, That when any iſſue upon the cuſtome of the City is joyned, though the Mayor and Citizens be party to the Actions, the Mayor and Aldermen have uſed to certifie the truth of the cuſtome. The plaintiff ſaid, that ſuch iſſue ought to be tryed by the Jury, and not by Certificate; and that the cuſtom for the tryal by the Certificate, was againſt Law. It was adjudged in this (amongſt other points) That it was againſt right, and juſtice

and

and equity, to allow them their Certificate, wherein they are to try and judge their own cauſe. And although in the pleading it was confeſſed, that the cuſtom of the Certificate of the Cuſtoms of *L.* are confirmed by Act of Parliament; yet it made no change in the caſe, becauſe it is none of the cuſtoms intended, but a kinde of a Preſcription, and ſo not within their cuſtoms. *Trin.* 12 *Jac.* in *C. B. Day* and *Savages* caſe *Hob.* 85.

5. *Note*: It was agreed by the Court, That if a man in pleading derive an eſtate from another man, and doth not ſhew what eſtate he had from whom he deriveth his eſtate, that it is a good cauſe of Demurrer. And if a man claim a Rent by grant out of the land of any other man, it is not ſufficient for him to ſay, That ſuch a one was ſeiſed *& conceſſit*; but he ought to expreſs of what eſtate he was ſeiſed. But it was agreed in the caſe, That the ſhewing of what eſtate, *&c.* ought to be material to the maintenance, and ſupport of the eſtate which he claimeth; otherwiſe it is not neceſſary to ſhew it. *Paſch.* 15 *Car.* in *B. R. Marſh* 1.

6. Treſpaſs brought, *quare cum equis, porcis & bidentibus.* The defendant pleaded and juſtified the treſpaſs *cum equis*, and ſaid nothing to the treſpaſs done *porcis & bidentibus.* It was the opinion of the whole Court, That the plea was inſufficient: and it was ſaid, That if ſeveral treſpaſſes be done unto me, and I bring treſpaſs, and the defendant doth juſtifie for one action, and ſaith nothing to the other, the whole plea is naught, becauſe the plea is entire as to the plaintiff, and the Demurrer to it is entire alſo. *Paſch.* 15 *Car.* in *B R. Buckley* and *Skinners* caſe *Marſh* 21.

7. Trover and Converſion was brought againſt husband and wife of ſheaves of corn, and declared that they did convert thoſe ſheaves *ad uſum ipſarum*, *viz.* of the husband and wife. It was the opinion of the Court, That the Declaration was not good, being of ſheaves of corn, being incertain, not expreſſing the certainty what corn it was. Alſo it was not good, becauſe the Declaration is laid, That the Converſion was *ad uſum ipſorum*, for that the wife hath no property in them during the life of the husband. *Mich.* 4 *Jac.* in *B. R. Hodges* and *Simpſons* caſe.

8. In a *Scire facias* to avoid a Statute, the caſe was: *A.* acknowledged a Statute to *I. D.* and afterwards conveyed part of the land liable to the Statute to *B.* who by bargain and ſale conveyed the ſame to *I. D.* the conuſee. *I. D.* extended the lands of *B.* the purchaſer, who thereupon brought his *Scire facias* to avoid the Statute, becauſe the conuſee had purchaſed parcel of the land, and ſo extinguiſhed his Statute. In this caſe it was moved for *I. D.* That the bargain and ſale is alleadged to be made to him, but it was not ſhewed that it was by Deed enrolled: but it was pleaded, That *virtute cujus*, *viz.* of the bargain and ſale, the conuſee was ſeiſed, and doth not ſhew that he entred. The queſtion was, What eſtate the bargainee had, the Deed not being enrolled; and then, if the Statute were extinguiſhed. The opinion of the whole Court was, That the *Scire facias* was well brought: for it was ſaid, that *I. D.* the defendant *perquiſivit ſibi & hæredibus ſuis*; and concludes, *virtute cujus*, and of the Statute of Uſes, he was ſeiſed: and it is a good averment that he had a Fee; and it is not material how he had it: and this Action being an equitable Action, the Court ſhall conceive ſufficient matter to give judgement for the plaintiff; and judgement was given for the plaintiff accordingly. *Mich.* 15 *Car.* in *B. R. Leak* and *Dawes* caſe. *Marſh* 63. and 651.

9. Debt upon an Obligation: the Condition was, That if the Obligor did deliver to the plaintiff 200 weight of Hops, in conſideration of 10 *l.* already paid, and 50 *l.* to be paid at the delivery, and the plaintiff to chuſe them out of 24 Bags of the obligors own growing, and to be delivered at *F.* at a day certain. Proviſo, that if the plaintiffs ſhould diſlike their bargain, that then they ſhould loſe their 10 *l.* and if they liked, they ſhould give 10 *l.* more. The defendant pleaded, that they were ready, and that the plaintiffs *non eligerunt*. Upon which the plaintiffs demurred. It was moved for the plaintiffs, that the plea was double, in that the defendant alleadged that they were ready, and that the plaintiffs *non eligerunt*; both which pleas are iſſuable. But the Court inclined to opinion, that the plea was not double, for that the alleadging himſelf to be ready, was but an inducement to the ſubſequent matter, and he relyed onely upon their election. 2. It was objected, That the defendant ought to have alleadged that he had 24 Bags of his own growing: for if he had them not, it was impoſſible for the plaintiff to make election which to have. But to that it was returned, That no notice in this caſe was requiſite: nor ought he to aver that he had them: for he being bound to deliver them, he is eſtopped to ſay that he had them not; and in this caſe the plaintiffs ought to do the firſt act, *viz.* requeſt the defendant to ſhew the Bags, for them to make choice. *Trin.* 15 *Car.* in *B. R. Brook* and *Goodes* caſe. *Marſh* 474, 475.

10. Action upon the Caſe upon *Aſſumpſit*, becauſe where the plaintiff ſold to the defendant ſo much Wood, the defendant in conſideration thereof did promiſe to pay ſo much money to the plaintiff, and to carry away the Wood before ſuch a day. The defendant pleaded that he paid the money

money at the day aforeſaid; but as to the carriage of it away before the day, the defendant pleaded *Non aſſumpſit*. The Jury found, that he did not pay the money at the day, but as to the other, they found that he did aſſume, and promiſe as aforeſaid. It was moved, That the finding of the Jury was naught: for being but one *Aſſumpſit*, and one entire thing, it could not be apportioned; and therefore they ought to finde the entire *Aſſumpſit* for the plaintiff, or all againſt him: all which was granted by the Court, and thereupon a Repleader granted. But it was ſaid and agreed in this caſe, That the defendants plea was not good, and therefore the plaintiff might have demurred upon it: but becauſe he had not done it, and for that the Verdict was naught, no Judgment could be given; and ſo onely a Repleader awarded in the caſe. *Trin.* 17 *Car.* in B.R. *Eaſt* and *Farmers* caſe. *Marſh* 100.

11. In a falſe impriſonment, the Defendant pleaded that *London* had a Court of Record by preſcription, which was confirmed by Act of Parliament, and that he was a Sergeant of the Mace of that Court; and that he had a Warrant directed to him out of the Court, to arreſt the Plaintiff *pro quodam contempt* committed to the Court in not paying of 20 *s.* to *I. B.* In purſuance of which Command, he did arreſt the Plaintiff. It was objected, That the plea was good, becauſe the Defendant was a ſervant to the Court, and had done but his duty. But the opinion of the Juſtices was, That the plea of the Defendant was not good, becauſe the Defendant doth not ſhew what the contempt was, nor in what Action, ſo as it might appear to the Court that they had Juriſdiction of the cauſe; and the plea is too general and incertain. And the Juſtices agreed, That it was hard that the Officer ſhould be puniſhed for his obedience to which he is bound, or for doing an act by the command of the Court, whether it were juſt or unjuſt, if it appeareth to the Court, that that Court had juriſdiction of the cauſe; but it doth not appear that that Court had juriſdiction of the cauſe: and then it is clear, that the Officer by obeying the Court when they have no juriſdiction, doth ſubject himſelf to an Action of falſe impriſonment. *Mich.* 17 *Car.* in B. R. *Dive* and *Olives* caſe. *Marſh.* 117.

12. Debt upon an Obligation, the Condition was, to keep a Pariſh harmleſs from a Baſtard-child. The Defendant pleaded that he had ſaved the Pariſh harmleſs, but did not ſhew how. The Plaintiff replyed, and ſhewed how that the Pariſh was warned before the Juſtices of Peace at the Seſſions, and were there ordered by Record to pay ſo much for the keeping of the Childe. The Defendant pleaded, *Nul tiel Record*: upon which the Plaintiff did demur. It was reſolved in this caſe, 1. That the plea of *Nul tiel Record* upon an Order of Seſſions, is not a good plea, becauſe that an Order of the Seſſions of Pleas is a Record. 2. The Defendants Bar was not good, in that he hath pleaded in the Affirmative, that he hath ſaved the Pariſh harmleſs, and doth not ſhew how, which he ought to have done: but in this caſe he ought to have pleaded *Non damnificatus*, and that had been good without further ſhewing. *Mich.* 17 *Car.* in B. R. *Marſh* 121.

13. Debt upon an Obligation, the Condition was, That whereas the Plaintiff was in quiet poſſeſſion of ſuch lands; if *I S.* nor *I. D.* nor *I G.* did diſturb him by any indirect means, but by due courſe of Law, that then, *&c.* The Defendant pleaded, that neither *I. S.* nor *I. D.* nor *I. G.* did diſturb him by any indirect means, but by due courſe of Law. It was the opinion of the Juſtices in this caſe, That the plea in Bar was not good; for it is a Negative Pregnant, *i. e.* ſuch a Negative which implies an Affirmative, which ſeems to be repugnant to the Negative, as in 21 *H.* 6. 9. In a Writ of Entry, the Defendant pleaded the Deed of the Demandant after the Darrein continuance. The Demandant ſaid, Not his Deed after the Darrein continuance. It was holden a Negative Pregnant: wherefore he ſaid, that he made it after the Darrein continuance; and then an Iſſue was taken upon it. 2. Exception to the plea, was, That he pleaded that neither ſuch a one, nor ſuch, nor ſuch, did diſturb him by any indirect means, but by due courſe of Law; and that cannot be tryed neither by the Jury, nor by the Judges: Not by the Jury, for it doth not lie in their mouthes to declare if he diſturbed him by any indirect means, and what is the due courſe of Law, for that doth belong to the Judges to determine: Not by the Judges, becauſe he hath not put it certain, that it was by a due courſe of Law, that he diſturbed him. All the Juſtices enclined to opinion, That the plea was not good. It was adjourned for difficulty. *Mich.* 29 *Eliz.* in B. R. *Deighton* and *Clarkes* caſe. *Godb.* 60.

14. In a *Quo Warranto*, the Information was, That whereas the Defendant was ſeiſed of a Manor, and of a houſe within it, that he claimed to have a Court, with view of Frankpledge, *infra Meſſuagium prædictum; & quod ſine aliqua Conceſſione ſint authoritate uſurpavit libertates prædictas.* The Defendant pleaded *Non uſurpavit libertates prædictas infra Meſſuagium prædict. modo & forma.* It was the opinion of the Court, That it was no good plea; for that the natural anſwer to a *Quo Warranto*, is either to claim or diſclaim, and here he doth neither: 2. Becauſe the *Quo Warranto* contains two things in it: 1. *Quo Warranto*, he

claims ſuch liberties; 2. It chargeth him with a tortious uſurpation; and here he anſwers to the uſurpation onely, but he doth not anſwer by what title or *Quo warranto* he claimeth them: and it was ſaid, that it had been adjudged in this Court, in the like caſe, That *Non uſurpavit modo & forma*, was no good plea without making a title. *Mich.* 29 *Eliz.* in B. R. Sir *Jervas Clyſions* caſe. *Godb.* 91.

15. Leſſee for years by Indenture rendring Rent, the Leſſee bound himſelf in an Obligation of 100 *l.* to perform all Covenants contained in the Indenture. The Rent was behinde, and the Leſſor brought debt upon the Obligation. The Obligor pleaded all Covenants and Agreements performed. The Leſſor ſaid the Rent was behind. It was the opinion of the Court, That it was no plea for the Obligor to ſay that the Rent was not demanded; but in his bar he ought to have pleaded, that all the Covenants were performed but the payment of the Rent, and for that he was always ready to have paid it, if any had come to demand it. But as the firſt plea is, it is naught; for when he pleads all performed, it ſhall be intended that the Rent is paid: the contrary of which he after ſhews. *Mich.* 29 *Eliz.* in C.B. *Godb.* 95.

16. In Avowry for damage feaſant, the defendant pleaded a Leaſe made to him by *I. S.* the other ſaid that before the Leaſe *I. S.* did enfeoff him: the other replyed and maintained his Leaſe *abſque hoc quod I. S. ſeiſitus feoffamen.* It was ſaid that this Traverſe of the Tenure was not formal, for the word *Seiſitus* was meerly idle, and ought to be left out, for that he cannot enfeoff unleſs he was ſeiſed: And the Court ſaid, that they had never ſeen that in ſuch caſe the Seiſin had been traverſed, but generally, *abſque hoc quod feoffavit.* Wherefore the ſame was holden in that manner pleaded not to be good. *Mich.* 29 *Eliz.* in C.B. *Hales* and *Homes* caſe, *Hales* and *Homes* caſe adjudged.

17. A man made a Leaſe of a Garden containing three Roods of Land; the Leſſee was cuſted, and he brought an *Ejectione firme*, and declared that he was ejected of three Roods of Land. It was moved that by the ſaid Declaration it ſhall not be intended that he was ejected of the Garden of which the Leaſe was made, and ſo the Action would not lie: and of that opinion was *Dyer* Juſtice, becauſe a Garden is a thing which ought to be named by the ſame name in all *Precipes*, as appeareth by the Regiſter. The other Juſtices held the contrary; and agreed, that in all real Actions a Garden ſhall be demanded by the name of a Garden, but not otherwiſe; but this Action of *Ejectione firme*, is in the nature of Treſpaſs, and it is in the election of the party to declare as here he hath done, or of the ejectment of a Garden; for a Garden may at one time be uſed for a Garden, and at another time it may be plowed and ſowed with Corn. The Court agreed, that the beſt order of the pleading is, to declare that he was ejected of a Garden containing three Roods of Land, as in the Leaſe it is ſpecified. *Hill.* 23 *Eliz.* in C. B. *Godb.*

18. Debt upon an Obligation of 40 *l.* the condition was, That if the Obligee the 18 of *Auguſt*, 4 *Jac.* ſhould go from *Aldgate* to the Pariſh-Church of *Stow-market* in *Suffolk*, within the ſpace of 24 hours, that then, &c. And he ſhewed, that he went from *Aldgate* to the place aforeſaid; and becauſe he did not ſhew within what Ward *Aldgate* was, it was holden that his declaration was not good. *Mich.* 7 *Jac.* in B. R. *Croſſe* and *Caſons* caſe. *Godb.* accordingly.

19. In Trover and Converſion, the caſe was, A ſtranger delivered the Horſe of *H.* to an Inholder. *H.* came to him, and demanded his Horſe; who refuſed to deliver him, unleſs he would ſave him harmleſs and indempnified. But becauſe the plea was, *Quod quidem homo*, delivered it to him, and did not ſet forth his name in certain, the plea was adjudged not to be good. *Mich.* 6 *Jac.* in B. R. *Harlow* and *Woods* caſe.

20. In a *Quare impedit*, the caſe was, *A.* brought a *quare impedit* againſt the Defendant, the Defendant ſhewed how that the King was entituled by reaſon of Symony, and preſented the Defendant; and that he was *perſona impeſonata* of the preſentation of the King. The plaintiff denyed the ſymoniacal Contract: upon which they were at iſſue, and found for the Defendant. The plaintiff brought a ſecond *quare impedit* againſt the Defendant, who pleaded all the matter before, and the Judgement, and did not ſay that he is now *perſona imperſonata*, but that he was *tunc perſona imperſonata*. It was ſaid that he could not plead to the title of the Patronage, without ſhewing that he is *perſona imperſonata*: and to ſay that *tunc fuit perſona imperſonata*, is but a plea by way of Argument, that becauſe he was then, ſo he is now; and ſuch plea is not good. 2. It may be that he was *perſona perſonata tunc*, and not *nunc*, for he might reſigne, or be deprived after, or the like, and it is a *Non ſequitur*, becauſe he was then, that he ſhall be now, and *parolls ſont pleas*, and every plea ſhall be taken ſtrongly againſt him that pleads it. The Juſtices were all of opinion, That he Parſon cannot plead to the title of the Parſonage without ſhewing that he is *perſona perſonata*. But the queſtion here was, whether the Defendant cannot plead the Record and Judgement yet in force againſt the plaintiff, without ſhewing that he

he is *persona imperſonata*. The Court delivered no opinion in it. *Hill.* 17 *Car.* in C. B. *Palme* and *Hudds* caſe. *Marſh* 159.

See more of Pleas *and* Pleadings, *and of divers points of Pleading in the Titles* Actions, Averments, Covenants, Declaration, Bar, *and almoſt in every other Title: to abridge the ſame Caſes again under this Title, were but Surpluſage: But if you look into the Tables, under every Title you may finde the ſaid Caſes and points abridged: out of which Caſes, and other Caſes, I have collected theſe few Rules which follow, to be obſerved concerning Pleas and Pleadings:* Viz.

RULES
Concerning
PLEAS, PLEADINGS and PLEADERS.

1. IF a man is to plead a Fine, he ſhall plead *quod quidem finis ſe levavit*, and not *Hæc eſt finalis Concordia.*

2. He that pleads an Entry for a Condition broken, muſt always plead a Demand: but otherwiſe it is, where a man diſtrains for Rent; for there the Diſtreſs is a Demand, although it be for a Rent-ſeck.

3. He who claims a Reverſion, in his pleading muſt ſet forth that he claimed the ſame upon the Land.

4. In Debt, where proceſs of Outlawry lies, the plaintiff ought to name the plaintiff certain, with the Title of his Addition, as *Gent. Yeoman, &c.* becauſe the King may have notice to whom to reſort for the forfeiture of the Goods.

5. If a man pleads a Releaſe, or Confirmation, he muſt plead that he to whom it was made, was ſeiſed.

6. If an Aſſize be brought againſt one who is Diſſeiſor and Tenant, he ſhall name him Tenant onely: but otherwiſe it is if it be againſt the Diſſeiſor onely.

7. If a man plead that *I. S.* took ſuch a woman to wife, he ought to ſhew in what place, as at *D.* to the end, that the Judges may know to what Biſhop to write to certifie.

8. In all perſonal Actions, the party defendant ought to be named certain, and the County alſo, becauſe upon the Outlawry, the King is to repair to the County for his Goods.

9. If a man pleads a Marriage, he ought to ſhew the Church in certain: and ſo it is of a death, in what place the party died.

10. In an *Ejectione firme* brought, a man ſhall ſay, *Quod protulit quandam billam de placito tranſgreſſionis & Ejectione firme*, and that the Defendant *vi & armis*, &c.

11. A man in his Count or Declaration, ought not to ſhew that ſuch a one was ſeiſed, and made a Leaſe, or Gift in taile; but that a Leaſe or Gift was made: But otherwiſe it is in a Bar, for there he ſhall ſay, That ſuch a one was ſeiſed, or made the Gift, *&c.*

12. In pleading, it is ſufficient to ſhew that ſuch a one was attainted of High-Treaſon, or *de diverſis proditionibus*, without ſetting out the ſpecial matter or circumſtances, becauſe the ſame is not traverſable.

13. If an Attainder be pleaded, it ought to be ſet forth before what Judges; as before the King in his Bench, or before Juſtices of Aſſize and Gaol-delivery.

14. In all Actions, but in an Aſſize, the County is to be put in the Margent of the plea.

15. If a man plead a Feoffment, a Gift in taile, or a Leaſe for Life, there he ſhall plead, Whereas ſuch a one *terram Feoffavit, didit, vel demiſit*; and ſhall not plead any licence, or entry, becauſe they are included in them.

16. He who pleads an Attornment, Releaſe, Exchange, Confirmation, ought to ſhew the place, the time of the Attornment, and that he was then Tenant.

17. If a man pleads a ſeiſin of ſeveral Acres, he cannot plead that he was ſeiſed in Fee of one Acre *ſimul cum* the other Acre; but he may plead that he was ſeiſed of white Acre, *ſimul cum* black Acre in Fee.

18. *Note*, that he who gives colour in an Aſſize, ought to do it by one before named in the plea, and not by a ſtranger.

19. A man ſhall not plead in a *Replevin, quare vi & armis ammia cepit.*

20. Where the Defendant in a *Replevin* hath cauſe to make an Avowry, he ſhall never plead a juſtification.

21. He that pleads a Deviſe, muſt ſhew that the Land is holden in focage, and of whom it was holden, and that the Diviſor was ſeiſed at the

time of his death: but if Leſſee for years, or a man ſeiſed in the right of his wife, deviſeth the Land in Fee, and afterwards purchaſeth the ſame, and dieth, the Deviſe is not good.

22. He that pleads the commencement of a Leaſe from the date, he ought to plead that the ſame begun immediately from the date.

23. He who pleads a Deviſe of Land, he ought to plead that the land was deviſeable at the common Law by cuſtom, or that it was by Writing, and that the Deviſor was ſeiſed at the ſame time of his death.

24. In pleading of an Aſſize, it is not ſufficient to ſay that the Defendant did diſſeiſe the Plaintiff; but he ought to ſhew and plead an Entry and Diſſeiſin, which is the manner of the Diſſeiſin.

25. In a Writ of Right, a man ought to ſhew and alledge Seiſin within 60 years: in a Writ of Entry, *ſur Diſſeiſin*, within 40 years: and in an Aſſize, within 30 years.

26. He who pleads an Attornment, he ought to ſhew the place, and the manner of the Attornment: *i. e.* by agreement, or by giving a peny, *ob.* or a farthing.

27. If a man in pleading convey a Leaſe for years of Lands, upon Condition to have Fee, he is not tyed to ſhew in what place the Leaſe was made, becauſe it ſhall be intended to be upon the Land, becauſe it ought to paſs by way of Livery: but otherwiſe it is in pleading a Leaſe for years onely.

28. If a man in pleading alledge payment of money in ſuch a place, as the *Temple-Hall*, &c. he ought to ſet forth in what County it is, for the Viſne.

29. Note, that the Writ, or Count, (which is as it were but a Comment upon the Writ) ſhall abate for falſe Latine: but by the Statute of 39 *E.* 3. it is ordained, that no Count ſhall abate for want of form; ſo that now the Count is not abateable for falſe Latine; but the Bar was never abateable by falſe Latine at the common Law.

30. If a man pleadeth a Leaſe for years, an Attornment, or a Surrender, he needs not to ſhew in what place, becauſe they ſhall be intended to be upon the Land.

31. Note, that a plea in Bar ought to be certain to all intents, otherwiſe it ſhall be taken ſtrongly againſt him that pleads it.

32. If a man pleads in Bar a double plea, and the plaintiff replies to it, and iſſue is joyned, and then it is found for the Plaintiff; now the plea is good, and the Plaintiff ſhall have Judgement.

33. If a man plead in Bar in an Aſſize, that *I. S.* was ſeiſed in his Demeſne, &c. the ſame is no plea; for it may be after the Diſſeiſin for which the Aſſize is brought: but he ought to ſay, That long time before the Seiſin and Diſſeiſin, *I. S.* was ſeiſed, &c.

34. He who pleads the performance of Covenants generally, muſt plead the Indenture or Deed likewiſe.

35. He that comes in as Vouchee, and would avoid a Warranty by change of the Eſtate, muſt ſhew how the Eſtate is changed.

36. He who pleads a Diſpenſation from the Archbiſhop to hold a Benefice in Commendam, confirmed by the Kings Letters patents, muſt aver the performance of the Covenants in the Diſpenſation.

37. He who juſtifies by a Licence or Liberty, muſt plead it ſpecially, and cannot have advantage of it upon the general iſſue.

In pleading Letters Patents, what Rules are to be obſerved therein, and upon what differences; where, the place, the day and the date of them muſt be pleaded; and where pleaded in *Cur. prolat.* and where not; and where the firſt Patentee aſſignes over his whole intereſt, and where but part; See the Titles *Grants of the King*, *Patents*; and ſee *Cook.* 1 par. in the Caſe of *Altonwoods* and *Bolſtrod*, 2 par. 154, 155.

Plaints.

Plaints.

Plaints in an Aſſize, or other Action, where good, where not: where the Writ ſhall be general, and the Plaint ſpecial, & è contra. In the Diſjunctive, where good, where not; and where the Plaintiff in his Plaint muſt make Title, where not.

1. AN Aſſize was brought of Tythes, the Writ was *de Libero tento*, and the Plaint is *de quadam portione decimarum, garbarum, feni, lanæ, & agnellorum annuatim provent. renovant. & creſſent. de &* in 100 *acr. terræ*, 10 *acr. prati*, & 100 *acr. paſture cum pertinentiis* in *N.* Exception was taken to the Plaint, becauſe it was uncertain, in not ſetting forth the certainty of the Loads. But to that it was anſwered, That the taking of part was a Diſſeiſin of the whole; which being caſual and uncertain, the Plaint cannot be more certain; and alſo the word *quadam* is a word of certainty, unleſs it be joyned to a word of uncertainty. 2. Exception was taken to the Writ, becauſe it was *de Libero tento*, whereas it ought to be *de portione Decimarum*: To that it was anſwered, That the Writ ſhall be general, and the Count ſpecial; and there is no ſpecial Writ given by the Statute of 32 *H.* 8. and then the ancient Writ ſhall ſtand. *Paſch.* 7 *E.* 6. *Dyer* 83.

2. An Aſſize was brought of his Freehold in *Weſtminſter*, and the Plaint was of the *Philizers* Office: the Plaintiff made his title in the Plaint, and alleadged Seiſin by taking of one *Capias*: the Plaint was ſaid to be good; and the Poſt where they were ſet at firſt when they were made Officers, was put in view. *Paſch.* 3 *Ma. Dyer* 114. *Vaux* caſe. See *Trin.* 4 *Ma.* 149. *Hunts* Aſſize. Aſſize was *de Officio Regiſtrarii Curiæ Admiralitatis Angliæ Principal.* and the plaintiff made his title in his Plaint

3. In an Aſſize, the Plaint was *in Dale tantum*; and there was two Dales in th: ſame County, and none without addition; yet it was adjudged, that the Writ and Plaint were good: the reaſon was, becauſe the Judgement in an Aſſize differs from other Writs; for he ſhall recover Seiſin of the thing put in Plaint by the view of the Recognitors: and if the thing in Plaint be ſo certain and plain, that the Recognitors may put the Plaintiff into poſſeſſion, it is ſufficient. *Paſch.* 7 *E.* 6. *Dyer* 84.

4. *Note:* It is ſaid that a man needs not uſe *tales ordines & certitudines* in the Plaint of an Aſſize, as in other Writs of *Præcipe quod reddat*; for 8 *Aſſ.* Wood was put before Paſture in a Plaint, which is contrary to the form and order of a *Præcipe quod reddat*, and the Plaint was *de annuo redditu unius robæ vel* 20 *s.* in the Diſjunctive, which had not been good in a *Præcipe quod reddat*; *& de quadam petia terræ*; and yet it was holden good in an Aſſize, without any other certainty.

5. A man ſeiſed of two old and ruinous Fulling Mills, preſcribed *Quod magna pars aqua cujuſdam rivoli*, did run from a place called *D.* to his ſaid Mills, and that there was a Bank made to keep in the water, and that he pulled down the Fulling Mills, and built up, and converted them to Corn-Mills; and that the Defendant brake the Bank, and diverted the water from his ſaid Mills. It was reſolved in this caſe, That the preſcription did extend to the new Griſt-Mills, becauſe in generalty the Mill is the ſubſtance; and the alteration was not of the ſubſtance, but of the qualities: and in this caſe it was ſaid, If one be in an Aſſize to demand a Griſt-Mill, or a Fulling Mill, or make his plaint of them, the Writ ſhall be *de uno Molendino*, generally, without any addition; and in his plaint he may ſet forth the nature of the Mill. *Cook.* 4 par. 86. *Lutterells* caſe.

6. *I. W.* brought an Aſſize againſt Sir *Tho Kayvet*, &c. *de libero tento* in *Weſtminſter*, and made his Plaint *de Officio Magiſter Ludorum pilarum palmarum: Anglicè*, the Office of Maſter of the Tenis-Players of the King in *Weſtminſter*. Exception was taken to the Plaint, becauſe in his Title he ſaith, *quod Officium prædict. eſt antiquum Officium in Weſtm. prædict. & quod Dominus Rex*, &c. *per literas Patent. conceſſit eidem* I. *Officium Magiſtri Ludorum pilarum palmarium, Habend. idem Officium eidem* I. *durante vita ſua*, &c. and doth not ſhew that any profit doth belong to the ſaid Office. But it was reſolved that the Plaint was good enough: for true it is, that of an Office of Charge, no Aſſize lieth. And 30 *Aſſ.* 4. An Aſſize was brought of the Office of Meſſor of the Mannor of *D.* with the Appurtenances; and there the difference was taken between an ancient Office and a new Office; for in an Aſſize of a new Office, there the Plaintiff ought to ſhew what Fee or profit is granted for the exerciſing of it. But the Court held the Plaint good enough. See 5 *E.* 3. See 3 *Aſſ. Aſſ.* 17. Aſſize of *Novel Diſſeiſia* was brought, and he made his plaint of a profit Apprender for the keeping of

a Park, *viz.* every day in the year, 1 *d. ob.* and a Roab; and it was adjudged, that the plaint was good, and the Aſſize maintainable, *Cook.* 8 par. 46. and 49. *Jebu Webbs* caſe.

7. An Aſſize was general *de Libero tento*, and the plaint was *de 4 acris ſalicetî*, that is, four Acres of Willows, and to have reaſonable Eſtovers in 100 Acres of Wood, *ſc.* Houſebote, Heybote: and the plaint was challenged, 1. Becauſe the plaint ought not to be *de quatuor acris ſaliceti*, but *terra*, or *prati*. 2. Becauſe the plaintiff had joyned in one plaint, two Freeholds; one, *ſcilt.* the four Acres of Willows at the common Law; and the other, *ſcilt.* the Eſtovers by the Statute, *i. e.* the Statute of *Weſtminſter* 2. *Cap.* 25. But the opinion of the Court was, That the plaint was good; and the Exceptions were diſallowed by the Court. See 15 *Aſſ.* 15. *Cook.* 8 par. 48. in *Webbs* caſe.

8. If a man grants to another 20 Loads of Hazel, or twenty Loads of Maple to him and his heirs, to be taken yearly out of his Wood of Dale; there the Grantee hath election which of them to take: and therefore if he or his heirs bring an Aſſize of them, and make his plaint in the Diſjunctive, the ſame is good: and ſo if a man doth grant to another for life an Annuity, or a Robe at the Feaſt of *Eaſter*, and both are behind, the Grantee in ſuch caſe may bring his Writ of Annuity in the Diſjunctive; for if he ſhould bring his Writ for one of them only, and ſhould recover, this Judgement ſhould determine his election for ever. *Cook.* 2 par. 42. in Sir *Rowland Heywards* caſe.

9. Errour was brought upon a Judgement given in a Writ of Entry *en le Poſt*, upon a Recovery had in C. B. The Errour aſſigned was, becauſe that the Writ of Entry was, *de uno annuali reddita ſive penſione 4 Marcarum exeunt de Eccleſia ſive Rectoria.* It was reſolved in that caſe, That the Writ was good enough, for there is not any incertainty; for one of two ſeveral things is not demanded, but one thing onely, or the demand is of Rent, or *penſione de 4 Marcarum*, and *Redditus* and *penſio*, are all one; and *exeunt de Rectoria*, proves it to be a Rent; for if it ſhould be an Annuity, the Rectory ſhould not be charged. *Paſch.* 35 *Eliz.* in B. R. *Cook.* 5 par. *Downes* caſe

10. Errour to reverſe a Judgement in a Writ of Dower, the Errours were, 1. That the Demand was *de tertia parte Decimarum garbarum* in *C.* and by this Demand the Tythes of the kind of them is not demanded in certain; for the word *Garba* admits of divers conſtructions. 2. The Demand is *Ac etiam de Rectoria de A.* which is alſo incertain; for it ought to be *de Rectoria Eccleſiæ de A.* But it was the opinion of the Court, That the Demand *de tertia garbarum*, was certain enough by common intendment; but it is here more certain then ſo, for it is *tertiam partem garbarum grauum*, which ſignifies Corn. Alſo it was reſolved, That it is not neceſſary to ſay, *Rectoria Eccleſiæ de A.* for it muſt ſo be neceſſarily intended. And it was agreed, That a Demand in a *Præcipe* ought to be more certain then a Demand in a Writ of Dower. The Judgement was affirmed. *Mich.* 1650. in B. R. *Fairfax*, and *Fairfax* caſe. *Styles* 237. 238.

11. Errour brought to reverſe a Judgement in an inferiour Court: the Errour aſſigned was, That the plaint was entred againſt *Francis*, and the proceedings were againſt *John*. It was the opinion of the Court, That it was not good; for a plaint there is in the nature of an original Writ; and therefore if it be erronious, it cannot be helped if it be after a Verdict. *Trin.* 24 *Car.* in B. R. *Brerton* and *Mountigous* caſe.

12. Errour brought to reverſe a Judgement in *Leiceſt.* It was aſſigned for Errour, becauſe that in that ſuit there was not any plaint; for in all inferiour Courts, the plaint is the original at the Common Law; and without that, no proceſs can iſſue out: and here, upon this Record, nothing is entred, but that the Defendant *Summonitus fuit*, and the firſt Entry ought to be *A. B. queritur de C.* &c. It was the opinion of the Court, That a plaint ought to be entred before proceſs iſſueth forth; and this Summons which is entred here, is not any plaint: The Judgement was reverſed. *Mich.* 30 *Eliz.* in B. R. *Savage* and *Knights* caſe. *Leon* 302.

13. In a *Replevin*, the Defendant did avow the taking of the Cattel damage feaſans: upon iſſue joyned, it was found for the Plaintiff in the Court at *Windſor*, being a three-weeks Court. Errour was brought, and aſſigned for Errour, that the entry of the plaint in the ſaid Court was the ſeventh day of *May*, and the Plaintiff afterwards did declare there of a taking of the Cattel the 25 day of *May*. It was the opinion of the Court, That this being in a three-weeks Court, was Errour, becauſe that no plaint can be entred but at a Court; and it appeared to the Court in this caſe, that the entry of the plaint was mean, betwixt the Court-days, ſo the Declaration is not warranted, no cuſtome being alledged to maintain ſuch an entry. *Hill.* 13 *Jac.* in B. R. *Brook* and *Gregories* caſe. *Gouls.* 266.

14. Note, where by the cuſtome of a Copyhold-Mannor, plaints have been made in the Court of the Mannor, in the nature of real Actions; if a recovery be had in ſuch a plaint againſt Tenant in tail, that recovery ſhall work a diſcontinuance, and ſhall take away the entry of the iſſue in taile: For, in as much as plaints in the nature of real Actions are warranted by the cuſtome, it is an inci-dent

cident which the Law annexeth to the cuſtome, that ſuch a recovery ſhall make a diſcontinuance. *Cook.* 4 par. 21. *Deal* and *Rigdens* caſe. *Mich.* 37 *Eliz.* in B. R. Rot. 1417. *Clan* and *Peales* caſe adjudged accordingly.

See more of Plaint in Lib. 1. *Title* Demand.

Pledges, *Plegiis Aquitandis*, and Pledge.

Where, and in what Writ, and in what Actions, and what Courts they lie; and what perſons ſhall finde Pledges, what not; and of the Writ de Plegiis aquitandis.

1. IF an Attorney of the Court of Common Pleas, doth ſue a ſtranger in that Court by reaſon of priviledge; it was the opinion of the Court, that of neceſſity he muſt find Sureties or Pledges *de proſequendo*, as well as a ſtranger who ſues an Attorney or Clerk by Bill, ought to find Pledges *in fine Billæ*; and in the principal caſe, the Judgement was reverſed in the Kings Benches, notwithſtanding the Verdict paſſed for the Plaintiff there for want of finding Pledges. *Paſch.* 12 *Eliz. Dyer* 288. *Fleeteman* and *Bygotts* caſe.

2. At a *Pluries Repleg.* the Sheriff retorned in Bank, *catalla elongata, & quod nullum aliud Breve*, &c. upon that a Withernam was awarded, and according to the ſaid Writ, the Sheriff retorned, that the Plaintiff found Pledges to proſecute: out of which note, That Pledges ſhall be found upon a Withernam awarded. *Mich.* 2 *Eliz. Dyer* 188.

3. If a Formdon be retorned *tardè*, and the Demandant ſueth an *alias ſummoneas*, there muſt be nine Returns between the Teſte and that: and note in the *alias* Summons, Pledges muſt be found; for in the *alias*, the words be, If the Demandant *fecerit te ſecurum*, except there be Pledges found in Court. *Paſch.* 8 *Eliz. Dyer* 252.

4. At the *Pluries Repleg.* the Sheriff retorned that the Defendant claimed property: upon which Retorn, his VVrit *de proprietate probanda* iſſued to the Sheriff, commanding him, taking with him the Cuſtos of the Pleas of the Crown, to make deliverance to the Plaintiff; and if it was found for him, then alſo if he find Pledges to proſecute, that he attach the Defendant to anſwer to the King for the contempt, as alſo to the Plaintiff for his damages. So note, in *Proprietate probanda* brought, Pledges were found, *Mich.* 2 *Eliz. Dyer* 173.

5. Error brought to reverſe a Judgment in Debt in C. B. The Error aſſigned was, becauſe no Pledges were found upon the Original Writ of Debt; and every Plaintiff is to be by his Pledges, becauſe he is to be amerced if Judgment be given againſt him: and for that cauſe, for the omiſſion of Pledges, the Judgment was reverſed. *Mich.* 11 *Jac.* in B. R. *Vaughan* and *Delahays* caſe.

6. Errour to reverſe a Judgement in the Common Pleas. The caſe was, One brought his Bill by Attorney in the Common Pleas; upon which Judgement, a VVrit of Errour was brought, and the Errour aſſigned was, becauſe he had found no Pledges: It was ſaid by the Court in this caſe, That Pledges may be entred when the party will. See 18 *E.* 4. 9. where it was held by all the Judges in B. R. That in any Bill or VVrit where Pledges are left out, the party at any time hanging the Plea, may finde Pledges, for that this is in the diſcretion of the Court, and is but matter of form: Quere, if there be not difference as to that between a Bill and a VVrit; for the VVrit is *Si queretus fecerit te ſecurum*, but ſo is not the Bill. But in the principal caſe, *Curia adviſare vult. Trin.* 13 *Jac.* in B. R. *Haver* and *Gibbons* caſe. *Bolſtr.* 3 par. 61.

7. Errour to reverſe a Judgement in the Common Pleas in a VVrit of Raviſhment of a Ward there brought according to the Statute of *Weſtminſter* 2. *Cap* 35. The Errour inſiſted upon, was this, The Raviſhment *de Gard* which was brought is given by the Statute of *Weſtminſter* 2. by which Statute there ought to be Pledges found by the Plaintiff; but here are no Pledges retorned by the Sheriff, nor yet any Entry or Order in Court, that Pledges ſhall be found, which ought ſo to be, this being an Original VVrit. It was the opinion of the whole Court in this caſe, That the Judgement ſhould be reverſed for want of Pledges. *Hill.* 14 *Jac.* in B. R. Doctor *Huſſey* and *Moores* caſe. *Bolſtr.* 3 par. 175. to 181. and note, it was adjudged in that caſe, That the ſame was not helped by the Statute of 18 *Eliz. Cap.* 14.

8. The Writ *de Plegiis acquietandis* lieth where a man becomes Pledge or Surety of another to pay a certain ſum of money at a day certain, &c. If the

the party doth not pay it at the day, if he who becomes Surety pay the money, he shall have this VVrit against him who ought to pay the same: And it seemeth by the old Books, that this VVrit is good, although he have not a specialty to prove it. See *Pasch.* 43 *E.* 3. *Fitz. br.* Pledges 9.

9. *Note:* Where a man recovereth against the Sureties in the Country, and the Sheriff distreins them to pay the Debt where the principal is sufficient: in that case the Writ *de Plegiis acquietandis* lieth. But if he sueth them in the Common Pleas, where the party principal is sufficient to pay the debt; it is a Quere in Mr. *Fitz. B.* whether the parties may plead that, and aver that the principal Debtor is sufficient. See 19 *E.* 3. *Brook Pledget* 12. The Plaintiff ought first to have the Writ against the party; and if he be insufficient, then against the Sureties.

10. A man was bound by Lease to perform Covenants. *Et ad majorem securitatem* the Lessee *invenit* D. *Fisteiusforem, ad per implead. Conventiones:* and further it was in the Deed, that we, *viz.* the Lessee and *D. Obligamur nos & utrumq; nostrum in toto & in solido*; and the *Præcipe* was brought in the name of one of them onely, and therefore it was abated. 39 *E.* 3. 9. accordingly.

11. One brought a VVrit *de Plegiis Acquietandis*, and the Jury found that the Plaintiff was bound for the Defendant as his Surety in an Obligation with him jointly and severally; and that being impleaded, he prayed a plea, *&c.* and yet Judgement was given against him: for as this case is, they were both Principals, and neither pledge nor Surety for the other: and this Action lies not but where one is expresly named as Surety in the Bond; which was not so in this case. *Pasch.* 22 *Eliz. Dyer* 370.

12. Note, That in a Writ *de Plegiis Acquietandis* brought in the Common Pleas, it was alledged that the Plaintiff became pledge for the Defendant in *London*; and that by the custome there, the pledge shall be discharged without a Deed, as well as by a Deed; and shewed how that the principal had not discharged him, although he had required him so to do, but suffered the Surety to pay the Debt; and for that cause the Action was brought by the Surety against the Principal. It was the opinion of the Court, That it was good in a City or Burrough, but not in another Lordship: and in that case the Court was of opinion, That the party needeth not to shew the cause of the contract betwixt the first Creditor and the Principal, but to shew the matter which giveth the cause of Action for the pledge, *viz.* because he was not acquitted. *Pasch.* 41 *E.* 3. 11. Note in that case, That an Action of Debt as Surety in *London* without a specialty proving that he was his pledge, lieth in the Common Pleas, or Kings Bench. And see 1 *E.* 4. 6. accordingly. and *Trin.* 20 *H.* 6. 31. accordingly.

13. In Judicial process, if the Plaintiff be barred, non-suit, or if the Writ abate, the Plaintiff shall not be amerced, because that the process is founded upon a Judgment and Record; and therefore in a *Quid Juris clamat*, *Scire facias*, *Per quæ servitia*, &c. in these Actions the Plaintiff shall not find pledges, because that he shall not be amerced. See 11 *H.* 4. 45. 9 *E.* 3. 31. 18 *H.* 6. tit. Pledges 1. *Cook.* 8 par. 61 in *Brechers* case.

14. Some persons shall not find pledges in respect of the Dignity of their persons; so the King, and also the Queen, because she partaketh of his prerogative, shall not finde pledges. 18 *E.* 3. 2. *Br.* tit. Amercement 53. *Fitz. N. B.* 195.

15. So an infant shall not finde pledges, *Hil.* 14 *Ass.* 17. but when he comes to his full age, hanging the VVrit, he is then to finde pledges, or else he is to be amerced; and see against an Infant, the Entry is, *Iddo in misericordia, sed pardonatur, quia infans. Cook.* 8 par. 61. in Brechers case.

16. In Trover and Conversion the case was this: *A.* being possessed of a Hatband set with Pearls and Diamonds, pawned the same to *B.* for 20 *l.* no certain time being appointed for the redemption of it. *B.* being sick, in the presence of his Wife, and with his consent, delivered it to *D.* the Defendant; and afterwards *B.* made his Wife his Executrix, and died. *A.* tendred to the Executrix the 20 *l.* who refused, and afterwards demanded of *D.* the Hatband, who refused to deliver it unto him: whereupon he brought an Action against *D.* In this case three points were resolved: 1. That although there be no time appointed for the redemption of it, yet it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it; for pledging doth not make an absolute property, but it is a delivery onely until he pay, *&c.* So it is a Debt due to the one, and a Retainer of the thing unto the other, for which there may be a Re-demand at any time upon payment of the money: for the pledge delivered is but as a security of his money lent; so as he who borrows the money is to have again his pledge when he repays it, and his tender gives him interest therein. 2. That this delivery of the Goods by the Wife with the consent of her Husband to the Defendant, there passed no interest of them to the Defendant, but a custody onely; and therefore the Tender of the redemption ought to be to the Executrix, and not to the Defendant. 3. Resolved, when *A* tendred the money to the Executrix, and she refused it, it was as good as payment; and the

especial

especial property of the Goods was revested in *A.* again; and then when he demanded the Hatband of the Defendant, and he refused to deliver it, it was a Conversion: and Judgement was given against the Defendant. *Hill.* 7 *Jac.* in B. R. Sir *John Ratcliffe* and *Davies* case. *Cro.* 2 par. 244. *Rolls.* 1 par. 79. the same case.

Pluralities.

See Lib. 1. *Title* Appropriations, *Divis.* 6.

Plenarty.

What shall be said Plenarty of a Church: Where it shall be by Admission and Institution, and to what intent, to what not: What makes a full Plenarty, where a bar against a common person, where against the King, and where not.

1. BY institution made by the Bishop of the Clerk presented to the Church, the Church is full as to the Spiritualties, *viz.* To celebrate Divine Service, To administer the Sacraments, and To instruct the Parishioners in the true Faith; and in a *Quare impedit* brought, Plenarty by institution is a good plea against a common person, 22 *H.* 6. 27. Plo. Com. 523. and yet the Incumbent is not a compleat Parson, because he wanteth the Temporalties by which he should live, which he hath not before induction; for upon the induction, the Temporalties, *viz.* the Glebe-Lands, Tythes, Offerings, *&c.* are delivered unto him. 33 *H.* 6. 24. accordingly.

2. A man was admitted, instituted and inducted into a Benefice of the yearly value of 8 *l.* Afterwards the King presented him to the Church of *S.* which also was a Benefice with Cure, and he was admitted and instituted; then the Archbishop of *Canterbury* granted him Letters of Dispensation for Pluralitie, which the King confirmed; and afterward he was inducted into the Church of *S.* In this case it was adjudged, That the Dispensation came too late, because it came after the institution; for it was said, that by the institution the Church *plena existit*, as to common persons, but not against the King; and as to the Spiritualties he was incumbent by the very institution. *Mich.* 41 *Eliz.* in B. R. *Cook.* 4 par. 79. *Digbyes* case.

3. The King was Patron of the Church of *D.* The Incumbent being sick, *A.* entred a *Caveat* in the life of the Incumbent, *viz.* *Caveat Episcopus ne admittat, nisi*, &c. The Incumbent died. A stranger presented one *M.* who was admitted and instituted. Afterwards *A.* presented *B.* who was instituted and inducted. *R.* obtained a presentation from the King, who was instituted and inducted. The Question was in the Spiritual Court, Who had Right? For the determination of which, it was referred to a Tryal at Law: and thereupon the Lessee of *R.* who was the Presentee, brought an *Ejectione firme*. And in that case, two points were resolved by the whole Court: 1. That the *Caveat* was void, being entred *in vita Incumbentis*. 2. That the Church was full by institution against all persons but the King; and the presentation of *A.* of *B.* was void by reason of the *super* institution; and so the presentation of *R.* the Incumbant, was good. *Pasch.* 15 *Jac. Morgan*, and *Glover*, and *Ronus* case. *Poph.* 133.

4. *Note:* At the Common Law, if a stranger had presented his Clerk to the Bishop, and he had been admitted and instituted into the Church whereof a common person was then Patron, the Patron had no remedy to recover his presentment, but by a Writ of *Right of Advowson*, by which the Incumbant was not to be removed. And so it was, if an Usurpation had been upon an Infant, or a *Feme Covert*, who had an Advowson by discent, Plenarty generally was a good plea against them; and the reason was, that the Incumbent might quietly intend and imploy himself to his Spiritual charges; and also because the Law intended, that the Bishop who had cure of souls within his Dioces, would admit and institute an able man for the discharge of his duty, and his own. But yet at the Common Law, if one had usurped upon the King, and his Clerk had been admitted, instituted and inducted, the King might have removed him by a *Quare impedit*, and been restored to his presentation: but this mischief at the Common Law was remedied by the Statute of *Westminster* 2. *Cap.* 5. which gave *Quare impedit* to the party, notwithstanding such Plenarty. *Dummodo Breve infra tempus semestre impetretur.* But at this day the Church is not full by institution against the King, because

before induction, the King may revoke and repeal his presentation; which he could not do if the Church were full of an Incumbent. *Cook.* Instit. 344. *b.* See 45 *E.* 3. 39. 18 *Eliz. Dyer* 348.

5. In a *Quare impedit* brought by the King against the Bishop of *Winton*, the case was, The Bishop did present *A.* to the Church, who was inducted; and afterwards *A.* accepted of a Plurality; by which the Church became void: and afterwards the Bishop presented *B.* to the Church, and the same day the Bishop died before *B.* was instituted and inducted: the King brought a *Quare impedit* against the Bishop and *B.* and recovered, and had a Writ to the Bishop to admit his Clerk. 24 *E.* 3. 31.

6. A Tenant for life of the Mannor of *D.* to which a Rectory, which is a Benefice with Cure, was appendant, the remainder to *B.* in Fee. *A.* presented *D.* who was admitted, instituted and inducted, and did not read the Articles; for which cause he was deprived at the suit of *A.* before the Bishop, and he appealed to the Arches, no notice being given by the Ordinary to the Patron, of the said Deprivation. *A.* died; the King by title of Lapse, presented *E.* who was admitted, instituted and inducted. *D.* died. *B.* presented *G.* who was admitted, instituted and inducted. *E.* entred into the Rectory, and took the profits. *G.* brought Trespass. In this case it was resolved, 1. That the Church was void presently by the Statute of 13 *Eliz.* without any sentence Declarative. 2. That when the King hath no title to present by any means, and he do present *ratione Lapsus*, that the presentment is void. 3. That in such case, although the Bishop admit, institute and induct the Incumbent, yet the Church remains void, and the rightful Patron is not put to a *Quare impedit* to remove such Incumbent; and if such Ordinary do collate within six moneths, and his Clerk be inducted, yet the rightful Patron is not put out of possession, but may present. 4. That although Plenarty by Collation doth not put him who hath right to present out of possession, yet Plenarty by Collation puts him who hath right to collate out of possession. *Cook.* 6 par. 29. *Greenes* case. See *Cook.* 6 par. 49. *Boswells* case accordingly.

7. The King hath title to present by Lapse, and and the Patron presents his Clerk by Usurpation, who is admitted, instituted and inducted: It was adjudged in this case, That by this Plenarty the King hath lost his presentation, and he shall not have the second presentation; and the Statute *de Prerogativa Regis* is to be intended, when the King hath an interest certain and permanent, and not when his interest is specially limited, and time is the substance of his Title. *Cook.* 7 par. 28. *Barkervilles* Case.

8. *Note:* It was resolved by the Court, That if the King hath Title to present by Lapse *barre*, and he doth present, and his Clerk is instituted, and dieth before induction, that he shall present again. 18 *Eliz. Giles* case. *Cook.* 9 par. 132. in *Hobbs* case. Like the Case where the King marrieth the Daughter which he hath in Ward, *infra annos nubiles*, and before the years of consent the Husband dieth, the King shall have the marriage of the Heir again, because that the first marriage was not compleated: but otherwise it is in both cases, in the case of a common person. See *ibid.* and see *Cook.* 6 par. *Ambrosia Gorges* case accordingly.

9. In a *Quare impedit* brought by the Queen, the Wife of the King, Plenarty by institution is no plea against her; for she is a person exempt from the person of the King, and shall partake of the Prerogatives of the King. *Cook.* 4 par. 23. in *Clarke* and *Pennyfathers* case.

10. Errour to reverse a Judgement in C. B. the Question was, Whether a double Usurpation should put the King out of possession, and put him to his Writ of *Right of Advowson*: it was there adjudged that he was, and now the Error was assigned in the matter of Law. It was resolved after many motions, That the King might maintain a Quare *impedit*; for he hath such a Privilege, that he cannot be put out of his own inheritance unless by his own Patent; and as he cannot be ousted of Land, so he cannot be of an Advowson. But Usurpation, and Plenarty upon it, shall bind him as to the possession, until he remove the Incumbent by a *Quare impedit*: and a second presentation shall not gain any possession, nor twenty presentations, but that he always remains seised, and in possession of the Advowson; and so it was adjudged, 38 *Eliz.* in *Hasletts* case. And although it hath been said, that in *Yardleys* case, 25 *Eliz.* it was adjudged, that the Queen was put out by a double presentation: in that case the Record doth not mention any induction upon the second presentment, so as there was not any Plenarty against the King. Yet *Popham* and *Fenfield* said, They well remembred that the case was well argued, as if there had been induction; and then the Court did not conceive, but that induction was fully pleaded; and yet resolved, that it should not bind the Queen, and gave Judgement accordingly. In the principal case the Judgement was reversed. *Trin.* 4 *Jac.* in B. R. The King and *Champions* case. *Cro.* 1 par. 123.

11. Plenarty is a spiritual thing; and therefore if it come into question, If a Church be full of an Incumbant, or not; the same shall be tryed by the Certificate of the Bishop, who best knows of the

the inſtitution. See 50 E. 3. 17. and 18. But if the iſſue to be tryed be, Whether the Church be void or not void, the ſame ſhall be tryed by a Jury of twelve men at the Common Law, unleſs the iſſue be upon ſome ſpecial Act of Avoydance; for then the ſame ſhall be tryed by the Certificate of the Biſhop, ſo as the eſpecial cauſe of the Avoydance be ſpiritual.

12. *Note:* It was reſolved, That at the Common Law the three points were not enquireable *ex Officio*, in a *Quare impedit*, or in a *Darrein preſentment*; but now they are enquireable by the third Branch of the Statute of *Weſtminſter* 2. For in as much as the Plaintiff is to recover the value of the Church for two years, if he cannot recover his preſentment, and the value of the moyety for a year if he can, it is neceſſary for the Jury to enquire, 1. If the Church be full; 2. Of whoſe preſentment it is full; and, 3. Of the value of the Church; becauſe according to that, he ſhall recover his damages. And ſee there the reaſon given why the Tryal if the Church be full, or not, is given to the Biſhop, becauſe the inſtitution is a ſpiritual thing. But for induction, that is a notorious Act, and ſhall not be tryed by the Biſhop, but by the Jury at Law: and yet in ſome caſes a Jury ſhall enquire of the Plenarty, as in the principal caſe there; and in all other *Quare impedits*, one of the points enquireable is, If the Church be full, or not. *Cook.* 6 par. 49. in *Boſwells* Caſe.

See more of Plenarty *in* Lib. 1. *Title of* Advowſons, *and in the Titles of* Inſtitution, Preſentment, *and* Quare impedit.

Poſſeſsion.

What it is, where and what, and who ſhall be ſaid a Poſſeſſor of Lands or Goods: Where a Poſſeſſion ſhall be veſted in a man without claim, where not; and where claim made by one ſhall give Poſſeſſion to another, where not.

1. POſſeſſion is two ways; *ſcilt.* Actual, or poſſeſſion in Law: Actual poſſeſſion is that by which a man gains the poſſeſſion *per pedis poſſeſſionem: viz.* by entry in fact into Lands or Tenements, or by ſome other act, when the Lands deſcend or come unto him: Poſſeſſion in Law is, when Lands or Tenements are deſcended or come unto a man, and he hath not yet really and actually entred into them; and it is called Poſſeſſion in Law, becauſe in Judgement and the eye of the Law, he is deemed to be in poſſeſſion, in regard he is Tenant to every mans Action that will ſue concerning the ſaid Lands or Tenements. *Cook.* 1 par. 42. in *Ratcliffs* caſe.

2. Tenant in taile had iſſue two Sons, the eldeſt had iſſue a Daughter, and died; his Wife *privement enſient* with a Son in the life of his Father, Tenant in taile in poſſeſſion, ſuffered a Recovery to the uſe of himſelf for life, and after to the uſe of *I. S.* for twenty one years, and after to the heirs males of his body begotten, and to the heirs males of the body of ſuch heirs males; and preſently after the Judgement, and before Execution, the ſame day that the recovery was ſuffered, Tenant in taile died. It was a Queſtion in this caſe amongſt others, If the Reverſion was in the Recoverers preſently after the Judgement, until Execution was ſued. It was ſaid that the Recovery was executed by the Judgement preſently, and a difference was taken when Lands were in poſſeſſion, and when in Leaſe for years or life: as if a Fine *ſur Conuſans de droit tantum*, be levied of Land in poſſeſſion, the Conuſee hath not any thing before entry; but if it be of a Reverſion upon an Eſtate for years or life, there the Reverſion or thing which lieth in grant, ſhall paſs preſently. So if a man makes a Leaſe for years upon a Collateral Condition; the

Feoffee makes a Leaſe for years again to the Feoffor; the Condition is broken: in that caſe the Law ſhall adjudge the Feoffor in of his Fee-ſimple preſently for neceſsity, and in ſuch caſe he needs not make any claim. But it was reſolved in the principal caſe, That the Reverſion was not in the Recoverers preſently by the Judgement, until Execution was ſued: and it is there laid for a Rule, That when a man may enter or claim, the Law will not adjudge him in poſſeſsion without entry or claim. *Cook.* 1 par. 94. and 97. *Shelyes* Caſe.

3. A man ſeiſed in Fee, for divers conſiderations covenanted to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his Son in taile: *Proviſo*, that at any time during his life with the conſent of others by Deed of Indenture to be enrolled, to revoke the ſame uſes, and to limit new uſes; and afterwards by Deed enrolled in the Chancery, he revoked the uſes in part, and limited new uſes to him and his heirs; and afterwards by another Deed he declared, that from the time of the Enrollment of the Deed in Chancery, all the firſt uſes in the firſt Indenture ſhould be void. It was in this caſe, amongſt other points, reſolved, 1. That the Fine levied before the Inrollment in Chancery, had extinct the power of Revocation; and ſuch a power of Revocation might be extinct or releaſed by any who had an Eſtate of Freehold in poſſeſsion, reverſion or remainder. 2. Reſolved, That if the Fine had not been levied, then by the Revocation, the ancient uſes were determined without entry or claim, becauſe he himſelf was Tenant for life of the Land; ſo as he could not enter upon himſelf, and claim he need not, when he himſelf is ſeiſed of the Land, and makes an expreſs act of Revocation, which is as ſtrong as a claim can be. *Cook* 1 par. 174. *Diggs* caſe.

4. *A.* Tenant for life, the Remainder in taile to *B.* the Reverſion to *B.* and his heirs expectant. *B.* levies a Fine to *C* and *D.* and the heirs of *C.* to the uſe of them and their heirs, and had iſſue, and died before all the proclamations paſſed: the iſſue being beyond Sea, the proclamations paſſed; afterwards the iſſue returned, and made his claim to the Remainder. It was adjudged in that caſe, That the iſſue was barred by the Fine with proclamations: and in that caſe it was reſolved, 1. That the Eſtate taile which paſſed by the Fine, was not abſolutely determined by the death of the Tenant in taile, but it was in the election of the iſſue to make it voidable or void. 2. Reſolved, That when the proclamations paſſed without entry or claim made by the iſſue upon the Land, that the right which deſcended to him was barred by the Statute of 4 *H.* 7. of Fines. 3. It was reſolved, That the iſſue in taile being heir and privy, could not by any claim which he could make upon the Land, ſave the Eſtate taile which deſcended to him. *Cook.* 3 par. 84, 85. The Caſe of Fines.

4. *Note:* It was reſolved by the Juſtices, That a ſtranger of his own wrong cannot enter in the name of him who hath right, and avoid a Fine which is levied according to the Statute of 4 *H.* 7. without a Commandment precedent, or a conſent ſubſequent within the five years after the Fine levied. But he who hath the Reverſion, or the Lord of a Mannor, may enter in the name of his Leſſee, or of his Copyholder, as well to ſave their inheritances, as particular Tenants, becauſe they are privies in Eſtate, and that they may do without requeſt precedent, or conſent ſubſequent. See *Mich.* 39 *Eliz.* in B. R. the Lord *Audleys* caſe vouched in *Cook.* 9 par 106. in *Margaret Podgers* caſe; and ſee there Guardian for Notiture, or in ſocage, may enter in the name of an Infant who hath right; and the ſame ſhall veſt the Eſtate in the Infant without any commandment or aſſent, becauſe he is privy betwixt them.

Poſſeſſio

Poſſeſsio fratris.

1. *What ſhall be ſaid a ſufficient poſſeſſion to make the Siſter, Uncle, &c. Heir, what not.*

1. A Copyholder in Fee by licence, made a Leaſe for years: the Leſſee entred; the Copyholder having iſſue a ſon and a daughter by one woman, and a ſon by another woman, died; the eldeſt ſon died before admittance: it was adjudged in this caſe, that the Land ſhould deſcend to the daughter of the whole blood; for it was reſolved, That where cuſtomary Lands of inheritance do deſcend to the heir before admittance, he may enter and take the profits; and that there ſhall be a *poſſeſſio fratris* before admittance upon an Actual poſſeſſion. *Mich.* 24 *Eliz.* in B. R. *Cook.* 4 par. 22. *Bowres* caſe. See *Mich.* 8 *Jac.* in B.R. *Eliſſe* and *Chapleys* caſe. *Roll.* 1 par. 42. accordingly. See, An uſe is an Hereditament at the Common Law, and there ſhall be *poſſeſſio fratris* of it. *Cook.* 1 par. 121. *Cook.* 3 par. 2. in the Marqueſs of *Winchesters* caſe.

2. If a man maketh a Gift to one, and the heirs of his body, and he hath iſſue a ſon and a daughter by one woman, and a ſon by another woman, and the Father dieth, and the eldeſt ſon entreth, and dieth, the younger ſon ſhall inherit *per formam Doni*; for he claimeth as heir of the body of the Donee, and not generally as heir to his Brother: and that is the reaſon that *Littleton* ſaith, That *Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*; in which Maxime, the words are to be obſerved, 1. That the Brother ought to be in actual poſſeſſion of the Fee and Freehold, either by his own act, or by the actual poſſeſſion of another: and therefore if Land, Rent, Advowſon, deſcend to the elder Brother, and he dieth before any entry made into the Land, or receive the Rent, or preſent to the Church, the younger Brother in ſuch caſe ſhall inherit: but if the eldeſt ſon enter, and by his own act hath gained the actual poſſeſſion; or if the lands were leaſed for years, or in the hands of a Guardian, and the Leſſee or Guardian poſſeſs the lands; there the poſſeſſion of the Leſſee or Guardian doth veſt the Fee and Freehold in the elder Brother, and in ſuch caſe the Siſter ſhall inherit as heir to her Brother. *Cook.* 3 par. 42. in *Ratcliffs* caſe.

3. A man Mortgaged Lands upon Condition, That if he or his heirs repay 100 *l.* at ſuch a day, that he ſhall re-enter. He dies, leaving iſſue a daughter onely; his wife *privement enſient* with a ſon: the daughter and heir at the day pays the 100 *l.* and afterwards the ſon is born. It was the opinion of the Juſtices in this caſe, That the Siſter ſhould retain the Land againſt the ſon born after the performance of the Condition: for ſo as much as ſhe paid the money, (and if ſhe had not paid it, the Land had been loſt) if ſhe could not retain the Land againſt the ſon, ſhe had no remedy for the money; and by payment thereof, ſhe hath gained the Land, and is in as a Purchaſor, though ſhe be entituled thereunto by the Condition, and as heir; and ſhe ſhall retain it as ſhe ſhall the perquiſite of a Villain, and as Land gained by her care and vigilancy. *Mich.* 3 *Car. Kirtons* caſe in Cur. Ward. *Cro.* 1 par. 61.

4. This Queſtion was in Parliament concerning the Barony of *Ruthen:* One being created Baron to him and his heirs, hath iſſue a ſon and a daughter by one Venter, and a ſon by a ſecond Venter, and the eldeſt ſon hath the Barony, and ſits in Parliament, and after dies without iſſue; Whether the ſecond ſon ſhall have that Dignity as heir to his Father, or the Siſter ſhall have it as *Poſſeſſio fratris* of Lands, *&c.* And the opinion of the Judges being required therein, it was by them reſolved, That there is not any *Poſſeſſio fratris* of a Dignity, but that it ſhall diſcend to the ſon; for the yonger ſon is *Hæres natus*, and the Siſter is onely *Hæres factus* by the poſſeſſion of her Brother of ſuch things as are in demeaſn, but not of Dignities, or the like, whereof there cannot be acquiſition of the poſſeſſion. *Hill.* 16 *Car.* the Lord *Greys* caſe. *Cro.* 1 par. 417.

5. The King purchaſeth Land, and dieth, having iſſue a ſon and a daughter by one woman, and a ſon by another woman; the eldeſt ſon entreth, and dieth without iſſue; the daughter ſhall not inherit the Land, but the younger ſon. See 34 *H.* 6. 34 Plow. Com. 245. accordingly.

6. If a man purchaſeth an Advowſon in Fee, and hath iſſue a ſon by one Venter, and a daughter by another, and dieth, and the ſon preſenes, and dieth without heir of his body; the daughter ſhall not have the Advowſon, but the Uncle of the ſon on the part of the Father. See 19 E. 2. *Quare imp.* 77.

7. If the ſon chargeth the Reverſion of Leſſee for life with a Rent-charge, and dieth, the ſon of the half blood ſhall have the Reverſion as heir to the Father, and ſhall hold it diſcharged of the Rent;

Rent; yet if he granteth the ſame Reverſion over for life or years, the ſame is a good *poſſeſſio fratris*, becauſe whoſoever will claim a Reverſion expectant upon a particular intereſt, ought to claim the ſame as heir of the Grantor. *Cook.* 3 par. 42. accordingly.

8. If a Remainder be limited to the right heirs of *I. G.* and he hath iſſue two ſons by divers women, and the elder hath iſſue, and dieth before the Remainder falleth, and afterwards the ſame falleth, the younger ſon ſhall have the Land, and not the ſon of the eldeſt. 7 *H.* 4. *Profits of Court* accordingly. But *Br.* title *Done* 8. makes a Queſtion of it.

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2. *Where entry made upon the poſſeſſion of the King, ſhall be lawful without ſuing of Livery, Petition, or* Ouſter le Mayne; *and where the Lord after the death of his Tenant, ſhall be in poſſeſſion of the Body of his Ward without Seiſure, where not.*

1. IF the Husband ſeiſed of Lands in the right of his wife, be attainted of Felony, and the King upon Office found ſeiſeth the Land, and after grants the ſame over to another in Fee: it was holden in that caſe that the Grant of the King was good to paſs the Eſtate to the Patentee during the Coverture, which the King had gained by the forfeiture; and the reaſon was, becauſe the King was entituled by the Office found, and therefore and in that caſe the heir could not enter upon the Kings poſſeſſion, or the poſſeſſion of his Patentee, but was put to his petition; and the King had an eſtate which he might lawfully grant. But if in ſuch caſe a ſpecial Office were found, that the Husband had nothing at the time of the Attainder but in the right of his wife; in that caſe, after the death of the wife, the heir of the wife might have entred upon the Kings poſſeſſion, or the poſſeſſion of his Patentee, without ſuing any petition. See 33 *Aſſ.* 10. *Cook.* 1 par. 48. and 50. in the caſe of *Altonwoods*.

2. Tenant *in Capite* enfeoffeth one & his heirs, Provided, that when the Feoffor ſhall pay 100*l.* to him and his heirs, that then it ſhall be to the uſe of the Feoffor and his heirs: the Feoffee dieth, his heir within age, the 100*l.* is paid, and then Office is found. In that caſe it was holden, that the Feoffor ſhall have the uſe by force of the firſt Livery; and by relation it ſhall defeat the Wardſhip of the body of the Land. 22 *Eliz. Dyer* 363. *Cook.* 1 par. 133. in *Chudleighs* caſe.

3. A man ſeiſed of a houſe in *London*, deviſable by cuſtome, and holden of the King, deviſed the ſame in taile; and if the Donee died without iſſue, that the Land ſhould be ſold by his Executors: the Deviſe died without iſſue; the Land eſcheated to the King: It was holden in that caſe, that the bargain and ſale made by the Executors, ſhould deveſt the Eſtate out of the King without petition or *Monſtrans de Droit*. 49 *E.* 3. *Iſabel Goodcheaps* caſe, and *Cook.* 2 par. 53. Sir *Hugh Chomleys* caſe. For there the Ground is put, that when an Eſtate ſhall be deveſted out of a common perſon, and veſted in another without entry or claim, there it ſhall be deveſted out of the King without petition or *Monſtrans de Droit*: and ſee there that the reaſon of the caſe of 49 *E.* 3. was, that it was deveſted out of the King for neceſſities ſake, in reſpect that in that caſe the Executors had but a power, and could not have a petition, or *Monſtrans de Droit*. But it was holden, That if Lands upon Condition cometh to the King, and the Condition be broken, and the King makes a Leaſe for life, he who hath the Condition cannot enter, but ought to have a petition, or *Monſtrans de Droit*. And ſee in the principal caſe of Sir *Hugh Chomley*, that it was agreed, That although that the remainder paſſed by bargain and ſale, ſo as in Judgement of Law an uſe paſſed firſt; and although it was of a thing which lay in grant, and not in Livery, and that the words are, that by the payment of the money the Eſtate ſhall ceaſe, and be void; yet the Eſtate ſhould not be deveſted out of the Grantor without claim, for that an Eſtate of inheritance cannot determine by Condition without entry or claim. *Cook.* 2 par. 53, 54. Sir *Hugh Chomleys* caſe.

4. *Note*: It was reſolved by the Juſtices, 1. At the Common Law when the King was ſeiſed of any Eſtate of Freehold or inheritance by matter of Record, be it by Record Judicial, Miniſterial, or by conveyance of Record, or by matter in fact, or found by Office of Record, he who had right, could not have had any Traverſe, upon which he was to have an *Ouſter le Mayne*, but was put to his petition: but when the King was intituled by matter in fact, and found by Office of Record, if in the ſame Office the title or intereſt of the party was found; there, and in ſuch caſes, the party grieved at the common Law, might have had a *Monſtrans de Droit*, and ſhould not be put to his petition. 2. Reſolved, That when the Kings Tenant ſeiſed in Fee dieth without heir, that the Fee and Freehold is preſently in the King without Office, if the Tenant was in poſſeſſion at the time of his death. But if the heir be diſſeiſed, and dieth

dieth without iſſue; or if an Alien born, or the Kings Villein be diſſeiſed, the King ſhall not be in poſſeſſion, till the poſſeſſion of the Diſſeiſor be removed. 3. Reſolved, That in all caſes at the Common Law, when the Kings title accrues to him by Judicial Record, or by Judgement of Record; there, although the King grants his Eſtate over, the party grieved was put to his petition, and to have a *Scire facias* againſt the Patentee. But when the King was entituled by conveyance of Record, as if the Diſſeiſor conveyed Land to the King by Fine, Deed enrolled, or the like; there, although the party was put to his petition as againſt the King, yet if the King granted the Land over, the Diſſeiſee might have entred, or have an Action againſt the Patentee, for that a Judicial Record ſhall be preferred before a conveyance of Record by conſent. *Cook.* 4 par. 55, 56, 57. The Wardens and Commonalty of *Sadlers* caſe.

5. It was reſolved, That if the King be Tenant in taile of any Gift of his Anceſtors who were Subjects, that the King upon a Fine upon Grant and Render, might bar the Eſtate taile: 1. Becauſe the King is bounden by the Statute of *Donis*, and the King ſhall take benefit of the Statute of 4 *H.* 7. which enables Tenant in taile to bar his iſſues, for otherwiſe the King ſhould be in worſe condition then any of his Subjects common perſons: and a difference was taken when the King claims in his natural capacity, as heir of the body *per formam doni*; for there he ſhall be bound by the Act of Parliament; and when the King claims in his politick capacity, there a general Act of Parliament ſhall not binde the King, unleſs he be named. But in the principal caſe it was ſaid, That it was neceſſary that the King grant Letters Patents to the Conuſee, that he might enter into the Land, becauſe the Fine being executory to a Grant and Render, it might be doubted if the Conuſee might enter upon the poſſeſſion of the King. *Mich.* 2 *Jac. Cook.* 7 par. 32. The caſe of Fine levied by the Kings Tenant in taile.

6. The caſe was, The King made a Gift in taile of a Park, and afterwards granted the Reverſion of the ſame over in taile; and if the Donee of the Reverſion paid 10 *l.* at the Exchequer for the uſe of the King, that then he ſhould have *prædictam Reverſionem* to him and his heirs. The Donee of the Reverſion paid the 10 *l.* at the Exchequer; Tenant in taile in poſſeſſion died without iſſue. In this caſe theſe points, amongſt others, were reſolved: 1. That a Grant with a Condition precedent of increaſe, might be made as well of things which lied in Grant, as of Reverſions, Rents, Commons, &c. as of things which lie in Livery. 2. Reſolved, That if he who had the Reverſion in taile, had died before the Condition performed, his heir of his body might have performed the Condition, and had Fee, for that the power ſhall diſcend to the heir as an inheritanee annexed to the Condition. 3. That if the Condition had been, that if the Donee pay 20 *l.* to *I. S.* that he ſhall have Fee, that preſently upon the payment the Fee ſhould be deveſted out of the King without Office found, Petition, or *Monſtraus de Droit* for neceſſity, for that otherwiſe it could not veſt. 4. That if the Tenant in taile in poſſeſſion had ſuffered a common Recovery with Voucher, that the Eſtate taile in the Reverſion had not been barred, but had been preſerved by the Statute of 34 *H.* 8. *Cap.* 20. for that when the Eſtate taile it ſelf cannot be barred, the Reverſion upon ſuch an Eſtate cannot be barred. 5. Reſolved, That if the Reverſion in the Fee had remained in the Crown, the Fine levied by Tenant in taile in poſſeſſion, ſhould not have barred the iſſue, but that he might enter by the expreſs words of the Statute of 34 *H.* 8. *Cook.* 8 par. 74. to 78. The Lord *Staffords* caſe.

7. Tenant *in Capite* died, his heir within age; the heir at full age tendred his Livery; and within the time given for the proſecution of it, bargained, and ſold part of the Lands to another in Fee, & died alſo within that time. In this caſe it was reſolved, That when the heir at full age tendred his Livery, it was as much as he could do: and then when within the time of proſecuting of it, the ſuing of it becoms impoſſible by the Act of *God*, the intereſt which the King had was determined by the death of the heir, and the Bargainee might enter upon the poſſeſſion of the King, and occupy the Land, without ſuing a *Mouſtraus de Droit*, or *Ouſter le Mziue*. *Cook.* 8 par. 173. *Holes* caſe.

8. The King granted the Office of Marſhalſea for life, and afterwards granted the ſame in Reverſion for 21 years: the Grantee of the Reverſion aſſigned his intereſt to *A.* Tenant for life made *I. S.* his Deputy at will, and died. *A.* by Deed, aſſigned the ſaid Office to *I. S.* and then Office was found that *I. S* committed divers forfeitures of his ſaid Office by ſuffering divers voluntary Eſcapes. In this caſe it was, amongſt other things, reſolved, That the King might ſeiſe the ſaid Office without ſuing a *Scire facias*: and in that caſe theſe differences were taken, 1. That in ſome caſes the King ſhall be in poſſeſſion by Seiſure without Office, as in the caſe of Temporalties of a Biſhop, or of a Prior Alien, becauſe the certainty appeareth in the Exchequer. 2. In ſome caſes the King ſhall be in poſſeſſion by the Office without Seiſure, as of Lands, Offices, Gard of Lands, whereof continual profit may be taken. 3. In ſome caſes the King ſhall be in poſſeſſion by the

Seiſure

Seiſure & Office, as in caſe of Advowſon, the rightful Patron ſhall not be ouſted by a falſe Office, until the King hath preſented his Clerk, who is inſtituted and inducted: for if the King bringeth a *Quare impedit* in that Action, he may traverſe the Office. 4. In ſome caſes the King ſhall be in poſſeſſion without Seiſure or Office, as where the Kings Tenant dieth without heir. 5. In all caſes when a common perſon is put to his Action, there, upon Office found, the King is put to a *Scire facias*: but when a common perſon may enter, or ſeiſe, there an Office found without a *Scire facias*, ſhall be ſufficient for the King. *Cook.* 9 par. 96. 98. Sir *George Reynells* caſe.

Where,

3. *Where, and in what caſe, the Lord ſhall be ſaid to be in poſſeſſion of a thing without actual entry or ſeiſure; and where, and what poſſeſſion ſhall take away a Diſcent to the half blood, what not.*

1. IF the Lord in Mortmain, or the Lord of a Villein, claimeth a Reverſion, by the claim the Law veſteth the Reverſion in him, and he hath not means to compel the Tenant to attorn; and therefore he ſhall avow, and have an Action of Waſte without attornment. *Cook.* 1 par. 14. in *Chomleys* caſe. *Cook.* 6 par. 68. in Sir *Maile Finches* caſe accordingly.

2. If a man be ſeiſed of a Mannor, part of which is in leaſe for life, and part in leaſe for years, and levyeth a Fine to *A.* to the uſe of *B.* in taile, with divers remainders over: In this it was holden, That *B.* ſhall avow for the Rent, or have an Action of Waſte without Attornment: for when the Reverſion is ſetled in any one in Judgement of Law, and he hath no means to compel the Tenant to Attorn, and no Lacheſs or default is in him; there he ſhall avow, and have an Action of Waſte without Attornment. *Cook.* 6 par. 68. in Sir *Maile Finches* caſe.

3. In a Writ of Meſne, the plaintiff made his title by preſcription, that the Defendant and his Anceſtors had acquitted the Plaintiff and his Anceſtors, and the heir Tenants time out of minde. The Defendant took iſſue, that the Defendant and his Anceſtors had not acquitted the Plaintiff and his Anceſtors, and the heir Tenant. It was found by Verdict that the Grandfather of the Plaintiff was enfeoffed by one *A.* and that *A.* and her Anceſtors was acquitted by the Anceſtors of the Defendant time out of minde, before that time: ſince which time, no Acquital had by *C.* It was adjudged in that caſe, That the Plaintiff ſhould recover his Acquital; for that there was once a title by preſcription veſted, which could not be taken away by the wrongful Ceſſer to acquit of later time; and in that caſe the Law favoured the right more then the poſſeſſion. *Cook.* Inſtit. 114. accordingly.

4. *Note:* The Raviſher of a Ward by his Raviſhment gains no intereſt in the Body or Cuſtody of the Ward, nor doth the true Guardian loſe the poſſeſſion by the Raviſhment: and therefore if my Tenant by knight-ſervice dieth, his heir within age, I am preſently in the poſſeſſion of the Body

Body without Seiſure; and the Treſpaſs at Common Law, and the Writ of Raviſhment now, doth not as in other Actions renounce the property or poſſeſſion of the Ward, but onely doth puniſh the *Temeraria occupatio*, and gives the Plaintiff damages according to his hurt, by abuſe or marriage of the Ward: and if another take him away from the Raviſher the Ward, and marry him, the firſt Raviſher can have no remedy againſt the ſecond, but the very Guardian may have an Action againſt them both, and ſhall recover againſt them both for their ſeveral Raviſhments. By *Hobart* Juſtice, in *Moore* and *Huſſeys* caſe. *Hob.* 93.

5. If one Tenant in Common entreth into the whole Land, and claims all the Land expreſly, he cannot by this Act and Entry diſpoſſeſs his Companion; for the poſſeſſion is the ſame as well before his entry and claim, as it is after: and from hence it is, That a Coparcener or Joyntenant, or a Tenant in Common, can never be diſſeiſed by his Companions. And ſo for the ſame reaſon it is, That if one Tenant in Common doth alone bring an Action of Treſpaſs againſt a ſtranger, his Actions ſhall be abated by pleading him Tenant in Common with another, although his entry was generally and expreſly into the whole. *Trin.* 12 *Jac.* in C. B. *Smales* and *Dales* caſe. *Hob.* 120.

6. If a man makes a Leaſe for years of Lands, and a ſtranger puts him out, he doth alſo diſſeiſe him in the Reverſion; but if the Leſſor himſelf putteth him out, there is no Diſſeiſin committed; and yet the Leſſee hath loſt his eſtate, and hath but a right to it: for although it be true, that when two are in poſſeſſion, the poſſeſſion is adjudged in him that hath right, for he onely poſſeſſeth, although the other be in poſſeſſion too, and taketh away the Trees, Corn, *&c.* yet when the true Owner is clearly put out, and removed, then he hath no longer eſtate or poſſeſſion, but right onely, and hath no election to be in poſſeſſion or not to be in poſſeſſion; and clearly then he cannot grant his Term: and if the Leſſor bring an Action of Debt for his Rent due at *Michaelmas*, the Leſſee ſhall plead in ſuch caſe, that he did enter upon him, and put him out, and that he continued poſſeſſion at the time; for he cannot have Rent out of that Land that he himſelf poſſeſſeth. *Per Hobart* Juſtice, in Sir *William Elvis*, and the Biſhop of *York*'s caſe. *Hob.* 322.

7. If a man be attainted of Felony by Judgement, the heirs begotten after the Attainder ſhall be excluded of all manner of ſucceſſion of Heritage as well on the part of the Mother, as on the part of the Father; the reaſon is, becauſe the ſon begotten after Judgement, hath not two inheritable bloods in him; for at the time of the begetting of him, the blood of the Father was corrupted; and where the Father is attainted of Felony, the blood in reſpect of which he ſhould inherit being corrupted, the ſon hath in him but a half blood, *viz.* the blood of the Mother in him uncorrupted; and none can be heir, if he hath not in him both the bloods of him to whom he maketh himſelf heir. *Cook.* 3 par. 41, 42. in *Ratcliffs* caſe.

4. *Where a Releaſe ſhall be void for want of poſſeſſion in him to whom the Releaſe was made; and what ſhall be ſaid a ſufficient poſſeſſion, what not.*

1. IN a *Præcipe* if one be vouched, in that caſe having regard to the Demandant, the Vouchee is Tenant of the Land, and a Releaſe made unto him is good; but having regard to a ſtranger, he is not Tenant, and a Releaſe unto him by a ſtranger is void. *Cook.* 1 par. 78. in *Corbetts* caſe.

2. *A.* made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of *B.* in taile, and after to the uſe of *C.* in Fee; *Proviſo*, and with liberty to revoke the uſes, and to limit new uſes if *A.* ſurvive *I. S.* and *I. S.* dieth without heir of his body. *A.* renounceth, and ſurrenders to *B.* and *C.* all the authority of Revocation; and releaſeth alſo the *Proviſo*, Conditions, Covenants and Agreements, as well as the ſaid power and authority, and afterwards *I. S.* dieth without iſſue male of his body. It was ſaid in this caſe, That an Authority which is Collateral to the right of the Land, could not be extinct by the Feoffment: and as to the Releaſe it was ſaid, That that which ſhould be releaſed was but a poſſibility, which could not be releaſed: but it was reſolved, That a Fine or a Feoffment would extinct a future power of Revocation; and if the power of Revocation had been preſent, that the ſame might be releaſed. And it was ſaid, That it might be reſembled to a Condition ſubſequent, which might be releaſed: as, If *A.* enfeoff *B.* and his heirs upon Condition, that if *B.* ſurvive *C.* that then, *&c.* If then *A.* and his aſſignes pay to *B.* and his heirs and aſſignes 40 *l.* that then he and his heirs ſhall recover; this is a Condition ſubſequent: and although the ſame cannot be performed but upon a Contingent, yet the inheritance is in him, and the ſame ſhall diſcend to his heir, and may be releaſed, and his heir by the Releaſe may be barred. *Cook.* 1 par. 112. *Albanes* caſe.

3. Note: by a fiction in Law, the Law ſuppoſeth that the Vouchee is Tenant of the Land, whereas in truth he is not; but that is as to the Demandant himſelf to enable him to do all things as to the Demandant, and which the Demandant may do to him; and therefore a Fine levyed by the Vouchee to the Demandant, or a Fine or Releaſe from the Demandant to the Vouchee, is good. So if Donee in taile maketh a Feoffment in Fee, *in rei veritate*, the Donee hath not *neq; jus in re, neq; veritate in re, neq; ad rem*; and yet in ſuch caſe the Donee may in ſuch caſe extinguiſh or diminiſh his Rent by a Releaſe or Confirmation to him. *Cook.* 3 par. 30. in *Butler* and *Bakers* caſe accordingly.

4. A Copyholder in Fee ſurrendred out of Court his lands to the uſe of another and his heirs upon Condition: at the next Court the ſurrender was preſented; but in the preſentment, the Conditions were omitted: he to whom the ſurrender was made being dead, the Lord did admit his Daughters to the Copyhold, and then he who ſurrendred, did releaſe unto them, and afterwards entred upon them. In that caſe it was adjudged, That his entry was lawful. And in this caſe it was reſolved, 1. That the preſentment of the ſurrender was void, becauſe it was not done in ſuch manner as the ſurrender was made; but if the Conditional ſurrender had been preſented, although the ſame had not been entred in the Roll, it was holden that the ſame ſhould have been amended. 2. It was reſolved, That he who hath a right to a Copyhold, may releaſe to another who is in by admittance of the Lord, and that ſuch releaſe is good to extinguiſh the right of the Copyholder, becauſe he to whom the releaſe is made is in by title, and by the admittance of the Lord: But if a Copyholder be diſſeiſed, a releaſe unto the Diſſeiſor in ſuch caſe is not good, becauſe he [illegible] not a cuſtomary eſtate upon which a releaſe may enure. *Paſch.* 31 *Eliz.* in B.R. *Cook.* 4 par. 25. *Kite* and *Queintons* caſe.

5. In debt brought the caſe was, *A.* became Baile for the Defendant; and before Judgement, the Plaintiff did releaſe unto *A.* all Actions, Duties and Demands, and afterwards Judgement was given againſt the Defendant, and a *Scire facias* brought againſt the Baile, who pleaded the releaſe. In that caſe it was adjudged that the releaſe did not bar the Plaintiff, becauſe the releaſe was made before any Duty was due; for until the Judgement was given againſt the Defendant, no Duty was due by the Baile. *Paſch.* 34 *Eliz.* in B.R. *Cook.* 4 par. 71. *Hoes* caſe.

6. If a man maketh a leaſe for years of Lands, and before the Leſſee entreth the Leſſor dieth; yet in ſuch caſe the Leſſee may enter, becauſe the Leſſee by force of the Leaſe hath preſent right to have the Tenements by force of the Leaſe: but if a man leaſe the Lands to one for years, if the Leſſor releaſeth to his Leſſee all his right before that the Leſſee hath entred into the Land, ſuch releaſe is void in Law, becauſe the Leſſee had not poſſeſſion in the Land at the time of the releaſe made,

made, but onely a right to have the ſame Lands by force of the ſame Leaſe. See *Litt. ſ.* 107. *Cook.* 5 par. 124. in *Saffyns* caſe.

7. A man poſſeſſed of a houſe and half Acre of land for 5000 years, by his Will deviſed the ſaid houſe and land to *A.* his Father for term of life; and after his deceaſe, the remainder of the ſaid houſe and land to *B.* Siſter of the Deviſor, and to the heirs of the body of the ſaid *B.* and made *A.* his Executor, and died. *A.* took upon him the execution of the Will, and entred. *B.* took husband. The husband and wife, at the requeſt of *A.* did grant, ſurrender, releaſe, aſſigne, and yeild up to *A.* the ſaid houſe and land, with all their right, intereſt and term in the premiſes, *Habendum pro & durante reſiduo termini dicti* 5000. *annorum tunc venturum.* *A.* demiſed the houſe and land to *C.* for forty years: the husband died: the wife took another husband. *A.* died. The wife and the ſecond husband entred into the houſe and land. The Queſtion was, becauſe the intire Term *ſub modo* was in *A.* the Father, If the ſaid grant and releaſe made unto the ſaid *A.* being in poſſeſſion of the whole term, might bar *B.* becauſe ſhe had but a poſſiblity, and not any intereſt or right in poſſeſſion, reverſion or remainder. In this caſe (amongſt other things) it was reſolved, I. That ſuch a poſſibility (as in the principal caſe) might be extinguiſhed by grant or releaſe to him who is in poſſeſſion. 1. Becauſe it is of a future intereſt of a Chattel, which may more eaſily be determined then a Freehold. 2. Becauſe it is a Maxime in Law, That every right, title or intereſt either *is preſenti*, or *in futuro*, by the joyning of all who may claim any ſuch right, title or intereſt, may be barred: and in this caſe both parties conſent to it, the one in releaſing, and the other in accepting of it: and therefore the right of *B.* in this caſe is extinct, and the intereſt of *A.* which was determinable by his death, is by the releaſe made abſolute during all the reſidue of the term. 3. Becauſe the whole intereſt of *B.* the Siſter did accrue by the Deviſe, and the aſſent of the Executor did execute it, and the death of *A.* was but a means to reduce the ſame into poſſeſſion; and the Law always reſpects the original act, and therefore this poſſibility may be releaſed. II. It was reſolved, That this poſſibility might be releaſed, becauſe it was a common poſſibility, and not a poſſibility remote. III. Reſolved, That when there is incertainty in the perſon, no releaſe can be made; but in this caſe the perſons were certain, and therefore the releaſe was good. *Cook.* 10 par. 48. *Lampitts* caſe.

8. The caſe in Treſpaſs was, *A.* deviſed Land to *I. D.* his baſtard-ſon, and to the heirs of his body, the remainder to *R. D.* his Couſen and heir, and his heirs, and deviſed the Land to *E.* his wife for 15 years, if ſhe lived ſo long. *A.* died. *E.* married with *R. D.* the heir of the Deviſor, and they two entred, and had poſſeſſion, and continued in poſſeſſion. *I. D.* the firſt Deviſee, releaſed to *R D.* all his right and intereſt in the ſaid lands; and afterwards, notwithſtanding his releaſe, he entred. The Queſtion in this caſe was, Whether *R. D.* be in after this eſtate determined, as Tenant at ſufferance, and what poſſeſſion he had; and whether a releaſe to him being but Tenant at ſufferance, be good to veſt the eſtate in him. It was reſolved, That he was in poſſeſſion but as Tenant at ſufferance, for in reſpect of his reverſion he had no colour to enter, and he came to the poſſeſſion by colour of a Leaſe made to the wife, which was determined before the releaſe made; ſo as he had not any title to hold the poſſeſſion but as Tenant at ſufferance. 2. This releaſe being made to him being Tenant at ſufferance, is not good to veſt any eſtate for want of privity between them; and a releaſe unto him, as to him who had the reverſion, is void, becauſe he had not any poſſeſſion; and an eſtate cannot be veſted in him in the reverſion by ſuch means. *Trin.* 4 *Jac.* in B.R. *Butler* and *Duckmanton* caſe. *Cro.* 2 par. 169.

More, Poſſeſsion.

1. IN Treſpaſs the caſe was, A Leſſee for years of ten Acres of Land, paying 20 *s.* Rent, the Leſſee is ouſted of parcel, yet he pays all the Rent to him in the Reverſion, the Leſſor having notice of the entry: the Queſtion was, Whether this protects the Reverſion, ſo as nothing is gained by the entry but the intereſt of the Leſſee, and ſhall be no Diſſeiſin. It was ſaid, It ſhall be no Diſſeiſin; and that ſo long as the particular Tenant continues his poſſeſſion, ſo long is the Reverſion in the Leſſor: for in ſuch caſe as to the Leſſor, the Leſſee ſhall be always deemed in poſſeſſion by force of the Leaſe; and the reaſon why the Leſſee ſhall be adjudged in poſſeſſion of all as to the Leſſor, is, becauſe the Leſſor cannot have notice of the alteration of the poſſeſſion; for when the Leſſee by his own act or ſufferance doth a thing in alteration of the poſſeſſion of which by common intendment the Leſſor cannot have and take notice, there the Law will not prejudice the Leſſor. 2. If it ſhould be a Diſſeiſin, a great miſchief would follow; for if a Diſcent ſhould be, it would take away the entry of the Leſſor, and yet no fault in him, becauſe in common preſumption the Leſſee always continues Tenant. It was the opinion of *Coke* and *Houghton* Juſtices, that in the principal caſe it was a Diſſeiſin; for it could not be denied but that the Leſſee was out of poſſeſſion, and then it follows of neceſſity that the Leſſor muſt be out of his poſſeſſion: and if in the principal caſe no Rent had been reſerved, then the Reverſion had been deveſted by the entry, for there had been no act done to hinder the knowledge thereof; and although the Rent reſerved be all paid, yet if he had expreſs notice thereof, the Reverſion had been deveſted. *Dodd* Juſtice held contrary, that it would be miſchievous if it ſhould be a Diſſeiſin. Quere. *Mich.* 12 *Jac.* in B. R. The Lady *Platts* caſe. *Brownlow* 1 par. 230.

2. In Debt for Rent, the Caſe was, *G. S.* Father of the Plaintiff, made a Leaſe for years reſerving twenty Marks Rent at two Feaſts, *ſolvend. eidem* G. S. *& heredibus ſuis, ad Terminos prædict.* and doth not ſay *per æquales portiones*. *G. S.* died; the Plaintiff his heir brought Debt for the whole twenty Marks, pretending the ſame to be all unpaid at each Feaſt, and declares that the Rent did grow due to him *ut Hæres*. It was reſolved in this caſe, becauſe the plaintiff entitles himſelf to this Rent as heir, but makes no title at all to himſelf in his Declaration, onely in it he ſays he is ſon and heir of *G. S.* the Leſſor his Father; but it is not alleadged in the Declaration, that the Action was brought by him as heir, as he ought to have done: wherefore it was holden that it was not good, for he ought to have ſhewed how he came to the reverſion; and in pleading a man ought to ſet forth how he comes to poſſeſſion, or the reverſion of a thing. *Mich.* 8 *Jac.* in B.R. *Smith* and *Naſams* caſe. *Bolſtr.* 1 par. 48.

3. Husband and Wife the Executrix of *I. S.* brought Trover and Converſion againſt *I. D.* for Goods of the Teſtator, and obtained a Verdict. In arreſt of Judgement it was moved, the Declaration was of a joynt poſſeſſion of goods of the Husband and Wife, and damages were given to the Husband and Wife, whereas the Goods properly belong to the wife only as Executrix. And 2. The Declaration doth not ſet forth how the wife came to the poſſeſſion of the Goods. It was reſolved, That the poſſeſſion of the Wife as Executrix, was alſo the poſſeſſion of the Husband, and ſo the damages may concern them both. 3. That it being but a poſſeſſory Action onely, it is not neceſſary to ſhew how the poſſeſſion of the Goods was gained. *Mich.* 23 *Car.* B R. *Fremling* and *Clatterbooks* caſe. *Styles* 48.

4. *C.* brought an Action upon the Statute of *Winchester* of Robbery againſt the Hundred of *L.* for being robbed of 160 *l.* after a Verdict againſt the Hundred. It was moved in ſtay of Judgment, that the Action did not lie for the party that brought, for that it appears that the money was taken out of a Port-mantle, which was carried by the Poſt-Boy, and that the Plaintiffs hand onely was upon one end of it. It was the opinion of the Court, That it was Robbery of the Plaintiff, and is all one where the ſervant is robbed in the preſence of the Maſter; for there the Goods ſhall be ſaid to be in the poſſeſſion of the Maſter. *Hil.* 1651. in B.R. *Croſtthwayt* and the Hundred of *Lowdens* caſe. *Styles* 319.

Posſibility, *and* Improbability.

See for Posſibility *in the Title precedent, see* Posſeſſion.

1. NOte: A remote Poſſib lity is never intended by Law; and therefore where *A.* was Tenant in taile, th: remainder to *B* in taile: *B.* grants all his Eſtate to *C.* for the life of *A.* this Grant is void, becauſe it is impoſſible that it ſhould take effect: and whereas in that caſe, it was objected that *A.* might enter into Religion, and become Profeſt, whereupon the Grantee might enter, and enjoy the Land during the natural life of *A.* It was reſolved, That that was a forreign poſſibility, and not probable or imaginable in Law; for a Poſſibility which makes a Remainder good, muſt be *Potentia propinqua*, and not *Potentia remota*. *Cook.* 2 par. 51. Sir *Hugh Chomleys* caſe.

2. If a Leaſe be made for life, the Remainder to the right heirs of *I. S.* this is good, for that by common poſſibility *I. S.* may die during the life of the Tenant for life; and until he die, his heirs are in him. But if at the time of the limitation of the Remainder there be no ſuch perſon as *I.S.* but during the life of the Tenant for life *I. S.* is born, and dies, the heir ſhall never take it. 2 *H.* 7. 13. accordingly. So likewiſe upon a Fine levied to *R.* he grants and renders to *I.* and *F.* his Wife, the Remainder to *G.* the ſon of *I.* in taile, the Remainder to the right heirs of *I.* and in truth at the time of the Fine levied, *I.* had not any ſon named *G.* but after had iſſue a ſon named *G.* and then died. In that caſe it was holden, that *G.* could not take the Remainder in taile, becauſe he was not born at the time of the Fine levied; and the Law doth not expect that he ſhall have a ſon after named *G.* for that is improbable, and a remote impoſſibility. 10 *E.* 3. 46. *ibidem*

3. If the Anceſtor marrieth his heir apparent within the age of conſent, and dieth, the infant being ſtill within the years of conſent, the Lord may take (if he will) the infant into his poſſeſſion; and if the infant be detained from him, he may recover him in a Writ of Raviſhment of Ward: and this is in reſpect of the Poſſibility that the infant may diſagree to the marriage: but if at the years of conſent he agree to the marriage, neither the King nor the Lord ſhall have the marriage, becauſe then it is a marriage *ab initio*, and there needs no other marriage. *Cook.* 1 par. Inſtit. 80. accordingly.

4. *H.* poſſeſſed of a houſe for 31 years, deviſeth the profits thereof to *I. durante viduitate*, and afterwards deviſeth the Term to *R.* and dieth. *I.* by the aſſent of the Executors, enters, and purchaſeth the houſe in Fee of *H.* who covenants that the houſe ſhall be free from all former bargains, and binds himſelf in an Obligation for performance of the Covenants. In debt brought upon the Obligation for performance of Covenants, the Plaintiff for breach aſſignes the Deviſe to *I.* and afterwards to *R.* and that after *I.* entring that covenanted had married *O.* upon which *R.* entred: the Queſtion was, If *R.* at the time of the making of the Covenant, having onely a poſſibility, the Covenant did extend unto it, or not. It was reſolved in that caſe, That the Covenant did extend to that poſſibility, and that the poſſibility for the purchaſe had eſſence, and might be forfeited. *Trin.* 23 *Eliz.* in C. B. Rot. 1974. *Hamington* and *Rudyards* caſe. Vouch in *Cook.* 10 par. in the end of *Lampitts* caſe.

5. A man ſeiſed of a Houſe and Wharf holden in Burgage, deviſed the ſame to his Wife and her heirs upon Condition, that the Wife by the advice of learned Counſel, ſhould aſſure the ſame in convenient time to certain charitable uſes, (which were indeed prohibited by the Statute of 32 *H.* 8.) It was reſolved in that caſe, That although the uſes were by the ſaid Act prohibited, yet if the Condition be not performed by the Wife, ſhe ſhall forfeit her Eſtate, becauſe they might have been ſetled by the advice of Counſel, and by purchaſing an Incorporation and a Licence to ſettle the Land thereupon. *Cook.* 1 par. 24. *Porters* caſe.

6. In *Ejectione firme*, the Caſe was, *I. B.* and *E.* his Wife, Tenants in taile of the Gift of Sir *J. Foſter*, the Remainder to the right Heirs of the Husband. *I. B.* having iſſue by his Wife *F. B.* 6 *E.* 6. levied a Fine to the King with proclamation. The King, *anno* 7. of his Reign, granted the Land to *F.* Earl of *Hunt.* and his heirs. 6 *Ma I.B.* died, & *E.* enters. *F.* Earl of *Hunt.* died ſeiſed of the Reverſion, which deſcended to *H.* Earl of *Hunt*, who by Indenture betwixt him and *E.* reciting that *E.* held the Lands in taile of the Gift of Sir *H. Foſter*, the Remainder expectant to the right heirs of the Earl of *Hunt.* confirms to *E.* all her Eſtate, Title, &c.

Cro. Habend. & tenend. to the ſaid *E.* and the heirs of the body of her, and the ſaid *I. B.* begotten, with warranty to the ſaid *E.* and the heirs of her body, and the body of *I. B.* begotten, againſt him and his heirs. *E.* 29 *Eliz.* dies. *F.* enters, and hath iſſue three ſons, *viz.* Sir *Hen. B.* Sir *John B.* and *F. B.* and dies. 41 *Eliz.* Sir *Hen. B.* Covenants to ſtand ſeiſed to the uſe of himſelf, and the heirs males of his body, the remainder to Sir *John B.* his brother, and the heirs males of his body, and afterwards dies without iſſue male, his wife *enſient* with a daughter named *Barbara*, married to *Wolſtan Dixy*. Sir *John B.* died, his iſſue entred, and let to the defendant. Sir *Wolſtan Dixy* entred in the right of his wife, and let the lands to the plaintiff. Whether the plaintiff had any title, or not, was the Queſtion. It was ſaid for the defendant, That the Fine with proclamation had barred the eſtate taile with *I.* and the heirs of *E.* claimed; and being barred as heir of the body of his father, he can never claim that eſtate; and that by the Confirmation to *E.* *nihil operatur* to her, nor to the heirs of her body, and the body of *I. B.* her husband, becauſe he in the reverſion had but a poſsibility to have it after the death of *I. B.* without iſſue; and a poſsibility cannot be transferred over to another. On the other ſide it was ſaid, When *E.* entred within the five years after the death of him who levied the Fine, ſhe was abſolute Tenant in taile, and was in of her former eſtate: and although that the eſtate taile was barred by the Fine, yet the Confirmation being by Indenture, revived the eſtate taile; and by this Confirmation, he in the reverſion hath excluded himſelf to claim the land againſt his Confirmation; for he may exclude himſelf of an eſtate. And whereas it was ſaid, that the Earl of *Hunt.* which confirmed the eſtate of *E.* had but a poſsibility, that was denied, for he had it as in right of his reverſion, if his Confirmation had not barred him; and if he hath but as a poſsibility, yet that might be well transferred by Confirmation or Releaſe. The Court doubted of the caſe, and afterwards by means of the Court, that matter was compounded: but the Court inclined to be of opinion, that the Confirmation was good, and created a good eſtate in *E.* deſcendable to her heirs. *Paſch.* 11 *Car.* in B. R. *Baker* and *Willis* caſe. *Cro.* 1 par. 342, 343, 344.

7. Treſpaſs the caſe was, Sir *George Manox* ſeiſed of twenty Meſſuages holden in Burgage in *L.* deviſeable, erected a School houſe in *W.* in Com. *F.* and by his Will, 33 *H.* 8. deviſed thoſe Tenements to *G. B.* and *R. A.* and four others who he made his Executors, *Habendum* to them, their heirs & aſſignes, upon condition, that his executors and feoffees, their heirs and aſſignes, ſhould pay out of the profits of the ſaid houſes, 47 *l. per annum*, to certain charitable uſes, or to finde a School-maſter there, *&c.* and to pay to an able Clerk there to help the Children, in teaching them there, 26 *s.* 8 *d.* and if any part thereof remained undone, then he deviſed them to *W. M.* his ſon, and the heirs males of his body, to perform the truſts and purpoſes aforeſaid: and if he failed, then he deviſed them to the Mayor and Commonalty of *L.* upon the ſame Conditions, and 35 *H.* 8. he died. The Deviſees entred, but none of them paid the ſums. *R. A.* died. *E. A.* was his heir, and entred into his part, and performed not the truſts: the heir of Sir *George Manox* entred for the Condition broken. *E. A.* entred upon him, and purchaſed the other parts of the Deviſees, who bargained and ſold them to him upon the truſts he ſhould perform the Will of the ſaid Sir *G. M.* and *E. A.* being in poſſeſſion, a Fine *ſur* Releaſe was levied to him, and he died ſeiſed. Afterwards the Mayor and Commonalty entred, upon whom the heir of *E. A.* entred; and the Mayor and Commonalty re-entred, and made the Leaſe, upon which the Action was brought. There were three Queſtions in the caſe, 1. If it were a Condition or Limitation appointed by the Will: 2. Admitting it a Limitation, and that it may be good to the heir of Sir *George M.* whether ſuch Limitation may be good to the Mayor and Commonalty, being but a poſsibility: 3. Whether there being a good title to the Mayor and Commonalty, they not having entred, but ſuffered five years to paſs. And in this caſe it was reſolved, 1. That the Fine with proclamations, and the five years paſſed, hath barred the plaintiffs eſtate. 2. That it was a void Limitation to the Mayor and Commonalty, being a poſsibility upon a poſsibility. *Hill.* 15 *Car.* in B.R. The Mayor and Commonalty of *London* and *Alſords* caſe. *Cro.* 1 par. 417.

8. If a man hath iſſue two ſons, and is diſſeiſed, and the eldeſt ſon releaſeth to the Diſſeiſor by Deed with Warranty, and dieth without iſſue, and afterwards the father dieth: this is a lineal Warranty to the younger ſon for the poſsibility, for that the younger ſon might have enjoyed his title to the Land by the eldeſt ſon, in caſe the eldeſt ſon had ſurvived his father. Otherwiſe it is where the younger ſon deceaſeth, and dieth without iſſue; for the eldeſt ſon can by no poſsibility convey his title to the Land from the Father through the younger ſon. *Cook.* 1 par. Inſtit. 271.

9. A poſsibility cannot be upon a poſsibility by conſtruction of Law; and therefore if Lands be given to a man and two women, and the heirs of their two bodies begotten, they ſhall have a joynt eſtate for life, and ſeveral inheritances. 7 *H.* 4. 16. *Cook.* 1 par. Inſtit. 25.

10. A Leaſe was made to Husband and Wife for their lives, the remainder to the Executors of the ſurvivor of them: the Husband granted the term, and died. It was holden that the ſame ſhould not bar the Wife, becauſe he had but a poſſibility, and not an intereſt. *Hill.* 17 *Eliz.* in B. R. *Popham* adjudged.

11. A man poſſeſſed of a Term for divers years, deviſeth the profits thereof to one for life, and after his deceaſe, to another for the reſidue of the years, and dieth: the Deviſee entreth with the aſſent of the Executors; and after he in the remainder during the life of the Deviſee, aſſignes it to another; and afterwards the firſt Deviſee dieth. It was reſolved in this caſe, That although that during the life of the firſt Deviſee, the ſecond Deviſee had no eſtate that he could aſſigne over, for the Deviſe to the firſt Deviſee was upon the matter of all the term, if he ſhould ſo long live; yet the ſecond Deviſe was not void, for the poſſibility that the ſecond Deviſee might out her the firſt: but yet it was holden that the plaintiff could not in that caſe aſſigne the ſaid poſſibility over. *Cook.* 4 par. 66. in *Fulwoods* caſe.

Poſſe Comitatus.

1. A. Brought an Action of Debt againſt *B.* for a great ſum of money; Proceſs continued till they were outlawed, and a *Capias utlagatum* was awarded againſt him. The plaintiff moved the Court, that the Sheriff might be commanded to execute the Writ: whereupon the Writ was delivered to the Sheriff in the open Court. The Sheriff anſwered that he would do his endeavour to execute it; but he ſaid, that the Defendant kept his houſe ſo, that he could not come at him. It was the opinion of the Court, That in ſuch caſe the Sheriff might take with him the power of the County, and break his houſe, and take him out; and ſo they ſaid it had been adjudged in the like caſe. *Hill.* 30 *Eliz.* in C. B. *Hare* and *Curſons* caſe. *Goldesbr.* 79.

2. If Waſte be committed in a Cloſe or Wood *ſparſim*, and the Waſte be found, in that caſe the Plaintiff ſhall recover the whole Cloſe or Wood, and the treble value ſhall be recovered by *Fieri facias*, or by *Elegit*, and not by *Capias*, becauſe a *Capias* lies not upon the original: but the Sheriff may in ſuch caſe take the power of the County to ſtay the Tenant from doing of Waſte upon an Eſtrepment. *Trin.* 8 *Jac.* in C.B. *Bedel*, and *Bedels* caſe. *Brownlow* 1 par. 140.

Præmunire.

A *Præmunire* was brought for the Queen and *P.* againſt Doctor *Matthew Dean* of *Chriſt-Church* in *Oxford*, and others, becauſe they did procure the ſaid *P.* to be ſued in the City of *Oxford* before the Commiſſary there in an Action of Treſpaſs by Libel according to the Eccleſiaſtical Law: in which ſuit, *P.* pleaded *ſon franktenement*, and yet they proceed, and *P.* was condemned and impriſoned: the Queen after withdrew her ſuit. The Queſtion was, If the party might proceed in it. See 7 *E.* 4. 2. The King ſhall have *Præmunire*, and the party grieved his Action See *Book Entries* 427. In a *Præmunire*, the words are, *ad Reſpondendum tam Domino Regi, quam A. B.* and *ibid.* 429. *Ad Reſpondendum tam Domino Regi de Contemptu, quam diſt. A. B. de Damnis.* But it was the opinion of the whole Court, That if the Queens Attorney will not further proſecute for the Queen, the party cannot maintain this ſuit; for the principal matter in the *Præmunire* is, The Converſion, and the putting of the party out of the protection of the Queen; and the damages are but acceſſary; and then the principal being releaſed, the damages are gone: and the Court in that caſe ſaid, That the Preſidents in the Book of Entries are not to be relied upon, for there is not any Judgement upon any of the pleadings there; but they are good directions for pleadings, and ſo to be uſed, but not otherwiſe. *Mich.* 27 *Eliz.* in B. R. The Queen, *Parrot*, and the Dean of *Chriſt-Churches* caſe. *Leon* 292.

Preſcription.

What perſons, and ſeiſed of what eſtates, may preſcribe, and what not: In and for what things a Preſcription, *and in and for what not: What ſhall be ſaid a good* Preſcription, *what not; and the difference betwixt* Cuſtome *and* Preſcription.

1. A Copyholder of certain Lands called *C.* parcel of a Mannor, alleadged, *Quod infra Manerium prædict. talis habetur, nec non à toto tempore cujus contrarii Memoria hominum non exiſtit, talis habebatur Conſuetudo, in quod quilibi tenementes prædictorum tenturum vocat. C.* had uſed to have Common in ſuch a place, parcel of the ſaid Mannor. It was reſolved in this caſe, That a Copyholder in his own name cannot preſcribe for the weakneſs and baſeneſs of his eſtate; but if he will preſcribe, he ought to preſcribe in the name of the Lord of the Mannor, *viz.* That the Lord of the Mannor, and all his Anceſtors, and all thoſe whoſe eſtate he had, have had Common in ſuch a place for him and his Tenants at will, *&c.* But when a Copyholder claimeth Common, or other profits in the ſoyle of the Lord, he cannot preſcribe in the name of the Lord, but there the Copyholder is to alleadge that within the Mannor is ſuch a Cuſtome, *&c. Cook.* 4 par. 31. accordingly. *Gatewards* caſe.

2. In Treſpaſs the Defendant pleaded that the cuſtome of the Town of *S.* is, That every inhabitant commorant and reſident within any ancient Meſſuage, by reaſon of his commorance and reſidence, have uſed to have Common in the place where, *&c.* time out of mind, for all Cattel commonable; and ſhewed, that he was an inhabitant in the Town of *S.* in an ancient Meſſuage there, and ſo juſtified. It was in this caſe reſolved, That the juſtification was not good, for that this preſcription to have Common *ratione commorancie*, was void for divers cauſes. 1. Becauſe no man can have an intereſt in any Common in reſpect of a houſe in which he hath not any intereſt, but an habitation only. 2. Every Common may be ſuſpended or extinguiſhed; but this Common is of ſuch a nature, that it cannot be extinguiſhed; for ſo ſoon as he who hath the Common removes, the new inhabitant ſhall have it. 3. That the Law gives no remedy or Action for him who claims ſuch Common by preſcription. And, 4. If ſuch Common ſhould be allowed, no Judgement could be had of Waſtes; which would be a great inconvenience. *Cook.* 6 par. 60. *Gatewards* caſe. *Trin.* 28 *Eliz.* in B.R. *Coſtars* and *Wingfields* caſe. *Goab.* 81. accordingly.

3. It was a Queſtion, If a Keeper of a Park for life might preſcribe in him and his Predeceſſors to have ſuch profits, appendants or incidents to his Office, or not. And it was the opinion that he was not enabled to make ſuch preſcription, becauſe he hath not any intereſt in the Office in perpetuity, nor there never was any eſtate of inheritance in the ſaid Office; and a man cannot preſcribe in the appendant, unleſs he may in the principal: and no man can preſcribe, unleſs he can ſay, that he and his Anceſtors, or Predeceſſors, *ac omnes illi quorum Statum ipſe habet in tali*, &c. *Trin.* 7 *E.* 6. *Dyer* 70. *Iſhams* caſe.

4. A Copyholder in Fee claimed Common of Eſtovers at all times of the year, reaſonably to be taken in the Wood and ſoyle of a ſtrange Mannor; and the preſcription was in this Mannor, *viz. Quod infra Manerium*, to which he is a Copyholder, *talis habetur Conſuetudo, &c. Quod Quilibet cuſtumarius ejuſdem tenement.* and did not ſay, *Ejuſdem Manerii, &c. habuit & habere conſuevit communem tanquam pertinent ad tenementa prædict.* It was adjudged by the Court to be no good preſcription. *Hill.* 21 *Eliz. Dyer* 363.

5. In an Action upon the caſe for diſturbing him of his Common, the Plaintiff declared, That *A.* ſeiſed of certain Lands for life, the remainder to *B.* in taile, to which Common was appendant, that *A.* and *B.* demiſed the Lands to him for years. It was ſaid in this caſe, that Leſſee for life cannot preſcribe; and he, and he in the remainder, cannot preſcribe together, and he in the remainder cannot have Common. It was ſaid by *Popham*, That the preſcription within both was well enough, for that all is but one eſtate, and the Leaſe of both. Quere, for *Wray* chief Juſtice conceived that the preſcription was not good. *Paſch.* 31 *Eliz.* in B.R. *Hauxwood* and *Husbands* caſe. *Lens* 177.

6. A Preſcription to have all wild Swans, which are *feræ naturæ*, and not marked, nidificant and frequentant, within ſuch a River, or a Creek, is not good. So is ſuch a preſcription for a Warren in ſuch a Mannor; for although they be nidificant within the Mannor, yet he cannot have them *jure privilegii*, but ſo long onely as they are within ſuch place. But if the preſcription be alleadged in this manner, *viz.* That within ſuch

a Creek there hath been time out of minde a Game of Wild Swans, not marked, nidificant, &c. and that ſuch an Abbot, and all his Predeceſſors, &c. have always uſed to have, and took to their own uſe ſome of the ſaid Wild Swans, and their Signets within the ſaid Creek: ſuch a Preſcription may be good; for albeit Swans are Royal Fowls, yet by this way a man may preſcribe in them. *Cook.* 7 par. 18. The caſe of Swans.

7. In an Action upon the caſe, the plaintiff declared, that *A.* ſeiſed of the Manor of *D.* did preſcribe that he had all thoſe whoſe Eſtate he had in the Mannor, an uſage to have *Libertatem foldagii & curſum ovium*, in the Town of *D.* for *meliore paſturatione ovium ſuorum*; and that the Inhabitants of the ſaid Town every ſecond year, left their lands to lie foreſts, and preſcribed that the Tenants of the Lands within the ſaid Town might erect Hordels in their Lands with licence of the Lord of the ſaid Mannor, and not otherwiſe: and that the ſaid *A.* let the ſaid Mannor to the Plaintiff, and that the Defendant erected the Hordels upon his lands without licence, ſo as the profits of his Foldage was impaired by it. It was objected that the Preſcription was not good, becauſe it was againſt Law to abridge the ſubject of the profits of his own lands. But it was the opinion of the whole Court, That the Preſcription was good; for it doth not extend, but to reſtrain the Tenant to erect Hordels, and doth not extend to take away the whole intereſt of the Owner in his lands. See 5 *E.* 1. *Preſcription* 55. 1 *H.* 7. 24. And note, in that caſe a Preſcription is alleadged in a ſtranger, and not in a Tenant. *Mich.* 25 *Eliz.* in B. R. *Punſany* and *Leaders* caſe. *Leon* 14.

8. In an Action upon the caſe, the Plaintiff declared, that he was ſeiſed of an ancient Meſſuage in *T.* and preſcribed that he and all his Anceſtors, Owners of the ſaid Meſſuage, had uſed time out of minde, &c. to erect Hordels *in aperta platea* of *T. juxta Meſſ. prædict.* every Market-day, to make Penns there for ſheep; and for ſuch penning of ſheep, he, &c. have uſed to take divers ſums of money of ſuch perſons who would pen their ſheep there; and that the Defendant had broken down his Hordels, *per quod proficium ſuum inde amiſit.* It was objected, That the Declaration, and ſo the Preſcription, was not good, becauſe it is too general, *viz.* to erect Hordels *in aperta platea*, not ſhewing in whoſe lands, whether in his own lands, or in the lands of another: for although that Fiſhers in the Sea may preſcribe to ſet Stakes in the lands of others for to dry their Nets; yet that is becauſe it is *pro bono publico*: but the Preſcription here is onely for a private gain; which cannot be in the land of another. There were other points in the caſe: but the Court was of opinion, That the Preſcription was good; and a Market is as well for the Commonwealth as a Fiſhing. *Paſch.* 30 *Eliz.* in B. R. *Ferms* caſe. *Leon* 108, 109.

9. Errour brought to reverſe a Fine levied upon a Plaint in a Writ of Covenant in *Exceter*: the Plaint was, *Quod tenent. convent. de duobus Tenementis*: and becauſe the word *(Tenement)* did not comprehend certainty, for that it may extend to whatſoever lieth in Tenure; the Court was of opinion that it was erroneous. 2. Errour was, becauſe that they claimed to levy a Fine by Preſcription; that alſo was not holden to be good. See 44 *E.* 3. 37. they of *Exeter* can preſcribe to have conuſans; but that ought to be by ſpecial Charter of the King, by expreſs words. And it was ſaid that it was adjudged in *Banbery* and *Birds* caſe, where a Fine levyed in *Cheſter* by Preſcription was reverſed; afterwards in the principal caſe the Fine was reverſed; but chiefly for the firſt Errour. *Trin.* 31 *Eliz.* in B. R. *Sted* and *Courtneys* caſe. *Leon* 188.

10. Errour to reverſe a Judgement in a *Replevin*, where the Defendant is Farmor of the Manor of *F.* of the poſſeſſion of St. *Johns* Colledge in *Oxon*, layed a Preſcription in him, and his Tenants and Farmors, to diſtrain for all Amerciaments in the ſaid Mannor; and ſhewed, that the Plaintiff in the *Replevin* was preſented by the Homage, for not repairing a houſe, being a cuſtomary Tenant, according to a pain impoſed upon him at a former Court, for which he was amerced by the Steward 10 *s.* and being found for the Avowant, Errour was brought, and aſſigned for Errour, that there was not any Preſcription layed in the Avowry for the Lord to amerce the Tenants: and of common right he cannot do it; for ſuch Amerciament is Extortion, and he cannot be his own Judge; and therefore he ought to enable him to diſtrain by Preſcription. 2. Here is no Offence, for a Copyholder is not bound to repair by the Common Law, if it be not by Preſcription; for he cannot have houſe-bote upon the lands as a Termor may, if it be not alleadged a Cuſtome. 3. Holden that a Steward cannot aſſeſs Amerciaments if it be not by Preſcription, but a Steward may aſſeſs Fines for Contempts in Court. *Mich.* 33 *Eliz.* in B. R. *Blunt* and *Whitacres* caſe. *Leon* 242.

11. Treſpaſs by the Kings Farmor for breaking a Wood, and cutting down 200 *l.* Loads of Wood, and carrying it away: The Defendants plead that they were Copyholders of 11 Acres of lands, parcel of the Mannor adjoyning to the ſaid Wood; and ſet forth, that within the Mannor was this Cuſtom; That every Tenant of the ſaid 11 Acres, &c. have uſed and accuſtomed *per ſe, vel per ſervientes ſuas per eorum preceptum ſuccid. capere & aſportare*

subboscum in dict. Bosco in quo, &c. pro reparatione prædict sepium ieter prædict. Boscum; and the said 11 Acres, *quandoque, eadem sepes & defensiones in decasu extiterint*; and shewed, that at the time of the Trespass the Hedges were in decay, and so justified. It was said that the Prescription was not good: 1. This customary land is *contiguè adjacens* to the Wood; and of common right the making of the Hedges doth appertain to the Owner of the Wood: and it is no more but to take the Woods of the land of another adjoyning to my land, to make the Hedges of the land in which the Wood groweth; which cannot be a good Prescription, for it sounds in charge, and not to the profit of him who prescribes. Quere: for the Case was adjourned, and not resolved. *Mich.* 32 *Eliz.* in B. R. *Leigh* and *Okeleys* case. *Leon* 313.

12. In an Action upon the case, the Plaintiff declared, that *L.* parcel of the Mannor of *E.* in the County of *S.* was ancient Demesn of the Crown of *England*, and that all men and Tenants of ancient Demesn ought to be acquitted of Toll in all places within the Realm, for them, their Goods and Chattels; and that Queen *Eliz.* *anno* 19. of her Reign, commanded all Mayors, Bayliffs, *&c.* to permit and suffer the men and Tenants within ancient Demesn to be quit of Toll, Murage, and other exactions thorowout the whole Realm. One shewed, that he was an inhabitant of the Town of *L.* and such a day carried his Goods to *Yarmouth* in the said County; and the Defendant, not ignorant of the premises, took and carried away a Cable of the Plaintiffs Goods to his damage, *&c.* The Defendant pleaded by protestation, that *L.* was not ancient Demesn; and by protestation, that the Tenants in ancient Demesn ought not to be quit of Toll: That the Town of *Yarmouth* was an ancient Borough, and that they have had time out of minde an Officer called a Water-Bayly; and that time out of mind they and their Predecessors have had and taken Toll of the Tenants and Inhabitants of *L.* for any of their Goods brought there to merchandize with: and if it be not paid, they have used time out of minde to distrain for it by their Water-Bayly: and said, That the Plaintiff such a day brought to *Yarmouth* 2000 *l.* weight of Cable-Ropes to sell, for which there was due for Toll 6 *d.* for Murage 6 *d.* and for Tronage 4 *d.* and the Defendant being Water-Bayly, demanded of the plaintiff the same sums, which he refused to pay; for which he took the said Cable *Nomine districtionis* for the said Tronage, *&c.* In this case two things were objected against the Defendants plea: 1. That the Defendant hath not set forth in himself any authority to demand the Duty. 2. That the Prescription to have Toll of the Tenants in ancient Demesn, cannot be good, because it cannot have a lawful beginning; for the Tenants in ancient Demesn are quit of Toll by the common Law, and such Tenants have an inheritance in such liberties, which the King by his Grant cannot take away. To which it was answered as to the first point, That to shew the authority to demand it, is not necessary, for that the Prescription is not upon Demand to distrain, for the Officer hath not any authority to demand it, for they ought to demand it who are to take the thing demanded, and those are the Bayliffs and Burgesses; and then when their Water-Bayly doth it, it is as much as if it had been done by the Corporation. To the second point it was said, That the plea is, That the Defendant take Toll onely for those things which were brought by Sea by Merchants, and not otherwise; and Tenants in ancient Demesn are not discharged of Toll for all things, but only for such as arise out of their Tenements, and are bought for their Tenements and Families there, and their sustentations, or for the manurance of their lands: and the Defendant justified not onely for Toll, but for Tronage, which their privileges doth extend unto: and therefore the justification in this case was good: afterwards Judgement was given, *Quod Querens nihil capiat per Billam*: for the Justices were all clear of opinion, That the Tenants in ancient Demesn should pay Toll for their merchandizes. *Trin.* 30 *Eliz.* in B. R. *Ward* and *Knights* case. *Leon* 231.

13. In a *Replevin*, the Plaintiff in bar of the Avowry pleaded, That *A.* was seised of a Messuage and twenty Acres of Land, and that always those, *&c.* have used to have Common in the place where, *&c.* for all their Cattel commonable in this manner, *viz.* If the land be sowed by the assent of the Commoner, then no Common till the Corn be mowed; and when it is mowed, then Common again till the land be sowed again by assent of the Commoners. It was said that this Prescription was against right, so as a man cannot sow his land without the leave of another. But the Court held the Prescription to be good; for by the Law of the land, the Owner of the land cannot plow the land where another hath Common: but in this case here is a benefit to each party, as well for the Owner of the land against the Commoner, as for the Commoner against the Tenant of the land, for each of them hath a qualified interest in the land. *Mich.* 30 *Eliz.* in C. B. *Hawes* and *Mollineux* case. *Leon* 73.

14. In an Action upon the case for not scouring a Ditch which ran betwixt the house of the Defendant, called the Bell in *Maidstone*, and an other man,

mants, Judgement was given for the Plaintiff. Errour was brought, and the Errour aſſigned was, That the Plaintiff doth preſcribe, That all the Inhabitants of the Bell, &c. had uſed to ſcoure the Gutter, &c. and it was in this form, viz. That the Defendant & *omnes aliis tenuram illam prius habentes, mundare debuere, & conſuevere talem foſſatam*; whereas it ought to have been, *Quod ipſi & predeceſſ. ſui de tempore cujus contrarium*, &c. or that ſuch a one, and his Anceſtors or Predeceſſors, whoſe Eſtate the Defendant hath, &c. 2. Becauſe the Preſcription is uncertain; for it is that *All Tenants*; which extendeth to Tenants in Fee, in taile, for life or years; and the Preſcription being the ground and foundation of the Action, ought to be certain. It was the opinion of the Juſtices, That the Exceptions and Errours were well aſſigned; and for theſe cauſes the Judgement was reverſed. *Mich.* 29 *Eliz.* in B.R. *John Joyces* caſe. *Godb.* 54.

15. In Treſpaſs for hunting 30 Hares, and 300 Conies in his Warren, and taking and carrying them away: the Treſpaſs was layed with a *Continuando* from ſuch a time to ſuch a time. The Defendant juſtified, becauſe he had Common in the place where is a Meſſuage for 240 ſheep; and that he, and all thoſe whoſe eſtate he hath, have uſed at ſuch time as the Common was ſur-charged with Conies, to hunt, kill, and carry away them, as to his Meſſuage appertaining: upon which the Plaintiff demurred in Law. It was the opinion of the whole Court, That the Preſcription was a void Preſcription, becauſe a man cannot make ſuch a Preſcription in the Free-Warren, or Freehold of another man. 2. Becauſe a man cannot preſcribe to hunt, kill, and carry away his Conies as pertaining to his Meſſuage. *Hill.* 9 *Jac.* in B.R. *Sandford* and *Havels* caſe. *Godb.* 184.

16. *Note*: A difference was taken between things which were in prender, and things which were in render: as if a man have Eſtovers in Woods to be taken every other year, if he omit to take them every other year, he cannot take them the third year: but of things which lie in render it is otherwiſe; and the caſe was, That one preſcribed for eight Loads of Wood to be cut and taken as appertaining to a Meſſuage. It was holden by the Court, that the Preſcription was not good; for the Preſcription ſhould be layed for Eſtovers to be imployed upon repairs of the ſaid Meſſuage, or to be ſpent in it: for a man cannot preſcribe to come and cut down my Wood, for that is as much as I who have the Freehold can do. But it was holden, That to preſcribe to have Common every other year, may be good, although he doth not ſhew what time of the year it begins: and it was ſaid, That if a man hath Common of Paſture in divers Cloſes, and parcels of Ground where he hath ſome lands of his own; there, and in all other caſes where one is to preſcribe, he need not make his title to every peece, but to ſay that he hath Common *in loco in quo*, &c. *inter alia*, and need not to ſpeek of the reſt of the Land in the reſidue of the ſaid Field, becauſe he hath Land of his own. *Mich.* 9 *Jac.* in C. B. *Brounlow* 1 par. 35.

17. In Treſpaſs, the Defendant juſtified for an Amercement ſet in the Sheriffs turn: Exception was taken to it, becauſe the Defendant juſtified by vertue of a Precept to him granted, and did not ſhew at what place; and alſo he preſcribes for the Turn to be held, and doth not ſhew any or what eſtate, or before whom. It was the opinion of the Court, That a Preſcription for a Turn or a Hundred, by a *Que Eſtate*, was not good, becauſe a Hundred is not maynotable, but lies in grant; and he ought to have ſaid, That the King, and all they that were ſeiſed of the ſaid Hundred, have had, and from the time, &c. But a Preſcription by a *Que Eſtate* for a thing incident to a Mannor, is good; and the Court was of opinion that it was not good, if it were not ſhewed before whom the Turn was held. *Paſch.* 9 *Jac.* in C. B. *Darney* and *Hardingtons* caſe. *Boulow* 1 par. 198.

18. See *Lib.* 1. title *Cuſtome*, page 537. where it is ſaid by *Coke* Chief Juſtice, That one Preſcription may be pleaded againſt another, where one might ſtand with the other: as it was adjudged in *Wright* and *Wights* caſe, where the Copyholder of a Biſhip preſcribed, That all Copyholders within the Mannor had been diſcharged of Tythes; but not where one Preſcription is againſt another, as where one preſcribes to have Lights, and the other preſcribes to ſtop them. *Mich.* 9 *Jac.* in B. R. *Hughes* and *Keimes* caſe. *Godb.* 183.

19. In Debt the Plaintiffs declared, that *Graveſend* and *Milton* were ancient Towns adjoyning to the River of *Thames*; and preſcribed, That the inhabitants of thoſe Towns have had time out of minde an ancient Paſſage from thence to *London*, and have uſed to make by-Laws for the Government of that Paſſage, and have provided Watermen and Rowers for the ſaid Paſſage, and to take of every Paſſenger and his Fardel 2 *d.* and that Queen *Eliz.* by her Letters Patents incorporated the inhabitants of *Milton* and *Graveſend* by the name of *Portreeve*, *Jurats*, &c. and that they had enjoyed the ſaid Ferry without interruption; and that 37 *Eliz.* a Conſtitution was made by them, That no Water-man ſhould ply any Fare or Paſſenger till the Barge had received ſo many of their Paſſengers by which they might receive 4 *s.* at the rate of 2 *d.* apiece; and that if the Tilt-boat, or any other Water-man received any Paſſenger before

fore the Barge be ſo furniſhed, that he ſhould pay to the *Portreeve, Jurats, &c.* for every Paſſenger ſo received 2 *d.* and aſſigned the breach of the Conſtitution, that the Defendant had received ſo many Paſſengers before the Barge was furniſhed: and upon *Nihil debet modo & forma*, it was found for the Plaintiffs: and in this caſe, which was argued by the Juſtices in open Court, Judgement was ſtayed for theſe cauſes: 1. Becauſe by the Preſcription the Barge hath not any precedence nor pre-eminence, but equal liberty is as to all Water-men to carry what Paſſengers they could; and then, if the Preſcription was not ſuch, then it could not be made ſuch by the Grant of the Queen, or by the by-Law or Conſtitution; for this is the liberty of the Subject, which cannot be abridged, or reſtrained by them. 2. Becauſe the Inhabitants of *Milton* and *Gravesend* are incorporated by the name of *Portreeve* and *Jurats*, (Poſſeſſors of Ships) (which words are omitted) ſo as the by-Law is not made by the ſame name by which they are incorporated. 3. Becauſe the Conſtitution is not purſued; for that is, That if any Water-man carry any Paſſenger, willing to go by the Barge, that ſuch Water-man ſhall pay, *&c.* and it is not averred that the Paſſengers which the Defendants carried were willing to go, and be carried by the Barge. 4. Becauſe the Conſtitution is not good, becauſe it is that no Wherryman ſhall carry any Paſſenger before the Barge ſhall be full diſmiſt; and that is not good; for it may be the Barge will not paſs to *London* at all that Tyde; and it ought to be averred that the Barge paſſed in convenient time after it was furniſhed. The Judgement was ſtayed. *Trin.* 10 *Jac.* in C. B. The Mayor and *Jurats* of *Gravesend* and *Edmunds* caſe. *Brownlow* 2 par. 177, 178.

20. A Pariſhioner did preſcribe to pay the tenth part of the Corn for *modus Decimandi*, and for the Hay alſo that grew upon the Head-lands. It was holden by the Court, That the Preſcription was not good, becauſe the tenth part is due for the Corn. But ſuch a Preſcription for the Corn, and after-rakings, was good, with an averment that they are *ſponte manus voluntarie*. *Mich.* 2 *Jac.* in B. R. *Parrey* and *Chanetrys* caſe. *Noy* 15. Quere, for that *Mich.* 30 *Eliz.* in B. R. Rot. 250. *Eggard* and *Adams* caſe, it was holden contrary.

21. In a *Replevin* for taking his Cattle in five Acres of Land, the Defendant avowed as Bayliff to *I. S.* and ſhewed, That *I.* and all thoſe whoſe Eſtate time out of minde had uſed to have Herbage and Paſturage in the ſaid five Acres when it was not ſown. It was objected that the Preſcription was not good, and that it was not like to Common, for that was a profit to be taken by the mouths of Cattel, but here the Preſcription is to have the Land it ſelf: for if a man lets the Herbage of the Land, the Land it ſelf paſſeth; and a *Pracipe quod reddat* lieth of Paſturage or Herbage, but not of Common. But the opinion of the whole Court was, That the Preſcription was good, for that it might have a good beginning by grant; and if it may be good by grant, it may be good by Preſcription. *Paſch.* 19 *Jac.* in C. B. Sir *George Sparkes* caſe. *Mich.* 6. and 7. See *Pitt* and *Christ* caſe. *Mich.* 45. accordingly.

22. *A.* Libelled againſt *B.* in the Spiritual Court for the Tythe of a Park: *B.* to have a Prohibition, ſhewed that he, and all thoſe whoſe Eſtate he had in the Park, had held this as a Park until 11 *Eliz.* at which time it was diſ-parked, and that time out of minde the Occupiers had uſed to pay to the Vicar of the Pariſh a Buck in Summer, and a Doe in Winter, in lieu and ſatisfaction of all Tythes due to the Vicar. It was ſaid that this was not a ſufficient cauſe to grant a Prohibition, becauſe now the Park is deſtroyed, and ſowed, and ſo the Preſcription failes, for that was annexed to the Park. 2. Becauſe the Tythe of Corn doth appertain to the Parſon, and not to the Vicar: and *Hawkins* and *Collins* caſe was put, where the Preſcription was to pay to the Vicar a certain thing in lieu and ſatisfaction of all Tythes due to the Parſon; and in that caſe a Prohibition was denyed. *Hill.* 18 *Jac.* in C. B. Rot. 641. *Reynolds* and *Poules* caſe. *Mich.* 1. and 44. *Eliz.* 57. the ſame caſe.

23. In a Prohibition the Plaintiff declared, that for ten years together he held and occupied 100 Acres of Land, and ten Acres of Wood lying within the bounds of the Pariſh of *S.* in a Park there called *Sugar Park*, and that he, and all the Occupiers of the ſaid Park, time out of minde have uſed to pay to the Parſon of *S.* yearly 4 *l.* in full ſatisfaction and diſcharge of all Tythes of the ſaid grounds; which 4 *l.* the Parſon had accepted. It being found for the Plaintiff, it was moved in ſtay of Judgement, becauſe it was not layed to be *antiquus Parcus*. See 6 *E.* 6. *Dyer. Ilchester* caſe. 2. The Preſcription was layed in the Occupiers, not in the Owners, nor by way of cuſtome in the place. It was reſolved by the Court, That this was no matter of intereſt and inheritance, but in point of diſcharge; and the Preſcription amounts to this, That the Occupiers or Pariſhioners have been time out of minde diſcharged of all Tythes by payment of 4 *l. per annum*: for every *Modus Decimandi* is a diſcharge of the natural Tythe, and ſo works by way of diſcharge. *Hill.* 13 *Jac.* in C. B. *Shelton* and *Montagues* caſe. *Hob.* 116.

24. In Treſpaſs the Plaintiff declared that the Defendant entred his Land, and did cut down and carry away two Loads of Graſs in the Plaintiffs ſoyle,

ſoyle, in a certain place of ground in which the Treſpaſs was ſuppoſed to be done, to ſtrow the Floor of the Church, and did not ſay that it is the ſame Treſpaſs. It was holden Errour: but the Court was clear of opinion, That the Preſcription for cutting of Graſs to ſtrow the Church was good, becauſe it was but in the nature of an Eaſement. It was objected in that caſe, That the Inhabitants of a Town might preſcribe to have an Eaſement over the Freehold, or in the Freehold of a ſtranger, but not a profit apprender: but becauſe the Plaintiffs Land lay near to the Church, the Court conceived the ſame to be but an Eaſement, and the Preſcription good. *Paſch.* 15 *Car.* in B. R. *Bonds* caſe. *Mayſh* 17.

25. *Note:* It was holden *per Curiam*, that a Preſcription to have Common for all his Cattel commonable, is not good; for thereby he may put in as many Beaſts as he will: but a Preſcription to have Common for his Cattel commonable, levant and couchant, is a good Preſcription: and ſo it was adjudged in *Sayes* caſe. *Paſch.* 17 *Car. Mayſh* 83.

26. In a *Quo Warranto* he claimes liberty of free Warren in *R.* The Defendant pleaded that he was ſeiſed in Fee of the Mannor of *R.* whereof the place *R.* was parcel; and that he, and all his Anceſtors, and all thoſe whoſe Eſtate he hath in the ſaid Mannor, have had time, *&c.* liberty of free Warren in all the ſaid Mannor, and within the Demeaſns thereof, *Ita quod nullus fugabit* any Game of Warren within the ſaid Mannor and Demeans thereof, *ſine licentia* of the Defendant; and iſſue being taken that he had not free Warren within the ſaid Mannor and Demeans thereof, it was found for the Defendant. It was moved that the plea was not good to preſcribe to have Warren in the ſaid Mannor, and the Demeaſns of the Mannor: for although a man may preſcribe to have it in his own Demeaſns, yet he cannot preſcribe to have it in the Lands of others as Freeholders, nor ought he preſcribe to have it pertaining to his Mannor. See 5 *Aſſi.* 5. It was reſolved, That a Preſcription to have free Warren in his Mannor is good, as well in the Lands of the Freeholders, as in the Demeaſns; for being by Preſcription, it is intended that this liberty was before the Creation of the Freeholders, whoſe Eſtates were extracted out of the Demeaſns after the beginning of this Preſcription. Quere, the caſe was not reſolved. *Trin.* 9 *Jac.* in B. R. The King and *Sherringtons* caſe. *Cro.* 1 par. 217.

27. In Action upon the caſe, the Plaintiff declared that he was Leſſee for years of a Cloſe in St. *Martyns*, and the Defendant was Occupier of another Cloſe there, called the *Yard*, near adjoyning to the ſaid Cloſe of the Plaintiff; and ſaid, That in the ſaid Pariſh there was a cuſtome, *Quod omnes Occupatores* of ſuch a Cloſe of the Plaintiffs, time out of minde had, and uſed to have, for them and their ſervants, *quandam viam, tam pedeſtrem quam equeſtrem*, at all times of the year, for all Carts and Carriages from the Plaintiffs Cloſe, *in vel ultra* the Yard, *ad vel in* a place called the *Leyſtall* in St. *Martins*, *& ſic retroſum*, from the *Leyſtall in vel ultra* the Cloſe called the Yard, to the Plaintiffs Cloſe; and alleadged that the Defendant ſuch a day and year erected a houſe *ex tranſverſo viæ prædict.* that he might not uſe his way: being found for the Plaintiff, it was moved in arreſt of Judgement, That ſuch a cuſtome within a Pariſh alleadged for an Occupier of ſuch a Cloſe to have a Way, *&c.* is not good; but he ought to preſcribe in him who hath the inheritance; and a Cuſtome in a Pariſh cannot be applyed to a Cloſe in a Pariſh: and of that opinion was the whole Court. And it was holden by all the Juſtices, That Inhabitants may alleadge a Preſcription for a Way to a Church or Market, being matter of neceſſity, or in matters of diſcharge, as a *Modus Decimandi*; but not in matter of profit, or charge in another ſuit. It was adjudged for the Defendant. *Paſch.* 13 *Car.* in B. R. *Bakers* and *Breremans* caſe. *Cro.* 1 par. 302.

28. Errour to reverſe a Judgement in C. B. in an Action upon the caſe, where the Plaintiff declared, that *A.* was ſeiſed of the Mannor of *F.* and that he and his Anceſtors time whereof, *&c.* had a Fold-Courſe for his and their ſheep, not exceeding 300. in 70 Acres of Land in *F.* every year, from 14 days after the Corn was carried away, to continue to our *Lady-day*, when the Lands not ſown again; and that he let to the Plaintiff 75 Acres, parcel of the Mannor, with the Fold-courſe for five years, and the Defendant diſturbed him of his Fold-courſe. The Defendant pleaded in Bar, That there is a Cuſtom within the ſaid Town, That any one may encloſe any part of his Lands lying in the Common Fields, and therefore he encloſed his Lands: it was thereupon demurred. It was adjudged that the bar was not good, becauſe he doth not traverſe the Preſcription in the Declaration: and he cannot plead a preſcription againſt a preſcription, but he ought to anſwer the preſcription alleadged in the Declaration. It was moved that the Declaration was not good, becauſe a Foldage being appurtenant to a Mannor, cannot be divided and annexed to part of it: but that Exception was over-ruled; for being in the nature of a Common certain, it might be divided and annext to parcel of the Mannor. The Judgement was affirmed. *Mich.* 6 *Car.* in B. R. *Spooner* and *Days* caſe *Cro.* 1 par. 312.

29. Treſpaſs for cutting down of Trees, the Defendant juſtifies by Preſcription to have Eſtovers, for that he was ſeiſed of a Houſe and Land

in Fee, and preſcribed to have Eſtovers for the repairing of the ſame houſe, or for the building of a new houſe upon the ſame Land: upon which it was demurred, becauſe it was no good Preſcription; for it ought to be reaſonable and uſual, which is to repair ancient houſes, but not to build new. But all the Court held that it was a good Preſcription, for that a man may grant ſuch Eſtovers at this day; and by the ſame reaſon there may be a Preſcription for them. *Paſch.* 2 *Jac.* in B. R. The Counteſs of *Arundel* and *Sterres* caſe, *Cro.* 2 par. 25.

30. Treſpaſs for taking and carrying away 30 Loads of Thorns in a place called the Common Waſte, the Defendant ſaid that he was ſeiſed in Fee of a Meſſuage and three Acres of Land, *&c.* and that he, and all thoſe whoſe Eſtate, *&c.* have uſed time out of minde, *&c.* to cut down, and take *omnes ſpinas creſcentes* upon the ſaid place, to expend in the ſaid houſe, or about the ſaid Lands, as pertaining to the ſaid houſe and Lands. The Plaintiff ſhewed that *I. S.* was ſeiſed in Fee of the Mannor of *C.* whereof, *&c.* and granted licence to him to take the Thorns, and thereupon he cut them, and carried them away. It was adjudged in this caſe, That the Lord might not cut down any Thorns, nor licence any other to cut them; for that this Preſcription excludes the Lord: but if he had claimed Common of Eſtovers onely, then if the Lord had firſt cut down the Thorns, the Commoner might not take them: and in this caſe it was ſaid, That it was reſolved in *Kenricks* caſe, That one may preſcribe to have the ſole Paſturage in ſuch a place from ſuch a time to ſuch a time againſt the Owner of the ſoyle who ſhall not meddle therewith during the term. *Mich.* 8 *Jac.* in B. R. *Dowglas* and *Kendals* caſe. *Cro.* 2 par. 256.

31. In an Action upon the caſe for laying of Loggs in the High-way, whereby the Way was ſtreightned, and the Plaintiff riding upon the Way, ſtumbled upon the Logs, and much hurt him: the Defendant did preſcribe, that the inhabitants of ſuch a Town time out of mind had uſed to lay Loggs in waſte places of the Way before their houſes and doors for their fuel, leaving ſufficient paſſage for Carts, horſe and foot; and that the Plaintiff riding improvidently upon the Way, turned his horſe upon the Blocks and Loggs, and ſo fell. It was adjudged in this caſe, That the Plaintiff having a ſpecial damage, that the Action did lie, although the Nuſance was a common Nuſance, and that a Preſcription to make a Nuſance was not good. See *Cook* 5 par. 71. in *Williams* caſe. *Trin.* 15 *Jac.* in B. R. *Fowler* and *Sanders* caſe. *Cro.* 2 par. 416.

32. In Treſpaſs for breaking his Cloſe, and depaſturing it with *equis, bobus, & vaccis*, with a *Continuando* from 8 *Maii* to 25 *Junii*, the defendant pleaded that the place where was 1000 Acres of Land, and that he was ſeiſed in Fee of the Mannor of S. & he, & all whoſe Eſtate, *&c.* have had time whereof, *&c.* Paſture there for two Gueldings every year from the firſt of *May*, until the Graſs there grown be cut and made into Hay, as to his Mannor appertaining; and juſtifies the putting in of the two Gueldings to uſe the Paſturage, and their continuance there till 20 *June*, *anno ſupradict.* It was ſaid, That this Preſcription was not good to claim it in the name of Paſturage; alſo he claims it appertaining to the Mannor, and doth not ſay that the Gueldings were levant and couchant; alſo it is unreaſonable to have Gueldings go in ſtanding Graſs. It was the opinion of the Court, That being in ſo great a quantity of Land, the going of two Gueldings cannot defoule it, and that it might be claimed by the name of Paſturage, without averment that they were levant and couchant: but becauſe the Treſpaſs is layed with a *continuando* from 8 *Maii* to 25 *Junii*, and he juſtifies onely to 20 *Junii*, and anſwers nothing to the four days; and becauſe it was laid to be with *equis, bobus & vaccis*; and he juſtifies for two Gueldings onely, and anſwers nothing to the *bobus & vaccis*: for theſe incureable faults in pleading, it was adjudged for the Plaintiff. *Hill.* 43 *Eliz.* in B. R. Sir *John Thorneil* and *Laſſells* caſe. *Cro.* 2 par. 27.

33. In an Action upon the caſe, the Plaintiff declared that he was poſſeſſed of a Cloſe in *W.* called *Green Cloſe*, and *B.* was poſſeſſed likewiſe of another Cloſe there, called *white Cloſe*, and that *omnes poſſeſſores* of the Defendants Cloſe time out of mind uſed to make the Fences, and the River of *Avon* which runs betwixt the ſaid Cloſes, ſo as the plaintiffs Cattel ſhould not come into the Defendants Cloſe; and ſhewed that for want of fencing, the plaintiffs Cattel went out of his own Cloſe into the Defendants Cloſe, and from thence into the Cloſe of *I. D.* who ſued and recovered againſt him in Treſpaſs. Upon *Not guilty* it was found for the plaintiff. It was objected, that 29 *E.* 3. and the Book of *Entries* 140. are, That a Preſcription, *Quod omnes terram tenentes* uſed to incloſe, was a good Preſcription: but it was reſolved in the principal caſe, That *Omnes terram poſſeſſores*, was not a good Preſcription; for that may be for years, or at will, and none may charge for matter of profit; but he ought to preſcribe in a Tenant of the Freehold, or in him that hath the inheritance: and the Court ſaid, that there was a difference between *Terram tenentes*, & *poſſeſſores*: for the firſt implyed a Fee-ſimple, becauſe it is alledged *reparare debet & ſolet*; but not the laſt. *Hill.* 20 *Jac.* in B. R. *Holbech* and *Warners* caſe. *Cro.* 2 par. 665.

34. A

34. A Preſcription that the Pariſhioners ſhall eat their Graſs, and make it into Cocks, and ſet out the tenth Cock for the Parſon, was adjudged a good preſcription and bar againſt the Parſon who ſueth for tythes of after-paſture, or for tythe of the ſecond Verture. *Paſch.* 4 *Jac.* in B. R. *Green* and *Auſtens* caſe. *Cro.* 2 par. 116.

35. In a prohibition the ſurmiſe was, that the Abbot of *B.* was ſeiſed in Fee of the Rectory of *N.* which was appropriate to the Abby time out of minde, and was ſeiſed in Fee of a Cloſe *M.* in *G.* in the pariſh of *N.* and had the ſaid Cloſe, and took the profits thereof in the right of all tythes within the Hamlet of *G.* The Defendant pleaded that the Abbot was ſeiſed of that Cloſe as parcel of ſuch a Farm, and traverſed that he took the profits thereof in lieu of tythes in the ſaid Hamlet. It was found for the plaintiff; and it was moved in ſtay of Judgement, that the ſurmiſe was not good; for he ſhewing that he was ſeiſed in Fee, it ſhall be as parcel of his Glebe, and cannot be in recompence of tythes: but he ought to have ſhewed that it was given in ancient time in recompence of tythes, or that he and his predeceſſors time out of minde, *&c.* had the Occupation of that Cloſe, and took the profits thereof in lieu of tythes. But the Exception was diſallowed by the Court; for it is a better form to ſay, that he was ſeiſed in Fee; for it is ſo ancient, that it cannot be ſhewn when, or by whom it was given. It was adjudged for the plaintiff. *Mich.* 16 *Jac.* in B. R. *Moore* and *Batlocks* caſe. *Cro.* 2 par. 57.

36. The Lord of the Mannor of *P.* did preſcribe that he, and all his Anceſtors, and all thoſe, *&c.* in the ſaid Mannor have had a Court-Baron there from three weeks to three weeks before his Steward; where it had been uſed to enquire and preſent all Treſpaſſes in the common Fields of the ſaid Mannor, and to puniſh them by amercement: and that at a Court holden before *I. S.* his Steward, it was preſented that the Defendant committed a Treſpaſs in the common Fields, for which he was amerced 10 *s.* for which an Action was brought. Upon *Non debet* found for the plaintiff, it was moved in arreſt of Judgement, that the preſcription to have a Court-Baron before his Steward was not good: and of that opinion was the whole Court; for it ought to be *Coram Stallatoribus.* But the Court was of opinion, That peradventure he might have preſcribed to have a Court to be holden before his Steward, but not a Court-Baron: the Judgement was arreſted. *Mich.* 18 *Jac.* in B. R. Sir *William Armys* and *Appletofts* caſe. *Cro.* 2 par. 582.

37. In an Action upon the caſe, the plaintiff ſhewed, that he was ſeiſed of an ancient Meſſuage and Lands to the ſame belonging in *P.* and that within the Pariſh-Church of *P.* time out of mind there was, and yet is, a little Chappel in the North part of the Chancel, called the Parſons Chancel, and that the plaintiff, and all thoſe whoſe Eſtates, *&c.* have uſed to repair and ſuſtain the ſaid Chancel, and have uſed for him and his family to ſit in the ſeats of the ſaid Chancel, and to bury there the perſons dying in the ſaid Meſſuage, and that none other during all the ſaid time without their licence have uſed to ſit there, or to be buried there; and that the Defendants *premiſſorum non ignari, malitioſe impediverunt* him to enter & ſit in the ſaid ſeats. The Defendants pleaded that the Earl of *Northumberland* was ſeiſed in Fee of the Honour of *P.* and that the ſaid Chappel was parcel of the ſaid Honour; and that the Defendants being ſervants of the ſaid Earl, and reſident within the ſaid Honour, did divers times in the time of Divine Service ſit in the ſeats of the ſaid Chancel by the command of the Earl: upon which plea it was demurred in Law. Exception (amongſt other things) was taken to the Declaration, becauſe he preſcribes to have that liberty appertaining to his houſe, and doth not ſhew that it is an ancient houſe, for otherwiſe he cannot preſcribe thereunto. And, 2. It was ſaid that the Allegation of the diſturbance was ill, without alleadging a ſpecial diſturbance how he was diſturbed. But the opinion of the Court was againſt both the Exceptions: as to the firſt, there is a difference when one preſcribes to have an Office, and the profits thereunto, there he ought to ſhew it to be an ancient Office; but when it is ſuppoſed that he is ſeiſed in Fee of a capital Meſſuage, and time, *&c.* it is therein included, that it is an ancient Meſſuage, and ſo might have ſuch a priviledge: and for the ſecond, it is ſufficient to alledge a general diſturbance, as it is uſual in caſe of a Fayr or Market; and Sir *John Harveys* caſe was vouched, where he preſcribed to have to his Mannor of *R.* a burying place, and ſeats in the Church of *H.* and the preſcription adjudged good; where for a diſturbance to bury he brought his Action. *Trin.* 18 *Jac.* in B. R. *Dawney* and *Dees* caſe. *Cro.* 2 par. 607, 606.

38. In an Action of Trover and Converſion of Timber-tree, the Queſtion was, If a Copyholder for life might preſcribe to cut down Timber-trees growing upon his Copyhold: It was the opinion of the whole Court, That ſuch a preſcription was void, becauſe it was a preſcription againſt Reaſon: but by way of uſage for reparation of his Copyhold, it was holden that a Copyholder might cut Timber-trees: and ſo it was ſaid it was adjudged in *Lutterell* and *Woods* caſe, in the Com. Pleas, and 21 *E.* 4. 29. uſage and cuſtome to turn their Plow upon the Head-land not ſowed with corn,

corn, is good; but it is there ſaid that a preſcription againſt Reaſon is not good; 2d, that none ſhall put his Cattel into his land before the Lord do put his Cattel in the ſame, is void; for if the Lord will never put in his Cattel, the Tenants by this ſhall loſe the profits of their own Lands. See *Litt.* 46. 5 *H.*7.9. and 10. 22 *E.*4.8. It was adjudged in the principal caſe to be a void preſcription. *Hill.* 7 *Jac.* in B. R. the Earl of *Northumberland* and *Wheelers* caſe. *Bolſtr.* 1 par. 153.

39. A man preſcribed to have Pot-water out of a River, and the Jury found that he ought to have it paying 6 *d.* yearly. It was adjudged that he had failed in his preſcription; and it was holden in that caſe, that if he doth not pay the money, that the ter-tenant might diſturb him in taking the Pot-water; which is all the remedy which he hath. *Cook.* 5 par. 78. *Greys* caſe.

40. *Note:* There is a difference betwixt Cuſtome, Preſcription and Uſage, *viz.* Cuſtome and Preſcription are in the Right, but Uſage is in poſſeſſion: Cuſtome is properly applyed to a place certain, as to a Country, Town, Hundred, and runs with the Land, as *Gavelkind:* preſcription hath reſpect to a perſon certain, which by intendment may have continuance for ever: Uſage differs from them both, for it may be made particular, as to a Hundred, and perſons which may not have continuance for ever, as to inhabitants of a Town to have a Way: Tenant for life cannot preſcribe, yet he ſhall have benefit of an Uſage.

41. In a Quo *Warranto*, for that the Defendant without warrant within the Foreſt of *N.* within the Manor of *C.* had a park conſiſting of 100 Acres of paſture, 100 Acres of Wood within his park, and killed the Kings Deer coming into the ſaid park: the Defendant pleaded that his Grandfather was ſeiſed of a Meſſuage, 100 Acres of Land, 200 Acres of Meadow, 300 Acres of paſture, and 100 Acres of Wood in *C.* called the Mannor of *C.* within the bounds of the Foreſt; and that he, and all thoſe whoſe Eſtates he had in the ſaid Lands, have held and had the ſaid 100 Acres of paſture, *&c.* incloſed, with all the Franchiſes and Liberties of a Park, and have kept Deer there, and have uſed *ad venandum, fugandum, accidendum, capiend. & aſportand amues & omnimodas damas in eodem parc. de tempore in tempori exiſtentes. Et quod Nullas Forreſtarias Domini Regi pradict. Foreſta, vel aliqui alii perſonæ intromittander ad fugandum venandum in pradict. parco ſine licentia* of his ſaid Grandfather, and that the ſaid park and Lands was come to the Defendant in tailo: the point in Law was, If the Defendant can preſcribe to have a park in the Kings Foreſt in ſuch manner as he pretendeth; for the Foreſt of the King is priviledged for wild beaſts to reſt in; and it is contrary to the nature of his Royal priviledge and Franchiſe of his Foreſt, to have his wild beaſts deſtroyed. The Court inclined to opinion, That a Subject may have a park within a Foreſt by preſcription or grant, but then it ought to be ſo incloſed, that the beaſts of the Foreſt enter not into the park: which if it be not ſo done, it is a forfeiture of the liberty of the park: but they conceived that this power of killing the Kings Deer which wandred into the ſaid park out of the Foreſt, was not good; for in this caſe it is claimed he may not enter into the park *ad venandum, fugandum*, and cechaſe them; which they may do in the Lands of any other Subjects lying within the Foreſt. Quere of the preſcription, for it was not reſolved. The King and Sir *John Byrons* caſe. *Bridgeman* 23, 24, 25.

See more of Preſcription *in* Lib. 1. *Title* Cuſtome, *and in the* Grants of the King, Franchiſes *and* Liberties.

Preſentation.

OR,

Preſentment to Churches and other Livings.

1. Preſentation, *What it is*; *and the difference between it, and* Collation, *and* Nomination; *and where a* Preſentment *ſhall be good, and by whom, and where not*; *and the form of a* Preſentation.

PReſentment, or Preſentation to a Church or other Living is, where any man, who hath title to give any Benefice Spiritual, nameth the Perſon to the Biſhop to whom he will give it, and ſuits a Writing to the Biſhop for him: Or, Preſentation is the Nomination of a fit or able Perſon to the Biſhop or Ordinary of the Diocels where the Church is, to be admitted and inſtituted by him to the Church which is void. Nomination and Preſentation are upon the matter all one; for he who hath the Nomination of the Church ſhall be accounted the Patron, and have a *Quare Impedit Preſentare ad Eccleſiam. Ve.* 14.H.4 11.17.E.3.64.*Ve* Lib.1. Title *Advowſon.* Diviſio.6.Sect.3,4,5,& 6.

2. If an Abbot hath the Preſentation, and another hath the Nomination, and the Abby is ſurrendred to the King, he that hath the Nomination ſhall have all, and ſhall be ſaid the Patron; in that it ſhall be ſaid to be an undecent thing that the King ſhall nominate to a Subject in ſuch a Caſe. *ve.* 1. Car. in B. R. in *Dickenſon* and *Greenhawes Caſe. Poph.*158.

3 Now the form of a Preſentation runs uſually in this manner, *viz. Reverendiſſimo in Chriſto Patri, & Domino, Domino* W. *permiſſione divina* Eboracenſi *Archi-Epiſcopo*, Angliæ *Primati & Metropolitano, ejuſve in abſentia vicario ſuo in rebus ſpiritualibus generali. Pranobili* T. S. *Baro de* P. *& inhabitatus Patronus Rectoria Eccleſia Parochialis de* H. *ſalutem in Domino ſempiternam. Ad Eccleſiam Parochialem de* H. *prædict' veſtra Diœceſis nuda per mortem* T. A. *ultimi Incumbentis ibidem vacantem, & ad meam Præſentationem pleno jam ſpectantem, Dilectum mihi in Chriſto* T. H. *Sacræ Theologiæ Profeſſorem Paternitati veſtræ præſento (or Commendo) humiliter ſupplicans, ut prefatum* T. H. *ad dictam Eccleſiam admittere, inſumque in Rectorem ejuſdem Eccleſia inſtituti & induci facere cum ſuis juribus & pertinentiis univerſis, ceteraque omnia & ſingula peragere & ad implere in hac parte qua ad veſtrum munus Epiſcopale pertinere videbuntur dignemini cum favore. In cujus rei Teſt. &c.*

4. One hath the Nomination to an Adwowſon, and another the Preſentation; if he name his Clerk, and he who ſhould preſent, preſents another Clerk to the Biſhop; he that hath the Nomination ſhall have a *Quare Impedit*, and the Writ ſhall be *Quod permittat ipſum præſentare*, although he hath but the Nomination; for that otherwiſe he ſhould be without remedy. And upon the ſame reaſon it is, That upon a diſturbance to one to preſent to a Priory or Chauntry donative of the King, or a Biſhop, or the like, a *Quare Impedit* lieth, and the Writ ſhall be *Quod permittat ipſum præſentare*; and yet thoſe words are not proper in ſuch Caſes; but the reaſon is, becauſe there is no other Writ by which the party might have right done unto him; and rather then he ſhall be without remedy, the Law permits that Writ to be uſed. *Ve.*F B.33. &c.

5. B. brought a *Quare Impedit* againſt the Ordinary, and *C.* the Incumbent, who was in of the Preſentation of the Queen; upon pleading there was a Demurrer, and before the ſame was diſcuſſed *B.* was outlawed at the Suit of *J. S.* in an action of Debt; then *C.* reſigned his Benefice, and the Queen preſented him again, whereupon he was Inſtituted and Inducted: Then *B.* brought a Writ of Errour in the Kings Bench, and reverſed the Outlawry; and now he brought his *Scire facias*, to execute the firſt Judgment againſt *C.* who pleaded all this matter in Barre: It was in this Caſe much inſiſted upon, that the Preſentee by his Outlawry had forfeited his Preſentation to the Queen, and that being once veſted in her could not be reverſed. But the opinion of the Court was, That in regard the Defendants reſignation was by practiſe, that this his reſignation ſhould extort the Execution from the Plaintiff; but that by reverſal of the Outlawrie, the Plaintiff ſhould have his Preſentation again: Wherefore it was adjudged for the Plaintiff. M.31.*Ely* in Ca.1.B. *Beverley* & *Cornwallis* Caſe. *Goldesbr.*104.105. *Ve. Leon.*63. the ſame Caſe, but not there adjudged.

6. The Vicaridge of *T.* in the County of *S.* came to the Queen by Lapſe: The Ordinary of the Diocels collated *A.* to the Vicaridg Afterwards the Queen preſented *B.* who brought a *Quare Impedit* againſt the Biſhop and the Incumbent, depending with ſuit: *A.* procured by covin and fraud a Preſentation from the Queen, without making mention of the pleaſure of the Queen to reverſe the firſt Preſentation

it was the opinion of the Juſtices, That in regard of the covin and fraud, the ſecond Preſentation was not good; but if it had not been for the covin, the ſecond Preſentation had been good in Law, and been the revocation of the firſt. 17. Eliz. *Dyer* 339.

7. The King had title to preſent to a Church by reaſon of Wardſhip; the King Preſented under the Great Seal, and His Clerk was Admitted, Inveſted, and Inducted; and afterwards He Preſented another under the Seal of the Court of Wards, who brought a *Quare Impedit*; and whether the firſt Clerk Preſented ſhould be removed, was the Queſtion. It was adjudged that the firſt Preſentation was good; for that a Preſentation by him under any of his Seals was good; and the Court held, That the *Quare Impedit* did not lie. And in this Caſe it was holden, That a Preſentation under the Great Seal, to a Church parcel of the Dutchie of *Lancaſter*, was good: Alſo the King may Preſent by Word if the Ordinary be preſent; for that a Preſentment is but a Commandment to the Biſhop. Tr. 8 Jac. in *Co.* 1. B. The King and *Emerſons* Caſe. *Brownl.* 1 part 162. *Ve* 11 Jac. in *Co.* B. The King and the Biſhop of *Lincolns* Caſe. *Ve.* 3 Car. in B.R. *Stephen* and *Potters* Caſe. *Cro.* 1. part 70, 71. *Ve.* lib. 1. tit. *Advowſon. Diviſo.* 6. *ſect.* 12. *&c.*

8. The Caſe was, *A.* and *B.* his Wife preſented to a Church, to which they had no right; the Husband died; the Queſtion was, Whether the Preſentation did gain any thing to the Wife? It was holden by the Juſtices, That it did not; for that the Preſentation was but a Commendation only, and the act of the Husband only, and it was not like an Entry into Land. *Paſch.* 15 Car. in B. R. *Neſſon* and *Hampſons* Caſe.

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2. *Who may Preſent to Benefices with Cure, who not; and what Perſons are capable of ſuch Preſentations, what not: For what cauſes the Ordinary may refuſe the Party Preſented, for what not: Of Preſentation for Lapſe; and by whom, and where, after the ſix moneths incurred, the Patron may Preſent, where not.*

1. AN Alien born ſhall not Preſent in his own right; but if he purchaſeth an Advowſon, and the Church doth become void, after office found that he is an Alien born, the King ſhall preſent: But an Infant under age may preſent in his own name and right; and if he doth not Preſent within ſix moneths after the Church ſhall fall void, Lacheſs ſhall come upon him. 8 E. 4. 4. 9 H. 6. 5. 17 E. 4. 9. 33 E. 3. *Quare Imp.* 46.

2. A Feme Covert cannot Preſent by her ſelf; but her husband ſhall preſent; and he may Preſent either in his own name without naming the Wife, or in his and his Wifes name. 31 E. 5. *Quare Imp.* 146. 3 H. 7. 14. But the Wife of the King is a Perſon ſole, and exempt from the Perſon of the King, and ſhe is of ability to preſent unto any Church or Advowſon; and in a *Quare Impedit* brought by her Plenary by Inſtitution of another, is no good barr againſt her, no more then it is in the Caſe of the King. 18 E. 3. 32. 24 E. 3. 35. *acc.*

3. If a Villain purchaſe an Advowſon, and the Church doth become void, the Lord ſhall preſent; for upon ſuch purchaſe the Lord may come and claim the inheritance of the Advowſon; and upon that claim the Intereſt of the Advowſon ſhall be veſted in the Lord; and upon the Avoydance the Lord in his own name and right ſhall preſent; But if the Lord of a Manor to which an Advowſon is appendant, or ſeiſed of an Advowſon in groſs. It was holden in that Caſe, M. 8. Jac. in Co. in *Walters* Caſe; That the ſame is no Enfranchiſement or Manumiſſion of the Villain: and ſo it was ſaid, That if the Leſſor doth Preſent his Leſſee for years to an Avoydance, the ſame is no ſurrender of his Term, although that the Leſſee accepteth the Preſentment. *See* Eliz. in *Co.* B. *Topſells* Caſe. *Godbt.* 173.

4. Guardian in Socage ſhall not preſent to an Avoydance of a Church in the name and right of the Heir, becauſe he cannot account for the Avoydance, for that he cannot make any profit of it; for that would be Simony, and ſo make his Preſentment void. 8 E. 2. Preſentment 10. Yet *Berry* ſaith, 14. E. 2. *Barr.* Preſentment 19. That he hath ſeen the Guardian Preſent in the name of the Heir, wherewith agreeth 20 E. 3. 1. *Darrein* Preſentment 19. by *Green Quare Libram.* For it muſt be intended of a Guardian in Knight Service, and not of a Guardian in Socage, *Ve.* 42 E. 3. *Quare Imp.* 13. The Preſentment of the Guardian in the name of the Heir, is a good title for the Heir in a *Quare Impedit.*

5. An Abbot having an occaſion to go beyond the Sea, made another Abbot his Procurator, to Preſent to ſuch Benefices as become void during his abſence: That Abbot Preſented in the name of him who made him his Procurator, to one of his own Advowſons which fell void. It was holden in that Caſe, That the right of the Advowſon did not paſs by ſuch Preſentation: But yet it was holden to be an uſurpation to the ſame Advowſon by him who went beyond Sea, to the Church. *Ve.* 17 E. 3. 60. F. B. *acc.*

6. There was an old Statute, That no Frenchman, although he was made a Denizen, ſhould be Preſented

to

to any Benefice within the Realm of *England*, ve. *Stat.* 13. *R.* 2. *Raſtal. France.* 1. *Stat.* 1. *H.* 5. *cap.* 7. But theſe Statutes being made in the time of war betwixt the Realms, are not now in force; But If the King do preſent contrary to a ſpecial Act of Parliament that his Preſentation is void. *M.* 8. *Iac.* in *Co. B. Walters Caſe.*

7 In a *Quare Impedit* the Caſe was, *A.* was ſeiſed of an Advowſon in groſs holden of the Queen in Chief, and aliened the ſame without Licence, the Church became void, the Leſſee preſented; The Queen brought a *Quare Impedit* without Office found; the Queſtion was, If the Queen without Office ſhould preſent: In that Caſe it was agreed by the whole Court, That if the Alienation had been by Deed only, that there the Queen without Office found ſhould not have preſented; for by ſuch an Alienation by matter of Fact, no *Scire facias* ſhould iſſue forth without Office found of the Alienation; But by an Alienation without Licence by matter of Record, a *Scire facias* lieth before Office; And in ſuch Caſe the King ſhall have the Mean profits from the time of the *Scire facias*; but in the firſt Caſe from the time of the Office found. *M.* 29. *Eliz. in Co. B.* The Queen and the Biſhop of *London* and *Scots* Caſe. *Lea.* 40.

8 If a man be *Ante Natus*, born in *Scotland* before the Union, he is capable of a Benefice in *England*, and ſo if he be born in *Flanders*, *Spain*, or any other Kingdom, friends and in League with the King of *England*. See *Cook* in *Calvins* Caſe, &c. And ſuch Incumbent ſhall maintain an Action real, perſonal or mixt, for any thing concerning the Gleab or the poſſeſſion of his Church, as Prior Aliens here may, he have done; for although he be an Alien born out of the Kings Dominions, yet he bringeth his Action not in his own right, but in the right of his Church; not in his Natural, but in his Politique Capacity. 40. Ed. 10. *Cook* 1. part. Inſtitutes 129. M. 8. Jac. in *Co. B.* Dr. *Stations* Caſe, &c.

9 *A.* ſeiſed of the Manor of *D.* to which an Advowſon was Appendant, the Church became void, and *A.* preſenteth *I.S.* to the Biſhops Ordinary of the place, who refuſed to admit him to the Benefice: Thereupon *A.* brought a *Quare Impedit* againſt the Biſhop, who pleaded, That upon his Examination of him, he found him to be *Schiſmaticum inveteratum*, and for that cauſe by the Law of the Church to be *Perſonam inhabilem & minime idoneum ad occupandum aliquod Beneficium cum cura animarum*, by reaſon whereof he refuſed to admit him to the Benefice being void: It was adjudged by the whole Court in this Caſe, and afterwards affirmed in a Writ of Error brought in the Kings Bench, That the plea of the Biſhop was inſufficient, becauſe he ſhewed generally that he was *Schiſmaticus inveteratus*, which was altogether uncertain, and the ſpecial Crime and Cauſe of his Refuſal ought to have been alledged by the Biſhop that the party might anſwer thereunto, ſo that he might either traverſe the Cauſe, or take Iſſue thereupon. Cook 5. part 58. *Specots Caſe.*

10 The Biſhop of *Norwich* refuſed to admit a Clerk becauſe he was a common haunter of Taverns, and a player at unlawful games: It was adjudged in that Caſe, That they were no ſufficient cauſes of Refuſal; for although they were offences prohibited by the Laws of the Realm to ſome perſons at certain times *Mala prohibita*, yet they were not Crimes which were *Mala in ſe*, for which a Clerk was to be refuſed, or to be deprived in caſe he was admitted. 9. *Eliz. Dyer* 254. But if a Clerk preſented be Miſcreant, Turk, Heretick, Perjur'd perſon, Baſtard, Villain, Outlawed, illiterate, or a meer Lay-man, and the particular crimes be ſet forth, theſe are good Cauſes for the Biſhops Refuſal of him upon a Certificate thereof made. See 5. H. 7. 19. 11. H. 7. 7. &c.

11. If the Patron doth preſent one, and the Biſhop upon Inquiry doth find that he hath Plurality, this is no Cauſe of Refuſal, becauſe it is at the peril of the Incumbent if he keep other Livings two moneths, that both Benefices are void, but that is nothing to the Biſhop; But if the Preſentee be a Villain, the Biſhop may refuſe him, but notice muſt be given to the Patron thereof, be he a Lay or a Spiritual perſon. See 14. *H.* 7. 18. &c.

12. Note, It was Reſolved by the Juſtices, That whatſoever are ſufficient Cauſes of Deprivation of an Incumbent, the ſame are ſufficient Cauſes for the Biſhop not to admit a Clerk to a Benefice. *Pſac.* 7. *Iac.* in *B. A. Auſtins* Caſe adjudged, &c. But if the Ordinary ſhall refuſe the Clerk he preſented for any of the Cauſes before alledged, he muſt give notice to the Patron of ſuch his Cauſe of refuſal, That the Patron may preſent another fit Clerk unto the ſame Church; For, if no Notice be given, and the 6. Moneths paſs, the Lapſe ſhall not run to the Biſhop or Ordinary, for that he ſhall not take advantage of his own wrong in not giving Notice thereof to the Patron. See 15. *H.* 7. 8. 12. *Eliz. Dyer* 293. 15. *Eliz. Dyer* 327. &c.

13. An Incumbent was Admitted, Inſtituted, and Inducted into a Benefice with Cure of Souls, in the time of King *Ed.* 6. and afterwards in the time of Queen *Mary* he was deprived, becauſe he was a married man, and a favourer of the Religion on foot in the time of King *Ed.* 6. and the Church being void by his Deprivation, another man was Inſtituted and Inducted in the time of Queen *Mary* into the ſame Church; and afterwards in the time of Queen *Elizabeth*, the laſt Clerk was deprived, and the firſt Sentence of Deprivation in the time of Queen *Mary* adjudged and declared to be void: It was Adjudged in that Caſe, That the Deprivation of the firſt Incumbent was good, and ſtood good until the ſame was afterwards declared to be void, and till then the ſecond Clerk was lawful In-

cumbent; But when the Sentence of Repeal came, and made void the firſt Deprivation, then was the firſt Incumbent in again by force of his firſt Preſentation, Inſtitution and Induction. Cook 4. part 102. *Winſors* Caſe.

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3. *Where and When Lapſe ſhall incur, When to the Biſhop, When to the King; And where their Laches of preſentment ſhall prejudice them; And where, after the ſix moneths paſt, the Patron may Preſent, notwithſtanding the Lapſe incurred.*

1 IF the Patron doth not Preſent his Clerk to the Biſhop within ſix moneths after the Church doth become void, then ſhall the Lapſe run to the Biſhop, and he ſhall Preſent for the default of the Patron a Clerk of his own; and his Preſentation is called Collation; and if the Biſhop ſhall ſurceaſe his time, which is likewiſe ſix moneths, then the Metropolitan, *viz.* the Archbiſhop of the Province, ſhall Collate his Clerk; and if he ſhall ſurceaſe to Collate within the like time, then the King, who is the Supreme Ordinary of all the Diocels of *England* ſhall Preſent his Clerk to the Church. See *Doctor & Student* 126. b. *Coke* part 15. in the Caſe of Eccleſiaſtical perſons.

2. If the Church become void by the death of the Incumbent, the ſix moneths ſhall be accompted from the time of his death, of which the Patron is to take notice at his peril, and preſent his Clerk accordingly; and ſo it is, If the Church do become void by Creation, *viz.* by making the Incumbent Biſhop, or by Ceſſion; But if the Church do become void by Reſignation, which is the Act of the party Incumbent himſelf, and which Reſignation of neceſſity muſt be made to the Biſhop or Ordinary: Or by Deprivation, which is the Act of the Law, there although the ſix moneths do incur before the Patron doth preſent; Yet the Biſhop or Ordinary ſhall not Preſent, unleſs the Biſhop upon the Reſignation or Deprivation had given Notice to the Patron of the ſame Avoidance; for in ſuch and the like Caſes, the ſix moneths ſhall be accompted from the time of the Notice given to the Patron of the Reſignation or Deprivation. See 16. *Eliz. Dyer* 327. 18. *Eliz. Dyer* 293. 18. *H.* 7. 49. in *Kelloway*.

3. If the King be Patron, and doth not preſent his Clerk within ſix moneths to the Church: In that Caſe the Ordinary *de jure* ought not to preſent for Lapſe, but he ought to ſequeſter the Profits of the Church until the King will Preſent; But if the Ordinary do in ſuch Caſe Collate his Clerk, and afterwards the King Preſents his Clerk to the Ordinary, the King ſhall not remove the Clerk of the Ordinary without a *Quare Impedit*: And if the King have Title to Preſent by Lapſe for the defaults of the Ordinary and Metropolitan; and notwithſtanding the Kings Title, the Patron doth preſent his Clerk, who is Admitted, Inſtituted and Inducted by the Metropolitan this ſhall bind the King, and the King cannot remove the Incumbent without a *Quare Impedit* brought, for by the Induction the Church was full; and although *Nullum tempus occurrit Regi*, yet in that Caſe he ſhall not remove the Incumbent without a *Quare Impedit*. See 14. *H.* 7. 21. *per Curiam.*

4. If the Kings Tenant be ſeiſed of an Advowſon, and Preſents, and afterwards the Church doth become void, and the Tenant dyeth, and the King ſeizeth the Advowſon; In that Caſe, If the Church do become void in the life of the Tenant, and ſix moneths paſs, and the Ordinary doth not preſent for Lapſe in the life of the Tenant, the King in ſuch Caſe ſhall preſent, for by the ſeizure he was ſeized, and then *Nullum tempus occurrit Regi*. See 18. *E.* 3. 21. acc.

5. A man held Lands of the King, and a Manor and Lands to which an Advowſon was Appendant of a common perſon, and dyed, and the Manor and Advowſon were ſeized unto the Kings Hands, and afterwards the Church did become void; and afterwards it was found by Office, That the Tenant was but Tenant for life of the Advowſon, and Livery was made of the Lands *cum exitibus*, yet in the Caſe it was holden by the whole Court, that by the Livery the Advowſon did not paſs out of the King, but the King ſhould preſent, and in that Caſe a Writ to the Biſhop was awarded for the King. 24. *E.* 3. 27. 29. *E.* 3. 81. acc.

6. The King ſhall preſent to his Free Chapels (in the default of the Dean) by Lapſe, in reſpect of his Eccleſiaſtical Juriſdiction; and ſee, that *Fitzherbert* in that Caſe ſaith, That the King doth preſent as Supreme Ordinary. *Co.* 5. part. 14. in the Caſe of Eccleſiaſtical perſons.

7. The King had Title to preſent for Lapſe, and the Patron uſurped upon him and preſented his Clerk, who was admitted, Inſtituted, Inducted and dyed: It was Adjudged in that Caſe that the King had loſt his Preſentment, and ſhould not have the ſecond Preſentation; and *Nullum tempus occurrit Regi* is to be intended when the King hath an Intereſt certain and permanent, and not when his Intereſt is ſpecially limitted, for that time is the ſubſtance of his Title. *Co.* 7. part. *Bikerviles* Caſe.

8. If the King be deceived in his Preſentation, or miſtaken in his Preſentation, his Preſentation is void;

void; and ſo when the King hath not Title to Preſent by any means, and he Preſents *ratione Lapſus*, his Preſentation is void. *Coke* 6. part. in *Greens* Caſe. acc.

9. In a *Quare Impedit* the Caſe was: *H.* being qualified took two Benefices above the value of 8. *l.* whereby the firſt became void, and ſo remained two years, whereby title of Lapps devolved to the Queen, and before Preſentment made by the Queen the Patron did preſent *A.* who being Inſtituted and Inducted, did refuſe to pay 38. *l.* 1. *s.* due to the Queen for the Tenths, which being certified by the Biſhop into the Exchequer, the Church by the Statute of 26. *H.* 8. became, *ipſo facto*, void; Wherefore the Biſhop being Patron in the right of his Biſhoprick, preſented *I. S.* againſt whom the Queen brought a *Quare Impedit*; It was Adjudged in this Caſe, That the Writ did lye, for that the Recuſancy to pay was his own Act: But it was holden, That if the Incumbent who was preſented dies being preſented by Uſurpation upon the Lapps to the Queen; yet the Rightful Patron ſhall preſent again; But when the Incumbent doth Reſigne, and makes the Church void by his own Act, *viz.* by his Refuſal, as in this Caſe; this may be by Colluſion, and then may a ſtranger Preſent upon the Title of the Queen, and ſo the Queen deprived of her Lapps. *M.* 30. *Eliz.* in *Coke*, *B.* The Biſhop of *Lincolns* Caſe. *Owen* 5. & 89. 90.

10. A *Quare Impedit* againſt the Biſhop and the Incumbent upon default; The Plaintiff made Title, and had a Writ to the Sheriff, where it was found that the Church remained void two years, ſo the Lapps devolved to the Crown, and was now full of the Collation of the Biſhop: In that Caſe it was holden that the Plaintiff ſhould have damages but for half a year, becauſe he ſhould remove the Clerk and have a Writ to the Biſhop, It was ſaid, It was not fully within the Rule *Nullum tempus occurrit Regi*, for the Patrons Title continues till the Lapps executed; ſo the Kings Title is not waſted in him peremptory. *Tr.* 7. *Eliz. Dyer* 241. *Watſons* Caſe.

11. In a *Quare Impedit* it was found by ſpecial Verdict, That *A.* was ſeiſed of the Manor with the Advowſon appendant, and Preſented *W. M.* who was admitted and Inducted: *A.* bargained and ſold the Manor to *F. B.* the Church voided by the death of *M.* 2. *Feb.* 89. the Queen preſented *F. S.* by theſe words, *per mortem naturalem ultimi Incumbentis illiem vacant & ad noſtram Preſentationem jure prerogativæ Coronæ noſtræ ſpectant.* who 16. *Feb.* was Inſtituted by Letters of Inſtitution, *per Dominam Reginam veram & indeputatã ut dicitur Patronem*, and then conveyed the Manor to the Plaintiff, and *S.* dyed, and that the King preſented *I. D.* in theſe words, *ad noſtram preſentationem ſive ex pleno, ſive per Lapſum temporis, ſive alio quocunq; modo ſpectant*: It was adjudged in that Caſe. That the Advowſon remained Appendant notwithſtanding the Queens Preſentation of *S.* for there was no colour of title to the Queen to preſent no Lapps, for the Preſentation and Inſtitution were all in the ſame moneth wherein the Avoidance was, and uſurpation by the Queen it was not, becauſe the Preſentation did ſuppoſe a Right where none was, and ſo was void. Then the Preſentation of *S.* being void, It was but a Collation of the Biſhop which makes no diſſappendency, nor ſo much as a Plenary, but the Church remains void; but the Patron may bring his *Quare Impedit*, and if the Biſhop do receive his Clerk, the other is out *Ipſo facto*. *Hill* 1. *Jac.* in *Co. B. Gawdy* and the Biſhop of *Canterburies* Caſe. *Hob.* 301. 32.

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4. *Where a Common perſon cannot Revoke or Vary from his firſt Preſentation; And where, and in what Caſes the King may Revoke or Repeal his firſt Preſentation, and in what Caſe not.*

1. NOTE, The better opinion of the old Books hath been taken to be, That a common perſon cannot Revoke, Repeal, or make void his firſt Preſentation, becauſe he hath put it out of himſelf, and hath given to the Biſhop power to perfect what was by himſelf firſt begun. *See* 31. *Eliz. Quare Impedit* 185. 17. *Eli. Dyer* 348. *Fitz. N. B.* 34. But if the King do preſent to a Church, and the Clerk be admitted and Inſtituted, yet the King may before Induction Repeal or Revoke his firſt Preſentment by preſentment of another Clerk to the Biſhop; and the very Preſentment of the ſecond Clerk without any more ſignification thereof to the Biſhop, is in Law a Repeal of the firſt. *See Coke* 1. part *Inſtitutes* 560. 25. *Eliz.* 47. *Robt. Kelſeys* Caſe, acc. *See* 8. *Jac. in Co. B.* before *Waters* Caſe, *See* 17. *El. Dyer* 337. The Caſe of the Vicarage of *Tatton* before, and ſo it was alſo adjudged. *M.* 4. *Jac.* in *Co. B.* In the Biſhop of *Bangor* and *Williams* Caſe.

2. If the King hath cauſe to preſent by reaſon of Lapps, or otherwiſe, and preſents *I. S.* to the Biſhop, and before *I. S.* be Inducted the King dyes, and the ſucceſſor King without Reciting or making mention of the Preſentment of his Predeceſſor, preſents *I. D.* to the ſame Church; It was adjudged in that Caſe, That the demyſe of the King did determine the firſt Preſentation; For that the Preſentation was but a power given to the Ordinary, which was countermandable and revocable, and by the Preſentment of him

I. S. had *neque Officium, neque Beneficium.* 2. In that Caſe it was Reſolved, that the firſt Preſentation was Repealed, although it was not recited by the King, and was not within the Statute of *6. H. 8. cap.* 15. that the King ought to Recite the ſame, for that the ſaid Statute went to Loſſes, and did not extend to Preſentations to Churches. *M. 8. Jac.* in the Exchequer Chamber, *Calvert* and *Kitchins* Caſe.

3. In a *Quare Impedit* betwixt *Wright* and the Biſhop of *Norwich*, the Queſtion was, if the King hath Title to preſent for Lapſe, and preſents, and his Clerk is admitted and Inſtituted, but not Inducted, and dyeth before Induction; If now the King ſhall preſent for the ſaid Lapſe, becauſe the Church was not full againſt the King: It was Reſolved in that Caſe by all the Juſtices, That the King might Repeal ſuch Preſentment before Induction, and that the King might preſent *de novo. Tr.* 32. *Eliz.* in *Coke Pr. Wright* and the Biſhop of *Norwich* Caſe. *Leon.* 156.

4. A man before the Statute of 21. *H.* 8. had a Diſpenſation from the Pope for a Plurality, and at the time of the making of the Statute of 28. *H.* 8. had one Benefice with Cure of ſouls of the value of 8. *l.* and within a year after the making of the Statute of 28. *H.* 8. *cap.* 16. he obtained a Confirmation to hold and enjoy the effect of his Diſpenſation: It was the opinion of *Monſon* and *Manwood*, Juſtices, that the firſt Benefice was void by the Statute of 21. *H.* 8. and that the Statute of 28. *H.* 8. did not reſtore him to the ſame without a new Preſentation, notwithſtanding that the Statute of 28. *H.* 8. made the Bulls of Diſpenſation made by the Pope, good for one year, and that the Chancellor of the Augmentation might make a new Diſpenſation to him; But it was the opinion of *Dyer*, Juſtice, as the Statute of 21. *H.* 8. made the Diſpenſation void, ſo the Statute of 21. *H.* 8. did reſtore him to the Benefice without a new Preſentation; for when two Statutes are croſs in appearances one to the other, and no Clauſe of *Non obſtante* is contained in the Statute, ſo as one may ſtand with the other, ſuch a Conſtruction ſhall be made of them, that both of them may take effect; And in that Caſe it was agreed, That the King before Induction of the Clerk may Revoke his Preſentation; but otherwiſe it is of a common perſon, and ſo it was adjudged in the Exchequer Chamber, and alſo, If the Church be void by Reſignation, and upon the Statute of 21. *H.* 8. for that no Notice is given to the Patron of the Lapſe incurred to the King, yet he ſhall not Preſent, becauſe his Prerogative ſhall do no wrong. 18. *Eliz. Dyer* 348. *Weſtons* Caſe.

More *Preſentation.*

1. IN an *Ejectione firmæ* brought by *R.* Incumbent of the Church of *D.* It was found by Verdict that the King was the true Patron; And that one *W.* entered a Caveat in the life of the Incumbent, lying in extremity, *viz. Caveat Epiſcopus ne quis admittatur niſi convocatus*; the ſaid *W.* the Incumbent dyed, *N.* a ſtranger preſented one *M.* who was Admitted and Inſtituted; afterwards *W.* preſented one *G.* who was Inſtituted and Inducted; and afterwards *R.* procured a Preſentation from the King, who was Inſtituted and Inducted: In the Spiritual Court it came in Queſtion, who had beſt Right to the Church; and there ſentence was given, that the firſt Inſtitution was void by reaſon of the Caveat, and then the Church being full of the ſecond Incumbent, the King was put out of his poſſeſſion, and ſo his Preſentment was void: But in this Caſe it was Reſolved for *R.* the Preſentee of the King. 1. Becauſe that this Caveat was void being in the life of the Incumbent. 2. That the Church upon the Inſtitution of *M.* was full againſt all but the King, and then the Preſentation of *G.* was void, by reaſon of the *ſuper* Inſtitution, and therefore no Obſtacle in the way to hinder the Preſentation of *R.* And in that Caſe it was holden by the Juſtices, That if the ſecond Inſtitution be void, the Sentence of the Spiritual Court cannot make it good, for that the Spiritual Court ought to take Notice of the common Law, which ſaith, *Eccleſia eſt plena, & conſulta* upon the Inſtitution. *M.* 15. *Jac.* in *B. R. Rones* Caſe, *Hobt.* 133.

2. In a *Quare Impedit* the Caſe was, *A.* Vicar of the Church of *I.* being a Benefice with Cure, above the value of 8. *l.* 11. *Jac.* took a ſecond Benefice with Cure, and was Admitted, Inſtituted and Inducted, whereby the firſt Benefice became void, and continued void for two years, and ſo the Title devolved to the King to preſent: The Defendant pleaded the general Pardon of 21. *Jac.* and that *A.* was not a perſon excepted, nor the Cauſe of Lapſe excepted; And that *A.* being Incumbent, reſigned the Benefice of *I.* to *I. D.* who preſented the Defendant, who was Admitted, Inſtituted and Inducted before the *Quare Impedit* brought: On the part of the King, The Exception of the Pardon was ſhewed, wherein all Titles of Action of *Quare Impedit*, other then ſuch Actions and *Quare Impedit* which the King hath, or may have, *Ratione Lapſus* incurred, *Ultra* three years paſt, for or concerning any Benefice whereof any Incumbent was, or the laſt day of the Parlia-

Parliament ſhould be in actual poſſeſſion by the Preſentation of any Patron, or Collation of any Ordinary; and traverſed, that the Vicarage of *I.* became void by the Reſignation of *A.* upon which the Defendant did demur in Law: [illegible] Queſtions in this Caſe were: 1. The Church continuing void by Lapſe for divers years, Whether the ſucceeding King might take advantage of the ſaid Lapſe, Or whether he was barred by the Statute of 25. *E.* 3. *cap.* 1. It was urged, That the King had not this as his proper Right, or as his proper Advowſon, but in the right of him who had the Inheritance; And that the Statute of 25. *E.* 3. extended to all Succeſſors and Heirs of King *E.* 3. and that none of them might Preſent to a Church in anothers Right; But as to that Point, It was holden by the Court, That the Title of the King was not bound by that Statute, and that he might Preſent to a Church fallen in the time of his Predeceſſor. The ſecond Point was, Whether *A.* was Incumbent and might Reſign, and that reſted upon the general pardon of 21. *Jac.* and upon the Statute of 21. *H.* 8. of *Pluralities*: It was urged, That the Church was not abſolutely void by the Statute of 21. *H.* 8. but voidable *quoad* the Patron; and that till he preſented, the other remained Incumbent; and ſo he continuing ſo for two years, and being in poſſeſſion, the general Pardon of 21. *Jac.* eſtabliſhed him in his Poſſeſſion: But it was Reſolved by the greater part of the Juſtices in the Exchequer Chamber, That the Church was abſolutely void in *facto & jure*, by taking of the ſecond Benefice, and the Patron at his peril ought to take Notice thereof, and Preſent within ſix moneths, otherwiſe Lapſe ſhould incur; and it was ſaid, That that appears by the pleading, which is, That by the Admiſſion, Inſtitution and Induction to the ſecond Benefice, *Prima Eccleſia vacavit de perſona Incumbentis, & vacans continuavit*; and it was holden by the Juſtices, That the general words of a Pardon ſhall not inure to make a Diſpenſation, and the Church being once void ſhall not be full without a new Preſentation, Admiſſion and Inſtitution: And it was ſaid, That the Exception in the Pardon did not extend to *A.* for it extended to thoſe only who were Incumbents, and not to ſuch Incumbents as were in by Uſurpation, or by wrong, or were removeable by a *Quare Impedit*; Judgment was given for the Plaintiff. *M.* 9. *Car. in Co. B. Rots.* 441. The King and the Biſhop of *Canterbury*, and *Pryſt's* Caſe. *Cro.* 1. *H.* 258.

3. *Quare Impedit* brought, *ad preſentandum ad Eccleſiam de W.* It was moved that the Writ might be amended; for his Title of Preſentation is *ad Vicariam* of the ſaid Church, and not Paſonage: The Court doubted of it at firſt, becauſe it was an Original Writ; for the words *ad preſentandum ad Eccleſiam* always intend right of Advowſon of the Parſonage; but when the Title is to the Vicarage only, there it is *ad preſentandum ad Vicariam*. See 15. *El. Dyer* 323. Yet afterwards, becauſe it appeared that the party was a Purchaſer, and that that miſpriſion happened by the default of the Clerk, who did not purſue his Direction, It was Ordered, That it ſhould be amended. *Tr.* 3. *Car. in Co. B. Turner* and *Palmers* Caſe.

4. *A.* brought a *Quare Impedit* againſt *B.* and *C.* and the Biſhop of *London*, of the Church of *D.* and ſhewed that *I. S.* was ſeiſed of the Manor to which, &c. and preſented *C.* and after Let the Manor to which, *&c.* to the Plaintiff; and that the Church became void by the Reſignation of *C.* *C.* entituled himſelf to it by Preſentation, as to an Advowſon in groſs, and traverſed the Appendancy: *B.* pleaded as perſon imperſoned of the Preſentation of the King, and pleaded that *I. S. per quandam pecuniæ ſummam* betwixt him and *I. D.* preſented the ſaid *C.* and pleaded the Statute 31. *Eliz.* of Simony, which makes the Preſentation, Inſtitution and Induction void; ſo it belonged to the King to preſent, who preſented the ſaid *B.* the Defendant, and traverſed that the Church became void by the Reſignation of *C.* It was Objected that the Plea was not good, becauſe the Preſentation being the principal, which being confeſſed and avoided, cannot be traverſed; But it was the opinion of the Court, that the Plea was good; and being alledged that the Church was void *per mortem vel Reſignationem*, or otherwiſe, it ought to be confeſſed or traverſed; for that is the cauſe of his Preſentation, and the Iſſue ought to be taken, *Si vacaverit per mortem, vel per Reſignationem*, for the Preſentation, Admiſſion and Inſtitution are but conducing to the Reſignation: It was Reſolved, that Judgment ſhould be given againſt *C.* for the Plaintiff, he relinquiſhing his Plea, and Confeſſing the Action; and upon the Demurrer that Judgment ſhould be given for the Defendant, which was done accordingly. *Hill.* 22. *Jac. in Co. B.* Sir *Gregory Fenner* and *Nicholſons* Caſe. *Cro.* 1. *part* 44.

5. In a *Quare Impedit* by the King againſt the Biſhop of *N.L.* and his Wife Patron, and *S.* Incumbent, the Declaration was grounded upon the Statute of 31. *Eliz.* of Simony; upon a Simonical agreement between *L.* and his Wife, and *S.* who was preſented upon this Agreement, that preſently after his Preſentation he ſhould make a Leaſe of part to *C.* and of other part to the ſon of *C.* and ſhould for her pay to the Son of *C.* 10 *l.* and that *S.* was preſented accordingly: It was Reſolved in this Caſe, That the Preſentation of *S.* was meerly void, and the Party ſo preſented was utterly diſabled by the Statute of 31. *Eliz.* cap. 6. to take the ſame Benefice again to which he was preſented by Simony, and made thereby utterly uncapable to have another Preſentation to the ſame Benefice. *M.* 13. *Jac. in B. R.* The

King

King and the Biſhop of *Norwich* and *Zakars* Caſe. *Bolch.* 3. part. 88, 89, 50, 91.

See more of Preſentation to Churches, in the Titles Of Advowſon, Approbation, Ordinary: Parſon *and* Patron: Pleadings, *Quare Impedit.*

Preſentments in Courts.

1. A Man brought an Action upon the Caſe againſt *I. L.* Clerk, and Declared that the ſaid Clerk and his Predeceſſor, time out of mind had uſed to ſay Divine Service, and adminiſter the Sacraments to him and his Servants and Tenants, at his Chappel within his Manor, every Sunday throughout the year: It was adjudged, That an Action upon the Caſe did not lie in this Caſe; but his Remedy was for the default of the Service to ſue in the Spiritual Court; But it was ſaid, That if the Chappel were private for him and his Servants, within his Manor, there a private Action upon the Caſe upon a Preſcription, was maintainable by the Lord of the Manor; but the ſame being publique for all his Tenants within the Manor, they might complain in the Spiritual Court, and it ſhould be there redreſſed. 2. It was Reſolved, That for a common *Nuſance* in the high way a man ſhould not maintain an Action upon the Caſe, for then every man might be troubled in *infinitũ*, But if any particular perſon after the *Nuſance* tryed had a more particular damage, there for ſuch Injury the party ought to have a particular Action upon the Caſe; and for common *Nuſances* that they ſhould be reformed in the Leet. *Coke* 5. part 73. *Williams* Caſe.

2. Note, It was Reſolved by the Court, That if a man have Cony-berries in his own Land, which increaſes to ſo great a number that they deſtroy his Neighbours Lands adjoyning; his Neighbour cannot have an Action upon the Caſe againſt him that owneth the Cony-berries for that he may kill them, being *feræ naturæ*, and he who owneth the Cony-berries hath no propriety in them; and he ſhall not be puniſhed for the hurt that they do: In that Caſe it was ſaid, That for erecting of a Dove Coat the Lord might puniſh the party upon a Preſentment in the Leet; but *Quære* the Caſe, for that 16. *Jac.* in *B. R.* in *Dewel* and *Saunders* Caſe in *B. R.* it was Reſolved to the contrary. *Coke* 5. part 104. *Boulton.* Caſe.

3. In Action upon the Caſe, the Caſe was, That a Copyholder in Fee did preſcribe to have Common in *B.* and he alledged that the Defendant put his Cattel into his Common, and that they had deſtroyed the Common, ſo that he could not have any benefit of the Common. Upon *Not Guilty* the Jury found that for the putting of his Cattle he was not guilty, but as to the feeding and conſuming of the graſs he was guilty: In this Caſe theſe Points were Reſolved. 1. That the Action upon the Caſe did lye, and the ſubſtance of the Verdict was to be reſpected, and not the Circumſtances; and although it is not found that the Defendant put in his Cattle, yet if his Cattle eſcape and ſtray there, and deſtroy the Common, Action upon the Caſe lyeth, for the deſtruction of the Common is the Subſtance and cauſe of the Action. 2. Reſolved, That the Commoner ſhall have an Action for conſuming of his Feeding and Paſture, for it is a damage and wrong to him; And a Commoner may take the Cattle of a ſtranger damage feaſant there; And therefore, If he ſhall not have an Action, all the feeding might be taken and depaſtured by Cattle, or might be detained and kept there with a ſtrong hand, and the Commoner might diſtrain them damage feaſant; for after the cattle have conſumed the Common they may eſcape, and every Commoner might ſurcharge the Common: But it was Reſolved, That for every petit feeding the Commoner ſhould not have an Action, but the depaſturing ought to be ſuch, *quod communiam habere non potuit, ſed totum proficuum ſuum amiſit*; but the Tenant of the Soyl may have an Action. *Coke* 9. part 112, 113. *Robt. Marrys* Caſe.

4. In Treſpaſs, the Defendant juſtified, That the Plaintiff was a common Baker, dwelling in *T.* and that it was preſented in a Leet in *T.* That he ſold Bread againſt the Aſſiſe *in locis Vicinis*, whereupon he was amerced, and the Amercement aſſerred to 10*s.* and that by a Precept in Court he did diſtrain the Plaintiff: In this Caſe the Court gave Judgment for the Plaintiff, becauſe it doth not appear that the Offence was committed within the Juriſdiction of the Leet, which ſhall not be preſumed unleſs it be pleaded; and the Plea here is abſurd, for it is ſaid that he was amerced without ſaying What. *Paſc.* 14. *Jac. B. R. Wilton* and *Hardingtons* Caſe. *Heb.* 129.

5. The Steward of a Leet being in Court, did ſay to the Defendant who was Reſident within the Precinct of the Leet, That he muſt be ſworn for the Queen to make Preſentments at the Court, To which the Defendant Replyed, in ſaying, *I ought to be ſworn, Toulye:* It was agreed by the Court in this Caſe, That this was a Miſdemeanor, for which the Defendant was fineable; for every Leet is the Queens Court, and a Court of Juſtice to which Reſpect and Reverence ought to be given, and theſe words are in great contempt of the Court; and it was ſaid by *Popham* Chief Juſtice, That if any man miſdemeaned himſelf

himſelf in the Leet in any outragious manner, The Steward might commit him, *Paſc.* 36. *Eliz.* in *B. R.* The Earl of *Lincoln* and *Fiſhers* Caſe. *Owen* 113.

6. In a Replevin the Defendant did avow as Fermor of the Manor of *B.* to St. *Johns* Colledge in *Oxford*, and layed a Preſcription in him and his Fermors to diſtrain for all Amercements in the ſaid Manor, and ſhewed that the Plaintiff in the Replevin was preſented by the Homage for not repairing a Houſe, being a Cuſtomary Tenant, according to a fine impoſed upon him at a former Court, for which he was amerced by the Steward to 1 *s.* And alſo at the ſame Court he was amerced by the Steward for not Ringing his Hoggs to 3. *s.* 4. *d.* for which Amercements he did diſtrain; And upon *Nihil dicit* Judgment was given for the Tenant to have Return; Whereupon Errour was brought, and the Errour aſſigned was, That there was not any Preſcription layed in the Avowry for the Lord to amerce the Tenants, and of common right he cannot do it, for the Lord cannot be his own Judge, and therefore he ought to enable himſelf to diſtrain by Preſcription: Alſo the fine is layed to be aſſeſſed by the Steward, whereas it ought to be by the Suitors, for they are Judges, and not the Steward: It was holden by the Court, That the Steward may aſſeſs a Fine for a Contempt, but not amerce; if not by Preſcription; Alſo it was holden, That the Lord of a Manor cannot aſſeſs an Amercement for a Treſpaſs done to himſelf or to his Lands, but otherwiſe it is of a common Treſpaſs done in the Land of another; but for a Diſtreſs he ought to preſcribe. *Paſc.* 33. *Eliz.* in *B. R. Blunt.* and *Whittons* Caſe. *Leon.* 241.

7. The Steward of a Court Leet impoſed a Fine jointly upon *A. B.* and *C.* chief pleaders, becauſe they refuſed at the ſaid Court Leet to pay *pro Certo Letto*, 10 *s.* to the Lord, for which the Lord diſtrained and avowed: It was in this Caſe amongſt other things Reſolved, 1. That the Fine ought to have been aſſeſſed upon them ſeverally and not jointly. 2. That the Lord could not diſtrain for Head-ſilver, or *pro certo Letto*, becauſe the ſame is againſt right, and for the Private of the Lord, the which he could not have without a Preſcription; and therefore as he ought to preſcribe in the Principal, ſo he ought in the Diſtreſs. 3. That for an Amercement in a Court Baron, the Lord cannot diſtrain without a Preſcription; but for a Fine, or an Amercement in a Leet, a Diſtreſs is incident of common Right. *Coke* 1. part 41. *Godfreys* Caſe. *Coke* 8. part 38. *Greiſleys* Caſe, acc.

8. Note, It was holden by all the Juſtices, That if a man ſetteth out his Tythe Corn, and afterwards taketh it away; the Parſon may ſue him in the Spiritual Court for the ſame, Or he may bring his Action of Treſpaſs againſt him; But if the Parſon ſue in the Spiritual Court a ſtranger for taking away the ſaid Tythe which were ſet forth, that the ſame is a *Præmunire* in the Parſon. *Hill* 6. *Jac.* in Co. *B. Brownl.* 1. part. 30. acc.

9. Note, by the Juſtices, That it was Reſolved, *Paſc.* 4. *Jac.* That when any Eccleſiaſtical Judge doth uſurp upon the Temporal Law, becauſe the Intereſt or cauſe of the Subject is drawn *ad aliud examen*, that is, when the Subject ought to have his Cauſe ended by the Common Law, whereunto by birth right he is inheritable, he is drawn *ad aliud examen*, to be decided by the Eccleſiaſtical Law; That the ſame is an Offence *contra Coronam & Dignitatem Regiam*; and the ſame (as the Caſe may be) is a *Præmunire*: And it was Reſolved, That although the High Commiſſion be the Court of the King, yet their Proceedings are Eccleſiaſtical; and if they uſurp upon the Temporal Law, the ſame is an Offence, and within the Statutes of *Præmunire*, as appeareth by the very Act of 1. *Eliz.* which never intended to take away the Offence of *Præmunire*, but expreſſly provided for it. See *Coke* 12. part. 38. in the Caſe of *Præmunire*.

10. In all Caſes when the Cauſe originally belongs to the Eccleſiaſtical Court, and cognizance and ſuit is proſecuted there; (although in truth the Cauſe, (all Circumſtances being diſcloſed) belongs to the Kings Court, and to be determined by the Common Law) Yet in that Caſe no *Præmunire* lies, but only a Prohibition; But although the Cauſe originally may appertain to the Cognizance of the Eccleſiaſtical Judge, Yet if he ſue for it in the Nature of a Suit, which doth not belong to the Eccleſiaſtical Court, there a *Præmunire* lyeth.

11. *A.* ſued a *Præmunire* againſt a Parſon, who by Citation convened him into the Eccleſiaſtical Court, and there Libelled againſt him for taking of Tythes which were ſevered from the 9 parts: In that Caſe the Parſon was condemned, and had Judgment, That he ſhould be out of the Kings protection, and ſhould forfeit all his Lands, Goods and Chattels, and ſhould ſuffer Impriſonment, and ſhould alſo pay damages to the party, as it was adjudged. 17. *H.* 8. in *Spilmans* Reports, *Turbervilles* Caſe: But it was holden by the Court, That when the Cauſe originally belongs to the Cognizance of the Eccleſiaſtical Court, although that hold plea of any incident to it, which belongs to the Common Law, there Prohibition lyeth, and not *Præmunire*.

12. In a Bill of *Præmunire* Preſented againſt the Biſhop of *N.* the matter was this: Within the Town of *Thetford*, in the County of *N.* time out of mind, *&c.* there had been a Cuſtom, That all Eccleſiaſtical Cauſes ariſing within that Town ſhould be determined before the Dean of that Town, who had peculiar Juriſdiction in it, and that none of the ſame Town ſhould be drawn in plea in any other ſpi-

tiual Court for Eccleſiaſtical Cauſes; and if any be againſt the ſaid Cuſtom drawn in ſuit before any Eccleſiaſtical Judge, and it be preſented before the Mayor of the ſaid Town, ſuch party ſhall forfeit 6. *l.* 8. *d.* And that ſuch a one ſued in the Conſiſtory of the Biſhop for a thing ariſing within the ſaid Town, which was preſented before the Mayor, for which he had forfeited 6. *l.* 8. *d.* The Biſhop cited the Mayor to appear before him at his houſe at *H.* in the County of *S.* and upon his appearance Libelled upon all the matter, and injoyned the Mayor upon pain of Excommencement to annul the Preſentment: It was Objected, That aſwell the Preſentment as the Cuſtome was void, and that the Biſhop had not drawn the party *ad aliud examen*, nor was it *contra Coronam & Dignitatem Regiam*; But it was Reſolved by the whole Court, That be the Cuſtom and Preſentment good or not, yet this is a Temporal thing determinable at the Common Law, and not examinable in the ſpiritual Court; and therefore, That the Biſhop had incurred a *Præmunire*, and thereupon Judgment was given againſt the Biſhop, that he ſhould be out of the Kings Protection, and ſhould forfeit his Lands, Goods and Chattels, to the King, and be impriſoned *ad voluntatem Regis*. Hill 25. *H.* 8. The Biſhop of *Norwich* Caſe. *Vouch. in Coke* 12. part 41. in the Caſe of *Præmunire*.

13. Upon a ſpiritual Verdict in *Ejectione firmæ*, the Caſe was, *A.* was indicted of a *Præmunire* upon the Statute of 13. *Eliz.* afterwards he made a Gift in tayle of the Land, and was afterwards attainted by Verdict, and had Judgment: It was afterwards found by Inquiſition upon a Commiſſion out of the Exchequer, that *A.* was ſeiſed in Fee of the Lands at the time of the Offence committed, and that afterwards the Queen by Letters Patent granted the Lands to *I. S.* 1. The Queſtion was, Whether an Attainder in a *Præmunire* ſhall have Relation to the Offence for the forfeiture, or only to the time of the Judgment. 2. Admitting it relate to the Offence, Whether the Patent after Inquiſition by Commiſſion under the Exchequer Seal, (no Office being found under the great Seal) be good by the Statute of 18. *Eliz.* which makes a Patent upon valuable Conſideration good, notwithſtanding there be not an Inquiſition under the great Seal: The firſt Point the Juſtices did not Reſolve, being a Caſe of difficulty; for the ſecond Point, Reſolved, That nothing veſted in the King till Office found; for the Freehold being in the party offending at the time of the Attainder, cannot be deveſted out of him but by Office under the great Seal; and it was ſaid that this Caſe was out of the Statute of 18. *Eliz.* and therefore upon this Point Judgement was given for the Defendant. *Hill* in 1. *Gar.* in B. R. *Groſs* and *Gayers* Caſe. *Cro.* 1. part 323.

14. If a Tenant in taile be attainted in a *Præmunire*, he ſhall forfeit the Land but during his life; and although the Statute of 16. *R.* 2. is, That ſuch perſon ſhall forfeit to the King all his Lands, Tenements, Goods and Chattels; yet that muſt be intended of ſuch eſtate which he may lawfully forfeit, and that is the Land in tail, but during his own life; and it was Reſolved, That the Statute of 16. *R.* 2. doth not take away the Statute of *Donis*, but he ſhall forfeit all his Fee-ſimple Lands Goods and Chattels. 7. *H.* 4. 20. *Simon Beverleys* Caſe, and ſo it was Adjudged, *Hill* 21. *Eliz.* in *Trudgins* Caſe. *Coke* 1. part *Inſtitutes* 130. acc. *Coke* 11. part 63. in Doctor *Foſters* Caſe. acc.

15. Note, It was the Opinion of the Juſtices of the Kings Bench, That if one Spiritual perſon doth ſue another Spiritual man in the Court of *Rome* for a matter ſpiritual, where he might have Remedy before his Ordinary, *viz.* the Biſhop of the Diocеſs within the Realm, that he incurreth the danger of a *Præmunire*, it being *Contra Ligeanciæ ſuæ debitum, & in contemptum Domini Regis, & contra Coronam & Dignitatem ſuam*; as if he wanted Juſtice, or Juſtice was not executed in the Eccleſiaſtical Courts within the Realm. *Coke* 5. part. in the Caſe of Eccleſiaſtical perſons. 23. 24.

16. By the Statute of 25. *E.* 3. Cap. 22. A man attainted in a *Præmunire* is by expreſs word out of the Kings Protection generally; It is ſaid, That that extended only to a Legal Protection, for the Parliament could not take away the Protection which the Law of Nature giveth unto him, and therefore notwithſtanding that Statute, the King may Protect and Pardon him; and although by that Statute it was enacted, that it ſhould be done with him as an Enemy, by which words a man might have ſlain ſuch a perſon until the Statute made 5. *Eliz.* cap. 1. Yet the King might Protect and Pardon him. *Coke* 7. part 14. in *Calvins* Caſe.

17. The King brought a Prohibition againſt the Prior of *W.* That where the King had recovered in a *Quare Impedit*, the Defendant ſent one to *Rome* with an Appeal, and ſued there to avoid the Judgement, againſt the Statute of *Præmunire*; and upon *Not guilty* pleaded, it was found againſt the Defendant, and thereupon Judgment was prayed for the King upon the new Statute, *viz.* 27. *E.* 3. cap. 1. in Caſe of *Præmunire*; But it was Reſolved, That the King could not have Judgment, becauſe the Judgment ought to be conformable to the Original, and this Suit was not brought according to the Statute, but by a Writ of Prohibition at the Common Law. 30. *E.* 3. 11. *Coke* 9 part 74. in D. *Anſleys* Caſe.

Prerogative. See before Title *King.*

1. IN many Caſes the King who claimeth by a Subject, ſhall be in better caſe in reſpect of the Dignity and Prerogative incident by the Law, to the perſon of the King; then the ſubject himſelfe, by whom he claimeth; As if the King be ſeiſed of a rent ſeck by attainder of Treaſon or by grant he ſhall diſtrain for the ſame rent, not only in the land charged, but in all his other Lands, and yet the ſubject by whom he claimeth ſhall not diſtrain for the ſame: And if the King purchaſeth a Seignioric of which land was holden by poſterioritie, the King ſhall be in better condition then the ſubject from whom he claimeth, and ſhall have the Priority. *Coke.* 5. part. 56. in *Knights* Caſe.

2. *A.* Seiſed of Lands holden in *Capite* made a feofment thereof to the uſe of his brother for life, the remainder to his Eldeſt Son in tail, the remainder to the younger in tail, with diverſe remainders over by Covin, to deceive the King of his Ward, and dyed; Office found the Covin; the Eldeſt Son before Livery died without Iſſue, the youngeſt Son within age. It was Reſolved in this Caſe, that although the Covin was found by office, yet the King ſhould have but the third part of the profits. 2. That the younger Son within age ſhould not be in Ward, becauſe the Covin did not extend to the youngeſt Son, and the King had once advantage of the Statute, after the death of *A.* the Father, and the younger Son claimes by force of a remainder. *Coke* 5. part. 165. *Mights* Caſe.

3. Tenant in taile of diverſe houſes and other Lands holden in *Capite* in fee, by Indenture made leaſes of the houſes whereof he was ſeiſed in taile for years not warranted by the Statute of 32. *H.* 8, and died without Iſſue, the reverſion diſcended to his general heires who were in Ward of the King: Office found that he died ſeiſed of an Eſtate in taile of the houſes, and that they deſcended to the ſaid general heires; It was Reſolved in this Caſe. That the King by his Prerogative in privity of the heires in taile, ſhould avoid the ſaid leaſes, during the time that the heires were in Ward. *Coke.* 7. part 7. The Earle of *Bedfords* Caſe.

4. If the Tenant of the King dieth ſeiſed of diverſe Manors, and it is found by Office that he died ſeiſed of one: In Dower brought againſt the heire of full age, he ſued a *Circumſpecte agens*: It was Reſolved, that in that caſe it extended to no more then was found in the Office, for this Writ is in the Nature of an Aide Pryer, and the King hath no right to ſeize more then is found in the Office. But it was Objected, that it ſhould be allowed as well as if the Heir was within age, for that by the Statute of *Prærogativa regis* the Wife may be endowed in Chancery: It was anſwered, that by the Statute of *Bigamis. Cap.* 4. *Aide* ſhall not be granted of the King in that Caſe: and that before the Statute of *Prærogativa Regis*, the King nor other Lord could not endow the Wife, if the Heir were of full age; becauſe he is not then Guardian; and the Statute of *Prærogativa Regis* giveth power to the King to endow the wife in ſuch Caſe, if ſhe will, and not otherwiſe; The Court in the principal Caſe, diſcharged the Tenant from ſuing to the Queen, and gave him day to plead an iſſuable plea. *Coke* 4. part. 16, 17. *Ann Bedingfields* Caſe.

5. Grandfather, Father, and Son, the Grandfather ſeiſed of a houſe holden in *Capite*, and of other Lands holden in *Gavelkind*, and of other Lands in Socage, deviſed part of his Lands to the Son in taile, and the other part of his Lands for the advancement of the other his Grand-children, and dyed ſeiſed, the Son within age, all the Grand-children being alive: It was Reſolved in this caſe. 1. That when by will He deviſed the ſame to his Son, that in ſuch Caſe, the ſaving in the Statutes of 32. and 34. *Hen.* 8. gave to the King the ward *& Primer ſeiſin*; and therefore the King ſhould have the third part of the whole. 2. Reſolved, That the King ſhould have the third part out of every ſeveral part, ſo as the charge ſhould be equal, and ſhould not lie upon one onely. *Cook.* 4. part 133. *Matthew Menes* Caſe.

6. It was found by Office, that *I. S.* by Licence of the King did Marrie to the Kings Neiſe, and that certain Lands diſcended to the ſame Neiſe, and that her Husband had Aliened the Lands without the Kings Licence to another, and for that cauſe the Lands were ſeiſed into the Kings hands. The Allience in that caſe came into the Chancery, and ſhewed the matter, that he Married the Neiſe with the Licence of the King; and that the Lands diſcended to Her after the Marriage. It was awarded in that Caſe, That the Allience ſhould have reſtitution of the Lands out of the Kings hands; and by that caſe. It appeareth, that the Wife being Married with the Kings Licence, She was Enfranchiſed during the Coverture; and when the Title of the King and of a ſubject doth Concurre, the Kings Title ſhall be preferred. *Cook.* 4. part 75. in the Commanalty of ſadlers Caſe.

7 If the King make a leaſe for years rendring Rent upon Condition to be paid, for non payment of the Rent, the King ſhall take advantage of the Condition without any demand of the Rent, it being a thing undecent and againſt the Dignitie of the King to wait upon his Subject, or to demand any thing of him, and this is by Reaſon of a perſonal

Prerogative annexed to the perſon of the King, and not in reſpect of the Nature and Quality of the rent, for that remaines the ſame whether it be paid to the King, or to a Common perſon. *Coke.* 4. part. 73. *Boroughs* Caſe.

8 Note in all Caſes when the King is party the Sheriff (if the door be not open) may after notice given of the Cauſe of his coming, and requeſt made to have the doores open, break open the houſe of the partie either to take, or make other executi n of the Kings proceſſe, if he cannot otherwiſe enter into it, but ſo he cannot do in the Caſe of a Subject: and for Felonie, or ſuſpition of Felonie, the Kings Officer may break the houſe to take the Felon, becauſe in every Felonie the King hath an Intereſt, and where the King hath an intereſt, the Writ is *Non omittas propter aliquam (aliam) Libertatem*; and therefore the Liberty or Priviledg of an Houſe, ſhall not hold out, againſt the King. *Coke.* 5. part. 91. in *Semoyes* Caſe.

9. A Common Recovery in a Writ of Entre againſt *I. S.* of the Manor of *D.* was drawn and endeavoured to be ſuffered wherein the Tenant prayed an aid of the King by reaſon of a warranty of the King whereby he warranted that Land and granted to make recompence upon Eviction, and this *Aide prayer* was inſtead of a voucher: and although the Kings Attorny had a warrant from the King to enter into the Warranty, and prayed that the Defendant might Count; & the demandant, *petit Cer ſus Dominum Regem*; Yet becauſe that ſuch a Courſe had not been ſeen, nor any Preſident ſhewed that ever any ſhould Count againſt the King as Vouchee, and for that this Courſe was deviſed, to bar a remainder exp ctant upon any eſtate taile in the King, therefore the Court would not ſuffer the ſaid Recovery to paſſe, for that the King ſhall never render in value upon Voucher, but in ſuch caſe, they ought to ſue to the King by Petition to have in value, and not by way of Voucher. *Mich.* 3. *Car. in Co. B. Cro.* 1 part. 68.

See at large of Prerogative, In the Title, King: and Grants of the King: and other Titles before.

Primerſeiſin.

See for this in toto: in the Titles of Guard: Livery & Ouſter le mayne.

Priviledge.

1. *What it is, Where, and for what Perſons, and in what Courts; And in what Courts Priviledge ſhall be, or may be demanded and allowed; And in what not.*

1. *Priviledge* is an Immunity, Liberty, or Franchiſe, claimed, belonging, or granted to ſome Office, Perſon, Town, place or Manor, by Preſcription, Cuſtome, or by the Kings Grant, or his Letters Patents; It is *Quaſi Lex privata*, or *Beneficium perſonale*, which in ſome Caſes *Extinguitur cum perſona.*

2. See 11. *E.* 4. *Fenny*, Sergeant at Law, being impleaded in the Kings Bench by Bill; he pleaded That he was a Sergeant at Law, and that all Sergeants at Law have uſed, time out of mind, to be impleaded in the Court of Common Pleas by Original Writ; and claimed his Priviledge, and the Priviledge was allowed. See in *Tr.* 6. *E.* 6. *Dyer* 71. and See 28. *H.* 8. *Dyer* 24. acc.

3. *A.* Servant of Sergeant *Hedley*, uſually attending upon him, was Arreſted by a Proceſs out of the Court of Marſhalſea; and he obtained a Writ of Priviledge out of the Court of Common Pleas, Reciting, That Sergeants at Law which are attending in that Court, and their Servants ordinarily waiting upon them, ought to enjoy the priviledg to be ſued in that Court; which being delivered to the Steward of the Cou t of Marſhalſey he would not allow thereof, ſuppoſing Sergeants at Law ought not to have ſuch Priviledges for them & their Servants: It was the opinion of the whole Court, that he ought to have the Priviledge; for they are properly attending at this Bar, and Sergeants only are to attend at the Common Bench, and ſhall be impleaded there and not elſewhere, and ſo it was Adjudged in *Martyn*, Sergeant at Law's Caſe, who was Arreſted in *London* at the Suit of the Biſhop of *Winchester*, and others, and had a Writ of Priviledge, Reciting, That Sergeants at Law were to be attendant to the ſaid Court, *ex officio plus quam alibi*; and therefore it was commanded that they ſhould ſurceaſe their Suits in *London* againſt the Sergeant. *M.* 3. *Car. in Co. B.* Sergeant *Hedleys* Caſe. *Cro.* 1. part 59, 60.

4. *A.* Clerk of the Chancery was ſued in the Common Plea, in Debt to the Outlawry, he ſued a *Superſedeas* to the Sheriff *quia improvide*, and afterwards ſued a Writ of Priviledge directed to the Juſtices of the Common Pleas, reciting the Priviledge of the Chancery

Chancery, requiring them to ſurceaſe; But the Priviledge was diſallowed, becauſe the Court was ſeiſed of the Plea by the Act of the Defendant himſelf; for inaſmuch as he ſued the *Superſedeas quia Improvide*, he had attorned the Juriſdiction of the Court, for every *Superſedeas quia Improvide*, recites an appearance in Court; but if he had not ſued forth ſuch Writ, notwithſtanding Exigent was awarded, the Priviledge ſhould have been allowed him. *Paſc.* 24. *H.* 8. *Dyer* 33, 34.

5. *A.* Receiver General of the Queens Revenues of the Crown in the County of *W.* being ſued to the Exigent in an Action of Debt in the Common Pleas, brought a Writ of Priviledge out of the Exchequer, directed to the Juſtices of the Common Pleas, *in hæc verba*, viz. *Quia datum eſt nobis intelligi.* That *A. B.* and his Wife, *Edmundum Hunt generoſum, Receptorem noſtrum generalem revenc. Coronæ noſtræ, in Com.* W. *coram vobis per nomen* E. H. *nuper de* London *generoſum trahant in placitum, Quo minus* ideo E. H. *nobis de revenſionibus predict. ſatisfacere valeat in noſtri damnum, & revenſionum predict. ſolutionis retardationem; Nos volentes Prærogativam noſtram ſervare illæſam, Vobis Præcipimus ne placitum predict. nec aliquod aliud placitū verſus predict'* E. H. *ad ſectam aliorum quorumcunque tenenc'.* &c. But this Writ of Priviledge was not allowed by the Court; by which it appeareth, That a Receiver ſhall not have the Priviledge of the Exchequer, allowed in a Suit brought againſt him in another Court. *M.* 16. *Eliz. Dyer in Co. B.* 328. *Hunts* Caſe.

6. *Laſſels* was taken in Execution upon a *Capias ad ſatisfaciendum* out of the Kings Bench at the Suit of the Lord *Dacres*, by the Sheriffs in *London*: Thereupon a Writ of Prærogative iſſued out of the Exchequer to have his body there, the Teſte of which Writ bore date before the Arreſt, and the return thereof was before the *Capias*; The Sheriffs of *London* brought the body of *Laſſels* into the Exchequer, and returned the Cauſe of the detainer of it, and upon ſhewing that the Priſoner was indebted to the Queen 100. *l.* the Priſoner by the Court of Exchequer was committed to the Fleet, as well for the Execution to the Lord *Dacres*, as for the debt due to the Queen, which he confeſſed in Court; Afterwards a *Habeas Corpus* came to the Warden of the Fleet to have the body of *Laſſels* at a day in the Kings Bench; at which day the Warden of the Fleet brought his body, and in his return ſhewed all the ſpecial matter; whereupon the Priſoner was remanded to the Priſon of the Fleet. *Paſc.* 3. *Eliz. Dyer* 197. *Laſſels* and the Lord *Dacres* Caſe. See *Coke* 1. part, *Inſtitutes* 131. and ſee that ſo it was adjudged in *M.* 5. *Car.* in the Exchequer: In the Lady *Sands* Caſe.

7. *P.* a Clerk of the Chancery married a woman who was Executrix to her Husband: In Debt brought againſt them in the Common Pleas; The Husband brought a Writ of Priviledge to have removed the Action; But the Writ was diſallowed by the Juſtices, and the Defendants ruled to anſwer there, becauſe the Wife was joint [illegible] the Husband and ſhe could not [illegible] Action with ledge, and therefore not the Husband. See 34. *H.* 6. 29. 35. *H.* 6. 3. acc. And although the Book 27. *H.* 8. 20. was Objected, where the Caſe was, That a man brought an Action againſt the Husband, and at the Pleas returned he and his wife were Arreſted into an inferiour Court *veniendo* to *Weſtminſter*, and there the Priviledge was granted: It was ſaid by the Lord *Dyer* that the reaſon of that Caſe was, becauſe the Wife came in that Caſe in aid of her Husband to follow the Suit. *M.* 24. *Eliz.* in *Co. B. Poles* Caſe. *Godbt.* 10. See *Dyer* 377. The ſame Cate.

8. *I. S.* brought Debt againſt Sir *Simon Fanſhaw* and his Wife as Executrix to another, and ſued them to the Exigent, at the return of the Exigent Sir *Simon* came voluntarily into the Exchequer, and prayed his Priviledge, becauſe he was an Officer of the Exchequer: It was a Queſtion in this Caſe, If he ſhould have his Priviledge, or no, for two Cauſes: 1. Becauſe he is ſued meerly for conformity and neceſſities ſake. 3. Becauſe he demands his Priviledges at the Exigent: It was Objected, That he ought to have his Priviledge, and ſome Preſidents were ſhewed, as *Paſc.* 44. *Eliz.* in the Exchequer: *James Aſhtons* Caſe, who was ſervant to the Lord Treaſurer. See *Ethrington* and *Aſhtons* Caſe. *Noy* 68. adjudged, &c. and 21. *Jac. Rott.* 1211. *Stantons* Caſe. In both which Caſes the Husband and the Wife were ſued in the right of the Wife, and the Husband had his Priviledge, and ſo it was ſaid; It was Reſolved *Hill* 8. *Jac.* in the Exchequer in *Watts* and *Glovers* Caſe; But in the principal Caſe the whole Court was of opinion, That the Defendant ſhould not have his Priviledge, becauſe the Action was brought againſt him in *Auter droit*, *viz.* in the Right of his Wife as Executrix; but no Judgment was entred in that Caſe. *Tr.* 17. *Car.* in *Co. B. Levett* and Sir *Simon Fanſhaws* Caſe. *Wilſh.* 149.

9 A man brought an Action upon the Caſe of *Trover* and *Converſion* in the Exchequer: the Defendant pleaded that the Plaintiff had an Action depending for the ſame *Trover* in the Kings Bench: It was Reſolved in that Caſe, That the Bill brought in the Exchequer ſhould abate, becauſe a man ſhould not be twice puniſhed for the ſame Cauſe: And Secondly, It was Reſolved, That although the firſt Action was in another Court, yet the Plea was good, becauſe it did not appear by the Pleas, whether the Plaintiff or Defendant was priviledged in the Court of Exchequer; and then by the Statute of *Articuli ſuper Chartas. Cap.* 4. which provides that No Common Pleas ſhall be holden in the Exchequer. *Co.* 5. part 26. *Sparries* Caſe. 10. *A.*

10. *A.* an Accomptant in the Exchequer to the King, was ſued in the Court of Kings Bench: *Southerton* Baron came into Court with his Book of Accompt the Accomptant, and that the Suit in that Court might be ſtayed: It was ſaid by *Williams* Juſtice, That the ſame ought not to be granted upon the prayer and Averment of the Baron only, but the ſame ought to be upon the plea and prayer of the party himſelf; and he ſaid, That in many Books it is adjudged, That without pleading and prayer of the party himſelf it could not be: Whereupon the Court demanded of *Man* the Secretary, How the Preſidents were; *Man* anſwered the Court, That by all the Preſidents, upon the Prayer and Averment of a Baron only, and without any Plea of the Party, the Court had uſed to grant the Priviledge: And ſo in the principal Caſe the Priviledge was granted by the Rule of the Court without any Plea or Prayer of the Party. *M.* 10. *Jac.* in *B. R. Bolſt.* 2. part 36.

11. In the Caſe of Priviledge by Priority of Suit, the Caſe was, Sir *Edw. Waterhouſe* was arreſted by *Latitat*, at the Suit of *Ingram*, upon a Bond of 1000 *l.* for the payment of 1000 *l.* the mony being for Land ſold to him; After the *Latitat* awarded the mony was brought into the Kings Bench; but before the return of it an Attachment iſſued in *London* againſt Sir *Ed. Waterhouſe*, for which he was Arreſted for divers Debts due by him, in which he ſtood bounden for *D. Waterhouſe*: It was prayed that the Kings Bench having the Priority of Suit, the mony might ſo be taken out of Court for *Ingram* the Plaintiff there: On the other ſide, on the behalf of the Creditors in the Attachment it was prayed, that the mony might not be delivered out of Court before the debts to be recovered againſt him in *London* be paid or ſatisfied, or he put in ſufficient Security to anſwer them their debts there recovered: It was ſaid by *Williams* Juſtice, That the Law and Courſe of this Court is, That if a *Latitat* do firſt iſſue, and an Attachment afterwards, that this Court had uſed to have the Priviledge, and are not to ſtay their proceedings by a ſubſequent Attachment; But the Court ſaid and were of Opinion, That if it be ſo as the Court is informed, that Sir *Edw. Waterhouſe* ſtood indebted to others ſums of mony borrowed before for him, and not paid, this 1000 *l.* they ſhall have to pay thoſe debts, and adviſed the matter to be examined; and the mean time ſaid it was in the power and diſcretion of this Court to keep the mony ſtill there until the Recovery in *London* had againſt him be ſatisfied; and not make this Court a means to ſtrip and ſtop others of their proceſs and juſt Debts. *Tr.* 10 *Jac.* in *B. R. Ingram* and Sir *Edward Waterhouſes* Caſe. *Bolſt.* 1. part 217, 218.

12. A Clerk of the Kings Bench ſued an Officer of the Common Pleas; he in the Common Pleas claimed his priviledg, but could not have it granted unto him; For it was ſaid by the Court, That it is a general rule, That where each of the perſons is a perſon [illegible] privilege, he who firſt claims it, *viz.* the Plaintiff, ſhall have it. As if an Attorney of the Common Pleas ſueth one of the Clerks of the Kings Bench, yet he of the Kings Bench ſhall not have the priviledge although the Kings Bench be the more high Court, becauſe the other is Plaintiff, and firſt claimeth it. *M.* 24. *Eliz.* in B.R. *Godb.* 81.

13. A man made a contract with another man when he dwelt in *London*; after the Contract made he went from the City of *London* and dwelt in the Cinque Ports; and being afterwards impleaded in the Kings Bench, he prayed his priviledge of the Cinque Ports, which is, That thoſe of the Cinque Ports ſhall not be ſued elſwhere but in the Cinque Ports, as the Book of 12. *El.* 4. is: The Court ſaid that that was true for any matter or cauſe ariſing in the Cinque Ports; but if a man enter into an Obligation of 1000 *l.* here, and then go and dwel in the Cinque Ports, perhaps to the intent that the Obligee might loſe his debt, It was adjudged, That the defendant ſhould not have the priviledge. M. 29. *Eliz.* in B.R. *Godb.* 90.

14 *A.* was ſued in an Action of Battery in the Common Pleas; upon *Not guilty* pleaded, it appeared, that the defendant and others had th own daggers at the plaintiff, and maimed him in an outragious manner; wherefore the Court adviſed the Jury to conſider as well of the fear they put him into of his life, as of the Mayhem, and give damages accordingly: The Jury being gone from the Bar, the defendant cauſed the plaintiff to be arreſted in the Kings Bench for a Battery done to him by the plaintiff before, and this was ſhewed to the Court, for which the Court was grievouſly offended with *A.* for they ſaid, that when a man is ſued here he ought ſafely to come and go by the priviledge of this place, without vexation elſewhere: *A.* ſaid he did it out of ignorance: But the Court ſaid, *Ignorantia Iuris non excuſat*, and commanded *A.* to releaſe the plaintiff of the arreſt; and alſo the Court impoſed a fine upon *A.* for his contempt, which he was enforced preſently to pay in Court; and the plaintiff was diſcharged of and from the arreſt. M. 29. *Eliz.* in *Co. B. Leas Caſe. Goldesbr.* 33. 34.

15. Note: A Writ of Priviledge was ſigned by all the Juſtices of the Common Pleas for *G.V.* a Clerk under the *Cuſtos Brevium* to free him from being a Souldier, reciting, That it is the Cuſtom and Priviledge of the Court, that neither the Attorneys nor Clerks of the Court ſhall be preſſed for Souldiers, nor elected to any other Offices *ſine voluntate ſua*, but ought to attend the ſervice of the Court: And the like Priviledge was granted to a Clerk of the Kings Bench. *Tr.* 1. *Car.* in *Co. B. Venables* Caſe. *Cro.* 1. part 8.

16. Note, It was agreed and Reſolved by the Juſtices,

ſtices, That all Proceedings in an Inferiour Court, after a Writ of Priviledge delivered out of this Court are void, and *Coram Non judice*, and if they do award Execution thereupon, this Court will diſcharge the party out of Execution. *M.* 9. *Jac.* in *Co. B. Brownlo.* 2. part 101.

17. In Treſpaſs brought in the Kings Bench againſt the Defendant *in Cuſtodia Mariſchalli*: The Treſpaſs was layed to be done in *Cornwall*; The Defendant in abatement of the Action, ſet forth the Charter of King *E.* 1. granted to the Stannery Court, inabling the Stannery workers to plead there, and there to be impleaded in the Stannery Court, and there prayed the benefit of that Priviledge, and to have the matter tryed there: It was Reſolved, That this Court was to hold plea of this notwithſtanding their Charter; and the party being here *in Cuſtodia*, the Plaintiff may declare againſt him in what manner he will, and his coming in here is not inquirable, and if one be here *in Cuſtodia Mariſchalli*, he is not to be fetched away, and if he ſhould not anſwer here being *in Cuſtodia Mariſchalli*, none then could have remedy againſt him; wherefore it was ruled that the Party ſhould Anſwer. *Hill* 10. *Jac.* in *B. R. Park* and *Lucks* Caſe. *Bolſtr.* 2. part 122, 123.

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2. *Priviledges of the Univerſities, Parliament,* London; *The Crown, Embaſſadours, Clergy, and of other Perſons and Places: Where granted and allowable; Where, And of divers other things concerning Matters of Priviledge.*

1. DEbt upon an Obligation made *C.* in the County of *S.* The Defendant pleaded the Priviledge of *Cambridge*, granted to them by Queen *Elizabeth*, for Scholars, Batchellors, Maſters, and their ſervants, upon Contracts made within the Univerſity; and ſhewed that the Bond was made in *Cambridge*, and that he was a Servant of the Scholars, viz. Bailiff of Kings Colledge within the Univerſity, and inhabiting within the Town of *Cambridge*, and precincts of the Univerſity, and therefore a Priviledged perſon of the ſame; But upon the Reading of the Count, It ſeemed to the Court, being a Bailiff of the Colledge, that he was not capable of that Priviledge. *Tr.* 13. *Jac.* in *Co. B. Carrel* and *Pasks* Caſe. *Brownlo* 1. part. 75.

2. In a Replevin, The Defendant made *Conuſans* as Baily to the Lord *Peters*, and ſhewed, That the Lord *Peters* was ſeiſed of the Manor of *W.* in the County of *Eſſex*, and had within the ſaid Manor a Leet of all Reſiants in *W.* and that the Plaintiff for not coming to the ſaid Leet was amerced, and for the Amercement he made Conuſans; And Iſſue being joyned upon the Preſcription, The Jury found that the Lord *Peters*, and all thoſe whoſe Eſtates, *&c.* have had a Leet *ut ſupra*; But further ſaid, That the Wardens and Scholars of *New Colledge* in *Oxford* were ſeiſed in Fee of the Manor of the Rectory of *W.* called *Romans-Fee* in *W.* and that they and all thoſe whoſe Eſtates, *&c.* have had a View of Frank pledge of all Inhabitants and Reſiants within the ſaid Manors called *Romans-Fee, ſemel in anno in feſto Commemorati nis Pauli tenend.* And that the Plaintiff was a Reſiant within the ſaid Manor; ſo the point intended was, Whether the Plaiutiff was a Reſiant within another Leet within the ſaid Manor, and ſo chargeable to two Leets; and whether one may have a grand Leet of all Inhabitants within the Town, and another an inferiour Leet of ſome of the Inhabitants within the ſame Town: The Court upon the opening of the Verdict, held, That foraſmuch as the Verdict hath found the Iſſue *verbatim* to be preciſely for the Avowant, as he pleaded it, the finding of the other matter is not material; So as the matter in Law came never in debate; and Judgment was given for the Avowant. *Hill* 1. *Car.* in *Co. B. Eve* and *Grights* Caſe. *Cro.* 1. part 54.

3. *Ejectione firmæ* of a Meſſuage in *Oxford*; The Defendant being Principal of *Glouceſter Hall*, pretended, that he being a Scholar, and a priviledged perſon, ought to be ſued before the Vice-Chancellor in *Oxford, Secundum morem Univerſitatis*, according to the Charters granted to the Univerſity; By which they had Conuſans of all Contracts, Covenants, Leaſes (excepting Free-hold:) It was Reſolved by the whole Court, That the Vice-Chancellor had not Juriſdiction, nor might hold plea in this Caſe at Bar; for that in this Caſe the Plaintiff ſhall recover poſſeſſion, and have a Writ of *habere facias poſſeſſionem*; and thereby he who hath a Freehold may be put out of poſſeſſion; But if the Action had been an Action of Covenant, or upon a Contract in which he ſhould have recovered damage, only there it had been otherwiſe, and the Priviledge might have been allowed. *M.* 3. *Car.* in *Co. B. Hall ys* Caſe. *Cro.* 1. part 62.

4 *D.* being ſued in the Kings Bench prayed his Priviledge, becauſe he is a Commoner in *Exeter* Colledge in *Oxford*, and brought Letters under the Seal of the Chancellor of *Oxford*, certifying the Priviledge, which Certificate was, That *D.* was a Commoner, as appeareth by the Certificate of Dr. *Prideaux*, Rector of the ſaid Colledge. The Certificate was by the Court diſallowed, becauſe it was not certified that he was a Commoner there upon the know-

ledge

ledg of the Chancellor; for a Certificate that another did certifie him was held not to be good in this Caſe. The Declaration came in *Hill.* 2. *Car.* A new Certificate was procured and returned in the Vacation, and he prayed his Priviledg in Eaſter Terme, it was objected, that after Imparlance he came too late to pray his Priviledg, and it is not that at the time of the Action brought he was a Commoner in Exeter Colledg, but that now he is; and he ought to have ſaid, that at the time of the Action brought, and now, he is a Commoner; But notwithſtanding theſe Objections the Priviledg was granted *Per Curiam. Paſ.* 3. *Car.* in *B. R. Fryer* and *Dewes. Godbert.* 404.

5. The Caſe in the Admiralty, between *Samuel Pallagii*, and the Spaniſh Embaſſador, was this. *Samuel Pellagii* had taken at Sea, *Jure Belli*, a Spaniſh Ship and 16 Chaſts of Sugar; He came into England & ſold to ſome Engliſh Merchants them, againſt whom, and the ſaid *Samuel*, the Spaniſh Embaſſador libelled in the Court of Admiralty for the ſaid Sugars: *Samuel Pellagii* pretended that he was an Embaſſador, ſent to the State of the united Provinces to Treat, and they did Treat with him; after which he did take the ſaid Spaniſh Ship; and whether this was taken as a lawful prize, was the queſtion in the Court of Admiralty; This caſe was referred to the Judges at Law, for their opinion therein: To whom it appeared, that this *Pellagii* was a Jew who took the Spaniſh Ship, The Spaniſh Embaſſador deſired that he might be tried by the Statute of 28 *H.* 8. *cap.* 15. The Civilians ſhewed what Priviledges he had as an Embaſſador to the King of *Morroco*, and that *jure natura* he ought not to be puniſhed for Criminal matters, as upon penal Statutes. But it was Reſolved, that if he offend *contra jus gentium*, then he might be proceeded againſt as a Pirat; wherefore the Juſtices Certified to the King their opinion, that he could but be tried here as a Pirate: Whereupon *Pellagii* prayed a Prohibition to the Admiralty. A ſentence there being given for the Spaniſh Embaſſador: But the Prohibition was denied by the whole Court, for that then there was no remedy for him. *M.* 13. *Jac* in *B. R. Samuel Pellagii* and the Spaniſh Embaſſadors Caſe *Baſil.* 3. part. 28. 29.

6. A member of Parliament ſhall have Priviledge of Parliament, not only for himſelfe and his ſervants but for his Horſes and other goods diſtrainable, and Priviledges of Parliament doth hold in all Caſes, except it be in Treaſon, Felony and breach of the Peace: See the Priviledges of Parliament. *Coke* 4. part. Inſtitutes. Title Parliament. 24. 25.

7. Debt was brought upon an Obligation, the Condition was, that if *A.* would render him ſelfe to an arreſt in ſuch a place, &c. The defendant pleaded, that by Priviledge of Parliament thoſe of the Parliament & their ſervants ought not to be arreſted by the ſpace of 40 daies before the Parliament, nor ſitting the Parliament, nor 40 daies after. And ſets forth, that *A.* was a ſervant to ſuch a man of the Parliament at ſuch a time ſo as he could not render himſelfe to be arreſted; upon which it was demurred: It was the opinion of the whole Court for the plaintiff: for that *A.* might render himſelfe: and then let it be at their peril, if they will arreſt him. 1. *Tr.* 4 *Jac.* in *Co. B. Jackſon* and *Kirtons* Caſe. *Brownlo.* 1. part. 91. 92.

8. Clergy men, or men of the Church, have the Priviledg, that they ought not appear at the Sheriffs tourne, or at the Leet, without there be great Cauſe, and if they be diſtreined to come to them, they may have a Writ out of the Chancery for their diſcharge: and all Clerks within Orders, although they have not Benefices, yet they have the like Priviledges; the reaſon is; to the end they may attend their function. See *F. B.* 160.

9. Note; It was ſaid by *Coke*, Chief Juſtice, That by Priviledge Prieſts were not to be arreſted by the Common Law, and that he had ſeen a Report in the time of Queen *Mary* grounded upon the Statutes of 50. *E.* 3. *cap.* 5. & 1. *H.* 2. *cap.* 15. concerning the arreſting of them in Holy Church; which Statutes are but an affirmance of the Common Law, and the maintenance of the liberties of the Church; in which Caſes, it was holden, that *eundo, redeundo, morando* for to Celebrate Divine Service, the Prieſt ought not to be arreſted, nor any who attended him in it; and that in ſuch caſe, the party grieved might have an Action upon the ſaid Statute of 50. E. 3. againſt him who arreſted him, for that when any thing is prohibited by an Act of Parliament, although that Act doth not give an Action, yet an Action lieth upon it. *Tr.* 10. See *Jac. Coke* 11. part. 100. *acc.*

10. In Debt, the plaintiff declared; That *I. S.* was bounden in a Recognizance to him of 200 li. before the Mayor and Aldermen of London in *Interiori Camera de Guildhall* London; upon which Recognizance the plaintif heretofore brought a *ſcire facias* before the Mayor in *Exteriori Camera*, and he had Judgment to recover; upon which recovery he had brought his Action; upon this the defendant did demur in Law, becauſe in ſetting forth the Recognizances, he hath not alledged, that the Mayer of London hath authority by preſcription, or grant for to take Recognizances and if he hath not then it is void: and the Statute of *Weſt.* *cap.* 49 cannot be taken to extend to Recogniſances taken in London. 2. Becauſe the Recognizance was taken in *Interiori Camera*, and the Court was holden in *Exteriori Camera*; and therefore not purſuant: But the opinion of the whole Court was for the plaintif: For the Court ſaid, we know, That thoſe of London have a Court of Record, and every Court of Record hath an Authority incident to it, to take Recognizances for all things which concern

cerne the juriſdiction of the ſaid Court, and which do ariſe by reaſon of matters there depending; to admit that the Court had not Juriſdiction to take Recognizances: yet becauſe that in the *Scire facias* upon it, the defendant did not take advantage of it, the the ſame is not void, but voidable: and the party in impleading hath admitted of it. It was adjudged for the plaintiff. *Hill.* 29. *Eliz. in Co. B. Hollingſhead* and *Kings* Caſe. *Leon.* 284.

11. Tenant in taile after poſſibility of Iſſue extinct in the reſpect of the privity of his eſtate hath theſe Priviledges incident to his eſtate which the Law alloweth not to a bare Tenant for life: as 1. He is diſpuniſhable for waſte. 2. He ſhall not be compelled to attorn. 3. He ſhall not have aid of him in the Reverſion. 4. Upon his alienation, no writ of *Conſimili Caſu* lieth. 5. After his death no writ of intruſion lieth. 6. He may join the Miſer in eſpecial manner in a Writ of right. 7. In a Precipe brought by him, he ſhall not name himſelfe Tenant for life. 8. In a Precipe brought againſt him, he ſhall not be named Tenant for life; But yet ſuch a Tenant hath but 4. Qualities agreeable to an eſtate for life. For 1. If he maketh a feoffment it is a forfeiture of his eſtate. 2. If an eſtate in taile, or in Fee deſcendeth to him, his former eſtate is drowned. 3. He in the revertion ſhall be received, upon his default, and 4. An Exchange between him and Tenant for life is good. *Coke* 11. part. 8. in *Bowls* Caſe. *Coke.* 1. 1. *part. Inſtitutes.* 27. and 28.

12. Tenant in taile after poſſibility granted over his eſtate; In that caſe, the graunter was forced to attorne in a *Quid juris clamat*; becauſe by aſſignment of his eſtate that Priviledg was loſt. *M.* 29 *Eliz. Events* Caſe. 2. Judg *Vouch.* in *Coke.* 11. part. 83. in *Bowls* Caſe.

13. If there be Tenant for life the reverſion over in Fee, if waſte be committed by Tenant for life, if after the waſte, he in the Reverſion granteth over his Reverſion, although that he taketh back the whole eſtate againe, yet his Priviledge as to have, an Action of Waſte is diſtroyed; and ſo it is, if he grant the Reverſion to the uſe of himſelfe, and his wife, the waſte is puniſhable; becauſe the eſtate of the Reverſion continueth not but is altered; and the Action of waſte, for the waſtes done before, which conſiſted in privity is gone. *Coke* 1. part. *Inſtitutes.* 53. *acc.*

14. An Attorny of the Court of the Kings Bench was elected Tithing man of the Town of *F.* in which Town the Cuſtome was pretended to be; That every one ſhould be Conſtable or Tithing man according to their ſeveral houſes and he having purchaſed ſeven houſes in the ſaid Town was in a Leet there choſen Tithingman. He brought a Writ of Priviledg to be diſcharged; becauſe he was an Attorney of this Court; It was prayed, That the Writ might not be allowed, for although in truth Attornies and Clerks in Courts have ſuch a Priviledg to be diſcharged when they are generally elected; yet when there is a ſpecial Cuſtome that they ſhall be elected Courſes that Cuſtome ought to be preferred before ſuch Priviledg. It was the opinion of the Court, That it cannot be a good Cuſtome, becauſe of their attendance here, they ſhall not be compelled to attend ſuch an Office; Alſo it cannot be a good Cuſtome. For then a Woman Inhabitant of the ſaid Town in one of the ſaid houſes it might be her Courſe to be a Conſtable, which the Law doth not permit; and ſo it was adjudged, That this Cuſtome could not prevaile againſt a perſon who by his Office is to attend here in Court, whereupon it was Ordered, That he ſhould be diſcharged. *M.* 10 *Car.* in *B. R. Prowſes* Cro. 1. par. 183.

15. *A.* Juror did ſurmiſe at the barre, That he was a Tenant in Ancient Demeſne, and had his Charter in his hand; and by reaſon thereof prayed to be exempted from being one of the Jury, and to be diſcharged by Priviledge: But the Court did not regard it, but caſt him to be ſworn, for that he might have his remedy againſt the Sheriff who returned him; and in that caſe it was ſaid, That if he had made default and loſt Iſſues, he might ſhew his Charter in the Exchequer, upon the Amercement eſtreated, and there he ſhould be diſcharged. *Paſc.* 31. *Eliz.* in *Co. B. Mills* & *Snowballs* Caſe. *Leon.* 207.

16. Information by Sr *Thomas Walker*, Chiefe Butler of the King, againſt *Frances* H. widdow for the detaining of Priſage; and ſhewed, That the King was ſeiſed in Fee of the Ancient duty called Priſage, which is of every ſhip of all merchants Aliens or Denizens containing 10 Tunns of Wine, to have for Priſage one Tunne: and if it contained 20 more, viz. *unum ante dolcum*, and the other *deorſum*: and ſhewed, That 28. *No.* 5. *Ja.* with two ſhips laden which wines of the goods of *G. H.* the defendants husband did arrive in the Port of London: and that in theſe two Ships were 24 Tunne of Wine; and afterwards two other Ships did arive, whereupon 8 Tunnes of Wine was required of the defendant, and that She not ignorant of the premiſſes, ſeeking the Kings diſinheritance refuſed to deliver them: The defendant for plea ſaid, That true it is, that the four ſhips which cannot did arrive in the Port of London, two of which Ships did arive in the life of her husband, and two after his death, and that her husband was poſſeſſed of theſe goods *ut de bonis proprijs*, and made her his Executrix and died: and pleaded the Charter of diſcharge of Priſage, made 6 *mencii.* 1. E. 3. to the Maior, Cominalty, and Citizens of London; *viz.* *Quod de vinis Civium nulla priſa fiat; ſed perpetuum inde eſſet quieti abſque hoc*, that theſe were her own goods, but only as Executrix of her late husband, with an averment that her husband was *Civis et Liberhomo de Civitate London*: Upon which plea, it was demurred in Law; the Queſtion in this Caſe was, if this Priviledg did lie, for the wife, as it was pleaded; This Caſe was very

long depending and learnedly debated; and many Presidents and *Books* Cases on both sides shewed and produced. But at last it was the opinion and resolution of the whole Court, That in the Principal Case *G. H.* was a compleat Citizen in every respect, and so continued till his death; and that these wines remaining in the hands of his wife the defendant were *bona Civium*; and so within the Charter of discharg, to be freed from the paiment of Prisage. *Pasc. 9. Jac in B R. Rott. 163* The Kings and *St Thomas Walter*, and *Frances Hangers* Case. *Bulst 3. part. 1. to 26.*

17. Debt upon an escape by an Attorny of the Common pleas by Attachment of Privilege, against the Deputy Marshal of the Kings Bench, The defendant pleaded his Privilege, viz. that he was deputy Marshall, and he ought not to be sued in other Court then in the Kings Bench, according to the Ancient Customs and Jurisdiction of that Court, upon which plea the plaintiff demurred: It was adjudged in this Case, that the defendant should not have his Priviledg, and the reason was, because the plaintiff was an Attorny, and ought to have his Priviledg in the Common Pleas; and because also that Court was first possessed of the suit; and the possessory shall be preferred, because *melior est possessio possidentis*. As to the Attendance of the Clerk was more necessary, then of the defendant, for that he may exercise his Office by a Deputy, which an Attorny or a Clerk cannot do; also the Office of the one, viz. of an Attorny is *Opus Laboris*, but the Office of the other is *Officium Labri* for that he may command the service to be done by another, and he is also to deal in Gives, Irons, and such like, and so the Office of an Attorny or Clerk of a Court is to be preferred before a Deputy Marshal of an Inferior Court; wherfore it was adjudged, That the defendant should Answer over. *Tr. 7 Jac. in Co. B. Guy* and *St George Reynels* Case. *Brownl. 2. part. 267.*

Privies and *Privities.*

Privies, or *Privitie* is, where a lease, or other estate is made to one to hold at Will for years for life, or if a Feoffment be made by one to others; in all these Cases, because such estates and things have passed between the said parties, they are called *Privies* in respect of strangers, between whom no such dealings or such like Conveyances have been made.

2. A. Leased his Land to B. for years rendring rent; the Lessee assigned over his Terme. *A.* brought an Action of Debt against B. for the rent behind after the Assignment; It was Objected that the Action did not lie, because the Land is the debtor and not the person, but in respect of the Land; and a difference taken between personal and real Contracts, as if a man sell his goods for mony to be paid at a day certain, although that the goods are taken away by one who hath right to them before the day, yet the seller shall have an action of debt in respect of the Contract; But if a man maketh a lease for years rendring rent, if before the day the Land be evicted by an ejectione title, the lessor shall not have an Action of debt in respect of the Contract, because it is a Real Contract and shall follow the nature of the Lands, and the rent is issuing out of the Land, and the person is not the debtor, but in respect of the Land. But in the principal Case it was Resolved, That the Action was maintainable in respect of the privity between the Lessor & the Lessee; And in this case it was Resolved, That there are three manner of Privities. 1. Of estate only, as if the lessor grant over his reversion, or if the Reversion escheate between the grantee, or Lord by Escheat or the lesser is privity in estate onely, and so between the Lessor Assignee. 2. Of Contract only is a personal privity and extends only to the person of the lessor and to the person of the lessee, as in the principal case after the assignment this privity doth remain between them, although that the privity of estate be removed, because the lessee by himself cannot prevent the lessor which the lessor hath against him by his own Contract; 3. Of an Estate and contract together as between the lessor and lessee as himselfe: and it was agreed in this Case, That if Lord and Tenant be, and the Tenant maketh a feoffment in Fee in that case, betwixt them, for arrearages due as well before the feoffment as after, without notice there is privity only as to the avowry. *Coke 3. part. 23. Walkers* Case.

3. Lessee for years assignes over his estate, the lessor by deed indented and enrolled bargains, and sels the reversion to another, the bargainee shall not have an Action of debt against the lessee, because there is no privity betwixt them, but in that case it was adjudged, that the lesser himselfe might have an Action of Debt against the lessee, for the rent due after the Assignment. *T. 36. Eliz.* in *B. R Hugle* and *Glovers* Case.

4 *A.* made a Lease for years, of three Acres of Lands to *C.* rendring Rent; *C.* Assigned all his estate in one Acre to another, *A.* suffered a common recovery to the use of *B.* in Fee, who brought an Action of Debt against the first Lessee. It was adjudged in that case, that the Action did well lie against him, for in as much as in that case the Lessee had assigned his estate but in part of the Land, and remained possessed as to the residue, the Action is maintainable against the Lessee for the whole Rent, for that there was not only privity of Contract betwixt them, but also privity of estate, and Contract together. 21. *Eliz. Brome* and *Heres* Case vouched, in *Coke* 3. part. 23. in *Walkers* Case.

5 Debt

5. Debt brought against two Administrators for Rent behind, after the death of the Intestate, they pleaded that before the Rent was behind one of the Administrator had assigned all his interest unto *I.S.* of which the plaintiff had notice, & accepted of the Rent by the hand of the Assignee before the day on which the Rents in question was due: It was adjudged in that Case, that the privity of contract as to the Action of Debt, was determined by the death of the Lessee, and therefore after the assignment debt did not lie against the Administrator, and in that Case it was adjudged, That when the Lessor hath Election to charge the Lessee or Assigner, there if he accept the Rent of the assignee he hath determined his Election, and shall not have Debt against the Lessee for Rent due after the Assignment. 41. *Eliz.* In *Co. B. Marrow* and *Turpins* Case adjudged.

6. The Case was, a Prebendary made a lease for years rendring Rent, and the Lesse died. The executors of the Lessee assigned over the Terme, and the successor of the Prebendary brought an Action of debt against the executors for Rent due after they had assigned the estate over. It was the opinion of three of the Justices, that the Action would not lie. But *Popham* Chiefe Justice held the contrary, for that the successor is privy to the Contract of his predecessor: So the Executor to the Contract of the Testator. *Hill.* 42. *Eliz.* in *Co. B. Overton* and *Siddals* Case. *Goldsbr.* 120.

7 Error of a Judgment in *S.* in debt upon a lease for years by the Assignee of a reversion; 3. Errors were Assigned: 1. For that the Court is holden by vertue of Letters Patents of Queen *Mary*, and the process is awarded *per Consuetudinem Curiæ*, which cannot be. 2. Because the Action is brought supposing a demise in *S.* of Lands in *D.* in another County: whereas it ought to be brought in the other County, being brough. upon the privity of estate, and not upon the Contract, the plaintiff being an Assignee of the Reversion; for it was said, That where the Action is brought by the Lessor upon the privity of Contract, it may be brought where the demise was made, although the Land be in another County. But where it is brought by one as Assignee of a Reversion it ought to be brought in the County where the Land lies, and not where the lease was made. 3. Because he claimes by grant of a Revertion, and doth not shew that it was by deed, and without a Deed or Fine, the Reversion cannot pass: For the 1. and 3. Errors principally the Judgment was reversed. *Tr. 4. Car.* in *B.R. Long*, and *Nether Cokes* Case. *Cro.* 1. part. 101.

8. Error of a Judgment in *Co: B.* The Error assigned was because Debt was brought in London by *C.* an Assignee of *I.S.* of a Reversion of Land in the County of *S.* upon a Lease for years of Land made in London rendring 10li *per an.* at the Middle Temple Church London, supposing the Lease to be made in the Parish of St *Mary Bow* London for two years rent behind, after the Assignment of the Reversion and attornment thereunto, whereas the Action ought to have been brought in the County of *S.* where the Land lies: It was [the opinion of the Court in this Case, that for as much as the privity of Contract is gone by the Assignment of the Reversion, and the attornment, and the rent followes the Land the plaintiff being entituled thereunto onely by reason of having the Land: therefore the Action ought to be brought in the County where the Land lies, and not elsewhere; the Judgment was Reversed. *Pas. 6. Car.* in *B R.* St *Stephen Bard*, and *Cudwores* Case *Cro.* 1. part. 133.

9. Covenant: whereas by Indenture. *Testamentum existit*, That the Executor of the defendant demised such a Messuage with a Garden in the Parish of St *Martins* in the Fields adjoyning to the plaintiffs house to the Testator for 21 yeers, the Testator Covenanted for him his Executors and Assignes, that he would not erect any building in the said Garden, to the prejudice of the parties lights: and the plaintiff assigned in *facto*, that such an Assignee of the Testator had erected a house in the said Garden to the prejudice of &c. The defendant pleaded that the Lessee assigned over his Terme to one *I.S.* who entred and paid his Rent to the plaintiff, and the plaintiff accepted him for his Tenant; whereupon it was demurred. It was objected, that the Covenant did not lie against the Executor of the Lessee; for he having assigned over his Terme, and the Lessor having accepted the Rent, the privity of Contract is determined, especially it being a Contract which concernes an Act to be executed upon the Land. But it was the opinion of the whole Court, that in as much as it was an expresse Covenant, that he shall not build, it shall binde him and his Executors, and no assignment nor acceptance of the Rent by the Lands of the Assignee shall take from him the advantage of suing him or his Executors upon an Expresse Covenant; No more, then if a Lessee had bound himselfe in an Obligation, to pay his Rent, his assignment over of his Terme and the acceptance of the Rent by the Lessor by the hands of the Assignee shall not take from him the advantage of the obligation, as it was adjudged in *Bret* and *Camberlands* Case. *Pasc. 6. Car.* in *B. R. Batchellor* and *Gages* Case. *Car.* 1. part: 136.

10. The case was, *D.* and another were Lessors for years by demise of the plaintiffs rendring Rent. *D.* assignes over his part to *M.* one of the defendants, the other Lesse makes his Will and thereby makes *P.* the other defendant his Executor, the rent is behind after the Assignment and after the death of the other Lesse, and for this Rent Debt was brought against the defendants, viz. against *M.* the assignee, and *P.* the

ſecutor of the other Leſſee; It was urged, that here the defendants have devided poſſeſſions and divided Intereſts, the one of them by an aſſignment, the other as executors, and therefore they ought to be ſeverally charged with ſeveral Actions; It was the opinion of the Court, that the Action of debt is alwaies joyned upon the demiſe, the which Continues ſtill the ſame notwithſtanding any alteration made by the Tenants, and here the Court was cleere of opinion that the Action was well brought, and Judgment was given for the plaintiff, the Bailiff of *Ipſwich*, and *Martin* and *Parkers* Caſe. *Trinit.* 14. *Jac.* in *B. R. Bulſtr.* 3 part. 211.

11. The Caſe upon a Demurrer was, That the defendant being endebted to *C.* who died Inteſtate, adminiſtration of his goods was committed to *I. S.* who brought Debt and had Judgment and died before Execution. The Adminiſtration of the goods of the firſt Inteſtate was Committed to the plaintiff, who ſocke a *Scire facias* upon that Judgment, upon which it was demurred whether it lay or not. It was obj cted, that the duty is as a debt due to the Inteſtate, and being turned into a Judgment, the ſecond adminiſtrator ſhou'd have a ſpecial *Scire facias* to execute it. But it was the opinion of the Court that the Action was determined, for default of privity, and therefore he is put to begin againe. *Paſc.* 1. *Jac.* in *B. R. Yare* and *Goughs* Caſe. *Cro.* 2. part. 4.

12. When Lands and warranties deſcend to two Coparceners, and they make partition, and one of them is impleaded, he ſhall not vouch alone, but ſhall pray in aide of his fellow, and ſo ſhall put themſelves in repreſentation of one heire and then vouch together: but if one Coparcener alieneth his part, and maketh default upon aide prayer, the privity is deſtroyed, and the other ſhall vouch alone; ſo if two Coparceners be, and one of them alieneth with warranty, and comes in as vouchee, now he ſhall pray in aide of his fellow, and either have *pro rata* upon the Leſſor, or vouch over with him upon the Warranty paramount. *per. Hob.* Juſtice in Sir *Henry Rolls* and *Oſborns* Caſe. *Hob.* 25. 26.

13. In Homage Auncetrel Continuance of blood on the Lords ſide is not alwayes neceſſary; For an Abbot, Prior, Biſhop, or the like may be Lord by Homage Anceſtrial, but yet there ought to be privity of ſucceſſion time out of minde in one and the ſame politique bodie, for if that body be once diſſolved, though a new one be founded of the ſame name, and all the poſſeſſions be granted to them, yet the Homage Auncetrial is gone and determined; But yet if a Prior and Covent be tranſlated (*concurrentibus his quæ in lege requiruntur*) to an Abbot and Covent, or to a Dean and Chapter; in that Caſe, becauſe the privity is preſerved, the Homage Auncetrial doth remain, for although the name be changed, yet the body is never diſſolved, but in effect doth continue ſtill. *Coke.* par. 1. *Inſtitutes* 102.

14. If Lands be let to a man for life, the remainder for life, the remainder in Fee and the Tenant for life alieneth in Fee, and he in the remainder for life make continual claime before the dying ſeiſed of the alienee, and afterwards the alienee dieth ſeiſed, and then he in the remainder dieth before any entry made by him; In this Caſe he in the remainder in Fee ſhall take advantage of the continual claime made by the Tenant in remainder for life, and may enter upon the heir of the alienee becauſe the right of entre which the Tenant for life in remainder had gained by his entre ſhall go to him in the remainder in Fee in reſpect of the privity of the eſtate; and ſo it is alſo of him in the Reverſion in Fee in the like caſe, becauſe he is alſo privie in eſtate. *Coke* 1. part. *Inſtitutes.* 252.

15. Husband and Wife are ſeiſed of Lands to the uſe of them and the heires males of the bodie of the husband, the remainder in Fee to another, the husband acknowledgeth a Fine of the Land in Fee, and a Stranger Recovers the Land againſt the Conuſees, who voucheth the husband only and he voucheth over the Common vouchee, and Judgment and ſeiſin are given, the wife being ſtill alive; It was adjudged that this recovery ſhould bind the remainder, for that here was a Lawful Tenant to the Precipe; and although that the husband who had the eſtate taile was vouched only, and not the wife who had a joint eſtate with him, yet it was holden that he coming in as vouchee comes in privity of the eſtate taile, and not of any other eſtate and then the recovery in value gives recompence, both to the eſtate taile which the husband hath, as alſo to the remainder, or becauſe although by the fine the eſtate taile as alſo the eſtate of the wife, and of the remainder were all diveſted or diſcontinued, yet the husband as vouchee ſhall be in Judgment of Law in of his eſtate taile; and that in reſpect of the privitie. *Coke.* 3. part. 6. in *Coppledicks* Caſe.

16. A man ſeiſed of Lands in Fee holden in ſocage deviſed the ſame to his baſtard daughter and her heires and died, the daughter within age by deed made a Feoffment of the ſaid Lands and died without Iſſue within age; and it was reſolved in this Caſe, that where Lord and an infant Tenant are, and the infant maketh a Feoffment in Fee, and executes the ſame by livery of his hand and dieth without heire, that the Lord ſhall not take advantage of the eſcheat in that caſe and in that caſe, it was further reſolved. 1. That privies in blood inheritable, as general heir, ſpecial heir, or as general or ſpecial heir, ſhall take advantage of the Infancy of his Anceſtor, and may enter upon a Feoffment made by their Anceſtors. 2. Reſolved, that privies in eſtate (if not in ſpecial Caſes) ſhall not take advantage of the Infancie of another, as if two Jointenants be in Fee with in age, and the one maketh Feoffment of his moyetie and dieth, the ſurvivor

cannot

cannot enter for the Infancy of his Companion, for by the Feoffment the Jointure was severed so long as the Feoffment remained in force, and the Heir of the Feoffor shall have *non fuit infra ætatem*, or shall enter into the Moity; But if they both joyn in the Feoffment, a joynt Right remains in them, and there if one dieth the Right shall survive, and the Survivor shall have the Right as from the first Feoffor. 3. Resolved, That Privies in Law as the Lord by Escheate shall never take advantage of the Infancy, because he is a Stranger to him; and when an Infant dyeth without Heir, the Feoffment is unavoidable. 4. It was Resolved, That if the Estate of the Infant had been upon a Condition to be performed by the Infant, and the Condition had been broken, during his minority, that the Land had been lost for ever: And Lastly it was Resolved in the principal Case, That forasmuch as it doth appear that the Feoffment made by the Infant was executed by Attorney, that the same was void; and that the Land should Escheate to the King. *Coke* 8. part 42. *Whittinghams* Case.

17. If a man be Outlawed in a personal Action, *&c.* and brings his Writ of Error, If he at whose Suit he was Outlawed will plead against him a Release of all Actions personal, this seems to be no Plea, because in the Action he shall recover nothing in the personality but only to reverse the Outlawry; But yet in that Case a Release of the Writ of Error is a good Plea; for although the Plaintiff in the Writ of Error is to recover or to be restored to nothing against the party, Yet forasmuch as the Plaintiff in the former Action is privy to the Record, a Release of Error to him is sufficient to bar the Plaintiff of the Suit and vexation by the said Writ of Error. *Coke* 1. part *Institutes* 289.

18. In a Writ of Errour to reverse an Outlawry, the Case was, *W. I.* seised in the Fee of the Manor of *S.* in the County of *K.* had Issue *H. I.* who was Indicted of Felony, 18. *Eliz.* and 19. *Eliz.* the Record of the Incictment was brought into this Court, and thereupon 20. *Eliz.* *H. I.* was Outlawed: *W. I.* dyed seised. *H. I.* entred into the Manor and Land as Son and Heir; and being seised of the same, conveyed the same to *B.* who brought a Writ of Errour to reverse the Outlawry of *H. I.* and whether the Feoffee of the Land might maintain a Writ of Errour to reverse an Attainder of Outlawry, was the Question: It was Objected in this Case, That it is not always necessary that he who brings the Writ of Error be party to the Record; but if he be grieved by the Record, that in that Case he shall have a Writ of Error: as a *Scire facias* is a Judicial Writ founded upon a Record, and hath as much in Privity as Error, and yet a Stranger to the Record shall have it: And 16. *H.* 7. The Heir of the Purchaser brought a *Scire facias* to execute a fine, and it was allowed, because he was the party grieved; and *Tr.* 34. *Eliz.* *Sharrington* and *Worsleys* Case was avouched, which was, *Sharrington* did recover against *Worsley* in Debt, who aliened the Land to *Charnock*: Afterwards an *Elegit* was awarded upon the Roll, and *Charnock* brought Error, and it was admitted good, and *Sharrington* forced to plead to it; But in the principal Case, the Opinion of the Court seemed to be, That the Writ of Error brought by the Feoffee to reverse the Attainder would not lye; For if the Feoffee should bring a Writ of Error and reverse the Judgment he must restore the Heir in blood, and none can do that but he who is privy in blood, and that is the Heir, and not the Feoffee: And Note, It hath been adjudged, That an Executor could not reverse an Attainder by Outlawry in felony, because it doth restore the blood; and in this Case it was said, The Case of *Sharrington* and *Charnock*, was to reverse the Execution, and not to reverse the Judgment: The principal Case was not now Adjudged but Adjorned. *Pasc.* 3. *Car.* in *B. R. Brookers* Case. *Godbt.* 375.

19. Note, It was Resolved in *Coke* 9. part, in *Margaret Podgers* Case (amongst other things) That if Lessee for years, or a Copy-holder be ousted, and the Lessor or Lord disseised, and the Disseisee levieth a Fine, and five years *passe*, that the Lessor or Lord are barred by the first Saving of the Act of 4. *H.* 7. because they may presently have a new Action, and recover the Land, and if five years pass before entry or claim, they shall be barred: And in that Case, It was also Resolved, That a meer stranger of his own wrong cannot enter in the name of him who hath right to avoid the Fine without a Commandant precedent, or Assent subsequent within the five years: But he who hath the Reversion, or the Lord of the Manor, may enter in the name of the Lessee, or his Copyholder, as well for the saving of their Inheritances as the particular Estates, because that they are Privies in Estate, and that they may do without Request precedent, or Assent subsequent, and the same is a lawful Entry within the Statute. *Coke* 4. part 106. in *Margaret Podgers* Case.

20. Husband and Wife by Indenture make a Lease for years by the words Demise, and the Lessee Covenants for him, his Executors and Administrators, that he, his Executors, Administrators or Assigns, to build a brick Wall upon the Land Demised; The Lessee assigns over his Term, and for not making the Brick Wall, a Writ of Covenant was brought against the Assignee: In this Case these Points (among others) were Resolved. 1. That when a Covenant extends to a thing in *esse* parcel of the Demises, the same shall bind the Assignee although he be not bound by express name; but when the Covenant extends to a thing which is not *in esse* at the time of the Demise made, that shall bind the Lessee, his Executors and Administrators, but not the Assignee. 2. Resolved, That if a man Demiseth a Stock of Cattle, or any

other goods perſonal for a time, and the Leſſee covenanteth for him and his Aſſignes, at the end of the Term to leave ſuch Stock or goods, or ſuch a price for them, and the Leſſee aſſigne and grant the Cattle, &c. This Covenant ſhall not bind the Aſſignee becauſe it is a perſonal Contract only, and there wants Privity; but the ſame ſhall bind his Executors and Adminiſtrators. *Coke* 5. part 17. *Spencers* Caſe.

21. Note, It was ſaid by the Juſtices, That if a Rent be reſerved upon a Gift made in Frank-marriage, that the ſame is void during the four Degrees; but afterwards the Reſervation ſhall be good: And in ſuch Caſe, If the Donor grant the Reverſion over, and the Donee in Frank-mariage returns: Now in this Caſe he ſhall pay his Rent to the Grantee, for that he hath loſt the Privilege of Frank-marriage, *viz.* the Acquittal: and alſo there is no Privity betwixt the Grantee and the Donor. *Paſc.* 25. *Eliz.* in *Co. B.* In *Webb* and *Potters* Caſe. *Godb.* 19.

Procedendo.

1. *Where, and in what Cauſe, and in what Action, and when,* Procedendo *ſhall be Awarded; And where, and in what not.*

1. NOte, by all the Juſtices of both Benches; That if any Officer, Clerk, or Attorney of any of the four Ordinary Courts of Juſtice at *Weſtminſter*, who ought to be attendant to the Court be arreſted in *London*, or in any other place at the time of his Attendance, he ſhall have a Writ of Priviledge with a flat *Superſedeas* in it; in which Caſe the no *Procedendo* ſhall be awarded to the inferior Court, if he may purſue in the Court where he is attendant. *Hill* 12. *Eliz. Dyer* 288.

2. A Writ of Right was brought in the Court of Ancient Demeſne, and the Plaintiff made Proteſtation to ſue there in nature of a Writ of Right at the *Common Law*; The Tenant joined the *Miſe* upon the mere Right, and upon that removed the Record by *Accedas ad Curiam*; but the opinion of the Court was, that that was no Cauſe, and therefore a Procedendo was awarded to the Bailiffs. *Hill* 2. *Ma. Dyer* 112. Sir *Humphrey Staffords* Caſe.

3. In an *Ejectione firmæ*, the Defendant prayed in Aid of the Queen, becauſe the Reverſion, after the Term which he claimed, was to the Queen by Attainder of the Earl of *Northumberland*, and the Aid was granted, and in the Chancery the Defendant prayed Search for the Queen: After long Argument it was Reſolved, That he ſhould not have Search, for that no damage ſhall be to the Queen; and it was ſaid by the Court, that it had not been ſeen, That Search ſhould be in the Aide-prayer upon only a Petition of Writ; and thereupon a Procedendo was awarded, but not to proceed to Judgment, *Regia inconſulta. M.* 15. *Eliz. Dyer* 320.

4. Treſpaſs was brought againſt two: The Defendants ſeverally claimed to have Common in the place where an Appendant to the Manor of *D.* whereof they were ſeveral Tenants, which Manor was holden of the King as of his Dutchy of *Lancaſter*, by Knights Service, and which was in ward to the King by the Nonage of the Heirs, which Wardſhip the King had granted to one of the Defendants under the great Seal of the Dutchy, rendring 20 *l. per annum*; and he prayed in Aid of the King, and had Aid by the words *Penes Dominum Regem*: And afterwards a Procedendo was granted out of the Chancery in the Name of the King, and not *ut Dux Lancaſtriæ*, directed to the Juſtices of the Common Pleas, *ad Procedendum in Loquela, ſed non ad judicium, Rege inconſulto*: It was Reſolved by all the Juſtices of both Benches, That by the Nonage of the King, E. 6. of Lands of the Dutchy was good, and not voidable by the Nonage of the ſaid King; becauſe they paſſed from his perſon as King, and not as Dutchy, and therefore the Procedendo awarded in the name of the King and not Dutchy was good; for by the Name of King the name of Dutchy was drowned, and he might not be a Sovereign and a Subject. *M.* 4 *Eliz. Dyer* 209.

5. Dower brought by *Eliz. M* againſt *N.* and others, who vouched to Warranty as Tenants for life; *T. M.* as Son and Heir of her Husband the Demandant, being within age, and in Ward to the King, by reaſon of Ward of one *I. S.* alſo within age, and in Ward of the Queen by reaſon of a Tenure *in Capite*; and ſhewed the Deed of the Husband of the Demandant of the Demiſe for life, with Warranty againſt him and his Heirs, and prayed in Aid of the King, and had it: and now came a Procedendo *in placito predict. ac in redditione juſticii in eodem placito cum ea cæteritate*, &c. The Court doubted what to do; but after good advice judgment was given for the Demandant, that ſhe ſhould recover againſt the Tenants, and they over in value againſt the Heirs: Afterwards a Writ of Error was brought, and Errour aſſigned only in a Diſcontinuance meane betwixt the removing of the Record for the Aid, and the Procedendo; but the Errour was not allowed, becauſe the parties had no day in Court. *M.* 9. *Eliz. Dyer* 256. *Michael* and *Netherlacs* Caſe.

6. In an Action upon the Caſe brought in *London* becauſe the Defendant called the Plaintiffs Wife Whore;

Where, and the Defendant removed the ſame into the Kings Bench by *Habeas Corpus*, It was moved for a Procedendo, becauſe the Action was maintainable in *London* for the ſame words, and not at the Common Law: But the Procedendo was denyed by the whole Court; and it was ſaid, That ſuch Cuſtome to maintain brabling words was againſt Law. *Tr.* 41. *Eliz.* in *B. R. Coke* 4. part 18. *Oxford* and *Croſſes* Caſe. See *M.* 9. *Car.* in *B. R. Harts* Caſe. *Cro.* 1. part 155. acc.

7. An Act of Common Councel was made in *London*, That if any Citizen, Freeman or Stranger, put any Broad-Cloth to ſale within the City before it be brought to *Blackwell* Hall to be viewed and ſtretched, and Hallage be paid for the ſame, viz. for every Cloth 1. *d.* that he ſhould forfeit for every Cloth 6. 1. 8. *d.* And it was Ordained, That for that the Chamberlain of *London* have an Action of Debt; and becauſe the Defendant broke the Ordinance Debt was brought in *London*; and after that it was removed *per Corpus cum Cauſa* into the Kings Bench, and afterwards upon long debate and advice, a Procedendo was awarded, For it was Reſolved, That divers Statutes being made for the making of woollen Clothes, and to avoid deceit in them; That ſuch an Ordinance being made for the better Obſervation and Examination of the ſaid Laws, and to prevent frauds, was good and allowable by the Law, and the Procedendo was awarded. *M.* 33. *Eliz.* in B. R. *Coke* 5. part 62. The Chamberlain of *London's* Caſe.

8. In Dower, the Caſe was, Grand-father, Father and Son; the Grand-father held of the King, the Father took a Wife, the Grand-father dyed; the Father had Iſſue and dyed before Office found, and before any Entry; and afterwards an Office was found for the King, that the Grand-father was ſeized, and dyed ſeized, and held of the King, who had Iſſue the Heir within age, by force of which the King ſeized the Ward, and committed him *durante minore ætate*. The Wife of the Father brought a Writ of Dower againſt the Committee: In this Caſe it was holden, that the Wife ſhould have her Dower againſt the Committee, and ſhould not be endowed in the Chancery, for that the King had nothing after he had committed the Heir, but that Livery ſhould be ſued by the Heir out of the Kings Hands: And it was ſaid, that in this Caſe, the Committee ſhould be Guardian in fact, and therefore the Action ſhould be brought againſt him, and he ſhould have Aid of the King; and ſo the King ſhall be made Party to ſave his own Right, which he hath by the Graunt *quamdiu in manibus noſtris fore Contingeris*: and when the Aide was granted, the Wife ſhall ſue forth a Procedendo out of the Chancery, and there the Right of the King ſhall be ſaved; and before the Procedendo be granted, ſhe ſhall be ſworn in the Chancery as if ſhe had been Endowed in the Chancery; But if ſhe have no Right, the King will grant a Procedendo in that Caſe. *Poſt.* 1. *H.* 7. 17, 18, and 19.

9. In an Action upon the Caſe for words, *viz. Thou art a Whore, and a Two-penny Whore*: Upon a *Habeas Corpus*, a Procedendo was awarded by one of the Juſtices, becauſe he was informed it was a good Cauſe of Action in *London* by the Cuſtome, for they puniſh ſuch perſons there by Cutting and Whiping: It was now moved for a *Superſedeas*; It was prayed that no *Superſedeas* might be granted, for that an Action lies there for the words; and it is an offence puniſhable at the Wardmote Enqueſt, and there puniſhable; ſo being puniſhable there, it was reaſon ſhe ſhould have her Action there: And *Tr.* 8. *Car.* was vouched where ſuch a Cauſe being removed by *Habeas Corpus*, a Procedendo was awarded; It was the opinion of all the Court but *Barkley*, Juſtice, that no *Superſedeas* be granted; But whereas it was alledged, That by the Statute of 21. *Jac.* that after a Procedendo is granted that no *Superſedeas* ought to be awarded, the Court denyed that, for when a Procedendo unduly, or *Improvide emanavit*, the uſe is to grant a *Superſedeas*. *M.* 13. *Car.* in *B. R. Bower* and *Coopers* Caſe. *Cro.* 1. part 350. See *Oxfords* Caſe before contr.

10. *Note*, If the Judges of any Court (as well of Record as other) do delay the party Plaintiff or Defendant, and will not give Judgment for him when they ought to do it: In ſuch Caſe the party grieved may have a Writ *de Procedendo ad judicium*, directed to ſuch Judges or Juſtices, and thereupon an *alias* and *Pluries*, if they will not proceed to give Judgement; and after that an Attachment (if they pleaſe) directed to the Coroners, returnable into the Kings Bench or the Common Pleas. See *Fitz. N. B.* 153. acc.

11. In Debt the Caſe was, a Plaint of Debt being affirmed in *Norwich*, an *Habeas Corpus* was awarded to bring the body and Cauſe before the Lord *Popham*, Chief Juſtice, bearing date the 19th. day of *June*, which was the laſt day of the Term, and he thereupon accepted Bail; After the Bail accepted and filed, Procedendo was awarded, Dated the laſt day of the ſaid Term; and thereupon they proceeded, and Judgment was given: And whether the Sheriffs were diſcharged or charged with the Priſoner, was the Queſtion: It was Reſolved, That the Sheriffs are diſcharged; for when a Writ of *Habeas Corpus* is returned, and Bail accepted, although they be not filed, yet the Priſoner is diſcharged, and his Sureties alſo in the inferiour Court; and although afterwards a Procedendo bearing date the ſame 19th. of *June*, (as of neceſſity it muſt, being a Judicial Proceſs to bear Teſt ſome days within the Term) Yet the Sureties and Sheriffs are diſcharged, and he may proceed againſt the Party as if he had not been impriſoned, and not otherwiſe. *Tr.* 5. *Jac.* in *B. R.*

Farnley

Farnley and *Baſſets* Caſe. *Cro.* 2. part 293.

12. A Bayliff ſhewed that a Leaſe was made to *F.* his Maſter for life, the remainder to the King in Fee, and prayed in aide of the King. The plaintiff in the Chancery prayed a *Procedendo*. It was ruled in that Caſe, that a *Procedendo* ſhould not be granted without examination of the Kings Title. 8. *H.* 7. 11.

13. If the Chaplain of a Chauntry being an Aſſiſe of *Novil diſſeiſin* againſt another Chaplain for Lands, and the defendant claimeth the ſame Chauntry by the Kings Collation, and prayeth in aide of the King. If the defendant cannot ſhew title the Chancery for the King, the plaintiff may have a *Procedendo* directed to the Juſtices of the Aſſiſe, that they proceed to the taking of the Aſſiſe, notwithſtanding the allegation made of the Kings Collation, and he may ſue the like Writ, where the defendant doth pray in aide of the King in an Aſſiſe by the Kings grant, and hath it granted, if he cannot ſhew matter in the Chancery which proves the Kings title, the plaintiff may have *Procedendo*, *Fitz.* N.B. See in the Writ *de Procedendo ad Judicium*. acc.

14. In a prohibition to ſtay proceedings in the Court of Requeſts, the Caſe appeared to be is that Bond was entred into for the paiment of mony upon the payment of which the Teſtator did promiſe to deliver up the Bond to be cancelled, the mony was paid, but the Bond not delivered up, the Teſtator died, Afterwards the Obligor ſued in the Court of Requeſts againſt the Executor for reliefe in equity, and to have the Bond delivered up, the Executor ſuggeſted that he knew nothing of the payment of the mony being no waies privy thereunto, and Prayed a Prohibition, for that he had no remedy to be relieved at the Common Law, in regard, that this promiſe made by the Teſtator to deliver up the Bond was a perſonal Aſſumpſit, and therefore *moritur cum perſona*. In this Caſe a Procedendo was granted unto him to proceed in the Court of Requeſts, there being juſt Cauſe for him there to proceed in that Court in the Caſe. *Tr.* 9. *Jac.* in *B. R. Strongs* Caſe. *Bolſt.* 1. part. 158.

Proces.

What Proces ſhall iſſue forth in ſeveral Actions; and upon what, and againſt whom. To whom directed, and the returne of them.

1. ONe of the Pannel was ſworn, and all the reſt of the Jurors were challenged by the defendants; he that was ſworn choſe one to him to try the Poles, afterwards the enqueſt remained for want of Hundredors and the plaintiff ſuggeſted to the Court that there were not Freeholders ſufficient within the Hundred, and therefore prayed preces to the next Hundred, but that was denied by the Court, but of that they muſt be Certified by the returne of the Sheriff. *Hill.* 28. *H.* 8. *Dyer.* 25.

2. In Debt brought againſt the Lord *Colham* they were at Iſſue, and a *Venire facias* was returned, ſerved, and proces continued againſt the Jury, till *Diſtringas*; The plaintiff preceiving the Array to be queſtuable, becauſe no knight was returned upon the *Venire*; he prayed a *Venire facias de Novo*; but the Court denied to grant it, becauſe that no other better writ could iſſue forth then the firſt. *M.* 10. *Eliz. Dyer.* 265.

3. The Citizens of Yorke, being Incorporated by King *Richard* the Second by the name of Mayor, Sheriffs and Citizens; They did now preſcribe, that forrain bought and forrain ſold have time out of mind wares been ſaleable by the Mayor Sheriffs and Citizens, whereas before the yeer of *Rich.* 2. They were Mayor, Bayliffs, and Citizens, and being at Iſſue upon the Preſcription, a *Venire facias* was prayed to the Sheriff of the County, which the Court granted for that the Officers of the City were Citizens. *M.* 11. *Eliz. Dyer.* 280.

4. The plaintiff upon Iſſue joyned in an *Ejectione firmæ* ſuggeſted to the Court, that the Sheriff and the Leſſor of the plaintiff who was named in the Declaration were Coſens, and ſhewed how Coſens, and thereupon prayed a *Venire facias* to the Coroner it was the opinion of the Court, that that was a Challenge for favour, and not a Principal challenge, to have a Writ to the Coroners; and it was ſaid that the Leſſor is no more party to the Writ then the Maſter is in whoſe right conuſans is made in a Replevin by his Bayliff. See 9. 1. p. 22. *Coke.* 1. part. *Inſtitutes* 158. *Paſc.* 13 *Eliz. Dyer.* 300.

5.

5. *A.* was Outlawed in *London* at the Suit of one, but the Exigent was delivered to the Plaintiffs Attorney, ſo as at the day the Exigent was not returned; upon which *Teſtatum fuit in Curia* for the Queen, that he was Outlawed, and a Writ prayed and directed to the Sheriffs of *London* (according to the Cuſtome) and not to the Coroner (who is the Mayor) to certifie the Court of this Outlawry, which was certified accordingly; and in a Writ of Covenant by *A.* this Outlawry was pleaded in diſability of his perſon: It was the opinion of the Court, That it being upon a Teſtatum which is certified according to the Cuſtome, that it was good enough being for the Queen; but in the Caſe of a common perſon it was not holden to be good, unleſs the Exigent had been returned. *M.* 15. *Eliz. Dyer* 317. See 5. *M. Dyer* 223. *Coke* 8. part 126. acc.

6. A *Venire facias* was awarded to the Coroners, whereas it ought to have been awarded to the Sheriff; and ſo the Jurors were returned by one who had not Authority: It was adjudged in that Caſe, That the Tryal was inſufficient, and not remedied by the Statute of 22. *H.* 8. 12. *Eliz.* But it was holden in that Caſe, that if the *Venire facias* had been awarded, *Ex aſſenſu partium*, then it had been good enough, for that *Conſenſus tollit Errorem*. See *Goodwyn* and *Franklyns* Caſe, vouch. in *Coke* 5. part 36. in *Baynhams* Caſe. *M.* 22. *Eliz. Dyer* 367. acc.

7. In Detinue, *De tribus pixidib & una biga cartis ſcriptis*; Upon a *Certiorari* directed to the Coroner, They returned that the Defendant was Outlawed, and returned the Exigent *verbatim*; upon which Return the Defendant was moliſted in his body, and alſo in his goods, and thereupon prayed Remedy in Banco, to be diſcharged of the Outlawry; and in this Caſe it was Reſolved by the Juſtices, 1. That Proceſs of Outlawry did not lye in a Writ of Detinue of *Charters*. 2. Reſolved, That the Return of the Outlawry by the Coroners was not a ſufficient Record againſt the party to make him Outlawed; For although that the Coroners give the Judgment of Outlawry, and make a ſhort remembrance in a Book thereof; Yet the keeping of the Record doth not belong to the Coroners, but the Return of the Outlawry ought to be by the Sheriff; and therefore in this Caſe the Outlawry was reverſed without any Writ of Error brought, and a Writ of Reſtitution granted of the Goods of the Defendant. *Paſc.* 5. *Eliz. Dyer* 223. *Proctors* Caſe. and See *Coke* 1. part *Inſtitutes* 128. That before the Defendant can diſable the Plaintiff, the Outlawry ought to appear of Record, and the Judgment after *Quinto Exactus* given by the Coroner in the County, is not ſufficient until the Exigent be returned; and Note, That it was Adjudged, *Tr.* 44. *Eliz.* in *Co. B.* in *Mere* and *Dolburies* Caſe, That the taking out a *ſuperſedeas* is an appearance of Record, and although that it be not delivered to the Sheriff before the *Quinto Exactus*, yet it ſhall avoid the Outlawry.

8. An Array made by the Predeceſſor of the Sheriff was challenged and Quaſhed for Coſenage: It was the opinion of the Court, That it is now in the Election of the Plaintiff, to have a new *Venire facias*, either to the Coroners or to the new Sheriff, and the Tryal being between the Vouchee and the Demandant: It was holden by the Court that the ſame was out of the Statute of Jeofails, the ſame not being between the parties to the Writ. *M.* 2. *Eliz. Dyer* 189.

9. In a *Quare Impedit* againſt the Biſhop of *S.* and the Incumbent, a Verdict before the Juſtices of Aſſiſe was for the Plaintiff, and Judgment given before them, and a Writ to the Metropolitan awarded, and for Damages a *Fieri facias* to the Sheriff: The Defendant by Error removed the Record into the Kings Bench, and had a *Superſedeas* to the Metropolitan made in the Common Pleas; afterwards the Plaintiff ſued forth a *Scire facias* to have Execution, becauſe the Defendant did not aſſigne Errors, and thereupon the Defendant Aſſigned two Errors. 1. Becauſe it was found by Enqueſt of Office that the Incumbent was in of the Preſentation of *A.* who was named in the Writ. 2. Becauſe damages were adjudged for half a year, whereas it appeared the Preſentation was not deraigned within ſix Months. Notwithſtanding theſe Errors, the Judgment was affirmed; and upon a Suggeſtion that the Writ of Error was brought before the Damages were levied, Damages were Aſſeſſed by the Court, and a Writ of Execution awarded to the Guardian of the Spiritualities, *Sede vacante* of the Metropolitan. *Tr.* 6. *E.* 6. *Dyer* 72.

10. *A.* Condemned in the Exchequer for a debt to the Queen, and Committed to the Fleet, was afterwards condemned in Debt in the Kings Bench at the Suit of a Subject; and being brought to the Bar by *Habeas Corpus* he was committed again to the Fleet at the Suit of the Subject. The Gaoler by the command of the Lord Treaſurer of the Exchequer, ſuffered the Priſoner to go into the Country with a Keeper, to get his Debts to pay the Queen; upon which the Subject brought Eſcape againſt the Gaoler: It was adjudged that the Action did not lie; for that the Kings Bench had not Authority to commit him to the Fleet, for the Marſhalſey is the upper Priſon, and ſo the Priſoner was never in Execution there for the party; But if he had been in Execution, no Command, although of the Queen her ſelf, is a ſufficient Warrant to diſcharge the Gaoler. *M.* 3. *Eliz. Dyer* 297.

11. In a *Quare Impedit* the Plaintiff recovered; and had a Writ *Sede vacante* of the Biſhop to the Guardian of the Spiritualties to admit his Clerk, which is no; returnable, and before Execution of the

Writ a Biſhop was Created: It was a Queſtion in that Caſe, if the Authority of the Guardian of the ſpiritualities in that Caſe did ceaſe, and this being ſuggeſted to the Court by the party, and that nothing was executed; a new Writ was awarded to the Biſhop which might be made returnable if the party pleaſed. *Paſc.* 18. *Eliz. Dyer* 350.

12. *Blower* being a meer Lay-man within the age of 24 years was Inſtituted and Inducted into a Benefice with Cure, a ſtranger ſued a Citation out of the Delegates to deprive him; depending which Suit, *W.* brought *Quare Impedit* againſt the Biſhop and *Blower*, and had Judgment by default at the Grand Diſtreſs; and a Writ was awarded to the Metropolitan (*quia Epiſcopus fuit pars*) to remove *Blower*, and to admit the Clerk of *W.* which was executed, and one *G.* was Inducted: Afterwards the Biſhop and *Blower* brought a Writ of Deceit in *Co. B.* againſt *W.* becauſe they were not ſummoned by the Summoners, who appearing being examined upon their Oaths denied any ſufficient Summons, *propter brevitatem temporis*; and this Matter *W.* pleaded in Bar of the Writ of Deceit; and *W.* pleaded alſo in Bar the diſability of *Blower*, and the Sentence of Deprivation in the Court of Delegates: It was holden by the Court to be no good plea, for that the Incumbency was not in queſtion, but the Diſturbance only; and for that cauſe it was adjudged that the firſt Judgment was void, and *Blower* the Plaintiff was reſtored to what he loſt. *M.* 20. *Eliz. Dyer* 354. *Blowers* Caſe.

13. A *Quare Impedit* was brought againſt the Biſhop of *Cact.* the Biſhop of *Lincoln*, and the Incumbent, they made default at the Grand Diſtreſs; Whereupon the Plaintiff made title, and had a Writ to the Biſhop, and a Writ was awarded to inquire of the damages, of the Plenarty, and at whoſe Preſentation, and of the time of Vacancy, and of the value of the Church *per ann.*; all which Points were returned by Inquiſition: In this Caſe Judgment was given for the Plaintiff that he ſhould recover the Preſentation; and the Plaintiff thereupon had a Writ to the Biſhop of *Lincoln*, and damages to the value of the Church for half a year. *Tr.* 7. *Eliz. Dyer* 241.

14. *A.* Attorney of the Common Pleas ſued forth an Attachment of Priviledge againſt *K.* in Treſpaſs, returnable at a day certain; After the ſaid Writ awarded, the Defendant was condemned that Terme in another Writ of Priviledge in Treſpaſs, at the Suit of the ſaid *A.* and Judgment given, and a *Capias ad ſatisfaciendum* was awarded to the Sheriff of *Middleſex*, returnable after the firſt day: At the firſt day upon return of the firſt Writ, the Sheriff returns two *Capi Corpus*, one by vertue of the firſt Writ, the other *ad ſatisfaciendum*, and brought in the body accordingly; and thereupon the Defendant was Committed in Execution to the Fleet: But a *Quare* was made in that Caſe: If the *Capias ad ſatisfaciendum* was well awarded or not, becauſe it was ſaid, No *Capias*, nor Proceſs of Outlawry did lye upon a Suit by Attachment of Priviledge. *M.* 3. *Eliz. Dyer* 192 acc.

15. In a Recovery had againſt *I. S.* in *B R.* in an Action upon the Caſe, for turning a Water-courſe from a Mill: I being found for the Plaintiff, a Writ of Inquiry of Damages iſſued, and the Plaintiff had a *Capias ad ſatisfaciendum*, and thereupon an Exigent, and the party was Outlawed, and the Outlawry was returned; The Defendant *gratis* rendred himſelf to the Priſon of the Mushelſey, and upon a Suggeſtion of Errors had a *Scire facias* againſt the Plaintiff; and then aſſigned two Errors. 1. That no day was given to the Plaintiff when the Writ of Inquiry of Damages was awarded; But as to that, becauſe the Court could not correct their own Errors, the Writ abated. 2. Error was, becauſe no *Capias* did lye in the Original, and then a *Capias ad ſatisfaciendum* did not lye, and that was holden to be Error; for in this Action he ſhould have had an Exigi or *Scire facias*: and for that Error the Judgment was reverſed. *M.* 3. *Eliz.* in *B. R. Bannes* Caſe. *Dyer* 195.

16. At the *Pluries Replegiare* the Sheriff returned in the Common Pleas, *Catalla clongata & quod nullum aliud breve &c.* for which Cauſe *Withernam* was awarded, and according to that Writ the Sheriff returned, that the Plaintiff found Pledges *de proſequend. &c.* and that he took ſix beaſts in *Withernam*, which he had delivered to the Plaintiff *quoſq;* and that he had attached the Defendant: Both appeared; And the Plaintiff declared of a taking and detaining of the Cattel, and the value of them: They were at iſſue upon the Property; It was ſaid that the Defendant ſhould not gage deliverance, but that the Plaintiff ſhould do of the Cattel taken in *Withernam*: *Note*, in this Caſe, becauſe it is apparent by the Return (*quod nullum aliud breve*) That no Plaint is before the Sheriff; for the firſt *Replegiare* gave him authority only, and not the *Alias* nor *Pluries*, for the Parties had day in Bank upon the Replevin without a *Pone*, &c. It was doubted in this Caſe, If the Plaintiff had not appeared, if he ſhould be Nonſuited, as if it had been upon the Replevin: And it was alſo doubted, if upon ſuch default the Defendant ſuggeſting a Propriety, he ſhould have a ſpecial Writ to have the Cattel again which were taken in *Withernam*, and that Return ſhould be awarded of the firſt: And it was the opinion of the *Preignotaries*, that it ſhould be awarded of the firſt, to the end the Plaintiff might have a ſecond Deliverance. *M.* 3 *Eliz. Dyer* 189.

17. A *Pluries Replg.* iſſued out of the Chancery returnable in *Banco*, at the Suit of *I. S.* for certain goods taken in *London* by *I. D.* late Mayor of *London*, and others: The Sheriffs returned the Writ, the effect of which Return was, That there is a Cuſtome within

within the City, That *Quandocunque aliqua bona vel catalla per Legem terræ replegiabilia ibidem capta fuerint, quod tunc ea debent & conſueverunt Replegiari tantummodo per Miniſtros Dict. Civitatis, pro tempore exiſtent, virtute Querelæ in Curia Domina Regina, & progenitorum ſuorum coram Vic. ejuſdem Civitatis levat & non per Breve Regina extra Cancellaria*, which Cuſtom was confirmed by Parliament, 5. E. 3. and that they were ſworn to obſerve the Cuſtomes without breaking of them, and therefore they could not, nor ought to execute the ſaid Writ: It was the opinion of the Juſtices of both Benches, That this Return was inſufficient: Whereupon another *Pluries Repleg.* was awarded to the Sheriffs that now were, and Proceſs awarded to Attach the late Sheriff for the Contempt: *ſee* That by the Common Law before the Statute of *Marlebridge, Cap.* 21: The Sheriff could not make a Replevin without a Writ: Note at length the Plaintiff in the principal Caſe had deliverance of his Cattel; and in that Caſe it is made a *Quare*, If the Defendants had day in Court to plead upon the *Pluries Replegiare. M. 8. Eliz. Dyer* 246, 246.

18. *Note*, That in all Actions *Quare vi & armis* a *Capias* lyeth; and where *Capias* lyeth in Proceſs, there after Judgment *Capias ad ſatisfaciendum* lyeth, and there the King ſhall have a *Capias pro fine*: But at the Common Law, Upon a Judgement for Debt or Damages, the body of a man was not to be taken in Execution by *Capias*, but the party was to have execution only of his Goods and Chattels, or of the Profits which grew upon his Lands, *viz.* either by a *Levari facias* to the Sheriff; *viz.* commanding the Sheriff, *Quod de bonis & Catallis Levari facias*, or by a *Fieri facias*: But in Debt againſt the Heir upon an Obligation made by his Father, Execution was of the Land which the Heir had by diſcent from his Father by the Common Law: And in an Accompt at the Common Law, the Proceſs was only diſtreſs *infinite*, until the Statute of *Weſtm.* 2. cap. 11. by which Statute *Capias* was given in an Accompt: But at the Common Law, the body, Lands, and Goods of the Accomptant of the King, were liable to the Kings Execution; for *Theſaurus Regis eſt vinculum pacis & bellorum Nervi*; and therefore the Law gave the King full remedy for it. *Coke* 3. part 12. Sir *William Herlerts* Caſe. *Plo. Com.* 321. acc.

19. It was Reſolved by the Juſtices, That at the Common Law for Raviſhment of a Ward, the Guardian might have an Action of Treſpaſs, in which the Plaintiff ſhould recover Damages, and the Defendant ſhould pay a Fine to the King, and be Impriſoned; and ſuch Action lay as well againſt a *Feme Covert*, as againſt a *Feme ſole*; but no Writ of Raviſhment of Gard lay at the Common Law: And therefore where a Writ of Raviſhment of Ward was brought upon the Statute of *Weſt.* 2. cap. 35. againſt Huſband and Wife, It was holden by *Coke* and *Walmſley* Juſtices, that a *Feme Covert* was not within the ſaid Statute, becauſe ſhe is diſabled to ſatisfie, and that the Goods and Lands of the Husband who is innocent, are not liable by that Statute to anſwer for a Raviſhment made by his Wife; and the Law will not intend ſo ſevere a puniſhment for the not doing of that, whom the Law it ſelf eath diſabled: And it was ſaid by them, That the Plaintiff might have had his Action of Treſpaſ at the Gommon Law againſt thoſe who Raviſhed the Heir; or a Writ *de Valore Maritagii* againſt the Heir himſelf. *Coke* 9. part 72. in Dr. *Haſtics* Caſe.

20. A man was Outlawed upon a Judgment in Debt; he brought Error, and the Judgment was affirmed, and upon that within the year a *Capias Utlagatum* is awarded, and the Defendant taken, and ſuffered to eſcape before the Return of the Writ: In this Caſe it was Reſolved, 1. That if at the Common Law a man hath Judgment in Debt, and after Judgement Outlaws the Defendant; the Plaintiff was at end of his Suit as to any Proceſs for himſelf, for he could not have a *Scire facias*, nor other Execution upon the Judgment, but was put to his new Original; and although a *Capias* did not lie before the Statute of 25. E. 3. in Debt, yet if the party was taken upon a *Capias Utlagatum*, at the Kings Suit, he ſhould be in Execution for the Plaintiff if he wou'd. 2. Reſolved, That if Judgment be given in *Co. B.* and removed by Error, and Judgment affirmed within the year, they may award a *Capias*, or a *Fieri facias*, and the Plaintiff ſhall not be put to a *Scire facias*, although it be in another Court. 3. Reſolved, That when a man is taken by a *Capias Utlagatum*, he ſhall be in Execution preſently after the Arreſt, if the party will, although that the Court doth not put him in Execution for the party. *Coke* 5. part 88. *Garnons* Caſe.

21. Judgment was given in *Co. B.* againſt Sir *William Fiſh*, and after the year and day a *Capias* was awarded, where there ought to have been a *Scire facias* firſt, and the cupon he was taken: Whereupon he brought Error in *B. R.* where the Judgment was affirmed, but the Execution was reverſed becauſe the Execution was not Warrantable, the Proceſs being erroneous. And out of the Kings Bench another Execution was awarded by *Sicut alias*, within the year of the affirmance of the Judgment in *B. R.* It was moved in that Caſe, That the Execution was erroneous, becauſe he ought to have a *Scire facias*, becauſe the year is paſt after the Judgment in the Common Pleas; and although the Court be changed, yet the Plaintiff ought to have the ſame Proceſs for Execution, as he ought to have in the firſt Court: And when the firſt Proceſs was reverſed for Error, then he cannot have a *Sicut alias*, but he ought to have a

new Original; and therefore a *Super ſedeas* was prayed, and that Sir *William Fiſh* might be delivered out of Execution: It was the opinion of the whole Court in this Caſe; That if the Court of Common Pleas award erroneous Proceſs, that this Court cannot award a *Super ſedeas*, but the party is put to his Error here; And it was the further opinion of the Court, That if Error be brought within the year of the Judgment in *Co. B.* and the Judgment be affirmed, the Plaintiff ſhall have a *Capias* although the Judgment be affirmed two years after the bringing of the Writ of Error, for he ſhall take the ſame Execution in *B. R.* as in the Common Pleas, and the altering of the Court makes no difference in it *Paſc.* 3. in *B. R.* Sir *William Fiſh* and *Wiſeman's* Caſe. *Godb.* 371, 372.

22. In Treſpaſs, upon *Not Guilty* pleaded, the parties were at Iſſue: And the Record of the *Niſi Prius* was *Graves-end Lane*, where it ſhould have been *Grays-Inn Lane*, and thereupon the Plaintiff was Non-ſuit; It was prayed a *Venire facias de Novo*; And 9. *Jac. Farthing* and *Dappers* Caſe was vouched: Where in an Action upon the Caſe, the Pies Roll was ſix weeks, and the Record of the *Niſi Prius* ſix Months, and the party was Non-ſuit, and *Venire facias de Novo* granted: It was the opinion of *Ley* Chief Juſtice, That the party cannot have a *Venire facias de Novo*, if the Non-ſuit be Recorded; But if the *Venire facias* varieth from the Record, there can be no Non-ſuit, becauſe there is no Record upon which the Non-ſuit ſhould be, and the *Niſi Prius* was proſecuted without Warrant: At length, a *Venire facias de Novo* was granted in the principal Caſe *per Curiam. Tr.* 21. *Jac.* in *B. R. Young* and *Eaglesfields* Caſe. *Godb.* 328.

23. In an *Ejectione firmæ*, the Plaintiff declared upon a Leaſe made by *W. C. H.* the Defendant pleaded *Not guilty*, and made Challenge, and prayed a *Venire facias* to the Coroners, becauſe the Sheriff is Coſen to the Leſſors Wife, which Challenge is not a principal Challenge, but for favour; And after Trial and Verdict it was amended in an Arreſt of Judgement, becauſe it was miſ-tryed; And in this Caſe it was ſaid, That Miſ-conveyance of Proceſs is where one Writ is awarded in the place of another, to an Officer which of right ought to execute that Proceſs, and he returns it, this is helped after Verdict by the Statute: But if a Writ be awarded to an Officer who ought not to execute that Proceſs, and he return it that is a Miſ-Trial, and not helped by the Statute. *Tr.* 1. *Jac.* in *Co. B. Craddocks* and *Fames* Caſe *Brownlo.* part 134.

24. Certain Goods of a Subjects of the King of *Spain* were forfeited upon the High-Sea, and afterwards were brought here into *England*, and there ſold to Sir *John Watts*; the Goods were Attached in the hands of Sir *John*, by Proceſs out of the Admiralty, and then a Libel was exhibited againſt the Goods in the hands of Sir *John*, and Sir *John* was not made a Party to the Suit; and thereupon Sir *John Watts* prayed a Prohibition, in as much as they were bought in open Market; and by this Suit in the Admiral-Court, the property of the Goods will be drawn into Queſtion there, The Suit was proſecuted there by *Alfonſo de Valaſco* the Spaniſh Embaſſadour; a Prohibition was granted, and the rather, becauſe Sir *John Watts* was not made there a party to the Suit. *M.* 9. *Jac.* in *Co. B.* Sir *John Watts* Caſe. *Brownlo.* 2. part 29.

25. In an Action of Battery *A. Capias pro fine* iſſued forth againſt the defendant *pro rege*, and alſo a *Capias ad ſatisfaciendum* returnable the ſame terme, at one and the ſame returne. As to the *Capias pro fine*, the Sheriff returned *Cepi Corpus*, and as to the *Capias ad ſatisfaciendum*; *Non eſt inventus*, and for this Contrariety of Returne, the Sheriff was amerced. But then it was moved by the Councel of the Sheriff, that the awarding of the *Capias pro fine* was utterly void, for that the fine was pardoned by Parliament, and it is enacted, that all proces awarded upon ſuch fines ſhall be void, and then the *Capias pro fine* being void, it matters not how, or in what manner it be returned, for that the Court ſhall not reſpect ſuch proceſs, nor any return of it, and then the Court not having any reſpect to that return, there is not any Contrariety, for the *Capias ad ſatisfaciendum* is only returned, and not the *Capias pro fine*: It was ſaid by the Court in this Caſe: That if the Sheriff in ſuch Caſe, takes the party by a *Capias pro fine*, upon that taking he is in execution for the party, and if the Sheriff let him go at large he ſhall anſwer for the eſcape; and in this Caſe, the *Capias pro fine* was well awarded, and the Court ought to regard it, and the defendant lawfully taken by it, and after in execution for the party, and afterwards when the pardon came and enacted *ut ſupra*, although that the proces be made void thereby, the ſame ought to be meant as to the intereſt of the King to the fine, but not as to the execution of the party, but the Sheriff ſhall Anſwer for that. *Paſ.* 29. *Eliz.* in *B.R. Hudſon* and *Leigh* Caſe. *Leon.* 55.

26. Error of a Judgment in *B.R.* upon an Aſſumpſit, where a verdict and Judgment was for the plaintiff, the error aſſigned was, that the Iſſue was joyned *Tr* 3. *Car. Venire facias beares date* 4. *Maii* which was before the Iſſue joyned, ſo the trial thereupon was ill, and upon a Writ of *Certiorari* upon Diminution alledged to certify the *Venire facias* and *Diſtringas*, they being certified the Writ of *Venire facias* was of the date. 4. *May* which was Eaſter Terme, but the Error was not allowed by the Court, for the Court ſhall intend that there was another *Venire facias*, and the Roll awarding the *Venire facias* being good, the miſdating of it is no Cauſe to ſtop Judgment; the Judg-

ment

ment was affirmed. *M.* 3 *Car.* in the *Exchequer. More* and *Hoſſys* Caſe. *Cro.* 1. part. 64.

27. Debt brought for 10 pounds upon the Statute of 5. *Eliz. cap.* 9. The Caſe was, an Action upon the Caſe was brought againſt the plaintiff, upon which Action they were at Iſſue, and the defendant was to be a witneſs for the plaintiff in that Caſe, at a Trial at *Glouceſter*: and to that purpoſe procured a ſubpena out of the Common pleas, to the defendant to teſtifie in the ſaid Cauſe; and ſhewed the ſubpena to the defendant, and left a note with her of the day and place of her appearance, and delivered her 12 pence towards her expences and charges, and promiſed her, if ſhe would come at the ſaid day and place to teſtifie, he would give her ſo much more *pro oneribus & expenſis ſuis* as ſhe ſhould reaſonably require, which ſumme ſhe accepted, but did not come to teſtifie although ſhe was required: It being found upon *Nihil debet* for the plaintiff, divers exceptions were taken to it by the defendant. 1. Becauſe the Proces was not ſerved upon the defendant as the Statute requires, but a note only thereof, and it being a penal Law, it ought to be taken ſtrictly. 2. There was but 12 d delivered to the defendant, at the time of the ſerving of the proces, which was no reaſonable ſumme for coſts and charges according to the diſtance of the place, and therefore the promiſe that he would give her after ſufficient for her charges was void. And 3. The party who ſhall recover by force of this Statute, ought to be grieved and damnified, and in this caſe the plaintiff hath not averred that he was damnified for her not appearance. For the firſt point the Court was cleere againſt the defendant, becauſe it is the common courſe to put divers in one proces, and to ſerve Tickets, or to give notice to the firſt perſons that are ſummoned, and to leave a Ticket, and to leave a Label or a Ticket with the party, and to deliver the Writ to the laſt party to be ſerved; To the ſecond point, the opinion of the Court was, that the Acceptance ſhould bind the defendant, but if ſhe had refuſed it, ſhe had not incurred the penalty of the Statute; But for the third point, the Court was cleer of opinion, that the Action would not lie for want of averment; that the plaintiff was damnified by the not appearance of the defendant: and ſo it was adjudged, that the plaintiff *Nihil Capiat per billam. Hill.* 14. *Car.* in *B. R. Goodwin* and *Weſts* Caſe. *Cro.* 1. part. 388. See *Godbit.* 18. the ſame Caſe.

28. In *Exceptione firma* after verdict, exception was taken, that the *Venire facias* was awarded for trial before the appearance and declaration, to try the Iſſue in the ſame Action, which cannot be good: But the Court held it to be amendable: For the Roll is the Warrant of the *Venire facias*, which being variant from it, the Teſte thereof ſhall be amended, to be ſubſequent to the Iſſue joyned, and whereas the Teſte was 23 *Jan.* which was Sunday: and ſo not *dies juridicus*, it was held alſo, that it ſhould be amended, for it was but the default of the Clerk in miſawarding of the proces, which is helped by the Statutes of 32. H. 8. and 18. *Eliz. Paſc. Jac.* in *B R. Cro.* 2. part 64. 65.

29. Error of a Judgment in *Norwich*: where in an Action of Debt, the Record was *Attachiatus fuit* where it ought to be *ſummonitus eſt*; It was ſaid that in regard the defendant had pleaded, and a verdict and judgment is given, this is not to be aſſigned for Error, for it is but want of an Original, which is helped after Verdict by the Statute of 18. *Eliz.* But it was Reſolved that this was not helped by the Statute, for the Statute is intended of the want of Original Writs which are ſued out of the Chancery; but extends not to proces which is in the nature of an Original Writ; and it hath been ruled, that the want of Bils upon the File in the Kings Bench (which is in the Nature of an Original Writ) is not aided by the Statute, and ſo it was Reſolved, that the want of this ſummons which ought to have been, was not helped by the Statute; and for that Cauſe the Judgment was reverſed. *Hil* 9. *Jac* in *B. R. Pratt & Dixons* Caſe. *Cro.* 2. part. 108.

30. Error of a Judgment in an Action of Trover: The Action was brought in the time of Queen *Elizabeth*, and the parties were then at Iſſue, and a *Venire facias* returned. Afterwards in the time of King *James*, an *Habeas corpora* was awarded with a *Tales*, which recited *Quod habeas Corpora Juratorum ſummonit in Curia nuper Regina*, and becauſe the Jurors were never ſaid to be ſummoned in *Curia Regina* (for the *Venire facias* is the firſt proces which is not any ſummons) it was therefore holden to be Error, and the Judgment was reverſed although the Error was in a Judicial proces, for that the one proces ought to warrant the other, which was not done here, for it cannot warrant this *Tales*. 1. *M.* 3. *Jac.* in *B R.* Sir *Francis Knowles*, and *Bechingſhaws* Caſe. *Cro.* 2. part. 88 89.

31. Note. In a ſuit in the Star Chamber by the Kings Attorney againſt *W.* It was agreed that a *Proceſs ad audiendum Juſticium* in that Court is not holden to be ſufficiently ſerved by leaving it at the houſe, though the wife and ſervants know it, but it ought to be a perſonal ſervice of him, or elſe he being at home, or proved by an *Affidavit* to have knowledg of it. But if a Proces be left at a houſe, one Terme, for a hearing at another Terme, ſo there be a convenient diſtance of time, It ſhall be preſumed a good ſervice of proces; upon a preſumption of notice of it. See *Worceſters* Caſe. *Hob.* 195. *Acc.*

32. In an Action of Treſpaſs, the Treſpaſs was layed to be 9. *Jac.* the defendant Juſtified by virtue of a Warrant 10. *Jac.* and takes a Travers *abſque hoc* that he was guilty before the Warrant made,

and did not ſay before and after. It was adjudged the Traverſe was not good, *per Curiam*. So in an Action of Treſpaſs, of a Treſpaſs done 1. *Maii*, the defendant pleaded a Releaſe to him. 1. *Junii* with a Traverſe *abſque hoc* that he was guilty after the firſt of *June*, it was holden that the day of the Treſpaſs is not material, and he ought to have Traverſed *abſque hoc* that he was guilty before or after. In this Caſe, it was Reſolved, that when proces is directed to three, or any of them to arreſt one, and two of them did do it, and arreſted the party that the proces was well executed: becauſe this is for the ſervice of the King to execute the proces. *Tr* 14. *Jac.* in *B R. Amſon* and *Walcots* Caſe. *Bolſt.* 3. part. 110. See 45. *Eliz.* in *B. R. King* and *Hobbs* Caſe. adjudg *acc. ibid.*

33. *A.* and *B.* were jointly and ſeverally bound in an Obligation to *I. S.* he took out proceſs againſt them by ſeveral *precipes*, and he had two ſeveral Judgments, and took out ſeveral executions againſt them of one *Teſte*, by a *Capias* againſt *A* and a *fieri facias* againſt *B.* and the Queſtion was, whether the Writs were well awarded: and the opinion of the Court was, that they were not; for that the Book of 15. *H.* 7. 15. is, that after a *Capias* he may not have a *Scire facias* againſt the ſame parties and yet ſome Books are See 18. *E.* 4. and 20 *E.* 4. 3. That if the *Fieri facias* be ſerved for part, a *Capias* may be awarded for the reſidue; but where a *Fieri facias* is executed for all, there a *Capias* after doth not lie; and it was holden that the party ſhall have but one execution with ſatisfaction againſt both parties. *M.* 22. *Jac.* in *B. R. Holt* and *Holts* Caſe. *Winch.* 113.

34. A defendant was convicted in the Star-Chamber for divers miſdemeanors, and a Fine and Impriſonment impoſed upon him, and dammages to the plaintiff; it was prayed, that proces might go out of that Court to levy the dammages upon the goods and lands of the defendant this Caſe was referred to the conſideration of the Judges and Barons, and by them all it was fully reſolved, that no proces could, or ought to be made, neither for the dammages nor for the Coſts of the plaintiff, for the Court hath not any power or Juriſdiction to do it, but only to keep the defendant in Priſon till he pay them: For, for the fine of the King, that Court cannot make any proces for the leavying thereof, but may eſtreat the ſame into the Exchequer, which hath power by Law to make forth proces to the Sheriff to levy the ſame: But if a man be convicted in the Star-Chamber for Forgery upon the ſtatute of. 5. *Eliz.* in that Caſe, for the double Coſts and dammages, an Engliſh Bill ſhall be made, directed to the Sheriff, reciting the Conviction and the Statute for the leavying of the coſts and dammages upon the goods, chattels, and lands of the defendant, for the Statute hath given power to that Court to give Judgment for the Coſts and dammages, and ſo by conſequence the Court in ſuch Caſe hath power to grant Execution. 1. *Hill.* 7. *Jac.* in *Cam. Stellat. Heywod* and Sir *John Whitbrokes* Caſe. *Coke. Select* Caſes. 64.

35. The Caſe was, A man was taken by a *Latitat* and put in bail who were Weſtmen afterward; Judgment paſſed againſt the Principals it was moved to the Court, whether proces upon a *Capias ad ſatisfaciendum* might go into Wales againſt the Bail or not; It was ſhewed to the Court, That in the Court of Common Pleas they do not uſe to ſend ſuch proces into Wales; but only proces of Outlawry: But the Secondary of the Kings Bench informed the Court, that the Courſe of that Court was otherwiſe, and that there were many Preſidents for it, and upon that the Court being fully ſatisfied therein gave a Rule, That proces might be granted into Wales againſt the Bail; and if the parties found themſelves grieved, they might bring their Writ of Error: and afterwards the proceſſe was awarded accordingly. *M.* 10. *Jac.* in *B.R. Hall* and *Rotherams* Caſe. *Bolſtr.* 2. part. 54. 55.

36. Error, to reverſe a Judgment given in the Marſhals Court, the exception taken was, that there was a diſcontinuance of the proces, and ſo there ought to have been no Judgment, and that there was a diſcontinuance appeareth: The continuance was *ad proximam curiam*, and it appeares upon the Return of the *Venire facias*, that that was no Court day, for it was the 23 day of the Moneth, whereas *Friday*, on which day the Court was holden, was not the 23 day: It was the opinion of the Court, that where there is a Diſcontinuance, the Court hath not power to give Judgment, the Judgment was reverſed. *M.* 23. *Car.* in *B.R. Styles.* 66.

Proofe.

1. WHen a thing is beyond the time of memory, a man is not compellable to prove the Commencement thereof. As where a Prior and his ſucceſſors have been Parſons Impropriators of a Church time out of mind, proofe of the commencement thereof, and whether it was by appropriation, or union, is diſpenſed with, becauſe by intendment no proof can be made thereof. *Coke.* 11. part. 10. in *Pridle* and *Nappers* Caſe.

2. The Maſters and Cloth-workers of *Ipſwich* brought debt for 3 pounds, 13 ſhilling and 4 pence againſt *D.* and declared that the King had Incorporated

porated them by the ſame name, and had granted them by Charter, *Quod nullus exerceat autem ſive occupationem in aliqua ſhoppa, domo, ſive Camera infra villam prediſt*; or a Cloth-worker or Tailer, *Niſi ante eos vel duos eorum probationem fecerit quod Apprentiz. fuit per ſpacium annorum &c.* It was a Queſtion in this Caſe, what proof ſhould be ſufficient for the party; It was agreed in that Caſe, that the proof cannot be upon oath, for that ſuch a Corporation cannot adminiſter an oath to the party, and then the proof muſt be by Indentures and witneſſes, and perhaps the Corporation will not allow of any of them, for which the party hath no remedy againſt the Corporation, but by his Action at the Common Law, and in the meane time he ſhould be barred of his Trade, which was his maintenance: and therefore it was holden by the Juſtices in this Caſe, that the Charter was void becauſe of theſe words, viz. *Niſi ante eos, vel duos eorum probationem facere, &c. Paſc.* 12. *Jac.* in *B.R.* The Cloth-workers of *Ipſwiches* Caſe. *Godbit.* 253. 254.

3. Note, It was holden by the Juſtices, if mony be to be paid upon proofe made, there it ſhall be made upon the trial, but if it be to be paid within three moneths after proofe, there proofe muſt be firſt made; but if it be upon proof before *A.* then proof being made before *A.* this extending proof ſhall tie the party: When a Bond is to be paid upon proof, this is intended of a Legal proof by Law, if it be layed generally to be paid upon proof, if it were by proof before two Juſtices, this ſhall be intended a ſufficient proof when the Action ſhall be brought upon the Bond, and if the defendant ſaith, that due proof was not made, then they ſhall ſay that before the two Juſtices &c. It was proved by Teſtimony before them, and then the Judg ſhall judg whether it be a ſufficient proof or not. *Paſc.* 14. *Jac.* in *Co. B. Brownlo.* 1. part 33.

4. A man was bound to pay to the plaintiff 100li within ten daies after his Return from *Jeruſalem*, the plaintiff proving that he had been there; and the plaintiff after 10 daies brought his Action without making any proof that he had been there; and if it were good, or that he ought to make proof of that before he brings his Action, was the Queſtion; and if he ought to make proofe, then what manner of proof: It was ſaid, that when a thing is true, and is not referred to any certain or particular manner of proof, as before, what ſhall be done, or how the proof ſhall be made, the party may bring his Action; and the other party may take Iſſue upon the doing of the thing which ought to be proved; and there trial of that ſhall be ſufficient; and in this Caſe, it was ſaid, That if any proof ſhould be, it ſhould be within 10 daies, which cannot be made by *Jury* in ſo ſhort a time; although it be agreed, that when a man ſpeaks of proof generally, it ſhall be intended of proof by *Jury*, becauſe that is the moſt high proof. *Coke* 6. part. 10. in *Gregories* Caſe. But in the principal Caſe, it was agreed by all the Juſtices, that the plaintiff need not make any other proofe, but only by the bringing of his Action: Then Exception was taken that the plaintiff had not averred in his Replication, that he was at *Jeruſalem*, but generally, that ſuch a day he returned from thence, and a man may returne from a place when he was not at the ſame place, as if he had been neer the place, or in the skirts of *Jeruſalem*; and upon that the Caſe was adjourned. *Hill.* 3. *Jac.* in *Co. B. Sturgis* and *Deans* Caſe. *Brownl.* 2. part 57.

5. Debt againſt *A.D.* Executor of *J.D.* upon a Bond of the Teſtator, the Condition whereof was whereas *A.D.* Son of the ſaid *I.D.* was bound Apprentice to the plaintiff for eight years, if he during that Terme waſted or Conſumed any of the plaintiff wares or goods, then if *I.D.* or his Executors within three Moneths after due proofe thereof made, either by the confeſſion of the ſaid *A.D.* or otherwiſe, and notice thereof given to the ſaid *I.D.* or any of them ſhould render him ſatisfaction of all ſuch monies as ſhould be duly proved to be conſumed, that then &c. The defendant pleaded, that the plaintiff before the Action brought had not proved, that the ſaid *A.D.* had conſumed &c. The plaintiff replied, that the ſaid *A.D.* had within the ſaid Terme, ſince ſuch a day, conſumed 400li of the plaintiffs Wares, and that the ſaid *A.D.* had by a Writing under his hand confeſſed the ſame: and that ſuch a day and place, he gave notice to the Defendant, that the ſaid *A.D.* had conſumed &c. that 400li and ſhewed him his Confeſſion under his hand: upon which the defendant did demurre in Law. It was ſaid that the plaintiffs Replication was not good, for that the proof ought to be by Action brought, and trial at the Common law againſt *A.D.* the Apprentice, or upon Confeſſion of the Apprentice upon an Action brought againſt him, and that the Law eſteemes not of any proofe, but of that which is upon Record: But it was Reſolved by the whole Court, that although generally proof is to be intended by a trial by Jury; yet it may be in another manner according to the Intent of the parties; and proof in this Caſe being referred to the Confeſſion of the parties, it is ſufficient if he confeſſe it under his hand, it it be true; but if it be not true, it cannot bind the defendant, but *prima facie*, it is a good proof, and the defendant having demurred upon it, it is confeſſed that he made ſuch proof: wherefore the Replication was holden good; and it was adjudged for the plaintiff. *Mich.* 10. *Jac.* in *B.R. Gold* and *Deaths* Caſe. *Cro.* 2. part 381.

6. Debt

6. Debt upon an Obligation, conditioned. Whereas *I. S.* was Apprentice to the plaintiff, who at any time during his Apprentiſhip imbezelled or conſumed any of his Maſters goods, if the defendant within three Moneths after proof thereof made, by confeſſion of the ſaid *I. S.* or otherwiſe, and notice thereof given ſhould make ſufficient recompence for all things ſo imbezelled, that then &c. The defendant pleaded, *Quod nulla probatio facta fuit* by Confeſſion of *I. S.* or otherwiſe, that he had imbezeled any goods, The Plaintiff replyed, ſuch a day *Probatio facta fuit*, and that the ſame day the Plaintiff gave Notice thereof to the Defendant, and that he had not ſatisfied *&c.* The Defendant demurred, becauſe it is not alledged that he imbezelled *de facto* ſo much, and without that there is not a ſufficient breach; for the Condition is, If he imbezil, and it be ſufficiently proved, ſo it is not ſufficient to ſay that proof was made, but that he ought to alledge *de facto*, that there was ſuch an Imbezelling; alſo it is not a ledged how the proof was made, which ought to be in this Action: For the Defendant hath three Moneths after proof and Notice, to make ſatisfaction; and of that opinion was the Court, and therefore Judgment was given for the Defendant. *M.* 16. *Jac.* in *B. R. Lee* and *Fydges* Caſe. *Cro.* 2. part 488. See *Hill* 15. *Jac.* in *Co. B. Crookbay* and *Woodwares* Caſe. *Hob.* 217.

7. *A.* brought *Aſſumpſit* againſt Sir *Arthur Ingram*, and declared that *I. S.* was indebted to her 160. *l.* and that ſhe told the Defendant that ſhe would Arreſt him for it; whereupon the Defendant upon Conſideration, That ſhe would at his Inſtance forbear, did promiſe to pay her ſo much as ſhe ſhould prove due unto her by the ſaid *I. S.* and that thereupon ſhe did forbear, and although 160. *l.* were due, and ſhe could well prove it, yet the Defendant hath not paid it: Upon Non *Aſſumpſit* found for the Plaintiff, It was moved that the Conſideration was inſufficient, becauſe there is no years for forbearance proved nor provided, for it might be for a minute: There was no Judgement, for the Caſe was compounded. *Hill* 15. *Jac.* in *Co. B. Turdley* and Sir *Arthur Ingrams* Caſe. *Hob.* 219.

8. Action upon the Caſe upon a Promiſe: Two were in controverſie about a Wager for Running; It was ſaid, that the Wager was got by deceit; the other ſaid, *Give me a ſhilling, and if you can prove that this was gotten by me by deceit, I will give you 5. l. for it*; and upon this he took the ſhilling, and the other brought an Action upon the Caſe upon *Aſſumpſit* for the 5. *l.* and layed *de facto*, that he had gained it the ſame Wager by deceit: It was adjudged in that Caſe, that the proof of this deceit in the ſame Action brought for the 5. *l.* was a ſufficient proof; and the difference was taken where the proof was general, and where with a reference to time, and to perſon, where the ſame is general, that the ſame ought to be by Jury; for that is *optima probatio*: *M.* 33. *Eliz.* in *B. R. Cragge* and *Griffins* Caſe. *Bolſtar.* 3. part. 56.

9. Error brought upon a Recovery had in an Action Popular, brought by Bill in the Court at *Ludlow* upon the Statute of 5. *Ma. Cap.* 5. It was aſſigned for Error, that the plaintiff ought by the Statute of 18. *Eliz.* have ſued by Original Writ, or by Information, and not by Bill for it was adjudged, that where the defendant ſued by Bill upon the Statute of 23. *H.* 6. of Sheriffs, that it was adjudged that it did not lie: 2. That the recovery was not in ſuch a Court as was intended by the Statute, for the Courts of Records inteſted by the Statute, *Propter excellentiam*, ſhall be intended the four Courts at *Weſtminſter*: and in that Caſe it was ſaid, that if a man ſpeak generally of proofe, It ſhall be intended of Proof by Jury. *Coke* 6. part. 20. *Gregories* Caſe.

10. In debt upon a Bond, the Condition was, That if he paid to the Obligee ſo much within ſix months after his return from *Venice*, proving this; He proved it under the hand of the Duke of *Venice*, yet it was holden by the Court to be no ſufficient proof, but the ſame ought to be by Jury. *M.* 29. *Eliz.* in *Co. B. Glemman* and *Browns* Caſe. *Bolſtr.* 3. part. 56.

11. Note, it was ſaid by the Chief Juſtice, that if divers perſons do Seal a Deed, and but one of them acknowledg the Deed, and the deed is thereupon enroled, that this is a good enrolment within the Statute, and may be given in evidence, as a Deed enroled, at a trial: and it was then ſaid and alſo agreed, that if a Deed do expreſſe a Conſideration of mony upon a purchaſe made; yet that is no proof upon a Trial that the monies expreſſed were paid, but it muſt be proved by Witneſſes. *Mich.* 1653. in *B. R. Thorne* and *Madiſons* Caſe. *Styles.* 462.

See more of Proof in Title Witneſſe.

Prochyn Amy, and *Prochyn* of Blood.

1. ERror of a Judgment in *Durham*: The Error aſſigned was, becauſe in an *Ecclione firma*, againſt *T. S.* the Father, and *I. S.* his Son, the Father appearing by *T. C.* his Atturny, and the ſaid *I. S.* the Son *per eundem T. C. proximum amicum ſuum* who was admitted *per Curiam*, *pro eodem I. S.*

ad proſequendum, and pleaded Not guilty, whereas he ought to have been admitted to plead by his Guardian and not by *Prochyn Amie*, and the admittance ought to have been *ad defendendum*, and not *ad proſequendum*. It was the opinion of the Juſtices, that it was erronious; for a Guardian and *Prochyn Amie* are diſtinct; and a Guardian, or *Prochin Amie* may be admitted for the plaintiff: The *Prochin Amie* was never before the Statute of *Weſt.*1. Caſe. 47. and he is appointed In Caſe of neceſſity, where an infant is to ſue his Guardian, or to be Eſſoined, or that the Guardian will not ſue for him; and for theſe cauſes he may be admitted to ſue by Guardian, or *Prochin Amie*, where he is to demand, or gain: But when he is to defend a ſuit in an Action Real, or Perſonal, it ought alwaies to be by Guardian, and the Guardian ought to be admitted by the Court, wherefore it was the opinion of the Court, that the admittance of the defendance, *per proximum amicum* was erronious, and eſpecially *ad proſequendum*. The Judgment was reverſed. *Tr.*20. *Jac.* in *B.R. Simpſon* and *Jackſons* Caſe. *Cro.*2. part. 641.

2. Three Brothers are: a feme ſole holds lands of the Eldeſt brother by Socage, and afterwards taketh the middle brother to husband, and dieth, their Son being within the age of 14 years: It was a Quere. 21. *Eliz.* in the Common Pleas, who ſhould have the Guardian ſhip of the Land as *Prochin Amie*; of the eldeſt, the eldeſt, or the youngeſt; and at length it was Reſolved, that the eldeſt ſhould have it, becauſe he was next of Blood.

3. A Writ of Accompt was brought againſt Guardian in Socage, and it was challenged, becauſe it was not ſhewed in the Writ nor Count, that he was *Prochin Amie*; but the Challenge was not allowed. 20. 22. E. 3. 11.

4. Note, that he who is next *Jure repreſentationis*, ſhall inherit, and not he who is next *Jure propinquitatis*; and therefore, if a man hath Iſſue two Sons *A* and *B*, and dieth, *B* hath Iſſue two Sons, *C* and *D*, and dieth, *C* hath Iſſue a Son, and dieth; *A* purchaſeth Lands in Fee and dieth without Iſſue, the Son of *C* ſhall inherit him, and not *D*, although that *D* be next Coſin, *Jure propinquitatis*; becauſe the Son of *C* is next *Jure repreſentationis*: But if a Leaſe had been made to *A*. the remainder to his next of blood in Fee, in that caſe *D* ſhould take the remainder, becauſe he is more nere of blood, to take by purchaſe. See 30. *Aſſ.* 47 *Acc.*

5. In a Raviſhment of Ward, the Caſe was: *A* ſeiſed in Fee, his Son and heir of the age of two years; his Wife took another Husband, and by him had Iſſue a Son; the Queſtion was, whether the uncle on the party of the Mother, or the youngeſt Son of the halfe blood, ſhould have the Guardian-ſhip of the Enfant within age: See, it is left a Quere, and not Reſolved. *Mich.*41. *Eliz.* in *Co. B. Swan* and *Gatelaids* Caſe. *Owen* 128.

6. A Woman had Iſſue two Sons, by two ſeveral Husbands, the ſecond husband deviſed Lands to the Woman, for life, the remainder to the next of kin of the woman: It was a doubt who ſhould have the Land; the better opinion ſeemed to be, that the younger Son ſhould have the Lands by the remainder, for that the one was no more nere of Blood to the Mother, then the other; but the Eldeſt was the more worthy of blood, and then it is uncertain by the Words who ſhall have it; but the intent which is alwaies to be taken in deviſes, ſhall be taken for the younger Son; becauſe he is the Iſſue of the Deviſor. See *Perkins Sect.* 508. 3c. *Aſſ. Deviſe.* 9 30. *Aſſ.* 47. *acc.* and ſee *Paſc.*25. *Eliz.* A Caſe in the Exchequer Chamber, which was this; Three Brothers were: the youngeſt purchaſed Lands, and deviſed it to his Sons in taile, and if he died without Iſſue, that then it ſhould remain to the next of Kin of the Linage of his Father; the younger brother then having Iſſue, a Son, the Queſtion was, who ſhould have the remainder, and upon great advice it was adjudged, that the Son of the eldeſt ſhould have it, becauſe he was next of the Linage, for Linage ſhall be taken in a Lineal deſcent, and the moſt worthy. See 15. *Eliz. Dyer.* 333. *Acc.*

7. A man was ſeiſed of a Manor, by diſcent of the party of his mother, and enfeoffed a Stranger of a Meſſuage parcel of the ſame, to hold of him and his heires by certain ſervices, before the Statute of *Donis Terrarum*, and died without heir of the party of the Mother; and there ſome would have had it, that the ſeignorie ſhould diſcend to the heirs, on the party of the Father, becauſe it was newly created by the ſaid Feoffor; But the rule given by *Barriſord* is, that it ſhall diſcend to the heires on the party of the Mother only, and for want of ſuch heir, that it ſhall eſcheat; for this ſeignorie, which he hath reſerved by his own Feoffment is due, by reaſon of the right which he hath in the Tenance, and the right of the Tenantrie ſhall diſcend to the heires on the party of the Mother. 5. E. 3. See Title *Avowry.* 207. Vouche in *Coke* 8. part. 54. in *Simons* Caſe.

See more of *Prochin Amy* and Prochin of Blood: in the Title of Eſtates.

Prohibition.

Prohibition.

Where upon a ſuit in the Spiritual Court for Tithes, a Prohibition will lie, and ſhall be granted, and where not: And where in Caſe, where a* Modus Decimandi *is alledged, where not.

1. A Man had payed for the Tythe of a Cloſe for 60 years together but 12 pence to the Parſon or Vicar; The Parſon afterwards Let to Farme his Rectory, and the Farmer ſued in the Spiritual Court for Tithes in kind; where the party pleaded the payment of 12 pence for the Tithes; which the Judg of the Spiritual Court refuſed to allow of: It was upon that Caſe granted, that a prohibition ſhould be awarded, and was awarded accordingly with an averment in the ſurmiſe, that the Spiritual Court would not allow of the plea. *Hill.* 7. *E.* 6. *Dyer.* 79.

2. A prohibition was ſued forth upon the Statute of 2. *E.* 6. upon a ſuit within ſeven years, within the Spiritual Court, for the Tithes of Wheat, growing in 60 Acres of Barren ground, which was improved: Upon Iſſue joyned, whether the 60 Acres were *fructueſa, & non ſterilis.* It was found by verdict, that for 30 Acres of them they were barren, and for the reſidue, it was found, that the party had payed tithes of Wool and Lamb; It was the opinion of the Juſtices in this Caſe, that becauſe he brought his ſuit of wheat, whereas he ought to have had ſuch Tythes as he had before for 7 years, that the Writ would lie. *M.* 2. *Eliz. Dyer. Pels* and *Sanderſons* Caſe. 170. 171.

3. Lands were in the hands of an Abbot and of his Farmors, time out of mind, but with Tithe Lamb and Wool. The Abby came to the Crown by the Statute of 31. *H.* 8. of diſſolution; the Parſon ſued to have Tithe of Hay and Grain in kind; It was holden, that by the word, diſcharged, in the Statute, the Lands were diſcharged of payment of Tithes in Kind; and in that Caſe a Prohibition was awarded. *Paſc.* 18. *Eliz. Dyer.* 349. the Parſon of *Pekirks's* Caſe.

4. A Religious Colledg to which a Rectory was appropriate, and other Lands of the ſaid Colledg came to King *Hen.* 8. by the Statute of 1. *E.* 6. The King conveyed the Rectory to *A*, and the Lands parcel of the poſſeſſions of the Colledg to *B. A.* ſued the fermer of B. for Tithes in kind of the Lands, who brought a Prohibition againſt *A.* and ſhewed the Statute of 31. *H.* 8. concerning diſcharge of Tithes, and alſo ſhewed unity of Poſſeſſion of both, at the time of both Statutes, and in this caſe it was Reſolved, that the Prohibition did not lie, for that this Colledg did not come to the King by the Statute of 31. *H.* 8. but by the Statute of 1. *E.* 6. and the branch of diſcharg of Tithes in the Statute of 31. *H.* 8. did not extend to any Colledge, which came to the King, by the Statute of 1. *E.* 6. 2. It was reſolved in this Caſe, that a general allegation of unity was not ſufficient within 31. *H.* 8. but that ſuch an unity as ſhould make a diſcharge of Tithes within that Statute, ought to be a lawful and perpetual unity, time out of mind &c. *Coke* 2. part. The Biſhop of Canterburies Caſe.

5. A parſon did Libel in the Spiritual Court, againſt a Pariſhioner for Tithes of ſuch Lands within his Pariſh; the defendant ſurmiſes, that he and all thoſe whoſe eſtate he hath, in the Lands out of which the Tithes are demanded, have uſed to pay every year 5 ſhillings to the Pariſh Clark of the ſame pariſh, for all the Tithes out of the ſame place; it was ſaid, that the preſcription was not good, for a Pariſh Clark is not a parſon incorporate, nor hath ſucceſſion; but if he had preſcribed, that they uſed to pay it to the pariſh Clark to the uſe of the Parſon, perhaps it might be good; In this Caſe, it was agreed by the Juſtices, that of common right the parſon is not bound to find the pariſh Clark; But if the Parſon be tyed to find ſuch a Clark, and ſuch a ſumme of mony hath been uſed to be paid to the pariſh Clark, in diſcharge of the Parſon, and Tithes; the ſame had been a good preſcription, and ſo by way of Compoſition good. But the Court held, that Tithes were to be paid to Spiritual perſons; and a Pariſh Clark is but a Layman: and therefore no prohibition would lie; and afterwards a Conſultation was awarded by the Court. *Hill.* 30. *Eliz.* in B. R. *Savel* and *Woods* Caſe.

6. The Caſe was. *A.* Parſon of *L.* libelled in the Spiritual Court for Tithes, the defendant ſhewed that the Cuſtome of the Town of *L.* is, that the parſon ſhall have for his Tithes the tenth Land ſowed with any manner of Grain, and he ſhall begin his reckoning alwaies at the firſt Land which is next to the Church &c. the parſon ſhewed, that the defendant by fraud ſowed every Tenth land which belonged to the parſon (*ut ſupra*) very ill, and with ſmall quantity of grain, and did not dung, and manage it as he did the other nine parts; by means whereof, whereas every other ninth Land of them, yielded eight Cocks, the tenth yielded but three Cocks; and for this matter the Parſon (confeſſing the Cuſtome) libelled in the ſpiritual Court and prayed Tithes in kind; The defen-

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dant prayed a Prohibition upon the Parſons confeſſion of the Cuſtome. But it was the opinion of the Court, that the Cuſtome was againſt common reaſon, and ſo voide; and therefore a Prohibition upon it was denied: But the Court was of opinion, that if the Cuſtome had been good, there the Parſon muſt have had his Action upon the Caſe. *Paſc.* 30. *Eliz.* in *B. R. Stebbs*, and *Goodlacks* Caſe. *Leon.* 99.

7. *A.* Parſon of *North-lyme* libelled againſt *I. S* for Tithes in Kind of certain paſtures. The defendant to have a Prohibition ſurmiſed, that he is inhabitant of *South-lyme*, and that time out of mind &c. every Inhabitant of *South-lyme* having paſtures in *North-lyme*, hath paid Tythes in kind unto the Vicars of *South-lyme*, where he is not reſident; and the Vicar hath alſo time out of mind, paid to the parſon of *South-lyme*, for the time being, two pence for every Acre: It was the opinion of the Court in this caſe, that this is not a ſufficient ſurmiſe to have a Prohibition; for that upon this the matter of *Modus Decimandi* ſhall never come in Queſtion, but only the right of Tithes, if they belong to the Parſon of *North-lyme*, or to the Vicar of *South-lyme*; and he might have pleaded this matter in the Spiritual Court, becauſe it toucheth the right of Tithes: and alſo the preſcription is not reaſonable: and therefore the Prohibition was denied, and a Conſultation awarded: 30. *Eliz.* in *B.R. Gatefield* and *Penns* Caſe. *Leon:* 128.

8. *A.* Mr. of the Rolls Libelled in the Spiritual Court againſt *B.* and *C.* his ſervant, for Tythes parcel of a Rectory whereof *A.* was Farmor to the Queen: It was moved, that againſt the Queens Farmor a Prohibition did not lye; But as to that it was holden by the Court, That a Prohibition doth lye againſt the Queens Farmor: Exception was taken to the ſurmiſe upon the Prohibition prayed, becauſe the ſaid *A.* had Libelled againſt the ſaid *B.* and *C.* his ſervants ſeverally, and now they both had made a joint Surmiſe; whereas they ought to have severed in their Surmiſes; and ſuch was the opinion of the Court: and for theſe Cauſes the Prohibition was denyed. *Paſc.* 26. *Eliz.* in *B. R.* Sir *Gilbert Gerrard* and *Sharringtons* Caſe. *Leon.* 186.

9. A Parſon Leaſed all his Gleab Lands for years, with all the Profits and Commodities, rendering 13. *l.* 4. *d. pro omnibus exactionibus & demandis*; and afterwards he Libelled againſt the Leſſee for the Tythes thereof, and the Leſſee upon that Surmiſe obtained a Prohibition: It was after moved for a Conſultation, and a Conſultation was awarded; for *Wray* Chief Juſtice ſaid, That Tythes are not things iſſuing out of Lands, nor any ſecular duty, but ſpiritual; and if the Parſon doth releaſe all demands in his Lands, his Tythes are not thereby extinct, and a Conſultation was granted. *Tr.* 31. *Eliz.* in *B. R. Stiles* and *Millers* Caſe. *Leon* 300.

10. The Leſſee of the Earl of *Hertford* prayed a Prohibition againſt the Vicar of *L.* to ſtay a Suit in the Spiritual Court for Tythes, becauſe the Lands were parcel of the Foreſt of *B.* whereof the King was ſeiſed in Fee *in jure Coronæ*, and he and all his Predeceſſors held it diſcharged of payment of Tythes, and after granted it to the Earl of *Hertford* in Fee, and ſo he ought to hold them diſcharged: The Court doubted whether the Parentee might have ſuch priviledge; Or that it be only a priviledge annexed to the Crown during the time the Land was in the Crown; but at laſt a Prohibition was granted *de bene eſſe*, unleſs cauſe were ſhewed by a day certain. *M. 3. Car.* in *Co. B. Morant* and *Cumings* Caſe. *Cro.* 1. part. 67.

11. Prohibition upon the Statute of 2. *E.* 6. becauſe he ſued for Tythes of Heath and barren ground within ſeven years after the Improvement: The Defendant pleaded the Statute of 50. *E.* 3. cap. 4. and that at another time a Prohibition was granted, and a Conſultation thereupon, and therefore he ſhall not have another Prohibition: It was ſhewed, That the Conſultation was not upon the ſubſtance of the Prohibition, but becauſe he did not prove by two witneſſes the ſuggeſtion within ſix moneths; the firſt Queſtion was, Whether by the Statute the ſuggeſtion ought to be proved by Witneſſes; as to that it was Reſolved, That it ought, as well as a Preſcription *de modo Decimandi*, or a Diſcharge of Tythes, or any other ſuggeſtion. 2. Reſolved, That it was not within the Statute of 50. *E.* 3. for that is intended where Conſultation is granted upon the ſubſtance of the Suggeſtion, and not where it is granted upon the inſufficiency of the form of the Suggeſtion, or in the proceeding thereupon: Wherefore it was adjudged for the Plaintiff, eſpecially as this Caſe is, becauſe it is a Collateral Cauſe, out of the ſuggeſtion, and no Cauſe of Conſultation at the time of the Statute made. *Hill* 6. *Car.* in *B. R. Stroad* and *Hoskins* Caſe. *Cro.* 1. part. 151.

12. A Prohibition was prayed to ſtay a Suit in the Spiritual Court upon a Sentence in *Ireland*, for Tythes of Fiſh taken in the Sea; becauſe Fiſh in the Sea or great Rivers are *feræ naturæ*, and not Tytheable; and alſo becauſe the Sea is not within any Pariſh, and ſo no Parſon can ſay it is within his Pariſh: But the Prohibition was denyed by the Court; For *Jones* Juſtice, ſaid, That for Fiſhes in *Ireland* Tythes were ever paid, and in *Cornwall* they pay Tythe for Fiſhing in the Sea, and they pay it to the Parſon of the Pariſh where they are Landed: And it is a Cuſtom in *Yarmouth* that Tythe ſhall be paid for Herrings. *Tr.* 8. *Car.* in *B. R. Cro.* 1. part 192. See *Hill* 9 *Car.* in *B R.* the ſame Caſe, but not reſolved *Ideo quære*, if Tythes ſhall be paid if it be not by Cuſtome.

13. A Suggeſtion was made to the Court, that the Cuſtom was, That for Tares cut or mowed before

they be ripe and given to plough Cattel, Tythes ought not to be paid; and another Custome for Headlands sowed with Corn, used to be fed with plough Cattel, or mowed and cut for that purpose, that the Owners should be discharged of Tythes; and upon that Suggestion, grounded upon speciall Customs, the Court granted a Prohibition. *Hill* 10. *Car.* in *B R. Meare* and *Thornams* Case. *Cro.* 1. part 285.

14. A Parson Libelled in the Spiritual Court for the Tythes of young Trees planted in a Nursery upon purpose to be rooted up and to be sold to be planted in another Parish; and a Prohibition was prayed, because they were of the Native of the Land, and Tythes should not be paid of them no more then of Coal, or of Stones digged, or for wood spent in the House for fuel: It was the opinion of the whole Court, That forasmuch as he made a profit of such young Trees, Tythes should be paid for them when he diggs them up and sells them in another Parish; the Prohibition was denyed *per Curiam. Hill* 14. *Car.* in *B. K. Gibs* and *Wyborns* Case. *Cro.* 1. part 378.

15. In a Prohibition, to stay a Suit for Tythes, the Plaintiff shewed, that he was seized in fee of three Acres of Meadow in the Parish of *S.* and that within the Parish there is a Custome, That every one seized of any Meadow within the same Parish have used time out of mind to cut down the grass growing upon a such Meadow at their own proper costs, and to Tedd and shake it abroad, and to gather it into round Rows, and put it into smal Cocks. *Et post primum circumlationem inde*, the 10th Cock *inde* to set forth for the Parson in satisfaction of all Tithes, as well of the first Moweth, as of the second Moweth; of that Meadow for the same years: and alledged *de facto*, that he did so, and that the defendant sued him for the Tithes of the after Moweth; It was objected, that this prescription was not good, because there is no more given to the Parson then he ought to have; But it was adjudged, that because it was alledged, that he at his own costs had tedded and shaked it abroad, and made it into Cocks, so it was a greater Labor and charge then the Law appoints, and the Parson hath the benefit of that Labour; that it was a good discharge, and the Prohibition allowed. *Pasc.* 2. *Jac.* in *B.R. Holl* and *Fettyplaces* Case. *Cro.* 2. part 41. and so it was adjudged. *Pasc.* 37 *Eliz.* in *B.R.* in *Awbrey* and *Johnsons* Case. And it was said, that without especial Custome, no Tithes shall be paid for Hay of the after Moweth: for that the Rule of Law is, that Tithes shall be paid *ex annalis renova alibus simul & semel.* See *Hill.* 16. *Jac.* in *Ci. B. Hide* and *Ellis* Case. *Heb.* 150. adjudg. acc.

16. Prohibition by the Plaintiff in the Spiritual Court, to stay his own suit, for he suing for Tithes in the Court of *N.* by virtue of a Lease made by the Vicar of *F.* for three years, the defendant claimed to be discharged of Tithes by a former lease, and composition by deed; It was the opinion of the Court, that the plaintiff himselfe might have a Prohibition to stay his own suit, for they are not to medle with the trial of Leases or real Contracts, although they have Juridiction of the Original Cause *viz.* for Tithes. *M.* 11. *Jac.* in B.R. *Wotts* and *Clysions* Case. *Cro.* 1. part. 352.

17. Upon a Reference in *Cu.* B. for a Prohibition; the plaintiff laid by his Prohibition, and the Ecclesiastical Court proceeded to sentence, afterwards the party appealed, and two Termes after the other dissolves the Prohibition. It was the opinion of the Court, that in regard he had surceased his time, and suffered the sentence to passe, that he now should not have the benefit of the Prohibition; and a difference was taken where a Prohibition was granted, and the party not serving it, sentence of excommunication is pronounced in default of answer there upon the matter, he may have the benefit of his Prohibition; but not where there is a sentence definitive. *Tr.* 15. *Jac.* in B R *Cro.* 2. part. 429.

18. A Prohibition was prayed to the Spiritual Court upon a suggestion, That the parson Libelled for the Tithes of a Mill which was erected upon Lands discharged of Tithes by the Sature of 31. *H.* 8 *Cap.* 13. of Monasteries. But it was denied by the whole Court, for *de Molendino denovo erecto non fuit prohibitio. Tr.* 15. *Jac.* B.R *Cro.* 2. part. 429. *acc.*

19. A Parson sued for substraction of Predial Tithes upon the Statute of 2. *E.* 6. in the Spiritual Court, the defendant made a suggestion, that for such a Farm upon which the Tithes did arise, there was a Custome that when the Tithes of the Land was set forth, that the owners of the said Lands had used time out of mind, to take back 30 Sheafs of the Tith Corne, and shewed, that he was owner of the said Farme, and that according to the Custome after the Tithe was set forth, that he did take back 30 Sheafs thereof, and prayed a Prohibition in this case: It was the opinion of the Court, that it ought to be averred, that the Farme was a great Farme, for otherwise it would be the impoverishing of the Church, and would take away a great part of the profit of the Parson: and if there were but 30 Sheafs in all, that the owners should not have them, for then the Custome should be unreasonable; But day was given to shew cause, why the prohibition should not be awarded. *M.* 11. *Jac.* in *Co. B. Fuckr* and Sir *Charles Chardishes* Case. *Godbit.* 234.

20. A Parson did Covenant and grant by deed with one of his parishioners, That in Consideration of 6 pound 13 shillings 4 pence *per annum* to be paid unto him, that parishonor should be discharged of all Tithe, upon condition to be void upon default of payment. Afterward the parson against his grant did sue the parishioner in the spiritual Court for Tithes in kind; A prohibition was prayed upon this mat-

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ter? But the Court would not grant it, becauſe that the Original, *viz.* Th: Tythes, do belong to Spiritual Juriſdiction: But it was ſaid, That the Pariſhioners might have an Action of Covenant againſt the Perſon, upon the deed in the Temporal Court. *M.* 26. *Jac.* in *B.R. Barnwell* and *Pleſſies* Caſe. *Godb.* 273.

21. A man granted Lands parcel of his Manor to a Parſon in Fee by Deed to be quit of Tithes, and the Parſon with the aſſent of the Ordinary grants to him that he ſhall be quit of Tithes of his Manor for that parcel of Lands, If he or his Aſſigns be impleaded in the Spiritual Court for the Tithe of his Manor, or of any parcel of the ſame, he and his Aſſigns may have a Prohibition upon that Deed; and if the Deed were made before time of Memory, and the party had continued ſo to be quitted of Tithes of the Manor, the ſame is a real Compoſition, and ſhall bind the Parſon and his Succeſſors; and if the Parſon afterwards ſueth for Tithes in kind, a Prohibition will lie by. *Hobart. Mich.* 16. *Jac.* in *Co. B. Cowper* and *Andrews* Caſe. *Hob.* 41, 42.

22. *A.* Sued in the Spiritual Court for all the Tithes of the ground of one *B.* who prayed a Prohibition upon a Surmiſe, That the Queen was ſeized of two parts of the Tithes, and granted them to one *W.* and ſo conveys them to another, to whom he had paid for thoſe two parts; The Parſon prayed a Conſultation for the Third part, but it was denyed by the Court, becauſe a Conſultation cannot be granted but according to his Libel: and therefore it was holden that he muſt Libel *de novo* for Tythe of the third part. *Hill.* 13. *Jac.* in *Co. B. Hoskins* Caſe. *Hob.* 115.

23. Upon ſurmiſe to have a Prohibition, It was ſurmiſed, That there was a concord and agreement between the Lord *Chandois*, who was ſeiſed of the Manor of *B.* in the County of *Wilts*, and the defendant Parſon of *B.* That the Lord *Chandois* and his Farmers of his ſaid Manor ſhou'd pay unto the ſaid Parſon ſo long as he ſhould remain Parſon, ſuch a ſum of money in ſatisfaction of all his Tithes, and that in conſideration thereof they ſhould hold the ſaid Manor diſcharged of Tithes. It was ſaid, That upon a Demurrer in that Caſe it was adjudged, that a Prohibition would not lye, and that a Conſultation was awarded. *Hill.* 13. *Jac.* in B. R. *Hawles* and *Byfields* Caſe. *Hob.* 176.

24. *A.* Parſon of *S.* did Libel againſt *B.* in the ſpiritual Court for Tythe of Lambs, and ſaid there was a Cuſtom there, that all lambs ingendered, fallen, and bred upon any one Tenement or Living in the ſame Pariſh, although they belonged to ſeveral owners, they have been caſt and reckoned together as if they were but one mans, and the Tenths or Tythe Lamb of them ſo counted together have been paid for Tithe: and in this caſe a Prohibition was granted; becauſe all Cuſtoms againſt common right are tryable by the Common Law; and alſo becauſe the pretended cuſtom was unreaſonable, and againſt Law; for by this means it might fall out, that ſome one might have but one lamb, and that might be taken for Tythe, and he that had more ſhould pay nothing at all. *M.* 18 *Jac.* in *Co* B. fol. 603. *Barker* and *Packers* Caſe. *Hob.* 329.

25. In the Caſe of a Prohibition, the Caſe was, That a Parſon Libelled in the Eccleſiaſtical Court for the Tithe of Cattel; and the plaintiffe in the Prohibition alledged, That thoſe Cattel of which Tithe was demanded, are for his Dairy and for the Plough: It was holden by *Winch.* Juſtice, who only was preſent in Court, That the Parſon ſhall not have Tythe of ſuch Cattel; but if he breed up Cattel to ſell, it is otherwiſe. *Tr.* 20. *Jac.* in *Co. B Winch* 33. acc. *M.* 1. *Jac.* in *Co. B. Baxter* and *Hopes* Caſe. acc.

26. In the Principal Caſe it was alledged by the Plaintiff in the Prohibition, That time out of mind the Pariſhioners had uſed to pay a half-penny for the Tythe of a Calf, and 1. d. for a Cow; and that upon a day limitted they uſed to bring this to the Church, and to pay this to the Vicar, and that now the Vicar had libelled in the ſpiritual Court to compell them to bring it home to his houſe: It was ſaid that that was no occaſion for a Prohibition, for they agree in the *Modus*, but vary in the place of payment, and that is no matter of Subſtance, and for that reaſon no Prohibition will lye. *Ibid.*

26. In a Prohibition the Caſe was, A Libell was againſt the Plaintiff in the ſpiritual Court for Tythes; the Plaintiff upon a ſuggeſtion there made that there had bin a *Modus* of 2. *s.* for all Tythes obtained a Prohibition; upon Iſſue Joined, the Plaintiff was Nonſuit, becauſe he could not prove his *Modus*, & a Conſultation awarded; Afterwards a Sentence paſt there againſt him againſt the *Modus*; he appeals unto another Court upon the ſame Libel, there he ſuggeſts a new *Modus* of 2. *s.* for Tythe Gorn and Hay, and thereupon he prays a new Prohibition upon the Statute of 50. *E.* 3. cap. 4. It was the opinion of the Court, That the Appeal being in the ſame Cauſe, ſhall not be cauſe to make us to grant a new Prohibition, after a Conſultation duly granted, for the great inconvenience that might enſue; wherefore the Prohibition was denyed. *Paſc.* 14. *Jac. Biggs* Caſe. *Bolſtr.* 3. part 182.

27. A man Libelled in the ſpiritual Court for the Tythe of Neck-wooll of 800. Sheep, which the Defendants had cut and converted to their own uſes; The Defendants anſwered there, that they uſed between *Michaelmas* and *Allhollantide* to cut the head, neck and ears to preſerve their Sheep from vermin, therby to make the Fleece the better, & that they were to pay the tenth Sheep at ſhearing time; but not to pay any of theſe Neck-fleeces being of no value, which plea they there refuſed, and gave ſentence againſt him: This in it ſelf the Court thought to be no ground for a Prohibition; but afterwards becauſe it appeared in

the ſuggeſtion, they uſed to wind up the other Fleeces at their own charge; Prohibition was granted by the Court. *M.* 14. *Jac.* in *B. R. Foſſe* and *Parkers* Caſe. *Bulſtr.* 3. part 242, 243.

28. *A.* Libelled in the Spiritual Court for the Tythe of Roots of Copps wood rooted up, the Court awarded a Prohibition in this Caſe; For the Roots ſhall be privileged as well as the Branches: And in this Caſe it was holden, That Tythes ſhould not be paid for Quarries of ſtone, nor for brick of Clay. *M.* 15. *Car.* in *B. R. Skynners* Caſe. *Noſh.* 58.

29. A Parſon Libelled in the Spiritual Court for Tythes: It was moved after Sentence upon a Suggeſtion of a *Modus Decimandi*; It was the opinion of the Court not to grant it after ſentence: The difference is where the party pleads the *Modus*, where not; for if he plead it there, notwithſtanding Sentence; a Prohibition hath been granted contrary, where he doth not plead it. *M.* 15. *Car.* in *B. R. Marſh.* 73.

See more of this *Diviſion* in *Lib.* 1. Title *Diſmes.*

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2. *Where a* Prohibition *ſhall be granted to the Eccleſiaſtical Courts; to ſtay their Proceedings in Cauſes: Which are Tryable at the Common-Law, and in what Suits; And for what Cauſes, what not.*

1. SUit was in the Spiritual Court, for theſe words, viz. *Thou art a forſworn Knave, for thou maideſt a falſe Accompt when thou were Churchwarden;* The Defendant prayed a *Prohibition*, ſuppoſing the diſcuſſing of the Perjury to belong to the Temporal Court: But upon opening of the matter, the Court was of opinion a Conſultation ſhould be granted, becauſe the perjury was ſuppoſed to be committed about his execution of his Office of Church-Warden, which doth belong to the ſpiritual Juriſdiction; But if it had been ſuppoſed to have been committed concerning a Feoffment or other Temporal Act, *Prohibition* would lye. *M.* 40. *Eliz.* in *Co. B. Brown* and *Lothers* Caſe. *Goldſbr.* 113.

2. One Libelled in the Spiritual Court for Tythe of Billet, Faggot, and Talwood, and averred it came of Birch, Maple, and Haſel: A *Prohibition* was ſued ſurmiſing that they came of Oak, Aſh, Elm; It was ſaid that in the Spiritual Court if one Libel for wood of one nature, and it is found of another nature, yet Judgment ſhall be given there for the Plaintiff: But the Court ſaid that was abſurd; And vouched *Molins* Caſe, where one Libelled for Billet and Faggot generally, without ſhewing of what wood they were made, and upon pleading it appeared that part was Tytheable, and part not, and a *Prohibition* was awarded; and ſo it was ſaid it was adjudged in one *Lancs* Caſe: And the opinion of the Court was in the principal Caſe, he ought to have pleaded the ſpecial matter to have had a Conſultation, viz. How many of them were Haſel, *&c.* which becauſe he had not done the *Prohibition* ſtood good. *Hill* 43. *Eliz.* in *Co. B. Goldſbr.* 127.

3. In a *Prohibition* the Caſe was, The Farmer of a Parſonage ſued in the Spiritual Court for Saffron, againſt the Vicar: The Vicar pleaded, that time out of mind, the Vicar and his Predeceſſors have had the Tythe of all Saffron within the Pariſh, The Plaintiff pleaded that the Land where the Saffron was growing this year, for forty years paſt had been ſowed with Corn, whereof the Parſon and his Predeceſſors had the Tythe: It was the opinion of the Court in regard the ſpiritual Court would not allow of the Plea there, that the *Prohibition* ſhould ſtand. *Hill* 43. *Eliz.* in *B. R. Beaufield* and *Feeles* Caſe. *Goldſbr.* 149.

4. *Note*, It was Reſolved by the whole Court, That if a man ſueth in the Spiritual Court for Defamation, the matter ought to be wholly Spiritual and Eccleſiaſtical, as for calling him Hereticque, Adulterer, Schiſmatique, *&c.* 2. Reſolved, That if the Defamation be or concerneth any thing which is determinable at the Common Law; there the Spiritual Court ſhall not have a Juriſdiction of it. 3. Reſolved, That he who ſues in the Spiritual Court for Defamation, although that the matter be meer Eccleſiaſtical; yet he cannot ſue there for damages; but the Suit there ſhall be for puniſhment, *pro ſalute animæ*: But yet if a man ſueth in the Spiritual Court for laying violent hands upon a Clerk, if the party will redeem his penance, and agree to pay to the party damnified a certain ſum of money, there for ſuch ſum, the Suit ſhall be in the Spiritual Court. *Tr.* 25. *Eliz.* in *B. R. Palmer* and *Thorps* Caſe. *Co.* 4. part 20.

5. It was Reſolved and Adjudged in *Co. B.* That in all Caſes depending between party and party in the Spiritual Court, where the Suit is only *pro ſalute animæ vel Reformatione morum*, as for Defamation, laying violent hands upon a Clerk, and the like: In ſuch Caſe the Kings pardon is in Bar of the Suit, becauſe the Suit is not to recover any damages, but to inflict puniſhment upon the Offendor; But if one Libelleth there for Tythes, or for a Contract of Matrimony, or for any thing wherein the Plaintiff hath an Intereſt, there the King cannot pardon it, neither before nor after the Suit. 2. Reſolved, although the Suit be for the King, yet when ſentence is

is given, and Coſts taxed for the party, the Kings Pardon ſhall not diſcharge them, although the pardon had been before the Sentence. 3. Reſolved, That although the party appeal, ſo as the Sentence to divers purpoſes is ſuſpended, yet by the firſt Sentence the party hath an Intereſt in the Coſts, which cannot be diſcharged by the Kings pardon. *Tr.* 20. *Jac.* in *Co. B. Coke* 5. part 51. *Halls* Caſe. *Tr.* 2. *Car.* in *Co. B. Baldry* and *Packards* Caſe. *Cro.* 1. part 33. *acc.*

6. The Marqueſs of *Winchester* by his Will in writing deviſed divers Manors to his reputed Son; and further deviſed that divers Manors ſhould be ſold, and bequeathed divers Legacies, and Plate to them: This Will was indeavoured to be proved in the Prerogative Court; and becauſe it appeared by Circumſtances that the Marqueſs was not of ſound memory at the time of the making of the ſaid Will, a *Prohibition* was prayed, which was granted by the Court; and the reaſon was, becauſe the Will concerning the Land and the Goods were mixed together, ſo as if they proceeded there concerning the Goods, the ſame did prevent the Tryal at Law for the Land; and for that cauſe the *Prohibition* was granted: For a Will of Lands ſhall be tryed at the Common Law. *Coke* 6. part 23. the Marqueſs of *Winchesters* Caſe. See there, 34. *Eliz.* in *B. R. Lloyd* and *Lloyds* Caſe adjudged, *acc.*

7. Note, it was Reſolved by the Court: That if an Orphan of London under the government of the Mayor and Aldermen ſue in the Spiritual Court, for any goods, money, or Legacy, in the Will of their Anceſtors, that in ſuch Caſes, a Prohibition lieth, becauſe that the Government of Orphans of London does appertain to the Mayor and Aldermen of London, and they have the juriſdiction of them: and in that Caſe, it was agreed, that if a Lord of a Manor hath probat of Wills within his Manor, if any in ſuch caſe prove the will in the Eccleſiaſtical Court, that a Prohibition lieth. *Paſc.* 35. *Eliz.* in *B R. Coke* 5. part. 73. The Caſe of the Orphans of London.

8. A Prohibition was prayed to the Spiritual Court, becauſe a ſuit was there for ſpeaking theſe words, viz. He was a Cuckold and a Wit-al; which is worſe than a Cuckold, and that *I.S.* had layen with the defendants wife: And it was ſaid, that theſe words were words only of Spleen, and Prohibitions uſually granted in ſuch Caſes: But it was the opinion of the whole Court in this Caſe; That although theſe ought not to be any ſuit there for the firſt words, they being too general; yet they being coupled with a particular, ſhewing that the wife committed ſuch an offence with ſuch a particular perſon, the words be not now words of Spleen, and uſual diſcourſe, but it was a defamation ſutable in the Spiritual Court: and the prohibition was denied. *M. 4. Jac.* in *Co. B. Eaton* and *Aylo*ffs Caſe. *Cro.* 11. part. 78.

9. The Adminiſtrator of *F.* was ſued in the Eccleſiaſtical Court, to make diſtribution of ſome part of the perſonal eſtate, to the ſiſter and heir of the Intestate; a Prohibition was prayed; upon a ſurmiſe, that by the Law of the Land, the Adminiſtration being committed the Ordinary hath no power to intermedele with making diſtribution of the goods of the Inteſtate to the Children or kindred: It was much inſiſted upon, that the Prohibition was not allowable, for that the uſual courſe hath alwaies been for the ordinary after debts paid, to give order for the diſtribution of part of the goods to the wife, and part to the Children: But it was Reſolved, that prohibition ſhould be granted; for the Adminiſtrator is only chargeable, and the ordinary hath nothing to meddle with it after that the Adminiſtration is Committed: and divers Preſidents were ſhewed of ſuch prohibitions, viz. *M. 10. Jac.* in *Co. B. Swifts* Caſe: where an Adminiſtratrix was bound in a bond of 200 pounds to the Ordinary to make true Adminiſtration, and to exhibit a true Inventory and to make a perfect accompt, and to diſtribute the ſurpluſs age after all debts and legacies paid at the appointment of the ordinary: and ſhe being ſued before the Biſhop of *G.* to make ſuch diſtribution: upon advice of the Court a Prohibition was granted. *Hill.* 2. *Car.* in *Co B. Fotherlies* Caſe. *Cro.* 1. part 45. See *Tr.* 14. *Jac.* in *Co. B. Tuckers* Caſe. *Hill.* 9. *Jac* in *Co B. rott.* 1608. *Watt* Caſe. M. 6. *Com.* in *B.R. Levannes* Caſe. *Cro.* 1. part. 146. *acc.*

10. A man ſued in the Spiritual Court for defamation for theſe words; thou art a drunkard and a drunken fellow: It was inſiſted upon, that a Prohibition did not lie in ſuch caſe, becauſe the Spiritual Court as well as the Temporal Court might meddle with the puniſhment of Drunkenneſs; But a Prohibition was granted by the Court, for theſe words do not concern any Spiritual matter, but meere Temporal, and are but *convitium temporale*, and a common phraſe of brawling, for which no ſuit ought to be in the Spiritual Court. Prohibition was granted. *M. 8. Car.* in *B. R. Bushold* and *Starrs* Caſe. *Cro.* 1. part. 207. 221. *acc.*

11 Prohibition was prayed to ſtay a ſuit in the Spiritual Court for theſe words viz. He is a Cuckoldly knave, and preſidents ſhewed, that for ſuch like words Prohibitions had been granted: But the Court was of opinion that in this Caſe the words were properly to be examined in the Spiritual Court, and that to be puniſhed being *pro reformatione morum*; and it is a diſgrace to the husband as well as to the wife; becauſe he ſuffers and connives at it; It was then ſaid, that the ſuit was in the Arches, which is the Arch-Biſhops Juriſdiction and the Words were ſpoken at *T.* in the Dioceſs of the Biſhop of London; But becauſe the Court was informed, that there hath been

been for a long time a Compoſition betwixt the Biſhop of London, and the Biſhop of Canterbury, that if any ſuit be begun before the Arch-Biſhop, it ſhall be alwaies permitted by the Biſhop of London, and ſo it is *quaſi* a general Licence, and ſued with the Biſhops aſſent: For both theſe cauſes the Prohibition was denied. *Hill. 9. Car.* in B. R. *Cobbets* Caſe. *Cro.* 1. part. 147.

12. Suit was in the Spiritual Court for calling the wife Welch Jade and Welch Rogue. The defendant appealed to the Court of Audience, and in the appeal mentioned the former words, and in the Libel was interlined viz. And a Welch Thiefe, whereupon Prohibition was granted, becauſe for the words Welch Thiefe action lay at the Common Law. But it was after ſhewed, that (Welch Thiefe) was not in the firſt Libel, nor in the appeal at the time of the Appeal, but was interlined after by a falſe hand; which was found to be ſo upon examination in the Spiritual Court, and ordered to be expunged: and it was ſhewed that the words Welch Jade were expounded in the Spiritual Court, and ſo known to be a Welch Whore. It was the opinion of the Court, that for theſe cauſes no Prohibition ſhould be granted. For that our Law gives credence to them therein, and eſpecially after two ſentences: But a conſultation was awarded: Welch Whore being a ſpiritual cauſe and examinable there. *Paſc.* 12. *Car.* in B. R. *Pew* and *Jeffories* Caſe. *Cro.* 1. part. 329.

13. The Husband prayed a *Prohibition* to the Eccleſiaſtical Court at *S.* becauſe his Wife ſued him there to be ſeparated from him *propter ſævitiam*; and ſentence was there given for the Husband againſt the Wife, and he was enforced to pay all the Coſts for his Wife: Afterwards ſhe appealed, and becauſe the Husband would not anſwer the Appeal againſt him, and pay for the tranſmitting of the Record he was excommunicated, and therefore prayed a *Prohibition*; the Court conceived it to be a hard Caſe, that he ſhould be inforced to ſpend his money againſt himſelf; and therefore would adviſe of it, but ordered to ſtay their proceedings in the mean time. *M. 1. Car.* in *Co. B. Greeves* Caſe. *Cro.* 1. part 11.

14. *A.* had Iſſue by *B.* his Wife two Sons, *C.* his eldeſt, and *D.* the younger, and dyed; *C.* within the age of fourteen years took *E.* to Wife, and at full age they lived together, *& habuerant carnalem copulam, & Cogniti & reputati pro viro & Uxore palam*: Afterwards *C.* put away *E.* and married *F.* leaving *E.* and had Iſſue by her *G. C.* dyed. *F.* publiſhed that ſhe was the lawful Wife of *C.* and that her Son *G.* was *mulier*: *D.* ſued in the ſpiritual Court to reverſe the marriage between *C.* and *F. F.* prayed a *Prohibition*: In that Caſe it was Reſolved, 1. That if *C.* and *F.* had had Iſſue, and had been unjuſtly divorced, as long as the Divorce ſtood in force the Iſſue had no remedy by the Common Law. 2. Reſolved, That when the Spiritual Court ſhall have Juriſdiction, it behoveth that the Cauſe be ſpiritual. 3. Reſolved, That when the whole Cauſe is originally Spiritual, yet if after in the Spiritual Court they proceed to try a temporal *Conuſance*, or that which is tryable at the Common Law, that in ſuch Caſe a *Prohibition* ſhall be awarded. See *Coke* 7. part 44, 45. in *Kenas* Caſe. *See* before S. 8.

15. *I.* brought a *Prohibition* againſt the Churchwardens of *H.* in the County of *S.* for that they ſued him in the Spiritual Court for certain mony impoſed upon him without his conſent, for repair of the Church; That the Church-wardens with the aſſent of the greateſt part of the Pariſhioners, *juxta quantitatem & qualitatem poſſeſſionum & reddituum infra dictam parochiam*, agreed to make a Taxation for the repair of the Church, and Notice thereof was given in the Church; at which day the Church-wardens and the greater part of the Pariſh made a Tax, viz. Every Occupier of Land to pay for every Acre 4. *d. I.* dwelt in another Pariſh, and averred that the Pariſhioners of every Pariſh ought to repair their Church, and not the Church of another Pariſh: Upon which the Defendant demurred in Law: It was adjudged in this Caſe, That a Conſultation ſhould be awarded; For it was Reſolved, That the ſpiritual Court had *Conuſant. de reparatione Corporis ſive navis Eccleſiæ*; and it was Reſolved, That although *I.* did dwell in another Pariſh, yet for that he had Land in the ſaid Pariſh in his own poſſeſſion, he in Law was a Pariſhioner of *H.* But when there was a Fermor of the ſame Land, the Leſſor which received the Rent ſhould not be charged, but the Inhabitant is the Pariſhioner, and the Receipt of the Rent doth not make the Leſſor to be a Pariſhioner. *M.* 32. *Eliz.* in *B. R. Coke* 5. part 66. *Jefferys* Caſe.

16. In a *Prohibition*, the Plaintiff ſurmiſed, that his Father dyed ſeized of ſuch Lands which deſcended to him as Heir, and that the Defendant by Libel in the ſpiritual Court had ſuggeſted, That he made a Will and deviſed thoſe Lands to his Executor to ſell, and made the Defendant Executor, who ſued in the ſpiritual Court to have Probate thereof, whereas *re vera* he made no Will, and being at Iſſue whether he made a Will or not, the Plaintiff was Non ſuit; and yet it was moved, that the Defendant was not to have a Conſultation, for that it is not ſhewed that the Teſtator had goods, and then there was no cauſe of Probate, for a Will of Land needs not be proved: The Court agreed theſe Caſes, for it appears there was not any cauſe of Eccleſiaſtical ſuit, But in this Caſe it appears he hath cauſe of ſuit to prove the Will for the Goods; for otherwiſe he cannot have an Action for them: A Conſultation was granted *Quoad* the goods. *Mich.* 5. *Car.* in *B. R. Hill* and *Thorntons* Caſe. *Cro.* 1. part 118. See *Coke* 6. part 23. the Marquis of *Winsons* Caſe ſeems contrary.

See

See Stil. before. See Tr. 4. Car. in Co. B. Dennis Caſe. Cro. 1. part 81. acc. Paſc. 1. Jac. in B. R. Mary Lemains Caſe. Paſc. 1. part 199.

17. A Prohibition was prayed upon the Statute of 23. H. 8. for ſuing for a Legacy of 10. l. in the Prerogative Court, whereas the parties did dwell in another Diocels; but becauſe the Will was proved in the ſpiritual Court, and the Suit in the ſame Court where the Probate was, and there Sentence was given for the Legacy; and an Appeal upon this Sentence to Court of Delegates, where it was affirmed, and coſts taxed, and Execution granted upon Sentence; and till after the Sentence in the Appeal no endeavour was made to ſtay the Suit by the Statute, the party having ſo long allowed the Juriſdiction of the Court: It was adjudged, that the party came too late to have a Prohibition. M. 3. Car. in Co. B. Smith and Pondrells Caſe. Cro. 1. part 69.

18. Note, It was holden by the Court, That if a Biſhop, Parſon, or other Eccleſiaſtical perſon, do cut down Trees upon the Lands, unleſs it be for Reparations of their Eccleſiaſtical Houſes, or ſuffer to be done any *Dilapidations*, they may be puniſhed for the ſame in the Eccleſiaſtical Courts, and a Prohibition will not lye in that Caſe; and yet for ſuch Waſtes done they may be puniſhed at the Common Law if the party pleaſe. M. 12. Jac. in B. R. The Biſhop of Saliſburies Caſe. Golbt. 259. See M. 12. Jac. in B. R. The Caſe of the Biſhop of Durham. Bolſtr. 2. part 279. acc.

19. A woman Leſſee for years had Iſſue two Daughters, one married to A. the other to B. A. had Iſſue four Daughters; B. had alſo Iſſue: The woman deviſed Legacies to the children of A. out of the Rent reſerved upon the Leaſe of the Land, and made B. her Executor, and dyed: A. required B. in behalf of the children to pay the money to him to imploy for the benefit of the children, which B. refuſed; and thereupon he ſued him in the Spiritual Court, and there ſentence was given: B. the Executor moved for a Prohibition; he alledging for the ground of it, That he was Executor, and chargeable in Accompt for the money: But becauſe he came after Sentence, and alſo after he had appealed to the Court of Delegates, and after a ſentence there alſo againſt him, Prohibition was denyed by the Court. M. 11. Jac. in Co. B. Aylifs and Browns Caſe. Golbt. 243.

20. In a Prohibition prayed, the Caſe was, A. lying ſick made his Will; And afterwards ſaid to his Executors named in the Will: *I Will that* B. *ſhall have* 20 *l. more if you can ſpare it*; the Executors anſwered Yes, but No Codicil was made of the ſame Legacy; A Suit was in the Spiritual Court for the Legacy: The Executor prayed a Prohibition; It was doubted in this Caſe, whether the Spiritual Court might give remedy to the perſon for the Legacy, for the ſame not being annexed to the Will by a Codicil it was but *fidei Commiſſum*; and ſo the doubt was, Whether the Spiritual Court might hold plea of it; for if they cannot hold plea of it, a Prohibition lyeth, although this Court hath not power nor juriſdiction of the thing it ſelf; the Court would adviſe of the Caſe. Paſc. 12. Jac. in B. R. Cartwrights Caſe. Godbt 246, 247.

21. The Pariſhioners had uſed time out of mind to chuſe the Pariſh Clerk of the Church of St. A. in Cant. and the old Clerk being dead, they choſe a new Clerk, and he had a Prohibition; and afterwards he was ſued again in the Spiritual Court; and the Parſon by force of a new Canon, choſe another man for Clerk: upon which the Clerk choſen by the Pariſhioners was ſued in the Eccleſiaſtical Court for ſetting of Bread upon the Communion Table, and ſinging in another Tune then the other Clerk did, and was deprived by Sentence there; and a Prohibition *de Novo* was prayed, for although the laſt Sentence there was not directly for uſing of the Office of a Clerk, yet by the matter contained in the Libel it was drawn into queſtion there; and it was ſaid that by the Suit in the Spiritual Court they would examine whether he was a lawful Clerk or not: It was the opinion of the Court that he ſhould have a Prohibition; for that the Canon is againſt the Common Law, and the Office of Clerk is a Lay-Office, and the Deprivation of the Ordinary of him was void in Law. Paſc. 8. Jac. in Co. B. Cundit and Plomers Caſe. Godbt. 163.

22. Sprat Sub-Deacon of Exeter did Libel in the Spiritual Court againſt N. Parſon of A. *pro annuali penſione* of 30. l. out of his Parſonage, and ſhewed how that *tam per realem Compoſitionem quam per antiquum & Laudabilem Conſuetudinem, ipſe & predeceſſores ſui habuerant & habere conſueverant predict. annualem penſionem* out of the ſaid Parſonage: In this Caſe it was adjudged, That although he claimed the ſame by Temporal grounds, *viz.* by Preſcription and real Compoſition; yet becauſe the parties were both Spiritual perſon, he had his Election to ſue for the ſame in the ſpiritual Court, or in the Temporal Court, and the Statute of 34. H. 8. doth licence ſpiritual perſons to ſue for Penſions in the ſpiritual Court: But it was agreed in that Caſe, That he which hath ſuch a Penſion doth bring a Writ of *Annuity* for the ſame (as he well may) and declare upon the Preſcription, he cannot afterwards ſue for the ſame by the name of a Penſion; and if he doth, in ſuch Caſe a Prohibition will lye. Tr. 10. Jac. in Co. B. Sprat and Nicholſons Caſe. Godbt. 196.

23. D. Wells ſued Hye in the ſpiritual Court for Defamation ſaying that he *Lyed*: The Plaintiff prayed a Prohibition; It was ſaid againſt the Prohibition, That where there is no Writ given for the party grieved in the Temporal Court, there the Spiritual Court ſhall have Juriſdiction: And in this Caſe there

is no Writt given by Law; and See F. R. 51. *Falſarius* is to be puniſhed in the ſpiritual Court; and *Boles Caſe. Tr.* 6. *Jac.* was vouched, where a man called a poor Vicar, *Poor Raſcally Knave*, and after a Prohibition granted, a Conſultation was awarded: And where a man may be puniſhed by both Laws, there the party hath his Election to Sue in what Court he pleaſeth: On the other ſide it was ſaid, Where the Suit is for Defamation there the Cauſe ought to be expreſſed; and ought to be wholly Spiritual; and in the principal Caſe it is not a matter directly affirmative: and 22. *Jac.* in *B. R.* It was adjudged where a Suit was in the Eccleſiaſtical Court for theſe words, viz. *Thou art a baſe & a Paltry Rogue*, a Prohibition was awarded. See *Tr.* 22. *Eliz.* in *B. R. Lovegrave* and *Barwins* Caſe adjudged. acc. and *Crimen falſi* cannot be intended a Lye, for that is intended of counterfeiting of the Kings Seal, or of Forgery: The Caſe was not adjudged. *Tr.* 8. *Car.* in *B. R. Hyt* and Dr. *Wells* Caſe. *Godbt.* 446.

24. *A.* Parſon of *S.* ſued *I. S.* Executor of one *B.* late Parſon there, in the Arches, for *Dilapidations*, and amongſt other things there was a Queſtion about a Leaſe for years, which was alledged to be taken by *I. S.* in his own name, but Covenantly in Truſt and for the uſe of the ſaid *B.* late Parſon there: Whereupon they would put *I. S.* to his Oath concerning the Covin: In this Caſe a Prohibition was granted *quoad*, the examining of him upon his Oath, for although the original Cauſe belongs to their *Conuſance*, yet the fraud and covin is crimina', and the avowing of it to be *bona fide* is puniſhable both in the Star-Chamber, and by the penal Law of fraudulent gifts, and therefore not to be extorted out of him by Oath: And what ſhall be Covin, or not Covin, reſts not in them to judge. *Tr.* 12. *Jac. Spendlow* and *Smiths* Caſe. *Hob.* 82.

25. The Judge of the Prerogative Court, upon granting of Adminiſtration took a Bond of one *S.* that the Adminiſtrator ſhould diſpoſe of the Surpluſage of the goods, after debts and Legacies paid, according to the direction of the Court: The Inteſtate having left a Wife to whom Adminiſtration was committed, did find a Surpluſage in her hands, and did ſentence her that ſhe ſhould give certain Portions to the kindred of her Husband, not being his children: It was the clear opinion of the Court in this Caſe, That whereas the Statute of 21. *H.* 8. appoints the Adminiſtration to be granted, and that the Ordinary ſhall take ſureties for the Adminiſtration of the goods of the dead, that the Ordinary may not impoſe any other Condition upon the Bond; and although the Ordinary will pretend that the true Adminiſtration in the Act is to be intended and extended, as well to the diſpoſition of the Surpluſage, as to debts and Legacies; yet that is not under their Judgment, for they muſt take their Bond according to the Law; and the meaning & expoſition of the ſtatute & of the Bond are to be adjudged by the Courts of the Common Law: and upon this a Prohibition was awarded. *Hill.* 13. *Jac. Slawneys* Caſe. *Hob.* 43. See *Tr.* 15. *Jac.* in *Co. B. Tooker* and *Leans* Caſe. *Hob.* 191. acc.

26. The Churchwardens of the Church of *R.* in *Eſſex* preſented to the Arch-Deacon, That one *P.* was a Raylor, and a ſower of diſcord between Neighbours; The Arch-Deacon enjoyned him purgation: The Court thereupon awarded a Prohibition, for that the Cauſe belongs to the Leet, and not to them, except it were in the Church. *M.* 16. *Jac.* in *Co. B. Smith* and *Pannels* Caſe. *Hob.* 246, 247.

27. A man Covenanted with *I. S.* to pay to *A. B.* and *C.* every one of them 10. *l* at the age of 24. years, and made an Obligation to perform the Covenants; and afterwards made his Will thus: *Item, I Will that every one of my Wives children*, viz. *A. B. and C. ſhall have every one of them* 10. *l. as their ſeveral ages of* 24. *years, in performance of my Bond and Covenant*: *A. B.* and *C.* ſued in the ſpiritual Court for the Legacies; A Prohibition was prayed, becauſe it was not given as a Legacy, though payable as before, for it was given in performance of Covenant: Yet at laſt the opinion of the Juſtices *Anderſon* and *Rhodes* was, That becauſe they were all ſtrangers to the Covenant, that it ſhould be taken as a Legacy, and ſo a Conſultation granted: The Caſe was compounded. *P.* 19. *Eliz.* in *Co. B. Pierce* and *Ducres* Caſe. *Goldsbr.* 58. See *Hill* 43. *Eliz.* in *Com. B. Nelſon* and *Sharps Caſe. Goldsbr.* 141. acc.

28. A man was taxed by the Pariſh for the Reparations of the Church; The Churchwardens ſued for this Taxation in the Spiritual Court; and pendant the Suit there, One of the Churchwardens R. leaſed to the Defendant in the Spiritual Court, all Actions, Suits and Demands; the other Churchwarden proceeded in the Spiritual Court, and upon that the Defendant prayed a Prohibition: It was the opinion of the whole Court, That it was not to be diſputed in this Court, whether the Releaſe were good or not; but the matter being begun originally before them in the Spiritual Court, which is the proper place to ſue for a Tax and not elſewhere; we have nothing to do with it, and therefore a Prohibition was denyed, and a Conſultation granted. *Hill* 7. *Jac.* in *B. R. Barons Caſe. Brownl.* 2. part 215.

29. A man was ſued in the Eccleſiaſtical Court for beating of his Wife, and for calling her *Whore*, and was ſentenced there by them to pay to his Wife 3. *s. per* week for Alimony; and divers fines were impoſed upon him for not performing that; and it was Ordered there, that he ſhould enter into a Recognizance for the performance of it: This being moved to the Court, the Court granted a Prohibition, and a *Habeas Corpus*, who was impriſoned to deliver

liver the party out of prison. [*Tr.* 11. *Jac.* in *Co.* B. *Agnes Case.*

30. Two men being Inhabitants of a Town, sued a Prohibition upon the Statute of 23. *H.* 8. cap. 9. because they being Inhabitants where such a Prebend and his Predecessors, time whereof, *&c.* had used to hold plea of *Causes* Ecclesiastical, the Defendant sued them before the Ordinary concerning Defamation: The Defendant pleaded, That the *Cause* is Ecclesiastical, depending in the Prebends *Court*; the inferiour Judge there requested the superiour Judge to assume it: Upon this bar it was demurred; for that it was not shewed that the *Cause* was Ecclesiastical, so as the Court might judge whether it were fit to be removed. 2. For that it was in a Peculiar to be removed before the Ordinary, and so out of the Statute, and no cause of a Prohibition: It was the opinion of the Court upon view of the Statute, That the Statute extends to Suits as well out of the peculiar Jurisdiction as out of the Diocess; The *Court* held the Bar to be good; and also, that a Prohibition brought by two cannot be good, where the griefs be several; and therefore *Consultation* was awarded. *M.* 5. *Car.* in B. R. *Katwalader* and *Bryans Case.* *Cro.* 1. part 115.

31. Prohibition because the Defendant sued there in the Consistory Court of *Chester* before the Commissary for a Mortuary, after the death of *I. S.* a Priest of the said Diocess, surmising that by custome there he ought to have for a Mortuary, after the death of every Priest dying within the Arch-deaconry of *Chester*, the best Beast or Mare, his Saddle, Bridle, Spurs, his best Gown or Cloke, his best Hat, his best upper Garments under his Gown, his best Signet or Ring; as to the Bishop, *de debita consuetudine fore supponitur*, and recites the Statute of 21. *H.* 8. concerning Mortuaries: The Plaintiff averred, there is no such Custome there, and that she had paid a Mortuary to the Parson of *B.* and that after a Prohibition the Defendant had prosecured his suit in the spiritual Court: The Questions were two, the first was, This Suit being for a Mortuary in the Arch-deaconry of *Chester*, Whether there were a custome in that place to have such things for a Mortuary? Whether this be a just cause of Prohibition, Mortuaries being only tryable in the Spiritual Court? 2. Whether a Consultation shall be granted without answering the Prohibition? The Court was divided in opinion concerning these two Points: Wherefore it was Ordered that the Defendant should plead or demur, and then the Court would give Judgment upon the Record before them. *M.* 7. *Car.* in *B. R. Hinde* and the Bishop of *Chesters* Case. *Cro.* 1. part 172, 173.

32. Prohibition prayed upon the Statute of 23. *H.* 8. cap. 9. For that the Bishop of *C.* having a Commendatory within his Diocess, Libelled for Tythes in the Court of the Arch-Bishop of *York*; and pendant the Suit dyed, and the Executors of the Bishop revived the Suit: The Question was, if a Suit being lawfully begun in the Arch-Bishops *Court*, shall afterwards be prohibited as Illegal: It was the opinion of the whole *Court*, That it would be hard to grant a Prohibition in such *Case*; for *pendo*, that they in the Arch-Bishops *Court* have examined their witnesses, so as the *Cause* is *Causa conclusa*, and they would not hear any more Examinations, but are ready to give sentence, the intent of the said Statute is not that such *Cause* should be remanded, whereby the Plaintiff should lose his costs of Suit: The Prohibition was denyed *per Curiam. Pasc.* 16. *Jac.* in *B. R.* The Bishop of *Carlites Case.* *Cro.* 2. part 483.

33. Prohibition was prayed to the *Consistory* of *London*, for that the Plaintiff was sued there by his Wife to be separated from him *propter sævitiam*, and sentence was given there against him, that his Wife should live from him, and that he should allow her 5. *s.* 6. *d.* weekly, although the Husband offered Reconciliation, and desired *Co*-habitation, and profered Caution to use her well; But the *Court* denyed to grant a Prohibition, because the Court of the Ordinary is the proper *Court* for the allowance of Alimony, and take order for Separation or Divorce. *Hill.* 12. *Jac* in *B. R. Hyats Case.* *Cro.* 8. part 364.

34. *A.* the Executor of *B.* had a Prohibition against *I. S.* and the *Case* was, That one *Agnes Salter* devised that the Testator and three others should sell certain Lands, and dispose the money to the Defendant and three others equally; the Land was sold accordingly, and the Defendant sued the Executor in the spiritual Court for the fourth part of the money: It was the cleer opinion of the *Court*, that neither the Land nor money was Testamentory, as this *Case* is, for it was not Assets to debts, but a sum arising of Land, and appointed to Spiritual uses in way of equity; and that Court cannot hold plea of a Legacy in Equity, but only where it is a Legacy in Law, in Deed; the Prohibition allowed. *Tr.* 17. *Jac. Edwards* and *Graves Case.* *Hob.* 265.

35. In a Prohibition the Case was, In the County of *W.* there was a Parish called *A.* and a Parish Church there; there was also in the same Parish a Chappel called *B.* and a Precinct called *Castle B.* the Inhabitants whereof did resort to the Chappel, and there Married, Christned, and received Sacraments, and had Church-wardens there, but buried not there, but at *A.* The Church of *A.* being in decay, the Parishioners of *B.* were taxed towards the Reparation with the Parishioners of *A.* and obtained a Prohibition upon a Surmise, that theirs was a Chappel Parochial, and that they alone time out of mind had used to repair that, by reason whereof they had been discharged of the Reparation of the Church of *A.* and yet in their Prohibition they confessed they were within the

Parish of *A.* On the behalf of the Parish of *A.* two Sentences were shewed in the Ecclesiastical Court, whereby the Parishioners of the Chappel were sentenced to pay towards the Reparation of the Church of *A.* and five Sentences on the contrary on the behalf of the Chappel, but all of them disannulled by Appeal: It was the opinion of the Court in this Case, That a Consultation should be granted; for though the Surmise were matter of Fact, and tryable by Jury, yet it is in the discretion of the Court to deny a Prohibition when it appears to them that the Surmise is not true, and especially in this Case, when the delay of Reparations may turn to the decay of the Church; and it is apparent to the Court that they were to all purposes part of the Parish of *A.* and therefore the Commoners were lyable to the Reparations with the rest; and they might resort to the Church of *A.* to bury, which was the mother Church. *Tr.* 12. *Jac.* in *Co. B.* The Parish of *Aston* and *Castle Birmidge* Case. *Hob.* 66, 67. See *Hill* 7. *Jac.* in B. R. *Bolstr.* 1. part 16, 17. acc.

36. One was presented *ex Officio* in the Ecclesiastical Court for not frequenting of his Parish Church; he pleaded that this was not his Parish Church, but that he had used to frequent another Parish Church, and because they in the Spiritual Court would not receive his plea, the Court was moved for a Prohibition: It was the opinion of the whole Court, That they in the Ecclesiastical Court have not any power to intermeddle with the Precinct of any Parish Churches, nor are they there to judge which shall be said to be a mans Parish Church; Wherefore a Prohibition was granted. *Tr.* 9. *Jac.* in *B. R. Bolstr.* 1. part 159.

37. In a Prohibition prayed, the Case was, *A.* was Presented, Instituted and Inducted into the Parish Church of *S.* Afterwards *B.* drew him into the Spiritual Court, questioning him for some matters, as touching the validity of his Induction: It was the opinion of the whole Court, that in this Case a Prohibition ought to be granted, for that this is directly within the *Statute* of 45. *E.* 3. cap 3. for here the very title of Patronage comes in question with the determination of which they ought not there to intermeddle; also matter of Induction and the validity thereof is determinable at the Common Law, and not there by them in their Court; and therefore to prohibit their proceedings, there in this Case, a Prohibition was granted. *M.* 8. *Jac.* in *B. R. Holts* Case. *Bolstr.* 1. part 179.

38. In a Prohibition upon a Libel in the Spiritual Court, where the Suit was for Tythe Apples, In discharge of which he pleaded there an Award, which was, That he was to pay so much for the Tythe; which plea they refused, thinking this to be void: The Court in this Case denyed to grant a Prohibition; for when the Original begins in the Spiritual Court, although afterwards a matter happens in Issue which is tryable by our Law, yet this shall be tryed there by their Law; as if one do sue there for a Horse devised to him, The Defendant doth there plead, That the Devisor did give his Horse to him in his life time; this is tryable by our Law, yet the same shall be tryed there: But if they will judge in Common Law matters otherwise then we do, in such Cases we will prohibit them: The opinion of the whole Court was, That his plea of an Award there pleaded, and by them refused, was no ground for a Prohibition. *Pasc.* 11. *Jac.* in B. R. *Parker* and *Kemps* Case. *Bolstr.* 2. part 227, 228.

39. In a Prohibition to the Spiritual Court, in Case of Tryal of the validity of a Lease: It was said that the Civil Law will not allow of a Lease, unless it have Tradition; and therefore the same is not to be tryed there, but they are to be prohibited to draw the matter *ad aliud examen*: In the principal Case, One said there that he had a Lease, the other said, that he had another Lease, this is tryable there, but if they will goe about there to try the validity of Leases, they are to be prohibited; A difference was taken where a Temporal matter is the main thing, and where but accessory, a matter at Common Law comes there in question upon a matter there tryable, the original matter being meer spiritual; and accessarily a temporal matter happens in debate, this is there tryable, otherwise it is, where originally the matter is not tryable there; if they proceed, they are to be prohibited. In the principal Case the Prohibition was granted. *M.* 12. *Jac.* in B. R. *Clifton* and *Oats Case. Bolstr.* 2. part 183.

40. A Woman being Administratrix of the goods of her husband being called before the ordinary to make an Accompt for the goods and personal estate of her Husband; She made an Inventory thereof, and in this she put all the goods her Husband had, and herein she did mistake her selfe, and did put in some goods which her Husband the Intestate had given away, and disposed of in his life time, to a younger child: In the Accompt, she shewing them a deed of gift made by the Intestate her husband, to those goods in particular to his daughter, they being in her Custody, and this plea of hers as to those goods they did reject; It was the opinion of the Court, that a Prohibition should be granted as to those goods; with an exception of debts: in regard this deed of gift was there pleaded before Sentence given for the rejecting of that which is contained in the deed of gift, they are to be prohibited: and a Prohibition *quoad* that was awarded accordingly: *Hill.* 1. *Jac.* in *B.R. James* and *James* Case. *Bolstr.* 2. part 315.

41. *A.* was Libelled in the Spiritual Court for these words, Thou art a drunkard and usest to be drunk thrice a week: and a Prohibition was prayed.

Per(ly)

Berkly Juſtice was againſt the Prohibition, becauſe the Action here is only *pro ſalute animæ*; and Drunkenneſſe is in their Articles and there preſentable: But notwithſtanding a Prohibition was granted, for ſo it was ſaid, it was adjudged in that Caſe, *in Vinior and Viniors* Caſe. And *Jones* Juſtice aid; That *Lynwood* ſaid well, that if all things that are againſt the Law of God (or words to that effect) ſhould be triable in the Eccleſiaſtical Court, the Juriſdiction of the Temporal Court ſhould be utterly deſtroyed: *Paſc.* 15 *Car.* in *B.R. Marſh.* 6.

42. The Lady *Cromwel* was poſſeſſed of diverſe leaſes and conveyed them in truſt, and afterwards married with Sir *John Stiſon*, afterward ſhe received the mony which came of the truſt, and with part of it, ſhe bought Jewels, and part ſhe left in mony and died. Sir *John* took Letters of Adminiſtration of the goods of his wife; They in the Eccleſiaſtical Court would make him accompable for the Jewels and the mony, and to put them into the Inventory: a Prohibition was prayed: the Court differed in opinion about it, ſome being for it, and ſome againſt it, why it ſhould not be granted was, becauſe the mony received upon the truſt is in Law the monies of the truſtees, and the wife hath no remedy for it but in Court of equity, and therefore the husband ſhould have it as adminiſtrator. The reaſon why it ſhould be granted was, becauſe here the truſt was executed, and when the wife had received the mony, and by the receipt the husband had gained property therein as husband, therefore he ſhould not be accompable for it, and further the Eccleſiaſtical Court ſhould determine the truſt of which they have no Juriſdiction, for they have not a Court of equity: The Court moved, that in Chancery they ſhould move for a Prohibition to the Eccleſiaſtical Court, for that in equity the mony did belong to the wife. *Tr.* 15. *Car.* in *B. R.* Sir *John Stiſon* Caſe. *Marſh.* 44. 45.

43. *C.* Libelled againſt *T.* in the Eccleſiaſtical Court for incontinency without a Citation, or preſentment, and for that the defendant was excommunicated: A prohibition was prayed, but was denied by the Court; Where they proceed *ex Officio* a Citation is not neceſſary, but put caſe it was, yet the Court was of opinion, that no prohibition was to be granted as this Caſe is, becauſe that where the Eccleſiaſtical Court hath Juriſdiction, although they proceed erroniouſly yet no Prohibition lieth, but the remedy is by way of Appeal, and therein he ſhall recover good Coſts. *Tr.* 17. *Car.* in *B.R. Coke* and *Tolls* Caſe.

Where, and in what Caſe, and for what Cauſe Prohibitions ſhall be granted to the Court of Admiralty for ſtay of their proceedings in that Court, and in whoſe and in what Caſes, not.

1. IT was moved for a Prohibition, for that the ſuit was begun in the Admiral Court upon a Charter party made beyond ſea, upon the Land: And a Prohibition was granted, though it be for a thing made in *Park*, or in any other place beyond the ſea, if it be not upon the Main ſea; But if the defendant there admit the Juriſdiction of the Court, and ſuffer ſentence, then the Court will not upon a bare ſurmiſe grant a Prohibition after the Admittance of the party himſelfe, if it be not of a thing which appeareth within the Libel, that is, that the Act was not made within the Juriſdiction of the Seas: *Paſc.* 11. *Jac.* in *Co. B. Brewel.* 2. part. 34.

2. Prohibition prayed to the Admiralty: for that *Violet* libelled in that Court againſt *Blague*, ſuppoſing him to be in a ſhip at Anchor at *Lime houſe*: The libel was in the Nature of a Detinue at the Common Law. And becauſe it is in *Corpore Comitatus*, and not in the Admirals Juriſdiction, a Prohibition was awarded: And a Caſe was cited in 13. *Jac* where a ſhip lying at Anchor at blackwal was broken by another ſhip, and thereupon a ſuit being commenced in the Admiralty a Prohibition was granted *per Curiam* and ſo it was in the principal Caſe. *M.* 16. *Jac.* in *B.R. Violet* and *Blagues* Caſe. *Cro.* 2. part. 514.

3. In the Caſe of a Prohibition: the Caſe was, An Engliſh man came into *Spain*, and there within the Dominions of the King of *Spain* he did fell down and carry away many loads of *Braſil*-wood: which *Don Diego de Serviente* Embaſſador of the King of *Spain* libelled againſt him in the Court of Admiralty here; In this Caſe it was Reſolved by the whole Court, that the Admiral Court had no Juriſdiction to try the ſame there; but the ſame may be layed to be done at any place here in England and ſo be here tryed; and it was ſaid that by the ſtatute of 15. *R.* 2. the power of the Admiral is limited, which he is not to exceed, and he is to have Juriſdiction only of matters done *ſuper altum mare*. *Hill.* 12. *Jac.* in *B. B. Don Diego de Serviente de A. canos*, and *Braniſtes* Caſe. *Bulſtr.* 2. part, 322.

4. A

4. A Frenchman had his ſhip taken by a Dunkirk upon the Sea, and before it was brought *infra præſidia* of the King of Spain it was driven by a Contrary wind to *Weymouth* in England, and there the Dunkirk ſold the ſhip and goods to one in *Weymouth*; The French man having notice that the goods were there libelled in the Admiralty againſt the Vender of the ſhip and goods, ſhewing that it was taken by Pirecy and not by Letters of Mart as was pretended; The Court inclined in this Caſe to grant a Prohibition, for that whether the Dunkirk tooke it by Letters of Mart, or not, was not material, the ſale being upon the Land and *infra Corpus Comitatus*; But becauſe, there was ſome miſdemeanor in the Vendee the Court would not award a Prohibition, but awarded that he ſhould have convenient time given him by the Court of Admiralty to find out the ſeller to maintain his Title, and in the mean time give Caution in the Admiralty, that if it be found againſt him, to reſtore the ſhip. *Tr.* 17. *Car.* in *B. R. Merſh.* 110.

5. It was Reſolved by the whole Court, that if one be ſued in the Admiralty Court for a thing alledged to be done upon the high ſea within the Juriſdiction of the Admiralty, and the defendant plead to it, and confeſſe the thing to be done, and after ſentence is given; That in ſuch Caſe the Court will be aviſed before they grant a Prohibition upon a ſurmiſe that it was done *infra Corpus Comitatus* againſt their own confeſſion, unleſſe it can be made to appear to the Court by matter in writing or other good matter, that this was done upon the Land; and although the admitrance of the party cannot give a Juriſdiction to the Court, where it of right hath none, for that it will be an encroachment upon the common Law; yet when the Court ſhall be informed that this is meerly for vexation and delay, if a Prohibition ſhall not be ſued till after ſentence, the Court in ſuch Caſe will grant no Prohibition. *Hill.* 8. *Jac. Coke* 12. part. 77. 78.

6. Many Poor Mariners ſued *I. S.* the Maſter of a Ship, for wages in the Admiral Court, Judgment there was given againſt *I. S.* he prayed a Prohibition and ſuggeſted that the Contract was made at London in England; The Prohibition in this Caſe was denied, becauſe he had not ſued his Prohibition in due time viz. before the Judgment given in the Court of Admiralty, and for that they are poor Mariners, and may not be delayed of their wages ſo long, and beſides they may all join in one libel there, but if they ſue here, they muſt bring ſeveral Actions; and therefore in diſcretion the Court denied the Prohibition; *Paſc.* 19. *Jac.* in *Co. B. Poor Mariners* and *Jones* Caſe. *Winch.* 8.

7. A Prohibition was prayed to the Court of Admiralty, the cauſe was for taking of a Recognizance in which the principal and his ſureties, his heires goods, and lands were bounden; and it was in the nature of an Execution at the common Law, and thereupon they in the Admiralty made out a Warrant to arreſt the body of the defendant: It was objected that they could not take a Recognizance; and by the Civil Law if the party render his body, the ſureties are diſcharged, and execution ought to be only of the goods, for the ſhip is only arreſted, and the libel ought to be againſt the ſhip and goods only, and not againſt the party, and his body cannot be taken in Execution; and therefore the Prohibition was prayed: This caſe was argued by the Civilians in open Court, wherein much was ſaid of the Juriſdiction of the Court of Admiralty and of their power: In this caſe it was agreed by *Coke* Chief Juſtice: That the cuſtomes of that Court ought to be allowed; and the Cuſtome of the Civil Law is, that in no caſe the ſurety is chargeable when the principal is ſufficient: But he agreed that they might take the body in execution which are for the moſt part Maſters of ſhips and Marchants who are tranſcuntes: and if they could not arreſt their bodies they might perhaps many times looſe the benefit of their ſuits; and ſo he inclined to opinion that the Prohibition would not lie; but the Caſe was not Reſolved, but adjourned. *M.* 10. *Jac.* in *Co. B. Greenway* and *Barkers* Caſe. *Godb.* 26.

8. In a Prohibition the Caſe was. *A* Maſter of a ſhip gave mony to B. to buy ſayles Cloaths for him, who bought ſuch Cloathes of *I. S.* in the pariſh of St *Katherins* neer the Tower of London. *I. S.* delivered the Cloathes in the ſhip which was in the River of Thames adjoyning to St *Katherines*, and becauſe the mony was not paid, *I. S.* ſued in the Admiral Court: In this caſe a Prohibition was granted by the whole Court, becauſe the contract was made on the Land and *infra Corpus Comitatus*, and becauſe the Admiral hath not Juriſdiction but of contract made *ſuper altum mare*. *M.* 7. *Jac.* in *Co. B. Leigh* and *Barleys* Caſe. *Owen.* 122. 123.

See more of this Diviſion; in Lib. 1. *Title Admiral* and *Admiralty.*

Where

Where and in what Caſes and for what Cauſes Prohibitions may be granted to ſtay proceedings in the Court of High Commiſſions, Courts of Councel at York, Marches of Wales, Court of Requeſts, and in other inferior Courts; and where and for what Cauſes not.

1. DIvers Articles were preferred before the High Coommiſſioners againſt *Edwards*: that he knowing that Dr *Walton* was trained up in Learning in the Univerſity of *Oxford*, and deſervedly took upon him the Degree of a Dr of Phyſick, of purpoſe to diſgrace the ſaid Doctor, and to blemiſh him in his Reputation, wrot many uncharitable Letters to ſeveral perſons, and to the Dr himſelfe, & therein taxed him of inciviliy, and diſhoneſty, and want of skill and Judgment in his Art and profeſſion; and alſo publiſhed in a letter, that the Father of the ſaid Doctor *Walton* (being late Biſhop of *Exeter*, and a Reverend Prelate of *England*) was ſubject to the diſeaſes of the French-pox, and Leproſy; upon which Articles, they required him to anſwer upon his Oath: and to ſet down what he meant, by certain inſignificant words mentioned in the ſaid letters; and for ſaying that he had gotten on the Hip of a Commiſſioner for Clauſes Eccleſiaſtical in the Dioceſs of *Exeter*; which words he ſpake to diſgrace him, and in him the whole Commiſſion Eccleſiaſtical in thoſe parts: For theſe Cauſes and their proceedings upon theſe Articles, a Prohibition was prayed: It was in this Caſe Reſolved by all the Juſtices; That the Articles were temporal concerning Dr *Walton* in his profeſſion of Phyſick, and ſo touched a temporal perſon and a temporal matter; and therefore a Prohibition did lie. 2. Becauſe it is for defamation, which ought to begin before the Ordinary, becauſe it is not ſuch an Enormious offence which is determinable before the High Commiſſioners. 3. It was reſolved, That the Eccleſiaſtical Judg cannot examine a man upon Oath upon the intention and thought of his Hart; and where a man is to be examined upon Oath it ought to be upon Acts, not words or intentions. 4. In this Caſe it was reſolved, that the High Court ſhould not have Conuſance of any ſcandal to themſelves; and for theſe Cauſes a Prohibition was directed to the Court of High Commiſſion. *M. 6. Jac. Edwards* Caſe. *Coke* Select Caſes 9. and 10.

2. It was moved for a Prohibition to the High Commiſſion, becauſe they would proceed there in a Caſe of incontinency: The Court denied to grant the Prohibition, becauſe the Court conceived they would not hold plea in ſuch a caſe, and adviſed the party to ſuggeſt this matter to them there; and if the would not allow of it, then the Court would grant a Prohibition, and ſuch was the opinion of the whole Court. *Paſc.* 10. *Jac.* in *B.R. Bolſt.* 1. part. 188.

3. Articles were exhibited before the High-Commiſſioners againſt *I.P.* that ſhe was aiding & aſſiſting to Sir *H.* in the years 1621. 1623. until *Sept.* 1624. to have familiar acquaintance with the Vicountes *Purbeck*, with whom he committed Adultery, and that ſhe was chiefe agent for their meeting at unſeaſonable times by and through her private Lodgings, by means whereof they took their opportunities to Commit Adultery, for which offence ſhe was by the Commiſſioners (7. *Feb.* 1627.) ſentenced to be guilty of Bawdry, & fined 200*l* to the King, & enjoyned to make penitential acknowledgment, and to be impriſoned till ſhe found ſureties for all the doing of all this ſentence. *I. P.* prayed a Prohibition, for that by the general pardon, 21. *Jac.* ſhe was pardoned for theſe offences, committed in the ſaid years; & avers ſhe was not guilty of any ſuch offence ſince the ſaid general pardon: In this Caſe, the Court granted a Prohibition, for although the time after the pardon is mentioned in the ſentence, yet it was for offences before the pardon. 2. Admitting that part of the offences were ſince the pardon, yet the fine being intire, and both the time before and after involved together, a Prohibition ought to be; and alſo becauſe ſhe is ſentenced to be impriſoned until ſhe find ſureties to performe the whole Order which is not warrantable: for although by the ſtatute of 1. *Eliz.* they may aſſeſs fines, or impriſon for an offence, yet they can neither commit any to priſon for the fine, nor till the party find ſureties to perform their order, but they ought to Certify the fine into the Exchequer: See there divers preſidents: where the party was cited before the High Commiſſioners for Adultery & Prohibitions were granted. *Tr.* 4. *Car.* in *B.R. Iſabel Peeles* Caſe. *Cro.* 1. part. 80.

4. A Prohibition was prayed to the Councel at York to prohibit them for holding of pleas in matters not there determinable by them; as in caſes of replevin & Avowries upon the ſame, the Court was cleer of opinion, that they could not there hold plea of a Replevin, nor of Avowries, theſe being determinable by the Common Law, whereupon a prohibition was granted to ſtay their proceedings in ſuch a Cauſe. *Paſc.* 8. *Jac.* in *B.R. Baker* and *Dickenſons* Caſe. *Bolſt.* 1. part. 110.

5. The Lady *Throgmorton* was committed by the Biſhop of *London* & other Commiſſioners under their hand until farther order ſhould be taken for her Enlargment;

ſegement; The Cauſe of her Commitment, ſhe being brought by *Habeas Corpus* to the Barre, was 1. For that ſhe had done many evil Offices betwixt Sir *James Scudamore* and her Daughter the Lady *Scudamore* wife of the ſaid Sir *James*, to make a ſeparation betwixt them; & after ſentence before the Commiſſioners for divers contemptuous words againſt the Court; ſaying that ſhe neither had Law nor Juſtice: It was reſolved by the Court, for her detayning of the wife and her endeavouring to make ſeparation, no ſuit could be before the High Court commiſſioners, becauſe for the detaining of the wife there is remedy at Law, and for ſuch offence they cannot impriſon: & for the words it doth not appear that they were ſpoken in Court. 2. It was reſolved, that that Court is no Court of Record, for they proceed according to the Civil Law; for none ſhall be Committed for a miſdemeanor in Court unleſſe the Court be of Record. *Tr. 8. Iac.* The Lady *Throgmortons* Caſe. *Coke* 12. part. 69.

6. In a Prohibition it was moved for a Queſtion, if the Court of Common Pleas might grant a Prohibition when no plea is dependent in the Common Pleas; It was objected, that it hath not Juriſdiction to hold plea without an Original, unleſſe it be by Priviledge of an Atturney or Clerk of the Court, or when there is an Action depending there for the ſame cauſe: and in ſuch caſe, the Prohibition ought to recite. *Quod cum tale placitum pendet &c.* the defendant *pendente placito*, hath ſued in the Spiritual Court. But it was Reſolved by all the Juſtices, that the Court of Common Pleas may award a Prohibition, although that no ſuit be there pendant for this, that the Common Pleas is the principal Court of Common Law; and it belongs to the Juriſdiction of the Court to determine all Common Pleas; and if the Eccleſiaſtical Court encroach upon the Juriſdiction of the Common Pleas of any thing againſt the Common Law of the Land, they may grant a Prohibition and that without an Original Writ. *M 6. Iac.* in the Caſe of Prohibitions. *Coke* 12. part. 59.

7. A ſuit was before the Councel of York: which was a Replevin in Engliſh granted by the Preſident and Councel, there; A Prohibition in that Caſe was granted out of the Common Pleas, for that at the Common Law no Replevin ought to be made but by Original Writ directed to the Sheriff, and the Statute of *Marlebridg* Cap. 21. and *Weſt.* 1. cap. 17. hath authorized the Sheriff upon Plaint made to him to make a Replevin; and the ground of the Prohibition in that Caſe, was; becauſe the King by his Inſtructions never made the Preſident nor Councel Sheriffs nor could grant them power to make a Replevin againſt Law, but the ſame ought to be by the Sheriff. See *Lock* and *Bells* Caſe. *Vouch Hill. 6. Iac.* in the Caſe of Prohibitions. *Coke* Select Caſes. 31.

8. Sir *Bethel Knight* Sheriff of the County of York, as executor of one *Stephenſon* who had made him and another his Executors, preferred an Engliſh Bill before the Councel of *York* againſt *Chambers* and others, in the Nature of an Action upon the Caſe upon a Trover and Converſion in the life of the Teſtator of goods and chattels to the value of 1000li, and becauſe the other would not joyn with him, he pretended that he had not any remedy at the Common Law, and therefore prayed remedy in equity there: In that caſe a Prohibition was granted, and that for theſe cauſes. 1. Becauſe there was an expreſs limitation in their Commiſſion, that they ſhould not hold plea between party and party, unleſſe both parties or one of them, *tanta paupertate ſunt gravati*, that they could not ſue at Common Law; and in this caſe the plaintiff was a Knight and Sheriff of the County. 2. Becauſe by that ſuit the King was deceived of his Fine, which he ought to have had, viz. 200li. 3. Becauſe there ignorance appeared in that ſuit viz. That one Executor had no remedy at the common Law, becauſe the other would not joyn in ſuit with him: whereas every one Learned in the Law knoweth, that ſummons and ſeverance lieth in any ſuit brought as Executors, and the Prohibition was allowed to be good. Sir *Bethel Knights* Caſe. *Coke* Select Caſe *ibid.* 31. 32.

9. *A* preferred his Bill before the Vice-Chamberlain of *Cheſter* againſt B. who dwelt in the ſame County, and *A.* who inhabited at London, both being Executors to one to whom *A.* was indebted by Bond, (which Bond was put in ſuit in the Court of common Pleas at London) and the Bill did concern an Agreement that the Teſtator had promiſed that one *I. S.* ſhould aſſigne a leaſe of Tithes to the plaintiff in conſideration of his entry into the ſaid Bond; He which inhabited in *Cheſter* anſwered, order was made there by the Vice-Chamberlain that proceſſe ſhould be awarded to him that dwelt at London, and an Injunction there was granted to ſtay the proceedings at common Law. In this caſe; Notwithſtanding that the Contract was made in the County *Palatine* and the priviledg followed the perſon who alſo dwelt there. Yet a Prohibition was granted, for it was reſolved that the Court of *Cheſter* had not power in this caſe; but it belonged to the Court of Chancery of *England. Hill.* 10. *Iac.* in *Co.* B. *Griggs* Caſe. *Hutton.* 29.

10. *E.* who was the Wife, and *C.* who was the daughter of *I. B.* Principal of St *Mary Hall* in *Oxford* Libelled in the Vice-Chancellors Court at *Oxford* againſt *W.* the Wife, for calling her Bawd, and old Bawd (which is termed the action of injury) the daughter for theſe words viz. ſcurvy Whore and Jade, and ſtriking her. The defendant prayed ſeveral Prohibitions. The Agent for the Univerſity ſhewed the Charter of the Univerſity of 14. *R.* 2. and 14.

Hen.

*Hen.*8. whereby it was granted unto them, that they might enquire of all Treſpaſſes Injuries and pleas and other Crimes (except Pleas of Freeholdor) where a Scholar, or any of ther ſervants or Miniſters *ſunt una partium, cognitionem & correctionem inde habeant ſecundùm eorum ſtatuta vel conſuetudines vel ſecundum legem Regni Anglia &c.* which Charters were confirmed by act of Parl. 13. *Eliz.* It was much debated at the Bench if a Prohibition in this Caſe ſhouldbe granted, becauſe the parties pleas there were with men which were not parties priviledged there, and the defendant who is a Schollar there doth not deſire the Priviledg: But the Court at laſt agreed; That foraſmuch as the Charters are, That the Univerſity ſhall have Conuſans of thoſe pleas where *una pars eſt Scholaris*, and ſo thereby the parties being enforced to ſue there; that no Prohibition ſhould be granted: But the Cauſe remanded. *Tr.*3. *Car.* in *Co. B Wilcocks* and *Parſels* Caſe. *Cro.*1. part. 52.

11. In an *Ejectione firmæ*, The defendant being Principal of *Glouceſter Hall* in *Oxford*, pretended that he being a Schollar there and a Priviledged perſon, ought to be ſued before the Vice-Chancellor there, *juxta moremuniverſitatis*, according to their Charters; and ſhewed, that they had Conuſans of all ſuch Contracts, Covenants, Quarrels, and this being a perſonal action, they ought to have Conuſans thereof; and a Preſident was ſhewed. 22. *E.* where a plea of Covenant was brought in the Court of the Vice-Chancellor there, by reaſon of a Contract made: The Contract was in the principal Caſe, that he ſhould enjoy for ſuch a houſe in *Oxford* for a year: It was the opinion of the Court upon view of the Charters, that the Vice-Chancellor had not any Juriſdiction, nor could hold pleas thereof, for that in this action, he ſhall recover poſſeſſion, and ſhall have an *Habere faciat poſſeſſionem*, and thereby he who hath a Freehold may be put out of poſſeſſion, and it is not like the preſident which is ſhewed, for there it is only an Action of Covenant, wherein the plaintiff ſhall only recover damages; but here the poſſeſſion; wherefore a Prohibition was awarded. *M.* 3. *Car.* in *Co. B. Hollyes* Caſe. *Cro.*1. part. 62.

12. A Prohibition was prayed to the Councel of the Marches of Wales for that upon a Bill there from a ſuppoſed Riot, they proceeded and gave ſentence and damage againſt the defendant to 1000 pounds, where by their inſtructions they ought not to hold plea of Damages of debt above 50 pounds; It was objected, that they might hold plea of Riot, or miſdemeanors as the Star-Chamber did; It was Reſolved in this Caſe, that although the Star-Chamber of late had uſed to decree damages to the party, the legality thereof not being queſtioned, it being a ſupreme Court: it doth not therefore follow that other Courts do aſſume to themſelves the ſame Juriſdiction; and the Act of 34. *H.*8. by which the Court of Wales is eſtabliſhed doth not warrant them to do more then formerly had been uſed to be done; and whether it was ſo before cannot be ſhewed; A Prohibition was granted. *Hill.*14 *Car.* in *B.R. Powel* and *Sheeres* Caſe *Cro.*1. part. 381.

13. A Prohibition was prayed to the Councel of the Marches of Wales, becauſe the party was ſued there for a Legacy above the value of 50 pounds, viz. for 100 pounds. It was ſaid that there inſtructions were to hold plea of Legacies of any ſumme; The Court doubted, whether ſuch inſtructions ſhould be good to warrant their proceedings, becauſe Cauſes teſtamentary and Legacies are ſueable in the Spiritual Court, and not elſewhere; for they cannot warrant that which is not according to Law; It was not reſolved but adjorned. *M.* 16. *Car.* in *B. R.* Sir *Henry Williams* Caſe. *Cro.*1. part. 432.

14. *I. S.* Seiſed of Lands in Fee makes a leaſe for life, and afterwards levies a fine of all his Lands with an indenture to lead the uſes of the fine which was to the uſe of *I. D.* for 15 yeares, and after to the uſe of himſelfe for life, with a Power by a *Proviſo*, for him to make Leaſes for 21 years or three lives in poſſeſſion; This leaſe being queſtioned before the Councel of Marches by a Bill there to have ſtay of the Execution of the power; a Prohibition was thereupon prayed, which was granted by the Court: for they all agreed, that this terme of 15 years is preſently ſubject to the power, by the *Proviſo* of him in the remainder, and that this power doth iſſue out of the whole eſtate, and that the firſt leſſee ſhall have the rent reſerved during the 15 years limitted to him, ſo as thoſe matters are determinable at Common Law. A Prohibition was awarded. *Pa.*12. *Jac.* in *B.R.* Fox and *Prickwoods* Caſe. *Cro.*1. part. 349.

15. In a *Quare impedit*, the Caſe was. Sir *T. Hutton*, preſented one *R.* his Clerk to the Biſhop of *Cheſters* Ordinary, who refuſed him, whereupon he complained to the Arch-Biſhop of York, who ſent a Monition to the Biſhop to receive his Clerk, or elſe to appeare before him and anſwer, who did neither; whereupon the Arch-Biſhop inſtituted him, and by his warrant the Clark was Inducted; One *K.* preſented by the King ſued in the Court of Delegates, ſuppoſing the Inſtitution by the Arch-Biſhop was void, and by conſequence meant to avoid the Induction, being as he ſuppoſed without warrant, and the reaſon was, becauſe the Arch-Biſhop did inſtitute here in London in time of Parliament. A Prohibition was prayed, and granted by the Court in this Caſe, for ſince by the Induction which is a temporal act and triable at common Law the Church is full, it is not to be avoided but by a ſuit of *Quare impedit* at the Gommon law, and not to be undermined by alledging inſufficiency in the Inſtitution in the Ec-

eccleſiaſtical Court, for that may come in Queſtion upon the trial of the Induction at *Law*, which will not be good if the Induction were not good; And it was holden in this Caſe, that though this Advouſon and Church were in the County of Lancaſter, and a *Quare impedit*, and alſo a Prohibition might be brought there: Yet the opinion of the Court was, that this Prohibition might be granted alſo in this Court, becauſe the title of the Advouſon is not here queſtioned, but the intruſion upon the common Law (whereof this Court hath the general care) is to be reſtrained, the Prohibition was awarded. *Tr.* 22. *Jac.* in *Co. B.* Sir *Tymothy Huttons* Caſe. *Hob.* 15. 16.

16. Note, It was agreed by the whole Court, that if the deviſee of 500 pound ſue in the Marches of Wales for this legacie, that in that caſe a Prohibition is grantable. For although the Court of common Pleas had no power to hold plea of that, yet becauſe the thing is only triable in the Eccleſiaſtical Court a Prohibition may be granted to reduce that to its proper Court; And although the Inſtructions of the Court of the Marches be to hold plea of all things, where there is no remedy at the Common Law; yet this is to be underſtood of matters in equity, and not to take the Juriſdiction from the Spiritual Court, for the King may not do that by his Letters Patents. *Paſc.* 22. *Jac.* in *Co. B. Good* and *Goods* Caſe. *Winch* 78.

17. Note, it was agreed *per totam Curiam* in the caſe of one who was an Adminiſtrator *durante minore ætate* of an infant: That the Court of Marches of Wales have no authority to enforce ſuch an Adminiſtrator to accompt before them; but only the Eccleſiaſtical Court; and if they do intermeddle with ſuch things, that this Court may grant a Prohibition. *M.* 22. *Jac.* in *Co. B. Bubles* Caſe. *Winch.* 103.

18. A Prohibition was prayed to the Dutchy Court, for proceeding there in a matter after a verdict and Judgment at the Common Law in an action of Treſpaſs: It was reſolved by the whole Court, that after a verdict and Judgment given in an action of Treſpaſs, the matter ought not to be brought into any Engliſh Court: for that is reſtrained by the Statute of 4. *H.* 4. *Cap.* 23. And here the Judgment was given in a Court of Record, and therefore not to be diſſolved by any Decree in the Court of Dutchy or in any other ſuch Court: and the Court ſaid, that never any Decree was made in that Court, in caſe where a Judgment was given in a Court of Record. *Mich.* 22. *Jac.* in B. R. *Wright* and *Fowlers* Caſe. *Bolſt.* 2. part. 284.

19. A Prohibition was prayed againſt the Warden of the Court of Stannaries in the County of *Cornwall* and one *A.* for that they procured an Order and a Decree for the payment of a Summe of money unto them without any Bill and ſummoning of the defendant to appear, or without any anſwer or ſentence of Court; ſo their proceedings were *Coram non judice*; and it was ſaid, that all their proceedings there ſummarily and *de plano* without any formall Courſe were illegal, and the Kings Courts may take notice where they proceed irregularly, and ſhall controul them, & preſerve the Juriſdiction of the Court; the Court ordered that a Prohibition be granted comprizing in it all the matter aforeſaid; which was done accordingly. *M.* 9. *Car.* in *B. R. Adams* and the Wardein of the *Stannaries Caſe*. *Cro.* 1. part. 421.

20. *G.* prayed a Prohibition to the Court of Requeſts, for that in an Action of Trover for divers goods after Verdict and Judgment in B. R. and affirmed in a Writ of Error; the defendant ſurmiſed matter of Equity that he was ſurpriſed in his Trial and had not his Witneſſes there; the queſtion being upon ſale by Commiſſioners upon the Statute of *Bankrupts*. The Court granted a Prohibition and ſaid, that ſo they would always doe when ever any exhibited Bills there after Verdict and Judgment. *M.* 16. *Car.* in B. R. *Calmadies* Caſe. *Cro.* 1. part. 432.

21. In debt, the defendant exhibits his ſuit in the Court of Requeſt, and there the plaintiff in that Court denied, that the debt was paid; and the Court of Requeſt awarded an injunction, and upon information of it the Court awarded a Prohibition, to inhibite the ſuit there. *Hill.* 7. *Jac.* in *Co. B. Reade* and *Fiſher. Caſe. Brownl.* 1. part. 197.

22. Prohibition was prayed to the Court of Requeſts, for that an Adminiſtratrix ſues in that Court, complaining that ſhe had taken Adminiſtration of her Husbands goods, thinking that he was out of debt, unleſs for ſmall ſums which he owed to Labourers, and that ſhe did pay thoſe debts, and ſo miniſtred the goods; and that afterwards debts were brought againſt her upon Specialties, and ſhe prayed an Injunction there, and had it; this matter being ſhewed to the Court, a Prohibition was granted *per Curiam. Paſc.* 17. *Jac.* in *B. R. Fobbins* Caſe. *Cro.* 2. part. 331.

23. *D.* had divers Creditors; all of them, but *C.* the Plaintiff, did give him two or three years day of payment; the Plaintiff would not agree to this, but would have his money preſently, or bring his Action for recovery of it: *D.* petitioned the Court of Requeſts, and prayed them to Order him to yield to the time of payment limitted by the other Creditors, they moved him thereunto, which he refuſed to do, but ſaid that if he would give him preſent ſecurity to pay him in ſome reaſonable time which he ſhould give him, he would be ſatiſfied, otherwiſe he would forbear no longer: Afterwards *D.* procured an Injunction from the Court to compel him to ſtand to the time limitted by the other Creditors; a Prohibition was

prayed,

prayed on the behalf of *C.* the Plaintiff, againſt which was objected; the Priority of Suit in the Courts of Requeſts; But it was Reſolved by the Court, that this Priority of Suit made nothing in the Caſe; for when the Suit is in the Kings Bench, another Court, as the Court of Requeſts, cannot grant an Injunction to ſtay the proceedings here; and where the Court of Requeſts hath the Priority of Action, this Court upon cauſe ſhewed may grant Prohibition to ſtay their proceedings in that Court: The Prohibition was granted. *Hill.* 7. *Jac.* in *B. R. Crwe* and *Drapers* Caſe. *Bolſtr.* 1. part 19.

24. In a Prohibition the Caſe was, *G.* Leſſor for years, rendring Rent to him with condition of Re-entry for not payment; the Leſſee ſows the Land, and afterwards aſſigns the Intereſt of his Term for one year to *R.* the Defendant and Plaintiff in Chancery to be ſaved harmleſs of a Bond of 60. *l.* which he was bound in with the Leſſee: The Rent was behind, and being demanded, not paid; the Leſſor enters for the forfeiture, and after in commiſeration of the Leſſee, grants the Corn upon the Land to a third perſon to the uſe of the Leſſee and his benefit: *R.* the Aſſignee of the Leſſee preſers his Bill in the Court of Requeſts againſt the Leſſor, Leſſee, and Aſſignee of the Corn, and ſuggeſts a Combination betwixt them to make a forfeiture of the Leaſe, and ſo to defeat him of the Corn: In their anſwer all the Allegations were denyed upon Oath; yet without further proceedings, or any proof made of the matter, the Court there made a Decree againſt the Leſſor and the other Defendants: *G.* moved for a Prohibition, It was Reſolved by the whole Court, that they would not examine the matter here after a Decree there paſſed, notwithſtanding that the Judges erred there in their proceedings (which the Court held they did in this Caſe) in point of Equity: But the Court ſaid, that if they will intermeddle with any matter of Law, in ſuch Caſe they will grant a Prohibition; But in this Caſe as it ſtood, although there was a miſtake by them of the matter of Equity, yet they would grant no Prohibition, and ſo the Prohibition was denyed. *M.* 11. *Jac.* in *B. R. Glaſcock* and *Rowleys* Caſe. *Bolſtr.* 2. part 142, 143.

25. In a Prohibition prayed to the Court of Requeſts the Caſe was, A *Feme ſole* poſſeſſed of a Term, conveyed the ſame over in truſt from her, and covenanted with *I. S.* with whom ſhe did intend to marry, that he ſhould not meddle with it, and for that purpoſe took a Bond of him: They Inter-married, The Court was of opinion he may intermeddle with it, but he ſhall not have it, and by Equity cannot aſſign it by reaſon of the Covenant before marriage; But if he do, It was the opinion of all the Judges, that a Prohibition will not lye in the Caſe; for that it is matter only for Equity; But if they in that Court do Decree *Demiſit*, or *Non Demiſit*, *Aſſignavit*, or *Non*, &c. then they exceed their Juriſdiction, and in ſuch Caſe a Prohibition lyeth. *Paſc.* 17. *Car.* in *B. R. Marſh.* 118.

26. A Prohibition was prayed to the Court of Requeſts, upon Suggeſtion that one Executor ſued another, the Bill being in nature of an Accompt; and it was ſaid that an Accompt doth not lye but by Writ. 2. Becauſe they had given damages there in the Accompt, whereas no damages are to be given in Accompt. 3. Becauſe they had ſequeſtered others Lands, which is againſt Law: Upon view of the Bill It appeared to the Court that it was a Bill only of Diſcovery againſt Truſtees, who were about to defeat an Enfant, and by a Confederacy to break a Truſt; Wherefore a Prohibition was denyed as to that matter; But as to the Decree for Sequeſtreating others Lands, a Prohibition was granted. *Tr.* 17. *Car.* in *B. R. Marſh.* 102.

27. A Bill was preferred in the Court of Requeſts for moneys due upon Accompt; It was moved that the Bill was no other but in the nature of debt upon Accompt, for which a Court of Equity hath no Juriſdiction; for by ſuch means the King ſhould loſe his Fine: Againſt the Prohibition it was ſaid, That the Defendant had Exhibited a croſs Bill, and ſo affirmed the Juriſdiction, and he ought to have demurred to the Juriſdiction; and alſo it was ſaid, that the Suit there was for divers Wares delivered by a Chandler of a countrey Town, and to prove the delivery of them he had no Witneſſes: it was the opinion of the Court that a Prohibition ſhould be granted, for it was but an Action of debt upon an Accompt, and the Court ſaid that if he had no Witneſſes to prove the delivery of the Wares, then he could have no releif alſo in the Court of Requeſts. *Tr.* 17 *Car.* in *B. R. Grubs* Caſe. Ibid. 102.

28. An Orphan of *London* did Exhibit a Bill in the Court of Requeſts againſt another for a diſcovery of part of his eſtate; the Defendant prayed a Prohibition upon the cuſtome of *London*, That Orphans ought to ſue in the Court of Orphans in *London*: But it was the opinion of all the Juſtices againſt that, becauſe that although the Orphans had that priviledge, yet if they conceived it more ſecure and better for them to ſue in the Court of Requeſts they might waive their priviledge of ſuing in the Court of Orphans in *London*, for *quilibet poteſt renunciare juri pro ſe introducto*, and this Caſe is the ſtronger, becauſe the Court of Orphans in *London* did conſent to this Suit in the Court of Requeſts: The Prohibition was denyed by the Court. *M.* 17. *Car.* in *B. R.* Ibid. 107.

29. A Prohibition was prayed to a Court Baron, and alſo an Attachment of the Steward for deviding of Actions to bring the ſame within their Juriſdiction, to defeat the Common Law; as alſo for refuſing to ſuffer the Defendant to put in any Attorny for him

then one of the Atturneys of that Court: For theſe Cauſes the Court awarded a Prohibition, and ordered the Steward to ſtand committed, till he had anſwered Interrogatories concerning that miſdemeanor; For it was ſaid, That an Atturney at common Law is an Atturney in every inferiour Court. *M.* 17. *Car.* in B. R. *Darcyes* Caſe.

More Prohibitions.

1. WT. Parſon of *S.* in *Eſſex*, ſued *W. M.* before the High Commiſſioners for giving unreverent ſpeeches to the Miniſter, and for carrying his Corn on Holy-days, and for not ſuffering the Parſon and his Pariſhioners to come thorow his Yard in Rogation weeks, and not giving them a Repaſt as uſually he had done: It was Reſolved by the whole Court, after a long debate in this Cauſe, That the High Commiſſioners cold not deal with ſuch inferiour Offences, but they were to be left to the proper Dioceſan, who is to reform the ſame; and therefore a Prohibition was granted by the Court to the High Commiſſioners to ſtay their proceedings. *M.* 45. *Eliz.* in *Co. B. Taylor* and *Maſſys* Caſe. *Coke* 4. part. *Inſtitutes* 333.

2. A Prohibition was granted out of the Court of Common Pleas to the High Commiſſioners, for that they held Plea of aſſaulting and laying violent hands on *I. S.* being a Parſon. *Tr.* 44. *Eliz.* in *Co. B. Pool* and *Grays* Caſe. Ibid. *See Tr.* 3. *Jac.* in *Co. B. Perters* Caſe. acc.

3. *Note*, By the Juſtices, where a man deviſeth that his Executors ſhall ſell Land, and of the monies raiſed ſhall give ſuch Portions to his Daughters; that the ſame is not a Legacy, becauſe it is given out of Land, and an Action of Accompt lyeth for the ſame; And therefore, If Suit be in the ſpiritual Court for ſuch Portion, a Prohibition ſhall be granted. *M.* 5. *Ma. Dyer*, 151. *Quere* for *Tr.* 9. *Eliz. Dyer* 264. and 4. *Eliz. Dyer* 300. is contrary.

4. A Parſon ſued in the ſpiritual Court for Tythe of Aſpe, and a Prohibition was awarded, for it was ſaid that it had been adjudged in that Court, That Tythes ſhould not be paid of Aſpe; nor if a man cut down Trees for Houſeboot, Hedgboot, Cartboot, *&c.* Tythes ſhall not be paid of them. *Hill.* 43. *Eliz.* in *Com. B.* The Parſon of *Ramſeys* Caſe. *Goldsbr.* 161.

5. *Note*, It was agreed by the Court, That if a Conſultation be once granted, no new Prohibition ſhall be afterwards granted upon the ſame Libell; But if it be apparent matter that the firſt was unduly granted, In ſuch Caſe a New Prohibition may be granted; and that upon the Statute of 50. *E.* 3. which extends to the ſpiritual Judge only, for the Admiral is out of that Statute. *Tr.* 11. *Jac.* in *Co. B. Brownlo* 2. part 36. See *Tr.* 30. *Eliz.* in *B. R. Stranſam* and *Medcalfeys* Caſe. *Leon.* 130. acc.

6. In the Caſe for a Prohibition the Caſe was, *S.* was preſented to the Vicarage of *P.* the Biſhop refuſed him, and admitted one *I. S.* to the Parſonage of *P.* at the preſentment of the Lord St. *John*: *S.* ſued the Biſhop for Contumacy *per duplicem querelam*; the Biſhop ſaid *Non habetur talis Vicaria*, upon which matter he ſued a Prohibition: Now for a Conſultation it was ſaid that Prohibition did not lye, for a Vicar is but he *qui gerit vicem Parſonæ*, ſo as the ſame is a ſpiritual matter, which ought to be tryed in the ſpiritual Court; and alſo the Libel is to have Admiſſion and Inſtitution, and the other matter ariſeth by their Plea, *Quod Rectoria de* P. *eſt Eccleſia cum cura animarum, abſque hoc quod habetur talis Vicaria*, and Suit is but an incident to the principal matter: In this Caſe a Conſultation was granted by the Court, *quoad Inſtitutionem* of *S.* only; but that they ſhould not further proceed. *Tr.* 31. in *B. R. Slugg* and the Biſhop of *Landaffs* Caſe. *Leon.* 181, 182.

7. In a Prohibition, for that the Defendant ſued in the ſpiritual Court for Tythe wood; The Party did ſurmiſe that the Lands were parcel of the Priory of *C.* and that the owner and his Succeſſors, time out of mind, held the Lands diſcharged of Tythes, and ſo held them at the time of the Diſſolution: The other party traverſed it; whereupon they were at Iſſue if the Biſhop held the Land diſcharged *Tempore Quo*; Exception was taken to the Suggeſtion, that here is nothing elſe then a Preſcription *De modo Decimandi*, for here is not ſet forth any diſcharge, as Compoſition, unity of poſſeſſion, Priviledge, *&c.* It was the opinion of *Wray*, chief Juſtice, that although the eſpecial manner of the Charge be not ſet down, yet the Court ſhall take it by a lawful means as Compoſition, or otherwiſe: It was found for the Plaintiff in the Prohibition. *M.* 33. *Eliz.* in *B. R. Naſh* and *Mellins* Caſe. *Leon.* 240.

8. In a Prohibition the Plaintiff declared, That whereas *P. M.* was ſeiſed of divers Lands, he made his Will, by which he made the Plaintiff his Son his Executor, and deviſed to *A.* his Wife 100. *l.* in conſideration and recompence of all her Dower of all his Lands; *P. M.* dyed, *A.* took Husband the Defendant, That upon ſpeech after betwixt the Plaintiff and Defendant, the Defendant in conſideration the Plaintiff promiſed to pay him the ſaid 100. *l.* promiſed to make him a Diſcharge of the 100. *l.* and of the Dower of his Wife, and notwithſtanding the Plaintiff was ready, and offered to pay the 100. *l.* It

was

was Objected, That here was no cauſe of a Prohibition, a Suit being for the money and Dower, for that the agreement upon the Communication was not any cauſe, nor doth it appear that it was performed: But a Prohibition was granted, for the Wife cannot have both money and Dower, for that was not the meaning of the Deviſor and here is *Modus & conventio*, which alters the Laws Agreement; the Prohibition was allowed *Paſc.* 33. *Eliz.* in *B. R. Pett* and *Baldens* Caſe. *Leon.* 235, 236. See *Tr* 17. *Jac.* in *Co. B. Rot.* 895. *Edwards* and *Graces* Caſe, before Sect. acc.

9. *Note*, It was agreed by the Court, That where a Will doth contain in it Lands and Goods, the Court ſhall not grant a Prohibition for the whole in the generality; But if in ſuch a ſpecial Caſe it be alledged, That the party who made the Will was then *de non ſana Memorie*, a Prohibition ſhall be there granted for the whole. *P.* 12. *Jac.* in *B. R. Egerton* and *Egertons* Caſe. *Cro.* 2. part. 346.

10. *A.* Parſon of *H.* brought a Prohibition againſt *W.* and declared, reciting the Statute of 18. *Eliz.* of Clergy; whereas he was Parſon, *&c.* and was Indicted, 13. *Jac.* at the Aſſiſes for Man-ſlaughter, and for the death of one *S.* and convicted; and at the next Aſſiſes he was allowed his Clergy, but was not burnt in the hand becauſe of his Orders, but by judgment of the Court was enlarged and delivered out of priſon, by force of which Judgment he was purged and acquitted of the Felony, That the Defendant pretending him to remain ſtill convicted, and thereby deprived of his Benefice, and that the Church was void; and that the Patron had preſented him to the Church, drew him in plea before the Chancellor of *London*, from whence it was appealed to the Judge of the Audience, and from thence to the Delegates; and thereupon he had his Prohibition; and yet the Defendant did proſecute him in the ſpiritual Court, whereupon the Defendant demurred, and Judgment was given by all the Judges for the Plaintiff, that he ought not to be queſtioned now in the ſpiritual Court for this Man-ſlaughter, and a Prohibition awarded: See the reaſon in the Caſe at large upon the Statute of 18. *Eliz.* of Clergy. *Tr.* 16. *Jac.* in *Co B. Scarle* and *Williams* Caſe. *Hob.* 299. to 194.

11. See a Prohibition to the Court of Dutchy, becauſe they there went about to queſtion the Validity of Letters Patent. 13. *Jac.* Sir *Henry Warner* and *Sackermans* Caſe before *Bolſtr.* 3. part 119, 120.

12. In what Caſe a Prohibition lyeth to *Cheſter*. *M.* 13. *Jac. Bolſtr.* 117. *Vaudrey* and *Pannets* Caſe. See before Sect. *Huſton* 22.

13. In a Caſe for Defamatory words, in the ſpiritual Court ſentence was given againſt the Plaintiff, who appealed to the Arches, and Judgment was given for the Plaintiff, and 12. *d.* coſts; then came the general Pardon, and the Defendant did appeal to the Delegates, and there the ſecond Sentence was affirmed, and greater coſts given; and the Defendant did plead the general pardon, and they would not allow that: It was moved for a Prohibition, It was agreed by the Court in this Caſe, That although this Suit and Sentence is only to make the party to deny the words, and confeſs the fault in ſome publique place, yet it is in effect, as if it were meerly at the Suit of the King for reformation, and this is a new invention which they have found out to take away the benefit of the pardon of the King; and therefore for that the Prohibition was granted: But the Court ſaid, That for the coſts taxed by the Delegates, they were not taken away by the Pardon, although the firſt offence was; but becauſe this Suit was not only to quaſh the Sentence for the Offence, but alſo for the coſts; and theſe new Coſts were aſſigned for the unjuſt vexation; they might proceed as for them, but not for the firſt Offence. *Hill* 22. *Jac.* in *Co. B. Eliz. Davies* and *Hawkins* Caſe. *Winch.* 125.

14. A Libel was in the ſpiritual Court for the Tythes of Pilchards taken in the Sea: The party prayed a Prohibition upon a Surmiſe that the cuſtome there is, That the Owner of the Fiſher-boat hath one moity of the Fiſh, and the Fiſherman the other moity, and that the Owner hath uſed to pay the Tenth of his moity in diſcharge of all: This by the Court was holden to be a good Surmiſe to have a Prohibition, for by the Common Law the Parſon cannot have the Tythe of Fiſhes taken in the Sea, becauſe it is not within any Pariſh. See 22. *Jac.* in *B. R. Holland* and *Heals* Caſe. *Noy* 108.

15. *Note*, It was holden by the whole Court, If ſentence be given in the ſpiritual Court, and Coſts taxed, and the Defendant brings an Appeal; Yet if the Suit did not appertain originally or properly to them, a Prohibition ſhall be awarded as well to the Coſts as to the principal Suit: Notwithſtanding that the Statute of 32. *H.* 5. cap. 7. ſayes, That the Eccleſiaſtical Court ſhall compel the Appealant forthwith to pay Coſts. See *Noy* 137. acc.

16. In the Court of Requeſts. 1. *G.* borrowed money of the Teſtator of *S.* and gave a Term, whereof he was poſſeſſed for ſecurity by Indenture with a Proviſo of Redemption; and ſhewed in his Bill that there was a verbal agreement between them, that if the money were not paid at the day, the Teſta or ſhould take the profits growing upon the Land, and if the profits amount to the value of the ſum of money, that then he ſhould have his Term again, and ſet forth that he had reaped the profits accordingly, which ſatisfied him, and yet he kept the poſſeſſion of the Term; and by his Bill prayed that he might accompt for the profits: A Prohibition was prayed, which was granted by the Court; and it was ſaid, That although the truſt is contrary to the Indenture, yet ſuch an averment was good, notwithſtanding

ing the Proviſo; And it was ſaid that the profits received ſhould be Aſſets, and if it ſhould be rekived in the Court of Requeſts, there ſhould be a *Deo-Davit* againſt the Executor. *M.* 4. *Car.* in *Co. B. Goſſe* and *Skiptons* Caſe. *Hetley* 117.

17. A Prohibition was prayed to the Prerogative Court, upon a Surmiſe that they did endevour to Baſtardize one who was Legitimate; but that Surmiſe was not true, but the Suit there was, Whether Letters of Adminiſtration were well granted or not: The Caſe was this. *A.* had a wife called *B.* who dyed, Afterwards he took a ſecond wife called *B.* alſo, and then dyed Inteſtate: *B.* the ſecond Wife took Letters of Adminiſtration of the goods of her Husband deceaſed: The Son of *A.* ſued in the Prerogative Court to Repeal thoſe Letters of Adminiſtration upon pretence that the firſt wife was yet alive: In this Caſe the Court delivered theſe Poſitions for Law, *viz.* 1. That one ought not to ſue in the Eccleſiaſtical Court to Baſtardize an Iſſue, but at the Common Law. 2. Where the Court hath granted Letters of Adminiſtration to one that ought to have them, they ought not to Repeal them there in that Court. 3. Where ſuit is there for Lands and Goods, a Prohibition may be there as to the Lands, but they may proceed there as to the Goods. 4. That where a thing is tryable in the Eccleſiaſtical Court, and there is alſo a matter incident to it, which is tryable at the Common Law, there a Prohibition ſhall not be granted. 5. If the Common Law and Civil Law differ concerning the Legality of a thing, if they do proceed there, a Prohibition lies, becauſe the Common Law ſhall be preferred; and in the principal Caſe the Rule was given, That a Prohibition ſhould be granted, and the other party ſhould demur upon it, ſo as it might be debated, whether it were grantable or not. *Paſc.* 22. *Car.* in *B. R. Bettiſworth* and *Bettiſworths* Caſe. *Styles* 10.

18. A Parſon Libelled in the ſpiritual Court for Tythes, and for the ſubſtraction of them, upon the Statute of 2. *E.* 6. The Defendant alledged a Diſcharge by reaſon of Priviledge within the Statute of 31. *H.* 8. and had a Prohibition; upon which they were at Iſſue, and it was found againſt the Defendant; upon which a Conſultation was awarded for the Parſon; in the ſpiritual Court, the ſentence was, That he ſhould recover ſingle Damages, *& ulterius*, that he ſhould recover *duplicem valorem*, which alſo were put in certain: Upon this Sentence, It was the opinion of the Court, That a ſpecial Prohibition ſhould be awarded, becauſe they exceeded in giving damages, contrary to the Statute, for although the Sentence be not expreſly, that he ſhall recover treble damages, yet the ſentence doth amount to ſo much, if joyned together; and a ſpecial Prohibition reciting the whole matter, was awarded accordingly. *M.* 11. *Jac.* in *Co. B. Baldwyn* and *Girreys* Caſe. *Godb.* 245.

19. Two men were bounden with *I. S.* as his Sureties in an Obligation; One of the Sureties was ſued upon the Bond, he exhibited an Engliſh Bill in the Court of Requeſt againſt the Defendant being the other Surety, to have Contribution, and a Prohibition was awarded, becauſe by entring into Obligation it became the debt of any of them, and the Obligee had his election to ſue which of them he pleaſed, and to take execution againſt him; and it was ſaid in this Caſe, that if one Surety ſhould have contribution againſt the other, it would be a great cauſe of Suits, wherefore Prohibition was granted; and ſo it was ſaid it had been adjudged in the like Caſe, *viz.* in Sir *William Woorwoods* Caſe. *Hill* 11. *Jac.* in *Co. B. Wormleighton* and *Hunters* Caſe. *Godb.* 243.

20. A Prohibition was prayed to the Court of Requeſts becauſe a man ſued there by Engliſh Bill for money which he had layed out for an Infant within age, for his meat, drink and neceſſary Apparel, and ſets forth in his Bill that the Infant being within age did promiſe him to pay the ſame: A Prohibition was granted, becauſe it was ſaid he might have his Action of debt at the Common Law for the ſame *Quere*; for a difference was taken when the *Aſſumpſit* is made whileſt he is within age, and when he comes of full age; for if he maketh a promiſe when he cometh of full age, or enter into a Bond for neceſſaries which he had whileſt he was within age; the Law is now taken to be, the ſame ſhall bind him. *M.* 11. *Jac.* in *Co. B. Rearſlie* and *Cuffers* Caſe. *Godb.* 219.

21. A man was preſented in the Eccleſiaſtical Court for working, *viz.* carrying of Hay upon a Holy day, *viz.* St. *John Baptiſts* day, in the time when the Miniſter prayed, and Service was at the Church; It was ſaid that the Church had Authority to appoint Holy-days; and therefore if ſuch days were not kept Holy but broken, the Church might puniſh the parties for the breaking thereof in the ſpiritual Court; But yet the Court granted a Prohibition. 1. Becauſe this is out of the Statute of 5. *E.* 6. by the words of the Act it ſelf, becauſe it was for neceſſity: And 2 The Court ſaid this was a Holy-day by Act of Parliament, and therefore it doth belong to the Judges of the Common Law to determine whether the ſame was broken by doing ſuch work upon that day or not: A Prohibition was granted. *M.* 11. *Jac.* in *Co. B. Wheelers* Caſe. *Godb.* 218.

22. A *Feme Covert* Libelled in the Spiritual Court againſt her Husband, for that he threatned her, and beat her, and in the end of her Libel prayed allowance of Alimony; a Prohibition was prayed, becauſe the Suit there was for a force, which was not tryable in that Court: and 11. *H.* 4. 88. was vouched, where a Clerk ſued in the ſpiritual Court for a Battery, and becauſe an Action of Treſpas and Aſſault did lye at the Common Law, a Prohibition was awarded; and

and damages are not to be given in the ſpiritual *Court*: But in the principal Caſe the Court agreed, That no Prohibition ſhould be, becauſe the wife cannot have any remedy at the Common Law againſt her Husband for beating of her, for ſhe is *ſub virga viri*; and alſo becauſe the Suit there is but by way of Enducement to have a Divorce *Cauſa Metus*. See 31. *E.* 3. to Prohibition 8. *M.* 11. *Jac.* in *Co. B.* Sir *Tho. Seymors* Caſe. *Godbt.* 215.

23. A Prohibition was prayed to the Court of Requeſts becauſe they held plea there of an Attornment, for the Complaint there was, to compel a man to Attorn upon a Covenant to ſtand ſeized to uſes: It was obſerved, that there were three Cauſes in the Bill wherefore Prohibition ſhould be granted, which were reduced to three Queſtions. 1. If a Copy-holder payeth his Rent, and the Lord maketh a Feoffment of the Manor? if the Copy-holder ſhall be compelled to Attorn? 2. If a man be ſeized of Free-hold Lands, and Covenants to ſtand ſeized to uſes, If in ſuch Caſe Attornment be needful? 3. If a Feoffment be made of a Manor by Deed, If the Feoffee ſhall compel the Tenants to attorn in a Court of Equity? for all which Cauſes it was the opinion of the Court, That the Tenants ſhall not be compelled to Attorn; for upon a Bargain and ſale, and a Covenant to ſtand ſeized to uſes, there needs no Attornment: And the Court ſaid, It was uſual in ſuch Caſes to grant Prohibitions to Courts of Equity, and eſpecially if the matter hath been once determined in the Courts of Common Law. *See* 12. *E.* 3. title Prohibition: A Prohibition was awarded to the Chancery. *M.* 11. *Jac.* in *Co. B. Jenour* and *Alexanders* Caſe. *Godbt.* 209.

24. *Note*, Upon a demand of the Juſtices of their opinions in what Caſe the Ordinary in Cauſes Eccleſiaſtical might examine the party *Ex Officio*, upon his Oath: It was Reſolved by them. 1. That the Ordinary cannot conſtrain any man, Eccleſiaſtical or Temporal, to ſwear or anſwer to Interrogatories as ſhall be Adminiſtred unto them, but they ought to deliver the Articles to him upon which he is to be examined, to the intent he may know whether he ought to anſwer unto them. 2. That no man, Eccleſiaſtical or Temporal, ſhall be examined upon ſecret thoughts of his heart, but ſomething ought to be done or ſpoken by him upon which he is to be examined; and if in ſuch Caſes Examination ſhall be by them, *ex Officio*, a Prohibition lyeth. See *Coke* 12. part 26. *Baſtr.* 26. *Tr.* 10. *Eliz. Leighs* Caſe there vouched, and *M.* 18. *Eliz. Dyer, Hynds* Caſe, who becauſe he would not ſwear *Commiſſionariis Eccleſiaſticis ſuper articulos proufura*; for that cauſe he was committed by them to the Fleet, but he was delivered by the Court upon a *Habeas Corpus*, *per Curiam.*

25. Sir *Anthony Roper* was drawn before the High Commiſſioners for a Penſion out of a Rectory Impropriate, of which Sir *Anthony* was ſeized in Fee: The High Commiſſioners tenuunced him to pay it, which he refuſed, upon which they committed him to priſon: It was Reſolved in that Caſe, that by the Statute of 1. *Eliz.* the High Courts had not authority in ſuch Caſe to puniſh or to impriſon the party, for they have not power to determine *meum & tuum*, as Penſions, Tythes, Legacies, Marriages, Divorces, Probates of Teſtaments, and the like; for that this would diſſolve the Court of the Ordinence, which is ſo neceſſary in many Caſes to the Adminiſtration of Juſtice, that without them Juſtice cannot be executed; and they have only power to commit for Crimes enormious, and have not power to commit him who deteins Penſions, Tythes, Legacies, *&c.* And if they hold plea of points of particular Intereſt, that in ſuch Caſe Prohibition doth lye to the Court of High Commiſſion: And in the principal Caſe, upon a *Habeas Corpus* brought, Sir *Anthony Roper* was ſet at liberty. *M.* 5. *Jac. Coke* 12. part 45, 46 Sir *Anthony Ropers* Caſe.

26. The Wife ſued her Husband before the High Commiſſioners for maintenance: It was Reſolved in that Caſe, That a Prohibition in that Caſe before granted was maintainable, for that it was not any enormity nor offence within the Statute of 1. *Eliz.* but a neglect of his duty, and a breach of his vow of Maintenance; alſo if ſuch Caſes ſhould be allowed, the party ſhould be defrated of his Appeal, and for that ſuch Suit belongs to the Court of the Ordinary. *Tr.* 6 *Jac. Coke* 12. part 50, 31. *Marmaduke Lingdales* Caſe. See *Tr.* 17. *Car.* in *B. R.* Sir *Edward Powels* Caſe. *Marſh.* 80. adjudged accordingly: In which Caſes it was agreed by all the Juſtices, That the ſaid High Commiſſioners might charge Land with a Rent as well as grant *Alimony* out of it, and a Prohibition was awarded.

27. A man Libelled in the Spiritual Court for Tythe within the Pariſh of *C.* The Defendants ſaid, That the Tythes were within the Pariſh of *A.* The Parſon of *A.* came *in pro intereſſe ſuo*; and thereupon they in the Spiritual Court proceeded to ſentence, which was given againſt the Plaintiff there: He came now and prayed a Prohibition, and the Queſtion was, If in ſuch a Pariſh, or in ſuch Pariſhes, we are tryable by the Law of the Land, or by the Law of the Church? It was the opinion of the Court, that it hath always been taken, that it is tryable by the Common Law; It was ſaid that the Pope had not diſtinguiſhed Pariſhes by his Canons, but only ordained that Tythes ſhould be paid within the Pariſh. *Tr.* 28. *Eliz.* in *B. R. Stranſham* and *Collingtons* Caſe. *Leon* 2. part.

28. *Gerrard*, Maſter of the Rolls, preſented *Charterton* Biſhop of *Cheſter*, to the Church of *Bangor*; To which Church alſo one *I. S.* preſented his Clerk, by

by which ſeveral preſentments the Church became Litigious: The Arch-Biſhop of *York* being Ordinary of the Place, awarded a *jure Patronatus*, &c. depending which, the Arch-Biſhop admitted *Chatterton*, for which *I. S.* Libelled in the Spiritual Court againſt the Arch-Biſhop; for that the ſaid Arch-Biſhop, *dicto Epiſcopo plus æquo faviens admiſit dictum Epiſcopum*, pendent the *Jure Patronatus*, in which Caſe by the Law of the Church the Admittance was void; The Biſhop upon this matter came and prayed a Prohibition, and had it, becauſe the right of the Patronage came in debate: Afterwards came *I. S.* and prayed a Conſultation, becauſe he medled not with the right of the Patronage, but only with the wrongfull Admittance; To whom it was ſaid by the Court, That the Awarding of the *Jure Patronatus* is not a thing of neceſſity, but at the will of the Ordinary, and for his better Inſtruction; But if he will at his peril take Notice of the right of the Patronage, he may receive which of the Clerks he will, without a *Jure Patronatus* awarded, and before any Verdict given upon it the Arch-Biſhop was ſatisfied of the right of the Plaintiff in the Prohibition to the Patronage, and thereupon admitted his Clerk: It was the clear opinion of the whole Court, That the Prohibition ſhould ſtand, and the Conſultation was denyed. *Paſc.* 26. *Eliz.* in *Co. B. Leon.* 2. part. *Gerrards* Caſe.

29. *A.* Libelled in the Spiritual Court againſt *B.* for Subſtraction of Tythes, the Defendant in the ſpiritual Court pleaded that he had divided the Tythes from the nine parts; the Plaintiff made addition to his Libel, and ſaid, That preſently after the pretended Diviſion, *in fraudem Legis* he took and carried away the ſame Tythes, and converted them to his own uſe; and thereupon he obtained a Sentence in the ſpiritual Court to recover the Treble value according to the Statute of 2. *E.* 6. The Defendant ſuggeſted to have a Prohibition that he had divided his Tythes, and that the Plaintiff ought to ſue him there for the double value, and not for the treble value; and that after ſentence the Parſon ſhall not ſue for them there, but at the Common Law: It was holden by the Court, That this diviſion made was not a diviſion according to the Statute of 2. *E.* 6. but was a fraudulent diviſion, and therefore the ſame is out of the Statute; But in this Caſe it was Reſolved, that the Plaintiff in this Caſe could not ſue in the ſpiritual Court for the treble value; and becauſe he did ſo, a Prohibition was awarded. *Tr.* 44. *Eliz. B. R. Sprat* and *Heals* Caſe. *Coke* Select Caſes 23.

Property.

1. *Who, and in what Goods, Chattels, or other things a man ſhall be ſaid to have* Property, *in what not; And where, and by what Act the ſaid* Property *ſhall be altered or changed; By what act the* Property *ſhall be loſt; And of the Writ* de Proprietate probanda; *And where it lyeth, where not.*

1. A Servant took and carried away his Maſters goods, againſt whom his Maſter brought an Action of Treſpaſs: It was ſaid that the Book of 2. *E.* 4. 4. was, That Treſpaſs in that Caſe would not lye againſt the Servant; But it was the opinion of the whole Court, and ſo Reſolved, That the Servant hath neither general nor ſpecial Property in his Maſters goods, and he ſhall have no Action of Treſpaſs if they be taken away, and therefore Treſpaſs lyeth againſt him if he take them: And if he do imbezil them it is Felony, as it was adjudged in 3. *H.* 7. 12. *M.* 30. *Eliz.* in *Com. B. Bloſſes* Caſe. *Goldsbr.* 72.

2. A man ſeized of a Wood, granted to another 100. Cords of Wood to be taken by the Aſſignment of the Grantor, and before Aſſignment, the grantee granted that over; If it was a good grant before Election was the Queſtion? It was the opinion of the Court that it was not grantable over for that no Property was veſted in him before the Aſſignment, and if the Grantee dye before Aſſignment the grant is void, and his Executors if he dye ſhall not have it. *M.* 40. *Eliz.* in *Co. B Goldsbr* 71.

3. If a man do gage Goode in pledge for 40 *l.* borrowed upon them, and afterwards the Debtor is condemned in 100. *l.* theſe goods ſhall not be taken in execution until the 40. *l.* be paid, becauſe the Property of the Goods is in the Gagee and not in the Gager, and the Creditor hath an Intereſt in them, 21. *E.* 4. 10. and ſo it is, If a man bail goods to one in pledge, and afterwards he is Outlawed, the King ſhall not have thoſe Goods before the party be ſatisfied; If a Leaſe be made to one for years of goods, and after

after he is attainted of Felony, the King ſhall not have theſe goods gaged in leaſe till the Leaſe be ended; and See 13. R. 2. A Termer is diſtrained for Rent behind, afterwards he is attainted for Felony done before the Diſtreſs taken: It was the opinion of the whole Court that the King ſhall not have this Diſtreſs as a forfeiture, unleſs he do ſatisfie the party who diſtrained. See *Bolſtr.* 3. part 17. in the Caſe of Sir *Thomas Waller* and *Hanger. Hill* 11. *Jac.* for theſe and other Caſes upon this ground.

4. In an *Ejectione firmæ*, the Caſe was; The Husband was poſſeſſed of a Term in the right of his Wife, and made his Will, and thereof made his wife his Executrix; and by his Will he deviſed the Term to his Wife, ſhe took upon her the Execution of the Will, and entred generally into the Land; and ſhe once confeſſed and declared theſe words, *viz. That her Husband had done very liberally with her, and had given her all that he had*; There were neither Debts nor Legacies to be paid: Afterwards the wife dyed Inteſtate, and afterwards Adminiſtration was committed to one of the goods of the Husband not Adminiſtred, and alſo of the goods of the Wife: The Queſtion in this Caſe was, whether the Wife took this Term as Executrix, or as Legatee; Some of the Juſtices were of opinion, that theſe words declared by her, *viz. My Husband hath given all to me*, did amount to an Agreement to have the Term of a Legatee or Deviſee, and it was ſaid, That the property of goods could not be in abeyance, but they muſt be in the Executor, Adminiſtrator or Ordinary: But the opinion of *Coke* was, that ſhe had the Term firſt as Executrix, and afterwards ſhe had it as Legatee, for it could not be otherwiſe; and by her general entry ſhe firſt had it as Executrix; and when a perſon hath two rights to a thing, it was ſaid, That the Law ſhall judge the party in by the beſt Right, And therefore it was the opinion of the whole Court in that Caſe, That in regard that there were no Debts nor Legacies to be paid, that the wife ſhould have the Term as a Legatee; and ſo the Term did belong to her Adminiſtrator, and not to the Adminiſtrator *de bonis non. &c.* of the Husband. *Tr.* 7 *Jac.* in *Co. B. Rot.* 2718. *Hellam* and *Leas* Caſe. See *Brownlo.* 2. part 132. acc.

5. Debt for Rent; the Plaintiff declared upon a Leaſe made to the Defendant at Will, to be holden from *Mich.* for as long as both parties ſhould agree, rendring rent; upon *Nihil debet*, the Jury found, That *I. S.* had Iſſue a Son and a Daughter, and deviſes that his Son ſhall have his Land at the age of 24. years, and gives 40. *l.* to his Daughter to be paid at her age of 21. years; and further deviſes, That his Executor ſhould have the overſight of all his Lands and moveable goods, till the ſeveral ages aforeſaid, and made the Plaintiff his Executor and dyed: They find that the Plaintiff made the Leaſe before mentioned, and that the Son dyed, but do not find at what age; and find that the Leſſee continued the poſſeſſion from *Mich.* for one year or more; and find that within that year the Daughter entred, and that the Defendant attorned Tenant to the Daughter: In this Caſe Judgment was given againſt the Plaintiff, for the opinion of the Court was, that the Plaintiff took no Intereſt in the Land by the Will; for the overſight and doing of his Land ſhall be intended in the right of the Heir, and to his uſe. 1. *M.* 3. *Jac.* in *Co B. Carpenter* and *Collins* Caſe. *Brownlo.* 1. part 88.

6. The Queen ſeized in Fee, made a Leaſe for years to one who was Outlawed at the time of the Leaſe made, rendring Rent, and afterwards the party was Outlawed again, and before ſeizure came out a general Pardon of all Goods and Chattels forfeited: In this Caſe it was holden by the Court, 1. That a man Outlawed was capable of a Leaſe from the Queen as Fermor to the Queen; and that the pardon with reſtitution was ſufficient to revive the Term forfeited by the ſecond Outlawry. 2. That a man Outlawed and pardoned had property in his goods. *M.* 30. *Eliz.* in the Exchequer, *Knowls* and *Powels* Caſe. *Owen* 116.

7. In Treſpaſs, the Plaintiff declares that he was robbed of 20. *l.* and that he purſued the Felon with Hue and Cry to ſuch a Town, who diſcovered the Felon to the Conſtable of the Town, who thereupon apprehended the Felon, and found the 20. *l.* about him, and took and detained it in his poſſeſſion: The Defendant confeſt the taking of the 20. *l.* *ut ſupra*; but becauſe the Town was of no ſtrength he carried the 20. *l.* to the next Town, and as he was going upon the High-way he was robbed of it: It was the opinion of *Williams* Juſtice, that although the taking of the Felon was juſtifiable, yet he is to keep the money at his peril, and becauſe he hath not he is liable to Action: But the Court conceived in this Caſe, That the Plaintiff ſhould have brought *Trover* and *Converſion*, and not Treſpaſs; and therefore the Caſe was deferred till the next Term to be argued upon the general Iſſue. *M.* 3. *Jac.* in *B. R. Wilgrave* and *Skynners* Caſe. *Owen* 120.

8 In a Replevin the Caſe was, The Lord *Windſor* was poſſeſſed of certain Sheep, and by Will deviſed them to *Eliz* his Daughter for her advancement in marriage, and made his Will, and his Wife his Executrix, and dyed; The wife took to Husband *I. S.* who leaſed the Sheep with a Ferm by Deed for eleven years; and it was agreed betwixt the parties, that the Leſſee ſhould keep ſo much of the Rent reſerved upon the Leaſe, to buy therewith ſo many

ſheep over, ſo as the whole Stock of the ſaid Sheep upon the ſaid Ferm ſhould amount to 1000. ſheep; and the Leſſee did covenant to yield and render to the ſaid *I. S.* at the end of the Term 1000. ſheep between two years ſhorn and four years ſhorn: *I. S.* afterwards granted to *A.* who married the Daughter, the ſaid 1000. ſheep to have them after the Term: The Term expired *I. S.* ſold them to *B.* who brought them away: *A.* pretending that the grant of the ſheep to him was good ſeized them: The Queſtion is in whom the property of the goods was; It was the cleer opinion of the Court, That the grant made by the ſaid *I. S.* of the ſheep during the Terme, was void; for that *I. S.* during the ſaid Term had not in the ſheep neither a generall property nor a ſpecial property, nor alſo after the Term; But if after the Term expired the Leſſee will not deliver to *I. S* 1000. ſheep, he is put to his Action of Covenant againſt the Leſſee; and in that Caſe the Leſſee was bound to deliver at the end of the Term not the ſaid ſheep, but ſuch a number of ſheep; and it was ſaid in that Caſe, That if I let certain ſheep to one for two years; upon that Leaſe ſomewhat remains in me, but that cannot be ſaid a Property, but rather a poſſibility of a Property, which cannot be granted over; It was adjudged for the Plaintiff, *M.* 29. *Eliz.* in *Co. B. Wood* and *Foſters* Caſe. *Leon.* 42.

9 In an Action upon an Aſſault and Battery; upon *not guilty* pleaded, the Caſe was, That the Plaintiff hired of the Defendant a Gelding for 4. *s.* for two days, to ride from *Graveſend* to *Nettlebed* in the County of *Kent*; the Plaintiff being by vertue thereof poſſeſſed of the Gelding rod out of his way to a place called *B.* towards *London*, Of which the Defendant having notice, he came with his ſervant upon the way to the Plaintiff, and required him to deliver him the Gelding, and thereby to be poſſeſſed himſelf of the Gelding, laid hands upon the Plaintiff, and took him from horſe-back, and would have taken the Gelding from him; whereupon the Plaintiff did maintain his poſſeſſion: In this Caſe it was adjudged for the Plaintiff, for the Battery is confeſſed, and that it aroſe from the misbehaviour of the Defendant; for the plea in Bar ſaith, that the Plaintiff had hired the Gelding for two days, and that they in that time diſturbed the Plaintiff of his poſſeſſion of the Gelding and thruſt him off his back, which was not lawful for them to do; for what ever the intent of the Plaintiff was, It was agreed by the Court that the Defendant could not juſtifie the ſeizing and taking away of the Gelding from the Plaintiff within the time for which he had hired him; for that during that time he had a ſpecial property in the Gelding againſt all men; and if the Plaintiff had miſuſed the Gelding, the Defendant in ſuch Caſe might have had an Action upon the Caſe againſt him: It was adjudged for the Plaintiff. *Hill.* 7. *Jac.* in *B. R. Lee* and *Askinſons* Caſe. *Cro.* 3. part 236.

10. Treſpaſs brought againſt the Defendant for fiſhing in *ſeperali piſcaria* of the Plaintiff, and declared that the Defendant *piſces ipſius cepit*; It was found for the Plaintiff: It was moved in ſtay of Judgment, becauſe the Plaintiff declared of taking of *piſces ſuos*, they being *fera natura*: It was the opinion of the Court that the Judgement ſhould be affirmed, and the difference is, where a man brings Treſpaſs for taking *piſces ſuos*, or *Lepores ſuos*, that Action will not lie; But if he bring Treſpaſs for fiſhing in his ſeveral *piſcary*, as in this Caſe; or for breaking his Cloſe and taking *Lepores ſuos*, there the Action will lye. *Tr.* 25. *Car.* in *B. R. Child* and *Greenhills* Caſe. *Marſh.* 48.

11. *Trover* and *Converſion* was brought againſt Husband and Wife of Sheaves of Corn, and the Plaintiff did declare that they did convert thoſe ſheaves *ad uſum ipſorum*, viz. of the Husband and wife: It was the opinion of the Court, That the Declaration was not good. 1. Becauſe it was uncertain, being of Sheaves of Corn, not expreſſing what Corn it was: And 2. It was not good being layed that the Converſion was *ad ipſorum uſum*; for that the wife had no property in them during the life of her Husband; *Quere*, for *Jones* Juſtice ſaid, That there might be a Converſion by the wife to her own uſe, if ſhe bake the Corn into bread and eat it. *M.* 14. *Car.* in *B. R. Hodges* and *Symſons* Caſe.

12. One was choſen to be Clerk of a Pariſh, and was put in and continued Clerk there for three or four years, but was not ſworn: Now a new Parſon put him out and ſwore another in his place, the Clerk ouſted prayed a Writ of Reſtitution: It was the opinion of the Court, That the new Parſon could not lawfully put him out, becauſe they ſaid it was a temporal Office, in which the party had a poſſeſſion and property: But they would not grant a Writ of Reſtitution, becauſe they conceived the Clerk had his remedy at Law; but if he was never ſworn in the Office they would award a Mandate to ſwear him Clerk. *Tr.* 17 *Car.* in *B. R. Marſh.* 101.

13. Treſpaſs for digging the Plaintiffs Cloſe, and killing 18. Conies there; the Defendant as to all the Treſpaſs, but the killing of 2. Conies, pleaded not guilty; and as to them he pleaded, that the place *&c.* was a great Heath in which he had Common of Paſture, and that he found the Conies eating the graſs, and that therefore he killed them, as was lawful for him to do: In this Caſe the Queſtion was, What intereſt the party who had the Freehold, had in things which were *fere naturæ*, which were upon the Freehold: It was the opinion of the Court, That in this

Caſe

Caſe although that Conies were *feræ naturæ*, yet when they are in the ſoil of the party they are reduced unto ſuch a property by reaſon of his poſſeſſion; That an Action lieth either for taking or killing of them. See 7. *H.* 6. 38. If a Beaſt which is *feræ naturæ* go out of any Park, the owner of the ſame hath loſt the property of it; upon which Caſe *Brook* in the abridging of the Caſe collects, that he had a property in it whileſt it remained in his poſſeſſion; and See 10. *H.* 7. 6. where it is holden that Accompt lyeth for things *feræ naturæ*: It was adjudged for the Plaintiff, and that the Defendant the Commoner could not juſtifie the killing of the Conies. *M.* 29. *Eliz.* in *Co. B. Conyes* Caſe. *Godb.* See *Coke* 5. part 104. *Bouſtons* Caſe ſeems contrary.

14. If a man hath Heir-Looms which by cuſtome have gone from Heir to Heir with the Houſe: It was holden, that the Heir hath ſuch an Intereſt and a property in ſuch Heir-Looms, That if a deviſe be made by Will of ſuch Heir-Looms that the deviſe is void in Law, becauſe the Law ſhall prefer the ancient Cuſtome before the deviſe. See *Coke* 1. part, *Inſtitutes* 185.

15. *Trover* and *Converſion* of a Hawk, called a Ramiſh Hawk, ſuppoſing him to be poſſeſſed of that Hawk *ut de bonis propriis*, and that he *caſualiter amiſit*, and that it came to the Defendants hands, and that he knowing it to be the Plaintiffs Hawk, being required had not delivered it, but converted it to his own uſe. Upon *not guilty* found for the Plaintiff, It was moved that the Declaration was not good, becauſe he doth not ſhew that it was a Hawk reclaimed and made Tame, for a Ramiſh Hawke is ſuch a one which liveth *inter Ramos*, from which it was inferred that it was *feræ naturæ*, and then if it flye away and have not *animum revertendi*, *Occupanti Conceditur*; and although the words of the Declaration was *de bonis propriis*, that did not help it, for that the party had but a right of poſſeſſion, and not of property, and if it be it is but a qualified property: The Judgment was arreſted. *Paſc.* 15. *Car.* in *B. R.* Sir *Martin Lyſter* and *Hones* Caſe. *Cro* 1. part 390, 391. See *Marſh.* 12. the ſame Caſe. See *Coke* 7. part 17. in the Caſe of *Swans*; Of what Beaſts and Birds a man may have property.

16. *Note*, It was adjudged in the Common Pleas, That if a man have Coney-borows in his own Lands which increaſe in ſo great a number that they deſtroy his neighbours Land adjoyning; that his neighbour cannot have an Action upon the Caſe againſt him who makes the Coney-borows, for ſo ſoon as the Coneys come in his neighbours Land he may kill them, for that they are *feræ naturæ*, and he who maketh the Coney-borows they being out of the Lands, hath no property in them. *Coke* 5. part 164. *Bouſtons* Caſe.

17. It was Reſolved by the Juſtices, That if Tenant for life or years cut down Timber Trees, or pulleth down the Houſes; that the Leſſor ſhall have the Timber, or Timber-trees, for the Leſſee hath them but as things annexed to the Lands, and when they are ſevered from the Lands, the property of them is to the Leſſor, and the Leſſee hath but a ſpecial property in them, but the Leſſor hath the general property in them becauſe they are his Inheritance; and if a Houſe fall by wind in the time of the Leſſee for life or years, or in the time of the Tenant in Dower, or by the Curteſie, the particular Tenants have a ſpecial property in the Timber to re-edifie the ſame Houſe for habitation; but ſuch particular Tenants cannot ſell the Timber ſo fallen down, becauſe that the general property thereof is in the Leſſor. *Coke* 11. part 79. 81. *Lewis Bowls* Caſe.

18. In Treſpaſs the Defendant pleaded, That *R. L.* was ſeized in Fee, and demiſed to *T. S.* and *M. P.* (excepting Trees of 21. years growth, if not decayed) for their lives, and Covenanted to ſtand ſeized *de tenis prediſt.* to the uſe of *R. L.* in tail *&c.* and the Defendant as ſervant to *R. L.* entred and ſold Trees: It was adjudged in this Caſe (amongſt other points) 1. That the Trees, notwithſtanding the Exception, did remain parcel of the Inheritance, and are not Chattels, but ſhall diſcend to the Heir. 2. That in this Caſe if there had been no Exception, the general property and intereſt of the Trees was in the Leſſor, and the Leſſee had but a particular intereſt in them, and that the Leſſor might ſell them without licence of the Leſſee, to take effect after the Leaſe determined; and that Tythes ſhall not be paid of them becauſe they are parcel of the Inheritance. *Coke* 11. part 46. *Richard Lyfords* Caſe.

19. A made a Leaſe of his Lands for years, excepting the woods; and afterwards the Leſſor granted the woods to the Leſſee: The Queſtion was, if now the wood was ſo annexed to the Land, that by Leaſe of the Land the wood ſhould paſs as a thing annexed to it; Or if the wood did remain as an Intereſt diſtinct and ſevered from the Land: It was Reſolved in this Caſe, That a Leſſee for life or years hath a ſpecial Intereſt or property in the Trees, as things annexed to the Lands, ſo long as they are annexed to the Land; But if the Leſſor or another ſevereth them from the Land, the property and Intereſt of the Leſſee is determined, and the Leſſor may take them as things annexed to his Inheritance; and if a man makes a Leaſe for life, and afterwards gives away the Trees, and the Leſſor dyeth, the donor cannot take them becauſe at the time of the gift the Leſſor had a property in them annexed to the Land. *Coke* 4. part 62. *Harlakendens* Caſe. 1. *Ma. Dyer* 91. *Martyns* Caſe.

20. Tenant for life, the remainder for life, the remainder in Fee; Tenant for life committeth Waste in cutting down Trees, and afterwards he in the remainder for life dyeth: It was adjudged, 1. That now the Impediment being removed, an Action of Waste is maintainable for the waste done in the life of him in the remainder for life: And 2. It was Resolved, That when the Trees are cut down, the property thereof belongs to him in the remainder in Fee. *Coke* 5. part 76. *Pagets* Case. See 1. *Ma. Dyer* 91. *Martyns* Case.

21. In *Trover* and *Conversion* of 200. Loads of Timber, 200. Loads of Stockwood, the Case was, Tenant for life without impeachment of waste, excepting voluntary waste: He in the Reversion bargaine and sells the Timber-Trees growing upon the Land to the Plaintiff; Tenant for life cuts down the same and selleth them to the Defendant: And whether the Bargainee of the Trees shall have *Trover* and *Conversion* against the Vendee of the Tenant for life, the Tenant for life being alive, was the Question: It was said, That he shall not sue for during the life of the Tenant for life, although the Lessor or he in the Reversion hath a generall property, yet he hath no authority to sell them, the Tenant for life having a particular interest in them; and his sale being void, his bargaine hath no interest to maintain the Action. *Tr.* 7. *Car.* in *B. R. Waller* and *Sands* Case. *Cro.* 1. part 297. See *Lyfords* Case, and *Bowles* Cases.

22. King *Hen.* 8. made a Lease for years to *I. S.* of *Brettons* Ferm, and certain Lands in *Sevenock*, *excepta & reservata grossis arboribus & bosco ibidem crescentibus & existentibus*: Afterwards King *Ed.* 6. granted the Reversion, and also the Trees and woods, to the Duke of *Northumberland* in Fee, who made a Lease to *Culpepper* for years, as well of the Lands as of the Trees and woods, without Impeachment of waste; and afterwards by the Attainder of the Duke the Fee came to Queen *Mary*, who granted the same to *Southwel* in Fee, who sold the same to *D.* in Fee, and bound himself in a Bond to save *D.* and the premisses harmless against *Culpepper*, for or concerning any interest or title to be made to the premisses; Afterwards *Culpepper* claimed the Trees, and cut down some of them: The matter in law in this Case was, if the great Trees and woods were as a Chattel in the King, or the Patentee of the Lordship did remain as parcel of the Land, notwithstanding the Exception or Reservation out of the Lease of Coltherst, and if the property of the Trees were in *Culpepper* presently by the word Demise or Lease without any word of grant; Or whether he might take them if the words without impeachment of waste had not been in the Lease. See 27. *H.* 6. *Statham*, That the Lessee without impeachment of Waste, shall not recover damages upon a stranger who cuts down the woods, but for trespass in the Lands and the branches; but *Statham* himself was of a Contrary opinion; It was the opinion of the Justices, that the property of the Trees remained in the Duke; and that the words in the grant to *Culpepper absque impetione vastis* made not any property of the Trees to be in him, for that in Trespass brought he should only recover damages for the Trespass only upon the Lands, and not the Trees: But for insufficiency of pleading Judgment was given against the plaintiff. *Pasc.* 2. *Eliz. Dyer.* 184 *Dauntsey*, and *Southwells* Case.

23. An *Extenti facias* was directed to the Sheriff upon a Statute Staple; The Sheriff extended the Land, and sold the goods, and returned the extent into the Chancery. A Writ of Prerogative Iland, That the Sheriff should first levy a debt of 1001i upon the Lands and goods for the King: The Sheriff upon that Writ returned the especial matter into the Exchequer: It was the opinion of the Justices, that if he would not mend his returne, that he should be amerced; For it was holden by the Court that before Liberate, the propertie of the goods were not in the Conusee: and therefore the King was to be first satisfied. *M.* 3. *E.* 6. *Dyer* by *Stringfellowes* Case. See 1. *Ma. Dyer.* 94. in *Milton*, and *Etringtons* Case. *acc.*

24. A man out of the market bought Cattel which were stolen, and gave 5 shillings in hand to have his election to refuse them in the market which was to be holden the next day: and then in the open market he agreed to have the Cattel, and payed the rest of the mony for them, and the Cattel were duly tolled; It was the opinion of the Justices, that notwithstanding all this, yet by such Sale, the propertie of the goods was not altered; because the agreement shall relate to the Contract, which was made out of the market. *Pasc.* 1. *Ma. Dyer.* 99. See *Pasc.* 9 *Jac in Co. B. Frogmers* Case a *Judge. acc.*

25 Certain Cattel which were stolen were driven in the night time by the Theife into a Franchise which had waife and estray: the Theife and the Cattel fell amongst Travellers, who suspecting they were stolen goods told him they would have him to go with them with the goods to the Town; the Theife waived the goods there and fled, whom the Travellers pursued but could not apprehend him; and in the mean time the Cattel strayed into another Franchise which also had waifes and strayes; and there remained for a year and a day: no suit nor claim being made by the owner; the question was which of the Franchises should have the goods; It was the opinion of *Catlyn* Chiefe Justice, that without seisures the property of the goods was not changed by the waiver: and therefore the Lord of the Franchises should

ſhould not have them: but upon the waiver, the property of the Cattel was in the Queen. *M.*18.*Eliz. Dyer.*348.

26. If a man buy goods in open market; this ſale ſhall bind all ſtrangers as well as the Seller: But that ſale in a market overt, ſhall not bind him who hath right to the goods, if the ſale be by fraud, or if the vendee hath notice that the property of the goods was belonging to another.33.*H.*6. *Coke* 3. *part.* 78. in *Treynes* Caſe.

27. Note, it was reſolved, that if plate be ſtolen, and ſold openly in a Scrivenors ſhop upon the market day, that that ſale doth not change the property of the plate, but the party ſhall have reſtitution of it, for that is not a market overt for plate: But if the ſale had been in a Goldſmiths ſhop the property is altred; but contrary if it be ſold in the Warehouſe or behind a hanging or behind a Cupboard upon which the plate ſtood: and every ſhop in London is a market overt for ſuch things which for the Trade of the owner are there put to ſell.*Hill.*31.*Eliz. Coke* 5.*part.* The Caſe of Market overt. *Popb.* 84. the ſame Caſe.

28. Debt brought againſt an Adminiſtrator, who pleaded fully adminiſtred; The Jury found that certain Obligations made by the Teſtator to the value of 100li were forfeit, and that the Adminiſtrator took in the ſaid Bonds, and gave his own Bond for the debt; and retained the mony in his own hands; It was the opinion of the Juſtices that this mony ſhall not be Aſſets, becauſe the property is changed by giving his bond for the ſame, and it is as if he had payed the debt with his own goods. But if he gave his promiſe for parts, and give his *Bond* for the reſt, it is not good for that part for which he giveth his promiſe, but for ſo much only as he hath given his Bond for; and that is good though the bond be made to a ſtranger with the appointment of the Debtor, and alſo before the debt due, for that by this, the firſt debt is gone. *Hill.* 30. *Eliz in Co. B. Faliſtengu.*

29. If a man be diſſeiſed, and during the diſſeiſin the diſſeiſor Cutteth down Trees, graſs, or the Corn which is ſowed upon the Land, and carrieth the ſame away, and the diſſeiſee doth entet, he ſhall have an Action of Treſpaſs, *vi & armis*, againſt the diſſeiſor, for the Trees, graſſe, corn; for after entry the Law doth ſuppoſe, that the Freehold did alwaies remain and continue in the Diſſeiſee; and ſo it is, if the Feoffee, or Heire of the diſſeiſor, or if the ſecond Diſſeis or doth cut and carry away Corn: or if the ſecond diſſeiſor doth himſelf ſow the Land after the regreſſe the diſſeiſee may take the Corne; for the regreſs of the diſſeiſee hath relation, as to the property of the Corn, to continue the Freehold in the Diſſeiſee *abinitio*: But yet if the Diſſeiſee doth take them they ſhall be recouped in damages as to the Diſſeiſor. *Coke* 11. *part. Liſords* Caſe. in fine.

30. Note, that in many Caſes, The Law giveth a certain time before the property of goods ſhall be altered or changed: As in Caſe of Eitrey: if the owner, proclamations being made, do not claime the ſame within a yeer and a day the ſame is forfeited: and ſo in Caſe of wreck of the Sea: and the year and day in caſe of wreck, ſhall be accounted from the taking or ſeizure of them as wreck: for although the property of them is veſted in the Lord before ſeizure, yet till the Lord ſeizeth, and taketh it into his actual poſſeſſion, it is not notorious who claimeth the wreck, nor to whom the owner ſhall repaire to make his claime: and to ſhew to him his proofe: and if it be wreck doth belong to the King, the party may have a Commiſſion to hear and determine it, and if the wreck doth belong to another then the King, then if the owner cannot ſatisfie him who claimeth the wreck by his Marke or Coquet, he may bring his Action at Common Law, and prove the ſame by verdict. *Coke* 5. part. 107. in Sir *Henry Conſtables* Caſe.

31. In Trover and converſion of a gelding, the Caſe was, one *A.* ſtole the Gelding from the plaintiff, and ſold him to the defendant in open market by the name of *B.* and it was entred in the Toll book, that *B.* ſold him; the Queſtion was if this alteration of his name ſhould make any alteration of the property although the ſale was in market overt. It was the opinion of the Juſtices, that this was no good ſale to barre the plaintiff, and they grounded their opinion upon the Statute of 2. and 3. *Ma. Cap.*7. which provides, that no property of ſtolen goods ſhall be altered, unleſſe the name and ſirname of the party be written in the Toll book: and it was the opinion of the Juſtices, that it ſhould be in the market and walked there for an houer together, or otherwiſe the propertie is not altered. *M.*30. *Eliz. Gibbs* and *Baſils* Caſe. *Owen* 27.

32. A man cannot claime propertie in goods by his Bailiff or ſervant: becauſe that if the claime be falſe, he ſhall be fined to the King for his Contempt, which the Lord cannot be unleſſe he claime it himſelfe, for *nemo pro alieno delicto punitur*: And if the defendant in a Replevin claimeth property falſlie, if it be found againſt him in a *Proprietate probanda*, he ſhall be fined and impriſoned. Ste 11.*H.*4.4.*Coke* 1. part. Inſtitutes 145. *Coke* 8. part. 60. in *Beechers* Caſe.*acc.*

33. At the *Pluries Replegi*: the Sheriff returned that the defendant claimed property, and thereupon a *Proprietate probanda* iſſued forth; It was a Queſtion:

on if notwithſtanding they might proceed in Banco, It was the opinion of the Court that they might, for it may be that the plaintiff had Cauſe to have the poſſeſſion of the Cattel, as a *Gage*, or for that the Cattel were let to the plaintiff to manure his Land. See 21. *H.* 7. 14. 1. *Mar. Dyer.* 173.

34. Note, when the Sheriff comes to make a Replevin of Cattle, if the defendant claimes property, then at the returne of that Writ, another Writ *de proprietate probanda* ſhall Iſſue to the Sheriff, by which he is commanded that taking with him *Cuſtodes placitorum &c.* he ſhall enquire of the property, and if it be found that the property was to the plaintiff, then a Redeliverance ſhall be made to the plaintiff and an Attachment againſt the defendant to anſwer for the Contempt and unjuſt detayning the Cattel of the plaintiff. If the defendant in the Replevin in Court claimes the property, if it be found againſt him, the plaintiff ſhall recover the value of the Cattel and his damages: and if the defendant plead in abatement of the Writ that the property is in the plaintiff and in another, and the plaintiff confeſſe it, by which the Writ ſhall abate, and *Returno habendo* be awarded, yet the plaintiff may have a new Replevin. See *Brownl.* 1. part. 167. 168. *&c.*

Protections.

1. *Where it lieth, in what Caſes and in what Actions it is allowable; and in what not; by whom and for whom to be Caſt: and by whom to be diſſallowed, and how long to endure. And of other matters Concerning Protection.*

1. ONe who was a Priſoner in the Fleet, at the ſuit of Common perſon in Execution was thought to be a fit perſon to ſerve the Queen in her Warres; It was moved to the Court, if he might be diſmiſſed out of Execution, by a Protection *quia moratur ſuper ſalva Cuſtodia*: It was the opinion of the Juſtices that he could not, and it is there a Quere. If the keeper ſuffer ſuch a Priſoner, at the command of the King, to goe to ſuch ſervice with a Baſton; if the ſame ſhall excuſe him againſt the party at whoſe ſuit he is in Execution; and by the ſtatute of 1. *R.* 2. *Cap.* 12. It ſeemes it ſhall not. *Tr.* 5. *Ma. Dyer.* 162. *Coke* 12. part. Inſtitutes. 130. *&c.*

2. A Protection cannot be caſt for any Officer of the Receit, or for any other officer of a Court of Record whoſe attendance is neceſſary for the Kings ſervice, or for the Adminiſtration of Juſtice. See 7. *H.* 43. *Coke* 1. part. Inſtitutes. 130.

3. A Protection may be caſt, either by a ſtranger or by the party himſelfe; For, an enfant, Feme Covert, Monke, or any other may Caſt a Protection for the Tenant or defendant: and See there, the difference when a ſtranger caſteth it, and when the Tenant or defendant caſteth it himſelfe, for the defendant or Tenant caſting it, he muſt ſhew cauſe wherefore he ought to take advantage of the Protection; but a ſtranger needs not to know the cauſe, ſave only that the Tenant or defendant is thereby protected. *Coke* 1 *part.* Inſtitutes 131.

4. A Protection cannot be caſt for the Demandant or Plaintiff, becauſe the Tenant or Defendant cannot ſue a Re-Summons or Re-attachment; for the Demandant or Plaintiff that ſued out the Summons or Attachment, muſt ſue forth the Re-Summons or Re-Attachment. *Co.* 1. part. *Inſtitutes* 139.

5. The King by his Prerogative might have granted Protection to his Debtor, that he might not be Attached nor ſued, but the King taketh him into his Protection until he hath paid the Kings debt; But now by the Statute of 21. *E.* 3. cap. 19. It is Enacted, That the Creditor ſhall have an Action againſt the Kings debtor, and ſhall have Judgment againſt him notwithſtanding ſuch Protection; But he ſhall not have Execution againſt the Kings Debtor who hath ſuch Protection, unleſs he take upon him to pay the debt which the Kings Debtor oweth to the King, and then he ſhall have Judgment and Execution againſt the Kings Debtor for both debts. See *Paſc.* 21. *Jac.* in the Court of Wards. Sir *Edward Cokes* Caſe. *Golbt.* 190, 191.

6. *Note*, That although the Voucher, Tenant by Reſceit, Prayer in aid, Garniſhee, be no parties to the ſuit or Writ, yet before they appear a Protection may be caſt for them, becauſe when the Demandant grants the Voucher, or Reſceit, in Judgment of Law they are made privy; and although the Demandant doth counter-plead the Reſceit or Voucher, yet if it be adjudged for them, and ſo they made privy in Law, a Protection may be caſt for them; and ſo it is of the Garniſhee, a Protection may be caſt for him at the day

day of the Return of the *Scire facias*, *Coke* 2. part *Inſtitutes* 131. acc.

7. If the King ſendeth *I. S.* into his Service into the wars beyond the Seas, or into the Marches of *Scotland*, and he is there detained and kept priſoner; In that Caſe *I. S.* ſhall have a ſpecial Protection, reciting the whole matter; and in the end of the Protection ſhall be this Clauſe, viz. *Theſe Preſents not not to be of force after the delivery of the ſaid* R. *from the ſaid Impriſonment.* F. R. *See Protection.* acc.

8. Note, It was Reſolved by the Juſtices, when the King by the Common Law cannot in any manner make a grant, there a *Non obſtante* of the Common Law, againſt the reaſon of the Common Law, will not make the grant good; but when the King by the Common Law may lawfully make the grant, but the Common Law doth require that he be inſtructed that he be not deceived; there a *Non obſtante* ſupplying it ſtands with the reaſon of the Common Law, and ſhall make the grant good; and therefore if the King grant a Protection in a *Quare Impedit*, or Aſſiſe with a *Non obſtante* of the Law to the contrary, this grant is void; for by the Common Law Protection doth not lye in any of theſe Caſes, for loſs may accrue to the Plaintiff by ſuch great delay; and therefore the *Non obſtante* cannot help when the King by the Common Law cannot grant it for the reaſon aforeſaid. *Coke* 4. part 35. in *Bryons* Caſe.

9. In an Aſſiſe of *Novel diſſeiſin* a Protection is not allowable, nor yet in a Certificate upon an Aſſiſe, becauſe the Aſſiſe is *feſtinum remedium*, to reſtore the Diſſeiſee to his Free-hold, whereof he is wrongfully and without Judgment diſſeiſed; and in this Action the Defendant ſhall not be Eſſoined, nor pray in aid of any but only of the King, nor vouch a ſtranger nor any party to the Writ, unleſs he will immediately enter into the Warranty; nor ſhall the Paſel demur for the non-age of the Defendant or the Tenant. *Coke* 1. part, *Inſtitutes* 131. *Coke* 8. part 58. in *Sebu Webbs* Caſe.

10. Although a Protection be allowed by the Court for a year, Yet if it be Repealed by *Innoteſcimus*, the Re-ſummons or Re-attachment ſhall be granted upon the Repeal within the year, for *remoto inpellimento*, &c. And if after a Protection is allowed by *Innoteſcimus*, the Defendant tarry in the Country without going to the Service; or otherwiſe repair from the ſame Service, upon Information the ſame to the Lord Chancellor, he ſhall repeal the Protection in that Caſe by another *Innoteſcimus*; But a Protection ſhall not be avoided by a baſe averment of the party, becauſe the Record of the Protection muſt be avoided by matter of as high a Nature. *Coke* 1. part, *Inſtitutes* 131. acc. See *Stat.* 13. R. 2. cap. 16.

11. A *Habeas Corpus* iſſued out of the Common Pleas to the Steward or the Marſhal of the Kings Houſe, who made the Return of it. *Quod Domina Regina per Literas ſuas Patentes ſuſcepit in protectionem ſuam* I. B. and his Sureties; and further by her ſaid Letters Patent *voluit*, that if any perſon ſhould arreſt, or cauſe to be arreſted the ſaid *I. B.* or any of his Sureties, that then the Marſhal of her Houſe, or his lawful Deputy, might arreſt every ſuch perſon, and detain them in priſon until ſuch perſon ſhould anſwer for the Contempt before the Privy Council; and that one *W. S.* cauſed one *I. D.* one of the Servants of the ſaid *I. B.* to be arreſted; and upon this Return the ſaid *W. S.* was diſcharged; and becauſe the ſaid parties after the ſaid *W. S.* was diſcharged, cauſed him to be arreſted again. an Attachment was awarded againſt them; Out of which Caſe Obſerve, That the Kings Protection in that Caſe was not allowable. *M.* 30. *Eliz.* in *Co. B. Searles* Caſe. *Leon.* 70.

12. Debt upon an Obligation, The Defendant coſt a Protection, upon which the Plaintiff did demur: It was ſaid, That the Protection was not good, for the Defendant is let to bail, and ſo is intended always in priſon, for ſo the Record makes mention, and then the Protection *quia moratur in partibus Zealand* is againſt the Record, and the Court ought to give credit to Records; Alſo the words of the Record are, That the Defendant *K.* is imployed in *Obſequio noſtro*, which is no Cauſe of Protection, for the uſual form (and ſo is the Law) is, that ſuch a one is imployed in *Negotio Regni*, for the defence of the Realm; for if the King will give Aid unto another Princes Subjects imployed, he ſhall not have Protection: Afterwards it was ſhewed that there was variance betwixt the Bill and Declaration, and the Protection, for the Bill is againſt *I. K.* Gent. and the Protection is *I. K.* only, but the Court held the ſame to be no material Variance. *M.* 31. *Eliz.* in *B. R. Osborn* and *Kirtons* Caſe. *Leon.* 185.

13. No Protection, either *Quia Profecturus*, or *Quia Moratur*, ſhall endure longer then a year and a day next after the Teſt or Date of it; and therefore if a Protection doth bear date 7. *Januarii*, and hath allowance *pro uno anno*, the Re-ſummons, Re-attachment, or Re-garniſhment, may be ſued 8. *Januarii* the next year. See *Coke* 5. part 107. *Coke* 1. part *Inſtitutes* 13. & 254. acc. See *Hob.* 139. acc. And See 39. *H.* 6. 40. by *Moil* and *Hob.* 153. in *Colt* and *Glovers* Caſe, That if a Protection be granted for leſs then a year it is void.

14. *A.* being under Protection was brought by *Habeas Corpus* by one to the Common Pleas But who deſired to have him charged in Execution by reaſon of a *Capias Utlagatum* after Judgment for his debt: It was

was said in this Case, That because the *Capias Utlagatum* was the Kings Suit in the first place, and but in the second degree for the Subject, that the King might discharge it; But a Protection will not do it, especially not being delivered or made known to the Coroners. *Hill.* 13. *Jac.* in *Co. B.* Sir *Thomas Sherleys* Case. *Hob.* 115.

15. Upon a *Capias Utlagatum* the Sheriff returned, that the party which was Arrested had a Protection from the Lord *Stafford* who was a Lord of Parliament: It was the opinion of the Justices, that the Return was not good; for the Protection of a Lord of the Parliament is not good in a *Capias Utlagatum* which concerned the King, and day was given to the Sheriff to mend the Return. *M.* 19. *Jac.* in *Co. B. Winch.* 24.

16. The Protections, *Quia Profecturus* (which concerns Servicrs in wars) and *Quia Moraturus*, which concerns Councel, as the Kings Embassadour or Messenger, *pro negotiis Regni* being for the publique good of the Realm, private mens Actions and Suits must be suspended for a convenient time, for *justa publica anteferenda privatis*; and the cause of granting of such Protections must therein be specified, that it may appear to the Court that they are granted *pro negotiis Regni*; And such Protections are not allowable only for men of full age, but for men within age, and for women as necessary Attendants upon the Camp; *viz. Quia Lotrix, seu Nutrix*, &c. *Coke* 2. part, *Institutes* 130.

17. A Protection, as well *Moraturus* as *Profecturus* must be to some place out of the Realm, and must be to some place certain, as *super Salva Custodia Calicia*, &c. and not to *Carlile*, or *Wales*, or the like, which are places within the Kingdom; But it may may be to *Ireland*, or *Scotland*, because they are distinct Kingdoms; and so to *Calice* or *Aquitain*: But a Protection granted to one until he returned out of *Scotland* in 1. *E.* 3. 25. was disallowed because of the uncertainty: So a Protection *Quia Moratur super altum Mare.* will not be good for the uncertainty of it.

18. A *Scire facias* brought why Execution should not be awarded upon a Judgment, the Defendant pleaded that the King 7. *Octob. an. secund.* of his Reign, did take him into his Protection for a year, and did grant to him that during that time he should be free from all manner of Plaints but Dower, *Quare Impedit*, and *placita coram Justiciarii Itinerantibus*; It was said, That this Protection was not warrantable for three Causes. 1. Because it was after the purchase of the *Scire facias*, and before the Return; and a Protection depending Suit is not allowable, although it mention that the party is to go a voiage with the Kings Son. 20. *H.* 6. 3. because it doth not specifie any particular Cause; *Quia Moratur*, or *Quia Profecturus*? And 3d. Because the Kings Bench is greater then a Justice in *Eyre*: The Court was of opinion in this Case, That for these Causes there was no colour of allowing the Protection. *Hill* 3. *Car.* in *B. R. Baster* and *Murrays* Case. *Godbt.* 366.

19. A Protection directed to one Court, shall not serve in another Court. 20. *H.* 6. 25. *Coke* 8. part 68. in *Trollipps* Case.

20. In Debt a Protection was cast *Quia Profecturus est super mare*, with *I. S.* the Kings Admiral: It was the opinion of the Court and Justices, that the Protection was not allowable; For the Court said, You never saw That a Protection was allowed if the party was not out of the allegiance of the Kingdom; as in *Gascoyne*, *France*, &c. But the Sea is within the allegiance of the King as of his Kingdom of *England*, and the Protection was disallowed. 6. *R.* 2. *Protection* 46. See the like 8. *R.* 2. *Protection* 125. where a Protection was cast, *Quia Profecturus est versus partes Scotiæ in munitione Castri Carlile*, and because *Carlile* was within the Realm the Protection was disallowed.

Protestation. See Title *Pleadings* and *Demurrer.*

Proviso.

Proviſo.

1. *Where and in what Caſe it ſhall make a Condition, where not; and how it ſhall be Conſtrued in Deeds and other Conveyances.*

1. NOte, It was ſaid for Law, that the words (*Proviſo ſemper*) put on the part of the Leſſee upon the words of the *Habendum*, makes a Condition; but contrary on the part of the Leſſor, as it is Covenanted in the Indenture, that the Leſſee ſhall do the Reparations, *Proviſo ſemper* that the Leſſor ſhall find the great Timber, the ſame is not a Condition; no more it is when it comes amongſt other Coveyances: Upon the part of the Leſſee, as it is Covenanted after the *Habendum & Reddendum*, that the Leſſee ſhall ſcour the Ditches, or the like, *Proviſo* that the Leſſee ſhall carry the dung thereof to ſuch a field, the ſame is not a Condition to forfeit the Leaſe for not performance of the ſame; contrary if the Proviſo be put immediatly after the habendum 35. *H.*8. Condition. 185.

2. When the Proviſo depends upon another ſentence, or hath reference to another part of the deed, it never makes a Condition, but a qualification or limitation of the ſentence or part of the deed unto which it referres: as where the Biſhop of *York* made a leaſe for years rendring rents Proviſo, that in time of vacation, the Rent ſhall be paid to the Chapter: It was adjudged in that Caſe that the Proviſo was not a condition, but a forſpeiſe which was annexed to the thing given 14. *Eliz.* *Dyer.* 312. *Eyres* and *Ormes* Caſe.

3. A man deviſed lands for yeares; Proviſo, and it is Covenanted betwixt the parties, that the leſſee ſhall not alien: It was adjudged in that Caſe, that it was a Condition by force of the Proviſo and a Covenant alſo. See 26. *Eliz.* *Simſon* and *Titterels* Caſe. Veuch in *Cook*. 10. part, in the Lord Cromwells Caſe: And ſee there, that the Proviſo being a Condition, ought to doe the proper office of a Condition, and that is to make the eſtate Conditional, and therefore in what place of the deed ſoever it is put, the ſame having the force of a Condition, ſhall have reference to the eſtate, and ſhall be annexed unto it.

4. *A.* Made a leaſe to *B.* of a Farme. Except the wood, and Covenanted with the Leſſee that he ſhould take all manner of underwood; Provided alwaies, and the Leſſee Covenanted, that he would not cut down any Timber trees. In this caſe it was ſaid, that the Proviſo was but in the nature of a Declaration with what trees the Leſſee ſhall not meddle becauſe it depended upon the Covenant of the Leſſor, and it is generall, *viz.* that he may cut any underwood, Provided that he do not cut down any manner of timber trees: At the beginning, the Court much inſiſted upon it, that it was a Condition: But yet at laſt ſaid, it was well put in that he ſhould not cut down any Timber trees, and therefore it was but a Declaration with what wood he ſhould not meddle, although in truth it was of ano her thing then was comprſed in the thing before; and then the adding of the Proviſo to ſuch a Covenant, ſhall not make the Proviſo of another nature then it was before the Covenant made or if no Covenant had been made of it; and upon that reaſon, it was adjudged; that it was not a Condition. *P.* 17. *Eliz.* *in B. R. Pepall* and *Hammgtons* Caſe. *Pop.* 117.

5. The Earl of Pembroke, granted the office of Lieutenantſhip of the forreſt of *C.* to Sir *Maurice Barkley*, and the heires males of his body and in the deed of grant were theſe words *viz.* Provided alwaies, and the ſaid Sir *Maurice* doth Covenant and grant, that it ſhall be lawfull for the Earl his heires and aſſignes to have the preheminence of the *Game*. Provided alſo, that Sr *Maurice* doth Covenant and grant with the Earl that neither he the ſaid Sir *Maurice* nor his heires ſhall cut down any Timber trees: It was reſolved in this *Caſe* by all the Juſtices, that although the Proviſo was coupled with an expreſſe Covenant of the grantee, and every Condition ought to be created by the words of the grantor, yet it was ſaid that the word *Proviſo* in this Caſe was a Condition, although it was intermixed with the words of Covent. In this Caſe *Popham* Chiefe Juſtice ſaid, That the word (*Proviſo*) ſhould be taken, ſometimes for a Condition, ſometimes for a Covenant, ſometimes for an Exception, ſometimes for a Reſervation, ſometimes for an Explanation; as if a man take Lands, Proviſo, that the leſſee ſhall not allien with out the aſſent of the leſſor, upon paln of forfeiture, here it is a *Condition*: 2. If I have two Manors, both of them named *Dale*, and I leaſe my manor of *Dale*, Provided you ſhall have my manor of *Dale* in the occupation of *I. S.* there, the Proviſo is an Explanation; 3. If a man leaſeth a houſe, and the leſſee Covenants, that he will repaire it, Provided alwaies the leſſor is contented to find great Timber, that it is a Covenant. 4. If *I* leaſe you my meſſage in *D.* Provided, I will have a

Chamber in it my ſelfe, this is an Exception of the Chamber. 5. If I make a leaſe rendring rent, at ſuch feaſt as *I. S.* ſhall name. Provided that the Feaſt of St *Michael* ſhall be one, here the Proviſo is a Reſervation. 36. *Eliz* in *B. R.* The Earl of *Pembroke*, and Lord *Barkleys* Caſe. *Goldesbr.* 130. *Popb.* 116. 117. *acc.*

6. In Covenant: the plaintiff declared, that he demiſed to the defendant certain Romes in *Bear Alley*, from &c. 1614 to 1626. rendring 6li 15s 4d rent. Provided, and upon condition, that the defendat ſhould gather the Rents of other the plaintiffs Tenants in *Beare-Ally* reſerved, mentioned in a ſchedule, and pay the ſame within 20 daies after every Quarter day, and it was agreed that the defendant ſhould retain the reſt of the benefit of the ſaid Rooms over and above the ſaid Rent of 6li 15s 4d *per an.* for his paines in gathering up the ſaid Rents and ſhewed, that the Rents mentioned in the ſchedule did amount to 19oli *per an.* and that the defendant had not paid the ſaid Rents; but did not ſhew, that the defendant had gathered them: It was much inſiſted upon, that the words Proviſo &c. ſhould make a Covenant; But the opinion of the Court was that it was not a Covenant, but a Condition annexed to the ſtate which determined it, by not Collecting and paying of the Rents; and it ſhall not be intended that it ſhould be a Covenant to enforce him to gather and pay them when peradventure he cannot collect them: It was adjudged for the defendant, and that the Action of Covenant brought did not lie: *M. 4. Car.* in *B. R. Gerry* and *Reaſods* Caſe. *Cro.* 1. part. 91.

7. Note, It is holden by *Hinde*, *in Plow. Com.* 33 and 34, That the Word *Proviſo*, not other words make a Condition, unleſſe the words be reſtrictive, as that he ſhall not do ſuch an Act; for if the words doe not reſtrain, they are rather Limitations then Conditions; and therefore if Lands be given in taile upon Condition that if he dieth without iſſue that the Donor may enter, the ſame is not a Condition, for thus nothing is reſtrained. Or if it be upon Condition, that if the leſſee doth Commit waſte, that then he ſhall enter, the ſame is not a Condition, becauſe that nothing is done thereby, but that which the Law gave before; but if it had been that if he had recovered for Waſte for part, that he might enter in the whole, otherwiſe it is, for that that is reſtrictive: and See *Plo. Com. Beiteſbrins* Caſe agrees that, for there land was let to husband and wife for life, the remainder to their eldeſt Son: *Proviſ. ſi ipſe inhabitare velit*; and becauſe the ſame is not Compulſative, but gave the party a free Election, therefore in that caſe he conceived that the words were not properly a Condition. *See* 27. *H.* 8. *Dockwrays* Caſe. *acc.*

See more of Proviſo *in Liber* 1. *Title* Conditions.

FINIS.

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of all the Points of LAW, contained in this SECOND VOLUME; under the general Titles, Divisions and Sections: and how to find them: P. for Page; C. for Case.

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Tenant in tail makes a Lease for life not warranted by 32 H.8. before Entry, he in the Remainder grants his remainder by Fine, If the Conusee may void the Lease: Quære. Page 819. Case 12.

Copyholder for life, and the Lord leaseth for years; The Copyholder remits a forfeiture: the Lessee may enter for the forfeiture, because the particular Estate is determined. p.819. C.13.

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Error brought in Parliament, the Record shall be brought by the Chief Justice, and after the Errors examined, remaunded in B. R. p. 819. C. 1.

A Record of a False Judgment in Auncient Demesne. The Writ was *Sub sigillo suo et sigillis 4. legalium hominum*, where it should be *per quatuor legales homines*; where such matter of substance wants, the party may have a new Writ. p.820. C.4.

Record removed by Error, by A.B. Assignee of J.S. good; where it was *Inter* A. B. *quer. et* F. G. Defendant, without the word Assignee, and good. p.820. C.5.

Variance in the Addition, and not in the first name, is not Error. p.820. C.7.

Kidman was returned in the *Venire*, and *Bodnam* in the *Distringas*, and *Habeas Corpora*; yet *berè parte servire*, it was amended. p. 820. C.8.

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Proclamations upon a Fine, not entred, or entred in another Term then ought to be, is Error not amendable. p.820. C.10.

In the Imparlance Roll, a Bond was alledged to be made at *New Castle*, and the Issue Roll, it was layed to be made at *York*; Error not amendable. p.820. C.13.

Pledges in a Replevin are not returned. Quære if Error. p.821. C.15. p.831. C.12.

Venire facias to try Issue, betwixt Plaintiff and two Defendants; if one be dead: If one of the Defendants be alive, the Tryal is good, and not erronious. p.821. C.16.

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Fine reversed by Error brought by an Enfant, the Error not being assigned in the Record, but without it, in the person of the Enfant. p.821. C. 18.

Inspection of an Enfant in Error to reverse a Fine upon the day of adjournment of the Term, good. p.820. C.20.

Judgment reversed by Error, because the Verdict was given only by those of the *Tales*. p.821. C.21.

Judgment reversed; because the *Venire facias* was *de vicineto de Hertford*, where it should have bin *de Castro Hertford*. p.822. C.23.

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The words *Expoſuit ad culturam* passeth no Estate, and therefore such an Occupier cannot joyn in an Action of *clauſum fregit*. p. 1107 C. 5.

Husband and Wife, and an Enfant joyn in Error to reverse a Fine, and good. p. 1107. C. 6.

A Replevin against six, five of them made Conusans, and Judgment and Costs given against them. The six joyned in a Writ of Error, and good, because the Law compelled to joyn, though to reap no benefit, but to discharge themselves of a Charge. p. 1108. C. 8.

Action by the Husband and Wife, where good; and the Wife may joyn with the Husband for suing for the damages, which in Case the Husband dyeth, shall survive to the Wife. p. 1108 C. 11.

Two Convicted of a Rescous, though the Fine and Imprisonment be several, they may joyn in Attaint. p. 1108. C. 11.

A Judgment against three, and one of them taken only in Execution, they may joyn in *Audita Querela*. p. 1108. C. 12.

A fraudulent Conveyance is made by one of Lands holden of several Lords. If they may joyn in one Action upon the Statute of 13 Eliz. of Fraudulent Conveyances. Quere. p. 1108. C. 13.

Several Heirs in Remainder of Lands in Gavelkind, where they may joyn in one Formedon. p. 1109. C. 15.

Coparceners and a stranger, cannot joyn in a Writ of Partition; because one may have a Writ at the Common-Law, and the other upon the Statute, p. 1109 C. 16, 17.

Tenants in Common may joyn in Actions where the Recovery of the one shall give advantage to the other, otherwise not. p. 1109. C. 18.

If a Reversion be Granted to two, and the Heirs of one of them, they may joyn in Waste. p. 1110. C. 22.

If a Right discends to Parceners, they may joyn in Actions real Auncestrel, though they are in several degrees from the same Auncestor, but the Issues not. p. 1110. C. 23.

Joynture.

What it is, and what shall be said a good Joynture within the Statutes of 11 H. 7. and 27 H. 8. p. 1110. C. 1.

Where a Woman may refuse her Joynture in *pais*, and be endowed by consent in *pais*, or by Writ of Dower. p. 1110. C. 2.

An Estate limitted to the Wife in Remainder for her life, where a good Joynture within 27 H. 8. but it must take effect immediately after the death of the Husband. p. 1111. C. 3.

Made to a Woman before Coverture, cannot be waived as a Joynture made during Coverture may be. p. 1111. C. 3.

No Estate made to a Woman upon Condition, can be averred to be for her Joynture. P. 1111. C. 3.

Lands purchased to Husband and Wife, and the Heirs of their two bodies, is a good Joynture within 27 Eliz. p. 1111. C. 4, 5, 6.

A Devise to the Wife generally, cannot be averred to be for her Joynture. But a Devise to a Woman for life, or in tail, and in satisfaction of her Dower, is a good Joynture within 27 Eliz. p. 1111. C. 7.

If Lands be conveyed for a Joynture to the Wife, and she after brings Dower, she is stopped to claim any of the Lands before conveyed to her. p. 1112. C. 8.

A Feoffment made to the Husband for life, the Remainder to J. S. for years, the Remainder to the Wife for her Joynture, is no bar of Dower. p. 1112. C. 9.

Lands

Lands conveyed by the Anceſtor of the Woman, and not purchaſed by the Husband, nor his Anceſtors, nor Aſſigned by his Anceſtors, is no good Joynture to the Wife. p. 1112. C. 11, 13.

If Lands be ſettled in the Wife by the Statute of 11 H.7. for her Joynture, where the Alienation of the Wife ſhall be a forfeiture; where not. p.1112. C.12.

An Eſtate is limited to Husband and Wife for life, the Remainder in tail: the Husband alters this Eſtate, and limits another Eſtate to his Wife: ſhe is remitted *volens nolens*, and it is no Joynture, but an Eſtate for life, limited to begin after an Eſtate tail. p 1112. C.13.

Joynt-Tenants.

Where, and by what Feoffment, Grant, Will, or Limitation, either by Deed, or without Deed. p.1113. C.1,2,3 4,7,11,12,18,20.

If a man hath Iſſue only two daughters, and deviſeth his Lands to them, they are Joynt-Tenants, and not Parceners. p.1113. C.2.

An Eſtate by way of Limitation during the life of two men, ſhall make them Joynt-Tenants, and the Survivour hold place. p.1114. C.5.

Eſtate to A. till he marry, and to B. till he be Preſented to a Benefice, they are Joynt-Tenants, notwithſtanding the ſeveral Limitations. Page 1114. C. 7.

Joynt Eſtate for Lives, but ſeveral Inheritances, P.1114. C.12.

Leaſe for years to two, Proviſo, if they dyed within the Term, to ceaſe; they make Partition, and one dyeth, the Term ſhould not ſurvive. p.1115. C. 13.

Where not a Joynt Eſtate upon a Remainder limited over. P.115. C.14.

Deviſe to two, and *Habendum* to them and their heirs part and part like, no Joynt Eſtate, but Tenancy in Common. P.1115. C.18.

Husband and Wife where they ſhall take joyntly; where not. p.1115. C.21,22.

A Grant to B, Son and Heir of A, *Habend.* to B. and C. and their Heirs, to the uſe of A. and B, their Executors and Aſſigns: A. the Father, and B. the Son are Joynt-Tenants by purchaſe. P.1116. C.23.

Where, and by what acts and whoſe, the Joynt-Tenancy betwixt Joynt-Tenants ſhall be ſevered. p. 1116. C.1 3 4 7 8.

Where not by a Partition. p.1116. C.2.

Not by Intermarriage. p.1117. C.6.

Enfants Joynt-Tenants; and one makes a Leaſe for life, and dyeth, it is no ſeverance of the Joynt Eſtate. p.1117. C.9 13.

Where two Joynt-Tenants are; and one releaſeth to his Companion, and dyeth: yet the Survivor ſhall be liable to the Charges upon the Lands, by the other. p.1117. C.10. p.1120. C.7.

Two, Joynt-Tenants with Warranty, the one diſſeiſeth the other, who recovereth againſt him in an Aſſiſe; the ſame ſhall not ſever the Joynt Eſtate; and the Judgment not to recover ſeverally. p.1117. 12.

Joynt-Copyholders; where the Deviſe and Surrender of the one ſhall bind the other. p. 1118. C.17.

A. and E. a Feme Sole, Tenant for life: E. takes Husband, who grants the Lands to A. for the life of E; whether this ſhall enure by a way of Releaſe, or otherwiſe. p.1118. C. 19.

Deviſe of Lands to A. and B, equally to be divided betwixt them; They are Tenants in Common, not Joynt-Tenants. P.1119.21.

Where the miſtaking of one Joynt-Tenant of the Law in his Grant, cannot alter or diminiſh his Grant. p.1119. C.22.

Joynt-Tenants, where one may prejudice his Companion. p.1119. C.1. p.1121. C.16.

Cannot prejudice one another in matter of Inheritance in the Freehold; but in the Profits they may. p.1119. C.2,3,4.

Where the Grant or Leaſe of the one ſhall not bind the other. p.1120. C.8.

Where one dyeth endebted to the King, the other ſhall hold the Lands diſcharged. Page 1120. C. 9.

If they bring a Writ or Action, where the death of the one ſhall abate; where not. Page 1121. Caſe 13.

Where the Licence of the one Joynt-Tenant, that another ſhall ſowe the Land, doth not tranſfer his Intereſt. p.1121. C.15.

Iſſues Joyned.

Iſſues joyned in ſeveral Actions, what good; what not. P.1122. C.1.

Upon the Statute of Uſury, where good; where not: and where the Surpluſage is traverſed, implyes the delivery upon Uſury. Page 1122, Caſe 2.

Of not guilty if good, upon the Statute of Uſury 1122. C.3.

Where after Iſſue Joyned and Tryed, the Jurours may alter, or affirm their Verdict. Page 1122. Caſe 4.

Where upon Iſſue joyned, if he continued Eſtate tail,

tail, and a Releaſe pleaded; the Eſtate tail is not extinct. p.1123. C.5.

Where Seiſin in Fee is alledged, and Iſſue joyned; though it be traverſed; though it be an apt Iſſue, yet it is helped by the Statute of 32 H 8. of *Jeofails*. P.1123. C.6.

Where well joyned, though there be not a Negative and an Affirmative; upon *Non ſolvit*, in Debt, P.1123. C.7. P.1127. C.29.

Where no Iſſue is joyned, not helped by the Statute of Jeofails. Page 1123. Caſe 8. Page 1124. Caſe 12.

Where Iſſue is joyned upon a Plea of the Defendant, which is impoſſible; yet upon a good Declaration, the Plaintiff ſhall have Judgment. P.1123. C.4.

In a *Scire facias* upon a Recognizance for the good behaviour (Not guilty to it) and a Juſtification to the reſt, upon a riotous Entry, and cutting down of Hedges; a Juſtification of it, for a Way, without traverſe of the Preſcription; Where the Not guilty is but matter of Form, and no Iſſue. P.1124. C. 10.

De injuria ſua propria; where good, where not. P. 1124. C.10,11. P. 1125. C. 16. P. 1127. C.20.

Where the Juſtices of *Niſi Prius* cannot proceed to a Tryall of an Iſſue; where it is imperfect for want of a day of a date of a Deed. P. 1124 Caſe 13.

Joyned upon a matter, not tryable neither by the Jurours, nor by the Judges: No Judgment can be thereupon. P.1124. C.15.

Where Iſſue is joyned upon a matter in two Counties, where they cannot joyn in tryal of it; and from whence the Tryall ſhall be. Page 1125. C.16.

Where ſeveral Aſſumpſits are in Iſſue, (*Non aſſumpſit modo et forma*) the Contract being entire; where good. Page 1125. Caſe 17, 18, 20.

Upon the Statute of 2 E.6. of *Tythes*; what good. P.1125. C.18.

The Iſſue upon Traverſe, (*was abſq; hoc*, That *prædict.* J.H. *Pater*, was ſeiſed in Fee) It was adjudged for the Plaintiff: for although not found, that J.H. *Pater* was ſeiſed in Fee; yet *prædict.* J. H. refers to *Pater*. P.1126. C.21.

Action upon the Caſe, for charging the Plaintiff with ſtealing of Goods. The Iſſue was, *abſq; hoc*, that the Plaintiff did refuſe to permit the Plaintiff *habere uſum* of the Goods; or ſhew how he came by them; where the Judgment to the Traverſe was Inſufficient; yet adjudged for the Plaintiff. P.1126. C.22.

Joyned upon [*a ſcilicet*] where void. Page 1126. C.23.

In Aſſumpſit, upon Iſſue joyned, If Land did diſcend; the difference where the diſcent ought to be averred *de facto*; where not. Page 1126. Caſe 24.

Upon *Aſſumpſit*, the Plaintiff declares upon two ſeveral Conſiderations, and the Jury find but one, or a Conditional promiſe; where not good to maintain the Iſſue. P.1127. C.25.

Evidence, where good to maintain the Iſſue, in an Action of Forgery of falſe Faits. Page 1127, Caſe 27.

Miſtaken where not amendable, if a Tryal be upon it. p.1127. C.28.

Where the Iſſue, is an Immaterial Iſſue, there is to be a Repleader: But an Affirmative and a Negative, do make a good Iſſue, though it be not an expreſſe Negative Implyed. Page 1128. Caſe 30.

Upon an Iſſue in debt, where payment of a leſſer ſum, and acceptance is pleaded, which ought to be traverſed. P.1128. C.31.

In Debt againſt Executors; where *plene adminiſtravit* generally; if a ſeveral Iſſue, where not; and where the party muſt not vary from it by ſhewing new matter. P.1128. C.32.

Good, though it be not a direct affirmative; but upon an Inducement only. Page 1128. Caſe 33.

Iſſue joyned, upon *Nul tiel Record*, where good; where not. p.1128. C.34.

Judgments.

Upon Iſſue joyned upon Joynt-Tenancy; No Judgment ſhall be for part, till the whole Iſſue be tryed. P.1129 C 1.

Upon a Recovery in Dower; upon Confeſſion of part of the Lands, where the Demandant ſhall have a ſpecial Writ of Seiſin for the part confeſſed. p.1129.C.2,3.

Entry in the *Quibus*, Upon *Non Diſſeiſivit* found againſt one Judgment, ſhall be againſt him for the whole Land. p.1129. C.4.

In a *Quare impedit*; The 3 Points were not found, nor charged. The Plaintiff had a Writ to the Biſhop, *ſuo periculo*. p.1129. C.5.

In *Ejectione Firmæ*; Where the Plaintiff ſhall not have Judgment, becauſe by Demurrer he hath abated his Writ p.1129. C.7.

Error doth not lye upon a Judgment *Quod Computet*, which is but an Award, till the later Judgment; becauſe the Plea is not fully determined. 1130. C.8.

Difference of the Judgments; in Appeal, and in a Writ of Error, the one is a ſuſpenſion only of

of it; but by purchasing Errour, the Judgment is not impeached, till the Record be Reversed. P.1130. C. 9.

Where Judgment shall be with a *Cessat Executio.* P.1131. C.1,2,3.

Upon *riens entr Mayns* pleaded, where the Plaintiff shall have Judgment presently; but no Execution till the Defendants have Assets in their hands. P.1131. C.4.

In an Assise on *Quod permittat* of Estovers; where the Plaintiff shall have Judgment with *Cessat Executio*; and where Judgment shall be against him, to be perpetually barred of them. P.1131. C. 5.

Where the Plaintiff shall have Judgment to recover, although the Issue be found against him. P.1131. C.1,2,3.

Accessary cannot be arraigned, where the Principal is pardoned, or hath his Clergy; for that none can be Principal, but by Verdict, Confession, or Outlawry: contrary, if the Principal be pardoned, &c. after arraignment. P. 1131. C. 4,

Judgment given upon an Administration; where there are *bona Notabilia* in divers Dioceses; where void; where only voidable. Page 1132. Case 6.

Where the Plaintiff layes a Prescription for Common; and the Jury find a Prescription *sub modo*, the Plaintiff shall have Judgment. Page 1132. C.7.

In a *Replevin*; Where no Judgment shall be, because all the Services Comprised in the Traverse, *absq. hoc*, are not found affirmatively. p.1132. C.8.

Though the Defendant's Plea in Barr be insufficient; yet if the Plaintiff relyeth upon a matter which doth not maintain his Issue, he shall not have Judgment: Contrary, if he had Demurred upon the Insufficient Bar. P. 1132. C. 9. p.1133. C.13. p.1135. C.18.

Where the Plaintiff's Title in a *Replevin* upon his own shewing, is destroyed; yet he shall have Judgment, where the Avowant in his Avowry destroyeth his own Title, and thereby giveth the Plaintiff another Title. P.1133. C.10.

In Debt, if the Plaintiff demands more then is due; where the relinquishing of part is not a falsifying of his Writ to abate it, though the demand be a thing entire, and he may pray Judgment for what is due only. Page 1133. Case 11, 12.

Against Executors, where it shall be of their own goods; where of the Goods of the Testator only. p.1134. C.1,2,4.

Where Judgment shall be against an Executor, of the Goods of the Testator, and upon a false Plea *de bonis Propriis.* Page 1134. Case 3. p. 1135. C. 9.

Debts upon single Contracts are to be paid before Legacies, by Executors, and before the reasonable part of the Wife or Children. Page 1134. Case 6.

Debt against an Executor, upon *Non Assumpsit*; the Plaintiff in his Declaration needs not aver Assetts, because the Law *prima facie* presumes Assetts: And if there be no Consideration to ground the *Assumpsit*; the Plaintiff cannot have Judgment. p.1135. C.7.

Where Judgment shall be given against the Verdict, for a Cause which appears to be matter of Record; Or that the Verdict is found against the Law. p.1135. C.1.

When matter of fact in one County depends upon matter of fact in another County; the Plaintiff may choose in what County to bring his Actions: and if it be found for him, he shall have Judgment. p.1136. C.2.

Where reversed in part, and stand good in part, P.1136. C.1. p.1137. C.2.

Reversed as to Damages given in Action upon the Case for words; and stand good for the Costs. p.1136. C.1.

Where one entire Judgment is given for a Messuage and Lands; being ill in part, it ought to be reversed for the whole. p.1136. C.2.

Of Execution upon an *Elegit*, reversed *quoad Executionem*, and yet the Writ was well returned. p.1137. C.3.

In *Ejectione Firmæ* the Plaintiff claimed the whole Land from J. S: whereas but a moyty belonged to J. S; he could have Judgment but of the moyty. p.1137. C.4.

Of Errour in Law, against three; and one of them is an Infant, yet the Judgment shall be reversed against them all: But otherwise, of Errour in *fait*. p.1137. C.5. p.1138. C.4.

Where Judgment shall not be given, though the party hath right, if the Issue be found against him. p.1137. C.1.

Judgment where given upon a vitious Original, is not helped by the Statute of *Jeofailes*. P. 1138. C. 3.

Where the Defendant pleads a Plea repugnant or Impossible, and Issue joyned upon it; yet if his Declaration be good, he shall have Judgment. p.1138. C.5.

Where Judgment shall be given against the King, without the Inquisition or Record transmitted to the Court; where not. p.1138. C.6.

Where a Fine shall not be reversed, upon an Errour in the Proclamations; but the Proclamations only. p.1138. C.8.

tail, and a Releaſe pleaded; the Eſtate tail is not extinct. p.1123. C.5.

Where Seiſin in Fee is alledged, and Iſſue joyned; though it be traverſed; though it be an apt Iſſue, yet it is helped by the Statute of 32 H 8. of *Jeofails*. P.1123. C.6.

Where well joyned, though there be not a Negative and an Affirmative; upon *Non ſolvit*, in Debt, P.1123. C.7. P.1127. C.29.

Where no Iſſue is joyned, not helped by the Statute of Jeofails. Page 1123. Caſe 8. Page 1124. Caſe 12.

Where Iſſue is joyned upon a Plea of the Defendant, which is impoſſible; yet upon a good Declaration, the Plaintiff ſhall have Judgment, P.1123. C.4.

In a *Scire facias* upon a Recognizance for the good behaviour (Not guilty to it) and a Juſtification to the reſt, upon a riotous Entry, and cutting down of Hedges; a Juſtification of it, for a Way, without traverſe of the Preſcription; Where the Not guilty is but matter of Form, and no Iſſue. P.1124. C. 10.

De injuria ſua propria; where good, where not. P. 1124. C.10,11. P. 1125. C. 16. P. 1127. C.20.

Where the Juſtices of *Niſi Prius* cannot proceed to a Tryall of an Iſſue; where it is imperfect for want of a day of a date of a Deed. P. 1124 Caſe 13.

Joyned upon a matter, not tryable neither by the Jurours, nor by the Judges: No Judgment can be thereupon. P.1124. C.15.

Where Iſſue is joyned upon a matter in two Counties, where they cannot joyn in tryal of it; and from whence the Tryall ſhall be. Page 1125. C.16.

Where ſeveral Aſſumpſits are in Iſſue, (*Non aſſumpſit modo & forma*) the Contract being entire; where good. Page 1125. Caſe 17, 18, 20.

Upon the Statute of 2 E.6. of *Tythes*; what good. P.1125. C.18.

The Iſſue upon Traverſe, (was *abſq; hoc*, That *prædict.* J.H. *Pater*, was ſeiſed in Fee) It was adjudged for the Plaintiff: for although not found, that J.H. *Pater* was ſeiſed in Fee; yet *prædict.* J. H, refers to *Pater*. P.1126. C.21.

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Joyned upon [*a ſciliter*] where void. Page 1126. C. 23.

In Aſſumpſit, upon Iſſue joyned, If Land did deſcend; the diſſcent where the diſſcent ought to be averred *de facto*; where not. Page 1126. Caſe 24.

Upon *Aſſumpſit*, the Plaintiff declares upon two ſeveral Conſiderations, and the Jury find but one, or a Conditional promiſe; where not good to maintain the Iſſue. P.1127. C.25.

Evidence, where good to maintain the Iſſue, in an Action of Forgery of falſe Faits. Page 1127, Caſe 27.

Miſtaken where not amendable, if a Tryal be upon it. p.1127. C.28.

Where the Iſſue, is an Immaterial Iſſue, there is to be a Repleader: But an Affirmative and a Negative, do make a good Iſſue, though it be not an expreſſe Negative Implyed. Page 1128. Caſe 30.

Upon an Iſſue in debt, where payment of a leſſer ſum, and acceptance is pleaded, which ought to be traverſed. P.1128. C.31.

In Debt againſt Executors; where *plene adminiſtravit* generally; if a general Iſſue, where not; and where the party muſt not vary from it by ſhewing new matter. P.1128. C.32.

Good, though it be not a direct affirmative: but upon an Inducement only. Page 1128. Caſe 33.

Iſſue joyned, upon *Nul tiel Record*, where good; where not. p.1128. C.34.

Judgments.

Upon Iſſue joyned upon Joynt-Tenancy; No Judgment ſhall be for part, till the whole Iſſue be tryed. P.1129. C 1.

Upon a Recovery in Dower; upon Confeſſion of part of the Lands, where the Demandant ſhall have a ſpecial Writ of Seiſin for the part confeſſed. p.1129.C.2,3.

Entry in the *Quibus*, Upon *Non Diſſeiſivit* found againſt one Judgment, ſhall be againſt him for the whole Land. p.1129. C.4.

In a *Quare impedit*; The 3. Points were not found, nor charged. The Plaintiff had a Writ to the Biſhop, *ſuo periculo*. p.1129. C.5.

In *Ejectione Firmæ*; Where the Plaintiff ſhall not have Judgment, becauſe by Demurrer he hath abated his Writ. p.1129. C.7.

Errour doth not lye upon a Judgment *Quod computet*, which is but an Award, till the later Judgment; becauſe the Plea is not fully determined. 1130. C.8.

Difference of the Judgments; in Appeal, and in a Writ of Errour, the one is a ſuſpenſion only of

of it; but by purchaſing Errour, the Judgment is not impeached, till the Record be Reverſed. P.1130. C. 9.

Where Judgment ſhall be with a *Ceſſat Executio*. P.1131. C.1,2,3.

Upon *riens entr Mayns* pleaded, where the Plaintiff ſhall have Judgment preſently; but no Execution till the Defendants have Aſſets in their hands. P.1131. C.4.

In an Aſſiſe on *Quod permittat* of Eſtovers; where the Plaintiff ſhall have Judgment with *Ceſſat Executio*; and where Judgment ſhall be againſt him, to be perpetually barred of them. P.1131. C. 5.

Where the Plaintiff ſhall have Judgment to recover, although the Iſſue be found againſt him. P.1131. C.1,2,3.

Acceſſary cannot be arraigned, where the Principal is pardoned, or hath his Clergy; for that none can be Principal, but by Verdict, Confeſſion, or Outlawry: contrary, if the Principal be pardoned, &c. after arraignment. P. 1131. C. 4,

Judgment given upon an Adminiſtration; where there are *bona Notabilia* in divers Dioceſſes; where void; where only voidable. Page 1132. Caſe 6.

Where the Plaintiff layes a Preſcription for Common; and the Jury find a Preſcription *ſub modo*, if the Plaintiff ſhall have Judgment. Page 1132. C.7.

In a *Replevin*; Where no Judgment ſhall be, becauſe all the Services Compriſed in the Traverſe, *abſq. hoc*, are not found affirmatively. p.1132. C.8.

Though the Defendant's Plea in Barr be inſufficient; yet if the Plaintiff relyeth upon a matter which doth not maintain his Iſſue, he ſhall not have Judgment: Contrary, if he had Demurred upon the Inſufficient Bar. P. 1132. C. 9. p.1133. C.13. p.1135. C.18.

Where the Plaintiff's Title in a *Replevin* upon his own ſhewing, is deſtroyed; yet he ſhall have Judgment, where the Avowant in his Avowry deſtroyeth his own Title, and thereby giveth the Plaintiff another Title. P.1133. C.10.

In Debt, if the Plaintiff demands more then is due; where the relinquiſhing of part is not a falſifying of his Writ to abate it, though the demand be a thing entire, and he may pray Judgment for what is due only. Page 1133. Caſe 11, 12.

Againſt Executors, where it ſhall be of their own goods; where of the Goods of the Teſtator only. p.1134. C.1,2,4.

Where Judgment ſhall be againſt an Executor, of the Goods of the Teſtator, and upon a falſe Plea *de bonis Propriis*. Page 1134. Caſe 3. p. 1135. C. 9.

Debts upon ſingle Contracts are to be paid before Legacies, by Executors, and before the reaſonable part of the Wife or Children. Page 1134. Caſe 6.

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Obligation.

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Upon a *Pluries Repleg.* of Goods taken in *London*, out of the Chancery, a Cuſtome was returned, That the Goods were repleiveable by virtue of a Plaint, levied only by the Sheriffs of the City, and not by Writ out of Chancery; ſo as they could not execute the Writ: It was a void Return; and an Attaint againſt the Sheriffs for their Contempt, and the Plaintiff had his goods delivered him. p. 1537. C. 17.

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I-10-21

THE Grand Abridgment OF THE LAW Continued.

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WITH

Two *Tables*, The one containing the

Names of the *Caſes*: The other, Of the Matter of every of the ſaid *Caſes*.

The Third Volume.

Publiſhed in the Fourteenth Year of the Reign of Our Soveraign Lord Charls *the Second*, *of* England, Scotland, France, *and* Ireland, *King*, *&c.*

By *WILLIAM HUGHES*, of *Grayes-Inne*, Eſquire.

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FINIS.

Quare Impedit.

Quare Impedit, *What it is, where it lyeth, and of what, and by whom, and against whom, where upon a Preſentation, Collation, or other Diſturbance by Uſurpation, or otherwiſe; and where not.*

1. *Quare Impedit*, is a Writ, and it lies when a man hath Right or Title to any Advowſon of a Church Dignity, or any other Promotion ſpiritual; & another man who hath no Right or Title, doth diſturb the true Patron, to preſent his Clerk, or other perſon to ſuch Advowſon, Dignity, or Spiritual Promotion; but preſenteth his Clerk to the Biſhop, to be Admitted, Inſtituted, and Inducted to the ſaid Church, or other Dignity: Then upon ſuch diſturbance, the lawful Patron, or he who hath Right to preſent, may have this Writ.

2. If a man hath a Chauntry which is donative by Letters Patens, and he giveth the ſame to another, who is diſturbed by another, or another doth Preſent; he who is diſturbed ſhall have a *Quare Impedit* of that Donative; and the Writ ſhall be *Quod permittat ipſum preſentare* to that Donative. If a man be diſturbed to Preſent to a Parſonage, then the Writ ſhall be *Quod permittat preſentare ad Eccleſiam*; for that the word *Eccleſia* intends a Parſonage. If it be to a Vicarage, *ad Vicariam*. If it be to a Prebend, then the Writ is, *Quare Impedit preſentare ad Prebendam*. See *Fitz. Nat. Brev.* acc.

3. If a man hath a Donative Chauntry, which is of the nature, that one name another his Clerk, and that the other ſhall Inſtitute and Induct him; there if he who hath Nomination be diſturbed, he ſhall have a *Quare Impedit*, and if he do recover, he ſhall have a Writ to enſtall and induct him into the poſſeſſion; but then ſuch Writ muſt be *Quare Impedit Preſentare*, and not *Nominare ad Eccleſiam*, as it is holden 14 H. 4. 11.

4. The Biſhop of *Coventry*, Patron of two Prebends, granted the next avoydance *alterius eorum primo vacante*. The Dean and Chapter confirmed the Grant; the Biſhop dyed, a Prebend became void, the Grantee brought a *Quare Impedit*: But it was holden, That the Writ was to be brought where the Cathedral Church was, and not where the body of the Prebend was. Mich. 3 Mar. *Dyer* 194.

5. The King preſented to a Prebend, *ratione Temporalium Epiſcopi ſede vacante*, and before Inſtitution, the King repealed his Preſentment; and notwithſtanding this, the Clerk was Inſtituted and Inſtalled by the Dean and Chapter; and afterwards the King reciting that the Preſentee was in *Canonice inſtitutus ſua preſentatione*, ratified and confirmed the Preſentation, and he dyed Incumbent, but in the mean time he was created a Biſhop. It was adjudged, That in that caſe, the King ſhould have the Preſentation again, notwithſtanding his Confirmation; and if he were diſturbed therein, he might have his *Quare Impedit preſentare ad Prebendam, &c.* Trin. 12 Eliz. *Dyer*, 292.

6. *Quare Impedit* was brought *de Vicaria de* T. in the County of *Worceſter*, parcel of the poſſeſſions of the Colledge of *Weſtm.* and the Queſtion was, whereas 2 E. 6. a Leaſe was made of all Heriditaments ſcituate and being in T; if thereby the Advowſon of the Vicarage did paſs: And it was holden, That it did paſs; for although that an Advowſon be not viſible, nor lyeth in Livery, yet in a Writ of Right of Advowſon brought, it ſhall be put in view; and the Church ſhall be put in view: and therefore a *Quare Impedit* will *a fortiori* lye of it. Paſch. 15 Eliz. *Dyer*, 323.

7. The Vicarage of *Tatton* in the County of S. came unto the Queen by Lapſe; The Ordinary of the Diocels collated A. to the Vicarage. Afterwards the Queen preſented B. who brought a *Quare Impedit preſentare ad Vicariam*, againſt the Biſhop and the Incumbent; depending which ſuit, A. by covin and fraud, obtained a Preſentation from the Queen, without making any mention of the pleaſure of the Queen to revoke or repeal the firſt Preſentment: In that Caſe, It was the Opinion of the Juſtices, That the ſecond Preſentation had been good, and a Repeal of the firſt, if it had not been by covin: and *ex hoc Nota*, That *Quare Impedit preſentare ad Vicariam*, was admitted good. Hill. 17 Eliz. *Dyer*, 339.

See, That a *Quare Impedit* lyeth of an Abbey, or a Priory. 6 E. 3. *Cook* 3. Part, 74. In

the Dean and Chapter of Norwiches Caſe acc.

8. A *Quare Impedit* was brought of the Church of B. the Defendant pleaded, that there was no ſuch Church in the County where the Writ was brought; and upon that, Iſſue was joyned. It was the opinion of the Juſtices in that Caſe, That if there was any Church within the County known by the name of B. it was ſufficient to maintain the Writ. See 31 H. 6. 18. A Parſon had an Annuity by preſcription of a Vicar: And afterwards King *Edw.* the 3. when the Vicar dyed, preſented J. S. a Parſon, to a Parſonage, and ſo were all his Succeſſors preſented as Parſons. In that Caſe it was holden, That now the Defendant might be charged as Parſon with the ſaid annuity, for that his Vicarage was turned into a Parſonage; and in that Caſe, if thereafter were a diſturbance upon a Preſentation to it, the Parſon might maintain a *Quare Impedit Preſentare ad Eccleſiam*, as to a Parſonage, and not *ad Vicariam*, *Cook* 6. Part, 65, 66. in Sir *Moy's Finches* Caſe.

9. A. Executor of J. S. who was Grantee of Preſentation of an Arch Deaconry in the County of D. brought a *Quare Impedit* againſt the Biſhop of *Coventry* and *Lichfield*, and declared of a Preſentment and Diſturbance, *in vita Teſtatoris, & quod Eccleſia vacavit, & adhuc vacat.* The Defendant pleaded [full of an Incumbent] before the Writ brought, and Judgment was given for the Plaintiff. In ſtay of Judgment it was moved, If a *Quare Impedit* did lye of an Arch-Deaconry, for that it is but a Function or Dignity. In this Caſe it was Reſolved, 1. That a *Quare Impedit* would lye of an Arch-Deaconry: And 2. That it would lye by an Executor for a diſturbance done *in vita Teſtatoris*. Paſch. 31 Eliz. in C. B. *Sale* and the Biſhop of *Lichfields* Caſe, *Owen*, 99. See *Leon*, 205.

10. A Church-Parochial may be Donative, and exempt from Ordinary Juriſdiction, and a Reſignation may be made to the Patron, and it may be viſited by Commiſſioners appointed by the Patron, and not by the Ordinary; and a *Quare Impedit* lyeth of a Church, Prebend, Chauntry, or Chappel Donative, and no lapſe ſhall incur to the Ordinary; but if the Patron of the Donative doth preſent unto the Ordinary, and his Clerk is admitted and Inſtituted, now the ſaid Church is made preſentative, and ſhall never be Donative again, and then lapſe ſhall incur to the Ordinary, as to Benefices Preſentable; and then upon a Diſturbance, the *Quare Impedit* ſhall be, *Preſentare ad Eccleſiam*: But a Preſentation to ſuch a Church Donative by a ſtranger, and Admiſſion and Inſtitution upon it, is meerly void. *Cook*, 1. Part, *Inſtitutes*, 344.

11. A *Quare Impedit* will lye for diſturbance to Preſent to a Church in *Wales*: for ſee Paſch. 14. E. 3. *Fitz.* Title *Juriſdiction* 24. The King brought a *Quare Impedit* for a Church in *Wales*, and good. See 14 H. 4. and ſee 7 H. 6. 35. A *Quare Impedit* doth lye in C. B. of a Church in ancient Demeſne, although it concerns the poſſeſſion in ancient Demeſne; becauſe they cannot there write to the Biſhop; and the Common Law being as ancient as their Priviledges there, will not endure that by pretence of Priviledge, there ſhould be a failer of Original Juſtice or Right; Set Hill. 10 Jac. in C. B. *Cox* and *Barnſleys* Caſe. *Hob*, 48. acc. See *Cook* 5. Part, in *Aldens* Caſe acc.

12. Note, There is *Advocatio Mediatatis Eccleſia*, and *Medietas Advocationis Eccleſia*; *Advocatio Mediatatis Eccleſia* is, where there be two Patrons of one Church, and each of them hath right to preſent a ſeveral Incumbent; the one, to one moyty of the Church, the other to the other moyty: And in ſuch Caſe, If an uſurpation, or other diſturbance be upon any one of them, or he be diſturbed in his Preſentment, he ſhall have a *Quare Impedit preſentare ad Mediatatem Eccleſia*. But *Mediatas Advocationis* is, where two Coparceners be of an Advowſon, and they make Compoſition to preſent by Turns, here each of them in truth hath but a right to the moyty of the Church, for that there is but one Incumbent of the ſame, and if one of them be to bring a Writ of Right upon an uſurpation, the Writ muſt be *de Mediatate Advocationis Eccleſia*: But if any of the ſaid Coparceners at her Turn be diſturbed in her Preſentment, ſhe may bring a *Quare Impedit* upon the ſaid diſturbance, and the Writ ſhall be *Quare Impedit preſentare ad Eccleſiam*; for that the Writ is grounded upon the Right of the Parſonage. See 33 H. 6. 12. and 36. *Odmyſells* Caſe acc. and yet though the Writ be general, *Preſentare ad Eccleſiam*, yet muſt the Count and Declaration be ſpecial, according to his Title, and ſo it is holden. *Cook* 5. Part, 102. in *Winſors* Caſe.

13. Note, 33 H. 6. 12. and 36. by *Priſot*, a man cannot have a *Quare Impedit de Advocatione Mediatatis Eccleſia*, or *de Mediatate Advocationis*, for if two have an Advowſon in common, or joyntly, and one Preſents, the other hath no remedy; becauſe that the Preſentment is but a perſonal thing, which is entire: And if two Patrons make a Conſolidation or union of two Churches, if one be diſturbed, he muſt have a *Quare Impedit*, *quod permittat ipſum preſentare ad Eccleſiam*, and not *ad Advocationem Mediatatis*, or *de Mediatate Advocationis Eccleſia*. But if there be two Patrons of two Churches adjoyning, and the Incumbent of one Patron demandeth Tythes in the Spiritual Court of the Incumbent of the other, and the one

of

of the Patrons ſueth a Writ of *Indicavit*, which is in the nature of a Prohibition, to ſtop the proceedings of the other; there, becauſe the right of the Patronage cometh in Queſtion. In that Caſe, the Patron of the Clerk prohibited, may have and maintain a Writ of Right, *de Advocatione Decimarum*, in this form, *viz. Precipe* A. *quod reddat* B. *Advocationem Decimarum, medietatis, tertiæ, quartæ partis, unius Carucatæ terræ*, and the Writ will well lye. See *Cook* 2. Part, *Inſtitutes*, 364. 38 E. 3. 13. Doctor and Student, *lib.* 2. *cap.* 25. 38 H. 7. 19. Br. *Droit de Reſte* 8.

14. A. ſeized of two parts of an Advowſon, and B. of the third part, A. preſented one, who dyed; afterwards he preſented again C. who was deprived 1 *Mar.* becauſe he was a Favourer of the Religion in the time of E. 6. B. preſented D. who afterwards is deprived, and C. reſtored: The Church voided by the death of C; B. preſented, and A. brought a *Quare Impedit*, and it was adjudged it did not lye: And in this Caſe it was agreed, That if two have Title to preſent by turns, and the one Preſents, and his Clerk is Admitted, Inſtituted, and Inducted, and afterwards deprived for crime, hereſie, or any other cauſe, yet he ſhall not Preſent again, but the ſame ſhall ſerve for his turn, becauſe that the Church was full, until the ſentence Declaratory came, and becauſe that the ſame was but voidable: But when the Admiſſion and Inſtitution are meerly void, the ſame ſhall not ſerve for a turn: But in the principal Caſe, although that the Clerk of B. was Parſon for the time to all purpoſes, yet when the ſentence came, C. was Incumbent again by force of his firſt Preſentment, and then when he dyed, the Defendant B. preſented in his turn: But if C. had dyed before the ſecond ſentence, or had not reverſed it, B. had had his Turn. Note, in this Caſe, the Writ was *Preſentare ad Eccleſiam*, and the Count was, *de Advocatione duarum Partium, &c.* and good. *Cook* 5. Part, 102. *Winſors* Caſe.

15. A. brought a *Quare Impedit*, and Declared, That the Earl of O. was ſeized in Fee of the Advowſon of O. and preſented D. who was Inſtituted and Inducted; and afterwards he Granted *primam & proximam Advocationem*, to the ſaid A. and then ſhewed, that the Preſentation of B. was void by the Statute of 21 H. 8. of *Pluralities*, not being a perſon qualified; and then ſhewed the Grant of *primam & proximam Advocationem* to him; and averred, That the Church *now* void, was the next avoidance: It was adjudged in that Caſe, That the *Quare Impedit* did not lye. Another reaſon ſeemed to be, That the Advowſon did not paſs, becauſe it was a thing in action only, Paſch. 3 *Mar. Dyer*, 130. *Agards* Caſe. See 11 Eliz. *Dyer*, 283. acc.

16. The next avoidance of a Church was Granted to three, *Habendum eis & uni eorum conjunctim & diviſim*; the firſt preſented the third, who was Admitted, Inſtituted, and Inducted; and upon a *Quare Impedit* brought, it was adjudged, That his preſentation was good: But it was ſaid, That if the Biſhop had refuſed his ſole Preſentment, peradventure he might have failed in his *Quare Impedit*; for that as it ſeems, the ſeverance in the *Habendum* is void in Law. Mich. 14 Eliz. *Dyer*, 304.

17. J. S. and Eliz. his Wife, brought a *Quare Impedit* againſt the Biſhop of *Exeter*, and Declared, That A. was ſeized of the Mannor of T. to which the Advowſon of the Church of T. was an Appendant in Fee, and by Will deviſed the ſaid Mannor with the Apurtenances, to the ſaid *Eliz.* for the Term of her life, and dyed; and that the ſaid *Eliz.* entred into the Mannor, and was thereof ſeized for life, and took to husband the ſaid J. S. and that they preſented to the ſaid Church J. D. who was Admitted, Inſtituted, and Inducted; and that afterwards, the ſaid Church became void by the death of the ſaid J. D; and ſo it appertained to the Plaintiffs to preſent, and that the Biſhop did diſturb them. In that Caſe it was adjudged, That the *Quare Impedit* brought by the Husband and Wife in their joynt names, was good, and did well lye. *Cook* 5. Part, 57. *Specotts* Caſe.

18. F. and the Counteſs of *Northumberland* his Wife, Sir *Thom. Cecil*, and D. his Wife, *William Cornwallis*, and L. his Wife, and the Lady *Davis*, Daughters and Heirs of the Lord *Latimer*, brought a *Quare Impedit* againſt *Hall*, and others, who pleaded the Releaſe of *Cornwallis*, pendant the Writ. In this Caſe it was Reſolved, That the Writ brought by the ſeveral Husbands, and their Wives, in which their names was, was well brought. 2. It was Reſolved, That the Releaſe pleaded, ſhould go in Bar of *Cornwallis* only, and that the Writ ſhould ſtand good as for the others. 3. In this Caſe it was Reſolved, That a Preſentment alledged in the Grantee of the next Avoydance, was a good Title for the Grantor and his Heirs in a *Quare Impedit*, *Cook* 5. Part, 97. The Counteſs of *Northumberlands* Caſe.

19. If Coparceners make partition in the Chancery to Preſent by Turns, and afterwards a ſtranger doth uſurp in their ſeveral turns, yet afterwards when their turns come, every one of them may have a *Scire facias* upon this partition, againſt the ſtranger, when his turn cometh, to ſhew wherefore he ſhould not Preſent, notwithſtanding the uſurpation aforeſaid: But if ſuch Partition be of Record, then they ſhall be put to their Writ of Right by reaſon of this uſurpation. But if Coparceners make compoſition to preſent by turns, and a

ſtranger doth uſurp, and Preſenteth in the turn of one of them, yet if they will, they may joyn in a *Quare Impedit* againſt the ſtranger, notwithſtanding that Compoſition; and after Compoſition to Preſent by turns, if they do Preſent in Common, they may well do ſo. See 16 H. 7. 8. *Fitz. Nat. Br.* 36. acc.

20. A. brought a *Quare Impedit* againſt the Biſhop of W. and the Warden and Scholars of *Merton* Colledge in *Oxford*, and Declared, how that the Predeceſſor of the Warden, was ſeized in *jure Collegii*, of ſix acres of Lands, to which the Advowſon was Appendant in Fee, and Preſented; And that afterwards J. S. was ſeized of the ſaid ſix Acres, to which &c. in Fee, and dyed ſeized; after which, it deſcended to G. Son and Heir, and afterwards the Father was attainted by Parliament, for which the King ſeized the ſaid ſix Acres; and being ſo ſeized, the Church became void; for which the Predeceſſor of the Defendant Preſented by uſurpation upon the King; and that afterwards the Act of Parliament was annulled, and G. the ſon was reſtored, and that he entred into the ſix Acres, and was ſeized in Fee, and thereof enfeoffed the Plaintiff, and that then the Church voided, and ſo he ought to Preſent: Upon which the Defendants did demur in *Law*. In this Caſe it was adjudged, that the *Quare Impedit* brought by that Plaintiff, would not lye, and thereupon a Writ was awarded for the Defendants to the Biſhop, without making any Title. Mich. 28 H. 8. *Dyer*, 24. Sir *John Danvers* Caſe.

21. A Church was void by the taking of a ſecond Benefice, upon the Statute of 21 H. 8. of Pluralities and Lapſe, devolved to the Queen, who Preſented A. who was Admitted, Inſtituted, and Inducted; and afterwards the Queen preſented B; A. dyed: The Patron brought a *Quare Impedit* againſt B. and counted of the Avoidance and Lapſe, *ut ſupra*; and that the Queen preſented A. who was Admitted and Inſtituted, and that the Church was now void by the death of A. The Queſtion was, Whether this was ſufficient or not, without ſaying Inducted: And it was holden that it was, becauſe that the Plaintiff alledged, that the Church was void by the death of A. which implyed an Induction, and then it was revocable. 20 Eliz. *Dyer*, 360.

22. A Joynt-Tenant, or a Tenant in Common, ſhall not have a *Quare Impedit* for the Advowſon which they have in Joynture, or in Common, in Caſe one of them preſents alone, againſt his Companion that ſo preſents: But if two Coparceners cannot agree in their Preſentation, the eldeſt Siſter ſhall have the firſt Preſentation, and ſo ſhall he have who hath her Eſtate, and if either of them be diſturbed by the other Coparcener, either of them ſhall have a *Quare Impedit* againſt the other Siſter. See *Fitzh. Nat. Br.* 34. acc.

23. At the Common Law, If depending a *Quare Impedit* againſt the Ordinary, for refuſing the Patrons Clerk, and before the Church was full, the Patron had brought a *Quare Impedit* againſt the Biſhop; and depending the ſuit, the Biſhop had admitted and Inſtituted a Clerk of another. In this Caſe, if Judgment was given for the Patron againſt the Biſhop, the Patron might have had a Writ to the Biſhop, and removed the Incumbent that came in *pendente Lite*; and therefore it was ſaid, it was good policy to bring the *Quare Impedit* againſt the Biſhop as ſpeedily as might be. *Cook* 1 Part, *Inſtitutes*, 344.

24. The Queen brought a *Quare Impedit* againſt the Biſhop of *London* and *Scot*: The Caſe was, A. was ſeized of an Advowſon in groſs, holding of the Queen in chief, and alienes the ſame by Fine, without licence; the Church became void, the Conuſee Preſented: The Queen without Office found, brought a *Quare Impedit*: It was a Queſtion, if the Queen without Office found, ſhould Preſent. It was agreed by the whole Court, That if the alienation had been by Deed only, that there without Office found, ſhould not have preſented; for upon ſuch alienation by matter of Fact, without licence, no *Scire facias* ſhould Iſſue without Office found of the Alienation: but upon an alienation without Licence by matter of Record, a *Scire facias* lyeth before Record: And it was ſaid, That in the laſt caſe, the Queen ſhall have the mean profits from the time of the *Scire facias* Returned; but in the firſt from the time of the Office found. Mich. 29 Eliz. in C. B. The Queen, and the Biſhop of *London*, and *Scots* Caſe. *Leon*, 40.

25. The Queen brought a *Quare Impedit* againſt M. and Counted, That *William* Lord *Say* was ſeized of the Manor of B. in the County of H. to which the Advowſon of the Church was appendant, and Preſented one C. and afterwards dyed ſeized, having Iſſue two daughters, viz. *Mary*, married to the Earl of *Eſſex*, and A. married to the Lord *Mountjoy*, who made partition, and the Manor of B. was allotted to *Mary* for her part: Afterwards the Earl and *Mary* dyed, having Iſſue F. who married the Marqueſs of *Northampton*: Afterwards a fine was levyed of the ſaid Manor by the ſaid Marqueſs and his Wife, by which the ſaid Manor was rendred to the ſaid Marqueſs for his life, the Remainder to F. his Wife in Tail, the Remainder to King *Henry* the eight in Fee: The Marqueſs was attainted of Treaſon, the King ſeized the Manor, afterwards F. dyed without Iſſue, after which the Church became void in the ſeizin of the Queen, and ſo it belonged to her to Preſent. The Defendant confeſſed the whole

matter

matter till the Attainder; and further pleaded, That after the ſaid Attainder, Queen *Mary* leaſed the ſaid Manners, with the Advowſon to R. and W. for 40 years, if the Marqueſs ſhould ſo long live, who were poſſeſſed accordingly, and in their poſſeſſion, the Church became void; to which avoydance one T. did preſent the Defendant, who upon his Preſentment, was Inſtituted and Inducted. It was the Opinion of the Court in this Caſe, upon the firſt opening of it, againſt the Defendant, becauſe he had not ſet forth in his Plea, that he had any Intereſt in the Advowſon; And it was ſaid, That the Patron himſelf could not have had ſuch a Plea if he had been party to the Writ, and therefore not the Incumbent; and it is no good pleading in any Action, to diſcover in Pleading any wrong, diſſeiſin, or uſurpation: But at length all the Judges were agreed in this Caſe, That Judgment ſhould be given againſt the Queen; and the Lord *Anderſon* delivered the reaſon of their Judgment; for here is not bare uſurpation pleaded againſt the Queen, but alſo an Eſtate, *ſcil.* a Leaſe for years in the Advowſon derived from Queen *Mary*, and that the Avoydance upon which the Action is brought, falleth within the ſaid Term, ſo as the Queen who is Plaintiff, is enconuted with a Leaſe of her Anceſtor, againſt which ſhe cannot make any Title to Preſent, without ſpecial matter: and therefore it was adjudged, That the *Quare Impedit* brought by the Queen in this Caſe, did not lye. Mich. 29 Eliz. in C. B. The Queen and *Middleton's* Caſe. *Leon*, 44. to 49.

26. The Queen brought a *Quare Impedit* againſt the Biſhop of *York* and M. and Declared upon a Preſentment made by King *Henry* the 8. in the Right of his Dutchy, and ſo Conveyed the ſame to the Queen by deſcent: The Defendant pleaded, That he and his Predeceſſors have collated to the ſame Church; and M. pleaded the ſame Plea: Upon which there was a Demurrer. It was Objected, That by theſe Collations, the Queen was put out of poſſeſſion, and put to her Writ of Right of Advowſon. But it was Reſolved by the Court, That the Plea of the Defendants was not good; for a Collation cannot gain an Uſurpation, or a Plenarty againſt the King, or put the King out of Poſſeſſion: And the Opinion of the Court alſo was, That the Writ was good, notwithſtanding the want of the clauſe in it, *Ratione Dotatus*. Paſch. 33 Eliz. in C. B. The Queen and the Biſhop of *York's* Caſe. *Leon*, 226, 227.

27. In a *Quare Impedit* by L. againſt H. the Iſſue was, If T. L. the Father of the Plaintiff did enfeoff the Plaintiff of the Manor of F. to which the Advowſon was Appendant: It was found, That the Abbot of S. was ſeized of a Capital Meſſuage and an hundred Acres of Lands in F. and that there was a Tenancy holden of the ſaid Capital Meſſuage, time out of minde, by the name of the Manor of F. and that the Advowſon was Appendant to it, and conveyed the Meſſuage and Advowſon to the King by the Diſſolution, and from the King to the ſaid T. L. who ſo ſeized without Deed, did enfeoffe the Plaintiff, and made Livery and Seiſin upon the Demeſnes, and that the Plaintiff made a Deed to S. It was the Opinion of the Court, That here was a ſufficient Manner to which an Advowſon might be Appendant; and in Law, the Advowſon is Appendant to all the Manners, but properly to the Demeſnes; and therefore by Attornment after, in the principal Caſe of the Freeholder, the Advowſon did paſs included in the Livery: And the Grant of the Advowſon made mean between the Livery and Attornment was void: and a Writ to the Biſhop was granted for the Plaintiff. Mich. 33 Eliz. in C. B. *Long* and *Hemmings* Caſe. *Leon* 207.

28. If a ſtranger doth uſurp upon my Tenant for life, and afterwards the Tenant for life doth confirm his Eſtate in Fee, and the ſtranger doth preſent two or three times, and then the Tenant for life dyeth, and then the Church doth become void; I ſhall have and maintain a *Quare Impedit*, for the Statute of *Weſtm.* 2. *cap.* 5. being made to ſuppreſs wrong doings, ſhall be taken largely; as it was adjudged Paſch. 14 Jac. in C. B. Rott. 1030. in the Lord *Stanhopps* and *Williams* Caſe: Where the Caſe was, That a Prior did grant the next Avoydance, and the Grantee ſuffered an uſurpation; and it was adjudged, That the Prior himſelf might have had a *Quare Impedit*, and been aided by the Statute of *Weſtm.* 2. and ſo was the Law there taken to be for every Leſſor, upon an uſurpation had upon his Leſſee. See 45 E. 3. by *Finchden* acc.

29. If an uſurpation be had upon a Biſhop or Abbot, *Sede Vacante*, this uſurpation ſhall not prejudice the Succeſſor, but he ſhall have a *Quare Impedit*, and thereupon ſhall remove the Incumbent, and ſhall Preſent: But if ſuch uſurpation had been in the time of his Predeceſſor, this ſhould have put the Succeſſor out of Poſſeſſion, if the ſix moneths were paſt. See 9 E. 3. 16. See *Fitzh. Nat. Br.* 34. acc.

30. If the Patron of a Benefice be Outlawed, and the Church become void, ſo as the time of Preſentment is come to the King, in regard of the Outlawry, and a ſtranger doth uſurp upon the King, and ſix moneths paſs, and the King brings a *Quare Impedit*, and removes the Incumbent: Now is the Advowſon recontinued to the rightful Patron, and the uſurpation, whilſt the Title was in the King, did not gain the Inheritance of the Advowſon

Advowſon out of the rightful Patron, but that he after the Outlawry reverſed, or pardoned, might Preſent, if the Church did become void. See 22 *Aſſ. p.* 33.

31. In a *Quare Impedit* brought, It was Reſolved by all the Juſtices, That all uſurpations ſhall binde the Biſhops who ſuffer them, but not their Succeſſors, for that it is within the Statute of 1 *Eliz.* which reſtrains Alienations and Grants made by Biſhops, &c. But where the Biſhop ſuffers an uſurpation in the right of his Biſhopprick, it ſhall binde himſelf during his time; But if he be Purchaſer of an Advowſon, and ſuffers an uſurpation, that ſhall not binde his Succeſſor. Mich. 21 Jac. in C. B. *Dalton* and the Biſhop of *Ely*'s Caſe. *Cro.* 2. Part, 673.

32. At the Common Law, If an uſurpation had been upon an Infant, or a Feme Covert, they had been thereby put out of poſſeſſion, and could not have maintained *Quare Impedit*, but were put to the Writs of Right of Advowſon; and that was as well where the Advowſon came to them by deſcent, as by purchaſe, and they were not helped by the Statute of *Weſt.* 2. as appeareth 1 E. 3. *Fitz. Quare Impedit* 43. and 35 H. 6. 60. The reaſon thereof was, becauſe the Incumbent came in by Judicial act of the Ordinary, *ſcil.* by Admiſſion and Inſtitution, and it was preſumed that the Ordinary would not do, or conſent to any act to be done, in wrong to the Patronage of the Church: But yet at the Common Law, If one had uſurped upon the poſſeſſion of the King, and his Clerk had been Admitted and Inducted, it ſhould not have put the King out of poſſeſſion, but that the King might have recovered his poſſeſſion by a *Quare Impedit*, for that the King was not bound by the Plenarty. See 18 E. 3. *Quare Impedit*, 151. *Cook* 6. Part, in *Boſwel*'s Caſe. But ſee Paſch. 25 Eliz. in C. B. It was holden, That by two uſurpations, the King might have been put out of Poſſeſſion, and put to his Writ of Right of Advowſon, and a Grant by him made of his Advowſon after two uſurpations void. See 51 E. 3. 46. and ſo it was adjudged, Mich 13 Jac. in C. B.

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2. *Where* Quare Impedit *lyeth againſt the Heir, Executor, the Queen, where not; where againſt the Ordinary, and what Acts by him ſhall make him a Diſturber, or what not; Where, and for what Cauſes the Writ ſhall abate, what not: Where it lyeth againſt the Incumbent ſole, and where the Patron muſt be named in the Writ; and what Pleas are good in Bar of it, what not.*

1. IN the time of E. 3. there was two Pariſh Churches in J. in the County of S. one called S. *Martins*, which was appendant to the Manner of J. the other *All Saints*, which was an Advowſon in groſs; and there were ſeveral Patrons of them; and both of them being void, the Church of *All Saints*, by conſent of the Ordinary and Patrons were united, and upon the union it was Ordained, That the Patrons and their Heirs ſhould preſent by Turns, and that the Patrons in groſs ſhould have the firſt Preſentment, and ſo *alternis vicibus*: The Patron in Groſs, granted his Patronage to the uſe of himſelf for life, the remainder to his Wife for life, the remainder to his right heirs, and dyed; the other Patron preſented twice together, and dyed, ſo as he uſurped upon the Tenant for life; Afterwards the Husband and Wife dyed, and at the next Avoydance, the Heir of the Patron in groſs Preſented, and he was diſturbed, and brought a *Quare Impedit* againſt the Heir of the Diſturber, and the Writ was, *Quod permittat ipſum preſentare ad Eccleſiam de* J. without ſaying *Sancti Martini de* J. upon which it was demurred; In this Caſe, it was a Quære, If the Right here ſhall be adjudged in as a Purchaſer, or by deſcent; for if by Purchaſe, it ſeemed to the Court he was without remedy; And in this Caſe it was agreed, That the Advowſon of S. *Martins* did remain appendant for every ſecond turn, and that there was no moyties betwixt them, as in Caſe of Joynt-Tenants or Tenants in Common: But for the other point, the Juſtices all agreed, that the Writ was good, without ſaying *Sancti Martini in* J. becauſe there was after the union but one Church there. Paſc. 4 Eliz. *Dyer* 259.

2. *Quare Impedit* brought by B. againſt the Biſhop of *Carliſle*; and the Plaintiff declared of a Preſentation made to one T. by an Abbot and Co-

vent

vent, in the time of *Hen.* 8. and made Title by a Grant of the next avoidance, and shewed, That the Church was void by the Deprivation of T. generally; The Bishop entituled himself for lapse, because that T. was deprived, because he was no Minister, but a Lay-man, and also did not read the Articles according to the Statute of 13 Eliz. And in this Case the Issue was, Whether notice were given by the Ordinary to the Patron, of that Deprivation, or not. and if it was a good notice; for if it was not, the Ordinary by his Presentment was a Disturber, and the *Quare Impedit* brought against him would lye. It was Resolved in that Case, That the Ordinary in Case of not reading the Articles, must give Notice thereof to the Patron, and the notice must be certain and particular, that the party hath not read the Articles; and general notice, that he is unexpible of the Benefice, is not sufficient; nor is intimation thereof given in the Church sufficient, but it must be to the Patron himself; and because such par ticular notice of the not reading of the Articles, was not given by the Ordinary to the Patron, It was holden in the principal Case, That by the Presentment the Ordinary was a Disturber, and the *Quare Impedit* was well brought against him. Hill. 18 Eliz. *Dyer*, 348. *Bacons* Case. But Note, That if a Clerk be refused by the Ordinary for Inability, Illiterature, or for any other cause, whereof notice ought to be given to the Patron; If the Patron doth dwell in a far and remote County, so as he cannot easily be found out by the Ordinary, In such Case, if the Ordinary make the Inability of the Clerk, or cause of his refusal to be known, by an Intimation fixed upon the Door of the Church, that in that case it is sufficient; and then if the six moneths incur and the Ordinary collate for lapse, the same shall binde the Patron, and a *Quare Impedit* will not lye against the Ordinary upon such Collation. See 16 Eliz. *Dyer*, 327. acc.

3. The Bishop of *Coventry* was Patron of two several Prebends, and Granted the next avoydance *alterius eorum primo vacante*, to J. S. which Grant was confirmed by the Dean and Chapter; the Bishop dyed, One Prebend became void, and the the Successor Presented; J. S. the Grantee brought his *Quare Impedit* within the six moneths, and two years after, Issue was found for J. S. the Plaintiff, as also the Avoydance plenarty, and that the Writ was brought within the six moneths, and the Bishop dyed: And it was holden, That the *Quare Impedit* was well brought, because the Successor Bishop by his Presentment, was a Disturber; and it was also adjudged, that the Writ was well brought, where the Church was. Mich. 3 Eliz. *Dyer*, 194.

4. One had the Nomination, and an Abbot had the Presentation to a Church, afterwards the Possessions of the Abbot came to the King, afterwards the King Presented without any Nomination. It was holden in that Case, That a *Quare Impedit* upon a Disturbance did lye against the Incumbent alone, for that the King cannot be a Disturber. Pasch. 32 *H.* 8. *Dyer*, 48.

5. The only Question in the Case was, If in the Case of a common person, a *Quare Impedit* did lye, against the Ordinary and the Incumbent only, without naming the Patron in the Writ: And it was adjudged, That it did not, but that the Writ should abate; the reasons were, 1. Because the Patronage should be recovered against him who had nothing in the Patronage. 2. Because at the Common Law the Incumbent could not plead any Plea which did concern the right of the Patronage, and therefore it was against all reason that he only should be named in the Writ, who could not defend the Patronage: But the Statute of 25 E. 3. enableth the Incumbent to plead against the King, and to defend his right, although he claims nothing in the Patronage; and by the equity of that Statute, he shall plead against all common persons. And Note, This difference in that Case was agreed by the Court, *viz.* That when the Inheritance or Intereſt of the Patron in the Patronage, is to be devested by the Judgment in the *Quare Impedit*, there the Patron ought to be named in the Writ; but when the Inheritance is not devested by the Judgment, but the Presentment only recovered, there the rightful Patron needs not to be named in the Writ: But in Case where the King Presents without Title, and his Clerk be Instituted and Inducted, there in that Case a *Quare Impedit* may be brought against the Bishop and the Incumbent only, and that for necessities sake, because it doth not lye against the King; and a *Quare Impedit* brought by the King against the Incumbent alone is good, without naming the Patron in the Writ. *Cook* 7. Par. 25, 26. *Holls* Case.

6. Note, Whereas in the Case of 32 H. 8. before; That the King came to be a disturber, yet see *Br.* 4 E. 6. 410. That in such case, the Bishop must be named in the Writ, for that the Incumbent could not come into the possession of the Church, but by the Admission of the Bishop, and the Bishop may be an especial Disturber: And see, That it is good policy upon every Presentation by usurpation, or otherwise, to bring a *Quare Impedit* as speedily as may be, and so it is good policy to name the Bishop in the Writ, for then he shall not collate for lapse of the Church, to remain void during six moneths; neither shall the Metropolitan collate if the time come to him for the same lapse: for that it is a Rule, That the Metropolitan shall never collate for lapse, but when the immediate Ordinary

Ordinary might have collated for lapſe, and hath ſurceaſed his time; and in ſuch caſe the Ordinary cannot collate, becauſe he is made party to the Writ. See *Cook* 1. Part, *Inſtitutes* 344. And ſo it was adjudged. Mich. 3 Jac. in C. B. in *Lancaſter* and *Lowes* Caſe.

7. Error was brought to reverſe a Judgment had in C. B. in a *Quare Impedit*: The Error aſſigned was, That this *Quare Impedit* is brought againſt the Incumbent without naming the Patron; and it is averred, that the Patron is alive, and therefore Judgment ought to have been given againſt the Plaintiff: and *Cook* 7. Part, 25. *Halls* Caſe was vouched to that purpoſe. To this it was anſwered, That peradventure this might have been a good Plea, if he had pleaded it in the Common Plea, and had relyed upon it without pleading over, ſo as the Plaintiff might have anſwered thereunto: But this cannot be aſſigned now for Error, for it is only to the Writ, and proves the Writ abateable, and it is not abated *in facto*, and nothing ſhall be aſſigned for Error concerning the Writ, but that which proves it to be abated *in facto*: but in regard he doth not rely thereupon, but hath pleaded over in bar, and ſo hath relinquiſhed his Plea to the Writ, he ſhall not now take advantage of it: But the Court was of Opinion, That becauſe the Patron was averred to be alive; and he was not made a Patron upon the Writ: therefore it was the Opinion of the Court, That (notwithſtanding for other matters alledged in the Caſe, the Judgment ſhould be affirmed) yet the Entry of the Judgment for that cauſe only ſhould be ſtayed. Mich. 2 Jac. in B. R. Sir *George Savill* and *Thorntons* Caſe. *Cro.* 2 Part, 650. 651.

8. If the Plaintiff in a *Quare Impedit* after appearance be Nonſuit, diſcontinueth his ſuit, or be made a Knight, this being his own act, ſhall abate the Writ, and is peremptory; but otherwiſe it is, if the Writ do abate for form, miſnomer, &c. 40 Eliz. *Cook* 7. Part, 27. Sir *Hugh Portmans* Caſe. See *Cook*, Part, *Blackamores* Caſe acc.

9. A *Quare Impedit* was brought, and the Writ was, *ſuam ſpectat Donationem*, and the word [*ad*] was omitted. It was adjudged in that Caſe, That the Writ ſhould be amended, and ſhould not abate. Hill. 30 Eliz. in C. B. *Brooksbyes* Caſe, *Goldesb.* 78.

10. If two Tenants in common, or Coparceners be of an Advowſon, and a ſtranger uſurps upon them, ſo as their right is turned into action, and they bring a *Quare Impedit*, and ſix moneths paſs, and then one of the Plaintiffs dyeth, the Writ ſhall not abate, but the Survivor ſhall recover, otherwiſe there ſhould be no remedy to redreſs this wrongful uſurpation, but they muſt joyn in the firſt Writ; ſee if the Writ be brought by one of them, the Writ ſhall abate. See 10 Eliz. *Dyer*, 279. *Cook* 1 Part, *Inſtitutes*. 198. &c.

11. A man brought a *Quare Impedit* againſt the Biſhop of *York*, and A. C. for diſturbing him to Preſent to the Church of L. which belonged to him: The Biſhop pleaded, That J. S. the Incumbent dyed 1 *Jan.* 12 Jac. and the Church remained void, and he Preſented J. C. for lapſe, and claimed nothing but as Ordinary, and the Incumbent confeſſed the Plaintiffs Title, and pleaded the Collation of the Biſhop of him to the Church. The Plaintiff by Replication ſhewed, That after the death of J. S. and before the ſaid firſt day of January, *viz.* 29 *Maii* 1615. he Preſented J. N. to the Church, and the Biſhop refuſed him; and that afterwards the Biſhop did collate A. C. to the Church. It was the Opinion of the Court, That now he hath abated his own Writ, becauſe the Action was brought before the Cauſe of Action, and no diſturbance can be before the Writ be brought. Mich, 15 Jac. in C. B. *Birkhead* and the Biſhop of *Yorks* Caſe. *Hob.* 197, 198.

12. A *Quare Impedit* was brought againſt *Richard* Biſhop of *Lincoln*, Ordinary, and the Incumbent; the Incumbent pleaded, That at the day of the Writ brought, there was no ſuch *Richard* Biſhop of *Lincoln*, *in rerum natura*. It was by the Court holden to be a good Plea to abate the Writ. Trin. 16 Jac. in C. B. *Blunt* and *Hutchinſons* Caſe. *Winch.* 73.

13. A. brought a *Quare Impedit* againſt the Biſhop of *Gloceſter*, and C. and counted upon a Diſturbance to Preſent 1 *Nov.* The Defendant pleaded, That 1 *Maii* before the ſaid 1 *Nov.* he himſelf was Preſented to the Church by the Queen, the which Preſentment came to him by lapſe; upon which the Plaintiff demurred. It was holden by the Court, That in that Caſe the Plea was inſufficient, for the Plaintiff counted upon a Diſturbance to him 1 *Novemb.* and the Defendant entitleth himſelf to an Incumbency 1 *Maii* after; in which anſwer, the Diſturbance ſet forth in the Count, is not anſwered by Traverſe, nor confeſſed, nor avoided: Then it was moved for the Queen, that ſhe might have a Writ to the Biſhop, for that the Title of the Queen is confeſſed. But the Opinion of the whole Court was againſt that, for that it appeareth that the Title of the Queen was once executed, ſo as nothing remains in the Queen; and now when the Defendant hath loſt his Incumbancy by ill Pleading (as he may) as well as by Reſignation, or Deprivation, yet the ſame ſhall not turn to the advantage of the Queen; for where the Queen Preſents for lapſe, and her Clerk is Inſtituted and Inducted, ſhe hath no more to do, but the Incumbent muſt ſhift as well as he can for the holding of it; afterwards the Plaintiff had a Writ to the Biſhop.

Mich.

Mich. 32 Eliz. in C. B. *Arundel* and the Bishop of *Glocesters* Case. *Leon.* 194.

14. A *Quare Impedit* by the Queen against the Bishop of *Cant.* and the Bishop of C. and F. and one H. and Counted that J. A. was seised of the Advowson of B. and was Outlawed in Debt; during which Outlawry the Church voided, so as it belonged to the Queen to Present, the Bishops pleaded, that they claimed nothing but as Ordinaries: F. pleaded, That King E. 4. *ex Gratia speciali, &c.* in Consideration of Service, did Grant to the Lord *Hastings*, the Castle and Barony of *Hastings*, and that he *habuerat omnia Bona & Catalla residentium & non residentium, & aliorum quorumcunque hominum, de & in Castro, Baronia, villa, &c.*; and derived the same to the Earl of *Huntington* as Heir; and pleaded, That the said Earl so seized, and the said A. B. so seized, That the Church became void during the Outlawry, and that the said F. usurped, and Presented the said H. And it was averred, That the said Church of B. at the time of the Grant, was within the Precinct and Franchise aforesaid: The Question was, If upon the Grant of King E. 4. to the Lord *Hastings*, of *Omnia Bona & Catalla*, the Presentment to the Church should pass or not. It was Objected, That this Title of Presentment was a Chattel in the King; and if such a Title come to the King, they shall pass by general words of *omnia Bona, &c.* But it was the Opinion of *Anderson* Chief Justice, That this Title to Present cannot pass by the general words, *omnia Bona & Catalla, &c.* for they do not extend to Rights, or things in action; for such things which are commonly known, shall pass by such general words: and by Grant of goods, Chattels real will not pass; and a man cannot be said to have a Chattel, but where he is possessed of it; and in this case, there was no Possession of it, but only *Jus Presentandi*, which did not pass by the Grant, and so the Queen had a good Title to Present; and the *Quare Impedit* would not lye. Mich. 32 Eliz. in C. B. The Queen and the Archbishop of *Cant.* and *Fane* and *Hudson's* Case. *Leon.* 201, 202.

15. H. Presented K. his Clerk to the Bishop of *Chester*, who refused him. He complained to the Archbishop of Y. who sent Monition of the Bishop of C. to reject the Clerk, who would not; whereupon the Archbishop Instituted R. and he was Inducted: The Bishop of C. and K. who was Presented by the King, sued in the Delegates, to avoid the Induction of R. whereupon H. prayed a Prohibition: The Court was of Opinion, That a Prohibition ought to be granted; for since by the Induction the Church is full, it is not to be avoided but by a suit in a *Quare Impedit* at the Common Law: But yet it was said by the Court, that he could not pray a Prohibition, in regard his *Quare Impedit* was depending, because then of his own showing, the *Quare Impedit* must abate, for the Church is full of his Presentation: but he must make his surmise, that the Church being full, they seek to avoid it, without mentioning his *Quare Impedit*. Trin. 12 Jac. in C. B. Sir *Timothy Hutton's* Case. *Hob.* 15.

16. A Tenant for life of a Manor, to which an Advowson was Appendant, the Remainder to B. in Fee, the Church became void: A. Presented J. D. who was Inducted, and did not read the Articles, for which he was deprived by Sentence Declaratory before the Bishop, but no notice was given to the Patron of this Deprivation: A. dyed, the Queen *Jure Prerogativæ*, Presented W. B. who was Instituted and Inducted; J. D. died, B. who was the Tenant in Remainder in Fee, Presented J. G. the Plaintiff, who thereupon entred into the Rectory. In this Case it was Resolved (amongst other things) That if the Queen by her Letters Patents mistaketh her Title, as if she hath Title to Present, in respect she is very Patron, and she Presenteth *ratione Lapsus*, that such Presentation is void, *à fortiori*, when the Queen hath not Title to Present by any means, and the Presents (as in the Case at Bar) *ratione Lapsus*, it is meerly void; and in such Case, although the Bishop doth Admit, Institute, and Induct the party, yet the Church doth remain void, and the right Patron is not put to a *Quare Impedit* to remove such Incumbent. *Cook* 6. Part, 29. *Greens* Case.

17. A man was Admitted, Instituted, and Inducted into a Benefice with Cure, of the value of 8 L. Afterwards the King Presented him to the Church of S. which was also a Benefice with Cure, and he was Admitted and Instituted: The Bishop of C. granted him Letters of Dispensation for Plurality, which was confirmed by the King; and afterwards he was Inducted into the Church of S. and afterwards the Queen did Present by reason of Lapse W. to the first Benefice, who was Admitted, Instituted, and Inducted. It was adjudged, That the Dispensation granted to A. came too late, he being Instituted into the Church of S. and that the first Benefice was void by the Institution of him into the second, and then the Dispensation to him for Pluralities came too late, the same being a Dispensation *recipere & retinere*; for the Church being full by his Institution, he could not receive that which he had before; and he could not receive that which he could not receive. *Cook* 4. Part, 79. *Digby's* Case.

18. *Quare Impedit* by the Queen against the Bishop of P. A. Patron, and C. Incumbent, and Counted *ratione Lapsu* for taking of two Benefices; The Defendant pleaded in Bar, That E. Baronets

of *Montcagle*, in her Widdowhood, reteined C. to be her Chaplain, acc. to the Statute of 21 H. 8. and he having the Benefice of C. obtained a Diſpenſation, with a Confirmation of the Queen for a Plurality, and afterwards he accepted of the Benefice of G. without that that the firſt Church of C. by taking of the Benefice of G. was void: The Queen Replyed, That before the ſaid C. accepted the Benefice of G. the ſaid Baroneſs took to husband the Lord *Compton*, and ſo was Covert of Baron; and afterwards the ſaid C. accepted the Vicarage of G. and was thereunto Inducted; upon which the Defendant did demur in Law. It was Reſolved againſt the Queen in this Caſe, viz. That the Chaplain after the inter-marriage might receive the ſecond Benefice for the Retainer of the Chaplain was not countermanded by the Inter-marriage, and it is not requiſite that ſhe be a Widdow, at the time of the Chaplains acceptance of the ſecond Benefice, and the power to purchaſe Licenſe for Plurality, is annexed to the Retainer; and the Reteiner was not determined by the Inter-marriage. It was adjudged againſt the Queen. *Cook* 4. Part, 217. *Aſtons* Caſe.

19. A *Quare Impedit* was brought by divers Plaintiffs; the Defendant pleaded a Releaſe made by one of the Plaintiffs depending the Writ of *Quare Impedit*. It was adjudged in that Caſe, That the ſame Releaſe ſhould go but in Bar of that Plaintiff only; and that the Writ ſhould ſtand good from the others: And in that Caſe it was ſaid, That in all caſes of a thing entire and in the realty, as Preſentation to a Church, Guard of the Body, &c. the releaſe of the one ſhould enure to the benefit of the other. See *Cook* 5. Part, 79. The Counteſs of *Northumberlands* Caſe.

20. B. brought a *Quare Impedit* againſt C. and had Judgment to recover: The Queen brought a *Scire Facias* upon the ſaid Judgment, and ſhewed, that after the ſaid Judgment, B. was Outlawed in an Action general, and the *Scire facias* iſſued *ad reſpondendum Quare Regina* ſhould not have execution of the Judgment by reaſon of the ſaid Outlawry. It was Objected in this Caſe, That the *Scire facias* did not lye for the Queen, for that Writ runs only in privity of the Record upon which it is grounded, to which Record the Queen is a ſtranger; and by Outlawry in an Action perſonal, no Action real ſhall eſcheat, and therefore the *Scire facias* being in the nature of a *Quare Impedit*, upon which it is grounded, or at leaſt a mixt Action, ſhall not be forfeited: Alſo it was ſaid, that in this Caſe, nothing was in the Record to entitle the Queen, but all the matter upon which a Writ to the Biſhop is prayed for the Queen, is out of the Record: And in this Caſe the Outlawry is not ſufficiently alledged; for that he ought to have made mention of the Exigent, and of all the proceedings, and of the Judgment of the Coroners, and for defect of that, no Title is given to the Queen: But as to the *Scire facias*, all the Judges agreed, That upon the matter the Writ lay well enough, and that it was good diſcretion in the Court to grant ſuch a Writ: And it was ſaid in that Caſe, That if two Coparceners be of an Advowſon, and they make Compoſition to Preſent by Turns, and afterwards one of them dyeth, her heir within age, and Ward to the King; the Church voideth, and the King is diſturbed in the Preſentment, he ſhall have a *Scire facias* upon ſuch Compoſition, although he be a ſtranger to it. In the principal Caſe, It was the Opinion of the Court, That the Preſentment did belong to the Queen by reaſon of the Outlawry. Mich. 29 Eliz. in C. B. *Bevely* and *Cornwallis* Caſe. *Leon.* 63.

21. A. brought a *Quare Impedit* againſt J. D. G. W. Clerk, and the Biſhop of L. of the Church of O. The Caſe was, G. Earl of H. was poſſeſſed of the Church of O. to which the Advowſon of the Vicarage was Appendant for 15 years; and by Deed granted to the Plaintiff the next Avoydance of the ſaid Vicarage, *cum primo & proximo vacare contigerit*, by any means whatſoever, if it ſhould happen to be void during the ſaid Term of years in the ſaid Rectory of O. granted to the ſaid Earl by the ſaid Biſhop of *Oxford*. The Defendants pleaded, That after the ſaid Grant made, the ſaid Earl being poſſeſſed of the ſaid Rectory, dyed inteſtate, and Adminiſtration of his goods granted to H. now Earl of H. who afterwards ſurrendred his Term in the ſaid Rectory to the Biſhop of *Oxford*, which he accepted; and that the Biſhop deviſed the ſaid Rectory with the appurtenances to one J. D. one of the Defendants, for his life, and that afterwards the Vicarage became void; upon which Plea the Plaintiff did demur: The ſole Queſtion in the Caſe was, If by the ſaid ſurrender the Grant of the ſaid next Avoydance was void. It was adjudged in that Caſe, that notwithſtanding the ſaid ſurrender, that the ſaid J. D. ſhould have the next Avoydance, becauſe the ſaid Limitation was no more then what the Law ſaid; for if Tenant for years grant an Avoydance, the Law ſhall imply this Limitation, if it void during the Term. 2. Becauſe the Grantor ſhall not derogate from his own Grant, and the Grant of every one ſhall be taken ſtrong againſt the Grantor, and moſt beneficial for the Grantee: And 3. Becauſe the Term for the benefit of the Grantee, hath in ſome reſpect continuance; as if Leſſee for years grants a Rent-charge, and afterwards ſurrenders for the benefit of the Grantee, the Term hath continuance, although *rei veritate* it be determined. Trin. 8 Jac. in C. B. *Cook* 8. Part, *Davenports* Caſe.

23. A *Quare Impedit* was brought by the Chancellor, Masters, and Scholars of the University of *Oxon*, for disturbing of them to Present to the Church of D. and they counted, That A. was seized of the Mannor of D. to which the Advowson of the Church of D. was appendant, and Presented B. and dyed; the Mannor, and the Advowson descended to C. his son and heir; and that he being so seized, at the Assizes holden 29 *Maii*, 8 Jac. was Indicted for not repairing to Church, and that afterwards Proclamation was made according to the Statute of 3 Jac. and because he did not render his body to the Sheriff at the next Assizes holden 16 *Aug.* 8 Jac. he was a Recusant convict, and that the Church then became void; and for that cause, it did appertain to them to Present by the said Statute of 3 Jac. The Defendant pleaded in Bar, That C. the son and heir of the said A. before the Conviction, viz. 20 *Junii*, 8 Jac. Granted the next Avoydance to him, and afterwards B. the Incumbent dyed, and he Presented the now Incumbent, who was Admitted, Instituted, and Inducted, and the Incumbent pleaded the same Plea, and traversed the appendancy; upon which the Plaintiff did demur. In this case it was objected, That the Grant was good, because C. was not a Recusant convict, but only Indicted of Recusancy. But it was Resolved, 1. That by the express words of the said Act, of 3 Jac. C. was disabled; for the words are, *Every person that shall be a Recusant convict, so long as he shall be a Recusant convict, should be disabled from the beginning of the said Parliament*; and such person C. remained, and such retrospect Acts of Parliament have had, and had been approved and allowed of in Law. 2. It was Resolved, that the Plaintiffs in their Counts needed not to have averred, That C. remained a Recusant convict, for that when once the Presentation *hac vice* was vested in the University, although afterwards he conformed himself, or dyed, yet the University should Present. *Cook* 10. Part, 54. 58. The Case of the Chancellor, Masters, and Scholars of *Oxford*.

24. In a *Quare Impedit* of the Church of W. against the Bishop of P. and W. B. Clerk, the Plaintiff counted, That T. C. was seized of the Mannor of W. to which &c. in Fee, and Presented F. T. his Clerk, who was Instituted and Inducted; and afterwards he levied a Fine of the Mannor, to which &c. to the use of himself for life, and after to the use of the Plaintiff for life, and dyed; after which F. T. was deprived; by which Deprivation the Church became void, and remained void, and so he ought to Present, and the Defendants did disturb: The Defendants pleaded; That they gave notice of this Deprivation to the Patron, and that after the notice, the Church did remain void by six months, according to 28 days to the month; whereupon the Bishop did Collate. In this Case it was adjudged, That the Computation of the six months should be according to the Kalender, for that *Tempus semestre* in the Statute shall be intended half a year, and when Computation is doubtful, it is good to determine the same by him who hath right, and to give him the longest time that may be, that he may not lose his Right: And therefore it was Resolved, That the Plea in Bar by the Defendants was not good, and that the *Quare Impedit* by the Plaintiff was well brought. Mich. 4 Jac. in C. B. *Cook* 6. Part. 62. *Catesbyes* Case.

25. *Quare Impedit* by the Lady C. of the Church of W. against the Bishop of *Ely* and *Thompson*: and counted, That Sir *Tho. C.* father of the Plaintiffs Husband, was seized of the Advowson in gross, and Presented M. and dyed seized, and that it descended to the Plaintiffs Husband, who granted the same to E. and others, to the use of the Plaintiff for Joynture, and after to the use of himself in Tail, and after dyed so seized, that the Church voided by the death of M. and so she ought to Present: The Bishop dyed pendant the Writ. The Defendant pleaded, That he was *Persona Impersonata* of the Church, *Ex Presentatione Regis*, and shewed that the Plaintiffs husband was seized of the said Advowson in gross, and also of the Mannor of P. holden of the King in *Capite*, and dyed; the Plaintiffs husband being his Son and Heir within age, and that an Office was found, whereby the Tenure and Discount were found, whereupon the King was seized, and Presented the said T. the Defendant, who was Instituted and Inducted, *absque hoc*, That the Plaintiffs husband granted the said Advowson to E. and others. The Plaintiff said, *Quod Non habetur Tale Recordum de Inquisitione*, upon which it was Demurred. It was said, That this Traverse of the Inquisition is not good, for that there never shall be a Traverse upon a Traverse, but where the Traverse in the Bar takes from the Plaintiff the Liberty of his Action, but when the Inducement is made, and concluded with a Traverse; and such was the Opinion of the Court: And it was Resolved, That for as much as two Titles are comprised in the Bar for the King; that in the Replication they ought both to be answered: and it is not sufficient to Traverse the Inquisition; but the Plaintiff ought to answer both to the Tenure and to the Descent. But in this case, because the Defendant did not rely upon them, but made them only Inducements to the Traverse of the Grant, which is the Plaintiffs Title, that Title ought to be maintained, and not to Traverse the Inducement to that Traverse; wherefore it was adjudged for the Defendant. Mich. 13 Car. in C. B. The Lady *Chidley* and *Thompsons* Case. *Cro.* 1. Part, 74, 75.

26. *Quare Impedit* by A. againſt the Biſhop of *Ex.* and W. for the Church of B. the Plaintiff conveyed to himſelf the Advowſon in Tail, and then ſhewed that he Granted the next Avoydance to J. S. and others, and that the Church voided by the death of C. the Incumbent, and that J. S. and the others Preſented J. N. who was Inſtituted, &c. and dyed, and ſo it belonged to him to Preſent: The Defendants pleaded in Bar, That before this Preſentment, the Plaintiff brought a *Quare Impedit* againſt this Biſhop, the Defendant of the ſame Church, and conveyed himſelf Title in Tail, and that the Church became void by the death of C. and that he Preſented J. N. who dyed, and ſo it belonged to him to Preſent: and averred, That it is the ſame Plaintiff, the ſame J. N. and the ſame Avoydance, and the ſame diſturbance; whereupon both Actions are brought, and that the firſt Action depends, not diſcontinued, and demands Judgment of this later Writ purchaſed, hanging the firſt Writ. The Plaintiff replyed, That after the bringing of the firſt Original, he ſtill ſeized in Tail, Preſented H. C. to the Biſhop, who refuſed him, which is the Diſturbance, upon which he now Declares; without that, that it is the ſame diſturbance upon which the former Actions were brought. It was the Opinion of the Court, That this *Quare Impedit* brought now by the Plaintiff, ought to abate; for although there muſt be a Diſturbance for to maintain the Action, yet the principal ſuit is to recover the Advowſon and Preſentation, and there was a Diſturbance laid in the former ſuit, ſo as new Diſturbance betters not the Caſe for the Plaintiff; and the Nature of a *Quare Impedit*, is to be final, upon Nonſuit, or Diſcontinuance; but this way were to defeat that, for the Plaintiff not bating his former ſuit, might bring infinite *Quare Impedits*, which were an intollerable vexation againſt Law: And therefore in this Caſe it was adjudged, That the Plaintiffs Writ ſhould abate: But it was holden, againſt ſeveral perſons, a man might have as many *Quare Impedits* as he would. Trin. 14 Jac. in C. B. The Earl of *Bedford* and *Wilſons* Caſe. *Hob.* 137, 138.

27. The Chancellor, Maſters, and Scholars of *Cambridge*, brought a *Quare Impedit* againſt A. B. and C. and claimed the Preſentation to the Church of D. becauſe that B. being Patron of the ſaid Church at the time of J. the laſt Incumbent, was a Popiſh Recuſant Convict: All the Defendants pleaded: but A. pleaded (the reſt relying upon the ſame Title) That B. was ſeized of the Manner of H. to which &c. in Fee, and that he was a Popiſh Recuſant, but for the non-payment of 20 l. a moneth, he ſaid, That by Inquiſition it was found, That B. was ſeized of the ſaid Manner, to which &c. and that the Commiſſioners upon the ſaid Inquiſition, did ſeize two parts of the ſaid Manner into the Kings hands, and that the King by his Letters Patents under the Exchequer Seal, did grant the ſaid two parts, with the appurtenances, and all the profits thereof, to the ſaid A. for 21 years, *ſi tam diu &c.* and that then the Church became void, by reaſon whereof he Preſented the Defendant C. *abſque hoc*, that B. was Patron of the Church at the time of the Avoydance as the Plaintiffs dictated. It was the Opinion of the Court in this Caſe, That upon the ſaid Plea it did appear, That the Title to the Avoydance did appear to be for the King, and that there were no words in the Kings Grant to A. to carry the Advowſon; and yet the Court would not award a Writ to the Biſhop for the King, being no Party to the Writ, except his Title was clear: Whereupon the Plaintiffs were demanded by the Court, why a Writ to the Biſhop ſhould not be adjudged for the King: The Defendants thereupon did confeſs, That ſuch Writ ought to be awarded: Whereupon Judgment was given for a Writ to the Biſhop for the King, and that he ſhould remove C. the Incumbent, and that the Biſhop ſhould admit *Idoneam Perſonam ad Preſentationem Regis.* Mich. 14 Jac. in C. B. The Chancellor, &c. of *Cambridge*, and *Walgraves* Caſe. *Hob.* 126. 128.

28. Note, upon the Statute of 25 E. 3. cap. 7. *pro Clero*, when a Biſhop or other Ordinary hath given a Benefice of Right devolute to him by time; and after the King Preſents, and takes ſuit againſt the Patron, who perhaps will ſuffer that the King ſhall recover without Action tryed in Deſcent of the Ordinary, or Poſſeſſor of the Benefice: In ſuch caſe, and in all other like caſes, where the Kings Right is not tryed, the Biſhop or Ordinary ſhall be rejected to counterplead the Title taken for the King, and to have his anſwer, and to ſhew and defend his right upon the matter, although he claim nothing in the Patronage; and the particular cauſe of this Law is, for the Releaſe only of the Ordinary that hath Collated by Lapſe, and of the Clerk that is ſo collated, that they may both plead to the Title againſt the King; for the King not being bound by lapſe of time, if the Common Patron ſuffered a lapſe, and the Biſhop collated lawfully; yet if the King pretending himſelf Patron brought a *Quare Impedit* againſt the Ordinary and the Incumbent, there was no means to ſave themſelves, ſince they could not deny the Kings Title, and maintain the Patrons in whoſe default the lapſe took place; but the Statute gives remedy in ſuch caſes by expreſs words, by counterpleading the Title of the King. See by *Hob.* Chief Juſtice, in the Caſe of Sir *Will. Ellis*, againſt the Biſhop of *York* and *Taylor*. *Hob.* 318, 319.

3. More

3. More, *Wherein a* Quare Impedit, *upon a Recovery had, or Title made; a Writ to the Biſhop, either to admit the Clerk of the Plaintiff, or of the Defendant ſhall be made, where not; and where, and in what caſe the Writ to the Biſhop ſhall be awarded to the King, and where and in what caſe it ſhall be awarded to the Biſhop, and where to the Metropolitan.*

1. A *Quare Impedit* was brought againſt the Archbiſhop of *Cant.* the Biſhop of *Lincoln*, and the Incumbent, they made default at the grand Diſtreſs, and upon that the Plaintiff made Title, and had a Writ to the Biſhop, and the Writ was awarded to enquire of the damage, of the Plenarty, and at whoſe Preſentation, and how long time the Church had been void, and of what value the Church was by the year; all which points were returned upon the Inquiſition: and accordingly the Judgment was given, That the Plaintiff ſhould recover the Preſentation; and thereupon he had a Writ to the Biſhop of *Lincoln*, and damages, to the value of the Church for half a year. Trin. 7. El z. *Dyer*, 241.

2. A. a Lay man, and within the age of 24, was Inducted into a Benefice; a ſtranger cited him out of the Delegates, to deprive him; depending which ſuit, W. brought a *Quare Impedit* againſt A. and the Ordinary, and had Judgment by default at the grand Diſtreſs; A. and the Biſhop brought a Writ of Deceit, for that they were not ſummoned: W. pleaded in Bar, the Deprivation of A: But it was holden no Plea, for that the Incumbency was not in queſtion; wherefore it was adjudged, That the firſt Judgment ſhould be void, and the Plaintiff reſtored to his Benefice; and to that purpoſe, he had a Writ to the Biſhop. Mich. 19 Eliz. *Dyer*, 352. *Blomers* Caſe.

3. A man Recovered in a *Quare Impedit*, and had a Writ to the Biſhop to Admit his Clerk, and before he was Admitted, a ſtranger brought another *Quare Impedit* againſt him who Recovered, and againſt the Patron and the Incumbent, and thereupon had a *Non Admittas* of him who Recovered. It was the Opinion of the Juſtices in that Caſe, That notwithſtanding the *Non Admittas*, yet the Biſhop ought to Admit the Clerk of him who Recovered, otherwiſe the Judgment ſhould not be executed, and Lapſe might incur. See 18 E. 4. 7. *per Curiam.*

4. In a *Quare Impedit*, if the Defendant doth not appear at the Grand Diſtreſs Returned againſt him, the Plaintiff ſhall have a Writ to the Biſhop without making Title, 10 H. 6. 8 *ex.* to the Biſhop, 3. 33 H. 6. 1. acc. and if the Defendant maketh Default after Appearance, the Plaintiff ſhall have a Writ to the Biſhop: But if they have day by continuance, and then the Defendant maketh default, a *Petit Cape* only ſhall iſſue forth, 2 H. 4. But ſee 24 E. 3. upon Default of the Defendant, the Plaintiff ſhall have a Writ to the Biſhop, and a Writ to enquire of the Damages.

5. Note, It is holden by *Gaſcoign* in 7 H. 4. 35. That a man ſhall never have a Writ to the Biſhop, where the Preſentee is in, and his right continues; but *Holts* there holds the contrary; For if a Clerk be Inſtituted to a Church, and J. pretending a Right to the ſame Church, doth bring a *Quare Impedit*, and it is found for the Defendant, that he hath right, yet his Preſentee ſhall have a Writ to the Biſhop, and he ſhall have a general Judgment, and recover his damage for the Diſturbance. 7 H. 4. 35. acc.

6. The Biſhop of *Coventry &c.* Patron of two Prebends, granted the next Avoydance, *Alterius eorum primo vacant*, the Dean and Chapter confirmed it; the Biſhop dyed, one Prebend became void, the Succeſſor Preſented; The Grantee brought a *Quare Impedit* within the ſix moneths, and two years after the Iſſue was found for the Plaintiff, and the Plaintiff had Judgment, and had his Election, to have a Writ to the Biſhop, or unto the Metropolitan to remove the Clerk. Mich. 3 Eliz. *Dyer* 194.

7. In a *Quare Impedit* againſt the Biſhop of S. and the Incumbent, a Verdict paſſed for the Plaintiff, and thereupon Judgment was given before them, and a Writ was awarded to the Metropolitan, and a *Scire facias* to the Sheriff for damages: The Defendant brought a Writ of Error, and had a [illegible] to the Metropolitan. Afterwards the Plaintiff brought a *Scire facias* to have execution, becauſe the Defendant did not aſſigne Errors: Afterwards the Defendant aſſigned Errors; one was, becauſe damages were adjudged for half a yeer, whereas it appeared the Preſentation was not deraigned within ſix moneths: Notwithſtanding which, the Judgment was affirmed, and a Writ of Execution awarded to the Guardian of the Spiritualties, *Sede Vacante* of the Metropolitan. Mich. 6 E. 6. *Dyer*, 77.

8. In a *Quare Impedit* the Plaintiff Recovered, and had a Writ to Admit his Clerk, Directed *Decano & Capitulo*, Guardians of the Spiritualties, *Sede vacante Epiſcopi*, which was not returnable; and before the Writ was executed, a Biſhop was created;

created: It was a doubt whether the authority of the Guardians of the Spiritualties to execute the Writ did ceaſe: But it was at laſt the Opinion of the Court, That becauſe that nothing was done in the ſaid Writ, the Plaintiff might have a new Writ to the new Biſhop, if he pleaſed. Paſch. 18 Eliz. *Dyer*, 350.

9. A Patronage was purchaſed from the Queen in Fee, the Church became void by taking of a ſecond Benefice, the Incumbent not being qualified, and the ſame remained void two years; the Queen *Vice Coronæ* Preſented the Lapſe, and her Clerk dyed Incumbent; the Purchaſor Preſented within the ſix moneths, alſo the Queen Preſented generally, and her Clerk was Inducted: The Purchaſor brought a *Quare Impedit* againſt the Queen and the Ordinary, who pleaded the Queens Title, *ut ſupra*, upon which there was a Demurrer, and *pendente lite*, the Incumbent reſigned, and the Queen Preſented again, and her Clerk was Inſtituted and Inducted; And afterwards Judgment was given for the Plaintiff, and he had a Writ to the Biſhop, commanding him to remove the Clerk; and if the laſt Preſentee of the Queens being in by ſix moneths, might be removed, was the Queſtion. It was Objected, That the Clerk could not be removed, becauſe he was not Party to the Writ; but the Court denyed that for Law, but that the Incumbent might be removed, although there were twenty Incumbents who came in *pendente Lite*. Paſch. 21 Eliz. *Dyer*, 364.

10. A *Quare Impedit* is depending betwixt two ſtrangers, If it appear in debate of the Cauſe, either by Pleading, or Confeſſion of the Parties to the Court, that neither of them hath right, but that the Preſentation doth belong to the King, the Court may, nay they muſt award a Writ for the King to the Biſhop, and that without Prayer on the part of the King; for the Court and Judges are of the Kings Counſel: But this muſt be where the King's Title appears ſo clear, *in allegatis & probatis* to the Court, as it is certain and infallible both againſt Plaintiff and Defendant. See *Hob.* 163. in the Caſe of *Colt*, and the Biſhop of *Coventry* and *Lichfield*: and ſee before, Mich. 14 Jac. in C. B. Rot. 649. The Chancellor, Maſters, and Scholars of *Cambridge*, and *Walgraves* Caſe, adjudged acc.

11. Note, It was Reſolved *per Curiam*, That without making Title to a Perſonage, a man may ſhew as *Amicus Curiæ*, falſe Latine, or other matter appearing within the Writ; for that is no Pleading, but remembring the Court of that which they ſhould take knowledge of *Ex Officio*; and one Plea, which in effect is the general Iſſue in a *Quare Impedit*; viz. *Ne diſturbavit per*, every Defendant may plead, without more, becauſe it doth defend but the wrong wherewith he ſtands charged, and leaſe the Plaintiffs Title not controverted, but in effect confeſſed; who may therefore upon that Plea, preſently pray a Writ to the Biſhop, or maintain the diſturbance for damages: And in a *Quare Impedit*, both Plaintiff and Defendant are Actors the one againſt the other, and therefore the Defendant may have a Writ to the Biſhop as well as the Plaintiff; but this he cannot have without Title appearing to the Court: and therefore if the Defendant never appeareth, yet the Plaintiff muſt make a Title for forms ſake, and ſo muſt the Defendant if the Plaintiff be Nonſuit. *Hobart* 163. acc.

12. In the Caſe of a *Quare Impedit*, between *Winſcomb* and *Pulleſton*, It was Reſolved, That Judgment ſhould be given for the King; and thereupon it was prayed, That a Writ might be awarded to the Biſhop for the King; againſt which it was Objected, That it was repugnant to the Record, in that *Pulleſton* the Defendant pleaded himſelf Parſon, no Perſonne; and in the end of his Plea ſaid expreſly, That the King Preſented him, and that he was Admitted, Inſtituted, and Inducted at the Kings Preſentation, before the Writ brought, ſo that by the Record it appears, That the King hath the effect of that for which the Writ is required: Yet becauſe it was affirmed by the Councel of *Pulleſton* himſelf, That the Church was not full, but that his Plea in that part was untrue, the Court entred into conſideration of the Cauſe; But at laſt it was agreed by the Juſtices, That the Writ ſhould be awarded to the Biſhop for the King, either *ex Officio*, as being a part of the Kings Judgment, and no way miſchievous, or elſe upon a ſurmiſe of the King. Trin. 15 Jac. in C. B. *Winchcomb* and *Pulleſtones* Caſe. *Hob.* 193, 194.

13. Error brought to reverſe a Judgment in C. B. in a *Quare Impedit*; The Writ was brought there againſt the Archbiſhop, the Biſhop, and three other Defendants: The Archbiſhop pleaded, That he claimed nothing but as Metropolitan; The Biſhop pleaded, That he claimed nothing but as Ordinary; the three Diſturbers made Title: Judgment there was given for the Plaintiff. Error brought, and one Error amongſt other was, becauſe the Plaintiff here had Judgment, and *Breve Metropolitano* granted to him, where it ought to have been *Breve Epiſcopo*. It was urged the difference to be where the Archbiſhop, and Biſhop be Defendants, and claim nothing but as Ordinary, there it ought to be *Epiſcopo*, but *ſi Epiſcopus eſt pars*, there it ſhall be *Brevi Metropolitano*. See *Cook*, 6. Part, 48. in *Roſwels* Caſe. It was ſaid by *Cook* Chief Juſtice, That if the Metropolitan be no party, and the Ordinary is a party, he may have his Writ *Metropolitano*, and the joyning them both in

In the *Quare Impedit*, ſhall not at all hurt the matter; And therefore it was the Opinion of the whole Court, That in the Principal Caſe, the Plaintiff had his Election to have the Writ to the one or to the other; and therefore that the Writ awarded *Metropolitano*, was good; and the Judgment was affirmed. Mich. 13 Jac. in B. R. Rott. 365. *Grange* and *Dennys* Caſe. *Bolſtr.* 3. Part, 174, 175, 176.

4. More, *Where, and what Damages ſhall be recovered on a* Quare Impedit, *and where, and what not. And if the King ſhall recover damages, if not; and where, where not.*

3. ERror of a Judgment in a *Quare Impedit*: the Judgment being for the Plaintiff, and the value of the Rent being found to be 80 l. *per ann.* and a Writ of Error being brought, and the Judgment affirmed, it having depended a year and more, the Court was moved, That according to the Statute of 3 H. 7. *cap.* 10. which appoints Damages and Coſts to be allowed where Writs of Error be brought to delay Executions; The Court awarded, That the Defendant in the Writ of Error, ſhould have Damages for a year, during which time, the Writ of Error was depending, according to the value of the Church found by the Verdict; ſo they awarded him 8 l. beſides Coſts, Mich. 4 Jac. in B. R. *Cro.* 1. Part, 103. See, Where in a *Quare Impedit*, the value of the Church was found to be 100 l. *per ann.* and a Writ of Error was brought, in which the Judgment was affirmed; yet becauſe the Defendant in the Writ of Error had obtained a Writ to the Biſhop, and his Clerk was Admitted and Inſtituted, and had alſo gotten the Poſſeſſion, until he was removed by a Writ of Reſtitution, the Court mitigated the Damages, and would give but 60 l. for the damages, and 20 l. for coſts. Mic. 7 Car. in B. R. The Earl of *Pembrock* and *Eccles* Caſe. *Cro.* 1. Part, 125.

2. Error brought of a Judgment in the Grand Seſſions in the County of P. in *Wales*, in an Aſſize of Darein Preſentment: The Principal Error inſiſted upon was, That the Verdict was not good, and the Jury had not well enquired, becauſe they did not finde when the Church became void, but ſaid in their Preſentment, *Quod tempus ſemeſtre modo tranſivit*, which might be long before the Writ brought. But the Opinion of the Court was, that the Verdict was good, and it is not neceſſary to finde when the Church became void; but *modo tranſivit*, ſhall be intended, that the ſix moneths paſſed pendant the Writ, which is only enquirable in reſpect of the damages; and when here the value of the Church is enquired of, and found of the value of 80 l. and that the Defendant is found to come in *ex Preſentatione* of one other of the Defendants, ſo that the Patron and the Incumbent are not named in the Writ, although, that the Defendant may be in by ſix moneths by the ſame Patron which was named before in the Writ brought, he ought to be removed; And the Judgment is for 40 l. which is for the moyty of the value, and therefore the Enquire and the Judgment are good. The Judgement was affirmed. H.11. 8 Car. in B. R. *Cort* and the Biſhop of S. *Davids* Caſe. *Cro.* 1. Part, 249. 253.

3. Note, The Writ of *Quare Impedit*, is a mixt Action, in which Summons and Severance doth lye; and although *inclusivè* the Preſentment may be recovered thereby, yet damages therein are principally reſpected; and therefore, If Husband and Wife be ſeized of an Advowſon in the right of his Wife, if the Church become void, and the Husband be diſturbed in his Preſentation, he may have a *Quare Impedit* in his own name, without naming the Wife in the Writ: for although the Preſentment be recovered thereby, yet for the diſturbance, which is a Perſonal wrong, damages are to be recovered, which ſhall go the Husband; and therefore if the Husband do bring a *Quare Impedit* upon ſuch a diſturbance made to him in his Preſentment to the Avoydance; a Releaſe of all Actions perſonally by the Husband, is a good Bar. See 22 H. 6. 27. 50 E. 3. 13. 28 H. 6. 9. acc.

4. Note, In a Writ of Darein Preſentment, or *Quare Impedit*, Damages ſhall be recovered, *Si tempus ſemeſtre tranſierit per impedimentum alicujus; Ita quod Epiſcopus Eccleſiam confœrat, & verus Patronus ea vice Preſentationem ſuam amittat, adjacentur Damna ad valorem Eccleſiæ de duobus annis; Et, ſi tempus ſemeſtre non tranſierit, ſed diſtrationatur Preſentatio infra Tempus prædictum & tunc adjacentur damna ad valorem Medietatis Eccleſiæ per unum annum*: And although it is ſaid that the King ſhall Count to his damages in a *Quare Impedit*, yet the King ſhall not recover damages, becauſe he is not within the clauſe of the Statute of *Weſtm.* 2. which giveth the damages. *Cook* 6. Part, 51. in *Boſwell's* Caſe. *Cook* 5. Part, 59. *Specots* Caſe.

5. Husband and Wife brought a *Quare Impedit* againſt the Biſhop of E. and Declared, That A. was ſeized of a Mannor, to which an Advowſon was appendant, and demiſed it to the Wife for life, and that they Preſented J. S. who dyed, and ſo it dig

did belong to them to Present: The Defendant pleaded, That the Plaintiff Presented one, who was *Scismaticus inveteratus*, whereof he gave notice to the Plaintiff; whereupon the Court gave Judgment, *viz. Ideo Consideratum est*, That the said Husband and Wife, *Recup reat versus prædict. Episcopum suam Presentationem ad Ecclesiam prædict. & habeant Brev. Episcopo Cant. totius Angliæ Primat. loci illius Ordinario, eo quod prædict. Episcopus est pars, & idem Episcopus in misericordia.* After a Writ of Enquiry of the value of the Church was awarded, and upon that Judgment was entred again, *viz.* That the Plaintiff should have a Writ to the Bishop, *ut supra*; *& quod recuperet versus prædict. Episcopum damna, & prædict. Episcop. in Curiam.* Upon this Judgment, Error was brought: The Error assigned was, That the Bishop was twice amerced, which he ought not to be by Law. It was answered, and Resolved, That he was but once amerced; for the Judgment in the Kings Bench was but a recital of the first, and so to give Judgment of all the damages, and not a new Judgment. But if it were admitted that the later Judgment were erroneous, yet the first Judgment is good, and perfect in it self, and shall not be impeached by an Error in the second Judgment; for the first Judgment was the Judgment which is in a *Quare Impedit* at the Common Law: for before the Statute of *Westm.* 2. the Plaintiff in a *Quare Impedit*, did not recover damages, and the Plaintiff after the Statute, may take the Judgment at the Common Law, and leave the benefit of the Statute, if he will; for which cause the Court gave Judgment, that the Judgment should be affirmed. See *Cook* 5. Part, 59. *Specots* Case. Hill. 32 Eliz. in B. R.

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5. *More*, Quare Impedit.

1. NOte, If a *Quare Impedit* be brought against three, one of them may appear before his Companion, and Process shall be continued till Distress against the rest, and the Plaintiff in the mean time may count against him that appears in the *Simul cum*: And if he who appears, pleads *non Impedivit*, the Writ may presently be awarded to the Bishop, but there shall be a *Cessat executio*, until the Plea between the Plaintiff and the other Defendants be determined: And if the Bishop appeareth, and claimeth nothing but his Ordinary, the Writ *ad admittendum Clericum* shall be awarded to the same Bishop upon the Judgment: But if the Bishop make Title and Claim to Present, then the Writ *ad admittendum Clericum*, shall be awarded to the Metropolitan of the Province: The death of one of the Plaintiffs doth not abate the Writ. If the Plaintiff recover in a *Quare Impedit*, he shall recover damages; and if a man do recover in a *Quare Impedit*, and dyeth, the Heir shall not sue forth Execution, because it is not a real Action. And Note, That the Plaintiff in his Count is to make mention of the last Incumbent, otherwise his Writ shall abate. See *Brownlow* 1. Part, 158.

2. Note further these Rules concerning *Quare Impedit*. 1. That the Husband alone, but in the Right of his Wife, may without his Wife, bring a *Quare Impedit*, but not an Assize of Darein Presentment, for that he shall recover nothing but his Presentation and damages, and if the Wife dyeth pendant the Writ, the Writ shall not abate. 2. That if a Writ of *Quare Impedit* be brought, and the Writ is, *Quod permittat Nominate ad Ecclesiam*, the Writ shall abate, for that there is no such Writ in the Register, but the Writ must be *Presentare ad Ecclesiam*. 14 H. 4. 11. and 1 H. 5. 2. 3. That a *Quare Impedit* for an Advowson in *Wales*, must be brought in the next English County. 4. In this Action of *Quare Impedit*, Judgment shall be given in this Action upon the Issue tryed, at the Assizes; and in this Action the Jury are to enquire of the three points, *viz.* of the Plenarty, Value of the Church, and of the last Presentation. 5. In this Action of *Quare Impedit*, Admission, Institution, Ability, Plenarty, shall be tryed by the Certificate of the Ordinary; but whether the Church be void by Resignation, or whether the Patron hath Presented his Clerk, or not, shall be tryed by Jury at the Common Law. 6. In a *Quare Impedit*, Protection doth not ly for the Defendants, because of the danger of the Lapse; Nor shall Consusans of Pleas be granted in a *Quare Impedit*, because the Inferiour Court cannot Write to the Bishop to admit the Clerk; nor shall a man have Aid in a *Quare Impedit* for the danger of the Lapse. 7. In the Count in a *Quare Impedit*, the Plaintiff must lay a Presentation from him from whom he deriveth his Title, or under some from whom he claimeth, otherwise it is not good. See for these Rules, *Cook* 1. Part, *Institutes*, 35. H. 6. 38. 13 E. 3. Tit. *Protection*. 15 E. 3. Tit. *Consusans*. 9. H. 7. 15. 5 H. 7. 96. Brev. Tit. *Aide*, 120. and *Brownlow*, 1 Part, 158.

3. Note, According to the last Rule above, That a man (Regularly) shall not have a *Quare Impedit*, unless he may alledge a Presentment in himself, or in one of his Ancestors, or in some other by whom he claims the Advowson, and that in his Count; yet the same hath some Exceptions, for if at this day a man by the Kings Licence make a Church Parochial, which shall be Presentable, &c. if he be disturbed to Present, he shall have no other

other Writ for the Recovery thereof then a *Quare Impedit*, and that without alledging Preſentment in any perſon for that Writ being the moſt uſual Writ, ſhall not be altered for any ſuch ſpecial Caſe: But if a man recover an Advowſon by a Writ of Right againſt another, where the Church is void, he ſhall Preſent; and if he be diſturbed, he ſhall have a *Quare Impedit*, and alledge a Preſentment in him againſt whom he recovered, without alledging any other Preſentment. See *Fitzh.* 33. acc.

4. *Quare Impedit* againſt the Biſhop of St. *Aſaph*, who juſtified for Lapſe: The Plaintiff replyed, That before the ſix moneths expired, he Preſented to the Biſhop one B. a Maſter of Arts, and a Preacher allowed, &c. The Defendant by Rejoynder ſaid, That the Church by which the Preſentment in the Action is brought, is a Church with Cure of ſouls, and that the Pariſhioners there are *Homines Wallici Wallicam loquentes Linguam, & non aliam*, for which cauſe he refuſed him, and gave Notice to the Plaintiff of ſuch Refuſal, and of the cauſe of it; upon which the Plaintiff did demur. It was ſaid in this Caſe, That the Rejoynder was not good, for that the Defendant had departed from his Bar; for in the Bar, he entitles himſelf by reaſon of Lapſe; and in the Rejoynder he confeſſeth the Preſentment of the Plaintiff, and pleads his Refuſal of his Clerk, and the cauſe of it. It was the Opinion of the Court, That it was a Departure: But Judgment was given for the Plaintiff upon another point in the Caſe. See *Librum.* Trin. 27 Eliz. in C. B. *Albany* and Biſhop of *Aſaphs* Caſe. *Leon.* 31.

5. *Quare Impedit* by the Queen againſt the Archbiſhop of *Canterbury*, the Biſhop of *Chicheſter*, and the Incumbent; and Counted, That A. was ſeized of the Advowſon, and was Outlawed in an Action perſonal, at the ſuit of J. S. The Patron pleaded in Plea, and the Incumbent the ſame Plea by himſelf in Bar. The Queen demurred in Law, in this manner, *viz.* *Quod ſeperalia placita per dictos, &c. placitus &c. Dicta Domina Regina neceſſe non habet, nec tenetur per Legem terræ reſpondere.* It was the clear Opinion of the Court in this Caſe, That the Demurrer ought to have been ſeveral, upon the Plea of the Patron upon it ſelf, and upon the Plea of the Incumbent by it ſelf. Hill. 3 Eliz. in C. B. The Queen and Biſhop of *Canterburies* Caſe. *Leon.* 139.

6. A. B. and C. Executors of J. S. Brought a *Quare Impedit* againſt the Biſhop of *Coventry*, &c. and M. the Incumbent, *Quod permittat Preſentare ad Archidiaconatum* of D. which was void, *Et ad Preſentationem Teſtatoris in vita ſua, & nunc in retardationem Executionis Teſtamenti*, did belong to the Executors. It was ſaid, That a *Quare Impedit* did not lye of an Archdeaconry; but that was Over-ruled by the Court: But the Court was of Opinion, That in this Caſe the Writ ſhould abate, for that the diſturbance to the Teſtator cannot be ſuppoſed new matter, *in retardationem Executionis Teſtamenti*. But the Juſtices agreed, That the Executors might have a ſpecial Writ upon their Caſe for their ſaid Diſturbance. Trin. 31 Eliz. in C. B. *Smalwood*, anp the Biſhop of *Coventry*, &c. Caſe. *Leon.* 205.

7. *Quare Impedit*, The Plaintiff Counted, That A. was ſeized of the Advowſon, and granted the next Avoydance to the Plaintiff, and B. and that the Church became void; and during the Avoydance, B. releaſed to the Plaintiff. It was the Opinion of the Juſtices in this Caſe, That the Releaſe being after the Church became void, was of no effect, but utterly void; and that in the Principal Caſe, the Releaſe being void, B. ought to have joyned with the Plaintiff in the Action. Mich. 31 Eliz. in C. B. *Brookbyes* and *Wickhams* Caſe. *Leon* 167.

8. In a *Quare Impedit* by the Queen, the Caſe was, A. being qualified, took two Benefices, above the value of 8 l. and after took a third Benefice, above the ſaid value, whereby the firſt became void, and remained void for two years: The Patron did Preſent A. who being Inſtituted and Inducted, refuſed to pay to the Queen her Tenths, by which by the Statute of 26 H. 8. the Church was *ipſo facto* void, and the matter was certified into the Exchequer: The Biſhop being Patron in the Right of his Biſhoprick, did Preſent the Defendant; againſt whom the Queen brought the *Quare Impedit*. It was adjudged for the Queen, That the *Quare Impedit* did lye; for the Recuſancy to pay the Tenths was his own act, and is a Reſignation; and this ſhall not hinder the Queen of the Lapſe. Mich. 30 Eliz. in C. B. Rott. 2299. The Biſhop of *Lincolns* Caſe. *Owen*, 5.

9. In a *Quare Impedit*, the Iſſue was, If the Advowſon was Appendant to the Mannor of D. in groſs; The Jury found that it was Appendant, and further found, That the Queen had Right and Title to Preſent, for that ſhe had Preſented at the two laſt Avoydances. It was the Opinion of the Court, That if it appeareth upon the Pleading, that the King hath Title to Preſent; The Court ſhall award a Writ to the Biſhop for the King: But here in this Caſe, there doth not appear any Title for the Queen upon the Pleading, but only upon the Verdict, ſo as the one party or the other may anſwer it; And becauſe in this Caſe the Jury have found for the Plaintiff, the Title found for the Queen ſhall not be reſpected, and it was ſurpluſage in the Jury

to finde it, for it was out of their Iſſue, and their charge. Trin. 31 Eliz. in C. B. *Norwood* and *Dennis* Caſe. *Leon.* 323.

10. In a *Quare Impedit*, the Iſſue was, If A. by Covin between him, and B. and C. did R ſigne into the hands of the Biſhop: In this Caſe it was Reſolved, That if the King hath Title of Lapſe, and a Reſignation be made by fraud, and one Admitted, this ſhall not take away the Kings Title; for if the Kings Title appear upon Record, then ſhall go out a Writ to the Biſhop for the King; but otherwiſe it is upon matter of Evidence, The King ſhall loſe his Preſentation, as well by Reſignation, as by death, where he hath Title to Preſent by Lapſe, and doth not; except the Reſignation be by fraud. Trin. 6. Jac. in C. B. and the Biſhop of *Chicheſters* Caſe. *Brownlow* 1. Part, 161.

11. In a *Quare Impedit*, The Plaintiff Counted, That R. B. was ſeized of the Parſonage of *Horley*, to which the Advowſon of the Vicarage was belonging; and that the Vicarage became void by the death of A. and that it was in the Kings hand, by reaſon of the Wardſhip of the ſon of R. B. who Preſented J. S. and then conveyes the Parſonage to J. D. in Fee; who 1 *Jan.* 1601. granted to F. the next Avoydance of the Vicarage, who granted it to the Plaintiff, and that J. S. dyed, and ſo he ought to Preſent: The Defendant as Parſon impariſonee of the Vicarage, ſaid, That King *Hen.* the 8. was ſeized of the ſaid Parſonage of *Horley*, to which the ſaid Advowſon of the Vicarage, &c. and Deviſed a Deſcent of it from *Hen.* 8. to the Queen, who Preſented J. S. and that by his death, King *James* Preſented him, who was Inſtituted and Inducted; and Traverſed, That R. R. was ſeized of the Rectory, *ad quam &c.* It was found by Verdict, That J. D. and his Wife were ſeized to them, and the Heirs of the Husband of the Rectory of *Horſham*, and 10 *Maii* 31 H. 8. did give the ſame Rectory to King *Henry* the 8. and to his Succeſſors; and that the ſaid King being ſeized of the Rectory of *Horley*, to which &c. by his Letters Patents 31. of his Reign, in Conſideration of the ſaid Rectory of *Horſham*, by the ſaid J. D. and his Wife, Granted to the ſaid King and his Succeſſors, gave to the ſaid J. D. and his Wife, the ſaid Rectory of *Horley*: and that 26 *July*, 31 H. 8. and not before, J. D. and his Wife acknowledged the ſaid Deed, which was afterwards duly Enrolled: The Queſtion was, That although the Deed to the King was not Enrolled, nor acknowledged at the time of the Grant, made by the King. If the Inrollment of it afterwards ſhould make it a good Grant, *ab initio*. It was the better Opinion of the Court, That although the Grant was not compleat, nor perfected, for want of Inrolment at the time of the Grant of the Rectory of *Horſham*, yet when the Inrolment came, it ſhould take effect neither from the Inrolment of it, nor by it, but by the firſt act between the parties; and that it ſhould binde to all purpoſes, *ab initio*: And ſo Judgment was given for the Plaintiff, who came in under the Kings Title, Hill. 12 Jac. in C. B. *Nevdl r*, and the Biſhop of *Wintons* Caſe. *Hob.* 222. *Brownlow*, 1. Part, 163. the ſame Caſe.

12. A. brought a *Quare Impedit* againſt the Biſhop of *London* for the Church of B. and claimed by Grant of the next Avoydance, made to him by J. G. The Defendant pleaded an Uſurpation by Queen *Mary* upon a Deprivation, and Plenarty of her Clerk by ſix moneths: The Plaintiff pleaded a Recovery by a *Quare Impedit*, upon a *Non ſum Informatus* by the Patron, againſt the Queen. It was holden in this Caſe, That if the King upon Uſurpation doth Preſent, and his Clerk be in by ſix moneths, If the Patron brings a *Quare Impedit* againſt the Kings Clerk, and recover by *Non ſum Informatus*, this ſhall remit the Patron to his Ancient Right; but otherwiſe it is, If the King do Preſent by Title in the Caſe of Deprivation, there the Patron muſt have ſix moneths after Notice. It was adjudged for the Plaintiff. Paſch. 12 Jac. in C. B. *Auſten* and the Biſhop of *Londons* Caſe. *Brownl.* 1. Part, 165. See *Bulſtr.* 3. Part, 38, 39, 40. the ſame Caſe.

13. Error brought by the King, of a Judgment given in a *Quare Impedit*, in the Common Pleas againſt the King: Where the Queſtion only was, If a double Uſurpation upon the King, doth ſo put him out of Poſſeſſion, that he ſhall be forced to his Writ of Right: And it was adjudged in C. B. againſt the Opinion of *Anderſon* Chief Juſtice, That he was put to his Writ of Right. Now upon this Writ of Error brought, it was Reſolved by all the Juſtices of the Kings Bench, That the Judgment given in the Common Pleas, ſhould be reverſed: And the reaſon of their Judgment was, Becauſe the Right of Patronage, and the Advowſon it ſelf being an Inheritance in the Crown upon Record, the Law will ſo protect it, that no force or wrong done by a ſubject, ſhall deveſt it out of the King; for there is a Record to entitle him, but there is no matter of Record againſt him: For a Preſentation by a ſubject, is but matter in fait, the which although it be mixed with that Judicial Act of the Biſhop, with Inſtitution, yet it ſhall not prejudice the King, being only grounded upon the wrong of a Subject. Trin. 4 Jac. in B. R. The King and *Matthewes* Caſe. *Brownlow*, 1. Part, 166. See *Cro.* 2. Part, 53. The King and Biſhop of *Wintons* and *Champions* Caſe. *Cro.* 2. Part. 53.

14. *Quare Impedit* by A. B. and C. againſt the Biſhop of P. and *Yates*. The Plaintiffs Count That

That W. W. was ſeized in Fee of the Advowſon of the Church as in groſs, and being void, Preſented E. B. who was Inſtituted in the time of Queen *Eliz.* and that, he ſo ſeized, the ſame deſcended to R. W. his ſon and heir, who dyed ſeized without Iſſue, and the Advowſon deſcended to his three ſiſters, E. F. and M: F. took to husband *E. Dryden*, who dyed ſeized of that part of the Advowſon *pro Indiviſo*, with the other two Siſters, which deſcended to Sir *John Dryden* his ſon (and ſo conveyes the deſcent to the other Siſters) and that by the death of the ſaid E. B. the laſt Incumbent, it belonged to them to Preſent; The Biſhop claimed nothing but as Ordinary: P. pleaded, That he was Parſon Impariſonee of the Preſentment of the King; and that before W. W. had any thing in the Advowſon, Queen *Eliz.* was ſeized in Fee of the ſaid Advowſon, *Jure Coronæ*, in groſs; and Preſented one J. E. who was Inſtituted and Inducted: That the Queen dyed, and the Advowſon came to King *James*, who Preſented the Defendant. The Plaintiff replyed, That the Church being void by the death of E. B. they Preſented, and Traverſed, That J. E. was Admitted, Inſtituted, and Inducted. It was found for the Plaintiffs, and Judgment given: Whereupon Error was brought by Y. and the Error aſſigned was, Becauſe the Plaintiffs Traverſe the Admiſſion, Inſtitution, and Induction of J. E. upon the Preſentation of the Queen, whereas they ought to have Traverſed the ſeizin of the Queen, and not the Admiſſion, &c. But it was adjudged, That the Traverſe was good, and well taken, and that the ſeizin of the Queen ought not to have been Traverſed; and the Judgment was affirmed. Mich. 10 Car. in B. R. Sir *John Dryden*, and others, and the Biſhop of *Peterborough* and *Yates* Caſe. *Cro:* 1. Part, 423.

15. Note, It was holden by the whole Court, but *Walmeſley*, Where the Grant of an Advowſon was pleaded, after the Statute of 27 H. 8. to one to the uſe of an other in Tail, That *Ceſtuy que uſe* needs not ſhew this Deed of Grant; becauſe the Deed belongs to the Grantee, and not to him; but yet he ought to expreſs that it was granted by Deed. See *Poph.* 277. *Eſcotts* Caſe. Hill. 6 Jac. in B. R. The Earl of *Huntington*, and Sir *Anthony Mildmays* Caſe. *Cro.* 2. Part, 217.

16. In a *Quare Impedit* for a Diſturbance to the Church of F. in the County of D. the Plaintiff entituled himſelf by Grant of the next Avoydance; and ſhewed, That A. the Incumbent was created Biſhop of O. in *Ireland*, and that afterwards the King Granted to the ſaid Biſhop to retein the ſaid Church for ſix years, *in Commendam*; the Incumbent dyed, whereby the Church became void, and thereupon the Plaintiff Preſented. In this Caſe it was agreed by the whole Court, 1. That the Plaintiff was to be barred, for that he hath not in his Declaration ſufficiently entituled himſelf. 2. It was holden, That when the Incumbent was created Biſhop, and the King Preſents, or grants that he ſhall hold it *in Commendam* (which is *Quaſi* a Preſentation); If the Grantee of the next Avoydance doth not then Preſent, he hath loſt his Preſentation; for he ought to have the next Avoydance, and he cannot have any other. It was adjudged againſt the Plaintiff. Mich. 22 Jac. in C. B. *Woodley* and the Biſhop of *Exeter*, and *Manwarings* Caſe. *Cro.* 2. Part, 691.

17. In a *Quare Impedit*, the Plaintiff Counted, That the Defendant being Parſon of the Church in Queſtion, was Preſented to another Benefice, and Inducted 15 *Aprilis*, by which the other Church became void: The Defendant ſaid, That he was Qualified at ſuch a day, which was after the 15. day of *April*, without that, that he was Inducted the 15 of *April*. It was the Opinion of the Court, That it was no good Traverſe; for he ought to have ſaid generally, without that, That he was Inducted before the day at which he is alledged to be Qualified; for if a man Declares of a Treſpaſs done 1 *Aprilis*, and the Defendant pleads a Releaſe 1 *Feb.* he ought to ſay without that, That the Treſpaſs was made after the Releaſe: by *Periam* Juſtice. Mich. 29 Eliz. in C. B. *Godbolt.*

18. Note, In a *Quare Impedit*, the Caſe was, A man recovered in a *Quare Impedit*, and had a Writ to the Biſhop to Admit his Clerk, and he did Admit and Inſtitute his Clerk; but he could not procure Induction; It was holden in that Caſe, That he had no remedy to have Induction, but by Suit in the Spiritual Court; and if a Prohibition be granted to ſtop the Suit there, a Conſultation ſhall be awarded; for when the Biſhop hath Admitted the Clerk, and Inſtituted him, he hath done all that the Common Law requires him to do; and for the Induction, the ſame is to be by the Archdeacon, for which he hath no remedy but in the Spiritual Court. Paſch. 23 Eliz. in C. B. *Godbolt*, acc.

18. An Aſſize of Darrein Preſentment was brought againſt the Patron, Ordinary, and Incumbent, for the Church of G. in the County of N. the Jury appeared at the Bar; the Ordinary made default, the other Defendants pleaded an abatement of the Writ; That the ſame Plaintiff had before brought a *Quare Impedit* againſt the Defendants for the ſame Church; which Writ was returned, and that they did appear to defend it. It was the Opinion of the whole Court, That the Plea in abatement of the Writ was good; for a *Quare Impedit* is a Writ of a higher nature then a Darrein Preſentment; for it is for the right, and for the Poſſeſſion: and if he againſt whom an Aſſize

of Darrein Presentment is brought, brings a *Quare Impedit*, the Assize o Darrein Presentment shall abate, Register, 30. acc. See 10 E. 3. *Statham.* Darrein Presentment. 3. If a man have a *Quare Impedit*, and also an Assize of Darrein Presentment of one and the same Advowson, the Darrein Presentment shall abate. The whole Court agreed, The Plea was good in abatement of the Writ, and awarded that the Assize should abate. Mich. 15 Jac. in C.B. *Andrews* and *Hackers* Case. *Hutton* 3.

19. *Quare Impedit* brought by *George Sherley* Baronet, against *Underhill* and *Barsey*, for Presenting to the Vicarage of the Church of *Nether-Elington*, and Counted of a Nomination as Appendant to the Church of *Elington*. It was found for the Plaintiff at the Assizes o. *Warwick*, and Judgment there for him, and a Writ to the Bishop awarded. Error was brought, and it was, to remove the Record which was between *George Sherley* Knight and Baronet; and the truth was, That Sir *George* is not, nor was named Knight, in all the Record. It was the Opinion of the Court, That the word Knight is part of the name, and so no Record was removed. Another error was assigned, that the Judgment was, *Quod recuperet Presentationem suam ad Ecclesiam predict.* whereas it ought to be, *Quod recuperet Presentationem ad Vicariam Eccles. & valorem Vicaria Eccles.* It was the Opinion of the Court, That it was but the misprision of the Clerk, and therefore Ruled it to be amended. Mich. 18 Jac. in C. B. *Sherley* and *Underhill's* Case. *Hutton* 41.

20. In a *Quare Impedit*, the Case was this: A. and B. were Patrons of an Advowson, to which they used to Present by Turns; A. Presented according to his Turn, and his Clerk dyed; B. Presented in his Turn also, and his Clerk was Deprived; After which A. granted his Advowson to L. the Plaintiff in Fee, and then the Bishop without any Notice, Collates J. S. to the Church, who dyed: The Question was, If L. the Patron should Present, or B. It was adjudged for the Plaintiff L. because that notwithstanding the Church was void by deprivation, yet the Patron might transpose his Advowson over. Mich. 34 Eliz. in C. B. *Leek*, and the Bishop of *Coventry's* Case. *Owen*, 131.

21. The Case was, The King was seized of a Mannor, to which an Advowson was Appendant in Fee, the Church voided, and a Stranger Presented his Clerk, who was in by six monethis: The King granted the Mannor, with all Advowsons to it, to B. the Incumbent dyed: It was holden by the Justices, That in that Case, the Grantee might Present, for the Advowson was always appendant, and the Inheritance thereof did pass unto the Grantee, and was not made disappendant by the usurpation, as it would have been in the Case of a Common person, for the King cannot be put out of possession: But in that Case it was holden, That the Patentee could not have a *Quare Impedit* of the first Disturbance, for that the Presentment did not pass to him, being a thing in Action, not being mentioned in his Grant; And therefore it was holden, If the Patentee bringeth a *Quare Impedit* of the second Avoydance, he must make his Presentment by the Presentment of the King, not making mention of the usurpation. Mich. 14 Eliz. in C. B. *Leon.* 3. Part, 28.

22. A man brought a *Quare Impedit*, and after Judgment, had a Writ to the Bishop of N. and an *Alias* upon that; and at the Return of the *Alias*, the Bishop Returned, That after the awarding of the first Writ, and before the Return of the *Alias*, the Queen had Presented the same Defendant by her Letters Patents, who is Admitted, Instituted, and Inducted. It was the Opinion of the Court, That the Bishop, as well for his contempt in not Returning the first Writ, as for his ill Return made upon the *Alias*, that he should be amerced 10 l. and so he was amerced 30 l. and a new Writ awarded to the Bishop, to admit the Clerk of the Plaintiff. Hill. 29 Eliz. in C. B. *Moore*, and the Bishop of *Norwiches* Case. *Leon.* 3. Part, 136. *Goldes.* 3. & 34. the same Case.

25. The Queen brought a *Quare Impedit* against the Bishop of *London*, and *Scot*; the Case was this: A. seized of an Advowson in gross, holden of the Queen in chief, alliened the same by Fine, without Licence of the Queen, the Church became void, the Conusee Presented: The Queen without Office found, brought a *Quare Impedit*: It was agreed by the whole Court in this Case, That if the allienation had been by Deed only, that the Queen without Office found, should not have the Presentment; for upon such an allienation, by matter in fait, no *Scire facias* shall Issue, without Office found of the allienation: But upon an Allienation without Licence by matter of Record, a *Scire facias* lyeth before Office. It was then moved, If the Queen being entituled to Present, *ut supra*; If a Pardon to the Conusee of all Allienations without Licences, and Intrusions; If the Estate of the Incumbent were thereby confirmed: But the Court did not Resolve the point. Trin. 30 Eliz. in B. R. The Queen, and the Bishop of *London*, and *Scots* Case. *Leon*, 3. Part, 195.

24. The Queen recovered in a *Quare Impedit*, against the Bishop of *Glocester*, and one S. in which *Quare Impedit*, the Bishop pleaded, *quod ipse nihil habet, nec habere clamat in Ecclesia predict. nec in advocatione ejusdem, nisi Admissionem, Institutionem, &c.* And afterwards the Bishop and the Incumbent brought a Writ of Error; and if

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the Writ of Error brought by the Biſhop and the Incumbent joyntly, was well brought, was the Queſtion. It was ſaid by ſome, That the Biſhop had no cauſe to bring a Writ of Error, for that he had diſclaimed in the Church, and the Patronage of it; Alſo the Writ in the cloſe of it was, *Ad grave damnum Epiſcopi*, whereas the biſhop could not be grieved by the Judgment, becauſe he had nothing in the Church. It was the Opinion of *Wray* Chief Juſtice, That the Biſhop ſhould joyn for Conformity of Law, and for privity of Record, and that the Biſhops plea is not ſo ſtrong as a Diſclaimer; for in caſe of Diſclaimer, the Judgment is, That the party ſhall take nothing by the Writ: But in caſe of the Biſhop here, the Judgment is, *Quod Querens recuperet poſſeſſionem ſuam verſus dictum Epiſcopum ad Eccleſiam prædictam*: Afterwards the Writ of Error was awarded good. Trin. 29 Eliz. in B. R. The Queen and the Biſhop of *Glouceſters* Caſe. *Leon*, 3. Part 198.

25. Note by *Cook* Chief Juſtice, That it hath been adjudged, That if a Church be void, and a Stranger without the privity of the after Incumbent, procures the Patron to Preſent, and gives unto him any ſum of money for his Preſentation, although that the after-Incumbent is not ſubject to that Symoniacal Contract, yet in as much as he comes in by a Symoniacal Preſentation, the Church is void, and it doth belong to the King to Preſent: So it is where the Incumbent makes a Symoniacal Contract with the Friend or Wife of the Patron, and the Patron knows not thereof, and the Incumbent is Preſented thereto by means of him who made the Symoniacal Contract, he is within the Statute of 31 Eliz. and the King may Preſent: And it was ſaid, That the Incumbent who is once Preſented, Admitted, and Inſtituted by a Symoniacal Contract, is a perſon diſabled to enjoy that Benefice, although he obtains a Preſentation *de novo* from the King; for that the Statute hath diſabled him to have it during his life. Mich. 13 Jac. The King, and *Cole* and *Sayes* Caſe. *Cro.* 2. Part, 385. *Hob.* 90. acc.

26. In a *Quare Impedit* the Caſe was, *Parkinſon* Patron of the Advowſon of the Church of D. the Church being void, did contract with a Stranger, That for 10 l. *per annum* to be paid unto *Parkinſon*, during the life of *Kitchin*, that he would Preſent *Kitchin* to the Church, which was done accordingly. It was adjudged in that Caſe, That although *Kitchin* knew not of the Contract, nor was any ways agreeing or conſenting to the ſame, yet he came in by Symonie; for the Statute ſhall be conſtrued ſurely againſt Symonie and Symoniſts, and the very Preſentation, Admiſſion, and Inſtitution of *Kitchin* in that Caſe, were adjudged void. Mich. 8. Jac. in the Exchequer, *Calvert* and *Kitchins* Caſe.

27. If a man purchaſe the next Preſentation or Avoydance, and doth not mention in certain what perſon he intendeth to Preſent, when the Church doth become void, he may Preſent any perſon whatſoever, who is capable of the Benefice: But if a man purchaſe the next Avoydance or Preſentation, or the ſame be Granted to him to Preſent J. S. by name, be it Son, Kinſman, or Friend of the Patron; It was adjudged, Paſch. 14 Jac. in C. B. in *Winſcomb* and *Pullſtones* Caſe, That the ſame is Symonie, and that the Clerk Preſented, comes in by Symonie, and the Patron ſhall loſe the Turn, and the King ſhall Preſent. And in that Caſe it was ſaid that it was adjudged, That when the Teſtator did contract by Symonie, that his Executors ſhould Preſent another man to the ſame Church, being void at the time of the contract, and the Teſtator dyed, and the Executors did Preſent him accordingly; that ſuch Preſentation was void, and within the Statute of 31 Eliz. Mich. 3 Jac. in C. B. *Fremdu* and *Engliſhes* Caſe.

28. In a *Quare Impedit*, the Caſe was, A. was ſeized of the Prebend of N. in the Collegiate Church of S. *Mary* of S. to which the Advowſon of the Vicarage of S. was Appendant: A. made a Leaſe of ſeveral parts of the Prebend, in the Concluſion of which Leaſe were theſe words, *Cum omnibus Commoditatibus, Emolumentis, Proficuis, & Advantagiis eidem Prebend. ſpectand. ſeu aliquo modo pertinend.* The Queſtion in that Caſe was, Whether the Advowſon of the Vicarage did paſs by this Caſe. It was the Opinion of the whole Court, and ſo after judged, That the Advowſon of the Vicarage did not paſs; for all the words before do imply things gainful, which is contrary to the nature of an Advowſon, and words in Grants ſhall not be conſtrued to an unuſual and an unreaſonable ſenſe. Mich. 16. Jac. in C. B. *London*, and the Collegiate Church of S. *Mary Southwell*. *Hob.* 303, 304.

29. In a *Quare Impedit*, the Caſe was, A. ſeized of a Manor with an Advowſon appendant, Preſented B. who was Admitted, Inſtituted, and Inducted: Afterwards A. ſold the Manor to which the Advowſon was Appendant, to J. S. the Church became void by the death of B. The Queen (the Church being void) Preſented J. D. by theſe words, *per mortem naturalem Incumbentis ibidem vacant.* who upon the ſame Preſentation, was afterwards Admitted, Inſtituted, and Inducted, by Letters of Inſtitution, *per Dominam Reginam, veram & indubitatam Patronam*: J. D. dyed, The King Preſented R. in theſe words, *Ad noſtram Preſentationem, ſive ex pleno jure, ſive per lapſum temporis, ſive alio quocunque modo ſpectant.* The Que-

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ſtion was, Whether notwithſtanding all this matter, the Advowſon did remain Appendant or not. It was the Opinion of the whole Court, and ſo after adjudged, That the Advowſon did remain appendant, notwithſtanding the Queens Preſentation of J. D. for it appeared, That there was no colour of Title for the Queen to Preſent; No Lapſe, for the Preſentation and Inſtitution were all in one moneth, wherein the Avoydance was; and it was no Uſurpation by the Queen, becauſe the Preſentation ſuppoſed a right, where none was, and ſo was void; for the Queen meant to do no wrong, and ſo the Preſentation of R. upon the ſame reaſon was void; and then the Preſentation of J. D. being void, It was but a Collation of the Biſhop, which makes no diſappendancy. Hill. 17 Jac. in C. B. *Gawdy*, and the Biſhop of *Canterbury*, and *Rones* Caſe. *Hob.* 301.

28. In a *Quare Impedit*, the Caſe was: The Queen Preſented to a Parſonage, which was void by the taking of another Benefice by S. the Defendant. The Defendant to enable him to have two Benefices, pleaded, That he was the Chaplain of Sir *James Croſts*, Comptroller of the Queens houſhold, who by the Statute of 21 H. 8. might have two Chaplains, and might qualifie them to take two Benefices. To which it was Replyed, That the ſaid Sir *James Croſts* had two other Chaplains, which are qualified to have two Benefices, who are alive, ſo as he is the third Chaplain, who could not be qualified by the Statute. To which it was anſwered, That one of thoſe two Chaplains was removed, and diſcharged by the ſaid Sir *James Croſts* to be his Domeſtical Chaplain, *ſcil. Capellanum familiarem*; and he hath now but two Chaplains, of which the Defendant was one: Upon which it was Demurred in Law. There were three points in the Caſe. 1. If a qualification *ſub ſigillo* be ſufficient within the Statute, without the Signature or Name of Sir *James Croſts*. 2. When two Chaplains are qualified, and one is removed out of the Service, If he might qualifie another by the Statute, the party being alive who was qualified. 3. Whether he remain his Chaplain during his life, notwithſtanding ſuch removal. In this Caſe it was adjudged for the Queen. For the firſt point, becauſe the Defendant S. was not qualified, *ſub Signo & Sigillo* of Sir *James Croſts*, but only *ſub Sigillo*: And the words of the Statute are, under the Signe and Seal of the King, or other, their Lord or Maſter, &c. which words [or other, their Lord or Maſter] ſhall be referred to Signe and Seal, which is limitted to the King. To the ſecond point, They agreed the Law to be clear, That after he hath retained as many as by Law he may retain, and they are *ſub Signo & Sigillo* certified and eſtabliſhed to be his Chaplains, and by reaſon thereof, have qualification for two Benefices, although that afterwards they are removed for diſpleaſure, or otherwiſe; yet during their lives, their Maſter cannot take other Chaplains, which may be qualified by the Statute; for ſo every Baron might have Chaplains ſans number, which was not the meaning of the Statute. 3. Reſolved, That although the party was removed from being Domeſtical ſervant of the Family, yet he did remain his Chaplain at large, and ſo a Chaplain within the Statute. Trin. 28 Eliz. in C. B. The Queen, and *Savages* Caſe. *Godbolt*, 41, 42.

See more of *Quare Impedit*, in the Titles of Advowſons, Preſentations, Pluralities, and other Titles.

Quare non Admisit.

Where it lyeth, and for whom, and againſt whom; in what Court, and in what County: and what ſhall be a good Plea in Bar in it, what not.

Quare non Admiſit, is a Writ, which lyeth, Where a man hath recovered his Advowſon or Preſentment, in a Writ of Right of Advowſon, *Quare Impedit*, or other Action; and hath a Writ to the Biſhop to Admit his Clerk, and the Biſhop doth refuſe to Admit him; then he may have this Writ either out of the Chancery, or out of the Court of Common Pleas: In which Writ, it is requiſite to make mention of the Recovery. And Note, That this Writ muſt be brought in the County where the refuſal is. 38 H. 6. 14. *Cook* 7. Patt, in *Bulwards* Caſe.

2. *Quare Impedit* was brought againſt the Ordinary, Patron, and the Incumbent; and Iſſue being joyned, and tryed for the Plaintiff. and Judgment given before the Juſtices of *Nſi Prius*, a Writ was awarded to the Biſhop to Admit the Plaintiffs Clerk, and afterwards the Record was ſent into the Common Pleas, and a new Writ was awarded to the Biſhop to admit the Clerk returnable in the ſame Court: Upon which Writ, the Biſhop returned, That, depending the *Quare Impedit*, a Title was found by Office for the King, by reaſon of the minority of the Plaintiff, being the Kings Ward, and that by reaſon thereof the King Preſented, and that the Church was full of his Preſentment,

ſentment, for which cauſe he could not execute the Writ. It was a Queſtion if the Biſhop might make ſuch Retorn; and, If it ſhould be good or not. It was the Opinion of the Court, That he ſhould not be eſtopped to make the Retorn of the Kings Title, becauſe he is not party, nor privie to the Verdict, nor to any plea of Plenarty. And it was holden in that Caſe, That if the Retorn of the Biſhop be falſe, the Plaintiff may have a *Quare non Admiſit* againſt the Biſhop, and thereby he ſhall recover his damages. Paſch 9 Eliz. *Dyer*, 260. *Baſſetts* Caſe. 24 E. 3. *Fitzh. Quare Impedit*, 15.

3. If a man recover upon a *Quare Impedit*, a Church in *Devon*, and he hath thereupon a Writ to the Biſhop, and he delivereth the Writ to the Biſhop in the County of *Middleſex*, and he there refuſeth to admit his Clerk; and thereupon a *Quare non Admiſit* was brought againſt the Biſhop in the County of *Devon*. It was Ruled in that Caſe, That the Writ ſhould abate; becauſe the Writ ought to be brought in the County where the refuſal was. Mich. 29 H. 8. *Dyer*, 40.

4. King E. 1. Preſented his Clerk to a Benefice within the Province of *York*, who was refuſed by the Archbiſhop, for that the Pope by way of proviſion, had conferred the Benefice on another. The King thereupon brought a *Quare non Admiſit*: The Arch-Biſhop pleaded, That the Pope had long time before provided to the ſaid Church, as one having Supream Authority in that Caſe, and that he durſt not, nor had power to put him out, who was by the Popes Bull in poſſeſſion: It was adjudged, That for this high contempt againſt the King, in refuſing to execute the Kings Writ, the whole Biſhoprick was ſeized into the Kings hand, and loſt during the Kings life. *Cook* 5. Part, 12. in the Caſe of Eccleſiaſtical perſons.

5. In a *Quare non Admiſit*, brought by the King againſt the Biſhop of *Exeter*, the Caſe was, The Church became void, and debate was betwixt A. and B. concerning the Right of Preſentment: After which, the Biſhop did Collate. The King brought a *Quare Impedit* againſt A. and recovered. In that Caſe it was ſaid, That the Biſhop could not countervail the Title of the King, nor diſſeiſe the recovery; and therefore becauſe he refuſed to admit the Kings Clerk, the Temporalty of the Biſhop was ſeized into the Kings hand. See 23 E. 3. 22. acc.

6. Note, It is a good Plea in a *Quare non Admiſit* brought for the Biſhop, to ſay, That the Church is litigious, or that there is a *Quare Impedit* depending of the ſame. See 20 E. 3. *Quare non Admiſit*, 10. and there *Quare non Admiſit* 9. It is a good Plea for the Biſhop, that he did not preſent for Lapſe.

7. If a man have Judgment, and a Writ to the Biſhop to Admit, and the Biſhop refuſeth to Admit the Plaintiffs Clerk; the Plaintiff upon this refuſal, may have a Writ of *Quare non Admiſit*: But if the Defendant doth reverſe the Judgment in a Writ of Error, and afterwards the Plaintiff, in a *Quare Impedit*, brings the Writ of *Quare non Admiſit*; The Defendant in ſuch caſe may plead *Nul tiel Record*: And Note, That by the Reverſal of the Judgment given in a *Quare Impedit*, the Judgment given in a Writ of *Quare non Admiſit*, is alſo reverſed. *Cook* 8. Part, 142. in Dr. *Druries* Caſe.

8. If a man hath recovered in a *Quare Impedit*, and hath had a Writ to the Biſhop to Admit his Clerk, and the Biſhop hath Admitted, and Inſtituted the Clerk, but the Archdeacon will not Induct: It hath been ſaid by ſome, That the Plaintiff hath no remedy, but by ſuing of the Archdeacon in the Spiritual Court: For if he ſhould bring a Writ of *Quare non Admiſit* againſt the Biſhop, It is a good Plea for the Biſhop to ſay, That he Admitted the Clerk, and ſent his Letter to the Archdeacon to Induct him, 38 H. 6. 15. But the Opinion of M. *Fitzherbert* in his *Nat. Brev.* in that caſe is, That if the Archdeacon will not Induct the Clerk, that the Clerk ſhall have an Action upon the Caſe againſt the Archdeacon in the Temporal Court, becauſe the Induction is a Temporal Act. See *Fitzh. Nat. Brev.* acc. in Title *Quare non Admiſit*.

Quarentine.

1. QUarentine is, where a man dyeth ſeized of a Meſſuage and Lands, and immediately after the death of the Husband, the Heir, or he who ought to have the Lands, will put the Wife out of the Meſſuage; then the Wife ſhall have a Writ called *Quarentina habenda*, directed to the Sheriff, and retornable within two or three dayes, ſpeedily to put her into poſſeſſion: For that by the Statute of *Magna Charta*, cap. 7. The Wife ſhall remain in the Capital Meſſuage after the death of her husband, by the ſpace of forty dayes: See *Fitzh. Nat. Brev.* 161. It was a Quære in 19 H. 6. 4. made by *Newton*, If the Woman ſhall not, have meat and drink for that ſpace of forty dayes, becauſe the Statute doth not extend unto it. But the words of the Writ in the Regiſter are, *Habeant rationabilia Eſtoveria, de Bonis maritorum*; and ſee the Statute of *Glocester*, cap. 4. There are Eſtovers *in Vivet & Veſtura*, which have been conſtrued

ſtrued to contain meat, drink, and habitation; Therefore Quere, If ſhe ſhall not have ſuch Eſtovers during the forty dayes.

2. In a Writ of Dower brought by the Wife of J. S. the Defendant pleaded, That the Demandant entred into parcel of the Lands after the Dar-rein Continuance: The Plaintiff ſaid, That ſhe entred for her Quarentine. In that Caſe it was holden, That the Entry of the Wife was lawful; But then it was holden, That ſhe muſt ſhew the time of the death of her husband, and that it was within the time of the forty dayes. Mich. 6. E. 6. *Dyer*, 76.

3. If the woman marrieth within the forty dayes, ſhe ſhall loſe her Quarentine; See 1 *Mar. Dyer*, 97. and ſee 5 *Mar. Dyer*, 161. It is a Quere, If a woman who hath Quarentine, may defend her poſſeſſion with force.

4. See Mich. 6. E. 6. *Dyer*, 76. in Caſe of Quarentine, The Wife muſt not depart from the houſe upon her husbands death, and Return when ſhe will for the reſt of her dayes; but by the Statute of *Magna Charta*, the woman muſt continue in the poſſeſſion of the houſe for the whole ſpace of forty dayes.

Quare Incumbravit Eccleſiam.

1. THis Writ is an Original Writ, as appeareth by 17 E. 3. 74. by *Shard*, and doth not lye, but where the Plaintiff recovereth by Judgment of the Court; Neither doth it lye until the party hath ſued the Writ of *Ne Admittas* to the Biſhop: For if the Biſhop do incumber the Church before the Writ of *Ne Admittas* ſued, the Party in ſuch Caſe ſhall have a *Quare Impedit*, and not a Writ of *Quare Incumbravit*. But if the Biſhop after the *Ne Admittas* delivered unto him, do Admit his Clerk, for whom it is found by *jure Patronatus*, yet the other party ſhall have a *Quare Incumbravit* againſt him, and in the Writ he ſhall recover his damages. 21 E. 3. *Quare Incumbravit*, 3.

2. Note, That after the Writ of *Ne Admittas* delivered, and the ſix moneths be paſt, the Biſhop may Preſent his own Clerk for Lapſe, and ſhall not be charged by *Quare Incumbravit* for that Preſentation; but he cannot Admit the Clerk of another man after the ſix moneths paſt, for that ſhall be againſt the Writ of *Ne Admittas* delivered unto him. Alſo, If the Biſhop do Preſent the Clerk of the other Party after the ſix moneths, who had Preſented unto him before, that Preſentment maketh Title to the party; and therefore although it be after the ſix moneths, it ſeems that then the *Quare Incumbravit* lyeth for the Plaintiff. See 2 E. 3. 50. & 55. acc.

3. Note by *Popham* Chief Juſtice, That the courſe to ſtop Strangers from Preſenting *pendente Brevi*, is, After a *Quare Impedit* is depending, to ſue a *Ne Admittas* to the Biſhop; and if the Biſhop then Admits the Clerk of any other hanging that Suit, and the Plaintiff recovers, he ſhall have a *Quare Incumbravit*, and thereby removes any that comes in pendant the Writ, by whatſoever Title he comes in, and ſhall force him who hath right to recover by *Quare Impedit*: But if he ſues not ſuch a Writ of *Ne Admittas*, if then the Incumbent of a ſtranger ſhould come in by good Title, *pendente Brevi*, he ſhall bar him in a *Scire facias*, and ſhall hold it. Mich. 3 Jac. in B. R. *Lancaſter* and *Lewes* Caſe. *Cro.* 2. Part, 93. by *Popham*.

Quid Juris Clamat.

1. *Quid Juris Clamat* is a Writ, and lyeth, Where a man granteth the Reverſion of Lands which another man holdeth of him for Tenant of life to another man, and his heir, by Fine levyed in the Kings Court of Record, and the Tenant who holdeth the land for life, will not Attorn to ſuch Grant, then the Grantee may have this Writ againſt him, and thereby compel him to Attorn to the Grant; and this Writ muſt be brought againſt thoſe who are Tenants of the Land, the day of the Note levyed, and againſt no other.

2. If he in the Reverſion will levie a Fine of his Reverſion unto another, upon a Writ of Covenant ſued forth againſt him in the Common Pleas: This Conuſans ſhall be taken in the Common Pleas; but the Fine ſhall not be engroſſed, until the Tenant for life hath Attorned: And ſuch Fine is ſaid to be Engroſſed, when the Chirographer maketh Indentures of the Fine, and delivereth them to the party to whom the Conuſans is made, and then the Fine is ſaid to be Engroſſed: And after that, the Conuſee ſhall not have a *Quid Juris Clamat* againſt the Tenant for life: But the courſe is, When he in the Reverſion, upon the Writ of Covenant ſued againſt him, makes the Conuſans of the Reverſion by Fine, that upon that, the Conuſee ſhall have the *Quid Juris Clamat* againſt

against the Tenant for life, and if the Tenant be weak, or that he cannot travel to the Court, then he may ſue a *Dedimus poteſtatem*, directed to the Juſtice, to take his Conuſans, &c. and to certifie the ſame into the Common Pleas. See 22 H. 6. 57. *Cook* 5. Part, in *Toyes* Caſe.

3. Upon a *Quid Juris Clamat*, The Jury found, and gave a privie Verdict over night, and the next day in open Court they altered their Verdict, and found for the Plaintiff, and both Verdicts were Returned upon the *Poſtea* by the advice of the Juſtices of Aſſize and upon which of the Verdicts Judgment ſhould be given, was the Queſtion: And at laſt the Opinion of the Juſtices was, That the latter Verdict ſhould ſtand in force, and not the firſt; and Judgment was given, *Non quod Querens recuperet Seiſinam, ſed ſequatur pro Seiſina ſi voluerit, & quod etiam ſuis Ingroſſetur ſi voluerit.* Mich. 4. Eliz. *Plow.* Com. 210. *Saunders* and *Freemans* Caſe. *Dyer*, 209. the ſame Caſe.

4. A man made a Leaſe by Indenture for years, and further Granted, That if the Leſſor alienes the Reverſion, or dyed within the Term, that then the Leſſee ſhould have Fee; the Leſſor levyed a Fine, the Conuſee brought a *Quid Juris Clamat* againſt the Leſſee, ſuppoſing him to be a Termor only, and he claimed Fee, and for that cauſe Judgement was given againſt the Termor, That he ſhould forfeit his Term, and that the Conuſee might enter, and the Fine ſhould be engroſſed if he pleaſed; and the Juſtices held, That the Condition in that Caſe was repugnant. 6 R. 2. *Pleſmatons* Caſe, vouch in 4 Mar. *Dyer*, 209.

5. Note, In a *Quid Juris Clamat* brought, the Tenant claimed Fee in part, and Attorned for the other part, and yet the whole Fine was Engroſſed without any exception: And yet it was ſaid, That 28 E. 3. in a *per quæ Servitia*, it was found; That one of the Tenants, *Non Tenuit*; and the Fine was Engroſſed for the Reſidue only. Paſch. 4 Mar. *Dyer* 212.

6. In a *Quid Juris Clamat*, brought by *Francis Windham*, the Caſe was this, The Lady *Greſham* was Tenant for life of the Manner of B. in *Norfolk*, the remainder to R. R. in Tail, the Reverſion to W. R. in Fee; R. R. levyed a Fine of his Remainder, to *Francis Windham*, and his Heirs; and before the Engroſſing of the Fine (*ut oportet*) he brought a *Quid Juris Clamat* againſt the Lady *Greſham*; who pleaded, That R. R. the Conuſor, at the time of the Fine levyed, had but an Eſtate in Tail, in the Remainder, and ſhewed how, and demanded Judgement thereupon, if ſhe ſhould be compelled to Attorn: Upon which the Plaintiff Demurred. And it was Reſolved by the Juſtices, That before the Statutes of 4 H. 7. and 32 H. 8. it was a good Plea; yet now after the ſaid Statutes (which make the Fine after the Engroſſing, and Proclamation) a Bar of the Eſtate Tail, although that the *Quid Juris Clamat* ought to be brought before the Engroſſing, and by conſequence, before the Eſtate Tail be barred; and that it doth not appear at the time of the *Quid Juris Clamat* brought, that it ſhall be a Fine at the Common Law, or a Fine with Proclamations. Yet it was adjudged, That ſhe ſhould Attorn. Mich. 28 Eliz. in C. B. Juſtice *Windham*, and the Lady *Greſhams* Caſe. Vouch. in *Cook* 3. Part, 86. in the caſe of Fines.

7. In a Replevin, the Caſe was, A Tenant for life of the manor of D. the Remainder to B. in Fee; B. and her husband levyed a Fine, 10 Eliz. of all the Demeſnes of the ſaid Mannor, by certain quantities of Acres, which included all the Demeſnes, who Granted and Rendered the Demeſnes to J. S. for 50 years, rendring Rent, and Granted the Reverſion to the Husband and Wife, and to the Heirs of B. the Wife; and in the Indentures which lead the uſe of the Fine, it is agreed, That the Husband and Wife ſhould have Egreſs and Regreſs into the ſaid Mannor, to hold Courts upon the ſaid Demeſnes; and it was averred, That the Demeſnes and Services were known, and called by the Mannor of D. 16 Eliz. another Fine was levyed by the ſaid Husband and Wife, of divers other Mannors of the ſaid B. the Wife, excepting the Mannor of D. (in which Fine ſo many Acres were contained, as was ſufficient to paſs the ſaid Demeſnes) to the uſe of the ſaid Wife for life, the Remainder to Sir *Moile Finch*, her eldeſt ſon, in Tail, with divers Remainders over: 19 Eliz. J. S. made his ſon, of the age of three years, his Executor, and dyed; Adminiſtration during his minority, was committed to C. Afterwards 23 Eliz. the ſaid Husband and Wife levyed another Fine of the ſaid Mannor of D. and of divers Acres, ſufficient to paſs the ſaid Demeſnes, to the uſe of the ſaid Husband and Wife, and to the Heirs of the Wife, until the Husband, with the aſſent of the Wife, in Writing, declare to what other uſes, and then to ſuch uſes, C. aſſignes to E. for ten years; A. dyed, E. entred; the Husband and Wife by Writing, declares the uſes to F. and G. and their Heirs: who Eject E. and enfeoff H. and J. unto the uſe of the Wife for life, the Remainder to her younger ſon in Tail; the Wife dyeth, the Rent is behinde; the younger ſon Diſtreins for the Rent, and the Leſſe of Sir *Moyle Finch*,

the eldeſt ſon of the Wife, brought the Replevin: And in this long Caſe, many points were reſolved (See *Librum*) amongſt which were theſe, 1. (Reſolution 9.) That becauſe that E. the Leſſee had but an Intereſt of a Term during the life of A. that no Attornment could be by him to the Fine; and to the diſtinction of the uſes, there needed no Attornment; for when Attornment cannot be, or is not requiſite to the Fine, which is the root, no Attornment is required to the Declaration of the uſes, which are but the branches. 2. (Reſolution 10.) That when a Reverſion is ſettled in any in Judgment of Law, and he hath not poſſible means to compel the Tenant to Attorn, there no Lacheſs is in him, and he ſhall avow, and have an Action of Waſte, without Attornment. 3. (Reſolution 11.) That in the principal Caſe, there was no Lacheſs in the Conuſee to have Attornment, although he had recited the particular Eſtates in the Fine; for preſently after the Conuſans, and before the Fine engroſſed, the Reverſion paſſed to the Conuſee, *& eo inſtante*, it is executed by the Statute of 27 H. 8. of *uſes*; ſo as it was impoſſible to have a *Quid Juris Clamat*, nor other remedy, to compel the Tenant to Attorn; and for as much as by the execution of the poſſeſſion, to the uſe, the benefit of the Conuſee to have *Quid Juris Clamat* is taken away; it is but reaſon that the Act of Parliament ſhould not turn to the prejudice of any: And an Act in Law, ſhall not prejudice any one. *Cook 6. Part, 63. to 68. Sir Moyle Finches* Caſe.

8. A man ſeized of Lands in Fee, made a Leaſe thereof to A. and B. for their lives, and dyed: The ſon granted the Reverſion to C. to which A. one of the Joynt-Tenants Attorned, and afterwards ſurrendred to him all his Intereſt, and dyed: C. entred. It was adjudged in this Caſe, That his Entry was lawful, and that he ſhould be Tenant in Common with B. and in this Caſe it was Reſolved, 1. That the Attornment of A. did veſt the reverſion in the Grantee, becauſe the Eſtate was entire, and Attornment is a lawful Act, becauſe it doth not give an Intereſt, but only preſerves a Grant; and it was ſaid, That if the Reverſion of two Tenants for life, or the Rent or Seignory of two Joynt-Tenants be granted by Fine, there in a *Quid Juris Clamat, quem reddit reddit*, &c. the one ſhall not be admitted to Attorn without his Companion, becauſe that the Plaintiff ought to have a Joynt Attornment in the ſame manner as he demands it, and alſo becauſe the one ſhall not prejudice the other; and upon a general Attornment in a Court of Record, the Leſſee ſhall loſe all advantages which are not claimed of Record. 2. Reſolved, That if the Tenant having notice of a Grant, Attorn for part, it ſhall be a good Attornment for the whole; becauſe Attornment is but a Conſent, which cannot be apportioned nor divided. *Cook*, 2. Part, 67. *Tooke's* Caſe.

9. *Chidley* brought a *Quid Juris Clamat*, and had Judgment againſt the Defendant: And the Plaintiff had made a Warrant to his Attorney for receiving of his Attornment, and the Defendant would have Attorned, but would not do his fealty: Divers Preſidents were ſhewed, That he ought to be ſworn in Court; and the Entry of a Judgment in a *Quid Juris Clamat* is, That he did Attorn, and *fecit fidelitatem*, and ſo he was ſworn in Court. And ſee 37 H. 6. 4. If he refuſe to Attorn being in Court, he ſhall be committed for contempt, and that was ſaid to be an Attornment; but *Priſot* ſaid, That notwithſtanding that, he ſhould not have an Action of Waſte, or arraign an Aſſize, without an expreſs Attornment. See Paſch. 3 Car. in C. B. *Chidleys* Caſe. *Hatton*, 89.

10. See, That a *Dedimus Poteſtatem* was Granted to receive an Attorney for the Defendant in a *Quid Juris Clamat*, although no Preſident could be found for it, and it was allowed of by the Court, by reaſon of the weakneſs of the Defendant, who could not appear in perſon, without danger of his life. 4 Mar. *Dyer*, 135.

See more of *Quid Juris Clamat* in *Litt.* 1. Title *Attornment*.

Quod

Quod ei deforceat.

Where, and in what Caſe it lyeth, and by whom, and againſt whom; and in what not: Where upon Recovery by default, and upon what default: Where and in what County to be brought. Voucher in it; And what ſhall be a good bar in it; What not.

1. IF Tenant in Dower, Tenant by the Curteſy, or Tenant for life, had loſt by default, they were without remedy at the Common Law, becauſe they could not have a Writ of Right. But now ſince the Statute of *weſt.* 2. cap. 4. all of them may have a *Quod ei deforceat.* And it is now agreed, That if a Recovery by default be had againſt Husband and Wife, Tenants in Frankmarriage, or Tenants for Term of their lives, they ſhall have *Quod ei deforceat* upon the Statute of *Weſt.* 2. *Cook* 2. Part, *Inſtitutes* 350.

2. If a Woman loſeth by default, and afterwards taketh Husband, ſhe and her Husband ſhall have a *Quod ei deforceat.* But if Tenant in tail loſeth by default, and dyeth, his Heir in that Caſe ſhall not have a *Quod ei deforceat*, but a Formedon, for that is his Writ of Right, and none ſhall have a *Quod ei deforceat*, but he that loſeth. But in a *Precipe* brought againſt Tenant in tail, he dyeth appear, and afterwards departs in deſpight of the Court, he ſhall loſe his Land, and yet he ſhall have a *Quod ei deforceat*, for that the Recovery is by his default, becauſe he did not appear when he was demanded. See *Fitz. Nat. Br.* 156. acc.

3. If Tenant for life make default in a *Precipe*, whereupon he in the Reverſion is received, and pleads to Iſſue, and it is found againſt the Tenant by Receipt, and Judgment is given for the demandant; in that Caſe the Tenant ſhall have a *Quod ei deforceat*; for although that there is a Verdict given, yet the Judgment is given upon the default 33 E. 3. *Quod ei deforceat.* 17. *Cook* 2. Part, *Inſtitutes* 351.

4. If Lands be given to two, and to the Heirs of one of them; now all the Fee is not meerly knit, and executed for the advantage of the Survivor of them, having a regard to him, for he ſhall not be puniſhed for Waſte, but having a regard to ſtrangers, the Fee is executed. And therefore if a Recovery be had againſt them by default, the one ſhall have a *Quod ei deforceat*, and the other, *ſcil.* he who hath Fee ſhall have a Writ of Right. Trin. 28 H. 8. *Dyer*, 9, 10. acc.

5. A *Quod ei deforceat* in the nature of a Writ of Right, was brought in the County of M. in *Wales*, the Tenant joyned the Miſe upon the meer Right; and upon that a Jury by *Venire facias* was returned, and 32 appeared, and before Verdict, the Demandant was Non-ſuit; upon which, final Judgment was given, *Quod teneat retineat terram illam ſibi et hæredibus in pace verſus petentem et hæredes ſuos imperpetuum.* And afterwards the Demandant brought a new *Quod ei deforceat* in the nature of a Writ of Right againſt the ſame Tenant for the ſame Land, who pleaded the final Judgment in bar, upon which the Demandant did demur, and Judgment was given againſt him; and upon the latter Judgment he brought Error. And in this Caſe, it was Reſolved, That although the Statute of *Rutland*, made 12 E. 1. provideth, That the Tryal in *Wales* of a Writ of Right, ſhall be by 12. common Jurours, yet Judgment final ſhall be given there; for although that manner and dignity of the Tryal be altered, yet the ſame Judgment doth remain as was before. 2. Reſolved, That if Judgment final be given in a Writ of Right, where it ought not to be, the ſame ſhall bind untill it be reverſed by Error. 3. That if the Tenant after the Miſe joyned, maketh default, Judgment final upon that default, ſhall not be given. But a *Petit Cape* ſhall iſſue forth, becauſe peradventure he may ſave his default. Trin. 38 Eliz. in B. R. *Penvins* Caſe. *Cook* 5. Part, 85.

6. Leſſee for the life of another man, the Remainder to him in tail; in this Caſe the Eſtate tail is not executed, but yet he ſhall have a *Quod ei deforceat, quod clamat tenere ad terminum vitæ ſuæ*, if he loſe the Land during the life of *Cestuy que vie.* See 7 H. 5. 2. acc. Where ſee if Land be granted to one for life, the Remainder for years, the Remainder to the firſt Tenant for life in Fee, there the Fee is executed, ſo as if he loſe by default he ſhall have a Writ of Right, and not a *Quod ei deforceat*, by *Manwood* Juſtice. P. 18. 17 Eliz. in C. B. *Godbolt.* 2.

7. A *Quod ei deforceat* was brought againſt two: they appeared and plead ſeveral Pleas, and the Iſſues were found againſt both of them, and they brought a Writ of Error thereupon in the Kings Bench. It was the Opinion of the Court, That the Judgment was erronious, and that the Writ of Error did well lye. But *Barkley* Juſtice ſaid, That if in a Writ of Right brought by two, the Miſe is joyned but in one Iſſue where there are ſeveral Iſſues, the Judgment ought to be ſeveral. Trin. 8 Car. in B. R. *Gwyn* and *Gwyn* Caſe. *Godbolt*, 448.

8. If a Recovery had bin had againſt Tenant for life, before the Statute of *weſt.* 2. he was at the Common Law without remedy, becauſe he could not have a Writ of Right in reſpect of the meanneſs of his Eſtate. And therefore at the Common Law. If a Woman Leſſee for life of a houſe had loſt by default, and had after that taken Husband, and the Recoveror had let the houſe to the Husband and Wife for their lives, in that Caſe the Wife could not have bin remitted, becauſe her Eſtate was remedileſs. But ſince that Statute, in ſuch Caſe, the Wife ſhall be remitted, becauſe ſhe may now regain her Eſtate by a *Quod ei deforceat.* For when an Act of Parliament, or a Cuſtome doth alter the reaſon or cauſe of the Common Law, thereby the Common Law it ſelf is altered. *Cook* 1. Part, *Inſtitutes* 356. acc.

9. Note, whereas divers hold Opinion, That upupon a Recovery had by default in an Action of Waſte againſt Tenant in Dower, or Tenant by the Curteſy, a *Quod ei deforceat* doth not lye, becauſe the default is not the cauſe of the Judgment, for notwithſtanding the default, there goeth out a Writ to enquire *de Waſto facto et quod Waſtum prædict.* it the Defendant *fecit*, ſo as the Defendant may give Evidence, and the Jurours may find for the Defendant, That no Waſte was done. As in an Aſſiſe, although it be awarded by default, the Tenant or Defendant *non amittat per d faltam.* Nevertheleſs, others do hold the contrary, becauſe that although in the Writ of Waſte, Judgment is not given only upon the default; yet the default is the principal, and the cauſe of the awarding of the Writ of Enquiry, as an incident thereunto. And the Law hath a reſpect alwayes to the firſt and Principal thing from whence it takes the firſt riſe and beginning. Quære the Law. *Cook* 1. Part, *Inſtitutes* 355. acc.

10. Error brought of a Judgment in *Wales* in a *Quod ei deforceat*, three Errors were aſſigned. 1. Becauſe the Writ being general, the Count is, that he deforced him of a Meſſuage, 20 Acres of Land, 30 Acres of Meadow, &c. and 20 Acres *Jampna et Bruaria*, which ought to have bin ſhewed in certainty; but the Court held, that *Jampna et Bruaria* are not intended of Lands of ſeveral ſorts, but of one and the ſame Land, which is Heath ground, upon which Geeſe and Furze are growing. 2. Becauſe he pleaded, he hath *majus jus tenendi tenementa prædict.* then the Plaintiff, and doth not ſay, *ſibi et hæredibus ſuis*, and becauſe he did not ſhew the certainty of the Eſtate, therefore it was not good: but the Court diſallowed of that Error, becauſe it ſhall be intended, That he had not a leſs Eſtate then Fee, and if he were but Tenant for life, it was at his peril ſo to plead, for that would be a forfeiture of his Eſtate. 3. Becauſe the *Venire facias* had not 19 dayes between the *Teſte* and the return of it, that alſo was diſallowed, becauſe in *Wales*, their proceſs is *de die in diem* in one and the ſame Seſſion. H ll. 5 Car. in B. R. *Griffith* and *Jenkins* Caſe. *Cro.* 1. Part, 128.

11. Error of a Judgment in the Grand Seſſions in *Wales*, in the County of M. in a *Quod ei deforceat* in the nature of a Writ of Right. The Defendant ſaid, That he had *majus jus* then the Plaintiff, upon which they were at Iſſue, and at the day the defendant made default, and a *Petit Cape* awarded; at the return of which J. S. appeared, and prayed to be received, becauſe the Feoffment was made to the uſe of the Defendant and his Wife, for the life of the Wife, the Remainder to the ſaid J.S. and his Heirs. The Demandant counterpleads that Receipt, traverſing the Feoffment, and thereupon Iſſue was joyned. At the day of the Return of the *Venire facias*, J. S. did not appear, but F. his Son and Heir prayed to be received by his Guardian, he being within age, and ſaid that J. S. his Father was dead, and prayed that the paroll might demur for non-age, the Demandant counterpleads his Receipt, taking Iſſue as before upon the Feoffment. At the day, the Tenant by Receipt made default, and a *Petit Cape* awarded, and at the day he did not ſave his default, and thereupon Judgment was given againſt the Tenant by Receit. In this Caſe, amongſt other Errors aſſigned, one was, becauſe the Judgment was given upon the default of the Tenant by Receipt upon his default, whereas the Judgment ought to be againſt the Tenant to the Action. And this the whole Court held to be a manifeſt Error, and therefore the Judgment was reverſed. Trin. 6 Car. in B. R. *Kiſſin* and *Vaughans* Caſe. *Cro.* 1. Part, 190, 191.

12. Error of a Judgment in the Grand Seſſions in *Wales*, in the County of P. where G. and his Wife brought a *Quod ei deforceat*, and made Proteſtations *ſequi breve iſtud in forma brevis de quod eis deforceat ad comm. legem ſecundum Statutum de Rutland*, and demanded a Meſſuage and Lands in R. *quæ clamant tenere ſibi et hæredibus* of the Wife, *in jure uxoris*, and ſaid, That T. B. was ſeiſed in Fee, and thoſe Lands after the Statute of 27 H. 8. of uſes, to Feoffees, to the uſe of the ſaid Wife, and the Heirs of her body, and that they entred and took the Explees within 20 years laſt paſt. The Defendants demanded Judgment of the Writ, becauſe it is a Writ formed upon the Statute of *weſt.* 2. made 13 E. 1. by which Statute it is provided *Quod quicunque tale breve intulerit, debet in brevi ſuo mentionem facere de Statutum quem clamat habere in Tenementis prædict.* which is not done in this Writ; and thereupon they demanded Judgment of the Writ, and it was adjudged there, That the Writ ſhould abate, upon which, Error

was

was brought. It was the Opinion of all the Juſtices, That the Writ of Error was well brought. For it is given by the Statute of *Rutland* 12 E. 1. and although the Statute of *Weſt.* 2. gives an eſpecial Writ of *Quod ei deforceat* in ſpecial Caſes, where Tenant for life, in Dower, or in tail, loſe their Lands by Recovery by default, and in ſuch Caſes the Writ makes mention of their Eſtates, yet this doth not take away the Statute of *Rutland* made 12 E. 1. which gives the *Quod ei deforceat*. And therefore it was adjudged for the Plaintiff in the Writ of Error, that the Judgment ſhould be reverſed, and that the Writ ſhould ſtand, and the Tenants plead thereunto. Mich. 10 Car. in B. R. *Griffith* and *Lewis*'s Caſe. *Cro.* 1. Part, 121.

Quod Permittat.

1. A *Quod Permittat* lyeth where a man hath Common of Paſture for his Cattel, and he is diſturbed by a ſtranger, that he cannot uſe his Common, then he may have this Writ; and the Writ runs in this manner, that he permit B. to have Common of Paſture in N. for 100 ſheep, &c. and *vide* 27 H. 8. 12. by *Fitzherbert*, that it lyeth always of Common, be it certain or uncertain, and not a *Precipe*. But a *Precipe* lyeth for Paſture for 20 Beaſts. And ſee there, That a *Precipe* will not lye againſt the Tenor of the Common, no more then againſt the Tenant. Yet *Shelley* there ſayes, That 3 E. 3. is contrary, That a *Precipe* lyeth againſt a Tenor, which is denyed by *Fitzherbert*. 27 H. 8. 12.

2. Tenant in tail may have a *Quod Permittat*. See 4 E. 3, 48. *Quod Permittat* 7. And ſee 20 E. 3. *Quod Permittat* 6. where it is ſaid, That this Writ is in the Nature of a Mordaunceſter.

3. If a man buildeth a Wall, or a houſe, or any thing which is a Nuſance to another's Freehold, and dyeth, he to whoſe Nuſance it is ſhall have a *Quod Permittat* againſt his Heir that did the Nuſance; and if a man levyeth a Nuſance to the Freehold of another, and he to whom the Nuſance is done, maketh a Feoffment in Fee of the Land, and he who did the Nuſance maketh a Feoffment of his Land, there is a Writ of *Quod Permittat* which lyeth for the Feoffee of him to which the Nuſance was levyed againſt the Feoffee of the other Land. See *Fitzh. Nat. Br.*

4. A Parſon of a Church ſhall have a *Quod Permittat* of Common in the right of his Church, and it ſhall be in the Nature of an Aſſiſe of Mordaunceſtor, becauſe he hath the Inheritance in the Common in the right of his Church. But if a Nuſance had bin done in the time of the Predeceſſor by a Diſſeiſor, no Writ of *Quod Permittat* did lye againſt the Diſſeiſor, or his Heir by the Predeceſſor, before the Statute of *Weſt.* 2. cap. 24. and the reaſon thereof was, becauſe there was no ſuch Writ in the Regiſter. *Cook* 2. Part, *Inſtitutes* 406, 407. acc.

5. See 34 E. 1. Br. Title Demand. a *Quod Permittat* did lye of a Fair or Market, and it did lye where the Father did levy the Fair or Market unto the Nuſance of another, it did lye for the Heir of him to whoſe Nuſance it was, againſt the Heir of him who did the Nuſance.

6. A. levyed upon his own Freehold a houſe ſo near the Curtilage of the houſe of J. S. *quod domus illa ſuper-pendet magnam partem*, viz. 3. *pedes Curtilagii J. S.* And afterwards A. conveyed his houſe to B. and B. conveyes his houſe to C. who brought a *Quod Permittat* againſt B. and declared That the Water did fall and deſcend from the ſaid houſe to the Nuſance of his Curtilage and houſe. And if a *Quod Permittat* did lye by the Feoffee, or not, was the Queſtion. It was objected, It did not lye, becauſe he to whom the wrong was done, had conveyed a Way over his houſe, and ſo the wrong by that means was remedileſs, for he ſhall take the Lands in the ſame Plight as the ſame was conveyed to him. But it was Reſolved by the Court. 1. That the Diſtilling and falling down of the Water in the time of the Feoffee, was a new wrong. So as a ſuffering of a wrong by the Feoffor, or his Feoffee to continue to the prejudice of another, ſhould be puniſhed by the Feoffee of the houſe to which the Nuſance was done. And if it be not reformed after requeſt made, That a *Quod Permittat* lyeth by the Feoffor againſt the Feoffee, and thereby he ſhall recover his damages. 2. In that Caſe it was Reſolved, That the Feoffee might abate the Nuſance as the Feoffor himſelf might have done, and alſo that the Feoffor of the houſe to which the Nuſance was done, might abate the Nuſance before that he had any ſpecial prejudice. Trin. 40 Eliz. in C. B. *Cook* 5. Part, 101. *Penruddock*'s Caſe.

7. In a *Quod Permittat* the Plaintiffs declared, That the Defendant erected upon his Freehold an houſe ſo near to the Plaintiffs houſe, *quod magna pars ejuſdem Domus ſuper-pendet* the Meaſure of the Plaintiff in breadth 17 Inches, and in length 17 Inches *ad nocumentum liberi Tenementi ſui*, and to his damages of 100l. It was Reſolved in this Caſe, That the Plaintiffs need not to ſhew forth in their Declaration how they came to the Eſtate in the houſe to which the Nuſance was done. It was objected in this Caſe, That the Plaintiffs ought to have

have alledged a Nuſance certain, *ſcil.* that the Rain did fall from the houſe new erected, upon the Plaintiffs houſe, by reaſon whereof he loſt his light, and his houſe was ſo ſpoyled with the Rain, that he could not remain in it. But it was Reſolved, That the Plaintiffs in the Declaration needed not to alledg any ſpecial Nuſance, becauſe in that Caſe the Defendant had erected the new houſe, which hung over part of the Plaintiffs houſe, ſo as of neceſſity, the Rain which fell, muſt fall upon the Plaintiffs houſe. 2. It was Reſolved, That the Plaintiff might have abated the Nuſans; and then he ſhould not have an Action for it. For that it is a good Plea in an Aſſiſe, or a *Quod Permittat*, That before the Writ brought or elſe dependant the Writ, he hath abated the Nuſance. And note, That in this Caſe it was adjudged, That the Statute of *Weſt.* 2. cap. 24. which giveth the *Quod Permittat* againſt the Allience of him who levyeth the Nuſance, doth not extend to the Allience of the Alliance. *Cook* 8. Part, 53. *Batters* Caſe.

8. An Action upon the Caſe was brought againſt one, *Quare exaltavit Stagnum, per quod ſumpra tum fuit inundatum*; The Defendant pleaded Not Guilty. The Jury found *Quod erexit Stagnum*; and if *erectio* and *exaltatio* be all one, then the Defendant may find that the Jury is Guilty. And thereupon Judgment was given for the Plaintiff where it ought to have bin for the Defendant. For it was ſaid, That *Erigere Stagnum eſt de novo facere, Exaltare, eſt treſſum majoris altitudinis facere*; *De exaltare, eſt ad priſtinam altitudinem adducere, Proſternere ſtagnum eſt penitus Tollere.* Note, It was the Opinion of all the Juſtices in this Caſe, That *erigere* is *de novo facere, et exaltare eſt ad majorem altitudinem attollere.* Note, an Exception was taken by the Court, That the Aſſiſe of Nuſance ought to be brought againſt the Tenant of the Freehold; and it is not ſhewed, That the Defendant was Tenant of the Freehold. And in this Caſe it was agreed, That if the ſtopping were by the Tenant, then an Aſſiſe lay. If it were by a ſtranger, then an Action upon the Caſe againſt him, but for a common Nuſance, no Action lay, but the ſame ought to be preſented in the Leet, or Turn; And in this Caſe, it was holden, That a Writ of Error ſhall follow the nature of the firſt Action: And then becauſe one of the Plaintiffs in the principal Caſe in the Writ of Error, had Releaſed, That the ſame ſhould be a bar to his Companions. Mich. 29 Eliz. in B. R. *Giles*'s Caſe. *Godbolt.* 58, 59.

9. A. brought a *Quod permittat* againſt B. and after Imparlance, the Defendant demanded the view. It was Ruled by the Court, That he might have it. See 34 H. 6. 9, 10. and the view was *de Tenementis prædictis*, and it was holden by the Court, That it was well, aſwell of the Lands to which the Nuſance was, as of the Lands which was the Nuſance. And the view in this Action is but for 15 dayes. Hill. 16 Jac. in C. B. *Brook* and *Groves* Caſe. *Hutton* 28.

10. An Aſſize was brought againſt the Defendant, becauſe that *Levavit quandam domum ad nocumentum, &c.* The Plaintiff ſhewed that he had a Windmill, and that the Defendant had built the ſaid Houſe, ſo as it hindred his Mill; The Jury found, That the Defendant *Levavit Domum*, and that but two feet of it did hinder the Plaintiffs Mill, and was *ad Nocumentum*. It was a Quere how the Judgment ſhould be. The Opinion of the Court was, That the Judgment ſhould be, That but part of the houſe ſhould be abated: Yet it was ſaid by ſome, That the Aſſize is ſuch a Writ as extends to the whole houſe, and therefore that the whole houſe ſhould be abated, according to the Writ: But a difference was taken by the Court betwixt *Erexit* and *Levavit*; for *Erexit* is, but when parcel of a Houſe is ſet up, *ad nocumentum*; but *Levavit* is, when an entire houſe is levied from the ground: And *Hobart* Chief Juſtice ſaid, That if the Defendant had not levyed the houſe ſo high by two yards, it had been no Nuſance; and therefore he ſaid, That he conceived, That the Writ was well anſwered, and that but part of the houſe ſhould be abated. *Quare.* The Caſe was not Reſolved, but the better Opinion ſeemed to be, That that only ſhould be abated which was *ad Nocumentum*, &c. Mich. 11 Jac. in C. B. *Traherns* Caſe, *Godbolt.* 233.

11. An Action upon the Caſe was brought for a Nuſance, for building the Defendants houſe ſo near the Plaintiffs, that a part of it ſuperpends; and the Plaintiff in conveying his Title, ſhewed a Leaſe for years made to him, if the Leſſor did ſo long live, and did not aver the life of the Leſſor, but ſaid, That by vertue of that demiſe, the Plaintiff hath been, and thereof was poſſeſſed. It was holden by the Court, that it was ſufficient. Paſch. 11 Jac. in C. B. *Brownlow*, 1. Part, 5.

12. Treſpaſs, *vi & armis*, for entring his Warren, digging his Soil, and chaſing and taking of his Conies: as to all but the entring the Warren, and chaſing the Conies, Not Guilty; and as to them, he pleaded a ſpecial Juſtification, *viz.* That he had Common there, time out of mind; and becauſe the Plaintiff ſtored the Burrows there with Conies, and made new holes, by reaſon of which, the Defendants Sheep fell therein, the Defendant with a Ferret did chaſe the Conies, and ſtopped up the holes with the earth digged out: Upon which the

the Plaintiff demurred. The Queſtion was, Whether a Commoner might drive out Conies which ſurcharged the Lands? It was ſaid, That he could not, for that the Freehold and Poſſeſſion of the Land is in the Ter-Tenant only, and a Commoner hath only the graſs of the Land, and that not abſolutely, but only to take it with the mouths of his Cattel; and therefore in 12 H. 8. 2. and 27 H. 8. 10. 13 H. 8. 16. the Expreſs in a *Quod permittat* is alledged, in taking the graſs with the mouths of his Beaſts; for which alſo ſee 22 Aſſ. 48. 10 E. 4. 4. 46 E. 3. 23. and Paſch. 43 Eliz. in B. R. *Belly* and *Langhorns* Caſe was vouched, That the Lord may uſe his Soil as he pleaſeth; and as this Caſe is, That the Commoner, although Tenant of the Land, could not kill the Conies, or take them with his Ferret; for a free Warrein in ſuch a Precinct, is a charge upon the Land, of what kinde ſoever it comes; and if the Conies come out of the Precinct, then may the Commoner juſtifie the killing or taking of them: As it was adjudged in *Hardyes* Caſe, in C. B. and in *Old* and *Comes* Caſe, 29 Eliz. Trin. 11 Jac. in B. R. *Carroll* and *Bakers* Caſe. *Brownlow*, 1. Part, 217.

13. Note, The Makers of the Statute of *Weſt.* 2. cap. 24. knew well, That the party injured by the Nuſance, although the wrong doer did it in his own ground, yet might the party grieved (although he had but Eſtate for years) enter, and abate, and demoliſh the Nuſance, were it houſe, to all other Nuſance, not only when it was in the wrong doer, but in the hands of the Alienee. But this Statute of *Weſt.* 2. doth give the Tenant of the Freehold as ſpeedy a remedy by Law as the Aſſize of *Novel Diſſeiſin*, which was accounted *Preſtinum remedium*, and yet if the wrong doer reform the Nuſance before the Aſſize, or *Quod Permittat* brought, the Action will not lye. But if the party hath any particular loſs by the Nuſance, he ſhall recover his damages in an Action upon the Caſe. See *Cook* 2 Part, *Inſtitutes*, 406. &c.

Quo Warranto.

1. *Quo Warranto* is a Writ which lyeth where a man uſurpeth, and taketh to hold Franchiſes or Liberties, without Licence of the King; then ſhall the King have ſuch a Writ againſt the Party, to come before his Juſtices, and to ſhew by what Right or Title he claimeth to hold ſuch Franchiſes and Liberties.

2. In a *Quo Warranto*, the Information was, That where the Defendant was ſeized of a Mannor, and of a Houſe within it, That he claimed to have a Court, or view of Frank pledge, *infra Meſſuagium prædictum*, and it was further, *viz.* That *ſine aliqua conceſſione, ſive authoritate, uſurpavit Libertates prædictas.* The Defendant pleaded, That *non uſurpavit Libertates prædictas infra Meſſuagium prædictum modo & forma.* It was ſaid, That the Plea was not good for many cauſes; for that the natural anſwer to every *Quo Warranto*, is either to claim, or diſclaim, and here he doth neither of them; and the ſpecial matter in the Information ought to be anſwered, and not the general to be pleaded, as it is here. 2. Becauſe he ſaith, *non uſurpavit infra Meſſuagium prædictum*; whereas he ought to have ſaid, *infra Manerium prædict.* 3. He ought to have ſaid, *Non uſurpavit Libertates prædictas, nec earum aliquam.* 4. It is not good, Becauſe he ſaith, *Non uſurpavit infra Meſſuagium prædictum*; for although it were ſufficient for us to ſay to make an Iſſue, *Quod uſurpavit infra Meſſuagium prædictum*, becauſe if he hath uſurped upon any part of the Mannor, *uſurpavit infra Meſſuagium prædict.* yet it is not good for the Defendant to anſwer ſo; for although he hath uſurped in any part of the Mannor, although not in *Meſſuagium prædict.* it is ſufficient for the Plaintiff. It was ſaid in this Caſe by the Court, That a *Quo Warranto* contains but two things. 1. It is demanded *Quo Warranto* he claims ſuch Liberties. 2. It chargeth him with a tortious uſurpation of them: The Plea was adjorned: But the better Opinion of the Court ſeemed to be, That in the principal Caſe, he hath anſwered to the uſurpation of them; but he doth not anſwer, nor ſhew by what Title he claimeth them: And in this Caſe it was ſaid, That in a *Reading* upon the Statute of *Quo Warranto* it was holden, That a *Quo Warranto* doth not lye of the claim of a thing which cannot be claimed, as to claim Felons goods, or to pardon Felons; for that thoſe are things which lye prope ly

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in point of Charter. Mich. 29 Eliz. in B. R. Sir *Gervaſe Cliftons* Caſe, *Godbolt*, 91. 92, 93.

3. A *Quo Warranto* Iſſued againſt B. to know *Quo Warranto* he held a Leet; To which he pleaded, That he was ſeized of ſuch a Meſſuage, and that he, and all thoſe whoſe Eſtate he hath in the ſaid Meſſuage, have uſed alwayes to have and hold a Leet there within the Meſſuage. It was a Queſtion, If this Preſcription, that is, to have a Leet appendant to a ſingle Meſſuage was good or not. It was adjudged in that Caſe, That for as much as by reaſonable intendment it might be that this houſe was the ſeat of that Mannor, and that the Lord granted the Mannor with the Leet, that the Preſcription was good. Mich. 27 Eliz. *Dalves* Caſe vouch. in *Brownlow* 2. Part, 217. in *Griffits* and *Coopers* Caſe.

4. An Information was upon a *Quo Warranto* againſt B. and S. why they claimed to have certain Liberties; B. diſclaimed in all, and ſo Judgment was for the King; S. alſo diſclaimed in all, but only in one; and that was, to hold a Court Baron; and for maintenance of that, he ſhewed; That Sir *Henry Nevil* was ſeized of an ancient Mannor, of which Mannor the Mannor of N. was parcel, and conveyes to him an Admittance to the Mannor of N. in 4 Eliz. and of two ſeveral parcels of Lands called Lakes, and Aylworths, and ſhews, that Meſſuage, and ſeven Acres of Lands, Cuſtomary Lands, uſed to be demiſed, were conveyed to him by the ſaid Sir *Henry Nevil*, *Tenendum ſecundum conſuetudinem Manerii*. The ſole Queſtion in this Caſe was, Whether S. by this Plea had well entituled himſelf ſo to the Mannor of N. as that he might juſtifie the keeping of a Court Baron. This Caſe was argued by all the Juſtices at the Bench; And it was Reſolved by all the Juſtices, That in the principal Caſe, the Defendant S. had not a Mannor, and therefore could not have ſuch a Court Baron as was incident to a Mannor; and all the Juſtices clearly declared againſt this Court Baron, and the Defendants keeping of it, he having made himſelf no good Title thereunto by his pleading; and therefore he ought by the Judgment of the Court upon this *Quo Warranto* brought againſt him, to be ouſted of the Court Baron by him kept, and Judgment was given for the King in the *Quo Warranto*. Mich. 8 Jac. in B. R. The King and *Staffertons* Caſe. *Bolſtrode*, 1 Part, 54, 55, 56. See *Cook* 11. Part, 17. and 18. *Nevill's* Caſe. See *Kellaway*, 138. acc.

5. In a *Quo Warranto* for uſing Waifs, Eſtreys, and Felons goods in L. the Defendant claimed Wait and Eſtrey by Preſcription; and for the Felons goods he pleaded, That J. late Abbot of S. *licitè habuit & gavifus fuit infrà L. predict. Bona & Catalla Felonum ad uſum ſuum proprium*, and pleaded the Statute of 27 H. 8. That all Monaſteries under 200 l. *per annum* were given to the King, in as ample manner as the Abbots had them, and that the Abby of S. was under the value of 200 l. *per annum*, and pleaded the Statute of 31 H. 8. cap. 20. by which all Priviledges, Franchiſes, &c. which the Abbots had, and uſed lawfully, ſhould by the ſaid Act, be revived in the King: By force of which, the ſaid King *Hen.* 8. was ſeized of the ſaid Franchiſes, to have the goods of Felons in L. and ſo ſeized, and ſeized of the Mannor of T. in L. parcel of the poſſeſſions of the ſaid Abby, granted the ſaid Mannor of T. to J. S. in Fee, *Et tot, tanta, talia hujuſmodi eadem, & conſimilia Libertates, Franchefias, &c. quot, qualia quanta, & quæ dictus nuper Abbas habuit, five gaviſus fuit; Et eo Warranto clamat Libertates, Franchefias, tanquam ad Manerium prædict. ſpectan. & pertinent.* In this caſe theſe points were Reſolved. 1. That a man cannot have goods of Felons by Preſcription or uſage, but may have them by the Kings Charter. 2. That when the King grants any Priviledges, Liberties, or Franchiſes, which were in his hands, as parcels of the Flowers of his Crown, as *Bona Felonum*, Waif, Eſtrey, &c. that if they come again to the King, they are drowned in the Crown, and if they were before appendant to poſſeſſions, the appendancy is now extinct, and the King is ſeized of them in the Right of his Crown. 3. That if the King grants to J. S. and his Heirs, *Catalla Felonum*, within the Mannor of D. and afterwards J. S. grants to the King and his Succeſſors, the Mannor of D. with the Franchiſes, and the King by his Letters Patents grants to J. N. and his heirs the ſaid Mannor, and further grants to him and his heirs, *tot, talia, tanta, eadem, & conſimilia, Privilegia, Libertates, &c. quot, qualia, quanta, & quæ*, the ſaid J. S. had; That in a *Quo warranto* brought againſt J. N. he cannot plead the Grant in ſuch general manner, but he ought ſpecially to plead the firſt Charter made of the Felons goods, and the re-Grant. 4. If the King graut to J. S. the Mannor of D. and his heirs, and within the Mannor, to have Waif, Eſtray, *Bona Felonum, &c. dicto Manerio ſpectant*, That in a Grant, theſe words (*dicto Manerio ſpectant*) do not refer to Goods and Chattels which lye in Charter, and cannot be appendant, yet they ſhall paſs, although they were never demiſed nor uſed with the Mannor. 5. In the principal Caſe, becauſe the Defendant conveyed to himſelf a Title to the Mannor by Feoff, which is pleaded without Deed, and doth not convey to him Title to the goods of Felons, which cannot paſs without Deed,

that

that therefore the goods and Felons ſhould be ſeized into the Kings hands. 1 *Cook* 9. Part, 25, 26. to 29 The Abbot of *Strata Marcellas* Caſe.

6. In a *Quo Warranto* brought againſt the Mayor and Communalty of *London*, the Caſe was, That a Grant was made to the Mayor and Communalty, that the Mayor for the time being ſhould have *plenam & integram Scrutinium gubernationem, & correctionem omnium & ſingulorum Myſteriorum*, without granting to them any Court. In that Caſe it was holden, That the ſaid Grant did not give them any irregular, or abſolute power, to correct or puniſh any of the ſubjects of the Kingdoms at their Wills and Pleaſures, but that ſuch a Grant is good for ſearch, by which diſcovery may be made of Offences, and defects, which may be puniſhed by the Law in any Court. Hill. 28 Eliz. The Mayor and Communalty of *London's* Caſe; Vouch. in *Cook* 5. Part, 119. in Dr. *Bonhams* Caſe.

7. Note, In the Caſe of the Abbot of *Strata Marcella* before, It was Objected, That it did not appear by the claim of the Defendant, what Eſtate the Abbot had in the Franchiſes, but generally, *Quod licite habuit, & gaviſus fuit*, and ſo peradventure he might have them but by Leaſe for years, or for life; But it was thereunto anſwered, and Reſolved, That a general having and enjoying of them, ſhall be intended of a having and enjoying in Fee-ſimple, and that in ſuch a Caſe, a particular eſtate or Intereſt ſhall not be preſumed, unleſs it be eſpecially ſhewed. See *Cook*, 4. Part, *ibidem*.

8. A *Quo Warranto*, againſt the Biſhop of *Durham*, why he claims to have *Bona & Catalla Felonum*, and of ſuch as ſtand mute. It was ſhewed in the behalf of the Biſhop, That *Durham* was a County Palatine, and had *Jura Regalia*, and by reaſon of that, he claimed thoſe Priviledges. It was urged againſt him, That by Grant of *Bona & Catalla Felonum*, the goods of perſons who ſtand mute, do not paſs. It was agreed, That in Caſe of a County Palatine, who holds *tam Libere per gladium, pront Rex Coronam*; and ſo holds the Biſhop his County Palatine, *tam libere &c.* and he hath *Jura Regalia*, and ſo all theſe, *ſcil. Bona felonum*, and the goods of thoſe which ſtand mute. But it was agreed in this caſe, That a man cannot preſcribe to have the goods of Felons, nor of Traytors, becauſe Preſcription only is for matter in fait, but a man may preſcribe in a County Palatine: 12 Eliz. *Dyer*, 289. and ſo by conſequence, to have all the Incidents belonging to a County Palatine. It was the Opinion of the whole Court, That the Biſhop ought not to be called in queſtion by a *Quo Warranto*, to ſhew his Priviledges in this Caſe. Paſch. 12 Jac. in B. R. Sir *Jerome Bowes* and the Biſhop of *Durhams* Caſe. *Bolſtr.* 2. Part, 226, 227.

9. A *Quo Warranto* againſt *Briggs*, to ſhew by what Warrant he claims to have a Forreſt: He put in his Plea, and claimed to have a Forreſt, and a Court of Swanny mote; and ſhewed, That K. H. 2. was ſeized of *Clecar*, which extended it ſelf into 21 Towns, and by Letters Patents 30 H. 2. did grant this Forreſt *R. Clifford*; afterwards the ſame came to the Earl of *Shrewsbury*, and ſo by mean Conveyances, it came to *Oliver Briggs*, who dyed ſeized, and from him it did deſcend, and come to the Defendant; who pleaded all this matter, which the Kings Attorney General had confeſſed to be true: This Caſe being argued by the Juſtices in open Court, It was agreed by them. 1. That a Juſtice Seat is incident to a Forreſt, and none can have a Juſtice in *Eyre* but the King. 2. Such a Grant in the hands of a ſubject, is a Chaſe; and not a Forreſt: A ſubject may have a Swanny mote Court, but he cannot have a Juſtice Seat. 3. This Charter never had any allowance, nor any manner of uſage hath been of this Forreſt for 500 years; and if there be a Charter before time of memory, it cannot be pleaded without an allowance. 4. Reſolved, That notwithſtanding the confeſſion of the Attorney general, yet that Judgment ſhould be given, and entred for the King; for if a man claim any thing, and doth not ſhew any uſage of it, Judgment ought to be given for the King; and in this Caſe the Defendant doth not ſhew any uſage of it, nor any confirmation of the Charter to be made; and this is matter of Law, and not matter of Fact, and the Attorney general ought to confeſs only matters of Fact, and leave matters of Law to the Judges. It was the Opinion of the whole Court, That upon the Defendants here Diſclaimer of a Juſtice ſeat, that Judgement muſt needs be given againſt him for the Forreſt; for he cannot have a Forreſt without a Juſtice ſeat: Wherefore *Briggs* the Defendant ſeeing the Opinion of the Court, the matter was no more moved. Mich. 12 Jac. in B. R. The King and *Briggs* Caſe, *Bolſtrode* 2. Part, 295, 296. See *Popham* 150. the ſame Caſe.

10. In a *Quo Warranto* againſt the Mayor and Bayliffs of *Maidſtone*. It was Ordered by the Court, That they ſhould have day to plead, till a fortnight after *Trinity* Term; they failed of pleading at the day: Whereupon Judgment was entred in the Roll, and a Writ of Seizin awarded, and Execution thereupon: Afterwards by a private Order of the Judges, in the Vacation, It was Ordered, That the Judgment ſhould be ſtayed; and the truth was, It was never entred among the Rolls of the Court, and therefore it was prayed, That the Judgment might

not be filed: It was said, That by the Judgment, the King was entituled to have the Franchises, and that he should not lose them; and 15 E. 4. 7. was put, that if the Defendant doth not come, the Franchises shall not be seized into the Kings hands, *Nomine districtionis*; and if the party who oweth the Franchises doth not come during the Eyre, he shall forfeit such Franchises; and so here in this case: and it was said further in this Case, That this was a Judgment of another Term, and Execution awarded upon it; and the King by awarding of Execution, hath averred, That Judgment is given and entred. But it was the Opinion of the Court, That the entring of a Judgment in a private Roll, was but as a Memorandum: And it was further said by the Court, That if a Judgment be pronounced here, and be not Entred, the Judges may alter it the next Term; and in the mean time, that the Defendants Plea shall be Recorded. Trin. 2 Car. in B. R. The Mayor and Bayliffs of *Maidstones* Case. *Popb.* 180.

11. In a *Quo Warranto* against the Corporation of *Maidston*, for claiming Liberties in the Vilage and Parish of *Maidstone* (in which a House called the *Mote*, wherein Sir *Humphry Tuston* dwelt, and a great house called the *Archbishops Palace*, which was conveyed to Sir *Anthony Astly* were scituated) A Judgment was entred by Disclaimer by consent of all parties, *Virtute vel pretextu Literarum Patent. gerent. dat. Anno* 17 *Jacobi Regis*; but because *Gerent. Dat.* 17 *Jac. Regis*, were in the Margin, and by a stroak made cross the words, the Clerk had omitted them in the Ingrossing of the Judgment which was entred upon Record, *Anno* 2 *Car. Regis*: It was moved, that those words might be interlined, and the Record amended, being omitted by the negligence of the Clerk; which was much opposed by Sir *Humphry Tustons* and Sir *John Astleys* Council, That the Record could not be amended, being in another Term, much less in another year, especially in the Kings Case; and when none of the Statutes of amendments extends to a *Quo Warranto*, or suits, where the King is party: But notwithstanding all this, It was holden by the Court to be amendable by the course of the Common Law, as well in another Term, as in the Term in which it was ended; and being meerly a Misprision of the Clerk by misreading of the Paper book, and by examination of all circumstances, it is no more then when a special Verdict is misprisented, which may be amended and rectified by the Notes of the Clerk of the Assizes; Whereupon by the Rule of the Court, the Record was amended. Mich. 4 Car in B. R. Sir *Humphry Tuston*, and the Mayor and Bayliffs of *Maidstones* Case. *Cro.* 1. Part, 102.

12. In a *Quo Warranto* for claiming a Leet, and a Court Baron from three weeks to three weeks, *infra Manerium, de W. & D.* and to have *Bona & Catalla Felonum*, and divers other Liberties; the Defendant disclaimed in all but the having of a Court Baron within his Mannor of W. and for that said, that J. S. was seized of the Mannor of W. whereof the Mannor of D. and the Mannor of S. within the said Mannor of W. were parcel, and demised, and demisable, time out of minde, by Copie of Court Roll, according to the Mannor of W. and that Mannor of D. is, and had been known, as well by the name of the Mannor of D. as by the name of a Messuage, twenty Acres of Customary Land, and twenty shillings Rent; and that J. S. granted it by Copie to the Defendant in Fee, by the name of a Messuage, &c. by reason whereof he held there a Court Baron. 1. It was moved, If a *Quo Warranto* did lye of a Court Baron; It was holden by the Court, that it did: for it is a matter of Right to hold Courts, and to administer Justice, which if any doth without Right, a *Quo Warranto* lyeth against him, to shew by what Title he holds it: But if he entitles himself to a Mannor, then he needs not to shew that he is to have a Court Baron, because it is an incident to it. But it was holden by all the Court, That a Copyholder cannot hold a Court Baron to have forfeitures, and hold Pleas in a Writ of Right; for it is *Oppositum in Objecto*, That a Tenant at Will should hold a Court. *Fleming* Chief Justice held, That he might hold a Court only to admit Copyholders, but all the other Judges denyed it and afterwards it was adjudged for the King, and that the Defendant should be ousted of the Court Baron. Mich. 8 Jac. in B. R. The King and *Stantons* Case. *Cro.* 2. Part, 259, 260. See, The King and *Staffordtons* Case before in this Section.

Quo Minus.

What persons shall have the Priviledge of the Exchequer, to sue by Quo Minus; *and what shall be a good Count in it, and what matter good to abate the Writ, what not.*

1. IN the Exchequer, the Queens Fermor brought a *Quo Minus*, and in his Count, entituled the Queen to the Reversion of his Term by the Grant of his Lessor, such was Sir *Rich. Sackville*, of the Reversion to the Duke of *Northumberland*, with his Attornment to the said Duke, and after

after the Duke granted it over to *Edw.* 6. in Fee, by Deed enrolled, and did not alledge expreſly, That Sir *Rich. Sackvile* granted the Reverſion by Deed, but generally, *Quod conceſſit Reverſionem in Feodo, ad quam quidem conceſſionem idem Querens ſe inde attornavit.* It was the Opinion of the Lord *Dyer*, That in this Caſe the Count was good, without laying *per chartam*, or by producing the Deed in Court, becauſe the Fermor was a ſtranger to the Deed of Grant, and he did not convey any Title to him under it. See 2 Eliz. *Dyer*, 174.

2. J. S. Receiver General of the Revenues of the Crown, being ſued in the Court of Common Pleas, to the Exigent, brought a Writ of Priviledge out of the Exchequer, directed to the Juſtice of the Common Pleas, *& Sociis ſuis, in his verbis, viz. Quia datum eſt nobis intelligere, quod J. H. Gener. & Uxor ejus Edmundum Hunt Generoſum, receptorem noſtrum Reverſionum Generalem Coronæ noſtræ, coram vobis per nomen E. Hunt, nuper de London Generoſ. trahunt in placitum, Quo Minus idem E. H. nobis*, the *receptoribus prædict. faciſfacere valeat ut tenetur, &c. Vobis præcipimus ne placitum prædict. verſus prædict. E. Hunt, ad ſectam quorumque tenentis*; but notwithſtanding this Writ, the Priviledge was diſallowed by the Court, Mich. 16 Eliz. *Dyer*, 328.

3. A man brought an Action of Trover and Converſion in the Exchequer; The Defendant Pleaded, that the Plaintiff had an Action depending in the Court of Kings Bench for the ſame Trover. It was Reſolved, That in that caſe, the Bill in the Exchequer ſhould abate. 2. It was Reſolved in that Caſe, That although the firſt Action was in another Court, yet the Plea was good, for that it doth not appear by the Plea, that either the Plaintiff or Defendant have Priviledge in the Exchequer, and then by the Statute of *Articuli ſuper chartas*, it is provided that no common Plea ſhall be in the Exchequer. Mich. 33 Eliz. in *Scaccario*, *Cook* 5. Part, 62. *Sparries* Caſe.

4. Where a Prior is Debtor to the King, an ought to have Tythes of another Spiritual Parſon he may ſue for the ſubſtruction of the Tythes in the Eccleſiaſtical Court, or in the Exchequer, *Cook* 5. Part 16. in the caſe of the Eccleſiaſtical Law. In 38 E. 3. 20. A Prior Alien, Fermor of the King, was indebted to the King for his Ferm; and being ſued for the ſame in the Exchequer, he ſhewed to the Court, That there was a Parſon who held a portion of Tythes, which was parcel of the poſſeſſions belonging to his Ferm, and that the Parſon withheld the Tythes from him, ſo as by reaſon thereof he could not pay the King his Ferm, without having of the Tythes which were in the Parſons hands: And upon this a *Quo Minus* iſſued out of the Exchequer, at the ſuit of the King and of the Prior, againſt the Parſon, for the paying of thoſe Tythes to the King; and there it is ſaid by *Shipwith*, That of that which may concern the King, and may turn to his advantage, and may haſten his buſineſs, whether the ſame be Temporal or Spiritual, the Court of Exchequer ſhall have Juriſdiction of it. 38 E. 3. 20. acc.

5. Note, It was Reſolved by the Court amongſt other things, That if a ſum of money be promiſed to be paid at ſeveral days, an Action upon the Caſe upon *Aſſumpſit* lyeth for not payment at the firſt, although no Action of Debt lyeth, until all the dayes be paſt; and Note further, That in that Caſe it was holden, That if the Debtor of the King ſueth by *Quo Minus* in the Exchequer, the Defendant ſhall not wage his Law for the benefit of the King.

See the Priviledge of Parſons to ſue by *Quo Minus* in the Exchequer, in Paſch. 21 Jac. in the Court of Wards, in Sir *Edw. Cooks* Caſe, *Godbolt* 289. and vouched *Lib.* A. Title, *Debt to the King*, Sect. 14.

Raviſhment of Ward.

Raviſhment of Ward; by whom, and for whom, and againſt whom it lyeth, and what ſhall be recovered in it; What not.

1. THe Writ of Raviſhment of Ward, did not lye by the Common Law for Guardian in Knight Service, but the ſame was given by the Statute of *Weſt.* 2. cap. 35. And by the Equity of that Statute, Guardian in Soeage ſhall have a Writ of Raviſhment of Ward, as Guardian in Knight Service. See *Fitzh. Nat. Br.* 140.

2. At the Common Law, and before the making of the Statute of *Merton*, cap. 6. The Law gave the Lord ſeveral Remedies, if his Ward were taken away, detained, or Married, *viz.* 1. An Action of Treſpaſs wherein he ſhould recover damages only. 2. A Writ of Right of Ward, wherein he ſhould recover the Cuſtody of the body and Lands, but if the Ward were married, then was the Lord driven to his Action of Treſpaſs, *Quare ſe intruſit Maritagio non ſatisfacto*; and that was, where he entred and intruded upon the Lord, either before or after his full age. But if the Heir himſelf entred into the Land after he came of full age, and married himſelf, there at the Common Law, the Writ *de valore Maritagii* did lye againſt the Heir. See *Cook* 9. Part, 74. in Dr. *Huſſeyes* Caſe.

3. There are two ſorts of Raviſhments of Ward, *ſcil.* in fact, and in Law. Raviſhment in fact, is when one taketh and carryeth away the Ward. Raviſhment in Law is, as if the Ward enters into Religion; and for ſuch Raviſhment, the Soveraign of the Religious houſe ſhall anſwer, for that his admiſſion of him is a Raviſhment in Law. See *Litt.* 45. But in that Caſe the Lord ſhall loſe the Wardſhip of the Land, becauſe the Heir being Civilly dead, the Land by Act in Law ſhall diſcend to another who ſhall be in Ward, or elſe pay Relief. *Cook* 1. Part, *Inſtitutes* 133.

4. If a man or a Woman marry a Ward to his or her Daughter, or any other perſon, this is a Raviſhment in Law: So it is if a man procureth a Ward to go from his Guardian. Or if one Raviſh a Ward, or eject the Lord to the uſe of a ſtranger without his privity, if the ſtranger agree thereunto; in all theſe Caſes they are eſteemed Raviſhers in Law. See 8 E. 3. 52. 30 E. 3. 6. 38 E. 3. 18. acc.

5. The Father may have a Raviſhment of Ward, *Quare filium ſuum et hæredem rapuit, cujus Maritagium ad ipſum pertinet*, but that is at the Common Law, but the Father cannot have a Raviſhment of Ward of his Son upon the Statute of *Weſt.* 2. cap. 35. becauſe that Statute is intended only and principally of Guardian in Knight Service.

6. In a Writ of Raviſhment of Ward, the Jury ſhall enquire. 1. Of the value of the Marriage. 2. Of the age of the Ward. 3. If he be married or not. Of the two firſt, the Jury muſt give a direct Verdict, but for the other they may give a Conditional Verdict; as to ſay, Whether he be married or no, they knew not; and if he be married, then they aſſeſs damages. But although the Verdict may be Conditional, yet the Judgment muſt be abſolute. But yet the Plaintiff in the Writ of Raviſhment, if he pleaſeth may have Judgment to recover the Marriage, and the leſſer damages, and have Execution of the body. Or if the Sheriff returneth that the Heir is married, then may the Plaintiff upon the Judgment have a *Scire facias* for the greater damages, and have Judgment to recover them. *Cook* 2. Part, *Inſtitutes* 440.

7. If a man be Guardian in the right of his Wife, although the Wife dyeth, yet the Husband ſhall have the Wardſhip of the Heir, becauſe it is a thing veſted. But if a Guardian marrieth the Heir after the age of 14 years, and after the Heir is taken by a ſtranger, in that Caſe the Guardian ſhall not have a Raviſhment of Ward, becauſe he hath had the value and effect of his Marriage before. See *Fitz. Nat. Br.* 142. acc.

8. A. brought an Action upon the Caſe againſt B. for raviſhing of his Ward, and the Writ was *Contra pacem*, without the words *vi et armis*. It was ſaid by *Dodderidge* Juſtice, That the Plaintiff had his Election, either to bring his Action at the Common Law, or his Action of Raviſhment of Ward upon the Statute of *Weſt.* 2. And in this Caſe,

Caſe, it doth appear, That here is an Action upon the Caſe brought only, for the taking and detaining of the Ward, ſo as he cannot preſer him in Marriage, and he ſaid upon this ſpecial matter, the Action upon the Caſe did lye, without the words *vi et armis*. 2. In this Caſe it was ſaid, That a Writ of Raviſhment of Ward ought to be brought in the Common Pleas. But yet a man may bring a Writ of Raviſhment in the Kings Bench, and if the Defendant be in the Cuſtody of the Marſhal of the Marſhalſea. Trin. 21 Jac. in B. R. *Shortridge* and *Hills* Caſe. *Godbolt.* 426.

9. Raviſhment of Ward was brought upon the Statute of *Weſt.* 2. cap. 35. againſt Husband and Wife, and others. The Jury found, That the Wife was guilty of the Raviſhment, but not the Husband, and aſſeſſed Coſts and Damages, and the Jury further found, That the Heir *maritatus exiſtit*, and that he was of the age of 16 years at the time of the Marriage, and found the value of the Marriage to be 800 l. In this Caſe, theſe points were Reſolved. 1. That by the Common Law for the Raviſhment of a Ward, an Action of Treſpaſs lay againſt the parties in which the Plaintiff ſhould recover Coſts and damages; and that ſuch Action of Treſpaſs did lye aſwell againſt a Feme Covert, as againſt a Feme Sole. But no Writ of Raviſhment of Ward did lye at the Common Law. 2. It was holden by *Walmeſly* and *Cook* Chief Juſtices, That a Feme Covert was not within the Statute of *Weſt.* 2. becauſe ſhe is diſabled to ſatisfy, and the Goods and Lands of the Husband who is innocent, are not lyable by the Statute to anſwer for the Raviſhment done by his Wife, and the Law will not intend ſo ſevere a puniſhment for the not doing of that, which to do the Law hath diſabled the party, and the Plaintiff in the Principal Caſe might have had his remedy by Action of Treſpaſs at the Common Law againſt thoſe who committed the Raviſhment; or a Writ *de valore Maritagii* againſt the Heir himſelf. 3. It was Reſolved, That when an Action is brought upon the Statute, that the Plaintiff cannot have his Election to have his Judgment at the Common Law, nor on the contrary part, becauſe he ought to have Judgment purſuant to the Original Action, which is the foundation and ground of his Suit. 4. It was Reſolved, That in the Principal Caſe, the Verdict was inſufficient for the incertainty who procures the Heir to be Married, *viz.* the Raviſher, or a ſtranger; nor when he was married, if before the Raviſhment, or after it, and doubtful and ambiguous Verdicts are void. 5. It was Reſolved, That a man in a Writ of Raviſhment of Ward brought upon the Statute, ſhould recover damages. And it was ſaid in this Caſe, That for the Judgment, the Statute being in the diſjunctive, *ſcil. abjuret regnum, vel habeat perpetuam priſonam*; that it was in the Election of the Judges of the Court, to give which of the ſaid Judgments they pleaſed. *Cook* 9. Part, 72, 73. Dr. *Huſſey's* Caſe.

10. If a Ward be raviſhed within age, and a Writ of Right of Ward be brought, in that Caſe, the Defendant may plead, That the Ward is come of full age, pendant the Writ, for that Writ is to demand the body of the Ward. But of a Writ of Raviſhment of Ward, there it is no Plea, That the Ward is come of age; but the enquiry in Raviſhment of Ward is, Whether he were married, or came of full age, as inferring, that though he were not married, yet if during the Marriage he were come of full age, that the Raviſher ſhould anſwer the value, becauſe the Guardian now cannot have his Marriage. See Book *Entries*, Tit. *Raviſhment of Ward.* 18. And ſee *Cook*, Book *Entries*, Tit. *Raviſhment, ult.* where the Raviſher was, condemned in the value of the Marriage, when the Ward dyed unmarried, and within age after the Raviſhment, becauſe the Guardian loſt the Marriage.

11. One brought a Writ of Ward againſt A. and demanded R. Son and Heir of J. as his Ward. A. came in, and ſaid, That ſhe claimed nothing in the Ward but Nurture; and in Court ſhe tendred R. to the Plaintiff, who did refuſe him becauſe he was Married. A. anſwered he was not married by her: the Plaintiff Replyed, he was married in her Ward, after ſhe became deforceor, for which time, ſhe was to anſwer. Unto which it was ſaid for her, That inaſmuch as ſhe came lawfully to the poſſeſſion of the Ward, and did tender him at the firſt day, ſhe could not be counted a Deforceor, and ſo ſhe was not amerced. But yet in that Caſe there was Judgment by agreement, That ſhe ſhould yield the Ward, and 20 s. but becauſe ſhe was not *contra bona fide* poſſeſſor, ſhe was to anſwer only for her own act; for her poſſeſſion from the beginning being lawful, and without wrong, could not be wreſted to the wrong which was done by others, and therefore ſhe was not charged for the Raviſhment, nor with damages for the Marriage. See 8 E. 3. 45. acc.

12. Note, If my Tenant by Knight Service dyeth his Heir within age, I am preſently in the poſſeſſion of the body, without ſeizure. And therefore the Treſpaſs at the Common Law, nor the Writ of Raviſhment now, doth not renounce the property or poſſeſſion of the Ward, but doth puniſh only the *Temeraria Occupatio*, and gives the Plaintiff damages according to his hurt, be it by abuſe, or marriage of the Ward, and if another take away the Ward from the Raviſher, the firſt Raviſher can

have

have no Action against the second, but the Guardian may have an Action against them both, and shall recover against them both for their several Ravishments. And it was said, That if one Ravish my Ward, and take him out of my possession by wrong, and after that another takes him from him, and marries him, or he marrieth himself during his Non-age, That in this Case I shall and may by Writ of Ravishment brought against my first Ravisher, recover not only damages for the taking him away, but also for the value of the Marriage. See by *Hobart*, in *More* and *Hussey's* Case. *Hob.* 99.

13. A. brought a Ravishment of Ward against B. and counted that J. S. Auncester of the Enfant, whose Heir he is, was seized of Lands in Fee, and held the same of the Bishop of *Winton* in Socage, and dyed, his Heir within the age of 14 years, and that the Custody of the Enfant did belong to him as *Prochin Amy*, by force of which he seised him, &c. The Defendant said; That the Land was holden of him by Knight Service, *absque hoc*, that it was holden of the Bishop; upon which Issue was joyned. The truth of the Case was, That all the Land discended, was holden in Socage; and the Opinion of the Court was prayed, if that matter should trench to the Issue as joyned. The Court was of Opinion, That it did not, for if all be holden in Socage, it is not material if part of it be holden of another, so it be holden in Socage. Pasc. 30 Eliz. in C. B. *Samford* and *Wards* Case. *Leon.* 111.

See more of *Ravishment of ward*, in Title *Gard.*

Rape.

1. RApe, properly taken, is, when a man hath carnal knowledg of a Woman by force, and against her Will; and the word *Rapere* to Ravish, signifieth legally as much as *Carnaliter cognoscere*, which cannot be expressed in legal proceedings by other words. The offence is called Rape, and the Offendor is called a Ravisher.

2. Rape was Felony by the Auncient Law of the Nation; which see, *Mirror of Justices* 37. And see there 83. and 147. the Pleadings then in an Appeal of Rape. But see that afterwards by the Statute of *West.* 1. cap. 13. That was taken away, Imprisonment was imposed upon the Offender for two years, if the party had not to satisfy the King withall for the Offence, and to recompence the party who was Ravished. See Star. *West.* 1. cap. 13. See after that by the Statute of *West.* 2. and divers other later Statutes, Rape was again made Felony. And therefore if the Lord had Ravished his Nief or Bond-woman, she might have had an Appeal of Rape against her Lord, as at this day she may have. See *Cook* 2. Part, *Institutes* 184. acc.

3. J. S. who was a *Scot*, was Indicted in the Kings Bench of the Rape of a Girl who was but of the age of 7 years, and no more; and the Indictment was *quod ipsam felonicè rapuit, et carnaliter cognovit.* He pleaded, Not Guilty, upon which a Jury was returned, and then he prayed his Tryal *per medietatem linguæ*, but that was denyed by the Court, and also it was then too late after the general Issue pleaded. Upon the Evidence of divers Ancient Matrons, he was found Guilty. But the Court doubted, Whether a Rape could be of a Child of that age, but if she had bin 9 years of age, or above, then they conceived it might be a Rape, for at such age she might be endowed. *Quære legem.* Mich. 14 Eliz. *Dyer*, 304.

4. An Appeal of Rape was brought by E. L. against R. P. and divers Exceptions were taken to the Count in the Appeal. 1. That it is *Quod tali die anno et Parochia eam rapuit et defloravit, et carnaliter cognovit*, without saying *felonicè.* 2. Because it was not averred in fact, That the Plaintiff did not assent to the Rape, neither before nor after the fact done; for in such Case the Appeal is given to the Woman by the Statute of *West.* 2. cap. 34. but otherwise, it is given to the King by Indictment only, the Exceptions were not Resolved by the Court. Trin. 3 Eliz. *Dyer*, 201. *Ellen Lambs* Case.

5. A Bill of Conspiracy was preferred against the Defendant for a Conspiracy to Indict the Plaintiff of a Rape; And the Plaintiff alledged in his Bill, That an Indictment was preferred against the Defendant before the Justices of Assise and *Nisi Prius* in the County of N. and did not lay it to be before Justices of *Oyer* and *Terminer*, and Goal-delivery. In that Case it was holden by the Court to be a good Exception, because Justices of Assise and *Nisi Prius* have not power to take Indictments. But afterwards upon view of the Bill, because it appeared that the principal thing tryable in this Court, was the Conspiracy, the Bill was retained. And in this Case it was said and agreed, That in Conspiracy the matter must be layed to be done *falsò et malitiosè*; and if it be in Case of a Rape, it must be layed that there was *recens prosecutio* of it,

it, otherwiſe it would argue a conſent; and therefore in the principal Caſe, becauſe the Defendant did not prefer an Indictment of Rape in convenient time after the Rape ſuppoſed to be done, but concealed the ſame for half a years time, and then would have preferred an Indictment againſt the Plaintiff for the ſame Rape; the Court was of Opinion, That the Indictment preferred was falſe and malitious. Mich. 4 Car. in the Starr-Chamber. *Taylor* and *Tonlias* Caſe. *Godbolt*, 444.

6. Note, where the Wife conſents to a Raviſher, having Iſſue a Daughter, and the Daughter entreth into the Land by force of the Statute of 6 R. 6. cap. 5. and after a Son is born, the Son ſhall never deveſt the Land which was veſted in the daughter by purchaſe for the forfeiture. See 9 H. 7. 25. 5 E. 4. 6. *Cook* 1. Part, 95. in *Shelbyes* Caſe, acc.

7. Note, That by the Statute of [*Rich.* 2. greater puniſhment is inflicted, both upon the party Raviſher, and the party Raviſhed, then was before, if ſhe conſent to the Raviſhment; for that in ſuch Caſe, both the Raviſhed, or the Raviſher, are diſabled to challenge Inheritance, Dower, or any other Eſtate in the Land; but in ſuch Caſe, the next of bloud may enter into [the Lands; and alſo the Husband of her who conſents to the Raviſhment; Or if ſhe hath no Husband, her Father, or next of bloud ſhall have an Appeal of Rape in ſuch Caſe, wherein no wager of Battel ſhall be allowed. And if a Woman be Raviſhed by her next of kin, and conſenteth to him, and hath neither Husband nor Father, the next of kin to him ſhall have the Appeal; for he hath diſabled himſelf by the Rape, whereby he becomes a Felon. See *Fitz.* Tit. *Corone* 459. *Cook* 2. Part, *Inſtitutes* 434. acc.

Rationabili parte, Rationabilibus Diviſis, and *Rationabili parte Bonorum.*

1. THe Writ *de Rationabili parte* is a Writ of Right which lyeth only betwixt Privies in bloud; as betwixt Brothers in Gavelkind, betwixt Siſters and other Coparceners, as Nephews, Neeces, and it lyeth only of Lands in Fee ſimple. As if the Anceſtor ſeiſed of Lands in Feeſimple, maketh a Leaſe thereof for life, having Iſſue divers Daughters, and the Tenant for life dyeth, and one of the Daughters entreth into the whole Lands, and diſforceth thereof her other Siſters, they may have and joyn in this Writ *de Rationabili parte*, and thereby they ſhall recover their proportions of the Lands againſt their other Siſter. But if they ſue this Writ againſt a ſtranger who deforceth them after the death of their common Anceſter; in ſuch Caſe, the Writ ſhall abate; for againſt a ſtranger they ought to ſue an Aſſiſe of Mortdaunceſter, or ſuch other Writ (as their Caſe ſhall require) of the Seiſin of their Anceſter. See *Fitzh. Nat. Brev.* 10.

2. Note, That in this Writ *de Rationabili parte* brought, the parties cannot joyn Iſſue to be tryed by Battel, becauſe it is a Writ which lyeth in privity, and between Privies in bloud; betwixt whom Battel doth not lye. But yet if one [Coparcener doth claim the Land by a Feoffment from their Anceſtor in Fee, if the other Coparcener will deforce her, and put her out of the Land; in that Caſe ſhe may have a Writ of Right againſt the Coparcener which deforceth her, in which Writ ſhe may joyn the Miſe by Grand Aſſiſe, or by Battel, becauſe in that Caſe ſhe doth not claim the Land as Heir to her Anceſter. See *Plow. Com.* 306. acc.

3. *De Rationabili* [*Diviſis* is alſo a Writ of Right, and properly lyeth where two men have Lands in divers Towns or Hamlets, ſo as the one is ſeiſed of the Lands in one Town, and they do not know the bounds of the Towns or Hamlets where the Lands do lye, nor which is the Land of the

the one, which the Land of the other; then this Writ lyeth for the one against the other. And this Writ may be directed to the Sheriff of the County, and is in the nature of a Commission unto him, commanding him, That he make Division and Partition of the Lands betwixt the parties by metes and Bounds. See *Fitz. Nat. Br.* acc. And see tha this Writ also lyeth, and shall be where two Lords are of Wasts adjoyning, that this Writ shall be directed to the Sheriff to make Division of it betwixt the Lords; and such Division made of the Waste by the Sheriff, shall bind the Lords for ever. See 29 E. 3. 58. acc.

4. *De Rationabili parte Bonorum* is, where the Wife after the death of her Husband, cannot have the third part of her Husbands goods after his Debts paid, and funeral expences performed. And therefore by the Statute of *Magna Charta* she may have this Writ against the Executors of her Husband for her reasonable part of the goods. It hath bin a Question, If this was due by the Common Law or by the Custome only of the Countries and places. See 30 H. 6. *Fitz.* Tit. *Responder* 95. A woman brought a Writ for the moyety of the goods, and counted upon the Custome, but not speaking of any Town, or that it was the Custome of the Realm. See 39 E. 3. 9. Detinue was brought by the Heir, and he Declared, That the Heir by the Custome ought to have the reasonable part of the goods of his Father, who dyed Intestate, and it was holden good. See 31 E. 3. A Woman did demand the moyety of her Husbands goods, because he had no Children, and counted upon the Custome of the Realm. But see 21 H. 6. 1, & 2. It seemeth it is due by Custome, and not *per Legem terræ*. And see Mich. 18 and 19 Eliz. in B. R. a Writ was brought and allowed there; notwithstanding that Exception was taken to it, That it was maintainable by the special Custome of *London*. 3 E. 3. Debt. 156. there the Count is, by the Custome of the Town of *Northampton*. And see 7 E. 4. 20. Exception was taken, because the Plaintiff did not Count, that the Custome did continue. But for the determination of this Question, Whether it be due by Law or Custome. See *Cook* 2. Part, *Institutes* 33. out of *Bracton. Lib.* 2. fol. 61.

5. Note, That the Administrators of a man that dyeth Intestate, or Executor of any, after the Debts paid, and Will performed, ought not to take any thing of the Testators to their own use, but ought to divide the same to the Wife and Children of the Intestate, or Testater, and that by the words of the Statute of *Magna Charta*, viz. *salvis uxori et Liberis suis rationabilibus partibus suis. Cook* 2. Part, *Institutes* 33. acc.

6. A. brought a Writ *de Rationabili parte Bonorum* against B. and counted of the Custome of the Town of *Nottingham*, and shewed all specially, and the Conclusion was, That he detayned *particulariter* goods of the party Plaintiff, which appertained to him as his part and portion. Upon *Non Detinet* pleaded. It was found, That the Plaintiff was entituled to this Action many years before the Statute of 21 Jac. and that he had not brought his Action within the time limitted by the said Statute. It was adjudged for the Plaintiff for these reasons, 1. Because that this Action is an Original Writ, and is not mentioned in the Statute of 21 Jac. and although the Issue is *Non Detinet*, yet it is no Action of Detinue, for a Writ of Detinue lyes not for money, unless it be in bags, but a *Rationabili parte Bonorum* lyes for money *in pecuniis numeratis*, because Statutes are not made to extend to those Cases which seldome or never happen, as this Case is but to these which frequently happen. Also this Statute takes away the Common Law, and shall not be extended to Equity; and upon these Reasons, the Court gave Judgment for the Plaintiff. Trin. 6 Car. in C. B. *Sherwin* and *Cartwrights* Case. *Hutton* 109.

Rasure. *See Lib.* 1. *Title* Deeds.

Recognizances.

Recognizances.

1. *Who, and before whom; and who hath power to take Recognizances: Where taken, shall be good; Where not. And what shall be said to be a good Recognizance; when taken, what not: and by whom it may be acknowledged, by whom not.*

1. A Man made a Recognizance in the Nature of a Statute Merchant before the Mayor of *Chester*; and it was supposed, That the said Mayor had not Authority to take Statutes by the King as the City of *London* and other Cities had. The Conusor made a Feoffment of the Land to a stranger, and afterwards the Conusee sued forth Execution upon the Statute, and thereupon the Feoffee of the Conusor brought an *Audita Querela*. Trin. 29 H. 8. *Dyer*, 35.

2. A Recognizance was made to Sir *Nicholas Bacon* Knight, Keeper of the Great Seal, and two others. And it was acknowledged before the said Sir *Nicholas Bacon*. It was demanded of the Justices, if it were good or not. It was the Opinion of the Court, That as to Sir *Nicholas Bacon* it was void, and to the other two it was good enough. Pasc. 5 Eliz. *Dyer*, 221.

3. A. seised of a house in *London*, took a Wife, and afterwards acknowledged a Recognizance to the Chamberlain of *London* according to the Custome for Orphanage money: And afterwards he acknowledged another Recognizance before the Recorder and Mayor of the Staple to B. B. sued out Execution upon his Recognizance, and had a *Liberate*, but it was not Returned; and upon that the Sheriff delivered the said house to B. The Successor of the Chamberlain sued Execution upon his Recognizance, and had an *Elegit* to a Serjeant at Mace, immediate Officer to the Court, and had the moyety of the said house delivered to him in extent. The Recognizor dyed, his Wife had the house delivered to her for her Dower, and dyed. The Chamberlain assigned his Interest over to F. and B. assigned also his Interest to F. the Heir of the Conusor demised the house to the Plaintiff, and the Defendant under the Title of F. entred. In this Case (amongst other points), It was Resolved, That the Successor of the Chamberlain of *London*, should have the said Recognizance. For although the Corporation of Chamberlain be a sole Corporation, yet it was by Custome. And the Custome which had created and made him a Corporation in Succession, had enabled the Successor to take such Recognizances made to his Predecessor. And it was said, That the Custome was a reasonable Custome, for his Executors or Administrators ought not to entermeddle with such Recognizances which by the Custome are taken in his Corporate Capacity, and not in his private Capacity. *Cook* 4 Part, 65, 66. *Fulwood's* Case.

4. In a *Scire facias* to have Execution of a Recognizance; the Case was, A special *Supplicavit* for the Peace was directed out of the Chancery to A. and B. Justices of the Peace, and to the Sheriff of the County to take a Recognizance of L. M. and N. for the Peace and good Behaviour. And the Commission was to A. B. and the Sheriff *et cuilibet eorum*. The *Supplicavit* was delivered to the two Justices who took a Recognizance from L. and M. and N. could not be found. The Sheriff was afterwards out of his Office. The new Sheriff made Return, That M. and N. *non sunt inventi in balliva mea*. And Returned, That A. and B. had taken a Recognizance of L. as appeareth, *per quandam Schedulam huic annex. in hæc verba*, &c. The Question in this Case was, That the *Dedimus* being directed to the two Justices, and the Sheriff, and being delivered to the two Justices, Whether the other Sheriff could certify it, and if a Record taken by one, can be certified by another. It was said by *Lee* Chief Justice, That when a Recognizance is put to a writing or Note of Remembrance thereof taken before Commissioners, it is immediately a Record. One takes notes of a Recognizance and dyeth: He to whose hands the Notes are come, may certify the same; and he said that in the Principal Case, the Sheriff might Return the Writ or Commission *ex Officio*, and also Return, *Quod executio istius brevis patet in quadam Schedula* &c. But it was the Opinion of *Haughton* and *Dodderidge* Justices, That the Record did not come duly into the Chancery, and so it was not any Record upon which there could be any prosecution for the King. The Questions in this Case, they said were two. 1. If the Sheriff, as this Case is, might make the Return; and they held, That he could not. For when the party delivers the Commission to the two Justices, the Sheriff cannot entermeddle with it, for then the Justices ought to return the Recognizance by vertue of that Commission. See 21 H. 7. 20. acc. and they held, That the *Supplicavit* and the Recognizance was not well returned by the new Sheriff, but it

ought to have bin by the other Commiſſioners. There was no Judgment g ven, but the Caſe was adjourned, becauſe *Lea* Chief Juſtice was very ſtrong in Opinion againſt the other Juſtices. Trin. 21 Jac. in B. R. *Leonard's* Caſe. *Godbolt*, 355.

5. A man was bound in a Recognizance for his good Behaviour. And it was ſhewed, That he was Arreſted by a Conſtable for ſuſpition of a Felony, and that he eſcaped from him. To which he pleaded, Not Guilty. Exception was taken, becauſe it was not ſhewed, That a Felony was committed, which might cauſe ſuſpition of the party. But it was the Opinion of the Court, That it needed not. For although no ſuch Felony was committed, and although the Arreſt by a Conſtable were tortious. Yet it was holden, That the Recognizor had forfeited his Recognizance by making an Eſcape, which was a Miſ-behaviour. Paſc. 26 Eliz. in C. B. *Godbolt.* 222 acc.

6. In Debt upon a Recognizance, The Plaintiff declared upon a Recognizance taken before the Lord *Hobart* Chief Juſtice of the Common Pleas, which was taken by him at Sergeants Inn in *Fleet-ſtreet* out of Term, and layed his Action in *London*. The Queſtion was, Whether the Action ought to be layed in *Middleſex* where the Recogniſance is Recorded, or in *London*, becauſe the entry of the Record is, That the Recognizance was acknowledged before the Lord *Hobart ut ſupra*. In this Caſe it was agreed. 1. That the ſeveral Judges may take Recognizances out of Term in any part of *England*. 2. That although it was not a perfect Record before it was entred upon the Roll, yet when it is entred, it is a Recognizance from the firſt acknowledgment, and binds the perſon as a Recognizance from that time. 3. That it might be in *London*, as the firſt and more worthy part of the Act. And it was further Reſolved, That a *Scire facias* upon ſuch a Recognizance ſhall be directed to the Sheriffs of *London*, and not to the Sheriffs of *Middleſex*. And a Preſident was cited upon a Judgment given in the Common Pleas at *Hertford* Term, and the Records brought to *Weſtminſter*. Yet the *Scire facias* went to the Sheriff of *Hertford*, and not to the Sheriff of *Middleſex*, becauſe by the Record it appeared, That the Judgment was given at *Hertford*. But if the Entry of the Record were general, that the Recognizance was taken before the Lord *Hobart*, then it ſhould be intended it was taken in open Court, and then the Action was to be brought in *Middleſex*. Mich. 14 Jac. in C. B. *Hall* and *Winkfields* Caſe. *Hob.* 195.

7. A. B. and C. were jointly bound in a Recognizance to the Plaintiff, viz. A. in 120 l. and B. and C. in 60 l. *et utreque eorum*. That if the Plaintiff ſhould bring Debt of 60 l. againſt A. before *Octob. Hill.* following in the Common Pleas, that he within eight dayes after warning, ſhould appear by himſelf, or by his Attorney, and if he were condemned, that he ſhould ſatisfy the Debt, or elſe render himſelf to the Priſon of the *Fleet*, there to remain *quouſque*, &c. and the Plaintiff layed *de facto*, that he brought Debt of 60 l. in the Common Pleas againſt A. and it was ſo far proceeded in the Action, that the Plaintiff ſhould recover his Debt of 60 l. and 5 l. for Coſts, and that he ſued forth a *Capias ad ſatisfaciend.* againſt A. and that he had not paid the condemnation, nor rendred his body. Upon which the Defendant demurred, becauſe the Action was brought only againſt C. whereas it ought to have bin brought againſt him and B. for the words are *uterque cognovit*. But it was Ruled by the Court, That foraſmuch as both of them appeared at the day of the Return. *Et taliter in eadem Curia proceſſum fuit*, that the Plaintiff recovered, it was ſufficient, being but a conveyance to the Action, and collateral. Another Exception was taken, becauſe the Plaintiff had not ſhewed, That he gave warning of the Action brought. It was holden by three of the Juſtices, That it was a material Exception, becauſe it is a Condition precedent, which ought to be firſt alledged to be performed, wherefore for that cauſe, Judgment was entred for the Defendant. Mich. 3 Jac. in B. R. *Hargrave* and *Rogers* Caſe. *Cro.* 2. Part. 98.

8. In the Exchequer, the Caſe was this; F. before the Statute of 23 Eliz. was always a Recuſant and for money lent by him to S. ſome before the Statute, and ſome after, he took a Recognizance in the name of the Defendants and others, and alſo a Grant of a Rent-charge by Deed Indented, with Condition of Redemption. And took ſeveral other Recognizances for the performance of Covenants, in the names of other, all which ſaid Recognizances did amount to 20000 l. but were to the uſe of F. and to B. at his diſpoſition. The Statute was made 28 Eliz. by which it was enacted, That for default of payment of 20 l. a Moneth, the Queen by proceſs out of the Exchequer, might take, ſecure, and enjoy all the Goods, &c. and two parts of the Lands of the Recuſant; F. was convict of Recuſancy, and did not pay the 20 l. a Moneth. The Queſtion was, if the King ſhould have the benefit of theſe Recognizances. It was objected, That if they had bin acknowledged to F. himſelf, they ſhould not have bin forfeited, for that the Statute ſpeaks only of Goods, and debts are not included within the word [Goods]. 2. The Recognizances are for the performance of Covenants of Rent-charge, which favours of the realty, and ſo not included

cluded within the intent of the Act which extends only to goods. 3. If any forfeiture did accrue to the King in this Case by the Act, it was by reason of the word (Goods), but here F. had not any goods, but only a meer Truſt and Confidence, which is nothing in conſideration of the Law. But it was Reſolved by all the Barons, and other the Juſtices. 1. That if the Recognizances had bin acknowledged to the party himſelf that they were given to the King within the word (Goods) and they were Chattells perſonal, and Chattells perſonalls were given to the King by the Act. 2. Becauſe aſwell the Recognizances, as the Rent-charge were made for the payment of money; and when Recognizances are forfeited, they are but Chattels perſonal. And 3. Here was Covin apparent in this Caſe, for when he was a Recuſant, at all times after the Statute of 23 Eliz. It ſhall be intended, That he took thoſe Recognizances in other mens Names, with an intent to prevent the King, and to defeat him of the levying of the forfeiture, and an Act done by Covin in the Caſe of the King *per Obligatum*, ſhall be equal to acts done by Covin *de Directo* to the party himſelf. And in this Caſe it was holden, That although one of the Recognizances was taken before the Statute of 28 Eliz. was made, yet it being to his uſe, it ſhall be in the nature of a Chattel in him; and although F. was not convict till 41 Eliz. that was not material, for at all times before that he was ſubject to a forfeiture for his Recuſancy. Paſc. 4 Jac. in the Exchequer, *Ford* and *Sheldens* Caſe. *Cook* 12. Part, 1, 2, and 3.

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2. *Execution upon Recognizance, and what manner of Execution ſhall be awarded, and how and by whom Executed; Where Diſcharged.*

1. AT the Common Law, when a common perſon ſued one upon a Recognizance, or had a Judgment for Debt or Damages, he could not have the body of the Defendant, nor his Lands, except in ſpecial Caſes in Execution, but he was to have Execution only of his Goods and Chattells, or of his Corn, or of other the like profits which grow of the Land. By which the Sheriff was commanded, *Quod de terris et catallis*. A *Levari facias &c.* Or he might have had a Writ called *Fieri facias*, which was only *de bonis et catallis*, both which Writs were to be ſued within the year after the Judgment, or the Recognizance acknowledged, and if he had not the one or the other within the year, the Plaintiff or Conuſee was put to his Action of debt. But by the Statute of *Weſt.* 2. cap. 45. a *Scire facias* was given. And by the Statute of *Weſt.* 2. cap. 18. *cum debitum fuerit recuperatum Elegit* was given of the moyety of the Land, which was the firſt Act which ſubjected Land to the Execution of a Judgment or a Recognizance. *Cook* 3. Part, 12. Sir *William Herberts* Caſe.

2. The Tenor of a Recognizance taken in Chancery, came from thence into the Common Pleas by *Mittimus* to the intent to have a *Scire facias* upon it out of the Common Pleas. But the Opinion of the Court was, That a *Scire facias* ſhould not Iſſue forth upon the Tenor, but an Original Action of Debt, and then the Plaintiff might declare upon the Tenor. Paſc. 22 Eliz. *Dyer*, 369. See 5 Eliz. *Dyer*, 217. acc.

3. In Debt upon an eſcape, the Caſe was, A. did acknowledge a Recognizance in the Chancery, and the Plaintiff had a *Scire facias*, and two *Nihils* returned. Afterwards he had a Judgment *Quod recuperet debitum*, and a *Levari facias* came to the Sheriff to levy the ſame, who returned *Nulla bona*. Afterwards he took forth a *Capias ad ſatisfaciendum* to the Sheriff, who took the party in Execution, and afterwards ſuffered him to eſcape, upon which the Action was brought. The point was, Whether a *Capias* doth lye upon a Recogniſance acknowledged in Chancery. It was Objected, That a *Capias* did not lye of a Recognizance taken in Chancery, and 14 Eliz. *Dyer*, 306. *Pattenhams* Caſe was vouched to be ſo. But it was anſwered, That as this Caſe is, the Action did well lye againſt the Sheriff. For preſently after the Recognizance acknowledged, it is a Judgment preſently, and ſo a Judgment upon Record. And where a Debt is upon Record, there by the Statute of 25 E. 3. cap. 17. the party may have a *Capias*. But admitting the proceſs was erronious, and a *Capias* be miſ-awarded, by which the party is taken in Execution, yet it is a lawful Execution, and the Sheriff is not to diſpute the Authority of the Writ, or Court, and ſo it was adjudged. Trin. 31 Eliz. in the Exchequer, in *Ognell* and *Paſlant* Caſe. Mich. 11 Jac. in B. R. *Weaver* and *Cliffords* Caſe. *Bollſtr.* 2. Part, 62. to 65.

4. Sir *George Griffy* now Barronet, was bound in a Statute Merchant of 1000 l. before the Mayor of *Coventry* to J. S. and upon a Certificate made by the Mayor into the Chancery, J. S. took out a *Capias* againſt *Griffy* by the name of *George Griffey* Eſquire, as he was named in the Statute, Whereupon Writs of Extent were made into the Counties of D. and S. which are executed and Returned. It was now prayed, That all might be amen-

ded. But it was denyed by the Court, and he was willed to ſue a new Writ out of the Chancery upon the firſt Certificate, *ſcil. Capias Corpus Georgii Griſley Milit. et Baronet, qui per nomen Georgii Griſl y Armiger r.cognovit* &c. See Paſc. 14 Jac. in C. B. Sir *George Griſley* Caſe. *Hob.* 109.

5. A man made a Feoffment in Fee upon Condition, That the Feoffee re-enfeoff the Feoffor for life, the Remainder to his eldeſt Son and his Heirs. Afterwards the Feoffor entred, and took the profits without the aſſent of the Feoffee, and made a Leaſe for years. The Feoffee acknowledged a Statute. Afterwards the Feoffor made another Feoffment to the uſe of himſelf for life, the Remainder to his ſecond Son in tail, with divers Remainders over, and dyed, the Feoffee enfeoffed the eldeſt ſon. In this Caſe, theſe points were Reſolved. 1. That the Feoffer by his entry and taking of the profits without the agreement of the Feoffee, was a Diſſeiſor, becauſe he took upon him without title as owner of the Land. 2. When the Feoffer made a Leaſe for years by Deed Indented, he had diſpenſed with the Condition during the Term, ſo as during the Term, he could not take advantage of it. 3. Reſolved, That when the Feoffee acknowledged a Statute, the ſame was not any diſability in him, or any cauſe for the Feoffer to re-enter, for that the Feoffee having but a right, the poſſeſſion in the hands of the Diſſeiſor, was not ſubject to the Statute, and then when the Feoffer entred, and made a Feoffment over, he had extinct the Condition, and ſo when the Feoffee enters, and enfeoffed the eldeſt Son, it was good, and he had a good eſtate. *Cook* 2. Part, 59. *Julius Winningtons* Caſe.

6. Two were bounden jointly and ſeverally in an Obligation, both of them were ſued ſeverally, and condemned, and were ſeverally taken in Execution, and afterwards one of them eſcaped, and the other brought an *Audita Querela*. It was adjudged in that Caſe, That it did not lye. For although there ſhall be but *unica executio*, yet that ſhall be intended an Execution with ſatisfaction, for he ſhall have both their bodies in Execution, and the body is not a ſatisfaction, but a pledg only for the Debt. *Cook* 5. Part, 86. *Blunfields* Caſe. And ſee there, where the Conuſors of a Statute Staple was taken in Execution, and eſcaped, yet his goods and Lands upon the Statute were extended, becauſe the Action which the Plaintiff hath againſt the Sheriff for the Eſcape, is not any ſatisfaction for the Debt. 33 Eliz. in C. B. *Linares* Caſe.

7. A. and his Wife levyed a Fine to J. S. of a Rectory, who granted and rendred a Rent-charge of 30 l. iſſuing out of the Rectory, to A. for life, to begin after the death of his Wife; Proviſo, That it ſhould not extend to charge the perſons of the Conuſees, but to charge the ſaid Rectory only, during the life of A. and rendred the Rectory to A. and his Wife, during the life of the Wife, the remainder to J. D. and his Wife, in Tail, the remainder to the right heirs of the ſaid J. D; A. acknowledged a Statute, according to the Statute of 23 H. 8. to B. the Wife of A. dyed, thoſe in the remainder outed A. Releaſed the Rent to him in the remainder; The Rent upon the ſaid Statute is extended and delivered, and for the Arrearage of it, Debt brought by B. againſt J. D. In this Caſe, amongſt other points, it was Reſolved, 1. That the Rent was lyable to execution preſently, by the Recognizance acknowledged, by the Statute of 13 E. 1. to which Statute, the Statute of 23 H. 8. did refer: So if a man hath a Judgment to recover Debt or Damages by that, the rent which he hath of any Eſtate of Freehold is lyable to it, and although that after Judgment he releaſe it, yet the party ſhall have Execution of the moyty of it by *Elegit* by the Statute of *weſt.* 2 cap. 18. 2. It was Reſolved, That it ſhould be had, That the Act of the Conuſor, ſhould Bar the Conuſee, who is a ſtranger to the Releaſe of his Execution of the Rent, no default being in him. 3. It was Reſolved, That the Action of Debt did not lye, ſo long as the Extent endured; for ſo long hath the Rent continuance, although the Freehold of it be determined. *Cook* 7. Part, 38. 39. *Lillingtons* Caſe.

More Recognizance.

1. A *Scire facias* upon a Recogniſance for the Peace, taken 9 *May*, 9 Car. Exceptions were taken to it. 1. Becauſe it was *Gardavit Pacem*, where it ought to have been *Conſervavit Pacem*; but that exception was diſallowed by the Court. 2. Becauſe the Recognizance was, That he ſhould appear at the next General Seſſions for the ſame County, and he did not ſhew the day of the next Seſſions. It was objected, That for that cauſe it was ill; for he ought to aſcertain the Court when the next Seſſions was, and ſo, That the breach of the Peace was before the ſaid Quarter Seſſions. But the Court was of Opinion, That if the breach was before the date of the Recognizance, and before the next Seſſions, it was ſufficient. Mich. 10 Car. in B. R. *Griffiths* Caſe. *Cro.* 1. Part, 283.

2. Error of a Judgment in the Common Pleas, brought by the Bayl; The Error aſſigned, was in the Execution againſt the Bayl, That no *Capias* was awarded againſt the Principal. It was ſaid, It was a Queſtion ſtirred in the Common Pleas, Whether an Execution might be in the Common Pleas

againſt

against the Bayl, though no *Capias* was against the Principal; and that *Hobart* Chief Justice there, was of Opinion, That it might, because the Recognizance by the Bayl in the Common Pleas, differs from the course of Bayl in the Kings Bench, for that the Recognizance is in a sum certain: But all the other Justices there held, That That it is all one in the Common Pleas, and in the Kings Bench: That a *Capias* against the Principal ought to be taken forth, and returned, *Non est inventus*; otherwise, no *Scire facias* ought to be against the Bayl; for if that the Principal be taken by the *Capias*, or that he render himself to Prison upon the Judgment, no Execution ought to be against the Bayl; and of that Opinion was the whole Court here in the Principal Case. Mich. 13 Car. in B. R. *South* and *Griffiths* Case. *Cro.* 1. Part, 345, 346.

3. One was bound in a Recognizance by the Chief Justice, to appear in the Kings Bench; the Court was moved to have his appearance respited, in regard he was Arrested in the Interim at the suit of another, and Imprisoned, so as he could not appear. It was said, That if a man be bounden in a Recognizance to appear in a Court of Record, if before the day of his Appearance, he be arrested at the suit of the King, and before the day of his Appearance he is Imprisoned, this shall discharge his Recognizance; but if he be arrested at the suit of another, and imprisoned, by reason of which he cannot keep his day, by this he hath broken his Recognizance: The whole Court did enclint, That in the Principal Case he should be discharged, because that he was before the day Arrested and Imprisoned. See *Littleton* 436, 437. where Imprisonment shall excuse appearance to make continual Claim. Trin. 9 Jac. in B. R. *Baldr.* 1. Part, 170.

4. A. brought Trespass against B. for taking of his goods: The Defendant pleaded, That the Plaintiff 5 Jac. did acknowledge a Recognizance of 100 l. to pay at Mich. next, at which day he did not pay it, and that two years after, the Recognizance was extended upon his goods, because the money was not satisfied at the day, nor at any time after: The Plaintiff replyed, That the money was paid, *ann.* 6 Jac. and prays it may be enquired of the County, &c. and upon Tryal, it was found for the Plaintiff. It was moved in arrest of Judgment, That there was no Issue joyned; for an Issue ought to be joyned upon a thing alledged by the party, but here the Plaintiff alledges payment a year after the day, on which the Defendant alledges a default in payment, and joyns Issue upon his own saying, whereas he ought to have stayed until the Defendant had rejoyned to his saying. But it was the Opinion of all the Justices, That it was an Issue joyned. Note, The Plaintiff after had Judgment, for although the Issue be not as good as it should be, yet the imperfection is helped by the Statute of 18 Eliz. And Note, That in this Case it was said, That although payment simply is no Plea in avoidance of a Recognizance, yet it was the Opinion of all the Justices, That after Issue joyned and Tryed, advantage cannot be taken of it. See *Cook* 5. 5. Part, in *Nidall's* Case. 43. acc. Pasch. 11 Jac. in B. R. *Mills* and *Jones* Case, *Brownlow*, 1 Part, 225.

See more of *Recognizance*, in Title of *Execution*.

Records.

Where a Record may be removed out of one Court to another; Where by Writ, or Certiorare; where by the Justices, or others; where removed by Certiorare, and remanded to the Inferiour Court by Mittimus; and where it is not removed by default in the Certiorare, & è contra.

1. THE Transcript of a Fine in the time of *Hen.* 4. was by the Ancestor removed out of the Treasury into the Chancery, and came into the Common Pleas, by *Mittimus* to have a *Scire facias* to execute the same, and the Ancestor dyed; and the Question was, If there needed to be a new Certificate of the Fine out of the Chancery, or if the Court might award upon that Fine a *Scire facias* to execute it: And it was the Opinion of the Court, That without a new *Mittimus*, the Heir should not have a *Scire facias*; for that by the death of the Ancestor, the authority given to the Justices, *de Banco*, by the Mittimus is determined. Hill. 28 H. 8. *Dyer*, 29.

2. Debt was brought upon a Counter Bond, to save harmless the Plaintiff of an Obligation against A. The Defendant pleaded, That the Plaintiff was not damnified: The Plaintiff shewed, That A. recovered against him upon a Plaint in *London*; They were at Issue upon *Nul tiel Record*. Note in that case, The Court did not write to the Inferiour Court of *London*, to certifie the Record, but gave day to the Plaintiff to have the Record in Court, *sub periculo*; where at the day, the Plaintiff by *Mittimus* out of the Chancery, brought in the Tenor of the Record; and upon that Certificate

of the Tenor, the Plaintiff had after Judgment. Mich. 3. Eliz. *Dyer*, 187.

3. In an Action upon the Caſe, the Plaintiff was Nonſuit, and the Defendant had Judgment for Coſts, upon the Statute of 23 H. 8. Upon a Writ of Error brought, the Record was removed into the Kings Bench: Afterwards, the Defendant brought an Original of Debt for the Coſts, in the Common Pleas. It was adjudged, That the Action did well lye: It was holden in that caſe, That the Court of Common Pleas could not write to the Kings Bench to certifie the Record, becauſe it was a higher Court; but in ſuch caſe the Record ſhall be certified into the Chancery by *Certiorare*, and from thence come in *Banco* by *Mittimus*: But in that caſe, if the Record had been in an inferiour Court, it was holden, That the Court of Common Pleas might have written to the Inferiour Court to have certified the Record. Paſch. 28. Eliz. *Dyer*, 32.

4. Note, A *Certiorare* was awarded out of the Kings Bench to the *Cuſtos Brevium*, an Officer of the Common Pleas, to remove the Record of a Fine levyed in the time of Queen *Mary* (whereas before nothing but the Tranſcript was removed by the Writ of Error, and Error found and adjudged in it) to the intent to have the Record of the File taken off the File, and to be cancelled in the Kings Bench; and Preſidents were ſhewed of the like, whereupon the *Certiorare* was allowed by the Court. But ſee there, where another *Certiorare* was directed to the Chief Juſtice of the Common Bench for the removing of a Record of *Niſi Prius*, upon a Verdict there; and an Attaint brought upon that Verdict in the Kings Bench, there the *Certiorare* was diſallowed by the Court, and denyed, there being no Preſident of ſuch Removal: But there muſt be a *Certiorare* out of the Chancery, and the Record brought in by *Mittimus*. Paſch. 10 Eliz. *Dyer*, 275. *Bourn* and *Ruſſel's* Caſe.

5. In an Aſſize, the Tenant pleaded an Outlawry in the Plaintiff, and demanded Judgment, but did not ſhew the Record of it: The Plaintiff pleaded *Nul Tiel Record*, and day was given to the Defendant to have the Record in Court: At the day, the Tenor of it was brought, by which it appeared, that there was variance in the day of the Return of the Exigent, and in the place where the Outlawry was pronounced, and the Plaintiff brought alſo the Tenor of the revoking and annulling of the Outlawry; and this was brought in by *Mittimus*, and this was after Iſſue was joyned: Yet becauſe of the variances aforeſaid, the Court was of Opinion, That it was a Failure of the Record, and the Defendant adjudged a Diſſeiſor. Mich. 3 *Eliz. Dyer*, 188.

6. Note, it was ſaid by *Cook*, That the Chancellor, or any of the Judges of any of the Courts of Record at *Weſtminſter*, may bring a Record out to another without a *Certiorare*, becauſe one Judge is ſufficiently known to another, as 5 H. 7. 31. where a Certificate was by the Chancellor alone; See 11 H. 4. acc. But that other Judges of baſe Courts cannot do, nor Juſtices of Peace, as 3 H. 6. where the Certificate by Suitors was held void. Paſch. 24 Eliz. in B. R. *Godbolt*, 14. acc.

7. A *Scire facias* was brought 6 H. 4. in the name of the King, at the Petition of the Prince, in Chancery, to repeal a Grant which R. 2. made of the Manor of H. in the County of *Cornwall*, to N. S. and M. his Wife, for their lives; At the return of the *Scire facias*, the Prince by his Attorney appeared, and the ſaid M. alſo, her husband N. S. being dead; and the Prince demanded, that the ſaid Letters Patents might be revoked, and that the ſaid Manor might be reſtored to him, as parcel of his Dutchy: The Record was delivered by the Chancellor into the Kings Bench, *Gaſcoigne* being then Chief Juſtice: Whereupon M. pleaded the Grant of R. 2. and prayed in aid of the King, and the Court gave day; and at the day the Prince brought a *Protedendo in Loquela*, and then M. made default; whereupon day was given to the Prince; and thereupon the Court gave Judgment, That the Letters Patents ſhould be revoked, and the Manor ſeized in the Kings hands, and ſhould be delivered to the Prince, as parcel of his Dutchy. See *Cook* 8. Part, 23. in the Princes Caſe; where this Caſe is brought in, to prove, That a Record brought in by the Chancellor alone, without any *Certiorare*, to certifie it, was allowed good and ſufficient.

8 King *Philip* and Queen *Mary*, by their Letters Patents 23 *Sept.* 3. & 4. of their Reigns, Granted to *Mark Steward*, the Office of their Serjant at Arms, attendant upon the Chancellor of *England*, for the Term of his life. It was found by force of Commiſſion taken before A. and B. and returned in the Chancery, that he did not ſerve in the ſaid Office of Serj. at Arms, from the 8. year of Queen *Eliz.* to the date of the Return of the ſaid Commiſſion, but abſented himſelf, 7 May, 2 Eliz. *Mark* came, and complained that he was unjuſtly removed from the ſaid Office, and ſaid, That the ſaid Queen the laſt of Nov. in the eleventh year of her Reigne, gave him Licenſe to abſent himſelf from the exerciſe of the ſaid Office, at his Will and pleaſure; and from the time of the Licenſe, the Queen did not command him to exerciſe the ſaid Office. Upon which, Iſſue was taken, and day was given, *Coram Domina Regina in craſtino Aſcenſionis ad faciendum & recipiendum quid juſtè fuerit in premiſſis*, and a *Venire facias* awarded to the Sheriff of *Middleſex*, returnable at the day in the Kings Bench. Note, in that Caſe, Sir *Thomas Bromley*, Chancellor of *England*, *Die Lunæ poſt craſtinum*

craſtinum Aſcenſionis, 21 Eliz. *per manus ſuas proprias* (without any Writ) *deliberavit Recordum prædict. coram Domina Regina in Cancell. ſua habitum*, into the Kings Bench, and *craſtino Aſcenſionis*, the Jury appeared, and gave a ſpecial Verdict in the Caſe; upon which ſpecial Verdict, there was after Judgment given, That the ſaid *Mark Steward* ſhould be reſtored to his Office, *Salvo Jure Reginæ*. See *Cook* 8. Part, 99, *in fine*. *Mark Stewards* Caſe.

9. Debt in the Common Pleas upon a Judgment in that Court: The Defendant pleaded *Nul Tiel Record*, and upon that the Plaintiff there obtained a *Certiorari* out of the Chancery, to ſend the Record thither, which by *Mittimus* might be ſent into the Common Pleas. It was doubted whether ſuch a *Certiorare* was allowable, becauſe the Records of the Kings Bench ſhall not be removed out of that Court into any other Court; becauſe the Pleas there, are *coram Rege*: Divers Preſidents were ſhewed, that ſuch Records were by *Mittimus* out of Chancery ſent into the Common Pleas, Hill. 21 Eliz. Rott. 1374. Upon a Judgment in that Court, *Nul tiel Record* was pleaded by *Mittimus* out of the Chancery, it was ſent into the Common Pleas, Mich. 24 Eliz. *Rott. Lee* and *Scargets* Caſe acc. Hill. 11 Jac. *Rott.* 3455. in C. B. *Palmer* and *Stewards* Caſe. Hill. 11 Jac. *Rott.* 1715. *Philips* and *Manings* Caſe acc. Upon theſe Preſidents ſhewed, It was the Opinion of the Court, That the courſe was well allowable. Hill. 8 Car. in B. R. *Latterel* and *Leas* Caſe. *Cro.* 1. Part, 217.

10. In a Writ of Error, the Caſe was, a Writ of Accompt was brought, and upon Iſſue joyned, Judgment was given, That the Defendant in the Accompt, ſhould accompt; *Et ideo in injuria quia non primus computavit*: Upon which Judgment, the Defendant brought a Writ of Error: The Queſtion was, if after that Judgment, the Writ of Error did lye, or not: It was Reſolved in that Caſe, That the Writ of Error upon that Judgment, *Quod computet* did not lye before the final Judgment given; becauſe that the Record ſhall not be removed, until the whole matter of the Accompt be determined; *& Judicium detur de integro*; and that cannot be, until Judgment be given of the arrearages and damages. 2. In this Caſe, it was Reſolved, That the Record was not removed by the Writ of Error; for until ſuch Judgment (as before) be given, the Chief Juſtice of the Common Pleas hath not authority to ſend the Record; for that the words of the Writ of Error are, *Si judicium inde redditum ſit, tunc recordare, &c.* and therefore it was holden, That the Court of Common Pleas might proceed upon the Record, although that the Roll was marked, *Mittitur*. *Cook* 11. Part, 39, 40. *Mitcalfs* Caſe,

11. In a Writ of Error in Parliament to diſſolve a Judgment given in an Aſſize, the Parliament being diſſolved; It was moved in the Court of Kings Bench, to have Execution of the former Judgment. In that Caſe, it was ſaid by *Cook* Chief Juſtice, That that was no Parliament, becauſe No Bill paſſed, nor any Royal aſſent: It was only but an Inception of a Parliament, but if any aſſent or diſaſſent had been to any Bill, then it ſhould have been ſaid to be a Seſſion, and then a Roll of it was to be made; and it was not to be tryed by a Jury whether it was a Parliament or not: It was further ſaid, That in the principal Caſe, It being a Judgment in an Aſſize, which is *Feſtinum Remedium*, it ought not to be delayed, but that Execution ought to be granted, for the Record was never removed; and Execution was granted in the principal Caſe. Trin. 12 Jac. Sir *Chriſtopher Heydon* and *Godſalves* Caſe. *Bulſtr.* 2. Part, 237.

12. In 8 Eliz. A. brought an Aſſize againſt divers Tenants of E. and recovered by Verdict; Afterwards the Tenants brought a Writ of Error in the Kings Bench, and aſſigned for Error, 1. That the Juſtices did adjorn the Aſſize by a Forrein County for Pleading, and there it was pleaded to the Aſſize, and the Aſſize paſſed for the Plaintiff, without a Writ of Reſummons of the Aſſize awarded; and alſo, becauſe no place was in the Teſte of the *Habeas Corpora*: The Judgment was affirmed, and now a Writ of Error was brought in Parliament, of the Judgment in the Kings Bench: In this Caſe, The Chief Juſtice brought the Record in Parliament, and alſo the Tranſcript; and after it was there examined, the Record was remanded, but the Tranſcript of the Record remained in Parliament, and upon that a *Scire facias* was awarded. Hill. 23 Eliz. in B. R. *Dyer*, 385. *Whalley's* Caſe.

13. A Tenor of a Recognizance by *Mittimus* out of the Chancery, came into the Common Pleas, It was holden in that Caſe, That upon the Tenor a *Scire facias* ſhould not Iſſue forth, but an Original Action of Debt. Paſch. 22 Eliz. *Dyer*, 369. See before.

Where

Where a Record ſhall be amended, for matter of Miſtake in it, either in words omitted, or for other defects in it, and where not; Where an erroneous Record, ſhall be accounted a Record till it be reverſed, and where no Record, if reverſed; and where by reverſal of one Record, another ſhall be reverſed, where not.

T. W. Executor of A. W. Executor of J. W. brought Debt in the Common Pleas againſt J. S. and Judgment was given, *Quod prædictus* J.W. *recuperet*; whereas it ſhould have been, *Quod prædict.* T. W. *recuperet*; and for that Error was brought: It was prayed, that the Record might be amended, for that it was the miſ-entring of the Clerk: But the Opinion of the Juſtices was, That it could not be amended, becauſe the Judgment was the Act of the Court, and not of the Clerk. H. 11. 43 Eliz. in C. B. *Welcomes* Caſe, *Goldesbr.* 124.

2. A. brought a Writ of Error againſt B. upon a Judgment given in Debt, in the Common Pleas; the Error aſſigned was, for that the Original Writ was 20 l. and all the mean Proceſs were ſo likewiſe: But where the Defendant appeared to the Exigent, the Entry was, *Quod defendens obtulit ſe in placito debiti decem Libras*, The Court at firſt conceived, that it might be amended, becauſe it was but the miſpriſion of the Clerk: But afterwards upon view of the Record, it appeared, That no original was certified; and therefore the Court was of Opinion, That it could not be amended. H. 11. 43 Eliz. B. R. *Goldesbr.* 133.

3. Error in the Exchequer Chamber, of a Judgment in B. R. where, in an Action of Covenant, the Parties were at Iſſue, and found for the Plaintiff, and Judgment given; Error was aſſigned, *Ore Tenus* (for it was not aſſigned of Record) That the Jurors appeared, *Qui Electi, Triati, & Jurati dicant ſuper Sacramentum ſuum*, and the Jury found for the Plaintiff; Whereas the Entry ought to have been, *Qui ad veritatem de infra contentis dicend. Electi, Triati, Jurati dicunt*, &c. and the words, (*Qui ad veritatem de infra contentis dicend.*) were omitted: Alſo it did not appear that they were ſworn *ad inquirendum*: It was ſaid, That that was but matter of Form; for when the Jury finds the point in Iſſue, it appears they came ſworn *ad Inquirendum*; and if it were material, it is amendable by the Statute of 8 H. 6. But it was the Opinion of all the Juſtices and Barons (except *Flemming* Chief Juſtice) That it was material, and not amendable, wherefore the Judgment was reverſed. Paſch. 4. Jac in B. R. *Scarro* and *Sapwry's* Caſe. *Cro.* 2. Part, 119.

4. Error of a Judgment in C. B. in an *Ejectione firmæ*; The Error aſſigned was, That *W. Brown* of *Bradfield*, was returned upon the *Venire facias*, and *Habeas Corpora*, and *William Brown* of *Metfield*, who was another perſon, and not returned, was ſworn: Upon this the Defendant Demurred in Law. It was moved, That the ſame was aſſignable for Error, for that it is againſt the Record, which is, That *William Brown* of *Bradfield* was returned, and ſworn; and although it was alledged, That in truth *William Brown* of *Metfield* was ſworn, yet all the Court held, That that was not aſſignable for Error, for that he is eſtopped to the contrary, and by this means every Record might be brought in queſtion. Trin. 8. Jac. in B. R. *Bowſe* and *Carringtons* Caſe. *Cro.* 2. Part, 244.

5. Error of a Judgment in C. B. for that the Defendant being an Attorney in the Common Pleas, and ſued by Bill, appeared, and pleaded in proper perſon, and being at Iſſue, the Record of the *Nſi Prius* was, *Quod tum prædict.* the Plaintiff *quum defendens* appeared *per Attornatos ſuos*, and the Verdict paſſed for the Plaintiff, and Judgment for him, whereas the Defendant could not appear *per Attornatum infra nominatum*, there being no Attorney in the Record for him. It was the Opinion of the Court, That it was Error; But the truth was, The Defendant appearing in proper perſon, it being but a miſ-entry of the Clerk: It was Ruled, That it ſhould be amended. Mich. 8 Jac. in B. R. *Hayward* and *Haywards* Caſe. *Cro.* 2. Part, 265.

6. Note, It was holden by the Juſtices, That where a Record is removed out of the Kings Bench into the Exchequer Chamber, it is not any Record in Court, until the Error be determined; and if there be any miſtaking by the negligence of the Clerk, in the Tranſcript, the courſe is then to ſend for the Clerk of the Court, and to amend it in the Exchequer Chamber: But if the principal Record which remains in Court, be falſe, then to amend it, and thereupon to alledge Diminutions; and upon Certificate thereof, the Tranſcript ſhall be alſo amended, if it appear to be but the negligence of the Clerk only. Trin. 15 Jac. in B. R. *Cro* 2. Part, 419.

7. Covenant, for that the Teſtator covenanted by Indenture, to pay for his daughters portion, upon marriage with the Plaintiff ſon, 4000 l. at ſeveral dayes; and for non-payment of 400 l. at one day, the Action was brought againſt the Defendants Executor: He pleaded, *Non eſt factum Teſtatoris*

ſtatoris, and found for the Plaintiff, and Damage 420 l. Coſts 13 s. 4. d. which were encreaſed by the Court to 12 l. The Judgment upon the *Poſtea* was, *Quod recuperet damna prædict.* amounting to 432 l. *de Bonis Teſtatoris, ſi tantum habet in manibus, & ſi non de propriis prædict. de Bonis propriis.* But the entry of the Judgment upon the Roll was, *Quod recuperet d. mna prædict. attingent ad* 432 *l. de Bonis Teſtatoris, &c. & ſi tantum in manibus ſuis non habent, tunc damna prædict. de Bonis Defendentis propriis,* where it ought to be *Miſſis prædict.* It was moved, That the Record might be amended, for the entry upon the *Poſtea* was well, and that was the Clerks Warrant for the entring of it upon the Roll; and upon examination, it being found ſo, it was amended: But it was held, That the Record was not to be removed, but the Tranſcript thereof, and therefore it might be amended: the Judgment was affirmed. Mich. 19 Jac. in B. R. Sr *Bernard Greenvile*, and Sir *Nicholas Smiths* Caſe. *Cro.* 2. Part, 627, 628.

8. Treſpaſs for breaking his Cloſe, in the Pariſh of *Pancras*, abutting upon *Grays*-Inn-lane; the Defendant pleaded Not Guilty, and the Record of *Niſi Prius* was *Graves*-Inn-lane; wherefore by reaſon of the Miſpriſion, the Plaintiff was Non-ſuit: Now becauſe the Roll and Paper-book were good, and it was but a Miſpriſion in the Record of *Niſi Prius*, which was void; a new *Venire* was prayed: and Trin. 9 Jac. in B. R. *Farthing* and *Doppers* Caſe was vouched, where in an Action upon the Caſe upon *Aſſumpſit*, the Record of *Niſi Prius* was in conſideration, that he promiſed to pay ten pounds within ſix moneths, whereas the Roll was ſix weeks; And it was adjudged, That the Plaintiff being then upon Nonſuit, the Record upon advice was amended, and a new Tryal awarded: The Court ſaid, It was a good Preſident; and therefore awarded in the Principal Caſe, That notwithſtanding the Nonſuit, there ſhould be a *Venire facias de novo* Trin. 2. Jac. in B. R. *Young* and *Enghefields* Caſe. *Cro.* 2. Part, 670. *Godbolt*, 328. the ſame Caſe.

9. Debt by A. againſt B. for an Eſcape; and the Plaintiff Declared upon a Recovery in the Court of *Aſhford*. The Defendant Pleaded *Nul Tiel Record*: The Record being certified, there were divers differences in the continuances, and in the Proceſs; Yet the Opinion of the Court was, That becauſe the Plaint, Declaration, and Judgment certified, did agree with the Declaration, that Judgment ſhould be given for the Plaintiff. Hill. 14 Jac. in C. B. *Coxhman* and *Hallys* Caſe. *Hob* 179.

10. The Court was moved for the amendment of a Record, where a Recovery was ſuffered of Lands in *Sutton*, in the County of *York*; and the Indenture of Bargain and Sale was by the right name, and ſo were the Indenture of Uſes, but the Writ of Entry was of the Mannor of *Salton*; and upon examination of the Parties to the Recovery, and that the Recovery is to no other uſes, then is expreſſed and mentioned in the ſaid Indenture, the Record was amended. Mich. 22 Jac. in C.B. *Winch.* 99, 100.

11. Error of a Judgment in *Ejectione firmæ*, after the Record removed, and Error aſſigned; It was prayed, That the Record might be amended, for the Entry was after the Imparlance; *Ad quam diem venerunt tam prædict. Thomas, quam prædict. Samuel per Attornatos ſuos: Et prædict. Thomas defendit vim &c. & dicit, non eſt inde Culpabilis*: and ſo *Thomas* was miſtaken for *Samuel*. It was the Opinion of the Court, That although the Record was removed, yet the Records were amended, it being only the default of the Clerk. Trin. 12 Jac. in C. B. *Spray* and *Parſons* Caſe was cited to have been adjudged accordingly: Whereupon the Record was amended. Hill. 13 Jac. in B. R. *Thomas Leſſer* and *Samuel Worths* Caſe. *Cro.* 2. Part, 444.

12. A *Quare Impedit* was brought by B. againſt the Biſhop of *Lincoln*, and others; and the Writ was *ſuam ſpectat Donationem*, and the word [*ad*] was omitted; It was moved, That it might be amended. The Court took time to adviſe of it: But at laſt it was the Opinion of all the Juſtices, That it was amendable; Whereupon a Clerk of the Chancery came into the Common Pleas, and amended it. Hill. 30 Eliz. in C. B. *Brocheſby*, and the Biſhop of *Lincolns* Caſe. *Goldesbr.* 78.

13. In *Ejectione firmæ*, upon Not Guilty pleaded, and Iſſue joyned before the Juſtices of Aſſize, where the Plaintiff had declared of divers Meſſuages, and divers Acres of Lands, lying in three Villages in the County of S. at the Tryal before the Jury was ſworn: The Defendants Council put in a plea, That after the laſt continuance, *viz.* ſuch a day in Trinity Term, before the day of Aſſize, the Plaintiff had entred into ſuch a Cloſe, by name, containing eight Acres, parcel of the premiſſes ſpecified in the Declaration: This Plea was received by the Judges of Aſſize. Afterwards, *viz.* in Mich. Term, the Defendants Council moved, That they might amend their Plea, *viz.* to put in every Village where the land did lye into which the Entry of the Plaintiff was, becauſe it was but matter of form: Afterwards, the Record of *Niſi Prius* was returned into the Exchequer. It was the Opinion of all the Juſtices, That the Plaintiff could not have a replication to that Plea, at the Tryal; for the Juſtices have no power either to accept a Replication upon

that Plea, or to Try it, but only to Return it as parcel of the Record of *Nisi Prius*: And the Justices held, That the Plea being put in in the Country, could not be amended in adding the Town in certain in which the Close did lye; for that was matter of substance. Mich. 8 Jac. in B. R. *Moore* and *Hawkies* Case. *Brownlow*, 1. Part, 145, 146.

14. In a *Formedon*, the Tenant pleaded a Fine, with Proclamations; The Plaintiff replyed, *Nul Tiel Record*: It was said, That the Record which remained with the Chirographer, did warrant the Plea; and the Fine which did remain with the *Custos Brevium*, did not warrant the Plea: Both the Records were shewed in Court, and to which of them the Court should hold, was the Question. It was found to that which was shewed by the *Custos Brevium*: And *Fisb* and *Brocketts* Case in *Plo. Com.* was vouched, where the Proclamations were reversed, because it appeared by the Record which was shewed by the *Custos Brevium*, That the third Proclamation was alledged to be made, 7 *Junii*, which was not *Dies Juridicus*; and yet it appeared by the Record by the Chirographer, that it was well done. But it was said by the Justices, There was no such thing in the same Case: And it was said by the Justices, That it was the Opinion of all the Justices, and Barons of the Exchequer, 26 Eliz. That in such Case, The Record which remains with the *Custos Brevium*, should be amended, and made according as it is in the Record of the Office of Chirographer: And the said President being shewed, It was Ordered, That it should remain as a President *in perpetuam rei memoriam*; because the Note which remains with the Chirographer, is *principale Recordum*. Mich. 29 Eliz. in C. B. *Godbolt*, 103.

15. In *Audita Querela*, the Plaintiff shewed, how that a Debt of 200 l. was recovered against him, upon which he was Outlawed. And afterwards by force of a *Capias utlegatum*, he was taken in Execution, and so being in Execution, the Sheriff suffered him to escape. The Defendant pleaded, That after the said Escape, and before the *Audita Querela* brought, the said Outlawry was declared to be erronious, and so *Nul tiel* Record of Outlawry, upon which the Plaintiff did demur. It was objected, That the Outlawry was not void, but voidable, and that at the time of the Escape, the Outlawry was of force, and the Sheriff shall never take advantage of Error, but shall be charged for the Escape, notwithstanding the Record be erronious. But it was adjudged, That in the Principal Case, the *Audita Querela* did not lye. For it was holden. 1. That when an erronious Judgment is given, and afterwards the Judgment is reversed by Error, collateral acts are thereby barred. As if A. be in Execution at the Suit of B. upon erronious Judgment; and afterwards the Judgment is reversed by Error, he may plead *Nul tiel* Record, but untill the Erronious Judgment be reversed, the Sheriff cannot take advantage of it; for there he cannot plead *Nul tiel* Record, although there be many first Error. But in the same Case, If the Plaintiff bring an Action against the Sheriff upon the escape, and hath Judgment and Execution, and afterwards the Judgment is reversed; yet because the Judgment was executed, notwithstanding the reversal of the first Judgment, it shall stand in force. 2. Resolved, That because the Judgment to avoid the Outlawry is declaratory, which declares the Outlawry to be *nul*, because the Exigent which is the Warrant to the Outlawry wanteth substance, there where that is so declared by Judgment of the Court, the same is void *ab initio*. *Cook* 8. Part, 142, 143. Dr. *Druries* Case.

16. A. had a Judgment in Debt against B. and by Deed enrolled, assigned the same to the Queen in satisfaction of a Debt due to her, with a Proviso, That if the Lord Treasurer, or the Barons of the Exchequer, or any two of them, for any reasonable cause should disallow of the Assignment, and revoke it by writing, that then the Assignment should be void. And afterwards by a Writ of Prerogative out of the Exchequer, the Lands of B. were extended, and his goods seized by the Sheriff by force of that Writ, but the Writ was not returned, three of the Barons did revoke the Assignment after the death of the Testator, because the Testator had satisfied the Queens Debt, and now the Executor brought a *Scire facias* to have Execution of the Judgment. And in this Case, amongst other points it was Resolved. 1. That the Execution for the Queen was good, although the Writ was not Returned. 2. That after the Execution had the Revocation came too late, for that the Queen had the end of the assignment, and the same was executed by process of Law, and when a man hath power of Revocation, and suffereth any thing to be lawfully executed by force of it, as to that he cannot make any Revocation. And see in that Case, where, by the reversal of one Record, another Record which doth depend upon it, shall be reversed, and where not. *Cook* 5. Part, 90. *Hors* Case.

17. If the Principal in Case of Felony, &c. be erroniously Attainted, either for Error in the process; or because he is out of the Realm, he is Outlawed. Yet the accessary may be attainted, for that the Attainder of the Principal stands good, untill it be reversed, and the Record of it a good Record: And so it was said it was Resolved. 2 R. 3. 12. And see the Case of 18 E. 4. 5. The Princi-

pal

pal was erroniouſly Outlawed for Felony, and the Acceſſary taken, Endicted, Arraigned, Attainted, and Executed. And afterwards the Principal did reverſe the Outlawry, and was Indicted and Arraigned of the Felony, and found Not Guilty, for which he was acquitted. It was demanded in ſuch Caſe, Foraſmuch as there cannot be an acceſſary where there is not a Principal (and in ſuch Caſe, there is no Principal) how the Heir of the acceſſary ſhall be reſtored to his Lands which his Father had forfeited by the ſaid unjuſt Attainder. It was ſaid to that, That the Heir might enter or bring his Action for that now upon the matter by act of Law, the Attainder againſt the Father was without any Writ of Error brought annulled, for by the Reverſing of the Outlawry againſt the Principal, the Attainder of the acceſſary which dependeth upon the Attainder of the Principal, is *ipſo facto*, defeated and made void, *Ex quo Nota*, That by the Reverſal of one Record, another Record ſhall be avoided. See *Cook* 4. Part, 119. in the Lord *Sanchers* Caſe, &c.

More Records.

1. DEbt brought by an Informer *tam pro Domina Regina, quam pro ſeipſo* againſt the Defendant, upon the Statute of 24 H. 8. of Apparel. The Defendant pleaded an Outlawry in the Plaintiff. The Plaintiff Pleaded *Nul tiel* Record, and day was given him to bring in the Record, and in the mean time the Plaintiff removed the Record, and the Plea of Outlawry into the Kings Bench by Error, and there aſſigned Error, and had a *Scire facias* upon it, and the Error not diſcuſſed, the Defendant brought into the Common Pleas an Exemplification under the Seal of the Kings Bench, without any Writ or other Seal. It was a Quære if it ſhould be allowed now for a Record, or it he had failed of the Record. It ſeemed to ſome to be a failer. So it ſhould have bin by relation if the Record had bin reverſed, for by the reverſal it is made no Record *ab initio*, although at the time of the Pleading of it, it was a Record. Hill. 6 Eliz. *Dyer*, 228.

2. In Debt, the Defendant waged his Law, and having day for it in another Term, he did not appear, nor was eſſoined, but a *Ne recipiatur aliquod eſſoine* was entred in the Roll of Eſſoins; and yet in the Plea Roll, there it was entred, *ad quem diem Defendens fecit ſe eſſoniare deviato veniendi*, &c. day was given over to another Term, when the Defendant failed of his Law; whereupon the Plaintiff had Judgment to recover. Afterwards the Defendant brought Error, and before any Error aſſigned, or a *Scire facias ad audiendum Errores* awarded, (to prevent his Adverſary, leaſt he ſhould cauſe an Eſſoign to be entred in the Eſſoign Roll) he alledged Diminution of the Record in that point, and prayed a *Certiorari* to the Juſtice of the Common Pleas, to certify, If he had any ſuch Eſſoin, and he certified that there was no Eſſoin according to the truth; and then it was alledged, That his Adverſary could not alledg Diminution in that point, although he had cauſed the Eſſoin to be entred in this Term: And afterwards the Judgment was reverſed upon the ſame Certificate for the Error aforeſaid. Mich. 16 Eliz. *Dyer*, 330.

3. P. brought an Action of falſe Impriſonment againſt J. S. and others, for Impriſoning him at *Briſtow*. The Defendant pleaded, That time out of mind, there hath bin a Court holden at *Briſtow* every *Monday* before the Mayor, &c. according to the Cuſtome and Liberties of the City, and according to the Cuſtome, J. S. levyed a Plaint there againſt the Plaintiff, whereupon the other Defendants being Serjeants, were commanded to Arreſt him, which they did. The Plaintiff took Iſſue, That J. S. did levy no ſuch Plaint againſt him, and it was found for the Plaintiff. It was ſaid in ſtay of Judgment, That it ought to have bin tryed by the Record. It was Reſolved, That the matter was well tryed, for that the matter of Record was mixt with the matter of fact, Whether the Court were kept, and the Plaint levyed according to the Cuſtome, which is a matter of fact tryable by *pais*. And the Opinion of the Court in this Caſe was, That the levying of a Plaint is like the ſuing of an Original, which is no Record, till it be returned in Court. It was adjudged for the Plaintiff. Mich. 16 Jac. in C. B. *Peter* and Sir *John Staffords* Caſe. *Hob.* 244.

4. In an *Ejectione firme* for a Farm in C. the Caſe upon the Evidence was, J. S. was ſeiſed in Fee, and about 29 H. 8. This Land was ſuppoſed to be conveyed to King *Henry* the 8th in Fee, for the enlargement of the Honor of *Hampton*, but no Deed nor matter of Record was in being to prove this Conveyance, and many reaſons were uſed to prove there never was ſuch a Conveyance, becauſe there is not one ſuch named in the Act of 31 H. 8. But it proved that this Land had continued in exchange as the Land of *Hen.* the 8th all his life, and that it had bin enjoyed in divers Leaſes made by E. 6. and Queen *Eliz.* and Rent paid for the ſame. And Queen *Eliz.* in the 16th year of her Reign granted the ſame to the Earl of *Lincoln*, and under that Title the Land had bin enjoyed a long time. It was the Opinion of the Court in this Caſe, That if

there was a Deed by which J. S. conveyed the Land to *Hen.* the 8th, and that he brought into the Court of Augmentation, although it be not found nor enrolled. Yet it is a ſufficient Record to entitle the King. And it is a Record by being brought into Court, and there received to be enrolled. Paſc. 15 Jac. in C. B. *Combs* and *Inwoods* Caſe. *Hutton* 1.

5. A. Deed of gift of Bargain and Sale of Lands in Exchange was made by the Duke of *Sommerſet* to King E. 6. and it was acknowledged to be enrolled before one of the Maſters of the Chancery, and alſo before the Chancellor of the Augmentations, and delivered in Court, and there put into a Cheſt, but it was enrolled. And if it might be now enrolled, was the Queſtion, and thereby the Lands veſt in the Queen as Heir or Purchaſor. It was the Opinion of the Lord *Dyer*, and the reſt of the Juſtices, That it could not be to veſt any Intereſt in the Queen. See for that Hill. 19 Eliz. *Dyer*, 355. But note, That in the Caſe of *Combes* and *Inwood* next before; the Book of the Lord *Dyer* in this Caſe was denyed to be Law; and there it was ſaid, That in that Caſe it was adjudged to be a good Conveyance. Quære.

6. Debt was brought upon an Obligation, The Defendant pleaded, That the Plaintiff is a Recuſant convict according to the Statute of 21 Jac. cap. 5. and demanded Judgment of the Action. The Plaintiff pleaded *Nul tiel* Record, and a day was given to bring in the Record. The Court ſaid, That the Defendant ought to have pleaded, Judgment if he ſhall be anſwered, for that the diſability is not but *quouſque, &c.* It was the Opinion of the Court, That a plea in diſability of the perſon in bar is peremptory. And it was ſaid, That the Debt of a Recuſant is not forfeit to the King, as in Outlawry, but if he fail of payment of the penalty according to the Statute: And the Court ſaid, If *Nul tiel* Record be pleaded in bar, it is an Iſſue, and Judgment ſhall be given upon failer of it. The Court gave direction for the bringing in of the Record, That a *Certiorari* ſhould be directed out of that Court to the Juſtices of the Peace where the Indictment was taken, to certify the whole matter. See Paſc. 3 Car. in B. R. *Hetley* 18.

7. Note, In the Caſe in C. B. between *Bing* and *Hodges*. One of the Jurours was named *Richard Smith* in all the proceſs againſt the Jurours. And after the Tryal, it was moved in Arreſt of Judgment. For that *Rice Smith* was ſworn upon the Tryal, and not *Richard*. It was the Opinion of the Court, That ſuch an averment cannot be made againſt a Record. For then an *Affidavit* would overthrow a Tryal. And it was ſaid, That that which is averred by the Statute of 21 Jac. cap. 13. is when a Jurour is named by one name in one place of the Record, and by another name in another place of the ſame Record. There it ſhall be helped by this Statute by averment, that he is the ſame man. Trin. 4 Car. in B. R. *Hetley* 107.

See more of Records in the Title of Amendments, and in the Title of Pleadings.

Recovery, and *Recovery* in value.

Common Recovery; and where the ſame ſhall bar and bind the Eſtate tail, and thoſe in the Reverſion, and Remainder; and where not; and of other things concerning a Common Recovery.

1. TEnant in tail, the Reverſion in the Crown, levyed a Fine, or ſuffered a Common Recovery. It was holden, That it was a bar to the Iſſue, but no Diſcontinuance, becauſe the King is in Reverſion. Paſc. 29 H. 8. *Dyer* 32. But ſee now by the Statute of 34 H. 8. the Eſtate tail is ſaved.

2. A man ſeiſed of a Mannor in Fee after the Statute of 27 H. 8. of uſes, enfeoffed divers perſons to the uſe of himſelf, and the Heirs Males of his body, and for want of ſuch Iſſue, the Remainder to divers other in tail, the Reverſion to the Feoffer and his Heirs; the Feoffer had Iſſue, and dyed, the Iſſue entred; he in the Remainder granted a Rent-charge out of the Land, and the Iſſue in tail levyed a Fine, and ſuffered a Recovery, and afterwards dyed without Iſſue. In this Caſe it was Reſolved. 1. That the Recoverors, nor any that came in under their Eſtate, ſhould be ſubject to the Charge of him in the Remainder, becauſe that the Recoveror is in of an Eſtate which he hath gained under the Tenant in tail in poſſeſſion, which Eſtate ſhall not be ſubject to the Charge of him in the Remainder, and alſo becauſe the Remainder can never come in poſſeſſion after the Recovery. 2. It was Reſolved, That a Common Recovery had againſt Tenant in tail, bars not only the Remainder, and all Leaſes and Charges made by him in the Remainder, but alſo the Reverſion, and all

Leaſes

Leaſes and Charges made by him in the Reverſion, and there is no difference betwixt a Remainder, and a Reverſion as to this purpoſe. *Cook* 1. Part, 62, 63. *Capell's* Caſe.

3. Tenant in tail had Iſſue two Sons, the eldeſt had Iſſue a daughter, and dyed, his Wife privily with Child of a Son in the life of his Father; Tenant in Tail ſuffered a Recovery to the uſe of himſelf, for the Term of his life, and after his death to the uſe of J. S. for 21 years, and after to the uſe of the Heirs Males of his body begotten, and the Heirs Males of ſuch Heirs Males, and preſently after the Judgment, and before Execution, the ſame day that the Judgment was, Tenant in tail dyed, and afterwards the Recovery was Executed: And then a Son was born, the younger Son entred. It was ſaid and Objected, That in this Caſe, Execution could not be ſued againſt the Iſſue in tail, becauſe the Iſſue in tail could not take benefit of the recompence; for he who vouched, could not have Execution againſt the Vouchee, untill Execution were had againſt him. And it was ſaid, That in this Caſe, the Iſſue in tail was in by Title paramount the Recovery, and therefore ſhould not be bound by the Recovery. But in this Caſe (amongſt many other excellent points of Law, for which ſee the Book at large) It was Reſolved, That Execution might be ſued againſt the Iſſue in tail, becauſe that the right of the Eſtate tail was bound by the Judgment had againſt Tenant in tail, and the Judgment to have recompence in value, and that in favour of Common Recoveries, which are now Common aſſurances of the Land. *Cook* 1. Part, 106. *Shellyes* Caſe.

4. Tenant in tail, the Remainder in Fee. He in the Remainder by Deed Indented and enrolled, Covenanted for conſideration of bloud, and other good conſiderations, to ſtand ſeiſed to the uſe of himſelf in tail, the Remainder to the Queen, her Heirs and Succeſſors, King and Queens of *England*. Afterwards Tenant in tail ſuffered a Common Recovery. It was adjudged, That in this Caſe, the Iſſue in tail was barred. And in this Caſe it was Reſolved. 1. That no uſe could be raiſed to the Queen upon ſuch a general conſideration without ſpecial averment, that valuable or other good conſideration was given. 2. Reſolved, That no Eſtate tail is preſerved by the Statute of 34 H. 8. but that which is created by the Kings Letters Patents, or be of the Proviſion of the King, and the Eſtate tail created by a common perſon, is not preſerved by that Statute. But when the King in conſideration of money, or other conſideration procures a ſubject to make a gift in tail to one of his Servants, the Remainder to the King, the ſame is ſaved by the ſaid Statute of 34 H. 8. but before the ſaid Statute, a Common Recovery did bar an Eſtate tail which was created by the Kings Letters Patents, although the Reverſion was in the King. *Cook* 2. Part, 15. and 16. *Wiſemans* Caſe.

5. Husband and Wife, Joynt-Tenants of a Manor, and to the Heirs of the body of the Husband, the Remainder to B. in tail, a Recovery was had againſt the Husband alone in a Writ of Entry in the Poſt in the life of the Wife with Voucher. B. in the Remainder was Attainted of Treaſon, and executed. And by Parliament, it was enacted, That he ſhould forfeit all ſuch Mannors, Lands, Tenements, Poſſeſſions, Rights, &c. which he had in Fee, or in tail, in uſe, or in poſſeſſion at the time of Treaſon committed; afterwards the Husband dyed without Iſſue of his body, the Wife dyed, the Queen granted a releaſe to C. the ſon of B. the Mannor which ſhe had by the Attaindor; and afterwards, the Queen brought a Writ of Error, againſt the Heir of the ſurvivor Recoveror, to reverſe the Recovery. In this (amongſt many other points, it was Reſolved, That as long as the Recovery ſtood in force (for it was but avoidable) he in the remainder had not any right to the remainder, in reſpect of the intended recompence, but for that the remainder was barred for the moyty; as if Tenant in tail ſuffer an erroneous recovery, and afterwards diſſeiſeth the Recoveror, and dyeth, the Iſſue ſhall not be remitted, as long as the recovery remains in force. 2. It was Reſolved, That becauſe he in the remainder had not right, this Writ of Error, which conſiſts more in privity then in Action, which is accompanied with a Right, was not given to the Queen by the general words of the Act of Parliament. 3. Reſolved, That for the one moyty, the recovery was a Bar unto the Eſtate tail, and to the remainder alſo; becauſe that by the recovery, the Joynture was ſevered, but for the other moyty of which the Wife was Tenant for life, the recovery was not any bar either to the Eſtate tail, or to the remainder; becauſe for that moyty there was not any Tenant to the *Precipe*; but the recovery had operation only by way of Eſtoppel, which did not binde the Iſſue in tail, which claimed *per formam Doni*. *Cook* 3. Part, 345. the Marqueſs of *Wincheſters* Caſe.

6. A. ſeized of Lands in Fee, levyed a Fine thereof to B. and C. and to the Heirs of B. who granted and rendred the ſame to A. and his Wife, who was not party to the Writ, or to the Conuſans, and to the Heirs of A; A. ſuffered a recovery with Voucher, in the life of his Wife, and afterwards dyed, the Wife dyed: He in the remainder brought a *Scire facias*, to have Execution of the remainder. It was adjudged in this Caſe, 1. That the grant and render to the Wife was not void, but voidable; though ſhe was not party to the Writ or Conuſans.

2. Reſolved

2. Reſolved, That this recovery againſt the Huſband only, ſhould not binde the remainder, becauſe between Husband and Wife there are no moyties, and the Joynture was not ſevered by the recovery againſt the Husband alone; and this caſe is as much, as if the husband had had a remainder in tail, expectant upon an Eſtate for life, in which Caſe a common recovery againſt him ſhall not binde, becauſe ſhe was not Tenant to the *Precipe*, nor ſeized by force of the tail; but the recovery as to the Eſtate of the Husband, took effect by Eſtoppel or Concluſion. Trin. 27 Eliz. in C. B. *Rott.* 276. *Owen* and *Morgans* Caſe.

7. A. ſeized of two Mannors, enfeoffed divers perſons, to the intent they ſhould render them back to A. and B. his Wife, whom he intended to marry, and to the Heirs males of the body of A. A. and B. intermarried, and had Iſſue C. A. dyed, C. in the life of B. Tenant of the Freehold, ſuffered a common Recovery, with ſingle Vouchers, to the intent that the Recoverers ſhould make a Feoffment to Uſes, and that the Wife, Tenant for life, ſhould Releaſe with Warranty, which Feoffment and Releaſe with Warranty, were made accordingly; and if the Collateral Warranty was a Bar to the Demandant, who was Heir in Tail, or was void by the Statute of 11 H. 7. cap. 20. was the Queſtion. it was adjudged in this Caſe, That the Eſtate Tail was barred by the Warranty. In this Caſe it was Reſolved, That when the Heir in Tail conveyed the Lands unto another, and the Releaſe and Confirmation of the Woman with Warranty, is but to perfect and corroborate the Eſtate which the Heir in Tail hath made; ſuch a Warranty is not reſtrained by the Act of 11 H. 7. for that ſhall be intended for his benefit, and not to his prejudice. 2. It was Reſolved, That when he in the Remainder in Tail, by a common Recovery had againſt him, by his Agreement diſableth himſelf to take benefit of the Statute of 11 H. 7. after his death, his Iſſue ſhall not take benefit of the ſame, becauſe that his Father was *in eſſe* at the time of the forfeiture, and could not enter; and a perſon who is not *in eſſe*, and who had not the immediate Intereſt at the time of the forfeiture, cannot take advantage of it. *Cook* 3. Part, 58. *Lincolne* Colledge Caſe.

8. Husband and Wife, and to the Heirs of the Husband, the Remainder over in Tail, the Remainder to the right Heirs of the Husband, levy a Fine, and a Recovery is had againſt the Conuſees, with Vouchers, in which the Husband only vouched, and Execution is had accordingly in the life of the Wife; which Recovery was to the uſe of the Husband for life, and after to the uſe of the Wife for life, and after to the uſe of the Heirs of the Husband: The Husband deviſed the Land to J. S. and afterwards dyed without Iſſue. It was in this Caſe adjudged, That this common Recovery did binde the Remainder in Tail, becauſe the Husband came in as Vouchee, and came in in privity of the Eſtate Tail, and was a lawful Tenant to the *Precipe*, and could not be joyntly ſeized with his Wife: But if the Husband and Wife had had a Joynt Eſtate to them, and to the Heirs of their bodies, with the Remainder over, and the Husband alone had been vouched, there it might be doubted, If the Eſtate Tail ſhould be barred, becauſe that the Wife had a joynt Eſtate of Inheritance with him. *Cook* 3 Part, 6. *Coppledicks* Caſe.

9. Land given to J. and to the Heirs males on the body of his Wife begotten, he hath Iſſue a Son, and after the Wife dyeth, and he diſcontinueth, and taketh an Eſtate back, to him, and the Heirs Females of the body of his ſecond Wife, and he diſcontinueth again; againſt which laſt Diſcontinuance, a common Recovery is had, in which the Tenant in Tail is vouched, and voucheth over the common Vouchee, and afterwards dyeth, and his three Iſſues bring ſeveral *Formedons* in the Diſcender, they ſhall all be barred by the Recovery; for in Judgment of Law, when he generally entreth in Warranty, he cometh in of all his ſeveral Eſtates, which ſhall be barred, in reſpect of one and the ſame recompence. See *Plo.* Com. in *Manxells* Caſe 8. acc.

10. Tenant for life, and he in the Remainder in Tail, ſuffer a common Recovery, in which they both vouch the common Vouchee. It was adjudged in that Caſe, That the ſame ſhould not binde the Eſtate Tail, for that he in the Remainder was not Tenant to the *Precipe*, but in truth the Tenant for life, and the Land is recovered againſt the Tenant for life only, and the recompence cannot veſt in him in the remainder, for as much as the Land is in truth recovered againſt the Tenant for life, and he in the remainder was never ſeized by force of the Tail. 8 Eliz. *Dyer*, 225 *Knivertons* Caſe. See Mich. 42 Eliz. in C. B. *Leach* and *Coles* Caſe, in a *Replevin*, *Rott.* 1073. adjudged acc.

11. Husband and Wife ſeized of a Mannor, and to the Heirs of the body of the Husband, the Husband by Deed Indented, Bargained and Sold the Land to one in Fee, who ſuffered a common Recovery, in which the Husband alone was vouched, which recovery was to the uſe of the Husband for life, and after to the uſe of the Wife for life, and for ſix moneths after, and after to the uſe of A. in Tail, and after to the uſe of the Wife in Fee. In this Caſe (amongſt other points) it was Reſolved, That although the Husband only was vouched, and vouched over the common Vouchee,, and after the Husband dyed, That the Eſtate tail was barred by the Recovery. *Cook* 6. Part, 32. *Fitz-Williams* Caſe.

12. Tenant

12. Tenant in Tail, the Remainder in Tail; he in the Remainder bargained and ſold his Remainder to A. for the life of Tenant in Tail, and after his death, the Remainder to the King in Fee; Tenant in Tail ſuffers a Recovery: the King granted his Remainder to Tenant in Tail, and his Heirs; Afterwards he in the Remainder bargained and ſold to B. the Remainder to the King, upon condition; another Recovery was had, and Tenant in Tail dyed without Iſſue. It was adjudged, That he in the Remainder, and all claiming under him, was barred by the Recovery. 2. Reſolved, That the common Recovery did bar the Eſtate Tail, and the Eſtate of A. in Remainder, although the Remainder was in the King; becauſe that the Eſtate Tail was not within the Statute of 34 H. 8. of the gift, or of the proviſion of the King, nor of any of his Progenitors. *Cook*, 2. Part, Sir *Hugh Cholmleys* Caſe, 15 Eliz. *Jackſon* and *Duryes* Caſe adjudged acc.

13. An Allien born, purchaſed Lands in Tail, the Remainder to a Stranger in Fee; the Allien ſuffered a common Recovery to his own uſe in Fee, all which was found by Office: The Queſtion was, If the Remainder ſhould be in him who had it before. It was the Opinion of the Court, That the Queen ſhould have the Land in Fee; for there was a good Tenant to the *Precipe*, and then, the Remainder was gone upon the Recovery ſuffered. Mich. 31 Eliz. in C. B. *Goldsbr.* 102.

14. Husband and Wife, the Wife being within age, levyed a Fine of the Lands of the Wife, a *Precipe*, *Quod reddat* was brought againſt the Conuſee, who vouched the Husband and Wife, and they appeared in perſon, and vouched over the common vouchee, and after made default, whereby a Recovery was had; and now the Wife and her ſecond Husband brought one Writ of Error to reverſe the Fine, and another to reverſe the Recovery, by reaſon of the Nonage of the Wife. The Court was of Opinion to reverſe the Fine, but they would adviſe upon the Recovery, for that the Husband and Wife appeared in perſon, and vouched over, ſo as the Recovery was had againſt them by their appearance, and not by default. Afterwards upon Examination it was found, That the Recovery was before the Fine; for the Recovery was, *Quind. Trin.* and the Fine was *Tres Trin.* the ſame Term; and ſo the Court held, That the Recovery did not take away the Error in the Fine. Mich. 40 Eliz. in C. B. Sir *Henry Jones* Caſe. *Goldsbr.* 181.

15. A man having Iſſue three Sons, viz. A. B. and C, deviſed his Lands to B. his ſecond ſon, and his heirs, *in perpetuum*, paying to C. his brother 20 l. at his age of 21 years; and if dyed without Iſſue, living A. that then A. ſhould have thoſe Lands to him, his Heirs, and Aſſignes for ever, paying the ſaid ſum that B. ſhould have paid; B. enters, and ſuffers a common Recovery, with a ſingle Voucher, to the uſe of himſelf and his heirs, and afterwards deviſeth the Lands to the Wife of the Plaintiff, and her Heirs, and dyes without Iſſue, living A.. There were many points in this Caſe. 1. If B. had an Eſtate in Fee, or Fee Tail. 2. If he had a Fee, and A. only a poſſibility to have a Fee; If the Recovery ſhould bar A. or that it be ſuch an Eſtate as cannot be extirped by a Recovery. For the firſt point it was Reſolved, That it was not an Eſtate Tail in B. but a Fee. For the ſecond point, it was holden by *Dodd.* Juſtice, That this Recovery ſhould bar A; for he had but a poſſibility to have a Fee, and *quaſi*, a contingent Eſtate, which is deſtroyed by this Recovery, before it came in *Eſſe*, otherwiſe it would be a kinde of perpetuity, which by no means could be deſtroyed; and although a Recovery ſhall not bar, but where a Recovery in value extends thereto; yet he held, That this Recovery deſtroying the immediate Eſtate, all Contingencies and Dependancies thereupon, are bound, and a Recovery ſhall binde every one who cannot falſifie it, and A. who hath this poſſibility, cannot falſifie it: But all the other Juſtices were of Opinion, That this Recovery ſhould not binde; for he who ſuffered the Recovery had a Fee, and A. but a poſſibility if he ſurvived B. and B. dying without Iſſue in his life, no Recovery in value ſhall extend thereto, unleſs he had been party by way of Voucher; and they ſaid, That here is not any Eſtate depending upon the Eſtate of P. but a collateral and meer poſſibility, which ſhall not be touched by a Recovery: And it was ſaid by *Houghton* Juſtice in this Caſe, That if a man gives, or deviſeth Lands to one, and his Heirs, as long as J. S. hath Iſſue of his bodys he by a Recovery ſhall not binde him who made this gift, without making him party by way of Voucher, for a Recovery againſt Tenant in Fee ſimple, ſhall never bar a collateral Intereſt, Title, or Poſſibility. It was adjudged for the Defendant. Hill. 17 Jac. in B. R. *Bell* and *Brownes* Caſe. *Cro.* 2. Part, 590. to 594.

16. In *Ejectione firme*, upon the Evidence, it appeared, That *Ed.* Earl of S. Tenant for life of the Mannor of A. in the County of S. the Remainder to *Grace* Lady *Chandiſh* his Siſter, of two parts thereof for life, the Remainder of the third part to the ſaid *Grace*, and the Heirs males of her body, the Remainder over: She by Indenture ſold to the ſaid *Ed.* all the moyty, part and purpoſe of the ſaid Mannor, and Covenanted to ſuffer a Recovery for further aſſurance. And the ſaid *Ed.* ſuffers a Recovery of the moyty of the ſaid Manner, it's Vouchee of *Grace*. In this Caſe it was agreed by the Juſtices, That this was a good Recovery of the entire:

entire third part, and not of the moyty of the third part. 2. It was agreed, That if one hath Intereſt only in the third part of a Mannor, and ſuffers a Recovery of the moyty of the Mannor, it is good for the third part, Paſch. 4 Car. in C. B. *Iſham* and *Morrices* Caſe. *Cro.* 1 Part, 77.

17. A. and his Wife ſeized of Lands in the right of his Wife, by Indenture, with a Letter of Attorney, let the Land, *Habendum a die datus*, for the life of the Leſſee, rendring Rent: The Attorney made Livery the ſame day, *ſecundum formam Chartæ*, the Leſſee entred, and payed the rent, which was alwayes received; the Wife dyed, her Heir without Entry ſuffers a common Recovery; the Queſtion was, whether it was good or not. It was the Opinion of the Court, That the Leaſe was void, and that the Livery the ſame day it beareth date, is void, to make it a good Leaſe. Then it was moved, That one entring without Livery, was but Tenant at Will, and cannot be a Diſſeiſor, without an intent in him to make a Diſſeiſin; but admitting it to be a Diſſeiſin, yet ſuffering a Recovery, he, and all under him, are eſtopped to ſay, he was not Tenant of the Freehold, and therefore the Recovery ſuffered, was good; and to that Opinion, the whole Court enclined. Mich. 10 Car. in B. R. *Bull* and *Wyats* Caſe. *Cro.* 1. Part, 282.

18. This Caſe was put by *Mountegue*, the Kings Serjant, to the Lord Chief Juſtice *Hobart*, of the Common Pleas, when he took his place of Chief Juſtice there, viz. Tenant in Tail, the Remainder in Tail, the Remainder in Fee; Tenant in Tail is attainted of Treaſon, Office is found, the King by his Letters Patents granteth the Land to A. who by Deed, bargaineth and ſelleth the Land to B; B. ſuffers a common Recovery, in which the Tenant in Tail is vouched; and afterwards, the Deed is Enrolled; And the Queſtion was, Whether this was a good Bar of the Remainder: And the L. Chief Juſtice *Hobart* was of Opinion, That it was no Bar of the Remainder, becauſe before the Inrolment nothing paſſed, but only by way of concluſion, and the Bargainee was no lawful Tenant to the *Precipe*. Mich. 11 Jac. in C. B. *Godbelt*, 218.

19. Note, It was agreed by the Juſtices, That if he in the Reverſion ſuffer a recovery to divers uſes, That this is a good Recovery againſt him by way of Eſtopel; and his Heirs cannot plead, that his Father or Anceſtor had nothing in the Land at the time of the Recovery ſuffered: for they are eſtopped to ſay, that he was not Tenant to the *Precipe*. Paſch. 3 Jac. in C. B. *Duke* and *Smiths* Caſe, *Godbolt*, 147.

20. If Judgment be had or given againſt Tenant in Tail upon a feigned Action, and the Tenant in Tail dyeth before Execution, by which the Lands deſcend to the Iſſue in Tail, and then he that recovers, ſues a *Scire facias* out of the Judgment, to have execution thereof againſt the Iſſue in Tail, in that Caſe, if the Iſſue plead to the *Scire facias*, and prove the Recovery to be falſe (which was the ground of the Judgment) he ſhall thereby Bar the Demandant to have Execution of that Judgment: But it is otherwiſe when the Tenant in Tail voucheth and recovereth in value, &c. by reaſon of the intended recompence. *Cook* 7. Part, *Inſtitutes*.

21. If a man recovers in a Writ of Entry in the *Poſt*, againſt Tenant in Tail, upon a Voucher, and recovers in value againſt the common Voucher, and before Execution, the Tenant in Tail dyeth, and his Iſſue enters. In this caſe, the Recoveree may well enter upon the Iſſue; for the Iſſue cannot falſifie this Recovery, becauſe of the Recovery in value. 29 H. 8. *Dyer*, 35. acc.

22. A. Tenant in Tail, the Remainder over to B. in Fee; A. for a great ſum of money, ſold the Land to J. S. and his Heirs, and for aſſurance, made a Feoffment in Fee, and levyed a Fine to the ſaid J. S. to the uſe of the ſaid J. S. and his Heirs: And by the Indenture of Bargain and Sale, A. Covenanted to make further aſſurance, within ſeven years, as the ſaid J. S. or his Heirs, or their Counſel ſhould adviſe; and before further aſſurance was made, J. S. dyed, his Heir within age: Now by the advice of Counſel, and the friend of the Infant, it was Deviſed, That for the cutting off the Remainder, a common Recovery ſhould be ſuffered, in which the Infant ſhould be Tenant to the *Precipe*, and ſhould vouch the Vendor; and becauſe the ſaid Term of ſeven years was near expired, and that the ſaid Recovery is intended to be to the uſe of the ſaid Infant, and his Heirs; It was prayed, That ſuch Recovery might be received and allowed; and upon two Preſidents ſhewed, one of the Earl of *Shrewsbury*'s Caſe, and the other of *Wiſemans* Caſe; The Court upon good aſſurance of people of good Credit, that it was to the uſe of the Infant, and upon the appearance of a good and ſufficient Guardian for the Infant, who was of ability to anſwer to the Infant, if he ſhould be deceived in paſſing the Recovery, and alſo upon *Affidavit* made by two ſeveral Witneſſes, That the ſaid intended Recovery was to the uſe of the Infant, and his Heirs; the Recovery paſſed, and was allowed. Mich. 33 Eliz. in C. B. *Leon*, 211.

23. Note, If an Infant Tenant in Tail, ſuffereth a common Recovery by his Guardian, the ſame is good, and ſhall binde him, becauſe he hath remedy over, againſt his Guardian, by an Action upon the Caſe, if it be to his prejudice; and ſo it was adjudged, Mich. 7 Jac. in C. B. in *Zouch* and *Mitchels* Caſe. But if an Infant ſuffereth a common Recovery by Attorney, the ſame is void, becauſe he hath not any remedy againſt him; and ſo it

it was ſaid it was adjudged, Mich. 5 Jac. in C. B. in *Holland* and *Lees* Caſe.

24. Lands are given to A. and his Wife in ſpecial Tail, the Remainder to B. in Tail, the Remainder to C. in Fee; A. the Husband levies a Fine alone to D. in Fee, and dyes, leaving Iſſue; the Wife enters, ſhe is in of her Eſtate in Tail, and her Entry alſo remits B. and C. to their ſeveral Remainders, and hath put D. out of his whole Eſtate, and in that caſe the Wife may ſuffer a common Recovery againſt her ſelf, as Tenant in Tail, and vouch the common Voucher, and that ſhall Bar the old Remainders of B. and C. but not her own Eſtate in Tail; and yet it is a rare Caſe, That a common Recovery againſt the Tenant in Tail, ſhall Bar the Remainder, and not Bar the Entail; for here the Iſſues in Tail were barred before by the Fine; and yet it may be truly ſaid, That the Entail is barred by the Recovery, becauſe the Wife was ſeized of the whole Tail which was ſo barred. *Per Hobart* in Trin. 15 Jac. in C. B. in *Duncombe* and *Wingfields* Caſe. *Hob.* 259.

Recuſants *and* Recuſancy.

Recuſants, *and* Recuſancy; *The Expoſition of the Statutes concerning them, what they ſhall forfeit for their Recuſancy, and to whom; where the Husband ſhall forfeit for the Recuſancy of the Wife, where not; and of divers other particular things concerning* Recuſants, *and* Recuſancy.

1. A *Quare Impedit* was brought by the Chancellor, Maſters, and Scholars of the Univerſity of *Oxford*, for diſturbing of them to Preſent to the Church of D. and they Declared, That A. was ſeized of the Mannor of D. to which the Advowſon of the Church of D. was Appendant in Fee, and Preſented D; A. dyed, the Mannor and Advowſon deſcended to C. his ſon and heir; and he being ſo ſeized, at the Aſſizes 29 *Martii*, 8 Jac. was Indicted for not coming to Church; and afterwards, Proclamations were made according to the Statute of 3 Jac. that he render his body; and afterwards at the Aſſizes 16 *Aug.* 8 Jac. he was a Recuſant Convict, and after, the Church became void, and ſo by vertue of the Statute of 3 Jac. they ought to Preſent: The Defendants pleaded, That C. the ſon and heir of A. before the ſaid Conviction, granted the next Avoydance to him, and after the Incumbent dyed, and he Preſented the now Incumbent, who was Inſtituted and Inducted, and traverſed the Appendancy: Upon which Plea, the Plaintiffs did demur in Law: It was Objected, That the Grant to the Defendant was good, becauſe C. at the time of the Grant, was not convicted of Recuſancy, but Indicted only. But in this Caſe it was Reſolved, 1. That by the expreſs words of the Statute of 3 Jac. C. was diſabled; for the words are, *Every perſon that ſhall be a Recuſant Convict, as long as he remains a Recuſant Convict, ſhall be diſabled from the beginning of the ſaid Seſſion of Parliament*; and ſuch a perſon C. did remain. 2. It was Reſolved, That the Plaintiffs in their Declaration needed not to aver, that C. continued a Recuſant Convict: for when once the Preſentation *pro hac vice*, was veſted in the Univerſity; although that afterwards the party conformeth himſelf, yet according to that Act of 3 Jac. the Univerſity ſhall Preſent. *Cook* 10. Part, 54, 55, 56 The Caſe of the Chancellor and the Scholars of *Oxford*.

2. An Informer ſued a Recuſant for the penalty of 20 l. a moneth, for not repairing to his Pariſh Church, or to any other Church, Chappel, or uſual place of Common Prayer, and Divine Service. The Defendant pleaded the Statute of 23 Eliz. That every Recuſant being a Recuſant Convict, ſhould forfeit for every moneth 20 l. And pleaded the Statute of 28 Eliz. That every Offender againſt the Statute of 23 Eliz. ſhould pay upon ſuch Conviction, 20 l. a moneth to the King, in the Exchequer, and pleaded the Statute of 35 Eliz. That no part by the ſaid Statute, ſhould be paid to the Informer. Divers Exceptions were taken to the Information. 1. That no perſon ſhould forfeit, unleſs he were a Recuſant Convict before; and it doth not appear that the Defendant was Convict before. 2. That none can Inform upon the Statute of 23 Eliz. but the King. 3. That the Conviction ought to be by Confeſſion, or Verdict, and doth not extend to Judgment upon a Demurrer. 4. The penalty is expreſly given to the King, and therefore the Informer is excluded; and *Legis poſteriores priores contrarias abrogant.* But in this Caſe, theſe points were Reſolved. 1. That the party might be Convicted in the Indictment or Information which is preſented againſt him; and the word [Convict] ſhall be taken for Attaint, for the party can forfeit nothing, until Judgment be given againſt him. 2. Reſolved, That the clauſe of 23 Eliz. of *Diſtribution*, did extend to the penalty of the Recuſancy. 3. That the Statute of

28 Eliz. had not taken away the Liberty which the Informer had by the Act of 23 Eliz. because that Act did not give the penalty to any to whom it was not given before. 4. Resolved, That the Statute of 35 Eliz. did not abrogate the Statute of 23 Eliz. as to the Action *popular*, and the Act is not *simpliciter*; That all and singular the pains, shall be recovered to his Majesties use, but *secundum quid*, & *sub modo*; and it doth not extend to abrogate any Law made before. 5. Resolved, That the Statute of 23 Eliz. which gave the 20 l. a moneth, did not take away the forfeiture of 12 d. for every Sunday, but both penalties did stand and remain. *Cook* 11. Part, 57. to 62. Dr. *Fosters* Case.

3. A. B. and C. were sued in a *Quare Impedit* by the Chancellor, Scholars, and Masters of *Cambridge*, who claimed the Presentation of the Church of C. because B. being Patron of the Church at the time of the Avoydance of the last Incumbent, was then a Recusant Convict: It was found upon a Commission, that the said B. was seized of the Mannor to which the Advowson was Appendant, and was a Recusant Convict, whereupon two parts of the Mannor were seized into the Kings hands, who Leased the Mannor, with the Appurtenances, and all Profits &c. to the same belonging, to J. S. for 21 years, if B. &c. and afterwards, that the Church became void. In this Case it was holden, That although there was no intention made of the seizure of the Advowson, yet the Presentment did belong to the King, and the King alone should Present, in that there were no words in the Kings Grant to J. S. to carry away the Advowson from the King; and that notwithstanding that Grant, that the Advowson did remain Appendant to the Mannor: But notwithstanding, the Court would not Grant a Writ to the Bishop for the King, except his Title were clear: Whereupon the Plaintiffs were demanded, if they had any thing to say, why a Writ should not be Granted for the King to the Bishop; and thereupon the Plaintiffs (notwithstanding their Title made in their Declaration) did wholly Disclaim; and thereupon Judgment was given for the King, and a Writ to the Bishop to remove the Incumbent, and to admit a Clerk at the Presentation of the King. Mich. 14 Jac. in C. B. The Chancellor of *Cambridge* and *Walgraves* Case. *Hob.* 126, 127.

4. In an Information against the Husband upon the Statute of 23 Eliz. for the Recusancy of his Wife, not coming to Church: the Information was against him for 240 l. which he was to forfeit, according to 20 l. the moneth, for his Wifes not coming to Church: Upon Tryal, it was found for the King: It was moved in Arrest of Judgment, That the Statute did not extend to the Husband for her Recusancy, he himself being conformable; and it was said, that it was like to Dr *Husseys* Case, *Cook* 9. Part, 71. upon the Statute of *Westm.* 2. That a Feme Covert should not be within that Act, to make her husband chargeable; and it was also said, That if a Feme Covert do commit a Ryot, the Husband shall not be lyable for it: But it was Answered and Resolved by the whole Court, That upon the Argument of Dr *Fosters* Case, diligent consideration was had of all the Acts made concerning Recusants. In which Case it was Resolved, That a Feme Covert was within the Statute of 1 Eliz. for the forfeiture of 12 d. and in the Statute of 23 Eliz. cap. 1. for the Statute of 20 l. forfeiture for every moneths absence; and that the Husband was liable for the Recusancy of his Wife, notwithstanding his own conformity; and therefore in the Principal Case, the Rule of the Court was, That Judgment should be entred for the King; which was done, and Execution thereupon awarded for the King. Mich. 13 Jac. in B. R. The King and *Lawes* Case. *Bolst.* 3. Part, 87, 88.

5. Debt brought by an Informer against Husband and Wife, to answer for the Recusancy of his Wife, upon the Statute of 23 Eliz. for 11 moneths, from 3 Decemb. 21 Jac. to the day of the Writ brought; and upon the Declaration, he demanded 12 l. The Defendant Demurred upon the Declaration, and the Plaintiff *Qui tam &c.* and the Demurrer being entred, King *James* dyed in the Vacation following; It was moved, Whether the Original Writ, the Declaration, Pleading, and Demurrer upon it should abate by the Decease of the King; as an Original brought by two, where by the death of one of them it shall abate. The Court took time to advise upon it, and see Presidents; and upon view of Presidents, the Court at last Resolved, That this Writ and Declaration, and all the Proceedings thereupon should stand. Trin. 1 Car. in C. B. *Farringtons* Case. *Cro.* 1. Part, 7.

6. Error to reverse a Judgment for the King, upon an Indictment of the L. S. *John* for Recusancy, for his not coming to Church for two moneths, he pleading Not Guilty; It was found by Verdict, that he was Guilty for one moneth, parcel of the time, but not for the other: whereupon it was adjudged, that he cannot forfeit 20 l. The King afterwards did signifie his pleasure, That if it were erroneous, that the Judgment should be reversed: whereupon several Exceptions (see *Librum*) were taken to the Indictment; all which were disallowed by the Court, as not being material Exceptions; and it was doubted, Whether any Exception be good upon Conviction of Recusancy; for that the Statute of 3 Jac. is precisely, That it shall not be void, or discharged, for default of form, or other matter, till after conforming himself by coming to Church:

Church? But afterwards, becauſe the Judgment was not *Ideo Capiatur*, and the omiſſion thereof is apparent to the Kings prejudice, and for that upon every Conviction upon Indictments, the Judgment is *Ideo Capiatur*, for this cauſe the Judgment was reverſed. Mich. 14 Car. in B. R. The Marquis of *Wincheſters* Caſe. *Cro.* 1. Part, 362.

7. A. M. was Indicted upon the Statute of 1 Eliz. cap. 2. for not coming to Church twelve Sundays together: The Indictment was removed into the Kings Bench, and there divers Exceptions taken to it. That the Statute is, All the Inhabitants within the Realm, &c. and it is not averred in *facto*, that ſhe did inhabite within the Realm; but it was diſallowed; for if it was otherwiſe, it ought to be ſhewed on the Defendants part. 2. That by the Proviſo in the Statute of 28 Eliz. it is Ordained, That none ſhall be Impeached of ſuch Offence, if he be not Indicted at the next Seſſions; and it appears, that the Offence was a year before the Indictment, and in the mean time many Seſſions were, or ought to have been. That alſo was diſallowed, for perhaps there were not any Seſſions within that time. 3. The Indictment was, That ſhe was Indicted *coram A. B. & Sociis ſuis*, Juſtices of Peace, and doth not name them particularly. It was anſwered, That it doth not appear that there were any other there but thoſe particularly named, and it differs from 1 H. 7. of a Fine levyed *Coram A. B. & Sociis ſuis*. 4. That the words of the Statute are, *Ought to abide in the Church till the end of the Common Prayer, Preaching, or other Service of God*, in the Diſjunctive, and the Indictment was in the Conjunctive. That Exception was diſallowed; for although the words are in the Diſjunctive, yet the Court ſaid, That a man cannot depart the Church ſo ſoon as the Service is ended, if there be Preaching, but he ought to continue there for the whole time. Mich. 3 Jac. in B. R. *Ann Mannocks* Caſe. *Godbolt* 148.

8. A. was endicted, for that he being a Recuſant convicted, departed above five miles from his abode at W. in the County of S. contrary to the Statute. The Defendant pleaded, That he informed B. C. and two other Juſtices of the Peace of the ſaid County of S. (the ſaid C. being a Deputy Lieutenant there) that he had urgent occaſions to go to *London* about buſineſs concerning his Eſtate, and made Oath that it was true; whereupon they by writing under their Seals, gave him Licenſe to go to L. and other places, as his buſineſs required, for ſix Moneths: by vertue whereof he went, and ſo juſtifies, upon which it was demurred. It was the Opinion of the whole Court in this Caſe. 1. That the Licenſe ought to be by four Juſtices of Peace, beſides the Lieutenant: For the words of the Statute ought to be preciſely obſerved. And it is not ſufficient that a Deputy Lieutenant be one of the four, and his aſſent ought to be by it ſelf without the other four. 2. That the Licenſe was not good, becauſe it is not pleaded to be under their hands, and it is not ſufficient to plead it to be under their Seals. 3. The Licenſes ought to ſhew the particular cauſe of the Licenſe, and not in general Terms, *viz.* for urgent cauſes. Judgment was entred for the King. Paſc. 11 Jac. in B. R. *Maxfields* Caſe. *Cro.* 2. Part, 352.

9. Information for the King and Informer, ſuppoſing that the Defendant before 31 *October* 9 Jac. the Defendant was a Recuſant convicted, and after his conviction, and two years before 31 *Oct.* 9 Jac. he conformed himſelf, and came to Church in the Pariſh of St. *Dunſtans*, and continued there during time of Divine Service. Notwithſtanding which, for three years after 31 *Oct.* 9 Jac. he had not received the Sacrament of the Lords Supper in the ſaid Church, nor any other place, but made default *contra formam Statuti*: So as he demanded 60 l. for every year. Upon Not Guilty found againſt the Defendant. It was moved, That the Information was incertain, becauſe no time of the Conviction is ſhewed, nor how, nor in what Court, nor before whom. It was ſaid, this had bin a good Exception, if he had demurred upon the Information, but having pleaded Not Guilty, all this is admitted, and the matter in fact is only tryable, Whether he hath received the Sacrament or not. 2. Exception, becauſe the Informer demands the penalty for three years, whereof by the Statute of 31 Eliz. No Informer can demand a penalty upon a penall Law, but by Information exhibited within a year after the Offence. But the Court held it to be well for the King, although it was not good as to the Informer. Hill. 12 Jac. in the Exchequer, *Syvedale* and Sir *Edward Lentholls* Caſe. *Cro.* 2. Part, 365.

10. F. H. was Indicted for Recuſancy, and before Conviction, he conformed himſelf; and afterwards upon his falling back again, he was Indicted again, and ſubmitted, and was Indicted a third time for a Relapſe. It was moved to have the ſame certified into the Court of Exchequer, for that by this his Relapſe upon the Statute of 35 El. he is to loſe all the benefit which he was to have upon his former ſubmiſſion and Conformity. It was the Rule of the Court, That this his Relapſe ſhould be certified into the Court of Exchequer, which was done accordingly. Paſc. 9 Jac. in B. R. *Francis Holts* Caſe. *Bolſtr.* 1. Part, 133.

11. It was found by Office, That *Ed. Tredway*, who was Son and Heir of Sir *W. Tredway* the Kings Tenant of a Mannor and Lands holden in *Capite*, dyed, being the Kings Ward. And that I. and E. were his Siſters and Heirs, of full age. It

was further found, That to prevent to have Religious education within the Realm. L. the elder Sister without Licenſe, went to *Dowey* in *Flanders*, where ſhe remained a Recuſant profeſſed, viz. a Nun; and that by reaſon thereof, by the Statute of 3 Jac. ſhe was to take no benefit of the Lands until ſhe returned and received the Sacrament, and the Oath preſcribed by the Statute. The Queſtion in this Caſe was, Whether E. the younger Sister ſhould ſue Livery of all the Lands out of the Kings hands, the eldeſt Sister being alive. It was Reſolved by the Juſtices, That ſhe could not, neither by the words, nor by the intent of the ſaid Statute. But that the King might retain the moyety of the Lands which belonged to the ſaid L. in his hands, untill that ſhe according to the Statute of 1 Eliz. ſhould take the Oath appointed by the Statute. Paſc. 15 Jac. in the Court of Wards. *Lea* 59 *Tredways* Caſe. See *Hob.* 73, 74. the ſame Caſe.

12. P. an Informer had a Verdict for the King and himſelf by Information in C. B. for 2201. for 11 Moneths abſence from the Church, againſt Sir *Francis Lovell*. It was moved in ſtay of Judgment, That the Information lay not in the Common Pleas, but by the expreſs words of the Statute of 28 Eliz. was reſtreyned only to the Kings Bench. This Exception took life from a conceit of Sir *Ed. Cokes* in *Foſters* Caſe, *Cook* 11. Part, where he ſayes, It was well obſerved, That the Statute of 28 Eliz. had reſtreyned the Informer only to the Kings Bench, and ſo he doth exclude both the Common Pleas, and the Exchequer. But it was the Opinion of the whole Court, That the Information did well lye in the Common Pleas, and that the contrary Opinion was an Error. For it is clear, That the Statute of 23 Eliz. gives the remedies upon Recuſancy, one for the Queen alone by Indictment, and that appears by the clauſe that admits ſubmiſſion before Judgment, or upon Arraignment before Juſtices of *Oyer* and *Terminer* and Goal-delivery, and Juſtices of Peace. The other by Action of Debt, Plaint, Bill, or Information, in any Court of Record of the Queen. And the Statute of 28 Eliz. was made only for the benefit of the Queen in the proper Suits by Indictment. Where, by the Rule of the Court, the Exception taken, and the conceit of Sir *Ed. Coke*, was rejected by the Court, and the Judgment upon the Information in the Common Pleas ſtood good. Mich. 15 Jac. in B. R. rott. 618. *Pye* and *Lovells* Caſe. *Hob.* 204, 205.

Redisseisin.

1. *Redisseisin* is where a man doth recover by Aſſiſe of *Novel-Diſſeiſin*, Land Rent, Common, or the like, and is put in poſſeſſion thereof by Verdict and Judgment of Law, and after he is Diſſeiſed again, or put out of poſſeſſion by the firſt perſon who Diſſeiſed him of the ſame Land, Rent, or Common; then lyeth this Writ of Diſſeiſin againſt him. And ſo it is if he recover any profit Apprender out of any Land, or any Office, Corody, or the like, if he be re-diſſeiſed of it, he may have a Writ of Redisseisin; and ſo one Redisseiſin after another, as often as he is Diſſeiſed. And upon ſuch a Redisseiſin committed, if it be found, the Court may commit the party to Priſon, becauſe it is a contempt which is done in contempt of the Court, and in deſpight of the Law. See *Fitz. Nat. Br.* 183. *Cook* 2. Part, *Inſtitutes* 83. acc.

2. A man ſhall have a Redisseiſin, although the Eſtate of him who recovered in the firſt Action or Aſſiſe be changed. And therefore if there be Tenants in ſpecial tail, and they do recover in an Aſſiſe, and afterwards one of them dyeth without Iſſue, and after he or ſhe who ſurviveth, and is now become Tenant in tail after poſſibility of Iſſue extinct, is Diſſeiſed again, he or ſhe ſhall have a Redisseiſin, for it is the ſame Freehold that they had before, for the ſame is parcel of the Eſtate tail. *Cook* 11. Part, 81. in *Lewis Bowles* Caſe.

3. In an Aſſiſe by A. where he was Redisseiſed, the Redisseiſin was found in part; and thereupon the Court was moved, If the Redisseiſin did lye, forasmuch as it is not but of part: And the Writ is, If he be *Redisseiſitus de eodem tenemento*, then Redisseiſin lyeth. But the Court held, That Redisseiſin lyeth of part, and that he ſhall recover damages as they are aſſeſſed by the Jury. Then it was moved, If Redisseiſin did lye in *Middleſex* or *London*, for it was ſaid, That it hath bin taken that it doth not lye there, but before Juſtices Itinerants; but all the Court held the contrary. See *Cook* 2. Part, *Inſtitutes*. Juſtices Itinerants, or in *Eyre*, were only named for example, and becauſe Aſſiſes were taken moſt commonly before them. For although the Aſſiſe be taken in the Kings Bench, Common Pleas, or before Juſtices of Aſſiſe; yet upon a Redisseiſin, the Writ lyeth. Hill. 30 Eliz. in

in C. B. *Thackers* Case. *Goldesbr.* 76. *Leon.* 69. acc.

4. In an Assise of *Novel disseisin*. A. recovered Land against B. B. Redisseised A. A. re-entred. B. Disseised him again. The Opinion of the whole Court in this Case was, That the Judgment in this Action is, not that he shall recover any Land, but double damages; and that the Defendant shall be taken and Imprisoned, and fined to the King; wherefore inasmuch as he shall recover no Land, the entry of A. into the Land cannot purge the offence and wrong which is made punishable by the Statute, and in that Case, It was holden by the Court, That if a man be Disseised, and after re-enters, and is Disseised again, that he ought to have an Assise of the last entry, and not of the first. See 27. Ass. 42. Mich. 29 Eliz. in C. B. *Goldesbr.* 64. See *Leon.* 69. the same Case.

5. Error to reverse a Judgment given in an Assise of *Novel disseisin* before Justices of Assise in the County of N. The Case was, The Assise being brought the first day, the Jury being at the bar, ready to be sworn; the Defendant came and confessed the Seisin and Disseisin as the Plaintiff declared: Whereupon the Plaintiff demanded Judgment. Judgment was given, which was entred, *Quod recuperet Seisinam per visum recognitorum.* It was assigned for Error, because none of the Jury were sworn, nor had the view, and they were not Recognitors before they were sworn, and therefore the Judgment was Erronious. But the Opinion of the whole Court was, That the Judgment was not Erronious. It is true, That in an Assise the Recognitors shall have the view; but yet if they have good knowledg of the Land, the Assise may be taken without the view. And a President 4 Jac. was shewed at an Assises in N. before *Popham* Chief Justice, where there was a Confession in the Assise, the Judgment was *Quod recuperet per visum Juratorum.* And see *Baxter* and *Bartletts* Case. *Baxter* brought an Assise of Freshforce, *Nul tort nul Disseisin* was pleaded, the Jury did find the Disseisin, and enquired not of the force for the King; upon which a Writ of Error was brought; and it was adjudged to be no Error, it being only the Office of the Court to enquire of this, and they not finding the force, it was better for the Defendant, for that then he was not to be taken by a *Capias* for the force. It was the Opinion of the whole Court in the principal Case, That the Judgment was not erronious, but well given, and the Judgment given at the Assises was affirmed. Mich. 11 Jac. in B. R. rot. 172. Sir *Christopher Heydon*, and *Shepherd* and *Smiths* Case. *Bulst.* 2. Part, 160, 161.

6. Red seisin doth not lye in Auncient Demesne because the proceedings in a Redisseisin is appointed by the Statutes to be made by the Sheriff, and in Auncient Demesne there is not any Sheriff, and the Bayliff who is Officer in Auncient Demesne, shall not supply the place of the Sheriff. *Cook* 4. Part, 65. in *Fulwoods* Case. See Hil. 33 H. 6. 25. *Comment.* on Originall Writs. 207. and 213. acc.

7. A. brought a Writ of Error against F. Son and Heir of J. P. upon a Judgment had against him in a Writ of Redisse sin at the Suit of the said J. P. and also of an Outlawry thereupon had against him for that cause, and assigned two Errors, one because the Sheriff took the Enquest in the Town, and not upon the Land according to the Statute. 2. Because the Sheriff made a Precept to one Bayliff to summon the Jury, who returned a Pannel, which was returned as parcel of the Record; and the Sheriff took the Enquest by some who were not returned by the Bayliff. To them it was said, That the Sheriff may vary from the Return of the Bayliff, and may make the return at another place, for the Sheriff himself is the person who maketh the Array, and is Judg in the Case. *Gascoign* said, That if the Sheriff had not made the Precept, and the Return by the Bayliff had not bin made parcel of the Record, it should have bin so, but he hath sent this Return as parcel of the Record, whereby he affirmeth the Return of the Bayliff: And if he had made process against the Jury by *Habeas Corpora*, and had taken the Enquest by others, it had bin Error. The Defendant in the Writ of Error pleaded, That the Plaintiff should not be admitted to assign Errors, for that after the Judgment, the Plaintiff in the Writ of Error did Release to J. P. who recovered in the Writ of Redisseisin, all Actions and demands; and although both the Errors were assigned in the Principal Record, yet by the Release he was estopped to Assign them for Errors. And because the Outlawry was good in process, yet because the Record and the Judgment are the Original of the process of the Outlawry, therefore if there be defect in the Original Judgment, the Outlawry which is depending upon it, is reversed: Whereupon the Court did reverse the Outlawry, notwithstanding the Release. See 11 H. 4. 6. *Cook* 8. Part, 152. in *Edward Altham's* Case; in which Case observe the Authority of the Sheriff, and how he shall demean himself in a Redisseisin.

8. If Husband and Wife be Disseised, and recover by Assise, and the Husband dyeth, and the Wife taketh another Husband, and they be Disseised again. They shall have a Writ of Redisseisin, although the Husband was not Disseised before: and the Writ willeth, That the Sheriff enquire, Whether they were Disseised before; and although the Husband was not, yet that is not material, because it is the right of the Wife, and she was Disseised

leiſed before. But if the Wife loſeth in the Aſſiſe of *Novel diſſeiſin*, and afterwards taketh a Huſband, and they do Rediſſeiſe the Plaintiff, he ſhall not have a Writ of Rediſſeiſin. See 9 H. 4. *Fitzh. Nat. Br.* 188. And ſee, That if a Feme Covert doth commit Rediſſeiſin, ſhe ſhall be puniſhed in a Rediſſeiſin. *Cook* 9. Part, 72. in Dr. *Huſſeis* Caſe.

Relation.

1. *Of matters of Record, Deeds, Aſſurances, and Conditions in them; to what time perſons, or acts done, they ſhall be conſtrued to relate; and how and by what words in them, and certain Rules concerning Relations.*

1. RElation is defined to be a Fiction of Law to make a Nullity of a thing *ab initio* for neceſſity ſake *ut res magis valeat quam pereat.* but as to Collateral Acts, the Law ſhall make no nullity of them: And in the diſtruction of a lawfull Eſtate veſted, the Law ſhall never make a fiction of it by Relation. *Cook* 3. Part, in *Butler* and *Bakers* Caſe, in which Caſe, ſee divers Rules concerning Relation, of which ſee ſome Caſes after.

2. The Execution of a thing which is Executory, reſpecteth alwayes the Original Act, or cauſe Executory; and when the Execution is done, it hath relation to the thing Executory, and maketh all but one act or Record, although it be performed at ſeveral times. And therefore if A. by Deed Indented, Covenanteth with B. That B. ſhall recover againſt him the Mannor of D. within a year next following; and that the Recovery and Execution thereupon to be had within the ſaid year, ſhall be had to the uſe of the Recoverer in tail, &c. and after the Recovery is had within the year, and the Execution is ſued after the year. In this Cate, it is clear, That although the Covenant is not purſued in time, according to the preciſe form thereof, yet the uſe ſhall be guided by the ſame Indentures. For variance in time ſhall not ſubvert the Original Agreement of the parties. *Cook* 1. Part, 99. in *Shellyes* Caſe.

3. A. by Indenture Inrolled, demiſed the Mannor of D. to B. and his Heirs in Fee-Farm rendring Rent with Clauſe of Diſtreſs, and upon non-payment, a Re-entry, and by the ſame Indenture Covenanted to make ſuch Aſſurances according to the intent, purport, and meaning expreſſed in the ſame Indenture: And by another Indenture bearing date the ſame day, A. Covenanted to levy a Fine of the ſaid Mannor before ſuch a Feaſt, &c. which Fine ſhould be to the only uſe, intents, effects and Conditions expreſſed in the former Indentures, and to none other: And Livery and Seiſin was made upon the ſame Indenture accordingly; and after the Fine was levyed *come ceo*, that B. had *ex dono*. A. with Releaſe and Warranty, according to the courſe of Fines. In this Caſe, It was holden by the Court, That the Rent was not extinct as touched by the Fine, becauſe that the Fine had relation to the former Indentures, Mich. 5 *Ma. Dyer*, 157.

4. A. Rent is reſerved to be paid out of Land at D. upon *Michaelmas* day, and if it be behind 40 dayes after, that then it ſhall be lawful for the Leſſor to recover. In this Caſe, the Rent ought to be tendred at D. at a convenient time before Sun-ſet, upon the laſt day of the 40 dayes. For although it be not by expreſs words, That if the Rent be behind and unpaid at D. by the ſpace of 40 dayes. Yet it was holden, It ſhall have relation to the place firſt named, and ſo the Law ſaith, That the Rent ſhall be paid the laſt of the 40 dayes, although it be not ſo expreſſed by words. See *Plow. comm. Kedwelly* and *Brand's* Caſe. 70.

5. In a Replevin, the Defendant made Conuſans, as Bayliff to the Lord *Howard*, and ſhewed, That the Prioreſs of *Holliwell* was ſeiſed of the Mannor of Prior in Fee. And 4 *Nov.* 19 H. 8. by Deed enrolled, ſold to the Lord *Audley* the ſame Mannor, who dyed, having Iſſue a Daughter, who took to Huſband the Duke of N. who had Iſſue the Lord *Howard*, to whom the ſaid Mannor Diſcended. The Plaintiff in bar of the Conuſans ſhewed, That the Deed was *primo deliberatum*, 4. *Nov.* 30 H. 8. and that mean between the date and the delivery, viz. 12. *Octobor*, The ſaid Prioreſs Leaſed the ſaid Mannor to one A. for 99 years, and conveyed the Term to the Plaintiff, *abſque hoc*, That the Prioreſs Bargained and ſold the ſaid Mannor to the Lord *Audley*, *ante dimiſſionem pradict. dict. A. fact.* Upon which there was a Demurrer. It was the Opinion of the Juſtices in that Caſe, amongſt many other points, That the averment of another delivery then the Deed doth import againſt the Deed Inrolled ſhould not be received, no more then a man may aver that a Recognizance was acknowledged at another day, for every Record imports a truth in it, and expreſs averment ſhall not be againſt it, but a man may conſeſſe and avoid it. And in that Caſe, it was ſaid and agreed,

agreed, That a man ſhall not have averment againſt the purport of a Record; but againſt the operation of a Record, as not put in view, nor compriſed, *partes finis nihil habuerunt*: And againſt Letters Patents is *Non conceſſit* is a good Plea. But *nultiel Record*, upon Enrolment of them, is no Plea. The Caſe was adjourned. Hill. 31 Eliz. in B. R. *Holland* and *Franklyns* Caſe. *Leon.* 183.

6. In an *Ejectione firmæ*, It was found upon the general Iſſue for the Plaintiff, and four days after the Verdict given, a ſpecial matter was moved for ſtay of Judgment; of which the Court took time to adviſe of, and gave day over, and in the mean time, one of the Plaintiffs dyed; which matter the Defendant further ſhewed to the Court, to ſtay the Judgment: It was ſaid, That that was no cauſe to ſtay Judgment, for the *Poſtea* came in 15 Paſch. which was 16 *Aprilis*, at which day the Court ought to have given Judgment preſently, but took time to be adviſed; and the 19 of *April* one of the Plaintiffs dyed; and the favour of the Court ought not to prejudice the party, for the Judgment ſhall have retorn to the 16 of *April*, at which time the party was alive? And ſo it was ſaid it was adjudged in one *James* Caſe, who dyed the day after the Verdict, and yet the Judgment was not ſtayed, for the Court after Judgment cannot examine ſurmiſes, and they have not day in Court to plead; and in the Principal Caſe, it was a day of Grace, and no Entry is made of it. The Court ſaid, That although no Plea can be now pleaded after Verdict, yet as *amicus Curiæ*, one may inform of ſuch matter; and ſometimes ſuch a Judgment hath been ſtayed, as in 4 Eliz. notwithſtanding ſuch Exception; and becauſe the Verdict was a hard Verdict, and againſt the Evidence, the Court was of Opinion, to ſtay the matter for a time, and ſaid, it lay in the diſcretion of the Court ſo to do. Trin. 31 Eliz. in B. R. *Iſelcyes* Caſe, *Leon.* 187.

7. The Plaintiff recovered againſt the Defendant in an Action of Debt, and had Execution; The Defendant after the day of the *Teſte* of the *Fieri facias*, and before the Sheriff had medled with the Execution of the Writ, *bona fide*, ſold certain goods and Chattels, and delivered them to the buyers. It was holden by the Court in this Caſe, That notwithſtanding the ſaid ſale, the Sheriff might do Execution of thoſe goods in the hands of the buyers, for that they are liable to the Execution; and Execution once granted or made, ſhall have retorn to the Teſte of the Writ. Mich. 22 Eliz. in C. B. *Wanſford* and *Sexſons* Caſe. *Leon.* 304.

8. In Treſpaſs, the Caſe was, One Bargained and ſold Lands by Indenture, 8 *Julii*, 2 Jac. The Deed was acknowledged 20 *Julii*, before a Maſter of the Chancery, 9 *Octob.* the Bargainor ſuffered a Judgment againſt him in the Court of Common Pleas; the 18 day of *Octob.* the Indenture was Enrolled in the Chancery: The Iſſue joyned, was, Whether the Bargainor was ſeized in Fee at the time of the Judgment: It was ſaid, That the Indenture being Enrolled, ſhall have Relation to the time of the Sealing and Delivery thereof, and makes the Bargainee ſeized *ab initio*; and then the Bargainor was not ſeized at the time of the Judgment; and of that Opinion was *Crook* Juſtice. But on the other part it was ſaid, That the Eſtate remains in the Bargainor, until the Inrolment, otherwiſe he could not be ſeized of the Eſtate, and till the Inrolment, the Poſſeſſion and Freehold continues in the Bargainor; for the Statute is expreſs, That nothing ſhall paſs until Enrolment; ſo that from the time of the paſſing, until the Inrolment, he remained ſeized: Then the Inrolment not being until the 18 day of *October*, and the Iſſue being, whether he were ſeized the fourth day of *October*; upon this Verdict, the Iſſue is found for the Defendant: The Court agreed, That the Inrolment of the Deed within the ſix moneths, relates to the ſealing of the Deed, and makes the Bargainee in, to avoid all Incumbrances made unto ſtrangers after the Enſealing: But conceived in the Principal Caſe, That in *rei veritate*, the Bargainor ſhall be ſaid to be ſeized, alwayes until the Inrolment; and nothing paſſeth to the Bargainee till the Inrolment, for it is ſo expreſſly appointed by the Statute, and it is *Quaſi* a conveiſion precedent, and until it be performed, nothing veſts in the Bargainee. See *Cook* 4. Part, *Finches* Caſe. That if the Bargainor makes a Feoffment, or a Fine before the Inrolment, to the Bargainee himſelf, and afterwards the Deed is Enrolled, the Bargainee is in by the Fine or Feoffment, but the Inrolment ſhall take away all Incumbrances made by the Bargainor himſelf to a Stranger, that they ſhall not prejudice the Bargainee; for the Inrolment hath relation to take away all Incumbrances. The Principal Caſe was adjourned, for that the Court would take further time to adviſe of it. Hill. 4 Car in B. R. *Flower* and *Baldwins* Caſe. *Cro.* 1 Part, 158.

9. A. and his Wife ſeized of the Parſonage of D. to them, and the Heirs of A. did grant the ſame to King *Hen.* 8. and his Heirs by Deed, 10 *Maii*, 31 H. 8. and then the King by his Letters Patents 21 *Julii*, 31. did Grant the Parſonage of S. (whereunto the Advowſon of the Vicarage belonged) to them, and the Heirs of A. in conſideration of the Parſonage of D. &c. given and granted by them to him, not ſaying by Deed, nor by what means. After 16 *Julii*, 32 H. 8. the Deed was acknowledged by A. and his Wife, and Enrolled, *ſecundum formam Statuti*. It was holden in this Caſe, That though the

the Deed to the King was not acknowledged, nor Enrolled at the time of the Grant made by the King, yet the Relation of the Inrolment, and the Operation of the Law, ſhall make the conſideration true in effect, and ſufficient, as touching the Husbands Eſtate, and the King ſhall not be deceived in his Grant. Hill. 12. Jac. in C. B. Rott. 1844. *Nettler*, and the Biſhop of *Wincheſters* Caſe. *Hob.* 222.

10. A. and B. by Indenture 3 *Julii*, 13 Jac. did bargain and ſell to J. S. and his heirs, the Manner of D. 4 *Octob.* 13 Jac. the Bargainee dyed, his heir of full age: In this Caſe it was Reſolved, the Land being holden in *Capite*, That his heir ſhould ſue as Livery; for it was ſaid, That this differed from all the Caſes of Recovery, Covenants to ſtand ſeized to Uſes, where the Eſtate veſts in the Heir, *quaſi* Heir, and never veſted in the Anceſtor, for this upon Inrolment, ſettles as between the Bargainor, and the Bargainee, *ab initio*, upon the Statute of 27 H. 8. of Uſes, which doth joyn all the Eſtates to the Uſes, *ipſo facto*, only the Statute of Inrolment ſays, That in that Caſe it ſhall not veſt, except the Deed be Enro'led; ſo if it be Inrolled, it doth veſt, not by the Statute of Inrolments, but by the Statute of Uſes. Yet in that Caſe it was agreed, That the Bargainee cannot ſell to another, until the Deed be Inrolled. Paſch. 15. Jac. in *Cur. Ward. Dimocks* Caſe. *Hob.* 136.

11. Upon a Verdict, a Rule was given by the Court for Judgment; this was upon Thurſday, upon Saturday after, the Plaintiff dyed: It was moved to have a Writ of Error, becauſe the party dyed before Judgment, and that cauſe is to have four days to ſpeak in Arreſt of Judgment, and it was moved for a *Superſedeas*: It was ſaid, That it was in the diſcretion of the Court to allow a Writ of Error; and although a Writ of Error was a *Superſedeas* in it ſelf, yet it was good to have a *Superſedeas* alſo: But becauſe the Writ of Error was not allowed, and becauſe no Error appeared to the Court, and for that where Judgment is entred, it ſhall relate to the Rule given, The Court Reſolved, That no Writ of Error ſhould be allowed, nor any *Superſedeas* granted. Mich. 15 Jac. in B. R. The Earl of *Shrewſbu* yet Caſe. *Popham*, 132, 133.

12. A. became Bail for B. upon a *Latitat* in the Kings Bench, before Judgment, the Bail let his Lands for valuable conſideration; Afterwards Judgment was given for the Plaintiff: It was a Queſtion If the Lands leaſed ſhould be lyable to the Bailment. It was the Opinion of the Court, That the Lands of the Leſſee ſhould be lyable; for it was ſaid, It was like to the caſe of a Bargain and Sale of Lands, which after is Enrolled within ſix months, which ſhall relate to the beginning of the Bargain, ſo upon the Judgment given, relation is made from the time of the Bailment: But the Court ſaid, they would further adviſe of the Caſe. Mich. 15 Jac. in B. R. *Baſkervile* and *Brookes* Caſe. *Popham* 132.

13. Note, In the Caſe betwixt *Walter* and *Bould*, It was a Queſtion, to what day a Judgment in full Term ſhall have Relation; whether to the Eſſoigne day, or to the day in full Term: It was ſaid, That it hath been the Opinion of moſt Lawyers and Practiſers, That a Judgment could not be given upon the Eſſoin day. But the Opinion of the Court was, That the Law was otherwiſe; for they ſaid, A Judgment in full Term ſhall relate to the firſt day of the Term, which is the Eſſoin day, and all other days given, are but days of Grace; and a difference was taken, which was this; where a Judgment is given upon any default in any Record, *quarto Die* is the day, and this is the day of Grace, before which day no default was to be Recorded, and ſo is the Entry, *Obtulit ſe quarto die*: but where Judgment is given upon appearance, there the Judgment hath relation to the firſt day; and it was ſaid, That a Judgment given upon the Eſſoin day was good; and ſo it was ſaid, it was adjudged Mich. 7 Jac. in C. B. in *Poyners* Caſe; where the Caſe was; *Poyns* an Infant, levyed a Fine, and in Trinity Term after, brought a Writ of Error, and prayed he might be Inſpected; and becauſe he had not his proofs there, day was given him till *Octab. Mich.* on which day, being the Eſſoin day, he came, and Juſtice *Cook* Inſpected him, *de bene eſſe*, and before *Menſe Mich.* he came of full age. It was the Opinion of the Court, That if the Inſpection ſhall be upon the day of Eſſoins, and before 4. *die poſt*, he come of full age, it is good: And in this Caſe it was ſaid, That if a man be bound to appear the firſt day of the Term in Court, he may appear the firſt day of Eſſoins, and then have his appearance recorded: And ſo the Court was clear of Opinion, That Judgment given in full Term, ſhall have Relation to the firſt day, which is the Eſſoin day, Trin. 8 Jac. in B. R. *Walter* and *Baulds* Caſe. *Bulſtr.* 1. Part, 33.

14. *Scire facias* upon a Judgment in Debt, Hill. Term, 22 Jac. againſt *Bill*; The Defendant being returned Ter-Tenant, pleaded a Statute acknowledged by the ſaid *Bill*, 22 Jan. 22 Jac. and an Extent by vertue of that Statute; and if the Judgment ſhall relate to the firſt day of Hill. Term, which was the 20 of Jan. being the Eſſoin day, or only to the 23 of Jan. which was the 4. *die poſt*, was the Queſtion. It was the Opinion of the Court, That the Judgment ſhall have relation to the firſt day, viz. the Eſſoin day, for in Law it is the firſt day

day of the Term, and all Legal proceedings have relation thereunto, and the 4. *die poſt* is the day of Grace; wherefore it being upon a Demurrer, it was adjudged accordingly for the Plaintiff. Hill. 2 Car. in C. B. *Stanford* and *Coopers* Caſe. *Cro.* 1. Part, 73.

15. In Trover and Converſion of goods, the Caſe was, A. and B. were poſſeſſed of the goods, and 21 Jac. were bound in a Statute to the Defendant, for a juſt and true Debt, and it being forfeited, the Defendant ſued forth an Extent to the Sheriffs of *London*, who extended thoſe goods (the Writ being returnable *Craſtino Annunciat.*) and returned the Writ and Inquiſition into the Chancery, 3 *Nov.* 3 Car. A. and B. became Bankrupts, being indebted to the Plaintiff, and others, 6 *Nov.* 3 Car. the Defendant ſued a *Liberate* upon the Extent, and the ſame day the goods upon Appraiſment were delivered in Extent: Afterwards 8 *Nov.* the Plaintiff and others, ſued forth a Commiſſion of Bankrupts againſt A. and B. The Commiſſioners ſold the goods to the Plaintiff 23 *Nov.* 3 Car. The point was, Whether A. and B. becoming Bankrupts after the Extent, and before the *Liberate*, whether the ſale made by the Commiſſioners was good: It was Objected, That it was good, and that the property of the goods did remain in the Conuſors, and by the Extent are only ſeizable into the Kings hands, but that ſhall not deveſt any property. But it was the Opinion of the whole Court, That thoſe goods extended before they became Bankrupts, could not be ſold by the Commiſſioners, becauſe they being extended, are *quaſi in Cuſtodia Legis*, ſo as the Conuſors have not any power to give, ſell, or diſpoſe of them; and although by the Extent the Conuſee hath not an abſolute Intereſt nor Property in them, until the delivery by the *Liberate*, and at the return of the Writ, may refuſe them for being over valued, yet that is for the advantage of the Conuſee; for the Extent is *Capias in manus noſtras*, and they be as goods gaged or diſtrained, which cannot be forfeited by Outlawry, or otherwiſe; and the *Liberate* is ſued, it hath relation to the Writ of Extent; and ſo the ſale of the Commiſſioners not good. It was adjudged for the Defendant. Hill. 3 Car. in B. R. *Radley* and *Halſeys* Caſe. *Cro.* 1. Part, 106.

16. In an *Ejectione firmæ*, the Caſe was, A. was Indicted of a *Præmunire*, upon the Statute of 13 Eliz. and afterwards made a gift in Tail of his Lands, and afterwards he was attainted by Verdict, and had Judgment: It was after found by Inquiſition upon a Commiſſion out of the Exchequer, That A. was ſeized of the Lands in Fee, at the time of the Offence committed; and that the Queen granted the Land to G. C. under whom the Leſſee of the Plaintiff claimed, and the Defendant under the Title of the Tenant in Tail. The points were, 1. Whether an Attainder in a *Præmunire*, ſhall have a Relation to the Offence for the forfeiture of the Lands, or to the point of the Judgment. This being a point of great difficulty, the Juſtices did not Reſolve. 2. Admitting the Attainder did relate to the Offence, If the Patent after the Inquiſition by Commiſſion under the Exchequer Seal, (no offence being found by Inquiſition under the Great Seal) be good by the Statute of 18 Eliz. cap. 2. For the ſecond Point, It was Reſolved, That the Freehold being a Stranger by the gift in Tail, at the time of the Attainder, it ſhall not be deveſted from him, and veſted in the King, without Office found under the Great Seal, which is only an Office to entitle the King; and not by an Inquiſition, by vertue of a Commiſſion under the Exchequer Seal. Therefore for this Point only, it was adjudged for the Defendant. Hill. 1 Car. in B. R. *Groſs* and *Gapers* Caſe. *Cro.* 1. Part, 123.

17. A man Bargained and Sold Lands by Deed Indented, Dat. 11 *Junii*, 1 Jac. Afterwards 12 *Junii*, the ſame year, Common was granted to the Bargainee for all manner of Cattel commonable, upon the Land; 15 *Junii*, the Deed of Bargain and Sale was Enrolled. It was adjudged in this Caſe, to be a good Grant of the Common, and that the Inrolment ſhall have Relation as to that, although for collateral things it ſhall not have Relation. Mich. 15 Jac. in B. R. *Ludlow* and *Statres* Caſe. *Godbolt*, 270.

18. Note, That an Adminiſtrater may bring an Action of Treſpaſſe, or a Trover and Converſion of Goods of the Inteſtate taken from before the Letters of Adminiſtration granted to him, for that the Letters of Adminiſtration do relate to the time of the death of the Inteſtate, and not to the time of the Granting of them; and ſo it was adjudged, Mich. 1652. in B. R. in *Long* and *Hibbs* Caſe. *Style*, 341.

2. *Where words ſubſequent ſhall have Relation to things mentioned before in the Premiſſes: Where they ſhall have Relation to the next precedent; And to what time an Act to be made upon a Condition, ſhall relate; And how, and to what time, place, perſon, or things, words in Deeds, &c. ſhall relate; & è contra.*

1. A Man ſeized of Lands in G. and W. deviſed the Lands in G. to his younger Son, for life, and dyed; his Heir entred into the Lands in W. and was ſeized in Fee, the younger ſon being within age; the Mother as Guardian for Nurture, entred into the Lands in G. and afterwards it was agreed betwixt the Mother and the eldeſt ſon, That the Mother do Releaſe unto the elder ſon all her Dower to the Lands in W. and after the Mother do releaſe to the elder ſon, all Actions, Reals and Perſonals, ſuits, and demands, *nec non totam dictam ſuam, & titulum Dotis de aliquibus terris in W. quæ vel quas*, ſhe had, or ever after might have, by reaſon of any thing, from the beginning of the world, to the date of the Releaſe. It was Reſolved in this Caſe (amongſt other points) that the words [*quæ vel quas*] do refer as well to the ſpecial word [*Dowers, &c.*] as to the general words [*Actions and Demands.*] for it was ſaid, It were againſt reaſon, that they ſhould refer to the general words, which are more remote, and not to the words of Qualification, which were nearer unto them. *Cook* 8. Part, 154. *Altham's* Caſe.

2. The Queen ſeized of the Rectory of L. had a portion of Tythes thereunto belonging; and ſhe by her Letters Patents, granted to J. S. *Totam illam portionem Decimarum in L. in Com. N. cum omnibus aliis Decimis ſuis quibuſcunque in L. in diſt. Com. N. nunc vel nuper in occupatione J. S.* It was holden in this Caſe, That the laſt words, *Nunc vel nuper, &c.* refer to the whole ſentence, and not to the latter part of it only, viz. *Cum omnibus aliis, &c.* 1. Becauſe the firſt words are, *Totam illam portionem Decimarum*; ſo as this word *illam*, ſheweth there ought to be ſubſequent words, to reduce into certainty what portion by the intention of the Queen, ſhall be granted, viz. *Illam*, which was in the occupation of I. S. and therefore this word *Illam*, is not ſatisfied till you come to the end of the ſentence. 2. It was holden, That theſe words, *Cum omnibus aliis*, couples the laſt words with the former, and makes the ſubſequent words refer to the whole ſentence. *Cook* 4. Part, 55. *Bozom's* Caſe.

3. The King granted to J. S. *omnia illa Meſſuagia in Tenura J. D.* ſcituate in W; and the truth was, the Lands did lye in D. It was Reſolved in this Caſe, becauſe the Grant is general, and is reſtrained to a certain Town, that the Patentee ſhall not have any Lands out of that Town, unto which the generality of the Grant refers, and that by reaſon of the word [*illa*]; for *omnia illa Meſſuagia*, muſt of neceſſity refer, as well to the Town, as to the *Tenura* of J. D. ſo that if either of them fail, the Grant muſt needs be void; for the word [*illa*] is not ſatisfied without you come to the end of the ſentence. *Cook*, 2. Part, 32. *Doddington's* Caſe.

4. Indentures of Demiſes were Engroſſed, bearing Date the 26 day of *May*, 25 Eliz. To have and to hold for three years, from henceforth; and the Indentures were delivered at four of the Clock in the Afternoon of the 20 day of *June*, 25 Eliz. It was Reſolved in this Caſe, That the words [from henceforth] ſhould have reference, and be accounted from the time of the delivery of the Indentures, and not from the Date; for [from henceforth] is as much as to ſay, from the making, or *a Conſtitione*; becauſe the confection or making of the Leaſe, beginneth by the Delivery; and the words [from henceforth] or any other words in a Leaſe, are of none effect or force, until the Delivery. *Cook* 5. Part, 1. *Clayton's* Caſe.

5. The Queen ſeized of the Mannor of D. to which an Advowſon was Appendant, demiſed the Mannor to J. S. for years, excepting the Advowſon: And afterwards, the King by his Letters Patents, granted *Totum illud Manerium de D. cum pertinenciis*, to J. D. in Fee, *exceptis quæ in Literis riſdem Patent. excipiuntur*; reciting the Letters Patents for years granted before: And further granted, *Manerium prædict. & omnia & ſingula præmiſſa cum pertinenciis, adeo plene & integre, & in tam amplis modo & forma, prout omnia & ſingula premiſſa, aut aliquo modo parcella ad manus noſtras devenerant*, or *in manibus noſtris nunc exiſtunt.* It was in this Caſe Reſolved, 1. That the Advowſon did paſs; for when the Grant of the King in general Terms refers to a certainty, it contains as expreſs certainty, as if the certainty had been expreſſed in the Grant, although that the certainty to which the Reference is, is not of Record, but lies in Averment. 2. Reſolved, That the words ſubſequent in the Grant, ſhould have relation to the

the things before mentioned: And therefore, if the ſaid clauſe, *adeo plene & integre*, had been omitted, the Advowſon had not paſſed by the firſt clauſe of the Grant; but by the addition of thoſe words, in the latter clauſe of the Grant, it did make the Advowſon to paſſe; for by thoſe words, the Kings intention did clearly appear. *Cook* 10. Part, 63. *Whittiers* Caſe.

6. Debt upon an Obligation, to perform all Covenants, Payments, Reſervations contained in ſuch an Indenture. The Caſe was this, A man ſeized of a houſe in Fee, demiſed the ſame to J. S. for one year by Indenture, and if both parties did agree, and ſhould be content, That the Term ſhould continue for a longer time, Then to have and to hold, *Demiſa pradict.* to the ſaid J. S. for three years, *Reddendo inde continuatim*, during the ſaid Term, at four Feaſts of the year, 40 s. rent; the Leſſee entred, and occupied the houſe for a year; The Leſſor for non payment of the ſaid Rent for the ſaid year, brought Debt: The Queſtion was, If the Leſſee ſhould pay any Rent for the ſaid year, or not. It was Objected, That he ſhould not pay any Rent for the firſt year, becauſe the *Reddendo* depended upon a Contingent which never took effect; for the Leaſe was not continued over the firſt year. 2. The Reſervation of the Rent was, *durante termino pradict.* which being ſpoken only in the ſingular number, ſhall relate only to the Term of three years laſt-mentioned, and not to the Term of one year, which was certain before the Contingent. But it was Reſolved, That the reſervation of the Rent did extend to the firſt year; and the proper place of a Reſervation is, to come after the limitation of all the Eſtates; and the words [*Reddendo inde*] have reference, and extend to all Eſtates before; and although the future Term be uncertain, yet the firſt term, for one year, is certain; and the words [*Durante termino pradict.*] although it be in the ſingular number, yet it is *Nomen collectivum*, and ſhall refer to every Term demiſed by the Indenture. *Cook* 10. Part, 106. *Humphry Iofilds* Caſe.

7. A. Leaſed certain Lands for years, yeilding yearly the Rent of 35 l. at *Michaelmas*, and the *Annuntiation*, or within twelve days after every of the ſaid Feaſts, payable at the Font-ſtone in the *Temple* Church; upon condition, That if the ſaid Rent of 35 l. or any part of it, be behinde, and unpaid, and not paid by the ſpace of twelve days next after any of the ſaid Feaſts, that then the ſaid Leaſe ſhould be void. It was adjudged in that Caſe, That the Leſſee in ſafeguard of his Leaſe, ſhould have twelve dayes after the twelve dayes, to pay the ſaid Rent; for when the Rent is not paid at the firſt day, it is as much as if it had been reſerved upon the twelfth day after: And where it is ſaid, *per pradict. ſpacium 12 dierum poſt*, &c. by good conſtruction, all the words ought to take effect; ſcil. *Poſt aliquod pradict. Feſtorum, ſeu dierum ſolutionis inde*, and *dies ſolutionis* is the twelfth day of the Feaſt; and therefore the Leſſee ſhall have twelve days after the twelve days, which is *dies ſolutionis poſt Feſt.* and that for the more avail of the Leſſee, for whoſe benefit further time was given; and thoſe words [*pradict. ſpacium 12 dierum*] may ſtand in good ſenſe, *ſcil. per pradict. ſpacium 12 dierum poſt pradict. 12 dies*; for that is *pradict. ſpacium*, although it hath not beginning as the other hath. Trin. 31 Eliz. in B. R. *Smith* and *Baſtards* Caſe; Vouch. in *Cook*, 10. Part, 129. in *Clunns* Caſe.

8. If a man, who is *non compos Mentis*, gives himſelf a mortal Wound, and before he dyeth, he becomes *ſanæ Memoria*, and afterwards dyeth of the ſame wound. In this Caſe, although that he dyeth of *ſanæ Memoriæ*, yet becauſe the original cauſe of his death hath relation to the original act, which was the ſtroak or wound, he ſhall not be *Felo de ſe.* 22 E. 3. *Coron*, 214. *Cook* 1. Part, 99. in *Shellyes* Caſe.

9. Husband and Wife ſeized of a Mannor, to them, and the heirs of the body of the Husband, by Deed Indented, Bargained, and ſold the Land to one in Fee, who ſuffered a Recovery, in which the Husband alone was vouched, which Recovery was to the uſe of the Husband for life, and afterwards to the uſe of the Wife for life, and for ſix moneths after, and after to the uſe of A. in Tail, and after to the uſe of the Wife in Fee; Provided, That it ſhall be lawful for the Husband and Wife, during their joynt lives, by any Deed or Writing ſealed, and publiſhed in the preſence of three Witneſſes, to alter or revoke any of the ſaid Uſe or Eſtates before Declared; and that at all times, from, and after, as the ſaid Husband and Wife ſhall by any ſuch Deed in Writing, expreſs or declare their minde to be, to alter &c. That then, and from thenceforth, ſuch of the ſaid Eſtates and Uſes ſhall ceaſe, determine, and be void; and that from thenceforth, the ſaid Recovery ſhall be, and all perſons ſhall ſtand and be ſeized to the uſe of ſuch, and ſuch Uſes and Eſtates, as by the ſaid Deed or Writing as aforeſaid, ſhall be Declared or Limitted only, and not to any other perſon or perſons, uſe or uſes: The Husband and Wife by Writing Indented, Sealed, and Publiſhed in the preſence of three Witneſſes, reciting the ſaid Power of Revocation, Declare, That the ſaid Recovery ſhall be to the uſe of the Husband for life, and after, to the uſe of the Wife for life, and ſix moneths after; and after to the uſe of B. in Fee, and after the Husband and Wife dye. In this Caſe (amongſt other Points) it was Reſolved, That although no uſe did ceaſe until the

Writing ſealed and publiſhed, and after the ſealing and publication thereof, nothing could be added to it; yet it well ſtood with the intent and words of the parties, That the new Declaration might be in the ſame Deed; And this word [ſuch] in the Proviſo, more properly refers and extends to the ſame Writing, in which the Revocation is, then to another; for [by ſuch Writing] is as much as to ſay, by the ſame Writing, *vel hujuſmodi ſcriptum*; and although the clauſes of the Creation of the new Uſes, and deſtruction of the old Uſes, are all in one and the ſame Deed, yet the Law ſhall conſtrue the clauſe of deſtruction, to precede the clauſe of Limitation of the new Uſes. *Cook* 6. Part, 33. *Fitz-Williams* Caſe.

10. In the great Caſe of *Quo Warranto*, *Cook* 9. Part, The Abbot of *Strata Marcellas* Caſe, theſe points (amongſt other) were Reſolved. 1. That when the King grants any Priviledges, Liberties, Franchiſes, which were Priviledges, Liberties, Franchiſes, in his own hands, as Flowers of his Crown; as *Bona Felonum, fugitivorum, utlagat.* Waif, Eſtray, Deodands, Wreck, &c. if they come again into the Kings hands, they are drowned in the Crown: But when a Liberty, Priviledge, Franchiſe, or a Juriſdiction is erected or created by the King, they are not extinct, nor the Appendancy ſevered from the poſſeſſions, though they come again to the King; as Grant of Market, Fair, Park, Warren, &c. 2. That if the King grant to J. S. and his Heirs, *Catalla Felonum* within his Manner of D. and afterwards J. S. grants to the King and his Succeſſors, the Mannor; and further grants to him and his heirs, *Tot, talia, tanta, eadem, & conſimilia Privilegia, Libertates & Franchiſias, quot, qualia, quanta, & qua* J. S. had. In that Caſe, in a *Quo Warranto* brought againſt J. N. he cannot plead the Grant in ſuch manner, but he is to plead ſpecially the firſt Grant made of the Felons goods, &c. and the re-Grant. 3. When the King Grants *Bona Felonum*, and divers other Franchiſes, to one for life; and afterwards the King Grants, *Tot, talia, tanta, eadem & hujuſmodi Privilegia* to J. S. and his Heirs, *Quot, qualia, quanta, vel qua, aliqui vel aliquis, habuerunt aut habuit*; That ſuch a Grant with ſuch a Reference is good, and J. S. ſhall have ſuch Priviledges as the Tenant for life had; for when a general Grant doth relate, or hath reference to another Deed, it is as much in Law, as if all the other Charters or Grants had been rented; becauſe they are upon Record. *Cook* 9. Part, 23. &c. See *Cook*, 9. Part, 42, 43. The Earl of *Shrewsburyes* Caſe, to this purpoſe.

More Relation.

1. AN Appeal brought of Felony, if the Defendant, depending the Plea, convey away his Land, the ſame is good, and ſhall prevent the Lord of his Eſcheat. But if a man be Endicted of Felony, and afterwards conveyes away his Land, and afterwards is Outlawed, there the Land ſhall Eſchear, becauſe in the one Caſe the Outlawry relates but to the Outlawry pronounced; and in the other Caſe, it relates to the Felony committed. *Cook* 1. Part, *Inſtitutes* 13.

2. A man Bargains and ſells his Lands to B. and before Inrolment of the Deed, Grants a Rent-charge to J. S. and afterwards the Deed is enrolled. It was holden in that Caſe, That the Grant was good, and that by the Inrollment, it ſhall be the Grant of B. and the confirmation of the other; but if the Deed had not bin enrolled, it ſhould be the Grant of the other, and the confirmation of B. *Cook* 1. Part, *Inſtitutes* 147.

3. A man Bargains and ſells a Reverſion, and afterwards levyes a Fine to the Bargainee of the ſame, and afterwards the Deed is enrolled. It was adjudged in that Caſe, That although the Inrolment of the Deed ſhould have relation to avoid mean acts; yet it ſhould not deveſt an Eſtate which was ſetled before. *Cook* 4. Part, 71. *Hindes* Caſe.

4. A man made a Leaſe for years rendring rent at *Mich.* and the Annunciation: He in the Reverſion Bargained and Sold the Reverſion to a ſtranger, who thereof gave notice to the Leſſee; the day of payment came, the Leſſee paid the Rent to the Bargainor, and then the Deed was enrolled. And if the Bargainee ſhould have the Rent alſo by relation, ſo as the Bargainor ſhall be charged in accompt to the Leſſee firſt payed, was the Queſtion. It was the Opinion of the whole Court, That in this Caſe the Bargainee ſhould not have the Rent. And in that Caſe it was ſaid, That if a Rent be paid to an Adminiſtrator who hath right for a time, and afterwards a Will is found, ſo as it appeareth upon the matter, that there was an Executor, and by conſequence no Adminiſtration could be, that the Rent ſhould be paid again to the Executor. Quære, becauſe it was a Chattel veſted. Mich. 6 Jac. in B. R. Sir *Robert Barker* and *Finches* Caſe.

5. The Diſſeiſee makes a Deed Indented, purporting a Leaſe for years, and delivers the ſame to a ſtranger off from the Land, as an Eſcrow, commanding him to enter upon the Land, and there

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to deliver it upon the Land as his Deed to the Leſſee, who doth it accordingly. It was adjudged in that Caſe, That it was a good Leaſe, becauſe it ſhall have Relation to the ſecond delivery for neceſſity, *ut res magis valeat quam pereat*. See 19 Eliz. *Jennings* and *Braggs* Caſe, vouched in *Cook* 3. Part, 35.

6. A. C. deviſed ſome of his Lands to R. C. and others, untill 800 l. ſhould be levyed and received out of the Rents and profits of them (beſides all Charges) to be imployed for the preferment of his two Daughters, M. and E. The Son and Heir of A. conceals the Will, enters into the Lands, and enjoyes them five years, and dyes. After whoſe death, the Will being diſcovered, R. C. enters in the Lands, and raiſeth 640 l. and imployes the ſame according to the Will. The Queſtion was, Whether the profits taken by the elder Son, and which the Deviſees might have taken, ſhould be accounted parcel of the ſum of the ſaid 800 l. In this Caſe, it was Reſolved, That although the words be [untill the ſum of 800 l. ſhall be levyed, &c.] yet it is as much in Law, as if the words had bin, [ſhall or may be levyed]. And it was holden in this Caſe, That in Caſe of a Leaſe for years, or limitation of an uſe untill ſuch a ſum ſhall be levyed, it is as much as to ſay, ſhall or may be levyed: for otherwiſe great miſchief would enſue, becauſe that he in the Reverſion or Remainder ſhall not enter untill the ſame be levyed. It ſhould be in the power of thoſe who are appointed to levy it, for to defer the levying of it, and ſo exclude him in the Reverſion or Remainder from taking of the profits of the Lands for ever: and therefore it was holden, That the words ſhall have ſuch reference, and have ſuch Relation and conſtruction, that an abſurdity or an Inconvenience follow not thereupon. *Cook* 4. Part, 80. Sir *Andrew Corbets* Caſe.

7. A. by Indenture enrolled, demiſed the Manner of D. to B. and his Heirs in Fee, rendring Rent, with clauſe of Diſtreſs, and upon non-payment of the Rent, to re-enter. And by the ſame Indenture Covenanted to make further aſſurance according to the purport and true intent and meaning of the parties expreſſed in the ſaid Indenture. And after by another Indenture, bearing date the ſame day, A. Covenanted to levy a Fine of the ſaid Manner, &c. before ſuch a day, &c. which Fine ſhould be to the only uſe, intents, effects, and Conditions expreſſed in the former Indentures, and to no other uſes; and Livery and Seiſin was made upon the ſame Indenture accordingly. And after the Fine was levyed *come ceo, &c.* as *B. habuit ex dono* of A. with a Releaſe with Warranty according to the uſual courſe of Fines. In this Caſe it was Reſolved and adjudged, That the Rent was not touched or extinguiſhed by the Fine, becauſe in that Caſe the Fine had relation to the former Indentures. Paſc. 5 Ma. *Dyer*, 157.

8. A Feme Covert had the third part of the Land of a Termor delivered unto her by the Sheriff in Dower. The Termor did give, grant, and aſſign all the Land, compriſed in his Leaſe, to A. and Covenanted, That he had not done any act, but that the Aſſignee might enjoy it againſt every one, and he was bound in an Obligation to perform the ſaid Covenants. In that Caſe it was adjudged, That he had not forfeited his Obligation, for that the words ſhould have relation to the words of the Leſſee, *viz.* that he had not done any act, and it was ſaid, That the words were not abſolute; as if the Aſſignee ſhould enjoy it againſt all men. See 7 Eliz. *Dyer*, 240.

9. Note, It is ſaid, That Relation is a fiction in Law, and will never do a wrong, or lay a Charge upon a third perſon. And therefore if a man ſeiſed in Fee, taketh a Wife, and maketh a Feoffment, and the Feoffee granteth a Rent of 10 l. to the Husband and Wife, and to the Heirs of the Husband, and the Husband dyeth, and the Wife recovered the moyety of the Land by Cuſtome, that in ſuch Caſe the Rent ſhall be apportioned, and ſhe ſhall diſtreyn only for 5 l. which is the moyety of the Rent; for although that the Dower be paramount the Rent by Relation, yet this Relation ſhall do no wrong. *Cook* 1. Part, *Inſtitutes* 190. *Cook* 3. Part, 29. in *Butler* and *Bakers* Caſe, acc.

10. Note, That by a Feoffment of a Mannor, and Livery made, the Services do not paſs untill Attornment; but after Attornment, it ſhall have relation to paſs them *ab initio*; but not to charge the Tenants with the Arrerages, or with Waſte done in the mean time; and ſo it was adjudged. H ll. 14 Eliz. in C. B. rott. 508. *Cook* 1. Part, *Inſtitutes* 310.

11. Note, That at the time of Granting a *Tales*, the Array muſt ſtand, for the word *Tales* are but words of ſimilitude, and have reference to a thing which at that time ought to be in *eſſe*; and therefore if the Array be quaſhed, or all the Polls challenged and drawn out, no *Tales* ſhall be awarded, for at that time they were not *Quales*: but in ſuch Caſe a new *Venire facias* ſhall Iſſue. Howbeit, that at the time of the citing of the *Tales*, the Principal Pannel did ſtand, and after is quaſhed, yet the *Tales* ſhall ſtand, for it is ſufficient that they were *Quales* at the time of the granting of the *Tales*. *Cook* 10. Part, 104. in *Denbawdies* Caſe.

12. The Archbiſhop of *Canterbury* had *Catalla felonum*

felonum de ſe infra manerium de D. he committed Treaſon; and afterwards the King made a general Grant to the Almoner of all goods of *Felons de ſe*. And afterwards the Archbiſhop is Attainted, and the *Hales* who had a Leaſe there, became *Felons de ſe*, and the Queen Granted the Term. It was a Queſtion, If the Pattentee or the Almoner ſhould have the Term. It was a Quære in *Dyer*, in 2 Ma. *Dyer*, 108. But ſee, that Quære is now Reſolved in *Cook* 1. Part, 150. that the Pattentee ſhall have it, and that by reaſon of the Relation of the Attainder, which had relation to the Offence committed.

13. In a *Mouſtrans de droit*, the Caſe was. In 17 E. 2. *John de malo Lacu*, gave to *Peter de malo Lacu*, and the Heirs of his body, the Caſtle and Mannor of *Mulgrave*, which after came to Sir *Ralph Bigod*: Sir *Ralph Bigod* 6 H. 8. made a Feoffment thereof to W. and others in Fee, to the uſe of his laſt Will, and dyed. The right of the Lands together with the entail, and the uſe deſcended to Sir *Francis Bigod*. 21 H. 8. Sir *Francis* made a Feoffment to J. S. and others, to the uſe of himſelf and *Katherine* his Wife, and to the Heirs of their two bodies, and had Iſſue *Ralph Bigod*, and *Dorothy*, 26 H. 8. the Statute of forfeiture for Treaſon was made, 29 H. 8. Sir *Francis* was Attainted and Executed. *Katharine* ſurvived him, 31 H. 8. a ſpecial Act of Parliament was made of his Attainder and forfeiture. 6 Eliz. *Ralph Bigod* Son and Heir of Sir *Francis* and *Katherine*, were reſtored in bloud by Parliament, and dyed without Iſſue. *Dorothy* married *Roger Ratcliff*, and they had Iſſue *Francis Ratcliff*. *Katherine* dyed, *Francis* entred. 33 Eliz. all this was found by Office. 34 Eliz. *Francis* dyed, having Iſſue *Roger Ratcliff*. 34 Eliz. the Queen granted the Caſtle and Mannor to *Edmund* Lord *Sheffeild*, and the Heirs Males of his body. *Roger Ratcliff* brought a *Mouſtrans de droit*, and had Judgment in it. Whereupon Error was brought in the Exchequer Chamber. There were many Queſtions moved in this Caſe; the Principal were two. 1. Whether *Francis Bigod* who had an Eſtate in ſpecial tail, and alſo any right of the old intail in him at the time of his Attainder: Or whether it was in Abeyance in reſpect of the Feoffment made 21 H. 8. In that point it was the Opinion of all the Juſtices, That the Feoffment gave away all the Eſtate that the Feoffor had concerning himſelf, or any benefit that he might receive thereby; but as concerning his Iſſue inheritable to that intail, and to him in the Reverſion, and for their good, there remained ſtill in him a right to that Intail by force of the Statute of *Weſt.* 2. for the good of thoſe that are ſaved by the Statute. 2. It was Reſolved, That this old Right of the Intail was forfeited to the Crown by the Statute of 26 H. 8. for that there was an Actual Eſtate in tail in the perſon Attainted at the time of the Attainder. 3. It was Reſolved, That their Rights were bound by the expreſs words of the Statute, there being no ſaving therein for them. 4. Reſolved, That when the Office was found, Iſſue in tail was barred notwithſtanding the remitter in that Caſe, by reaſon of the Relation of the Office. And afterwards the former Judgment given for *Ratcliff* was reverſed in the Exchequer Chamber. Mich. 13 Jac. in the Exchequer Chamber. Rott. 96. See the Caſe argued at large, *Hobart* 334. and in *Godbol.* 314.

14. Error to reverſe a Judgment in C. B. becauſe the Judgment was there given againſt a dead man, the Defendant dying after the *Niſi Prius* and before the day in Bank. It was urged, That the day of *Niſi Prius*, and the day in Bank were all one. It was the Opinion of the whole Court, That the Judgment given in the Common Pleas ſhould not relate to the day of the *Niſi Prius*, but according to the day in Bank; and if death do happen in the mean time between the day of *Niſi Prius*, and the day in bank; if Judgment be given, it is erronious. It was the Opinion of the whole Court, That the Judgment given againſt the dead man ſhould be reverſed. Trin. 12 Jac. In B. R. *Jourden* and *Dennys* Caſe. *Bolſtr.* 2. Part, 241.

Releaſes

Releaſes.

1. *Where a Releaſe is void for want of a poſſeſſion of him to whom the Releaſe is made, and where not; and where it is good by reaſon of Privity betwixt the Releaſſor, and Releaſſee: Where not.*

1. IF a man Leaſe Lands to another for Term of years. If the Leſſor doth Releaſe to the Leſſee all his Right before that the Leſſee hath entred into the Land by force of the Releaſe, ſuch Releaſe is void, becauſe that the Leſſee had not poſſeſſion of the Land at the time of the Releaſe made, but only a Right to have the Land by force of the ſame Leaſe. But if the Leſſee entreth into the Land, and be thereof poſſeſſed by vertue of the Leaſe, then ſuch a Releaſe made to him by the Feoffor or Leſſor, is good and ſufficient in reſpect of the privity which is betwixt them; and ſo it is if the Releaſe be made to the Leſſee by the Heir of the Feoffor or Leſſor. See *Litt.* 109. Sect. 459. acc.

2. The Prior of St. *John* and his brethren made a Leaſe by Indenture to three at Will; one of the three dyed; the Leſſors in 4 H. 8. by Indenture, reciting the death of one of them, and that the firſt Indenture was ſurrendred and cancelled, made an Eſtate to the Survivors, *Habendum* to them and their Heirs, but made no Letter of Attorney to make Livery. It was adjudged in that Caſe, That it was void, for that by the ſurrender of the Indenture, the Eſtate at Will was determined, ſo as that now they had not any poſſeſſion, ſo as the Grant could not ennure to them as a Confirmation. It was a Quære in that Caſe, if the death of one of them did not determine the Eſtate at Will. Hill. 10 Eliz. *Dyer*, 296. See now *Cook* 5. Part, 10. in *Henſteads* Caſe, that the Eſtate at Will is not determined, and then a Releaſe upon ſuch an Eſtate may be good.

3. *Eliz.* who was great Aunt to the Earl of *Devon*, was married to *Jo. Vyvion*, both born in Marriage, and named *John*; the eldeſt being reputed by the Father to be begotten by one *Mayo*, and by him called *John Mayo*. E. the Wife of *Vyvion* dyed. The Earl of *Devon* dyed without Iſſue: Office found after his death, That *John Vyvion* the younger, was co-heir to the Earl, upon which he ſued Livery with the other co-heirs, and held Courts, and received Rents. And afterwards *John* the eldeſt releaſed, and granted all his Right, Intereſt, and Demand in all the Mannors, &c. to *John* the younger; and after the Tenants payed their Rents to *John* the younger as before. It was holden by the Court in this Caſe, That this *John* the younger ſhall not be taken to be Heir notwithſtanding the vulgar reputation. And 2. That neither the ſuing of Livery, holding of Courts, nor the Receipt of the Rents, had gained him any poſſeſſion, either by wrong or Right upon which the ſaid Releaſe could ennure. Trin. 13 Eliz. *Dyer*, 302. *Vyvions* Caſe.

4. Leſſee for years rendring rent, the Reverſion is Granted for life, the Remainder over in Fee, the Grantee for life releaſeth all his Right to him in the Remainder in Fee: he in the Remainder Grants the Reverſion in Fee, the Tenant for life alſo releaſeth to that Grantee. It was holden in that Caſe, That the Releaſes were void, becauſe they had not words of ſurrender. It is there a Quære, If the ſecond Releaſe ſhall not ennure as an Attornment to make the Remainder to paſs. Paſc. 8 Eliz. *Dyer*, 251.

5. Leſſee for years is ouſted by a ſtranger, who leaſeth the Land over for years; the firſt Leſſee Releaſeth to the ſecond Leſſee all his Right. It was holden by *Martin*, 9 H. 6. 41. that the Releaſe was good, and yet there was no privity berwixt them, for that in the Releaſe of a Right in a Chattel, there needs no privity. But ſee *Fitz.* Title Releaſe 44. upon the ſaid Caſe of 9 H. 6. That if a man be Diſſeiſed, and the Diſſeiſor makes a Leaſe for years, and the Diſſeiſee doth Releaſe unto him all his Right, that the ſame is not good for want of privity. See 49 E. 3. 28. by *Belk* acc.

6. A man makes a Leaſe for years, rendring Rent; If the Leſſor before Entry Releaſeth to the Leſſee all his Right in the Land, that in that Caſe, although the ſame ſhall not ennure by way of enlargement of the Eſtate for want of privity; yet it ſhall extinguiſh the Rent. So if a Leaſe be made to begin at a day to come, rendring Rent, and before that day, the Leſſor doth Releaſe all his Right which he hath in the Land, the ſame ſhall not enlarge the Eſtate, but it ſhall ennure to extinguiſh the Rent in reſpect of the Privity. *Cook* 1. Part, *Inſtitutes* 270.

7. A Copyholder in Fee of a Mannor of the Dean and Chapter of *Weſtminſter*, ſurrendred the Copyhold Lands out of Court by the hands of Tenants according to the Cuſtome of the Mannor, to the uſe of another and his Heirs, upon certain Conditions: At the next Court the ſurrender was Preſented,

Preſented, but in the Preſentment, the Conditions were omitted. He to whom the ſurrender was made, being dead, the Lord by his Steward according to the Cuſtome, admitted his Daughters and Heirs, who entred. He who made the Surrender by his Deed, releaſed to the Daughters, being in poſſeſſion. In this Caſe, amongſt other points, it was Reſolved, That the Releaſe in the Caſe at bar, had extinguiſhed the Right of the Copyholder, becauſe the Hee to whom the Releaſe was made, was admitted to the Tenements, and ſo Copyholder in poſſeſſion, ſo as the Releaſe of the Cuſtomary Right did enure to them: and it was holden, That thereby the Lord was not at any prejudice, becauſe he had his Fine upon the Admittance, and they to whom the Releaſe was made, were in by Title, *ſcil.* by the Admittance of the Lord, and ſo the Releaſe did ariſe by way of extinguiſhment. Paſc. 31 Eliz. in B. R. *Kite* and *Quientons* Caſe. *Cook* 4 Part, 25.

8. A Woman hath Title of Dower, and releaſeth to him in the Reverſion, and afterwards Tenant for life ſurrendreth to him; It ſeems a good Bar, and yet the woman hath not cauſe of Action againſt him in the Reverſion, at the time of the Releaſe made; but the reaſon thereof is, becauſe that the woman hath right to the Land, and he in the Reverſion hath an Eſtate upon which the Releaſe may enure, and by the recovery of her Dower, his Eſtate ſhould be charged. See Paſch. 44 Eliz. in B. R. in *Hoes* Caſe. *Cook* 5. Part, 71.

9. A Prebend made a Leaſe for 70 years; The Biſhop, Dean, and Chapter reciting the Leaſe, confirmed *Dimiſſionem prædictam*, for 51 years, *& non ultra*: Afterwards the Prebend made another Leaſe, to begin after the determination of the firſt Leaſe: It was adjudged in this Caſe, That the Confirmation did extend to the whole Term, and the words [for 51 years,] came too late; and the Leaſe being for 70 years, it ſhould be repugnant to confirm *dimiſſionem prædictam*, for 51 years: But if he had confirmed the Lands for 51 years, the ſame had been good; for that had not been repugnant to the Confirmation: In that Caſe it was ſaid, If a Prebend makes a Leaſe for years, a confirmation may be made of the Lands for a leſſer number of years, becauſe the years are ſeveral, although the Term be one; But if a man makes a Leaſe for life, or a Gift in Tail, or in Fee, a Confirmation of the Land to the Leſſee, made for an hour to the Leſſee, is good for ever; becauſe the Eſtate of the Freehold or Inheritance is entire. *Cook* 5. Part, 81. *Fords* Caſe.

10. A man made a Leaſe for years, to begin after the determination of a Term for years then in *Eſſe*; the firſt years determined, the Leſſee did not enter, but he in the Reverſion entred, and made a Feoffment, and levyed a Fine, with Proclamations, and five years paſſed without any Title or Claim, made by the ſecond Leſſee for years, It was Reſolved in this Caſe, That the ſecond Leſſee in this Caſe of his Term, by the Statute of 4 H. 7. of Fines; for although that Leſſee for years hath not an Eſtate that he may levie a Fine; yet becauſe that the words of the Statute are general, and extend to all, and the words of the Leaſe [ſaving ſuch Right, Claim, or Intereſt] and he who hath a Term for years, hath an Intereſt, to whom a Releaſe may be made; and alſo, becauſe it is within the miſchief of the Statute; It was Reſolved, That his Intereſt was barred by the Fine. 2. It was Reſolved, That by the Feoffment, the ſecond Leſſee had but a Right, and when his future Intereſt commenced in the Land, then he had a preſent Eſtate in the Land, that the ſame might then be deveſted, which he might reveſt by his Entry: For if a man makes a Leaſe for years, and before the Leſſee entreth, the Leſſor dyeth; yet the Leſſee may enter, and he hath a right preſently in him, according to the form of the Leaſe, ſo as his Intereſt is accompanied with a preſent Entry, and a poſſibility to take the profits; and a Releaſe made to ſuch a Leſſee ſhall be good. *Cook* 5. Part. 124. *Seſſins* Caſe.

11. Note, That all Rights, Titles, and Actions, may by the privity of the Law, be Releaſed to the Tert-Tenant; and therefore a Right or Title to the Freehold, or Inheritance, be it in preſent, or in future, may be Releaſed in five manners. 1. To the Tenant of the Freehold in Fait, or in Law, without any privity. 2. To him in the Remainder. 3. To him ſeized of the Reverſion, without any privity; but an Eſtate cannot be enlarged without a privity. 4. To him who hath a Right only in reſpect of Privity; as if the Tenant be diſſeized, the Lord may Releaſe the Service in reſpect of the Privity only, and Right, without any Eſtate. 5. In reſpect of Privity only, without Right; as if Tenant in Tail maketh a Feoffment in Fee, the Donee after the Feoffment, hath not any Right; and yet in reſpect of the Privity only, the Donor may Releaſe to him the Rent, and all the Services, ſaving the Fealty; So the Defendant may Releaſe to the Vouchee in reſpect of Privity only; but no Eſtate can paſs by Releaſe, but to him who hath an Eſtate in privity. *Cook* 10. Part, 48. in *Lampitts* Caſe.

12. If a man Lett to another his Land for Term of years, if the Leſſor Releaſe to the Leſſee all his Right, before the Leſſee entreth into the Land, the Releaſe is void, becauſe the Leſſee had not poſſeſſion of the Land, but only *intereſſe Termini*, at the time of the Releaſe made; It is otherwiſe, If Tenant for life be in poſſeſſion; or if the

the Leſſee had been in poſſeſſion. See before Sect. 1. and ſee *Cook* 1. Part, *Inſtitutes*, 27. acc.

13. A. made a Feoffment to the uſe of himſelf for life; and after to the uſes of B. in Tail, and after to the uſe of C. in Fee; with power to revoke the Uſes, and to limit new Uſes, if A. ſurvived J. S. and J. S. dyed without heir male of his body; A. renounced, and ſurrendred to B. and C. all the power and authority of Revocation, and releaſed the Proviſo, Conditions, Covenants, and Agreements, as well as the ſaid Power and Authority; and after, J. S. dyed without Iſſue male of his body. It was ſaid, That an Authority which was collateral to the Land, could not be extinguiſhed by a Fine or Feoffment, and a future Duty; as Relief could not be releaſed by Releaſe of all demands. But it was Reſolved in the Principal Caſe, That if the power of Revocation had been preſent, that it might be Releaſed; and a Caſe was taken, where any is Executory, is created by Deed, the ſame thing by the conſent of all parties to the creation of it, may be by their Deed defeated and annulled; as Warranties, Recognizances, Rent, Charges, Covenants. *Cook* 1. Part, 111. in *Albanies* Caſe.

14. Note, It is a Rule in Law, That no Right paſſeth by a Releaſe, but the Right which the Releaſor hath at the time of the Releaſe made; and therefore if there be Father and Son, and the Father be diſſeized, and the ſon (living the Father) Releaſeth by his Deed to the Diſſeiſor, all the Right which he hath, or may have, to the Land, with Warranty, and after the Father dyeth; yet the ſon may enter upon the poſſeſſion of the Diſſeiſor, becauſe he had no Right at the time of the Releaſe made, all the right being then in the Father; and therefore after the death of the Father, the ſon may enter into the Land, notwithſtanding his own Releaſe. *Cook* 1. Part, *Inſtitutes*, 265.

15. If a *Precipe Quod reddat* be brought, a Releaſe from the Demandant to the Vouchee is good, and yet the Vouchee hath nothing in the Land; but the reaſon thereof is, becauſe that when the Vouchee entreth into the Warranty, he becomes Tenant to the Demandant, and may render in value to him, in reſpect of the privity betwixt them; but a Stranger cannot releaſe to the Vouchee, becauſe he is not *in rei veritate*, Tenant of the Land: And if after the Vouchee hath entred into the Warranty, and become Tenant in Law, a collateral Anceſtor of the Demandant, Releaſeth to the Vouchee with Warranty, he ſhall not plead this againſt the Demandant, for that Releaſe by a Stranger is void, becauſe there wants privity. *Cook* 1 Part *Inſtitutes*, 265. *Cook* 8. Part 151. in *Alibams* Caſe.

16. Donee in Tail maketh a Feoffment in Fee, and the Donor Releaſeth to him and his Heirs, all his right in the Land; this ſhall extinguiſh the Rent, becauſe the Lord muſt avow upon him, and yet the Tenant in Tail after the Feoffment hath no right in the Land; but the reaſon thereof is in reſpect of the Privity; and for that the Donor is of neceſſity compellable to avow upon him; for if he ſhould avow upon the Diſcontinuee, then it ſhould appear of his own ſhewing, that the Reverſion whereunto the Rent is incident, ſhould be out of him; and ſo by conſequence, the Avowry ſhould abate. Trin. 18 Eliz. in C. B. Sir *Thomas Wyats* Caſe.

17. A Releaſe to a Tenant at Will is good, becauſe between the Leſſor and ſuch a Leſſee, there is a poſſeſſion with privity; but a Releaſe to a Tenant at Sufferance (*viz.* who cometh to the poſſeſſion unlawfully, and then holdeth over) is not good, becauſe he hath a poſſeſſion without privity; as if Leſſee for years hold over his Term, a Releaſe to him is void: But if a man entreth into Lands of his own wrong, and take the profits of them, and ſaith he will hold them at the Will of the Owner, that doth not make him a Tenant at Will, or a Tenant at Sufferance, but a Diſſeiſor, becauſe he cannot qualifie his own wrong, and then a Releaſe to him as a Diſſeiſor, is good. *Cook* 1. Part *Inſtit.* 271.

18. A. ſeized of Lands, demiſed the ſame to B. his Baſtard ſon, and to the Heirs of his body; the Remainder to C. his Coſin, and Heir, and to his Heirs; and deviſed the Lands to E. his Wife, for fifteen years, if ſhe ſo long lived; A. dyed, E. married with C. the Heir of the Deviſor, to whom the Remainder was limitted; E. and C. entred, and continued the poſſeſſion; B. the firſt Deviſee releaſed to C. all his right and Intereſt in the ſaid Lands, and yet afterwards, notwithſtanding this Releaſe, entred, and let the Land to the Plaintiff: The Queſtion was, Whether C. be in after this Eſtate determined, as Tenant at Sufferance, and what Poſſeſſion he had, and whether a Releaſe to him, he being but Tenant at Sufferance, be good, to veſt the Eſtate in him. It was Reſolved in this Caſe, he was in but as Tenant at Sufferance; for in reſpect of his Reverſion, he had no colour to enter, and he came into poſſeſſion by vertue of the Leaſe made to E. which was determined before the Releaſe made, ſo as he had not any Title to hold the Poſſeſſion. 2. It was holden, That this Releaſe made to him being Tenant at Sufferance, was not good, to veſt any Eſtate for want of Privity between them, and a Releaſe to him as to him who had a Reverſion, was void, and an Eſtate cannot be veſted in him in the Reverſion, by this means.

Trin. 4 Jac. in B. R. *Butler* and *Duckmantons* Caſe. *Cro.* 2. Part, 169.

19. In Treſpaſs, the Caſe was, A. ſeized of the Land in Queſtion, and of other Lands, by his Will deviſed the Land in Queſtion to D. his Wife for life, and to T. his younger ſon, to him and his heirs, in Fee, and the other Land was deviſed to D. for life, and to the Plaintiff and his Heirs in Fee, under this condition; If D. dyed before the Legacies were paid, then his wills they ſhall be paid by N. and T. his ſons, portion-like, out of the Houſes and Lands given them, and if either of the ſons dye before they Enter, then the longer liver of them ſhall enjoy both parts, to him and his heirs; and if both dye before they Enter, then his Executors, or one of them, to pay the Legacies, and to take the profits until they are paid, and a year after, and made D. his Wife his Executor; D. Entred, the Plaintiff N. by Deed, in the life of D. Releaſed to T. all his right, with Warranty; F. by his Will deviſed the Lands to A. his Wife, and dyed in the life of D. and before the Legacies paid, D. dyed: In this Caſe, the Queſtion was, If this Deviſe of a Fee after a Limitation, were good or not: See *Cook* 10. Part, 46. *Lampits* Caſe. It was Reſolved in this Caſe, That Judgment ſhould be given for the Defendant, and that this Releaſe of N. be it a Condition, or a Limitation, it had diſcharged it; and as to him, It is an Intereſt veſted by the Deviſe, but not executed till it happen; and it was ſaid, That it was not like to an Heir in the life of the Father, for he is a Stranger, and hath no right at all, and yet his Releaſe with Warranty hinders him, and here this Releaſe is accompanyed with Warranty; and therefore the Releaſe of N. was good, and thereby he had barred himſelf. It was adjudged for the Defendant. Hil. 2 Jac. in C. B. *Howell* and *Augers* Caſe. *Hutton* 160.

20. The Father ſeized of Lands in Fee, he, and his ſon and heir apparent, by Indenture, Leaſed Land to the Defendant for years, to begin after the death of the Father, rendring Rent unto the ſon; the father dyed, the Leſſee entred, the rent was behind, the ſon diſtreined, & the Leſſee brought Treſpaſs, and had Judgment; for the Reſervation of the Rent was held to be utterly void; for although the ſon did prove Heir, it bettered not the Caſe; but the Reſervation muſt have been to the Heir, or Heirs of the Leſſor, by that name, for that is the only word of Privity in Law, requiſite to the Reſervation of Rents; for the Heir is in Repreſentation in point of taking of Inheritance, *eadem Perſona cum Anteceſſore*: And although in ſuch a caſe the Rent could never be demanded by the Father, yet the Heir ſhall take it from the Father, as riſing from the Root of the Reverſion, which was his fathers; And ſo it was holden, That the Rent it ſelf, which was in the father, though not to demand, becauſe it was not yet due, yet it was ſo his, as he might Releaſe and diſcharge it by the word Rent, though not by the word Action. Trin. 12 Jac. in C. B. *Oates* and *Frithes* Caſe. *Hob.* 130.

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2. *Where, and in what Caſes Releaſes ſhall be ſaid to Enure by way of Enlargement of an Eſtate; where by* Mitter le Droit, *and where by Extinguiſhment; and where, and to whom ſuch Releaſes ſhall be good, where not.*

1. IF a man makes a Leaſe for life of Lands, and afterwards the Leſſor doth Releaſe to the Leſſee all his right of, in, and to the Lands, without any words more in the Releaſe, his Eſtate is not thereby entangled; But if he Releaſeth to him and his heirs, or to him, and the heirs of his body, there the Releaſe doth enure by way of Enlargement of the Eſtate of the Leſſee. *Litt.* 109. acc. And therefore the Caſe, That Huſband and Wife were Tenants for life, the Reverſion to three in Fee; and they in the Reverſion did Releaſe to the Huſband all their Right, and to the Heirs of the Huſband: The Queſtion was, If the Wife had thereby a Fee. It was the Opinion of the Court, That ſhe had not, but that it did enure to her only as a Confirmation of her Eſtate during her life, and it did not enure by way of Enlargement, as her Eſtate. See 19 H. 6. 16. acc.

2. A man ſeized of Lands in Fee, demiſed the ſame to one A. and B. his ſon, and the Heirs of B. for 99 years, and ſo from 99 years to 99 years, until 300 years were paſt, without impeachment of Waſte, rendring Rent if it were demanded; and Covenanted, That he and his Heirs, at the end of thoſe 300 years, would make to the Heirs of the Leſſee, ſuch a Demiſe for other 300 years; but no Livery was made. The Queſtion was, That becauſe a Fee-ſimple was expreſſed in the Premiſſes of the Deed, if the Limitation for years in the *Habendum* were repugnant. It was Reſolved, That the *Habendum* was not repugnant to the Premiſſes; and in that caſe, theſe differences were agreed, when things take their eſſence and effect by the delivery of the Deed, and which things lye in Grant, without any other Ceremony, there ſuch a Limitation

to

to one and his Heirs, *Habendum*, for life, or years, is void: But when to the Eſtate limitted in the premiſſes of a Deed, a Ceremony is requiſite to the Eſſence and Perfection of it, and to the Eſtate limitted by the *Habendum*, nothing is requiſite but only the delivery of the Deed, as in the Principal Caſe, there the *Habendum* might ſtand. 2. In this Caſe it was Reſolved, That theſe words [to the Heirs of B.] upon the conſideration of the whole Indenture, was void; and that both the Leſſees had but an Eſtate for years, and if Livery had been made, the ſame would not change their Eſtates: Out of which Caſe, Note, That although upon Grant of an Eſtate, there be words of Enlargement in the Deed, yet thereby the Eſtate is not enlarged. *Cook* 1. Part, 23, 24. *Baldwines* Caſe.

3. If Tenant in Tail be diſſeized, and Releaſeth to his Diſſeiſor, it is no diſcontinuance, but the Eſtate is voidable by Claim or Action of the Iſſue in Tail; but if a Releaſe be with Warranty, it is a diſcontinuance, if the Iſſue in Tail be Heir to the Warranty: So if Tenant in Tail makes a Leaſe for life, *viz.* his own life, or for years, and Releaſeth to the Leſſee and his Heirs, the ſame is no diſcontinuance, although it be with Warranty: So if Tenant in Tail maketh a Leaſe for life, and afterwards grants the Reverſion in Fee, it is no diſcontinuance of the Fee, if it be not executed in the life of the Grantor. *Cook* 3. Part, 85. in the Caſe of Fines.

4. A. and B. two Joynt-Tenants for life, the Reverſion over in Fee; Judgment is given againſt A. in Debt, and after he Releaſed to his Companion before Execution. It was Reſolved in this Caſe, That although that B. to whom the Releaſe was made, is now in by the Leſſor, and not by A. yet as to him who had the Judgment in the Action of Debt, he by his own wrong ſhall not defeat him of his Execution: But if A. had dyed before Execution, the Survivor ſhould have held the Land diſcharged. 2. It was Reſolved, When the Releaſe is made to B. and he in the Reverſion enters, and is in of his ancient Eſtate, yet as to him who had the Judgment, the Eſtate of A. did continue during his life; and in that Caſe it was put, That if Huſband and Wife, ſeized of a Rent or Common in Fee, Releaſe to the Tenant of the Land, the Rent is extinct; yet as to the Wife, it hath continuance, for that ſhe ſhall be endowed of it. *Cook* 6. Part, 79. the Lord *Abergavenies* Caſe.

5. If a man ſeized of Lands, is diſſeized by two, and he releaſeth all his Right to one of the Diſſeiſors; In this Caſe, the Releaſee ſhall hold out his Companion, becauſe the two diſſeiſors being in by wrong, and againſt Law, when one of them hath a lawful Intereſt by the Releaſe of the Diſſeiſor, the wrong vaniſheth, and is utterly extinct; for the Releaſee is ſeized *per my & per tout*, and is thereby capable of the whole Eſtate; and ſo is it of two Joynt Abators or Intruders, who come in meerly by wrong; for by the operation of the Law, preſently upon the delivery of the Releaſe, the whole Freehold and Inheritance is veſted in the Releaſe, and all the Eſtate which the other Abator or Intruder hath, is deveſted. *Cook* 1. Part, *Inſtit.* 194.

6. Three Joynt-Tenants, one for life, and the other in Fee; One of them who hath the Fee, doth Releaſe to him who hath but for life, all his Right, without more words: It was holden, That he who had for life, had not a greater Eſtate then he had before; becauſe the Releaſe ſhall go according to the Eſtate: But if the Joynt Eſtate were to them in Fee, although that one of them doth Releaſe all his Eſtate without more, he hath a Fee: and Note by *Paſton*, 19 H. 6. if he had Releaſed but for life, yet he ſhould have had Fee. See 19 H. 6. 17. 9 Eliz. *Dyer*, 263. 10 Eliz. *Dyer*, acc.

7. If a man levyeth a Fine of Land in ancient Demeſne at the Common Law, to another, the Lord in ancient Demeſn ſhall have a Writ of Diſceit againſt him who levied the Fine, and againſt him who is Tenant; and by that ſhall avoid the Fine, and the Conuſor ſhall be reſtored to his poſſeſſion, and Title which he had given away by the Fine: But if the Conuſor, after the Fine, Releaſe to the Conuſee in poſſeſſion, being by Deed, or confirm his Eſtate in the Land, there the Conuſee ſhall have the Land, notwithſtanding the Fine avoided; becauſe that Releaſe or Confirmation made to him being in poſſeſſion, made his Eſtate firm, and rightful againſt the Heirs of him who releaſed; and yet the Conuſor had not any right to the Land, but only a poſſibility to have the Land again, after the Writ of Diſceit brought by the Lord of whom the Land was holden. See 21 E. 4. 20. 7 H. 4. 4. *Cook* 10. Part, 50.

8. Note, Releaſe by way of Extinguiſhment is, when he to whom the Releaſe is made, cannot have that which is Releaſed unto him; and therefore, if there be Lord and Tenant, and the Lord Releaſeth to the Tenant all the right which he hath in the Seignory, or all the right which he hath in the Land, ſuch Releaſe ſhall enure by way of extinguiſhment againſt all perſons; becauſe the Tenant cannot have the Service, to take it of himſelf. *Litt.* 112, *b.* acc.

9. Lord and Tenant were; The Lord Releaſed to the Tenant for life, and afterwards, only to the ſon of the Tenant, that he ſhould hold the Land diſcharged; the Lord dyed, the Tenant dyed, the wife of the Lord brought a Writ of Dower; the Tenant demanded the view, and could not have it,

becauſe the Seignory was in ſuſpence: But Note, in *Fitz. Tit.* Voucher, 120. it is ſaid, That in that Caſe, *Thorp* would have had the Seignory to be extinct, and that the Wife ſhould have the Rent as a Rent Seck; but all the whole Court was againſt him. 13 E. 3. *br.* Tit. *View* 96. 13 E. 3. *Fitz.* Tit. *Voucher*, 120.

10. *Puttenham* by Indenture, granted Land in Fee-Farm in Fee, with condition of Re-entry for non-payment, and Covenanted to make further aſſurance, and by another Indenture bearing the ſame date, he covenanted to levie a Fine, to the Uſes, Intents, Effects and Conditions in the firſt Indenture: He levyed a Fine, *Sur Conuſans de Droit come ceo*, &c. It was Reſolved, That the Conditions were not extinct: Hill. 5. *Mar. Dyer*, 157. See 34 Eliz. *Clever* and *Childes* Caſe, Vouch. in *Cook* 2. Part, 73. in the Lord *Cromwells* Caſe acc. And it was reſemblable to the Caſe of 11 E. 3. where a Releaſe was made by the Lord, to the Tenant of the Land, of all the Right in the Land and Seignory, *Salvo ſibi Dominio ſuo*, where it was holden, that the Tenure thereby was not extinct, but the annual Services only, and ſuch right only which he had unto the Land. Hill. 5 *Mar. Dyer*, 157.

11. Queen *Mary* having a Rent of 20 l. *per annum*, iſſuing out of a Mannor, of which a man and his Wife were joyntly ſeized in Fee, for a ſum of money paid by the Husband, by her Letters Patents, Gave, Granted, Remiſed, Releaſed, and Renounced to the Husband his Heirs, the ſaid Rent of 20 l. and afterwards the Husband dyed, and the Wife ſurvived; and if ſhe ſhould pay the Rent to the Heir of the Husband, was the Queſtion; and that depended upon this, If the Letters Patents ſhould in Law be taken for a Releaſe only, or might be uſed as a Grant at the Election of the Husband and his Heirs. It was the Opinion of the Lord *Dyer* in that Caſe, That it was in the Election of the Patentee to uſe the ſame as he pleaſed; and alſo it was ſaid, That it was the Intent of the Queen in that Caſe, to have the Rent to be continued, if the Patentee pleaſed; and afterwards to declare his Election, the Patentee deviſed the Rent. Mich. 15 Eliz. *Dyer*, 319.

12. Husband, Wife, and a third perſon, purchaſed Lands to them, and to the Heirs of the Husband and the third perſon; the third perſon releaſed to the Husband only, without the words, To his Heirs, all the Right, Title, Eſtate, and Demand which he had, or he or his heirs might have, or claim in the Land: After the Husband and Wife made a Leaſe for years, of all the Land, rendring Rent to them, and to the Heirs of the Husband; and after the Husband dyed: and for the moyty of the Rent being behinde after the death of the Husband, his Heir diſtreined the Leſſee. It was the Opinion of all the Juſtices, for the Heir, for the moyty of the Rent; *ſcil.* 1. That the Releaſe made to the Husband alone, it enures to him alone, and not to him and his Wife. And 2. That there needed not the words [his Heirs] in the Releaſe, but that the whole Moyty, State, and Intereſt which the Releaſor had, was veſted in the Husband in Fee-ſimple, becauſe he had a Fee-ſimple in the whole Land at the time of the Releaſe made, ſo as it could not enure to enlarge the Eſtate to him who had an equal Eſtate with him who Releaſed; but if the Releaſe had been made to the Wife, then there ought to have been the words in it, To her Heirs; becauſe ſhe had therein but an Eſtate for life before. Trin. 9 Eliz. *Dyer*, 263.

13. In Treſpaſs, the Defendant pleaded, That the Plaintiff within age, by Judgment, and Letter of Attorney, made a Feoffment to the Father of the Defendant, rendring Rent; and that after, by Indenture, he confirmed *Tenementa predicta*; *Habendum Tenement. predict. ſibi & Hæredibus*; and that his Father dyed ſeized, and that the Lands deſcended to him: Upon which the Plaintiff demurred. It was holden by the whole Court, That upon his own ſhewing, the Feoffment was void; for being by Letter of an Attorney by an Infant, it was a Diſſeiſin: Alſo he did not ſhew the firſt Indenture, wherein the Warrant of Attorney was contained: Nor did he add, That the Defendant had any thing in the Land upon which the Confirmation might enure: Alſo he pleaded, That he Confirmed *Tenement. predict. Habend. Tenement. predict.* and that is not true, that the Land ſhould paſs here but where a Confirmation enures by way of Enlargement: Nor was it averred that the Plaintiff was of full age at the time of the Confirmation: and for theſe cauſes it was adjudged for the Plaintiff. Mich. 2 Eliz. *Dyer*, 109. *Rugwayes* Caſe.

14. Debt upon an Obligation; The Condition was, to perform Covenants, Grants, and Agreements contained in an Indenture of Leaſe. The Defendant pleaded the Indenture; and that after, *viz.* a day five year after, the Plaintiff by Deed Releaſed, *ad primum diem Maii, quod eſſit in anno Domini, &c.* all Covenants in the Indenture: upon which the Plaintiff did Demur. It was adjudged to be no Plea, becauſe he had not alledged, that till the Releaſe, he had not broken any Covenant; for if the Obligation be once forfeited, a Releaſe of Covenants will not diſperſe with it. Trin. 35. H. 8. *Dyer*, 57. *Cook* 1. Part, *Albanars* Caſe. *Cook* 8. Part, 154. *Albans* Caſe acc.

3. Releaſe

3. *Releaſe of Actions reall and perſonall; Suits, Quarrells, Covenants, Duties, and Demands; how to be taken, and to what extend; and where, and in what Caſes; and to whom good, and where and in what not.*

1. A Statute Merchant was acknowledged the 26 h day of *July*, 8 Eliz. the Conuſee made a Releaſe bearing date 25 *Julii* of all Debts, Actions, Demands, and Executions due by the Conuſor, *uſque Confectionem præſentium*, and delivered the ſame Deed of Releaſe the 27th day of the ſame *July*. It was holden in this Caſe, That the Statute was diſcharged, for that the day of the delivery was holden to be the day of the making of it, but if the words had bin *uſque datum præſentium*, the Statute had not bin diſcharged. Hill. 14 Eliz. *Dyer*, 307.

2. If I Releaſe unto you all Actions which I have againſt you, and another. In this Caſe notwithſtanding the joynt words, all Actions which I have againſt you alone, are releaſed, for the Deed ſhall be conſtrued moſt beneficial to him to whom the Releaſe is made, and moſt ſtrongly againſt him that made it. *Cook* 5. Part, 7. in *Windhams* Caſe. See *Cook* 4. Part, 56. in *Knights* Caſe. If two are endebted to the King, and the King releaſeth to one of them, it ſhall not diſcharge the other.

3. In perſonal Actions, one Joynt-Tenant may Releaſe all; but if the perſonalty be mixt with the realty, it is otherwiſe. As in an Aſſiſe by two, the Releaſe of all Actions perſonalls by one, is no bar againſt the other: For although an Aſſiſe is an Action mixt in the realty and perſonalty; yet *omne majus trahit ad ſe minus*. So in a Writ of Right of Ward of the body brought by two, the Releaſe of one ſhall not bar the other, but ſhall give his companion the whole Ward. But in an Action of Waſte brought by two, the Releaſe of the one ſhall bar the other for that in Waſte, the perſonalty is the Principal. *Cook* 2. Part, 62. in *Tuckers* Caſe.

4. A Replevin againſt ſix, one avowed, and the other five made Conuſans as Bayliffs to the firſt for an Amercement, for breaking of a By Law in a Court Leet, and Judgment was given againſt them, and Coſts and Damages. The ſix brought a Writ of Error; the Defendant in the Writ of Error, pleaded the Releaſe of one of the five in bar. It was Reſolved in that Caſe, That inaſmuch as the Law did compell the Defendants to joyn in the Writ of Error, to reap no benefit, but to diſcharge them only of a Charge impoſed upon them, that the Releaſe of the one ſhould not bar the other. *Cook* 6. Part, 25. *Ruddocks* Caſe.

5. If a man Releaſeth *totum Jus* generally, all his Rights are thereby Releaſed; but if the Diſſeiſee Releaſe to the Diſſeiſor, *omnes actiones*, viz. *recuperandi ſive proſequendi in judicio*, thereby his Right of Entry is not Releaſed, for when a man hath divers means to come to his Right, he may Releaſe one of them in ſpecial; and yet take benefit of the other. See *Litt.* 150. 19 Aſſ. 3. 19 H. 6. 4. acc.

6. If the Diſſeiſee Releaſe all Actions to the Heir of the Diſſeiſor, thereby his right is gone in Judgment of Law, for when a man hath not any other means to come to his Land, but only by way of Action. If he Releaſe all Actions, by ſuch Releaſe his Right is incluſive in Judgment of Law gone, becauſe by his own act, he hath barred himſelf of all means and remedies to recover or attain thereunto. But if the Heir of the Diſſeiſor maketh a Leaſe for life, the Remainder in Fee; and the Diſſeiſee Releaſe to the Tenant for life all Actions which he hath againſt him: and after Tenant for life dyeth, the Diſſeiſee ſhall have an Action notwithſtanding ſuch Releaſe againſt him in the Remainder, for he did but Releaſe the Action, and the Act in Law will never extend the act of the party further or more largely then his expreſs words. *Cook* 8. Part, 152. in *Altons* Caſe.

7. If a man Covenant to do a Collateral thing, before the breach thereof, a Releaſe of all Actions Suits and Quarrels, is nothing worth; for before the breach, there is not any duty, nor cauſe of Action, but the breach ought to go before it, as it was adjudged 4 Eliz. in C. B. but in ſuch Caſe a Releaſe of all Covenants ſhall bar the ſame. *Cook* 1. Part, 112. in *Chudleighs* Caſe.

8. A Woman hath Title of Dower of Land, whereof one is Tenant for life, the Reverſion to another in Fee, and the Woman Releaſeth to him in the Reverſion. It is a good bar in a Writ of Dower brought againſt Tenant for life, and yet at the time ſhe had not preſent cauſe of Action againſt him, but *in futuro* after the death of Tenant for life. See 21 H. 7. 41. Releaſe of an Annuity to the Patron in the time of vacation is good, yet no Action lyeth againſt him, nor againſt any other till a Succeſſor be made, and yet a Releaſe ſhall extinguiſh it. See *ibid.* 112.

9. In Debt brought, A. became Bail for the Defendant. And before Judgment, the Plaintiff Releaſed to A. all Actions, Duties, and Demands; and

and after Judgment was given againſt the Defendant, and a *Scire facias* ſued out againſt the Bail, who pleaded that Releaſe. It was adjudged in that Caſe, That the Releaſe did not bar the Plaintiff, becauſe the Releaſe was before any duty was done, for untill the Judgment given againſt the Defendant, no duty was due by the Bail. *Cook* 5. Part, 71. *Hees* Caſe.

10. Note, It was adjudged in the Common Pleas, That an Executor before probate, may Releaſe an Action, although that before probate he cannot have an Action, for the Right of the Action is in him. But if A. Releaſeth, and afterwards taketh Adminiſtration, it ſhall not bar him; for the Right of the Action, was not in him at the time of the Releaſe. And in that Caſe, it was holden, That if a man be bound to pay a ſum at a day to come, a Releaſe of all Actions before the day, bars it; yet before the day, he cannot have an Action. *Cook* 5. Part, 28. *Middleton's* Caſe.

11. In an Action brought for 10 l. The Plaintiff declared, how that he and the Defendant, 10. *Feb.* 7 Jac. ſubmitted themſelves to the award of J. S. who awarded, they ſhould be friends, and that the Defendant ſhould pay to the Plaintiff 10 l. at *Midſummer* following, at ſuch a place; which not being paid, the Action was brought. The Defendant pleaded in bar a Releaſe made by the Plaintiff to him of all demands from the beginning of the World, untill the 10th of *April*, and ſhewed the Releaſe to the Court, to which the Plaintiff demurred. In this Caſe, it was adjudged againſt the Plaintiff. For although the ſum awarded is not grounded upon any precedent Debt or Contract betwixt the parties, yet it lyes in demand preſently, and the Plaintiff might aſſign it by his Will, and the Executor ſhould have it, and by the Spiritual Law, Adminiſtration may be granted of it before the day of payment, if the Plaintiff dye before; yet it is not recoverable before Midſummer, nor will an Action lye for it; but it is a duty preſently by the Award: and as the Award is perfect preſently, ſo ſoon as it is pronounced, ſo are all things which are contained in the Award; and therefore it being a duty preſently by the Awards, a Releaſe of all demands did releaſe and diſcharge it; and ſo it was adjudged, Hil. 9. Jac. in C. B. *Bridges* and *Eniots* Caſe. *Brownlow* 1. Part, 115.

12. A man is bound in an Obligation, *dat.* 3 *Jan.* and by Releaſe dated the 2 day of the ſame month of *January*, Releaſes all Actions, from the beginning of the World until this preſent day, and delivered the Releaſe after he had delivered the Obligation: *Cook* Chief Juſtice conceived, That a Releaſe of all Actions until the date, ſhall not diſcharge the duty after; but a Releaſe *uſque confectionem præſentium*, diſcharges only after the date, and before the delivery: But he ſaid, that the day of this preſent time, ſhall be the day of the date, and it ſhall not be added, that it was delivered 10 years after, and it ſhall not wait upon the delivery of the Deed. Paſch. 6 Jac. in C. B. *Brownlow* 1. Part, 300.

13. J. N. did Covenant by Indenture with J. S. to pay him 40 l. yearly, for 20 years, and afterwards J. S. did Releaſe to J. N. all Actions, Whether the Covenant was diſcharged, was the Queſtion: It was holden in that Caſe by all the Juſtices, That only the Arrearages were diſcharged, becauſe the Covenant is Executory every year, to be executed during the Term of the 21 years, for he may have ſeveral Actions of Covenant for every time that it is behinde; for if it be behinde the ſecond year, he may have a new Action for that; for nothing ſhall be diſcharged by the Releaſe of all Actions: but that which was in Action, or a duty at the time of the Releaſe made: And therefore it was holden in the Principal Caſe, That the Releaſe ſhould extinguiſh only that which was actual at the time of the Releaſe made: And ſo Not, That a Releaſe doth not diſcharge a Covenant which is not broken. Paſch. 24 Eliz. in C. B. *Gubbolt*, 11, & 12.

14. Covenant brought; for that the Plaintiff by Indenture lett to the Teſtator a Houſe in *Fleet-ſtreet* for years; and the Leſſee covenanted to repair it well, from time to time, during the Term, and in the end of the Term, to leave it well repaired to the Leſſor, and aſſigns the breach, that he did not leave it well repaired at the end of the Term: The Defendant pleaded, That within three days after the date of the Indenture, the Plaintiff Releaſed to the Teſtator, all Debts, Duties, and Demands: the truth was, That the Plaintiff had recovered 6 l. damages and coſts againſt the Teſtator, and made an Acquittance upon the Receipt thereof, with a general Releaſe of all Actions, Duties, and Demands which was pleaded in Bar, being entred *in hac verba*; whereupon it was Demurred. It was the Opinion of the Court, That it was not any Bar, for being a Covenant future, and not in demand at the time of the Releaſe made, but to be performed at the end of the Leaſe, this Releaſe, although it be of all Demands, yet there not appearing any intent to Releaſe, it cannot therefore be any bar; but if he had Releaſed all Covenants, it had been a Bar. Hill. 4 Jac. in B. R. Rott. 577. *Hancock* and *Fields* Caſe. *Cro.* 2. Part, 170.

15. Debt upon an Obligation, conditioned for performing of an Award made by Arbitrators, who 24 *Martii* awarded, That the Defendant ſhould pay to the Plaintiff at *Mich.* next following, 20 l. The Defendant pleaded the Plaintiff's Releaſe of all Actions and Demands, made to him the tenth day

of *April*. The Queſtion was, Whether by this Releaſe thus made, the payment of the 20 l. by the Defendant to the Plaintiff, were abſolutely gone or Releaſed. The whole Court conceived, That the Releaſe was no bar to the Plaintiffs Action. A difference was taken, Where an Obligation is entred for payment of money at a day to come, there it is a debt and duty preſently, and may be diſcharged by ſuch a Releaſe before the day of payment; but it is not ſo in the Caſe of an Annuity Rent, nor in an Action of Debt for non-performance of an award, and for payment of money at a day to come. No Judgment was given in the Caſe. Trin. 8 Jac. in B. R. rott. 1222. *Tynan* and *Bridges* Caſe. *Cro.* 2. Part, 300. See the Caſe before, Sect. 11.

16. Debt brought as Adminiſtrator, and demands 25 l. for that G. W. was poſſeſſed of a Leaſe for years, and 2 Jac. aſſigned the Leaſe to the Defendant, rendring yearly during the Term 50 l. at our *Lady* and *Mich.* The Defendant pleaded, That G. W. 5 Jac. Releaſed to him all Actions, Debts, Duties, and Demands before the date of that Releaſe. Upon which it was demurred. It was moved, That this duty accrued after the Releaſe, and being a future duty, was not diſcharged by this Releaſe, no more then if the Leſſor ſhould Releaſe unto his Leſſee for years, all Actions and Demands, it is no bar to the Rent which accrues yearly, becauſe every year is *quaſi* a new duty. But in the principal Caſe, the whole Court agreed, That forasmuch as the Leſſee had aſſigned over all his Term, reſerving this rent, it is not attendant on the Reverſion, but is only due by contract. And this Releaſe of all demands diſchargeth this contract, and all demands concerning it. Wherefore it was the Opinion of the Court, That the Releaſe was a good bar for the Rent encurred. Trin. 16 Jac. in B. R. *Witton* and *Eyes* Caſe. *Cro.* 2. Part, 486.

17. *Aſſumpſit*, In conſideration that the Plaintiff would lend him 7 l. and would accept of a Bond of G. M. of 80 l. and a Letter of Attorney to ſue it, and would promiſe to Releaſe unto the Defendant all Actions and Demands. The Defendant promiſed, That if the Plaintiff could not recover from the ſaid G. M. 40 l. within ſuch a time, he would pay that 40 l. unto him upon requeſt; and the Plaintiff alledged *in facto* the lending of the 7 l. and the acceptance of the Bond of 80 l. and that he according to his promiſe *poſtea* the ſame day releaſed to the Defendant all Actions and Demands, and that the Defendant had not according to his promiſe, although he could not receive from G. M. within the ſaid time, &c. (*licet ſæpius requiſitus*) paid to him the 40 l. The Defendant pleaded *Non-Aſſumpſit*, which was found againſt him. It was moved in ſtay of Judgment, That the Plaintiff by this Releaſe which he had ſhewed of all demands, had extinguiſhed his Action. It was Reſolved by the whole Court, That the Action was maintainable, for this Releaſe is part of the conſideration, and the cauſe which gives him this Action; and although the Releaſe is general of all Actions and demands, yet that doth not diſcharge what is future, and whereof he had not any cauſe of Action at the time of the Releaſe made. It was adjudged for the Plaintiff. Mich. 19 Jac. in B. R. *Porter* and *Philips* Caſe. *Cro.* 2. Part, 623.

18. If an Aſſiſe be brought againſt the Diſſeiſor and Tenant, the Diſſeiſor can make no uſe of a Releaſe of Actions real made by the Plaintiff to him, becauſe he hath nothing to do with the realty, and it is an entire Action mixt of the realty and perſonalty, but hath ſeveral reſpects to ſeveral perſons (whereas if the ſame perſon were both Diſſeiſor and Tenant), it were good. *Hob.* 163. in *Colt* and *Glovers* Caſe.

19. *Aſſumpſit* brought by Husband and Wife againſt J. S. Executor of T. S. The Plaintiff declared, That there was a communication had of a Marriage between the Wife, the Plaintiff, and the ſaid T. S. that the ſaid T. S. in conſideration that the ſaid Wife the Plaintiff, would take him to her Husband, he promiſed, that if after the Marriage, he the ſaid T. S. dyed, living the ſaid Wife, that he would leave her worth 100 l. and averred that ſhe did marry him, who dyed, and did not leave her worth 100 l. Upon *Non-Aſſumpſit* it was found for the Plaintiff. It was moved, That by the Intermarriage the Action was extinguiſhed, and thereby the promiſe was releaſed, and of that Opinion was *Hobart* Juſtice. But *Winch* and *Hutton* Juſtices held the contrary, for that the Law will not make a Releaſe contrary to the intent of the parties, and that the Marriage will not deſtroy that which it ſelf creates. Hill. 15 Jac. in C. B. *Smith* and *Stafferds* Caſe. *Hutton* 17.

20. *Aſſumpſit*, the Plaintiff declared, That the Defendant promiſed the Wife of the Plaintiff in her Widdowhood, That if ſhe would marry J. S. he would pay her yearly after the death of J. S. during her life 40 s. and afterwards ſhe married J. S. and for the non payment of the 40 s. yearly after the death of J. S. the Plaintiff brought the Action. The Defendant pleaded a Releaſe of J. S. of all Actions and Demands. It was holden by the Court to be no plea, for being a promiſe to perform a payment after the death of J. S. there was not any poſſibility it could be demanded of him, and therefore the Releaſe was void in Law, and the Action adjudged to be well brought by the now Plaintiff. Trin. 6 Jac. in B. R. *Belcher* and *Hudſons* Caſe. *Cro.* 1. Part.

1. Part, 222. See *Hobart*, 216. acc.

21. A. brought a Writ of Error to reverſe a Judgment given againſt him in C. B. for 200 l. A. being in Execution upon the Judgment had againſt him, removed himſelf by a *Habeas Corpus*. And in this Writ of Error, *mainu-Captors* were taken for him to proſecute the Writ of Error with effect; and if the Judgment be affirmed, then he to pay the Principal; and if he do not pay, then his *Mainucaptors* to pay. After this Writ of Error brought, and Mainucaption taken, and before Judgment affirmed, a Releaſe was made to him and his Mainucaptors of all Actions, Executions and Demands. The Judgment was afterwards affirmed. The money was not paid by A. the principal; upon which a *Scire facias* was proſecuted againſt the Mainucaptors, who in bar pleaded this Releaſe; and whether this Releaſe ſhould be a good bar to the *Scire facias*, was the Queſtion. This Caſe was long argued. It was the Opinion of the Court, That by this Releaſe the debt was diſcharged, and that this Releaſe being pleaded by the Mainucaptors in bar, was a good plea. But no Judgment was given in the Caſe. But the parties perceiving the Opinion of the Court, reſted ſatisfied, and the matter was not moved again. Paſc. 12 Jac. in B. R. *Huxley* and *Harriſons* Caſe. *Raſt.* 2. Part, 231, 232.

22. A man ſeiſed of Lands in G. and W. deviſed his Lands in G. to his younger ſon for life, and dyed; his Heir entred into the Lands in W. and was ſeiſed in Fee, the younger Son being within age, the Mother as Guardian by Nurture, entred into the Lands in G. and afterwards it was agreed betwixt the Mother and the eldeſt Son, That the Mother Releaſe to the elder Son, all her Dower to the Land in W. And afterwards the Mother doth Releaſe to the eldeſt Son, all Actions, reals and perſonalls, Suits, Quarrells, and Demands, *Nec non totam dotem ſuam ac titulum dotis de aliquibus terris in W. qua vel quas* ſhe had or ever after might have *ratione alicujus rei* from the beginning of the World, to the date of the Releaſe: the younger Son dyed. The Queſtion was, Whether the ſaid Releaſe made by the Mother, to him in the Reverſion expectant upon an Eſtate for life, had extinguiſhed her Dower. 2. If the concord or agreement of the parties did qualify the force of any of the words of the Releaſe. In this Caſe, theſe points were Reſolved. 1. That a Releaſe of all Actions, perſonalls and reals to him in the Reverſion upon a Freehold, did not extinct the Dower. 2. It was Reſolved, That the Releaſe of all Suits and Quarrells, was no bar of the Dower. And this word (Quarrel) extends not only to Actions real and perſonal, but alſo to all cauſes of Actions and Suits. But by Releaſe of all Suits, Executions are barred, becauſe that none can have Execution without a Suit. 3. Reſolved, That by the Releaſe of all demands, If the Deed of Releaſe had not gone further, the Dower had bin barred. By Releaſe of all demands, Freeholds, and Inheritances, Executories are Releaſed, as Rents, &c. and by Releaſe of all Demands, Executions are Releaſed. And by a Releaſe of all Demands to a Diſſeiſor, a Right of Entry is releaſed. 4. It was Reſolved, That aſwell the firſt words, as the ſubſequent words, did extend to Releaſe all Actions, Quarels, Demands, Title of Dower unto the Lands in W. only, and not to the Lands in G. for the latter words qualify and reſtreyn the firſt words to the Lands in W. 1. Becauſe that all the words are in one ſentence. 2. Becauſe if the general words ſhould ſtand without qualification, then the ſpecial words ſhould be vain, and of no effect, *et maledicta eſt expoſitio quæ evacuat textum*. 3. Becauſe it is a Rule in Law, *Quando Charta continet generalem Clauſulam, poſtoquæ deſcendit ad verba ſpecialia quæ Clauſulæ generali ſunt Computanea, Interpretandum eſt ſecundum verba ſpecialia*. 5. Reſolved, That the words relative (*Quæ vel quas*) refer aſwell to Actions and demands, as to the ſpecial words, and refer aſwell to the words immediate, as to the general words which are more remote. 6. It was Reſolved, That the ſaid collateral averment out of the Deed, was not of any force or effect in Law, and matter in fact is to be averred by the party, and tryable by Jury, and matter in Law by the Judges, and no averment *de hors* can make that good which appeareth upon conſideration of the Deed to be void. And in the principal Caſe, If the general word (Demand) had in Law by the Judgment of the Judges upon conſideration of the whole Deed of Releaſe, barred her of her Dower, no collateral averment *de hors* could have qualified and abridged the force or operation of the ſaid word but it ought to be qualified by apt words conteyned within the ſame Deed, as in this Caſe it was. And for theſe cauſes, it was adjudged, That the Dower was not Releaſed. *Cook* 8. Part, 150. *Edward Altham's* Caſe.

23. Debt againſt an Executor, the Caſe was; A. made the Defendants Executors, they being within age, Adminiſtration during their minority, was committed to J. S. and it was found, That during the minority of the Executors, there were goods of the Teſtators in the Adminiſtrators hands, to the value of 4000 l. and that the Defendants the Executors, when they came of full age, did Releaſe to the Adminiſtrator *durante minori ætate* all manner of Demands. It was made a Queſtion, Whether the ſaid 4000 l. were Aſſets in the Executors hands. It was the Opinion of the whole Court, That

That it was Aſſets in their hands. And in that Caſe, it was ſaid, That it is not requiſite that every Aſſets be a thing in poſſeſſion, or in the hands of the Executor. For a thing may be Aſſets in the Executors hands if it come in lieu of a thing which was in the hands of the Teſtator. It was alſo holden, That this Releaſe of the Executor to the Adminiſtrator, was a *Devaſtavit* of the goods of the Teſtator, although they were not goods in poſſeſſion. Mich. 27 Eliz. in C.B. *Kitleys* Caſe. *Godbolt.* 29, 30.

24. A Releaſe of all Demands, is no bar in a Writ of Error to reverſe an Outlawry, becauſe the Writ is only to relieve the Plaintiff by way of diſcharge and not by way of demand. 11 E. 4. 6. *Thefcelland* and *Penro's* Caſe.

25. Note, That by a general Releaſe of all Actions, realls, and perſonalls, an Action which one hath as an Executor, is not releaſed by *Chandiſh.* 39 H. 6. 26. b. Quære.

More Releaſes.

1. THe Husband and Wife as Adminiſtrator of her former Husband, recovered a Debt; depending which Suit, the Son of the Inteſtate by Covin between him and the Defendant, procured new Letters of Adminiſtration to him and his Mother to be granted by Covin, and after Judgment, releaſed to the Debtor. The Husband and Wife ſued forth Execution: whereupon the Debtor brought an *Audita Querela*; depending which, the ſecond Adminiſtration was Repealed by ſentence, and the Covin and the Repeal were pleaded in Bar of the *Audita Querela*; upon which there was a Demurrer, And Judgment was given againſt the Plaintiff in the *Audita Querela*, by reaſon that the Releaſe was obtained by Covin, &c. Hill. 17 Eliz. *Dyer*, 339.

2. Two Executors brought an Action of Debt, the one was ſummoned and ſevered. It was the Opinion of the Court, That after Judgment he could not acknowledge ſatisfaction, becauſe he was not privy to the Judgment: But the Court held, That notwithſtanding he was ſummoned and ſevered, yet before Judgment, he might have Releaſed, and ſuch Releaſe had been good. Mich. 15 Eliz. *Dyer*, 319.

3. *Luker*, a Merchant of *Ireland*, was bound in an Obligation of 80 l. to one D. of *London*; the Obligation was made in Ireland, but it alwayes remained in *London*: D. dyed Inteſtate in *England*, his ſon obtained Letters of Adminiſtration from the Archbiſhop of *Dublin*, of all the Goods and Chattels which were his fathers, within that Province; and afterwards he did releaſe the Debt, and the Action of Debt to *Luker*: Afterwards the Archbiſhop of *Canterbury* committed the Adminiſtration of the goods of the ſaid D. to his Wife; Whereupon ſhe brought Debt in *London*, and recovered, notwithſtanding the Releaſe made by the ſon; becauſe the Adminiſtration granted to the ſon, was not lawful; for the Adminiſtration was to be committed where the Obligation remained, and not where the debt firſt began. Mich. 14 Eliz. *Dyer*, 305. *Lukers* Caſe.

4. A man who was condemned in Debt, paid part of it to the Plaintiff, and the Plaintiff made him an Acquittance in this manner, *ſcil.* Received 10 l. in part of a more ſum, wherein the Defendant was condemned by Judgment, before Juſtices of *Niſi Prius*, whereas the Judgment alwayes is in *Banco*; It was moved, If this Acquittance were ſufficient in Law to ground an *Audita Querela* upon: The Plaintiff intending to take forth a *Capias ad ſatisfaciendum* againſt the Defendant. It was the Opinion of the Juſtices, That it was not; For it was ſaid, That if I do Releaſe all Actions which I have *Ratione Teſtamenti*, and I am not Executor, the Releaſe is void. But it was ſaid, That if I Releaſe all the right which I have in white-Acre, which I purchaſed of one ſuch; and in truth, I purchaſed of another: yet becauſe the Land is certainly named; the Releaſe is good, notwithſtanding the miſ-recital; but when it is made in general, it is otherwiſe. Mich. 33. H. 8. 50.

5. If a man do recover Debt or Damages in a perſonal Action by a falſe Verdict, and afterwards the Defendant doth releaſe to the Plaintiff all Actions perſonals; the Defendant cannot bring an Attachment to be reſtored thereby to what he loſt, becauſe he is barred thereof by his Releaſe; and ſo it is in a real Action: If the Tenant give Releaſe unto the Demandant after Recovery, all his Right in the Land, he ſhall not have a Writ of Error, becauſe he cannot have the effect of his Writ, which is to be reſtored to the Land. *Cook* 1. Part, *Inſtitutes*, 289.

6. A man hath a Son within age, and is diſſeiſed, and dyeth; and afterwards, the ſon being within age, the diſſeiſor dyeth, and the Lands deſcend to his Heir, and a ſtranger enters upon the Lands, and abates; and afterwards the ſon of the Diſſeiſee, when he cometh of full age, releaſeth all his right in the Land to the Abator: In this it is holden, That the Heir of the Diſſeiſor ſhall not have an Aſſize of *Mordaunceſter* againſt the Abator, but ſhall be barred; and the reaſon is, becauſe the

A Abator is now armed with the right of the Heir of the Diſſeiſee by his Releaſe, and in that Caſe the Entry of the ſon, the heir of the Diſſeiſee was chargeable; for that he was within age at the time of the diſcent. But it is otherwiſe where a man of full age is diſſeized, and a Deſcent is caſt; for that in ſuch caſe a Releaſe to the Abator is not good; becauſe the Entry of the Diſſeiſee being taken away, the Releaſe to the Abator by the Diſſeiſee was a good foundation, upon which it may be grounded, *Cook* 1. Part, *Inſtitutes*, 227. acc.

7. If the body of the Defendant after a Recovery had by Judgment in Debt, be taken in Execution by a *Capias ad ſatisfaciendum*, and the Defendant being in Execution, the Plaintiff doth Releaſe unto him all Actions, he ſhall ſtill remain in Execution notwithſtanding ſuch Releaſe; but if the Plaintiff in ſuch caſe doth Releaſe to the Defendant all Debts, Duties, and Judgments, there the Defendant ſhall be diſcharged out of Execution; becauſe the Debt, Duty, or Judgment, which is the cauſe of the Execution, is thereby diſcharged. *Cook* 1. Part, *Inſtitutes*, 291. *Cook*, 5. Part, *Hoes* Caſe, 71. acc.

8. A. poſſeſſed of a Term for 500 years, demiſed the Term to B. for life, the Remainder to C. and the Heirs of his body, and made B. his Executor, and dyed; B. was poſſeſſed of the Leaſe, and afterwards C. Releaſed to B. all his Right in the Term: In that Caſe it was Objected, That the Releaſe was void, becauſe that C. at the time of the Releaſe, had no Eſtate in him, but only a poſſibility, the whole Eſtate and Term being in B. ſo that after the death of B, C. might enter again upon the Leaſe, notwithſtanding the Releaſe. But it was Reſolved in that Caſe, That C. by that Releaſe had extinguiſhed all his Right and Title to the Term, and had fixed it in B; becauſe the Deviſe by A. and the aſſent of B. the Executor, appearing by his acceptance of the Releaſe, were the original and fundamental cauſes of the Intereſt of C. and the death of B. was but a means to bring the Leaſe in poſſeſſion, and gave nothing at all; for that the whole Intereſt accrued by the Deviſing, and was executed by the aſſent of the Executor; and therefore in that Caſe, C. had not only a poſſibility, but ſuch an Intereſt as might well be releaſed. *Cook* 10. Part, 49. *Lampits* Caſe.

9. If the Conuſee of a Statute, or Recognizance, doth releaſe to the Tenant of the Land all the right that he hath in the Land; yet notwithſtanding ſuch Releaſe, he may ſue forth Execution; becauſe that at the time of the Releaſe made, he had not any Intereſt in the Land; for that the body was the Debtor, and not the Land, but in reſpect of the body; and the Land is not charged with the debt before Execution. So ſee, that a Releaſe made by the ſon to the Diſſeiſor againſt his father, in the life of his father, is not good, but void; becauſe the ſon had not any right all the life time of his father. See *Cook* 10. Part, 50. *Pla. Com.* 72. See *Thom. Popes* Caſe acc.

10. A man ſeized of Lands in Fee, deviſed a Rent out of it, with clauſe of Diſtreſs, and dyed; his ſon and heir entred, and dyed, the Rent was behinde, the ſon of the ſon dyed, and his ſon entred into the Land, and made a Feoffment to the Plaintiff, and the Deviſee of the Rent releaſed all Actions, Debts, and Demands to the Feoffor; and afterwards he diſtrained the Cattle of the Feoffee for rent behinde, before the Feoffment. It was the Opinion of the Court in this Caſe, That the Releaſe was not good, becauſe the Deviſee had no cauſe of Action at the time of the Releaſe made againſt him to whom he made the Releaſe; but if the Releaſe had been made to the Feoffee, then it had been good, becauſe that he was ſubject to a diſtreſs. Trin. 10 Jac. in C. B. *Strobridge* and *Forteſcues* Caſe. *Brownlow* 2. Part, 190.

11. Debt upon an Obligation of 80 l. The Defendant pleaded, That the Plaintiff himſelf in the Court of P. being a Court of Record, brought debt upon the ſame Obligation, againſt the now Defendant: Upon the ſame Bond where the Defendant and J. P. the elder, were joyntly bound for the payment of 40 l. and after plea pleaded, the Plaintiff entred a *Retraxit*, and averred, that the ſaid J. P. the younger named in the Obligation, and the ſame J. P. againſt whom the *Retraxit* was, was one and the ſame perſon, and demanded Judgment, if againſt the *Retraxit* he ought to ſue; upon which it was demurred: It was ſaid for the Defendant, that this *Retraxit* was in the nature of a Releaſe, and *quaſi* a Releaſe. *Crook* Juſtice, ſaid, It was neither Releaſe *in facto*, nor in Law, but *quaſi* an agreement that he will not farther proſecute; and it might be that the ſaid J. P. the younger paid the moyty of the money, and the Obligee did agree to accept it of him, and that he would not further proſecute againſt him, and being joyntly and ſeverally bound, he might make ſuch an Agreement, and not diſcharge the Bond; *Barkley* Juſtice held the Plea good, and that it was a good Bar; for that it is a Bond joynt and ſeveral; and one of them being diſcharged, it cannot be now a joynt Bond; wherefore the diſcharge to the one, was the diſcharge *quoad* the other; But becauſe the Juſtices diſagreed in Opinion, it was adjourned. Hill. 14 Car. in B. R. *Dennis* and *Paynes* Caſe. *Cro.* 1 Part, 395.

12. Covenant, The Defendant by Indenture enfeoffed J. S. of Lands, and Covenanted for himſelf and his heirs, with the Feoffee, his heirs and aſſignes, to make further aſſurance, upon requeſt,

J. S.

J. S. conveyed the Lands to the Plaintiff, who brought the Action, becauſe the Defendant did not levy a Fine upon the Plaintiffs requeſt. The Defendant pleaded a Releaſe made from J. S. with whom the firſt Covenant was made; which Releaſe was dated after the Commencement of the Suit. It was Reſolved in this Caſe, that the Covenant did go with the Land, and that the Aſſignee ſhould have benefit of it; and the breach of the Covenant being in the time of the Aſſignee, for not levying the Fine, and the Action brought by him, they held, that the Covenantee could not Releaſe this Action wherein the Aſſignee was Intereſſed; wherefore Judgment was given for the Plaintiff. Trin. 14 Car. in B. R. *Midlemore* and *Goodales* Caſe. *Cro.* 1. Part, 361.

13. A woman ſued in the Spiritual Court, without her Husband, for Defamation of her, and ſentence was for her, and coſts aſſeſſed: In an Appeal of this ſentence to the Arches, the Defendant pleaded there, the Releaſe of the Husband, as well of the ſentence, as of the coſts, which was there denyed, and upon that he prayed a Prohibition; for it was ſaid, That a Wife may ſue, ſo the Husband may releaſe, and the ſaid releaſe is to be guided by the Common Law. But it was the Opinion of the Court, That the Releaſe of the Husband cannot be a Bar to this Suit *quoad Reformationem morum*; for the Court may ſentence the Defendant to a ſubmiſſion, or a corporal puniſhment, which the Husband cannot Releaſe; but as for the Coſts, the Husband might well releaſe them: Whereupon a Rule was given, that a Prohibition ſhould go, as to ſtay the Suit, *quoad* the Coſts only. Trin. 7 Car. in B. R. *Cro.* 1. Part, 161.

14. In an *Ejectione firmæ*, after a Verdict at *Niſi Prius* for the Plaintiff; The Defendant at the day *in Banco*, pleaded a Releaſe from the Plaintiff, betwixt the Verdict, and the day *in Banco*. It was Reſolved by the Court, That he had not day to plead it, nor had any remedy but by *Audita Querela*, if the Plaintiff ſued forth Execution. Mich. 20 Jac. in B. R. *Stamp* and *Parkers* Caſe. *Cro.* 2. Part, 646.

15. The Caſe was, J. S. and A. a Feme ſole, were Joynt-Tenants for life; A. took Husband, who by Fine grants to J. S *Tenementa prædict. & feram. & quicquid habent, pro termino vitæ* of the ſaid A. *& illos Reddidit*, *Habendum* to him and his Aſſignes, for the life of the ſaid A. and Warrants it to him and his heirs, during the life of the ſaid A. And whether this Grant by Fine ſhould enure by Releaſe, or by Grant of the Eſtate, and ſeverance of the Joynture of the moyty, was the point. It was Reſolved by the Court, That it ſhould enure by way of Releaſe; and that the rather, by reaſon of the words, *Ei Reddidit*, which enures by way of Releaſe; and both Eſtates being in him, the Law ſhall veſt that in him, as if he had it from the Feoffors: and *Dodd* Juſtice ſaid, That by whatſoever means he comes to the Eſtate of his Companion; it ſhould enure by way of Releaſe: And therefore, If one Joynt-Tenant bargains and ſells to his Companion by Deed Inrolled, although that veſts the uſe, and the Statute veſts the poſſeſſion, yet being in him, the Law ſhall conſtrue it to be entirely in him, and not by diviſion of Eſtate: Wherefore it was Reſolved in the Principal Caſe, That there was no Occupancy for that moyty of A. but A. determined by the death of J. S. and it was adjudged for the Plaintiff. Trin. 19 Jac. in B. R. *Euſtace* and *Scawens* Caſe. *Cro.* 2. Part, 696.

16. Treſpaſs againſt J. for breaking his Cloſe at D. and beating of him, 1 *Ollob.* 10 *Jac.* The Defendant pleaded, That he, together with one J. D. the time of the Treſpaſs ſuppoſed, did joyntly break the Plaintiffs houſe, and beat him: And afterwards, viz. 13 *Junii*, 11 *Jac.* the Plaintiff did Releaſe to J. D. by his Writing, all Actions, real and perſonal; and averred, That the Treſpaſs of which the Plaintiff complained, and that which he and J. D. did joyntly, was one and the ſame, and not *alia, neque diverſa*. In this Caſe it was adjudged for the Defendant; for although a Treſpaſs be joynt and ſeveral, that he may ſue either one or all, yet when two joyn in Treſpaſs, they make but one Treſpaſſer, and either of them is anſwerable for his fellows fact, as for him; and therefore a Releaſe to one, diſchargeth the whole Treſpaſs; and againſt Joynt Treſpaſſors, there can be but one ſatisfaction: And therefore if one be ſued in one Action, although he may ſever in Plea and Iſſues, yet one Jury ſhall aſſeſs dimages for all. Trin. 12 Jac. in C. B. *Cork* and *Youngers* Caſe. *Hob.* 66.

17. Sir *William Fleetwood*, the Kings Receiver, being indebted to the King for arrearages of his Receipts, and ſeized of the Mannor of C. in the County of *Middleſex*, did convey the ſame to Sir *Roger Aſton* in Fee, and he conveyed to the King, his Heirs, and Succeſſors, and preſently took it again to him and his Heirs, rendring yearly 34 s. *pro omnibus Servitiis, & Demandis*. Afterwards Sir *William Fleetwood* became further indebted upon his Accompt to the King: The Queſtion was, Whether the ſaid Mannor was extendable and lyable to any of the debts aforeſaid. It was the Opinion of *Cook* and *Hobart* Juſtices, that they were not chargeable, for the Land it ſelf was never chargeable for it, but in reſpect of the perſon which was Debtor: And when the King conveys the Land over, he cannot againſt his own Conveyance, charge the Land, although the debt be of ſuch a nature,

that it gives no right in the Land; And therefore a Releaſe made by the King to the Tenant of the Land of all Rights and Titles, doth not diſcharge it. But the Chief Baron made a doubt of it, becauſe he took the uſe of the Exchequer to be otherwiſe; wherefore a Decree of diſcharge of the Land was *ſalvo jure Regis*. Paſch. 13 Jac. Out of the Court of Wards. Sir *William Fleetwood's* and Sir *Roger Aſton's* Caſe. *Hob.* 45.

18. A. brought Treſpaſs againſt B. C. and D: B. pleaded Not Guilty, whereupon Iſſue was joyned; C. and D. made Juſtification: After a Replication, Iſſue was joyned; depending the Demurrer, the Iſſue was levyed againſt B. and damages againſt him, and Judgment given againſt him; After which Judgment, the Plaintiff entred a *Nolle proſequi* againſt the Defendants C. and D; and thereupon, Error was brought by all the Defendants againſt the Plaintiff. It was the Opinion of the Court, That the *Nolle proſequi* againſt C. and D. had not diſcharged B; and ſo there was no Error: whereas it was Objected, That the entry of the *Nolle proſequi* had diſcharged all the Defendants: And the Court was of Opinion in this Caſe, That C. and D. ſhould not have joyned in this Writ of Error, becauſe there was no Judgment againſt them, nor they grieved: And the Writ of Error is, *ad grave damnum* of them all. Hill. 11 Jac. in B. R. *Parker* and Sir *John Lawrence*, *Nevil* and *Woods* Caſe. *Hob.* 70.

19. Debt for 523 l. againſt the Sheriff of S. The Plaintiff Declared, That P. and others, were bound in a Recognizance of 2000 l. to him, and that after Judgment, he ſued a *Levari facias* to the Defendant, which he delivered to him; whereupon the Defendant levied the ſum, and at the day returned, *Quod paratos habeo*, and yet did not deliver it in Court, *per quod &c.* The Defendant, *Quoad* 300 l. pleaded *Nihil debet*; and to the reſt, That before the Return, he did pay to the Plaintiff the ſame ſum; whereupon the Plaintiff by his Acquittance, reciting that he had received it, did acquit him: upon which it was demurred in Law. There were ſeveral Queſtions in the Caſe. 1. Whether Debt would lye, becauſe there is no contract betwixt the Plaintiff and the Sheriff. As to that Reſolved by the Court, That it would lye; for although there be no actual Contract, yet there is a kind of Contract in Law; for when money is levyed by the Sheriff, the Action ceaſeth againſt the Defendant, and the Action is *ipſo facto* tranſferred to the Sheriff, having both the Judgment to make it a Debt, and the Levie to make him anſwerable; And it was holden, That upon ſuch Levies appearing upon Record, the Court may award a *Diſtringas*, or the party may have a *Fieri facias*, or an *Elegit* againſt the Sheriff, to levie as much of his own Eſtate. 2. It was holden, That the Defendants Plea to the 308 l. *Nihil debet*, was not good, becauſe it was contrary to the Return on Record. 3 Reſolved, That ſince the Defendant by his Return had charged himſelf with the whole money, *paratos habeo*, then to be delivered to the Plaintiff, that he could not ſay that it was paid, releaſed, or acquitted before. Trin. 15. Jac. in C. B. *Speak* and *Richards* Caſe. *Hob.* 206.

20. Note, It was Reſolved by the Court, That by releaſe of all Actions, Duties, and Amerciaments, a Releaſe which was in Queſtion, was releaſed. Paſch. 35 Eliz. *Rotheram* and *Crawleyes* Caſe. *Owen*, 71.

21. Note alſo, That it was Reſolved, That a Releaſe or a Confirmation which enures by way of Enlargement of an Eſtate, may be as well to an Uſe as a Feoffment. See Mich. 7 Jac. in the Court of Wards. *Sammes* Caſe. *Lea* 12. See *Cook*, *Sutcliff Caſe*, 55. the ſame Caſe, more large.

22. In a *Quare Impedit*, the Caſe was, That next Avoydance was granted to A. and B. then the Church did become void, B. releaſed to A. *Totum Statum, & Titulum*, and then A. being diſturbed, brought a *Quare Impedit* in his own Name; It was ſaid, That by the Avoydance, it is become an Intereſt and a Chattel, and that one Joynt-Tenant may Releaſe unto the other becauſe of their privity, though they have no poſſeſſion. It was the Opinion of the whole Court, That the Releaſe was void; for it is a thing in Action, and of Privity, and Confidence, and cannot be Releaſed, nor tranſferred. Mich. 32 Eliz. in C. B. *Brokeſbyes* Caſe, *Owen* 850. See Paſc. 38 Eliz. in C. P. The Biſhop of *Norwich* and *Bennets* Caſe. If a man grant the next Avoydance of the Church to two before Avoydance, the one may releaſe to the other in reſpect of Privity; but after the Church is void, ſuch a Releaſe is void. Vouch in *Cook* 1. Part, *Inſtit.* 290.

23. A. ſeized of three Acres of Lands, grants a Rent-charge out of them to M. and after he enfeoffs J. S. of two Acres; M. Covenants with J. S. and grants, that he will not charge the two Acres for the ſaid Rent, with any Diſtreſſes after; and B. the Ter-Tenant of the other Acre being diſtreined, brings a Replevin. The Queſtion was, If the Covenant and Grant by M. be a Releaſe of the Rent: *Glanville* Juſtice ſaid, It was a Releaſe; but *Anderſon* Chief Juſtice was of contrary Opinion: But the Opinion of the whole Court was, That if it be a Releaſe, that the Ter-Tenant may plead it, for that thereby the Rent is extinguiſhed. See *Butler* and *Mennings* Caſe. *Noy*, 5.

24. An Action of Treſpaſs was brought for taking of a Horſe; The Defendant pleaded, That the now Plaintiff was heretofore barred in an Acti-

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on of Treſpaſs brought for the taking of the ſame Houſe. It was holden by the Court to be a good Plea, and that Judgment ſhould be given againſt the Plaintiff; for that a Bar by Judgment doth amount to a Releaſe in Law. See Sir *Humphrey Ferrers* and *Wignall's* Caſe. *Noy* 58.

25. Action upon the Statute of 1 & 2 *Mar.* for driving Diſtreſſes, and Impounding them in ſeveral places, ſo as the Owner was put to ſeveral Replevins; The Action was brought againſt three Defendants; and upon Not Guilty, it was found for the Plaintiff, and forty ſhillings damages aſſeſſed by the Jury againſt every Defendant ſeverally, and Judgment was given for the Plaintiff, that he ſhould recover the penalty of the Statute, viz. againſt every one five pounds, and for damages againſt every one forty ſhillings trebled. Upon which Judgment, Error was brought, and the Error aſſigned in the Judgment, becauſe the damages and penalties are ſevered, where it ought to have been jointly: It was adjudged Error, and the Judgment was reverſed. For but one five pound ſhall be inflicted upon all the Defendants, and not ſeveral five pounds, by the Statute; yet the words are, *That every perſon offending, ſhall pay five Pounds*; but the meaning of the Statute is, That the penalty ſhall be referred to the Offence, and not to the perſons; and then, becauſe there was but one offence, there ſhall be but one five pound forfeited: And it was ſaid, and agreed in this Caſe, That if there had been twenty jointly ſued, that a Releaſe made to one of them, ſhould have diſcharged all the reſt. See *Partridge* and *Emſons* Caſe. *Noy*, 62.

See more of *Releaſe* in the Titles before.

Relief.

1. RElief is ſometimes a certain ſum of money, that the Heir ſhall pay to the Lord of whom the Lands are holden, which after the deceaſe of the Auncеſtor are diſcended to him as next Heir, ſometimes it is the payment of another thing, and not of money: And therefore for the generality of it, it was a thing uncertain, and was not alike in all Tenures, but every Tenure for the moſt part at this day, doth pay a ſpecial Relief certain, or a certain ſum of money in lieu thereof. Relief is a very Ancient duty payable both to the King and Lords in the time of the *Saxons*, and before the *Norman* Conqueſt, but under ſeveral other Appellations, and of ſeveral quantities, qualities, and degrees; and for the moſt part was uncertain, untill the Statute of *Magna Charta* cap. 2. which appoints the Relief certain, according to the Tenure of the Land.

2. Relief was paid according to the Knights Fee, which perſons of Honor and Dignity held of the King, and according to their yearly Revenue. A Knight was anciently to have 20 l. *per annum*. A Baron 13 Knights Fees and a quarter: an Earl 20 Knights Fees. And after the Statute of *Magna Charta*, cap. 3. the fourth part of ſuch Revenue which was requiſite by the Law to the Dignity, was to be paid to the King for a Relief. See *Cook* 9. Part, 124. *Anthony Lowes* Caſe, &c. As the Relief of a Knight is 5 l. which is the fourth part of 20 l. which is the fourth part of the Revenue of a Knight. The Relief of a Baron is 100 Marks, which is the fourth part of his Revenue, 400 Marks including therein 13 Knights Fees and a quarter: And the Relief of an Earl is 100 l. which is the fourth part of 400 l. *per annum*, the Revenue of an Earl. And the Relief of a Duke is 200 l. and ſo by conſequence his Revenue is or ought to be 800 l. *per annum*, *Cook* 7. Part, 34. in *Nevills* Caſe. And note, That at this day, Noble men do pay ſuch Reliefs as other men uſe to do in reſpect of their Tenures. For as the Heir of a Knight ſhall not pay a Relief, unleſs he have a Knights Fee. So the Heir of an Earl or Baron, ſhall not pay Relief, unleſs he hath an Earldome, or a Barony. See 6 H. 8. *Dyer*, 2. *Cook* 2. Part, *Inſtitutes* 9.

3. A Biſhop, holding the Lands of his Biſhop-

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prick *per Baroniam*: And ſo, many Abbots and Priors had Baronies within the Kingdome: And yet they paid no Relief, becauſe they came, and come to the Land by Succeſſion, and not as Heir by Inheritance. *Cook* 2. Part, *Inſtitutes* 7.

4. If a Knight hold Lands by Grand Serjeanty, he ſhall not pay Relief, declared by the Statute of *Magna Charta*, but the Heir being of full age at the death of his Anceſtor, ſhall pay the value of his Lands for one year, which is his Primer Seiſin. See 11 H. 4. 72.

5. If he in the Reverſion dyeth, his Heir within age, living the particular Tenant, he ſhall be out of Ward, becauſe the Seignory is ſerved by the Tenant; but after his death, he ſhall be in Ward, and at full age ſhall pay Relief; and it was ſaid, That a Reverſion is holden aſwell as a particular Tenancy. See 4 Ma. *Dyer*, 137. and ſee, That if Tenant by Knights Service makes a gift in tail, and afterwards releaſeth to the Donee and his Heirs; now the Donee hath an Eſtate tail, with the Reverſion expectant, and if he dyeth, his Iſſue within age, the Lord ſhall have the Wardſhip of the body and Land; and if the Heir be of full age, the Lord ſhall have a Relief. *Cook* 2. Part, 92, 93. in *Bingbams* Caſe.

6. If Land be conveyed for the advancement of the Tenants Wife, or for payment of his Debts. If after the Land be alliened *bona fide* before the death of the Tenant, the King nor other Lord ſhall have the Wardſhip; and there no Relief ſhall be paid. And ſo if the Father had enfeoffed his Son, if the Son had alliened the Land *bona fide*. It was out of the Statute of *Malbridge*, cap. 6. and in ſuch Caſe, the Lord ſhould not have the Wardſhip, and ſo no Relief was to be paid. But in ſuch Caſe, If the Son had dyed in the life of the Father. But otherwiſe, If the Conveyance had bin made by the Son after the death of the Tenant, then the Lord had cauſe of Wardſhip; and then the Allienation ſhall not take away the ſaid benefit from him. And ſo note, where ever there is Title of Wardſhip, there is a Relief due, and to be paid. For every Tenant by Knight Service ſhall pay a Relief. *Cook* 2. Part. 94. acc.

7. If there be Lord, Meſne, and Tenant, and the Rent due by the Meſne is behind, and afterwards the Tenant doth forjudge the Meſne, and the Lord receive the Services of the Meſne, which now iſſue immediately out of the Tenancy, yet he ſhall not be barred of his Arrerages which iſſued out of the Menalty; ſo if the Rent be behind, and the Tenant dyeth, the acceptance of the Services by the hands of the Heir, ſhall not bar him of the Arrerages, becauſe in thoſe Caſes, although the perſon be altered, yet the Lord doth accept the Rent and Services of him who only ought to do them. But acceptance of a Rent or Service by the hands of a Feoffee, ſhall not bar the Lord of a Relief due, for Relief is no Service, but a fruit and approvement of Service; for if it were part of the Services, then an Action of Debt ſhould not lye for the ſame ſo long as the Rent continueth; but it is as a bloſſome or fruit fallen from the Tree, and for Relief, it behoveth not to avow upon any perſon certain. *Cook* 3. Part, 66. in *Pennants* Caſe.

8. See tit. E. 1. Title *Relief* 13. 41 E. 3. 22. Relief is no Service, but in an approvement of Service, for which the Lord may diſtreyn, but ſhall not have an Action of Debt. But his Executors or Adminiſtrators ſhall have Debt for the ſame, becauſe they cannot diſtreyn for it. *Cook* 1. Part, *Inſtitutes* 83, 84. See *Cook* 8. Part, 16. acc. *Cook* 4. Part, 49. in *Ognells* Caſe, acc.

9. Note, by *Littleton*, That the Heir of a Tenant by Knight Service, ought not to pay Relief, untill his age of 21 years. Yet in ſome Caſes, the Heir ſhall pay a Relief when he was within age at the time of the death of his Anceſtor. As if a man holdeth Lands of the King by Knight Service in *Capite*, and of a common perſon other Lands by Knight Service, and dyeth, his Heir being within age. In this Caſe, The King hath the Wardſhip of body and Land by his Prerogative, untill the full age of the Heir: And therefore in this Caſe, the Heir (although he be within age) ſhall immediatly pay Relief to the other Lord; for as the Law giveth away the Wardſhip to the King by reaſon of his Prerogative, ſo doth it in reſpect thereof reſerve to the other Lord, all that may be conveniently reſerved, viz. his Relief. *Cook* 1. Part, *Inſtitutes*, 83. acc.

10. The Bayliff of the Lord *Berkley* diſtreyned for Relief. The Queſtion was, becauſe the Land had bin in Ward to the Queen by reaſon of other Lands held of her Majeſty by Knight Service in *Capite*, Whether the Heir ſhould pay Relief to the other Lords at his full age. It was adjudged in that Caſe, That he ſhould. But in that Caſe it was holden, That the Avowant ſhould have Judgment for the Relief only, and that he ſhould releaſe the damages, but becauſe it was a new Caſe, and the Court doubted of that payment. Mich. 44 and 45 Eliz. in B.R. *Shepheard* and *Mitchworths* Caſe. See *Cro.* 3. Part, 184. vouched in *James* and *Tuneyes* Caſe. *Cro.* 2. Part, 28. the ſame Caſe.

11. Tenant by Knight Service dyed, having Iſſue a Son and a daughter by one Woman, and a Son by another Woman; the eldeſt Son dyed before entry. It was holden in that Caſe, That the ſecond Son ſhould pay two Reliefs, becauſe that his Brother was Tenant by a poſſeſſion in Law. See

Temp.

Temps. E. 1. *Fitz.* to the Relief. 12.

12. If the Father enfeoffeth the Son within age, and dyeth, his Heir of full age, he ſhall not pay a Relief, becauſe nothing diſcends to him. And Relief is not within the Statute of *Marlbridge* of Colluſion, but *tarum Cuſtodiam terræ et hæredis.* 4 E. 3. br. *Relief* 6. 7 E. 3. *Fitz. Relief* 11. that he ſhall pay Relief, becauſe that his Father dyed Tenant to the Lord as to Avowry. But ſee 2 E. 4. 6. by *Danby*, that nothing diſcended. But yet 17 E. 3. *Fitz.* Title Releaſe 3. agrees with 4 E. 3. But ſee 31 E. 3 Colluſion 29. If the Father enfeoffeth the Son at full age, there he ſhall pay no Relief. Nor the King ſhall not have Primer Seiſin.

13. Relief is but a perſonal thing. And yet a Writ of Meſne will lye for the Tenant of the Meſne for his Relief not paid. 33 H. 6. 32.

14. The Heir in Socage ſhall not pay Relief, but ſhall double his rent by the name of Relief. Br. Relief 13. And ſee 13 E. 3. Relief 6. That the Lord may diſtreyn the Heir for the Relief of the Grandfather, and of the Father, before he accept him to be his Tenant.

15. If he who holds his Lands by Grand Serjeanty, dyeth, his Heir of full age; the Heir ſhall pay to the King for a Relief, the value of the Lands for a whole year. See *Litt.* 35. 11 H. 4. 74. acc.

16. Relief is to be paid by the Heir in Socage, preſently after the death of his Anceſtor of what age ſoever the Heir is, becauſe he cannot have the Wardſhip of him. And the Lord may diſtreyn preſently after the death of the Anceſtor for it. But the King ſhall not have Primer Seiſin in Caſe of a Tenure in Socage in chief, unleſs the Heir be of the age of fourteen years. *Cook* 1. Part, *Inſtitutes* 92.

17. Note, it is ſaid, That in the County of *Weſtmerland*, there is *duplex Tenura*; the one *per albam firmam*, that is to ſay, Blanch farm; the other *per Cornagium*, viz. Cornage: And it is ſaid, That he who holdeth by Blanchfarm of a common perſon after the death of the Anceſtor, ought to double the Farm by the name of a Relief, but he who holdeth by Cornage, ſhall pay the whole value of the Land for one year for a Relief. *Cook* 2. Part, *Inſtitutes* 9. acc. *John Graiſtock's* Caſe.

18. In an *Aſſumpſit*, A. ſeiſed of Land, held it of the Plaintiff as of his Mannor of W. by Rent, and by a Cuſtomary Relief of one years value, A. alienes this Land to B. who 1. *May*, 10 Jac. deviſed it to the Defendant; the Deviſor dyed, the Defendant entred. The Plaintiff layes a *Colloquium* between him and the Defendant, as touching the Arrerages of the rent, and the Relief. The Plaintiff ſaid, That if he would not pay it, he would ſue him for it; upon this, the Defendant did promiſe to the Plaintiff, That if he would forbear the Suit until the next Court, and then if the Plaintiff ſhould make it appear to the brothers of the Defendant, That the Tenements were ſo chargeable with the 5 s. yearly rent and Relief, that he would pay them to him: and the Plaintiff avers, That he did forbear the Suit, and at the next Court did make it appear to his brothers by the Preſentment of the Homage, and the Records of the Court, that the rent and Relief were due by the Defendant. The Queſtion in this Caſe was, Whether this Relief as it is in the Record, be of ſuch a nature, as that remedy may be had for it. It was the Opinion of the Juſtices after long Argument, that Judgment ſhould be given for the Plaintiff, for here it is due by Tenure, for the Record is, that he held *per Relivium* to be paid *ſecundum conſuetudinem Manerii*; and then he hath good remedy for it, for that he may diſtreyn for it, and then the conſideration is good in ſubſtance, and ſo the Action well brought. Hill. 22 Jac. in B. R. *Hungerford* and *Havilands* Caſe. *Bulſtr.* 3. Part, 323.

Remainder and *Reverſion.*

1. *Where a Remainder expectant or dependant upon an Eſtate for years, or at life, ſhall be good, and may ſtand in one perſon; Where not: And where it ſhall be good without a particular Eſtate; Where not.*

1. A Reverſion upon a Term for years was granted to the uſe of the Grantor for life, and after his deceaſe, to the uſe of his Executors and Aſſigns for 21 years, the Remainder over in tail. The Grantor was Attainted of Treaſon by Act of Parliament, and all his Lands, Goods, and Chattells veſted in the Queen; and afterwards the Queen granted it over. It was the Opinion of the Juſtices in this Caſe, That the Queen ſhould have the Term as forfeit, for it was an Intereſt in the Grantor, and might

might well ſtand in himſelf in expectancy. But the Juſtices were of Opinion, and agreed, That if the Term were not forfeited, That then the entry of him in the Remainder in tail was lawful, becauſe that there was no other perſon who had an Intereſt in it during the Term. Paſc. 4 Eliz. *Dyer*, 209.

2. Lands were aſſured by Fine, to the uſe of J. S. and his Wife for the Term of their lives, and the longer liver of them, the Remainder after their deceaſe, for ſix Moneths, to the uſe of the Executors of the ſaid J. S. and after the ſix Moneths ended, to the uſe of J. D. and his Wife, and to the Heirs of their two bodies lawfully begotten: and for want of ſuch Iſſue, to the Heirs of J. S. for ever. Provided, That if it happen J. S. at any time after to have Iſſue of his body, or any Wife of the ſaid J. S. after his deceaſe to be with Child, begotten by the ſaid J. S. that then after ſuch Iſſue had, and 500 l. paid to A. or tendred or refuſed within the ſpace of ſix Moneths after the birth of the Iſſue, then the uſe of the ſaid Lands immediately after the deceaſe of the ſaid J. S. and his Wife, and after the ſix Moneths ended and expired, ſhall be to the ſaid J. S. and the Heirs of his body; and for want of ſuch Iſſue, to the right Heirs of the ſaid J. S. the Wife of J. S. dyed, he took another Wife. It was a Quære what eſtate J. S. had in the Land before Iſſue had by the ſecond Wife, and before the ſix Moneths paſſed. It was the Opinion of *Dyer* and others, That before the performance of the Contingent, he had no larger Eſtate then he had before. Trin. 14 Eliz. *Dyer*, 314.

3. If a man at this day, ſince the Statute of 27 H. 8. maketh a Feoffment in Fee to the uſe of A. for years, and after to the uſe of the right Heirs of B. or to the uſe of the Wife of B. that ſhall be, the limitation to the right Heirs, or to the Wife that ſhall be, is void, becauſe it had bin void if it had bin in poſſeſſion. And therefore where the Caſe was, *Francis* Earl of *Bedford* made a Feoffment in Fee of divers Mannors to the uſe of himſelf for years, and after his deceaſe, to the uſe of *John* Lord *Ruſſell* his Son and Heir apparent, and to the Heirs Males of his body, and for want of ſuch Iſſue, to the uſe of the right Heirs of the Earl, and afterwards the ſaid *John* dyed without Iſſue Male in the life of the Earl his Father. It was Reſolved in that Caſe, That the uſe and Eſtate limitted by way of Remainder to the right Heirs of the Earl, was void, for that it had bin void if it had bin limitted by Eſtate executed at the Common Law, for that the Remainder ought to veſt during the particular eſtate. Paſc. 35 Eliz. in the Court of Wards. The Earl of *Bedford*'s Caſe, vouched in *Cook* 1. Part, 130. in *Chudleigh*'s Caſe.

4. The Queen ſeiſed of the Mannor of S. demiſed the ſame to H. B. for 21 years, who demiſed ſmall parcells of the ſaid Mannor to others for years; and after the Queen, reciting the ſaid Letters Pattents, in conſideration of a ſurrender of all his Intereſt, Granted the ſaid Mannor to the ſaid H. D. *Habendum à die Conſeſſionis* for three lives. It was Reſolved in this Caſe, amongſt other points, That an Eſtate of Freehold cannot begin at a day to come, becauſe a man cannot make a preſent Livery to a future Eſtate, and an Eſtate for life cannot paſs without Livery; and therefore the Grant by Letters Pattents, which amount to a Livery in Law, could not begin at a day to come, for if the Freehold ſhould paſs preſently by the Letters Pattents, then the Queen ſhould have a particular Intereſt or Term without a Donor or Leſſor, which is againſt the Rules in Law. And in that Caſe, this difference was taken; Two have a Joynt Authority to take Livery and Seiſin, there Livery made to one in the name of both, is not good, becauſe they are both but one Attorney. But if two Joynt-Leſſees have power to take Livery, there Livery made to one in the name of both, is good, becauſe they have an Intereſt in the Land before their Entry, and the Livery to one in the name of both, is an actual poſſeſſion in them both, and ſufficient to ſupport a Remainder. *Cook* 5. Part, 94. *Barwick*'s Caſe.

5. The King made a gift in tail of a Park, and afterwards granted the Reverſion of it in tail; and if the Donee of the Reverſion payed 60 l. at the Receipt of the Exchequer, that then he ſhould have *reverſionem prædict.* to him and his Heirs. In this Caſe, amongſt other points, It was Reſolved, That a Grant with a Condition precedent to encreaſe, may be made aſwell of things which lye in Grant, as Rents, Advowſons, &c. as of Lands which lye in Livery, and may be annexed aſwell to an Eſtate tail, which may not be drowned, aſwell as to an Eſtate for life or years, which may be drowned by the acceſſion of a greater Eſtate. But then ſuch increaſer of an Eſtate by force of a Condition precedent, ought to have theſe incidents. 1. There ought to be a particular Eſtate upon which the encreaſer of the greater Eſtate ought to be builded. 2. Such particular Eſtate ought to continue in the Leſſee or Grantee, untill the increaſer happen. 3. It ought to veſt at the time that the Contingency falleth. And 4. The particular Eſtate and encreaſer ought to take effect by one and the ſame Deed, or by ſeveral Deeds delivered at the ſame time, and not by ſeveral Deeds delivered at ſeveral times. *Cook* 8. Part, 75. the Lord *Stafford*'s Caſe.

6. A man deviſed Lands to his Wife for life up-

on Condition to bring up his eldeſt Son, and after the deceaſe of his Wife, to his ſecond Son in tail; the Wife entred, but did not educate the Son, the eldeſt Son entred upon her. It was adjudged in this Caſe, That the entry of the eldeſt Son was lawful. And in this Caſe amongſt other points, It was Reſolved, That the Heir by his entry, ſhould defeat only the Eſtate of the Wife, and that the Remainder might well ſtand by the Deviſe, without the particular Eſtate; but if the Eſtate had paſſed by Livery, then it had bin otherwiſe, becauſe the Livery is defeated by the defeating of the particular Eſtate. Hill. 3 Ma. *Dyer*, 126.

7. Note, it is a Rule in Law, That a Remainder cannot ſtand without a particular Eſtate, yet it is agreed in 37 H. 6. 36. That if a man maketh a Feoffment in Fee to the uſe of one for life, and after to the uſe of another in Fee; That although the particular Tenant refuſeth, yet the Remainder is good: And ſo it is if a man deviſeth Lands for life, the Remainder in Fee, and the Tenant for life refuſeth, that the Remainder is good. *Cook* 1. Part, 101. in *Shellyes* Caſe.

8. If a Feoffment be made unto the uſe of one for life, and after to the right Heirs of J. S. the Fee-ſimple of the Land ſhall be in abeyance; and before the Statute of 27 H. 8. If a man had made a Feoffment to the uſe of one for years, and after to the right Heirs of J. S. this limitation had bin good, for that the Feoffees remained Tenants of the Freehold, but ſuch limitation after the Statute is void, for then the Freehold ſhall be in ſuſpence; for that nothing remained in the Feoffees. And it was ſaid, That in the principal Caſe of *Chudleigh*, the future uſes were deſtroyed by the Feoffment of the Tenants for life; and although that the Remainders were in the cuſtody of the Law, yet they ought to be ſubject to the Rules of Law. And becauſe the Rule of Law is, That he in the Remainder ought to take the Land when the particular Eſtate determineth, or elſe the Remainder ſhall be void. And in that Caſe, Inaſmuch as by the Feoffment of the Tenants for life, their Eſtate was determined, and the Title of Entry given for the forfeiture, and then thoſe in the future Remainder were not in *eſſe* to take it; for that cauſe the Remainders in *futuro*, by matter *ex poſt facto* were utterly deſtroyed and made void; and there is no difference when an Eſtate determineth by the death of Tenant for life, and when the ſame determineth by his forfeiture, for in both Caſes entry is given to him in the next Remainder; and then if he cannot take the Land when the particular Eſtate endeth, the Remainder is void. *Cook* 1. Part, 135. in *Chudleighs* Caſe.

9. If a Leaſe be made for life, the Remainder to the right Heirs of J. S. the ſame is good to him in the Remainder, becauſe by poſſibility J. S. may dye during the life of Tenant for life; but if J. S. be not in *eſſe* at the time of the Remainder limitted, but be born after, during the life of the Tenant for life, there the Remainder is void, *quia potentiâ remota*. And ſee, That a Remainder limitted by a general name, may be good, although that the party who ſhould take it, be not in *eſſe* at the time of the Remainder limitted. As a Leaſe for life, the Remainder to the right Heirs of J. S. or a Remainder *primo genito filio*, but a Remainder limitted by a particular name of Baptiſm, or Surname, is not good, if the party be not in *eſſe*. The principal Caſe was, Tenant in tail, the Remainder in tail, he in the Remainder bargained and ſold his Remainder to A. for the life of Tenant in tail, the Remainder after his death, to the King in Fee. It was adjudged in that Caſe, That the Remainder to the King was void, becauſe that he in the Remainder, granted all his Eſtate to A. for the life of Tenant in tail, in which caſe, he could not limit any Remainder upon it, for a Remainder is but a remnant of an Eſtate, and the King could not have the Remainder of the Eſtate when it was all granted away before. *Cook* 2. Part, 51. Sir *Hugh Cholmleys* Caſe.

10. A man ſeiſed of Lands had Iſſue two Sons, A. and B. A. had Iſſue two Daughters, and B. had Iſſue C. a Son, and he deviſed his Lands to his Executors for the payment of his Debts, untill C. being of the age of nine years, come to the age of 21 years, and when he came to ſuch age, that then he ſhould enjoy the Land to him and his Heirs, and dyed; C. before he came of 21 years, dyed; his Heir entred, and made a Leaſe for years, the two Daughters entred, the Heir re-entred. And it was adjudged, That his entry was lawful. It was Reſolved in this Caſe, That the Intereſt of the Executors did not ceaſe, although that C. dyed before he came to the age of 21 years. For in Wills, the intent of the Deviſor ſhall be conſidered, and when he deviſed the Lands to his Executors for the payment of his Debts, it is to be intended that he had computed that the profits of the Lands for 12 years, would ſatisfy and pay his Debts, and therefore he did not intend, that their Eſtate ſhould determine by the death of his Son; and the words, *viz.* untill ſuch time as C. ſhall come to the age of 21 years, ſhall be conſtrued, untill ſuch time as C. ſhould have come to the age of 21 years: and it was adjudged, That the Remainder was good, And it was agreed in this Caſe, That if a man hath Iſſue a Son of the age of 9 years, and makes a Leaſe untill his Son ſhall attain to his full age, and that after that he accompliſheth his full age, that the ſame ſhall remain over to another in Fee, that nothing

veſts in him in the Remainder; ſo it was ſaid to be a Rule, When a Remainder is limitted to take effect upon the doing of an Act, which Act ſhall be the determination of the particular Eſtate, if the Act dependeth upon a caſualty, the Remainder ſhall be in contingency, and ſhall not veſt preſently. And it was ſaid, That if a Leaſe be made for years, the Remainder to the right Heirs of J. S. that the Remainder is void, becauſe a Freehold cannot be in abeyance. *Cook* 3. Part, 20. *Berraſtons* Caſe.

11. Note, It is regularly true, That where the particular Eſtate is defeated, that there the Remainder ſhall be alſo defeated; but that is to be intended when the particular Eſtate and the Remainder do depend upon one Title; but where the particular caſe is defeicible, and the Remainder by good Title, there, although the particular Eſtate be defeated, yet the Remainder continues good: As if the Leſſor diſſeiſes A. Leſſee for life, and makes a Leaſe to B. for the uſe of A. for life, the Remainder to C. in Fee; In that caſe, although A. enter, and defeat the Eſtate of B. for life, yet the Remainner to C. being once veſted by good Title, ſhall not be avoided; for it were againſt reaſon, that the Leſſor ſhould have the Remainder again, againſt his own Livery. And ſo it is if a Leaſe be made to an Infant for life, the Remainder in Fee, the Infant at his full age, diſagrees to the Eſtate for life, yet the Remainder ſhall ſtand good, becauſe it was once veſted by good Title: But note, that in both theſe caſes, there was a particular Eſtate in being at the time of the Remainder created. *Cook* 5. Part, *Inſtitutes*, 298. But if the Lord grant his Seignory to A. for life, the Remainder to B. in Fee; A. dyeth, and then the Tenement returns to B. there the Remainder to B. is void; becauſe there was no Attornment to the particular Eſtate; which being void for want of Attornment, the particular Eſtate which ſhould ſupport the Remainder, being defeated and void, the Remainder which depends upon it, is void alſo. *Cook* 1. Part, *Inſtitutes*, 310.

2. *Where a Remainder ſhall be void, becauſe not Executed in due time; what ſhall be a due time to execute it: Where void; becauſe it is repugnant to the particular Eſtate: Where Remainder ſhall be good upon a Condition, or upon a Contingency; and where the Eſtate ſhall paſs preſently, where not, till the Condition or Contingency performed.*

1. A. Seized of Lands in Fee, deviſed the Land to the Father for life, and after, to the next heir male of the father; the father having Iſſue a ſon at the time the Deviſor dyed, the father made a Feoffment in Fee, with Warranty, and afterwards, the father dyed. In this Caſe (amongſt other points) it was Reſolved, That by the Feoffment of the father, Tenant for life, the Remainder was deſtroyed; for that every contingent Remainder, ought to veſt either during the particular Eſtate, or at leaſt, *eo inſtante* as the particular Eſtate determines; for if the particular Eſtate be determined, either in Remainder, or in Law, before that the Contingency fall, the Remainder is void. *Cook* 1. Part, 66. *Arches* Caſe, See *Cook* 1. Part, 130 in *Chudleighs* Caſe acc. See before, , *Cook* 2. Part, Sir *Hugh Chomleys* Caſe, 51.

2. The Law gives no regard to Remainders or Reverſions, which are expectant upon Eſtates in Tail, but accompts them as good as void: And there ſee *Cook*, 1. Part, That if Tenant in Tail ſuffer a Common Recovery, they ſhall not only bar the Eſtate Tail, and the Remainder, and Reverſion, but alſo a Rent which he in the Reverſion or Remainder hath granted; And therefore it was adjudged 12 Eliz. in *Treling* and *Truſords* Caſe, That a Reverſion or Remainder, expectant upon an Eſtate in Tail, ſhall not be Aſſets to the heir, in Debt brought upon an Obligation made by his father: And if Lands be given in Tail, the Remainder, the right heirs of J. S. if Tenant in Tail ſuffer a Recovery, J. S. being alive, yet this Recovery ſhall bar the Remainder, although it were in abeyance, and in conſideration of the Law. See *Cook* 6. Part, 42. in Sir *Anthony Mildmayes* Caſe.

3. One deviſed Lands to the Prior and Covent of St. B. ſo that they pay to the Dean and Chapter of P. 20 l. *per annum*, and if they fail of payment, then their Eſtate to ceaſe, and to remain to the Dean, &c. It was the Opinion of the Juſtices,

ſtices, That it was a void Remainder; becauſe a Remainder might not be limited after an Eſtate in Fee; and as to the Condition, It was Reſolved, That the Dean and Chapter in the Remainder, ſhould not take advantage of it, but the heirs. Paſc. 29 H. 8. *Dyer*, 33.

4. A man deviſed Lands to his Wife, upon condition to bring up his eldeſt ſon; and after the deceaſe of his Wife, to his ſecond ſon in Tail; the Wife entred, but educated not; the eldeſt ſon entred upon her, and adjudged that his Entry was lawful. It was there ſaid and agreed, That a Condition might be annexed to a Will: And it was alſo ſaid, That if a man by Will deviſe, that his Executors ſhall ſell Lands, and they retain it in their own hands, that in ſuch caſe the Heir may enter, for the Condition is broken. In that Caſe it was alſo holden, That a particular Eſtate may be upon Condition, although the Remainder be without Condition, and he in the Remainder ſhall not take advantage of the Condition, but the heir: And in the Principal Caſe it was holden, That the Heir by his Entry ſhall defeat only the Eſtate of the Wife, and that the Remainder might ſtand without the particular Eſtate; but if the Eſtate had paſſed by Livery, it had been otherwiſe. A Gift in Tail, the Remainder to the right Heir of the Donor, upon condition, that if he alien in Fee, that it ſhall be lawful to enter, upon the Condition broken, the Eſtate Tail is only defeated. Hill. 3 Mar. *Dyer*, 127. See *Plo. Com. News* and *Scholaſticus* Caſe, acc.

5. A Leaſe was made for 40 years to W. C. if he ſo long lived, and if he dyed within the ſaid Term, that then his Wife ſhould have all the premiſes, for the whole reſidue of the ſaid Term, if ſhe ſhould ſo long live; and if ſhe ſhould dye within the ſaid Term, that then it ſhould remain to the ſon of the ſaid W. C. It was the Opinion of the Juſtices in that Caſe, That the Remainders limitted were void. Trin. 8 Eliz. *Dyer*, 253. See *Cook* 1. Part, the Reſtor of *Chiddington's* Caſe.

6. In Waſte, the Caſe was, T. C. ſeized of the Manor of C. having Iſſue ſix ſons, and one daughter, deviſed the ſaid Manor to J. S. for 99 years, if the ſaid J. S. and G. his Wife, or any of them, ſhould ſo long live; and further by his ſaid Will, deviſed the ſaid Manor to P. his eldeſt ſon, and the heirs males of his body, the Remainder to his other ſons, the Remainder to his ſaid daughter: Proviſo, That if P. his ſaid ſon, or any of his ſaid ſons, or the heirs males of their bodies, ſhould attempt, endeavour, &c. by any act, to ſell, allien, diſcontinue &c. That immediately after ſuch attempt, &c. and before any ſuch Bargain, Sale, &c. were executed, that the Eſtate made to every ſuch perſon, ſon, &c. ſo attempting &c. ſhould ceaſe and determine, as if ſuch perſon ſo attempting, &c. were dead; and that ſuch perſon to whom the premiſſes ſhould remain or come, ſhould have and enjoy the premiſſes. T. C. dyed, P. his eldeſt ſon levyed a Fine of the ſaid Manor: H. ſecond ſon of T. C. claimed the Remainder by vertue of the Deviſe. In this Caſe (amongſt other things) it was Reſolved, That this Proviſo was repugnant, for two cauſes, 1. Becauſe when he had deviſed the Lands to one, and the heirs males of his body, ſuch Proviſo to ceaſe, as if he were dead, was repugnant; for the death of Tenant in Tail, is not the determination of his Eſtate, but his death without Iſſue. 2. It was repugnant, for that by the firſt part of the Proviſo, the Eſtate ſhould not ceaſe until attempt, &c. and by the latter part of it, it ſhould ceaſe after attempt, and before accompliſhment. 3. Reſolved, That the Proviſo was void for Incertainty; and in this Caſe, be it a Condition, or a Limitation, it was ſaid, That the entire Eſtate ought to be defeated thereby; and an Eſtate in Land, cannot ceaſe in part, and be in *eſſe* for other part; nor ceaſe for a time, and revive after. Hill. 37 Eliz. in C. B. *Jermin* and *Foſcotts* Caſe. Vouch. in *Cook* 1. Part, 85. in *Corbetts* Caſe.

7. A Biſhop made a Leaſe of a Mannor to A. and B. for 60 years, without Impeachment of Waſte, rendring Rent; Proviſo, That if the ſaid A. and B. dyed within the ſaid Term, that preſently after the deceaſe of the ſaid A. and B. *& diutius eorum vivent.* that it ſhould be lawful for the Biſhop and his Succeſſors to re-enter: The Biſhop dyed, the Succeſſor leaſed the Mannor to C. *Habendum cum ſive poſt mortem ſurſumreddit*, &c. or forfeiture of the ſaid B. it ſhould be void, for 60 years, which was confirmed by the Dean and Chapter, and afterwards granted the Reverſion to D. in Fee; the Tenant Attorned, and afterwards B. dyed; the ſecond Leſſee dyed, and his Intereſt came to the Plaintiff. It was Reſolved in this Caſe (amongſt other things) That the ſecond Leaſe did veſt preſently in Intereſt, and did not depend upon Contingency, to take effect in poſſeſſion at the end of the firſt Term, if by none of the three means the firſt Leaſe became void in the mean time: And therefore it was Reſolved, That if a man make a Leaſe for years, to begin after the ſurrender, for future determination, or end of the former Leaſe, which ſhall firſt happen, the Leſſee hath not election to have the ſecond Leaſe, either upon Surrender, or forfeiture, or end of the firſt Leaſe, which he pleaſeth, but which of them ſhall firſt happen, the ſecond Leaſe which before did conſiſt in Intereſt, ſhall begin in poſſeſſion. 2. It was Reſolved,

That when the Leaſe of the King is doubtful if it be good or not, and another is to take a Leaſe of the ſame Lands, the courſe is, to make the *Habendum* to begin after the end or determination of the firſt Leaſe, for ſo many years; And therefore, if A. reciting, that B. hath a Leaſe for years, demiſeth the Lands to C. for years, to begin after the end or determination of the firſt Leaſe (and in truth there is not any former Leaſe in *eſſe*) the Leaſe to B. ſhall begin preſently. *Cook* 6. Part, 34. The Biſhop of *Bath's* Caſe.

8. Note, That it was Reſolved, That in all Caſes, when an Intereſt or an Eſtate doth begin upon a Condition precedent, be it to be performed by the Plaintiff, the Defendant, or by a Stranger, and be the ſame in the Affirmative or Negative; there the Plaintiff in his Count, or Declaration, ought to ſhew the performance of it; for that there the Intereſt is not in him, until the Condition be performed: But when the Intereſt or Eſtate paſſeth preſently, and veſts in the Grantee, and is to be defeated by matter *ex poſt facto*, there the Plaintiff may declare generally, without ſhewing the performance of the Condition, and he ſhall not be driven to ſhew that which makes againſt himſelf, but there the Defendant who ought to take advantage of it, ought to plead it. 2. Reſolved, when an Intereſt paſſeth preſently, and is to be defeated by a matter *ex poſt facto*, If it doth appear to the Court by matter in Law, that the Action ſhall not be maintainable, without ſhewing of the performance of the Condition or Conſideration, there the Plaintiff ought to provide the performance of it, for the maintenance of his Action. *Cook* 7. Part, 10. and 11. in *Aghtreds* Caſe. See *Plo. Com.* 25. *Colbirſts* Caſe. acc.

3. *When a Remainder in Fee, or Tail, upon another particular Eſtate to the ſame perſon, ſhall be good, and when executed, when not; Where a Remainder limitted to right Heirs, Heirs of the body, to the Iſſue in* Ventre ſa Mier, *or to one not in* eſſe *ſhall be good, where not: And where a Remainder limitted to the right Heirs, ſhall veſt in the party himſelf, and not in the Heir as a Purchaſor, & è contra.*

1. TEnant for life of Land, the Remainder in Tail, the Remainder in Tail; Tenant for life, and he in the firſt Remainder, joyn in a Fine, *ſur Conuſans de Droit come ceo*, to another in Fee, who renders a rent of 20 l. to Tenant for life, he in the firſt Remainder dies without Iſſue. It was Reſolved in that Caſe, That the ſaid Fine levyed by Tenant for life, and him in the Remainder, was no diſcontinuance, either of the firſt Remainder, or of the ſecond Remainder; becauſe every one gave only that which they might lawfully give. Alſo it was no forfeiture; for that the Law, which abhors wrong, ſhall conſtrue it firſt to be the Grant of Tenant in Tail, and afterwards to be the Grant of Tenant for life, *ut res magis valeat quam pereat*, *Cook* 1. Part, 76. *Bredons* Caſe.

2. Tenant for life, the Remainder in Tail, the Remainder in tail, Tenant for life enfeoffeth him in the firſt Remainder in Tail, who dyeth without Iſſue, it is a forfeiture of his Eſtate; and the difference is, when he in the Remainder accepts an Eſtate by Feoffment, becauſe the ſame is a deveſting of the Remainder, and when he in the Remainder joyns in a Conveyance. 41 E. 3. 21. acc.

3. Tenant for life, the Remainder in Fee to an Infant, they both joyn in a Fine, and afterwards the Fine is reverſed, as to the Infant: Yet it was holden in that Caſe, That the Conuſee ſhould hold the Land during the life of the Tenant for life; becauſe in that Caſe, each of them only gave that which he might lawfully give, as it was adjudged in *Engliſhes* Caſe. But it was ſaid, That if Tenant for life, the Remainder to the King for life, the Remainder in Fee, make a Feoffment, it is a forfeiture; becauſe he hath made a Livery in Fee, although that thereby nothing paſſeth but his own Eſtate,

Eſtate, for that the Remainder to the King, cannot be thereby deveſted: But if Tenant for life be, the Remainder in Tail, the Remainder in Tail, Tenant for life, and he in the firſt Remainder make a Feoffment; in that caſe, it is no diſcontinuance; for that there every one gives that which he may lawfully give; and although that he in the firſt Remainder dyeth without Iſſue, yet the Feoffee ſhall hold the Land during the life of the Tenant for life; and if the Feoffment be by word, then it is the ſurrender of Tenant for life; and the Feoffment of him in the Remainder, *ut res magis valeat quam pereat.* *Cook* 1. Part, 77. in *Bredons* Caſe.

4. A. Tenant for life, the Remainder to B. and another, the Remainder to C. and his Heirs; C. levyed a Fine to A. and B. to the uſe of A. for his life, and after to the uſe of B. in Fee: It was adjudged in this Caſe, That by the death of A. the Joynture betwixt B. and the others was ſevered, and that B. was Tenant in common with them; And in that Caſe this difference was taken; That if a man makes an Eſtate to three, and the Heirs of one of them, one of them in this Caſe hath Fee-ſimple, and yet the Joynture continues, for it is all one Eſtate created at one time, and therefore the Fee-ſimple cannot drown the Joynture, which takes effect with the Creation of the Remainder in Fee: But when three Joynt-Tenants are for life, and one of them purchaſeth the Fee, or the Fee diſcends to him, the Fee-ſimple doth drown the Eſtate for life, for the Eſtate was in *eſſe* before. *Cook* 3. Part, 60. *Weſtcotts* Caſe. Note alſo, that in that Caſe it was Reſolved, That Tenant in Tail may grant over his Remainder; for that an Eſtate Tail cannot be extinct by the acceſſion of a greater Eſtate: But when an Eſtate is made to three, and the heirs of one of them, he who hath the Fee, cannot grant over his Remainder, and continue in himſelf an Eſtate for his own life: And if a Reverſion be granted to the Tenant for life, and to another in Fee, the Reverſion is extinct for a moyty; for that Tenant for life cannot acquire the Reverſion, or the Remainder of the ſame Land, but the Eſtate for life ſhall be drowned. *Ibid.*

5. A Leaſe was made to A. and his Aſſignes; *Habendum*, to him during his life, and the lives of B. and C. It was adjudged in this Caſe, That it was a good limitation, and that the Leſſee had but one Eſtate, which had this Limitation, during his life, and the lives of two others; and that he had but one Freehold, and therefore there could not be any drowning of Eſtate in the caſe; but he had a Freehold to continue during the lives of three men, and the lives of the Survivor of them. Paſch. 37 Eliz. *Cook* 5. Part, 13. *Roſſes* Caſe.

6. A man poſſeſſed of a houſe in L. for 31 years, by his Will deviſed all the profits of it to B. during the time that ſhe ſhould continue ſole, and a Widdow; and afterwards he deviſed the Term to C. his ſon, and dyed: B. with the aſſent of the Executor, entred; he in the Reverſion, by Deed Bargained and ſold the ſaid houſe to B. in Fee; and covenanted with him, That the ſaid houſe, at the time of the aſſurance, ſhould be diſcharged of former Bargains; and bound himſelf in an Obligation to perform the Covenants. In this Caſe it was Reſolved, 1. That the Executory Deviſe was good. 2. That although the entire Fee was not in B. *quaſi &c.* ſo as by the purchaſe of the Fee-ſimple the Intereſt of B. was extinct, yet the ſame ſhould not defeat the Executory Deviſe. 3. That C. could not grant his Intereſt over, as long as B. remained ſole. 4. Reſolved, That becauſe that C. had but a poſſibility, yet the Covenant did extend unto it, and to that purpoſe had eſſence. Trin. 28 Eliz. in C. B. *Huntington* and *Rudyods* Caſe, Vouch. in *Cook* 10. Part, in *Lamplits* Caſe.

7. A. ſeized of the Mannor of D. in Fee, Covenanted to ſtand ſeized thereof to the uſe of himſelf, and B. who he intended to marry, for the term of their lives; without Impeachment of Waſte: and after their deceaſe, to the uſe of their firſt Iſſue male, and to the heirs males of ſuch Iſſue; and for want of ſuch Iſſue, to the uſe of the heirs males of the body of the ſaid A. and B; with divers Remainders: they inter-marry, and have Iſſue D. Afterwards A. dyeth, without any Iſſue of the body of the ſaid B. but only D; B. enters, a Beam falls down by force of the wind; B. takes the Timber, and converts it to her own uſe, and dies. In this Caſe (amongſt other things) it was Reſolved, That until Iſſue, A. and B. were ſeized of an Eſtate Tail, exempted *ſub modo*, until the birth of the Iſſue male, and then they became Tenants for life, the Remainder to their Iſſue male in Tail, the Reverſion to the heirs males of A. and B. for the Eſtate for their lives was not abſolutely drowned, until they had Iſſue male. 2. Reſolved in this Caſe, That B. had the priviledge of a Tenant in Tail, after poſſibility of Iſſue extinct, in reſpect of the Inheritance which was once in her, and that by reaſon of this priviledge, the property of the Trees were in her, by vertue of the Houſe, without impeachment of Waſte. *Cook* 11. Part, 80. *Lewis Bowlers* Caſe.

8. A. ſeized of Lands in Fee, deviſed the Land to the Father for life, and after to the next heirs male of the Father; the father having Iſſue a ſon at the time the Deviſor dyed; the father made a Feoffment with Warranty, the ſon entred, and after,

ter, the father dyed. It was Reſolved in this Caſe, 1. That the Father had but an Eſtate for life, and that his ſon being his next heir male, could not enter for the forfeiture. 2. Reſolved, That the Remainder limitted to the right heir male of the father, was good, although he could not have heir male during his life; but it is ſufficient if the Remainder veſt, *eo inſtante* as the particular Eſtate determines. 3. Reſolved, That by the Feoffment of the Tenant for life, the Remainder was deſtroyed; for if the particular Eſtate be determined, either in fact, or in Law, before the Contingency happen, the Remainder is void; but if the Tenant for life be diſſeized, and dyeth, the Remainder is good; for that the particular Eſtate doth remain in right, and might be revеſted. *Cook* 1. Part 66. *Archers* Caſe.

9. Grandfather, father, and ſon; The Grandfather held the Manor of D. of B. as of his Manor of S. by Knights Service, and levyed a Fine to the uſe of himſelf for life, the Remainder to the uſe of the father in Tail, and after to the uſe of the right heirs of the Grandfather; the father dyed, his ſon within age: B. the Lord, ſuffered a Recovery of his Manor of S. to the uſe of himſelf and his Wife in Tail, the Remainder to the uſe of C. and his Wife in Tail, the Remainder to the uſe of the right heirs of D; B. and his Wife dyed without Iſſue, C. entred, the Grandfather dyed, his Wife dyed, the ſon entred, and made a Leaſe for years, rendring Rent; C. re-entred, the Leſſee brought *Ejectione firmæ.* In this Caſe it was Reſolved, 1. That the Grandfather had an Eſtate in Fee, expectant upon the Eſtate Tail, as a Reverſion, and not as a Remainder. 2. That C. ſhould not have the Wardſhip of the Land, becauſe a Reverſion in Fee is expectant upon it, and the Reverſion is immediately holden of the Land, and not of the Eſtate Tail. *Cook* 2. Part, 91. *Binghams* Caſe.

10. A man ſeized of Lands in Fee, levyed a Fine, to the uſe of his Wife for life, the Remainder in tail, the Remainder to the right heirs of the Conuſor; Tenant in Tail dyed without Iſſue, the Conuſor in the life of Tenant for life, made a Leaſe for a thouſand years, and dyed. It was adjudged in that Caſe, that the Leaſe was good, for the Conuſor had it as a Reverſion. 30 Eliz. *Milford* and *Fenwicks* Caſe. *Ibid.*

11. A man ſeized of three Acres, made a Leaſe of one of them to A. for life, and of the other to the uſe of B. for life; and of the third, to the uſe of C. in Tail; and afterwards by Deed Indented, covenanted with his brother, that after all the Eſtates ended and determined, that he and his heirs would ſtand ſeized of the ſaid three Acres, to the uſe of his ſaid brother in Tail. It was adjudged in that Caſe, That preſently by the death of B. one of the Tenants for life, the brother ſhould have the Acre of B. and ſhould not ſtay until all the Eſtates were ended; for by the Covenant, the Eſtate in the ſeveral Acres veſted preſently in the brother. See 32 Eliz. in the Court of Wards, *Pollard* and *Alcocks* Caſe. Vouch. in *Cook* 5. Part, 8. in Juſtice *Windhams* Caſe.

12. The King Lord, Two Tenants in common Meſnes, and Tenement; one of the Meſnes made a Feoffment of the moyty of the Menalty, unto the uſe of himſelf for life, the Remainder to his ſon in Tail, the Remainder to his right Heirs: The Tenant made a Feoffment of the Tenancy to the ſon; and after, the ſon by colluſion betwixt him and the father, enfeoffed the father and his heirs, to the intent to defraud the other Meſne of the Wardſhip, and dyed, his heir within age; the other Meſne ſeized the Ward, and after, the father, Tenant for life, dyed. In this Caſe it was Reſolved, 1. That the King ſhould not have the Ward, but that the other Meſne ſhould have it in reſpect of the Colluſion; for his Title was conſummated by the death of the Tenant who made the Feoffment, but ſo was not the Kings Title, until the father, who was the Tenant for life of the Menalty, was dead, and the King had but a poſſibility. 2. Reſolved, That by the Feoffment of the Tenant, the Meanalty was extinct; becauſe the Feoffee had the Reverſion of the Meanalty, and the Reverſion being extinct, no particular Eſtate for life, or in Tail of the Meanalty could ſtand, as to him. 3. Reſolved in this Caſe, That although the Meſne had not means to recover the Ward, before a Writ of Ward brought, yet the Title of Ward, although it were a thing in Action, ſhould not be deveſted by the death of another Anceſtor. *Cook* 9. Part, 119. *Quicks* Caſe.

Were

4. *Where an Eſtate limitted by Name of a Remainder, ſhall be conſtrued and taken for a Reverſion: Where a Grant of a Feeſimple by name of a Reverſion or Remainder, ſhall not be good, et è contra. Where the Kings Grant by name of a Reverſion, ſhall be good. And where the Reverſion of the King ſhall paſs by another Name, as Land, &c.*

1. NOte, It was Reſolved by the Court, That if the King be Tenant in tail of Land, the Reverſion expectant to him in Fee; and the King recites his Eſtate, and grants the Land in tail; that in ſuch Caſe, the Grant is void; for although that the King recites his Eſtate, and be apprized of it, yet the Eſtate which he intended to Grant, did not ſtand with his Eſtate, for neither his Eſtate tail in poſſeſſion, nor his Eſtate in Reverſion would enable him to make a Grant of an Eſtate tail in poſſeſſion; and therefore becauſe the Grant cannot take effect according to the intent of the King, the Grant ſhall be void: and a violent conſtruction ſhall not be made in the Kings Grants. And therefore in the Principal Caſe of *Alton woods*. It was holden, That the Grant of the King made to *Walſh*, was void, and not good. 1. Becauſe the King intended to Grant an Eſtate of Inheritance, and not for Term of life. 2 He intended to Grant one entire Eſtate, and not two ſeveral Eſtates. 3. He intended to Grant an Eſtate tail in poſſeſſion, and not part in poſſeſſion, and part in Reverſion. 4. The King intended to Grant ſuch an Eſtate in the Mannor, ſo as the King might have the Ward or Primer Seiſin of the Land in poſſeſſion, and that he could not have if *Walſh* had it but for the life of the King; and therefore it was holden, That the King was deceived in his Grant. *Cook* 1. Part, 52, 53. *Alton Woods* Caſe.

2. A. Tenant in tail, the Remainder to B. in tail, B. by Deed Indented and Inrolled, both Bargain and ſell his Remainder to J. S. for the life of A. Tenant in tail. It was adjudged in this Caſe, That the Grant was void, becauſe it could ever take effect in poſſeſſion, nor the Grantee could never have benefit thereof; and a difference was taken of ſuch a Grant of a Reverſion, and the ſaid Grant of Remainder, for the Grant of the Reverſion during the life of Tenant in tail, is good, becauſe he ſhall have the Services which the Tenant in tail ought to do during the life of the Tenant in tail, but ſuch a Grant of a Remainder can never to any purpoſe take effect, and therefore the ſame is void. *Cook* 2. Part, 51. in Sir *Hugh Chamleyes* Caſe.

3. Land was deviſed to Husband and Wife, and after their deceaſe, to their Children, they then having Iſſue a Son and a Daughter. It was Reſolved in this Caſe, That the Husband and Wife had an Eſtate but for their lives, the Remainder to their Children for life, and no Eſtate tail. And if by the Common Law ſuch a Conveyance had bin made, the Husband and Wife ſhould have had an Eſtate but for their lives, the Remainder to their Children for their lives. And in that Caſe it was ſaid, That if A. deviſeth Lands to B. and to his Iſſues or Children, and he hath not any Iſſue at the time of the Deviſe, that the ſame is an Eſtate in tail, for that the intent of the Deviſor is manifeſt and certain, for they cannot take as immediate Deviſees, becauſe they are not in *rerum natura*, and by way of Remainder they cannot take, becauſe it was not the intent of the Deviſor; and therefore thoſe words ſhall be taken by way of limitation, and ſhall be an Eſtate in tail. *Cook* 6. Part, 15. *Wilds* Caſe.

4. Tenant in tail, the Remainder in tail, the Reverſion to the right Heirs of Tenant in tail. Tenant in tail by Deed enrolled, bargained and ſold the Land to J. S. and his Heirs; and afterwards levyed a Fine with Proclamations to the Bargainee with Warranty; the Conuſee made a Feoffment in Fee, he in the Remainder had Iſſue, and dyed. In this Caſe, it was Reſolved. 1. That by the Bargain and Sale, the Bargainee had an Eſtate of Inheritance diſcendable to his Heirs determinable upon the death of Tenant in tail, and had the Reverſion expectant upon the Remainder in tail, and that the Wife of ſuch Bargainee ſhould be endowed. 2. Reſolved, That the Fine levyed by the Bargainee, did not make any Diſcontinuance, becauſe the ſame did not touch nor diſplace the Remainder, and no Eſtate of Freehold paſſed by the Fine, but the Fine with the Proclamation did corroborate the Eſtate of the Bargainee, for his Eſtate was determinable upon the death of Tenant in tail, and now it is not determinable without death, without Iſſue. But if the Fine had bin levyed before the Bargain and Sale enrolled, it had bin a Diſcontinuance. Note in the principal Caſe, The Remainder by the Feoffment of the Conuſee was not diſplaced, and put to a right, For the Conuſee had a Feeſimple determinable up-

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on the death of Tenant in tail without Iſſue, and when he made a Feoffment, his determinable Fee in poſſeſſion, and his abſolute Fee expectant upon the Eſtate tail in Remainder paſſed, and did not deveſt the Remainder for the Feoffment in it ſelf, was not tortious, nor could be tortious to another. And when he who had the Fee determinable, made a Feoffment, he who had a Fee, gave a Fee, and did not do wrong to his Heirs, and ſo there was no wrong done to him in the Remainder. *Cook* 10. Part, 96. *Edward Seymour's* Caſe.

5. Note, It was Reſolved by the Court in *Bozouns* Caſe (amongſt other points), That when the King by the Common Law cannot make a Grant, there a *Non obſtante* of the Common Law, will not againſt the reaſon of the Common Law make the Grant good; but when the King may lawfully make the Grant, but the Law doth require that he be inſtructed that he be not deceived, there a *Non obſtante* ſupplying it, ſtands with reaſon of the Common Law, and ſhall make the Grant good. When the King maketh a Leaſe for life or years, he hath the Reverſion in him, which he may lawfully Grant; but the Law requires that he be not deceived in his Eſtate, *ſcil.* to Grant the poſſeſſion of Land where he hath but a Reverſion; And therefore when he Granteth the Land, notwithſtanding it be in Leaſe for life or years, of Recoverors, or otherwiſe. Or if he Grant the Land, and further Grants the Reverſion dependant or expectant upon any Eſtate for life or years, in both theſe Caſes, the Grant is good. 2. When the words of the Grant be not ſufficient *ex vi termini* to paſs the thing Granted, there any *Non obſtante* cannot make the Grant good. But in Caſe of a Grant of Land which is in Leaſe for life or years; there, by the Grant of the Lands, the words are ſufficient *ex vi termini* to make the Reverſion to paſs, but the Law requireth, That the King be not deceived in the thing which he Granteth, and that is ſupplyed by the *Non obſtante.* *Cook* 4. Part, 35. in *Bozouns* Caſe.

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5. *Remainder of a Chattell; where good; Where not.*

1. A Termor deviſed his Term to his eldeſt Daughter, and to her Iſſues, the Remainder to his youngeſt Daughter; the eldeſt dyed without Iſſue, and her Husband alliened the Term; It was the Opinion of *Baldwin* and *Shelley*; that the youngeſt Daughter was without remedy, becauſe it was a void Remainder of a Term; as it is of a Chattel perſonal; but *Englefield* contrary, becauſe of his intent. See 37 H. 6. 30. 7 E. 6. br. 178. acc.

2. Leſſee for years deviſed his whole Term to A. Proviſo, That if he dyed, living J. S. that then the reſidue ſhould remain to J. S. A. Alliened, and dyed. It was the Opinion of the Juſtices, That J. S. was without remedy. 6 E. 6. *Dyer*, 75. See *Plow. Comm.* 190. acc. 2 E. 6. Tit. Deviſe, 13. acc.

3. A Leaſe was made for 41 years to W. C. *ſi tam diu vixerit et ſi obierit infra dictum terminum*, That E. the Wife of the ſaid W. C. ſhould have the reſidue of the years. It was the Opinion of *Dyer* and *Catlyn*, That the Term was determined by the death of W. C. for then there was no Remainder of the Term, and therefore the limitation was void. 8 Eliz. *Dyer*, 253.

4. A Leaſe was made to two for Term of years, with a Proviſo in the end of the Deed, That if the ſaid Leſſees dyed within the Term, that the Term ſhould ceaſe. The Leſſees make Partition, or one of them allieneth his part and dyeth. It was holden, That the Leſſor could not enter into his part who was dead, but that the Grantee, or the Executors of the Leſſee (if he made no allienation) ſhould have his part during the life of the ſurviver, and that there ſhould be no Occupancy in ſuch Caſe. And it was ſaid, That it was not like where a Leaſe is made to two for the Term of their lives, and they make Partition, and one dyeth; that there his part ſhall revert to the Leſſor. See Mich. 3 E. 6. *Dyer*, 67.

5. If there be Lord and Tenant, and the Lord Grant his Seignory to the Tenant of the Land for life, the Remainder over in Fee; It was ſaid in that Caſe, That the Remainder was void, becauſe no Formedon could be maintained by him in the

the Remainder, without alledging of Explees in the particular Tenant. And ſo it is of Seignory Granted in Fee to the Tenant of the Land, and a ſtranger, they are not Joynt-Tenants, but the one moyety is extinct. See Hillar. 4 *Mar. Dyer*, 140.

6. J. S. Parſon of a Rectory, Demiſed the ſame to E. for 80 years, if ſhe ſhould ſo long live, and if ſhe dyed *infra prædict. Terminum* 80 *annorum*, or alienes, that her Eſtate ſhould ceaſe, and then it ſhould remain to R. *pro et durante reſiduo prædict. Termini* 80 *annorum*, if he ſhould ſo long live, and if he ſhould dye *ut ſupra, &c.* that then his Eſtate ſhould ceaſe, and that then it ſhould remain to W. *pro tot annis prædict. Termini* 80 *annorum ſi, &c.* and if he alienes, *ut ſupra*, that then his Eſtate ſhould ceaſe; and then the ſaid J. S. *conceſſit premiſſa durant. tot annis quot remanerent, et ultimo continuarent inexpirat.* to T. *executoribus et aſſignis ſuis.* J. S. dyed, T. dyed, E. and R. dyed. The Adminiſtrator of T. entred, and aſſigned the Term over. In this Caſe it was Reſolved. 1. That the Demiſe to R. and W. were void, becauſe that the Eſtate which E. had, was not for 80 years abſolutely, but *ſub modo*, and then the Demiſe to them *pro tot annis quot remanerent poſt mortem dict. E. pro et durante reſiduo Termini prædict.* 80 *annorum* was void; for there could not be a reſiduo of the ſaid Term, becauſe the ſame determined by the death of E. 2. It was Reſolved, That the Leaſe and limitation to T. was void for the incertainty; for it was incertain at the making of the Leaſe, how many years ſhould be behind at the death of E. A man poſſeſſed of a Term for 90 years in conſideration of Marriage demiſed the Land to his Son for 70 years, to begin after his death, adjudged a good Leaſe; and the difference is, where the Demiſe is of the Land, and where of the Term. 35 Eliz. in B. R. *Lacroſts* Caſe. *Cook* 1. Part, 153. The Rector of *Cheddingtons* Caſe.

7. A man poſſeſſed of a Term for divers years, deviſed the preſits thereof to one for life, and after his deceaſe, to another for the reſidue of the years, and dyed; the firſt Deviſee entred by the aſſent of the Executor; and afterwards he in the Remainder during the life of the firſt Deviſee, aſſigned it to another, and afterwards the firſt Deviſee dyed. It was adjudged in that Caſe, That the Aſſignment was void, for he in the Remainder had but a poſſibility during the life of the firſt Deviſee, for it is as much in Law as if the Land had bin Deviſed to him for ſo many years as he ſhould live, or for all the Term if he ſhould live ſo long, ſo as the Intereſt of the Term was *ſub modo* in him, and the other in the Remainder had but a poſſibility, which he could not Grant over, as it was adjudged in C. B. *Cook* 4. Part, 66. in *Fulwoods* Caſe.

8. A man poſſeſſed of a Term for 40 years, Deviſed the ſame to J. S. after the death of his Wife, and that the Wife ſhould enjoy the ſame during her life, and that J. S. ſhould not Deviſe nor ſell it, but ſhould leave the ſame wholly to his Son. And in the mean time my Will is, That my Wife ſhall have the uſe thereof during her life, yielding to the ſaid J. S. during his life, 7 l. at two Feaſts, and made his Wife his Executrix and dyed, the Wife entred, and paid the 7 l. yearly according to the Will; and ſaid, That if ſhe dyed, J. S. ſhould have the ſaid Term, and after dyed. In this Caſe (amongſt other things) it was Reſolved. 1. That J. S. took not any thing by way of Remainder, but by way of Executory Deviſe; And a man may Deviſe ſuch an Eſtate by his Will, which he cannot do by Act executed, or by Conveyance in his life time; and the Caſe is no more but this, That the Teſtator Deviſed, That if his Wife dyed within the Term, that J. S. ſhould have the reſidue of the Term; and further Deviſed the ſame to his Wife for life. 2. Reſolved, That the Deviſe was good, becauſe it was but of a Chattel, which might veſt and deveſt at the pleaſure of the Deviſor, without prejudice to any. 3. Reſolved, That there is no difference when one Deviſeth his Term for life, the Remainder over; and when a man Deviſeth the Land, or his Leaſe, or the uſe or Occupation, or Preſits of his Land: for in Wills, the intent of the Deviſor is to be obſerved, and the Law ſhall make conſtruction of the words to ſatisfy the intent; and the intent of the Deviſor expreſſed in his Will, is the beſt Expoſitor of the words: And therefore, If a man Deviſeth his Leaſe for life, the ſame is as much as to ſay, That he ſhall have ſo many of the Heirs as he ſhall live, and although the ſame be incertain at the beginning, yet when he dyeth, by matter *ex poſt facto*, it is made certain. Mich. 7 Jac. in C. B. *Cook* 8. Part, *Matthew Mannings* Caſe, 95, 96. See *Cook* 10. Part, 47, and 52. *Lampitts* Caſe, &c.

9. Note, It was Reſolved, That when a man limits an Eſtate by Indenture to the uſe of himſelf for life, with power to make Leaſes for life or years, or to ſuch perſons as he ſhall name by his laſt Will, of any Eſtate or Eſtates, the Remainder to A. in tail, with divers Remainders over, That thoſe Remainders are upon a Contingent, and do not veſt in them preſently by the Statute of 27 H. 8. untill the contingency falleth, becauſe it is in doubt, Whether the Eſtates *in futuro* ſhall ever veſt. *Cook* 8. Part, 86. *Lew. Lowries* Caſe.

10. Note alſo, That it was holden by *Cook*

nd *winch* Juſtices, but not Reſolved by the whole Court, That if a man Deviſeth in this manner, and by theſe words, *viz.* I Give, Grant, Will, and Bequeath to T. all my Manners, Lands, &c. To have and to hold, to T. and the Heirs of his body, for and during the Term of 500 years, that the ſame is but an Eſtate for years determinable upon limitation for want of Iſſue. But it was agreed, That if a man hath a Term, and deviſeth the ſame to one and the Heirs of his body, his Heir ſhall not have it, but his Executors, becauſe a Term is but a Chattel which cannot be entailed. See 28 Eliz. *Peacocks* Caſe. And Mich. 21 Eliz. *Higgins* and *Mills* Caſe, vouched in *Cook* 10. Part, 87. acc.

11. A. ſeiſed of certain houſes in Fee 24 H. 8. deviſed them to T. P. for 99 years, who by his Will deviſed the ſaid Leaſe in theſe words, *viz.* I deviſe my Leaſe to my Wife during her life, and after her death, I will it go to her Children unpreferred, and made his Wife his Executrix, and dyed; his Wife entred, and was poſſeſſed by reaſon of the gift and Legacy: and afterwards married with J. S. And afterwards 3 *Maii*, J. D. did recover againſt J. S. 140 l. and by *Fieri facias* directed to the Sheriffs of *London*, the ſaid Term was ſold to N. L. and after the Judgment againſt J. S. was reverſed by Writ of Error, *et quod ad omnia quæ amiſit ratione judicii pradict. reſtituator.* And afterwards the Wife, the Executrix, dyed; and E. the Daughter being only unpreferred, entred, and made the Leaſe to the Plaintiff. In this Caſe (amongſt other points) it was Reſolved, That the ſaid Executory deviſe of the Leaſe after the death of the Wife to the Daughter unpreferred, was good. And in that Caſe, it was agreed, That there is no difference, when the Term or Leaſe, or houſes, and when the uſe and Occupation is deviſed, for that in all theſe Caſes, the Executory Deviſe is good. Paſc. 26 El. z. in B. R. *Amner* and *Loddingtons* Caſe. *Godbolt*, 26.

12. In Treſpaſs, the Caſe was; A. was poſſeſſed of a Leaſe of Lands for 160 years; and by his Will deviſeth, That his brother C. ſhould have the uſe and Occupation thereof, and ſhould take the profits thereof during his life, and after his death, the uſe and Occupation thereof ſhould remain to the Wife of C. during her Widdowhood; and after her Widdowhood, the uſe and profits to remain to the eldeſt Son of C. which he ſhould happen to have during his life; and after ſuch Son dying without Heir Male, to any other Sons, which the ſaid C. ſhould happen to have: And if C. dye without Heir Male of his body, that the uſe and profits ſhall remain to S. S. in the ſame manner as before: And made the ſaid C. and S. S. his Executors, and dyed. The Queſtion was, Whether this Deviſe of a Term in this manner be good to go in Remainder. And if ſuch Remainders, the one after the other of the Deviſe of a Leaſe, may be good. All the Court inclined to be of Opinion, That the Deviſe of a Term in this manner to make a perpetuity, cannot be good. For to limit a poſſibility after a poſſibility, and to limit the Remainder of a Term after a dying without Iſſue, ſtands not with the Rules of Law. But the Court would adviſe of the Caſe. Trin. 5 Car. in B. R. *Sanders* and *Caraſhes* Caſe. *Cro.* 1. Part, 166, 167.

13. Leaſſee for 60 years, deviſeth in this manner, I give my Wife and my Couſin, my Term for their lives, and after to ſuch perſons as ſhall remain in my houſe at N. at the time of my deceaſe. The Wife overlives the Couſin, and aſſigns the Term to another. The Couſin and Heir of the Deviſor enters. The Queſtion was, Whether this Remainder of a Term were good, or not. The Court was divided in Opinion, For *Cook* and *Walmeſly* Juſtices held, That it was not, becauſe it was but a poſſibility, and there cannot be any Remainder thereof. And no Councel can Deviſe how ſuch a Remainder by any Act can be executed and Deviſed. But *Warburton* and *Daniel* Juſtices held the contrary; Wherefore the Caſe was adjourned. Mich. 5 Jac. in C. B. *Mullet* and *Satkfords* Caſe. *Cro.* 2. Part, 198.

14. In an *Ejectione firme* upon a ſpecial Verdict, the Caſe was, W. H. poſſeſſed of a Leaſe for 76 years, lett it to one B. from the day of his death, untill the firſt of *May* 1629. (which was three Moneths before the end of the Leaſe) if D. his Wife lived ſo long. Afterwards he Deviſed, That W. his Son and his Aſſigns ſhould have the Tenements, and the Reverſion of them, and all his Intereſt in the ſaid Tenements for all others of the ſaid 76 years which ſhould be unexpired at the time of his Wives death; Provided, That if W. dyed without Iſſue living at the time of his death, That T. his Son ſhould have it for all the reſidue of the ſaid 76 years unexpired, from the death of his ſaid Wife, and of W. without Iſſue. And if he dyed without Iſſue, then to his Daughters; and made his Wife his Executrix, and dyed. The Wife aſſented to the Legacies, W. aſſigned all this Leaſe and his Intereſt to the ſaid D. who aſſigned it to C. D. dyed, and then W. dyed without Iſſue. T. the Deviſee entred, and made a Leaſe to the Plaintiff; the Defendant claimed under C. the Aſſignee of D. In this Caſe it was adjudged for the Defendant; and it was Reſolved. 1. That Leſſee for years letting it after his death untill the 1. of *May*, 1629. it was a good Leaſe which began immediately after his death. 2. That the Leaſe being

being made to begin after his death, unto the 1. of *May*, 1629. (the Leaſe being made 12. *Aug.* 1553.) if *Dorothy* his Wife ſhould ſo long live, he did not thereby convey the Intereſt and the Remainder of the Term, viz. from the 1. of *May* 1629. unto 12. *Aug.* 1629. which Intereſt and poſſibility together he might Deviſe to W. his Son. The main Queſtion was, If this Deviſe being to W. and his Aſſigns, with a Proviſo, That if he dyed without Iſſue living, That T. ſhould have it, and he Alliens it, and after dyes without Iſſue, Whether this Alienation ſhould bind T. or that he ſhould avoid it. And it was Reſolved, That this Alienation ſhould bind him: For when he limitted to him and his Aſſigns, all the Eſtate was veſted in him, and he had an abſolute power to diſpoſe thereof; for the Law doth not expect his dying without Iſſue, and therefore the difference is, where a Leaſe is deviſed to one if he live ſo long, and afterwards to another, the firſt hath but a qualified Eſtate, but when it is limitted to him and his Aſſigns, then the Proviſo thereunto added, is void to reſtreyn the Alienation. Upon this Judgment, a Writ of Error was brought in the Exchequer Chamber. But the Judgment was there affirmed. See *Lib.* Hill. 15 Jac. in B.R. *Child* and *Bayliss* Caſe. *Cro.* 2. Part, 459, 460, 461, 462.

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6. *Where, and by what act or acts of the particular Tenant, or by the Act or means of a ſtranger, a Remainder ſhall be taken away, defeated, and deſtroyed; and where and by what act not. And where and by what Act the Reverſion or Remainder of the King ſhall be deveſted and Diſcontinued.*

1. A Termor deviſed his Term to one for his life; the Remainder to another, and made the Deviſee his Executor by the ſaid Will, and dyed; the Deviſee proved the Will, and entred, and made his Executor, and dyed, the Executor entred, and took the profits for a year, againſt whom he in the Remainder brought an Accompt as Bailiff, &c. And by the Opinion of the Juſtices of the Common Pleas; the Action did not lye, for three cauſes. 1. For want of privity, and becauſe he was never in poſſeſſion of the Land, nor took any profits of it. Alſo becauſe the Remainder is void, for the Deviſee firſt entred as Executor, which was his colour and firſt cauſe of coming to the Land, and had not declared by any act, that his intent was to execute the Deviſe; but if there had bin any Co-Executor, and he had not ſuffered him to joyn in the Occupation of the Term with him, that had bin a full Declaration, that his intent was, that he took the ſame as Deviſee; but there it ſhall be intended, that he took it as Executor. But three of the Juſtices held and agreed, That the Remainder of a Term deviſed to one for life, is good by Deviſe, but not by Eſtate Executed. Trin. 11 Eliz. *Dyer*, 277.

2. A Leſſee of a Houſe and Land for 60 years, by Will deviſed, That J. his Wife, ſhould have and enjoy the Tenements, &c. for ſo many years as ſhe ſhould happen to live; and after her deceaſe, he deviſed the reſidue of the years to F. his ſon, and his Aſſignes, and made his Wife his Executrix, and dyed, having goods ſufficient to pay Debts and Legacies, above the ſaid Leaſe; the Wife proved the Will, and Entred, and Occupied the Tenements during her life; and after, ſhe took F. to Husband; F. dyed Inteſtate, H. and his Wife by Deed, granted all their Intereſt and Term to two men, who gave the ſame back again to the Husband and Wife; after, Adminiſtration of the Goods and Chattels were committed to W. the Wife dyed; W. the Adminiſtrator, entred; upon whom the ſervant of H. entred. In this Caſe it was adjudged, That the Deviſe to J. the Wife was good, and to F. the ſon alſo, and the Entry of the Wife, with the claim of the Land as a Legacy, was an Execution for both their Eſtates, and the Intereſt of the Wife was not a collateral Occupation, but is of the ſame thing which is limitted to the ſon; and the limitation to the ſon was not a poſſibility, but a Deviſe of the Land it ſelf; and ſo it was adjudged, That the Adminiſtrator of the ſon, ſhould have the Land after the death of the Wife; and Judgment was given for the Plaintiff. Paſch. 20 Eliz. *Walsden* and *Elkington's* Caſe. *Plowd. Com.* 516. to 525.

3. An Allien born, purchaſed Lands in Tail, the Remainder to a Stranger in Fee, the Allien ſuffered a Common Recovery to his own uſe in Fee; all this was after found by Office. It was moved to the Court, if the Remainder ſhould be to him who had it before, or no? It was the Opinion of the Juſtices, That the Queen ſhould have the Land in Fee, for there was a good Tenant to the *Precipe*, and then the Remainder is gone. Mich. 31 Eliz. in C. B. *Goldesbr.* 102.

4. A. Tenant in Tail, the Remainder to B. in Tail; B. grants a Rent-charge, A. ſuffers a Common Recovery, and dyes without Iſſue, the Grantee diſtreins for the Rent, the Allienee brings Replevin: It was adjudged for the Allienee, for that

a Common Recovery againſt Tenant in Tail, ſhall binde not only the Remainder, and all Leaſes, charges, &c. granted or made by him in the Remainder, but alſo the Reverſions, and all Leaſes and Charges, granted or made by him in the Reverſion. *Cook* 1. Part, 62. *Caſtells* Caſe. See *Cook* 1. Part, 67. *Bredons* Caſe. *Cook* 1. Part, 120. *Chudleighs* Caſe, acc. *Cook* 2. Part, 52. in Sir *Hugh Chomleys* Caſe, acc.

5. Lands were given to Husband and Wife, and to the heirs of the body of the husband, the Remainder in Tail, the Reverſion to the heirs of the Husband. The Husband levyed a Fine to A. and B. and their Heirs, a Recovery is had againſt the Conuſees, with Voucher, who vouch the husband only, and execution is had accordingly in the life of the Wife, which Recovery was to the uſe of the Husband, for life, and after, to the uſe of the Wife for life, and after, to the heirs of the Husband: The Husband deviſed the Lands to J. S. and after, dyed without Iſſue. It was adjudged in this Caſe, That this Common Recovery ſhould binde the Remainder in Tail; becauſe the Husband came in as Vouchee, and came in in privity of the Eſtate Tail, and is a lawful Tenant to the *Precipe*, and cannot be ſaid joyntly ſeized with his Wife, becauſe ſhe was not Vouched. But if the Husband and Wife had had a Joynt Eſtate to them, and the heirs of their bodies, with a Remainder over, and the Husband alone had been vouched, in that caſe it might be doubted if the Eſtate Tail ſhould be barred; becauſe the Wife had a joynt Eſtate of Inheritance with him. *Cook* 3. Part, 5. *Copledicks* Caſe.

6. A man ſeized of Lands in Fee, having Iſſue a ſon by one woman, and a ſon and a daughter by another woman, Deviſed his Land to his Wife for life, the Remainder to his younger ſon in Tail, the Reverſion to his right heirs; a Common Recovery is had againſt Tenant for life, in which he in the Remainder in Tail is vouched, and that was to the uſe of him in the Remainder in Tail, and his heirs, who dyed without Iſſue. In this Caſe, theſe points were Reſolved, 1. That a Common Recovery had againſt Tenant for life, upon a true Warranty and Recovery in value, ſhould binde him in the Remainder; becauſe that the particular Eſtate, and the Remainder, are but one Eſtate; and the Warranty and Recompence ſhall extend to both Eſtates: But a Common Recovery againſt Tenant for life only, is a forfeiture of his Eſtate. 2. That no Act or Statute hath been made, to preſerve the Reverſion or Remainder upon an Eſtate Tail; becauſe by intendment, an Eſtate Tail hath continuance for ever, and Tenant in Tail hath power to bar him in the Remainder or Reverſion; and he in the Reverſion upon an Eſtate Tail, ſhall not be received upon the Statute of *Weſt.* 2. *cap.* 3. for the Statute doth not extend unto it. 3. Reſolved, That the Statute of 14 Eliz. of *Feigned Recoveries*, doth not extend to preſerve any Reverſion or Remainder expectant upon an Eſtate Tail, where Tenant for life is impleaded, and Tenant in Tail is vouched, for where Tenant in Tail is privie to the Recovery, it cannot be ſaid that the ſame is by Colluſion. *Cook* 10. Part, 43. 44. *Jennings* Caſe.

7. Note, That a Recovery by Aſſent without Title, ſhall not deveſt a Reverſion or Remainder out of the King; becauſe the ſame being ſuffered by aſſent of the Parties without Title, is but a Conveyance. 25. E. 3. 48. *Cook* 1. Part, 16. in Sir *Will. Pelhams* Caſe.

8. Note; *& vid.* That it was Reſolved in *Cook* 2 Part, in Sir *Hugh Chomleys* Caſe, That a Common Recovery did bar the Eſtate tail, and the Eſtate of him in the Remainder, although that the Remainder was in the Queen; becauſe that the Eſtate tail was not within the Statute of 34. H. 8. of the gift of the King, or any of his Anceſtors. In that Caſe it was agreed, If the Remainder ſhould be deveſted out of the King without a Petition, or *Monſtrans de Droit*; and thereupon, this difference was taken, viz. That where an Eſtate ſhall be deveſted out of a Common perſon, and veſted in another, without Action, Entry, or Claim, that the ſame ſhall be deveſted out of the King without Petition, or *Monſtrans de Droit*; but when in ſuch caſe, in the caſe of a common perſon, an Eſtate ſhall not be deveſted out of him, there it ſhall not be deveſted out of the King, without Petition, or *Monſtrans de Droit*: And therefore in this Caſe, 49 E. 3. *Iſabel Goodcheaps* Caſe, where a man deviſed a houſe in *London*, deviſable by the Cuſtome, and holden by the King in tail, and if the Donee dyed, without Iſſue, that the Land ſhould be ſold by his Executors; the Deviſee dyed without Iſſue, now the Land eſcheated to the King, yet the Bargain and Sale of the Executors, did deveſt the Eſtate out of the King, without Petition, or *Monſtrans de Droit*. But Note, That that was for neceſſity, becauſe the Vendee was in paramount the Eſchear; and therefore that Caſe was agreed to the Law, becauſe that there they had but a power to ſell, and could not have a Petition, nor *Monſtrans de Droit*, *Cook* 2. Part, in Sir *Hugh Chomleys* Caſe.

More

More Remainder, *and* Reverſion.

1. A Man gave Lands to J. S. *Habendum*, to him, and to three others for their lives, *& diutius eorum v' venti ſucceſſivè*; The Queſtion was, What Eſtate J. S. had. It was ſaid, That he had an Eſtate but for his own life, becauſe he cannot have an Eſtate for his own life, and the life of another, where the Intereſt commenceth both in preſent; and the word *ſucceſſivè*, doth not make a Remainder: And it was ſaid, That a Leaſe to one for life, *Habendum* to him, *& primogenito filio ſuo*, was in Remainder *primogenito filio*; and ſo a Leaſe for years, *Habendum*, to him and to another, was no Remainder. Mich. 29 Eliz. in B. R. *Windſmore* and *Halbards* Caſe. *Godbolt*, 51, 52.

2. A Leaſe was made to J. S. for Deed, *Habendum* to him, his Wife, and his Daughter *ſucceſſivè, ſicut ſcribuntur & nominantur in Ordine*; J. S. dyed, and then his Wife dyed: And if it was a good Eſtate in Remainder to the daughter, was the Queſtion: And in this Caſe, theſe three points were made. 1. That they did not take preſently. 2. That they could not take by way of Remainder. 3. That they could not take as Occupants, becauſe that the intent of the Leſſor was, It was ſaid that they did not, by reaſon of the Incertainty: But the Court ſaid, That this differs from *Windſmores* Caſe, and Reſolved, That the Daughter had a good Eſtate in Remainder; and ſaid, That the ſame did not differ from the Caſe in *Dyer*; where a Leaſe was made by Indenture to one, *Habendum* to him and others, *ſucceſſivè, ſicut nominantur in Charta*; for that thoſe words, *ſicut nominantur in Charta*, makes that Eſtate certain enough; and ſo they ſaid, That in the Principal Caſe, *ſicut ſcribuntur & nominantur in Ordine*, is certain enough, and ſhall be taken to be *ſicut ſcribuntur & nominantur in eadem Charta*. Mich. 11 Jac. in C. B. *Hill* and *Grabbams* Caſe. *Godbolt*, 220.

3. Note, It was holden by *Popham* Chief Juſtice, That where a Leaſe was made to Husband and Wife for their lives, the Remainder to the heirs of the Survivor, that the ſame was a good Remainder, notwithſtanding the Incertainty; and that in that Caſe, the Husband after the death of the Wife, ſhould have Judgment to recover the Land, 40 Eliz. in B. R. by *Popham*. See *Godbolt* 139.

4. J. K. Copyholder in Fee, deviſed it to his Wife for life, the Remainder to W. his ſon in Fee, and made a ſurrender to that uſe; the Wife was admitted generally, and, If this were an Admittance of him in the Remainder, was the Queſtion. It was ſaid, it was not; becauſe in that Caſe, W. cannot ſurrender before Admittance, as he might do in Caſe of a Deſcent, but not where he comes in by purchaſe: But on the other ſide it was ſaid, (and to which the Court enclined) to the contrary; for the Remainder veſted when the particular Eſtate veſted, or elſe it ſhall never veſt, but it ſhall not be void; *Ergo*, It is executed when the particular Eſtate is executed; and the admittance of the particular Tenant, is the admittance of him in the Remainder, but not to prejudice the Lord of his Fine; See 7 R. 2. *Scire facias* 3. where Tenant for life ſueth execution, it is in execution for him in the Remainder: And where one deviſeth for Life, the Remainder in Tail, an *ex gravi Querela* was ſued: It was ſaid, That this ſhall hold as well for Tenant in Remainder, as for Tenant for life. *Fitz. Nat. Br.* 201. and ſee *Plo. Com.* in *Wrotteſleys* Caſe, That an Aſſent to the Deviſee for life, is an Execution of the Deviſe to him in the Remainder. Trin. 30 Eliz. in B. R. *Kippings* Caſe. *Goldesbr.* 95.

5. A. ſeized of Lands in Fee, having Iſſue two ſons, B. his eldeſt, and C. a younger ſon, made a Feoffment to the uſe of himſelf for life, without impeachment of Waſte, and after, to the uſe of C. for life, the Remainder after his deceaſe, to the uſe of the firſt ſon of C. which ſhould have Iſſue male of his body, and to his heirs for ever; and for want of ſuch Iſſue, to the firſt daughter of the ſaid C. which ſhould have Iſſue of her body, and to her heirs for ever; and for want of ſuch Iſſue, the Remainder to the right Heirs of C. for ever: A. dyed, B. being his ſon and heir; B. had Iſſue G. and dyed; C. entred after the death of A. his father, H. the ſon of C. dyed without Iſſue; C. after the death of H. his ſon, levyed a Fine of the Lands; the ſon of B. entred upon the Conuſees. It was holden in this Caſe, That this Remainder to the younger ſon, who ſhould have Iſſue, is but a contingent Remainder, and the Remainder to the right Heirs veſted in C. the ſon, and that the levying of the fine was no cauſe of forfeiture, and that the Heir of B. might not take advantage of ſuch forfeiture. Paſch. 7 Car. in B. R. *Bowton* and *Nicholls* Caſe. *Cro.* 1. Part, 265.

6. The Caſe was, a man ſeized of Lands in Fee, levyed a Fine thereof to the uſe of his Wife for life, the Remainder to the uſe of his eldeſt ſon, and the heirs males of his body, the Remainder to the right heirs of the Conuſee; the Conuſee made Leaſe for a thouſand years to B. the eldeſt ſon dy-

eth

eth without Iſſue male, having Iſſue a daughter, the Conſtor dyeth, the Wife after dyeth, the eldeſt ſon enters, and leaſeth the Lands to the Plaintiff. It was adjudged in this Caſe, That it was a Reverſion, and no Remainder, and this Limitation to his right Heirs, was meerly void. Paſch. 31 Eliz. in B.R. *Fenwick* and *Mitfords* Caſe. *Leon.* 182.

7. The Caſe was; Grandfather, Father and Son; the Grandfather ſeiſed of an houſe in J, deviſed the ſame to his eldeſt ſon for life, the remainder to A. ſon of his eldeſt ſon, and the heirs males of his body, the remainder to the right heirs of the Deviſor, and to the heirs males of his body; The Father and Son dyed without Iſſue male, the Son having Iſſue a daughter, who entred, and aſſured the Land to J.S; and Covenanted, That ſhe was ſeiſed of a ſure Eſtate in Fee ſimple. It was ſaid, That the Daughter ſhould take the laſt Remainder as right Heir at the time it ought to be executed, and to the Heirs males of her body, ſo as ſhe had but an Eſtate tail, and ſo the Covenant was broken. But it was anſwered, (and ſo it was the Opinion of the Court) That at the time the Deviſe took effect, the Father was right Heir, ſo as the remainder veſted in him immediately, and ſhould not expect, untill the Father and Son dye without Heir male of the Son, for the Father is a perſon able to take to that upon the death of the Deviſor, the Father is Tenant for life, the remainder to the ſon, and the heirs males of his body, the remainder to the Father, *ut ſupra*, the Reverſion to the Father in Fee, and the Daughter hath the ſame Reverſion in Fee by diſcent, after the entail is ſpent. Trin. 31 Eliz. in B.R. *Leon.* 188.

8. A, and E. his Wife, ſeiſed of Lands in the right of the wife in Fee, by Indenture demiſed the ſame to B. and C. his Wife, and D. their daughter, *Habendum* to them *ut ſupra dictum eſt, et eorum diutius vivanti ſucceſſive*, from *Mich.* following for the Term of their Lives, rendring yearly during their Lives *ut ſupra dictum eſt*, 13 s. 5 d. at two Feaſts, and a Heriot after the death of every of them. After Mich. A. and his wife made Livery to B. and D his daughter; A. dyed; E. his wife accepted the Rent of B; B. dyed ſeiſed, C. his wife entred, and dyed ſeiſed: D. entred; E. entred upon her, and let the Land to the Defendant: D. took a husband, they entred, and let the Land to the Plaintiff: In this Caſe, one Point was, In regard the Indenture is made between A. and his wife on the one part, and B. on the other part; and the Demiſe is made to B. and C. his wife, and D. their daughter, *ut ſupra dictum eſt*, C. and D. being no parties to the Indenture; If it was a good Leaſe to C. and D by way of Remainder, the one after the other, or not? It was Reſolved, That as to this Point, they ſhould take by way of Remainder, the one after the other, as if the Clauſe had been in the Deed, *ſicut Nominantur in Charta*: for if they ſhould not ſo take, the Deed ſhould be void, which the Law will not permit, if by any Conſtruction it can be made good; and the Limitation *ut ſupra dictum eſt*, that he intended the other ſhould pay the Rent, and Heriot. Wherefore it was adjudged, That this Leaſe was good by way of Remainder, and that therefore the Plaintiff ſhould recover. Errour was brought upon the Judgment in the Exchequer Chamber; and afterwards the matter was ended by Compoſition, Trin. 17 Jac. in B.R. *Gruenwood* and *Tybers* Caſe, *Cro.* 2. Part, 563, 564.

9. In *Ejectione Firmæ*, the Caſe was; A. ſeiſed of 3. Houſes in N, having 3. ſons, B, C, and D, deviſed one of his Houſes called the *Starr*, to B. and his Heirs for ever, and he to enter at his age of 22. years: Another of the Houſes he deviſed to C. his Son, and his Heirs for ever, and he to enter at his age of 22. years. The third Houſe he deviſed to D. and his Heirs, and he to enter at his age of 22. years; Provided, That if all my ſaid Children dye without Iſſue of their bodies, That then all my ſaid Houſes ſhall remain to M. my Wife, and her Heirs for ever. B. and C. dyt without Iſſue; D. had Iſſue a daughter, married to J. S. the Leſſor; M. entred into the Houſe deviſed to C: J. S. entred, and made the Leaſe to the Plaintiff: the Queſtion was, Whether by the death of C. without Iſſue, there be a Croſſe Remainder by Implication given to D, and the Heirs of his body? Or whether M. ſhall have it preſently by the death of C. without Iſſue. It was Objected, That M. the Wife ſhould not have any thing, till all his ſons were dead without Iſſue: for the words are, If all his ſons dye without Iſſue, that then his wife ſhall have all his Houſes. But it was Reſolved by the Court, That M. the Wife ſhould have it immediately after their ſeverall deaths, as they dyed without Iſſue, and that there is not here any croſſe Remainders of any of thoſe Houſes from the one ſon to the other, becauſe being a Deviſe to them ſeverally by an expreſs Limitation, there ſhall not be any greater Eſtate to them by Implication: and although the Eſtate be limited at the firſt to them and their Heirs, yet it is abbreviated and made an Eſtate ſeveral in them ſo their ſeveral Houſes, but none of them hath a Remainder in the Houſes of the other. Trin. 19 Jac. in B.R. in *Gilbert* and *Witty's* Caſe, *Cro.* 2. Part, 655, 656.

10. A. B. ſeiſed in Fee of a Meſſuage, having Iſſue 3. Daughters, E, F, and K. deviſed the ſame to his wife for life; and after her decreaſe, that his Executors ſhould receive the profits thereof, untill

till the full ſum of 900 l. was received for the preferment of his daughters in Marriage; and after the 900 l. levied, the ſaid Meſſuage ſhould remain to his right heirs males for ever: and if his heirs males ſhould diſturb his Executors in receiving the profits, that then their Eſtate ſhould ceaſe, and the Lands ſhould be divided amongſt the Daughters then living, and dyed; one W. B. was found his Heir male; his wife entred, and dyed; E. his eldeſt daughter after his deceaſe, married *Aſhenhurſt*, and had Iſſue, and *Curtis* the Plaintiff by a Leaſe made by W. B. the Heir male, brought an *Ejectione Firmæ* againſt *Aſhenhurſt*; in which all the ſpeciall matter above was found: And in this caſe, it was adjudged againſt the Plaintiff, Mich. 7 Jac. in B. R. *Curtis* and *Aſhenhurſts* Caſe, *Hob.* 34. See for the reaſon of this Caſe, Hill. 10 Jac. in C. B. *Cuaden* and *Clarks* Caſe, *Lib.* 1. tit. *Deviſes Hob.* 30. 31. 32, 33. fol 648. Sect. 35.

11. In an *Ejectione firmæ*, the Caſe was, M. S. ſeiſed in Fee, makes a Feoffment to the uſe of her ſelf for life, without Impeachment of Waſte, and after to the uſe of the Feoffees for 80 years, if N. S. and E. his Wife ſhould ſo long live; and if the ſaid E. ſurvive N. her husband, then to the uſe of the ſaid E. for life, without impeachment of Waſte, and after the deceaſe of the ſaid E. to the uſe of P. S. ſon of the ſaid N. and E. in Tail; and for want of ſuch Iſſue, to the uſe of J. N. and D. S. and F. S. and to the heirs of their bodies, the Remainder to the right heirs of M. S. the Feoffor; and there was a Clauſe in the Indenture, That the intent of the Eſtate for years to the Feoffees was, that the ſaid E. S. might have the profits, and not N. her husband, who was a prodigal: M. S. dyes, D. dyes without Iſſue, the Feoffees enter; E. S. dyes, N. yet alive, and P. S. dyes without Iſſue; J. N. and his Wife, and F. S. entred, and were poſſeſſed: The only Queſtion in this Caſe was, Whether the Remainder in Tail to P. S. and the Remainder in Tail to E. and F. were contingent, or executed. It was Reſolved by all the Court, That the Remainders were not contingent in the Eſtate for life, which was to come to E. S. the Wife of the ſaid N. S. but were veſted preſently. 2. It was Reſolved, That all the uſes limited to the perſons not in *eſſe*, were contingent; but the uſes to the perſons in *eſſe* veſted preſently, and yet theſe contingent uſes when they happen, veſt by Interpoſition, if the firſt Eſtate for life, which ought to ſupport them, be not diſturbed. Hill. 7. Jac. in B. R. Rot. 1148 *Napper* and *Saunders* Caſe. *Hutton*, 118, 119.

12. B. made a Feoffment in Fee, to the uſe of himſelf, for life, and after to the uſe of ſuch Iſſue or Iſſues of the body of M. from eldeſt to eldeſt, as were reputed to be begotten by the ſaid B. whether he be lawful or unlawful: In this Caſe, it was agreed by all the Juſtices but *Popham*, That it was a good Remainder limited to a Baſtard, for a ſon in reputation ſuffices to make him a Purchaſor, as it was holden, 14 Eliz. *Dyer*, 313. And although in 22 Eliz. *Dyer*, it is holden, That a man cannot by way of Covenant, raiſe an Uſe to his Baſtard, yet by way of Limitation of an uſe upon a Feoffment, it is otherwiſe: And although *Litt.* ſayes, That a Baſtard is *nullius filius*; yet without queſtion he had a Mother, and ſo ſhall be termed in Law the Iſſue of his Mother. If A. hath Iſſue three ſons, and the eldeſt is a Baſtard, and a Remainder is limitted to the eldeſt Iſſue of A. In that Caſe, the ſecond ſon who is *Mulier*, ſhall take the Remainder; for that in general words, the Conſtruction ſhall be *in digniori ſenſu*; but if the words be ſpecial, as in the Principal Caſe, it is otherwiſe; for that *Modus & Conventio vincunt Legem.* Mich. 31 Eliz. *Bladwill* and *Edwards* Caſe. *Noy* 35.

13. Upon a ſpecial Verdict returned upon an Extent; the Caſe was, There was Tenant for life, the Remainder in tail; he in the Remainder in tail made a Statute ſtaple, and afterwards granted away his Remainder, and after, the Tenant for life dyed, and the Grantee of the Remainder entred, and whether execution of this Land ſhall be ſued upon the Statute, was the Queſtion, for as much as the ſaid Land never was in Demeſne in the hands of the Conuſor: *Egerton* Lord Keeper ſaid, That before that time, there had been a difference taken between a Remainder, and a Reverſion depending upon an Eſtate for life; for to a Remainder are no ſervices due or incident, and for that cauſe it is termed Seck; but a Reverſion hath Services incident, and thoſe may be extended, and by conſequence, the Reverſion, when it cometh in poſſeſſion; But he ſaid, It was all one, for one may charge a Remainder when it happens, as well as a Reverſion. It was ſaid by others, That there was no Queſtion in this Caſe; for although there was ſome ſcruple made of it in 33 H. 6. yet the Caſe is without Queſtion; for if he in the Remainder makes a Leaſe for years, to begin at a day to come, yet if he grant over the Remainder, the Grantee ſhall hold that charged with the Leaſe. Hill. 43 Eliz. in B. R. *Goldesbr*, 119.

14. In *Ejectione firmæ*, upon a ſpecial Verdict, the Caſe was, M. *Kellway* ſeized of the Lands, made his Will in this manner; For the good Will I bear to the name of the *Kellwayes*, and the deſire my Lands may remain in the name of the *Kellwayes*, I give unto the heirs males of my body, all my

my Lands whatſoever; and for default of ſuch Iſſue, my Will is, to entail all my Lands to my Nephew H. K. and the heirs males of his body, and for want of ſuch Iſſue, to F. K. and the heirs males of his body, and ſo to W, C, and R. *Kellway*, and the heirs of their reſpective bodies; and for want of ſuch Iſſue, to the right heirs of the ſaid M. *Kellway*, until ſuch time as the ſaid *Hen. Kellway*, or any Iſſue male of his body ſhall effectually aſſent, conclude, do, or go about to do any act or acts, to alter, diſcontinue, or change this Eſtate, &c. and the &c. the ſame to go to T. *Kellway*, and the heirs males of his body, and ſo to the reſt, under the ſame Limitations and Proviſoes (*verbatim*) as before. M. K. dyed without Iſſue, H. K. entred, and had Iſſue R. and after, T. K. dyed, having Iſſue S. R. and S. levyed a Fine of the Lands; the Queſtion in the Caſe were, 1. Whether there were any other immediate Deviſe to them, then one after the other, by the firſt part of the Will. 2. Whether by the ſecond part of the Will it is but a Contingent to T. if H. do go about to alien: All the Juſtices conceived, That it was an immediate Deviſe by the firſt part, and not only contingent. 3. Queſtion was, Whether this kinde of perpetuity be allowable; and whether it was a Limitation annexed to the Eſtate of H. which abſolutely determined his Eſtate by his Aſſent to levie a Fine; ſo as the fine levyed after, ſhould be a diſcontinuance. It was Reſolved by all the Court, That it is a perpetuity, *Ergo*, condemned, and repugnant to the Law, and not allowable; for he may not determine an Eſtate tail by ſuch Limitation, nor can he give Title to another to enter, who is a ſtranger; for by the Fine there is a diſcontinuance of the Remainder, and a deveſting thereof, ſo as he cannot Enter: Alſo the Court held, That theſe were ambiguous words, to make the Limitation of an Inheritance by the determination thereof, and therefore void, and repugnant to the Law. Hill. 17 Jac. in P. R. *Fey* and *Hinds* Caſe. *Cro.* 2. Part, 697, 698. See *Cook* 6. Part, 40. Sir *Anthony Mildmays* Caſe. *Cook* 10. Part, 26. *Mary Purkingtons* Caſe acc.

Remitter.

Remitter; What it is: Where, and in what Caſe, and againſt what acts, the party ſhall be ſaid to be in his Remitter; and in what not: And other matters concerning Remitters.

1. REmitter is, when a man hath two Titles to Lands, Tenements, &c. and he cometh to the Land by the laſt Title; yet he ſhall be adjudged to be in the Lands or Tenements, by force of his ancient or elder elder Title; and that ſhall be ſaid to be to him a *Remitter*. As if Tenant in tail diſcontinueth the Eſtate tail, by making a Feoffment of the Land; and afterwards he entreth, and diſſeiſeth the Diſcontinuee of the ſame Lands, and then dyeth ſeiſed of the ſaid Lands, and the Lands deſcend to his Iſſue, or to the other Heir in tail, who is inheritable to the ſame Land by force of the entail; in ſuch caſe he is in his Remitter, and ſhall be ſeiſed by force of the firſt entail; and the title of the Diſcontinuee ſhall thereby be utterly defeated and annulled: And the Reaſon thereof is, For that ſuch an Heir is Tenant of the Land, and there is no perſon againſt whom he may ſue his Writ of Formedon for to recover the Eſtate tail; for he cannot have an Act on againſt himſelf. See *Cook* 1. Part, *Inſtitutes*, 346, 347. acc.

2. If Tenant in tail doth enfeoffe his Son and Heir apparent in the tail, who is within age, and after Tenant in tail dyeth; this is a Remitter to the Heir: but if he was of full age at the time of the Feoffment, then he is not remitted; for that it was his folly, that he being of full age, would take ſuch a Feoffment.

3. If the Husband alieneth the Land of which he is ſeiſed in the right of his Wife, and afterwards the Husband taketh back an Eſtate in the ſame Lands to him and his wife, for the Term of their Lives, this is a Remitter to the woman; for that the alienation, ſhall be ſaid to be the act of the Husband, and not the act of the Wife; and no folly ſhall be adjudged in the Wife, during the life of her Husband. But yet if ſuch alienation be by Fine in a Court of Record, then the taking back of the Lands to the Husband and Wife for the Term of their Lives, ſhall be no Remitter

to the Wife; because upon the levying of the Fine, the wife shall be examined by the Judge: and such examination of the Judge, of the woman, being in a Court of Record, shall bind the Wife for ever. And Note, That in each Case, when the Entry of one is lawful, and he or she taketh an Estate to him or her of the same Lands when they are of full age; If it be not by Deed Indented, or by matter of Record, which shall estopp him or her, in that case it shall be to him or her a good Remitter.

4. A Woman Tenant in general taile, had Issue a Daughter; and after she took another Husband, and by him had Issue another Daughter: Afterwards the Husband and Wife discontinued the Lands entailed, and took back an Estate in it to them, and to the Heirs of their two bodies begotten, and then they dyed, and the Land discended to the younger Daughter: It was adjudged in that case, That the eldest Daughter was not remitted: for although she had a right which discended unto her, yet no possession discended to her, and therefore she could not be remitted; and one cannot be remitted, where only there is a Title of Entry, 19 H. 6. 39. tit. *Entry Congeable.* 3. *Br.* title, *Remitter*, 12. See *Plow. Com.* 246. acc.

5. A man seised of Lands in the right of his Wife, before the Statute of 27 H. 8. of *uses*, made a Feoffment thereof to his use, and declared his Will, That his Feoffees should stand seised to the use of his wife for the Term of her life, after the Statute of 27 H. 8. was made; which is, That *Cestuy que use*, shall be in possession of such estate as they had in the Use. It was a Question, If the woman was in her Remitter? It was said, That she should be remitted, because she came not to the Land by her own act, but by an act of Law, as if a Remainder had fallen upon her, and there was none against whom she could bring her *Cui in vita*. But the Opinion of the Justices was, That because of the Act of Parliament, to which every one is a party, she should be adjudged in of such Estate as she had by the Statute; which annexed the possession to the Use: and that was but an Estate for life, and therefore she should not be remitted, Mich. 28 H. 8. *Dyer*, 23.

6. If Tenant in tail after the Statute of 27 H. 8. of *uses*, maketh a Feoffment to the use of his Issue being within age, and his Heirs, and dyeth, and the right discends to the Issue within age; in that case he is not remitted, because that the Statute executes the possession according to the Statute: But if the Issue in tail waiveth the possession, and bringeth a *Formedon* against the Feoffees, and recovers, he shall be recovered; and in such case, if no Formedon be brought, If the Issue dyeth, his Issue shall be remitted, because a Fee-simple discended to that Issue. *Cook* 1 Part, *Institutes*, 348.

7. Tenant in tail sustereth a Common Recovery with Voucher, and dyeth before execution had, and the Issue in tail entreth; the Recoveror may enter upon the Issue, and the Issue is not remitted, because of the recompence in value, *Cook* 1. Part, *Sheffy's* Case. *Cook* 10 Part, 38. in *Portington's* Case: And see *Cook* 3. Part, in the Marquesse of *Winchesters* Case, That if Tenant in tail sustereth a Common Recovery, and afterwards disseiseth the Recoveror, and dyeth, the Issue in tail is not remitted; for that the Estate tail was bound by the Judgment to have in value; although in truth no recompence can be had. See, If there be Tenant in tail, and a Stranger bringeth a *Precipe quod reddat* against him, and he voucheth to Warranty, and the Demandant by default of the Vouchee, or by the Confession of the Tenant, recovereth against the Tenant in tail, and recover in value against the Voucher, and before Execution, the Tenant in tail dyeth, and the Land discends to his Issue; yet in that case, the Demandant may enter or sue Execution against the Issue: for that in such case, the Issue shall not be remitted; nor shall he falsifie the Recovery, because he may have Assets. See *Plow. Com. alt.* in *Marcells* Case, Trin. 29 H. 8. *Dyer*, 35. acc.

8. Husband and Wife, Tenants in tail, had Issue two sons; the Husband dyed, the Wife made a Feoffment to divers persons to the use of the wife, without impeachment of Waste; and after her decease, to the use of the Heirs of her late husband, upon her body lawfully begotten; and for want of such Issue, the Remainder to J. S. in Fee. After the Statute of 27 H. 8. of Uses made, The wife with her second husband, and the younger son levied a Fine *sur Conusans de Droit come ceo*, with Warranty of the Wife, and her Heirs to a Stranger, who rendred back the Land to the younger son for 61. years, and granted the Reversion and Rent to the wife by the same Fine, and to the heirs of her body, and of the body of he body lawfully begotten; the remainder to J. S; upon whom the eldest son of the wife by her first husband entred: the wife dyed, the younger son claymed the Rent: It was adjudged against the younger son, That he had no title to it: and the reason seemed to be, for that the eldest son by his Entry was remitted; or, at the least, by his Entry for the forfeiture, all other Estates were avoided, Hill. 2 Mar. *Dyer*, 111. *Cowarn's* Case.

9. In an Aſſiſe, the Caſe was, Tenant in generall Tail, before the Statute of 27 H. 8. enfeoffed divers perſons in Fee, to the uſe of himſelf for life; and after his deceaſe, to the uſe of W. his Heir apparant, and the heirs males of his body begotten; and for want of ſuch Iſſue, the Remainder to the Plaintiff in the Aſſiſe in tail, with divers Remainders over, the remainder to the right Heirs of the Feoffor; the Feoffor dyed before the Statute was made; W. entred, and was ſeiſed, and had Iſſue a Daughter, and dyed without Iſſue male: The Queſtion was, If the Plaintiff in the Aſſiſe, Tenant in tail in remainder, might enter, or not? And that depended upon this, Whether W. who was inheritable to the old entail, and in remainder of the new entail, and was in poſſeſſion, was remitted, or not? It was the Opinion of the Juſtices, That he was not remitted; and therefore the Plaintiff in the Aſſiſe being in the Remainder, had Judgment to recover the Land, Mich. 6 E. 6. *Dyer*, 77. *Ryvers* Caſe.

10. Tenant in genetal tail, having Iſſue two ſons, the eldeſt had Iſſue a Daughter, and dyed, his Wife of Child with a ſon; The Father ſuffered a Common Recovery to the uſe of himſelf for life; the Remainder to the Recoverors for 24. years; the remainder to the heirs males of his body: The Recovery was had, returnable Oct. Mich. viz. 9. October, upon that day in the morning; Tenant in tail dyed, and after, a Son was born; and, If the Uncle, or the Son new born, or the Daughter, ſhould have the Land, was the Queſtion? It was Reſolved by the Juſtices, That the Iſſue male of the body ſhould have it; for if it be by purchaſe becauſe of the mean Eſtate for years, the Uncle may not have it: For it behoves as well to be heir, as well as male, who ſhall take; and the Daughter of the eldeſt Son is Heir: but it ſeems it ſhall be to her by diſcent, till the ſon born. And all the Juſtices held, That the Recovery was well executed againſt the Iſſue in tail, becauſe of the recompence in value. Mich. 23 Eliz. *Dyer*, 374. Sir *Coke* 1. Part, *Shelly's* Caſe, acc.

11. In Treſpaſs, the Caſe was; Sir *John Mounſon* had an Eſtate for years in Lands, the remainder to *Tho. Mounſon*, his ſon and Heir apparant in tail, with divers remainders over. Sir *John* the Leſſee for years, made a Feoffment to divers, and a Letter of Attorney to others, with Commiſſion to enter into the Lands, and to ſeal the Deed of Feoffment, and to deliver it in his name to the uſe of the ſaid *Tho.* and his Heirs, and another by a Commandment or Letter of Attorney of the ſaid *Tho.* entred in his name; In this Caſe, the Court was of Opinion, That it was a good Feoffment, notwithſtanding that both the Leſſee and the Attorney were diſſeiſors: for it is good between the Feoffer and the Feoffee: For they ſaid, By the Feoffment, to the uſe of him in the Remainder, and his Heirs, if he in the Remainder enter, that he is remitted, and the Eſtate for years is gone implicitively: And the Court ſaid, That in all Caſes where the Freehold cometh to the Term, there the Term is extinguiſhed: And therefore, If one Mortgageth his Reverſion unto the Leſſee for years, and after performs the Condition, yet the Leaſe for years is utterly extinguiſhed. Trin. 30 Eliz. in C. B. *Mounſon* and *Wells* Caſe, *Goldſbr.* 92, 93.

12. Dower by Sir *John Shirley*, and *D.* his Wife, late the Wife of Sir *Henry Bowyer*, againſt *B. Wood*, of Lands *ex donatione* of the ſaid *Bowyer* her late husband. The Defendant pleaded, That the ſaid Sir *Hen. B.* being ſeiſed of the Manor of W, did make a Feoffment thereof to the uſe of himſelf, and the ſaid *D.* his then wife, for the Term of their Lives, for the Joynture of the ſaid Wife, the Remainder to one B, and dyed. The Demandant Replyed, That before the ſaid Feoffment made, The ſaid Sir *Hen. B.* being ſeiſed of the ſaid Manor, did Covenant to ſtand ſeiſed thereof, to the uſe of himſelf in tail, the remainder to his ſaid Wife for the Term of life, the remainder to J. S. in tail; and afterwards made the Feoffment *pront*, and then dyed without Iſſue; and that ſhe entred, and was ſeiſed by force of a *Remitter*. Whereunto the Tenant rejoyned, That ſhe held her Dower, in claiming her Eſtate by the Feoffment in Joynture; and demanded Judgment, Whether againſt that Claim ſhe could be remitted? Upon which Plea, the Demandant Demurred. It was the Opinion of the Court in this Caſe, That the Tenants Plea was inſufficient. For firſt, it was holden, That the *Remitter* to a Woman could not work, till her Husband was dead without Iſſue; becauſe till then, the poſſeſſion and right did not meet together in her. Alſo, It was holden, That becauſe both Eſtates were made unto her during Coverture, that therefore regularly upon the death of her Husband, ſhe might claim which Eſtate ſhe would. But *Hobart*, Chief Juſtice, ſaid, That although that was true; yet in that Caſe, becauſe J. S. was in the Remainder by the firſt Conveyance, and not by the ſecond; therefore it would be a prejudice to him in the Remainder (which roſe with the firſt Eſtate) if the Law ſhould not adjudge her in her *Remitter* at the firſt *Volens Nolens*. And ſo he ſaid, It was adjudged, 41 E. 3. 17. in *John S.* yet Caſe: And he ſaid, That the Plea of Joynture was utterly avoided by the neceſſity of the Remitter, which was wrought by the Law. Hill. 10 Jac. in C. B. rott. 3803: Sir *John Shirley* and *Woods* Caſe, *Hob.* 71. See *Cro.* 2. Part, 488, 489, the ſame Caſe.

13. G. M. and A. his wife ſeiſed of Lands in Fee in the right of the Wife, 43 Eliz. levied a Fine thereof to the uſe of them, and the Heirs of their two bodies, the remainder to B. for life; the remainder to F. in tail, the remainder to A. in Fee; and they find, that they being in actuall poſſeſſion of the premiſſes; G. alone, 44 Eliz. levied another Fine of the ſame Lands, to the uſe of the ſaid G. and his wife in ſpecial tail as before, the remainder to G. himſelf in tail, the remainder to the ſaid G. and D. in Fee: They find, That G. and his Wife ſo ſeiſed, and in actual poſſeſſion: A. 14. Novemb. 44 Eliz. dyed, without Iſſue; and that J. N. is her Heir: G. continued his poſſeſſion: and 1. Feb. 45 Eliz. for money bargained and ſold the Lands to H. and S. and their Heirs: and they find, That afterwards 23 Febr. 45 Eliz. a Writ of Entry was brought againſt H. and S. being Tenants of the Freehold, upon which a Recovery was had, with Warranty: Which Recovery was to the uſe of G. and his heirs; and then they find, That G. and D. have of the Recoverors, made a Leaſe for 21. years to one L; which Leaſe came to W. the Defendant; and then G. *dyed*, and that then B. entred upon W. and made the Leaſe to the Plaintiff, upon whom the Defendant entred. In this Caſe, there were theſe Points, (amongſt other) 1. Whether the Wife be remitted upon the ſecond Fine to her firſt entail? And whether that Remitter extended to B. and the other old Remainders: And for that it was holden, That A. and G. her husband too, was remitted to the firſt entail; and that the ſaid *Remitter* did extend to them in the Remainders, as long as the *Remitter* ſtood. The ſecond Point was, Whether the *Remitter* failed, and when? And for that it was holden, That the *Remitter* failed as A. the Wife dyed; and that the old Remainders were turned into rights. The third Point, Since the Remitter ceaſed by the death of A. the Wife, and the Remainder of B. and others were put to a Right, how, they might Relieve themſelves after the death of G. the husband without Iſſue: For that payment it was holden, That the Land returned again into the Eſtate paſſed by the ſecond Fine, which continued during the life of G. the Husband, and was to continue as long as there was Iſſue, if there had been any; for till then, they in the Remainder had no title to demand the Land: But when G. the husband dyed without Iſſue, then came the Remainder to be demandable; and then B. in the Remainder did enter upon W; the Defendant claiming under the Husband, and made the Leaſe to the Plaintiff: which Leaſe, the Court held to be good, Trin. 15 Jac. in C. B. *Dancomb* and Wingfields Caſe, *Hob.* 255, 256, to 263.

14. In an *Ejectione Firmæ*, the Caſe upon a Special Verdict found, was; Land was given to a man and his Wife, and to the Heirs of the body of the Husband; and for want of ſuch Iſſue, the remainder to the right Heirs of the Husband: the Husband made a Feoffment in Fee with Warranty, and took back an Eſtate to him and his Wife for their Lives, the Remainder to A. and B. his two daughters, and to their Heirs: the Husband dyed, having Iſſue 4. Daughters; the Wife entred, and dyed: The Queſtion was, Whether by this Feoffment there was a Diſcontinuance wrought, or not; and then, Whether the Entry of the Wife, after the death of her Husband, ſhould ſo far operate, as to make a *Remitter* unto the Eſtate tail. And, 3. If there be no Diſcontinuance, but there be a Remitter; if the Warranty be gone: It was Objected ſtrongly, That by the Feoffment there was no Diſcontinuance wrought: For that here the Husband and Wife are Joynt-Tenants for life, with an Eſtate tail expectant; and none can diſcontinue the tail, if he were not ſeiſed of the tail; and here the husband was not ſeiſed of the tail at the time of the Feoffment: but the Husband and Wife were Joynt-Tenants for life, and ſo there was no Diſcontinuance by the Feoffment at the preſent: And then as to the Re-purchaſe of the Eſtate, Whether this ſhall make any Remitter? The Court was clear of Opinion, That here was a Diſcontinuance: and as to the Remitter, the Court held, That there could be no Remitter before an Entry. And although it was Objected ſtrongly, That he that made the Feoffment, was never out of poſſeſſion of the Land, and ſo this muſt be a Remitter: Yet the Court was of Opinion, That becauſe the husband and wife both did not enter, there could be no *Remitter*: But the Court held, That by the Livery, the husband was out of poſſeſſion. Trin. 9 Jac. in B. R. *Horewood* and *Holmans* Caſe, *Bulſtr.* 2. Part, 29, 30, 31.

15. Husband and Wife ſeiſed of a Tenement in *London*, to them and the Heirs of the Husband, ſuffered a Recovery in a Writ of Right in *London*, which by the Cuſtome binds as a Fine at Common-Law, which was to the uſe of the Recoverors, untill they had made a Leaſe for 40. years, and after to the uſe of the Husband and Wife, and the Heirs of the Wife; the Leaſe was made, the Husband dyed: And if this Leaſe was determinable upon the Limitation of the uſe to the Recoverors, untill they had made the Leaſe; and by the Limitation of the Uſes, the Leaſe was deſtroyed; was the Queſtion? It was the Opinion of the Juſtices, That the Leaſe was good, and not defeaſable by the Wife, who ſurvived her husband:

For her Ancient and former Right was gone by the Recovery, and then the Limitation of the Uſe after the Leaſe made, created a new Eſtate in the husband and Wife, and they claimed under the Recovery and Leaſe; and therefore it was adjudged, That they ought to hold the Land charged with the Leaſe, Trin. 2 Eliz. *Dyer*, 190.

16. Land was given to Husband and Wife in ſpecial tail, the Remainder to the right Heirs of the Husband in Fee; they had Iſſue: the Husband alone levied a Fine with Proclamation to his own uſe; and after, the Husband by Will Deviſed the Land to his Wife for life, the Remainder over to a ſtranger in Fee, the Husband dyed, the Wife entred, claiming only an Eſtate for term of her life, and after dyed: and if the Iſſue in tail, or the Deviſee in the Remainder ſhould have the Land, was the Queſtion? It was the Opinion of the Court, That the Iſſue in tail was barred; partly, becauſe his Mother had waived the Eſtate tail; and her Remitter: And ſecondly, by the Fine, which had barred his conveyance to the Land, and to the entail, Trin. 18 Eliz. *Dyer*, 351.

17. Tenant in tail before the Statute of 27 H. 8. of Uſes, and a Feoffment in Fee to the uſe of himſelf and his Heirs; and before the Act, he and his Feoffees made a Leaſe for years rendring Rent, and dyed after the Statute, and the Land diſcended to his Iſſue, who before Entry by the Termor, levied a Fine to another. It was the Opinion of the Juſtices, That the Alience ſhould not avoid it, for although the Son was remitted, yet the Leaſe was not meerly void, without an actual Entry by the Iſſue. See *Plow. Com. Smith* and *Stapleton's* Caſe, 33 H. 8. *Dyer*, 51. acc.

18. A. Tenant in tail of the Mannor of D, took to husband R. T; who, 29 H 8. made a Feoffment to certain perſons, to the uſe of himſelf and his wife for their Lives, and the longeſt Heir of them; and after their deceaſe, to the uſe of J. T. their Son and Heir for life; and after their deceaſe, to the uſe of R. T, ſon and heir of the ſaid J. T. and K, and the Heirs males of the body of the ſaid R; and for want of ſuch Iſſue, to divers other Uſes: By virtue of which Feoffment, it was found, That R. and A. were ſeiſed in tail in the right of A; *ſcil.* the ſaid A. in her Remitter; and that afterwards in the time of E. 6, they made a Leaſe of the Lands for 21. years, according to the Statute of 32 H. 8; which Leaſe came to the hands of T. T, Executor of the Leſſee: It was found, That J. was dead; and that R. had Iſſue *Roger*, and alſo dyed: A. dyed, *Roger* dyed; and found, that *Roger* the ſon of *Roger* was within age, and that the Lands were holden by Knight-Service. After a long Argument, it was Reſolved in this Caſe, That the Remainder to K. the Wife of J. T. was good: and that R. was not remitted, becauſe the Statute gave the poſſeſſion to them in ſuch frame as they had the uſe; And although the Office found, That A. was remitted, that was not material; for that the Jury was not to determine of the *Remitter*, which was a matter of Law, Mich. 1 & 2 Mar. *Dyer*, in the Court of Wards, *Tonaſend* and *St. bills* Caſe, *Plow. Com.* 111. to 115.

19. Leſſee for Life, made a Leaſe for 30 years; and after, the Leſſor and Leſſee for life made a Leaſe for 60 years unto another; which Leaſe for 60. years, the Leſſor firſt confirmed: and after, the Leſſor confirmed the Leaſe for 30 years; and after, the Tenant for life dyed within the 30 years: In this Caſe, It was holden, That the Leaſe for 30. years was determined by the death of the Tenant for life, and the Leſſee for 30. years might enter; for although that the Leaſe for 60. years was the later in time; yet was it of greater force in Law, becauſe the Leſſor who had power which of them he would, did firſt confirm the ſecond Leaſe. *Temp.* Eliz. *Haswell* and *Lodgers* Caſe, *Cook* 1. Part, *Inſtitutes*, 296. Which Caſe ſeems to be contrary to the Rules of *Remitter*; where the reaſon of *Remitter* is, That his *primer eſtate, eſt le melior eſtate*; and alſo againſt the Rule, *Quod prius eſt tempore, potius eſt jure.*

20. If a Feme Sole ſeiſed of Lands in Fee, taketh Husband; and the Husband alieneth the Lands in Fee; and the Alienee letts the Lands to the Husband and Wife for life, ſaving the Reverſion to the Leſſor and his Heirs: In this caſe, the Wife is remitted, and is ſeiſed of the Lands in her Demeſne as of Fee, becauſe the taking back of the Eſtate, ſhall be adjudged in Law the Act of the Husband, and not of the Wife, ſo as no folly can be adjudged in the Wife, who was *Covert* at the making of the Leaſe. And in that caſe, the Leſſee hath nothing in the Reverſion, by reaſon of the *Remitter* of the Wife: And if the Leſſor in ſuch caſe ſhould bring Waſte againſt the Husband, for Waſte done by him; although the Husband cannot barr the Leſſor, by ſhewing the Remitter of the Wife: yet in ſuch caſe, If the Husband at the Grand diſtreſs make default, and the Wife be received, ſhe may ſhew the Whole matter, how that ſhe is in her Remitter, and ſo barr the Leſſor of his Action or Waſte. See *Litt. 666. Cook* 1 Part, *Inſtitutes*, 351. acc.

21. Lands are given to Husband and Wife, and to the Heirs of their two bodies, afterwards the Husband allieneth the Lands in Fee, and taketh back an Eſtate to himſelf for life: In this Caſe, the

Husband

Husband ſhall not be remitted againſt his own Act, viz. his Alienation: But if he take back an Eſtate to himſelf and his Wife for their lives, although they be but one perſon in Law, and there be no moyties betwixt them, yet becauſe the Wife cannot be remitted in this caſe without her husband, unleſs the husband be remitted alſo: In that Caſe, in Judgment of Law, both Husband and Wife ſhall be remitted againſt the Husbands one Alienation. *Cook* 1. Part *Inſtitutes*, 354.

22. If Lands be given to Husband and Wife in Tail, or in Fee, and the Husband dyeth, the Wife cannot deveſt the Freehold out of her by any verball waiver or diſagreement, as if before Entry made by her, ſhe ſaith, ſhe waiveth, and diſagreeth to ſuch Eſtate, and will never take or accept thereof; yet the Freehold doth ſtill remain in her, and ſhe may enter when ſhe pleaſeth; and therefore if ſhe entreth into the Lands, and taketh the profits, although ſhe ſaith nothing, ſhe is in her Remitter to the Eſtate, if ſhe be ouſted of it. *Cook* 3. Part, 26. in *Butler* and *Bakers* Caſe.

23. In Dower, the Caſe was, That Lands were given to the Father for life, the Reverſion to his ſon and heir for life; the father and the ſon joyned in a Feoffment to the Uncle in Fee, *ſcil.* to the brother of the Father; the Uncle took a Wife, the father dyed, the ſon being his heir in tail, the Uncle dyed without Iſſue, ſo as the Land deſcended to the ſon, as heir to the Uncle, againſt whom the Wife of the Uncle brought Dower. It was moved, If the ſon being heir in tail to his father, and heir alſo to his Uncle for the Fee diſcended, ſhould be remitted, for then no Dower accrueth to the Wife of the Uncle, for that the Eſtate of which ſhe demandeth Dower, is gone: But if the Livery in which the ſon joyned with his father, be the Livery of the ſon, the Livery in his, was an impediment to the Remitter, ſo as during his life, he ſhall be adjudged ſeized of the Lands in Fee by diſcent from the Uncle, and then Dower lyeth, for that the ſame Eſtate is Intereſted, of which the Wife demandeth Dower: The Court doubted of the Caſe, and if it was the Livery of the ſon or not; wherefore it was adjourned to be adviſed upon. Mich. 29 Eliz. in C. B. *Partridge* and *Partridges* Caſe. *Leon.* 37.

24. In *Ejectione firmæ*, the Caſe was: A. and B. his Wife being joyntly ſeized by purchaſe, during the Coverture for their lives, the Remainder to W. their ſon in Tail, the Remainder to the right heirs of A; A. by Deed, with a Letter of Attorney, enfeoffed the ſaid W. and his Wife, and the heirs of the body of the ſaid W. the Remainder to the right heirs of A. with Warranty againſt all men, and after levies a Fine to two ſtrangers of the ſame Land, to them and their heirs, with Warranty againſt all perſons, and they render back the Land to him for a week, the Remainder to the ſaid W. and his Wife, and to the heirs of the body of W. the Remainder to the right heirs of A; A. dyes, B. his Wife enters, and dyes; W. the eldeſt ſon enters, W. and his Wife re-enters: In this Caſe, the Queſtion was, Whether this Warranty made by A. upon the Feoffment, being a Collateral Warranty, and deſcending upon W. the eldeſt ſon, were totally avoided by the entry of B; and alſo, if the Remitter to the Wife B. be a Remitter to W. in the Remainder, and ſo the Warranty diſcharged: It was the Opinion of the Court in this Caſe, That it was ſo; for the Warranty being diſcended and attached before the entry of B. the Wife, although ſhe was not bound by the Warranty, yet he in the Remainder being bound, that eſtops the Remitter, as to him. It was adjudged for the Plaintiff. Mich. 4 Car. in B. R. *Kendall* and *Foxes* Caſe. *Cro.* 1 Part, 103.

25. Tenant in Tail made a Feoffment to the uſe of himſelf in Fee, and afterwards he deviſed the ſame Land to his Wife in Fee, and dyed: In this Caſe it was holden, That the ſon was not Remitted, although that the Father dyed ſeized; for that the Deviſee took away the Diſcent. See 5 Eliz. *Dyer*, 221. *Biſhops* Caſe. *Cook* 1. Part, *Inſtit. Pl.* 624. acc See 4 Mar. Br. Deviſe 52. Pl. 482.

26. The youngeſt brother diſſeiſeth the eldeſt brother, who was barred in an Aſſize by falſe oath; the youngeſt brother charged the Land, and dyed without Iſſue, and the Land diſcended to the eldeſt. It was the Opinion of the Juſtices, That he was without remedy to avoid the charge; becauſe he ſhall not be remitted againſt the Record, and there was not any againſt whom he might bring an Attaint. Mich. 25 H. 8. *Dyer* 5.

27. It is taken for a Rule in Law, That a man ſhall not be remitted to a Right remedileſs, for which he can have no Action, for *Litt.* ſaith, That the Principal cauſe of a Remitter, is, when the Iſſue hath no perſon but himſelf againſt whom he may bring his Action; by which it appeareth, that he hath juſt cauſe of Action; for neither an Action without a Right, nor a Right without an Action, can make a Remitter: As if Tenant in Tail ſuffer a common Recovery, in which there is Error, and afterwards the Tenant in Tail diſſeiſeth the Recoveror, and dyeth; in that Caſe, the Iſſue hath an Action, viz. a Writ of Error; but yet ſo long as the Recovery remaineth in force, he hath no Right; and therefore in that Caſe, he cannot be remitted. So if B. purchaſeth an Advowſon, and ſuffereth an Uſurpation, and ſix moneths paſs, and

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the Uſurper granteth the Advowſon to B. and his heirs, and B. dyeth, his heir is not remitted, becauſe his right to the Advowſon was remedileſs. *Cook* 1. Part, *Inſtitutes*, 349.

28. Tenant in tail maketh a Feoffment in Fee with Warranty, and afterwards Diſſeiſeth the Diſcontinuee, and dyeth ſeiſed, leaving Aſſets to his Iſſue. In this Caſe, ſome hold, That in reſpect of this ſuſpended Warranty and Aſſets, that the Iſſue in tail ſhall not be remitted, but that the Diſcontinuee ſhall recover againſt the Iſſue in tail, and he ſhall take advantage of his Warranty if he hath any. See *Cook* 1. Part, in *Shellyes* Caſe, acc. And after in a Formedon brought by the Iſſue, the Diſcontinuee ſhall bar him in reſpect of the Warranty and Aſſets; and ſo every mans right is ſaved. *Cook* 1. Part, *Inſtitutes* 390. acc.

29. If the Husband doth Diſcontinue the Lands of the Wife, and the Diſcontinuee doth Demiſe back again the ſame Land to the Wife for her life. In this Caſe, Whether the Husband agreeth, or doth diſagree to the Livery, yet it is a Remitter to the Wife; and the reaſon thereof is, for that the Law having once reſtored her ancient and better right, will not ſuffer the diſagreement of the Husband to deveſt it out of her, and ſo to revive the Diſcontinuance, becauſe Remitters tending to the advancement of ancient rights are much favoured in Law. And ſo if Lands be given to a man and his Heirs Females of his body, and he maketh a Feoffment in Fee, and taketh back an Eſtate to him and his Heirs, and dyeth, having iſſue a daughter, and leaveth his Wife great with child of a Son. In this Caſe, the Daughter is remitted; and although the Son be afterwards born, he ſhall not deveſt the Remitter. See 9 H. 7. *Cook* 1. Part, in *Shellyes* Caſe, acc. *Cook* 1. Part, *Inſtitutes* 356. acc.

30. In a *Monſtrans de droit*, the Caſe was. In 17 E. 2. *John de Malo lacu*, gave to *Peter de Malo lacu*, and the Heirs of his body, the Caſtle and Manor of *Mulgrave*, which afterwards came to Sir *Ralph Bigod*. Sir *Ralph* 6 *Hen.* 8. made a Feoffment to W. and others, to the uſe of his laſt Will, and dyed. The right of the Lands, together with the entail, and the uſe diſcended to Sir *Francis Bigod*. 21 H. 8. Sir *Francis* made a Feoffment to J. S. and others, to the uſe of him and *Katharine* his Wife, and the Heirs of their two bodies, and had Iſſue *Ralph Bigod*, and *Dorothy*. 26 H. 8. the Statute of Forfeiture for Treaſon was made. 29 H. 8. Sir *Francis* was Attainted of Treaſon and Executed, and *Katharine* ſurvived him. 31 H. 8. a ſpecial act was made for his Attainder and forfeiture. 6 Eliz. *Ralph Bigod* Son of Sir *Francis* and *Katharine* were reſtored in bloud by Parliament, and dyed without Iſſue; *Dorothy* married *Roger Ratcliff*, and they had Iſſue *Francis Ratcliff*. 8 Eliz. *Katharine* dyed, *Francis* entred. 33 Eliz. all this was found by Office. 34 Eliz. *Francis Ratcliff* dyed, having Iſſue *Roger Ratcliff*. 34 Eliz. the Queen granted the Caſtle and Manor of *Mulgrave* to *Edmund* Earl of *Sheffeild*, and the Heirs Males of his body. *Roger Ratcliff* brought his *Monſtrans de droit*, and had Judgment. Whereupon Error was brought in the Exchequer Chamber. There were many Queſtions in the Caſe, two were, Whether *Francis Bigod* who had an Eſtate in ſpecial tail, had alſo a right of the old entail in him at the time of his Attainder: Or whether it was in abeyance in reſpect of the Feoffment made by him 21 H 8. It was the Opinion of the Court, That the Feoffment gives away all the Eſtate the Tenant in tail the Feoffor had concerning himſelf, or any benefit he might receive thereby, but as concerning his Iſſue inheritable to that entail, and to him in the Reverſion, and for their good, there remained ſtill in him a right of the ſaid entail by the Statute of *Weſt.* 2. for the good of thoſe that are ſaved by the Statute, but whether it were in the Feoffor himſelf ſleeping, till there be an Heir of the intail, or an Abeyance, was the Queſtion. 2. It was Reſolved, That this old right of the entail was forfeited to the Crown by the Statute of 26 H 8. for that there was an actual Eſtate tail in the perſon Attainted at the time of the Attainder. 3. It was Reſolved, That their Rights were bound by the expreſs words of the Statute, there being no ſaving therein for them. 4. It was much ſtood upon, if the Iſſue in tail was in this Caſe Remitted. But if there was a Remitter in the Caſe, It was Reſolved, That when the Office was found of all this ſpecial matter, that the Iſſue was barred notwithſtanding that there was a Remitter in the Caſe. And afterwards Judgment was given for the King and the Earl of *Mulgrave* the Lord *Sheffeild*. that the former Judgment given in the Caſe ſhould be reverſed: And it was reverſed accordingly. Mich. 13 Jac. in the Exchequer Chamber; the Lord *Sheffeild's* and *Ratcliffs* Caſe. *Hob.* 334. See *Godbolt.* 314. the ſame Caſe.

31. Note, Upon an Evidence given to the Jury, It was ſaid by the Court, That if Tenant in Tail, the Remainder in Fee, diſcontinueth the Land, and takes back an Eſtate in Fee, and afterwards deviſeth it to his Wife for life, the Remainder to B. for years, the Remainder in Fee to him who had the Remainder before, and then dyes without Iſſue, and the Wife enters, and dyes; that he in the Remainder may enter, for that he is remitted, and ſo he may enter upon the Deviſee

for years, and avoid the Leaſe, although that his Remainder was created by the ſame Will. See 9 H. 6. 43. Remitter avoids a Leaſe for years without Entry. See 45 Eliz. in B. R. *Rook* and *Spra's* Caſe, *Nº* 48.

32. If the father enfeoffeth his ſon and heir apparent within age, and then dyeth, his heir may cauſe to be in either by diſcent, or by the Feoffment, 2 *E.* 1. Title *Remitter*, 13. But if the father and ſon purchaſe Lands joyntly for life, and to the heirs of the Father; although in that Caſe, that the Fee doth diſcend, yet becauſe the frank Tenement was in him in joynture with his father, in that caſe he was ouſted of his age; 5 E. 3. *Age* 61. 4 E. 3. *Age* 59. acc.

33. Tenant in Tail makes a Leaſe to his ſon for life, within age, and at full age releaſeth to him in Fee; In that Caſe it was holden, That he ſhould be remitted, becauſe the Freehold which was given within age, was the ſubſtance: *Quære* of it; becauſe it ſeems the Eſtate for life is extinct; and therefore, If the father Leaſeth the Land to the ſon for life, and after the Reverſion diſcends to him, *Quære* in that Caſe, If he ſhall be remitted? If Tenant in Tail doth diſcontinue the Eſtate tail, and the Diſcontinuee doth enfeoff the heir at full age; It was conceived that he was not remitted, for that folly ſhall be adjudged in him, although he had the preſent right during the life of his father; and ſo it ſeems, If the ſon during the life of his father taketh the Diſcontinuee to wife: But if the Diſſeiſor of Tenant in Tail enfeoffeth the heir of full age, now he is remitted, becauſe his Entry was lawful. See 21 E. 4. 47. 40 E. 3. 43. acc.

34. If Tenant in Tail makes a Feoffment, and takes back an Eſtate in Fee, and then allieneth upon condition, and dyeth, his ſon and heir within age, enters for the Condition broken. It was the better Opinion in 8 H. 7. 7. That becauſe the ſon was within age, that he ſhould be remitted: But ſee 9 H. 7. 8. by *Keble* and *Read*, That if Tenant in Tail enfeoffeth his brother, and dyeth, and a Recovery is had by default againſt the Uncle, and he dyeth, the Iſſue in Tail brings Deſcent within age, as heir to the Uncle, and recovers, he ſhall not now be remitted, becauſe he ſhall be taken as heir of full age, and ſhall be concluded by the Recovery, which is matter of Record.

35. Note by *Litt.* 147. That if Tenant in tail enfeoffeth his Son in Fee, which Son inheritable to the tail, at the time of the Feoffment, is within age; and afterwards Tenant in tail dyeth, and he to whom the Feoffment is made is his Heir in tail, the ſame is a Remitter to the Heir in tail. For although that during the life of Tenant in tail, who made the Feoffment, ſuch an Heir ſhall be adjudged in by force of the Feoffment; yet after the death of the Tenant in tail, he ſhall be adjudged in by force of the tail. And although ſuch Heir was of full age at the time of the death of the Tenant in tail who made the Feoffment, the ſame is not material if he were within age at the time of the Feoffment; and if ſuch an Heir within age at the time of the Feoffment, entreth of full age, living Tenant in tail, and being of full age, he chargeth the Land with a Rent charge, and after Tenant in tail dyeth, the Land is diſcharged of the Rent, becauſe the Heir is remitted, and is in of another Eſtate in the Land, then he was at the time of the Rent charge granted. *Litt.* 147.

36. Grandfather, Father, and Son; the Father Diſſeiſed the Grandfather, and dyed ſeiſed, the Son endowed the Wife of the Father, and then the Grandfather dyed. It was conceived in that Caſe, That the ſon might put out the Tenant in Dower, becauſe he had a new Right deſcended to him from the Grandfather: and that the entry of the Son was lawfull upon the Tenant in Dower. But it was holden, That if the Son had charged the Land, and then the Grandfather had dyed, that the Son ſhould hold the Land charged, and ſhould not be remitted, becauſe the entry was not lawfull upon him, and when the right of the Grandfather diſcendeth, he ſhall not be remitted. But if there be Great Grandfather, Grandfather, Father, and Son, and the Grandfather diſſeiſeth the Great Grandfather and dyeth, and the Father dyeth, and the Son endows the Wife of the Father, and the Grandfather dyeth. It was holden, That in that Caſe, the Son could not ouſt the Tenant in Dower, for the Grandfather himſelf could not do it, and no more can his Heir. And it was ſaid, That if the Son Diſſeiſeth the Father, and chargeth the Land, and then the Father dyeth, that the Lands ſhould be charged for ever. But if the Son had bin firſt dead, there it had bin otherwiſe; for that the Son ſhall hold the Land diſcharged, becauſe he ſhall be remitted. Note, That the reaſon in the Principal why the Son ſhould put out the Tenant in Dower, was, becauſe that the Law did compell him to aſſign Dower; and then when he hath done a thing to which he is compelled by the Law. The clauſe of compulſion being removed, he ſhall avoid that which himſelf had done. As 9 H. 6. 23. A man hath Iſſue a Son and a Daughter by one Woman, and a Son by another Woman, and dyeth ſeiſed of Lands, the Son enters and dyeth ſeiſed, the Daughter enters as Heir to him. The other Siſter brought a *Nuper obiit*, and was found of the whole blood, for which Caſe ſhe recovered, and betwixt them partition was made voluntarily, yet ſhe

ſhe brought a Writ of Error, and the partition was no Eſtoppel becauſe ſhe was compellable to it during the Recovery in force; and ſo it was in the Principal Caſe. But the Grants of Rents by the Son, is her voluntary Act, which himſelf ſhall not avoid, notwithſtanding the new right came after to him. 19 H. 6. 23. acc.

37. A man Diſſeiſes the Kings Tenant, and afterward the Diſſeiſor is Attainted of Felony, and before Office the Diſſeiſee entreth upon the Land (as he well may). It was holden in that Caſe, That the Diſſeiſee was remitted. Afterwards Office was found for the King. In that Caſe, it is agreed in the book on both ſides, That the Remitter is defeated, and that thereby the poſſeſſion and Land is given to the King as it was in the perſon Attainted, and that the Right remains to the Diſſeiſee to be purſued and recovered againſt the King ſo as every man hath his due, and there is no wrong either to the King, or to the Subject, for the Kings Title was by the Attainder, and not by the Office, which did but find the Title, and not give it, and the Diſſeiſees due was the right which remained in him notwithſtanding the Diſſeiſin, and the Attainder, and the Office; And in that Caſe it was ſaid, That the Diſſeiſor might forfeit the Land, for it was his, but the right was not his, but the Diſſeiſees. 3 E. 4. 25. The Earl of *Northumberlands* Caſe.

Rents.

1. *What it is, the ſeveral Natures of it; as Rent-Service, Rent-charge, and Rent-Seck. And where Rents reſerved out of Lands ſhall enſue the Nature of the Land out of which they go; Where not. And of other matters concerning Rents.*

1. RE*dditus*, Rent, *dicitur à Reddendo*, and *reddere inde*, *nihil aliud eſt quàm acceptum reſtituere*; and *reddendo inde* is as much to ſay, as that the Leſſee ſhall pay ſo much, and profits to be raiſed out of the Lands at ſuch a day, which Rent is not due, untill the profits are taken by the Leſſee; and that is the reaſon that the Rent is not due before the day of payment incurred, becauſe it is to be rendred and reſtored of the iſſues and profits; and that is the cauſe that if the Land be evicted, or the Leaſe be determined before the legal time of payment, no Rent ſhall be paid, for it ſhall never be apportioned in reſpect of part of time, as it ſhall be upon the Eviction of part of the Land. *Cook* 10. Par. 128. in *Clunns* Caſe.

2. If a Rent be Granted out of the Manor of D. and the Grantor grant over, that if the Rent be behind, that the Grantee ſhall diſtreyn for the ſame in the Manor of S. this is no grant of Rent, but a penalty in the Manor of S. and the reaſon thereof is, becauſe the Law needs not to make conſtruction, that this ſhall amount to a grant of a Rent, for here the Rent is expreſly granted to be iſſuing out of the Manor of D. and the parties have expreſſly limitted out of what Land the Rent ſhall iſſue, and upon what Lands the diſtreſs ſhall be taken, and the Law will not make an Expoſition againſt the expreſs words and intention of the parties when this may ſtand with the reaſon of the Law. *Cook* 7. Part, 24. in *Butts* Caſe.

3. Rent-Service is, Where the Tenant in Feeſimple holdeth his Land of the Lord by Fealty and certain Rent, or by other Service and Rent. Then if the Rent of the Tenant be behind and unpaid, the Lord may diſtreyn for the Rent, but for that he cannot have an Action of Debt. So if a man gives Lands to another, paying to him and his Heirs, a certain Rent, the ſame is a Rent-Service, becauſe the Reverſion is in the Donor; but if a man makes a Feoffment in Fee, or a gift in tail, with the Remainder over to another, reſerving Rent without Deed, ſuch Reſervation is void, and in ſuch Caſe by the Statute of *Quia Emptores Terrarum*, the Donee or Feoffee ſhall hold the Land of the Lord Paramount of whom the Donor held the ſame. But if a man make a gift in tail of Land, the Remainder over in Fee, or a Leaſe for life, the Remainder over, or a Feoffment, and by the ſame Indenture, he doth reſerve to him a certain Rent, and if the Rent is behind, that he ſhall diſtrein for the ſame, ſuch a Rent is a Rent-Charge; but if in ſuch Caſe, there be no clauſe of Diſtreſs, then the Rent reſerved is a Rent-Seck, and for ſuch Rent, he ſhall never diſtrein; but if he be ever ſeiſed of ſuch Rent; if it be unpaid, he may have an Aſſiſe of it; but if he was never ſeiſed of it, he is without remedy for ſuch Rent.

4. A man makes a Leaſe for years of Lands, and the Leſſee Covenants with the Leſſor, to pay to the Leſſor, his Executors and Aſſigns yearly ſuch a Sum; and doth not charge the Land with it, the ſame is not any Rent, becauſe it is not iſſuing out of Lands, as it is holden in *Plow. Com.* in *Browning* and *Boſſens* Caſe. 139. 5. If

5. If a Rent-charge be granted to two, out of an Acre of Land, and that it ſhall be lawful for one of them, and his heirs, to diſtrein in the ſame grant for the ſame, the ſame is a Rent Seck; for in as much as they ſtood joyntly ſeized of the entire Rent, it cannot be as to one a Rent Seck; and as to the other, a Rent-charge; and the diſtreſs is as appurtenant to Rent; and therefore, if he who hath the Rent dyeth, the Survivor ſhall diſtrein; and if both of them grant over the Rent to one, he ſhall diſtrein for the ſame; But if a man grant a Rent to one and his heirs out of black Acre, and grant to him that he may diſtrain for it in the ſame Acre for the Term of his life, the ſame is a Rent-charge for his life, and a Rent-Seck after *diverſis temporibus*, otherwiſe if the diſtreſs be limitted for certain years in the ſame Acre, there it remains a Rent-Seck entirely, becauſe that the Fee and frank Tenement is Seck in ſuch Caſe. *Cook* 7. Part, 24. in *Butts* Caſe.

6. If a man grant a Rent by Deed out of his Land, there to charge the Land it is remedileſs; but the Grantee may charge the perſon in a Writ of annuity; but if there be ſuch a clauſe in it, that he ſhall not charge the perſon, the ſame is void, if he do not give him ſeizin; becauſe ſuch Proviſo takes away all remedy, from the Grantee. *Cook* 6. Part, 58. in *Bredimans* Caſe.

7. A. ſeized of Lands in Fee, which were deviſable, made a Leaſe thereof, rendring Rent, and after, he deviſed this rent to a ſtranger, and dyed, the ſtranger ſeized of the Rent dyed: If the heir, or the executors ſhould have the Rent, was the Queſtion: It was holden in this Caſe, That the Executor, and not the heir of the Deviſee, ſhould have the Rent, becauſe it was but a Chattel in the Deviſee. *Baldwin* and *Shelley* Juſtices, held, That the Deviſe was void, being a new thing; but *Fitzherbert* ſaid, That where the Rent is incident to the Reverſion, that it ſhall be of the nature of the Land. Mich. 26 H. 8. *Dyer*, 5.

8. If a man be ſeized of Lands on the part of the mother, and maketh a Feoffment in Fee, reſerving rent to him and his heirs, the rent ſhall go to the heir on the part of the Father, 7 H. 6. 4. But if a man be ſeized of Lands on the part of the mother, and maketh a Feoffment in Fee of the Land to the uſe of him and his heirs, the book 5 E. 4. 7. is, That this uſe ſhall not go to the heir at the Common Law; but for as much as the Land moveth from the part of the mother, therefore the uſe, which is nothing but a truſt and confidence, ſhall go to the heirs on the part of the mother. *Cook* 1. Part, 100. in *Shellys* Caſe.

9. One Coparcener granted a Rent to two other Coparceners, for owelty of partition; although the words are joynt, yet the cauſe of the grant ſhall be reſpected, and the Rent ſhall be of the qual ty of the Land, and therefore they ſhall have the Rent in degree and quality of Coparceners, and not joyntly; and if two Coparceners make a Feoffment in Fee, rendring rent to them and their heirs, the heirs of the one and the other ſhall inherit, becauſe their right in the Land was ſevered. *Cook*, 5. Part, 8. in Juſtice *Windhams* Caſe.

10. A. lett Land to B. for years, rendring rent, the Leſſee aſſigned over his Term; A. brought an Action of Debt againſt B. for the rent, after the aſſignment. It was adjudged, That it was maintainable: It was Objected againſt the Action, that the Land is the debtor, and not the perſon; but in reſpect of the Land; and difference was taken between perſonal Contracts, and real: As if a man ſells goods, for money to be paid at a day certain, although the goods be taken away by one who hath right to the goods, before the day, yet the Vendor ſhall have an Action of Debt, in reſpect of the Contracts; But if a man maketh a Leaſe for years of Lands, rendring rent, if before the day be incurred, the Land be evicted by Eigne Title, the Leſſor ſhall not have an Action of Debt in reſpect of the Contract, becauſe it is a real Contract, and ſhall enſure the nature of the Land, and the rent iſſueth out of the Land, and the perſon is not debtor but in reſpect of the Land; and therefore, if the Lord granteth over the Reverſion, the Contract runs with the Eſtate, and the Grantor ſhall not have Debt for the Rent after the eſcaut, but the Grantee ſhall have it as a Contract which enſueth the nature of the Land. But in the principal Caſe it was Reſolved, That the Action was maintainable in reſpect of the privity of the Contract between the Leſſor and the Leſſee. *Cook* 3. Part, 22. *Walkers* Caſe.

11. A man grants a Rent-charge to another and his heirs, the Grantee dyes, his Wife recovers Dower againſt the heir. In that Caſe it was holden, That the heir cannot after ſuch endowment, bring a Writ of Annuity for the other two parts; for either the whole muſt be a Rent-charge, or the whole muſt be an Annuity; becauſe otherwiſe it would not be according to the Deed of Grant, which is entire, without fractions. *Cook* 1. Part, *Inſtitutes*, 141.

12. In Debt by an Executor, the Caſe was, By Articles Indented between the Teſtator and the Defendant; It was agreed, That he ſhould have ſuch a Houſe and Lands for 6 years; In conſideration of which, and that the Teſtator ſhould ſufficiently repair the houſe, the Leſſee covenanted and agreed, for him, his heirs, executors, and aſſigns, to pay to the Teſtator, his heirs, executors, and aſſigns, an annual rent of 90 l. during the ſaid 6 years; and upon this the Defendant entred, and

the Teſtator dyed, and for 90 l. rent for one year, the Executor brought the Action. It was ſaid, That this was meerly a Covenant to pay a ſum in groſs, and ſhould go to the Executors, and ſhall not enure by way of Reſervation; and the intent of the parties was, That it ſhould be only as a Covenant, and as a ſum in groſs, otherwiſe the words of the Covenant were idle. But it was holden by the Court, That it was meerly a Rent, and enſues the Reverſion, and goes to the Heir, and not to the Executors; for as the words Covenant and Grant, that he ſhall enjoy the Lands for the Term of 6 years amounts to a Leaſe, and ſhall binde the heir, ſo the words of Covenant and Grant of the Leſſee, That he ſhall pay ſuch a Rent annually, amounts to a Reſervation; and the rather, becauſe he Covenants and grants to pay him and his Heirs. It was adjudged for the Defendant. Hill. 6. Car. in B. R. *Drake* and *Mundeyes* Caſe. *Cro.* 1. Part, 150.

13. Aſſize of a Rent Seck; the Caſe was, a Rent Seck of 4 l. *per annum* was granted by A. to B. his ſon, iſſuing out of a houſe called *the Unicorn*, in L. payable at the Annunciation, and Mich. at the houſe of the ſaid B. in L. to begin at Mich. after his deceaſe, and he gave 6 d. in name of ſeizin; and for Rent behinde, the Action was brought: The Jury finde the grant of the Rent, and ſeizin given, at the demand, at the houſe called *the Unicorn*, at the Feaſt of the Annunciation, and that none was there to pay it; and if this were a diſſeiſin of the Rent, was the Queſtion. It was Reſolved by the Juſtices, That it was a good Demand, and a Diſſeizin for not payment of it, and that this gift of 6 d. in the name of ſeizin, was good ſeizin; and the Jury found all in damages, *viz.* 24 l. not mentioning it to be for arrearages of Rent, and well enough. Paſch. 14 Car. in B. R. *Smith* and *Smiths* Caſe. *Cro.* 1. Part, 365.

14. If a man which hath a Rent ſervice iſſuing out of Lands, purchaſeth parcel of the Land out of which the Rent is iſſuing, that ſhall not extinguiſh the Rent, ſave only for the parcel; for a Rent-ſervice in that Caſe, is ſeverable, and may be apportioned according to the value of the Land, becauſe it iſſueth out of the profits of the Land, and is due by Common Right: But if a man hath a Rent-charge to him and his Heirs iſſuing out of Land, and he purchaſeth parcel of that Land to him and his heirs, the whole Rent-charge is extinct, and the Annuity alſo; becauſe a Rent-charge is entire, and iſſuing out of every part of the Land againſt Common Right. *Cook* 1. Part, *Inſtitutes*, 147.

15. If a man makes a Leaſe for life, rendring Rent, the ſame is a Rent-ſervice; but if the Leſſor granteth the Rent to another, then it is a Rent-Seck, becauſe it is ſevered from the Reverſion; for the Reverſion cauſeth it to be a Rent-ſervice; and if a man holdeth by Fealty and Rent, and Grants the Rent, the Seignory paſſeth; for the Rents paſſeth it: But if a man holdeth by Homage, Fealty, Eſcuage, and Rent, if he granteth the Rent, it is a Rent-Seck; becauſe the Seignory, *viz.* the Homage, Fealty, and Eſcuage remains. See 26 Aſſ. 38. acc.

16. A Rent was granted to a Feme ſole, and her heirs, without the words, for the Grantor and his Heirs: The Husband and Wife brought a Writ of Annuity, and Declared, and was Non-ſuited; and afterwards, the Husband and Wife were Divorced, *cauſa Adulterii*; the Rent was behinde, the Wife diſtreined for the Arrearages: In this Caſe it was holden, That the Declaration by the Husband and Wife was an Election to make it an Annuity, and not a Rent-charge, and that the ſaid Declaration had prejudiced the Wife in her Inheritance; for if the Husband had not Declared, it ſhould have been a Rent in Fee in the Wife, but being turned into an Annuity, ſhe had an Eſtate but for life. 2. In that Caſe it was holden, That although that the Plaintiffs in the Writ of Annuity were Non-ſuit, yet the ſame did not alter the Election, but made the Declaration void, *ab initio*, as a Writ of Error doth. 3. Reſolved, That the Divorce, *Cauſa Adulterii*, did not make the Marriage void *ab initio*. 4. It was Reſolved, That Debt did lye, or that ſhe might diſtrein for the Arrearages. Mich. 6 Jac. in C. B. adjudge acc.

17. A Rent-charge of 10 l. *per annum*, was granted to a man, or an Annuity of 10 l. at his Election. It was holden in that Caſe, That the ſame was grantable over, being in the Grantee without Election; and that theſe words, or an Annuity of 10 l. were void, becauſe all was included in the Grant of the Rent-charge; and it was ſaid, That this Caſe was not to be compared to the caſe in 17 E. 2. where one granted to one 20 l. or 10 l. becauſe there nothing veſted in the Grantee before Election: But this Caſe was to be compared to the Caſe of *Southwell* and *Ward*, Mich. 32 Eliz. in B. R. where an Abbot granted to the Hoſpital of St. *Johns*, 40 loads of Wood, out of a great Wood, or a certain ſum in lieu of them, and that was a good Grant without Election: And in that Caſe it was ſaid by *Pop.* That when one granteth to another his black Horſe, or white Horſe, there ought to be Election: And it was ſaid to be adjudged in the Dutchy Court, That if a man be enfeoffed of the Manor of D. or of an Acre, parcel of it, that there needs no Election: And in the Principal Caſe it was holden, That a Grant for years, or life, of an Annuity, might be granted over, unleſs it be granted *pro Conſilio impendendo*, or upon Confidence, and then it is grantable over, if it be granted

granted to one and his aſſignes, or to his heirs, which implyes Aſſignees. But it was holden, That a Rent-charge, of what nature ſoever it be, is grantable over. Mich. 19 Jac. in C. B. *Gitens* Caſe, adjudge acc.

18. A. ſeized of Land in Fee, granted a Rent-charge of 20 l. *per annum* the rent, to B. to him, and his Heirs, during his life, and the lives of M. his Wife, and D. and E. his daughters; A. dyed, E. his daughter married P. the Defendant. M. 1557. 20 l. was behinde, and not paid to P. and E. his Wife, for the Rent behinde, the husband diſtreined and avowed: Being found for the Defendant, Error was brought, and 1. Error was aſſigned, becauſe this Rent was granted to one and his Heirs during his life, and three others, and is not diſcendable to the Heir, nor ſhall the Heir be Occupant thereof: But it was holden by all the Court, That the Limitations were good enough, and that the Heir ſhould have this Rent, as a party ſpecially nominated, and as Heir by diſcent, although it be not properly an Eſtate diſcendable. 2. Error, that the Eſtate being limitted to him for his own, and the lives of others, his own life includes as much as the lives of the others, and therefore void for the others: But that Exception was diſallowed by the Court, and the Judgment was affirmed. Mich. 7 Jac. in C. B. Rott. 1730. And Mich. 8 Jac. in B. R. Rott. 348. *Bowles* and *Poores* Caſe. *Cro.* 2. Part, 282.

19. In a Replevin, the Defendant avoued for Rent, and ſhewed, That A. was ſeized of the Manor of W. and made a Feoffment of the place, where parcel of it to O. rendring Rent and Suit at the Court of the ſaid Mannor, and that A. was ſeized of the ſaid Rent, and dyed ſeized; and that the ſame diſcended to B. his ſon and heir; who thereof ſo ſeized, bargained and ſold the ſaid Manor and Rent to N. father of the Avowant, by theſe words, *Manerium de tr. & omnimodos reditus*, reputed, deemed, or adjudged part of the ſaid Manor, who dyed ſeized, and that the ſame diſcended to the Avowant, his ſon and heir; and averred, That the ſaid Rent, at the time of the ſaid Bargain and Sale, *& diu ante*, was reputed parcel of the Manor aforeſaid: Upon which the Plaintiff did demur in Law. It was the Opinion of the Juſtices in this Caſe, That this Rent did not paſs by the Bargain and Sale, made to N. father of the Avowant; for here, in the premiſſes of the Avowry, is not any matter ſet forth importing Reputation, or by which it may appear, that the Rent in queſtion was ever reputed parcel of the ſaid Mannor, but rather to the contrary; and the bare averment of Reputation in the concluſion of an Avowry, is not ſufficient to induce Reputation: But if the Avowant had in his Avowry ſet forth any ſpecial matter to induce the Court to conceive any Reputation upon the matter of the Avowry, as to ſhew that the Bayliffs of the ſaid Mannor had always received the ſaid rent as parcel of the ſaid Mannor, and as Bayliffs, had accounted for it as parcel of the ſaid Mannor; or that the Leſſees of the ſaid Mannor had enjoyed the ſaid Rent as parcel of the ſaid Mannor, the ſame had been good matter to induce Reputation, and to have incorporated the ſaid Rent with the ſaid Mannor: Judgment was againſt the Avowant. Paſch. 26 Eliz. in B. R. *Forman* and *Bohans* Caſe. *Leon*, 13.

20. A man made a Leaſe for years, rendring Rent at Mich. and the Annunciation; he in the Reverſion bargained and ſold the ſame to a ſtranger, who gave notice thereof to the Leſſee; The day of payment came, the Leſſee paid the Rent to the Bargainor, and then the Deed was Enrolled: The Queſtion was, Whether the Bargainee ſhould have the rent by Relation, ſo as the Bargainor ſhould be charged in accompt to the Leſſee for the Rent firſt paid. It was the Opinion of the Court, That the Bargainee ſhould not have the Rent; and *Dodd.* Juſtice ſaid, If Rent be paid to an Adminiſtrator who hath right for the time, and after, a Will is found, and proved, ſo as it appeareth upon the matter, that there was an Executor, and by conſequence, no Adminiſtration could be, that the Rent ſhall be paid again by him to the Executors. Mich. 6 Jac. in B. R. Sir *Robert Barker* and *Finches* Caſe. *Godbolt*, 156.

21. A man ſeized of black Acre in Fee, and of white Acre for years, by Deed, granted a Rent out of both to J. S. for life, with clauſe of diſtreſs in both; the Rent was behinde, J. S. diſtreined, and avowed in white Acre. It was Reſolved (amongſt other things) That when a man grants a Rent out of Land in Fee, and a Term for years, to have for life, the Freehold of the Rent ſhall go out of the Land in Fee, and not out of the Term, becauſe it is but a Chattel; and the agreement of the parties cannot charge ſuch a thing with a Rent, which is not chargeable by Law, as out of an Advowſon, Fair, Hundred, &c. becauſe in an Aſſize, they cannot be put in *Vicco*, nor a diſtreſs taken in them. 2. Reſolved, That white Acre ſhould be charged with the Diſtreſs, although that the Rent did not iſſue out of it. *Cook* 7. Part, 23. *Butts* Caſe.

22. A woman granted an Annuity of 20 l. *per annum* to her younger ſon, iſſuing out of the Manors of *Eſtwell*, *Otterplea*, *Poſtiery*, lying and being in the pariſhes of *Eſtwell*, *Weſtwell*, and *Chattock*, in the County of *Kent*, *aut alibi in eodem Com. dictis Manerijs, ſeu eorum alicui quoquo modo ſpectant. vel pertinent.*; the woman alſo is ſeized of an Acre of Land in *Chattock*, not parcel of, nor appertaining to any of the ſaid Mannors, and dyeth

ſeized; the Grantee enters, and abates in the ſaid Acre, and continues ſeized by abatement; and if the ſaid Acre, which was not parcel, nor appertaining to the ſaid Mannors, ſhould be charged with the ſaid Rent, or not, was the Queſtion. It was adjudged in that Caſe, That the Rent did not iſſue out of the ſaid Acre; becauſe that in that caſe, there is but one Grant to one and the ſame ſentence, for there is no period nor end of the ſentence, before the concluſion of theſe words, *aut alibi*; and the *aut alibi* doth not enlarge the Grant of the Rent to iſſue out of other Lands or Tenements, but enlargeth the Towns or places into which the Lands before did extend. *Cook* 6. Part, 34. *Henry Finches* Caſe.

23. If a man grant a Rent, *in Manerio de D. percipiend.* in 100 Acres of Lands, parcel of the ſame Mannor, with clauſe of diſtreſs in the 100 Acres, the Rent ſhall iſſue out of the 100 Acres only, and the general words ſhall be conſtrued according to the ſpecial words. *Cook* 8. Part, 154. in *Altham's* Caſe.

24. A man makes a Leaſe for life by Indenture, of Lands in ſeveral Counties, and makes Livery of the Lands in one County, and divers days after, makes Livery in the other County: yet one entire Rent ſhall iſſue out of the Lands in both Counties; and the reaſon thereof is, for that the Law will never adjudge by parcels, in ſubverſion of the agreement and intent of the parties, but where all acts are done in performance of the Original Contract of the parties, then the Law will adjudge upon all the Acts, as executed at one time. *Cook* 2. Part, 74. in the Lord *Cromwell's* Caſe.

25. A Rent by Deed was granted to one, and his Aſſigns for life, *pro Conſilio impendendo*, payable yearly at four Feaſts, and for default of payment, if it be demanded, that it ſhould be lawful for the Grantee, and his Aſſignes, to diſtrein: The Grantee [aſſigned the Rent, the Tenant attorned, the Aſſigne upon the Land demanded the Rent after the day, and for want of payment, diſtreined. In that Caſe theſe points were Reſolved, 1. That a Grant of a Rent to one, *pro Conſilio impendendo*, could not be aſſigned over by the expreſs words of the Grantor. 2. That the Aſſignee needed not to demand the Rent at the day, as he ought in caſe of a Recovery. 3. Reſolved, That if a man hath a Rent-Seck, payable yearly at the Feaſt of P. and hath once ſeizin of the Rent, and the Feaſt paſſeth, and no tender is made, he may after the day, demand the Rent upon the Land; and if none be there ready to pay it, it is a diſſeizin of the Rent, for which he may have an Aſſize: But if the Tenant be at the laſt inſtant of the day, ready upon the Land to pay the Rent, and now cometh to demand it, or to receive it, there he cannot after, in the abſence of the Tenant, come upon the Land, and demand it, and make the other a Diſſeiſor, and recover damages without default in him: But in ſuch caſe, the Rent ought to be demanded upon the Land, with all the Arrearages; and although the ſame be in the abſence of the Tenant, yet the ſame debt amounts to a deeper in Law, upon which he may have an Aſſize, and recover the Arrearages, Damages, and Coſts. *Cook* 7. Part, 27. *Mannd's* Caſe.

26. In an Avowry, the Caſe was, J. S. granted a Rent of 14 l. *per annum*, out of Land; *Habendum*, 7 l. *per annum*, for 38 years, if J. D. ſo long live, payable at Mich. and at Lady; and *Habendum* the other 7 l. and to begin after the death of W. for 38 years, payable at the ſaid Feaſts; and if it happen the ſaid Rent of 14 l. to be behinde, that he may diſtrein: And if this was one entire Rent, or ſeveral Rents, was the Queſtion; for that it is but one Grant of 14 l. in the beginning, and the Diſtreſs is limitted for 14 l. and ſo entire in the Diſtreſs. But it was Reſolved by the Court, that they were ſeveral Rents, becauſe they have ſeveral beginnings, and ſeveral endings; and although it be mentioned to be but one in the clauſe of Diſtreſs, yet it is to be intended diſtributive to each part thereof; whereupon it was adjudged for the Avowant. Paſch. 5 Car. in B. R. *Cro.* 1. Part, 209. *Bear* and *Woodleys* Caſe.

27. A Prior ſeized of divers houſes, with the conſent of his Covent, made a Leaſe of them for years, rendring the yearly rent of 5 l. 10 s. 11 d. at four Feaſts of the year, as well in the City of L. *viz.* for the Houſe, 3 l. 11 d. for another, 20 s. and for other houſes, ſeveral Rents, reſidue of the ſaid 5 l. 10 s. 11 d. with condition, That if the ſaid Rent of 5 l. 10 s. 11 d. were behinde, in part, or in all, at any of the ſaid Feaſts, That then it ſhould be lawful for the Prior and his Succeſſors to re-enter. It was Reſolved in this Caſe, (amongſt other points) That it was but one entire Leaſe, conſiſting upon ſeveral unites. 1. One Demiſe. 2. One Leſſee. 3. One beginning. 4. One Term. 5. One determination. 6. One Reſervation of Rent in groſs; and that the (*ſcil.*) after, did not make a ſeverance of it, but the ſame is rather a ſeveral Declaration of the ſeveral values of the Land: and therefore it was Reſolved, That it was but one entire Rent, by the intention of the parties, *& benigne faciendæ ſunt chartarum interpretationes propter ſimplicitatem Laicorum, ut res magis valeat quam pereat.* *Cook* 4. Part, 54. *Knights* Caſe.

28. If there be two Joynt-Tenants, and one makes a Leaſe for years rendring Rent, the Leſſor dyeth, the other ſhall not have the Rent becauſe that

that he claimeth by the firſt Feoffor, which is paramount the Leaſe, and the Reſervation: And ſo if Tenant for life maketh a Leaſe for years reſerving Rent, and afterwards ſurrenders to him in the Reverſion, not being in by force of his Ancient Reverſion, he cannot have the Rent newly reſerved. *Cook* 1. Part, 96. in *Shelyes* Caſe.

29. Note, That Regularly a Rent-charge is extinct by purchaſe or otherwiſe gaining the poſſeſſion of the Land out of which the Rent is iſſuing. But yet in ſome Caſes, a Rent-Charge ſhall not be wholly extinct where the Grantee claimeth from and under the Grantor. And therefore if B. maketh a Leaſe of an Acre of Land to A. and A. is ſeiſed of another Acre in Fee. A. Granteth a Rent-Charge to B. out of both Acres, and doth Waſte in the Acre which he holdeth for life. B. recovereth in Waſte. In this Caſe, It was holden, That the whole Rent is not extinct, but ſhall be apportioned; and yet B. claimeth the one Acre under A. and the reaſon thereof is, for that no man ſhall take advantage of his own wrong. For ſeeing the Waſte was committed by the Act and wrong of the Leſſee, he ſhall not take advantage thereof to extinguiſh the whole Rent; and the whole Rent cannot only iſſue out of one Acre, becauſe the Leſſor hath the one Acre under the Eſtate of the Leſſee, and therefore in ſuch Caſe it ſhall be apportioned. And ſo it is if A. had made a Feoffment in Fee, and B. had entred for the forfeiture; in that Caſe, the Rent ſhall be apportioned, and not wholly extinct. *Cook* 1. Part, *Inſtitutes* 148.

30. If the Father within age purchaſeth parcel of the Land charged with the Rent, and alieneth within age, and dyeth, and the Son recovereth in a Writ of *Dum fuit infra ætatem*, or entreth, in that Caſe, the Law is mixt with the act of the party; and yet in ſuch Caſe, the Rent ſhall be apportioned, for that after the Recovery or entry, the Son hath the Land by Diſcent. *Cook* 1. Part, *Inſtitutes*, 150.

31. Lord and Copyholder for life, the Lord Grants a Rent-charge out of the Mannor; the Copyholder ſurrenders to the uſe of A. who is admitted. In this Caſe it was holden, That he ſhould not hold the Copyhold charged with the Rent, but if in ſuch Caſe the Copyholder dyeth, ſo as his Eſtate is determined, and the Lord granteth it to a ſtranger *de novo*, to hold the ſaid Lands by Copy. It was adjudged that this new Tenant ſhall hold the Land charged with the Rent. See 10 Eliz. in C. B. adjudged. See Mich. 26 Eliz. in the Exchequer. *Leon.* 4. acc.

32. A man Leaſeth a Hundred, rendring rent, or a man Grants a Rent out of a Hundred; It is not a good Rent, but meerly void, for that a Hundred is not Manourable, nor can be put in view, nor any Aſſiſe lyeth of ſuch Rent. See 20 Eliz. *Cleere* and *Corbets* Caſe. The Dean and Chapter of *Norwich* Leaſed a Parſonage and Common of Paſture, rendring Rent. 1 E. 6. they ſurrendred their poſſeſſions to the King; and afterwards the King granted the Parſonage without ſpeaking of the Common of Paſture. It was holden in that Caſe, That the Patentee ſhould have all the Rent, and no Apportionment ſhould be in reſpect of the Common, for that all the Rent iſſued out of the Parſonage, and nothing out of the Common. See the Caſe vouched. Trin. 33 Eliz. in the B. R. in *Knightly* and *Spenters* Caſe. *Leon.* 331.

33. In Treſpaſs for entring his houſe, It was found that the Plaintiff Leaſed the houſe to the Defendant for 7 years, with Condition, That if the Rent be behind by the ſpace of 10 dayes, that then it ſhall be lawful for the Leſſee to re-enter. After the Feaſt of, &c. the Rent was behind, and the 10th day after the Leſſor came a Quarter of an hour before Sun-ſetting, and demanded the Rent in theſe words, *I demand* 3 l. 10 s. *for a half years Rent of this houſe, now due*, and there continued till the Sun was ſet, but no Rent was paid. Note, the Iſſue was, If he came to the houſe half an hour before Sun-ſet, and there continued demanding the half years Rent of the premiſes due at the Feaſt of the Annunciation laſt paſt. It was moved, That upon this Verdict, the Iſſue is not found for the Plaintiff: The Iſſue was upon the half hour, and the Quarter part of the hour was found. 2. The Iſſue was, If the demand were of the Rent due at the Feaſt of the Annunciation paſſed, and the Verdict is for Rent due at the time of the demand. It was the Opinion of the Court in this Caſe, That the Verdict was good for the Plaintiff. But it was agreed by all the Court, That if in demand of Rent (*ut ſupra*) the Leſſor or any on his part doth demand any penny more or leſs then is due, or in his demand doth not ſhew the certainty of the Rent, and the day of payment of it, and when it was due, the demand is not good, and no re-entry in ſuch Caſe ſhall be given unleſs the demand be preciſely and ſtrictly followed. Mich. 31 Eliz. in C. B. *Fabian* and *Winſors* Caſe. *Leon.* 305.

34. In a Replevin, the Defendant avowed, and ſhewed, That A. his Father was ſeiſed of the Mannor of, &c. and granted out of it to the Avowant a Rent of 20 l. *per annum*. And if the Rent be behind by ſix dayes after the Feaſts, &c. wherein it ought to be paid, *ſi licite petatur*, then it ſhould be lawfull to diſtreyn. The Grantor afterwards Covenanted with the Lord Treaſurer and others, To ſtand ſeiſed of the ſaid Mannor to the uſe of himſelf and his Heirs, untill he and his Heirs have made

made default of payment of 100 l. *per annum*, till 3000 l. be paid; and after ſuch default of payment, to the uſe of the Queen and her Heirs, untill the ſaid 3000 l. ſhould be levyed; and levyed a Fine to the uſes aforeſaid. The Rent was arrear, default of payment was made of the 100 l. *per annum*. The Queen granted the Mannor to the Plaintiff, the Grantee diſtreyned for the Rent and Arrerages. It was holden by the Court in this Caſe, That the demand of the Rent was good, and as to the demand during the poſſeſſion of the Queen, the Court held the ſame to be good. For although the poſſeſſion of the Queen be privileged as to the Diſtreſs; yet the Demand is good without any wrong to her Prerogative, for the Rent in Right is due, and the poſſeſſion of the Queen is in Right chargeable with it, but is not recoverable by Petition; and it was holden, That if the party ſueth the Queen by Petition, he ought to ſhew in his Petition, That he hath demanded the Rent. And it was holden, That notwithſtanding the poſſeſſion of the Queen, the Rent is demandable and payable to entitle the party unto Petition againſt the Queen, and to Diſtreſs againſt the Subject when the poſſeſſion of the Queen is removed. Mich. 32 Eliz. in C. B. *Wicks* and *Dennis*'s Caſe. *Leon.* 190.

35. The Father ſeiſed of Lands, he and his Son and Heir by Indenture Leaſed the Land to the Defendant for years, to begin after the death of the Father, rendring Rent to the Son; the Father dyed, the Leſſee entred, the Rent was behind, the Son diſtreyned. It was holden in this Caſe, That the Reſervation of the Rent to the Son was void, and though the Son did prove to be Heir, it bettered not the Caſe; but the Reſervation muſt have bin to the Heir or Heirs by the Leſſor, by that name, for that is the only word of privity requiſite to the Reſervation of Rents. Trin. 12 Jac. in C. B. *Oats* and *Friths* Caſe.

36. In Debt, the Caſe was, a man was poſſeſſed of a Term for 20 years in the right of his Wife, he made a Leaſe for 10 years rendring Rent to him, his Executors, and Aſſigns, and dyed. The Queſtion was, Whether the Wife ſhould have the Rent after the death of her Husband, or the Executors of the Husband. It was the Opinion of the Court, That the Executors ſhould have the Rent, and not the Wife, for it is a ſpecial Reſervation, and the Wife ſhall not have it, becauſe ſhe comes in paramount. And alſo the Rent is incident to him who hath the Reverſion under the Leſſor, and that is the Executor. Trin. 16 Jac. in B. R. *Blaxton* and *Heaths* Caſe. *Poph.* 145. See *ibid.* 35 Eliz. 5. *ibid.* acc.

37. B. made a Leaſe of Lands to F. for ten years rendring 50 l. Rent payable yearly by equal Portions at the Annunciation and *Mich.* or within 10 dayes after any of [the ſaid Feaſts within the ſaid Term. The Term expired for Arrerages of Rent for the two laſt years, the Action of Debt was brought after the 10 dayes, counting the Arrerages to be behind at the Feaſt of *Mich.* paſt, which was the laſt Feaſt, and the laſt day of the Term: Upon the general Iſſue pleaded, It was found for the Plaintiff. In Arreſt of Judgment it was ſaid, That the Plaintiff in this Caſe was without remedy for any part of his rent, by reaſon of the falſity in his Action. For if a man bring his Action for one thing to which he hath right, and for another thing for which he hath no right, his Writ ſhall abate for all; and here the Plaintiff bringing his Action for rent payable within 10 dayes, which are out of the Term, and ſo no Rent by force of the Reſervation, nor yet a Rent within the word (yearly) therefore the whole Writ ought to abate, and this laſt rent being reſerved, and payable out of the Term, is no Rent. The Opinion of the Court was, That although the Leaſe ended at *Mich.* yet the duty as to the Rent remains by reaſon of the Contract betwixt them, and then the 10 dayes are only a Liberty given to the Leſſee for his benefit. Hill. 7 Jac. in B. R. *Barwick* and *Foſters* Caſe. *Bulſt.* 1. Part, 1. *Cro.* 2. Part, 227, 233. *idem.*

38. In *Ejectione firmæ*, it was found, That A. was ſeiſed of Land in Fee, and by Indenture granted a Rent of 20 l. *per annum* to B. his Heirs and Aſſigns payable at the Annunciation and *Mich.* with clauſe of Diſtreſs. And Covenanted for him, his Heirs and Aſſigns, with B. his Heirs, &c. to levy a Fine of the ſaid Lands to C. and D. which ſhould be that the Conuſees ſhould ſtand ſeiſed to the uſes and intents, That if it ſhould happen the ſaid Rent to be unpaid, and no ſufficient Diſtreſs found upon the premiſes, or any Reſcous, Pound, Breach, or Replevin ſhould happen to be, Then it ſhould be lawful for B. his Heirs, &c. to have the Rents thereof untill the ſaid 20 l. rent, and the Arrerages ſhould be paid to the ſaid B. his Heirs, &c. B. within ſix Moneths 9 Jac. Bargained and ſold the ſaid Rent of 20 l. *per annum* to F. with all penalties and forfeitures, 19 *Oct.* 11 Jac. the rent due at *Mich.* was demanded by F. and not paid. Trin. 12 Jac. D. one of the Conuſees at the requeſt of F. levyed a Fine to the uſes in the firſt Indentures. 13 Jac. F. diſtreyned for the Rent of 10 l. due at *Mich.* 11 Jac. and impounded the Diſtreſs, and the Defendant ſued a Replevin. Then they find, That F. entred and Leaſed to the Plaintiff. The Queſtions in the Caſe were, 1. Whether the entire Rent not being arrear, but only 10 l.

10 l. for half a year, were cauſe of entry within the Proviſo, which is, If the ſaid Rent of 20 l. be arrear. It was Reſolved, That it was a ſufficient cauſe of entry, and he might have an Aſſiſe *de redditu*, though but half a year; and it is not a Condition, but a Limitation of the uſe according to the intent of the parties; where this non payment of the 10 l. and the Replevin brought, are good cauſes of Entry. 2. Whether this Rent of 10 l. due and demanded before the Fine levyed, and after the Fine is levyed, and then a Diſtreſs is taken for the Rent due before the Fine levyed, and then a Diſtreſs is taken for the Rent due before the Fine levyed, and after a Replevin is ſued thereupon. Whether this gives title of Entry to B. In this, the Court was divided in Opinion, *Houghton* and *Doddridge* Juſtices held, he had not title to enter, for by the Fine the uſes were raiſed, and that cannot extend to a Rent formerly arrear, for there ought to be Arrerages and Diſtreſs for them both after the uſes raiſed. For the words are, If the Rent be behind, and Diſtreſs taken, and Replevin ſued, Then, &c. which cannot refer to a Rent due before the Annunciation. *Crook* and *Mountagu* Juſtices held, That the Fine was but an Aſſurance, which muſt be guided by the Indentures, which were long before the Rent due for the Execution if the thing have reſpect to the Original act, and ſhall have relation thereunto; wherefore they held he might well enter. But if the Diſtreſs had bin before the Fine, and the Replevin after, perhaps it had bin otherwiſe. But in this Caſe, they were both after the Fine. The Caſe was adjourned to adviſe upon. Hill. 13 Jac. in B. R. *Havergill* and *Hart's* Caſe. *Cro.* 2. Part, 110, 111, 112.

39. In a Replevin, the Defendant made Conuſans for a Rent-Charge to his Father. The Plaintiff confeſſed the Tenure, but alledged, That at our Lady, which was one day of payment, he was upon the Land, and offered to pay it, and remained upon the Land till Sun-ſetting. The Defendant Replyed (*proteſtando*, that he made no ſuch tender), That after that, and before the Diſtreſs ſuch a day, he at a Cloſe demanded the Rent, and none came there to tender it, for which cauſe he diſtreined; and averred, that neither at the time of the Diſtreſs, or at any time after the Plaintiff offered to pay it; upon which it was demurred. It was the Opinion of the whole Court for the Defendant, and that he ſhould have return of the Cattel; and the difference was taken between this and Homage, where one makes tender to the party, and he refuſeth, there he cannot diſtreyn, becauſe it cannot be performed by a ſtranger, or by another as a Rent may: And it was agreed in this Caſe, That the tender at the day was not material; but if he had tendred it at the Diſtreſs, then the taking ſhould have bin tortious. Hill. 15 Jac. in C. B. *Crawley* and *Kingſmills* Caſe. *Hutton* 13.

40. A. makes a Leaſe of 20 Acres rendring Rent, the Leſſee grants all his Eſtate in one of the Acres to J. S. the Leſſor confirms the Eſtate of J. S. It was Reſolved in this Caſe by the whole Court, That by this Confirmation the entire Rent is gone in all the other Acres; for being an entire Contract, and by his own Grant there cannot be an occupation for part, and an extinguiſhment for the other part. Mich. 34 Eliz. in C. B. *Geddard's* Caſe. *Owen.* 10.

41. In a Replevin, the Caſe was, A man ſeiſed of Lands in Fee, granted a Rent-Charge out of it to A. for life, with clauſe of Diſtreſs, and then makes a Leaſe to B. for years, and then Grants the Reverſion to J. S. for life. The Rent is behind, the Tenant makes the Defendant his Executor and dyes; the Term of B. ends. J. S. enters and makes a Leaſe to the Plaintiff; the Executors of A. Diſtrein for the Arrerages. It was the Opinion of the Juſtices in this Caſe, That the Diſtreſs was well taken for the Arrerages upon the Statute of 32 H. 8. cap. 37. for that the Rent doth not iſſue out of the Term for years, but out of the Freehold; and upon Grant thereof, the Tenant of the Freehold muſt attorn, and not the Termor. Trin. 35 Eliz. in B. R. *Lambert* and *Auſtens* Caſe. *Owen.* 117.

42. Debt upon an Obligation; The Condition was, If the Obligor pay the Rent of 37 l. yearly at two Feaſts, according to the true intent of certain Articles of Agreement made between the Obligor, and Obligee during the Term, &c. That then, &c. The Defendant pleaded the Articles certain, That the Obligee *demiſit et ad formam tradidit* to the Defendant *Omnia talia Domus Tenementa et terras in parochia de P. in Quibus*, the ſaid Obligee had an Eſtate for life by Copy according to the Cuſtome of the Manour, *Habendum* for 21 years, if the Obligee ſhould ſo long live, rendring to the ſaid Obligee during the ſaid Term 37 l. to be paid at the Caſtle of C. and further pleaded, That at the time of the making of the ſaid Articles, The ſaid Obligee had not any Eſtate in any houſes, Lands, &c. in P. for the Term of his life by Copy. Upon which Plea, the Plaintiff demurred in Law; and Judgment was given for the Plaintiff. In this Caſe, were two points. If nothing paſſed by the Articles, and ſo the Reſervation of the Rent void. 2. If the ſaid Obligation for payment of the ſaid Rent was void. It was Reſolved by the Court upon the firſt point, That no Rent is reſerved, for the Leaſe did never begin, and ſo the Rent ſhould not. As to the ſecond point, Whether

Whether the Rent ſhould be paid by reaſon of the Obligation, as a ſum in groſs, or not. The Court differed in Opinion: For *Fenner*, Juſtice, held, The Condition of the Obligation, is to pay the Rent according to the Articles; which is, That if the Leſſee have not the Land, the Leſſor ſhall not have the Rent. *Popham*, contrary; For the Obligor is bound to pay it, although nothing were demiſed to him; for that by the Obligation, he hath made it a ſum in groſs: And it is altered from the nature of a Rent upon the Obligation, and he is bound to pay the Rent or Sum; and if this be either of them, he muſt pay it. There was no Judgment in the Caſe, Paſch. 38 Eliz. in B. R. *Strowd* and *Willis* Caſe, *Owen*, 110, 111.

43. Tenant in tail of a Rent-Charge, agreed with the Tenant of the Land, to extinguiſh this Rent, and that he would levy a Fine of the Land to the Tenant; and afterwards he did levy a Fine *ſur Conuſans de Droit come ceo*, and upon a Releaſe: And if this Fine did cut off the Eſtate tail in the Rent, was the Queſtion? It was ſaid, and Objected, That this Fine was no barr or extinguiſhment of the Rent; becauſe the Writ of Covenant doth not contain the thing of which the Fine is to be levied, and here is not any Fine directly of the Rent. And ſee the Opinion of *Thornton*, in *Plowd. Com.* in *Smith* and *Stapleton*'s Caſe, Tenant in tail of a Rent, diſſeiſed the Terr-Tenant, and levied a Fine with Proclamations: It was holden, That the ſame ſhould not barr the Iſſue in tail of the Rent. But the Opinion of the Court was, That this Fine doth work by way of Releaſe; and things are not to paſſe litterally in a Fine: and the words of the Statute of 32 H. 8 are, Of any Lands, Tenements, or Hereditaments, any wayes entailed; and if there be any word in the Conveyance which will carry it, it is ſufficient: and this Rent is an Hereditament entailed to the perſon who levied the Fine, and is carried *inclusivè* in the Statute. Nay, if a man had nothing in the Land if it was entailed to him who levied the Fine, this ſhall barr the Eſtate tail for ever: And therefore ſee, Tenant in tail made a Feoffment to J. S; and after that, he did levy a Fine to a ſtranger of the Land: It was holden, That he Iſſue ſhould never avoid that Fine; and yet neither the Conuſor nor Conuſee had any thing in the Land. And ſee *Cook* 1. Part, *Arthers* Caſe, Where the Iſſue in tail levied a Fine in the life of his Anceſtor; It was a good Barr, and yet he had there but a poſſibility. And it was holden in this Caſe, That if a man have a Piſcary in another mans Land, and a Fine is levied of it by the name of Land, it will paſſ: the Piſcary, and will barr the Iſſue if it were entailed. In the Principal Caſe, It was holden, That the Rent entailed, was barred by the Fine. Hill. 22 Car. in C. B. *Hilliard* and *Saunders* Caſe, *Winch.* 109, 121, 122.

44. In a *Replevin*, the Caſe was; Tenant for life, and he in the Remainder in tail, joyned in the grant of a Rent in Fee out of the Land; and then they joyned in the levying of a Fine to a ſtranger and his Heirs. It was adjudged in this Caſe, That the Eſtate of the Grantee of the Rent which was before determinable, was now made abſolute. Mich. 22 Jac. in C. B. Sir *Tho. Holbeach* and *Sambeartes* Caſe, *Winch.* 102. *Cro.* 1. Part, 73. the ſame Caſe.

45. Husband and Wife, and a third perſon, were Joynt-Tenants for the Lives of the Wife, and the third perſon; The Husband and Wife by Indenture let the moyety for 21 years: the Wife dyed; the ſurviving Joynt-Tenant entred: And, If this Leaſe ſhould bind the Survivour, was the Queſtion? It was the Opinion of the Court in this Caſe, That the Leaſe was good, and is as a Leaſe made by her, untill ſhe after the Coverture, or one who claims in privity by her, avoid it by Entry; For it is not void by the death of the husband, but only voidable; and the Avoidance out to be by Entry, which cannot be by the Joynt-Tenant Survivor, for he is paramount the Wife, and not under her: And therefore the Leaſe being good, untill it be avoided by one who hath privity, ſhall bind as long as any of the Joynt-Tenants be alive: It was adjudged for the Plaintiff. Mich. 13 Jac. in B. R. *Smalman* and *Agborowes* Caſe, *Cro.* 2. Part, 417. *Bolſtr.* 3. Part, 272, 273. the ſame Caſe.

46. A. poſſeſſed of a Leaſe for 100. years; He and J. his Wife, by Indenture ſealed only by A, and not by his wife, aſſigned their Eſtate in the Leaſe to T, *reddendo et ſolvendo* to him and J. his Wife *durante termino prædict.* to them and the Survivor of them, if they ſhould ſo long live, 71 l. at *Mich.* and our *Lady*: Proviſo, That if the ſaid Rent be behind at any of the ſaid Feaſts and not paid to him or his Wife, or to the Survivour of them, and to their Aſſigns, and to the Aſſigns of the Survivor of them to re-enter, &c. T. enters; A. dyes, J. ſurvives him. At the Annunciation after, and for 40. dayes the Rent was behind, and not paid: the Wife the laſt day demands it; The Adminiſtrator of A. alſo demands the Rent, which is not paid. It was urged, That the words, *reddendo et ſolvendo* to the husband and wife *durante toto termino*, and to the Survivor of them, being by Indenture, ſhould enure as a Reſervation to the husband, and as a Grant to the wife:

wife: It was the Opinion of the Court in this Case, That although the *reddendo et solvendo durante termino*, (if there had been no more said) had been a Reservation during the Term: Yet when he doth not rest upon the Exposition of the Law; but it is *reddendo* to him and his Wife, and the Survivor of them, if they so long live; that is an expresse Reservation; that it shall not be during all the Term, but to him and his wife, and the Survivor of them: And the Reservation to the Wife is void, because she is no party in Interest, or to the Deed, and to the Survivor of them, is also void to give the wife any privilege thereof. And therefore, It was holden, That the Rent should endure no longer, then during the life of the Husband. Hill. 7 Car. in B. R. *Bland* and *Inmans* Case, *Cro.* 1. Part, 210. *Godbolt*, 449. the same Case.

47. A man seised of Lands in Fee, and of Copyhold Lands in Fee according to the Custom of the Mannor, made a Lease of the Freehold Lands, and of the Copyhold to J. S. for years, rendring one entire Rent: And afterwards the Lessor surrendred the Copyhold Lands to C. and his heirs; and at another time granted by Deed of the Freehold Lands to C. in Fee: J. S. attorned, and after C. brought debt against J. S. for the whole Rent. It was Objected, That the Reservation of the Rent was an entire Contract, and by the grant of the Lessee, the same could not be apportioned: Also by that act, the Lessee should be subject to two Fealties, whereas he was subject but to one before. It was Resolved, That the Contract was not entire, but that the same by the Act of the Lessor, and the assent of the Lessee might be severed: for the Rent is incident to the Reversion, and the Reversion is severable, and by Consequence so is the Rent. And as to the Fealties, to that the Lessee shall be subject, although the Rent should be extinct: For it is of necessity incident to the Reversion, and to every part of it, but the Rent shall be apportioned. Pasch. 39 Eliz. in B. R. *Collins* and *Hardings* Case.

48. Note: It was agreed by the whole Court, That Arrearages of Rent reserved upon an Estate for life, are not forfeited by Outlawry, because they are realt, and no remedy for them, but a Distress: Otherwise, if upon a Lease for years. Hill. 5 Car. in C. B. *Hetley*, 364.

49. A man grants a Rent out of Lands, and limits the same to be paid at a house which is off from the Land; and if the Rent be behind, and lawfully demanded, then the Grantee to distrain: the Rent is behind, and the Grantee distrains, no demand being made at the house; In a *Replevin*, The Opinion of the Court was, That there ought to be a Demand at the house: and the Distress it self is not a sufficient demand; for the demand is parcel of the Contract: and demand ought to be before the party is entituled to distrain, Pasch. Tr. 17 Car. in C. B. *Selden* and *Kings* Case, *Marsh* 218. And so it was likewise adjudged, 3 Car. in C. B. in *Berryman* and *Bowdens* Case.

50. In a Replevin, the Case was, A man acknowledged a Statute, and afterwards granted a Rent-Charge: The Statute was afterwards satisfied by effluxion of time; and the Grantee of the Rent did distrain; And whether he might distrain without bringing a *Scire facias*, was the Question? It was strongly urged, That the Grantee, though he were not privy, ought to have a *Scire facias*; for it is only to accompt. But the Opinion of the Court was, That the Grantee might well distrain; and he cannot have a *Scire facias*, because he is a stranger: But if he may have a *Scire facias*, (for there is no Authority in Law in the Point) yet he may well distrain without it. And *Bramston*, Chief Justice, said, I believe you will never find a *Scire facias* brought by the Grantee of a Rent, or of other profit apprender. Pasch. 18 Car. in B. R. *Barwell* and *Harwell's* Case, *Marsh*, 207.

51. A. made a Lease for years, reserving Rent at Mich. upon Condition, That if the Rent be behind at Mich. and a moneth after, that he might enter. The Lessee after Mich. and before the moneth ended, sent his Servant to the house of A, to pay the money to A; The Servant delivered the Rent to B, who was the Daughter of A, to deliver the same to A; the said B. having at several other times received the Rent, and paid it to A: which he accepted; but now he refused to receive it, and entred for non-payment of the Rent. It was said, That his Entry was lawful, and that the tender made to B, and by B. to the Lessor, was not good, because the Servant of the Lessee had authority to deliver it to the Lessor: therefore when he delivers it to another, he hath not pursued his authority: But notwithstanding this, because that in the principal case, the Rent was due at Mich. and the moneth after was given, because of the penalty of Re-Entry, and the tender and refusal was after the Rent was due, and within the moneth; and in regard the Lessor was at no prejudice, if he had accepted of the Rent when B. his Daughter tendred it unto him; and because it appeared to the Court, That the Lessor had an intent to defraud the Lessee of his Lease, and the Law doth not favour frauds; and therefore it was adjudged against A. the Lessor, Hill. 28 Eliz. in B. R. *Croppes* Case, *Godbolt*, 38, 39.

52. A Leſſee for 30 years of a Farm called *Creſwellfield Grange*, conſiſting of divers parcels; viz. *Hobſfield Parkfield*, and divers others, made his Son his Executor, who demiſed all the Grange (except *Hobſfield*) to B. for 23. years, and demiſed *Hobſfield* to F. for 23. years; and afterwards granted all the reſidue of his Term in the whole Grange, to B. and F: He in the Reverſion in Fee, granted a Rent-Charge in Fee, iſſuing out of all his Lands called *Creſwellfield Grange quondam in tenura* of A, *et adtunc in tenura et occupatione B. vel aſſignat. ſupra.* The Rent was behind, the Term for 30. years was expired; He in the Reverſion made a Feoffment in Fee to another; the Grantee made his Executors, and dyed: the Feoffee made a Leaſe at Will, the Executors of the Grantee diſtrained for the Rent behind in the life of the Grantee before the expiration of the Term. And in this Caſe, Judgment was given for the Executors againſt the Plaintiff, in a *Replevin*. In this caſe, It was Reſolved, (amongſt other Points) 1. That the Arrearages due in the life of the Grantee, were loſt by the Common-Law. 2. Reſolved, That by the Statute of 32 H. 8. Cap. 32. Debt lay againſt the Feoffee of the Feoffee, or the Tenant at Will of the Feoffee for the arrearages, by the expreſs words of the Statute; for when things are due in right, and become remedileſs by the Act of God; *ſcil.* the death of him to whom they are done, Acts of Parliament which give remedy in ſuch caſe, ſhall be favourably expounded to advance the remedy proportionable to the miſchief and defect of the Law; and ſo the ſecond Feoffee; and ſo in *infinitum* ſhall be charged by force of the Statute. And it was agreed in that Caſe, That if A. hath a Rent-Service, or a Rent-Charge in Fee, or for life, the Rent is behind; A. grants over the Rent to another; the Tenant attorns, and dyes, that his Executors ſhall not have Debt, for that by the Grant over, the Arrears are loſt, and were not due to the Teſtator at the time of his death: and in ſuch caſe after the Grant over, the Teſtator himſelf could not diſtrain, or have any remedy for the Arrearages. Hill 29 Eliz. in C.B. *Cook* 4 Part, 49, 50. *Ognells* Caſe.

53. A Rent was granted to a Woman Sole for life; the Rent was behind: ſhe took a huſband, the Rent was again behind, the Wife dyed; the Huſband brought Debt againſt the Heir of the Grantor for the Arrearages encurred before the Marriage: It was Reſolved, That for the Arrearages encurred before the Marriage, the Huſband had not any remedy by the Common-Law; but for the arrearages due during the Marriage, at the Common-Law an Action was maintainable. But it was Reſolved, That by the Stat. of 32 H.8. Cap. 37. the huſband ſhould have an Action of Debt, as well for the Arrearages before the Marriage, as for the Arrearages after the Marriage, 17 Eliz. Reported by *Bendloes*, *Sharp* and *Poolets* Caſe, vouched in *Cook* 4. Part, in *Ognells* Caſe.

See more of Rents, *Lib.* 1. in the Title of *Demands*, *Conditions*; and after, in the Title of *Reſtrenations*.

Reparations.

1. IF a man Leaſeth a Manor to one for years, and the Leſſee Covenanteth to keep the Houſes of the ſaid Manor, as much as was in the ſaid Manor, in as good plight as he found them, and ſo to leave them in the end of the Term; and during the Term, the Tenant doth Waſte in the Houſes, or in cutting down of Oaks: It was Reſolved, That in that caſe, an Action of Covenant doth lye preſently againſt the Leſſee, becauſe it is impoſſible that now the Covenant ſhould be performed. See *Fitzh. Na. Br.* 145. 13 E.3. Covenant. 2. *Cook* 5 Part, 23. in Sir *Anthony Maynes* Caſe, acc.

2. If one committeth Waſte, and before an Action of Waſte, the Leſſee doth repair the houſes, and afterwards the Leſſor brings an Action of Waſte; In that Caſe, It was Reſolved, That the Action is not maintainable, becauſe the Jurours ought to View the Waſte; which now they cannot do: But yet in that caſe, the Defendant ought to plead and ſet forth the ſpecial matter, and cannot plead, that he did no Waſte, becauſe the Entry is in the *Preterperfect Tenſe*; *ſcilicet*, *Quod non fecit waſtum*. See 10 Eliz. *Dyer*. 256. *Cook* 5 Part, 119. in *Whelpdales* Caſe, acc.

3. If a houſe falleth down in the time of the Leſſee for life or years, or in the time of Tenant in Dower, as by the Curteſie; the particular Tenants have ſuch a ſpecial property in the Timber, that they may take the ſame to build the like houſe for his habitation: And ſo it is, if they cut down Trees for reparations, they have a ſpecial property in the Trees for that purpoſe, 44 E.3.5. And ſo it was Reſolved, *Cook* 11. Part, 82. in *Lewis Bowles* Caſe.

4. Note; Tenant for life or years in many Caſes, may fell down Timber Trees to make Reparations, although he be not compellable thereunto,

ment, and ſhall not be puniſhed for the ſame in an Action of Waſte: As if an houſe be ruinous at the time of the Leaſe made, if the Leſſee ſuffer the houſe to fall down, he is not bound by Law to repair the houſe in that caſe; and yet if he cut down Timber upon the ground ſo letten, and repair it, he may well juſtifie it: and the reaſon is, becauſe the Law doth favour this ſupportation and maintenance of houſes for habitation: And therefore if the Leſſor by his Covenant undertake to repair the houſes, yet the Leſſee (if the Leſſor doth it not) may with the Timber growing upon the ground, repair them. *Coke* 1. Part, *Inſtitutes*, 54.

5. A Leaſe was made of a Meadow bordering upon the River of *Ex.* in *Devon.* and the Leſſee Covenanted to ſuſtain and repair the Banks of the River, upon a pain of 10 l; and afterwards by reaſon of a ſudden Flood, the Banks were decayed and periſhed: It was the Opinion of the Juſtices in that caſe, That the Leſſee ſhould be excuſed from the penalty, as if it had been of a houſe burnt by Lightning, or thrown down by Tempeſt; but yet in that Caſe, It was holden, That he ought to repair the Banks in convenient time, 29 H. 8. *Dyer*, 33.

6. If one be bound by Preſcription to keep a Sea Bank in good repair, and by a ſudden and unuſuall encreaſe of Waters it is beaten down; In ſuch caſe, the Commiſſioners of Sewers may charge all other perſons and their Lands, that may receive any loſs or damage thereby; but if any default or negligence be found in him, who ought to repair it, as that he hath not kept the Banks ſo high, nor ſo well repaired as they have been uſed formerly to be kept; Or that the danger was not ſo inevitable, but that he might well have prevented it: The Commiſſioners in ſuch caſe may charge Him only with the Repair thereof; or if he be not able to repair it, ſo as the charge is layd upon others, each perſon charged may have an Action upon the Caſe againſt him, and recover Damages according to his loſs. *Coke* 10 Part, 139. in *Knigbly's Caſe*.

7. Upon a Leaſe made of a houſe, the Leſſee Covenanted, That he would from time to time, after 3. moneths warning ſufficiently repair, and at the end of the Term, leave it ſufficiently repaired to the Leſſor; and for not leaving it ſufficiently repaired, Covenant was brought. Upon this, the Defendant demurred, becauſe he doth not alledg, That he for 3. moneths before gave notice to him of the defects. It was Reſolved in this Caſe, That the Declaration was good; for the Clauſe, To leave it repaired at the end of the Term, is diſtinct by it ſelf, and doth not depend upon the former Clauſes; for he ought to leave it ſufficiently repaired without Notice, at his perill; and the Notice within the 3. moneths, refers only to the Reparations within the Term, whereunto he is not tyed without Notice 3. moneths before, Trin. 20 Jac. in B. R. *Hayſett* and *Butchers* Caſe, *Cro.* 2. Part, 644.

8. In Covenant, the Caſe was; The Plaintiff let a houſe to the Defendant for 21. years, from Mich. following: And the Defendant Covenanted, *Quod ab & poſt emendationem & reparationem dict. Meſſuagii*, by the Plaintiff, his Heirs or Aſſigns, He at his proper Coſts and Charges as need ſhould require, *bene ſufficienter repararet & ſuſtineret* the ſaid Meſſuage during the Term, and ſo leave it at the end of the Term well and ſufficiently repaired; and alledged a Breach, That at the time of the Demiſe, and beginning of the Term, a Dove-houſe parcell of the Premiſſes, was in good and ſufficient reparations; and the Defendant during the Term, *voluntarie* ſuffered it to ſtand uncovered for a year, whereby it became very ruinous, and afterward pulled it down, and ſo it became of no value. The Defendant pleaded, That he did not ſuffer it to ſtand uncovered, nor did pull it down. Upon which, being at Iſſue, it was found for the Plaintiff. It was moved, That the Breach was not well aſſigned; for the Covenant is, That *ab, & poſt*, that the Plaintiff hath repaired it, that he would maintain it in reparation, ſo as the Defendant ought not to repair it, untill the Plaintiff hath firſt repaired it. And of that Opinion was the whole Court. For the Court held, That the Covenant being *ab & poſt reparationem* by the Plaintiff, that the Plaintiff ought firſt to repair it. Wherefore it was adjudged for the Defendant. Hill. 19 Jac. in B. R. *Slater* and *Stones* Caſe, *Cro.* 2. Part, 645.

9. In Covenant brought, for not repairing a houſe upon a Leaſe made, wherein the Defendant Covenanted for himſelf, his Executors and Aſſigns, to repair the houſe within 2 moneths warning the 1. of Jan. 19 Jac. The Defendant pleaded, That long before the Warning; viz. 3 Jac. he aſſigned over his Term to J. S. who had alwayes after paid his Rent to the Plaintiff; which he had accepted of, and avers the performance of all Covenants, untill the Aſſignment: It was the Opinion of the Court, That this aſſignment doth not take from the Leſſor his advantage of the expreſs Covenant, notwithſtanding the acceptance of the Rent by the hands of the Aſſignee; for that notwithſtanding the ſame, he might charge the Leſſee or Aſſignee at his Election. Mich. 10 Jac. in B. R. *Barnard* and *Godſall's* Caſe, *Cro.* 2. Part, 309. The ſame Term, *Varnie* and *Goodcheap* Caſe, adjudged acc.

10. A. ſeiſed in Fee of a Meſſuage in B. in Fee, and of a Leaſe for divers years in being; let both the Houſes and Courts, Orchards, Gardens, appertaining to them, to the Defendant by Deed for 10 years, whereby the Leſſee Covenanted to repair the Houſes, Edifices, and Buildings, with neceſſary Reparations; and that he would maintain and keep *dimiſſa præmiſſa*, with paying and fencing, and at the end of the Term, leave *domos & alia præmiſſa* ſufficiently repaired, pailed, and fenced: and thereof by a Deed, he granted the Reverſion to the Plaintiff in Fee, and by another Deed, the Reverſion for years; and the Defendant attorned upon the ſeveral Grants; and that at the time of the Leaſe and grant of the Reverſion, the houſes were well repaired; and that after, to him of the grant of the Reverſion *Diverſa domus loca parcella, et res eorundem tenementorum et præmiſſorum deceſſuat. diruit. & fract. fuerant & in deceſſu deveneranat; Et quod diverſa alia parcellæ et res eorundem tenementorum et præmiſſorum eiſdem præmiſſis affixa ab inde avulſa, et ſeparata fuerant*; and Juſtified, in the pavement of the Court, Locks and Keys carrying away, and of a Cupbord, breaking the glaſſe in the Windows, and carrying away a Shelf not fixed. Upon which, the Defendant Demurred: and being adjudged for the Plaintiff, and Damages entire given to 100 l, Errour was brought, becauſe he having two Reverſions; the one in Fee, and the other for years, by ſeveral Deeds, ought to have brought ſeveral Actions. But it was Reſolved, That it was well enough. The ſecond Errour was, That the aſſignment of the breach is, in not repairing of the Pavement, which is out of the Covenant; for it is neither building, pailing, nor fencing, and damages are given for it. It was ſaid by the Court, It was within the Intention of the Covenant; and it is *quaſi* the building, and within the words, *Leave them ſufficiently repaired, maintained, &c.* The Judgment was affirmed, Mich. 7 Jac. in C. B. rotr. 3214. *Pyett* and the Lady *St. Johns* Caſe, *Cro.* 2. Part, 329.

11. Covenant: for that the Caſe was; Queen *Eliz.* let an houſe to W. C, wherein were theſe words; viz. That the Leſſee his Executors and Aſſignees *reparabunt domum prædict.* and leave it ſo Repaired. Afterwards, the Queen granted the Reverſion to the Plaintiff, and to his wife, and the heir of the husband in Fee; and for not repairing, the Action was brought. It was Demurred, becauſe the Action was brought by the husband alone: 2. Becauſe they be not the words of the Covenant of the Leſſee, nor is it the Deed of the Leſſee. But it was Reſolved for the Plaintiff; for the Action being perſonall, and damages only to be recovered, the husband may alone have the Action. 3. Reſolved, That theſe words in the Queens Letters Patents, did amount to a Covenant on the part of the Leſſee; and he accepting the Leaſe, was bound to the Covenant. Trin. 13 Jac. in B. R. rott. 1500. Sir *John Brett* and *Cumberlands* Caſe, *Cro.* 2. Part, 399.

12. Leſſee for 80 years, upon Condition, That if the Leſſee, his Executors or Aſſigns, did not repair the Houſe within 6. Weeks after Warning, that the Leaſe ſhould be void: The Leſſee made a Leaſe for 10 years to J. S, who ſuffered J. D. to occupy the houſe: the Leſſor came to the houſe, and gave notice of the defectments in the Reparations to the Occupier of the houſe; and for default of Reparations, he entred. It was adjudged in this Caſe, That the Notice given to the Occupier of the houſe, was not ſufficient, no more if it had been given to the Aſſignee of the Leſſee; but it ought to be to the perſon intereſted in the Term, who is liable to the Reparations. 2. Reſolved, That the Notice at the houſe is not ſufficient, but it ought to be to the perſon of the Leſſee. Hill. 44 Eliz. in B.R. *Streetman* and *Everſleys* Caſe. *Owen*, 114.

13. A Copyholder brought Treſpaſs againſt the Lord, for cutting down of Trees; and alledged a Cuſtome within the Mannor, That a Copyholder might cut down Trees to repair his Houſe; if that there was not ſufficient left to repair it: and alledged, That there was not ſufficient Trees left to repair it. It was Reſolved in this caſe, 1. That a Copyholder might cut down Trees to repair, and for firebote and other neceſſaries. 2. That Treſpaſs lyeth againſt the Lord for cutting down the Trees; for that the Copyholder hath an Intereſt in the Trees, as well as in the Land. And it was ſaid, That the Lord might as well pull down the Copyholder's houſe, as cut down his Trees: And a Copyholder hath a ſpecial Intereſt in the ſhadow and Lopps; and the Lord the generall Intereſt. Mich. 8 Jac. in C. B. *Heydon* and *Smiths* Caſe, *Godbolt*. See the Caſe more at large, *Cook Select. Caſe*, 67. See, Trin. 40 Eliz. in B. R. *Stebbing* and *Groſvenors* Caſe, The Cuſtome of the Mannor of N. in the County of S. was, That every Copyholder might lopp the Pollingers upon his Copyhold *pro ligno combuſtibili*; and the Lord of the Mannor cut down the Pollingers, being upon the Plaintiff's Copyhold; upon which, he brought his Action upon the Caſe, becauſe that the topps of the Trees in ſuch caſe did belong to the Copyholder, and they were taken by the Lord.

14. Upon a Leaſe of a houſe, the Leſſee Covenanted, That he would repair the houſe with convenient, neceſſary and tenentable Reparations; The

The Leſſor brought Covenant, and alledged a breach, in not repairing for want of Tyle, and dawbing with Morter; and did not ſhew, That it was not Tenentable: It was the Opinion of the Court, That he ought to have ſhewed it; for the houſe may want ſmall Reparations, as a Tyle or two, and a little Morter, and yet have convenient, neceſſary, and Tenentable Reparations. Paſch. 15 Car. in B. R. *Conyſbies* Caſe, *Marſh*, 17.

15. An Information was exhibited againſt the Inhabitants of *Shorreditch*, for not repairing the High-way: The Iſſue was, Whether they ought to Repair it, or not: In this caſe, It was ſaid by the Court, That by the Common-Law, The Inhabitants of a Pariſh ought to repair all High-Wayes lying within the Pariſh, if Preſcription did not bind ſome particular perſon thereto, which was not in this Caſe. In this caſe, ſome of the Inhabitants would have been Witneſſes, to prove, that ſome particular Inhabitants lying upon the High-Wayes, had uſed time out of mind to repair it: but they were not permitted by the Court, becauſe they were Defendants in the Information: Wherefore the Jury found, That the Inhabitants ought to repair the Way. Trin. 15 Car. in B. R. The King & the Inhabitants of *Shorreditches* Caſe, *Marſh*, 17.

16. Many Indictments were exhibited ſeverally againſt ſevtral men, becauſe each by himſelf ſuffered his door to be unrepaired. And it was *ſhewed* in the Indictments, That every one of them ought to repair. It was moved, That the Indictments might be quaſhed. But the Court would not Quaſh them without Certificates, that the parties had repaired their doors. Trin. 15 Car. in B. R. *Marſh*, 45.

17. Note: The Inhabitants within the Pariſh of H. having a Free Chappell of Eaſe, had a Cuſtome, That thoſe within ſuch a Precinct, ought to find a Rope for the third Bell, and to repair part of the Mother-Church: In conſideration of which, they have been freed from payment of Tythes to the Mother-Church: the Queſtion was, Whether it was a good Cuſtome, or not. Quære; for it was not Reſolved, but the Caſe adjourned. Paſch. 17 Car. in B. R.

18. Upon the Commiſſion of Sewers, upon the Statute 23 H. 8. Cap. 5. and upon their Order or Decree, made a Certificate thereof: Theſe Exceptions were taken to their Certificate; 1. It doth not appear, that the Commiſſion was under the Great Seal of *England*, as it ought to be. 2. It doth not expreſs the Names of the Jurors, nor ſhewed, that there were 12. ſworn, who made the Preſentment, as it ought to be; but only, *Quod præſentatum fuit per Juratores*; ſo as there might be but 2. or 3. ſworn. 3. By the Certificate it appears, that it was preſented by the Jury, That the Plaintiff ought to repair ſuch a Wall: but it is not ſhewed for what cauſe, viz. either by reaſon of Tenure, Preſcription, or otherwiſe. 4. They Preſent, That the Wall wants Reparations, but it doth not ſhew, That it lyes within the Levell. 5. It appears, That there was an Aſſeſſment without a Preſentment; for it is Preſented, That ſuch a Wall wanted Reparations, and that the Commiſſioners aſſeſſed the Plaintiff for Reparation of that Wall, and another, for which there was no Preſentment. 6. It appears by the Certificate, That the Tax was laid upon the perſon; whereas it ought to be levied upon the Land. 7. It appears, There was no Notice given to the Plaintiff of the Aſſeſſment; which ought to have been by reaſon of the great penalty which followes for not payment of the Aſſeſſment: for by the Statute, the Land is to be ſold for want of payment. 8. Becauſe they Aſſeſſe and Tax the Plaintiff upon Information; for it ſeems, That they were credibly informed, That ſuch a Wall wanted Reparation, and that the Plaintiff ought to repair it; whereas they ought to have done it upon Preſentment, and not upon Information, or their private knowledg. 9. They Aſſeſs and Tax the Plaintiff; and for non-payment of it, ſell the Diſtreſs; which by Law they ought not to do, for the Statute enables them only to diſtrain; and that a Replevin might be brought, for the Statute gives Avowry: and if the ſale of the Diſtreſs ſhould be ſuffered, then no Replevin could be thereof: The Opinion of the Juſtices was, That the Certificate of the Commiſſioners was inſufficient, for divers of theſe Cauſes: and more eſpecially, becauſe it was not ſhewed, That the Commiſſion was under the Great Seal of *England*, Mich. 17 Car. in B. R. *Marſh*, 123.

19. In a *Replevin*; The Defendant Juſtified by authority from the Commiſſioners of Sewers: And the Jury found, That the Tenants and Occupiers of 7. Acres of Lands adjoyning to the River of *Thames*, had alwayes uſed to repair the Bank ſometimes voluntarily, ſometimes by Preſentment; and that divers other perſons had Lands within the ſaid Levell ſubject to drowning, if the ſaid Bank was not repaired and made: It was Reſolved in that Caſe, That all ſhould be Taxed, and not he only who had the Land adjoyning to the River. For the Statute of 6 H. 6. Cap. 5. and the Commiſſion of Sewers, have preciſe words in the Commiſſion, That no perſon of any Eſtate or Condition ſhall be ſpared; otherwiſe, great inconveniency might enſue: for it may be, that the rage of the Water ſhall be ſo much and ſo great, that the

the whole value of the Land adjoyning will not be ſufficient to repair the Bank, *Et qui ſentit commodum ſentire debet et Onus.* And the ſaid Statute requires equality, which well agrees with the Rule of Equity, *Cook* 5. Part, 100. *Rooks* Caſe. 2. In that Caſe, Reſolved, That although that by the words of the Commiſſion, authority is given to the Commiſſioners, to do according to their diſcretion; yet their proceedings ought to be bounden within the Rule and reaſon of Law. 3. It was Reſolved, That if the Owner of the Land was bounden by Preſcription to repair the Bank; that upon ſuch a Commiſſion awarded, the Commiſſioners ought to charge him only with the whole, but might Tax all who have any Land in danger. See *Cook* 10 Part, 140. in *Knighly*'s Caſe, &c.

Repeal.

A *Quare Impedit* was brought againſt the Biſhop of W. and the Warden of *Merton* College in *Oxford*; and the Plaintiff declared, how that the Warden was ſeiſed in *Jure Collegii*, of ſix Acres of Lands, to which the Advowſon was appendant in Fee, and Preſented: And after W. C. was ſeiſed of ſix Acres, with the Advowſon appendant in Fee, and dyed ſeiſed, and that they diſcended to G. his ſon and heir: And afterwards, the father was attainted of Treaſon by Parliament, for which cauſe the King ſeiſed the Acres; and he being ſo ſeiſed, the Church became void; and the Predeceſſor of the Defendant did Preſent by Uſurpation upon the King; and afterwards, the Attaindor was annulled, and the ſon reſtored, and entred into the ſix Acres, and enfeoffed the Plaintiff; and now the Church being void, it appertained to the Plaintiff to Preſent: Upon which the Defendants did demur in Law. It was in this Caſe adjudged againſt the Plaintiff, and a Writ awarded to the Biſhop, without making any Title. 28 H. 8. *Dyer*, 24.

2. *Reginald Poole*, who was Dean of *Exeter*, 31 H. 8. was attainted of Treaſon, but not deprived by Sentence, but his poſſeſſions were forfeited by the Statute of 26 H. 8. Dr. *Haynes* was choſen Dean: Afterwards the Biſhop made a Feoffment of certain of his Lands of his Biſhoprick in Fee, and the ſaid Dr *Haynes* confirmed it, and afterwards the Attaindor 2 *Mariæ* was repealed, and made void, againſt the firſt Dean only, and his Heirs: The Biſhop dyed; It was a Quære, If the Succeſſor of the Biſhop ſhould be bounden by the Feoffment and Confirmation? Mich. 3 *Mar. Dyer*, 123. See *Cook* 1. Part *Inſtitutes*, 30. It ſeems the Succeſſor ſhall be bound by the Confirmation, becauſe the Confirmation is but a meer aſſent by Deed, to the Grant.

3. Two brothers were: The youngeſt had Iſſue a ſon, and is attainted of Treaſon, and Executed; and afterwards, the eldeſt brother (having good cauſe for a Petition of Right to certain Lands, being in the Kings hands before the Attaindor) dyed without Iſſue, and the ſon of the younger brother was his next Heir in blood, who by the Attaindor of his Father, is diſabled to the ſaid Right, and Title of Action, as Heir to his Uncle: And, If the ſaid Right was extinct, and the cauſe of Petition determined, was the Queſtion? And it was the Opinion of the Juſtices, That ſo long as the Attainder remained in force, that it was. After all this, the ſon was reſtored in blood by Parliament, as Heir to his Father, in theſe words, viz. That he and his Heirs ſhall be from henceforth enabled only in blood, as ſon and Heir, and Heirs of the ſaid Father; and made only, Heirs, and Heirs in blood to the ſaid father, and that alſo the ſaid ſon and his Heirs, ſhall from henceforth be enabled to ask, have, hold, and enjoy all ſuch Lands, which at any time hereafter ſhall diſcend, come, remain, or revert from any collateral Anceſtor of his ſaid father, as if the Attaindor had not been, had, &c. Saving to all and every perſon, Bodies Politique, their Heirs, Succeſſors, &c. all ſuch Eſtate, as if the ſaid Act had never been made: And now the Queſtion was, if the ſaid ſon was reſtored to the ſaid Right and Title of Petition which was in his Uncle, as Heir to him, or not. Note, There was a Proviſo before the Saving, &c. That the ſaid Act of Reſtitution ſhould not extend to any Lands which were in the Kings hands, or of any other perſon, by the Attaindor. It was holden by the Juſtices, and the whole Court, That by theſe Clauſes, That the intent of the King, and of the Parliament, was literal to the party, who was reſtored, ſo as he ſhould be enabled to have the Petition of Right, as Heir to his Uncle. Paſc. 10 Eliz. *Dyer*, 274.

4. Note, That a common perſon cannot revoke, or Repeal a Preſentment to a Church, made by himſelf; becauſe he hath put the ſame out of himſelf, and he hath given to the Biſhop power to Preſent that which was by himſelf firſt begun: But if the King doth Preſent to a Church, and his Clerk be Admitted and Inſtituted, yet the King may before Induction, Repeal or Revoke his firſt Preſen-

Preſentment, by Preſentment of another Clerk to the Biſhop; and the very Preſentment of the ſecond Clerk, without any more ſignification thereof to the Biſhop, is in Law a Repeal of the firſt. See 25 E. 3. 47. *Robert de Kelſyes* Caſe. *Cook* 1. Part, *Inſtit.* 360.

5. The King Preſented (by reaſon of the Temporalties of a Biſhops *ſede vacante* in his hands) one to a Prebend; the Preſentee was afterwards Inſtituted and Enſtalled by the Dean and Chapter, Guardians of the Spiritualties; Afterwards, the King reciting that he was *Canonicè Inſtitutus* by reaſon of his Preſentation, did Ratifie and confirm the Preſentation, and he dyed Incumbent: A Biſhop being created in the mean time. It was holden in this Caſe, That the King ſhould Preſent again, notwithſtanding his Confirmation, becauſe he was not full Incumbent by the firſt Preſentation of the King. Trin. 32 Eliz. *Dyer*, 292. Mich. 8 Jac. in C. B. *Walters* Caſe adjudged acc.

6. The Vicarage of *Yatton* in the County of S. came to the Queen by Lapſe, The Ordinary of the Diocеſs Collated A. unto the Vicarage; Afterwards the Queen Preſented B, who brought a *Quare Impedit* againſt the Biſhop, and the Incumbent, pendant which Suit, A. by Covin and fraud obtained a Preſentation from the Queen, without making mention of the Queens pleaſure to Repeal the firſt Preſentment. It was holden by the whole Court in that Caſe, That the ſecond Preſentation in it ſelf had been ſufficient, and had been a Repeal of the firſt, if it had not been by Covin. And ſo it was adjudged, Mich. 4 Jac. in the Common Pleas, in the Biſhop of *Bangor* and *Williams* Caſe. See 19 Eliz. *Dyer* 339.

7. If the King hath reaſon to Preſent by Lapſe, or otherwiſe, and Preſents J. S. to the Biſhop, and before J. S. be Inſtituted and Inducted, the King dyeth; and the Succeſſor King, without reciting or making mention of the Preſentment of his Predeceſſor, Preſents J. D. to the ſame Church. It was adjudged in ſuch Caſe, That the Demiſe of the King did determine the firſt Preſentation; becauſe the Preſentation was but a power given to the Ordinary, which was Countermandable, and Revocable, and by the Preſentment, J. S. held *neque Officium, nec Beneficium*. 2. In that Caſe it was adjudged, That the firſt Preſentation in that Caſe was Repealed, although it was not recited by the King; and it was not within the Statute of 6 H. 8. cap. 5. That the King ought to recite the ſame; for it was agreed, That the ſaid Statute went only to Leaſe, and did not extend to Preſentations to Churches. 16 *Eliz. Dyer*, 327. Mich. 8. Jac. in the Exchequer, *Calvert* and *Kitchins* Caſe adjudged acc.

8. Sir *Maurice Berkley* had the Office of Banner-bearer by Patent from the King; and at the Coronation of Queen *Mary*, he came before one of the Maſters of the Chancery, and ſurrendred the ſame; which ſurrender was accepted of by the ſaid Maſter, and a Record made of it, but not delivered up, for Reſtitution was made of the ſaid Patent: And, after the ſaid Office was granted by Letters Patents to J. L. Sir *Maurice* brought a *Sciyre facias* againſt J. S. for to ſhew cauſe why the ſaid Letters Patents granted to the ſaid J. S. ſhould not be Repealed; for it was a Queſtion, if the Record of the ſaid Surrender, was ſufficient to make void the firſt Patent to Sir *Maurice*. The point was not determined by the Juſtices, but remained undetermined; But at laſt, the matter was compounded between them by the Lord Keeper of the Great Seal; and thereupon J. S. was removed from the Office, and Sir *Maurice Berkley* was reſtored to the ſaid Office. Hill. 2 Eliz. *Dyer*, 276.

9. Note, That where there are two Patents of one thing, there a *Scire facias* lyeth by the old Patentee, to Repeal and make void the laſt Patent againſt the ſecond Patentee; for 28 H. 8. a *Scire facias* iſſued to the Sheriff of *Middleſex*, at the Suit of *John Penwarren*, who was Baylie of the Hundred of C. in the County of *Cornwall*, by Inheritance, and expulſed out of his ſaid Bayliwick by *Hen. Thomas*; and thereupon the ſaid Letters Patents were Repealed, and made void, and the ſaid *John Penwarren* was reſtored to the ſaid Office, *una cum exitibus*. Paſch. 3 Eliz. *Dyer*, 197. See there many *Scire facias* brought for the Repealing of ſecond Letters Patents.

10. The King, at the ſupplication of Prince *Henry* his firſt begotten ſon, Duke of *Cornwal*, brought a *Scire facias* againſt *Henry Lindley* Knight, and Serjant *Hele*, to Repeal Letters Patents of Q. Eliz. Dat. 2 *Maii* 8. 37. of her Reigne, to the ſaid *Hen. Lindley*, and one *Gelly Meirick*, and their Heirs, of the Manners of *Taunton*, *Tottowie*, and *Landalph* in the County of *Cornwall*, to the end the King might make Livery of them to the ſaid Duke, as members and parts of the ſaid Dutchy; whereupon the ſaid Sir *Hen. Lindley*, Serjant *Hele*, and one *Warwick Heale*, Terr-Tenants were ſummoned, and after three Imparlances, they pleaded to the Act of Parliament, 11 E. 3. *Nul tiel Record*; and afterwards, Judgment was given for the King, That the Letters Patents granted by Queen *Eliz.* to *Lindley* and *Hele* ſhould be Repealed. *Cook* 8. Part, the Princes Caſe.

11. *Anno* 5 H. 4. Rott. Parliament, a Petition in Parliament was exhibited by the Commons for the Reſumption of Grants and Letters Patents made of the Lands of the Dutchy of *Cornwall*;

To

To which the King and Lords gave anſwer. And it was agreed by the King and Lords in Parliament, That the Lord the Prince ſhould have Writs of *Scire facias*. And thereupon, a *Scire facias* was brought in the Chancery, in the Name of the King, to Repeal a Grant which King R. 2. made of the Manner of *Riſborge*, parcell of the Dutchy of *Cornwall*, made to Sir *Lewis Clifford*, and his Heirs, who was returned ſummoned, and made default; Wherefore it was adjudged, That the ſame Letters Patents made to the ſaid Sir *Lewis Clifford*, ſhould be repealed. *Cook* 1. Part, 23. in the Prince's Caſe. See there, more Letters Patents repealed, upon *Scire facias* brought.

12. An Eſtate made to the King, and Letters Patents by him granted over, and all by Covin, by him, who granted to the King and the Patentee, to make an Evaſion out of the Statute of *Mortmain*, ſhall not binde, but ſhall be repealed. Hill. 14 Eliz. *Cook* 3. Part, 78. in *Fanmors* Caſe. See *Cook* 4. Part, 57, 58. in Caſe of the Warden and Communalty of Sadlers Caſe adjudge acc.

13. Upon a Rule given to ſhew juſt cauſe why a Prohibition ſhould not be granted to the Prerogative Court, It was Reſolved, That if the Prerogative Court have power to prove a Will, they may Repeal it by an Appeal; but if Lands be deviſed by the Will, together with goods, they have no power to Repeal it, as to the Lands; but if they ſhould have no power to Repeal it, as to the goods, it would be very miſchievous: But they have no power to make the Deviſe good or ill, as to the Lands; and therefore, where the Prerogative Court endeavoured to appeal a Will wherein Lands were deviſed, the Court at firſt ſeemed to grant a Prohibition; But afterwards, the Court held, There could be no ſuch Diviſion made of the Will by Prohibition, as to ſtand good in part, and to be Repealed for the reſt, and ſo would not grant the prohibition. Trin. 1650. in B. R. *Bowles* and *Clarks* Caſe. *Styles* 221.

2. *Where one Statute ſhall Repeal another Statute by general words, and where not.*

1. IF a man before the making of the Statute of 21 H. 8. cap. 13. had had a Diſpenſation from the Pope for a Plurality, and at the time of the making of that Statute had had one Benefice, with Cure of ſouls, of the yearly value of 8l. and within a year after the making of the Statute of 28 H. 8. he obtains a Confirmation of his former Diſpenſation, with words in the Confirmation, To hold and enjoy the effect of his Diſpenſation. It was the Opinion of *Mounſon* and *Manwood* Juſtices, That the firſt Benefice was void, by the Statute of 21 H. 8. and that the Statute of 28 H. 8. did not reſtore him to the ſame without a new Preſentation, notwithſtanding that the Statute of 28 H. 8. cap. 16. made the Bulls of Diſpenſation made by the Pope, good for one year; and that if they be ſurrendred within the year, That the Chancellor of the Augmentation may make a new Preſentation of him: But by *Dyer* Juſtice, As the Statute of 21 H. 8. made the firſt Benefice void, ſo the Statute of 28 H. 8. did reſtore him to the Benefice; for where two Statutes are creſs in appearance one to another, and no clauſe of *Non obſtante* is contained in the ſecond Statute, ſo that one may ſtand with the other, ſuch conſtruction ſhall be made of the Statutes, that both of them ſhall take effect. Mich. 18 Eliz. *Dyer*, 347.

2. A man ſeized of a Wharf and Houſe, holden in Burgage, deviſed the ſame to his Wife, and her Heirs, upon condition, That the Wife by the adviſe of Learned Councel, and in convenient time, ſhould give all the Lands for the maintenance of a Free-School, and certain Almſmen, and Almſ women for ever, and that the Wife ſhould have the profits during her life, bearing the charges of the ſame School, and made his Wife his Executrix, and dyed; ſhe entred, and was ſeized; and afterwards made a Leaſe of the Lands for years, the Heir entred for the Condition broken. It was Reſolved in this Caſe (amongſt other things) That the Statute of 23 H. 8. cap. 10. did not extend to take away good and charitable Uſes, for that that Statute took away only ſuperſtitious Uſes, as other Statutes, *viz.* the Statute of

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26 H. 8. and 28 H. 8. 31 H. 8. and 37 H. 8. did.

2. It was Reſolved, That the Statute of 32 and 34 H. 8. of Wills, did take away the force of the Statute of 23. for that the words are, That all and every perſon having an Eſtate in Fee ſimple, may diſpoſe, &c. by which it appeareth, That Companies not incorporated, are included, and not excepted out of the Statute of 32 and 34 H. 8. *Cook* 1. Part, 25. *Porters* Caſe.

3. A Tenant for life of Land, the Remainder in Tail to B. the Reverſion to B. and his heirs expectant; B. levyed a Fine to C. and D. and to the heirs of C. to the uſe of them and their heirs, and had Iſſue, and dyed, before all the Proclamations were paſt, the Iſſue being then beyond ſea, the Proclamations are made, and afterwards, the Iſſue returns, and made his claim. In this Caſe it was adjudged by the Fine and Proclamations. In this Caſe it was Reſolved, That the Eſtate Tail which paſſed by the Fine, was not abſolutely determined by the death of Tenant in Tail; but it was in the election of the Iſſue in Tail, to make it voidable or void. But 2. It was Reſolved, That when the Proclamation paſſed without any claim made by the Iſſue in Tail, that right which diſcended to him, was barred by the Statute of 4 H. 7. and 32 H. 8. and the ſaid Tail was not preſerved by the Statute of *Donis*, or any other Statute. *Cook* 3. Part, 87. The Caſe of *Fines*.

4. A man ſeized of a Reverſion in Fee, expectant upon an Eſtate Tail, by Indenture, in conſideration of blood, Covenanted to, and ſeized of the ſaid Reverſion, to the uſe of his Neece; and afterwards, Tenant in Tail in poſſeſſion, dyed. It was Reſolved, That in that Caſe, the King ſhould not have Primer ſeizin by the Statutes of 32 and 34 H. 8. 2. Reſolved, That by the Statute of *Marlbridge*, It was Colluſion apparent to enfeoff his eldeſt ſon: But it was holden, That no Colluſion can be averred, when upon an Eſtate for life, or a gift in Tail, the Remainder was limitted or left in another. 3. Reſolved, That the ſaid ſaving of Ward and Primer Seiſin in the Statute of 32 H. 8. ſhould have relation only to Acts executed, and not unto Wills; for alwayes in Statutes, relation ſhall be made according to the matter precedent; but in an Act executed, he might convey all, and therefore it was neceſſary to add the ſaving, as to that. *Cook* 7. Part, 76. Sir *George Carſons* Caſe.

5. A Mannor which did conſiſt of free Rents, of 7 l. Copy Rents 3 l. and of Demeſnes, which had uſed to been demiſed for ſeveral Rents and Farms of 7 l. to which Mannor an Acre of Waſte, parcel of the ſaid Mannor, of the value of 1 d. Heriots, Court Baron, and Perquiſites of Courts, which were never demiſed for life, years, or otherwiſe appertaining, were by a private Act of Parliament, 27 H. 8. given to A. and B. in Tail, with divers Remainders over, and the Donees were by the Act reſtrained, *Quod non facerent aliquod nocumentum*, or diſinheritance to the Iſſue in Tail, or to thoſe in the Remainder, and that they ſhould have power to make Leaſes for life, years, or at Will, rendring the true and ancient Rent of the ſaid Tenements ſo to be demiſed, and that all other Acts ſhould be void: Tenant in Tail accepted a Fine of a ſtranger *ſur Conuſans de Droit*, &c. by which he granted and rendred the Mannor for 300 years, rendring Rent, amounting to the Free Rents, Copyhold Rents, and Farm-Rents, and 18 d more, and 12 d. for the Waſte to be paid at two Feaſts, where the ancient Rent was payable at four Feaſts; Tenant in Tail dyed; and if the ſaid Leaſe of 300 years was to be avoided by the ſaid Act of 27 H. 8. was the Queſtion. It was Reſolved in this Caſe (amongſt other points) That although it is provided by the Act, That all Eſtates made, reſtrained by the ſaid Act, ſhould be void, yet the ſame ſhould not be void, as to Tenant in Tail himſelf; but ſhould be avoided by the Iſſues in Tail; and that all Acts of Parliament ſhall have a reaſonable conſtruction to be collected out of the words of the Act, according to the meaning of the Makers of the Act. *Cook*, 5. Part, 6. The Lord *Mountjoyes* Caſe.

6. A Cauſey of ſtone in the River of D. and City of C. was made, before the time of E. 1. for the maintenance of certain Mills; of late a Decree was made for a Breach made in the ſaid Cauſey. It was adjudged in that Caſe, That the Statute of *Magna Charta*, *Omnes Kideli deponantur*, extended only to Wear for taking of Fiſh, and that the Commiſſioners of Sewers could not ſubvert a Cauſey erected before the time of E. 1. but by the Statute of 25 E. 3. c. 4. and 1 H. 4. c. 12. If they be inhanced, they ought to be amended by abatement; and the Cauſey in Queſtion was erected before the time of E. 1. and never ſince enhanced, and therefore out of the ſaid Statutes: So it was Reſolved in the Caſe of *Cheſter* Mills, upon the Statute of 23 H. 8. cap. 5. of *Sewers*. *Cook* 10. Part 137.

7. A Religious Colledge to which a Rectory was appropriate, and other Land of the ſaid Colledge came to the King by the Statute of 1 E. 6. The King conveyed the Rectory to A. and the lands parcel of the poſſeſſions of the Colledge to B. The Fermor of B. brought a Prohibition againſt the Fermor of A. and in that ſhewed the Statute of 31 H. 8. concerning diſcharge of Tythes, and alſo ſhewed both the poſſeſſions at the time of both Statutes: It was adjudged in this Caſe, That a Prohibition did not lye, and a conſultation was awarded: For it was

Reſolved, That this Colledge did not come to the King by the Statute of 31 H. 8. but by the Statute of 1 E. 6. 2. It was Reſolved, That the branch of Diſcharge of Tythes in the Statute of 31 H. 8. did not extend to any Colledge which came to the King by the Statute of 1 E. 6. 3. Reſolved, That no Eccleſiaſtical Leaſe, as Biſhoprick, Deanries, which are not Religious, were within the ſaid Statute of 31 H. 8. for ſuch houſe ought to be Religious and Regular, which vowed obedience, conſtant poverty, and perpetual chaſtity. *Cook* 2. Part, 38. The Biſhop of *Canterburies* Caſe.

8. Note, It was holden and Reſolved by the Juſtices, That the Statute of 33 H. 8. for Tryals of Treaſon committed out of the Counties, was repealed by the Statute of 1 & 2 *Ph. & Mar.* and that the Rebels which were in the North, ſhould be Indicted in the County where the offence was committed, and the Indictment removed before the King *in Banco*, and the Juſtices of *Oyer in Middleſex*, and the Jury ſhall be of the County where the Indictment was. Hill. 12 Eliz. *Dyer*, 286.

9. An Informer ſued a Recuſant for the penalty of 20 l. by the moneth, for not repairing to his Pariſh Church, nor to any other Church or Chappel, or place of Common Prayer, or Divine Service: The Defendant pleaded the Statute of 23 Eliz. That every Recuſant being a Recuſant Convict, ſhould forfeit to the King for every moneth 20 l. and pleaded the Statute of 28 Eliz. That every offender againſt the Statute of 23 Eliz. ſhould pay for every moneth after ſuch conviction, without any other Indictment, 20 l. to the King at the Exchequer, and pleaded the Statute of 35 Eliz. *quod nulla pars* by the ſaid Statute ſhould be paid to the Informer. In this Caſe it was Reſolved upon the ſaid Statutes, 1. That the branch of 23 Eliz. of Diſtribution ſhould extend as well to the clauſe of penalty of Recuſancy, as to the ſaying and hearing of Maſſes. 2. Reſolved, That the Statute of 28 Eliz. had not taken away the liberty which the Informer had, by the Act of 23 Eliz. becauſe that Act did not extend to any abrogation, but the rather, to a more ſpeedy execution of the ſaid branch of 23. and alſo, becauſe that Act did not give any penalty to any perſon to whom it was not given before; and alſo, becauſe the Statute is in the affirmative, and Statutes affirmative, do not take away precedent Acts affirmative. 3. Reſolved, That the Statute of 35 Eliz. did not take away the Statute of 23 Eliz. as to the Action papalent; for the purpoſe of the Act was only to ouſt delays, and to give ſpeedier remedy; alſo the words of the Act of 35 Eliz. are not *ſimpliciter*, That all penalties ſhall be recovered to his Majeſties uſe; but *ſecundum quid & ſub modo*, and the Act of 35 H. 8. ſhall be extended only to that to which it is referred, and ſhall not alter or abrogate any Law before: And Acts of Parliament ought not by any ſtrained conſtruction out of general and ambiguous words of a ſubſequent Act, be abrogated. *Cook* 11. Part, 59 to 61. Dr. *Fosters* Caſe. And in that Caſe it was Reſolved, That the Act which gave the 20 l. a moneth, did not take away the Act of 1 Eliz. which gave the forfeiture of 12 d. for every Sunday, but that both did well ſtand together.

Repleader.

1. IN a Replevin, the Defendant made Conuſans as Bayliff to J. S. for damage feaſant, and ſuppoſed, That King E. 6. let the Land to A. and B. for Term of years, who Granted parcel of his Term to the ſaid J. S. The Plaintiff ſaid, That long before the ſaid King had any thing, &c. That the late Abbot of K. was ſeiſed in Fee in the right of his Church, and with the aſſent of his Covent demiſed to him for life, *Habendum poſt mortem* A. and B. and that they dyed, and he put in his Cattel. They were at Iſſue upon Traverſe of the Leaſe of the Abbot; and the Jury gave their Verdict at large, and found the Leaſe *ut ſupra*, but concluded, that there was not any Letter of Attorney to make Livery. It was the Opinion of the Juſtices, That in this Caſe a Repleader ſhould be awarded, becauſe that a Verdict at large cannot be given upon a ſpecial Iſſue joyned. Paſc. 3 Ma. *Dyer*, 117, 118.

2. Debt againſt Executors of an Executor upon an Obligation made by the firſt Teſtator, The Defendant pleaded, That his Teſtator in his life time adminiſtred all the goods and Chattells, which were the goods of the firſt Teſtator at the time of his death; and that no goods and Chattels of the firſt Teſtator, were in his hands at the time of the Writ brought, or after. The Plaintiff replyed, That the Executor of the firſt Teſtator had divers Goods and Chattells which were of the firſt Teſtator in his hands not Adminiſtred at the time of his death, to the value of, &c. It was the Opinion of the Court, That this Iſſue was a Jeofail, becauſe the Defendant in his Bill did not conclude, ſo nothing in the hands of his Teſtator. And the Plaintiff in his Replication doth not alledg, That the Teſtator of the Defendant had Aſſets in his hands *tempore mortis ſuæ*; and therefore it was inſufficient, for it might be that he had once Aſſets the which he diſpoſed of for the payment. And alſo the Concluſion is by another affirmative. And ſo the Iſſue is joyned upon two Affirmatives, which maketh it to be a Jeofail; and thereupon a Repleader was awarded by the Rule of the Court. Mich. 2 Eliz. *Dyer*, 174.

3. Debt

3. Debt upon an Obligation, The Defendant pleads, That a ſtranger was Impriſoned by another ſtranger, and kept in Priſon till the Defendant as his Surety of the ſtranger, made the Obligation. It was holden by the Court to be a naughty Plea, and a Repleader awarded. Trin. 7 Jac. in C. B. *Mantell* and *Gibbs* Caſe. *Brownlow*, 1. Part, 64.

4. B. brought Debt againſt S. upon a Bond, the Condition was, That whereas the Defendant was Arreſted at the Suit of one A. If now the Defendant ſhall appear in the Kings Bench, where the proceſs is returnable, that then, &c. And the Defendant ſaid in fact, That he had appeared *ſecundum formam et effectum conditionis prædict. et hoc petit quod inquiratur per patriam et prædict. B. ſimiliter.* It was moved, That the parties ſhould re-plead for this matter upon which they are at Iſſue, *ſcil.* the appearance is not tryable by Jury, but by the Record. And the Court was clear of Opinion, That the parties ſhould replead for that cauſe. Mich. 30 Eliz. in C. B. *Bret* and *Shepheards* Caſe. *Leon.* 90.

5. In Error, A. brought a *Quare Impedit* of the Church of D. againſt the Arch-Biſhop of *Canterbury*, and S. the Plaintiff entituled himſelf by Grant to the next Avoydance. That one T. C. was Preſented, Admitted, Inſtituted, and Inducted thereinto, and that the Church became void by acceptance of another Benefice above value. The Arch-Biſhop pleaded a plea, upon which it was demurred. And S. pleaded a Plea, and traverſed, That the ſaid T. C. was Admitted, and Inſtituted therein; and upon this they were at Iſſue, and a Writ awarded to the Arch-Biſhop upon that Tryall. Afterwards upon conſideration of the Plea of S. it was adjudged to be ill, and a Repleader awarded, becauſe the Induction being alledged, ought alſo to have bin traverſed. Whereupon the Defendant amended his Plea, and traverſed the Admiſſion, Inſtitution, and Induction, and Iſſue was thereupon joyned, and found for the Plaintiff. After divers continuances *in Banco*; the Plaintiff ſhewed, that the Arch-Biſhop was dead; and prayed, That there might be no Judgment againſt him, and to have Judgment upon the Verdict, which was granted. Whereupon S. brought Error, and aſſigned, That the Re-pleading was not well awarded for the Iſſue which was joyned before the Writ awarded to the Arch-Biſhop was well awarded, and there needed no Repleader. But it was holden by the Court, That the Repleader was well awarded, for the Induction being alledged aſwell as the Inſtitution, there ought to be a traverſe to it, which alters the courſe of the Tryal. Hill. 9 Car. in C. B. *Stephens* and *Fancons* Caſe. *Cro.* 1. Part, 276.

6. Error of a Judgment in Trover againſt Huſband and Wife, becauſe the Wife after Coverture found goods, and converted them to her uſe. They pleaded *Quod ipſi non ſunt culpabiles*; and for that cauſe it was Ruled ill, and no tort is ſuppoſed in the Husband. Wherefore after a Verdict for the Plaintiff, a Repleader was awarded; whereupon they pleaded, and traverſed the Converſion. It was found for the Plaintiff, and Judgment given, and Error brought and aſſigned, That the firſt Iſſue was well joyned, and there ought not have bin a Repleader. But *Non allocatur*. For the wrong being alledged to be in the Wife, and none in the Husband; the Iſſue only ſhall be that ſhe is not guilty, and ſo the Preignothories of the Common Pleas certified it to be their courſe. Hill. 44 Eliz. in the Exchequer Chamber, *Cox* and *Cropwells* Caſe. *Cro.* 2. Part, 5, 6.

7. Replevin, the Defendant avows upon the Statute *Infra feodum et dominium* upon a ſtranger. The Plaintiff ſaid *Non tenuit* generally, without alledging tenure *de aliquo*, and traverſed the tenure alledged. It was holden to be ill, and for that cauſe a Repleader awarded. And it was holden, That the Plaintiff might have all Pleas which he might have at the Common Law, beſides Diſclaimer, for he might traverſe the Tenure, or plead *hors de ſon Fee*, but he cannot plead *Non tenure* generally. Paſc. 3 Jac. in C B. *Paramor* and *Chapmans* Caſe.

8. Upon an Aſſumpſit of the Wife *dum ſola fuit* the Plea was entred, *Et prædict. J. N. et Bridgetta ven. et defend. vim et injuriam, &c. Et ipſa Bridgetta dicit, quod ipſa non Aſſumpſit. Et hoc, &c. et prædict. Querens ſimiliter.* This being tryed, and found for the Plaintiff, it was moved in ſtay of Judgment, That a Plea of a Feme Covert without the Husband, is no plea at all. And an Iſſue being joyned, and tryed thereupon, is idle and not helped by any Statute of Jeofailes. Wherefore a Repleader was awarded by the Court. Mich. 9 Jac. in B. R. *Tampion* and *Newſons* Caſe. *Cro.* 2. Part, 288.

9. In Debt upon an Obligation upon Condition to pay 10 l. 10 s. the Defendant pleaded payment of 10 l. *ſecundum formam Conditionis*, upon which they were at Iſſue, and a Verdict was for the Plaintiff; and yet a Repleader was awarded. Hill. 13 Jac. in B. R. *Kyat* and *Halls* Caſe. *Hob.* 113.

10. In an Action of Aſſault and Battery, the Defendant pleaded Not Guilty to the Battery, and pleaded a ſpecial Juſtification as to the aſſault. It was prayed, That there might be a Repleader, becauſe the Iſſue joyned is immaterial. It was holden by the Court, That where there is an immate-

rial Iſſue, there ought to be a Repleader, and it is not helped by the Statute, and there can be no Judgment, for the matter is not put in tryal, and for this cauſe it would be unreaſonable to give Judgment, and the Iſſue is an immaterial iſſue; where the Court ruled the parties to Replead, Paſc. 1649. in B. R. *Jennings* and *Lees* Caſe.

See more of *Repleader* in the Title *Amendments, Jeofailes*, and *Pleadings*.

Replegiare, or *Replevin.*

1. A *Replegiare*, or a Replevin, is a Writ where a man diſtreineth another for Rent, or other thing, then he ſhall have this Writ directed to the Sheriff to deliver to him the Diſtreſs, and ſhall find ſureties to purſue his Action, and if he purſue it not, or otherwiſe it be found and adjudged againſt him, then he that took the Diſtreſs, ſhall have again the Diſtreſs, and that is called the return of the Cattel, and for that he may have a Writ, which is called *Returno habendo*.

2. If the Lord taketh the Cattel of his Tenant wrongfully. And afterwards the Cattell come home again to the Tenant. In ſuch Caſe, although that the Tenant be poſſeſſed of the Cattel, yet he may have a Replevin againſt the Lord for his Cattel taken, and therein he ſhall recover his damages for the wrongful taking of them, becauſe elſe he ſhall be without remedy, for he cannot have an Action of Treſpaſs againſt the Lord for ſuch taking of his Cattel. See *Fitzh. Natur. Brev. 69.* acc.

3. Note, It appeareth by the words of the Statute of *Marlbridge* cap. 21. *Quod vice comes poſt querimoniam inde ſibi factam, ea ſine impedimento vel contradictione ejus, qui dicta averia ceperit, deliberare poſſit*: by which words it appears, That a Plaint muſt firſt be entred in the County Court before the Sheriff can make a Replevin. But yet upon the ſaid Act, the Sheriff may take a Plaint out of the County Court, for that it would be very inconvenient for the Owner to forbear his Cattell till the County Court day *Cook* 1. Part, *Inſtitutes* 145.

4. If a Replevin be ſued by Writ, and the Sheriff returns thereupon, That the Cattell be not to be found, then a *withernam* ſhall be awarded againſt the Defendant; And if a *Nihil* be returned, then an *alias Capias* and *pluries Withernam*; and thereupon an *Exigent*; and if he do at the Return of the Exigent find Pledges to make deliverance, and be admitted to his Fine, then the Plaintiff ſhall declare upon an *nuncore detend.* and go to tryal upon the right of the cauſe of Diſtreſs; and if it be found for the Plaintiff, he ſhall recover his Coſts and Damages; and if for the Defendant he ſhall have *Returno Habendo*. But if upon the Return of the *Pluries Replegiare*, the Defendant appeareth, then no *Withernam* lyeth; but he muſt gage deliverance or be committed. See *Brownlow*, 1. Part, 169.

5. If the Plaintiff in a Replevin doth declare, That the Defendant had, and doth yet detain the Cattel, and the Defendant doth appear, and afterwards makes default, the Plaintiff ſhall have Judgment to recover all in damages, aſwell the value of the Cattel, as damages for the taking of them, and his Coſts. Mich. 8 H. 8. Rott. 108. acc.

6. In a Replevin, the Defendant avowed as Adminiſtrator of F. for a Rent reſerved upon a Feoffment made of the Manor of D. reſerving Rent in Fee to the Feoffor in the name of a Fee-Farm Rent with clauſe of Diſtreſs for the not payment of it; and that the Rent did diſcend to the Iſſue of the Feoffor, and for Rent due to the Heir of the Feoffor in his life time, the Defendant avowed. The Plaintiff in bar of the Avowry ſaid, That neither the Inteſtate, nor his Anceſtors, nor any other whoſe Eſtate the ſaid F. hath in the Rent, were ever ſeiſed of the ſaid Rent within 40 years; upon which there was a Demurrer. It was the Opinion of the Court in this Caſe, That the Seiſin is not to be alledged, being it was by Deed made within the time of Preſcription; neither is Seiſin to be alledged but where it is traverſable; but where it is traverſable, there it muſt be alledged. It was adjudged for the Avowant. Trin. 6 Jac. in C. B. *Cowper* and *Fiſhers* Caſe. *Brownl.* 1. Part, 169.

7. In a Replevin, the Lord avowed the taking of one Mare as for Rent behind, and for the fourth part of a Relief, but doth not expreſs the ſame due for the Relief, and for the Rent. For the Rent, the Plaintiff pleads a tender, and for the Relief demurs, becauſe the Defendant in the Avowry had not expreſſed the ſame, and alſo becauſe he had diſtreined one thing both for the Rent and the Relief, pretending that if one cauſe ſhould paſs againſt him, and another for the Avowant; that he could not have *Returno Habendo*. But the Opinion of the Court was to the contrary. But they ſaid That

That if two men do diſtrein one and the ſame Mare for ſeveral cauſes, and they have ſeveral Judgments for themſelves ſeverally, that in ſuch Caſe no *Retorno Habendo* can be made of the Mare. Hill. 12 Jac. in C. B. *Pain* and *Moſtalls* Caſe, acc.

8. In a Replevin, the place was omitted in the Declaration: Whereupon the Plaintiff demurred. It was holden by the Court to be a good cauſe of Demurrer, for that the Plaintiff is bound to take notice where the Cattel are diſtreined. And a man cannot diſtreyn for a Rent-Charge but in the day time, becauſe the party cannot take notice where the diſtreſs was taken; and the Law doth preſume that the Tenant of the Land, or his Servants are all the day upon the ground. Hill. 12 Jac. in C. B. *Read* and *Howes* Caſe. *Brownl. 176.*

9. In a Replevin, the Plaintiff declared, That the Defendant *cepit averia* of the Plaintiff *apud Oceould*, and did not ſay, *in quodam loco, &c.* upon which the Defendant did demur in Law. The Queſtion was, Whether the expreſſing of the place where the taking and diſtreining of the Cattel was were material in the Plaintiffs Declaration or not. It was Objected for the Defendant, That the Ancient form of the Regiſter ought to be obſerved. And in the Regiſter, the place where the taking is, is ſet forth. And 35 H. 6. 40. Exception was taken to the Declaration, becauſe the Plaintiff in the Replevin did not alledg the place where the taking was. It was ſaid by *Cook* Chief Juſtice, to which the other Juſtices inclined, That the effect of the Suit in this Caſe, is not the ſhewing of the place, but the taking of the Cattel; and it is to come on the part of the Defendant to ſhew where he took the Cattel, for perhaps the Plaintiff doth not know where he took them: and if he did know the place where they were taken, yet perhaps he hath not Witneſſes to prove the ſame, and ſo by this means, the Plaintiff ſhould be at a miſchief, and delayed in his ſuit; whereas a Replevin is *feſtinum remedium* to have his Cattel again, which perhaps are his Plough Cattel. And in this Caſe, upon the matter, the Avowant is the Actor, and he beſt knows the place where he took the Cattel: And it is no reaſon that the Plaintiff miſſing the place, not being matter of ſubſtance, ſhould be prejudiced in his Suit. Divers books were alledged, where the taking is alledged to be in a Town, without ſaying *in quodam loco*, and yet good. 4 E. 3. 13. 14 E. 3. 14. 21 H. 7. 23. 9 H. 4. in 1 *Homine replegiando.* 13. The Caſe was adjourned. Trin. 10 Jac. in C. B. *Read* and *Howes* Caſe. *Godbolt. 186.* See *Hob. 16.* the ſame Caſe.

29. In a Replevin, the Plaintiff made his Plaint of taking of 1000 ſheep. It was againſt F. and others. F. pleaded *Non Cepit*; the others ſaid, That the property of the Sheep was in another. Upon the firſt Iſſue, the Caſe was this, The Lord W. was poſſeſſed of certain ſheep, and by his Will deviſed them to E. his Daughter, for her advancement in marriage, and made his Wife his Executrix and dyed: the Wife took to Husband J. S. who let the Sheep with a Farm for 11 years by Indenture; upon which it was agreed, That the Leſſee ſhould keep ſo much of the Rent to buy ſo many Cattel ſtill over, ſo as the whole ſtock of the Sheep upon the Farm ſhould amount to 1000. And the Leſſee Covenants to yield and render to the ſaid J. S. at the end of the Term 1000 ſheep, between two years, ſhorn, and four years, ſhorn. Afterwards J. S. gave to one A. who had married E. the Daughter, the ſaid 1000 ſheep, to have them after the ſaid Term; the Term expired, J. S. ſould and granted them to *Wood* the Plaintiff. A. pretending, That the ſaid Sheep paſſed to him by the ſaid Grant of J. S. ſeiſed them, the ſame was done *Noſtanter*, as they were driven in the High way. Whereupon contention ariſing betwixt the parties concerning the ſaid ſheep, the one charging the other with Felony, the Conſtable of the Town went to the houſe of F. the Defendant, to aſk his advice, who anſwered he would not meddle therewith. Afterwards J. D. who had bought the ſheep of A. came to F. and ſaid, That the High way was ſufficient for Paſturage for them, and prayed that the ſheep might be delivered to him to keep; to whom F. anſwered, That if the ſaid J. D. would find ſufficient Sureties, to deliver back the Cattel to him who had right, he would be contented the ſaid J. D. ſhould take them. And to that purpoſe, he became bound to F. The Opinion of the whole Court was, upon this long matter ſhewed, That F. *Non cepit*; and as to the property of the ſheep, the Court was clear of Opinion, That the Grant made by J. S. of the Sheep during the Term was utterly void, for that the ſaid J. S. during the ſaid Term, had not in the ſaid Cattel, either a general or a ſpecial property; nor alſo after the Term; but if that after the Term the Leſſee will not according to his Covenant deliver to J. S. 1000 ſheep, he is put to his Action of Covenant; and it was ſaid by the Juſtices, That if I let certain ſheep to one for two years; upon that Leaſe, ſomewhat remains in me, but that cannot be properly ſaid a property, but rather a poſſibility of a property, which cannot be granted over. Mich. 29 Eliz. in C. B. *Ward* and *Foſter's* Caſe. *Leon. 42, 43.*

11. In a Replevin, the Defendants made *Conſtat* as Bayliffs to J. S. for damage feaſant. The Plaintiff

Plaintiff in bar of the Conuſans ſhewed, That he, and all thoſe whoſe Eſtate he hath in 140 Acres of Land, time out of mind, have had Common in ſix Acres of Land, whereof the place where is parcel, and ſo put in his Cattel, &c. againſt which the Defendants ſaid, That he had Common in 40 Acres of Land, whereof the ſix are parcel, all lying in *Communi Campo*; and that the Plaintiff long time before the taking, &c. had purchaſed two Acres, parcel of the ſaid 40 Acres: Upon which it was demurred. It was ſaid, That the Replication to the bar was not good; For in the barto the Avowry, the Plaintiff hath ſhewed that he hath Common in ſix Acres, and the ſame ſhall be intended Common in the ſix Acres only for Common in 40 Acres, cannot be Common in ſix Acres. See 35 H. 6. 38. In Debt for Rent upon a Leaſe for years, the Plaintiff declared, That he Leaſed to the Defendant 30 Acres of Land, rendring the rent in demand. The Defendant pleaded, That the Plaintiff leaſed to him the ſaid 30 Acres, and alſo ſuch a Rectory rendring the ſame Rent; it was holden it was no Plea without traverſe, *abſque hoc*, that he Leaſed the 30 Acres only. In the Principal Caſe, the Court was clear of Opinion, That for want of a Traverſe, the plea was not good, for the Common ſuppoſed in the bar to the Conuſans out of the ſix Acres, cannot be intended the Common ſuppoſed in the Declaration, *ſcil.* out of the 40 Acres. And the Court was clear of Opinion, That by the purchaſe of the two Acres, the whole Common was gone. Mich. 29 Eliz. in C. B. *Kimpton* and *Bellamyes* Caſe. *Leon.* 43, 44.

12. A Replevin againſt two, who make Conuſans as Bayliffs to A. for a Rent upon a Leaſe for life. The Plaintiff in bar of the Conuſans pleaded, That two ſtrangers had right of entry in the place where, &c. and that the Defendants by their commandments entred, and took the Cattel damage feaſants, *abſque hoc*, that they took them as Bayliffs to A. the Defendant did demur. It was ſaid, That the Traverſe was not good, for by that means the intent of the party ſhall be put in Iſſue, which no Jury can try. It was ſaid by the Court in this Caſe, That when a Bayliff diſtreins, he ought if he be required, to ſhew the cauſe of his Diſtreſs, but if he be not required, he is not tyed to do it. But at laſt the Court agreed, That the traverſe was well taken. Mich. 29 Eliz. in C. B. *Bullers* Caſe. *Leon.* 50.

13. In Evidence to a Jury in a Replevin brought by I. S. againſt one B. for taking of Cattel; the Defendant made Conuſans, and he ſaid, That J. D. was ſeiſed of ſix Acres of Lands, and granted a Rent out of that, to his Son in tail, and for Rent behind, he avowed; the Iſſue was, That the Rent did not paſs by the Grant. It was holden in that Caſe, That the avowant ought to prove, that the Grantor was ſeiſed of ſix Acres or more, and not of four or five Acres, if he will maintain his Iſſue. Trin. 19 Jac. in C. B. *Bennets* Caſe. *Winch.* 15.

14. In a Replevin, the Defendant ſaid, That he had property in the Beaſts, *abſque hoc*, that the property was in the Plaintiff, and ſo prayed Judgment of the Writ. It was found for the Plaintiff. It was moved in Arreſt of Judgment, for that in no book is found ſuch a traverſe as this, that the Plaintiff had not property, but only that the property was in the Defendant. And 2. The concluſion of his plea is not good. It was ſaid by *Hobart* Juſtice, That an Action of Detinue affirms the property at the time of the Action, but a Replevin the time of the taking; and two men may have ſuch property in the ſame thing, that every of them may have a Replevin. It was ſaid by a Serjeant at Bar, not of Council in the Caſe, That the Book of Entries is, That the Defendant might traverſe the property of the Plaintiff. *Hutton* Juſtice ſaid, That was never ſeen. The whole Court agreed, That this being after Verdict, Judgment ſhould be given for the Plaintiff. Mich. 19 Jac. in C. B. *Winch.* 26.

15. In a Replevin betwixt S. and R. who made Conuſans as Bayliff to the Earl of B. and ſhewed, that the Land was parcel of ſuch a Chauntry, which came to King E. 6. by the Statute of 1 E. 6. and pleaded the ſaving, by which the Right of others was ſaved; and ſhewed, that ſo much Rent was behind, upon which he made Conuſans. The Plaintiff Replyed, That the Land is out of the Fee and Seignory of the Earl of B. It was holden, That that was no plea, for he confeſſed ſo much in his Avowry, and this Avowry is not for Rent ſervice, for the Seignory is extinct by Act of Parliament, but this is for Rent reſerved by the ſaving of the Act of Parliament, and this is a Rent Seck, and diſtreinable for the Privilege which was before, and it was holden, That he might Traverſe the Tenure, that at the time of the making of the Statute, nor ever after, this was ever holden of the Earl of B. Paſc. 22 Jac. in C. B. *Stephens* and *Randalls* Caſe. *Winch.* 77.

16. In a *Replevin*, for taking of 4. Oxen at C. in the County of L. in a place there called *Dowgate Leys*: The Defendant ſaid, That the place contained 4. Acres in C. *magna*, which was his Freehold, and Juſtifies the taking Damage Feaſants. The Plaintiff in barr to the Avowry Replyes, That the place where, &c. lyes in a place called H. quarter parcel of a great Field called E. in C. aforeſaid, and that the Plaintiff at the time,

time, and long before was ſeiſed of a Meſſuage and 14. Acres of Land Meadow and Paſture to the ſaid Meſſuage belonging; and that he and all thoſe whoſe Eſtate he had, ought to have Common, and ſo preſcribed to have Common for him, his Farmers and Tenants, &c. for all Cattle Commonable Levant and Couchant upon the Tenements. Upon Iſſue taken upon the Common, it was found for the Plaintiff. In Arreſt of Judgment, It was moved, That it did not appear by the Barr to the Avowry, in what place the Meſſuage and Land, to which the Common did appertain, did lye; viz. Whether it did lye in C, or in any other place, or County; which of neceſſity ought to be ſhewed, becauſe the Tenure ought to be both of the place where the Meſſuage and Land did lye, and of the place where the Land did lye, to which the Common was claimed; and therefore of neceſſity it ought to be ſhewed in Certain, and ſhall not be of neceſſity intended to be in C. where the Common is: For a Common may be appurtenant or appendant to Land in another County. And for that defect, the Judgment was Arreſted *per Curiam*. Trin. 8 Jac. in C. B. *Braxall* and *Thorolds* Caſe, *Brownl.* 1. Part, 188.

17. In a *Replevin*, the Caſe appeared to be, That the Cuſtome of a Mannor was, That if a Copyhold Tenant ſuffer his houſe to be ruined for want of Reparation, that he might be amerced, and that the Lord might diſtrain the Cattell as well of the Tenant, as of the under-Tenant Levant and Couchant upon the Land for the Amercement: A Copyholder ſuffered his houſe to go to ruine for want of Reparations, and afterwards made a Leaſe of his Copyhold Meſſuage for a year; and the Lord diſtrained the Under-Tenant. In this Caſe, It was holden by the Court, That it was a good Cuſtome, and alſo a good Diſtreſſe. And in that Caſe, It was ſaid, That the Amercement is not only perſonall, but is a Charge upon the Land, and the Diſſeiſee is but a pledg, and therefore a ſtranger might be diſtrained by ſuch a Cuſtome, Hill. 17 Car. in B.R. *Thorn* and *Tylers* Caſe, *Marſh*, 161.

18. In a *Replevin*, the Caſe was; A man claimed Common for his Cattell Levant and Couchant upon the Land in a Field called D, when the ſaid Field was unſowed with Corn; and ſet forth, That he put 6. Kine, and uſed his Common in the ſaid Field, becauſe the Field was not ſowed with Corn. The Defendant in his Avowry ſhewed, That part of the Field was then ſowed with Corn. It was the Opinion of the whole Court, That ſowing parcel of the Field, ſhould not hinder the Plaintiff from uſing his Common in the reſidue, for that might be done by Covin, to deceive the Commoner of his Common. Mich. 5 Jac. in C. B. *Tinelack* and *Rigbyes* Caſe, *Brownlow.* 1. Part, 189.

19. In a *Replevin*, the Caſe was; A man granted a Rent out of certain Lands, and limited the ſame to be paid at a houſe which was another place of the Land; and in the Grant was this Clauſe, That if the Rent were behind, and lawfully demanded at the houſe, that then it ſhould be lawful for the Grantee to diſtrain: the Rent was behind, and the Grantee diſtrains; and upon Trayerſe taken upon the demand, Whether this Diſtreſſe upon the Land were a good demand, as this Caſe is, was the Queſtion? It was the Opinion of the Court, That there ſhould be a Demand: For it was ſaid, It is part of the Contract, and like a Condition precedent: For as in a Condition precedent, a man ought to perform the Condition, before he take any thing by the Grant; ſo in this caſe, the Grantee ought to make a demand to enable him to diſtrain; for before the Demand by the manner of the Grant, he is not entituled to a Diſtreſſe. Trin. 17 Car. in C.B. *Selden* and *Kings* Caſe, *Marſh*, 147.

20. In a *Replevin*, Avowry was made for an Amercement in a Leet, and ſhewed, That he was ſeiſed of the Mannor in Fee, and that he and all, &c. have had a Court-Leet, &c. The Plaintiff traverſed, That he was ſeiſed of the Mannor in Fee. The Court was of Opinion, That if the Defendant had but a Reputed Mannor, it would maintain the Avowry, although he had no Mannor in truth. Mich. 8 Jac. in C. B.

Repli-

Replication.

What Replication ſhall be good; What not. Where, and to what barr; What not. Where made good by the Rejoynder: Where it muſt be general; Where ſpecial. And of divers other matters concerning Replications.

1. TReſpaſſe for entring his Houſe, and breaking his Cloſe in D. The Defendant pleaded, That the Houſe and Cloſe in which the Treſpaſs is ſuppoſed, contains 20. Acres, and is, and was, his Freehold. The Plaintiff Replyed, *Quod locus et clauſa, in quo ſupponitur tranſgreſſio eſt unum, Meſſuagium*, and makes title to it. Upon Not-guilty, It was found againſt the Plaintiff; for that by his Replication, he doth make Title but to a Meſſuage, which doth not maintain the Declaration, which was for a Meſſuage and Cloſe. It was adjudged againſt the Plaintiff. Mich. 40 Eliz. in C. B. *Goldſtor.* 158.

2. Note; It was moved to the Court, That when the Defendant pleads in barr to the Action, and the Plaintiff Replyes, and the Defendant doth demur ſpecially upon the Replication, and the Barr is inſufficient, Whether the Juſtices ſhall give Judgment upon the Replication, or ſhall reſort unto the inſufficient Barr, the Replication being alſo inſufficient. It was the Opinion of the Court, That when the Action is of ſuch a nature, that the Writ and the Count doth comprehend the Title, as a *Formedon*, or the like, then becauſe there is a ſufficient Title for the demandant by the Writ and Count, ſo as the Judges may ſafely proceed to Judgment for the Plaintiff, there they ſhall reſort to the Inſufficient Barr: Contrary, where the Title doth commence only by the Replication; as in an Aſſiſe, Treſpaſs, &c. Trin. 29 Eliz. in C. B. *Zouch* and *Bonfields* Caſe, *Godbolt*, 138. *Leon.* 75. the ſame Caſe.

3. Debt upon an Obligation of 500 l. to perform the Award of A. and B; The Defendant pleaded, That the Arbitrators did not make any Award. The Plaintiff ſhewed the Award in his Replication, but did not aſſign any breach. Upon Iſſue joyned, it was found for the Plaintiff. It was the Opinion of the Court, That although the Verdict was found for the Plaintiff, yet he could not have Judgment, becauſe there was defect in the Replication, in that he did not aſſign a Breach, and ſo had no cauſe of Action; and the ſame being matter of ſubſtance, is not helped by the Statute: Judgment was ſtayed, Paſch. 7 Jac. in B.R. *Barrs* and *Fletchers* Caſe. *Cro.* 2. Part, 220.

4. *Ejectione Firmæ*, upon a Leaſe made by A: The Defendant pleaded, That before A. had any thing, J. S. was ſeiſed, and had Iſſue H, and dyed ſeiſed, and that the Land diſcended to H. his Son and Heir; and that A. entred, and was ſeiſed by Abatement, and made the Leaſe. The Defendant Replies; and confeſſed the Seiſin of J. S: and ſaid, That he Deviſed the Lands to A. in Fee, and dyed; by force of which, A. entred, and was ſeiſed by force of the Deviſe; Without that, that A. was ſeiſed by Abatement. Upon which, It was demurred. In this Caſe, It was adjudged for the Defendant; for that the Traverſe was not good: for the Plaintiff made Title under A. the Deviſee, and ſo his Entry was lawfull, and not by Abatement; and then to take a Traverſe makes the Replication vitious: for no Traverſe ought to be, where the thing traverſable is Iſſuable, And alſo, it was not good for the manner of it; for it ought not to be, That A. was ſeiſed by Abatement; but without that, That A. did abate. Paſch. 7 Jac. in B.R. *Eedel* and *Luſt's* Caſe, *Cro.* 2. Part, 221.

5. Debt upon an Obligation; The Defendant pleaded, It was upon Condition, to ſtand to the Award of J. S; who awarded, That the Defendant ſhould pay to the Plaintiff at ſuch a day 100 l. or find two Sureties to be bound with him, to pay the 100 l. to the Plaintiff, by 20 l. *per annum*, till the whole was paid; and that he had performed the Award. The Defendant ſaid, He had not paid him the 100 l. and ſo aſſigned the breach: upon which, the Defendant did demur. It was the Opinion of the Court, That the Replication was good; for although the Award be ſet down in words diſjunctive, yet in Law, in ſubſtance, it is ſingle: for as to the finding of the Sureties, the Award is void, ſo as nothing is awarded, but the payment of the 100 l. at the day; to which the Plaintiff by his Replication hath fully Anſwered. It was adjudged for the Plaintiff, Hill. 30 Eliz. in C. B. *Oldfield* and *Willners* Caſe, *Leon.* 140.

6. *Scire facias* againſt K. R. Adminiſtratrix of J. R. upon a Judgment for a debt due by the Inteſtate: The Defendant pleaded, That the Inteſtate made his Will, and made E. R. his ſon within age, his Executor; and that Adminiſtration was

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committed to her *durante minore ætate*; and that E. R. at 17. years refuſed to be Executor, and that Adminiſtration was committed to J. S; and that at the time E. R. came of full age, ſhe had fully adminiſtred all the Eſtate which came to her hands. The Plaintiff Replyed, That at the time E. R. came of full age, *devaſtavit diverſa bona* of the Inteſtate, *unde ſatisfeciſſe potuit* to him his debt. The Defendant Rejoyned, *Quod ipſa non devaſtavit aliqua bonorum, &c.* Which upon Iſſue, was found for the Defendant. It was moved, That there was not any Iſſue joyned; for in his Replication, he doth not alledge, That K. the Defendant *devaſtavit*, but *quod devaſtavit*, and K. is not named. It was the Opinion of the Court, That the Iſſue was well joyned; for there is no mention who *devaſtavit* in the Replication; and therefore it muſt be Intended, That the Mother of the Executor *devaſtavit*: And the Rejoynder being *Quod predict. K. non devaſtavit*: for ſhe was the Adminiſtratrix, and no other could make the *Devaſtavit*. And K. in her Replication ſaith, *Quod ipſa non Devaſtavit*; and hereupon a Verdict was: which the Plaintiff ſhall not avoid by an Exception to his own Replication. Judgment was given for the Defendant. Trin. 3 Car. in B. R. *Oxford* and *Rivetts* Caſe, *Cro.* 1. Part, 57. and 66.

7. Treſpaſs of Aſſault and Battery; The Defendant pleaded, That the Plaintiff aſſaulted him, and would have beat him and wounded him, and what he did, was in his own defence. The Plaintiff Replyed, That he had a Special Warrant from the Sheriff to arreſt him upon Attachment, and that he laid hands upon him, and the Defendant reſcued himſelf, and beat the Plaintiff, *de injuria ſua propria*; *Et hoc eſt paratus verificare*. It was the Opinion of the whole Court, That the Replication was not good, becauſe he did not conclude his Plea, *Et hoc petit quod inquiratur per Patriam*, but relyed upon his Plea, Mich. 4 Car. in B. R. *Dunſtomb* and *Smiths* Caſe, *Cro.* 1. Part, 117.

8. Errour in the Exchequer, upon a Judgment in debt upon an Obligation; The Errour aſſigned was, That there was not a breach alledged,: For the Condition being, That he ſhould enjoy ſuch Lands without Evi'ction, the Breach was aſſigned by Recovery by Verdict, in *Ejectione Firmæ*, upon a Leaſe made to one E; and doth not ſhew what Title E. had to make the Leaſe; but avers, That E. had good Title; and it might be, he had a title derived from the Plaintiff after the Obligation made: and therefore he ought to ſhew, That he had good and *Eigne* Title before the Leaſe made. And for this caſe, It was holden by all the Juſtices, That the Replication was not good, Mich. 10 Jac. in B. R. *Kirby* and *Hanſteers* Caſe, *Cro.* 2. Part, 315.

9. Debt upon an Obligation, to perform the Award of J. S: The Defendant pleaded, That J. S. made an Award, That whereas there was a Suit by the Defendant in Chancery againſt the Plaintiff for ſuch a Cauſe, That that Suit ſhould ceaſe, and that the Plaintiff ſhould ſtand as quitted *de qualibet materia, in eadem contenta*: and avers, That he did not farther proſecute the ſaid Suit, and that the Plaintiff alwayes *ſtetit inde quietus* of every matter in the Bill. The Plaintiff by Replication ſhewed, That before the ſubmiſſion, the Defendant exhibited *Quandam Billam* in the Chancery againſt the Plaintiff, and ſets it down Certain; and that after the Arbitrament, he exhibited, *quandam aliam Billam*; and averrs, That they were both for one and the ſame Cauſe, and the matter in the laſt was in the firſt. It was Objected, That it was not ſufficient to ſay, *Quod ſtetit Quietus*; but he ought to ſhew how he was diſcharged. But it was the Opinion of the whole Court, That the Plea was good; for there is a difference, where one is bound to acquit another of ſuch a Suit, or ſuch a debt; there he ought to procure his actual diſcharge. But the Arbitrament being, *Quod ſtaret acquietus*, but that by that Arbitrament he ſhould be acquitted, which is ſufficient; And where Arbitrators award, That one ſhall be quit againſt the other, it is a good barr in an Action brought by any of them. 2. It was holden, That the Replication was not good, becauſe it was not ſhewed, that any *Subpœna* was ſued out upon the Roll. It was adjudged for the Defendant, Paſch. 12 Jac. in B. R. *Fretman* and *Sheenes* Caſe, *Cro.* 2. Part, 339, 340.

10. Errour of a Judgment in *Derby*, in Debt againſt the Heir upon an Obligation of his Father, the Defendant pleaded *reins per diſcent*. The Plaintiff Replyed, Aſſetts, but did not ſhew any place. It was found for the Plaintiff: Errour brought, Becauſe he did not ſhew in his Replication, any place where the Aſſetts ſhould be. The Court held it to be erronious: For Intendment ſhall never hold it, and that the Replication was ill: And the Judgment was reverſed, Mich. 16 Jac. in B. R. *Bown* and *Carringtons* Caſe, *Cro.* 2. Part, 502, 503. See *Clark* and *Broughtons* Caſe, *ibid.* adjudged acc.

11. *Ejectione Firmæ*; The Plaintiff declares of a Leaſe made by J. B: The Defendant pleaded, That the Land was Copyhold parcel of the Manor of S; of which the King was ſeiſed; and by his Steward ſuch a day granted the ſame to him in Fee, to hold at Will according to the Cuſtome of

the Mannor, and that he was admitted; and ſo Juſtifies. The Plaintiff Replyed, That before the King had any thing, &c. Queen *Elizabeth* was ſeiſed in Fee in the right of the Crown, who, by her Steward, at ſuch a Court granted the Land in Queſtion to him in Fee, to hold at Will, according to the Cuſtome of the Mannor, who was admitted and entred. It was demurred, becauſe the Plaintiff ought to have traverſed the Grant alledged by him in his Barr. But the Court held the Replication good, for the Plaintiff hath confeſſed and avoided the Defendant's Title, by a former Copy granted by the Queen, and ſo needed not traverſe the Grant to the Defendant. Paſch. 10 Jac. in B. R. *Rice* and *Haverſtons* Caſe, *Cro.* 2. Part, 299.

12. Treſpaſs; for that the Defendant took and impriſoned the Plaintiff for the ſpace of a Moneth: The Defendant Juſtified by a Writ out of the Exchequer, to take the Plaintiff and his Lands, untill the King was ſatisfied. And the Sheriff of S. took the Plaintiff in Execution by a *Latitat* at the Suit of R. D; and *in exitu ab Officio* left him in the Priſon to R. H. being Sheriff. his Succeſſor. The Plaintiff Replyed, That *quoad* the Execution out of the Exchequer, that there was a *Superſedeas* unto the Defendant *Quod cum deliberaret, ſi ea de cauſa et non alia ſuit impriſonatus*, and as to the detainment by the *Latitat*, he pleaded, That R. B. commanded the Sheriff to diſcharge him of that Action, before that Impriſonment, and made to the Sheriff a Releaſe of that Suit. The Defendant demurred upon the Replication. It was the Opinion of the Court in this caſe, That the *Superſedeas* was as good cauſe to diſcharge him, as the firſt Proceſs was to Arreſt him; and in regard he hath not done it, he is chargeable to falſe Impriſonment. 2. It was Objected, That the Sheriff was not bound to obey the Plaintiff's diſcharge upon the *Latitat*: for although a Sheriff upon a Plaintiffs Command, may let a Priſoner out of Execution; yet he is not bound to do it. But the Court held the Replication good enough: For as well as the Sheriff may take Notice of the party to Arreſt him at his Suit; ſo he is to take knowledg of the party to accept his diſcharge. It was adjudged for the Plaintiff. Hill. 12 Jac. in B. R. *Withers* and *Henley's* Caſe, *Cro.* 2. Part, 379.

13. Errour; The Caſe was; J. W. Adminiſtrator of J. R. *de bonis non adminiſtr.* of J. T. Executor of J. A. not adminiſtred by J. S. Adminiſtrator of J. A, brought Debt againſt H. the Plaintiff. The Defendant pleaded, That the ſaid J. A. made the ſaid J. T. his Executor, who adminiſtred, and after dyed, and made one J. D. his Executor, who took upon him the Execution of the Will of the ſaid J. T, and adminiſtred divers of the Goods; which J. D. is alive. The Plaintiff Replyed, That *bene et verum eſt*, that J. A. made J. T. his Executor, who adminiſtred the Goods, and dyed, and made J. D. his Executor; but ſaid, That J. T. did not prove the Will of the ſaid J. A; and that the ſaid J. D. before he received *Onus Teſtamenti* of the ſaid J. T. refuſed before the Ordinary, ſuch a day, to adminiſter his Goods as Executor to him: Upon which the Defendant did Demur. It was adjudged for the Plaintiff; And Errour brought, and aſſigned for Errour, That the Replication was a Departure from the Declaration. The Opinion of the Court was for the Defendant in the Writ of Errour, and that the firſt Judgment ſhould be affirmed; for that the Declaration was good, That he adminiſtred as Executor: And the Replicatson is not any Departure: For that ſhews, How that he was Executor *quoad* Adminiſtration, but not abſolute Executor, becauſe he had not proved the Will; and then when he dyed without Probate, the firſt Teſtator dyed Inteſtate. 2. It was holden, That he might well aſſent to be Executor to one Teſtator, and refuſe for the other. Mich 17 Jac. in B.R. *Hayton* and *Wolfet* Caſe. *Cro.* 2. Part, 614.

14. Debt upon an Obligation, to ſtand to an Award: The Plaintiff declared of an Award made 28. *May*, ſuch a year to be delivered up the 29. day of *May* the ſame year. The Defendant pleaded, *Nullum Arbitrium*. The Plaintiff Replyed, The Award was made by the Umpier, 28 *May*, ready to be delivered up the ſame 28 of *May*. The Defendant demurred to the Replication, for doubleneſſe; one in his Declaration; the other in his Replication: for, the Award ſet forth in the Declaration, and that in the Replication, cannot be intended to be one and the ſame. The Opinion of the Court was, That the Iſſue to be tryed, is not to be taken upon the day of the Award made, and ſo it cannot be double; and one cannot demur for the doubleneſſe of the matter upon a thing upon which no Iſſue can be taken. It was adjudged for the Plaintiff. Trin. 23 Car. in B. R. *Tylers* Caſe. *Styles*, 41.

15. Debt upon Obligation: The Plaintiff declared, That whereas at the requeſt of the Defendant he became bound to a third perſon, for the payment of a certain ſum of money unto J. S. at a day certain, wherein the Defendant became bound to pay the money to J. S. at the day limited, for which the Plaintiff was bound; and in the mean time, ſhould ſave him harmleſſe, Then the Obligation to be void. The Defendant pleaded, That he cauſed the party with whom the Plaintiff was

bound

bound to ſubmit himſelf to Priſon, and that the Plaintiff was not damnified. The Plaintiff Replyes, and denyes not the Barr, but ſayes, That a *Latitat* was ſued out againſt him, and that he feared to be Arreſted. The Defendant Demurred upon the Declaration, becauſe he doth not ſay, He took out the *Latitat prout patet per recordum*; and Queſtioned, how the Words, in the mean time, ſhould be underſtood. It was the Opinion of the Court, That it was not neceſſary to plead *Non Damnificatus*, if the party be in Priſon; and the words in the mean time refer to the laſt words of the Condition. But the Court ſaid, That here the one pleaded an ill Plea, and the other hath alledged an ill Breach: and therefore they would Adviſe. Paſch. 1652. in B.R. *Young* and *Petits* Caſe, *Styles* 356.

16. Debt upon an Obligation, for not performance of Covenants by an Under-Sheriff. One Covenant was, That he ſhould not execute any Extent, of any ſum above the ſum of 20 l. before he had firſt given Notice to the Sheriff of the Writ: and if any ſuch Writ of Execution were above 20 l, that he ſhould not execute it, without ſpecial Warrant of the High Sheriff. The Defendant pleaded, That he had performed all the Covenants. It was the Opinion of *Hobart*, Chief Juſtice, in that Caſe, That if the Covenant had not been againſt Law for Executions above 20 l; and that the Barr had been inſufficient, becauſe he did not plead Negatively to the Covenant, That yet if the Replication were naught, and aſſigned no ſufficient Breach, the Plaintiff could not have had Judgment; For although the Action were well brought, yet when it appeareth, that the Condition was for performance of Coverants, there can be no cauſe of Action, without ſome Covenant broken; and therefore in that caſe, the Plaintiff could not have had Judgment, And if it doth appear to the Court, that the Plaintiff hath no cauſe of Action, he ſhall never have Judgment, although the Barr be inſufficient, and although he hath thereupon a Verdict againſt the Defendant. Paſch. 11 Jac. in C. B. Sir *Daniel Norton* and *Syms* Caſe, *Hob.* 13. & 14.

17. King *Henry* 8. made a Leaſe for years to *Colthurſt*, excepting great Trees, and after granted the Reverſion and Trees to the Duke of *Northumberland*, who demiſed the Land and Trees to J. S. without impeachment of Waſte: The Duke is Attainted; and the Queen granted the Fee to S, who enfeoffed J. D. in Fee, and was bound to ſave harmleſſe the ſaid J. D, and the premiſſes touching the Intereſt of J. S. by the Leaſe. Afterwards J. S. felled Trees; J. D. brought Debt upon the Obligation. It was the Opinion of the Court, Becauſe he ſhewed not in his Replication, That J. S. claimed the Trees by virtue of the Leaſe, nor made his Concluſion, *Sic Damnificatus*. it was adjudged againſt him. Trin. 2 Eliz. *Dyer*, 185.

18. Debt upon an Obligation, The Condition was, Whereas the Plaintiff had taken J. S. as an Apprentice, That if J. S. ſhould Waſte or Conſume any of his Goods, and that duly proved by the Confeſſion of J. S. or otherwiſe, That then the Obligor, his Executors, &c. within three moneths after due proof and Notice thereof given to him or them, ſhould render him recompence and ſatisfaction. The Defendant pleaded, That there was no proof made, &c. The Plaintiff Replyed, That there came to the hands of the Apprentice 4000 l. of his in Flemmiſh Money, whereof he imbezelled and waſted as much thereof as came to 400 l; and that he confeſſed it by a Writing under his hand. It being found for the Plaintiff, Errour was brought, and aſſigned; becauſe it is not ſaid to whom he made the Confeſſion in the Replication. But the Opinion of the Court was, That the Replication was good; for here it ſhall be taken to be underſtood of a voluntary confeſſion according to the common acceptation, and not to a Confeſſion in a Court of Record; and it is good enough, becauſe it anſwered the words of the Condition. Paſch. 14 Jac. in C. B. *Death* and *Golds* Caſe, *Hobart*, 92, 93.

19. Treſpaſſe; The Defendant Juſtified, becauſe it was the Freehold of J. Marqueſs of *Winton*, and by his Command. The Plaintiff Replyed, That the Land is parcell of the Manner of A; and that W. was ſeiſed in Fee of the ſaid Manor, and levied a Fine thereof to the uſe of himſelf and his Wife for their Lives, the Remainder to *Ed. Pawlet* for 100 years, if he ſo long lived; W. and his Wife both dyed; *Ed.* entred, and let to him for 21. years; who entred, and averred the life of *Edward*. It was Demurred hereupon, becauſe the Replication doth not anſwer nor confeſſe and avoid the Freehold of J. Marqueſſe of *Winton*, which was alledged in the Barr. It was holden by the Court, That the Barr being a Barr at large, the Title in his Replication being at large, his claiming but a Leaſe for years, is a ſufficient Replication, without Anſwering to the Freehold. It was adjudged for the Plaintiff. Paſch. 10 Jac. in B. R. *King* and *Cokes* Caſe, *Cro.* 1. Part, 279.

20. Treſpaſſe of Aſſault and Battery; The Defendant Juſtified in his own defence, by reaſon of an Aſſault upon him. Upon Iſſue joyned, upon

Evidence, the Defendant gives in Evidence an Aſſault and Battery upon the Plaintiff, 2. July, 13. Car. before, and produced Witneſſes to prove it. The Plaintiff ſhewed, That the Battery which he intended, was 9. July, 13 Car. and he alſo produced Witneſſes to prove it. The Defendant's Councel moved, That it was no Evidence; for that the Plaintiff ought to have made a ſpeciall Replication, and ſhewed that ſpeciall matter. But the Opinion of the Court was, That that was not requiſite; and if another day had been ſhewed in the Replication, it ſhould be a Departure: and it ſufficeth to ſhew it in Evidence, to be done at another day (*ſon Aſſault demeſne*); for the day is not material. Paſch. 14 Car. in B.R. *Thurston* and *Lyſters* Caſe, *Cro.* 1. Part, 370.

21. Debt brought in *London* againſt one, as Son and Heir, upon an Obligation made by his Father, who pleaded, Nothing by Diſcent at the time of the Writ brought, nor ever after. The Defendant Replyed, Aſſetts in *London* in *Parochia et Ward. de A*; and afterwards the Plaintiff gave in Evidence, Aſſetts in *Cornwall*. It was conceived, 10 Eliz. *Dyer*, 271. that the Jury could not find this locall matter in a Forrein County. But ſee, *Cook* 6. Part, 47. in *Dowdall's* Caſe; Where it is Reſolved, That where the place is material, and when it is made parcell of the Iſſue, there the Jury cannot find the Point in Iſſue in another place; becauſe by ſpecial pleading, the Point is reſtrained to a certain place. 2. There is a difference, where the place is named for Conformity and Neceſſity; and where it is parcell of the Iſſue: And therefore it was agreed, That in the Caſe above put, of 10 Eliz. *Dyer*, 271. That in Debt brought againſt the Heir, and he pleads, Nothing by Diſcent, generally, the Plaintiff cannot Reply in ſo generall a manner; for then no Tryall can be thereupon: but in ſuch caſe, for conformity and neceſſity of Tryall, he ought to name a certain place, as there he did, within a Ward within *London*. But yet in that caſe, It was holden, That the Jury might find Aſſetts in any other County whatſoever, *Cook* 6. Part, 47. in *Dowdalls* Caſe.

22. Debt againſt an Adminiſtrator, upon a Bond of 600 l. made by the Inteſtate; The Defendant pleaded in Barr a Recovery of 100 l. to the King, and another Recognizance of 800 l. to J. S. *pro vero et juſto debito*; and pleaded another Recognizance to J. D. of 1000 l. *pro vero et juſto debito*; and pleaded divers other Recognizances of great value, and that ſhe had fully Adminiſtred, and that *Nulla habet bona*, which were the *Inteſtate's in manibus ſuis præterquam bona ad valentiam*, of the ſaid Recognizance to the King, and the other Recognizances, and averred, That all the ſaid Recognizances remained in force, *et quod ipſa nulla, five alia, five plura habet bona, præterquam bona, quæ non ſufficient ad ſatisfaciend. prædict. debita ſeperalia*. The Plaintiff Replyed, That the ſaid Recognizance to J. S. was for the ſecurity of 400 l; which 400 l. the Inteſtate paid to J. S. in his life-time, in full diſcharge of the ſaid 800 l; which 400 l. J. S. received; and pleaded, That the other Recognizances were for performance of Covenants, all which were performed, and that all the ſaid Recognizances did remain by fraud and Covin of the Adminiſtrator, not cancelled, to defraud the Plaintiff of his juſt debt; and averred, That the Adminiſtrator had Goods in her hands of the Inteſtates, *præterquam bona ad valentiam* of the ſaid 100 l. due to the King. Upon which, the Defendant did Demur in Law. Divers Exceptions were taken to the Plaintiff's Replication; 1. Becauſe the Plaintiff in the Replication had averred, That the Recognizance to J. S. of 800 l. was made *pro ſecuritate ſolutionis* 400 l. and ſo have taken averment againſt the Recognizance, which is matter of Record. 2. It is not averred, When the 400 l. was paid. 3. Becauſe they have not traverſed, That the Recognizance to J. D. was not acknowledged *pro vero et juſto debito*. 4. Becauſe the Plaintiff's in their Replication averr, That the Recognizance remained not diſcharged, by Covin of the Defendant, to defraud the Plaintiffs of their Debt; and the Defendant alone cannot commit Covin: for that Covin ought to be betwixt two. But in this Caſe, It was Reſolved, 1. That the Barr was inſufficient; for the Defendant confeſſeth, That ſhe had Aſſetts to pay the ſaid Recognizances; and after denyeth. 2. She ſaid, She had Aſſetts, but not ſufficient; but ſhe ought to confeſſe how much ſhe had, becauſe ſhe acknowledged Aſſetts. 3. Reſolved, That the Replication of the Plaintiffs was good, and that their pleading, That the Obligation was made to perform Covenants, was good without more certainty, becauſe they are ſtrangers. 4. That the generall allegation of Covenants, by the Plaintiffs in their Replication, was good, without ſhewing of Refuſal to releaſe. Mich. 10 Jac. in C. B. *Cook* 9. Part, 108, 109. *Meriel Treſhams* Caſe.

23. In a *Replevin*; the taking was ſuppoſed to be in K: The Defendant ſaid, That the place is 40 Acres parcell of the Manor of K, which is his Freehold. The Plaintiff Replyed, and ſaid, That the place is parcel of the Manor of K. in K, and conveyed to himſelf Title to that, *abſq; hoc*, that the ſaid Manor of K. *unde, &c.* was the Freehold of the Defendant: In that caſe it was holden, That he was eſtopped to give Evidence, that the

the Defendant had not any Mannor of K; for the *abſq; hoc*, and the word *unde*, implyes, that he had ſuch a Mannor: But the Plaintiff ought to have taken by Proteſtation, That the Defendant had no ſuch Mannor of K; and have Replyed, That it was parcell of the Mannor of K. in K, to which he himſelf conveyed Title; *abſq; hoc*, that the ſaid 40 Acres was the Freehold of the Defendant. Paſch. 2 Eliz. *Dyer*, 183.

See more of *Replication*, in the Title *Pleadings*.

Reputation.

Reputation, *What it is; What time is ſufficient to make Reputation: Where a Mannor ſhall be by Reputation: Grants of the King, where good by Reputation: Whether Chauntries by Reputation ſhall be within the Statutes of* 31 *H.* 8. *and* 1 *E.* 6. *And of divers other things by Reputation.*

Reputatio, eſt vulgaris opinio, ubi non eſt veritas; Et vulgaris opinio eſt duplex, ſcil. *Opinio vulgaris, orta inter graves, & diſcretos, & quæ vultum veritatis habet; & opinio tantum orta inter leves & vulgares homines abſque ſpecie veritatis. Cook* Part, 107. in *Adams* and *Lamberts* Caſe.

2. Pope *Urban*, at the requeſt of the Baron of *Greyſtock*, founded a Colledge of a Maſter and ſix Prieſts, reſident in *Greyſtock*, and aſſigned to each of the Prieſts five Marks *per annum*, beſides their bed and chamber; and the Maſter 40 l. *per annum*, and the ſame was certified into the Book of Firſt Fruits and Tenths, *Rectoriam & Eccleſiam de Greyſtock*; which Colledge was in being five years before the Act of 1 E. 6. It was Reſolved by the Juſtices, That this Reputative Colledge was not given to the King by the Statute of 1 E. 6. becauſe it wanted a lawful beginning, and the countenance of lawful Commencement; for the Pope cannot found a Colledge within this Realm, but it ought to be done by the King himſelf, and no other: And it is there ſaid, That *Nomen non ſufficit, ſi res non ſubjunt & falſa. Cook* 4. Part, 109. in *Adams* and *Lamberts* Caſe, 7 E. 6, *Dyer*, 18.

3. King E. 1. *anno* 12. of his Reigne, granted to T. B. Biſhop of St. *Davids*, and his Succeſſors, the Advowſon of 34 Churches in *Wales* within his Dioceſs, to hold of the King and his Succeſſors, in as the Biſhop and his Succeſſors might appropriate them, or any of them, to their Church of St. *Davids*, and *Aberguelly*, or annex Prebends to them in their ſaid Churches; Three years after, with the Kings aſſent, he erected or eſtabliſhed a Colledg, or Collegiate Church, in *Landwybeny*, being one of the 34 Churches, and ordained 13 Channons ſecular there; *ſcil.* five Prieſts, four Deacons, and four Subdeacons, and of them made Prebends and Prebendaries, and annexed and appropriated 13 of the ſaid Churches to them, and reſerved to himſelf and Succeſſors as Dean, *Locum in Choreo, & vocem in Capitulo*, and Viſitation; in which the Biſhop did not purſue the power and authority given him by the Letters Patents. Afterwards E. 3. reciting the ſame foundation of the ſaid Colledge, and of all other the premiſſes, by his Letters Patents, granted and confirmed to the Biſhop of St. *Davids*, and his Succeſſors, all that which his Predeceſſor had in the Premiſſes, notwithſtanding the Statute of *Mortmain*. It was the Opinion of the Court in that Caſe, That notwithſtanding all that was done without the Kings Licence, yet by the ſaid Letters Patents, the ſaid Colledge continued a Colledge in Reputation, and that this Colledge was given to the King by the Statute of 1 E. 6. becauſe it had the countenance of a Colledge by the Kings Letters Patents, although for the cauſe aforeſaid, the ſame were of no effect. Mich. 10 Eliz. *Dyer*, 269.

4. Note, It was Reſolved, That a Chauntry or Colledge in Reputation, and not in Law, was given to King E. 6. by the Statute of 1 E 6. within theſe words: All, and all manner of Chauntries, Colledges, &c. In 29 Eliz. in the Chancery, upon an Aid Preyer of the King. The Caſe was, Between the Lord *St. John* Plaintiff, and the Dean and Chapter of *Gloceſter* Defendant, for the Parſonage Impropriate of *Penmark*, in the County of *Glamorgan*; becauſe that the Patron (who before the Appropriation had granted the Advowſon to the Body Eccleſiaſtical, to which the Appropriation was made) in 18 H. 2. was but Tenant in Tail; and yet alwayes it continued as a Church Impropriate. It was Reſolved by the Lord Chancellor (being aſſiſted with ſome of the Judges) That that Rectory by Reputation was given to the King by the Statute of *Monaſteries*: The Lord *St. John*, and the Dean and Chapter of *Gloceſters* Caſe. Vouch. in *Cook* 11. Part, 13. in *Pridle* and *Nappers* Caſe.

5. The Parſonage of *Bulbenham* in the County of *Leiceſter*, 22 E. 4. was appropriated to the Abbot

bot of *Sudbury*, but no Vicarage was endowed (for upon every Appropriation, a Vicar ought to be endowed) according to the Act of 4 H. 4. but there had continued a Vicar there in Reputation, and the Rectory continued also appropriated. In that Case it was Resolved in the Exchequer, That the said Rectory was given to the King by the Statute of Monasteries, Trin. 30 Eliz. *Grimes* and *Smiths* Case. See 40 E. 3. The Church of *Kimbolton* was Appropriated, and there was a defect in the Appropriation, That the Earl of *Hereford* who granted the Advowson of the said Church to the Body Ecclesiastical, to which the Appropriation was made, was but Tenant in Tail; and yet it was clearly Resolved, That the said Rectory was given to King H. 8. by the Statute of *Monasteries*. Hill. 4 Jac. in Chancery, *Beadle* and *Bears* Case. Vouch. in *Cook* 11. Part, in *Pridle* and *Nappers* Case.

6. A Tenant for life of the Manor of D. the Remainder to B. in Fee; B. and her Husband levied a Fine 10 Eliz. of all the Demesnes of the said Manor, by certain quantities of Acres, which included all the Demesnes, and granted and rendred the Demesne to J. S. for 50 years, rending Rent, and granted the Reversion to the Husband and Wife, and to the Heirs of the Wife; and in the Indentures which lead the use of the Fine, It was agreed, That the Husband and Wife should have Ingress, Egress, and Regress, to hold Courts upon the said Demesnes; and averred, That the said Demesnes and Services were within the County known, reputed, and called by the name of the Manor of D. 16 Eliz. another Fine was levyed by the said Husband and Wife, of divers other Mannors of the Wife, except the Manor of D. in which Fine, so many Acres were contained, as were sufficient to pass the said Demesnes to the use of the Wife for life, with divers Remainders over. In this Case (amongst other points) it was Resolved, That the Exception in the Fine 16 Eliz. by the name of the Mannor of D. was sufficient to except it out of the Fine; for that was the Intention of the parties, for they did not intend the dismembring or destroying of the said Manor; for provision was made to have Egress and Regress to hold Courts of the Mannor; also, the parties to the Fine in 16 Eliz. thought it to be a Manor; and there it is excepted, by the name of a Manor, and the intent of the parties was to exclude it out of the Fine in 16 Eliz. and to include it in a subsequent Fine levied, 23 Eliz. where it is named by the name of a Mannor. *Cook* 6. Part, 63. Sir *Moyle Finches* Case.

7. In an *Ejectione firmæ*, A Lease was made of a Mannor, and Issue was joyned, *Quod non demisit Mencrium*, and a special Verdict was given, That there was not any Freeholders, but divers Copyholders of the said Mannor, and that it was known by the name of a Mannor: It was adjudged in that Case, That although it was not a Mannor in Law, for want of Freeholders; and although it was impleading in an Action adversary, and not amicable; yet because the Issue was found, and that in truth the Lands passed by the Lease, It was adjudged for him who had the Lease of the Mannor, Mich. 23 Eliz. in B. R. *Vines* and *Dwhams* Case, *ibid.*

8. In a Replevin, the Case was, Sir *Francis Ask.w* was seized of the Mannor of *Cofford* in Fee, which Mannor did extend unto *Dreiton*, *North Kelsey*, *South Kelsey*. D. and C. had Demeans and Services, parcel of the said Mannor in each of the said Towns, and granted *Manerium suum de North Kelsey* in *North Kelsey* to B. and his Heirs; and further granted all his Lands and Tenements in *North Kelsey*; and to the Grant, the Tenants in *North Kelsey* did attorn: The Question was, if by this Grant to B. a Mannor passed or not. It was said, That upon this Grant, no Mannor passed, but that the Lands and Services in *North Kelsey* should pass as in gross, for they were not known by a Mannor, but for parcel of a Mannor: But in this Case, it was holden by the Justices, That in as much as Sir *Francis Askew* had before this Grant, as well Demeans as Services in *North Kelsey*, it may be said collaterally a Mannor there, and that, notwithstanding *Tempore Concessionis* (*propriè loquendo*) no Mannor was in *North Kelsey*, yet now by operation of Law, upon this new Grant, a new Mannor shall arise: And whereas it was Objected, That a Court Baron is incident to a Mannor, and no Court Baron is alledged to be there; It was holden, That there need not now be any erection of a Court, because the Court Baron before the Grant, might be holden in any place within the Mannor; therefore every part of the Demesnes is capable of a Court to be holden there: And so it was the Opinion of the Court, That a Mannor passed. Pasch. 27 Eliz. in C. B. *Marsh* and *Smiths* Case. *Lun*, 26.

9. In a Replevin, the Defendant avowed for a Rent-charge, and shewed, That A. was seized of the Mannor of W. and 33 H. 6. made a Feoffment of the place, where &c. to one O. rending Rent, and Suit of Court, at the said Manner, and W. was seized thereof, and dyed seized, and that the same descended to B. his son and heir, who was seized of the said Rent, as parcel of the said Mannor; and that the said B. so seized of the said Mannor and Rent, 26 H. 8. bargained and sold the said Mannor and Rent, to the father of the Avowant, by these words, *Manerium de W. & omnes, & omnimodas Reddittus*, reputed, deemed, & adjudged part or parcel of the said Mannor, who dyed

dyed ſeized, and the ſame deſcended to the Avowant as his ſon and heir; and averred, That the ſaid Rent, at the time of the Bargain and Sale, and *dia ante*, was reputed parcel of the ſaid Mannor: It was Objected in this Caſe, That the Averment in the purchaſe of the Avowry, was contrary to the matter of the Avowry; for the creation of the Rent ſet forth in the Avowry proceſs, That the Rent was not parcel of the Mannor, but a Rent in groſs; and then the Averment, That the Rent is parcel of the Mannor, without ſhewing how, againſt the ſpecial matter of the Avowry, is not traverſeable: Alſo, nothing can be parcel of a Mannor, which in *rei veritate* cannot be parcel of a Mannor; but a Rent charge cannot be parcel of a Manoor *rei veritate*, therefore not by Reputation. It was the Opinion of the Juſtices in this Caſe, That this Rent did not paſs by the Bargain and Sale by B. to the Father of the Avowant; for that in the premiſſes of the Avowry, is not any matter ſet forth importing Reputation: But if the Avowant in his Avowry had ſet forth any ſpecial matter to induce the Court to conceive a Reputation upon the matter in the Avowry, as to ſhew, that the Bayliffs of the ſaid Mannor had alwayes received the ſaid Rent, as parcel of the Mannor, and had accompted for it as parcel of the Mannor, and that the Leſſees had enjoyed the Rent as parcel of the Mannor; the ſame had been good matter to induce Reputation. Judgment was given againſt the Avowant. Paſch. 26 Eliz. in B. R. *Forman* and *Babuns* Caſe. *Leon*, 13, & 14.

10. The Statute of 1 H. 5. cap. 5. is, That in every Writ Original, in which Proceſs of Outlawry lyeth, that Addition ſhall be given to the Defendants, of their Eſtates, or Degrees, or of their Trade: One who was Yeoman by birth, was commonly called Gentleman. In ſuch Caſe it was adjudged, That in a Writ brought againſt him, he ſhall have the addition of Gentleman, although in truth he be not a Gentleman, but only by vulgar Reputation; for the intent of the Statute is, That he have ſuch a Name by which he may be known. Hill. 25 Eliz. in C. B. *Carter's* Caſe.

11. If a Grant be made to a Baſtard by the name of him who is ſuppoſed to beget him, it is good, if he be known by ſuch a name: So if a Remainder be limitted *Richardo filio Richardi Lawood*; It was holden to be good, although he was a Baſtard, if in vulgar Reputation and knowledge he be known by ſuch name. 39 E. 3. 11. acc. Part 6. Part, 65. in Sir *Moyle Finches* Caſe.

Repugnant, and *Repugnancy*.

1. IF a Leaſe for life be made upon condition, That if a ſtranger pay to the Leſſor 20 l. that then after the death of Tenant for life, it ſhall remain to the ſtranger; this is a good Remainder. So if a Leaſe be made to the Husband and Wife, and if provided by the ſaid Leaſe, that if A. the eldeſt ſon ſhall dye, living the Husband and Wife, that then it ſhall remain to B. their ſecond ſon for life: In theſe caſes there is no Repugnancy, nor contrariety; becauſe that in the firſt Caſe the ſtranger ſhall have it expreſly after the death of the Tenant for life: But if a Leaſe for life be made upon Condition, That if a ſtranger pay to the Leſſor 20 l. that then immediately the Land ſhall remain to the ſame ſtranger; this Remainder is void, for the Repugnancy and contrariety; for that the Tenant for life ought to have it during his life, during which time the ſtranger cannot have it. *Plowd. Com.* 33. in *Colthurſt* and *Bejuſhams* Caſe.

2. The Cuſtome of *London* is, That a man may deviſe his purchaſed Lands in *Mortmain*. A Purchaſer made his Will, and thereby Deviſed, That the Prior of St. *Bartholomew*, and their Succeſſors, ſhould have the Land, *ita quod reddant annuatim Decano & Capitulo Sti. Pauli* 16 Marks: and if they failed of payment, that their Eſtate ſhould ceaſe; and that for default of payment, the Dean and Chapter ſhould have the ſaid Lands: the Condition was broken, the Dean and Chapter Entred. In that Caſe it was adjudged, That the Condition was void; and the reaſon was, becauſe no Eſtate could remain after the Fee-ſimple was limitted away; becauſe the Feoffor had determined his Intereſt and Right; and then a ſtranger could not enter for the condition broken. Paſch. 24 H. 8. *Dyer*, 33.

3. A. made B. and a Woman, his Executors; Provided, That B. ſhould not adminiſter his goods. It was the Opinion of the Juſtices, That this Proviſo was void for its Repugnancy; for when A. had made them once his Executors, the ſeveral Powers limitted to them afterwards, was void; becauſe when the

the intent of a man who makes his Will, agrees not with the Law, his Intent ſhall be taken as void: And therefore, if a man deviſeth Lands to J S. in Fee, and if he dyeth without Heir, that J. D. ſhall have the Land, ſuch a Deviſe is void, as to J. D; becauſe that one Fee-ſimple cannot depend upon another Fee-ſimple by Law. See 19 H. 8. *Dyer*, 4.

4. A man ſeized of Lands in Fee, Demiſed the ſame to one, and B. his ſon, and to the heirs of B. *Habendum*, until 99 years, and ſo from 99 years, to 99 years, until 300 years were paſſed, without impeachment of Waſte, rendring Rent, if it were demanded: And the Leſſor Covenanted, That he and his Heirs, at the end of the ſaid 300 years, would make to the Heirs of the Leſſee, ſuch another Leaſe for 300 years, but no Livery was made. The Queſtion was, That becauſe that Fee-ſimple was expreſſed in the premiſſes of the Deed, If the Limitation in the *Habendum* was Repugnant and contrary to the Premiſſes. It was Reſolved, That the *Habendum* was not contrary to the Premiſſes; and in that caſe, theſe differences were agreed for Law; When things take their eſſence and effect by the delivery of the Deed, and which lye in Grant, without any other Ceremony, there, in ſuch a Limitation to one and his heirs, *Habendum*, for life or years, is void: The ſame Law if a Seignory be Granted to one and his heirs, *Habendum*, to the Grantee for years, it is void; but when to an Eſtate limited by the Premiſſes, a Ceremony is requiſite to the perfection, to the eſſence of it, and to the Eſtate limitted by the *Habendum*, nothing is requiſite but only the delivery of the Deed (as in the Principal Caſe) there although the *Habendum* be of a leſſer Eſtate then is mentioned in the Premiſſes, the *Habendum* ſhall ſtand: And therefore it was adjudged in the Principal Caſe, That the *Habendum* was not repugnant, and that the Leaſe was a good Leaſe. And Note, a difference was taken between an Eſtate in the Premiſſes implyed, and an Eſtate expreſſed; for if A. Grant a Rent to B. generally, the ſame by Implication is an Eſtate for life; but if the *Habendum* be for years, the ſame qualifies the generality and Implication of the Premiſſes. 2. It was Reſolved in the Principal Caſe, That the uſe, by and to the Heirs of B. upon conſideration had of the whole Deed, were void: and that both the Leſſees had a good Eſtate for years; and if Livery had been made, the ſame ſhould not have changed their Eſtates. *Cook* 2. Part 23. *Baldwins* Caſe.

5. Tenant for life, the Remainder in Fee; Tenant for life made a Leaſe for years, the Leſſee entered; Tenant for life granted *Tenement. p adiſt.* to C. *Habendum Tenement. prædict.* from the Feaſt of Mich. following, for life; Leſſee for years attorned, C. entred, and made a Leaſe at Will, to whom the Tenant for life levyed a Fine *cum cæt. &c.* he in the Remainder entred, and his entry was adjudged lawful. It was Reſolved in this Caſe (amongſt other points) That the Grant to C. was void; for an Eſtate of Freehold, cannot begin at a day to come; and the *Habendum* in this caſe was not contrary to the Premiſſes, for that the *Habendum* only qualifies the Eſtate, and limits it; for the Office of the premiſſes of a Deed, is to expreſs the Grantor, Grantee, and thing Granted; and the Office of the *Habendum*, is to limit the Eſtate. *Cook* 3. Part, 55. *Buckley's* Caſe.

6. Husband and Wife Tenants for years of the Meſſuage called the *three Conies* in *Fleetſtreet*: The husband Let part of the Term by theſe words, *The Houſe called The three Conies, with all the Chambers, Cellars, and Shops; except to the husband, the Shops to his own uſe*: The Husband dyed, the Wife entred, and an *Ejectione firmæ* being brought; It was the Opinion of the Juſtices, 1. That, that Exception was but Temporary to the Husband only, there being no words, To him, his Executors, or Aſſigns. 2. It was Reſolved, That the Exception was void touching the Shops, becauſe it was repugnant to the Leaſe, the Leaſe being of all Shops, &c. Hill. 9 Eliz. *Dyer*, 264.

7. In an *Ejectione firmæ* upon a Leaſe for years upon *Not Guilty* pleaded; the Caſe was, A Copyholder in Fee of the Mannor of T. (where the Cuſtome was, That any Copyholder might ſurrender out of Court into the hands of two Tenants Copyholders of the Mannor to the uſe of another) ſurrendred into the hands of two ſuch Tenants of the Manner, the Copyhold Tenements to uſe of D. and B. ſon of the ſaid A, and of the longeſt liver of them both; and for want of ſuch Iſſue, to B. the ſon of his body, lawfully begotten; the Lands to remain to the youngeſt ſon of *Mary*, Wife of the ſaid Copyholder; this ſurrender not to ſtand nor be of force, until after the death of A. the Copyholder; A. dyed, and the Surrender was Preſented at the next Court; D. and B. ſon of the ſaid D. were admitted Tenants to them, and the longeſt liver of them, and to the heirs of the body of B. the ſon, the Remainder to the younger ſon of *Mary*. D. and B. dyed without Iſſue, H. younger ſon of *Mary* entred, and made the Leaſe to the Plaintiff: E. the Wife of the Defendant, is found Heir of the Copyholder, and entred, and ouſted the Plaintiff. The Queſtions in this Caſe were, 1. Upon this clauſe, viz. *This Surrender not to ſtand and be of full force, until after the death of A.* the Surrender

resdent; Whether the Surrender were good, and that clause void? It was Resolved by the Court, That the Surrender was good, and that clause (being repugnant to the Premisses) shall be rejected as as void and idle, and shall not destroy the Premisses. The second point was, Whether B. had an Estate for life only, or an Estate to him, and the heirs of his body? It was Resolved, That he had but an Estate for life; and being limitted by express Limitation, it shall not be a higher Estate to him by Implication. Trin. 10 Car. in B. R. *Seagood* and *Hares* Case. *Cro.* 1. Part, 267.

8. A. seized of black Acre in Fee, and possessed of white Acre for years, grants a Rent-charge to B. for life out of both Acres; B. distreins, and avows in white Acre. It was adjudged, That the Avowry was not good, because he derived the Rent out of white Acre, *Virtute cujus* he was seized for life, which was Repugnant to have a Freehold out of a Chattel; and therefore Judgment was given against him for insufficient Pleading. *Cook* 7. Part, 24. *Butts* Case.

9. A Prebend Leased Lands for 70 years, the Dean and Chapter being Patron, confirmed *Dimissionem predict.* for 51 years, *& non ultra*. It was the Opinion of the Court, That the Confirmation was good for the whole Term; for when they confirmed *Dimissionem predict.* &c. for 51 years, it was void, and Repugnant; but if they had recited the Lease, and confirmed the Land for 51 years, it had been good for the 51 years only. *Cook* 5. Part, 81. *Fords* Case.

10. Note, It was said by the Justices, That if a man make a gift in Tail, upon condition that he shall not make a Feoffment, this is a good Condition: But if the Condition be, that he shall not make a Charter of Feoffment, this is not good; for this without Livery, amounts but to a Tenancy at Will, which Tenant in Tail cannot be restrained to do: So if a man make a gift in Tail, upon Condition that he shall not make a Lease for his own life, this is void and Repugnant; for when a man makes a gift in Tail (which is an Estate of Inheritance, and by possibility may continue for ever) he cannot be repricved from doing any lawful act, or making any Estate, which is no wrong to any: But if a man maketh a Lease for life or years, with Condition, that he shall not allien nor demise the Land, this is good; because the Lessor hath the Reversion, whereby he hath power to restrein the Lessee: So if a man demiseth a Copyhold Mannor for life or years, with condition, that he shall make no voluntary Grant of any Copyhold Lands, according to the Customs of the Mannor, this is good. But if a Mannor be granted in Tail with such a Condition, the Condition is void for the Repugnancy. *Cook* 6. Part, 42, 43. in Sir *Anthony Mildmays* Case.

11. A man by Indenture, Covenanted to stand seized to the use of himself for life, and after, to the use of divers of his sons, and the heirs males of their bodies; Proviso, That if they, or any heirs males of their bodies, should avise or attempt any Act, by which the Limitation of the said Land, or any Estate Tail should be undone, barred, or discontinued, That after such act made, or discontinuance executed, the uses (as to him so attempting) should cease, as if such person were naturally dead; the eldest son suffered a common Recovery. It was Resolved in this Case (amongst other points) That the same Proviso, to cease an Estate limitted to one, and the heirs males of his body, was void, was repugnant, and against Law; for that the death of the Tenant in Tail, is not a ceaser of the Estate Tail, but the death without Issue is the determination of it, and before Issue, Tenant in Tail hath an Inheritance, which may by possibility continue for ever; and it is repugnant, that Land should remain during the life of Tenant in Tail himself. *Cook* 1. Part, 84. *Corbetts* Case.

12. A. made a Charter to B. in Fee-simple, and the same day it was Covenanted between them, That B. should hold the same Tenements for eight years, and if A. did not pay to B. 10 l. at the end of the Term, that then the Land should remain to B. and his heirs. In this Case it was holden, That the subsequent Covenant was void and Repugnant: for first, the Charter of Fee-simple was absolute, and the Covenant being made after the Charter, could neither alter the absolute Charter, nor upon a condition precedent give him a Fee-simple, that had a Fee-simple before. See 12 E. 2. Tit. *Voucher*, 265. *Cook* 2. Part, *Institutes*, 217. acc.

13. If a man deviseth Lands, upon Condition that the Devisee shall allien, the Condition is void, and so it is of a Grant, Release, Confirmation, or any other Conveyance by which a Fee-simple doth pass; for it is absurd, and Repugnant to reason, that he who hath no possibility to have the Land revert again to him, should restrein the Devisee, Feoffee, or Grantee in Fee-simple to allien, and take away all his power. *Cook* 1. Part, *Institutes*, 223. acc.

14. Debt upon an Obligation for not performance of Covenants by Sir *Daniel Norton* High Sheriff of H. against *Chamberlain* his Under Sheriff. The Case was, The said Sir *Daniel* made the Defendant his Under Sheriff at Will. The Under Sheriff (amongst other) did Covenant, That he would not execute any Extent, *Liberate*, *Elegit*, or other Execution of any sum above the sum of 20 l. before he had made known first to the Sheriff, the

nature and quality of the ſaid Writ, and if any ſuch Execution were above 20 l. that he would not Execute it without ſpecial Warrant of Sir *Daniel*, the High Sheriff. It was Reſolved in this Caſe, That if a Sheriff will make an Under Sheriff, Proviſo, That he ſhall not ſerve Executions above 20 l. without his ſpecial Warrant, is void, becauſe by making of him Under Sheriff, he implicitely gives him power to Execute all the Ordinary powers of a Sheriff; as ſerving of Proceſs and Executions; and therefore ſuch a Proviſo is repugnant and void in Law to the Office of an Under Sheriff. It was objected, That this reſtraint grew not on the part of the Sheriff, but on the part of the Under Sheriff by his Covenant, which might ſtand good notwithſtanding it was repugnant to his Office. But the Court held the Covenant void in Law, for ſince by being made Under Sheriff, he is lyable by Law to execute all Proceſs; he could not Covenant not to Execute any Proceſs without ſpecial Warrant, it being contrary to Law, and the ſame repugnant to his Office of Under Sheriff. Paſc. 11 Jac. in C. B. Sir *Daniel Norton* and *Syms* Caſe. *Hob.* 12, 13, 14.

15. The Eſtates of Idiots and Lunatiques are intruſted to the King. And therefore, If the King ſhould grant to one who intrudeth upon the Poſſeſſions of an Idiot or Lunatick, or take their poſſeſſions unlawfully, that he would not meddle with them, but ſuffer them to do their pleaſure, ſuch a grant were void, becauſe it is contrary and repugnant to the truſt and Office of the King, which is to do Juſtice, which he cannot put off. So if the King being but Guardian, grants the Land in Fee, the Grant is void for the reaſon aforeſaid, as it was adjudged, 21 E. 3. 47. in the Earl of *Keats* Caſe. See *Cook* 7. Part, 36. the King cannot give away a penal Law. So if the King having a Laps, ſhould grant to an Intruder, That he would not preſent to the Church, or if perhaps one ſhould intrude or uſurp upon the Kings Lapſe, and the King ſhould grant to the Uſurper, That he would not remove his Clerk, this were contrary and repugnant to that Truſt which the Law repoſeth in the King, aſwell for the behoof of the true Patron, as for the good of the Church, for by this means the true Patron ſhould loſe his Patronage: and therefore in all theſe Caſes ſuch Grant of the King would be void. See by *Hobart* Juſtice, in the Caſe of *Colt* and the Biſhop of *Coventry* and *Litchfields* Caſe 155.

16. Note, It was Reſolved, in the Caſe between the Colledg of Phyſitians, and Dr. *Bonham*, (amongſt other things). That foraſmuch as the Phyſitians had not any Court granted to them by Letters Patents, that they could not by any Authority *implicitè* granted to them, or for any miſdemeanor done by Dr. *Bonham*, commit him to Priſon without Bail or Main-prize, untill he ſhould be delivered by the command of the Preſident and Cenſors. And for proof of that, the Caſe of the Mayor and Commonalty of the City of *London*, 38 Eliz. was remembred. A Grant was made to the Mayor and Commonalty, That the Mayor for the time being ſhould have *Plenam et integram Scrutiniam gubernationem et correctionem omnium et ſingulorum Myſteriorum*, without granting to them any Court in which there ſhould be any legal proceedings, That the ſame was good for to ſearch by which a diſcovery might be made of ſuch Offences, which by the Law might be puniſhed in any Court, but the ſame did not give them any abſolute or irregular power to puniſh any Subject of the Realm at their pleaſures. And it was agreed by the whole Court in the Caſe of Dr. *Bonham*; That when an Act of Parliament is againſt common Right and reaſon, and repugnant and impoſſible to be performed, that the Law doth adjudg ſuch an Act to be void. See 14 Eliz. *Dyer*. The Statute of 1 E. 6. gave Chauntries to the King, ſaving to the Donors all ſuch Rights and Services. The Common Law ſhall adjudg it to be void as to the Services. For it ſhould be againſt Right, Reaſon, and repugnant to Law, that the King ſhould hold of any, or do any ſervice to any of his Subjects. See Hill. 7 Jac. in C. B. *Cook* 8. Part, 94, 95. in Dr. *Bonhams* Caſe.

17. Note, That a ſaving in an Act of Parliament which is repugnant to the body of the Act is void; and therefore ſee *Plow. Com.* 563. where the ſuppoſed Attainder of the Duke of *Norfolk* was by Act of 1. *Mariæ* declared to be void, and *Nul ab initio*, Saving Eſtates and Leaſes made by King E. 6. that the Saving was void, for when the Attainder was declared to be void, the ſaid Saving was againſt the body of the Act, and therefore void. *Plow. Com.* 563.

18. By the Statute of 31 H. 8. cap. 13. it is Enacted, That all Religious houſes and their poſſeſſions, then or after to be diſſolved, ſhall be unto the King in the ſame eſtate and Condition as they were at the time of the making of the ſaid Act, Saving to all ſtrangers their Intereſts, &c. After the ſaid Act made, the Abbot of *Ramſey* granted the next Avoydance of a Church of his Patronage, and afterwards the Abby was diſſolved. In that Caſe, it was adjudged, That the grant was void, and the Saving repugnant to the body of the Act, for if the Advowſon ſhall be in the King in the ſame Eſtate and Condition as it was at the time of making of the ſaid Act, then a Grant afterwards made cannot be ſaved. Mich. 7 Eliz. *Dyer*, 231.

19. King

19. King *Hen.* the 8th, Tenant in tail to him and the Heirs Males of his body of the Mannor of A. by force of a Fine 3 H. 7. with the Reverſion to him, his Heirs and Succeſſors by force of an Attainder and Office, gave by his Letters Patents the ſaid Mannor of A. to W. W. in tail. And after it is enacted by Parliament, That the ſaid Mannor of A. by reaſon of the great profit and pleaſure of it, ſhould be re-veſted in the King, his Heirs and Succeſſors, Saving to all their Rights, &c. W. W. Bargained and ſold the ſaid Mannor to J. S. againſt whom Intruſion was brought. In this Caſe, it was amongſt other points Reſolved, That the ſaving in the ſaid Act was void and repugnant, and that the ſaving did not extend to ſave the Eſtate of him who was ſeiſed of the Land: And it was further Reſolved, That although the Grant made to W. W. was good, and he had an Eſtate tail, yet by the expreſs words of the Statute, the ſame was given to the King. *Cook* 1. Part, the Caſe of *Alton Woods*.

20. A wound was given the 4th day of *Auguſt*, and the party dyed the 19th day of *December* after. And an Indictment againſt A. and B. as acceſſaries to the Felony, was drawn in theſe words, *viz. Et predict. A. et B. tempore felonie et murdri predict. fuit*, viz. 4. *Auguſt*, &c. *felonice fuerunt preſenti, &c. ad feloniam et murdrum predict. in forma predict. faciend.* It was Reſolved in this Caſe, That the ſaid Indictment as to A. and B. the Abettors was inſufficient and void for the Repugnancy in it, becauſe no Felony was committed untill the death of the party, and one ſhall not be adjudged a Felon by relation, which is a fiction in Law. *Cook* 4. Part, 42. in *Heydons* Caſe. So in an Appeal of Murder, in the Count, the wound was layed to be given at B. and the death to be at D. and then the Indictment concludes, *Et ſic predict. J. S. quod S. predict. modo et forma* the ſaid J. S. *felonice, &c. Murdravit.* It was Reſolved in that Caſe, That the Indictment was inſufficient, and void, for that it cannot be ſaid, That he murdred him at the place where the wound was given, but where the party dyed. *Cook* 5. Part, 42. *Humes* Caſe. See *Cook* 4. Part, *Wrotes* Caſe, &c.

See more of *Repugnant* and *Repugnancy*, in the Titles of *Deeds*, *Grants*, *Covenants*, *Conditions*.

Requeſt.

Where, and in what Caſe a Requeſt is neceſſary; Where not: Where generally made and layed, it good; and where it muſt be ſpecial, and ſpecially layed; Where not.

1. DEbt upon an Obligation to ſtand to the Arbitrament of J. S. who did arbitrate, That the Defendant ſhould pay to the Plaintiff 20 l. and appointed no certain day of payment. The Defendant in pleading confeſſed the Arbitrament; but ſaid, the Plaintiff did never require him to pay it. Whereupon the Plaintiff demurred in Law. It was holden by the Court clearly, That it was no Plea, becauſe the Defendant at his peril ought to make payment within convenient time, and the Plaintiff needs not to make any requeſt. Mich. 30 Eliz. in B. R. *Bret* and *Andrews* Caſe. *Goldesbr.* 63.

2. In *Aſſumpſit*: The Declaration was, In conſideration that the Plaintiff would give credit to E. C. then Servant to the Defendant for any thing the ſaid E. C. ſhould deal for to the uſe of the Defendant with the Plaintiff; promiſed, That he would ſee the Plaintiff contented that which the ſaid E. C. ſhould deal for with the Plaintiff, when the Defendant ſhould be requeſted. It was found by Verdict, That the Defendant promiſed to ſee the Plaintiff contented that which the above named E. C. ſhould deal with the Plaintiff for the uſe of the Defendant any way. It was the Opinion of the Court, That this Verdict did not maintain the Declaration, becauſe for collateral matters, which are not duties, a Requeſt is material, and are not like a duty; as for Debt which is due, and no day of payment expreſſed, that ſhall be alledged when he ſhall be thereunto requeſted, generally. As if I ſell my horſe for 10 l. and no day of payment, it ſhall be alledged in the Declaration *cum inde requiſitus eſſet*. Trin. 5 Jac. in C. B. *Gore* and *Colthrops* Caſe. *Brownlow*, 1. Part, 13.

3. Debt upon an Obligation, the Condition was, That if the Defendant before *Mich.* do make knowledg, and ſuffer all and every ſuch reaſonable Act

and thing whatſoever they be, for the good and lawful aſſuring and ſure making of the Mannor of D. to J. S. and his Heirs, &c. that then, &c. The Defendant pleaded, That before *Mich.* the Plaintiff had not reaſonably required the Defendant to make any reaſonable Act or Acts which ſhould be for the good and lawful aſſuring of the Mannor of D. The Plaintiff replyed, That at ſuch a day before *Mich.* he requeſted the Defendant that he would convey and aſſure the Mannor of D. to J. S. according to the tenour of the Condition: upon which Iſſue joyned, it was found for the Plaintiff. It was moved in ſtay of Judgment, Here was no breach, for that the Plaintiff ought to have required one aſſurance in certain. It was adjudged, That the Condition was broken, for by the Condition the Defendant is to make all and every act whatſoever for the aſſuring of the Mannor; in ſo much, that if the Plaintiff ſhould requeſt one Fine, Feoffment, or Recovery, or Bargain and Sale, the Defendant ought to make all. But the Opinion of the Court was, That he was not bound to make an Obligation, or Recognizance, for the enjoying of the Mannor, for that is but collateral Security, and no aſſurance. Mich. 1 Jac. in C. B. *Pudſey* and *Newſams* Caſe. *Brownlow*, 1. Part, 84.

4. Debt upon an Obligation, the Condition was to perform, obſerve, fulfil and keep all Covenants, Grants, Articles, Payments, contained in a Leaſe. The Leſſee did not pay the Rent at the day, the Plaintiff without making any requeſt, begins a Suit upon the Obligation, and upon this matter pleaded; the Plaintiff Replyed, That he was not demanded: And upon that the Defendant demurred. It was ſaid for the Defendant, that when any penalty is annexed to the payment of a Rent, be it annexed to the Eſtate or otherwiſe, it ought to be requeſted, and without requeſt to pay it, no penalty ſhall be incurred: On the other ſide it was ſaid, That the Leſſee ought to make a tender upon the Land to ſave the penalty, and then the Leſſor need not to make requeſt. The Caſe was adjourned. But *Cook* Chief Juſtice cited *Miles* and *Drayles* Caſe. Where a man was bound for performance of a Will, he needed not to pay Legacies Deviſed, for which a day is Aſſigned without a Requeſt. Mich. 20 Jac. in C. B. *Maxley* and *Jennings* Caſe. *Brown.* 2. Part, 176, 177.

5. In *Aſſumpſit*, The Plaintiff declared, That in conſideration of a ruſſ Bond delivered by the Plaintiff, the Defendant promiſed to pay to him at the day of the Plaintiffs Marriage 3 l. and alledged in *facto*, That he was married ſuch a day, *Et licet ſæpius requiſitus*, he had not paid it. Upon *Nihil dicit* and Judgment for the Plaintiff, It was moved, That the Declaration was not good. 1. Becauſe he doth not ſhew that he gave notice of his Marriage. 2. Becauſe the payment ought to be after Requeſt, and the day of Requeſt ought to be mentioned, for *licet ſæpius requiſitus* will not ſerve. It was the Opinion of the Court, That the Defendant at his peril ought to take notice of the Marriage; and that *poſtea requiſitus* was ſufficient without ſhewing the day of the Requeſt. Paſc. 2 Car. in C. B. *Crane* and *Cramptons* Caſe. *Cro.* 1. Part, 23.

6. *Aſſumpſit*, The Plaintiff declared, Whereas the Defendant had a Dog which uſed to kill ſheep; and the Defendant knowing thereof, That his Dog had killed the Plaintiffs ſheep; and taking notice that the Plaintiff intended to ſue him for recompence; he intreated the Plaintiff not to ſue him, and to make what benefit he could of the Sheep; and in conſideration that the Plaintiff would deſiſt his Suit, and make ſuch benefit as he might of the Sheep; the Defendant 1. *Maii*, 18 Jac. promiſed to recompence him the Damages which he ſuſtained by the killing of the ſaid ſheep. And alledged, That thereupon he deſiſted his Suit, and endeavoured to make benefit of the ſheep killed, but could not make any; and alledged, That he was damnified 44 s. and that 1. *May*, 2 *Car.* he requeſted the Defendant to recompence him of the damages ſuſtained. The Defendant pleaded the Statute of 21 Jac. of Limitation of Actions. It was adjudged for the Plaintiff, for there was no cauſe of Action untill requeſt to make recompence, for till requeſt there was not any thing due, and the duty ariſeth upon the requeſt; and the non payment of the money after the requeſt, is the cauſe of the Action; and becauſe the Action was brought within the time after the breach. It was adjudged for the Plaintiff. Trin. 4 Car. in B. R. *Cro.* 1. Part, 98, 99. See Mich. 4 Car. *Godbolt*, 437. the ſame Caſe.

7. In *Aſſumpſit*, the Plaintiff declared, Whereas there was a contract betwixt the Defendant and J. S. concerning certain Trees growing upon ſuch Land, the Defendant in conſideration the Plaintiff would cut down and carry the ſaid Trees, promiſed that he would ſave him harmleſs of all damages and loſſes which might happen to him by reaſon of ſuch cutting down, or carrying them away when he ſhould be required; and alledged, That he cut down five of the ſaid Trees, and carried them to the Defendants houſe, and the Defendant had not ſaved him harmleſs, *licet ſæpius requiſitus*, but ſuffered him to be ſued at the Common Law for cutting them down, whereby he was enforced to lay out divers ſums of money in defence of the Suit. Upon *Non Aſſumpſit* found againſt the

the Defendant; It was moved in ſtay of Judgment, That the Declaration was not good, becauſe he doth not ſhew in what Court he was ſued, nor what Charges he expended, nor how he was damnified. It was the Opinion of the Court, That the Declaration was ill in ſubſtance, no breach being ſufficiently ſhewed; and *Peck* and *Metholds* Caſe was vouched: Where an *Aſſumpſit* was, That he ſhould deliver ſuch an Obligation upon requeſt after payment of ſuch a ſum; and he alledged the money was paid, and that *licet ſæpius requiſitus* he did not deliver the Obligation. Upon *Non Aſſumpſit* and Judgment for the Plaintiff. Error was brought, becauſe it was not to be delivered, but upon requeſt; and ſo it was ſaid in the principal Caſe, becauſe a ſpecial requeſt was not made, and the year and place alledged of the requeſt, it was not good. It was the Opinion of the Court, That the Declaration was not good, and Judgment given for the Defendant, Mich. 10 Car. in B. R. *Palmer* and *Knights* Caſe. *Cro.* 1. Part, 280, 281.

8. Covenant, For that the Defendant Covenanted, That he would make a lawfull ſurrender of ſuch Copyhold Land upon reaſonable requeſt, and that he would permit the Plaintiff to enjoy the ſaid Lands, and to receive the rents quietly. The Plaintiff ſhewed, That ſhe was a Copyholder of ſuch Lands, and alledged a Cuſtome, that ſhe might ſurrender by Letter of Attorney into the hands of Tenants out of Court; and ſhewed, That he cauſed a Letter of Attorney to be made for the Plaintiff to ſeal, and gave Authority to two perſons therein named, to ſurrender at the next Court, and tendred to her to Seal, and ſhe would not Seal it, nor ſurrender at the next Court holden ſuch a day, and that ſhe received the Rents of the Lands, and ſo brake her Covenant. The Defendant pleaded, That the Plaintiff tendred to her ſuch a Letter of Attorney to ſeal, and for that ſhe did not know what was therein contained, ſhe required reaſonable time to be adviſed by her Councel, and the Plaintiff refuſed to give her any time, for which cauſe ſhe did not Seal it. It was Reſolved in this Caſe. 1. That the breach is not well aſſigned, for ſhe is upon the Covenant to make ſurrender upon requeſt, but is not bound to make a Letter of Attorney to make a ſurrender, ſo the breach is not aſſigned according to the Covenant; and whereas it was Objected, That ſhe was to have reaſonable time; the Court was of Opinion, That there was no difference, whether ſhe was to do it upon requeſt, or upon reaſonable requeſt: And it was holden in that Caſe, That there ought to be an expreſs requeſt to make the ſurrender, and not an implyed requeſt. It was adjudged for the Defendant. Hill. 6 Car. in B. R. *Sym* and the Lady *Smiths* Caſe. *Cro.* 1. Part, 218.

9. In *Aſſumpſit*, the Plaintiff declared, That he was an Inn-keeper, and a Commiſſion iſſued in a Suit, betwixt the Defendant and others to examine Witneſſes, which Commiſſion was ſet upon in the Plaintiffs houſe being an Inn, and in conſideration that the Plaintiff did promiſe to find Horſe-meat, and Mans meat for the Defendant and his company during the ſitting of the ſaid Commiſſion, the Defendant promiſed to pay all ſuch ſums as the Dyet and Horſe meat ſhould amount unto, when he ſhould be requeſted; and alledged *in facto*, that he found Horſe meat and Mans meat during all the time of three dayes the Commiſſion there was ſet upon, which came to 5 l. which the Defendant *licet ſæpius requiſitus* had not paid. Upon *Non Aſſumpſit* found for the Plaintiff, It was moved, That the promiſe being to pay upon requeſt, the year, day, and place ought to be expreſſed: and of that Opinion was the whole Court. For when the Defendant is chargeable upon a Collateral promiſe, there ought to be a preciſe Requeſt alledged, and *licet ſæpius requiſitus* is inſufficient. Judgment was ſtayed. Mich. 5 Jac. in B. R. *Selman* and *Kings* Caſe. *Cro.* 2. Part, 187. See *Hill* and *Wades* Caſe. *Cro.* 2. Part, 523. acc.

10. Debt upon an Obligation Conditioned, Whereas he was Preſented to the Church of S. in the Iſle of *Ely*. That if he reſigned the Benefice within a Moneth after requeſt made to him, *viz.* at the Parſonage houſe of S. that then, &c. The Defendant pleaded, *Non requiſivit*. It being adjudged for the Plaintiff, and Error brought and aſſigned. 1. For that the Plaintiff alledgeth a Requeſt at the Parſonage houſe of S. by a *Viz.* whereas it ought to have bin alledged at the Parſonage houſe preciſely. 2. Becauſe it is not ſhewed, That he gave notice. But both Errors diſallowed by the Court; for, for the firſt, it is a uſual courſe to expreſs it by a *viz.* for the ſecond, being found to be preciſely made, it is included therein that he was preſent, and had ſufficient notice given him, otherwiſe they ought not to find the requeſt. Paſc. 9 Jac. in B. R. *Lawrence* and *Johns* Caſe. *Cro.* 2. Part, 274.

11. In *Aſſumpſit*, the Plaintiff declared, That the Defendant in conſideration that he had retained the Plaintiff to go from *London* to *Paris*, to Merchandize divers goods for the profit of the Defendant, promiſed to give him ſo much as ſhould content him, and alſo to give him every ſum of money he ſhould expend there in his affairs: and layed, that he was contented to have 25 l. for his labour, which the Defendant refuſed to pay. Exception was taken to the Declaration, for that there

there is not ſet down any time or place of the notification of his contentment: And it was ſaid, That if one aſſume to pay to another 20 l. upon requeſt, if the time and place be not ſhewed, In ſuch Caſe often Judgment is ſtayed, for that no Action will lye without a Requeſt. In the Principal Caſe it was adjudged for the Plaintiff; for the ground of the Action is the *Aſſumpſit*, and the ſhewing of the contentment, is but to reduce the Action to a certainty. Paſc. 30 Eliz. in B. R. *Dillaby* and *Haſſalls* Caſe. *Leon.* 124. See *Godbolt*, 144. the ſame Caſe.

12. Error upon a Judgment in debt in C. B upon an Arbitrament of 340 l. ſuppoſing that there were controverſies betwixt the Plaintiff and the Defendant and his Wife for divers ſums of money layed out by the Wife *dum ſola fuit*, and that they ſubmitted themſelves in Arbitrament, aſwell concerning the Premiſes, as concerning all Suits betwixt them concerning the Premiſes; and the Arbitrators awarded, that the Defendant ſhould pay to the Plaintiff 340 l. for all ſums of money layed out by the Plaintiff for the ſaid Wife, *dum ſola fuit cum inde requiſitus eſſet*, and that all Suits betwixt them ſhould ceaſe. And that the Defendant *licet ſæpius requiſitus* had not paid the 340 l. It being upon *Nihil debet* found for the Plaintiff, and Judgment, Error brought. It was Aſſigned for Error, That the Arbitrament is to pay 340 l. *cum inde requiſitus eſſet*; ſo requeſt being part of the agreement, there ought to be a ſpecial requeſt, and *licet ſæpius requiſitus* will not ſerve: and ſo was the Opinion of the Court: And it was ſaid, it is not like unto a Debt upon a Bond or Contract, for there the Debt being due by ſpecialty or Contract, needs not a ſpecial demand, but *licet requiſitus* will ſerve. But being due by Arbitrament, it is not due but according to the Arbitrament upon ſpecial demand. The Judgment was reverſed. Paſc. 18 Jac. in B. R. *Waters* and *Bridges* Caſe. *Cro.* 2. Part, 639, 640.

13. *Aſſumpſit*, The Plaintiff declared, Whereas the Defendant had a *Fieri facias* for 61 l. of the goods of J. S. and delivered that Writ to the Sheriff, to whom it was directed, and affirmed to the Plaintiff, That the Cloth in the Shop of C. S. were the goods of J. S. lyable to the Execution, and required the Plaintiff to execute it. The Defendant then and there, in conſideration that the Plaintiff would ſeize the ſaid Cloth for the ſaid Execution, promiſed the Plaintiff, That he would enter Bond to the Sheriff when he ſhould be required, in any reaſonable ſum to ſave the Sheriff, and the Plaintiff harmleſs againſt all perſons, for entring the ſaid Shop, and taking the ſaid goods in Execution: And the Plaintiff giving credit to his promiſe, entred the ſhop, and took the ſaid goods in Execution, for which C. S. ſued him in Treſpaſs, and recovered againſt him 20 l. And the Defendant *licet ſæpius requiſitus* had not entred Bond to the Sheriff. Being found for the Plaintiff, it was moved, That the promiſe was upon a conſideration againſt Law, *ſcil.* to take Execution of goods, which were not the Defendants, and to ſave him harmleſs againſt all perſons. But it was adjudged, That the Declaration was good, and requiring the Sheriff to do Execution, its reaſonable he ſhould ſave him harmleſs; and the promiſe to give Bond in a reaſonable time, is good enough, though not agreed what the penalty ſhould be. It was adjudged for the Plaintiff. Mich. 20 Jac. in B. R. *Arrundell* and *Gardiners* Caſe. *Cro.* 2. Part, 653.

14. Error of a Judgment given in the Court of *Northampton* in an *Aſſumpſit*. The Error was Aſſigned, becauſe it appeareth, That the Action was brought before the Plaintiff had made requeſt. The Caſe was, A Contract was made between the Plaintiff and the Defendant; and the Defendant was to pay to the Plaintiff 10 l. when the Plaintiff ſhould require him. The Plaintiff brought an Action in the ſaid Court, 1. *Martii*, 16 Jac. and the Requeſt is layed to be 7. *Martii*, 16 Jac. following. It was ſaid in this Caſe, Where a contract is made, and no time is expreſſed for the payment of the money. If the party bring his Action before he make his requeſt, he ſhall not have damages: but if he maketh an actual Requeſt, and the Defendant doth not pay the money, there he ſhall recover damages beſides the duty. Here the Action was brought before the requeſt made, and ſo no damage to the Plaintiff. And the Judgment was, That the Plaintiff *recuperet damna prædicta*, *viz.* the Damages layed in the Declaration. *Dodd* Juſtice ſaid, That the Judgment ought to have bin *Quod recuperet damna quæ ſuſtinuit*, and not *damna prædicta*. The Judgment was reverſed. Trin. 21 Jac. in B. R. *Gleed* and *Wallis*'s Caſe. *Godbolt*, 362.

15. In an Action upon the Caſe, The Plaintiff declared upon an account, and ſhewed that the Defendant was found in Arrerages 20 l. which he promiſed to pay when he ſhould be requeſted; the Plaintiff had not layed any day or place of the Requeſt in his Declaration. It was ſaid by *Hobart* Chief Juſtice, That when a man brings an Action upon the Caſe for a thing which was Originally a debt, he need not lay any time or place of Requeſt; but when the Action is brought for a collateral thing, there he ought to lay a day and place of the Requeſt. Trin. 19 Jac. in C. B. *Bartlet* and *Bartlets* Caſe. *Winch.* 2.

16. Action

16. Action upon the Caſe; The Plaintiff declared, That the Defendant in Conſideration that the Plaintiff had paid to J. S. 40 l. to the uſe of the Defendant by his appointment, he aſſumed upon requeſt, to deliver an Obligation, in which he and another ſhould be obliged to the Plaintiff in 100 l: And that the Defendant *Licet ſæpius poſtea requiſitus*, did not deliver the ſaid Obligation. It was found for the Plaintiff. It was moved, in ſtay of Judgment, That the Plaintiff had not alledged any ſufficient requeſt, by ſhewing ſuch a day, and ſuch a place which is Iſſuable, and being matter collateral, the Requeſt is part of the Cauſe of the Action. It was the Opinion of the Court, That the Plaintiff ſhould have Judgment; yet they agreed the difference, when the Requeſt ſhall be alledged as part of the thing to be performed, and when it is implyed in the debt: And for the time here, it is ſufficient, *viz. Poſtea*; but for the place, it is omitted; and if Iſſue had been tendred thereupon, it might be ſupplyed afterwards. Mich. 22 Jac. in C. B. *Mitchell* and *Pecks* Caſe. Note; It is ſaid, That this Judgment was reverſed in B. R. becauſe the Requeſt being upon Collateral matter, is material. Quære, If ſo. See *Bolſtrod.* 3. Part, 299, 300.

17. Action upon the Caſe, for a Promiſe, brought by an Executor, againſt the Executor of an Executor, for payment of money lent unto him; *Wood* borrowed the money, and promiſed to pay the ſame: In this caſe, It was the Opinion of the Court, It is here implyed, That he was to pay this upon Requeſt, being that which the Law required: If no Requeſt be made by the omiſſion of it, he is not to loſe his debt; the Law here is *prime tempore*: but by Law they are both of them *ſimul tempore*, the requeſt made the money to be paid; but if he doth not make requeſt, the debt by this is not to be loſt: for his Executors may requeſt; as they did in the principal Caſe. And in this Caſe, It was ſaid, That it had been adjudged, If money be lent to one, who promiſeth to pay it upon requeſt, to J. S. who dyes before any requeſt made; yet he ſhall have it: for the money ſhall be paid to his Executor. Mich. 14 Jac. in B. R. *Davenport* and *Woods* Caſe. It was adjudged for the Plaintiff. *Bolſtr.* 3. Part, 259.

18. B. brought an Action upon the Caſe againſt Sir *Arthur Lake*, and Declared, That whereas at the ſpecial Inſtance of *Lettice*, Wife of the Defendant, he had provided for the ſaid *Lettice*, a Taffety Roll; the Defendant did promiſe to pay as much as it was worth, upon Requeſt; and alſo in like manner for providing of Linnen, &c. and making ſeverall Garments for the Wife; and averred, That the ſeveral things bought amount to ſuch a ſum, and the making thereof, was worth ſuch a ſum, which *in toto*, &c. and alledged the requeſt, and averred that they were neceſſary Veſtiments, & convenient for the degree of the Wife, and that after the making of them, he delivered them to the Wife: The Queſtion in this Caſe, was, Whether the Cauſe of Action ſhall be ſaid upon the requeſt, or upon the promiſe. It was ſaid, That this was the Contract of the Husband; whereupon the Plaintiff might have an Action of debt againſt him, and then it is but an Aſſumpſit in Law, and the Requeſt is not the cauſe of the Action. But the Court inclined, That no Action of Debt lay againſt Sir *Arthur* upon this Aſſumpſit; but only an Action upon the Caſe upon the Requeſt, Mich. 5 Car. in B. R. *Tiſſ* and *Lakes* Caſe, *Hutt.* 105, 106.

19. In Aſſumpſit, the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff had ſold and delivered to him ſuch a number of Pieces of Stuffs, the Defendant did promiſe to deliver to him the value of the Stuffs in ſuch Pipes of Wine lying in J. S. his Celler in *London*, as the Plaintiff ſhould make choyce of. Upon Non Aſſumpſit, it being found for the Plaintiff. It was moved in ſtay of Judgment, That the Plaintiff in his Declaration hath not averred, That he made any election, and before election, the Defendant was not bound to deliver them. In this Caſe, the Court held, That here ought to be a ſpecial Requeſt made to deliver the Wines, becauſe it is upon a Contract; and becauſe no Requeſt was made, It was adjudged againſt the Plaintiff. Mich. 23 Car. in B. R. *Parmiter* and *Creſſy's* Caſe, *Styles*, 49.

20. In Action upon the Caſe, the Plaintiff declared, That the Defendant in Conſideration that the Plaintiff had paid him ſuch a ſum of money, did aſſume and promiſe to joyn in the Surrender of certain Copyhold Lands: The Defendant Demurred upon the Declaration, and ſhewed, That the Plaintiff did not alledg, that he made any Requeſt to the Defendant, to joyn in the Surrender, which he ought to do; for it was not a ſingle act to be done by the Defendant alone, but he was to joyn in the Act with another: And ſuch was the Opinion of the Court. Alſo the Court was of Opinion, That the Breach was not well aſſigned; for he hath aſſigned a particular way how he ſhou'd Surrender into the hands of two Tenants of the Mannor; whereas he did aſſume onely to joyn in a Surrender, which might be in Court, or into the hands of the Lord, as well as into the hands of two Tenants. It was adjudged againſt the Plaintiff. Trin. 24 Car. in B. R. *Freeborn* and *Purchaſers* Caſe. *Styles*, 107.

21. Action upon the Caſe; the Plaintiff declared upon 3. Aſſumpſits made by the Defendant to the Plaintiff, That the Defendants Son ſhould pay

pay ſuch a ſum of money to the Plaintiff for his boarding with him, when he ſhould be thereunto required. Upon Non Aſſumpſit found for the Plaintiff, It was moved in ſtay of Judgment, That the Plaintiff doth not ſhew that he did require the ſon to pay the ſum of money; but only ſaith, *Licet ſæpius requiſitus, non ſolvit.* It was the Opinion of the Court, That this was a Collaterall promiſe; and therefore the requeſt muſt be averred to be made to the ſon. It was adjudged, *Quod Querens nihil Capiat per Billam.* Mich. 1649. in B. R. *Williamſon* and *Meads* Caſe, *Sty*les, 207.

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2. *Where re-entry for a Condition broken, ſhall not be lawfull without demand or requeſt of the Rent reſerved. And where a Condition upon Eſtates is not to be performed without requeſt*; Et è contra.

1. THe Queen made a Leaſe for years, rendring Rent payable at her Receipt of her Exchequer at *Weſtminſt. ſeu ad manus baliorum ſeu receptorum*, with Condition, to be void for non payment of the Rent; and afterwards granted over the Reverſion: And, If the Patentee ſhould demand the Rent, to take advantage of the Condition, was the Queſtion? And in this Caſe, It was Reſolved (amongſt other things); 1. That if a Common perſon reſerve a Rent upon a Demiſe, payable at a place off the Land, he who will take advantage of the Condition for not payment of the Rent, ought to demand the Rent at the place where it is limited to be paid; for the payment of the Rent off the Land, doth not alter the Nature and Quality of the Rent. 2. Reſolved, That the Patentee ought to demand the Rent upon the Land *et expreſſio eorum quæ tacitè inſunt nihil operatur.* 3. That the King ſhall take advantage of a Condition, for not payment of Rent, without a Requeſt, or demand of the Rent. *Cook* 4. Part, 72, 73. *Borough*'s Caſe.

2. A Rent by Deed was granted to one and his Aſſigns for life *pro Conſilio impendendo*, payable yearly at 4. Feaſts; and for default of payment, if it ſhould be demanded, that it ſhould be lawful for the Grantee and his Aſſigns to diſtrain: the Grantee aſſigned the Rent; the Tenant attorned, the Aſſignee upon the Land demanded the Rent after the day; and for want of paymept, diſtrained: In this caſe, it was Reſolved, 1. That a grant of a Rent to one and his aſſigns, *pro Conſilio impendendo* might be aſſigned over by expreſs words of the grantor. 2. That the Aſſignee needs not to demand the Rent at the day, as he ought in caſe of a Re-entry; but in caſe of a Diſtreſs, he may demand it at what time he pleaſeth. 3. That if a man hath a Rent-Seck payable yearly at the Feaſt of M. and hath once Seiſin of the Rent, and the Feaſt paſſeth, and no tender or demand made, he may, after the day, demand the Rent upon the Land; and if none be ready to pay it, the ſame is a denyal of the Rent; for which he may have an Aſſiſe. *Cook* 7. Part, 28. *Manis* Caſe.

3. A man made a Feoffment in Fee of his Land; and for the better aſſurance, bound himſelf in an Obligation, That he and his ſon ſhould do all ſuch acts as ſhould be deviſed by the Obligee: The Obligee deviſed a Deed of Releaſe; the Father ſealed it as his Deed, but the Son did not deliver it; but becauſe he could not read, and was unlearned, he required the Obligee to read it to him, or to have the Deed to be read unto him; which he refuſed, but brought Debt upon the Obligation: In this Caſe, It was Reſolved, 1. That if a man not lettered be bound in an Obligation, he is not by Law bound to deliver it, before it be read unto him: and if it be in a language which he underſtands not, he is not bound to deliver it, before it be expounded to him. 2. Reſolved, That if a man can read, yet if the Deed be in ſuch a language, that the party doth not underſtand it, if he requeſt or demand that the writing be read and expounded to him, and is ready to it; if it be denyed him, he may refuſe to deliver it. But in the principal Caſe, The Son was bound to deliver it at his perill, becauſe his Father had bound him ſo to do. *Cook* 2. Part, 3. *Manſers* Caſe.

4. A Perſon promiſed, that he would make a good and lawful Eſtate and aſſurance in Law, of a Rectory diſcharged of all former bargains and ſales made by him, during their joynt Lives of him and the Plaintiff, as by Councel Learned of the Plaintiff, upon requeſt made, ſhould be adviſed; In an Action of Aſſumpſit brought, It was moved in ſtay of Judgment, If the advice ſhould be given to him who ſhould make the Eſtate immediately, or to the Plaintiff? In this caſe, It was Reſolved, That it is moſt fit, that the Councellor give his Counſel to him with whom he is of Councel; and that he ſignifie the ſame to him who is to make the Eſtate: But in this caſe, it was Reſolved, That the Councellor cannot give advice without requeſt. *Cook* 5. Part, 20. *Higginbottams* Caſe.

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5. Debt upon an Obligation; The Condition was, That if the Defendant delivered to the Plaintiff an Obligation of the ſum of 10 l. wherein the Plaintiff ſtood bounden with one T. to the Defendant for the payment of 10 l: And alſo, if the Defendant do acknowledg ſatisfaction of a Judgment upon the ſaid Bond, and alſo deliver true notes of all Bills of Charges, as do concern the ſame; that then, &c. The Defendant pleaded, *Quod non fuerunt aliqua Bilia Miſarum pro et concern. Sent. predict.* and did not anſwer, *ad reſiduum conditionis*: In that Caſe, It was adjudged againſt the Defendant; for he ought to have performed the reſidue of the Condition in convenient time, and that without Requeſt. And in this Caſe, it was Reſolved, 1. When the act, by the Condition of the Obligation to be performed, is in the nature of a tranſitory thing, as payment of money, and no time is limited, although that the place is expreſſed, the act ought to be done within convenient time. 2. A difference was taken between the Concurrence of the Obligee and a ſtranger, and the Obligor and the Obligee: For if I be bound to enfeoffe a Stranger, and no time is limited, although that the concurrence of the Obligor and Obligee is requiſite, the Obligor ſhall not have time to make it during his life; but he ought to do it preſently: for the Obligor hath taken upon him to do it to a ſtranger, and that may be done without the concurrence of the Obligee: But when the Obligee himſelf is party, and the act cannot be without his concurrence, there it is reaſon that the Obligor have time during his life to do it, if the Obligee doth not haſten the ſame upon requeſt. 2. Reſolved, That when the Act to be performed by the Condition by the Obligor, doth not concern in any manner the Obligee or his benefit, but is to be done by the ſole act and labour of the Obligor, there the Obligor hath time to do it during his life; and the performance of it cannot be haſtned by Requeſt. *Cook* 6. Part, 30, 31. *Bathies* Caſe.

6. A man by his Will deviſed his Land to A. his ſon for 60. years, after the death of the Deviſor, if the ſaid A. ſhould ſo long live; and after, to the uſe of B. his ſon for life; and after to the heirs males of the body of A, with divers remainders over; Proviſo, That if A. do not ſuffer his Executors quietly to carry away all his goods in his houſe, or ſhall do any thing to hinder the intent of his Father, that then the Uſes limited to A. and his heirs ſhould ceaſe. The Deviſor dyed; The Executors came to the houſe, and would have carried away the Goods, and A. would not ſuffer them, but forbid and hindered them to carry away the Goods; he in the remainder entred for the Condition broken. In this caſe, amongſt other Points, It was Reſolved, That the denying by word, was not any breach of the Condition, but there ought to be an act done; as, after Requeſt made, to have ſhut the doore upon them, or to have layed his hands upon them, and ſo reſiſted them. 2. Reſolved, That although a particular diſturbance by a ſpecial act had been ſhewed; yet A. ſhould not loſe his Term, for none ſhall loſe any Eſtate or Intereſt which he lawfully hath, without ſome act or default in himſelf: and therefore becauſe A. was a ſtranger to the Feoffment, he ſhould not loſe his Term without Notice given to him of the Proviſo of the Will of his Father: As Grantee of a Reverſion or a Feoffee ſhall not take advantage of a Condition for not payment of Rent, without Notice, and demand of the Rent of the Leſſee. But it was agreed in that caſe, That if a man be bound to perform the Award of J. S; and J. S. doth make an Award, That the Obligor ought to perform it without Requeſt or Notice, becauſe he hath bound himſelf to do it. *Cook* 8. Part, 92, 93. *Fraunces* Caſe.

More *Requeſt.*

1. IN an Action upon the Caſe, the Plaintiff declared, That in Conſideration that he the Plaintiff would marry A; B, promiſed to pay the Plaintiff 20 l. when he ſhould be required, after marriage: and the Plaintiff in his Declaration did not alledg any ſpecial Requeſt of it; which was moved to ſtay Judgment. But the Court was of Opinion, That it was good, and that it was not neceſſary for the Plaintiff to alledge a Requeſt, or Demand of it. Hill. 14 Jac. in C. B. *Skipwoſh* and *Skipwoſhs* Caſe, *Brownlow*. 1. Part, 10.

2. Errour of a Judgment in Debt, given in the Court of *Windſor*, becauſe the Coſts *de incremento* are not ſaid to be given *ad petitionem Querentis*, as it ought to be; and *Beneficium nemini obtrudituri*: and therefore it was ſaid, That an Alien born ſhall not have *medietatem Linguæ*, if he do not requeſt it: On the other ſide, it was anſwered, That Coſts ought alwayes to be aſſeſſed *ad petitionem Querentis*; and although the requeſt of the Plaintiff was not here preciſely put to the increaſe of the Coſts; yet at the beginning of the

Judgment it is ſaid, *Ideo ad petitionem Querentis, &c. Conſideratum eſt, &c.* that Coſts ſhall be given *ex incremento*; ſo as this request goes to the whole ſentence. It was the Opinion of the Court, That the Judgment ſhould be reverſed; for, the encreaſe of Coſts ought to be given *ad petitionem Querentis*; and the words, *ad petitionem Querentis*, in this caſe, being miſ-placed, will not ſupply the defect; and Damages *de Incremento*, is always *ad petitionem Querentis*. Hil. 2 Car. in B. R. *Goods* Caſe, *Popham*, 211, 212.

3. In Aſſumpſit, to pay 34 l. which accrewed upon ſeveral promiſes; The Plaintiff ſurmiſed, That one was endebted to him in 12 l; and the Defendant came unto him, and prayed to truſt him; and if he would, he would pay him the old debt, and, whatſoever he ſhould be in arrearage more, if it did not exceed 100 l, he would pay: and that afterwards he ſold to him divers Pieces of Fleſh, at reaſonable prices; and that he ſent him 3 l, which he promiſed to pay; and then he came and requeſted him to pay the whole 34 l; but he would not pay the 19 l. for the price of the Fleſh, nor the 12 l: Judgment being for the Plaintiff, It was moved in Arreſt of Judgment, Becauſe he doth not alleeg before, That the Fleſh which he ſold amounted to 19 l. And, 2. Becauſe he makes but one Requeſt for the ſeverall Debts, where there ought to have been ſeveral Requeſts. The Court was of Opinion, All was good for the firſt, becauſe he refuſed to pay the 19 l. *pro precio*; but it had been better, if he had alledged, That the Fleſh amounted to ſuch a price; and for the Requeſt, the Court was of Opinion, That it was well made. Paſch. 4 Car. in C. B. *Gammon* and *Mallorus* Caſe, *Hetley*, 84.

4. Debt for an Amerciament in a Court-Baron, The Plaintiff declared, That he was amerced at the Court-Baron of the Fermor of the Mannor of C: Amongſt other Exceptions to the Declaration, one was, Becauſe it is not ſhewed in the Declaration, That he required or demanded the Amerciament. But to that was Anſwered, *Licet ſapius requiſitus*, was in the Declaration, and that that was ſufficient, becauſe it was a duty before the Requeſt; but if firſt by the Requeſt it becomes to be a duty, then a Requeſt *in facto* ought to be alledged. Mich. 29 Eliz. in B. R. *Godbolt*.

5. The Caſe was; Tenant for life made a Leaſe for 21 years, rendring Rent at Mich. and the Annunciation, or within 13 Weeks of any of the ſaid Feaſts: After Mich. and before the 13. Weeks paſſed, the Leſſor dyed; the Plaintiff his Executor brought an Action of Debt for the Rent: It was Reſolved by the Court in this Caſe, That the Action did not lye; for the Rent being to be paid at Mich. or within 13. Weeks after, the Leſſee had Election to pay it at any of the dayes; and before the laſt day it is not due; and when the Leſſor dyeth before that day, his Executors had not any right to the Rent; but after the death of the Leſſor, having but an Eſtate for life, the Rent was gone: But if the Leſſor had had a Fee-ſimple, and dyed before the laſt day, his heir ſhould have had the Rent as incident to the Reverſion: But if the Leſſor had over-lived both dayes, the Rent had been a thing veſted, and his Executors ſhould have had it; But if the Rent had been reſerved at Mich. and if it be behind for 13 Weeks, that then it ſhould be lawful for the Leſſor to re-enter. If the Leſſee overlived Mich. the Executors ſhould have had debt for the Rent; for then the Rent was due, and the 13 Weeks were but a diſpenſation of the entry of the Leſſor untill that time. And it was Reſolved in this caſe, as well where the Rent is reſerved at two dayes in the diſjunctive, that it is ſufficient, if that the Rent be demanded at the laſt day, without demanding it at the firſt day. Mich. 32 Jac. in B. R. *Glover* and *Archers* Caſe.

6. If A. bringeth an Action againſt B. of Trover and Converſion of Plate, Jewels, &c. and the Defendant pleads Not guilty; It is good Evidence *prima facie*, to prove a Converſion, That the Plaintiff did requeſt the Defendant to deliver them, and he refuſed, and therefore it ſhall not be preſumed that he hath converted them to his own uſe. Yet it is there ſaid, It is but Evidence; and if it ſhould be found by Special Verdict in ſuch caſe, That the Plaintiff did requeſt them of the Defendant, and he refuſed to deliver them, it is not a matter upon which the Court can judge any Converſion. For Converſion ought to alter the Action of Detinue to Action upon the Caſe, which a denyal cannot do in Law; and yet it is good Evidence, and ſo hath been approved and allowed, to prove a Converſion. *Cook* 10. Part, 57. in the Caſe of the Chancellor of *Oxford*.

7. Six Carpenters came to a Tavern, and called for a Quart of Wine, and drank it, and upon Requeſt, refuſed to pay for it: It was Reſolved in this Caſe, 1. That when Entry, authority, or Licence is given by the Law, and the party doth miſcarry himſelf in the doing of it, he ſhall be a Treſpaſſor *ab initio*; as if the Lord diſtrain for Rent and Damage Feaſant, and wrake or kill the diſtreſſe: and ſo if a man entreth into an Inne or Tavern, and carrieth away any thing:

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But when Entry, or authority, or Licence, is given by the party, and he doth amiſſe, he ſhall be puniſhed for his Miſ-doing; but ſhall not be a Treſpaſſor *ab initio*. 2. Reſolved, That Not doing, cannot make the party who hath authority or Licence by the Law, to be a Treſpaſſor *ab initio*: and therefore in the principal Caſe, for not paying for the Wine (though upon requeſt) the Defendants ſhall not be adjudged Treſpaſſors *ab initio*, but the Taverner for that ſhall have an Action of Debt. *Cook* 5. Part, 147. The 6. Carpenters Caſe.

8. Two Joynt-Tenants of a Houſe, one acknowledged a Statute, and dyed poſſeſſed of divers Goods in the ſaid houſe: The Sheriff with the Jury came with proceſs of Law, to extend the Goods, and they offered to enter into the houſe to extend the Goods, and the Defendant not ignorant of the premiſſes, to diſturb the Execution, the door being open, ſhut the door; by which doing, the Sheriff could not extend the Goods. And in this Caſe, It was Reſolved, 1. That the houſe of every man is his Caſtle; and therefore, if Theeves come to a mans houſe, to rob or murder him; if he kill any of the Theeves, it is not felony, and he ſhall forfeit nothing. 2. If a houſe be recovered in any reall Action, or by *Ejectione Firme*, the Sheriff upon an *Habere facias Seiſinam*, or *Poſſeſſionem*, may break the houſe to do Execution, becauſe that after Judgment, it is not the Defendant's houſe. 3. In all Caſes where the King is party, there the Sheriff after he hath ſignified the Cauſe of his coming, if no doore be open, may breake the houſe, and do Execution; but if he may enter without breaking of the houſe, or upon Requeſt made by him, in ſuch caſe if he break the houſe, he is a Treſpaſſor. 4. It was Reſolved in the principal Caſe, for the Sheriff upon requeſt and denyal, in the caſe of a common perſon, to break the houſe of any Subject, and execute any Proceſs for the Inconvenience of Murthers and Robberies; and the Sheriff cannot break the houſe by force of a *Fieri facias*, but he is a Treſpaſſor; and yet the Execution which he doth in the houſe, is then good. 5. It was Reſolved in the principal Caſe, That the Sheriff had not done his duty: For it doth not appear, that he had made any requeſt to open the doore of the houſe, and therefore the party might lawfully ſhut the doore of his own houſe. *Cook* 5. Part, 92, 93. *Semaynes* Caſe.

9. Note: It was Reſolved by the Court, That if there be Lord Meſne and Tenant; and the Lord avow upon a ſtranger, and not upon the Meſne, there the Tenant is without remedy to have Aide of the Meſne, becauſe he is Tenant in Feeſimple, and may plead any Plea, that the Meſne may, and the Meſne cannot joyn with the Tenant, becauſe that the Avowry is not made upon the Meſne: But yet, in ſuch caſe, the Tenant is not without remedy, but the Tenant may reſort to the Meſne, and ſhew him his caſe, and pray the Meſne to take his Cattel out of the Pound, and to put in his own Cattel, and ſo demand Acquittal againſt the Meſne; And if upon ſuch requeſt the Meſne refuſe, he may have a Writ of Meſne againſt him, and plead in that, that he was diſtrained in default of the Meſne, and recover his Coſts and Damages againſt him; and by ſuch means the Meſne ſhall compell the Lord to avow upon him, and abate the Avowry made upon the Stranger: But if in ſuch caſe, the Tenant ſutth a *Replevin*, and hath deliverance of the Cattell, and doth not make ſuch Requeſt to the Meſne, then the Lord ſhall avow upon the Stranger, and the Tert-Tenant is without remedy, through his own default. *Cook* 9. Part, in the Caſe of *Avowry* 21, 22. *acc.* See *Cook* 9. Part, 111. in *Meriet Treſham's* Caſe, *in fine*, accord.

10. See, That where a man is bound to do a thing by Obligation, or otherwiſe, that there in ſuch caſe he muſt do it, at his perill, without requeſt. *Cook* 2. Part, 3. before, in *Manſers* Caſe. And ſee, *Hob.* 14: acc.

See more of *Requeſt*, in the Titles of *Demand*, *Conditions*, *Covenants*, and in the other Titles.

Reſceit.

Where, and in what Action it lyeth, what not; where he in the Reverſion ſhall be Reſceived, upon the default of the particular Tenant for life, or years, where not; And where, and in what Caſe the Wife ſhall be Reſceived for default of her husband, where not.

1. REſceit is, When an Action is brought againſt Tenant for life, or years, or other particular Tenant, and they make default; then he in the Reverſion cometh, and prayeth that he may be Reſceived to defend the Land, and to plead with the Demandant.

2. Note, It is ſaid in *Cook* 8. Part, 50. That an Aſſize is *Feſtinum Remedium*, wherein the Defendant ſhall not be Eſſoined, nor caſt a Protection, nor vouch a ſtranger; nor ſhall a ſtranger be Reſceived; for that Reſceit doth not lye in an Aſſize; but Quære of that, for that in 22 E. 3. Tit. *Reſceit*, 139. an Aſſize of Mort dancester was brought againſt Husband and Wife, the Aſſize was awarded by default, and remained *pro defectu Juratorum*; and the Wife came, and prayed to be Reſceived: It was Objected, That Judgment was given that the Aſſize ſhould be taken: Yet in that caſe, becauſe the Wife came, and prayed to be Reſceived, before final Judgment was given; after the Aſſize awarded, the Wife was Reſceived. See 22 Aſſ. 22. *Cook* 11. Part, 39. in *Metcalfes* Caſe.

3. In a Writ of Entry for Diſſeizin, brought againſt J. S. Tenant for life, who made default after default; he in the Reverſion came and prayed to be Reſceived, and was Reſceived, and pleaded in Bar, upon which they were at Iſſue; and at the Aſſizes, the Iſſue was found againſt the Demandant; and in the mean time, between the Aſſizes and the day in Bank, J. S. the Tenant for life, dyed; and afterwards, at the day in Bank, the Appearances of the Demandant, and of the Tenant by Reſceit, by the Attorneys were recorded: The Demandant pleaded the death of the Tenant for life, and prayed, That the Writ might abate, and that no Judgment might be; and the Tenant by Reſceit prayed, upon the *Poſtea* returned, that Judgment might be given; and the Court doubted what ſhould be done. *Et Curia adviſare vult.* Hill. 9 Eliz. *Dyer*, 258. Sir *Humphrey Ratcliffs* Caſe.

4. In Admeaſurement of Paſture againſt Huſband and Wife, Judgment was given, that Admeaſurement ſhould be made, which was afterwards done, and Returned into the Common Pleas at a day certain; at which day, the Husband made default, and the Wife came into Court before the Judgment given in the Principal matter, and prayed to be Reſceived. It was Objected, That ſhe came too late after the Admeaſurement awarded, which is a Judgment: But the Opinion of the Juſtices was, That that was not a Judgment upon the principal matter; and where the Statute of *Weſt.* 2. *cap.* 3. is, *Si maior ante Judicium venerit, &c.* It was ſaid, That that muſt be intended of the principal Judgment; and by the Rule of the Court, the Wife was Reſceived. See 5 E. 2. *Fitzh.* Title *Reſceit*, 165. *Cook* 11. Part, 39.

5. In a Writ of Right brought by the Lord *Windſor* againſt Husband and Wife, at the Petit *Cape*, and awarded; the Wife came, and prayed to be Reſceived: It was prayed, That becauſe the Demandant offered not himſelf at the firſt day, that he might be Non-ſuited; but it was denyed by the Court: wherefore the Wife was Reſceived, and Vouched, and afterwards, ſhe waived the Voucher, and joyned the *Miſe* upon the Grand Aſſize. Mich. 2 Mar. *Dyer*, 103. The Lord *Windſor* and *St. John* Caſe.

6. A man ſeized of Lands in Fee, having Iſſue a ſon by one woman, and a ſon and a daughter by another, deviſed his Land to his Wife for life, the Remainder to his younger ſon in Tail, the Reverſion to his right Heirs; a common Recovery was had againſt Tenant for life, in which he in the Remainder in Tail was vouched, and that to the uſe of himſelf in Tail, and his Heirs, who dyed without Iſſue. In this Caſe (amongſt other things) it was Reſolved, That no Act or Statute had ever been made to preſerve a Reverſion or a Remainder upon an Eſtate in Tail, becauſe by intendment, an Eſtate Tail hath a continuance for ever; and Tenant in Tail hath power to binde him in the Reverſion or Remainder: And in that Caſe it was holden, That he in the Reverſion or Remainder, upon an Eſtate Tail, ſhould not be Reſceived by the Statute of *Weſt.* 2. for that the Statute doth not extend to it: But if Tenant for life be, the Remainder for life, if Tenant for life be impleaded, he in the Reverſion hath been Reſceived, becauſe that he in the Remainder had no higher Eſtate then Tenant for life himſelf: But if there be a Fee immediate between the Eſtate of him who claims to be Reſceived, he ſhall not be Reſceived; and if he

he who hath the Reverſion in Fee, and he who hath the mean Eſtate for life, at the ſame time might be Reſceived, the mean Eſtate for life, in reſpect of the proximity, ſhould be preferred before the Reverſion in Fee; becauſe the words of the Statute are *Admittantur hæredes, vel illi ad quos ſpectat reverſio*, *Cook* 10. Part, 44, 45. *Jennings* Caſe.

7. An Action of Waſte was brought againſt Husband and Wife, and after Iſſue joyned at the *Niſi Prius*, the parties appeared, and a Verdict was given for the Plaintiff; at the day in Bank, It was moved, That the Wife might be Reſceived: But it was rejected by the whole Court as a ſtrange motion, for ſhe could not in ſuch Caſe be Reſceived. Trin. 14 Jac. in C. B. *Bell* and *Hartleys* Caſe. *Hob.* 177.

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2. *Where Tenant by Reſceit ſhall Vouch, and what ſhall be a good Counterplea of a Voucher, what not; and where one ſhall be eſtopped to Counterplead Reſceit, where not.*

1. IN a *Formedon* in the Remainder brought againſt Husband and Wife, the Husband made default, and the Wife was Reſceived, and Vouched over, and the Demandant took three Counterpleas to the Voucher; *ſcil.* 1. That for part of the Tenements, that the Wife had nothing therein but joyntly with her Husband. 2. For another part, That the Vouchee, nor any of his Anceſtors, ever had any thing in the Premiſſes in Demeſne, Reverſion, or Services, after the Title of the Demandant, but joyntly with J. S. and others who were alive. And for the Reſidue; That the Husband and Wife had levyed a Fine thereof, with Warranty, to a ſtranger: Upon which Counterpleas, the Wife demurred in Law. It was the Opinion of the Court, That none of the Counterpleas were good, 1. Becauſe it ſhall be intended that this Joynt-Tenancy was made during the Coverture; and then no moyties betwixt them, and that now ſhe is Tenant by Reſceit as a Feme ſole. 2. For the ſecond, becauſe he ought to have alledged by name, that the Vouchee, or his Anceſtors were Joynt-Tenants, and averred the continuance of the ſame, and there is no averment of the Continuance during the life of the Vouchee, or his Anceſtors. 3. That the Demandant ſhall be eſtopped to alledg the alienation of the Land by Fine, pendant the Writ, as he was before upon the Counterplea of the Reſceit; and if it ſhould be a Counterplea, the ſame is to the alienation and Warranty, and not to the Vouchee, for that Proceſs that the Vouchee cannot render in value, when the Vouchee had nothing in the Lands at the time of the Voucher. The Counterpleas were all diſallowed by the Court. Paſch. 17 Eliz. *Dyer*, 351.

2. See, Where Tenant by Reſceit ſhall vouch, and what ſhall be a good Counterplea to the Voucher. *Cook* 1. Part, 15. in Sir *William Pelhams* Caſe.

3. Error of a Judgment in a *Quod ei deforceat*, in the Seſſions in the County of *Montgomery*: The Defendant ſaid, that he had *majus jus* than the Plaintiff; upon which they were at Iſſue; and at the day, the Defendant made default, and a *Petit Cape* was awarded. At the day of the Return, J. S. prayed to be Reſceived, becauſe the Feoffment was made to the uſe of him and his Wife, for the life of the Wife, the Remainder to the ſaid J. S. and his Heirs: The Demandant Counterpleaded the Reſceit, traverſing the Feoffment; and at the Return of the Jury, J. S. did not appear, but one B. his ſon and heir, prayed to be Reſceived, by his Guardian, he being within age; and ſaid, that his father was dead, and he his ſon and heir appeared, and pleaded the ſame plea his father did, and prayed that the peril might demur for nonage: The Plaintiff counterpleaded his Reſceit, taking Iſſue upon the Feoffment, as aforeſaid; and upon that they were at Iſſue; and at the day, the Tenant by Reſceit made default, and *Petit Cape* awarded; whereupon Judgment was given againſt the Tenant by Reſceit: Whereupon Error was brought, and Error aſſigned, becauſe the Counterplea was of the Feoffment, where he ought to have ſaid, Of the Reverſion, and he cannot traverſe the Feoffment. 2. Error, Becauſe the Reſceit is admitted after Reſceit, which ought not to be, but only in Caſes where the Tenant by Reſceit dyeth, and the Heir cometh *in loco ſuo*. 3. Becauſe the Judgment was given againſt the Tenant by Reſceit, upon the default of the Tenant by Reſceit, when the Judgment ought to be given againſt the Tenant to the Action. The Court diſallowed the two firſt Errors; but for the third, they held it a manifeſt Error, and therefore the Judgment was Reverſed. Trin. 6 Car. in B. R. *Kiffin* and *Vaughans* Caſe. *Cro.* 1. Part, 190, 191.

4. In a *Præcipe quod reddat*, the Tenant confeſſed the Action; whereupon came others, and ſaid, that they were in Remainder, and that the Land was in ſuch a Town, and holden by the Tenant for the life of one J. as of the Manner of T. by

by certain Services, the which Mannor was ancient Demeſne, and all Lands and Tenements within the ſame Mannor, have uſed to be pleaded by Writ of *Droit cloſe*. It was holden by the Court, That they ſhould be Reſceived ſo to plead, notwithſtanding the Tenant had confeſſed the Action in that Court; for it was ſaid, That the Confeſſion of the Tenant doth not make the Land to be frank-fee, if Judgment be not given thereupon; But if the Tenant for life doth levie a Fine of the Land, Quere, If then it ſhall not be frank-fee. Mich. 2 E. 4. 26.

5. See, Where he who prays to be Reſceit, upon Grant of a Remainder in Tail, ſhall not be Reſceived, unleſs he ſhew his deed of Grant of the Remainder. *Cook* 10. Part, 92. and 94. in Dr *Leyfields* Caſe.

Reſcous.

Where, and in what caſe it lyeth, and againſt whom, and for what; and where the Writ ſhall be brought againſt the Reſcouſſer, where againſt others, and by whom.

1. REſcous is, where a man doth diſtrein Cattel for Rent, or other ſervices, or for damages feaſant, and would impound them, and another doth Reſcous, or take them from him: Or it is, when the Sheriff, Baylie, or other Officer of the King, doth arreſt a man for debt, or for other ſervice, or cauſe and Reſcous is made either by the party himſelf, or by a ſtranger; then this Writ of Reſcous lyeth: and in ſome Caſes it lyeth for the Baylie, Sheriff, or Officer: and in ſome caſes, for the party plaintiff to whom the damage is done, or at whoſe Suit he was arreſted. *Fitz. Nat. Br.* acc.

2. If a man ſueth forth an Execution, and hath a Capias to the Sheriff to arreſt the party, and the Sheriff makes his Warrant to the Baylie of a Liberty where the party dwelleth, to arreſt him, by which the Bayly doth arreſt him, and others do Reſcue him from the Bayly; he who ſued for the Writ of Execution, ſhall have a Writ of Reſcous againſt them that reſcued him: But Quære, If in ſuch Caſe the Bayly of the Liberty ſhall not have Reſcous againſt him, becauſe the Bayly is chargeable to him who ſued forth the Writ of Execution.

3. In an Action upon the Caſe, brought againſt the Sheriffs of *London*, upon an Eſcape; they arreſted the party upon a *Latitat*, and that in bringing him to the Goal, a Reſcous was made of him, and ſo returned a Reſcous: The Queſtion was, Whether it was good, or whether an Action upon the Caſe would lye againſt the Sheriff, when one is Reſcued from him who is taken upon a Mean Proceſs: This Caſe was much doubted at the firſt, and Mich. 44 Eliz. in B. R. Rott. 177. *Walde* and *Lamberts* Caſe was vouched; where it was held, That a Reſcous ſhould not excuſe the Sheriff in an Action upon the Caſe, brought by the party upon an Eſcape. But it was Reſolved by the whole Court, That the Action would not lye, the Arreſt being made upon a Mean Proceſs; and it would be a miſchievous Caſe, if the Sheriff ſhould be compelled alwayes to have with him the *poſſe Comitatus*; and the party hath his remedy at Law againſt the Reſcouſſer, by a Writ of Reſcous: And in this Caſe, it was agreed, That if in the Arreſting, the party is Reſcouſed, be it upon an Execution, or a Mean Proceſs, No Action for this lyeth againſt the Sheriff; and if the Priſoner be arreſted, and in bringing him towards the Goal he is Reſcouſed from the Sheriff, no Action lyeth againſt the Sheriff: But if a man be Arreſted, and be in Execution, and afterwards he is Reſcouſſed, then *Caveat Vicecomes*; becauſe he might have raiſed in ſuch Caſe *Poſſe Comitatus*. Trin. 13 Jac. in B. R. *May*, and *Proby*; and *Lumleys* Caſe. *Bulſtrode* 3. Part, 199, 200. *Cro.* 2. Part, 419. The ſame Caſe.

4. In an Action upon the Caſe, the matter was this; An Action of Debt was brought by the Plaintiff, and he recovered, and had a *Capias ad ſatisfaciendum* to take the party; the Sheriff Arreſts him, and the Defendant made a Reſcous; and if in that Caſe, an Action lyes againſt the perſon who Reſcouſed him, was the Queſtion: See the Book of 6. E. 43. the difference where the Arreſt is upon Mean Proceſs, where upon Execution: The Caſe was debated, and the Judges divided in Opinion; but the better Opinion ſeemed to be, That the Action did lye. Paſch. 4 Car. in C. B. *Lyres* and *Cunninghams* Caſe. *Hetley* 95.

5. An Action upon the Caſe againſt J. S. and his Wife, whereas the Plaintiff had recovered in Debt againſt one, and had a *Capias ad ſatisfaciend.* directed to the Sheriff, and the Sheriff arreſted the party, and had him in Execution, and the Defendants Reſcued the party, and he eſcaped: Upon *Not Guilty*, the Wife was found guilty of the Reſcous. It was Objected, That the Action lay not, becauſe Debt upon the Eſcape lay againſt the Sheriff, and it is an immediate wrong to the Sheriff,

Sheriff or Bayly, and the party had no prejudice in common preſumption, becauſe that his Action is transferred to the Sheriff, who hath ability to ſatisfie him. But the greater Opinion of the Court was, That the Action did lye againſt the Defendants, Paſch. 4 Car. in C. B. *Coughams* Caſe. *Hutton* 98. See Sect. before; and Quære, If it be not one and the ſame Caſe.

6. In Action upon the Caſe, the Plaintiff declared, Whereas J. S. was indebted to him in 300 l. he ſued a *Latitat* out of the Kings Bench to the Sheriff of *Nottingham*, to arreſt him; intending upon Return of the Writ, and Bayl put in, to Declare againſt him; that he delivered the Writ to J. D. the Sheriff, who made a Warrant to the Kings Bayliff of the Liberty of *Newark* to execute it; which Warrant was delivered to one L. Deputy of the Lord *Burleigh, Ratio Libertatis Domini Regis Vicecomitis ſui de Newark*, who arreſted the ſaid J. S. and that the Defendant reſcued him out of the Cuſtody of the ſaid Deputy, and he eſcaped. Upon *Not Guilty*, it was found for the Plaintiff, and 180 l. damages: Whereupon Error was brought, which was, That it is ſhewn, that he was reſcued from the Deputy of the Bayliff of the Franchiſe, whereas it ought to be from the Bayliff himſelf, or from the Sheriff; but the ſaid Exception was overruled by the Court, and P. 31 Eliz. *Burgh* and *Appletons* Caſe was vouched; where it was Declared, That the Bayly of a Liberty arreſted the party, and delivered him to the Sheriffs Deputy, and he reſcued him from the Sheriffs Deputy, and Judgment was given for the Plaintiff. 2. Error was, becauſe it was alledged that the Lord *Burleigh* was *Balivus Libertatis Domini Regis de N.* and the King cannot have any Liberties: but *non allocatur*; for the King may grant ſuch Liberties by ſuppreſſion of Abbeys, or by other means, and they ſhall not be ſaid to be extinct, unleſs they be ſhewed ſo to be. The Judgment was affirmed. Paſc. 8 Jac. in the Exchequer. *Kent* & *Elwis* Caſe. *Cook* 2. Part, 241.

7. In an Action upon the Caſe, the Plaintiff declared, That whereas W. P. *ſenior*, and W. P. *jun.* were indebted to him by ſeveral Bonds, he ſued a *Latitat* out of the Kings Bench to the Sheriff of S. to arreſt them, and that the Sheriff made a Warrant to J. S. and others, to arreſt them; who arreſted W. P. *jun.* and the Defendants reſcued him: The Defendants pleaded *Not Guilty*: a Special Verdict found this matter, viz. That the debt due to the Plaintiff, the proſecuting the *Latitat*; and further found, That the ſaid W. P. was indebted to P. P. *ſen.* and that he ſued out a *Latitat* againſt him, who made a Warrant to the ſame Bayly to Arreſt him at the ſuit of the ſaid P. P. *ſen.* and it was directed to them, *conſtabulis & decenis*, that they were not known Bayliffs, and that 8 *Jan.* in the night, about 6 a clock, they entred the houſe of one of the Defendants, the door being open, and W. P. being there, P. P. *jun.* laid his hands upon him, and having both the warrants in his pocket, ſaid to him, *Here I do arreſt you by vertue of a Warrant which I have*, but did not ſhew him the Warrant, nor had it in his hands, nor told him at whoſe ſuit he Arreſted him, nor W. P. did not demand to ſee the Warrant. In this Caſe, theſe points were Reſolved. 1. That this Arreſt, till the other demanded to ſee the Warrant, was legal, acc. to *Cook* 5. Part, 68. 2. That this Arreſt in the houſe, the door being open, and at 6. of the clock at night, was good againſt the party arreſted, and the reſcuing of him was unlawful, *Cook* 5. Part, 81. *Garnons* Caſe. 3. That the arreſt was good, although he did not ſhew him by which of the Warrants he arreſted him; for that being once in cuſtody, he is in cuſtody for all cauſes for which the Sheriff hath made him warrants. 4. That for this Reſcous, the Plaintiff, at whoſe Suit the Arreſt was, might maintain the Action, for he hath the loſs, and cannot have his Action againſt the Sheriff. Trin. 16 Jac. in B. R. *Hodges* and *Marks* Caſe. *Cro.* 2 Part, 475. See *May* and *Prokyes* Caſe before.

8. In Reſcous the Plaintiff declared, That where, as he had diſtreined 40 ſheep of the Defendants, and 80 of J. S. for damage feaſance, the defendant reſcued them all, and took and chaſed them: The defendant juſtified the putting his 40 ſheep in the place where was Common, and that the plaintiff, *de injuria propria*, took and chaſed them, and that he would have taken them from him, and they ran amongſt the other ſheep of J. S. and folded with them, and becauſe he could not ſever them, he chaſed them, which is *eadem Reſcous*: Upon a Demurrer, it was adjudged for the Plaintiff, for though there be ſome colour to reſcue his own ſheep, yet he ought not to Reſcous the ſheep of a ſtranger, who appeared not to have any right of Common. Paſc. 18 Jac. in B. R. *Jennings* and *Playſtows* Caſe. *Cro.* 2. Part, 468.

9. In Treſpaſs, the Plaintiff declared, That he had levyed a plaint in the Counter of *Lond.* againſt W. and upon proceſs, he was arreſted by J. S. a Sergeant, & that the defendant, *vi & armis*, did reſcue him, whereby he loſt his debt: upon *Not Guilty*, and verdict for the Plaintiff, Judgment was, *Quod Defendens capiatur*; upon which, Error was brought in the Exchequer Chamber, and the Judgment was affirmed; for although the nature of the Action is properly upon the Caſe, as touching the Plaintiffs loſs, or damage of debt, yet being done with force, & that force being done, although not to the Plaintiff himſelf, to the Sergeant who was Miniſter as wel for him, as to the Court, he may lay and bring his Action *vi & armis*. P. 14 Jac. in B. R. *Wheatly* and *Stones* Caſe. *Hob.* 180. See there M. 41 El. in B. R. *Aſtel* and *Ridges* Caſe: M. 43 El. in B. R. *Perling* and *Marriots* Caſe acc.

2. Where

2. *Where Execution ſhall be taken, and awarded, when the Party taken, reſcued himſelf and eſcaped.*

1. DEbt upon an Obligation, to pay 100 l. The Defendant pleaded, That J. S. was bound with him, joyntly and ſeverally in the ſame Obligation, and that the Plaintiff recovered againſt him, and had him in Execution, upon a *Capias ad ſatisfaciendum*, and that at ſuch a day, he freely ſuffered him to eſcape. It was adjudged for the Plaintiff; for an Execution againſt one is no Bar; and although he eſcaped by the voluntary permiſſion of the Sheriff, ſo as the Plaintiff is entituled to an Action againſt the Sheriff, yet that ſhall not deprive him of his remedy againſt the other; but if he had pleaded, that the Sheriff had ſuffered him to go at large, by the command or licence of the Plaintiff, it had been a diſcharge, and might have been pleaded in Bar. Hill. 2 Car. B. R. *Whitacres* and *Hawkinſons* Caſe. *Cro.* 1. Part, 53.

2. In Action upon the Caſe, the Plaintiff declared, That he recovered againſt T. D. in Debt, and that he was taken by the Sheriff upon a *Capias ad ſatisfaciendum*, and the Defendants reſcued him. It was ſaid, an Action did not lye by the Plaintiff againſt the Defendant for this Reſcous, but the remedy is againſt the Sheriff, in Debt, or Action upon the Caſe, and the Sheriff ought to have his Action againſt the Reſcouſors: But it was adjudged, That the Action did well lye for the Plaintiff, for that he is the party that ſuſtained the loſs, and to whom the injury was done; wherefore he ought to have the Action, and not be enforced to ſue the Sheriff, who perhaps is dead, and then no Action lyeth againſt his Executors; and if he do recover, the parties may plead it, if they be ſued by the Sheriff. Paſch. 4 Car. in C. B. *Myns* Caſe. See Sect. before, 4. & 5.

3. *Scire facias* to have Execution upon a Judgment in Debt; the Defendant pleaded, That at another time the Plaintiff had ſued Execution by *Capias ad ſatisfaciendum*, and the Defendant was taken in Execution. The Plaintiff Replyed, and ſaid, That was true, but that he preſently Reſcued himſelf, and eſcaped. It was the Opinion of the Court, That the Replication was good; and that the Plaintiff not having the fruit of his Execution, might have a new Execution. And although it be no good Return upon a *Capias ad ſatisfaciendum*, that the Defendant Reſcued himſelf; yet the Defendant ſhall not take advantage of his own wrong. And whereas it was ſaid, That the Plaintiff might have his remedy againſt the Sheriff. It was anſwered, That doth not take away his remedy againſt the party who eſcaped, unleſs the Defendant ſhew that the Plaintiff hath ſued the Sheriff, and recovered againſt him: Wherefore it was adjudged for the Plaintiff. Trin. 6 Car. in B. R. *Robinſon* and *Cleyton's* Caſe. *Cro.* 1. Part, 174, 185. acc.

More *Reſcous.*

1. ONe was Indicted for a Reſcous, and Exception was taken to it, becauſe it wanted the words, *Vi et armis*, or *manu forti*; and alſo, becauſe the place where the Reſcous was made, was not certainly expreſſed. But it was the Opinion of the Court, That it was good, for it ſhall be intended, That where the Arreſt was made, there was alſo the Reſcous; and the Indictment was good without the words *vi et armis*, for the word *Reſcuſſit* implies it was done with force. Paſc. 12 Jac. in B. R. *Cramlingtons* Caſe. *Cro.* 2. Part, 345.

2. H. Indicted in *London* for a Reſcous made to a Sergeant at Mace, upon a Plaint in *London*, upon Not Guilty, It was found for the King; and a Fine aſſeſſed of 30 l. upon him, and Impriſonment without Bail or Main-prize. Error upon it was brought and aſſigned, becauſe the Indictment was not *vi et armis*. And 2. Becauſe it was expreſſed, That he made the Arreſt by vertue of a Warrant. But becauſe the Indictment was, That by vertue of a Plaint before ſuch a Sheriff, he was lawfully taken and Arreſted. It was the Opinion of the Court, That it ſhall be intended, That he had a good Warrant. Paſc. 16 Jac. in B. R. *Hews* Caſe. *Cro.* 2. Part, 472.

3. In a *Capias utlagatum* before Judgment, the Sheriff returned, That J. S. and J. D. reſcouſed the party. It was moved, That the Return was not good, for there ought to be additions by which they might be ſued to Outlawry. But the Court held it to be good without additions, for no Statute will compell the Sheriff to give additions in this Caſe. It was the Opinion of the Court, That the Return was good, and the Reſcouſors who were

preſent

preſent, were commited to the *Fleet*. Paſc. 19 Jac. in C. B. *Holman* and *Hall's* Caſe. *Winch.* 10.

4. The Sheriff of S. returned a Reſcous againſt A. that whereas there was a Judgment had againſt B. and a *Fieri facias* awarded upon it, with a Warrant to R. to take the goods of B. by vertue thereof ſuch a day. *R. diverſa bona et catalla ipſius*, did levy, and had them in his Cuſtody, and that A. reſcued them from the Bayliff, *contra voluntatem ipſius* R. It was the Opinion of the Juſtices, That no Reſcous can be upon a *Fieri facias*, but the party ſhall have an Action upon the Caſe. And Reſcous only lyes upon a *Capias*, which lyes againſt the perſon himſelf. Trin. 5 Car. in C. B. The Sheriff of *Surrey* and *Addertons* Caſe. *Hetley*, 145.

5. The Sheriffs of *Norwich* brought Action upon the Caſe againſt B. becauſe that they *à Capias ad ſatisfaciendum* being awarded to them, they 20 *Feb.* 25 Eliz. directed their Warrant in Writing to three Sergeants of the City to Arreſt him, by force of which, the ſaid Sergeants the 26th of *Feb.* in the ſame year, did Arreſt him in Execution, and that he was reſcued and eſcaped. Upon Not Guilty, a Special Verdict, That about 20. *Feb. Anno* 25. ſuch a Warrant was made by them to the Sergeants, but not 20. *Feb.* and that the Sergeants by force thereof, about 26. *Feb.* did Arreſt him, but not 26. *Feb.* And upon the whole matter, there was a demurrer. It was Objected, That the Arreſt was not good, nor did the Action lye. 1. Becauſe the body of a man cannot be Arreſted without a Warrant in Writing, and it is not ſhewed, That the Warrant was in Writing, *et ſigillo ſignatum*, as it ought to be. 2. Becauſe there muſt be a preſent loſs to the Plaintiffs, they are chargeable, but not charged; for if the Sheriffs dye before they begin his Suit againſt them, their Executors ſhall not be charged. And 3. The Verdict is not good, for the wrong in it is not layed certain. But the Court held, That it was not material, whether he ſhewed or not, That the Warrant was *ſub ſigillo ſigillat.* 4. They held, That they ſhould have their Action upon the Caſe for the wrong done, and that the Defendant ſhould not take advantage of his own wrong. See 13 H. 7. 1. It was the Opinion of the Court, That the Action was well brought. Hill. 29 Eliz. in B. R. *Yarram* and *Bradſhaws* Caſe. *Godbolt*, 225.

Reſervations.

1. *Of the words*, Tenendo, Reſervando, Faciendo, Reddendo, Solvendo; Salvo Excepcis; *how they ſhall be taken and conſtrued; where they ſhall be good, and to what extend, in Deeds or Grants, or Acts of Parliament, and to what not.*

1. REſervation is a general Term, but it is of divers natures; for by ſome words of Reſervation, it ſhall be taken to go to that which a man had not before: As if a man make a Leaſe for years or life, reſerving Rent, becauſe he had not the Rent before; and therefore the word *Reddendo* ſhall be conſtrued to the giving him a Rent, which he had not before, ſometimes it ſhall extend to that which he had before: As if a man make a Leaſe of Lands, reſerving the Woods, Under-woods, or great Trees, there Leſſee cannot meddle with them, by reaſon of the words of Reſervation; be the words *reſervatis*, or *exceptis groſſis arboribus*.

2. Note, It is ſaid in *Plow. Com.* 140. in *Browning* and *Beſtons* Caſe. That upon a Leaſe for years, although that there are not the uſual words of Reſervation of the Rent. Yet if there be words equivalent in Law, it is ſufficient. And although that the words be not apt nor uſual, yet if they have ſubſtance, and lead to the matter intended, it is ſufficient. And the Law takes words of ſubſtance not uſual, equivalent to words of ſubſtance uſual. And therefore if Land be granted by Indenture, and by the ſame Indenture, the Leſſee Covenants and Grants to render and pay for the Lands ſuch a ſum, the ſame in ſubſtance is a good Reſervation of Rent. So ſee 9 H. 6. 35. A Commoner makes a Deed to the Tenant of the Land, by which he renounceth his Common to him, the ſame ſhall enure as a Releaſe of the Common; and yet there are no words of Releaſe in the Deed.

3. Guardian by Deed Indented, aſſigns unto a Woman Dowable, and to her ſecond Husband, Land of greater value then her Dower amounts unto; and in reſpect thereof, by the ſame Deed, the Husband and Wife grant an yearly ſum, to the value of the overplus to the Guardian, with clauſe

of Diſtreſs; the Husband dyes, the ſame ſhall bind the Wife after the death of the Husband, becauſe that the Grant of the ſame for the over-plus, ſhall be a good Reſervation of Rent. 17 E. 3. 9. *Avowry*, 95. acc.

4. The King Lord, an Abbot Meſne, and Tenant of the Mannor of D. the Tenant is Attainted of Treaſon, and after Office found, the King by his Letters Pattents granted over the Mannor to B. and his Heirs, *Tenendum de nobis haeredibus et Succeſſoribus noſtris et aliis capitalibus Dominis feodi illius per ſervitia inde debita et de jure conſueta.* It was Objected, That the Tenure ſhould be of the King, becauſe by the Attainder, the Meſnalty was extinct, and alſo becauſe there is an expreſs Tenure reſerved of the King. But it was Reſolved, That the words were ſufficient to create a Tenure in the Meſne, for ſuch was the intent of the King, that the Meſne who did not offend, ſhould not loſe his Services. 2. It was Reſolved, That the Tenure ſhould be of the Meſne immediately, and of the King as Lord Paramount. *Cook* 6. Part, Sir *John Molyns* Caſe.

5. Lord, Meſne, and Tenant: The Meſne held of the King in *Capite* in Socage; and the Tenant held of the Meſne in Socage: the Tenant was Attainted of Treaſon, the King ſeiſed the Land, and granted by his Letters Pattents the Tenancy to J. S. *Tenendum de nobis et haeredibus noſtris per Servitium militare, et faciendo aliis capitalibus Dominis feodi ſi qui fuerint, reddita et Servitia quae inde debebantur antequam ad manus noſtras devenerant.* It was Reſolved in this Caſe, That the Tenure of the Meſne ſhould be revived, although that the King by his Letters Pattents in the firſt place had reſerved to him other Services, becauſe the King for his Honor, and the advancement of the ancient Right expreſly intended, That the Meſnalty ſhould be revived. Note there, a difference between a Creation of a new Tenure without any reſpect to the ancient Right; for there the firſt Reſervation ſhall be preferred; and Reſtitution of an Ancient Tenure, for that ſhall be preferred before the Reſervation, which is firſt in words. *Cook* 9. Part, 131. *Bewlyes* Caſe.

6. If the King be entituled to the Land of J. S. by forfeiture of Treaſon, or Felony by Act of Parliament, or by Office, by that, all Tenures are determined, as well of the King, as of all others: and if that Land be given to another, by another Act of Parliament, ſaving to all others their Rights, Intereſts, Titles, Rents, Services; as if no ſuch Act had bin made. It was holden, That in ſuch Caſe, the Seignories were not revived, for that no Seignory was in *eſſe* at the time of the ſecond Act of Parliament made, and there are no words of gift or Reviving in the Act, but words of Saving, which doth not ſerve to ſave that which was not in *eſſe* at the time of the Saving. See 27 H. 8. Br. tit. *Parliament*, 77. Note the Difference betwixt this Caſe, and Sir *John Molins* Caſe; for in that Caſe, there were words which did amount to the reviving of the Ancient Seignory.

7. The King Granted Lands in Fee, *Tenendum de nobis, et ſucceſſoribus noſtris per Servitia unam roſam rubicam, annuatim ad feſtum St. Johannis pro cunctis Servitiis.* It was adjudged in that Caſe, That it was a Tenure in Socage in Chief, for inaſmuch as Fealty is incident to every Rent Service, the Law annexes Fealty to the ſaid Rent, ſo as the Tenure ſhall be by a Roſe and Fealty; and that is a favourable conſtruction as near to the intent of the King as may be. *Cook* 6. Part, 6. *Wheeler* Caſe.

8. A man poſſeſſed of a Term for 100 years, he and his Wife by Deed Indented, Aſſigned the ſame to J. S. *reddendo et ſolvendo*, to the Husband and Wife, and to the Survivor of them 10*l.* yearly, during the Term: Proviſo, That if the Rent were behind by 40 dayes, that the Husband and Wife, and the Surviver of them ſhould enter; the Husband dyed Inteſtate; there was two points in the Caſe, 1. If it was a good Rent to the Wife, ſhe being a party to the Deed, but not ſealing it. 2. Admitting, That the Wife could not enter, nor demand the Rent, If the Adminiſtrator of the Husband might demand the Rent, and enter for the Condition. It was holden by *Berkley* Juſtice in this Caſe, That the Wife ſhould have the Rent by force of the *ſolvendum*, which ſhould operate as a new Grant, for the *Reddendo* ſhall relate to the Husband, and the *Solvendum* to the Wife, and words of Reſervation ſhall ennure according to the intent of the parties. 2. He held, That forasmuch as the Reſervation was during the Term, that the Executor or Adminiſtrator ſhould have it. Trin. 8 Car. in B. R. *Spencers* Caſe. See *Godbolt*, 448. *Blands* Caſe.

9. King *Hen.* 8. by his Letters Pattents gave the Mannor of A. to *Walter Walſh*, and the Heirs males of his body: Afterwards by an Act of Parliament made, 28 H. 8. It was Enacted, That the ſaid Mannor of A. by reaſon of the great profit and pleaſure of it ſhould be re-veſted in the King, his Heirs and Succeſſors, ſaving to all perſons their Rights, Titles, &c. as if the ſaid Act had not bin made. It was Reſolved in that Caſe, That when the ſaid Mannor of A. was expreſly given to the King by the Act of Parliament, the general ſaving in the Act did not extend to ſave and reſerve the Eſtate of him who was ſeiſed of the Land: for when a *ſalvo* in an Act of Parliament is repugnant,

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to the body of the Act it ſelf, there the *Salvo* is void. *Cook* 1. Part, in the Caſe of *Alton Woods*, 47, 50, 51. See *Plow. Com.* 503. The Attainder of the Duke of *Norfolk* by an Act of Parliament, 1. *Mar.* was declared to be void, Saving the Eſtates and Leaſes made by King E. 6. It was Reſolved, That this (*Salvo*) was void, for when the Attainder was declared to be void, the ſaid (*Salvo*) was repugnant to the body of the Act; and therefore void.

10. The Prior and Covent of C. made a Leaſe of their Mannor of D. with the Appurtenances in the County of D. *una cum Columbris ac redditu omnium Testamentorum ejuſdem Manerii, decimis garbarum, pertinentiis Eccleſiæ ibidem, finibus, hariottis, perquiſitis Curiæ ibidem provenient, et aliis quibuſcunque emolumentis et profitais eidem Manerio pertinent. five proveniet. Advocation. Eccleſiæ ibid. et Wrecum Maris, &c. duntaxat, Exceptis et reſervatis.* The Prior and Covent were Parſons of the Church there, and had Spiritual Juriſdiction, the doubt was, Where the Exception ſhould begin, and, If the Farmor ſhould have the letting, ſetting, *perquiſits* of Court, &c. The Opinion was, That the Farmor ſhould have them, and that the Exception did begin but at *advocationibus Eccleſiæ*, for otherwiſe the Leaſe ſhould be repugnant in it ſelf; or for every Emolument profit appertaining to the Mannor, ſhould be reſerved to the Leſſor. Alſo the nature of an Exception or foreprize is to reſtrein part of a thing before ſpoken of, whereas *Decimas garbarum, &c.* is a new thing. Paſc. 37 H. 8. *Dyer*, 59. *Wiltſhires* Caſe.

11. In *Clifford's* Error, in *Ejectione firmæ*; Error was aſſigned, That the Writ was *in Manerium de A. &c. et unum Meſſuagium, &c.* And the Count was of the Demiſe of the Mannor, *advocatione Eccleſiæ reddit. aviſa, &c. dicto Manerio pertinent. exceptis et reſervatis*, ſo as the whole Mannor was not let, as the Writ ſuppoſed. The Opinion of the Juſtices was, That it was a void Exception of the Services, which were of the ſubſtance of the Mannor, and the Leaſe is *Manerio ſpectant.* and ſo the Exception void. Hill. 1 *Ma. Dyer*, 96. in *Clifford's* Error.

12. Note, there was an Exception taken to the Pleading, in *Fulmerton* and *Steward's* Caſe. *Plow. Com.* 102. in the firſt Leaſe of a Tenement, there late *Argent*, becauſe that the Plaintiff did not aver, that the ſame was not parcel of the 100 Acres of Paſture in which the Treſpaſs was ſuppoſed. And upon that, the Caſe was this; A man ſeiſed of a Mannor, made a Leaſe thereof for years, excepting one Acre. *Bramley* Juſtice held, That that Acre was not parcel of the Mannor, but ſevered from it, and became in groſs; As of an Advowſon appendant, where the entire Mannor is let; the Advowſon excepts the Advowſon, the Advowſon is ſevered and become in groſs. But *Portman* Juſtice, held the contrary, and took a difference between the Leaſe of the Mannor for life with ſuch Exception, and a Leaſe of years of it. Mich. 1 *Ma. Dyer*, 103.

13. L. Tenant in Knight-Service of C. as of his Mannor of D. in the County of N. holden in *Capite*, levyed a Fine, and took back an Eſtate of the ſame for life, the Remainder to his Wife for life, the Remainder to the right Heirs of the Husband, and C. being within age, it was upon Office found in the County of *Middleſex*, That he held the Mannor of O. in Ward; and the King granted the Wardſhip during the Minority to P. excepting Wards and Marriages: L. dyed, having two ſons, his Wife entred; the eldeſt dyed, the youngeſt within age, if the King ſhould have the Wardſhip, and the third part of the Land out of the hands of the Wife, by the Statute of 32 H. 8. was the Queſtion. In that Caſe, it was a Quære if the Exception were good or not. It ſeemed the better Opinion to be, That it was thought it was a ſtring incident; for that there Judgment is given for the Queen. Mich. 2 Eliz. *Dyer*, 172. *Lanes* Caſe.

14. A. ſeiſed of a Mannor to which an Advowſon was appendant, by Deed Indented, Granted, and ſold the ſaid Mannor to B. and his Heirs. In which Indenture were divers Covenants to levy a Fine, and ſuffer a Recovery to the uſes in the Indenture. Provided, That B. ſhould give the Advowſon to A. for his life, and if it happen void, then one time to his Executors. A. ſuffered a Recovery according to the Indenture, and afterwards A. and B. levyed a Fine with a Render of a Rent of 42 l. to A. in tail, the Remainder to D. in Fee, with recompence and Diſtreſs. B. in his life time did not grant the Advowſon to A. and dyed. The Church voided, E. the ſon of B. entred into the Mannor: A. entred for the Condition broken. In this Caſe (amongſt other things) it was Reſolved, That the Fine levyed by A. and B. had not extinct the Condition; For the Fine by the Common Law was directed to have a ſpecial operation according to the intent of the parties by the general Covenant, and that was, that the Eſtate ſhould be conditional, and that the Condition ſhould not be vouched by the Fine, but the ſame did extinct all other Rights and Titles, ſaving only the Condition. And in that Caſe, it was put for a Rule, and agreed, That a ſaving of a Condition might be annexed to another Deed, and that it was not of neceſſity, that the ſaving ſhould be alwayes in the ſame Record. And in that Caſe, it was put and agreed,

That the Lord by Deed might releaſe all his right in the Land, ſaving to him his Rent. And a man may enter into Warranty, ſaving to him his Rent or Condition; and that the Releaſe of the Lord to his Tenant is good *Salvo ſibi dominio*. *Cook* 2. Part, The Lord *Cromwell's* Caſe.

15. Husband and Wife, Leſſees for years of a houſe called the three Conies in *Fleetſtreet*, the Husband let part of the Term by theſe words, viz. the houſe called the three Conyes, with all Chambers, Cellars, and Shops, excepting to the Husband, the Shops to his own proper uſe; the Husband dyed, the Wife entred into the Shops. It was the Opinion of the Court, That the Exception was but temporary to the Husband himſelf where there are no words of Executors and Aſſigns; and that the Exception was void touching the Shops, becauſe it was repugnant to the Leaſe it ſelf of the Shops. Trin. 9 Eliz. *Dyer*, 264. See 3 H. 6. 53. acc. And ſee *Perkins*, Sect. 642, 643. acc.

16. If a man be ſeiſed of a Water in which he hath a Piſcary from the Town of D. in the County of M. to the Town of *Sale* in the ſame County; and upon the ſame Water he hath a Mill, and he Grants to a ſtranger, *totam partem Piſcarie ſuæ de Duam procul terra inde extendent, et quod nec ipſe nec hæredes ſui nec molendinarii de cetero cum retibus nec aliis ingen. Piſcabunt. ſalvo tamen ſtagno Molendini*. It was holden in this Caſe, That this Exception or Reſervation ſhould not ouſt the Grantee of his Piſcary in the ſame Stagne or Pool; but the *Salvo* ſhould have Relation only, as for the Reparation of the Mill, and for the doing only of neceſſary things to the Mill. 34 Aſſ. 11.

17. A man leaſed his Land for years, excepting the Wood; And afterwards the Leſſor granted the Wood to the Leſſee, if now the Wood were ſo united to the Land again, that by the Leaſe of the Land, the Wood paſſed as a thing annexed to it, or if it did remain as an Intereſt diſtinct and ſevered from the Land, was the Queſtion. It was Reſolved in this Caſe (amongſt other points), That the Leſſee had no Judgment of Law abſolute and divided property in the Trees, ſo that by the Leaſe of the Land they do not paſs: And this difference was taken, That if I enfeoff you of all my Lands (except the Trees) to have and to hold, to you and your Heirs; now the Trees in property are divided from the Land, although *in facto* they remain annexed to the Land, for if he cut them down and carry them away, it is not Felony. And therefore if the Feoffor grant the Trees to the Feoffee, they are re-united as well in property as they are *in facto*, and the Heir of the Feoffee ſhall have them, and not the Executors of the Feoffor. *Cook* 4. Part, 63. *Herlackendens* Caſe.

18. Leſſee for years opened a Cole Mine, and afterwards aſſigned over all his Intereſt in the Land with all profits and commodities, excepting the profits in the Cole-Mine, the Aſſignee digged in the Cole-Mine: and the Leſſor brought an Action of Waſte. In this Caſe, amongſt other things, it was Reſolved. 1. That if a man hath Land in part of which there is a Cole-Mine open, and he demiſeth the Land for life, or for years, the Leſſee may dig Coles in it, for it ſhall be intended, that he ſhall take all the profits of the Lands. But if the Mine be not open, but included in the bowells of the Land, there by Leaſe of the Land, the Leſſee cannot make new Mines; but it ſhall be Waſte. 2. Reſolved, That the Exception in the Principal Caſe was void: For a man cannot except a thing which doth not belong unto him; and by the Exception of the Mine, the Land it ſelf is not excepted. And it was Reſolved, That the Leſſee could not appropriate the Mine to himſelf, and ſubject himſelf only to Waſte, and treble damages, becauſe the Leſſee by his own wrong which he committed, could not deveſt the Intereſt which the Leſſor had in the Mine. *Cook* 5. Part, 12. *Saunders* Caſe.

19. Leſſee for years aſſigned over his Term, excepting the Timber Trees; and afterwards the Trees were cut down. It was adjudged, That in that Caſe, an Action of Waſte was maintainable againſt the Aſſignee, for that the Exception was void. 28 Eliz. in C. B. *Foſter* and *Spencer's* Caſe.

20. A. and B. his Wife being Tenants for life of a Tenement called R. the Remainder to A. in tail, the Remainder to B. in tail, the Reverſion to A. and his Heirs. A. and B. by Indenture demiſed the ſaid Tenement to J. S. for years, except all Trees of Timber, Oaks, and Aſhes, and liberty to carry them away, rendring Rent. A. dyed, having Iſſue M. a Daughter, the Wife of Sir *Allen Percy*. Afterwards J. S. demiſed the ſaid Tenement to Sir *Allen* for 7 years; the Queſtion was, Whether Sir *Allen* having the immediate Inheritance in the right of his Wife expectant upon the Eſtate for the life of B. and having the poſſeſſion by the ſaid Demiſe, might cut down the Timber Trees, Oaks, and Aſhes. It was Objected, That he might well do it. For it was ſaid, That it was Reſolved in *Cook* 5. Part, in *Saunders* Caſe, That if Leſſee for years or life aſſign over his Term, excepting the Mines or Trees, that the exception is void, becauſe he cannot except that which he cannot lawfully take. But it was Reſolved in the principal Caſe by all the Juſtices, That the Exception was good, becauſe that he who hath the Inheritance joyns in the Leaſe with the Leſſee for

life.

life. But it was further Reſolved, That if Tenant for life leaſeth for years, excepting the Timber Trees, the ſame is lawfully and wiſely done; for otherwiſe, If the Leſſee or Aſſignee cutteth down the Trees, the Tenant for life ſhould be puniſhed in Truſt, and ſhould not have any remedy againſt Leſſee for years. But when Tenant for life upon his Leaſe excepteth the Trees, if they be cut down by the Leſſor, the Leſſee or Aſſignee ſhall have an Action of Treſpaſs *Quare vi et armis*, and ſhall recover damages according to his loſs. Trin. 7 Jac. in the Court of Wards. Sir *Allen Percies* Caſe. *Cook's* Select Caſes, 60.

21. A man made a Leaſe for 30. years of a Manor, Excepting all Woods and Underwoods growing and being upon the ſaid Manor, and afterwards made another Leaſe to the ſame Leſſee of all the Wood and Underwoods growing and being upon the ſaid Manor for 60 years, without impeachment of Waſte; and afterwards made a third Demiſe of the ſaid Manor to the ſaid Leſſee without Exception, to begin at a day to come; *ſcil.* from the expiration of the firſt Leaſe for 30 years; the Term for 30 years expired; the Leſſee cut down Trees, and he in the Reverſion brought Waſte: In this Caſe, It was Reſolved, 1. That by the Exception of the Wood and Underwood, the ſoile it ſelf was excepted. 2. That notwithſtanding the Exception, the Woods did remain parcell of the Manor. 3. That by the acceptance of the future Leaſe to begin divers years, to begin after the ſaid Leaſe of 60 years was ſurrendred, becauſe the Leſſee by his Acceptance had affirmed the Leſſor to have ability to make a new Leaſe; the which he had not, if the firſt Leaſe had ſtood. *Cook* 5. Part, *Ives* Caſe.

22. A Leaſe was made Reſerving Woods and Underwoods to one for years; the Leſſee cut down Woods. It was holden, That Waſte did not lye, Becauſe the Statute is *in terris boſcis, ſibi Dimiſſis, &c.* *Shelley* ſaid, That by the Reſervation of the Woods, the Land is not reſerved; for the Tenant ſhall have the herbage, &c. But by a grant of Woods, the Land ſhall paſſe, becauſe the Deed of every man ſhall be ſtrongeſt taken againſt him. Trin. 28 H. 8 *Dyer*, 19. See *Cook* 11. Part, in *Liford's* Caſe.

23. A man Leaſed divers Cloſes, by the words, Demiſeth, granteth, and to Farm letteth, together with all manner of Timber Wood, and Underwood, and Hedg-rowes, Except the great Oaks in ſuch a place: The Termor cut down Wood in a place which is not excepted. It was the Opinion of the Court, That it was Waſte; for that he who hath Timber demiſed to him, cannot cut down the Trees; and the word [*Great*] in the Leaſe, doth not alter the Demiſe. Hill. 23 Eliz. *Dyer*, 374.

24. A man makes a Leaſe of a Manor, in which there is a Wood of 30 Acres, and in another place of the Manor there are Timber-Trees, and there is an Exception of Timber-Trees and great: In that caſe, by 3. Juſtices, the Herbage and the Underwoods do paſſe: And ſuch ſeemed to be the Intent of the Leſſor, by reaſon of the word [Great] in the Exception. Hill. 7 E. 6. *Dyer*, 79. *Cook* 1. Part, *Inſtitutes*, 46. acc.

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2. *Where the ſpecial Reſervation of the party ſhall deſtroy the generall intendment and reſervation of the Law; and where not. And where a Reſervation of part or parcell of the thing given, or Let, ſhall be good; Where not.*

1. TEnant by Knight-Service, at this day makes a Guift in tail of the Land, reſerving to him and his Heirs, 10 s. Rent, without more words; It was the Opinion of the Juſtices in that Caſe, That the Tenant ſhould hold by both; for one of them the Law hath reſerved; viz. the Tenure by Knight-ſervice, without ſaying any more, and the which is added to it, by the ſpecial reſervation of the party. Paſch. 34 H. 8. *Dyer*, 52.

2. A. by Indenture granted Land in Fee-Farm, Reſerving Rent, with Condition of Re-Entry for not payment of the Rent; and by the ſame Indenture he Covenanted and granted, with the Grantee, &c. to make further aſſurance according to the intent expreſſed in the ſame Indenture: And by another Indenture of the ſame date, he Covenanted to levy a Fine of the ſaid Lands, which ſhould be to the only uſe, intents, effects, and Conditions expreſſed in the former Indenture, and no other; and Livery and Seiſin was made upon the Indenture accordingly; and afterwards he levied a Fine *ſur Conuſans de Droit come ceo, &c.* to the Grantee with Warranty: It was the Opinion of the Juſtices in this caſe, That by the Fine of the Land, the Rent and Conditions were not extinct by reaſon of the former Indenture, which Ruled the Fine. And it was ſaid by them, That it was like unto a Releaſe, made by the Lord to the Tenant of the Land, of all the

the right in the Land and Seigniory, *Salvo ſibi Dominio ſuo*, whereby the Town was not extinct, but the annual ſervices only. Hill. 4 Mar. *Dyer*, 159. *Puttenhams* Caſe.

3. If a man be ſeized of Lands on the part of his Mother, and maketh a Feoffment in Fee, Reſerving Rent to him and his Heirs: in this Caſe, according to the Rule of the Common Law, the Rent ſhall go to the Heir of the part of the father: But if a man be ſeized of Lands on the part of his Mother, and maketh a Feoffment in Fee, to the uſe of him and his heirs, in this caſe the uſe ſhall not go to the heir at Common Law, viz. to the heir of the part of the Father, ; but for as much as the Land and Living moveth from the part of the Mother, therefore the uſe, which is nothing but a Truſt and a confidence, ſhall go to the heirs on the part of the Mother. See 8 H. 6. 4. 5 E. 4. 7. *Cook* 1. Part, 100. in *Shelleyes* Caſe. See 4 Mar. *Dyer*, 134. acc.

4. Upon a Writ of Cuſtoms and Services, where it is Reported, That whereas there was contention betwixt the Lord and Tenant, for Murage and Caſtle Ward; the Lord upon the Fine, *Conceſſi*, That the Tenant, *ſit quietus de prædict. Servitio, ſalvis aliis omnibus Servitiis*: The Juſtices *prima facie* conceived, That this Fine was to releaſe the Tenure of Knight Service, and to reſerve only a Tenure in ſoccage: The Tenancy being holden by a Knights Fee and a half: But upon advice afterwards, It was Reſolved by the ſaid Juſtices, That the Knight-Service did ſtill remain; for that the diſcharge of the Murage and Caſtle-Ward, which it might be were uſurped, was by them holden to be no diſcharge of the Tenure in Knight-Service. Paſch. 2 Eliz. *Dyer*, 180. *William de Bruſes* Caſe.

5. Abbot of a Covent made a Leaſe for years, reudring yearly during the Term to the Abbot and Covent, or to his Succeſſors, 14 l. at two Feaſts, upon condition, That if the Rent be behinde, to re-enter: The Abbot ſurrendred all the Lands to the King, which afterwards by mean Conveyances came to J. S. who levyed a Fine of the Reverſion to B; B. before Attornment, granted by Deed the Reverſion to his ſon and heir, to whom the Termor Attorned, and then the Rent was behinde, and the ſon in the Reverſion entred into the Land. In this Caſe (amongſt other points) it was Reſolved, That the Reſervation in the disjunctive was good; for the Law ſhall make ſuch a conſtruction as ſhall ſtand with the Intention of the Law, and of the parties: And it was agreed, That rendring rent yearly during the Term to him *and* his Succeſſors, and rendring rent during the Term to him *or* his Succeſſors, is all one if the Rent be reſerved to him and his Succeſſors, although the words are joynt, and in the Copulative; yet by conſtruction in Law, the Leſſor ſhall have it during his life, and his Succeſſors after his deceaſe: And theſe words (to him, or his Succeſſors) are words only of explanation; for ſuch Reſervation had been good, being reſerved yearly during the Term, without theſe words, To him and his Succeſſors. But if a Feoffment be made, To have to one, or to his heirs, he hath but an Eſtate for life; becauſe there wants words precedent, to divert the words in the disjunctive; the ſame Law, if a Reſervation to one, or his heirs. *Cook* 5. Part, 112. *Mallories* Caſe. Sir *Pla. Com.* 171. in *Hill* and *Graveys* Caſe acc.

6. The Biſhop of *York* made a Leaſe for years, of divers Lands in *Batterſey*, rendring rent at *Batterſey*, Proviſo, That in the time of Vacation, the Rent ſhall be paid to the Chapter, *ut in jure ſuæ Sede vacante*, the Rent was behinde, the Baylif of the Succeſſor of the Biſhop re-entred, and diſtrined. It was holden in this Caſe (amongſt other things) That the Proviſo was not a Condition, but a Forepriſe, or Exception, not annexed to the thing given; and if it ſhould be a Condition, yet it was an impoſſible Condition; becauſe that rent may not be paid to the Chapter, becauſe they have not the Reverſion; alſo in *jure ſuo* it could not be; becauſe that, *ſede vacante*, the Queen had the Right: And it was holden, That the Rent in that Caſe ſhould not be paid, either at *York*, or at the Manſion houſe of the Biſhop, at *Batterſey*, but it ſhould be paid upon the Land, and upon demand. Paſch. 5 Eliz. *Dyer*, 221. *Ayer* and *Ormes* Caſe.

See to this Diviſion, Sir *John Molyns* Caſe. *Cook* 6. Part, Sect. 4. *Diviſio* 1. before.

7. A man ſeized of a Mannor in Fee, holden in *Capite* of the King, before the Statute of *Quia Emptores terrarum*, did Enfeoff J. S. of part of the Demeſnes of the Mannor, without ſaying more, who enfeoffed another, *Tenendum* of the Feoffor and his heirs, *per redditum* 26 s. 8 d. *per annum*, and *pro omnibus Servitiis & Demandis*. It was the clear Opinion of the Juſtices, That this Land was not holden in *Capite*, and the firſt Menalty is holden of the Feoffor, as by the Mannor by Knights ſervice. Paſch. 13 Eliz. *Dyer*, 299.

8. In Debt, upon Obligation to perform Covenants, Payments, and Reſervations in an Indenture; the Caſe was, A man ſeized of a houſe in Fee, leaſed the ſame to J. S. for a year by Indenture; and if both parties agreed, and ſhould be contented, that the Term ſhould continue for any longer time: Then *Habendum & Tenendum dimiſſa prædict.* in the ſaid J. S. for three years, *Reddendo inde annuatim*, during the ſaid Term of four feaſts of the year 40 l. Rent; the Leſſee entred, and occupied the houſe for a year, and the Leſſor ac-

not payment of the ſaid rent for the ſaid year, brought debt: The Queſtion was, If the Leſſee ſhould pay any rent for the firſt year, or not? It was Objected in this Caſe, That the Leſſee ſhould not pay any Rent for the firſt year, becauſe the *Reddendo* did depend upon a Contingent, which never took effect; for the Leaſe was not continued over the firſt year, and the Reſervation is, *durante termino prædict.* which being ſpoken only in the ſingular number, ſhall relate only to the three years laſt mentioned, and not to the term of one year, which was certain, before the Contingent: and becauſe every Reſervation ſhall be taken ſtrongly againſt the Leſſor, and ſhall not be extended beyond the words. But it was Reſolved, That the Reſervation of the Rent ſhould extend to the firſt year, and the proper place of Reſervation, is to come after the Limitation of all Eſtates; and the *Reddendo inde* did extend to all the Eſtates before; and *durante Termino prædict.* although it be in the ſingular number, yet the ſame is *Nomen collectivum*, and ſhall have reference to every Term within the Indenture; and ſuch conſtruction ſhall be made of Reſervation of Rents, that the Leſſor ſhall not loſe his Rent at any day. *Cook* 10. Part, 107, 108. *Humphry Laſields* Caſe.

9. A Leaſe was made of a Houſe and Lands for years, if the Leſſee ſhould ſo long live; and afterwards, the Leſſor by his Deed Indented, granted the Meſſuage and Land to another: To have, and to hold the Reverſion to the Grantee for life, *cum per mortem, ſurſumredditionem, vel forisfacturam* of the Leſſee, *aut aliter acciderit, Reddendo inde annuatim*, to the Grantor and his heirs, *cum Reverſio acciderit* 9 *s.* 4 *d. per annum*; the Leſſee dyed, the Grantor of the Reverſion diſtreined for the Arrearages of the Rent, as well before the death of the Leſſee, as after. And in this Caſe it was Reſolved, 1. That by the Leaſe of the Meſſuage and Land, the Reverſion paſſed. 2. That *Hebendum Reverſionem* was good; for that in Judgment of Law, nothing but the Reverſion is granted by the premiſſes. 3. That by the ſaid Reſervation, the Rent ſhall not begin till the Reverſion fall in poſſeſſion; and theſe words, *cum Reverſio prædict. acciderit*, ſhall be expounded according to the intent of the parties, which was not that the Grantee for life ſhould pay the Rent reſerved, before that he might take the profits to raiſe the Rent out of them. *Hill.* 23 Eliz. in C. B. *Paines* and *Prowſes* Caſe. *ibid.*

10. The King leaſed a Mannor to J. S. excepting the Courts and Perquiſites; the Grantee made another Leaſe, to begin after the firſt, excepting Courts and Perquiſites: It was holden by the Juſtices, That the Exception in the Leaſe of the King was good, but not in the Leaſe of the Grantee: and therefore it was holden, That the Grantee of Reverſion, during the firſt Term, might grant Copies; but when the ſecond Leaſe begins, he may not, but the Leſſee might. Paſch. 12 Eliz. *Dyer* 288.

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3. *Reſervation of Rents; out of what they may be reſerved; What not. Where the reſervation ſhall be good; and to whom, and where not. To whom the Rent reſerved ſhall be good; To whom not. At what time Rents reſerved ſhall be ſaid to begin, and be good at; What not. And of divers other things concerning Grants and Reſervations of Rents and Services. And where a Rent upon a Leaſe ſhall follow the Reverſion; Where not.*

1. EVery Reſervaton of Rent ought to be out of ſuch a thing, to which a man may reſort to take a Diſtreſs; as out of Houſes, Lands: And a Rent in caſe of a Common perſon, cannot be reſerved out of a Rent; but the King may reſerve a Rent out of a Rent; or out of a thing which is not mainvainable. See 44 E. 3. 45.

2. A Biſhop after the Statute of 1 Eliz. made a Leaſe for years of a Fair, being parcel of his Biſhoprick, for three lives, rendring the ancient and accuſtomed Rent; which Leaſe was confirmed by the Dean and Chapter. It was adjudged in that Caſe, That his Succeſſor ſhould avoid the Leaſe, becauſe that a Fair is but a Franchiſe, or a Liberty not Manurable, out of which a Rent cannot be reſerved; and all Leaſes of ſuch Inheritances out of which the ancient Rent cannot be reſerved, are void. *Cook* 5. Part, 3. *Jewells* Caſe.

3. A Mannor did conſiſt of divers Free Rents, amounting to 7 *l.* &c. and 15 Copyhold Tenements, which were holden for lives, the Cuſtomary rent of which was 3 *l.* and of Demeſnes, which had uſually been demiſed by Indenture for ſeveral Rents, and Fermes of 8 *l.* &c. and there was one Acre of Waſte, parcel of the ſaid Mannor, in which were divers high-wayes, and Common for the Tenants, of the yearly value of 12 *d.* There was alſo a Court Baron, and Perquiſites of Courts, appertaining to the ſaid Mannor; the ſaid Free-Rents, Copyhold Rents, Herriots, Perquiſites of Courts,

o Leet, were never before demiſed for life or years. It was found, That *Anne*, the Wife of *Charles* Lord *Mountjoy*, was Tenant in Tail of the ſaid Mannor, and after, to *J. Pawlet*, and *Eliz.* his Wife, and the heirs of their bodies lawfully begotten, with divers Remainders over: And that the ſaid *Charles* Lord *Mountjoy* dyed, and that the ſaid *Anne* his Wife did accept a Fine *ſur Conuſans de Droit, &c.* of the ſaid Mannor; by which Fine the ſaid *Anne* granted and rendred the moyty of the ſaid Mannor for 300 years, rendring Rent, amounting to the Free-rents, Copyhold Rents, Ferm-rents, and 18 d. more, and 12 d. for the Acre of Waſte. It was Reſolved in this Caſe, amongſt other things, That the Rent did not Iſſue out of the Heriots, Leets, &c. which were never before demiſed, but out of the things manurable, to which the Leſſor might reſort to diſtrein; And it was ſaid, and agreed in this Caſe, That if a Leaſe be made of Land, and of the Mature of a Mill rendring Rent; or if a Leaſe be made of Land, and a Hundred, or of an Advowſon rendring rent, all the Rent ſhall iſſue out of the Land, and not out of the Mature, Hundred, or Advowſon. But in that Caſe, it was agreed, (as before in *Jewels* Caſe, That the King might reſerve and rent out of a Fair, or thing not manurable, becauſe he might diſtrein in all other the lands of the Grantee, for ſuch Rent: And it was agreed, That if a Rent be granted out of a Mannor, that the Demeans only, and not the Services, are charged, and chargeable with the Rent. *Cook* 5. Part, 4. Sir *John Molyes* Caſe.

4. The Cuſtome of *London* is, That a Purchaſer of Freeman in *London*, may deviſe his purchaſed Lands in Mortmain: A purchaſer deviſed his Lands by his Will, to the Prior and Covent of St *Bartholomew*, and his Succeſſors, ſo as they pay to the Dean and Chapter of St *Paul* in *London*, 20 Marks rent; and if they failed payment, that their Eſtate ſhould ceaſe, and the Dean and Chapter ſhould have the Land; and for the Condition broken in not payment of the Rent, the Dean and Chapter entred. It was the Opinion of the Juſtices in this Caſe, That the Condition was void, and that the rent reſerved to the ſtranger, was not good. Paſch. 29 H. 8. *Dyer*, 33.

5. A man ſeized of Lands in Fee, made a Leaſe of them for life; and afterwards, by Indenture, Covenanted to convey and aſſure the ſaid Lands to the uſe of himſelf for life, the Remainder to his ſon in Tail, with divers Remainders over: And by the ſame Indenture, it was further Covenanted and agreed, That it ſhould be lawful for him at any time after, to make of the ſaid Land any Leaſe or Leaſes, Grant, or Grants, as well in poſſeſſion as Reverſion; Provided, That they ſhould not exceed the number of three Lives, or 21 years, the *quod* upon every ſuch Leaſe & Grant, the moſt ancient Rent was reſerved during the ſaid Leaſe or Grant: Afterwards, he levyed a Fine to the Uſes in the Indenture; and afterwards Leaſed the ſaid Lands to J. S. for 99 years, if the ſaid J. S. and J. D. ſhould ſo long live, to begin after the determination of the Eſtate of the Tenant for life, rendring yearly after the beginning of the ſaid Leaſe to him, his heirs, or aſſigns, or to ſuch perſon to whom the Inheritance of the premiſſes ſhould appertain during the ſaid Term, 14 s. 4 d. at the four moſt uſual Feaſts, yearly to be paid. It was a Queſtion in this Caſe (amongſt other points) if the Reſervation of the Rent was good. It was Reſolved, That it was good, for the Leaſe had not its Eſſence from the Eſtate which that Leſſor had for life, but the Leaſe had its Eſſence out of the Fine; and in conſtruction of Law, did precede the heirs for life, and all the Remainders; Alſo the Reſervation was to the Leſſor, and to every perſon to whom the Inheritance and Reverſion of the premiſſes ſhall appertain during the Term, which is good; for the Law ſhall diſtribute the time to every one to whom the Limitation of the Uſe was. But the Court ſaid, That the ſureſt way was to reſerve the Rent yearly during the Term, and leave the Law to make diſtribution, without any expreſs Reſervation to any perſon certain. *Cook* 8. Part, 70, 71. *Whitlocks* Caſe.

6. A man ſeized of black Acre for Fee, and of white Acre, for years, granted a Rent out of both to J. S. for life, with clauſe of diſtreſs in both Acres; the Rent was behinde, and J. S. diſtreined, and avowed in white Acre. In this Caſe (amongſt other things) it was Reſolved, That when a man grants a Rent out of Land in Fee, and a Term for years, to have for life, that the Freehold of the Rent ſhall Iſſue out of the Land in Fee, and not out of the Term, becauſe it is but a Chattel, and the agreement of the parties cannot charge ſuch a thing with a Rent which is not chargeable by the Law, as out of an Advowſon, Hundred, &c. which cannot be put in view in an Aſſize, nor any diſtreſs taken in them. *Cook* 7. Part, 23. *Bas* Caſe.

7. A. ſon of J. S. brought debt againſt the Defendant for twenty Marks Rent, and Declared, That his Father the 27 of *April*, 25 Eliz. Leaſed to the Defendant a Houſe, &c. in B. in the County of C. from Mich. following, for 21 years, yielding during the ſaid Term, if the Father ſhould ſo long live, 30 l. at our Lady, and Mich. by equal portions, and yielding to the heirs and aſſigns of the father after his death, 20 Marks at the Term aforeſaid, and that the Defendant entred, and occupied the Lands from 35 Eliz. &c. the father dyed,

ed, 4 *Mali*, 7 Jac. and becauſe 20 Marks for a half years Rent was behinde, the Action was brought. The Defendant demurred upon the Declaration: It was adjudged againſt the Plaintiff; for the clauſe by which the Rent is reſerved to the Heir, gives but twenty Marks for the whole year, and not twenty Marks every half year; and therefore the Plaintiff had miſtaken his demand in ſuing for twenty Mks. for one half year; for theſe words, *ad terminos prædictos*, are only the time of the payment of the twenty Marks, which were to be paid as the 30 l. were; and although in the clauſe which reſerved the rent to the heirs, the words *by equal portions*, were omitted, yet the Law will ſupply them. Another cauſe of the Judgment was, becauſe the Plaintiff brought his Action as heir to his father, and did not ſhew that the Reverſion deſcended to him, and the Rent demanded is incident to the Reverſion deſcended, and ſo the Plaintiff makes no Title to have the Rent, *quod Nota*. Mich. 6 Jac. in C. B. *Smith* and *Newſhams* Caſe. *Brownlow* 1 Part, 108, 109.

8. In a Replevin, the Caſe was, W. H. was ſeized of a Meſſuage, and 55 Acres of Land, five Acres of Meadow, and ſix Acres of Paſture in F. and 27 *Junii* 28 H. 8. by Indenture, demiſed the Tenement aforeſaid to J. S. for 79 years, *Reddendo inde annuatim*, to the ſaid W. H. and his Aſſignes, 26 s. 8. at the Feaſt of the Annunciation, and Mich. by equal portions, and after, the Leſſor dyed, and the Reverſion deſcended to his ſon, under whom the Defendant claimed: The point in this Caſe was, If the Rent reſerved ſhould go to the heir, or ſhould be determined by the death of the Leſſor; for if the Leſſor had reſerved the Rent to him, it ſhould determine by his death, and the Addition, and his Aſſignes ſhall not enlarge the Reſervation. It was adjudged in this Caſe, That by this Reſervation, the Heir ſhould not have the Rent; for that the Reſervation was made to the Father, his Executors, and Aſſigns, and not to his heirs. Mich. 5 Jac. in C. B. *Weſton* and *Edwins* Caſe. See Hill. 33 Eliz. in C. B. Rotr. 1341. *Richmond* and *Butlers* Caſe adjudged acc. *Cook* 12. Part, 36.

9. In an Action of Debt for Rent, the Caſe was this, A man poſſeſſed of a Term for 20 years, in the right of his Wife, made a Leaſe for ten years, rendring rent to him, his Executors, and Aſſigns, The Queſtion was, Whether the Executors or the Wife ſhould have the Rent? *Crook* and *Houghton* Juſtices, held, That the Rent was gone; *Mountague* contrary. But it was agreed by them all, That the Executors of the Huſband ſhould not have it: It was alſo agreed, That if Leſſee for 20 years makes a Leaſe for 10 years, and then ſurrenders his Term, that the Rent is gone. And it was holden in the principal Caſe, If the Huſband after the Leaſe made, had granted over the Reverſion, his Grantee ſhould not have the Rent. *Mountague* ſaid, in the principal Caſe, The Wife in Chancery might be relieved for the Rent. Trin. 16 Jac. in B. R. *Blaxton* and *Heath*. Caſe. *Godbolt*, 279.

10. A. the Father, ſeized of Lands in Fee, he and his ſon and heir apparent, by Indenture, Leaſed Lands to J. S. for years, to begin after the death of the father, rendring rent unto the ſon; the father dyed, the ſon entred, and the Rent was behinde, and the ſon diſtreined, and the Leſſee brought an Action of Treſpaſs, and had Judgment; for the Reſervation of the Rent was held utterly to be void; for although the ſon did prove heir, it bettered not the Caſe by the event: but the Reſervation muſt have been to the heir, or heirs of the Leſſor by name, for that is the only word of Privity in Law, requiſite in the reſervation of Rents and Conditions; for the heir is in repreſentation in point of taking of Inheritance, *eadem perſona cum Anteceſſore*. Trin. 12 Jac. in C. B. Rott. 3264. *Oats* and *Frithe* Caſe. *Hob.* 130. 151.

11. The Caſe was, A. being ſeized of Lands in Fee, ſuffered a common Recovery, to the uſe of himſelf and his Wife, for life, the Remainder, *Seniori puero de corpore dict. A.* and to the heirs males of the body *dicti ſenioris pueri*. It was the Opinion of the Juſtices, That the ſon ſhould have it, and not the daughter; for although *pueri* was taken for male or female, yet now it is taken in any modern Author for male; and the circumſtances do prove, that he intended it to his ſon, for that he made it for ſetling of his Inheritance; and it ſhall not be ſuppoſed he ſuppoſed his daughter ſhould have it; and where a Leaſe may be taken two wayes, the moſt uſual ſhall be intended; as in Caſe of a Reſtitution of a Rent at Mich. that ſhall be intended at the chiefeſt Feaſt. Mich. 16 Eliz. in C. B. *Lane* and *Coups* Caſe. *Owen*, 64.

12. A man makes a Leaſe for years, reſerving rent to him, his Executors and Aſſigns, and during the Term, the Leſſor dyes; his Heir, who hath the Reverſion, brought debt for the Rent: It was urged, that the Rent was incident to the Reverſion; and the heir having the Reverſion, ſhall alſo have the Rent as incident to it: So 5 E. 4. 4. If two Joynt Tenants make a Leaſe, rendring Rent to one of them, yet the other ſhall have the Rent, though no mention be made of him: But it was adjudged to the contrary by the Court; for when a man paſſeth Lands from himſelf, the Law gives him liberty to paſs them in ſuch manner as he himſelf will; and this liberty ought to take effect according to the expreſs words; for the Law will not extend the words further, for the intent ſhall ap-

pear by the words, and then in the principal Caſe, it cannot be intended, that his will was, that the Heir ſhould have the Rent, becauſe the words are not ſufficient to give it to his heirs. See 12 E. 4. A man made a Leaſe for years, rendring Rent to the Leſſor and his Aſſigns; In that caſe, none ſhall have the Rent but the Leſſor, and it is void by his death, for his Aſſignee cannot be privie to the Reſervation; and the words of the party ſhall not be in any wayes enlarged, unleſs there be great inconveniency to be avoided. Hill. 33 Eliz. in C. B. *Richmonds* Caſe. *Owen* 9.

Reſignation.

1. REſignation is, Where the Incumbent of a Church or Benefice doth reſigne it up, or leaveth it to the Ordinary who did admit and Inſtitute him into the Church or Benefice, or unto his ſucceſſors: It differeth from a Surrender in this, The Reſignation is made to him who hath no Intereſt in the thing reſigned, but an authority to admit the party to the Church or Benefice; whereas a Surrender is made to the party who hath an Intereſt in the thing which is ſurendred: and every Reſignation muſt be *abſolutè, ſponte, purè, & ſimpliciter.*

2. R. G. Parſon of the Church of E. in the County of *Norfolk*, did by an Inſtrument in Writing reſigne his Benefice, before a publique Notary, and others, into the hands of the Biſhop; the Reſignation was abſolute and voluntary, to the uſe of J. S. and J. D. or either of them: But in the Inſtrument of Reſignation was theſe words inſerted, *Proteſtatione & ſub Conditione quod ſi aliqui eorum non admiſſi fuerint per affectionem Epiſcopi infra ſex menſes, quod tunc hæc præſens Reſignatio mea vacua & pro nulla habeatur.* It was Objected, That the Plaintiff might reſigne, as well upon a Condition, as a particular Tenant may ſurrender upon Condition; and it was ſaid, That two Parſons may exchange their Livings; and if the Eſtate be executed on the one part, and not on the other, that parſon whoſe part was not executed, might have his Benefice again; as it was adjaged 46 E. 3. But the Opinion of the Court was, That the Incumbent cannot transfer his Benefice unto another, without Preſentation; and it is againſt the nature of a Reſignation to be upon Condition; for it being an Act Judicial, a condition cannot be annexed unto it, no more then the Biſhop or Ordinary, can admit the Incumbent upon Condition. Mich. 34 Eliz. in C. B. *Gaytons* Caſe. *Owen*, 12.

3. Note, It was adjudged in the Court of Common Pleas, by the Lord *Dyer*, *Weſton*, and the whole Court, That a Dean, or any other Eccleſiaſtical perſon, might reſigne their Dignities or Benefices to the King, as divers did to King E. 6. for that the King had the authority of the ſupreme Ordinary. *Cook* 5. Part, 34. in the Caſe of Eccleſiaſtical perſons.

4. A Parſon of the Church of G. was bounden in an Obligation to the Prior of E. to reſigne to the Prior for a certain penſion, as it ſhould be agreed betwixt them. The Parſon and Prior did agree of a certain penſion of 5 l. and yet the Parſon refuſed to reſigne, 14 H. 4. 19. It was the Opinion of the whole Court, That although they were agreed of the Penſion, yet the Parſon was not bound to reſigne, until he might be ſure of his Penſion, and that he could not be without a Deed; and therefore in ſuch Caſe, the Parſon was not bound to reſigne, until the Prior ſhould render a Deed of the Penſion, whereby he might be ſure of it. *Cook* 5. Part, 21. in Sir *Anthony Maines* Caſe.

5. In Treſpaſs, the Caſe was, The Defendant being Incumbent of the Church of B. (being a Donative, and C. and G. having the Donation thereof) made an Inſtrument, whereby he *Conceſſit & reſignavit* to C. *& omnibus ad quos in hac parte pertinet ad acceptandum Eccleſiam ſuam de* B. and thereupon the two Patrons gave it to the Plaintiff, who being diſturbed by the Defendant (who ſuppoſed the Reſignation to be void) brought Treſpaſs. It was a Queſtion, whether the Reſignation of a Donative Church, could be to the Donor, or how it might be departed with. It was the Opinion of the whole Court, That this being a Donative, begun only by the foundation and erection of the Donor, he hath the ſole Viſitation and Correction, and the Ordinary hath nothing to do therewith, and as the Parſon comes in by him, ſo he may reſtore it to him; and although the Preſentee when he is in, hath the Freehold, yet he may reveſt it by his Reſignation, without any other Ceremony, and the Ordinary hath nothing to do therewith; for Admiſſion and Inſtitution are not requiſite in caſe of a Donative. 2. It was Reſolved, That the Reſignation to one of the Patrons was good: for it enures to both, as a Surrender ſhall do. 3. Reſolved, That although the Reſignation was *de Eccleſia*, yet it extends to all the poſſeſſions; and although it was Objected, That it is not found that the Donors accepted of the Reſignation; yet it was holden, That it being in a ſpecial Verdict, all neceſſary circumſtances

cumſtances ſhall be intended. It was adjudged for the Plaintiff. Paſch. 3 Jac. in B. R. *Fairchild* and *Gaunt*'s Caſe. *Cro.* 2. Part, 63.

6. In a *Quare Impedit*, the Iſſue was, if I. S. by Covin between him, and B. and C. did reſigne into the hands of the Biſhop: In this Caſe it was holden, That if the King hath Title of Lapſe, and a Reſignation be made by fraud, and one be admitted, this ſhall not take away the Kings Title; for if the King's Title appear upon Record, then ſhall go out a Writ for the King; but otherwiſe it is upon matter of Evidence: The King ſhall loſe his Title by Reſignation, as by death, where he hath Title to Preſent by Lapſe, and doth not, except the Reſignation be by fraud. Trin. 6 Jac. in C. B. *Comber* and the Biſhop of *Wincheſter*'s Caſe. *Brownl.* 1. Part, 161.

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2. *Where upon Reſignation the Church is void, and to whom the Reſignation muſt be made; And where, and when all charges of the Incumbent ſhall be avoided upon Reſignation, where not.*

1. REſignation, if it be of a Benefice with Cure of ſouls, it muſt be made to the Biſhop, who is the immediate Ordinary, by whoſe Admiſſion and Inſtitution, the Incumbent came firſt into the Church, and cannot be made to the King as ſupreme Ordinary of the Dioceſſes of *England*; and the reaſon thereof is, 1 H. 7. *Quare Impedit*, 103. becauſe upon the Reſignation, the Ordinary is to give notice unto the Patron of the Avoydance; to the intent, that the Patron might Preſent another to the Church; which the Biſhop may do, but the King is not bound to do.

2. If two Parſons do agree to permute or exchange their Benefices, this cannot be done by any Act of theirs, but there muſt be a Reſignation of their Benefices firſt made unto the Ordinary, for they muſt be ſettled therein by him: But if a Reſignation be made of any Dignity or Promotion Spiritual in the Church, and not to a Benefice with Cure of ſouls, there to extinguiſh the Dignity, or Spiritual Promotion, the Reſignation made to the King as ſupream Ordinary, is ſufficient to make a Reſignation of the ſame. See 10 H. 6. 11.

3. *Goodman*, Prebendary of the Prebend of *Co-* in the Cathedral Church of *Bath* and *Wells*, by Deed enrolled, did Grant, Render, and Confirm to King E. 6. *Totam Prebendam ſuam de Cory, & omnia Maneria, poſſeſſiones, jura, & hereditamenta quæcunque tam ſpiritualia, quam temporalia, & plenam & liberam diſpoſitionem, authoritatem, & poteſtatem dict. Prebend. pertinent. ſpectantem, ſive Incumbentem: Habendum eidem Regi & Succeſſoribus ſuis ad eorum proprium uſum, ad omnem juris effectum, qui ex inde, &c.* And after the *Habendum*, there were theſe words in the Deed, &c. *viz. Cui in hac parte ad omnem juris effectum, qui ex inde ſequi poterit aut poteſt dictæ Prebendæ: Et omnia jura mihi ratione ejuſdem qualitercunque acquiſita, ut decet, ſubjicio, & ſubmitto.* And in this Caſe it was agreed by the Judges, 1. That thoſe words were effectual, and ſufficient to make a Reſignation of the Prebend. 2. That the Reſignation of the Dignity made unto the King as ſupream Ordinary, was good to extinguiſh the Dignity, although the ſame was not made unto the immediate Ordinary. 3. That by that Deed, and by thoſe words, *Canoniam ſive Canonicatum*, his ſpiritual Function was ſurrendred to the King: For it was ſaid, That by the Law, *Reges ſacro Oleo unctii ſpiritualis Juriſdictionis ſunt capaces*; and again, *Rex eſt perſona mixta cum Sacerdote.* 13 Eliz. *Dyer*; *Goodman*'s Caſe.

4. Note, The words of ſubſtance in the Inſtrument of Reſignation made unto the Biſhop or Ordinary, muſt be either *renunciare*, *cedere*, or *remittere*, in the caſe of a common perſon; for the word *Reſignare*, is no fit or proper word of Reſignation of the Church, as it was holden by the Civilians in *Goodman*'s Caſe: But in Caſe of the Dignity reſigned then to the King, the words in the ſaid Grant were holden to be ſufficient to make a Reſignation of the ſame. See *Dyer*, *ibid.*

5. In every Reſignation, the time of the Reſignation is conſiderable; and therefore, If a man, Preſented to a Benefice with Cure of ſouls, be Admitted and Inſtituted by the Biſhop, the Church in Caſe of a common perſon, is ſaid to be full, and he may then reſigne: But where the King is Patron, there becauſe the Church is not full until Induction, he cannot reſigne before he be Inducted; But in no Caſe before he be Inducted, can he charge the Gleab: And if he be Inducted, and diſcharge the ſame, yet ſuch charge upon his Reſignation, ſhall be avoided, and ſhall binde but during his time: As if a Parſon or Prebendary make a Leaſe for years, and afterwards reſigne, 12. H. 8. 8. by *Pollard*, 26 H. 8. 2. 21 H. 7. 1. the Leaſe for years ſhall be avoided: So if a Parſon or Vicar alien the Gleab of his Church, or permute the ſame, the ſucceſſor may enter, 2 H. 4. 5. But if a Writ of Annuity be brought againſt a Parſon, who prays in Aid of the Patron and Ordinary, and the

Aid is granted, and they make default, and afterwards upon their default, the Patron doth confeſs the action, and then doth reſigne, or dyeth; this by the Common Law ſhould have bounden the Patron, Ordinary, and the Succeſſor, becauſe the Patron had done as much as in him lay, to have freed the Glebe, by praying in Aid of the Patron and Ordinary. See 20 H. 6. 47. 7 H. 6. 38. 22 H. 6. 28. 4 H. 7. 2. 19 H. 6. 29. acc.

6. If a Writ of Annuity, or other Writ be brought againſt a Parſon or Vicar, and pendant the Writ, the Parſon or Vicar do reſigne his Parſonage or Vicarage into the hands of the Ordinary; In this Caſe, becauſe the Reſignation is the Act of the party, he ſhall not take advantage thereof, and abate his own Writ; But if a Writ be brought by an Incumbent, and pendant the Writ he doth reſigne his Benefice, in that caſe he ſhall abate his own Writ. See 20 H. 6. 10. acc.

Reſtitution.

Where, and in what Caſe it lyeth, and for whom; unto what a man ſhall be reſtored upon a Judgment reverſed: And where upon Reſtitution it ſhall avoid all Mean Acts, Where not.

1. B Brought a *Quare Impedit* againſt C. and had Judgment to recover upon a Demurrer in Law; Afterwards it was ſhewed, that B. was Outlawed after the ſaid Judgment in an Action of Debt, at the ſuit of J. S; C. reſigned his Benefice to the Queen; a *Scire facias* iſſueth, *ad reſpondendum quare diſſa Domina Regina*, ſhould not have Execution of the Judgment aforeſaid, by reaſon of the Outlawry aforeſaid, and then ſhe declared upon the Outlawry aforeſaid, and that the ſaid C. had reſigned; whereupon C. was Preſented again by the Queen, and Inſtituted and Inducted: Afterwards B. brought a Writ of Error in the Kings Bench, and reverſed the Outlawry, becauſe he was named of *Hamby*, when there were two Towns of the ſame name, and neither of them without addition; and thereupon brought a *Scire facias* againſt C. to execute the firſt Judgment, who plead all the matter aforeſaid. It was ſaid, That by the Outlawry of the Plaintiff, the Queen was entituled to the Preſentation, although it was but a thing in Action, which being once veſted in the Queen, and ſhe afterwards Preſenting C. again to the ſame Church, that the Preſentation of him was good, and ſo the Wife barred. It was the Opinion of the Court, That when the Queen Preſented, ſhe had gained a Patronage, until it was recovered again; for ſo long as the Incumbent continueth by that Induction in poſſeſſion, ſo long he who Preſented him continueth Patron; then when the Queen had Preſented C. *de novo*, which is done by fraud *pendente Lite*, and after the Outlawry is reverſed: It was the Opinion of the Court, That no act done by the Queen hanging the Writ, ſhould extinct the Plaintiff from his Execution. See 21 H. 7. If the Defendant reſigne, and a ſtranger is Preſented hanging the Writ, yet the Plaintiff ſhall remove the ſtranger. It was the Opinion of the whole Court, That upon the Reverſal of the Outlawry, the Plaintiff ſhould be reſtored to his Preſentation, and that C. Preſented *de novo* by the Queen, upon an apparent practiſe of C. to reſigne (for otherwiſe the Queen could not have Preſented him, the Church being full) ſhould be removed. Mich. 31 Eliz. in B. R. *Berkley* and *Cornwall's* Caſe. *Goldesbr.* 103, 104. *Leon*, 63. the ſame Caſe.

2. The Sheriff by force of a Writ of Execution by *Fieri facias* ſold the Term of the Defendant by a Writ of *Venditioni exponas*, and delivered the monys in Court to the Plaintiff; and afterwards, upon a Writ of Error brought, the Judgment was reverſed. It was the Opinion of the Juſtices, That Reſtitution could not be made of the Term which was made by the default of the party himſelf, but he ſhould be reſtored to the monies for which the Term was ſold by the Sheriff. Trin. 20 Eliz. *Dyer*, 363.

3. Leſſee for 99. years, by his Will Deviſed his Leaſe in theſe words; viz. I deviſe my Leaſe to my Wife during her life; and after her death I will that it go to her Children unpreferred; and made his Wife his Executrix, and dyed: the Wife entred, and married with J. S; and afterwards for 140 l. debt recovered againſt J. S. upon a *Fieri facias*, the Term was ſold by the Sheriff. Afterwards the Judgment was reverſed by a Writ of Errour brought, and awarded *Quod omnia quæ amiſit ratione Judicii, reſtituantur*; the Wife the Executrix dyed: In this caſe, It was Reſolved; 1. That the Executory Deviſe of the Leaſe after the death of the Wife, to the daughter, was good. 2. That the Sale made by the Sheriff upon the *Fieri facias*, did not deſtroy the Executory Deviſe. 3. That the Sale made of the Term by the Sheriff

ſhall

ſtood good, although that the Judgment was reverſed, and that the Plaintiff ſhould be reſtored to the value of the Term, but not to the Term it ſelf, and that the Vendee had an abſolute property in the Term during the life of the Wife, and that the value of the Term ſhould go to the Daughter not preferred after the death of the Wife. Mich. 27 Eliz. in B. R. *Annet* and *Lockington's* Caſe. See *Cook* 8. Part, 96. in *Matthew Manings* Caſe. See *Godbolt*, 27. acc.

4. In *Audita Querela*, the Plaintiff ſhewed, That 200 l. debt was recovered againſt him, upon which he was Outlawed, and afterwards taken in Execution by a *Capias utlagatum*; and being in Execution, the Sheriff ſuffered him to eſcape: The Defendant pleaded, That after the ſaid Eſcape, and before the *Audita Querela* brought, the Outlawry was declared to be erroneous; and ſo no Record of the Outlawry: Upon which, the Plaintiff did Demur. It was Objected, That at the time of the Eſcape, the Outlawry was in force; and the Sheriff ſhould never take advantage of Errour, but ſhould be charged with the Eſcape, notwithſtanding that the Record was erroneous: But it was adjudged, That the *Audita Querela* did not lye. And, 1. It was Reſolved, That when Erroneous Judgment is given, and after the Judgment is reverſed by Errour, that all Collateral acts executory are thereby barred. 2. In this caſe, It was Reſolved, That there is a difference between mean acts done in Execution of Juſtice which are Compulſory and voluntary acts: As if a Judgment be given in Debt, and the Sheriff upon a *Fieri facias* ſell a Term, and then the Judgment is reverſed by Errour, the Term ſhall not be reſtored, but only the ſum: But if an Outlawry, by which the Sheriff is commanded to take the body, *et bona et Catalla quæ per inquiſitionem venerint in manus noſtras, Capias*; If by force of ſuch Writ, the Sheriff ſells the goods and Chattels, and afterwards the Outlawry is reverſed, the party ſhall be reſtored to his Goods and Chattels, becauſe the Sheriff was not commanded by Writ to ſell them. *Cook* 8. Part, 143. Dr. *Druries* Caſe. See 5 Eliz. *Dyer*, 223. *Proſſers* Caſe: And *Cook* 5. Part, *Hoes* Caſe, acc.

5. A. ſeiſed in Fee of the Mannor of S. in the County of K, had Iſſue H, who was Indicted of Felony 18 Eliz: 19 Eliz. the Indictment was brought into the Kings-Bench, and thereupon H. 20 Eliz. was Outlawed: A. dyed, H. entred into the Mannor as ſon and Heir; and being ſeiſed of the ſaid Mannor and Lands, Deviſed the ſame to C. in Fee: who conveyed the ſame to B, who brought a Writ of Errour to reverſe the Outlawry of H. And whether it would lye, was the Queſtion, he being a meer ſtranger, and a Feoffee only of the Land? It was the Opinion of the Juſtices, after many long Arguments at Barr, and debate of the Caſe in Court, That the Writ would not lye, Becauſe by the Writ reverſed, the Blood which was corrupted by the Attainder, was to be reſtored; and if the Feoffee might bring Errour, and reverſe the Judgment, he muſt reſtore the Heir in blood; and none can have Errour to reſtore blood, but he only who is privy in blood, and that is the Heir, and not B. the Feoffee. Paſch. 3 Car. in B.R. *Brookers* Caſe, *Godbolt*, 376, 377, 378.

6. A man was Indicted as Principal, for the death of J. S; and another as Acceſſary, for receiving the Principal. Afterward the Principal was Outlawed, and the Acceſſary hanged; and the Lord ſeiſed the Land of the Acceſſary for Eſcheat. Afterwards, the Principal came and reverſed the Outlawry, and was found Not guilty: The Heir of him who was hanged, entred upon the Lord by Eſcheat: And in that Caſe, it was adjudged, That in as much as there could not be an Acceſſary, unleſſe there was a Principal, It was adjudged, That the Heir ſhould be reſtored to his Lands; and that therefore his Entry upon the Lord by Eſcheat was lawful. See this Caſe vouched, Hil. 7 Jac. in B. R. in *Gittins* and *Cowpers* Caſe, *Brownlow*, 2. Part, 220.

7. If in an Appeal of Felony, an *Exigent* be awarded againſt a man, although that he cometh in upon the *Exigent*, yet he ſhall forfeit his goods for his *Retrevit*, which is a flying in Law. But if a man hath a Pardon of elder date then the *Exigent*, in that caſe his Goods are ſayed, for the ſaving of them appears upon Record; and the Goods (if ſeiſed) ſhall be reſtored to him: And if a Writ of *Exigent* doth erroniouſly iſſue forth, yet till it be reverſed, it ſtands in force, and his goods are forfeited. But his Executors or Adminiſtrators ſhall have a Writ of Errour to reverſe the Judgment upon the Exigent, and upon the Reverſall thereof, the goods of the party ſhall be reſtored unto them. 24 Eliz. in B. R. *Mariners* Caſe. See *Cook* 5. Part, 100. *Long's* Caſe, &c.

8. Error, Whereas the Defendant recovered damages in Debt in C. B. of 100 l. The Plaintiff thereupon had an *Elegit* into the County of *Lancaſter*, which mentioned, that another *Elegit* iſſued into *London*, and returned *Nihil*. And upon a *Teſtatum eſt*, It was commanded to extend all the Goods and Lands. Whereupon the Sheriff returned, That he took a Leaſe for years of Tythes which he delivered to the Plaintiff as *bona et catalla ſua* for the ſaid Debt. The Error was, becauſe the Writ

Writ was with a *Teſtatum*, whereas there was not any Writ before awarded into *London*. It was held to be Error. Then it was moved, If he ſhould be reſtored to the Leaſe it ſelf, or to the value, *viz.* the 100 l. It was Objected, That the Sale was good, and that after, it came to two or three mens hands. But it was holden, That this Sale ſhould not bind him; and a difference was taken betwixt this Sale and delivery upon an *Elegit* to the party himſelf, and to a ſtranger upon a *Fieri facias*. For the *Fieri facias* gives power to the Sheriff to ſell and bring the money into Court; Wherefore when he ſells a Term to a ſtranger, although the Execution be reverſed, yet he ſhall not by vertue thereof be reſtored to the Term, but to the monies. See before *Amner* and *Loddington's* Caſe. But the Sale and delivery of the Leaſe to the party himſelf upon an *Elegit*, is no Sale by force of the Writ delivered in Extent, which being reverſed, the party ſhall be reſtored to the Term it ſelf. And therefore a Writ of Reſtitution was awarded. Trin. 8 Jac. in B. R. *Goodyer* and *Junces* Caſe. *Y. Laverton* 179. *Cro.* 2. Part, 246. the ſame Caſe.

9. A Judgment in *Durham* being reverſed in B. R. a Writ of Reſtitution was awarded to enquire what were the profits of the Land recovered, *a tempore Judicii pradict.* which was 7. *Aug.* 19 Jac. Whereupon the Inquiſition was returned, That they amount to 10 l. Exception was taken to the Writ, for it ought not to have bin what the profits amounted unto from the Judgment. Wherefore the Plaintiff in the Writ of Error had a new Writ of Reſtitution, which was to enquire what profits of the Land the Plaintiff who recovered had taken *Colore Judicii pradict.* which was 7. *Aug.* 19 Jac. and after the Reverſal thereof: which being returned, That he took the profits of the Land *colore Judicii pradict.* before the Reverſal thereof to the value of 10 l. Exception was taken, That this Writ was not good; for it ought to be what profits he took after the Execution ſued. But the Court held, That the Writ was good enough. For the Plaintiff in the Writ of Error after the reverſal is to be reſtored to all what he loſt, and what the Plaintiff in the Judgment by colour thereof had taken after the Judgment. Wherefore the Writ was ordered to be filed; and the Plaintiff had Execution of the damages found by that Writ. Mich. 22 Jac. in B. R. *Simpſon* and *Juxons* Caſe. *Cro.* 2. Part, 698.

2. *Where and in what Caſe a Writ of Reſtitution ſhall be awarded to reſtore a man to his Franchiſe, Place, Office. Divers Caſes thereof.*

1. ONe Citizen ſued another in the Court of Common Pleas for Debt upon an Obligation, for which, and becauſe the Plaintiff refuſed to ſtand to the Order of two Aldermen, they Diſfranchiſed him. And becauſe that that was no cauſe, and there appeared to be no other cauſe to Diſfranchiſe him, a Writ of Reſtitution was awarded to the Mayor to reſtore him. Paſc. 16 Eliz. *Dyer*, 333.

2. Note, Theſe points were Reſolved by the Juſtices. 1. That words of contempt, or *contra bonos mores*, are not ſufficient cauſes to Diſ-franchiſe a Citizen or a Burgeſs; but if he doth any thing againſt the duty and truſt of his Freedome, or unto the prejudice of the City or Borough, the ſame is a good cauſe to Diſ-franchiſe him, but then there ought to be an Act done, and not an endeavour only. For *Non effecit conatus niſi ſequatur effectus.* 2. Reſolved, That no Freeman of any Corporation can be Diſfranchiſed by the Corporation, if they have not authority to do it by expreſs words in their Charter, or by Preſcription; but ſuch Freeman ought to be convicted by the Law before he be removed. *Cook* 11. Part, *James Bagg's* Caſe.

3. *Clark*, a Burgeſs of *Hartford* being expelled from being a Burgeſs there, had a Writ to the Mayor and Burgeſſes to reſtore him, or ſignify the cauſe, who returned, That he being Church Warden, Preſented one, being a Burgeſs, and maliciouſly without cauſe, for being abſent from one perambulation, for which being rebuked by the Mayor, he ſaid contemptuouſly, I care not for Mr. Mayor, nor any of the Burgeſſes; and for this cauſe they expelled him. It was holden to be no cauſe of expulſion of him, and therefore another Writ was awarded to reſtore him. Mich. 16 Jac. in B. R. *Clarks* Caſe. *Cro.* 2. Part, 506.

4. A. one of the Councel of *Coventry* was removed: He had a Writ of Reſtitution, and thereupon the Corporation returned, That they had a Cuſtome to elect any to be of the Common Councill, and to remove him *ad libitum*. The Court held the Retorn good, and took this difference, Where

Where a man is a Free-man, or Alderman, there they cannot remove him from his Freedome or place without cauſe; and in ſuch Caſe, ſuch a Cuſtome is void, becauſe the party hath a Freehold therein. But to be of Councell, is a thing collaterall to the Corporation, and ſo one may be removed. It was afterwards ſurmiſed, That he was an Alderman, and removed. Whereupon a new Writ iſſued to reſtore him. Trin. 17 Jac. in B. R. *Warrens* Caſe. *Cro.* 2. Part, 540. See Trin. 23 Car. in B. R. *Eſtwick* and the City of *Londons* Caſe. *Syles* 42, 43.

5. In a Writ of Reſtitution to the Mayor and Burgeſſes of *Glouceſter*, to reſtore T. to the place of Alderman, he being removed by them. They returned the cauſes of his removal. 1. One was, for his lending of money to young men by the hands of his Wife. Another cauſe was, that he was a Drunkard. 2. They returned, That their Common Councill did conſiſt of 30 Burgeſſes, and that they called him before 30 of them *in Domo Conſilii* to anſwer the matters Objected againſt him, and becauſe he did not give ſufficient anſwers to the matters, they did therefore remove him. For the firſt, it was holden to be no cauſe, being but a Collateral cauſe, and not trenching to things incident to his place as an Alderman. 2. It was agreed, That if a Magiſtrate be a common Drunkard, it is a perſonal Offence, and a good cauſe to remove him, becauſe this goes to the point of Government, otherwiſe if he be drunk by accident. 3. It was agreed, That the Return was not good; for that it is ſaid, That this removal of him was *in Domo Conſilii*, but it was not ſaid in the Return, that it was *apud Commune Concilium*. Wherefore by the Rule of the Court, a new Writ of Reſtitution was awarded to reſtore T. to his place of Alderman. Trin. 14 Jac. in B. R. *Taylors* Caſe. *Bulſtr.* 3. Part, 189, 190. See *Poph.* 134. the ſame Caſe. And ſee there how the Caſes differ.

6. A. being put out of the Town Clerkſhip of *Bedford*. It was moved for a Writ of Reſtitution of him to his place. It was doubted by ſome, Whether he could be reſtored or no. becauſe the Office was granted to him in Reverſion, when it was expectant upon an Eſtate for life; and when the Officer for life dyed, one *Foy* was elected. And it was doubted by ſome, Whether this Court had power to Grant Reſtitution in this Caſe. But it was Reſolved, That this Court hath power to Grant Reſtitution in ſuch a Caſe where he was put out of his Office; and one *Mudlicotts* Caſe was vouched to have bin adjudged accordingly. And 43 Eliz. By Warrant of *Fenner* Juſtice, a Writ of Reſtitution was granted in the like Caſe; and ſo it was ſaid it was adjudged, 10 Eliz. in one *Conſtables* Caſe, and the like in 16 Eliz. Paſc. 2 Car. in B. R. *Audley* and *Joyes* Caſe. *Popham* 196.

7. The Cuſtome of the *Ville* of *Stepney* is, that the Neighbours in the Hamblet was to make choice of ſuch a one to be their Conſtable, and to preſent him to the Lord *Wentworth* the Lord of the Mannor, and then to have him ſworn; they made choice of ſuch a one to be Conſtable, and Preſented him to the Lord, who was ſworn accordingly. The ſaid Conſtable was removed by the Juſtices of Peace at their Quarter Seſſions. Whereupon a Writ of Reſtitution was prayed to reſtore the Conſtable choſen by the *Ville*, and ſworn. It was the Opinion of the Juſtices in this Caſe, That Juſtices of Peace are to elect Conſtables of Hundreds and High Conſtables; and theſe as they are to be choſen by them, ſo they are removeable by them if there be cauſe for it. But if it be in a Mannor (as in the Principal Caſe it was), and the Conſtable is choſen and ſworn in the Court Leet (as in the Principal Caſe he was), the Juſtices of the Peace have no power or Authority to remove him, but they may Fine him if there be cauſe for it. But it was agreed by the Court, That no Writ of Reſtitution lyeth for a Conſtable: Wherefore by the Rule of the Court, an Order was entred, That the firſt diſplacing of the Conſtable choſen by the *Ville*, and approved by the Lord of the Mannor, was altogether unlawful; and an Order made by the Court, for the reſtoring, placing, and ſetling him in his place of Conſtable again. Trin. 9 Jac. in B. R. the Caſe of the Conſtable of *Stepney*. *Bulſtr.* 1. Part, 174.

8. Upon a Writ of Reſtitution, the Caſe appeared to be this. An Alderman of *Lincoln* was removed for cauſe, J. S. elected Alderman in his place. Afterwards the Alderman firſt removed, the cauſe of his removal appearing inſufficient, had a Writ of Reſtitution granted him by the Court, with a Rule to remove J. S. and reſtore the other. Afterwards one of the Aldermen dyed, and ſo another place became now void; and by their Charter, they having twelve Aldermen: J. S. now moved the Court for a Writ of Reſtitution to be reſtored to his place again. It was the Opinion of the Court, That they could not write to them to elect ſuch a one, this Court being only to deal in Caſes of Reſtitution, by granting Writs of Reſtitution upon bad and undue removalls: The whole Court was clear of Opinion againſt the granting of a Writ of Reſtitution, as this Caſe is, unto J. S. for he cannot be reſtored to the place of an Alderman, to a new place by force of his former Election, for by his removal he is now *Statu quo prius*, no Alderman, and ſo not to be reſtored to the place

of.

of an Alderman. Trin. 11 Jac. in B. R. *Shuttleworth* and the Corporation of *Lincolns* Caſe. *Bulſt.* 2. Part, 122.

9. *Langham*, a Citizen and Freeman of *London* was committed to *Newgate* by the Court of Aldermen. He was brought to the bar by a *Habeas Corpus*: Upon which Return was made, That *London* is an Ancient City Incorporate by the name of Mayor, Commonalty, and Citizens; and that a Court of Record had bin time out of mind, holden before the Mayor and Aldermen. And that there is a Cuſtome, That if any Freeman be elected Alderman, That he ought to take an Oath *in hac verba*, viz. You ſhall ſwear to ſerve the King in ſuch a Ward, in the Office of an Alderman, of which you are Elected. You ſhall duly come to the Court of Orphans and Huſtings, if you be not hindred by command of the King, or any other lawful cauſe. You ſhall give good Counſel to the Mayor. You ſhall not ſell Bread, Ale, Wine, or Fiſh by retail. And ſet forth a Cuſtome, That if any perſon be choſen Alderman, he ſhall be called to the Court, and the Oath tendred to him: And if he refuſe to take it, that he ſhall be committed till he take the Oath. And then ſet forth, That *Langham* being a Freeman, and having taken the Oath of a Freeman, was *debito modo electus* Alderman of ſuch a Ward, and being *habilis et idoneus* 1. *Feb.* was called to the Court of Aldermen, and the Oath tendred him, and that he refuſed to be ſworn, *in contemptum Curiæ et contra Conſuetudines*; Wherefore according to the Cuſtome he was committed. It was ſaid, That this was an inſufficient Return for the matter of it, for he is Impriſoned generally untill he takes the Oath, which utterly takes away the Liberty of the Subject, for by this means he may be Impriſoned for ever. 2. There is no notice given him that he was choſen Alderman. And 3. The Oath is naught, being unreaſonable: For he ought to forſwear his Trade; For if he did ſell Bread, Ale, Wine, or Fiſh before, he muſt ſwear he ſhall never ſell them by retail afterwards, which is very unreaſonable; for perhaps he may be impoveriſhed afterwards, and ſo neceſſitated to uſe his Trade, or otherwiſe to periſh. But the Opinion of all the Juſtices upon Argument in Court was, That the Return was good, and that the Oath was reaſonable (ſee the reaſons in the Book at large). And that the Court being a Court of Record, might lawfully commit him for refuſing to take the ſaid Oath; and that ſuch Commitment upon ſuch a refuſal, had bin admitted and practiſed, and divers Preſidents vouched to that purpoſe. Wherefore he was remaunded to Priſon. Hill. 17 Car. in B. R. *Langhams* Caſe. *Mayſh.* 179. to 191.

10. *Barnardiſton* being removed by the Bayliffs and Common Council of *Colcheſter* from his place of Recorder of the ſaid Town, had thereupon a Writ of Reſtitution granted him; upon the Return of which they ſet forth divers cauſes why they removed him. As, 1. That at a Quarter Seſſions, one A. being endicted and convicted for having two Wives, he prayed his Clergy, which was denyed by him; and being Condemned, and Reprieved, notwithſtanding that Judgment, he was afterwards admitted by him to his Clergy. 2. That he neglected to ſit at the publick Seſſions of the Peace, ſo as they could not be held for the Town. 3. He neglected a long time to ſit in Court, whereby cauſes ready for Tryal could not be tryed in delay of Juſtice. It was the Opinion of the Juſtices, That although ſome of theſe Cauſes might be ſufficient Cauſes to deprive him of his place: Yet in regard they had not proceeded againſt him in a legal way, for he was never called to anſwer the Crimes objected againſt him: and they ought to have convented him, and hear what excuſe he could make before they put him from his place; for he might have ſome juſt cauſe of his abſence or doing. It was the Judgment of the Court, That he ſhould be reſtored to his place of Recorder of the ſaid Town. Paſc. 1655. in B. R. *Barnardiſton* and the Town of *Colcheſters* Caſe. *Style*, 447.

11. *Yates* and five other Freemen of the Town of *Kingſton* upon *Thames*, being Diſfranchiſed by the Corporation there; they prayed a Writ of Reſtitution, which was granted: Upon which a Return was made, whereby they ſet forth the cauſe of their Diſfranchiſement to be this, viz. That there was a difference amongſt the Corporation about making an Attorney of their Court, at a Court holden for the ſaid Town; and there was like to be a Tumult about this matter. Whereupon the Bayliffs did adjourn the Court, and commanded all parties there to depart, and they with thoſe of their party went away. But *Yates* and the parties Diſfranchiſed ſtayed there, and ſaid the Court was not diſſolved, and did affirm they were a Court, and thereupon did make divers Acts of Courts, and cauſed them to be entred in the Court-book. And in their Return, That for ſuch Offences, perſons, by the Cuſtome, have bin from time to time removeable. This Caſe being long and often debated, and long depending; The Lord Chief Juſtice gave the Reſolution of the Court therein, and ſaid, That they were all of Opinion, That here was good cauſe to Diſfranchiſe the parties for entring Orders made by a pretended Court, which in truth was no Court, for the ſame was very prejudicial to the Corporation, and to the ill example

angle of others to diſturb the Government. But Cuſtome is the main cauſe of Diſtranchiſing any perſon, for thereby the party loſeth his Freehold, and therefore not to be put in practice, but upon very good Warrant. But in the Principal Caſe, there appears no ſuch Cuſtome upon the Retorn. For the Retorn is, That for ſuch Offences the parties have uſed to be removeable and diſchargeable, which is meerly imaginary; and a thing *in Fieri*, and not *in facto*, or in uſage, and ſo it is a dead thing in the Womb which never had birth; and the Corporation hath not ſhewed, that it was at any time put in practice, or have made any direct affirmation of the Cuſtome. Wherefore it was the Opinion of the whole Court, That the Retorn was inſufficient, and that *Yates* and the others ſhould be reſtored to their Freedomes, &c. Mich. 1655. in B. R. *Yates* and the Town of *Kingſton* upon *Thames* Caſe. *Styles* 477. to 481.

12. *Foreman*, a Barriſter of one of the Temples, was expelled the houſe, and his Chamber ſeiſed for non payment of his Commons. Thereupon he prayed a Writ of Reſtitution, and brought the Writ ready framed into Court, which was directed to the Benchers of that Society. But the Court denyed to grant the Writ, becauſe there is none in the Inn of Court to whom the Writ can be directed, becauſe it is no body Politick, but only a voluntary Society, and ſubmiſſion to Government. And the Court ſeemed angry, that he had waived the ancient and uſual way of Redreſs for any grievance in the Inns of Court, which was by appealing to the Judges, and wiſhed the party ſo to do. Hill. 17 Car. in B. R. *Foreman's* Caſe. *Marſh.* 177.

13. One was choſen to be Clark of a Pariſh Church, who had continued there four years Clark, but was never ſworn. Now a new Parſon of the Church put him out, and ſwore another in his place. A Writ of Reſtitution was prayed, and the Caſe was compared to Diſfranchiſement, where Reſtitution lyeth. But the Court denyed to grant the Writ: And the Chief Juſtice ſaid, That the Parſon had no power to put him out, for that it is a Temporal Office with which the Parſon hath not to do. And ſaid, That the Clark had his remedy at Law. Wherefore they would not award a Writ of Reſtitution; but if the Clark was never ſworn, they would award a Mandate to ſwear him. Trin. 17 Car. in B. R. *Marſh.* 101.

14. A *Mandamus* was directed to the Maſter and Fellows of *Gonvile* and *Cayus* Colledg in *Cambridg*, to reſtore one to an Ushers place of a Free-School in *Cambridge*, of which they are Viſitors. It was excepted againſt the Retorn, That they had not ſhewed that they had any Authority to deprive the party of his place, nor doth it appear that they gave him notice of their proceedings. And it was ſaid, That this was a publick Office, & not a private, & tended much to the publick good, like the Caſe of an Alderman, or a Freeman of a Corporation. It was ſaid on the other ſide, That this was a Temporal Office for which he had his remedy at Law, and alſo that the Maſter and Fellows are no Corporation, ſo no Writ can be awarded to them. It was the Opinion of the Juſtices, That a Writ did not lye to reſtore him; for by the ſame Rule as the ſchoolmaſter ſhould be reſtored, every Scholler may claim to be reſtored: And it was the Opinion of the Court, That the Viſitors might remove the Maſter of the School if he obſerve not the Rules and Government of the School: and it is as reaſonable for them to turn out the Maſter or Uſher, as to receive them in. The matter was referred to the Chancellor of the Univerſity. Trin. 1655. in B. R. *Craford* and the Maſter and Fellows of *Gonvile* and *Cayus* Colledg Caſe. *Styles* 457.

15. In an *Ejectione firme*, a Verdict being found for the Plaintiff. There was afterwards an Agreement made between the Plaintiff and the Defendant, That the Defendant ſhould hold the Land recovered for the Remainder of the Term to come, and according to this Agreement, he held it for two years; but afterwards, before the Term expired, the Plaintiff took out an *Habere facias poſſeſſionem*, and executed it. It was moved to the Court, That the Defendant might have a Rule for Reſtitution; but it was denyed by the Court, for they ſaid, That the party might have his Action upon the Caſe againſt the Plaintiff for not performing his Agreement. Hil. 1654. in B. R. *Wood* and *Markham* Caſe. *Styles* 408.

3. *Reſtitution; Where awarded upon Indictments upon the Statute of 8 H. 6. of Forcible Entry; Where not. And where Reſtitution ſhall be by Act of Parliament, and ſhall avoid all mean Acts: Where not.*

1. NOte, It was the Opinion of the Juſtices of the Kings Bench, That notwithſtanding that a Traverſe be tendred to an Indictment upon the Statute of 8 H. 6. of Forcible Entry, That they may either Grant or ſtay the Writ of Reſtitution at their diſcretion, according as the truth of the Title doth appear unto them. Mich. 3 Ma. *Dyer*, 122.

2. If complaint be made to three Juſtices of Peace at their Quarter Seſſions of a Forcible Entry, and a Forcible Deteyner, and the Indictment is found. It is a Quære, If the Juſtices who were abſent, might Grant a Writ of Reſtitution in ſuch Caſe. It was the Opinion of the Juſtices, That if the Seſſions was a ſpecial Seſſions for that purpoſe. And the Juſtices to whom the complaint was made, had gone and viewed the Force according to the Statute, and after had enquired of it, and found it, and thereupon had Granted Reſtitution, That no other Juſtice in ſuch Caſe might Grant a *Superſedeas* to it, becauſe no other Juſtice hath Authority by the Statute to Grant Reſtitution, but thoſe to whom the complaint of the force is made: and before whom it is found. But the Juſtices of the Kings Bench who have Supream Authority, may grant a *Superſedeas* in ſuch Caſe. Mich. 3 Eliz. *Dyer*, 187. See *Dalton* Juſtice of Peace, 212, 213. acc. See *Cook* 9. Part, 118. in the Lord *Sanchors* Caſe, acc. And ſee *Cook* 11. Part, 59. in Dr. *Foſters* Caſe, acc.

3. The Statute of 8 H. 6. gave power to Juſtices of Peace to make Reſtitution, and thereby Juſtices of *Oyer* and *Terminer*, or Goal delivery, thereby ſhall not Grant Reſtitution: Yet if the Indictment be removed into the Kings Bench *coram Rege*, they ſhall award Reſtitution: And ſo it was Reſolved in 3 Eliz. in *Daliſons* Reports; And in 4 H. 7, 8. Reſtitution was awarded in ſuch Caſe. See 15 H. 7. 5. 7 E. 4. 18. acc.

4. The Court was moved to quaſh an Indictment of Forcible Entry, after the party who was Indicted, had pleaded, and a Verdict found againſt him. The Court ſaid, That they are not to quaſh Indictments for every ſmall fault, and be ſo curious in the framing of Indictments. But ſaid, If one interrupt a long poſſeſſion with force, and the other regain by undue means, an Indictment lyes not againſt him for this, for this is but *vim vi repellere*. And after a Verdict, and before Judgment upon an Indictment of Forcible Entry; the party ought not to move for a Reſtitution. Mich. 24 Car. in B. R. *Styles* 136.

5. *Poole*, Dean of *Exeter*, was attainted of Treaſon, 31 H. 8. but he was not executed by any ſentence, but his poſſeſſions were forfeited by the Statute of 26 H. 8. another was put in his place, he and the Chapter confirmed the Feoffment of the Biſhop; and afterwards, the Attaindor of *Poole* was Repealed by Parliament, and the Biſhop dyed. There is a Quære in 3 *Mali Dyer*, 123. If the Succeſſor ſhould be bound by that Confirmation, the Dean being reſtored. See *Cook* 1. Part, Preſidents, 300. where it ſeems he ſhall be bound by it, becauſe the Confirmation is but a meer aſſent by Deed to the Grant.

6. Two Brothers were, the youngeſt had Iſſue a ſon, and was attainted of Treaſon, and Executed; Afterwards, the elder Brother (having good cauſe to have a Petition of Right to certain Lands being in the Kings hands before the Attaindor) dyed without Iſſue, the ſon of the younger Brother being his next heir in blood, who by the ſaid Attaindor of his father, is diſabled to the Title, or Right of Action of his Uncle: The Queſtion was, If his Right was extinct, and the Cauſe of Petition of Right determined? It was the Opinion of the Court, That ſo long as the Attaindor remained in force, that it was. Afterwards the ſon is reſtored by Parliament in blood, as heir to his Father, in theſe words, *viz. That he and his heirs ſhall be from henceforth enabled only in blood, as ſon and heir to his ſaid father, and made only heir and heirs in blood to his ſaid father*: And alſo, *That the ſaid ſon and his heirs, ſhall be from henceforth enabled to demand, vik, have, hold, and enjoy all ſuch Lands, Tenements, &c. which at any time hereafter ſhall deſcend, come, remain, or revert from any collateral Anceſtor of his father, as if the Attaindor had not been*: And if by the ſaid Act, the ſon ſhall be reſtored to the ſaid Right and Title of Petition, that was in his Uncle, as heir to him, was the doubt: Note, There was a Proviſo before the *Saving That this Act of Reſtitution ſhall not extend to any Lands which were in the hands of the King, or of any other, by reaſon of the Attaindor*. It was the Opinion of the Juſtices, That by theſe clauſes, the intent of the King, and of the Parliament, was liberal

liberal to the party who was reſtored, ſo as he ſhould be enabled to have the Petition of Right which his Uncle had: And it was ſaid, That there was great equity therein; for that he, nor his Anceſtors from whom he claimed, had offended the King: And this Opinion of the Juſtices, to whom the Caſe was referred, was certified to the Queen accordingly. Paſch. 10 Eliz. *Dyer*, 274. *Grayes* Caſe.

7. If there be an Indictment of forcible Entry, if it appeareth that the Plaintiff had ſeiſin at the time of the Writ brought, there can be no Writ of Reſtitution; for the Statute ſaith, If he Entreth with force, or keep him out with force, &c. the principal Caſe was, That there was an Indictment, which was, That the Defendant, *adtunc & adhuc*, doth keep the poſſeſſion forcibly, whereas the Plaintiff was in poſſeſſion: And thereupon a Writ of Reſtitution was awarded, by reaſon of the word *adhuc*. See 9 E. 4. 19. Paſch. 15 Car. in B. R. *Marſh* 6.

Retorn of the Sheriff.

Retorn of the Sheriff upon ſeverall Writs: And what ſhall be ſaid to be a good Retorn upon the ſaid Writ? What not.

1. UPon an *Habere facias Seiſinam* in a Writ of Dower of the third part, the Sheriff retorned, That he offered to the Demandants, the Seiſin of the third part of the Tenements aforeſaid, and ſhewed to the Parties what made the third part, by metes and bounds, Incertain, according to the Tenour of the Writ, and they refuſed to receive them of him. It was the Opinion of the Juſtices, That the Entry of the Demandants was now lawful. And although Exception was taken to the Retorn, That it was incertain, and not good for Repugnancy; yet, upon the Retorn being read, and viewed, was allowed to be good: And the Court refuſed to Award an *Habere facias Seiſinam de novo*; for that, they ſaid, would be a new Preſidente, the like of which was not ſeen. Mich. 11 Eliz. *Dyer*, 278.

2. Note, in a *Quare Impedit*; although that it was found, *Ex Officio*, that the Church was full of B, who was a ſtranger to the Writ; and it doth not appear, Whether he came in by better Title, then the Plaintiff had: Yet the Plaintiff ought to have a general Writ to the Biſhop, and the Biſhop ought to execute it (prevail who can) and the Biſhop cannot retorn upon the Writ directed unto him, That the Church is full of another; for no Iſſue can be joyned between the Plaintiff and him, for he hath no day in Court, no more then the Sheriff can upon an *Habere facias Seiſinam* retorn, That another is Tenant of the Land by right, for that cannot come in Iſſue between the Demandant and him, and therefore he ought to execute the Writ, and ſo ought the Biſhop to do in the other caſe; and although that a third perſon hath right, yet they are excuſed, becauſe they have their Warrant by proceſs of Law, and then the parties may try their right as the Law requireth. *Cook* 6. Part, 52. *Boſwell's* Caſe.

3. A. and his Wife, Demandants againſt J. S. in Dower of a Freehold in *Munden magna*, *Munden parva*, and D. the Sheriff retorned *Pledg. de proſequend.* J. D. R. R. and the names of the Summoners, J. D. R. F. and after the Summons made, and by the ſpace of 14. dayes and more, before the Retorn of the Writ, at the moſt uſual Church door of *Munden magna*, where part of the Tenements lay, upon the 27. of October, being the Lords Day, immediately after Service ended in that Church, he publiquely proclaimed all and ſingular things contained in the Writ, to be proclaimed according to the form of the Statute in that behalf made and provided. Exception was taken to the Retorn, becauſe that Proclamations was not made at the doors of the Churches where the Land lay: but it was ſufficient, to make Proclamation at any of the Churches by the Opinion of the Court; but becauſe he ſaid, he had cauſed to be proclaimed all and ſingular in the Writ contained; It was holden, That the Retorn was inſufficient, becauſe he did not expreſſe what. *Hill.* 13 Jac. C. B. *Allen* and *Walters* Caſe, *Brownlow*, 1 Part, 127.

4. Upon a *Capias* directed to the Sheriff, the Sheriff retorned a Reſcous, but did not ſhew the place where the Reſcous was done; the Retorn was holden to be inſufficient, although he ſhewed in Certain the place where he arreſted the body of the party. Paſch. 5 E. 6. *Dyer*, 69.

5. Note: It was holden by the Court, That the Retorn of the Sheriff of a Reſcous made to his Baily Errant by theſe words, *viz. Virtute iſtius Brevis, &c. mandam balivo meo itineranti, &c. qui mihi ſic reſpondit, quod arreſtavit, &c.* and ſhewed the certain day, year, and place, &c. and that Reſcous was made, was no good retorn, becauſe the Arreſt

is the proper Arreſt of the Sheriff himſelf, and no credit to be given to the ſaying, or anſwer of the Baily Errant; otherwiſe it is of the Baily of a Franchiſe: And in the principal Caſe, It was holden, That if it be upon a *Capias ad ſatisfaciend.* or upon a *Capias ut Legatum* after Judgment, the Sheriff himſelf ſhall be charged with an Eſcape; except it be by the Kings Enemies. Trin. 7 Eliz. *Dyer*, 241.

6. Upon an *Extendi facias* upon a Statute Staple out of the Chancery, the Sheriff extended the Lands of the Defendant; and he priſed the Goods, and ſeiſed them into the Kings hand according to the Writ, but did not deliver them. Afterwards, a Writ of Prerogative came out of the Exchequer, commanding the Sheriff to levy 100 l. which the Defendant owed her upon his goods: and if he had not ſufficient goods, then to extend the Land: which Writ was delivered to the Sheriff after the day of Retorn of the firſt Writ; but the firſt Writ was not retorned, and the Sheriff retorned the whole Matter aforeſaid into the Exchequer: And the Sheriff was amerced for making ſuch ſpecial Retorn, and was forced to execute the Writ of Prerogative; for it was holden by the Court, That untill a *Liberate*, no property was in the Conuſee: But it was ſaid, That the Goods being ſeized into the hands of the King for the uſe of the party, they were privileged from all other Executions, but that of the King only. M. 3 E 6. *Dyer*, 67. *Stringfellowes* Caſe.

7. Note: It was Reſolved and adjudged, That when Judgment is given againſt Executors; and upon the *Fieri facias*, the Sheriff retorns, *Nulla bona*, that the Plaintiff may have a ſpecial Writ of *Fieri facias*; *ſcil.* That the Sheriff levy the debt of the goods of the deceaſed; *Et ſi ſibi conſtare poterit*, That the Executors have waſted the Goods, then of their own goods, becauſe that in ſuch a caſe, if the Sheriff make a falſe Retorn, the party may have his remedy by an Action upon the Caſe, *Cook* 5. Part, 32. *Pettifers* Caſe.

8. *Matthew Herbert* acknowledged a Recognizance to the King of 3000 l. and dyed, after his death, a *Scire facias* iſſued againſt the Executors, *Teſtamenti et ultimæ voluntatis prædict. Mathæi et hæred. terrarum et tenementorum quæ fuit fuerint*; and at the day, the Sheriff retorned, That he had not Executors. But *Scire feci Willielmo Herbert Militi fil. et hæred. dict. Mathæi quod ſit, &c. William* made default, and Judgment upon that default was given for the King, *quod recuperet verſus dict. Will. Herbert, &c.* And thereupon Errour was brought, and 3 Errors aſſigned: 1. That the *Scire facias* was *hæred. terrarum et tenementorum*, which was improper, and againſt Law; for always one is ſaid Heir to his Anceſtor, and not to the Land; and it cannot be ſaid that he is *Filius or conſanguineus et hæres Manerii dict D.* 2. Admitting the Writ good, Then forasmuch as the Writ requireth, *Quod Scire facias hæred. terrarum et tenementorum, &c.* And the Retorn of the Sheriff, *Quod Willielmo Herbert Militi fil. et hæred. prædict. Mathæi*, is not good, becauſe he doth not retorn him Heir of any Lands or Tenements; for his Warrant is not to ſummon the Heir of the ſaid *Matthew*, but the Heir of the Lands and Tenements of the ſaid *Matthew*, and each Retorn ought to anſwer the point of the Writ. 3. Admitting the Writ and the Retorn good, yet the Judgment was not good, becauſe it was general, where it ought to have been ſpecial; for by ſuch Judgment, his own Lands ſhould be charged. But theſe Points were not Reſolved by the Court. *Cook* 3. Part, 35. Sir *William Herberts* Caſe.

9. A. ſeiſed of a Houſe in *London*, took a Wife, and afterwards acknowledged a Recognizance to the Chamberlain of the City of *London*, according to the Cuſtome, for Orphanage-money; and afterwards acknowledged another Recognizance to B, before the Recorder and Mayor of the Staple: B. ſued Execution upon his Recognizance, and had a *Liberate*, but the ſame was not retorned, and the Sheriff upon that delivered the ſaid Houſe to B: The Succeſſor of the Chamberlain ſued forth Execution upon his Recognizance by *Elegit*, to a Sergeant of the Mace, immediate Officer to the ſaid Court, and had the moyty of the houſe delivered to him in Extent; A. the Conuſor dyed, his Wife had the Houſe delivered to her for her Dower. Afterwards the Wife dyed, The Chamberlain aſſigned his Intereſt over to F; and afterwards B. the other Conuſee aſſigned his Intereſt over to F: The Heir of the Conuſor, let the houſe to the Plaintiff; The Defendant under the Title of F. entred. In this Caſe, (amongſt other things) It was Reſolved, 1. That the Execution ſued forth upon the *Elegit*, was good, without giving notice to B. the other Conuſee, or having a *Scire facias* againſt him, becauſe that the firſt Execution was not retorned, nor appeared to the Court. But if it had been retorned, and appeared to the Court, then there ought to have been a *Scire facias* againſt him. 2. Reſolved, That the Execution of the *Liberate* was void; although that the Writ was not retorned. And ſo it was ſaid, It is of a *Capias ad ſatisfaciend.* and *Habere facias poſſeſſionem*, and of all other Writs where Land is to be delivered, Seiſin had, or goods ſold, although that the Writs be never retorned: but otherwiſe it is, where an Enqueſt is to be taken, there it ought to be retorned, as in an *Elegit*, to the in-

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ment that the Court may judge of the ſufficiency of the Inquiſition. *Cook* 4. Part, 67. *Falwoods* Caſe. *Cook* 5. Part, 90. *Hats* Caſe, acc.

19. Errour upon a Judgment in C. B. in a *Præcipe quod reddat*: And aſſigned for Errour, for that by the Statute of 31 El. z. Cap. 13. It is Enacted, That for avoiding of ſecret Summons in reall Actions, without convenient Notice of the Tenants of the Freehold, that after every ſummons upon the Land in any reall Action, 14. dayes at the leaſt before the Retorn thereof, Proclamations of ſummons ſhall be made on a Sunday, at or near the moſt uſual Doore of the Church or Chappell of that Town or Pariſh where the Land whereupon the Summons was made, doth lye; and theſe Proclamations ſo made as aforeſaid, &c. *ut in Statuto*. And in this caſe, there was not any Proclamation made at the Church-door; Whether the Plaintiff ſhall have an Averment againſt the Retorn of the Sheriff, was the Queſtion? It was adjudged, That the party ſhall not have an Averment againſt the Retorn of the Sheriff; for if the Retorn be falſe, the party ſhall have an Action upon the Caſe againſt the Sheriff. Hill, 42 Eliz. in B. R. *Collet* and *Marſh*'s Caſe, *Goldeſb.* 128.

11. Note: If a man have Judgment to have a Retorn upon a Nonſuit in a *Replevin*, and the Plaintiff brings a Second Deliverance, this is a *Superſedeas* to the Retorn; yet the Defendant in the firſt *Replevin* ſhall have a Writ to enquire of the Damages, which ſhall not be ſtayed by the ſecond Deliverance: but if he have Judgment in the ſecond Deliverance, then it ſhall be retorned Irreplevisable, and he ſhall recover Dammages. Hil. 43 Eliz. in C.B. *Goldeſb.* 185.

12. In a Writ of Partition, It was found for the Plaintiff; And a Writ was awarded to the Sheriff, That he ſhould make the Partition; and the Sheriff did thereupon allot part of the Lands in ſeverality; and for other part of the Lands, the Jurours would not aſſiſt him to make the Partition: All which appeared upon the Retorn of the Sheriff. And an Attachment was prayed againſt the Jurours, and a new Writ prayed to the Sheriff. The Court doubted what to do in the Caſe, and took time to be adviſed upon both Points. Hill. 13 Jac. in C. B. *Rogell* and *Harry*'s Caſe. *Godbolt*, 265.

13. A. recovered againſt B. in an Action of Battery; for which a *Capias pro fine*, iſſued againſt B. and alſo a *Capias ad ſatisfaciend.* retornable the ſame Term at one and the ſame Retorn. As to the *Capias pro fine*, the Sheriff retorned a *Cepi*; and as to the *Capias ad ſatisfaciendum*, *Non eſt inventus*. For this Contrariety, the Court was of Opinion, That the Sheriff ought to be Amerced. But it was moved for the Sheriff, That the Awarding of the *Capias pro fine*, was meerly void: For the Fine was pardoned by Parliament. And it was alſo Enacted, That all Proceſs awarded upon ſuch Fines, ſhould be void, and then the *Capias pro fine* being void; it matters not in what manner it be retorned; for the Court ſhall not regard ſuch Proceſs, nor any Retorn of it, and then the Court not having any reſpect to that Retorn, there is not any Contrariety; for the *Capias ad ſatisfaciendum* only is retorned, and not the *Capias pro fine*. But it was the Opinion of the Court, That the *Capias pro fine* was well awarded, and the Court ought to regard it, and the Defendant lawfully taken by it, and alſo in Execution for the party in Judgment of Law, and that afterwards when the Parliament came, and Enacted, *ut ſupra*, although the Proceſs be made void thereby, the ſame ought to be meant as to the Intereſt of the King. in the Fine, and the vexation of the Subject by it; but not as to the Execution of the party, but the Sheriff ſhall anſwer for that. It was alſo holden by the Court in that caſe, That if the Plaintiff ſueth an *Elegit* upon a *Capias pro fine* executed, the Defendant ſhall not be adjudged in Execution for the party; for he hath made his Election of another manner of Execution; *ſcil.* of the Land, and he ſhall never reſort to have Execution of the body Paſch. 29 Eliz. in B. R. *Hudſon* and *Leigh*'s Caſe. *Leon.* 51.

14. In Trover and Converſion, the Defendant pleaded, That A. recovered in Debt againſt J. P. Executor of E. P. 100 l. and 20 l. damages; the Debt of the Goods of the Teſtator, and the damages of the Goods of the Teſtator *ſique fuerint*, and if not of the Goods of the Executor. Upon which, A. procured a *Fieri facias* directed to the Sheriff of N, who made his Warrant to the Defendant, to execute his Writ. And before Execution, J. P. dyed Inteſtate, and Adminiſtration was committed to the Plaintiff, and the Defendants afterwards did Execution of the proper Goods of J. P. and ſold them, and delivered the money to the Sheriff; and averred, That E. P. had no other goods. The Plaintiff Replyed, That the Sheriff upon the Retorn of the Writ of Execution, retorned as to the principal debt, That the goods of the Teſtator were waſted; and as to the damages, that he could not execute the Writ, *quia tardè*: In this Caſe it was holden, That the falſe retorn of the Sheriff, ſhould not prejudice the Defendants. And at another day it was holden, That the Averment, that the Goods, put in Execution, were the goods of the Teſtator the day of the Writ of Execution ſued, was a good Averment, without ſaying, The day of the Execution done; for the Award of the

Writ

Writ of Execution ſhall bind all his Goods againſt whom the Judgment was given, which he had at the day of the Writ of Execution awarded. And it was holden in this Caſe, That, notwithſtanding the death of the party againſt whom, the Sheriff might do Execution of the goods of the dead in the hands of his Executors: And afterwards Judgment was given againſt the Plaintiff. Trin. 31 Eliz. in B. R. *Park.* and *Moſſe* and *Howes* Caſe. *Leon.* 144, 145.

15. In an *Ejectione Firme*, Judgment was given for the Plaintiff: And upon *Habere facias Poſſeſſionem*, the Sheriff retorned, That in the Execution of the ſaid Writ, he took the party with him, and came to the houſe, recovered, and removed thereout a Woman and two Children, which were all the perſons, which, upon diligent ſearch, he could find in the houſe, and delivered to the Plaintiff peaceable poſſeſſion, to his thinking, and afterwards he departed, and immediately 3. other perſons which were ſecretly lodged in the houſe, expelled the Plaintiff again: Upon Notice of which, he returned to the houſe, to put the Plaintiff in full poſſeſſion; but the other did reſiſt him, ſo as without perill of his life, and of them that were with him, he could not do it: Upon this Retorn, the Court awarded a new Writ of Execution; for that the ſame was no Execution of the firſt Writ: and alſo awarded an Attachment againſt the parties. Trin. 31 Eliz. in B. R. *upton* and *Wells* Caſe. *Leon.* 145.

16. *Scire facias* in Chancery. Upon a Recognizance by one C; the Defendant was retorned dead; Whereupon a ſecond *Scire facias* iſſued againſt the Heir of C, and againſt the Terr-Tenants of the Lands of C. which he had *tempore Recognitionis, vel poſtea*: Whereupon the Sheriff retorned the Defendant Terr-Tenant of ſuch Lands, and omitted to retorn any thing concerning the Heir; Upon which, the Defendant pleaded, That the ſaid C. had nothing in the Lands at the time of the ſaid Recognizance, or after. Upon this, being at Iſſue in Chancery, and ſent in B. R. to be tryed; It was found for the Plaintiff, That C. dyed ſeiſed, and a Verdict for the Plaintiff. It was the Opinion of 3. of the Juſtices, That the Retorn was not good, becauſe the Plaintiff names and ſet forth, That there is an Heir, and there is no Retorn *quoad* the Heir, ſo as to him it is *Pur ſi album breve*, and no Retorn; and it is not aided by any the Statutes of Jeofails. But *Crook*, Juſtice, conceived, The Defendant ſhould not take advantage thereof; for having pleaded, and the Iſſue being found againſt him, he ſhall not now take advantage for not retorning the Heir to be ſummoned; for it may be that there is not an Heir, or that the Heir hath no Land, or may not be found. Wherefore *ad informandum Curiam*, Whether there was an Heir, a new *Scire facias* was awarded: Upon the Retorn of which, It was agreed by the whole Court, That although the Retorn had been better, if it had been found who was Heir, and that he was warned, or that there was not any Heir in the Country; yet it was well enough: For anciently, the *Scire facias* was only againſt the Terr-Tenant, and the Heir was not charged in the *Scire facias* but as Terr-Tenant: and if the Retorn be not good or formal, yet it is aided by the Statute of Jeofails; and the Miſ-retorn or inſufficient Retorn of the Sheriff alſo, *quoad* the Heir, (becauſe he is not named in the Retorn) is but a diſcontinuance, which is aided by the Statute of Jeofails. Wherefore the Court ſaid, There was no Cauſe to ſtay the Judgment. It was adjudged for the Plaintiff. Trin. 7 Car. in B. R. *Eyres* and *Tauſtons* Caſe, *Cro.* 1. Part, 215, and 228.

17. In an *Ejectione Firme*, it was found, That J. S. Tenant in tail of Lands, was bound in a Recognizance in the nature of a Statute Staple, to W. B. who, 21 Jac. made *Eliz. T.* his Executrix, and dyed: 1. July, 1 Car. The Executrix proved the Will; and 9. July, 1 Car. ſued out an *Extendi facias* retornable in Chancery, *Oct. Mich.* That before the Retorn of the Writ, viz. 17. Aug. 1 Car. *Eliz.* the Executrix dyed; and that, 22. Sept, 1 Car. the Sheriff *virtute Brevis*, took an Inquiſition, by which it was found, That the ſaid J. S. was ſeiſed in Fee to him and the Heirs males of his body, of the Land in queſtion at the time of the Recognizance, of the value of 14 l. 4 s. 10 d. and at the day retorned this Inquiſition into the Chancery: They find, that 19. Aug. 1 Car. Adminiſtration of the Goods of W. B. not adminiſtred by *Eliz. T.* (who dyed Inteſtate) was committed to R. T. Adminiſtrator; which was retorned, That 2. *Junii*, 2 Car. the Sheriff delivered the ſaid Lands to the Adminiſtrator *Tenendum* according to the ſaid Extent, whereby he entred, and was ſeiſed, &c. And that the ſaid J. S. entred, and let to the Plaintiff, whereby he entred, and was poſſeſſed, untill the ſaid R. T. the Adminiſtrator *oſted* him, &c. It was the Opinion of the Juſtices in this Caſe, 1. That his *Extent* and *Liberate* were void; for the *Extent* being ſued by the Executrix upon the Statute made to her Teſtator, and ſhe dying before the Inquiſition taken; The Inquiſition taken after the death of her that ſued it was void: For the Writ is, to apprize and ſeize into the Kings hand, *ut ea Liberari faciamus* to the Executrix; and ſhe being before the Inquiſition was taken, the Inquiſition taken after and retorned, is void. See 36 H. 6.

P.

Pr. Statute Merchant, 43. 2. If the Extent be not void, yet the *Liberate* is not well executed, to deliver it to the Adminiſtrator: For the Executrix ſuing it as Executrix to W. B. the Teſtator, and ſhe dying Inteſtate, this Writ is ſued by the Adminiſtrator, who comes paramount her, and claiming immediately from the firſt Inteſtate, cannot, upon this Extent ſued by the Executrix, have the *Liberate*; but ought to begin *de novo*, and to procure a new Certificate, and a new *Extent* and *Liberate*. Trin. 11 Car. in B. R. *Clive* and *Veers* Caſe. *Cro.* 1. Part, 325, 329.

18. A *Venire facias* was awarded to the Coroners, whereas it ought to have been awarded to the Sheriff, and ſo the Jurors were retorned by one who had not authority. It was adjudged an inſufficient Tryal, and not remedied by the Statutes of 32 H. 8. or 18 Eliz. of *Jeofails*. But if the *Venire facias* had been awarded *ex aſſenſu partium*, then it had been good; for that *aſſenſus tollit Errores*. *Goodwyne* and *Franklins* Caſe, vouched in *Cook* 5. Part, in *Boysbams* Caſe, 37.

19. In Debt after Verdict, it was ſhewed to the Court, That *Robert Moore* was retorned upon the *Scire facias*, and ſo named in the *Diſtringas*; but in the Pannell before the Juſtices of the *Niſi Prius*, he was named *Robert Moriee*, and ſo upon the *Poſtea*: It was Reſolved, If it may appear upon the Examination, that his right name was *Robert Moore*, ſo as he is well named in the *Venire facias*; and alſo that he was the ſame man that was retorned & ſworn; that in ſuch caſe, the *Poſtea* ſhould be amended. Mich. 35 Eliz. in B. R. *Cook* 5. Part, 41, 42. The Counteſſe of *Rutlands* Caſe.

20. In an *Ejectione Firmæ*, after Verdict, It was moved in Arreſt of Judgment, That upon the *Venire facias*, no Retorn was endorſed, nor any name of any Sheriff appeared upon the back of the Writ, *nec quod Executio patet in quodam Panello*, but a Panel of the Jurors with their Mainpernors, was annexed to the ſaid Writ. Alſo a *Tales* was awarded, and a Pannell annexed to the *Tales*, but no Retorn of them, nor name of the Sheriff to it; but the *Poſtea* made mention, that they were retorned *per Mandatum Juſtic.* It was Reſolved, That the ſame would not ſerve; For the Sheriff ought to retorn the Jurours, and the *Tales* alſo; and where there is not any Retorn, the ſame is not remedied by the Statute of 18 Eliz. nor any other Statute. Mich. 36 Eliz. in B. R. *Cook* 5. Part, *Rowlands* Caſe.

21. Errour of a Judgment in *Carnarvan*: It was aſſigned, That 12 Jac. a *Venire facias* was retorned in this manner, *Per Thomam Revenſcroft Vicecomitem*: *Iſtud Breve cum panello mihi deliberata fuit, per Tho. Hanmer Militem, nuper vicecomit. in exitu ab Officio ſuo; et ſic indorſatur; Thomas Hanmer Miles, nuper Vicecomes.* It was Objected, That it was retorned by one who had not authority, and ſo was as no Retorn; or as if it had been retorned a Blank. But the Court held: That it was good enough: For it appears by the Retorn, That he was Sheriff next before *Tho. Revenſcroft*: For the Plaintiff at the Aſſizes, in *July* before, put in his Challenge, That *Tho. Hanmer* then Sheriff, was Coſen to him; and ſhewed how: and therefore prayed a *Venire facias* to the Coroners, and the Defendant denyed the Couſinage: Whereupon a *Venire facias* was awarded to the Sheriff. And then when, *in exitu Officii*, he delivered that Writ, Retorned *Tho. Hanmer, Miles*, it is ſufficient to ſatisfie the Statute: For he need not alledg his name of Office. Now the Statute appoints, That he who retorns, ſhall add his name to the Retorn; which is ſufficient, if it be his Chriſtian and Sirname; and his name of Office is not requiſite: and then the word, *Nuper Vicecomes*, ſhall not make the Retorn void: And the word, *Nuper vicecomes*, doth neceſſarily imply, that he was not then Sheriff at the time of the delivery of the Writ to the new Sheriff: *Whitlock*, Juſtice, doubted of it; therefore *Curia aviſare vult*. Paſch. 6 Car. in B. R. *Bethell* and *Parry's* Caſe, *Cro.* 1. Part, 136, 137, 412, acc.

22. In a *Scire facias* to have Execution of a Recognizance; The Caſe was, a ſpecial *Supplicavit* for the Peace was directed out of the Chancery to A. and B. Juſtices of the Peace, and to the Sheriff of the County of &c. to take a Recognizance of L. M. and N. for the Peace and good Behaviour; And the Commiſſion was to A. B. and the Sheriff, *& cuilibet eorum*: The *Supplicavit* was delivered to the two Juſtices, who took a Recognizance from L. but M. and N. could not be found; The Sheriff was afterwards out of his Office, the new Sheriff made a Retorn, That M. and N. *non ſunt inventi in Balliva mea*; and alſo Retorned, That A. and B. had taken a Recognizance of L. as appeareth *per quandam ſchedulam huic annex. in hac verba*: The Queſtions in this Caſe were. 1. Whether the Sheriff (as this Caſe is) may only make the Retorn? 2. Admitting that he cannot, but the ſame being Retorned, and the Chancery accepting of it, and ſending it to this Court, Whether we cannot damn the Record. It was the Opinion of the Juſtices, That this is a ſpecial Recognizance, grounded upon the grievance of the party, and by the Kings Commiſſion, they are made ſpecial Judges in this Caſe; and when the party, who ſues the ſame, delivers it to the two Juſtices, the

Sheriff

Sheriff cannot intermeddle therewith, for then the Juſtices ought to Retorn the Recognizance by vertue of that Commiſſion, and they to whom the Writ is firſt directed, they are only to execute it, and Retorn it. And as to the ſecond point, although the Record is in the Chancery, and the party hath pleaded to it, yet we cannot accept of it here, if it have not due proceedings, and if the Record come not in duly, then the Court is never ſeized of the Record: *Ley* Chief Juſtice, was of Opinion contrary to the other Juſtices, wherefore the Caſe was adjourned, Trin. 21 Jac. in B. R. *Leonards* Caſe. *Godbolt*, 355, 356.

23. A Writ of Partition was brought upon the Statute of 32 H. 8. The Defendant confeſſed the Partition, and a Writ awarded to the Sheriff, *quod fiat partitio*; The Sheriff Retorned the Partition made by 12 men; One of the parties did ſuggeſt an unequality in the Partition, and prayed a new Writ. In 6 E. 6. *Dyer*, 73. It is a Quære, if it ſhall be granted: But ſee *Cook* 1. Part, *Inſtitutes*, 171. that Quære Reſolved, and that the Partition ſhall ſtand good, being made by Writ.

24. A Writ of falſe Judgment was brought in the Common Pleas, upon a Judgment given in ancient Demeſne, in a Writ of Right Cloſe, there proſecuted in the nature of a Writ of *Aiel*; and divers Errors were aſſigned, and amongſt others, 1. That there was no Officer named in the Award, or Retorn of the Summons. 2. No day is fixed to the Tenant in the Summons. 3. No names of the Summoners were Retorned. The Court upon examination of theſe and other Errors, awarded that the Judgment ſhould be Reverſed, and the party reſtored, but without Coſts or Damages, Trin. 9 Eliz. *Dyer*, 262.

25. Note, It was holden *per Curiam*, That although a man cannot aver contrary to that which is Retorned by the Sheriff; yet he may ſay, That he who hath Endorſed his Name on the back of the Writ Retorned, was not Sheriff; becauſe that by the Common Law, until the Statute of E. 2. no Sheriff nor Officer uſed to put their names to the Returns; and therefore, the averment, that he who made the Retorn was not true Officer, is not taken away by any Statute, but the ſame remains as a thing at the Common Law. Paſch. 1 Jac. in B. R. in *Arundel* and *Arundels* Caſe. *Yelverton*, 33, 34.

26. A man had Judgment in the Kings Bench in an Action upon the Caſe; and upon a Writ of Enquiry upon Damages to the Sheriff of N. the Writ was, *Præceptum eſt Vicecom. quod per Sacrament. 12 bonorum & legalium hominum de Baliva ſua diligenter inquirat, quæ damna &c.* The Sheriff retorned, *Quod mandavit J. S. Balivo Libertatis J. D. Militis Hundred. de B. cui executio præſ. Brevis totaliter reſtat ſiendo, & quod alias infra Com. prædict. fieri non potuit. Qui quidem Baliva ſic ſibi reſpondit*; and ſets down an Inquiſition before the Bayliff, &c. Upon Error brought in the Exchequer Chamber, It was Reſolved by all the Judges, That the Retorn was inſufficient for it was apparently untrue, and againſt Law, becauſe the Warrant was directed to the Sheriff himſelf, to be executed in any part of his Shire, and no Venue is contained in this Inqueſt of Office, as there is in other Writs to entitle Bayliffs of Liberties. Trin. 12 Jac. in the Exchequer Chamber, *Vavaſy* and *Gouſtones* Caſe. *Hob.* 83.

27. Debt for 523 l. 17 s. againſt the Sheriff of S. and declared, That P. and others were bound in a Recognizance of 1000 l. to the Plaintiff, and that after Judgment, he ſued a *Levari facias* to the Defendant, which he delivered to him; whereupon the Defendant levyed the ſum, and at the day, Retorned *Quod paratus habeo*, and yet did not deliver it in Court, *per quod &c.* The Defendant *quoad* 308 l. pleaded *Nihil debet*; and to the reſt, that before the Retorn, he did pay to the Plaintiff the ſame ſum; whereupon the Plaintiff by his Acquittance, reciting that he had received it, did acquit him, upon which the Defendant did demur in Law. There were divers Queſtions in this Caſe, 1. Whether Debt would lye, becauſe there is no Contract betwixt the Plaintiff and the Sheriff? It was (as to that) Reſolved by the Court, That it would lye; for although there be no Action of Contract, yet there is a kind of Contract in Law; for when the money is levyed by the Sheriff, the Action ceaſeth againſt the Defendant, and the Action is *ipſo facto* tranſferred to the Sheriff, having both the Judgment to make it a debt, and the Levie to make him anſwerable. 2. It was holden, That the Defendants Plea to the 308 l. *Nihil debet*, was not good, becauſe it was contrary to the Retorn of Record. 3. Reſolved, That ſince the Defendant by his Retorn had charged himſelf with the whole money (*paratus habeo*) then to be delivered to the Plaintiff, he cannot now ſay, that it was paid and acquitted before. Trin. 15 Jac. in C. B. *Spark* and *Richards* Caſe. *Hob.* 206.

28. A. brought a Writ of Error againſt F. ſon and heir of F. P. upon Judgment had againſt him in a Writ of Waſte, at the ſuit of the ſaid J. P. and alſo of an Outlawry thereupon had againſt him for the ſame cauſe, and aſſigned two Errors. 1. Becauſe the Sheriff took the Enqueſt in the Town, and not upon the Land, according to the Statute. 2. Becauſe the Sheriff made a Precept to one Baylie to ſummon the Jury, who Retorned a pannel, which was Retorned as parcel of the Re-

cord,

ered, and the Sheriff took the Enquest by some who were not Returned by the Baylie. To the first it was said, That if the Sheriff cause the Jury to view the Waste, he may take the Enquest at another place. As to the second, it was said, That the Sheriff may vary from the Retorn of the Baylie; for the Sheriff himself is the person who makes the Array, who is also a Judge in this Case. *Gascoigne* said, That if the Sheriff had not made the Precept, and the Retorn by the Bayly had not been made parcel of the Record, it had been so; but he hath sent this Retorn as parcel of the Record, whereby he affirmeth the Retorn of the Baylie; and if he had Process against the Jury by *Habeas Corpora*, and had taken the Enquest by others, it had been Error, which was granted. It was the better Opinion the Retorn was not good. See 11 *A.* 4. 6. *Cook* 8. Part, 152. in *Edward Altham's* Case.

29. A *Capias* was directed to the Sheriff of *London*, to take the body of J. S. the Writ was Returnable *die Jovis*, which was *All Souls* day, and thereupon the Sheriff took the party, but he Returned, because that the Writ was Returnable upon a day that was not *dies Juridicus*, he suffered the party to go: It was holden by the Court, That the Retorn was insufficient; for the Writ was good, and the detaining of the party by vertue thereof was lawful, but yet he could not have the party there at the said day, wherefore the Sheriff was compelled to bring the party into Court, which after so he did accordingly. Mich. 2 Car. in B. R. *Pasch.* 205.

30. *Webb* was amerced at a Justice Seat in the Forrest, for putting his sheep there to pasture; he justified the doing of the same; for which his contempt he was fined; which fine being demanded of him, he refused to pay; for which he was committed to prison: He brought an *Habeas Corpus*: Upon which Returned, the matter appeared as before. Exceptions were taken to the Retorn. 1. Because it did not appear before whom the Justice Seat was held, as it ought to be by the Law of the Forrest. 2. Because it appeared not by the Retorn that this was an Offence within the Forrest. It was agreed by the Court, 1. That a man cannot have Common of Pasture for sheep, by the Forrest Law, unless it be by Prescription; and as to the Justice Seat, it is not material before whom it is held, if it be *infra les bounders del Forrest*, as *Cook* Chief Justice said. It was then prayed, That the party might be Bayled; which the Court would not do, but advise upon it; for if the Imprisonment be lawful, he is not Baylable; and he that justifies a wrong by Law, ought to have punishment for it: He was remanded to prison. Trin. 14 Jac. in B. R. *Webb's* Case. *Bulstr.* 3. Part, 213.

31. Doctor *Alphonso* being committed by the Colledge of Physitians in *London*, for practising of Physick, he had an *Habeas Corpus*, and was brought to the Bar, and thereupon the Retorn was read; upon the reading of which, it appeared to the Court, That the Retorn was insufficient; for no cause was therein shewed of his Commitment; and therefore the Court held it clearly to be insufficient. Then it was prayed on the behalf of the Colledge, that they might amend their Retorn: The Court answered, matter of form meerly in a Retorn, is amendable, but not matter of fact, which goes to the Justification of the Imprisonment; wherefore by the Rule of the Court, the Doctor was Bayled till the next Term, the Court conceiving it best for him; for if the Court should discharge him for the insufficiency of the Retorn, they would presently take him again, and commit him, and then amend their Retorn, and make it better; wherefore he was Bayled, and not absolutely discharged of his Imprisonment. Pasch. 12 Jac. in B. R. Dr *Alphonso* and the Colledge of Physicians in *London's* Case. *Bulstrod.* 2. Part, 259.

32. Upon a *Capias utlegatum* before Judgment, the Sheriff Returned, That J. S. and J. N. Rescoused the party: It was moved, That the Retorn was not good, for that there ought to be additions: But the Opinion of the Court was, That the Retorn was good without additions; for that no Statute nor Book doth compel the Sheriff to give additions in such case; and it was said, That if the Sheriff in this case Retorn, that the party himself *simul cum J. S. & J. N.* made the Rescous, that this is no good Retorn. In the Principal Case, the Rescouſſors being present in Court, were committed to the Fleet. Pasch. 19 Jac. in C. B. *Homes* and *Halls* Case. *Winch.* 10.

33. *Quare Impedit* against the Bishop of R. who pleaded, That he claimed nothing but as Ordinary; yet further pleaded, That the Clerk which the Plaintiff Presented, had before Contracted with the Plaintiff Symoniacally; and therefore, because he was *Symoniacus*, he refused him, and that the Church was then void, and so remained void; whereupon the Plaintiff had a Writ to the Archbishop of *Canterbury*, who Retorned, That before the coming of this Writ, the Church was full of one Dr G. *ex Collatione* of the said Bishop of R. which had collated by Lapse. It was holden by the Court, That this Retorn was insufficient, for that it is clear, That although the six moneths pass, yet if the Patron Present, the Bishop ought to admit, although it be after the Title devolved to the Metropolitan; and so it is, although the Title by Lapse accrued to the King as Supreme Ordinary: And in this Case, the Bishop (who is the Defendant) is bound by the Judgment, and the Writ is

notwithſtanding the claim of the Biſhop, that he admit the Clerk, and the Biſhop is but as a ſervant, and ought to execute the Proceſs of the Court. Trin. 16 Jac. in C. B. *Boston* and the Biſhop of *Rocheſters* Caſe. *Hutton* 24.

34. Error brought to Reverſe a Judgment in the Palace Court at *Weſtminſter*, in an Action upon the Caſe: Two Errors were aſſigned, 1. That it is not ſhewed in the Declaration, That it was *infra juriſdictionem Pallatii*. 2. That there was not 15 days for the Retorn of the *Venire facias*, as there ought to be. Both Errors were over-ruled by the Court: For the firſt, It is good enough, becauſe the Court is alledged to be held by Letters Patents. And for the ſecond, The Court being holden by Letters Patents, the *Venire* may be Retorned within the 15 days, though by the uſual courſe of the Common Law it cannot be ſo. Trin. 23 Car. B. R. *Moreſield* and *Webbs* Caſe. *Styles*, 39, & 40.

35. A Proclamation was directed to the Sheriff of *Cheſhire*, againſt J. H. and the Writ was Retorned, *Tali die ad Comitatum meum Tenement. in le Shirhall*, &c. *Proclamationem feci, ac eodem die ad generalem Seſſionem*, &c. *Proclamationem feci*; and this matter was pleaded in avoydance of an Outlawry, to Reverſe it; becauſe theſe Proclamations were made one day, whereas the Writ was, *Tribus ſpecialibus diebus*, &c. It was holden by the Court to be an ill Retorn, and the Sheriff was amerced for it. Mich. 31 Eliz. in C. B. *Goldsb.* 111.

36. The Sheriff of a County made a Warrant *Balivis ſuis*, to arreſt the body of ſuch a man, and the Bayliffs of the Liberty Retorned a Reſcous: Exception was taken to it, becauſe it was *Balivis ſuis*, and the Retorn was made by thoſe who were not his Bayliffs: But it was adjudged, That the Retorn was good, for that the Liberty might be within his Bayliwick. Paſch. 15 Car. in B. R. *Maſſo*, 25.

See more of the *Retorn of the Sheriff*, in *Lib.* 1. Title *Amendments*, and in other Titles.

Retraxit.

1. *Retraxit* is, when the Plaintiff or Demandant cometh in proper perſon into the Court where his Plea is; and ſaith, that he will not proceed further in the ſame Plea; this is a bar to that Action for ever.

2. A. brought a *Quo minus* in the Exchequer againſt B. It was found for the Plaintiff, and for default of a good Venue, the Judgment was ſtayed. Afterwards, A. by his Attorney entred a *Retraxit*, ſcil. *Fatetur ſe in Curia ſic ulterius nolle proſequi*; Upon which Judgment was given for the Defendant, *Quod eat ſine die*; but the Plaintiff was not amerced; Afterwards, A. brought a Writ of Error, and the Judgment was reverſed: And in that Caſe (amongſt other things) it was Reſolved, 1. That a *Retraxit* cannot be, unleſs the Demandant or Plaintiff be in Court in proper perſon; and it cannot be by an Attorney, becauſe a *Retraxit* is a perpetual Bar, and in the manner as a Releaſe: And Note, a *Retraxit* is alwayes on the part of the Plaintiff or Demandant, and a Departure in Court is alwayes on the part of the Defendant. 2. It was Reſolved, That in the Principal Caſe, the Plaintiff ought to have been amerced; for a *Retraxit* is a voluntary acknowledgment, that he hath not any cauſe of Action, and is a good Bar for ever; and becauſe the Plaintiff was not amerced, therefore it was Reſolved, That it was Error. 3. It was Reſolved, That if the Tenant do diſclaim, he ſhall not have a Writ of Error againſt his Diſclaimer; for by his Diſclaimer, he hath barred himſelf to have any right in the Land; and he cannot have Error, to have Reſtitution of the Land againſt his own Diſclaimer: But it was Reſolved in the Principal Caſe, That although that the Plaintiff had made a *Retraxit* in his own proper perſon, yet he might have a Writ of Error, either in the Judgment, or in the proceedings; for no Impereſection is ſaved in ſuch Caſe by any Statute, when Judgment is given in a *Retraxit*: And Note, The Entry of a *Retraxit* is in this manner, viz. *Quod Querens in propria perſona ſua venit, & dicit quod ipſe placitum ſuum predict. verſus predict. defendentem ulterius proſequi non vult, ſed inde omino ſe Retraxit.* *Coke* 8. Part, 58. *Beecher's* Caſe.

3. Debt upon an Obligation; the Defendant pleaded, That the Plaintiff himſelf in the Court of

of P. (being a Court of Record) had brought debt upon the ſame Obligation againſt J. P. *jun.* wherein J. P. *ſen.* and J. P. jun. were joyntly and ſeverally bounden, for the payment of 40 l. After a Plea pleaded, the Plaintiff entred a *Retraxit*, and he avered, that it was the ſame Obligation, and that the ſaid J. P. jun. named in the Bond, and the ſaid J. P. againſt whom the *Retraxit* was, is one and the ſame perſon, and demanded Judgment, if againſt this *Retraxit* he ought to ſue; upon which it was demurred: It was argued, That this *Retraxit* was in nature of a Releaſe, and that the diſcharge of the one, was the diſcharge of the other. The Court was divided in Opinion; *Crake* Juſtice held, That it was neither a Releaſe in *facto*, nor in Law, but *quaſi* an Agreement, that he would not further proſecute. *Barkley* Juſtice held it was a good Bar, for it is a Bond joynt and ſeveral, and one of them being diſcharged, it cannot now be a joynt-Bond; wherefore the diſcharge *quoad* the one, is alſo a diſcharge *quoad* the other: There being no other Juſtices in Court, and the Court thus divided in Opinion, the Caſe was adjourned. Hill. 14 Car. in B. R. Rott. 680. *Dennis* and *Paines* Caſe. *Cro.* 1. Part, 396, 397.

Revive, and *Reviver*.

Where a thing once ſuſpended, or extinguiſhed ſhall be ſaid again to be revived, and where not.

1. *Cranmer*, Archbiſhop of *Canterbury*, made a Leaſe for years of parcel of the Manor of P. Afterwards, he granted a Rent-charge out of the ſaid Manor to Dr *Butts* for term of years: Dr *Butts* by his Will deviſed that the ſaid Archbiſhop ſhould have ſo much of the ſaid Rent, with the Arrearages thereof, as ſhould amount to 100 l. and if he dyed, or left his Biſhoprick, that the reſidue of the ſaid Rent ſhould remain to *E. Butts* his Nephew, to whom he gave and deviſed all his eſtate and intereſt in the ſaid Rent: *E. Butts* after the 100 l. levyed by the Archbiſhop by way of Retainer, diſtreined for the Rent, and made Avowry. It was holden in this Caſe, That admitting the Legacy and Aſſignment was good, yet the Avowry was not maintenable, for that the Rent and annuity was ſuſpended by the Gift and Legacy of the 100 l. to the Archbiſhop, whoſe perſon was chargeable to it, as well as the Land; and a thing perſonal ſuſpended, or an action perſonal ſuſpended, is gone for ever, eſpecially when it is by the act or conſent of the party himſelf, who hath the thing ſuſpended, and eſpecially of a thing againſt common Right, as this is; As if a Woman Obligee, or Obligor, marrieth with the party, and afterwards they are Divorced *cauſa precontractus*, yet the debt is extinct: But when it is by the Act of the Law, it is otherwiſe: As where a man condemned in Rediſſeiſin, was impriſoned by Outlawry of Felony, and afterwards pardoned, the execution of his body was (for the time he was Priſoner to the King) ſuſpended; but after the pardon granted, it was revived. Hill. 4 Mar. *Dyer*, 140. *Cranmers* Caſe.

2. *Trewynnard*, a Burgeſs of Parliament, was taken upon an Exigent after a *Capias*; and afterwards upon a Writ of Priviledge of Parliament, he was ſet at liberty. It was holden in this Caſe (amongſt other things) That after the Parliament was ended, he might be taken in Execution again; for that the Plaintiff ſhould not be prejudiced of his Execution by the Act of Law, which doth not wrong to any man. Paſch. 28 H. 8. *Dyer* 60.

3. *Humfrey de Bohem*, Earl of *Eſſex*, held Manors of the King by ſervice, to be Conſtable of *England*; he had Iſſue two daughters, and dyed; the daughters took husbands, and the husband of the youngeſt was made King; they made partition. It was Reſolved by the Juſtices, That they ſhould have continuance in the other; for otherwiſe they ſhould have the two Manors without doing any ſervice for them: And it was holden in this Caſe, That if the father held of one of his two daughters, and dyed ſeized, and they make partition, if the Service be an entire Service, as Homage, &c. that the whole Service is revived. Trin. 11 Eliz. *Dyer*, 285. *Humfrey de Bohems* Caſe.

4. Two men were ſeized of two Cloſes adjoyning; one of them was bound by Preſcription to make the Incloſure, and he purchaſed the other Cloſe, ſo as there was an unity of poſſeſſion in him, and he ſuffered the Cloſes to lye open, unfenced, and had Iſſue two daughters, and dyed; they made partition of both Cloſes, and the one was allotted to one Siſter, and the other to the other, without making mention who ſhould make the Fence; and if the charge ſhould ſurvive, or was

extinguiſhed, was a Quære in Mich. 13 Eliz. *Dyer*. It hath been ſince Reſolved, That in ſuch Caſe, the charge of making the Fence ſhould be revived, and ſhould charge that daughter who had that Cloſe. See *Dyer*, 295.

5. This Caſe was moved to the Court of Kings-Bench, If an Abbot hath a Parſonage which is appropriate in D, which is diſcharged of payment of Tythes; and afterwards the Abbot purchaſeth part of the Lands in the ſame Town and Pariſh where the Parſonage is. It was ſaid, That this Land ſo purchaſed, is diſcharged of Tythes in the hands of the Abbot; for the Tythes were ſuſpended during the poſſeſſion of the Abbot, in the hands of the Abbot. But after that, the Abby was ſurrendred into the Kings hands, *Anno* 30 H. 8. and afterwards the ſame poſſeſſions were given to King *Henry* 8. by the Statute of 31 H 8. Cap. 13. as they were in the hands of the Abbot. The Queſtion now was, Whether the Land ſo purchaſed by the Abbot before the Surrender, were diſcharged of payment of Tythes by the Statute, or not? It was the Opinion of Mr. *Plowden*, That they were not diſcharged of Tythes by the Statute; For that no Lands are diſcharged by the Statute, but ſuch Lands as were lawfully diſcharged in right by Compoſition or other lawfull thing; and the Lands in this caſe were not diſcharged in right, but ſuſpended during the poſſeſſion of the Abbot in his own hands: And ſo he ſaid it is, When the Land is purchaſed by one, and the Parſonage by another, the right of Tythes is revived, and the Lands charged as before the purchaſe of the Abbot. And ſo he ſaid it had been adjudged. Mich. 17 Eliz. in B. R. *Godbolt*, 1. See *Cook* 11. Part, *Pridle* and *Nappers* Caſe, acc.

6. A man makes a Leaſe for life, and after makes a Leaſe to another for years, to begin after the death of Tenant for life; the Leſſee for years dyeth Inteſtate; The Ordinary commits Adminiſtration: The Adminiſtrator and the Tenant for life joyn in a purchaſe of the Fee: There were two Queſtions moved in this Caſe, 1. Whether the Fee were executed in the Tenant for life, for any part? 2. Whether the Term were gone in part, or in all? It was the Opinion of the Juſtices, That the Fee was executed for a moyety. *Manwood*, Juſtice, held, If Lands be given to one for life, the remainder for years, the remainder to the firſt Tenant for life in Fee, there the Fee is executed; ſo as if he loſe by default, he ſhall have a Writ of Right, and not a *Quod ei Deforceat*; for the Term is no impediment that the Fee is not executed: And in the principal Caſe he ſaid, That the Term ſhould not be extinct; for it is not a Term, but *inter eſſe termini*, which cannot be granted nor ſurrendred. *Mounſon*, Juſtice, held, That if he had had the Term in his own right, then by the purchaſe of the Fee, the Term ſhould have been extinguiſhed; but here he hath it in the right of another as Adminiſtrator. *Dyer*, If a woman hath a Term, and takes a husband, who purchaſeth the Fee, the Term is extinct. *Manwood*, The Law may be ſo in ſuch caſe, becauſe the Husband hath done an Act which deſtroyes the Term by the purchaſe. But if the Husband had entermarried with him in the Reverſion, there the Term ſhould not be extinguiſhed; for that the Husband hath not done any act to deſtroy the Term, but the Marriage is the Act of Law. *Dyer* ſaid, That was ſome colour, but was of Opinion, That in the principal caſe, they were Tenants in Common of the Fee. Paſch. 17 Eliz. in C.B. *Godbolt* 2.

7. If a Parſon purchaſe a Manor within his Pariſh, by this purchaſe and unity of poſſeſſion, the Manor which was before Tythable, is now made *Non Decimabiles*, becauſe he cannot pay Tythes to himſelf: But if the Parſon maketh a Leaſe of his Parſonage and Rectory to a ſtranger, now the Parſon himſelf ſhall pay Tythes of his Manor to the Leſſee of the Rectory: And if the Parſon maketh a Feoffment of the Manor, the Feoffee ſhall pay Tythes to the Feoffor the Parſon, becauſe Tythes cannot be extinct by any unity of poſſeſſion, as a Rent-Charge may be, which is a thing iſſued out of Land; but Tythes are due by the Law of God *ex debito*, by the Manurance and Tillage of the Occupier of the Lands, into whoſe hands ſoever the Lands come, if they come not into the hands of the Parſon himſelf. But if the Parſon let his Land which is his Glebe, rendring Rent; Quære, If in ſuch caſe, the Leſſee ſhall pay Tythes. Mich. 30 H. 8. *Dyer*, 43. See *Cook* 2. Part, in the Biſhop of *Canterburies* Caſe. *Cook* 1. Part, *Albanies* Caſe, 32 H. 8. *Br. Diſmes*, 17. plt. 178.

8. The King, Lord; Abbot, Meſne; and C. Tenant of the Manor of D. The Tenant is Attainted of Treaſon; and after Office found, the King by his Letters Patents grants over the Manor to B. and his Heirs, *Tenendum de nobis hered. et ſucc. noſtris et aliis Capitalibus Dominis feodi illius per ſervitia inde debita, et de jure conſueta.* It was Objected in this Caſe, That the Tenure ſhould be of the King, becauſe by the Attainder the Mealty was extinct; and alſo becauſe there is an expreſs Tenure reſerved to the King; and therefore the words *de aliis capitalibus*, ſhall be void.

void. But it was Reſolved, That the words were ſufficient to create a Tenure in the Meſne, for ſo was the intent of the King, That the Meſne which did not offend ſhould not loſe his Services. And it was ſaid, That this Caſe differed from the Caſe in 27 H. 8. tit. *Parliament* 77. for in that Caſe there was not any words of gift or reviving, but in this Caſe, the Grant of the King ſhould amount in Judgment of Law, to the reviving of the Ancient Seignory. 2. It was Reſolved, That the Tenure ſhould be of the Meſne immediately, and of the King as Lord paramount, as it was before the Attainder. *Cook* 6. Part, 6. Sir *John Molins* Caſe. See *Cook* 9. Part, 131. acc.

9. The Queen Granted a Copyhold in Fee, and afterwards granted the Inheritance of the Copyhold to a ſtranger. The Copyholder deviſed the Copyhold to M. and afterwards ſurrendred to this uſe of his Will. It was Reſolved in this Caſe. 1. That the Cuſtome had ſo eſtabliſhed the Eſtate of the Copyholder, that by ſeverance of the Inheritance of the Copyhold from the Mannor, the Copyhold was not deſtroyed. 2. Reſolved, That notwithſtanding the ſurrender and Deviſe, the Copyhold diſcended to the Heir; for after the ſeverance of the Inheritance from the Mannor, the ſurrender was utterly void, for the Land was not parcel of the Mannor at the time; and the Deviſe only cannot transform ſuch an Eſtate, but it ought to be by ſurrender into the hands of the Lord. *Cook* 4. Part, 24. *Martel* and *Smiths* Caſe.

See more of this Diviſion in the Title of *Extinguiſhment.*

2. *Where a Rent reſerved upon a Leaſe ſhall be revived by the Entry of the Leſſee upon the Feoffee; Where not.*

1. THE Caſe was, A man made a Leaſe for life of Lands, and afterwards let the ſame Land for years rendring Rent, the Term to begin after the death of the Leſſee for life: Afterwards the Tenant for life granted his Eſtate to his Leſſor, and the Leſſor during the life of the Leſſee for life, ſuffered a common Recovery: And afterwards the Tenant for Term of life dyed; And for Rent behind the Recoverors avowed. There was two points in the Caſe. 1. If the Rent was extinct by the Feoffment. 2. If the Recoverers might avow for the Rent within the Statute of 7 H. 8. cap. 4. It was objected, That if a man make a Leaſe for years, rendring Rent, and then enter and make a Feoffment, that although that the Termor re-enter, That the Rent is not revived, becauſe it was once extinct. But it was the Opinion of the Juſtices in this Caſe, That the Rent was not extinct, becauſe that in this Caſe the Rent was not in *eſſe* at the time of the Feoffment made, for it was not to be paid till after the death of the Leſſee for life. And they compared it to this Caſe, If I make a Leaſe for 40 years, reſerving 10 s. Rent at the end of 20 years, that after the 20 years, the Feoffee ſhall have the Rent. For the ſecond point, the Juſtices held, That it was out of the Statute of 7 H. 8. For the Statute is, That the Recoverers, their Heirs, or Aſſigns, may avow and juſtify for Rents and Services, or by them recovered, as thoſe perſons might againſt whom the Recovery was had, and in this Caſe, he againſt whom the Recovery was had, could not make any Avowry, and therefore it was out of the Statute. Hill. 28 H. 8. *Dyer*, 31.

2. A Leaſe was made for years, rendring Rent; the Leſſor made a Feoffment of the Land, the Termor being upon the Land; and the Termor held and occupied the Land. If the Feoffee ſhould have the Freehold and the Rent, was the Queſtion. It was ſaid, That if a Feoffment were made, the Termor agreeing to it, that the Rent was gone becauſe it was a ſurrender of his Term; but that was denyed. See 9 H. 6. there it is ſaid, That if the Leſſor make the Feoffment with the agreement

of

of the Leſſee, that then the Feoffee ſhall have the Rent. But in the principal Caſe, all the Juſtices agreed, That if the Leſſor ouſt the Termor *ſe in vita*, and maketh a Feoffment, although that the Termor re-enter, that the Rent is extinct, for the Land was diſcharged of the Rent in the hands of the Feoffor, and in the hands of the Feoffee, it ſhall not be revived; no more then if the Lord Diſſeiſe his Tenant, and maketh a Feoffment, although that the Leſſee re-entreth, the Feoffee ſhall not have the Seignory. *Keighly* Juſtice ſaid, That there was a difference betwixt the Caſes. For in the Caſe of the Lord, for whom he re-enters, he leaves nothing in the perſon of the Feoffee, but defeats all his Eſtate; but in the other Caſe, he leaveth the Reverſion, and the Freehold in the Feoffee. The Caſe was not Reſolved, *ſed Curia adviſare vult*. Paſc. 29 H. 8. *Dyer*, 33.

3. A Leaſe for years was made of a houſe called the *Greyhound* in *Fleetſtreet*, with dive ſimplements rendring Rent; the Leſſor entred, and made a Feoffment; and for Rent behind, the Feoffee brought an Action of Debt. It was adjudged to be maintainable, although there was no privity betwixt them. And there it was ſaid, That the Rent was not extinct, but only ſuſpended untill the Termor might by his regreſs revive the Reverſion. And in that Caſe it was holden, That there ſhould be no apportionment of the Rent, there being no Eviction, but the Rent ſhall follow the Reverſion of the Land, which is *magis dignum*, and not the Reverſion of the Chattells. Paſc. 4 Eliz. *Dyer*, 212.

See for this Diviſion. Sir *Moile Finches* Caſe. *Cook* 6. Part, 69, 70.

Revocation.

1. *What ſhall be a good Revocation of a Will; What of a former Deed, What not, and the power of it: And where Revocations ſhall be taken ſtrictly; When not.*

1. IN a Replevin, the Iſſue was, Whether the Land diſcended to *Ann W.* daughter of J. W. The Caſe was this, J. W. was ſeiſed of the Lands in Queſtion, and of other Lands, And by his laſt Will, deviſed all his Lands and Tenements to W. W. of *London* in Fee; and after and before his death, he made a Feoffment in Fee of the ſame Lands; and when he ſealed the Feoffment, he demanded, Will not this hurt my Will. It was anſwered, It would not. Then he ſaid, If this Will not hurt my Will, I will ſeal it, and then he ſealed it; and a Letter of Attorney to make Livery. And the Attorney made Livery, but not in the Land in Queſtion. The Teſtator dyed. It was Objected. That this Feoffment was a Revocation of the Will, and ſo the Deviſe void. For if the Teſtator had ſaid it ſhould not be his Will, it had bin a plain Revocation, and then the making of the Feoffment is as much as if he had ſaid, that the Will ſhall not ſtand. But it was the Opinion of the Court, That the mind of the Teſtator was, That this Will ſhould ſtand, and there is no Revocation in fact; for he ſaid, If this will not hurt my Will, I will Seal it; and although the Attorney made Livery in part; yet for the Lands in Queſtion, where no Livery was made, the Will ſhall ſtand, for a Will may be effectual for part, and for part it may be revoked. It was adjudged, That the Will ſtood good for that part. Mich. 28 Eliz. in C. B. *Gibſon* and *Platieffs* Caſe. *Goldesbr.* 32, 33. See *Godbolt*, 133. the ſame Caſe.

2. Note, by all the Juſtices, upon an Evidence to the Jury in an *Ejectione firmæ*, That if a man hath a Leaſe, and diſpoſeth of it by his Will, and afterwards ſurrenders it up, and takes a new Leaſe, and after dyeth, that the Deviſee ſhall not have this laſt Leaſe, becauſe this was a plain countermand of his Will. Trin. 30 Eliz. in C. B. *Aſhby* and

Lever

Lovers Caſe. *Goldesbr.* 93.

3. A Feme Sole was ſeiſed of Lands in Socage, and by her laſt Will deviſed them to J. S. in Fee, and afterwards ſhe did take the Deviſee to Husband, and during the Coverture ſhe countermanded her Will, ſaying, That her Husband ſhould not have the Land, nor any other advantage by her Will. It was adjudged upon great deliberation, That it was a countermand of the Will, the words being ſpoken after Marriage, for the making of a Will is but the Inception thereof, and it doth not take effect untill the death of the Deviſor. Mich. 31 Eliz. in C. B. *Goldesbr.* 109, 110. See *Cook* 4. Part, 61. *Forſe* and *Hemblings* Caſe, acc.

4. In an *Ejectione firme*, the Caſe was; A. ſeiſed of Lands in Fee, had Iſſue by ſeveral Women; F. his eldeſt Son, and W. his ſecond Son, and deviſed the Lands in Queſtion to F. his Son, to the uſe of him for life, and after to the uſe of the Heirs Males of his body, and after for want of ſuch Iſſue, to the uſe of T. and the Heirs Males of his body, and for default of ſuch Iſſue, to the uſe of his right Heirs, and afterwards he made a Leaſe of the ſame Land to W. his ſecond Son for 30 years, to begin after his death without other alteration of his Will. W. entred and ſurrendred his Leaſe of 30 years to F. who let the Land to the Defendant. Afterwards F. dyed without Iſſue, W. entred as Heir Male of the body, and made the Leaſe to the Plaintiff. Two Queſtions in this Caſe, If the Leaſe for 30 years to W. to begin after his death be a countermand and Revocation of that Deviſe totally, or only *quoad* the Term, and ſhall ſtand as to the Inheritance. It was Reſolved, That it was not any Revocation of the Inheritance, but only for the Term, for they both may ſtand together, and there ſhall not be any Revocation, unleſs it be expreſſed. The ſecond point was, Whether this Deviſe to F. and to the Heirs Males of his body, and for want of ſuch Iſſue, to the Heirs Males of the Deviſor, and the Heirs Males of their bodies, and for want of ſuch Iſſue, to the Heirs Males of the Deviſor, be a limitation in tail to the Heirs Males of the body of the Deviſor, ſo as W. may claim by this limitation an Eſtate in tail, or whether it veſted only in F. as Heir-Male of the Deviſor, and as by purchaſe; for if the Inheritance in Feeſimple veſted in him. This point was not Reſolved, but adjourned. Trin. 19 Jac. in B. R. *Hodkinſon* and *Woods* Caſe. *Cro.* 1. Part, 16.

5. One Deviſed Lands to his Siſter in Fee, and afterwards made a Leaſe to her for ſix years of the Lands to begin after his deceaſe, and delivered it to a ſtranger to the uſe of his Siſter; which ſtranger did not deliver it to her in the life of the Teſtator, but afterwards, and ſhe refuſed, and claimed the Inheritance. In this Caſe, It was Reſolved, becauſe the Deviſe and the Leaſe made to one and the ſame perſon, beginning at the ſame time, cannot ſtand together in one and the ſame perſon, That it was a countermand of the Deviſe. But it was there agreed by all the Juſtices, That if the Leaſe had bin made to any other then the Deviſee, they might ſtand together, and the Leaſe ſhould not have bin a Revocation of the Will as to the Inheritance, but only during the Term. Mich. 2 Jac. in C. B. *Cook* and *Bullocks* Caſe adjudged acc. *Cro.* 2. Part, 49. the ſame Caſe.

6. In Treſpaſs, the Caſe was, one made his Will in Writing, and deviſed his Lands to A. H. and her Heirs: And afterwards being ſick, and lying on his death bed (becauſe A. H. did not come to viſit him), he affirmed, That A. H. ſhould not have any part of his Lands or goods. It was holden by the whole Court, That this was not any Revocation of the Will, being but by way of diſcourſe, and not mentioning his Will. But the Revocation ought to be by expreſs words, that he did revoke his Will, and that ſhe ſhould not have his Lands given her by his Will, or words which might ſhew his intent to make an expreſs Revocation thereof. Paſc. 4 Jac. in B. R. *Sympſon* and *Kirtons* Caſe. *Cro.* 2. Part, 115.

7. In an *Ejectione firme* upon Evidence to a Jury. It was Reſolved by the whole Court, That if one maketh his Will in writing of Lands, and afterwards upon communication, ſaith, That he hath made his Will, but that ſhall not ſtand. Or, I will alter my Will, &c. that theſe words are not any Revocation of the Will, for they are words but *in futuro*. But if he ſaith, I do revoke it, and, Bear Witneſs thereof, hereby he abſolutely declares to revoke it *in preſenti*, and it is then a Revocation. And in this Caſe it was agreed by the Juſtices, That as one ought to be of good and *ſane Memorie* at the diſpoſing, ſo he ought to be of as good and *ſane Memorie* at the revoking of it. And as he ought to make a Will by his own direction, and not by Queſtions, ſo he ought to revoke it of himſelf, and not by Queſtions. Mich. 16 Jac. in B. R. *Cranvell* and *Sanders* Caſe. *Cro.* 2. Part, 487.

8. Upon a ſpecial Verdict, the Caſe was, A. made a Conveyance to divers uſes, *viz.* to the uſe of himſelf for life, with divers Remainders over, with a Proviſo, That if he made a Conveyance of the premiſes in Fee, or in tail, that it ſhould be good, and a Revocation of the former uſes. It was found, That he made a Leaſe for years, and the next day granted the Reverſion in Fee, to which the Leſſee attorned. It was Reſolved in this

Caſe,

Caſe, That although there be not one entire eſtate in Fee conveyed, yet both being found, and that it was with an intent to make a Fee to paſs, That this was a Revocation within the Proviſo. Paſc. 13 Car. in B. R. *Shepe* and *Tartons* Caſe. *Cro.* 1. Part, 339.

9. In an *Ejectione firmæ*, it was found, That G. L. the Father, by Indenture did Covenant to ſtand ſeiſed of the Lands in Queſtion, to the uſe of himſelf for life, and after his deceaſe, to the uſe of G. L. his Son and Heir, and the Heirs of his body, the Remainder to his own right Heirs. Provided nevertheleſs, That if G. the Father ſhould at any time during his life be minded upon any occaſion to make void or change the uſes, that then it ſhould be lawful for him, being in perfect health and memory, by writing under his hand and Seal, and by him delivered in the preſence of three credible Witneſſes, to declare that his Will and pleaſure is, That the ſaid uſes or any of them, ſhould be altered and made void, and that then, and from thenceforth, the ſaid uſes ſhould be void, and the ſaid G. the Father, and all other ſhall ſtand ſeiſed to ſuch uſes as by the ſaid writing ſhall be limitted. Then G. the Father made his Will in writing under his hand and Seal, and thereby did deviſe the ſaid Tenements to T. L. the Leſſor, and the Heirs of his body, and for want of ſuch Iſſue, to his Son G. in tail, the Remainder to his Daughter in Fee, and that the ſame laſt Will was Sealed and delivered in the preſence of four, being credible Witneſſes, and dyed. T. L. the younger Son entred, and made the Leaſe, upon whom the Defendant G. L. entred. The Queſtion in this Caſe was, Whether a Revocation actual, or an act implying ſo much made by Will by force, and within the meaning of the Proviſo. It was adjudged for the Plaintiff. And in this Caſe, it was agreed, That in Revocations, all forms and Circumſtances muſt be obſerved; as that it be by Writing, Signed, Sealed, and delivered in the preſence of Witneſſes, which although it be not requiſite in a Will as a Will; yet as it is a Revocation within the Proviſo it muſt have them. 2. Reſolved, That although Revocations muſt obſerve the Circumſtances that the owner impoſeth upon himſelf; yet no more ſhall be impoſed upon him, but his power ſhall be taken favourably, as agreeable to nature, that every man have power over his own, which is the reaſon that the latter Act which cannot ſtand with the former uſes, is conſtrued a Revocation, though according to the expreſs words and vulgar ſenſe it is none. Trin. 17 Jac. in C. B. *Kibbet* and *Lees* Caſe. *Hob.* 312, 313.

2. *Where a Condition or power to revoke uſe, ſhall be good; Where not. Where and by what Act ſuch a power ſhall be extinct: And where a power to revoke uſe ſhall be good againſt a Purchaſor, bona fide; Where not.*

1. A. made a Feoffment in Fee to the uſe of himſelf for life, and after to the uſe of B. in tail, and after to the uſe of C. in Fee. Proviſo, and with liberty to revoke the uſes, and to limit new uſes. If A. ſurvive J. S. and J. S. dyes without Iſſue Male of his body. A. renounces, and ſurrenders to B. and C. all the power and Authority of Revocation, and Releaſes alſo the Conditions, Covenants, and Agreements, as well in the ſaid power of Revocation; and afterwards J. S. dyes without Iſſue of his body. In this Caſe it was ſaid, That an Authority which is collateral to the right of the Land, cannot be given away, or extinguiſhed by a Fine or Feoffment: as if *Tenant pour vie* deviſeth that his Feoffees ſhall ſell his Land, and dyeth; they make a Feoffment in Fee over, yet they may ſell the Land againſt their own Feoffment. But it was Reſolved, That a Fine or a Feoffment ſhould extinguiſh a future power of Revocation; and it was holden, That if in the principal Caſe, That if the power of Revocation had bin preſent, yet the ſame might have bin releaſed: And it was put for a Rule in Law. That when a thing Executory is created by Deed, the ſame thing by the conſent of all parties to the creation of it, may by their Deed be defeated and annulled, as Warranties, Recognizances, Annuities, Covenants, Revocations, &c. may by mutual conſent of the parties to the creation of them by their Deed, be defeated and annulled. *Cook* 1. Part, 110, 111. *Albanies* Caſe.

1. A man conveyes Land to the uſe of himſelf for life, and after to the uſe of divers of his bloud, with a power of Revocation, as after ſuch a Feaſt; and afterwards, and before the power of Revocation begins, he for valuable conſideration, Bargains and ſells the Lands to one and his Heirs. It was Reſolved in this Caſe, That this Bargain and Sale was within the remedy of the Statut of 27 Eliz. cap. 4. of fraudulent Conveyances. For the Act wills not that ſuch voluntary Conveyance, originally

originally ſubject to a power of Conveyance, ſhall ſtand good againſt a Purchaſor *bona fide* for valuable conſideration, Mich. 43 Eliz. in C. B. *Standen* and *Bullocks* Caſe vouched in *Cook* 3. Part, in *Twines* Caſe, 82, 83.

3. A. ſeiſed of divers Mannors holden in *Capite*, Covenanted with J. S. and J. D. to ſuffer a common Recovery to the uſe of himſelf for life, and after to the uſe of B. in tail, and after to the uſe of C. in tail, and after to the uſe of B. in Fee, with power of Revocation and declaration of new uſes in his life, or by his laſt Will. The King licenſed the ſaid A. to alliен the ſaid Mannors and Lands to J. S. and J. D. and their Heirs, without mention of the Declaration of any uſe within the Licenſe the Recovery is had. A. Revokes the firſt uſes, and declares, That preſently after his death C. ſhould have the ſaid Mannors in tail, with divers Remainders over. In this Caſe, It was Reſolved, That although no uſe is mentioned in the Licenſe, and the Licenſe was only to alliен to J. S. and J. D. that although the Land was transferred to another, ſo as the King was not appriſed of his Tenant, yet becauſe the ſame was executed by the Statute of 27 H. 8. of uſes, and an Act of Parliament, to which every one is party, can do no wrong, for that cauſe, when the King gave Licenſe to alliен to J. S. and J. D. and the Statute executes the poſſeſſion in another, there ſhould not any Fine be due to the King for this Eſtate executed. 2. Reſolved, That when A. had Licenſe to alliен to J. S. and J. D. and accordingly he ſuffered a common Recovery, which Recovery was to uſes with power of Revocation and alteration, that in that Caſe, although that he hath altered the Kings Tenant, yet becauſe the King had given him Licenſe to alliен to J. S. and J. D. out of which alliенation, all the uſes, aſwell future, as preſent, as out of a Fountain ariſe, that for that cauſe there needs no new Licenſe for all the Alliенations ariſing out of the Recovery. *Cook* 6. Part, 27, 28. Viſcount *Mountague's* Caſe.

4. A. ſeiſed in Fee, by Indenture in conſideration of Bloud, Covenanted with B. his Nephew, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of B. in tail, the Remainder to the right Heirs of B. Proviſo, That if the ſaid A. makes by himſelf, or by any other during his natural life, tender to the ſaid B. of a Gold Ring, to the intent to make void the ſaid uſes, that then the ſaid uſes ſhould be void. Afterwards A. 26 Eliz. is Attainted of Treaſon done beyond Sea, and Outlawed upon it. The King by his Letters Patents, leaſeth the Land to C. and D. for 40 years, the Attainder is confirmed by Act of Parliament. And 28 Eliz. by another Act at the ſame Parliament, it is Enacted, That the ſaid Act ſhall not extend to make any Leaſe made by the King after the Treaſon void; and by another Act at the ſame Parliament, That all perſons which claim any eſtate or Intereſt in the Lands of any perſon Attainted, not enrolled ſince 8 Eliz. ſhall within two years after the Seſſion of Parliament, ſhew and bring into his Majeſties Court of Exchequer, his, and their Grant, Conveyance, and Aſſurance, then the effect thereof to be enrolled upon Record, or elſe the ſame to be void. The King by his Letters Patents, reciting the ſaid Proviſo, and that the benefit of it is given to him by Act of Parliament, authoriſed E. to deliver the Gold Ring to B. to the intent to make void the ſaid uſes; he reads the Patent to B. and makes a tender to him, which he refuſeth; and certifies the ſame into the Exchequer; and the life of A. was averred. In this Caſe, amongſt many other points, it was Reſolved, That Conditions which are perſonal, and in privity, and inſeparably annexed to the perſon, cannot be performed by any other; and ſuch a Condition is not given to the King by the Statute of 33 H. 8. cap. 20. 2. Reſolved, That the Condition in the Principal Caſe, *ſcil.* the Tender of the Gold Ring was not annexed to the perſon of A. but any other perſon might make the tender; and it was given to the King by the Statute. 3. Reſolved, That A. had an Eſtate for life by limitation of uſe by the operation of the Statute of 27 H. 8. 4. Whereas it was Objected, That the tender ought to be found by Office. It was Reſolved, That the tender and the Certificate was good, and the party grieved, if it were falſe, might traverſe it. 5. It was Reſolved, That preſently upon the tender, according to the Proviſo, that the uſes were determined, and the Land veſted in the King by force of the Act of 33 H. 8. cap. 20. 6. It was Reſolved, That at the time of the tender, the Conveyance was in force, for by the words of the ſaid Act, the Conveyance ought to be exhibited within the two years, but the Act doth not require that it be enrolled within the two years, for it might be enrolled at any time after the two years. *Cook* 7. Part, 11, 12, 13, 14. *Englefields* Caſe.

5. Sir *Thomas Griſham* ſeiſed in Fee of the Mannors of M. and C. in the County of N, levied a Fine thereof, 12 Eliz. to B. and C. to the uſe of himſelf, and the Lady *Anne* his Wife, with power of Revocation, that if the ſaid Sir *Thomas* ſhould pay 40 s. to B. and C, or the Heirs of B, then the ſame to be to the uſe of the ſaid Sir *Tho.* and his Heirs, 13 Eliz. he levied another Fine to the ſaid Conuſees of the Mannors of N. and F, to the ſame Uſes declared by another pair of Indentures, with like payment of 40 s. B. dyed; Sir *Thomas* paid one ſum of 40 s. to C. for Revocation of the Uſes raiſed upon both the Fines;

and this payment was teſtified under divers hands: and after he raiſed divers Uſes and Eſtates of divers Manners holden in *Capite*, and dyed. It was in this Caſe Reſolved by the Juſtices, That the Uſes were not revoked, but that the Revocation was void, becauſe the two ſeveral ſums of 40 l. ought to have been tendred, and not one ſum of 40 l; for they were ſeveral Indentures, and ſeveral Manners, and could not be ſatisfied with one ſum: for which cauſe, all the ſaid Manners came to the Lady *Greſham* by Survivor. Trin. 31 Eliz. in the Exchequer, Sir *Tho. Greſham's* Caſe. *Leon.* 89. See *Cook* 9. Part, 106. in *Podgers* Caſe, the ſame Caſe.

8. A man ſeiſed of Land in Fee, Covenanted to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his ſon in tail. Proviſo, That at any time during his life, with the Conſent of divers, by Deed indented to be enrolled in any Court of the King, to revoke any of the ſaid Uſes, and to limit new Uſes; and afterwards by Indenture enrolled in the Chancery, he revoked the Uſes of part of the Land, and limited the ſame to the uſe of him and his Heirs; and afterwards by another Deed he declared, That from the enrollment of that Deed in the Chancery, all the firſt Uſes in the firſt Indenture ſhould be void, and that the Land ſhould be to the uſe of himſelf in Fee, and afterwards he levied a Fine of all the Land; and if he dyed ſeiſed in Fee of the Lands mentioned in the Deed of Revocation, was the Queſtion? In this caſe, theſe Points were Reſolved, 1. That he might revoke part at one time, and part at another time, and ſo untill he had revoked the whole, but he could revoke one part but once. 2. That whereas the Revocation is to be made by Deed Indented to be enrolled, the ſame is, Deed Indented and Enrolled; for no Revocation could be before Enrollment. 3. That the Fine levied before the Enrollment, had extinguiſhed the power of Revocation. 4. That if the Fine had not been levied, then by the Revocation, the old Uſes had been deſtroyed without Entry or Claim. 5. That by the ſame Conveyance, as the old Uſes might have been revoked by the ſame Conveyance, the like Uſes might be limited. *Cook* 1. Part, 173. *Diggs* Caſe.

7. Tenant in tail of divers Manners and Lands, did ſuffer a Common Recovery which was to the uſe of his laſt Will; and afterwards by Writing under his hand and ſeal, did declare, that his intent and meaning was, That the ſaid Recoverors and their Heirs, ſhould ſtand ſeiſed of the ſaid Manors and Lands, to the uſe of himſelf and the Heirs males of his body, the remainder to the uſe of E. Daughter, and the Heirs of her body; the remainder to his own right Heirs. Afterwards, he and his Recoverors did make a Feoffment unto 3. perſons, and their Heirs, and limited new Uſes, two of which Feoffees had notice of the ſaid former Uſes; and the third had not notice thereof: One Queſtion in this Caſe was, Whether the uſes limited by the ſaid Writing under his hand and ſeal, and whereby the uſes in remainder in tail be limited to the daughter, be revocable or not. This Caſe was by the King referred to three of the Judges; viz. *Mountague*, *Hobert*, and *Doderidg*: It was the Opinion of *Mountague*, That although the firſt uſes upon the Recovery were to the uſe of the Laſt Will of the ſaid Tenant in tail, and his Heirs, and till he ſhould expreſſe his Will and Intention concerning the ſame; yet when he had expreſſed his intent and meaning once by Writing ſealed and ſubſcribed by him, and ſo once notified and publiſhed the ſame, and thereby given an Intereſt to a third perſon by Grant expreſſed, that he cannot recall the ſame, as he might have done, if the ſame had been by a Laſt Will, which is ſubject to Change. But the ſaid two other Judges conceived, That the ſaid Uſes limited by the ſaid Writing, were revocable; for when a Conveyance is made to the uſe of the Laſt Will of him that makes the Conveyance, the Recoverors in ſuch caſe, ſtand ſeiſed in the mean time to the uſe of him and his Heirs, untill Limitation be made of his Will and Meaning concerning the ſame. But when he maketh ſuch particular Limitation or diſpoſition of the ſaid Uſes, Whether it be by a Laſt Will, or otherwiſe by Deed or Writing, as long as he appointeth, that the Recoverors ſhall ſtand ſeiſed to other uſes, and buildeth the ſame upon the firm foundation, (*ſcil.* the Recovery) as in this caſe he did, the ſaid Uſes are alway revocable, becauſe they are grounded upon the laſt aſſurance, (*ſcil.* the Recovery) which was to the uſe of his Will, which is alwayes ſubject to change; and the words to the uſe of his Will, is not thereby meant, a Teſtament only, but to be extended to any other voluntary diſpoſition or gratuity whatſoever: This Caſe was afterwards referred again, and Juſtice *Hutton* joyned in the Reference; who agreeing in Opinion with *Mountague*, Juſtice; by reaſon of the difference of the Opinions of the Juſtices, the Matter was afterwards ended, by an Award made by the Kings Majeſty; and three of the 5. Manners allotted to E. the Daughter. 15 Jac. The Earl of *Oxmonds* Caſe. *Hob.* 349, 350.

Sales.

Sales.

Where, and in what caſe, good; and of what, and by whom: And what not.

1. TReſpaſſe, for taking of a Cow; The Defendant ſaid, That the Land where the Treſpaſſe is ſuppoſed to be done, is the Land of J. S; the which J. S. had loſt 4 l. Iſſues to the Queen, and that there came a Warrant to him, being Under-Sheriff, out of the Exchequer, to levy the ſaid 4 l. in the Lands of J. S: and becauſe the Cowe was Levant and Couchant upon the Land, he took her: It was ſaid by the Court, That the Sheriff cannot take the Beaſts of a ſtranger which are Levant and Couchant, and ſell them. But he might take by way of Diſtreſſe, to levy the debt to the Queen. Hill. 43 Eliz. in C. B. *Goldesbr.* 140.

2. The Caſe was, upon an *Elegit*, The Jury found, That J. S. was poſſeſſed of a Leaſe for 100 years, to begin at the Feaſt of Mich. 2 & 3 *Mar.* Whereas in truth the Leaſe was to begin at Mich. 3 & 4 *Mar.* the Eſtate and Intereſt of which J. S, the Jurours apprized to 80 l. and the Sheriff ſold the Leaſe as a Chattel for 80 l: The Queſtion was, If the ſame were good? It was the Opinion of the whole Court, That the ſale of a Term upon an *Elegit*, was void: For the *Elegit* is, That by Inquiſition of 12. Men *per rationabil. extent.* the Sheriff ſhould apprize the Goods and Chattels, and ex end the Land; ſo as without Enquiry, the Sheriff may not ſell: Then if the Sheriff Enquire of one Term, and ſell another, (as it was in the principal Caſe) the ſale is not good. Yet *Popham*, Juſtice, ſaid, That if it had been found by Inquiſition generally, That he is poſſeſſed of ſuch Land for term of divers years *adtunc venter.* which they have apprized to ſuch a ſum, this had been good, in as much as they have not any means to come to the knowledg of the Certainty of the Term. But when, by Enquiry in particular, a Term is found, they may not vary from that, and ſell another. Hill. 43 Eliz. in B. R. *Palmer* and *Humfreys* Caſe. *Goldesbr.* 172.

3. Two men were Partners in Goods; one of the Partners ſold to J. S. at ſeveral times goods, to the value of 100 l; and for the goods at one time bought, he paid the money according to the time: Afterwards, an Action was brought by one of the Partners for the reſt of the money; and the Plaintiff declared upon one Contract for the whole goods; whereas in truth they were ſold upon ſeverall Contracts made: and the Defendant in that caſe would have waged his Law. The Court adviſed the Plaintiff to be Nonſuit, and to bring a new Action, becauſe that Action was not well brought; for it ought to have been a ſeveral Action upon the ſeveral Contracts. And in this Caſe, It was agreed by the Court, That the ſale of one Partner, is the ſale of them both: and therefore although the one of them ſelleth the Goods, or Merchandizes with them; yet the Action muſt be brought in both their names. Hill. 11 Jac. in C. B. in *Lambert's* Caſe, *Godbolt*, 244.

4. In Treſpaſſe, the Caſe was; A man made his Will, and made A. E. J. and O. his Executors, and Deviſed his Lands to A. E. J. O. by their ſpecial names, and to their Heirs: And further Deviſed, That the Deviſees ſhould ſell the Lands to J. D, if he before ſuch a day would give for the ſame 100 l: And if not, then that they ſhould ſell them to any other, to the performance of his Will; viz. for the payment of his debts: J. D. would not give the 100 l; One of the Executors refuſed to entermeddle, and the other ſold the Lands. The Queſtion was, If the Sale were good, or not? It was ſaid, That it was not good, Becauſe it is a ſpecial Truſt, and a joynt Truſt; and a joynt Truſt ſhall never ſurvive: for perhaps the Deviſor who is dead, repoſed more Confidence in him who refuſed, then in the others. Alſo, the Deviſees have an Intereſt in the Lands, and each

of them hath a part, and therefore the one of them cannot ſell without the other. But if the Deviſe were, That 4. ſhould ſell, they have not an Intereſt, but an authority. It was ſaid on the other ſide, That although the Deviſe was to them by their proper names, and not by the name of Executors; yet the intent appeareth, that they were to ſell as Executors, becauſe it was to the performance of his Will, in which Debts and Legacies are to be paid: and although there are divers authorities to be executed; yet it is but one Debt. The Court inclined to Opinion, That the Sale was not good, but the Caſe was not Reſolved. Mich. 29 Eliz. in B. R. *Bonefant* and Sir *Rich. Greenfield*'s Caſe, *Godbolt* 77. See 26 Eliz. in B. R. *Vincent* and *Lees* Caſe, in *Cook* 1. Part, *Inſtitutes*, 113. acc.

5. Note: It was moved, and afterwards agreed by the Court in the Caſe of a Prohibition to the Court of Admiralty, That if a Pyrat taketh goods upon the Sea, and ſelleth them, that the property of them is changed, no more then if a Theef upon the Land ſteals them, and ſelleth them. And in this Caſe, it appeared upon the Libell, That *bona Piratica fuerunt infra Portum Argier ſuper alium mare*. And for that Cauſe, the Prohibition was denyed, becauſe *Argier* being a Forrein Port, the Court could not take notice, whether there was ſuch a place of the Sea, called the Port; or whether it was within the Land, or not. Trin. 10 Jac. in C. B. *Greenway* and *Barker*'s Caſe. *Godbolt*, 193.

6. Note; It was adjudged to be Law by the whole Court, That if a man bail Goods to another at ſuch a day to rebail; and before the day, the Baily doth ſell the Goods in Market overt: Yet at the day, the baylor may ſeize the Goods; for that the property of the goods was alwayes in him, and not altered by the ſale Market overt. Mich. 7 Jac in B. R. *Godbolt*, 160.

7. Information was in the Common-Pleas by P. againſt B. for buying of Cattell, and ſelling them again in the ſame Market againſt the Statute; which was found againſt the Defendant: Judgment was entred, *quod ſit in miſericordia*; whereas it ought to have been *Capiatur*, being upon an Information, for it is a Contempt, and puniſhable by Impriſonment: In this Caſe, upon a Writ of Errour brought in the Kings-Bench, the Judgment was reverſed. Trin. 21 Jac. in B.R. *Pye* and *Bonners* Caſe, *Godbolt*, 349.

8. The Defendant being a Goldſmith; and having skill in Jewels and Pretious Stones, had a Stone, which he affirmed to be a Bezars Stone, and ſold it to the Plaintiff for 100 l; whereas *re vera*, it was not a Bezars Stone; for which Deceit, the Plaintiff brought an Action upon the Caſe. It was holden in the Exchequer-Chamber by all the Juſtices, That the bare affirmation of it to be a Bezar Stone, without warranting it to be ſo, was no cauſe of Action. But *Anderſon*, Chief Juſtice, was of Opinion, That the Deceit for ſelling of it for a Bezars Stone, whereas it was not ſo, was a good cauſe of Action. But notwithſtanding, it was otherwiſe adjudged. Paſch. 1 Jac. in the Exchequer-Chamber, *Chaundler* and *Lepar* Caſe. *Cro.* 2 Part, 4.

9. In an Action in the Nature of Deceit, the Caſe was; Queen *Eliz.* was ſeiſed in Fee of the Vicarage of S, whereunto the Tythes of S. appertained. To which Vicarage, the Defendant 9. *Junii*, 35 Eliz. affirmed, he was lawfull Incumbent, and had right to the Tythes after the death of T. V. the Incumbent. Whereupon the Plaintiff, 16 *Junii*, 35 Eliz. having ſpeech with the Defendant, of the buying of the Defendant the Tythes appertaining to the ſaid Vicarage after the death of T. V. (who dyed 16 *Aprilis*, 35 Eliz.) till Mich. following, That the Defendant *actus ſcienter*, that he had not any right or Intereſt to the ſaid Tythes, ſold them to the Plaintiff for 30 l. *falſo et deceptive*; and alledged *de facto*, That T. V. was Preſented, Inſtituted, and Inducted into the ſaid Vicarage, *ult. Aug.* 35 Eliz. and took the Tythes, and ſo the Plaintiff loſt them. It being found for the Plaintiff upon Not guilty; It was moved, That the Action did not lye; for that an Action in the Nature of Deceit lyes not, where one ſells a thing wherein he hath not any property; and although he took upon him, that he was owner, and had right to ſell, unleſſe he warrant that the other ſhall enjoy it accordingly, (which warranty ought to be at the time of the ſale) it is not good. And of that Opinion was the Court: For here he had not poſſeſſion, and it is no more then if one ſhould ſell Lands, whereof another is poſſeſſed, without Covenant or Warranty for enjoyment of it; or of the ſale of a horſe, without a warranty: but it is at the perill of him that buys, to provide for himſelf. Hill. 4 Jac. in the Exchequer. *Roſwell* and *Vaughans* Caſe, *Cro.* 2. Par, 196, 197.

10. Action upon Trover and Converſion of Goods, and Converting them: The Defendant pleaded a ſale in Market-overt, whereby he Juſtified the Converſion. It was holden by the Court, to be no Plea, becauſe that it amounts to the generall Iſſue: and Ruled accordingly, That if he did not plead, a *Nihil dicit* ſhould be entred. Trin. 5 Jac. in B. R. *Johns* and *Williams* Caſe, *Cro.* 2. Part, 165.

11. In Trover and Converſion of a Gelding: The Caſe was, That one P. had ſtollen a horſe, and ſold the ſame to the Defendant in open Market, by the name of *Lyſter*, and the ſaid falſe name was entred in the Toll-Book. It was holden by the Court clearly in that caſe, That by the ſale, the property was not altered. Mich. 31 Eliz. in C.B. *Gibbs* Caſe, *Leon.* 225.

Satisfaction.

1. DEbt brought upon a ſingle Bill; The Defendant pleaded, That he did enfeoffe the Plaintiff of Lands, in ſatisfaction of that debt; upon which the Plaintiff demurred. Upon reading of the Record, It was adjudged to be a naughty Plea to a ſingle Bill: otherwiſe it had been, upon a Bond with a Condition to pay money. Trin. 11 Jac. in B. R. *Clyves* and *Leaſe* Caſe. *Brown.* 1. Part, 70.

2. Debt was brought upon a Judgment, and the Defendant was taken in Execution upon the Judgment; and afterwards the Plaintiff became *Feſo de ſe*, by which the Almoner ſeized all his Goods: and afterwards, the Almoner would have acknowledged ſatisfaction of the debt and damages in that Judgment. It was doubted, That he could not. Paſch. 14 Jac. in B. R. *Lord* and *Huxley's* Caſe, *Brown.* 1. Part, 73.

3. Upon a Wager of Law, It was ſaid by *Anderſon*, Chief Juſtice, That if I am bound to pay you a certain ſum of money, and a ſtranger delivers you a horſe by my Aſſent, for the ſame debt; this is no Satisfaction: So if I be endebted to you upon a ſimple Contract, and a ſtranger makes an Obligation for this debt, the debtor cannot wage his Law, for this doth not determine the Contract. Trinit. 29 Eliz. in C. B. *Goldesbr.* 77.

4. Debt; The Defendant pleaded, *Nihil debet per Legem*; and in truth, the money was due to the Plaintiff; but the Plaintiff was alſo endebted to the Defendant in the like ſum: and before the Action brought, they were agreed, That each of them ſhould be acquitted againſt the other; and thereupon the Defendant would have waged his Law. *Anderſon* and *Periam*, Juſtices, doubted, Whether he might do ſo, or not; for an Accord without ſatisfaction, is no Plea: And debt cannot be diſcharged by word. *Rhodes* ſaid, It was good, being by conſent of the parties. And *Fenner* ſaid, That payment by way of Retainer, is good. See 11 R. 2. *Fitz. Barr.* 242. 22 H. 6. acc. Hill. 30 Eliz. in C. B. *Saunderſons* Caſe. *Goldesbr.* 80.

5. *Ejectione Firme* was brought againſt three Defendants; They pleaded, That after the Treſpaſſe and Ejectment done, that there was an agreement between the Plaintiff and Defendant, That one of the Defendants ſhould pay unto the Plaintiff 10 l. in ſatisfaction thereof, and give his bond to the Plaintiff to perform the ſame; which he had performed: In this caſe, It was Reſolved by the Juſtices, That it was a good Plea: And Reſolved, That in all Caſes which ſuppoſe a wrong to be done *vi et Armis*, where a *Capias* or *Exigent* lyeth at the Common-Law, there an Accord with Satisfaction, is a good Plea for Redemption of his body from Impriſonment. Trin. 9 Jac. in C.B. *Peto* and *Cheneys* Caſe, and *Shermans* Caſe. See *Cook* 9. Part, 77.

6. Debt upon a ſingle Bill; The Defendant pleaded payment without an Acquittance; and upon this they went to Iſſue, and found for the Plaintiff: In that caſe, it was adjudged, That although payment without an Acquittance, is no Plea; and ſo an Iſſue joyned upon a thing not material: for if he payes without Acquittance, the ſingle Bill yet remains in force. But becauſe Iſſue was there joyned upon an Affirmative and a Negative, and found for the Plaintiff, It was adjudged, to be aided by the Statutes of 32 H. 8. & 18 Eliz. of *Jeofails*. *Cook* 5. Part, 43. *Nicholls* Caſe.

7. Debt upon a Bill of 6 l. 13 s. 4 d. After the Clauſe, *In cujus rei Teſtimonium*, this Clauſe was added, in nature of a Proviſo. Provided nevertheleſſe, That the ſaid 6 l. 13 s. 4 d. is not to be paid, untill ſuch a one hath had a Recovery in ſuch an Action or Suit which he hath hanging againſt the Plaintiff, upon a Bond of 200 l. Conditioned for ſaving harmleſs, or hath made an end of the ſaid Suit; And then, the Concluſion was, *dat. eiſdem die et anno.* To this, the Defendant pleaded in Barr, That no end was made of the ſaid Suit upon the Bond of 200 l. nor any Recovery had, but that the ſame ſtill depends, and therefore, according to the Proviſo, the 6 l. 13 s. 4 d. demanded by the Bill, is not to be paid to the Plaintiff. The Plaintiff Replyed, That an end was made of the ſaid Suit upon the ſaid Obligation of 200 l. by giving a Compoſition of 20 l. which was accepted in full ſatisfaction; *viz. in plenam ſatisfactionem actionis predict.* Being upon Iſſue, It was found for the Plaintiff. It was moved in Arreſt of Judgment, becauſe out of this matter of fact, ariſeth matter in Law, which makes

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againſt the Plaintiff, ſo as he cannot have Judgment, and this giving of 20 l. in ſatisfaction of the Obligation of 200 l. is not good; for that 20 l. cannot be a ſatisfaction for 200 l. But it was the Opinion of the Court, That Judgment ſhould be given for the Plaintiff. It was ſaid, It muſt be agreed, That after the day that the ſame is due, 20 l. cannot be paid in Satisfaction of 200 l. but here it is not ſo; the 20 l. being paid to end the Suit for 200 l; and this is good: and before the ſame was due, 20 l. may be well given, and ſo accepted of, and good in Law, to ſatisfie 200 l. Alſo here the 20 l. was given *in plenam ſatisfactionem actionis predict.* and not in ſatisfaction of the 200 l. It was adjudged for the Plaintiff, Mich. 1 Car. in B. R. *Thompſon* and *Butchers* Caſe. *Bolſtr.* 3. Part, 301, 302.

8. Judgment was given upon a Bond of 4000 l. and the *Scire facias* was ſued for 3000 l. and he did not acknowledg Satisfaction of the other 1000 l: It was moved, That the *Scire facias* ſhould abate: For if a man brings debt upon a Bond of 20 l, and ſhewed a Bond of 40 l. and doth not acknowledg ſatisfaction of 20 l, it is not good. It was ſaid by the Court, That there is no difference betwixt the Action of Debt upon a Bond and a *Scire facias*, and the Intendment; viz. That it ſhall be intended that he was paid, becauſe that he ſued but for 300 l, will not help the Defendant: And therefore the Opinion of the Juſtices was, That if the Defendant in the *Scire facias* ſay nothing by ſuch a day, That Judgment be entred for the Plaintiff *quod executio fiat.* Mich. 29 Eliz. in B. R. *Godbolt*, 79, 80.

9. Debt by an Executor, upon divers Obligations made to the Teſtator: The Defendant pleads, That he did pay a leſſer ſum then is expreſſed in the Obligations to the Teſtator during his life, and that he did accept thereof in full ſatisfaction of the ſaid Obligations. To this Plea, the Plaintiff Demurred. The Queſtion in this Caſe, was, Whether the payment, or the acceptance of the money paid in ſatisfaction, be to be traverſed? The Court held it indifferent to traverſe either of them; but ſaid, It was more proper to join Iſſue upon the payment. In this Caſe, It was ſaid and agreed, That if one pay money in ſatisfaction of an Obligation, and the party to whom it is paid ſaith, that he will receive it for another cauſe; Yet if he receive it, It ſhall be adjudged to be paid in ſatisfaction of the Obligation: for he muſt receive it upon ſuch Terms as the other will pay it. Mich. 1650. in B. R. *Bois* and *Crawfield's* Caſe. *Styles*, 239.

10. The Condition of an Obligation was, That if the Defendant do keep the Arbitrament and Award of J. S. indifferently choſen by the Defendant and the Plaintiff, to order, rule, and final determination to make of all matters, Suits, and Demands whatſoever had or depending betwixt the Defendant and the Plaintiff, from the beginning of the World, untill the day of the date of the Obligation, that then &c. In debt brought, The Defendant pleaded, That the Arbitrator *Nullam fecit arbitrium, de et ſuper premiſſis in condition predict. ſpecificat.* The Plaintiff Replyed, That the Arbitrator made an Award *de et ſuper premiſſis modo et forma ſequente, ſcil.* That whereas there was a Suit depending between the Defendant and the Plaintiff for debt of 20 l. due by the Defendant to the Plaintiff; which debt the Defendant had promiſed to pay to the Plaintiff, that the Defendant ſhould pay to the Plaintiff for his ſaid debt due and his Coſts, 22 l. In this Caſe, It was Reſolved, That the Award was good and ſufficient; for it is an Award as well of the one part as of the other; for one Receives money, and the other a diſcharge of his debt, and of his promiſe to pay it, which ſhall be a ſatisfaction. 2. It appeareth, That the Award was made *the premiſſes predict. in conditione predict. ſignificat.* which words do import, That he had made an Award of all that which was referred unto him; and ſo it ſhall be intended, untill the contrary be ſhewn: For when a ſubmiſſion is general, Of all Actions, It may well ſtand with the generality of the words, that there was but one cauſe depending in controverſie betwixt them: But where a Submiſſion is of certain things in ſpecial, with a Proviſo or Condition, That the Award ſhall be *de premiſſis*, there it behoves, that the Arbitrament be made of all debts; otherwiſe it is void. But if divers things in ſpecial are ſubmitted, without ſuch Condition Concluſion; there the Arbitrator may make an Arbitrament of one of them. *Cook* 8. Part, 97. *Roſpoules* Caſe.

Scire

Scire facias.

Where it lyeth, and by whom, and against whom, and for whom; and upon what Recovery, or Judgment; and in what Court to be brought; Where upon Execution, and upon what, and in what Court; & è contra. What a good Plea in Bar of it; and where the Writt shall abate, where not.

1. A *Quare Impedit* was brought by B. against C. the Presentee of the Queen; the Plaintiff had Judgment to recover: the Queen shewed that the Plaintiff was Outlawed, and prayed a Writ to the Bishop, and a *Scire facias* against the Queen, wherefore he should not have Execution of his Judgment. It was the Opinion of the Justices, That they ought to stay Execution, but how Process shall be awarded, or if a *Scire facias* should Issue against the Plaintiff or no, they would advise; but *Periam* Justice thought they might have a *Scire facias*. Mich. 29 Eliz. in C. B. *Beverley* and *Cornwall's* Case. *Goldesbr.* 44, and 55. acc.

2. Note, It was said by *Popham* and *Gawdy*, and not denyed, That if a *Fieri facias* goes to the Sheriff to levie the debt of the Defendants goods, and he doth not return his Writ, If the Plaintiff sues for a *Scire facias* upon the same Judgment against the Defendant, If he may plead this matter, and put the Plaintiff to his remedy against the Sheriff; for that the sale of the Defendants goods by the Sheriff, is good, and not to be defeated; and so it is a good Plea in Bar in another Execution, otherwise the Defendant should be put to a great mischief. Set 20 H. 6. 24. 44 E. 3. 18. *Quere*, If he shall not have an *Audita Querela*, if the Plaintiff take out a new *Scire facias* within the year? Hill. 43 Eliz. in C. B. *Fox* and *Baltens* Case. *Goldesbr.* 170.

3. A. and his Wife, Executrix of J. W. brought a *Scire facias* after the said Executrix came of full age, against J. D. and his Wife, Administratrix of W. D. to have Execution of a Judgment had by J. D. and H. E. Administrators, *durante minori ætate* of the Executrix, upon a Bond entred into to the Testator; and whether it lay by the Executrix or not, was the Question. It was the better Opinion of the Court, that it did not lye. Mich. 3 Jac. in C. B. *King* and *Deaths* Case. *Brownlow* 1. Part, 59.

4. D. brought an Action of Assault and Battery and Imprisonment, against W. the Defendant pleaded a special Justification, *scil.* That in *Nov.* 2 Jac. an Action of Trespass was brought in C. B. by one A. against J. G. and upon the general Issue it was found for J. G. and Judgment given for her; and before Execution, J. G. took to husband the Plaintiff: Afterwards Error was brought in B. R. and upon a *Scire facias* against the said J. the Judgment in C. B. was reversed, and Costs given to A. the Plaintiff, on the Writ of Error; and afterwards, a *Capias ad satisfaciendum* was directed to the Defendants, to take the said J. G. by force of which, the Defendants took the Wife of the now Plaintiff; with an Averment, That the said J. G. and the Wife of the now Plaintiff, were one and the same person; upon which the Plaintiff demurred. It was Objected, That the Justification was not good; because when the Sheriff is to execute a Process, he is to do it upon the right person, at his peril; and when his Warrant is against J. G. there is no such J. G; for by her marriage with the Plaintiff, she had another name, and therefore he is a Trespasser, for taking J. D. and his averment cannot help him, because it agrees not with his Warrant. But the whole Court was of a contrary Opinion; for first, the *Scire facias* was according to the Judgment in C. B. and well then might all the subsequent Process be according, in course of Law; But if the Husband had come upon the *Scire facias*, and shewed how that she was Covert, then the Action ought to have been against both of them. And 2. In the Principal Case, The parties themselves in all the Proceedings, have admitted that she was the same person, and that she had the same name; wherefore they shall be concluded from saying the contrary; and although the Sheriff had shewed the marriage, the same had been but a bare allegation of the Sheriff, and it appears not judicially whether it was so or no. And 3. It would be dangerous for the Sheriff to return a *non est Inventus*, because that parties have admitted her name in all the Proceeding; and then the Sheriff should be estopped also. Trin. 11 Jac. in B. R. *Doyly* and *Whites* Case. *Brownlow*, 2. Part, 226. It was adjudged for the Defendants.

5. The Case was, An Executrix till the Wives of the Plaintiffs came of full age, or were married, and that then they to be Executrices; This Executrix

cutrix during the minority, brought an Action of Debt, and Recovered; and before Execution, the women Executrices, took husbands, and brought a *Scire facias* upon the Record, to have Execution upon the Judgment against the Defendants as Terr-Tenants, who pleaded ſpecially, That they had nothing in the Freehold, nor in the Land, but only a Leaſe for years, and that the Freehold was in a ſtranger; upon which the Plaintiffs demurred. It was argued for the Plaintiffs, That there is a difference betwixt this Executor, and an Adminiſtrator, *durante minori ætate*: If an Adminiſtrator have Judgment, and dyes before Execution, or the other have ſued out their Letters of Adminiſtration, they ſhall have no Execution of this Judgment, becauſe he comes in paramount the firſt Adminiſtration, as immediate Adminiſtrator to the firſt Inteſtate; but in this Caſe, all theſe Executors were in privity one to another, and here they are all made by the firſt Teſtator: And in the Principal Caſe, the Executors come in in privity; as in caſe where two Executors are, and one dyes, the other who ſurvives, ſhall have execution of a Judgment given for them; for Adminiſtrator during Nonage, is only to the uſe, commodity, and profit of an Executor; ſo as he being Executor to the Teſtator, ſhall have Execution. 2. It was ſaid, That the plea, that the Defendants had but for years, and that the Freehold is to a ſtranger, is not good; for as much as nothing was to be recovered but only damages: And it was ſaid, That it was adjudged in a *Scire facias*, to have Execution of a Judgment in an *Ejectione firmæ*, in *All Souls* Colledge Caſe; That the Plea that he had nothing but for years, was no plea; for as much as nothing was to be recovered but only the Term, and not the Freehold. On the Defendants ſide it was ſaid, That the Return of the Sheriff was void, becauſe the Writ commanded him to give notice to the Terr-Tenants of the Fee-ſimple, and he did not Return, that thoſe who he had Returned were Tenants of the Fee-ſimple, and ſo no Tenant is Returned at all: And it was ſaid, That a *Scire facias* to have Execution of a Fine, ſhall not be ſued againſt Leſſee for years, but againſt him that hath the Freehold. The Caſe was not adjudged, but adjourned. Mich. 9 Jac. in C. B. *Kent*, and his Wife, and others, againſt *Laurence Trollop*, and the Wife of *Gunter*. *Brownlow*, 2. Part, 144, 145.

6. Adminiſtrators during the minority, had Judgment in debt, and before Execution ſued, the Executor came of full age of 17 years; how Execution ſhould be ſued, was the Queſtion; for that the power of the Adminiſtrator was determined by the coming of the Executor of 17 years, and the Executor was not party to the Record. It ſeemed to the Court, That the Executor might ſue a ſpecial *Scire facias* upon the Record, and ſo ſue Execution in his own name. See 27 H. 8. 7. a. Paſch. 9 Jac. in C. B. *Brownlow*, 83. acc.

7. The Defendant upon a Condemnation in Treſpaſs, the Defendant appeared *gratis*; and to have a *Scire facias* pleaded a Releaſe of Executions, and found ſureties to pay the Condemnation: The Prothonotaries ſaid, That in that Caſe, becauſe it was a *Capias ad ſatisfaciendum*, that he ſhould not have it, unleſs he were Returned *Cepi corpus*, or a *Reddidit ſe*, and brought in in cuſtody; but that he being at large, and not impriſoned, ſhould be put to his *Audita Querela*; but if it be upon a *Capias ad reſpondendum*, or Exigent, then he might appear *gratis*, becauſe he had day in Court. Trin. 11 Eliz. *Dyer*, 285.

8. A Conuſor of a Statute Staple, ſeiſed of Lands in the Counties of D. and S. enfeoffed ſeverally A. and B. in the County of S. and C. of the Lands in the County of D; the Conuſee ſued Execution of the Lands in the County of S. only, and the Lands of A. were extended, and delivered, and the Sheriff upon the Extent returned, That theſe were all the Lands which the Conuſor had, *in Baliva ſua die recognitionis, & quod nulla alia habuit terras ſeu Tenementa, &c.* A. grieved by this Execution, brought an *Audita Querela*, and had a *Scire fac.* Returned in the County of D. to have C. contributory; C. appeared, and pleaded the omiſſion of the Lands in the poſſeſſion of B. in the County of S. in abatement: It was the Opinion of the Juſtices, That it was no Plea; for the plaintif is not bound peremptorily at his peril to take notice of all the Terr-Tenants and Lands which are lyable to the Statute, but of his proper; and the Defendant might here well have *Audita Querela*, to have contribution of the other Terr-Tenants. Paſch. 16 Eliz. *Dyer*, 332.

9. The Tranſcript of a Fine was removed by the Anceſtor out of the Treaſury in C. B. into the Chancery, and it came in Bank by *Mittimus* to have a *Scire facias* to execute the ſame, and the Anceſtor dyed: It was the Opinion of the Court, That without a new *Mittimus*, the heir ſhould not have a *Scire facias*, becauſe by the death of the Anceſtor, the authority given to the Juſtices of the Bench was determined. Hill. 28 H. 8. *Dyer*, 29.

10. *Quare impedit* was brought by B. againſt the Ordinary, Patron, and the Incumbent; the Ordinary claimed nothing but as Ordinary; Iſſue betwixt the others was found for the Plaintiff, and Judgment given by the Juſtices of *Niſi Prius*, and a Writ to the Biſhop awarded; and the Record being ſent in *Banco*, another Writ was award-

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ed to the Biſhop, returnable *in Banco*, upon which the Biſhop Returned, That pendant the *Quare Impedit*, an Office was found for the King, by the minority of the Plaintiff, being within age, and in Ward, and the King Preſented, of which the Church is full, which excuſed the not performing of both Writs. It was holden, That he ſhould not be eſtopped of this Return, for his plea is not any plea of plenarty; and if this Attorn be falſe, he may have a *Quare non Admiſit*, and alſo have a *Scire facias* againſt the firſt and new Incumbent. Paſch. 9 Eliz. *Dyer*, 260.

11. An Annuity was granted for the exerciſe of a Stewardſhip, and after Recovery in Annuity, the ſame was behinde again, and the Grantee brought a *Scire facias*: The Defendant ſaid, That pendant the Writ, the Plaintiff had refuſed (being requeſted) to hold Court. It was holden by the Court to be a good Plea; for upon the *Scire facias* he had Judgment before of the arrearages before, and pendant the Writ, where if he refuſeth, the Annuity ceaſeth; and then it was holden, he ſhould recover the arrearages by an Action of Debt only. 23 Eliz. *Dyer*, 377. acc.

12. An Adminiſtrator during the minority of A. B. and C. recovered Debt due to his Teſtator, and dyed; A. dyed: It was moved, if by the death of A. the whole authority ſhould ceaſe? That point was not Reſolved: But it was adjudged, That the Executors of the Adminiſtrators ſhould not ſue Execution by *Scire facias* upon the firſt Judgment; for that none ſhall have Execution of that Judgment, but he who ſhould be ſubject to the payment of the debts of the firſt Inteſtate, which the ſaid Executors ſhould not. *Cook* 5. Part, 9. *Brudnell's* Caſe.

13. A. brought an *Audita Querela* againſt B. and a *Scire facias* upon it againſt the ſame party. It was moved, That in as much as no Execution was ſued againſt A. upon the Statute Staple, in which he was bounden to the ſaid B. ſo as he was not in priſon, That no *Scire facias* ought to Iſſue, but *Venire facias*. The Court was clear of Opinion, That it is at the Election of the party grieved, which of them he will have: Then to it was moved, That the *Audita Querela* ought to be ſued in the Chancery, and not in the Common Pleas: But the Court was alſo clear of Opinion, That he might ſue in which of the Courts he pleaſed. Hill. 30 Eliz. in C. B. The Lord *Dudley* and *Layes* Caſe. See 26 Eliz. *Dyer*, 332. *Leon*, 195.

14. R. W. and J. P. brought a Writ of Error againſt the Biſhop of H. and B. upon a Recovery had by the Biſhop of B. againſt them, for that the ſaid W. had brought a *Quare Impedit* againſt the ſaid B. and the Biſhop, and had Recovered againſt them by default, whereupon W. had a Writ to the Metropolitan to admit his Clerk, and in the Writ of Diſceit, Judgment was given for the Plaintiffs; for it was found, That the Summons was the Friday, to appear the Tueſday after, and ſo an inſufficient Summons: And in that Writ W. and P. pleaded, That B. the Incumbent was deprived of his Benefice in the Court of Audience; which ſentence was affirmed upon Appeal before the Delegates; and notwithſtanding that Plea, Judgment was given againſt W. and P. Divers Errors aſſigned, 1. Becauſe the Biſhop and Incumbent joyned in the Writ of Diſceit; for that their right was ſeveral. 2. Becauſe it was not ſet forth in the Writ of Diſceit, That B. was Incumbent; for the Writ of Diſceit ought to contain all the ſpecial matter of the Caſe. 3. That upon a ſuggeſtion made after Verdict, That B. was Incumbent, and in of the Preſentment of the Lord S. and that he was removed, and G. in by a Recovery in a *Quare Impedit* by default, a Writ to the Biſhop was awarded, without a *Scire facias* againſt G. for he is poſſeſſor, and the Statute of 25 E. 3. gives him authority to plead againſt the King, and every Releaſe and Confirmation to him is good, It was anſwered, This is a Judicial Writ, and not an Original, and nothing is to be demanded but the Defendant is only to anſwer to the Diſceit; and the Iſſue is contained in the Writ, and the Judges ſhall examine the Iſſue, without any plea pleaded, or appearance of the Tenant, and the Judgment here is not to recover any thing in demand, but only to reſtore the party to his former eſtate: And as to the *Scire facias*, there needs none here againſt the new Incumbent, for that he comes in pendant the Writ, but if it had been before the Writ brought, then a *Scire facias* would: The Caſe was adjourned, and not Reſolved. Hill. 27 Eliz. in B. R. *Williams* and *Blowers* Caſe. *Leon*, 293, 294.

15. *Scire facias* to have Execution upon a Judgment in Debt; The Defendant pleaded, That at another time the Plaintiff had ſued Execution by *Capias ad ſatisfaciendum*, and the Defendant was taken in Execution. The Plaintiff replyed, It was true, That he ſued a *Capias ad ſatisfaciendum*, and that the Defendant was taken in Execution; but he preſently Reſcued himſelf, and eſcaped. It was holden by the Court, That the Replication was good, and that the Plaintiff not having the fruit of his Execution, he may have a new Execution; and although it is no good Return upon a *Capias ad ſatisfaciendum*, that the Defendant reſcued himſelf, yet the party himſelf ſhall never take advantage of his own wrong. Trin. 6 Car. in B. R. *Robinſon* and *Cleyton's* Caſe. *Cro.* 1. Part, 174. 185. acc.

16. Husband and Wife, the Wife Adminiſtratrix

ſtratrix to her former husband, brings debt upon an Obligation of 200 l. due to the Inteſtate, and had Judgment to recover their debt and damages; the Wife dyes, and a year and day being paſt, the Husband brought a *Scire facias* to have Execution. *It* was the Opinion of the Court, That this *Scire facias* did not lye for the Husband, becauſe it being a debt demanded by the Wife, is in *auter droit*, and although ſhe recover, yet ſhe dying before Execution, the duty remains to him who takes new Adminiſtration; and although the Husband be party to the Judgment, yet he hath no property in the debt: But if Husband and Wife bring debt for a debt due to the Wife, and recovers, the Wife dyes, the Husband may bring a *Scire facias* to execute this Judgment; for the debt being recovered, the Husband after the death of the Wife ſhall have it. Hill. 6 Car. in B. R. *Beamount* and *Longs* Caſe. *Cro.* 1. Part, 150. 164. acc.

17. *Scire facias*, ſuppoſing that he recovered in debt againſt an Executor, and had Judgment for 40 l. of the goods of the Teſtator, *ſi tantum*, and 7 l. for Coſts, *de Bonis* of the Teſtators. *ſi tantum*; and if not, *de Bonis propriis*; and before ſatisfaction, he dyed Inteſtate, and Adminiſtration was committed to the Defendant, *de Bonis primi Teſtatoris*, and alſo of the Executors, and that the Executor had not ſatisfied, and therefore he brought a Writ to ſhew cauſe why he ſhould not have execution: The Defendant pleaded Plein adminiſtration of the goods of the firſt Inteſtate; and upon Iſſue joyned, it was found for the Plaintiff. It was moved in ſtay of Judgment, That this *Scire facias* was not well grounded; for the Recovery being againſt an Execution of a debt by the Teſtator, and he dying Inteſtate, the ſuit is determined: But the Opinion of the Court was, That the *Scire facias* was well awarded. It is true, that as Executor, he cannot have a *Scire facias* by the Executor, but is put to a new Action, for that he comes in paramount the Judgment, and is not party thereunto; yet where a Judgment is againſt an Executor for the Teſtators debt, although he dyeth Inteſtate, this Judgment might be executed by *Scire facias* againſt the Adminiſtrator of the firſt Teſtator, who cometh in place of the Executor, and being for the debt of the Inteſtate, is lyable thereunto, but as Adminiſtrator to the Executor, he is not lyable. Mich. 5 Car. in B. R. *Snape* and *Norgates* Caſe. *Cro.* 1. Part, 119.

18. Error of a Judgment in C. B. It was aſſigned for Error, That no *Capias* was awarded againſt the Principal, and yet a *Scire facias* iſſued againſt the Bayl, and Judgment againſt them, and the Principal and Bayl brought the Error. It was holden, That the Writ brought by them was not good; for they ought not to joyn in Error; for the Bayl may not avoid the Judgment againſt the Principal in any Error which is in the Proceeding, and the Principal hath nothing to do with the Judgment againſt the Bayl. Trin. 11 Car. in B. R. *Buſſel* and *Yallers* Caſe. *Cro.* 1. Part, 295.

19. In a *Scire facias* againſt the Bayl, the Caſe was; That in Debt for 70 l. by the Plaintiff againſt *L.* a *Capias* iſſued againſt him, directed to a Sergeant at Mace, who returned a *Cepi Capias*; that *L.* *ſecundum Conſuetudinem Villæ intrat ei ſecuritatem*, viz. one H. who was dead, and the ſaid Defendant *ad Comparandum*, and if he were condemned to ſatisfie the debt, or to render himſelf to priſon: It was ſo far proceeded in an Inferiour Court at *Lyon*, That Judgment was given for the Defendant: And thereupon Error brought, and that Judgment reverſed. And now becauſe *L.* the Principal did not pay the debt, nor render himſelf to priſon, this Action was brought: upon which it was Demurred. It was moved, That this Bayl found before the Sergeant, although it was alledged to be *ſecundum Conſuetudinem Villæ*, was not good: For the Bail being matter of Record, cannot be found before any but the Judge of the Court: but Bail for appearance only, might be taken by the Sergeant. And of that Opinion was the whole Court, It was adjudged againſt the Plaintiff. Hill. 2 Jac. B.R. *Loft* and *Keldridges* Caſe, *Cro.* 2. Part, 94.

20. *Scire facias* againſt the Bail; The *Scire facias* recited, That the Judgment was given againſt C. the Principal, in debt, and that he had not paid the Condemnation, nor rendred himſelf to priſon according to the Bail. The Defendant pleaded, That the Principal was dead before the *Scire facias* brought. And becauſe it was not alledged, when he dyed, nor that he dyed before the *Capias* awarded, it was holden to be no Plea. And although Exception was taken to the *Scire facias*, becauſe it is not mentioned therein, That the *Capias* was awarded; Yet it was holden good enough; for that it is not of neceſſity to be recited. Mich. 3 Jac. in B. R. Juſtice *Williams* and *Vaughans* Caſe. *Cro.* 2. Part, 97. Trin. 5 Jac. *Tymp* and *Colemans* Caſe, *Cro.* 2. Part, 165. acc.

21. After Judgment, a *Capias* was awarded againſt the Principal, and Returned *Non eſt inventus*; and afterwards a *Scire facias* was againſt the Bail, who was returned *Nihil*. A ſecond *Scire facias* was awarded, and then he brought in the body of the Principal, and prayed it might be accepted in Execution. It was ſaid by the Clerk, That it came too late after the *Capias* returned. It was the Opinion of *Popham*, Juſtice, That it might be very well, unleſſe the firſt be returned

Warnel,

Warned, and Judgment given thereupon. For the *Scire facias* otherwiſe would be to little purpoſe: Wherefore by Award of the Court, the Principal was received. Hill. 3 Jac. in B. R. *Hill* and *Saunderſons* Caſe. *Cro.* 2. Part, 109.

22. *Scire facias* againſt an Executor upon a Judgment in Debt againſt the Teſtator: The Defendant pleaded, That the Plaintiff ſued forth Execution againſt the Teſtator by *Capias ad ſatisfaciend.* and had his body in Execution; who dyed in priſon, and delivered Judgment. Upon which it was Demurred, becauſe this Execution is not any ſatisfaction. It was prayed, That foraſmuch as he did not plead, That ſatisfaction was given, Execution might be awarded, It was holden, The Barr was good: For when the party is taken in Execution, although it be not in it ſelf any ſatisfaction; yet as to him there cannot be any other Execution. But becauſe it was a new Caſe, and had not been before adjudged, the Court would adviſe of it. Paſch. 43 Eliz. in B. R. *Williams* and *Catteries* Caſe. *Cro.* 2. Part, 136, 143.

23. Debt upon an Obligation, and a Recovery by *Nihil dicit*: After the Defendants death, a *Scire facias* was brought againſt the Heir, and a Recovery againſt him upon two *Nihils* returned; who dyed, and a new *Scire facias* was brought againſt the Heir, and a Recovery had againſt him by default. Whereupon Errour was brought in the Exchequer Chamber. Errour aſſigned, That there was not any Bill upon the File, as in truth there was not any. But upon ſuggeſtion to the Court, That it being an Ancient Judgment, the Bill might well be imbezelled off the File. It was Ordered, That a new Bill ſhould be put upon the File. Mich. 5 Jac. in B. R. *Mayney* and *Collet* Caſe. *Cro.* 2. Part, 186.

24. Errour in the Exchequer-Chamber: Aſſigned, for that Debt was brought in *Cumberland*, and Judgment had by Confeſſion, and a *Scire facias* brought againſt his Executor in *Middleſex*, and Judgment there for the Plaintiff; whereas the *Scire facias* ought to have been brought in *Cumberland*, where the Original was brought; and not in *Middleſex*, although the Judgment was there by Confeſſion: For the *Scire facias* ought to purſue the firſt Action. Mich. 11 Jac. in Exchequer. *Wharton* and *Muſgraves* Caſe. *Cro.* 2. Part, 331.

25. In an Action upon the Caſe for words, the Plaintiff had Judgment, but no Execution was ſued forth for one year following, but afterwards the Defendant brought a Writ of Error returnable in the Exchequer Chamber. The Return being removed, the Plaintiff prayed day to aſſign Errors, and at the day did not aſſign them, but was Nonſuit, and the Record remaunded. Afterwards the Defendant being Impriſoned for other cauſe, it was moved, That he ſhould be in Execution for this cauſe, although the year and day were paſt after the Judgment, ſo as the Plaintiff was put to his *Scire facias* to have Execution. Yet becauſe the Defendant had brought a Writ of Error, It was ſaid, That thereby he had renewed the Record, and the Record being renewed, That in that Caſe, the Plaintiff ſhould have Judgment without a *Scire facias* brought; and ſuch was the Judgment of the Court. Hill. 12 Jac. in the Exchequer Chamber, Sir *Henry Bellaſis* and *Hanfords* Caſe. *Cro.* 2. Part, 364, 365.

26. *Scire facias* upon a Judgment in Debt againſt R. for 200 l. againſt his Ter-Tenants. The Sheriff returned, That he warned J. C. and three other Tenants; the Tenants made default. J. C. pleaded, That one R. T. was Tenant of 20 Acres in ſuch a Town, which are the Lands of the ſaid R. againſt whom the Recovery was at the time of the Judgment, and delivered Judgment if he ſhould anſwer till the ſaid T. R. be warned. It was adjudged, That the Plea was good. In this Caſe, It was adjudged for the Defendant. For it was ſaid, There is a difference betwixt a *Scire facias* to have Execution upon a Judgment in Debt, and to have Execution upon a Judgment in a real Action; for in the laſt, this is not any plea; for every Tenant ſhall anſwer for that which he hath, and the one may loſe, and the other not. But in a *Scire facias* to have Execution of a Debt, becauſe every one ought to be contributory, the one ſhall not anſwer ſo long as he can ſhew that another is contributory with him: and although that the Sheriff Return that they are Ter-Tenants; yet that ſhall not conclude the Defendant, but that he may ſay, That another is Ter-Tenant of parcell who is not warned. It was adjudged for the Defendant. Trin. 11 Jac. in B. R. *Michell* and Sir *John Croſts* Caſe. *Cro.* 2. Part, 507, 508.

27. A *Scire facias* againſt the Sheriff; For that the Plaintiff having brought a *Fieri facias* upon a Judgment againſt one T. directed to the Defendant, he returned, That he had taken goods into his hands, to the value of 72 l. and had ſold ſo much of them as amounted to 11 l. and that the reſidue did remain in his hands *pro defectu emptorum*, untill ſuch a day, at which day he putting them to Sale, they were reſcued from him; upon which it was demurred. It was agreed in this Caſe, That as to the Return of the Reſcous, it was not good. The Queſtion was, Whether the Sheriff had charged himſelf by this Writ. *Jones* Juſtice, That he had not; For although the Sheriff hath Returned, That the goods are of the value of

72 l. that is not any Eſtoppel, but that he may ſet them for more or leſs after, as he can get for them. *Dodderidge* Juſtice contrary, for he cannot diminiſh ought from the power that the Law gives him; and he held, That the Sheriff had charged himſelf by this Retorn. If he had retorned only *Quod remanent in manibus pro defectu emptorum*, he ſhould not have charged himſelf, for he had done his Office, but when he ſaith further, That they were reſcued out of his hands, he therein had miſdemeaned himſelf, and therefore is chargeable; and in this Caſe, he is chargeable becauſe he hath his remedy over. *Mountagu* Juſtice agreed with *Dodderidge*, but yet no Judgment was. But it was adjourned. Mich. 16 Jac. in B. R. *Sly* and *Finches* Caſe. *Cro.* 2. Part, 514, 515.

28. *Scire facias* to have damages recovered in an Appeal. The Defendant pleaded, That after Judgment, the Teſtator ſued Execution by *Scire facias* againſt the Bail, and had Judgment and Execution awarded againſt the Bail: Upon which it was demurred; And it was adjudged no Plea, becauſe it was not ſhewed, That he was ſatisfied by the Execution againſt the Bail; for otherwiſe, without ſatisfaction, he may alwayes charge the Principal. Trin. 17 Jac. in B. R. *Freeman* and *Freemans* Caſe. *Cro.* 2. Part, 549.

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2. *Where a* Scire facias *lyeth upon a Recognizance; and upon what Recognizance; and for what cauſe, and in what Court; and where not.*

1. IN Debt againſt a Sheriff for an Eſcape, the Caſe was, A. did acknowledg a Recognizance in the Chancery; and the Plaintiff had a *Scire facias*, and two *Nihils* retorned. Afterwards he had a Judgment, *Quod recuperet debitum*, and a *Levari facies* came to the Sheriff to levy the ſame, who Retorned *Nulla bona*. Afterwards he took out a *Capias ad ſatisfaciendum* to the Sheriff, who took the party in Execution, and afterwards did ſuffer him to eſcape; upon which the Action was brought. The point inſiſted upon was, Whether a *Capias* doth lye upon a Recognizance acknowledged in Chancery, or not? It was objected, That a *Capias* doth not lye upon a Recognizance taken in Chancery. And 13 and 14 Eliz. *Dyer*, 306, *Puttenhams* Caſe was vouched to be accordingly. And *Cook* 3. Part, 12. Sir *William Herberts* Caſe. On the other ſide it was Anſwered, That as this Caſe was, the Action upon the Eſcape did well lye againſt the Sheriff. For preſently after the Recognizance is acknowledged, it is a Judgment upon Record; and where a Debt is of Record, there by the Statute of 25 E. 3. cap. 17. the party may have a *Capias*, and the Court of Chancery hath a courſe alwayes in ſuch Caſe, to award a *Capias*. But admitting that the proceſs was Erronious, or that they award an Erronious proceſs, or miſ-award a *Capias*, by which the party is taken in Execution, yet it is a lawful Execution, and the Sheriff is chargeable with the Eſcape, and he is not to examine the Error of the Court where the Court hath Juriſdiction of the cauſe; and ſo it was adjudged, Trin. 31 Eliz. in the Exchequer, in *Raſtall* and *Ognells* Caſe, which ſee in *Cook* 8. Part, 141. in Dr. *Druries* Caſe. Paſc. 44 Eliz. *Weaver* and *Cliffords* Caſe. *Bulſtr.* 2. Part, 62, to 65. But ſee *Yelverton*, Hill. 1 Jac. in B. R. in the ſame Caſe. That it was the Reſolution of *Yelverton*, *Gawdy*, and *Popham*, Juſtices, That a *Capias* doth not lye upon a Recognizance in Chancery; and although there be Preſidents to the contrary, yet that doth not ſtop the mouth of the Judges; and therefore if the party be taken upon ſuch a *Capias*, and Eſcape, the Sheriff is not chargeable with the Eſcape, for he is not chargeable, but where it is upon a lawful Commitment, and ſo is the Statute of *Weſt.* 2. to be intended, which gives the Action againſt the Goaler, which is not in this Caſe, becauſe the Law doth not give a *Capias* upon a Recognizance in Chancery. See *Yelverton* 46.

2. A *Scire facias* was brought in Chancery upon a Recognizance there; The parties being at Iſſue, the Record was ſent in B. R. to be tryed, and being found for the Plaintiff, he had Judgment, and an *Elegit* thereupon Retorned; Whereupon divers Lands were extended and offered by the Sheriff to be delivered to the party according to the Extent, which the Plaintiff refuſed before the Sheriff, becauſe they were too high, and prayed that the Extenders might retain them; all which was Retorned by the Sheriff, and at the day of the Retorn, the Plaintiff came and prayed that the Extenders might retain them according to the Statute of *Aſton Burnell*. And a Caſe was ſhewed out of *Bendloes* Reports, 4 and 5 *Mar.* where it is ſet down to be Reſolved by all the Juſtices, That upon an Execution upon a Recognizance for debt, if the Land be extended too high, the Plaintiff may pray that the Extenders may retain it, aſwell as upon an Extent upon a Statute Merchant or Staple. But in a *Scire facias* upon Bail, and Recovery and Execution

Execution thereupon, it is otherwiſe, and of that Opinion was all the Court; Wherefore it was awarded, that the Extendors ſhould have the Land at the Rate, &c. and that they ſhould pay the Debt. Hill. 44 Eliz. in B. R. *Mollineux* and *Lazes* Caſe. *Cro.* 2. Part, 12.

3. *Scire facias* upon a Recognizance for the good behaviour taken in the Crown Office, the breach aſſigned was, becauſe he aſſaulted and beat one ſuch a day, and doth not ſay *vi et armis*, and for this cauſe after Verdict, the Exception being taken, Judgment was ſtayed. Mich. 14 Jac. in B. R. The King and *Hutleys* Caſe. *Cro.* 2. Part, 432. See *Baſſt.* 3. Part, 220. the ſame Caſe.

4. *Scire facias* upon a Recognizance of the good Behaviour; the Breach was aſſigned, Becauſe the Defendant ſaid to a Conſtable, in executing of his Office, Thou art a lying Raſcal. 2. Becauſe he ſaid to another who threw down his ledges, One of you is dead of the Plague, and I hope I ſhall ſee more of you to dye of the Plague. 3. He ſaid to a Woman, That ſhe was a Whore and a Jade. 4. Becauſe he ſaid to one in the Church yard after Evening Prayer, That he was a forſworn Knave, and a perjured Knave. The Defendant pleaded, Not Guilty. And it appeared upon Evidence, That he ſpake to the Conſtable, becauſe he affirmed, that the Defendant uſed to carry Picklocks about him, Thou art a lying Raſcall, which words did not prove that it was any diſturbance of the Execution of his Office, or in any act about his Office: And for the other words, the Court held, That they did not extend to the breaking of the Peace, or to the terror of any, nor was there any act done, but only evill words; and although the manner of ſpeaking may be a good cauſe in diſcretion to bind one to the good Behaviour; yet being bound, words only would not tend to the breach of the Peace; Wherefore the Court left it to the Jury to conſider of the validity of the Evidence, who conſidering thereof, gave a Verdict for the Defendant. Paſc. 14 Car. in B. R. The King and *Reynards* Caſe. *Cro.* 1. Part, 358.

3. *Where a* Scire facias *brought by the King to repeal his Letters Patents, muſt be brought; and where not: And where the King may enter and ſeize without a* Scire facias. *And where a* Scire facias *will lye by one Pattentee againſt another Pattentee to repeal his Patent; Where not.*

1. A *Scire facias* for the firſt Pattentee of the King, to revoke a Letter Patent of a Parkſhip upon a diſturbance; and the *Scire facias* being returned, *Et nihil ſcivit dicere nec dixit nec potuit dicere recordum quia litera pradicti Patent. ſibi conſtit. revocari et ad nullari debeant.* Judgment was given in the Chancery, That the ſaid Letters Patents ſhould be revoked. Another *Scire facias* was awarded to revoke and annull the Office of Grant of an Auditorſhip for a Condition broken. Another *Scire facias* was Granted for making void and annulling the Grant of the Officer of Remembrancer in the Exchequer, to *Blage*, which was granted him, *quamdiu ſe bene geſſerit in Officii*, he being a Baron of the Exchequer; whereas the taking upon him of the Baronſhip, determined the ſaid Office of Remembrancer. Another *Scire facias* Granted for the King to admit the Office of Sergeant at Arms to be exerciſed *cum Caſtellario*, for his not attendance, for he had a Bayliwick of Inheritance which required attendance, and the Pattent was revoked and made void *ſalvo jure cujuſlibet.* See Paſc. 3 Eliz. *Dyer*, 197, 198. for theſe ſeveral *Scire facias*'s.

2. A *Scire facias* was awarded to make void and annul the Office of Receiver of the County of *Eſſex*, *Hertford*, and *Middleſex*, Granted to Sir *Robert Cheſter* for Term of his life, with a Fee, becauſe he was in Arrerages upon his Account had before an Auditor, and ſo had broken the Condition: and the Opinion of the Juſtices was, That the ſame was well revoked by the *Scire facias*, although the matter was not found by Office. Hill. 3 Eliz. *Dyer*, 211. Sir *Robert Cheſters* Caſe.

3. Upon a Commiſſion in the nature of a *Diem clauſit extremum*, a Tenure of the Queen as of the Barony of S. was Returned. Afterwards a ſecond Commiſſion was awarded, and found a Tenure

nure in Knight Service, as of the ſaid Barony, and after that, a third Commiſſion iſſued Reciting *quod compertum eſt per Inquiſitionem capt. poſt mortem A. tempore H. 5.* That the ſaid Land was holden of the King in Knight Service in *Capite*, upon which Knight Service in *Capite* was returned *prout per diſt. Inquiſitionem de tempore H. 5. Liquet.* It was holden by the Juſtices in this Caſe, That the Heir needs not to traverſe the two laſt Inquiſitions, for they were without Warrant, but that the firſt Office, although againſt the Queen ſhould ſtand and be allowed, untill they ſhould be diſproved by a *Scire facias*, which ſhould Iſſue out of the Record of H. 5. acc. to the Statute of 29 E. 1. of Eſcheators. Paſc. 8 Eliz. *Dyer*, 249.

4. The Lord *Brook* who was Lord Chief Juſtice of the Common Pleas, did annull and make void a Grant made by himſelf before to one, of the Office of chief Prignothory of the Common Pleas, becauſe he was a perſon *Inidoneus*, to execute the ſaid Office, and granted the ſame to another. And in that Caſe, a Preſident was ſhewed in 5 E. 4. where the Office of Clark of the Crown in the Kings Bench was granted to one *Vinter* and another, and after dyed. And *Vinter* exhibited his Patent: And it ſeemed to the Juſtices, that becauſe he was never exerciſed in the ſaid Office, that his Patent was void; and the Juſtices refuſed to admit him into the ſaid Office for the benefit of the King and his people: And this his diſability being ſignified to the King, the King commanded them, *Ore tenus* without any *Scire facias* to ſwear and admit another into the ſaid Office. Mich. 5 Mr. *Dyer*, 151.

5. In a *Scire facias* brought by Sir *Maurice Berkley* againſt Sir *John Sallyard*; the Caſe was, Sir *Maurice Berkley* being a Patentee of the King of the Office of Banner bearer in the Field; upon the Coronation of Queen *Mary*, before one of the Maſters of the Chancery out of Court, without delivery or Reſtitution of the Letters Patents to be cancelled, made a ſurrender of them, which ſurrender was accepted of, and Recorded by the ſaid Maſter in *hæc verba*, *Memorandum quod Mauricius Barkley Miles venit coram me W. E. Cancell. Dominæ Reginæ uno Magiſtror. 29 Sept. Anno Mariæ 1. et ſurſumreddit in manus dictæ Dominæ Reginæ Officium ſuum vacat.* the Bannerſhip *una cum omnibus vadiis, &c.* and thereupon the Office was Granted to the ſaid Sir *John Sallyard*. It was a Queſtion, if the Record aforeſaid was ſufficient to make a ſurrender of the ſaid Office. It ſeemed to be the Opinion of the Juſtices, That it was not. Wherefore afterwards, Sir *John Sallyard* was removed, and the ſaid Sir *Maurice Barkley* was reſtored to his ſaid Office. Mich. 2 Eliz. *Dyer*, 176.

Sir *Maurice Berkleys* Caſe.

6. King *Hen.* 8. ſeiſed of the Manner of *Torrington*, and of a Fair holden within the ſaid Manner every *Saturday* in every Week, and of a Fair there holden yearly, *in vigilia feſto et craſtino St. Mich.* Granted to one V. and two other Merchants of *Torrington*, *Mercatum infra Manerium ſuum de* Torrington *in Comm.* Devon, *et nundinas ſuas ibidem annuatim terminis in feſto St. Mich.* for the Term of 31 years rendring rent, and after dyed, Queen *Mary*, *Anno* 2. of her Reign, Incorporated the Town of *Torrington*, and Granted to them, That they and their Succeſſors ſhould have and hold *de cetero unum Mercatum in Burgo de* Torrington *et duas Nundinas ibidem annuatim*, viz. *unam in feſto vigil. et craſtino St. Mich. et aliam in die St. Georgii Martyris, et* 2. *dibus proxime ſequent.* And in *May* after, the Queen reciting the ſaid Leaſe made to V. and alſo the ſaid Corporation and Grant made to them; Granted the Reverſion of the ſaid Market within the Town of *Torrington*, and of the ſaid Fairs, to *James Baſſet* in Fee, after the expiration of the ſaid Term of 21 years; the Heir of *Baſſet* brought a *Scire facias* againſt the Corporation, to annul and make void their Letters Patents, as to the ſaid Market and Fairs. It was holden in that Caſe by the Juſtices, That the younger Patent *Baſſet*, ſhould not have a *Scire facias* to repeal the Ancient Patent, but *è contra*. And it was holden by the Juſtices, That if the laſt Patent be of Fairs and Markets to be holden at other times then the firſt, it is no cauſe of repeal, for that it is a diſtinct thing from the firſt Granted. Trin. 10 Eliz. *Dyer*, 276. *Baſſet* Caſe.

7. Note. Theſe Rules were put and agreed for Law. 1. At the Common Law, If the King was by falſe Office poſſeſſed of any Cuſtody, or Intereſt in the Land by reaſon of Gardiſhip or Idiocy, that although that the Office was falſe, yet the party could not have any traverſe, but was put to his Petition. But where the King by vertue of any Office is only entituled, and cannot make any ſeizure without ſuit; there in a *Scire facias* brought by the King, the party might traverſe the Office, becauſe that nothing was in the King by the Office: As if the Kings Tenant ceſſe for two years, or had committed Waſte, or had made a Feoffment upon colluſion, and the King brings a *Scire facias*, the party might traverſe the ceſſer Waſte, or Colluſion. 2. That in all Caſes at the Common Law, when the Title of the King accrues to him by judicial Record; there although the King Grants his Eſtate over, the party grieved was put to his Petition, and ſhould not have a *Scire facias* againſt the Patentee. But when the King was entituled by

by Conveyance of Record; as if a Diſſeiſor convey Land unto the King by Fine, Deed enrolled, or the like, there although the party was put to his Petition as againſt the King; yet if he granted him the thing over, the Diſſeiſee might enter, or have an Action againſt the Patentee, for that a judicial Conveyance by Record is preferred before a Conveyance of Record by aſſent. *Cook* 4. Part, 59. in the Caſe of the Wardens and Commonalty of *Sadlers*. See *Cook* 4. Part, 126. in *Beverleyes* Caſe, acc.

8. The King granted the Office of Marſhalſey for life, and afterwards granted the ſame in Reverſion for 21. years. The Grantee of the Reverſion aſſigned his Intereſt to A: Tenant for life deputed J. S. at Will, and dyed; A. aſſigned the ſaid Office to J. S: Office found, That J. S. committed divers forfeitures of the ſaid Office, by ſuffering divers voluntary Eſcapes. In this Caſe, It was Reſolved, That the King might ſeize the Office, without ſuing a *Scire facias*. And in that Caſe, theſe differences were taken; 1. That in ſome Caſes, the King ſhall be in poſſeſſion by Seizure without Office. As in caſe of the Temporalties of a Biſhop, or Prior Alliens, becauſe the Certainty thereof doth appear in the Exchequer. 2. In ſome Caſes, the King ſhall be in poſſeſſion by Office, without ſeizure; as of Lands, Offices; Ward of Lands whereof a continual profit may be taken; As where it is found by Office, that a Condition is broken; or that a perſon Attainted is ſeiſed of Lands, &c. 3. In ſome Caſes, the King ſhall be in poſſeſſion by ſeizure and Office. As in caſe of an Advowſon, the Rightful Patron, the King ſhall not be entituled by a falſe Office found thereof, untill the King hath preſented his Clerk, and he is Admitted and Inſtituted: For if the King brings a *Quare Impedit*, in that caſe he may traverſe the Office. 4. In ſome caſes, the King ſhall be in poſſeſſion without Office or ſeizure; as where the Kings Tenant dyeth without Heir. 5. In all caſes, where a Common perſon is put to his Action, there upon an Office found, the King is put to his *Scire facias*: but when a a Common perſon cannot enter or ſeize; there an Office found without a *Scire facias*, will ſuffice for the King. *Cook* 9. Part, 96. Sir *George Reynells* Caſe.

More *Scire Facias*.

1. FOur Women Co-heirs of H; 3. of them and their Husbands prayed a Writ of Covenant to levy a Fine againſt the fourth Siſter and her Husband: By which Fine, the Defendants did acknowledg the Tenements to be the right of one of the Siſters, as thoſe which her Husband and ſhe, and the two other Husbands and their Wives had of the guift of the Conuſees: And the Conuſees granted and rendred back the Tenements to the Wife of the Conuſor in tail, to hold of the Chief Lord *per ſervitia debita et conſueta*: and if it ſhould happen that ſhe dye without heir of her body, then after her deceaſe, the ſaid Tenements wholly to remain to the ſaid 3. Women Siſters the Conuſees, and the Heirs of their bodies begotten, the remainder to the right heirs of H: The Siſter who was the Donee in tail upon the Grant and Render, dyed without Iſſue; the other three Siſters and their Husbands brought a *Scire facias* to execute the remainder in tail to them. It was holden, That in that caſe a *Scire facias* did not lye to execute the ſame Remainder; For that the Conuſees had a Fee executed in them; and then the remainder limited to themſelves in tail, was void. Paſch. 5 E. 6. *Dyer*, 69. See 1 H. 5. 8. 42 E. 3. 5. acc.

2. A *Scire facias* was brought by *Tho: Gale*, to execute a Fine; The Fine was levied, being a Fine *Sur Conuſans de Droit come Ceo, &c.* between the ſaid *George Gale*, and *Tho. Gale*; by which the Conuſee rendred the Lands to the ſaid *George Gale* the Conuſor in tail, the remainder to himſelf in Fee: the Conuſor dyed without Iſſue, and *Thomas* the Conuſee brought a *Scire facias* to execute the ſaid Remainder: It was holden in that Caſe, That it was no Remainder, but a Reverſion in the Conuſee, it being a Fine *Sur Conuſans de Droit come ceo*: But if it had been a Fine executory, then it was ſaid, That he ſhould have a *Scire facias* in the Reverter; but as now the Caſe is, he was put to his Formedon. Paſch. 3 Eliz. *Dyer*, 199. *Gales* Caſe.

3. A. ſeiſed of a Houſe in *London*, took a wife, and afterwards acknowledged a Recognizance to the Chamberlain of *London*, according to the Cuſtome for Orphanage Money: And afterwards acknowledged another Recognizance before the Recorder

Recorder and Mayor to B; B. ſued Execution upon his Recognizance, and had a *Liberate*, but the ſame was not returned, and the Sheriff upon that delivered the ſaid houſe to B: The Succeſſor of the Chamberlain ſued Execution by *Elegit* upon his Recognizance, and had the moyety of the ſaid Houſe delivered him in Extent: A. the Conuſor dyed. It was in this caſe Objected, amongſt other things, That the Execution upon the *Elegit* was unlawful, Becauſe that B. was in by matter of Record, whereof he ought to take Notice, and have a *Scire facias* againſt him. But it was Reſolved by the Court, That the Execution upon the *Elegit* was good enough. But it was ſaid, That if the Sheriff had returned the former Execution by *Extent*; and the matter had appeared to the Court, That in ſuch caſe, the Plaintiff ought to have had a *Scire facias*. *Cook* 4. Part, 65 *Fullwoods* Caſe.

4. A Judgment was given upon a Bond of 4000 l. and the *Scire facias* was ſued for 3000 l. and he did not acknowledg Satisfaction of the other 1000 l: It was moved, That the *Scire facias* ſhould abate: For if a man brings debt upon a Bond of 20 l, and ſheweth a Bond of 40 l. and doth not acknowledg ſatisfaction of 20 l, it is not good. It was the Opinion of the Court, That there was no difference betwixt the Action of Debt upon a Bond and a *Scire facias*. And the Intendment, *viz.* That it ſhall be intended that he was paid, becauſe that he was ſued but for 3000 l, will not help him the Defendant: And therefore the Opinion of the Juſtices was, That if the Defendant in the *Scire facias* ſay nothing by ſuch a day, That Judgment be entred for the Plaintiff. Mich. 29 Eliz. in B. R. *Godbolt*, 79, 80. See before, Title, *Satisfaction*, Sect. 8. the ſame Caſe.

5. A Judgment was given in Debt at the Grand Seſſions in *Wales* againſt the Defendant inhabiting in one of the ſaid Counties; The Defendant dyed Inteſtate, one inhabiting in *London*, took Letters of Adminiſtration; Whether any Execution might be in *Wales*, was the Queſtion, becauſe he neither Inhabits, nor hath any thing there: And if not, Whether the Record may be removed into the Chancery by *Certiorari*, and ſent by *Mittimus* into the Kings-Bench or Common-Pleas, to the intent to take forth a *Scire facias* upon it, to have Lands out of *Wales*, or goods in the hands of the Adminiſtrator lyable there to it. It was holden by all the Juſtices and Barons, That he could not; for he may not have a *Scire facias* in any Court, betwixt the Judgment is given. Paſch. 2 Car. in B. R. *Cro.* 1. Part, 23.

6. Errour of a Judgment in Debt upon an Eſcape againſt a Sheriff, of one G. B; againſt whom a Recovery was in debt as Adminiſtratrix to one J. S. and that he being in Execution, the Sheriff ſuffered him to Eſcape. The Errour aſſigned was, That the firſt Recovery was as Adminiſtratrix to J. S. and the debt upon the Eſcape, is as Executrix to J. S; which cannot be, that one ſhould dye Inteſtate, and have an Executrix; and the Debt upon the Eſcape ought to purſue the firſt Action. And if an Executor brings an Action and Recovers, and dyes Inteſtate, the Adminiſtrator of the firſt man may not ſue forth Execution. It was the Opinion of the whole Court, That the Action was not well brought; and therefore the Judgment was reverſed. Mich. 12 Jac. in B. R. Sir *Hen. Slingsby* and *Lambert* and *Shilstons* Caſe, *Cro.* 2. Part, 394.

7. In a *Replevin*, the Caſe was thus; A man acknowledged a Statute, and afterwards granted a Rent Charge; the Land is extended, the Statute is afterwards ſatisfied by effluxion of time, and the Grantee did diſtrain for the Rent; And whether he might, without bringing his Action, was the Queſtion? It was Objected ſtrongly, That he ought for to have a *Scire facias*; and this *Scire facias* ought to be *ad Computandum*: But the Opinion of the Court was, That he might well diſtrain without a *Scire facias*, for he did not meddle with the poſſeſſion, but diſtrained for the Rent; and the Grantee of the Rent cannot have a *Scire facias*, becauſe he is a ſtranger; and a ſtranger cannot have a *Scire facias*, either *ad Computandum*, or to have back the Land again. But if he might have a *Scire facias*, yet it was holden, That he might diſtrain: And *Brampſton*, Chief Juſtice, ſaid, You will never find any Book, where a *Scire facias* was brought by the Grantee of a Rent or other profit apprender; and the Judgment is a the *Scire facias* is, *Quod tenementa prædict. redeliberentur*: And may the Grantee in this caſe have the Land and thing in demand? Certainly not; and you ſhall never find in all our Books, That a man ſhall have an Attaint or a Writ of Errour, but he who may be reſtored to the thing loſt by the Judgment. See 3 Car. in B. R. *Dunkers* Caſe, adjudged acc. It was adjudged in the principal Caſe, for the Avowant. Hill. 15 Car. rott. 177. in B. R. *Cro.* 1. Part, 434. *Burwell* and *Harwell's* Caſe. See *March.* 207. the ſame Caſe.

8. In Aſſumpſit by A. againſt J. S. and one Dr. T. his bail; Judgment was given in B. R. againſt the Principal, and after by a *Scire facias* againſt the Bail; and the Principal and Bail joyned both in a Writ of Error in the Exchequer-Chamber: The Writ by Judgment was abated, becauſe they could not joyn. Then it was deſired, That

That the Bail might have a new Writ of Errour by himself, *Quod coram nobis reſidet.* But it was denyed by the Court, becauſe the *Scire facias* is none of the Actions wherein a Writ of Errour is given in the Exchequer-Chamber. Hill. 10 Jac. in Exchequer-Chamber. *Forreſt* and Sir *James Sandelands* Caſe. *Hob.* 72.

9. A. recovered againſt T. H. by Judgment; who dyed, and upon a *Scire facias* againſt the Terr-Tenants, the Sheriff returned J. H. Tenant of a Houſe that was his at the time of the Judgment in *Yarmouth*; J. H. came in, and pleaded, That T. A. enfeoffed him long before the Judgment in Fee, *abſq; hoc*, that he was ſeiſed at the time of the Judgment, or at any time after. Upon that Iſſue being joyned, the Sheriff found the Feoffment; but ſaid, It was made by Covin to defraud the Plaintiff and other Creditors. It was adjudged for the Plaintiff; for that T. H. ſtill remained ſeiſed as to the Creditors, notwithſtanding the Feoffment: But if Iſſue had been taken, directly enfeoffed, or not enfeoffed, it had been found againſt the Plaintiff; for in that caſe, he muſt avoid the Feoffment by Covin ſpecially pleaded, for it is a Feoffment, ſuch as it is. Hill. 10 Jac. in C. B. *Humberton* and *Howgills* Caſe, *Hob.* 72. acc.

10. J. N. in *Anno* 35 Eliz. recovered in C. B. 300 l. debt againſt the Earl of *Derby*, and 3 l. Coſts, and made A. N. his Executix, who dyed before Execution, Inteſtate. S. took Adminiſtration of the Goods of J. N. not adminiſtred by A. N, and took to husband W. the Plaintiff, and both of them brought a *Scire facias* againſt the Terr-Tenants upon the ſaid Judgment, and had divers *Scire facias* into divers Counties. Upon one *Teſtatum*, *viz.* into the Counties of L. C. and N. returnable *Craſtino Annunctia.* 16 Jac. a *Scire facias* upon the Writ into the County of L. is returned againſt J. Terr-Tenant, *Et quod non fuerunt plures*, and Judgment was given to have Execution againſt him; and an *Elegit* awarded: Upon the Writ in the County of C, It was returned *Scire facias* 30. Tenants, *Et quod non fuerunt plures*; 10 of the 30 made default, and Judgment againſt them, and *Elegit* awarded; the other 20. appeared, and pleaded ſeverally: Upon the third *Scire facias* into the County of N; the Sheriff returned a *Scire facias* to the Earl of B. and his Counteſs Tenants, who appeared and pleaded; and upon any Execution done upon theſe Writs of *Elegit*, the ſaid W. the husband of S. dyed. It was a Queſtion, If upon the death of the husband, all the whole Writs of *Scire facias* ſhould not abate as well againſt the Tenants, againſt whom the Judgment is entred, as againſt thoſe who pleaded? And, admitting it ſhall abate againſt them all, Whether the Plaintiff ſhall have Execution againſt any of theſe Tenants before the Judgment be given for, or againſt the other? Theſe Queſtions were not Reſolved, but the Court would adviſe of them. Trin. 16 Jac. in C. B. *Whittingham* and the Terr-Tenants of the Earl of *Derby*'s Caſe. *Hob.* 287. See *Hutton*, 32. the ſame Caſe.

11. Errour of a Judgment in B. R. where in a *Scire facias* upon a Judgment of 900 l. and Execution thereupon, the Defendant there being dead, The Plaintiff ſurmiſed, That he was ſeiſed of Lands in the Counties of K. and S, and prayed a *Scire facias* into the ſeverall Counties. The Sheriff of K. returned, That A. was Terr-Tenant of the Land in K: The Sheriff of S. returned, That B. and his Wife were Terr-Tenants of the Lands in S: A. being warned, took upon him the Tenancy of the Lands mentioned in the Sheriff's return; and pleaded, That another man in the ſame County had other Lands, whereof T. D. was Terr-Tenant; the then Plaintiff denyed it, and Iſſue thereupon, and found for the Plaintiff, and Judgment againſt A: But for the Lands in S, B. and his Wife pleaded, That they were not Tenants; and thereupon were at Iſſue: And being found for them, Judgment was given *quod eant ſine die.* A. brought a Writ of Errour upon that Judgment, and aſſigned for Errour, That B. was dead before the time of the tryal upon which it was demurred. It was the Opinion of the Court, That although that B. be dead, it is not materiall to A, eſpecially it being found by this Verdict, That B. was not Tenant. It was the Rule of the Court, That the Judgment ſhould be affirmed. Trin. 10 Car. in B. R. *Angell* and Sir *William Coopers* Caſe. *Cro.* 1. Part. 372, 373.

12. M. entred into a Recognizance of 2000 l. to H; and afterwards into a Statute of 1000 l. to D; D. extended upon his Statute the Mannor of S, which was H; And he having alſo divers other Lands: Afterwards H. ſued Execution upon his Recognizance, and had the moyty of the Mannor of S. firſt delivered to D. in Execution; but omitted divers other Lands which were of M. out of his extent at the time of the Recognizance: D. brought an *Audita Querela* in C. B. againſt H. and had Judgment; And upon Errour brought in B. R. the Judgment was affirmed: for D. being in by Judgment, and upon title by Execution upon the Statute, ought to have his Land lyable to the Extent upon the Recognizance; but *pro tanto*: and therefore he ought to have included the other Lands of M. in his Extent, as well as the Land of D: But if D. had not been Tenant by Title, but by Diſſeiſin, then he ought not to be relieved upon

Audita Querela. And take Notice, That in this Caſe, It was ſtrongly holden by *Yelverton*, one of the Juſtices, That H. ought to have had *a Scire facias* againſt D. before that he removed his poſſeſſion, becauſe he was in by Title. But Quære of that. Mich. 45 Eliz. in B.R. *Hinde* and *Deans* Caſe. *Yelverton*, 12.

13. C. was endebted to C. in 20 l. who dyed Inteſtate; F. his Wife Adminiſtratrix recovered by Judgment againſt G; but, before Execution, dyed Inteſtate; Y. took Adminiſtration of the goods of C, and brought a *Scire facias* againſt G. upon the Judgment: It was the Opinion of the whole Court, That it did not lye; For one Adminiſtrator is not privy to the other; and this *Scire facias* being grounded upon a Record, it behoves him who will have an Action upon this Record, to make himſelf privy to him who was party to the Record: which cannot be in this caſe, for that every Adminiſtrator claims by Commiſſion, and *Quaſi* by a Collateral authority from another. Paſch. 1 Jac. in B. R. *Yates* and *Gaughs* Caſe. *Yelverton*, 33.

14. A recovered 200 l. upon a Bond againſt B. and the Action was layd in the County of C; and afterwards B. dyed Inteſtate, and W. took Letters of Adminiſtration; and afterwards the Plaintiff ſued a *Scire facias* to execute the Judgment againſt W, and laid the Action in W: and upon Fully Adminiſtred pleaded, the Jury found Aſſetts to 100 l. in the hands of W: It was moved, That this *Scire facias* ought to have enſued his Original; and that the ſame being ſued in the County of W. it was not good, but it ought to be brought in C: It was holden by the Court, That there was a difference betwixt Debt upon a Record, and a *Scire facias* upon the Record; for Debt upon the Record, recites the firſt Action, and the place where the Recovery was, ſo as there appears within the Record, a variance. But in a *Scire facias*, it is recited only *Com. A. recuperaſſet* ſuch a debt, *quod quidem Judicium adhuc ſtat*, &c. ſo as no place where the firſt Recovery was, appears: And the Court cannot take Notice, that the *Scire facias* is grounded upon the Record of the Judgment in C; becauſe that the *Scire facias* is a diſtinct Record of it ſelf, and not annexed to the firſt Judgment. Wherefore Judgment was given for the Plaintiff, and adviſed the ſaid W. to bring Errour, and ſhewed their Opinions clearly, That it would be Errour, becauſe that now after the Judgment in the *Scire facias*, the firſt Judgment, and this Execution upon the *Scire facias*, do make but one Record, of which the Judges in the Exchequer Chamber ought to take Notice. Hill. 9 Jac. in B. R. *Muſgreve* and *Wharton's* Caſe. *Yelverton*, 218.

15. S. brought a *Scire facias* againſt *Liveſy*, Sheriff of K. reciting, That whereas he had recovered 300 l. againſt R. P. and had a *Scire facias*, The Defendant returned, That he had levied 63 l. which he had ready at the day, and yet he did not bring the money into Court; and afterwards he was removed from his Office: and the Writ was, to ſhew why he ſhould not have Execution againſt him of the ſaid ſum, with which he had charged himſelf by his ſaid Return. Upon which, the Defendant Demurred. It was, upon reading of the Record, adjudged for the Plaintiff, according to 9 E. 4. 50. and 5 E. 3. 53. *Fitzh.* Title, *Execution*, 101. And in this Caſe, It was adjudged, That debt lyes againſt the Sheriff that hath charged himſelf by his Return, That he hath levied the money; as it was adjudged, Trin. 15 Jac. in C. B. in *Speake* and *Richards* Caſe. Which Caſe, See *Hob.* 205. vouch. in *Lib.* 1. Title, *Debt*, fol. 375. Sect. 14. Hill. 10 Jac. in B.R. *Smith* and *Liveſey's* Caſe, *Hutton*, 32.

16. E. T. brought a *Scire facias* againſt M. Sheriff of S. for returning of inſufficient Pledges; in a Replevin brought by one R. againſt the now Plaintiff in which the ſaid R. made default: whereupon a *Returno habendo* was awarded, and an *averia clamata* returned, and then a *Withernam*, and then a *Nichil*, &c. and for taking of this inſufficient Pledges, this *Scire facias* was brought upon the Statute of *Weſt.* 2. cap. 2. And the Defendant demurred upon it, and Judgment was given againſt the Sheriff. Hill. 21 Jac. in C. B. *Travers* and *Michelbornes* Caſe. *Hutton* 77. See Hill. 11 Jac. in C. B. rott. 3563. *Samerford* and *Beamonts* Caſe. *ibid.* adjudged acc.

17. In a *Scire facias* upon a Recognizance, the Caſe was this; A. recovered in Debt in this Court againſt one D. who brought a Writ of Error to reverſe the Judgment in the Exchequer Chamber, which was returnable, 3. *Feb.* laſt, and did find Bail according to the Statute of 3 Jac. cap. 4. the Defendant being his Bail, and bound in a Recognizance, That D. ſhould proſecute his Writ of Error with effect, and to ſatisfy the debt and damages if the Judgment was affirmed. And 12 *Feb.* the *Scire facias* was brought againſt him upon the Recognizance, to know why he ſhould not have Execution, in regard D. did not proſecute his Writ. The Defendant pleaded, That whereas the Writ of Error was returnable 3. *Feb.* D. the the Principal 2. *Feb.* came into Court, and *reddidit ſe in eadem Curia* in diſcharge of his Bail, *et per mandatum Curiæ Committitur Mariſchallo, et adhuc remanet* in Execution in the Marſhalſea: Upon which Plea the Plaintiff demurred in Law. It was the Opinion of the whole Court, That this Plea was

not

not good. He doth not in the Plea ſay, *Quod reddidit ſe Priſona ſed venit hic in Curia, et in eadem Curia reddidit ſe Priſona*; and that is impoſſible to be ſo, for here ought to be a Court day, and no render of himſelf could be *in eadem Curia* it not being *dies Juridicus*. Alſo it ought to be, That *in eadem Curia reddidit ſe, et per eandem Curiam Commiſſus*, for the Court ought to commit him, and it is not ſufficient for him to render himſelf, but he ought to be committed in Execution *per Curiam*; and this to be ſo, is here impoſſible, becauſe it appears not to us that this 2. day of *Feb. Non fuit dies Juridicus*, and therefore this is without help. Judgment was given for the Plaintiff. Paſc. 14 Jac. in B. R. *Auſtin* and *Monks* Caſe. *Bulſtr.* 3. Part, 191, 192.

18. The Plaintiff had Judgment againſt the Defendant in Debt in C. B. and a *Capias* for taking of him, and becauſe he could not be taken, a *Scire facias* was granted againſt the Bail; upon which *Nihil* was returned. Afterwards the Defendant brought a Writ of Error to reverſe the Judgment, and the Record was removed in B. R. after a ſecond *Scire facias* againſt the Bail was granted, who before the Return of it, brought in the Principal, and prayed to have this allowed. It was ſaid, That the Court of Common Pleas, and this Court, do differ in this; there in the Common Pleas, they have but one *Scire facias*; but here we have two, the Record is here removed before the ſecond *Scire facias*, and therefore he is not to bring in the Principal after this is removed by a Writ of Error; and it was ſaid, it was adjudged in Sir *George Bowes* Caſe, That if the Bail do bring in the Principal upon the firſt *Scire facias*, this *de jure* ought to be allowed: but if he do nothing herein untill the ſecond *Scire facias*, and then bring in the Principal, it is not to be allowed, *Anno* 8 Eliz. Sir *George Bowes* Caſe,: And ſo the Rule in the principal Caſe, That this bringing in of the principall upon the ſecond *Scire facias*, was diſallowed according to the Reſolution in *Bowes* Caſe, Paſch. 14 Jac. in B. R. The Spaniſh Embaſſadour and *Giffords* Caſe. *Bulſtr.* 3. Part, 182, 183.

19. A *Scire facias* iſſued againſt the Terr-Tenants, to have Execution of a Judgment againſt F. Earl of *Derby*, in 25 Eliz. The Defendant pleaded, That long before F. had any thing in the Land, That *Ed.* Earl of *Derby* was ſeiſed of the Land, and 1 *Maria*, enfeoffed J. S. to the uſe of the Lord *Strange* and his Wife in tail, the remainder over to the ſaid F; and made the ſaid F. his to the Eſtate tail; and pretended, That by this means, the Land ſhould not be lyable to this Judgment, becauſe it was entailed to F, who dyed ſeiſed of ſuch Eſtate. The Plaintiff traverſed the Feoffment made by *Ed.* Earl of *Derby*: The Jury found, the Feoffment was made by *Ed.* to the perſons nominated as the Defendant had pleaded; but this was to the uſe of the Feoffor for life, the remainder over to the Lord *Strange* and his Wife, the Remainder as before: And, if this ſhould be intended the ſame Feoffment which the Defendant had pleaded, was the Queſtion; *Winch*, Juſtice, ſaid, That in this caſe, there was ſuch an Eſtate found as had taken away the Execution of the Extent, and that the Eſtate for life is not material: But the Court would Adviſe. It was adjourned. Trin. 20 Jac. in C.B. The Earl of *Derby*'s Caſe. *Winch.* 32.

20. Note; Where an Executor brought a *Scire facias* upon a Judgment given for the Teſtator in debt for him; The Defendant would have pleaded, The death of the Teſtator between the Verdict and the Judgment; but *per Curiam*, he cannot ſo do: for he may not plead this in a *Scire facias*; but the Defendant is put to his Writ of Error. Mich. 20 Jac. in B. R. *Winch.* 48. acc.

21. A *Scire facias* was prayed to the Juſtices of the Kings-Bench in *Ireland*; and upon the Book of 45 E. 3. 19. p. 18. a *Procedendo* was granted here to them to proceed there, Regiſter 43. A Writ of *Fieri facias* was directed to them in this manner, *viz. Rex Juſtitiario ſuo Hiberniæ ſalutem. Dodderidg*, Juſtice, ſaid, Nothing is to come hither out of *Ireland*, but only a Tranſcript of the Record, the Record it ſelf there remains, Whereby, by the Rule of the Court, in the principal Caſe, a *Scire facias* was granted to the Juſtices of the Kings-Bench in *Ireland*. Trin. 11 Jac. in B. R. *Taylor* and *Terry*'s Caſe, *Bulſtr.* 2. Part, 118.

22. Errour to reverſe a Judgment for 200 l. in C. B. the Caſe appeared to be this; H. had Judgment againſt the Defendant: and after the Writ of Errour brought, and Errours aſſigned, H. dyed Inteſtate, and R. took Letters of Adminiſtration, A *Scire facias* was brought againſt him *ad audiendum Errores*, (the Plaintiff in the Writ of Errour had a Releaſe from him) R. the Adminiſtrator appeared here, and afterwards gave up his Letters of Adminiſtration to J. S: Upon this, It was moved to the Court, That the *Scire facias* might be granted to the Adminiſtrator generally. It was urged, That J. S. being now Adminiſtrator, the Plaintiff could not plead the Releaſe of another againſt J. S; And it was ſuppoſed, That this Releaſe was granted by Covin from R, and the Plaintiff in the Writ of Errour, who had the Releaſe, ſuppoſed that J. S. had got the Adminiſtration by Covin: It was ſaid by the Secon-

dary in this case, That the presidents were both wayes; That the *Scire facias* might either be *Administratoribus*, generally, or *tali Administratori*. It was holden by the Court in this Case, That the death of the Defendant in a Writ of Errour, doth not abate the Writ of Errour, but that he may have a *Scire facias* against another *ad audiendum Errores*: But otherwise it is, where the Plaintiff in the Writ of Errour dyes, there the Writ shall abate. The Court gave the Rule, That the *Scire facias* should be *administratoribus* generally. At another day, the matter was moved again, and then the Case appeared to be, That H. brought his Writ of Errour, and being in Execution upon a Judgment had against him, brought a *Habeas Corpus*: and in this Writ of Errour, Bail was taken to prosecute the Writ of Errour with effect; and if the Judgment be affirmed, then to pay the principal; and if he do not pay, then his Bail. After this, and bail taken, and before Judgment affirmed, a Release was made to him and the Bail, of all Actions, Executions, and Demands; and afterwards the Judgment was affirmed. The money not paid by H, a *Scire facias* was prosecuted against the Bail, who pleaded this Release in Barr, being made before any thing was done. It was the Opinion of the whole Court, That this being pleaded by the Bail in barr to the *Scire facias*, was a good Plea; for that by this Release, the debt is discharged. But they would not at this time Over-rule the same. Wherefore the parties perceiving the Opinion of the Court, rested satisfied, and did not further proceed in the Cause. Trin. 11 Jac. in B. R. *Haxley* and *Harrison*'s Case, *Bolstr.* 2. Part, 231, 232.

23. A Recognisance was acknowledged at Serjants-Inne in *Fleetstreet*, and delivered, and enrolled at *Westminster*: In this Case, the Court held, That it was in the Election of the Conusee to bring his *Scire facias* either in *London* where the Recognizance was acknowledged, or in *Middlesex*, where it was delivered and enrolled. But afterwards, upon further advice to be of the Case, the Court was of Opinion, That the *Scire facias* ought to be where the Recognizance was taken; and not where it is recorded. Hill. 22 Car. in B. R. *Andrews* Case. *Styles*, 9.

24. Four several persons were bound *Conjunctim & Divisim*, in an Obligation to B; B. had a Judgment against them; one of the Defendants dyed: B. sued out a *Scire facias* against the four. And it was demurred to the *Scire facias*, because one of the Defendants against whom the Judgment was, upon which the *Scire facias* was granted, was dead, when the *Scire facias* issued forth. The Plaintiff perceiving the Opinion of the Court was, That the suing forth of the *Scire facias* was not good, moved for his own Expedition to have it quashed. Which was done accordingly. Trin. 23 Car. in B.R. *Blackwell* and *Ashton*'s Case. *Style*, 58.

25. An Action of Accompt was brought against a Feme Covert an Administratrix and her Husband in the Common-Pleas, and Judgment against the Defendants *quod Computent*; the Writ dyed, and the husband brought a Writ of Errour in this Court, to reverse the Judgment. It was holden by the Court, That the Writ of Errour did not lye, because the Record cannot be removed by it, for that would disturb the proceedings in the Common-Pleas, and the party would have no fruit of his Suit, if the Record should be removed, or any remedy to recover the arrears due unto him: Yet the Original is determined by the Judgment *quod Computet*. Trin. 1651. in B. R. *Spittlehouse* and *Farmery*'s Case, *Styles*, 291.

26. A *Scire facias* was brought by J. S. against J. D. in the Chancery, to avoid a Statute; the Case was this; A. acknowledged a Statute to J. D. and afterwards conveyed part of the Land lyable to the Statute, to B, who by Bargain and Sale conveyed the same to J. D. the Conusee: J. D. extended the Lands of J. S. the Purchasor, who thereupon brought his *Scire facias* to avoid the Statute, because that the Conusee had purchased parcell of the Land lyable to the Statute. This Case coming by *Mittimus* out of the Chancery into the King-Bench; In Arrest of Judgment, It was moved for J. D. the Defendant, That the Bargain and Sale is alledged to be made to him; but it is not shewed, that it was by Deed enrolled: but it was pleaded, That *virtute cujus* viz. of the Bargain and Sale, the Conusee was seised, but doth not shew, that he entred. The Question was, What Estate the Bargainee had, the Deed not being enrolled? And what Estate the Conusee had before Entry, the Deed not being enrolled; and then, if the Statute was extinguished; if it was not, then the *Scire facias* was not well brought. But the Opinion of the whole Court was, That the *Scire facias* was well brought; for it was said, That J. D. the Defendant, *perquisivit sibi, & heredibus suis*; and concludes, *virtute cujus*, and of the Statute of Uses, he was seized; which is a good averment, That he hath a Fee, and it is not material how he hath it; and this Action being an equitable Action, the Court may conceive sufficient matter to give Judgment for the Plaintiff; and in this Case, it was said and agreed, That if a man be seised of black Acre, and white Acre, and acknowledgeth a Statute, and afterwards he maketh a Lease for years of white Acre, the Reversion over in Fee, and de-

rewards the Conusee purchaseth black Acre, and extendeth the Land of the Lessee for years, that he in the Reversion should have an *Audita Querela*, or a *Scire facias* for the damnification which came to his Interest: And it was also holden, That he who hath but *inter esse Termini*, should have an *Audita Querela*: Judgment was given for the Plaintiff in the *Scire facias*. Mich. 15 Car. in B. R. *Leak* and *Dawes* Case. *Mar.* 63. & 69.

Sclaunder, Sclanderous Words, and *Scandal.*

1. THe Defendant said of the Plaintiff these words, *I will hang him, for he hath spoken words that be high Treason.* It was said, That the words are not Actionable, because they are too general, because it doth not appear what the words were: But *per Curiam*, the words are Actionable; for words spoken may be Treasonable: As to say, That the King is a Bastard; Or, That another hath better Right to the Crown: And it is not safe for the Plaintiff to put incertain, what words he spake; because words which are Treason, are *Arcana Imperii*, and not to be vulgarly uttered, but to be discovered to the King, or his Council. Mich. 5 Jac. in B. R. *Blanchflower* and *Atwoods* Case. *Yelverton*, 107.

2. Mr *Bettisford* hath spoken Treason, and that I can prove, adjudged Scandalous and Actionable; for Treason may be committed as well by Words as by Actions: for every thing which discovers the minde of a man to be trayterous to his Soveraign, is capital to the party. Hill. 8 Jac. in B. R. *Bettisford* and *Prestis* Case. *Yelv.* 197.

3. In an Action of Sclander brought, the Plaintiff declared, That he was a Merchant, and that the Defendant having speech with J. S. of him, spake these words of the Plaintiff; *He is a Bankrupt, and he is fled beyond the Seas for much money.* The Defendant pleaded, That the Plaintiff at the time of the words spoken, was an Alien, and born in *Brabant* in *partibus transmarinis*, under the obedience of the Duke of *Brabant*, *Et extra ligeantiam Domini Regis*: Upon which the Plaintiff did demur. It was adjudged for the Plaintiff; for Traffique betwixt Merchant strangers, and domestick Merchants, is Warranty by the Law of Nations, and by the Law of the Land, and the Common Law in all things which concern his Trade of Merchandize, protects him; and this Sclander here, although it toucheth the Plaintiff only in his person, yet because it impairs his Credit in his Trade, by which he lives, and by which other of the subjects have the benefit of Commerce with him, the words are Scandalous, and Actionable. Hill. 8 Jac. in B. R. *Tuvloose* and *Morrisons* Case. *Yelv.* 198.

4. The Plaintiff is a Felon? Take heed what you say (said a stranger.) Why (said the Defendant) Is not he a Felon, which knew of a Murder and concealed it? He (meaning the Plaintiff) knew of the murder of A. L. and did not reveal it, till it was long after openly known. It was adjudged, That the words were Scandalous and Actionable, and that the subsequent words did enlarge the Slander; for although to conceal a Felony is not Felony, but Fineable, and an Offence, for which he ought to be bounden to the good Behaviour; yet the same shews malice in the Defendant, and it is a great Imputation to the Plaintiff. Pasch. 7 Jac. in B. R. *Newlin* and *Fassits* Case. *Yelverton*, 154.

5. Words were these, *You might have known your own sheep, and not have stollen mine.* It was the Opinion of *Flemming* and *Yelverton* Justices, That the words were not Scandalous nor Actionable, being only by Imputation: A Slander shall not be drawn in by a streined construction; But *Crook* and *Williams* Justices, held the contrary, and that it cannot be taken in any other sense, but by strong implication, and necessary consequence, to charge the Plaintiff to have stollen sheep; and the words being entirely spoken, are not to be taken dividedly, but ought to receive an entire construction. *Quare*, how it was Resolved Mich. 6 Jac. in B. R. *Thompson* and *Knotts* Case. *Yelverton*, 144.

6. An Action was brought for calling the Plaintiff Sorcerer, and Inchanter. It was holden by the Court of Common Pleas, That no Action lyeth for those words; for *Sortilegium est rei futuræ per sortes exploratio*; and *Sortilegus, sive sortilegia est, qui sortes futura pronuntiat est*; Inchauntry *est verbis aut rebus adjunctis aliquid præter naturam moliri*: He which is convicted of Sorcery and Deceit, shall only be Fined and Imprisoned: *Conjuratio* is derived of the words, *Con & Juro, & proprie dicitur, quando multi in alicujus perniciem jurant*: In the Statute of 5 Eliz. cap. 16. It is taken for the Invocation of any evil or wicked spirits, i. e. *Conjurare verbis conceptis aliquos malos, & impuros*

impuros Spiritus, the ſame is Felony: But Witchcraft, Inchantment, Charm, or Sorcery, are not Felony, if not by them any perſon be killed, or dyeth: If a man be called a Conjurer, or a Witch, he ſhall not have any Action upon the Caſe, unleſs that he ſaith, That he is a Conjurer of the Divel, or of any evil or wicked Spirit. Mich. 7 Jac. in C. B. *Mattons* Caſe. *Cook, Select Caſes*, 49. *Brownlow* 2. Part, 276. the ſame Caſe.

7. *Hen.* Earl of *Lincoln*, brought a *Scandalum Magnatum* againſt one, for theſe words, *viz. The Earl of Lincolns man, did by his commandment, take the goods of one* Hoskins, *by a forged Warrant, &c.* And the Earl recovered great damages by Verdict. In arreſt of Judgment it was moved, That the words were not actionable, becauſe it was not averred, That the Earl knew the Warrant to be forged; and of that Opinion was the whole Court. Mich. 40 Eliz. in C. B. The Earl of *Lincoln* and *Michel Bowes* Caſe. *Goldesbr.* 115.

8. *Scandalum Magnatum* for theſe words, *My Lord* (meaning the Earl of *Lincoln*) *is a baſe Earl, and a paultry Lord, and keepeth none but Rogues and Raſcals like himſelf.* Upon Not Guilty, It was found againſt the Defendant. It was moved in Arreſt of Judgment, That the words were not actionable, for they touch not him in his life, nor in any matter of his Loyalty, nor import him in any main point of his Dignity; but are words of ſpleen, concerning his ſervants, which is not material. It was the Opinion of the Juſtices, That becauſe they touched him in his Honour and Dignity, and to term him a baſe and paultry Lord, is matter to cauſe contempt betwixt him and the people, or of the Kings Indignation againſt him; the words were Scandalous and Actionable. Paſch. 4 Jac. in B. R. The Earl of *Lincoln* and *Roughtons* Caſe, *Cro.* 2. Part, 196.

9. The Lord *Cromwel* brought an Action *de Scandalo Magnatum*, upon the Statute of 2 R. 2. cap. 2. againſt the Vicar of D. for ſpeaking of theſe words, *You like not thoſe that maintain Sedition againſt the Queens proceedings*; unto which the Defendant pleaded a ſpecial Juſtification, *viz.* That the Plaintiff procured two to Preach in his Church, which inveighed in their Sermons againſt the Book of Common Prayer; and becauſe the Defendant did prohibit them, the Plaintiff ſaid to the Defendant, *Thou art a falſe Varlet. I like not of thee*; To whom the Defendant ſaid, *It is no marvel though you like not of me, for you like of thoſe* (meaning the two that ſhould have preached) *that maintain ſedition* (meaning *ſeditioſam illam doctrinam*) *againſt the Queens proceedings.* It was in this Caſe adjudged, to be a good Juſtification: for in caſe of Sclander for words, the ſenſe of the words are to be taken; and the ſenſe of them doth beſt appear by the cauſe and occaſion of ſpeaking of them: And therefore in this caſe it was ſaid, That the Council of the Defendant had done well in ſhewing the ſpecial matter, whereby the ſenſe of the word [Sedition] might appear upon the coherence of all the words taken together; *viz.* That the Defendant meant the Seditious Doctrine againſt the Queens proceedings in the Act of 1 Eliz. by which the Common Prayer was eſtabliſhed, and that he did not intend any ſuch publique or violent Sedition as was alledged by the Plaintiff. *Cook* 5. Par. The Lord *Cromwell's* Caſe.

10. See upon this Diviſion, The Earl of *Shrewſbury*, and Sir *Thomas Stanhops* Caſe. Mich. 37 Eliz. in B. R. *Poph.* 68, 69, 70.

11. See alſo the Earl of *Northamptons* Caſe, for *Scandalum Magnatum*, what ſhall be ſaid to be Scandal, and where puniſhed; where it is Reſolved (amongſt other things) That if a man hear falſe and ſcandalous rumours, either of the King, or of any other the Grandees and Peers of the Realm, that it is not lawful to relate them to others, and that he had heard J. S. to ſay ſuch ſcandalous words or rumours; for that in ſuch caſe, the party ſhall be puniſhed and impriſoned, until he find out the party that ſpake them. 2. It was Reſolved in that Caſe, That if A. ſay to B. Did you not hear that C. is guilty of Treaſon; This amounts as much as to a ſcandalous Publication; and in a private Action of Sclander, of a common perſon, if J. S. publiſh, that he hath heard J. N. ſay, That J. G. was a Traytor, or a Thief; in an Action of the Caſe, if the truth be ſuch, he may Juſtifie: But if J. S. publiſh generally, without a certain Author, That J. G. was a Traytor, or a Thief, there an Action upon the Caſe lyeth againſt J. S. for that he hath not given to the party grieved any cauſe of Action againſt any, but againſt himſelf that publiſhed the words, although that in truth he might hear them. *Cook* 12. Part. 133. 134. 135. The Earl of *Northampton* and *Goodricke* Caſe.

12. Words were theſe, viz. *It would be proved by many vehement preſumptions, That the Plaintiff was an Inventor, and the Plotter of the death of J. S. becauſe he would not ſell him his Land.* It was Reſolved by the whole Court, That the words were not actionable, nor ſcandalous; becauſe he affirms nothing of the Plaintiff, but refers all to preſumptions, which are incertain; and words of Sclander ought to be ſpoken affirmatively. Paſch. 7 Jac. in B. R. *Weblyn* and *Mayers* Caſe. *Yelv.* 153.

13. Words, *viz. Bear witneſs Miſtris, That he hath ſtollen my hair-cloth.* It was Reſolved by the whole Court, That the words were not ſcandalous nor Actionable, becauſe there is not a direct affir-

mat-

native to charge the Plaintiff with the ſtealing of it, but it reſts only upon teſtimony and proof. Paſch. 6 Jac. in B.R. *Berry* and *Wrights* Caſe. *Yelv.* 116.

See more of *Sclander*, and *Sclanderous words*, Where they are Actionable, in *lib.* 1. Title, *Action upon the Caſe, for words.*

Seals.

1. THe King ſeized of a Mannor in Fee, in the Right of his Crown, Granted Copy-hold Lands, parcel of the ſaid Mannor, to one in Fee; and after, by his Letters Patents under the Exchequer Seal, made Leaſe of thoſe Lands for 21 years: The Leſſee for years granted his eſtate to the Copyholder: The King reciting the Leaſe for years, granted the Reverſion to J. S. in Fee; the years expired, and the Grantee of the Reverſion entred upon the Copyholder. In this Caſe (amongſt other points) it was Reſolved, That the Leaſe under the Exchequer Seal was good by Common Uſage; for that the Cuſtoms of the Kings Court are as a Law, and the Common Law doth take notice of them; And it was holden, That a Leaſe by the order of the Exchequer, by the word *Commiſimus, Habend. Tenend. & Reddend.* ſuch a Rent is good by the ancient Uſage there: And it was further holden, That the Law takes notice of divers of the Kings Seals: The King licenſed one to make an Attorney under his Privie Seal, and it was holden good. The King may command one that he is not out of the Kingdom under his Privie Seal, or Privie Signet: But a Proteſtion or Warranty of Attorney is not good under the Privie Seal. If the King doth diſcharge a debt due to him by the Sheriff under the Privie Seal, the ſame is not good; but it ought to be under the great Seal. *Cook* 2. Part, 16. *Lents* Caſe. See *Crook* 1 Part, 380.

2. Upon a ſpecial Verdict, the Queſtion was, whether a Leaſe by the King under the Exchequer Seal of Lands uſually demiſed to one for life; the Remainder for life, the Remainder to a third for life, reſerving the uſual Rent, ſhall be good or not? It was urged, That it could not; for that Freehold cannot paſs from the King, but by Patent under the Great Seal. But it was the Opinion of all the Juſtices, That Leaſes for life under the Exchequer Seal, being uſually Leaſed, and the ancient Rent reſerved, are allowable, and good for the Kings benefit, that his Land ſhall not lye unletten; and all the Barons of the Exchequer ſaid, That it was their courſe to demiſe as well for life as for years, under the Exchequer Seal; and Judgment was entred accordingly. Hill. 13 Car. in B. R. *Kemp* and *Barnards* Caſe. *Cro.* 1. Part, 369.

3. A man ſeized of houſes in Fee, deviſed them by his Will to his Wife (ſhe being an Allien born) The King by his Letters Patents under the Great Seal, made the Wife Denizen; the Deviſor dyed, the Wife took another husband; and the Letters Patents being naught in the Teſte, they obtained an exemplification of the Enrolment of the Letters Patents under the Great Seal, which was with the true Teſte; and afterwards, an Office was found before Commiſſioners by force of a Commiſſion to them directed under the Exchequer Seal; by which it was found, That the ſaid Wife was an Allien born. It was in this Caſe (amongſt other things) Reſolved, That the Office found by Commiſſion under the Exchequer Seal, was not ſufficient to entitle the King to the Lands of an Allien born; but that ſuch Office which doth concern Fee, or Freehold, ought to be by force of a Commiſſion under the Great Seal. Mich. 30 Eliz. in the Exchequer, *Cook* 5. Part, 52, 53. *Pagetts* Caſe.

4. Note, It was Reſolved *per Curiam*, That when the Kings Officers by force of any matter of Record, may have ſo certain notice of the Lands and Tenements therein contained, that they may put them in charge to the King, although the Record it ſelf be not of any effect or validity in Law; yet in Judgment of Law, ſuch Lands or Tenements ſhall not be ſaid to be concealed: And therefore it is there ſaid, That any Grant or Demiſe of any Land certain under the Exchequer Seal, where it ought to be under the Great Seal, or under the Great Seal, where it ought to be under the Dutchy Seal, or under the Seal of the Dutchy, or the Augmentation, where it ought to be under the Great Seal; although that nothing paſſeth by it, yet by reaſon thereof, ſuch Land ſhall never be ſaid to be concealed. *Cook* 10. Part, in *Arthur Legats* Caſe. 111, 112.

5. Upon a ſuggeſtion by the Earl of *Devon* to the King, That all Munitions decayed, and unſerviceable, had been uſed to be taken as Fees by the Maſter of the Ordnance; The King by his Privie Seal, licenſed the Earl, being Maſter of the Ordnance, to take all unſerviceable Iron Ordnance, Shot,

Shot, and Munition contained in ſuch a book, and to convert them to his own uſe: The Earl took the Ordnance, and Munition, and ſold them, and converted the money to his own uſe. The Queſtion was, If the Executor of the Earl might be charged to the King for the converſion of the ſaid Ordnance. In this Caſe (amongſt other things) it was Reſolved, 1. That the Earl could not claim the ſaid Iron-Ordnance as Fees appendant to his Office; becauſe the Office was erected but of late time, and then he could not claim them as ancient Fees by Preſcription to a new Office. 2. Reſolved, That the ſaid Privie Seal being made and granted upon a falſe ſuggeſtion, the King was deceived, and ſo the Privie Seal was void. 3. Reſolved, That no Officer of the King, might *ex Officio*, iſſue out, or diſpoſe of the Kings Treaſure, although it was for the honour of the King himſelf, or for his profit, without the Kings Warrants; and that a Warrant by word of mouth, or under his Privie Seal, was not ſufficient to iſſue out the Kings Treaſures, but the Warrant ought to be under the Great Seal, or Privie Seal. *Cook* 11. Part, 12. in the Earl of *Devonſhires* Caſe.

6. In an Action of Covenant, the Caſe was That the Defendant covenanted that he would erect three houſes upon ſuch Land demiſed unto him, unleſs he was reſtrained by the Kings Proclamation, &c. The Defendant pleaded, That ſuch a day and year, the King made a Proclamation to reſtrain Building: Upon which the Plaintiff demurred, becauſe a Proclamation was pleaded, and no plea expreſſed where the Proclamation was made, and ſo no Viſne could be, if Iſſue ſhould be joyned thereupon; and alſo, becauſe it is not pleaded to have been *ſub magno Sigillo Angliæ*; And of that Opinion the Court ſeemed to be upon the firſt motion, becauſe that a Proclamation binds not, unleſs it be under the Great Seal; and if it be denyed, there can be no Iſſue thereupon (but only *Nul tiel Record*) which cannot be, unleſs he pleads it to be *ſub magno Sigillo*. But yet afterwards, ſome of the Juſtices doubted of it, becauſe that when it is pleaded, That ſuch a Proclamation was made, it ſhall be intended duly made; wherefore the Caſe was adjourned. Hill. 5 Car. in B. R. *Cro.* 1. Part, 130.

7. In 11 Jac. in the Court of Common Pleas, It came in Queſtion, Whether that a Preſentation made by the King to an Advowſon appendant to a Mannor, parcel of his Dutchy, under the Great Seal of *England*, was good, or not; and whether the ſame ought not to have been under the Seal of the Dutchy? And it was Reſolved by the whole Court, That the Preſentation was well made; for that the Preſentation was but the Kings commendation of his Clerk to the Ordinary, and was not any Intereſt of the Inheritance of the Advowſon, but only it was a thing concerning the Advowſon, and but as a Flower fallen from the Stock, which did not now participate of the Root; and alſo, for that the King might have Preſented by word only: And the Caſe between the King and the Biſhop of *Chicheſter*, which was Mich. 8 Jac. in C. B. was affirmed to be good Law; That where the King had an Advowſon in the right of his Ward, and Preſented unto the Advowſon under the Great Seal, that the ſame was well made, although it was not under the Seal of the Court of Wards; for that the King might Preſent by word only, and his Preſentation was but his commendation of his Clerk to the Biſhop: And *Stephen Gardiners* Caſe was vouched by *Coke* Chief Juſtice, where the Preſentation of him to the Deanry of *Norwich*, was good, although that the King in his Preſentation did miſtake, and miſ-recite the name of the foundation of the Deanry, for that his Preſentation was but his commendation of the Dean, and touched not the Inheritance of the Deanry. Mich. 11 Jac. in C. B. The King and the Biſhop of *Lincolns* Caſe.

8. A. ſeized in Fee of the Advowſon of W. by Deed lett that Advowſon, and divers other Lands for years, to the Lord *Zouch*, and others, for payment of his debts, & dyed ſeized of the Inheritance, ſome of his Lands being holden in Knight ſervice in *Capite*, and his ſon and heir within age: The King granted the Wardſhip of the Body and Lands to the Leſſees, rendring Rent, with a clauſe that it ſhould be void for non-payment: The Rent at Mich. 1 Jac. was behinde; and after, in Feb. 2 Jac. the Rent due at Mich. 2. and all other Rents were paid. The Church became void during the minority of the Ward; and afterwards, the King Preſented to the Church under the Great Seal, and under the Seal of the Court of Wards; the Defendant, *ſuppoſitur*, was Preſented, as to a Church which appertained to the King, *ratione minoris ætatis* of the ſaid Ward; and afterwards, he obtained Inſtitution and Induction; and after was dead, the Plaintiff (who was Preſented under the Great Seal) obtained Inſtitution and Induction: Which of them was Parſon, was the Queſtion. In this Caſe it was agreed, That the King may Preſent to any Church which he hath in right of Wardſhip, either under the Great Seal, or under the Seals of the Court of Wards; but a Preſentation under the Seal of the Court of Wards, if he hath not right to Preſent in right of the Ward, is void, and cannot make an uſurpation. It was further made a Queſtion in this Caſe, That for as much as the Preſentation under the Great Seal, and the Preſentation under the Seal of the Court of Wards, were in the [illegible] cy,

cipal Caſe both made in one day; and the Preſentation under the Seal of the Court of Wards, doth not mention the firſt Preſentation, and revoke it, whether it ſhall be good; but of this, no Opinion was delivered; becauſe it was conceived by the Court, That the Preſentation under the Seal of the Court of Wards, in the Principal Caſe, was void. Mich. 3 Car. in C. B. *Stephens* and *Peters* Caſe. *Cro.* 1. Part, 70, 71.

9. In Error of a Judgment in the Grand Seſſions in the County of P. in *Wales*, in an Aſſize of Darrein Preſentment, by H. C. againſt the Biſhop of St *Davids*, and others; Amongſt many Errors aſſigned, one was, becauſe the Iſſue being joyned, Whether H. C. did laſt Preſent one R. D. the laſt Incumbent, who was Inſtituted and Inducted upon his Preſentation; The Plaintiff offered in evidence, letters of Inſtitution, which appeared to be, and ſo mentions, That they were ſealed with the Seal of the Biſhop of *London*, becauſe the Biſhop of St *Davids* had not his Seal there; and the Defendant had demurred thereupon, That theſe Letters were inſufficient, and the Demurrer was denyed, which was ſaid, was an Error, becauſe they ought to have permitted the Demurrer, and ſhould have adjudged upon it. But it was holden by the Court, That the admitting of the Demurrer, ought not to be aſſigned for error; for when upon the Evidence, the matter was over-ruled by the Juſtices of Aſſize, That was a proper cauſe of a Bill of Exception, and the remedy which the Statute appoints in ſuch caſe: And for the matter of the Letters of Inſtitution, ſealed with another Seal, and made out of the Dioceſs, It was holden, That they were good enough; for the Seal is not material, it being an Act made of the Inſtitution, and the Writing and Sealing is but a Teſtimony thereof, which may be under any Seal, or in any place; yet the Court would adviſe of it. Hill. 8 Car. in B. R. *Cart*, and the Biſhop of St *Davids*, and others Caſe. *Cro.* 1. Part, 149.

10. A Bill of Intruſion in the Exchequer againſt *Cater*, he pleaded the Grant of the Queen. The Plaintiff replyed, That before the Queen had any thing, this Sir *Fr. E.* was ſeized of the Manor, of which &c. and he being beyond the Sea, the Queen ſent forth Letters under the Privie Seal, *Quod ipſe in Fide & Legiantia quadiſt. Regine teneretur inde directe redire in Angliam: predict. tamen Fr. ſpretis mandatis dict. Regine, redire renuſavit*, for which a Certificate was made by the Queen into the Chancery, *Quod dict. Fr. in partibus Tranſmarinis ſine Licentia dict. Regine remanſit*, and thereupon a Commiſſion was awarded, to ſeize the Land of the ſaid Sir *Fr.* which was entred in the Replication, *in hac verba*, reciting alſo the Privie Seal, and that the ſaid Sir *Fr.* did ſtay there (*Spretis Mandatis, &c.*) for which the Queen ſeized, and granted to the Plaintiff: Amongſt others, it was aſſigned for Error, becauſe it is not alledged in the Replication, of what date the Privie Seal was, nor that any notice of the ſaid Privie Seal was given to Sir *Fr.* To that it was anſwered, That the Privie Seal need not any date, eſpecially in this Caſe; for the matters which are under the Privie Seal, are not iſſueable; and this Privie Seal is not as other Writs and Precipes are, returnable in any Court, but the Queen her ſelf, from whom it originally came, ſhall receive it, and alſo the Meſſage upon it, and ſhe her ſelf (in ſuch caſe) is Judge of the contempt, and no Record of that Privie Seal, doth remain in any Court, but the Queen doth keep it; and then, when the Queen is informed of the contempt, ſhe makes a Warrant ſometimes to the Chancellor, to award a Commiſſion; ſometimes to the Barons and Treaſurer of the Exchequer to ſeize the Land, and that Warrant is ſigned with the Seal Manual of the Queen; and the Queen may certifie and ſet down the cauſe of ſuch ſeizure in the Warrant; and the Queen may certifie the ſaid Commiſſion by word of mouth; and if the other party will ſay, That the Queen hath not certified it, he ſhall be concluded by the Commiſſion which is under the Great Seal: All the matter aforeſaid, was agreed by the Chancellor, and all the Juſtices; and that no Certificate ought to be made at all in this Caſe: And in this Caſe, divers Preſidents were ſhewed in ſuch caſe; 18 E. 2. *Edward de Woodſtocks* Caſe. And it was holden, That the Queen having ſeized by force of the Common Law, and having made a Grant of it, now when the Statute of 13 and 14 Eliz. are made, ſhe hath not any Eſtate thereby, for ſhe had ſuch Intereſt before, and nothing accrues to her thereby, whereof ſhe can make a ſeizure; for ſhe hath departed with the whole before. Mich. 26 Eliz. in the Exchequer. *Cater's* Caſe. *Leon*, 9.

11. A. was bounden in a Statute of F. and there were two Seals put to the Statute, & Execution was ſued upon the Statute. The Conuſee brought an *Audita Querela*, and they were at Iſſue, If two Seals were put to the Statute, and tryed for the Plaintiff in the *Audita Querela* by the Sheriff of the City of *Lincoln*. It was moved, That the Tryal ought to have bin by the Certificate of the Mayor of *Lincoln*, before whom the acknowledgment was, and not by the Jury, which was denyed by the Court; for the Iſſue is not, Whether any ſuch Statute was acknowledged or not; but whether the Statute in Queſtion hath two Seals or not, and that is not Recorded by the Mayor as the

Statute it ſelf is. Paſc. 33 Eliz. in C. B. *Aſtew* and *Faliambs* Caſe. *Leon.* 228, 229.

12. A Charter party, Indented between the Maſter and Owners of a Ship of the one part, and divers Merchants of the other part, was made. By which the Maſter and the Owners Covenanted to Ship certain Merchandizes at ſuch a Port beyond the Sea, and to tranſport them to the City of *London*. By which the Merchants Covenanted *ſeparatim*, that one Merchant would pay 3 l. and the other 3 l. &c. *et ad performationem omnium et ſingularum Covenantorum quilibet Mercator obligat ſeipſum* in double the Freight. The Seal of one of the Merchants was broken from the Deed. It was Reſolved in this Caſe, 1. That although the Merchants joyn in Covenant, yet this word *ſeparatim* made them ſeveral Covenants. 2. Reſolved, That although the Covenants on the part of the Maſter and Owners were joynt, yet the Covenants of the Merchants were ſeveral; and for that cauſe, if the Seal of one of the Merchants be broken from the Deed, yet the ſame doth not make void the Deed, but as to him only. But if any of the Seals of the Maſter and Owners had bin broken from the Deed, all the Covenants had bin defeated. But when Covenants are ſeveral, they are ſeveral although they be written in one Parchment. *Cook* 5. Part, 23. *Mathewſons* Caſe.

13. Debt upon an Obligation againſt an Executor; the Defendant pleaded *Non eſt factum* of the Teſtator. It was found by a ſpecial Verdict, That the Teſtator was bound [in that Obligation with two others joyntly and ſeverally; and that afterwards the Seals of the two others were eaten up with Mice and Rats: And whether it was the Bond of the Teſtator or not, was the Queſtion. It was ſaid, That the Obligation ſtood good againſt the Defendant notwithſtanding the eating of the Seals of the other two, becauſe they were joyntly and ſeverally bounden, and that is all one as if they had bin ſeveral Obligations. And Trin. 2 Jac. *Banning* and *Symonds* Caſe was put. Where the Caſe was, That 28 Merchants were bound joyntly and ſeverally, and three of their Seals were broken from the Obligation; and it was Reſolved, That the Deed did remain good againſt the others. In the Principal Caſe, the whole Court did incline ſtrongly to be of Opinion, That Judgment ought to be given for the Defendant; and their reaſon was, That if the Obligee by his own act or Lacheſs diſchargeth one of the Obligors, where they are joyntly and ſeverally bounden, that the ſame diſchargeth them all. But *adjornatur*. Mich. 17 Car. in B. R. *Bryly* and *Gaſfords* Caſe. *Marſh.* 125, 126, 127, 128.

Seiſin.

1. *What ſhall be a ſufficient Seiſin to have an Aſſiſe, or an Avowry of a Rent, Common, or other thing; and by whom, and upon whom. And where Seiſin of one thing ſhall be Seiſin of another. And where Seiſin of part ſhall be of the whole, et è contra.*

1. A Man held his Lands by Homage, Fealty, Eſcuage, and Suit of Court; and the Seignor had Seiſin of the Fealty only. It was adjudged in that Caſe, That the ſame was a ſufficient Seiſin of all the other Services, for Seiſin of part of any Service, is a Seiſin of the whole, and Fealty is parcel of Homage. *Cook* 4. Part, 8, 9. *Pevells* Caſe. And ſee there Reſolved, That Seiſin of any part of any Service, is an actual Seiſin of the whole, to have and maintain an Aſſiſe; and as to avow, a Seiſin in Law is ſufficient; but to have an Aſſiſe, there muſt be an actual Seiſin.

2. If the Lord granteth his Seignory to another upon Condition, and the Tenant payeth the Rent to the Grantee, and afterwards the Condition is broken, and the Lord diſtreineth for the Services, and Reſcous is made, in ſuch Caſe he ſhall have an Aſſiſe, for that the Seiſin before is ſufficient. But if a man giveth Land upon Condition, and the Condition is broken, in ſuch Caſe, the ancient Seiſin is not ſufficient, but he ought to enter, and gain a new Seiſin, *ibid.*

3. If there be Lord and Tenant by Knight Service, and Rent, Seiſin of the Rent is ſufficient to have the Ward of the Tenant, and a good Seiſin to make an Avowry. 7 E. 6. br. Gard. 69.

4. In a *Quare Impedit*, it was Reſolved, That the Preſentment alledged in the Grantee of the next Avoydance, and not in the Grantor himſelf, was a good Title for the Grantor and his Heirs in a *Quare Impedit*. 2. That if the Grantee for years of a Seignory, or the Gardien happen Seiſin of the Services, it ſhall be a good Seiſin for him in the Reverſion: And in the Principal Caſe there, it was adjudged, That the Preſentment alledged in the Leſſee,

Leſſor, or Donor, or in the Leſſee or Donee, was not double, for that the Preſentment of the Leſſor or Donor is only traverſable. *Cook* 5. Part, 98. The Counteſs of *Northumberlands* Caſe.

5. A man ſeiſed of Black Acre for years, and of White Acre in Fee, Granted a Rent out of both to J. S. for life, with clauſe of Diſtreſs in both, the Rent was behind, J. S. avowed and diſtreyned in Bl. Acre. In this Caſe, amongſt other things, it was Reſolved, That when a man Grants a Rent out of Land in Fee, and a Term for years, to have for life, That the Freehold of the Rent ſhall iſſue out of the Land in Fee, and not out of the Tenure, which is but a Chattel. And therefore in the Principal Caſe, it was Reſolved, That the Avowry was inſufficient. 1. Becauſe the Avowant did not make mention of any Land, but of the Land in which he had but a Term for years; whereas he ought to have derived his Rent out of the Land in Fee; and every Avowry which is in the Nature of a Count, ought to have ſufficient matter upon which he ought to have Judgment to have a Retorn. 2. Becauſe the Avowant pleaded a Grant out of the Term for years only, and concluded *virtute cujus*, he was ſeiſed *in Dominico ſuo ut debito tenemento pro termino vitæ ſuæ*, which is repugnant to have a Freehold out of a Term; and ſo the Caſe was adjudged againſt the Avowant for default in a pleading. *Cook* 7. Part, 24. in *Rutt's* Caſe.

6. A man deviſed a Rent of 10 L. out of his Manor to A. for life, and by the ſame Will he deviſed the Manor to B. for years; the Deviſor dyed, the Leſſee for years paid the Rent to the Deviſee during the Term, the years expired, the Deviſee of the Rent demanded the ſame at the day which was not paid, and upon that brought an Aſſiſe. And in this Caſe (amongſt other points) it was Reſolved, That this payment by the Deviſee for years was not ſufficient Seiſin to maintain an Aſſiſe againſt the Ter-Tenants after the years expired, and that for divers cauſes. 1. In reſpect of the weakneſs of the Eſtate of Leſſee for years, who cannot prejudice or draw the Freehold into Queſtion. 2. Becauſe that he who hath not Seiſin of the Land, cannot give Seiſin of a Rent, *et nemo poteſt plus juris in alium transferre quam ipſe habet*. And note, 'Tis difference was taken betwixt a giving of Seiſin, and a receiving of Seiſin, for it was agreed, That he who hath but a Term for years, might take a Seiſin for the benefit of him who had the Reverſion or Freehold; but the Tenant for years by payment could not give a Seiſin to bind him who had the Freehold. And 3. It was Reſolved, That it ſhould be very inconvenient, if he who had not a Freehold ſhould give a Seiſin, for then Tenant by Statute Merchant, *Elegit*, or other owners of Lands might put the Lord in Seiſin of a Rent, of which they had not any Seiſin in poſſeſſion within time of limitation, which ſhould be cauſe of Suits and troubles. *Cook* 6. Part, 57. *Bredimans* Caſe. *Cro.* 2. Part, 142. the ſame Caſe.

7. A Rent was granted to one and his Aſſigns for life *pro Conſilio impendendo*, payable yearly at four Feaſts; and for want of payment, if it was demanded, that it ſhould be lawfull for the Grantee and his Aſſigns to diſtrein; the Grantee aſſigned the Rent; the Aſſignee upon the Land demanded the Rent at the day, and for want of payment, he diſtreined. In this Caſe, It was Reſolved. 1. That the Aſſignee needed not to have demanded the Rent at the day; but in Caſe of Diſtreſs, he might demand it at what time he pleaſed. 2. Reſolved, That if a man hath a Rent Seck payable yearly at the Feaſt of P. and hath once Seiſin of the Leaſe, and the Feaſt paſſeth, and no tender is made, he may after the day demand the Rent upon the Land, and if none be ready to pay the ſame, it is a denyal of the Rent, upon which he may have an Aſſiſe. But if the Tenant be at the laſt inſtant of the day ready upon the Land to pay the Rent, and none commeth there to receive it, there he cannot afterwards in the abſence of the Tenant come upon the Land and demand it, and make the other a Diſſeiſor without default in him. But in ſuch Caſe the Rent ought to be demanded upon the Land with all the Arrerages; and although the ſame be in the abſence of the Tenant, yet the ſame amounts to a denyer in Law of the Rent, upon which the party may have an Aſſiſe, and recover his Coſts and damages. *Cook* 7. Part, 29. *Maunds* Caſe.

8. In a Replevin, It was Reſolved, That if a man avow for Fealty, Rent, and Suit of Court where the Tenure is only by Fealty and Rent; There the Tenure ſhall be traverſed in an Avowry. But if a man holdeth by 2 s. Rent, and the Lord upon voluntary payment of the Tenant hath had 3 s. there in Avowry the Seiſin ſhall be traverſed, and not the Tenure. 2. Reſolved, That Seiſin of more Rent then ought to be, ſhall bind in Avowry. But in a *Ne injuſte vexes*, Aſſiſe, Ceſſavit, Reſcous, or Treſpaſs, ſuch a Seiſin of more Rent ſhall be avoided, becauſe there the Tenure, and not the Seiſin is traverſable. 3. Reſolved, That when the Plaintiff agrees with the Avowant in the quantity of the Tenancy, and confeſſeth the Tenure by Fealty and Rent; and as to the Rent, pleads, Nothing is behind, and traverſeth the Tenure, *modo & forma* ſcil. *abſq; hoc*, that the Tenure was by Fealty and Rent, and Suit of Court (as in the Principal Caſe); that the traverſe was good, although

though that the Avowry was made for Rent only: Upon which, Iſſue being joyned, it was found for the Plaintiff in the Principal Caſe againſt the Avowant. *Cook* 9. Part, 33, 34. *Bucknell's* Caſe.

9. Note in the Principal Caſe of *Bucknell* before, It was ſaid, 1. That Seiſin in Avowry doth receive divers Limitations. 2. The Iſſue in tail ſhall avoid in an Avowry, Seiſin had by the hands of Tenant in tail. 3. That the Succeſſor of a Biſhop in an Avowry ſhall avoid Seiſin had by the hand of the Predeceſſor. 3. That the very Tenant ſhall avoid encroachment of Rent in an Avowry if he hath a Deed to ſhew the contrary. But none ſhall have *contra formam Feoffamenti*, but the Feoffee and his Heirs. But the Heir of the Feoffee upon a Deed ſhewed, ſhould avoid Seiſin had by his own hands. 4. Incroachment of Seiſin is not material where there is no Tenure. 5. That ſuch a Seiſin ſhall be avoided by coheſion of Diſtreſs. 6. If a Rent be payable at two dayes, and the Lord encroacheth Seiſin at four dayes, that this Encroachment being voluntary, ſhall be avoided in an Avowry, becauſe they agree in the ſum. 2. Note, How and where Seiſin in Avowry ſhall be traverſed. 1. The Tenant in Avowry ſhall not plead *ne unque ſeiſis des Services* generally. And therefore, if he be Tenant in Fee ſimple, he ought to diſclaim, or ought to plead, out of his Fee, and ſo traverſe the Tenure. 2. That he who denyes Seiſin after the time of limitation, ought firſt to acknowledg the Tenure, to the end the Lord may have a Writ of Cuſtomes and Services. 3. If the Lord avoweth for Services, and alledgeth Seiſin by the hands of the Plaintiff, or another in a Replevin; the Plaintiff may plead, That the Avowant was never ſeiſed by his hands. 4. That Seiſin is not traverſable, but only for that for which Avowry is made, unleſs the Seiſin be alledged of a ſuperiour Service, which is a Seiſin in Law of the Inferiour Service. *Cook* 9. Part, *ibid.* In *Bucknell's* Caſe.

10. See where payment of Rent by a Bayliff, or Tenant for life or years, or at Will, works a ſpecial prejudice to the Maſter or Leſſor, it ſhall not be accounted a ſufficient Seiſin thereof. As if the Lord hath not had Seiſin of his Rent for 60 years, and the Tenant makes one his Bayliff general of his Mannor. In ſuch Caſe, the Bayliff cannot without expreſs commandment of his Maſter, pay his remedileſs Rent to the Lord. See *Bradimans* Caſe before. But if a man be ſeiſed of a Mannor, part in Leaſe for life, and other part in Leaſe for years: And he levyeth a Fine to A. to the uſe of B. in tail, with divers Remainders over. In this Caſe B. ſhall avow for Rent, or have an Action of Waſte, without Attornment. For when a Reverſion is ſettled in any, in Judgment of Law, and he hath no means to compell the Tenant to attorn, and no Lacheſs or default is in him. In ſuch Caſe he ſhall avow, or have an Action of Waſte without Attornment. *Cook* 6. Part, 68. in Sir *Moile Finches* Caſe.

11. In a Replevin, the Defendant as Adminiſtrator of F. avowed for Rent reſerved upon a Feoffment made in Fee of the Mannor, reſerving Rent in Fee to the Feoffor in the name of a Fee-Farm Rent, with clauſe of Diſtreſs for the non payment of it, and that the Rent did diſcend to the Iſſue of the Feoffor; and for the Rent due to the Heir of the Feoffor in his life, he avowed. The Plaintiff in bar to the Avowry ſaid, That neither the Inteſtate nor his Anceſtors, nor any whoſe Eſtate, &c. were ſeiſed of the ſaid Rent within 40 years then laſt paſt before the taking. A demurrer was, pretending, That he ought to alledg Seiſin in the Avowry within 40 years. But it was holden by the whole Court, That the Seiſin was not to be alledged, being it was by Deed made within the time of Preſcription; neither is Seiſin to be alledged, but where it is traverſable there it muſt be alledged, and in no other Caſe. Judgment was given for the Avowant. Trin. 6 Jac. in C. B. *Cowper* and *Fiſhers* Caſe. *Brownlow* 1. Part, 170.

12. An Avowry was made for an Amercement in a Court Leet, and ſhewed, That he was ſeiſed of the Mannor in Fee, and that he and all, &c. had had a Court Leet there. The Plaintiff traverſed, That he was ſeiſed of the Mannor in Fee. It was the Opinion of the Court, That if the Defendant had a reputed Mannor, it would be ſufficient to maintain the Avowry, although he indeed had no Mannor in truth. Mich. 8 Jac. in C. B. *Brownl.* 1. Part, 170. &c.

13. In a Replevin, the Defendant avowed, That the Father of the Plaintiff was ſeiſed of the Mannor, &c. and granted out of it to the Avowant a Rent of 20 l. *per annum*. And further granted, That if the ſaid Rent be behind ſix dayes after the Feaſts of, &c. wherein it ought to be paid *ſi licet petatur*, that then it ſhould be lawful to diſtrein. The Grantor afterwards by Indenture Covenants with the Lord Treaſurer and others to ſtand ſeiſed of the ſaid Mannor unto the uſe of himſelf and his Heirs, untill he and his Heirs have made default of payment of 200 l. *per annum* to the uſe of the Queen and her Heirs, untill 3000 l. ſhould be paid and levyed. And afterwards a Fine was levyed to the uſes aforeſaid; the Rent was behind, default of payment of the 200 l. to the Queen was made; Office was found, the Queen ſeiſed the Lands, the Avowant during the poſſeſſion of the Queen demanded the Rent, and the Attorney

thereof. The Queen Granted the Lands to the Plaintiff and P. the Grantee diſtreined for the Rent. In this Caſe (amongſt other things), it was holden by the whole Court, That the demand of the Rent during the poſſeſſion of the Queen was good. For although the poſſeſſion of the Queen be priviledged as to the Diſtreſs; yet the demand is good without any prejudice to her Prerogative, for the Rent in right is due, and th poſſeſſion of the Queen is in right charged with it, and if the party ſueth to the Queen by Petition, he ought to ſhew in his Petition, that he hath demanded the Rent. See 7 H. 6. 40 The Diſſeiſee may make continual claim, although the poſſeſſion of the Land of which he is Diſſeiſed be in the King; And 34 H. 8. Br. *Seiſin* 48. If the Heir at full age intrudeth upon the poſſeſſion of the King, and payes Rent to the Lord of his Lands holden of a Subject, the ſame is a good Seiſin, and ſhall bind the Heir after he hath ſued his Livery, And ſee 5 E. 4. 4. Diſtreſs taken upon the poſſeſſion of the King, is not lawfull. But a Seiſin obtained during it, is good. Mich. 32 Eliz. in C. B. *Wicks* and *Dennis*'s Caſe. *Leon.* 190, 191.

14. Lord and Tenant by Knight Service, to pay every year ſuch a quantity of Salt, but ſince 10 H. 7. the Tenant hath alwayes paid money for the Salt. The Queſtion was, If the Lord might reſort to the firſt Service, and if the money be Seiſin of the Salt. *Manwood* Juſtice took this difference, *ſcil.* Where the Lord takes a certain ſum of money for the Salt, the ſame is not any Seiſin, for that the Service is altered. As at the firſt, Socage Tenure was a work to be done by labour, *ſcil.* Plowing; but now it is changed to a certain Rent, and the Lord cannot reſort to have his Plowing. And he ſaid, That in *Kent*, divers Tenants in ancient times, have paid Barley for their Rent, but the ſame was afterwards paid in a certain ſum of money, ſo as now the Lord of ſuch Tenements cannot demand Barly. But if the ſum uſed to be paid hath bin incertain, in one year, ſo much, and in another year, ſo much, according to the price of Salt, then ſuch a payment of money is a ſufficient Seiſin of the Salt; all which was agreed by the Court. Mich. 20 El. in C. B. *Leon.* 266.

15. A man made a Leaſe to J. S. for 50 years if he Leſſor ſo long lived, rendring Rent at four uſual Feaſts, or within 13 Weeks after every ſeveral Feaſt by ſeven portions: After one of the Feaſts, the Leſſor dyed, his Executors brought debt for the Rent due at the ſaid Feaſt. In this Caſe, it was Reſolved, 1. That the Action was not maintainable. 2. Becauſe that the payment being limited in the Diſjunctive, the moſt beneficial ſhall be taken for the Leſſee, and before that time, the Leſſee is diſcharged by the act of God. And it was ſaid, That if the Leſſee pay his Rent before the day, the ſame is voluntary, but not ſatisfactory; but ſuch a payment is ſufficient to give a Seiſin to have an Aſſiſe. 2. Becauſe when the Leſſee makes not payment at the firſt day, the Election is paſt, and then the Rent is abſolutely due the ſecond day, and the ſecond day is aſwell paid of the Reſervation, as the firſt day. *Cook* 10. Part, 127. *Clunns* Caſe.

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2. *Where a man in Pleading ſhall ſay* Seiſitus in Dominico ſuo et de feodo; *and of what; and where,* ut de feodo et core. *And where he ſhall ſay* Seiſitus; *Where not.*

1. ERror was brought of a Recovery in an Action of Waſte, Where the Plaintiff declared, That he was Seiſed, and ſo ſeiſed *dimiſit pro termino annorum*, and did not ſhew of what Eſtate he was ſeiſed; and yet he did ſhew, That it was *ad exheredationem ejus*, and that was aſſigned for Error; and in the Principal Caſe it ſhall be ſuppoſed, That he had but an Eſtate for life, for it ſhall not be intended he had an Eſtate of Inheritance, without expreſſing words carrying the Inheritance. As 7. Aſſ. *If I grant a Rent to J. S. and do not name what Eſtate he ſhall have in it, he ſhall have but an Eſtate for life.* *Sail* Juſtice ſaid, *It was a fault incurable.* On the other ſide it was ſaid, That he might plead *quod dimiſit* without ſhewing that he was ſeiſed *et dimiſit*, and therefore it was but ſurpluſage in the Principal Caſe, and it ſhall be intended, that he that bringeth Waſte, that he hath ſuch an Eſtate that he may maintain the Action. In *Adams* Caſe, *Plow. Com.* One ſhewed, That ſuch an Abbot was ſeiſed, and that the Land came to the King by the Diſſolution, and that the King being ſeiſed, did grant the ſame, and did not ſhew of what Eſtate the King was ſeiſed, and yet good; and in the Principal Caſe it was ſaid, That the Defendant had pleaded, *Nul waſt fait*, and ſo by his Plea had affirmed the Declaration to be good. *Brawront* Juſtice held, That he ought to have ſhewed and ſaid *Reverſione inde ſibi et heredibus*. The Opinion of the Court ſeemed to be, That the Plea was not good, and that it was no helped by the Statute of 18 Eliz. But the Caſe was not Reſolved. Hill. 29 Eliz.

29 Eliz. in C. B. *Widall* and Sir *John Aſton*'s Caſe, *Godbolt*, 121.

2. Errour of a Judgment in C. B. where the Plaintiff ſhewed, That *dia fuit, et adhuc ſeiſitus* of a houſe, &c. he did preſcribe, That he and all thoſe whoſe Eſtate he hath in the ſaid houſe, had uſed to have Common in the Waſte of L, and that the Defendant, 15 Jac. had made Waſte in making Cony-berries; *quorum quidem præmiſſorum*, he loſt his Common: and Judgment was given in C. B. for the Plaintiff. The Errour aſſigned was, That *dia ſeiſitus* was not good; for that it hath no limitation of time: and it may contain as well 40 years, as one year. Another Errour was, becauſe he doth not conclude, *quorum quidem præmiſſorum prætextu*, he loſt his Common: but leaves out the word (*prætextu*). It was ſaid, That the word (*prætextu*) is a Concluſion, that the particular wrong doth continue. But in this caſe, it was Anſwered, That the word (*prætextu*) is wanting, and a Seiſin firſt ought to be layed; and then *prætextu quorum* is good. It was the Opinion of the Court, That the Declaration was not good. The Declaration ought to have been *dia ſeiſitus*, and *ſic ſeiſitus*, he made the Cony-berries: and if it had been ſo, it had been good; but as this Caſe is, it is not good. And it was the Opinion of the Court, That (*dia*) includes no certainty of time, and *Quorum quidem præmiſſorum*, &c. was a ſpeech without ſenſe, without the word (*prætextu*). And for theſe Cauſes, the Judgment was reverſed. Trin. 21 Jac. in B. R. Sir *Thomas Lee* and *Griffeth*'s Caſe, *Godbolt*, 347.

3. An Advowſon is but a Right of Preſentation; yet in Judgment and account of Law, it is a Temporal Inheritance, which ſhall deſcend to the Heir as other Inheritances ſhall, and may be conveyed, bargained and ſold, as other Temporal Inheritances are: and although a man cannot Count in pleading, That he is ſeiſed thereof in *Dominico ſuo ut de feodo*, for that it is an Inheritance incorporeal, and ſavoureth not *de Domo*; yet may he in pleading Count or Declare, That he is ſeiſed thereof *ut de feodo et jure*, 34 H. 6. 24. 19 E. 3. *Quare Imp.* 154. *Cook* 1. Part, *Inſtitutes*, 17. and 201. acc.

Seizure.

Where it may be made, and of what things, and of what not. Of the King, where good by Office; Where without Office the King may enter; Where not.

1. NOte: It was agreed by all the Juſtices, That for a Heriot Service, the Lord cannot diſtrain out of his Fee, no more then for a Rent; but he may ſeize a Heriot-Cuſtome out of his Fee. Trin. 30 Eliz. in C. B. *Goldesbr.* 97.

2. In Treſpaſs, for taking of an Ox in D; The Defendant juſtified the taking in Black-Acre, and that it was his Freehold for Damage Feaſant: The Plaintiff made a new Aſſignment, That the place where he hath aſſigned the taking to be, is Green Acre in D: and the Defendant juſtified there for Heriot-Service. It was the Opinion of the Court, That the Lord might ſeize for Heriot-Service; and when the Lord hath ſeiſed, the ſame is a Seiſin by the hands of his Tenant. Hil. 43 Eliz. in B. R. *Bodyam* and *Smith*'s Caſe, *Goldesbr.* 191.

3. Dower was brought *de tertia parte Reſtoria de D*; and upon that a *Grand Cape* iſſued *Cape in manum noſtram, tertiam partem Reſtoria*, and the Sheriff by colour of this Writ, took the Tythe ſevered from the 9. parts, and carried them away. It was agreed by all the Juſtices, That the ſame is not ſuch a ſeizure as is intended by the Writ, but the Sheriff by virtue of ſuch Writ ought to ſeize generally, and leave them there where he found them. And the Court was of Opinion, To commit the Sheriff for ſuch his miſdemeanor. Mich. 30 Eliz. in C. B. *Michell* and *Hides* Caſe, *Leon.* 92.

4. It was found by Office, That T. was ſeiſed in Fee of a parcel of Marſh Land in K. and Deviſed the ſame by his Will, and all his Lands from his Heir to other perſons: and afterwards in 2 E. 6. dy'd ſeiſed of the Premiſſes, *Et quod premiſſa prædict. tenentur de Domina Regina in Capite per Servitium Militare*; And that C. D. was Coſen and Heir to T: And it was found, That Sir *William St. Leger* received the profits of the ſaid parcel

parcell of Lands during the Minority of C. Anno 9. the Queen by Act of Parliament pardoned All Profits and Sums of money not afterwards excepted in the ſame Act. In the Act, one Exception is in theſe words, viz. [And alſo, Except and ſtherized out of this General and Free Pardon, all Ravishments, wrongfull taking and withholding any of the Queens Wards, or Wards Lands, at any time come or grown to the Queens hands, and not yet diſcharged: And alſo except all manner of Intruſions had made or done by any perſon or perſons, in or upon any Mannors, Lands, Tenements, &c.]. The Queſtion was, Whether Sir William St. Leger be not diſcharged of the mean Rates during the Minority. It was Reſolved, That the taking of the mean Rates during the Minority, could be no Intruſion upon any Lands within one Exception, becauſe there was no Office found for the King at that time. Beſides, the Lands therein mentioned, are the Inheritance of the Queen; and theſe words in the Exception could be but of a Chattel in her. And for the other Exception, It appeared alſo to the Juſtices, That there were no profits excepted therein, nor could the Lands of F. deceaſed, be ſaid to be Wards Lands in the Queens hands at the time of the Pardon, for that there was not a ſeizure made of them, nor Office found at that time to entitle the Queen unto them. Wherefore it was Reſolved, That the profits taken during the Miſority, were pardoned; and that Sir William St. Leger might not be charged with them. Mich. 12 Jac. in Curia Wardorum, Sir William St. Leger's Caſe. Lea, 48, 49.

5. A *Fieri facias* iſſued to the Sheriff, to levy a Debt for J. S; the Sheriff by virtue thereof ſeized the goods, but did not return the Writ: afterwards the Sheriff was diſcharged, and a new Sheriff made. The old Sheriff after his diſcharge, ſold the goods to the Defendant; againſt whom, Trover and Converſion was brought, and the matter aforeſaid was found by Verdict. It was in this caſe adjudged for the Plaintiff; for the ſale made by the old Sheriff after his diſcharge, was void: and where the Sheriff hath ſeized goods by virtue of a Writ of Execution, and afterwards is diſcharged, he ought to turn over the goods to the new Sheriff, as he doth his priſoners. And it was holden, That by the ſeizure of the goods, the property of the Owner was not altered, for the ſeizure is not any Execution; and the Sheriff after ſuch a Seizure, ought to declare the Writ executed in part, and cannot deliver them to the party; for as the Writ of Execution is warranted by the Roll, ſo ought the executing and diſcharge thereof appear upon Record. And it was holden in this caſe, That the Sheriff after the Seizure, although he had continued in his Office, could not have ſold the Goods without a Writ of *Venditioni Exponas*, which is not grantable untill it doth appear by the Return of the Sheriff, that *remanent pro defectu Emptorum*. Hill. 1 Jac. in B. R. *Ayer* and *Adin*'s Caſe. *Yelv.* 44.

6. In Intruſion it was found, That A. was ſeiſed of divers Meſſuages, &c. And by Deed Indented and enrolled, bargained and ſold all his Lands, Meſſuages, &c. which lay in the Pariſh of St. *Andr.* in the Tenure of J. S. to B. for life, the remainder to C. in Fee; B. entred, and took huſband, who made a Leaſe for years: A. was Attainted of Treaſon; The King granted the ſaid Meſſuages to D. and his Heirs; Proviſo, That if they were not concealed, that then the Letters Patents ſhould be void. And it was found, That the Lands lay in the Pariſh of St. *Sepulch.* and that they were in the Tenure of J. S: In this caſe, It was Reſolved, 1. That nothing paſſed by the ſaid Bargain and Sale, becauſe that the firſt certainty, *ſcil.* in the Pariſh of St. *Andr.* was falſe: but if the firſt certainty had been true, although the ſecond certainty had been falſe, the Grant had been good. 2. Reſolved, That by the Common-Law, for Lands in Feeſimple, and by the Statute of 26 H. 8. Cap. 3. for Lands in tail, the actual poſſeſſion was not in the King by Attainder before Office; but when Tenant in Feeſimple is Attainted of Treaſon, and dyeth, there the Fee and Freehold without Office found, ſhall be in the King without Office for neceſſity, becauſe a Freehold cannot be in Abeyance: Otherwiſe it is, if the Land were entailed, the ſame ſhall diſcend to the Iſſue untill Office found: For the Act of 26 H. 8. gives only the forfeiture; and Attainder is not corruption of blood for Lands, untill the Statute of 33 H. 8. Cap. 20. 3. It was Reſolved, That although by the Statute of 33 H. 8. the King ſhall be in actuall poſſeſſion without Office; Yet when the Diſſeiſee is attainted of Treaſon, preſently by the Attainder, the King had but a right: And if the Diſſeiſee at the Common-Law is attainted of Treaſon, and the Seiſin and Diſſeiſin found by Office, the poſſeſſion ſhall not be in the King, untill a *Scire facias*, or ſeizure at the laſt, becauſe that when a ſtranger is ſeiſed at the time of the Office found, the King ſhall not be in poſſeſſion untill ſeizure. *Cook* 3. Part, 10. & 11. *Dowties* Caſe.

7. Note, *Cook* 4. Part, in *Beverly*'s Caſe; That if in Idiot or a Natural Fool, the Cuſtody of him is given by the Law to the King as Tutor, by the Common-Law, and his Lands by the Statute of *Prærogativa Regis*, and the act is in the King, but

but the Freehold is in the Idiot; and the King shall have the Custody of his Body, Goods and Chattels, as of his Lands, as well those which he had by purchase, as those which he hath as Heir at the Common Law. If an Idiot *à Nativitate*, alien his Lands at full age, upon a *Scire facias* brought by the King against the Alienee, the Lands shall be seised into the Kings hands, and the Inheritance vested in the Idiot: But the King shall not have the Custody of Land which an Idiot holdeth by Copy; for that is but an Estate at Will by the Common Law; and if the King should have the Custody of it, it should be a prejudice to the Lord of the Mannor. But yet an Alienation made by an Idiot of his Copyhold Land after Office found, shall be avoided; And all Alienations or Guifts made by an Idiot before Office found, shall be avoided by Office found; for no Lich.ff: shall be in the King. But if an Idiot dyeth before Office found, after his death no Office may be found; and without Office, the King cannot be entituled. And it was holden, That a *Non Compos Mentis* after Office found, is in the same case as an Idiot. *Cook* 4. Part, 127, 128. *Brentley's* Case.

8. The Case was, The Lord *Clifford* held the Barony of Sheriffwick of W. of the King by Grand Serjeanty in *Capite*: The King gave License to the Lord *Clifford*, that he might thereof enfeoffe two Chaplains in Fee, so as they gave back the Land to the Lord, and the heirs males of his body, the remainder over: The Lord *Clifford* according to the Licence, did enfeoffe the two Chaplains; and before they had given back the same, the Lord *Clifford* dyed, his Son and Heir within age, and in Ward to the King: All this was found by Office, and returned into the Chancery; Out of which, and the Charter of Licence, a *Scire facias* issued against the two Chaplains, If they could say any thing, Why the Lands so occupied by them, should not be seised into the Kings hands? Who appeared, and pleaded the Kings Licence, and the Feoffment of the Lord *Clifford*, and so they were the King's Tenants by License; and as to the re-enfoffment, That it was in their will to do it; With that, That they were ready to have made the Feoffment to the Lord *Clifford* in his life; but he would have it by Fine, and thereupon brought a Writ of Covenant, and dyed depending the Writ: And that after his death, they were ready, if they had the Kings Licence, to make the re-enfeoffment to his Son and Heir, according to the Condition. It was in this case adjudged, That the Lands should be seised into the Kings hands, and that he should have the profits thereof from the time of the death of the Lord *Clifford*; And the reasons of the Judgment were; 1. Because that by the Licence of the King which is of Record, and by the Office returned, it appeareth upon Record, That the Chaplains had no other Estate, then upon Condition. 2. It appeareth, That they had time in the life-time of the Lord *Clifford*, to have performed the Condition. If they had made the Guift in tail to the Lord himself, they had pursued the Licence; but when the Lord dyed, they could not by force of that Licence make the Guift to his Son; and then not doing it in the life of the Lord, it drew a Charge upon the Heir, to purchase a Licence, and perhaps the King would never give Licence, and then the Estate never should be made, and all in default of the Feoffees who had time to make it: so if that without Licence they should give it back to the Heir, his Lands should be seized into the Kings hands for alienation without Licence. And for these Causes, it was adjudged, That the Entry of the Heir was lawful. *Cook* 2. Part, 80. The Lord *Clifford's* Case, vouch. in the Lord *Cromwells* Case.

9. Note; It was Resolved (amongst other things), That White Swans not marked, which have gained their natural Liberty, and are *natantes* in an open and common River, may be seized to the use of the King by his Prerogative, as well as any other flying Fowl Royal. 2. That a Subject may have White Swans not marked in his private Waters; and if they do escape out of the private Waters, into an open and Common River, he may bring them back, and retake them: But if they do swim in an open or common River without such pursuit, In such case, the King may seize them as Royal Fowls: And the reason is, Because they cannot be known from other Swans. *Cook* 7. Part, 16. in the Case of Swans.

10. In a *Quo warranto*, for using of Waifs, Streys, Felons goods in L; The Defendant claimed Waife and Estray by Prescription; and for the Felons goods, he pleaded, That J. late Abbot of S, *Licitè habuit et gravisus fuit infra L. prædict. bona et Catalla felonum ad usum suum proprium*; and pleaded the Statute of 27 H. 8. That all Monasteries under 200 l. *per annum*, were given to the King in as ample manner as the Abbot had them; and that the Abbey of S. was under 200 l. *per annum*, and pleaded the Statute of 32 H. 8. Cap. 20. by which all Priviledges, Franchises, &c. which the Abbots had and used lawfully by the said Act should be revived, and should be in the King. By force of which, King *Hen.* 8. was seised of the Franchises, to have the Goods of Felons in L: and so seised of the Mannor of T. in L. parcel of the possessions of the said Abby, granted the said Mannor of T. to J. S. *Et sic talia tanta hujusmodi*

eadem & consimilia, Libertates, Franchesias, &c. quæ, qualia, quanta, et quæ, the said late Abbot *habuit sive habere fuit, et eo warranto clamat Libertates, Franchesias, &c. tanquam Mauricio prædecessori.* It was in this Case, amongst other Points, Resolved, That because the Defendant conveyed unto himself title to the Mannor by Feoffment, which is pleaded without Deed, and doth not convey himself title to the Felons goods, which cannot passe without Deed, that for this cause, the Felons Goods should be seised into the Kings hands. *Cook* 9. Part, 26, 27. The Case of the Abbot of *Strata Marcella*.

Servant *and* Master.

Where the Master shall be charged for the Act, Offence, or Wrong done by his Servant; And how far he shall be charged, how far the Servant: And where the Master shall have Action, for the Wrong done to his Servant.

1. A. Recovered against B. in the Common-Pleas, and upon an *Ex post Capias*, the Defendant was Outlawed; and after the year, the Plaintiff procured a *Capias utlegatum* against him, and delivered it to the Sheriff of *London*; and that one L. one of the Sheriff's Sergeants, had arrested the said B, and then A. came to B. with the Sheriffs Warrant to arrest him upon the *Capias utlegatum*; which he refused to do: and in this case A. brought an Action against the Sheriff, and suppoſed, that the Sheriff arrested B. upon the *Capias utlegatum*, and suffered him to go at Large. The Defendants pleaded, *Quod non permiserunt ire ad largum.* It was adjudged for the Plaintiff. In this case, It was Resolved, That when a man is in the Custody of the Sheriff by procesſ of Law, and afterwards another delivers him a Writ to arrest the body of him who is in his Custody; he is in his Custody presently, although he maketh no actual Arrest of him: and although he cannot arrest him whom he hath already; yet he ought to keep him safe by vertue of the Writ. 2. It was Resolved, That although the *Capias utlegatum* was sued after the year, so as the Defendant could not be in Execution without prayer of the party, yet the Plaintiff is prejudiced by his Escape: and therefore the Action doth lye against the Sheriff himself. Trin. 41 Eliz. in C. B. *Cook* 5. Part, 98. *Frost's* Case.

2. In an Action upon the Case, the Case was; The Defendant being a Goldsmith in *London*, and having Counterfeit Jewels, knowing them to be Counterfeit, sent his Servant J. S. with them to the Plaintiff, being a Merchant in *Barbary*, to make sale of the Jewels to the King of *Barbary*; to whom the Plaintiff sold them for 800 l: J. S. having received the money, went from thence; The Jewels afterwards being discovered to be Counterfeit, the Plaintiff by Imprisonment was enforced to make Restitution to the King. In this case it was Resolved, That although the Defendant did not command his Servant to make use of the Plaintiff, and that the Jewells were of some value; yet that the Action did well lye against the Master, and that the Master should answer for his Servant. Trin. 16 Jac. in B.R. *Cro.* 2. Part, 468. *Southern* and *Howes* Case.

3. In Debt, the Plaintiff declared, That he being an Attorney in the Common-Pleas, that the Defendant retained him to prosecute for J. S, and agreed to pay him his Fees; and shewed, That he had layed out so much for J. S. in the Suit, and the Defendant had not paid him. In *Nihil debet* pleaded, It was found for the Plaintiff, and Judgment: Whereupon Errour was brought, and it was Assigned for Errour, That the Defendant is but a Sollicitor, and that there is not any consideration, and it is maintenancy in him to sollicite Suits. 2. That Debt doth not lye, but an Action upon the Case, for that there is not any Contract betwixt them. But the Opinion of the Court was, That the Exceptions were not good. Hill. 3 Car. in C. B. *Sands* and *Trivillians* Case. *Cro.* 1. Part, 76.

4. Debt was brought against the Sollicitor of Sir *Tho. Elvis*, who retained the Plaintiff, being an Attorney, to prosecute a Suit against the said Sir *Tho: Elvis*, for his Fees; which being found for the Plaintiff, Errour was brought; And it was Objected, That Debt did not lye. But it was Over-Ruled by the Court, That the Action did well lye; and that it was a good Contract made by the Sollicitor. Hill. 16 Jac. in B. R. *Bradford* and *Woodhouses* Case. *Cro.* 2. Part, 520.

5. Errour of a Judgment in the Common-Pleas, in debt, for 42 l. 9 s. 3 d. and declares upon several accompts, of divers sorts of Wares sold for divers severall sums; and upon severall Retainers at several dayes, to do severall sorts of

Works: and amongſt others, That he ſhould retain one J. S. the Plaintiff's Servant, to work with him for 5. dayes, *Capiendo inde pro ſalario ſuo pro quolibet die* 2 s. *per quod actio accrevit* to deliver 10 s; and ſo Accompts of ſeverall Wares bought, and ſeveral retainers, and ſeverall ſums lent, amounting *in toto*, to 42 l. 9 s. The Defendant pleaded *Non debet*, and found *Quod debet* 30 l. *inde et quod reſiduum non debet*; and Judgment for the Plaintiff. Errour brought, and Aſſigned, Becauſe the Action lyes not for the Maſter, for the Retainer of the Servant to work with the Defendant for 5. dayes; for it is not alledged, that he did the ſervice for his Maſter, but for himſelf; and the Retaining is of the Servant for his own proper labour, and by Contract with him: And, if it were the Retainer of the Servant by the Command and appointment of his Maſter, he ought to have ſhewen, that he retained the Maſter, and not the Servant: For then he ought to have declared accordingly, That he retained the Maſter, who by himſelf or Servant ſhould work. And of that Opinion was the whole Court. Wherefore the Judgment was reverſed. Hill. 19 Jac. in B. R. *Treſwell* and *Middleton*'s Caſe, *Cro.* 2. Part, 653.

6. It was found by Office, That the Office of Marſhall of the Kings, was *ipſo facto* in the King, by reaſon of many Eſcapes ſuffered, which was a forfeiture of the ſaid Office: And yet it was Reſolved in that Caſe, That the Officer ought to have a Writ of Diſcharge, to diſcharge him; for that, till he be actually removed, he ſhould anſwer for all Eſcapes. And it was Reſolved in that caſe, That he who hath the Cuſtody of a Goale, whether lawfully or not, he ſhall be charged for the Eſcape of Priſoners: And if he be but a Deputy, and hath not ſufficient to anſwer for the Eſcapes; then *reſpondeat ſuperiori*, and he who hath the Inheritance, ſhall be charged. *Cook* 9. Part, 98. in Sir *George Reynells* Caſe.

7. In an Action upon the Caſe for Deceit, The Plaintiff declared, That A. was his Servant, and had 65 l. of his in his Cuſtody, and that the Defendant to deceive the Plaintiff of the ſaid money, procured *quendam Literam* to be written and directed to the ſaid A, and Counterfeited the name of the Plaintiff thereto, and ſealed it *quaſi* with the Plaintiff's Seal, and cauſed it to be delivered to the ſaid A, affirming it to be the Plaintiff's Letter, and that he was ſent to him by the Plaintiff: Whereupon the ſaid A. cauſed it to be read; and underſtanding that in the ſaid Letter it was contained, That the Plaintiff had appointed the ſaid A. to deliver to the Defendant 65 l. to the uſe of one J. S. to whom by the Letter it was ſuppoſed he was endebted. The Plaintiff by reaſon thereof, A. giving Credit unto him, paid and delivered to the Defendant the ſaid 65 l. *ubi revera*, the Letter was Counterfeit, and he never ſent the Defendant, nor was he endebted in any ſuch ſum. Upon Not Guilty, being found for the Plaintiff, and Damages 105 l; It was moved, That this Action lyes not for the Maſter, but ought to be by the Servant: But all the Court held, That the Deceit and abuſe is to the Maſter, and the loſſe only to him, and therefore the Action well lyes for him: And upon a Writ of Errour brought, the Judgment was affirmed. Hill. 6 Jac. in B. R. *Tracy* and *Peales* Caſe. *Cro.* 2. Part, 223.

8. In an Action upon the Caſe, the Plaintiff declared, That in Common Innes, the Innkeeper ought to keep the Goods of their Gueſts ſafely, and all other goods brought into their Inn under their Cuſtody, without ſubſtraction; and that one J. S. Servant of the Plaintiff, was lodged at the Defendant's Houſe in D; and that he having a bagg there, with 8 l. in money of the Plaintiff's therein, *quidam malefactores*, to the Plaintiff unknown, took and carried away the ſaid bagg of money being in the ſaid Inne in default of the Defendant and his Servants: Upon Not Guilty, It was found againſt the Defendant, and moved in Arreſt of Judgment, That the Action ought to have been brought by the Servant, and not by the Maſter; for the Cuſtome of the Realm is only for Travellers, and here the Maſter was not a Travailer. But it was adjudged, That the Maſter might well have the Action; And ſo it was ſaid, it had been Reſolved before in this Court: And afterwards a Writ of Error brought, the Judgment was affirmed in the Exchequer-Chamber, Trin. 7 Jac. in B. R. *Bedle* and *Morris*'s Caſe. *Cro.* 2. 224.

9. Treſpaſſe; for that the Defendant 20. Jan. 17 Jac. *quendam* J. S. Servant of the Plaintiff, did beat and wound, *per quod, Servitium prædict. J. S. per magnum tempus, ſcil. à prædict.* 12. *Martii* 17. *ſupradict. uſq;* 1. *Martii proxim ſequent. perdidit.* Upon Not Guilty pleaded, it being found for the Plaintiff; It was moved, That the Bill ſhould abate: For the Bill is brought, Hill. 18 Jac. and the Battery is ſuppoſed 20. Jan. 17 Jac. and the loſſe of the ſervice to be *per magnum tempus. ſcil. à prædict.* 20. *Martii*, 17 *Jac. uſq;* 1. *Martii* following, which was 18 Jac. which is to the time of the Action brought, and Damages are given for the time after the Action brought. It was the Opinion of the Court in this Caſe, That here the point of the Action is the loſſe of his Service; which ought to be ſhewed certainly:

rainly: for that only enables him to the Action; and if the time certain be not expreſſed therein, the Declaration is not good; and therefore the (*ſtil.*) for what comes after, is material; which being ill-alledged, the Declaration is not good. It was adjudged for the Defendant. Paſch. 19 Jac. in B. R. *Hanbury* and *Ireland*'s Caſe. *Cro.* 2. Part, 618.

10. An Action upon the Statute of Huy and Cry was brought by the Servant in his own name, who was robbed, and part of the goods were his Maſters, and part his own proper goods; The Defendant was found guilty as to his own goods; and a Special Verdict was found as to the goods of the Maſter: and the Plaintiff had Judgment. Trin. 8 Jac. in B. R. *Needham* and the Inhabitants of *Staſes* Caſe. *Brownlow*, 1. Part, 155.

11. A. brought an Action againſt B. for 20 l. The Condition of the Bond was, That whereas one R. had bound himſelf Apprentice to the Defendant for 8. years; the Defendant did Covenant with the Plaintiff, That he would retain, teach, keep, and employ the ſaid Apprentice in his own Houſe and Service, in the Art of Chirurgery during the Term: and then ſhewed, That within the Term, the Defendant ſent his ſaid Apprentice in a Voyage to *Bantam* in the *Eaſt-Indies*, which he pleaded to be in the Company of other expert Chirurgions, the better to learn the Art. Upon which, the Plaintiff Demurred. It was adjudged for the Plaintiff; for it was expreſſly againſt his Covenant: for although the Covenant was not ſo reſtrained to the houſe, but that he might ſend his Servant into other places about his Cures; yet he might ſtill be as one of his Houſhold coming and going, and in his Service, and not put over to any other. And in this Caſe, It was ſaid by *Hobart*, Chief Juſtice, That generally no man can force his Apprentice to go out of the Kingdom, except it be expreſſly ſo agreed; or that the nature of his Apprentiſhip doth import it: As, If he be bounden to a Merchant-Adventurer, &c. Hill. 13 Jac. in C. B. *Coventry* and *Woodhall*'s Caſe. *Hob.* 134, 135.

2. *What acts done by the Servant, or Attorney, in the name and right of the Maſter, are good and Juſtifiable: And what not.*

1. A Copyholder in Fee made a Letter of Attorney to two Tenants of the Mannor, to ſurrender his Copyhold to the uſe of J. S. and his Heirs, who at the next Court brought in the Surrender, and did accordingly, no Cuſtome being found to warrant ſuch Surrender: In this Caſe, It was Reſolved, 1. That the Surrender was good, becauſe he might ſo do *de Communi jure*, without alledging any Cuſtome. 2. It was Reſolved, That at the Common-Law, ſome things are ſo inſeparably annexed to the perſon of a man, that he cannot do them by Attorney or other, as Homage, Fealty, &c. The Lord may beat his Villein for cauſe, or without cauſe, and he hath no Remedy; but if he commandeth his Servant or another to beat him, an Action will lye againſt him who beats him: So if the Lord Diſtrain his Tenant, when nothing is behind, Treſpaſs *vi et Armis* doth not lye againſt the Lord; but if he commandeth his Bayliff or Servant to Diſtrein when nothing is in arrear, and he doth Diſtrain, an Action lyeth againſt the Bayliff or Servant. *Cook* 9. Part, 75, 76. *Combes* Caſe.

2. Note: It was holden and Reſolved by the Juſtices, That if Leſſee for years or Copyholder be *ouſted*, or the Leſſor, or the Lord Diſſeiſed, and the Diſſeiſor levieth a Fine, and five years paſſe, that the Lord or Leſſor are barred by the firſt Saving of the Statute of 4 H. 7. of *Fines*, becauſe they might preſently have their reall Action, and Recover the Land; and therefore if 5. years paſſe before their Entry or Claim, they ſhall be barred: But it was Reſolved, That a meer ſtranger of his own wrong cannot enter in the name of him who hath right, and avoid the Fine, without a Commandment precedent, or an aſſent ſubſequent within the 5. years. But he who hath the Reverſion, or the Lord of the Mannor, may enter in the name of his Leſſee, or his

Copyholder, as well to ſave their Inheritances, as the particular Eſtates, becauſe they are Privies in Eſtate; and that they may do without requeſt precedent, or aſſent ſubſequent; and that is a lawful Entry within that Statute. *Cook* 9. Part, 106. *Podgers* Caſe.

3. In an Action of Falſe Impriſonment againſt a man, for an Aſſault, Battery, and Impriſonment 6. dayes: The Defendant, to all but the Aſſault, Battery, and Impriſonment for 6. hours, pleaded Not Guilty; and for the Battery and Impriſonment for 6. hours, he juſtified by a Warrant from the Sheriff of S, who directed his Warrant to his Bayliff to execute it; who Arreſted the Plaintiff, and required the Defendant to be aiding to him; which is the ſame Battery, &c. Upon which it was Demurred, becauſe it was not pleaded, That the Writ being executed, was returned; for the Writ is Conditional, *Ita quod habeas Corpus in Curia tali die*: And therefore if the Defendant himſelf will juſtifie, It is no Plea, without ſhewing the Return of the Writ. But that Exception was diſallowed by the Court. For the Court ſaid, It is true, that the Sheriff ought to return his Writ, otherwiſe his Juſtification is not good: But it is not ſo with his Baily or Servant, for he hath no means to make the Sheriff to make Return thereof; and that which he did, was legally done, and it ſhall not be made illegal by the Sheriff's act, in not returning of the Writ. 2. It was Reſolved, That the Sheriff might by word diſcharge the Baily, that he keep not his Priſoner longer. Hill. 11 Car. in B. R. *Girlings* Caſe. *Cro.* 2. Part, 322, 323.

Sheriff.

His Power and Authority; and what Acts done by him as Sheriff are good: And where he may take Poſſe Comitatus *to execute Proceſs; Where not. His Oath, and by what Law; and how there may be addition to it.*

1. A Brought Debt againſt B. for a great ſum of money; Proceſs continued till a *Capias utlagatum*. The Plaintiff moved, That the Sheriff might be Commanded to execute the Writ, which was delivered to him in Court. He ſaid, He would do his endeavour; But, B. the Defendant hath ſo long kept his houſe, that he cannot come at him. It was the Opinion of the Court, That the Sheriff might take *Poſſe Comitatus* with him, and break his Houſe, and take him out; and ſo they ſaid, it had been adjudged. Hill. 30 Eliz. in C. B. *Hart* and *Curſons* Caſe. *Golds.* 79.

2. It was adjudged by the whole Court, That if a *Fieri facias* be directed, and delivered to the Sheriff, he may not break the Outer door of the Houſe and enter, and do Execution; but if the Outer door be open, then he may enter by that; and then he may, and ought to break the door of an Entry, or Chamber which is locked, and break open any Cheſt which is locked, and take the Goods in that in Execution: and if he doth not, an Action upon the Caſe will lye againſt him. Trin. 44 Eliz. in B. R. *Brownlow.* 1. Part, 50.

3. Note; When any Houſe is recovered by any real Action, or by *Ejectione Firmæ*, the Sheriff may break open the Houſe, and deliver the Seiſin, or Poſſeſſion thereof to the Demandant, or Plaintiff: (for that the words of the Writ are, *Habere facias Seiſinam*, or *Poſſeſſionem*), becauſe otherwiſe there would never be an end of Suits: for after Judgment, it is not (in right and Judgment of Law) the Houſe of the Tenant or Defendant; *Cook* 4. Part, 91. in *Simons* Caſe.

4. The

4. Treſpaſs, for breaking his Houſe, and breaking 3. doors, and carrying away 3. Locks of the ſame doors. The Defendant juſtified the Entry of the houſe by vertue of a *Fieri facias* awarded againſt the Plaintiff directed to the Sheriff; and that he being Sheriff, and the other Defendants his Bayliffs, two of the Defendants entred into the Houſe, and the door being open, took the Goods, and the Plaintiff ſhut the doors upon the Bayliffs, and Impriſoned them two hours; wherefore he broke open the doors to reſcue his Bayliffs. It was holden by the whole Court, That although a Sheriff cannot break open an houſe, being to take Execution by a *Fieri facias*; yet when the door is open, that he enters, and be diſturbed in his Execution by the parties who are within the Houſe, he may break the Houſe to reſcue his Bayliffs, and to take Execution. Mich. 17 Jac. in B. R. *Cro.* 2. Part, 555, 556.

5. Errour, to reverſe a Fine in *Cheſter*: The Errour aſſigned was, Becauſe the Writ of Covenant was directed to the Coroners, with this Clauſe in the end of the Writ, *Quia prædict. J. D. Miles, eſt Vicecomes Comitatus Ceſtriæ fiat. Executio brevis prædict. per Coronator. ita quod Vicecomes ſe non intromittat*; where the Writ was to be directed to the Sheriff. It was ſaid by the Councel of the Plaintiff, in the Writ of Errour, That if the Sheriff had been ſole party to the Fine, yet the Writ ought to have been directed to him, becauſe it is but a Summons; and the Sheriff may ſummon himſelf, and it is not retorned that he is Sheriff, and cannot ſummon himſelf, and the courſe of Law is, That the Writ ſhall be directed to the Sheriff, and not to any other, when it may be done without prejudice. But it was Reſolved by the Court, That it was not Error; for if the Writ be directed to the Sheriff, and he is a party, it is doubted, if the Sheriff as Plaintiff may execute; and as Defendant, he may execute a Writ upon himſelf; and therefore it were good, to avoid that doubt, to take a Writ to the Coroners, to avoid the doubt of delay; for if he be Plaintiff, and makes not ſuch ſurmiſe, the Defendant peradventure will take Exceptions in abatement of the Writ; and ſo if he be Defendant, he may peradventure plead an abatement of the Writ; but when it is awarded to the Coroner, if the Defendant ſhould have excepted againſt it, yet when he appears, and accepts thereof, and comes in, and levies a Fine thereupon, he never afterwards ſhall aſſign for Errour, That the Writ ought to have been directed to the Coroners, eſpecially it being upon an amicable Writ to make aſſurance: Wherefore by the Judgment of the whole Court, the Fine was affirmed. Trin. 8 Car. in B. R. *Done*, and *Smither*, and *Leighs* Caſe. *Cro.* 1. Part, 300.

6. Note, It was ſaid by the Court, That if a *Capias utlegatum* iſſue out to the Sheriff, to take the party, and to enquire what Lands and Tenements he had; and the Sheriff by Inquiſition finds, that he is ſeiſed of many Lands, and continues poſſeſſion in them: If the Sheriff in ſuch caſe put the party out of poſſeſſion, he ſhall have an Action of Treſpaſs againſt him. Paſch. 22. Car. in B. R. *Wiack.* 78.

7. An Action upon the Caſe upon an Eſcape, upon a *Latitat*, before any Declaration; and the Sheriff retorned a Reſcous. It was the Opinion of the Court, That it was no good Retorn, nor Plea; for that he might have had *Poſſe Comitatus*, as well upon the ſerving of the ſame Proceſs, as he might upon an Execution. See 43 Eliz. in B. R. Rott. 279. *Waldo* and *Lamberts* Caſe. *Noy* 40.

8. In an Action upon the Caſe for not performance of Covenants; The Caſe was, Sir *Daniel Norton* Knight, Sheriff of the County of H. made one *Chamberlain* his Under-Sheriff at his Will; and amongſt other Covenants, there was a Covenant or Proviſo, That *Chamberlain* ſhould not execute any Extent, *Liberate*, *Elegit*, or other Execution, for any ſum above the ſum of 20 l. before he had firſt made it known to Sir *Daniel*, the High Sheriff. It was holden by all the Juſtices in this Caſe, That ſuch Covenant or Proviſo was void in Law, being againſt the Law, and Juſtice: And in that Caſe it was holden, That it was in the Election and Power of Sir *Daniel Norton*, whether he would make an Under-Sheriff at all, or not; Yet it was adjudged, That by any Act, Proviſo, or Covenant, he could not have him to be Under-Sheriff, and yet abridge him of the power which the Law gave him for the doing and ſerving of Execution according to the Law. Paſch. 11 Jac. in C. B. Sir *Daniel Norton* and *Symms* Caſe. *Hob.* 12 & 13. See *Chamberlain* and *Goldſmiths* Caſe. *Brownl.* 2. Part, 281. the ſame Caſe.

9. Debt upon an Obligation of 100 l. by a Sheriff; The Condition was, If J. S. appeared in the Common Pleas *à die Paſc. in quindecim dier. ad reſpondendum S. A. in placito debiti*, that then &c. The Defendant appeared, and pleaded the Statute of 23 H. 6. And that upon a *Capias* out of the Common Pleas, to take the ſaid J. S. *ad reſpondendum T. A. in placito debiti de* 320 l. by vertue of the ſaid Writ, the ſaid J. S. was arreſted, and Impriſoned, until he entred into the ſaid Bond, ſo it was not made according to the Statute, upon which it was demurred; and it was ſaid, That it

was

was not Warranted by the Statute, becauſe it is not mentioned that he ſhould appear *ad reſpondend. in placito debiti*, nor is it according to the Writ, *ad reddendum ei* 320 l. for *In debito* generally, is incertain; becauſe it may be in Annuity, or *Rationabili Bonorum*, and the ſum ought to be ſhewed, that the party might know to what to anſwer. And another Exception, becauſe the Obligation is 100 l. for an appearance only; whereas it hath been been adjudged, that 40 l. bond is ſufficient: But both Exceptions were over-ruled by the Court. To the firſt, That the Statute is intended only to repreſs Extortions, and Frauds in the Sheriffs, and doth not preſcribe any ſtrict form of the Bond, but it ought to be made unto him only by the name of his Office, and to expreſs the day and place of his appearance; and although it be variant in other circumſtances, it is not material: And for the ſecond, the Law doth not reſtrain him to any ſum or ſecurities; for he may take one, or two, or more ſureties, and may take what ſum he pleaſe to force the party to appear. Hill. 7 Jac. in B. R. *Villiers* and *Haſtings* Caſe. *Cro.* 2. Part, 386.

10. Debt againſt an High Sheriff, for an Eſcape of one C. his priſoner in Execution: Upon the Iſſue, the Evidence was, That one J. S. being Goaler of the Sheriff, having the ſaid Priſoner in Execution in his Goal at A. ſuffered him to walk abroad in the ſaid Town, yet for the moſt part with a Keeper; whereupon the Court directed, and ſo found by the Jury againſt the Defendant, as an Eſcape; for although the Sheriff may remove his Goal from one place to another within his Bayliwick, yet he muſt keep it, and his priſoners, within it, and not ſuffer them to go at large out of the priſon, though he himſelf be attending upon him, without an *Habeas Corpus* from ſome Court of Juſtice. Mich. 15 Jac. in C. B. *Balden* and *Temples* Caſe. *Hob.* 212.

11. In the Star-Chamber, the Caſe was this, The Plaintiff and K. were bound with D. W. as his Sureties, to one C. in 400 l. for the payment of 200 l. Judgment was given againſt K. but at the Suit of K. Execution was forborn by C. to ſee if any contribution could be gotten of W. the Plaintiff; for D. W. was a Bankrupt: but at laſt nothing coming, C. took of K. 270 l. in ſatisfaction of his debt; yet delivered his Bond into the hands of K. to put in Suit againſt the Plaintiff: Againſt whom K. ſent to S. a *Latitat*, and withal, a *Capias utlegatum* before Judgment, at the Suit of one B. a ſtranger, without his privity, to the end, that if the Plaintiff kept his houſe, that they might break the houſe, and ſerve it, and the *Latitat*: The ſaid S. the Sheriff entred the houſe in the morning, the outer door being open, but being within the houſe with ſix Bayliffs, ſhut the doors, and drew their ſwords, and preſently the Sheriff, with ſome of them, ran up to the chamber where the Plaintiff and his Wife were abed, and the door lockt, and knocking a little, broke open the door, and took the Plaintiff, and took a Bond of 40 l. for his appearance upon the *Latitat*, and 40 l. for ſuing out a *Superſedeas* upon the Outlawry, and ſo diſcharged him; and afterwards, the Plaintiff paid to K. 90 l. and had his Bond both to C. and the Sheriff delivered up: In the Star-chamber the Sheriff was fined 200 l. for the unneceſſary outrage and terror of this Arreſt, for not ſignifying that he was Sheriff, that the door might have been opened without violence, and eſpecially for diſcharging the Plaintiff upon the *Capias utlegatum*; and although K. did ſue his fellow ſurety for contribution, in the name, and by the conſent of his Creditor, becauſe it was a juſt ground of equity, that the ſureties ſhould be equally charged; yet for uſing the Kings Proceſs and Prerogative without Warrant of Court, or party intereſted, K. was fined 50 l. Paſch. 17 Jac. in *Cam. Stellat. Waterhouſe* and his Wife, and *Saltmarſh* and *Kettings* Caſe. *Hob.* 263, 264. See Trin. 17. Jac. in *Cam. Stellat. Park* and *Evans* Caſe, the like Caſe.

2. *What*

2. *What ſhall be an Eſcape in the Sheriff, and where an Action will lye againſt him upon ſuch Eſcape, where not; and how far he is chargeable.*

1. ACtion upon the Caſe, the Plaintiff Declared, That he recovered 30 l. againſt T. D. and ſued forth a *Capias ad ſatisfaciendum*, and delivered it to the Sheriff, who had taken the party in Execution, and the Defendants reſcued him out of Execution, and ſince he cannot be found, and ſo the Plaintiff is defrauded of his Execution. Upon a Verdict for the Plaintiff, it was moved, That an Action lyes not againſt the Defendant for this Reſcous, by the party himſelf who recovered, but his remedy was againſt the Sheriff, in Debt, or Action upon the Caſe, and the Sheriff ought to have his remedy againſt the Reſcouſſors: But it was the Opinion of the Court, That the Action did well lye for the Plaintiff, for he is the party who hath the loſs, and to whom the injury was done; wherefore in reaſon he ought to have the Action, and not be enforced to ſue the Sheriff, who perhaps is dead, and then no Action lyes againſt his Executors. It was adjudged for the Plaintiff. Paſch. 4 Car. in C. B. *Mym* and *Comptons* Caſe. *Cro.* 1. Part, 87.

2. In Debt againſt a Sheriff for an Eſcape, The Caſe was, A. did acknowledge a Recognizance in Chancery, and the Plaintiff had a *Scire facias*, and two *Nihils* returned; afterwards, he had a Judgment, *Quod recuperet debitum*, and a *Levari facias* came to the Sheriff to levie the ſame, who returned *Nulla Bona*. Afterwards he took forth a *Capias ad ſatisfaciendum* to the Sheriff, who took the party in Execution, and after ſuffered him to eſcape: The point inſiſted upon, whether a *Capias* doth lye upon a Recognizance acknowledged in Chancery. It was Objected, That a *Capias* doth not lye upon ſuch Recognizance; and 13 and 14 Eliz. *Patrixhams* Caſe was vouched to be accordingly, and *Cook* 3. Part, Sir *William Herberts* Caſe. To which it was anſwered, That as this Caſe is, the Action did lye againſt the Sheriff; for that preſently after the Recognizance is acknowledged, it is a Judgment upon Record; and where debt is upon Record, there by the Statute of 25 E. 3. cap. 17. The party may have a *Capias*: But it was ſaid, That admitting that the Proceſs was erroneous, or that the Court do miſ-award a *Capias*, by which the party is taken in Execution, yet it is a lawful Execution, and the Sheriff is chargeable with the Eſcape, and he is not to examine the Error of the Court, where the Court hath Juriſdiction of the Cauſe: And ſo it was ſaid it was adjudged, Trin. 31 Eliz. in the Exchequer, in *Ognell* and *Paſtons* Caſe; which ſee *Cook* 8. Part, 142. in Dr *Drurys* Caſe. Wherefore the Court was clear of Opinion, upon the conſideration of that Caſe and Preſident, That Judgment ſhould be entred for the Plaintiff, which was done accordingly. See Paſch. 1 Jac. in B. R. *Weaver* and *Cliffords* Caſe. *Cro.* 2. Part, 1. and *Bulſtrode* 2. Part, 62. to 65. the ſame Caſe.

3. Error of a Judgment in the Common Pleas, in an Action upon the Caſe, againſt the Sheriff of *Lancaſt.* for ſuffering one M. W. to eſcape out of Execution; and ſhewed, how he had recovered 100 l. in C. B. againſt the ſaid M. W. and after a *Capias*, and *Non eſt Inventus* thereupon returned, and a *Teſtatum* that he concealed himſelf in the County of L. a Writ was awarded to the Chancellor of the County Palatine, That he ſhould command the Sheriff to take the ſaid W. *ad ſatisfaciendum*, *Ita quod* the Chancellor ſhould have him, &c. and that the Chancellor commanded the Sheriff, that he ſhould take the ſaid W. *Ita quod* the Sheriff ſhould have him *coram Juſticiariis*, &c. and that thereupon the Defendant did arreſt him, and had him in Execution, and at D. permitted him to go at large. It being found againſt the Defendant, and Judgment, Error was brought, and aſſigned, 1. That this Action did not lye, but he ought to have debt. 2. That the Writ directed by the Chancellor to the Sheriff, was not warranted by the Writ directed to him, for that it varies from the command; for it ought to have been, That the Sheriff ſhould have the body before the Chancellor, *Ita quod* he have him before the Juſtices. 3. Becauſe the Declaration was, reciting the Writ, That whereas he hath brought a Writ of Debt againſt M. W. and recovered, &c. and then ſhews all the matter of eſcape, &c. and then it is *modo Quæritur, quod cum* he brought a Writ of Debt againſt the ſaid M. W. and doth not ſay the aforeſaid M. ſo it may be a ſtranger, and ſo not good: But all the Exceptions were over-ruled by the Court; for the firſt, That it is in the election of the party to bring either the one or the other. For the ſecond, Although there be Error in the Proceſs, the Sheriff cannot take advantage thereof. And for the third, Upon conference with the Prætonotories, and view of Preſidents, That it is the common courſe after recital of the Writ in the

made

unde Queritur, to begin *de Novo*, and not to say *prædict*: The Court held both courſes good enough, wherefore the firſt Judgment was affirmed. Mich. 9 Jac. in B. R. *Burton* and *Eyres* Caſe. *Cro.* 2. Part, 288, 289.

4. Action upon the Caſe againſt the Sheriff, for ſuffering one to eſcape who was arreſted upon a *Latitat*, the Plaintiff intending upon his appearance, and Bayl, to Declare againſt him, where he was arreſted by J. S. the former Sheriff, and left in priſon, and the Defendant ſuffered him to go at Liberty, without finding Sureties for his appearance: Upon Not Guilty, this being found by Verdict, That J. S. arreſted him, and at the day, retorned *Languidus*, and afterwards *in exitu ab Officio*, delivered him to the Defendant as a Priſoner for this cauſe, and the Defendant ſuffered him to go at large, and if &c. It was adjudged for the Plaintiff; for this permiſſion was a juſt cauſe of Action, for by this means the Plaintiff is defrauded and delayed of his Action; and although it be found that the other Sheriff retorned *Languidus in Priſona*, which is more then is in the firſt Declaration, yet that is not material to the Plaintiff, he remaining always in Priſon. Mich. 12 Jac. in B. R. *King*, and Sir *Euſtbie Andrewſes* Caſe. *Cro.* 2. Part, 380.

5. In Debt upon an Eſcape, againſt a Sheriff, the Caſe was, A Plaint of Debt being affirmed in *Norwich*, an *Habeas Corpus* was awarded, to bring the Body, with the Cauſe, before the Lord Chief Juſtice *Popham*, bearing date 19 *Junii*, which was the laſt day of the Term, who accepted Bail, which being filed, a *Procedendo* was awarded the laſt day of the Term, and thereupon they proceeded, and Judgment was given; and, If the Sheriffs were diſcharged, or charged with the Priſoner, was the Queſtion. It was Reſolved, That the Sheriffs were diſcharged; for when a *Habeas Corpus* is awarded, and Bail taken, although they be not filed, yet preſently the Priſoner is diſcharged, and his Sureties alſo, in the Inferiour Court; and although afterwards a *Procedendo* be awarded, ſuch as was in this Caſe, yet the Sureties are diſcharged, and he may proceed againſt the parties, as if he had not been imprifoned, and not otherwiſe. Mich. 5 Jac. in B. R. *Faintly* and *Boſſitts* Caſe. *Cro.* 2. Part, 203.

6. Error of a Judgment in C. B. againſt a Sheriff, for that whereas he had a *Capias utlagatum* after Judgment, againſt J. S. and delivered it to the Sheriff of D. to execute, who ſeeing J. S. and being deſired to execute it, did not execute the ſame, but ſuffered him to go at large; and afterwards the Sheriff retorned a *Non eſt Inventus* here to *Weſtminſter*, in deceit of the King, and prejudice of the party of his debt: The Defendant pleaded Not Guilty; which being found againſt him, and Judgment, Error brought, and aſſigned, 1. Becauſe the Action is brought by the King, and himſelf, where it ought not ſo to be. 2. That the Tryal was *de Vicineto de Weſtm.* where the offence is alledged to be in D. in the County of D. and from thence the Viſne ſhould come: But both Errors were diſallowed by the Court; The firſt, Becauſe it is the Kings Writ, and the King is to have the benefit of it as well as the party; and to the ſecond Not *allocatur*, becauſe the falſe Retorn was here at *Weſtminſter*, which is the cauſe of the Action. The Judgment was affirmed. Paſch. 17 Jac. in B. R. *Parkhurſt* and *Powels* Caſe. *Cro.* 2. Part, 532, 533.

7. Debt upon an Obligation, The Defendant pleaded, that the Condition was, That he ſhould perſonally appear before the Juſtices, and ſet forth, how that he was taken by a *Latitat* by the Sheriff, who took this Obligation on his deliverance, and urged the Statute of 23 H. 8. that the Obligation was not according to the Statute. By the Opinion of three Juſtices, If it were in an Action wherein a man may appear by an Attorney, then it is void; and the Plaintiff ſhewed a Judgment of 27 and 28 Eliz. in *Stokford* and *Cutts* Caſe, where ſuch a Judgment was given for the Sheriff. The next Term it was moved again, and *Anderſon* Chief Juſtice was of Opinion, That the Obligation was void; for when an expreſs form is limited by the Statute, no variance ought to be from it: But the other Juſtices were againſt him, for he ought to appear in proper perſon in caſe of a *Latitat*. *Anderſon* ſaid, I deny that, for that *Latitats* have not been about ſixty years continuance. See *Cook* 10. Part, 12. *Bretagnes* Caſe. And *Cook* 1. Part, *Inſtitutes* 257. Hill. 29 Eliz. in C. B. *Loſells* Caſe. *Owen*, 90, 91.

8. In an Action upon the Caſe, the Plaintiff Declared, That he was Sheriff of the County of W. and a Writ came to him to arreſt J. S. at the ſuit of the Defendant, who requeſted the Plaintiff to make one R. who was his friend, his ſpecial Bayle; In conſideration of which, the Defendant did promiſe, That if J. S. did eſcape, no advantage ſhould be taken againſt the Plaintiff; whereupon he made R. his Bayly, who arreſted J. S. who afterwards eſcaped from him; and that notwithſtanding, the Defendant had charged the Plaintiff for this; and a Verdict was found for the Plaintiff. And in this Caſe it was agreed, That where a Sheriff doth make a Bayly upon requeſt of any one, it was reaſon that the ſame ſhould not charge the Sheriff with an Eſcape, by reaſon of the negligence of ſuch Bayly; for the Sheriff hath no

curiey from every of his Baylies, to ſave him harmleſs; wherefore it is great reaſon, That if upon requeſt he makes a ſpecial Bayly, that the party ſhould not take advantage of ſuch Eſcape, but the Sheriff might have his Action upon his promiſe. It was adjudged for the Plaintiff. Mich. 30 Eliz. in C. B. *Dairity Court*, and *Smalbrooks* Caſe. *Owen*, 97, 98.

9. Eſcape was brought againſt two Sheriffs, and one of them dyed: The Queſtion was, If the Writ ſhould abate? The Court delivered no Opinion in the Caſe; But by the Court, this difference was agreed, That an Eſcape upon an Arreſt, by the ſame Proceſs, as a *Capias ad reſpondendum, &c.* the Writ ought to ſurmiſe, *ad largum ire permiſit, & non comparuit ad diem*, becauſe the party was Bayliable, and ſo the Sheriff might lawfully ſuffer him to go at large; but otherwiſe, if the arreſt be upon an Execution, as a *Capias ad ſatisfaciendum*, there *ad largum ire permiſit*, is good enough. Note, It was ſaid in this Caſe, That Paſch. 2 Jac. in C. B. in the Caſe of the Lady *Mounſon* againſt the Sheriff of the City of *Lincoln*, for the taking of inſufficient ſecurity, upon 23 H. 6. That the death of one of the Defendants, did not abate the Writ. See *Noy* 72. The Sheriff of *Nottinghams* Caſe.

10. In Debt, the Plaintiff Declared, That whereas he recovered againſt T. A. and M. his Wife, in Treſpaſs, for damages 203 l. and the ſaid M. was committed in Execution to the Defendant; That the Defendant 24 *Nov.* 16 Jac. ſuffered her to go at large, *per quod Actio accrevit*? The Defendant pleaded, That ſhe brake Priſon, and eſcaped, and that he freſhly followed her, and took her again 21 *Octob.* 17 Jac. in freſh ſuit, and had her in Execution, and yet hath her. It was ſaid, That this Plea was not good, becauſe the Eſcape is alledged 24 *Nov.* 16 Jac. and the Action is brought Paſch. 17 Jac. and the Repriſal is alledged to be a year after the Eſcape, and after the Action brought. It was Objected, That the Action did not lye in this Caſe, becauſe the Eſcape is of a Feme Covert, where the husband is ſubject to the Execution, ſo the Plaintiff hath not loſt his debt; for by Intendment, ſhe might not have paid it if ſhe had layn in priſon, for ſhe had nothing but what was her Husbands, and the Execution remains yet againſt him. But it was the Opinion of the whole Court, That this was not any Plea, becauſe the Action is brought, and implies a voluntary permiſſion *ire ad largum*, which is neither denyed, nor traverſed; and if the Sheriff voluntarily lets a Priſoner to go at large, he cannot retake him; and ſo this Repriſal being alledged after the Action brought, is to no purpoſe, nor is any plea; and the Action did well lye, or an Action upon the Caſe againſt the Sheriff, at the pleaſure of the party. It was adjudged for the Plaintiff. Hill. 2 Jac. in B. R. *Whiting* and Sir *George Reynells* Caſe. *Cro.* 2. Part, 657, 658.

11. Error of a Judgment in C. B. Whereas before he had brought Debt for 40 l. againſt J. S. and had Judgment to recover the debt againſt him, and had taken forth an *Elegit*; That the Defendant thereupon Retorned, That he had by ſuch a Jury Appriſed ſuch goods in *ſpecie*, to the value of 40 l. and had extended ſuch lands, which goods and lands he delivered to the Plaintiff, *ubi revera* he never delivered them to the Plaintiff, *per quod Actio, &c.* The Defendant pleaded *Nihil debet*, which was found againſt him, and Judgment for the Plaintiff. Error brought, and aſſigned, That Debt lyes not in this Caſe; for it is not any debt in the hands of the Sheriff, nor is there any cauſe to maintain this Action; for if he had not delivered the goods, he ſhould have his Action for the falſe Return; and *Pikes* Caſe 14 Eliz. was alledged, where the Sheriff upon a *Scire facias* Retorned, That he had ſold the goods for ſo much money which he had delivered to the Plaintiff, and the Plaintiff averring that he had not the money, maintained an Action of Debt. But the Court held, That that differed from the Caſe in Queſtion, becauſe there, by his Return, he confeſſed he had ſold the Goods, and delivered the money; but here it is not Retorned, that he medled with the goods, or with the value of them, and ſo there is not any certainty to charge him; Wherefore the Judgment was reverſed. Hill. 15 Jac. in C. B. *Coriton* and *Thomas* Caſe. *Cro.* 2. Part, 566.

3. *Where an Action lyeth by the Sheriff for his Fees, ; What his Fees are upon an Execution ſerved ; And where, and how he ſhall be puniſhed for taking of Exceſſive Fees.*

2. THe Plaintiffs being Sheriffs of *Coventry*, brought debt for 7 l. and 6 d. for their fees, for an Execution of 181 l. ſo that for their fees demanded was 12 d. for every pound, until 100 l. and 6 d. for every pound over and above. See the Statute of 28 Eliz. and note the Proviſo in that Statute, which doth not extend to a City Corporate ; and Note, That Statute is Introductive of a New Law for the encouraging of Officers to venture to do Executions. And in this Caſe it was Reſolved, 1. That the Sheriff may have an Action of Debt for his Fee, although the Statute doth not give any remedy : And ſo it was ſaid it was adjudged the 14 Jac. in B. R. in the Caſe of *Proby* and *Lumley*, Sheriffs of *London*. 2. Reſolved, That the Proviſo in the Statute of 28 Eliz. extends to a City Corporate, when Judgment is there given within their Franchiſe, and Execution upon it, and not when Judgment and Execution iſſueth out of Superiour Courts ; for in the firſt Caſe, the Officer is not at great care or peril ; but as to the Sheriff of a County, his labour and travel is all one, be it in the Body of a County, or in the Franchiſe : But if that Town be a County of it ſelf, there the Sheriffs ſhall have their Fees, according to 28 Eliz. And now Judgment was given for the Plaintiff ; but there was much doubt upon the words of the Statute, and the Court was divided in the point, If the Sheriff ſhall not have 12 d. for every pound to 100 l. or if he ſhall have but 6 d. when the Execution is more then 100 l. Hill. 1 Car. in B. R. *Walden* and *Viſelayes* Caſe. *Ny.* 75.

2. See Trin. 8. Car. in B. R. *Lyſter* and *Bromleys* Caſe ; What Fees the Sheriff may take for executing a *Capias ad ſatisfaciendum* for 400 l. *Cro.* 1. Part, 209.

3. Note, That the Sheriff of *Berks* was committed by the Court to the Fleet, for taking 20 s. for making a Warrant upon a general *Capias utlagatum* ; for all the Juſtices were of Opinion, That the Sheriff ſhall not take any Fees for making any Warrant or Execution of that Writ, but only 20 s. 4 d. the which is given by the Statute of 23 H. 6. for it is at the ſuit of the King. But upon a *Capias utlagatum unde contractus eſt*, which is after Judgment, it ſeems to be otherwiſe. Mich. 7 Jac. in B. R. *Brownlow*, 2. Part, 283.

More *Sheriffs.*

1. NOte, It was ſaid and agreed by the Court, That if a Sheriff execute a *Capias*, and there is no Original to Warrant it, he is excuſed in it, for he is not to examine, Whether the Original be ſued out or not. So if a Bayliff executes Proceſs made by the Steward for damages recovered in the Mannor in a thing in which they had no Authority to hold Plea, he ſhall not be puniſhed. But if Proceſs commeth to the Sheriff to Arreſt J. S. and he Arreſt J. N. or to make Execution of the goods of J. S. and he make Execution of the goods of J. D. there he is a Treſpaſſor ; for in ſuch Caſe he muſt take notice at his peril of the perſon, and of the goods. So if that J. S. come to ſue a Replevin to the Sheriff, to Replevie the Cattel of J. S. and ſhews him the Cattel of J. N. and ſaith, they are his Cattell, he is a Treſpaſſor to J. N. and the Sheriff may have an Action againſt J. S. for his falſe Information ; for the Sheriff muſt at his peril take notice whoſe Cattel they be. Mich. 5 Jac. in C. B. *Buckwood* and *Beal* Caſe. *Brownlow*, 1. Part, 210, 211.

2. Error of a Judgment in *Carnarvon* ; the Error Aſſigned was, That a *Venire facias* was returned thus, viz. *per* Tho. R. *Vicecomitem* ; *Iſud Breve cum pannello annexo mihi deliberatum fuit per* Tho. H. *nuper Vicecomitem in exitu ab Officio ſuo.* And was Indorſed *Tho. H. Miles nuper Vicecomes*, which is not good, for it appears it was returned by one who had not Authority, for ſaying *nuper Vicecomes* excludes him, that he was not Sheriff when he made the Return. See *Coke* 5. Part, *Rowlands* Caſe. It was agreed by the Court, That the word *nuper Vicecomes* doth neceſſarily imply, That as he was not Sheriff then at the time of the delivery of the Writ to the new Sheriff, So it is to be conſtrued, That by the word *Nuper* he was Sheriff at the time of the Pannel made ; And if he had returned it without theſe words *Nuper Vicecomes*,

Vicecomes, it had bin clearly good; then the Addition thereof ſhall not make it ill. It was not Reſolved, but the Court would adviſe. Paſc. 6 Car. in B. R. *Bethyll* and *Parry's* Caſe. *Cro.* 1. Part, 136, 137. See Hill. 9 Car. in B. R. *Bathell's* Caſe. *Cro.* 1. Part, 411. acc.

3. In Trover and Converſion, the Caſe was, A Sheriff upon a *Fieri facias* ſeized goods into his hands to the value of the Debt, and paid part of the Debt, and the goods not being ſold, nor the Writ returned, the Sheriff was diſcharged of his Office, and afterwards ſold the reſidue of the goods without any Writ of *Venditioni exponas*. It was Reſolved, That the Sale was good, for the Writ of *Fieri facias* gave him Authority to ſell without any other Writ, and the Sale by him after is good, although he was diſcharged of his Office. Tr. 3 Jac. in B. R. *Ayne* and *Adens* Caſe. *Cro.* 2. Part, 73.

4. A. T. Couſin and Heir of W. T. after his death, becauſe he had no Iſſue alive at the time of his death (but M. his Wife was then ſuppoſed to be Enſient by him) who dyed 15. *Feb.* 1623. and ſhe was married again to J. S. within a Week after the death of her Husband, procured a Writ *de ventre inſpiciendo* of the ſaid M. directed to the Sheriff of L. to cauſe her to be ſearched, Whether ſhe were with child by the ſaid W. T. *et quando ſuit partura*. This Writ was returnable in C. B. The Sheriff returned, That he had cauſed her to be ſearched, and returned the Inquiſition, That by ſuch perſons he cauſed her to be ſearched, and found her Enſient, *et quod partura ſuit* within 20 Weeks. She being removed to C. in the County of *Surry* with her Husband; It was prayed, That the Sheriff might take her into his Cuſtody, and keep her till ſhe was delivered of her Child, that there might not appear to be any falſe or ſuppoſitious birth. But becauſe ſhe was a Feme Covert, who ought to cohabit with her Husband, they would not take ſuch a courſe with her, but left her with her Husband, he entring into a Recognizance that ſhe ſhould not remove from the houſe they then Inhabited. And a Writ was awarded to the Sheriff of S. to cauſe her to be ſeen every day by two of the Matrons returned by him, and that three of the ſaid Matrons ſhould be preſent with her at the time of her delivery, ſo as no falſhood might be at her Birth. She was afterwards delivered of a Female Daughter, who was afterwards upon an Inquiſition, found to be Daughter and Heir of the ſaid W. T. Paſc. 22 Jac. in B. R. *Theakers* Caſe. *Cro.* 2. Part, 685, 686.

5. In Aſſumpſit, the Caſe was this, A *Capias ad ſatisfaciendum* at the Suit of the Plaintiff was to the Sheriff of W. to take one T. H. The Sheriff *mandavit* A. B. C. and D. *quatuor Baliviis et cuilibet eorum* to take the ſaid T. H. by vertue of which A. and B. took him, and J. S. in conſideration of the diſcharge of the ſaid T. H. promiſed to the Plaintiff, &c. After Verdict for the Plaintiff, It was moved, That the reſt by two of them was not lawful. But the Court was of Opinion, That in regard that this was a Miniſterial act, and an Authority without any Intereſt, that it was well executed by two. It was alſo holden, That the *Mandavit* was good, without ſhewing it to be by Deed. Trin. 44 Eliz. in B. R. rott. 401. *King* and *Hobs* Caſe. *Noy* 47.

6. Debt againſt the Executors of W. C. late Sheriff of the County of D. The Plaintiff declared, That he recovered againſt the Executor of W. P. a debt of 100 l. and 22 l. for damages *de bonis Teſtatoris ſi &c. Et ſi non* the ſaid 22 l. *de bonis propriis*; and the Record being removed into this Court, he had a *Fieri facias* directed to the ſaid W. C. for the levying of the ſaid 22 l. damages of the goods of the Executor, which he afterwards levyed, and dyed, without paying it; Whereupon he demanded it of his Executors, and they had not paid it *per quod actio, &c.* Upon *Non debent* found againſt the Executors. In Arreſt of Judgment, it was moved, Becauſe he chargeth him in an Action of Debt, whereas there was never ſuch Action brought before, but if it had appeared by the Record, that no money was levyed, he might have had an Account, or an Action upon the Caſe, or a *Scire facias*, but never an Action of debt. 2. Becauſe that although the Action lyes againſt the Sheriff himſelf, yet it lyes not againſt his Executors. For the non-payment is a perſonal wrong wherewith the Executors are not chargeable. But it was the Opinion of the Juſtices, That the Action did well lye; And to the Objections, it was ſaid, That the *Fieri facias* being duly Executed, and the money levyed by the Sheriff, the Executor of P. the Defendant in the firſt Action was diſcharged, and the Sheriff is chargeable for the money to him that recovered it. The Court alſo held, That the Sheriffs Executors are aſwell chargeable as himſelf. For there is a difference where the Sheriff is chargeable in his life with a perſonal wrong or miſ-feaſance, there *actio moritur cum perſona*, but where he is chargeable for levying of money, and not paying it, that is for a duty; and there if he dyes, his Executors are chargeable aſwell as himſelf. Judgment was for the Plaintiff. Hill. 14 Car. in B. R. *Perkinſon* and *Gilfords* Caſe. *Cro.* 1. Part, 387, 388.

See more of Sheriff in the Titles of Actions of Debt, Eſcape, Executions, and other Titles before.

Sommons and *Severance.*

Where and in what Action, and for whom, and by whom, and against whom it lyeth, and where the Defendants shall sever in their Pleas, &c. Where not.

1. A Writ of False Judgment was of a Judgment given in ancient Demesne in a Writ of *Right-Close*, prosecuted there in the nature of a Writ of *Aiel*; One of the Plaintiffs was Nonsuit, and severed. And the Record being brought in, divers Errors were assigned, viz. That there was no Officer returned of the Summons. 2. That no day was prefixed to the Tenant in the summons, but *ad proximam Curiam*. And 3. No names of the Summoners returned, and for these causes, amongst others, the Judgment was reversed. Pasc. 9 Eliz. *Dyer*, 261.

2. Three Coparceners were of Lands, one of them alliened her part; another a Writ of Partition against the Alienee and the other Coparceners upon the Statute of 31 H. 8. of Partition. It was holden in that Case, That the Writ should abate, because that a Writ of Partition in such Case did lye at the Common Law. But in that it was said, If they do joyn against the Alienee, and one of them had bin Nonsuited, she should have summoned and severed, and yet her part shall be allotted to her. Mich. 8 Eliz. *Dyer*, 243. See *Cook* 2. Part, *Institutes* 175. acc.

3. Three Coparceners of a Reversion, one alliened her part, the particular Tenant dyed. The eldest Sister entred into the whole. It was the Opinion of the Court, That the Grantee and the other Coparceners could not joyn in a Writ of Partition against the three, because the one of them is entituled by the Common Law, and the other by the Statute of 31 H. 8. Quære, if in that Case the entry of the eldest Coparcener doth give Seisin to the Grantee, as it doth to the other, because of the Privity. Hill. 3 Eliz. *Dyer*, 128. *Ballards* Case.

4. *J. Varny* made a Feoffment in Fee to the use of himself and D. his Wife, and to the Heirs of their two bodies, the Remainder to the right Heirs of the Husband, and they had Issue M. and the Husband dyed: D. the Wife sold the Land in Fee. M. and R. her Husband joyned in a Fine in confirmation of the Estate, and M. dyed without Issue. Now R. and D. and one *Ed. Varny* as Cousin and Heir of M. brought a Writ of Error to reverse the Fine, and to avoid the Sale of D. upon the Statute of 11 H. 7. R. and D. did not appear, upon which a summons *ad sequendum simul* issued, which was returned *Nihil*, and yet after they appeared freely with the third, and they assigned Errors. Mic. 1. Ma. *Dyer*, 89

5. Note, If two Executors bring Debt, and the one is summoned and severed, and the other prosecuted the Action to Judgment, the Executor who is severed, cannot now acknowledg satisfaction of the Debt, because he is not privy to the Judgment; And yet if he had released before Judgment, it should have barred the other notwithstanding his severance. Mich. 14 Eliz. *Dyer*, 319 acc. See 48 E. 3. 14. 9 E. 4. 33. *Cook* 5. Part, in *Middletons* Case, acc.

6. If one Demandant in a real Action, or if one Plaintiff in a personal Action where Summons and severance lyeth; as in debt by Executors. If one Demandant or the Plaintiff be Nonsuit, and the other sueth forward, he who is Nonsuit shall not be Amerced. *Cook* 8. Part, 61. in *Beechers* Case.

7. In a Replevin against six, the one avowed, and the five made Connsans as Bayliffs to the first, for an Amercement for the breaking of a By-law in a Leet, and Judgment was given against them, and Costs and Damages. And the six brought a Writ of Error, and the Defendant in the Writ of Error pleaded the Release of one of the five in Bar. And in this Case it was Resolved, That because that the Law did compell them to joyn in a Writ of Error to recover no benefit, but to discharge themselves of a Charge imposed upon them, that the Release of the one should not bar the other. And it is there said, That if damages are recovered against divers in a Writ of Conspiracy, that it was adjudged, That they might all joyn in an Attorney, and that the Nonsuit of the one should not hurt the other, no more then in an *Audita Querela*, or a *Scire facias* upon a Release. *Cook* 6. Part, 25. *Rudhalls* Case.

8. Debt was brought by two Executors, the one was summoned, and severed, and dyed: It was adjudged, that in that Case the Writ should not abate; but in that Case, If the one dyed before severance, it was holden, That the Writ should abate. 2. In this Case, it was Resolved, That if two being

an Original Writ real, and the one is ſummoned and ſevered, and dyeth, that the Writ ſhall abate, but otherwiſe it is where it is a Writ real Judicial. 3. Reſolved, That where the Plaintiff is to recover nothing, but only diſcharge himſelf of a burthen, there the death of one of the Plaintiffs ſhall not abate the Writ, as in an *Audita Querela*. And note, that it is there ſaid, That Summons and ſeverance is alwayes before appearance. *Cook* 10. Part, 134. *Read* and *Redmans* Caſe.

9. Error of a Judgment given in the Common Pleas in a *Precipe quod reddat*. It was aſſigned for Error, That by the Statute of 31 Eliz. cap. 13. It is Enacted, That for the avoiding of ſecret Sommons in real Actions without convenient notice of the Tenants of the Freehold, That after every Summons upon the Land in a real Action, 14 dayes at the leaſt before the Return, Proclamations ſhall be made on a *Sunday*, at or near the moſt uſual door of the Church or Chappel of that Town or Parith where the Land whereupon the Summons doth lye, be made. And in this Caſe, it was ſaid, That there was not any Proclamations made at the Church door. It was adjudged, That in this Caſe the party ſhould not have an averment againſt the Return of the Sheriff of the Summons or Proclamations, for that if the Return be falſe, the party might have his Action upon the Caſe againſt the Sheriff. Hill. 43 Eliz. in B. R. *Collet* and *Mayſhes* Caſe. *Goldesbr.* 128, 129.

10. Note, it was ſaid and agreed, That Summons and ſeverance lyeth betwixt Executors Plaintiffs: And if one of the Executors be Outlawed, or Excommunicated, he may be demanded, and if he appear not, he ſhall be ſevered by an award without Proceſs after he hath appeared, and the other ſhall appear without him; but if he hath not appeared, then Summons and ſeverance ſhall iſſue out againſt him. See *Brownlow*, 1. Part, 37. acc.

11. An Enfant brought a Writ of Error upon a Fine levyed by him within age. The Caſe was this, Husband and Wife were Tenants for life, the Remainder to the Enfant in Fee, and they three joyned in a Fine, and the Enfant only brought the Writ of Error. It was objected, That all three ought to have joyned in this Writ, and the Husband and Wife ought to be Summoned and ſevered. On the other ſide, it was ſaid, That here the Husband and Wife have not cauſe of Action, but the Enfant only is grieved by the Fine, 29 E. 3. 14. In an Aſſiſe againſt three Coparceners, they pleaded by Bayliff, *Nul tenant de Franktenement* &c. and it was found, that two of them were Diſſeiſees and Tenants, and that the third had nothing: And afterwards the three Coparceners brought an Attaint, and after appearance, the third Siſter was Nonſuit, and afterwards by award, the Writ did abate. It was the Opinion of *Wray* Chief Juſtice in the Principal Caſe, That as the Writ is here brought, it is well, for the Error is not aſſigned in the Record, but without it, in the perſon of the Enfant, and that is the cauſe of the Action by him and for no other. And it was ſaid, That if two Enfants levy a Fine, That although they joyn in Error, yet they ought to aſſign Errors ſeverally, and they may ſue ſeveral Writs of Error. Afterwards it was holden by the Court, That the Writ was good; and the Fine was reverſed as to the Enfant only. Mich. 31 Eliz. in B. R. *Pigot* and *Harringtons* Caſe. *Leon* 317.

12. Error of a Judgment in C. B. Whereas an Action of Debt was brought by ſix Executors, and after three of them being ſummoned and ſevered: The three others bring Debt upon an Obligation made to the Teſtator. The Defendant pleaded *Non eſt factum*, and found againſt him, and Judgment for the Plaintiff. Error brought and aſſigned, becauſe there is not any mention therein of thoſe that ſevered, for they being alwayes Executors, ought to be named in the Judgment. It was commanded by the Court to ſearch Preſidents, Whether upon Summons and ſeverance, Judgment ſhall be for thoſe only which Proſecuted; and it was certified, That the courſe was ſo. It was the Opinion of the Court, That it was a good courſe, and no cauſe of Error for the Executors, which are ſevered peradventure never proved the Will, and it may be they will never prove it, or Adminiſter. Wherefore when they are named in the Writ, and will not joyn, it is reaſon that Judgment be given for thoſe which proſecuted without naming thoſe which were ſevered. Whereupon it was Ruled, That the Judgment ſhould be affirmed. Mich. 11 Car. in B. R. *Price* and *Parkhurſts* Caſe. *Cro.* 1. Part, 303.

13. In Debt for Rent, the Caſe was, A. and another were Leſſees for years by Demiſe of the Plaintiffs, rendring Rent. A. aſſigns over his part to M. one of the Defendants, the other Leſſee makes his Will, and thereby makes P. the other Defendant his Executer, and dyes; the Rent is behind after aſſignment, and after the death of the other Leſſee; and for this Rent, the Action was brought againſt the Defendants, and it was brought in the *debet et detinet*: the Queſtion was, If a Joynt-Action lyes againſt them both. It was urged, That ſeveral Actions ſhould have bin brought, and not a joynt Action, the contract here being determined, and *Walkers* Caſe, *Cook* 3. Part, 24. was vouched to that purpoſe. And here the Defendants have divided poſſeſſions, and divided Intereſts, he on by Aſſignment, the other as Executor. But the Opinion

of

of all the Court was, That the Action here is well brought against them both; and Severance of the Land shall not make severance of the Actions of the Plaintiffs; if it should, great inconveniencies would follow, by several Assignments of under-Tenants amongst themselves; and therefore he may for his Rent, resort to his first Lessee; and the Action of Debt is grounded upon the Demise which continues still, notwithstanding any alteration made by the Tenants: Wherefore Judgment was given for the Plaintiffs. Trin. 14 Jac. in B. R. The Bayliffs of *Ipswich* and *Martin* and *Parkers* Case. *Bolstr.* 3. Parts 211, 212.

14. Error in Debt, The Defendant in the Common Pleas appeared the first day which he had by the Summons; and afterwards the Plaintiff recovered by *Non sum informatus*, but the Defendant *Non in Misericordia quia venit ad primam summonitionem*, and Error upon this Judgment was alledged, That there was not any Original, and upon that issued a *Certiorari* for the Original in that Term in which the Original Action was brought; which is certified, that in that Term there was no Original between the parties. And it was said, That the Original might be entred of another Term following. And therefore the *Certiorari* was too strict to tye it to a Term in *specie*. But it was the Opinion of the Court, That if there be any Original of another Term, it will not serve, because all the matter was begun and ended in one Term, as appeared by the *Nihil in Misericordia*. But where the Defendant doth not come the first day, but by mean process, there the Judgment is, that he shall be *in Misericordia*; and there an Original certified between the parties of any Term depending the Plea, is sufficient. Mich. 5 Jac. in B. R. *Disme* and *Sherleyes* Case. *Yelverton*, 108.

15. The Case was, A. man was seised of Lands in Fee, and of Lands by Copy in Fee, and he made one entire Lease of the Land in Fee, and of the Copy-Lands to H. for years, rendring one entire Rent. And afterwards the Lessor surrendred the Copyhold-Lands to the use of C. and his Heirs; and at another time, Granted by Deed the Reversion of the Freehold Lands to C. in Fee. And H. attorned: and afterwards for Rent behind, C. brought one Action of Debt for the whole Rent. It was Objected, That the Reservation of the Rent was an entire contract, and by the act of the Lessee the same cannot be apportioned. And therefore, If one Demiseth three Acres, rendring three shillings Rent; and afterwards Bargaineth and Selleth by Deed Indented and Enrolled the Reversion of one Acre, the whole Rent is gone, because that contract is entire, and cannot be severed by the act of the Lessee. But it was Resolved, That in the Principall Case, The contract was not entire, but that the same by the act of the Lessor, and the Feoffment of the Lessee might be severed, for the Rent is incident to the Reversion, and the Reversion is severable, and by consequence also the Rent. 2. It was Resolved, That although C. commeth to the Reversion by several Conveyances, and at several times; Yet he may bring an Action of Debt for the whole Rent. See Hill. 43 Eliz. *inter* and *Lassells* Case. Hill. 42 Eliz. in C. B. Rot. 181. *Ewer* and *Males* Case. And note, it was said, That in this Case, If by severance of part of the Reversion, the Ancient Rent should be lost, many inconveniencies would in such Case follow. Pasc. 39 Eliz. in B. R. Rot. 233. *Collins* and *Hastings* Case. *Cook* Select Cases 57.

16. *Thyan* brought Dower against *Tyan*, and had Judgment by default; a Writ of Enquiry issued to the Sheriff, who delivered seizin of the Dower recovered, and Returned the Writ: The Defendant brought Error, and assigned their Errors in the Record, 1. The Original Writ appears not to be Returned, according to the Statute; for the year doth not appear when it was Returned. 2. The Proclamation made by the Sheriff, appears not to be where the Land lyes. 3. The Return doth not mention the Proclamation to be after the Summons, as the Statute requires. 4. It is not said, That he did make Proclamation upon the Land. 1. It appears not that the Proclamation was made in the Parish where the Summons was, as the Statute directs. To these it was answered, To the first, It shall be intended to be in the year of the Reign, and not of the age of the King; though the word Reign be omitted. 2. The Land lyeth in divers Parishes, and Proclamations at the Church of any of the Parishes is good. 3. It is not necessary to Return the place of the Summons: And it was said, That it was made *secundum formam Statuti*, that supplies all the defects. *Quære*, For the and Exceptions to these points of Summons, were not Resolved by the Court. Mich. 23 Car. in B. R. *Thyan*, and *Thyans* Case, Styles, 67. 68. &c.

17. In a Writ of Dower brought by A. against W. of Lands in *Magna Munden*, and *Munden Parva*, The Sheriff returned Pledges and Summons, and then averred, That *post summon. predict. in forma predict. fuit* he did at *Munden Magna*, where

part of the Tenements lye at the moſt uſual door, &c. cauſe to be proclaimed all that was conteyned in the Writ. And although that the words of the Statute of 31 Eliz. cap. 13. be ſomewhat doubtfull, (viz. Parithes, or Chappells where Lands lye) yet the Opinion of the Court was, That the Proclamation in one Town was ſufficient. Paſc. 12 Jac. in C. B. *Ailes* and *Walters* Caſe. *Hob.* 133.

Symonie.

Symonie, *what it is, and the Nature of it: what ſhall be ſaid Symonie, what not: And, if it were an Offence at the Common Law, before the Statute of* 3 *Eliz. or not.*

1. THe nature of Symonie is, That it is *Contractus ex turpi Cauſa, & contra bonos mores*; and ſo it is againſt Law, and void by the Statute of 3. Eliz. againſt party and parties, privies, and ſtrangers ſhall take advantage of it: Like as if a man be bounden in an Obligation uſurious, the Bond is void between the parties; and therefore if ſuch an Obligee makes his Executor, and dyeth, and the Executor pay the uſurious Bond, other Creditors may ſhew it, and make a *Devaſtavit* of it. *Hob.* 167. in *Winſcombs* Caſe.

2. It was Reſolved by the whole Court, That if any one ſhall receive, or take money, fee, or reward, or other profit, for any Preſentation to a Benefice with Cure, although he in truth who is preſented is not knowing of it, yet the Preſentation, Admiſſion, Inſtitution, and Induction, are void by the expreſs words of the Statute of 3 Eliz. and the King ſhall have the Preſentation *hac vice*; for the Statute intends to inflict puniſhment upon the Patron, as upon the Author of this corruption, by the loſs of his Preſentation; and upon the Incumbent, who came in by ſuch a corrupt Patron, by the loſs of his Incumbency, although he never knew of it; but if the Preſentee be not knowing of the Corruption, then he ſhall not be within the miſchief of diſability in the ſame Statute. Mic. 8 Jac. in C. B. Dr *Hutchinſons* Caſe. *Cro.* 12. Part, 101. *Jenkins*, 202. acc. the ſame Caſe: There he Libelled in the Spiritual Court for Tythes; The Defendant ſhewed, That the Dr came in by Symony and Corruption, and prayed a Prohibition. The Dr pleaded, That he had his pardon, and pleaded the ſame at the Spiritual Court; and notwithſtanding, the Court granted a Prohibition, becauſe the Pardon doth not make the Church to be full, but only maketh the Offence diſpuniſhable; But if in ſuch caſe the King doth Preſent, his Preſentee ſhall have the Tythes.

3. In a *Quare Impedit*, The Plaintiff ſhewed, That T. C. the Defendant was ſeized in Fee of the Mannor of H. to which the Advowſon of the Vicarage was appertaining, and that the Church became void by a Symoniacal Agreement betwixt R. S. the Defendant, and the Wife of the Patron, that the Patron ſhould Preſent him, and ſhewed what the Symonie was *in ſpecie*, and that the Patron accordingly Preſented him; wherefore by the Statute of 31 Eliz. the Church is void, and it belongs to the King to Preſent. The Defendant pleaded, That Queen Eliz. was ſeized in Fee of the Rectory of F. appropriated, whereunto the Advowſon of the Vicarage appertained, and that the Parſonage came to the King by deſcent; and that the Church being void, the ſaid T. C. Preſented the Defendant by uſurpation, and that the Defendant was Admitted, Inſtituted, and Inducted; and that afterwards the King Preſented that Defendant to the Advowſon of the Vicarage, and traverſed, that the Advowſon of the Vicarage was appertaining to the Mannor of N. In that Caſe it was adjudged, That the Plea was not good; for when one is Admitted, Inſtituted, and Inducted, by the Preſentation of a common perſon, although it were the Preſentation by the King, yet the King cannot Preſent another, the Church being full, without removing the Incumbent by a *Quare Impedit*; and the Church is full of him, until he be removed by a Judicial means, or by Reſignation: And in this Caſe, it was ſaid by *Cook* Chief Juſtice, That if a Church be void, and a ſtranger without the privity of the after-Incumbent, procures the Patron to Preſent, and gives unto him any ſum of money for his Preſentation, although the after-Incumbent is not privie to that Symoniacal Contract, yet in as much as he comes in by a Symoniacal Preſentation, the Church is void, and it belongs to the King to Preſent: And ſo it is where the Incumbent makes a Symoniacal Contract with the Friend or Wife of the Patron, and the Patron knows not thereof, and the Incumbent is Preſented by means of him that made the Symoniacal Contract, he is within the Statute of 31 Eliz. and the King may Preſent. Paſch. 13 Jac. in C. B. The King againſt the Biſhop of *Norwich*, and *Thom. Cale*, and *Robert Saleys* Caſe. *Cro.* 2. Part, 381.

4. In an *Ejectione firmæ*, the Caſe was, The Lord

of all the Court was, That the Action here is well brought against them both; and *Severance* of the Land shall not make severance of the Actions of the Plaintiffs; if it should, great inconveniencies would follow, by several Assignments of under-Tenants amongst themselves; and therefore he may for his Rent, resort to his first Lessee; and the Action of Debt is grounded upon the Demise which continues still, notwithstanding any alteration made by the Tenants: Wherefore Judgment was given for the Plaintiffs. Trin. 14 Jac. in B. R. The Bayliff. of *Ipswich* and *Martin* and *Parkers* Case. *Boistr.* 3. Part, 211, 212.

14. Error in Debt, The Defendant in the Common Pleas appeared the first day which he had by the Sammons; and afterwards the Plaintiff recovered by *Non sum informatus*, but the Defendant *Non in Misericordia quia venit ad primam summonitionem*, and Error upon this Judgment was alledged, That there was not any Original, and upon that issued a *Certiorari* for the Original in that Term in which the Original Action was brought; which is certified, that in that Term there was no Original between the parties. And it was said, That the Original might be entred of another Term following. And therefore the *Certiorari* was too strict to tye it to a Term in *specie*. But it was the Opinion of the Court, That if there be any Original of another Term, it will not serve, because all the matter was begun and ended in one Term, as appeared by the *Nihil in Misericordia*. But where the Defendant doth not come the first day, but by mean process, there the Judgment is, that he shall be *in Misericordia*; and there an Original certified between the parties of any Term depending the Plea, is sufficient. Mich. 5 Jac. in B. R. *Disne* and *Sherleyes* Case, *Yelverton*, 108.

15. The Case was, A. man was seised of Lands in Fee, and of Lands by Copy in Fee, and he made one entire Lease of the Land in Fee, and of the Copy-Lands to H. for years, rendring one entire Rent. And afterwards the Lessor surrendred the Copyhold-Lands to the use of C. and his Heirs; and at another time, Granted by Deed the Reversion of the Freehold Lands to C. in Fee. And H. attorned: and afterwards for Rent behind, C. brought one Action of Debt for the whole Rent. It was Objected, That the Reservation of the Rent was an entire contract, and by the act of the Lessee the same cannot be apportioned. And therefore, If one Demiseth three Acres, rendring three shillings Rent; and afterwards Bargaineth and Selleth by Deed Indented and Enrolled the Reversion of one Acre, the whole Rent is gone, because that contract is entire, and cannot be severed by the act of the Lessee. But it was Resolved, That in the Principall Case, The contract was not entire, but that the same by the act of the Lessor, and the Forfeiture of the Lessee might be secured, for the Rent is incident to the Reversion, and the Reversion is severable, and by consequence also the Rent. 2. It was Resolved, That although C. commeth to the Reversion by several Conveyances, and at several times; Yet he may bring an Action of Debt for the whole Rent. See Hill. 43 Eliz. *inter* and *Lassells* Case. Hill. 42 Eliz. in C. B. Rott. 181. *Ewer* and *Mals* Case. And note, it was said, That in this Case, If by severance of part of the Reversion, the Ancient Rent should be lost, many inconveniencies would in such Case follow. Pasc. 39 Eliz. in B. R. Rott. 233. *Collins* and *Readings* Case. *Cook* Select Cases 57.

16. *Thynn* brought Dower against *Thynn*, and had Judgment by default; a Writ of Enquiry issued to the Sheriff, who delivered seizin of the Dower recovered, and Returned the Writ: The Defendant brought Error, and assigned their Errors in the Record, 1. The Original Writ appears not to be Returned, according to the Statute; for the year doth not appear when it was Returned. 2. The Proclamation made by the Sheriff, appears not to be where the Land lyes. 3. The Return doth not mention the Proclamation to be after the Summons, as the Statute requires. 4. It is not said, That he did make Proclamation upon the Land. 1. It appears not that the Proclamation was made in the Parish where the Summons was, as the Statute directs. To these it was answered, To the first, It shall be intended to be in the year of the Reigne, and not of the age of the King; though the word Reign be omitted. 2. The Land lyeth in divers Parishes, and Proclamations at the Church of any of the Parishes is good. 3. It is not necessary to Return the place of the Summons: And it was said, That it was made *secundum formam Statuti*, that supplies all the defects. *Quare*, For the and Exceptions to these points of Summons, were not Resolved by the Court. Mich. 23 Ca. in B. R. *Thynn*, and *Thynns* Case, *Style*, 67, 68. &c.

17. In a Writ of Dower brought by A. against W. of Lands in *Magna Munden*, and *Munden Parva*. The Sheriff returned Pledges and Summons, and then averred, That *post summon. predict. in forma predict. fuit* he did at *Munden Magna*, where put

part of the Tenements lye at the moſt uſual door, &c. cauſe to be proclaimed all that was contayned in the Writ. And although that the words of the Statute of 31 Eliz. cap. 13. be ſomewhat doubtfull, (viz. Parithes, or Chappells where Lands lye) yet the Opinion of the Court was, That the Proclamation in one Town was ſufficient. Paſc. 12 Jac. in C. B. *Allen* and *Walters* Caſe. *Hob.* 133.

Symonie.

Symonie, *what it is, and the Nature of it: What ſhall be ſaid Symonie, what not: And, if it were an Offence at the Common Law, before the Statute of* 3 *Eliz. or not.*

1. THe nature of Symonie is, That it is *Contractus ex turpi Cauſa, & contra bonos mores*; and ſo it is againſt Law, and void by the Statute of 3. Eliz. againſt party and parties, privies, and ſtrangers ſhall take advantage of it: Like as if a man be bounden in an Obligation uſurious, the Bond is void between the parties; and therefore if ſuch an Obligee makes his Executor, and dyeth, and the Executor pay the uſurious Bond, other Creditors may ſhew it, and make a *Devaſtavit* of it. *Hob.* 167. in *Winſcombs* Caſe.

2. It was Reſolved by the whole Court, That if any one ſhall receive, or take money, fee, or reward, or other profit, for any Preſentation to a Benefice with Cure, although he in truth who is preſented is not knowing of it, yet the Preſentation, Admiſſion, Inſtitution, and Induction, are void by the expreſs words of the Statute of 3 Eliz. and the King ſhall have the Preſentation *hac vice*; for the Statute intends to inflict puniſhment upon the Patron, as upon the Author of this corruption, by the loſs of his Preſentation; and upon the Incumbent, who came in by ſuch a corrupt Patron, by the loſs of his Incumbency, although he never knew of it; but if the Preſentee be not knowing of the Corruption, then he ſhall not be within the cauſe of diſability in the ſame Statute. Mic. 8 Jac. C. B. Dr *Hutchinſons* Caſe. *Cro.* 12. Part, 101. *Godbolt*, 202. acc. the ſame Caſe: There he Libelled in the Spiritual Court for Tythes; The Defendant ſhewed, That the Dr came in by Symony and Corruption, and prayed a Prohibition. The Dr pleaded, That he had his pardon, and pleaded the ſame at the Spiritual Court; and notwithſtanding, the Court granted a Prohibition, becauſe the Pardon doth not make the Church to be full, but only maketh the Offence diſpuniſhable; But if in ſuch caſe the King doth Preſent, his Preſentee ſhall have the Tythes.

3. In a *Quare Impedit*, The Plaintiff ſhewed, That T. C. the Defendant was ſeized in Fee of the Manor of H. to which the Advowſon of the Vicarage was appertaining, and that the Church became void by a Symoniacal Agreement betwixt R. S. the Defendant, and the Wife of the Patron, that the Patron ſhould Preſent him, and ſhewed what the Symonie was *in ſpecie*, and that the Patron accordingly Preſented him; wherefore by the Statute of 31 Eliz. the Church is void, and it belongs to the King to Preſent. The Defendant pleaded, That Queen Eliz. was ſeized in Fee of the Rectory of F. appropriated, whereunto the Advowſon of the Vicarage appertained, and that the Parſonage came to the King by deſcent; and that the Church being void, the ſaid T. C. Preſented the Defendant by uſurpation, and that the Defendant was Admitted, Inſtituted, and Inducted; and that afterwards the King Preſented that Defendant to the Advowſon of the Vicarage, and traverſed, that the Advowſon of the Vicarage was appertaining to the Manor of N. In that Caſe it was adjudged, That the Plea was not good; for when one is Admitted, Inſtituted, and Inducted, by the Preſentation of a common perſon, although it were the Preſentation by the King, yet the King cannot Preſent another, the Church being full, without removing the Incumbent by a *Quare Impedit*; and the Church is full of him, until he be removed by a Judicial means, or by Reſignation: And in this Caſe, it was ſaid by *Coke* Chief Juſtice, That if a Church be void, and a ſtranger without the privity of the after-Incumbent, procures the Patron to Preſent, and gives unto him any ſum of money for his Preſentation, although the after-Incumbent is not privie to that Symoniacal Contract, yet in as much as he comes in by a Symoniacal Preſentation, the Church is void, and it belongs to the King to Preſent: And ſo it is where the Incumbent makes a Symoniacal Contract with the Friend or Wife of the Patron, and the Patron knows not thereof, and the Incumbent is Preſented by means of him that made the Symoniacal Contract, he is within the Statute of 31 Eliz. and the King may Preſent. Paſch. 13 Jac. in C. B. The King againſt the Biſhop of *Norwich*, and *Thom. Cole*, and *Robert Salers* Caſe. *Cro.* 2. Part, 386.

4. In an *Ejectione firmæ*, the Caſe was, The Lord

Lord *Winſor* was ſeized in Fee of an Advowſon, and granted the next Avoydance thereof to Dr G. and after, the Church became void; and after, one R. F. father of H. F. dealt with Dr G. (the Church being void) to permit the Lord *Winſor* to Preſent the ſaid H. F. who knew not of this agreement; and he thereupon, was Admitted, Inſtituted, and Inducted. In this Caſe it was Reſolved and Decreed in the Court of Wards, by the advice of the Chief Juſtice, and Chief Baron, That he was Preſented by Symonie, and that by the Statute of 31 Eliz. it belonged to the King to Preſent, without Deprivation, or removing of the Incumbent by a *Quare Impedit*: Whereupon the King Preſented J. S. who was Inſtituted and Inducted, and continued there three years: Afterwards, R. F. the father, ſued him before the High Commiſſioners for miſdemeanours, and procured him to be deprived, and ten days after, procured a Grant of the next Avoydance to J. N; and within ten days after the Deprivation, R. F. procured J. S. to Preſent the ſaid H. F. who was Admitted, Inſtituted, and Inducted, and made the Leaſe. It was holden in this Caſe, That the ſaid Preſentation of H. F. was meerly void, and that he was a perſon diſabled by the expreſs words of the Statute, to accept of that Benefice, and that his Admiſſion, and Inſtitution, and Induction thereunto, was meerly void. Paſch. 17 Jac. in B. R. *Booth* and *Patten* Caſe. *Cro.* 2. Part, 533.

5. Note, It was ſaid, That by the Law, That the Preſentation to every Benefice, after the Church is once void, ought to be *Libera, vera, pura; ſi pecunia intervenerit, non eſt Preſentatio, aut Donatio, ſed Venditio*: and therefore, If there be any Covenant, Contract, Promiſe, or Agreement made with the Patron, or with any other, That the Patron for any ſum of money, gift, reward, benefit, or other conſideration, or thing whatſoever valuable, ſhall Preſent J. S. to the Benefice, being void, although the ſame be made without the conſent or knowledge of J. S. and afterwards, upon ſuch Contract or Conſideration, the Patron doth Preſent J. S. to the Benefice, and he be Admitted, Inſtituted, and Inducted; by the Statute of 31 Eliz. cap. 6. The Preſentation, Admiſſion, and Induction of him are void, which were but voidable before by Deprivation, and the King ſhall have the Turn, and ſhall Preſent. See *Cook* 1. Part, *Inſtitutes*, 120. Paſch. 41 Eliz. in C. B. *Baker* and *Rogers* Caſe acc. And ſee Paſch. 17 Car. in B. R. in Sir *John Rowſe* and *Wrights* Caſe: It was adjudged, That the Church is void, without any Declaratory Sentence.

6. *Parkinſon*, Patron of the Advowſon of the Church of D. the Church being void, did contract with a ſtranger, That for 10 l. *per annum* to be paid unto *Parkinſon* during the life of *Kitchin*, that he would Preſent *Kitchin* to the Church, which was done accordingly: And it was adjudged in this Caſe, That although that *Kitchin* knew not of the Contract, nor was any ways agreeing or conſenting to the ſame, yet that he came in by Symonie; for the Statute of 31 Eliz. ſhall be conſtrued large and largely againſt Symonie and Symoniſts; and the very Preſentation, Inſtitution, and Induction of *Kitchin*, in that Caſe was adjudged void. Mich. 8 Jac. in the Exchequer, *Cather*, and *Kitchins* Caſe. See *Godbolt*, for the Caſe more at large.

7. If a man purchaſeth the next Preſentation or Avoydance, and doth not mention in certain what perſon he intendeth to Preſent when the Church doth become void, he may Preſent any perſon whatſoever, who is capable of the Benefice; but if a man purchaſeth the next Avoydance, or the next Avoydance or Preſentation be granted unto him, to Preſent J. S. by name, be it Son, Kinſman, or a Stranger: It was adjudged in that Caſe, That the ſame is Symonie, if ſuch perſon be Preſented, and the Patron ſhall loſe his Turn, and the King ſhall Preſent. And ſo it was adjudged, Paſch. 14 Jac. in the Common Pleas, in a *Quare Impedit* brought by *Brodrick Winſcomb* againſt the Biſhop of *Winchester* and *Pulleſton*, which Caſe ſee at large, *Hob.* 165. to 168. and divers Caſes there vouched; what ſhall be Symonie, what not.

8. If the Elder Brother giveth money to the Patron to Preſent his Younger Brother (being a Scholar in the Univerſity) to ſuch a Benefice, when it ſhall become void; or if the Teſtator contract by Symonie, That his Executor ſhall Preſent another man to the Church, the ſame being void at the time of the Contract, and the Teſtator dieth, and the Executor doth Preſent accordingly: It was holden in the firſt of theſe two Caſes, Mich. 39 Eliz. in C. B. in *Ruſhes* Caſe, and Mich. 3 Jac. in C. B. in the ſecond Caſe, in *Freman* and *Engliſhes* Caſe, That although the younger brother, or the other, knew not of the ſaid Contracts by being Preſented upon them, that it was Symonie; for it was ſaid, That ſo odious a thing was Symonie in the Eye of Law, That if the Church being void, a man ſeeketh for money to be Preſented to the ſame, that although that afterwards the Patron doth Preſent the ſame man *gratis*, yet the perſon Preſented (for this Symoniacal attempt only) is diſabled to take the ſame Benefice, although in truth he gave nothing for the ſame. And it was ſaid, That every Incumbent who cometh in by virtue of ſuch corrupt agreement, contract, or conſideration, is ſo diſabled for ever after to be Preſen-

ed to the same Church: That the King himself, to whom the Law giveth Title to Present in such Case, cannot Present the same man to the same Church, for that the said Statute of 31 Eliz. being made for the suppression of Symonie, Symonists, and corrupt Agreements, doth binde the King in those Cases, That the King cannot enable him who is disabled by the Statute; and the party being disabled by Act of Parliament, the same being an absolute Law, cannot be dispenced withal by any agreement of the King, with a *Non obstante*, as a Law may be where a thing is prohibited *sub modo*, only upon a penalty to be given to the King; and if the King doth pardon the Symonie, yet he doth not make the person capable of the Benefice, who was disabled by the Statute; nor can he plead the said pardon against the Statute of 31 Eliz. See the Cases before, of Dr *Hutchinson*, and the Case of *Saker*, to this purpose.

9. Note, If the Church be void Symonie, by the Statute of 31 Eliz. That the Ordinary is not bounden to give notice of the Avoydance within six moneths after the Presentment made; for that for the most part, the Contracts by Symonie are made in such secret, that the Ordinary cannot have notice of them, and the Church is void by the Act of Parliament, and therefore no notice is requisite; and so it was adjudged Mich. 3 Jac. in C. B. in *Godwins* Case.

10. Debt was brought upon an Obligation, to perform certain Covenants, which Covenants were to touch made upon Symoniacal Contracts. In that Case it was adjudged for the Plaintiff; for it was said, That that Obligation was Collateral, and the Law doth not look upon, or take notice of the Symonie, *eo nomine*, for that it is not once named in the Statute, but only corrupt giving, &c. Mich. 41 Eliz. *Gregory* and *Ouldhams* Case, Vouch in *Noy* 26, in *Winscomb* and *Pulleston* Case.

11. Debt upon an Obligation conditioned; Whereas the Plaintiff intended to Present the Defendant to such a Benefice, That if the Defendant at any time after his Admission, Institution, and Induction, at the Plaintiffs request, resigned the said Benefice into the hands of the Bishop of L. that then, The Defendant upon Oyer of it demurred. It was the Opinion of the Court, That if the Plaintiff had averred, That the Obligation was made to pay such a sum, or to make a Lease, or other act, which appears in it self to be Symonie, then upon such a Plea, peradventure it might appear to the Court to be Symonie: But as it is pleaded by way of Demurrer, upon the Oyer of the Condition, it doth not appear that there is any Symonie; for such a Bond to cause him to resigne, may be good, and upon good reason and discretion required of the Patron; *viz.* If he be not resident, or take a second Benefice, or the like; and *Jones* and *Lawrence* Case was vouched; where such a Bond made to resigne a Benefice, when the son of *Jones* came to the age of 24 years, to the intent that he might be presented to the Benefice, was adjudged in the Kings Bench; and affirmed in a Writ of Error brought in the Exchequer Chamber, by all the Judges, to be good. Hill. 5. Car. in B. R. *Babington* and *Woods* Case. *Cro.* 1. Part, 129.

12. An Information upon the Statute of 31 Eliz. of Symonie, supposing the Church of the Tower of *London* to be a Benefice with Cure, and that the Defendant agreed with J. S. to give him 20 l. who might procure him to be Presented thereunto by the King, and Admitted, and Instituted, and Inducted; and he alledged, That he procured the King to give him the Presentation to the said Church, and that he was Admitted, Instituted, and Inducted. It was moved, That this being a Donative of the Kings Donation, it is not within the Statute, for that mentions where one comes in only by Symonie, by Presentation, or Collusion: Also this could not be within the Statute, because the King being the Donor, it cannot be intended that he Presented by Symonie. For the first it was said, That it was within equal mischief against that which the Statute provides, and so within the remedy. And to the second, It was said, That Symonie may be contracted betwixt betwixt strangers, without the Privity of the Incumbent or Patron. And the Opinion of the whole Court was, That the consideration to have money to procure him to be the Rector of the Church, is a Symoniacal Contract, and an unlawful act, and condemned by all Laws: But upon another matter, Judgment before given, was reversed. See Mich. 9 Car. in B. R. *Mackaller* and *Taddericks* Case. *Cro.* 1. Part, 241. 256. 263.

13. Note, In a *Quare Impedit*, that it was adjudged, That the Grant of the next Avoydance for money when the Parson was sick in his bed, ready to die, is Symonie; for that the Statute is, If the Contract be made directly or indirectly, by any way or means. Pasch. 22 Jac. in C. B. *Sheldon* and *Bettis* Case. *Winch.* 63.

14. In an *Ejectione firmæ*, the point was, The Patron takes an Obligation of the Clerk which he Presented, that he should pay 10 l. to the son of the late Incumbent, so long as he should be a Student in *Cambridge*, not preferred. It was the Opinion of the Court, That this was not Symonie; otherwise, if it had been to be paid to the son of the Patron: And it was said, That it was the Earl of

Suffex Caſe, That an Obligation made by the Preſentee to the Patron to pay 5 l. yearly to the Wife and children of the late Incumbent, that notwithſtanding there was great oppoſition made in that caſe, yet the Parſon held his Benifice. Wherefore in the Principal Caſe, It was adjudged accordingly. Paſch. 2 Jac. in C. B. *Baker* and *Mountfords* Caſe. *Noy*, 142.

Statutes; *Merchant*, and *Staple.*

The Form of it, and where it ſhall have Priority of Judgments, where not: and of the Proceedings upon it.

1. NOte, It was agreed by the Juſtices, That a Statute Staple, or an Obligation in the nature of it, is but an Obligation Recorded; and one Obligation, be it of Record, or not of Record, cannot drown another: And therefore, In the Caſe where a man brought Debt upon an Obligation, and the Defendant pleaded in Bar, *Quod Querens poſt diem ſolutionis*, and before the Writ brought, accepted a Statute Staple for the ſame debt, in full ſatisfaction of the ſaid Obligation. It was adjudged to be no Plea in Bar; for although the Statute was of Record, yet it was but an Obligation Recorded: But it was holden, That Judgment in a Court of Record, is higher then a Statute Staple, Statute Merchant, or Recognizance acknowledged by aſſent of the parties, without Judicial Proceedings. See 2 Jac. in C. B. *Brarthayts* Caſe, Vouch. in *Cook* 6. Part, 45. in *Higgins* Caſe.

2. If a Judgment be given in a Court of Record, it ſhall be preferred in caſe of Execution, before a Statute: But if a man acknowledge a Statute, and afterwards confeſſeth a Judgement, if the Land be extended upon the Judgment, the Conuſee ſhall have a *Scire facias* to avoid the Extent upon the Judgment; but otherwiſe in caſe of goods; for there he that firſt comes, ſhall be firſt ſerved: for if I have a Judgment againſt one, and afterwards he acknowledgeth a Statute, and by vertue of the Statute, the goods of him (being dead) were taken in Execution; Then upon the Judgment, a *Scire facias* was ſued; and afterwards, a *Fieri facias* of the Teſtators goods: And it was holden, That the goods firſt extended, were lawfully extended, and ſhould be good. See *Brewslew* 1. Part 37. acc.

3. A Judgment was had againſt Sir *Fr. Freman*, and an Extent came to the Sheriff, and afterwards, & before any thing was done thereupon, a *Scire facias* againſt the Executor was delivered to the Sheriff: The Queſtion was, Whether the Extent, or the *Fieri facias* ſhould be firſt executed. Note there, If the Land be firſt extended upon the Statute, and after comes an *Elegit* upon a Judgment obtained, before the acknowledging of the Statute comes to the Sheriff, the moyty of the Land extended, ſhall be delivered to the Plaintiff upon the Judgment. See *Brewslew*, 1. Part, 38. Sir *Francis Freemans* Caſe.

4. In Debt for Rent, the Caſe was, A Conuſee of a Statute took a Leaſe for years of the Reverſion, and rent reſerved upon the Leaſe for years; the Leſſee attorned, the Conuſee aſſigned over this Leaſe for years: Afterwards, H, being Conuſee of a puiſne Statute, extended this Reverſion and Rent; and afterwards, the firſt Conuſee of the firſt Statute, extends this Reverſion and Rent. It was adjudged in this Caſe, That the firſt Conuſee by the acceptance of the Reverſion and Rent, and aſſigning it over, the Extent was ſuſpended during the Term, and the ſecond Conuſee might well extend it againſt him. Paſch. 15 Jac. in B. R. *Herrington* and *Garraways* Caſe. *Cro.* 2. Part, 424. 478.

5. A. brought debt againſt B. for 100 l. and declared upon a Leaſe made of the Manor of R. and of a Capital Meſſuage, and four Cloſes of Paſture, rendring 120 l. *per annum*, with a *Nomine pœna* of 8 l. *per diem* for non-payment, and ſhewed, That 60 l. was behinde for the Rent at ſuch a Feaſt, and ſo remained for the ſpace of 100 days, making 40 l. ſo together 100 l. The Defendant confeſſed the Demiſe, and pleaded an Extent of the Land by a ſtranger, upon a Statute acknowledged before the demiſe; but did not ſhew that the *Liberate* was executed after the Rent due. Upon which the Plaintiff demurred. In that Caſe, Judgment was given for the Plaintiff, for the 60 l. becauſe it was due before the *Liberate* executed. But for the 40 l. *Nomine pœnæ*, It was adjudged againſt the Plaintiff, becauſe he layed no actual demand of his Rent at the day, without which a peyn is not forfeited. Hill. 10 Jac. in C. B. Sir *Richard Grobham* and *Thornborough's* Caſe. *Hob.* 82.

6. A. entred into a Recognizance of 1000 l. to H, and afterwards, into a Statute of 2000 l.

to D; D. extended his Statute upon the Manor of S. which was A. he also having divers other Lands. Afterwards, H. sued Execution of his Recognizance, and had the Moytie of the Manor of S. first delivered to D. in Execution, but left out of his Extent divers other Lands, which were the Lands of A; for which D. brought an *Audita Querela* against H. in C. B. and had Judgment; Upon which, Error being brought in B. R. the Judgment was affirmed; for D. being in by Judgment upon Title by Extent upon the Statute, ought to have his Land lyable to the Extent upon the Recognizance, but *pro rata*; and therefore it ought to have included all the Lands of A. in his Extent, as well as the Lands of D. But it was said, That if D. had not been in by Title, but by Disseizin, or by other wrongful means, then he ought not to have been relieved upon the *Audita Querela*. Mich. 45 Eliz. in B. R. *Hinde* and *Deanes* Case. *Yelv.* 12.

7. See to this Division, Hill. 30 Jac. *Cox* and *Burslys* Case. *Hob.* 47, 48. See for it in *lib.* 1. Title *Ancient Demesne*, Sect. 11.

8. Judgment was given against B. the Defendant, in debt of 300 l. in C. B. After the Judgment, he entred into a Statute of &c. to J. S. and dyed Intestate; his Wife took Administration, and removed the Record of Debt recovered against her husband, into the Kings Bench, by Error; depending this Suit, she paid the debt to J. S. upon the Statute; and afterwards, the first Judgment was affirmed; And in a *Scire facias* against the Administrator, to have Execution, she pleaded the payment of the Statute, *ultra* which she had not Assets: The Justices of the Kings Bench being divided in Opinion in this Case, It was referred to the other Justices; and then, by the greater Opinion of the Justices, It was holden a good Plea, and that the payment of the Statute was no *Devastavit*; for at the time of the Execution of the Statute, she could not have pleaded the Judgment in C. B; for it was a doubt whether it should be affirmed or not; and then no default was in the Wife to discharge the Statute. Hill. 45 Eliz. in B. R. *Reade* and *Brerelocks* Case. *Yelverton* 29.

2. *If a Statute be acknowledged, and no day of payment is expressed in it, When the money is to be payed.*

R. D. being seized of Lands in Fee, did acknowledge a Statute of 500 l. to R. M. to be paid to the Conusee, &c. without expressing any day of payment: The Conusor made a Lease of the Lands to E. for years, who granted his estate to B. the Conusee: The Conusee dyed Intestate, and his Administrator extended the Land; whereupon the Assignee of the Term brought an *Audita Querela*. The only Question in this Case was, Whether this Statute being without an express day of payment, be good or not, by the Statutes of *Burnell* and *Mercatoribus*. This Case being argued by the Justices of the Common Pleas, It was holden by the greater part of the Justices, That it was good: for when the party acknowledgeth the debt to be due, and no time is expressed, the Law appoints the payment to be immediately; and that is such a time as the Mayor by his Certificate may take notice of. Hill. 17 Jac. in C. B. *Meskyn* and *Hickfords* Case. *Bridgman*, 20, 21, 22. See *Winch.* 82, 83. the same Case; and *Hutton* 42.

Particular Statutes.

Certain Particular Statutes; the Exposition of them, and how to Extend and be Construed; and Cases thereupon.

Statute *Magna Charta*, Cap. 2. of *Relief*.

1. BY this Statute, the 4th part of the Revenue which is requisite by the Law to a Dignity, shall be paid to the King for a Relief; As the Relief of a Knight is 5 l. which is the 4th part of 20 l. which is a Knights Revenue. The Relief of a Baron is 100 marks, which is the fourth part of his Revenue; for 400 marks includes 13 Knights Fees and a quarter. The Relief of an Earl is 100 l. which is the fourth part of the Revenue of an Earl. And it appeareth, that the Relief of a Duke shall amount to 200 l. and by Consequent, his Revenue ought to be 800 l. *per annum*. And that is the reason in our Books of Law, That every one of the Nobility is presumed in Law to have sufficient Freehold *ad sustinend. Nomen et Onus*. Cook 4. Part, 33, 34. in *Nevill's* Case.

2. Note: That in ancient time, a Plough-Land was of the yearly value of 5. Nobles *per annum*, and that was the Living of a Sokeman, or Yeoman; *et ex duodecim Carrucatis Constabit unum feodum Militis*, which amounts to 20 l. *per annum*. And the Relief of a Knight, and all Superiours, is the fourth part of their Revenue by the year: So *una Baronia constat ex* 13 *feodis Militum, et de* 3. *parte unius feodi Militis*; which amounteth to 400 marks; And by the Equity of the Statute of *Magna Charta*, *Cap.* 2. for as much as a Marquesdome consisteth of the Revenues of two Barronies, which do amount to 800 marks, he shall pay for a Relief 200 marks. And Note; At the time of the making of this Statute, There was not any Duke, Marquess, or Viscount, in *England*, and therefore the Statute doth not mention them. The Eldest Son of King *Ed.* 3. called the Black Prince, was the first Duke in England after the Conquest. *Robert* Earl of *Oxford* was the first Marquess: and before the Reign of King *Henry* the 6th, there was not any Viscount. Cook 9. Part, 124. in *Anthony Lowes* Case.

3. In an Action upon the Case of Assumpsit, the Case was; A. was seised of Land holden of the Plaintiff, as of his Mannor of W. by Rent, and by a Customary Relief of one years value, and aliened the same to H; who 10 Jac. Devised it to the Defendant: The Devisor dyed, the Defendant entred, and was seised: The Plaintiff layed, That there was *Colloquium* betwixt him and the Defendant, touching the Arrearages of the Rent and the Relief: and the Plaintiff said to the Defendant, That if he would not pay him, that he would sue him for it; Upon which the Defendant did promise to the Plaintiff, That if he should make it appear to the Brothers of the Defendant, that the Tenements were so chargeable with the 5 s. Rent, and with the Relief, he would pay him; and avers, That he did forbear the Suit: and at the next Court he made it appear to the Brothers *per praesentationem Homagii ipsius Curiae*, and by the Records of the Court, that the Rent and Relief were due by the Defendant. It being found for the Plaintiff, In arrest of Judgment, it was insisted, upon that he could not have remedy for this Relief, if the Law doth not give him remedy for it; and there the Relief is meerly due by Custome, and so no remedy for it but by Custome. But it was the Opinion of the Court, That as here it is layd, that he might distrain for it, It being *Relevium cum acciderit secundum Consuetudinem Maneriі*; and this is parcel of the Tenure, and therefore he may well distrain for it. See 14 H. 4. 2. in the Long *Recordare* by *Hankeford*, &c. And here it is said, That the Land is held *per redditum, et Relevium*. It was said, That Relief is no part of Service, and therefore Debt lyeth for it, and it may be incident to the Tenure, but no parcel of it. It was said in his Case, That the Statute of *Magna Charta*, doth not *Introducere novam legem*, but *explanare veterem cum acciderit*, and here the Relief due by Tenure, is a sufficient Consideration to raise an Assumpsit, because he may have remedy by Distresse. But *Doddridg*, Justice, said, That the Statute of *Magna Charta* was in part *Introductionem novi juris* for the Barons Relief; which before that Statute, was at the Kings pleasure. It was agreed by the whole Court, That if the Relief growes due by Custome, then he ought to have a Custome to enable him to recover it. But in the principal Case, It was agreed, That the Relief was due by Tenure, and that he might distrain for it; and therefore Judgment was entred for the Plaintiff. Trin. 22 Jac. in B. R. *Hungerford* and *Havilands* Case. Rollr. 3. Part 323.

Same

Statute of *Magna Charta*, Cap. 3. and 6. of *Wards*.

THe Queſtion was, Whether the making of the Heir within age, of Lands holden in Knight-Service, a Knight, did diſcharge him of the value of the Marriage? It was Reſolved in this Caſe, 1. That when the King makes the Heir in Knight-ſervice in Ward, a Knight, that he is out of Ward for his body; but if the King creates ſuch an Heir within age, a Duke, Marqueſs, Baron, he ſhall be in Ward, notwithſtanding the Dignity. 2. Reſolved, That when Tenant in Knight-ſervice dyeth, his Heir within age, preſently the value of the Marriage is veſted in the Lord as a Chattel; and therefore when he is made a Knight, he then, in judgment of Law, being of full age, the ſon ſhall not have the value of the Marriage; but yet he ſhall be in Ward as to his Land, by the Statute of *Magna Charta*, Cap. 3. 3. Reſolved, That when the Heir apparant within age, is made Knight in the life of his Anceſtor, and afterwards his Anceſtor dyeth, his Heir within age, he ſhall be out of Ward, and ſhall pay no value of Marriage, nor ſhall the Lord have the Wardſhip of his Land, for that by the making of him Knight in the life of his Anceſtor, he is made as of full age; ſo as when the Anceſtor dyed, no Intereſt either in the body, or in the Land, veſted in the Lord. And the Statute of *Magna Charta* for the Wardſhip of Land doth not extend to it; for the purview thereof only extends when the Heir is made Knight *infra ætatem*, which ſhall be intended after the death of his Anceſtor. See *Cook* 6. Part, 73, 74. Sir *Drue Drewries* Caſe. See *Plow. Com.* 268. in *Ratcliff*'s Caſe, adjudged accordingly.

2. Tenant in *Capite* dyed ſeiſed, his ſon and Heir within age was made Knight in the life of his Father; the Son after the death of his Father, tender'd his Livery before his age of 21 years, and continued it. Two Queſtions were in the Caſe, 1. Whether the profits of the Lands were ſaved to the King, by the Tender and Continuance? 2. Whether the King ſhould have the Mean Rates within the age of 21. years. Both Points were Reſolved againſt the King: And it was Reſolved, That the King ſhould have Primer Seiſin, as if he had been of the age of 21. years at the time of the death of his Anceſtor, becauſe the King by making him a Knight, had adjudged him of full age to do Knight-ſervice. *Cook* 8. Part, 173. Sir *Henry Conſtables* Caſe.

3. It was a Queſtion moved by the Attorney of the Wards to the Juſtices, That if the King knights his Ward within age after the death of his Father, Whether thereby he loſt the Wardſhip of the Lands, ſo as thereby the Ward might preſently require Livery, though he be within age? The Juſtices were of Opinion, That although the value of the Marriage remains due notwithſtanding ſuch Knighthood, becauſe the ſaid marriage was veſted in the King before; as was Reſolved in *Duries* Caſe. And the reaſon of that Caſe, will guide this; for by making of him a Knight, the King allowes him to be of full age: and ſo for the time paſt, the profits are well received; but from thenceforth the Wardſhip is to ceaſe, and ſo conſequently the profits, and he is to ſue his Livery preſently. See *Hob.* 46. accord.

4. The time of the death of the Kings Tenant for his Heir to ſue Livery, is of Lands holden by Knight-Service in *Capite*, be the Heir in Ward, and then comes of full age, or be he of full age at the death of his Anceſtor, viz. the Heir male at 21. years, the Heir female above 14. at the death of the Anceſtor; and if the poſſeſſion of the Freehold doth diſcend immediately after the Anceſtors death, to the Heir, the Livery is to be ſued forthwith. If only a Reverſion doth diſcend, then not till after the death of the particular Tenant, if it be a Reverſion without Rent incident thereunto: Howbeit, the Heir at his full age hath his Election either to ſue it immediately in the life of the particular Tenant paying for Primer Seiſin but half a years value, or to tarry till after his death, and then to ſue it, and pay a whole years value of the Land: but if it be of a Reverſion with a Rent incident thereunto, and he ſueth out his Livery in the life of the Tenant, as he may do, he ſhall pay for Primer Seiſin but one years value of the Rent. See 14 Eliz. *Dyer*, 308. *Cook* 1. Part, *Inſtitutes*, 77. *Lea*, 19. acc.

Statute

Statute of *Magna Charta*, Cap. 10. of *Diſtreſſe*.

1. THe Writ of *Ne injuſte Vexes*, is grounded upon this Statute; and it lyeth where Lord and Tenant are, and the Tenant hath holden of the Lord and his Auncestors by Fealty, and 20 s. Rent yearly, and of late the Lord hath gotten Seiſin of greater or more Rent, by payment of the Tenant by his own agreement, if the Lord will diſtrain his Tenant for this Surpluſage of Rent, the Tenant cannot avoid the Lord in an Avowry for this Surpluſage of Rent; for the Seiſin which the Lord hath had by the payment of this Rent of his own agreement. But in ſuch caſe, The Tenant may ſue a Writ of *Ne injuſte vexes* directed to the Lord, which is a Prohibition in it ſelf to the Lord, that he do not diſtrain his Tenant to do other ſervice then of Right he ought to do; which Writ is in the nature of a Writ of Right; and is grounded upon this Statute, That no man ſhall be diſtrained to do more ſervice of a Knights Fee, or other Freehold, then is therefore due. See *Fitzh. Natura Brevium*, 10. acc.

2. A Rent gained by Encroachment by the Lord by voluntary payment, cannot be avoided by the Tenant in an Avowry: But if the Lord encroach other Services which the Tenant ought not to do, as Homage or Eſcuage, then the Tenant may avoid this Encroachment in an Avowry, becauſe the Tenant may traverſe the manner of the Tenure in that caſe; As to ſay, That he holdeth of the Lord by Fealty, and 20 s. Rent, without that, that he holdeth by Homage Fealty and Rent, in manner as in the Avowry is made: Or the Tenant in that caſe may ſue a Writ of *Ne injuſte vexes*, if he will: and if the Lord doth after the Writ delivered, diſtrein him, he may have an Attachment againſt the Lord. See *Cook* 2. Part, *Inſtitutes*, 21. *Cook* 4. Part, 11. in *Bevill*'s Caſe, acc.

3. Note: It was ſaid and agreed, That Leſſee for life, or Donee in tail, ſhall not have an *Injuſte vexes* againſt their Donor, the ſame being a Writ of Right; for that in as much as the Reſervation is his Title, no encroachment upon them ſhall hurt them: but they ſhall avoid the ſame in an Avowry; and that this Statute of *Magna Charta* upon which the Writ of *Ne injuſte* is grounded, doth not extend to Donee in tail, Leſſee for life, or Grantee of a Rent-Charge, which appeareth by theſe words in the Statute, (viz. *majus Servitium*), which is meant betwixt very Lord, and very Tenant. *Cook* 8. Part, 65. Sir *William Foſter*'s Caſe.

4. If a man giveth Lands to two Men, and the Heirs of their two bodies begotten, yielding a Hawke, and they die, their ſeveral Iſſues ſhall pay but one Hawke: And the Reaſon of the Caſe is, Becauſe the Reſervation of the Leſſor is his Title, and when he himſelf reſerveth but one, the Law which is grounded upon Right and Equity, will never encreaſe or give him more then himſelf hath reſerved. And the Reaſon appeareth in *Plow. Com.* 94. in *Woodlands* Caſe. For Encroachment by the Donor upon the Donee, or of the Leſſor upon the Leſſee, ſhall not bind them in an Avowry; as it ſhall betwixt Lord and Tenant: And the Reaſon is, Becauſe when the Donor or Leſſor, or the Heir of any of them avoweth, he ought to ſhew the Originall Reſervation by which it will appear, how much the Donor or Leſſor hath reſerved. But if there be Lord and Tenant, and the Tenant maketh a Guift in tail, or a Leaſe for life, the Remainder in Fee, there encroachment by the Lord upon the Donee or Leſſee ſhall bind them, for there the Lord needs not to ſhew the Commencement of his Seignory; but it ſhall not bind the Iſſue in tail. *Cook* 5. Part, 108. in *Humphrey Lofields* Caſe.

5. In a *Replevin*, It was Reſolved, 1. That if a man avoweth for Fealty, Rent, and Suit of Court, where the Tenure is but by Fealty and Rent, there the Tenure ſhall be traverſed: But where a man holdeth by 2 s. Rent, and the Lord upon voluntary payment of the Tenant hath had 3 s; there in an Avowry, the Seiſin ſhall be traverſed, and not the Tenure. 2. Reſolved, That Seiſin of more Rent then ought to be, ſhould bind in an Avowry: But in an *Ne injuſte vexes*, Aſſiſe, Ceſſavit, Reſcous, or Treſpaſſe, ſuch a Seiſin of more Rent ſhould be avoided, becauſe the Tenure, and not the Seiſin, is traverſable. 3. It was Reſolved in the principal Caſe, When the Plaintiff agreed with the Avowant in the Quantity of the Tenancy, and confeſſed the Tenure by Fealty and Rent, and as to the Rent pleaded *Nihil arrear*, and traverſed the Tenure *modo et forma*; *ſcil. abſq; hoc*, that the Tenure was by Fealty, Rent, and Suit of Court, that the Traverſe was good, although that the Avowry was for Rent only. Upon which Iſſue being joyned, It was found for the Plaintiff againſt the Avowant. *Cook* 9. Part, 31. *Bucknall*'s Caſe.

6. Not

6. Note where, and how Seiſin ſhall be traverſed in Avowry; theſe Rules. 1. The Tenant in an Avowry ſhall not plead, Never ſeiſed of the Services, generally. And therefore, If he be Tenant in Fee-ſimple, he ought to diſclaim or plead, Out of his Fee, and ſo traverſe the Tenure. 2. He that denyes Seiſin after the Statute of Limitation, ought firſt to acknowledg the Tenure; to the intent, that the Lord may have a Writ of Cuſtomes and Services. 3. That if the Lord avoweth for Services, and alledgeth Seiſin by the hands of the Plaintiff, or of another in a *Replevin*, The Plaintiff may plead, That the Avowant was never ſeiſed by his hands. 4. Seiſin is never traverſable but only for that for which the Avowry is made, unleſſe that Seiſin be alledged of a Superior ſervice, which is a Seiſin in Law of an inferior ſervice: As, where the Tenure is by Rent, and other Services, and Seiſin is alledged in them all, and Avowry is for Rent onely, there the Seiſin of the Rent is onely traverſable. But if the Tenure be by Homage, Fealty and Eſcuage, and Rent of 2 s. and Seiſin is alledged in all, and for Homage he avoweth, he ſhall be received to traverſe the Seiſin of the Eſcuage; for that is Seiſin of the Homage. *Cook.* 9. Part, *ibidem.* 36. in *Buckwalls* Caſe.

Statute of *Magna Charta*, Cap. 12. *Communia Placita, &c.*

1. THe Statute of *Magna Charta*, Cap. 12. is in the Negative; *viz.* *Quod Communia Placita non ſequantur Curiam noſtram, ſed teneantur in aliquo loco certo.* Notwithſtanding that, It was adjudged, in 23 H. 3. tit. *Bre.* and 31 H. 1. tit. *Prerogat.* 28. That the ſame did not bind the King; but that the King might have a *Quare Impedit* in the Kings-Bench. See *Cook* 11. Part, 68. in *Magdalen* Colledg Caſe, acc. And ſee 20 E. 3. *Fitzh.* tit. *Brev.* 881. in the Earl of *Cheſter's* Caſe, this Statute is alledged, to take away the Juriſdiction of the Kings-Bench. But it was Reſolved, That that Statute did not take away the Juriſdiction of that Court. See *Cook* 8. Part, in the *Prince's* Caſe, 23.

2. Treſpaſſe was brought here *in Cuſtodia Mariſcalli*; and in the Declaration, the Treſpaſs was laid to be done in *Cornwall*; the Defendant pleaded in abatement of the Action, and ſet forth the Charter of King *Ed.* 3. granted to the Stannary Court, thereby inabling the Stannary Workers to plead there, and there to be impleaded in the Stannary Court, and therefore prayed the benefit and Priviledg of that place, and to have the tryall there: And that it was alledged, That the Court here if now to hold Plea of this, notwithſtanding their Charter: For that this Court may hold Plea of Debt, Covenant, Detinue, notwithſtanding the Statute of *Magna Charta*, which is *Communia Placita non ſequantur Curiam noſtram*, and being here in *Cuſtodia Mariſcalli*, the Plaintiff may here declare againſt him in what manner he will; and his coming here is not requirable, Hill. 10 Jac. in B. R. *Parke* and *Lock's* Caſe. *Bulſtr.* 2. Part, 122, 123. See Mich. 41 Eliz. in B. R. *Braynes* and *Watts* Caſe, *Braynes* killed *Watts* within the Cinque-Ports; which was Murder: ſhe did declare here againſt him in B. R. in *Cuſtodia Mariſcalli*; and he pleaded, That he ought to be tryed before the Conſtable of *Dover*: But his Plea was not allowed; and he was found guilty, and hanged. And in this Caſe, the Court ſaid, That if one be here *in Cuſtodia Mariſcalli*, he is not to be fetched away; and if he ſhould not anſwer here, being in *Cuſtodia Mariſcalli*, none then could have remedy againſt him. Wherefore in the principal Caſe, the Defendant by Rule of the Court, was forced to anſwer.

Statute

Statute of *Magna Charta*, Cap. 14. of *Amercements*. And Stat. of *Weſt.* 1. Cap. 6.

1. AMercements, are Sums of Money aſſeſſed upon ſome perſons properly in Inferiour Courts for ſome Offence: They are called by the Statute of *Magna Charta*, Cap. 14. *Miſericordia*, in reſpect of the ſmallneſs of them, and are grounded upon the words of that Statute, *viz. Nullus liber homo amercietur, niſi ſecundum quantitatem delicti &c.* and therefore, if it be unreaſonable, the Law hath provided a Writ for the ſame, called *Moderata Miſericordia*. Which ſee, *Fitzh. Nat. Br.* 181, 182. And although ſuch Amercements be ordinarily aſſeſſed for defects or defaults in Inferiour Courts; as Court-Barons, &c. Yet they may be, and uſually are aſſeſſed in Courts of Record, as well as in inferiour Courts, upon defaults made by the Plaintiffs or Defendants. See *Cook* 5. Part, *Godfrey's* Caſe, acc.

2. Every Amercement is to be aſſeſſed upon every perſon ſeverally for his Offence; and one ought not to be amerced for the Offence of another: For the nature of the word *Miſericordia*, as appears by the ſaid Statute, is, That a man ſhall not be amerced ſo much as he deſerveth; and then if he ſhould be amerced for the Offence of another, it ſhould be unreaſonable; and againſt the words of the ſaid Statute.

3. If two be amerced for one Treſpaſſe joyntly, they ſhall not joyn in *Moderata Miſericordia*; for that they ſhall be ſeverally amerced, though the Treſpaſſe be joynt. And when any one is amerced for any Treſpaſſe, and the ſame is afferred by his peers, then he ſhall not have the Writ *de Moderata Miſericordia*; For then it is according to the Statute of *Magna Charta*. See 10 E. 2. tit. Actions upon the Statute. *Fitz.* acc.

4. By this Statute, No Spirituall perſon ſhall be amerced according to his Spiritual Benefice, but according to his Lay-Fee, and according to the Quantity of the Treſpaſſe; and if he be otherwiſe amerced, he ſhall have a Writ againſt the Sheriff, or him that amerced him, upon this Statute. *Fitzh. Nat. Br.* 76. acc.

5. In a Replevin, the Caſe was, The Lord of the Mannor of A. had a Leet within his Mannor, and time out of minde there was a Cuſtome, That the Inhabitants and Reſiants within the Mannor, had uſed within a moneth after the Feaſt of Mich. to chuſe an able man (an Inhabitant) to be Conſtable for the year following; which man ſo cheſen, uſed to execute the ſaid Office; and if he were preſent, he uſed to be ſworn by the Steward of the Mannor, to execute that Office; and ſhewed, That at a Leet holden for the ſaid Mannor by J. S. Steward of the Court; the Defendant being an Inhabitant within the Mannor, was cheſen to be Conſtable of A. and being preſent in Court, was charged by the Steward to take the Oath of Conſtable, which he refuſed to do, but departed in contempt of the Court; for which the Steward of the Court ſet a Fine of 5 l. upon him, for which his Cattel were afterwards diſtreined. In that Caſe, theſe points were Reſolved. 1. That if any contempt be committed in a Court of Record, the Judges of the Court may impoſe a reaſonable Fine upon the Offender; and a Court Leet is a Court of Record, in which the Steward is Judge, and he may Impoſe a reaſonable Fine. 2. That if a man be Fined in a Court of Record for a Contempt, That although it be not afferred by the Jury, or Enqueſt, yet the ſame is good: But by the Statute of *Magna Charta*, and *Weſtm.* 1. cap. 6. Amercements ought to be afferred, and taxed *per pares*; and therefore in every Caſe where the Plaintiff is Nonſuit, or Judgment given againſt the Defendant, the Juſtices do not aſſeſs the Amercement, but the Entry is, *Ideo in Miſericordia* generally. 3. That the Amercement of any one who is a Miniſter of Juſtice, or of any Officer who hath Execution of the Kings Writ, ſhall be amerced by the Judge of the Court where the Caſe dependeth, and the ſame is out of the Statute of *Magna Charta*, and *Weſtm.* for that theſe Statutes extend only to private men, and not to the Miniſters of Juſtice, whoſe Offences are done to the Court it ſelf. *Cook* 8. Part, 38. in *Gurleys* Caſe.

6. Error was brought to reverſe a Judgment which was afferred in a Court Leet. The Error aſſigned was, That it was an unreaſonable Amercement. It was the Opinion of the whole Court, That after an Amercement is once aſſeſſed, it cannot be reverſed for Errour in the unreaſonableneſs of it, and that no Writ of *Miſericordia* lyeth in that Caſe. Trin. 7 Jac. in B. R.

B.R. *Stubbs* and *Flowers* Case, *Bulſtrod.* 1. Part, 115.

7. A. brought debt by *Quo Minus* in the Exchequer againſt B. It was found for the Plaintiff; Afterwards, A. by Attorney entred a *Retraxit*: *ſalvo ſuitatur ſe nolle ulterius proſequi*. Upon which, judgment was given, That the Defendant *eat ſine die*, but no Amercement was upon the Plaintiff: Whereupon, Errour was brought. It was Reſolved in that caſe, amongſt other things, That in the principal Caſe, the Plaintiff ought to have been amerced, becauſe that A. *Retraxit*, is a voluntary acknowledgment that he had no Cauſe of Action, and is a Barr for ever; and therefore becauſe he was not amerced, It was adjudged to Errour: And although a man ſhall not alledge that for Errour which is for his advantage; yet in the principal Caſe, the Judgment was not perfect; for the Amercement ought to be parcell of the Judgment, and that is for the advantage of the King; and for default of that, the Judgment was Reverſed. And in that Caſe, It was Reſolved, That although the Plaintiff had made a *Retraxit* in his proper perſon, yet he might have a Writ of Errour either in the Judgment, or in the proceedings: for that no Imperfection in ſuch caſe is ſaved by any Statute, when Judgment is given. *Cook* 8. Part, 60, 61. in *Beethers* Caſe.

8. It was Reſolved by the Juſtices, That the reaſonableneſs of Fines ſhall be reſolved by the Juſtices; and if they appear to be exceſſive, they are againſt Law: By the Statute of *Weſtm.* 1. Cap. 35. An Exceſſive or an Outragious Aide, is againſt Law. See *Glanvile*. *Lib.* 9. *Cap.* 71. acc. An Exceſſive Amercement is againſt Law, as appears by this Statute of *Magna Charta*. *Nullus Liber homo Amercietur niſi ſecundum quantitatem delicti*; and an Exceſſive Fine at the Will of the Lord, ſhall be ſaid an oppreſſion of the people. And ſee, That Waſte lyeth *in exulando A. et B. Natives, quorum quilibet tenuit Meſſuagium et unam virgatam terræ in villa de T. per gravues et inſolerabiles Diſtrictiones*. *Cook* 11. Part, 44. in *Gaſeys* Caſe.

Statute Merton, *cap.* 1. *of Dower.*

1. NOte by the Juſtices, That the Wife Demandant in Dower, ſhall not recover Damages by this Statute, unleſs that her Husband dyeth ſeiſed. Paſc. 11 Eliz. *Dyer*, 284.

2. In a Writ of Dower *ex aſſenſu Patris*, or *ad Oſtium Eccleſiæ*; the Wife Demandant in Dower, ſhall not recover Damages, becauſe ſhe may enter. 2. She ſhall not recover damages, but where her Husband dyed ſeiſed of the Freehold and Inheritance. 3. If the Wife Demandant in Dower delay her ſelf, ſhe ſhall not recover damages by this Statute. And 4. In the mean, rates and damages by this Statute, are to be recovered againſt the Tenant. *Cook* 1. Part, *Inſtitutes* 32.

3. The late Wife of a Copyholder in Fee of a Manner, in which by ſpecial Cuſtome, Women were to be endowed, recovered her Dower by Plaint in the Court of the Manner, and becauſe her Husband dyed ſeiſed, ſhe recovered 40 l. of the profits from the death of her Husband. The Woman brought an Action of Debt for the 40 l. In this Caſe, theſe points were Reſolved. 1. That the Wife ſhall not have Dower of a Copyhold, unleſs it be by ſpecial Cuſtome. 2. That when a Woman is to be endowed by Cuſtome of a Copyhold, ſhe ſhall have all incidents to Dower; and therefore by this Statute of *Merton*, ſhe ſhall recover damages; and therefore the Recovery of the Damages was lawfull, and that they were well warranted by law, although they exceeded 40 l. 3. Reſolved, That no Action of Debt lyeth at the Common Law for the ſaid Damages, for that upon ſuch Judgment, no Writ of Error or falſe Judgment lyeth but her remedy is in the Court of the Mannor, or in the Chancery. Trin. 37 Eliz. *Shaw* and *Thompſons* Caſe. *Cook* 4. Part, 30.

4. By this Statute the Wife ſhall recover damages where her Husband dyeth ſeiſed. The Caſe was, that the Husband made a Feoffment in Fee, and afterwards took back an Eſtate to himſelf for life, the Remainder over and dyed. It was Ruled in that Caſe, That the Wife ſhould not recover damages, becauſe although the Husband dyed ſeiſed, yet he did not dye ſeiſed of ſuch an eſtate of which ſhe is Dowable, and ſo not within the intent of the Statute. See Hill. 14 Jac. in B. R. in *Huſſey* and *Moors* Caſe. *Bulſtr.* 3. Part, 278.

Statute Merton, cap. 4. *Of Improvement of Common.*

1. A Man preſcribed to have Common appurtenant to his houſe and Land in the Lands of A. and alſo in the Lands of B. B. purchaſed the houſe and Land to which the Common was appendant, and made thereof a Leaſe for years, the Leſſee put in his Cattel into the Land of A. who drove them out; and thereupon the Leſſee brought Treſpaſs. In this Caſe, it was Reſolved. 1. That Common appendant is of common right, and begins by the operation of Law, and in favour of Tillage. And therefore a man need not preſcribe in it, and ſuch Common is appendant to Arrable Land, and for his Cattel to plough his Lands, and for Cows and Sheep to Manure the Land, and it is againſt the Nature of ſuch Common to be appendant to Meadow or Paſture. 2. Reſolved, That Common appendant may be apportioned, and that by purchaſe of part of the Lands to which it is appendant, the Common ſhall be apportioned, but Common appurtenant cannot be apportioned by the act of the parties, and therefore by purchaſe of part of the Land ſuch a Common is extinct. 3. Reſolved, That Common appendant, or by reaſon of Vicinage, ought to be by Preſcription; but Common appurtenant, or in groſs, may commence by Grant. And in this Caſe, it was ſaid by *Wray* Chief Juſtice, That where two Lords have Common for their Tenants by reaſon of Vicinage, that the one of them may encloſe againſt the other, for that the Tenants of the one Manor cannot put in their Cattel into the Waſte of the other; but they ſhall be excuſed when they come there by Eſcape, and that by reaſon of ancient uſage which the Law hath allowed. *Cook* 4. Part.

2. Note, It is ſaid in the Statute of *Weſt.* 2. cap. 25. As before time, Aſſiſe hath held and holden place of Common of Paſture, ſo ſhall it henceforth hold place of Common of Torbary Fiſhing, and of ſuch like Commons which any man had appendant to Freeholds, or without Freeholds by ſpecial Deed at the leaſt for Term of life. And the reaſon why Aſſiſe lay at the Common Law of Common of Paſture, and not of other Commons was, becauſe there was a ſpecial Writ in the Regiſter for Common of Paſture, and not for any other Commons. And yet ſee 12 H. 3. tit. *Aſſiſe* 417. That an Aſſiſe lay of Common of Piſcary. And ſee, that the Statute of *Weſt.* 2. cap. 25. is but an affirmance of the Common Law; For in the ſame manner he ſhall have an Aſſiſe for Fiſhing in his ſeveral Piſcary, or Torbary, and the Writ ſhall be general. But the Plaintiff in his Plaint ought to ſhew, That the Defendant claiming Common of Paſture in his ſeveral with his Cattel, &c. and the Judgment ſhall not be, that he ſhall receive Seiſin of the Tenements, &c. but that he ſhall have and hold the ſame in ſeveralty, for the Plaintiff himſelf is ſeiſed of the Freehold, and therefore he cannot make his Plaint to be Diſſeiſed of his Freehold, for it is not ſo. *Cook* 8. Part, 49, 50. in *John Mills* Caſe.

3. In an Action upon the Caſe, the Caſe was, A Copyholder in Fee preſcribed to have Common in B. and he alledged that the Defendant put in his Cattel in the Common, and that they had deſtroyed the Common, ſo as he could not have any benefit of his Common; the Jury found, That for the putting in of his Cattel, he was not guilty, but as to the Feeding and conſuming of the Graſs, that he was Guilty. And in this Caſe (amongſt other things) it was Reſolved, That a Commoner ſhould have an Action for the Feeding and the conſuming of his Common, becauſe it was a damage and wrong done to him; and the Commoner may take the Cattel of a ſtranger there damage feaſant; and therefore if he ſhould not have an Action, all the feeding might be taken and fed by Cattel which might be kept there with ſtrong hand, and the Commoner may diſtrein them Damage feaſant, or after the Cattel have conſumed the Common, they might eſcape out, and ſo every one would ſurcharge the Common. But in that Caſe, it was Reſolved, That for every ſmall feeding, the Commoner ſhould not have an Action upon the Caſe, but the Feeding ought to be ſuch *per quod communiam habere non potuit ſed totum proficuum ſum amiſit.* *Cook* 9. Part, 112. *Robert Marrys* Caſe.

4. The Lord of a Town cannot by this Statute improve all the Common, leaving ſufficient Common for the Tenants within the Lands of other Lords, as it was holden in 4 E. 3. tit. *Aſſiſe*, 178. *Cook* 2. Part, 25.

5. If one hath Common appendant to his Tenement in a great Waſte. It was holden, That in ſuch Caſe the Lord might improve part of the Waſte, leaving ſufficient Common and way to it in the Waſte. And if afterwards the Lord doth enfeoff the Commoner of the improvement. It was the Opinion of the Court, That the ſame ſhould not extinct the Common in the reſidue of the Waſte. See Mich. 17 Eliz. *Dyer*, 339. but Quære for the Book of 18 E. 3. 30. ſeems contrary-

thereto

that if the Feoffee purchaſeth part of the Improvement, that the Common is exiſted.

6. Note, upon this Statute, it was holden, That if the Lord do incloſe, and do not leave ſufficient Common in the reſidue for the Tenants, that the Commoners in ſuch Caſe may break down all the Incloſure, becauſe they have Common in the whole. See 8 E. 3. 38. 16 E. 3. *Common.* 9. and 22. *Aſſ.* 412. acc.

7. Note, That the Lord who is in by wrong, may improve by this Statute of *Merton*, againſt the Tenants and Commoners; and ſo it was adjudged. Trin. 10 Car. in C. B. in *Legrad* and *Linleys* Caſe.

Statute of Merton, cap. 6. *Of Raviſhment of Wards.* And cap. 7. *Of Wards.* And Weſtm. 2. cap. 35.

1. NOte, That this difference was taken and agreed, upon the Statutes of *Merton*, cap. 6. and cap. 7. That the profits of the Lands which the Guardian taketh for the double value, ſhall be in ſatisfaction of the double value; but otherwiſe in the Caſe of the ſingle value; for that the words of the Act, cap. 6. in Caſe of the double value, are, *Tunc tenat terram ejus ultra terminum ætatis ſuæ per tantum tempus quod poterit inde recipere duplam valorem*; ſo as by the expreſs words, the profits ſhall be conſtrued parcel of the double value; but the words of the 7th Chapter concerning the ſingle value, are, *Si quis hæres, &c. pro domino ſuo noluit ſe maritare non compellatur hoc facere, ſed cum ad ætatem venerit vel Domino ſuo ei ſatisfaciet ei, &c. pro maritagio ſuo antequam terram ſuam recipiet*; by which words it appeareth, that the Guardian ſhall receive the profits to his own uſe, untill the Heir ſatisfy him. *Cook* 4. Part, 81. in Sir *Andrew Corbets* Caſe.

2. The Queſtion was upon the ſaid Statutes of *Merton*; If the Guardian ſhould have the ſingle value without tender of Marriage. It was Objected, he ſhould not. For, 1. The Statute doth not ſay, *Quod valor Maritagii ejus de more jure pertinet ad Dominum feodi, ſed Maritagium ejus pertinet.* 2. The Lord who is to have the benefit of the Marriage, is to do the firſt act, *ſcil.* to tender the Woman which the Heir ſhall marry, and when default is in him who is to do the firſt act, the other party is excuſed. 3. That by the words of the Writ *de valore Maritagii*, and alſo by the Writ of Intruſion, the Lord ſhall not have the ſingle value without tender, and in default of the Heir. But it was anſwered and Reſolved, That the Guardian in Knight Service ſhould have the ſingle value of the Heir within the ſaid Statutes without Tender; and that by the Common Law, it was in the Election of the Lord to have the Marriage of the Heir, or to ſuffer the Heir to marry himſelf where he pleaſed, and to have recompence for it *ſcil.* the value of the Marriage. Alſo that by the Common Law, not only the Writ *de valore Maritagii* did lye, but alſo the Writ *Quare Intruſit Maritagio non ſatisfacto*, and that at the Common Law, if the Heir within age had married himſelf, the Guardian ſhould have recovered in Treſpaſs the value of the Marriage. All which prove, That the ſingle value did appertain to the Lord without any tender. And it was ſaid, That if a tender were neceſſary, the Heir might prevent the Lord of the Marriage by his own act and wrong of that which by Law did belong unto him. *Cook* 5. Part, 117. *Palmers* Caſe.

3. It was Reſolved, That for the Heir Female, the Guardian ſhould not have the forfeiture of the Marriage; for at the Common Law, the age of the Heir Female was 14 years: ſo as if ſhe was of ſuch age at the time of the death of her Anceſtor ſhe was out of Ward; and at the Common Law, there was not any forfeiture of Marriage, but only the ſingle value. But the forfeiture of Marriage was given by this Statute of *Merton*, cap. 6. which Act cannot extend to the Heir Female, becauſe it extends only, when ſuch Heir ſhould be of the age *quatuordecim annorum et ultra*, and the Heir Female at ſuch age is out of Ward. And alſo the words of the Statute are *ultra ætatem 21. annorum*, and that ſhall be intended as to Heir Male as to Wardſhip, and not to any Heir Female. But it was agreed in this Caſe, That in Caſe of an Heir Female before the age of 14 years, the Lord ſhould recover the ſingle value without tender. *Cook* 6. Part, 70. 71. in the Lord *Darcies* Caſe.

4. A Writ of Raviſhment of Ward was brought upon the Statute of *Weſt.* 2 cap 35. againſt Huſband and Wife. The Jury found, that the Wife was guilty of the Raviſhment, but the Husband was not; and found alſo, That the Heir *Maritatus exiſtit*, and that he was of the age of 16 years at the time of the Marriage, and found the value of the Marriage to be 800 l. And in this Caſe, It was Reſolved, 1. That for Raviſhment of a Ward at the Common Law, an Action of Treſ-

paſs lay againſt the parties in which the Plaintiff was to recover his Coſts and damages; and that ſuch Action lay aſwell againſt a Feme Covert, as againſt a Feme Sole. But no Writ of Raviſhment did lye at the Common Law. 2. Reſolved, That the Statute of *Weſt.* 2. cap. 35. had made alteration from the Statute of *Merton*, cap. 6. concerning Raviſhment of Wards. 1. The Statute of *Merton* did not extend to Heirs Females; but the Statute of *Weſtminſt.* 2. extends to both, *viz.* Children, be they Male or Female. 2. The Statute of *Merton* did not extend to any of the Clergy; but the Statute of *Weſtminſt.* 2. extendeth to all perſons. 3. The Statute of *Merton* extends but where the Heir Female was led away within fourteen years. But the Statute of *Weſt.* 2. extendeth to a Raviſhment after *annos nubiles*. 4. They differ in words; *Merton* is, *Vi abductis et detentis*: the words of *Weſtminſt.* 2. are, *Raptu ſeu detentis*. 5. They vary in the Proceſs, for in the Writ upon the Statute of *Merton*, he ſhall have but the old Proceſs at the Common Law. But the Statute of *Weſtminſt.* 2. giveth a more ſpeedy Remedy, and that death of the Plaintiff or Defendant ſhall not abate the Writ. 6. The Statute of *Weſtminſt.* 2. giveth a greater puniſhment then the Statute of *Merton*. 3. It was holden by *Cook* and *Walmſly* in the Principal Caſe, That a Feme Covert was not within the Statute of *Weſtminſt.* 2. becauſe ſhe is diſabled to ſatisfy, and the goods and Lands of her Husband are not lyable by that Statute to anſwer for the Raviſhment of his Wife; and the Law will never intend ſo ſevere a puniſhment for the not doing of that, which to do, the Law it ſelf hath diſabled him; and the Plaintiff in the Principal Caſe might have had an Action at the Common Law againſt thoſe which Raviſhed him; or a Writ *de valore Maritagii* againſt the Heir himſelf. *Cook* 9. Part, 72, 73. Dr. *Huſſies* Caſe.

Statute of Weſtminſt. 2. Cap. 5.
Of Advowſons.

1. UPon the words (*cujus Preſentatus ſit Admiſſus*). See in what Caſes Admiſſion is a ſufficient Title, and gains the Advowſon of the Church.

2. A man is Admitted, Inſtituted, and Inducted into a Benefice with Cure, of the value of 8 l. and afterwards the King Preſents him to the Church of S. which is a Benefice of Cure, and he is Admitted and Inſtituted. The Biſhop Grants to him Letters of Diſpenſation to have Plurality, which the King confirms; and afterwards he is Inducted into the Church of S. It was adjudged in the Caſe, That the ſaid Diſpenſation came too late, becauſe it came after the Inſtitution, for by the Inſtitution *Eccleſia plena exiſtit* againſt all perſons unleſs it be againſt the King: And as to the Spiritualties he is full Parſon by the Inſtitution, but as to the Temporalties, he hath not the Freehold in them untill Induction. *Cook* 4. Part, 99. *Dyſons* Caſe.

3. A. Tenant for life of the Manor of D. to which a Rectory, which was a Benefice, was appendant, remaining to B. in Fee. A. Preſented D. who was Admitted, Inſtituted, and Inducted, but did not read the Articles for which cauſe he was at the Suit of A. deprived; and he pleaded to the Charge, No notice was given by the Ordinary to the Patron of the Deprivation. The King Preſented for Lapſe J. S. who was Admitted, Inſtituted, and Inducted. It was Reſolved in this Caſe, 1. That the Church was preſently void by the Statute of 13 Eliz. for not reading the Articles. 2. It was Reſolved, That although the Biſhop had Inſtituted and Inducted the Incumbent, yet the Benefice did remain void, and the right Patron was not put to his *Quare Impedit* to remove the Incumbent; and if the Ordinary in ſuch Caſe had collated within the ſix Months, yet that ſhould not have put the Patron out of Poſſeſſion, nor put him to a *Quare Impedit*, but that he might Preſent. *Cook* 6. Part, 29, 30. *Greens* Caſe.

4. The King hath Title to Preſent for Lapſe, the Patron uſurps and Preſents his Clark, who is Admitted, Inſtituted, and Inducted. It was adjudged in that Caſe, That the King had loſt his Preſentment, and ſhould not have the ſecond Preſentment

tation; And the Statute of *Prerogativa Regis, Nullum tempus, &c.* is to be intended when the King hath an Intereſt certain and paramount, and not when his Intereſt is ſpecially limitted for the *Tempus occurrit Regi. Cook* 7. Part, 28. *Baskervile's* Caſe.

Upon the words *Habeant eandem Actionem qualem haberet ultimus anteceſſor.*

1. A Man ſhall not be remitted to an Advowſon Appendant (although he hath right to it) before he hath re-continued the Mannor to which, &c. becauſe that before he hath recovered the Mannor, he hath no any Action to recover the Advowſon. So if a man purchaſe an Advowſon in Fee, and ſuffereth an Uſurpation, and ſix Moneths do paſs, now he hath right; but foraſmuch as he hath not remedy for it, he ſhall never be remitted to it, although that the Advowſon be caſt upon him, either by Diſcent, or by other Act of Law. *Cook* 3. Part, 3. in the Biſhop of *Wincheſter's* Caſe.

2. It was Reſolved, That at the Common Law, before this Statute of *Weſtminſt.* 2. If a common perſon had Preſented his Clark to the Church, who was Admitted, Inſtituted, and Inducted; that thereby the rightfull Patron was put out of poſſeſſion, and the Uſurper had gained the Inheritance of the Advowſon by wrong, and the Preſentment of the Patron *pro hac vice* left for ever: And foraſmuch as Biſhops would Admit and Inſtitute Preſentees without Informing themſelves (as they ought to have done of the right of him who Preſented: Many Patrons loſt their Preſentations without any regard to Infancy, Coverture, or the like. And for this cauſe, this Act of *Weſtminſt.* 2. was made, which reciteth *Cum aliquis jus preſentandi non habens, &c. preſentaverit ad aliquam Eccleſiam, cujus Preſentatus ſit admiſſus (id eſt Inſtitutus) ipſe qui eſt verus Patronus per nullum aliud Breve recuperare potuit advocationem ſuam quam per Breve de Recto.* And therefore by this Act, three things amongſt other were provided, For, 1. If an Uſurpation had bin upon an Enfant or a Feme-Covert who had an Advowſon by Diſcent; the Enfant at his full age, and the Wife after the death of her Husband, ſhould have the ſame Action by *Quare Impedit*, or Aſſiſe of Darrein Preſentment, as her late Anceſtor might have had. The ſecond is, That Plenarty is no Plea in an Aſſiſe of Darrein Preſentment, or *Quare Impedit.* 3. That from thenceforth in the Writs of Darrein Preſentment, and *Quare Impedit*, damages ſhould be awarded. *Cook* 6. Part, 50. in *Boſwell's* Caſe.

3. Note, It was ſaid and holden by *Hobart* Lord Chief Juſtice; upon this Statute of *Weſt.* 2. Cap. 5. That there are no perſons Relieved within that Statute but thoſe which are Heirs; for the word (*hæres*) you find and have in all places and Caſes of the Preamble, and in the Purview layed together. 1. *Hæredes infra ætatem exiſtentes per fraudem et negligentiam Cuſtodum.* 2. *Hæredes etiam, ſive Majores, ſive Minores per negligentiam vel fraudem* of Tenant by the Curtely, Dower, &c. and then follows the Purview; *Statutum eſt quod hujuſmodi Preſentationes non ſint hujuſmodi reſtis hæredibus, aut illis* (ſupply *hæredibus*) *ad quos poſt mortem aliquorum, hujuſmodi advocationes reverti debent, ita prejudiciales qu'n quotieſcunque aliquis jus non habens tempore hujuſmodi Cuſtodiarum Preſentaverit.* And the ſtrength of the Proviſo is, *Habeat eandem actionem, &c. qualem haberet ultimus anteceſſor hujuſmodi hæredis, &c.* See Poſc. 14 Jac. in C. B. in the Lord *Stanhope* and the Biſhop of *Lincoln* and *Williams's* Caſe. *Hob.* 238, 239. acc.

Upon

Upon the Statute of 13 E. 1. *Of Winchester, of Huy-and-Cry.* And 27 Eliz. *Of Robbery and Huy-and-Cry.*

1. UPon this Statute of 13 E. 1. of *Winchester*, it was Resolved, That if a man be robbed in his house in the day time, or in the night, that the Hundred shall not be charged with the same, because the house of every man is his Castle, which he ought to keep and defend at his peril; and such a Robbery with which the Hundred shall be charged, ought to be done openly, so as the Country may take notice of it. *Cook* 7. Part, 6. *Lendill's* Case.

2. The Case was, That a man was robbed in *January* after the Sun-setting, but during day light. And it was adjudged, That the Hundred should answer for the same, because it was a Convenient time for men to travel about their business. *Cook* 7. Part, 7. *Aspoles* Case. See Pasc. 3 Jac. *May*, and the Inhabitants of *Morleyes* Case. *Cro.* 2. Part, 106. acc.

3. A man was robbed in the Hundred of O. in the County of S. and he and his Servants pursued the Felons into another County, and there one of the Felons was taken. It was the Opinion of the Court, That if a stranger make Huy-and-Cry, so that the Felons be taken, the Hundred is discharged. But Quære if it be so, If one of the Felons be only taken. Trin. 29 Eliz. in B. R. *Combsords* Case. *Goldsbr.* 55.

4. A Clothier was robbed in the Hundred of S. of 50 l. upon the Sabbath day in the time of Divine Service. The Question was, Whether the Hundred were chargeable for not making of Huy-and-Cry. *Mountague* Chief Justice was of Opinion, That it was *bonum opus*, and might lawfully be done, but said, That no man might be compelled upon any penalty to do it upon that day. But the rest of the Justices were against him, and that the Hundred was chargeable. Mich. 16 Jac. in B. R. *Waite* and the Hundred of *Stoakes* Case. *Godbolt*, 280.

5. An Action was brought against the Inhabitants in the half Hundred of W. in the County of L. being found. It was moved in Arrest of Judgment, That the Action would not lye, because it was not brought against the whole Hundred. The Court was of Opinion, That the Writ should have bin brought against them in this manner, *Inhabitantes in Hundredo de W.* called the Half Hundred of W. But the Writ was held good, for the Writ is, and so shall be intended to be brought against the men Inhabiting in the half Hundred of W. The Jury found that the Robbery was done upon the *Sunday*; and yet the Court held, That the Hundred was lyable. Trin. 11 Jac. in C. B. *Constable* and the Inhabitants of the Hundred of *Waltham's* Case. *Brownlow*, 1. Part, 155.

6. Note, In an Action brought upon the Statute of Huy-and-Cry against the Inhabitants of the Hundred of G. The Plaintiff declared upon a Robbery done the 9th day of *October*, 13 Jac. and the Original bore date the 9th of *October*, 14 Jac. It was the Opinion of the Court, That because the Writ was not brought within one year after the Robbery was done, according to the Form of 27 Eliz. that it was a good Exception. Hil. 14 Jac. in C. B. *Norris* and the Inhabitants of the Hundred of G. Case. *Brownlow, ibid.* 116.

7. An Action was brought against an Hundred, upon the Statute of Huy-and-Cry: the point was, If one be robbed in one Hundred, and he escape and fly into another Hundred, and the Thieves instantly pursue him, and rob him there; If the Hundred in which he was robbed should be only charged; and it was the Opinion of the whole Court, That it should be charged. Mich. 10 Jac. in B. R. *Deans* Case. *Hutton* 125.

8. Action upon the Statute of *Winton* of *Huy and Cry*; The Plaintiff Declared, That A. his servant was robbed of 60 l. by persons unknown, and made Huy and Cry, according to the Statute, and none of the Thieves taken: and A. had made oath before a Justice of the Peace, within 20 days before the Action brought, That he did not know the parties, nor any of them who robbed him. It being found for the Plaintiff, It was moved, That the Action did not lye, because the Plaintiff himself was not sworn; and by the Statute of 29 Eliz. the party who brings the Action, ought to be sworn. But it was Resolved by the Court, That the Action will lye by the Master, and that the servants Oath was sufficient; for it is properly in his power, that he was robbed, and did not know the parties, and not the Master, and it would be very inconvenient if the Master should not bring the Action, but the servant only; for that the servant might release or discontinue the suit. Trin. 2 Car. in C. B. *Reymond*, and the Hundred of *Olnings* Case. *Cro.* 1. Part, 26. See Mich. 4. Car. in B. R. *Cro.* 1. Part, 244. acc.

9. Action

9. Actions upon the Statute of Huy and Cry, The Plaintiff Declared, That he was robbed of ſuch a ſum, and made Huy and Cry at C. in the ſaid County, near to the place where he was robbed, and gave notice of it to the Inhabitants of C. being found for the Plaintiff, and Error brought, It was aſſigned for Error, becauſe he doth not alledge, that C. was a Village within the Hundred; ſo as notice was given to the Inhabitants within the Hundred where the Robbery was committed, for to give the notice to any Vill which was not within the Hundred, was not the intention of the Statute: But all the Juſtices held, That it is not material it ſhould be given to thoſe of the Hundred, but to the Inhabitants of the Vill near adjoyning: for the words of the Statute do not mention that notice be given to the Inhabitants of the Hundred. And it was ſaid, That it had been adjudged, That notice given to the Inhabitants of the Vill adjoyning, though it was out of the County, was good enough: But at his peril he is to make it at a Village near adjoyning to the place. Paſch. 30 Car. in B. R. *Mirick*, and the Inhabitants of the Hundred of *Repſgates* Caſe. *Cro.* 1. Part, 175. See Trin. 2 Car. in C. B. *Tutter*, and the Inhabitants *de Ducurnes* Caſe. *Cro.* 1. Part, 30. acc.

10. Action upon the Statute of *Winton* of Huy and Cry; and ſhewed, That ſuch a day he was robbed of ſo much money within that Hundred, and that he made Huy and Cry, and ſhewed, how according to the Statute of 29 Eliz. and that within 40 dayes before the Action brought, he was ſworn before ſuch a Juſtice of Peace, That he was robbed of ſo much, and did not know the Felons, and that the Defendants had not taken any of the Felons, nor ſatisfied him, *contra formam Statuti*: It was ſaid, That the Action was no good, becauſe it is founded upon two Statutes, both mentioned in the Declaration, yet concludes *contra formam Statuti prædict.* The Court was of Opinion, The beſt form was *Statuti prædict.* and not *Statutorum prædictorum*; for the Action was grounded only upon the Statute of *Winton*, which gives penalty and remedy: The other Statute ſhews only how the Examination ſhall be, and in what time the Action ſhall be brought out, but gives not any penalty; and *Statuti prædict.* refers only to the Statute of *Winton*, which gives the Action. Mich. 5 Jac. in B. R. *Andrew*, and the Hundred of *Lenkners* Caſe. *Cro.* 2. Part, 187.

11. Action upon the Statute of *Winton*, ſuppoſing that he was robbed of 80 l. of money, and of a Cloak, and divers other things: Upon Not Guilty, It was found, *Quod quoad Captionem aſportationem & ſpoliationem infra ſcript.* 80 l. That the Defendants were Guilty, and aſſeſs damages to 90 l. and as to the reſidue *infra ſcript.* Not Guilty. Judgment was for the Plaintiff, for ſo much as was found for him, *Et quoad reſiduum quod Quærens Nihil Capiat per Billam, & ſit in Curiam*: Error brought and aſſigned, the Verdict was ill, for the Hundred cannot be Guilty *de Captione*, but they are to be found Guilty for not taking the Thieves, and not anſwering the money. But the Court was of Opinion, it was well enough; and the finding they were guilty of the caption, is as much as to ſay, That the Plaintiff was robbed of ſo much, and that they had not made him amends. The Judgment was affirmed. Trin. 12 Jac. in B. R. *Oldfield* and the Inhabitants of *Witherley*. Caſe. *Cro.* 2. Part, 350.

12. In an Action upon the Statute of Huy and Cry, It was, That he was robbed in ſuch a high way, *in diviſis Hundredorum*, and that he gave notice to the Inhabitants of the Hundred near to the place he was robbed. It was moved, That the notice ought to be given to both Hundreds: But it was Reſolved, That the notice given to the Inhabitants of either Hundred, was ſufficient. Paſch. 21 Jac. in B. R. *Foſter*, and the Hundred of *Iſlleworths* Caſe. *Cro.* 2. Part, 675.

Statute 8 *Hen.* 6. *Of Forcible Entries.*

1. AN Indictment was upon the Statute of 8 H. 6. of *Forcible Entry*: It was, *Inquiſitio capt. ad Seſſion. Pacis, &c. in Com. S. Tenent. tali die Martis, & die Mercurii, &c.* And the Statute was miſrecited in ſome points, and for that cauſe the Indictment was quaſhed: for although the Seſſions may endure two or three days, yet the Record ought to mention, That the Seſſions was holden at one day certain: It was ſaid in that Caſe, That it is not policy in Indictments upon the Statute of 8 H. 6. to recite the Act, for the recital thereof is not neceſſary, and miſrecital thereof is fatal to the Indictment, but the beſt way is to draw the Indictment with concluſion, *contra formam Statuti*, and not to recite the Act. Hill. 30 Eliz. *Cook* 4. Part, 48. acc.

2. A. was Indicted upon the Statute of 8 H. 6. for Forcible Entring into the Rectory of H. The forcible Entry, was before the laſt pardon, and he tendred a Traverſe to the Indictment; and after a *Venire facias* and *Diſtringas* returned, the pardon came

cause which discharged the Fine to the King. It was moved to the Court, That the party Indicted, was ousted from his possession by colour of this Indictment; a Writ of Restitution being awarded upon it, wherefore the party prayed, That he might proceed, and he would relinquish the benefit of the pardon, for that he had no other means to be restored to his possession; and it was not reason, that a general pardon should turn to his prejudice; and some of the Justices were of that Opinion, That he might proceed: But afterwards, upon conference had with all the Judges and Serjants, it was holden, That there ought to be no further proceedings upon this Indictment; for the offence being pardoned by the general pardon, they are to take notice of it, and therefore they cannot proceed to have Restitution, Hill. 4 Jac. in B. R. *Fawcett's* Case. *Cro.* 2. Part, 149. And so it was said it had been Resolved before by all the Judges of *England*, in the Lord *Stafford*, and Sir *Tho. Thynne's* Case. See *Yelv.* 99. the same Case.

3. In Indictment against F. upon the Statute of 8 H. 6. That he entred with force, and disseized H. and held it out with force: The Bill was found *quoad* the detainer with force, and thereupon Restitution awarded: The Indictment being removed, it was found to be ill; because it was not found that he entred peaceably, according as it ought to be by the words of the Statute; and of that Opinion was the Court: Then it was moved and prayed to have Restitution: But it was moved, That it should be stayed; for if re-restitution should be had, then J. S. who was in Ward to the King, should have benefit of it, and H. who had been 30 years in possession, should be kept out of possession; but yet being but to make re restitution upon an ill restitution, the Justices held it to be but reasonable, and therefore awarded it. Hill. 4 Jac. in B. R. *Ford's* Case. *Cro.* 2. Part, 151.

4. Indictment of Forcible Entry into Tythes, The party prayed Restitution; Whether this Indictment was maintenable or not, was the Question. It was moved, That Indictments should be allowed for Tythes, as well as for Rent; and for Rent it appears, That Forcible Entry lies; *Fitzh. Nat. Br.* 49. 20 H. 6. 11. But afterwards, a Writ of Restitution was awarded. Mich. 6 Car. in B. R. *Cro.* 1. Part, 146.

5. An Exception was taken to an Indictment upon the Statute of 8 H. 6. of Forcible Entry, because it is not therein shewed, in whom the Freehold is. *Cook* Chief Justice, This ought clearly to be shewed; and to say, *Disseisivit, & intravit, &c.* The Statute saith expressly, Disseize, and therefore Tenant by *Elegit*, or Statute-Merchant, cannot Indict one upon the Statute of 8 H. 6. but he ought to shew, that he did him expulse, and disseize the Reversioner. It was the Opinion of the Court, That the Indictment was not good; wherefore it was quashed *per Curiam*. Trin. 13 Jac. in B. R. *Bulst.* 3. Part, 71.

6. In an Indictment upon the Statute of 8 H. 6. of Forcible Entry, the Case was, One was Lessee for years, and the Reversion did belong to the Company of Goldsmiths, *Et quendam J. S. tenentem expulit.* *Cook* took Exception to the Indictment, and said, That a Disseizin might be to one, although not in possession, as to a Reversioner upon a Term for years, but he could not be expulsed, unless he were in possession; for *Privatio, præsuppone Habitum*, and two cannot be *Expulsi*, where one was only in possession. It was also said, That the Indictment is, That the Tenant of the Freehold was expulsed, and dissezed, and then the Termor was expulsed: But as to that, it was said by the Judges, That the latter clause, *scil. Et quendam J. S. tenentem, &c.* was but surplusage: For if one enter with force, and expel the Tenant of the Freehold, it is within the Statute of 8 H. 6. And as to the Objection made by *Cook*, That the Indictment is, That he disseized and expelled the Tenant of the Freehold, out of the possession of the Freehold, The Court said, That the possession of the Termor, is the possession of him in the Reversion. Mich. 29 Eliz. in B. R. *Godbolt*, 45.

7. B. and others were Indicted, *pro equal* they entred into such Lands *existens liberum Tenementum* of J. S. *& manu forti* disseized him; and because the Indictment was not *adhuc existens liberum Tenementum*, and *Existens liberum Tenementum*, may refer to the time of the Indictment, and not to the time of the Entry; therefore the Indictment was holden not to be good, and was discharged. Trin. 21 Jac. in B. R. *Bridges* Case. *Cro.* 2. Part, 609.

8. J. S. and others, were Indicted for a Forcible Entry into a house, parcel of the Manor of D. which was the Freehold of J. D. and whereof F. was a Customary Tenant, and for Disseizing J. D. and expulsing of F. from thence. In this Case, although it was moved, That no Restitution might be; and it was Objected, That Restitution is only to be made in respect of the Freehold, and J. D. who is supposed to be Tenant of the Freehold, did not require it, but the contrary: Yet by the Court, Restitution was granted in respect of F. the Copyholder; for in as much as the Indictment is a Record, by which appeareth the Disseizin of J. D. and the expulsion of F. the Court ought to reform the wrongs in their several degrees, and to restore F. first, who was expulsed; and upon *Ex consequenti*, followeth the Restitution of the Free-

Freehold. But if the Indictment had been only of a Diſſeizin, without expulſion, there no Reſtitution might be, but upon the Prayer of him who had the Freehold. Hill. 3 Jac. in B. R. Sir *And. Newels* Caſe. *Yelv.* 81. And ſo it was ſaid it was adjudged in the Lord *Norris* Caſe.

9. Exceptions were taken to an Indictment upon the Statute of 8 H. 6. of Forcible Entry; for that the ſame was, *Locum in quo, ad tunc, & adhuc exiſtens liberum Tenementum* of him in the Reverſion. It was the Opinion of the Court, That here was a double repugnancy in this Indictment; for after the *adhuc exiſtens*, it is *extra tenet.* And 2. being *adhuc exiſtens*, then it is no diſſeizin; for theſe cauſes the parties were diſcharged, and the Indictment quaſhed. Trin. 11 Jac. in B. R. The King and Speirs Caſe. *Bulſtr.* 3. Part, 421.

10. An Indictment upon the Statute of 8 H. 6. of Forcible Entry, was, viz. That F. and P. 20 *Aug.* 44 Eliz. *Vi & armis, & manu forti unum Meſſuagium* in F. in *Com. S. exiſtens ſolum & liberum Tenementum, J. S. illicitè, & contra formam Statuti, &c. ingreſſum fecerint & præfat. J. S. a poſſeſſione ſua, &c. adtunc & ibidem expulerat, & diſſeiſierat.* Exception was taken to this Indictment, becauſe it was found that F. his *unum Meſſuagium ingreſſum fecerunt*; whereas it ſhould be, *in unum Meſſuagium*: But that Exception was diſallowed, for that the one or the other was good enough. The ſecond Exception was, The Indictment is *Exiſtens*, and doth not ſay, *ad tunc exiſtens*: But that was diſallowed alſo; for when it is found, That ſuch a day they entred into a Meſſuage [*exiſtens*] *ſolum & liberum Tenementum, &c.* This word *exiſtens*, ought of neceſſity refer to the time and day of the Entry: And ſo it was ſaid it was adjudged in *Savages* Caſe: Wherefore it was the Opinion of the Court, That this Indictment was good. Mich. 44 Eliz. in B. R. *Fentons* Caſe. *Yelv.* 27.

11. S. and ſeven others, were Indicted of Forcible Entry into a Cottage and Croft, in H. in the County of *York*; It was, That they *manuforti* entred upon the poſſeſſion of A. B. Fermor of R. F. and diſſeiſed A. F. *Et ſic Diſſeiſium extra tenuerunt.* It was moved, That the Indictment was inſufficient, becauſe they have not found, that A. B. the Fermor was amoved and expelled, and that is the force of the whole matter; for the poſſeſſion of the Fermor or Termor, is the poſſeſſion of the Reverſioner; and without ouſting of the Leſſee, there cannot be a diſſeizin to him who hath the Freehold: And ſuch was the Opinion of the Court, and the Indictment was diſcharged: But if the Indictment had not expreſſed A. B. to be Fermor, but generally, the Cottage to be in his Occupation, then it was the Opinion of *Williams* Juſtice, the Indictment which found the Diſſeizin only, had been good. Mich. 7 Jac. in B. R. *Freiſlan* and *Shellitoes* Caſe. *Yelv.* 165.

Upon the Statute of 23 *H.* 6. Cap. 10. Of *Sheriffs.*

1. WBeing a Priſoner in *Ludgate* upon a *Capias utlagatum* in Detinue, the Goaler took an Obligation of him, and two Sureties, with Condition to ſave him harmleſs, and to diſcharge his Fees, and to render his body at the time, upon Summons, &c. In Debt againſt one of the Sureties, he pleaded Condations performed; upon which the Plaintiff demurred. It was holden to be an inſufficient Plea; but there it was queſtioned, If the Court (*ex Officio*) be bounden to take notice of the ſaid Statute, not being pleaded by the party. *Dyer* held, the Court was not, becauſe but a particular in general; but of a general Statute, the Judges are to take notice, becauſe it makes a Common Law: In that Caſe it was ſaid, That it is not expreſſly averred, That the Plaintiff is Goaler, otherwiſe then that the Plaintiff named himſelf ſervant to J. S. *alias dictus* T. R. Goaler of *Ludgate*; then it was ſaid, If he be a ſtranger, and not Goaler, which the Court cannot take notice whether he be or not, then the Bond is good at the Common Law, and not by the Statute; for the Statute ſpeaks of Obligations made to Officers *colore Officii.* 3. It was ſaid, That it was out of the Statute, becauſe it is not ſhewed, That he was arreſted according to the courſe of Law, but only, That he was Outlawed at N. *tali die &c. & poſtea Arreſtatus* at *London*, and ſhewed not by whoſe authority, and without a Writ of *Capias utlagatum*, it ſhall be unlawful to arreſt him, which ſhall not be intended, becauſe it is not ſhewed. In this Caſe it was ſaid, That Outlawry is one of the ſeven Exceptions in the Statute, of which the Sheriff had commandment not to let to Mainprize; and yet an Obligation upon that, is not out of the Statute. Mich. 2 Mar. *Dyer* 119. *Whittinghams* Caſe. See *Pla. Com* 60. *Dove* and *Maringhams* Caſe.

2. The Under-Marſhal took an Obligation of one in Execution, and a ſtranger, to ſave him harmleſs of Eſcapes, and let the Priſoner at large; and although the Statute of 23 H. 6. toucheth only

the Sheriff, Warden of the Fleet and Pallace, and Ministers of the Sheriff: Yet the Opinion of the Court was, That the Obligation was void: And it was the Opinion of the Court, That the Condition was against the Law, and then the Obligation void by the Common Law. Pasch. 11 Eliz. *Dyer*, 284.

3. Note, The Statute of 23 H. 6. cap. 10. is, and makes an Obligation taken in other manner then the Statute prescribes to be void: Yet it is holden in 7 E. 4. 5. That the party against such Obligation, cannot plead *Non est factum*, but it is avoidable by Plea, with such apt conclusion as the Law doth appoint. *Cook* 3. Part, 59. in *Lincoln* Colledge Case. See *Cook* 5. Part, 119. in *Wolpsdales* Case acc.

4. It was Resolved by the Court, That the Sheriff who hath a *Fieri facias*, may take an Obligation of the Defendant, to pay the money in Court at the Return of the Writ, and it shall not be void by the Statute of 23 H. 6. cap. 10. because that the Statute extends only to such Obligations, with any who in his custody maketh to the Sheriff; and also, because such an Obligation was not void by the Common Law. 2. It was Resolved, That if the Sheriff taketh one surety of the party, the same is good enough, because it is at the Sheriffs peril. 3. It was Resolved, That if the Sheriff, or Gaoler, for ease, and enlargement of any one who is in his Custody, taketh a Promise to save him harmless, that the same is within the Statute of 23 H. 6. although that the Statute speaks only of Obligations with Conditions; for an *Assumpsit* is within the words of the Statute (viz. *any Obligations*) by *Wray* Chief Justice: And so it was said it was Resolved, Mich. 27 Eliz. in *Darby* and *Heathcotes* Case. *Cook* 10. Part, 100. *Bourchiers* Case. See there, Mich. 29 Eliz. in C. B. Rott. 1502. *Barney* and *Kotts* Case, and Trin. 34 Eliz. in C. B. *Dawsons* Case.

5. Debt upon an Obligation of 200 l. upon condition to come to his Lodging, and to go with him to the Councel at *Wales*. The Defendant pleaded the Statute of 23 H. 6. and that the Plaintiff is a Serjant at Arms attending upon the Council of the Marches there, and took that Bond out of colour of an Attachment out of the said Court, and so the Bond was void. It was said, That he was not an Officer intended within the Statute, which extends only to Sheriffs, and Bayliffs, and other Ministers of Guarding of Prisons, which a Serjant at Arms is not: Also the said Court was erected since the said Statute, and therefore cannot be intended within it. The Court enclined to be of that Opinion, but did not Resolve the point: But afterwards, because it was shewed, That the Plaintiff made the Arrest out of the Marches, viz. in *London*, they held clearly that this Obligation was out of the intent of the Statute. Mich. 8 Car. in B. R. *Johns* and *Strafords* Case. *Cro.* 1. Part, 225.

6. Debt upon an Obligation of 100 l. The Condition was, If G. R. appeared in the Common Pleas, *à die Pasch. in quindecim dies, ad respondendum* Thom. Allen, *in placito debiti*, That then &c. The Defendant pleaded the Statute of 23 H. 6. and that upon *Capias* out of the Common Pleas, to take the said G. R. *ad respondendum* to the said *Allen, in placito debiti* of 310 l. by vertue of which he was Arrested and Imprisoned, until he entred into the said Bond, and so it was not made according to the Statute, and so void, upon which it was demurred. Exception was to the Obligation, because the Obligation was 100 l. being for an appearance only: Whereas it hath been adjudged, That an Obligation of 40 l. for an appearance is sufficient, and therefore the taking of a greater Bond, is extortious, and void by the Statute. But the Exception was disallowed by the Court; for the Statute doth not restrein him to any sum, or any sureties, but he may take them according to his discretion. And although it hath been adjudged, That a Bond of 40 l is sufficient to excuse him for an Escape; because by the Statute he is enforced to let him to Bail, yet not *sequiter*, that he should be restrained from taking a Bond of a greater sum. It was adjudged for the Plaintiff. Hill. 7 Jac. in B.R. *Villiers* and *Hallys* Case. *Cro.* 2. Part, 286.

7. In Action upon the Case upon *Assumpsit*, The Case was, E. a Sergeant at Mace, took and Arrested one H. and having him in Execution, did deliver him over to the Plaintiff, being the Gaoler, *ad Custodiendum in salva Custodia*. Upon this, J. M. the Defendant came to him, and made him this Promise, grounded upon this consideration, That in consideration that the Plaintiff would suffer H. whom he had in Execution for the debt of one *Sparke*, *ire ad largum*, &c. the said debt not being satisfied, he then promised to give him such a sum of money, for which the Action was brought. It was the Opinion of the Court in this Case, That this Obligation was void, the same being grounded upon consideration, which is against the Law, and so the Plaintiff had no cause of Action. Pasch. 12 Jac. in B. R. *Blakman* and *Mortas* Case. *Rolls*. 2. Part, 213.

8. In Debt upon an Obligation, the Condition was to pay 20 l. The Defendant pleaded the Statute of 23 H. 6. That no Sheriff take an Obligation by colour of his Office, in other manner then is prescribed by the Statute; and shewed, that

that a Statute of 120 l. was acknowledged to him by J. S. and that it was extended by the Plaintiff, being Sheriff; and that it was agreed between the Brother of the Plaintiff, and the Under-Sheriff, before the *Liberate* executed, That the Defendant ſhould enter into the ſaid Bond to the uſe of the Plaintiff: The Plaintiff confeſſed this, and pleaded the Statute *ut ſtatim*; Upon which the Defendant Demurred. There were three points in the Caſe. 1. When the Sheriff doth take an Obligation with a penalty for money, which is given to him for his Fees, which are due by the Statute of 27 Eliz. Whether this be good within the Statute. 2. When the Sheriff extends the Statute, and the Conuſee enter into Bond for the payment of the Fees after the Extent, and before the *Liberate* returned, Whether this be good? 3. Whether the Statute gives 12 d. in the pound for the firſt 100 l. and if that extend, then but 6 d. It was Reſolved by the Court, That Judgment ſhould be given againſt the Plaintiff. And they agreed, That this Obligation was not within the Statute of 23 H. 8. for that the party was not in the Cuſtody of the Sheriff. 2. Agreed, That the Sheriff may not take his Salary appointed by the Statute, till a compleat Execution; viz. till the *Liberate*; for the words of the Statute are in the Negative. 3. It was ſaid, That this Obligation was void by the Common Law, and extortion, and a taking by colour of his Office. 4. It was Reſolved, That the Sheriff ſhall have but 6 d. in the pound for all, if it extend 100 l. And afterwards, Judgment was commanded to be entred for the Defendant. Mich. 20 Jac. in C. B. *Empſon* and *Rutherſt* Caſe, Winch. 21. and 50.

Upon the Statutes of 18 Ed. 1. 27 E. 1. and Stat. 4 H. 7. Cap. 24. and 32 H. 8. of *Fines*.

1. NOtwithſtanding the Statute of 27 E. 1. *de finibus levatis*, which took away Exceptions againſt Fines levied; the Queſtion was, Whether notwithſtanding that Statute, the Iſſue in tail might averr againſt ſuch a Fine levied by his Anceſtor. It was ſaid, That by the Statute of *Donis Conditionalibus*, It is provided, That as to the Iſſue in tail *Finis ipſo jure ſit nullus*; And it was ſaid, That where there wanted Seiſin in the one party or the other, there it might be averred, *Quod partes finis nihil habuerunt*. And it was ſaid, That the Book of 13 Aſſ. is, That it had been adjudged a good Plea, for the Iſſue in tail againſt a Fine and render of his Father, to alledg the Continuance of his Father. But ſee, *Cook* 3. Part, 88. in the Caſe of Fines, where it is Reſolved, That the Iſſue in tail, although he was not bound by any Fine levied by his Anceſtor, by the Statute of 4 H. 7. yet he was *eſtopped* to averr, That in ſuch caſe *partes finis nihil habuerunt*; but being privy, as Heir to him who levied the Fine by the Statute of 27 E. 1. he was eſtopped to annihilate the Fine of his Anceſtor by any ſuch Plea.

2. The Father Tenant for life, the Remainder to his Son and Heir apparant, levied a Fine to a ſtranger *ſur Conuſans de Droit come ceo*, &c. with Warranty, and took back an Eſtate by the ſame Fine. In that caſe, It was holden, That the Heir ſhould not be received to averr Continuance of the poſſeſſion and Seiſin, *ante finem tempore finis, or poſt finem*, in the Tenant for life; for that it is a Feoffment upon Retorn, and makes a Diſcontinuance of the Remainder and Reverſion. Mich. 16 Eliz. *Dyer*, 334.

3. In a *Formedon*, the Tenant pleaded, *Ne dona pas*. The Demandant by Replication, ſaid, That a Fine was levied of the ſame Lands between the Father of the Demandant, and one T. by which Fine, the Father of the Demandant did acknowledg to T. the Lands *come ceo*, &c. and the ſaid T. gave by the ſaid Fine, to the Father of the Demandant in tail. In that caſe it is ſaid by *Stone*, That ſince the guitt is proved by as high a Record, a man ſhall not averr againſt ſuch a matter in avoidance of the ſaid Fine, and yet the party againſt whom it was, was a ſtranger to the Fine. & 3 E. 3. 12. *Fitz.* tit. Averment, 42.

4. *Ed.* Lord *Zouch* brought a Formedon in the Deſcender of the moyety of a Manor, and divers Lands, againſt *Rumfield*; who pleaded in Bar, That *John*, great Grandfather of the Demandant, levied a Fine *Sur Conuſans de Droit come ceo*, of the ſaid moyety. Paſch. 32 H. 8. which was by the ſaid Fine granted and Rendred to the ſaid *John* and his Heirs, whoſe Eſtate the Tenant had. The Demandant Replyed, That at the time of the ſaid Fine levied, and at all times after, the ſaid *Rumfield* now Tenant, was ſeiſed of the Land in demand in his Demeſne as of Fee. In this caſe, It was Reſolved by all the Juſtices of the Common-Pleas, That the Demandant, being Heir in tail againſt ſuch Fine levied by his Anceſtor, whoſe Heir he is, was eſtopped to averr his Seiſin and Continuance thereof in a ſtranger, at the time

of the ſaid Fine levied, nor to aver, *Quod partes finis nihil habuerunt*, Mich. 30 Eliz. in C. B. *Zouch* and *Bampfields* Caſe, *Leon.* 75. to 84.

5. A Fine was levied of a Manor, and of a great number of Acres of Land Meadow, &c. and the Clerk who entred the Kings Silver, entred it in ſuch manner; viz. *N. D. dat. Dat Domine Regine* 40 s. *pro Licentia Concordandi in placito Conventionis* of ſo many Acres of Meadow Land, &c. leaving out the Manor; and becauſe it appeared upon examination, and upon View of all the part of the Fine, that the ſame was but the miſpriſion of the Clerk who entred the Kings Silver; and that the ſaid ſum of 40 s. was in truth as well for the Manor, as for the Reſidue of the Land: It was in that Caſe Reſolved, that it was a good Fine, and well levied; and therefore Reſolved, That the ſaid Entry ſhould be amended. Mich. 39 Eliz. in C. B. *Cook* 5. Part, 44. *Bohunns* Caſe.

6. Lands were given to the Grandfather and his Wife in ſpecial tail; the Grandfather dyed, the Father diſſeiſed the Grandmother, and levied a Fine with Proclamation; the Grandmother dyed, the Father dyed: In that caſe, It was Reſolved by the Juſtices, That the Son was barred; and yet the Father at the time of the Fine levied, had but a poſſibility, the Grandmother living, to the Tail: and yet the Judges did expound the Statute of 32 H. 8. (being an Act of Explanation) according to the Letter; That for as much as the Land was entailed to his Anceſtor, although his Anceſtor was alive, ſo as no Eſtate in right was diſcended to him, which he might paſſe or execute; Yet, becauſe the ſaid Statute ſaith, Entailed to the perſon ſo levying, or to any of his Anceſtors in the disjunctive; It was holden, That the Fine with Proclamations did barr the right which after the Fine ſhould diſcend to him, not only as to himſelf, but to all the Heirs in tail. Mich. 20 Eliz. in C. B. *Archers* Caſe, vouch. in *Cook* 3. Part, 90.

7. A man made a Leaſe for years to begin after the end of a Term then in being; The firſt Leaſe determined, the ſecond Leſſee did not enter, but he in the Reverſion entred, and made a Feoffment, and levied a Fine with Proclamations, and 5 years paſſed without claim made by the ſecond Leſſee. It was Reſolved in this caſe, That the ſecond Leſſee was barred of his Term, by the Statute of 4 H. 7. of *Fines*; for although that the Leſſor for years hath not an Eſtate that he may levy a Fine, yet becauſe that the words of the Statute are general, and extend to all perſons, and the words of the Saving are, [*Such Right, Claim, or Intereſt*] and he who hath a Term for years, hath an Intereſt, and alſo becauſe he is within the Miſchief, It was Reſolved, That his Intereſt, and the Intereſts of Tenants by Statute Merchant, Statute Staple, Guardian or Executors, are within the ſaid Statute of 4 H. 7. and bound by the Fine; For all theſe have Intereſts in the Land; and he who hath a naked right, or title to any Inheritance, cannot levy a Fine, and yet he ſhall be bound by a Fine levied by the Tenant of the Land. *Cook* 5. Part, 124. *Saffins* Caſe.

8. Tenant in tail, the remainder in tail, the Reverſion to the Right Heirs of Tenant in tail: Tenant in tail by Deed enrolled, bargained, and ſold the Land to J. S. and his Heirs; and afterwards levied a Fine with Proclamations to the Bargainee with Warranty: The Conuſee made a Feoffment in Fee; he in the Remainder had Iſſue and dyed, and then Tenant in tail dyed without Iſſue: In this caſe, it was Reſolved, amongſt other Points, That the Fine levied by the Bargainee, was no diſcontinuance of the Remainder, becauſe the ſame did not touch nor diſplace the Remainder, and no Eſtate of Freehold paſſed by the Fine, but the Fine with Proclamations did Corroborate the Eſtate of the Bargainee: for wherein his Eſtate was determinable upon the death of Tenant in tail, now it is not determinable without death without Iſſue; but if the Fine had been levied before the Bargain and Sale enrolled, then it had been a Diſcontinuance. 2. It was Reſolved, That the Feoffment of the Conuſee was not any diſcontinuance of the remainder; for none can diſcontinue a Reverſion or a Remainder, but he only to whom the Land is entailed: And therefore, If Tenant in tail granteth *totum ſtatum ſuum*, and he maketh a Feoffment in Fee, the ſame ſhall not take away the Entry of him in the Remainder or Reverſion. *Cook* 10. Part, 96, 97. *Edward Symons* Caſe.

9. Tenant in tail, the remainder in tail, &c. Tenant in tail in poſſeſſion makes a Leaſe for three Lives, according to the Statute of 32 H. 8. and afterwards dyeth without Iſſue; He in the Remainder before any Entry levieth a Fine: It was the Opinion of the whole Court, That the Fine was good, for that by the death of Tenant in tail without Iſſue, the Freehold was veſted in him in the remainder in tail. Mich. 20 Eliz. in C. B. *Lees* Caſe.

10. Error brought by J. B. Son and Heir of T. B. againſt J. S. of a Judgment given by default, in a Formedon in the Diſcender, againſt T. B. of a Meſſuage and Lands in S. in the County of B; The Errour was, for want of a Warrant of Attorney: The Defendant in the Writ of Errour pleaded in barr a Fine with 4. Proclamations

nations, with warranty; which Fine was levied to J. D. and his Heirs, to the use of him and his Heirs with Warranty; by vertue of which, the said J. D. entred, and was seised to the use of him and his Heirs, and demanded Judgment, Whether the Plaintiff shall be received to bring a Writ of Errour, or assign Errours against this Fine with Proclamations. In this case, two Points were, 1. Whether he who is only Tenant to the Writ, and not Tenant to the Land, as the Defendant here appears to be, may plead this Plea which goeth in bar of Errors? 2. Whether it be a good Barr? In this Case, It was Resolved by the Court, That the Tenant to the Suit might well plead this Plea. 2. Resolved, That this Fine, and 5. years passed without bringing a Writ of Errour, is a good barr (by the word *Actions*) within the second Saving of the Statute of 4 H. 7. And *Cook*, Chief Justice, said, That it was Resolved, 27 Eliz. in the Exchequer-Chamber, in *Mandevill's* Case, That if one hath right to a Writ of Errour, and sufferreth five years to passe, without bringing that Writ, he shall be barred by that Fine and 5. years passed. Trin. 11 Jac. in B. R. *Bartholomew* and *Belfields* Case. Cro. 1. Part, 332, 333.

11. Errour of a Judgment in C. B. in *Ejectione firmæ*, The Case was, A. was seised of Lands in Fee, and conveyed them to the use of T. his Son, and E. his Wife, and the Heirs of their bodies, for the Joynure of the Wife: A. dyed; T. and E. his Wife entred, and had Issue P. their eldest Son, and D. their second Son, the Lessor of the Plaintiff: T. dyed; E. took a second Husband, and they by Deed inrolled, bargained and sold the Land to P. and his Heirs; but no Livery or Inrollment was found of it. Then P. by Indenture bargained and sold the Lands to H. and levied a Fine with Proclamations to the said H. to the use of him and his Heirs; and afterward P. dyed without Issue: E. dyed; D. the second son of F. entred, and made the Lease. The Question was, Whether the Fine by P. the eldest son in the life of his Mother, Tenant in tail; he dying without Issue in the life of his mother, should barr D. the second son of T. or no? It was adjudged in the Common-Pleas, That this Fine levied by P. should not barr D. the second son: Whereupon Errour was brought in B. R. and by the whole Court, the first Judgment was affirmed. For, this Fine levied by the eldest son who was never seised by force of the entail, and dying without Issue before the tail discended upon him, is not a Fine within the Statute of 32 H. 8. or 4 H. 7. to barr the entail; For though he be inheritable to the tail, and, if he had survived, his Fine had been a barr to his brother; yet because he dyed in the life of his Ancestor, and never had the Estate tail, the younger brother shall never mention him in a *Formedon* in the *Discender*, he never being Ancestor in tail to his younger Brother, nor any such Ancestor to whom the Land was entailed. Wherefore the Judgment given in the Common-Pleas was affirmed. Trin. 11 Car. in B. R. *Bradstock* and *Stowell's* Case. Cro. 1. Part, 313, 314.

12. The Case was; Husband and Wife made a Feoffment of the Manor of B. to one O. to the use of himself and his Wife, and the Heirs males of their two bodies, the remainder in Fee to the Husband; They had Issue a Son and a Daughter; the Husband dyed; the Son made a Lease by Indenture, to begin after the death of his Mother, rendring Rent; and then by agreement levied a Fine with Proclamations, to the use of himself in Fee, and dyed without Issue. The Mother, by the assent of the Daughter and her Husband, sufferred a Common Recovery, in which the daughter and her Husband came in as Vouchees; the use of which Recovery, was to the use of the Mother for life, the Remainder to her Daughter and her Husband in tail, the remainder in Fee to the daughter; and then the Mother dyed. The Opinion of the Court in this case was, That the Fine levied by the brother (being the first Issue in this entail) levied in the life of his Mother, (who was sole Tenant of that entail, and did survive him) should not barr his sister, to whom the Land so entailed discended immediatly from her Mother. See the Reasons at large upon the Statutes of 32 H. 8. and 4 H. 7. in the Book at large. Mich. 19 Jac. in C. B. *Mackwilliams* Case, Hob. 332, 333.

See more of the Statute of Fines, in the Title of *Fines Levied*.

Upon

Upon the Statute of 11 *H.* 7. Cap. 20. of *Discontinuance of Rights by Women.*

1. A Man seised of Lands in Fee, enfeoffed divers, upon Condition, That they should give the Land to him and his Wife in tail, the remainder to his right Heirs; they had Issue a Son; the Husband dyed: the Son in the life of the Wife levied a Fine, with Proclamations, to A. in Fee: The Wife entred, and made a Lease for 3. Lives, not warranted by the Statute of 32 H. 8. the Consuse re-entred. It was Resolved in this Case, That the Lease made by the Wife, although that it was without warranty, was within the Statute of 11 H. 7. Cap. 20. for a Discontinuance stands in equall degree with a Warranty, or Recovery. 2. It was Resolved, That if he in the Remainder had granted over his Remainder in Fee only, that he might have entred for the forfeiture by the expresse words of the Statute, and not he in the Remainder. 3. Resolved, That the Consuse might have entred for the forfeiture, because by the Fine, the Estate tail is barred, and now he is that person, to whom the Interest, Title, and Inheritance, after the death of the wife doth appertain: And in this case, It was agreed for Law, That if a woman Tenant in tail doth accept a Fine *sur Conusans de Droit come ceo*; and thereby grant and render the Land for 1000 years, that the same is an alienation within the Intent of the Statute of 11 H. 7. Cap. 20. *Cook* 3. Part, 50. Sir *George Browns* Case.

2. A. seised of two Mannors, enfeoffed divers, to the intent they should give back the same to A. and B. his wife, whom he did intend to marry, and to the Heirs males of the body of A: A. and B. entermarried, and had Issue C: A. dyed; C. in the life of B. Tenant of the Freehold, suffered a Common Recovery with a single Voucher, to the intent that the Recoverors should make a Feoffment to Uses, and that the Wife, Tenant for life, should release with Warranty; which Feoffment and Release with Warranty, were made accordingly. And, If the Collateral Warranty was a Barr to the Demandant who was Heir in tail; or was void by the Statute of 11 H. 7. Cap. 20. was the Question? And in this case, It was Resolved, 1. That although the said Statute of 11 H. 7. makes the Discontinuance, Alienation, Warranty, and Recovery, utterly void; yet those generall words ought to be expounded, that they are not void betwixt the parties themselves, but stand in force betwixt them, and against all others, but only against such to whom the Interest, Title, and Inheritance, after the death of such woman doth appertain, and they only may make the same void by their Entry. 2. Resolved, That when the Heir in tail conveys the Lands unto another, and the Release and Confirmation of the Wife with Warranty, is but to perfect and strengthen the Estate which the Heir in tail hath made, that such a Warranty is not restrained by the said Statute of 11 H. 7. because it shall be intended to his benefit, and not to his prejudice: And in this case, the Wife with the Heir in tail, might have barred the Estate tail by Fine, and then the Statute will not restrain the Warranty of the Wife made to him who hath the Land by Conveyance of the Heir in tail. 3. Resolved, That when he in the Remainder in tail by a Recovery had against him by agreement, disableth himself to take benefit of the forfeiture given by the Statute of 11 H. 7. after his death, his Heir shall not take benefit thereof, because his Father was in *esse* at the time of the forfeiture, and could not enter; and a person who is not in *esse*, or who had not the immediate Interest at the time of the forfeiture, shall not take advange of it. 4. Resolved, That if Tenant in tail, being in of an Estate in tail, suffereth a common Recovery, and a Collateral Ancestor of the Tenant in tail releaseth to the Recoverors with Warranty, that this Warranty shall bind, and the Terr-Tenants may take advantage of it by way of Rebutter. *Cook* 2. Part, 58, 59, 60. *Lincoln*-Colledg Case.

3. A. Bishop of E. seised of divers Messuages and Lands in D. as well for service done by N. T. as for divers other Considerations, 36 H. 8. gave the said Messuages and Tenements to the said N. T. and to one *Sybel Yardley* his Cosen, *Habendum* the said Tenements, with all their Appurtenances to the said N. T. and *Sybell*, and the Heirs of their two bodies begotten. It was found, That the said Messuages and Lands were *inter alia cognita* by the name of a Tenement, and occupied under the Rent of 15 l. and that N. T. was servant to the Bishop, and that *Sybell* was his Cosen, and that a Marriage was then intended betwixt the said N. T. and *Sybell*, which was had accordingly, and that they had Issue J. and W; That N. T. dyed, and that afterwards *Sybell* took to husband J. S; and they 29 Eliz. enfeoffed J: afterwards J. S. dyed, *Sybell*

Sybell re-entred; J. levied a Fine *sur Conusans de Droit* to the Defendant: *Sybell* afterwards, 35 Eliz. enfeoffed her second Son; J. Entred: The Question in this Case was, Whether this Guift in this manner, be a guift within the Stat. of 11 H. 7? for if it be a Joyncture within the Statute, and is purchased by her Husband, then the Feoffament by Sybell to her second husband was a forfeiture, of which the eldest son might take advantage. It was Resolved, That it was not a Joyncture within the said Statute; for it was not a guift by the husband, nor by the Auncestor of the husband; And the Consideration of the service of the Husband, is not said to be such a purchase as the Law intends: and although the Deed be for divers other Considerations, that general Clause shall not alter the Case. 2. Resolved, That admitting it were a Joyncture within the said Statute, yet as this Case is, neither the Heir nor the Consusee shall take advantage of the forfeiture, by the alienation to the younger son: For when the Heir is enfeoffed by the second husband and the wife, and afterwards the husband dyes, and she enters, she defeats that Estate: And when the Heir levied a Fine to the Defendant, that Fine gave no Interest, but only by Estoppell; because the Heir had nothing at the time of the Fine, nor the Consusee; yet the Heir hath given his right to the entail, and concluded himself, that he cannot enter; and the Consusee cannot enter, because he hath nothing but by way of Estoppell, and no Reversion. Hill. 3 Jac. in B. R. *Ward* and *Walthewes* Case, *Cro.* 2. Part, 174. 175.

4. In an *Ejectione Firme*, the Case was; A. was seised of Lands in Fee, and by Indenture Covenanted with B. as well in Consideration of 200 l. paid by B. as in Consideration of a marriage betwixt L. his son, and *Anne* the Daughter of B. to convey Land to the use of the said L. and *Anne*, and the Heirs of the body of the said *Anne* to be begotten, and to his right Heirs: The marriage took effect; The Father dyed before the assurance; L. in performance of his Fathers Covenants, makes the assurance: afterwards L. enfeoffed one W. and L. and his Wife levied a Fine to the said W: R. G. entred for a forfeiture, by the Statute of 11 H. 7. The first Question was, If this shall be said a Joyncture within the Stat. of 11 H. 7? It was Resolved, That it should; for the Conveyance being by the Husband, or his Ancestor, in consideration of a Marriage, although it be conjoyned with a consideration of money, is within the Statute, and shall be expounded a Joyncture within the Statute. The second Question was, If it were an Estate Tail in the Wife only, or in the Husband and the Wife. It was Resolved, That it was an Estate Tail in the Wife, and but an Estate for life in the Husband. The third Question was, If this being a Joyncture within the Statute, whether the alienation of the Wife with her first Husband, who limitted it, be a forfeiture within the Statute. It was Resolved by the whole Court, That it was not a forfeiture, neither within the words, nor within the intent of the Statute: Not within the words, for the words are, *If any woman being sole, or with any after-Husband, &c.* And here she was not sole, and this Husband who conveyed it, he was married to the woman before the Conveyance. 2. It was out of the intent of the Statute; because the Husband who made the Assurance, joyned with the Wife in the Alienation; and this Statute being in the restraint of the Common Law, shall be taken strictly. Pasch. Jac. in B. R. *Kirkham* and *Thompsons* Case. *Cro.* 2. Part, 474. 475.

5. In an *Ejectione firme*, The Case was, A. seized of Lands in Fee, of the yearly value of 20 l. having two daughters co-heirs, M. and E. by Indenture 31 Eliz. Covenanted with J. S. in consideration of a marriage betwixt J. S. and the said M. and in consideration of 115 l. to be paid by the said J. S. to assure those Lands to the use of himself for life, and after, to the use of the said J. and M. and the heirs of their bodies, the Remainder to the heirs of E. and her right heirs: The marriage took effect. J. S. paid the 115 l. After, J. and M. had Issue B. the Lessor of the Plaintiff; J. S. dyed, M. took a second Husband, who alienes the Land to the Defendant; B. entred for the forfeiture, and let the Land to the Plaintiff: Whether this was an Estate within 11 H. 7. was the Question. It was much insisted upon, That it was within the words and intent of the Statute, it being purchased by the Husband for a valuable consideration. It was the Opinion of all the Barons in this Case, That this was not any Joyncture within the said Statute, because the Lands moved from the Wives father, and her advancement in marriage, is intended to be the cause of the gift, and not the money; and this appears, because the Limitation is to her, and her husband, in special Tail, and after, to the Wife in general Tail; and for default of her Issue, to her sister, in Fee; so as the Father principally intended the advancement of his daughter: And although the Husband paid the 115 l. that is not intended as a valuable price of the Land, but to have the Estate limitted to him as well as to his Wife, so as he might have the Lands, although he had no Issue: Wherefore it was adjudged for the Defendant. Mich. 19 Jac. in the Exchequer, *Kyrsellus*, and *Lloyds* Case. *Cro.* 2. Part, 624. See Trin. 6 Car. in B. R. *Copland* and *Pyatts* Case, adjudge acc. *Cro.* 1. Part, 177.

6. Husband

6. Husband and Wife, Tenants in tail of the Guift of the Husband, the Remainder to the Husband in Fee: the Husband dyed; the son and heir of the husband and wife levied a Fine with Proclamations to the use of him and his Heirs; the Wife let a Lease of the Land for 21. years, and dyed; the son devised the Land to E. and his Heirs, and dyed: Whether the Lease made by the Wife, were good to bind the Devisee, was the Question? It was the Opinion of the whole Court in this Case, That the Issue in tail was barred by the Fine to avoid this Lease; and that although that the Estate tail was barred; yet it is not extinguished, but remains in *Esse* to support the Lease, so long as any Issue in tail doth remain alive; And so the Court agreed, That the Lease was good. Trin. 18 Jac. in B. R. *Crocker* and *Kelsy*'s Case. *Bridgman*, 28.

7. The Wife had a Joynture with her Husband of his Inheritance, an Estate in speciall tail, the Remainder to the right Heirs of the Husband; they had Issue a Son: the Husband dyed; the Wife took a second husband, and they by Fine aliened the Land in Fee: the Son being within age, entred by colour of the Statute of 11 H. 7. The second husband dyed, the Lord by Knight-Service entred upon the Son, and claimed the Wardship: It was Resolved in that case, That he should not be in Ward, because he was in as a Purchasor during the life of the Wife. The second Question was, If the Mother contrary to her own alienation by Fine, might enter? It is there left a Quære, and not Resolved. Mich. 22 Eliz. *Dyer*, 362.

8. Note: There is a difference concerning Estates conveyed to Women for their Joyntures; An Estate in Fee conveyed to a woman, is no Joynture within the Statute of 11 H. 7. for to restrain such an Estate, that it shall not be aliened, is repugnant to the Rules of the Common-Law; but an Estate conveyed in Fee, and in satisfaction of Dower, is a good Joynture within the Statute of 27 H. 8. Cap. 10. *Cook* 4. Part, 4. *Vernon*'s Case.

Upon the Statute of 21 of *Hen.* the 8th, Cap. 13. *Of Non-Residence and Pluralities.*

The words of the Statute are. 1. *That then and immediately after such possession had thereof, the first Benefice shall be adjudged in Law to be void.* 2. *And that it shall be lawfull to every Patron to Present another.*

1. IT was Resolved by the Court, That before the Statute of 21 H. 8. If a man had a Benefice with Cure, and took another Benefice with Cure, that the first Benefice was void; but that was an Avoydance by the Spiritual Law, and not by the Common Law; of which Avoydance the Patron might take notice if he would, and might Present without any Deprivation or Resignation. But because the Avoydance did accrue by the Ecclesiastical Law, no Lapse did incur without notice, and yet the Patron might Present and take notice of it if he would; so as for the benefit of the Patron, the Church was void, but not for his disadvantage. But now forasmuch as it is affirmed by this Statute of 21 H. 8. cap. 13. if the first Benefice be of the value of 8 l. in the year, the Patron at his perill ought to present unto it; for inasmuch as it is an Avoydance by Act of Parliament every one ought to take notice of it at his perill. *Cook* 4. Part, 75. in *Hollands* Case.

2. A man was Admitted, Instituted, and Inducted into a Benefice of Cure, of the value of 8 l. And afterwards the King granted to him the Church of S. which was also a Benefice with Cure, and he was Admitted and Instituted. The Archbishop of *Canterbury* granted to him Letters of Dispensation for Plurality, which were confirmed by the King, and afterwards he was Inducted into the Church of S. It was in this Case adjudged, That his Dispensation came too late, because it came after the Institution; for by the Institution, the Church is full against all persons unless against the King; and as to the Spiritualties, he is full Person by the Institution, but as to the Temporalties he hath not the Freehold of them in him until he

be Inducted. And in this Case, it was Resolved, That by the Statute of 21 H. 8. the first Benefice was void by the Institution to the second Benefice, and the Church full before Induction. 2. It was Resolved, That admit that the first Benefice was not void by the Institution, yet the Dispensation came too late; for the words of the Statute are, [May purchase License to receive and take, and keep two Benefices with Cure of Souls]. And the words of Dispensation are *retinere & retinere*; and because that by the Institution the Church was full, he could not by License receive that which he had before. *Cook* 4. Part, 79. *Bigbies* Case.

The words of the Statute are, (Shall take another Benefice with Cure of Souls of the yearly value of 8 l.); The Question is, What value the Statute intends, Whether the very value of the Benefice; or as it is taxed in the Kings Books.

1. THe King brought a *Quare Impedit* against the Bishop of B. and *Hanleigh* Incumbent, for disturbing him to Present to the Church of *Swyre* in the County of D. which came to him by Lapse; and set forth the Statute of 21 H. 8. and that H. the Defendant was Parson of *Swire*, being a Benefice with Cure, of the valve of 8 l. *viz.* of the value of 30 l. *per annum*; and that the Defendant H. had taken another Benefice with Cure, *viz. Milbury Eack* in the said County, being also a Benefice with Cure, by which the first Benefice became void, and continued void for two years, and so the King ought to Present. The Defendant H. pleaded a special Plea, *viz.* by Protestation, That at the time of the making of the Statute, That the Church of *Swyre* was but of the value of 7 l. 14 s. 4 d. He pleased the Statute of 26 H. 8. By which Statute the Lord Chancellor had Commission to enquire of the values of all Benefices, and to certify the same in the Exchequer. And that upon such Commission awarded, it was returned into the Exchequer, That the Church of *Swyre* was but of the value of 7 l. 14 s. 4 d. and that he was Inducted into *Swyre*; and because the same was but of small value, the Archbishop of *Canterbury*, *quantum interest*, did grant him Dispensation to take another Benefice, which was confirmed by the Kings Letters Patents, and that thereupon he was Admitted, Instituted, and Inducted into the said Benefice of *Milbury Eack*, being a Benefice of the value of 8 l. Upon which the Kings Attorney did demur in Law. This Case was argued by the Justices in C. B. and the Court was divided in Opinion. *Foster* and *Walmesly* Justices held, That the value should be taken according to the taxed value as the Church was in the Kings Books. *Warburton* and *Cook*, That it should be taken according to the very value. Wherefore for difference of Opinion, it was adjourned into the Exchequer Chamber; and afterwards the Case was compounded by Order from the Kings Majesty. For the maintenance of the Opinions of *Cook* and *Warburton*, these Presidents were shewed. One 40 Eliz. in C. B. *Bash* and *Swiths* Case, where Issue being upon the value of the Benefice, the Jury found the value according to the very value, and not according to the taxed value, as it was in the Book of First Fruits. See Pasc. 7 Eliz. *Dyer*, 237. though it be valued in the Kings Books but at 6 l. yet the first Benefice is void by this Statute by all the Justices. 2. 41 Eliz. at the Assises, *Bond* and *Trickets* Case, Where *Anderson* Chief Justice directed the Jury, the Issue being upon the value of the Benefice, to find according to the very value, and not according to the taxed value. Quære the Law, for the Case is not yet Resolved, only this point being moved upon another Case. Pasc. 10 Car. in C. B. the Court then seemed to encline against the Opinions of *Cook* and *Warburton* before delivered in *Hanleighs* Case. Pasc. 8 Jac. in C. B. The King and the Bishop of *Bristow* and *Hanleighs* Case.

2. In an *Ejectione firmæ*, the Case was, That the Land in Question was parcel of the Glebe of the Rectory of M. and that A. was Parson of M. and that M. was a Benefice with Cure, of the value of 8 l. and that he was Chaplain to the Earl of S. and obtained a Dispensation to accept of another Benefice, *Modo sit* within 10 Miles of the former, which was confirmed under the Great Seal. And it was found, That A. had accepted another Benefice with Cure 17 Miles distant from the first, and was Instituted and Inducted thereunto. Both the Benefices being within the Diocess of *Lincoln*. The Archbishop in his Visitation inhibited the Bishop of *Lincoln* not to execute any Jurisdiction during his Visitation. And it was found, That the Patron had omitted to Present to the first Benefice within the six Months, and that the Bishop of *Lincoln* within the second six Months collated the Lessor of the Plaintiff to the first Benefice, who was Admitted and Inducted. The Points in the

Caſe were, 1. If *Si modo* was a Condition in this Licenſe, and made the firſt Benefice void when he took the ſecond Benefice. 2. Whether the Biſhops Collating during the time of the Biſhops Viſitation, and after his Inhibition were good. This Caſe was argued in the Court by Civilians, and by the Judges: And it was holden, That although the words (*Modo ſit*) be uſually taken to be a Condition; but in Civil Law was only an Admonition or Caution, and for the great inconvenience which would enſue, that multitude of Benefices would be void by Lapps, which have bin quietly enjoyed. It was Reſolved, That it ſhould not in the Principal Caſe be taken to be a Condition; and then that the Benefice ſhould be void *quoad* the Patron, as the taking of a ſecond Benefice is by the Statute of 21 H. 8. And then the ſecond point of the Collation by the Biſhop in the time of Viſitation, and after the Inhibition will not be material. It was adjudged for the Defendant in the *Ejectione firme*. Trin. 11 Car. in B.R. *Dodſon* and *Lyans* Caſe. *Cro.* 1. Part, 341.

3. A. was Preſented to a Benefice with Cure: and afterwards having purchaſed a qualification, he accepted another Benefice; and afterwards he accepted of the Arch-Deaconry of *Glouceſter*. B. Libelled againſt him in the Spiritual Court, and that by the acceptance of the Arch-Deaconry, the firſt Benefice was void. In this Caſe it was argued and holden by the Civilians, That their Law is, That if one having a Benefice of Cure of Souls, and accepts of an Arch-Deaconry, that the firſt Benefice is void. But *Wray* Chief Juſtice ſaid, That he conceived, that by the Statute of 21 H. 8. the Law is qualified by reaſon of a Proviſo there, *ſcil.* Provided, That no Deanary, Arch-Deaconry, &c. be taken or comprehended under the name of a Benefice, with Cure of Souls. Paſc. 31 Eliz. in B.R. *Underhill* and *Savages* Caſe. *Leon.* 316.

4. It hath bin a Queſtion, Whether the Preſentation of one man unto two ſeveral Advowſons, or living in one Church, each of them being above the value of 8 l. be a Plurality within the Statute of 21 H. 8. or at the Common Law or nor. It hath bin conceived, That it is not; firſt it is no Plurality by the Eccleſiaſtical Law, for that the words of the Canon Law are, *Plurima Beneficia quibus animarum Cura ſalmiſſa eſt, non ſine gravi Eccleſiarum damno ab uno obtineri cum unus in pluribus Eccleſiis rite Officia per ſolvere, aut vibus earum neceſſariis, cum neceſſariam impendere nequeat.* But in ſuch Caſe, the Parſon is not *in pluribus Eccleſiis* but in one Church. 2. When there are ſeveral Advowſons (as in this Caſe) one Parſon hath not the whole Church, nor the whole Cure of Souls. And the words of the Statute of 21 H. 8. are, If any Parſon having one Benefice with Cure of Souls, of the value of 8 l. accept and take another Benefice with Cure of Souls, &c. But in this Caſe he hath not one whole Benefice, nor hath he the whole Cure of Souls. And as in Caſe, If a Conſultation be made of three Churches, they are all now one Incumbency, although the Advowſons be ſeveral for the Patrons to Preſent by Turns; and the Writ ſhall be *Quare Impedit preſentato ad Eccleſiam*: For now upon the matter, there is but one Church, ſo in this Caſe, the Church upon the matter ſhall be but one, and the Incumbency but one, and ſo the ſame is no Plurality, either by the Common Law, or by the Statute of 21 H. 8. But Quære. See *Hughes Parſons* Law.

5. Another Queſtion hath bin, If a man be Parſon of a Church Impropriate with a Vicarage endowed, and he that is Parſon accept of a Preſentation to the Vicarage without Diſpenſation; Whether the ſame be a Plurality by the Canon, or by the Statute of 21 H. 8. It hath bin conceived, That although that they are ſeveral Advowſons, and that ſeveral *Quare Impedits* may be brought and maintained concerning their poſſeſſions. Yet that the Preſentment of one man unto the Patronage and Vicarage, neither before the ſaid Canon, nor ſince to be any Plurality, becauſe the Parſonage and Vicarage are but one Cure; and that appeareth by the Proviſo in the Statute of 21 H. 8. Provided, that no Parſonage that hath a Vicar endowing, be taken under the name of a Benefice with Cure of Souls. And 2. Becauſe the Parſonage and Vicarage are all but one, the Vicarage being endowed out of the Parſonage; and a man may be his own Vicar, and of this Opinion was *Hobart* Lord Chief Juſtice. Mich. 21 Jac. in C.B. in *Woodly* and *Manwerings* Caſe.

6. In an *Ejectione firme* upon a Special Verdict, the Caſe was three points. 1. When a Chaplin who is Benficed in a living above the value of 8 l. is Admitted and Inſtituted into another Benefice, and before Induction he gets a Qualification, and after is Inducted; If now the Benefice which he had firſt, be void. 2. When the Diſpenſation is entred in the Chancery in a pay book, and not enrolled, if that be ſufficient. 3. When a Parſon is Inhibited by the Archbiſhop, that he ſhall not entermeddle with the Benefice, by means whereof, the Parſon is abſent for the ſpace of 80 dayes. If ſuch abſence ſhall make a Leaſe made by the Parſon void. For the firſt point, it was Reſolved, That the Diſpenſation for qualification to have two Benefices, came too late. To the ſecond, *Non fuit reſponſum*: but to the third point, all the Juſtices agreed, that ſuch abſence doth not make the Leaſe void, but it muſt be a voluntary abſence; and this

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is not voluntary, by reaſon of an Inhibition. Hill. 43 Eliz. in C. B. *Robbins* and *Princes* Caſe. *Goldsbr.* 162.

7. Note, It was Reſolved by the Court upon a Special Verdict, That the Parſon ought to abide upon his Rectory, viz. the Parſonage houſe, and not in any other houſe, although it be within the ſame Pariſh; for the Statute is intended, not only for the ſerving of the Cure, and for Hoſpitality, but alſo for the maintaining of the houſes, not only for himſelf, but for his Succeſſors. But it was there agreed, That Impriſonment without Covin, was a good excuſe of non-reſidency; and ſo if there be not any Parſonage houſe there. And ſo alſo is ſickneſs without fraud. If the Patient *bona fide* remove by the advice of his Phyſitian, for better Ayre for the Recovery of his health.

8. It was Covenanted betwixt A. and B. That A. ſhould Preſent B. to the Church of D. and that afterwards B. ſhould leaſe the Parſonage to A. or to any other perſon named by him, and that the ſaid B. ſhould not be abſent by 80 dayes, and that he ſhould not reſign, and B. was bound to perform theſe Covenants, and afterwards B. was Preſented to the Benefice. A. brought an Action upon the Bond, pretending that he could not enjoy the Leaſe by reaſon of the abſence of the Parſon. The Leaſe was made to the Curate at the nomination of A. The Parſon pleaded, That the Obligation was void by the Statute of 14 Eliz. cap. 11. viz. all Leaſes made by any Curate ſhall be of no better force, than if they had bin made by the Benficed Parſon himſelf. It was ſaid, When a Parſon leaſeth to his Curate, who leaſeth over. The Statute doth not make the Leaſe void by any abſence of the Parſon, but of the Curate for 80 dayes. Quære, for it ſeemeth, That by the Statute of 14 Eliz. the Curate cannot Leaſe, &c. Paſc. 30 Eliz. in B. R. *St. John* and *Petits* Caſe. *Leon.* 100.

9. An Information was exhibited againſt two Parſons upon the Statute of 21 H. 8. The one of them pleaded ſickneſs, and by the advice of his Phyſitians, he removed into better Ayre for recovery of his health; this was holden Juſtifiable by the Court againſt the other. It was for taking a Farm: the other pleaded, That he took the Farm only for maintenance of his houſe and Family, this alſo was holden juſtifiable by the Court. Then it was moved to the Court, That the Plaintiff was a common Informer, and did prefer this Information againſt them for vexation, and to draw them to a compoſition, for which they had proſecuted againſt him an Indictment in the Countrey upon the Statute of 18 Eliz. to puniſh common Informers for abuſes, and prayed, that he might put in Sureties to anſwer Coſts. The Court ſaid, That that could not be done; but the Rule of the Court was, That the Defendants ſhould not anſwer the Information before the Informer appeared in perſon. Mich. 10 Jac. in B. R. *Baſſr.* 2. Part, 18. *Gaulſtons* Caſe.

See more upon this Statute, in the Titles of *Advowſons*, *Diſpenſations*, and *Pluralities*.

Upon the Statute of 27 of *Henry* the 8th, Cap. 16. *Of Inrollments*.

1. A Man ſeiſed of Lands in Fee by Indenture 4. *October*, 4 and 5 Ma. ſold Lands in Fee, and after in the ſame Term, the 9th of the ſame Moneth, he bargained and ſold, and levyed a Fine of the ſame Lands to another in Fee: and after 21 *Martii* then following (which was the laſt day of the ſix Moneths, accounting 28 to the Moneth, and accounting the ſaid day of the date of the Indenture for none of them) the Indenture was enrolled in the Chancery. It was demurred in Law, which of the Bargainees ſhould have the Land. It was the Opinion of the Court, That the firſt Bargainee ſhould have the Land, becauſe by the firſt Bargain the uſe was altered before the Statute of Inrolments: And ſee there, from the date, which are the words of the Statute, are the ſame in ſenſe, as from the day of the date. Mich. 5 Eliz. *Dyer*, 218. *Popham's* Caſe.

2. A man ſeiſed of divers Mannors, and of divers Lands, part in Leaſe for years, part Copyhold, for valuable conſideration, Demiſed, Granted, Bargained and ſold to J. S. the ſaid Mannors and Lands, with all Rents reſerved upon any Demiſe, to have and to hold after the death of the Bargainor for 17 years, rendring a Roſe to his Heir; the Deed is acknowledged to be enrolled. Afterwards he Covenanted to ſtand ſeiſed of the ſaid Mannors, &c. to the uſe of himſelf and the Heirs of his body, no Attornment was to the Bargainees; and afterwards the Bargainor dyed, his Heir within age. In this Caſe (amongſt other things) it was Reſolved, That the Leſſees had election to take the ſame, either by Deviſe, or by Bargain and Sale; and if the Law ſhould enforce them to take by Demiſe, then they ſhould loſe the Rents reſerved upon the Leaſe for years.

But if the Intereſt paſs by Bargain and Sale, then there needed not any Attornment in the Caſe, becauſe that Statute of 27 H. 8. of Uſes, executes the poſſeſſion to the Uſe, and the Statute of 27 H. 8. of Inrollments, doth not extend to it, becauſe no Eſtates of Freehold paſſe, but only an Eſtate for years. 2. Reſolved, That this Election remained to the Leſſees notwithſtanding the alteration by the ſecond Indentures, and notwithſtanding the death of the Leſſor, or the Kings title of Wardſhip. *Cook* 2. Part, 36. Sir *Rowland Heywards* Caſe. See *Cook* 8. Part, 93. *Foxes* Caſe.

3. A man made a Leaſe for years, and afterwards Bargained and ſold the Reverſion to one and his Heirs; and before the Enrolment of the Deed, he levyed a Fine of the Lands to him and his Heirs, and afterwards the Deed was enrolled within the ſix Moneths. It was adjudged in this Caſe, That the Conuſee was in by the Fine, and not by the Indenture enrolled, for when the Feeſimple paſſed by the Fine to the Conuſee and his Heirs, the Inrolment of the Indenture of Bargain and Sale could not deveſt the Eſtate which was ſetled in him by the Fine. It is true, that Inrolment ſhall have relation from delivery of the Deed, but that is only to avoid mean Charges made to a ſtranger by the Bargainor after the delivery, and before the Enrolment, but not to deveſt an Eſtate lawfully ſetled in the Interim in the Bargainee himſelf. *Cook* 4. Part, 71. *Hinds* Caſe.

4. The Father, Tenant for life of a Copyhold, (where the Cuſtome was to have for two or three lives *Succeſſivè*) the Remainder to his eldeſt Daughter for life, the Remainder to his ſecond Daughter for life *poſt mortem* of the one and the other. The Father by Bargain and Sale enrolled, purchaſed the Inheritance of the Copyhold of the Lord, who levyed a Fine thereof to the Father and his Heirs; the Father dyed, his Son entred and levyed a Fine to the uſe of himſelf and his Wife, and to his Heirs, and dyed; ten years paſſed, the Wife entred. It was in this Caſe (amongſt other things) Reſolved, That the Bargain and Sale did not Deveſt the Eſtate of them in Remainder, becauſe the Lord did that which he lawfully might do, and the Copyholder accepted that which he lawfully might. And 3. Becauſe the Bargainee was in by the Statutes of Enrolments, and an Act of Parliament cannot do wrong. *Cook* 9. Part, 106. *Margaret Pogers* Caſe.

5. The Caſe was; A man Bargained and ſold Land by Indenture the eighth of *July*, 20 Jac. the Deed was acknowledged the tenth of *July*, the ninth of *October* following, the Bargainor ſuffered a Judgment in C. B. the eighteenth day of *October* the Indenture was enrolled. The Queſtion was, Whether the Bargainor was ſeaſed in Fee at the time of the Judgment. In this Caſe, *Jones* and *Hide* Chief Juſtice conceived, That the Bargainor ſhall be conceived to be ſeiſed untill the Enrolment, and that nothing paſſeth to the Bargainee untill the Enrollment; for it is *quaſi Conditio precedens*, and till it be performed, nothing veſts in the Bargainee. *Cook* Juſtice was of Opinion, That when the Inrolment is within the ſix Moneths, he is in *ab initio*, and the Fee veſts in the Bargainee *ab initio*; and that the Statute of 27 of H. 8. of Uſes, executes the poſſeſſion to the uſe, but that is not untill the Deed is enrolled, and when the Deed is enrolled, it veſts in him *ab initio*: And till Enrolment, the Bargainee hath Election whether he will take it by Deed or not; which is the reaſon, That if he himſelf in the interim takes an Eſtate by Feoffment or Fine, he himſelf deſtroyes the Uſe. But when he himſelf doth no act of Diſturbance, and the Enrolment is within the ſix Moneths, it ſhall relate to the date of the Deed; and then the Bargainee is ſeiſed the ſaid ninth of *October*, being the day of the Judgment, and not the Bargainor. Quære, for the point was not Reſolved. Hill. 4 Car. in B. R. *Flower* and *Baldwin's* Caſe. *Cro.* 11. Part, 158.

6. Note, It was agreed by the Court, That if a man Bargains and ſells his Lands by Indenture to be enrolled, and before the Deed enrolled, he makes a Livery to the Bargainee, that in that Caſe the Livery doth prevent the operation of the Enrollment, and the party ſhall be accounted in by the Livery, which is the more worthy ceremony to paſs Eſtates, then by the Bargain and Sale, and therefore it ſhall be preferred. Mich. 26 Eliz. in B. R. *Stantley* and *Bratebridges* Caſe. *Leon.* 5.

Upon

Upon the Statutes of 31 H. 8. cap. 1. And 32 H. 8. cap. 32. *Of Partitions.*

1. THree Coparceners of a Reverſion; one of them alliened her part; the particular Tenant dyed, the eldeſt Siſter entred into the whole. It was the Opinion of the Court in this Caſe, That the Grantee and the other Coparcener could not joyn in a Writ of Partition againſt the third, becauſe one of them is entituled by the Common Law, and the other by the Statute of 31 H. 8. But Quære in that Caſe, If the entry of the eldeſt Siſter doth not give Seiſin to the Grantee, as ſhe doth to the other, becauſe of the privity of blood. Hil. 3 Ma. *Dyer*, 128. See 7 Eliz. *Dyer*, 243. Mich. 7 and 8 Eliz. in *Bendlies* Reports. And ſee *Cook* 1. Part, *Inſtitutes* 175.

2. Tenant by Curteſy may have a Writ of Partition upon the Statute of 31 H. 8. cap 32. for although he be not Joynt-Tenant, nor Tenant in Common, yet becauſe that a *Precipe* lyeth againſt him, he is in equal Miſchief. *Cook* 1. Part, *Inſtitutes* 175.

3. In a Writ of Partition brought upon the Statute, the Defendant ſhall not have his age. Trin. 14 Jac. in B. R. *Poynts* and *Gibbons* Caſe. *Hob.* 173. the reaſon is, becauſe he compelled to make Partition. But if the Partition be inequal, the ſame is avoidable only by entry if the Partition be without Writ; but if the Partition be by Writ, the ſame is unavoidable, although it be unequal. *Cook* 1. Part, *Inſtitutes*, 171.

4. Note, That it was adjudged, That Joynt-Tenants in Common who are compelled by Writ to make Partition, ought to purſue the Statutes, and cannot make Partition by word, becauſe the ſame remains at the Common as it was adjudged. Mich. 16 and 17 Eliz. in C. B. Rott. 1340. in *Harris* and *Edens* Caſe. But the Allience of one Coparcener may have a Writ of Partition againſt the other Coparcener, becauſe they are Tenants in Common. *Cook* 1. Part, *Inſtitutes* 175.

5. Two Joynt-Tenants are Warranty; Partition is made betwixt them in a Writ of Partition *eadem facienda*. It was adjudged in that Caſe, That by force of the Statute of 31 H. 8. of Partition, the Warranty did remain. But if they make Partition by Deed after this Statute, then the Warranty is gone. *Cook* 6. Part, 12. in *Maniers* Caſe.

6. Out of the Court of Wards, this Caſe was referred to all the Juſtices and Barons of the Exchequer, *viz.* Two joynt-Tenants, and to their heirs, one of them makes a Conveyance to the uſe of himſelf, and his Wife, for a Joyncture, and the advancement of his ſon: Whether this be an Aſſurance within the Statute of 32 and 34 H. 8. ſo as the King ſhall have the third part; *Sir Randolph Crew* and the Lord Chief Baron were divided in their Opinions from all the other Juſtices, who conceived it to be out of the Statutes; for the words are, *If any ſole ſeized, or ſeized joyntly with others*, &c. in ſuch Caſe the Statute provides, That the King ſhall have the third part upon ſuch Conveyance; but where two are joyntly ſeized to them and their heirs, and the one makes a Conveyance, this is out of the Statute of 32 H. 8. and therefore it ought not to be within 34 H. 8. for that is a Statute of Explanation, and ſhall be conſtrued according to the words, and not with any Equity; for there cannot be an Explanation upon an Explanation: And ſo it was ſaid it was Reſolved in 43 Eliz. Paſch. 2 Car. in the Court of Wards. *Cro.* 1. Part, 23.

7. Sir *Walter Lewſon* made a Leaſe for 100 years for the payment of his debts, and the performance of his Will; and afterwards, conveyed the Inheritance to ſtrangers, and dyed, his Heir within age, the Lands being holden in *Capite*. It was Reſolved in that Caſe, That the King ſhould have the Wardſhip, or Livery, as the Caſe required, by reaſon of the particular Eſtate ſo created; and although the Heir hath nothing, yet the King ſhall not be prejudiced of that which is due to him. 2. It was holden, That whereas Sir *Walter Lewſon* conveyed the Land to *Mary Curſon*, wife of *Sackville*, being daughter and heir to his ſiſter, which ſiſter is now heir to him; That this Conveyance is not within the Statute of 32 & 34 H. 8. becauſe it is a more collateral line, alſo his ſiſter ſurvived him, ſo the daughter of his ſiſter was not his heir and ſuch Conveyance is out of the Statute of *Marlbridge*: And *Drapers* Caſe was cited in the Court of Wards, for the Wardſhip of B. the ſon of the daughter of *Drater*, to whom *Draper* had conveyed his Land, and dyed, and his daughter and heir the mother of B. ſurviving him; It was Reſolved he ſhould not be in Ward. Paſch. 5 Jac. in the Court of Wards: The Lord *Buckhurſt*, and Sir *John Lewſons* Caſe. *Cro.* 2. Part, 157.

8. It was a Queſtion upon the Statute of 32 H. 8. If the Incumbent of a Church purchaſeth the Advowſon thereof in Fee, the Advowſon being holden

holden in ſoccage, and deviſeth the Inheritance to another in Fee; Whether this be a good Deviſe of the next Avoydance, becauſe that inſtantly by his death, when his Will ſhould take effect, the Church is void, ſo a thing in Action, and not deviſable. But it was the Opinion of the Court, That it was good enough; for the Law is ſo, That all ſhall be good, according to the intent of the party, expreſſed in his Will. Paſch. 13 Jac. in B. R. Sir *Edward Pynchon*, and Doctor *Harris* Caſe. *Cro.* 2. Part, 371.

9. A. F. and Eliz. his Wife, ſeized in Fee of the Mannor of D. in the right of the Wife, holden of the King by Knight-ſervice *in Capite*, 36 Eliz. levyed a Fine thereof, with a Remainder to them, and the heirs of the body of A. the Remainder to the right heirs of A. Afterwards 2 Jac. they levyed a Fine of that Mannor, *ſur Conuſans de Droit*, &c. to the uſe of themſelves for their lives, the Remainder to B. their firſt Son, in Tail, the Remainder to other of their ſons, the Remainder to the right heirs of A. B. the ſon being within age, Whether he ſhould be in Ward for his Land or body, was the Queſtion. It was Reſolved, That he ſhould not; becauſe the Eſtate limited to the Wife, is her ancient Eſtate, which ſhe had by the firſt Fine, which was extracted out of her own Inheritance; wherefore during her life, there is not any Wardſhip for the third part of the Body or Land; for the Husband was not ſole ſeized at the time of the ſecond Conveyance made, ſo out of the intent of the Statute of 34 H. 8. Mich. 3 Jac. in *Cur. Ward. Fleyers* Caſe. *Cro.* 2. Part, 294.

10. It was found by Office in *London*, 5 Sept. 9 Jac. That A. was ſeized in his Demeſne, as of Fee of five Meſſuages and Tenements, with the appurtenances, in the Pariſh of C. *London*, and 1600. made his Will in Writing, and thereby gave to B. his ſon, and the heirs of his body, the ſaid Meſſuages, the Remainder in Tail to C. his ſon; and ſo being thereof ſeized, dyed 1 May 1602. the ſaid B. his ſon and heir, being found to be of the age of 15 years, and the Land being holden by Soccage *in Capite*, and that B. his ſon and heir is now of full age of 21 years. The Queſtion was, if any Livery ought to be ſued, and of how much. The Judges did Reſolve, That if the ſaid Lands were deviſeable by the Cuſtome of the City, then all paſſing by the Deviſe, no Livery ought to be ſued of any part, no more then if all had been conveyed by Act executed within the Statute of 32 H. 8. Whereupon it was Ordered, That a Bill ſhould be exhibited, to the intent that a Certificate might be had of the ſaid Cuſtome, which was done accordingly; which was certified to have been accordingly, and divers Preſidents ſhewed of ſuch Certificates: Whereupon the Certificate being found, It was prayed, That the ſame might be allowed, which was done accordingly, and a Decree thereupon. Trin. 13 Jac. in *Cur. Ward.* whereon Caſe. *Leon*, 53.

11. A man ſeized of a Mannor holden by Knight ſervice, made a Feoffment of the Moyety thereof before marriage, to the uſe of himſelf for life; and after, to the uſe of a woman whom he intended to marry, for her Joynture, the marriage took effect; and afterwards, he leaſed the other moyety to A. and B. for years, for payment of his Debts and Legacies; and afterwards he deviſed portions by his Will to his younger ſons, and dyed, his heir within age. It was Reſolved in this Caſe, That for as much as the advancement of his Wife is within the ſaid Statute, as payment of his debts, and preferment of his children, that although that the eſtate of the Wife hath the precedence, yet the Kings third part ſhall be taken equally out of both moyeties, and not out of the moyetie ſo deviſed only. *Cook* 8. Part, 175. *Virgil Parkers* Caſe.

Upon the Statute of 32 H. 8. cap. 28. *Of Leaſes made by Tenant in Tail, by Eccleſiaſtical Perſons, and by Husband and Wife: And what ſhall be good Leaſes, what not; What warranted by the ſaid Statute, what not; And of Leaſes upon the Statute of* 13 *Eliz. by Eccleſiaſtical perſons.*

1. A Tenant in Tail, before the Statute of 32 H. 8. was bound in a Recognizance to him in the Remainder, That he ſhould not make any Eſtate longer then for his own life. It was holden, That if after the Statute he makes a Leaſe for 21 years, or three lives, that in ſuch Caſe he ſhall forfeit his Recognizance, but yet he in the Remainder ſhall not avoid the Leaſe made according to the Statute, if the Tenant in Tail dyeth without Iſſue, for that ſo was the intent of the makers of the Statute. Paſch. 33 H. 8. *Dyer*, 41. The Earl of *Bridgwaters* Caſe. But ſee more, *Coke* 8. Part, 43. in *Payns* Caſe; the ſaid Caſe in *Dyer* is denyed to be Law.

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2. Sir *Thomas Wyatt* Tenant in Tail to him, and the heirs males of his body, of the gift of the King, made a Leaſe for 30 years to *Auſten*, rendring 20 s. rent to him, his heirs, and aſſignes, and dyed, having Iſſue, who accepted the Rent, and after, was attainted of Treaſon, and executed, having his ſon in life, and the King accepted the Rent. Note, It was the Opinion of the Court in that Caſe, That for inconvenience of two Feeſimples to be in the King, which cannot be: It was holden, That the King was in point to enter, and ſo the Leaſe was void, and the Kings acceptance could not make it good. Paſch. 3 Eliz. *Dyer* 115. Sir *Thomas Wyatts* Caſe. *See Cook* 7. Part, 8. in the Earl of *Bedfords*. That becauſe in this Caſe, the King had avoided the Leaſe, but as to Primer Seiſin, that after Livery made, it is in the Election of the Iſſue in Tail, by acceptance of the Rent, to have affirmed the Leaſe, becauſe that the Leaſe was avoided by the King, but for part of the Term. *See Cook* 1. Part, *Inſtitutes*, 46. acc.

3. A. purchaſed Lands to him, and his Wife, and their heirs: Afterwards, A. without his Wife, let the Land to L. T. for 60 years, if they lived ſo long, rendring 280 l. *per annum* at two Feaſts: H. dyed, The Queſtion was, If this Leaſe ſhould binde the Wife, by the Statute of 32 H. 8. It was the Opinion of the Juſtices, That it ſhould binde her; for the body of the Act is, That all Leaſes made of Land, which the Husband is ſeized of in the right of his Wife, of Inheritance, or jointly with his Wife by purchaſe, during the Coverture, or before, ſhall be good and effectual, and that the Wife ſhall have ſuch remedy for the Rent as he that made the Leaſe: But then it was ſaid, That it appeared upon the Evidence, That anciently the Land was in Leaſe, and occupied by two Tenants, the one paid 60 l. and the other 180 l. and ſo for both, 240 l. yearly; and now they are joyned in one Leaſe, and 280 l. yearly reſerved, which is more by 40 l. a year then both Leaſes were before: Whether this was a good Leaſe within the Statute: It was not Reſolved, but the matter was compounded. Mich. 1. Car. in B. R. *Smith* and *Sanders* Caſe. *Cro.* 1. Part, 15. See *Cook* 6. Rep. 6. The Lord *Mountjoyes* Caſe.

4. Note, It was agreed by the Juſtices, That Leaſes by which the Eſtate and Intereſt of ſtrangers ſhall be charged or charged, ſhall be taken ſtrictly, becauſe they extend to the defeating or charge of the eſtate of a third perſon; and to that purpoſe, the Caſe was; This *Hen.* Earl of *Suſſex*, ſeiſed of the Manor of *Bernham* in *Eſſex*, to the uſe of himſelf for life; and afterwards, to the uſe of the Counteſs of *Suſſex* for life, with divers Remainders over: Proviſo, That it ſhould be lawful to the Earl to make Leaſes for 21 years, rendring the ancient Rent, &c. And afterwards, the Earl made a Leaſe of the ſaid Manor for 21 years, to begin at the Feaſt of S. Mich. then following; and although the power was general, to make Leaſes for 21 years, without being reſtreined to make them in poſſeſſion, or any number of years, but generally, to make Leaſes for 21 years. Yet it was adjudged in that Caſe, That the Leaſe was void: For 1. If by the ſaid Power, he may make any future Leaſe, or Leaſe in Reverſion, then he may make a Leaſe for 21. in poſſeſſion; and afterwards, infinite Leaſes in Reverſion for 21 years, which ſhall be contrary to the meaning of the Parties. 2. Becauſe that for as much as this Proviſo gave power to charge the Eſtate of a third perſon, with a Term of 21 years; ſuch Proviſo ſhall be taken ſtrictly, and ſhall not extend beyond the letter and meaning of the parties. Mich. 28 Eliz. in B. R. *Lepar* and *Wroths* Caſe. *Leon*, 35. See the Caſe vouched in *Cook* 6. Part, 33. in *Fitzwilliams* Caſe. But ſee it more certain, and at large, in *Leon*, 35.

5. Error was brought to reverſe a Judgment given in a Writ of Partition: The Error aſſigned was, That there are two Statutes of Partition, *viz.* 31 H. 8. cap. 1. and 32 H. 8. cap. 32. And the party doth not ſhew in his Writ upon which of the Statutes he grounds his Action. Another Error was, That the Declaration doth ſhew, *Quod tenent proindiviſo*, and doth not ſhew what Eſtate they held; and the one Statute gives partition of an Eſtate of Inheritance, and another which gives partition for years, or for life. *Tamfield* and *Suit* Juſtice: The Writ is, *Quod recuſat facere partitionem contra formam Statuti in hoc caſu proviſo*; and that is according to the Statute, and good; for be the Eſtate an Eſtate of Inheritance, Freehold, or Leaſe for years, we leave it indifferent, to be referred to the conſideration of the Law. *Gawdy* Juſtice was of Opinion, That the Writ is to be deviſed upon his or their caſe or caſes; and therefore the party ought to ſhew his caſe in ſpecial, and what Eſtate he hath: And it is no anſwer, That the Plaintiff cannot know the Eſtate of the Defendant; for in a *Practipe* at the Common Law, he ought to take notice of the Eſtate of the Tenant, otherwiſe his Writ ſhall abate, for the miſpriſion of it: for if he bring not upon one Statute againſt a Tenant, it is not good; and if the Statute of 31 H. 8. had only been made, and not the Statute of 32 H. 8. If he had brought a Writ upon that Statute, he ought to have ſhewed, that he had an Eſtate of Inheritance, againſt whom he brought the Writ: *Quare*, The Caſe was not Reſolved. Mich. 29 Eliz. in B. R. *Saraſam* and *Colburnes* Caſe,

Caſe. *Godbolt*, 84, 85. See Mich. 10 Jac. in B. R. *Rawlins* and *Barrets* Caſe. *Bulſtrode* 2. Part. 114.

Upon the Statutes of 32 H. 8. cap. 1. and 34 H. 8. cap. 5. *Of Wills, Deviſes, Words, &c.*

1. A Man ſeiſed of Lands in Fee holden in Socage, lying ſick, ſent for a man Learned in the Law, to make his Will; who took Notes of him of his Will, and afterwards put the ſame in Writing; and afterwards the Deviſor dyed before the Will was read unto him. It was the Opinion of the Court, That it was a good Will in Writing to convey Socage Land, within the Statute of 32 H. 8. And ſee, That Articles being read to the Deviſor of his Will, and written after his death, was adjudged to be a good Will within the ſaid Statute. 4 and 5 Eliz. in *Hinton's* Caſe. See 6 E. 6. *Dyer*, 72.

2. A man by his Will did intend to deviſe lands to J. S. for life, the Remainder thereof to J. S. and before the Writing of the Remainder, the Deviſor dyed. In that Caſe it was adjudged, That the Deviſe was void for the whole, within 32 H. 8. Becauſe the one did depend upon the other: But it was agreed, That if a man ſeized of two Acres in Soccage, and by his Will intends one Acre to J. S. and the other Acre to J. D. and for one Acre the Deviſe is put in Writing, and afterwards the Deviſor dyeth, before the Deviſe of the other Acre is put in Writing. It was holden, That it was a good Deviſe for the Acre which was put in Writing, but not for the other. Trin. 11 Jac. in C. B. *Caſar* and *Lakes* Caſe.

3. A man ſeized of Lands holden in Soccage, deviſed Lands to his Wife, upon condition to bring up his eldeſt ſon; and after the deceaſe of his wife, to his ſecond in Tail; the Wife did not educate the ſon, the eldeſt ſon entred upon her. It was Reſolved in this Caſe, That a Condition might be annexed to a Will by this Statute, which gives liberty to a man to Deviſe Lands for the advancement of his Wife, payment of his Debts, &c. and that a particular Eſtate may be without a condition, although the Remainder be without a Condition. And in this Caſe it was Reſolved, That although the Remainder be without condition, yet he ſhall not take advantage of the breach of it; but the heir becauſe he is prejudiced in the Inheritance by the Deviſe. Hill. 3 *Mar. Dyer*, 127. *Warren* and *Lee* Caſe.

4. A. and B. his Wife, Joynt-Tenants of Lands in Fee, ſuffered a Recovery 23 H. 8. which Recovery was averred to be to the uſe of the Husband, his Heirs, and Aſſigns: Afterwards, in 24 H. 8. he deviſed the ſaid Lands to his Wife for life, the Remainder over, &c. and 37 H. 8. he dyed. It was holden in this Caſe, That the Deviſe was void; for the Deviſe was not within the Statute of 1 R. 3. to convey the poſſeſſion till the Statute of 27 H. 8. which did transfer the uſe into poſſeſſion, which was a Countermand of the Deviſe, by drawing the uſe in the poſſeſſion; and the poſſeſſion could not be deviſed, till the Statute of 32 H. 8. was made, which enabled to Deviſe the poſſeſſion; ſo that by reaſon of the weakneſs of the foundation, the Deviſe was adjudged void *ab initio*: But if the Will had been publiſhed again after the Statute of 32 H. 8. made, then it had been a good Will, and a good Deviſe. Paſch. 4 Mar. *Dyer*, 143. Trinitans Caſe.

5. A man ſeized of a Wharf and Houſe in *London*, holden in Burgage, deviſed the ſame to his Wife, and her Heirs, upon Condition that the wife by the advice of Learned Counſel, and in convenient time, ſhould aſſure all the ſaid Lands for the maintenance of a Free-ſchool, &c. and that his Wife during her life, ſhould have the profits of the Lands, bearing the charges of the School, &c. and made his Wife his Executrix, and dyed, who entred, and made a Leaſe of the Lands for years: In this Caſe (amongſt other things) was Reſolved, That the Statute of 23 H. 8. did not extend to take away charitable uſes, but only extended to ſuperſtitious uſes. 2. Reſolved, That the Statute of 32 and 34 H. 8. of Wills, did take away the force of the Act of 23 H. 8. for that the words are, That all and every perſon, having any Eſtate in Fee ſimple, may diſpoſe, &c. And it was ſaid, That by theſe words, Companies not Incorporate, are included, and not excepted out of the ſaid Statute of 32 H. 8. *Cook* 1. Part, 25. *Pelet's* Caſe.

6. A. ſeiſed of the Manner of *Toby*, and A. and his Wife ſeiſed of the Manner of *Hinton*, to them and to the heirs of their two bodies, by an Eſtate made to them during the Coverture, for the Joynture of the Wife, the Reverſion to A. in Fee; *Toby* being and amounting to the value of two parts, and *Hinton* to the third part, both holden in *Capite*: A. by his Will Deviſed the Manner of *Toby* to his Wife for life, upon Condition, that ſhe ſhould not take her former Joynture in *Hinton*, with divers Remainders over: The wife

in the Court did waive by word her Eſtate in *Hinton*, and agreed to the Mannor of *Toby*, and entred into that: And, If the Deviſe was good for the whole Mannor of *Toby*, or but for part of it, was the Queſtion, upon theſe Statutes of 32 and 34 of H. 8. of *Wills*. It was Reſolved in this Caſe, amongſt other things, That the Deviſor had not power to Deviſe the whole Mannor of *Toby* by the Statutes; 1. Becauſe the Deviſor was not a perſon [having] within the Statute; for every perſon ought to be a perſon [having] at the time of the making of his Will, and in this caſe; and the Deviſor had not the Mannor of *Hinton*, but he and his wife had it, betwixt whom are no moyties, ſo as that he was not Owner. 2. The Deviſe was not good, becauſe the Deviſor had not a ſole Eſtate in the Mannor of *Hinton*, neither at the time of the making of his Will, nor at the time of his death, but joyntly with his Wife, and ſhe could not diſagree during the Coverture. 3. The Deviſe was not good, becauſe by the Statute, the King ought to have the clear value of the third part, without any diminution; but by this Deviſe, the King ſhould have but a poſſibility for his third part; *viz.* to have the Mannor of *Hinton* if the Wife, would diſagree, and the Statute hath been conſtrued, that equality ſhall be obſerved, and with equality avoided. *Cook* 3. Part, 33, 34. *Butler & Bakers* Caſe.

7. A man ſeiſed of a Reverſion in Fee expectant upon an Eſtate tail, in conſideration of blood, Covenanted to ſtand ſeiſed of the Reverſion, to the uſe of his Neece; and afterwards Tenant in tail in poſſeſſion dyed. It was Reſolved in this Caſe, That the King ſhould not have Primer Seiſin by the Statutes of 32 and 34 H. 8. 2. It was Reſolved, That the ſaving of Wardſhip and Primer Seiſin in the Statute of 32 H. 8. ſhould have Relation only to acts executed, and not to Wills; for always in Statutes, relation ſhall be according to the matter precedent. But in an Act executed, he may convey all, and therefore, It was neceſſary to add the ſaid Saving as to that. 2. It was Reſolved, If Grandfather, Father, and two Sons be, and the Grandfather in the life of the Father conveyeth his Lands to any of the ſons, the ſame is out of the Statute of 32 H. 8. for the ſame is not vulgar, nor uſual; and the Father ought to have the immediate care of his ſons and Heirs. But if the Father be dead, then the Care of them doth appertain to the Grandfather, and then if he doth Convey any of his Lands to any of the ſaid ſons, the ſame is within the Statute. *Cook* 6. Part, 76, 77. Sir *George Curſons* Caſe.

8. A man ſeiſed of 3. Acres of Lands of equal value, the one holden in *Capite*, and he Deviſeth the Acre holden in *Capite*, & one of the other Acres to his youngeſt ſon in tail; & afterwards purchaſeth other Lands holden in Socage. In this caſe, theſe Points were Reſolved; 1. That the Reverſion of the Acre holden in *Capite* upon the Eſtate tail, did reſtrain the Deviſe of the whole Socag. Land newly purchaſed by the words of the Stat. of 34 H. 8. Cap. 5. becauſe the ſame is (*holden*). 2. Reſolved, That a Reverſion in Fee expectant upon an Eſtate tail, Seek or Frunleſſe, is an Hereditament within the Statute of 34 H. 8. becauſe that although the Reverſion in preſent be not of any value, yet the Land it ſelf is of annual value, and therefore ſuch a Reverſion is deviſeable: And Hereditaments which in their natures are not valuable, are within the Statute of 34 H. 8. and if they be holden in *Capite*, ſhall reſtrain the Deviſe of the Mannor, &c. and ſhall make them void for a third part; for the Hereditament holden by Knight-Service in *Capite*, needs not to be deviſeable. 3. Reſolved, That the time of the Having, time of the Holding, and the time of the Diſpoſing, ought to concur together in the perſon who deviſeth. *Cook* 10. Part, 82. *Leonard Lovies* Caſe.

9. A. with his proper money purchaſed Lands holden in *Capite* to him and an Enfant, and to their Heirs. It was Reſolved, That this purchaſe could not be averred to be by Colluſion, to take away Wardſhip which might accrue after his death, becauſe he was never ſole Tenant, nor in reſpect of Survivorſhip, any Wardſhip or Primer Seiſin could accrue to the King. 2. Reſolved, That no Feoffment which A. ſhould make, could be averred to be by Colluſion, to take away Wardſhip or Primer Seiſin after his death, becauſe if no Feoffment was made, no benefit could accrue to the King by his death. 3. Reſolved, That when the Father makes a Feoffment for the advancement of his Wife, preferment of his Children, or payment of his debts, the ſame cannot be averred to be by Covin, and to give cauſe to the King to ſeize the whole Land. 4. Reſolved upon the Statutes of 32 & 34 H. 8. That in all Caſes when the Kings Tenant Conveyes his Lands for years, life, or in tail, to his Children; or when a ſtranger is joyned with the Heir in tail, or when a Remainder is limited in Fee, or when an Eſtate is declared by Will, that in all ſuch caſes by the Statute of 34 H. 8. Covin may be averred for the King, but only for a third part, becauſe the Statutes have enabled him to convey two parts at his will and pleaſure. *Cook* 8. Part, 164, 165. *Mights* Caſe.

10. In Treſpaſſe, the Caſe was; A. was ſeiſed in Fee of the Mannors of I. and S. and by his Will Deviſed the ſame to B. his Son for life; the remainder to the firſt ſon of the ſaid B. in tail, the remainder to his ſecond ſon, the remainder to his third ſon, the Remainder to D. his brother of the Deviſor: Proviſo, That if his ſon go about to

make any alienation or diſcent, by which the premiſſes cannot remain and come as formerly is appointed by the Will, otherwiſe then is for Joynture for any of their Wives for life onely, or Leaſes for 21 years, whereupon the old and accuſtomed Rent ſhall be reſerved; then ſuch perſon ſhall forfeit his Eſtate. A. dyed, B. his ſon built a new Houſe upon the Land, and 4 *Mariæ*, Leaſed to C. for 21 years, rendring the ancient Rent; And afterwards, 2 Eliz. levied a Fine of the ſaid Manor and Lands; and 5 Eliz. he made a Joynture to his Wife in this manner; viz. he Covenanted with others to ſtand ſeiſed to the uſe of himſelf and his Wife for their lives, and afterwards to the uſe of his right Heirs. And afterwards, 18 Eliz. he Leaſed the Land to J. S. and his Wife for 23 years, to begin preſently (which was a year before the Leaſe made to C. expired). It was ſaid in this Caſe, That B. had power and authority, not being but Tenant for life, to make a Leaſe for years, or a Joynture; for his meaning was, to give a power as well as an Eſtate; for otherwiſe, the word *otherwiſe*, ſhould be void. 2. The Queſtion was, If this Joynture was good, or not; for if it be void, then the Leaſe made, ſtands good. It was ſaid, That the Joynture was void, and then the Leaſe ſtood good: for an Uſe cannot riſe out of power, but may riſe out of an Eſtate of the Teſtator, and out of his Will. It was Objected, That a year before the Leaſe made to C. expired, the Leaſe was made to J. S. to begin preſently; and therefore it was not good, for ſo he might make Leaſes *in infinitum*. To that it was ſaid, That the Leaſe here was good enough, for this Leaſe is to begin preſently, and ſo no charge to him in the Reverſion; as in the Caſe of *Fox* and *Collier*; and a Biſhop makes a Leaſe for 3. years after the expiration of a former Leaſe to begin preſently. It was adjudged a good Leaſe to bind the Succeſſor. And it was ſaid, That if Tenant in tail Leaſeth to begin at Mich. next enſuing, It is a good Leaſe by the Statute of 32 H. 8. So is a Leaſe for 10 years, and after for 21 years, and yet the Statutes are in the Negative: but in the principal Caſe, the power is in the Affirmative, and the Inheritance is not charged in the whole with more then 21 years. Wherefore the Opinion was, That the Leaſe was good. Trin. 31 Eliz. in B.R. *Read* and *Naſh*'s Caſe. *Leon.* 147 148.

11. The Statute of 32 H. 8. Cap. 28. of Leaſes, is an enabling Statute to ſome perſons; and therefore by that Statute, a Biſhop by his Deed without the Dean and Chapter; a Parſon ſeiſed in the right of his Church, may make Leaſes of their poſſeſſions; but then ſuch Leaſes muſt be made under theſe Proviſoes following; viz. 1. The Leaſe muſt be made in writing by Deed Indented, and not by word, *Cook* 5. Part, *Inſtitutes*, 44 b. 2. The Leaſe muſt begin from the day of the date thereof, or from the making thereof, *Cook* 5. Part, the Lord *Mountjoyes* Caſe. 3. The Ancient Leaſe muſt be ſurrendred, expired, or ended within one year at the making of the ſecond Leaſe. *Cook*. 5. Part, 2. *Elmers* Caſe. And ſuch Surrender muſt be abſolute and not conditionall. 4. There muſt not be a double Leaſe in being at one time. 5. The Leaſe muſt not exceed 21. years or 3 Lives, from the making thereof. 6. The Leaſe muſt be of Lands or Tenements out of which a Rent may be reſerved, *Cook* 5. Part, 3. *Fermes* Caſe. 7. The Leaſe muſt be of Lands and Tenements which commonly have been letten to Farm for 20 years before the Leaſe made. *Cook* 6. Part, 37. The Dean and Chapter of *Worceſter*'s Caſe. 8. There muſt be reſerved to them and their Succeſſors, ſo much yearly Rent, or more, as hath been accuſtomably uſed to be paid for the ſaid Lands or Tenements, within 20 years before the Leaſe made. And, 9. The Statute of 32 H.8. doth not extend to any Leaſe to be made without impeachment of Waſte.

12. The Wardens and Fellowes of All-Soul's Colledg in *Oxford*, Leaſed Lands to J. S. To have and to hold from the Feaſt of the Annunciation next following, to the end and Term of 20 years; The Leaſe bore date 1. July, 10 Eliz. And made a Letter of Attorney to J. D. to enter into the Manor, and to ſeal and deliver the ſaid Deed of Leaſe in their names to the Plaintiff J. S: J. D. by force thereof entred into part of the Demiſed premiſſes, and did there ſeal and deliver the ſame. But it was not found, That there was not any Manor. It was Objected, That becauſe the Letter of Attorney was to enter into the Manor, and all the Lands and Tenements of the Colledg in ſuch a Town, and to ſeal and deliver a Leaſe in the name of the Leſſor, and to deliver it to the Plaintiff as their Deed, That the Attorney in executing the Warrant had not purſued it, for that he only entred into the Lands; and it is not found, that he entred into the Manor. But it was holden by the Court, That it doth not appear upon the Special Verdict, but that the Colledg was in poſſeſſion at the time of the Leaſe made, and then there needed not any ſuch Entry, but the bare ſealing and delivery of the Deed, had been good enough. And it doth not appear by the Verdict, That the Colledg had any Manor, and then the Caſe is no other, but that a man Leaſeth a Manor, and certain Lands in D. and makes a Letter of Attorney to make Livery of them, where he hath nothing in the Manor, the ſame

is a good Livery, and the Authority well executed. But if it had been, That the Colledg had ſuch a Manner there, then the Entry into the Land only, without meddling with the Manner, and the Livery made accordingly, ſhould not have been good. Mich. 33 Eliz. in C. B. *Carter* and *Cleycock*'s Caſe. *Leon.* 306.

Upon the Statute of 31 H. 8. Cap. 7. and 37 H. 8. Cap. 12. and 2 Ed. 6. Cap. 13. of *Tythes*.

1. THe Prior of St. *John* of *Jeruſalem*, had a Priviledg from *Rome*, That he ſhould not pay Tythes for any Land which *propriis manibus aut ſumptibus excolant*: It was Reſolved notwithſtanding, That upon the Statute of 31 H. 8. that their Fermors ſhould pay Tythes. And in that Caſe, It was holden, That if before the Statute of Diſſolution, the Prior had made a Leaſe for years, and the King after the diſſolution had granted the Reverſion; It was holden, That if the Term expired, the Patentee ſhould hold the Lands diſcharged of payment of Tythes, *ſi propriis manibus excolit*: But if he make a Leaſe for years, his Leſſee ſhall pay Tythes. 10 Eliz. *Dyer* 278. See *Cook* 2. Part, 44. in the Biſhop of *Canterburies* Caſe.

2. Lands in the hands of an Abbot, and of the Fermors of an Abbot, were, time out of mind, &c. charged but with the Tythe of Lamb and Wool; and now the Parſon ſued to have Tythe in kind of Hay and Corn. It was holden in that Caſe, That a Prohibition ſhould be granted; for that they were diſcharged of payment of Tythes in kind, by the Statute of 31 H 8. Paſch. 28 Eliz. *Dyer*, 349. Parſon of *Pyke*'s Caſe.

3. In an Attachment upon a Prohibition in the Common Pleas; upon a Suit for the Tythes of 22 Acres of Lands, within the Pariſh of T: the Plaintiff pretended, That they were diſcharged of Tythes: Upon a Special Verdict, it was found, That the Prior of *Mountague* was Patron of the Church of F; and 20 H. 8. the King gave Licence to the Prior, to appropriate the ſaid Church into their own hands; 21 H. 8. the Church was appropriate to them; the Church being then full, 27 H. 8. the Appropriation was confirmed by the Dean and Chapter, and afterwards the Incumbent dyed; and ſo the Prior was ſeiſed of the ſaid Church, and of the ſaid 22 Acres of Lands *ſimul et ſemel*, and ſo continued till the Stat. of 31 H. 8. of Diſſolution; & no Tythes paid for the 22 Acres, untill 1 *Maria*. And, If this unity of poſſeſſion was ſufficient to diſcharge the Land from the payment of Tythes, was the Queſtion? And it was adjudged, It was not. And in that caſe, amongſt other Points, it was Reſolved, That unity of the Parſonage and Lands which ſhould pay Tythes by Appropriation or otherwiſe in the hands of Eccleſiaſtical and Religious perſons, had diſcharged them from the payment of Tythes; and by the Stat. of 31 H. 8. ſuch an unity of poſſeſſion ſhall be a diſcharge for the Kings Patentee, from the payment of Tythes for the Lands which came to the Crown by the ſaid Statute: But then ſuch an Unity muſt have had theſe 4. Qualifications; It muſt have been *Juſta, Libera, Æqualis, Perpetua*. 1. It muſt have been *Juſta*, claimed by right; for if either the Parſonages, Vicarages, Lands, or Tythes, had come or been united to their houſes by Diſſeiſins, or other unlawful acts, ſuch an Unity had not been a good diſcharge within the Statute. 2. It muſt have been *Libera*, free from the payment of any Tythes: For if their Fermors, Tenants at Will or for Years, had paid Tythes, it had not been a ſufficient Unity. 3. It muſt have been *Æqualis*, there muſt have been a Fee-ſimple both in the Lands and in the Tythes in them; For if the Abbots, Priors, &c. had held but by Leaſe, it had not been ſuch an Unity as the Statute intended. And, 4. It muſt have been *Perpetua*; *ſcil.* time out of mind, &c. and then for the infinite impoſſibility, and impoſſible infiniteneſs, That ſuch Immunities and Diſcharges which ſuch Religious perſons and houſes had before the ſaid Statute of 31 H. 8. time out of memory could not be known, ſuch an Unity had been a good diſcharge in their own hands; and ſuch an Unity is a good diſcharge in the Kings Patentee from the payment of Tythes, within the Statute of 31 H. 8. *Cook* 11. Part, 13, 14, 15. *Pridle* and *Nappers* Caſe. See Mich. 15 Jac. in C.B. *Slade* and *Drake*'s Caſe, *Hob.* 195. to 200.

4. Action upon the Statute of 2 E. 6. for not ſetting forth of Tythes; and declares, That the Plaintiff was ſeiſed of a Portion of Tythes of Corn and Hay, growing upon ſuch a Grange; and that the Defendant was occupier of 41 Acres of Land ſowed with Wheat, and Rie and Barley, and reaped the Corn, and carried it away without ſetting forth of Tythes, and that the Tythes were worth 40 s. and the treble value 6 l. for which he brought his Action. Being upon *Nihil debet* found for the Plaintiff, It was moved, That the Declaration

ration was not good, for that he entitles himself to a portion of Tythes being a Lay-person, and doth not shew how; and it being a profit apprender in another's Soile, he ought to make a good Title to himself. But the Exception was disallowed, for that the Action is grounded upon the Tort, for not setting out of the Tythes; and the Seisin in Fee is but a Conveyance, and for this Action he need not to make a Title: And it is usuall, that the Plaintiff bring the Action as *Firmarius vel proprietarius*, without shewing any particular Title; and it differs from the Case of Assignment of Tythes, for there he ought to make Title. 2. It was said, That it was not good, Because it is not shewed what was the quantity of every grain in Specie, for here it is incertain, and the Court knowes not how to judge of it: But *non allocatur*. For he shews what the Tythes were worth, and the wrong is supposed by carrying them away, which is sufficient. It was adjudged for the Plaintiff, Mich. 15 Jac. in B. R. *Sanders* and *Sanford*'s Case. *Cro.* 2. Part, 437, 438.

5. In a Prohibition, the Case was, That an Abbot having a Privilege to be discharged of Tythes, *quamdiu manibus propriis* in 4 E. 4. made a Guift in tail; and 31 H. 8. the Abby was dissolved: The Question was, Whether the Donee of the Issue in tail should be discharged? It seemed to the Court, That he should not be discharged; for the Statute dischargeth none, but as the Abbot was discharged at the time of the Dissolution, so they must claim the Estate and Discharge under the Abbot, since the Statute; So if by a Common Recovery, the Reversion had been barred before or after the Statute. But if the Land had returned to the Abbot or King before or after the Statute, it had been otherwise. Mich. 16 Jac. in C. B. *Farmer* and *Sheremans* Case, *Hob.* 248.

6. It was moved for a Prohibition to the Spiritual Court, upon a Libell there for Tythe of Underwood, by reason of a Prescription in *Non Decimando* for the Wilde of *Kent*, this Wood growing there: And the reasons alledged for the Prohibition, were, 1. That a whole Country generally may prescribe in *Non Decimando*, in a particular place. And, 2. The Statute of 2 E. 6. in the 8th Proviso, gives life unto this Prescription for this particular place and Precinct. But it was Resolved, That no Prohibition should be granted in this Case. It was agreed, That a whole Country may prescribe in *Non Decimando*. See *Doctor and Student*, 166. but that is with this Proviso, so as there is besides sufficient maintenance for the Parson; otherwise it is not good. 2. It was said, That the Statute of 2 E. 6. helps not at all in this Case. And whereas it hath been said, That the Conquror never Conquered this place; this is but Historicall and Apocryphall, for he was a Conquerour by Composition had. It was also said, It is true, That in former time long since, this place in *Kent* was not Tytheable, because there was no wood there but great Timber-Trees, which were not Tytheable; but these being now cut down, wasted, and destroyed, this place which was not Tytheable before, being now underwood, and converted into Pasture, Tythe shall be there paid; unless the same be within the Proviso of the Statute of Exemption from payment for a time after the Melioration of the same; otherwise Tythes shall be paid presently. It was Resolved, That no Prohibition should be granted in this Case. Mich. 12 Jac. in B. R. *Roffill* and *Rutchaft*'s Case. *Bulst.* 2. Part, 235.

7. Note, by the Justices; If Lands holden of J. S. be given to an Abbot and his Successors, or to any other Corporation; In such case, if the Abbot and all the Covent dye, so as the Body Corporate is dissolved, the Donor shall have the Lands again, and not the Lord by Escheat, because in case of a Body Politique or Corporate, the Fee-simple is vested in them in their Politick Capacity. The principal Case was; A Prescription was laid in Abbot and Covent; and it appeared, That the Body was dissolved, because all the Monks dyed, and the Lands came to Lay-mens hands. And it was Resolved by the Court, That the Prescription was determined, and the parties should pay Tythes in kind. Mich. 11 Jac. in C. B. The Dean and Canons of *Windsor*, and *Webb*'s Case. *Godbolt*, 211.

8. The Statute of 13 Eliz. Cap. 6. is, That no Master and Fellowes of a Colledg in *Cambridg* or *Oxford*, shall make any Lease for life or years of any of their Lands and Tenements, unless a third part at the least, of the Ancient Rent be reserved and payed in Corn for the said Colledge, otherwise the Lease to be void. In an *Ejectione Firmæ* brought of a Lease made of the Rectory of St. *Lawrence* Church in *London*: The Question was, Whether the Lease were void, or not, because Tythes in *London* do not consist of such things, but only in money, according to the Decree concerning Tythes in *London*? It was holden by the Court in this Case, That the Lease was good, notwithstanding the defect in the special Reservation which is limited and appointed by the said Statute. And in that Case, It was said and agreed, That a Lease of a House, Mill, Ferry, were out of the Statute. And it was agreed, That the Statute ought to be intended of Tythes of Common right, and not of such Customary Tythes, as those in *London*; And therefore, If all Parishioners pos-

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ſcribe in *a modo Decimandi*, *ſcil.* to pay a certain ſum of money for all manner of Tythes upon demiſe of ſuch a Rectory, ſuch a Reſervation is not neceſſary; for theſe are Tythes againſt right, and no Tythes are within that Statute, but thoſe which are annuall. Paſch. 26 Eliz. in the Exchequer. *Kemp* and *Hollingbrook's* Caſe. *Lenn.* 18, 20.

See more upon theſe Statutes, in *Lib.* 1. Title, *Actions upon Statutes*, and Title, *Tythes*.

Upon the Statute of 5 *Eliz.* Cap. 4. *Of Labourers and Apprentices.*

1. NOte: It was agreed by the Juſtices, That the juſtices of the Peace ought not to Certifie into the Chancery, their agreement made upon Servants Wages, Six moneths after Eaſter; according to the Statute of 5 Eliz. of *Labourers*; upon a penalty of 10 l. and that by the expreſſe words and meaning of the Statute. 32 Eliz. *Dyer* 265.

2. G. brought a Writ of Errour againſt B; The Caſe was, That B. brought a *Replevin* in the Court of *Ludlow* (which is a Court of Record) againſt G. *tam pro Domina Regina quam pro ſuipſo*, upon the Statute of 4 and 5 *Ph.* and *Mary*, which forbiddeth, That none ſhall Weave Woollen Cloth or Kerſies, if he hath not been an Apprentice, or exerciſed the Trade, &c. by 7. years, upon pain of forfeiture of ſuch Cloth, or the value of it, the penalty to be recovered by Action, Bill, Plaint, or Information, in any Court of Record, wherein no Eſſoine, Protection, &c. It was aſſigned for Errour, That the breach of the ſaid Act was taken away by the Statute of 5 Eliz. Cap. 4. But it was the Opinion of the Court, That it was not, for that both Acts do ſtand together. And it was ſaid, That a latter Statute in the Affirmative, ſhall not take away a former Act, and the rather, if the former be particular, and the latter general. *Cook* 5. Part, 19. *Gregories* Caſe.

3. The Cuſtome of *London* was alledged to be, That no perſon whatſoever, not being free of the City, ſhall by any colour, way, or means whatſoever directly or indirectly by himſelf, or by any other keep any Shop, or any other place whatſoever inward or outward, to put to ſale any Wares or Merchandizes by way of Retail, or uſe any Trade, Myſtery, or Handicraft, for hire, gain, or ſale, within the City, upon pain of forfeiture for every time 5 l. It was Reſolved in that caſe, That the ſame was good by way of Cuſtome; but it was not good by way of Grant, or Charter made to the City. *Cook* 6. Part, 122. The Caſe of the City of *London*, and *Wagoners* Caſe.

4. The Corporation of the Taylors of *Ipſwich* made an Ordinance, That if any exerciſed the Trade of a Taylor, untill he was preſented before them, and untill they had allowed him to be a Workman, that he ſhould forfeit to them 3 l. 13 s. 4 d. to be levied by Diſtreſſe or Action of Debt. A man who had been an Apprentice unto a Taylor 7. years, according to the Statute of 5 Eliz. was Servant to a Gentleman, and by his commandment made Cloathes in the houſe of his Maſter for his family, before he was allowed to be a Workman by the Company. In this caſe, theſe Points were Reſolved, 1. That by the Common-Law, none could be prohibited to work in any lawfull Trade, becauſe the Law abhorreth Idleneſſe as a matter *ominum vitiorum*. And the Stat. of 5 Eliz. was not made only that Artificers ſhould be skilful; but that young men ſhould not be trained up in Idleneſs. 2. It was Reſolved, That the reſtraint of the Defendant for more then the Stat. of 5 Eliz. had done, was againſt Law; and ſuch Ordinance, That they ought to be preſented to them, was contrary to the Act of 5 Eliz. 3. That the Stat. of 5 Eliz. intendeth the publique uſe of a Trade or Myſtery, and doth not extend to him who is a private Cook, Taylor, &c. in the houſe of any for the uſe of his family; for every one may work in ſuch private manner, although he never had been an Apprentice. *Cook* 11. Part, 54. The Taylors of *Ipſwiches* Caſe. See Paſch. 14 Jac. *Norris* and *Stapps* Caſe. *Hob.* 211.

5. Errour of a Judgment in *Coventry*. In an Information upon the Statute of 5 Eliz. for exerciſing the Trade of an Ironmonger, not being Apprentice. After Verdict, and Judgment for the Plaintiff; The Errour aſſigned was, Becauſe Informers cannot ſue upon the Statute to have the moyty; for that by the expreſs words of the Statute, the forfeiture is given to the Corporation, for the benefit of the Corporation for the Relief of the poor and other Uſes of the Corporation. But the Errour was not allowed: For although that Statute gives one moyty to the Informer, and the other to the King, except in Corporate Towns, to whom ſuch forfeitures are granted, It is to be underſtood, and ſo hath always been expounded, That in that caſe the forfeiture given to the King, belongs to the Corporation, and the Informer is to have his part ſtill. The Judgment was affirmed. Trin. 9 Car. in B. R. *Cro.* 1. Part, 230. See Hill. 14 Jac. in C. B. *Dewſon* and *Barbers* Caſe. *Hob.* 183.

6. An Information was againſt the Defendant, for uſing the Trade of a Goldſmith, upon the Statute of 5 Eliz. not being an Apprentice: The Defendant

ration was not good, for that he entitles himself to a portion of Tythes being a Lay-person, and doth not shew how; and it being a prosit apprender in anothers Soile, he ought to make a good Title to himself. But the Exception was disallowed, for that the Action is grounded upon the Tort, for not setting out of the Tythes; and the Seisin in Fee is but a Conveyance, and for this Action he need not to make a Title: And it is usuall, that the Plaintiff bring the Action as *Firmarius vel proprietarius*, without shewing any particular Title; and it differs from the Case of Assignment of Tythes, for there he ought to make Title. 2. It was said, That it was not good, Because it is not shewed what was the quantity of every grain in Specie, for here it is incertain, and the Court knowes not how to judge of it: But *non allocatur*. For he shews what the Tythes were worth, and the wrong is supposed by carrying them away, which is sufficient. It was adjudged for the Plaintiff, Mich. 15 Jac in B. R. *Sanders* and *Sanford's* Case. *Cro.* 2. Part, 437, 438.

5. In a Prohibition, the Case was, That an Abbot having a Privilege to be discharged of Tythes, *quamdiu manibus propriis* in 4 E. 4. made a Guift in tail; and 31 H. 8. the Abby was dissolved: The Question was, Whether the Donee of the Issue in tail should be discharged? It seemed to the Court, That he should not be discharged; for the Statute dischargeth none, but as the Abbot was discharged at the time of the Dissolution, so they must claim the Estate and Discharge under the Abbot, since the Statute; So if by a Common Recovery, the Reversion had been barred before or after the Statute. But if the Lord had returned to the Abbot or King before or after the Statute, it had been otherwise. Mich. 16 Jac. in C. B. *Farmer* and *Sheremans* Case, *Hob.* 248.

6. It was moved for a Prohibition to the Spiritual Court, upon a Libell there for Tythe of Underwood, by reason of a Prescription in *Non Decimando* for the Wilde of *Kent*, this Wood growing there: And the reasons alledged for the Prohibition, were, 1. That a whole Country generally may prescribe in *Non Decimando*, in a particular place. And, 2. The Statute of 2 E. 6. in the 8th Proviso, gives life unto this Prescription for this particular place and Precinct. But it was Resolved, That no Prohibition should be granted in this Case. It was agreed, That a whole Country may prescribe in *Non Decimando*. See *Doctor and Student*, 166. but that is with this Proviso, so as there is besides sufficient maintenance for the Parson; otherwise it is not good. 2. It was said, That the Statute of 2 E. 6. helps not at all in this Case. And whereas it hath been said, That the Conquror never Conquered this place; this is but Historicall and Apocryphall, for he was a Conquerour by Composition had. It was also said, It is true, That in former time long since, this place in *Kent* was not Tytheable, because there was no wood there but great Timber-Trees, which were not Tytheable; but these being now cut down, wasted, and destroyed, this place which was not Tytheable before, being now underwood, and converted into Pasture, Tythe shall be there paid; unless the same be within the Proviso of the Statute of Exemption from payment for a time after the Melioration of the same; otherwise Tythes shall be paid presently. It was Resolved, That no Prohibition should be granted in this Case. Mich. 12 Jac. in B. R. *Russell* and *Rathbust's* Case. *Bulst.* 2. Part, 235.

7. Note, by the Justices; If Lands holden of J. S. be given to an Abbot and his Successors, or to any other Corporation; In such case, if the Abbot and all the Convent dye, so as the Body Corporate is dissolved, the Donor shall have the Lands again, and not the Lord by Escheat, because in case of a Body Politique or Corporate, the Fee-simple is vested in them in their Politick Capacity. The principal Case was; A Prescription was laid in Abbot and Covent; and it appeared, That the Body was dissolved, because all the Monks dyed, and the Lands came to Lay-mens hands. And it was Resolved by the Court, That the Prescription now determined, and the parties should pay Tythes in kind. Mich. 11 Jac. in C. B. The Dean and Canons of *Windsor*, and *Wilds* Case. *Godbolt*, 211.

8. The Statute of 18 Eliz. Cap. 6. is, That no Master and Fellowes of a Colledg in *Cambrid.* or *Oxford*, shall make any Lease for life or years of any of their Lands and Tenements, unless a third part at the least, of the Ancient Rent be reserved and payed in Corn for the said Colledge, otherwise the Lease to be void. In an *Ejectione Firmæ* brought of a Lease made of the Rectory of St. *Lawrence* Church in *London*: The Question was, Whether the Lease were void, or not, because Tythes in *London* do not consist of such things, but only in money, according to the Decree concerning Tythes in *London*? It was holden by the Court in this Case, That the Lease was good, notwithstanding the defect in the special Reservation which is limited and appointed by the said Statute. And in that Case, It was said and agreed, That a Lease of a House, Mill, Ferry, were out of the Statute. And it was agreed, That the Statute ought to be intended of Tythes of Common right, and not of such Customary Tythes, as those in *London*; And therefore, If all Parishioners prescribe

ſcribe in *Modo Decimandi*, *ſcil.* to pay a certain ſum of money for all manner of Tythes upon demiſe of ſuch a Rectory, ſuch a Reſervation is not neceſſary; for theſe are Tythes againſt right, and no Tythes are within that Statute, but thoſe which are annuall. Paſch. 26 Eliz. in the Exchequer. *Kemp* and *Hollinghurſt*'s Caſe. *Lenn.* 19, 20.

See more upon theſe Statutes, in *Lib.* 1. Title, *Actions upon Statutes*, and Title, *Tythes*.

Upon the Statute of 5 *Eliz.* Cap. 4. *Of Labourers and Apprentices.*

1. NOte: It was agreed by the Juſtices, That the Juſtices of the Peace ought not to Certifie into the Chancery, their agreement made upon Servants Wages, Six moneths after Eaſter; according to the Statute of 5 Eliz. of *Labourers*; upon a penalty of 10 l. and that by the expreſſe words and meaning of the Statute. 32 Eliz. *Dyer* 265.

2. G. brought a Writ of Errour againſt B; The Caſe was, That B. brought a *Replevin* in the Court of *Ludlow* (which is a Court of Record) againſt G. *tam pro Domina Regina quam pro ſeipſo*, upon the Statute of 4 and 5 *Ph.* and *Mary*, which forbiddeth, That none ſhall Weave Woollen Cloth or Kerſies, if he hath not been an Apprentice, or exercied the Trade, &c. by 7. years, upon pain of forfeiture of ſuch Cloth, or the value of it, the penalty to be recovered by Action, Bill, Plaint, or Information, in any Court of Record, wherein no Eſſoine, Protection, &c. It was aſſigned for Errour, That the breach of the ſaid Act was taken away by the Statute of 5 Eliz. Cap. 4. But it was the Opinion of the Court, That it was not, for that both Acts do ſtand together. And it was ſaid, That a latter Statute in the Affirmative, ſhall not take away a former Act; and the rather, if the former be particular, and the latter general. *Cook* 5. Part, 19. *Gregories* Caſe.

3. The Cuſtome of *London* was alledged to be, That no perſon whatſoever, not being free of the City, ſhall by any colour, way, or means whatſoever directly or indirectly by himſelf, or by any other keep any Shop, or any other place whatſoever inward or outward, to put to ſale any Wares or Merchandizes by way of Retail, or uſe any Trade, Myſtery, or Handicraft, for hire, gain, or ſale, within the City, upon pain of forfeiture for every time 5 l. It was Reſolved in that caſe, That the ſame was good by way of Cuſtome; but it was not good by way of Grant, or Charter made to the City. *Cook* 6. Part, 122. The Caſe of the City of *London*, and *Wagoners* Caſe.

4. The Corporation of the Taylors of *Ipſwich* made an Ordinance, That if any exerciſed the Trade of a Taylor, untill he was preſented before them, and untill they had allowed him to be a Workman, that he ſhould forfeit to them 3 l. 13 s. 4 d. to be levied by Diſtreſſe or Action of Debt. A man who had been an Apprentice unto a Taylor 7. years, according to the Statute of 5 Eliz. was Servant to a Gentleman, and by his commandment made Cloathes in the houſe of his Maſter for his family, before he was allowed to be a Workman by the Company. In this caſe, theſe Points were Reſolved, 1. That by the Common-Law, none could be prohibited to work in any lawfull Trade, becauſe the Law abhorreth Idleneſſe as a matter *omnium vitiorum*. And the Stat. of 5 Eliz. was not made only that Artificers ſhould be skilful; but that young men ſhould not be trained up in Idleneſs. 2. It was Reſolved, That the reſtraint of the Defendant for more then the Stat. of 5 Eliz. had done, was againſt Law; and ſuch Ordinance, That they ought to be preſented to them, was contrary to the Act of 5 Eliz. 3. That the Stat. of 5 Eliz. intendeth the publique uſe of a Trade or Myſtery, and doth not extend to him who is a private Cook, Taylor, &c. in the houſe of any for the uſe of his family; for every one may work in ſuch private manner, although he never had been an Apprentice. *Cook* 11. Part, 54. The Taylors of *Ipſwiches* Caſe. See Paſch. 14 Jac. *Norris* and *Stupps* Caſe. *Hob.* 211.

5. Errour of a Judgment in *Ceveaty*. In an Information upon the Statute of 5 Eliz. for exerciſing the Trade of an Ironmonger, not being Apprentice. After Verdict, and Judgment for the Plaintiff; The Errour aſſigned was, Becauſe Informers cannot ſue upon the Statute to have the moyty; for that by the expreſs words of the Statute, the forfeiture is given to the Corporation, for the benefit of the Corporation for the Relief of the poor and other Uſes of the Corporation. But the Errour was not allowed: For although that Statute gives one moyty to the Informer, and the other to the King, except in Corporate Towns, to whom ſuch forfeitures are granted, It is to be underſtood, and ſo hath always been expounded, That in that caſe the forfeiture given to the King, belongs to the Corporation, and the Informer is to have his part ſtill. The Judgment was affirmed. Trin. 9 Car. in B. R. *Cro.* 1. Part, 230. See Hill. 14 Jac. in C. B. *Dreſſon* and *Barbers* Caſe. *Hob.* 183.

6. An Information was againſt the Defendant, for uſing the Trade of a Goldſmith, upon the Statute of 5 Eliz. not being an Apprentice: The Defendant

Defendant pleaded the Customs of *London*, That one having been an Apprentice for 7. years, and made a Freeman of *London* of any Trade, may use any other Trade in the same City. And shewed, That he was bounden an Apprentice in the Art of a Cordwainer, and served 7. years, and was made free, and so justified. It was excepted to the Plea, because he pleaded *quod uti possit*, any other Trade; and not *quod usus fuit*. But this was Answered, That this being alledged by way of Custome in the City, and not as a particular Prescription, it was good enough: And so seemed to be the Opinion of the Court. 2. Whereas it was Objected, That the matter of Plea was not good, Because a Custome cannot be alledged against a Statute. It was Answered, That that being the Custome of *London*, which Customes are Confirmed by Act of Parliament; it was good enough. But that Point the Court doubted, and therefore it was not Resolved. Hill. 9 Jac. in B. R. The King and *Bagshaws* Case. *Cro.* 1. Part, 253.

7. Note: In the Case last before, Between the King and *Bagshaw*; Issue being afterwards joyned, Whether there was such a Custome as was pleaded? The Recordor of *London* Certified (*Ore tenus*) that there was not any such Custome generally; for he said, That the Custome is not, That one brought up as an Apprentice in the Trade of a Goldsmith, Taylor, &c. being a Freeman of *London*, by colour thereof may use any Trade: But one of a Trade who useth buying and selling, may exercise another Trade of buying and selling. *Cro.* 1. Part, 253.

8. In Debt upon an Obligation taken of the Defendant, being an Apprentice, to deliver up a just and true Account of all such Wares to him to Merchandize withall. The Defendant demurred upon the Declaration, and set forth the Statute of 8 Eliz. cap. 4. That all Indentures, Covenants, Promises, and Bargains, of, or for the having, taking, or keeping of any Apprentice, should be void, and that the Bond here was so taken of the Defendant. It was the Opinion of the Court in this Case, That Bonds taken for Service, were void by the Statute: And here the contract to make him his Apprentice, is void by the Statute. But this Bond is not for the retaining, nor for the having of him as an Apprentice. But as to the Wares to him delivered, the Bond is here taken of him to render a just account of these. And this is a good Bond, and out of the Statute, both out of the words, and out of the intent of the Statute. Pasc. 14 Jac. in B. R. *Bennet* and *Belfields* Case. *Bulst.* 3. Part, 179.

9. Covenant against an Apprentice for departing from his Service. The Defendant pleaded, That at the time of the making of the Indenture, he was within age. It was thereupon demurred: And it was said, That the Indenture should bind him, because it was for his advantage to be instructed in a Trade; also by the Statute of 5 Eliz. he is compellable to be bound out as an Apprentice. But it was Resolved, That although an Enfant may voluntarily bind himself an Apprentice; and if he continue an Apprentice for 7 years, he may have the benefit and use of his Trade: Yet neither at the Common Law, nor by any words of the Statute of 5 Eliz. a Covenant or an Obligation of an Enfant for his Apprentiship, shall bind him; but if he mis-behaveth himself, the Master may correct him in his Service, or complain to a Justice of Peace to have him punished, but no remedy lyeth against the Enfant upon his Covenant. It was adjudged for the Defendant. Trin. 4 Car. in B. R. *Gilbert* and *Fletchers* Case. *Cro.* 1. Part, 119.

10. An Information was brought upon the Statute of 5 Eliz. cap. 4. for using of the Trade of an Upholster, in which he was not brought up. The Defendant pleaded the Customs of *London*, and that he was a Freeman, and so enabled to use any Trade, and that the said Customs was confirmed, *per regem in Parliamento*. The Court was clear of Opinion against the Informer, That the Custome as the same was alledged, was good, although ill pleaded. But yet however, the Court inclined to be of Opinion, That an Upholster was not a Trade within the Restraint of the Statute of 5 Eliz. no more then a Brewer or a Pippin-monger. But no judgment was given in the Case, but the matter ended by composition. Trin. 11 Jac. in B. R. The King, *Allen*, and *Todeys* Case. *Bulst.* 2. Part, 187.

11. Information in the Exchequer for using the Trade of a Brewer contrary to the Statute of 5 Eliz. cap. 4. of Apprentices not having been brought up seven years an Apprentice. It was Objected, That the Art of a Brewer is not within the Statute. And 2. That by the Statute of 31 Eliz. that the Offence is punishable only in the Sessions of the Peace. But it was adjudged, That a Brewer is within the Statute. And for the second point, That the Statute of 31 Eliz. cap. 5. is not in the Negative; and this being a Suit for the King, this is a proper Court for him, and the Information is maintainable here. Mich. 4 Jac. in the Exchequer, *Sheyle* and *Taylors* Case. *Cro.* 1. Part, 176.

Upon

Upon the Statutes of 13 Eliz. cap. 5. And 27 Eliz. Cap. 4. *Of fraudulent Guifts, Deeds, and Conveyances.*

1. A. is endebted to B. in 100 l. and to C. in 100 l. C. brings Debt against A. A. in secret makes a general gift by Deed to B. of all his goods in satisfaction of his Debt, and notwithstanding, kept possession of the goods. C. recovered against A. and had Judgment, and a *Scire facias* was awarded to the Sheriff, who comming to do Execution upon the goods, B. made a Rescous, and affirmed the gift of the goods to him to be good. It was adjudged in this Case, That the gift was fraudulent, and within the Statute of 13 Eliz. for here were all the badges of fraud. 1. It was general, without exception of things necessary. 2. The giver continued the possession of the goods after the gift. 3. The gift was secret and not sealed nor delivered before his Neighbours. 4. It was pendant the Suit. 5. In this Case, it was Resolved, That although it be a true Debt, and the consideration true; Yet it was not good, because it was not made *bona fide*. And it was said and Ruled, That an a gift made upon a good consideration, unless it be *bona fide*, is not within the Proviso of the Statute; so a gift made *bona fide*, unless it be upon good consideration, is not within the Statute; but it ought to be both upon good consideration, and *bona fide*. *Cook* 3. Part, 84. *Twines* Case.

2. A man conveyed Land to the use of himself for life, and after to the use of divers of his blood, with a power of Revocation, as after such a Feast, and afterwards and before the power of Revocation began, he for valuable consideration, Bargained and Sold the Land to one and his Heirs. It was adjudged in this Case, That this Bargain and Sale was within the remedy of the Statute of 27 Eliz. Of fraudulent Conveyances; for the Act wills not that such a voluntary Conveyance, originally subject to a power of Revocation, should stand against a Purchasor *bona fide*, for valuable consideration. Mich. 43 Eliz. in B. R. *Standen* and *Bullocks* Case.

3. Debt was brought against the Son and Heir upon an Obligation made by his Father. The Defendant pleaded, Nothing by Discent. It was found, That before the Suit began, the Defendant had made a Feoffment in Fee to defraud the Plaintiff of his Action, but this fraud was not pleaded. It was Resolved in this Case, That the fraud might be given in Evidence, and it needed not that the Statute of 13 Eliz. cap. 5. Of fraudulent gifts, he pleaded, because that the Act saith, That the Estate as to the Creditor should be void, and the Act shall be favourably construed against fraudulent Conveyances; and it would be mischievous to enforce a stranger to the Feoffment to plead the certainty of the Feoffment, especially the same being made by fraud, which is so secretly contrived, that it cannot be discovered. *Cook* 5. Part, 60. *Goodes* Case.

4. In Debt against an Administrator of J. S. the Case was, J. S. for 20 l. paid by the Plaintiff the ninth of *Feb.* 2 Car. Granted all his goods mentioned in a Schedule annexed to the Deed, and gave possession of them by a Pewter dish, with a Covenant, that he, his Administrators, &c. should solely keep them, and deliver them to the Plaintiff upon his demand, and bound himself in 40 l. to the Plaintiff to perform that Covenant. The Intestate dyed, the Plaintiff demanded the goods of the Administrator, who would not deliver them: Whereupon the Plaintiff brought his Action, and in his Declaration shewed in *specie* what goods were contained in the Schedule. The Defendant pleaded the Statute of 13 Eliz. of Fraudulent Gifts, and said, That J. S. the Intestate, 2. *Feb.* 2 Jac. was endebted to divers in several sums, and set forth the persons and sums amounting to 100 l. and 19. *Feb.* made the Deed of gift above mentioned, being then of them and other goods possessed, to the value of 80 l. and no more; and that it was made of fraud and Covin betwixt J. S. and the Plaintiff to defraud his Creditors, and that J. S. notwithstanding the gift, occupied all the goods during his life, and that after his death, Administration was committed to the Defendant. The Plaintiff replyed, That the Defendant had Assets in his hands, and that the gift was made upon good consideration. Upon which it was demurred, and the demurrer was adjudged to be good for these Causes. 1. Because the Defendant hath not averred that the Debts due to the Creditors, were unpaid. 2. Because he did not shew that the Debts due to the Creditors were by Specialties. 3. Because the Defendant supposed it would be a *Devastavit* in him, which would not be so, for that the goods in the Plaintiffs hands, would be lyable to the Creditors. 4. The Defendant is not such a person as is enabled by the Statute to plead that Plea, for that the Statute makes the Deed void as against the Creditors

Creditors, but not againſt the party himſelf, his Executors or Adminiſtrators. It was adjudged for the Plaintiff. Hill. 8 Jac. in B.R. *Hawes* and *Leaders* Caſe. *Cro.* 2. Part, 270.

5. Note, upon the Stat. 27 El. of fraudulent Conveyances. It was adjudged, That where one after Marriage voluntarily aſſigned a Leaſe for years *quaſi* in Joynture for his Wife, and took the profits, and afterwards ſold it to one who had no notice of this Conveyance, That this was within the Statute although at firſt it was not made upon truſt to be revoked, nor any clauſe of recompence therein, becauſe it was a voluntary Conveyance at firſt which ſhall be intended fraudulent. But if at the time of the Marriage, or after, by reaſon of a Portion given by his Wives friends in recompence thereof, and for a Proviſion for the maintenance of the Wife, he had made an Aſſignment of ſuch a Leaſe, and had afterwards taken the profits, and then had ſold the Term, it had not bin within the Statute. Paſc. 5 Jac. *Colvile* and *Parker's* Caſe. *Cro.* 2. Part, 258.

6. In Treſpaſs, the Jury found a Special Verdict to this effect. A. ſeiſed of Lands in Fee holden of J. L. as of his Manner of H. by Fealty and Rent, and rendring the Beaſt after every Tenant in Feeſimple by Deed, in conſideration of paternal love to his Son and Heir apparant, and in conſideration of a Marriage between his Son and B. and for the advancement of his Son, enfeoffed his Son and Heir apparant of the ſaid Land; and afterwards the Son, to the intent that B. ſhould not be endowed of thoſe Lands during the life of the Father, re-demiſed the Land to the Father for 40 years, if he ſhould ſo long live: Afterwards the Marriage took effect. The Son did ſuit at the Lords Court, and after the Feoffment, the Father paid the Rent to the Lord, and after the Father dyed, and the Lord took the beſt Beaſt for a Heriot after the death of the Father: And the Jury found the Statute of 13 Eliz. of Fraudulent Conveyances. It was Reſolved in this Caſe, 1. Becauſe that no fraud was found by the Jurors, the Court ſhall not adjudg the ſaid Feoffment fraudulent. And although the Jury have found Circumſtances to incite the Jurors to find a fraud, yet the ſame is but Evidence to the Jurors, and not any matter upon which the Court could judg the ſame to be fraud. 2. The Jurors have not found, That the Feoffment was made to defraud the Lord of his Heriot, and ſo they have not found the ſame to be within the Statute of 13 Eliz. 3. The Feoffment being found to be made in conſideration of Marriage, and to that particular intent concerning the Dower of the Wife of the Son, the ſame ſhall not by conſtruction of Law extend to any other intent. As the Caſe 10 El. in the Court of Wards. Tenant in *Capite*, his Heir within age, and endebted to many, enfeoffed divers upon Condition, that when he or his Heirs ſhould pay to the Feoffees 30 l. that then they ſhould make ſuch Feoffments to ſuch uſes as he or his Heirs ſhould limit, or otherwiſe the Feoffment ſhould be void. And it was found, *Quod nulla alia Cauſa intentio aut colluſio ad defraudandum regem, &c. de Cuſtodia hæred. aut terrarum*; and although that the Feoffment was found to be by fraud and Covin, which is illegal; yet becauſe the fraud was to a particular intent, *ſcil.* to defraud Creditors, It ſhall not be extended to another intent, *ſcil.* to defraud the King of his Ward. Trin. 10 Jac. in C. B. *Tyer* and *Littletons* Caſe, vouched in the Chancellor of *Oxfords* Caſe. *Cook* 10. Part, See *Brownl.* 2. Part, 187, 188. the ſame Caſe.

7. In an *Ejectione firmæ*, the Caſe was, Grandfather, Father, and Son; the Grandfather upon Marriage of the Father, made the Fathers Wife a Joynture; and at this time Covenanted to Demiſe the Tenements in which, to the Father; and accordingly the Grandfather by Indenture Demiſed the moyety of the Tenements in which, &c. to the Father, to begin after the death of the Grandfather for 1000 years, and of the other moyety for 1000 years, to begin at a day to come. In both which Demiſes were Proviſoes, That if the Father ſhould dye without Iſſue, or if he ſhall make any Leaſe upon which the ancient rent ſhall not be reſerved, that the ſaid Leaſes made to the Father ſhould be void. The Father afterwards aſſigned over the ſaid Leaſes to the uſe of R. his Son an Infant to the end they might not be drowned by Diſcent of the Reverſion, and with an intent that the Infant ſhould pay his Debts. The Grandfather ſhortly after dyed: After the death of the Grandfather, the Father for valuable conſideration, by Deed enrolled, Bargained and Sold the Lands to J.S. and J.D. and their Heirs. It was Reſolved in this Caſe, 1. That the Vendees who came in upon a valuable conſideration, ſhould avoid the ſaid Leaſe by the Statute of 27 Eliz. cap. 4. And in that Caſe it was ſaid, That it is not needfull that he who ſells the Land, be he who makes the fraudulent Conveyance, but be the Eſtate fraudulent, whoever ſells the Lands, the Purchaſor ſhall avoid ſuch fraudulent Eſtate made. 2. Reſolved, That in the principal Caſe, although that the Father had not the Inheritance of the Land at the time of the Aſſignment of his Leaſe (being made to him fraudulently by the Grandfather) but all the Eſtate of Inheritance was in the Grandfather, yet when the Grandfather dyed, and the Father ſold the Land, his Vendee ſhould avoid the ſaid Leaſe by the Statute of 27 El. cap. 4. *Cook* 6. Part, 72, 73. *Lawnds* Caſe.

Upon

Upon the Statute of 13 Eliz. cap. 7.
Of Bankrupts.

1. A Man is endebted to A. and B. in 100 l. and afterwards becomes a Bankrupt. A Commiſſion is awarded under the Great Seal according to the Statute of 13 Eliz. cap. 7. to C. and D. to make Sale of the goods to the Creditors, afterwards the Bankrupt gives all his goods to another Creditor for payment of his Debt; and afterwards the Commiſſioners ſell the goods joyntly. It was adjudged in this Caſe, That the Sale of the Commiſſioners was good, and according to the Statute, for the intention of the Statute was to relieve the Creditors equally, and that there be an equal proportion obſerved in the diſtribution of the goods to the Creditors. And it was holden, That after the Commiſſion, the Bankrupt himſelf cannot make any diſtribution of any of his goods to any Creditors; and therefore notwithſtanding his delivery of goods, the ſale by the Commiſſioners is good. 2. It was Reſolved, That the Sale was good made without Deed enrolled by the expreſs words of the Statute itſelf, and ſo the Sale had bin good, although they had not ſeen the goods, for that is referred to their diſcretions. But it was agreed, That the Commiſſioners ought to make ſeveral diſtributions to the ſeveral Creditors, and not a joynt Sale, but that is to be intended, when the Debts are ſeveral; but in the principal Caſe, it was a joynt Debt. *Cook* 2. Part, 25, 26. the Caſe of Bankrupts.

2. Upon the Statute of Bankrupts, this Caſe was moved to the Court, If a Bankrupt be endebted to one in 200 l. and to another in 10 l. and he hath a Debt due to him by Bond of 20 l. whether the Commiſſioners may aſſign this Bond to the two Creditors joyntly, or whether they muſt divide it, and aſſign 20 Marks to one, and 20 Nobles to the other. The Court was of Opinion, That it was ſo to be divided as the words of the Statute are, viz. to every Creditor a portion, rate and rate like, &c. Then it was moved how they might ſue the Bond, Whether they might joyn in ſuit or not. *Et quod non fuit reſponſum.* But *Warburton* Juſtice ſaid, That when part of a Bond is aſſigned to one, and part to another, that now the Act of Parliament doth operate upon it, and therefore they ſhall have ſeverally. For he ſaid, That by the Cuſtome of *London* part of a Debt might be attached, therefore he conceived part might be ſued. Trin. 10 Jac. in C. B. *Godbolt* 195.

3. In Treſpaſs, a Verdict was for the Plaintiff, and Damnages aſſeſſed, &c. Execution is ſued forth by a *Capias ad ſatisfaciendum*, and afterwards the money was levyed by the Sheriff; the Plaintiff became a Bankrupt, and by the Commiſſioners of Bankrupts, the damages, &c. recovered, was aſſigned to A. and B. Creditors and others. The Sheriff brought the money in Court; the Plaintiff who recovered, prayed that the money might be delivered to him, and the Creditors pray it may be delivered to them according to the Aſſignment of the Commiſſioners. It was the Opinion of the Court in this Caſe, That the money in the Sheriffs hand was not aſſignable, although by the Judgment the damages and Coſts were certained and turned into *rem judicatam*. Yet the Aſſignation therein being as the money of the Plaintiff who was a Bankrupt, which was not his money untill it were paid unto him out of the Court. It was in the hands of the Sheriff *quaſi in Cuſtodia legis*; and ſo much the ſtronger in this Caſe, becauſe it was upon a *Capias ad ſatisfaciendum*, and the money paid to the Sheriff to ſatisfy the Execution, ſo as it is not due to the Plaintiff untill it be paid unto him, and none may give a diſcharge thereof but the Plaintiff who is party to the Record. Mich. 5 Car. in B.R. *Robſon* and *Flowers* Caſe. *Cro.* 1. Part, 119, 126.

4. In Treſpaſs, upon Not Guilty, It was found, That the Land in Queſtion was Copyhold of Inheritance of the Manour of C. whereof one A. Husband of the Defendant was ſeiſed in Fee; within which Manour the Cuſtome is, That if a Copyholder in Fee ſeiſed of a Copyhold dyeth, having a Wife at the time of his death ſurviving him, that ſhe ſhall have and hold the Copyhold during her life, and for 12 years after, and found the Statute of 13 Eliz. of Bankrupts. And that upon a Commiſſion to enquire upon the complaint of Creditors. It was found, That A. the Husband was a Bankrupt, and ſo adjudged him; and it being found that he was ſeiſed in Fee of the ſaid Copyhold, they Bargained and ſold the ſaid Copyhold to the Plaintiff and other Creditors for 600 l. And they find, That by an Act of Parliament 1 Car. the Cuſtoms of the Manour are eſtabliſhed; and that the Wife at a Court holden *April* the 12th. It was found that ſhe ſurvived her Husband, and ſo ought to enjoy the Copyhold during her life, and for 12 years after; and that before the Admiſſion of the Plaintiff and the other Creditors, the Wife was admitted Tenant, *ſecundum Conſuetudinem Manerii prædict.* The points in the Caſe, were firſt, Whether by the

Bargain and Sale by the Commiſſioners, the eſtate of the Copyholder was veſted in the Bargainee before admittance by the Lord, ſo as the ſaid A. did not dye Tenant, and is not within the Cuſtome, that his Wife ought to have a Widdows Eſtate. 2. Admitting he did dye Tenant, and the Widdow had ſuch an Eſtate veſted in her. Whether the Vendees by force of the Bargain and Sale ſhall not afterwards deveſt the Eſtate of the Wife by relation. It was Reſolved in this Caſe, That the Bargain and Sale did bind the Copyholder and his Eſtate, and that he is no Copyholder after the Bargain and Sale enrolled, and the Bargainee is only barred to take the profits, till compoſition with the Lord. 2. That when the Bargainee is admitted by the Lord, it ſhall veſt in the Bargainee, and ſhall have relation to the Bargain and Sale, and ſhall deveſt the Eſtate which the Wife claimeth by the Cuſtome. 3. Reſolved in this Caſe, The Husband did not dye Copyhold-Tenant; and the Wife ought to be the Wife of a Tenant. Wherefore it was agreed, That Judgment ſhould be given for the Plaintiff, which was done accordingly. H.11. 13 Car. in B. R. *Parker* and *Bletke's* Caſe. *Cro.* 1. Part, 410, 411.

5. Upon the four Statutes of Bankrupts, viz. 34 H. 8. 13 Eliz. 1. and 21 Jac. the Caſe was this, A. 9 Jac. purchaſed a Copyhold to him and his Son for their lives, the Remainder to his Wife in Fee. In 11 Jac. he became an Inholder, and about 12 years after, a Commiſſion of Bankrupt was ſued out againſt him, and the Copyhold was ſold by the Commiſſioners to the Defendant. A. dyed, and his ſon entred and made a Leaſe to the Plaintiff, the Defendant entred upon him, upon which the Action was brought. There were divers points in this Caſe. 1. Whether an Inholder may be a Bankrupt within theſe Statutes. It was Reſolved by all the Juſtices as to that point, That an Inholder *quatenus* an Inholder, is not within theſe Statutes, becauſe an Inholder doth not live by buying and ſelling, for he doth not ſell any thing but utter it. He that ſells any thing, doth it by way of Contract, but an Inholder doth not contract with his Gueſts, but provides for them, and cannot take unreaſonable rates, as he who ſells may; and if he doth, he may be endicted of Extortion, which the ſeller cannot: And where the Statutes ſay, *Get their Livings by Buying and Selling*, that it ought to be for the greater part of their living thereby. And if a Gent. buy and ſell Land, he is not within the Statute, for it ought to be taken thoſe that buy and ſell perſonal things. The ſecond point was, Whether Copyholders were within the Statutes of 13 El. and 1 Jac. It was Reſolved, That it was within the ſaid Statutes, and that the Statutes ſhall be conſtrued moſt Beneficial for the Creditors. The third point, That A. being no Inholder at the time of the Purchaſe, and afterwards becomming an Inholder, Whether he was within the Statute of 13 Eliz. It was Reſolved by the Juſtices, That he was not; Not within the words of the Statute, which are (*If the Offender purchaſe*), and here he was not an Offender at the time of the purchaſe; beſides, here the Son ſhould be puniſhed for the Offence of the Father, which is not to be by the Law of God, and he ought to be indebted at the time, and he might give away his goods before he was in debt. And in this Caſe, it was ſaid, That the thing which makes him an Offender, is his intent to defraud his Creditors, and that doth not appear in this Caſe. It was adjudged for the Plaintiff againſt the Defendant, That he was not a Bankrupt within the Statute, and that the purchaſe was well made, and not to be avoided. Trin. 15 Car. in B.R. *Crisp* and *Pratt's* Caſe. *Marſh.* 34, to 37. See *Cro.* 1. Part, 195. the ſame Caſe.

6. A Commiſſion was ſued forth by ſome of the Creditors of the Bankrupt, and they purſued it, and his Lands were ſold; and afterwards other Creditors who would neither partake with, nor aid the former, prayed that they might be joyned with them. It was Reſolved in this Caſe. 1. That the Commiſſioners may ſell and prepare for diſtribution preſently upon the Execution of the Commiſſion; but untill the four Moneths paſt, they may not proceed to make Diſtribution. 2. Reſolved, That the offer in this Caſe of the Creditors to be joyned, was not an effectual offer, without offering to be contributary to the Charge; but to offer any particular ſum, it was not neceſſary. And their words, viz. *For the Charge of the Commiſſion*, is to be extended to all Charges ariſing in ſuing forth of the Commiſſion, and in Execution and diſpence thereof. 3. Reſolved, That at any time before diſtribution, the Creditors may come and pray to be joyned, but after the four Moneths paſt, and diſtribution made, they come too late; for ſo the diſtribution might be made void. Tr. 17 Jac. in B.R. *Ruyles* Caſe. *Hutton* 37, 38. See *Hob.* 287. the ſame Caſe.

Upon

Upon the Statutes *Of Uſury*, 13 *Eliz. Cap.* 8. And other Statutes.

1. IN a *Scire facias* brought to execute a Judgement, The Defendant pleaded, That he borrowed of the Plaintiff 100 l. to give him 120 l. for the Loan thereof for a year; and the Plaintiff for his Aſſurance, would have the Defendant confeſs this Judgment of 120 l. and ſo he pleaded the Statute of Uſury in Bar of the *Scire facias*; Upon which the Plaintiff demurred: The words of the Statute of Uſury are, All Bonds, Contracts, and Aſſurances collateral, or other, &c. ſhall be void. The whole Court was of Opinion, That this was no Plea to defeat the Judgment; for here the Judgment may not be ſaid any Aſſurance for the money, but it is a Judgment upon the Aſſurance: And, if ſuch matter had been, the Defendant ought to have pleaded, That upon the firſt Action in Bar, and not to ſuffer the Judgment. It was adjudged, That the Plaintiff ſhould recover. Hill. 43 Eliz. in C.B. *Goldeſb.* 128.

2. In Debt for 120 l. upon a Bond; The Caſe was, W. was Indebted to one A. in 100 l. upon an Uſurious Contract; And A. was indebted to E. in 100 l. for which W. and A. were bound to E. and Debt being brought upon that Obligation, W. pleaded the Uſury between him and A. to void the Bond; E. the Plaintiff replyed, That A. before the making of the Bond, was indebted to him 100 l. a juſt debt, for the which W. and A. were bound to him in the Bond put in Suit; and that he was not any ways knowing of the Uſury between W. and A. upon which the Defendants did demur. It was adjudged for the Plaintiff; for it is not Uſury in the Plaintiff, but only between W. and A. to which the Plaintiff not being privie, he ſhall not be prejudiced; for although the Statute of Uſury is to be taken ſtrongly for the ſuppreſſing of Uſury, yet it muſt be betwixt ſuch perſons as uſe corruption, and not to puniſh the innocent, as the Plaintiff is; but if no debt had been due to the Plaintiff before, then clearly it had been Uſury, for there had been no lawful cauſe to make the Bond to him, but only to countenance the Corruption between W. and A. Trin. 2 Jac. in B.R. *Ellis* and *Warnes* Caſe. *Brownlow* 1. Pa. 63.

3. In Debt upon an Obligation, the Caſe was, J. S. lent 100 l. for a year, and at the end of ſix months, took 5 l. for the Intereſt of it: It was ſaid, That it was not Uſury within the Statute, becauſe it was not above 10 l. for the 100 l. But it was the Opinion of all the Juſtices of *England*, That it was Uſury; And they ſaid, That this is not like the Caſe of Mortgage, for the Statute which allows the Mortgage, ought of neceſſity to allow the profits to be taken as they do naturally ariſe; but here where 100 l. is lent for a year, the Statute intends, That the profit and increaſe of the 100 l. ought not to be taken till the end of the year; for if the 5 l. Intereſt be received at the end of the ſix months, then he to whom the 100 l. is lent, hath not the uſe and profit but of 95 l. for the whole year; and the Statute is to be taken ſtrict, as to the offender, and largely in the puniſhment of Uſury. It was adjudged againſt the Plaintiff. Mich. 45 Eliz. in B.R. *Barnes* and *Winlaſes* Caſe. *Yelv.* 30, 31.

4. In a Replevin, the Defendant avowed for the Rent of 20 l. The Plaintiff in the Avowry alledged the Statute, and that A. did lend to B. 100 l. and that B. granted to A. and his heirs, an annual Rent of 20 l. upon condition, That if the ſaid B. paid to A. at ſuch a day the 100 l. that then the Rent ſhould ceaſe; B. received the money, and granted the Rent upon ſuch condition; and for Rent arrear, he diſtrained, and avowed. It was in this Caſe adjudged for the Avowant; for it appears, That the ſame was not a corrupt Bargain, within the Statute of 13 Eliz. of Uſury; becauſe that nothing was to be paid until the day; and if the 100 l. had been paid at the day, the Rent ſhould ceaſe, without paying any thing for it: And therefore it was the Opinion of the Court, That it was a clear Bargain, and a purchaſe conditional of ſuch a Rent, and no Uſury within the Statute. Mich. 34 Eliz. in B. R. *Cook* 5. Part, 70. *Burtons* Caſe.

5. In Debt upon an Obligation, The Caſe was, A. requeſted B. to lend him 30 l. and upon communication betwixt them, B. lent him the money 6 Decemb. 34 Eliz. until the ſecond of June next following, to pay to him for the principal and Intereſt of it 33 l. the ſaid ſecond of June, if the ſon of the Obligee was then alive; and if he dyed before that day, that he pay to him but 27 l. It was Reſolved in this Caſe, That it was an Uſurious Contract, within the Statute of 13 Eliz. for if the Original Contract be uſurious, no ſhadow will ſerve to make it good. Paſch. 37 Eliz. in C. B. *Cook* 5. Part, 71. *Clerkes* Caſe.

6. Debt upon an Obligation, The Defendant pleaded the Statute of Uſury, and ſhewed, That a

Ship went to Fish in *New found-land* (which Voyage might be performed in eight moneths) and that the Plaintiff delivered 50 l. to the Defendant, to pay 60 l. upon the return of the Ship to D; and if the said Ship by occasion of Leakage or Tempest should not return from *New found land* to D. then the Defendant should pay the principal money, viz. 50 l. only; and if the Ship never returned, he should pay nothing. In this Case, it was Resolved, Not to be Usury within the Statute; for if the Ship had stayed at *New-found land* two or three years, he should have paid at the return of the Ship, but 60 l. and if it never returned, then nothing, so as the Plaintiff ran a hazard of having less than the Interest which the Law allows. Pasch. 6 Jac. in B. R. *Sharpley* and *Harretts* Case. *Cro.* 1. Part, 208, 209.

7. Debt upon an Obligation, conditioned to pay 20 l. *per annum*, during the lives of the Plaintiffs wife and son: The Defendant pleaded the Statute of Usury, and how that he came to the Plaintiff to borrow of him 120 l. according to the rate of 10 l. for 100 l. who refused to lend the same, but corruptly offered to deliver 120 l. to him, if he would be bounden to pay 20 l. *per annum* during his, and the Plaintiffs wifes and sons lives; whereupon he entred into such Bond for the security of the payment of the 20 l. *per annum* which is above the rate of 10 l. *per cent.* It was Resolved in this Case, That this being an absolute bargain, in consideration of the payment of the 20 l. *per annum*, during two lives, and no longer, and no agreement to have the principal money, was out of the Statutes of Usury. But if there had been any provision for there payment of the Principal, although not expressed within the Bond, it had been an usurious agreement and lending within the Statute. Mich. 7 Jac. in B. R. *Fountain* and *Grimes* Case. *Cro.* 1. Part, 253.

8. In Trespass for breaking his Close, The Case upon special Verdict was, A. was seized of the Close, &c. And it was agreed, That one M. should lend unto him 150 l. for security of repayment of which, A. Leased the Close to M. for 60 years, to begin at the end of two years, upon condition, that if he paid the 150 l. at the end of the two years, the Lease to be void: It was agreed, That for the deferring and giving day of payment for the said two years, A. should pay to M. for Interest, yearly 22 l. 10 s. quarterly, if M. should so long live: M. lent the 150 l. A. made the Lease, and granted by Fine to M. the rent of 22 l. 10 s. to be paid quarterly, if M. so long lived: Afterwards A. conveyed the Inheritance to the Plaintiff, the 150 l. was not paid, M. took the Defendant to Husband, who entred for not payment: There was several Questions in this Case. 1. If it was an usurious Contract, because it was a casual Bargain. It was Resolved, That it was an usurious Contract; for by intendment, M. might live above two years, and it is apparent, that she should receive that consideration, whereby she is within the Statute. 2. If this Lease being taken for the payment of the principal money, and not for the Interest, be within the Statute: Resolved, it was; because it is for security of money lent upon Interest, and for securing of that which the Statute intended M. should lose. 3. It was Objected against the Verdict, because it is not found, *Quod corruptum agreamentum fuit*, to draw her to be an Offender within the Statute. It was Resolved, That if the corrupt agreement be not expressed in the Verdict, and the matter is apparent to the Court to be Usury, there the Jury need not to shew, that it was corruptly; for *res ipsa loquitur*. Trin. 14 Jac. in B. R. *Roberts* and *Thompsons* Case. *Cro.* 2. Part, 507.

Upon the Statute of 13 Eliz. cap. 10. and 14 Eliz. cap. 11. *Touching Leases made of their Benefices by Parsons, &c.*

1. A Parson made a Lease by Indenture for 11 years; and covenanted to suffer the Lessee and his Assigns, to enjoy the Lands for 11 years, and that he would not do any act by which the Benefice should be void, and that one A. Farmer of part of the Tythes, should pay 8 l. yearly, for seven years, and he was bounden to perform that Covenants. In an Action of Debt brought upon the Bond, he pleaded performance of the Covenants, *ex parte sua perimplend. tenend.* until 20 Eliz. at which time he himself was absent by the space of 80 days, but spake nothing of the Statute of 13 Eliz. cap. 17. or 14 Eliz. cap. 11. And as to the Covenant, in the Negative, he said nothing, as he ought to have done. It was the Opinion of the Justices, That there needed not an express mention, that the Fermor paid the 8 l. for that they said, it was implyed in the words, in *ex parte sua perimplend. tenend.* And see, That it is a *Quære*, if the Covenants and Obligation were void *ab initio* by the Statute of 14 Eliz. cap. 11. Mich. 23 Eliz. *Dyer*, 372, 373.

2. The President and Scholars of *Corpus Christi* Colledge in *Oxford*, made a Lease for years, Provided

Proviſo, That the Leſſee, nor his Aſſignees, ſhould not alien to any perſon or perſons, without ſpecial licence of the Leſſors; and afterwards, they by their Deed, gave Licence to the Leſſee to alien or demiſe the Land, to any perſon or perſons whatſoever; the Leſſee alienes his Term to J. S. who by his Will deviſed the ſame to his ſon, the Leſſors by their Attorney entred for the Condition broken. In this Caſe it was Reſolved, That the alienation by the licence to J. S. had deſtroyed the Condition, ſo as no alienation after might give cauſe to the Leſſors to enter for the Condition broken; for the Leſſors could not diſpenſe with the Condition in part, but they did diſpenſe with all alienations after to be made. 2. It was Reſolved in this Caſe, That the Statute of 13 Eliz. concerning Leaſes made by Deans and Chapters, was a general Law, of which the Court ought to take notice, although the ſame be not pleaded. *Cook* 4. Part, 120. *Dumpers* Caſe.

3. Note, It was Reſolved in Parliament, That Leaſes made to the Queen by Colledges, Deans and Chapters, Guardians of Hoſpitals, or any other, having Spiritual and Eccleſiaſtical Juriſdictions and Livings, againſt the Proviſion of the Statute of 13 Eliz. cap. 10. Of Leaſes, were reſtrained by the ſame Act, as well as Leaſes made to Common perſons. And 2. It was Reſolved, That the general words of the Statute of 18. had not enabled Eccleſiaſtical perſons to make Leaſes, or Eſtates to the King, which by the Statute of 13 Eliz. were reſtrained; and, That the King being the Head of the Commonwealth, could not be an inſtrument to defeat, or deſtroy an Act of Parliament, which was made for the good of the Commonwealth. *Cook* 4. Part, 15. The Caſe of Eccleſiaſtical perſons.

4. A Parſon 9 Eliz. demiſed his Rectory to the Patron for 50 years, who 14 Eliz. by Deed aſſigned it over: The Biſhop confirmed the Leaſe 17 Eliz. in the life of the Leſſor. It was Reſolved in this Caſe, That becauſe the Leaſe was made before the Statute of 13 Eliz. and ſo not within the Act, the Confirmation after the ſaid Act, to preſent the ſaid Leaſe was not within the privacie, or the Intention of the Act. 2. Reſolved, That the Grant over by the Patron, imported in it ſelf, as well a Grant of the Term, as a Confirmation of the Term it ſelf; and ſo a Deed of one and the ſame thing, by one and the ſame perſon, to one and the ſame perſon, and at one and the ſame time, did enure to divers purpoſes, as to a Grant of his Intereſt, and a Confirmation of the ſame Intereſt, 17 Eliz. in *Scaccario*. *Hodges* and *Newcomb's* Caſe.

5. The Maſter and Fellows of *Magdalen* Colledge, after the Statute of 13 Eliz. by Indenture Enrolled, conveyed a Houſe, parcel of the poſſeſſions of their Colledge, to the Queen in Fee, rendring Rent at the Feaſt of Mich. with clauſe of Diſtreſs; Proviſo, That the Queen convey the ſame to J. D. in Fee: The Queen by her Letters Patents, conveyed the ſame to J. D. according to the Proviſo: J. D. levyed a Fine, with Proclamations of it; the Maſter dyed, the Succeſſor accepted the Rent of the Conuſee, and made an Acquittance under his Hand and Seal, and after, the Maſter dyed. In this Caſe (amongſt others) theſe points were Reſolved. 1. That the Maſters and Fellows were reſtrained by the Act of 13 Eliz. to convey any of their poſſeſſions to the King, although the King was not expreſſly named in the Act. 2. Reſolved, That the King ſhall not be exempted out of general Acts of Parliament, made for the ſuppreſſing of wrongs, *viz.* Dilapidations, and Diminution of Spiritual Livings, and the Statute of 13 Eliz. was made to that purpoſe. 3. Reſolved, That the King is within the words of the ſaid Act, *viz.* Perſon or perſons; and the ſaid Act is *Actus remedialis*, for it was neceſſary to provide ſuch a remedy for the publique good of the whole Eccleſiaſtical State; alſo, it is an Act of Preſervation, to preſerve the poſſeſſions of Colledges, Hoſpitals, &c. and therefore the King is bound by it. 4. Reſolved, That by the Act of 13 Eliz. the Maſter and Fellows are diſabled to Grant; and then the King cannot take from them who are diſabled to Grant; but yet, that ſuch a Diſability was not *ſimpliciter*, but *ſecundum quid*; for that the Maſter and Fellows who made the Grant, ſhould not avoid ſuch a Grant, but it might be avoided by their Succeſſor. 5. Reſolved, That if this Conditional Grant to the King ſhould be good, the King who is the Fountain of Juſtice, *Medicus Regni*, *Pater Patriæ*, *Sponſus Regni*, ſhould be an Inſtrument of doing wrong and injuſtice; and the Law will never make ſuch a conſtruction of an Act of Parliament, to advance the private good of any man, and to take away the good of the Commonwealth. 6. It was Reſolved, That the Statute of 18 Eliz. cap. 2. had not given any vigour or effect to the ſaid Grant made to the Queen; becauſe ſuch Conveyances are eſtabliſhed only by the ſaid Act, which are made for ſatisfaction of debts, ſums of monies, or other good conſiderations; and therefore out of the Letter of the Act: and there was not only an omiſſion of a good conſideration, but the addition of an evil perfect ſo, to make the King an Inſtrument to do a wrong: Alſo the Statute of 18 Eliz. did not enable any perſon to make a Conveyance to the King, who was diſabled by the Common Law. 1. *Cook* 11. Part, 67. to 79.

6. In

6. In Treſpaſs, The Caſe was, A. Prebendary of the Prebend of A. and F. was ſeized of the Rectory of P. in the right of his Prebend, and 13 Eliz. did demiſe the ſame to J. S. and J. D. for 70 years. C. Biſhop of L. Patron of the Prebend, and Ordinary of the Dioceſs, granted the next avoidance to D. which was confirmed by the Dean and Chapter. After, D. did confirm the Leaſe made by A. to J. S. and J. D. they being then alive; Then J. S. dyed, and the next Avoydance being come to E. and G. they Preſented J. N. who was Inſtalled and Inſtituted into the Prebend. D. dyed, L. ſucceeded him; then dyed J. N; L. did collate K. to the Prebend, who was Inſtituted and Inducted, and entred into the Parſonage, and Leaſed the ſame to W. for five years, which firſt came to the Plaintiff, upon whom the Defendant entred, who claimed under the Leaſe made by A. to J. S. and J. D. In this Caſe it was adjudged for the Plaintiff; for although B. the Prebendary came in after, and under the Confirmation of the Leaſe, yet J. N. the Prebendary before him, came in by a Grant of the next Avoydance, made, confirmed, and preſented before the confirmation of the Leaſe, and ſo conſequently, was not ſubject unto it; and then when he entred upon the Parſonage, he was ſeized in his Demeſne as of Fee, and ſo did defeat the Leaſe totally, ſo as it could never take effect, and revive againſt any Succeſſor whatſoever. Trin. 11 Jac. in C. B. *Speadlers* and *Barkets* Caſe. *Hob.* 7.

7. In an *Aſſumpſit*, the Caſe was found upon a ſpecial Verdict to be, That the Defendant did demiſe to the Plaintiff, all his Tythe of Corn and Hay; and the Agreement between them was this: The Plaintiff ſhould pay him for the Tythe, 55 l. at a day certain, then next following; and upon this Agreement, the Defendant paſſed his Tythe to the Plaintiff, and upon his Promiſe, which not being performed, he brought the Action. It was found he confeſſed the Agreement to be ſo, but in Bar, he pleaded the Statute of 13 Eliz. cap. 20. and the Statute of 14 Eliz. cap. 11. for the avoiding of Leaſes made by a Parſon by his abſence from his Living by the ſpace of 80 days in one year; and ſhewed, That one J. S. was Parſon of S. (to whom theſe Tythes did belong and in whoſe right the Defendant claimed them) was abſent from his Parſonage by the ſpace of 80 days in one year, and ſhewed in what year, and ſo by this his Intereſt determined, and the Agreement with the Plaintiff by this made void: But they found, That J. S. Parſon of S. was not abſent in manner as was alledged, for they found, That he dwelt in another Town adjoyning, and came conſtantly to his Pariſh Church, and there read Service; and they found, That he had a Parſonage houſe in S. fit for his habitation; and whether this was an abſence to avoid the Leaſe within the Statute, was the Queſtion. It was ſaid by the Juſtices, That upon the ſaid Statutes of 13 and 14 Eliz. the Parſon ought to be abſent from his Church 80 dayes together in one year; *ſcil.* à *Reſſionia*, but this was not ſo here; for that he came to his Church, and read Divine Service four days in the week, viz. Sunday, Wedneſday, Friday, and Saturday; and therefore clearly this cannot be intended ſuch an abſence, as was within the ſcope of the Statute, as thereby to avoid his Leaſe: And ſo it was Reſolved by the whole Court, That the Defendants plea in Bar was not good, and Judgment was given for the Plaintiff. Paſch. 7 Jac. in B. R. *Shepherd* and *Twoolſirs* Caſe. *Bulſtrode* 1. Part, 111, 112.

8. In an *Ejectione firmæ*, the Caſe was, The Dean and Chapter of *Worceſter*, by the name of the Dean and Chapter of the Cathedral Church of *Worceſter*, and the bleſſed Virgin of S. *Mary* of *Worceſter*, made a Leaſe for life; *Habendum* from the day of the date; and made a Letter of Attorney to one to make Livery, *ſecundum formam Chartæ*: The Attorney made Livery the next day after, and the Jury found the Leaſe made the 25. day of &c. and that the Livery that was made by the Attorney, was made *poſt* 25 *diem prædict.* The Queſtion was, Whether this was a good Leaſe, well made, and executed. It was the Opinion of the whole Court, and ſo Reſolved, That this Leaſe was not good, becauſe the Freehold is not to expect the beginning afterwards; and it is clear, this being a leaſe made à *die datus*, is not good, for that according to *Cook* 2. Part, 55. in *Bucklers* and *Harvies* Caſe, a Freehold cannot begin *in futuro*, *Et quod ab initio non valet*, *tractu temporis non convalescit*; And in this Caſe the Lord *Dacres* Caſe was argued, which was, That *William* Lord *Dacres* made a Feoffment in Fee to *Thomas* and *Leonard* his ſons, upon condition to make a Feoffment over to Parſon *Dacres*, and to one *Middleton*: All the Deeds were ready to be delivered; but it ſo happned, That before *William* Lord *Dacres* had delivered his Deed of Feoffment to *Thomas* and *Leonard*, that they had delivered their Deed to Parſon *Dacres* and *Middleton*, with a Letter of Attorney to one to make Livery: Afterwards, *William* Lord *Dacres* delivers his Deed; Livery was then by vertue of the Letter of the Attorney. It was adjudged in this Caſe, That this Livery was void, becauſe at the time of the Feoffment, they had nothing to paſs: for if a man makes a Feoffment, and a Letter of Attorney to one, to make Livery, and before ſuch an Eſtate do paſs, Livery is made, the Livery is clearly void. Trin. 12 Jac. in B. R. *Baker* and *Finches* Caſe, *Bulſtr.* 2. Part, 301. 303. 304.

Upon

Upon the Statute of 32 H. 8. cap. 30. And 18. Eliz. cap. 14. *Of Jeofails.*

1. IN *Aſſumpſit*, the Defendant pleaded *non Aſſumpſit*; Iſſue was joyned, and found for the Plaintiff: In Arreſt of Judgment it was alledged, That no place is alledged of the *Aſſumpſit*; and when an Iſſue is miſ-tryed, it is not helped by the Statute: The Opinion of the Court was, That the Statute ſhall be taken moſt liberally; ſo that if a Verdict be once given, it ſhall be a great cauſe that ſhall hinder Judgment; wherefore although no place be ſhewn, yet when it is tryed and found, he ought to have Judgement. Paſch. 29 Eliz. *Goldesbr.* 48.

2. In a Replevin, they were at Iſſue upon a Preſcription for Common, in N. appendant to Land in another place, and the Viſne was from N. only, which was found for the Plaintiff. It was the Opinion of the Court, That the Viſne ought to be from both places, when the matter ariſeth in two places; and though it be after Verdict, yet in regard it was a miſ-tryal, it is not helped by the Statute of Jeofail. Mich. 28 Eliz. *Goldesbr.* 38. *Knights* Caſe.

3. In Aſſault and Battery, the Defendant was condemned by *Nihil dicit*, and a Writ of Enquiry of damages went out, and then the Attorney of the Plaintiff dyed. It was the Opinion of the Court, That if in an Action after Judgment, the Attorney dye, a new Attorney may pray Execution without Warrant; but in this Caſe, becauſe that he dyed before the ſecond Judgment, he ought to have a Warrant of Attorney; for the firſt Judgment is no final Judgment. It was then moved, That this ſhall not be within the Statute of Jeofails, which ſpeaketh of Verdicts; for this ſhall not be ſaid a Verdict, to which the Court agreed; for a Verdict is that which is put in Iſſue, by the joyning of the parties. Paſch. 29 Eliz. in C. B. *Goldesbr.* 43.

4. In a *Formedon*, they were at Iſſue, and a ſpecial Verdict found, and Judgment given for a default in the Writ of the Plaintiff, Error brought, and alledged for Error, That after Verdict given, no default in the Writ ſhall prejudice the Plaintiff by the Statute of 18 Eliz. cap. 14. *Popham* Chief Juſtice ſaid, That if there be no Writ, it is not helped by the Statute; otherwiſe, if there be inſufficient matter in the Writ; and in every *Formedon* there be two things requiſite; the one is the gift, the other is the Conveyance to the Defendant; and if either of theſe two fail, the Writ is inſufficient in ſubſtance, and is not holpen by the Statute. Hill. 43 Eliz. in B. R. *Dowtall* and *Catesbyes* Caſe. *Goldesbr.* 116.

5. It was moved in Arreſt of Judgment, That the *Venire facias* did vary from the Roll, in the Plaintiffs name; for the Roll was *Peter Percy*, and the *Venire facias* was *John Percy*, and the *Poſtea* was according to the Roll, which was the true name: The Court doubted whether it might be amended, or whether it ſhould be accounted as if no *Venire facias* had iſſued, becauſe it is betwixt other parties. But it was holden, That in caſe no *Venire facias* iſſueth, the ſame is holpen by the Statute of Jeofails, and in this caſe it is in effect as if no *Venire facias* had iſſued forth; and ſo it was adjudged. *Cook* Chief Juſtice ſaid, That if there be no *Venire facias*, or *Habeas Corpora*, yet if the Sheriff doth return a Jury, the ſame is helped by the Statute of Jeofails. Trin. 10 Jac. in C. B. *Godbolt*, 194. See there, Trin. 7 Jac. in the Exchequer, *Herenden* and *Taylors* Caſe adjudged accordingly.

6. An Action of Treſpaſs was brought, wherefore *vi & armis*, the Goods and Chattels of the Plaintiff he did take and impound; The Defendant pleaded the Common Bar; The Plaintiff aſſigned the place, and they are at Iſſue upon that: And after a Verdict, it was moved in Arreſt of Judgment, That there was no Iſſue joyned, becauſe the Lands are not in queſtion, and ſo no Aſſignment neceſſary; and thereupon Judgment was ſtayed: But afterwards, upon a Motion to the Court, Judgment is given for the Plaintiff, becauſe the Iſſue was holpen by the Statute of Jeofails; and ſo it was ſaid it was adjudged. Trin. 4 Jac. in C. B. Hill. 6 Jac. in B. R. *Plaiſt* and *Thornleys* Caſe. *Brownlow* 1. Part, 200.

7. Debt brought againſt the Defendant, as heir to his father: The Defendant pleaded, That he had nothing by Deſcent but 29 Acres in D. in ſuch a County: The Plaintiff replyed, That he had more Land in the County of S. Upon this they were at Iſſue, and found for the Defendant; viz. That he had nothing in S. by reaſon whereof, the Plaintiff had Judgment to have Execution of the 20 Acres in D. This Judgment was in C. B. Upon which Error was brought, and Error was aſſigned in the Diſcontinuance in the Record of the Plea, from Eaſter Term, to Mich. Term after:

And

And whether it was helped by the Statute of 18 Eliz. becauſe it was after Verdict, was the Queſtion. It was adjudged by the Court out of the Statute, and that it was Error; for the Judgment was not grounded upon the Verdict, but only of the Defendant of Aſſets; and the Verdict was nothing to the purpoſe, but to make the Defendant's Confeſſion the more ſtrong: And therefore, the Statute of 18 Eliz. is to be intended, when the tryal by Verdict, is the means and cauſe of the Judgment, *Quod Nota*; and therefore the Judgment was reverſed. Hill. 7 Jac. in B. R. *Mollineux* and *Mollineux's* Caſe. *Brownlow*, 1. Part, 106.

3. In an Attachment of Priviledg, the Plaintiff being an Attorney, declared upon an Aſſumpſit; And after a Verdict for the Plaintiff, and Judgment, Errour was brought, and aſſigned, Becauſe there was no pledges entred upon the Imparlance Roll. It was moved, That it might be amended, and pledges inſerted. For in the *Niſi Prius* Roll, there are pledges mentioned. But the amendment was denyed by the Court; for although the Iſſue Roll ſhall be amended by the Imparlance Roll, becauſe it is precedent; yet the Imparlance Roll ſhall not be amended by the Iſſue Roll: and it was not remedied by the Statute of 18 Eliz. Mich. 3 Car. in C. B. *Wolfe* and *Holes* Caſe. *Cro.* 1. Part, 65.

9. In Attaint; One of the Jurors was returned by the name of *Alexander Preſcott*: In the Reſumnions which is in the nature of *Diſtringas*, it was *Alexandrus Preſcott*, and he was ſworn by that name. The Verdict of the Petit Jury was affirmed by them. In ſtay of Judgment, it was moved, That this was tryed by a wrong perſon, and therefore the Verdict is ill, and not helped by any Statute. But the Sheriff and the ſaid Jurour being examined in Court, It appeared, That *Alexander* was his true name, and that he was the Jurour intended to be returned and ſworn, and that there was not any known by the name of *Alexandrus Preſcott* in the ſame Town. It was clearly Reſolved by the Court, That it was not aided by the Statute of 21 Jac. for that extends to the Sirname only of Jurours, where their additions are miſtaken, but not where a Chriſtian name is. And *Cook* 5. Part, 42. was vouched, Where *Palus Cheek* was returned in the *Venire facias*, and the *Diſtringas* was *Paulus Cheek*, which was his true name, and yet not amended. Note, in that caſe, the Miſpriſion was in the Return of the *Venire facias*, which was the firſt Proceſs and Return; but in this caſe in the ſecond, which ought to be guided by the former Proceſs. Wherefore the Court doubted of the Caſe; And it was Adjourned. Mich. 6 Car. in B. R. *Drewet* and *Winchcomb* Caſe. *Cro.* 1. Part, 147.

10. After a Verdict for the Plaintiff in an Action upon the Caſe; It was moved, That there was a Miſtriall not aided by any Statute: For upon the *Venire facias* there were but 23 Jurours returned, where there ought to have been 24: The Tryall was by 10 of the Principal, and two of the *Tales de Circumſtantibus*. It was urged, That where the Tryall is by 12 of the Principall, it is good; but if there was not 12 of the Principal ſworn, it ſhall not be good. And ſo it was ſaid, it was adjudged, 21 Jac. in *Colthop* and *Newes* Caſe, where the Tryal was by 10 of the Principal, and two of the *Tales*, that it was a Miſ-tryall. But afterwards, upon Conference with the reſt of the Juſtices at Serjeants Inne, the greater part of them conceived, That in the principal Caſe, It was but a Miſreturn of the Sheriff, and that it was helped by the Statutes of 18 Eliz. 21 Jac. Wherefore it was adjudged for the Plaintiff, Trin. 7 Car. in B. R. *Sankell* and *Stafford* Caſe. *Cro.* 1. Part, 161.

11. Errour of a Judgment in C. B. in an Aſſumpſit: The Error aſſigned was, Becauſe upon the *Venire facias* 23 Jurors were returned; and in the *Habeas Corpora* there were 24; viz. the 23 who were returned upon the *Venire facias*, and one L. who was not therein Returned, and being returned by *Diſtringas*, 12 of them were ſworn, whereof the ſaid L. was one, and the Iſſue tryed by them. This being aſſigned for Errour, it was holden by the whole Court, That it was Errour, and not aided by any of the Statutes of 32 H. 8. 18 Eliz. or 21 Jac. For a Juror returned who is not a Juror, who was never returned by the Sheriff, ſo as he appearing, is ſworn without warrant, and is one added peradventure by the Nomination of the Plaintiff: Wherefore for this cauſe, the Judgment was Reverſed. Trin. 8 Car. in B. R. *Fines* and *Norton's* Caſe. *Cro.* 1. Part, 202, 203.

12. Errour of a Judgment in an *Ejectione Firmæ*, Becauſe the Original doth not warrant the Declaration; for the Original bears date, 24 Jan. 6 Car. and the Ejectment is ſuppoſed 31 Jan. And after Not Guilty, and Verdict found for the Plaintiff; this was aſſigned for Errour. It was the Opinion of the whole Court in this Caſe, That the Judgment was Erroneous, Becauſe this Original is certified as an Original in this Action which is betwixt the ſame parties of the ſame Land, and of the ſame Term, and being taken out before the cauſe of Action, it is a vicious and ill Original, and not aided by any Statute. Whereupon the Judgment was Reverſed. Mich. 8 Car.

B

in B. R. *Johns* and *Stayners* Caſe. *Cro.* 1. Part, 205.

13. Debt by an Adminiſtrator for Arrearages of Rent upon a Leaſe by the Inteſtate: The Plaintiff declared, That Adminiſtration was committed by the Archbiſhop, but did not ſay, *profert hic in Curia literas Adminiſtrationis.* The Defendant pleaded, And it was found for the Plaintiff. In ſtay of Judgment, it was moved, That the not ſhewing of the Letters of Adminiſtration was matter of ſubſtance, which made the Declaration vitious, and not aided by the Statutes of 32 H. 8. or 18 Eliz. of Verdicts; for that enables the Plaintiff to his Action, and the omiſſion thereof takes from the Defendant the advantage which he might have by demanding *Oyer* thereof. It was Reſolved by the Court, That it was a matter of ſubſtance which ought to be ſhewen by the Plaintiff, to enable to his Action; and the Defendant ſhall have advantage thereof at any time. Wherefore it was adjudged for the Defendant. Mich. 14 Jac. in B.R. Sir *John Cutts* and *Bennetts* Caſe. *Cro.* 2. Part, 409. See Trin. 12 Jac. in C. B. *Cope* and *Lenams* Caſe. *Hob.* 3. acc.

14. Errour to reverſe a Judgment given in C. B. in a Writ of Raviſhment of Ward; The Errour aſſigned was, That neither upon the Return of the Original Writ before the Sheriff, nor after in Court, any pledges were Returned. It was agreed by all the Juſtices, That at the Common-Law, it was Errour; for, for the Kings and parties benefit, the Plaintiff ought to find pledges, that if he be Non-ſuited, he and his Pledges be amerced. The doubt was, Whether it was aided by the Statute of 18 Eliz. which doth aid defects in Returns, defects of Forms &c. It was Objected, That it was within the Body of the Act, and out of the Proviſo: For penal Lawes, are to be intended thoſe actions which are popular, and a penalty in groſs for the King, or for the Plaintiff, but not to thoſe actions which give greater damages as, Actions of Waſte Debt, &c. But the Opinion of the Court was, That it was not aided by the body of the Act; for that only redreſſes defaults in forms or miſreturns, or inſufficient Returns, which may happen by negligence, or inſufficiency of the Clerk: But not finding of Pledges, is merely the act of the party, which is not aided, although it be within the words, yet it is clearly excepted by the Proviſo; for this Action is founded upon a penal Law, which the Proviſo excepts clearly out of the Act. Wherefore it was adjudged, That the firſt Judgment ſhould be reverſed. Hill. 14 Jac. in B. R. Dr. *Haſſie* and *Mores* Caſe, *Cro.* 2. Part, 414.

15. Errour brought of a Judgment in B. R. in an Action upon an Obligation; Iſſue being taken upon payment, the *Venire facias* was awarded to the Coroners, and Verdict found, and Judgment for the Plaintiff; And Errour brought: The Errour aſſigned was, That where the *Venire facias* was returned by two Coroners only; and the *Diſtringas* by 3. Coroners, there was at the time of the Award and Return of the *Venire facias* and *Diſtringas*, 4 Coroners; It was agreed, That this was at the Common-Law an Errour; for Coroners or Miniſters muſt all joyn, but as Judges they may divide. But by the Statute of Jeofails, it was made good, by the words of imperfect and inſufficient returning of Proceſs by Sheriffs or other Officers. Yet the Court was of Opinion, That if one Sheriff of *London* make his Return without his fellow, that this would not be holpen, as being no Return at all. Hill. 11 Jac. in C.B. *Lamb* and *Wiſemans* Caſe. *Hob.* 70.

16. Errour to reverſe a Judgment in C. B. in an Action of *Waſte.* The Biſhop declared upon a Leaſe made by himſelf; whereas in truth the ſame was made by his Predeceſſor: and this was aſſigned for Errour, for this Variance between the Original Writ and the Declaration. It was the Opinion of the whole Court, That it was a material Errour, and was not aided by the Statute of 18 Eliz. and therefore the Judgment was reverſed. See *Cook* 5. Part, 37. *Biſhops* Caſe, acc. Mich. 14 Jac. in B. R. *Young* and the Biſhop of *Rocheſters* Caſe. *Bulſtr.* 3. Part, 224.

17. Debt upon a Bill of 6 l. 13 s. 4 d. The Defendant demanded *Oyer* of the Bill: in which, after the Clauſe, *In cujus rei teſtimonium*, this Clauſe was added in the nature of a Proviſo; Provided Nevertheleſs, That the ſaid 6 l. 13 s. 4 d. is not to be paid untill ſuch a one hath had a Recovery in ſuch an Action or Suit which he hath hanging againſt the Plaintiff, upon a Bond of 200 l. Conditioned for the ſaving harmleſs, or hath made an end of the ſaid Suit; and then the Concluſion was, *Dat. eiſdem die et anno &c.* To this the Defendant pleaded in Barr, That no end was made of the ſaid Suit upon the Bond of 200 l. nor any recovery had, but that the ſame ſtill depends, and therefore according to the Proviſo, the 6 l. 13 s. 4 d. is not to be paid to the Plaintiff. The Plaintiff Replyed, That an end was made of the ſaid Suit upon the Obligation by a Compoſition of 20 l. given and accepted of in full ſatisfaction and diſcharge of the ſaid Suit, and ſo the 6 l. 13 s. 4 d. now demanded, is to be paid to him. Upon which, being at Iſſue, a Verdict was for the Plaintiff: It was moved, That the Plaintiff ought not to have Judgment, becauſe upon the matter of Fact, matter of Law ariſeth, which makes againſt the

Plaintiff; viz. the giving of 20 l. in satisfaction of 200 l. which in Law is not good. It was the Opinion of the whole Court in this Case, That Judgment ought to be given for the Plaintiff. It was Resolved, That this Proviso was parcell of the Bill, although it came after the words, *In cujus rei Testimonium.* It must be agreed, That after the day that the money is due, 20 l. cannot be paid in satisfaction of 200 l, but in this case it is not so, the 20 l. being paid to end the Suit for 200 l. and this is good; and before the day that the same was due, 20 l. may be given and accepted of, and good in Law, for to satisfie for 100 l. before the day that the same was due; or this may well end a Suit for 100 l. Wherefore by the whole Court, Judgment was given for the Plaintiff. Mich. 1 Car. in B. R. *Tompson* and *Butchers* Case. *Rolls.* 3 Part, 301, 302.

18. Debt upon an Obligation for payment of a lesser sum: The Defendant pleaded a New Bond given at the day in full satisfaction, and so accepted. The Plaintiff did not Demur upon the Plea, but took Issue, That it was not accepted: And by Verdict, it was found against the Plaintiff; And yet Judgment was prayed for the Plaintiff, Because the Bond upon which the Action was brought, and the Action it self was denyed, but as good as confessed, and the Plea to discharge it, was none in Law. On the other side, it was said, That by the Statute of 32 H. 8. of Jeofails, Judgment ought to be given for the Defendant, according to the Verdict. And it was said, That the Case as it was put, was mistaken; for that the Plaintiff was Nonsuit before the Verdict. Trin. 11 Jac. in C. B. *Rowden* and *Strat*'s Case, *Hob.* 69. But see, Mich. 6 Jac. in C. B. In Debt brought upon an Obligation by Husband and Wife of 100 l. made to her when she was sole, for the payment of 52 l. 10 s. The Defendant pleaded, That at the day of payment of the 52 l. 10 s. he and his son did make a new Bond of the sum of 100 l. to the said Wife, being then sole, for the payment of the said 52 l. 10 s. at another day then to come, which she accepted of. Upon which, It was Demurred. And it was adjudged for the Plaintiff, for that it was holden no Actual satisfaction at present as it ought to be. Sir *Richard Lovelace* and *Corbets*'s Case. *Hob.* 68.

19. An Action was brought upon the Statute of *Winchester*, of *Hue* and *Cry*, against the Hundred of C; and it was found for the Plaintiff; and a Writ of Errour was brought, and all the Record was Certified, and now the Plaintiff prayed, That two things might be amended; The first, the Title of the Action: For upon the Roll, it is an Action upon the Case; whereas it should have been an Action upon the Statute. But it was said by *Hobart*, Chief Justice, and agreed by the whole Court, That it could not be amended; for that the Statute of 18 Eliz. did not give Amendment upon Indictments, or upon Actions Popular, or Actions upon Penal Statutes. The second was, upon the *Venire facias*, Where *Gregory* was returned; but the Clerk of the Assizes returned one *George*: And it was the Opinion of the whole Court, That there needed no Amendment of it, it being in the *Tales de Circumstantibus*, and not in the principall Pannel: And also, for that it was by the consent of the parties. And *Hobart* said, If that Variance had been material, It should not be amended; for that we will not make a new Certificate, for the Court of Kings-Bench may chuse to Credit the first or the second Certificate, and so we shall submit our Judgments to the Censure and Pleasure of another Court; which we will not do. Trin. 21 Jac. in C.B. *Harvey* and the Hundred of *Chilsams* Case, *Winch.* 66.

See more, upon these Statutes of *Jeofails*, 1 *Lib.* 1. Title, *Amendments.*

Upon the Statutes of 23 *Eliz.* Cap. 1. 29 *Eliz.* Cap. 6. 35 *Eliz.* Cap. 1. 3 *Jac.* Cap. 4. and other Statutes against *Recusants.*

1. IN an Information in the Exchequer; the Case was; A. a Recusant, before 23 Eliz. took a Recognizance in the names of the Defendants, and took a grant of a Rent-Charge to them in Fee, with a Condition of Redemption. The Recognizance was upon Condition, for performance of Covenants in the same Deed. Afterwards, the Statute of 28 Eliz. was made; By which it was Enacted, That if default of payment was made in any part of payment of 20 l. for every moneth, &c. Then and so often, the Queens Majesty by Process out of the Exchequer, may take, secure, and enjoy all the Goods, and two parts, &c. And that after the said Act, and before 24 Eliz. A. had lent great sums of money to S; and for assurance of it, took a Rent-Charge by Deed Indented, in the names of other the Defendants, for performance of Covenants: Which Recognizances did amount in all to 21000 l. all which were to the

the uſe of the ſaid A. and were at his diſpoſition; And after 41 Eliz. A. was Convict of Recuſancy, and did not pay the 20 l. a moneth: And, If the King ſhould have the benefit of the ſaid Recognizances, was the Queſtion? It was Objected, 1. That if the Recognizances had been acknowledged to A. himſelf, they ſhould not be forfeited, becauſe the Statute ſpeaks only of goods, and debts are not included in the word [*Goods*]. 2. They were acknowledged to perform Covenants in an Indenture for a Rent-Charge, and therefore not within the Intent of the Act, which ſpeaks of Goods. 3. No Fraud or Covin appears in the Caſe, and then, for as much as no Act of Parliament extends to this Caſe, the Common-Law doth not give any benefit to the King. 4. Becauſe in this Caſe, A. hath not any goods within 28 Eliz. but only a meer Truſt and Confidence, which is nothing in Conſideration of Law: And the Court cannot adjudge, That they belong to the King by Equity of the ſaid Statute, becauſe it is a Penall Law: and alſo one of the Recognizances was taken before the Statute of 28 Eliz. which gave the forfeiture. But it was ſaid by all the Barons of the Exchequer, upon Conference had with the other Juſtices, 1. That if the Recognizances had been acknowledged to the party himſelf, they were given to the King; for perſonal actions are included within the words, Goods, as goods in poſſeſſion. And it was ſaid, That it had been Reſolved, That debts were forfeited to the King by the ſaid Act. To the ſecond it was ſaid, That as well the Recognizance, as Annuity, were made for the payment of money; and when they are forfeited, they are but Chattels perſonal. To the third it was ſaid, There was Covin apparant; For when he was a Recuſant at the time of the Act of 23 Eliz. It ſhall be intended, He took the ſaid Recognizance in the name of others, to prevent the King of levying of the forfeiture. To the fourth it was ſaid, *Non reſpondit*, whether the debts doth accrue to the King by the Common-Law, or by the Statute; if it be any the way or other, No ſubterfuge that the party can uſe, can defraud the King: And although one of the Recognizances was taken before the Statute of 28 Eliz. yet it was to his uſe, and ſo in the nature of a Chattel to him. And although A. was not convict, till 41 Eliz. that is not material; for that at all times before, he was ſubject to a forfeiture for his Recognizances. It was adjudged for the King. Paſch. 4 Jac. in Exchequer. *Ford* and *Sheldons* Caſe, *Cook* 12. Part, 1. & 2.

2. Note; This Caſe was moved to the Court; Leaſee for life, the Remainder in Fee; He in the Remainder cuts down Timber-Trees, and ſells them. Tenant for life being a woman, was informed againſt for Recuſancy: The ſale of the Trees was made by the aſſent of the Tenant for life: the money was brought by the Vendee into the Exchequer, who ſhould have the money, was the Queſtion? It was the Opinion of the Court, That he in the remainder cannot cut and ſell without the aſſent of the Tenant for life, who did aſſent; The Recuſant cannot be entituled to the Timber, but he in the Remainder is to have them, Therefore the Rule of the Court was, That the money ſhould be delivered to him in the Remainder upon a Bond entred by him to repay the money, if the Court ſhould ſee cauſe; but that the money ſhould not be paid to him, before the Wood was delivered to the Vendee: But however, the Court was clear of Opinion, That the King could not by any wayes be intituled to have the Timber Trees. Paſch. 9 Jac. in the Exchequer. *Baſtr.* 1. Part, 133.

3. Errour to reverſe a Judgment upon an Indictment againſt the Lord *St. John*, for his Recuſancy for his abſence from Church for 2. moneths. Upon pleading, It was found, That he was faulty for the abſence of one moneth parcell of the time, and not for the other. Wherefore it was adjudged, That he ſhould forfeit 20 l. and for the other moneth *eat ſine die*. The Kings Attorney ſignified to the Court the Kings Majeſties pleaſure to be, That if it was Erroneous, that it ſhould be reverſed. Divers Exceptions were taken to it, None of which by the Court were holden to be material. And it was doubted, Whether any Exception be good upon Conviction of Recuſancy: For the Statute of 3 Jac. is preciſely, That it ſhall not be void, or diſcharged for default of form or other matter, untill after conforming himſelf to the Church. But yet afterwards in the principal Caſe, becauſe the Judgment was *not Ideo Capiatur*, and the omiſſion thereof is apparant to the Kings prejudice; and for that upon every Conviction in Indictments, the Judgment is *Quod Capiatur*; For this cauſe the Judgment was Reverſed. Mich. 14 Car. in B. R. The Marquels of *Wincheſter's* Caſe. *Cro.* 1. Part, 362.

4. Information againſt the Husband upon the Statute of 23 Eliz. Cap. 1. for 240 l. which he was to forfeit for the Recuſancy of his Wife, by abſenting her ſelf from Church for ſo long a time. Upon Tryall, It was found for the King. It was moved, That this Statute doth not extend to the husband, to ſubject him to the penalty of the ſaid Act for the Recuſancy of his Wife, he himſelf being Conformable; and here the husband is not made a party by 23 Eliz. and therefore he ſhall not pay the penalty inflicted by the ſaid Statute. But the Statute of 35 Eliz. Cap. 2. gives an

Action of Debt for the penalty, and this brings the husband in. But the ſame was Over-ruled by the Court, according to the Judgment given in Dr. *Foſters* Caſe. Which Caſe, ſee *Cook* 11. Part; and after followeth, Mich. 13 Jac. in B. R. The King and *Lewis* Caſe. *Co. Jr.* 3. Part, 87.

5. An Informer ſued a Recuſant for the penalty of 20 l. by the moneth, for not repairing to the Parish-Church, or other Chappell or uſuall place of Common-Prayer or Divine Service. The Defendant pleaded the Statute of 23 Eliz. That every Recuſant, being a Recuſant Convict, ſhould forfeit to the King for every moneth 20 l. and pleaded the Statute of 28 Eliz. That every Offendor againſt the Statute of 23 Eliz. ſhall pay for every moneth after ſuch Conviction, without any other Indictment, 20 l. to the King at the Exchequer; and pleaded the Statute of 35 Eliz. *quodq; nulla pars*, by the ſaid Statute ſhould be paid to the Informer. In this Caſe it was Objected, 1. That none ſhould encur the forfeiture, unleſſe he was lawfully Convicted before; and it doth not appear, that the Defendant was a Recuſant convict before, and Penal Statutes ſhall be taken ſtrictly. 2. That none can Inform upon the Statute of 23 Eliz. but the King only. 3. That the Conviction ought to be by Verdict or Confeſſion, and ſhall not extend to a Judgment upon a Demurrer. 4. That the penalty of 20 l. a moneth is expreſly given to the King, and by Conſequence, the Informer is excluded. And, 5. The Statute of 35 Eliz. by expreſſe words, gives the penalty to the King, *Et Leges poſteriores, priores Contrarias abrogant*. But in this Caſe, It was Reſolved, 1. That the Statute of 23 Eliz. of Diſtribution, did extend as well to the Clauſe of penalty of Recuſancy, as to the Clauſe of Saying and Receiving of Maſſe. 2. Reſolved, That he againſt whom any Judgment is given upon *Nihil dicit*, or upon inſufficient Plea pleaded, or Demurrer upon it, is convicted within the purview of the Statute; for he who is Attainted or Adjudged, is Convicted and more. 3. Reſolved, That the Statute of 28 Eliz. had not taken away the Liberty which the Informer had by the Act of 23 Eliz. becauſe the ſaid Act did not intend any Abrogation, but a more ſpeedy execution of the branches of the Act of 23 Eliz. and becauſe this Act doth not give the penalty to any perſon to whom it was not given before: And alſo the Statute is in the affirmative; and Statutes in the Affirmative, do not take away precedent Statutes in the Affirmative. 4. Reſolved, That the Statute of 35 Eliz. doth not abrogate the Statute of 23 Eliz. as to the Action popular; for the purpoſe of the Act was only to *auſt* delayes, and to give a more ſpeedy remedy againſt the Husbands for the forfeitures of their Wives Recuſancy: ſo as now the Husbands and their Wives may be charged as well at the Kings Suit by Debt, Bill, Plaint, as at the Suit of the Informer: And the words of the Act of 35 Eliz. are not penned *ſimpliciter*; *ſcil.* that all and ſingular the paines ſhall be reſtored to his Majeſties uſe, but *ſecundum quid et ſub modo*. 5. Reſolved, That the Stat. of 23 Eliz. which gives the 20 l. a moneth, doth not take away the Act of 1 Eliz. which gives the forfeiture of 12 d. for every Sunday, but both ſtand together. *Cook* 11. Part, 65, 66. Doctor *Foſter's* Caſe. See Trin. 14 Jac. in B. R. *Parker* and Sir *John Wild* and his Wifes Caſe, *Bridgman*, 120, 121, 122. See *Cro.* 2. Part, 480. the ſame Caſe.

6. E. F. being the Kings Ward of Lands holden of the King by Knight-Service in Chief, dyed the Kings Ward; And by *Devenerunt* after his death, It was found in the 13th year of the King, That *Lettice* and *Eliz.* were his Siſters and heirs, and both of full age: And that L. the elder Siſter in the life of her brother the Ward, departed out of the Realm without Licence, to prevent her Religious Education, and was and remained a Nun profeſt at *Doway* in *Flanders*, and that the profits of all the Lands by the Statute of 3 Jac. Cap. 5. belong unto her other ſiſter *Elizabeth*. The Queſtion was, What ſhould become of the part of *Lettice*? Which caſe being referred to the Juſtices, the Lord Chief Juſtice *Mountague* and the Lord *Hobart*; It was agreed by them, That the moyty of *Lettice* as to the Eſtate of the Land, was not forfeited nor ſettled in *Elizabeth* her ſiſter; for the Statute ſaith ſhall take no benefit by deſcent, &c. not that ſhe ſhould not take by deſcent; and then proceeds to ſhew the meaning thereof, that the ſaid profits during her unconformity, ſhall be received by the next of Kin, and they ſhall be anſwerable unto her after her Conformity. And therefore it was Reſolved in that Caſe, That the ſaid *Eliz.* cannot as the next of Kin, challenge or demand of Right to have Livery out of the Kings hands of the part and purpart of the ſaid *Lettice* by virtue of the Statute of 3 Jac. neither by the words, nor by the intent of the Statute; but the King, if it pleaſe him, might retain the Moyty of the ſaid *Lettice*, untill ſuch time as according to the Statute made 1 Eliz. ſhe ſhall take the Oath appointed by the ſaid Statute: Which was decreed accordingly. See Mich. 15 Jac. in the Court of Wards. *Trudways* Caſe. *Lea*, 59. See *Hob.* 73. the ſame Caſe.

7. A. B. C. and others were sued in a *Quare impedit* by the Chancellor, Master and Schollers of *Cambridge*, and they claimed the Presentation to the Church of C. by the Statute of 3 Jac. because that B. being Patron of the said Church at the time of the Avoidance of the Church by the death of J. P. then last Incumbent, was then a Popish Recusant. To all this, the Defendants pleaded; but the Plea of A. which was most materiall, was this; He did confesse, That B. was seised of the Mannor of E. to which he in his Demesne is of Fee, and that he was a Popish Recusant: but he said, That for non payment of 20 l. a month, by Commission sent forth; and upon Inquisition, it was found, That the said B. was seised at the time of his Conviction, of the said Mannor, &c. and thereupon, the Commissioners did seize two parts of the said Mannor into the Kings hands; and that the King did by Letters Patents Demise to the said A. the said two parts, and all profits to the same belonging for 21 years, *si tam diu &c.* and there shewed, that the Church became void. A. still remaining a Popish Recusant, by reason whereof he presented C. his Clerk, *absq; hoc*, That B. was Patron of the same Church at the time of the Avoidance, as the Plaintiffs had declared. Upon this Plea, The Court conceived, That the Title to the Avoidance did appear to be in the King; for the Statute gives two parts of all the Recusants possessions, so that although there be no mention made in the Inquisition and seizure of the Advowson specially; yet two parts of the Advowson will follow two parts of the Mannor, and then the King will present next: Whereupon the Plaintiffs were demanded, What they could say, Why a Writ to the Bishop should not be awarded for the King upon his Title? Whereupon they did confesse, notwithstanding their Title made in their Declaration, which they did disclaim, that the title of Presentation was in the King: And thereupon a Writ was awarded for the King to the Bishop accordingly. Mich. 14 Jac. in C. B. The Chancellor of *Cambridge*, &c. and *Walgraves* Case. *Hob.* 126, 127.

Upon the Statute of 31 Eliz. cap. 6. *Of Symony.*

1. NOte, It was Resolved by the whole Court, That if any shall receive or take money, Fee, reward, or other profit for any Presentation to a Benefice with Cure, although in truth he who is Presented, be not knowing of it, yet the Presentation, Admission, and Induction are void by the expresse words of the Statute of 31 Eliz. cap. 6. and the King shall have the Presentation *hac vice*; for the Statute intends to inflict punishment upon the Patron, as upon the Author of this corruption, by the loss of his Presentation; and upon the Incumbent who came in by such a corrupt Patron, by the loss of his Incumbency, although that he never knew of it. But if the Presentee be not cognisant of the corruption, then he shall not be within the clause of disability in the same Statute. And so it was said it was Resolved, Mich. 8 Jac. in C. B. *per verba Statuti*, which are very well penned against the avarice of corrupt Patrons. Mich. 10 *Jacobi*. Doctor *Hutchinsons* Case. *Cook* 12. Part, 101. See *ibid.* 75. acc.

2. The words of the Statute are (*For any sum of money, reward, gift, profit, or benefit*) or for, or by reason of any Bond, Promise, Agreement, Covenant, or assurance for any Sum, Reward, Gift, Profit, or Benefit, Present, or Collate.

3. The Question in the Court of Common Pleas, was, That a Feme Sole was seised of an Advowson of a Church; and the Church being void, she Presented J. S. to the Church, upon Condition, That he should take the woman for his Wife, which he did accordingly. It was Resolved in that Case, That this was a Simonaical Contract which made the Presentation void, for that it was a benefit within the Statute to the Woman, and an advancement of her: And in that Case, it was put, That if the Patron of a Church Present J. S. to the Church, being void, upon an agreement that he shall be Tutor to the Son of the Patron: That although this be not properly a gift, or a Reward; yet in regard it was a benefit to the Patron in the Tuition of his Son, that the same was within the intent of the Statute. Mich. 8 Jac. in C. B. *Mountfords* Case. And in the Argument of that Case, this Case was put, Contention was between the Parson

Parſon and the Pariſhoners for Tythe Cyder. The Church afterwards became void, and the Patron did Preſent J. S. to the Church upon Condition that he ſhould not ſue the Pariſhoners for Tythe Cyder. It was ſaid, that it was adjudged in that Caſe, That the ſame was not any Simonaical agreement within the Statute, for that it was only to prevent a Suit, and a Deed of mercy. But if the Patron himſelf were within the Pariſh, and ſhould pay ſuch Tythe, then becauſe the Patron had a benefit and profit by ſuch an agreement, it had bin a Simonaical Contract within the Statute.

4. The Church within the Tower of *London* being a Donative of the King; one J. S. was Parſon thereof, and reſigned. Afterwards the Defendant agreed with J. S. to give him 20 l. if he might be procured to be Preſented thereunto by the King, and Admitted and Inducted. It was ſaid, That this being a Donative of the Kings Donation, was not within the Statute of 31 Eliz. for that mentions only where one comes in only by Simony by Preſentation. And 2. That this could not be within the Statute, becauſe that the King being Donor, it cannot be intended that he Preſented by Simony. And the Statute is, That the Patron ſhall loſe his Preſentment for that time, and the King is to have it; and therefore it ſhall not extend to any of the Kings Donations. But both the Exceptions were diſallowed by the Court. For the firſt, that though it be a Donative, yet it is in equal miſchief with a Preſentation, and ſo within the remedy: And for the ſecond, For that Simony may be contracted betwixt ſtrangers, and yet within the purview of the Statute. Mich. 9 Car. in B. R. *Bowdrock & Mackellars* Caſe. *Cr.* 1. Part, 241.

5. Debt upon an Obligation for performance of Covenants, That T. B. ſon of W. B. ſhould marry A. Daughter of the Defendant, and in conſideration of this Marriage, the Defendant Covenanted to pay 300 l. and amongſt divers other Covenants, the Defendant Covenanted, That he would procure the ſaid T. B. to be Preſented, Admitted, Inſtituted, and Inducted into ſuch a Benefice upon the next Avoydance of the ſaid Church; and the breach aſſigned was, for not performance of the ſaid Covenant of procuring him to be Admitted, and Inſtituted, &c. And upon this the Defendant demurred, becauſe this Covenant is againſt Law, being a Simonaical Agreement, and a Bond for performance thereof is not good. But it was holden by the whole Court, That if it had appeared to have bin, That in conſideration of the Marriage of his Son, &c. he would procure him to be Preſented, Admitted, Inſtituted, and Inducted into ſuch a Church, That had bin a Simonaical Contract, and had voided the Obligation. But here this Covenant is not a conſideration of the ſaid former Covenants, nor depending upon them, but it is a meer diſtinct Covenant in it ſelf, and independant upon the former, and without ſpecial averring or ſhewing, That it was a Simonaical Contract, it ſhall not be intended, but it may be a Covenant upon a good conſideration; and therefore it was adjudged for the Plaintiff. Mich. 11 Car. in B. R. *Hyde* and *Mannings* Caſe. *Cro.* 1. Part, 307.

6. If the Biſhop of *Canterbury* Granteth a Diſpenſation to J. S. upon a corrupt Contract, *ut ſpero* the Church of D. which is void; and afterwards Lapſe incurreth to the Biſhop as Ordinary; and thereupon he Collates J. S. to the ſame Church. It was ſaid, That in this Caſe, that it was a Collation upon a corrupt agreement within the Statute, for that in ſuch Caſe the Law looks back upon the Original Act, the Diſpenſation upon the corrupt Agreement, by *Hobart* Chief Juſtice, in the Argument of *Colt* and *Glover's* Caſe. *Hob.* 158. 159.

7. A. ſeiſed of a Manour to which an Advowſon is appendant; S. comes to A. and promiſeth him, That if he would Preſent him after the death of the now Incumbent, that he would give him 70 l. to which he agreed; and upon that it is agreed, That the next Avoydance ſhall be granted to S: the Incumbent dyes, A. preſents S. who continues Incumbent from 27 El. to 7 Jac. Then A. grants the Manour with the Appurtenances to W. S. the Incumbent dyeth 7 Jac. and the King Preſents J. S. by Title of Simony. W. brings a *Quare Impedit*, and adjudged in that Caſe, That it doth not lye; and there it was agreed, That it was Simony, becauſe there was a corrupt contract for the Advowſon. And note, that in the Statute of 31 Eliz. there is not the word Simony, for by that means the Common Law would have bin Judg what ſhould have bin Simony what not; but the words are, Corrupt Agreement: And it was ſaid, That although the next Avoydance might be bought and ſold *bona fide*, without Simony: Yet it was in the principal Caſe Granted to S. to perform the corrupt Agreement. 2. It was Reſolved in that Caſe, That the death of the Simonaical Incumbent did not hinder but the King might well preſent, for that the Church was never full as to the King, and that turn is preſerved to the King by force of the Statute; and it was agreed in that Caſe, To ſay the Church was full for ſix Months is no Plea, where the party is in by Simony. Paſc. 14 Jac. in C. B. *Wincheomb* and *Pollitons* Caſe. *Noy* 25. See *Hob.* 165. to 169. more at large, the ſame Caſe.

8. In a *Quare Impedit* by the King, It was Reſolved by the whole Court, That if an Incumbent were guilty of Simony in obtaining a Benefice, that he was made uncapable of that Benefice for ever by

by the words of the Statute of 31 Eliz. which are largely to be expounded; and it was compared to the Caſe of Sir *Arthur Ingram*, who having bought the Office of Cofferer, being an Office handling and concerning the Kings Treaſure; where it was holden by the Lord Chancellor *Egerton* and *Cook* Chief Juſtice, that he was not only removeable for the perſon, but alſo for ever uncapable of that Office by force of the Statute of 5 E. 6. although he had a *Non obſtante* in his Letters Patents, for that the Perſon being diſabled by the Statute, he could not be enabled by the King to take that Office again. The King, and the Biſhop of *Norwich* and *Sayer's* Caſe, 13 Jac. in C. B. *Hob.* 75. See the ſame Caſe more at large in *Bulſtr.* 3. Part, 87, 88, 89. *Cro.* 2. Part, 385. the ſame Caſe.

9. Note, an Arch-Deaconry is an Eccleſiaſtical Preferment, of which there are three ſorts. 1. *De jure.* 2. By Preſcription. 3. By Covenant. It was a Queſtion moved in the Court of Common Pleas, 9 Car. If an Arch-Deaconry *de jure* were within the Statute of 31 Eliz. and if a gift or reward were given for ſuch a Dignity, Whether it was within the Statute. It was holden, That it was directly within the Statute. But it was conceived, That where an Arch-deaconry is by Preſcription, or by Covenant between the Biſhop and Arch-deacon, that ſuch an Arch-deaconry might be out of the Statute. For although the word (Covenant) be within the Statute; yet it was ſaid that the ſame ſhall be taken to extend only where a Covenant is made for a ſum of money for ſuch an Arch-deaconry which is *de jure*, and ſhall not extend to Arch-deaconryes by Preſcription; as to the Arch-deaconry of *Richmond*, or other the like Arch-deaconryes, which time out of mind have bin holden by Covenant between the Biſhop and the Arch-deacon: and therefore it was ſaid, That if J. S. Covenant with the Biſhop to pay him 10 l. *per annum* out of ſuch an Arch-deaconry, that ſuch a Covenant was out of the Statute of 31 Eliz. And it was there ſaid, That an Arch-deaconry by Preſcription was as ſtrong as one *de Communi jure*. Mich. 9 Car. in C. B. acc.

Set more upon this Statute, in *Lib.* 1. in the Title of *Advowſons*, and before in the Title of *Profeſſations to Churches*.

Upon the Statutes of 5 Eliz. Cap. 2. and 39 Eliz. *Of Tillage.*

1. INformation was in the Exchequer againſt the Defendant upon the Statute of 5 Eliz. of Tillage, ſetting forth, That the Defendant had converted 300 Acres of Arrable Lands of Tillage to Paſture, and the ſame Converſion hath continued from 15 Eliz. to 20 Eliz. The Defendant as to the Converſion pleaded, Not Guilty, and as to the Continuance, the general Pardon of Parliament 23 Eliz. upon which it was demurred in Law. In this Caſe it was argued, That the Pardon did not extend to the Continuance of the ſaid Converſion: And in this Caſe, the Barons were of Opinion, That if A. be ſeiſed of Arrable Lands, and Converts the ſame to Paſture, and ſo converted, leaſeth it to B. who continues it in Paſture as he found it, he ſhall be charged by that Statute; and it was ſaid, It is not any good conſtruction, where the Exception in the Pardon is, Excepting the Converting of any Lands from Tillage to Paſture, made, done, committed, or permitted, that the Converſion out of the Pardon ſhall be intended and conſtrued, the bare act of Converſion, but the whole Offence, *ſcil.* the continuance and practice of it is underſtood: As if by general Pardon all Intruſions are excepted, now by that, the inſtant act of Intruſion, *ſcil.* the bare entry is not only excepted, but alſo the Continuance of the Intruſion, and the proportion of the profits. And note the words of the Statute are (Converſion permitted), and Converſion continued, is Converſion permitted, and the Statute doth not punish the Converſion, but alſo the continuance of the Converſion, for the penalty is appointed for each year in which the Converſion continues. It was ſaid on the other ſide, That the Converſion and the Continuance thereof are two ſeveral things each by it ſelf; and ſo the Converſion being only excepted, the Continuance thereof remains in the grant of the Pardon. Quære, for the Caſe was not Reſolved, but it was adjourned, &c. Mich. 26 Eliz. in the Exchequer. *Clyppeſtes* Caſe. *Lett.* 274.

2. In

2. In an Information upon the Statute of 39 Eliz. for not reſtoring of Paſture into Tillage, being ancient Tillage Lands, and converted into Paſture: Upon Not Guilty pleaded, It was found, That the Land was ancient Tillable Land, and uſed for Tillage 22 years before the Converſion, and converted before the Statute of 39 Eliz. and not reſtored before 1. *May* 1599. nor ever ſince. And that the Defendant was an Occupier for the laſt year, being the time in the Information mentioned, but never before: and whether he were puniſhable as an Offender within the Statute, was the Queſtion. For the words of the Statute are, *That Lands Converted before the Statute ſhall be reſtored into Tillage before* 1. May 1599. *and being reſtored ſhall ſo continue for ever.* It was ſaid, It was out of the Statute, a ſtranger being Occupier thereof, and not he that converted it. But it was Reſolved, That he was within the Statute; for although he be out of the words, yet he is within the intent thereof: For the Statute extends to puniſh the Occupier and continuer thereof in Paſture, and not only the firſt Converter; and if other conſtruction ſhould be made, then all Lands which were converted before 9 Eliz. and not re-converted before 1. *May* 1599. ſhould be out of the Statute, which was not the meaning of the Statute: Wherefore it was adjudged for the Plaintiff. Hill. 14 Jac. in B. R. *Parker* and *Sanders* Caſe. *Cro.* 2. Part, 418.

Upon the Statute of 43 Eliz. cap. 4. *Of Charitable Uſes.*

1. UPon a Reference out of the Chancery to the Juſtices upon the Statute of 43 Eliz. of Charitable Uſes; the only Queſtion was, Whether a Decree made by the Commiſſioners upon the Statute, and exceptions put in againſt it in Chancery, and there examined, heard, and confirmed in part, might be there re-examined upon a Bill of Re-view, as other Bills of Review, upon Decrees in Chancery. It was Reſolved by the Juſtices, That this Bill of Review is not allowable, but the Decree in Chancery is concluſive, and not to be further examined, becauſe it takes its Authority by Act of Parliament, and the Act doth mention but one Examination, and it is not to be reſembled to the Caſe where a Decree is made by the Chancellor by his Ordinary Authority. M. 2 Car. in Chancery. *Tho. Wiaſor*, and the Inhabitants of *Farahams* Caſe. *Cro.* 1. Part, 29.

2. A. was ſeiſed in Fee of the Manor of D. holden of the King by Knight-Service in *Capite*, and deviſed the ſaid Manor to be ſold by his Executors, part of the money to be paid to his Wife, and part to divers other Legatees, the reſidue to be beſtowed in Charitable Uſes, viz. for the marrying of poor Virgins, and Relief of Priſoners. The Queſtion in this Caſe was, Whether this were a good Deviſe to bind the King, and to bar him of his Primer Seiſin by the Statute of 43 Eliz. of Charitable Uſes. It was the Opinion of all the Juſtices (upon a ſpecial Reference to them from the King), That this ſhall not bar the King of his Intereſt of Wardſhip, Livery, or Primer Seiſin, becauſe general words where the King is not named, ſhall not bind or bar him. The ſecond Queſtion was, Whether ſuch a Deviſe by the ſaid Statute be good againſt him for the whole, and ſhall bar the Heir to claim a third part. It was Reſolved, That admitting it to be a Conveyance within the Statute; yet it is void againſt the Heir for a third part. For by the Statute of 32 and 34 H. 8. he hath no power but to diſpoſe of two parts, ſo for the third part, it is void. The third Queſtion was, Whether this were a Conveyance within the Statute of 43 El. becauſe here is not any diſpoſition of the Land to Charitable Uſes, but an appointment, That the Land ſhall be ſold, and the money divided. As to this, it was Reſolved, That it was not. Hill. 14 Car. in *Cur. Ward. Aſcough's* Caſe. *Cro.* 1. Part, 378.

3. A man deviſed his Lands to his Executors, to find a Preacher, School-Maſter, and poor people, the Lands then being but of the yearly value of 40 l. *per annum*. Afterwards the Land encreaſed to the value of 100 l. *per annum*. It was adjudged in this Caſe, That the whole encreaſed, ſhould be employed for the maintenance of the Preacher and School-Maſter, and poor people; and no part of it converted by the Deviſees to their own uſe. And ſo it was ſaid it ſhould be of the Revenues of a College they ſhall be imployed in the maintenance and increaſe of ſuch works of Charity as the Founder preſcribeth, and no part of it converted to the private uſe of any one. For every College is ſeiſed in *jure Collegii, ſcil.* that the Members of it might take benefit of the encreaſe of the Revenues, and nothing converted to private Uſes. Paſc. 8 Jac. *Coke* 8. Part, The Caſe of *Thetford* School, 130. See *Gibbons* and *Maltyards* Caſe, in *Pasch.* 7. the ſame Caſe.

Upon

Upon the Statute of 21 Jac. Cap. 16. *Of Limitation of Actions.*

1. IN Aſſumpſit, It was moved in Arreſt of Judgment, That the promiſe is alledged to be made beyond the time limited by the Statute of 21 Jac. and the action is brought within the time limitted. It was the Opinion of the whole Court, If it appears ſo by the Plaintiffs own ſhewing, the Plaintiff cannot maintain his Action, but Judgment ſhall be given againſt him. But if the Contract in the Aſſumpſit, or debt be alledged to be within the time limited by the Statute, and upon *Non debet*, or *Non Aſſumpſit*, it appear upon the Evidence, That the *Aſſumpſit* or Contract was beyond the time limited, and ſo the Evidence cannot maintain the Action, the Defendant ſhall take advantage thereof, for the Statute is in the Negative, That he ſhall not maintain Action but within ſuch a time limited by the Statute. Trin. 4 Car. in C. B. *Brown* and *Hancock's* Caſe. *Cro.* 1. Part, 81.

2. Aſſumpſit againſt an Adminiſtrator upon a promiſe of the Inteſtate, that the Inteſtate 1. *Maii* 32 Jac. borrowed 20 l. and in conſideration thereof, promiſed to repay it to him upon requeſt. And that the Plaintiff 1. *Aug.* 32 Jac. requeſted the payment, and that he has not paid it, and dyed, and Adminiſtration was committed to the Defendant, who upon requeſt had not paid it. Upon *Non Aſſumpſit* pleaded, and Verdict for the Plaintiff, It was moved, That the *Aſſumpſit* being made *his anno* 21 Jac. and the breach in the ſame year, the Action is brought too long after, for by the Statute of 21 Jac. it ſhould be brought within 6 years. Two of the Juſtices conceived he might not have advantage of this Statute, unleſs he had pleaded it, or had demurred thereupon, becauſe the Statute hath divers exceptions, ſo as if the Plaintiff were within the Exceptions, it were well enough. The other Juſtices conceived, That foraſmuch as it appeareth by the Plaintiffs own ſhewing in his Declaration, that it is out of the limitation of the Statute, and the Statute is in the Negative, that it ſhall not be brought at all, unleſs it be brought within the time limited by the Statute. The Court would adviſe, *et adiornatur.* Mich. 5 Car. in B. R. *Tankerſley* and *Robinſons* Caſe. *Cro.* 1. Part, 116.

3. Error of a Judgment in C. B. in Aſſumpſit, ſuppoſing that the Defendant 16 Jac. *apud B. in Suff.* promiſed to pay, &c. After Verdict and Judgment for the Plaintiff, The Defendant brought Error, and upon Diminution alledged, the Original was certified. Hill. 4 Car. upon which the Plaintiff in the Writ of Error pleaded the Statute of 21 Jac. of Limitation of Actions; and that this Action being upon a promiſe in 16 Jac. and not brought within 6 years after the promiſe, nor within three years after the Statute, it did not lye. The Defendant pleaded, That he 2 Car. which was within three years after the Statute, brought an Original Aſſumpſit, ſuppoſed to be made in *Kent*, againſt the Defendant, now Plaintiff, wherein he was Outlawed, but in 3 Car. the Outlawry in the Common Pleas was declared void, and that within a year after he brought this Action, ſuppoſing the promiſe to be made at B. in *Suff.* to his damage of 600 l. And in the former Action in *Kent*, to his damage of 300 l. and avers that it was one promiſe. Upon which Plea, the Plaintiff in the Writ of Error demurred in Law. It was Objected, That foraſmuch as this Outlawry was not reverſed by Error, but avoided by Plea, that the firſt Original was not determined, but he might have proceeded thereupon; and then to bring a new Action, and in another County, is not according to the Statute of 21 Jac. But the Court was of Opinion, That this variance of the County and damages is not material to the Action, being tranſitory, and averred to be for one and the ſame cauſe; and although the Outlawry is not reverſed by Error, but is avoided by plea, it is within the Statute; For the Statute is not, where the Outlawry is reverſed by Error; but where the Outlawry is reverſed. The Judgment was affirmed. Mich. 5 Car. in B. R. Sir *Thomas Finch* and *Lamb's* Caſe. *Cro.* 1. Part, 214.

4. Action for words, Whereas the Plaintiff was of good Name and fame, and of chaſt Converſation, and had offered to marry to him their Daughter: And whereas there was a Communication with one W. R. to marry his Daughter, and the ſaid W. R. was willing to have his Daughter to match with him, and offered 40 l. in Marriage, That the Defendant having communication with J. S. and others of the Plaintiff: The Defendant 20 *Sept.* 7 Car. to diſcredit the Plaintiff, and hinder him in his Marriage, ſaid of the Plaintiff, That the Plaintiff had layen with ſuch a Woman, and others, and them *Carnaliter cognovit*, by reaſon whereof the ſaid W. R. refuſed to give his Daughter in Marriage to him, and that he cauſed the Plaintiff to be proſecuted in the Arch-Deacons Court for that incontinence; upon which he brought this Action.

Mich. 10 Car. Upon Not Guilty found against the Defendant; It was moved in stay of Judgment, That these words being spoken 20. *Septemb.* 7 Car. and the Action being brought Mich. 10 Car. (whereas it ought to be brought within two years by the Statute) by his own shewing, it is brought for words spoken above two years, and therefore he ought to be barred by the Statute. It was the Opinion of the Justices, That he should not now have advantage thereof, and that so it had bin adjudged: For otherwise there should be a mischief in that Court, more then in any other Court, viz. the Common Pleas, where they prosecute by Original and Outlawry; and if the Outlawry be reversed, the Statute aids the Plaintiff. But here they proceed by *Latitat*, whereby the cause of Action doth not appear, and perhaps divers years continues by process before the Defendant may be arrested, and the Plaintiff in his Declaration needs not to shew the cause wherefore he did not begin his Suit sooner. But if the Defendant pleads the Statute of 21 Jac. then the Plaintiff by Replication ought to shew cause why he did not bring his Action according to the time limitted by the Statute, otherwise he is to be barred. Hill. 10 Car. in B. R. *Hawkins* and *Billheads* Case. *Cro.* 1. Part, 293.

5. M. exhibited his Bill in the Court of Requests against B. and set forth, That the Defendant was endebted to him 400 l. and further shewed, How that the Defendant was decayed in his Trade, and was not able to pay him, and thereupon he was content to accept of 100 l. for the whole, and that the Defendant at the payment of the 100 l. required the Plaintiff to give him a Release, and then promised him, in consideration that he would make him a general Release, that he would pay him the residue of the Debt whensoever God should make him able; which Promise he oftentimes renewed: And then set forth, That an Estate of a great value was fallen to the Defendant, and that now he is able to pay him, and refuseth so to do. The Defendant first pleaded the general Issue, That he made no such Promise, and afterwards pleaded the Statute of 21 Jac. of Limitation of Actions, which they there would not admit, and therefore he prayed a Prohibition. It was said for the Defendant, That they ought not to have refused the Plea, because there is no remedy against a Statute. But it was Answered and Resolved, That a Prohibition ought not to be granted. 1. Because the Plaintiff hath no remedy but in Equity, because the Assumpsit made before the Release is discharged by the Release, and the Assumpsit which is after, is void, because there is no consideration, the Debt being discharged before. 2. That this is not within the Statute of Limitations, for that it is but a Trust reposed in the Defendant, that he would pay the residue when God should make him able, and being a bare Trust, is not taken away by the Statute of Limitation of Actions: And it was the Opinion of the Justices, That the Trust need not to be expressed in the Bill, for if it appeareth upon the whole matter of the Bill, That there is a Trust, it is enough, and he need not to express it. Wherefore the Prohibition was denyed by the Court. Hil. 17 Car. in C. B. *Mosse* and *Browns* Case. *Hob.* 151.

Upon the Statutes of 18 Eliz. cap. 2. 43 Eliz. cap. 3. 7 Jac. cap. 4. and 3 Car. cap. 4. Concerning *Bastard Children.*

1. IN a special Action upon the Case, The Plaintiff layed in his Declaration, That the Defendant did endeavour to Question him, and to charge him at the Quarter Sessions, to be the reputed father of a Bastard childe; Whether the Action did lye, was the Question. It was Resolved *per Curiam*, That the Action did not lye, this being an Ecclesiastical Sclander, and so to be punished there; But if he had layed, That he had procured an Order of Sessions to be there made against him, for to be the reputed father, and so to keep the childe, then the Action would lye upon the Temporal losse. And in that Case it was agreed *per Curiam*, That upon the Statute of 18 Eliz. cap. 3. That the Justices of Peace, nor the Justices of Assize have any power to meddle with bastard children, but upon an Appeal and Setting; but this is to be done by the two next Justices. Pasch. in B. R. *Bowber* and *Paniers* Case. *Bastr.* 2. Part, 343.

2. Upon a *Habeas Corpus*, who was committed and detained in prison in the County of *Oxon.* The Case was, H. having got a Bastard childe, by the Statute of 18 Eliz. cap. 3. this is to be referred to the examination of the two next Justices of the Peace, to examine and order the same; They did examine the matter, and made their Order therein; the which if the party refuse to perform or to enter into Bond to appear at the next Quarter Sessions, then they are to commit him to Prison without Bayl or Mainprize: H. accordingly com-

tred into Bond, and after, at the next Quarter Sessions, where he appeared, they did there commit him to prison. It was the Opinion of the Court in this Case, That this Imprisonment of him was illegal, this being out of their power, they having no power given them by the Statute, but upon his refusal to perform their order, they ought to have pursued their ordinary remedy against him, upon his Bond entred into, but not by his Commitment; wherefore he was Bayled by the Rule of the Court. Mich. 3 Car. in B. R. The King and *Hammonds* Case. *Bulst.* 2. Part, 341.

3. P. brought to the Bar, upon an *Habeas Corpus*, upon the Return of it, It appeared, That he at *Lincoln*, upon complaint to two Justices of Peace next adjoyning, was ordered to keep a Bastard child, he being (according to the said Order) the reputed father: From this Order, he appealed to the next Quarter Sessions: At which Sessions the matter being examined, he was discharged, and the former Order repealed. Afterwards, at another Quarter Sessions, the matter being re-examined, It was Ordered, That according to the first Order, That he should be accompted the reputed father of the Bastard, and should keep it; and if he did not perform it, he should be committed. All this matter appearing upon the Return, The Court held, That he being discharged at the next Quarter Sessions, to which according to the Statute of 18 Eliz. he appealed, That the second Sessions had no power to alter it; whereof, because there was none there for to maintain the Return, It was Ordered, That if no other matter was shewn, That he should be discharged. Hill. 9 Car. in B. R. *Bridges* Case. *Cro.* 1. Part, 248. 255. And see there, that it was holden, That the Statute of 3 Car. cap. 4 doth not aid this Case.

4. Error of a Judgment in B. R. in an Action upon the Case for words; whereas one J. D. was delivered of a Bastard childe, That the Defendant having communication with J. D. of the Plaintiff, and of the said Bastard childe, said of the Plaintiff these words, He (meaning the Plaintiff) is the reputed father of that Bastard childe: After Verdict, and Judgment for the Plaintiff, Error was brought, and assigned for Error, That these words were not Actionable: And of that Opinion was the whole Court, unless he had alledged some Temporal loss, viz. That he lost thereby his marriage, or the like; or that it was such a persons Bastard as was not able to keep it, whereby it would be to the Parish chargeable to keep; or that he by this means should be charged for the maintenance of such a Bastard, and to have further punishment: for it was said, That it had been Resolved, That a Bastard childe of persons able to keep it, and not like to be chargeable to the Parish, is not within the Statute of 18 Eliz. and a Reputed father is to be adjudged by the two next Justices of the Peace, or by the Sessions: Wherefore the Judgment in the Principal Case was Reversed. Hill. 10 Car. in B. R. *Salter* and *Browns* Case. *Cro.* 1. Part, 315.

5. A. was charged by B. for the getting of a Bastard childe upon her body; The two next Justices of the Peace did not make any Order in it, according to the Statute of 18 Eliz. but the cause came first to be heard at the general Sessions of the Peace in the County of L; where the Justices Ordered, That whereas it was proved by witnesses, That one J. S. had often used private company with the said B. and had confessed, that he had done as much to her, as a man could do to a woman, and that she had said, That J. S. had the use of her body, That thereupon A. should be discharged of the childe, and she be committed to the house of Correction, and J. S. the reputed father, should pay for the keeping of the childe 14 d. weekly: Afterwards, at the Assizes at L. The Judges Ordered, That the two next Justices of the Peace where the childe was born, should take consideration thereof, and settle such a course as to justice appertained; whereupon two Justices declared A. to be the reputed father, and that he should pay 18 l. to the Overseers of the Parish, and 14 d. weekly, and that he refusing to pay the same, the Justices committed him upon a *Certiorari*: Upon the Return, A. appeared in the Kings Bench; where it was Resolved, 1. That before the Statute of 3 Car. cap. 4. The Justices at the Sessions had not authority to intermeddle in Case of Bastardy, till the two next Justices of the Peace, according to the Statute of 18 Eliz. had made an Order therein. 2. That by the Statute of 3. Car. The Justices of their several Limits, are to make an Order in case of Bastardy; and therefore the first Order made in the principal Case, was good and Legal, and the second Order made by the two next Justices was void, and could not revoke that Order which was made before by good authority. 3. That the Commitment of B. for her life, was more then the Justices had authority to do: But yet it was Resolved, That an Error in part, and in that part which only concerned her, should not vitiate the whole Order; wherefore it was adjudged, That A. should be discharged. Pasch. 19 Car. in B. R. *Slaters* Case. *Cro.* 1. Part, 337. 338.

6. Upon a Petition unto Sir *William Jones*, Justice of Assize, upon the Statute of 18 Eliz. cap. 4. The Case was, A. P. having a Bastard childe, upon a complaint made at the Quarter Sessions, It was referred to the two next Justices of the Peace,

who

who heard and examined the matter, and made an Order, that one J. B. to be the reputed father, and Ordered him to allow towards the keeping of the childe, one shilling four pence *per* week; J. B. refused to perform the Order, but appealed to the Quarter Sessions: The Justices of the Peace at their Quarter Sessions, did re-examine the matter, and did disallow of the former Order, and did make a new Order of Sessions, by which they did charge another person; viz. W. C. to be the reputed father of the Bastard childe: Upon this the Inhabitants Petitioned Justice *Jones* to hear the matter again, which he did; and after both Orders read in Court, The Justice would not enter into the re-examination of the cause, but did *in omnibus* affirm the last Order made by the Justices at their Quarter Sessions; affirming, That upon the parties Appeal to them from the first Order, the last Order made at the Quarter Sessions was final, and that no Appeal was to be admitted against the said last Order; and so he said it was adjudged in *Pridgeons* Case, 13 Car. at the Assizes, *Berksfords* Case. *Bolstrode*, 2 Part, 355.

7. R. upon a *Habeas Corpus*, being brought to the Bar, It appeared by the Return, That he was committed by a Warrant of Mr *Shepherd*, a Justice of Peace of *Middlesex*; because he being the reputed Grandfather of one B. G. a poor fatherless and motherless childe, born in the Parish of S. *Giles in Campis*, and he being a man of ability to maintain and provide for the said childe, refusing to do it, or finde sureties for his appearance at the Quarter Sessions, was Committed. The Court was moved to have R. discharged; because this Warrant of his commitment was against Law: And the Court was informed, That R. did live and inhabite in the Town of A. in the County of *Suff.* and so the granting of the Warrant, and proceeding upon it, was *coram non Judice*. It was the Opinion of the Justices, That it is very reasonable that he should contribute to the maintenance of the childe, he being a man of good sufficiency; but in this course as is here taken, he is not compellable to do it: The childe resides here in the Parish of St *Giles*, and the Contribution is to be here; but the party which is to pay it, doth Inhabite in the County of *Suff.* and the Justices of Peace there, may make an Order in this, and so cause the money to be sent up: But the Court was clear of Opinion, That they have not any power there to make any Order in this Case; Wherefore the Rule was, That R. appear at the next Quarter Sessions for *Middlesex*; and upon his performance of that, he was discharged by the Court. Mich. 7 Car. in B. R. The King and *Reves* Case. *Bolstrode* 2. Part, 344.

8. This Question was propounded by J. S. a Justice of Peace, to Justice *Jones*, a Justice of Assize, upon the Statute of 43 Eliz. cap. 2. One had a Bastard childe, but she was not questioned for it, no Proceedings being had against her upon the Statute of 18 Eliz. cap. 8. Afterwards she had a second Bastard childe: The Question now propounded was, Whether she shall now be proceeded against upon the Statute of 7 Jac. cap. 4. as for her second Offence, she not having been punished for her first Offence; and whether this second Offence shall be taken as the first Offence? It was the Opinion of the said Justice, That she shall not be punished upon the Statute of 7 Jac. as for her second Offence, unless she had been before questioned, and punished for her first offence: But she might have been punished for her first offence, either by the Statute of 18 Eliz. cap. 3. or the Statute of 7 Jac. cap. 4. but is not to be punished as her second offence, by the Statute of 7 Jac. unless she had been punished for her first offence. 7 Car. *Regis*, at the Assizes. *Bolstr.* 2. Part, 349.

9. A. a single woman, was got with childe by B. a single man, the childe was born in the Parish of D. in the County of S. 11 years since; B. the reputed father, took the childe from the mother, and placed him at Nurse elsewhere: Afterwards, B. married with another woman, and with her did cohabite in the Parish of C. *in Villa de S.* the Bast childe dwelt with him, and had been maintained by the Reputed father ten years: After, the Reputed father dyed, leaving his Wife, and divers children begotten on her, and also left the Bastard childe: The Question in this Case was, by whom the Bastard childe is to be maintained, and to what place sent? It was the Opinion of the Justices, That this Bastard childe is to be sent to his Mother, to be kept by her, and maintained, if she be of ability to do it; but if not, then to the Vill of S. who are to keep and maintain this Bastard childe, and he is to be sent thither, in regard the said Bastard childe had been there before setled with the reputed father, where he was for ten years: and to this place of his last setling, as to the place of the birth, the Law hath respect; and so it was Ordered by the Justices. 7 Car. *Regis*, at the Assize in Lent, in the County of *Salop*. *Bolstrode* 2. Part, 350.

Where one Statute shall repeal another, without expressing Repeal, where not; and where Statutes in the affirmative imply a Negative, where not.

1. A Man long before the making of the Statute of 21 H. 8. cap. 13. had a Dispensation from the Pope for Plurality, and at the time of the making of the Statute of 21 H. 8. had one Benefice, with Cure of Souls, of the yearly value of 8 l. and within a year after the making of the Statute of 28 H. 8. cap. 16. he obtained a Confirmation of his former Dispensation, with words in the Confirmation, to use and enjoy the effect of his Dispensation. It was the Opinion of *Manwood* and *Manson* Justices, in this Case, That the first Benefice was void, by the Statute of 21 H. 8. And that the Statute of 28 H. 8. cap. 16. did not restore him to the same, without a new Presentation, notwithstanding that the Statute of 28 H. 8. made the Bulls of Dispensation made by the Pope, good for one year; and that if they be surrendred within the year, That the Chancellor of the Augmentation might grant a new Dispensation unto him: But the Lord *Dyer* was of Opinion, That as the Statute of 21 H. 8. made the first Benefice void, so the Statute of 28 H. 8. cap. 16 did restore him unto the Benefice; for when two Statutes are mis in appearance one to the other, and no clause of *Non obstante* is contained in the second Statute, so as one may stand with the other, such construction shall be made of the Statutes, that both of them may take effect. Hill. 28 Eliz. *Dyer*, 347. *Nelson* Case.

2. *Cox*, who was Chaplain to the Archbishop of *Canterbury*, having one Benefice of the Gift of the Queen, obtained a Dispensation from the Archbishop his Master, to take, have, and enjoy a Trialty, viz. Three Benefices incompatible: which Dispensation was confirmed by the Queen, by Letters under the Great Seal, *aliquo Statuto, actu, restrictione, aut aliquare causa, vel materia quacunque in aliquo non obstante*; by force of which Dispensation, he obtained two other Benefices incompatible; and whether the first of the three Benefices was void by the Statute of 21 H. 8. was the Question. It was the Opinion of the Justices, That notwithstanding the Act of 1 and 2 *Mar.* That by the Act of 1 Eliz. cap. 1. That the first Benefice was void by the Statute of 2 H. 8. cap. 13. But it was said, That in that part of the Act of 21 H. 8. which is revived by the other Statutes there is a Proviso and Restraint to the Archbishop of *Canterbury*, for granting of Dispensations contrary to the Act of 21 H. 8. which was now said to be in force. Trin. 28 Eliz. *Dyer*, 372. *Coxes* Case.

3. The Statute of 1. and 2. *Mar.* cap. 10. is That all Tryals hereafter to be had, awarded, or made for Treasons, shall be had and used only according to the due order and course of the Common Law of this Realm, and not otherwise. And it was the Opinion of the Justices, That notwithstanding that Statute, yet the Statute of 35 H. 8. made for Tryals committed out of the Realm, did stand in force, and was not Repealed; because no offence of Treason committed out of the Realm, was tryable by the course of the Common Law, so as that Statute did enlarge the power for Tryal of Treason in that point; But for Treason committed in a Forreign Country, The Justices were of Opinion, That it takes away the Statute of 33 H. 8. Mich. 3 Mar. *Dyer*, 132.

4. Note, It was the Opinion of all the Justices, That the Scature of 33 H. 8. for Indictment and Tryal of Treasons, confessed before three of the Council to be in a Forreign Country, was Repealed by the Statute of 1 and 2 Mar. and therefore it was holden, That the Rebels in the North parts, who had confessed their offences before three of the Council, should be Indicted in the County where the offence was committed, and the Indictment to be removed into the Kings Bench, or the Justices of *Oyer* and *Terminer* in *Middlesex*; and for the Tryal thereof, should come the Freeholders of the County where the Judgment is. Hill. 12 Eliz. *Dyer*, 291.

5. Husband and Wife alliened the Land of the Wife by Fine, with Proclamations, and the Husband dyed, and the five years expired after his death, without any Action or Entry made by the Wife. It was the Opinion of the Justices, That notwithstanding that the Statute of 32 H. 8. doth not Limit any time of Entry, yet that the Wife and her heirs should be barred for ever by the Statute of 4 H. 7. of Fines and Proclamations, which is a general Law; and also, because the Statute of 32 H. 8. doth not speak but only of Fines levyed without Proclamations. Mich. 6. E. 6. *Dyer*, 72.

6. A man seized of a Wharf, and houses in *London*, holden in Burgage, by his Will in writing, devised the same to his Wife, and her Heirs, upon Condition, That his Wife by the advice of Learned Council, within convenient time, should give.

who heard and examined the matter, and made an Order, that one J. B. to be the reputed father, and Ordered him to allow towards the keeping of the childe, one shilling four pence *per* week; J. B. refused to perform the Order, but appealed to the Quarter Sessions: The Justices of the Peace at their Quarter Sessions, did re-examine the matter, and did disallow of the former Order, and did make a new Order of Sessions, by which they did charge another person; viz. W. C. to be the reputed father of the Bastard childe: Upon this the Inhabitants Petitioned Justice *Jones* to hear the matter again, which he did; and after both Orders read in Court, The Justice would not enter into the re-examination of the cause, but did *in omnibus* affirm the last Order made by the Justices at their Quarter Sessions; affirming, That upon the parties Appeal to them from the first Order, the last Order made at the Quarter Sessions was final, and that no Appeal was to be admitted against the said last Order; and so he said it was adjudged in *Pridgeons* Case, 13 Car. at the Assizes, *Berksfords* Case. *Bolstrode*, 2 Part, 355.

7. R. upon a *Habeas Corpus*, being brought to the Bar, It appeared by the Return, That he was committed by a Warrant of Mr *Shepherd*, a Justice of Peace of *Middlesex*; because he being the reputed Grandfather of one B. G. a poor fatherless and motherless childe, born in the Parish of S. *Giles in Campis*, and he being a man of ability to maintain and provide for the said childe, refusing to do it, or finde sureties for his appearance at the Quarter Sessions, was Committed. The Court was moved to have R. discharged; because this Warrant of his commitment was against Law: And the Court was informed, That R. did live and inhabite in the Town of A. in the County of *Suff.* and so the granting of the Warrant, and proceeding upon it, was *coram non Judice*. It was the Opinion of the Justices, That it is very reasonable that he should contribute to the maintenance of the childe, he being a man of good sufficiency; but in this course as is here taken, he is not compellable to do it: The childe resides here in the Parish of St *Giles*, and the Contribution is to be here; but the party which is to pay it, doth Inhabite in the County of *Suff.* and the Justices of Peace there, may make an Order in this, and so cause the money to be sent up: But the Court was clear of Opinion, That they have not any power there to make any Order in this Case; Wherefore the Rule was, That R. appear at the next Quarter Sessions for *Middlesex*; and upon his performance of that, he was discharged by the Court. Mich. 7 Car. in B. R. The King and *Reves* Case. *Bolstrode* 2. Part, 344.

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1. A Man long before the making of the Statute of 21 H. 8. cap. 13. had a Diſpenſation from the Pope for Plurality, and at the time of the making of the Statute of 21 H. 8. had one Benefice, with Cure of Souls, of the yearly value of 8 l. and within a year after the making of the Statute of 28 H. 8. cap. 16. he obtained a Confirmation of his former Diſpenſation, with words in the Confirmation, to uſe and enjoy the effect of his Diſpenſation. It was the Opinion of *Manwood* and *Manſon* Juſtices, in this Caſe, That the firſt Benefice was void, by the Statute of 21 H. 8. And that the Statute of 28 H. 8. cap. 16. did not reſtore him to the ſame, without a new Preſentation, notwithſtanding that the Statute of 28 H. 8. made the Bulls of Diſpenſation made by the Pope, good for one year; and that if they be ſurrendred within the year, That the Chancellor of the Augmentation might grant a new Diſpenſation unto him: But the Lord *Dyer* was of Opinion, That as the Statute of 21 H. 8. made the firſt Benefice void, ſo the Statute of 28 H. 8. cap. 16 did reſtore him him to the Benefice; for when two Statutes are contrary in appearance one to the other, and no clauſe of *Non obſtante* is contained in the ſecond Statute, ſo as one may ſtand with the other, ſuch conſtruction ſhall be made of the Statutes, that both of them may take effect. Hill. 28 Eliz. *Dyer*, 347. *Pollard's* Caſe.

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4. Note, It was the Opinion of all the Juſtices, That the Statute of 33 H. 8. for Indictment and Tryal of Treaſons, confeſſed before three of the Council to be in a Forreign Country, was Repealed by the Statute of 1 and 2 Mar. and therefore it was holden, That the Rebels in the North parts, who had confeſſed their offences before three of the Council, ſhould be Indicted in the County where the offence was committed, and the Indictment to be removed into the Kings Bench, or the Juſtices of *Oyer* and *Terminer* in *Middleſex*; and for the Tryal thereof, ſhould come the Freeholders of the County where the Judgment is. Hill. 12 Eliz. *Dyer*, 291.

5. Husband and Wife alliened the Land of the Wife by Fine, with Proclamations, and the Husband dyed, and the five years expired after his death, without any Action or Entry made by the Wife. It was the Opinion of the Juſtices, That notwithſtanding that the Statute of 32 H. 8. doth not Limit any time of Entry, yet that the Wife and her heirs ſhould be barred for ever by the Statute of 4 H. 7. of Fines and Proclamations, which is a general Law; and alſo, becauſe the Statute of 32 H. 8. doth not ſpeak but only of Fines levyed without Proclamations. Mich. 6. E. 6. *Dyer*, 72.

6. A man ſeized of a Wharf, and houſes in *London*, holden in Burgage, by his Will in writing, deviſed the ſame to his Wife, and her Heirs, upon Condition, That his Wife by the advice of Learned Counſel, within convenient time, ſhould

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give and assure the same, for to maintain a Free-School, and Almesmen, and Almeswomen for ever; and the said Wife should have the Issues and profits of the same during her life, bearing the charges of the said School, &c. It was Objected in that Case, That although the Statute of 23 H. 8. cap. 10. That the erection of a Grammar School to instruct youth, as well in Learning, as in good Manners, was a work of Charity, and good in it self; and so to maintain poor men and women; yet because when such Feoffments were made to such uses, the same was prejudicial to the Lords for their Wards Reliefs and Escheats, and because the benefit of the Lords was respected by that Statute, and it was for his benefit to take away such uses; for that cause it was said, That the Uses and Intents mentioned in the said Will, were void. But in that Case it was Resolved, 1. That the Statute of 23 Eliz. cap. 10. did not extend to take away Charitable Uses; for the Statute took away superstitious Uses, as other Statutes, viz. The Statutes of 26 H. 8. and 31 and 37 H. 8. did. 2. It was Resolved, That the Statute of 32 and 34 H. 8. of *Wills*, had taken away the first of the said Statute of 23 H. 8. cap. 10. for that the words are, That all and every person, having an Estate in Fee simple, may dispose, &c. By which Statute it appeareth, That even Corporations and Companies not Incorporated, are included, and not excepted out of the said Statute of 32 H. 8. And therefore it was Resolved, That the said good and charitable Uses stood good, notwithstanding the said Statute of 23 H. 8. cap. 10. *Cook* 1. Part, 25. *Porters* Case.

7. King *Henry* 8. by his Letters Patents, erected a Colledge of Physitians in *London*; and by the said Letters Patents, Granted them, That none should exercise the Art of Physick within the City of *London*, or seven miles from it, unless he were allowed by the President and others of the said Colledge; And by the said Letters Patents, Granted to them, That there should be four Censors, or Governours, yearly chosen by them, who should have the Tryal and Examination of all Physitians which practised Physick within the said City, or seven miles of it; And further, by the said Letters Patents, Granted to them, That they should have the punishment of all those who practised Physick within the said City, *Pro delictis suis in non bene exsequendo, faciendo, & utendo facultate Medicinæ, per Fines, Amerciament. & Imprisonament. Corporum eorum.* The said Charter was Confirmed by Act of Parliament, 14. H. 8. By which Act it was further Enacted, That no person should be suffered to practise Physick through *England*, until he be examined at *London* by the President, and three of the Censors, except he be a Graduate of the University of *Oxford* or *Cambridge*. And afterwards, by an Act of 1 Mar. the said Letters Patents were also confirmed: And by the same Act it was Enacted, That when as the President, or such as the Colledge should yearly authorise, should send or commit any such Offender for any Offence or Disobedience, contrary to any Article of the said Grant, to any Goal or Prison, That the Goaler should keep and receive such person, without Bail or Mainprize: *Bonham*, who was a Graduate, *scil.* a Doctor of Physick in the University of *Cambridge*, practised Physick in *London*, contrary to the said Letters Patents, and Acts of Parliament, and was summoned to appear before the President and Censors, for practising Physick in *London*, and he upon the Summons did not come to them; Wherefore it was awarded, That for his disobedience, he should be amerced 10 l. and that he should be Arrested, and committed to Prison: M. *Bonham* said, That he had practised Physick, and would practise Physick in *London*, *Nisi de Collegio petita venia*; and affirmed, That neither the President, nor the Censors, had any authority over them who were Doctors of the Universities: Afterwards, he was committed to Prison; and thereupon he brought a false Imprisonment, and Judgment therein was given for *Bonham*. And in this Case (amongst other things) it was Resolved by the Justices, That the Act of 1 Mar. did not enlarge the power of the Censors to Fine or Imprison any, for any cause for which they ought not to be Fined by the Act of 14 H. 8. For the words of the Act of 1 Mar. are, According to the Tenor and Meaning of the said Act; But in this Case at Bar, *Bonham* did not any Act contrary to any Article or Clause in the said Act of 14 H. 8. 2. It was Resolved in this Case, forasmuch as the said Physitians had not any Court granted to them by the said Letters Patents, they could not by any authority implicite granted to them, for any misdemeanour done by *Bonham*, commit him to Prison without Bayl or Mainprise, until he should be delivered by the Commandment of the President and Censors, as they did in this Case; And for proof thereof, the Case of the Mayor and Communalty of *London*, 38 Eliz. in a *Quo Warranto* was remembred; A Grant was made to the Mayor and Communalty, That the Mayor for the time being, should have *Plenam & integram scrutationem, Gubernationem, & Correctionem omnium & singulorum Mysteriorum*, without Granting to them any Court in which there should be any Proceedings; That the same was good for search, by which a Discovery might be made of such offence, which by Law might be punished in any Court; but the same did not give them any absolute power to com-

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mit any Subject of the Realm at their pleaſures. And Note, In the Principal Caſe, It was agreed by the Court, That when an Act of Parliament is againſt Common Right and Reaſon, and repugnant, and impoſſible to be performed, That the Common Law doth judge ſuch an Act of Parliament to be void. See 14 *Eliz. Dyer.* The Statute of 1 E. 6. gave Chauntries to the King, ſaving to the Donor all ſuch Rents and Services; The Common Law ſhall adjudge it void for the Services; for it ſhould be againſt Common Reaſon, That the King ſhould hold of any, or ſhould do any Service to any of his Subjects, Hill. 7 Jac. in C. B. *Cook* 8. Part, 94, 95. Doctor *Bonhams* Caſe.

8. An Informer ſued a Recuſant for the penalty of 20 l. a moneth, for not repairing to the Parish Church, or any other Chappel, or uſual Place of Common Prayer, &c. The Defendant pleaded the Statute of 23 Eliz. That every Recuſant being a Recuſant Convict, ſhould forfeit to the King for every Offence 20 l. and pleaded the Statute of 28 Eliz. That every offender againſt the Statute of 23 Eliz. for every moneth after his Conviction, ſhould pay 20 l. to the King at his Exchequer; and pleaded the Statute of 35 Eliz. That no part by the ſaid Statutes ſhould be paid to the Informer. And it was ſaid, That by the ſaid Statutes, no part of the penalties ſhould be paid to the Informer, but all ſhould be paid to the King; and if the Defendant ſhould be chargeable to the Informer, then he might be double charged: It was Reſolved in this Caſe (amongſt other things) 1. That the Statute of 28 Eliz. had not taken away the Liberty which the Informer had by the Statute of 23 Eliz. Becauſe the ſaid Statute is in the Affirmative; and Regularly, Statutes in the Affirmative do not take away precedent Acts in the Affirmative. 2. Reſolved, That the Statute of 35 Eliz. did not abrogate the Statute of 23 Eliz. as to an Action popular; for that the purpoſe of the Act was only to cut delayes, and to give a more ſpeedy remedy againſt the Husband, for the Wives forfeitures for their Recuſancies; and Acts of Parliament ought not by any ſtrained conſtruction out of general and ambiguous words of a ſubſequent Statute to be abrogated. The Statute of 16 R. 2. cap. 5. is, That all the Lands of one Attainted in a Præmunire, ſhall be forfeited to the King: Yet if Tenant in Tail of Lands be attainted in a Præmunire, It was Reſolved, That thereby the Eſtate Tail is not barred, becauſe theſe general words have not Repealed the Statute of *Donis*, and therefore he ſhall forfeit the Land but for his life, and his Iſſue ſhall not be barred. *Cook* 1. Part, from 59. to 64. D. *Foſters* Caſe.

9. The words of the Statute of 27 H. 8. are, That all Grants by Letters Patents to be made for time of Life, or years of any Office concerning the Lands within the Survey of the Court of Augmentation, &c. ſhall be ſealed with the Great Seal of that Court. It was conceived by the Juſtices, That the ſame implyeth a Negative, ſo as if the Grant be under the Great Seal, it ſhall be void. Mich. 33 H. 8. *Dyer*, 50. See *Cook* 11 Part, 64. It is ſaid, That the ſaid Leaſe made under the Great Seal, was not abſolutely void, for that the words are not *ſimpliciter* general, but *ſecundum Quid*. See 7 Eliz. *Dyer*, 232.

10. It was Enacted by the Statute of 6 E. 6. That the Quarter-Seſſions in the County of *Angleſey*, be alwayes holden at *Beaumorris* only, *Et non alibi infra Com. Angleſey*: And a Seſſions was holden at *Newburgh* in the ſame County; and divers perſons were there Indicted, &c. And 4 & 5 *Mar.* It was Reſolved by all the Judges of *England*, That all was *Coram non Judice*, and void by reaſon of the Negative Prohibition. *Cook* 11. Part, 65. in Dr. *Foſters* Caſe.

11. A. brought an Attaint in the Common-Pleas, of a falſe Verdict given in *Norwich*, upon the Statute of 23 H. 8. againſt a Citizen of N. upon a Verdict given *in Curia Civitatis ibidem*, againſt him in an Action upon the Caſe; Conuſans of Plea was demanded by reaſon of the Kings Charter of *Ed.* the 4th, *de omnibus placitis et attinctis*: Which Charter was Confirmed by King *Ed. 6.* And yet the Conuſans was denyed by the Court: For the ſaid Writ of Attaint *ex neceſſitate*, ought to be brought *in uno duorum Bancorum*; for that the words of the Statute are, That all Attaints here to be taken, ſhall be taken in the Kings Bench, or in the Common Pleas, and in none other Court. Trin. 3 Eliz. *Dyer*, 202.

12. Lands in *London* deviſeable by Cuſtome, came to King *Henry* the 8th, by the Statute of *Dr. Colmon*, The King granted the Lands to hold of him in *Capite*; The Patentee deviſed the whole Lands. It was the Opinion of the whole Court, That the Deviſe was good againſt the Heir for the whole Land, becauſe the Lands were deviſeable by Cuſtome before the Statute of 32 H. 8. and the Statute is in the affirmative, and doth not take away any Cuſtome. But yet it was agreed in that Caſe, That the Saving in the ſaid Act, gave in ſuch caſe the third part to the King for Wardſhip Primer Seiſin, &c. and yet that the Heir ſhould be barred by the Cuſtome. See 4 & 5 *Mar. Dyer*, 155. *Cook* 1. Part, *Inſtitutes*, 111. *Cook* 9. Part, 133. in *Mathew Manes* Caſe, 200.

13. A Religious Colledg to which a Rectory was appropriate, and other Lands of the ſaid Col-

ledge

ledg came to the King by the Statute of 1 E. 6. the King Conveyed the Rectory to A; and the Lands parcell of the poſſeſſions of the Colledg, to B: The Fermor of B. brought againſt the Fermors of the Rectory, and ſhewed the Statute of 31 H. 8. concerning diſcharge of Tythes, and ſhewed alſo unity of poſſeſſion at the time of oth Statutes. It was adjudged, That in that Caſe, the Prohibition did not lye, and a Conſultation was granted: For it was Reſolved, That this Colledg did not come to the King by the Statute of 31 H. 8. but by the Statute of 1 E. 6. And it was Reſolved, That the branch of the Statute of 31 H. 8. did not extend to any Colledg which came to the King by the Statute of 1 E. 6. *Cook* 2. Part, 46. The Biſhop of *Canterburies* Caſe.

Where, and what Statutes ſhall by Equity be Conſtrued to extend to other perſons, other things, other places, other times, other Eſtates, and other Actions or Writs, then are mentioned in the Statutes; And where, and what not.

1. A Man ſeiſed of a Mannor in Fee after the Statute of 27 H 8. of Uſes, enfeoffed divers perſons to the uſe of himſelf and the Heirs males of his body; and for want of ſuch Iſſue, with divers remainders over in tail, the Reverſion to the Feoffor and his Heirs: the Father had Iſſue and dyed; He in the Remainder granted a Rent-Charge out of the Land, and the Iſſue in tail levied a Fine, and ſuffered a Common-Recovery, and afterwards dyed without Iſſue: It was Reſolved in that caſe, That the Recoverors, nor any who came in under their Eſtate, ſhould be ſubject to the charge of him in the Remainder, becauſe the Recoveror is in of an Eſtate which he hath gained under the Tenant in tail in poſſeſſion; which eſtate is not ſubject to the charge of him in the Remainder; and alſo becauſe the Remainder can never come in poſſeſſion after the Recoveror: And it was Reſolved, That no Leaſe, nor Rent, nor Eſtate, made by him in the Remainder, ſhould charge the poſſeſſion of the Recoverors. *Cook* 2. Part, *Capell's* Caſe.

2. Tenant in tail, the remainder in Fee; He in the Remainder by Deed Indented and enrolled, for good Conſiderations, Covenanted to ſtand ſeiſed to the uſe of himſelf in tail, the remainder to the Queen, her Heirs and Succeſſors, Kings and Queens of England: Tenant in tail ſuffered a Common Recovery. It was adjudged in this Caſe, That the Iſſue in tail was barred; for it was ſaid, That in that caſe no uſe could be raiſed to the Queen upon ſuch general conſideration, without ſpecial averment was made, That valuable or other good Conſideration was given. And, 2. In that caſe, It was Reſolved, That no Eſtate tail is preſerved by the Statute of 34 H. 8. but that which is created by Letters Patents of the King, or be of the proviſion of the King, and the Eſtate tail created by a common perſon, was not within that Statute. *Cook* 2. Part, 35. *Wiſemans* Caſe.

3. Grandfather, Father and Son; The Grandfather held the Mannor of D. of B. as of his Mannor of S. by Knight-Service, and levied a Fine to the uſe of himſelf for life, the remainder to the uſe of the Father in tail, and afterwards to the uſe of the right Heirs of the Grandfather: The Father dyed, his ſon within age. B. the Lord ſuffered a Recovery of the Mannor of S. to the uſe of himſelf and his Wife in tail, the remainder to the uſe of C. and his Wife in tail, the Remainder to the right Heirs of B: B. and his Wife dyed without Iſſue, C. entred, the Grandfather dyed, the Wife dyed, the ſon entred, and made a Leaſe for years, rendring Rent; C. re-entred: In this caſe, theſe Points, amongſt others, were Reſolved, 1. That the Grandfather had an Eſtate in Fee expectant upon an Eſtate tail, as a Reverſion, and as a Remainder. 2. That C. ſhould not have the Wardſhip of the Land, becauſe that a Reverſion in Fee is expectant upon it, and the Reverſion is an Hereditament holden of the Lord, and not of the Eſtate in tail. 3. That a man ſhall never have the Wardſhip of the Heir, when the Land was never in his Fee. 4. Reſolved, That C. ſhould not have the Wardſhip of two parts of the Land by the Statute of 32 H. 8. becauſe the Heir of the Father who is in by diſcent, ſhall be in Ward by the Common-Law, and not by the Statute; alſo the Statute gives two parts to the King, or to the Lord, when the advancement continues in the perſon advanced without any alteration by act in Law, or by diſcent, or act of the party. But when the Land is Conveyed to the advancement of the wife of the Tenant, or payment of his debts, if afterwards the Land be aliened *bona fide*, before the death of the Tenant, the King nor other Lord ſhall have any Wardſhip. *Cook* 2. Part, 93. 94. *Bingbams* Caſe.

4. A. ſeiſed of the Mannor of *Toby* in Fee; And A. his Wife ſeiſed of the Mannor of *Bacton*, to them and the Heirs of their two bodies begotten, by an Eſtate made to them before Coverture by the

the Joynture of the Wife, the Reverſion to A. in Fee; *Toby* amounting to the value of two parts of the Lands, and *Hinton* to a third part, both holden in *Capite*; by his Will Deviſed the Manner of *Toby* to his Wife for life, upon Condition, that ſhe ſhould not take her former Joynture in *Hinton*: The Wife by word (*in pais*) waived her Eſtate in *Hinton*, and agreed to the Manner of *Toby*, and entred into it. And, If the Deviſe were good for the Manner of *Toby*, or any part of it, was the Queſtion? It was Reſolved in this Caſe (amongſt other Points), That the Deviſor had not power to Deviſe the whole Manner of *Toby*, by the Statutes of 32 and 34 H. 8. of *Wills*: 1. Becauſe that the Deviſor was not a perſon [having] within the Statute: For every perſon ought to be having at the time of the making of his Will; and the Deviſor had not the Manner of *Hinton*, but he and his Wife had it, and ſo he was not Owner. 2. Becauſe the Deviſor had not the ſole Eſtate in the Manner of *Hinton*, neither at the time of the making of his Will, nor at the time of his death, but with his wife; and ſhe could not diſagree during the Coverture. And, 3. Becauſe by the Statute, the King ought to have the clear yearly value of the third part, without any diminution, but by this Deviſe, the King ſhould have but a poſſibility for his third part; *ſcil.* to have the Manner of *Hinton*, if the Wife will diſagree. 2. It was Reſolved, That the third part ought to deſcend immediately after the death of the Deviſor; and in this Caſe, the Manner of *Hinton* ſurvived to the Wife, untill ſhe diſagreed; and it may be ſhe will not diſagree within two years: And therefore it was Reſolved, That the Deviſe was not good for the whole Manner of *Toby*; but that the King ſhould have the third part of it. *Cook* 3. Part, 25. to 37. *Butler* and *Baker's* Caſe.

5. In a Replevin, the Caſe was; W. R. was poſſeſſed of a Farm for 30 years, called *Coſwellfield Grange*, which conſiſted of divers parcels; *ſcil. Hob field*, *Parkfield*, and others, and made his Will 4 E. 6. and thereof made H. his Son his Executor; who, 4 *Mar.* Deviſed all the Grange, except *Hob field*, to H. B. for 23. years, and excluded *Holmfield* to W. F. for 23. years; and afterwards granted all the reſidue of his ſaid Term in the ſaid Grange to W. F. and H. B. He in the Reverſion 13 Eliz. granted a Rent iſſuing out of all his Lands and Tenements, commonly called *Coſwellfield Grange*, *Quondam in tenura W. R. et aliorum in tenura ſive occupatione H. B.* The Rent was behind, the 30 years expired; He in the Reverſion made a Feoffment in Fee of the ſaid Farm to another; the Grantee made his Executors, and dyed; The Feoffee made a Leaſe at Will; the Executors of the Grantee diſtrained for the Rent behind in the life of the Grantee before the expiration of the Term: And Judgment was given for the Executors. A Doubt did ariſe in this Caſe, upon the words of the Statute of 32 H. 8. Cap. 37. upon theſe words; [*viz.* And it ſhall be lawfull to every ſuch Executor or any ſuch perſon or perſons to whom ſuch Rent or Fee-Farm ſhall be due, and not paid at the time of his deceaſe, to diſtrain for the Arrearages of all ſuch Rents upon the Lands, &c. ſo long as the ſaid Lands, Tenements, or Hereditaments continue, remain, and be in the ſeiſin, or poſſeſſion of the ſaid Tenement in Demeſne, who ought immediately to have paid the ſaid Rent, &c. be in the ſeiſin or poſſeſſion of any other perſon or perſons claiming the ſaid Lands, &c. only by and from the ſaid Tenant by purchaſe, guift, or diſcent, in like manner as the Teſtator might or ought to have done in his life.] It was Objected, That this Caſe was out of the ſaid Act, for the Act doth extend only to Tenants in Demeſne, who immediately ought to have paid it; and that was in the Caſe at Barr to the Grantor, and thoſe who claim only by and from him. And in this Caſe, Leſſee at Will of the Feoffee, doth not claim by, from, or under the Grantor, but he claimeth by, and from the Feoffee, and ſo out of the Statute. But it was Reſolved, That although the Leſſee at Will doth not immediately claim from the Grantor; yet he is within the ſaid Act; for where things are done in right, and in truth, and become remedileſs by the Act of God; *ſcil.* by death of him to whom they were due; in ſuch Caſes, Acts of Parliament ſhall have a favourable Interpretation, to extend the remedy proportionable to the miſchief: And therefore the ſecond Feoffee, and ſo *in infinitum*, ſhall be charged by force of this Act. Alſo the ſecond Feoffee is within the words of the Act: For although he be not in by the Grantor, yet he is from him; for *from*, doth amount to as much as *under* him. *Cook* 4. Part, 50. *Ognells* Caſe.

6. In an *Ejectione* of the Rectory of A. in A. B. and C; The Defendant pleaded Not guilty; and the Viſne came only out of A: and for that the Judgment was reverſed, that this Tryall was inſufficient; for that the Statute of 32 H. 8. Cap. 30. doth not extend to a Verdict given between the Demandant and the Voucher, nor unto any default in the Original Writ, or in the Return thereof, or to want of an Original; and the Statute of 18 Eliz. Cap. 14. helps many of theſe defects, but doth not remedy any inſufficient Tryall, but that remaineth at the Common-Law. See *Goodwin* and *Franklins* Caſe there vouched. See

22 Eliz. *Dyer*, 367. See *Cook* 5. Part, *Gardiners* Case. Trin. 30 Eliz. in the Exchequer. *Cook* 5. Part, 36. *Baynham's* Case.

7. The Husband ſeiſed of Lands in Fee, made a Feoffment in Fee to the uſe of himſelf for life, without impeachment of Waſte, and afterwards to the uſe of his Wife for her Joynture, upon Condition, That ſhe ſhould perform his laſt Will: The Husband dyed, the Wife Entred, and agreed to that Eſtate; and afterwards brought Dower. It was Objected, That all the Eſtates limited by the Statute of 27 H. 8. for Joyntures of the Wife, are of a joynt Eſtate made to the Husband and Wife, and none of them to the Wife only, or by way of Remainder: and the letter of the Statute doth import a Joynt-Eſtate; for that the word (*Jointure*) doth imply a Joynt-Eſtate. But in this Caſe, It was Reſolved, That the Eſtate limited in the Remainder to the Wife for her life, was a good Joynture within the Statute of 27 H. 8. but then the ſame ought to take effect immediately after the death of the Husband. 2. It was Reſolved, That an Eſtate limited to the Wife upon Condition, was a good Joynture within the ſaid Statute, if the Wife after the death of her Huſband accepted of it. So a Feoffment to the Huſband for life, and after to the uſe of the Wife, *durante viduitate*, is a good Joynture within the Statute; for the ſame is an Eſtate for life, which cannot be determined but by her own act. 3. Reſolved, That an Eſtate made to the Wife upon Condition, to perform the laſt Will of her Husband, might be averred to be for the Joynture of the Wife, and ſuch an averment is given by the expreſs words of the Statute. *Cook* 4. Part, 1. and 3. *Vernon's* Caſe.

8. A man held his Lands by Homage, Fealty, Eſcuage, and Suit of Court; the Lord had Seiſin of the Fealty only. It was Reſolved in this caſe, 1. That it was a ſufficient Seiſin of all other Services; for the Seiſin of part of a Service, is the Seiſin of the whole; and Seiſin of Fealty, is Seiſin of Homage. 2. It was Reſolved, That Seiſin in Law, was a ſufficient Seiſin to make an Avowry, within the Statute of 32 H. 8. by the expreſs words of the Statute, which are, Actual Poſſeſſion or Seiſin, in the diſjunctive. 3. It was Reſolved, That the Statute of 32 H. 8. did not extend to ſuch a Rent or Service, which by common poſſibility might not happen or come due within 60 years, as Caſual Services. 4. It was Reſolved upon the ſame Statute, That if a man be out of poſſeſſion 60 years, yet if his Entry be not taken away, he may enter, and bring an Action of his own poſſeſſion; for that the firſt Clauſe of the Statute doth not barr any right, but probability that none ſhall ſue or maintain any Writ of Right for any Tenements, but only of the Seiſin of his Anceſtors within 60 years: but he may have an Action of his own poſſeſſion. *Cook* 4. Part, 8. and 9. *Beville's* Caſe.

9. A. ſeiſed of Lands in Fee holden in Socage, Diviſed a Rent, with Clauſe of Diſtreſſe, to B. for life: C. heir of A. Leaſed the Land to D. for life, the Remainder to E. in Fee: The Rent was behind in the life of D; D. dyed; B. diſtrained E. in the Remainder for all the Arrearages encurred in the life of D: It was Objected in this Caſe, That the Statute of 32 H. 8. Cap. 37. is; (In caſe of Diſtreſs by Executors or Adminiſtrators) ſhall diſtrain for the ſame Arrearages upon ſuch Lands and Tenements, out of which the ſaid Rents or Fee-Farms were iſſuing in ſuch manner and form as he ought or might to have done, &c. And in caſe of Executors of Tenant for life, there the diſtreſs is given unto him in whoſe time the Arrearages encurred due, ſo as he in the Reverſion or Remainder ſhould not be charged for the Arrearages encurred in the life of Tenant for life. But it was Reſolved, That as this Caſe is, he in the Remainder by the latter branch ſhould be charged. For the Judges ought not to make Conſtruction againſt the expreſs words of the Statute. And it was ſaid by them, That the ſeveral indeing and penning of the former part of the Act concerning Diſtreſſes given to Executors, and this branch did argue, That the makers of the Act did intend a difference of the Proviſions and Remedies, otherwiſe they would have followed the ſame words: And in the principal caſe, all the Land was charged with the Rent, and the Heir held all his eſtate charged with it, and when he made a Leaſe for life, the Remainder in Fee; he in the Remainder was chargeable, and might have been diſtrained by the Common-Law, but being prevented by the Act of God, by the death of C. the laſt part of the Statute hath ſupplyed that remedy, and given to the Grantee power to diſtrain; as if *Cestuy que vie* had been alive. *Cook* 5. Part, 118. *Edwards* Caſe.

10. A. ſeiſed in Fee by Indenture, in conſideration of blood, Covenanted with B. his Nephew, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of B. in tail, the remainder to the right Heirs of B: Provided, That if the ſaid A. by himſelf or any other perſon during his natural life, tendered to B. a Gold Ring, to the intent, to make void the ſaid Uſes, that then the ſaid Uſes ſhould be void: Afterwards A. was attainted of Treaſon: The Queen by her Letters Patents Leaſed the Land to C. and D. for 40 years; The Attainder was Confirmed by an Act of Parliament

18 Eliz. And by an Act at the ſame Parliament, it was Enacted, That all perſons which claim any Eſtate or Intereſt in the Lands of any perſon attainted, not enrolled ſince 18 Eliz. ſhall within two years after the Seſſion of that Parliament, ſhew and bring into the Court of Exchequer his or their Grant or Aſſurance, then the effect thereof to be enrolled of Record, or elſe the Aſſurance to be good; The King by his Letters Patents reciting the ſaid Proviſo, and that the benefit thereof was given to her by Act of Parliament, authorized E. to deliver the Gold Ring to B. to make the ſaid Uſes void; he tendred the ſame to B, who refuſed to accept of it. It was Objected in this caſe, That the Tender of the Gold Ring was inſeparably annexed to the perſon, and therefore the Tender made by a ſtranger, was not good. But it was Reſolved, That in this Caſe, the Tender of the Gold Ring was not annexed to the perſon of A, but any other might do it; and it was given to the King by the Act of Attainder: and when the Statute gives the Condition to the King, the performance of it which is the ſubſtance, which is not inſeparably annexed to the perſon, is given to the King. 2. It was Objected, That the Conveyance by the ſaid Act of Parliament of 18 Eliz. was void, becauſe the two years were paſt, and the ſame was not enrolled. But it was Reſolved, That at the time of the Tender, that the Conveyance was in force; for by the words of the Act, the Conveyance ought to be exhibited within the two years (as it was in the principal Caſe), but the Act doth not require, that it be enrolled within the two years, but that it might be enrolled at any time after the two years. *Cook* 7. Part, 13. and 14. *Engleſield's* Caſe.

11. W. W. and E. his Wife, had Iſſue a Son and two Daughters on the body of E; viz. F. and M: W. W. by his Will appointed the Education and government of his ſaid Son and Daughters, To the Grandfather and his Wife during their Lives, and dyed: F. the Relict of W. W. took to Huſband R. R; The Grandfather dyed; The Grandmother was ſeiſed of Lands in Socage, and Deviſed the ſame by her Will to her ſon in tail, the remainder to F. and M. and to the Heirs of their two bodies, equally to be divided betwixt them, the Remainder to E. the Mother being her Daughter and Heir, and her Heirs. The Grandmother dyed: The ſon died without Iſſue; F. took to Huſband W. A. and ſhe and her Huſband and M. entred into the Lands, and were ſeiſed; and afterwards M. remaining in the houſe of R. R. being above the age of 14 years; and within the age of 16 years, with the conſent of R. R. left the houſe of the ſaid R. R. and went to D. in the ſame County, and was there married to E. R. The Queſtion upon the whole Matter was, Whether E. the Mother had the Cuſtody and government of the ſaid M. at the time of the Contract and Marriage within the Statute of 4 & 5 Ma. Cap. 8. or not? In this caſe, amongſt other Points, It was Reſolved, 1. That E. the Mother had the Cuſtody of her Daughter as Guardian, by coverture and aſſignation within the Statute. And although that it appeareth by the Special Verdict, That the ſaid M. her Daughter departed out of the houſe of the ſaid E. her Mother 6 hours before the Contract; yet in Judgment of Law, E. her Mother had the Cuſtody of her at the time of the Contract of Marriage, becauſe the Cuſtody was a thing inſeparable from the perſon of the Mother. 2. It was Reſolved, That the ſaid M. and F. were Tenants in tail, the Reverſion to E. their Mother. 3. Reſolved, That upon this Verdict, E. R. and M. his Wife had good Title to the Land againſt W. R. and F. his Wife; and, that one daughter, as this Caſe is, ſhall not take benefit of the forfeiture of the other. For the Statute gave the forfeiture to the next of Kin to whom the Inheritance ſhould diſcend, or come after her deceaſe, &c. during the life of ſuch perſon as ſhall ſo contract Matrimony: So as firſt there ought to be blood; and ſecondly, ought to be next of blood to whom the Inheritance ſhall diſcend: and though that F. the daughter be of blood, yet in this caſe by the death of M. the Land, if ſhe hath Iſſue, ſhall diſcend to her Iſſue; and if ſhe have no Iſſue, it ſhall revert to E. the Mother. Hill. 34 Eliz. in B. R. *Cook* 3. Part, from 38. to 42. *Ratcliff's* Caſe.

12. In a *Quare Impedit*, the Caſe was; A man was ſeiſed of a Manor to which an Advowſon was appendant, and Deviſed the ſame to his Wife for life, and dyed: the Wife took another Huſband, and then preſented J. S. who was admitted, inſtituted, and inducted, and dyed, the Church voided again, and they preſented J. D. to the Biſhop, who refuſed the Clerk, becauſe upon his examination of him, he ſaid he was *Schiſmaticus inveteratus*. And, in the Common-Pleas, it was adjudged for the Plaintiff; and Errour brought, and aſſigned for Errour, That for inſufficiency of the Biſhops Plea, he gave Judgment for the Plaintiff, and *Epiſcopus in miſericordia*; and after a Writ of Enquiry iſſued to enquire of other Points: which being found and Returned, Upon that, Judgment was entred again; *Et predictus Epiſcopus in miſericordia*; and ſo the Biſhop was twice amerced, which was ſaid to be Errour. But it was Anſwered, and Reſolved, That the latter was but only a recital of the firſt, and ſo to give a full Judg-

ment of all with Damages, and not a new Judgment: but yet admit the later Judgment was erronious, yet the first Judgment was perfect in it self, for the first Judgment was the Judgment which was given in the *Quare Impedit* at the Common-Law; for before the Statute of *Weſt.* 2. Cap. 5. the Plaintiff in a *Quare Impedit* did not recover Damages: And the Plaintiff after the ſaid Statute, might take the Judgment at the Common Law, and relinquiſh the benefit of the Statute, if he pleaſeth. And for that cauſe, the Judgment was affirmed. *Cook* 5. Part, 59. *Specots* Caſe.

13. In a Writ *de valore Maritagii*, The Plaintiff declared, That the Anceſtor of the Defendant dyed in his Homage, and that the Land diſcended to the Defendant, and that he tendred him a Competent Marriage, and that he refuſed it: The Defendant denyed the Tender. In this caſe it was Reſolved, 1. That the value of the Marriage did belong to the Lord without a Tender, by the Common-Law; But the forfeiture of Marriage was given by the Statute of *Merton*, Cap. 6. which did not extend to an Heir female; for that extended only to ſuch an Heir as was of the age of 14 years, *et ultra*: and an Heir female at ſuch age was out of Ward; Alſo the Statute is *ultra ætatem* 21. *annorum*, and that is the full age of the Heir male, as to Wardſhip, and not of the Heir female: but before the age of 14, the Lord ſhall recover the ſingle value without Tender. Hill. 14 Jac. in C.B. *Cook* 6. Part, 71. The Lord *Darcies* Caſe. Mich. 29 Eliz. in the Court of Wards. *Hampdens* Caſe, adjudged accordingly.

14. The Lord *Sanchar*, a Baron of *Scotland*, of Malice forethought in the County of *Middleſex*, did procure J. S. to kill J. D. which J. S. aſſociating to him J. N. they killed the ſaid J. D. within the City of *London*: In this caſe, amongſt other Points, It was Reſolved, That a Baron of *Scotland* was not a Peer of England, and therefore he ſhould be tryed a Common Jury, and not by the Peers of *England*. 2. In that caſe, It was Reſolved upon the Statute of 2 E. 6. Cap. 24. That the Indictment of the Acceſſory in the County of *Middleſex*, needed not to recite, that the Principal was Indicted before Commiſſioners of *Oyer* and *Terminer* in *London*; For that the ſame is no direct affirmance, that the Principal committed the Murder; for an Indictment is but an Accuſation in lieu of the Kings Count, which might be either true or falſe: but the Indictment ſhall recite *de facto*, that the Principal committed the Murder in *London*. 3. It was Reſolved, That the Juſtices of the Kings-Bench are the ſoveraign Juſtices of Gaol-Delivery and *Oyer* and *Terminer*, and within the words (*Juſtices of Gaol Delivery, and Oyer and Terminer*) within the Statute of 2 E. 6. and therefore, if an Indictment of Forcible Entry be removed into the Kings Bench, they may award Reſtitution. And yet the Statute of 8 H. 6. Cap. 3. ſpeaks only of Juſtices of the Peace; but the reaſon thereof is, becauſe they have ſoveraign and ſupream authority over them. And it was Reſolved, That by the Common-Law, no Commiſſioners of *Oyer* and *Terminer*, nor Gaol-Delivery, could ſit in the County, where the Kings-Bench did ſit. Becauſe the Kings-Bench are greater then the Eyre; *Et in præſentia Majoris, ceſſat poteſtas Minoris*, *Cook* 9. Part, 118, 119. The Lord *Sanchar's* Caſe.

15. A man ſeiſed of a Manor holden by Knights Service, made a Feoffment of the moyety thereof, before Marriage, unto the uſe of himſelf for life, and after to the uſe of the Wife he intended to marry, for her Joynture; the Marriage took effect, and afterwards he let the other moyety to A. and B. for years, for the payment of Debts and Legacies, and afterwards deviſed part to his younger Sons, and dyed, his Heir within age. It was Reſolved in this Caſe, That becauſe the advancement of his Wife is aſwell within the Statute of 32 H. 8. as the payment of his Debts, and the portionment of his Children, although that the Eſtate of the Wife hath the precedency; yet the third part of the King ſhould be equally taken out of both halfs, and not out of the half ſo deviſed. *Cook* 8 Part, 173. *Virgil Parkers* Caſe.

16. A man by Indenture Covenanted to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of divers of his Sons, and the Heirs Males of their bodies; Proviſo, That if they or any of their Heirs Males ſhould reſolve, adviſe, or attempt any act by which the limitation of the ſaid Land, or any Eſtate tail ſhould be undone, barred, or determined, or diſcontinued, that after ſuch act or Diſcontinuance made or executed, the uſes as to him ſo attempting, &c. ſhould ceaſe as if he were naturally Dead; and dyed. The eldeſt Son ſuffered a common Recovery, and the younger Son entred. It was Reſolved in that Caſe, That that Proviſo to *ceſſe* an Eſtate limited to one and the Heirs Males of his body, was void and repugnant to Law; for that the death of the Tenant in tail is not the ceaſing of the tail, but the death of the Tenant in tail without Iſſue of his body, is the determination of it. But in that Caſe it was ſaid and agreed, That an Act of Parliament, or the Common Law might make an Eſtate void as to one perſon, and good to another, but a man by his words or act cannot ſo do. Land is given to Husband and Wife, and the Heirs of their two bodies; The Husband levyeth a Fine with Proclamations, and hath Iſſue and dyeth; this Fine by force of the Statute of 32 H. 8. cap. 36. ſhall bar the Iſſue in tail, but ſhall not bind the Wife. So if a man hath

Land

Lands as Executor, and ſurrenders it, as to one reſpect the Term is extinct, and as to another reſpect it is Aſſets. See 18 Eliz. *Dyer*, 351. *Cook* 1. Part, 87, 88. *Corbets* Caſe.

17. A. ſeiſed of divers Manners, and of divers Lands, part in Leaſe for years with a Rent reſerved, part in Copyholds for valuable conſideration, Demiſed, Granted, Bargained and ſold to J. S. the ſaid Manners and Lands, with all Rents reſerved upon every Demiſe, to have after the death of the Bargainor for 17 years, rendring a Roſe to his Heirs, the Deed was acknowledged to be enrolled. And afterwards he Covenanted to ſtand ſeiſed of the ſaid Manners and Lands to the uſe of himſelf, and the Heirs of his body; no attornment was to the Bargainee; and afterwards the Bargainor dyed, his Heir within age. It was Reſolved in this Caſe, That the Leſſees had election to take it, either by Demiſe, or by Bargain and Sale: For when a man for money Grants Bargains, and ſells Lands for years, the owner gives election to the Leſſee to take it, the one way or the other; for if the Law ſhould force them to take by Demiſe, then they ſhould loſe the Rents reſerved upon the Leaſes for years. but if the Intereſt paſſeth by Bargain and Sale, then there needeth no Attornment, for the Statute of 27 H. 8. executes the poſſeſſion to the uſe; and the Statute of 27 H. 8. of Inrolments, doth not extend to it, becauſe no eſtate of Freehold paſſeth, but only an Eſtate for years. 2. Reſolved, That this Election did remain to the Leſſees, notwithſtanding the alteration by the ſecond Indenture, and notwithſtanding the death of the Leſſor, and notwithſtanding that the King was entituled to Wardſhip, becauſe they had an Intereſt in them preſently, which they preſently might have aſſigned over. *Cook* 2. Part, 35, 36, 37. Sir *Rowland Heywards* Caſe.

18. A. ſeiſed of a Manner, by Deed Indented, enfeoffed thereof J. S. and his Heirs, rendring yearly to A. his Executors and Aſſigns, 10 l. Rent. A. dyed ſeiſed, the Rent deſcended to his Son and Heir, who dyed in the Eſtate, his Executors diſtrained and avowed for the Rent. In this Caſe, it was Reſolved upon the Statute of 32 H. 8. which gives Diſtreſs to an Executor or Adminiſtratore in like manner and form as the Teſtator might or ought to have done, &c. upon another clauſe of the ſaid Statute, That the Adminiſtrators were not driven in their Avowry for the ſaid Rent to alledg any Seiſin within 40 years; for in Caſe of Reſervation, or Grant of a Rent, there the Deed is the title, and the common courſe of it appeareth within time of memory. But the Statute ſhall be intended, when the Avowant was forced to alledg Seiſin by force of any ancient Statute of Limitation, and that was when the Seiſin was material, and of ſuch force that it ſhould not be avoided in an Avowry, although that it was by encroachment. But the Statute doth not compell any to alledg Seiſin, where Seiſin was not neceſſary before: And note, in that Caſe it is ſaid, That Leſſee for life, or Donee in tail, ſhall not have *Ne injuſte vexes* againſt the Donor, for inaſmuch as the Reſervation is the Title, no encroachment ſhall hurt them, but they ſhall avoid the ſame in an Avowry; And the Statute of *Magna Charta* cap. 10. upon which the *Ne injuſte vexes* is grounded, doth not extend to a Donee in tail, Leſſee for life, or Grantee of a Rent-charge; but extends betwixt very Lord and very Tenant. *Cook* 8. Part, 65. Sir *William Foſters* Caſe.

19. By the Statutes of 22 E. 4. cap. 7. And 35 H. 8. cap. 17. If any perſon having Woods of his own within any Forreſt, Chaſe, &c. cauſe to be cut down the Wood, or any part thereof by Licenſe, or without Licenſe, &c. or make Sale of the ſame, That the Subjects poſſeſſors of the ground whereupon the Wood cut did grow, and the perſons to whom the Wood ſhall be ſold, immediately after the Wood ſo cut, incloſe the ſame ground with ſufficient hedges to keep out all manner of Beaſts and Cattel out of the ground for Preſervation of the Spring. Upon this Statute, the Caſe was; A. was ſeiſed of the Forreſt of H. in Fee, in which J. D. had Common appurtenant to his houſe and Land, throughout the whole Forreſt. It was Covenanted betwixt A. and J. S. by Indenture, and the ſaid A. granted to J. S. all the Woods and Underwoods which at any time after ſhould grow upon any parcel of the Forreſt, except the Soil of the Wood, with Liberty to incloſe for preſervation of the Spring of the Wood, and to exclude the Deer, and all Cattel out of the Wood. It was the Queſtion, If by that Statute J. D. was barred of his Common or not. In this Caſe, amongſt other points, it was Reſolved, That the ſaid Statute of 22 E. 4. did not extend to the wood of a Subject; For by the Common Law, he who hath a Wood in which another hath Common, cannot incloſe and exclude the Commoner, be it in a Forreſt, Chaſe, or out of them. But he who hath ſeveral Woods in a Forreſt, may after the cutting of them, incloſe for three years, *pura foſſato et haia bofſa ſecundum foſſatum Forreſte*. 2. Reſolved, That the Commoners were not any parties betwixt whom the ſaid Act of 22 E. 4. was made; but the parties were Subjects, owners, and Wards of the King, and doth not extend to Commoners. For if was Reſolved, When any Act of Parliament makes any Conveyance good againſt the King, or any other perſon or perſons in certain, the ſame doth not take away the right of any other, although

there

there be no saving in such Act of Parliament. 3. Resolved, That the words, Beasts of the Forrest, do not extend to sheep, &c. But Buck, Doe, Roe, Hare, &c. *Cook* 8. Part, 137, 138. Sir *Francis Barrington's* Case.

Where, and what Statutes shall bind the King; what not; and of which he shall take advantage, although he be not named in them: What not.

1. HUsband and Wife, Tenants in tail, the Remainder to B. in tail; A Recovery was had against the Husband alone in a Writ of Entry with Voucher. B. in the Remainder was Attainted of Treason. And afterwards it was Enacted by Parliament, That B. should forfeit all such Manors, Lands Rents, Reversions, Remainders, Possessions, Offices, Rights, Conditions, and Hereditaments which he had or ought to have in Fee, or in tail, in use, or possession at the time of the Treason committed: Afterwards Husband and Wife both dyed without Issue. The Queen Granted the Lands to C. the Son of B. and restored to him the Manner; And afterwards the Queen brought a Writ of Error against the Heir of the Recoveror to reverse the Recovery. It was Resolved in this Case (amongst other things), That this Writ of Error was not given to the Queen by any words of the Act of Attainder, because the Tenant was in by Title, and the entry of the person Attainted was not lawfull, and a right of Action was not given to the Queen by any words of the said Act.

2. It was Resolved, That the King Tenant in tail by the gift of any of his Ancestors being Subjects, might levy a Fine upon Grant and Render, and bar the estate tail. 1. Because the King is bound by the Statute of *Donis*, and it is but reason, That the King shall take benefit of the Statute of 4 H. 7. and 32 H. 8. which enables Tenants in tail to bar the Issues; and it should be hard that the King should be in worse condition then a common person. 2. There is a difference when the King claims in his natural capacity as Heir of the body *per formam Doni*, for there he shall be bound by the Act of Parliament; and when he claims in his Politick capacity, there a general Act of Parliament shall not bind him if he be not named. But in the principal Case it was the Opinion of the Justices, That after the render made, it was necessary to have Letters Patents to grant to the Consusee, that he might enter into the Land; for otherwise, the Fine being Executory upon Grant and Render, it might be doubted, If the Consusee without such a Grant might enter upon the King. Mich. 2 Jac. *Cook* 7. Part, 32. In the Case of Fines levyed by the Kings Tenant in tail.

3. The King brought a Prohibition against the Prior of W. That where the King had recovered in a *Quare Impedit*, the Defendant sent his brother with an Appeal to *Rome*, and sued there to avoid the Judgment according to the Statute of *Premunire*, and upon Not-Guilty pleaded, it was found against the Defendant; and there for the King Judgment was prayed upon the Statute of 27 E. 3. cap. 1. in Case of a *Premunire*; and it was adjudged he should not have it, because that the Judgment ought to be conformable to the Original, and this Suit was not brought according to the Statute, but by Writ of Prohibition at the Common Law. 30 E. 3. 11. *Cook* 9. Part, in Doctor *Huffys* Case.

4. The Master and Fellows of *Magdalen* Colledg; After the Statute of 13 Eliz. by Indenture enrolled, conveyed a house parcel of the possessions of their Colledg to the Queen in Fee, with a Proviso that the Queen convey the same to J. D. in Fee. The Queen by her Letters Patents conveyed the same to J. D. according to the Proviso, who afterwards levyed a Fine with Proclamations of it; the Master dyed, and the Successor accepted of the Rent of the Consusee. In this Case amongst other things it was Resolved. 1. That general Statutes which did provide necessary and profitable remedy for the maintenance of Religion, advancement of Learning, and Relief of the poor, should extend generally according to the words, and the King should not be exempted out of any of them by any construction of Law. 2. Resolved, That the King should not be exempted out of general Acts of Parliament made to suppress wrong; and the Statute of 13 Eliz. was made to suppress wrongful. Dilapidations and diminution of Spiritual Livings; and because the King cannot be supposed to do wrong, therefore he shall be included within the said Act. And in that Case, it was said, That the Statute of West. 2. cap. 5. made to suppress wrong, did bind the King. 3. Resolved, That general Acts of Parliament which tend to perform the Will of the Founder or Donor, shall bind the King, although that he be not named. 4. Resolved, That the Master and Fellows were within the said Act of 13 Eliz. and disabled to Grant; and then the King could not take from them who were disabled

disabled to Grant by the words of the Act. But it was not a disability *simpliciter*, but *secundum quid*; for if the Master and Fellows made such a Grant, it should not be avoided by the Master himself, but by his Successor. 5. It was Resolved, That the King was bound by the said Statute of 13 Eliz. For in Acts of Parliament, the Original intent and meaning of the Makers of them is to be observed: And if this Conditional Grant to the King should be good, the King who is the Fountain of Justice, and the maintainer of Religion and Justice, should be made an Instrument of wrong and injury; and the Law will not make an Interpretation of an Act to advance the private of any man, and to take away the right of the Subject. *Cook* 11. Part. 68, 69. *Magdalen* Colledges Case. Note, These Resolutions in *Magdalen* Colledges Case, are Rules to know what Acts of Parliament shall bind the King, and what not; and therefore I have entred many particular Cases to shew what Acts of Parliament should bind the King, what not.

5. In a *Quare Impedit*, the Plaintiff declared, That one R. B. was seised of the Parsonage of *Harby*, whereunto the Advowson of the Vicarage belonged, and that the Vicarage did become void by the death of A. and that it was in the Kings hands by reason of Wardship of the Son of R. B. who Presented J. S. and then conveyes the Parsonage to J. D. in Fee, who 1. *Jan.* 1621. Granted to F. the next Avoydance of the Vicarage, who granted it to the Plaintiff, and that J. S. dyed, and so the Plaintiff ought to Present. The Defendant as Parson imparsonee of the Vicarage saied, That King *Henry* the 8th was seised of the Parsonage of *Harley* to which the Advowson of the Vicarage, &c. and claims a Discent of it from *Hen.* 8. to Queen *Eliz.* who Presented J. S. and that by his death, King *James* Presented him who was Instituted and Inducted; and traversed, That R. B. was seised of the Rectory *ad quam, &c.* It was found by Special Verdict, That J. D. and his Wife were seised in Fee to them and the Heirs of the Husband of the Rectory of *Hersham*, and 20. *Mail.* 31 H. 8. did give the same Rectory to H. 8. and his Successors, and that the said King seised of the Rectory of *Harley*, which, &c. by his Letters Patents 21 *July*, 31 H. 8. in consideration of the aforesaid Rectory of *Hersham*, by the said J. D. and his Wife, Granted to the said King and his Successors, gave to the said J. D. and his Wife the said Rectory of *Harley*; and that 26 *July*, 31 H. 8. and not before, J. D. and his Wife came into the Chancery, and acknowledged the Deed, which was afterwards enrolled. The Question (amongst others) was, That although the Deed to the King was not enrolled at the time of the Grant made by the King; yet the Involment of it afterwards, when the same comes, should make the Kings grant good *ab initio*. It was the Opinion of the Court, That although the Grant of the King was not compleat nor perfected for want of Involment at the time of the Kings Grant, yet when the Involment comes upon it, it takes effect, neither from the Involment, nor by it, but by the first act, and therefore between the parties it should bind to all purposes *ab initio*. And it was holden, That if a man giveth Lands to the King by Deed, and afterwards chargeth the Land, and then a Fine is levyed to the King of the same Lands, the King shall hold the Lands discharged. Hill. 12 Jac. in C. B. *Needler* and the Bishop of *Winchesters* Case. *Hob.* 222, 223.

See more where the King is bound by Statutes and Acts of Parliament, in the Titles of *King*, *and Grants to the King*.

More Statutes; the Interpretation and Construction of them: And of divers other matters concerning Statutes.

1. NOte, It is the Office of Judges to make such Construction of Statutes and Acts of Parliament, as may *suppress* the mischief, and advance the remedy; and also to suppress such subtile Inventions and evasions as may continue the mischief, and *pro privato commodo*; and to add force and life to the Cure, according to the Intention of the makers of the Act, *pro bono publico*. And therefore it was Resolved, That when an Act of Parliament alters the Service, Tenure, Interest of the Land, or other thing in prejudice of the Lord, or of the Custome of the Manour, or in prejudice of the Tenant, there the general words of such an Act shall not extend to Copyholds; but where an Act of Parliament is generally made for the common good, and no prejudice may accrue by reason of the alteration of any Interest, Service, Tenure, or Custome of the Manour; in such Cases, many times, Copyholds and Customary Estates are within the general words of such Statutes or Acts of Parliament. *Cook* 3. Par. 3, & 7. in *Heydons* Case.

2. An Act of Parliament that gives power of Imprisonment, ought to be strictly Interpreted, to preserve as much as may be the Liberty of the Subject. And see, That the Act of 14 H. 8. cap. 5. which

which gave power to the President and Censors of the Colledg of Physitians in *London* to Imprison, was adjudged to be so strictly and liberally to be understood, that the Goaler was not thereby bound to receive such as they should commit unto him; because there was no clause in that Statute to give them power so to do: And therefore was the Statute of 1 Ma. cap. 9. made, which commands the Goaler to receive them upon a penalty, and yet the Receipt of the Goaler in that Case seems to be a necessary incident to the power given them to Imprison; but in regard it concerned the Liberty of the Subject, and they had not the Authority of any Court to commit any, therefore it was Resolved, That the Goaler could not receive such as they should commit, without an express provision by Act of Parliament to that purpose. *Cook* 8. Part, 120. in Dr. *Bonhams* Case.

3. In a Replevin, the Case was, R. Earl of S. was seised of the Manner of B. in Fee, and leased the same to the King for 21 years, and dyed. The said Manner discended to T. Earl of S. and he being seised, It was Enacted by Parliament, 4 Ma. That the Lady *Frances*, Wife of the said Earl, by vertue of the said Act, should hold and enjoy during her Widdowhood, for and in consideration of a Joynture, the said Mannor. Provided, That it should be lawful for the Earl by his writing Indented, *dimittere vel dimittere facere* for 21 years of the said Mannor for any yearly Rent, so as upon all and singular such Lease and Leases, the ancient Rent or more were reserved, and that every such Lease should be good and effectual in Law against the said Lady *Frances*, for the Term of her life, if the said Term should so long continue. The Earl made a Lease of the Mannor for 21 years, to begin at the Feast of St. *Mich.* then next following. It was holden in that Case, That although by the said Act of Parliament, the power was general to make Leases for 21 years, without being restrained to make them in possession, or any number of years: Yet in that Case it was adjudged, That the said Lease was void for two causes. 1. If by the power he may make any future Lease or Leases in Reversion, then he might make a Lease for 21 years in possession, and afterwards infinite Leases for 21 in Reversion, which should be contrary to the meaning of the parties. 2. Because That forasmuch as the Proviso gave power to charge the Estate of a third person, such Proviso should be taken strictly, and should not extend beyond the Letter and meaning of the parties. Mich. 28 Eliz. in B. R. *Lepar* and *Wyths* Case. *Lem.* 35.

4. Upon a Reference to the Chief Justice, Chief Baron, and others, Justices out of the Court of Wards; the Case was, Two Joynt-Tenants to them and their Heirs, one of them made a Conveyance to the use of himself and his Wife for a Joynture, and the advancement of his Son. The Question was, If this were an assurance within the Statutes of 32 and 34 H. 8. so as the King should have the third part. The major part of the Justices conceived to be out of the Statutes. For the words are, If any Sole seised, or seised joyntly with others &c. in such Case the Statute provideth, That the King upon such Conveyance shall have a third part. But where two are seised joyntly to them and their Heirs, and one makes a Conveyance, this is out of the words of the Statute of 32 H. 8. and therefore ought not to be within the words of 34 H. 8. being a Statute of explanation only, which shall be construed according to the words, and not with any Equity or intendment: For there cannot be an explanation upon an Explanation: And so it was said it was Resolved, 43 Eliz. in B. R. Pasc. 2 Car. *Cro.* 1. Part, 23.

5. The Judg of the Prerogative Court upon granting of Administration, took a Bond of an Administrator, That the Administrator should deliver the Surplusage of the goods after Debts paid, according to the Distribution of the Court, but the Wife being Administrator, the Judg did find a Surplusage in her hands, and did sentence that she should give certain Portions to certain of the kindred of her Husband, being not his Children. It was the Opinion of the Court in this Case, That whereas the Statute of 21 H. 8. appoints the Administration to be granted; and that the Ordinary shall take Sureties for the Administration of the goods of the dead, That the Ordinary may not impose any other or further Condition upon the Bond; and although the Ordinary will permit, That the true Administration mentioned in the Statute is to be extended, as well to the disposition of the Surplusage, as to Debts and Legacies. To it was holden by the Court, That that doth not lie under their Judgment, for they must take the Bond according to Law. And when it is sued, the exposition of the Statute, and of the Condition of the Bond is to be judged by the Courts of Common Law. And it was said in this Case, That the Statute of 21 H. 8. cap. 5. did insinuate the mind of the Testator, to prefer them; it is likely he would have preferred if he had made a Will, which is to give the profit of the Estate to them, who not only labor and dolor in suing to bring in and defend the Estate, then to give such a vast power to the Ordinary, to dispose of the Surplusage where he will. Hill. 13 Jac. in C. B. *Stevenges* Case. *Bul.* 83.

6. In a Replevin, the Case was, The Predecessor of the Bishop of *Chichester* seised of a Park in the

the right of his Biſhoprick, by Deed 44 Eliz. Granted a Leaſe of keeping of the Park, and all appertaining to it to J. F. for life, *Et ulterius*, granted *pernecessitate Officii predict.* five Marks, with clauſe of Diſtreſs, *nec cum* a Livery and 13 s. 4 d. *nec non Pasturam pro duobus equis* together with the Windfalls, which Leaſe was confirmed in the Life of the Biſhop, by the Dean and Chapter. The Defendant in Avowry ſhewed, That the ſaid Park had him anciently Granted with the Fee of 5 Marks, and for the Arrerages of the Fee, the Defendant did avow. The Plaintiff pleaded the Statute of 1 Eliz, and ſaid, That this Paſturage was a larger Fee then ever was granted before: Upon which the Avowant did demur. The Queſtion was, If this new addition of the Paſturage to the Grant of the Office of Keeper did make the Grant void. The Court was divided in Opinion, but the better Opinion ſeemed to be, That this Augmentation of the Paſturage did not make the Grant void in all, but for the Augmentation only, and that it was ſeveral in *ſpecie* from the five Marks, and that this was out of the Statute of 1 Eliz. and that the things are ſeveral and might be recovered as diſtinct things in their nature in the intent of the Grantor, and that therefore the Grant was void *quoad* the Paſturage, but not to make the Office with the 5 Marks void. Paſ. 1 Car. in C. B. The Biſhop of *Chicheſter* and *Freſtenſ* Caſe. *Lea* 71.

7. A man was Indicted for that he took upon him to be a Juſtice of Peace in the County of B. not having Lands to the value of 40 l. *per annum*, and for that he ſent his Warrant to have one before him to find Sureties of the Peace. It was the Opinion of the Court, That this was no offence within the Statute which appoints a Penalty in ſuch Caſe. For when a Statute appoints a penalty for doing of a thing which was no offence before, and appoints how it ſhall be recovered, viz. by Bill, Plaint, or Information; in ſuch Caſe the party cannot be proceeded againſt by Indictment. Mich. 21 Jac. in B. R. *Caſtle's* Caſe. *Cro.* 2. Part, 643, 644.

Superſedeas.

What is a Superſedeas, *what not; Where grantable, where not; in what Actions it lyeth, and for whom; and where to be allowed, where not.*

1. *Superſedeas* is a Writ which hyeth in divers caſes, but it is alwayes to command ſome ordinary proceedings in Law, which ought otherwiſe to proceed.

2. Note, It was ſaid by Doctor *Amy* a Doctor of the Civil Law, That if a Church become void, and a Stranger enters a Caveat with the Regiſter of the Biſhop, That none be Inſtituted into the Church, until he be be made privie thereunto; and the Biſhop before he have notice of the Caveat, Inſtitutes the Incumbent; that the Inſtitution is meerly void in the Spiritual Law; for that the Regiſter ought to Notifie the Caveat to the Biſhop, and his negligence in that Caſe ſhall not prejudice him who entred the Caveat: And if the Biſhop have notice of the Caveat, and gives day to him that puts it in, and before that day he Inſtitutes the Incumbent, it is meerly void; for that the entring of the Caveat is a *Superſedeas* in it ſelf. Mich. 31 Eliz. in the Lord *Zouches* Caſe. *Goldesbr.* 146.

3. If a man have Judgment to have a Return upon a Nonſuit in a Replevin, and the Plaintiff bringeth a ſecond Deliverance: It was holden, That this is a *Superſedeas* of the Return; and yet the Defendant in the firſt Replevin, ſhall have a Writ to enquire of the damages, which ſhall not be ſtayed by the ſecond Deliverance; But if he have Judgment in the ſecond Deliverance, then ſhall be Return irrepleviſable, and he ſhall recover damnages. Hill. 43 Eliz. in C. B. *Goldesbr.* 185.

4. A man was condemned in Debt, and brought an *Audita Querela* upon a Releaſe, and had a *Superſedeas*. It was the Opinion of *Periam* Juſtice, That if the Sheriff take him before he hath notice of the Writ, although it be after the *Teſte*, that it is well: But the other Juſtices held the contrary; and ſaid, It had been adjudged contrary

to the Opinion of *Periam.* Trin. 30 Eliz. in C. B. *Goldesbr.* 96.

5. A. B. was Outlawed after Judgment, and an *Elegit* was awarded againſt the Defendant: A *Superſedeas* was prayed, *Quia erroniceè emanavit*, for that the party might not have any other manner of Execution but a *Capias*: For a *Fieri facias* he cannot have, becauſe the Queen is entituled to the goods; and an *Elegit* he may not have, becauſe the Queen is entituled to all the profits of his Lands. It was ſaid, That it appears by 21 H. 7. 7. That the party outlawed, might make a Feoffment, and ſo out the King of the profits. It was not Reſolved, but the Court would adviſe of the Caſe. Hill. 43 Eliz. in C. B. *Goldesbr.* 180. acc.

6. A. was arreſted by a *Capias ad ſatisfaciendum*, by a Bayliff of *Middleſex*, within the Barrs of *Holborn*, which is in *London*; a *Superſedeas* was prayed, becauſe the Arreſt was falſe. It was agreed by the Court in this Caſe, That a *Superſedeas* cannot be Granted; for in a *Superſedeas*, it cannot be *Executio erroniceè emanavit*; and here the Execution was well granted: And if it be Returned by the Sheriff generally, it ought to be intended, That it was well ſerved, But a *Habeas Corpus* was granted in the Caſe. Trin. 3 Car. in C. B. Mrs *Brewes* Caſe. *Hetley* 30.

7. A Writ of Error was brought to reverſe a Judgment, which was received and allowed, and notwithſtanding the Plaintiff that had the Judgment had taken out Execution, whereupon a *Superſedeas* was prayed, to ſuperſede the Execution, and an Attachment againſt the party for his contempt. It was moved by the Councel, That after a Writ of Error is received and allowed, the hands of the Court that gave the Judgment, are foreclоſed from granting out any Execution, and that the Writ of Error in it ſelf is a *Superſedeas*, *Dyer*, 283. It was Objected, That the Writ of Errour was not well purſued, becauſe that the Roll was not marked. It was the Opinion of the Court, That whether the Roll be marked or not, or notice given to the Attorney of the other ſide, yet if the party proceed to take out Execution, it is a Contempt to the Court; Wherefore a *Superſedeas* was awarded, *quia improvidè emanavit.* Mich. 1649. in B. R. *Mercer* and *Rales* Caſe. *Styles* 159.

8. A Peer of the Realm was arreſted by a Bill of *Middleſex*, and being in the cuſtody of the Marſhal of this Court, he prayed a *Superſedeas* to it, becauſe he was a Peer of the Realm: But the Court denyed to grant him a *Superſedeas*, but ſaid, he muſt plead his Priviledge if he be ſo, for that the Court cannot take notice of it. Mich. 1649. in B. R. The Earl *Rivers* Caſe. *Styles* 177.

9. Upon an Affidavit made, it was ſhewed to the Court, That there were two Writs of Execution executed upon one Judgment; and therefore it was prayed, That the laſt Execution might be ſuperſeded, becauſe there ought not to be two Executions for one matter, but where the party is prejudiced by death, or act of Law, that he cannot take benefit of the former Execution. The Court was of Opinion, That if the firſt Writ was Returned and filed, there could not be a ſecond Execution; otherwiſe, if it was not returned and filed. Hill. 1650. in B. R. *Sherley* and *Semaigne* Caſe. *Styles*, 255.

10. An Indictment upon the Statute of 8 H. 6. was found at the Quarter Seſſions, and a Writ of Reſtitution was granted. It is a Quære in 3 Eliz. *Dyer*, Whether the Juſtices which were abſent, might in ſuch Caſe grant a *Superſedeas*. But it was holden, That if it were at a ſpecial Seſſions, there none but they which were preſent might grant it, except the Juſtices of the Kings Bench, who have ſupream authority, the King ſiting there. See Mich. 3 Eliz. *Dyer*, 187. See *Dalton*, 242.

11. A *Fieri facias* came to the Sheriff to levie money, who Returned, That he had taken goods into his hands, to the value of part of the debt, and that they remained in his keeping for want of Buyers, and that before the Return of his Writ, a *Superſedeas* came to him for doing further Execution, which Writ he Returned annexed to the *Fieri facias*, and that the *Superſedeas* was awarded in *Banco*, by reaſon of a Writ of Error there brought. It was the Opinion of the Court in this Caſe, That notwithſtanding that, the Execution was not ſerved, nor the property altered, and the *Superſedeas* awarded; That a *Venditioni exponas* ſhould be awarded, which was awarded accordingly. Paſch. 1 Mar. *Dyer*, 98.

12. Husband and Wife, as Adminiſtrators of the firſt Husband, recovered a Debt; depending which Suit, the ſon of the Inteſtate, by Covin betwixt him and the Defendant, procured new Letters of Adminiſtration to him and another jointly, and after Judgement, releaſed to the Debt; The Husband and Wife thereupon ſued forth Execution; whereupon the Debtor brought an *Audita Querela*, with a *Superſedeas* in it, depending which, the ſecond Adminiſtration was Repealed by ſentence, and the Covin and Repeal pleaded in Bar; upon which the Defendant did demur: And in that Caſe it was adjudged againſt the Plaintiff in the *Audita Querela*, notwithſtanding the ſame was ſued our, and a *Superſedeas* upon it. Hil. 17 Eliz. *Dyer*, 339.

13. P. was Outlawed at the ſuit of L. in an Action

Action of Detinue, 19 *Octob.* and the Exigent was Returned *Craſtino Animarum*, at which day the Sheriff did not Return the Exigent; but he Returned that the 19 day which was the 5. County, the Defendant appeared, and brought a Writ of *Superſedeas*, *Quia improvidè*, because the Defendant had often appeared by his Attorney: The Teſte of the *Superſedeas* was the 12 day of *Octob.* which was a week before the 5. County; and in truth, the *Superſedeas* was then granted, and delivered upon Record in *Banco* the ſame day: And upon a ſuggeſtion of the Plaintiff that the Defendant was Outlawed, a *Certiorare* was granted, to certifie if the Defendant was Outlawed or not, and the Teſte of the Writ was 30 *Octob.* which was a week before the Return of the Exigent; upon which the Coroners Returned that he was Outlawed: by which Return of the Coroners, the Defendant was troubled both in his body and goods: It was in that Caſe adjudged, That the Return of the Coroners was not ſufficient to make the Plaintiff Outlawed, wherefore it was Reverſed, and a Writ of Reſtitution awarded to the Defendant for his goods. Mich. 5 Eliz. *Dyer*, 223. *Proctors* Caſe.

14. An *Habeas Corpus* was awarded, to remove a Caſe in the Court of *Gilford* in S. notwithſtanding they proceeded; upon Examination it appeared that the Writ was delivered after Iſſue joyned in Debt, viz. *per minas* pleaded, ſo as by the Statute of 23 Jac. the Judge might refuſe. In this Caſe it was Reſolved by the Court, Becauſe it was in an Action of Debt upon an Obligation of 200 l. not made within the Town; and becauſe the Proceedings was before one who was Town-Clerk, and an Attorney of the Common Pleas, and not an Utter Barriſter, as he ought to be, by the expreſs words of the Statute, the Proceedings was not Warranted by the Statute, and their Proceedings after the *Habeas Corpus* awarded, were void; wherefore a *Superſedeas* was awarded. Mich. 3 Car. in C. B. *Clapham's* Caſe. *Cro.* 1. Part, 56.

15. In an Action upon the Caſe for calling one Whore, in L. upon an *Habeas Corpus*, a *Procedendo* was awarded, becauſe it was conceived a good cauſe of Action in *London*, by the Cuſtome. A *Superſedeas* was prayed, and the cauſe to be removed, for that it was againſt Law to ſuffer ſuch Actions to be proſecuted in *London*, whereas no Action lyes at the Common Law for the words. On the other ſide, It was prayed, That no *Superſedeas* might be awarded, becauſe it is an offence there Puniſhable, at the Wardmoots Enqueſt, and there puniſhable, and the more reaſon the party ſhould have his Action in *London*: And it was ſaid, That after a *Procedendo* once granted, no *Superſedeas* ought to be awarded. But the Opinion of the whole Court was againſt that; for when a *Procedendo* unduly or *improvidè emanavit*, the uſe is, to grant a *Superſedeas*. But in the Principal Caſe, the Court was of Opinion, That the *Procedendo* was well granted, and thereupon denyed to grant a *Superſedeas*. Mich. 13 Car. in B. R. *Bowes* and *Cowpers* Caſe. *Cro.* 1. Part, 350.

16. Upon *Plene Adminiſtravit* pleaded by an Executrix, and Judgment againſt her, ſhe brought a Writ of Error; It was moved, That ſhe ſhould not have a *Superſedeas* to ſtay the Execution, without ſpecial Sureties to pay the Condemnation, if the Judgment ſhould be affirmed upon the Statute of 3 Jac. cap. 8. It was Reſolved, That this Caſe was out of the Statute; for although the Statute be general, yet it is intended in ſuch Caſes where it is againſt the party himſelf. But where the Judgment is Special, That the Execution ſhall be of the goods of the Teſtator, and damages only *de Bonis propriis*; It is not reaſonable that the party ſhould be enforced to finde Sureties to pay the entire Condemnation with his own goods: And it was ſaid in this Caſe, That ever ſince the ſaid Statute made, That in ſuch Caſe a *Superſedeas* had been allowed upon a Writ of Errour brought by an Executor or Adminiſtrator; wherefore a *Superſedeas* was awarded. Mich. 12 Jac. in B. R. *Goldſmith* and the Lady *Platts* Caſe. *Cro.* 2. Part 352.

17. Error brought, for that a Writ of *Habeas Corpus* with *Niſi Prius* being awarded; a *Superſedeas* was granted and delivered to the Sheriff for ſtaying of the Return of the Writ; notwithſtanding which the Sheriff returned the *Habeas Corpus* at the Aſſiſes, and a Tryal was thereupon had, and Judgment. It was holden by the Court, That it was Error, as is the proceedings in an Inferiour Court after a *Habeas Corpus* delivered without a *Procedendo*. The Judgment was reverſed. Hill. 1 Jac. in B. R. *King* and *Hills* Caſe. *Cro.* 2. Part, 43.

18. Treſpaſs for that the Defendant took and Impriſoned him for the ſpace of a Moneth. The Defendant juſtified by a Writ out of the Exchequer to take the Plaintiff and his Lands for a Debt to the King; and that ſuch a Sheriff of S. took the Plaintiff in Execution, and that by vertue of a *Latitat* at the Suit of J. S. he took the Plaintiff, and *in exitu ab Officio*, left him in Priſon to the Defendant, being Sheriff. The Plaintiff replyed, That *quoad* the Execution out of the Exchequer, there was a *Superſedeas* out of the ſame Court delivered to the Defendant *quod eam deliberaret ſi ea de Cauſa et non alia fuit impriſonatus*; and as to his detainment upon the *Latitat*, he pleaded, That

the ſaid J. S. the Plaintiff in the ſaid Suit commanded, the Sheriff to diſcharge him of his Action before that his Impriſonment, and made a Releaſe to the Sheriff of that Suit. Upon which it was demurred. It was Reſolved in this Caſe, That the *Superſedeas* was a good cauſe to diſcharge him, as the firſt proceſs was to Arreſt him, and he ought to obey it at his peril, and in regard he had not done it, he is chargable with a Falſe Impriſonment. And that the detaining him in Priſon is a new Caption; and ſo the Plaintiff may well declare of a Caption and Impriſonment, Hill. 12 Jac. in B. R. *Wybers* and *Henlys* Caſe. *Cro.* 2. Part, 379.

19. Debt brought againſt Husband and Wife, Executrix of A, her former Husband, proceſs continued againſt them till the Exigent; upon which the Husband appeared and put in a *Superſedeas* for himſelf only, without making ment on of his Wife. This being moved, the Juſtices demanded of the Prejnothories what was to be done, for the ſame is a practice, and a dangerous Caſe for example. It was anſwered by them, That the Court cannot remedy it, for now by the *Superſedeas* the Husband *ſine die*, and he ſhall not be driven to anſwer without his Wife as this Caſe is, and he is impleaded in the right of his Wife, and therefore the Wife ſhall be waived, and the Husband diſcharged. See *Book Entries* 187. and ſee 43 E. 3. 8. acc. But at the laſt the Juſtices adviſed thereof, and gave order that the *Superſedeas* ſhould be ſtayed without recording the appearance of the Husband. And it was ſaid, That that was the Caſe of the Lady *Matry* and her Husband, who were ſued in an Action of Debt, to the Outlawry; upon which the Husband appeared, and put in a *Superſedeas* for himſelf without ſpeaking of the Wife, and the *Superſedeas* was not allowed. Mich. 30 Eliz. in C.B. *Bulford* and *Foxes* Caſe. *Leon.* 138, 139.

20. *Shepheard* and others brought an Aſſiſe againſt Sir *Chriſtopher Heydon* in C. B. which was tryed at the Aſſiſes in N. and Judgment was given for the Demandants in the Court of Common Pleas. Sir *Chriſtopher Heydon* brought a Writ of Error, and aſſigned for Error, That whereas the Judgment was given upon his own Confeſſion, the Judgment was entred, That the Plaintiff did recover *per viſum Recognitorum Aſſiſæ ſpradict.* And after the ſaid Judgment affirmed in the Kings Bench, Sir *Chriſtopher* brought another Writ in Parliament to reverſe the Judgment in the Kings Bench. The Queſtion in this Caſe, amongſt others, was, Whether the bringing of the Writ of Error in Parliament, was a *Superſedeas* in it ſelf. The Court doubted of the point; for *Cook* Chief Juſtice ſaid, He had ſeen 26 or 27 Writs of Error which were brought in Parliament, where the firſt Judgment was diſaffirmed, and but one where the Judgment was affirmed. It was holden clearly by the Court, That this Writ of Error was a *Superſedeas* of it ſelf, and that upon the Books of 8 E. 2. *Error* 88. and 1 H. 7. 19. where it is ſaid, That the Juſtices did proceed to Execution after the Judgment affirmed in Parliament, and therefore *ex conſequenti* not before. And the Court held, That if a *Superſedeas* be once granted and determined in default of the party himſelf, that he ſhall never have another *Superſedeas*. Alſo it was holden by *Cook* Chief Juſtice, That by this Writ of Error in Parliament Sir *Chriſtopher* could not have the effect of his Suit, becauſe it is to reverſe a Judgment *coram Rege*, and ſo the Judgment in the Common Pleas ſtands firm, and Sir *Chriſtopher* is put to a new Writ of Error in this Court, for the Judgment in the Kings Bench is, *Judicium affirmetur, ſit ſine retractatu et effectum*, ſo that not being the Fundamental Judgment, the reverſal thereof is but the beginning of a Suit. And therefore the Court adviſed Sir *Chriſtopher* to ſue to the Kings Majeſty by Petition to have a new Writ of Error, for that without Petition he cannot have the Writ. Paſc. 12 Jac. in B. R. Sir *Chriſtopher Heydon* and *Shepheard* and *Smiths* Caſe. *Godbolt* 247, 248, 249, 250.

21. After the parties were at Iſſue in Treſpaſs, and a *Habeas Corpus* awarded againſt the Jury; the Court of Common Pleas where the Action was depending awarded a *Superſedeas, quia improvide*, which was delivered to the Sheriff, who notwithſtanding proceeded, and found for the Plaintiff. The ſame was aſſigned for Error. The Defendant pleaded *in nullo eſt erratum*, for the Error aſſigned is a matter in fact depending upon a matter of Record, and then the Defendant by pleading *in nullo eſt erratum* hath confeſſed it, viz. that ſuch *Superſedeas* was awarded and delivered to the Sheriff before the Tryal, by which it followed, That the hands of the Sheriff were ſhut, that he could not proceed to diſtrein the Jury, nor return the Writ before the Juſtices of Aſſiſe. Mich. 2 Jac. in B. R. *King* and *Andrews* Caſe. *Yelverton* 517.

22. Judgment was given in the Kings Bench in *Ireland*. Within two dayes after the Judgment, the Defendant delivered to the Chief Juſtice a Writ of Error, purchaſed out of the Chancery in *England* returnable in the Kings Bench in *England*. And whether they might award Execution, was the Queſtion, becauſe the Record remains with them, which they conceived they might do, for that the Record is not ſent into the Kings Bench, but the Tranſcript only. Wherefore they prayed the advice of the Juſtices of *England*. It was the Opinion of all the Juſtices, That the Writ of Error is in Judgment of Law a

Superſedeas, although the Record be not ſent. For if Error be brought in Parliament upon a Judgment in B. R. the Tranſcript only is ſent, and yet the Court is foreclosed *pendente placito in diſcuſſo*. And in this Caſe it was ſaid, That the Kings Bench in *England* might not award Execution, but upon a Judgment given, they ſhould ſend a ſpecial Mandate to the Chief Juſtice of *Ireland* to do it. *Paſc.* 17 Jac. in B. R. The Biſhop of *Oſſories* Caſe in *Ireland*. *Cro.* 2. Part. 534, 535.

23. Error of a Judgment in B. R. in Debt. A *Superſedeas* was awarded *ad audiendum Errores* returnable 11. *Mich.* 18 Jac. and there was not any ſuch day of Adjournment in the Exchequer Chamber; therefore it was holden by all the Juſtices to be a Diſcontinuance. Wherefore it was moved, That the Plaintiff ſhould have allowance of a new Writ of Error *Coram vobis reſident.* which was taken under Seal, and certified. It was Reſolved by the Court, That it lay not; for they have power to proceed by ſpecial Statutes, and they are directed by the Statutes that they ſhall proceed upon a Writ of Error awarded to the Chief Juſtice of the Kings Bench to remove the Record, and to reverſe or affirm, and then to remaund, and they have not any power to award Execution; and if ſuch courſe ſhould be allowed, the party might often Diſcontinue, and afterwards have a new Writ of Error, and ſo *in infinitum* delay the Plaintiff that he ſhould never have Execution. And the Court ſaid, That forſmuch as they might not award Execution, they might not a ſmit of a Writ of Error, but according to the words of the Statute. Mic. 19 Jac. in B. R. *Cave* and *Polewheels* Caſe. *Cro.* 2. Part, 620.

24. Upon an Exigent againſt the Husband, the Wife put in a *Superſedeas*. In this Caſe it was agreed by the Juſtices, That the Wife for the ſafeguard of her ſelf from Impriſonment, being returned upon the Exigent, or upon the *Capias*, viz. upon the one, *Quod reddidit ſe ſoror* upon the other *Cepi*, and as to the Husband (*Non eſt inventus*) may appear, and ſo long as the proceſs continues againſt the Husband, ſhall have *idem dies*. But when the Husband is returned Outlawed, ſhe ſhall be diſcharged without *idem dies*. But whether ſhe ſhall have a *Superſedeas* is doubtfull. It ſeemed by all to be agreed, That the Husband after he purchaſeth his pardon, or after he comes to reverſe the Outlawry, he ſhall not have allowance of his Pardon nor appearance received, unleſs he bring in his Wife, who by preſumption of Law is to be brought in by him; but the Husband is not to be brought in by the Wife. See 18 E. 4. 4. there the Caſe was, That a Feme Covert was ſued as a Feme Sole, and ſhe was Outlawed, and then the Husband came and brought a Writ of Error for the reverſal of it in his name, and the name of the Wife. It is there ſaid, it is queſtionable, being that he was not party to the Suit. And the Prerogatories ſaid, That no *Superſedeas* was ever granted for the Wife in ſuch Caſe. H. 2 Car. in B. R. *Hutton* 86.

25. Four were bound in a Recognizance of debt acknowledged in the Court of *Cheſter* to Sir *John Langford*. Afterwards one of the Conuſors dyed, his Heir within age. Sir *John Langford* brought a *Scire facias* againſt the other three to have Execution, who pleaded that the Heir of the Conuſor who was dead, was within age, and inaſmuch as during his Minority he cannot be charged, and the Survivors ought not to be charged, they demanded Judgment. Note out of that Caſe, it was obſerved by *Cook*, That the Heir is not charged only as Ter-Tenant, but in ſome reſpect as Heir, for otherwiſe in that Caſe he ſhould not have his age. And it was ſaid, That it is a Rule in 17 E. 3. 43. That the Heir of the Conuſor ſhall have an *Audita Querela* before Execution ſued, aſwell as the Conuſor himſelf, and ſhall have a *Superſedeas*, but ſo ſhall not have a ſtrange Purchaſor un ill he be ouſted by an Execution. See *Cook* 3. Part, 13. in Sir *William Herberts* Caſe.

26. Note, It was agreed by the Juſtices in B. R. That when Judgment is given in this Court againſt another, and Execution upon it; That in ſuch Caſe, the Lord Keeper cannot Order that the money ſhall ſtay in the Sheriffs hands, or Order that the Plaintiff ſhall not call for it; for notwithſtanding ſuch Order he may call for it. And it was agreed, That a Writ of Error is a *Superſedeas* to an Execution, but then there ought to be notice of it given to the Sheriff; otherwiſe if he notwithſtanding the *Superſedeas* ſerve the Execution, he ſhall not run into Contempt, for which an Attachment ſhall be granted. Mich. 15 Car. in B. R. *Maſſ.* 549

Surplu-

Surplusage.

1. *What shall be said Surplusage; What not: What shall hurt; What not: Where it shall abate a Writ, Count, Plea, and make it vitious; Where not.*

1. A Man having Issue 3. sons by his Wife' seised of a House in Fee, in consideration of naturall affection, and to the intent that all his Tenements should continue in his name, Covenanted by Indenture, That he and his Heirs would stand seised of the said house to the use of himself for life; and after his decease, to the use of his Wife for life; and after their deceases, of the one moyty to the use of his second son in tail of the moyty of one house, and of the other moyty to the use of his third son in tail, and dyed: The Question was, If any Use did rise to the Wife, or not; and, if the Wife were within the Consideration; and, if it might be averred? In that case, It was Resolved, 1. That a Consideration which stood with the Deed, and was not repugnant to it, might be averred. 2. Resolved, That admit, that other Consideration then is expressed in the Deed cannot be averred; yet here is an express Consideration in it self: For when he limits the same to the use of his Wife for life, that purports a sufficient Consideration in it self, and needs not any averment, *Et manifesta probatione non indiget*: As, if the Father, Tenant by Knights-Service, enfeoffeth his Son and Heir apparant within age, it needs not to be averred, that it was by Collusion, because it is apparant. *Cook* 7. Part, 40. *Bedell's* Case.

2. In the Case of *Alton-Woods*, 1. Exception was taken, That the Office doth entitle King *Hen.* 7th after his death, and found Seisin in H. 7. and a discent to *Hen.* 8 so as the Office which was found 23 H. 8. doth not entitle King *Henry* the 8th by force of the Office and Attainder, but entituleth King *Hen.* 7th, and King *Hen.* 8th, as Heir to him, and that is the Title which the Office found for King *Hen.* the 8th, and therefore the Office is not sufficient. But the said Exception was disallowed by the Court; For in as much as it was found by Office, That the Earl of W. was seised of the said Reversion at the time of his Attainder, it was sufficient to entitle King *Henry* the 8th, without finding the residue of the matter, which was but surplusage, and more then needed. 2. Another Exception was, That the pleading of the Grant made by King *Henry* the 8th, to W. W. as to the Consideration, was insufficient, Because it was not averred, That the King had Demised the Mannors of G. and C, as he had recited; for in truth there were no such Leases unto W. (as he recites) for his life, and was induced to grant the Mannor of A. unto W. and his Wife, because the Mannor of C. (which he recites, he had granted to W. and his Wife for the Term of their lives) shall be surrendred; but if, *in rei veritate* there were not such Leases for life, then the King was deceived in the Consideration which was of Record and valuable: And if the Defendant had pleaded, That the King made such Lease, the same had been issuable and traversable. But that Exception was also disallowed; For the Consideration was, That W. W. shall surrender the Letters Patents of the Mannor of C, and all that he hath. That is to say, the surrender of the Letters Patents, and that is the Consideration, and not the Surrender of the Estate Demised. And it was agreed, That he needed not to aver more then is contained within the Consideration it self. And it was said, That although the King doth recite the Demise, yet that is not the Consideration of the new Grant; and false recital of a thing which was not parcell of the Consideration, made not the Grant void. See *Cook* 1. Part, 42, 43. in *Alton-Woods* Case: and *lege* the Principal Case there.

3. A man prescribed to have Common appurtenant to his House and Land in the Land of A, and also in the Land of B: B. purchased the house and Land to which the Common was appertaining, and made a Lease thereof for years; the Lessee put his Cattel into the Land of A who chased them; and the Lessee brought Trespass. It was Resolved, That Common appendant is of Common Right, and beginneth by operation of Law, and in favour of Tillage, and therefore a man need not prescribe in it; and such a Common is only appendant to arrable Land, and for Cattle to manure the Land, and for Coates and Sheep to dung and soile the Land; and that it is not the nature of such Common to be appendant to Meadow and Pasture. And therefore it was Resolved, That the Common in the principal Case was Common appurtenant, and not Common appendant. In that case it was also holden, That Common appendant is not altered, by altering part of the Land to which it is appendant. But in pleading it ought to be alledged, That it is appendant to arrable

arable Land only. *Cook* 5. Part, 37. *Terringham's* Caſe.

4. Queen *Elizabeth* made a Leaſe for years, rendring Rent payable at the Exchequer at *Weſtminſter, ſeu ad manus baliverum ſeu receptorum, &c.* with Condition, to be void for non payment; Afterwards the Queen granted the Reverſion in Fee. It was Reſolved in that caſe, That the demand of the Rent ought now to be made upon the Land; For in the caſe of the King, the limiting to be paid into the Exchequer, or into the hands of Bailiffs or Receivors, was but ſurpluſage, and no more than the Law would have Ordered, if the place or perſon at all had been named in the Letters Patents, ſo as ſuch a Limitation in the Queens caſe operated nothing: And then when the Queen aliened the Reverſion to a ſubject, it is then as if no Limitation had been made where, or to whom, the Rent ſhould be paid, and then the payment ought to be upon the Land. *Cook* 4. Part, 73. *Bromley's* Caſe.

5. J. F. and M. his Wife brought a *Formedon in Remainder* againſt E. B. of 3. Meſſuages in A. which R. L. did give to E. C. and the Heirs of her body, the Remainder to J. P. and his Heirs, *Et quia poſt mortem predict. E. et J. P. prefat. J. F. et M. fil. et hared. Roberti P. gen. fratris Hugonis P. filii et haredis predict. J. P. remanere debent per formam reddituum predict. eo quod E. obiit ſine haerede de Corpore ſuo exeunte, &c.* The Tenant pleaded in abatement of the Writ, That the Demandant ſhould by the form of the Regiſter have ſuppoſed, that the Meſſuages *poſtmodum predict. E. et J. P. prefat. J. F. et M. ut conſanguineum et hared. predict. J. P. remanere debet per formam donationis predict.* Which concluſion he hath not made. It was the Opinion of the whole Court in this Caſe, That the Writ was good enough, in as much as it appears to the Court by the pedigree as it is ſet down, that ſhe is, and needs muſt be Coſin and Heir unto J. P; ſo as it is but *palma pro pugno*, the ſame thing more largely ſpoken, and the form of the Regiſter may bear ſuch an alteration. See 11 H. 6. 20. in a *Formedon in Deſcender*, The Demandant made himſelf Heir to every one that had been enheritable to the tail, though by the Regiſter he be bound to make himſelf Heir only to them that were ſeiſed by force of the intail. But yet the Writ was holden good, for now we ſee he muſt needs be Heir to all that was ſeiſed, but he muſt not fail to make himſelf Heir to all that were ſeiſed. Hill. 11 Jac. in C. B. *Feck* and *Brinford's* Caſe. *Hobart*, 51.

6. In Waſte by T. H. againſt R. W. the Caſe was; One M. D. was ſeiſed in Fee of the third part of a Meſſuage and certain Lands in B. in the County of W. and Demiſed them to S. W. for 41. years, who aſſigned to R. W: After which, M. D. by Bargain and Sale, Conveyed the Reverſion to J. S. and his Heirs, the ſaid J. S. being ſeiſed of another third part thereof in Fee; after which, viz. 1. June, 17 Eliz. J. S. dyed ſeiſed of the Reverſion of the ſaid two parts, and this diſcended to B. S. his Son and Heir; who, 20. *Junii*, 28 Eliz. by Bargain and Sale enrolled, conveyed the Reverſion of the two parts to the ſaid T. H. and his Heirs. After which, R. W. committed Waſte in the ſaid houſe. Whereupon T. H. brought an Action of Waſte, and aſſigned the Waſte, in ſuffering the Hall, of price 20 l. and other Rooms to be uncovered, to the diſenheriſin of the Plaintiff: And upon *Nihil Dicit*, a Writ of Enquiry of Damages was awarded; in which was compriſed, That the Sheriff ſhould go to the place waſted, and there enquire of the ſaid Damages. Who returned the Inquiſition taken of B. without making mention, That he went to the place waſted. Whereupon Judgment was given in C. B. That he ſhould recover Seiſin againſt the Defendant, of the ſaid places, *per viſum Juratorum Inquiſitionis predict. et damna ſua occaſione Vaſti predict. in eiſdem locis in triplo, ſecundum formam Statuti.* Upon which, a Writ of Errour was brought in B. R. And there it was agreed by all the Judges, That it was but Surpluſage, to comprehend in the Writ of Enquiry of Damages, That the Sheriff ſhall go to the place waſted, and there enquire of the Damages, in as much as by not doing thereof the Waſte is acknowledged, and therefore he needs not go to the place waſted: But where a Writ is awarded to enquire of Waſte upon default made at the grand Diſtreſs, there by the Statute of *Weſt.* 2. the Sheriff ought in perſon to go to the place Waſted, and enquire of the Waſte done, and therefore in that caſe it was needfull to have the Clauſe in it; for by the View, the Waſte may be better known to them: but where the Waſte is acknowledged, as here, that Clauſe is Surpluſage, and needs not; but he may do it at any place within his Bailywick where he pleaſeth. See Paſch. 35 Eliz. *Heydock* and *Warwards* Caſe. *Popham*, 24.

7. Debt, the Plaint was of 6 l. 14 s. 2 d. and declared, That the money grew due by reaſon of two ſeveral Contracts, *ſcil.* ſo much for the one, and ſo much for the other; and it appeared upon Accompt, & Computation of theſe two ſums, that it was more by 3 d. then was contained in the Plaint. The Defendant pleaded as to 6 l. 14 s. 2 d. *Nihil debet*, and found for the Plaintiff, and Judgment in in an Inferiour Court, That the Plaintiff ſhould recover as he declared. Upon which, Errour was brought,

brought, and assigned, That 3 d. more is given by the Judgment to be recovered, then was found by the Jury to be due. It was holden by *Fenner* and *Yelverton* to be Errour, and they conceived a difference where the Plaint (for the purpose) is 8 l. and he declares for 10 l. *viz.* 5 l. for a horse, and 5 l. upon another Contract, and *Nil debet* to the 10 l. and nothing to the other, and so found, yet the same is good; for the 5 l. in the Declaration is but surplusage, because that the Plaint was answered *in toto* with the principal Contract layed in the Declaration, *scil.* the horse. But in the principal Case, the moneys mentioned in the Declaration, being upon severall Contracts, and none of the Contracts only amounting *per se*, to the sum specified in the Plaint, every part of the Declaration was materiall; and so being found too short by the Verdict, the Judgment was Erroneous. Trin. 44 Eliz. in B. R. *Crompton* and *Smiths* Case. *Yelverton*, 5.

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2. *Where Surplusage in an Indictment, Verdict, Deeds, or Grants, shall make them void; Where not: Where it is not materiall*; et è contra. *And where Customs to have a thing against Common right, is Surplusage.*

1. IN a Writ of Dower, the Issue *Ne unq; Seisis que Dower*: It was given in Evidence to the Jury, That a Feoffment was made to the Husband, and the Deed shewed. To which it was said, That long before the Feoffment, the husband was seised of the Land to him and his first Wife in tail, and after discontinued, and took back an Estate in Fee by the Feoffment aforesaid, and dyed seised; so the Heir was remitted, and the second Wife not Dowable. *Mountague* would have demurred, and dismissed the Jury. But the Court was clear of Opinion, That the Jury ought to find for the Demandant, because their charge is only upon the Seisin, *scil.* if the Husband was seised of such an Estate of which she might have Dower. *Knightly* would have had the Jury found all the matter at large; as it was in Temps. E. 1. but the Court would not admit a Verdict at large. Pasch. 30 H 8. *Dyer*, 41.

2. In an Evidence upon an Issue joyned upon Villinage regardant to a Manor; It was holden by the Justices, That he ought to make his Title to the Villein as regardant, and not if he were a Villein in grosse, or not, because they are not charged with that. But *Bromley* was of another Opinion, because their charge is upon the Right of Villeinage. Pasch. 33 H.8. *Dyer*, 48.

3. Debt brought against J. S. Executor of the Last Will and Testament of J. N: It was found by Verdict, That J. N. made a Bond in the nature of a Statute-Staple to J. S. and dyed: and J. S. as Executor of his own wrong, retained goods in his own hands, in satisfaction of his own debt. It was Objected, 1. That he might retain, because the Plaintiff hath affirmed him to be Executor in his Declaration, and the Jury cannot find against that which the parties have admitted in pleading, and so the finding of the Jury, that he was Executor of his own wrong, was surplusage. 2. Although that an Executor of his own wrong cannot retain against a lawful Executor, or a lawful Administrator; yet he might retain against a Creditor, who hath affirmed him in his Declaration to be Executor. But it was Resolved by the Court, That the Retainer by an Executor of his own wrong, was not good, for the manifold inconveniencies which would follow. *Cook* 5. Part, 30. *Coulte's* Case.

4. Debt against an Executor, the Jury found the death of the Testator in *Ireland*, and the Defendant took divers Goods of the Testator in *Ireland*, and administred to the value of the Debt; and that he did not administer any goods of the Intestate within the Kingdom of *England*. It was Objected, That the Jury cannot find things transitory in another County, or in another Realm; Because by presumption of Law, they cannot have knowledg of the thing; and a thing done meerly beyond Sea, shall not be tryed here. But it was Resolved by the Court, 1. That the Jury may find Affetts in any County, because they are things Transitory: But when the place is materiall, and made parcell of the Issue, there the Jurours cannot find the Point in Issue in any other place, for that by special pleading, the Point in Issue is restrained to a place certain. 2. It was Resolved, That the Jurors have found the substance of the Issue; *scil.* Affetts, and then the finding, That they are beyond Sea, is but Surplusage; and if an Executor hath goods in any part of the World, he shall be charged in respect of them. *Cook* 6. Par, 44. *Dowdales* Case.

5. A man made a Lease for 30 years of a Manor, excepting all Woods and Underwoods growing and being upon the Mannor; And afterwards made another Lease to the same Lesse of all the Woods and underwoods growing or being upon the said Mannor for 60 years, without impeachment

of Waſte; and afterwards made a third Demiſe to the Leſſee for 30 years, without any expreſſion to begin from the day of the expiration of the ſaid Leaſe for 30 years: The Term for 30 years expired, the Leſſee cut the Trees, and he in the Reverſion brought an Action of Waſte: And in this caſe it was Reſolved, That by the Exception of the Wood and underwood, the ſoile it ſelf was excepted; and the words, [Growing and being upon the Mannor] were Surpluſage; for by Demiſe of all the Woods upon the Mannor, all Woods growing and being upon the Mannor, paſſe; for that is all one. 2. Reſolved, That notwithſtanding the Exception, the Woods did remain parcell of the Mannor, and by the Demiſe of the Mannor they did paſs. Mich. 40 Eliz. in C.B. *Cook* 5. Part, 11. *Ives* Caſe.

6. An Abbot a Covent made a Leaſe for years, rendring yearly during the Term to the Abbot and Covent, or to the Succeſſors, 5 l. Rent at two Feaſts; upon Condition, That if the Rent be behind, to re-enter; The Abbot ſurrendred to the King his Land, which by mean Conveyances came to J. S. who levied a Fine of the Reverſion to B; B. before Attornment granted by Deed the Reverſion to his Son and Heir, to whom the Termor attorned; the Rent was behind; the ſon in the Reverſion entred upon the Land: In this Caſe, (amongſt other Points) it was Reſolved, That the Reſervation in the disjunctive was good, for the Law ſhall make ſuch a Conſtruction as ſhall ſtand with the intention of the party. And it was agreed, That rendring Rent yearly during the Term to him and his Succeſſors, or rendring Rent to him during the Term, or to his Succeſſors, was all one, if the Rent be reſerved to him and his Succeſſors: And although that the words are joyne, and in the Copulative; yet upon conſtruction of the Law, the Leſſor ſhall have the Rent during his life, and his Succeſſors after his deceaſe: And theſe words [To him or to his Succeſſors] are words onely of explanation, for ſuch a Reſervation had been good, being reſerved yearly during the Term, without the words to him and his Succeſſors. *Cook* 5. Part, 112. *Mallories* Caſe.

7. In an Indictment of Murders, divers Errors & Exceptions were taken and alledged, 1. Becauſe that in the Indictment it was alledged, That the Indictment was taken before W.S. *Coronatore Domine Regine infra Libertat. dicte Domine Regine Ville ſive de Coſſam predict. ſuper viſum Corporis*: and it is not alledged to what places the ſaid Liberty did extend, or what part, or if any part of the Town of Coſſam was within the Liberty; ſo as it doth not appear that the Coroner had Juriſdiction. And Indictments which concern the lives of men, and which are the Kings Counſel, ought to have a full and preciſe certainty, to which the party may anſwer, and ſhall not be taken by Argument. But it was Reſolved, That the Indictments was good enough. For if Indictments be certain to a general intent, it is ſufficient: and in this caſe there is a ſufficient certain Intendment, that *Coſſam* is within the Liberty of *Coſſam*; and that the Town it ſelf ſhall be preſumed to be out of the Liberty of the Town, is but a conſtrained Conſtruction, which the Law will not allow of. 2. It was Objected, That the Indictment was not good, for that it wanted the word *percuſſit*. And for this cauſe, it was Reſolved, That the Indictment was inſufficient; For although that a Gun was diſcharged upon the party, yet it might be, that he was not ſtruck with it; And an Indictment may be a *percuſſit* as well out of ſtroke out of a Gun, or a Bowe, as with a ſword in hand; For this cauſe, the Indictment was Quaſhed. *Cook* 5. Part, 121. *Longs* Caſe. See *Cook* 4. Part, 42. in *Heydons* Caſe, acc.

Surrender.

What words ſhall make a Surrender, What not; And where the Acceptance of a new Eſtate from the Leſſor, or him in the Reverſion, ſhall be a ſurrender of the firſt Eſtate or Intereſt; and where not.

1. IN a *Replevin*, the Caſe was; A. poſſeſſed of a Term of Abby Lands aſſigned it to R. rendring 50 l. *per annum, ſi R.* his Executors or aſſigns, ſhould ſo long occupy *virtute dimiſſionis*; and R. granted, That it ſhould be lawful to diſtrain it, &c. Afterwards the King granted the Reverſion to D. to whom A. ſurrendred; & afterwards D. deviſed the Land to his Wife for life, upon whom the Adminiſtrator of A. diſtrained, and avowed upon the Aſſignee of R. for the Rent: The Plaintiff pleaded, That her Husband was ſeiſed in Fee, and Deviſed to her for life, and the diſcent of the Reverſion to her ſon, who prayed in Aide of him. The matter aboveſaid being pleaded in bar, the Avowant demurred thereupon: 1. Becauſe it was pleaded, That the Reverſion was given to the King by the Statute of 31 H. 8.

where the Statute gives not any but thoſe which ſhall be ſurrendred, relinquiſhed and yielded up; and in this caſe, the ſurrender was not ſhewed; and for that it was the Opinion of the Court, That the Barr was inſufficient. And, 2. Becauſe he pleaded, That the Reverſion diſcended, which was not true; for that untill the Wife entred, there was not any Reverſion. Hill. 2 Mar. *Dyer*, 110. *Donner's* Caſe.

2. A Leaſe was made for years rendring Rent; the Leſſor made a Feoffment of the Land, the Termor being upon the Land, and the Termor held the Land; And, If the Feoffee ſhould have the Freehold and the Rent, was the Queſtion? It was the Opinion of the Juſtices, That it was a good Feoffment, for the Termor had an Intereſt in his Chattell, and the Leſſor in the Freehold, and ſo they have diſtinct Intereſts; and ſo the Freehold ſhall paſſe, and the Term be ſaved: But otherwiſe it is in the caſe of a Leaſe for life, although the Termor be content with the ſame, yet that is not a ſurrender. See Paſch. 29 Eliz. *Dyer*, 33. See *Cook* 2. Part, 31. ſeem contrary.

3. Leſſee for years rendring Rent; the Reverſion was granted for life, the remainder over in Fee, the Grantee releaſed all his right to him in the Remainder: He in the Remainder granted the Reverſion in Fee, the Tenant for life alſo Releaſed to the ſame Grantee; Yet it was adjudged in that caſe, That the Releaſes were void, becauſe there wanted words of Surrender in them. It is there a Quære, if the ſecond Releaſe ſhall not amount to an Attornment to make the Remainder to paſſe. Paſch. 8 Eliz. *Dyer*, 251.

4. In Treſpaſſe upon Not guilty, the Caſe was; A. was ſeiſed of the *Barton* of S. in Fee, and demiſed the ſame to J. T. and to W. R. for the Term of their lives, and dyed; the Reverſion diſcended to Sir *John A.* as ſon and heir, who by Indenture granted the ſame to E. T. the Defendant, the Reverſion of the ſaid *Barton* for Term of life; to which Grant J. T. attorned, being then joyntly ſeiſed of the ſaid *Barton* with W. R. Afterwards J. T. by his Deed ſurrendred to the ſaid E. T. all his Eſtate, Title, and Intereſt in the ſaid *Barton*, and dyed. E. T. entred into the ſaid *Barton*, claiming to hold in Common with the ſaid W. R. The point in the Caſe was only, If the Attornment of one Joynt-Tenant did not veſt the Reverſion in him, then the ſurrender made to him was void. And in this Caſe it was Reſolved. 1. That the Attornment of one Tenant for life ſhould veſt the Reverſion in the Grantee, becauſe the Eſtate of joynt Leſſees is entire, and by conſequent the Reverſion is dependant and expectant upon ſuch an Eſtate as entire alſo; and the Attornment is a lawfull act, and alſo becauſe an attornment doth not give an Intereſt, but only perfecteth a Grant made by another. And in this Caſe (amongſt other things) it was put for a Rule, That a Leſſee cannot attorn upon a Condition ſubſequent, but if the Reverſion be once veſted, the ſame cannot after be deveſted by any attornment, but contrary of a Condition precedent; for there it is not any Attornment untill the Condition be performed. *Cook* 2. Part, 66, 67. *Tookers* Caſe.

5. A man Attainted of Felony, pleaded his Charter of Pardon, and claimed to be reſtored to his goods and Chattells forfeited to the King by the Felony; the words of the Pardon were, *Pardonavit, remiſit et relaxavit.* It was the Opinion of the Court, That he was not by theſe words reſtored to his goods and Chattells, for the words do not amount to a ſurrender in the Caſe of a common perſon, much leſs in the Caſe of the King; and there ought to have bin the word *reſtituit*. Hill. 23 Car. in B. R. *Chapell* and *Drewes* Caſe. Styles 41.

6. A man made Leaſe by Indenture for 30 years to begin preſently. Afterwards the ſame Leſſor leaſed the ſame Land, for the ſame Term to a ſtranger to begin at the Feaſt of *Mich.* following. Afterwards the firſt Leſſee purchaſed the Reverſion in Feeſimple, ſo as his Term was drowned. It was the Opinion of the Court, That the ſecond Leſſee might enter after *Mich.* and hold his Term. Hill. 2 Ma. *Dyer*, 112.

7. In an *Ejectione firmæ*, the Caſe was, A Woman Leſſee for years, took a Husband, and dyed, the Husband was poſſeſſed of the Term; and afterwards the Leſſor by Deed Indented, Granted, and Demiſed to the Plaintiff, *Robert Wroteſley*, the Tenements by theſe words, *viz.* The Reverſion of all that his Farm in B. and alſo another Tenement there, with all Lands, Leaſes, Meadows and Paſtures, with all and ſingular their Appurtenances now in the Tenure of J. S. who was the Husband of the firſt Leſſee, To have and to hold all the ſaid Farm and Tenements, with all other, &c. to the ſaid *Robert Wroteſley* and his Aſſigns, from the end of the expiring of the Term of years Granted unto the ſaid J. S. to the end of 53 years. Afterwards *J. S.* took another Wife, and made her his Executrix, and to her deviſed his Term, and dyed, his Wife entred, claiming by the Deviſe; and afterwards ſhe married another Husband; and ſhe and her Husband being in poſſeſſion took a Leaſe for the Term of their lives from him who had the Feeſimple, by which the Term was drowned; upon which *Robert Wroteſley* before the expiration of the Term of years, ſuppoſing that his ſecond Leaſe took effect, entred upon them, and by them ejected brought

brought the Action. In this Caſe, all the Juſtices agreed, That the Grant of the Reverſion *Habendum* the Land for years *à ſine termini, &c.* did countervail a good Leaſe. 2. That the word (Granted to J. S.) was a good Leaſe; and although it was falſe, yet the falſe recital ſhould not avoid the Grant. 3. That the ſecond Leaſe ſhould begin immediately after the end and determination of the firſt Term, without expectation of the expiration of the years and time of the firſt Term. For to this word *termino annorum*, the Emphaſis and Accent ſhall be referred, as to the chief part of the ſentence: And it was holden, That in ſuch Caſe, a Writ of *ad Terminum qui præteriit* would well lye, if after ſurrender the Leſſee would hold out his Leſſor, although that it be *infra ſpatium temporis annorum*. Hill. 2 Eliz. *Dyer*, 177, 178. *Plow. Com. Wrotteſley* and *Adam's* Caſe. 190, to 199.

8. A man was poſſeſſed of the Capital Meſſuage of H. in S. (which was the Manſion houſe of the late Lord *De la Ware*) for Term of years by a Leaſe made thereof in the Augmentation Court, rendring a Rent. And afterwards within the Term, the ſame King Granted the Cuſtody and the Office of keeping of the ſaid Meſſuage by his Letters Patents unto the Leſſee for the Term of his life, together with a Fee. It was holden in this Caſe, That it was a ſurrender of the Termor; but the matter was compoſed by Arbitrament. Paſc. 3 Eliz. *Dyer*, 220.

9. The Prior and Covent of *Norwich* in 24 H. 8. made a Leaſe to A. for 24 years. Afterwards in 26 H. 8. they made a new Leaſe to C for 99 years. 30 H. 8. the Priory was tranſlated into a Deanry, and then they made a new Leaſe to C. for 99 years, within a year of 31 H. 8. of the Statute of Diſſolution. And 1 E. 6. the Dean and Chapter ſurrendred to the King. In this Caſe (amongſt other points) it was Reſolved, That the taking of the ſecond Leaſe by C. was a ſurrender of the firſt Leaſe, although it was not then in *eſſe* at the time. See 37 H. 6. 4. acc. And alſo it was holden, That the ſecond Leaſe was void, becauſe it was within the year of 31 H. 8. Mich. 11 Eliz. *Dyer*, 281. *Cobets* Caſe.

10. The Prior of St. *Johns* of *Jeruſalem*, and his brethren made a Leaſe by Indenture to three a Will, one of the Leſſees dyed. In 4 H. 8. the Leſſees reciting the death of one of them, and that the firſt Indenture is ſurrendred and cancelled, they made a Leaſe to the Survivors, *Habendum ris et hereditas*, but made no Livery, nor Letter of Attorney to make Livery. In that Caſe it was adjudged, That it was void; for that by the ſurrender of the Indenture, the Eſtate at Will was determined, ſo as the ſecond Leaſe could not now ennure as a Confirmation. It is a Quære in that Caſe, If the death of one of the Leſſees did not determine the Will. See *Cook* 5. Part, 10. in *Heydads* Caſe, that Quære Reſolved, That the Eſtate at Will is not determined. Mich. 10 Eliz. *Dyer*, 268.

11. The King ſeiſed of a Manor in Fee in the right of his Crown, granted Copyhold Lands parcel of his Manor to one in Fee, and afterwards by his Letters Patents under the Exchequer Seal, made a Leaſe of thoſe Lands for 21 years; the Leſſee Granted his Eſtate to the Copyholder, the King reciting the leaſe for years, granted the Reverſion in Fee; the years expired, the Grantee of the Reverſion entred upon the Copyholder, and in this Caſe it was Reſolved, 1. That the Leaſe made by the King under the Exchequer Seal was good. 2. That by the acceptance of the Term for years by the Copyholder, that the Copyhold Eſtate was determined. 3. That the ſeverance of the Freehold, and Inheritance of the Land holden by *Copie* did not determine the Copy-Eſtate. For although that the Copyholder hath but an Eſtate at Will, yet he is not removeable at the Will of the Lord, ſo long as he performs the Cuſtomes and Services. *Cook* 2. Part, 17. *Lanes* Caſe.

12. A. Tenant for life, the Remainder to B. and another for life, the Reverſion to C. and his Heirs, C. levyed a Fine to A. and B. to the uſe of A. for his life, and after to the uſe of B. in Fee. A. dyed. It was Reſolved in this Caſe, That by the death of A. the Joynture between B. and the other was ſevered. And that B. was Tenant in Common with them, and this difference was taken, When the Feeſimple is limitted by a new Conveyance, there the one may have the Feeſimple, and the other an Eſtate for life; but when they are Tenants for life firſt, and afterwards one of them gets the Feeſimple, or the Feeſimple diſcends to him, there the Joynture is ſevered: and when an Eſtate is made to three, and to the Heirs of one, he who hath the Fee, cannot grant over his Remainder, and continue in himſelf an Eſtate for life. And if a Reverſion be granted to the Tenant for life, and another in Fee, the Reverſion is extinct for a moyety: for, Tenant for term of life cannot acquire the Reverſion or Remainder of the ſame Term, but the Eſtate for life ſhall be drowned. And if Tenant for life granteth his Eſtate to him in the Reverſion, the ſame is a ſurrender for a moyety. *Cook* 2. Part, 61. *Wiſeits* Caſe.

13. Note upon the Statute of 27 H. 8. of Uſes, It was Reſolved, That if he in the Reverſion enfeoffeth Leſſee for years to the uſe of another, that in that Caſe, although that the Leaſe be ſurrendred and extinct by the Common Law, yet by the ſaving

of the said Statute, the Term of the Feoffee is saved, 27 Eliz. in the Court of Wards, *Chaynes* Case. and so it is if the Lord enfeoffeth a Copyholder to the use of another, his Copyhold is saved by the said Statute. 28 Eliz. in the Court of Wards; both Cases vouched in *Cook* 7. Part, *Lillingston's* Case.

14. Note, That he who hath an *Interesse termini, scil.* a future Interest, cannot by express words surrender it; but in such Case acceptance of a new Lease shall drown it, 37 H. 6. 17. *Cook* 10. Part, 53. in *Lampits* Case, acc.

15. Upon an Evidence to a Jury, the Case was, That where the Husband made a Lease by Indenture to the Defendant for 90 years; and afterward enfeoffed certain persons, and took back an Estate to him and his Wife in tail; and afterwards the Termor took from the Husband a Lease for 28 years only to begin immediately by word; the Husband dyed, and the Wife ousted the Termor. It was the Opinion of the Justices in that Case, That she might well do it, because the first Lease was surrendred and drowned by the Acceptance of the second Lease. Hill. 4 Ma. *Dyer*, 140, 141.

16. Tenant for life is content, and agreed with him in the Reversion, that he shall have the Land, and the Interest in it for the yearly Rent of 20 s. but there is no Writing nor Livery and Seisin made upon it. It was Resolved by all the Justices, That the same was no surrender; And the rather in the principal Case, because the agreement was, That if the Tenant should survive and overlive the other, that he should have back the Land again. Pasc. 8 Eliz. *Dyer*, 252.

17. Note, It was adjudged in this Case, That if Lessee for years of a Manner taketh a Lease of the Bayliwick of the Manor, that the same is no surrender of his Term, because it is of a thing which is collateral. Mich. 5 Jac. in B. R. *Gage* and *Peacocks* Case. *Godbolt* 153. See Trin. 5 Jac. in B. R. *Cro.* 1. Part, 176. the same Case between *Gibs* and *Searl*.

18. In a Replevin, the Defendant made Conusans as Bayliff to J. S. because the Father had Granted a Rent-charge of 6 l. 13 s. 4 d. to the Son for life, and for Rent behind he distrained. The Plaintiff confessed the Grant, but said, That afterwards the Land discended to E. P. who let it to J. S. for 500 years. The Defendant rejoyned, That after this Lease, and before any Rent was arrear, he surrendred the Lease of the Lands to the said E. P. upon which it was demurred. The matter of Law was, When the Grantee of a Rent for life accepts of a Lease of part of the Lands, and after surrenders the said Lease, Whether the Rent remains suspended during the years, or be revived presently by the surrender. It was urged, That it is determined during the Term for years: For if he had granted the Lease over, it had passed the Rent *inclusivè*: And so where the Lessee surrenders, it is *quasi* a Grant to him during the Term, and therefore the Rent shall not be revived; but if the Lease had been to the Grantee of the Rent upon Condition, and the Lessor had entred for the Condition broken, the Rent had been revived, for the Lease is absolutely determined. But it was the Opinion of the Court, That in the principal Case the Rent was revived: For by the surrender and agreement of the parties, the Lease is absolutely determined, and not in *esse*, and none of them can say that it is in *esse*; but a stranger who is to have benefit thereby, may well say it is in *esse* as to him, but *quoad* the Lessor and Lessee it is determined, and the possession and Interest is in them without entry. Hill. 3 Car. in C. B. Sir *Ed. Peto* and *Pembertons* Case. *Cro.* 1. Part, 72.

19. The Case was, A man seised of two Acres of Land, made a Lease for years of one Acre to one, and another Lease for years of the other Acre to another, and then enters and makes a Feoffment, and several Liveries upon the several Acres, and one of the Lessees being absent, doth not assent to the said Livery, and the use of the Feoffment was not to the use of his Will; and then he declares his last Will, and by that recites the said Feoffment, and then declares the use of that to be to the use of himself for life, the Remainder over to a stranger; and afterwards the Tenant for years which did not assent to the Livery, Granted his Estate to the Feoffor, and the Feoffor dyed. It was said, That this ensures as a Grant of the Reversion, and that the Grant of the particular Tenant ensures first as an Attornment, and then as a surrender of his Estate, as if it had been an express surrender. But it was Resolved by the Justices, That this doth not ensure to make an Attornment as an express surrender will, for an express surrender admits the Reversion to be in the Grantee to whom the surrender is made; but in this Case, before Attornment, the Grantee hath nothing; and after Attornment, the particular Estate being granted, it shall be drowned in the Reversion. Hill. 8 Jac. in C. B. *Bane* and *Strettons* Case. *Bowman* 1. Part, 51.

20. Tenant in Socage Leased his Lands for four years, and dyed, his Heir within the age of eight years. The Mother being Guardian in Socage, leased the Land by Indenture to the same Lessee for 14 years. It was holden by the Court, That in this Case, the first Lease was surrendred, but otherwise upon a Lease made by Guardian by Nature.

Mich.

Mich. 31 Eliz. in C. B. *Leon.* 158. See Hill. 31 Eliz. *Willis* and *Whitewood's* Case. *Leon.* 322. acc.

11. In *Ejectione firmæ*, it was found by especial Verdict, That W. Lord *Mountegle* was seised of the Manor of D. and became bound in a Statute to A. who dyed; the Executors of A. sued Execution. Upon the *extendi facias*, a *Liberate* issued forth; upon which the Manor was delivered to the Executors, but was not returned. The Executors being possessed of the said Manor, the Lord commanded a Court Baron to be holden there, which was done by the sufferance of the Executors who were present; and in the presence of the Lord, said these words, *We have nothing to do with this Manor.* The first point was, If the Execution was well done, the *Liberate* not being returned. It was said that it was, and the Earl of *Leicester* and *Torfield's* Case vouched by *Egerton* to be adjudged in the point. 2. It was moved, That the Executors being in possession by force of that Execution, and permitting and suffering the Consor to hold a Court, and saying in his presence the words aforesaid; If the same doth amount to a surrender to the Consor or not. It was the Opinion of *Wray* Chief Justice, That hereupon this matter is no surrender, for that here the words are not addressed to the said Consor who is capable of a surrender, nor to any person certain: And it was said by him, That it is not like the Case, 40 E. 3. 23. *Chamberlain Assise.* Where Tenant for life saith to him in the Reversion, That his Will is, that he enter, for that there is a person certain who can take it. Quære, the Case was adjourned. Hill. 28 Eliz. in B. R. *Pendlebeck* and *Newman's* Case. *Leon.* 279, 280.

12. The Case was, Lessee for 30 years leased for 19 years, and then the first Lessee and one B. by Articles in writing made betwixt them, did conclude and agree, That the Lessee for 19 years should have a Lease for 3 years in the said Lands and others, and that the same should not be any surrender of the first Term. To which Articles the said Lessee for 19 years did after agree and assent unto. It was the Opinion of all the Justices in this Case, That the same was not any surrender; And they were of Opinion, That one Termor could not surrender to another Termor. Trin. 32 Eliz. in C. B. *Pury* and *Allens* Case. *Leon.* 303.

13. A man made a Lease for years by Indenture, and Covenanted with the Lessee upon surrender of his Lease, to make him during the Term, a new Lease. The Lessee accepted a Fine, *sur Conusans de droit come ceo*, and by the same Fine Granted and rendred the Land to the Conusee for 800 years. In this Case it was adjudged, That Covenant lay against him without any surrender made. 2. It was Resolved, That if the said Lease for 80 years was but an Interest of a future Term, so as the Lessee might make the surrender to the Lessor; yet because the Lessor had disabled himself to make the new Lease, which is the effect and end of the surrender, that the Lessee should not be enforced to make the surrender, for thereby he should forfeit his old Term without any possibility of having a new Term according to the Covenant of the Lessor. Pasc. 38 Eliz. in B. R. *Cook* 5. Part, Sir *Anthony Maynes* Case, 21.

14. If a Lease be made for life, the Remainder to Husband and Wife in special tail, and afterwards the Husband dyeth without Issue; the Wife is now Tenant in tail after possibility of this Remainder; and if Tenant for life surrendreth unto her, as he may, such surrender is good (for the life of him in the Remainder is higher then the life of another) and then she is Tenant in tail after possibility of Issue in possession. *Cook* 11. Part, 81. in *Lewis Bowles* Case.

15. The President and Schollers of *Magdalen* College in *Oxon*, 8 Eliz. let a Messuage in S. to W. S. for 21 years, rendring the ancient Rent, and 23 Eliz. they let the same Messuage to the said W. S. for 20 years from the said *Mich.* then next ensuing rendring also the ancient Rent. And 31 El. they made a Lease of the same Messuage to J. D. for 21 years from the making of the Lease, which Lease was by mean Assignments conveyed to the Plaintiff, upon which an Action was brought against the Defendant who had the Interest of the said W. S. by mean Assignments. It was the Opinion of *Popham*, That *ipso facto* upon the last Lease made to W. S. and accepted by him, that the first Lease was determined, for this last contract determines the first, when the one and the other cannot stand together; and such was the Opinion of the whole Court; and so it was said it was agreed, 1 Eliz. in the Case of the Abbot of *Reading*. Hill. 35 Eliz. in B. R. *Thompson* and *Trefford's* Case. *Popham* 9.

16. Action upon the Case against W. R. Executor of J. R. for that the Plaintiff in the life of the Testator was possessed of a Messuage in the Parish of, &c. in *London* for divers years. And whereas the Testator was possessed of the Reversion thereof for divers years then also to come; the said Testator 12. *Aprilis* at L. in consideration that the Plaintiff at the request of the Testator in his life time would surrender all his Estate and Term of years which he then had to come in the said Messuage, and procure one T. T. to give to the Testator 100 l. for a Lease thereof to be made by the Testator

ſtator to the ſaid T. T. promiſed to pay the Plaintiff 30 l. of the ſaid 100 l. and layed *in facto*, that at the inſtance of the Teſtator, viz. 20. *Aprilis*, 28 Eliz. at L. he ſurrendred to the Teſtator all his Eſtate in the ſaid Meſſuage; and the ſame 20 *Aprilis* procured the ſaid T. T. to give the ſaid Teſtator 10 l. for a Leaſe of the ſaid Meſſuage, then and there made for 19 years; And that the Teſtator in his life time, nor the Defendant his Executor, had paid the ſaid 30 l. although required by the Plaintiff. Upon *Non Aſſumpſit* and Verdict for the Plaintiff, it was moved in ſtay of Judgment, becauſe that the Plaintiff 20 *Aprilis*, 28 Eliz. ſurrendred all his Eſtate and Term which he had then to come; and for any thing appears, it may be another Term then he had the 12th of *April* before; for it is not ſaid, That he being ſo poſſeſſed, ſurrendred. 2. It is all his Term, and in the mean time, part of the Term is encurred; and the intent was, That the ſurrender ſhould be made immediately. 3. It was alledged, That a Term for years cannot be ſurrendred to another Termor for years. It was anſwered and Reſolved, That the conſideration is, that the Plaintiff ſhould ſurrender upon requeſt of the Teſtator in his life time, ſo as it is not to be done inſtantly at his peril, until requeſt: and it is alledged, That at the requeſt of the Teſtator 20. *Aprilis* he ſurrendred; eſpecially it is good here, where the Action is not grounded upon the Term, but upon the Requeſt. 2. Reſolved, That it ſhal be intended, that the Teſtator had ſuch a Term in Reverſion, to which the Term of years in poſſeſſion might be ſurrendred; for he who hath 10 years in poſſeſſion, may ſurrender to him who hath 20 years in Reverſion, for the leſſer may ſurrender to the greater Term. And although it ſhall be taken againſt the Plaintiff, that he had a greater Term in poſſeſſion, then the Teſtator had in the Reverſion; Yet it was holden, That the ſurrender ſhall be good, for that in Law it is greater and more beneficial for him to have a leſſer Term in poſſeſſion, then a greater in Reverſion. It was adjudged for the Plaintiff. Trin. 35 Eliz. in B. R. *Hughes* and *Robotham* Caſe. *Poph.* 30, 31.

27. The Caſe was; Tenant for life, the remainder for life, the Reverſion in Fee; He in the Remainder for life gives his Deed of Demiſe (with the aſſent of the firſt Tenant for life) upon the Land to a ſtranger in the abſence of the Leſſee, and ſaid, That he ſurrendred to him in the Reverſion. The Point was, Whether he in the Remainder for life can ſurrender without Deed? Two of the Juſtices, viz. *Haughton* and *Mountague* agreed, That it might be ſurrendred without Deed, becauſe it had its beginning without Deed; but it could not be granted over without Deed. *Doddridge* and *Croke*, Juſtices, ſaid, That it could not be ſurrendred without Deed; but ſaid, That Tenant in poſſeſſion may, or Tenant for life and he in the Reverſion together, may ſurrender to him in the Reverſion: but this ſhall enure as two ſeveral Surrenders; firſt of him in the Remainder to the Tenant for life; and then by the Tenant for life to him in the Reverſion. Paſch. 16 Jac. in B. R. *Bennet* and *Wetherby's* Caſe, *Popham*, 137, 138.

28. A Woman Tenant in tail makes a Leaſe for 31 years, and after takes Husband, and have Iſſue: The Husband being Tenant by the Curteſie, ſurrenders; the Heir doth *enter* the Leaſe, and the Leſſee brings Ejectment: In this caſe, It was holden by the Court, That the Surrender was good, and that the Privity was ſufficient. See *Owen*, 32. acc.

29. In a *Replevin*, the Caſe was; A Leaſe was made *Habendum à Datu*; the Queſtion was, Whether it be all one with *à die datu*? It was adjudged, That it was all one. And ſo it was ſaid, It was adjudged, Trin. 8 Jac. in B. R. in *Hanlon* and *Morgans* Caſe, Where a Leaſe was made 1 *Mail. Habend. à datu præſentium*, and declared upon a Leaſe *à die datus*, and adjudged good, and all one. The ſecond Queſtion in the Caſe was, Leſſee for years made a Leaſe to his Leſſor of all the Term, Excepting one day: The Queſtion was, Whether it was a Surrender, or not? Touching that, it was ſaid by *Coke*, Chief Juſtice, That if Leſſee for 100 years grants to his Leſſor all his Term (excepting one year) it is clearly no ſurrender: and ſo it is, if there be a Saving to himſelf of a moneth, a week, or a day, it is no Surrender. Mich. 13 Jac. in B. R. *Bacon* and *Wale's* Caſe. *Bulſt.* 3. Part, 203, 204.

30. In Waſte; the Plaintiff declared againſt *T. H.* and *Elizabeth* his Wife in Waſte; and ſet forth, That Queen *Eliz. Anno* 8. under the Exchequer Seal, made a Leaſe to *A. B.* and *E. Juliff.* for 3. Lives, and that A. and B. are dead, and conveyed the Remainder to the King, and from him to the Plaintiff; and that the ſaid T. H. the Defendant took the ſaid E. to Wife, who did Waſte: The Defendants confeſs the Leaſe, death, and Marriage, and ſaid, That the ſaid T. H. and E. his Wife, 2. Feb. 40 Eliz. ſurrendred as well the Eſtate of the ſaid E. as the ſaid Letters Patents, to the intent that the Queen ſhould make a new Leaſe to the ſaid *Elizabeth*, and to C. and D. for their Lives; which Surrender, the Queen accepted, and 3. Feb. next, made ſuch Demiſe: Iſſue being joyned upon the Surrender and Demiſe, the Jury found the new Leaſe made 3. Feb. in which is in-clud-

cited, That she had surrendred the Estate and Letters Patents, as in Consideration of 20 nobles paid; And the Jury find, that the said Demise made 3. Feb. was with the consent of the said T. H. and that he and his Wife agreed thereunto, and held claiming by the said Demise. It was adjudged in this Case for the Plaintiff; For the Consideration which procured the new Lease, is the surrender; and the surrender is not absolute, but defensible if the Wife survive, or if the husband will disagree: And therefore, it was said, That if a woman Lessee for years taketh a husband, and after the *Feme* takes a new Lease of the Queen for life, this extinguisheth the Term; but if the Husband disagree, then the Lease is revived. 2. Because in this case the Freehold which the Husband had in the right of his Wife, could not be given by his bare assent: but if the Lease had been made *de novo* to the Husband and Wife, then it had been questionable, for the Estate passeth by implication; viz. Surrender in Law, by acceptance of a new Lease. 3. It was said, It shall be taken, of an actuall Surrender made by the Husband and Wife, and of such a surrender which is operated by a Consequent act of Law. Trin. 14 Jac. in C. B. *Sturys* and *Holmans* Case. *Hutton*, 7.

31. The Case was, Lessee for the life of another man, the Remainder to an Infant for the life of J. S. the Remainder to J. S. for the life of another man: The first Lessee, and the Infant, did surrender upon the Land to J. S. in the last Remainder. In this Case it was held, That the surrender was good in Law. The first Question was, If the latter Remainder to J. S. was good, because his life was the enclose of the two last Remainders; and for that it was holden good; for although he could not have the last Remainder limitted to him, the first Remainder being determined by his life, yet because he had the same to Grant, it was holden to be good. The second point was, If this surrender made upon the Land by both, were good, and how the same should enure; As to that it was said, That it should enure as a Surrender for the Tenant for life, and as a Confirmation by the Infant. The third point was, If Lessee for the life of another, doth surrender to him in the Remainder for the life of another, if the same was good; And it was holden, That it was good; because he had equal Estate executory to whom the surrender was made. Mich. 14 Jac. in C. B. adjudged &c.

32. Grandfather, father, and son; the Grandfather dyeth, the father assignes Dower to the Grandmother, as mother; the Grandmother surrendreth to the father, paying 10 l. *per annum*; the father dyeth, and his Wife brought a Writ of Dower against the son, by reason of the possession of her Husband of the third part of the whole Land, and recovered; because the Father had the Fee, and the Freehold conjoyned in the life of the Grandmother by the surrender: And in such Case, If the father had been within age, it was holden he should have been in Ward; And in a Writ of Entry, his Entry should be supposed by his Ancestor, and not by his Grandmother; and he should deraigne the Warranty against the Feoffor of the Grandfather, but should not have in value, till after the death of the Wife: And here in this Case it was holden, That when the Wife of the Father doth recover in Dower, she shall pay to the Grandmother so much of the Rent as doth belong to her proportion in Dower. And in this Case it was holden, That although the Estate of a man be conditional, or upon a bad Title, yet the Wife shall not be ousted of her Dower, until the conditional or defeasible Title be defeated, and then the Entry is given, as well upon the Wife as upon the Heir: And so where Husband and Wife are Tenants for life, and surrender to him in the Reversion, there the Wife of him in the Reversion shall be endowed, and yet the surrender is but conditional; for if the Wife of the Tenant for life overliveth her Husband, the surrender is defeasible *à fortiori*, in case where the Surrender is not defeasible. Mich. 45 E. 3. 13. Comment upon Original Writs, 173.

33. Lessee for years of a Rectory, to which the Advowson of a Vicarage was appendant, granted the next Avoidance of the Vicarage to J. S. if it should happen that the same should become void during the Term *in esse*: The Lessee dyed Intestate, his Administrator surrendred the Term of the Rectory to the Lessor, and afterwards the Advowson of the Vicarage became void. It was adjudged in this Case, That notwithstanding the Surrender, yet J. S. should have the next Avoydance. 1. Because the said Limitation saves no more then the Law says; for if Tenant for years graunteth an Avoydance, the Law implies this Limitation, if the Church become void during the Term. 2. The Grantor shall not derogate from his own Grant: And 3. the Term for the benefit of the Grantee hath to some respect continuance; as if Lessee for years grant a Rent-charge, and afterwards surrendreth, for the benefit of the Grantee the term hath continuance, although that *rei veritate* it be extinct. *Coke* 8. Part, 145. *Davenports* Case.

34. Note, There is a Surrender in Law, as well as a Surrender in Fact; and therefore the Case was, That the King demised a Messuage, rendring rent; and afterwards, the Lessee took a Patent of the Office of keeping the said House, and it was adjudged to be a Surrender in Law of the Lease.

Leaſe. 3 Eliz. *Dyer.* 200. Set before.

35. In an Information of Intruſion, it was found, That the King was ſeized of a Rectory, and by his Letters Patents, demiſed the ſame to the Wardens of the Church of S. *Saviours*, for 21 years; and afterwards, the King by other Letters Patents, reciting the ſaid Leaſe with Letters Patent, and all their Eſtate, Intereſt, and Term of years, the ſaid Wardens *made habentes & ad præſens poſſidentes, nobis ſurſum reddiderunt, & reſtituerunt cancellend. quam quidem ſurſum redditionem acceptamus. In conſideratione ſurſum reddit. prædict. & pro Fine 20 l. ad recept. Scaccarii per præfatos Guardianos ſolat.* demiſed the ſaid Rectory to the ſaid Wardens of the ſaid Church for 50 years: And it was found in Chancery for the Cancelling of them, but no *Vacat* was made of the Enrolment of them, and that the Defendants entred into the Rectory by force of the ſecond Leaſe. It was Reſolved in this Caſe, That there needed not any actual Surrender, becauſe the words *Modo habentes & ad præſens poſſidentes* proved, That at the making of the ſaid Letters Patents, they had the Leaſe for years in them, and by the acceptance of the new Leaſe, their Eſtate for years was ſurrendred; and in Judgment of Law, the Surrender doth precede the new Grant; and the King is not prejudiced in Eſtate, Intereſt, Value, nor Remedy; and although a Corporation cannot make an expreſs Surrender, without Deed under their Seal, yet they may by act in Law ſurrender their Eſtate without writing. *Cook* 10. Part, 67. The Caſe of the Wardens of the Church in S. *Saviours* in *Southwark*.

36. In a Replevin, the Defendants avowed as Bayliffs to the Dean and Chapter of *Windſor*, That one R. P. held the place of the Dean and Chanons, as of their Manor of H. by Rent, and Suit of Court, and that he being ſummoned, did not appear at the Court holden in the ſaid Manor, and for Suit, they did diſtrein him: The Plaintiff confeſſed the Seizin, and the Tenure, but ſaid, That 9 Eliz. the Dean and Chapters did by Indenture Leaſe the ſaid Manor to one G. S. for 51 years, who entred, and was yet poſſeſſed, the Reverſion to the Dean and Chapters: The Avowants confeſſed the Leaſe to S. but ſaid, That by the ſaid Leaſe, all Leets, Lawdays, and Courts there to be holden, and all manner of Fines, Perquiſites, and profits of Courts were excepted; and that S. being ſo poſſeſſed 11 Jac. granted all his Eſtate to one B. and that B. 12 Jac. by his Deed, did grant all Leets, Lawdays, Courts, &c. unto the Dean and Chapter, and that they afterwards held the Courts, and the default of Suit, &c. and that the Defendant did diſtrein: The Plaintiff demurred, in that the Courts be ſurrendred and excepted. In this Caſe, it was adjudged for the Plaintiff; for it was agreed, That the Exception in the Original Leaſe of the Courts was void, and a Manner it could not be without a Court; and by the ſame reaſon, the Surrender of the Courts was void, which were inſeparable from the Manner. Trin. 13 Jac. in B. R. *Brown* and *Goldſmiths* Caſe. *Hob.* 108.

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2. *Of Surrender of the Kings Letters Patents, what ſhall be ſaid a good Surrender of them, and what not.*

1. A and B. joynt-Patentees for the Term of their lives, of the Office of the Fourth of W. out of the Court of Augmentation, and Enrolled in the Exchequer; A. in the abſence of B. beyond Sea, ſurrendred the Patent in Chancery, which was there cancelled, and a remembrance of it made *in dorſo*, but it was not Enrolled, that they both had ſurrendred; whereupon a new Patent was made to J. S. reciting the former Surrender to be in both their names: B upon his Return, ſued to have an Exemplification, or a *Conſtat*, and required the Lord Keeper of the Great Seal, to Grant a *Certiorare* to remove the Record of the Enrolment out of the Exchequer. It was a doubt, if the Patentee himſelf ſhould be within the purview of the Statute of 3 & 4 E. 6. cap. 4. But it was the Opinion of the Juſtices, That by the firſt ſentence of the purview, the Patentees themſelves were aided by the ſaid Statute. Hill. 1 Eliz. *Dyer*, 167. Sir *Thomas Wrothes* Caſe. See *Cook* 5. Part, in *Pope* Caſe.

2. The Clarkſhip of the Hamper was granted to one *Sadler*, and to one *Hales*, for the Term of their lives, and the life of the longer liver of them: of the Patents there were two; one a Duplicat, which was in the cuſtody of *Hales*, the Principal Patent was by Warrant of the Privie Seal, *Authoritate Parliamenti*, and that remained with *Sadler*; which Patent was ſurrendred, and cancelled by him, but no *Vacat* was made of the Involment of it, and a new Grant was made by the Queen, with the recital of the firſt Patent, and Surrender, and Cancelling to *Sadler* of the ſame Office: *Hales* was beyond Sea, and afterwards returning, he claimed his Joynt-Eſtate in the ſaid Office. It was the opinion of the Juſtices, That the ſaid Duplicat ſhould not avail the ſaid *Hales*, becauſe it was made by the Chancellor without any Warrant. Paſch. 1 Eliz. *Dyer*, 197.

3. Leaſe

3. King *Hen.* the 8. granted the cuſtody of the Caſtle of C. to the Lord *Darcy*, Queen *Mary* reciting the Grant, and miſtaking the date, and that the ſame was in her hands by Surrender of the Lord *Darcy*, Granted the Cuſtody to *Kemp*. Queen *Mary* dyed, and Queen *Elizabeth* Granted the Office to *Mark Williams*, who entred upon *Kemp*; whereupon he brought an Aſſize: *Kemp* gave in evidence, a Surrender of the Lord *Darcy* before *Hare* Maſter of the Rolls, which was not recorded, nor the Patent cancelled, nor a *Vacat* entred in the Iſt of *Hare*, and no time was ſhewed of the Surrender; It was doubted by the Juſtices, if they might record the Surrender after the death of *Hare*; But the Juſtices were clear of Opinion, That if the Surrender of the Lord *Darcy* was not before the Patent to *Kemp*, that then his Patent was void: Afterwards *Kemp* was Non ſuit. Note in that Caſe, the Surrender was of a Patent bearing date 32 H. 8. whereas in truth it bore date 33 H. 8. And it was ſaid, That the Patent of 32 H. 8. cannot be the Patent of 33 H. 8. by which the Office was granted, and therefore it was adjudged void, notwithſtanding the Statute of 34 H. 8. of *Miſrecitals*. Hil. 3 Eliz. *Dyer*, 195.

4. Note, It was ſaid, and Exceptions taken to the Pleadings in the Caſe of *Alnutwods*, becauſe it was not averred, That the King had demiſed the Manors of G. and C. as he had recited; for if *in rei veritate* there was not ſuch Leaſes, then the King was deceived; and the King was induced to Grant the Manor of G. in Tail, becauſe that he thought that he had granted the ſame to W. for term of his life; and was induced to Grant the Manor of A. in Tail, becauſe that the Manors of C. which (as he recites) he had granted to W. and his Wife, ſhould be ſurrendred: But the Exception diſallowed; for the conſideration was, That W. ſhall ſurrender the Letters Patents of the Manor of C. and all that he hath averred, viz. The Surrender of the Letters Patents, and that is the conſideration, and not the Surrender of the Eſtate; and it was ſaid, That no more needed to be averred than what was contained in the Conſideration it ſelf; and a falſe recital of that which was not parcel of the Conſideration, makes not the Grant void. See *Cook* 1. Part, 43. in the Caſe of *Alton Woods*.

5. King *Henry* 7. *Anno* 19 of his Reign, granted by his Letters Patents, the Manour of D. to *A. B.* in Tail, and after, reciting the former Letters Patents, and that they were Surrendred, and delivered to be Cancelled; the King by other Letters Patents, *ex certa ſcientia*, &c. granted to the ſaid A. B. and E. his Wife, *Maneriam prædict.* and to their heirs. In this Caſe it was Reſolved, That the Grant was good, and the Reverſion of the Manour which the King had paſſed by the Grant, in as much as the party had truly informed the King of the Eſtate Tail, and of the delivery of the Letters Patents to be cancelled, although that the King had miſtaken the Law in matter of fact; yet the ſame ſhall not avoid his Grant, eſpecially the ſame being *ex certa ſcientia*, which ſhall be taken in the moſt beneficial and liberal ſenſe, according to the Kings intent expreſſed in his Grant, and no default being in the party. *Cook* 6. Part, 55. The Lord *Chandos* Caſe.

See the Caſe of the Wardens of the Church of S. *Saviours*, *Cook* 10. Part, 67. to this Diviſion before.

6. The Caſe was, Queen Eliz. *anno.* 19. granted to Sir *Fulk Grevil*, the Office of Clerk of the Council of the Marches of *Wales*, for his life; and by another Patent 25 Eliz. granted to him the Office of Secretary there for his life: 1 Jac. without recital of theſe Patents, the King granted the ſame Office to him for his life: After. 9 Jac. the King reciting the ſaid firſt Patent 1 Jac. granted the ſaid Office to A. N. for his life, when after the death, ſurrender, or forfeiture of the ſaid Sir *Fulk*, they ſhould be void: After, 14 Jac. by another Patent, reciting the Patent of 1. & 9 Jac. and omitting the Grant in 15 & 25 Eliz. the King granted the ſaid Offices to J. V. and J. M. *Habendum*, for their lives, *cum poſt mortem* of the ſaid Sir *Fulk*, or A. N. ſurrender, forfeiture, or other determination, *vel alia quocunque modo*, the ſaid Offices ſhould be void, or ſhould come to the Kings hand, to diſpoſe; *non obſtante a malè nominando vel malè recitando prædict. Officia*; Et *non obſtante malè recitando, vel malè nominando aliquod donum vel conceſſionem prompta fallum de Officiis prædict.* And, Whether the Patent of 14 Jac. be good or not, was the Queſtion. It was agreed, That the Patent 19. and 25 Eliz. were good, and then Sir *Fulk Grevil* being Patentee, and alive, and he accepting a Patent in 1 Jac. without reciting the former Patent, and no *Non obſtante* therein, it is clearly void; as it was agreed in *Harris* and *Wingates* Caſe, That if Leſſee for years of the Queen, take a new Leaſe for years of the ſame thing, without recital of the former Leaſe, it is a void Leaſe, and no Surrender of the firſt Leaſe. Another Queſtion was, Whether the clauſes of *Non obſtante* in the Patent of 14 Jac. makes it good; becauſe it recites the two Patents which are void, and omits the recital of the two Patents which were good. It was the Opinion of the greater part of the Juſtices, That the Patent of 14 Jac. was meerly void, by reaſon of thoſe recitals, which were not properly miſrecitals, and falſe recitals, but rather falſe informations or ſuggeſti-

ons, whereby the King was deceived; for by intendment, the King conceived those Grants to be good, which were void; and so the King is deceived, and the *Non obstante* shall not aid such false Informations, or false suggestions. Trin. 6 Car. in B. R. The Lord *Brook*, and the Lord *Goring's* Case. *Cro.* 1. Part, 143.

7. In the great Case of Trespass, for cutting down of Trees in *Odiham* Park in *Hampshire*, It was found by Verdict, That King *Henry* the 8. seized of the Manor and Park of *Odiham*, by Letters Patents 33 of his Reign, Granted to G. the Office of Stewardship of the said Manor, and Parkership of the said Park, with reasonable Herbage: And by the same Letters Patents, did Grant to him the Manor of Q. *cum pertinentiis*, and 100 Loads of Wood, excepting the Park, the Park, the Deer, and the Wood for 50 years, if he should so long live: That G. did Surrender and Restore the said Letters Patents, in Chancery, to be cancelled, and that they were cancelled, and that the said Surrender was made to the intent to make a new Lease thereof to P. King *Henry* the 8. *anno* 36. reciting the Letters Patents to G. to be 32 H. 8. whereas they were dated 33 H. 8. did grant the same to P. as before they were granted to G. That King *Ph.* and *Mar.* *anno* 5. and 6. seized of the said Manor in *Jure Coronæ*, reciting that *Hen.* 8. *anno* 36 of his Reign, had granted to P. as before, and omitting the Proviso, which was for 50 years, if he should so long live, in consideration of 200 l. paid, did grant the Office, as before, and did grant Herbage generally; and by the same Patent, did grant to him the Manor, *cum pertinentiis*. And here was a Rent Reserved, and a Proviso, That for doing Waste, the Patent should be void. Queen Eliz. reciting the Letters Patents of 5 and 6 Queen *Maries* truly, did grant the Parkership to Secretary *Walsingh m.* and Leased the Manor to him, with the appurtenances, with power to take one hundred Loads of Wood, excepting the Deer, *Habendum*, from the end of the Lease to P. either by Surrender, or forfeiture, for twenty one years rendring Rent: *Walsingham* granted the same to H. which by mean Assignment came to *More* the Defendant. King *James*, *Anno* 1. granted the said Manor, and the said Offices, by his Letters Patents, to the Lord *Zouch*, who entred; *More* entred upon him, and cut down Trees: This Case, being long, was many times learnedly argued at the Bar, and after at the Bench, but no judgement given in it, the matter being ended by Composition. But it was said, That in this Case, the better Opinion of the Justices was, That P. in the Principal Case had but the custody of the Park, and not the Interest of it, and that by acceptance of the custody of the Park, when he had a Lease of the Park before, his Lease was surrendred. See the Case argued at large, and divers points in it. Trin. 21 Jac. in B. R. The Lord *Zouch* and *More's* Case. *Godbolt* 413. to 426.

See more of this Division, in Title *Grants of the King*, *Patents*, and other Titles before.

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3. *Surrenders made by Copyholders of their Estates; where good, where not; and what, where, and how the Estate passeth upon such Surrender: And divers other matters concerning Surrenders by Copyholders.*

1. A Copyholder in Fee, devised his Copyhold to his Wife for life, the Remainder to W. his Son in Fee, and made a Surrender to these uses, and dyed; the Wife was generally admitted: It was said, That this was no Admittance of him in the Remainder, for it is not like the Case of a Discent where the Reversion should have descended; because in this Case W. cannot Surrender before admittance: On the other side, It was said, That one who hath the Land by discent, may Surrender before Admittance; but when it is by purchase, it cannot be surrendred. It was the Opinion of the Court, That the Remainder vested when the particular Estate vests, or else it shall never vest; and it is executed, when the particular Estate is executed: And it is like to the Case in 7 R. 2. *Scire facias* 8. And see *Fitzh. Nat. B.* 201. Where one deviseth for life, the Remainder in Tail, and an *Ex gravi Querela* sued, the same shall serve as well for him in the Remainder, as for the Tenant for life; and see *Plowd. Com.* in *Weldens* Case, where an assent to the Devisee for life, is an Execution of the Devise to him in the Remainder. Trin. 30 Eliz. in B. R. *Kipping's* Case. *Goldesbr.* 95.

2. In Trespass, the Case was, Upon a special Verdict found, That one F. was retained by E. P. Lady of the Manor, to be her Steward there, for the keeping of the Courts of the said Manor; which Retayner was by word only in the Country, and

and no Fee or Annuity given for the exercising of the ſaid Office: He out of Court at S. *Dunſtans* in the Eaſt, took a Surrender, which was entred in the Rolles of the Court, and that before that time, he had taken divers Surrenders, as well out of Court, as in Court: It was ſaid in this Caſe, That F. is not ſuch a Steward as may take Surrenders out of Court, though as to other Acts he be a ſufficient Steward, for theſe cauſes. 1. No Fee is allowed him for the exerciſing of the ſaid Office. 2. He is not retained by Deed; for although he may be retained without Deed, to hold Court *pro hac vice*, yet if the Retayner be for life or years, it ought to be by Deed. 3. He is retained to keep Court, but not to be Steward, which ſhall be intended to hold Court, and then when that is paſt, his Authority ſhall ceaſe, and that which he doth afterwards, is void. 4. There is not any Cuſtome found, to finde ſuch a Surrender out of Court: On the other ſide, it was ſaid, That he was Steward at the Will of the Lady of the Mannor, which Will ſhall not be determined till the Lady diſcharge him; And although an Aſſize cannot be brought of ſuch an Office without a Patent of it, for that it cannot paſs for life, without Deed, yet he may be appointed without Deed; and a man may be conſtituted Bayly of a Mannor without Deed, and yet moſt doth appertain to the Office of a Bayliff, then a Steward, and, it is not material as to the Grant, whether he hath a Fee for the exerciſing of the Office or not, but the party is not compellable to do the ſervice without a Fee; and in this Caſe, the Retayner is not to keep one Court, but all the Courts of the Lady of the ſaid Mannor. The Caſe was not adjudged, but adjourned. Paſch. 33 Eliz. in C. B. *Blagrave* and *Hands* Caſe. *Leon.* 227.

3. A Copyholder doth Surrender unto the uſe of a Stranger, for ever, and the Lord admits the Surrenderee to hold to him and his heirs: It was adjudged in this Caſe, That if it were upon a Diviſe, that ſuch a one ſhould have the Copyhold in Fee; and afterwards, a Surrender is made unto the Lord to grant the Copyhold according to the Will, and he grants it to him and his heirs, the Grant is good: But Quære in the firſt Caſe, for that it was but a bare Surrender only. Mich. 29 Eliz. in B. R. *Allen* and *Pulſhills* Caſe. *Godbolt*, 137.

4. In an *Ejectione firmæ*, the Caſe was, Two Coparceners Copyholders in poſſeſſion, the one did Surrender his Reverſion in the moytie after his death. It was the Opinion of the whole Court, That the Surrender was void; and the ſame is all one, as well in Caſe of Copyhold, as of Freehold: And ſo it was ſaid it was adjudged in 26 Eliz. in *Platts* Caſe, and 3 Car. in *Simpſons* Caſe. Paſch. 10 Car. in B. R. *Barker* and *Taylors* Caſe. *Godbolt* 451.

5. A Copyholder Surrendred in conſideration of money had, to B. the Lord accepted of the Surrender, and granted the Copyhold to B. for her life; who was admitted, and ſhe dyed: A. being alive, claiming it as her former Eſtate, lett the land to the Defendant; the Lord entred, and lett it to the Plaintiff: It was ſaid in this Caſe, When a Copyholder for life Surrenders to the uſe of another, who is admitted, that the firſt Copyholder hath *Quaſi* a poſſibility or Remainder of the Eſtate; and if he ſurvive him to whoſe uſe the Surrender was made, that he ſhould have it again. But it was the Opinion of the whole Court in the principal Caſe, That A. ſhould not have the Copyhold again, and there is no difference, as to that purpoſe, to Surrender to the uſe of one, and to Surrender generally. But the Court agreed, That if a Copyholder in Fee doth Surrender to the uſe of another for life, who is admitted, he is in *Quaſi* by the Copyholder, and by the death of the Copyholder ſhall have it again. Hill. 2 Car. in B. R. *King* and *Lords* Caſe. *Cro.* 1. Part, 148.

6. In an *Ejectione firmæ*, upon a ſpecial Verdict, It was found, That the Cuſtome of the Mannor is, That a Copyholder in Fee may Surrender out of Court into the hands of two other Copyholders of the ſaid Mannor, to the uſe of another in Fee, which ought to be Preſented at the next Court of the ſaid Mannor, otherwiſe it ſhall be void. It was found, That T. H. father of the Leſſor, whoſe heir he is, was a Copyholder in Fee, and Surrendred out of Court, into the hands of A. B. and W. J. Copyholders, to the uſe of R. W. in Fee, who entred, and paid the Rent to the Lord: That T. H. dyed, and that H. B. and J. W. who took the Surrender, are dead, and that no Court was held during that time, and that the Leſſor being heir to him who Surrendred entred, and lett to the Plaintiff. In this Caſe, it was the Opinion of the whole Court for the Plaintiff; for they held, That by the Surrender into the hands of two Tenants, nothing paſſed until it was Preſented in Court, and that till then, the Intereſt remained in him who made the Surrender, which, which Intereſt deſcended to the Heir, who is Leſſor to the Plaintiff, and he might well enter, and make the Leaſe, being but one year without the Licence of the Lord of the Mannor, or without any ſpecial Cuſtome. But the Court held, That it was not of neceſſity, that the parties who took the Surrender, ſhould Preſent it; for as the Cuſtome is found, if it be Preſented by any other Copyholder when the next Court is holden, it is well enough, and he thereupon may be admitted:

But in the Principal Case, for as much as no Court here hath been holden, the Interest doth remain in the heir. It was adjudged for the Plaintiff. Hill. 13 Jac. in B. R. *Frasell* and *Wessbes* Case. *Cro.* 2. Part, 403.

7. There was a Copyhold Messuage called *Symonds*, whereunto divers Copyhold Lands were appertaining; The said Messuage, with the appurtenances was surrendred to the Lord, to the use of J. S. The Question was, Whether all his right in the other Lands did passe by the Surrender, or not. It was the Opinion of the Court, That they did not passe, but only the Messuage and the Curtilage? Another Question was in the Case, If there be Husband and Wife Copyholders in the right of the Wife, and they surrender out of Court into the hands of the Steward, and the wife is examined by him, it not being proved, that he was Steward by Patent, nor any Custome to warrant it, Whether the same be good, or not. It was Resolved, That it was good. Pasch. 17 Jac. in B. R. *Smithson* and *Gages* Case. *Cro.* 2. Part, 126. Note; This Case seems to Resolve the Doubt made in *Blagrave* and *Woods* Case. Which see before, Sect. 2.

8. In a *Replevin*, the Case was; J. S. was seised of a Copyhold of the Mannor of D, and by Licence of the Lord by Indenture, demised the same to the Plaintiff for 20 years rendring Rent; J. S. afterwards surrendred the Reversion of one moyty of the said Copyhold to J. D. to which he was admitted, and then he surrendred the other moyty to B. the Wife of J. N. who was also admitted. It was Resolved in this Case, That the Surrender in this case by the name of a Reversion, was good. 2. That there needed no Attornment upon the Surrender made of the moyty by J. S. to J. D. because it passed not by way of Grant of the Reversion. But it was holden, That in this case there might be an Admittance of the Lord; and when the Admittance is given, the Estate is setled. Pasch. 14 Jac. in C. B. *Swinnerton* and *Millers* Case, *Hob.* 177, 178.

9. A Copyholder of Inheritance in Fee-simple (*jacens in extremis*) surrendred his Copyhold-Lands into the hands of the Lord of the Mannor, *Habendum* after his death to the use of an Enfant *in ventre sa mier*; and if such Enfant dye without Heir within age, or before marriage, then to the use of B. and his Heirs, according to the Custome of the Mannor: the Child was born, and dyed within age: In this case it was Resolved, 1. That the surrender to the Enfant *in ventre sa mier*, was not good as an immediate surrender; for it cannot begin at a day to come. 2. That the Remainder to B. was void, because it was to begin upon a Condition precedent, which was never performed, and therefore the Surrender into the hands of the Lord, was void; for that the Lord doth not take but as an Instrument, to convey the Lands to another. Hill. 7 Jac. in B. R. *Simpson* and *Sutherns* Case. *Bulstr.* 2. Part, 273. See *Godbolt*, 264. the same Case.

See more of Surrenders of Copyholds, in *Lib.* 1. Titles, *Copyholds*, and *Admittances*.

Suit and *Suitors*.

Suit; the Kinds, and their Difference: Where done, and by whome to be done: And where, and what remedy, if not done. And where Suit done by one, shall discharge the other: And where it shall be apportioned; Where not.

1. NOte: There are severall sorts of Suits; viz. Suit Reall, and Suit Service: Suit reall is by reason of Resiance, due at the County-Court, Wapentake, or Hundred, and the like, which are Suits at Courts Reall, viz. the Kings Courts. These Suits are not done for their Lands or Freeholds, but by their persons by reason of their Resiance within the Precincts: But that which is done by reason of Tenure, is called Suit-Service; and so it seems, That within one Precinct, one may hold by Suit-Service, as also by Suit reall: and where there may be severall reall Suits in respect of Resiance, there, there may be but one entire Service in respect of the Land. See 45 E. 3. 25. acc.

2. Where Land is holden by Fealty and Suit by three; there, if a *Cessavit* be brought against them for not doing their Suit, if two of them lose their parts, yet the third shall be charged with the whole Suit, because it is not severally: And so where the Lord purchaseth part of the Land, the whole Service is gone and extinct. 40 E. 3. 41. See *Cook* 4. Part, in *Bevill's* Case, acc.

3. Where the Land for which the Suit-Service is done, cometh to Coparceners, who make Partition; or to divers by severall Feoffments, there the

the Suit done by the one, ſhall diſcharge all the others: But if it be behind, the Lord may avow upon which of them he pleaſeth for the whole; for there ſhall not be a joynt Avowry upon ſeverall Tenures. But ſee, That by the Statute of *Marlbridge*, Cap. 19. That Coparceners who hath *iniam partem*, ſhall do the Suit after Partition, and the other ſhall make Contribution to her. But of thoſe who have joynt-Eſtates, Quære, how the Suit ſhall be done. See 24 E. 3. 73.

4. Lord and Tenant by Homage, Fealty, a Hawke yearly, and Suit of Court, the Tenant maketh a Feoffment in Fee of one Acre: It was ſaid in ſuch caſe, By the Common-Law, that the Feoffee ſhould hold by Homage Fealty, a Hawke and Suit of Court; For, *Una in partes dividi requerant ſolida à ſingulis præſtantur*: And by the Statute of *Marlbridge*, Cap. 9. If the Tenant who holdeth by Suit, doth enfeoffe another ſeverally; in ſuch caſe the Lord ſhall have but one Suit, and he who doth the Suit, ſhall have Contribution againſt the other. But if the Tenant who enfeoffeth divers joyntly, there he ſhall not have Contribution; and yet the Feoffees ſhall do but one Suit. *Cook* 6. Part, 1. in *Bruerton's* Caſe.

5. Note: There is a difference betwixt entire Services which are for the ſole benefit of the Lord, and are a charge to the Tenant, as the ſervice of a Hawk, &c. and Services entire which are *pro bono publico*, or for Religion, Charity, Devotion: For although that the Lord purchaſeth parcell of the Tenancy, ſuch Services do remain: as if the Tenure be to make a Bridg, to keep a Beacon, or to marry poor Virgins, or to find a Preacher; But if the Tenure be to be Carver, Butler, or Cook to the Lord, or to cover the Lords Hall, &c. in ſuch caſes by purchaſe of parcell, the whole Service is extinct, becauſe theſe are for the ſole benefit of the Lord. *Cook* 6. Part, 1. *Bruerton's* Caſe, acc.

6. Note: That the Statute of *Marlbridg* doth not reſtrain the King; For if Lands holden of the King doth diſcend to two Coparceners or more, all of them ſhall do the Suit as well before Partition, as after Partition. See *Plow. Com.* 244. acc. But if the Lands be holden of another Lord, then the Coparcener or her Feoffee who hath the part of the elder ſiſter, ſhall only do the Suit; and if the Lord will diſtrein the other Coparceners, they ſhall have a Writ againſt him directed to him, or his Bayliffs, to diſcharge them of that Suit and of the Diſtreſs. See 40 E. 3. 5. 34 Aſs. 15. And ſee *Fitzh. Nat. Br.* the Writ in ſuch caſe.

7. If the Heirs or Feoffees do do the Suit real at the County-Court, Hundred, or Wapentake, if one do the Suit, all of them are diſcharged. But the Lord cannot alter the Suit which is due to his Court of Dale, to be done at his Court of Sale, nor take money for the ſame; but for his Suit Arrear he may diſtrein. And ſo it was adjudged, Mich. 20 Jac. in C. B. in Sir *Ralph Boſville's* Caſe.

8. Note: That for Suit-reall, the Tenant ſhall be amerced, and not diſtreined: And the Diſtreſs for the Amerciament ſhall not be of other mens goods, but only of the goods of the party himſelf if it be not by Preſcription: But for Suit-Service a man may diſtrain the Cattell of any man which are upon the Land. See 12 H. 7. 17. & 18. *Cook* 8. Part, in *Talbotts* Caſe.

9. A man held a houſe and half a Yard-Land, Meadow, and Paſture, of the Lord by Fealty, Suit of Court, and a Heriot to be paid after the death of every Tenant dying ſeiſed; The Lord purchaſed parcel of the Land, and afterwards the Tenant enfeoffed J. S. of other parcel of the Land: It was adjudged in that Caſe, 1. That by the purchaſe of parcell of the Land by the Lord, that the Heriot-Service was extinct. 2. It was Reſolved in that Caſe, That if the Tenant had firſt enfeoffed J. S. of parcel of the Land, and after had enfeoffed the Lord of other parcell, the Heriot-Service had remained for the Lord which J. S. purchaſed, becauſe that J. S. by his purchaſe holdeth a ſeverall and diſtinct Tenure of Heriot-Service, and therefore the purchaſe of the Lord of any part of the reſidue after, extinguiſhed only the Heriot which the Tenant ought to render, and not the Heriot which J. S. by his diſtinct Tenure ought to pay. 3. It was Reſolved, That if the Lord purchaſeth parcell of the Tenancy, that the Heriot-Service is utterly extinct. But if the Cuſtome of a Mannor be, That upon the death of every Tenant of the Mannor that dyeth ſeiſed of Lands holden of the Mannor, that the Lord ſhall have a Heriot, there although the Lord purchaſeth parcell of the Tenancy, yet the Lord ſhall have a Heriot by the Cuſtome. *Cook* 8. Part, 105, 106. *John Talbotts* Caſe.

10. Note: *Secta ad Molendinum* lyeth, If the party doth not his Suit to the Plaintiff's Mill, becauſe he hath a profit thereby: But for Suit to his Court, the Lord hath no other benefit but appearance at his Court; and therefore Quære, If the Lord ſhall have *Secta ad Curiam*. *Fitzh. Na. Br.* 158. d.

11. *Secta ad Molendinum* was brought *de omnibus bladiis creſcend.* in 100 Acres of Lands, with the appurtenances in D; and the Plaintiff did ſet forth,

forth, That he did withdraw his Suit for 5. years; To which the Defendant pleaded, That he was not ſeiſed by the hands of the Defendant; but that he did it *gratis, et ſpontanea, & voluntate ſua, &c.* Book of Entries, 504. p. 1.

12. The Steward of a Leet impoſed a Fine joyntly upon A. B. and C. chief pledges, becauſe they refuſed at the Court-Leet to preſent, that they ought to pay *pro certo Letto*, to the Lord 10 s. and the Lord diſtrein'd them for it, and avowed: It was Reſolved, That in that caſe, the Lord could not diſtrain *pro certo Letto*, becauſe it was not right, and for the private of the Lord, which he could not have without Preſcription. But it was in that caſe ſaid, That for an Amercement in a Leet, a Diſtreſs was incident of Common Right; but for an Amercement in a Court-Baron, the Lord cannot diſtrain and avow Preſcription. *Cook* 11. Part, 45, 46. *Godfreys* Caſe. *Cook* 8. Part, 39, 40. *Griſſyes* Caſe, acc.

Suitors. See *Lib.* 1. Title, *Courts.*

Suits *by way of Action, or otherwiſe.*

1. SUit (ſaith *Bracton*) is *pugna Civilis*, for *ſicut Actores armantur actionibus et quaſi gladiis accinguntur, ita res minuuntur Exceptionibus et defendentur quaſi Clypeis.* *Hob.* 20. And ſee, 162. *ibidem.* He ſaith, there is a great Reſemblance between *pugna Militaris et Civilis*; for as in a Battell every Weapon is not put into every mans hand; nor all men appointed confuſedly to all Services; So doth the Law aſſign to every man his proper Action and Office according to the propriety of his Caſe and faculty: And therefore at the Common Law, the Incumbent, or any other who claimed nothing in the Patronage, could not Counterplead the Title of the Plaintiff in a *Quare Impedit*, becauſe that was for Title to the Patronage, with which he had nothing to do. See in *Colt* and the Biſhop of *Coventry's* Caſe, *Hob.* 162.

2. *Actio jus vix perſequendi in judicio quod alicui debetur.* And therefore when a man hath not any means to come to his Land, or other thing in demand but by way of Action, that if he releaſeth all Actions, his right inclusively by Judgment of Law is gone, becauſe by his own act he hath bound himſelf from all means to recover or attain thereunto: And although the words are, *quod alicui debetur*, yet in ſome Caſes, a duty ſhall be barred by the Releaſe of all Actions, although no Action lyeth at the time for the duty: As, if a man be bounden to another to pay a certain ſum of money at Michaelmas next; if the Obligee before the Feaſt releaſe to the Obligor all Actions, he ſhall be barred for ever of the duty; for that it is *debitum* preſently, although it be not preſently paid. *Cook* 8. Part, 155. in *Altham's* Caſe.

3. *Querela*, is derived *à querendo*; and Querela, Controverſies, and Debates are *Synonyma*, and of one ſignification: And for the word (Suit,) it is to know, That by the Releaſe of all Suits, Executions are barred; for that none can have an Execution without Suit, or Prayer. But a Releaſe of all Suits, is not a barr in Dower. *Cook ibid.*

4. An Action of Covenant was brought, and the breach was aſſigned, That the Plaintiff ſhould quietly enjoy the Lands Demiſed to him; And he ſhewed, That the Defendant exhibited a Bill againſt him in Chancery, pretending the Leaſe was made in truſt, and it was decreed to be otherwiſe: And, Whether the exhibiting of the Bill was a breach of the Covenant, there being no diſturbance, at the Common-Law, was the Queſtion? And the Court was clear of Opinion, That it was no breach of Covenant; for it was no diſturbance at Common-Law, nor Entry, and the Law could not take notice of it. It was adjudged for the Defendant. Trin. 11 Jac. in C. B. *Selby* and *Chutts* Caſe. *Brownlow*, 1. Part, 23.

5. Upon the Statute of Bankrupts, this Caſe was moved to the Court; If a Bankrupt be indebted unto one in 20 l. and to another in 10 l. and he hath a debt due to him by Bond of 20 l; Whether the Commiſſioners may aſſign this Bond to the Creditors jyntly? and, Whether they muſt divide it, and aſſign 20 marks to one, and 20 nobles to the other. It was the Opinion of the Court, That it is ſo to be divided as the words of the Statute are; viz. to every Creditor a portion, rate and rate like. Then it was demanded, How they might ſue the Bond, whether they might join in Suit, or not? *Warburton*, Juſtice, ſaid, That when part of a Bond is aſſigned to one, and part to another, that now the Act of Parliament doth

operate upon it, and therefore they ſhall ſue ſeverally. And he ſaid, That by the Cuſtome of *London*, part of a debt might be attached; and therefore he conceived, that part of the debt might be ſued for. Trin. 10 Jac. in C. B. *Godbolt*, 195, 196.

6. Dr. *Wells* ſued *Hye* in the Spiritual Court for defamation, for ſaying, That he lyed: After a Prohibition granted, it was moved for a Conſultation: For it was ſaid, That by the Statute of 21 E. 1. of Conſultation; When there is no Writ given in the Chancery for the party grieved in the Temporall Court, there the Spiritual Court ſhall have the Juriſdiction; and in this caſe, there is no Writ given by the Law. 2. That when the party may be puniſhed by either Lawes, there the party had his Election in what Court he would ſue: and therefore if a man were a Drunkard, he might be ſued in the Eccleſiaſtical Court for his Drunkenneſs, and yet he might be bounden to the good behaviour for the ſame by the Juſtices. So the Imputed Father of a Baſtard Child may be ſued for the Offence either in the Spiritual Court, or at the Common Law, by the Statutes of 15 Eliz. and 7 Jac. On the other ſide it was ſaid, That where the Suit is for defamation, there the cauſe ought to be expreſſed, and ought to be wholly ſpirituall; And in the Principal Caſe, It is not a matter affirmative, which is directly ſpirituall: and *Crimen falſi* in the Spiritual Law, is intended of Counterfetting of the Seal, or of Forgery; and *Crimen falſi* cannot be intended of a lye: And *Lovegrove* and *Brewers* Caſe, Trin. 42 Eliz. was vouched; A man ſaid to a Clerk, a ſpiritual perſon, *Thou art a woodcock, and a Fool*; for which he ſued him in the Spiritual Court, and a Prohibition was awarded. Trin. 8 Car. in B. R. *Hye* and Dr. *Wells* Caſe. *Godbolt*, 446, 447.

7. An Action upon the Caſe was brought, for ſuing in the Admiral Court for a thing done upon the Land, and not upon the high Sea; and adjudged, That the Action was maintainable. Mich. 11 Jac. in C. B. *Rew* and *Alports* Caſe. *Brownl.* 1. Part, 4.

Surmiſe.

1. AN *Audita Querela* was brought to avoid an Execution of a Judgment; and the Plaintiff ſurmiſed, That after the Judgment he had paid the whole ſum. *Popham*, Juſtice, ſaid, That ſuch ſurmiſe, is not any ſurmiſe to avoid a Judgment upon a bare payment, without writing or other matter of Evidence; No more then it is any Plea to barre an Execution demanded by a *Fieri facias*. But the whole Court held, It was a good Surmiſe in this Caſe; For it is not only a Suit in Law, but a Suit in Equity alſo; and it is as a Commiſſion to examine a Cauſe: For it is not reaſon, that if the money be paid, that the party ſhould lye in Execution. And ſo it was ſaid, it was adjudged in *Maſins*, and the Lady *Haukins* Caſe. Paſch. 2 Jac. in B. R. *Ognell* and *Randall*'s Caſe. *Cro.* 2. Part, 29.

2. *Audita Querela*: The Caſe was, A. was bounden in a Recognizance to W. in 200 l. and being taken in Execution, brought an *Audita Querela* in Chancery, ſurmiſing the ſaid Statute to be void: And thereupon found Sureties in Chancery, where every one of them was bound in 200 l. That the ſaid A. ſhould appear in *Cancel.* 6. Mich. following, *et ſtaret juri in ea parte proſecutor. cum effectu.* Upon this, being at Iſſue in the Kings Bench, and there tryed, It was adjudged, That the Surmiſe was inſufficient to diſcharge him: and awarded. *Quod nihil capiat per Breve.* And becauſe he did not render himſelf to the Priſon of B. R. nor pay the Condemnation, a *Scire facias* was brought upon the Recognizance; and the breach aſſigned, becauſe he paid not this Condemnation, nor rendred himſelf to priſon. It was Objected, That the Recognizance is not but for appearance, and there is not any word that he ſhall render himſelf, or pay the Condemnation. But it was Reſolved by the whole Court, That the Recognizance being *ad Comparendum et ad ſtandum juri. &c.* It ſhall be intended according to the Intention of the Court there, That when one is in Execution, and delivered out of priſon with ſuch Sureties, it is not only to appear; but, if he be condemned, to ſatisfie

tisfie the Condemnation, or to render himself to prison, to remain in Execution for the debt; and of the Course in Chancery, the other Courts at *Westminster* ought to take Notice: and such Exposition the words, *Ad standum juri* ought to have; otherwise the party who hath Execution should be at a Mischief: for if it should be only *ad comparandum et prosequend. cum effectu*; which is only to be without being Nonsuited, or using delay; yet he being condemned, the other should not have remedy for his debt; which is against the Statute of 11 H. 6. which was made to remedy the Mischief, that those who were in Execution, should not be delivered upon Surmises, without good Sureties: And the practice is. *Ad standum juri*, to satisfie the Condemnation. It was adjudged for the Plaintiff. Pasch. 3 Jac. in B. R. *Wolrich* and *Massies* Case. *Cro.* 2. Part, 67.

3. In a Prohibition for the staying of a Suit for Tythes in the Spiritual Court; It was Surmised, That the Lord *N.* was seised of a Messuage and Lands in the Parish of D, and agreed with the Defendant being Parson, in Consideration of 10 l. to be annually paid by the said Lord *N.* to the Defendant during their joynt Lives and his continuing Parson, in satisfaction of all Tythes growing upon the Low-Lands, that he and his Tenants should retain the Lands without payment of Tythes; And shewed, That the Lord *N.* paid the 10 l. accordingly: and that, notwithstanding this, the Defendant sued him for the Tythe of the said Lands. And in this Case, It was the clear Opinion of the whole Court, That it was not a sufficient Surmise to maintain a Prohibition: for an Agreement to be discharged from the payment of Tythes for a year, may be good by word; but such an Agreement of discharge during the Parson's life, is not good without Deed. And it was said, That such a Surmise was made, in *Nelson* and *Pretiman's* Case; and it was adjudged void. Wherefore a Consultation was awarded. Mich. 4 Jac. in B.R. *Hawkins* and *Brayfields* Case. *Cro.* 2. Part, 137.

4. A. to have a Prohibition to stay a Suit in the Spirituall Court for substraction of Tythes, surmised, That he being Defendant there, had but one Witness to prove a Lease of the Tythes; which was not there allowed, because it was *singularis Testis*. But in this Case, it was Resolved, That a Consultation should be awarded because it is a Rule, That where *Cognitio Principalis* is, there *Cognitio accessoria* necessarily followeth. And, 2. If such Surmise should be alledged in each case, it would oftentimes be made for meer delay; and a President, of Pasch. 35 Eliz. in B. R. *Fatter* and *Wibkins* Case, was shewed, where, upon such a Surmise to have a Prohibition, a Consultation was awarded. Hill. 8 Jac. in B.R. *Roberts* Case.

5. In a Prohibition, the Surmise was, That the Abbot of B. in the County of D. was seised in Fee of the Rectory of N. time whereof, &c. and was seised in Fee of a Close called the Meadow Close in G. in the Parish of N. and held the said Close, and took the profits thereof in right of all Tythes of Hay within the said Hamlet of G. The Defendant pleaded, That the said Abbot was seised of the said Close as parcell of such a Farm; and traversed, That he held it, and took the profits thereof in lieu of Tythes of Hay in the said Hamlet. Upon Issue joyned, being found for the Plaintiff, It was moved in Arrest of Judgment, That the Surmise was not good; For he shewed, that he was seised in Fee, that is as parcell of his Glebe, and it cannot be in recompence of the Tythes, but he ought to have shewed, that it was given in ancient time in Recompence of the tithes. But the Exception was disallowed by the Court; For it is a better form to say, That he was seised in Fee: for it is so ancient, it cannot be shewed when, or by whom it was given, but having had it always in lieu of Tythes, it is good enough, and shall be intended to have been given time whereof, &c. in Recompence of the Tythes, and that in regard of that Land, the discharge of those Tythes had its beginning. It was adjudged for the Plaintiff. Mich. 16 Jac. in B. R. *Moore* and *Bullocks* Case. *Cro.* 2. Part, 501. See Hill. 42 Eliz. *Austen* and *Pigotts* Case, adjudged acc.

6. A. was in Execution upon a Statute Merchant at the Suit of B; he brought an *Audita Querela*, and shewed certain Articles between him and B. to discharge him of the Statute, and prayed to be let to Mainprise: But the Court denied it, For that one in Execution ought not to be let to Mainprise upon a Surmise; and here the Action which he shews, are not good to discharge him of the Execution; but his Remedy is to have an Action of Covenant. Hil. 6 Jac. in B. R. *Pyne* and *Robinsons* Case. *Cro.* 2. Part, 219.

7. A Prohibition was granted upon this Surmise, That one B. Lessee for years of such Lands, agreed with the Parson, That he should retain the Land free from the payment of Tythes, in Consideration of 10 s. *per annum*, and of 10. Loads of Wood; And alledged, That he always paid the 10 s. and the 10 Loads of Wood, and the other had accepted of it, and that he assign'd this Land to the Plaintiff in the Prohibition. It was moved, That

That his Surmiſe being parcell of the Agreement, and for Rent arrear, could not be a diſcharge during the Parſons life. Wherefore a Conſultation was prayed. But the Court held the Surmiſe to be good, being by way of Retainer; and that the Aſſignee might take advantage thereof; although it was by Paroll. Trin. 21 Jac. in B. R. *Manycomb* and *Sw ett* Caſe. *Cro.* 2. Part, 669.

3. A Parſon, did Covenant with A. his Executors and Aſſigns, That for 10 s. paid to him every year by A. his Executors or Aſſigns, That he, his Executors and Aſſigns ſhould be quit of the Tythes for ſuch Lands during the life of the Parſon. Afterwards, A. made B. an Enfant his Executor, and dyed Adminiſtration *durante minore ætate* of the Enfant, was committed to another, who Leaſed out the Lands at Will; The Parſon Libelled in the Spirituall Court againſt the Tenant at Will, for to have Tythes in kind of the Land: And upon the Surmiſe of the Matter aforeſaid, It was Reſolved, That he ſhould have a Prohibition, for that the Agreement or Compoſition did bind the Parſon during his life: and although the Aſſignee could not ſue the Parſon upon the Contract, yet he ſhould have a Prohibition to ſtay the Parſons Suit in the Eccleſiaſtical Court; and put the Parſon to his remedy for the 10 s. upon the Contract. Paſch. 21 Jac. in B.R. *Snell* and *Bents* Caſe. *Godbolt.*

Suſpence *and* Suſpenſion.

Where a Seigniory, Rent, Tythes, or other thing ſhall be in ſuſpence; and by reaſon of what act or means: And where a thing ſuſpended, ſhall be received again; And where not.

1. J. S. is Tenant in Fee-ſimple of the Mannor of *Dale*, or Tenant in tail thereof, the Reverſion to the King; and after, this Mannor is by expreſs name given by Act of Parliament to the King, Saving the Rights and Intents of all perſons and perſons; It was a Queſtion, Whether the Eſtate of J. S. was ſaved, or not? And it was conceived, That it was not; for that the Saving as to the Honour of the Land, is repugnant, in as much as the Mannor is by expreſs name given to the King. And a Saving in an Act of Parliament which is repugnant to the body of the Act, is void. See *Plowd. Com.* 463. where the ſuppoſed Attainder of the Duke of *Norfolk*, was by Act of Parliament, 1 *Mar.* declared to be null and void *ab initio*, Saving the Eſtates and Leaſes made by King *Ed.* 6. In that caſe it was adjudged, That the Saving was void: For when the Attainder was declared to be void, the ſaid Saving was againſt the Body of the Act, and ſo void. And if Land Eſcheat to the King for forfeiture of Treaſon, and afterwards that Land is given to another by Act of Parliament, Saving to all other their Rights and Services, the Saving is repugnant, for that they were extinct by the forfeiture. *Cook* 1. Part, 47. in the Caſe of *Alton-woods.*

2. The King ſeiſed of a Mannor in Fee in the Right of his Crown, granted Copyhold-Lands parcell of his Mannor, to one in Fee, and afterwards made a Leaſe of the ſaid Lands for 21 years. The Leſſee for years granted his Eſtate to the Copyholder; the King reciting the Leaſe for years, granted the Reverſion in Fee: It was Reſolved in that caſe, (amongſt other things) That by the acceptance of the Term by the Copyholder, the Copyhold-Eſtate was determined as well as if the Copyholder had immediately accepted a Leaſe for years of the Copyhold; for, the Copyhold Intereſt, and the Eſtate for years in the ſame Land, cannot ſtand together in one perſon at the ſame time, without confounding the leſſer; and they are of divers natures, and therefore they cannot ſtand together in one and the ſame perſon. *Cook* 2. Part, 17. *Lanes* Caſe.

3. The King *Lord*, Abbot Meſne & C. Tenant of the Mannor of D, the Tenant was Attainted of Treaſon; and after Office found, the King by his Letters Patents granted over the Mannor to B. and his Heirs, *Tenendum de Nobis, hæred. et ſucc. noſtris, et aliis Capitalibus Dominis feodi illius per Servitia inde debita et de jure conſueta.* It was Objected, That in this caſe, the Tenure ſhould be of the King, becauſe that by the Attainder, the Meanalty was extinct, and therefore *nulla Servitia* were *debita ſeu conſueta.* And, 2. There is an expreſs Tenure reſerved to the King; and Land cannot immediately be holden of two perſons: But it was Reſolved in that caſe, That the words were ſufficient to create a Tenure in the Meſne, for ſuch was the intent of the King, and the Grant of the King doth in Judgment of Law amount to the reviving of the ancient Seigniory, and that the Tenure ſhall be of the Meſne immediately, and of the King as Lord paramount, as it was before the

Attainder. *Cook* 6. Part, 6. Sir *John Molin's* Caſe.

4. Note: It was Reſolved, That when a Rent is granted out of Land in Fee, and out of a Term for years, to have and perceive to the Grantee for the Term of his life, that this, as an Eſtate of Freehold according to the purport of the Deed, cannot iſſue out of the Term for years, but out of the Land which the Grantor hath in Fee-ſimple only, becauſe the Freehold of the Rent may go out of that, and not out of a Chattel. And in an Aſſiſe brought of ſuch Rent, It was Reſolved, That the Land in Fee ſhall be only put in View; and if the Grantee accept a Leaſe of this, once in Leaſe for years, it ſhould not ſuſpend the Rent. *Cook* 7. Part, 27. in *Butts* Caſe.

5. A. made a Feoffment to the uſe of himſelf for life, and after to the uſe of B. in tail, and after to the uſe of C. in Fee; Proviſo, and with Liberty, to revoke the Uſes, and to limit new Uſes, if A. ſurvive J. S, and J. S. dye without Heir male of his body: A. renounced and ſurrendred to B. and C. all the power and authority of Revocation, and Releaſed alſo, the Proviſo, Conditions and Covenants, as well as the ſaid power and authority: And afterwards J. S. dyed without Iſſue male of his body. It was Objected, That an authority which is collaterall to the right of the Land, could not be given away, or extinguiſhed by a Fine or Feoffment. But it was Reſolved, That a Fine or a Feoffment would extinguiſh a future power of Revocation. And it was holden in the principall Caſe, That if the power of Revocation had been perfect, it might have been extinguiſhed by a Releaſe. *Cook* 1. Part, 111. *Albanies* Caſe.

6. Debt upon an Obligation, the Condition was, That the Defendant ſhould perform, fulfill, and keep all and ſingular the Covenants, Grants, Payments, and Conditions expreſſed in certain Indentures bearing date, &c. The Defendant pleads the Indenture, and the performance of all Covenants, &c. The Plaintiff aſſigns the Breach, for non-payment of half a years Rent at our Lady day: 9 Jac. the Defendant Rejoyns, That the Plaintiff entred into the Lands before the ſaid Feaſt, *viz.* 24. *die Martii*, *Anno* 9. Whereupon Iſſue was taken: Judgment being ready to be given for the Plaintiff, It was alledged, That there was no breach layed, becauſe there was no demand of the Rent alledged. The Judges were of Opinion, That that was no fault, becauſe the Iſſue did not riſe upon the Rent not paid, but upon a Collateral Point, that did admit the Rent not paid, becauſe by the Entry which was a Suſpenſion, it was made not payable. *Hobart*, Chief Juſtice, ſaid, It was plainly made, that the Breach was not the Replication, when the Plaintiff ſaid, That the Rent was behind; which implyes, That it was demanded, and not paid: for in ſuch caſe, the Plaintiff never pleads, that he did demand it, and it was behind. But if indeed it never was demanded, Then after the Plaintiff hath pleaded the Rent behind, which is true *prima facie*, and then the Defendant Rejoyns, That he was there ready to pay it, and no man did demand it: and ſo the demand comes in Iſſue. It was adjudged for the Plaintiff. Hil. 11 Jac. in C. B. *Baker* and *Spains* Caſe. *Hobart*, 8.

Taile

Tail.

1. *Tail; What it is, whence derived. By what words of Grant, either in the Case of a Common person, or of the King, it shall be created; and of what things an Estate in Tail may be; of what not.*

1. Mr. *Littleton*, Lib. 1. Cap 2. saith, That *Taillare, idem est quod ad quandam constitutionem ponere*: And therewith agreeth Mr. *Plowden* in his *Comment.* 251. in the Lord *Berkleyes* Case; and because in the gift it is expressed of what body the Heirs who shall inherite shall issue, for that cause it was called Tail; or rather, it might take its name from this word *Talier* in *French*, which is to cut off: For *à Talier bois* is to cut Wood in the French Tongue; and because that the Estate is docked or cut off, for before it was Feesimple, and now the Fee is divided from it, and the Estate is thereby cut off, or made less; It may well thereof be said an Estate tail, *scil.* an Estate cut asunder, divided, and diminished. See *Plow. Com.* 251. in the Lord *Berkleyes* Case.

2. At the Common Law if Lands had bin given to Husband and Wife, and to the Heirs of their two bodies begotten, and the Woman had had Issue, and the Husband dyed, and she had taken a second Husband, and had Issue by him; the second Husband should have bin Tenant by the Curtesy, 30 E. 1. Title *Formedon* 66. which proves, That the Issue by the second Husband might by possibility have inherited. For at the Common Law after Issue had, Tenant in tail had a Feesimple to three purposes. 1. To give. 2. To forfeit by an Attainder, 7 E. 3. 6. 3. That the Tenant by having of Issue, had a full Feesimple to make the Land descendable to her Issues by any Husband, as a thing annexed to her Estate. And that is proved also by the words of the Statute of *Donis*, *scil.* *Nisi habeat, &c.* for if the Issue of the second Husband should not inherite, the Husband should not have bin Tenant by the Curtesy as it was adjudged, 21 H. 3. that he should be. See *Cook* 8. Part, in *Paines* Case.

3. If Land had bin given to one and the Issue of his body, and the Donee had Issue a Son and dyed; in such Case the Son at the Common Law had not an absolute Feesimple in him, but only such power which his Father had, *scil.* to alien *post prolem suscitatam*: And if such Issue had dyed without Issue, and without any alienation made, the Land should have reverted to the Donor: For a Collateral Heir which was not of the body of the Donee, was not within the form of the gift. 18 E. 3. 46. *Cook* 7. Part, 35. acc.

4. A gift to Husband and Wife *et uno haredi de corpore suo exeunte sive legitime procreato, et uni haredi ipsius haredis tantum*: It was holden to be a good Estate tail, 39 Ass. 3. So a gift to J. S. *et haredibus de corpore suo exeuntibus*; *Habendum filio et haredibus*; he had an Estate tail in possession, and a Reversion expectant in Fee. 21 H. 6, 7. 45 E. 3. 20. acc.

5. If a man give Land to a man, *et feminæ suæ aut liberis suis de corpore*, or *prolibus suis*, or *exitibus aut pueris suis de Corpore*: In such Case the Donee hath no Estate tail, but only an Estate for life; because if such gifts had bin made before the Statute of *Donis*, they had bin no Feesimple Conditional; and therefore by the Rule of Mr. *Littleton*, they are no Estates tail. *Cook* 1. Part, 103. in *Shelley's* Case: For there it was said, That the Statute of *Donis* was a Nurse, and no Mother of Estates of Inheritances tailed, and that it preserved the Estates of Inheritances in tail, but did not beget or create any Estate tails, which were not Feesimples before at the Common Law.

6. See *Cook* 8. Part, 103. in *Shelleyes* Case. It was vouched to have bin adjudged in the Case of *Martin Hastings* for the Manor of *Elsing* in *Norfolk*, That where an Estate was made to one, and to the Issues Males of his body, that in that Case

he had but an Eſtate for life; and ſo it was ſaid it was holden by *Manwood* Juſtice, in 17 Eliz. in *Clutches* Caſe.

7. A man made a Feoffment in Fee to the uſe of his younger Son in tail, the Remainder to the Donees *et hæredibus ſuis in poſterum procreandis*; the Father dyed, the younger ſon dyed without Iſſue; the doubt was, If the eldeſt Son of the Father ſhould have the Land; if there being no Heir begotten after the gift, (the Remainder being over) if he in the Remainder might enter preſently. It was the Opinion of *Wray* Chief Juſtice, That the eldeſt Son ſhould not have the Land by reaſon of this word *in poſterum*; which is of force to exclude and bar him. But he ſaid, if the gift had bin to his Iſſue *procreandis*. It had bin all one as if he had ſaid *procreatis*; And then ſee 18 E. 2. *procreandis* doth not exclude the Iſſue born before.

8. R. G. ſeiſed of Lands in Fee, gave the ſame by Deed Indented to A. *pro termino vitæ ſuæ, rem. inde reſtis hæredibus maſculis de corpore R. diſti*, the Donor *legitimè procreatis rem. inde reſtis hæredibus ſucc. in perpetuum*. Afterwards the Donor had Iſſue two ſons and dyed: H. the Tenant for life dyed; the eldeſt Son entred, and had Iſſue a Daughter, and dyed without Iſſue Male; and if the Daughter or the brother ſhould have the Land, was the Queſtion in Treſpaſs brought: there were two points in the Caſe. 1. If this limitation of tail were good or not. 2. Admitting that, then when the tail once began, and was veſted in the eldeſt Son, when he dyed without Iſſue Male, if the tail was ſpent, or that the Land ſhould go to the younger Son. It was the better Opinion of the Court, That the limitation of the Remainder in tail was void, becauſe the Donor could not make his own right Heir a Purchaſor, without the departing of the Feeſimple out of himſelf: ſo the Opinion of the Court was againſt the tail, and for the Heir general, and ſo it was adjudged. Mich. 5 Ma. *Dyer*, 156. *Griſwalds* Caſe.

9. *Aden Beresford* the Father, made a Feoffment in Fee of a Mannor, to the uſe of the ſaid *Aden* the Father for life, the Remainder to his Son in tail, and to the Heirs of his body begotten, and for want of ſuch Iſſue, to the uſe of *Aden Beresford* ſon of *James Beresford*, and the Heirs Males of the body of the ſaid *Aden* ſon of the ſaid *James*, lawfully begotten with divers Remainders over. The Queſtion in this Caſe was, If *Aden* the ſon of *James* had a Feeſimple, or a Fee tail, becauſe there wanted the words (of the body). It was Reſolved, That he had an Eſtate tail; and that the Remainders over were lawfully veſted; for that theſe words (of the body) are not neceſſary to the creation of an Eſtate tail, as long as there are words which do amount to ſo much. And that this word (*De*) or (*Ex*) accounted with the word ſubſequent (*procreatis*) did appropriate the Heirs Males to be of the body of *Aden*. For that *de Adæno, ex Adeno, et de Corpore Adeni* are all one, and ſuch conſtruction always ſhall be made, that all the words may ſtand together, if they may ſo ſtand by the Rule of Law. Mich. 5 Jac. in the Court of Wards. *Cook* 7. Part, 41. *Beresfords* Caſe. But in the Caſe, Hill. 38 El. between *Abraham* and *Teig*, where a Feoffment was made to the uſe of certain Indentures, where in one limitation was *ad opus et uſum Gabrielis Dymer et hæredum maſculorum ſuorum legitimè procreatorum et pro defectu talis exitus* to the uſe of divers others in tail in Remainder. It was adjudged, That *Gabriel* had a Feeſimple, for it is not limitted of what body the Heirs Males ſhall be begotten; but his intent was, *quod ſinguli hæredes ſui maſculi* ſhould inherite, which intent of his did not ſtand with the Rule of Law.

10. Note, It was Reſolved, 1. That an Eſtate made to one and his Heirs during the life of J. S. is but an Eſtate for life, upon which a Remainder may depend by the Common Law. 2. That an Eſtate made to one and his Heirs on the body of J. S. begotten, is an Eſtate tail, and no Feeſimple, againſt the Opinion of *Aſcough*. 20. H. 6. 36. *Cook* 1. Part, 140. in *Chudleighs* Caſe.

11. A man having Iſſue three daughters, ſeiſed of Lands in Feeſimple; In conſideration of his Iſſue Male (if he ſhould have any), and for the advancement of the ſaid Daughters and the Heirs of their bodies, and for the continuance of the Land in his bloud, Covenanted to ſtand ſeiſed of the ſaid Lands to the uſe of himſelf for life, and afterwards to the uſe of his three Daughters, and to their Heirs of their bodies: And if any of them dye without Iſſue Male, that then her part ſhall ſurvive with a Proviſo for their ſeveral Husbands; That if they ſurvived their Wives, and ſhould not be entituled to be Tenants by the Curteſy, that then he might limit any of the ſaid Lands by his Will for the payment of his Debts, or for the advancement to any perſon or perſons for life or years: One of the Daughters dyed without Iſſue Male, the Father aſſigned a great part of the Land to his younger daughter for her advancement for 1000 years, without reſervation of any rent: and if it were a good limitation in Law, was the Queſtion. It was Reſolved in this Caſe, 1. That the uſes were well raiſed to the Daughters by the Covenant. 2. That the limitation for 1000 years was aſwell againſt the Intention of the parties, as againſt the words of the Proviſo; for if the ſame ſhould be good, it ſhould be rather a fruſtrating of the eſtate of the other Siſters,

ſters, and to defraud the intention grounded upon a good conſideration, then to perform and preſerve it, for it cannot be intended a reaſonable conſideration which tends to the ſubverſion of eſtates. *Cook* 1. Part, 175. *Mildmayes* Caſe.

12. Lands were deviſed to Husband and Wife, and after their deceaſe to their Children, they then having Iſſue a Son and a Daughter. It was Reſolved in this Caſe, That the Husband and Wife had but an eſtate for the Term of their lives; the Remainder to their Children for life, and no eſtate tail, and the intent of the Deviſor ſhall be conſtrued according to the Rules of Law; and by the Common Law, If ſuch Conveyance had b'n made, the Husband and Wife had had but an eſtate for their lives, the Remainder to their Children for their lives. In that Caſe it was put, If A. deviſeth his Land to B. and to his Iſſues or Children, and he hath not any Iſſue at the time of the Deviſe, that the ſame is an Eſtate tail, for the intent of the Deviſor is manifeſt and certain, for they cannot take as immediate Deviſees, becauſe they are not *in rerum natura*. And by way of Remainder they cannot take, becauſe that it was not the intent of the Deviſor, and therefore thoſe words ſhall be taken by way of limitation, and ſhall be an Eſtate tail. And a Deviſe to Husband and Wife, and to the men Children of their bodies begotten, and they have not Iſſue at the time of the Deviſe; yet it was adjudged an Eſtate tail, 4 Eliz. in *Bendloes* Reports. But if a man Deviſeth Lands to A. and his Iſſues, and he hath Iſſue of his body living, they have but a joynt Eſtate for their lives, *quod Nota. Cook* 6. Part, 17. *Wyldes* Caſe.

13. Note, where a Deed ſpeaketh by general words, and afterwards diſcendeth to ſpecial words, if the ſpecial words agree to the general, the Deed ſhall be intended according to the ſpecial words: As if a man giveth Lands to one and his Heirs, *Habendum*, to him and the Heirs of his body, he ſhall have but an Eſtate in tail, and no Fee expectant, for that the *Habendum* doth qualify the general words precedent. But if a man giveth Lands in the premiſes of a Deed to one and the Heirs of his body, *Habendum* to him and his Heirs, he hath an Eſtate tail, and a Fee expectant. *Cook* 8. Part, 155. in *Altham's* Caſe.

14. A Formedon was brought upon ſuch gift, viz. *R. dedit W. et J. uxori ejus et hæredibus de corpore alterius ipſorum W. et J. qui diutius viverent communibus, et quod poſt mortem; W. et J. T. filio et hæred. ejuſdem W. qui prædict. J. ſupervixit diſcendere debet.* So that the gift was to the Husband and Wife, and to the Heirs of the body of the ſurviver of them. In that Caſe it was ſaid, That as to the Eſtate tail there was incertainty in the perſon: And therefore it was ſaid, That if in ſuch Caſe, ſuch perſons ſhould make a Leaſe for 21 years, obſerving all the Circumſtances required by the Statute of 32 H. 8. yet ſuch a Leaſe ſhould not bind; for, for the incertainty of the perſon of the Survivor, the Eſtate tail was not veſted. See *Cook* 10. Part, 51. in *Lampits* Caſe. *Regiſt. Originall.* 239.

15. In an *Ejectione firmæ*, the Caſe was; S. B. being *Ceſtuy que uſe* before the Statute of 27 H. 8. D.viſed to his Wife certain Lands for her life, and that after his deceaſe, R. B. his eldeſt Son ſhall have the Land 30 l. under the ſum or price it coſt, and if he dyed without Iſſue, F. B. his ſecond Son ſhall have the Land 30 l. under the price it coſt; and if he dye without Iſſue of his body, then his two Daughters A. and E. ſhall have the Land paying the value thereof to the Executors of his Wife. The chief Queſtion in this Caſe was, Whether R. B. the Deviſee had an Eſtate tail or not. It was argued and ſaid, That in this Caſe it was an Eſtate tail; and it was compared to the Caſe of 2 El z. *Dyer, Frenchmans* Caſe, where a man Deviſed Lands to his Wife for life, the Remainder to C. F. and the Heirs Males of his body; and if he dye without Heirs of his body, the Remainder over, and it was clearly taken, that the general limitation, if he dyed without Iſſue of his body, ſhall not alter the ſpecial tail, for that the intent is apparant: Upon the other ſide it was ſaid, That the Eſtate was a Feeſimple, for that the words are, That he ſhall have the Land 30 l. under the price it coſt; and ſo the words (paying) imply a Feeſimple. The Court inclined to be of Opinion, That it ſhould be a Feeſimple. But the Caſe was not Reſolved, but adjourned. Mich. 40 Eliz. in B. R. *Bulleyn* and *Bulleynes* Caſe. *Golde.br.* 134, 135.

16. A man deviſed Lands to his Wife for life, the Remainder to his Son; and if his Son dyed without a Son, that then it ſhould remain over: It ſeemed to the Court, That this was a good Eſtate tail; and it was adjudged accordingly. Trin. 7 Jac. in C. B. *Robinſons* Caſe.

17. Error brought of a Judgment in *Fliſt*; the Caſe was, A. gave Lands to B. and his Wife, *Habendum* to the Husband and Wife, to the uſe of them and the Heirs of their two bodies; and for want of ſuch Iſſue, to the uſe of C. and his Heirs, and whether the Husband and Wife have an Eſtate tail, or but for their lives, was the Queſtion. It was objected, That the Eſtate out of which the uſe ſhould riſe, was but for their lives, and the uſe cannot make the Eſtate longer then the limitation. For where Lands are given to two for their lives, to the uſe of another for his life; If the Leſſees dye, the uſe

uſe to him to whom it is limitted, is determined. But the Court held, That there is a difference, where an Eſtate is limited to one, and the uſe to a ſtranger, there the uſe ſhall not be more then the Eſtate out of which it is derived. But when it is limited to two *Habendum*, to the uſe of the Heirs of their bodies, this is no limitation of the uſe, but a limitation of the Eſtate, and the Heirs of their bodies are in by the Common Law, and ſhall take as a limitation to them and the Heirs of their bodies with a Remainder over, that the Deed might be conſtrued according to the intent of him that made it. Mich. 6 Car. in B. R. *Jenkins* and *Young's* Caſe. *Cro.* 1. Part, 167. See the like Caſe adjudged. Hill. 6 Car. in B. R. *Meredith* and *Jones* Caſe. *Cro.* 1. Part, 178.

18. In Waſte, the Caſe was; E. S. after the Statute of 27 H. 8. made a Feoffment in Fee to the uſe of the ſaid E. S. and *Eldred* his Wife, to the uſe of the ſaid E. S. and *Eldred* for the Term of their lives, *ea eorum diutius vivorum*, and after the deceaſe of the ſaid E. S. and *Eldred*; then to the uſe of the Heirs of the body of E. S. to be begotten upon the body of *Eldred*, &c. It was holden in this Caſe, That *Eldred* the Wife had but an Eſtate for life, and that the intail and the Inheritance by the form of the limitation aboveſaid, reſted only in the Husband E. S. and it is all one as if it had bin given *Hæreditum E. S. de Corpore ſuo ſuper Corpus Eldred*, &c. Trin. 12 Jac. in B. R. *Stout* and *Oxenbridges* Caſe. *Hob.* 84.

19. The Caſe was, L. L. ſeiſed of Lands in Fee, deviſed it to T. L. his eldeſt Son, and the Heirs Males of his body from and after his deceaſe, for 500 years, upon Condition, That he ſhould allow all his Grants and Eſtates made by him, Provided, That if the ſaid T. or any Heir Male of his body alien, &c. the premiſes or any part thereof otherwiſe then to Leaſe the ſame to any perſon or perſons for any number of years as ſhall determine upon the deaths of any three perſons, or upon the death of any four perſons to be named in the leaſe whereupon the old Rents ſhall be reſerved; That then all the premiſes for want of ſuch Iſſue Males of the body of the ſaid T. or ſo much thereof as ſhall be alienced, leaſed otherwiſe then as aforeſaid, contrary to the intent of theſe preſents, ſhall remain to W. L. and the Heirs Males of his body. L. L. dyed, T. L. entred and made a Leaſe for 1000 years to J. S. and dyed without Iſſue Male, having a Daughter, J. the Defendant, who entred. W. L. entred as in the Remainder; and if his entry was lawfull or no, was the Queſtion. It was the greater Opinion of this Court, for the Defendant: For that W. L. had not any Remainder; for it is not limited to him, but upon a dying without Iſſue, and an Alienation againſt the Condition, ſo as it is a Conditional limitation, which is void and repugnant to make a Remainder to begin after the limitation of an Eſtate tail: And one of the Juſtices ſaid, That this Leaſe for 1000 years was not a breach of the Condition, becauſe being made by Tenant in tail, it determines by his death. Trin. 2 Jac. in C. B. *Love* and *Goddard's* Caſe. *Cro.* 2. Part, 61, 62.

20. W. S. ſeiſed of a Meſſuage holden in Socage, having M. his Wife, F. his Son, and three Daughters, A. B. and E. deviſed the ſame in this manner, I bequeath to F. my Son, my houſe in L. after the death of my Wife; and if my three Daughters, or either of them do outlive their Mother, and F. their Brother, and his Heirs, Then they to enjoy the ſaid houſes for the Term of their lives: And my ſaid houſes then I give to my Siſters Sons, R. W. and J. W. and they to pay yearly to the Company of Merchant Taylors 6l. 10 s. and if they deny the payment of the ſaid ſum, then the ſaid Company to enter. The Deviſor dyed. The Son and two of the Siſters dyed without Iſſue. M. the Wife ſurvived them, and then dyed. E. the third Siſter ſurvived, and entred, having Iſſue the Defendant. J. W. dyed. R. W. entred and dyed. The Queſtion in this Caſe was, Whether F. the Son had a Fee, or a Fee tail by this Will. It was the Opinion of the Court, That he had a Fee tail; for (Heirs) in this place is intended, Heirs of his body: For it is impoſſible the Son ſhould dye without Heirs as long as his Siſters were alive, and therefore the intent of the Deviſor ſhall be conſtrued to extend to the Heirs of his body, and ſo to be an Eſtate tail. Hill. 13 Jac. in B. R. *Webb* and *Herriots* Caſe. *Cro.* 1. Part, 415, 416. See Mich. 15 Jac. *King* and *Rumball's* Caſe. *Cro.* 1. Part, 448.

21. In a Replevin, the Caſe was; A. ſeiſed of Lands in Fee, deviſed them to his Wife for life, and after to J. his eldeſt Son and his Heirs, upon Condition, That he as ſoon as the Land ſhould come unto him in poſſeſſion, ſhould Grant to S. his ſecond Son, and his Heirs, a Rent of 4l. out of the ſaid Lands: And if the ſaid J. dyed without Heirs of his body, that the Lands ſhould remain to the ſaid S. and the Heirs of his body, and dyed. The Wife entred and dyed. J. entred, and Granted the Rent of 4l. to S. and his Heirs, with clauſe of Diſtreſs. S. Granted the Rent to E. the Defendant, to whom J. Attorned: J. dyed. S. entred and enfeoffed J. D. who let the Land to the Plaintiff. The Queſtion was, Whether J. had an Eſtate in Fee by this Deviſe at the time of the Grant of this Rent; becauſe the Deviſe was to him and his Heirs upon Condition, that he ſhould Grant a Rent to S. and his

his Heirs, whereby the intent was ſhewed, That he ſhould have Fee, otherwiſe he could not legally Grant ſuch a Rent to have Continuance after his death. But it was Reſolved to be an Eſtate tail; for being limited, That if he dye without Iſſue, that then it ſhould be to S. and his Heirs of his body, that ſhews what Heirs of J. were intended, *ſcil.* Heirs of his body: But yet by the limitation of the Will he is to make this Grant of this Rent, which being by the appointment of the Donor, is not *contra formam doni*, but ſtands with the gift, and ſhall bind the Iſſue in tail. Paſc. 15 Jac. in B. R. *Dutton* and *Bogrum* Caſe. *Cro.* 2. Part, 427.

22. A. ſeiſed of Lands in D. and S. and having two ſons, T. and F. deviſeth all his Lands to his Wife for life, and after her death, All his Lands in D. to T. and his Heirs for ever; and his Lands in S. to F. and his Heirs for ever; *And I will, That the ſurvivor of them ſhall be Heir to the other if either of them dyeth without Iſſue.* The Wife dyes, T. enters into the Lands in D. and deviſeth them to R. his ſecond Son in Fee. The Queſtion was, If this be a Deviſe in tail immediately, or only a contingent Eſtate if he dyed without Iſſue in the life of his brother. It was the Opinion of the whole Court, That it was an Eſtate tail, with the Remainder over, ſo as the Deviſe made by T. to R. his younger Son, was void; And that although the firſt part of the Will gives a Fee; yet the ſecond part corrects it, and makes it but an Eſtate in tail. Mich. 22 Jac. in B. R. *Chaddock* and *Cowlyn* Caſe. *Cro.* 2. Part, 695. 696.

23. The Caſe was, A Fooffment was made of three Acres to A. and B. to the uſe of R. R. and M. his Wife for their lives, and after to the firſt, ſecond, and third Son, of the body of M. and afterwards to the Heirs of the body of M. by R. begotten. They had not any Son but a Daughter, who was the Plaintiff. R. levyed a Fine of the Land. M. dyed, the Plaintiff entred: The Defendant pleaded the Fine of R. It was adjudged in this Caſe, That the Plaintiff was not barred by the Fine, for R. had but for life, and the Eſtate tail was in the Wife only: For the Juſtices ſaid, That the Husband is not named, but to declare what Heir of the body of the Wife ſhould inherite, not every Heir, but ſuch Heir only as R. her preſent Husband ſhould beget: And they all agreed, That the Inheritance was only in the Wife, because the word (Heir) which made the Inheritance, is annexed only to the body of the Wife; but if it had been to the Heirs which the Husband ſhould beget on the body of the Wife, there the tail had been in both. Trin. 6 Jac. in B. R. *Repps* and *Benhams* Caſe. *Tabert.* 131.

24. If the King *de gratia ſua ſpeciali & ex certa ſcientia, & mero motu*, Grants Land to one and his Heirs Males, ſuch a Grant is void, as it was adjudged 18 H. 8. and yet if a common perſon had made ſuch a Grant, the Grant had been good; but if it ſhould be good in the Kings Caſe, it ſhould be a general Eſtate in Fee-ſimple deſcendable, as well to Females as to Males, in courſe and order of deſcent, which ſhould be againſt the intent and purpoſe of the Kings Grant, for he intended to Grant an Eſtate in Fee-ſimple only deſcendable to Heirs Males. *Cook* 1. Part, 49. in the Caſe of *Alton woods*.

25. Guardian and Channons Regular of a Colledg ſeiſed of ancient Copyhold Lands, parcel of the Manner of D. Granted thoſe Lands to A. and B. for their lives by Copy, according to the Cuſtome of the Manner. Afterwards 30 H. 8. by Indenture they made a Leaſe of the ſaid Lands to C. for 80 years, rendring the ancient Rent, and afterwards ſurrendred their Colledg to the King. Afterwards the Statute of 31 H. 8. was made. A. and B. dyed. C. the Leſſee entred: The King brought Intruſion. In this Caſe, it was Reſolved, That the Leaſe made to C. of the ſaid Lands, whereof the ſaid A. and B. were ſeiſed by Copy, was void. 2. Reſolved, That the ſaid Copyhold Eſtate was an Eſtate for life within the Statute of 31 H. 8. cap. 13. for the intent of the ſaid Statute was to avoid doubling of Eſtates, and but to have one ſingle Eſtate in *eſſe* at one time. 3. It was Reſolved, That when an Act of Parliament alters the Service, Tenure, Intereſt of the Eſtate, or other thing in prejudice of the Lord, or of the Cuſtome of the Manner, or in prejudice of the Tenant, the general words of ſuch an Act of Parliament doth not extend to Copyholds, but when an Act is generally made for the good of the Commonwealth; and no prejudice accrues by any of the alterations aforeſaid, there Copyholds and Cuſtomary Eſtates are within ſuch Statutes. 4. It was Reſolved, That the Statute of *Donis Conditionalibus* did not extend to Copyholds, becauſe it ſhould tend to the prejudice of the Lord by alteration of the Cuſtome. But it was holden, That by Cuſtome Copyhold Land might be entailed. *Cook* 3. Part, 8. 9. *Heydons* Caſe.

26. Note, It was Reſolved by the Court, That whereas by the Cuſtome of the Manner, Plaints had been made in the Court of the Manner, in the nature of Real Actions; That if a Recovery be in the Court of the Manner, in a Plaint in the nature of a real Action, againſt Tenant in Tail of Lands (admitting that Copyhold Lands by the Cuſtome may be entailed) that it ſhall be a Diſcontinuance, and take away the Entry of the Heir in Tail;

for in as much as Plaints in the nature of Real Actions, are warranted by the Customs: It is an Incident which the Law annexeth to the Customs, That a Recovery shall be a Discontinuance. Trin. 36 Eliz. in B. R. *Cook* 4. Part, 23. *Deal* and *Rogers* Case.

27. King *Rich.* 2. by his Letters Patents, created *Ralph Nevil* Lord of *Raby*, Earl of *Westmorland*, to him, and the heirs males of his body: Which Honour afterwards descended to *Charles Nevill* Earl of *Westmorland*, who was attainted of Treason, and dyed without Issue male. In this Case, three points were referred to the Justices, 1. If the limitation of the said Dignity to *Ralph Nevill*, and the Heirs males of his body, was within the Statute of *Donis*, or was a Fee-simple, descendable at the Common Law. 2. Admitting it was within the Statute of *Donis*, if by the Attainder of Treason, the Estate Tail were forfeited by a Condition in Law, *tacite* annexed to the said Dignity. 3. If it were forfeited by the Statute of 26 H. 8. cap. 13. of Treason. In this Case it was Resolved, 1. That a Name of Dignity, as of an Earl, Viscount, &c. might be entailed by the Kings Letters Patents to one, and the heirs males of his body, and that it was within the Statute of *Donis*, because it concerned Land; and every Earl, Baron, &c. is created of some place. 2. It was Resolved, That that Dignity (if the Statute of 26 H. 8. had not been made) by Attainder of Treason might be forfeited, by a Condition in Law annexed to the estate of the Dignity, because it is an Office of great Trust and Confidence reposed in him by the King; and when such a person, against his duty, and the end of his Dignity, commits Treason, by taking up of Arms, or otherwise, against the King, and thereof is attainted, he hath forfeited his Dignity, by a condition in Law annexed to it. 3. Resolved, That if such a Dignity had not been forfeited by the Common Law, yet it was forfeited by the Statute of 26 H. 8. for that a Dignity is an Hereditament; and all Hereditaments are within the said Statute. *Cook* 7. Part, 33, 34. *Nevill's Case.*

28. All Inheritances, Corporate or Incorporate, concerning Land, or annexed to Land, or exercised with Lands, whether they lye in Tenure or not, may be entailed; but Inheritances meerly personal, and exercible upon Chattels, and not Issuing out of Land, nor concerning Land, cannot be entailed. *Cook* 1. Part, *Institutes*, 20. acc.

29. An Use may be entailed, *Plowd. Com.* in *Manxell's* Case. 30 H. 8. *Fitzh. Feoffments to uses.* 48. And therefore it was adjudged, 14 Jac. in B. R. in *Franklyns* and *Coopers* Case, That Tenant in Tail might stand seized to an Use.

30. 18 E. 3. 27. The Office of Serjanty in the Church of D. was entailed.

31. 5 E. 4. The Office of Marshal of *England* was entailed, and it was adjudged, That a *Formedon* did lye of it. See *Dyer*, *Humphry Bohun* Earl of *Essex* Case, adjudged accordingly.

32. See 32 H. 6. 28. The Earldom of *Shrewsbury* was entailed to *J. Talbot* Knight, and the heirs males of his body.

33. 13 E. 4. 1. The Office of Chamberlain of the Exchequer was granted in Tail, and the Grant was holden good; and it was holden, That the not attendance upon, or the not executing of his said Office, was a forfeiture of it.

34. 4 H. 7. 10. by *Kyder.* The Stewardship of a Mannor may be entailed, because the same is exerciseable about Land, and so is in the Realty: But the Offices of Master of the Kings Hawks, or of the Kings Horse, cannot be entailed within the Statute of *Donis*, because they do not savour of the Realty.

35. 18 E. 3. 56. The profits of a Mill were given to one, and the Heirs males of his body. It was holden to be a good gift, and within the Statute of *Donis*, and a *Formedon* was brought of the profits of the said Mill, and adjudged it did well lye, and yet the Mill it self did not pass by the Gift. And Note, it was said, That a Discharge of Tythe to one, and the heirs of his body, by a Parson imperpetuel, was a good entail; and that none could take advantage of such a Grant, but the heir of the body: And so it was said, That the King might Grant to one, and the heirs of his body, to be discharged of Toll, and such a Grant was good, and none should take advantage of it but the Issue in Tail: And so it was said it was of Conusance of Pica, view of Frank-pledge, Waifs, Estrays, Wrack of the Sea, they were grantable in Tail within the said Statute of *Donis*.

36. But see 9 E. 4. 53. That Tail male of a Chattel, was not good, nor within the said Statute; and if Tenant in Tail give away the Chattel, the Issue hath no remedy for them, because they are but Chattels; although that the Executors cannot have them: But for the Deed which doth concern the Entail it self. It was holden, That the Issue in Tail might have an Action of Detinue.

37. In Trespass upon a special Verdict, it was found, That A. Copyholder in Fee, 39 Eliz. surrendred his Copyhold Lands, into the hands of the Tenants of the Mannor, to the use of his Will: A. had Issue two sons, J. and H. and devised his said Lands to J. and the heirs males of his body, the Remainder to H. and the heirs males of his body, with divers Remainders over, and dyed 41 Eliz. the Surrender was Presented, and J. admitted, To have to him and his heirs: Afterwards, J. had Issue three sons, and Surrendred the same to the use of his

his Will, and thereby Devised it to K. his Wife, and dyed 42 Eliz. the Surrender was Presented, and she admitted; the three sons of J. dyed without Issue, and the Jury found, That no Copyholder might Surrender, or Devise his Copyhold in Tail, and that afterwards, A. married J. D. who Leased the Land to the Plaintiff: The Question was, when a Copyholder in Fee surrenders to the use of one in Tail, being no Custome to warrant such entail, whether it be an entail by the Statute of *Donis*, or a Fee-simple conditional at the Common Law. It was holden by all the Justices, That a Copyhold could not be entailed within the Statute of *Donis*, and that for divers causes. 1. Because it was not within the Letter of the Statute, which speaks only *de Tenementis per Chartam datis*. 2. It is not within the meaning of the Statute, because before 7 E. 4. 19. they were not of any account, being but Estates at Will. 3. The Statutes provides against those who might make disinheritson by Fine, or Feoffment, which a Copyholder could not do, or make. 4. Because, If they might be entailed, that the Reversion should be left in themselves, which cannot be. *And* 5. Because it would be mischievous, because that should be no means to dock and cut off the Estate Tail. Mich. 2 Car. in B. R. *Snyder* and *Mouldfers* Case. *Godbolt*, 367. *Cro.* 1. Part, 131, 132. the same Case. *Quære*, For this Case hath at no time been absolutely Resolved, nor is it determined at this day, Whether Copyhold might be entailed or not, but still controverted; and therefore see the Case following.

38. In an *Ejectione firmæ*, the Case was, A. was seized of certain Customary Tenements, holden of the Manour of F. and 3 H. 8. (before which time the Customary Tenements of the said Manour had been always used to be granted by Copy of Court Roll in Fee-simple, for life or years, but never in Tail till then) the said A. surrendred his said Copyhold Lands to the use of *Joan* his eldest daughter, for life, the Remainder to J. G. the eldest Son of *Joan*, and to the heirs males of his body, the Remainder to H. G. and the heirs males of his body, the Remainder to the right Heirs of A. and Seizin was given to *Joan*: A. dyed, having Issue the said *Joan* and *Eliz.* And at a Court holden for the said Manour 4 H. 8. it was Presented, That the said Daughters were his Heirs, and that the said Surrender made, was void, because it was not used within the Manour, to make Surrenders of Estates in Tail, and thereupon, the Homage made partition of the Lands, and limited part to *Joan*, and part to *Eliz.* and seizin was given them accordingly: *Eliz.* dyed, M. was found her Heir, and admitted Tenant; Afterwards, *Joan* dyed, M. took to Husband J. S. who with his Wife, Surrendred his part to the use of J. D. and his heirs; M. dyed without Issue, J. D. held his part, and Surrendred it to the use of R. N. and J. K. and their Heirs, who were admitted, J. G. dyed. In this Case, it was said by some of the Justices, That an Estate could not be of Copyhold Lands, unless in case where it had been used; for that the Statute of *Donis* shall not enure to such Customary Lands, but to Lands at the Common Law; and they said, That the Remainder be limited to J. G. upon the death of the said R. was in Fee Conditional, which is well warranted by the Custome to devise in Fee; But they said, That during the life of A. nothing was in *Eliz.* which could discend from her to her daughter M. or might be surrendred to the said M. and her Husband, and therefore, M. dying without Issue, in the life of J. G. who had the Fee simple conditional, nothing was done which might hinder the son of H. G. of his Entry: But yet after long debate, It was holden by the Court, That the Statute of *Donis Conditionalibus* co-operating with the Custome, That a Copyhold might be entailed: And further, in this Case it was holden, and so Resolved, That such an Estate Tail could not be destroyed by a Surrender, unless by special Custome. Mich. 36 Eliz. in B.R. *Gravends* and *Brooks* Case. *Popham* 32, 33.

39. Note, It was adjudged in the Court of Common Pleas, upon an Evidence given for Lands within the Manour of *Illesworth*, in the County of *Middlesex*, That no Estate Tail might be of a Copyhold, without a special Custome to Warrant it. Trin. 36 Eliz. in C. B. Rott. 547. And Mich. 36 Eliz. in B. R. It was adjudged, That a Copyholder could not suffer a Common Recovery, because the Recovery in value is by reason of the Warranty annexed to an Estate at the Common Law, which cannot be annexed to a Customary Estate, 42 Eliz. in B.R. *Keish* and *Ivet* Case. *Quære*, For at this day, where Copyholds may be entailed by the Custome of the Manour, It is usual at this Tail, to dock such Estate Tail by a Recovery had with Vouchers, in the Court of the Lord of the Manour, which is holden to be a good Bar against the Issue in Tail.

for in as much as Plaints in the nature of Real Actions, are warranted by the Customs: It is an Incident which the Law annexeth to the Custome, That a Recovery shall be a Discontinuance. Trin. 36 Eliz. in B. R. *Cook* 4. Part, 23. *Deal* and *Rogers* Case.

27. King *Rich.* 2. by his Letters Patents, created *Ralph Nevil* Lord of *Raby*, Earl of *Westmorland*, to him, and the heirs males of his body: Which Honour after wards descended to *Charles Neville* Earl of *Westmorland*, who was attainted of Treason, and dyed without Issue male. In this Case, three points were referred to the Justices, 1. If the limitation of the said Dignity to *Ralph Nevill*, and the Heirs males of his body, was within the Statute of *Donis*, or was a Fee-simple, descendable at the Common Law. 2. Admitting it was within the Statute of *Donis*, if by the Attainder of Treason, the Estate Tail were forfeited by a Condition in Law, *tacite* annexed to the said Dignity. 3. If it were forfeited by the Statute of 26 H. 8. cap. 13. of Treason. In this Case it was Resolved, 1. That a Name of Dignity, as of an Earl, Viscount, &c. might be entailed by the Kings Letters Patents to one, and the heirs males of his body, and that it was within the Statute of *Donis*, because it concerned Land; and every Earl, Baron, &c. is created of some place. 2. It was Resolved, That that Dignity (if the Statute of 26 H. 8. had not been made) by Attainder of Treason might be forfeited, by a Condition in Law annexed to the estate of the Dignity, because it is an Office of great Trust and Confidence reposed in him by the King; and when such a person, against his duty, and the end of his Dignity, commits Treason, by taking up of Arms, or otherwise, against the King, and thereof is attainted, he hath forfeited his Dignity, by a condition in Law annexed to it. 3. Resolved, That if such a Dignity had not been forfeited by the Common Law, yet it was forfeited by the Statute of 26 H. 8. for that a Dignity is an Hereditament; and all Hereditaments are within the said Statute. *Cook* 7. Part, 33. 34. *Nevill's* Case.

28. All Inheritances, Corporate or Incorporate, concerning Land, or annexed to Land, or exercised with Lands, whether they lye in Tenure or not, may be entailed; but Inheritances meerly personal, and exercible upon Chattels, and not Issuing out of Land, nor concerning Land, cannot be entailed. *Cook* 1. Part, *Institutes*, 20. acc.

29. An Use may be entailed, *Plowd. Com.* in *Manxell's* Case. 30 H. 8. *Fitzh. Feoffments to uses.* 48. And therefore it was adjudged, 14 Jac. in B. R. in *Franklyns* and *Coopers* Case, That Tenant in Tail might stand seized to an Use.

30. 18 E. 3. 27. The Office of Serjanty in the Church of D. was entailed.

31. 5 E. 4. The Office of Marshal of *England* was entailed, and it was adjudged, That a *Formedon* did lye of it. See *Dyer*, *Humphrey Bohun* Earl of *Essex* Case, adjudged accordingly.

32. See 32 H. 6. 28. The Earldom of *Shrewsbury* was entailed to *J. Talbot* Knight, and the heirs males of his body.

33. 11 E. 4. 1. The Office of Chamberlain of the Exchequer was granted in Tail, and the Grant was holden good; and it was holden, That the not attendance upon, or the not executing of his said Office, was a forfeiture of it.

34. 4 H. 7. 10. by *Kyder*. The Stewardship of a Manour may be entailed, because the same is exercisable about Land, and so is in the Realty: But the Offices of Master of the Kings Hawks, or of the Kings Horse, cannot be entailed within the Statute of *Donis*, because they do not savour of the Realty.

35. 18 E. 3. 56. The profits of a Mill were given to one, and the Heirs males of his body. It was holden to be a good gift, and within the Statute of *Donis*, and a *Formedon* was brought of the profits of the said Mill, and adjudged it did well lye, and yet the Mill it self did not pass by the Gift. And Note, it was said, That a Discharge of Tythe to one, and the heirs of his body, by a Parson imparsonee, was a good entail; and that none should take advantage of such a Grant, but the heir of the body: And so it was said, That the King might Grant to one, and the heirs of his body, to be discharged of Toll, and such a Grant was good, and none should take advantage of it but the Issue in Tail: And so it was said it was of Conusance of Pleas, view of Frank-pledge, Waifs, Estrays, Wrecks of the Sea, they were grantable in Tail within the said Statute of *Donis*.

36. But see 9 E. 4. 53. That Tail made of a Chattel, was not good, nor within the said Statute; and if Tenant in Tail give away the Chattels, the Issue hath no remedy for them, because they are but Chattels; although that the Executors cannot have them: But for the Deed which doth concern the Entail it self. It was holden, That the Issue in Tail might have an Action of Detinue.

37. In Trespass upon a special Verdict, it was found, That A. Copyholder in Fee, 39 Eliz. surrendred his Copyhold Lands, into the hands of two Tenants of the Manour, to the use of his Will and had Issue two sons, J. and H. and divided his said Lands to J. and the heirs males of his body, the Remainder to H. and the heirs males of his body, with divers Remainders over, and dyed 41 Eliz. the Surrender was Presented, and J. admitted, To have to him and his heirs: Afterwards, J. had Issue three sons, and Surrendred the same to the use of his

his Will, and thereby Devised it to K. his Wife, and dyed 42 Eliz. the Surrender was Presented, and she admitted; the three sons of J. dyed without Issue, and the Jury found, That no Copyholder might Surrender, or Devise his Copyhold in Tail, and that afterwards, A. married J. D. who Leased the Land to the Plaintiff: The Question was, when a Copyholder in Fee surrenders to the use of one in Tail, being no Custome to warrant such entail, whether it be an entail by the Statute of *Donis*, or a Fee-simple conditional at the Common Law. It was holden by all the Justices, That a Copyhold could not be entailed within the Statute of *Donis*, and that for divers causes. 1. Because it was not within the Letter of the Statute, which speaks only *de Tenementis per Chartam datis*. 2. It is not within the meaning of the Statute, because before 7 E. 4. 19. they were not of any account, being but Estates at Will. 3. The Statutes provides against those who might make dis-inheritson by Fine, or Feoffment, which a Copyholder could not do, or make. 4. Because, If they might be entailed, that the Reversion should be left in themselves, which cannot be. And 5. Because it would be mischievous, because that should be no means to dock and cut off the Estate Tail. Mich. 2 Car. in B. R. *Snyder* and *Mouffets* Case. *Godbolt*, 367. *Cro.* 1. Part, 131, 132. the same Case. *Quære*, For this Case hath at no time been absolutely Resolved, nor is it determined at this day, Whether Copyhold might be entailed or not, but still controverted; and therefore see the Case following.

31. In an *Ejectione firmæ*, the Case was, A. was seized of certain Customary Tenements, holden of the Manor of F. and 3 H. 8. (before which time the Customary Tenements of the said Manor had been always used to be granted by Copy of Court Roll in Fee-simple, for life or years, but never in Tail till then) the said A. surrendred his said Copyhold Lands to the use of *Joan* his eldest daughter, for life, the Remainder to J. G. the eldest son of *Joan*, and to the heirs males of his body, the Remainder to H. G. and the heirs males of his body, the Remainder to the right Heirs of A. and Seizin was given to *Joan*: A. dyed, having Issue the said *Joan* and *Eliz.* And at a Court holden for the said Manor 4 H. 8. it was Presented, That the said Daughters were his Heirs, and that the said Surrender made, was void, because it was not used within the Manor, to make Surrenders of Estates in Tail, and thereupon, the Homage made partition of the Lands, and limited part to *Joan*, and part to *Eliz.* and Seizin was given them accordingly: *Eliz.* dyed, M. was found her Heir, and admitted Tenant; Afterwards, *Joan* dyed, M. took to Husband J. S. who with his Wife, Surrendred his part to the use of J. D. and his heirs; M. dyed without Issue, J. D. held his part, and Surrendred it to the use of R. N. and J. K. and their Heirs, who were admitted, J. G. dyed. In this Case, it was said by some of the Justices, That an Estate could not be of Copyhold Lands, unless in case where it had been used; for that the Statute of *Donis* shall not enure to such Customary Lands, but to Lands at the Common Law; and they said, That the Remainder be limited to J. G. upon the death of the said R. was in Fee Conditional, which is well warranted by the Custome to devise in Fee; But they said, That during the life of A. nothing was in *Eliz.* which could descend from her to her daughter M. or might be surrended to the said M. and her Husband, and therefore, M. dying without Issue, in the life of J. G. who had the Fee simple conditional, nothing was done which might hinder the son of H. G. of his Entry: But yet after long debate, It was holden by the Court, That the Statute of *Donis Conditionalibus* co-operating with the Custome, That a Copyhold might be entailed: And further, in this Case it was holden, and so Resolved, That such an Estate Tail could not be destroyed by a Surrender, unless by special Custome. Mich. 36 Eliz. in B.R. *Gravenels* and *Brooks* Case. *Popham* 32, 33.

39. Note, It was adjudged in the Court of Common Pleas, upon an Evidence given for Lands within the Manor of *Isleworth*, in the County of *Middlesex*, That no Estate Tail might be of a Copyhold, without a special Custome to Warrant it. Trin. 36 Eliz. in C. B. Rott. 547. And Mich. 36 Eliz. in B. R. It was adjudged, That a Copyholder could not suffer a Common Recovery, because the Recovery in value is by reason of the Warranty annexed to an Estate at the Common Law, which cannot be annexed to a Customary Estate, 42 Eliz. in B. R. *Knish* and *Ivett* Case. *Quære*, For at this day, where Copyholds may be entailed by the Custome of the Manor, It is usual at this Tail, to dock such Estate Tail by a Recovery had with Vouchers, in the Court of the Lord of the Manor, which is holden to be a good Bar against the Issue in Tail.

2. *Where, and what Acts done by Tenant in Tail shall binde and bar his Issue, and what not; and where the Issue in Tail shall falsifie a Recovery had against his Ancestor, where not.*

3. IF Tenant in Tail be of a Reversion expectant upon an Estate for life, and suffereth a Common Recovery, and hath Judgment to recover over in value, yet his Issue shall avoid the Recovery, for he shall not be estopped, because he claimeth *per formam Doni*: But if Execution be sued in the life of the Tenant in Tail, then in as much as the Estate Tail doth not descend to the Issue in Tail, and for as much as then he may sue Execution over, to have Recovery in value, it is a good reason to bar the Estate Tail; but if the Issue in Tail be in by a lawful discent in possession, before the Recovery be executed, and the Bar be compleat; there the Issue shall not be bound by such Recovery. And see 14 H. 6. In the Case of an Exchange, That although Assetts do descend unto him of greater value then the Land in Tail, yet it is in the Election of the Issue to have the one Land or the other. *Cook* 1. Part, 96. in *Shelleys* Case.

2. Tenant for life of Land, the Remainder in Tail, the Remainder in Tail; Tenant for life, and he in the first Remainder in Taile joyn in a Fine, *sur Conusans de Droit, &c.* to another in Fee, rendring a Rent of 40 l. to Tenant for life; He in the first Remainder, dyeth without Issue. It was Resolved in that Case, That the Fine levyed by him in the first Remainder, was not any discent of the first Remainder, or of the second Remainder; because every one gives that which he may lawfully give: And also, it was no forfeiture; for that the Law, which abhors wrong, shall construe it to be first the Grant of Tenant in Tail, and afterwards, the Grant of Tenant for life, *ut res magis valeat, quam pereat.* *Cook* 2. Part, *Bredon's* Case.

3. Tenant in Tail, the Remainder in Fee; he in the Remainder by Deed Indented and Enrolled, Covenanted for consideration of blood, and other good considerations, to stand seized to the use of himself in Tail, the Remainder to the Queen, her Heirs and Successors, Kings and Queens of *England*. Afterwards, Tenant in Tail suffered a Common Recovery. It was Resolved in this Case, That the Issue in Tail was barred by this Recovery, and that no Estate Tail is preserved by the Statute of 34 H. 8. but that which is created by Letters Patents of the King, or else that it be of the Provision of the King; and the Estate Tail created by a Subject, is not preserved by the said Statute: And it was Resolved, That before the Statute of 34 H. 8. a Common Recovery did bar an Estate Tail, which was created by the Kings Letters Patents, although that the Reversion was in the King. *Cook* 2. Part, 175. *Wiseman's* Case. See *Cook* 2. Part, Sir *Hugh Cholmley's* Case acc.

4. A. seized of two Manners, enfeoffed divers persons, to the intent that they should give back the same Manners to A. and B. who he intended to marry, and to the heirs of the body of A; A. and B. intermarried, and had Issue C; A. dyed, C. in the life of the Tenant of the Freehold, suffered a Common Recovery, with a single Voucher, to the intent, that the Recoverors should make a Feoffment to Uses, and that the Tenant should Release, with Warranty to them; which Feoffment, and Release with Warranty, was made accordingly; and if the Collateral Warranty should bar the Demandant, who was Heir in Tail, or should be void by the Statute of 11 H. 7. cap. 20. was the Question. It was adjudged, That the Estate Tail was barred by the Warranty; for it was Resolved, That when he in the Remainder in Tail, by the common Recovery had against him by his agreement, had disabled himself to take benefit of the forfeiture given by the Statute of 11 H. 7. after his death, his Issue cannot take benefit of it, because his father was *in esse* at the time of the forfeiture, and could not enter. 2. It was Resolved in this Case, That if Tenant in Tail being in of another Estate, suffereth a Common Recovery, and a collateral Ancestor of Tenant in Tail doth release to the Recoveror with Warrant, this Warranty shall bind, and the Terr-Tenants may take advantage of it by way of Rebutter. *Cook* 3. Part, *Lincoln* College Case.

5. A. Tenant for life, the Remainder in Tail to B. the Reversion in Fee to B. and his heirs expectant; B. levies a Fine to C. and D. and to the heirs of C. to the use of them, and their heirs, and hath Issue, and dyeth before the Proclamations be passed, the Issue then being beyond Sea, the Proclamations are made, and afterwards the Issue returns, and makes claim to the Remainder in Tail: It was adjudged, That the Issue in Tail was bar-

red by the ſaid Fine and Proclamations: It was amongſt other things Reſolved, 1. That when the Proclamations paſs without any claim made by the Iſſue in Tail upon the Land, the right which deſcended to him was barred by the Statute of 4 H. 7. of *Fines*, and 32 H. 8. 2. Reſolved, That the Iſſue in Tail being heir, and privie, cannot by any claim which he can make, ſave the Eſtate Tail which deſcends to him; for that the Savings within the Statutes, extends to Strangers, and not to Parties or Privies: But if Tenant in Tail maketh a Feoffment, and the Feoffee levyeth a Fine with Proclamations, the Iſſue ſhall have five years after the death of Tenant in Tail; Contrary, if Tenant in Tail be Diſſeized, and the Diſſeizor levyeth a Fine, and five years paſs, and afterwards Tenant in Tail dyeth, there the Iſſue in Tail is barred. *Coke* 3. Part, 85. In the caſe of Fines.

6. The Caſe was, Tenant for life, the Remainder in Tail, He in the Remainder in Tail, levied a Fine to the Tenant for life, and her Huſband, upon a *Conuſſit Tenementa, &c.* to the ſaid Husband and Wife, for the life of the Wife, and dyed after Proclamations. It was Reſolved in this Caſe, That it was not any Diſcontinuance, or Bar of the Entail, but during the life of the Tenant for life; nor was it any Bar or Alienation of the Entail, after that Eſtate determined. Mich. 2 Jac. in *Cur. Ward.* The Earl of *Rutlands* Caſe. *Co.* 2. Part, 40.

7. In a Replevin, the Caſe was, A. Tenant in Tail of a Rent-charge out of the Manner of K. levyed a Fine of the Manner to A. C. and his heirs: This Fine with Proclamations was pleaded in Bar in an Avowry for the Rent, by the Heir in Tail; which Fine was levyed of this Rent *per Nomina Manerii, &c.* with an averment, That this Fine was levyed with an intent to Bar the Rent by agreement of the parties. The Defendant pleaded *Non-compoſed*; whereupon it was Demurred. It was the Opinion of *Harvy* Juſtice, and *Hobart* Chief Juſtice, That this Rent was barred by this Fine with Proclamations, by the Statute of 4 H. 7. and 32 H. 8. becauſe the Fine being levyed of the Land *inclusive*, gives the Rent, and is a Fine to Bar it, as well as a Fine of the Rent it ſelf: As, where Tenant in Tail of a Rent enters into the Land, and Enfeoffs a Stranger with Warranty, that gives the Land diſcharged of the Rent, and that Warranty extends thereunto. But *Hobart* Chief Juſtice ſaid, That this Fine was in Bar of this Rent, unleſs it had been expreſly mentioned in the Fine; and that this Fine is not within the Statute, not being levyed of any thing entailed. Hill. 22 Jac. in C. B. *Hallatt* and *Saunders* Caſe. *Cro.* 2. Part, 699.

8. In a Replevin, The Caſe was this, Sir *Thomas Wyatt* was Tenant in Tail, to him, and the heirs males of his body, the Reverſion in Fee to the King, he 35 H. 8. enfeoffed *G. Moulton* to the uſe of him and his Heirs; He had Iſſue *George Wyatt*, who had Iſſue Sir *Francis Wyatt*: The Plaintiff ſhewed, That Sir *Thomas Wyatt* 1 Mar. was Attainted of Treaſon, and Executed; which Attainder was confirmed by a ſpecial Act of Parliament, and that he ſhould forfeit all his Lands and Tenements, *jura conditionis, & Hereditamenta ſua*, and that they ſhould be veſted in the Queen without Office. Upon all this matter diſcloſed in Pleading, The Queſtion was, Whether after this Feoffment, Sir *Thomas Wyatt* had any Eſtate or Right remaining in him, which is not forfeited, and given to the Queen by this Attainder, and Act of Parliament? For if it be forfeited, the Plaintiff who claims in, under the Kings Title, is in, and hath good Right and Title; but if otherwiſe, Judgment ought to be given for the Defendant, who comes in under the Title of Sir *Francis Wyatt*. Becauſe this Caſe had been much controverted, and the ſame Caſe in ſubſtance which was Reported in *Plowd. Comment.* in *Walſingham's* Caſe; and afterwards, in the Common Pleas, in *Aulers* Caſe: It was ſolemnly argued by all the Juſtices, and Barons of the Exchequer, in the Exchequer Chamber, and the reaſons in *Walſingham's* much inſiſted upon: That it being a Feoffment by Tenant in Tail of the Gift of the King, (the Reverſion remaining in the King at the time of the Feoffment) there was no Diſcent of the Eſtate Tail, for it cannot be a Diſcontinuance, the Reverſion being in the King, and therefore the Eſtate Tail remained in him at the time of the Attainder, and then the forfeiture thereof was veſted in the King, by the Statute of 26 H. 8. The greater Opinion of the Juſtices and Barons, was for the Plaintiff. See the reaſons more at large in the *Coke* at large: And although it was very learnedly argued by ſome of the Juſtices, on the part of the Defendant, and ſome Exceptions taken to the Pleadings, which afterwards were over-ruled; for this cauſe, according to the greater Opinion of the Juſtices of the Exchequer Chamber, Judgement was entred for the Plaintiff in the Kings Bench, and ſo this *vexata* Queſtion is now Reſolved. And in the Argument of this Caſe, The Judgment which was given in *Ratcliffe* and the Lord *Sheffields* Caſe, 21 Jac. in the Exchequer Chamber, was affirmed to be good.

Pasch. 7 Car. in the Kings Bench, *Stone* and *Newmans* Case. *Cro.* 1. Part, 508. and 332 See the Lord *Sheffields* Case. *Hob.* 334, 335, 336.

9. Upon a Special Verdict, the Case was thus, Lands were given to Sir *Thomas Cotton* for life, the Remainder over, to *Cheney Cotton*, his eldest son, *& primogenito filio, & hæredi masculo* of the said *Cheney*, *& sic de primogenito in primogenitum filium*, the Remainder to the Heirs males of the body of the said *Cheney*; and for want of such Issue, the Remainder to *William Cotton*, his second Son, *& primogenito filio, in primogenitum filium*; the Remainder over to the said Sir *Thomas* and *William*, and the Heirs males of their bodies lawfully begotten: *Cheney Cotton* dyed without Issue, *William Cotton* having Issue, went beyond Sea; Sir *Thomas Cotton* 19 Eliz. levyed a Fine, with Proclamations, and afterwards, *Cotton* dyed in *Antwerp* beyond Sea, his son being within age: Sir *Thomas Cotton* by Indenture, limitted the use of the Fine to himself for life, the Remainder over, to *Robert Cotton*, his third son, in Tail; Sir *Thomas* dyed, *William* the son, being yet within age, Entred, and 31 Eliz. Leased the Lands to the Defendant, at Will. This Case was long debated, and often argued at the Bar; and at last it was agreed, and Resolved by the Justices, That for one moyty of the Land, the Infant was bound, for that Sir *Thomas Cotton* had an Estate Tail in a moyty; for he was the Issue of the body of the Conusor; and for the other moyty, the Fine levyed by Tenant for life, *William* the Father being Tenant beyond the Sea: It was holden by the Lord *Anderson*, *Windham*, and *Walmesley* Justices, That the Infant was not barred, notwithstanding the Objection, That *William* the Father never returned, and notwithstanding the words of the Statute of 4 *Hen.* 7. And it was said by the Lord *Anderson*, That although *William* the father did not return, yet, if the son make not his Claim within five years after the death of his father, being of full age, and without impediment, he shall be barred. Mich. 33 Eliz. in C. B. *Cottons* Case. *Leon*, 211.

10. Husband and Wife are Joynt-Tenants for life, the Remainder to the Husband in Tail; the Husband suffers a Recovery as Vouchee; It was holden, That this Barrs the Remainder, although the Wife joynes not; for he was a lawful Tenant to the Precipe, and the Husband coming in as Vouchee, comes in in Privity of the Estate, and the Recompence goeth to the Issue in Tail: But if the Wives Inheritance had been joynt with the Husbands, it might have been a doubt, Whether the Issue had been barred: But yet it seems he had been barred for the moyty, in respect of the Recovery in value of the Moyty. See *Cook* 6. Part, 32. Sir *William Fitz-Williams* Case.

11. Note, It is holden commonly, That Tenant in Tail cannot allien, or charge the Land entailed, without a Fine or Recovery: And yet if a Disseisor maketh a Gift in Tail, and the Donee in consideration of a Release by the Disseizee, of all his right to the Donee, Granteth a Rent-charge to the Disseizee, and his Heirs, proportionable to the value of his Right; This shall binde the Issue in Tail, although that the Estate Tail doth continue, and this is in respect of the Recompence. *Cook* 1. Part, *Institutes*, 143.

See more of this Division, in *Lib.* 1. in the Title *Of Common Recovery*; And in the Title *Barr*; And in the Title *Fines*; and other Titles before.

Tales.

1. AT the Aſſizes, Tryall was of a *Modus Decimandi*; One of the principal Pannell did appear only upon the *Venire facias*: The Queſtion was, If in ſuch caſe, a *Tales* might be *de Circumſtantibus*. It was holden by the Court, That ſuch a *Tales* might be awarded. See 30 Eliz. *Dyer*, acc. And it was ſaid by the Court, That at the Common-Law (if not in Appeal) the *Tales* might be of odd number, *ut quinq; Tales*, or *novem Tales*; But now ſince the Statute of 35 H. 8. the *Tales* may be even or odd. But it was adjudged, That in no Caſe, where a Tryall is at the Barr, ſhall not any *Tales de Circumſtantibus* be awarded. Mich. 11 Jac. in C.B. *Norton* and *Lyſters* Caſe. *Godbolt*, 203.

2. In a *Replevin*, 24. were returned upon the *Venire facias*; And upon the *Habeas Corpora*, only 23 were returned, and the Jury did not appear full: And a *Tales* was awarded and tryed for the Plaintiff; And it was holden good, becauſe the *Venire facias* was full returned. Trin. 12 Jac. *Trinhouſe* and *Smith's* Caſe. *Brownlow*, 1. Part, 183.

3. In Treſpaſs upon the generall Iſſue pleaded at the Aſſizes, One of the Jurours of the principall Pannell appeared only; And at the Prayer of the Plaintiff, a Pannell of *Tales de Circumſtantibus* was returned by the Sheriff in this manner: The Title was, *Nomina Decem talium*, and under that he Returned 11. Jurours: In this Caſe, concerning *Tales*, theſe Points were Reſolved; 1. That when but one of the principal Pannel appeareth, the Court may award 11. *Tales* by the words of the Statute of 35 H.8. Cap. 6. That in the principal Caſe, the Miſpriſion of the Clerk ſhould be amended; and (*Decem*) put out of the Title, and then the Title ſhall be *Nomina Talium* only, and good enough. 2. That if at the time of the *Tales* granted, the principal Pannel ſtood, and afterwards is quaſhed; yet the *Tales* ſhall ſtand, for it is ſufficient, if there were *Tales* at the time of the granting of it. 3. If one of the Jurours dyeth before appearance, or before the Verdict given after he is charged, *Tales* ſhall be awarded. 4. That the *Tales* ought to be under the Number of the principall Pannel; and although at the Common-Law *Tales* ought to be of even Number, yet ſince the Statute, it may be of incertain number. 5. That in every New *Tales*, the Number ſhall be diminiſhed: For if the firſt be *Decem Tales*, the ſecond ſhall be *Octo Tales*; but if the *Tales* be awarded, and afterwards quaſhed by Challenge, the party may have *Tales* of the ſame number. 6. If the principal Pannell be quaſhed, the Tryall may be by *Tales* only: and if the *Tales* do not make an Enqueſt, a *Tales* to ſupply, the firſt *Tales* may be granted. 7. The *Tales* ought to be of the ſame Quality as the Principals are; and therefore if the firſt be *per medietatem Linguæ*, the *Tales* ſhall be accordingly. 8. In an Aſſize, If ſo many of the Jurors make default, that there are not 12, the Juſtices of Aſſiſe cannot award a *Tales de Circumſtantibus*, becauſe the Statute doth not extend to an Aſſize. *Cook* 4. Part, 103, 104. *Denbowds* Caſe.

4. In an *Fjectione Firmæ* of a Cole-Myne, Judgment was for the Plaintiff: Errour brought, and aſſigned, Becauſe the *Venire facias* was awarded in the time of Queen *Elizabeth*, and a *Diſtringas* thereupon, *Et pro defectu Jurator.* an *aliat Diſtringas* was awarded in the time of King *James*, which is, *Quod diſtringas Juratores nuper ſummonit. in Curia noſtra*; Whereas it ought to have been *in Curia nuper Reginæ*: And by virtue of this Writ, a Triall was had by the ſame Jurors with a *Decem Tales* awarded *de Circumſtantibus*. And *Knowls* and *Beckinſhawes* Caſe was vouched; Where a *Venire facias* being awarded in the Common-Pleas, and Returned in the time of Queen *Eliz.* and an *Habeas Corpora*; and an *Habeas Corpora pro defectu Juratorum* was awarded in the time of King *James*, which was, *Quod Habeas Corpora Juratorum nuper ſummonit. in Curia noſtra et apponat eis Decem Tales*: and a Triall being thereupon had, the Judgment was Reverſed. But it was Reſolved, That in the principal Caſe, the Writ ſhould be amended, and the Triall was good. And the Difference was taken between the principal Caſe, and that Caſe of *Knowls* and *Beckinſhawe*: for there the *Habeas Corpora* is of the Jurours *ſummonit in Curia noſtra*, [*Et quod ad illos apponat Decem Tales*, ſo that the Sheriff had not authority *apponere Decem Tales*, but to the Jurours firſt ſummoned *in Curia Regis*, and there was not any ſuch: But it is not here commanded by the Writ, any *Tales* to the Jury firſt ſummoned: and ſo there is a great difference betwixt this and that caſe. So the Opinion of the Court was, That the Writ was amendable: and the Judgment was affirmed. Hill. 2 Jac. in B. R. rott. 537, *Comyn* and *Kynaſtons* Caſe. *Cro.* 2. Part, 161.

5. In

5. In Treſpaſs before Iſſue tryed, the Sheriff was Challenged, and a *Venire facias* iſſued to the Coroners; At the *Niſi Prius* for want of Jurors, a *Tales* was prayed by the Plaintiff, and as appeareth by the *Poſtea* returned, the *Tales* was returned by the Sheriff, and that *per mandatum* of the Juſtices; and Judgment was given in the Kings-Bench for the Plaintiff. Errour was brought in the Exchequer-Chamber, and that matter aſſigned for Errour. It was Reſolved to be Errour; For when the Proceſs is once awarded to the Coroners, they ſhall ſerve all other mean Proceſs, and they ought to return the *Tales*, and not the Sheriff, and the ſame is not helped by the Statute of *Jeofails*, for it is the Award of the Court, to command the Sheriff to return the *Tales*. The Judgment was Reverſed. Mich. 45 Eliz. in B. R. *Corn* and *Paſlowes* Caſe. *Telverton* 15. See Trin. 36 Eliz. *Wie* and *Morgans* Caſe adjunged acc.

6. In Errour, the Caſe was; Upon a Recovery by Verdict, upon Challenge of the Sheriff, The *Venire facias* iſſued to the Coroners; and at the Triall at the Aſſizes, a *Tales* was awarded; the name of one of which *Tales* was *Gregory Grigſon*, and upon the *Poſtea* returned by the Clerk of the Aſſizes, the *Tales* was returned to be by the Sheriff; but the entring up of the Judgment, was made *per Coronatores*, and the name of the Juroar upon the *Tales*, which was *Gregory*, was returned by the Clerk of the Aſſiſe according to his true name: but in the Roll of the Judgment he was named *George Grigſon*: In this caſe, the Judgment was Reverſed for 3. cauſes, 1. Becauſe the names of the Coroners ought to be added to the *Tales* in the foot of the Pannell, and in this caſe their names were *tantum in Dorſo*; which was upon the Retorn of the firſt Pannell. 2. Becauſe it appeareth upon the Retorn of the *Poſtea*, that the *Tales* were retorned by the Sheriff, which is Errour, when the firſt Proceſs is iſſued to the Coroners. 3. Becauſe the name of the Juror upon the *Tales*, which is *Gregory*, is made in the Entry of the Judgment to be *George*. For theſe cauſes, the Judgment was reverſed. Hill. 9 Jac. in B.R. The Lord *Candiſh* and Sir *George Savill*'s Caſe, *Yelv.* 213.

7. In an Action upon the Caſe for Slander, againſt a Merchant-Stranger; It being found for the Plaintiff, and 200 l. damages given, It was moved in ſtay of Judgment, That the Tryall was by *Niſi Prius* in L. by a partiall Jury, becauſe upon the default of ſtrangers, one being Challenged, and drawn out, a *Tales* was awarded *de Circumſtantibus* by the Juſtices of *Niſi Prius*; whereas a *Tales* could not have been granted in this Caſe by the Statute of 35 H. 8. For that Statute ſpeaks only of ſuch Jurours which have 40 s. Freehold, which cannot be intended of Aliens, which cannot have Freehold. It was the Opinion of the Juſtices, That when the ſaid Statute comes to the Clauſe which gives, that a *Tales* be granted by the Juſtices of *Niſi Prius*, It ſhall be intended, ſuch perſons as the firſt Jurors were; which ſhall be of Aliens as well as of Engliſh, where the caſe requires it: And Aliens may be of a County or place where the *Niſi Prius* is to be taken; and although an Alien cannot purchaſe Land of an Eſtate of Freehold, yet he may have an habitation or a houſe to dwell in. And the Opinion of the Juſtices was, That where the default was only of Strangers, the *Tales* might have been awarded only of ſtrangers: as, where a thing is to be tryed by Inqueſt within two Counties, and thoſe of one County appear, but not thoſe of the other, the *Tales* might be of the other County only. Mich. 35 Eliz. in B. R. Sir *Julius Ceſar* and Carlins Caſe. *Popham*, 36, 37.

8. In an *Ejectione Firmæ*, after Verdict, it was moved in Arreſt of Judgment, That upon the *Venire facias*, no Retorn was endorſed, nor any name of any Sheriff appeared upon the back of the Writ; Nor that *Executio brevis patuit*. *&c* appear *in quodam pancllo*: But a Pannell of the Jurours with their Manucaptors, was annexed to the ſaid Writ; And alſo *Tales* was awarded, and the Pannell of the *Tales* was annexed, but no Retorn of them, nor of the name of the Sheriff to it: But the *Poſtea* made mention, that they were retorned *per mandatum Juſticiar.* It was Reſolved in that caſe, That that would not ſerve; For the Sheriff ought to retorn the Jurours, and the *Tales* alſo; and where there is not any Retorn of the ſame, the ſame is not remedied by the Statute of 18 Eliz. or by any other Statute. Mich. 36 Eliz. in B. R. *Cook* 5. Part, 42. *Rowlands* Caſe.

Tender

Tender *and* Refusall.

What shall be a good Tender, or Refusall; What not. By whom, of what, and upon what; And where Issue shall be joyned, upon tender, and upon Refusall; and the one or the other traversable at Election.

1. IF a Feoffment be made, upon Condition, That the Feoffor shall pay a certain sum of money at a day certain, &c. If tender of the money be made accordingly, and the Feoffee doth refuse to receive it, the Feoffor and his heirs may enter, and then the Feoffee is without remedy to recover the money at the Common-Law, because it was his folly, that he would not receive it when he might. So, if an Obligation of 100 l. be made for the payment of 50 l. at a day: and at the day, the Obligor Tenders the money, and the Obligee refuse it: In that case, although in an Action of debt upon the Obligation, the 50 l. may be received, because it is still a duty parcell of the Obligation; yet if the Defendant plead the Tender and Refusal (wherein he must say *uncore prist*) and tender the money in Court, if the Plaintiff will not then receive it, but take Issue upon the Tender, and the same be found against him, he hath lost the money for ever, because he hath made two Refusals, when he might have had it. *Cook* 1. Part, *Institutes*, 207.

2. A. brought Debt for 40. Quarters of Mault, and declared upon two Obligations, in which the Defendant acknowledged himself to owe 20 Quarters to be delivered at D. such a day; and if he failed, to forfeit 40. Quarters. The Defendant pleaded a Tender, and that the Plaintiff refused, and demanded Judgment, if Action. Upon which the Plaintiff did Demur. In this case, Judgment was given for the Plaintiff, because the Defendant did not plead, *uncore prist*; *scil.* that he was yet ready. Mich. 28 Eliz. *Dyer*, 24.

3. Debt was brought against the Executors of J. S. in the *Debet et Detinet*, for Rent behind at the death of the Testator. They pleaded, That part of the Land was evicted in the life of the Testator; and for the residue of it, that they offered it, and were yet ready to pay it: Upon which, the Plaintiff did Demur: but yet afterwards he accepted of the money according to an apportionment, without Costs or Damages on either side. Hill. 7 E. 6. *Dyer*, 81, 82.

4. A man was bound to pay 20 l. viz. 10 l. at Michaelmas, and 10 l. at Christmas: He tendred the 10 l. at Michaelmas, and it was in *Pollards*, which was after abased; and he failed of the payment of the 10 l. Upon which, an Action of Debt was brought; And upon Tender pleaded: In this case, the Judgment was, That because in default of the Plaintiff himself, he received not the first 10 l; that he should have it in *Pollard*; and the second payment in Sterling money. Hill. 7 E. 6. *Dyer*, 82.

5. A man was bound in 20 l. to pay 10 l. He pleaded, That at the day he was ready to pay the sum, and a Tender at the place; In Debt brought, it was adjudged, That he ought to plead, that he was yet ready, although there was a place certain named where the payment should be made: But otherwise, it was said, it was of a Collateral all thing. Trin. 5 Mar. *Dyer*, 151. *Paull's* Case.

6. Debt upon an Obligation, the Defendant demanded Oyer of the Obligation, and afterwards he imparled; and then he pleaded a Tender at the day and place, and that there was none to receive it, and that he now was ready; and did not say, That he was at all times ready. It was adjudged, That the Plea was good, and that the same had excused him of the forfeiture; and that he should not by the Imparlance be estopped to plead, That he was now ready, &c. Pasch. 13 Eliz. *Dyer*, 300. See Mich. 19 Jac. in B. R. *Steward* and *Cole's* Case, *Cro.* 2. Part, 627. acc.

7. A Copyholder in Fee surrendred to the use of J. S. and his heirs, upon Condition, That if he paid to the Mortgagee 250 l. of lawful money of *England*, at the Mansion House of the Obligee, That the Condition should be void; at the day and place he tendred the money to the Mortgagee, but parcell of it was in Spanish money: The Mortgagee refused it, and at the last instant of the day, the Mortgager tendred the whole money in bags; who refused it: And if it was a good Tender, or not, was the Question? In this case, these Points were Resolved, 1. That although that the time convenient for the Tender of the money be before Sun-setting, so as the money may be told, yet if the Tender be made to him who ought to receive it at any time of the day in which it ought to be paid, and the other refuseth it,

it, that the penalty of the Obligation is saved, and the party needs not to make a new Tender at the last Instance of the day. 2. Resolved, That the Tender in Spanish money being made good by proclamation, was good. 3. Resolved, That the Tender in bags was good, if there be the true sum, without the telling or numbring of the money, and the Mortgagee ought to tell the money, or he may accept of it without telling of it, if he pleaseth. Trin. 43 Eliz. in C. B. *Cook* 5. Part, 114. *Wades* Case.

8. If a man enfeoffeth another man by Deed, upon Condition, That the Feoffor shall pay a certain sum of money; in such case, the Feoffor may by accord betwixt them give the Feoffee a Horse, or a Gold Ring, &c. in satisfaction, and yet the money in such case is collateral, having respect to the Land; for if Tender be made, and refusal, he shall never pay the money; and therefore it is meer collateral, *quia reprobata pecunia in hoc casu liberat solventem*. So if a man by Obligation be bound in 100 Quarters of Wheat, upon Condition to pay 50 Quarters, he cannot give money or other thing in satisfaction thereof, because the Contract was not originally for money, but for a Collateral thing; and in such case, if the Obligor tendreth the same at the day, and the other refuseth, he shall plead the same, without saying, That he is yet ready, because that Corn is *bonum perituram*, and it is a charge to the Obligor to keep it. *Cook* 9. Part, 79. in *Peytoes* Case.

9. In Debt upon an Obligation, the Condition was, That if the Obligor deliver to the Plaintiff the Obligee, at such a day and place 20 l. or 10 Kine, at the then choice of the Obligee, &c. that then, &c. It was the clear Opinion of the Court in this case, That the Defendant in pleading the performance thereof, ought to tender to the Plaintiff as well the 20 l. as the 10 Kine; and for default thereof, Judgment was given against the Defendant. Mich. 30 Eliz. in C. B. *Fordley's* Case. *Leon.* 68.

10. In Debt, upon an Obligation, to stand to an Award; The Plaintiff set forth, That the Arbitrators awarded, 1. That the Defendant should pay to the Plaintiff 10 l. 2. That the Defendant should yield up, surrender, and relinquish to the Plaintiff all such Houses and Tenements which he had in possession, by reason of the Custody of the Plaintiff; so that the Defendant should acquit and discharge the Plaintiff of such an Obligation. The Defendant to the first pleaded, That he was ready, and yet is. As to that, the Opinion of the Court was, That the Plea was not good; for that the Defendant ought to have pleaded a Tender. To the second, the Defendant pleaded, That he had yielded up, &c. all such houses generally, without shewing which in certain; And for that cause, the Court was clear of Opinion, That the Plea was not good. To the third, the Defendant pleaded, *Quod Querens non fuit damnificatus*. The Court held the same to be insufficient, for he ought to have shewed, How he had discharged him; & it is not sufficient to answer only to the damnification. It was adjudged for the Plaintiff. Mich. 30 Eliz. in C.B. *Brett* and *Anders* Case, *Leon.* 71.

11. In *Ejectione Firmæ*, the Case was; A. was seised in Fee, and made a Feoffment upon condition of payment of money on the part of the Feoffee at a certain day; before which, the said A. died, his son and heir being within age: Afterwards, at the day of payment, a Stranger at the Instance and request of the Mother of the Heir, tendred the money to the Mortgagee in the name of the heir being within age, who refused it: It was Resolved in this case, That the same was not a sufficient Tender to redeem the Land according to the Mortgagee; for it is found by the Jury, That the Heir at the time of the Tender was within age generally, not particularly, of 6. or 10. years, &c. then it might well stand with the Verdict, That the Heir at such time was of the age of 18 years, at which age he is by Law out of the Ward of his Mother, or any other *Prochin Amy*: But if the Jury had found, that the Heir at the time of the Tender, was of tender years, viz. of the age of 14. years, in which case by Law he might be in Ward, in such case the Tender had been good. Mich. 28 Eliz. in B.R. *Watkins* and *Atwell's* Case. *Leon.* 34. See *Cook* 1. Part, *Institutes*, 206. acc.

12. Debt upon an Obligation, for not performing of an Award; The Defendant shewed, That the Arbitrament was; That whereas there was a Controversie betwixt the Plaintiff and him, concerning the Leasing of a house in C. which the Defendant claimed from J.S. one of the Plaintiffs, for 6. years at 15 l. *per annum* quarterly, which Rent was behind for a year; That he should pay for this Rent to J. D. the other Plaintiff, 13 l. 6 s. 8 d. and that he should enjoy it for 3. years and an half, and should pay half a charge for it to the said J. D. 15 l. at the Annunciation, and Mich. or within 40 dayes after; and that if he failed of the payment, that then the Award for his enjoying of it, should be void. The Defendant pleaded payment of the said 13 l. 6 s. 8 d. at the days; and pleaded the Tender of the said Rent and all the Tenements, and that none were there to receive it. Upon which it was Demurred. In this case, it was Resolved, 1. That this was a sum in gross,

groſs, and payable without demand, at the perill of the Plaintiff. 2. That this Tender (admitting it might be upon the Land) is not ſufficient, for that it is not pleaded to be made the firſt Inſtant, as it ought to be. 3. That this Conditional Award was good, for that it is abſolute, if the Defendant pay the Rent. It was adjudged for the Plaintiff. Paſch. 14 Jac. in B.R. *Furſer*, *Bond*, and *Prowds* Caſe. *Cro.* 2. Part, 423.

13. A. ſeiſed in Fee, by Indenture in Conſideration of blood, Covenants with B. his Nephew, to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of B. in tail, the remainder to the right heirs of B: Proviſo, That if the ſaid A. by himſelf, or by any other during his natural life, tender to B. a Gold Ring, to the intent to make void the ſaid Uſes, that then the ſaid Uſes ſhall be void: And afterwards, A. 26 Eliz. is Attainted of Treaſon, and Outlawed upon it: The King makes a Leaſe of the Lands to C. and D. for 40 years; the Attainder is confirmed by Act of Parliament; and Enacted, That the ſaid Act ſhall not extend to make any Leaſe void, made by the King after the ſaid Treaſon. Alſo enacted, That all perſons which claim any Eſtate or Intereſt in Lands not enrolled ſince 18 Eliz. ſhall within two years after the Seſſion of that Parliament, ſhew and bring into the Court of Exchequer, his or their grant or aſſurance, the effect thereof to be entred and enrolled of Record, or elſe the Aſſurance to be void: The King reciting the Proviſo, and the benefit thereof given him by Act of Parliament, authorizeth E. to deliver the Gold-Ring to B. to the intent to make void the Uſes; he renders the Patent to B, and makes a Tender to him; which he refuſeth to accept of, and Certifies the ſame into the Exchequer: In this caſe, it was Reſolved, (amongſt other things) 1. That the Condition in the principal Caſe, *ſcil.* the Tender of the Gold-Ring, was not annexed to the perſon of A; but that any one might make the Tender, and that it was given to the King by the Act of Parliament; and when a Statute gives a Condition to the King, the performance of it, which is the ſubſtance, and which is not inſeparably annexed to the perſon, is given to the King. 2. That the Tender and Certificate was good, without Office found: and if the party be grieved, he might traverſe it, becauſe it is a Record only to ſatisfie the King of his Title. 3. Reſolved, That preſently by the Tender, according to the Proviſo, the Uſes were determined, and the Land veſted in the King by force of the Act of Parliament. *Cook* 7. Part, *Engleſields* Caſe. See *Popham*, 10. the ſame Caſe.

14. Upon a Special Verdict, upon redemption of a Mortgage; The Mortgagor at the day and place of the payment of the money came, and ſaid to the Mortgagee, *Here, I am ready to pay you* (naming him) *the* 200 l. which was the money due; and yet he held it all the time upon his Arm, in bagges: In this Caſe, It was adjudged to be no Tender; For it might be Counters, or baſe money for any thing appeared. And it was ſaid by the Lord *Anderſon*, Chief Juſtice, That it is no good Tender to ſay, *I am ready* &c. Trin. 40 Eliz. in C.B. *Suckling* and *Conrys* Caſe. *Noy*, 74.

15. In a *Replevin*, the Defendant made Conuſans as Bayliff to his Father for a Rent-Service; The Plaintiff confeſſed the Tenure, but alledged, That at the day of payment, he was upon parcel of the Land, and offered to pay it, and remained there till after Sun-ſetting: The Defendant (*proteſtando*, that he made no ſuch Tender) ſaid, That after that, and before the Diſtreſs, at ſuch a day, he at the place demanded the Rent, and none came there to pay it; for which he did Diſtrein; and avers, That neither the Plaintiff, nor any other, neither at the time of the Diſtreſs, nor at any time after, offered to pay the Rent. It was adjudged for the Defendant; and a difference taken between this and Homage, where one makes a Tender to the party, and he refuſes, there he cannot Diſtrain, becauſe it is a perſonal thing, which cannot be performed by another hand, as payment of a Rent may. And it was agreed, That the Tender there at the day, is not material; but if he had tendred it when the Diſtreſs was taken, then the Diſtreſs had been wrongful. Hill. 15 Jac. in C.B. *Crawley* and *Kingsmills* Caſe. *Hutton*, 13. *Hob.* 207. acc.

18. A Pariſhioner of L. in *Eſſex*, brought an Action upon the Caſe againſt the Parſon of L. and ſet forth, That he at the Pariſh of L. had layed out for the Parſon 15 Cheeſes for his Tythe; and the Defendant ſuffered them to remain in the houſe of the Plaintiff for ſuch a time, and did not fetch them away. In this caſe, It was ſaid, 1. That Action upon the Caſe did not lye, for the refuſing to receive the Tythes. 2. That the Declaration was not good, in as much as the ſetting forth was within the Pariſh of L, and it doth not appear, that there was any Tender at the houſe of the Plaintiff. It was alſo Objected, That the Tender alſo ought to be made at the Church, or to the Parſon, or Rector, and for that the Tender not being alledged to be at his houſe, it was not ſufficient. But the Opinion of the Court in both Points was, 1. That the Action did lye. And, 2. That the Tender was very good, and that it ſhall be intended, that it was made at his houſe. Trin. 21 Jac. in B.R. *Wiſeman* and *Denham's*

Caſe. *Godbolt*, 329. *Lea*, 70. the ſame Caſe.

17. In an *Ejectione firme*, the Caſe was, a Leaſe for years was made upon Condition to be afterwards avoided by the Reverſioner upon the Tender of 6 d. the Leſſee enters; afterwards another enters upon him, and doth Diſſeiſe him. It was objected in this Caſe, That this tender of 6 d. to avoid the Leaſe, cannot be made after the Diſſeiſin, But the Opinion of the Court was, That the payment is a Collateral thing, and may be well made notwithſtanding the Diſſeiſin, Paſc. 9 Jac. in B.R. *Plat* and *Sheeps* Caſe. *Bolſtr.* 1. Part, 118.

18. If there be Mortgagor and Mortgagee of Land, and at the day of payment of the money for the Redemption of the Land (a ſtranger of his own head) in the name of the Mortgagor or his Heir, without his conſent or privity, tenders the money, and the Mortgageor accepteth thereof: In ſuch Caſe, it is a good tender and ſatisfaction, and the Mortgageor or his Heirs may re-enter into the Land immediately after ſuch tender and conſent thereunto. But yet the Mortgagee or his Heir may diſagree thereunto if they will. *Cook* 1. Part, *Inſtitutes* 206. acc.

19. If a Feoffment be made upon Condition to pay the Feoffee 20 l. upon a certain day. In this Caſe the Feoffor is bound to make tender thereof unto him if he be in *England*; but if he be out of the Land, he is not bound to ſeek him, nor to go out of the Realm unto him. Nor ſhall the Feoffee take advantage of his own abſence, but the Feoffor ſhall enter upon the Land, as if he had duly tendred it according to the Condition, becauſe the Feoffee himſelf was the cauſe, that the Feoffor could not make due tender at the day limited for the payment thereof. See *Cook* 1. Part, *Inſtitutes* 210. *Litt.* Sect. 340. acc.

20. Note by *Warburton* Juſtice, That it was Reſolved in C. B. *per Curiam*, That where a Rent was reſerved upon a Leaſe, and the Leſſee bound by Obligation to payment, that in ſuch Caſe the Leſſee muſt pay it without demand; but in ſuch Caſe he is not bound to ſeek the Leſſor, but to tender it only upon the Land; for he hath bound himſelf to pay it, but ſtill as a Rent, and that where the Law *pill.* Trin. 11 Jac. in C. B. in *Baker* and *Spains* Caſe. *Heb.* 8.

21. A. ſeiſed in Fee of the Manors of W. and M. in the County of N. 12 Eliz. made a Feoffment thereof to B. and C. to certain uſes, with clauſe of Revocation upon tender of 40 s. and that after ſuch Revocation, he might limit new uſes. The ſaid A. made the like Conveyance of his Lands in the County of S. upon tender of 40 s. Afterwards A. tendred to the ſaid Feoffees one ſum of 40 s. to revoke the uſes raiſed upon both the Feoffments; and afterwards raiſed divers new uſes of the ſaid Manors, and dyed. It was Reſolved in this Caſe by the Juſtices, That by that tender, the uſes were not revoked, but that the Revocation was utterly void; for two ſeveral ſums of 40 s. ought to have bin tendred, for that they were ſeveral Indentures, and could not be ſatisfied by one ſum. Afterwards the ſaid Revocation was made good by a ſpecial Act of Parliament. Mich. 39 Eliz. in the Exchequer. Sir *Tho. Greſham's* Caſe. *Leon.* 89.

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2. *Tender of Marriage in Cauſe of Wardſhip; where good and requiſite; When not.*

1. IF the Lord Tender a Covenable Marriage to the Heir Female within two years, and ſhe marrieth within the two years, the Lord in ſuch Caſe ſhall not have the forfeiture of the Marriage, becauſe the only end which the Statute of *Weſt.* 1. cap. 22. giveth thoſe two years, is, for the Lord to make his Tender, or rather that he ſhould not loſe the advantage of his Tender, and the benefit of thoſe two years are given unto him as it were in lieu of forfeiture in Caſe the Heir Female ſhould refuſe his tender; for if he maketh Tender within the two years, and ſhe accept the ſame and marry, immediately after Marriage, ſhe is out of Ward. *Cook* 1. Part, *Inſtitutes*, 79. See 35 H. 6. Tit. *Gard.* 71.

2. Note, It was Reſolved by the whole Court, That Guardian in Knight Service ſhould have the ſimple value of the Heir without Tender: and that at the Common Law it was in the Election of the Lord to have the Marriage of the Heir, or to permit the Heir to marry himſelf; and ſo give recompence, *ſcil.* the value of it to the Lord for it; and that at the Common Law, not only a Writ *de valore Maritagii* did lye; but alſo a Writ of Intruſion *Maritagio non ſatisfacto*: and at the Common Law, If the Heir had bin Raviſhed and married, the Lord ſhould have recovered the value of the Marriage; which prove, that the value of the Marriage did appertain to the Lord without Tender. See *Cook* 5. Part, *Palmers* Caſe.

3. In *Valore Maritagii* the Plaintiff declared, That the Anceſtor of the Defendant dyed in his homage, and that the Land deſcended to the Defendant,

fendant, and that he tendred a competent Marriage to her, which ſhe refuſed: The Defendant denyed the Tender; upon which the Plaintiff demurred. In this Caſe, it was Reſolved, That the value of the Marriage did belong unto the Lord without any Tender. 2. That there was no forfeiture of marriage at the Common Law, but the ſame was given by the Statute of *Merton*, cap. 6. which did not extend to an Heir Female, but to the Heir Male only. 3. That if the Common Law would have forced the Lord to have made a Tender of Marriage to his Ward, it would have given all neceſſary circumſtances for the performance of it; as to have appointed a certain place where the Tender ſhould be made, and not leave the Lord, who was the ſuperiour, to ſeek out the Ward, who was his inferiour, to make the Tender. *Cook* 6. Part, 70. the Lord *Darcys* Caſe.

4. The Queen granted the Wardſhip and Marriage of the body of her Ward, ſaving to her the Land. The Grantee tendred a Marriage to the Heir, which was refuſed, and therefore the Grantee prayed, That he might retain the Land at the full age of the Heir for the value of the Marriage. It was holden in this Caſe, That neither the Statute of *Marlbridg*, nor the Statute of 32 H. 8. by which Statute the Court of Wards was erected, did give any Authority to retain the Land for the value of the Marriage. Mich. 9 Eliz. *Dyer*, 260.

5. Tenant in *Capite*, made a Feoffment in Fee to the uſe of his Feoffees and their Heirs, till the Feoffee pay 300 l. to him and his Heirs, and then to the uſe of the Feoffor and his Heirs; the Feoffee dyed, his Heir within age, the 300 l. is paid to the Heir, all this was found by Office, and the King ſeiſed of the Ward: Upon a *Monſtraus de droit* brought, it was Reſolved in this Caſe, That although the Heir was in Ward to the King, yet the Wardſhip ſhould be revеſted out of him; and that the King upon a Tender made, ſhould not have the value of the Marriage; for by the removal of the Kings hands, all the mean Contingents were removed. Hill. 13 Eliz. *Dyer*, 299.

6. In an Action upon the Caſe, the Plaintiff ſuppoſed, That the Defendants Father held of him ſuch Lands by Knights Service, and dyed in his homage, his Heir within age, and that he tendred unto him a convenient Marriage, and ſhewed what; and demanded of him the value of the Marriage. The Defendant taking the Tenure by Proteſtation, traverſed the Tender. It was the Opinion of the Court, That the Tender was not Traverſable. Then it was moved, That an Action of the Caſe did not lye in the Caſe, but the Plaintiff ſhould have brought a Writ *de valore Maritagii*. It was holden by ſome of the Juſtices, That Action upon the Caſe did lye, as well as a Writ *de valore Maritagii*. But becauſe the Plaintiff in his Declaration did not ſhew, That the Anceſtor of the Defendant was ſeiſed in Fee; The Court doubted, Whether the Declaration was good, and upon that would adviſe, *Et adjornatur*. Hill. 13 Car. in C. B. *Arrundell* and *Sanders* Caſe. *Cro.* 1. Part, 361.

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3. *Tender of Amends; When, and where good; where not: And of other matters concerning Tender made.*

1. NOte, It was Reſolved by the Court, That when a Diſtreſs is taken damage feaſant, that the party may tender amends untill the Cattel be in the Pound; but after they are there, they are *in Cuſtodia legis*, and then tender of amends comes too late. 2. Reſolved, That Tender of amends by a Bayliff, is not good, becauſe he cannot deliver a Diſtreſs which is taken, no more then he can change the Avowry of his Maſter, or demand a Rent upon a Condition to re-enter. Paſc. 43 Eliz. in B. R. *Pilkingtons* Caſe. *Cook* 5. Part, 119.

2. Note, and ſee *Cook* 8. Part, 147. In the ſix Carpenters Caſe, Tender of a Rent upon the Land before Diſtreſs makes the Diſtreſs wrongfull; Tender after the Diſtreſs, and before the Impounding or Imparking of the Diſtreſs, makes the Detainer, and not the Diſtreſs wrongfull, but Tender after the Impariment or Impounding, makes neither the one nor the other tortious, for that then the Tender comes too late, in regard the matter is then put to the Tryal and determination of Law. *Cook* 1. Part, *Inſtitutes* acc.

3. In Treſpaſs, the Defendant pleaded, That according to the Statute of 21 Jac. That he tendred amends before the Action was brought. The Plaintiff Replyed, That before ſuch Tender, that he ſued forth a *Latitat Teſte* the laſt day of the Term before, and upon that procured the Defendant to be Arreſted, intending to declare in Treſpaſs. It was Reſolved by the Court, That in this Caſe the Tender came too late. For aſwell as a Tender after an Original Writ, comes too late, ſo after an Arreſt upon a *Latitat*. For the Tender intended by the Statute, is to be immediately after the Treſpaſs, and before any Suit commenced. Trin. 8 Car. in B. R. *Watts* and *Bakers* Caſe. *Cro.* 1. Part, 192.

4. Note, It was Reſolved, That if there be Lord Meſne, and Tenant, and the Lord avoweth upon Diſtreſs upon a ſtranger, and not upon the Meſne; there the Tenant is without remedy to have aid upon the Meſne, becauſe that he is Tenant in Feeſimple, and he may plead any plea that the Meſne may plead; and the Meſne cannot joyn with the Tenant, becauſe the Avowry is not made upon the Meſne. But in ſuch Caſe the Tenant is not without remedy, but the Tenant may reſort to the Meſne, and ſhew to him his Caſe, and pray the Meſne to take his Cattel out of the Pound, and put in his own Cattel, and ſo demand acquittal of the Meſne; and if upon ſuch requeſt the Meſne refuſeth, the Tenant may have a Writ of Meſne againſt him, and in that ſhew, That he was diſtreined in default of the Meſne, and he ſhall recover his Coſts and damages againſt him, and by ſuch means the Meſne ſhall compell the Lord to avow upon him, and ſhall abate the Avowry made upon the ſtranger. But if in ſuch Caſe the Tenant ſueth a Replevin, and hath deliverance of his Cattel, and doth not make the requeſt to the Meſne as above is ſaid, Then the Lord ſhall avow upon the ſtranger, and the Tenant is without remedy through his own default. *Cook* 9. Part, 20, 21. in the Caſe of Avowry.

5. Note at the Common Law, If there be Lord, Meſne, and Tenant; and the Meſne truly doth his Service to the Lord Paramount; and yet the Lord doth diſtrein the Tenant paravail for them; at this time the Diſtreſs is tortious, and the Tenant is not diſtreined in default of the Meſne: but in this Caſe, If the Tenant paravail requeſt the Meſne to take his Cattel out of the Pound, and put in his own Cattel in lieu of them: Or if the Tenant hath a Replevin of his own Cattel, and requeſteth the Meſne to joyn and acquit him, and he refuſeth, by this matter *ex poſt facto*, the Law ſhall adjudg that the Tenant paravail was diſtreined in default of the Meſne; and if in a Writ of Meſne, the Meſne pleadeth, Not diſtreined in his default. It ſhall be found againſt him, otherwiſe the Tenant paravail ſhall be in no default, and ſhall have wrong, and yet he ſhall be without remedy: And it is all one to the Tenant if the Diſtreſs be wrongfull or not, if he ſhall not have any redreſs. And the Law hath ever endeavoured to put the Rule in Execution *Curia Domini Regis non debet deficere Conquerentibus in Juſticia exhibenda. Juſtitia eſt ſuum cuique tribuere.* *Cook* 9. Part, 111. *in fine* of *Mariel Treſham's* Caſe.

Tenures.

1. IT was found by Office, That A. held Land of the King as of his Honor of P. and other Lands as of his Manner of D. which came to the King by Attainder of Treaſon of the Marqueſs of L... It was the Opinion of the Juſtices, That it was not a Tenure in *Capite*: And it was holden, That at this day the King may create a Tenure in *Capite* if he give Lands to hold of his perſon, but not if he give Lands to be holden of a Manner, Honor, &c. And a Tenure in *Capite* muſt be immediately of the King, and created by the King himſelf; for a Tenure created by a Subject, can never be a Tenure in *Capite*, nor have any Prerogative annexed to it. And a Tenure in *Capite* of the perſon of the King cannot be releaſed, although he after Grants the Reverſion, for that it is not incident to the Reverſion, but to the perſon of the King. Mich. 30 H. 8. *Dyer*, 44.

2. It was holden by the Court, That a Tenure of the King as of the Honor of *Glouceſter*, whereof two parts came to the King by diſcent; and the third part by the Attainder of the Duke of *Buckingham*, ſhould not be holden to be a Tenure in chief of the King as of his perſon, nor give Prerogative of other Lands to the King. Trin. 36 H. 8. *Dyer*, 58.

3. *Humfrey Bohun* Earl of *Eſſex*, who held Manors of the King to be Conſtable of *England*, had Iſſue two Daughters, and dyed; the Daughters took Husbands, and the Husband of the youngeſt was made King; and they made Partition. It was in this Caſe Reſolved. 1. That there was a good Tenure reſerved, which was holden to be Grand-Serjeanty. 2. Reſolved, That the Daughters before Marriage might execute the Office by Deputies, and after Marriage, it ſhall be executed by the Husband of the eldeſt Siſter. Trin. 11 Eliz. *Dyer*, 285. *Humfrey Bohun's* Caſe.

4. If the King Grants Lands in Fee, and reſerves nothing, the Patentee ſhall hold of the King by Knight Service in *Capite*: So it is if the King ſaith, *ſine aliquo inde reddendo*; yet in ſuch Caſe, becauſe all Lands muſt be holden of ſome perſon, and by ſome Service, the beſt Service ſhall be intended for the King; and therefore in that Caſe againſt the

the expreſs words of the King; the Law in ſuch Caſe will create a new Tenure by Knight Service in *Capite*.

5. The King Granted Lands in Fee, *Tenendum de nobis et hæredibus noſtris per ſervitium unius Roſæ rubricæ annuatim ad feſt. Nativitatis Sancti Johannis Baptiſt. ſolummodo pro omnibus Servitiis.* It was Reſolved in this Caſe, That it was a Tenure by Socage in chief. In this Caſe, it was Objected, That if the King Grants Lands in Fee, and reſerveth nothing, or *ſive aliquo inde reddendo*, the Tenure ſhall be by Knight Service in *Capite*. 2. That the Tenure cannot be by a Roſe only, becauſe Fealty is incident, and ſo the King was deceived in his Grant. But it was Reſolved, That foraſmuch as Fealty is incident to every Rent Service, the Law ſhould annex Fealty to the ſaid Rent, ſo as the Tenure ſhould be by a Roſe and Fealty; and then thoſe words *pro omnibus aliis Servitiis*, ſhall be intended of other Services which the Law doth not imply nor add unto it; and that is a fair conſtruction, and as near the intent of the King as may be: And next, it is there ſaid, That if the King Grants Lands in Fee, and reſerves any Rent ſpecial, the Tenure ſhall be ſuch as he reſerves, be it Socage or other. *Cook* 6. Part, 7. *Wheeler's* Caſe.

6. Note, That by Treaſon committed, all Tenures, whether it be of the King or of other perſons, are extinct. But yet the Caſe was, The King was Lord, Abbot, Meſne, and C. Tenant, and the Tenant was Attainted of Treaſon; and after Office found, by his Letters Patents Granted over the Manor to B. and his Heirs, *Tenendum de nobis hæredibus et ſucceſſoribus noſtris et aliis Capitalibus Dominis feodi illius per ſervitia inde debita et de jure conſueta*: And although that in this Caſe it was Objected, That the Tenure ſhould be of the King becauſe that by the Attainder the Menalty was extinct, and therefore *nulla ſervitia fuerant debita vel de jure conſueta*. And 2. There is an expreſs Tenure reſerved to the King, and Lands cannot be immediately holden of two perſons, and therefore the words *Tenendum de nobis* ſhould ſtand; and the words *de aliis Capitalibus Dominis* ſhould be void. Yet it was Reſolved, That the words were ſufficient to create a Tenure in the Meſne, for ſuch was the intent of the King, That the Meſne who did not offend, ſhould not loſe his Services. *Cook* 6. Part, 6. Sir *John Maſins* Caſe.

7. A. held 59 Acres of Lands of the Manor of B. by Suit of Court, which Manor was holden of C. by Knight Service in *Capite*, and alſo held a Meſſuage and half an Acre of Land of the Manor of C. by Fealty and Rent, both which Manors were parcel of the Dutchy of *Lancaſter*: King *Hen.* 8. *Anno* 15. Granted to A. the Rent and Relief, and did Releaſe to A. and confirm his Eſtate in the ſaid Manors *Habendum et Tenend.* by Fealty only, *pro omni ſervitio ſeculari exactione et demand.* 19 H. 8. the King granted the Manor of C. to A. and his Heirs, *Habendum*, the Manors, Lands, Tenements, Rents, Services of the King by the Rent of 26 l. 10 s. and made Livery accordingly. In this Caſe (amongſt other things), it was Reſolved, That the ſaid 59 Acres, *Toft*, and half Acre of Land, ſhould be holden by Fealty only. For when the King releaſes, and Grants the Services to the Tenant and his Heirs, the ſame doth not extinguiſh the Tenure in the whole for neceſſity of Tenure; but there the Tenure ſhall be by Fealty. *Cook* 9. Part, 123. *Anthony Lowes* Caſe.

8. By the Common Law, if Office be found, But *de quo* the Land *tenetur Juratores ignorant*. It was taken to be an immediate Tenure of the King, and was ſufficient to entitle the King to Wardſhip. But now by the Statute of 1 Ed. 6. cap. 4. It ſhall not be ſaid to be a Tenure of the King in *Capite*, but a *Melius inquirendum* ſhall be awarded. But if upon the *Melius inquirendum* the ſame be found again incertainty, *viz.* *de quo vel de quibus Juratores ignorant*, in ſuch Caſe the beſt ſhall be intended for the King, *viz.* that it is a Tenure of the King by Knight Service in *Capite*. *Lea* 5. acc.

9. If Lands be given to hold of the King in Fee Farm, it is Socage Tenure, and yet this Tenure ſhall yield no Relief; the reaſon thereof is, becauſe the Law intends that the Farm or Rent which the Tenant payes for the Land, is the full value of the Land, and recompences all other profits of Tenure. See the Caſe of the Inhabitants of *Saffron Walden*, *Lea* 5. acc.

10. A man ſeiſed of Lands in Fee, which Lands are holden of a common perſon, ſueth Livery, or an *Ouſter le mayne* of thoſe Lands out of the Kings hands: Or if a man doth confeſs by any matter of Record, the Lands to be holden in chief of the King. This is a Tenure by Colluſion or Eſtoppel, and ſhall make the Lands to be holden of the King of whomſoever the Land was holden before; and the King ſhall have Wardſhip by reaſon of ſuch Tenure. See 7 E. 3. 37. acc.

11. Upon *à Dum clauſit extremum* after the death of J. F. Father of the Ward. It was found, That he held a Meſſuage and 20 Acres of Land in K. in the County of C. of the Defendant in Knight-Service, and that he did likewiſe hold one Meſſuage and eight Acres of Land in W. of the Queen, as of her Manner of E. by Fealty, and 3 s. Rent *per annum, et per quæ alia Servitia Juratores nesciunt*. Afterwards a *Melius inquirendum* was awarded upon ſuppoſal, that the Land was holden of the King by Knight

Knight Service; Upon which *Mellus*, it was found, That he held the said Meſſuage and eight Acres of Lands in W. of the Queen by Knight Service. The Queſtion was, Whether the Lands were holden of the King by Knight Service in *Capite* or not. It was holden in this Caſe by the Juſtices upon a Reference to them out of the Court of Wards, That the Tenure by Knight Service of the Queen found by the *Mellus inquirendum* ſhall be taken to be found of the Mannor of E. whereof the reaſon is, that the *Mellus inquirendum* is in its own nature at the Common Law but a ſupplement to the defect or uncertainty of a former Office. And ſo here, the Tenure being firſt found certainly of the Queen, as of a Mannor, and by ſome Service certain, and the uncertainty only for ſome part when the *Mellus inquirendum* comes, it perfects that, and ſo both make but one Office, and muſt be joyned together. Hil. 12 Jac. in *Cur. Ward. Inche* and *Rolls* Caſe. *Hob.* 50.

12. After the death of J. S. it was found by *Mandamus*, that he dyed ſeiſed of Lands, *Et quod tenentur de Domino Rege ut de uno groſſo per vicesimam partem unius feodi Militis.* It was holden by the Juſtices in this Caſe, That it was a Tenure by Knight Service in *Capite*; and that all Tenures in Chief are in groſs, and that the words *ut de groſſo*, were of no ſenſe at all in Law, and ſo were void. Hill. 13 Jac. in the Exchequer. *Spathurſt* Caſe. *Hob.* 91.

13. Note, when *Litt.* Sect. 118. ſaith, That every Tenure which is not Knight Service, is a Tenure in Socage, that he there ſpeaketh of Socage as it is largely taken, and ſo called *ab effectu*; that is, all Tenures which hath the like effects and incidents belonging to them as Socage hath, are termed Tenures in Socage, although originally Service of the Plow was not reſerved; as that if originally a Roſe, or a pair of guilt ſpurs, or a Rent were reſerved. *Cook* 1. Part, *Inſtitutes* 86. and 108. acc.

14. Lord, Meſne, and Tenant: the Meſne held of the King in *Capite* in Socage, and the Tenant held of the Meſne in Socage. The Tenant is Attainted of Treaſon, the King ſeiſeth the Lands, and Grants by his Letters Patents the Tenancy to J. S. *Habendum et Tenendum de nobis per Servitium Militare, et faciendo aliis Capitalibus Dominis feodi illius ſi qui fuerint, reddita et Servitia inde debentur, antequam ad manus noſtras devenerunt.* It was Reſolved in this Caſe, That the Tenure of the Meſne ſhould be revived, although that the King by his Letters Patents in the firſt place had reſerved to him other Services, becauſe that the King for his Honor and advancement of the ancient Right expreſſly intended, that the Mean ſhould be revived: And therefore it was Reſolved, That in that Caſe, the clauſe of the Reviver of the Mean ſhould be prevented; and that the Tenant paravail ſhould hold of the Meſne, as he held before the Attainder, and the reſtitution of an ancient Right ſhould be preferred. *Cook* 9. Part, 123. *Bowleyes* Caſe.

15. A man held Lands by Homage *et Servitium unius periam Calcarium deauratorum vel 6d. et inveniendum unum hominem in Terra London. cum arcubus et ſagittis per 40 dies tempore Guerre, in Borali Anglo locis predict. pro omni Servitio.* It was ſaid, That the ſame was a Tenure by Knight Service *per Minorem Serjantiam.* Hill. 8 E. 1. *Roll.* 86. *Jones de Moſes* Caſe. *Cook* 2. Part, *Inſtitutes* 3.

16. Note, it is ſaid, That in the County of *Weſtmerland* there is a double Tenure, viz. *unus per album firmam, alius per Carnagium*; and that the whole hold *per album firmam*, ſcil. Blanch Farm of common perſons after the death of their Anceſtors, ought to double the Farm by name of a Relief; but thoſe who hold by Carnage, ſhould pay for Relief the value of the Land for a year. *John Grimſtocks* Caſe. vouched in *Cook* 2. Part, *Inſtitutes* 9.

17. See 17 E. 3. Br. *Tenures* 69. A Tenure *ad inveniendum unum equum*, is Petty Serjeanty, becauſe it is not to be done by the body of a man.

Title.

Title.

Where, and in what Caſe, and in what Writs, or Actions, or Pleadings, the Party, Plaintiff, or Defendant, muſt make a Title; and what ſhall be a good Title, what not.

1. IN Intruſion upon an Accompt for a Rent in the Exchequer for the Queen: The Defendant pleaded, That before the Queen had any thing in the Land, That the Abbot of D. was ſeized in Fee, and that he, with the aſſent of his Covent, by Indenture, Leaſed the Land to A. B. by force of which he was poſſeſſed; which Eſtate the Defendant had: The Queens Attorney Traverſed the Leaſe, which was found againſt the Queen. It was the Opinion of the Juſtices in that Caſe, That although the Plea of the Queens Eſtate was inſufficient to make a good Title, yet in Caſe of Freehold, the Queens Attorney cannot now take advantage of it. Paſch. 7 Eliz. *Dyer*, 238. It being in Caſe of a Termor, who muſt make a Title, or elſe he ſhall be put out of poſſeſſion.

2. Note, It was ſaid in Caſe of an Avowry, That it is ſufficient for the Avowant to plead his Freehold; but if the Plaintiff will Traverſe the ſame, he ought to make himſelf a Title; And *Periam* Juſtice ſaid, It is not ſufficient to make it of his own ſeizin, but he muſt make it Paramount his own ſeizin. Mich. 29 Eliz. in C. B. The Lady Rogers Caſe. *Goldsbr.* 65.

3. Treſpaſs againſt Husband and Wife, who juſtified, That J. was ſeized, and made a Leaſe to them for years, &c. The Plaintiff Replyed, *De ſon tort Demeſne. Abſque hoc*, that he Leaſed, &c. It was the Opinion of the Court, That the Plaintiff ought not to take a Traverſe, unleſs he firſt make a Title to himſelf; but otherwiſe it is, if the Defendant claim Common, or ſuch like, and no poſſeſſion of the Land. Mich. 29 Eliz. in C. B. *Foſter* and Potters Caſe. *Goldsbr.* 69.

4. In an Action upon the Caſe, the Plaintiff declared, That within the Mannor of D. there had been time of minde divers Copyholders, and during the ſaid time, there had been an Uſage in the ſaid Mannor, That every Copyholder for every Acre of Land, ſhould have Common in ſuch a Waſte of the Lords; and ſhewed, That he was a Copyholder and poſſeſſed of 20 Acres; and by reaſon thereof, ought to have Commons for forty Beaſts; and that the Defendant being Leſſee for years of the Mannor, had made a Coney-grey within the Waſte, by which he ſo digged the Waſte, that his Beaſts could not take their Common as they were wont. It was Objected, That a Copyholder could not preſcribe, but in the Right of the Lord. But it was the Opinion of the Court, That although a Copyholder may not preſcribe but in Right of his Lord; yet by way of Uſage, as this Caſe is, It hath been adjudged, That he may make Title; and in the Principal Caſe, the Title is well made, and ſet out. Mich. 40 Eliz. in C. B. *Pearce* and *Bakers* Caſe. *Goldsbr.* 133.

5. In debt, by an Adminiſtrator, againſt the Adminiſtrators of one K. for not performance of Covenants, the Caſe was, Tenant for 31 years, deviſed to his Wife ſo long as ſhe ſhould be ſole, and a Widdow, the Occupation and Profits of his Term; and after her Widdowhood expired, all the Leaſe and Intereſt to R. his ſon, and dyed; the Wife had the Term by force of the Deviſe; He in the Reverſion, by Indenture, did give, and grant, bargain, and ſell all that his Tenement to the Wife and her Heirs for ever, and did Covenant to make further Aſſurance; and that at the making thereof, it ſhould be diſcharged of all former Bargains, Sales, Titles, Rights; and afterwards, he levyed a Fine; and after, the Wife married, and the ſon entred, and the Adminiſtrator of the Wife brought debt upon the Obligation againſt the Adminiſtrators of him in the Reverſion, and averred, That the time of the Feoffment, was charged with the ſaid Leaſe for 31 years. It was argued for the Defendans, That here the Term was extinct by the Grant and Sale, and then the Feoffment void, and thereupon no charge at the time of the Feoffment; and *Wheelers* Caſe 14 H. 8. 17. was vouched, and a Title ſuſpended, is no Title. On the other ſide, it was ſaid, That it was not clearly diſcharged, becauſe of the poſſibility of the charge enſuing, although the charge was not then preſently executed; and in proof thereof it was ſaid, It was not all gone by the acceptation of the Feoffment, and then it is a Bargain; for a Leaſe for years is a Bargain, for there he hath *Quid pro quo*: And it is alſo a Title, as in *Nichols* Caſe: And then, although he hath nothing which he could releaſe, becauſe it was caſual, whether it ſhall happen or no, yet now when it happens, it is a charge, *ab initio*. It was the Opinion of the whole Court, That although it be no charge at the time of the Feoffment,

ment, yet it is not discharged; for if it be discharged, then it shall never be discharged afterwards: Wherefore all the Court agreed, That it was an Incumbrance, and not discharged; and Judgment was given for the Plaintiff. Mich. 30 Eliz. in C. B. *Hammington* and *Richards* Case. *Goldsbr.* 59. & 65.

6. In Trespass, The Defendant pleaded in Bar, That one A. was seized of the Messuage in Fee, and so seized the day and year &c. did Demise it to the Defendant for two years, from such a Feast past; by virtue of which he Entred, and was possessed; until the Plaintiff claiming by colour of a Deed made by the said A. where nothing passed by the Deed, upon which the Defendant Entred, &c. The Plaintiff replyed by Protestation, That the said A. was not seized; and for Plea, said, That he did not lett to the Defendant: Upon that, Issue being joyned, it was found for the Plaintiff. It was moved, That Judgment ought to be against the Plaintiff, because he hath not made any Title by his Replication. It was answered, and Resolved by the Court, That he need not make any Title in this Case, but it is sufficient to Traverse the Bar, without making Title in his Replication; and in as much as it is acknowledged by the Defendant, that A. did Demise it to the Plaintiff, and that this is a Lease at Will, at the least not deserted by his own shewing, but by the Lease made to the Defendant; this being Traversed, and found against the Defendant, the Plaintiff by the acknowledgment of the Defendant himself, hath a good Title against him, to enter into the Land; and by it, the Defendant by his re-entry, is a Trespasser: Wherefore the Court held the Replication good, and Judgment was given for the Plaintiff, 21 E. 4. 1. Mich. 34 and 35 Eliz. in B. R. *Fenner* and *Fforts* Case. *Pophl.* 1. & 2.

7. In a *Quare Impedit* brought, these points were Resolved, 1. If the Plaintiff in a *Quare Impedit*, be Non-suit after appearance, the same is peremptory, and a good Bar, in another *Quare Impedit* brought within the six moneths; because the Defendant upon Title made, by which he is become Actor, shall have a Writ to the Bishop to Admit his Clerk to the same Church, which is a good Bar in another *Quare Impedit*; so if the Plaintiff discontinueth his Suit, the Defendant upon Title made, shall have a Writ to the Bishop: But if the *Quare Impedit* within the six moneths, abateth for false Latine, or insufficiency of former, the same is the default of the Clerk, and is not peremptory to the Plaintiff, but that the Plaintiff may have a new *Quare Impedit*: But if the Plaintiff be made a Knight, pendant the Writ, the Writ shall abate, and the Defendant upon Title, shall have a Writ to the Bishop; And it is peremptory to the Plaintiff, because it is the Plaintiffs own Act. *Cook* 7. Part, 27. Sir *Hugh Portman's* Case.

8. A *Quare Impedit* was brought against the Archbishop of *Canterbury*, the Bishop of *Lincoln*, and the Incumbent, they made default at the Grand Distress; upon that, the Plaintiff made Title, and had a Writ to the Bishop, and the Writ was awarded to enquire of the damages of the Plenarty, and at whose Presentation, and how long time since the Vacation, and of what value the Church is *per annum*; all which points were Returned by Inquisition; and Judgment was given for the Plaintiff to recover his Presentation, and he had a Writ to the Bishop of *Lincoln*. Trin. 7. Eliz. Dyer, 240, 241.

9. An Assize, or *Novel Disseisin*, was brought of a Rent in the County of *Middlesex*, and made his Title, that R. was seized of the Manor of S. holden in Soccage, and, by his Will, Devised to the Plaintiff a Rent issuing out of his said Manor, for his life; and by the same Will, Devised the said Manour to his Wife, to have from the day of his death for 15 years, and dyed; the Wife Entred, and paid the Rent; the Rent after came in Arrear, and the Demandant (the Plaintiff) came to the Manour house, and there remained until Sunset, *petendo* the Rent and Arrearages, and the Defendants did not pay it, but denyed to pay it, and so disseized the Plaintiff of the said Rent. One of the Defendants made a default, the other pleaded, *Nul Tort, Nul Disseisin*; the Assize found for the Plaintiff; *scil.* the Seizin, and Disseisin. The only Question was, Whether the payment of the Rent by the Wife, who was only Tenant for years, was a sufficient seizin of the Rent to maintain the Assize. In that Case it was Resolved, That the payment by the Devisee for years, was not a sufficient payment for to maintain the Assize against the Tenants of the Lands, after the years determined. Note in this Case, The Plaintiff made his Title in his Plaint, which was the cause of remembring this Case under this Title. *Cook* 6. Part 56. *Bedingam's* Case. See more where the Plaintiff shall make his Title in an Assize in his Plaint, 7 E. 6. *Dyer*, in the *Serjeants* Case, where an Assize was brought *de quadam pallina Decimarum*; the Demandant made his Title in his Plaint. And see *Cook* 8. Part, 46. in *John Webbs* Case accordingly.

10. Note, It was holden by the Court, That if a man hath Common in a Waste for an hundred Sheep, as appurtenant to a house, and certain Acres of Land, Meadow and Pasture; and he purchaseth another house, with certain Lands, which hath

hath alſo Common in the ſame Waſte for another hundred Sheep, as appurtenant to that by preſcription; If in Pleading he entituleth himſelf entirely for one Common appurtenant to both Houſes and Lands together, for two hundred Sheep, he hath failed of his Preſcription; for that he ought to make two ſeveral Titles, and Preſcriptions for the two hundred Sheep, and not to have joyned them both in one, becauſe that they are diſtinct Commons. Trin. 5 Mar. *Dyer*, 164. acc. See 4 Eliz. *Dyer*, 229. acc.

11. Debt brought for Rent due upon a Leaſe for years by the Adminiſtrator of J. S. and the Plaintiff Declared for Rent due ſince the death of the Inteſtate, and had a Verdict, and Judgment in C. B. Whereupon Error was brought, for that it doth not appear by the Declaration, whether the Rent ſued for, doth belong to the Adminiſtrator, or not; for that he makes not any Title to it, and for any thing that appeareth, it may belong to the Heir as well as to him: It was ſaid, That this exception was not good, being after Verdict, and *Non Detinet* pleaded, and when the Jury hath found *Detinet*; which was impoſſible, if the Inteſtate had been ſeized in Fee of the Rent: But the Court inclined to be of Opinion, That the Declaration was naught in ſubſtance, for the Plaintiff therein hath made himſelf no Title to the Rent, and all that is in the Declaration to entitle him, is only by way of Inference or Concluſion: The Court moved the parties, That the Declaration might be amended, paying Coſts, and a new Tryal by conſent, which was agreed unto, and done accordingly. Mich. 1653. in B. R. *Eaſton* and *Drakes* Caſe. *Styles*. 393.

12. In an Action of Aſſault and Battery, The Defendant juſtified a ſervant to J. S. That the Plaintiff came to Fiſh in the ſeveral Piſcary of his Maſter: Judgment was given for the Defendant: Whereupon Error was brought, and two Exceptions taken. 1. Whereas the Defendant had, in his Plea of Juſtification, entituled his Maſter to the ſeveral Piſcary, by the Kings Letters Patents, he did not ſhew, That the King was ſeized of this ſeveral Piſcary, *jure Coronæ*, and ſo it might be the King had no power to grant it. 2. Becauſe he doth not ſhew the Letters Patents, which he ought to do, becauſe he derives a Title by them. The Court gave day to ſhew cauſe in this Caſe, why the Judgment ſhould not be reverſed. Hill. 22 Car. in B. R. rot. 1857. *Jones* and *Youngs* Caſe.

13. In Treſpaſs, for entring into a ſhop, and taking of three Fiſh from his ſervant. The Defendant ſaid, That before the Treſpaſs, &c. H. O. was ſeized of the ſhop in Fee, and 30 Eliz. leaſed the ſame to one S. and derived to himſelf an Intereſt under that Leaſe, and gave colour to the Plaintiff, and ſo juſtified. The Plaintiff replyed, That before H. O. had any thing, T. B. was ſeized of the ſhop in Fee, and 7 E. 6. deviſed the ſame to *Tho.* his ſon in Tail, the Remainder to J. in Fee, and dyed. *Tho.* by Deed Indented, Enrolled in the *Haſlings, London*, Bargained and ſold the ſame to E. in Fee, who Entred; J. dyed without Iſſue, ſo as his Remainder deſcended to *Tho. E.* deviſed the ſhop to T. O. and R. O. in Fee, and dyed ſeized; they entred, and were ſeized in Fee; *Tho.* dyed ſeized of the Remainder in Fee, without Iſſue; the ſhop deſcended to R. G. as Coſen and Heir of T. O. and R. O. dyed; after which, H. O. named in the Bar, entred, and ſo intruded in the ſhop, and by ſuch Entry and Intruſion, was ſeized in Fee; and ſo ſeized, R. G. 29 Eliz. dyed, by which the ſhop deſcended to W. G. as couſin and heir: W. G. dyed without Iſſue, by which it deſcended to the Plaintiff, as couſin and heir; and afterwards 30 Eliz. H. O. made the Leaſe *prout*, and the Plaintiff entred. The Defendant by Rejoynder ſaid, That H. O. was ſeized of the ſhop in Fee, and leaſed *ut ſupra* in the Bar, *abſque hoc* that H. O. *in Shopam prædict. intravit, & ſe ſic intruſit modo & forma, &c.* upon which the Plaintiff demurred in Law, becauſe the Traverſe was not good; for the Intruſion being the means to avoid the Title of H. O. ought to be Traverſed expreſly, and not by circumſtance; as to ſay, *abſque hoc quod intruſit*, for that had been a full anſwer; but ſo is it not, to ſay *Abſque hoc quod H. O. intravit, & ſic ſe intruſit*. To that it was anſwered, That it was not material whether the Traverſe was good or not, for that the Replication was naught, and the Title alledged in the Bar, is not anſwered, and the Title of H. O. ought to be avoided directly, and the ſame is only by a ſuppoſal of his Intruſion by H. O. which cannot be by Law upon an Eſtate of Inheritance; and then, if the Title alledged in H. O. is not avoided, but only by alledging his Entry by way of Intruſion, and by the Law there cannot be any Intruſion, the Bar is not anſwered, and ſo the Plaintiff cannot have Judgment, but the Defendant acquit of the Treſpaſs: And ſuch was the Opinion of the whole Court, and that the Plaintiff *Nil Capiat per Billam*. Hill 7 Jac. in B. R. *Goddard* and *Thorlons* Caſe. *Yelv.* 170, 171.

2. Title, *what it is; where the Tenant ſhall pray the Aſſiſe upon Title: And what ſhall be a good Title in Aſſiſe, or other Action, what not.*

1. THe word [Title,] hath two ſignifications, one properly and ſtrictly, for a Title, for which an Action lyeth, as for a Condition broken; or upon an Alienation in Mortmain, &c. In another ſignification, it is taken more largely; and in this ſenſe, *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt*; and ſignifieth the Title which one hath to Land, as by Fine, Feoffment, Deſcent, &c. And therefore when the Plaintiff maketh Title in an Aſſize, the Tenant may ſay, That the Aſſize came upon the Title, which is as much as to ſay, upon the particular Conveyance, &c. which he maketh to the Land: And it is called *Titulus à Tuendo* becauſe by the ſame he defendeth his Land, *& plerumq; conſtat ex munimentis quæ movent & tuentur cauſam*: and there by Releaſe of all Title to Land, all his Right is extinct; for it ſhall be taken ſtrongeſt againſt him, and in the largeſt ſenſe: So when a man hath Title in the proper Leaſe, either by a Condition, or in Alienation in Mortmain, the Releaſe of all his Right doth extinct his Title. *Cook* 8. Part, 153. in *Edw. Alibans* Caſe.

2. In Aſſize againſt two, One of them pleaded the Releaſe of the Plaintiff of all Actions; the other pleaded Joynt-Tenancy; The Plaintiff ſaid, That he who pleaded the Releaſe, was Tenant, and to the Plea pleaded by the other, he ſaid, That after the Releaſe aforeſaid, he was ſeized, until by them diſſeized; and prayed the Aſſize. In that Caſe, It was adjudged a good Title, although he did not make a Title but of his own poſſeſſion; becauſe the Defendant did not entitle himſelf to the Term, but pleaded ſuch a Releaſe which every Diſſeiſor might plead; and notwithſtanding, that upon that Judgment, a Writ of Error was brought, yet the Judgment was afterwards affirmed. Mich. 19 Aſſ. acc.

3. In an Aſſize of a Rent, The Tenant took upon him the Term of the Land, and pleaded *Fait de ſon Fee*: The Plaintiff ſaid, He was Lord of the Manor of B; and that he and his Anceſtors, and thoſe whoſe Eſtate had been ſeized of the Rent time out of minde &c.: Exception was taken to the Plea, becauſe he did not claim the Rent as parcel of the Manor: in which caſe, it ſhall be intended, that it is a Rent-Seck, or a Rent-charge, in which caſe his Title is not good without a Speciality, for he ſhall not preſcribe in the blood; but ſaith, That all thoſe whoſe Eſtate &c. and if ſuch a Rent which one hath by Preſcription be alienated, the Grantee cannot have it, without making a Title to it by Deed, and every mans plea ſhall be taken ſtrongeſt againſt himſelf, for if it be a Rent-Service, he may plead, that it is within his Fee: It was the Opinion of the Juſtices, That it was not good; and therefore he amended his Title, and pleaded all, as aforeſaid, and that it was parcel of the Manor of B. It was then Objected, That he doth not deny but the Land put in view, was out of his Fee, and then it ſhall be intended a Rent-Seck, or a Rent-charge, which cannot be parcel of a Manor: But that was denyed; for it was ſaid by *Skirwith* Juſtice, That if the Lord, before time of memory, releaſeth to the Tenant all his Right which he hath in the Seignory, reſerving Rent, that Rent is parcel of the Manor; and ſo if the Lord Paramount purchaſeth the Term, yet the Rent of the Meſne is parcel of the Manor; for the Meſne had it, and he ſhall have it as a Rent-Seck; and if he alieneth the Manor, the Rent ſhall paſs by Livery and Seiſin of the Manor without Deed. The Aſſize was awarded, to enquire of the verity of the matter. 22 Aſſ. acc.

4. Note, In an Aſſize, If the Tenant plead a Recovery againſt the Plaintiffs Anceſtors, it is a good Title to ſay, That long time after, &c. the ſame Anceſtor dyed ſeized, &c. If it be ſo that the Tenant ſheweth not that he ſued Execution in the life of his Anceſtor; for if he enter after, and dyeth ſeized, the Entry of the Defendant is taken away. Quære, For 21 H. 6. It was ſaid by *Fortiſcue*, That the contrary was adjudged in the Exchequer Chamber, That it was not a good Title, unleſs that he ſhew how his Anceſtor came to the Land by a Title after the Recovery. In that Caſe it was ſaid, That if the Tenant plead a Recovery againſt the Plaintiff by a Stranger, whoſe Eſtate he hath, That it is a good Title to ſay, That long time before he was ſeized, &c. That he was ſeized, until by the now Tenant diſſeized, without ſhewing the Recovery. Quæ of that. Hill. 33 E. 3.

5. In Treſpaſs, the Caſe was, T. was ſeized of a Houſe, forty four Acres of Land, ſeven Acres of Meadow, and two Acres of Paſture, in D. To which Houſe, Meadow, Paſture, he, and all thoſe

thoſe whoſe Eſtate he had, had Common of Paſture for Oxen, Cows, and Calves, levant and couchant upon the Houſe, Land, Meadow, and Paſture, as to the ſaid Houſe, Land, Meadow, and Paſture appertaining, in thirty Acres of Lands, in which J. S. was ſeized in Fee, and Demiſed the ſaid Houſe, Land, Meadow, Paſture to which, to one P. who put his Cattel into the ſaid thirty Acres, and the Farmer of J. S. chaſed them out; upon which P. brought an Action of Treſpaſs. In this Caſe, it was Reſolved, That it was againſt the nature of Common Appendant, to be appendant to Meadow and Paſture; and therefore, becauſe the Preſcription was layed to have Common appendant time out of minde, to a Houſe, Meadow, Paſture, time out of minde, this was Common appurtenant, and not Common appendant: But if a man hath Common for Cattel which ſerve for his Plough, appendant his Land, and perhaps of late time a houſe hath been built upon it, and ſome part is imployed to Paſture, and ſome to Meadow, and the ſame for maintenance of Tillage, which was the Original cauſe of the Common; In ſuch Caſe, the Common doth remain appendant, and ſhall be intended, in reſpect of the Common uſage, for Cattel levant and couchant upon ſuch Land as the beginning as was Arable; but in his Pleading, he ought to alledge it to be appendant to Land: and if he preſcribe to have it appendant to a Houſe or Meadow, it is no good Title; for that upon his own ſhewing, Common appendant cannot be to a Houſe, Meadow, or Paſture. 2. It was Reſolved in the Principal Caſe, That in regard the Common was appurtenant, and not appendant, and ſo againſt common Right; That by the purchaſe of parcel, all the Common was extinct; for Common appurtenant, cannot be extinct in part, and in eſſe for part, by the Act of the parties. *Cook* 4. Part, 37, and 38. *Terringhams* Caſe.

6. *Ed.* Lord *Zouch*, brought a *Formedon* in the Diſcender of the Moytie of the Manner of D. againſt *Bamfield*; who pleaded in Bar, That *John*, Great Grandfather of the Demandant, levyed a Fine, *ſur Conuſans de Droit come ceo, &c.* of the ſaid moytie of the ſaid Manner, Paſch. 30 H. 8. which was by the ſaid Fine rendred and granted to the ſaid *John* his ſon, whoſe Eſtate the Tenant had: The Demandant Replyed, That at the time of the ſaid Fine levyed, and at all times after, the ſaid *Bamfield* was Tenant, and ſeized of the Land in Demand, in his Demeſne, as of Fee. It was Reſolved in this Caſe, That the Demandant being Heir in Tail, had not made any good Title to this moytie of the ſaid Manner; for that he could not, being Heir in Tail, againſt ſuch Fine levyed by his Anceſtor, whoſe Heir he is, aver ſeizin, and continuance of the Lands in a Stranger, at the time of the Fine levyed; nor aver, *Quod partes Finis nihil habuerunt*; and that therefore, he had not, nor could make any Title to the ſame, he being Iſſue in Tail by the Statute of 4 H 7. and 32 H. 8. barred to make ſuch averment againſt the Fine levyed by his Anceſtor. Paſch. 28 Eliz. in C. B. The Lord *Zouch* and *Bamfields* Caſe. *Leon.* 75, 76, 77.

7. Note, When one bringeth an Aſſize of *Novel Diſſeiſin*, *Mordauncteſter*, or Writ of *Entre ſur Diſſeiſin*, or any other Real Action, and he be barred by Judgment upon Demurrer or Verdict; the Demandant and his heirs are not only barred in the ſame Action; but alſo, as long as the Record of the ſaid Judgment ſtandeth in force, he and his heirs are barred of their Entries: But in ſuch Caſe, The ſame is not an utter Bar of their Right or Titles to the ſame Land; but they may bring a Writ of a higher nature, and ſet forth their Right and Title therein; and therein they may try the matter, and their Title again, in an Action or Writ brought of a higher nature then the firſt Action or Writ was: *Cook* 6. Part, 8. in *Ferrers* Caſe: And whereas in that Caſe it is ſaid, That a man ſhall not falſifie a Recovery in the point tryed in a *Scire facias* brought upon the ſame Judgment, or in another Writ of the ſame nature; yet he may bring an Action of a higher Nature, and therein falſifie the firſt Recovery, if in ſuch caſe he have a good Title. *Ibid.*

Tythes.

More; *Not mentioned nor contained in* Lib. 1. *Title*, Diſmes, *or* Tythes.

1. IN an Action upon the Statute of 2 E. 6. for not ſetting forth of Tythes; The Plaintiff ſhewed, That the Rector of M. had two parts of the Tythes in 3. parts divided, and the Vicar the third part time out of mind by Preſcription; and that the Rector and Vicar by ſeverall Leaſes, had let the Tythes to him by ſeverall Leaſes; and that he being ſo *Proprietarius* of the Tythes, that the Defendant had ſowed ſo many Acres with Grain within the Pariſh, and carried them away, without ſetting out *decimam partem*. Upon *Nihil* in Debt pleaded, it being found for the Plaintiff; It was moved in Arreſt of Judgment, That the Writ did contain ſeveral Actions; and that he claimed them by ſeveral Titles from the Rector and Vicar, and therefore could not joyn both Titles in one Writ, but he ought to have had ſeveral Actions for the ſeveral Tythes. It was the Opinion of the whole Court in this caſe, That although they could not joyn in Action, *viz.* The Rector and Vicar; yet when both their Titles are conjoyned in one perſon, the matter of title is conjoyned alſo in one; and that it is ſufficient generally to ſay, That he is *Firmarius*, or *Proprietarius* of the Tythes, without ſaying, of whoſe title; this being a perſonal action grounded meerly upon the Contempt for not ſetting forth the Tythes; and not an Action wherein the right of the Tythes comes in debate. Paſc. 3 Jac. in B. R. Sir *Rich. Champernon* and *Hill's* Caſe. *Yelverton*, 63.

2. A man being ſued in the Spiritual Court for Tythes, brought a Prohibition, and ſuggeſted, That the Priory of D. was ſeiſed of the Grange of S. in the right of his Priory; and preſcribed in him and his Predeceſſors, to hold this Grange without payment of any Tythes: and ſhewed how the Priory came to the Crown, 31 H 8. by Diſſolution, to hold as the Prior held, and derived a Leaſe to him for 40 years from Queen *Elizabeth*; and after ſhewed, How that the Defendant ſued him in the Spiritual Court, for the Tythes of 40 Fleeces of Wooll. The Defendant pleaded, That he ſued the Plaintiff for 400 Fleeces of Wooll, and prayed a Conſultation; which was awarded upon Variance between the Libell and the Suggeſtion; and double Coſts adjudged for the Defendant. It was the Opinion of the Juſtices, That the ſaid Judgment was erroneous for both Cauſes; for the Variance was not materiall, becauſe the Plaintiff preſcribed *in Non Decimando*, & ſo utterly *ouſted* the Spiritual Court of Juriſdiction; otherwiſe it had been, if the Suggeſtion had been upon a *Modus Decimandi*. And, 2. The Judgment for the double Coſts was Erronious, upon the expreſs words of the Statute of 2 E. 6. which doth not give double Coſts, but only for default of proof of the Suggeſtion, and for no other cauſe. Mich. 3 Jac. in B. R. *Hutton* and *Barns* Caſe. *Yelverton*, 79.

3. A Parſon Leaſed his Tythes of 200 Acres of Lands (of which B. was ſeiſed to him and his Wife, and the Heirs of B.) to B. by Indenture, To have from Mich. next to him and his Heirs during the life of B: B. dyed, his Wife had the 100 Acres for her Joyneture, and married F, who let the 200 Acres to the Plaintiff; the Heir alſo of B. granted the Title of theſe Lands to the Plaintiff at Will: The Parſon ſued the Plaintiff in the Spiritual Court for the Tythes againſt his own Leaſe; The Plaintiff ſued a Prohibition: It was adjudged for the Defendant, becauſe the Leaſe of the Tythe was void, being to begin at a day to come: and this Leaſe cannot enure by way of diſcharge, becauſe there are not any words in the Leaſe to prove it; and it was the intent of the parties, that the ſame ſhould operate by way of Intereſt, which was moſt beneficial to the Leſſee, becauſe then it might be granted over: Which could not be, if it were only by way of diſcharge. Trin. 6 Jac. in B. R. *Edmonds* and *Smith* Caſe. *Yelverton*, 132.

More

More Tythes.

1. THe Parſon of the Church of S. Libelled in the Spiritual Court againſt P. for the Tythes of green Tarts eaten before they were ripe, and for the Tythes of the Herbage of dry Cattel, and for Tythes of Sheep bought and ſold, and for Tythes of Churchings and Burialls; P. prayed a Prohibition; and as to the green Tarts, ſaid, That they had uſed time out of mind, &c. in the ſame Pariſh; In Conſideration, they had not for their Milch-Kine ſufficient Meadow and Paſture, to pay for the Tythes of ripe Tarts, the 10th ſhock; but for their green Tarts which are eaten before they be ripe, In conſideration that they gave them to their Cattel, they uſed to be diſcharged of any Tythes thereof; And the truth of the Caſe was, That 400 Acres of Land within the ſaid Town, had uſed to be ploughed and ſowed every year by the labour of their draught-Cattel: In conſideration of which, and for that there was not ſufficient Meadow or Paſture for their Draught-Cattel, they had uſed to be diſcharged of the Tythes of green Tarts, eaten before they were ripe. It was holden by the Court in this Caſe, To be a good Cuſtome; for the Parſon hath benefit thereby: for otherwiſe, the ſaid 400 Acres could not be ploughed without ſuch ſhift, to eat with their Draught-Cattel the green Tarts, and ſo the Parſon ſhould loſe his Tythes thereof: and for the Tythes of the Green Tarts, he hath the Tythes of the 400 Acres. It was holden a good Preſcription; and a Prohibition was granted. Mich. 30 Eliz. in B. R. *Perry* and *Simes* Caſe. *Leon.* 2. Part, 27.

2. W. Libelled againſt B. in the Spirituall Court for Tythes, and ſurmiſed, That P. was ſeiſed of the Lands, and in Conſideration of 5 l. by him paid to the Parſon: It was Covenanted and agreed betwixt them, That P. and his Aſſigns ſhould be diſcharged of Tythes of the ſaid Lands during his life: It was Reſolved in this Caſe, That no Prohibition ſhould go, for that this is not any expreſs Grant of Tythes, but a Covenant and Agreement only, upon which he may have an Action; but no Prohibition: And ſo it was ſaid, It was adjudged in *Weſtlod* and *Peppers* Caſe. Where it was agreed betwixt the Parſon and one of his Pariſh, That for 20 ſhillings rent *per annum*, the Pariſhioner ſhould be diſcharged of Tythes for 20 years, if he lived ſo long. And it was holden, That no Prohibition did thereupon lye; *à fortiori*, where the Eſtate is for life. Trin. 30 Eliz. in B. R. *Woodward* and *Baggs* Caſe. *Leon.* 2. Part, 29.

3. The Defendant ſued the Plaintiff in the Spiritual Court for Tythes in kind; The Plaintiff, to have a Prohibition, ſuggeſted, That they had uſed in the ſaid Pariſh time out of mind, to take the 30th Sheaf in ſatisfaction of Tythe of Corn, and that in thoſe years wherein the Plaintiff had ſuppoſed, the ſubſtraction of his Tythes, he had ſevered the 30th Sheaf from the 9. parts, and the Parſon would not take them away; and that he offered that Plea in the Spiritual Court, but they would not allow of it. The Court was clear of Opinion, That the Suggeſtion was good: For if the Pariſhioner ſeiſeth forth his Tythes, and the Parſon will not take them away, or if they be deſtroyed by Caſuall by his Lacheſſe, he ſhall not have Tythes again; for after ſeverance *tranſit Decima in Catalla*: But if the Pariſhioner doth ſet forth his Tythes, and takes them again; he may be ſued for the Tythes in the Spiritual Court, and the ſetting forth ſhall not excuſe him. Trin. 30 Eliz. in B. R. *Bennet* and *Shortwrights* Caſe. *Leon.* 2. Part, 101.

4. This Caſe was moved in the Exchequer; If one hath a Rectory Impropriate; and by the Statute of 26 H. 8. Cap. 3. is to pay an annuall Rent for the ſame in the name of a Tenth, and by that is diſcharged of Tenths and Firſt-Fruits; If he ſhall have the Priviledg of the Exchequer, for he is to pay the ſame ſum yearly: The Barons were of Opinion, That he ſhould not, for ſo every one who is to pay any Tenths or Firſt-Fruits, ſhould draw another who ſueth him, into the Exchequer, and ſo all Controverſies concerning Tythes and Perſonages ſhould be drawn thither, which would be prejudice to the Spiritual Courts. *Egerton*, Sollicitor, vouched *Coulers* Caſe, Where the King gave a Perſonage to a Prior in Frankalmoign, and the Tythes thereof being withdrawn, the Prior impleaded him who withdrew his Tythes in the Exchequer: And it was holden, That the Prior ſhould have the Priviledg, for the King is in danger to loſe his Foundetſhip, if the Rectory be Evicted. Quære, the Caſe was not Reſolved. See 38 E. 3. *Grants*, 84. Mich. 32 Eliz. in Exchequer. The Dean and Chapter of *Windſors* Caſe. *Leon.* 2. Part, 146.

Toll, *or* Tolne.

1. TOll, or Tolre is a payment uſed in Cities, Towns, Markets, Fairs, &c. for Goods and Cattel brought thither, either to be bought, or ſold; It is alwayes to be paid by the Buyer, and not by the Seller, unleſs there be a ſpecial Cuſtome for it.

2. Tenants in Ancient Demeſne, by the Cuſtome of the Realm, ought to be quit of Toll in every Market, Fair, Town, or City, within the Realm; And alſo the Lord in Auncient Demeſne himſelf ſhall be as well acquitted of Toll throughout the Realm, as the Tenants ſhall be: So alſo of Portage, Paſſage, and the like: and Tenants in Ancient Demeſne at Will, or for Term of years, as Free Tenants, or Tenants for life, ſhall be diſcharged of Toll for their goods; and if they be diſtrained, they may joyn, and ſue a Writ of *Monſtraverunt* directed to the Sheriff, that he do not diſtrein them, or any of them: And in all Caſes, where Toll is demanded where it ought not to be paid of them that ſhould go to buy or ſell Toll Free, the parties grieved may have a Writ *de eſſendi quiet. de Tolonco. Fitz. Nat. Br.* 226, 227.

3. The Species of Toll are ſeveral; as Tronage, Paſſage, Portage, Pannage, Toll thorong, Toll-Travers, and Toll Turn; Toll of Mills, and Toll in Markets and Fairs; all which a man may have in his own Land: and yet if he be diſſeiſed of them, he may have an Aſſiſe of them. The ſeveral Species of Toll, and the Deſcription of them, and what they are. See in *Cook* 8. Part, 46, 47. in *The Webbs* Caſe.

4. If an Officer take Toll of him who ought to be quit of Toll, he ſhall have a generall Action of Treſpaſs, or an Action upon the Caſe at his Election. *Cook* 4. Part, 94. in *Slades* Caſe.

5. In an Action upon the Caſe, The Plaintiff declared, That L. parcell of the Mannor of E. in the County of S. was Ancient Demeſne of the Crown of England; And that all men and Tenants of Ancient Demeſne ought to be quit of Toll in all places within the Realm for their Goods and Cattels. And that Queen *Eliz. Anno* 19 of her Reign, commanded all Mayors, Bayliffs, &c. to permit and ſuffer the Men and Tenants within Ancient Demeſne, to be quit of Toll, Murage, and other exactions throughout the whole Realm; And ſhewed, That he was an Inhabitant of the Town of L. and ſuch a day carried his goods to *Yarmouth* in the ſaid County of S; and that the Defendant not ignorant of the premiſſes, took and carried away a Cable of the Plaintiff's Goods, to the value of 8 l. for Toll to his Damage, &c. The Defendant, pleaded by Proteſtation, That L. was not Ancient Demeſne, and by Proteſtation, that the Tenants in Ancient Demeſne ought not to be quit of Toll; And that the Town of *Yarmouth* was an Ancient Borough, and that they have had time out of mind an Officer called a Water-Baily, and that, time of mind, they and their Predeceſſors have had and Taken Toll of the Tenants and Inhabitants of L. for any their goods brought thither to Merchandize with; And if the Toll be not paid, they have uſed time out of mind to diſtrain for it by their Water-Baily. And further ſaid, That the Plaintiff ſuch a day brought to *Yarmouth* 2000 Weight of Cable ropes to ſell; For which there was due for Toll 6 d: For Murage 6 d: For Tronage 4 d. And the Defendant being Water-Baily, demanded of the Plaintiff the ſaid ſums which he refuſed to pay: for which he took the ſaid Cable, *Nomine diſtrictionis* for the ſaid Tronage, &c. In this caſe, two things were Objected againſt the Defendant's Plea, 1. That the Defendant hath not ſet forth in himſelf any authority to demand the duty. 2. That the Preſcription to have Toll of the Tenants in Ancient Demeſne, cannot be good, becauſe it cannot have a lawful beginning: For the Tenants in Ancient Demeſne are quit of Toll by the Common-Law; and ſuch Tenants have an Inheritance in ſuch Liberties, which the King by his Grant cannot take away. To which it was anſwered, As to the firſt Point, That to ſhew the Authority to demand it, is not neceſſary, for that the Preſcription is upon demand to diſtrein: For the Officer hath not any Authority to demand it; for they ought to demand it, who ought to take the thing demanded, and thoſe are the Bayliffs and Burgeſſes: And then when their Water-Baily doth it, it is as much as if it had been done by the Corporation. As to the ſecond Point, It was ſaid, That the Plea is, That the Defendant take Toll only for thoſe things which are brought by Sea by Merchants, and not otherwiſe: And Tenants in Ancient Demeſne are not diſcharged of Toll for all things, but only for ſuch as ariſe out of the Tenements, or are bought for their Tenements or Families there, and their ſuſtentation, or for the Manurancy of their Lands: and the Defendant juſtified not only for Toll, but alſo for Tronage, which their Priviledges doth not extend

ment: and therefore the Juſtification in this caſe was good. Afterwards in the principal caſe, Judgment was given againſt the Plaintiff; For that the Juſtices were all of them clear of Opinion, That the Tenants in Ancient Demeſne ſhould pay Toll for their Merchandizes. Trin. 30 Eliz. in B. R. *Wood* and *Knights* Caſe, *Leon.* 231.

6. An Action upon the Caſe was brought againſt the Defendant, for taking of Toll for a paſſage over the Weſt-End of the Bridge of W; and the Plaintiff ſhewed for Title the Letters Patents of King *Henry* the 6th, *Anno* 20 of his Reign, to the College of All-Souls in *Oxford*; For them, their Tenants and Fermors, to be quit of Toll; and ſhewed, How that he was Fermor to the College, and yet that the Defendant had taken Toll of him contrary to the Letters Patents. The Defendant pleaded in bar the Statute of 28 H. 6. of Reſumption of all Liberties formerly granted by King *Henry* the 6th. The Plaintiff by way of Replication extended the Statute of 4 H. 8. by which all Letters Patents granted by H. 6. to that College were made good; the Statute of 28 H. 6. of Reſumption notwithſtanding: Upon which the Defendant did Demur: The only Queſtion was, Whether the Replication were a departure from the matter contained in the Declaration. It was Objected in this caſe, That the Plaintiff ought to have declared upon the Letters Patents, and to have ſhewed the Statute of Reſumption, and the Statute of 4 H. 7. of Reviver, and all that in his Declaration, and that in this caſe he enforceth his Declaration by a Statute; which is another, and a new thing. But the Opinion of the Court was, That it was no Departure; for there is not any new matter contained in the Replication, other then was in the Declaration; For the title of the Plaintiffs did ſtill remain the ſame upon the Letters Patents, and relyed upon that; and a Departure is always where the matter touching the Point in Action, is Variant in the Replication, otherwiſe then it was in the Declaration. 2. In this caſe, It was agreed by the Court, Although the Grant of *Hen.* 6th, to be diſcharged of Toll, &c. was *tantum pro ſeipſo*, and not for him, his Heirs and Succeſſors, yet the ſame was good againſt his Succeſſors; as well as in the Caſe of grant of the Intereſt, which in the Caſe of Sir *Thomas Grey*, was agreed to be good. Mich. 43 Eliz. in B. R. *Wood* and *Hankſbeads* Caſe, *Yelverton*, 85. 14.

7. Action of Trover and Converſion was brought; The Defendant pleaded a Sale of the goods in *Marlborough*, which is a Market Overt; and the Bar well pleaded. An Exception was taken, for that it is not ſaid, That Toll was paid: In that caſe, It was ſaid by *Hutton*, Juſtice, That there are divers places where no Toll is paid upon Sale in Market; and yet the property is changed: and Judgment was given accordingly. Mich. 3 Car. in C. B. *Hodges* and *Franklins* Caſe. *Hetley*, 49.

8. Note: The Law hath Ordained, That he who will be aſſured of his goods, buy them in Market Overt, and ſuch ſale there ſhall bind all ſtrangers as well as the ſeller: but yet it is agreed in 33 H. 6. 5. That a ſale in Market Overt ſhall not bind him who hath right to the goods, if the ſale be by fraud; Or if the Vendee hath Notice that the property of the goods doth belong to another man; no, although that Toll be paid for them. *Cook* 3. Part, 78. and 83. in *Ferrers* Caſe, and *Twines* Caſe.

Traverſe.

What ſhall be ſaid to be a good Traverſe; and what not: Where the Plea not good, for want of Traverſe.

1. A *Quare Impedit* was brought, and the Plaintiff declared, That his Anceſtor was ſeiſed of the Mannor to which the Advowſon is appendant, and preſented, and dyed ſeiſed, and the Mannor diſcended to him, and ſo he ought to preſent. The Defendant pleaded in bar, That the Anceſtor was joyntly ſeiſed with his Wife, and that ſhe ſurvived, and for default of Preſentation, the Lapſe encurred to the Biſhop, who did Collate, *abſq; hoc*, that he dyed ſole. It was the Opinion of the whole Court, That the Traverſe was void, becauſe he had confeſſed, and avoided him before. See 5 H. 7. 11. Mich. 29 Eliz. in C. B. *Gerrards* Caſe. *Goldsbr.* 45.

2. Debt upon an Obligation with Condition, That if the Defendant ſuffer the Plaintiff his Tenants and Fermors to enjoy ſuch a Common, that then, &c. And the Defendant pleaded Conditions performed; and the Plaintiff aſſigned for breach, That he did not ſuffer A. B. his Tenants to enjoy, &c. *Abſq; hoc*, that he performed the Condition. It was the Opinion of the whole Court, That the Traverſe was not good; no more then if one be bound

bound to perform the Covenants in an Indenture; And the Defendant pleads, That he hath performed all (generally), if the Plaintiff aſſign a breach, he ſhall not ſay further *abſq; hoc*, that the Defendant hath performed the Covenants, for ſo much he had ſaid before. Paſch. 29 Eliz. in C.B. *Gawen* and *Whites* Caſe. *Goldesbr.* 62.

3. In Treſpaſs, the Defendant ſaid, That the place where, was the Freehold of A. at the time, and as ſervant, &c. The Plaintiff ſaid, That long time before the Treſpaſs, B. was ſeiſed in Fee, and enfeoffed him, and was thereby ſeiſed, till by A. diſſeiſed, upon whom he reveſted, and was ſeiſed untill the Defendant *die et anno prædict.* made the Treſpaſs: The Defendant maintained the Barr, and traverſed the Diſſeiſin. It was holden by the Court, That it was a Jeoſail, becauſe in the Replication he had not denyed the Franktenement at the time of the Treſpaſſe. Mich. 3 & 4 Mar. *Dyer*, 134.

4. In an Avowry, A. Conveyes the Land to himſelf as heir to J. S. becauſe the ſaid J. S. dyed ſeiſed in his Demeſne as of Fee without Iſſue, &c. The Plaintiff confeſſing the dying ſeiſed, conveyed himſelf title to the Land by the Deviſe of J. D. *abſq; hoc quod terra diſcendit* to the Defendant. In this caſe, it was adjudged againſt the Plaintiff, becauſe he did not traverſe the dying ſeiſed, but the diſcent. Mich. 22 Eliz. *Dyer*, 366. *Vernon's* Caſe.

5. In a *Replevin*, the Defendants made Conuſans as Bayliffs to Sir *Fr. L.* of the taking in W. Cloſe as Damage-Feaſant, *ut in ſolo et Libero tenento ipſius Fr. L.* The Plaintiff ſaid, That before the time, and at the time when, &c. he was ſeiſed in his Demeſne as of Fee, of a Cloſe called B. Cloſe, to the ſaid Cloſe of W. adjoyning: and that the ſaid Sir *F. L.* and all thoſe whoſe Eſtate he had, had uſed, time out of mind, to encloſe the ſaid Cloſe containing two Acres of Paſture, againſt the ſaid Cloſe, called B. Cloſe. The Defendants denying the Preſcription by Proteſtation, ſaid, That the ſaid B. Cloſe was the Soil and Freehold of G. Earl of S; *abſq; hoc*, that the ſaid Plaintiff was ſeiſed of B. Cloſe in his Demeſne as of Fee. Upon which, there was a Demurrer. The Opinion of the Court in this caſe was, That the preciſe Eſtate which the Plaintiff had in B. Cloſe, was not traverſable by the Defendants, if the Plaintiff had not ſhewed ſome Eſtate in it generally, that he was ſeiſed of it, without ſhewing of what Eſtate, or that it was his Freehold, and then the other party ſhould be driven to ſay, that he had nothing in it; for if he had but Common, or an Eſtate for years, or at Will, or but a Licenſe of the Owner to put in his Cattel for this time, it had been ſufficient; and then the beſt anſwer to that had been, with a flat Negative, *ſcil. nihil habent in præd. Clauſo tempore quo, &c.* which is the moſt apt pleading: For a Traverſe *abſq; hoc*, ought to be taken to a thing expreſſly alledged before, and is induced with a former Plea, or ſhewing a croſſe matter contrary to the Plea of the Plaintiff, as here, *ſcil.* That B. Cloſe was the Freehold of the Earl of S. *abſq; hoc, &c.* And at laſt, the Traverſe *abſq; hoc* that he was ſeiſed in Fee, was holden to be a good traverſe, becauſe that the Plaintiff had given that advantage to his adverſary to that preciſeneſs of Eſtate, who beſt knew what Intereſt he had to put his Cattel in B. Cloſe; For if he had nothing in B. Cloſe, nor Common there, nor the Licence of the Owner, but was a meer ſtranger, he was a Treſpaſſor. Mich. 22 Eliz. *Dyer*, 365. Sir *Fr. Leeks* Caſe.

6. In Treſpaſſe, the Defendant pleaded, That the place in which, is Copyhold, and pleaded a Grant to S. which granted it to him. The Plaintiff Replyed, That long time before the Grant pleaded by the Defendant, A. G. was Leſſee for life, *ſecundum Conſuetudinem Manerii*; And that the Cuſtome is, That the Lord may grant Copies as well in Reverſion as in poſſeſſion; And that 5 Eliz. the Lord M. being Lord of the Manor, granted to him a Copy in Remainder before the Grant made to S. which now came in poſſeſſion, and that he entred, untill, &c. The Defendant Rejoyned, That there is a Cuſtome within the Manner, that the Lord may grant Copies in Reverſion, with the agreement and conſent of the Tenants in poſſeſſion; and if any Grants of Copies be without conſent of the Tenant in poſſeſſion, that then there is ſuch a Cuſtome, that ſuch Grants ſhall be void *abſq; hoc*, that they are demiſeable *modo et forma, &c.* Whereupon the Plaintiff demurred. It was ſaid and holden, That this Plea is repugnant and void; for by theſe words (*If any be granted,*) he implyeth, that there is ſuch a Cuſtome: and then when he ſaith, *abſq; hoc*, that there is ſuch a Cuſtome, this Traverſe is void, and the Plaintiff ſhall have Judgment. Quære, the Caſe was not Reſolved. Mich. 31 Eliz. in C.B. *Plympton* and *Dobyneys* Caſe. *Goldsbr.* 102, 103.

7. Intruſion by the Queen againſt A. B. &c. ſuppoſing they Intruded into the Rectory and Perſonage of *Ethelborough* in the County of N; and ſhewed, That in the time of *Henry* the 4th, the Colledg of St. *Peter* of *Ethelborough*, was founded at *Weſtminſter* in the County of *Middleſex*, by the name of *Decani et Capitali*, and that the Rectory of *Ethelborough* was appropriated to the ſaid Colledg; and that afterwards in 1 E. 6. the ſaid Colledg

Colledg was diſſolved, and the ſaid Rectory amongſt other Poſſeſſions came to the King, and that the Defendants 1 Eliz. intruded into the Rectory, and took 1000 Sheep, 1000 Calves, 1000 Loads of Corn, &c. *diſſa Regina proveniencia ex Decimis Rectoriæ prædict. apud Weſtm. prædict.* The Defendant pleaded, That the ſaid Colledg of *Ethelborough* was founded in *Ethelborough*, &c. *per nomen Decani, Canonicorum, et fratrum*, who Leaſed the ſaid Rectory ſo appropriate, to one C. for 40 years, in 30 H. 8. who affirmed the ſame to the Defendants; by force of which, they juſtified the taking at *Ethelborough*, *Abſq; hoc*, that the ſaid Colledg of St. *Peter* in *Ethelborough*, was founded *per nomen Decani et Capituli Eccleſiæ Sancti Petri de Ethelborough* at Weſtm. aforeſaid. Upon which, the Queens Attorney did Demur in Law. In this Caſe, (amongſt other Points) It was Reſolved, That the Traverſe of the Foundation was not good: For he hath here traverſed that which was not alledged; For the placing of the words in the Traverſe; *ſcil. apud Weſtm.* in the end of the Traverſe, ſeems by common Conſtruction, to be intended thereby, that there is no ſuch Colledg at *Weſtminſter*, and not that the Colledg was not founded at *Weſtminſter*; for then the Traverſe ſhould be, *abſq; hoc, quod Collegium prædict. fundatum fuit* at Weſtm. *per nomen, &c.* But the moſt proper Traverſe which the Defendant could have taken, had been, *Abſq; hoc, quod Decanus et Capituli Eccleſiæ Collegiat. de Ethelborough*, was ſeiſed; for the Corporation mentioned in the Bill, and that which is mentioned in the Barr, are not all one, but differ in this manner; *ſcil.* in the Bill, the Dean and Chapter; and in the Barr, Dean, Canons and Brethren: and perhaps there are two ſuch Corporations, and then both cannot be ſeiſed; and therefore upon the Seiſin of one of them, the traverſe ſha'l be taken. Judgment was given for the Queen. Mich. 29 Eliz. in the Exchequer. The Queen and the Lord *Vaux*'s Caſe. *Leon.* 37, 38, 39, 40.

8. In Treſpaſs, the Plaintiff declared, That the Defendant *finul cum quodam J. S. clauſum ſuum fregit.* The Defendant pleaded to Iſſue, and it was found for the Plaintiff. It was ſaid, in ſtay of Judgment, That the Declaration was not good, for that it doth appear therein by the Plaintiff's own ſhewing, that the Action ought to be brought againſt another alſo not named in the Writ. Notwithſtanding which, Judgment was given for the Plaintiff. And thereupon Errour brought, and the ſame matter aſſigned for Errour: In this caſe, the Juſtices of the Common-Pleas, and the Barons of the Exchequer, were clear of Opinion, That by the Common-Law, the Declaration was not good, for the reaſon aforeſaid. But if in Treſpaſs againſt one, who pleads, That the Treſpaſs was done by himſelf and one B, to whom the Plaintiff hath Releaſed; and the Plaintiff traverſeth the Releaſe, In that caſe, for as much as the matter doth not appear upon the Plaintiff's own ſhewing, but comes in on the part of the Defendant, and not denyed by him, the Declaration is good enough. Mich. 29 Eliz. *Henby & Broads* Caſe. Exchеq. *Leon.* 41.

9. In a *Replevin*, the Defendants made Conuſans as Bayliffs to G. B. for Damage-feaſant. The Plaintiff in barr of the Conuſans ſhewed, That he and all thoſe whoſe Eſtate he hath in 140 Acres of Land, time out of mind had Common for all manner of Cattel in 6. Acres of Lands, whereof the place where is parcell; and ſo put in his Cattel. Againſt which, the Defendants ſaid, That the Plaintiff had Common in 40 Acres of Lands, whereof the 6. Acres are parcell, lying *in Communi Campo*; and that the Plaintiff long time before the taking, had purchaſed two Acres parcel of the ſaid 40 Acres. Upon which it was Demurred in Law. It was the Opinion of the whole Court, That for want of a Traverſe, the Plea was not good: For, by *Periam*, Juſtice, the Common ſuppoſed in the Barr, to the Conuſans out of the 6. Acres cannot be intended the Common, ſuppoſed in the Replication; *ſcil.* out of the 40 Acres; and if in Treſpaſſe the Defendant Juſtifie by reaſon of Common in 6. Acres of Lands, upon which the parties are at Iſſue, and the Defendant in Evidence ſhews, that he hath Common in 40 Acres, whereof the ſaid 6. Acres is parcell, the ſame doth not maintain his Title, but the Iſſue ſhall be found againſt him. But the Lord *Anderſon* ſaid, in the principal Caſe, Becauſe that this Demurrer is general, the other party ſhall not take advantage of the defect of pleading for want of the Traverſe, and that by reaſon of the Statute of 27 Eliz. for Traverſe is but matter of Form, and the want of the ſame ſhall not prejudice the other party in point of Judgment, but the Judges ought to judge upon the ſubſtance, and not upon the manner and form of pleading. And the Court was clear of Opinion, That by the purchaſe to the 2. Acres, the whole Common was extinct. Mich. 29 Eliz. in C. B. *Kimpton* and *Bellamies* Caſe. *Leon.* 43.

10. In a *Replevin*, the Defendants made Conuſans as Bayliffs to A. for a Rent reſerved upon a Leaſe for life. The Plaintiff in barr pleaded, That two ſtrangers had right of Entry in the place where, and that the ſaid Bayliffs by their Commandments entred, and took the Cattel, of which the *Replevin* is brought damage-feaſants *abſq; hoc*, that they took them as Bayliffs to the ſaid A. Upon

on which Traverſe, the Defendants did Demur in Law. It was the Opinion of the whole Court, that as the Traverſe is here, That the Traverſe was good, and well taken; and ſo it was ſaid, it was adjudged, Mich. 29 Eliz. in C.B. rott. 2494. in *Lewin* and *Hardin's* Caſe. And in this Caſe, it was ſaid by the Court, That when a Bayliff diſtrains, he ought, if he be required, to ſhew the cauſe of his Diſtreſs; but if he be not required, then he is not tyed to do it. Paſch. 29 Eliz. in C.B. *Butlers* Caſe. *Leon.* 50.

11. In a *Quare Impedit*, the Plaintiff Counted, That he was ſeiſed of the Manor of D, to which the Advowſon was appendant, and that the Church became void, and that he preſented M.S. his Clerk: The Defendant pleaded, That he was ſeiſed of the Advowſon as in groſſe, and preſented one M. S. *abſq; hoc*, that the Advowſon was appendant. It was moved, That he ought to traverſe the Preſentment, and not the Appendancy, eſpecially here, where both parties preſent one and the ſame perſon. To which it was Anſwered, That that doth not appear; For the Defendant hath pleaded, That he preſented M.S. but doth not ſay, *prædict. M. S.* ſo as it may be he is not the ſame perſon, but another. See 10 H. 7. 27. the Traverſe is well taken; contrary, where the Plaintiff declares of an Advowſon in groſs, and that he to the ſame preſented; and the Defendant pleadeth, That he is ſeiſed of ſuch a Mannor to which the Advowſon is appendant, &c. without that, that the Advowſon is in groſſe, there he ſhall traverſe the Preſentment; for the Preſentment ſhall make it in groſſe. See 13 H. 8. 12. Trin. 32 Eliz. in C.B. The Lord *Buckhurſt* and the Biſhop of *Wincheſters* Caſe: *Leon.* 154.

12. In a *Replevin*, The Defendant avowed for Damage Feaſants in his Freehold, The Plaintiff ſaid, That long time before the Plaintiff had any thing, he himſelf was ſeiſed untill by A. B. and C. diſſeiſed, againſt whom he brought an Aſſiſe, and recovered, and the Eſtate of the Defendant was mean between the Aſſiſe and the Recovery in it. The Defendant ſaid, That long time before the Plaintiff had any thing, One G. was ſeiſed, and did enfeoffe him, *abſq; hoc*, That A. B. and C. *vel eorum aliquis aliquid habuerre* in the Lands at the time of the Recovery. It was the Opinion of *Walmſley*, Juſtice, That the Barr unto the Avowry, was not good; for that the Plaintiff hath not alledged, That A. B. and C. were Tenants *tempore recuperationis*, and that ought to be ſhewed in every Recovery where it is pleaded. But *Windham*, Juſtice, was of a contrary Opinion; For that the Aſſiſe might be brought againſt others as well as the Tenants; as againſt Diſſeiſors: But other Actions reals, ought to be brought againſt the Terr-Tenants only: and therefore it needs not to ſhew, that they were Terr-Tenants at the time of the Recovery, and the Traverſe is well enough. Mich. 32 Eliz. in C.B. *Rigden* and *Palmers* Caſe. *Leon.* 193.

13. In Trover and Converſion, The Plaintiff declared, That he was poſſeſſed of 27 Ells of Lynnen Cloth as his own goods, and that the Goods came to the Defendants hands by Trover, and that he knowing them to be the Plaintiff's goods, ſold them to perſons unknown, and converted the money to his own uſe. The Defendant as to 24 Ells, ſaid, That long before the loſing, J.S. was poſſeſſed thereof *ut de bonis ſuis propriis*, and ſold them to the Defendant; who before Notice that they were the Plaintiff's goods, and before requeſt, ſold them to perſons unknown: And as to the other 3. Ells, he was ready to deliver them to the Plaintiff. Upon theſe Pleas, the Plaintiff did Demur in Law. It was adjudged for the Plaintiff; for the Defendant confeſſeth the Converſion, and hath not conveyed a ſufficient Title to himſelf to the goods, by which he might juſtifie the Converſion. For the Plaintiff declares of Converſion of his own goods; and the Defendant juſtifies, becauſe the property of the goods was in J. S. who ſold them to him; which cannot be a good Title in him without a Traverſe, unleſſe he had ſhewed, that he had bought them in Market-Overt: and alſo the Defendant's Plea might be true, and yet the Defendant is guilty; For it may be the Defendant himſelf ſold them to the Plaintiff, or to another who ſold them to the Plaintiff; and afterwards the Defendant found them: and here the Converſion is confeſſed, and not avoided by a ſufficient Juſtification: and as to the laſt Plea, it is not ſufficient; for it amounteth but to Not-guilty: and alſo the ſale in the firſt Plea is not good, That it was made to perſons unknown; for it cannot be, but that he muſt have Notice of the Buyers: and therefore for the Inſufficiency of the Defendant's Plea, It was adjudged for the Plaintiff. Mich. 33 Eliz. in C.B. *Vandrink* and *Archers* Caſe, *Leon.* 221.

14. In a *Replevin*, the Defendant did avow by reaſon that A. held of him an Acre of Land in the place where, by Fealty and 16 s. Rent payable at two Feaſts. The Plaintiff ſaid, That he held the ſame Acre and two others of the Avowant by Fealty and 16 s. payable at one day, *abſq; hoc*, that he held the ſaid Acre by the Services at two dayes: It was ſaid, That he ſhould not have the Traverſe, That the Tenure cannot be traverſed. But the Opinion of the Court was, That he ſhould have the Traverſe; for if he ſhould traverſe the

Seiſin,

Seiſin, he ſhould thereby confeſſe the Tenure. And the Court ſaid, That the difference commonly taken is this, That where they agree in the Tenure, there the Seiſin is traverſable; but where they do not agree, there the Tenure is traverſable. And in this caſe, the payment at two dayes doth alter the Tenure. Trin. 26 Eliz. in C. B. *Thogmorton* and *Tyringhams* Caſe. *Godbolt*, 23, 24.

15. In *Aſſumpſit*, the Plaintiff declared, That the Defendant was endebted to him 29. *Maii*. 29 Eliz. And that the Defendant in conſideration that the Plaintiff would forbear to ſue him untill ſuch a day after promiſed at the ſaid day to pay the Debt. The Defendant pleaded, That 29. *Maii*. 29 Eliz. He was endebted to the Plaintiff in the ſaid ſum; for aſſurance of which, afterwards he acknowledged a Statute to the Plaintiff, upon which he had Execution, and levyed the money *abſque hoc*, that he was endebted to the Plaintiff, *extra vel poſtea* the ſaid day *aliquo modo*. In this Caſe, it was holden by the Court, That the cauſe of Action is the Aſſumption, and the conſideration is not traverſable, and alwayes the ground of the Action is traverſable. And the Aſſumpſit in this Caſe, is the ground of the Action, and not the Debt. Judgment was given for the Plaintiff. Trin. 33 Eliz. in B. R. *Smith* and *Hitchcocks* Caſe. *Leon.* 252.

16. In an Action of Covenant, the Caſe was; A. ſeiſed of Lands, leaſed the ſame for life rendring Rent: afterwards he Deviſed the Reverſion to his Wife, and dyed. The Defendant took to Wife the Wife of the Deviſor. The Deviſee of the Reverſion, afterwards bargained and ſold the Reverſion to one M. and his Daughter during his own life, and afterwards Granted the Rent to the Plaintiff, and Covenanted, that the Plaintiff ſhould enjoy the Rent during his Term *abſque aliquo impedimento* of him, his Heirs or Aſſigns, or any perſon claiming under the ſaid M. M. dyed ſeiſed, and the Rent diſcended to B. his Heir; the breach was aſſigned in this, *ſcil.* in the Heir of M. who hath the Rent by reaſon of the Grant of the Reverſion to M. The Defendant pleaded the Grant of the Reverſion to M. *per ſcriptum*, without ſaying *ſigillo ſuo ſigillat. et hic in Curia prolat. abſque hoc*, that the ſaid Reverſion diſcended to B. and thereupon the Plaintiff did demur. 1. Becauſe the Grantee of the Reverſion is pleaded *per ſcriptum*, and doth not ſay *ſigillat.* for a Reverſion cannot paſs without Deed. And 2. It ought to be pleaded *hic in Curia prolat.* for the Court is to ſee ſuch Deed, to the end they may know it to be a lawfull Deed without interlining or other defects. 3. Becauſe the Defendant hath traverſed the Diſcent, whereas he ought to have traverſed the dying ſeiſed, for of every thing diſcendable, the dying ſeiſed is the ſubſtance, and the Diſcent is but the effect. See 22 El. 2. *Dyer*, 366. and 21 H. 7. 31. Paſc. 23 Eliz. in C. B. *Maidwell* and *Andrews* Caſe. *Leon.* 309.

17. In a *Quare Impedit* againſt N. and P. and the Biſhop of L. the Plaintiff ſhewed, That Sir *T. M.* was ſeiſed, and Preſented P. and let the Manor to which the Advowſon is appendant, to the Plaintiff, and that the Church became void by Reſignation of P. by reaſon whereof he ought to Preſent. The Biſhop ſaid, He claimed nothing but as Ordinary. P. entituled himſelf unto it by Preſentation, as to an Advowſon in groſs, and traverſed the Appendancy. Upon which the Plaintiff took Iſſue. N. pleaded as Parſon impersonee of the Preſentation of the King, and confeſſing the title of Sir *T. M.* and the Leaſe for years to the Plaintiff, pleaded over, That Sir *Th. M. pro quadam pecunia ſumma* betwixt him and one J. Preſented P. and pleaded the Statute of 31 Eliz. of Symony, which made the Inſtitution and Induction void, and that the King having title to Preſent by the Statute by reaſon of the Symony Preſented him, who was Admitted, Inſtituted, and Inducted; and traverſed that the Church became void by the Reſignation of P. upon which it was demurred, becauſe the Preſentation being the Principal, which being confeſſed and avoided, cannot be traverſed. But it was the Opinion of the Court, That the Plea was good; For the Plea makes the Traverſe but Argumentative, that he might not reſign. And being alledged, That the Church was void *per mortem vel reſignationem*, or otherwiſe, it ought to be confeſſed or traverſed, for that is the cauſe of his Preſentation, and the Iſſue ought to have been taken, *Si vacavit per mortem vel deprivationem vel reſignationem*; for the Preſentation, Admiſſion, and Inſtitution are but conducible to the Reſignation, and the Reſignation or Avoydance is the chiefeſt of the matter. Whereupon Judgment by conſent was Reſolved to be given for the Plaintiff. Hill. 22 Jac. in C. B. Sir *Gregory Fenner* and *Nicholſon* and *Peſfields* Caſe. *Cro.* 1. Part, 44.

18. In a *Quare Impedit*, the Plaintiff ſhewed, That Sir *Th. C.* was ſeiſed in Fee of the Advowſon of the Church of W. as of an Advowſon in groſs; and Preſented M. and dyed ſeiſed, which diſcended to Sir *Th. C.* the Husband of the Plaintiff. who 9. *Martii*, 8 Jac by Deed Granted it to T. E. and another in Fee to the uſe of the Plaintiff for her Joynture; and after to the uſe of himſelf in tail, and afterwards dyed ſeiſed, and that the Church became void by the death of M. wherefore it belonged to the Plaintiff to Preſent: The Defendant pleaded, That he was *Perſona impersonata, ex preſenta-*

tione Regis: And ſhewed, That Sir T. C. the Plaintiffs Husband dyed ſeiſed in Fee of the Church of W. as of an Advowſon in groſs, and of the Manor of P. in the County of C. his Son and Heir being within age, holden of the King by Knight Service in *Capite*, and that an Office was found, whereby the Tenure and Diſcent was found: Whereupon the King was ſeiſed, and Preſented the Defendant, who was Inſtituted and Inducted, *Abſque hoc*, That the ſaid Sir *Tho. C.* Granted the Advowſon to E. and others *prout*. The Plaintiff ſaid *Quod non habetur aliquod tale Recordum de inquiſitione*; Upon which it was demurred. In this Caſe, it was ſaid, That this Replication of Traverſing the Inquiſition was not good; for there never ſhall be a Traverſe upon a Traverſe, but where the Traverſe in the bar takes from the Plaintiff the liberty of his Action for the place, or time, or ſuch like, there the Plaintiff may maintain his Action for the place or time, and may traverſe the Inducement to the traverſe, and needs not to joyn with the Defendant in the traverſe; but when the Inducement is made and concluded with a traverſe of a title ſhewen by the Plaintiff, there the Plaintiff is enforced to maintain his title, and not traverſe the Inducement to the traverſe. And of that Opinion was the whole Court. 2. It was Reſolved, That inaſmuch as two titles are compriſed in the bar for the King, *ſcil.* the dying ſeiſed within age, and the Tenure by Knight Service. That therefore in the Replication they ought to be anſwered, and it was not ſufficient to traverſe the Inquiſition, but the Plaintiff ought to have anſwered to the tenure, and to the Diſcent alledged of the Mannor if the Defendant had relyed upon them; but becauſe the Defendant did not relye upon them, but made them inducements to the traverſe of the Grant which is the Plaintiffs title, that title ought to be maintained, and not to traverſe the Inducements to that Traverſe. It was adjudged for the Defendant. Paſc. 2 Car. in C. B. The Lady *Chicheſley* and *Thompſons* Caſe. *Cro.* 1. Part, 74, 75.

19. Treſpaſs, for that at *Edenbridge* he killed his Maſtiff Dog. The Defendant pleaded, That J. S. was ſeiſed of a Warren in D. in the ſame County where he was then Warrener, and that the Dog was divers times killing of Conies there, and therefore he finding him there *tempore quo* running at Conies, he killed him *abſque hoc* that he was guilty *apud Edenbridge prout*. It was demurred unto, becauſe he traverſeth the place only, and doth not traverſe all other places. It was the Opinion of the Court, That the traverſe was good, becauſe the cauſe of his Juſtification was local: and the Juſtification was holden good, becauſe it is alledged the Dog uſed to be there killing of Conies, and that the Warrener for the Salvation of his Conies may well juſtify the killing of him. Trin. 2 Jac. in B. R. *Wanburſt* and *Dammes* Caſe. *Cro.* 2. Part, 44, 45.

20. *Ejectione firmæ*, The Defendant entituled himſelf by Copy, granted 44 Eliz. The Plaintiff entitles himſelf by Copy granted 1. *Junii*, 43 Eliz. The Defendant maintains his bar *abſque hoc*, That the Queen 1. *Junii* 43 Eliz. Granted the Land by Copy, *modo et forma prout*. It was the Opinion of the Court, That the day ought not to be made material, unleſs the Queen had Granted before the Grant to the Defendant. The traverſing alſo of the day where it ought not, is matter of ſubſtance; for thereby it makes it parcel of the Iſſue, which ſhould not be: Wherefore it was adjudged for the Plaintiff, and that the traverſe was not good. Hill. 5 Jac. in B. R. *Lane* and *Alexanders* Caſe. *Cro.* 2. Part, 202. See Trin. 14 Car. in B. R. *Nevilſon* and *Whiby's* Caſe. *Cro.* 1. Part, 360. Set *Yelverton* 122, 123. the ſame Caſe.

21. *Ejectione firmæ*, Upon a Leaſe made by *Eliz. J.* The Defendant pleaded, That before *Eliz.* had any thing, One M. J. was ſeiſed in Fee, and had Iſſue H. and dyed ſeiſed, and that the Land deſcended to H. as Son and Heir, and that *Eliz.* entred, and was ſeiſed by Abatement, and made the Leaſe to the Plaintiff. The Plaintiff by Replication confeſſed the Seiſin of M. J. and that he being ſo ſeiſed, by Will Deviſed the Land to *Eliz.* in Fee, and dyed, and that ſhe entred by force of the Deviſe, and made the Leaſe *abſque hoc*, that the ſaid *Eliz.* was ſeiſed by Abatement in manner and form, &c. It was adjudged for the Defendant. For the Plaintiff by his Replication needed not both to confeſs and avoid, and to traverſe the Abatement, for the Plaintiff made a title to his Leaſe under *Eliz.* the Deviſee, and ſo her entry legall, and not by Abatement; and then to take a traverſe, entr makes the Replication vitious: for no traverſe ought to be taken where the thing traverſed is Iſſuable; and if the traverſe might have bin good, it ſhould have bin *Abſque hoc*, that ſhe did abate, and not ſeiſed by Abatement. Paſc. 7 Jac. in B. R. *Iſdell* and *Lulls* Caſe. *Cro.* 2. Part, 221. *Yelverton*, 151. the ſame Caſe.

22. *Quare Impedit* againſt R. T. for diſturbing him to Preſent to the Church of B. and ſhewed, That he was ſeiſed in Fee of the Advowſon in groſs, and Preſented J. T. who was Inſtituted and Inducted, and dyed, and ſo it belonged to him to Preſent. The Defendant ſaid, that he was Parſon impariſonee of the Preſentment of A. T. who is yet alive: and ſaid, That before the Plaintiff had any thing to do with the Advowſon, King H. 8. was ſeiſed

ed thereof in Fee, and that the Church became void, and that he Preſented one D. and that H. 8. dyed, and it diſcended to E. 6. and from him to Queen M. and ſo to Queen *Eliz.* who ſeiſed thereof *jure Coronæ*, after the death of D. Preſented one K. who was Admitted, and Inſtituted; and by his death, the Church became void, and that the Plaintiff Preſented by Uſurpation the ſaid J. T. who was Inſtituted and Inducted; and that Queen *Eliz.* dyed ſeiſed, and it diſcended to the King, who by his Letters Patents Granted the next Avoydance to A. T. who by the death of J. T. Preſented him. The Plaintiff replyed and made Proteſtation of the Seiſin in Fee of Queen *Mary*, Queen *Eliz.* and the King that now is; and for Plea confeſſing the Seiſin of the Plaintiff, and the Grant of the next Avoydance by him, and the Preſentment thereby; and the Seiſin of King H. 8. and King E. 6. and that King E. 6. by his Letters *Anno* 4. of his Reign, Granted that Advowſon to Sir *Tho. Wyat* in Fee, who Granted it to the Plaintiff; and that Queen *Eliz.* made the ſeveral Preſentments in the Count by Lapſe: And after the Church became void, and the Plaintiff Preſented the ſaid J. T. by whoſe death the Church being void again, it belonged to him to Preſent; and traverſed the dying ſeiſed of King E. 6. upon which it was demurred. It was objected in this Caſe (amongſt other points), That the traverſe was not good, becauſe he traverſeth the dying ſeiſed of King E. 6. but doth not traverſe the Seiſin of Queen *Mary*, and Queen *Eliz.* nor the Preſentments alledged in the bar by reaſon of the Seiſin in Fee, it being the principal matter of the bar. But the Opinion of the Court was, That the Replication was good enough, for the dying ſeiſed is the principal matter traverſable, and the other matters are but conſequents thereof; and the Plaintiff hath liberty to traverſe any part of the Defendants Plea; and the Preſentments alledged, are all well confeſſed and avoided, when he ſhewed, that they were Preſentations by Lapſe, and not by reaſon of any Seiſin in Fee. It was adjudged for the Plaintiff, and that the Judgment ſhould be affirmed. Mich. 20 Jac. in B. R. Sir *George Saville* and *Thorntons* Caſe. *Cro.* 2. Part, 650, 651.

23. In Treſpaſs, the Defendant pleaded, That before the Treſpaſs J. S. was ſeiſed in Fee, and 21 Eliz. exchaffid T. N. to the uſe of J. B. and M. his Wife, and the Heirs of their bodies, who had Iſſue H. B. and dyed ſeiſed, which diſcended to him, and from him to three Daughters. The Plaintiff replyed, That here before the Treſpaſs, J. D. was ſeiſid in Fee, and gave the Land to E. B. and J. his Wife, and the Heirs Males of their bodies, and that they had Iſſue J. B. and the Plaintiff, and that J. had Iſſue H. and dyed, and H. dyed without Iſſue Male: Wherefore he as Heir Male entred, and traverſed the Seiſin alledged in J. S. It was Objected, That the traverſe of the Seiſin of J. S. was not good, but he ought to have traverſed the gift in tail, which is the principal matter. But it was Reſolved by the Court, That the Replication was good, and that it was in his Election to traverſe the Seiſin in Fee alledged in the bar, or the gift in tail. See *Cook* 6. Part, 25. acc. It was adjudged for the Plaintiff. Paſc. 21 Jac. in B. R. *Baker* and *Blackmans* Caſe. *Cro.* 2. Part, 681. *Godbolt*, 427. the ſame Caſe.

24. Action of Treſpaſs, ſuppoſing that the Defendants Father held of him ſuch Lands by Knights Service, and dyed in his Homage, his Heir within age, and that he tendred unto him a convenient Marriage, and ſhewed what, and demanded the value of the Marriage. The Defendant *Proteſtando* to the Tenure *pro placito*, traverſed the Tender: Upon which the Plaintiff demurred. It was Reſolved in this Caſe, 1. That the tender is not traverſable. But an Exception was taken to the Declaration, becauſe it was not ſhewed, That the Anceſtor was ſeiſed in Fee of the Land ſuppoſed to be holden, and that was conceived by the Court to be a material Exception. It was adjourned. Hill. 13 Car. in B. R. *Arrundell* and *Sanders* Caſe. *Cro.* 1. Part, 361.

25. Note by the Juſtices, That Regularly a man ſhall not traverſe the Diſcent, but the dying ſeiſed: but, in Caſe of a Deviſe, of neceſſity the traverſe muſt be of the Diſcent, for there they cannot traverſe the dying ſeiſed; for if they traverſe the dying ſeiſed, then the parties overthrow their own Title, and the Deviſe. Trin. 21 Jac. in B. R. in *Sommers* Caſe. *Godbolt*, 410.

26. Replevin for taking his Beaſts at O. viz. one Gelding, one Mare, to his damage, &c. The Defendant did demur upon the Declaration, becauſe there was no place aſſigned where the taking was but only a Town. It was Reſolved, That the Declaration was not good for the cauſe aforeſaid. For the general Preſidents in Declarations, in Replevins, is to aſſign a place as well as a Town, and in ſuch a Caſe, as well the place as Town are traverſable by the Avowant wherein the Replevin differs from an Action of Treſpaſs, wherein the Plaintiff may aſſign his Treſpaſs only in one Town; and if he do not aſſign a place, the Defendant may plead at another place, without traverſing the place aſſigned by the Plaintiff. But a Replevin is an Action of more certainty, and of neceſſity muſt contain a place in the Declaration. See 35 H. 6. 40. Trin. 10 Jac. in B. R. *Read* and *Hawkers* Caſe. *Hob.* 16.

27. Treſpaſs

27. Treſpaſs for taking a Kettle at *Weſtowne*, the Defendant Juſtified by reaſon of a Cuſtome in the Mannor of T. and the Plaintiff joyned Iſſue *De injuria ſua propria abſque tali Cauſa.* The *Venire facias* was awarded *de Vicineto de Weſtowne et manerio de T.* by the Roll, and a Verdict for the Plaintiff, and in that Caſe, although it was ſaid, That the Plaintiff ſhould not have traverſed the cauſe generally, but the Cuſtome; Yet it was adjudged that the ſame was holpen by the Statute of Jeofails as matter of form, becauſe *abſq; tali Cauſa* contained the Cuſtome and more; but becauſe the Sheriff had returned his Pannel *de Vicineto de Weſtowne* only, It was holden to be incurable, and not to be amended. Mich. 12 Jac. in C. B. *Banks* and *Parkers* Caſe. *Hob.* 76.

28. In a Replevin, the Defendant did avow, That *Ellen Enderby* was ſeiſed in Fee of three Acres of Land in D. and took to Husband F. P. by whom they had Iſſue *Thomas*. *Ellen* dyed; the Husband was in by the Curteſy. T. the Heir in Reverſion granted a Rent of 5 l. out of the three Acres to the Avowant. The Plaintiff in bar ſaid, That before *Ellen* had any thing, J. S. was ſeiſed in Fee, and gave the ſame to *J. Enderly* in tail, who had Iſſue *Ellen*, who after the death of her Father entred, and was ſeiſed in tail, and took Husband *ut ſupra*, and had Iſſue *Tho. ut ſupra*, and dyed, and *Tho.* in Reverſion, Tenant by the Curteſy Granted *ut ſupra, abſq; hoc* that *Ellen E.* was ſeiſed of the three Acres in Fee: Upon Iſſue joyned, it was found for the Avowant. It was moved in Arreſt of Judgment, That there was no Iſſue joyned, for that the traverſe of the Seiſin of *Ellen* was idle, for no title to the Rent is derived from her, but the Seiſin of *Tho.* the Grantor ought to have bin traverſed. The Court was of Opinion, though an apter Iſſue might have bin taken, and that the traverſe is not good; yet it is helped by the Statute of Jeofails; for the Eſtate of *Ellen* was in a ſort, and by Circumſtances material; for if ſhe was ſeiſed in tail, the ſame diſcended to *Tho.* the Grantor, then by his death the Rent is determined, but if the Fee diſcended to *Tho.* from *Ellen*, then the ſame enabled *Tho.* to grant the Rent. Mich. 2 Jac. in B. R. *Pigot* and *Pigotts* Caſe. *Yelverton*, 54.

29. Waſte by M. againſt E. for Waſte done in Meſſuage, Land, and Wood demiſed to E. for years. The Defendant ſhewed, That the Meſſuage was parcel of the Mannor of C. which came to King H. 8. by Diſſolution; and ſo to Queen *Eliz.* who by her Letters Pattents Granted the ſame to R. H. in Fee, who conveyed it to the Defendant in Fee, who Granted back the ſame to the Plaintiff and his Heirs ſo long as H. had Iſſue of his body, for which the Plaintiff entred, and leaſed to the Defendant *prout*: And further ſhewed, That H. dyed at D. without Iſſue of his body 20. *Jan. anno* 3 Jac. Upon which the Plaintiff demurred, and had Judgment in the Common Pleas. Upon which the Defendant E. brought Error in B. R. And in this Caſe, the firſt Judgment was affirmed: For the defects in the Defendants Plea. 1. Whereas the Plaintiff in the Action of Waſte declared of a Seiſin in Fee in himſelf, out of which the Leaſe to the Defendant was derived, which ought to be intended a pure and abſolute Fee, the Defendant did not diſcloſe any Eſtate in the Plaintiff, but a Fee determinable, which is another kind of Eſtate then the Plaintiff had alledged, and therefore it was not good without a traverſe, for the Plea of the Defendant ought to confeſs and avoid, or traverſe the material point in the Declaration, which is the Seiſin in Fee, and the Defendant by his plea doth not confeſs it. 2. The Plea is not good, becauſe he alledgeth the death of H. without Iſſue 20. *Jan.* 3. and *non conſtat*, what *January*, whether it was before the Writ brought, or after; for if before the Writ brought, then nothing in the Reverſion at the time of the Writ brought, is a good plea for the Defendant; and if he dye after the Writ brought, then he ought to alledg the death without Iſſue, pendant the Writ. Mich. 6 Jac. in B. R. *Ewer* and *Meiles* Caſe, in Error. *Yelverton* 140, 141.

30. In *Aſſumpſit*, the Caſe was; The Defendant Granted to the Plaintiff 1000 Trees in ſuch a Wood to be cut down within three years after the Grant: Afterwards they agreed, when the Plaintiff had cut down ſome of the Trees, that they ſhould not cut down any more during the 3 years, and that the Defendant would Licenſe them after the three years, to cut ſo many Trees as ſhould amount to the full number of 1000. And becauſe the Defendant hindred after the three years, the Plaintiffs brought *Aſſumpſit*, and declared upon the matter aforeſaid. The Defendant pleaded That before the promiſe ſuppoſed to be made by the Defendant, the Plaintiffs had cut down 1000 Trees *Abſque hoc*, that at the time of the promiſe, they had cut but 800 Trees only (as they layed in the Declaration); upon which the Plaintiffs demurred. It was Objected in this Caſe, That the traverſe was idle, for the Defendants Plea had bin good without any traverſe at all, becauſe it was a full anſwer that they had cut 1000 Trees; Alſo the traverſe ought to have bin *abſque hoc*, that the Plaintiffs at the time of the promiſe had cut but 800 Trees, omitting the word (*tantum*). But the Opinion of the Court was, That the traverſe was good; for the Plaintiffs by alledging the cutting of the 800 trees only

only in their Declaration, which is matter iſſuable, hath given advantage to the Defendant to traverſe in the manner as he hath done; for every matter in fact alledged for the Plaintiffs, may be traverſed by the Defendant; and then the Plaintiffs by their demurrer upon the bar, have confeſſed the cutting of 1000 Trees, which was his full bargain at firſt, and ſo there is no conſideration to ground the *Aſſumpſit* upon, and Judgment was given for the Defendant againſt the Plaintiffs. Mich. 8 Jac. in B. R. *Tatum* and *Poulter*, and *Perients* Caſe. *Yelverton* 195.

31. In Treſpaſſe of Aſſault and Falſe Impriſonment, ſuppoſed to be done at ſuch a Pariſh and Ward in *London* the 20th of *May*, 35 Eliz. The Defendants juſtified by reaſon of an Execution in the Court of *Sandwich* within the 5. Ports, in Debt, and traverſed *abſq; hoc*, that they were guilty in *London*. The Plaintiff Replyed, and maintained the Aſſault and Impriſonment, and ſaid, and traverſed *abſq; hoc quod habetur aliquod tale Recordum ſuper quo prædict.* the Defendants had alledged, *Et hoc paratus eſt verificare per Recordum illud.* And upon this, the Defendants Demurred. The Court ſeemed *prima facie*, That the Defendants Plea was good, becauſe it was a ſpecial matter of juſtification, which cannot be pleaded and alledged to be in any other place then where it was done. But in the Caſe at Barr it was ſaid, If the ſpeciall matter alledged in the Forreign County be falſe, the Plaintiff may maintain his Action, and traverſe the ſpecial matter alledged by the Defendants; and ſo a Traverſe in ſuch caſe may be upon a Traverſe, when falſity is uſed to *ouſte* the Plaintiff of that benefit which the Law gives him. Mich. 38 Eliz. in C. B. *Paramour* and *Verrals* Caſe. *Popham*, 101.

32. In an Action of Covenant, The Covenant was, That a Ship ſhould go with the next Wind, and that the Merchant ſhould pay ſo much for the freight. The Defendant ſaid by way of Traverſe, That he did not go with the next wind. It was ſaid, That the Traverſe was not good; but he ought to have traverſed, That the Ship did not go at all, for that which is material, is to be traverſed; and that is, that the Ship did not go with the next Wind. and a Circumſtance cannot be traverſed, and the Wind is alterable. It was adjudged for the Plaintiff. Paſch. 2 Car. in B.R. *Conſtable* and *Claberies* Caſe. *Popham*, 161.

33. In an Action of Treſpaſs, It was layed to be done, 1. *Maii*: The Defendant pleads a Releaſe to him made *primo Junii*, and takes a Traverſe, *abſq; hoc*, that he was guilty at any time after the firſt of June. It was adjudged in this Caſe, That the day of the Treſpaſs is not material, and that he here ought to have traverſed in this manner: *ſcil. abſq; hoc*, that he was guilty before or after the firſt of June. Trin. 14 Jac. in B.R. *Amſon* & *Walcotts* Caſe. *Bulſtr.* 3. Part, 209.

34. Debt brought by an Executor, who brought in Court *Literas Teſtamentarias*; The Defendant by way of Plea ſhewed, That the party which was dead, dyed Inteſtate, and Letters of Adminiſtration were granted to him, *abſq; hoc*, that the Plaintiff is Executor: It was the Opinion of the whole Court, That the Traverſe as it was here, is not good, But if any Traverſe at all ſhould be taken, it ſhould have been *abſq; hoc quod Conſtituet eum Executorem*. It was adjudged againſt the Defendant. See 10 H. 6. 26. 9 E. 4. 33. Mich. 14 Jac. in B.R. *Bulſtr.* 3. Part, 250.

35. In Action upon the Caſe, for a Conſpiracy to Indict him of Felony; For ſtealing of 5. ſheep; upon which the party was acquitted. The Defendant pleaded in barr, and ſhewed, and juſtified his proceedings, That 18. *November*, at B. he was poſſeſſed of 5. Oxen ſtollen from him by a ſtranger; upon Freſh-ſuit, he heard they were in the poſſeſſion of the Plaintiff; he demanded ſight of them, but he refuſed to let him ſee them: he ſaid he had killed 4. of them, refuſed to ſhew him the Skins, which was the ground of his ſuſpition; upon this, by Warrant he was brought before a Juſtice of Peace, and by him examined, *et propter varias et incertas reſponſiones*, he ſuſpected him, likewiſe bound him to the Seſſions, and the Defendant to proſecute; and upon this, he was Indicted, and acquitted. The Plaintiff Replyed, confeſſing the goods, that they were ſtollen, and brought to C. to Market, where he being a Butcher, bought them, and did Toll them; That for this he was Indicted, and acquitted, and takes this Traverſe, *Abſq; hoc*, that he refuſed to ſhew them to the Defendant. Upon this Replication, there was a Demurrer. The Court in this caſe ſeemed to be of Opinion, That the Traverſe here *abſq; hoc*, that he refuſed to ſhew him the Cattel, was a good Traverſe, and an Iſſue might have been taken upon it; but by ſuch a Traverſe *de injuria ſua propria abſq; tali Cauſa*, by this the Plaintiff would have been tryed, becauſe that part of the Barr is good, the Traverſe here is good, and no cauſe of Demurrer *propter varias et incertas reſponſiones*. The parties ſeeing the Opinion of the Court, ended the matter betwixt themſelves, that it was not moved again. Trin. 14 Jac. in B. R. *Weale* and *Wells* Caſe. *Bulſtr.* 3. Part, 284, 285.

36. In Action upon the Caſe upon a Promiſe, The Plaintiff declared, That there was an Accompt betwixt him and the Defendant; and upon the Accompt, the Defendant was found to be in Arrear to the Plaintiff in the ſum of 61. the which he promiſed to pay to the Plaintiff at a time paſt; for

for not payment whereof, the Action was brought. The Defendant confeſſed it to be true, that long before there was ſuch an Accompt had between them; and that upon the ſame Accompt, he was found in arrearages to the Plaintiff for the ſaid ſum: for which he entred into a Bond unto the Plaintiff, and concluded his Plea with a Traverſe *abſq; hoc*, that there was any other Accompt between them after this time. Upon which it was Demurred. It was the Opinion of the whole Court, That the Traverſe in this caſe taken by the Defendant in the Concluſion of his Plea, *abſq; hoc*, that there was any other Accompt made between them, after the entring into the Bond for the payment of the money demanded, was a good Traverſe and well taken. Wherefore it was adjudged, That the Plaintiff *Nil Capiat per Breve*. Hill. 7 Jac. in B. R. *Talby* and *Cooks* Caſe. *Bollſr.* 1. Part, 16.

37. In a *Replevin*, the Defendant Juſtifies the taking; for that the place where was called R. Mead, parcell of the Mannor of D, the Freehold of one C; and ſo Juſtifies the taking of the Cattel Damage-Feaſants to C. as his ſervant, and in his right. The Plaintiff ſaid, That long before C. was ſeiſed of this, That J. S. a ſtranger was ſeiſed, and ſo conveyes a Title to himſelf, but takes no Traverſe of the Freehold to be alledged in C; It was the Opinion of the Court, That the Replication without a Traverſe was not good: For he ought to have ſaid, That long time C. was ſeiſed, that J. S. was ſeiſed, and to have concluded with a Traverſe *abſq; hoc*, that the ſame was the Freehold of C. *tempore Captionis*. It was adjudged for the Avowant. Mich. 8 Jac. in B R. *Pompier* and *Chamberlains* Caſe. *Bollſr.* 1. Part, 48.

38. In Treſpaſs, *Quare vi & armis*, for Cancelling a Deed; The Plaintiff Declared, That the Defendant was ſeized in Fee of certain Lands, and of this enfeoffed J. S. and his heirs with Warranty, reſerving to himſelf a yearly rent, with clauſe of Diſtreſs, if not paid; and after, the Defendant did bargain and ſell the ſaid Rent to the Plaintiff; for the Cancelling of which Deed (the which the Plaintiff *caſualiter amiſit*) the Action was brought; but doth not ſhew, that he was at any time poſſeſſed of this Deed, but only by Implication *argumentative*. The Defendant Traverſed the Grant of the Rent, That no ſuch Bargain was made: The Queſtion was, Whether here was a good Traverſe taken, or not? Whether the matter were Traverſeable, or no? It was Objected, That the Traverſe was well taken, nor could the Defendant in this Caſe, have taken a better Traverſe; for in regard the Plaintiff in his own Declaration hath ſet forth his Title; by this, he hath given to the Defendant ſuch an advantage for to Traverſe thus if he will, which otherwiſe the Law would not have given him. But the whole Court was clear of Opinion, That the Grant here is not Traverſeable, and ſo the Traverſe taken to it, is not good: But by the whole Court, the Plaintiff in his Declaration ought to have ſhewed, That he was poſſeſſed of the Deed before, which he hath not done, and for the omiſſion of this, the Declaration is not good; and for that cauſe the Rule was, *Quod Querens nil Capiat per Billam*. Mich. 9 Jac. in B. R. *Suſfield* and *Conſtable's* Caſe. *Bollſrode*, 1. Part, 214.

39. In Treſpaſs, the Defendant ſhewed, That King *James* was ſeized *in jure Coronæ*, of the Mannor of D; within which Mannor, there were divers Copyholders demiſeable in Fee, in Tail, for life or years; and that the Copyholders of the ſaid Mannor, by Cuſtome might make Leaſes for three years without Licence; and that the King *anno* did grant the Copyhold in Queſtion, to A. who was Admitted; under whom the Defendant claims. The Plaintiff by Replication ſet forth, That long before, Queen *Eliz.* was ſeized of the ſaid Mannor, whereof the Land in Queſtion is parcel, and that ſhe *anno* 22. of her Reign, did Grant the ſaid Copyhold in Fee to one B. who was admitted thereunto, and dyed ſeized; and that his ſon and heir was alſo admitted, and did Leaſe the Copyhold to the Plaintiff; and that afterwards, by the death of the Queen, the Mannor did deſcend to the King, who (as before) made the ſecond Grant, and ſo demands Judgment: Upon this Replication, the Defendant did demur in Law, and for cauſe, ſhewed, That the Plaintiff had not traverſed the ſecond Grant alledged. It was the Opinion of the whole Court in this Caſe, That the Replication was good, without any Traverſe; for that the Plaintiff by his Replication, hath confeſſed and avoided the Title made by the Defendant, which is ſufficient, without any Traverſe; and the Plaintiff here is not to Traverſe the ſecond Leaſe under which the Defendant claims; for that the Law ſaith, That being a former Leaſe made, the ſecond is void: And ſo it was ſaid it was adjudged in one *Alexanders* Caſe, Mich. 10 Jac. in B. R. *Rice* and *Rees* Caſe. *Bollſr.* 2. Part, 1. & 2.

40. In a Replevin, the Defendant avowth becauſe A. was ſeized, and Leaſed to B. for ninety years, who granted the Term to C. who granted it over to D. who granted it to E. whoſe Eſtate the Defendant had: The Plaintiff confeſſed the Aſſignment made to C. but ſaid, That C. took Husband, and the Husband granted the Term to the Plaintiff, without that, That C. granted the Term to D. It was adjudged in this Caſe, That the Traverſe made

made to the Bar to the Avowry, was inſufficient; becauſe a Leaſe for years cannot be gained but by a lawful Grant: And therefore, when one claims a Leaſe for years, and another claims by an Eigne Grant, there he ſhall not Traverſe the laſt Grant, but the other may Traverſe the elder Grant: But it is otherwiſe in caſe of a Feoffment; for there, if the other claim by a former Feoffment, he ought to confeſs, and avoid the latter Feoffment, as by Diſſeizin; for a Diſſeizure may gain a Fee, but a Leaſe for years cannot be gained but by a lawful Conveyance. *Cook* 6. Part, 24. *Hethars* Caſe.

41. In a Prohibition to ſtay a Suit in the Eccleſiaſtical Court for the ſurpluſage of profits: The Plaintiff ſhewed, That the Fee-ſimple Land, and other Land, was charged with the payment of Fifteens, and five ſhillings yearly to the poor; and that the reſidue of the profits he was to have to his own uſe; the others do maintain their Libel, and aver the Surpluſage, and to go to the Reparation of the Church, and the Reſidue to be diſpoſed of to charitable uſes, and takes a Traverſe *abſque hoc*, that the ſurpluſage of the profits was to be to the uſe of the Plaintiff himſelf; Upon which Plea the Plaintiff demurred. It was Objected, That this Traverſe was not good; for if a man pleads in Bar, and takes a Traverſe, by this Traverſe he waives his Plea in Bar, and this which is Traverſed, is but an Inducement to the Plea, and not a Plea in it ſelf; and no Traverſe is to be taken to an Inducement, nor yet to the Concluſion of a Plea. But it was the Opinion of the Court, That the Traverſe was good, and well taken, for the point of Suggeſtion is always Traverſeable; the Plaintiff ſuggeſts here, that he is to have the Surpluſage of the profits to his own uſe, the Defendant doth Traverſe that, the taking of the profits is always Traverſeable, for that makes him Tenant, or not Tenant. It was adjudged againſt the Plaintiff. Paſch. 10 Jac. in B. R. *Audlis* and *Cliffons* Caſe. *Bulſtrode* 2. Par. 10.

42. In Trover and Converſion of certain goods, The Defendant pleaded, and juſtified the taking at ſuch a place at L. as Bell-man there, by Cuſtome to take out of every bag of Corn holding a Buſh. l, and no more, a Pint; and if it did hold more, then a Quart; and ſhewed, That he was choſen Bell man *& tempore quo* did take the ſame, as by Cuſtome it belonged to him to do, and lays the taking at one place by the Cuſtome, and the Converſion at another; And upon this Plea, the Plaintiff Demurred in Law. The Queſtions in this Caſe (amongſt others) were, 1. If this Cuſtome were a good Cuſtome. 2. Whether any Traverſe here ought to have been: For the firſt point, It was Reſolved, That this Cuſtome was good, and reaſonable, and ſhall be conſtrued to have a reaſonable Commencement; for the Office of a Bellman is to clean the ſtreets, and *pro labore ſuo*, he had this allowed him, and it is *pro bono Publico*; and the Converſion is here the point, and the Trover is but the Inducement to the Action; and he ſheweth here, That he hath not converted the goods of the Plaintiff, but his own goods, when he conveyes himſelf a property: And as to the point of Traverſe, the Court at the firſt over-ruled this, That no Traverſe here needs to be, for that the Converſion is the point of the Action, and not the Trover. Paſch. 12 Jac. in B. R. *Hill* and *Hawks* Caſe. *Bulſtr.* 2. Part, 201.

43. Treſpaſs for Aſſault, Battery, Fining, and Impriſoning the Plaintiff at C. The Defendant as to the Aſſault and Battery pleaded Not Guilty: As to the Impriſonment, the Defendant juſtifies the ſame at A. in this manner; ſetting forth, That there the Court was held before him for the Stannery, he being he Steward of the Court; In which Court there was a Suit between the now Plaintiff, and another, for debt; which Suit there, went againſt the now Plaintiff, who was condemned in the Suit, and taken by his command, and in Execution for this, until he ſhould pay it, and his Fine, which is the ſame Impriſonment, and Juſtifies, and takes a Traverſe *abſque hoc*, that he was *culpabilis* at any place *extra Curiam Stanneriæ*: Upon this Plea, the Plaintiff demurred in Law. It was the Opinion of the Court, That the Traverſe here was not good; for by this it doth not appear what Juriſdiction the Court of Stannery is, nor how far the ſame doth extend it ſelf; the Treſpaſs here is layed to be at C. he pleads a Suit between the Plaintiff and another at A. That the Plaintiff in the Suit there, was Condemned and Impriſoned, until he paid the Debt and Fine, with a Traverſe *abſque hoc*, that he was Guilty *ubi, extra Curiam* of the Stanneries, this is not good; for by this plea in this manner, *abſque hoc*, that he was guilty in any place in *Com. Devon.* out of the Juriſdiction of the Court of Stanneries; by this it doth not at all appear to the Court, whether C. be within or without the Stannery; Wherefore it was Reſolved, That both the Plea and the Traverſe were not good, and Judgment for the Plaintiff. Trin. 12 Jac. in B. R. *Evdy* and *Stanleys* Caſe. *Bulſtr.* 2. Part, 316, 317, 318.

44. In a Replevin, the Defendants made Conuſans as Bayliffs to J. S. Executor of R. G. and that the place where did contain twenty Acres, parcel of the Manour of T. and that the Archbiſhop of *York*, and others, were ſeized of the ſaid Manor in Fee, and 1 *Junii* 11 H. 7. by Deed enrolled,

granted to King *Hen.* 8. a Rent-charge of 50 marks *per annum*, to rent in Fee, with clause of Distress, and so convey the Rent down to Queen Eliz. who by her Letters Patents, granted it to R. G. for Life, who made J. S. his Executor, and avowed for Arrearages. The Plaintiff pleaded in Bar, and confessed the seizin of the Archbishop, and others, and said, That 4 *Junii* 11 H. 8. they enfeoffed P. E. in Fee of the said Manner, who conveyed it to R. E. who entred, and licensed the Plaintiff to put in his Beasts, which he did, and they were there, till the Defendants distrained them, *absque hoc*, That the Archbishop and others, 3 *Junii* 11 H. 8. granted the Rent to the said King and his Heirs, *modo & forma prout*. The Defendants say, That the Archbishop and others, did grant to the King the Rent, *modo & forma*, as they alledged: Issue thereupon joyned. It was found, That the Archbishop and others 11 H. 8. recovered the Lands against P. E. and it was to the intent, to grant the Rent to the King and his Heirs, and then of the Recovery of the Manner out of which, to the said P. E. in Tail, the Remainder to the King; and they being seized, by their Deed dated 3 *Junii*, Sealed and Delivered, which was enrolled afterwards 7 *Junii*, granted the said Rent to the King *Hen.* 8. The Judges upon conference in this Case, Declared their Opinion to be, That Judgment should be given for the Defendants, for that the Issue is joyned upon the Grant, *modo & forma*, and not upon the day, as is offered by the Traverse, and the matter found is generally; and see *Litt.* that *modo & forma* avoids, and prevents the matter of day, and goes solely to that which is material; and for any thing appears, there is no Intervening matter after the third day, and before the seventh day, that the Deed is enrolled, and then it is a good Grant, 3 *Junii*, so Judgment was given for the Defendants. Mich. 8 Car. in B. R. *Hicks* and *Mountfords* Case. *Hutton*, 120, 121.

45. In Trespass; The Defendant in Bar to the new Assignment pleaded, That before the time of the Trespass, A. was seized in Fee, and so seized, dyed; and that the Tenements where &c. descended to his son and heir; who so seized 8 Car. Demised it to the Defendants for two years, by vertue whereof, he entred, and gave colour to the Plaintiff by a Grant by his Father, where nothing passed: The Plaintiff replyed, That before the son had any thing, one E. the Grandfather was seized in Fee, and 8 Jac. in consideration of a marriage between A. his son, and the Plaintiff for her Joynture made a Feoffment thereof to the said A. and the Plaintiff his Wife, and to the heirs of the said A. upon the body of the Plaintiff begotten, the Remainders to the heirs of the said A. in Fee, and shewed the marriage; and that by the Statute of 27 H. 8. they were seized *ut supra*, *absque hoc*: That the said A. the Father dyed seized of the Tenements, with the Appurtenances *de novo assignat.* in his Demesne as of Fee, *prout* the Defendant alleged: Whereupon it was demurred. In this Case, it was adjudged for the Plaintiff, because no dying seized is pleaded, so that it might be Traversed, but with a *sic seizitus obiit*. Also the matter only Traversable here, is the seizin *modo & forma*; for by the Replication, seizin joyntly with the Plaintiff, and to the heirs of the body of the said A. with a Fee-simple in him, is confessed, and that is good, with the Traverse: The Court agreed it a good Traverse, and Judgment was given for the Plaintiff. Trin. 9 Car. in C. B. *Edwards* and *Lawrences* Case. *Hutton*, 123.

46. In *Ejectione firmæ*, The Plaintiff declared of a Lease made at H; The Defendant pleaded, That *H. prædict. ubi Tenement. prædict. jacent*, is within the five Ports, where the Kings Writ runs not, and so pleaded to the Jurisdiction: The other replyed, That the Town of H. was within the County of S. *absque hoc*, that it was within the five Ports; Upon that the Defendant Demurred. It was said, That the Traverse was not good, for he ought to have Traversed, *absque hoc quod Villa de H. ubi Tenementa jacent*, is within the five Ports, for the truth was, it was part in the five Ports, and part in *Suffex*, and the Land lyes in that part which is within the five Ports. It was answered, and Resolved, That the Traverse was good, and that the Bar was naught, and that the Plaintiff may not Traverse in other manner; and the Defendant in his Bar ought to have made the distinction; and every Plea which goes to the Jurisdiction of the Court, shall be taken strong against him that pleads it: It was adjudged for the Plaintiff. Mich. 21 Jac. in C. B. *Austin* and *Beadles* Case. *Hutt.* 113.

47. In an Action upon the Case, The Plaintiff Declared, That he was seized of the Manner and Castle of H. in the County of S. by purchase from G. Lord *Audley*, and that he was in Communication to demise the said Castle and Manner for a Fine, and 100 l. Rent *per annum* to R. E; and that the Defendant *promissorum non ignarus*, said; I have a Lease of the Castle and Manner of H. for 99 years, and then published a Demise, supposed to be made by the Grandfather of the Lord *Audley*, to E. D. her husband, and offered to sell it, *ubi revera* the said Lease was counterfeit by her Husband; by reason of which Publication, the said R. E. did not proceed to accept of the said Lease. The Defendant pleaded in Bar, *Quod Talis Indentura, qualis* in the Declaration came to the Defendants hand

hands by Trover, and Traverſed, ſhe knew of the Forgery; Upon which the Plaintiff did demur. It was Reſolved in this Caſe (amongſt other points) That the Bar was inſufficient; for the knowing of the Defendant of the Forgery, is not Traverſeable: Alſo, the manner of pleading, *Talis Indentura quæ-ſita*, is no direct anſwer to the Indenture alledged in the Declaration; for *Talis Indentura, non eſt eadem Indentura*. It was adjudged againſt the Defendant. Mich. 33 Eliz. Sir *Gilbert Gerrard*, and *Dickenſons* Caſe. *Cook* 4. Part, 18.

48. A *Quare Impedit* brought by divers, The Defendant pleaded the Releaſe of one of them, pendant the Writ; In this Caſe it was adjudged, That the ſame goeth in Bar of him only. 2. It was Reſolved, That a Preſentment alledged in the Grantee of the next Avoydance, and not in the Grantor himſelf, was a good Title for the Grantee and his Heirs in a *Quare Impedit*: And in this Caſe it was ſaid, That if Grantee for years of a Sanctuary or Guardian happen, ſeizin of the Services, it ſhall be a good ſeizin for him in the Reverſion: And a Preſentment alledged in the Leſſor or Donor, or Leſſee or Donee, is not double; for that the Preſentment of the Leſſor or Donor is only Traverſeable. *Cook* 5. Part, 98. The Counteſs of *Northumberlands* Caſe.

49. In Treſpaſs for a way; The Defendant did juſtifie, and ſaid, That he had a way, not only *ire, equitare, & Averia ſua fugare*, but alſo *Carrucas ſuas, & Carragias currere, &c.* The Plaintiff Traverſed it *abſque hoc*, That he had a way, not only *ire, equitare, &c.* in the words aforeſaid; and thereupon they were at Iſſue, and found for the Plaintiff. It was moved in Arreſt of Judgment, That the Iſſue was not well joyned, becauſe it was not a direct affirmative, but by inducement only: But the whole Court was againſt that. It was ſaid by *Jones* Juſtice, That if I ſay, That not only J. S. hath been at ſuch a place, but alſo J. D. (without Queſtion it is a good affirmative, that both of them have been there: But all the Juſtices agreed, That in the Principal Caſe, the Pleading was more elegant then formal. Mich. 15 Car. in B. R. *Hicks* and *Webbs* Caſe. *Mar.* 55.

50. Debt upon an Obligation, The Condition was, to perform an Award: The Defendant ſaid, That the Award was made, That the Defendant ſhould forceaſe all Suits depending betwixt them, which he had done. The Plaintiff replyed, That the Arbitrators made the Award, *ut ſupra*; and alſo awarded, That the Defendant ſhould pay to the Plaintiff 20 l. at the houſe of J. S. *abſque hoc*, that they made the other award only: The Defendant Rejoyned, It is true, they made thoſe awards; but they further awarded, That the Plaintiff ſhould Releaſe to the Defendant, which he hath not done: Upon which Rejoynder, the Plaintiff did Demur in Law. It was Objected, That the Award was void, becauſe it is to do a thing upon the Land of another, which he cannot lawfully do; And although the Arbitrators may award to do a thing which is inconvenient, yet not to do a thing which is impoſſible. But the Opinion of all the Juſtices was, That the Award was good; for the money is to be paid *apud domum* J. S. and not *in domo*. 2. Reſolved, That although the award ſhould not be good, as to that part, yet for the Reſidue it is good, and therefore for non performance of the Reſidue, the Bond was forfeited. In this Caſe, whereas it was alledged, That the Replication was inſufficient, for that the Plaintiff ought not to have Traverſed as this Caſe is; for a man ſhall not Traverſe that which is alledged by Implication, but that ought to be Traverſed, which is alledged *de facto*, upon which an Iſſue may be joyned; yet that Exception was diſallowed by the Court, and the Traverſe was ſaid to be good. Paſch. 12 Jac. in B. R. *Linſey* and *Aſhtons* Caſe.

51. In Avowry for damage feaſant, The Defendant pleaded a Leaſe made to him by J. S; the other ſaid, That before the Leaſe made, J. S. did Enfeoff him; The other replyed, and maintained the ſaid Leaſe *abſque hoc*, that J. S. *Seiſitus feoffavit*: *Gawdy*, This Traverſe is not formal; for the word [*Seiſitus*] is merely idle, and ought to be left out; for he cannot Enfeoff, unleſs he be Seized; and it never hath been ſeen that the Seizin in ſuch caſe hath been Traverſed, but generally, *abſque hoc, quod feoffavit*: And ſuch was the Opinion of the whole Court. Mich. 29 Eliz. in C. B. *Hales* and *Homes* Caſe.

52. In a *Quare Impedit*, It was Counted, That the Defendant being Parſon of the Church in queſtion, was Preſented to another Benefice, and Inducted the 15 of *April*, by which the firſt Benefice became void, &c. The Defendant ſaid, That he was Qualified ſuch a day, which was after the 15 of *April*, *abſque hoc*, that he was Inducted the 15 of *April*. It was the Opinion of the Court, That it was no good Traverſe; for he ought to have ſaid generally, *abſque hoc*, That he was Inducted before the day at which he is alledged to be qualified; for if one declareth of a Treſpaſs done 1 *Aprilis*, and the Defendant plead a Releaſe 1 *Feb.* he ought to Traverſe *abſque hoc*, That the Treſpaſs was done after the Releaſe, by *Periam* Juſtice. Mich. 29 Eliz. in C. B. *Godbolt*.

53. In ſecond Deliverance, The Plaintiff Declared, of a taking and detayner of Cattel in a place called *Nunt-field*, in *Swattam Balbeck*, againſt gages and pledges: The Defendant made Conuſans as

Bayliff to *Thom. Marſh*; and ſaid, That long before the taking, *Thom. Marſh* the Father was ſeized of the Manour of *Michel*-Hall in *Swattam Bulbeck*, of which the Land there was parcel; and that one *A. Gage*, and D. his Wife, and *T. Grange*, and F. his Wife, were ſeized of the Land in which, in the Rights of the ſaid D. and F. their Wives in Fee, and that they held the Land, as of the Manour of *Michel*-Hall, by Soccage, viz. Fealty and certain Rent: And that the ſaid *Thom. Marſh* the father, by the hands of the ſaid Husbands and Wives, was ſeized of the ſaid Services, as by the hands of his very Tenants, and derived the Tenancy to Sir *Anthony Gage*, and the Surrendry to *Thom. Marſh* the ſon; and becauſe that Fealty was not done by Sir *Anthony*, the Defendant as Bayliff to *Thom. Marſh* the ſon did juſtifie, *ut infra Dominium, & Feoda ſua*: The Plaintiff by Proteſtation ſaid, *Non tenet* the ſaid Lands of the ſaid *Thom. Marſh*, as of his Manour of *Michel*-Hall by Soccage, Fealty, and Rent, as aforeſaid, *pro placito* ſaid, That the Defendant took the Cattel againſt gages and pledges: And Traverſed *abſque hoc*, That the ſaid *Thom. Marſh* the Father, was ſeized of the ſaid Services by the hands of the ſaid Husbands and Wives, as by the hands of their very Tenants; Upon which the Defendant did demur in Law; and for cauſe ſhewed, that the Plaintiff had Traverſed a thing not Traverſeable. This Caſe was argued by the Judges, and by them Reſolved, 1. That at the Common Law, the Plaintiff at the Common Law was not enabled to take this Plea; for a Stranger at the Common Law, could not plead any thing but *Hors de ſon Fee*, or a thing which did amount to ſo much, and could not plead any thing to the Title of the Tenure. See *Brown* and *Goldſmiths* Caſe. *Hob.* 119. acc. 2. That the Plaintiff is enabled by the Statute of 21 H. 8. and becauſe the Statute enables the Lord to avow upon the Land, not naming any perſon certain, it is but Juſtice and Equity that the Plaintiff ſhould be enabled to plead any thing in diſcharge of it; and although the Plaintiff be a Stranger, and claimeth no Intereſt in the Land, yet for the ſaving his goods, he may plead this plea. 3. Reſolved, That the Traverſe here, was not well taken; for being but an equitable Conſtruction, that the Plaintiff may plead the plea, he ought to purſue the form of the Common Law, in the form of Traverſe, which he hath not here done, and therefore the Traverſe is not good; and where the Seizin is not material, there it is not Traverſeable; where the Surrendry is not in queſtion, there no Traverſe of the Seizin; where the Lord and Tenant differ in the Services, there no Traverſe of the Seizin, but of the Tenancy; but where they agree in the Services, there the Seizin may be Traverſed. *Cook* 9. Part, 33. *Rachrel's* Caſe. Alſo, it is not good, becauſe it is a general Traverſe of the Seizin *per Manus*, the Tenure not being admitted; and it is a general Rule, That a man ſhall never Traverſe the Seizin of Services, without admitting of the Tenure: Alſo the Traverſe is not good, becauſe he hath Traverſed a thing not in demand, which is the Rent; for he ought to have Traverſed the Seizin of the Fealty only, for which the Diſtreſs was taken, and not the Rent: And Note, In this Caſe it was Reſolved by all the Juſtices, That a Traverſe of Seizin *per manus* generally, without admitting of a Tenure, is not good. Hill. 17 Car. in C. B. *Leyton* and *Granges* Caſe. *Marſh* 166. to 176.

Traverſe of Offices *found before the Eſcheator.*

1. IT was found by Office by Writ of *Mandamus*, that T. C. was ſeized in Fee of certain Meſſuages and Gardens in *London*, and dyed without Heir, the Lands holden of the King in Soccage; The Corporation of Sadlers ſhewed their right, That R. M. was ſeized in Fee of them, and by his Will, deviſed the ſaid Meſſuages, &c. to the Warden and Communalty of Sadlers, in Fee, and that they were diſſeized by T. C. who dyed without Heir, and ſhewed the Cuſtome in *London*; That a Freeman might Deviſe in Mortmain: And in this Caſe theſe points were Reſolved, 1. When the King was ſeized of any Eſtate of Freehold or Inheritance by matter of Record, whether it be by Record Judicial, or Miniſterial, by Conveyance of Record, or by matter found by Office of Record, he who had right, could not have any Traverſe, upon which he was to have *Amoveas manum*, but was put to his Petition of Right: But where the King is Entituled by matter in Fact, and found by Record, if in the ſame Office the Title and Intereſt of the party be found, there the party grieved, at the Common Law ſhould not be put to Petition, but might Traverſe. 2. Reſolved, That when the King's Tenant ſeized in Fee, dyeth without heir, the Fee and Freehold is preſently in the King without Office, if the Tenant was in poſſeſſion at the time of his death; but when a Stranger is in poſſeſſion at the time of the Eſcheat, there the King ſhall not be adjudged in poſſeſſion, until this Seizin and poſſeſſion

diſſion be removed. 3. When a common perſon againſt another common perſon is put to his real Action, In ſuch Caſe, he ſhall be put to his Petition, which is in the nature of a Real Action againſt the King: And the difference was taken, when the Anceſtor of the King diſſeizeth another, and dyeth, and the Lands diſcend to the King, there becauſe by the diſcent the entry of the Diſſeiſee is taken away, the party ſhall be put to his Petition: But in the Caſe of Eſcheat, when the Diſſeizee dyeth without heir, if it were in the Caſe of a common perſon, the Entry of the Diſſeizee was not taken away, and therefore there in the Caſe of the King, he ſhall not be put to his Petition, but may Traverſe the Office. *Cook* 4. Part, 55, 56. The Warden and Communalty of Sadlers Caſe.

2. A. ſeized of a Manner holden by Knight-Service in *Capite*, took B. to Wife, who had Iſſue C: Afterwards the marriage betwixt A. and B. in the Court of Audience by ſentence, was declared to be void, becauſe they were *infra annos nubiles*, and they were Divorced; A. took to Wife D. and afterwards, before Commiſſioners Eccleſiaſtical, the marriage betwixt A. and D. is declared to be lawful, and that the ſaid A. was never lawfully married to B. D. dyed, afterwards A. took E. to Wife, by whom he had Iſſue F. and dyed; Office found after his death, That F. was his only daughter and heir, within age: The King granted the Cuſtody and Wardſhip of F. to J. S. and E. then his Wife; C. exhibited a Bill in the Court of Wards, pretending that ſhe was daughter and heir of A. and alledged, That A. and B. at the time of their marriage, were both above the age of *Conſent*, and that they did cohabite ten years together before the ſuppoſed Divorce, during which time, they had Iſſue the ſaid C. and prayed, That ſhe might Traverſe the ſaid Office, J. S. and his Wife, Witneſſes, were examined on the part of C. and before publication, J. S. dyed; C. exhibited a Bill of Reviver againſt E. and afterwards, C. had Iſſue G. and dyed: G. took husband, and ſhe and her husband brought a Bill of Reviver, to revive the firſt Suit againſt E. In this Caſe (amongſt other) theſe points were Reſolved, That G. who was the Plaintiff in the Bill of Reviver, ought to have an Office found, before ſhe might Traverſe; for when the King is ſure of Wardſhip, and Primer Seiſin by Office, there is no reaſon that any one who pretendeth himſelf to be heir ſhould Traverſe the Office that the other was not heir, until the King be ſure to have profit by him, either by Wardſhip, or Primer Seiſin; for then after the firſt Office avoided, he might ſhew matter to have the King of Wardſhip and Primer Seiſin; which ſhall be unreaſonable. 2. Reſolved, That the Statute of 2 E. 6. Cap. 8. doth not give any Traverſe to him who pretends himſelf to be Heir, againſt an Office found for another Heir, without an Office be found for him; but the intent of the Act was, to take away a doubt at the Common Law: which was, That if one be found Heir within age by an Office, and another is found Heir in the ſame County, and of full age, If the party grieved ſhould have a Traverſe immediately? *Cook* 7. Part, 43, 44, 45. *Kynas* Caſe.

3. Note: It was Reſolved, That if an Office be found againſt the King, and a *Melius Inquirendum* awarded, and in that it is found for the King, but the *Melius* is void for repugnancy in the Writ; a new Writ of *Melius Inquirendum* ſhall be awarded. But if upon the Writ of *Melius*, it be found againſt the King, there the King ſhall not have a new Writ of *Melius Inquirendum*; for then there ſhould be no end, but new Writs ſhould infinitely iſſue forth: And if an Office be found for the King, the party grieved may traverſe it; and if the Traverſe be found againſt him, the ſame makes an end of the buſineſs; and ſo it is if it be found for him who traverſeth. Hill. 7 Jac. *Cook* 8. Part, 168. *Paris Stoughtons* Caſe.

4. Where an Office is imperfectly found againſt the King, In ſuch caſe, the King cannot traverſe the Office, as a Subject may upon a Surmiſe made in the Court of Wards, that the Lands are of greater value; that they are holden by other Services; that the Tenant was ſeiſed of another Eſtate; that there are more Heirs, or other Heirs, then were found in the Office, or whereby the Office was found within age, where indeed the Tenant dyed without Heir, ſo that the Land ought to Eſcheat; or where by the firſt Office one is found Heir of full age, where he was under age: and generally where his Highneſs hath better Title then was found for him by the firſt Office; In ſuch Caſes, a *Melius Inquirendum* may be awarded for the King. See *Lee*, 25. acc.

5. At the Common-Law, a *Melius Inquirendum* is grantable, Where the Office was found, *quod tenementa tenentur* of the Heir of J. S. not named in the Writ. But it was doubted, upon the Clauſe in the Statute of 2 E. 6. Cap. 8. (That where *de quo vel de quibus ignorant*, there a Tenure of the King is found but by *Due Servitia ignorant*, that a *Melius Inquirend.* ſhall be awarded, as is uſed, any Law Cuſtome to the contrary notwithſtanding) If notwithſtanding the Proviſo in the ſaid Act, which extends not to prejudice or take away the Title of the King, or of any other accrued by any other Inquiſition before the ſaid day, but that they ſhall enjoy as if the Act had not been made, If upon ſuch ancient Offices a

Melius

Melius Inquirendum lyeth? And the better Opinion was, That it did not. In that caſe, it is ſaid, If a man be found by Office of the age of 15 years, and when he comes to 20, he is found by *ætate probanda* of full age, If the Queen had no remedy, but ought to make Livery; See the words of the Act, That at his full age indeed, he ſhall have an *Ætate probanda*; and if it be granted before, it ſeems a Traverſe ſhall be admitted. And ſo it was Ruled, Mich. 5 Mar. *Dyer*, 155, 156.

6. King *Henry* the 8th gave Lands in tail to *Tho. Culpepper*, the remainder in tail to *John Culpepper*: *Thomas* was attainted of Treaſon; which Attainder was confirmed by Parliament, and the Actual Seiſin of the Lands given by the Act to King *Hen.* 8th, ſaving all rights, &c. of ſtrangers. The King ſeiſed the Lands, and granted the ſame to one *Baſſe* in Fee. *Tho. Culpepper* dyed without Iſſue, *John* entred, and being *ouſted* by *Baſſe*, brought a Writ of *Entre Sur Diſſeiſin* againſt him, who ſhewed all the matter and the diſcent to King *Ed.* 6. and prayed in Aide of him, and the Aide was granted, and 4. Searches were granted in the Chancery; depending which, a *Mandamus* was awarded at the Suit of *Baſſe*; and upon that, the Grant in tail to *Tho. Culpepper* was found, and the Attainder, Execution, and the dates being falſe, a *Melius Inquirendum* was awarded; The true dates of the Letters Patents upon it was found, but the Attainder and Execution were found to be before the Grant: Upon which Return in Chancery, for the apparent untruths, a *Procedendo* was awarded; and the Demandant was not put to his Petition, or *Monſtrans de Droit*, becauſe it ſeemed to the Juſtices upon the matter in Law, That the baſe Fee of the King was determined by the death of *Tho. Culpepper* without Iſſue, and that the remainder and Entry of the Plaintiff was ſaved by the ſaid Act of Parliament. See Trin. 1 Mar. *Dyer*, 100. *Culpeppers* Caſe.

7. Upon a Commiſſion in the Nature of *Diem clauſit extremum*, a Tenure of the Queen as of the Barony of S. was returned; After, a ſecond Commiſſion found a Tenure in Knight-Service as of the ſaid Barony: After that, a third Commiſſion iſſued, reciting, *Quod compertum eſt per Inquiſitionem Caput poſt mortem A. tempore H.* 5. that the ſaid Land was holden of the King in Knight-Service in *Capite*; upon which, Knight-Service in *Capite* was now returned *prout prædict. Inquiſitionem tempore H.* 5. *liquit.* It was holden by the Juſtices in this caſe, That the Heir need not to traverſe the two laſt Inquiſitions, for they were without warrant; but the firſt Office although againſt the Queen ſhall be allowed, till diſproved by a *Scire facias* which ſhall iſſue out of the Record of H. 5. according to the Statute of 29 E. 1. of *Eſcheators*. Paſch. 8 Eliz. *Dyer* 249. *Baſſetts* Caſe. See 12 Eliz. *Dyer*, 291. acc.

8. It was found by an Inquiſition after the death of the Lord *Powis*, who dyed ſeiſed of Land holden in *Capite*, That V. was his Coſen and Heir, and within age; and E. G. the huſband ſon of the Lord *Powis* tendred a Traverſe to the dying ſeiſed, and that V. was not his Heir, but A. B. and to have the Land to Farm. V. being of full age, tendred a ſpeciall Livery, the Land being of the value of 100 l. It is there a Quære, If the Queen *ex debito Juſtitiæ* ought to grant a ſpecial Livery? or if it be in her Election to ſue a general Livery, notwithſtanding the Statute of 33 H. 8. and, if Livery ſhall be ſtayed, untill Traverſe be found or not. It was the Opinion of the Court, That the Queen had the Election: And it was the Opinion of the Court, That if the Office was not found for E. G. that V. ſhould proceed with his Livery. Trin. 22 Eliz. *Dyer*, 377. *Vernons* Caſe.

Trade.

1. THE Corporation of the Taylors of *Ipſwich* made an Ordinance, That if any one ſhould exerciſe the Trade of a Taylor, untill he be preſented before them, and they had allowed him to be a Workmar; that he ſhould forfeit to them 3 l. 13 s. 4 d. to be levied by Diſtreſſe or Action of Debt; A man who had been Apprentice to a Taylor 7 years according to the Statute of 5 Eliz. was ſworn to a Gentleman, and by his Commandment made Cleathes in the houſe of his Maſter for his Children, before he was allowed to be a Workman by the Corporation: In this caſe, theſe Points were Reſolved, 1. That by the Common-Law, no man might be prohibited to work in any lawfull Trade, becauſe the Law abhorred Idleneſs as *mater omnium vitiorum*. See 2 H. 5. 6. A Dyer was bound, that he ſhould not uſe the Dyers Craft for two years; And it was adjudged in that caſe, That the Obligation was void and againſt Law: and the Statute of 5 Eliz. was not made only that Artificers ſhould be skilfull; but that young men ſhould not be brought up in Idleneſs. 2. Reſolved, That the Reſtraint of the Defendant for more

then the ſaid Statute was made, was againſt Law; and ſuch Ordinance, That they ſhould be preſented to them, and allowed by them, was contrary to the Act of 5 Eliz. But Ordinances made for the Government of men of Trades and Myſteries are good, but not to reſtrain them in a lawful Trade. 3. Reſolved, That the Statute of 5 Eliz. is intended of a publique uſe of a Trade or Myſtery, and not of him a private Taylor, Cook, Brewer, Baker, &c. in the houſe of any one in his family, for there every one may uſe it in ſuch private manner, although he never had been an Apprentice. 4. Reſolved, That the Statute of 19 H. 7. Cap. 7. doth not allow or diſallow any Ordinances made by a Corporation to be good and lawful; but leaves them to the Common-Law: but only by ſuch allowance they ſhall not incur the penalty of 40 l. if they put in uſe any Ordinances againſt the Kings Prerogative, or the Common profit of the people. *Cook* 11. Part, 53. The Caſe of the Taylors of *Ipſwich*. Note; In that Caſe, it was holden further by the Juſtices, That if a man hath brought a new Invention, or a new Trade within the Kingdome in perill of his life, and conſumption of his Eſtate or Stock; Or if a man hath made a new diſcovery of a thing: In ſuch caſes, The King of his Grace and Favour, in recompence of his Coſts and Travail, may grant by Charter unto him, That he only ſhall uſe ſuch a Trade or Traffique for a certain time, Becauſe at the firſt, the people of the Kingdom are ignorant, and have not knowledg or skill to uſe it; but when that Patent is expired, the King cannot make a new Grant thereof; For when a Trade is become Common, and others have been bounden Apprentices in the ſame Trade, there is no reaſon that ſuch ſhould be forbidden to uſe it. See in the ſame Caſe, *Godfol.* 253. b.

2. J. W. was arreſted at the Suit of the Chamberlain of *London*, upon the forfeiture of the payment of 5 l. for that he *non exiſtens Liber perſona, &c. uſus eſt manuali occupatione de Tallow Chandler, &c.* And upon the Return of the *Habeas Corpus* in the King's-Bench, the Court took adviſement upon that part of it, whereby it was averred, That he *non exiſtens, &c. uſus eſt manuali occupatione de Tallow Chandler, &c.* and ſhewed not, that he ſold any Candles, &c. For if he made them for his own uſe, and ſold none for gain, he might well do it; as every one is permitted to bake or brew, &c. for their own uſe, &c. but it ſeemed to be implyed by the ſame averment, That it was his Trade by which he got his Living; viz. by ſelling Commodities of his Trade, and not that he made them for his own uſe: For it is not properly ſaid, That one uſeth a Manual Occupation, when he only doth it for himſelf. And Note, the Caſe there was, That the Cuſtome of *London* was, That no perſon whatſoever not being Free of the City, ſhall by any colour, way, or means whatſoever directly or indirectly by himſelf, or by any other, keep any Shop or any place whatſoever inward or outward, to put to ſale any Wares or Merchandizes by way of Retail, or uſe any Trade, Myſtery, or Handicraft, for hire, gain, or ſale within the City of *London*, upon pain of Forfeiture for every time 5 l. It was Reſolved, That the ſame was good by way of Cuſtome, but it was not good by way of Grant or Charter made to the City. Hill. 7 Jac. in C. B. *Wagoners* Caſe. *Cook.* Caſe of the City of *London*. *Cook* 8. Part, 122. to 129.

3. The Queen by her Letters Patents granted to *Darcy*, the making of playing Cards, and the ſole Importation of all playing Cards into England for two years; and by the ſame Letters Patents did forbid that no other ſhould buy, Import, or ſell any playing Cards within the Realm during the Term. In this caſe, It was Reſolved, That the Grant of the ſole making of playing Cards within the Realm, was void; firſt, becauſe it is a Monopoly; which is againſt the benefit and Liberty of the Subject. Secondly, Becauſe the ſole Trade of any Mechanical Artifice, is a prejudice to all the Subjects, and only for the private Commodity of the Patentee; and a Grant of the King to the Grievance of the People, is void in Law. *Cook* 11. Part, 85, 86.

4. Note: Upon a Motion made for a Conſultation upon a Prohibition awarded: It was ſaid by *Cook*, Chief Juſtice, That no Subject of the King may Trade with any Realm of Infidells without Licence of the King; and the reaſon of that is, That he may relinquiſh the Catholick Faith, and adhere to Infidelliſm; and he ſaid, that he had ſeen a Licence made in the time of King *Ed.* 3. where the King recited, That he having ſpeciall Truſt and Confidence, That his Subject will not decline from his Faith and Religion, Licenſed him, *ut ſupra*. And Note, this Queſtion did ariſe upon the Recital of a Licence made to a Merchant to trade into the Eaſt-Indies. Hill. 7 Jac. in C.B. *Mitchelburn* and *Mitchelburn's* Caſe. *Brownlow* 2. Part. 196.

5. In an Aſſumpſit, the Plaintiff declared, That the Defendant was a Mercer, and kept a Shop in N, and had his Shop furniſhed with old ſullied Wares; and the Plaintiff had a Shop furniſhed with new and Freſh Wares; and in Conſideration that the Plaintiff would buy of him his Wares in his Shop, and pay for them ſuch prizes as he paid when he firſt bought them; The Defendant promiſed, That he would not any longer

keep

keep any Shop in N: and the Plaintiff declared, That he bought the Defendant's said Wares, and paid 300 l. for them, the price the Defendant bought them at; whereas they were not worth 100 l: and yet the Defendant contrary to his promise kept his Shop there, and furnished it with new Wares to the Plaintiff's damage of 500 l. It was moved in Arrest of Judgment, it being found for the Plaintiff, That the Assumpsit was against Law, being to restrain the use of a lawful Trade. But all the Justices held, That it was a good Assumpsit, for it is voluntary, and that a man upon a valuable Consideration, may restrain himself, that he will not use his Trade in such a Town, which is usual in *London*, *et volenti non fit injuria*. And it was said, It is not like the case of 2 H. 4. of the Dyer; for there he was compelled to enter into Bond, Not to use the Trade of a Dyer: and yet in that case, the Defendant durst not Demur. And upon the matter, it is but the selling of his Custome, and leaving another to gain it! And a Prescription to restrain one to use a Trade in such a place, is good. And Pasch. 18 Jac. *Bragg* and *Tanners* Case, was agreed, Where one for 30 l. promised to pay 100 l. if he thence forward kept a Drapers Shop in Newgate-Market, that the Assumpsit was good. And in the principal case, upon a Writ of Errour brought in the Exchequer-Chamber, the Judgment was affirmed by all the Justices. Mich. 17 Jac. in B. R. *Broad* and *Folletts* Case, *Cro.* 2. Part, 596.

High-Treason, *and* Petit-Treason.

What Treason by the Common-Law, by the Statute of 25 Ed. 3. *And what Treason by other Particular Statutes: Treason by Acts done; and Treason by Words spoken.*

1. IF any one shall Imagine, Intend, or Compasse the death of the King, or of his Royal Consort the Queen, and shall by Writing, or open act declare the same, *Hic est omnes Lesæ Majestatis*, an Offence against the Head of the Common-wealth, and therefore High-Treason, by the Common-Law, and so declared by the Act of 25 E. 3. *Cook* 8. Part, 28. in the Prince's Case.

2. If any one shall kill the Lord Chancellor, or Lord Keeper of the Great Seal of England; who is the dispeser of the Kings Conscience; The Treasurer, the Lord Keeper and dispeser of the Kings Treasure and Revenue; The Lord Chief Justice of England, Lord Chief Justice of the Common-Pleas, Justices of Assise, or any other Justice, in the time of the Execution of their Places, who are as it were the distributive hands of the Kings Ordinary Justice, this is an Offence against the Person of the King himself; and hath been accounted High-Treason.

3. *Tho. Bensted* was Indicted and Arraigned before Commissioners of *Oyer* and *Terminer*, wherein all the Justices and Barons were in Commission: In which case, It was Resolved by them, That he going to *Lambeth*-House in Warlike manner to surprise the Archbishop who was a Privy Counsellor, it being with Drum and a Multitude of 300 persons, that it was Treason. 2. That the breaking of a Prison wherein Traytors be in durance, and causing them to Escape, was Treason, although that the parties did not know that there were any Traytors there; and that upon the Statute of 1 H. 6. Cap. 5. Pasch. 16 Car. in B. R. *Thomas Bensted*'s Case. *Cro.* 1. Part, 421. See 5 R. 2. Rott. Parliament, membr. 31 32. acc.

4 Nott,

4. Note: If Subjects of the King Levy War, they are not Enemies, but Traytors and Rebells: And he which is over-Sea at the time of Rebellion, and there succours a Rebell who did fly thither, knowing it is a Traytor, by 25 E. 3. by 4 Justices, Hill. 13 Eliz. *Dyer*, 298. And see there, *Story* being beyond Sea, practised with a Foreign Prince, to invade the Realm. Also he practised the Destruction of the Queen. It was holden, That they were both Treasons, and Tryable by 35 H. 8. an Act in force, notwithstanding the Repeal, and the Clause of 1 & 2 Mar. That Tryals for Treason shall be according to the Common-Law. Hill. 13 Eliz. *Dyer*, 298. *Stories* Case. *Dyer*, 310.

5. If a man joyn the Arms of England with his own Arms, the same is Treason; and so it is, if he Counterfeiteth the Arms of the King. 33 H. 8. Pr. Treason, 2. *Kitchin* 12. acc.

6. Note: It is said, That if at this day a man be aiding to the Kings Enemies, or be killed in open Rebellion against the King, he shall not forfeit his Lands or his Goods. But if the Chief Justice of the Kings-Bench (who is Head-Coroner of England) in person upon view of the body of him killed, make a Record thereof, and retorneth the same into the Kings-Bench. It is such a Treason, for which he shall forfeit his Lands and Goods; And so it was said, It was Resolved in the time of H. 7. by *Fineux*, Chief Justice, *Cook* 4. Part, 57. in the Case of the Wardens and Comminalty of Sadlers.

7. *A. Crohogan*, an Irish-man, was arraigned for Treason; For that being the Kings Subject, 9. July, 7 Car. at *Lisbone* in *Spain*, he used these words, *I will kill the King*, (*innuendo Dominum Carolum Regem Angliæ*) *if I may come to him*: And in August, 9 Car. he came into *England* for the same purpose. To this he pleaded, Not guilty; and it was proved by two Merchants, That he spake these words on Shipboard at *Lisbone* in *Spain*: and added in great heat these words, *Because he is an Heretique*. This his Traytorous intent and imagination of his heart, declared by these words, were holden to be High-Treason, by the Course of the Common-Law; He coming into *England*, was Arrested and Arraigned, and found guilty, and had Judgment as a Traytor: and although his Returning into *England*, (he being a Dominican Fryer, and made Priest in *Spain*) to seduce the Kings people, was Treason, by the Statute of 23 Eliz. yet he was proceeded against for Treason, upon the Statute of 25 Ed. 3. of Treason. Mich. 9 Car. in B. R. *Arthur Crohogan's* Case. *Cro.* 1. Part, 242.

8. *John Owen*, alias *Collins*, was Indicted and Arraigned of High-Treason, for speaking these Traytorous English words at *Sandwich* in the County of *Kent*; *viz.* If the King be excommunicate by the Pope, It is lawful for every man to kill him, and it is no Murder: For as it is lawful to put a man to death who is condemned by a Temporal Judge, so it is lawful to kill the King, if he be excommunicate by the Pope; for that is the execution of Law; and this, of the Pope's Supream Sentence: The Pope being the greater, includes the King being the lesser. He pleaded, Not Guilty. The sum of the Evidence was, That the said *Owen* coming from St. *Lucar* in *Spain*, spake the said words to divers persons, who told them to the Mayor of *Sandwich*, who having Conference with him, he spake the like words to the Mayor: Whereupon, the Mayor tendred him the Oath of Allegiance; which he refused to take; and he put his hand to a Writing, containing the said words, as his Opinion. The Exception taken by *Owen*, was, That he did not speak of the King of *England*. But that was said to be a simple Exception; For that before he spake the words to the Mayor, the Mayor asked him, If he were an Englishman, or not? He answered, He was, and then spake the said words to the Mayor. The Chief Justice, *Cook*, said, That if he had not spoken of the King of *England*, but of the King generally, it had included the King of *England*: The Matter of his Indictment was not grounded upon the Statute of Supremacy, but upon the Common-Law, his Intent to compass the death of the King; of which the Statute of 25 E. 3. is but an Explanation. And he said, That notwithstanding that the words were but Conditionable; *viz.* (*If he were Excommunicated*) yet he said, It was High Treason. And so it was said, It was adjudged in the Duke of *Buckingham's* Case, in the time of King *Hen.* 8th, and in the Lord *Stanley's* Case, in the time of King *Hen.* the 7th. *Owen* was found Guilty, and had Judgment of Treason. Pasch. 13 Jac. in B. R. *Owen alias Collins* Case. *Godbolt*, 363.

9. Note: It was said *per Curiam*, That words spoken may be Treason; as, to say, That *the King is a Bastard*, and that *another hath better Title to the Crown*; for that may draw the Subjects from their Allegiance, and beget Mutiny in the Kingdome. And therefore, It was Resolved in an Action upon the Case, for words spoken, which were these, *I will hang him, for he hath spoken words which be High-Treason*; that an Action will lye for the words, although the words be general. And it was said by *Flemming*, Chief Justice, That in such case, it is not safe for the Plaintiff to put incertain, what words the Defendant

dant ſpake; For words which are Treaſon, are *Arcana Imperii*, and not to be vulgarly bruited and uttered; but are only to be diſcovered to the King or his Councel, or other Magiſtrate; for otherwiſe by his ordinary report of the words without diſcovering them, the Plaintiff may endanger himſelf. Mich. 5 Jac. in B. R. *Blanchflowers* and *Arwoods* Caſe. *Yelverton*, 107. See Hill. 3 Jac. *Berisford* and *Preſſes* Caſe. *Yelv.* 197. acc.

10. M. and two others were Indicted for counterfeiting 20 ſhillings pieces of the Kings Coyn, and M. for offering thoſe pieces to the Kings Subjects, knowing them to be Counterfeit; He being thereupon Arraigned, pleaded Not-Guilty. But the Evidence being pregnant againſt him, he was found guilty, and the others were acquitted, and Judgment given, That he ſhould be drawn, and hanged, but not quartered, according to the Opinion of *Stamford*, 182. Mich. 10 Car. in B. R. *Morgans* Caſe. *Cro.* 1. Part, 278.

11. Note: It was Reſolved by the Juſtices, in the Caſe of *Rich. Bradſhaw*, and *Robert Burton*, who with others by word entred into an agreement one with the other, to riſe and put themſelves into Arms, and ſo to go from one Gentlemans houſe to another, and ſo from houſe to houſe, to pull down Incloſures: This appearing by their own Confeſſion, and two Witneſſes, was adjudged to be High-Treaſon within the Statute of 13 Eliz. Cap. 1. The words of which Statute are, That if any intend to levy War againſt the Queen, and this malitiouſly, adviſedly, and expreſly declare, or utter by any words or ſayings, that this ſhall be high Treaſon. For all the Court agreed, That Rebellion of Subjects againſt the Queen, hath been alwayes High Treaſon at the Common-Law. For the Statute of 25 E. 3. Cap. 1. is, That levying of War within the Realm, is Treaſon, and Rebellion is all the War which a Subject can make againſt the King. Paſch. 39 Eliz. *Bradſhaw* and *Burtons* Caſe. *Popham*, 122.

12. Note: Upon the Arraignment of *Robert* Earl of *Eſſex*, and others for Treaſon, which was, 19 Feb. 44 Eliz. It was holden by *Popham* Chief Juſtice of *England*; *Periam*, Lord Chief Baron of the Exchequer; *Gawdy*, *Fenner*, *Wolmeſley*, *Clark*, and *Kingsmill*, Juſtices, and ſo adjudged, That the Conſultation of them in *Drury* Houſe, was Treaſon, although the ſame came not to effect; and the Rebellion in the City, was a proſecution of that their Conſultation, for if they could have got Aide at *London* amongſt the Citizens, they would have invaded the Court: And in that caſe, It was by the ſame Judges further Reſolved, That he who intendeth to preſcribe Lawes to his King or Prince, whereby he reſtraineth his power, doth intend miſchief, and deſtruction of his Prince, and doth intend both to take the Crown and life from him. 2. That if a man be ignorant of the determination of thoſe that take up Arms againſt the Prince, and yet joyneth himſelf in Action with them that do it, he is guilty of Treaſon. 3. If any man ſhall attempt to ſtrengthen himſelf ſo far, that the Prince cannot reſiſt him, he is guilty of Treaſon. Alſo, That every Rebellion the Law conſtrueth to be a Plot againſt the Kings life, and a depoſing of him, in as much as the Rebell will not ſuffer the King to continue or Raign, that ſhall after puniſh or revenge ſuch a Rebellion. See for theſe Reſolutions of the Juſtices upon the Arraignment of the Earl of *Eſſex*, 19. Febr. 44 Eliz. Mr. *Cambden's* Book of the Life of Queen *Elizabeth*; and Quære.

Preſidents of Treaſon.

1. *Thomas Heber*, 18 E. 4. was Indicted of Treaſon for theſe words, *viz.* That the laſt Parliament was the moſt ſimple and inſufficient Parliament that ever had bin in *England*, That the King was gone to live in *Kent*, becauſe that at the preſent he had not the love of the Citizens of *London*, nor ſhould he have it for the future. That if the Biſhop of *Bath* and *Wells* were dead, the Archbiſhop of *Canterbury*, being Cardinal of *England*, would loſe his Head. It was adjudged in this Caſe, That theſe words were ſufficient Evidence to prove, that they were ſpoken to withdraw the affection of the people from the King, and to ſtir them up againſt him *in mortem et deſtructionem Regis*, and therefore were High Treaſon. 18 E. 4. in B. R. *Tho. Hebers* Caſe. See 3 Ma. *Dyer*, 128. *Conſtables* Caſe. *Cook* 1. Part, 10. *Calvins* Caſe.

2. *Elizabeth Barton* the Holy maid of *Kent*, for pretending Revelations from God, That God was highly diſpleaſed with the King for being Divorced from the Lady *Katharine*, and that in Caſe he perſiſted in that ſeparation, and ſhould marry another, that he would not continue King above a Month after; becauſe that the ſame tended to the depriving of the lawful Succeſſion of the Crown: ſhe

was

was Attainted of Treason by the Statute of 25 H. 8. *Elie, Bartons* Case.

3. *Rich. Cole*, for putting Poyson in a Pot of Pottage in the Kitchin of the Bishop of *Rochester*; whereby two persons dyed, was Attainted of Treason; and by the Statute of 22 H. 8. cap. 9. It was Enacted, That he should be boyled to death. 22 H. 8. *Richard Coles* Case.

4. *John Imperiall* that came into *England* upon Letters of safe Conduct, as an Agent from the State of *Genoa*, sitting in the Evening before his Door in *Bread-street* (as the words are of the Record) *paulo ante ignitegium*, *John Kirby* another Citizen coming that way, casually *Kirby* trode upon his Toe, it being twilight, this grew to an affray, and the Ambassador was slayn. *Kirby* was Indicted of Treason, the Indictment found all this, and that it was *se defendendo*, and without Malice. Yet afterwards by Parliament it was declared Treason, because the same did concern the honour of the Nation, that publick Faith should be strictly kept; and it might endanger the Traffique of the Kingdome; and therefore Judgement was given against him for Treason, and *Kirby* was Attainted. See 2 R. 2. Rott. Parliament. Mich. 18. 3 R. 2. Ter. Hill. Rott. 31. in B. R. *John de Imperialls* Case.

5. *John Hall* for a barbarous Murder committed upon the Duke of *Glocester*, stifling him between two Fether beds at *Calice*, was adjudged to be hanged, drawn, and quartered by Parliament in 1 H. 4. And yet it was but Murder. But the Parliament added the greater punishment to it in respect of the foulness of the fact. 1 H. 4. *John Halls* Case.

6. *John Sparkewke*, upon the way amongst other discourse said, That King *Henry* the fourth was not rightfull King, but the Earl of *March*, and that the Pope would Grant Indulgencies to all that would assist the Earls Title; and that within half a year, there would be no Liveries nor Cognizances of the King; That the King had not kept promises with the people, but had layed Taxes upon them. This denying the Title, with motives, though but implyedly of Action against it, was adjudged Treason, and a compassing of the Kings death. Pasc. 3 H. 4. Rott. 12. in B. R. *Sparkewes* Case.

7. An Indictment was Presented against *John Awater*, for these words, That he had bin servant to the Earl of *Warwick*, That though he were dead, the Earl of *Oxford* was alive, and should have the Government of part of the Countrey; That *Edward* whom they call King of *England* was a false man, and had by Art and subtilty slain the Earl of *Warwick*, and the Duke of *Orleans* his brother without any cause, who before had both of them bin Attainted of High Treason. It was adjudged, That these words were High Treason. Trin. 18 E. 4. *Awaters* Case.

8. *Henry* Lord *Grey*, being Lieutenant of *Ireland*, was Attainted of High Treason, and had Judgment for letting divers Rebells out of the Castle of *Dublin*, and discharging *Irish* Hostages and Pledges that had bin given for the securing of the Peace, and for not punishing one who said, The King was an Heretick. He pleaded, This was no adhering to the Kings Enemies; and yet it was adjudged Treason, and they cost his life. Trin. 33 H. 8. in B. R. *Leon.* Lord *Grey's* Case.

9. Sir *John Mortimer* being committed to the Tower for suspition of Treason, he brake the Prison and escaped; and although that was not Treason within the Statute of 25 E. 3. yet 2 H. 6. he was Attainted of Treason for the same by Bill. See 2 H. 6. Sir *John Mortimers* Case.

10. *Bassball* comming from *London*, found *Bernard* at Plough in the Parish of *Offley*, in the County of *Hertford*. *Bernard* asked him, What News? He said to him, That King *Richard* the second was alive in *Scotland* (which was false), and that at *Midsummer* he would come into *England*. *Bernard* said, What is then to be done? *Bassball* answered, Get men, and go to King *Richard*. This Advice was adjudged to be High Treason. Mich. 3 H. 4. in B. R. rott. 4.

11. *Grant*, and divers other Apprentices of *London* assembled at Tower Hill, carried a Cloak upon a Pole instead of a Banner; their intent was to deliver divers Apprentices out of Prison, being committed by a Sentence in the Star-Chamber for Ryots. To kill the Mayor, and to set prizes upon Victualls. It was Resolved in that Case, That it was a levying of War against the Queen, being intended against the Government, and the Officers of the Queen. Trin. 37 Eliz. in B. R. adjudged, *Grants* Case.

12. Note, it was Resolved, That if Inhabitants of a Town consult to take up Arms to throw in Inclosures upon a private Interest or claim of Common, that the same is but a great Ryot. But where divers of the County of *Oxford* consulted together, and stirred up others to take up Arms for the throwing in of all Inclosures in *England*, although that nothing was done, nor no assembly made to that purpose of them: Yet forasmuch as the Statute of *Merton* gives power of Inclosures in many Cases; the same was adjudged a levying of War against the Queen, and Treason within the Statute of 13 Eliz. cap. 1. Pasc. 39 Eliz. in B. R. *Bradshawes* Case.

13. A Bull was publiſhed, *Anno* 11 of the Reign of Queen *Eliz.* by Pope *Pius Quintus*, by which the Queens Majeſty was excommunicated, and deprived of her Kingdome, and thereby declared, That her Subjects were diſcharged of all Obedience to her. It was Reſolved by all the Judges, That the publiſhing of this Bull by a Subject againſt his Soveraign, was Treaſon in the higheſt degree by the ancient Common Law of *England*: For, if to publiſh a Bull of Excommunication within this Realm againſt a Subject thereof, was adjudged Treaſon in the time of King E. 1. as it was; *à fortiori*, it is Treaſon in the higheſt degree to publiſh ſuch a Bull againſt the Soveraign Monarch her ſelf. And therefore *Anno* 13 Eliz. cap. 1. by Act of Parliament it was declared, That if any perſon after the firſt day of *July* next comming, ſhould uſe or put in ure in any place within the Realm, or any of the Queens Dominions; any ſuch Bull, Writing, or Inſtrument, from the Biſhop of *Rome*, or any his Succeſſors; not only to bring the Realm and the Imperial Crown thereof into the thraldome and ſubjection of Forreign and unlawfull Juriſdiction and Authority claimed by the See of *Rome*, but to eſtrange and alienate the minds of the Queens Subjects from their dutifull obedience, and to raiſe and ſtir up ſedition and rebellion within the Realm, that the ſame ſhould be High Treaſon. See Stat. 13 Eliz. cap. 1, and it was ſaid, That this was High Treaſon by the Ancient Common Law. And thereupon *Campian*, *Sherwin*, and many other Popiſh Prieſts being apprehended, and confeſſing that they came into *England* to make a party for the Catholick cauſe when need ſhould require, were in the 23th year of the late Queen, Indicted, Arraigned, tryed, adjudged, and executed by the ancient Common Law, for their High Treaſon againſt their natural Prince. *Cook* 5. Part. In the Caſe of the Kings Eccleſiaſtical Law. p. 2, and 15.

Pettit Treaſon.

1. PEtit Treaſon is an Offence againſt the Head, although not againſt the Supream Head of the Common Wealth: If therefore the Wife killeth her Husband, or the Servant his Maſter, or the Maid Servant her Miſtreſs, unto whom as unto their Heads they are Subordinate. Or if the Clerk ſhall kill his Ordinary who is his ſuper-intendent, this is Petit-Treaſon. See 12 Aſſ. 30. 1 R. 3. 4. acc. And it hath bin holden for Law, That if a Servant intendeth to kill his Maſter, or a Maid her Miſtreſs, and leave their Service, and afterwards do put their Intention into Act, that this is Petit Treaſon. See 39 Aſſ. 17. and *Plow. Comm.* 260. and Quære.

2. A Woman Servant conſpired to rob her Miſtreſs, and in the Night ſhe let in a Felon at the door, and had him to the bed of her Miſtreſs, where he killed her Miſtreſs, the Servant holding the Candle, but ſaid nothing. It is a Quære in 3 M. *Dyer*, 128. If ſhe be a Principal, and if it be Petit Treaſon. See 40 E. 3. Br. *Corone* 119. *Plow. Comment.* 100. and *Dalton* Juſtice of Peace. 231.

3. The Wife conſpired with her Servant to kill her Husband, which ſhe did in the abſence of the Wife. It was holden by the Juſtices, that it was Petit Treaſon in the Wife being Acceſſary, becauſe it was Petit Treaſon in the Servant, but otherwiſe if the Conſpiracy had bin with a ſtranger. Paſc. 16 Eliz. *Dyer*, 332.

4. Appeal was brought by the Son of the death of his Father, againſt *Mary Pigot*, and *Eliz. Lewes*, becauſe that they *felonicè* conſpired the death of *Robert Pigot* the Plaintiffs Father, late Husband of the ſaid *Mary*; and that for that purpoſe, the ſaid *Mary proditoriè*, and the ſaid *Eliz. felonicè* miniſtred unto him a kind of Poyſon in a Poſſet, which he not knowing, drank up, and after within a ſhort time dyed. After full Evidence againſt *Mary*, and doubtfull againſt *Eliz.* Exception was taken that there was but one *Venire facias*, whereas there ought to have been ſeveral *Venire facias*'s in the Appeal, for that they were ſeveral Offenders, the one

one being charged with Treason, the other with Felony. But it was the Opinion of the Court, That the Plaintiff might take one *Venire facias*, or several *Venire facias*'s for doubt of alleage. See 9 E. 4. 27. Wherefore it was adjudged for the Plaintiff, and Judgment given, that the said *Mary* should be burnt. Trin. 14 Car. in B. R. *Pigot* and Pigots Case. *Cro.* 1. Part, 382.

5. One *Butler* and others upon the Sea, next to the Town of *Leyfast* in *Suffolk*, robbed divers of the Queens Subjects, and spoiled them of their goods, which they brought into *Norfolk*, and there they were apprehended and brought before a Justice of Peace of the same County, who being examined, confessed a cruel and barbarous Piracy, and that those goods which they then had with them, were part of the goods which they had robbed from the Queens Subjects upon the Sea. It was the Opinion of *Wray* and *Periam* Justices, That forasmuch as the Common Law doth not take notice of the Original Offence, *scil.* the Piracy, the bringing of the stolen goods upon the Sea into a County, did not make the same punishable at the Common Law; and therefore their Offence was committed to the Vice-Admiral of the said County. 28 Eliz. *Butlers* Case.

6. A Master or Captain of a Ship, a *Norman*, together with some *English* men, robbed the Kings Subjects upon the High Seas. It was said by *Fisher* in that Case, That it was Felony in the *Norman* Captain, and Treason in the *English* men; and the reason of the Case was, because the *Normans* were not then under the Obedience and Allegiance of the King of *England* (for King *John* lost *Normandy*) and for that cause Piracy was but Felony in the *Norman* Captain; but in the *English*, which were under the Obedience of the King of *England*, the same was adjudged Treason (which is to be understood of Pettit Treason) which was High Treason before, and therefore in that Case the Pirats being apprehended, the *Norman* Captain was hanged, and the *English* men were hanged and drawn. See *Stamford* 10. 40 Aff. 25. vouched in the Case of the Admiralty. Trin. 7 Jac. *Regis*. *Cook* 8th Cases 54.

Where and what Lands shall be forfeited to the King for High Treason; and what not.

1. KIng *Henry* the 8th, Tenant in tail to him, and the Heirs Males of his body of the Mannor of A. by force of a Fine lavyed 3 H. 7. with the Reversion to him, his Heirs, and Successors by force of an Attainder, and Office, gave the same Lands by his Letters Patents to W. W. in tail. And after it was Enacted by Parliament, That the said Mannor of A. for the cause of the Grant, Profit, and Pleasure of it, should be vested in the King, his Heirs, and Successors, saving to all their rights, &c. W. W. bargained and sold the said Mannor to J. S. who entred, against whom Intrusion was brought. In that Case, Exception was taken to the pleading; It being that King H. 7. was seised of the Reversion in Fee by the said Act of Attainder. By which it is Enacted, That the said Earl of *Warwick* shall forfeit all his Lands, &c. and that King H. 7. dyed seised of the said Reversion, and that that did discend to King H. 8. is repugnant and insufficient. For inasmuch as it doth not appear, when *Ed.* Earl of *Warwick* dyed who was Attainted, it is clear, That untill his death, or Office found, nothing rested in King *Henry* the 7th. For so it was said it was Resolved 27 H. 8. Br. *Tit. Office* 17. 15 Eliz. *Dyer*. 325. And the Statute of 26 H. 8. cap. 13. by which Land in tail is forfeit. And 33 H. 8. cap. 20. which Land forfeit for Treason, is by the said vested in the King without Office *prout*, that this word (shall forfeit) vests nothing in the King till Office, or death at the Common Law: And so it was Resolved in this Case. But then it was Resolved, That an Office found before the Escheator, and returned into the Chancery is good; and if it be found upon Examination of the Escheator that he hath seised the Lands into the Kings hands, although that such Office be never returned, yet it is sufficient to entitle the King. *Cook* 1. Part, 42. The Case of *Alton Woods*.

2. In Intrusion it was found, That A. was seised of divers Messuages, and by Deed Indented and Inrolled, Bargained and sold all his Lands and Messuages lying in the Parish of St. *Andrew*, in the Tenure and Occupation of J. S. to B. for life, the Remainder to C. in Fee. B. entred and took Husband who

who made a Leaſe for years; A. is Attainted of Treaſon. The King granted the ſaid Meſſuages to D. and his Heirs; Proviſo, That if they were not concealed, that then the Letters Pattents ſhould be void; and it was found that the Lands lay in the Pariſh of St. *Sepulchres*, and that they were in the Tenure of J. S. In this Caſe it was Reſolved, 1. That nothing paſſed by the ſaid Bargain and Sale, becauſe that the firſt certainty, viz. in the Pariſh of St. *Andrews* in *Holborn* was falſe. 2. Reſolved, That by the Common Law, and by the Statute of 26 H. 8. cap. 13. for Lands in tail, the actual poſſeſſion was not in the King by Attainder before Office. But when Tenant in Feeſimple is Attainted of Treaſon, and dyeth, the Fee, and Freehold without Office found, ſhall be in the King. For neceſſity that a Freehold cannot be in Abeyance; but otherwiſe it is, If Tenant in tail be Attainted, for that it ſhall diſcend to his Iſſue untill Office found: For the Act of 26 H. 8. gives only the Forfeiture, and Attainder was no corruption of bloud for Lands Intailed, untill the Statute of 33 H. 8. cap. 20. 2. It was Reſolved, That although by the Statute of 33 of *Henry* the Eighth the King ſhall be in actual poſſeſſion without Office, yet when the Diſſeiſee is Attainted of Treaſon, preſently the King by his Attainder had but a Right; And if a Diſſeiſee at the Common Law is Attainted of Treaſon, and the Seiſin and Diſſeiſin be found by Office, the King ſhall not be in poſſeſſion without ſeizure. Afterwards in the principal Caſe Office was found, and by that the Meſſuages were ſeiſed into the Kings hands, and new Letters Pattents were thereof made by the King, and the ſecond Pattentee peaceably enjoyed the Lands. *Cook* 3. Part, 10. *Dowties* Caſe.

3. Tenant in tail of the gift of the King by Knight Service, before the Statute of 26 H. 8. is Attainted of Treaſon, and dyeth, his Heir within age; although that the bloud be corrupted, yet it was holden in ſuch Caſe, That by force of the Statute of *Divis*, he ſhall be in Ward, becauſe he is a ſpecial Heir in ſuch Caſe. And although the King ſeiſed the Land in ſuch Caſe as forfeit for Treaſon; yet when the King is in poſſeſſion, the Law ſhall adjudg him in by reaſon of Wardſhip, which is his beſt title: & the Law doth more reſpect a ſmall Eſtate during the Minority by right, then a great Eſtate in Fee by wrong: And in that Caſe it was agreed, That if there be Grandfather, Father, and Son, and the Father is Attainted of Treaſon, and dyeth, and then the Grandfather dyeth ſeiſed, That in ſuch Caſe, although that the bloud be corrupted, yet the Land ſhall diſcend to the Son *per formam Doni*, and that Diſcent ſhall take away Entry, for that the Son is in by Diſcent. See 7 H. 4. 32. *Hollands* Caſe vouched in *Cook* 8. Part, 166. in *Digbyes* Caſe.

4. Husband and Wife, Dontes in ſpecial tail; The Husband is Attainted of Treaſon, and executed, having Iſſue, the Wife dyes. In that Caſe it was ſaid, That the Iſſue ſhould not have the Land, for that he ought to make Conveyance by both, as it was holden by the Juſtices there. See 5 H. 7. 33. But ſee *Cook* 9. Part, 139. in *Beaumonts* Caſe, the reaſon of that Caſe, That in the ſaid Caſe of Treaſon, the bar and forfeiture is made by the Statute of 26 H. 8. But yet by that Statute, The Eſtate of the Wife, if ſhe overliveth her Husband, is ſaved, and the bar is only as to the Iſſues in tail, and not as to the Eſtate of the Wife. See Caſe, 16 Eliz. *Dyer*, 332. *Cook* 9. Part, 139, 140. *Beaumonts* Caſe.

5. Note, It was Reſolved, That a Name of Dignity, as of a Viſcount, Earl, &c. may be entailed by the Kings Letters Pattents, to one and the Heirs Males of his body, and the ſame is within the Statute of *Donis*, for that it concerns Land, and every Baron or Earl is Created of ſome place. 2. That the Dignity, if the Statute of 26 H. 8. had not bin made by Attainder of Treaſon, might be forfeited by a Condition in Law annexed to the Eſtate of the Dignity. For the ſame is an Office of great truſt and confidence repoſed in him by the King; and when ſuch a perſon doth a thing againſt his Duty, and the end of his Dignity in taking up of Arms, or otherwiſe againſt the King, and is thereof Attainted, he ſhall forfeit his Dignity by a Condition in Law annexed to the Eſtate of it. 2. In that Caſe it was Reſolved, That if ſuch a Dignity had not bin forfeited for Treaſon at the Common Law, yet it was forfeited by the Statute of 26 H. 8. cap. 13. For a Dignity is an Hereditament, and an Inheritance was of it. *Cook* 7. Part, 33. 34. *Nevills* Caſe.

6. It was found by Office in 43 Aſſ. 28. Returned into the Chancery, That one W. of *Hilgton* who was ſeiſed of certain Lands in the County of *York*, was aiding to *Gilbert de M.* who was the Kings Enemy, and that the Lands were ſeiſed into the Kings hands; and thereupon came W. into the Chancery, and traverſed the Office, and it was found for him, and he had Reſtitution by Judgment of the Court. Note, *Cook* 4. Part, 57. in the Caſe of the Warden of the Sadlers, gave a Covent to the Recorder upon that Caſe. For there he ſaith, That at this day although a man be aiding to the Kings Enemy, or be killed in open Rebellion againſt the King, he ſhall not forfeit his Lands, or his goods. But if the Chief Juſtice of the Kings Bench (who is head Coroner of all *England*) in perſon upon view of the body of him killed in open Rebellion,

Rebellion, make a Record thereof, and retorneth the ſame into the Kings Bench, he ſhall forfeit his Lands and his goods, as it was done and Reſolved in the time of *Henry* the 7th by *Fineux* Chief Juſtice. *Cook* 4. Part, 57. in the Sadlers Caſe.

7. In a *Monſtrans de droit*, the Caſe was this; In 17 E. 2. *John de Malo Lacu*, gave to *Peter de Mal Lacu*, and the Heirs Males of his body, the Caſtle and Mannor of *Mulgrave*, which came to Sir *Ralph Bigod*; Sir *Ralph Bigod* 6 H. 8. made thereof a Feoffment in Fee to W. and others, to the uſe of his laſt Will, and dyed; the right of the Lands, together with the entail and the uſe, diſcended to Sir *Francis Bigod*. 21 H. 8. Sir *Francis* made a Feoffment to J. S. and others, to the uſe of himſelf and *Katharine* his Wife, and the Heirs of their two bodies, and had Iſſue *Ralph Bigod*, and *Dorothy*. 26 H. 8. the Statute of forfeiture for Treaſon was made. 29 H. 8. Sir *Francis* was Attainted of Treaſon, and Executed, and *Katharine* ſurvived him. 31 H. 8. a ſpecial Act of Parliament was made of his Attainder and forfeiture. 6 Eliz. *Ralph Bigod*, Son of Sir *Francis* and *Katharine*, was reſtored in bloud by Parliament, and dyed without Iſſue: *Dorothy* married *Roger Ratcliff*, and they had Iſſue *Francis Ratcliff*. 8 Eliz. *Katharine* dyed, *Francis* entred. 33 Eliz. all this was found by Office. 34 Eliz. The Queen Granted the Caſtle and Mannor to *Edmund* Lord *Sheffeild*, and the Heirs Males of his body, *Roger Ratcliff* brought his *Monſtrans de droit*, and had Judgment: Whereupon Error was brought in the Exchequer Chamber. There were two main Queſtions in the Caſe. 1. Whether *Francis Bigod* who had an Eſtate in ſpecial tail in poſſeſſion, and alſo a right of the old entail in him at the time of the Attainder, or whether it was in Abeyance in reſpect of the Feoffment made in 21 H. 8. And the Opinion of the Court was, That the Feoffment gave away all the Eſtate de Tenant in tail the Feoffor had concerning himſelf, or any benefit he might receive thereby; but as concerning his Iſſue to that in tail Inheritable, and to him in the Reverſion, and for their good; there remained ſtill to him a right by force of the Statute of *weſt.* 2. for the good of thoſe that are ſaved by that Statute; but whether it be in the Feoffor ſleeping till there be an Heir in tail, or in Abeyance, or in conſideration of the Law, is a Queſtion. 2. It was Reſolved, That this old right of the Eſtate tail was forfeited to the Crown by the Statute of 26 H. 8. for that there was an actual Eſtate in tail in the perſon Attainted at the time of the Attainder. 3. It was Reſolved, That their Rights were bound by the expreſs words of the Statute, there being no ſaving therein for them. 4. Reſolved, That when the Office was found, the Iſſue in tail was barred notwithſtanding any Remitter pretended to be in the Caſe. Wherefore Judgment was given for the King and the Lord *Sheffield*, and that the former Judgment ſhould be reverſed. And the Heirs of the Lord *Sheffeild* peaceably hold the Caſtle, Mannor, and Lands at this day. Mich. 13 Jac. in the Exchequer Chamber. rott. 96. The Lord *Sheffeild* and *Ratcliffs* Caſe. *Hob.* 334. See *Godbolt*, 314. long argued the ſame Caſe.

8. The Biſhop of *Durham* had *Jura Regalia* within his Dioceſs. Then came the Statute of 26 H. 8. Whether the forfeiture of Treaſon ſhould be taken away from the Biſhop by reaſon of that Statute, and given to the King, was the Queſtion. It was holden in that Caſe, That for new Treaſons, the Biſhop ſhould not have the forfeitures, for thoſe were at the Common Law; but that he ſhould have the forfeitures of Lands in Feeſimple within his Dioceſs, and that he had by force of the ſaving in the ſaid Statute. 12 Eliz. *Dyer*, 289. the Biſhop of *Durhams* Caſe.

9. By the Statute of 26 H. 8. Church Land was forfeited; for ſo you ſhall find it in the Statute of Monaſteries, which excepts Church Lands to be forfeited for Treaſon. Cardinal *Pool* being Attainted did forfeit his Deanary, and yet he was not ſeiſed thereof *in Jure proprio*. For it was *Jus Eccleſiæ*. For ſee 27 E. 3. 89. A Writ of Right of Advowſon was brought by a Dean, and he Counted, That it was *Jus Eccleſiæ*; and Exception was taken, That it is not *Jus ſuæ Eccleſiæ*; but the exception was diſallowed: for the *Jus* is not in his natural capacity, but in his Politick capacity; and yet by the Statute of 26 H. 8. ſuch Church Land was forfeited for Treaſon. See *Godbolt*, 324. acc. 27 E. 3. 89.

Treſpaſs

Treſpaſs.

Where it lyeth; by whom, for whom, againſt whom, and for what: where vi & armis, *where not; And what ſhall be a good Bar in the Action, what not.*

1. THere are two ſorts of Writs of Treſpaſs, the one is, Treſpaſs upon the Caſe, which is *Vicountiel*, and is directed to the Sheriff, and the Treſpaſs is to be determined by him; It is in the concluſion of the Writ, *Contra Pacem*, but the Writ is not *Vi & Armis*, nor is it retornable, as other Writs of Treſpaſs are; but if the Writs which are retornable in the Common Pleas, or Kings Bench, want the words, *Quare vi & armis* in the Writ, the Writs ſhall abate.

2. Treſpaſs, *Quare vi & armis* againſt Tenant at Will; The Defendant Demurred in Law; Whether any ſuch Action will lye againſt him or no; The Action was for cutting down of Trees: It was agreed by all the Juſtices, That the Action will well lye *vi & armis*; for otherwiſe he ſhall have no Action; for Waſte is not maintainable. And *Littleton* ſaith, That Treſpaſs lyeth, and ſo is 12 E. 4. 33. for otherwiſe, this being a common caſe, it ſhall be a common miſchief. Mich. 30 Eliz. in C. B. *Walgrave* and *Sommerſets* Caſe. *Goldesbr.* 72.

3. It was moved to the Court, That if the ſervant of a Mercer taketh his goods, That an Action of Treſpaſs will not lye; and if he imbezel the goods, That it is not Felony; 2 E. 4. 3 H. 7. 12. It was the Opinion of the Court, That the ſervant hath neither general nor ſpecial property in the goods, and he ſhall have no Action of Treſpaſs if they be taken away; and therefore, if he taketh them, Treſpaſs lyeth againſt him; and if he imbezel them, it is Felony; and ſo it was adjudged, Mich. 30 Eliz. in C. B. *Moſſes* Caſe. *Goldesbr.* 72. Mich. 30 Eliz. in C. B. *Glaſs* and *Haymes* Caſe. *Leon* 87.

4. H. and three others brought an Action of Treſpaſs, *Quare vi & armis clauſum fregit*: The Jury found a ſpecial Verdict, That H. only was ſeized of the Cloſe, containing ſixteen Acres, & *expoſuit eas* to the three other plaintiffs to be ſowen; and that he ſhould finde half the ſeed, and they three ſhould finde the other half, whereby the land was ſowed accordingly; and that the Boar of O. came and deſtroyed the Corn. The whole Court was of Opinion, That the Verdict ſhould abate the Writ, for that they all four joyned in the Writ, and it appeareth, That three of them had nothing there, and the Defendant cannot break their Cloſe, where three of them hath nothing. And *Cheny* and *Bunyes* Caſe was vouched by *Rhodes* Juſtice; In a Partition brought, the Defendant pleaded, That they did not hold in Common, and the Jury found, That he and his Wife held in Common, and yet the Verdict abated the Writ: And it was the Opinion in the Principal Caſe, That there was but a Bargain, and no Intereſt, and then the three had no colour to bring Treſpaſs, *Quare Clauſum fregit*. Hill. 30 Eliz. in C. B. *Harets* Caſe. *Goldesbr.* 77.

5. Note, It was Reſolved amongſt other points, That if there be Lord and Tenant, rendring Rent, and the Lord doth diſtrein, when no rent is behind, that in ſuch caſe the Tenant may make Reſcous; or if he be often diſtreined, he may have an Aſſiſe of *Soven faits* diſtreined: And in ſuch Caſe, the Tenant may do Reſcous: But for a wrongful Diſtreſs where nothing is behinde, the Tenant ſhall not have an Action of Treſpaſs *vi & armis* againſt the Lord, becauſe the ſame is prohibited by the Statute of *Marlebridge*, cap. 3. *Cook* 4. Part, 11. in *Probil's* Caſe.

6. The Lord may beat his Villein for cauſe, or without cauſe, and the Villein ſhall not have any remedy; but if the Lord commandeth another to beat his Villein without cauſe, he ſhall have an Action of Battery againſt him that beateth him: So if the Lord doth diſtrein the Cattel of his Tenant, although nothing be behinde, the Tenant in reſpect of the duty which belongeth to the Lord, ſhall not have Treſpaſs *vi & armis* againſt him: But if the Lord commandeth his Bayliff or Servant in ſuch Caſe to diſtrein, where nothing is behinde, the Tenant ſhall have an Action of Treſpaſs *vi & armis*, againſt the Bayliff or Servant. *Cook* 9. Part, 76. in *Combs* Caſe.

7. In Treſpaſs, The Plaintiff Declared, That he levyed a Plaint of Debt in the Counter of *London*, againſt one W. and by Proceſs, he was Arreſted by one B. a Sergeant; and that the Defendant, *vi & armis* did reſcue him, whereby he loſt his debt: Upon Iſſue, Not Guilty, and Verdict for the Plaintiff, Judgment was given, *quod defend. Capiatur*: Upon which, Error was brought in the Exchequer Chamber, and the Judgment was affirmed;

ſuit; for although the nature of the Action is properly upon the Caſe, as touching the Plaintiffs loſs of damage and debt; yet being done with force, and that force being done, although not to the Plaintiff himſelf, he may have his Action, *vi & armis*, Paſch. 14 Jac. in B. R. *Wheatly* and *Stowrs* Caſe. mo. 180. Mich. 35 Eliz. *Aſtell* and *Ridgett* Caſe. Mich. 43 Eliz. in B. R. *Pawling* and *Morris* Caſe acc. Mich. 6 Jac. in B. R. It was Reſolved, Though the Reſcous were layed *vi & armis*, yet it would bear either Treſpaſs *vi & armis*, or Treſpaſs upon the Caſe. Note, In that Caſe, it was ſaid, That the Plaintiff muſt beware that he follow his Original, if it be by Writ; for if it be *vi & armis*, or upon the Caſe, the Judgment muſt be ſuitable.

8. A. brought an Action of Treſpaſs againſt B. for that *vi & armis*, he took and led away *Quendam Canem Venaticum pradict. &c.* and a Verdict was found for the Plaintiff, and Judgment was given for the Plaintiff by the Court. Trin. 17 Jac. in C. B. Rott. 944. *Edwards* and *Engletons* Caſe. *Hob.* 283.

9. Error brought of a Judgment in Treſpaſs in B. R. The Error aſſigned was, That the Declaration was not good, becauſe in Treſpaſs, the Plaintiff ſuppoſeth, that the Defendant 31 *Maii* 13 Jac. at *London*, at ſuch a place aſſaulted him, *& adhuc & ibidem*, beat and wounded him, and a Bag of the value of 12 d. with 100 l. in money therein, took and carried away, *& alia Enormia, &c.* and doth not ſay, *adtunc & ibidem*, and ſo no time is mentioned for carrying away the Bag. The Court held the Declaration was well enough, for the word [*Et*] couples it with the time and place of the Battery: But becauſe there wanted the words [*vi & armis*] in the Declaration, which is not matter of form, but of ſubſtance, and not aided by any of the Statutes, the Judgment was reverſed. Hill. 13 Jac. in B. R. *Tyler* and *Walſeds* Caſe. *Cro.* 2. Part, 44.

10. Treſpaſs for taking of a Greyhound with a Collar: The Defendant ſaid, That the Dog was courſing a Hare in his land, and therefore he took him, and led him away; upon which it was Demurred. It was adjudged for the Plaintiff, becauſe the plea is frivolous; whereby it ſeems that Treſpaſs lyeth. Hill. 15 Jac. in B. R. *Athill* and *Corbets* Caſe. *Cro.* 2. Part 463.

11. Treſpaſs, *Quare vi & armis Clauſum fregit.* The Defendant juſtified, upon Report, That a Vermine called a *Badger* was there, *ad damnum Inhabitantium*; by reaſon whereof, with his hounds he hunted there, and found the Badger, and chaſed him, till he expelled him in the place where, and thereupon digged the ground, and took the Badger, and killed him: Upon which the Plaintiff Demurred. It was adjudged, That the Action did lye; for although the Common Law warrants the hunting of ſuch ravenous Beaſts of Prey in another mans land, yet it requires it ſhould be done in an ordinary and uſual manner; and therefore, there being an ordinary courſe (viz. Hunting) to kill the Badger, the digging for him was unlawful. See 37 Eliz. *Nicholas* Caſe. The ſame for a Fox. Paſc. 11 Jac. in B. R. *Geoſs* and *Mynns* Caſe. *Cro.* 2. Part, 321.

12. Treſpaſs upon the Caſe upon Trover, The Caſe was this, The Detendants Bayliff ſeized the Beaſts for an Heriot, whereas there was not any due, whereunto the Defendant agreed, and convicted them, whereupon the Action was brought. The Queſtion was, Whether he ought to have this Action, or Action of Treſpaſs. It was Objected, That Treſpaſs and Trover are contrary Actions, and it cannot be, that he ſhould have property, and no property, at the ſame time: And the Writ is not true, for he hath not any property at the time of the converſion. But the Opinion of the whole Court was, That he had election to bring either of the Actions at his pleaſure. Paſch. 42 Eliz. in B. R. *Biſhop* and Viſcount *Montagues* Caſe. Mich. 2 Car. in C. B. *Cro.* 2. Part, 50.

13. Treſpaſs of Aſſault and Battery, The Defendant pleaded, That he was amongſt others, by command of the Lords of the Council, a Trained Souldier in *London*, of the Band of Captain A. and ſo was the Plaintiff, and that they were skirmiſhing with their Muskets, charged with powder for their exerciſe *in re Militari*, againſt another Captain and his Band; and as they were ſo skirmiſhing, the Defendant *caſualiter, & per infortunium, & contra voluntatem ſuam* in diſcharging his Peece, did hurt and wound the Plaintiff, which is the ſame treſpaſs, *abſque hoc* that he was guilty *aliter five alio modo*. Upon Demurrer by the Plaintiff, Judgment was given for the Plaintiff: For although it was agreed, That if two men at Tilt or Turney in the preſence of the King, kill one another, this is not Felony; yet in Treſpaſs, which tends only to give damages according to the hurt or loſs, it is not ſo; and no man ſhall be excuſed of Treſpaſs, except it may be judged utterly without his fault: But if the Defendant in the Principal Caſe had ſaid, That the Plaintiff came croſs his Peece when it was diſcharging, or had ſet forth the Caſe with the circumſtances, ſo as it had appeared to the Court, that it had been inevitable, and that the Defendant had committed no negligence to give occaſion to the hurt, then the Action would not have lain. Paſch. 14 Jac. in B. R. *Weaver* and *Wards* Caſe. *Hob.* 134.

14. In an Action of Treſpaſs, The point only was this; I chaſe the Sheep of another out of my ground with a Dog, and the Dog purſues them into another mans Land next adjoyning, and I chid my Dog, and the Owner of the Sheep brings Treſpaſs for chaſing of them: It was ſaid, That the Juſtification was not good: A man may have Cattel out of his own ground, but cannot exceed his authority; and an authority in Law abuſed, is void in all, and to hunt them into the next ground, is not juſtifiable. It was the Opinion of the Court, That the Action did not lye; for that here was not any hedge, as appereth: and when the Defendant ſaw them out of his own ground, he rated the Dog, and the nature of a Dog is ſuch, that he cannot be ruled ſuddenly: And this difference was taken, If I ſee Sheep in my Land, I may chaſe them out; but if another ſeeth them, and chaſeth them out, I may have an Action of Treſpaſs againſt him, becauſe he hath taken away my advantage. And in the account of this Caſe, this Caſe was vouched to have been adjudged: Treſpaſs was brought for hunting, and breaking of hedges, and the Caſe was, A man ſtarted a Fox in his own land, and his Hounds purſued him into another mans lands; and it was holden, That he might hunt and purſue him into another mans Lands; becauſe a Fox is a noyſome creature to the Commonwealth. In the Principal Caſe, Judgment was given, That the Plaintiff *Nil Capiat per Billam.* Hil. 22 Jac. in B. R. *Miſten* and *Fandyes* Caſe. *Poph.* 161.

15. A Copyholder brought Treſpaſs againſt the Lord for cutting down of Trees; and alledged a Cuſtome, that he might cut down to repair his houſe, and that there was not ſufficient Trees left to repair it. It was Reſolved in this Caſe, 1. That without a Cuſtome, a Copyholder might cut down Trees to repair. 2. That the Treſpaſs did lye againſt the Lord, for that the Copyholder hath an Intereſt in the Trees as well as in the Land, and the Lord might as well pull down his houſe, as cut down his Trees. Mich. 8 Jac. in C. B. *Hyden* and *Smiths* Caſe: *Godbolt*, 173.

16. Note, It was Reſolved by the Court, That if one in Trade upon the poſſeſſion of the King, and another man entreth upon him, that he ſhall not have and maintain an Action of Treſpaſs; for he who is to have Treſpaſs, ought to have a poſſeſſion; and in this Caſe he had not, for that every Intruder ſhall anſwer to the King for his time, and therefore ſhall not anſwer to the other party; and he cannot ſay, *Quare Clauſum ſuum fregit*, as the Writ requireth. Mich. 29 Eliz. in C. B. *Godbolt*, 133.

17. Note, It was Ruled by the Court in an Action of Treſpaſs, *Quare Clauſum fregit, & cuniculos ſuos vel ipſum A. &c. cepit &c.* and good. Paſch. 8 Jac. in C. B. *Newton* and *Richards* Caſe. *Godbolt*, 174.

18. In Treſpaſs brought, the Defendant did juſtifie as Leſſee to the Lord *Mountegue*, and that the Lord, for him and his Farmors, had uſed to have a way over the Land in which the Treſpaſs is ſuppoſed to be done, and that by reaſon of a Cart wherewith the way was ſo digged and diverted, that he could not ſo well uſe his way as before, and that therefore he did fill up the Cart roots, and digged a Trench to let out the water; upon which the Plaintiff did demur. It was Objected, That Treſpaſs did not lye, for that it was no loſs nor hindrance to him, but it is for his profit, and the Land is not the worſe. It was the Opinion of the Court, That the Action did well lye; for that he who claims a way in this Caſe, hath not an Intereſt in the ſoil, and therefore cannot dig it: It was then aſked, what remedy he ſhould have, the way being ſo ſurrounded? *Suit* Juſtice ſaid, If he had went before that way in his ſhooes, let him now pluck on his Boots: Alſo, the Opinion of the Court was, That the pleading was not good; for he ſaith, He could not uſe his way ſo well as before, whereas he ought to plead, That he could not uſe the way at all. Mich. 29 Eliz. in B. R. *Dyke* and *Dunſtons* Caſe. *Godbolt*, 52, 53.

19. An Action was brought againſt *Joyce*, an Inn-keeper of the Bell in *Maidſtone* in *Kent*, for not ſcouring of a Ditch, betwixt the houſe of the ſaid *Joyce*, and another man; and Judgment was given for the Plaintiff againſt the Defendant; Whereupon Error was brought, and divers Errors aſſigned. 1. That the Plaintiff doth preſcribe, That all the Inhabitants of the Bell had uſed to ſcour the Cutter, &c. And it was ſaid, That that was no good form of Preſcription; for it ought to have been, *Quod ipſi & Prædeceſſores ſui de tempore cujus contrarium, &c.* Or, That ſuch a one, and his Anceſtors and Predeceſſors, whoſe Eſtate the Defendant hath, &c. 2. That the Preſcription was uncertain; for it is, That all Tenants, &c. which extendeth as well to Tenants in Fee, in Tail, for life, or years; and the Preſcription is the foundation and ground of the Action. 3. The Plaintiff hath not alledged, That the Defendant was Tenant at the time of the Action brought; as in the Caſe of *Black fryers*, where the Plaintiff brought his Action, for that the Defendant had turned the Courſe of a Water of a Conduit-pipe, and the Declaration was, *Quod cum Querens ſeiſitus exiſtit*, and doth not ſay, *exiſtit*; ſo the Plaintiff was not ſuppoſed Owner of the Scite and Meſſuage in *Black fryers*, but only at the time of the Action brought,

brought, and not at the time of the diverſion of the Water. 4. Becauſe it was for ſcouring a Gutter betwixt houſes, and he doth not ſay, That it was *contigui adjacens* to the Houſe. It was the Opinion of the Court, That it was not good; for that it is, *Quod emanet illi qui tenuerant*, and doth not allege a Seiſin, but by way of Argument; and alſo, becauſe the words were not *contigui adjacens*. The Judgment was reverſed. Mich. 29 Eliz. in B. R. *John Joyces* Caſe. *Godbolt*, 54, 55.

20. In Treſpaſs, for ſtopping of a way. It was found for the Plaintiff. It was moved in Arreſt of Judgment, 1. That the Plaintiff claims a way from his houſe to his Mill, and ſo back again from the Mill to his houſe, and claims an Inheritance in the Houſe, and therefore he ought to have Aſſize or Nuſance, and not Treſpaſs. 2. Becauſe every way ought to be either appendant, or in groſs, and it is not layed, that the way was appertaining to his houſe. For the firſt Exception, It was the Opinion, That the Plaintiff might have either the one or the other Election at his Election: But for the ſecond, It was holden, In regard that in this Action the Plaintiff is only to recover damages for the Treſpaſs done; he need not ſay, the way to be Appendant; And ſo the Declaration was holden good, and Judgment given for the Plaintiff. Mich. 8 Jac. in B. R. *Pilard* and *Cafars* Caſe. *Bolſtr.* 1. Part, 47.

21. Treſpaſs of Aſſault and Battery, *& damnum* of the Plaintiff; The Defendants pleaded, *Not Guilty*, and found againſt them, and ſeveral damages given by the Jury to the Plaintiff, *viz.* given one ſo much, and *viz.* given to the other ſo much, ſeverally, and Coſts to the Plaintiff entire. It was moved, That the damages ought to have been joynt. The Opinion of the whole Court was, That this Battery is ſeveral, and ſo the damages ought to be; and the reaſon is, becauſe the Battery of the one, is not the Battery of the other; and that the Battery of the one, may be greater then the Battery of the other: But in Treſpaſs for cutting down and carrying away of Trees, for that this a joynt Act, the damages are to be entire. It was adjudged for the Plaintiff. Trin. 9 Jac. in B. R. *Sampſon* and *Craſfelds* Caſe. *Billrode*, 1. Part 157.

22. In Treſpaſs of Aſſault and Battery, *& quod eundem ferum & capit*; The Caſe was, The Plaintiff and the Defendant being at play, the Plaintiff threw his money into the Defendants heap, and ſo intermingled them together; the Defendant kept all; and upon this ſtriving for the money, the Plaintiff brought the Action. It was adjudged in this Caſe, That the Action would not lye, and that by this Act done by the Plaintiff, it is done by him of his own wrong; for what is his own proper money, cannot now be known; and therefore the Law ſaith, That he ſhall loſe all, by his own Act; And ſo it was ſaid it was adjudged, That if J. S. hath a heap of Corn, and J. D. will mingle his Corn with the Corn of J. S. he ſhall have all the Corn, becauſe this was ſo done by J. D. of his own wrong. In *Shorditeh* and *Mores* Caſe; And alſo in Sir *Richard Martins* Caſe. Hill. 12 Jac. in B. R. *Ward* and *Eyres* Caſe. *Bolſtr.* 2. Part, 323.

23. In Treſpaſs, The Plaintiff Declared, That ſuch a day, the Defendant aſſaulted him, *unum equum precii 6 l. à perſona ipſius* [the Plaintiff] *adunc & ibidem cepit*. It was the Opinion of the Court in this Caſe, That the Declaration was not good; for that the Plaintiff doth not ſuppoſe any property in the Horſe, but he ought to have ſaid *Equum ſuum, aut Equum ipſius Querentis*; for as it is layed, the Declaration may have two Intendments. 1. That the Horſe was the Defendants, and then the taking was lawful; or the Plaintiffs, and then tortious; and being indifferent in conſtruction, it ſhall be taken ſtrongeſt againſt the Plaintiff; and then, when the Jury aſſeſs entire damages for both the Treſpaſſes, and for one there is no cauſe of Action, the Verdict is not good, *per Curiam*. It was adjudged againſt the Plaintiff. Paſch. 1 Jac. in B. R. *Parcell* and *Bradleys* Caſe. *Yelverton*, 36.

24. Treſpaſs, *Quare Clauſum fregit*, and ſpoiled his graſs. The Defendant pleaded, That in the Cloſe where &c. there had been time out of mind, a foot-way for all the Kings people, *in, per, & trans* the ſaid Cloſe, to ſuch a place; and that the Plaintiff ſuch a day ploughed up the ſaid Foot-way, and ſowed the ſame with Corn, and layed Thorns at the ſide of it; and pleaded, That within the ſame Cloſe, near the old Foot-way, the Plaintiff before the Treſpaſs, *reliquit, & aſſignavit*, another Foot-way for all the Kings people, to go over the new way; which way, from the time it had been layed forth, had been uſed by all Foot-paſſengers: Wherefore the Defendant went over the ſaid way at the time when, to ſuch a place, which is the ſame Treſpaſs. And in this Caſe, It was adjudged againſt the Plaintiff. And although in that Caſe the Defendant pleaded generally, That the Plaintiff *aſſignavit viam*, and did not ſhew to whom, yet that was not material; for *quod eſt commune omnibus*, cannot be aſſigned to any particular perſon. Mich. 6 Jac. in B. R. *Howe* and *Widlakes* Caſe. *Yelv.* 141, 142.

25. In Treſpaſs, The Plaintiff Declared, That the Defendant entred his Land, and cut down, and carried away two Loads of Graſs in the Plaintiffs Soil, which was ſuppoſed to be done to ſtrow the floor of the Church. It was the Opinion of the Court in this Caſe, That a Preſcription for cutting

of graſs to eſtrow the Church, was good, becauſe it was but in the nature of an eaſement; and ſo it was ſaid, It was for Inhabitants to have a way over the Land of another to their Church. It was Objected, That the Inhabitants by Cuſtome, might have an eaſement over the Freehold, or in the Freehold of another, but not a profit appendant: But in the Principal Caſe, becauſe the Plaintiffs Freehold lay near to the Church, the Court conceived, That the ſame was but a matter of Eaſement, and not a profit appendant; and therefore, that the Action would not lye. Paſch. 15 Car. in B. R. *Bonds* Caſe. *Maſſ* 16 17.

26. A. brought Treſpaſs againſt B. for fiſhing *in ſeperali Piſcaria* of the Plaintiff, and Declared, That the Defendant *Piſces ipſius cepit*, being found for the Plaintiff. In ſtay of Judgment it was moved, becauſe the Plaintiff Declared of taking *Piſces ſuos*, whereas they being *feræ naturæ*, the Plaintiff hath not property in them; and the ſame being matter of ſubſtance, is not helped by the Verdict. It was the Opinion of the Court in this Caſe, That in a general ſenſe, they cannot be ſaid *Piſces ipſius*, but in a particular ſenſe they may; and a man may have a ſpecial and qualified property in things which are *feræ naturæ* three ways, *ratione imprimitatis, ratione loci, & ratione privilegii*; and in this Caſe, the Plaintiff hath them by way of Priviledge. It was the Rule of the Court, That the Judgment ſhould be affirmed, upon this difference, where a man brings Treſpaſs for taking *Piſces ſuos*, and *Lepores ſuos*, and the like, the Action will not lye; but if he bring Treſpaſs for Fiſhing in his ſeveral Piſcary, as in the Principal Caſe, or for breaking his Cloſe, and taking *Lepores ſuos*, there the Action will lye. Trin. 15 Car. in B. R. *Childe* and *Greenhills* Caſe. *Maſſ* 48, 49.

27. Treſpaſs for a way, The Defendant did Juſtifie, and ſaid, That he had a way, not only *ire, equitare, & Averia ſua fugare*, but alſo *Carrucis, & Carretagiis carriare*; The Plaintiff Traverſed *abſq; hoc*, that he had a way, not only *ire, equitare, &c.* in the words aforeſaid; and Iſſue being thereupon joyned, It was found for the Plaintiff: It was moved, That this was not a direct affirmative, that he had a way, but by way of Indictment only. The whole Court were of Opinion, That it was a good affirmative; But it was ſaid by the Court, That the Pleading was more elegant then formal. Mich. 15 Car. in B. R. *Hicks* and *Webbs* Caſe. *Maſſ*, 55.

28. Treſpaſs, *Quare Clauſum fregit*, 20 *Junii Anno* 2. and the continuance till 6 *Novemb.* after. After Not Guilty Pleaded, It was found for the Plaintiff, and Judgment given, That it was entred, *Nihil de fine, quia Pardonatur*: And upon Error brought, It was aſſigned, That it ought to be *Capiatur*, becauſe by reaſon of the pardon of the King, *Anno* 3. which pardons all offences before the 25 of *Sept.* before; he alledgeth, That but part of the Treſpaſs was pardoned. But the Opinion of the Court was, That the Judgment was well entred; for the firſt Entry in Treſpaſs being only *vi & armis*, being pardoned, all that depended upon it, was pardoned; Alſo it appears by the Declaration, that the continuance of the Treſpaſs is not layed in the Entry, but only *Quoad depaſturationem, & conſumptionem herbæ*, which is added only for encreaſing of damages to the party. Paſch. 6 Jac. in B. R. *Strickland* and *Thorps* Caſe. *Yelv.* 126.

29. In Treſpaſs, The Plaintiff Declared of the taking of his horſe at B. the 14 Nov. 3 Jac. The Defendant pleaded, That the ſame 14 day he ſeized him within his Mannor of D. as an Eſtray; and ſhewed, That he had Title to have Eſtrays, and that the ſame day the Plaintiff took back the horſe, and was thereof repoſſeſſed. The Plaintiff Replyed, That the 16 Nov. the Defendant did uſe, and ride the Horſe to B. upon which it was Demurred: And it was adjudged for the Plaintiff; for the matter alledged in the Replication, is not any departure: for when the Defendant by his Demurrer hath confeſſed that he rid the Horſe the 16 of Novemb. although the taking of the Horſe as an Eſtray was juſtifiable; yet becauſe by the ſeizure of the Eſtray he had not a property, but a bare cuſtody, the Riding of him made the ſeizure tortious, and ſo the Action maintainable. Hill. 4 Jac. in B. R. *Bagſhaw* and *Gerwards* Caſe. *Yelverton*, 96, 97.

30. Treſpaſs *vi et Armis*, one ſuch being his Servant, *Cepit et abduxit* at D. in the County of E; The Defendant pleaded, That he was a Vagrant in the ſame County, and he not having notice that he was ſervant to another, retained him. It was ſaid, That if I retain the ſervant of another man in the ſame County where I and his Maſter inhabit, it is not juſtifiable, though in truth I had not notice of that. The Court ſaid, It is a hard matter to make me take Notice of every ſervant which is retained in the ſame County; and yet perhaps if this Retainer be upon the Statute of Labourers at the Seſſions, this is Notorious, and I ought to take Notice thereof at my perill: But it is otherwiſe of a private Retainer, for though it be within the ſame County, yet being a private matter in fact, the Law will not compell me to take Notice of that at my perill; otherwiſe if this be matter of Record. In this caſe, It was ſaid by the Court, That the Receiving and entertaining of a Servant may not be ſaid to be *Vi et Armis*. Mich. 22 Jac. in C. B. *Winch.* 51.

31. Note: It was Reſolved by the Court, That

That if a man hath Conyboroughs in his own Land, which do encreaſe to ſo great a number, that they deſtroy his Neighbours Land adjoyning. That in this caſe, His Neighbour cannot have an Action upon the Caſe againſt him who maketh the Conyboroughs: nor ſo ſoon as the Conies come into his Neighbours Land, he may kill them, for they are *feræ naturæ*, and he who maketh the Conyboroughs hath no property in them; and he ſhall not be puniſhed in Treſpaſs or otherwiſe, for the hurt which the Conies do wherein he hath no lawful property, and which the other may lawfully kill. *Cook* 5. Part, 104. *Bealſtons* Caſe.

32. Note: It was Reſolved by the Juſtices, That every Anceſtor male or female, ſhall have Treſpaſs or Ravishment of Ward againſt a ſtranger, who wrongfully raviſheth the Heir apparent of any perſon, be they male or female; and the Writ of Treſpaſs ſhall ſay, *Quare J. Conſanguineum & hæredem, cujus Maritagium ad ipſum pertinet, tali die rapuit & abduxit contra pacem*: and in that the Law hath great reaſon; For whereas in truth all the Eſtate of the Anceſtor, and the eſtabliſhing of his Inheritance, conſiſteth in providing a Convenable Marriage for his Heir apparent; for that cauſe the Law giveth remedy againſt him who wrongfully deprives him by their Raviſhment, of the means to accompliſh the ſame: and it is not material of what age in ſuch caſe the Heir be. But ſuch Action lyeth not againſt Guardian in Knight-Service by any Anceſtor, but only for the Father, and for him the Action lyeth againſt the Lord of whom the Land is holden by Knight-Service, where his Son and Heir apparent is raviſhed by him. *Cook* 3. Part, 38, 39. in *Ratcliffs* Caſe.

33. An Action of Treſpaſs was brought, for breaking of his Cloſe, and beating of his Servant; but he doth not ſay, *per quod Servitium amiſit*. The Defendant pleaded, Not guilty, and the Jury found him guilty, and aſſeſſed damages entirely. It was holden in that caſe, That becauſe the Plaintiff had no cauſe of Action for beating of his ſervant, becauſe he had not averred, That thereby he loſt his Service, That it was adjudged, That the Plaintiff *Nil Capiat per Billam*. Mich. 25 Eliz. *Pudy* and *Osburns* Caſe. Vouch. in *Cook* 5. Part, 116. in Sir *Henry Conſtables* Caſe.

34. If the Servant be beaten. The Maſter ſhall not have an Action of Treſpaſs of Battery, if that the Battery be not ſo great, that by reaſon thereof he loſeth the ſervice of his Servant; but the Servant himſelf for every little battery, ſhall have an Action, and the Cauſe of the difference is, That the Maſter hath not any damage by the perſonal beating of his Servant, but by the reaſon of a *per Quod Servitium amiſit*, ſo as the original act is not the cauſe of his Action, but the Conſequence upon it; *viz.* the loſſe of his Service, is the cauſe of Action; For, be the battery great or little, if the Maſter doth not loſe the Service of his Servant, the Action will not lye. See *Cook* 4. Part, 113. in *Robert Mercys* Caſe.

35. Note: It was holden by the Court, That if a man be diſfranchiſed without a juſt cauſe, and be for the Cauſes of his diſfranchiſement committed to Priſon, or his Shop ſhut up; or if with force he be removed out of their Aſſembly, &c. in theſe and the like Caſes, he may have an Action of Falſe Impriſonment, or an Action of Treſpaſs, *Quare domum fregit*; or an Action of Aſſault and Battery: And in theſe Actions, the Cauſes of the diſenfranchiſement ought to be pleaded, and be decided by the Law. *Cook* 11. Part, 99. in *James Beggs* Caſe.

36. Six Carpenters came to a Tavern, and called for a Quart of Wine, and drank it; and upon requeſt made, they refuſed to pay for it: The Queſtion was, Whether their denying to pay for it, made their entry tortious *ab initio*? And in this caſe, It was Reſolved, That when an Entry, authority, or Licence is given by the Law; and the party doth amiſs, That he ſhall be ſaid a Treſpaſſor *ab initio*. As if the Lord who diſtrains for Rent or Damage-feaſants, doth labour or kill the Diſtreſs; So if a man entreth into a Common Inne or Tavern, and carrieth away any thing out of it. But when the entry, authority, or Licence, is given by the party, and there he doth amiſs, there he ſhall be puniſhed for his miſdoing, but ſhall not be a Treſpaſſor *ab initio*. 2. Reſolved, That not doing of a thing, cannot make the party who hath authority or Licenſe, by the Law to be a Treſpaſſor *ab initio*; becauſe Not doing, is no Treſpaſs. A man diſtrains for Rent, or Damage-feaſants, the Leſſee tenders the Rent or Amends, and requires his Cattel, and the other will not deliver them; this doth not make him to be a Treſpaſſor *ab initio*, but damages there ſhall be recovered only for the detaining of the Cattel, and not for the diſtraining of them: And therefore in the principal Caſe, It was adjudged, That for the not paying for the Wine, the Defendants were not Treſpaſſors *ab initio*, but in ſuch caſe, the Tavernor might have an Action of Debt againſt them. *Cook* 8. Part, 146, 147. The Six Carpenters Caſe.

37. In Treſpaſſe for breaking of his Cloſe, The Defendant pleaded, That before this, he had brought an *Ejectione Firmæ* againſt the now Plaintiff, and recovered, and had Execution, &c. Judg-

ment,

ment, if Action. It was agreed by all the Juſtices in this caſe, That it was a good barr, and that the Concluſion of the Plea, was alſo good: Judgment, if Action, without relying upon the Eſtoppell. Mich. 32 Eliz. in C. B. *Kempton* and *Cooper* Caſe, *Leon.* 313.

3. In an *Ejectione Firmæ*, The Defendant pleaded in barr, a Recovery had in the Kings-Bench againſt the Leſſor of the Plaintiff. It was Objected, That it was no barr, no more then in Treſpaſs, becauſe the Plaintiff is but Leſſee to him who was barred, and that which is between the parties, cannot be an Eſtoppell againſt the Plaintiff here, who is a ſtranger. But it was the Opinion of the whole Court, That it was a good Barr. For this Action is as ſtrong to bind the poſſeſſion as a Writ of Right, is to barr the right. And although the party ſhall not plead this by way of Eſtoppel, yet he ſhall conclude, Judgment if Action. As if in Aſſiſe, a Recovery in another Action be pleaded in barr, he ſhall not conclude by way of Eſtoppel, but Judgment, if Action: And there, he is driven to a higher Action, and the Law ſhall never have an end, If after a man be barred in his Action, he may bring the ſame Action he may bring the ſame Action again. Trin. 28 Eliz. in C.B. *Payton* and *Lawſons* Caſe, *Goldsbr.* 43.

39. In an *Ejectione Firmæ, et bona et Catalla ibidem invent. vi et armis capt.* The Plaintiff declared of a Leaſe for 40 years, to begin at Mich. next after the death of J. S. and averred, That J. S. dyed, and he entred: The Defendant pleaded in barr, *non Ejecit.* It was found, *quod Ejecit*; and Judgment given, That he ſhould recover the Term; and in that caſe, becauſe he did not ſhew the time of his Entry, for if he entred before Mich. after the death of J. S. he was a Diſſeiſor, and not a Termor; and alſo becauſe he pleaded *Non Ejecit*; which was found: For the Plea ſhould have been, Not guilty. For theſe and other Cauſes, upon a Writ of Errour brought, the Judgment was reverſed. 7 E. 6. *Dyer*, 89. *Clifford's* Caſe.

40. In Trover and Converſion of certain Goods; The Defendant pleaded, That the Plaintiff had brought the like Action againſt J. S. for the ſame goods before this Action brought, in which Suit he proſecuted ſo far againſt J. S. that he had Judgment and Execution againſt J. S. and averred, That the goods comprehended in both the Actions, were the ſame goods. Upon which the Plaintiff demurred in Law. And in that caſe, It was adjudged againſt the Plaintiff: And a difference was taken by the whole Court, Where the demand and Recovery is of a thing certain; and where of a thing which is uncertain. As if two be bound in 100 l. to J. S. jointly and ſeverally, there a Recovery and Execution againſt one, is no barr againſt the other; for Execution is not any ſatisfaction of the 100 l. demanded, 4 H. 7. 22 E. 4. But where Treſpaſs is done by two, which reſts only in damages, and the Plaintiff recovers againſt one of them, and hath Execution, the ſame is a good barr againſt the other. And it was agreed, That the very Judgment is a ſufficient barr, for *tranſit in rem judicatam*; and the thing incertain is now by the Judgment made certain, and ſo altered and changed into another nature then it was at the firſt; and therefore he cannot now reſort to demand the incertainty again, for the firſt Judgment ſhall be a barr to it. The ſame Law is of an Action of Battery brought by divers, and a Recovery againſt one of them, in an Action afterwards brought of the ſame Battery, the firſt Recovery is a barr. And ſo it was adjudged in *Hitchens* and Sir *John Poyns* Caſe and his Servants, for a Battery. Trin. 3 Jac. in B.R. *Broom* and *Waters* Caſe. *Telverton*, 67, 68.

41. If a man recover in Treſpaſs at the Common-Law, it ſhall bar him in Writ of Raviſhment of Ward; *et è contra*: As in the Treſpaſs of Battery and Appeal of Maihem, and in Common Treſpaſs, and the Treſpaſſe upon the Statute of 5 R. 2. and 8 H. 6. or *de Malefactoribus in parcis*. See *Hob.* in *Moor* and *Huffey's* Caſe, 94. acc.

42. In Treſpaſſe; The Plaintiff declared of a Treſpaſs in Great Long Meade in D. 12. *Mail*, 1 Jac. with a *Continuando*, &c. The Defendant *Proteſtando*, That the Treſpaſs did not continue *modo et forma*, for Plea ſaid, That at the time of the Treſpaſſe ſuppoſed, He was poſſeſſed of a Cloſe called Wood-end in D. for a certain Term then to come, *Cuidam Clauſo*, called Little long Meade, *contiguè adjacens*; and that Great Long Meade to the ſame Cloſe called Little Long Meade, is *contiguè adjacens in D. prædict.* And that the Plaintiff likewiſe was poſſeſſed of the ſaid ſeveral Cloſe called Little long Meade, and Great long Meade, for a Term to come; and that the Plaintiff ought to repair, make, and maintain the Hedges, as well between the Cloſe called Wood-End, as the other two Cloſes; and that the Defendant being ſo poſſeſſed of the Cloſe called Wood-End, *tempore quo*, put in his Cattel to feed there; and that the Plaintiff ſuffered the Hedges and Fences between that Cloſe and the other Cloſes, to remain open, and not repaired, by reaſon of which, the Cattel put in Wood-end by the breach of the Hedges and Incloſures, entred into the other two Cloſes of the Plaintiffs, and ſpoyled the graſſe, &c. In this Caſe, two

two Exceptions were taken to the Barr: 1. Becauſe the Defendant pleaded generally, That he was poſſeſſed of the Cloſe called Wood-End, and did not ſhew of whoſe Leaſe, or for how long time. 2. Becauſe the Defendant ſayes only, *Quod Querens debuit reparare*, and doth not ſhew by what Title, and in what ſort. For the firſt, The Opinion of the Court was, That he needed not to do it, becauſe the Intereſt of the Cloſe called Wood-End, was not in Queſtion, but is merely collateral to the thing in Queſtion, and is but conveyance to the ſubſequent matter. And the ſecond Exception was diſallowed by the Court; For they ſaid, There is a difference where the right to endite or charge the Inheritance is in Queſtion, and where the Plea goes only to excuſe a Treſpaſs; but in this caſe it goes only to excuſe a Treſpaſſe *pro hac vice*: Alſo the Defendant is a ſtranger to the Title of the Plaintiff, and cannot by preſumption know by what Title he ought to repair. Wherefore it was adjudged for the Plaintiff. Mich. 3 Jac. in B.R. *Falde* and *Ridges* Caſe. *Telverton*, 74-77.

43. In Treſpaſs *de uxore rapta et abduſta cum bonis viri*, brought in *London*, in the Common-Pleas at *Weſtminſter*; and the Treſpaſſe ſuppoſed to be in *Parochia de Bow, in Warda de Cheap*. The words of the Writ were, *Et ea injuſtè detinet contra pacem, et contra formam Statuti in hoc caſu provis. &c.* The Defendant pleaded Not guilty. Upon the Evidence in *London*, at Guild-Hall, it appeared, That the Defendant had committed Adultery with the Woman in *Southwark*, where both parties dwelt: and that the Woman afterwards of her own accord, went from her husband to *Ratcliff* in *Middleſex*, and there remained a day and a night; and thither came the Defendant to her, and conveyed the Woman from *Ratcliff* to *Richmond* in *Surrey*; and if this would prove him guilty in *London*, was the Doubt? The Lord *Dyer* would have had the Jury found a Speciall Verdict, but they found the Defendant guilty generally, and aſſeſſed 300 l. Damages. It was the Opinion of many, That the Action did not lye in *London*: But afterwards the Judgment was ſtayed, becauſe the Original was returned in B.R. *ſcil. coram vobis aliquibus*, See in what County the Action ſhould be brought. *Cook* 7. Part, *Bulwer's* Caſe. Mich. 9 Eliz. *Dyer*, 256.

44. Treſpaſſe was brought upon the Statute, That none ſhall diſtrain the Beaſts of the Plough, if any other reaſonable Diſtreſs may be had, and declared of a taking *contra formam Statuti*, he did not ſhew ſpecially how he had other diſtreſs; yet it was adjudged good, and implyed in the words, *Contra formam Statuti*. And it was ſaid, That it ſhall come on the other ſide, viz. on the part of the Defendant; After he hath ſhewed the cauſe of the Diſtreſs, he ſhall alſo ſhew, That there was no other Diſtreſs. Trin. 14 Eliz. *Dyer*, 312.

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2. *Where in Treſpaſs, the Plaintiff ought to make a new Aſſignment; And what ſhall be good; what not.*

1. NOte: It was holden by the Court, in Treſpaſſe for breaking of his Cloſe; If the Defendant ſaid, That the place where the Treſpaſſe is ſuppoſed to be done, is 6. Acres of Land in D, which are his Freehold; and the Plaintiff ſaith, That it is his Freehold, and not the Freehold of the Defendant: If the Defendant hath 6. Acres in D, and the Plaintiff other ſix Acres; The Defendant cannot give in Evidence, that he did the Treſpaſſe in his own Land, but by his Plea it ſhall be intended, that his meaning reſers to the 6. Acres of the Plaintiff, and not to his own 6. Acres, becauſe untill he gave a name to the place where the Treſpaſs was done, the Plaintiff needeth not for to alledg a new Aſſignment, becauſe that the Defendant hath not varied from the meaning of the Plaintiff, if he doth not give a name certain to the 6. Acres; As to ſay, That the place where, &c. is 6. Acres in D. called Green Meade, &c. Mich. 28. 18. *Dyer*, 23.

2. If the Plaintiff in Treſpaſſe doth make a new Aſſignment, and giveth a ſpecial name to the place, and alſo aſſigns Batells *Circa quamlibet partem loci*; viz. Eaſt, Weſt, North, and South; and gives alſo names to the Batells: It was a doubt, Whether he ought to prove the Abatells to be true, as well as the name of the place, or not? It was the Opinion of many, That he ought ſo to do; For that every word which is put in the Aſſignment to make the place certain to be known to the Jury, before the words, *ſcil. alia quæ in bonis*, are effectual, and the Abatells are parcell of the Aſſignment. Trin. 5 Ma. *Dyer*, 161.

3. The new Aſſignment in Treſpaſſe, *Quod Clauſum fregit*, was this. *ſcil. in una acra Terræ ſive prati jacen. in quodam Campo in S. prædict. vocato Northfield.* To that the Defendant pleaded, *Quod præd. Tranſgreſs. de novo aſſign.*

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in *predict. acra Terræ*, Not Guilty; and for this incertainty of Land, or Meadow, and without any abatells or name of the Acre, and alſo the Anſwer to the Acre of Land only, by the Opinion of the Court, the Jury was diſcharged, becauſe the Aſſignment ought to have been without any *fuit, &c.* And the Plaintiff might have the two Acres, one of Land, the other of Meadow; and no Abatell is made; and the Anſwer is not full, &c. Trin. 9 Eliz. *Dyer*, 264.

More Treſpaſs.

1. IN Treſpaſſe, the Caſe was this; A Woman being poſſeſſed of a Copyhold for her Widowes Eſtate, ſowed the Land, and after took the Plaintiff to husband; and the Defendant being Lord of the Mannor, entred and took the Corn, and the husband brought Treſpaſs. It was Objected, That the Womans Eſtate was certain, viz. for her life, but yet determinable by Limitation if ſhe marry: And if a man who hath a Eſtate determinable by Limitation, ſoweth the ground, and before ſeverance, the Limitation endeth the Eſtate, yet the party ſhall have the Corn which he hath ſowed. But it was the Opinion of the Court in the principal caſe, That the Action did not lye, becauſe in the principal Caſe, It was the Act of the Woman, the taking of husband, and ſhe is the cauſe of the determination of her Eſtate, and therefore the Lord, and not the Husband, ſhall have the Corn: But if the Woman had Leaſed for years, and the Leſſee had ſowed the Land, and after ſhe had taken husband, in ſuch caſe the Leſſee, and not the Lord, ſhould have the Corn; for that the Act of the Woman ſhall not prejudice a third perſon. Hill. 43 Eliz. in B R. *Oland* and *Bardwicks* Caſe, *Goldsbr.* 189. See *Cook* 5. Part, *Oland's* Caſe, &c.

2. Treſpaſſe brought by the Committee of a Lunatique being a Copyholder, to whom the Lord had committed the Lunatique, and a ſtranger ſowed the Land; The Queſtion was, Whether the Committee or the Lunatique ſhould have the Action? The Court was of Opinion in this Caſe, That the Action ſhould be brought in the name of the Lunatique. Mich. 15 Jac. in C.B. *Cook* and *Dawſons* Caſe. *Brownlow* 1. Part, 197.

3. In Treſpaſſe: Whereſore by force and Arms, the Servant of the Plaintiff, out of the Service of the Plaintiff he had taken; and layed the Treſpaſſe to be at H: The Defendant *juſtified*, That one was poſſeſſed of Corn at S; and that the Servant by the Command of his Maſter, had carried away the Corn; and that the Owner came to the Defendant being Conſtable, and prayed him to detain the Servant, untill he could procure a Warrant of a Juſtice of Peace, and traverſeth, That he was guilty at H: Upon which the Plaintiff demurred. It was holden by the Court, to be a naughty Plea. 1. Becauſe the Conſtable cannot detain any man, but for Felony. 2. Becauſe the Traverſe is naught, becauſe the Treſpaſſe is in the ſame County, and ſo he might have juſtified as well in H. as in S. Mich. 30 Jac. in C.B. *Ringhall* and *Wilſey's* Caſe. *Brownlow*, 1. Part, 198.

4. Treſpaſſe for breaking his Cloſe, and for Cropping 200 Pear-Trees, and 200 Apple-Trees, to his damage of 40 l. Upon Not guilty, it was found for the Plaintiff, and damages aſſeſſed 40 l. It was prayed, That the damages might be mitigated; for that is appeared by *Affidavit*, that the Plaintiff before the Action brought, would have accepted of 5 l. But it was denyed by the Court: For they ſaid, They could not diminiſh the Damages in Treſpaſs, which was locall, and therefore could not appear to them, and the Damages might well amount to 40 l. for Cropping an Orchard: And Judgment was entred accordingly. Mich. 3 Jac. in C.B. *Delves* and *Wynes* Caſe, *Brownl.* 1. Part, 204.

5. Treſpaſſe brought againſt Husband and Wife, and the Plaintiff declared, That they did beat one Mare of the Plaintiffs, and committed divers other Treſpaſſes. Upon Not guilty, it was found, that the Wife did beat the Mare; and for the reſidue they found for the Defendant, and gave no Verdict concerning that for the husband, either by way of Acquittal, or Condemnation. It was ſaid by the Juſtices in this Caſe, Where a Battery is brought againſt husband and wife, ſuppoſing that they both beat the Plaintiff, or the Plaintiff's Mare; and upon Not guilty pleading, It is found, that the Wife only made the Battery, and not the husband, That in ſuch caſe, the Verdict is againſt the Plaintiff, for that now it appears, that the Plaintiff's Action was falſe, for the Husband in this caſe ſhall not be joyned for Conformity ſake, and there is a Special Writ in the Regiſter for this purpoſe: and it is not like a Battery charged upon J. S. and J. D. for there one may be acquitted, and the other found guilty, and good, becauſe they are in Law ſeveral Treſpaſſes. Mich. 5 Jac.

in C. B. *Drewry* and *Dennis* Caſe. *Brownlow*, 1. Part, 209.

6. Treſpaſſe for breaking the Plaintiff's Cloſe 5. *Aug.* 21 L. in *com.* S. and ſpoyling his graſſe with his Cattel. The Defendant pleaded, That the time where, &c. the Freehold of the Land where, was to J. S. and that the Defendant as ſervant, and by his Commandment entred, and put in his Cattel. The Plaintiff Replyed, It is true, that the Freehold was to J. S; but that long before the Treſpaſs, J. S. Leaſed the Land to the Plaintiff at Will, by reaſon whereof he entred, and was poſſeſſed untill the Defendant did the Treſpaſſe, and traverſeth without that, That the Defendant by the Command of J. S. and put in his Cattel: Upon which the Defendant demurred. In this caſe, It was adjudged againſt the Plaintiff, for the Plea in bar is good, and in no wiſe avoided by the Replication; for the Replication muſt be good only by way of Title, and the Plaintiff doth not entitle himſelf to any good Leaſe at Will, for he doth not alledg indeed any Seiſin in J. S. or any poſſeſſion in him, out of which a Leaſe at Will may be derived: And Judgment was given accordingly. Mich. 6 Jac. in C. B. *Mitham* and *Barkers* Caſe. *Brownlow*. 1. Part, 213.

7. In Treſpaſſe for breaking his houſe, and carying away a braſſe Chafer: The Defendant plaines, That the houſe is parcell of a half Yard in P; and that it was holden of the Earl of *Northumberland* as of his Manner of W. by Homage, Fealty, Eſcuage, Incertain, Suit of Court, Incloſure of the Park pale, and Rent ere pound of Cummin; and for the Rent behind for 3. years, and the Homage and Fealty, the Defendant as Servant to the Earl, and by his Command juſtified the Entry and taking, &c. The Plaintiff Replyed, That the houſe was holden of R. S. as of his Manner of L, without that, that it was held of the Earl in manner and form: Upon which they were at Iſſue: and the Jury found, That it was holden of the Earl as of his Manner of P. by Homage, Fealty, Incloſure of the Park, Rent a pound of Cummin, and no otherwiſe. In this caſe, It was adjudged for the Defendant. For although the Verdict did not agree with the Plea in manner and form of the Tenure, yet it agreed in ſubſtance in the Point, for which the taking was; to wit, That the Land was holden of the Earl. and that is ſufficient. And difference was taken between Replevin and Treſpaſs; For in a Replevin, becauſe the Avowant is to have Return, it behoves the Avowant to make good Title in all things, but it is otherwiſe in Treſpaſſe, for there, the Defendant is heard only to excuſe the Treſpaſs, and therefore if there be any tenure, it ſufficeth. See 33 H. 8. *Dyer*, 48. Where the Iſſue was, Whether a Villein regardant or Free, &c? The Jury found a Villein in groſſe; yet it was holden good, for that the ſubſtance was the Villeinage, which was found. Mich. 6 Jac. in C. B. *Goodman* and *Aylings* Caſe. *Brownlow*, 1. Part, 212.

8. In Treſpaſſe, the Plaintiff declared, That the Defendant 20. Febr. 5 Jac. brake his Cloſe called *Sandy Heath*, and entred, killed and carried away 100. Conies; and that the Defendant the ſame day did enter, and chaſe and killed 50. Conies, and carried them away to his damage, &c. The Defendant to the whole, but the entring and breaking of the Cloſe, pleaded Not guilty: and as to that, pleaded, That *William* Lord *Ruſſell* and *Elizabeth* his Wife were, and yet are, ſeiſed in Fee in the right of the Wife, in a certain piece of of Heath containing 10 Acres in *Sandy* Cloſe, adjoyning and on every ſide ſeparated from the place called *Sandy-Heath*; and that they in thoſe whoſe Eſtate, &c. have uſed to have for themſelves and the Fermors of the ſaid piece of Heath, a paſſage unto the ſaid peece of Heath, and from the ſaid peece, in, by, and through the ſaid Cloſe called *Sandy Heath*, &c. the whole year, at their pleaſure, to receive and take the profits of the ſaid peece; and ſaid, That long before the Treſpaſs, &c. many Conies were wandring in the ſaid piece of Heath, and many Conies holes were there made, and were in the ſaid peece eating the graſſe, and the Defendant as Servant to the ſaid Lord, and by his Command, the time in which, in, by, and through the ſaid Cloſe, in which, towards, and to the ſaid piece, did walk over to hunt and take the ſaid Conies in the ſaid Peece then being, and feeding, which is the entring and breaking the Cloſe of which the Plaintiff complains, and avers, That the place by which the Defendant walked, was the next paſſage by which he could go to the ſaid peece of Heath. Upon which the Plaintiff demurred in Law. In this caſe, It was adjudged for the Plaintiff: And that for theſe Cauſes; 1. For that a paſſage, is properly a paſſage over Water, and not over Land, and the Defendant ought to have preſcribed for the way, and not for the paſſage, for he ought to have obſerved the uſual words in the Law, for a Preſcription and uſage is for a Way, and not for a paſſage. 2. The Preſcription is not good, becauſe he doth not ſhew from what place, nor to what place the paſſage or Way is; for although a Way be in groſs, yet it ought to be bounded and circumſcribed to ſome certain place, eſpecially when it appears to lye in uſage, time out of mind. 3. The bar is not good, becauſe he doth

not ſhew what manner of paſſage it is, Whether a Foot Way, or Horſe Way and Cart Way: and for theſe cauſes, it was holden, the Plea was not good, and Judgment was given againſt the Defendant. Mich. 9 Jac. in C. B. *Alban* and *Bremſalls* Caſe. *Brownlow*, 1. Part, 214.

9. Treſpaſs for chaſing the Plaintiffs Cattel in ſuch a Cloſe. The Defendant juſtified damage feaſants in his Freehold. The Plaintiff Replyed and ſhewed a Grant of Common in the place, whereby the Defendant did grant to the Plaintiff; and that afterwards the Defendant had erected a Rick of Corn, and the Plaintiff put in his Beaſts to uſe his Common, and the Defendant chaſed them. It was the Opinion of the whole Court, That the chaſing of the Defendant was not lawful, for by ſuch means he may defeat his own Grant; for by the Grant of Common in ſuch a place, the Grantee may uſe the whole Common; and when the Grantor erects a Rick of Corn or Hay upon the Common, he will diminiſh the Common, which will tend to the enfeebling of his Grant, which ought not to be; for the Beaſts ought to range over the whole place, and eat the Hay or Corn without doing any wrong, for that the wrong did firſt begin in the Grantor, which is the Defendant, of which he ſhall never take advantage. But in the Caſe becauſe the Plaintiff did not ſhew to the Court the Indenture of Grant, for that very cauſe only Judgment was given againſt the Plaintiff. Hill. 8 Jac. in C. B. *Farmer* and *Hauts* Caſe. *Brownl.* 1. Part, 220.

10. Treſpaſs of Aſſault and Battery againſt 3; Two of them pleaded, Not Guilty, and Judgment was given againſt the third by *Non ſum informatus*. The two were found Guilty for all, and the Jury gave damages ſeverally, againſt one 100 l. againſt the other 5 l. and what Judgment ſhould be given, the Court at firſt doubted. But at laſt Reſolved, That the damages which were given by the firſt Jury, viz. the 100 l. ſhould be recovered againſt all the Defendants in that Writ named; and that in Treſpaſs, the firſt Jury taxes the damages for the whole Treſpaſs, & ſhall bind all the Defendants, & therefore Execution was commanded againſt all the Defendants for the 100 l. Trin. 9 Jac. in C. B. Rott. 1835. *Heyden* and *Styles* Caſe.

11. Treſpaſs for cutting his Nets and Oars. The Defendant juſtified, for that he was ſeiſed of a ſeveral Piſcary, and that the Defendant with divers others endeavoured with the Oars to row upon the Water, and with their Nets to catch his Fiſh; and for ſafeguard of his Fiſhing, he did cut the Nets and Oars, upon which the Plaintiff did demur. It was the Opinion of the whole Court in this Caſe, That the Plea of the Defendant was not good; but he might have taken the Nets and Oars, and detained them damage feaſants, and ſtop their further Fiſhing. It was adjudged for the Plaintiff. Mich. 7 Car. in B. R. *Reynel* and *Champernoons* Caſe. *Cro.* 1. Part, 165.

12. Treſpaſs for ſtriking the Plaintiffs Hawk with a ſtaff, by which ſtroak his Hawk dyed; being found for the Plaintiff, and damages aſſeſſed, It was moved that the Declaration was not good, becauſe the Plaintiff doth not ſhew what kind of Hawk ſhe was, as Goſhawk, Lanner, &c. For *Accipter* is the *genus*, and the Declaration ought to ſhew the *ſpecies*. 2. It is not ſhewed that ſhe was a Reclaimed Hawk; for a Hawk is *fera naturæ*, and if ſhe be not reclaimed, the Plaintiff cannot have any property in her. But the Court held the Declaration to be good enough, being in an Action of Treſpaſs for ſtriking and killing, &c. which he only may have who hath the poſſeſſion; And this Caſe differs from *Fines* Caſe in *Dyer*, and from *Spencers* Caſe, *Cook* 5. Part, for there it was an Action of Trover and Converſion, which lyes not but of an Hawk reclaimed, and which may be known by her Vervells, Bells, or ſome other mark, whereby notice can be taken of her owner. It was adjudged for the Plaintiff. Mich. 1 Car. in B. R. Sir *Francis Vincent* and *Loſneyes* Caſe. *Cro.* 1. Part, 13.

13. In Treſpaſs, the Defendant juſtified the taking of the Cattel damage feaſants, pretending a Cuſtome, That the Plaintiff being Lord, hath the place in which entirely to himſelf till *Lammas day*, and that afterwards it is Common for the Tenants, ſo as the Plaintiff can put in but three Horſes only, and becauſe the Plaintiff after *Lammas day* put in more then three Horſes, the Defendant took them Damage feaſant. It being found for the Defendant, it was moved, That the Defendant could not take the Cattel damage feaſants, becauſe he was only a Commoner, and the place where is the Plaintiffs Soil. Two of the Juſtices of the Court held the taking to be good, becauſe the Lord is to be excluded by the Cuſtome for all but his ſtint; and the Commoners have no other remedy to preſerve their right, and feeding their Cattel, but by taking the Lords Cattel if he offend. But two other Juſtices doubted of it, becauſe they did not ſhew the uſage to diſtrein the Lords Cattel for damage feaſants. Trin. 6 Jac. in B. R. *Kenrick* and *Perjeers* Caſe. *Cro.* 2. Part, 208.

14. In Treſpaſs, *Quare clauſum fregit*, the Caſe was this, The Defendant had a Cloſe adjoyning to the High way, being the Waſte, as was ſuppoſed, of the Plaintiff, Lord of the Manor. The Cattel of the Defendant coming out of his Cloſe, did

did caſually ſtray into the High way; and for this Treſpaſs done by them in the High way, or Waſte, the Lord brought the Action. The Court were of Opinion, That if the Cattel ſtay there any time, and feed upon the Paſture, the Plaintiff being Lord, may have Treſpaſs. But it appeared to be *uſa via regia*; and therefore the Court much diſliked of the Action, and were of Opinion againſt the Plaintiff. But no Judgment was given, the matter being ended by *Compromiſe*. Hill. 8 Jac. in B.R. *Durand* and *Childs* Caſe. *Bolſtr.* 2. Part, 157.

15. In Treſpaſs, the Caſe was; A man made his Will, and made the Plaintiff his Executor. An Adminiſtration was granted to the Defendant, who took the goods into his hands; the Plaintiff being Executor, proves the Will, and afterwards brought Treſpaſs againſt the Defendant for taking of theſe his goods. It was the Opinion of the whole Court, That the Action was well brought, and that an Executor may have an Action of Treſpaſs *qu' et armis* before Scire, becauſe he hath a property being made Executor, otherwiſe an Adminiſtrator may ſue an Executor by getting the goods into his hands before probate. It was adjudged for the Plaintiff. Mich. 12 Jac. in B.R. *Fiſher* and *Young's* Caſe. *Bolſtr.* 2. Part, 268.

16. Treſpaſs brought for taking away his Hay; Upon Not Guilty found for the Plaintiff. It was ſaid, That the Declaration was not good, for that the Plaintiff hath not purſued his Title made in the Declaration. It was the Opinion of the Court, That if a man bring an Action of Treſpaſs for taking his Hay, and conveyes himſelf a Title to it, this is more than he ought to do; but he ought to have ſaid generally *Quare Fenum ſuum Cepit*; and it is but Surpluſage for a Plaintiff in his Declaration for a Treſpaſs done, to make a Title to himſelf; and if he doth make a Title and not purſue it, or if his Title be not good, this is not material, being but matter of Surpluſage, and nugatory. It was adjudged for the Plaintiff. Mich. 12 Jac. in B.R. *Williams* and *Ramſeds* Caſe. *Bolſtr.* 2. Part, 188.

17. Treſpaſs for an Aſſault, wounding, taking, and Impriſoning the Plaintiff. The Defendant ſaith *quoad* the Aſſault and wounding, Not Guilty; and *quoad* the taking and Impriſoning he doth juſtify by force of a Warrant he had from the Lord Mayor of *London*, but doth not ſhew in his Plea any time when the Warrant was made, nor yet any place where the ſame was made: he doth juſtify in this manner, *quoad Captionem et Impriſonamentum*, but in his Juſtification he leaves out the Aſſault; Upon this Plea the Plaintiff demurred in Law. The Court ſaid, Here are ſeveral Aſſaults layed, *ſcil.* the Aſſault in the Wounding, and the Aſſault in the taking, here he hath in his Plea juſtified *quoad Captionem et impriſonamentum*; but in his Juſtification he hath left out the Aſſault, which is the chief cauſe of the Demurrer; where the Court held, That the Plea was not good, and a Rule given to begin again. Trin. 12 Jac. in B. R. *Wilſon* and *Dodd's* Caſe. *Bulſtrod.* 2. Part, 335, 336.

18. In Treſpaſs by J. S. againſt A. and B. for breaking his Cloſe, and Aſſaulting his Servants: For Title ſhewed that this was Copyhold, parcel of ſuch a Manner, of which one J. D. was Lord, who 34 Eliz. Granted this Copyhold to the Plaintiff and his Heirs. The Defendants as to the Aſſault, plead Not Guilty; and for the Treſpaſs in the Cloſe, the Defendants do juſtify in this manner, *ſcil.* They confeſs the Cloſe to be Copyhold Land, but plead, that long before it was parcel of the Manor of C. in the County of E. and that long before the Treſpaſs ſuppoſed, one P. and M. his Wife was Lord of the ſaid Manor in the right of the Wife for life, the Remainder in tail to A. one of the Defendants, and made a Leaſe thereof to B. the Defendant, by force of which he was poſſeſſed, and cut down the Trees, and his Servants aided him in carrying them away, and ſo Juſtifies by this his Plea in bar; but doth not ſhew how P. and his Wife came to this Eſtate for life, the Remainder over. The whole Court clearly agreed, That this Plea was not good, becauſe it is not therein ſhewed how the particular Eſtate pleaded to P. and his Wife for life, the Remainder to B. hath his commencement, they claiming under a derivative eſtate for years, which ought in pleading in bar to be ſet forth, for which omiſſion the Plea is not good. The matter in Law was, If a Copyholder by Cuſtome might cut down Timber Trees for Reparation. It was the clear Opinion of the whole Court, That by the Cuſtome, the Copyholder is to employ the Timber for the Reparation, with the top and bark he cannot repair, but theſe he is to have, and may ſell them towards his Charge in reparation; and ſo it was ſaid it was adjudged. Trin. 14 Jac. in B. R. in *Lewis* and *Smiths* Caſe. Trin. 14 Jac. in B. R. *Sanford* and *Stephens* Caſe. *Bolſtr.* 2. Part, 281, 282.

19. Treſpaſs for Aſſault and Battery, layed to be at *Biſhop-Stanford*, in *Com. Hertford*. The Defendant comes in and pleads, and ſhews that he was Servant to a Scholler in St. *Johns* Colledg in *Cambridg*; and that they are to have Conuſans there, and are not to be drawn out of the Univerſity: And ſhewed, That their Charters for *Cambridg* and for *Oxford*; and the Act of 13 Eliz. for

the Confirmation of the Charter for *Oxford*, and ſo, *Cambridg*. To this Plea the Plaintiff did demur in Law, becauſe the Defendant hath taken no traverſe, which he ought to have done, with an *abſque hoc*, that he was guilty in any place *extra Univerſitatem Cantabrigiæ*, that ſo they might have taken Iſſue. It was the clear Opinion of the Court in this Caſe, That the Defendant here ought to have concluded his Plea with a traverſe, and that for this omiſſion, the plea was not good, and the Plaintiff had good cauſe of Demurrer. Judgment was for the Plaintiff. Hill. 14 Jac. in B. R. *Payn* and *Wrothes* Caſe. *Bolſtrod.* 3. Part, 282, 283.

20. Treſpaſs of Battery ſuch a day. The Defendant pleaded, That *tempore quo*, he was ſeiſed of ſuch a Rectory in the place where, &c. in Fee, and that *tempore quo*, There was Corn ſeverted from the nine parts, and that the Plaintiffs came to carry away the Corn, and the Defendant in defence of his Corn, and to keep the Plaintiff from taking of it, ſtood there to defend it; and if the Plaintiff had any hurt, it was of his own wrong. The Plaintiff replyed *De injuria ſua propria abſque tali Cauſa*; upon which the Defendant demurred. It was adjudged for the Plaintiff, for that ſuch general Replication is good, and the Plaintiff needs not to anſwer to the Title of the Defendant, becauſe the Plaintiff by his Action doth not claim any thing in the Soil, or Corn, but only damages for the Battery, which is meerly collateral to the Title. It was adjudged for the Plaintiff. Trin. 7 Jac. in B. R. *Taylor* and *Markham's* Caſe. *Telverton*, 157, 158.

Tryall, *and* Miſ-Tryall.

1. *Where, and in what Caſes the Iſſue joyned ſhall be tryed by the Ordinary: And where, and in what Caſes not.*

1. IN a *Quare Impedit*, the Plaintiff made Title by Survivor, upon a Grant made to him and others by A. who had *Advocatio quarte partis* in groſs, and had Preſented B. &c. and after another as in groſs, and after a third as in groſs; and then the Defendant Preſented as Appendant; and every of them had *Advocationem quarte partis*, and that the Church was now void by the death of the Preſentee of the Defendant, and ſo now remains. The Defendant ſaid, That the entire Advowſon was Appendant to the Mannor of D. the moyety of which he had by Diſcent, and that now it belonged to him to Preſent without that, that B. was Admitted and Inſtituted at the Preſentation of A. It was the Opinion of the Court in this Caſe, the Admiſſion and Inſtitution being traverſed, That the ſame ſhould be tryed by the Certificate of the Ordinary. Mich. 6 E. 6. *Dyer*, 78.

2. *Quare Impedit* was brought by Sir *Henry Sidney* againſt the Biſhop of *Glouceſt.* and R. who was late Incumbent, who was created Biſhop by the Queen. But the Iſſue was joyned upon the Avoydance by reſignation of the late Incumbent. It was doubted how the ſaid Iſſue ſhould be tryed. It was Ruled by the Court, That the Iſſue ſhould be tryed by the Countrey, becauſe the principal part of the Iſſue is the Avoydance, and that is beſt known to the Countrey, and the Reſignation is but an Evidence of it. Hill. 6 Eliz. *Dyer*, 229. Sir *Henry Sidneys* Caſe.

3. Iſſue was joyned in a Writ of Dower brought; If accoupled in lawfull Matrimony, and a Writ was awarded to the Biſhop to certify the ſame. The Biſhop made a ſpecial Certificate, viz. the Marriage to be of the age of 12 years of the Husband, and 16 years of the Wife. It was the Opinion of the Court, That the Retorn of the Biſhop was inſufficient,

cient, for he ought to retorn the lawfulneſs of the Marriage only, viz. If accoupled in lawfull Matrimony, and not have made ſuch ſpecial Retorn; and in ſuch Caſe, that the Iſſue is to be tryed only, by the Biſhop as Spiritual Judg of it; and therefore for making of ſuch inſufficient Retorn, the Biſhop was Amerced 20 l. by the Court, and a new Writ awarded to the Biſhop to certify. Mich. 14 El. *Dyer*, 305, and 313. See Paſc. 22 Eliz. *Dyer*, 368. acc.

4. See for the manner of the Biſhops Certificate in Caſe of Loyalty of Matrimony. *Ballon Lib.* 5. *De exceptionibus* cap. 14. 39 E. 3. 20. And ſee the form of the Certificate in this manner, 14 Eliz. *Dyer*, 305, and 313. viz. *Breve Domini Regis præſentibus annexum omni qua decuit reverentia accepimus, virtute cujus brevis vobis Certificamus, Quod omnibus et ſingulis in brevi illo ſpecificat. rite et debitè juxta juris exigentiam obſervat. et vocatis in exparte vocandis, diligentem et celerem ſui fecimus Inquiſitionem deres veritate de et ſuper matriis in brevi illo content. Per quam Inculenter et evidenter, comperimus et invenimus, per legitimos proboines, et alia in hac parte canonicè requiſ. Quod diſt. A. in brevi prædict. nominata quod B. in Com. N. in Dioceſi N. D. in prædict. brevi ſuccitur nominato legitimo Matrimonio Copulata fuit. In cujus rei Teſtimonium, &c.* By which it appeareth, That the Ordinary muſt certify the point in Iſſue generally, viz. *Copulata, vel non Copulata fuit in legitimo Matrimonio*, and muſt not make a Special Verdict of it, or expreſs the manner of the Marriage at large.

5. If a Writ of Dower be brought againſt the Biſhop of N. and others by ſeveral *Præcipe's*; and they plead, That the Demandant was never accoupled in loyal Matrimony; yet the Writ ſhall go to the ſame Biſhop to try and certify the loyalty of the Matrimony, and not unto the Metropolitan: For although the Biſhop be a party to the Writ, and a Defendant in the cauſe; yet becauſe there are other parties and Defendants beſides himſelf, who ſhall be bound by his Certificate; It ſhall be preſumed that the Biſhop will do right; and therefore he himſelf ſhall be Judg of the Matrimony. But if the Biſhop himſelf alone had bin Defendant, and had pleaded ſuch a Plea, and Iſſue joyned. In that Caſe he ſhall not try the Matrimony, for then he ſhould be Judg in his own Cauſe, which the Law will not ſuffer. And therefore the Certificate of the loyalty of the Marriage in ſuch Caſe ſhall be by the Metropolitan. 10 R. 2. *Tryall*, 100. But if in a Writ of Dower, or other Writ the Iſſue is, Whether A. the Demandant were the Wife of J. S. or not: th ſame ſhall not be tryed by the Certificate of the Biſhop, but by a Jury at the Common Law. 39 E. 3. 15. acc.

6. Baſtardy is an Eccleſiaſtical cauſe; and if general Baſtardy be pleaded in diſability of the Plaintiff, the ſame ſhall be tryed by the Certificate of the Biſhop, Whether it be in a real or a perſonal Action. See *Cook* 5. Part, in the Caſe of the Abbot of *Strata Marcella*, and 47 E. 3. 14. But if it be pleaded, That the Plaintiff was born at ſuch a place before the Marriage ſolemnized, and ſo a Baſtard. This is a ſpecial Baſtardy, and ſhall be tryed by a Jury at the Common Law where the Birth is alledged. See 38 Aſſ. 24. 7 E. 6. *Dyer*, 89. 46 E. 3. 3. 8 H. 6. 3. acc. See Trin. 14 Jac. in C. B. Where in an Action upon the Caſe for calling one Baſtard, and the Defendant juſtified, that he was a Baſtard, and it was awarded, That this ſhould be tryed by the Countrey, and not by the Ordinary. *Hob.* 179.

7. Profeſſion is a Spiritual thing, and ſhall be tryed by the Certificate of the Biſhop. 40 E. 3. 27. By *Bellknap*, *Cook* 4. Part, 71. in *Hinds* Caſe, acc. For ſo was Profeſſion alledged in a Knight of the Order of St. *John* of *Jeruſalem* tryed by the Certificate of the Biſhop where the Profeſſion was alledged in 31 E. 3. *Fitz. Tryal.* 98. But if the time of the Profeſſion be in Iſſue, it ſhall be tryable by a Jury at the Common Law, and not by the Certificate of the Biſhop, as it is adjudged in *Cook* 4. Part, 71. in *Hinds* Caſe.

8. If a man plead Profeſſion in another man, which is traverſed, it ſhall be tryed by the Certificate of the Ordinary. But if he plead, That at the time of the making of ſuch a Deed, or the doing of ſuch a thing, that the party was profeſſed in Religion, the ſame ſhall be tryed by Jury, becauſe the Profeſſion refers to a certain time, 9 H. 7. 2. by *Huſſey* Juſtice. But if Profeſſion, or Baſtardy be alledged in a ſtranger, who is no party to the Writ, then the Profeſſion or Baſtardy ſhall be tryed by a Jury at Law. For that if the Tryall ſhould be by the Ordinary, and he make his Certificate of the ſame, the ſame remains a Record for ever, and ſhould conclude and bind the party for ever, for that he can make no averment againſt it, which would be dangerous and prejudicial to him who is no party to the Writ. See 43 E. 3. 37. 6. 33 H. 6. *Fitz. Tryall* 90 acc. *Cook* 8. Part, 32. in the Caſe of the Abbot of *Strata Marcella*, acc.

9. Admiſſion, Inſtitution, and Deprivation, are Spiritual things, and ſhall be tryable by the Certificate of the Biſhop; for Inſtitution is but the Letter of the Biſhop, of which a Jury cannot take notice 22 H. 6. 27. 8 H. 5. 9. acc. But Induction is a Temporal Act, and ſhall be tryed by a Jury at the Common Law. 22 H. 6. 27. by *Brown.* 2 H 4. 17. 12 H. 4. 11. 32 H. 6. 24. acc. See *Cook* 6. Part,

Part, 49. in *Boſwell's* Caſe, accordingly.

10. Note, In *Cook* 7. Part, 43. in *Kenns* Caſe, That a Sentence of Divorce may be repealed in the Spiritual Court by a Suit there after the death of the parties; but if any of the parties be dead before the Sentence, there and in ſuch Caſe, they cannot ſue in the Spiritual Court to declare the Marriage to be void, and to Baſtardize the Iſſue, becauſe the Tryal doth appertain originally to the Common Law, and to the Kings Court where no diſability is by ſentence in the Eccleſiaſtical Court. See there 39 Aſſ. 10. 39 E. 3. 31. 24 H. 8. *Baſtardy*, 44.

11. A *Quare Impedit* was brought by *Specot* and his Wife againſt the Biſhop of *Exeter*; and declared, That A. F. was ſeiſed of the Mannor to which the Advowſon was appendant, and deviſed the ſame to the Wife, and ſhe took Husband the Plaintiff, and then the Church became void, and they Preſented their Clerk, and the Biſhop diſturbed them. The Biſhop pleaded, That he claimed nothing but as Ordinary, and confeſſeth the Title of the Plaintiffs, but further ſaid, That he examined their Clerk, and upon examination found him *fore Schiſmaticum Inveteratum*, ſo as by the Law of the Church, he could not admit him to the Church; upon which the Plaintiff demurred. It was objected in this Caſe, That the Plaintiff ought to be barred, for that when a Parſon is once Preſented to the Biſhop, the examination fully appertains to the Biſhop, as appears by the Statute *De Articulis Cleri*; and if he deprive him for being a Schiſmatick generally, it is ſufficient, and he is not to ſhew the particular Schiſme; and of thoſe things which touch the learning or ſufficiency of the Clerk, they ſhall be tryed by the Spiritual Court; and if the Biſhop ſay he is an Heretick, it is ſufficient, and he need not ſhew wherein. See 9 E. 4. 2. br. *Depoſition* 5. where a Depoſition of A. was pleaded, there he ought to ſhew before what Judges he was depoſed, but not wherein. But it was Reſolved, That the Plea of the Biſhop was inſufficient. For by the Statute of *Articuli ſuper Chartas*, there ought to be a reaſonable cauſe of his refuſal *et Cauſa vaga et incerta non eſt Cauſa rationalis*; and therefore to alledg that he was *Schiſmaticus Inveteratus* generally, was not good, for that no certain Iſſue could be taken upon the ſame; and therefore it is too general for Tryal, and although that it may be ſaid, That it ſhall not be tryed by a Jury, but by the Metropolitan, as perhaps it ſhall be, yet the Plea is too general as it is pleaded; for how can he know wherein he is a Schiſmatick, ſo as he might examine him thereof. See Mich. 29 Eliz. in C. B. *Specots* Caſe. *Goldesbr.* 36. *Cook* 5. Part, 57, 58. acc.

12. In a *Quare Impedit*, the Caſe was, The Biſhop of *Landaff* refuſed to admit S. who was Preſented to the Vicarage of P. and Admitted one M. B. to the Parſonage of P. at the Preſentation of the Lord *St. John*. S. ſued the Biſhop for contumacy *per duplicem querelam*. The Biſhop pleaded, *Non habetur Talis Vicaria*; upon which matter he ſued a Prohibition. It was ſaid a Prohibition did not lye; for a Vicar is but he that *gerit vicem Perſonæ* to ſupply his place in his abſence, ſo as the ſame is a Spiritual matter which ought not to be tryed here. Alſo the Libell is to have Admiſſion and Inſtitution, and the other matter ariſeth by their Plea, *ſcil. Quod Reſtoria de P. eſt Eccleſia cum cura animarum, abſque hoc quod habetur talis Vicaria*; and ſo it is but an Incident to the Principal matter. Wherefore it ſhall be tryed there, and a Conſultation prayed. On the other ſide, it was ſaid, That we do alledg and ſhew, That in the time of E. 3. one L. was ſeiſed of the Mannor of P. to which the Church of P. is appendant, and alledg Preſentments from that time, and we convey it to the Lord *St. John*, and they would now defeat us upon this promiſe. It was the Opinion of the Court in this Caſe, That the Libell doth contain nothing but only contumacy in the Biſhop in that he hath not Admitted S. and the other matter comes in in the Replication; and therefore it was awarded, That a Conſultation ſhould be granted *Quoad Inſtitutionem* of S. only, and that they ſhould not proceed further. Trin. 31 Eliz. in B. R. *Slugg* and the Biſhop of *Landaff's* Caſe. *Lin.* 181, 182.

13. Excommunication is a Spiritual thing, and if it be pleaded in Diſability of the party in the Kings Temporal Courts, the ſame muſt be certified thither by the Biſhop himſelf, 41 E. 3. 12. *Cook* 1. Part *Inſtitutes*, 134. for no man can certifie an Excomengement, but only the Biſhop, who is the immediate Officer to the Kings Court for that purpoſe, 12 E. 4. 15, 20 H. 6. 17. But if the Biſhop be *in remotis*, or *ſede vacante*, an Excommengement certified by the Guardian of the Spiritualties is ſufficient, 8 H. 6. 3. 20 H. 6. 1. *Cook* 8. Part, in *Trollops* Caſe.

14. An Excommengement certified by the Commiſſary, or Official of the Biſhop, is not good at this day, although in ancient times the ſame had been allowed, 7 E. 4. 14. 11 H. 4. 64. in Debt. If the Pope, or any other having forraign authority, doth Excommunicate a ſubject of this Realm, it is no diſability of his perſon; for the Common Law doth diſallow of all Acts done by Forreign Power in diſability of any ſubject within the Realm. See Dr. and Stud. 125.

15. If a Biſhop certifieth the Kings Courts, That

That another Biſhop certified him that the party is Excommunicate in his Dioceſs; This Certificate, upon the Certificate of another, is not good, 25 E. 3. Excommengement 29. for the Biſhop muſt certifie the party to be Excommunicate, upon his own knowledge: But if a man be Excommunicate by the Official, or Commiſſary of the Biſhop, the ſame being done in the Biſhops right, and in his Court, is ſufficient, although the ſame cannot be certified into the Kings Court, but it muſt be certified under the Seal of the Biſhop. 7 E. 4. 14. *Coke* 8. Part, in *Trollops* Caſe.

16. If a Biſhop be Defendant in an Action brought againſt him, and Excommengement of the Plaintiff in that Caſe certified by him to have been in his own Court, is not allowed to be any diſability of the Plaintiff, for that the Biſhop ſhall not be Judge in his own Caſe, and the Temporal Court ſhall intend the ſame to be in the ſame cauſe. See 5 E. 38. 16 E. 3. Excomm. 5 10 H. 7. 9. &c.

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2. Tryal of other Things; *Upon Iſſue joyned in the Courts of Common Law; How, and where, and in what manner, and by whom they ſhall be: And where the Jury ſhall enquire of the intent of a man, where not.*

1. H Being of full age, brought an *Audita Querela* in the Chancery, to avoid a Recognizance in the nature of a Statute Staple acknowledged by him within age. But becauſe his Age was to be tryed by Inſpection of the Court, which now could not be, he being of full age, It was the Opinion of the Court, That the *Audita Querela* did not lye. Mich. 7 Eliz. Dyer, 232. *Herriſons* Caſe.

2. *Cheney* levied a Fine, and after brought a Writ of Errour to Reverſe it, and aſſigned Nonage, and had a *Scire facias* againſt the Conuſee: And upon two *Nihils* returned, the Court proceeded, and by Witneſſes and Inſpection they reverſed the Fine. *Cheney* ſold the Lands to others, upon whom the firſt Conuſee entred; And the Vendees brought a Writ of *Entre ſur Diſſeiſin*: and againſt the Judgment before, The Tenant gave an Exemplification of Examination of Witneſſes in the Chancery, proving him to be of full age: and although it ſeemed not to the Court available againſt the Judgment, yet the Verdict paſſed with thoſe Witneſſes; and was afterwards affirmed in an Attaint. Afterwards, the Vendees of *Cheney* being duly barred in the Writ of Entry, and in the Attaint, They brought a Writ of Right; Where the Tenant chuſe Tryall by Battail: and the Liſts of the Champions, and all being prepared, the Plaintiff being called, was Nonſuit, and ſo Judgment final was given. See Mich. 7 Eliz. *Dyer*, 201. & 301. *Cheney*'s Caſe. And ſee there, the manner of Tryal in a Writ of Right, and the proceedings in it, in *Lib.* 1. Title, *Battail.*

3. Note: Concerning Tryals, upon Iſſues joyned, Theſe Grounds were taken, and Reſolved to be Law:

1. That Matters in Suit, ſhall be tryed by the Country; matter in Law, by the Judges; and matter of Record, by the Record it ſelf: And ſee there for ſeveral manners of Tryals; *viz.* *Coke* 8. Part, in the Caſe of *Strata Marcella.*

2. A Peer of the Realm ſhall be tryed by his Peers, without Oath: but in an Appeal at the Suit of the party, a Peer of the Realm ſhall be tryed by a Common Jury. 10 E. 4. 6.

3. Cuſtome of a Court ſhall be tryed by the Judges of the ſame Court, if the Cuſtome be pleaded in the ſame Court. 11 E. 4. 2.

4. In Dower or Appeal brought by a Woman of the death of her husband, If it be pleaded, That the husband is alive, it ſhall be tryed by the Juſtices upon proof made before them, for the greater Expedition. 6 E 3. 19.

5. Age of an Enfant ſhall be tryed by Inſpection of the Juſtices, upon Errour to reverſe the Fine levied by him: And if Aide be prayed of him in the Reverſion who is ſaid to be within age, if the Iſſue be upon it, It ſhall be tryed by the Juſtices, by Inſpection of him. 17 E. 2. Tit. *Accompt*, 121.

6. In an Appeal of Mayheim; the Mayheim ſhall be tryed by the Inſpection of the Court. 28 Aſs. 5.

7. Earl or not Earl. Baron or not Baron, ſhall be tryed by the Kings Writ. 33 H. 6. 19. *Coke* 5. Part.

8. If a Mannor be Ancient Demeſne or not, it ſhall be tryed by the Book of *Doomeſday*, Which Book remains in the Exchequer: but if an Acre be parcell of ſuch a Mannor, it ſhall be tryed by the Country. 22 Aſs. 45.

9. If the Sheriff make ſuch a Return; Or if ſuch a one be Sheriff, or not, It ſhall be tryed by the

the Examination of the Sheriff himſelf. 9 H.4.1. 10 H. 4. 7.

10. If an Approver ſaith, That he brought his Appeal before the Coroner by Dureſſe, the ſame ſhall be tryed by the Coroner; and if he deny it, the Approver ſhall be hanged. 12 Aſs. 29. *Coron.* 118.

11. If a Statute-Merchant, or Staple, be a true Statute, or not, the ſame ſhall be tryed by the Examination of the Mayor and Clerk of the Statutes, 21 E. 3. 24. *Fitzh. Nat. Br.* 114.

12. Cuſtome of *London* ſhall be tryed by the Mayor and Aldermen; and Certified by the Record *Ore Tenus.* 5 E.4.30. 21 E.4.16.

13. Not Attached by 15 dayes, ſhall be tryed by the Examination of the Baily. 15 R.2. Exam. 22.

14. If a man was beyond Sea at B. in *France*, &c. It ſhall be tryed by the Certificate of the Mayor of B. 4 E.4.10. See *Litt.* 21. And if one be beyond Sea in the Kings Service, It ſhall be tryed by the Certificate of the Marſhall of the Kings Hoſt. 2 Eliz. *Dyer*, 176. *Bartues* Caſe, See *Cook* 8. Part, 31. The Abbot of *Strata Miretta*'s Caſe, for all theſe manner of Tryals.

4. Note: The Statutes of 27 E.3. Cap.8. and 28 E. 3. Cap.13. of the Staple, were made for the benefit *et in favorem alienigenarum*, for Tryals by *Medietatem Linguæ*: And yet, If an Alien be Plaintiff, and omitteth the Advantage of the requeſting tryal *per medietatem Linguæ*, whereupon a *Venire facias* iſſueth out, and the ſame is returned. It was holden, That in ſuch caſe he hath ſlipt his time; and that the Judges not bound *Ex Officio* to award ſuch a Writ, for that it doth not appear unto them by the Record, *quod una pars ſit alienigena*: And ſee there, That Treaſon ſhall not be tryed *per medietatem Linguæ*. For there *Sherley* a *Frenchman* was Arraigned for Treaſon in the Kings-Bench, and the *Venire facias* was awarded in *York* generally, and not *per medietatem Linguæ*. Paſch. 4 Mar. *Dyer*, 144. *Sherleys* Caſe. See Paſch. 19 Eliz. *Dyer*, 358. *Spinoſus* Caſe acc.

5. Sir *Julius Cæſar*, Maſter of the Requeſts brought an Action in B. R. for ſclanderous words againſt *Ph. Corſini*. The Defendant pleaded Not Guilty, and ſaid, That he was an Alien born, &c. and prayed Tryal, *per Medietatem Linguæ*, which was Granted: And at the *Niſi Prius* in *London*, but ſix Engliſhmen and five Aliens appeared; And the Plaintiff prayed a *Tales de Circumſtantibus per medietatem Linguæ*, and it was granted, ſo as there wanted one Alien: And the Record was, *Ideo alius Alienigena de Circumſtantibus per Vicom. London, ad requiſitionem inſius Nominati Julii Cæſaris per Mandat. Juſticiar. de novo appoſit. cujus nomen Panello prædict. affidator ſecundum formam Statuti in hujuſmodi caſu ſup. edit. et proviſ. Qui quidem Juratus, ſic de Novo appoſitus, viz. Chriſtianus Detbick Alicnigena, exactè venit ac in Juratam illam cum aliis Juratoribus prædict. prius Impanellat., & Juratis, Juratus fuit.* And the Jury found for the Plaintiff. It was moved in Arreſt of Judgment, That no *Tales* was to be granted the *Circumſtantibus* by the Juſtices, when the Tryal is *per medietatem Linguæ* by the Juſtices of *Niſi Prius*, by the Act of 35 H. 8. becauſe in the Act it is ſpoken of Freehold of Jurors, and an Allien is not properly ſaid of any County, or to have Freehold, nor can have Iſſues returned upon him: But it was adjudged, becauſe that the Statute was made for ſpeedy Execution, That it ſhould be expounded favourably, according to the intent and meaning of the Makers of the Act: And although, that in the Principal Caſe, the *Tales* was prayed by the Plaintiff, whereas it ought to be *ad requiſitionem Defendentis*, yet that ſhould be taken to be but miſpriſion of the Clerk, and that it ſhould be amended. Mich. 36 Eliz. in B. R. Sir *Julius Cæſars* Caſe. See *Cook* 10. Part, 104. *Denbawdies* Caſe acc.

6. If a Peer of *Ireland* commit Treaſon in *Ireland*, he cannot be tryed in *England*, for that he is not a Subject of *England*, but of *Ireland*; and the Tryal in *Ireland* is by Parliament, and not *per Pares*. 20 Eliz. *Dyer*, 360. acc.

7. Note, It was ſaid by the Juſtices, That Indictments and Tryals for Treaſon, confeſſed to be before three of the Council, was Repealed by the Statute of 1 & 2 *Mar.* And therefore it was holden by them, That in the Caſe of the Rebellion which was in the North, That the Rebells ſhould be Indicted in the County where the Treaſon was committed, and the Indictments ſhould be removed before the King in the Kings Bench, and that a Jury ſhould come from the place where the Indictments were, of Jurors of the County there. Hil. 12 Eliz. *Dyer*, 286.

8. In a Caſe of a Prohibition to the Admiralty, It was Reſolved, That if a Pyrate taketh goods upon the Sea, and ſelleth them, that the property of them is no more changed, then if a Thief upon the Land ſteals goods, and ſelleth them: And therefore in the Principal Caſe there; for that it appeared in the Libel exhibited into the Court of Admiralty, That *Bona Piratica fuerunt infra Portum Argier ſuper alium Mare*; for that cauſe a Prohibition was denyed, becauſe the Juſtices ſaid, That *Argier* being a Forreign Port, the Court could not take notice whether there was ſuch a place of the Sea called the Port, or whether it were within the Land or not: Afterwards, by the mediation of the

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Chief Juſtice, the parties agreed to try the Caſe in the *Guild-Hall* in *London*. Trin. 10 Jac. in C. B. *Greenway* and *Barker's* Caſe. *Godbolt*, 133.

9. A Woman brought an Appeal of Murder in the County of *Salop*, being the next County adjoyning to *Montgomery* in *Wales* for the Murder of her Husband. After a Verdict for the Plaintiff, It being Tryed by a Jury of the County of *Salop*. It was moved in Arreſt of Judgment, That the Appeal ought to have bin brought in the County of *Montgomery* where the fact was done, and not in the County of *Salop*. In this Caſe it was Reſolved by the whole Court, That the Writ ſhould abate. For it was ſaid, That it was a fundamental Rule in Law, That a Tryal for Murder by Appeal or otherwiſe, ſhould not be out of the County where it was committed. And it was ſaid, That no Preſidents can be ſhewed, where Appeals have bin allowed in Counties adjoyning for Murders done in *Wales*. Hill. 5 Car. in B. R. *Sentley* and *Prices* Caſe. *Cro.* 1. Part, 179.

10. After Verdict, in an Action upon the Caſe, it being found for the Plaintiff, it was ſaid, That there was a Miſ-Tryal. For upon the *Venire facias*, there were but 23 Jurors returned, where there ought to have bin 24, and the Tryal was by ten o the Principal, and two of the *Tales*, *de Circumſtantibus*. It was the Opinion of the Court, That the ſame was but a Miſ-return of the Sheriff, which was aided by the Statute of 18 Eliz. Trin. 7 Car. in B. R. *Sankill* and *Stockers* Caſe. *Cro.* 1. Part, 161. See *Cook* 5. Part, in *Gardiners* Caſe, accordingly.

11. Copyholder in Fee by Licenſe, makes a Leaſe for years, and dyes, the eldeſt Son dyes before Admittance. It was Reſolved in this Caſe, Though the Copyholder in Judgment of Law hath but an Eſtate at will, yet Cuſtome hath ſo eſtabliſhed his Eſtate, that by the Cuſtome it is diſcendable to his Heirs. 2. That the Heir before Admittance, may take the Profits and ſurrender to the uſe of another. For although that every Admittance amounts to a Grant, and ſo may be pleaded; and therefore (as was objected) nothing veſts before Admittance: Yet after Admittance, the Heir in pleading may alledg this is a Grant. For if he ſhould be compelled to ſhew the firſt Grant, it was before memory, and ſo not to be tryed, and then the Cuſtome fails. Yet he may alledg the Admittance of his Anceſtor as a Grant, and ſhew the Diſcent to him, and that he entred, and this without Admittance. But he cannot plead, That his Father was ſeiſed by Copy and dyed ſeiſed, and that the ſame diſcended to him, for that he cannot prove upon Tryall, becauſe it is but a particular Eſtate at Will in Judgment of Law diſcendable by the Cuſtome. *Cook* 4. Part, 22. *Browns* Caſe.

12. Action upon the Caſe was brought for ſpeaking theſe words, viz. B. is a perjured old Knave, and that is proved by a Stake parting the Land of A. and B. It was Reſolved in this Caſe, That upon all the words taken together, the Action did not lye: For that the intent of the party cannot be enquired of by the Jury, nor put in Tryal: Alſo if it could, the laſt words do explain his intent to be of no Judicial perjury. For it is impoſſible that a ſtake can prove a man perjured. But if the Plaintiff had diſcloſed the truth of the Caſe in his Declaration, ſo as the matter in Iſſue might have bin put in Tryal, and enquired of; As that there was a Controverſy betwixt two, Whether the Stake ſtood upon the Land of the one, or the other, or as an indifferent boundary, and the Plaintiff was depoſed in an Action for this as a Witneſs, and had perjured himſelf in his Depoſition; perhaps upon matter in Iſſue, which might be enquired of, and Tryable by Jury, the Action would have lyen. *Cook* 4. Part, 19. *Britteridges* Caſe.

More Tryall, *and* Miſ-Tryall.

1. ERror to reverſe a Judgment upon an Indictment, where the party was Indicted in the County of D. of being a common Barretor, where having traverſed it before the Juſtices of Aſſiſe there, and the Indictment found, and a Verdict was againſt him, and Judgment given, that he ſhould pay a Fine, and be Impriſoned: And the Error aſſigned was, becauſe upon the Endictment, proceſs being awarded, he appeared *gratis* at the following Aſſiſes, and pleaded, Not Guilty: And then a *Venue facias* was Returnable the ſame Aſſiſes, and was thereupon tryed and found Guilty; That this *Venire facias* was miſ-awarded to make it Returnable at the ſame Aſſiſes, whereas there ought to have bin 15 dayes betwixt the *teſte* of the Writ, and the day of the Return thereof, and not to have made it returnable the ſame day. But the Opinion of the Court was, That it was well enough; and that al-

well when the party is at large, and comes *gratis*, as where he is then in the Goal: wher fore it was adjudged, That the Tryall was good. Hill. 9 Car. in B. R. *Chapmans* Caſe. *Cro.* 1. Part, 248.

2. In Action upon the Caſe, the Plaintiff declared, That whereas he lent to the Defendant a Gelding to ride from *London* to the City of *Exon*; and there ſate to deliver it to the Plaintiff, That the Defendant intending to deceive the Plaintiff, rode the ſaid Gelding from *London* to *Exon*, and from *Exon* to *London*, and by that riding ſo abuſed his horſe, that it came of little value: Upon Not Guilty, it was found againſt the Defendant, and damages. It was objected (amongſt other things), That here was no good Tryall, becauſe the Bargain was at *London*, and the fact was alledged in riding back to *London*, and the miſuſer in the Journey, and the Tryall ought to have bin at *London*, where the beginning of the contract was, and not at *Exon*, where the Converſion was alledged. But the Court was of Opinion, That the Tryall was good, becauſe the Principal wrong was the not delivering upon requeſt at *Exon* according to the Contract, and then when he denyed the delivery, and converted him to his own uſe, the Plaintiff might well have an Action for both together. It was adjudged for the Plaintiff. Mich. 1 Car. in C. B. *White* and *Ryſdens* Caſe. *Cro.* 1. Part, 14.

3. In Action upon the Caſe, the Plaintiff declared, That he had procured a Writ of Entry *ſur Diſſeiſin* againſt one A. and thereupon had a ſummons of Lands in *London*, and delivered the ſaid ſummons to the Defendant being Under-Sheriff of the ſaid County, *virtute cujus* the ſaid Defendant ſummoned the ſaid A. upon the Land; but notwithſtanding that, did not return the ſummons. A. pleaded, Not Guilty: The matter was tryed at *London*, where the Action was brought for the Plaintiff. It was moved, That here was a Miſ-Tryal, for that the Iſſue ought to be tryed in the County where the Land is, becauſe that the cauſe is local. But the Exception was diſallowed by the Court, for that the Action is well layed in *London*, and ſo the Tryall there alſo is good. Trin. 31 Eliz. in B. R. *Maſh* and *Abreys* Caſe. *Leon.* 146.

4. Error brought to reverſe an Outlawry pronounced againſt him, and ſhewed that he was Outlawed by the name of J. B. of *Humby* in the County of *Lincoln*, Gent. And that within the ſaid County, there are two *Humbyes*, ſc. *Magna Humby* & *parva Humby*, and none without addition. To which it was ſaid on the other ſide. That the truth is, there are two ſuch Towns, and that *Magna Humby* is known as well by the name of *Humby* only, as taken for the name of *Humby Magna*; and upon that they were at Iſſue. It was moved in this Caſe, If the Inqueſt to try this Iſſue ſhall come *de Corpore Comitatus*, or from *Humby Magna*. It was ſaid it ſhall be tryed by an Inqueſt of *Humby Magna*; but if the Iſſue had bin no ſuch Town, then the Inqueſt ought to have bin *de Corpore Comitatus*: and wherefoever an Inqueſt may be tryed out of a ſpecial Viſne, there it ſhall never be tryed by the body of the County. Sir 22 E. 4. 4. But the Opinion of *Wray* Chief Juſtice in the Principal Caſe was, That the Iſſue doth amount to no ſuch Town, for that the purcloſe of the Plea is, and no *Humby* without addition; and he ſaid, that the book of 22 E. 4. is not ruled, but is only the Opinion of *Bryan* only. But yet afterwards in the Principal Caſe it was adjudged, that the Tryall was well. Paſc. 30 Eliz. in B. R. *Beverly* and *Bowds* Caſe. *Leon.* 109.

5. A. was bound by a Statute to F. and there was not two Seals put to the Statute, and Execution was ſued upon the Statute; and the Conuſee brought an *Audita Querela*, and they were at Iſſue, If two Seals were to the Statute, and tryed for the Plaintiff in the *Audita Querela* by the Sheriff of *Lincoln*. It was moved, That the Iſſue ought to have bin tryed by the Certificate of the Mayor of *Lincoln*, before whom the acknowledgment was. But the Opinion of the Court was againſt that, for that the Iſſue is not, Whether any ſuch Statute was acknowledged or not; but whether the Statute in queſtion hath two Seals or not; and that is not recorded by the Mayor, as the Statute it ſelf is. It was adjudged for the Plaintiff. Paſc. 33 Eliz. in C. B. *Aſcew* and *Fulcants* Caſe. *Leon.* 228, 229.

6. Action was brought againſt one as Executor, who pleaded, That he refuſed; upon which they were at Iſſue. The Biſhop did certify *Quod non recuſavit*, whereas in truth he had refuſed before the Commiſſary. It was argued, That the Court ought to write to the Commiſſary to certify. But that was denyed by the whole Court, and the party cannot aver againſt the Certificate of the Biſhop, no more then againſt the Return of the Sheriff, and the Court ſaid, that the only remedy for the Defendant, was to have an Action upon the Caſe againſt the Biſhop for his falſe Return. Then it was moved, That the Iſſue joyned upon the Refuſal ought to be tryed by Jury, and not by Certificate of the Biſhop. And ſuch was the Opinion of the Juſtices, where the Iſſue is, Whether the Executor did refuſe before ſuch a day, or after, there the Tryal ſhall be by Jury; contrary where the Iſſue is upon refuſal generally, becauſe the refuſal is before him as a Judg; as alſo is Reſignation. Trin. 31 Eliz. in C. B. *Leon.* 205, 206.

7. Action

7. Action upon the Caſe, for calling the Plaintiff, *Perjured Knave*. The Defendant Juſtified, for that the Plaintiff had ſworn in the Exchequer, That the Defendant had refuſed to pay the Subſidy; whereas in truth he had not ſo done. The Plaintiff replyed, *De injuria ſua propria*, the Action was brought in *London*, and tryed for the Plaintiff. The Court ſaid, That the matter was tryable in both Counties; but if the Counties cannot joyn, as *London* cannot with the County of *Middleſex*, there the Iſſue is vitious. And it was the Opinion of the Court, That where the Tryal is evill, the ſame is not helped by the Statute of Jeofails. Mich. 28 Eliz. in C.B. *Box* and *Newſlewes* Caſe. *Godbolt*, 107. *Goldsbr.* 28. the ſame Caſe.

8. Aſſumpſit; The Defendant pleaded, *Non aſſumpſit*; The Iſſue was found for the Plaintiff. It was alledged in ſtay of Judgment, That no place was alledged of the Aſſumpſit; and when an Iſſue is miſ-tryed, as here, there it is not helped by the Statute of Jeofails. It was the Opinion of *Periam*, Juſtice, That the Statute ſhall be taken liberally; ſo that if a Verdict once be given, it muſt be a great cauſe that ſhall ſtay Judgment: Wherefore although in the principal Caſe, no place is ſhewed; yet when the matter is once tryed, the Plaintiff ought to have Judgment: And ſo was the Opinion of the Court. Paſch. 29 Eliz. in C. B. *Goldsbr.* 47.

9. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes, The Caſe was; A man being poſſeſſed of Tythes in the right of his Wife, as Executrix of her former husband, grants *totam jus, titulum, et Interreſſe ſuum de et in Decimis predict.* It was found for the Plaintiff. It was moved, That the Plaintiff had not ſet forth any good Title to himſelf. It was Reſolved, That the Grant was good, and that the Leaſe which he had of the Tythes in the right of his Wife, did thereby paſſe; for the word (*ſuam*) doth import a property in poſſeſſion. It was then Objected, That it was a Leaſe made by an Abbot within the year before the Diſſolution; and therefore void. It was Anſwered, That the Iſſue here only was, Whether he were diſcharged of Tythes; and the Jury have given their Verdict, That at the time of the Diſſolution, there was no diſcharge of Tythes; and this Leaſe being but an Inducement to the Title of the Plaintiff, therefore the Iſſue was good enough, and the ſame was well tryed. Hill. 10 Jac. in B.R. *Arnold* and *Bidgoods* Caſe, *Cro.* 2. Part, 308.

10. Treſpaſs, for entring his Cloſe and houſe at G: The Defendant juſtified, That a *Capias Utlagum* was by a Warrant from the Sheriff directed to him to execute upon one S; and becauſe J. S. was the Common voice, That S. was at the Plaintiff's houſe, he went in a Foot path through the Cloſe to the ſaid houſe, and asked leave of the Plaintiff to enter his houſe to ſearch for the ſaid S; and that the Plaintiff licenſed him; whereupon he entred, and not finding S, he returned the ſame way. Iſſue being joyned upon the Licenſe, It was found for the Plaintiff. It was moved in Arreſt of Judgment, That there was not any Replication for the Cloſe, nor Iſſue joyned thereupon, ſo as all was diſcontinued. But the Opinion of the Court was, That the Triall was good, and that Judgment ſhould be given for that which was found; and that for the other matter, that the ſame was helped by the Statute of Jeofails. Mich. 12 Jac. in B.R. *Watts* and *King's* Caſe. *Cro.* 2. Part, 353.

11. In Treſpaſſe, the parties being at Iſſue, upon a *Venire facias* awarded, Twenty five were Returned, and at the *Niſi Prius*, 12. of them were ſworn, whereof the 25th perſon was one. It was moved in this Caſe, That the Triall was ill, and not aided by the Statute of Jeofails. The Court held, That although 25. were Returned, and 12. of the firſt 24. had been ſworn, and not the 25th perſon, the Triall had been well enough; but as the Caſe now is, it is a Miſ-Trial, and not warranted to ſwear the 25th perſon: Wherefore a *Venire facias de Novo* was awarded. Trin. 20 Jac. in B. R. *Calthrop* and *Newtons* Caſe. *Cro.* 2. Part, 647.

12. Treſpaſſe, for taking 20 Loads of Wheat in E; The Defendant pleaded to all but 2. Loads, Not Guilty; and as to them, That J. S. was ſeiſed in Fee of the Rectory of W; and Deviſed it by Will to the Defendant in Fee, and dyed; and the Defendant entred, and that the Corn was Tythes ſeverd, and ſo juſtified. The Plaintiff *Proteſtando*, That E. was not within the Pariſh of W, pleaded, That the ſaid J. S. was ſeiſed of the Rectory *prout*, and dyed ſeiſed thereof without Iſſue, which diſcended to the Plaintiff as Coſen and Heir; whereupon he entred, and Traverſed the Deviſe. Upon which, Iſſue was joyned, And a *Venire facias* to try thoſe two Iſſues *De vicineto Parochia de W*: The Jury found the Iſſue of Not guilty for the Defendant, and the other Iſſue for the Plaintiff. It was moved, That it was good enough; For although the Plaintiff in the Declaration ſuppoſeth E. to be, and doth not ſhew it to be within the Pariſh of W; yet the Defendant by his Plea confeſſeth it to be within the Pariſh of W, and entitles himſelf thereunto as parcel of the Rectory; and then the *Venire facias* is well awarded from *vicineto de Parochia*. To which

it was Anſwered, and Reſolved, That although the Defendant in the one part of his Plea confeſſeth, That E. is within the Pariſh of W; yet that ſhall not help this Trial: For the firſt Plea, of Not Guilty, is diſtinct by it ſelf, and the Iſſue is joyned upon it. The ſecond part of the Plea is alſo diſtinct from the firſt, and hath not any relation thereunto, and nothing which is therein ſhall help the Plaintiff, *quoad* the trial of the firſt. But peradventure, ſuch a Confeſſion in one entire Plea, would have helped him; but as it is, it is not good, and therefore the Juſtices were of Opinion, That it was a Miſ-Tryall, and a *Venire facias de novo* was awarded to try the ſame Iſſues. Mich. 3 Jac. in B. R. *Lepworth's* Caſe. *Cro.* 2. Part, 86, 87.

13. A *Scire facias* upon a Recognizance againſt J. H. for the good Behaviour, For that the ſaid J. H. with other riotous perſons, 4 *Maii*, 17 Jac. riotouſly at 11 of the Clock at night, entred into the Cloſe of one J. F. in L. and cut up a Quick-ſet Hedg of the ſaid Cloſe: the Defendant pleaded to all but ſides the entring of the Cloſe, and cutting down the Quick ſet Hedg, Not Guilty. And as to that he juſtified, That the ſaid Cloſe in L. called D. Cloſe, is, and time whereof, &c. was an High Way leading from *Shelley* in the ſaid County, over the ſaid Cloſe to *Newport*; and becauſe the Way was ſtopped by the ſaid Quick ſet hedg, he cut it down: as was lawfull to do to uſe the ſaid Way. The Replication was, That the ſaid J. H. *de injuria ſua propria ex malitia ſua præcogitata* with the others, cut down the ſaid Quick ſet Hedg *prout* as alledged, *Et hoc petit quod inquiratur. Et prædict. Defendens ſimiliter.* And the Verdict was found againſt the Defendant. It was in this Caſe ſaid, and ſo holden, That admitting that the Iſſue was good, yet that here was a Miſ-Tryall, for that the *Venire facias* is only *de L.* where the Cloſe is; whereas it ought to have bin from *Shelley* and *Newport*, from which places, and to which places the Way is ſuppoſed to lead: Wherefore it was adjudged for the Defendant, that he ſhould be diſcharged. Mich. 38 Jac. in B. R. The King and *Hoppers* Caſe. *Cro.* 2. Part, 598, 599.

14. A. brought Debt againſt B. upon a Leaſe for years: The Caſe was, The Grandfather of the Plaintiff ſeiſed of Lands in *Southwark*, made a Leaſe of the ſame to the Defendant at *London*, rendring Rent. Afterwards he Deviſed the Reverſion to A. the Plaintiff in Fee; and in his Will declared his intent to be, That his Executors ſhould have the Reverſion during the Term, upon Condition, that they enter Bond to pay 34 l. *per annum* at the uſual Feaſts; and Deviſed, That this Bond ſhould be made by the advice of his Overſeers; all this to be done within ſix Months after his deceaſe; And if his Executors refuſe, his Will was, That the Overſeers ſhould take the profits upon the ſame Condition: The Deviſor dyed, no Obligation was made within the three Months, and the Plaintiff required the Executors to enter the Bond, and pay the Rent, which was not done: Whereupon he brought his Action in *London*, and not in *Southwark* where the Land did lye. It was agreed in this Caſe, That the Plaintiff had good Title to have the Rent; but becauſe the Plaintiff had miſtaken the laying of his Action, it was for that Caſe only adjudged againſt the Plaintiff. Then it was moved, That in this Caſe the Plaintiff might pay Coſts. But it was Reſolved, That this Caſe was not within the Statute of 32 H. 8. and 4 Jac. where the words of the Statute are, That if the Plaintiff be Nonſuit, or a Verdict given againſt him upon a lawfull Tryall, that he ſhould pay Coſts; for that he ſhall not pay Coſts, for no Verdict is found againſt the Plaintiff, but rather for him, and Judgment is given againſt him, becauſe he only miſtook his Action. Hill. 21 Jac. in C. B. *Tothern* and *Clybrooks* Caſe. *Winch.* 69.

15. Debt brought upon an Obligation of 60 l. Iſſue was taken, that the money was paid at *Coventry*, and yet by conſent of parties and a paper Rule, the Iſſue was tryed at *London*, and found for the Plaintiff, and Judgment given. And upon Error brought in the Exchequer Chamber, the Judgment was reverſed, for that the conſent of parties may not change the Law. Paſc. 7 Jac. in the Exchequer. *Crow* and *Edwards* Caſe. *Hob.* 5.

16. In Waſte, the Plaintiff in the Writ layd the Waſte in the Caſtle of *Burgham*, and other Waſts in the Towns of *Burgham*, *Flaxbridg*, and *Appleby*; and then aſſigned Waſtes in the Towns mentioned in the Writ, and in another Town called *Langton*, not mentioned in the Writ. Whereupon 18 ſeveral Iſſues were joynted, whereof one was concerning the Reparation of the Caſtle of B. and none concerning any thing of *Flaxbridg*. And there was one *Venire facias* for Tryall of all theſe Iſſues. It was moved, That it was a Miſ-Tryall. But it was Reſolved, Though they were all ſeveral Iſſues, and might be Tryed by ſeveral *Venire facias's*, and then every *Venire facias* ſhould have come from the place where the particular Iſſue did ariſe: Yet in ſuch Caſes as this, One *Venire facias* was allowed to try them all for avoiding of multiplicity; but then that *Venire facias* muſt ariſe from all the places from whence the Iſſues do ariſe, and from no more; but in this Caſe, the *Venire* offended in both, for the *Venire facias* did not come *inter alia de Vicineto Caſtri de Burgham*. And

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2. The *Venire facias* was awarded from one Town *mutt alia*, from whence no Iſſue did ariſe; and the *Venire facias* being one in Deed, could not be made good in part, and void in part, eſpecially where a Town was added to the *Venire facias*, which could not be applyed more to one Iſſue then the other; And therefore the Court held it vitious in all. The Earl of *Cumberland*, and Counteſs Dower of *Cumberlands* Caſe, *Hob.* 37.

17. In Falſe Impriſonment brought for Impriſoning him at *Briſtow*; The Defendant pleaded, That time out of mind there hath been a Court of Record holden at *Briſtow* every Monday before the Mayor, &c. according to the Cuſtome; and that according to the Cuſtome, J. S. levied a Plaint there againſt the Plaintiff; whereupon the Defendants being Sergeants, were commanded to Arreſt him; which they did, &c. The Plaintiff took Iſſue, That J. S. did levy no ſuch Plaint: which was found for the Plaintiff. It was moved, That it ought to have been tryed by the Record. But it was Reſolved, It was well tryed, for that the matter of Record is mixt with matter in fact, that is, whether the Court were kept, and the Plaint entred according to the Cuſtome, which is a matter of fact triable by Jury: and the levying of a Plaint, is like the ſuing of an Original, which is out of Record, untill it be returned in Court. It was adjudged for the Plaintiff. Mich. 16 Jac. in C. B. *Potts* and *Stafford's* Caſe. *Hob.* 124.

18. Error to reverſe a Judgment in a *Quare Impedit*; The Caſe was, The Biſhop of *London* 11 H. in the County of *Middleſex*, did grant the next Avoidance to a Church of his Preſentation in the County of *Worceſter*; Upon Iſſue taken *Quod non Conteſſit*. It was tryed in the County of *Worceſter*; Error was brought, and alledged, That it was a Miſ-tryal: But againſt that it was ſaid and alledged, That the Tryal was good; for that the Tryal ſhall be where the Land is, according to the Book, 43 E. 1. And of that Opinion was the whole Court; And ſo it was ſaid, It was adjudged in *Heale* and *Sprotts* Caſe. Mich. 8 Jac. in B. R. The Biſhop of *London*, and *Drews* Caſe. *Hob.* 1. Part, 47.

19. Note: It was Reſolved in the Caſe of the Lord *Vaux*, who was Indicted for his refuſal to take the Oath of Allegiance, That at the Common-Law, In theſe 4. Caſes only, a Peer ſhall be tryed by his Peers; viz. in Treaſon, Felony, Miſpriſion of Treaſon, and Miſpriſion of Felony; and the Statutes which give ſuch Tryall have Reference to theſe, or to other Offences made Treaſon or Felony: But in caſe of a *Præmunire*, the ſame being only in effect but a Contempt; no Tryal ſhall be of him by his Peers: The Lord *Vaux* afterwards confeſſed the Indictment, and therefore Judgment was given againſt him according to the Statute of 16 R. 2. viz. To be out of the Kings Protection, his Lands, Tenements, Goods and Chattels to be perpetually forfeited to the King, and to be impriſoned during his life. Paſch. 10 Jac. in B. R. The Lord *Vaux's* Caſe. *Bollſtr.* 1. Part, 198, 199.

20. Error to reverſe a Judgment given in the Court of Pipowders at *Rocheſter* upon a Bond of 300 l. The Plaintiff declared upon a Bond long before entred into; and ſet forth, That the Court was there holden, *ſecundum Conſuetudinem*, and by Charter before the Mayor calling to him two Citizens; which Bond was entred into for payment of money to the Plaintiff at his houſe in *Rocheſter*. The Defendant there pleaded payment of the money at the Plaintiff's houſe. The Plaintiff Replyed, That the money was not paid: Upon which Iſſue was joyned, And a *Venire facias* was awarded Returnable before the Mayor, or his Deputy, calling to him two Citizens upon the Tryall, and Verdict and Judgment was given for the Plaintiff: Whereupon Error was brought. The ſole Queſtion was, Whether the Judgment given there, was erroneous or not. In this caſe, It was the Opinion of the Court and Juſtices, That by Preſcription, a man may well have and hold a Court of Pipowders, without a Fair, or a Market, as to have Contracts made long before: and here in this caſe, the Court is layed to be held by Cuſtome, viz. *ſecundum Conſuetudinem* and by Charter, in the Copulative: And ſo it was ſaid, It was Reſolved, Mich. 8 Jac. in *White* and *Howes* Caſe, In an Action upon the Caſe, for ſlanderous words brought in a Court of Pipowders for words ſpoken long before the Court was held: It was adjudged for the Plaintiff, and affirmed in a Writ of Errour, becauſe the Court was there layed to be held by Preſcription. 2. It was holden, That this Preſcription is not altered nor changed by this Grant and Confirmation by Charter; but that they may well ſtand together: And the difference was taken, where the Charter doth deſtroy the Cuſtome; and where it is only by way of Addition to it: and in this manner, as in the principal Caſe, the Cuſtome, Preſcriptions and Charter may well ſtand together. 3 Reſolved, That as to the Iſſue here, and Tryall thereupon, The payment here is pretended to be at the Plaintiff's houſe, being in the City of R: this cannot be made good any wayes; but he ſhould have ſaid, That this money was paid to the Plaintiff; viz. at the City of *Rocheſter*, at the Plaintiff's houſe in the City of R. 4. Reſolved, As to the *Venire facias*, and awarding of the ſame, The ſame ought to be done by the

the Mayor alone, for he alone is the ſole Judg, and the other Citizens are not Judges, untill they be called to ſit with him. 5. Reſolved, That as to the Return of the *Venire facias Coram me vel Deputatum meum*, unleſs it appear and be proved by ſpecial words in their Charter, that he may hold his Court by his Deputy. The parties in the principal Caſe, perceiving that the Opinion of the Court was, That the Judgment was Erroneous, agreed to go to a new Tryal. Hill. 9 Jac. in B.R. rott. 231. *Goodſon* and *Duffills* Caſe. *Bulſtr.* 2. Part, 21, 22, to 26.

21. Debt upon a Bond made at S; The Defendant pleaded, That the ſame was made at another place, upon a corrupt Contract, ſo to avoid the Bond upon the Statute of 13 Eliz. of Uſury. The Plaintiff Replyed, That it was made *bona fide*, and takes a Traverſe, That it was entred into upon any corrupt Contract: Hereupon Iſſue joyned; And the *Venire facias* awarded from the place where the corrupt Contract was layed to be: And the Jury found for the Plaintiff. It was moved, That the *Venire facias* was not well awarded, but it ought to have been from both places, viz. where the Bond was ſealed, and from the place where the corrupt Contract was laid to be. It was the Opinion of the whole Court, That the Tryall ought to be by a Jury from the place only where the corrupt Contract was layed to be; and therefore the Tryal was good, and the *Venire facias* well awarded, and Judgment was entred for the Plaintiff. Mich. 10 Jac. in B. R. *Stanton* and *Barions* Caſe. *Bulſtr.* 2. Part, 34, 35.

22. *Quare Impedit* by F. C. againſt S. T. Clerk, Sir *Philip T.* and *Rich.* Biſhop of *Lincoln*, *Quod permittat præſentare ad Eccleſiam de Ulceby*: He confeſſed, That A. was ſeiſed of the Advowſon in Fee, and that it was holden in Socage, and ſo ſeiſed, Deviſed it in tail, and entailed himſelf as heir in tail: S. T. the Incumbent pleaded, That there was no ſuch Biſhop of L. *in rerum Natura*, and delivered Judgment of the Writ: Sir *Ph. T.* pleaded, That there was no ſuch Church called *Ulceby*, in the County of L: The Plaintiff demurred upon the Incumbents Plea; and to the Plea of Sir *Ph. T.* replyed, That there was ſuch a Church in the County of L: This being tryed at *London*, It was found for the Defendant; for there was an union of the Church of F. to *Ulceby*: and it was called *Ulceby cum Fardington*. It was moved, That it being tryed by *Venire facias de vicinto de Ulceby*, it was a Miſ-Tryal; for when *Nul tiel Vill* is pleaded, it ſhall be tryed *per Corpus Comitatus*. It was the Opinion of the whole Court, That it was a good Tryal; and that it is admitted, That there is ſuch a Town, and that the Writ implyes it. Trin. 16 Jac. in C. B. *Capledick* and *Tauſey's* Caſe. *Hutton*, 31, 32.

23. In falſe Impriſonment, The Defendant juſtified, That *Briſtow* is an Ancient City, &c. and that there had been a Court holden there before the Sheriffs, &c. and juſtified, That there was a Plaint levied, and Judgment, and the now Plaintiff taken in Execution. The Plaintiff Replyed, *Quod non fuit aliqua querela levata*, according to the Cuſtome, and prayes, *Quod Inquiratur*, &c. It was found at *Briſtow* for the Plaintiff. It was moved, in ſtay of Judgment, That this being matter of Record, viz. the Entry of a Plaint in a Court of Record; It ſhould be tryed by the Record, and not by the Country. But it was adjudged, That the Tryal was good, becauſe it was not merely Record; but whether it was according to the Cuſtome. And it was ſaid, That *Non preſentis eſt ullum Brevet*, is tryable by the Country. Mich. 16 Jac. in C. B. *Stafford's* Caſe. *Hutton*, 20, 21.

24. Note: That in Parliament holden 1 Car. It was Reſolved by the Judges, upon Conference concerning the Lord *Digby*, That when any Peer ſhall be proceeded againſt for Treaſon; that ought to be by Indictment; and that being done, Then the King is to appoint a Peer to be Steward for the time, and then to proceed to Arraign him or elſe to tranſmit the Indictment by *Certiorari* the Parliament, and there to proceed: Or otherwiſe to prefer a Bill in Parliament, which ought to be paſſed by both Houſes, and then it is an Attainder by Parliament. But in this Caſe, being that part of the Treaſon Objected againſt him, was ſuppoſed to be done beyond Sea, and made Treaſon by the Act of 3 Jac. Cap. 4. That cannot be tryed but by Indictment to be taken before Juſtices of Aſſiſe and Gool-delivery, where the party was taken, or before Juſtices of the Kings-Bench; and ſo it cannot be tryed by the Statute of 35 H. 8. Cap. 2. Mich. 14 Car. The Lord Digbies Caſe. *Hutton*, 131.

25. The Caſe was; One *Everet* was arraigned for ſtealing of a horſe, and Reprieved after Judgment; and Indicted again for ſtealing of another Horſe before this Attainder. And the Vicar of P. in the County of S. was Indicted as Acceſſary, before this Felony, for the procurement of it; And *Everet* again being Indicted upon this laſt Indictment, did not plead, that he was formerly Indicted of another Felony, &c. but acknowledged the Indictment; whereby the Acceſſary was Arraigned, tryed, and found guilty, and had his Judgment alſo as the Principal: But the Execution of the Acceſſary was reſpited. It was moved to the Juſtices, Whether upon this matter, it ſhall be in

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cessary the Accessary, the Principal being executed. It seemed to all the Judges and Barons, That the matter was clear in this case, Because the Principal did not take advantage of his first Attainder by way of Plea; but acknowledged the Deed, in which Case the Accessary may be well arraigned. But if the Principal had pleaded his former Attainder, Now whether he shall be put to answer for the benefit of the Queen, having regard to his Accessary; or otherwise shall go quit, because there is not any Principal? It seemed to *Popham*, and some Justices, That it shall be in the same manner, as if the same person so formerly Attainted, should be tryed now for Treason made before his Attainder, because it is for the Advantage of the King in his Escheat of the Land: And there is a difference where the Treason was made before the Felony of which he is Attainted, and where after. But it was agreed, That the party Attaint shall not be again arraigned for any other Felony done before the Attainder in Case where no Accessary was touched. But upon the Statute of 1 El. cap. 4. he who shall have his Clergy in such manner, shall not be drawn in question for any other Felony done before his Attainder, for which he might have his Clergy. Mich. 38 & 39. Eliz. *Everetts* Case. *Popham*, 107.

26. In Debt upon the Statute of 2 E. 6. for not using such of Tythes. Upon *Nihil Debet* pleaded, it was found against the Defendant, and Judgment given. It was moved in stay of Judgment, That it was a Mis-Tryal; for the *Jurata* upon the *Nil Debet* is, That *Jurat. ponitur in respectum Inter Merchant* Plaintiff, *et Rawson* Defendant, *in Placito Transgressionis absque pace Oblat. Mich. 8 Pasc.* In by this *Jurata*, which is the Warrant of the Justices of *Nisi Prius*, there is not any Authority to try the Issue. It was holden to be plain Misprision. The Issue being *in Placito debiti*, and not in *Placito Transgress.* But it was, notwithstanding, holden by the Court, That it was but by default of the Clerk, and therefore that it was amendable by the Statute of 8 H. 6. cap. 12. But least it was the default of the Clerk of the Treasury to commit such a gross offence, he was fined 40*l*. Mich. 8 Car. in B. R. *le Merchant* and *Lawsons* Case. *Cro.* 1. Part, 200, 201.

27. Error of a Judgment in *Cornwall*, In debt upon an Obligation: the Error was, because the Tryal of the Issue was by six only. It was said to be no Error, because the Court was holden by Adjournment, and the Tryall there *secundum Consuetudinem, & tempore quo, &c.* before used. But it was holden by the Court, That such a Custome may by law, was a void Customs, and against the Common Law, and there cannot be an exemption of persons from being Jurours, unless there be sufficient Jurours besides the persons exempted to make Tryalls. Wherefore the Judgment was reversed. Mich. 7 Car. in B. R. *Tredimock* and *Perrymans* Case. *Cro.* 1. Part, 188, 189.

28. A. and B. Sheriffs of *London*, brought Debt upon an Obligation against G. upon Condition of appearance at a certain day in B. R. The Defendant pleaded, That he being Arrested by a Precept out of B. R. appeared at the day, upon which they were at Issue to be tryed by the Countrey. In this Case, a Repleader was Awarded by the Court, because it was tryable by the Record; for although the Sheriff doth not Return the Process; yet the Defendant ought to come into the Court at the day, and there a special entry shall be made of his appearance; and so it was said it was adjudged in *Brett* and *Shepheards* Case. Mich. 30 Eliz. in B. R. *Howse* and *Gibbons* Case. *Owen* 53.

29. It was moved for a Prohibition to the Prerogative Court upon a surmise, that the party did endeavour to Bastardize one there who was legitimate. It was answered, That the surmise was not true, and that the Suit there only was, Whether Letters of Administration were by them well granted; and the Case there was, A. had a Wife called *Bridget*, who dyed, he took another Wife called also *Bridget*, and dyed Intestate. The second Wife took Letters of Administration of the goods of her Husband; the son of A. sued in the Prerogative Court to repeal those Letters of Administration, upon pretence, That *Bridget* the first Wife was living. In this Case, these ensuing positions were delivered by the Court. 1. That one ought not to sue in the Ecclesiastical Court to Bastardize an Issue, but at the Common Law. 2. Where the Ordinary hath Granted Letters of Administration to one who ought to have them, they ought not to repeal them. 3. Where a Suit is in the Ecclesiastical Court for Lands and goods, a Prohibition may be granted as to the Lands. 4. That in the Principal Case, neither Bastardy of the Issue nor Marriage is in question as is surmised, but the validity of the Administration, and the other things are but as incidents to the matter in question. 5. That Wife, or no Wife, is tryable at the Common Law, but whether lawfully married, is tryable by the Ecclesiastical Court. 6. Where a thing is tryable in the Spiritual Court, and there is a matter incident to it which is tryable at the Common Law, there a Prohibition is Grantable. The Rule of the Court was, That a Prohibition should be Granted, and that the other should demur upon it, and so being the matter in Question to be debated, Whether it would lye or not. Pasc. 13 Eliz. in B. R. *Bisworth* and *Bisworths* Case.

30. In an Action upon the Case upon *Assumpsit*,

ſit, after a Verdict and Judgment, Error was brought and aſſigned for Error. 1. That there was 18 returned upon the Jury, and but two of them tryed the Iſſue. 2. Part of the Declaration to ground the *Aſſumpſit* upon, was in another County, and not within the Juriſdiction of the Court where the Iſſue was tryed. And for theſe Errors, the Judgment was reverſed. Trin. 23 Car. in B.R. *Chudley* and *Stiuches* Caſe. *Styles* 33.

31. In Treſpaſs againſt the Defendant and others for taking away divers parcells of Ribbon from him. The Defendant pleaded by way of Juſtification the Cuſtome of *London* againſt Hawkers, *viz.* to take away Wares from any that ſold them up and down the Streets. The Plaintiff replyed, there was no ſuch Cuſtome, and Iſſue was taken upon it, and thereupon the Cuſtome was Certified by the mouth of the Recorder, and a Tryal upon it in *London*, and a Verdict for the Defendant; the Plaintiff moved, That it was a Miſ-Tryall, becauſe it was before them which were intereſſed in the Cauſe, and prayed another Tryal. It was the Opinion of the Court in this Caſe, That here is a point of Intereſt, as well as a part of Priviledg; for part of the goods taken come to the benefit of the City, and therefore they ought not to be their own Judges, for this is againſt natural reaſon, and ſo it is a Miſ-Tryal. A new Tryal was Awarded. But Quære if there ſhall be a Repleader, or a new *Venire*. Mich. 24 Car. in B. R. *Smith* and *Hancocks* Caſe. *Styles* 137.

32. Treſpaſs againſt a Parſon for not carrying away his Tythes in due time. The Defendant pleaded, That the Plaintiff gave him no notice to fetch them away. The Plaintiff replyed, That he did give him notice, but doth not ſhew where he gave him notice. It was ſaid by the Court, That there are many Caſes where the place is not material; yet it muſt be alledged for the Venue. If Debt be brought againſt an Executor, and he plead fully Adminiſtred. If the Plaintiff reply, he hath Aſſets, he ought to alledg the place where he hath aſſets: And ſo in this Caſe, the place ought to be alledged, That a Jury who are neareſt the place, and who have beſt knowledg of the matter may try it, although it may be tryed in another place; but if the Tryal be ill, the Verdict will not help it, but there muſt be a new Tryal. Mich. 1652. *Liniſton* and *Mawicers* Caſe. *Styles* 342.

33. The Caſe was this, One of the Juſtices of Aſſiſe falling ſick, and dying at *Chelmsford* in *Eſſex*, the Aſſiſes were adjourned to *Brentwood*; the other Judg fell ſick and dyed at *London*, and a new Commiſſion iſſued to another Judg to ſit at *Brentwood*; and there a Tryal was had upon the old *Jurata* returned before the other Judges. The Queſtion was, If this was not a Miſ-Tryall in regard there was not a new Jury returned. The Opinion of the Court was, That it was not a Miſ-Tryall, becauſe the death of the Juſtices was not material to make it void, for the Juſtices are not named in the *Jurata*, but the cauſe is expreſſed generally to be tryed by the Juſtices. And in this Caſe, it was ſaid for a Rule, That if a Clerk miſ-enter a thing uſual in matter and form, it is to be amended, but the Error of the Judg may not be amended as it was holden in this Court, in *Sawyer* and *Hortons* Caſe. Mich. 13 Car. and Hill. 15 Car. in B. R. in *Relch* and *Fates* Caſe. Hill. 1654. *Barker* and *Elmers* Caſe. *Styles* 412.

34. Error brought to reverſe a Judgment againſt a Taylor, upon an Information exhibited againſt him at the Aſſiſes at *Oxford*, for taking more money of one who was bound Appentice to him, then he might by the Law. The Error Aſſigned was, That the Juſtices of Aſſiſe had no power to determine of Offences of this nature. It was ſaid, That as they are Juſtices of *Oyer* and *Terminer*, they have power by their Commiſſion to determine Offences of this nature; and it ſhall be intended here that they proceeded by vertue of that Commiſſion. It was ſaid by the Court, That it appears not here by vertue of which of their Commiſſions they have tryed the Offence, but both the Commiſſions are jumbled together in the Record, and they have not Authority by all their Commiſſions: and beſides in this Caſe, there is another fault in the Judgment; for it is not ſaid, It is conſidered by the Court, but only it is conſidered. The Rule of the Court was, That cauſe be ſhewed, why the Judgment ſhould not be reverſed. Hill. 1654. in B.R. *Richardſons* Caſe. *Styles* 430.

35. Debt upon an Obligation, the Condition was, That the Defendant ſhould pay ſo much in the houſe of the Plaintiff at *Lincoln*. The Defendant pleaded payment at *Lincoln* aforeſaid: Upon which they were at Iſſue, and the *Venire facias* was *De Vicineto Civitatis Lincolne*, and found for the Plaintiff. It was moved in Arreſt of Judgment, That it was a Miſ-Tryall, becauſe the *Venire facias* ought to have bin of the body of the County, and not of the City, which was alſo a County of it ſelf. It was Reſolved by the Juſtices, That the Tryal was good, and their Reſolution was grounded upon the Book, 34 H. 6. 49. 50 there being no other Authority in the Law in that point, but that Caſe. And this was taken for a Rule by them, That where it doth appear upon the Record, that there is a more proper place for Tryall, then where the Tryal was, that there the Tryal is good, but here is not a more proper place: And it was ſaid, It was impoſſible to be tryed in the body of the County, becauſe the payment was to be in the City; but yet if a man ſpeak generally of the County of *Lincoln*, it ſhall be intended

extended of the body of the County, and not the City, becauſe the City is but a Corporation out of the County. But it was Reſolved, That the Tryal was in the moſt proper place, and therefore good. Mich. 17 Car. in C. B. *Thorndike* and *Thrapſton's* Caſe.

36. In a Prohibition, the Caſe was, Queen *Eliz.* was ſeiſed of the Manour of *Nanington*, which did extend into four Pariſhes, viz. *Stangrave*, and three others: and the Plaintiff ſhewed, That he was ſeiſed of three Cloſes in *Stangrave*; and preſcribed, That the Queen, and all whoſe Eſtate, &c. had a *Modus Decimandi* for all thoſe Cloſes; and for all other the Demeſnes in the ſaid Pariſh of *Stangrave*; And if the *Venire facias* ſhould be *de Parochia de Stangrave*; or of the Manour, was the Queſtion: And it was Reſolved by the whole Court, That the *Venire facias* ſhould be, and the Viſne be of the Pariſh, and not of the Manour, and a difference was taken, when a man claims any thing which goes to the whole manner, and when only in parcels; for then in the one Caſe, the Viſne ſhall be of the Manour, and in the other Caſe not. See 9 Eliz. *Dyer*, 262. But it was ſaid, That in the Caſe at bar, the *Modus* did ſtretch only to things in *Stangrave*, and therefore the *Venire facias* ſhould be only the *Parochia de Stangrave*. Mich. 11 Jac. in C. B. *Norton* and *Iſſlers* Caſe.

37. Quad had Judgment in an Action upon the Caſe at the Aſſizes, and damages given to him 30 l. It was moved in Arreſt of Judgment, That the *Venire facias* was, *de Duodecim*, and that one of them did not appear; and ſo there was one *de Circumſtantibus*; and the Entry in the Roll was, That the ſaid Juror *exaffat. venit*, but the word *Juratus* was omitted; and for this cauſe the Judgment was ſtayed. Paſc. 8 Jac. in C.B. *Quads* Caſe. *Godbolt*, 177.

38. Adherence to the Kings Enemies out of the Realm, is Treaſon; And by the Statute of 33 H. 8. cap. 2. ſhall be tryed by a Jury of 12 men in the Kings Bench in *England*, or by Commiſſion Aſſigned for that purpoſe. Mich. 34 Eliz. Sir *John Perots* Caſe. *Cook* 3. Part, *Inſtitutes* 261. And ſo there, when part of an Act. *ſcil.* the Original Act is done in *England*, and another part is done beyond the Sea, there the Tryall ſhall be by a Jury in *England*, and the *Venire* ſhall be from the place where the Writ bears date. A man by Indenture Covenants by Charter party, That a Ship ſhall Sail from *Mackary* Haven in *Norfolk*, to *Matterell* in *Spain*: In an Action of Covenant brought upon this Charter party, being made at *Thetford* in *Norfolk*, was tryed by a Jury of 12 men in the County of *Norfolk*, where the Contract began. Paſc 28 Eliz. in B. R. *Conſtantines* Caſe vouch. in *Cook* 6. Part, 47. in *Dendales* Caſe.

39. In an Action perſonal againſt two; If one pleads in bar unto parcel, which extends only to himſelf, and the other pleads a plea which goeth to the whole, and to both. The latter Plea ſhall be firſt tryed, and both of them ſhall have advantage of it, becauſe in a perſonal Action, the diſcharge of the one is the diſcharge of the other; but it is otherwiſe in a Plea real, becauſe every Tenant may loſe his part of the Land by his Miſ-pleading. But in Caſe where an Iſſue is joyned for part, and a Demurrer of the reſidue, there the Court may direct the Tryall of the Iſſue, or Judg the Demurrer firſt at their pleaſure. 15 E. 4. 25. *Cook* 1. Part, *Inſtitutes* 125.

40. See before, That there are ſix Certificates allowed for Tryal at the Common Law. 1. In time of War, the Certificate of the Marſhall of the Kings Hoſt out of the Realm. 2. In time of Peace out of the Realm, as an Outlawry, If it be alledged by the Defendant, that he was Impriſoned at *Bordeaux* in *France*, it ſhall be tryed by the Certificate of the Mayor of *Bordeaux* there. 3. Cuſtome of *London* ſhall be tryed by Certificate of the Recorder *Ore tenus*. 4. By Certificate of the Sheriff upon a Writ to him directed in Caſe of Priviledg. 5. Tryal of Records ſhall be by the Certificate of the Judges in whoſe Cuſtody they are by the Law. 6. Loyalty of Matrimony, Baſtardy, &c. ſhall be tryed by the Certificate of the Ordinary. See *Cook* 9. Part, 30, 31. in the Caſe of the Abbot of *Strata Marcella*. See before.

41. Note, Concerning the courſe of Tryal of Legitimation and Baſtardy, theſe Reſolutions following, viz. 1. It was Reſolved, That Cauſes Matrimonial and Teſtamentary, were Civil Cauſes, and did appertain to the Juriſdiction of the Civil Magiſtrate, untill they were granted to the Clergy by Kings and Emperours; and the King by the Common Law of *England* had ſuperintendency upon all the proceedings of Prelates, with power of reſtraint and correction if they did not duly proceed in them. 2. Reſolved, That the Queſtion of Baſtardy or Legitimation ought firſt to be moved in the Kings Temporal Court, and Iſſue ought to be joyned upon it there; and then it ought to be tranſmitted to the Eccleſiaſtical Court to be tryed and examined there: and of that the Biſhop ſhall make a Certificate to the King. But if a Suit to prove Baſtardy or Legitimation be commenced in the Spiritual Court before the matter is begun in the Kings Court, in ſuch Caſe a Prohibition lyeth. 3. Reſolved, That the Eccleſiaſtical Judg cannot enquire of Baſtardy or Legitimation without ſpecial direction or commandment from the King: ſo when he hath received the Kings Writ to make the Inquiſition, two cannot ſuccede for any Appeal or Inhibition,

hibition, but ought alwayes to proceed untill he hath certified the King thereof. 4. Resolved, That the very cause and reason wherefore the Ecclesiastical Judg cannot enquire of Bastardy or Legitimation before he hath received the Kings Writ, is, because the Spiritual Court never had jurisdiction or power to meddle with Temporal Inheritances, either directly, or indirectly. See Sir *John Davyes* Reports. The Case of Tryall of Legitimation and Bastardy.

42. Goods were devised to W. Son and Heir of J. S. who sued for them in the Spiritual Court. The Executors said, That W. was not Son and Heir of J. S. and Issue was joyned upon that. It was the Opinion of the Justices, That the same should be tryed in the Spiritual Court, because that the matter did depend upon another matter, of which that Court had Jurisdiction. See *Kellowey* 110. p. 33. But if the Issue be upon a thing which is meerly Temporal, and is not pursuant upon the principal matter, there the Tryal shall be at the Common Law. *Cook* 9. Part, in *Henslows* Case, acc.

43. In an Indictment of Murder, The Murder was alledged to be *apud Civitatem Westm. in Com. Middlesex in Parochia Sanctæ Margaretæ*. The Jury was returned for the Tryal *De Vicineto Civitatis Westm.* which found the Defendant guilty. It was moved in Arrest of Judgment, That the Tryall ought to be by men of the Parish, and not of the City; and it was Resolved accordingly, because the Tryall was insufficient, and a new *Venire facias* was awarded to try the Issue again, because the life of the party was never in jeopardy. *Cook* 6. Part, 24. *Arundells* Case.

44. In Trespass, the Defendant pleaded a grant of the Queen by her Letters Patents under the Great Seal. The Plaintiff took Issue *Non concessit Tenementa predicta per predict. Litteras Patentes.* It was adjudged in this Case, That the Issue should be tryed where the Land lay, and not where the Letters Pattents bore date. For the Letters Pattents being matter of Record, cannot be denyed. And therfore the effect of the Issue of *Non concessit* was, That the Queen had not any thing in the Land, or that the Tenements did not pass by the Letters Pattents, which shall be tryed where the Land lyeth. *Cook* 6. Part, 15. *Edens* Case. See 8 Eliz. *Dyer*, 253. 37 Eliz. *Dyer*, 342. acc.

45. Note, It was Resolved by the Court, That when a Jury, returned by force of a *Venire facias* to try an Issue, hath given a Verdict which is accepted and recorded by the Court, be the same perfect, or imperfect, the Jurours are discharged thereof for ever, and shall never in the same cause be recalled to try the same Issue. But if the Verdict be so imperfect, That Judgment cannot be given upon it, Then the Court shall award a *Venire facias de novo* to try the said Issue by others, 38 E. 3. 48. in a *Cessavit*, 27 H. 6. 4. in *Conspiracy*. But where the Recognitors of an Assise give a Verdict, which is not well examined by the Justices, who take the Assise, There the first imperfection shall be enquired of by the first Jurors, for there no new process can be made; but the Recognitors which are Returned, shall alwayes stand, because they are returned upon the Original. *Cook* 8. Part, 65. in *Loudays* Case.

46. In a *Mesne traverunt*, the Lord prayed, That the Tenant might ascertain the Court, That the Manner is Auncient Demesne; and thereupon the Tenant shewed a Charter of King E. 3. which recites of *Inspeximus* the Charter of *Hen.* 1. which Charter rehearsed *Inspeximus* the Charter of *William* the Conquerror, who had Granted and confirmed the Manner to one H. B. which Charter of *William* the Conqueror had *Inspeximus, Chartam Ed. Regis Anglia*; so as it appeared by the Charters, That *William* the Conqueror was possessed, and St. *Edward* also, as the Plaintiff said. In that Case it was said by the Court, That the Charters are not material, for the words therein are but form, although the King never had possession, and might ensure as a Confirmation; and it is but *Inspeximus*. And if the Charters themselves were shewed, they would not prove that the Land was in the possession of St. *Edward*, or *William* the Conquerror; and they are not Records now, and therefore they cannot adjudg what is Auncient Demesne. But the Court said and agreed, That Auncient Demesne shall be only tryed and adjudged by the Book of Doomsday which is in the Exchequer. See 43 E. 3. 23. acc.

See more of Tryall, in *Lib.* 1. Title *Amendments*. And in the Title of *Issues joyned*, and *Venire facias*.

Trover

Trover *and* Converſion.

SEE for Trover and Converſion, *Lib.* 1. Title *Actions upon the Caſe*, of Trover and Converſion.

More Trover *and* Converſion.

1. ACtion upon the Caſe of Trover of his Beaſts. The Defendant juſtified by reaſon of a Rent Granted to A. his Executors and Aſſigns for the life of B. out of Bl. Acre, and ſhewed how that A. is dead, and he as Adminiſtrator Diſtreyned for the Rent in Black Acre after the death of A. and averred the life of B. It was adjudged, That the Juſtification was not good, both for the manner and manner of it; for by the death of A. the Rent was determined, and could never come to the Executors or Adminiſtrators; for it was not a thing Teſtamentary, but a Freehold, and ſo not like where a Grant is to A. and his Heirs for the life of another. Yet *Popham* Juſtice agreed, That if a Rent be Granted to A. for the life of another, the Remainder to B. although that A. dyeth, by which the Rent is determined an Intereſt as to the perception of it; Yet becauſe the Terr-Tenant during that time holds the Land diſcharged of it, it is ſufficient to ſupport the Remainder: Alſo the Court was of Opinion, That if the Rent had continued, then the taking of the Cattel by a lawfull Diſtreſs for the Rent, had not bin any Converſion at all; but otherwiſe if the Diſtreſs was not lawfully taken. Mich. 45 Eliz. in B. R. *Salters* Caſe. Tilverton 19.

2. The Plaintiff declared, That 8 *Maii*. 4 Jac. he was poſſeſſed of ſuch goods at *London*, in ſuch a Ward, and named them, and that he caſually loſt them, and that they came to the Defendants hands, 1. *Oct.* *Anno* 5. who knew them to be the Plaintiffs goods, converted them to his own uſe. The Defendant pleaded, That before the Plaintiff had any thing, W. D. was poſſeſſed of the ſaid goods, as of his proper goods, and ſuch a day, *Anno* 4 Jac. for good conſideration, gave them to the Defendant, by force whereof he was poſſeſſed of them. And the Defendant, 1. *Maii*, *Anno* 5. loſt them; and 2. *Maii*, *Anno* 5. they came to the hands of W. D. at *London*, who the ſame day, gave them to the Plaintiff, by which he was poſſeſſed, and loſt them, 1. *Octobr*, *Anno* 6. and they came to the Defendants hands, and he converted them to his own uſe, upon which the Plaintiff demurred; and it was adjudged for the Plaintiff, becauſe the bar is not good, becauſe it doth not confeſs nor avoid, nor Traverſe the Title of the Plaintiff to the goods alledged in the Declaration, but gives to the Plaintiff only a colour to the poſſeſſion without any right or property; and that upon the ill and defeaſible gift made to him by W. D. and in an Action of Trover, and all other Actions where the Plaintiff makes a Title to the thing demanded, or to a thing for which he demands damages, there the Defendant ought to make a better Title to himſelf, and to traverſe the Plaintiffs Title, or otherwiſe confeſs and avoid it. Hill. 7 Jac. in B. R. *Priſley* and *Whites* Caſe. *Tilverton*, 173, 174.

3. In Trover and Converſion, the Caſe was: Tenant for Life, without Impeachment of Waſte, excepting voluntary Waſte; He, in the Reverſion, Bargained, and ſold the Timber-trees, and ſells them to the Plaintiff; Tenant for life cuts them down, and ſells them to I. S. and Whether the Bargainee ſhall have Trover againſt the Vendee of Tenant for life, the Tenant for life being alive, was the Queſtion. It was argued, he ſhould not; for during the life of Tenant for life, although he in the Reverſion hath the general property, yet he hath no authority to ſell them, and his ſale being void, his Bargainee hath no Intereſt to maintain the Action. See *Cook. Lyford's* Caſe. *Cook.* 8. part. *Bowlers* Caſe. *Tr.* 7. *Jac.* in *B. R. Waller* and *Sand's* Caſe. *Cro.* 1. part 199.

4. In an Action of Trover of Goods, and converting them, the Defendant pleaded a Sale in Market overt, whereby he juſtified the Converſion: It was holden in that Caſe to be no Plea, becauſe it anſwers but to the general iſſue; wherefore adjudged, That if he did not plead, *Nihil dicit* ſhould be entered. Trin. 5. *Jac.* in *B. R. Johns* and *Witham's* Caſe, *Cro.* 2 Part. 165.

5. In Trover and Converſion, the Caſe was:

A. B. and C: A. was indebted unto C. in ſuch a ſumm of money; and B. in ſuch a ſumm was indebted to A. It was agreed between A, B. & C, that B, in diſcharge of his debt unto A, ſhould diſcharge the debt of A. unto C, in paying, and delivvring unto him certain Commodities, which he then had in his hands, being properly the Goods and Commodities of A; and which B, by, and with the conſent of A, did promiſe and undertake to deliver them to C. in diſcharge of the debt of A. to him, and C. was content to accept thereof: B. did not according to his promiſe diſcharge the debt of A. to C, but converted the goods to his own uſe. It was agreed by the whole Court in that Caſe, That the Action was maintainable: For, if a man bail goods to one, to bail them over to another; if he to whom the bailment was thus made, contrary to the truſt in him repoſed, do not deliver them over, as he was to have done, but convert them to his own uſe, ; by this deceit, he hath made himſelf lyable to an Action, both of the firſt bailor, and alſo of the party to whom they were to be bailed over. And in this Caſe here, although the Third Perſon to whom the goods ought to have been bailed, had never the poſſeſſion of them, yet the Converſion, and non-ſeiſure, is a wrong to C. the Third Perſon; for which he may have his Action. It was adjudged for C. the Third Perſon, who brought the Action. See 28 H. 8. *Dyer.* 20, 21. M. 8 *Jac.* in B. A. *Flewellin* and *Reves* Caſe. *Bolſtr.* 1. Part. 68.

6. Error brought to reverſe a Judgment in C. B, in an Action upon the Caſe, upon Trover and Converſion of 300 *Toddas Lane* at C: the Error aſſigned was; That the Declaration was not good, being *Toddas Lane*; but the Opinion of the whole Court was, That it was no Error, for *Toddas Lane* is good enough, and very ſignificant; and this is as well known, as *Barellas Cerviſiæ*, & *Pipas Vini*, for theſe are *Vocabula artis* only, to certifie the Court of this, and ſo it was agreed clearly, that *Toddas Lane* was no Error. *Paſc.* 8 *Jac.* on B. R. *Proctor* and *Cliſtor's* Caſe. *Bolſt.* 1. Part 127.

7. Trover againſt Husband and Wife: The Plaintiff declared of a Trover of the goods of the Plaintiff by the Wife, which ſhe Converted to her own uſe. It was moved, That the Action ought to be brought againſt the Husband onely, becauſe that a woman could not Convert them to her own uſe during the vCoverture, but onely to the Husbands uſe. But the Opinion of the Court was, That the Writ was good againſt them both, and that the Converſion was in nature of a Treſpaſs, and ſo the Action would lye M. 31. *Eliz.* in B. R. *Owen.* 48.

8. In Trover and Converſion againſt Husband and Wife, the Plaintiff declared, That he was poſſeſſed of diverſe goods in *Specie*, until ſuch a day, and then loſt them; and that they came to the poſſeſſion of both the Defendants, and that they Converted them to his damage. It was found for the Plaintiff in C. B. and upon a Writ of Error, brought in B. R; the Judgment was affirmed, and yet exception was taken to the Declaration, becauſe the Converſion was laid to the charge of the Wife, and a Feme-Covert could not Convert goods, but it ſhall be ſaid the Converſion of the Husband onely. But the Reaſon of the Judgment was, becauſe the Action was not grounded upon any Property ſuppoſed to be in the Defendants, but upon the Poſſeſſion onely; and the point of the Action, is the Converſion; which is a wrong, with which the Wife may be charged. But in this Caſe, it was holden, That Husband and Wife cannot have an Action of Trover, and ſuppoſe a poſſeſſion in them both, becauſe the Law in point of Owner-ſhip doth transfer all the Intereſt to the Husband. M. 7 *Jac.* in B. R. *Draper* and *Fulkes* Caſe. *Yelverton.* 165. 166.

9. In Trover and Converſion of two Tunn of Wine. That the King was ſeized in the Right of his Crown, of the Prizage of all Wines imported by any Subject, or Alien from the parts beyond Sea: And that, for the ſaid Prizage, was confirmed to the King and his Farmers, out of every Veſſel bringing in 20 Tunn, two Tunn of Wine; one before the Maſt, and the other behinde; and that the King ſo ſeized before the coming of the two Tunns to the Defendants hands, The King granted to Sir *Tho. Walter* the Office of chief Butlerage, with all Fees, and made him chief Butler for life, to be exerciſed by him and his Deputy; and that the chief Butler for the time being, had uſed, by himſelf, or his Deputy, to take for the uſe of the King, the ſaid Prizage; and ſhewed, that a Ship laden with 20 Tunn of Wine, arrived from beyond the Sea, at the City of *Exeter*, and that at the ſaid City, nine Tunns and an half of the ſaid 20 Tunns being the Plaintiffs Wines, were unladen there; whereof two Tunns were due to the King for Prizage: And that being Deputy of Sir *Tho. Walter*, and by his Command, he took the ſaid two Tunns of Wine, for the uſe of the King, and carryed them away. Upon which Plea, the Plaintiff did demur. Divers exceptions were taken to the Plea, amongſt which, one was, Becauſe the Defendant doth not traverſe the Converſion ſuppoſed by the Plaintiff, for that is a Converſion in the Defendant himſelf, and he juſtifies a Converſion to the uſe of the King, which is another Converſion, than that with which the Defendant is charged. But the Opinion of the whole Court was, That he needed not to traverſe the

the Converſion, nor Plead in other manner than he hath done: 1. Becauſe the coming to the hands, and the inter-medling with the two Tunns ſuppoſed by the Plaintiff, is confeſſed by the Defendant to be to the uſe of the King; and that is the matter in Law upon the Plea in Barr, and matter in Law, ſhall not be traverſed. 2. If the ſeizure to the uſe of the King ſhall not be adjudged Lawful, then he himſelf ſhall be adjudged guilty of the Converſion; becauſe he hath confeſſed in point of Judgment poſſeſſion of the goods, and a medling with them: It was adjudged for the Defendant. Hill. 1 *Jac.* in B. A. *Kenicot* and *Bogans* Caſe. Therein 198. 199. 200. 201.

10. Note: It was ſaid, Mich. 3 *Jac.* in B. R. That Trover and Converſion lyeth for Money, although it be not in a Bagg: But not Detinue, and ſo it was ſaid it was Reſolved, 40 *Eliz.* in *Holyday* and *Hicks* Caſe. And it was ſaid, That if the Maſter delivers Corn to his Servant to ſell, who doth accordingly, and converts the Money; the Maſter may bring an Action of Trover and Converſion for the Money, againſt his Servant, and that ſo it had been adjudged. Mich. 3 *Jac.* in B. R. *Noy* 32.

11. Trover and Converſion of a Bagg of Money. The Caſe was: A. received againſt B. Forty pounds, in the County Court; a *Capias* iſſued againſt B, and *Non eſt inventus* returned by the Defendant, Serjant at Mace; a *Scire facias* iſſued againſt W. one of the Pledges of B: And upon this there Goods of W. his goods, were taken in Execution; the Plaintiff being preſent to ſtay the Sale of the goods, pawned the ſaid Bagg of Money, and left it in the hands of the Defendant; to the end, that he ſhould keep the ſame till the next Court-day; and this only is a Pledge for the Re-delivery of the goods to the Defendant, upon his requeſt; if W. in the interim did not obtain from A. the ſuing of the Execution, and the Jury found no Requeſt made, nor W. had procured the ſtay of the Execution, but found the Requeſt of the Plaintiff to the Defendant, to deliver the Bagg of Money, and his refuſal; the Opinion of the Court in this Caſe was, That this being a Bailment, and the Writ of Execution being expired, and the time limited to the Defendant by the Writ to ſell the goods, it was impoſſible for the Defendant to have the goods again; but he was to have the Bagg of Money, which was adjudged for them, and therefore he was to keep the ſame for his ſatisfaction; and this Retainer of the Bagg of Money, though upon requeſt, in this Caſe, was no Converſion; and ſo the Principal, Judgment was given for the Defendant againſt the Plaintiff. Trin. 11 *Jac.* in B. R. *Hawk* and *Clerks* Caſe, *Rolls.* 2. Part 307. 308.

12. In an Action of Trover and Converſion to his own uſe, *per venditionem quibuſdam hominibus ignotis*: The Defendant pleaded, That the goods were bailed to him, to deliver over to I. S, to whom he had delivered them; *abſque hoc*, that he did convert them to his own uſe; *per venditionem hominibus ignotis*. It was moved, That the matter was not traverſable: And ſuch was the Opinion of *Wray*, Chief Juſtice; for the Converſion to his own uſe, is the cauſe and ground of the Action, and not the ſelling of the goods. Mich. 19 *Eliz.* in B. R. *Leon.* 2. Part 14.

13. In Action of Trover, the Plaintiff declared, That the Dean and Chapter of *Weſt.* did Leaſe to him an Houſe, by deed indented; of which Indenture he was poſſeſſed, and afterwards loſt it, and by Trover it came to the Defendants hands, who ſold it, and Converted the Money thereof coming, to his own uſe. The Defendant pleaded *Not guilty*; The Plaintiff gave in Evidence, That the Leaſe was made to him, and to one B. and that the ſaid Indenture was delivered to the ſaid B. (and that was agreed to be the Poſſeſſion of them both) and B. dyed, and afterwards A the Plaintiff was the ſole Owner of it. It was holden by the Court, That that was good Evidence in the part of the Plaintiff, and if the Plaintiff can prove the other part of the Declaration, *ſcil.* That the Indenture came to the hands of the Defendant, and that he ſold it, that then he ſhould recover; But on the Defendants part, it was given in Evidence, That the ſaid B. ſold to the Defendant his part and Intereſt in the ſaid Leaſe, and alſo in the Indenture, ſo as now he is become Tenant in common with the Plaintiff, and then his ſale doth not give any cauſe of Action to the Plaintiff; and that alſo was holden by the Court to be good Evidence, without pleading of it. Afterwards in the Caſe, the Plaintiff was Non-ſuit. Paſc. 16 *Eliz.* in B. R. *Leon.* 2. Part 210.

See before for Trover and Converſion. *Lib.* 1. Title, Action upon the Caſe of Trover and Converſion.

Trusts *and* Confidence.

1. IN the Chauncery, this Question arose: If A be seized upon Trust and Confidence to the use of B. and his Heirs, and A. selleth the Land to one, who hath notice of the Trust, to whose use shall the Vendee be seized? And if before the sale, one cometh to the Vendee, and saith to him, Take heed how you buy such Land, for A. hath nothing in that, but onely in Trust, to the use of B: And another comes to the Vendee, and saith to him, It is not so as he is informed, for A. is seized of this Land absolutely, by which the Vendee buyeth the Land, If this first *Caveat* given to him, *ut supra*, be a sufficient notice of the Trust, or not? In this Case it was said, by the Lord Keeper of the great Seal, that it is not, for flying Reports, are many times Fables, and not Truths; and if it should be admitted for a sufficient notice, then the Inheritance of every man might easily be slandered. Note, It was said, That it had been adjudged in the Star-Chamber, in one *Booth*'s Case; where a man said to another, Take heed how you publish such a Writing, for it was forged; and notwithstanding the Party doth publish it, that this is a sufficient notice to the Publisher, that the Deed was forged. And the Lord *Popham* put this Case: Take heed how you receive or entertain A. B, for he hath committed such a Felony; and I giving no credit to it, receive the Party, whereas in truth he had committed the Felony, that now I am accessary to that Felony: But the Lord Keeper said, That he would not draw blood upon such an opinion. Hill. 43 *Eliz.* in *Cancel. Wildegoose* and *Wayland*'s Case. *Goldsbr.* 147.

2. This Case was referred, by special Command of the King to the Judges, *scil.* King *James* made a Lease to I. D. and others, of the provision of Wines for His Majesties House, for Ten years, in Trust for the Earl of S. They made a Lease of all the Tearm besides one Month, rendring 9 l. *per Annum*. The Earl of S. was after attainted of Felony. If this Trust which was for the Earl, was forfeited to the King, by that Attainder; It was the Opinion of all the Judges, that this Trust was forfeited to the King, and that the Executors shall be compelled to assign the rest of the Tearm, and the Rent to the King: And *Burket*'s Case was cited, 24 *Eliz.* where one took a Bond in another's name, and afterwards was Out-Lawed, that the King should have the Bond. And also 24 *Eliz.* *Armstrong*'s Case, Lessee for years assigned over in Trust to another for himself, and afterwards was attainted of Felony, and adjudged that this Trust was forfeited to the King: But all the Judges held, That a Trust in a Free-hold, was not forfeited upon an Attainder of Treason. M. 13 *Jac.* in B. R. The King, and the Executors of Sir *John Daccomb*'s Case, *Cro.* 2. Part. 512, 513.

3. The Case was, A Feoffment was made unto another man, *ad eam intentionem*, that he should convey the same to such a one, to whom he sold it, and he sold the Land to another, and did refuse to convey it; whereupon an Action upon the Case was brought. It was agreed by the Court in this Case, That the Action would lye, for it was said, that it was a Trust, that he should assure it to another; and it is a good consideration in Equity in the Chauncery, The Conveyance in Trust; and thereupon an Action upon the Case will lye. M. 29 *Eliz.* in B. R. *Megods* Case. *Godbolt*, 64.

4. In Trespass, the Case was: A man made his Will, and made A. E. I. O. his Executors; and deviled his Lands to A. E. I. and O. by special names, and to their Heirs; and further deviled, That the said Devisees should sell the Lands to A. D. if before such a day he would give for the same 100 l. and if not, then they should sell them to any other, to perform his Will; *viz.*: for the payment of his Debts: I. D. would not give the 100 l. one of the Executors refused to inter-meddle, and the other three sold the Lands: The Question was, If the sale was good or no: It was said, That the sale was not good, because it is a special, and a joynt Trust, and a joynt Trust shall never survive; and perhaps the Devisee reposed more Trust in him who refused, than in the other: Also the Devisees have an Interest in the Land, and each of them hath a part, and therefore one cannot sell without the other. But if the Devise was, that Four should sell, they have not an Interest, but an Authority: It was said on the other side, That although the Devise was to them by their proper names, and not by the names of Executors, yet the intent appeareth, that they were to sell as Executors; because it was to the performance of his Will, and that might be by Three, and the sale of the Lands doth refer to the performance of his Will, in which Debts and Legacies are to be paid; and al-

although there are diverſe Authorities to be executed, yet it is but one Truſt. The Court enclined, That the Sale was not good, but the Caſe was not reſolved. M. 39 *Eliz.* in B. R. *Bonifant*, and Sir *Rich. Grimſtolds* Caſe. *Godbolt.* 77, 78.

5. In a Prohibition prayed to the Court of Requeſt, the Caſe was: A. Feme ſole, poſſeſſed of a Terme, conveyed the ſame over in Truſt for her, and Covenanted with I. S. whom ſhe did intend to marry, that he ſhould not meddle with it; and for that purpoſe, took a Bond of him, they entermarried: It was the Opinion of the Court, That he may inter-meddle with it, but he ſhall not have it, and by equity he cannot aſſign it, by reaſon of the Covenant before Marriage; and therefore the Opinion of the Court was, That a Prohibition ſhould not be, but that it is matter onely for Equity: But the Opinion of the Juſtices was, That if that Court direct *Diviſit*, or *non Diviſit*; *Aſſignavit*, or *non Aſſignavit*; then they do exceed their Juriſdiction, and then in ſuch Caſe a Prohibition will lye. *Paſc.* 17. Car. in B. R. *Marſh.* 88. *Paſc.* 32 *Eliz.* in Counſellor *Wisbam's* Caſe adjudg. *Cook* 1 Part. Inſtitutes 351.

6. M. exhibited a Bill in the Court of Requeſts againſt B, and ſet forth That the Defendant was indebted to him in 400l. for Wares delivered; and further, That the Defendant was decayed in his Eſtate, and not able to pay him, and therefore he was to accept 100l. for the whole; and that the Defendant, at the day of payment of the 100l., required the Plaintiff to give him a general Releaſe, and then promiſed him in conſideration that he would make him a general Releaſe, that he would pay him the reſidue of his Debt, whenſoever afterwards God ſhould make him able; and that the Defendant afterwards, diverſe times did renew his promiſe to the Plaintiff. The Defendant firſt pleaded the general Iſſue, that he made no ſuch promiſe; which being found againſt him, he afterwards pleaded the Statute of 21 *Jac.* of Limitations of Actions; and upon the whole matter, prayed a Prohibition, becauſe the Bill was in the nature of an Action upon the Caſe; and alſo becauſe the Court refuſed the Plea of the Statute of Limitations, which they ought not to do, becauſe there is no remedy in equity againſt a Statute; To that, it was anſwered: 1. That the Plaintiff hath no other remedy, but in equity, becauſe the Aſſumpſit made before the Releaſe, is diſcharged by the Releaſe, and the Aſſumpſit, which is after, is void, becauſe there is no Conſideration, the Debt being releaſed before. 2. It is not within the Statute of Limitations, for it is but a Truſt repoſed in the Defendant, that he would pay the reſidue, when God ſhould make him able; and being a bare Truſt, is not taken away by the Statute of Limitations. It was reſolved by the Court in this Caſe, That no Prohibition ought to be granted, for the Reaſons laſt before; and it was ſaid by them, that although no Truſt be expreſſed, yet if it appeareth upon the whole Bill, that there was a Truſt, it is enough; and the Party ought not to expreſs it. It was adjudged, That no Prohibition ſhould iſſue forth. Hill. 17 *Car.* in C. B. *Moſt* and *Browns* Caſe. *Marſh.* 151, 152.

7. Note: It was reſolved by the Lord Keeper, and the Judges, called Aſſiſtants, in a Caſe there depending; That when Lands or Leaſes were conveyed to two, or more upon Truſt, and the one of them receives all, or the moſt part of the Profits, and after dyeth, or decayeth in his Eſtate, that his Co-Truſtees ſhall not be charged, or compelled by that Court, to anſwer for the Receipts of him ſo dying or decayed, unleſs ſome fraud or ill dealing appear to have been in them, to prejudice their Truſt; for they being by Law Joynt-Tenants, or Tenants in Common, every one by Law may recover either all, or as much of the Profits as he can come by; and it it is no breach of Truſt, to permit one of the Truſtees to receive all, or the moſt part of the Profits, it falling out many times, that ſome of the Truſtees live far from the Lands, and are put in Truſt out of other reſpects, than to be troubled with the receipt of the Profits. But his Lordſhip and the Judges were of Opinion, That if two Truſtees were, and one of them without Warrant of the Party that truſted them, or of a Court of Equity aſſigneth his Eſtate, and the Aſſignee doth receive the Profits, and becometh *Non ſolvent*, he that made the Aſſignment ſhall anſwer it for him; but the other Original Truſtee ſhall anſwer no more than what he received himſelf; becauſe the Aſſignee cometh not in by him, or his Aſſent or appointment. But his Lordſhip and the Judges were of Opinion, and did reſolve, That if upon the Proof and Circumſtances, the Court be ſatisfied, that there be a *Dolus malus*, or any evil practice, fraud, or ill intent in him, that permitted his Companion to receive the whole Profits, he may be charged, although that he receiveth nothing. Trin. 9 *Car.* in the Chancery. *Townley* and *Sherborn's* Caſe. *Bridgman.* 35, 36, 37, and 38.

8. In an Action upon the Caſe, brought againſt the Lord of a Mannour, for refuſing to admit the Plaintiff to a Copy-hold Eſtate: The cuſtom of the Mannour was laid to be, That every Copy-holder might nominate one to his Copy-hold Eſtate and that he being thus nominated by the cuſtom, he alſo is to have the ſame priviledge of the like no-

nomination afterwards; and that the Plaintiff being nominated to the Copyhold Estate, did tender his Fine to the Lord in Court, and prayed to be Admitted, and the Lord refused to do this, and for this Refusal he brought his Action. It was objected, That it was a Trust reposed in the Lord, for the breach of which, he shall have remedy to compell him to perform the Trust; and Customs hath confirmed this Copyhold Estate to pass in this manner. And if the Lord may cut them off from their Inheritances in this manner, this may prove prejudicial to them. But it was Resolved in the Principal Case, That he cannot have this Action against the Lord for this his refusal to admit him, without a special Custome. For it is clear in this Case, That by this nomination he hath no right at all, the Interest is in the Lord; the nominatee hath neither *jus in re*, nor *ad rem*, he hath only a Nomination, which is only matter in equity: And here in this Case he hath neither *damnum*, nor *Injuria*, because he hath no Interest; and he shall not draw an Interest to himself from the Lord against his Will. It was said, That this Case is *prima Impressionis* of this kind, and the Rule of the Court was, That *Quærens nil Capiat per Billam*. Hill. 32 Jac. in B. R. *Ford* and *Hoskins* Case. *Bulst.* 2. Part, 337.

9. The Case was, A Copyhold was surrendred to J. S. in Trust, That H. an Allien should receive and take the profits thereof to his own use and benefit: Upon this, an Inquisition was taken for the King, That the King should have the Trust, and that this Trust was not a thing meerly in Action, but an Hereditament; and every Allien that purchaseth, is said to purchase to the Kings use; and it is here a Trust mixed with an Interest; and a Feoffment made in Trust for an Allien, is all one with an Use for an Allien. But it was adjudged in this Case, That the Inquisition found for the King to entitle him to the Copyhold Land, should be quashed, because that the King cannot be entituled to Copyhold Lands, much less to the use of Copyhold Lands; and such an use is a thing which lyeth only in paivity: And in this Case it was a Trust for the Allien to take the profits, and the Allien had no Estate in the Land: and it is a thing which lyeth only in Action, and in privity, and therefore not to be seised upon by another. And it was said, That if the King should have it, the Lord should be wronged, which the King cannot do. Also it is not for the Honour of the King to have Copyhold Estates, which is a base Tenure: Also it was said, That the Commissioners who found the Inquisition for the King, had no power to seize the Lands into the Kings hands, but only to enquire what Lands the Allien had: Wherefore Judgment was given, That the Lands should be restored. Pasc. 23 Car. in B. R. The King and *Hollands* Case. See before, Sir *John Dutcombs* Case.

10. Note, There is a difference between a naked Trust and Authority; and a Trust and Authority joynted with an Interest, and an Authority created by the Act of the party, and by Act of the Law for the Execution of Justice; as a Letter of Attorney made to three jointly and severally to make Livery and Seisin, two of them cannot make Livery. But if the Sheriff directeth his Warrant to three jointly and severally to Arrest J. S. two of them may Arrest him, because it is for the Execution of Justice *& pro bono publico*. *Cook* 1. Part, *Institutes* 181.

Tyme.

1. *From what time, and to what time, and from whom Damages shall be recovered in severall Writs and Actions; and from what not.*

1. NOte, for a Rule, *per Curiam*, That in all personall Actions, The Plaintiff shall declare to his damages certain, because he shall recover damages only for the wrong done before the Writ brought, and shall recover no damages for any thing done, pendant the Writ. But in a real Action, the Plaintiff shall not Count to his damages, because he is to recover damages pendant the Writ. In a Writ of *Entre sur Disseisin*, a man shall recover damages, and shall have a Writ to enquire of the damages, and the Plaintiff shall recover damages from the time of the Disseisin, untill the time of the awarding of the Writ of enquiry of damages, and not after. But in a *Precipe quod reddat* of a Rent, he shall recover the Arrerages behind, as well those depending the Writ as those before, unto the time of the Judgment given, because that it is his Inheritance.

2. It was Resolved by the Justices, That if a man hath a Rent-Seck payable yearly at the Feast of *Easter*, and hath once Seisin of the Rent, and the Feast passeth, and no tender or demand is made, he may after the day demand the Rent upon the Land, and if none be ready to pay it, it is a denyer of the Rent, upon which he may have an Assise. But if

the Tenant be at the laſt inſtant of the day ready upon the Land to pay the Rent, and none come to demand or receive it, there he cannot after in the abſence of the Tenant come upon the Land and demand it, and make the other a Diſſeiſor, and recover damages in his default. But in ſuch Caſe, the Rent ought to be demanded upon the Land, with all the Arrerages, and although the ſame be in the abſence of the Tenant, yet the ſame ſhall amount to a denyal in Law, and he may have an Aſſiſe, and recover the Arrerages and damages. *Cook* 7. Part, 29. in *Mounds* Caſe.

3. In a Formedon in the Diſcender, the Tenant vouched J. S. the Demandant counter-pleaded the voucher; and ſhewed, That he had before brought a Formedon in the Diſcender againſt the ſame Tenant for the ſame Land, and had Judgment, and there the Judgment was reverſed, becauſe that the ſummons was not duly made, and that he hath brought this Writ by *Journeyes* Accounts. In this Caſe it was Reſolved, 1. When a Writ abates by the Act or default of the Demandant, as in miſ-information of the name of the Tenant, or of the Town, &c. there the Demandant ſhall never have a Writ by *Journeyes* Accounts; but where a Writ abates by default of the Clerk, or for falſe Latine, variance, or other matter of form, there he ſhall have a new Writ by *Journeyes* Accounts. 2. That a Judicial Writ ſhall never be brought by *Journeyes* Accounts, becauſe that Judicial Writs ſhall not abate for form. 3. That the Writ now brought by *Journeyes* Accounts, *in quadam modo* a Continuance of the firſt Writ; and therfore if ſuch Writ be brought againſt Executors, they ought to plead fully Adminiſtred the day of the firſt Writ brought; And in this Writ, the Demandant ought to ſhew the certainty of the time of the Abatement of the firſt Writ, ſo as it may appear to the Court, That the latter Writ is brought by *Journeyes* Accounts. *Cook* 6. Part, 11. *Spencers* Caſe.

4. In a Replevin, it was Reſolved by the Court, That when a Diſtreſs is taken for Damage Feaſants that the party may tender amends till the Cattell are impounded, but after they are in the Cuſtody of the Law, then ſuch a Tender commeth too late; and Tender of amends to the Bayliff is not good, for that he cannot deliver the Diſtreſs once taken. Paſc. 43 Eliz. in B. R. *Cook* 5. Part, 76. *Pilkingtons* Caſe. Trin. 37 Eliz. *Nevil* and *Segraves* Caſe, adjudged acc. See *Cook* 8. Part, 147. the ſix Carpenters Caſe, acc.

5. Action of Treſpaſs againſt A. B. and C. A. appeared, and the Plaintiff declared againſt him *ſimul cum, &c.* and he pleaded, Not Guilty. Afterwards B. appeared, againſt whom the Plaintiff alſo declared *ſimul cum, &c.* And upon Not Guilty, A *Venire facias* was awarded, and both Iſſues tryed at the Aſſiſes: and the Iſſue againſt A. being firſt tryed, the Jury aſſeſſed upon that Iſſue for the Plaintiff 200 l. damages; and afterwards the Iſſue was tryed againſt B. and 50 l. damages aſſeſſed by the ſecond Tryall: C. appeared and confeſſed the Action, and a Writ of Enquiry of damages was awarded upon the Roll, but none iſſued. In this Caſe it was Reſolved, 1. When in Treſpaſs againſt divers Defendants, they plead, Not Guilty, or ſeveral Pleas, and the Jury find for the Plaintiff in the whole. The Jurors cannot aſſeſs ſeveral damages, becauſe that all is but one Treſpaſs, and made joynt by the Writ and Count; but if the Jury find one Guilty at one time, and another at another, there ſeveral damages may be taxed. 2. Reſolved, That the Defendants who pleaded laſt, ſhould be charged with the damages taxed by the firſt Jury, and the ſecond Enqueſt ſhall not aſſeſs damages, but the party ſhall be contributory to the damages aſſeſſed by the former Inqueſt. 3 Reſolved, That becauſe in Judgment of Law the ſeveral Juries gave one Verdict at one time, the Plaintiff had Election to have Judgment of the beſt damages, and that ſhall bind them all, but he ſhall have but one Execution. 4. Reſolved, Where in Treſpaſs the Defendants plead ſeveral Pleas, tryable at one and the ſame time by the ſame Jury, and found for the Plaintiff, the Jury cannot ſever the damages; and if they do, the Verdict is naught. *Cook* 11. Part, 5, 6, and 7. Sir *John Heydon's* Caſe.

6. Note, upon the Judgment given in the Common Pleas in *Specots* Caſe; in a *Quare Impedit*, Error was brought, and amongſt others, it was Aſſigned for Error, That for the inſufficiency of the Biſhops plea, the Court gave Judgment, *viz. Ideo conſideratum eſt quod pradict. H. et E. recuperent verſus pradict. Epiſcopum preſentationem ſuam ad Eccleſiam pradict. et habeant breve Arch. Cant. totius Angliæ Primat. loci illius Metropolitano eo quod pradict. Epiſcopus eſt pars, et idem Epiſcopus in curiam.* And after a Writ of Enquiry of the value of the Church was awarded, and other points found and returned, and upon that Judgment was entred again, *ſcil.* That the Plaintiff have a Writ to the Biſhop *ut ſupra, Et quod recuperet verſus pradict. Epiſcopum damna, &c.* ſo as the Biſhop was twice amerced, which ought not by Law to be; and thereupon this difference was taken, That if a man bring Treſpaſs againſt two, and one is found Guilty to damages by himſelf, and the other is found guilty to damages by himſelf, that in this Caſe each Defendant ſhall be ſeverally amerced, and the Plaintiff ſhall be ſeverally amerced againſt each

of them. But in an Action againſt one Defendant or Tenant, one pleads one plea to part, and another to the reſidue, or confeſſeth part, and pleadeth to Iſſue for other part, and the ſeveral Iſſues be found againſt him, the Defendant ſhall not be twice amerced. And therefore becauſe the Biſhop being one perſon, was twice amerced, it was Error. But to this it was anſwered, That the latter was but only a recital of the firſt, and ſo to give a full Judgment of all with the damages, and not a new Judgment. But it was ſaid, That admit the latter Judgment was Erronious, yet the firſt Judgment was good and perfect in it ſelf, and ſhould not be impeached for any Error in the ſecond Judgment, for the firſt Judgment was the Judgment in a *Quare Impedit* at the Common Law, for before Stat. *Weſt.* 2. the Plaintiff did not recover damages in a *Quare Impedit*, and ſo the Plaintiff may leave the benefit of that Statute if he will, and take his Judgment at the Common Law. Wherefore the firſt Judgment in C. B. was affirmed. *Cook* 5. Part, 58, 59. *Specotts* Caſe.

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2. *Where a time Convenient ſhall be allowed to the performance of a Condition after notice given, and requeſt made: What ſhall be ſaid a Convenient time, what not. Where Grants, Leaſes, ſhall be avoided for a time, and ſtand for a time: How a Condition ſhall be performed, when no day or time is expreſſed for the performance of it; and of divers other matters concerning time.*

1. A Man ſeiſed of a Wharf and Houſe holden in Burgage, deviſed the ſame to his Wife, and his Heirs, upon Condition, That the Wife by the advice of learned Council, and in convenient time, ſhould give the ſame to maintain a Free-School, Alms-men, and Alms-women for ever; and that his ſaid Wife ſhould have the Profits of the ſaid Lands during her life, beaing the Charges of the ſaid School, &c. and made his Wife his Executrix and dyed; ſhe entred and Leaſed the ſame for years, and the Heir entred for the Condition broken. In this Caſe (amongſt other things) it was Reſolved, That the Condition was not void; for the Teſtator hath deviſed, That Council Learned ſhall adviſe how the ſaid Lands and Tenements ſhall be aſſured for the maintenance and continuance of the ſaid Acts, which well might be. 1. By making them a Corporation by the Kings Letters Pattents, and then by Licenſe of the King to aſſure the Lands to them, and ſuch was the intent of the Teſtator. 2. Reſolved, That the Condition was broken, becauſe the Wife had not done the ſame in convenient time, *ſcil.* after eight years. And 3. Becauſe ſhe had now diſabled her ſelf to perform the Condition, by making of the Leaſe for years. *Cook* 1. Part, 25. *Porters* Caſe.

2. A man made a Feoffment in Fee of his Land, and for the better aſſurance, bound himſelf, that he and his Son ſhould do all acts deviſed by the Obligee. The Obligee deviſed a Deed of Releaſe, the Father delivered the ſame as his Deed, but the Son did not deliver it, but becauſe he was unlearned, he required the Obligee to read the ſame unto him, or to have the ſame read unto him, which he refuſed, but brought an Action againſt the Father upon the Obligation. In this Caſe it was Reſolved, That the Son was bound to deliver the Deed at his perill, becauſe the Father had bound himſelf that he ſhould ſo do. *Cook* 2. Part, 3. *Maſſes* Caſe.

3. Debt upon an Obligation, the Condition was, That if the Defendant deliver to the Plaintiff one Obligation of the ſum of 10 l. wherein the Plaintiff ſtood bound with one T. to the Defendant for the payment of 5 l. And alſo if the Defendant do acknowledg ſatisfaction of a Judgment upon the ſaid Bond, and alſo deliver true notes of all Bills of Charges as do concern the ſame, That then, &c. The Defendant pleaded, *Quod non fuerunt aliqua Bilia miſarum pro et contern. fact. paſſat.* and did not anſwer to the reſidue of the Condition. In this Caſe, it was adjudged againſt the Defendant, for that he ought to have performed the reſidue in convenient time, and that without requeſt? And in that Caſe, theſe differences were taken and Reſolved, 1. When the Act by the Condition of the Obligation to be done to the Obligee, is in its nature a tranſitory Act, as payment of money, &c. and no time is appointed, although that the place be expreſſed, there the Act ought to be performed in convenient time. 2. There is a difference between the concurrence of the Obligor and a ſtranger, and of the Obligor and Obligee. As if I be bounden to enfeoff a ſtranger, and no time is limitted, although that the concurrence of the Obligor is requiſite, the Obligor ſhall not have time to do it during his life, but ought to do it perſonally,

ſtantly, becauſe the Obligor hath taken upon him to do that to a ſtranger, and that may be done without the concurrence of the Obligee; but when the Obligee himſelf is party to the Act, and the act cannot be done without his concurrence, there it is reaſon that the Obligor have time during his life, if the Obligee doth not [illegible] him to do it upon requeſt. 3. Reſolved, That when the Act which the Obligor by the Condition ought to do, doth not concern in any manner the Obligee, nor his benefit, but is to be done by the ſole act and labour of the Obligor, and no time is limited in the Condition for the performance thereof; there the Obligor hath time to do it during his life; and the performance thereof cannot be reſtored by requeſt. *Cook* 6. Part, 31, 32. *Bothies* Caſe.

4. Debt upon an Obligation, the Condition was, That if the Defendant do permit the Plaintiff, his Executors, and Aſſigns, not only to threſh the Corn in the Defendants Barn, but alſo to carry it away from time to time: and at all times hereafter convenient, with free egreſs and regreſs, or elſe to pay 8 l. upon requeſt, that then, &c. the truth was, The Defendant permitted the Corn to be there two years, in which time Rats had devoured much of it, and then the Plaintiff threſhed the reſidue, and the Earl brought his Action, upon which it was demurred. It was ſaid, That the Bond was not forfeit, for the Earl had not taken it out in time convenient, and time convenient is that which is not prejudicial to any perſon; and there it is a prejudice to the Defendant if the Plaintiff will not carry away his Corn. But the Opinion of the Court was againſt that, That for here the party hath bound himſelf, and the Condition is (at time convenient), and if he will come in the night or on the Sabbath day, this is no convenient time; but although that he come a long time after, yet it may be at convenient time; and the words are not within convenient time; Wherefore it was adjudged for the Plaintiff. *Windham* Juſtice ſaid, if it had bin within convenient time, there would have bin a diſtreſs. Hill. 30 Eliz. in C. B. The Earl of *Kents* Caſe. *Goldsbr.* 76, 77.

5. A. ſeiſed of a Manner to which an Advowſon was Appendant, by Deed Indented, Granted, Bargained and ſold the Mannor with the appurtenances for good conſideration to B. and his Heirs. In which Indentures there were divers Covenants, *ſcil.* to ſuffer a Recovery, and levy a Fine, to the uſes in the Indenture. Proviſo, That B. ſhall give the Advowſon to A. for his life, and if it happen not void, then one time to his Executors. A. ſuffers a Recovery according to the Indenture. Afterwards A and B. levy a Fine with a Render of a Rent of 42 l. to A. the Remainder to D. in Fee, with a *Nonint ſolut* and Diſtreſs. B. in his life doth not Grant the Advowſon to A. and dyeth; the Church voids. E. the Son of B. enters into the Mannor. A. enters for the Condition broken. In this Caſe (amongſt other things) it was Reſolved, 1. That the Proviſo was a Condition, and the Law hath not appointed any proper place for a Condition, but the ſame is left to the Election of the parties. 2. That in this Caſe, by the death of B. the Condition was broken: For it was put for a Rule, That when the Grantee upon Condition is to make an Eſtate to the Feoffor, or Grantor, he hath time to do it during his life; but if requeſt be made by the Feoffor or Grantor, to the Feoffee or Grantee, and the Feoffee or Grantee dye before any Eſtate made to the Feoffor or Grantor, there the Condition is broken: But when the parties by mutual agreement give a certain time within which the Condition ſhall be performed, and within the time he who ought to perform the Condition dyeth, ſo as the Condition is become impoſſible by the Act of God, there the Eſtate remains abſolutely diſcharged of the Condition: and in that Caſe it was agreed, That when an Eſtate is to be made by the Feoffee upon Condition to a ſtranger, the Feoffee ought to do the ſame within convenient time, and the ſtranger needeth not to make any requeſt. *Cook* 3. Part, 79. the Lord *Cromwells* Caſe.

6. A. ſeiſed in Fee by Indenture, Covenanted with B. to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of B. in tail, with divers Remainders over; Proviſo, That if A. by himſelf, or by any other during his life, tender to B. a Gold Ring, to the intent to make void the ſaid Uſes, that then the ſaid Uſes ſhall be void. Afterwards A. is Attainted of Treaſon. The King leaſeth the Lands to C. and D. for 40 years; the Attainder is confirmed by Act of Parliament; and by another Act, it is Enacted, That the ſaid Act ſhall not extend to make any Leaſe made by the King after the Treaſon void: And it is alſo Enacted, That all perſons which claim any Eſtate or Intereſt in the Lands of any perſon Attainted, not enrolled ſince 18 Eliz. ſhall within two years after the Seſſion of that Parliament, ſhew and bring into the Exchequer, his or their Grant, Conveyance, or Aſſurance to be enrolled and entred of Record, or elſe the Aſſurance to be void. The King reciting the Proviſo, and that the benefit thereof is given to him by Act of Parliament, doth Authorize E. to deliver the Ring of Gold to B. to the intent to make the ſaid uſes void; who tenders the ſame to B. who refuſeth. In this Caſe amongſt many other points, Reſolved, That preſently upon the tender, according to the Proviſo, that the uſes were determined, and

the Land vested in the King by force of the Act of 33 H. 8. of the Attainder. And in that Case, whereas it was Objected, That the Conveyance by the Act of Parliament 28 Eliz. was void, because that the two years were past, and the Conveyance was not enrolled, and so the Condition void; and then the King was seised in Fee; and so the Lease for 40 years did remain good. It was Resolved in that point, That at the time of the Tender, the Conveyance was in force; for that by the words of the said Act, the Conveyance ought to be exhibited within the two years, but the Act doth not require that it be enrolled within the two years, for that it might be enrolled at any time after the two years. *Cook* 7. Part, *Englefield's* Case.

7. A. seised of Lands in Fee, having Issue, six Sons, and one Daughter; deviſed the same to I. S. and his Wife for 99 years, if any of them should so long live; and afterwards deviſed the same to his eldeſt Son, and the Heirs males of his Body, the remainder to his other Sons, the remainders over: Provided, That if his said Son, or any of his Sons, or the Heirs Males of their Bodyes should go about to sell, allien, or discontinue; That immediately from and after such time or times, and before any such Sale, Bargain, or Alienation, the Eſtate of the Perſon so dying, should ceaſe; and as if the Perſon so attempting, were naturally dead, and that such Perſon, to whom the premiſes should deſcend, remain, &c. should have the Land, &c. and dyed: The Eldeſt Son levyed a Fine of the Lands with Proclamations, the second Son claimed the Reverſion by force of the Deviſee, and if he had the Reverſion in him, so as he might, maintain an Action of Waſte, was the Queſtions In this Case it was reſolved, 1. That the *Proviſo* was void, and againſt Law; for that be it a Proviſo, Condition, or Limitation, it cannot determine the Eſtate for Part, and continue the same for the Reſidue; and an Eſtate in Land, cannot ceaſe for a time, and revive, and reveſt again. 2. When a man giveth Lands to one, and the Heirs Males of his Body, with remainders over; he cannot by Law determine this Eſtate in tail, as to one Perſon, and diſpoſe of the same to another Perſon. Hill. 31 Eliz. in C. B. *Jermyn* and *Arſcott's* Case. Vouched in *Cook*. 1 Part, 55. in *Corbet's* Case. See *Cook*, 6. Par. 40. Sir *Anthony Mildmay's* Case acc. *Cook* 8 Part, 17. in the Princes Case, acc.

8. A man made a Leaſe for 30 years of a Manor, Except the Wood, and Under-Wood growing upon the Manor; and after made a Leaſe to the same Leſſee, of all the Wood, and Under-Wood, growing, and being, upon the said Manor for 60 years, without impeaching of Waſte, and afterwards made a third Deviſe of the Manor to the Leſſee for 30 years, without any exception to begin at a day to come, *ſcil.* from the expiration of the firſt Leaſe for 30. years, it was reſolved in this Case (amongſt other things), That by the acceptance of the future Leaſe, to begin diverſe years after the said Leaſe for 60 years was a Surrender; likewiſe the Leſſee by his acceptance hath affirmed the Leaſe to have ability to make the Leaſe; which he had not, if the firſt had ſtood: as if Leſſee for 20 years, accepts a Leaſe for 30 years, to begin ten years after, it is a preſent ſurrender of the Terme; and he who hath a Leaſe for 20 years, cannot ſurrender the laſt 20 years, ſaving to him the firſt 20 years, and so make a fraction of the Terme. *Cook* 5 Part, 11 *Jues* Case.

9. In a *Quod permittat*, by H. B. and *Eliz.* his Wife, againſt G. S, the Plaintiff declares; That I P. was seised of a Meſſuage, in the Parish of D: and that the Defendant did erect upon his Free-hold a house, so near the said Meſſuage, *nuper* J. P. *modo ipſorum* H. & Eliz., *ſic quod Orientalis pars ejuſdem domus ipſius* G. *ſuperpendet* the Meſſuage late of the said I. P; and now the said Hen. and Eliz. 17 inches, to his damage of 100l. It was objected in this Case, That there was variance between the Writ and the Count; because the Writ was *Levavit ad nocumentum liberi tenementi nuper Johannis* P. *& modo* H. *& Eliz.* And the Count was, *Levavit Meſſuag. jam prope Meſſuage predict.* I. P. *& modo predict.* H. & Eliz.: So as the Writ is *ad nocumentum liberi tenementi nuper Johan.* P. and the Count is *liberi tenementi ipſorum*, H. & Eliz. But this Exception was not allowed by the Court, for that the Plaintiffs ſhew in their Count, that the levying was in the time of I. P. which agreeth with the Writ; because that the levying was, *ad nocumentum Johan.* I. P. and the Concluſion *ad nocumentum* of the Plaintiffs was neceſſary, for that otherwiſe they cannot maintain their Action, nor recover Damages. Note, in this Case, That the *Quod permittat* was brought for a Nuſance done in the time of another, and not in the time of them who brought the Action, and yet maintainable. *Cook* 9 Part, 54. 55. *Battens* Case. vid. *Cook*, 5 Part. 101. in *Penruddocks* Case. acc.

10. Note: In the Case of Appeal of Murther, Exception was taken unto it, because the wound was given the Fourth of *Auguſt*, and the death was laid, the 19th of *December* next following; and the Indictment ſaith, That *predict.* T. M. & W. M., *&c. tempore Felonie & Murdri predict. fact. ſcil.* 4. *Auguſt. felonice fuerunt preſentes ad felonias & Murd. predicta. in forma predict. faciend.* But in this Case it was ſaid, That the death hath relation to the ſtroak; for if a man *non compos mentis*, ſtriketh himſelf, and afterwards is of Sane memory, and dyeth, the death hath relation to the ſtroke,

ſtroke; and he ſhall forfeit nothing. And ſee *Stamford*: That the Appeal ſhall be brought within the year after the ſtroke, and not the death; for when death followeth, in Judgment of Law the Felonie was committed the day when the blow was given; for the death, in a manner, is but the execution of the Felony. But the whole Court was againſt that, for they ſaid, it had been often adjudged, That Indictments were inſufficient, when the ſtroke is one day, and the death is another day. *Vid.* Hill. 28 Eliz. in B. R. *Cook* 4 Part. 41 *Heydons* Caſe.

11. In the Caſe of Diſcontinuance of Proceſs, by the demiſe of the King, theſe Points (amongſt other) were reſolved. 1. Upon the Statute of 1 E. 6. *Cap.* 7. it was reſolved, That if any Judicial Writ, or any Proceſs in a Court of Record be awarded, in the time of the Predeceſſor-King, it may be executed in the time of the Succeſſor. 2. That if an Appeal be brought and delivered to the Sheriff within the year, and before the Return thereof, the King dyeth; by the Common-Law, the Plaintiff upon a *Certiorari* to the Sheriff returned in B. R. ſhall have a Re-attachment; although the ſame comes not in by Return of the Sheriff, but by *Certiorari* for neceſſity; otherwiſe, the Plaintiff, who Lawfully brought his Writ within the year without any default in him, ſhould loſe his Appeal. 3. Reſolved, That if an Information be preferred, either for the King, or as well for the King, as the Informer, and Iſſue or demurrer is joyned in it, and the King dyeth; that all is ſtayed, but onely the Information, and that ſhall ſtand; and upon that, an Attachment is awarded; and upon the Return of which, the Defendant appears, and ſhall plead *De Novo*. For although the King in *genere* doth not dye, and there is no *Interregnum*, yet in *individuo*, he dyeth; and that ſtands with Reaſon, for upon many Penal Statutes, the Suit is to be begun within a certain time, and if the Information ſhould not be in force after the death of the King, the offence ſhould not be puniſhed: But if the King bringeth an Original Writ, as a *Quare impedit*, &c. then by the death of the King, the Writ ſhall abate; becauſe the King, for whom the Judgment ought to be given, is dead at the time, and no Proceſs can be awarded upon the Original, as there may be upon an Information. *Cook* 7 Part, 30, 31. The Caſe of Diſcontinuance of Proceſs by the death of the King.

12. A. by Indenture covenanteth with B, that A ſhall recover of him the Mannor of B, within one year then next following; and that the ſaid Recovery, and the Execution thereupon, to be had within the ſaid year, ſhall be had to the uſe of the Recoverer in tail, *&c.* And after the Recovery is had within the year, and the Execution iſſued after the year; It was holden in this Caſe, That although that the Covenant is not purſued in time, according to the preciſe form thereof, yet the uſe ſhall be guided by the ſaid Indenture; and ſo in that Caſe, If the ſame Recovery between the ſame Parties of the ſame Land were ſuffered after the year, yet if no intervenient agreement were between the Parties, the Recovery ſhall be intended to the uſes in the ſame Indentures; for that variance of time in theſe caſes, ſhall not ſubvert the Original agreement and contract of the Parties. *Cook* 1 Part, 99. in *Shelleys* Caſe.

13. Note: It was ſaid by the Court, That the time of the Birth of a man or woman, is chiefly to be conſidered, to make them Subjects born, or not; and is as it were the Eſſence of a Subject born: For a man cannot be ſubject to the King of *England*, unleſs at the time of his Birth, he were under the Allegiance and Obedience of the King of *England*; although the Kingdom of the King, under whoſe Allegiance he was born, do afterwards deſcend to the King of *England*. And therefore it was Reſolved, That that was the Cauſe, that *Antinati* in *Scotland* (for at that time of their Birth, they were under the Allegiance, and Obedience of another King) were Aliens born, in reſpect of the time of their Birth. *Cook* 7 Part, 18. in *Calvins* Caſe.

14. In a *Quod permittat prosternere novam quandam domum*, that being new built, hindred the light of the next Houſe by over-charging: Upon Iſſue joyned, and Verdict, it appeared; That the Defendant had built the ſaid Houſe, upon the old Foundation of an houſe, which had been built there before, and had been pulled down by one, who was then Owner of both Houſes. It was the Opinion of the Court in this Caſe, That the unity of poſſeſſion of both Houſes now in one man, did ſuſpend that eaſement, ſo as the Defendant could not be charged with any damage, but for that which ſhould be cauſed by making it hang over more than it did before; for that that being done in another time, was now gone; although that afterwards the Houſes came to ſeveral hands. Hill. 13 Jac. in C. B. *Robins* and *Barns* Caſe. *Hob.* 131.

15. Debt upon an Obligation. The Condition was, That if the Defendant did ſell the Tythes in D. that he ſhould pay to the Plaintiff ſuch a ſumm of Money; but if he ſold them not, that then he ſhould deliver an Obligation to the Plaintiff for the payment of a certain ſumm, at a certain day that is limitted. A Verdict being for the Plaintiff, it was moved, to ſtay Judgment; That he ought to have convenient time for the doing of the thing,

things expreſſed, and it appears not by the Record, that he had convenient time. But the Court held, that the time between the date of the Obligation, and the bringing of the Action, was convenient time; and that there being a ſecond thing to be performed in the Caſe, the former was not done; that therefore that former thing ought to be done within ſome reaſonable time, elſe the Party ſhould be prejudiced by ſtaying to have the ſecond thing performed. Trin. 21 *Car.* in B. R. *Williamſon* and *Houlby*'s Caſe.

16. In Aſſumpſit, the Plaintiff declared, That the Defendant, in conſideration of a Marriage to be had, between the Plaintiffs Son, and the Defendants Daughter; and of ſetling of Lands upon him, upon the Marriage, did promiſe, that within ſuch a time after the Marriage had, he and his Son ſhould be bound, *Per ſcriptum ſuum debita juris forma, fiend.* to the Plaintiff, for the payment of 3000l. for a Marriage-Portion; and aſſignes for Breach, that the Defendant did not become bound *Per ſcriptum ſuum Obligatorium.* The Plaintiff had a Verdict: The Defendant in ſtay of Judgment, ſaid that the Breach was not well aſſigned; For the Breach aſſigned, leads to a Perſonal engagement, for paying of 3000 l., which is not ſo expreſſed in the promiſe, but a general ſecurity to be given for the money, and a Recognizance and a Judgment are not properly *Scriptum*; and the Declaration doth not ſet forth by whom the ſecurity was to be given, nor whether he had convenient time to do it, as he ought to have had; and the Plaintiff was to do the firſt act, *viz.* to tender the Obligation. But it was Reſolved by the Court, 1. That the promiſe did extend to a Judgment or a Recognizance: For a Judgment, Statute, or Recognizance, is *Scriptum.* 2. Here appears by the Declaration to be two Months for the performing of the promiſe, which is a convenient time, and there doth not appear any hinderance, and the Defendant was bound to do it without requeſt; and there was no neceſſity for the Plaintiff to make any election of the time when he will have it done. Judgment was for the Plaintiff, which was after affirmed in a Writ of Error brought in the Exchequer Chamber. Trin. 24 Car. in B. R. *Treby* and *Pools* Caſe. *Styles* 143, 144.

17. In *Ejectione firmæ* brought in the Exchequer. The Plaintiff declared, That *William More* 5. *Maii*, 10 Jac. let to the Plaintiff a Meſſuage and Lands with the appurtenances in C. *Habendum*, from the Feaſt of the Annunciation of St. *Mary*, then paſt for 21 years *ex tunc* next following. And the Ejectment was alledged to be the ſaid 5. *Maii*, 10 Jac. Upon Not Guilty, it was found to this effect, That before the ſaid Demiſe, *W. More* was ſeiſed of the Lands in Fee; and the ſaid *W. More* the ſaid 5. *Maii*, 10 Jac. *ſupradict.* made an Indenture of Leaſe to the ſaid *Tho. More* of the ſaid Meſſuage and Tenements, *Habendum* from the Feaſt of the Annunciation of the Virgin *Mary* laſt paſt, for and during the Term of 21 years next enſuing the date hereof, fully to be compleat and ended, by force of which the Plaintiff was poſſeſſed untill he was Ejected by the Defendant the ſaid 5. *Maii* 10 Jac. The Queſtion was, If the Leaſe found by the Jury did agree with the Leaſe mentioned in the Declaration for one Term of years or not, becauſe the Leaſe by the Declaration, was a Leaſe made 5. *Maii* 10 Jac. *Habendum* from the Feaſt of the Annunciation then laſt paſt, for 21 years *extunc, ſcil.* from the ſaid Feaſt next enſuing. But the Leaſe found by the Jury, was a Leaſe made 5. *Maii* 10 Jac. by Indenture, bearing date 5. *Maii* 10 Jac. *Regis Habendum de feſto Annunciationis Beatæ Mariæ tunc ult. præterito pro termino* 21 *annorum proxſequend. dat. diſſ. Indenturæ.* It was adjudged for the Plaintiff in the Exchequer; and afterwards affirmed in the Exchequer Chamber in a Writ of Error there brought. Trin. 11 Jac. *More* and *Muſgraves* Caſe. *Hob.* 18, 19.

18. Debt upon an Obligation for not performance of Covenants. The Caſe was, Sir *Robert Brown* was ſeiſed of the Mannor of G. with the Advowſon appendant: and Sir *Robert Strowd* was ſeiſed of the Mannor of D. in the ſame County. It was agreed betwixt them, That there ſhould be an Exchange betwixt them of the ſaid Mannors; and becauſe G. was the better, *Strowd* Covenanted with Sir *Robert Brown* and his Son to pay 1100 l. to the Father for the Demeſnes of the ſaid Mannor of G. and that at *Mich.* next, there ſhould be a mutual entry into the ſaid Mannors, and that in the mean time they ſhould take the profits of their own Mannors. And the Plaintiffs declared, That they had performed all the Covenants on their part, and the Defendant had not paid the 1100 l. The Defendant by proteſtation, that the Plaintiffs had not performed the Covenants, ſaid, That the Plaintiff after *Mich.* ſold the Mannor of G. to J. S. and his Heirs: Upon which it was demurred in Law. It was ſaid for the Defendant, That the Action could not lye, for the Contract is Executory, and there is no money to be paid untill he hath the Mannor; for the Covenant is, *pro Maneriis*, and *Pro* implyes a Condition, and being Executory on the one part, it ſhall be alſo Executory on the other part. Alſo there is no time limited when the 1100 l ſhall be paid; and it being a tranſitory act, it ought to be done within convenient time. And in this Caſe the Law will appoint no time, becauſe the other party hath diſabled himſelf to perform his part.

part. On the other ſide, it was ſaid, That an Act here is to be done upon an indefinite time, and the Defendant is to do the firſt Act, and the Defendant ought to procure Councel to adviſe for mutual Aſſurances were to be made, and the one ought not to be Carver to the other. And for the time it ought to be before *Mich.* or otherwiſe the Plaintiff ſhall be enforced to keep his Mannor all his life, and ſhall be hindred of the ſale of it for the payment of his Debts; and by the Articles every thing is to be done before *Mich.* And 37 Eliz. in B. R. *Mills* and *Perſons* Caſe was, A man Covenanted in conſideration of 4 l. rent to be granted to him payable at *Mich.* and our Lady day yearly, to levy a Fine of the Mannor of, &c. to the uſe of, &c. and the Aſſurance is not made before *Mich.* And it was Reſolved, That the Covenant was not performed, for the Grant of the Rent ought to be before *Mich.* otherwiſe he could not have the benefit of it. The Principal Caſe was not Reſolved, but adjourned. Mich. 2 Car. in B. R. Sir *Robert Brown* and Sir *Robert Strowds* Caſe. *Poph.* 198, 199.

19. Debt upon an Obligation, the Condition was, Whereas the Defendant had Granted an Annuity to the Plaintiff, that the Defendant ſhould make further aſſurance to the Plaintiff for the enjoying thereof within one Moneth, when he ſhould be thereunto required. Upon a Special Verdict, the Queſtion was, from what time the Moneth ſhould begin, from the date of the Obligation, or from the time of the requeſt to be made. It was the Opinion of the Court, That if there be an indifferent conſtruction which may be taken two ways, the Court ſhall take it that way which ſhall be moſt reaſonable to make the Obligation ſtand in force: And therefore after ſuch requeſt, the Aſſurance ſhall be made, and the Obligation ſhall be intended for the benefit of the Obligee. It was adjudged for the Plaintiff. Hill. 1650. in B. R. *Wentworth* and *Wentworths* Caſe. *Styles* 242.

20. In Coverant, the Caſe was, That the Defendant Covenanted that ſhe would make a lawfull ſurrender of Copyhold Land, and that ſhe would permit the Plaintiff to enjoy the Lands, and to take the Rents and Profits quietly without interruption. And ſhewed, That the Defendant was Copyholder of ſuch Lands; and ſhewed the Cuſtome, That a Copyholder might ſurrender by Letter of Attorney into the hands of two Tenants out of Court, and that he cauſed a Letter of Attorney to be made for the Defendant to Seal, to give Authority to them to ſurrender, and tendred it to the Defendant, which ſhe refuſed to Seal, and to ſurrender at the next Court, but took and received the Rents and profits of the Lands. The Defendant pleaded, That the Plaintiff tendred to her ſuch a Letter of Attorney to Seal, and becauſe ſhe did not know what was therein contained, ſhe required time to be adviſed by her Councill, and the Plaintiff refuſed to give her any time, for which cauſe ſhe did not Seal it. It was Reſolved by the Court in this Caſe, That the breach was not well aſſigned; For the Defendant by her Covenant was to ſurrender upon requeſt, but ſhe was not bound to make a Letter of Attorney, thereby to make a ſurrender. 2. That in ſuch Caſe ſhe need not to make ſurrender till ſhe had had convenient time to adviſe with her Councill; and to ſurrender upon requeſt, and reaſonable requeſt is all one. 3. It was Reſolved, That the requeſt made to her to Seal the Letter of Attorney, was not an expreſs requeſt, but an implyed requeſt, and therefore not good. It was adjudged for the Defendant. Hill. 8 Car. in B. R. *Symms* and the Lady *Smiths* Caſe. *Cro.* 2. Part, 218.

21. In *Aſſumpſit*, the Plaintiff declared, That in conſideration of 130 l. paid, the Defendant ſold him 7. *Martii*, *Anno* 9 Car. all the Furzes growing upon ſuch a parcel of Land; to be taken before Mich. 1635. and promiſed the Plaintiff, That he would peaceably permit him to enjoy the ſaid Furze, and quietly to carry them away without diſturbance. And though the Defendant had permitted him to carry away 50 Loads of the ſaid Furze, yet he did not permit him to enjoy the ſaid Furze, but diſturbed him from taking 1000 Loads of them, which were growing upon the Land at the time of the Bargain. Upon *Non Aſſumpſit*, it was found for the Plaintiff, and Judgment; and Error brought and aſſigned, becauſe he doth not ſhew the certain time of the diſturbance, Whether it were before Mich. 1635. But the Court Reſolved, That this being after Verdict, it ſhall be intended, That it was within the time, the Defendant having pleaded *Non Aſſumpſit*, and the cauſe of damage appearing upon the Tryal, for otherwiſe there had bin no cauſe to have damages; and it is not material that the time of the diſturbance be layed in the Declaration, for that it is collateral to the promiſe. The Judgment was affirmed. Mich. 13 Car. in B. R. *Hall* and *Marſhalls* Caſe. *Cro.* 1. Part, 317.

22. A man granted a Rent out of certain Lands *pro Conſilio impenſo, et impendendo*. To have and to hold, to him and his Aſſigns for the Term of his life, payable at four Feaſts in the year, and for want of payment upon demand, that it ſhould be lawful for him to diſtrein; the Grantee granted the rent over. The Aſſignee after one of the dayes, demanded the Rent, and diſtreined. In that Caſe it was adjudged, That the Diſtreſs was lawfull. For in ſuch Caſe, he needed not to make any demand at any

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of the dayes, as in Caſe of a Re-entry; but he might demand it when he pleaſed, becauſe it was only to entitle him to his remedy for his duty. For it is not neceſſary that the Grantee of a Rent-charge, or of a Rent-Seck, demand it at the very time when it becommeth due, but at any time after, it is ſufficient. And it is not like to the demand of a Rent upon a Condition, becauſe that is parcel, and overthroweth the whole Eſtate; and therefore in that Caſe, the time of the Demand muſt be certain, to the end that the Leſſee, Donee, or Feoffee may pay the Rent. But the demand of a Rent-Seck, or of a Rent-charge, is only a formal mean to recover that which is due; and therefore in Caſe it be demanded after it is behind at any time, whether the Tenant be preſent or not, it is ſufficient. *Cook* 1. Part, *Inſtitutes* 144, 153.

23. Note, there are four times of payment of a Rent which is iſſuing out of Land; the firſt is voluntary and not ſatisfactory, and yet it is good to ſome purpoſes; the ſecond is voluntary, and in ſome Caſes ſatisfactory, and in ſome not. The third is legal and ſatisfactory abſolutely, but not coercive. The fourth is legally ſatisfactory and coercive. And there as to the firſt, If the Leſſee pay his Rent before the day, this is a voluntary payment, but not ſatisfactory; but if it be paid in the name of a Seiſin of Rent, although it ſhall not ennure by way of ſatisfaction, yet it ſhall give ſufficient Seiſin in Aſſiſe: For the ſecond, If the rent be payable at *Eaſter*, in that Caſe, If the Tenant pay the Rent in the morning, and the Leſſor dye before noon, this payment was voluntary, and yet is good and ſatisfactory againſt the Heir. As to the third, the legal time is a convenient time before the laſt inſtant of the day, and ſo the moſt extream time which is ſatisfactory, and not coercive, for that untill the end of the day, no remedy by Law is given forth. The fourth is, When the Rent being once due and behind, is recovered by courſe and order of Law; but this is ſatisfactory, and withall Coercive. *Cook* 10. Part, 127. in *Clun's* Caſe.

24. Note, That in many Caſes concerning time, the Law determines what ſhall be a convenient time. And therefore in Caſe of Eſtray, if the owner doth not claim it within a year and a day, it ſhall be forfeited: And ſo it is in Caſe of Diſtreſs after entry or claim. But in Caſe of Wreck of the Sea, the year ſhall be accounted from the taking or ſeizure of the goods as Wreck; for although the property is veſted in the owner before ſeizure, yet till he ſeize them and take them into his actual poſſeſſion, it is not known who claims the Wreck, nor to whom the owner ſhall reſort to make his claim; and if the owner bring his Aſſion for them within the year and the day, it is ſufficient. See *Cook* 5. Part, 107. in Sir *Henry Conſtables* Caſe.

See more concerning Tyme *in the ſeverall Titles before.*

Vacation,

Vacation, Voydance, *and* Avoydance.

1. KIng *Hen.* the 8th Translated the Abbey and Priory of *Norwich* by his Letters Patentes, and created them by the name of Dean and Chapter, who surrendred to King E. 6. their poſſeſſions. And after the King Incorporated them by the name of *Decani et Capitul' ex fundatione E. 6.* and after re-granted their poſſeſſions to them by the name of *Decani et Capitul' Sanctæ et individuæ Trinitatis Norwich*, omitting the words *Ex fundatione E. 6.* It was adjudged in this Caſe, That the Foundation was good, and the re-grant of their poſſeſſions good, and that the King was Founder. And in this Caſe it was further Reſolved. 1. That Tranſlations made by King *Henry* the Eighth of Priors and Covent, into Dean and Chapters, were adjudged good in Parliament by the Statute of 33 H. 8. 2. That admit that the Tranſlation was imperfect, yet it was made good by the Statute of 35 Eliz. 3. That by the ſurrender made by King E. 6. the Corporation of Dean and Chapter was not gon; for although that they had departed with their poſſeſſion, yet it was no vacation, becauſe for neceſſity the Corporation did remain as well to aſſiſt the Biſhop in his function, as to give their aſſent to Eſtates which he ſhould make of the Temporalties; and it was ſaid, That as long as the Biſhoprick did remain, they did remain, although they had not any poſſeſſions. And it was ſaid, That if a Prebendary hath a Manner, and the Manner be recovered by Eigne Title, yet his Corporation remains, for he hath *Stallum in Choro, et vocem in Capitulo.* *Cook* 3. Part, 74. The Dean and Chapter of *Norwich's* Caſe.

2. Note, It is put for a Principle in Law, That all Lands in Fee-ſimple may be charged with a Rent, or otherwiſe, when all thoſe who have Intereſt join in a Grant of it, for that the Grant is made *Concurrentibus his qui in lege requiruntur*: And therefore if the Patron and Ordinary do charge the Glebe in the time of Vacation, the ſame ſhall bind, becauſe that no other hath Intereſt therein during the Vacation, but they only. *Cook* 1. Part, 144. in *Mayowes* Caſe.

3. A Prebend made a Leaſe for ſeventy years. The Dean and Chapter reciting the Leaſe, did Confirm *Dimiſſionem prædict. in forma prædict. fact. pro termino* 51 years. It was adjudged in that Caſe, That the Confirmation did not extend to the whole Term of ſeventy years. But if they had confirmed the Land for one and fifty years, it had bin good, and no repugnancy had bin in the Confirmation. In that Caſe, a difference was taken between a bare aſſent, and an aſſent accompanied with an Intereſt. That the Patron, and Dean and Chapter have an aſſent accompanied with an Intereſt in the Prebendary; and therefore they may confirm a Grant in part, or in all, or upon a Condition. And in that Caſe it was ſaid, That a Releaſe to the Patron in time of Vacation of an Annuity, is good, and the Patron and Ordinary in time of Vacation, may charge the Glebe, becauſe they have an Intereſt in it; and the right is in the Patron and Ordinary. *Cook* 5. Part, 81. *Fords* Caſe.

4. Leſſee for years of a Rectory, to which the Advowſon of the Vicarage was appendant, Granted the next Avoydance of the Vicarage to J. S. if it happened that it became void during the Term in *eſſe*. The Leſſee dyed Inteſtate, his Adminiſtrator ſurrendred the Term of the Rectory to the Leſſor, and afterwards the Church of the Vicarage became void. In this Caſe, it was adjudged, That notwithſtanding the ſurrender, that J. S. ſhould have the next Avoydance. 1. Becauſe the limitation is no more but what the Law ſayes. For if Tenant for years granteth the next Avoydance, the Law implyes this Limitation if the Church be void during the Term. 2. Becauſe the Grantor ſhall not derogate from his own Grant, which ſhall be taken ſtrongeſt againſt him, and

moſt beneficial for the Grantee. 3. Reſolved, That the Term for the benefit of the Grantee, hath to ſome reſpect continuance. As if Leſſee for years Grant a Rent-charge, and afterwards ſurrendreth for the benefit of the Grantee, the Term hath continuance; although in truth it be determinted. *Cook* 8. Part, 145. in *Davenport's* Caſe.

5. A Church may become void by ſeverall means and Laws, *ſcil.* by the Eccleſiaſtical Law; and by Poſitive Law. And in ſome Caſes by the Act of the Incumbent, and in ſome Caſes by ſentence in the Eccleſiaſtical Court, grounded upon the Act or defect of the party. Death natural doth make a preſent Avoydance *de facto*. Death Civil, *de jure, non de facto*. And therefore it is ſaid in *Cook* 1. Part, *Inſtitutes* 132. That if a man had entred into Religion, and bin profeſſed (*renunciavit omnibus quæ ſecum ſunt*), and he was Civilly dead in Law, ſo as his Profeſſion were in ſome houſe of Religion within the Realm, for of Forreign Profeſſions, the Judges were not to take notice. And by ſuch Profeſſion, his Benefices had bin void. Yet it is ſaid, That the King being *perſona Mixta*, and having the Juriſdiction aſwell Eccleſiaſticall as Civil in him, might have diſpenſed with ſuch a perſon, to have holden his Benefices, notwithſtanding his Profeſſion; and the Patron by the Common Law had no remedy for ſuch Avoydance, becauſe by the Profeſſion, the Church was not ſaid to be abſolutely void *de facto*, but *de jure* only, See 11 H. 4. 37. and 213. But in that Caſe it was ſaid, If the Profeſſion had bin certified by the Ordinary, and no Diſpenſation or Licenſe had bin obtained from the King. This Civil death by the Eccleſiaſtical Law had bin an Avoydance of the Church, of which the Patron might have taken advantage, and Preſented another to be Inveſted into the Benefice. *Cook* 1. Part, *Inſtitutes* 132.

6. By a Canon made in the Councel of *Lateran*, holden 1215. under *Innocent* the third, It is Ordeyned *Quod Quicunque receperit aliquod Beneficium, cum Cura animarum, ſi prius tale Beneficium obtinebit ſit eo jure ipſo privatus.* This Decree or Canon is general. And if a Parſon or Vicar that had one Benefice with Cure, had taken another without diſpenſation, the ſame had bin an Avoydance of the firſt Benefice, called Ceſſion by the ſaid Canon without any ſentence Declaratory to have made the Church void. See 24 E. 3. 30. and 24 E. 3. 26. acc. Yet by ſuch Ceſſion the Church was not ſo abſolutely void *de facto*, that Lapſe ſhould have encurred upon the Patron if he had not Preſented another Clerk to the ſame Church within ſix Moneths, unleſs notice had bin given to the Patron by the Ordinary of ſuch Ceſſion. See *Cook* 4. Part, 77. in *Hollands* Caſe. And ſee that the King might have diſpenſed with the ſaid Canon, and ſo did in many Caſes. See 29 E. 3. 44. the Prior of *Ongates* Caſe.

7. A. was Preſented to a Benefice, and after to another; and then purchaſed a Diſpenſation, and was qualified; and afterwards accepted of the Arch-Deaconry of *Glouceſter*. In this Caſe it was Reſolved, That by the acceptance of a ſecond Benefice, the firſt Benefice was void by Ceſſion without any ſentence Declaratory. The ſecond point was, Whether the Acceptance of the Arch-deaconry was a Benefice with Cure of Souls within the Statute of 21 H. 8. cap. 13. Quære for this point was not Reſolved. Paſc. 31 Eliz. in C. B. *Hadohill* and *Savages* Caſe. *Lon.* 316.

8. Deprivation by a Sentence Declaratory in the Eccleſiaſticall Court, is an Avoydance of a Church or Benefice. The cauſes of Deprivation being ſuch as are allowable by the Common Law; as *Conſcientia criminis, Debilitas Corporis, Defectus Scientiæ, Malitia plebis, Grave ſcandalum, Irregularitas perſonæ*, Hereſy, Schiſme, Buſtardy. See *Doddridge* in his Book of Advowſons, acc.

9. If the Patron Preſenteth a meer Lay man within the age of 23 years, to a Church, or to a Benefice with Cure, and he is Admitted, Inſtituted and Inducted: And afterwards is ſued to be deprived in the Spiritual Court for Incapacity by a ſtranger; and afterwards a *Quare Impedit* be brought againſt the Ordinary and Incumbent, and Judgment be given againſt the Defendant, Incumbent, for his default at the Grand Diſtreſſe. If afterwards the Incumbent by a ſentence pronounced in the Spiritual Court, be deprived for his Incapacity at the ſtrangers ſuit. In that Caſe it was holden, That the Deprivation is good, although he were removed before upon the Judgment given in the *Quare Impedit*. But in that Caſe, it was holden, That if the Incumbent who was deprived, doth bring a Writ of Diſceit upon the Judgment given againſt him in the *Quare Impedit* for default, for that he was not ſummoned. In that Caſe, it was holden, That he ſhall have Judgment, and the deprivation in the Spiritual Court ſhall be no impediment unto him, for that in the *Quare Impedit* the Incumbency was not in Queſtion, but the Diſturbance only; and it ſhall be ſaid to be no Avoydance of the Church, but he ſhall be reſtored to what he loſt. See 19 Eliz. *Dyer*, 353. *Bowers* Caſe.

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10. An Incumbent was Admitted, Inſtituted, and Inducted into a Benefice with Cure in the time of King E. 6. And afterwards in the time of Queen *Mary*, he was deprived, becauſe he was a married man, and a favourer of the Religion then on foot in the time of King *Edward* the ſixth, and the Church being void by his Deprivation, another man was Inſtituted and Inducted into the ſame Church in the time of Queen *Mary*; And afterwards in the time of Queen *Elizabeth*, the laſt Clerk was deprived, and the firſt ſentence of Deprivation in the time of Queen *Mary* declared and adjudged to be void. In that Caſe it was adjudged, That the Deprivation of the firſt Incumbent was good, and ſtood good untill the ſame was afterwards declared to be void, and untill then the Clerk Preſented by Queen *Mary*, was lawfull Incumbent. But when the Sentence of Repeal came, and made void the firſt Deprivation; Then was the firſt Incumbent in again by force of his firſt Preſentation, and he needed no new Inſtitution and Induction, for that now upon the matter there was never a full Avoydance of the Church. See *Cook* 4. Part, 101. *Winſors* Caſe.

See more of Vacation and Avoydance, in the Titles of Advowſon, Preſentations, Pluralities, and other Titles.

Valore Maritagii, Value, *and* Valuation.

1. THe Writ *de Valore Maritagii* lyeth, where the Tenant who holdeth of the Lord by Knights Service dyeth, his Heir within age, and in the Cuſtody of the Lord; and the Lord tendreth him a convenient Marriage, which the Heir refuſeth, but entreth upon the Lands, then the Lord ſhall have this Writ, and ſhall thereby recover the value againſt the marriage, and alſo to recover the Land. And in Caſe the Lord dyeth, then his Executors ſhall maintain this Writ againſt the Heir. See for that, *Kelloway* 133. 134. It hath bin a Queſtion, Whether the value be due to the Lord without Tender. See 40 E. 3. 6. 31 E. 3. br. *Aſſiſe*, 331. and 21 E. 4.

2. A Writ of Intruſion was brought *Mariagio non ſatisfacto* by A. againſt B. The Writ and the Count did ſuppoſe a tender of the Marriage to the Defendant, when he was within age, without diſparagement; and that he *Mariagium illud renuens ſe intruſit Mariagio ſuo non ſatisfacto*: The Defendant traverſed the Tender, and upon that they were at Iſſue. It was the Opinion of the Court, That the Traverſe was good, becauſe the Plaintiff had expreſſly ſuppoſed by his Writ and Count a Tender: And ſee, that Iſſue joyned, was upon the Refuſal; 40 E. 3. and 21 E. 4. 51. It was decreed by the whole Court, that the Tender in this Action is Traverſable, notwithſtanding the words of the Statute of *Merton*. Mich. 8 Eliz. *Dyer* 255. *Penery's* Caſe.

3. See, That it was reſolved, and adjudged, That Guardian in Knights ſervice, ſhall have the ſingle value without Tender; and that by the Common-Law, it was in the Election of the Lord, to have the Marriage of the Heir, or to permit the Heir to Marry himſelf where he pleaſeth, and to have recompence, viz. the value of it. And alſo reſolved, That at the Common-Law, not only a Writ *de valore Maritagii* lay, but alſo the Writ, *Quare ſe intruſit, Maritagio, non ſatisfacto*: And it was ſaid, That if the Heir within age, had been Raviſhed, that the Guardian ſhould have recovered for Treſpaſs, the value of the Marriage; which is a proof, that the value of the Marriage did appertain to the Lord without Tender. *Cook* 5 Part, 117. *Palmers* Caſe. See *Cook* 7 Part, 70 *Druses* Caſe. And ſee now, that the ſaid doubt in Mich. 8 Eliz. *Dyer* 255. is now Reſolved.

4. Two Co-partners were, one within age, and in Ward; the Lord purchaſed the part of her who was of full age, and afterwards he tendred a Marriage to her that was within age; who refuſed it: Afterwards the Lord and the Infant by their Deed, made partition, and afterwards the Infant did diſagree. It was the Opinion of the Juſtices in that Caſe, That the Lord ſhould loſe the value of the Marriage, becauſe the ſame was due to the Lord without tender. See 31. Aſſ. 26. acc.

5. When Tenant in Knight ſervice dyeth, his Heir within age, preſently the value of his Marriage is veſted in the Lord, as a Chattel; and therefore although that he be made a Knight, he then, in the Judgment of Law, being of full age, the Lord

ſhall have the value of the Marriage: But yet if he ſhall be in Ward as to his Land, by the Statute of *Merton*; and if the heir ſhould be diſcharged of the value of the Marriage, by the making of him a Knight, many inconveniences would follow, both to the King and Subjects; for then none would give any thing, or little for the Kings Wards, and it would be prejudicial to the Subjects; for by this means they ſhould be deprived of their Ward-ſhips by making of them Knights; eſpecially when one might be made a Knight, ſo ſoon as he is baptized. *Cook* 6 Part, 44, 45. Sir *Drue Drurie's* Caſe.

6. Tenant in *Capite* dyed, his Heir within age, the Heir at his full age tendred his Livery, and was admitted to it, and within the time given to him for the proſecution of his Livery, he Bargained, and ſold part of the Lands to another in Fee, and within that time alſo dyed; In this Caſe it was Reſolved, That at the Common Law, the King ſhould have Primer Seiſin after the death of ſuch, as held of him in chief, of all the Lands and Tenements, of what age ſoever the Heir was; and ſhould take the Iſſues and Profits, until he hath taken homage of ſuch Heir; and when he was of full age, he ſhall pay the full whole years value or Profits; but when the Heir was in Ward, and within age, there upon his Livery ſued, he ſhould pay but the half years Profit of the Land for a Primer Seiſin. 2. It was Reſolved, That when the Heir at his full age tendred his Livery, that was all which the Heir could do; then when he dyed within the time given him, for the proſecution of his Livery; ſo as the ſuing of the ſame was become impoſſible by the act of God, the Intereſt which the King had, is determined by the death of the Heir. So if the Heir of full age, at the time of the death of his Anceſtor dyeth, without any tender of Livery, the Livery is gone: But yet in ſuch Caſe, the King ſhall have all the Mean Rates, Profits, to the value of the Lands, until the death, for default of Tender. *Cook* 8 Part, 172. *Hall's* Caſe.

7. Note, It appeareth by the Statute of *Magna Charta, Cap.* 2. That alwayes the fourth part of the Revenue, requiſite to the dignity of the Perſon, was to be paid to the King for a Relief: The Relief of a Knight, was five times the value of his Revenue, being 20l. *per Annum.* Of a Baron, 100 Marks: Which was the fourth part of the value of the Revenue of a Baron. And of an Earl, ten times the value of his Revenue, being 400l. *per Ann.* And the Relief of a Duke, now ſince the Statute (for there were no Dukes at the time of the making of the ſaid Statute) is 200l., the value of his Revenue being accounted to be 800l. *per Annum.* *Cook* 7 Part, 34. in *Neuils* Caſe. *Cook* 9 Part. 124. *Anthony Law's* Caſe. &c.

8. Note, It is enacted by the Statute of 1 *Hen.* 4. *Cap.* 6. That thoſe, who demand of the King Lands, Tenements, Offices, &c. that they make expreſs mention of the value of them. But it was holden by *Priſot*, Juſtice, That if the Office be of a certain value, there it behoveth that he make mention of the value; but if it be of a Caſual thing, there it needeth not; as if the King grant to me a Market, I need not to ſet the value thereof, becauſe it is not yearly certain: So that when the King in his Grants requireth, that the value be mentioned, it is to be intended of a thing, which is of a certain yearly value: But if a man hath a Hundred, with the goods of Felons, Outlawes, Fines, Amercements, Return of Writs, and ſuch like Caſual hereditaments within the Hundred, and ſuch Hundred, with the ſaid Caſual hereditaments, have been accuſtomably Let to Farm for a yearly Rent, then the ſame may be demiſed within the purview of the Acts of 32, and 34 *Hen.* 8. *Cook* 3 Part, 33. in *Butler* and *Bakers* Caſe.

9. A man ſeized of three Acres of Land, of equal value; the one holden in *Capite*, deviſed the Acre holden in *Capite*, and one of the other Acres, to his younger ſon in tail; and afterwards purchaſed other Lands holden in Socage. It was Reſolved in that Caſe, That the Reverſion of the Acres holden in *Capite* upon the Eſtate tail, did reſtrain the Deviſe of the whole Socage-Land, now purchaſed by the words of the Statute of 34 *Hen.* 8. And in that Caſe it was Reſolved, That a Reverſion expectant upon an Eſtate tail, ſeck and fruitleſs, was an hereditament with the ſaid Statute; becauſe, that although the Reverſion in preſent was not of any value, yet the Land it ſelf is of an annual value, and therefore is deviſeable; and hereditaments, which of their nature are not valuable, within the ſaid Statute; and if they be holden in *Capite*, ſhall reſtrain the Deviſee of Manors, &c. and ſhall make them void for a third Part. *Cook* 10. Part, 82. *Leonard Lewes* Caſe. See there, 34 Eliz. in the Court of Wards. *Bedingfields* Caſe. adjudge acc.

10. A Copyholder in Fee ſurrendred his Lands to the uſe of J. S. and his Heirs upon Condition, That if he paid to the Mortgagee 250 l. *Legalis monete Angliæ ad domum manſionalem* of the Mortgagee, that the ſurrender ſhould be void. At the day and place he tendred the money to the Mortgagee, but part of it was in *Spaniſh* money, which the Mortgagee refuſed to accept of. It was Reſolved in this Caſe, amongſt other things, That the tender in *Spaniſh* money being lawfull by the

King

Kings Proclamation, was good: And that the King by his Prerogative might make the Coyn of any Forrign King current within his Realm by his Proclamation. *Cook* 5. Part, 114. *Wades* Case.

11. Queen Eliz. *Anno* 43. of her Reign, made mint moneyes in the Tower of *London* in *England*, and sent the same into *Ireland*, with a Proclamation, that the said money should be current in that Realm, and should be accepted and received by all her Subjects using Trade and Merchandizing within that Realm, with punishment for contempt upon them who refused the same; and made by the same Proclamation, all Coyns current in that Realm of no effect. A Merchant of *Ireland* was bound in an Obligation in 200 l. to J. S. of *London*, upon Condition to pay to J. S. 100 l. sterling, current and lawful money of *England* in the Church of Dublin in *Ireland*. The day of payment fell after the Proclamation; at which day the Merchant tendred the 100 l. in mixt moneyes. The Question was, If the tender in mixt money were good enough after the Proclamation to save the forfeiture of the Bond. It was adjudged, That the Tender made in mixt money, was good. In that Case, concerning Monies, and the value of them, These points were Resolved. 1. That a standard of money was necessary in every Commonwealth, because there could not be any equality in contracts without money; and for the facility of commerce, money was invented. For it is said *Moneta est justum medium et mensura rerum Commutabilium*, and every thing may be valued by money. 2. Resolved, That it belongs only to the King of *England* to Coyn money within his Dominions, and none can do it without a special License, or commandment; and if any one doth it of his own head, it is High Treason: And to the making of money compleat and current, it was said that there were six incidents, 1. Weight. 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the Prince. 6. Proclamation. And there it was agreed, That the King by his Proclamation might make any Coyn lawful money of *England*, and then *à fortiori*, he may establish a standard of monies within his own Dominions. But it was shewed out of *Lambert's* peramulation of *Kent*, 191. That this Prerogative and Privilege hath bin communicated to Subjects within *England*, as to the Arch-bishop of *Canterbury*: And the Abbot of St. *Edmondsburyes* Case 21 E. 3. 6. was put, *scil.* Si *Talents*, *Besanuits*, or other Coyn be of uncertain value, the King himself hath power to put a certain value upon it. 3. It was Resolved, That the King might change his money in substance, and in impression, and in enhaunsing or abasing of it, and of the value of it, or might utterly decry it, or make it of no effect, as he did in the Case at bar at his pleasure, and that by his Prerogative. See 9 E. 4. 49. by *Danby*, 6 Ed. 6. *Dyer*, 82. and such changes have bin made by the sole Authority of the King in all ages without Parliament. See Sir *John Davy's* Reports, the Case of Mint Money. *Princeps potest mutare Monetam ratione publicæ utilitatis*, viz. *tempore belli vel aliàs si utile sit futurum populo. Ita etiam ut ex Cœlo fieri potest*: *Budelius de re Numaria*, *Lib.* 1. *cap.* 5. *Covarruvias Lib. de Collectione veterum numismatum*, *cap. de Mutatione Monetæ*, &c.

12. Husband and Wife seised of the moyety of the Mannor of J. to them, and the Heirs of the Husband, the Husband levyes a Fine to J. S. who suffers a Recovery in which the Husband only is vouched, which Recovery was to the use of the Cousuee and his Heirs; the Cousuee made a Feoffment to A. who enfeoffed B. and C. in Fee, and after Exchange is made between A. B. and C. and is executed, and the exchange was of the moyety of the Mannor of J. for the 4th part of the Mannor of D. B. and C. exchangers of the 4th part enter, and thereof enfeoff E. the Husband dyeth, the Wife entreth into the Mannor of J. A. re-entreth into the fourth part of the Mannor of D. In this Case, amongst other things, it was Resolved, That the word Exchange implyed a Warranty, but none should vouch by force of that Warranty, but the Exchangers or their Heirs; and no Land shall be recovered in value, but only the Land put in exchange. And there note, it was said, That if Land be evicted, he who loseth the Land shall recover in value, according to the value which he hath lost; and in an Exchange, when the whole Estate is evicted, the whole exchange is defeated. *Cook* 4. Part, *Bullards* Case.

Vari-

Variance:

1. *Variance in Deeds, Grants, Leaſes: And what ſhall be ſuch a Variance in in them, as ſhall make the Deeds, Goods, Grants, &c. void, what not.*

FOr a Prohibition to the Spiritual Court for Tythe-Hay. The Plaintiff made ſurmiſe, That there was an Agreement betwixt the Parties, that for the yearly ſum of 7 l. paid by the Plaintiff to the Defendant, that the Defendant promiſed to the Plaintiff, that he ſhould have the Tythes of the Lands, during his life; and upon an Attachment upon a Prohibition, the Plaintiff declared, That for the ſaid Annual ſumm, the Defendant Leaſed to the Plaintiff the Tythes for his life; The Defendant demurred upon the Declaration, for the Variance between the Surmiſe and the Declaration; for in the Surmiſe, a Promiſe is ſuppoſed, for which the Plaintiff might have his Action upon the Caſe; and in the Declaration a Leaſe. It was the Opinion of the Court in this Caſe, That the Surmiſe is as a Writ, for which if Variance be between the ſame and Declaration, all is naught. Trin. 30 Eliz. in B. R. *Gomerſall* and *Biſhops* Caſe. *Leon.* 128.

2. In an *Ejectione firmæ*, the Caſe was: King *Henry* the 7th. erected, and founded an Hoſpital, by the name of the Maſter and Chaplains of the Hoſpitall of King *Henry* the 7th. *de le Savoy*; and afterwards Queen *Mary* made a Leaſe of Lands, parcell of the Hoſpital, by the name of Maſter of the Hoſpitall, *Henrici nuper Regis Angliæ vocat. le Savoy*; and if this was a good Leaſe, or not, was the Queſtion. And in the Court of Exchequer, upon the Arguments of two of the Barons there, viz. Clerk. and Gent. it was adjudged, that it was a good Leaſe; upon which Judgment, a Writ of Error was brought into the Exchequer-Chamber: It was objected, That here was Variance in Subſtance, from the name given in the Foundation, and the name reported in the Leaſe, for that they are not *Idem Senſus*; for the word, *De*, as *De Savoy*, aſſignes a place; but the word *Vocat.* *locum non denotat*, but only the very name: alſo the word, *De*, ſuppoſeth a place before the Foundation, as a place upon which the Hoſpital was erected, called *Le Savoy*, before the erection of it; but the words, *Vocat. le Savoy*, ſuppoſeth the name, only *Savoy* was impoſed upon the Foundation, and *Le*, is matter of certainty and verity, but, *Vocat*, matter of Reputation onely: And in maintainance of that ſide, this Caſe was put by the Lord *Bowleigh*, Lord *Treaſr.* The Guild of *Boſton* in *Lincolnſhire*, was incorporated by the name of the Guild of Saint *Nicholas*, and our Lady the Virgin *Mary*, and he made a Leaſe for years, by the name of the Guild of our Lady the Virgin, and St. *Nicholas*; *Religioſæ quodam motus, ut nomen Virginis Mariæ in Charta dimiſſionis pro poterunt nomini*, St. *Nicholas*: And it was adjudged, a void Leaſe, for the Variance aforeſaid. On the other ſide, it was ſaid, That there was no Variance, for that there is a difference, where the word in the name of the Corporation which precedes *De*, is all one, and of the ſame nature, with the word which follows *De*; and where, on the contrary, in this Caſe, the word which precedes *De*, is Hoſpital, and the words which follow *De*, *Le Savoy*, they are all one and the ſame thing, ſo as the Hoſpital and Savoy, are all one and the ſame, and therefore may be called *Le Savoy*; and this Hoſpital was erected upon the Manor of Savoy, and therefore now commonly called, *Savoy*, without any addition. This Caſe was very oftentimes argued at large, and much ſtood upon on both ſides; See the Arguments at large: But afterwards the matter was compounded by mediation of friends. M. 31 Eliz. in the Exchequer-Chamber. *Marriot*, and *Laſcot's* Caſe. *Leon.* 159, to 166.

3. The Caſe was, The Hoſpital of *Donington*, in the County of *Berks*, was founded by the name of *Miniſter Dei pauperis domus de Donington*; and they made a Leaſe of parcell of the Lands of the Hoſpital in Engliſh, by theſe words; viz: Maiſter of the Alms-houſe of God of *Donington*, *juxta Newbery*: And, If this were a good Leaſe or not for the Variance of the name, in the Foundation, and in the Leaſe, was the Queſtion. It was the better Opinion of the Juſtices in this Caſe, That the Leaſe was good, for that here, if he be *Miniſter pauperis Domus Dei de Donington*, he is *Miniſter Dei*; and the addition of the word *Dei*, after *Domus*, notwithſtanding the ſeeming Variance, ſhall do no hurt: for if they do agree in common underſtanding, it ſhall be good. Hill. 43 Eliz. in B. R. in *Sherborn* and *Lewis's* Caſe. *Goldesbr.* 122, 123. And ſee 12 Jac. in C. B. Rott. 2187. in *Petts* and *Jones's* Caſe. Where upon a Leaſe made of the ſame Hoſpital of

d Damages; it was adjudged accordingly.

4. It was found by Inqueſt, upon an *Elegit*, That H. F, againſt whom the Elegit was, was poſſeſſed of a Leaſe for 100 years, to begin at the Feaſt of Saint Mich. 3. and 4. *Ma. Cujus quidem H.F. & Jam, intereſſe & terminum in tenement.* poſſeſſ. the Jurors appraiſed to 80l., and that the Sheriff ſold the Leaſe as a Chattel for 80l.; the Queſtion was, if the ſale by the Sheriff was good. It was ſaid, That although the Leaſe was miſrecited, and that H. F. had not any ſuch Leaſe when the Jury comes to praiſe it, and the Sheriff ſells his Eſtate in the Land, they do not refer that to the Record before, but generally that they ſell all the Eſtate, Intereſt, and Terme of H. F. But upon conſideration had of the Record, it was ſaid by *Popham*, Chief Juſtice, That the ſale of the Terme by an Elegit, was void; and the difference between an Elegit, and a *Fieri facias*, was to be conſidered further. Elegit is, That *per Inquiſitionem & ſacrament.* 12 *hominum per rationabile pretium & extent.* the Sheriff apprize the Goods, and extend the Lands ſo, as without enquiry the the Sheriff may not ſell. Then if the Sheriff enquire of one Terme, and ſells another, as this Caſe is, the Terme ſole, was never found by Inquiſition, and for that, the ſale is not good. But if it had been found by Inquiſition generally, that he is poſſeſſed of ſuch Lands for diverſe years, *ad tunc* now, which they have apprized to ſuch a ſum, this had been good; becauſe they have not any means to come to the knowledge of the certainty of the Terme: But when by enquiry, a Terme is particularly found, they may not vary from that, and ſell another: And ſo it was adjudged Hill. 43 Eliz. in B. R. *Palmer* and *Humphrey's* Caſe. *Goldesbr.* 173.

5. A. ſeized of Lands in Fee, having Iſſue, two Daughters by B. C. D, and E. B, had Iſſue; R.A. deviſed the Lands to his Wife for life, and after her deceaſe, the ſame to be equally divided amongſt his Daughters, or their Heirs. A. dyed, the Wife dyed; the Defendant in the Right of C. D. and E. entred: F. the Daughter of B. entred into the Lands, and Leaſed them to the Plaintiff; whether F, who was the Daughter of B. one of the Sifters, ſhould have the fourth part of the Lands, was the Queſtion. It was the Opinion of the Court, That ſhe ſhould have the fourth part of the Lands; for in this Caſe the word (Heirs) was not added of neceſſity, for the Heir of any of the Sifters to take by purchaſe, but only to make the Heir of B. to take part of the Lands: And it was the Opinion of the Court, That being in the diſjunctive, it was the ſtronger for the Plaintiff; for they ſaid, If it were (And) then it would bar from the firſt, and give the three Sifters the Fee; but being in the Diſjunctive (Or), there is more colour that ſhe ſhould take the fourth part, by the deviſe Mich. 1 *Car.* in B. R. *Taylor*, and *Hodskin's* Caſe. *Goldesbr.* 363.

6. The Caſe concerning *Trinity-Colledge* in *Cambridge*, was this: King *Hen.* 8. incorporated the Schollars of *Trinity Colledge* in *Cambridge*, by the name of Mr. Fellows, and Schollars, *Collegij ſanctæ & Individuæ Trinitatis*, in the Town and Univerſity of *Cambridge*: And in 6 Ed. 6. they made a Leaſe by the name of Maſter and Fellows of *Trinity-Colledge* in *Cambridge*, leaving out the Univerſity: If the Leaſe were good, was the Queſtion. It was argued, that the Leaſe was not good: It was ſaid, That to every Corporation, two things were incident; the Name, and the Place; and if any of them fail, and be not recited in the Leaſe, the Leaſe is not good; and the Corporation in this Caſe being founded upon two Places, and one Place being left out, the Leaſe is not good, but both Places ought to be inſerted. On the other ſide, it was ſaid, That that the Leaſe was good; and ſaid, That there is a certain Place in this Caſe, that is the Town of *Cambridge*; and it was denied, that it was founded upon two Places; for no more than a Material body may be but in one place, *Simul & ſemel*; no more may it be, of a body Corporate, which hath his reſemblance to a body Natural. But admit that a Corporation may be founded upon two Places, yet it was ſaid, That an Univerſity was not Local, but Perſonal: *Vid.* 48 *Hen.* 3. and 49 *Eliz.* 3. vouched in the Caſe at large; and the Caſe 26 Eliz. the Dean and Canons of *Windſor* made a Leaſe, by the name of Dean and Canons of *New Windſor*; and it was adjudged a good Leaſe, and not void for Variance. And the Lord *North's* Caſe was vouched, That *Chriſts-Church* in *Oxford* was incorporated by the name of Dean and Canons of *Chriſts-Church* in *Oxford*; and they made a Feoffment by the name of Dean and Canons of *Chriſts-Church*, in the Univerſity of *Oxf.* and the Feoffment was holden good, notwithſtanding the Variance. This Caſe being argued by the Juſtices, Mich. 7 Jac. the Court was divided in Opinion; for *Croke* and *Williams* Juſtices, held that the Leaſe was good: But *Fenner* and *Yelverton* held the contrary. And *Flemming* Juſtice ſaid, That he conceived the Leaſe was not good; but ſaid, this ſhould not be abſolutely his Opinion. *Williams*, Juſtice, brought in the Decree out of the Court of Wards, concerning the Caſe of *Trinity-Colledge*, 7 Eliz. which, ſee vouched in *Cook*. 2 Part, in *Porters* Caſe: But

to

o the Decree it was ſaid, That there was a diffe-rence between the Caſe of a Deviſe, and a Grant; and *Flemming* Chief Juſtice ſaid, That the Decree had not changed his Opinion; and thereupon he moved the Parties to an Agreement, and would not as then give Judgment. Paſch. 7 Jac. in B. R. *Trinity Colledge* Caſe. *Brown* 2 Part, 243, to 247.

7. Husband and Wife. The Wife by Indentures declares the uſes of a Fine, that it ſhall be onely to the uſe of her ſelf for life, and afterwards to the uſes of the Conuſees. Afterwards, the Husband by another Deed, without the aſſent of the Wife, declares the uſes, to the uſe of the Husband and Wife for the Terme of their lives, without impeachment of Waſte, and afterwards to the uſe of the Conuſees; and afterward the Fine is levyed by the Husband and Wife. It was in this Caſe adjudged, That both the Declarations in both Indentures were void, and that the ſaid Fine ſhould be to the uſe of the Wife and her Heirs, as if no other uſes had been declared. It was ſaid, That every one might diſpoſe of the uſe of the Land, according to his Eſtate which he hath in the Land, and therefore the Husband alone could not declare the uſe, nor the Wife alone; but they ought to joyn in the Declaration of the uſes. But it was reſolved, When the Huſband and Wife vary in the Declaration of the uſes, all the uſes limitted in the remainder are void, although they be limitted with both conſents. But it was holden, That if Joynt-tenants vary in Declaration of uſes upon a Fine, the ſame is yet good, becauſe the uſe ſhall be directed accoeding to their Eſtates. *Cook* 2 Part, *Beckwiths* Caſe.

8. Note: If it be agreed by Indenture, That a Fine ſhall be levyed of certain Lands, by a certain number of Acres to diverſe Perſons, and that they ſhall grant, and render the Land again in Fee-ſimple, which ſhall be to certain uſes: The Find is levyed of the Land, but there is ſome Variance in the number of Acres compriſed in the Fine, or the Fine is levyed to one of the Parties only, who grants, and renders the Land, ſo as there is Variance between the Covenant and Fine in Number and Perſons: It was nevertheleſs holden in this Caſe, That the Fine ſhall be averred to the uſes of the Indentures; for the Original Bargain and Agreement of the Parties was declared by writing, and although there be ſome little Variance found in Quantity, Perſons, Tyme, or other Circumſtances between the Fine and the Indentures, yet the Law will permit Averment to agree the Fine and the Indenture, notwithſtanding thoſe Circumſtances of Number, Perſons, Tyme, and the like; when the Party avers there was not any new Conſideration, or new Agreement betwixt the Parties, but that the Fine was levyed according to the Indentures, and to the uſes, & intents contained in the ſame: And therefore it was adjudged in *Taverners* Caſe, 42 Eliz. That if A. hath 10 Acres in D. and B. hath as many in the ſame Town; and A. levyeth a Fine to B. of 20 Acres, and B. grants and renders 20 Acres to A. in Fee, that in that Caſe, A. ſhall not have the 10 Acres of B, unleſs there was an eſpeciall Agreement betwixt them to that effect. *Vid. Cook* 2 Part, 76. in the Lord *Cromwells* Caſe. *Cook* 5 Part, 26. in the Earl of *Rutlands* Caſe, &c.

9. A. by Deed Indented, covenanteth with B, That B. ſhall recover the Mannor of D. againſt him, within a year next following; and that the Recovery and execution thereof, to be had within the ſaid year, ſhall be had to the uſe of the Recoverer in tail, &c. and afterwards the Recovery is had within the year, and Execution is ſued after the year: It was holden in this Caſe, Although that the Covenant was not purſued in ſtrictneſs of time, but varied from the Agreement of the Parties; yet the uſes ſhould be guided by the ſame Indentures, and ſo if the Recovery had been between the ſame Parties, if it had been after the year, if it were of the ſame Land; for that no Variance of time ſhall ſubvert the Original Agreement or the Parties, or their Contracts. *Cook* 1 Part, 99. in *Shelleys* Caſe.

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2. *Variance betwixt the Writ, Bill, Count, Pleadings, Judgment; where it ſhall make them void, or to be erronious: Where not:*

In Debt brought upon the Statute of 32 Hen. 8. *Cap.* 9. which was made againſt buying pretenced Titles, &c. the Statute was recited in the Declaration, to begin the 28th day of *April Anno* 32 C. 8. whereas in truth it did begin the 28th day of *April*, 32 Hen. 8. and was continued by Prorogations untill 32 Hen. 8. And it was adjudged in that Caſe, That for that Variance the Declaration was not good. *Vid. Pla. Com.* 79. *Partridges* Caſe.

2. Note: It was reſolved by the Court, That Variance betwixt the Original Writ, and the Count

Count, or Declaration, is not remedied by any of the Statutes of jeofails; and a difference was taken, 1. When the Original Writ, which in matter of Substance, varieth from the Count, or Declaration; that, that is not remedied by the Statute of 18 Eliz.: But when there is no Original Writ, the ſame is remedied by the expreſs words of the Statute. 2. It was reſolved, That when the Original Writ is once removed, (whether it be before it *nulle eſt Erratum* pleaded, or after), and a material Variance appeareth to the Court, between the Writ and the Count or Declaration; in that Caſe the Judgment ſhall be reverſed. Paſc. 3 Eliz. in B. R. *Cook* 5 Part, *Bſhop's* Caſe. 37.

3. In an Appeal of the death of a Brother, againſt I. S. of M. as Principal, and one F. as Acceſſary; whereas the name of the Principal, was F. S. the Acceſſary pleaded, *Nul tiel, in rerum natura*, as I. S. the day of the Writ brought, or at any time ſince. In that Caſe, it was the Opinion of the Juſtices, That although there was another I. S, if he were not in the ſame County, where the Tenement of M. is, or if he were dead before the Writ brought, that it was ſufficient; and it was there holden, That *in favorem vitæ*, a man might traverſe the Return of the Sheriff. Mich. 18 Eliz. *Dyer* 338.

4. In a Replevin: A man avowed for an Heriot upon a Leaſe, made by Deed to R. C. his Executors and Aſſignes, for 99 years: If R. C. I. B. and G. B, or any of them, ſhould ſo long live; rendring Rent, and rendring Paying, after the death of the ſaid R. C. his Executors and Aſſignes, his, or their beſt Beaſt for an Heriot, or 50 s., at the Election of the Leſſor, his Heirs and Aſſignes; and becauſe the ſaid R. C. aſſigned this Leaſe to the Plaintiff, and dyed; for non-payment of the Heriot, after the death of the ſaid R. he diſtrained and avowed. Now in the Deed the clauſe for the Heriot was, Rendring, and paying to the Leſſor, his Heirs, and Aſſignes, after the death of the ſaid R. C. I. B. and G. B; and ſome of them, his or their beſt Beaſt in the name of a Heriot; or 50 s. in money: For this Variance, the Plaintiff demurred, and Judgment was given for the Plaintiff, and Error was aſſigned in the Point of Law; for it was ſaid, that this was no Variance; for the Leaſe being to him, his Executors, and Aſſignes, the Reſervation of the Heriot in conſtruction of Law, is the Reſervation of him, his Executors, and Aſſignes; viz: after the death of him, his Executors, or Aſſignes, his, or their beſt Beaſt: And it cannot be conſtrued the Beaſt of B, and B, becauſe they are ſtrangers to the Deed. But it was the Opinion of the Court, That it was a manifeſt Variance; for although the Beaſt of B. and B, cannot be conſtrued to be meant thereby, yet the Reſervation is not, That it ſhall be paid, after the death of the Executors, or Aſſignes, but only after the death of R. C. B. and B, and ſo they are the Parties after whoſe death, the Heriot is to be paid, and not after the death of the Executors or Aſſignes. Paſc. 8 *Car.* in B. R. *Randall* and *Scarges* Caſe. *Cro.* 1 Part, 228, 229.

5. Error of a Judgment in C. B. in Trover and Converſion; where it was found, and Judgment for the Plaintiff. The Error aſſigned was, becauſe the Original Writ was *de quibuſdam bonis & cattellis*, and doth not ſhew any at all in the Writ. But that was holden to be no Error, but another Error was aſſigned; for that the *Venire facias*, is awarded, *de vicineto Civitatis Covantriæ*, which ought not to be; for *Civitatis Covantriæ* being in the M. Court, is intended the County; and as a *Venire facias* ought not to be from a County, ſo it ought not to be from a City. The Court doubted of it: But afterwards upon view of Preſidents, That all *Venire facias's* are awarded *De vicineto Civitatis*, which is intended as well *De Civitate* it ſelf, as *De vicineto infra hanc diſtinctam Civitatis*. It was Reſolved by the Court, that it was good enough; and the Judgment was affirmed. Mich. 10 Jac. in B. R. *Cliſon* and *Proctors* Caſe. *Cro.* 2 Part, 307.

6. Error of a Judgment in C. B. The Error aſſigned, was, Becauſe the Original in the Common-Pleas was, That E. the Plaintiff was ſeized in Fee, of a Meſſuage, and 60 Acres of Land, 60 Acres of Meadow, 80 Acres of Paſture in H; and that he and his Anceſtors had Common Appurtenances in 200 Acres of Waſte, and that the Defendant had incloſed three Acres thereof, and diſturbed him of his Common, to his damage of 40 l., and the Declaration ſuppoſeth to his damage of 100 l., ſo as there is Variance betwixt the Original and the Declaration, And there it was ſaid, That the Plaintiff ought not to recover, but be barred; for, otherwiſe the King ſhould loſe his Fine; and it is not a Tryal, without an Original, but an ill Original. It was reſolved by the Court, That although it had been a good Exception in C. B. before the Plea pleaded for the Variance, yet now being after Verdict upon *Not guilty* pleaded, the Jury finding but 12 damages, it is well enough, and not aſſignable for Error. But if the Verdict had found more damages, than was comprized in the Writ, and leſs than is in the Declaration, yet it had been ill, and the Judgment Erroneous, for that there is not any Writ to warrant it: And the Court held it, now ſince the Statute of 18 Eliz. that the Variance not being in matter of Subſtance, or in point of

Judgment, that it was well enough. Mich. 18 Jac. in B. R. *Eardly* and *Tarnoths* Case. *Cro.* 2 Part, 629. See Mich. 8 Jac. in B. R. *Hobbins* and *Kimbles* Case. *Bulst.* 1 Part, 49. acc.

7. *Raphael Hunt*, in an inferior Court, after Verdict obtained a Judgment in Debt, upon a Contract for 20 Sheep; which being removed by Error, into the Kings-Bench, it was shewed; That there was no Declaration in the inferior Court, for the Declaration was thus: *Raphael Hunt* complains against H. F. of a Plea, that he render to him 20 l. which he owes him, and unjustly detains, and whereof the same Plaintiff, by M. his Attorney, &c. whereas the Defendant, &c. It was holden by the Court to be no Declaration, for want of the word *Dicit*, and the sense is imperfect: And although it was objected, that the Declaration is sufficient, if it be good to a common intent, and *Quer.* being writ short, it may be *Queritur*, and then it is, and whereof the same complains: Yet the Court held, that would not help it; for it is not certain to which the word *Item* should refer, whether to the Plaintiff, or Defendant; and of the two, it should rather refer to the Defendant, which is the next Antecedent; and the Court held it matter of Substance which is wanting, and the Judgment was reversed. Mich. 5 Jac. in B. R. *Field* and *Hunts* Case *Brownlow* 1 Part, 96.

8. Debt by an Executor: For that the Testator and the Defendant accounted together, and the Defendant was found 94 l. in Arrearage, which he had not paid; The Writ was recited in the Declaration, and the Declaration supposed the account to be *apud Exon.* upon *Non-debet*, it was found for the Plaintiff. In stay of Judgment, it was moved, That the Original was in the County of *Devon*, supposing the account to be there, and all the matter there; so the Writ lies not upon this Declaration. Upon Examination it appeared, that there was not any in *Exon.* it was therefore prayed for stay of Judgment: But notwithstanding, the Court held, that the Plaintiff should have Judgment; for this is not any Original for this Action in the County of *Exon.*; and so it shall be taken, as if there had been no Original, and to be within the purview of the Statute; and so it was said it was adjudged in B. R, where in Trespas of Battery, the Bill upon the File was in *London*, and supposed the fact to be at *London*, and the Declaration was in *Middlesex*. In that Case it was holden, That because it was no Bill for this Declaration, and within the Equity of the Statute, it was adjudged for the Plaintiff; although it was objected it varies from the Declaration, and doth not warrant it. Mich. 21 Jac. in C. B. *Reynell* and *Kilseys* Case. *Cro.* 2 Part, 674, 675. See *Hill.* 20 Jac. in B. R. *Calthrop* and *Culpeppers* Case. *Cro.* 2 Part, 654, acc.

9. Debt upon the Statute of 2 E. 6. for not setting forth of Tythes. The Plaintiff declared, That J. S. Parson of the Rectory of S. let him the Rectory for six years, if he lived so long, and continued Parson there. And that the Defendant being an Occupier of Lands within the Parish sowed with Wheat, reaped and carried away the same, the Tythes not set forth; and averred the life of J. S. and that he continued Parson. It was found by Verdict, That the Parson made the Lease for six years, if he so long lived, and that the words (If he continued Parson) were not within the Leafe. It was the Opinion of all the Justices, That the Variance betwixt the Lease and the Declaration, and the Leafe found, was not any prejudice, for it is all one in substance, and the addition in the Declaration (If he so long continue Parson) is no more then the Law *tacitè* implyes: Also the Lease is not the ground of the Action, but the taking away of the Tythes, and for remedy of the wrong, the Action is, and the allegation of the Leafe is but an Inducement to the Action. But if Debt had bin brought upon the Leafe for years, perhaps such variance would have bin material, because the Leafe is the ground of the Action. Mich. 11 Jac. in B. R. *Wheeler* and *Heydons* Case. *Cro.* 8. Part, 328.

10. In Covenant, the Plaintiff declared, That *William* K. the Defendant, and one A. K. enfeoffed him of certain Lands in W. reciting thereby, That one *Robert K.* by his Will in writing, devised those Lands to him in Fee, and Covenanted with the Plaintiff, That he and the said A. K. *haberent virtute predict. voluntatis plenam potestatem, bonum jus, &c.* to allien the said Lands to the Plaintiff. And for breach assigned, That *Robert K.* dyed seised of the Lands, and made not any Will; whereby the Lands discended to J. K. his Heir at Law, who entred and expelled the Plaintiff. The Defendant demurred, because the Declaration varies from the Indenture, because the Covenant is in this manner. And the said *William K.* and T. K. (whereas T. K. was not party to the Indenture, nor sealed the same) do Covenant for them and their Heirs, to, and with the Plaintiff, That they the said *William K.* and A. K. now have, his Heirs and Assigns by force and vertue of the said Will, do own full power, good right, and lawfull Authority to allien, &c. and for this Variance, it was said, The Declaration was not good, for the Covenant is void and insensible. But the Opinion of the Court was, That the Declaration was good, and the Addition of *Tho. K.* in the Covenant was idle, he being no party, and his words in the Covenant, his

Heirs

Heirs and Aſſigns by force, &c. do own, &c. being inſenſible, the party omitting them in the Declaration, and reciting the Covenant in that which was ſenſible, was good enough. It was adjudged for the Plaintiff. Trin. 11 Jac. in B. R. *Goodman* and *Knights* Caſe. *Cro.* 2. Part, 358, 359.

11. In an Action upon the Caſe for ſcandalous words, the Defendant denyed the ſpeaking of the words, and traverſed *abſque hoc*, that he ſpake the words as they are layed in the Declaration. The Jury upon a Special Verdict, found the words to be theſe, ſpoken by the Defendant, *ſcil. I think in my Conſcience, if Sir* John Sydenham *might have his will, he would kill all the true Subjects of* England, *and the King too; and he is a maintainer of Popiſhry.* The Jury do find the words in the Declaration, but they do further add unto them theſe words, which they likewiſe find, which he then alſo ſpake (*I think in my Conſcience*). It was objected, The words in the Declaration are abſolute in the affirmative, but the Jury have found words which are not abſolutely in the affirmative, *viz. I think in my Conſcience*; and if this be a Variance, was the Queſtion, ſo as the Plaintiff cannot have Judgment. The Court was of Opinion, That this was no material Variance; and the omitting of them in the Declaration being but Circumſtances; and the adding of the words by the Jury, is not ſuch a Variance as is material: For all is found by the Verdict which he did ſpeak, *et aliquid amplius*, which doth aggravate, and nothing alter the words before. Judgment was given for the Plaintiff. Mich. 14 Jac. in B. R. Sir *John Sydnham* and *Mayes* Caſe. *Bolſtr.* 3. Part, 260.

12. Error to reverſe a Judgment in C. B. in Treſpaſs and Ejectment. The Plaintiff declared upon the Imparlance Roll upon a Leaſe made 21 *Jan.* 10 Jac. *Habendum* 20 *December* in the ſame year, for four years. And upon the Iſſue Roll he declared upon a Leaſe made 30. *Jan.* 10 Jac. *Habendum à viceſimo Decembris* in the ſame year for four years. Upon Not Guilty, the Jury gave a Special Verdict for the Plaintiff upon the latter Leaſe, 30. Jan. And Judgment given for the Plaintiff. Error was brought. The Queſtion was, Whether theſe by intendment might be taken for one and the ſame Leaſe. It was the Opinion of the Juſtices, That the ſecond Leaſe doth vary from the firſt, and therefore cannot be intended to be the ſame Leaſe. And if upon the Imparlance, the Plaintiff doth declare in Debt, and upon the Plea Roll he declares in Treſpaſs, and hath Judgment, it is a materiall Variance in a Writ of Error to reverſe it. Trin. 14 Jac. in B. R. *Milward* and *Wath*'s Caſe. *Bolſtr.* 3. Part, 213.

13. In Covenant brought againſt Leſſee for years; the Plaintiff declared, That the Defendant had Covenanted, That he would not cut down more Timber growing upon the Lands demiſed then ſufficient for needfull and neceſſary Reparations of the houſes and buildings let to him. And aſſigned for breach, That he had cut down Timber to the value of 10 l. and had converted them to his proper uſe. A Verdict and Judgment being againſt the Defendant: He brought Error, and aſſigned there was Variance between the Covenant expreſſed in the Leaſe, and the Covenant in the Declaration; and ſo a Judgment was not given upon a breach of the Covenant expreſſed in the Leaſe, *viz.* That he ſhould not cut down more Timber then was neceſſary for Reparations; for by this breach the Plaintiff ſuppoſeth that the Defendant had Covenanted not to cut down any Timber to imploy to his own uſe, which is not the Covenant expreſſed in the Leaſe; and although the Defendant had cut down Timber, and converted it to his own uſe, this was not a breach of the Covenant expreſſed in the Indenture, except it be averred he cut down more then was neceſſary for Reparations; and ſuch was the Opinion of the Court, and the Judgment was reverſed. Hill. 21 Jac. in B. R. *Wingfield* and *Sherwood*'s Caſe. *Style* 5.

See more of Variance, in Lib. 1. *Title Amendments, Title, Abatement of Writ; and here, Title, Jeofails, and other Titles.*

Venditioni Exponas.

1. A. Being Defendant in Debt at the Suit of J. S. A *Fieri facias* iſſued to the Sheriff to levy the Debt for J. S. The Sheriff by force of the *Fieri facias* ſeiſed the goods, but did not return the Writ. Afterwards the Sheriff was diſcharged of his Office, and a new Sheriff made. The old Sheriff after his diſcharge, ſold the goods to the Defendant, againſt whom A. brought an Action of Trover and Converſion: It being found for the Plaintiff, It was moved in Arreſt of Judgment, That the Sale made by the old Sheriff after his diſcharge, was void, becauſe his Authority ceaſed with his Office. And in Caſe where the Sheriff hath ſeiſed the goods by Writ of Execution, and after is diſcharged, he ought to turn over the goods to the new Sheriff, as he doth the Priſoners; and by ſeizure of the goods, the property of the Owner is not altered, for the ſeizure is not the Execution, but the beginning of it, and the Sheriff after ſuch ſeizure ought to return the Writ executed *in tanto*, and cannot by Law deliver them to the Plaintiff. For as the Writ of Execution is Warranted by the Roll, ſo ought the diſcharge and executing of it appear by Record; and the Sheriff after the Seizure, although he continueth in his Office, cannot ſell the goods without a Writ *de Venditioni Exponas*; and that is not grantable untill it appears by the Retorn of the Sheriff, *quod remanent pro defectu Emptorum*. Hill. 2 Jac. in B. R. *Ayer* and *Aden's* Caſe. *Yelverton*, 44. See *Cook* 2. Part, 73. the ſame Caſe.

2. In a *Scire facias* to have Execution, the Sheriff retorned, That by vertue of a Writ of *Fieri Facias*, he took the goods in Execution *ad valentiam* 11 l. which remained in poſſeſſion for want of buyers, and that they were reſcued out of his poſſeſſion. *Mountague* and *Dodderidge* Juſtices were of Opinion, That the Plaintiff ſhould have Execution againſt the Sheriff, and that by this Retorn he had concluded himſelf, and was lyable to the value of 11 l. And they took a difference where the Sheriff by vertue of the Writ of *Venditioni Exponas* ſells the thing under the value, there he ſhall be diſcharged, but otherwiſe where he ſells the goods *Ex Officio*. *Crook* and *Haughton* Juſtices ſaid, That the Plaintiff ſhall not have a *Scire facias* againſt the Sheriff, but where he hath the money in his purſe, and that the Plaintiff muſt have a *Diſtringas* directed to the new Sheriff, or a *Venditioni Exponas*. The Court was divided in Opinion. *Quære idem.* Hill. 16 Jac. in B. R. *Slye's* Caſe. *Godbolt*, 276.

3. Judgment was given in Debt in the Common Pleas againſt the Defendant. Error brought, and the Judgment was affirmed, and thereupon a *Fieri facias* directed to the Sheriff, who levyed the money and dyed, the Writ not being retorned. Whereupon Debt was brought againſt his Executors. It was the Opinion of the Juſtices, That Debt would lye againſt the Sheriff where he ſells goods upon a *Fieri facias*, for that he in Law is now become Debtor, and the Defendant is diſcharged againſt the Plaintiff; and a difference was taken betwixt ſeiſure of goods only, and where the Sheriff ſeiſeth and ſelleth the goods, for till ſale, no debt will lye againſt him. Alſo it was agreed, That Debt will lye againſt his Executors, and a difference taken where the wrong is *ex malefitio*, for there it dyeth with the perſon, and where it is *ex contractu*; for there it doth not dye with the perſon. Alſo it was ſaid, That in this Caſe the Sheriff could not have waged his Law, for that the Debt is brought upon matter of Record. And it was ſaid, That it was reaſon to charge the Sheriff in this Caſe; and ſo by conſequent his Executor, becauſe that the Defendant is diſcharged, and may plead, That his goods were taken in Execution by the Sheriff in ſatisfaction of the ſame Debt, and the Executors may be charged, becauſe no wager of Law lyeth, becauſe the Debt is brought here upon matter of Record. And ſo it was ſaid it was adjudged in *Speke's* Caſe in C. B. Paſc. 15 Car. in B.R. *Parkinſon* and *Cakiſord's* Caſe. *Mariſh.* 13.

4. Note, It was holden by the whole Court, That if a Writ of *Fieri facias* iſſueth forth to the Sheriff to levy money in Execution, and the Sheriff levyeth the money, and delivers it to the party, and doth not retorn his Writ. In that Caſe, That the party may ſue forth a new Writ of Execution, or elſe he may have his Action againſt the Sheriff for the money; and the Sheriff in ſuch Caſe cannot plead, That he hath delivered over the money to the party, for it doth not appear that the ſame was delivered in Execution to the party, unleſs the Writ be retorned in Court. For the words of the Writ are *Ita quod habeas Denarios hic in Curia.* And if the Sheriff levy the Execution upon goods, and ſelleth the goods, and doth not retorn his Writ, he is chargeable to the party; for he ought not to ſell the goods but by Writ of *Venditioni Exponas*, if they remain in his hands, and that upon his retorn, that

that they remain in his hands for want of Buyers. Paſc. 3 Jac. in C. B. *Gages* Caſe adjudged.

Venire facias: Viſne, or *Venue.*

1. *Where good, where not. Where well awarded; and from what Place, Town, it muſt be; from what not: And where and in what Caſe* Venire facias de novo *ſhall be awarded; What not.*

1. ERror was brought to reverſe a Judgment. And the Error aſſigned was, For that the Suit was commenced, 35 Eliz. And the *Venire facias* to try the Iſſue bore date, 33 Eliz. It was ſaid, That a *Venire facias* which bears date 33 Eliz. cannot poſſibly be to try an Iſſue which is in 35 Eliz. which is two years after; and therefore here is no *Venire facias*, and ſo it is holpen by the Statute of 18 Eliz. after Verdict. But it was ſaid, That this was one *Yorks* Caſe, which was adjudged in this Court, That it was not helped by the ſaid Statute. Mich. 40 Eliz. in B. R. *Boyer* and *Jenkins* Caſe. *Goldesbr.* 118.

2. In a Replevin, they were at Iſſue upon a Preſcription for Common in N. appendant to Land in another, and the Venue was of N. only. And it was found for the Plaintiff, and he prayed his Judgment, for that the Tryal might be in the one place aſwell as in the other. But the Opinion of the Court was, That it ought to be from both places when the matter ariſeth in both; and if they had bin in ſeveral Counties, the Counties ought to have joyned. Then it was ſaid, That it was after Verdict. But the Court ſaid, That the Verdict did not amend the matter, if the Iſſue be miſ-Tryed, as it is in this Caſe. Mich. 29 Eliz. in C. B. *Knight's* Caſe. *Goldesbr.* 38.

3. *Aſſumpſit*, the Plaintiff declared, That in conſideration of 10 l. the Defendant aſſumed to make two lights into one. Upon *Non-Aſſumpſit*, they were at Iſſue: and the Record of the *Niſi Prius* was to make two Lights, and one where it ought to be into one. And upon that the Plaintiff was Non ſuit. It was moved, Whether he might have a new *Venire facias* upon the firſt Iſſue, inſomuch as the *Venire facias* did not iſſue forth upon the firſt Record. The Opinion of the Court was, That he might go to a new Tryall. But whether he ſhould have a *Venire facias de novo*, or that the old *Venire* ſhould ſerve, the Court doubted, for that the firſt Jury was ſworn. Mich. 40 Eliz. in C. B. *Shelt* and *Wrights* Caſe. *Goldesbr.* 136.

4. Debt upon the Statute of 2 E. 6. for Tythes. The Plaintiff declared, That one was ſeiſed of the Rectory of *Eveley, alias Kirkley*, in *Kingſton* upon *Hull* in his Demeſne as of Fee, and ſo ſeiſed ſuch a day and year at *Eveley, alias Kirkley*, demiſed to the Plaintiff the ſaid Rectory for years; by vertue whereof he hath bin, and yet is poſſeſſed, and the Defendant ſuch a day, and before and afterwards held and occupied 30 Acres of Land in S. in *Kingſton*, in a place called F. and that the Tythes did belong unto him. The Defendant pleaded, *Nil debet per patriam*. After Verdict in Arreſt of Judgment, it was moved, That the Iſſue was miſtryed, becauſe the *Venire facias* was of *Eveley alias Kirkley*, whereas it ſhould be of S. where the Tythes grew; and ſuch was the Opinion of the Court. Paſc. 44 Eliz. in C. B. *Cooper* and *Batons* Caſe. *Brownlow* 1. Part, 76.

5. In a Replevin for taking of Cattel at A. in a place called R. the Defendant avowed Damage feaſants. The Plaintiff in bar ſaid, That he was ſeiſed of a Meſſuage, &c. in C. in the Pariſh of A. and preſcribed for Common. After Tryall, it was moved in Arreſt of Judgment, That the *Venire facias* was ill awarded, becauſe it was of A. only: and ſuch was the Opinion of the Court. And in that Caſe it was ſaid, That at C. or in C. implyed a Village, and therefore the *Venire facias* ought to have bin of C. and A. to which the Preignotories agreed. Trin. 9 Jac. in C. B. *Francis* and *Forteſts* Caſe. *Brownlow* 1. Part. 176.

6. In Treſpaſs againſt S. and others for entring his Cloſe. Judgment was entred againſt D. one of the Defendants by *Nihil Dicit*. S. pleaded, Not Guilty. A *Venire faciat* was awarded upon the Roll between the parties, as well to try the Iſſue, as to enquire of the damages. The Plaintiffs took out their *Venire facias* to try the Iſſue between the two Defendants, and the two Plaintiffs. And according to that was the *Habeas Corpus* and *Diſtringas*: But the Plaintiffs knowing D. to be dead, took their Record of *Niſi Prius* againſt S. only, and he was found guilty. In ſtay of Judgment, it was ſhewed, That there was no Iſſue joyned betwixt the Plaintiffs and D. for the Judgment was given againſt him

him by *Nihil dicit*, and the *Niſi Prius* ought to have mentioned the Iſſue only betwixt the Plaintiffs and S. and there ought to have bin an Enquiry of damages between the Plaintiffs and D. according to the Award upon the Roll, which is the Warrant for the *Venire facias*; and of that Opinion was the whole Court, except *Williams* Juſtice, who relyed upon 9 Eliz. *Dyer*, *Cook* and *Wortons* Caſe; where in Partition againſt two, one confeſſed the Action, and the other pleaded to Iſſue: And the *Venire facias* was to try the Plaintiffs, and the two Defendants, and by the Opinion of the Court it was amended. But to that it was anſwered, That there was a difference between that Caſe and this, for no damages are to be recovered in a Partition, but it is otherwiſe in Treſpaſs; and therefore it was ſaid, That in that Caſe, it was as if a ſtranger had bin named in the *Venire facias*. Mich. 5 Jac. in B. R. *Sands* and *Scullards* Caſe. *Brownlow*, 1. Part, 209.

7. Treſpaſs againſt P. and his Servant, for breaking his Cloſe, and taking a Cow at P. in the County of B. One of the Defendants pleaded, Not Guilty: The Servant pleaded, That the Plaintiff held of Sir *Peter P.* as of, &c. in the County aforeſaid, and for ſervice behind by the command of his Maſter, he ſeiſed the Cow. The Plaintiff traverſed, &c. and one *Venire facias* was awarded out of both Villages; and being found for the Plaintiff. In ſtay of Judgment it was ſaid, That the *Venire facias* ought to be awarded, becauſe the Iſſue is of things in ſeveral places. For if there be ſeveral Iſſues in one place, one Jury ſhall be only impanelled; but if in ſeveral places, ſeveral things local, ſeveral *Venires* ſhall be. The Court was of Opinion, that one Jury ſhould be only impanelled, and one Venue ſhould be awarded out of both places, and it is all one as if it had bin in one place; but otherwiſe if it had bin in ſeveral Counties. Mich. 21 Jac. in B. R. *Fuller* and *Petteſworths* Caſe. *Brownlow* 1. Part, 229.

8. E. W. did recover her Dower in the Common Pleas, in which Writ ſhe demanded *tertiam partem Manerii de D. nec non tertiam partem quarundam terrarum jacent. in H.* And upon *Ne unque ſeiſique Dower*; the parties were at Iſſue, and the *Venire facias* award of H. and it was found for the Plaintiff, and Judgment given. Upon Error brought in B. R. It was aſſigned, That it was a Miſ-Tryal, for that the *Venire facias* ought to have bin *de Manerio*. See 6 H. 7. 3. Yet it was holden good for the Land in H. And it was alſo holden, That it being found, that the Husband was ſeiſed *De Manerio de D.* that now the Tryall was good for the whole. Paſc. 21 Jac. in B. R. *Wrotſley* and *Candiſhes* Caſe. *Godbolt*, 257.

9. Treſpaſs for entring his Cloſe, abutted on one ſide with *Pancras*, and butted on the other ſide *Graves-Inn Lane*. Upon Not Guilty, the parties were at Iſſue, and the Record of *Niſi Prius* was *Grayes-Inn Lane*, and the Plaintiff was Non-ſuit. It was moved to have a *Venire facias de novo*. And 9 Jac. Rott. 1349. *Farthing* and *Duppers* Caſe was vouched in the point. It was ſaid by *Lea* Chief Juſtice, You cannot have a new *Venire facias* if the Nonſuit be recorded. And if the Record of *Niſi Prius* varieth from the Record, then it can be no Nonſuit, becauſe there is no Record upon which the Nonſuit can be, and the *Niſi Prius* was proſecuted without Warrant and Judicial proceſs are of Record, becauſe they are by the Award of the Court. But if the Tranſcript of a Record be miſtaken by a Clark, it iſſueth out by the Award of the Court; and if it vary, then it is no Record. I conceive there is a difference where the Jury is ſworn, as it is in the Preſident, and then the Plaintiff is Nonſuit; but in the Principal Caſe, the Plaintiff was Nonſuit before the Jury was ſworn. But the whole Court ſaid to *Lea* Chief Juſtice, the Caſe is the ſtronger to have a new Tryall. Trin. 21 Jac. in B. R. *Young* and *Englefield's* Caſe. *Godbolt*, 328.

10. The parties were at Iſſue in the Chancery, and a *Venire facias* was awarded out of the Chancery to try the Iſſue, and it was *Quod Vicecomes faciat coram, &c. duodecim Liberos et legales homines de vicineto de &c. quorum quilibet habeat quatuor libras Terre, Tenementorum vel redditus per annum ad minus, per quos rei veritas melius ſciri poterit.* It was moved in Arreſt of Judgment, That the *Venire facias* was not well awarded, For it ought to be *Quorum quilibet habeat quadraginta ſolidos terre, Tenementorum vel reddit. per annum ad minus* according to the Statute of 35 H. 8. which appoints that every one of the Jurours ought by Law to expend 40 *s. per annum* of Freehold, and it ought not to be *Quatuor Libr. terre* according to the Statute of 27 Eliz. cap. 6. It was ſaid by the Juſtices, That it was a plain Caſe, For the *Venire facias* ought to be according to the Statute of 35 H. 8. becauſe the Statute of 27 Eliz. ſpeaks nothing of the Chancery, but only of the Courts of Kings Bench, Common Pleas, and the Exchequer: Wherefore the *Venire facias* in the Caſe at bar was not well awarded. Trin. 16 Jac. in B. R. *Philpot* and *Feilder's* Caſe. *Godbolt*, 334.

11. *Ejectione firme* of a houſe in *Rochester*. The Ejectment was layed to be of a houſe which was in *Auſtrali parte vicie Anglice* the High ſtreet. It was ſaid by the Chief Juſtices, If it had bin *ex Auſtrali parte vici*, then the South part had bin but a boun-

dary,

dary, but here it was well laid. Then it was moved, That the *Venire facias* is *Duodecim liberos & legales homines de Winton*, and doth not say of any Parish of *Winton*. But notwithstanding that, it was holden good. For it is not like *Arundell's* Case, *Cook* 6 Part, for there the Offence was laid to be done *in Parochia Sanctæ Margaretæ de Winchester*; and therefore the Visne ought to be of the Parish: But in this Case, it being laid generally in *Winton*, it is sufficient if the Visne come out of *Winton*. Trin. 21 Jac. in B. R. *Howet* and *Pyrt* Case. *Godbolt*. 335.

12. Error was brought, and Error assigned; That an Action was laid in *Lancestion*, and the *Venire facias* was awarded *de vicineto de Lancestion*. It was said, That the Neighbour-hood might be of those, of which the Maior and Baliffs had no power; viz. those out of their Jurisdiction; and there the *Venire facias* was mis-awarded. See 19 Jac. in C. B. *Barkley's* Case. There the *Venire facias* was, *De vicineto Civitatis Eborum*; and well enough, for *vicineto* shall imply those within the Jurisdiction, and not the Neighbour-hood. See 19 Jac. *Proffer* and *Clifford's* Case adjudged contrary. Where it was *Venire facias de vicineto Civitatis Coventry*, and adjudged not good; for it ought to be, *De vicineto Coventry*. *Doderidge* Justice, said, That *Vicinetto* goeth about the Precinct: And he said, That when he was a Counsellor, he then moved for *Bristol*; and to maintain it good *De tribus de Bristol*; but in the Lease it was rated, that it was not good, but that it ought to be *de Civitate Bristol*. Pasc. 1 *Car.* in B. R. *Intrata*. Mich. 2 *Car. Rott.* 4. 9. in B. R. *Godbolt*. 381.

13. In a Prohibition, the Case was: Queen *Elizabeth* was seized of the Manor of N, which did extend into four Parishes, viz. *Stangrave*, and three others. The Plaintiff shewed, That he was seized of three Closes in *Stangrave*, and prescribed that the said Queen, and all those whose Estate he had in the said three Closes, had a *Modus Decimandi*, for the said three Closes, and for all the Demaines of the said Manor in *Stangrave*. And whether the *Venire facias* should be *de Parochia de Stangrave*, or *de Manerio*, was the Question. It was resolved by the whole Court, That the Visne should be of the Parish of *Stangrave*, and not of the Manor; and the difference was taken, when one claims any thing which goes to the whole Manor, and where only to parcell of it; for in the one Case, the Visne shall be of the Manor, and in the other not. See 9 Eliz. *Dyer*. In the Principal Case it was observed, that the Pleading was, That the Manor was *in Parochia*, and the *Modus* alledged to be *in Parochia*, and the Prohibition *de Parochia*; and therefore the *Venire facias* ought to be *de Parochia*, and not *de Manerio*, or *de Villa*. And *Cook* cited 4 Eliz. 4. and 23 Eliz. 4. That in Trespas, *de Parochia* is a good addition; for it shall not be intended, that there are two Owners in one Parish. Mich. 11 Jac. in C. B. *Norton* and *Lyster's* Case. *Godbolt* 203.

14. Action upon the Case. Whereas the Under-Stewardship of the Courts of the Manor of K, and other the Manors of the Bishop of G, was anciently an Office for terme of life, with the Fee of 3*l.* 6*s.* 8*d.* *per annum*. And whereas a former Bishop of G. had granted to the Plaintiff the said Office for life, with the Fee payable yearly at Mich. and our Lady, issuing out of the said Manor; that the Bishop dyed, and the Plaintiff set forth, that he was ready to keep the Courts of the now Bishop, but that the Defendant pretending a grant to be made to him from the Bishops Successor, disturbed him from seizing of them; upon *Not guilty*, it was found for the Plaintiff. Many Exceptions were taken, both to the Grant, and also to the Declaration, which were over-ruled by the Court. See *Libr.* It was then moved, That here was a Mis-tryal, the disturbance being alledged to be in the Court at K; and so the other Courts, where more Vills are, and the Tryal being *per vicinetum* of the Mannors, whereas it ought to be of the Vills wherein the Mannors are; and therefore it was not ayded by the Statute of 21 Jac. But the Court held, That in regard some of the Manners are alledged to be within those Vills, and the Venue being of the Mannors, it shall be good by the Statute, although it were of fewer, or more Places then it ought to be: Judgment was for the Plaintiff. Mich. 1 *Car.* in C. B. *Cook* and *Youngers* Case. *Cro.* 1 Part, 11.

15. Error to reverse a Judgment in C. B. an *Ejectione firmæ*. The Error assigned was, for that I. C. *apud* D, *demisit* a House, and 40 Acres of Lands in B; *per nomina omnium Messuagiorum, Terrarum & Tenementorum suorum in Parochia de* D, *seu alibi in Comitatu* K. Upon *Not guilty*, it was surmised, That the Parish of D. is in *Rumney* within one of the 5 Parishes; *ubi breve Domini Regis non currit*; and that A. is the next Village adjoyning thereunto, in the said County of K: Whereupon, a *Venire facias* was awarded, *De vicineto de* A; and it was found for the Plaintiff. It was assigned for Error, that the *Venire facias* was mis-awarded, and that it was a Mis-tryal not ayded by the Statute; for it ought to be, that D. is within the 5 Parishes, and not that the Parish of B. is within the Cinque-Ports; for D. may be a Village of it self. But the Court held, That the

the Vill and Parish are intended all one, unless the contrary be shewed, and that it is not Error: The Judgment was affirmed. Pasc. 4 *Car.* in B. R. *Bath.* and *Gilberts* Case. *Cro.* 1 Part, 102.

16. Error brought of a Judgment in B. R, in an Assumpsit, where a Verdict and Judgment was for the Plaintiff: The Error assigned was, That the Issue was joyned, Trin. 2 *Car.* and the *Venire facias* bears date, *Quarto die Maij*, which was before the Issue joyned; so as that the Tryal was ill thereupon. And upon a Writ of *Certiorari*, upon Diminution, alledged to certifie the *Venire facias*, and the *Distringas*, they certified, That the Writ et *Venire facias*, which was of the Date 4. *Maij*, which was in *Easter* Term: But the Error was not allowed by the Court, for the Court shall intend there was no other *Venire facias*, and the Roll awarding the *Venire facias* being good, the mis-dating of it is no cause to stay the Judgment: The Judgment was affirmed. Mich. 3 *Car.* in Exchequer Chamber. *Moor* and *Hodge's* Case. *Cro.* 1 Part, 64.

17. W. Keeper of the Gate-house, was sued in an Action upon the Case, for suffering I. S. to escape, who was in Execution upon a Judgment, Trin. 2 *Car.* He Pleaded *Not guilty* in *London*, and it was found by *Nisi Prius*: and because the Record of the *Nisi Prius* mentions the Judgment to be Trin. 3 *Car.*, which was a mis-prision of the Record, the Plaintiff was Nonsuit. It was now moved for the Plaintiff, That by reason of this mis-prision, the Record of the *Nisi Prius* is not warranted by the Roll; and the Nonsuit being thereupon null, the *Postea* shal not be Recorded, nor Entred: Wherefore it was prayed, that a *Distringas de Novo* might be awarded; and by the Rule of the Court, upon shewing of Presidents, a *Distringas* was awarded. Mich. 6 *Car.* in B. R. *Aquila Weeks* Case. *Cro.* 1 Part, 147.

18. Assumpsit A. was seized of Lands in C, in the County of K. 21 *May*, 1631. in Fee; and was in Communication with the Plaintiff to sell the same for such a summ. That the Defendant, *Ad tunc & ibidem*, viz. *Prædict.* 21. *die Maij*, *Anno* 1631. *apud London, in Parochia, &c.* in consideration of such a summ promised, &c. upon *Non Assumpsit*. The Tryal was in *London*, Exception was taken that it was a Mis-tryal, not ayded by any of the Statutes; for it ought to have been in *Kent*, where the Land lyeth, and whereby the *Ad tunc & ibidem*, the promise is; and the Venue cannot be altered; and of that Opinion was the whole Court, and that the viz. was idle, and could not alter it: A *Venire facias de Novo* was awarded. Mich. 8 *Car.* in B. R. *Delves* and *Clarks* Case. *Cro.* 1 Part, 207.

19. An Assumpsit was laid at *Maidston* in the County of *Kent*, and upon *Non-Assumpsit* pleaded, the *Venire facias* was *de vicinet Villa & Parochia de Maidston*; and thereupon a Tryal. It was the Opinion of the Court, that it was Error, and an insufficient Tryal; for that the Tryal ought not to be of a larger precinct, then the Plaintiff himself supposeth the Substance of his matter to be. Mich. 5 Jac. in B. R. *Parkhurst* and *Palmers* Case. *Yelverton.* 104.

20. Debt upon the Statute of 2 E. 6. for not setting forth of Tythes. Issue being joyned upon *Nihil debet*, and the Parson in his Declaration, shewing that he was Parson *de Parva Lavar*, in the County of *Essex*, and that the Defendant had so many Acres of Land, *infra Parochiam de Parva Lavar*, sowed with Wheat, &c.; the Defendant at *Parva Lavar*, took and carryed away the Wheat, not setting forth of the Tythe of it. Being found for the Plaintiff, amongst other Exceptions, it was moved, That the matter was mis-tryed, and that ought to be a new Tryal; because the *Venire facias* was *de Parva Lavar*, where it ought to have been *de Parochia de Parva Lavar*. It was the Opinion of the Court, upon great deliberation had, That the Tryal was good; for by this Action, no damages are demanded, or recovered; but the Defendant only punished for the contempt against the Statute, in not setting forth of his Tythes; and this wrong of which the Plaintiff complains, is laid only in the Town of *Parva Lavar*, and not in the Parish. It was adjudged for the Plaintiff. Pasc. 6 Jac. in B. R. *Oliver* and *Collins* Case. *Yelverton.* 127. And so it was said, it was adjudged in *Barnard* and *Cotterdams* Case.

21. In Trespass. The Plaintiff declared for taking of certain Corn, Hay, &c. severed from the 9 parts at E, in the County of W. The Defendant, as to part of the Tythes, pleaded *Not guilty*, and Issue joyned upon it; and as to other part, pleaded a Devise of the Parsonage, wherein, &c. from T. L. to the Defendant, at W. in the same County; and to enable the Devise of the Tythes in E. alledged, E. to be a Hamlet of W; to the end that all the Tythes might pass: and upon *Non Devisavit*, being at Issue, the Visne was only from W, and found for the Plaintiff; *Quod* T. L. *non devisavit*: And the other Issue of *Not guilty*, they found for the Defendant. It was moved in stay of Judgment, That the Venue was mistaken, because it was from W. only, and not of E; and those of W, cannot tryt a matter in E. And although it was answered, That Trespass lyeth of a Trespass in a Hamlet, and it is confessed that E. is a Hamlet; yet it was the Opinion of the Court, that

that it was a miſ-tryal, for when the Plaintiff declares generally of a Treſpaſs in E, it ſhall be preſumed to be a Town; of which Town, the matter in Iſſue ought to be Tryed: And although the Defendant hath confeſſed E. to be a Hamlet, that is only to enable the Deviſe, and not to extend to the other Iſſue before: A *Venire facias de Novo* was awarded. Mich. 3 Jac. in B. R. *Leyworth* and *Wyth* Caſe. *Yelverton.* 77. See *Cro.* 2 Part, 86. the ſame Caſe.

22. In a Replevin, for taking 4 Oxen at C, in the County of L, in a place called *Dowgate-Leys*; The Defendant ſaid, That the place contained 4 Acres of Paſtures in C. *Magna*, which was his Free-hold, and juſtified, damage feaſants: The Plaintiff in bar ſaid, that the place where, &c. lyeth in a place called *Have-acre-Quarter*, parcel of a great Common-field, called *Raſſfield*, in C. *prædict. Camp*, the Plaintiff at the time aforeſaid, was ſeized in Fee of a Meſſuage, and 14 Acres of Land, &c. to the ſaid Meſſuage belonging; and that the Plaintiff, and all thoſe, whoſe Eſtates he preſcribed to have Common for him, his Farmers, and Tenants, *in loco in quo, &c. pro omnibus averiis communicabilibus ſuper tenement. prædict.* Levant and Couchant. And upon that, Iſſue was taken upon the Common, and found for the Plaintiff: In ſtay of Judgment it was moved, That it doth not appear by the barr, in what place the Meſſuage and Land, to which the Common did appertain, did lye, whether in C, or in another Town or County; and that of neceſſity ought certainly to be ſhewed, becauſe the Venue ought to be from the place where the Meſſuage and Land lyeth, as well as from the place where the Land in which the Common is claimed; and therefore it ſhall not of neceſſity be intended in C, where the Common is, for that Common may be appendant, or appurtenant to Land in another County; and for this Caſe, the Judgment was ſtayed, and a Repleader awarded. Trin. 8 Jac. in B. R. *Broxolme* and *Thwaits* Caſe. *Yelverton.* 177.

23. In a Replevin. The Defendant avowed, becauſe the Plaintiff held certain Land in D. of him by Fealty, and certain Rent, as of his Manner of D, and for ſuch ſervice behind, he avowed the taking of the Cattel: The Iſſue being joyned upon the Tenure, a *Venire facias* was awarded to D, and it was found for the Avowant, and Judgment given in C. B, and Error was brought and aſſigned, That the *Venire facias* ought to have been as well of the Manner of D, as of thoſe of D; for Notice upon Tryal (the Iſſue being upon the Tenure) ariſeth as fully out of the Manner, as out of D. Note, In the Principal Caſe, the place where the Land lay, was called *Kingſdown*, and the Manner of which the Tenure was, was called the Manner of *Kingſdown*; and thereupon this difference was taken, That where the Tenant holds his Land as of a Manner, and where he holds his Land of a Signory in groſſe; for where the Avowant hath but a Signory in groſſe, there the Venue ſhall be only where the Land lyeth; But where, of the Manner which is Local, and which by intendment hath Free-hold by, there the Venue ſhall be as well from the Manner, as from the place where the Land lyeth. Alſo it was agreed, That where it appeareth by the Record, the Land to lye in D, and to be holden of the Manner of D. in D, and where of the Manner of D. only; for in the firſt Caſe, the *Venire* of D. is ſufficient, becauſe it appeareth the Land, and the Manner to be in D; but in the other Caſe, the *Venire* ought to be of both; becauſe it doth not appear that the Manner and Land do lye in one Town; and the Manner of D. may be in S. or V. as well as in D; and for this cauſe, it was holden to be Error in the principal Caſe, and the Judgment was Reverſed. Mich. 45 Eliz. in B. R. *Lovelaces* Caſe. *Yelverton.* 26.

24. In Debt for Rent, the Plaintiff declared, That ſhe by Deed demiſed to the Defendant, a Capital Meſſuage, Manner, or Houſe, called C, in the Pariſh of D, in the County of W. The Defendant *proteſtando* that the Rent was not behinde, ſaid, That before any Rent arear, the Plaintiff entred into ſeveral parts of the Houſe, and him diſpoſſeſſed; upon which Iſſue was joyned, and the *Venire facias* was *de vicineto de* C, within the Pariſh of D. It was moved, That the *Venire* ſhould be of the Pariſh only, and not of C; for that C. is not alledged as a Town, but the name of the Houſe. But the Court reſolved, the *Venire* was good; for C. is alledged as a Town in the Pariſh of D: And *Hobart*, Juſtice, ſaid, That it had been often adjudged, That on the allegation of a thing, to be done at the Town of D. in the Pariſh of S, that the *Venire facias* of the Pariſh is good; for though the Pariſh may contain many Towns, yet it is not preſumed, but that it is one Continent, if the contrary doth not appear by the Record: And ſo he ſaid it was holden. Paſc. 9 Jac. in the Lord *Candiſh*, and Sir *George Savels* Caſe. Mich. 15 Jac. in C. B. *Dorrel* and *Andrewes* Caſe. *Hutton.* 6.

25. Action upon the Caſe. The Plaintiff declared, That whereas he is, and, by the ſpace of 20 years paſt, hath been an Inhabitant within the Town of *Long L.* in the Pariſh of B; and whereas the Inhabitants of *Long L*, time out of mind, uſed to make a Common-way, as well for Foot-men, as Horſe-men, to go and ride from the ſaid Town of

L, to the Parish-Church of B, to hear Divine Service in the said Church, and to carry Bodies, dying in the said Town, to the said Church, to be interred, *modo & forma sequent.* viz. &c. and shewes the way through diverse Closes in *Long L, Little L,* and G; and over the Church-yard of the said Church of B, and from thence unto the Church aforesaid, and backward &c. That the Defendant made a Ditch in one of the said Closes in G, and shewed disturbance. The Defendant pleaded *Not guilty,* and found for the Plaintiff. In stay of Judgment it was moved, That the *Venire facias* was of G. only. It was the Opinion of the Court, that the same should be quashed, and a new *Venire* from all the said four Towns. Hill. 12 Jac. in C. B. *Reynor* and *Waterhouses* Case. *Hutton.* 27. See Mich. 18 Jac. in C. B. *Clark* and *Woods* Case. *Ibidem* 39. how it varies, and in what, from this Case.

26. Note, and see, That it was holden and adjudged, that a *Venire facias de vicinetto,* of a place known in a Town, without making the Venue of the Town, was not good. Mich. 5 *Car.* in C. R. in *Baker* and *Johnsons* Case. *Hutt.* 105.

27. Error to reverse a Judgment in Debt. The Error assigned was, That there was a Mis-tryal, the *Venire facias* being mis-awarded. The Case was, The payment was to be made in *Lincolns-Inn*-Hall, and the *Venire facias* was from *Holbourn*; whereas it should have been of *Lincolns-Inn,* being the most certain place. The Court was of Opinion, That the *Venire* was well awarded; and said, That they never heard of any *Venire* to be of any of the Inns of Court,; and in the Principal Case, the payment was to be at *Lincolns-Inn*-Hall, in *Holbourn*; and then the *Venire* ought to be of *Holbourn*, for this is the Town: The Judgment was affirmed. Trin. 11 Jac. in B. R. *Baker* and *Cherwes* Case. *Bolstr.* 2 Part. 120.

28. In Trespass, the Case was: A Lease was made *apud Cudworth,* of the Land lying *in Parochia de Cudworth, pradict.* The *Venire facias* was, *De vicinetu Parochiæ de Cudworth.* It was urged, That it was a Mis-tryal, and the *Venire facias* not well awarded. The Lease was made at *Cudworth.* This is to be tryed by a *Venire facias* of the same Parish, which lyeth in *Cudworth* only. But it was answered, and resolved by the whole Court, that here was no Mis-tryal, but the *Venire facias* well awarded; (*pradict.*) Here is such an averment, as that of necessity it must be taken, That *Cudworth* the Town, and *Cudworth* the Parish, is all one; and if so, then the *Venire facias* of the one, or of the other, shall be good; but if the Parish be of a larger Continent than the Town, then it is otherwise. Mich. 44 Eliz. in B. R. between *wright* and *whitington,* in an *Ejectione firmæ*: The Lease there, upon which the Tryal was had, was made *apud Abington,* of Land lying in *Burgo de Abington pradict.* The *Venire facias* was, *de vicinetu de Burg. de Abington pradict*: This Tryal was held to be good, and the *Venire facias* to be well awarded; for *pradict.* makes this by intendment of Law to be all one. And *Cook* vouched a Case, which was in the Common Pleas: A man was bound to pay so much money, in the South-Porch of the Parish Church of D; he pleaded the payment of this money, in the South Porch of the Parish-Church of B, and doth not say in the Parish of D, but of D. *pradict.*; The *Venire facias* was, *de Parochia Ecclesia Parochialis de* D. If a Town be layed to be in a Parish, there the *Venire facias* is to be of the Town, not of the Parish; for this is a sure Maxim to be observed, That the *Venire facias* is alwayes to be from the place which is most certain, and a Town is more certain then a Parish, which may contain diverse Towns. In the principal Case, the whole Court agreed, that there was no mis-tryal, and that the *Venire facias* was well awarded: And Judgment was given for the Plaintiff. Pasc. 12 Jac. in B. R. *Vale* and *Fields* Case. *Bulstr.* 3 Part, 209, 210.

29. *Ejectione firmæ* of the Rectory of A. in A. B. and C; the Defendant pleaded *Not guilty,* and the Visne came only out of A. It was adjudged an insufficient Tryal, and not remedyed by the Statute of 32 *Hen.* 8. or 18 *Eliz.*; for that it was resolved, That the Venue ought to have been of the three Towns. *Cook* 5 Part, 41. *Bretons* Case.

30. In an Indictment of Murther: The Murther was alledged to be done *apud Civitatem Westminster, in Com. Midd. in Parochia Sancte Margaretæ*; and for the Tryal, a Jury was returned *De vicinetu Civitatis Westmonst.* It was resolved, That the Tryal was insufficient; for the Venue ought to have been of the Parish, and not of the City; for a Parish is intended more certain than a City, and when a Parish is alledged to be in a City, the Venue shall come out of the Parish, and a Parish shall be intended lesser than a City; and alwayes the Tryal shall be from such place, as by presumption shall have best Consuance of the fact. *Cook* 6 Part, 14. *Arundells* Case.

31. Note: It was resolved by the Court, When a Jury returned by force of a *Venire facias,* to try any Issue, giveth a Verdict, which is accepted, and recorded by the Court, the Jurors are discharged for ever, and shall never be called again, to try the same Issue. But if the Verdict be so imper-

fect

ſaid, that Judgment cannot be given upon it, that the Court ſhall award *Venire facias de Novo*, to try the ſame Iſſue by others. But if the Recognizors of an Aſſize give a Verdict, which is not well examined by the Juſtices, but is imperfect for default of good examination, there the Plaintiff ſhall have a Certificate of the Aſſize, and the imperfection ſhall be enquired of by the firſt Jurors; for the Recognizors of Aſſize, are not returned to try any Iſſue certain, and there is a Jury the firſt day, before any Plaint, Plea, or Iſſue; and there no new Proceſs can be awarded: for the Recognizors which are once returned, ſhall ſtand; becauſe they are returned upon the Original, and there becauſe the Aſſize is *feſtinum remedium*, the Plaintiff ſhall have a Certificate of the Aſſize, to ſupply the firſt imperfections. But when a Jury is returned upon a *Venire facias*, which is a Judicial Proceſs, to try a certain Iſſue, there the Court, if the Verdict be imperfect, ſhall award a new Judicial Proceſs, *ſcil.* a new *Venire facias*. 1 *Cook* 3 Part, 66. *Lovedayes* Caſe.

Venire facias *miſ-awarded, where amended; and where, and for what other Miſtakes, or Cauſes, it ſhall be amended; and where, and for what not.*

1. AFter a Verdict for the Plaintiff, for ſtay of Judgment, it was moved; That the name of the Sheriff was not endorſed to the Writ of Diſtringas with *Niſi prius*, and therefore was ill; for by the Statute of *York*, to every *Venire facias*, the name of the Sheriff ought to be endorſed. It was ſaid, that this being but a Judicial Proceſs, and the *Venire facias* well returned, the name of the Sheriff is not ſo neceſſary, and that it might be amended; as it was ſaid it was in the Caſe of an *Habeas Corpus*, in C. B. But all the Court held, That it was ill, and not amendable, nor aided by any of the Statutes of 32 *Hen.* 8. or 18 *Eliz.*, and is all one with the Caſe of a *Venire facias*, where the name of the Sheriff is not thereunto, which hath often times been ruled to be ill; wherefore it was ruled that the Tryal was ill. Mich. 5 Jac. in B. R. *Holdeſworth* and Sir *Steven Proctors* Caſe. *Cro.* 2 Part, 188.

2. Error of a Judgment in B. R. in Debt upon an Obligation: The Condition was, That if ſuch a one appeared in the Kings Bench the next Term following, and put in good Bail at the ſuit of H. H. that then, &c. He pleaded that the Term was adjourned to the Caſtle of *Hartford*, and that he there put in good Bail; upon which Iſſue was. It was found for the Plaintiff, and Judgment for him, and Error brought and aſſigned, becauſe the *Venire facias was de vicineto, de Hartford*, where it ought to have been *de Caſtrum de Hartford*. It was holden by all the Judges and Barons, to be a manifeſt Error; for *Caſtro Hertford*, is a diſtinct name of a place, as *Manerium de Dale*; and it is not like, where a thing is to be done at the Capital Meſſuage of B, there the Venue ſhall be of D; for that is intended to be all one with the Town. But *Caſtrum Hartford* is intended a diſtinct place by it ſelf. Paſc. 8 Jac. in B. R. Exchequer Chamber. *Cuningham* and *Hugh Hares* Caſe. *Cro.* 2 Part, 234.

3. Error of a Judgment in the Court of *Pipowders* in *Rochester* in Debt. Amongſt many other Errors aſſigned, one was aſſigned; one being, That the Court, being (as it is the ſtyle of the Court) *coram Majore, & duobus Concivibus*. The *Venire facias* is made, returnable *Coram I. S. Majore, vel deputato ſuo, & coram duobus Concivibus*, at ſuch an Hour, which is not good; for it doth not appear, that either by Cuſtom or Charter, the Mayor might make a Deputy, or that Proceſs ſhould be returnable before the Deputy; and therefore the *Venire facias* was miſ-awarded, and not helped by the Statute of Jeofails. The Court ſeemed to encline to that Opinion, but wiſhed the Parties, that the Defendant ſhould put in new Bail, and the Plaintiff declare *de Novo*. Hill. 9 Jac. in B. R. *Goodſon* and *Daffields* Caſe. *Cro.* 2 Part, 313.

5. Treſpaſs for entring into Land in *Langgame*. The Defendant pleaded, That the place where, is parcel of a Waſte, called *Hope*, in *Langgame*, and that the Earl of B. was ſeized in Fee of the Manor of *Biſhops Taunton*, where a Houſe, and 20 Acres of Land in *Langgame* is Copy-hold, and by cuſtom as a Copy-holder claimed Common of Eſtovers, in the ſaid Waſte, called the *Hope*, &c. and ſo juſtified. The Iſſue was upon the Cuſtom, and found for the Plaintiff, that there was no ſuch Cuſtom. It was objected, That the Tryal was good; for the Copy-hold being in *Langgame*, and the place where being in *Langgame*, they in *Langgame* may well try that Cuſtom; for the one part of the Manor, may well know the Cuſtoms of the other part. But it was holden by all the Juſtices, that it was a miſ-tryal; for the Venue ought

to be of the place as the extent of the Iſſue, and the Iſſue being, Whether there were ſuch a Cuſtome within the Manner. The Manner may extend into divers Towns, and therefore the *Venire facias* ought to be of the Manor, and not of the particular Town within the Manor. Mich. 11 Jac. in B. R. the Earl of *Bedford's* Caſe. *Cro.* 2. Part, 329.

5. Error to reverſe a Judgment in B. R. becauſe the Bill was filed *dic Mercur. poſt Octab. Purific.* which was upon the 12th of *Feb.* and the *Venire facias* bore date 30. *Feb.* which was before the Bill filed, or any Iſſue joyned; which was ſaid to be ill, and not holpen by the Statutes. But all the Juſtices and Barons held, That it ſhould be as if there had bin no *Venire facias*, being before the Action brought; and it is contrary to the Roll, which mentions it to be awarded after the Iſſue joyned. See *Bowyer* and *Johnſons* Caſe, in this Title, Sect. 1. Hill. 15 Jac. in the Exchequer. *Marſham* and *Bulwers* Caſe, *Cro.* 2. Part, 458.

6. Debt upon the Statute of 2 E. 6. for not ſetzing forth of Tythes. The Plaintiff ſhewed, That he is ſeiſed in Fee of the Rectory of Y. and that the Defendant was Occupier of certain Lands in P. within the ſaid Pariſh whereof the Tythes were due unto him, and that he cut and carried away the Corn, without ſetting out the Tythes. The Defendant pleaded, That Sir *John White* was ſeiſed of the Manor of P. within which Manor is a Cuſtome, That he and all thoſe whoſe Eſtate, &c. have uſed to pay 35 s. to the owner of the Rectory of the Pariſh of Y. in lieu of all Tythes growing within the ſaid Manor, and that the ſaid Sir *John* let to him the ſaid Lands. Iſſue was upon the Preſcription, and found for the Plaintiff. It was the Opinion of the Court in this Caſe, That the Tryall was ill, becauſe the *Venire facias* ought to have bin aſwell from Y. as from P. for that the Cuſtome is to pay to the Church of Y. ſo as the *Venire facias* ought to have bin as well from the place of the payment, as of the place out of which the payment ought to have bin. A *Venire facias de novo* was awarded. Mich. 21 Jac. in B. R. Sir *Robert Phillips* and *Sladers* Caſe. *Cro.* 2. Part, 676. See before in the Title, Sect. 3. *Cooper* and *Bacons* Caſe.

7. A *Venire facias* was made in this form, viz. *Liberos et legales homines de B.* It was by the Rule of the Court amendable by the Roll, for it ſhall be intended that the Jurours are inhabiting in the Town of B. although the Sheriff retorned the Jurours of other places, and none of them be named of B. Alſo the *Venire facias* was retorned by A. B. *Armiger*, without naming him Sheriff; and it was amended by the Rule of the Court. Trin. 14 Jac. in C. B. *Bullen* and *Jervis's* Caſe. *Brownl.* 1. Part, 43.

8. In *Ejectione firmæ* after Verdict; Exception was, That the appearance and the Iſſue were in *Ter. Hillarii*, 1 Jac. and the Bail was *Craſtino Purificationis*, and thereupon was the Declaration and Iſſue; and a *Venire facias* awarded, dated 23. *Jan.* 1 Jac. and upon it a *Diſtringas* 12. *Feb.* ſo as the *Venire* was awarded before the appearance and Declaration to try the Action, which was ſaid could not be good: Yet the Court held, That it was amendable, for the Roll is the Warrant for the *Venire facias*, which being variant from it, the *Teſte* thereof ſhall be amended to be made ſubſequent to the Iſſue joyned. Paſc. 3 Jac. in B. R. *Dolphin* and *Clarks* Caſe. *Cro.* 2. Part, 64.

9. In Treſpaſs after Verdict, it was moved, That the *Venire facias* was awarded, That viz. *Jacobus, &c. Vicecomiti ſalutem*, omitting of what County he was Sheriff; and it was retorned by the Sheriff of the County of S. where the Action was brought. It was ſaid to be an ill Tryal, and an ill Writ, for *non conſtat Curiæ*, by what Sheriff of the County it is retorned, nor by whom it is returnable. But notwithſtanding all this, becauſe the Writ was Warranted by the Roll, it being a Judicial Writ. It was Ruled by the Court, That it ſhould be amended. Trin. 3 Jac. in B. R. *Lea* and *Lacies* Caſe. *Cro.* 2. Part, 78.

10. Error of a Judgment in B. R. was aſſigned, For that W. B. of *Bradfield* was retorned upon the *Venire facias* and *Habeas Corpora*; and W. B. of *Metfield* who was another perſon, and not retorned, was ſworn. It was the Opinion of the whole Court, That that was not aſſignable for Error, for that it is contrary to the Record, and he is eſtopped to ſay the contrary, for then every Record might be brought in Queſtion. Trin. 8 Jac. in B. R. *Bewſe* and *Cunningtons* Caſe. *Cro.* 2. Part, 244. See Hill. 15 Jac. in B. R. Sir *Philip Stanhops* Caſe. *Cro.* 2. Part, 457. acc.

11. *Scire facias* upon a Judgment againſt the Inteſtate againſt the Defendant, Adminiſtrator of *Tho. M.* The Defendant pleaded fully Adminiſtred, and found againſt him. Divers Errors aſſigned, 1. That the *Venire facias* was not good, becauſe it is *ad triandum Exitum inter Ed. M. miſtem, et Tho. W.* and he is not named Adminiſtrator of *Tho. M.* and there might be another Action and Tryal betwixt them in their proper right. 2. The *Niſi Prius* Roll upon which the Tryal was, That Challenge being made to the Sheriff after Iſſue, and confeſſed; *Venire facias* was awarded to the Coroner, but the Roll of *Niſi Prius* was, That the *Venire facias* was awarded to the Sheriff. It was

holden,

holden, That this Roll of the *Nisi Prius* is a Miſpriſion, and ought to be Warranted by the Record, and therefore ruled that it ſhould be amended. Mich. 12 Jac. in B. R. Sir *Ed. Muſgrave* and others Caſe. *Cro.* 2. Part, 354.

11. Treſpaſs for taking a Kettle at *Weſt-Town*, The Defendant juſtified by reaſon of a Cuſtome in the Manour of T. The Plaintiff joyned Iſſue *de injuria ſua propria*. The *Venire facias* was awarded *de Vicineto de Weſt-Town et Maneria de T.* by the Roll, and a Verdict was for the Plaintiff. But becauſe the Sheriff had returned the Panel *de Vicineto de Weſt-Town* only, the ſame was holden to be incurable, though the award was by the Roll *de Vicineto de Weſt-Town et de Maneria* both. And it was Ruled, That the *Venire facias* was not to be amended for two reaſons. 1. It ought not to be *de Weſt-Town* at all, becauſe the taking was confeſſed on both ſides, ſo required no Tryal; but the cauſe only controuled, was the Cuſtome, and other things ariſing from the Manour of T. and although the Roll had bin perfect from the Manour only (as it ought to have bin) ſo as the *Venire facias* might be amended by Warrant of it. Yet now, when P. appears to the Court, that the Tryal was not had by ſuch a Jury as the Roll and the Law required to the prejudice of the truth, it ought not to be allowed, and therefore it was Ruled not to be amended. Mich. 12 Jac. in C. B. *Banks* and *Parkers* Caſe. *Bul.* 76, 77.

13. In a Replevin, the Defendant pleaded, That it was his Freehold. The Plaintiff replyed, That the Beaſts eſcaped thence by default of the Encloſure. The Defendant ſaid, That *tempore Capionis*, the Hedg was well repaired; and Iſſue upon that. It was found againſt the Plaintiff. It was moved in Arreſt of Judgment, That it was not a good Iſſue: For it ought to have bin *tempore Eſcapii*, or *intra-vamis*. But the Exception was diſallowed by the Court, being after Verdict. But becauſe upon view of the Return of the *Venire facias*, nothing was underſtood but the names of the Jurours, the Court awarded a Repleader. Mich. 4 Jac. in B.R. *Aſford* and *Venners* Caſe. *Noy* 115.

3. *Where, and in what Caſe the* Venire facias *ſhall be to the Coroners; and not to the Sheriff: and in what Caſe not.*

1. IN an Ejectment brought upon a Demiſe made by C. the Defendant pleaded Not Guilty, and a Challenge to the Sheriff. And prayed a *Venire facias* to the Coroners, becauſe the Sheriff is Cozen to the Plaintiff, and ſhews how; and becauſe the Defendant did not deny it, a *Venire facias* was awarded to the Coroners. And after a Verdict, That matter was alledged in Arreſt of Judgment, becauſe it was not a principal Challenge. Whereupon it was Ruled, That a *Venire facias de novo* ſhould be awarded to the Sheriff.

2. Upon Iſſue joyned in an *Ejectione firmæ*, The Plaintiff ſuggeſted, That he and the Sheriff, and one of the Coroners were all of the Livery of the Earl of *Worceſter*, and prayed a *Venire facias* to the other Coroner. And the Defendant confeſſed the ſuggeſtion. Whereupon proceſs was made according to the prayer, and the Jury found for the Plaintiff. And now in Arreſt of Judgment, it was moved againſt it, becauſe it was not a principal Challenge, but becauſe it was *ex aſſenſu partium*, and that the Statute of 32 H. 8. helps the miſconceivance of proceſs. Judgment was given for the Plaintiff. Mic. 22 Eliz. *Dyer*, 367.

3. Note, It was ſaid by the Court, That the Statute of 18 Eliz. cap. 14. helpeth not any inſufficient Tryal. And therefore whereas a *Venire facias* was awarded to the Coroners, whereas it ought to have bin awarded to the Sheriff, and ſo the Jurors returned by one who had not Authority. It was holden to be in the nature of an inſufficient Tryal, and not remedyed by the Statutes of 32 H.8. or 18 Eliz. as it was ſaid. It was adjudged in *Goodwin* and *Franklins* Caſe, vouch. in *Cook* 5. Part, 36. in *Reynhams* Caſe.

4. Treſpaſs for taking his Cattel, and detaining them until a Fine of 10 l. was paid. The taking was layed to be *apud* H. one of the Defendants pleaded Not Guilty; the other juſtified, becauſe *Harwell* was in the Hundred of H. and the Sheriffs Torn of the ſaid Hundred, and that at a Leet within the Hundred. It was Preſented, That the Defendant ought to repair a High way which he had not

not repaired; whereupon the pain of 10 l. was assessed upon him, and the same Estreated, and so justified. The Plaintiff Replyed, That the Bishop of *Winton* was seised in Fee of the Mannor of *Harwell*, and that he and his Predecessors have used always to have a Leet of all the Inhabitants there; And trav rsed, that it was not within the Leet of the Hundred. Amongst other things in this Case, It being found for the Plaintiff; In stay of Judgment, it was moved, That it being a thing which concerned the Sheriff and his Interest, the *Venire facias* ought to have bin awarded to the Coroners, and not to the Sheriff himself. And also it ought not to have bin awarded from *Harwell*, but from the Hundred, or from the body of the County. But the Exception was disallowed by the Court; for being awarded to the Sheriff himself when he was party, and not to the Coroners, that is no Exception for the Sheriff, it being done for his advantage and favour. But perhaps the Plaintiff might well have taken that Exception: Also *Harwell* is a place which is alledged by both parties where the Leet is, wherefore from that place the *Venire* shall be, and not from any other. It was adjudged for the Plaintiff. Mich. 17 Jac. in B. R. *Leader* and *Samuells* Case. *Cro.* 2. Part, 551.

5. Error upon a Judgment given in B. R. upon an Obligation, The Issue taken upon payment upon a good surmise. The *Venire facias* was awarded to the Coroners, and a Verdict and Judgment for the Plaintiff. The Error assigned was, where the *Venire facias* was returned by two Coroners only, and the *Distringas* by three Coroners, that there were at the time of the Award, Return, and *Distringas*, four Coroners. It was agreed, That this at the Common Law was Error, for Coroners as Ministers, must all joyn; but as Judges they may divide. But the Court said, That by the Statute of Jeofails it was made good by the words of imperfect, and insufficient returning of process by Sheriffs or other Officers. Yet the Court was of Opinion, That if one Sheriff of *London* make his Return without his fellow, this was not holpen, being no Return at all. Hill. 11 Jac. in C. B. rott. 1036. *Lambe* and *Wiseman's* Case. *Hob.* 70.

More Venire facias, Visne, *or* Venue.

1. Quare Impedit was brought for the Church of B. The Issue was, That there was no such Church; the *Venire facias* was, *de Vicineto de B.* And Exception was taken, because it was not of the body of the County; but the Exception was salved, because in the Declaration that one dyed at B. aforesaid: And it was said, That every place alledged shall be intended a Town, and by the uses of the Writ, it is presumed in Law to be a Parish; And then if there be a Parish and a Town, If the *Venire facias* be either of the Parish or Town, it is good. Trin. 16 Jac. in C. B. *Capel* and *Tanfes* Case. *Brownlow* 1. Part, 161.

2. In Debt brought upon an Escape against a Bailiff of a Liberty. Exception was taken to the Declaration after a Tryall, because it was not alledged therein, That the Sheriff made a Warrant to the Bailiff upon an Execution; but it was only alledged, That at A. aforesaid, by vertue of the Warrant aforesaid, he took the Prisoner, and saith not, within the Liberty aforesaid. It was the Opinion of the Court, That it was a void Exception. Trin. 10 Jac. in C. B. *Brownsworth* and *Fessors* Case. *Brownlow* 1. Part, 79.

3. A. B. brought an Action against W. and Issue was joyned; and then the Plaintiff surmised, That he was Bayliff and servant to C. the Sheriff of *Essex*, and therefore prayed process to the Coroner, *et ei Conceditur*. And yet afterwards a *Venire facias* went to the Sheriff, and the Jury found for the Plaintiff. It was moved in Arrest of Judgment, and the Question was, Whether this Grant to the Coroners, and being meerly in favour of the Plaintiff to avoid his delay by Challenge, may not be left, aswell after it is Granted, as it hath bin required at the first. 2. Whether this be not a mis-awarding of process remedied by the Statute of Jeofails. Quære, For the Case was put only, but not Resolved. Trin. 12 Jac. in C. B. *Webbs* Case. *Hob.* 64.

4. T. L. brought Trespass against J. R. and C. M. for imprisoning him five dayes. J. R. pleaded, Not Guilty to four dayes; where, upon Issue, and to the other day, a Justification, and thereupon another

the Iſſue. C. M. did likewiſe divide his plea into two, whereof the latter was a Juſtification, and thereupon Iſſue taken. Then follows the *Venire facias* in theſe words, viz. *Ideo quod triandum exinde illum quem prædict. alium exitum inter prædict. T. L. et præfat. J. R. ſuperius mentionat. Præceptum eſt Vicecomit.* It was excepted unto, That this award was inſufficient, being in certain, and could not be applyed to all, though the Jury had given Verdict for all, but notwithſtanding, the Court ruled it to be good, becauſe *exitus* may reſpectively ſerve for all, *reddendo ſingula ſingulis.* Trin. 13 Jac. in C. B. *Leiſham* and *Rowes* Caſe. *Hob.* 66.

5. In Trover and Converſion, The Declaration upon the Imparlance Roll had ſpaces for the day and year, of loſing, finding, and Converſion of the goods; but the Iſſue Roll and all the reſt were perfect in theſe points: The Court was of Opinion, That the Imparlance Roll could not be amended by the Iſſue Roll, becauſe it was the Original, and was a Warrant to the other, and not *è converſo*. But yet becauſe upon the Iſſue Not Guilty, Verdict was given for the Plaintiff, the Court gave Judgment for him, becauſe the Declaration as it was found in the Imparlance Roll, was good enough in matter, for the Trover and Converſion was layed in the Preterperfect Tenſe, and ſo before the Action brought; and ſo but default in form, was helpen by the Statute of Jeofails. Hill. 12 Jac. *Parker* and *Parkers* Caſe. *Hob.* 76.

6. *Hylliard & ux.* the Plaintiff declared, That R. H. and other, 9 *Oct.* 5 Jac. at St. *Genarys* in the County of, &c. did demiſe, and to Farm let to the Demiſees, one Meſſuage, four Gardens, 200 Acres of Land, &c. with the Appurtenances called Eaſt *Digard*, alias *Digard*, in the ſaid County for five years. Upon Not Guilty, Judgment was for the Plaintiff. Error brought and aſſigned for Error, that the Plaintiff in his Declaration did not ſhew in what Town, Pariſh, Hamlet, or place the ſaid Tenement called *Digard* lay, but in the general County aforeſaid; and for that cauſe the Judgment was mewed in the Exchequer Chamber. Note in that Caſe, it was ſaid, Here is a Tryal without a Viſne, if the Jury were from St. *Genarys*, and if it were *de Corpore Comitat.* it was not good, for that it is not to be called where a nearer place may be. Hill. 5 Jac. in C. B. *Rich* and *Sheers* Caſe. *Hob.* 98.

7. *Quare impedit* brought *quod permittat præſentare ad Eccleſiam de ubicunque*. The Defendant pleaded, *Quod nulla talis habetur Eccleſia vocat. ubicunque in Com. prædict.* Whereupon Iſſue was joyned, and after a Verdict for the Defendant, It was moved, That the *Venire facias* was miſtaken; For it was *de Vicineto de ubicunque*, whereas it ſhould be *de Corpore Comitat.* as where the Iſſue is, that there is no ſuch Town. But the Court gave Judgment, *Quod Coſſetur Breve.* For although it be denyed, That there is any ſuch Church, yet the Town is not denyed; and the Count of *Eccleſia de ubicunque* is an allegation that there is a Town called *ubicunque* whereof whether there be a Church. The Viſne properly ariſeth from the Town; and although it was obſerved, That the Iſſue did not meet in words, for the Writ is *Eccleſia de ubicunque*, and the Plea, *Eccleſia vocat. ubicunque*, yet the ſame in effect is the ſame. Note, that another of the Defendants had pleaded to the Writ, that there was no ſuch Biſhop of *Lincoln* as was named: Whereupon there was another Demurrer. Yet the whole Writ was abated againſt them all upon the Verdict, but no Judgment was given upon the other Demurrer. Trin. 16 Jac. in C. B. Rott. 3210. *Capledick* and Sir *Phil. Tirwhits* Caſe. *Hob.* 249.

8. In a Prohibition, the parties were at Iſſue upon a Cuſtome, *de non Decimando* of Wood *infra wildam Suſſex*. It was moved from whence the *Venire facias* ſhould be. The Court directed, That it ſhould be *de Corpore Comitatus*, for that *Wilde* is no Viſne whereof the Court can take knowledg, and by aſſent it was awarded accordingly. Trin. 17 Jac. in C. B. *Fawkner* and *Andrews* Caſe. *Hob.* 266.

9. In a ſecond Deliverance for taking his horſe at *Wilkſitz pain, in quodam loco vocat. Ore Peeces*. The Defendant ſaid, That the place contained 20 Acres, parcel of 1020 Acres, which 1000 Acres, time out of mind, were parcel of the Manor of *Wilkſitz pain* in the County aforeſaid: Of which Manor the Earl of N. was ſeiſed in Fee, and acknowledged the taking as Bayliff to the Earl. Upon Traverſe *abſque hoc*, That the place was parcell *de Wilkſitz pain*. The *Venire facias* was awarded *de Vicineto de Wilkſitz pain*. After Tryall and Verdict, Judgment was ſtayed in that Caſe, becauſe the *Venire facias* ought to have bin *de Vicineto Manerii*, and not *de Vicineto* of the Town. Trin. 16 Jac. in C. B. *Gayhurſt* and *Millers* Caſe. *Hob.* 284.

10. S. brought a Replevin againſt H. for taking a Diſtreſs in *Baildon*, in a place there called *Steed houſe*. The Defendant made Conuſans as Bayliff to W. H. becauſe the houſe was holden of him as of his Manor of *Baildon*. The Plaintiff ſaid, It was out of his Fee. The *Venire facias* was *de vicineto de Baildon*. After Verdict, It was moved, That the *Venire facias* ſhould have bin aſwell from the Manor as the Town. The Court gave Judgment for the Plaintiff, becauſe it doth not appear that the Manor was larger then the Town; and the Court ſhall not defeat it upon a poſſibility, it may be, or not be. But if the Viſne were to come from two Towns by the Records, and were taken but in

one

one, the Case were clean contrary. Trin. 18 Jac. in C. B. *Steed* and *Harleys* Case. *Hob.* 305.

11. In an Action upon the Case, the Plaintiff layed, That he was seised of a Messuage in *Fairfield*, to which he had Common appendant, and seven Acres in F. aforesaid; and that he also had a Way from his Messuage to the said 7 Acres, in, by, and over it to B. and that the Defendant had ploughed up the said 7 Acres, whereby he lost both the use of his Common and Way. Upon Not Guilty, the *Venire facias* was from *Fairfield* only. It was said it should have bin from B. also. But the Court gave Judgment for the Plaintiff. For although it is true, That if the Issue had bin about the Prescription, it must have bin from both: Yet the Issue Not Guilty respects chiefly the grief, which is the Ploughing up of part of the Way in F. which is a Trespass upon the Case there though the Way went no further, so as the rest of the Way is but an inducement to the Action. Trin. 18 Jac. in C. B. *Clark* and *Woods* Case. *Hob.* 315.

12. Debt upon an Obligation, the Condition was, That the Defendant should pay so much in the House of the Plaintiff at *Lincoln*. The Defendant pleaded payment at *Lincoln* aforesaid; upon which they were at Issue, and the *Venire* was awarded, *De vicinetu Civitatis Lincoln*, and found for the Plaintiff. It was moved, That it was a Mis-tryal; because the *Venire facias* ought to have been of the Body of the County, and not of the City. It was resolved by the Justices, that the Tryal was good, and the Resolution grounded upon 34 H. 6. 49. and 50. P. 17. there being no other Authority in the Law in the Point; and it was taken for a Rule, That where it doth not appear upon the Record, that there is a more proper place for Tryal, then where the Tryal was, that there the Tryal is good; but here is no more proper place: And it was said, it was not possible to be tryed in the County; because that the payment was to be in the City: And yet it was said, It is true, that if a man speak Generally of the County of *Lincoln*, it shall be intended the Body of the County: It was resolved, that the Tryal was good. Mich. 17 *Car.* in C. B. *Thorndike* and *Turpingtons* Case. *Mar.* 125.

13. Error of a Judgment in *Newbury*, because the Assumpsit was there; The Defendant pleaded *Non*-Assumpsit; yet the *Venire facias* was, *De vicinetu de Newbury*, when it ought not to be *De vicinetu de Newbury*; for that they have not found Action out of *Newbury*, and *Logeins* and *Ferns* Case was vouched to be according. But upon view of diverse Presidents, that the *Venire facias* hath been good both ways; although the Corporation do not extend their jurisdiction out of the Town, yet the *Venire facias* being awarded, *De viginti de Newbury*, it was holden, that those of the Town might be well returned: The Judgment was affirmed. Trin. 16 Jac. in B.R. *Walker* and *Mansfields* Case. *Cro.* 1 Part, 493.

14. Trespass. The Defendant justified the putting in his Cattel, as a Copy-holder of the Lord N. of his Mannor of D. for Common; the Issue was upon the prescription. B, another of the Defendants, justified as Tenant to Sir *John T.* who was a Free-holder in *Dorcester*, who claims Common as appurtenant to his Free-hold: The Plaintiff surmising that the Lord N. was Lord of the Mannor of *Dorcester*, where all the Free-holders are his Tenants, pray a *Venire facias* to the next Town which was W, in the Hundred of E; which was awarded accordingly, and tryed at the Bar. It was moved, That it was a Mis-tryal for *Quod* B. Tenant of Sir *J. T.* there was no Challenge; wherefore there ought to have been several *Venire facias*. But the Court after resolved several motions, that the Tryal was good; for there shall never be several *Venire facias*es to try several Issues in one County, but to several Issues in several Counties, it is otherwise: It was adjudged for the Plaintiff. Mich. 17 Jac. in B. R. *Dance* and *Elden*, and *Buckleys* Case. *Cro.* 12. part, 550.

15. A *Venire facias* was awarded returnable, *Mens.* Mich. It was not returned at the day; Whereupon the Defendant sued a *Venire facias*, with Proviso returnable, *Octab.* 6 Hill. But in the mean time, the first *Venire facias* was filed, Mich. Terme, *post diem*. Afterwards the second *Venire facias* was returned, and upon that second a Panel. The Plaintiff pursued a *Habeas Corpus*, and the Jury appeared and found for him. It was holden in that Case, That although it was erroneous by the Common-Law, yet upon consideration of the Statute of 32 *Hen.* 8. of Jeofails, upon the point of misconceivence of Process, Judgment was given for the Plaintiff. Mich. 11 Eliz. *Dyer* 284. *Grogs* Case.

16. The Son and Heir brought an Appeal against M. P. *Proditorie*, and E. L. *Felonice*, for that they conspired the death of R. P. his Father; and that the said M. P. to that purpose, and the said E. L. *Felonice*, gave him such a kind of poyson in a Posset; which he not knowing, drank up; and afterwards within a time dyed: The Defendant pleaded Not Guilty: They were tryed at the Bar. M. P. was found guilty, but the other not. It was moved, That there was no Declaration upon the File of Mich. Terme: Also, that there ought to have been several *Venire facias*, because they were several Offenders, and not one Offender. But the Opinion of the Court was, That the Plain-

tiff might take out one ; or ſeveral *Venires*, for doubt of Challenge. Trin. 14 *Car.* in B. R. Pigot and Pigots Caſe, *Cro.* 1 Part, 383.

17. Error of a Judgment at the Seſſions of Peace, upon an Indictment of Barretry; where the party was Indicted the ſame Seſſions Arraigned, and he traverſed, and a *Venire facias* was awarded immediately to try it, and he was convicted, fined, and impriſoned. It was aſſigned for Error, That this Tryal and awarding a *Venire facias*, the ſame Seſſions he was Indicted, and pleaded it could not be good; for it ought to have been made returnable at the next Seſſions, and not to be made returnable the next day. But the Exception was diſallowed by the Court; for the Party being preſent, may be tryed as well the ſame day, as at another time. Trin. 14 Jac. *Rice* and the Kings Caſe. *Cro.* 1 Part, 404.

See more of *Venire facias*, and Viſne in *Lib.* 1. Title *Amendments*: And for the Title *Jeofails*, *Tryals*, and other Titles.

Verdict:

what: what ſhall be ſaid, a good Verdict, what not: And where a Verdict findes more then is put in Iſſue, where good, where not.

1. ACtion of Aſſault and Battery was brought, and the Defendant was condemned by *Nihil Dicit*, and a Writ of Enquiry of Damages went forth, and then the Attorney of the Plaintiff dyed, and another Attorney without Warrant, prayed the ſecond Judgment and Execution. It was agreed by the Court in this Caſe, That if in an Action after Judgment the Attorney dyeth, a new Attorney may pray Execution without Warrant; but in this Caſe, becauſe that he dyed before the ſecond Judgment, it ſeemed to them that he ought to have a Warrant of Attorney, for the firſt Judgment is not final; and the Preignochories ſaid, If after the firſt Judgment one of the Parties had dyed, the Writ ſhould abate. And it was ſaid, That this was not within the Statute of Jeofails, for that a Verdict is that which is put in Iſſue by the joyning of the Parties. Paſc. 29 Eliz. in C. B. *Goldesbr.* 49.

2. Husband and Wife brought Waſte, and declared, That the Defendant was ſeized in Fee, and made a Feoffment to the uſe of himſelf for life, and after to the uſe of the Mother of the Wife, who dyed, and it deſcended to her, and after the Defendant made Waſte. The Defendant pleaded, That he was, and yet is ſeiſed in Fee, *abſque hoc*, that he made a Feoffment in manner and form *prout*, and the Jury found a ſpecial Verdict, That the Defendant made a Feoffment to the uſe of himſelf for life, without impeachment of Waſte, the remainder in Fee *pro ut*. It was objected, That the Plaintiff ought not to have Judgment; for where a Verdict diſcloſeth any thing, whereby it appeareth that the Plaintiff ought not to recover, Judgment thereupon ought to be given againſt him. But the Opinion of the Court was, that Judgment ſhould be entred for the Plaintiff; for it was ſaid by *Anderſon*, chief Juſtice, That which was found more than their Iſſue, was void; as 33 *Hen.* 6. where the Tenant in Aſſize pleads, *Nul Tenant. de franck Tenement, noſme en le Aſſize, et ſi home ne ſoit, &c.* and the Jury found that he was Tenant, but that he held joyntly with another: Yet there the Plaintiff recovered, and had Judgment, and ſo in the principal Caſe. Mich. 30 Eliz. in C. B. *Faire* and *Peters* Caſe. *Goldesbr.* 72, 73. See this Caſe more at large in *Leon.* 66.

3. A *Scire facias* was brought upon a Recognizſance: The Defendant pleaded in abatement of the Writ, That one B. was ſeized of three Acres of Land, not named; Judgment *ſi executio*. The Iſſue was, If the ſaid three Acres of Land was the Land of the ſaid B. or not. The Jury found, That B. and I. L. were Joynt-Tenants of the ſaid Land of three Acres: If the Jury found for the Plaintiff or Defendant, was the Queſtion. It was the Opinion of the Court, That the Verdict was found for the Plaintiff: For if in caſe one plead his Free-hold, and another ſay his Free-hold *abſque hoc*, that it is the Free-hold of the Plaintiff, and upon that they are at Iſſue, and the Verdict findes that the Plaintiff and Defendants are Tenants in Common, this Verdict is found for the Plaintiff; for he that makes the firſt lye, ſhall be tried, and that was the Defendant. And ſee 46 E. 3. That in caſe *Proviſo*, if the Iſſue be upon an Alienation in Fee, and the Jury finde an Alienation *pro termino vitæ*, this is a Verdict good enough, and the Plaintiff ſhall recover; for the Alienation is the Queſtion, and whether it be in Fee, or for life, is but Form. It was adjudged for the Plaintiff. Hill.

43 Eliz. in C. B. The Lady *Gresham* and *Maias* Caſe. *Goldesbr.* 161.

4. In Debt for Rent: The Plaintiff declared upon the demiſe of 26 Acre, rendring Rent; the Defendant pleaded, That the Plaintiff Lett to him the 26 Acre, and four Acres more, *abſque hoc*, that he demiſed to him the 26 Acres only; and upon Iſſue joyned, it was found, that he Lett unto him 21 Acres. It was a Query, If upon this Verdict the Plaintiff ſhould have Judgment: But the better Opinion of the Court ſeemed to be, That the Plaintiff ſhould have Judgment, and that the Verdict was a good Verdict. For thta, the Defendant confeſſed the 26 Acres by implication; and then the Verdict is to no other purpoſe, but to maniſeſt, that he did not Let to him the four Acres. Paſc. 28 *Hen.* 8. *Dyer* 33. Hill. 17 Jac. in B. R. *Hughs* and *Boreman's* Caſe adjudged accordingly.

5. In a Writ of Entry in *ſe Quibus* of 70 Acres of Land in H. the Tenant pleaded, That one C. was ſeized in Fee, and demiſed the ſaid Land to him for life; The Demandant intituled himſelf by the ſaid C, *abſque hoc quod demiſit modo, & forma.* It was found by Verdict, That C, and ſix others, were ſeized to the uſe of C, of the ſaid 70 Acres, and of a Houſe in H; which Houſe and Land had been time, &c. called W; and that the ſaid C. and the other, joyned in a Leaſe of the ſaid Houſe, with the Appurtenances, unto the Tenant. In this Caſe it was adjudged, That Judgment ſhould be for the Plaintiff, and that this demiſe found by the Verdict, would not maintain an Iſſue for the Tenant. Hill. 5. Ma. *Dyer* 158. *Marrow's* Caſe.

6. A man is Indicted of Murther, before the Coroner, upon *viſum corporis & quod fugam fecit*: Afterwards he is arraigned upon that Indictment, and he pleads Not Guilty, and he is acquitted, and it is found that another man is Guilty, yet becauſe of the firſt Judgment upon the Indictment, he ſhall forfeit his goods; and that is of more force, than is his acquittance; for that upon his Arraignment, his flying ſhall not be given in Charge, and the goods were forfeit upon the firſt Indictment. Paſc. 7 Eliz. *Dyer* 238.

7. B. entred upon C. into Land, as a perquiſite of his Villain regardant, to his Manor G, in the County of G, and thereof made a Leaſe to F. for life; who being diſſeiſed by C, brought an Aſſize. The Iſſue was, If B. and his Anceſtors, and all thoſe, whoſe Eſtate he had in the Manor of G, had been ſeized of C. and his Anceſtors, as villains regardant, time out of mind, *&c.* The Jury found a ſpecial Verdict, viz. That the ſaid B. and his Anceſtors, were ſeized of the ſaid Manor time, &c. and that the Anceſtors of B, was ſeized all times of the Anceſtors of the ſaid C, as villains regardants, untill 1 *Hen.* 7. and that C. was villain regardant to the ſaid Manor, and that no other Seiſin of C. or his Anceſtors, was after had. It was in this Caſe, amongſt other points reſolved, That the Plaintiff ſhould not recover upon this Verdict, becauſe that no actual or full Seiſin of B. and his Anceſtors, of C. and his Anceſtors as villains regardants is found, but only a Seiſin in Law; and it was ſaid, that it matters not, That the Jury have given a Verdict upon the Right of villains, upon which a good Iſſue might have been taken; and all the Preſidents are, where villenage is objected, although he hath alledged alſo Seiſin of the Perſon of the villain, and his Anceſtors; yet the Iſſue is joyned upon the Right of villeinage, *ſcil.* Frank and Free of Eſtate; and not villain *pro ut*, and it is not ſo found in this Caſe. Alſo in this Caſe, the preſumption doth fail in part, *ſcil.* in the Plaintiff himſelf, who is Party, and all his Anceſtors ſince 1 *Hen.* 7. Wherefore it was adjudged againſt the Plaintiff. Paſc. 11 Eliz. *Dyer* 283, 284. *Butler* and *Crowches* Caſe.

8. Note: If the Jury give a Verdict of the whole matter and more, *&c.* it is but ſurpluſage, and ſhall not ſtay Judgment, for that *utile per inutile non vitiatur*; and the Jury may find all neceſſary circumſtances in Law, which tend to the point in Iſſue: But if the matter which is found be doubtful and ambiguous, it is an inſufficient Verdict, and no Judgment ſhall be given thereupon: As in caſe, If an Executor plead, Fully Adminiſtred, and Iſſue is joyned thereupon, and the Jury finde that the Defendant hath goods in his hands to be Adminiſtred, but do not finde to what value, this Verdict is very incertain and inſufficient; ſo a Verdict which findes part of the Iſſue, and nothing of the reſt, it is inſufficient for the whole; as in caſe, If a Writ of Intruſion be brought againſt one, for intruding into a Meſſuage, and 100 Acres of Land; and upon the general Iſſue pleaded, the Jury find againſt the Defendant for the Land, but ſay nothing as to the Meſſuage, this is an inſufficient Verdict for the whole; as it was adjudged, *Hen.* 25 Eliz. in the Exchequer Chamber, in the Queen and *Bracts* Caſe. See *Cook* 1 Part, Inſtitut. 227.

9. In Accompt. The Plaintiff charged the Defendant as Bayliff of his Shop, *cum habuit, & adminiſtrationem bonorum*; the Defendant anſwered as to the Goods only, and ſaid nothing to the Shop: It was ſaid by *Cook* in this Caſe, that here is a thing put in Iſſue, which is not in the Verdict; nor found, nor touched in the Verdict; and that that makes all that was found in the Verdict to be

be void; and that that was not helped by any of the Statutes of Jeofails: And therefore it was ſaid, That in that Caſe the whole Plea was diſcontinued; becauſe he did not anſwer to parcel, and of parcel the Plaintiff could not have Judgment according to his Declaration. But notwithſtanding, in that Caſe, it was the Opinion of the whole Court, That the Statute of 32 *Hen.* 8. *Cap.* 30. did extend to it; for that it is thereby Enacted, That after Verdict, Judgment ſhall be given, notwithſtanding any diſcontinuance. Mich. 29 Eliz. in B. R. *Gomerſal* and *Gomerſals* Caſe. *Godbolt.* 55.

10. In a Raviſhment of Ward, brought upon the Statute of *Weſtminſter*, 2. *Cap.* 35. The Jurors found that the Ward *was* married, and that at the time of his marriage, he was of the age of 18 years and upwards: It was in this Caſe adjudged, That this was not a good Verdict; becauſe it is not only left uncertain who procured him to be married, or whether the Raviſher himſelf, or a ſtranger, or that the Ward of his own accord married himſelf; and alſo for that it was incertain in the time when he was married, whether before the Raviſhment, or after; and Verdicts ought to be ſuch, that the Judges may proceed to Judgment, and doubtfull and incertain Verdicts are void in Law; as it is holden 30 E. 3. 23. *Cook* 9 Part, 74. Dr *Huſſie's* Caſe.

11. A. brought a Writ of Annuity againſt B, and they being at Iſſue, the Jury found for the Plaintiff, and alſo the Arrearages; but did not aſſeſs any Damages or Coſts. It was Reſolved, That this Verdict being imperfect, could not be ſupplyed by a Writ of Enquiry of Damages: Whereupon the Plaintiff afterwards releaſed his Damages and Coſts, and thereupon had Judgment. The Defendant thereupon brought a Writ of Error, and aſſigned for Error, that the Verdict was inſufficient; but yet notwithſtanding, in that Caſe, the Judgment was affirmed, becauſe that the Plaintiffs Releaſe of his Damages and Coſts, was for the benefit and advantage of the Defendant. *Cook* 11 Part, 56. *Brabams* Caſe.

12. In a Replevin: The Defendant avowed as Bailiff to I. S, Lord of the Mannor of H, ſuppoſing that the Land was holden of I. S. as of his Mannor by fealty 21d. Rent, and ſuit in Court, and alledged Seiſin of all the ſaid ſervices within 30 years, and for fealty and ſuit of Court undone; th. Conuſans was made, *ut in terris, tenement. de prædict.*; the Lord, *in forma prædicta & infra feudum ſuum.* The Plaintiff conveyed the Land by him, of whoſe hands the Seiſin was alledged; ſaying, that he held the ſame by fealty, and 12 d. Rent, and ſuit of Court, *pro omnibus ſervitiis*, and traverſed the Seiſin of the fealty, *redendo* 21d. Rent. The Jury at *Niſi Prius*, found the Seiſin of the 21 d. Rent *prout*, and aſſeſſed damages for that, but of the reſidue of the ſervices, that he was not ſeiſed. It was the Opinion of the Court, That upon this Verdict, no Judgment could be given; becauſe that all the other things compriſed in the Travers, *abſque hoc*, were not found for the Plaintiff in the affirmative. Mich. 26 Eliz. *Dyer* 330.

13. The Caſe was: The Biſhop of E, in the time of *Hen.* 8. by his Deed, gave Land to N. T. and S. his Coſſin, in conſideration of ſervice done by N. T, and to the Heirs of their Bodies, and dyes; they have Iſſue, I. and W. N. T. dyed, S. took to Husband I. D, and they alliened the Land to I. in Fee; S. and I. afterwards levyed a Fine of the Land to W, and afterwards S. infeoffed W, being her younger ſon who infeoffed the Defendant I. N; the Defendant I. N, for the tryal of his Title, ſealed a Leaſe to the Plaintiff; who declared of ſo many Acres of Land in *Sutton Coſfield*; the Jury, upon Not Guilty, found by Verdict, that the Biſhop gave the Tenements aforeſaid, by his Deed, and by the Deed it did appear, that the Land did lye in *Little Sutton*, within the Lap of *Sutton Coſfield*. In this Caſe it was holden, 1. That this was not to be any Joynture within the Statute of 11 *H.* 7. for the Biſhop was not any Anceſtor of the Husband, and the Husband took nothing by that, but it was a voluntary recompence given by the Biſhop, in reward of the ſervice paſſed; alſo the Biſhop might well intend it, for the advancement of the Woman, who was his Coſin. 2. It was holden, that the Fine of I. the elder ſon, and of S. levyed to W, deſtroyed the Entry of I. and W; for although in truth the Fine paſſed nothing, but by concluſion: yet I. the ſon, and W. his Conuſee, ſhould be eſtopped to claim any thing by way of forfeiture againſt that Fine. 3. It was holden, That although upon view of the Deed made by the Biſhop, the Land, which by the Declaration is ſaid to be in *Sutton Coſfield*, by the Deed appears to be in *Little Sutton*; yet it was reſolved, that this was helped by the Verdict, by which it was found expreſſly, That the Biſhop gave the Land within written, and therefore being ſo preciſly found, the Deed is not material. Paſc. 5 Jac. in C. B. *Ward* and *Willoughby's* Caſe. *Brownl.* 1 Part, 137.

14. B. and his Wife brought Dower againſt T. A, ſon and Heir of B. A, the firſt Husband of the Wife, the Plaintiff, and demanded Dower of Lands in D. and S. The Tenant pleaded *Ne unque ſeiſi que Dower.* The Jury found that B. A. was ſeized during the Coverture, *de omnibus. Tenemen is infrà ſcript. præterquam*, the Tene-

ments in &c. ſo as *diſt.* the Wife, Plaintiff, *Datari potuit.* Exception was taken to this Verdict, becauſe that this *præterquam* doth confound the Verdict. But it was Reſolved by the Court, That the *præterquam* was idle and ſurpluſage; for it is of another thing than that which is in demand, and the Seiſin of the firſt Husband of Lands in D. and S, is confeſſed, and the *præterquam* works nothing. Then it was moved in this Caſe, That here the Jury have Aſſeſſed Damages; as, In caſe where the Husband dyeth ſeized, the which dying ſeized, is not found by the Verdict: To which it was ſaid by the Court, That the Husband might pray Judgment of the Lands, and releaſe the Damages, or may aver that the Husband dyed ſeized, and have a Writ of Enquiry of Damages. Mich. 30 Eliz. in C. B. *Butler* and *Agret* Caſe. *Leon.* 92.

15. Note: It was holden by the whole Court, That if one of the Witneſſes, after the Jury departed from the Bar, doth repeat unto the Jury the ſame Evidence which he gave before, and no more; yet that doth make the Verdict to be void. Mich. 32 Eliz. in C. B. *Elmes* and *Medcalfs* Caſe. *Leon.* 305.

16. In Treſpaſs, the Defendant pleaded, That the place where, &c. was parcel of a yard Land in P, holden of the Lord *North*, as his Mannor of W. by Homage, Fealty, Eſcuage, and ſuit of Court, incloſure of the Park-pale, and for the Rent behind for three years, and the Fealty; and that the Tenant the Defendant, juſtified as ſervant of his Maſter, and by his Command. The Plaintiff replyed That the Land was holden of I. S, as of his Mannor of L, without that that it was holden of the Lord *North*, in manner and form; upon which, they were at Iſſue, and the Jury found that it was holden of the Lord *N.* as of his Mannor of W. W, by Homage, Fealty, Incloſure of the Pale, and a pound of Cummin, and not otherwiſe. In this Caſe it was adjudged for the Defendant; for although that the Verdict did not agree with the Plea, in manner and form of the Tenure, yet it agreed in Subſtance in the point, for which the taking was; *viz.* that the Land was holden of the Lord *N*, and that is ſufficient.

17. Aſſumpſit againſt an Executor. The Plaintiff declared, That the Teſtator in his life, *viz.* 16 *Oct.* 18 Jac. in conſideration of 5 l. lent him, promiſed to pay, &c. The Defendant pleaded, That the Teſtator *Non aſſumpſit*: The Jury found that the Teſtator *Aſſumpſit modo et forma*, but that the Teſtator dyed ſuch a day, 17 Jac. ſo as he was dead a year and more, before the time found in the Record. It was adjudged in this Caſe, That the Verdict being, that the Teſtator *Aſſumpſit modo et forma*, the finding over that the Teſtator dyed, before the time mentioned in the Declaration, was but idle, and ſurpluſage; nor is the day of the Aſſumpſit material: It was adjudged for the Plaintiff. Mich. 4 *Car.* in B. R. *Lukerſall* and *Swanes* Caſe. *Cro.* 1 Part, 92.

18. Treſpaſs, for that the Defendant beat and aſſaulted the Plaintiffs Wife, and carryed away with her ſuch goods, and detained her for half a year, *per quod ſolamen et conſortium quod habere potuiſſet* with his Wife *amiſit & alia enormia*; Upon NotGuilty, it was found for the Plaintiff; Error brought in the Exchequer-Chamber, and aſſigned, That the Husband hath brought the Action, which he cannot do without his Wife, and hath recovered damages for the Battery. But all the Juſtices and Barons held in this Caſe, That the Husband in this Action did not recover damages for the Battery, but for the loſs which he had for the want of his Wifes company; and the *per quod conſortium amiſit*, and the abduction of her, is one entire act; and for that cauſe the damages were given: And it was holden in this Caſe, That this Verdict and Judgment do not bar the Wife to have an Action after the death of her Husband for the Battery; and ſo it was ſaid it was adjudged. Paſc. 17 Jac. in B. R. Rot. 187. See *Hide* and *Sciſſors* Caſe. The Judgment was affirmed, Hill. 2 *Car.* in Ex. Chamb. *Young* and *Pridds* Caſe. *Cro.* 1 Part, 63.

18. Error of a Judgment in B. R. upon an Obligation conditioned for the payment of 100l. by A. B. and C, or any of them. The Defendant A. pleaded that he paid it at the day: The Plaintiff replyed, That neither the ſaid A. B. nor C, nor any of them, paid the 100l. at the day. The Jury found, That the ſaid A. had not paid the 100l. as the Defendant had pleaded; and Judgment given for the Plaintiff, Error brought and aſſigned; becauſe the Verdict was not according to the Iſſue, for it might be paid by any of the other. But the Court held it well enough; for that the addition of B. and C. not mentioned in the bar, was but ſurpluſage; and their finding that A. did not pay the money, is ſufficient, and it ſhall not be intended that any of the other paid it, when the Defendant A. ſaith, that he himſelf paid it: The Judgment was affirmed. Paſc. 1 *Car.* in C. B. *Abſcot* and *Heals* Caſe. *Cro.* 1 Part, 4.

19. In Treſpaſs, the Defendant juſtified, becauſe it was the Free-hold of I. S, and he entred by his command, the Plaintiff entitles himſelf, becauſe the Land was Copy-hold, and demiſable in Fee, and that I. N. was ſeized in Fee by Copy, and that the Land deſcended to two Daughters and Heirs, who were admitted, and demiſed to the Plain-

Plaintiff for years; and Iſſue being joyned upon a collateral matter, and the Verdict given for the Plaintiff, it was moved, That the Plaintiff had not made good Title; for none may entitle himſelf to Copy, but he ought to ſhew a Grant thereof; and not ſhewing a Grant in this Caſe, it was not good: And of that Opinion was the whole Court. But it was ſaid, That it was but a default in Form, and the Iſſue being taken upon a collateral matter, and found for the Plaintiff, it was good, and helped by the Statute of Jeofails. Paſc. 6 *Car.* in B. R. *Shepherds* Caſe. *Cro.* 1 Part, 137.

10. *Eiſdem ſ. me* of Meſſuages. 3000 Acres of Land, 3000 Acres of Paſture in D, *per nomina* of the Manor of M. and 5 Cloſes *per nomina, &c.* The Defendant pleaded *Not guilty*, and the Jury gave a ſpecial Verdict; viz. *Quoad* four Cloſes of Paſture, containing by eſtimation 2000 Acres of Paſture, was not Guilty *Quoad reſiduum*; they finde matter in Law. It was the Opinion of the Court, That this Verdict was incertain; for that it doth not appear, for how much they acquit him; and when they finde *Quoad reſiduum* the ſpeciall matter, it is incertain what that *reſiduum* is; ſo as there cannot any Judgment be given thereupon: Therefore by the Rule of the Court, A *Venire facias de Novo* was awarded, to try that Iſſue. Hill. 3 Jac. in B. R. *Woolmor* and *Caſtons* Caſe. *Cro.* 1 Part, 113.

11. A Verdict being imperfect, a *Venire facias de Novo* was awarded, and then a general Verdict was given againſt both the Defendants, whereby they were found Guilty: It was moved, That this was a void Verdict, viz. as to the Wife; whereas by the firſt Verdict, ſhe was found Not Guilty. It was the Opinion of the whole Court, That the firſt Verdict was void, by reaſon of the imperfection therein, and is as no Verdict, and all that is found therein void, although it be entred in the Roll; wherefore the ſecond Verdict is good, being found upon better Evidence. Mich. 19 Jac. in B. R. *Langley* and *Pains* Caſe. *Cro.* 1 Part, 627.

12. Treſpaſs by Husband and Wife, for breaking the Cloſe of the Husband, and for Battery of the Wife, *ad damnum ipſorum*. The Defendant as to the breaking of the Cloſe, pleaded *Not guilty*; and as to the Battery, juſtifies: For the firſt Iſſue it was found for the Defendant, and for the ſecond, for the Plaintiff. It was moved, That the Declaration was not good, becauſe the Husband joins the Wife with him in Treſpaſs, *de clauſo fracto*; but for the Battery they may joyn. Then it was moved, That in regard it was found againſt the Plaintiff, for the Iſſue in which they ought not to joyn; that the Defendant is diſcharged for that part which is ill, and is good for the reſidue. The Court was divided in Opinion in the point. But the better Opinion ſeemed to be, That the Declaration being ill in it ſelf in ſubſtance, the Verdict ſhall never make it good. Hill. 21 Jac. in B. R. *Buckley* and *Cales* Caſe. *Cro.* 3 Part, 655.

13. Error of a Judgment in Treſpaſs in B. R. The Error was, That a Treſpaſs of *Clauſum fregit de aſcendo, &c.* viz. *Equas bobus vaccis, porcis, et bidentibus*. The Defendant pleaded *Quoad*, the Treſpaſs *aſſignat ave ips depaſcendo Quoad*, any Treſpaſs, *cum aliquibus averiis, præterquam cum duobus ſpadonibus & tribus vaccis*. Not Guilty; and *Quoad*, the Treſpaſs *Clauſum fregit, cum duobus ſpadonibus, & vaccis*, he juſtified for preſcription of Common; upon which they were at Iſſue: The Verdict for the firſt Iſſue, That the Defendant was Guilty *cum aliquibus averiis*, and aſſeſſed damages. And for the ſecond Iſſue, they found for the Plaintiff; and upon this Verdict, Judgment was given for the Plaintiff. The Error aſſigned was, That the Verdict finding that he was Guilty, *cum aliquibus averiis*, not ſhewing what was in certain: but the Exception was diſallowed by the Court, for being found that he was Guilty, *cum aliquibus averiis*, it is as general as the Declaration, and it is not material for what number, or for what head of Cattel, but the Verdict good enough: The Judgment was affirmed. Hill. 20 Jac. in B. R. *Elſton* and *Burrows* Caſe. *Cro.* 2 Part, 662.

14. Replevin of his ſheep, taken in *Cotteſmore* Common. The Defendant made Conuſance as Bayliff, to the Provoſt of *Eaton Colledge*; becauſe the Common belonged to the Provoſt, *&c.* and the Sheep were there damage feſant: The Plaintiff ſets forth, That *Cotteſmore* Common contained Acre (but did not ſet forth what number), but left a Blank for the ſame; and that he was ſeized of 100 Acres, parcel thereof in Fee; and that he, and all thoſe whoſe Eſtate, &c. had Common in the reſidue of *Cotteſmore* Common, for 400 Sheep, as appurtenant to the ſaid 100 Acres. The Defendant traverſed the preſcription, it was found for the Plaintiff: It was moved in ſtay Judgment, by reaſon of the number of the Acres omitted by the Plaintiff in the bar to the Conuſance; becauſe *Non conſtat Curiæ*, what the reſidue of the Acres were. But it was adjudged for the Plaintiff, becauſe in this Action he is not to recover any Land, but only damages, for the Bailiffs taking of the Cattel; ſo the Land is not in queſtion: And both Parties agree, that there is a *Reſiduum* of the Common, and ſo it is found by the Verdict, and be it more or leſs, it is all one; for in that which remains above the 100 Acres, the Plaintiff ought to have Com-

Common. It was adjudged for the Plaintiff. Mich. 6 Jac. in B. R. Sir *Anthony Cope*, and *Temples* Caſe. *Yelverton.* 146.

25. Treſpaſs againſt Husband and Wife: The Plaintiff declared, that they did beat his Mare; and of diverſe other Treſpaſſes: Upon *Not guilty*, the Jury found, That the Wife beat the Mare; and for the reſidue they found *Not guilty*. The Opinion of the Court was, That the Plaintiff *Nil capiat per Billam*; for the Verdict is altogether imperfect, for they have found the Wife Guilty of beating of the Mare, and have given in Verdict, as to the taxing the Husband, either by way of acquittal, or condemnation, and ſo finding for the reſidue *Not guilty*, doth not extend but to the Treſpaſſes, and not to the Battery of the Mare: Alſo it appeareth by the Verdict, That the Action of the Plaintiff is falſe; for the Husband ſhall not be joyned in ſuch Caſe, but for conformity; and it is not like a Battery charged upon I. S. and I. D; for there one may be acquitted, and the other found Guilty; becauſe in Law they are ſeveral Treſpaſſes. Mich. 5 Jac. in B. R. *Drury* and *Dennis* Caſe. *Yelverton.* 106.

26. In a Replevin: The Defendant avowes the taking as a Commoner damage-feaſants in *April* 11 Jac. The Plaintiff in bar ſayes, That one A. was ſeized of a Houſe and Land, whereunto he had Common, and demiſed the ſame to him, the 30th. of *March*, 11 Jac. to hold from the Feaſt of the Annunciation next, for a year: The Avowant traverſed the Caſe *modo & forma*, where, upon Iſſue taken, the Jury found, That A. made a Leaſe to the Plaintiff, the 25th. day of *March* for a year, from thence next following; and although this be not the ſame Leaſe that the Plaintiff pleaded, after this begins one day, and the other not ſo ſoon, nor was to take his limitation, but from that day excluded; yet the Court gave Judgment for the Plaintiff: for the ſubſtance of the Iſſue is, Whether the Plaintiff have ſuch a Leaſe from A. or not, as by force thereof, he might have Common at the time; which appeared for him in this Caſe, and the *Modo & forma* in the reſt, is not material; and yet it muſt not depart altogether from the form of this Iſſue, for if it had been found that he had right of Common by a Leaſe from another, or as an Owner, it would not have ſerved his turn; for that had been clear out of the Iſſue, both for Matter and Form. Trin. 12 Jac. in C. B. *Pope* and *Skinners* Caſe. *Hob.* 73.

27. T. brought Treſpaſs againſt S. The Defendant juſtified, by conveying himſelf an Eſtate by Copy, in a piece of ground, parcel of the Manor of C. whereof A. was ſeized; and the Plaintiff came upon it, and he laid his hands, *Molliter*, &c. The Plaintiff conveyed himſelf an Eſtate by Copy of another parcel of the ſame Mannor, and then laid, That the ſaid A, Lord of the ſaid Manor, had had for him and his Tenants, in this piece of ground, a way over the Defendants piece; Thereupon Iſſue taken, it was found for the Plaintiff. It was the better Opinion of the Court in this Caſe, That this was not holpen by the Statute, becauſe indeed this is no Iſſue at all, nor thing, nor poſſibly Iſſuable, & therefore the Verdict muſt alſo be utterly void; for a Verdict cannot make that good, that the Court ſees cannot be in Law; and although it was ſaid, that the ſubſtance of the Iſſue, was, no way; and if it had been laid in the Iſſue by way of Cuſtom, the ſame Evidence would have maintained the Iſſue: It was anſwered, That ſince it is put in Iſſue as before, ſo as it cannot ſtand in Law, there Verdict is not to be taken againſt him, to make him ſubject to an Attaint, if in another ſenſe it be falſe: And it was ſaid, That if they had found a Cuſtom for the way, the Court would not have given Judgment; for the ſpecial matter of the Cuſtom, did not bar the Iſſue, as it is taken upon a preſcription void in Law. Hill. 13 Jac. in C. B. *Tucker* and *Salters* Caſe. *Hob.* 111, 113.

28. In Treſpaſs, Iſſue was taken, That R. I. Prebendary of the Prebend of P, in the Church of S, and all his Predeceſſors, Prebendarie, &c. had uſed time out of mind, to keep a Shepherd of certain Sheep of theirs, following the ſame Sheep, for the better keeping of them, feeding together in a certain Paſture, from the Sheep of F. Earl of S. in the ſame place, and the Iſſue was found accordingly. It was moved, That it was a void Verdict; for the preſcription was ſenſleſs, and could not ſtand; That the Sheep could be kept time out of minde, from the Sheep of the Earl, being but one mans life: But yet Judgment was given according to the Verdict for the Plaintiff; for the ſubſtance of the Iſſue was, the keeping of the Sheep of the Prebendary feeding together, and the other part was but a Conſequent of it; that thereby they were kept from the Sheep of the Earl. Trin. in Jac. in C. B. *Napier* and *Juſtars* Caſe. *Hob.* 117.

29. Error for the reverſing of a Judgment in C. B. in an Action of Covenant, to make a Leaſe; and ſhewed, That *Nihil habuit*, of which he could make a Leaſe; The Defendant pleaded, *Quod habuit vide*, &c. upon which they were at Iſſue, and the Jury found, that he had Land, whereof he might make a Leaſe, and they finde what Eſtate he had therein: It was a Queſtion, Whether the Verdict ſhould make the Plea good: The Court was clear of Opinion, That the Plea was not good, becauſe he doth not ſhew what Eſtate he

he had in the Land: for the Plea of *Habuit*, of it ſelf was no good Plea, without ſhewing in ſpecial the Eſtate that he had. But yet the Court was clear of Opinion, that the Verdict here hath made the Plea good, and ſo the Judgment was well given. M. 10 Jac. in B. R. *Gloſſe* and *Gills* Caſe. *Bulſtr.* 2 Part, 41.

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2. *Special Verdicts, or Verdicts at Large, in what Actions; how to be taken and conſtrued, where favoured, where not; where good, though finde not the Parties Title, and the different Effects between them, and a general Verdict.*

1. A Special Verdict, or a Verdict at large, may be given in any Action, and upon any Iſſue, General, or ſpecial; becauſe the truth of the Caſes may be the better diſcovered and diſcuſſed, and Juſtice and Right done. As if a man ſeized of Lands for life, Leaſeth the ſame for life, without Deed, rendring Rent, upon condition of re-entry, upon *Non*-payment of the Rent; whereupon the Leſſor enters, and the Leſſee brings an Aſſize: In that Caſe, the Jurors may finde the matter at large; and in ſuch Caſe the Judges ought to judge it for the Tenant: although regularly a Condition is not available, without a Deed ſhewed; and although the Leſſor ſheweth not a Deed. *Cook* 1 Part, *Inſtit.* 227.

2. In a Special Verdict, all matters ſhall be intended and ſupplyed, but only that which the Jurors have referred to the conſideration of the Court; and ſo it was adjudged, 31 Eliz. in B. R. in *Scobel* and *Gabells* Caſe. Vouch in *Cook.* 5 Part, in *Gondales* Caſe.

3. A man poſſeſſed of Land in Fee, upon Condition, that if the Feoffor, within a year after the death of the Feoffee, pay to his Heirs, Executors, or Adminiſtrators, 100l.; that then the Feoffment ſhall be void. The Feoffee makes a Feoffment over, and dyeth; and afterwards within the year, it was agreed between the Feoffor, and the Heir of the Feoffee, that the Feoffor pay the 100l., and that the Heir pay back all to the Feoffor, but only 30l. who doth accordingly; and the Feoffor enters into the Land, pretending the Condition to be broken. It was in this Caſe, amongſt other Points reſolved, That becauſe the Jurors replyed, and concluded upon the payment, if it were a perfect manner of the Condition or not, That in ſuch Caſe, the Court ought not to give Judgment, untill they had reſolved that, which the Jurors referred to their Conſiderations; and that all other matters ſhould be intended and ſupplyed; but that only which the Jurors had referred, to the conſideration of the Court. *Cook* 5 Part, 97. *Goodale's* Caſe.

4. In an *Ejectione firme* brought, the Defendant pleaded *Not guilty*; and the Jury found it ſpecially, That one W. was ſeized of the Land in Fee, and did enfeoff the Husband and Wife, To have, to hold, to the Husband and Wife, and the Heirs of their Bodies, between them to be begotten; by vertue of which Feoffment, the Husband and Wife was ſeized of the whole Land in Fee-tail, &c. The Husband enfeoffed the youngeſt ſon of the Land in Fee, and afterwards, the Husband dyed, and the Wife ſurvived; afterwards, ſhe dyed, before any Entry made by her into the Land, & the Jurors further find the Leſſor to be the eldeſt ſon of their Bodies, and that the youngeſt ſon enfeoffed the Defendant; and that afterwards the eldeſt ſon entred into the Land, and made the Leaſe in the Declaration; and whether his Entry was Lawful or no, upon the Statute of 32 H. 8. That Fines and Feoffments made by the Husband &c. during the Coverture, be, or make any diſcontinuance, or be hurtful to the Wife, or her Heirs, was the Queſtion; and upon this ſpecial Verdict found, It was holden, That the Heir was not barred of Entry by the Statute. Hill. 5 Jac. in C. B. *Greale's* and *Poſſyes* Caſe. *Brownlo.* 1 Part, 131.

5. In Treſpaſs, the Jury found a ſpecial Verdict, to this effect: A. ſeized of Lands in Fee, holden of Th. L. as of his Mannor of H, by Fealty, Rent, and rendring the beſt Beaſt, after the death of every Tenant in Fee-ſimple, by Deed, in conſideration of Paternal love to his ſon and Heir Apparent, and in conſideration of Marriage between his ſon and B, and for the agreement of his ſon enfeoffed his ſon and Heir Apparent of the ſaid Land. Afterwards the ſon, to the intent that B. ſhould not be endowed of the ſame Land, during the life of the Father, re-demiſed the Lands to the Father for 40 years, if he ſhould ſo long live; and afterwards the Marriage took effect. The ſon did ſuit at the Lords Court, and after the Feoffment, the Father paid the Rent to the Lord; and after the Father dyed, the Lord took a Beaſt for a Heriot *poſt mortem* of the Father; and the Jury found the Statute of 13 Eliz. of fraudulent conveyances. It was reſolved in this Caſe, amongſt other

other things, That becauſe no fraud is found by the Jurors, that the Court ſhall not adjudge the ſaid Feoffment fraudulent; and although the Jurors have found circumſtances to incite the Jurors to finde a fraud, yet the ſame is but as Evidence to the Jurors, and not any matter upon which the Court ſhall adjudge the ſame to be fraud. 2. The Jurors have not found, that the ſaid Feoffment was to defraud the Lord of his Heriot, and ſo they have not found the ſame to be within the Statute of 13 Eliz. Trin. 10 Jac. in C. B. *Tyrer* and *Littletons* Caſe. *Brownlo.* 2 Part, 187. See the ſame Caſe vouched in *Cook* 10 Part, in the Caſe of the Chancellor, Maſter, and Scholars of *Oxfords* Caſe.

6. The Sheriffs of *Norwich* brought an Action upon the Caſe againſt B. becauſe they being Sheriffs, a *Capias ad ſatisfaciendum* was awarded to them; and that they, 20 *Febr.* 25 Eliz. directed the Warrant in writing, by three Serjants of the City to Arreſt B, by force of which, the Serjants the 26 of *Febr.* in the ſame year, did Arreſt him in Execution, and that he was reſcued, and eſcaped: The Defendant pleaded *Not guilty*, and upon Tryal of the Iſſue, a ſpecial Verdict was found, That about 20 *Feb.* 25 Eliz. ſuch a Warrant was made by but not 20 *Feb.* and that the Serjants by force thereof, about 20 *Febr.* did Arreſt him; but not the 26 of *Febr.* Upon which there was a demurrer: It was ſaid, amongſt other things, That as to the Verdict, the ſore and foundation of the Action is the wrong, and that here is not found certain; for it is ſuppoſed to be 26 *Febr.* And alſo the Warrant was *Circa* 26 *Febr.*, and if it were at any time before, then it was maintainable, but not if it was at any time after; and here the Verdict finding it to be *Circa* 26 *Feb.* is not good. But the Opinion of the Court was, That the Verdict was certain and good enough; for it ſaith, That *ad tunc & ibi dem ipſum ſeipſum recuſſit*, and that cannot but be referred to a time certain before, viz. the 26 h. of *Febr.*; Wherefore, though it was very much oppoſed, Judgment was given for the Plaintiff. H. 29 Eliz. in B. R. *Yarraw* and *Bradſhaw's* Caſe, *Godbolt.* 125.

3. *Where and what Acts done by the Jurors, and when ſhall make their Verdict void: And how the Jurors muſt demean themſelves in the giving of their Verdict.*

1. NOte, That to prevent falſe Verdicts, If the Jury after their Evidence given unto them at the Bar, do at their own Charges eat and drink, before they be agreed on their Verdict, it is finable only; but it ſhall not avoid the Verdict. But yet if that before they be agreed of their Verdict, if they do eat or drink at the charge of the Plaintiff, if the Verdict be given for the Plaintiff, it ſhall make the Verdict to be void; but if the Verdict be given for the Defendant, it ſhall ſtand good: And *ſic è Converſo. Cook* 1 Part, *Inſtitutes*, 228. acc. See Pafc. 35. H. 8. *Dyer* 55. acc.

2. At the *Niſi Prius*, the Jury after Evidence given, and that they were departed from the Bar, came and returned, and ſaid, That they all, but one who had eaten Pears, and had drank Ale, were agreed of their Verdict, who would not agree with them; at the requeſt of the Plaintiff, they were ſent back again, and afterwards they returned, and gave Verdict for the Plaintiff, and the Verdict was holden to be good, and a Fine was aſſeſſed of 10l. upon the ſaid Juror who had eaten and drunk, and Judgment was entred for the Plaintiff. Mich. 5 Eliz. *Dyer* 218. See 29 H. 8. *Dyer* 37. 14 H. 7. 31. 20 H. 7. 3. Pafc. 24 H. 8. in *Spilmans* Reports. acc.

3. If the Plaintiff after Evidence given, and that the Jury is departed from the Bar, or any for him, do deliver any Writing, Note, or Letter from the Plaintiff to any of the Jurors, which doth, or may concern the matter in Iſſue; or deliver any further Evidence or eſcroll, touching the matter in Iſſue, which was not before given in Evidence; if thereupon the matter ſhall be found for the Plaintiff, it ſhall make the Verdict to be void, as to the Plaintiff; but if notwithſtanding, they give their Verdict for the Defendant, then it ſhall be a good Verdict; and *ſic è Converſo.* But if the Jury carry away any Writing unſealed, which was not given in Evidence in open Court, this ſhall not make the Verdict to be void, although the Ju-

ry

ors ſhould not have taken and carryed away ſuch Writing with them. *Cook* 1 Part, *Inſtitutes.* 227, 228, &c. And ſee there, that after the Jurors are agreed, of their Verdict, they may in Caſes between Party and Party, if the Court be riſen, give a privy Verdict, before any of the Judges of the ſame Court in which the Tryal is; and the next Morning they may in open Court, either affirm, or alter their Privy Verdict, and that which is given in Court ſhall ſtand: But in criminal Cauſes of life and member, the Jury can give no privy Verdict, but they muſt give it openly in Court. *Cook* 1 Part, *Inſtitutes.* 295. acc.

3. In Treſpas, the Caſe was, The Jury being charged, and Evidence given, and being retyred into a houſe to conſider of their Verdict, they remained there a long time, without concluding any thing; The Officers who attended them, ſeeing their delay, ſearched if they had any thing about them to eat; and found, that ſome of them had Figgs, other Pippings; which being moved to the Court, they were examined upon Oath; and two of them did confeſs that they had eaten Figgs, before they had agreed on their Verdict; and three of them confeſſed, that they had Pippings, but did not eat them. It was holden, That this was a great miſdemeanor in the Jurors, and thoſe who had eaten, were Fined every of them 5l.; and thoſe who had not eaten, every of them 40 s. apiece: But upon great advice, and conſideration had, and conferrect with the reſt of the Judges, the Verdict was taken to be good, notwithſtanding the miſdemeanor aforeſaid. See *Book.* Entryes. 251. Hill. 3 Eliz. in C. B. *Mounſon* and *Porters* Caſe. *Leon.* 132, 133.

More Verdict.

1. DEbt for 19l. 10s. The Plaintiff declared upon a Leaſe for years, of certain Copy-hold-Lands, rendring 30l. *per Annum*, at Mich. and the Annunciation, by equal portions; and upon a Leaſe of certain Free-hold Lands, in the ſame Town, rendring 20s. *per An.* at the ſame Feaſt; and for 19l. 10s. for the Copy-hold Lands Rent Arrear, and 10s. for the Free-hold: The Action was brought, the Defendant pleaded *Nil debet*, and found for the Plaintiff *quoad* the 10s. for the Free-hold; & *quoad* the 17l. 10s. for the Copy-hold. It was found for the Defendant; The Clerk of the Aſſizes retorned the *Poſtea*, that it was found for the Plaintiff, and the 10s. parcel of the 19l. 10s. and *Quoad* the reſidue of the 19l. 10s. the Defendant, *Non debet.* In ſtay of Judgment it was moved, That the Verdict was incertain which of thoſe Rents was not paid; but becauſe the Judge before whom the Iſſue was Tryed, did well remember, that the Jury found for the Copy-hold-Rent for the Defendant, and for the Free-hold-Rent, for the Plaintiff: By the Rule of the Court, the retorn of the *Poſtea* was amended. Mich. 9 Car. in B. R. *Eliot* and *Skippers* Caſe. *Cro.* 1 Part, 246.

2. The Executor of A. brought Debt upon an Obligation againſt the Executor of I. D: the Defendant pleaded, That I. D. dyed Inteſtate, and that before the Writ brought, Adminiſtration of the goods was committed to I. M, who Adminiſtred, and yet doth Adminiſter: The Plaintiff replyed, That I. D. dyed Inteſtate, and that before the Adminiſtration granted, diverſe Goods of his came to the Defendants hands; which Goods the Defendant as Executor to the ſaid I. D, *Adminiſtravit, ſeu alter ad uſum ſuum propriam diſpoſuit et convertit, et hoc, &c.* Whereupon Iſſue was joyned, and found againſt the Defendant in the diſjunctive, as aforeſaid. It was adjudged for the Plaintiff, for the point in Iſſue is directly found, and the Iſſue alſo is not improper; for though the Verdict be true, if either he did Adminiſter, or otherwiſe convert them to his own uſe, yet both muſt be as Executor; for ſo is the Pleading and Verdict, and then it is but the ſame thing ſpoken two wayes; and ſince there was an Execution in wrong, before the Adminiſtration granted, the Plaintiff had cauſe of Action veſted in him, which ſhall not be taken away by the Adminiſtration granted, though it be before the Action brought. Trin. 11 Jac. in C. B. Rott. 4081. *Stebie* and *Oxbaſtons* Caſe. *Hob* 49.

3. Note, It was ſaid by the Court, and put as a Rule in Law, That although a Verdict ſeemeth to ſtray, or not conclude formally, or punctually unto the Iſſue, ſo as you cannot find the words of the Iſſue in the Verdict; yet if a Verdict may be concluded out of it, to the Point in Iſſue, the Court ſhall work it into a form, and make it ſerve; and therefore ſee 47 E. 3. 19. In a *Precipe* one came and ſaid, That the Tenant was Tenant for life, and prayed to be received for the Reverſion; the Defendant on the other ſide, pleaded, That the Tenant in the Action had Fee; whereupon Iſſue was taken that he had not Fee: But it was found, that neither the Tenant, nor he in the Reverſion, had any thing in the Land, which is clean beſides the Iſſue, and againſt the Reaſon of *Reſſit.* Yet it was adjudged, that he ſhould be received, for by this Ver-

dict, it was found, that the Tenant had not Fee, which was all that was put in Iſſue: For both the Demandant and the Tenant praying the Receit, allowed a Tenant to the Action, which muſt be a Tenant of the Freehold, and that being agreed by the parties, the Jurours cannot falſify that. See in *Foſter* and *Jackſons* Caſe, *Hob.* 54.

4. In Waſte, the Plaintiff declared that the Defendant was ſeiſed, and made a Feoffment in Fee to the uſe of himſelf for life, the Remainder to the Plaintiff in Fee, after which he committed Waſte. The Defendant ſaid, That he was ſeiſed in Fee, without that that he made the Feoffment *post*, the Plaintiff declared; the Jury found, That he was ſeiſed of ſuch Eſtate as the Plaintiff declared, but with the Priviledg to be diſ-puniſhed of Waſte. It was Reſolved in this Caſe, That the Defendant might waive the Priviledg, and then the Jury cannot find any thing out of the Iſſue, and the *Verdict* was therefore void, and it was adjudged for the Defendant. Paſc. 25 Eliz. in C. B. rott. 603. *Keyre* and *Deucatts* Caſe. *Owen* 91.

5. It was found by *Diem clauſit extremum*, That *A.* was ſeiſed of Lands, and that J. was his Heir within age, and that the Land was holden of the King in *Capite*; J. dyed within age. By Inquiſition by vertue of a Writ of *Devenerunt*, after the death of J. it was found, That the Lands were holden of J. D. as of his Mannor of D. It was Reſolved in this Caſe, That although the firſt Office was executed, and doth remain as Evidence for the King whileſt it remains in force: Yet the Jurors are at liberty to find the certainty of the Tenure, and are not concluded by the firſt Inquiſition. *Cook* 12. Part, 102. *Heyes* Caſe.

6. In *Ejectione firmæ*, the Defendants pleaded, Not Guilty; the Jury found them Guilty *in tanto unius Meſſuagii in occupatione, &c. quantum ſtat ſuper ripam*: And whether this *Verdict* were ſufficiently certain, ſo as the Court might give Judgment upon it, and execution thereupon had, was the Queſtion. It was ſaid, *Id certum eſt, quod certum reddi poteſt*, and this may be reduced to a certainty upon the view of the Sheriff. It was Reſolved by the whole Court, That the *Verdict* was inſufficient for the incertainty, and a difference was taken betwixt Treſpaſs, and *Ejectione firmæ*, for ſuch a *Verdict* in Treſpaſs may be good, for there damages only are to be recovered but in an *Ejectione firmæ*, the thing it ſelf. It was objected, That the *Verdict* was good, becauſe the demand was certain although the Jury found it *in tanto*; and where there may be certain deſcription for the Jury, it is good enough. But to that it was anſwered, That that which is naught in demand, is not in the *Verdict*, and therefore would be naught in the Judgment. Trin. 17 Car. in C.B. *Juxton* and *Andrews* Caſe. *Marſh.* 97.

7. E. brought an Action upon the Caſe againſt F. becauſe whereas the Plaintiff had ſold to the Defendant ſo much Wood; the Defendant in conſideration thereof did promiſe to pay ſo much money to the Plaintiff, and to carry away the Wood before ſuch a day. The Defendant pleaded, That he paid the money at the day aforeſaid, but as to the carrying of it away before the day, he pleaded *Non aſſumpſit*, and the Jury found, that he did not pay the money at the day; but as to the other they found that he did aſſume and promiſe as aforeſaid. It was moved in ſtay of Judgment, that the finding of the Jury was naught: For being but one *Aſſumpſit*, and the ſame being an entire thing, it could not be apportioned, and therefore they ought to find the entire *Aſſumpſit* for the Plaintiff, or all againſt him. It was Reſolved that the *Verdict* was not good. Trin. 17 Car. in B.R. *Eaſt* and *Farmers* Caſe. *Mar.* 100.

8. In Treſpaſs, the *Verdict* was found for the Defendants. It was moved in Arreſt of Judgment for the Plaintiff, becauſe no bail was entred for one of the Defendants, for every Defendant is ſuppoſed *in Cuſtodia Marſhalli*, and in this Caſe the *Venire facias* is awarded to try the Iſſue betwixt the Plaintiff and Defendants, where one of the Defendants is no party in Court; and it was ſaid, that in ſuch Caſe it was Reſolved in the Lord *Chandys* and *Scullers* Caſe, that the Judgment was erroneous. It was the Opinion of the Court in this Caſe, That becauſe no fraud appeared in the Plaintiff, That he ſhould not be bound to ſtand to the *Verdict*. But it was ſaid in that Caſe, That if the ſame Defendant had appeared at the Suit of any other that Term, it had bin ſufficient. Trin. 16 Jac. in B. R. Dean and Sir *Arthur Manneringe's* Caſe. *Hob.* 145.

Vicar

Vicar *and* Vicarages.

1. Vicarages were Originally endowed out of Parſonages. And the Vicar was to have aid of the Patron if he was impleaded for any thing concerning his Vicarage, and the Parſon was ſubject to every Charge of the Vicarage; and the Vicar in ancient time was not eſteemed the Tenant of the Freehold of the Land of the Vicarage, but the Freehold thereof was in the Parſon; and the Vicar himſelf was not ſuch a perſon againſt whom the Lands of the Vicarage could be demanded; nor did any *Precipe* lye againſt him as Vicar, nor could he maintain an Aſſiſe in his own name as Vicar. See for all theſe points before. 31 H. 6. 13. by *Yelverton.* 8. Aſſ. 36. 40 E. 3. 27.

2. In 22 E. 3. *fitz.* Title *Brief*, 256. In an Aſſiſe brought againſt a Vicar, he pleaded that he had nothing but as Vicar, and demanded Judgment of the Writ. The Plaintiff ſaid, That he was ſeiſed untill Diſſeiſed by him. In that Caſe, it was holden, That if he had found the vicarage ſeiſed, that then it was a good plea. But in that Caſe it is holden, That a Vicar ſhall not have an Aſſiſe in his own name.

4. In 4 E. 3. *Fitz.* Tit. *Brief*, 704. a Writ of Intruſion was brought againſt a Vicar, who pleaded to the Writ, That the Freehold was in the Parſon, and notwithſtanding that plea, the Writ did not abate; but the reaſon of that Caſe might be, For that the Intruſion was a tortious act and a perſonal wrong, and therefore the perſon of the vicar was charged with the ſame. But yet note, That in that very Caſe, the vicar had aid of the Patron and Ordinary, by which it appeareth that the Freehold was in the vicar himſelf, but not the Feeſimple of the Gleab of the vicarage. And note there, That the Poſſeſſions of the vicar and Parſon are ſevered; and it is ſaid, That every of them ſhall have ſeveral Writs concerning the Rights which do appertain unto them, and they ſhall not joyn in one Writ. They ſhall likewiſe pay the Charges lyable upon their ſeveral Gleabs ſeverally. And note, it is ſaid, That now at this day, a Vicar may have and maintain a Writ of *Juriſdictum* againſt the Parſon, who is the Patron of his Vicarage for the Gleab of the Vicarage. And by this it appeareth, That upon the Endowment at firſt of Land upon the Vicarage, that the Freehold of the Land is in the Vicar; but that the abſolute Feeſimple of the Gleab of the Vicarage is in the conſideration and intendment of Law, in ſuch manner as the Feeſimple of the Gleab of the Parſonage is.

4. If there be contention *de Jure Decimarum originem habeat de jure Patronatus, tunc ſpectat ad legem Civilem*: as it was holden by the Opinion of all the Juſtices, Mich. 29 Eliz. in *Buſby* the Vicar of *Paneas* Caſe. See *Godbolt*, 63. And in that Caſe it was ſaid, That *de mero jure*, The Parſon is to have all Tythes if there be no endowment of the Vicarage. And ſo it was ſaid it was Reſolved, 15 Car. in B. R. That a Vicar cannot have Tythes but by gift, Compoſition, or Preſcription, for that all Tythes *de Jure* do belong to the Parſon.

5. Note, there are *Decima Majores*, *et Decima minores*. In Treſpaſs for taking of two load of Woad. The Jury found, That if they were *Minuta Decima*, then the Jury found the Defendant guilty. If they were not *Minuta Decima*, then for the Plaintiff. It was ſaid for the Plaintiff, that without more circumſtances, Woad ſhall not be intended *Minuta Decima*. For it may be, That a great quantity of Woad may be ſowed, and the greateſt part of the Pariſh may conſiſt in it; For *Minuta Decima* are but of ſmall conſideration, as herbs in a Garden, or ſuch like. And therefore Woad ſowed in a Field is not *Minuta Decima*. But it was Reſolved, That Woad growing in the nature of an Hearb, the Tythe thereof ought to be accounted *Minuta Decima*, and ſo to belong to the Vicar. And 42 Eliz. it was adjudged, That the Tythe of fourty Acres of Lands ſowed with Saffron, was *Minuta Decima*, and did belong to the Vicar.

6. The Prior of D. was ſeiſed of the Advowſon of N. appropriated to his Priory; and alſo of the Vicarage of N. endowed with ſmall Tythes. This Appropriation and Endowment was in the time of King *John*, and ſo continued, untill the time of King *Henry* the 6th, when the Pope Granted by his Bulls, That the Prior ſhould appoint one of his Monks to Officiate the Cure, who ſhould be removable *ad natum Prioris*. The Queſtion was, Whether thereby the Vicarage was diſſolved. It was objected, That it was in regard the Pope was then Supream Ordinary: And it was good without the Kings Licenſe, in regard the endowing was a Spiritual act, and the Patron had nothing to do therein: And as the endowment of a Vicarage is a Spiritual act, ſo is the diſſolving of it. But it was holden. 1. That a Vicarage perpetual could not

be diſſolved after the Statute of 4 H. 4. 2. That the Pope had not any power to make any Ordinance againſt the Statute, and the Pope could not diſſolve the Vicarage in this Caſe, for that by the Statute he had not any right to meddle with Advowſons, Benefices, &c. And the Pope by his Bulls cannot diſpence with the Law, though they tend in *Ordine ad Spiritualia.* 3. That there was no diſſolving of the Vicarage alledged in the Caſe, or any words that did amount to it, but the words only are, That the Vicar ſhould *dot ad naturam Prioris.* 4. It was ſaid, That a Parſonage and a Vicarage are two diſtinct Benefices, and both have *Curam animarum*, the Parſon *habitualiter*, and the Vicar *actualiter*: And although the Vicarage be Spiritual, yet the Corporation is Temporal, which the Pope cannot diſſolve. And in this Caſe, *Parry* and *Banks* Caſe, 12 Jac. in the Exchequer was vouched, which was, A Parſonage was Appropriated to the Deanary of St. *Aſaph*, 24 H. 8, and a Vicarage endowed. The Biſhop 24 Eliz. diſſolved the Vicarage. *Parry* pretending the Vicarage was not diſſolved, but remained in the Kings hands, obtained a Preſentation to it. It was Reſolved in that Caſe, That after the Statute of 31 H. 8. which made Parſonages Lay-Fees, that the Ordinary might not diſſolve the Vicarage, when the Parſonage is in a Temporal hand, for that ſhould be to deſtroy the Cure. In the Principal Caſe, it was holden, That the Vicarage was not diſſolved. Mich. 16 Jac. in B. R. *Britton* and *Wades* Caſe. *Cro.* 2. Part, 516, 517, 518.

7. Note, In *Cook* 11. Part, 10. in *Pridle* and *Hoppers* Caſe, it is ſaid, That upon the Appropriation of every Church to a Religious houſe, &c. there muſt be a Vicar endowed, and a competent ſum of money to be yearly diſtributed to the Poor. And ſee Trin. 16 Jac. in B. R. in *Wards* Caſe. It was Reſolved, That a Vicarage endowed might alſo be appropriated, but then ſuch an Appropriation cannot be made to the Parſon. And ſee 31 H. 6. *Fitz.* Title *Indicavit*, ſuch a Vicarage endowed, appropriated, may be alſo diſſolved; but in the Caſe of Appropriation, aſwell of the Vicarage endowed, as of a Parſon; the Appropriation muſt be made by a Spiritual perſon, as by the Biſhop or Ordinary by an Inſtrument under their hands and Seals; and it muſt be by Licenſe from the King, for that no perſon whatſoever can make any Appropriation without the Kings Licenſe.

8. The Caſe was, The Abbot of S. held the Parſonage of L. in the County of L. to his proper uſe, as a Parſonage Appropriated. The Parſonage 31 H 8. came to the King by the Diſſolution of Monaſteries, who in 37 H. 8. granted it in Fee-Farm, under which grant the Plaintiff claimed. The Defendant had obtained a Preſentation of the Queen, and ſo deſtroy the Appropriation, did ſhew the Original of it, which was in *Anno* 22 E. 4. with a Condition in it a Vicarage ſhould be competently endowed. And alledged, That the Vicarage was never endowed, and for that cauſe the Appropriation was void, and in truth there was no Inſtrument, nor any direct proof made of the Endowment of the Vicarage. But in that Caſe, foraſmuch as the ſaid Rectory was for all the time of the Appropriation ſuppoſed, reputed, and taken to be appropriate, and by all that time, a Vicar Preſented, Inſtituted and Inducted, as a Vicar rightfully endowed. It was Reſolved by all the Juſtices, That it ſhall be preſumed, That the Vicarage in reſpect of Continuance, was lawfully endowed; and it ſhall be of dangerous Preſident to examine the Originalls of Appropriations of any Parſonages, and the endowments of Vicarages, for that the Original of them in time will periſh. Trin. 37 Eliz. in the Exchequer Chamber. *Grimes* and *Smiths* Caſe. *Poph.* 4. See Mich. 1609. in *Carle Ward. Stafford's* Caſe. *Lea* 25. acc.

9. In a *Quare Impedit* brought, The Plaintiff declared, That the Defendant had diſturbed him to Preſent *ad Vicariam de D.* and ſhewed, That the Queen was ſeiſed of the Rectory of D. and of the Advowſon of the Vicarage of D. and by her Letters Patents, gave to the Plaintiff *Rectoriam prædictam cum pertinentiis et etiam Vicariam Eccleſiæ prædict.* In that Caſe it was holden by the Court, That by theſe words the Advowſon of the Vicarage did not paſs; and that it did not paſs in the Caſe of a common perſon, may leſs in the Caſe of the King. But it was holden, That if the Queen had Granted *Eccleſiam ſuam de D.* that then the Advowſon of the Vicarage had paſſed. Mich. 32 Eliz. in C.B. *Aſhgells* and *Dennis's* Caſe. *Leo.* 191.

10. It hath bin a Queſtion much controverted in old Books, *viz.* If there be Parſon and Vicar endowed in one Church, and the Vicarage doth become void, Who ſhall be ſaid to be Patron, and have right to Preſent to the Avoydance, Whether the Patron of the Parſonage, or the Parſon the Incumbent of the Parſonage. In 17 E. 3. 51. ſome of the Judges are of Opinion, That the Advowſon of the Vicarage doth appertain to the Parſon, others, that it doth belong to the firſt Patron, and the Court is divided in Opinion. And ſee Mich. 16 E. 3. *Fitz. Quare Imp.* 145. b *Perning and Hil.* The Ordinary cannot make a Vicar without the aſſent of the Patron. 5 H. 2. *Fitz. Quare Imp.* 161. puts the Caſe, That although the Vicarage be made

with

with the assent of the Patron and Ordinary, yet the Advowson of the Vicarage doth remain in the Patron, because it is parcel of the Advowson of the Parsonage. In 16 E. 3. *Fitz. Grant*, 56. It was a Question, If by the Grant of the Advowson of the Church, the Vicarage did pass. It was said there by *Stunt*, That it doth pass as incident to the Parsonage. And see 31 H. 6. 13, 14. by *Hengist*, The Parsonage and Vicarage are all one: and he that is Patron of the Parsonage, is Patron of the Vicarage, and *Fortescue* doth agree the same. But notwithstanding the said Authorities, it hath bin conceived, and such is the Opinion at this day (*ut credo*), That *de Jure*, the Parson is the Patron of the Vicarage, unless upon the endowment of it, it be otherwise provided. And see *Fitzh. Nat. Brev.* 33. where it is said, That the Presentation to the Vicarage doth belong unto the Parson of Common right, if it be not otherwise agreed unto. See 2 H. 3. *Fitz. Grants* 89. If a man by Fine Grant his Parsonage, saving the Presentation to the Vicarage, it is a void Saving. And common experience is, That where there is an Appropriation, and a Vicar endowed, That the Parsons to whom the Appropriations were made, were always accounted Patrons of the Vicarage. And see 50 E. 3. 26. An Abbot who had the Advowson Appropriate upon which there was a Vicarage endowed, did Present to the Vicarage. See 17 E. 2. *Fitz. Quare Imp.* 178. acc. Also in regard the Endowment of the Vicarage is taken out of the Parsonage, and out of the Estate of the Parson; and if he be impleaded of Glebe, of which he is so endowed, he shall have aid of the Parson; and if the same endowment be diminished, the Ordinary may new endow it out of the Parsonage, as 31 H. 6. 13. is, for these reasons it hath bin conceived, That the Advowson of the Vicarage doth appertain to the Parson, and not to the first Patron of the Parsonage. Quære, what the Law is at this day. For that in our late Books of Reports, I do not find this point to have bin Resolved, or determined; and therefore I have thought fit to mention this point here, and leave it to the consideration of the Learned.

11. A Vicar did contract by these words, viz. *Inter se convenerunt*, with a Parishioner to pay so much for encrease of Tythes, and dyed; his Successor sued in the Ecclesiastical Court for them, and a Prohibition was prayed. It was adjudged in this Case, That although it was confirmed by the Ordinary, yet the same could not bind the Successor, and thereupon a Prohibition denyed. Pas. 17 Car. in B. R. *Hitchcock's* Case.

12. In the Case of a Prohibition where the Vicar Libelled in the Spiritual Court for Tythe of Herbage and Agistment of Cattel upon Grounds after Harvest: Where the Parishioners alledged a Custome to pay a Tythe of Hay to the Parson. It was Resolved, 1. That the payment of Tythes to the Parson is a sufficient discharge of the Vicar, because *de jure* all Tythes belong to the Parson, and the Vicarage is derived out of the Parsonage, and so no Tythes *de jure* doth belong to him but onely upon Endowment or Prescription, which must be shewed by the Vicar, for that the Court shal not intend it; for the Vicarage is a diminution, and impairing to the Parsonage. 2. That the Custome was good; for inasmuch as the owner of the ground hath paid Tythe of Hay, he is of common right discharged of Agistment upon the same Land; and the Land shall answer but one Tythe. And it was adjudged in *Adolphs* Case, That paying of Tythes of Rye and Wheat by the Sheaf, that the party shall not pay Tythe of the Halme of the same Land, because the Halme is but part of the stalk upon which the Tythe Sheaf grew. Pasc. 4 Jac. in B. R. *Green* and *Allen's* Case, *Yelverton* 86.

See in all the Titles before, concerning Vicars and Vicarages. And note where, and what act done to them and by them, and Parsons, shall have one Construction in Law; for although they be distinct *Nomine*, yet they be *idem in Spiritualibus*, and in consideration of Law. And the Cases concerning one of them, may be generally applyed to the other. *Ideo*, Quære the Tytles.

View:

View.

View; where it lyeth; and for whom, and in what Actions to be Granted, in what not: And what things ſhall be put in View; what not.

1. VIew generally is when an Action real is brought, and the Tenant knoweth not what Land it is that the Demandant demandeth by his Writ, Then the Tenant may pray the View; that is to ſay, That he may ſee the Land which he demandeth: But if the Tenant hath had the View in one Writ, If that Writ be abated for Miſnomer or other cauſe, and he bringeth another Writ againſt the ſame Tenant, in the ſecond Writ, the Tenant ſhall not have the View.

2. In a *Precipe quod reddat*, the Tenant demanded the View; and an *Habere facias viſum* iſſued forth, and the Tenant came not to the Sheriff to take the View. It was the Opinion of the whole Court in that Caſe, That the Sheriff may return, That none came to take the View; and it was ſaid, That the *Habere facias Viſum* being at the Suit of the Tenant if he make default to take the View, it is good reaſon to exclude him from the View. Mich. 29 Eliz. in C. B. *Ho* and *Hoes* Caſe. *Goldesbr.* 44.

3. In a plea of Land, the Queſtion was Whether after a general Imparlance, the Tenant ſhould have the View. It was the Opinion of the Court, That in that Caſe, the View was not Grantable, no more are Joynt-Tenancy or Non-Tenure pleadable after Imparlance, for the firſt, See Hill. 4 Eliz. *Dyer*, 210. 20 H. 6. 18. 8 H. 5. 8. 4 H. 7. 17. 35 H. 6. 31. 9 E. 4. 31. But the Preignothories ſaid, That the Preſidents were contrary.

4. In a Writ of Right of the Manor of D. *Et de duabus partibus Cuſtodia Foreſte de C.* The Tenant demanded the View, and the Writ of *Habere facias viſum* was awarded by the Court, and it was *Manerii et duarum partium Cuſtodia. &c.* It was holden by the Court to be an inſufficient View, for the Foreſt it ſelf ought to be put in View, and not *duæ partes tantum*. As where a Rent or Common is demanded, the Land out of which the Rent or Common is comming ought to be put in View, and therefore in the principal Caſe, a Writ of *Habere facias viſum de novo* was awarded. Mich. 30 Eliz. in C. B. *Liverſyns* Caſe. *Leon.* 56.

5. In an Action of Waſte, the Waſte was aſſigned in a Wood. The Jury viewed the Wood only, without entring into it. It was holden by the Court, That the ſame was ſufficient: for otherwiſe it ſhould be tedious to the Jury to have had the View of every ſtub of a Tree which had been felled. Yet it was ſaid, That if the Waſte had been aſſigned in ſeveral corners of the Wood, then the Jury is to have the View of every corner; but contrary where it is aſſigned in the whole Wood; and it was ſaid in this Caſe, That if Waſte be aſſigned in every room of a houſe, the View of the houſe generally is ſufficient; and the Lord *Dyer* ſaid, That if Waſte be aſſigned in ſeveral places, and of ſome of them, the Jury had not the View, that of that they may find, No Waſte done. Mich. 20 Eliz. in C. B. *Leon.* 267.

6. Note, It was ſaid and agreed by the Juſtices, That by the name of all Hereditaments ſcituate, lying and being in D. that the Advowſon of the Vicarage ſhall paſs; for although the Advowſon be not viſible, nor palpable, nor lyeth in Livery. Yet in a Writ of Right of Advowſon, the Church ſhall be put in View, ſo as that it had a being in the Town and Church. Paſc. 15 Eliz. *Dyer*, 314. See 43 E. 3. 1. acc.

7. A man may have a Writ of Right of Advowſon, *de Advocatione Eccleſiæ de D.* and then if there be two Churches in one Town, the Tenant ſhall have the View; but if there be two Churches in one Town Dedicated to two ſeveral Saints, viz. St. *Mary*, and St. *Peter*; then if a Writ of Right be brought *de advocatione Eccleſiæ Sanctæ Mariæ* of D. the Tenant ſhall not have the View. *Coke* 11. Part, 22. in Dr. *Ayries* Caſe.

8. Note, B. brought a Writ of *Quod permittat* againſt G. and after Imparlance, the Defendant demanded the View. It was Ruled by the Court, That he might well do it. See 34 H. 6. 9. and 10. 6 E. 4. 1. and the View was *de tenementis prædict.* which was ſaid aſwell of the Lands to which the Nuſance was, as to the Lands which was the Nuſance. And it was ſaid, That in this Action, the View is but for 15 dayes. Hill. 36 Jac. in C. B. *Brooke* and *Greaves* Caſe. *Hutton* 18.

9. In a Writ of Dower, the Tenants demanded the View, and the Demandant counterpleaded the View, *Quod le tenement. nul entry niſi* by the Huſband;

hand, and thereupon the Tenant did demur; and it was adjudged a good counterplea, and the Tenant was ousted of his View. Hill. 18 Jac. in C.B. rott. 933. *Bridgland* and *Poſt's* Caſe, *Hutton* 44. See 9 E. 4. 6. 2 H. 4. 24. acc.

10. In an Aſſiſe brought for the Office of a Herauld at the Funeral of the Earl of *Exeter*. The Queſtion was, Where the View ſhould be made. It was alledged that it ſhould be made in the place where he exerciſed his Office; but the Court doubted of that, but they were examined of the View made in the Abbey of *Weſtminſter* being the place where the Funeral was performed. And in that Caſe, The Court was of Opinion, That in Dower where Tythes are demanded, there no View lyes, for of things that are inviſible, no View lyes. Trin. 7 Jac. in C. B. *Brownlow* 1. Part, 27.

11. If a Manour be divided betwixt Coparceners, Demand may be made of the moyety of the Manour, and View may be made of that part only which is demanded. But it is otherwiſe if the Manour were not ſevered; for there although the demand be but of the moyety, yet the View ſhall be of the whole Manour. See 26 H. 8. 4. 9 E. 4 13.

12. In Dower of two parts of two Mills, and Rent in other Towns, whereas they were two Tofts at the death of the Husband. As to parcel, the Tenant pleaded a Remitter, and as to the reſt, he demanded the View; and although the View was demanded of the Lands, yet by the Award of the Court, the Tenant was ouſted of the View. 14 H. 4 33.

13. A man ſeiſed of Black Acre in Fee, and of White Acre for years, by Deed granted a Rent out of both of them to J. S. for life, with clauſe of Diſtreſs in both Acres: the Rent was behind, J. S. Diſtreyned in White Acre. In this Caſe, amongſt other things, it was Reſolved, That when a man Grants a Rent out of Land in Fee, and out of a Terme for years to have for life, that the Freehold of the Rent ſhall iſſue out of the Land in Fee, and not out of the Term for years, which is but a Chattel; and the agreement of the parties cannot charge ſuch a thing which is not chargeable by Law, as a Rent cannot be granted out of an Advowſon, a Hundred, a Fair, and the like, becauſe in an Aſſiſe brought of them, they cannot be put in View, nor any Diſtreſs taken in them; and it was ſaid, If in the Principal Caſe, an Aſſiſe be brought, that the Acre in Fee ſhould be only put in View. Cook 7. Part, *Butts* Caſe.

14. If a man at the Common Law hath a rent iſſuing out of two Counties, he cannot have an Aſſiſe in one County, becauſe every part of the Lands in the two Counties is charged with this Rent, and ſhall be put in View, as it is agreed 18 E. 2. *Fitz.* Tit. *Aſſiſe*, 380. But if a man maketh a Leaſe of Lands in two Counties for another mans life, rendring Rent, and the Rent is behind, and *Ceſtuy que vie* dyeth, the Leſſor ſhall have an Action of Debt in which of the Counties he will, for now it is changed into Debt; and in that Caſe, no Land ſhall be put in View, but the perſon of the Debtor ſhall be only charged by the Common Law. *Cook* 7. Part, 3. in *Elbrers* Caſe.

15. A Writ of Dower was brought by Husband and Wife againſt divers perſons; ſome of them confeſſed the Action, and the others demanded the View: the Queſtion was, If they ſhould have it, The Juſtices at the firſt ſeemed they ſhould have it, but at laſt upon the ſight of divers Books, as 33 H. 6. 14 H. 6. 6. becauſe Dower was favoured in Law, they were ouſted of the View. Paſc. 8 Eliz. *Dyer*, 179.

16. Note, It was agreed by the Juſtices in an Aſſiſe brought of Lands in *Kent*, where the Plaint was of a Meſſuage and four Acres of Land in *Eaſt-Malling*, that the Plaintiff might abridg his Plaint of the Meſſuage, becauſe that the Jurours had not the View, but of the Land, *et hoc fuit ex errum propria autoritie*, without making of it by the Sheriff. And it was holden, That the View was well enough, for it was ſaid, That if the Jury have good knowledg of the thing in Plaint, ſo as they can put the Plaintiff into poſſeſſion if he doth recover, the ſame is good enough, although the Sheriff never gave them the view of it. Paſc. 28 H. 8. *Dyer*, 62. *Pennington* and *Marſes* Caſe.

17. Aſſiſe was brought *de Libero Tenemento in Weſtmin.* and the Plaint was of the Office of Philizer, and the Plaintiff made his Title in his Plaint, and alledged Seiſin, by taking of a *Capias*, &c. and ſee there in that Caſe, That the Poſt where the Officers ſit when they are made Officers, was put in view. See Paſc. 3 *Ma. Dyer*, 214. And ſee *Cook* 8. Part, in *John Webbs* Caſe, acc.

18. Note, That to Feoffment, Livery and Seiſin is requiſite; but yet if there is not any Deed of the Feoffment, yet if the Land doth lye in another County, Livery made within the view of the Land, is good, as the books of 9 E. 4. 39. and 38 E. 3. are.

19. If a Feoffment be made, and Livery be within the view, and the Feoffee dares not enter into the Land for fear, but claims the Land: In ſuch Caſe the Inheritance of the Land is veſted in him, although that by the Livery no Eſtate paſſed unto him, neither in fact, nor in Law. And ſo note, That a Livery in Law is execu-

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ted by an Entry in Law. *Cook* 1. Part, *Inſtitutes* 48.

20. If a man maketh a Feoffment in Fee, and maketh Livery within the view, the Eſtate of the Land is not bound untill entry by the Feoffee; but yet in ſuch Caſe, if the Lands do lye in ſeveral Counties, and the Feoffee dareth not to enter, there Livery of it made within the view, ſhall be a good Livery, which afterwards may be executed by an Entry. *Cook* 1. Part, 156. acc. And ſee, That if Lands which do lye in ſeveral Counties be put in Exchange, if the Lands be in view, the Exchange is good, and preſently executed, without any entry, by *Moile* in 9 E. 4. 35. *Quod Nota.*

Vi Laica removenda.

1. THis is a Writ which lyeth in Caſe where there is debate or Controverſy betwixt two Incumbents, Parſons; or by two Proviſors for a Church, and one of them entreth into the Church with a great Lay power with force, and keepeth the other out with force and Arms. In ſuch Caſe, he who is kept out by ſuch force, may have this Writ directed to the Sheriff, that he remove ſuch Lay power which is in or upon the Church: And to remove ſuch Lay power and force; if need require, the Sheriff may take with him *poſſe Comitatus*; and ſome have bin of Opinion, That he may Arreſt the perſons, and Impriſon them for the contempt (but Quære of that): The Writ is only that he remove the force, but upon ſuch Writ, the Sheriff ought not to remove the Incumbent, or perſon Sheriff is in poſſeſſion, whether the poſſeſſion be of right or wrong, but only to remove the force, and ſuffer the Incumbent to continue the poſſeſſion; and if the Sheriff doth, contrary to the Writ, remove the Incumbent, he is to make him amends preſently for the wrong, otherwiſe the Incumbent hath remedy in Law againſt the Sheriff. See *Fitz. Nat. Brev.* and *Old Nat. Brev.* 31. acc.

2. Note that this Writ of *Vi Laica removenda* will not lye untill a Return be made by the Biſhop or Ordinary into the Chancery; and then upon ſuch Certificate made into any of the Kings Courts, the Kings Bench or Common Pleas at the pleaſure of the party. If the King ſuch collate any one to a Prebend, which commeth to the King by Title, and the Biſhop doth make ſuch a reſiſtance, that the Kings Preſentee cannot have the Corporal poſſeſſion of the Prebend, but is kept out of poſſeſſion by Lay power or force. Then was the Kings Preſentee to have this Writ directed to the Sheriff, with a *poſſe Comitatus* in the Writ, to remove the ſaid power of reſiſtance. See *Fitz. Nat. Brev. ibid.* acc.

Victualls, and *Victuallers.*

1. NOte by the Statute of *York*, No Victualler ſhall uſe the Occupation to ſell victual or Wine in groſs, or by Retail, ſo long as he is in Office in any Town, Borough, or City, to keep the Aſſiſe upon Bread and Wine upon forfeiture, &c. If a man who is a Victualler be choſen to be Mayor, Sheriff, or other Officer in a Town, Borough, or City; who by reaſon of his Office is to keep the Aſſiſe. By the Statute of 3 H. 8. cap. 18. It is Ordeyned, That two diſcreet perſons of the ſame Town, &c. who are not Victuallers, be choſen and ſworn to aſſeſs the Aſſiſe of Bread, Wine, and Victual during the time that he is in his Office. And then after the price aſſeſſed of Wine and victual for the time, it ſhall be lawfull for him who is choſen Mayor or Sheriff, to ſell Wine and victual for the time that he is Officer. See the Statute of *York*, and the Statute of 3 H. 8. cap. 18. in *Raſtall.*

2. An Action upon the Caſe was brought for the ſpeaking of theſe words, viz. *Sir a Juſtice, I will give him* 5 *l. every year for his Gifts for Juſtice matters.* It was Reſolved by the Juſtices, That the words were not actionable: For it was ſaid, That one might take Preſents of victuals without offence. Mich. 3 Jac. in B. R. *Kemp* and *Howſgate* Caſe. *Cro.* 2. Part, 90.

3. An Information was in the Exchequer upon the Statute of 5 E. 6. for Ingroſſing of Apples, being dead victualls, the Defendant being a Coſtermonger.

monger. It was demurred thereupon, and that it is out of the Statute, for it is not ſuch a victual as the Law intends, and ſo it was Reſolved by all the Judges upon Conference had in the ſame Caſe. And *Coke* Chief Juſtice ſaid, That there was not any thing Prohibited within the Statute, but it had a Proviſo how in ſome kind it might be brought. But there was not any ſuch Proviſo for Appetals, and therefore it was never intended to be reſtreyned. Mich. 6 Jac. in B. R. *Braddon* and *Brewer's* Caſe. *Cro.* 1. Part, 214.

4. Information upon the Statute of 5 E. 6. for ingroſſing 100 Buſhells of Salt to ſell again. It was demurred upon the Declaration, becauſe it is not any victual within the intent and meaning of the Statute. And it was ſaid, That it would be a great inconvenience, if Salt ſhould be within the Law as victualls, for then it ſhould extend to them who carry Salt to be ſould in Waynes, and it would enforce every one by the Buſhel or Peck at the Ship or Saltpits, which the Law never intended; but the Law intends thoſe things which are ſold in great quantities uſually at every Market in every County; as Corn, Butter, Cheeſe, &c. But if any one ingroſs Salt with an Intent to ſell it at his own price, and at unreaſonable prices, he may be thereof Indicted at the Common Law, and if it be found, he ſhall be fined. And it was ſaid in this Caſe, That it was adjudged 18 Eliz. in the Kings Bench, That buying of Barley, and converting it into Malt, and ſelling it, was no Offence puniſhable in a Mayor who ſold it, nor made him to be a Victualler, (the Mayor being prohibited to ſell victualls) and it was ſaid alſo, That 21 Jac. it was adjudged, That Hops were not victualls within this Statute. Mich. 17 Car. in B. R. the King and *Reynolds* Caſe. *Cro.* 1. Part, 167.

Vill, *or* Town:

1. IN an Action upon the Caſe, Whereas the Mayor and Burgeſſes of *Liskarrell*, in the County of, &c. were ſeiſed in Fee of three Water Mills in L. *predict.* That the Mayor and Burgeſſes and all thoſe, &c. in the ſaid Mills for them, their Tenants and Farmers, time whereof, &c. have had their Watercourſes running from a place called H. *in Parochia de L. predict.* to the ſaid Mills, to ſerve them with water to grind Corn: and declared, That ſuch a day they demiſed to him the ſaid Mills for 21 years; and that he being poſſeſſed, the Defendant 1. *Oct.* 5 Jac. at L. *predict.* between H. and the aforeſaid Mills, digged a breach and diverted the Watercourſe. That whereas he uſed to grind every Week 30 Quarters of Corn, he could now grind but only 10 Quarters. The Defendant pleaded Not Guilty, and found againſt him. It was moved, That the *Venire facias* was from the Town of L. whereas it ought to have bin from the Pariſh of L. for the Watercourſe is alledged to be current from the place called H. *in Parochia de L. predict.* But the Exception was diſallowed by the Court; For the Court ſaid, That the Pariſh of L. and the Town of L. are intended to be all one, and H. is but a place known, and no Town by intendment. It was adjudged for the Plaintiff. Mich. 8 Jac. in B. R. Sir *William Wray* and *Veſpers* Caſe. *Cro.* 1. Part, 163. See *Hob.* 6. the ſame Caſe.

2. *Ejectione firmæ* of a Leaſe of R. A. and the Plaintiff declares of a Leaſe made at C. of Lands in *Parochia de C. predict.* The Defendant pleaded Not Guilty. It being found againſt him, It was moved in ſtay of Judgment, That the *Venire facias* was awarded *de Parochia de C.* where it ought to have bin *de Villa de C.* For *Parochia de C.* is not the Village before mentioned. But the Opinion of the Court was, That it was good enough, for that (*predict.*) made them all one, and the Court ſhall not intend that the Pariſh did extend into other Towns then C. and although a Pariſh may extend into more Towns, yet it ſhall not be ſo intended, eſpecially when it is ſaid, *Parochia de C. predict.* It was adjudged for the Plaintiff. Paſc. 12 Jac. in B. R. *Vale* and *Fields* Caſe. *Cro.* 1. Part, 340.

3. In *Ejectione firmæ* upon a Verdict, the Caſe was, There being two Towns, *Walton*, and *Street* in the Pariſh of *Street*, a Fine was levyed of ſuch Lands in *Street*; and whether the Lands in *Walton* did paſs by that Fine, was the Queſtion. It was adjudged in that Caſe, That they ſhould not paſs; for *Street* being a diſtinct Town by it ſelf, and ſo found by the *Verdict*; Although that *Street* the Pariſh doth comprehend both, yet in the Fine the Lands in *Walton* ſhall not be ſaid to be compriſed, unleſs *Walton* had bin a Hamlet of *Street*. But if the Fine had bin levyed of all Lands within the Pariſh of *Street*, then all had paſſed. Mich. 2 Jac. in B. R. *Stork* and *Foxes* Caſe. *Cro.* 2. Part, 120.

4. In an Action upon the Caſe, the Plaintiff declared, That whereas he for the ſpace of 20 years, had bin an Inhabitant within the Town of *Long-Leverſeidge* in the Pariſh of B. and whereas the Inhabitants of *Long-Leverſeidg* had uſed time out of mind, to have a common High way, aſwell for Footmen as Horſemen, to go and ride from the Town of L. to the Pariſh Church of B. aforeſaid, to hear Divine Service within the ſaid Church, and to carry bodies dying in the ſaid Town, to the Church of B. to be buried, *modo et forma ſequente*, *viz.* and ſhews the way through divers Cloſes in *Long-Leverſeidge*; little L. and G. and over the Church yard of the ſaid Church of B. and from thence to the Church aforeſaid, and backwards. That the Defendant had made a Ditch in one of the Cloſes of G. and ſo diſturbed him, &c. The Defendant pleaded, Not Guilty. It was found for the Plaintiff; It was moved in Arreſt of Judgment, That the *Venire facias* was only of G. whereas it ought to have bin from the ſaid ſeveral Vills, or Towns. The Court was of Opinion, That the *Venire facias* was not well awarded; and therefore a new *Venire* was awarded of *Long-Leverſeidg*, Little L. and *Goverſall* to try the Cauſe again. Hill. 11 Jac. in C. B. *Reynr* and *Waterbowſes* Caſe. *Hutton* 20.

5. In an *Ejectione firmæ* upon a Leaſe by J. B. who was ſeiſed of two Marſhes (amongſt others, called *Knigheſwick*, and *Southwick*, which lye in the Iſland of *Camby*, in the Pariſh there called *North-Benfleet*), He being Tenant in tail, and intending to bar it, by Indenture Covenanted to ſuffer a Common Recovery of thoſe two Marſhes by name, and of many other Lands, to the uſe of himſelf in Fee; the Recovery was had, and therein *South-Benfleet* and many other Pariſhes named, and *Camby*; but the Pariſh of *North Benfleet* was omitted. It was the Opinion of the Court in this Caſe, although that *Camby* was a place known, yet being in a Town, that the Recovery extends not thereunto; no more then if one had a Mannor in the Town of D. which Mannor is called B. and in the Mannor is a place known which is called B. Wood, it is not good; And the Court agreed, That a Common Recovery is good in a Town, Pariſh, or Hamlet. But if it ſhould be admitted, That a Common Recovery ſhould be good in a place known, in a Town or Hamlet, the ſame ſhould be abſurd; for there is no Town wherein there is not twenty places known. And it was agreed, That the *Venire facias* of a place known, was not good, without the making the *Venire* of the Town. Mich. 5 Car. in C. B. *Baker* and *Johnſons* Caſe. *Hutton* 105.

Villein *and* Villeinage.

1. *Britton* ſaith, That Villeinage began firſt after *Noahs* Floud, when all things were in Common; and when they did encreaſe, Battails did encreaſe amongſt them. For the Avoyding of which miſchief, it was ordained, That none ſhould kill another in Battail, but that thoſe who they vanquiſhed ſhould be their Villeins to uſe at their pleaſure, or to kill them. In ſome Countries they were called *Servi*, *viz.* Slaves, over whom the Lord had power of life and death, as appeareth by *Juſtin*, *Inſtitutes Lib.* 1. *gloſſ. Servitus.* See *Britton* 70, 77. The Lord Chief Juſtice *Hobart*, in the Argument of *Moor* and *Huſſes* Caſe, *Hob.* 99. ſaith, That Villenage came *ex jure gentium* by reaſon of Captivity, they were called *Servi*; not *à Serviendo*, but *à Servando*. There were Villeins almoſt in all Nations, and in *England* before the *Norman* Conqueſt, as appeareth by *Ingulphus* Hiſt. 861. and 903, 913. in a Grant made of the Mannor of *Spalding* to the Abbot of *Crowland*, wherein many Villeins and their Services are particularly recited. And Suit doth alſo appear by many other Records and Grants before the Conqueſt. This Servitude and Tenure by Villeinage continued here in *England* untill the time of King *Richard* the ſecond, and is ſince by degrees rather worn out, then aboliſhed by any Law, nothing being now left, but the name of it. The laſt man which was claimed for a Villein, being *Cruch* of *Somerſetſhire*, in the time of Queen *Elizabeth*, Mich.

Mich. 10 Eliz. *Dyer*, 266. *Butler* and *Crouches* Case.

2. Mr. *Fitzherbert* in his *Natura Brevium*, out of the Book of 14 H. 6. saith, That those who held their Lands in base Tenure in Auncient Demesne, or by the Rod, held them in *Villeinage*, and that Copy-Tenants, Copyholders, or Tenants by Copy, is but a new found Term: For that in ancient time they were called and named Tenants who held in Villeinage; and that they were not named in the Court Rolls, Copyholders, or Tenants by Copy, but they were called Tenants in Villeinage, or Tenants by Base Tenure.

3. Mr. *Littleton*, *Lib.* 1. cap. 11. saith, That Tenure in Villeinage properly is, Where a *Villein* holds of his Lord to whom he is a *Villein*, Lands or Tenements according to the Customs of the Manor, or otherwise at the Will of the Lord to do to his Lord *Villein* Service, as to carry out the Lords Dung out of his Mannor, and lay it upon the Lords Land. And yet he saith, That a Tenure may be to do such a Service as is called *Villeinage*; and yet they which do the Service are not *Villeins*, *Lit.* 38. acc. For as he saith, No Land holden in *Villeinage*, or *Villein* Land, nor any Customs arising out of the Land, shall never make a Freeman to be a *Villein*; But a *Villein* make Lands which is fit to be holden in *Villeinage* of the Lord.

4. Villeins are either Regardants, or in gross. And every *Villein* is a *Villein*, either by Title of Prescription, viz. that he and his Auncestors have bin time out of mind, or by Confession in a Court of Record. But *vid. Hob.* 99. That the Confession in a Court of Record, is not the Creation of the *Villeinage*, but rather a Declaration of a righ full *Villeinage*.

5. Tenant in tail of a Mannor, to which a *Villein* was regardant, enfeoffed J. S. of an Acre of Land, parcel of the said Mannor, by these words, viz. *Dedi unum Acram Terræ*; and further the Grant was, *Dedi R. Villanum meum*. It was [a Quæ. Whether the *Villein* did pass as Regardant or in gross, because it was by several Grants, although it was in one Deed. It was conceived that the *Villein* passed as a *Villein* in gross, because it was by several Guifts. Pasc. 33 H. 8. *Dyer*, 48. And see *Plow. Com.* 104. 6. That if a man leaseth his Mannor for life or years, except the *Villeins* that by such Exceptions the *Villeins* are become in gross, although they were before Regardants to the Mannor.

6. See 40 E. 3. 17. and 43 E. 3. 4. Where *Villeinage* Regardant is pleaded. It was holden by *Thorp* That it is a good Avoydance of it, to say, That his Father was an Adventiff, viz. such a man from which no man knew from whence he came, nor where he was born; but *Belknap* held the contrary.

7. In an Action of Trespass brought, it was found by the Jury, That the Defendant held the same Land of the Plaintiff by the Roll at Will, because it was Neif Land, and because the Defendant would not do his Services to the Plaintiff, he entred, and the Defendant put him out, and thereupon he brought his Action; and it was adjudged the Action was well brought, 42 E. 3. 25. Quære in that Case, If it were Copy-Land, for that it is agreed in the Books of 41 E. 3. 8. and 46 E. 3. 6. That the Freehold of the Land holden in *Villenage*, is in the Lord.

8. Grandfather, Father, and Son: The Grandfather was a *Villein*, and went from the Manor, and remained out of it, without returning into the Mannor for 60 years, and afterwards dyed without any seizure had or any service done by him, and had issue a Son born out of the Mannor, and dyed. The Son also remained 40 years out of the Mannor, and was taken as a Freeman, without any seizure or claim made by the Lord. It was the Opinion of the Justices in that Case, That he was not seizable as a *Villein*. Pasc. 10 Eliz. *Dyer*, 266. *Butler* and *Crouches* Case.

9. If a man will confess himself to be a *Villein* in a Court of Record, although he was not a *Villein* before; yet now by this his Confession he is become a *Villein* in gross. Butt see 18 Ass. 10. *Fitz.* Tit. *Villeinage*, 16. That a Feme Covert cannot confess her self to be a Neif; but the Husband and Wife in the right of his Wife may so do. See 27 E. 3. *Villeinage* 27. and 41 E. 3. *Vill.* 6. If in a *Precipe quod reddat* the Tenant for life saith, That he is *Villein* to J. S. and the Plaintiff saith, That he is Frank, and it is found that he is Frank, *scil.* Free accordingly: Yet upon such his Confession, he shall remain *Villein* to J. S. during his life. And see 10 Ass. 13. That by Confession of the Husband that he is a *Villein*, the Land shall be vested in the Lord, although the Tenant hath the same but in the right of his Wife; but that shall be only for the life of him who makes the confession.

10. If the Lord sueth a Writ of *Nativo Habendo* before the Sheriff, whereby he claimeth the Inheritance of his Villein; yet the Lord may remove the Plaint before the Justices of the Common-Pleas, and then the matter shall be tryed by them; and thereupon he shall have Process against the Villein; for the Sheriff cannot determine the Title of Villeinage in the County: But in such Case, it is good for the Lord; that when he sueth the *Nativo habendo* to the Sheriff, that forthwith he sue his *Pone*, to remove the Plaint before the Justices

in *Banco*, for if after the Writ of *Nativo habendo* issued, the Lord sueth a Pone, to remove the Plaint in *Banco*; and before it be delivered to the Sheriff, the Villein sueth a *libertate probanda*, and delivereth the same to the Sheriff, by which the Sheriff adjourneth the Plaint before Justices in Eyre, and returneth the matter upon the Pone before the Justices of the Bench; in that Case, the Justices *de Banco*, ought not to proceed upon that Pone, because the Sheriff hath returned, that he hath adjourned the Plaint before Justices in Eyre, by the Writ of *Libertate probanda*; and yet the Pone was of elder date, than the Writ of *Libertate probanda*. See 11 H. 4. 48. by *Gascoigne*. and see *Old*. Nat. Brev. 46. 45 E. 49. Vill. The Party in that Case is without remedy, if not against the Sheriff.

11. A. brought a *Nativo habendo* against B. in the County before the Sheriff, the same was removed by Pone in C. B. at the day of the return. A. did not appear, Judgment was given, that B. should be enfranchised for ever: Upon that Judgment, Error was brought in the Kings Bench, and it was adjudged, That the Judgment should be reversed; for the Judgment only ought to be, that the Plaintiff be in *misericordia*, and not the Defendant be enfranchised; for the not appearance of the Plaintiff at the day of return of the Pone, is but a Nonsuit before appearance; for both the Action, and the Pone, might be brought as well by a stranger, as by the Plaintiff: And although the Pone doth say, *ad Petitionem petent.* yet that is but a suppofal, and shall not conclude the Plaintiff in this Writ, which is a Writ of Right. And if at the day of the Pone, return, the Plaintiff and Defendant do appear, the Plaintiff shall then count upon the Writ *de Nativo habendo*, alledging of Seisin. Explees, and producing of some of the blood of the Defendant, who know him to be a villein, as the Books of 19 H. 6. and 13 E. 1. in villeinage. See Pase. 1 Jac. in B. R. *Dighton* and *Bartholomewes* Case. *Yelverton.* 12.

12. In a *Pretipe quod reddat* brought, the Tenant would have confessed himself to have been villein to another by his Attorney: But he was not admitted so to do; but the Confession must be in Person, by himself in Court: But otherwise it is, where he pleads that he holds the Land in villeinage, such a Plea may be by Attorney; because that a Free-man may hold Lands in villeinage. 41 E. 3. 8. Yet see 44 E. 3. 2. and 13. H. 4. *Villeinage* 40. Where in Trespass brought, the Defendant pleaded villeinage in the Plaintiff, and the Attorney of the Plaintiff confesseth the same; and the Plea and Confession was holden to be good. *Vid.* 31 E. 3. *Vill.* 8. If villein bring Rent as Executor, and the Lord pleads villeinage, and the Plaintiff saith that he brings the Action as Executor, it is a *Quære* if that shall not be a Confession of him, that he is a villein; *Finchden* held that it should be.

13. If villeinage be pleaded by the Lord, in an Action real, mixt, or Personal, and it is found that he is no villein, If a Writ of Error be thereupon brought, it is no enfranchisment; because the Plaintiff in the Writ of Error, is thereby to defeat the former Judgment; and if in the mean time the villein bringeth an Action against the Lord, the Lord in such Case, need make no protestation, so long as the Record remains in force; for at that time he is free. *Cook* 1 Part, *Institutes.* 127.

14. It was found by Office, That T. by Licence of the King, did marry the Kings Neise, and that certain Lands descended to the same Neise, which her Husband alliened without the Kings Licence to another, and for this cause the Land was seized; The Allienee came into the *Chancery*, and shewed all this matter, *viz.* That the Neise was married with the Kings Licence, the descent, to the Niese after the marriage. It was holden in this Case, That the Wife being married with the Kings Licence, it was an enfranchisment at least, during the Coverture; and that the Husband in such Case, should be Tenant by the Curtesie. See 33 E. 3. in Traverse. 36 Avouch. in *Cook* 4 Part, in the Case of the Wardens and Commonalty of Sadlers, 55.

15. Note, It is Enacted by the Statute of *Malstbridge*, *Cap.* 6. That the Lord by Knights service shall not lose the Wardship by a Feoffment made by Collusion; yet if the Tenant enfeoffeth the villein of the Lord upon Collusion, the Lord may enter and expell him, and shall not be put to his Action; as it is holden, 33 H. 6. 16. For the general words of the Act, shall not enable the villein, who is disabled, against the Lord by the common Law; and therefore it is holden, That if in such Case, the Lord bringeth an Action against the villein, the same is an enfranchisement of him. *Cro.* 11 Part, 77. in *Magdalene-College* Case.

16. In 19. E. 2. in a *Nativo habendo*, the Plaintiff counted upon a Confession, and the Defendant did acknowledge the same; and afterwards the Plaintiff was Nonsuit. In that Case it was holden, that the same was an enfranchisment of the villein for ever.

17. If a Villain purchaseth Lands and dyeth before the Lord entreth, the Lord is barred for ever; for before the Lord entreth, he hath neither *jus in re*, nor *ad rem*, but only a possibility of an Estate,

Eſtate, which eſtate he muſt gain by his entry. And therefore if the *Villein* doth by way of prevention alien before the Lord entreth; the Lord is for ever barred of the poſſibility which he had to enjoy the Land. But yet if the King *Villein* purchaſeth Lands and alieneth before the King (upon an Office found for him) doth enter; yet the King after Office found, ſhall have the Land; and yet after Office found, the King ſhall not have the mean Profits, becauſe the Kings Title cometh to the Land by ſeiſure. But if the Kings Villein getteth any Goods or Chattels, in ſuch Caſe the property of them is in the King, before any ſeiſure or Office. *Cook* 1 Part, *Inſtitutes.* 158. acc.

18. If a Villein be diſſeiſed before the Lord doth enter, the Lord may enter into the Lands in the name of the Villein, and thereby gain the Inheritance of the Land; but if there be a diſcent caſt, ſo as the entry of the Villein is taken away, then the Villein muſt re-continue the Eſtate of the Land by Judgment and Execution, before the Lord of Villein can enter. So if the Villein purchaſeth the Lands in tail, and alieneth before the Lord entreth, the Lords entry is taken away; but if the Villein dyeth, and his Iſſue recovereth the Land entailed in a Formedon, in that Caſe the Lord may enter.

19. Note, concerning enfranchiſments and Manumiſſions of Villeins, theſe Rules and Caſes following; *viz.* If the Lord delivereth Seiſin of Lands to his villein, to hold in Fee, Fee-tail for life or years, or make him any other Eſtate: Or if the Lord ſueth againſt this Villein a *Precipe quod reddat*, and Recover, or be Nonſuit: Or if he ſueth his Villein in any other Perſonal Action, as Debt, Accompt, Covenant, Treſpaſs, or the like; theſe are enfranchiſments of the Villein: Becauſe that in ſome of the ſaid Caſes, the Lord might enter into the Lands of his Villein, or take his goods without ſuit; but by ſuch ſuits, the Lord enableth the Villein, and to render the Land in ſome Caſes to the Lord, and in other of the Caſes damages. So, if before Indictment the Lord bringeth an Appeal of Felony againſt his Villein, whereupon the Villein is acquitted, this is an enfranchiſment of the Villein; becauſe upon the acquittance, by the Statute of *Weſtminſt.* 2. *Cap.* 12. the Defendant ſhall recover damages. And Note, That in every Caſe where the Lord giveth to the Villein a juſt cauſe of Action, he is thereby enfranchiſed. *Cook* 1 Part, *Inſtitutes.* 138. And ſee diverſe Books there vouched to prove the Rules and Grounds aboveſaid.

20. Lord and Villein. The Lord is bound in a Statute: The Conuſee ſueth Execution of the Statute upon the Lands of the Villein. It was holden, 20 Eliz. that the ſame was good, and that the ſame did veſt the reverſion of the Lands purchaſed in the Conuſor: And alſo it was then holden, upon the Statute of 32 H. 8. which giveth re-entent upon eviction, that the ſame ſhall veſt in the Conuſor; and if after the Villein do oust the Conuſee, it was conceived, that the ſame was no ſuch eviction, as was Lawful; and therefore, in ſuch Caſe, the Party ſhould not have re-entent upon the ſaid Statute 20 Eliz.

21. If the Lord deviſeth Lands to his Villein: It was the Opinion of Mr *Plowden*, That it ſhould be an enfranchiſment againſt the Heir, and yet he was Villein to the Heir, as ſoon as the Deviſe took effect. But in ſuch Caſe, becauſe the Father had power to enfranchiſe him, he ſhall be enfranchiſed, becauſe he is now in by the Father: As if the Father had delivered a Deed of enfranchiſment to one, to deliver to his Villein ſeven years after; and the Father being Lord dyeth, and the Deed is afterwards delivered, it ſhall be an enfranchiſment: So, if a man makes a Leaſe for life, the remainder to the right Heirs of I. S. who hath Iſſue, a ſon, who is a Villein by the confeſſion of the Feoffor, and the Feoffor dyeth, and afterwards I. S. dyeth, and the Tenant for life dyeth; and the ſon of I. S. entreth; he ſhall be enfranchiſed. See *Plow. Cogitat.* 48. acc.

22. If the Lord doth preſent his Villein to a Church which is void: It was ſaid, It was no enfranchiſment of him, and ſo it was ſaid it was adjudged, in the time of Queen *Eliz.* in *Topfields* Caſe. See Mich. 8 Jac. in C. B. *Waters* Caſe adjudged acc. *Godbolt.* 179.

23. Lord of Lands holden in Soccage had a Villein in groſſe, and deviſed that his Executors ſhould ſell his Lands, for the payment of his Debts: They ſold the Lands to the Villein: The Lord had Iſſue, a Daughter, who was married to I. S, and they had Iſſue: I. S. dyed, the Lord dyed; the Daughter being Seignoreſs, enter-married with the Villein. In this Caſe, there were two Points conſiderable: The firſt was, If the ſale of the Executors unto the Villein, was an enfranchiſment of him. And 2. If the enter-marriage of the Seignioreſs with the Villein, was a perpetual enfranchiſment of him. *Quære.* The Poynts were not reſolved. Trin. 8 Jac. in C. B.

24. Where a Free man marrieth a Neif, it hath been holden by ſome, That by this enter-marriage, the Wife ſhall be free for ever. But the better Opinion of our Books are, ſhe ſhall be priviledged during the Coverture only, unleſs the Lord himſelf marrieth the Neif; and then it hath been holden, that ſhe ſhall be free for ever. *Cook* 1 Part, *Inſtitutes.* 156.

See more of *Villeins* and *Villenage*, in the Title of *Tenures* and *Enfranchiſement.*

Union and *Conſolidation* of *Churches.*

1. BY the Common Law, If two Churches were ſo poor, and of ſo ſmall Revenues that the Incumbents could not live and maintain their charge of the profits of them. The Ordinaries, Patrons, and Incumbents might make a Conſolidation, or an Union of the two Churches into one. 50 E. 3. 27. 40 E. 3. 28. acc. And upon ſuch Union, it muſt be appointed who ſhall Preſent next after the Union, one of them, or both, or joyntly, or ſeverally by turns. See *Doctor* and *Student*, 116. And upon ſuch union and Agreement made, each of the Patrons, if he were diſturbed in his time, might have a *Quare Impedit præſentare ad Eccleſiam*: For although that by the Union the Incumbency of one Church be loſt and extinguiſhed, yet the Patronage doth ſtill remain: And therefore if an Annuity be Granted out of the Church of D. and afterwards D. be united to S. If the Grantee doth Releaſe to the Patron of S. the Annuity is not extinct; but a Releaſe to the Patron of D. although in the time of Vacation, will extinguiſh the Annuity.

2. It hath bin a Queſtion, Wether at the Common Law, an Union may be made of one Church or Chappell unto another, without the Kings Licenſe or conſent. It was conceived, That it might be, for that the Union is the act of the Ordinary, *unio eſt actus Spiritualis*; and as it is ſaid *Munus Epiſcopale eſt unire, quia tota Dioceſis eſt Cura Epiſcopi*: and the Licenſe of the King is not ſo neceſſary in the Caſe of Union of one Church to another, as the ſame is in the Appropriation of Advowſons. See 34 E. 3. *Fitz. Quare Imp.* 197. 12 H. 8. 8. by *Elliot*. And ſee, That in Caſes of Union, It is ſaid, That the Union was made by the Patron and Ordinary, or *Concurrentibus his qui in lege requiruntur*. And ſee 11 H. 7. 9. The Chappel of *Wanborow* was united to *Magdalen* Colledg in *Oxford*, and it was pleaded, That the Union was made by the Patron and Ordinary, but it is not pleaded to be with the Kings Licenſe. 11 H. 7. 9. And ſee, That the Pariſh Churches of *Ilerfield* and St. *Martins*, in the County of *Southampton*, were united by the Ordinaries with the conſents of the Patrons, but it is not ſet forth to be with Licenſe of the King. See 9 Eliz. *Dyer*, 259.

3. Note, a Church, with Parochial Chappel, or Colledg, cannot be founded or erected by any perſon, without the Kings Licenſe, as it appeareth by the Caſe of the Church of *Greyſtock*, where the Pope erected and founded a Colledg without the Kings Licenſe, and the Foundation was void. See 7 E. 6. *Dyer*, 81. But yet it is conceived, That if one Church be united unto another without the Kings Licenſe, that ſuch union is not void for theſe Cauſes. 1. Becauſe the Parſon who was Incumbent, the Patron and the Ordinary at the Common Law might have alliened the poſſeſſions of the Church, or have layed a Charge upon it without the Kings Licenſe, *à fortiori*, therefore they might unite two Churches into one, for that the King loſeth nothing thereby. 2. If an Advowſon holden of a common perſon be appropriated without the Kings Licenſe. It was holden 21 E. 3. 5. by *Shard*, That it was no forfeiture of the Advowſon, but that the King ſhould Preſent to the Avoydance *Nomine diſtrictionis tantum*, untill a Fine be paid to the King for the Allienation without Licenſe, but it doth not make the Appropriation void; *à fortiori* then an Union ſhall not be void, which is leſs than an Appropriation, although it be without the Kings Licenſe. See 38 Aſſ. 22. *Fitz.* Title *Grants* 1. 3. The Right of the King to the Church is only to Preſent for Lapps, which is but a caſual and a collateral Right; and therefore for theſe reaſon, it was conceived, That an Union made of two Churches into one without the Kings Licenſe, might be good and ſtand good at the Common Law.

4. By the Statute of 37 H. 8. cap. 29. It is enacted, That whereas there are many poor Pariſhes within one Mile of another, the Tythes and Revenues whereof be not ſufficient to maintain the Curats, and for the maintenance, Reparations and Ornaments, and duties of the Church, That an Union or Conſolidation of two ſuch Churches may be into one, with the conſents of the Ordinaries, lawfull Patrons and Incumbents, by writings under their hands and Seals. Note in this Statute there is no mention made of the Licenſe of the King to be had, which if the Licenſe or conſent of the King, had bin neceſſary, the makers of that Law, (as is conceived) would not have omitted. And the King doth not loſe any thing by ſuch an Union; For that all Tenths and Firſt-fruits of Chappels or Churches United according to that Statute are ſaved, and reſerved to the Crown. See Stat. 37 H. 8. cap. 29. See *Roſtall* Abridgment of Statutes, 483. acc.

5. Trin.

5. Trin. 9. Car. in C. B. in Dr. *Rawlins*, and Sir *Henry Yaxleys* Caſe, for the Church of *Bowthorp* in *Norfolk*, the Queſtion was, Whether the Statute of 37 H. 8. *Cap.* 19. did extend to a Parochial Church only, or unto other Churches? And whether by that Statute a Church Parochial might be united to a Collegiate Church, and whether the ſame might be without the Kings Licence or conſent. The Caſe was not reſolved, but in the Argument of that Caſe, it was conceived to be the ſafeſt and ſureſt Courſe to have, or obtain the Kings Licence or Conſent, although it be ſubſequent to the Union made; for ſo it was ſaid it was holden to be in the Caſe of 11 H. 7. 7. For there after the Union made, the King granted his Pardon, which was holden to be a ſubſequent aſſent, and ſufficient to make the Union. And in the Argument of that Caſe, it was ſaid to have been adjudged, Trin. 37 Eliz. in C. B. in *Auſtin* and *Tayars* Caſe, That the Confirmation by the Kings Letters Patents, of an Union made of the Pariſh Church of *Aſh.* unto the Deanery of N, after the Union made, was good and ſufficient.

6. There was a Pariſh in the County of W, called A; and there was likewiſe in the Pariſh a Chappel, called *Birmidg* Chappel, and a precinct, called Caſtle B; the Inhabitants whereof did reſort to the Chappel, and there Married, Chriſtned, and received the Sacraments, and had Churchwardens, and perambulation by it ſelf; but they buried not there, but at A; A. Church being in decay, the Paritioners of B. Chappel were Taxed towards the Reparations, with the reſt of the Pariſhioners of A, and obtained a Prohibition upon a ſurmiſe, That there was a Chappel Parochial, and that they alone had uſed to Repair that, and their own Church, and by reaſon thereof, had been diſcharged from the Reparation of A. Church; yet confeſſed they were within the Pariſh of A. It was holden by the Court, That although the Service were matter of Fact, and Tryable by Jury; yet it was in the diſcretion of the Court to deny a Prohibition, when it appears to them, that the ſurmiſe is not true; eſpecially in Caſe of this Nature when the delay of Reparation is to the utter decay of the Church, and the intolerable charge of the Pariſhioners, and is apparent to the Court, that they were to all purpoſes a Part of the Pariſh of A. (though it doth not appear to have been any Union) and therefore *de communi jure*, lyable to Reparation with the reſt. Trin. 12 Jac. in B. R. The Caſe of the Pariſh of *Aſton* and *Caſtle Birmidge* Chappel. *Hob.* 66, 67.

Unity of Poſſeſſion.

1. IN an Action upon the Caſe by Husband and Wife, the Plaintiff ſet forth, That the Wife before Marriage, was poſſeſſed of a Cloſe in Saint *M*, in which a Houſe was builded; and the Defendant was Occupier of another Cloſe, called the *Yard*, in the ſaid Pariſh of Saint *M*, adjoyning to the Plaintiff's Cloſe; and that within the ſaid Pariſh there was a Cuſtom, *Quod omnes occupatores*, of ſuch a Cloſe of the Plaintiff's, time out of mind, had uſed to have for them, and their ſervants, *quandam viam tam pedeſtrem, quam equeſtrem*, at all times of the year, for all Carts and Carriages from the Plaintiffs Cloſe, *in vel ultra* the Cloſe called the *Yard*, to a place uſually called the *Leyſtall*, in Saint M. aforeſaid, and back again from the ſaid *Leyſtall*, in, and over the ſaid *Yard*, to the Plaintiff's Cloſe; and that ſhe being ſo poſſeſſed, and having the occupation of the ſaid Cloſe, the Defendant, to hinder her of her way, and totally to exclude her ſuch a day and year, erected a Building upon the ſaid Cloſe called the *Yard, ex tranſverſo via prædict.* that ſhe might not have, or uſe her way; and that afterwards ſhe took Husband, the Plaintiff, and that they, after the Marriage, could not uſe the way. Upon *Not guilty* pleaded, found againſt the Defendant, it was moved in arreſt of Judgment, That ſuch a Cuſtom alledged, within a Pariſh, for an Occupier of ſuch a Cloſe, to have a way &c. was not good, but he ought to preſcribe in him who hath the inheritance; and that a Cuſtom in a Pariſh cannot be applyed to a Cloſe in a Pariſh; and ſuch was the Opinion of the Court: Although it was ſaid, that he could not otherwiſe preſcribe, becauſe one man was once Owner of both Cloſes, and Unity may not deſtroy the way: But to that it was anſwered, That it ought to have been ſo particularly ſhewed, which doth not appear here; and peradventure it will not ſerve in Caſe of a way, but in Caſe of neceſſity; as a Water-courſe betwixt two Houſes. All the Juſtices held, That Inhabitants may alledge preſcription for a way to a Church, or a Market, which is of neceſſity, but not in a matter of profit or charge in another Soil. Paſc. 11. Car. in B. R. *Baker* and *Brereman's* Caſe. *Cro.* 1 Part, 302.

2. Leſſee

2. Leſſee for 99 years of two Houſes, deviſeth them to his Wife for all the ſaid term, if ſhe live ſo long unmarried, and after her death to B; and if his Wife marrieth, then ſhe ſhall have one Houſe, and 20 l. *per annum* out of all other his Land, and then B. ſhall have the other Houſe, and makes his Wife his Executrix, and dyeth; the Wife enters claiming by the Deviſe, and then marrieth; and then the Husband and Wife claims the Houſe deviſed to her after her marriage, by the aſſent of the Executor, enters into the other Houſe, the Wife dyeth. It was reſolved in this Caſe, That becauſe the Wife took the whole terme as Executrix, that ſhe ſhould not have the Rent out of it, becauſe that the Rent was extinguiſhed by Unity of Poſſeſſion: But if the Rent ſhall be determined by the death of the Wife, *Quære*, for it was not reſolved. Trin. 12 Jac. in B. R. *Gouge* and *Heywards* Caſe. *Bridgman*, 54. 55.

3. Debtors of the King, ſeized in Fee of diverſe Mannors, conveighed the ſame to A. and his Heirs, who, by Deed Indented, did grant the premiſes to the King in Fee; afterwards the King did regrant the ſaid Mannors and Lands to A. and his Heirs, 20 s. Rent, *pro omnibus ſerviciis et demandis*: Afterwards the ſame Debtor became further indebted to the King. It was reſolved in this Caſe, That the ſaid Mannors were not extendible, or lyable to any of the Kings Debtors, but diſcharged in Law, by the poſſeſſion of the King. Paſc. 13 Jac. Sir *John Mallets* Caſe. *Leon.* 50.

4. Leſſee for years of 20 Acres, rendring Rent, grants all his Eſtate in one of the Acres to I. S; the Leſſor confirms the Eſtate of I. S. It was reſolved in this Caſe, That the Rent was gone; for being an entire Contract by his own act, there can be no apportionment for part, and extinguiſhment for other part; and no Contract ſhall be apportioned. Mich. 43 Eliz. in C. B. *Goddards* Caſe. *Owen.* 10.

5. If the Tenant doth enfeoff the Lord and others, all the Seignory is extinct by the Unity of Poſſeſſion; and ſo it is, if he enfeoffeth the Lord but of the moyety of the Land; But if the Tenant doth enfeoff the Lord and a Stranger, to the uſe of another, and his Heirs, and makes Livery to the Stranger, it in ſuch Caſe is not extinguiſhment of the Seigniory, though he was a Party to the Deed of the feoffment. Paſc. 6 Eliz. *Sutton* and *Robinſons* Caſe. *Owen* 31.

6. A. holds Lands of the Mannor of B, by ſuit of Court and Rent, and afterwards he is attainted of Treaſon; The King grants the Lands by his Letters Patents, to I. S. It was reſolved in this Caſe, That while the Lands were in the Crown, the Rent was not extinct by any Unity, or otherwiſe, but ſuſpended only; and that then by the grant of the Lands to I. S, that the Rent was revived, and and that I. S. ſhould pay the ſame. Mich. 7 Jac. in *Cur. Ward. Longs* Caſe. *Leon.* 5.

7. An Advowſon is granted for years, the Leſſor during the Leaſe, preſents the Leſſee to the Church, which becomes void: It was reſolved in this Caſe, That it was an extinguiſhment of his Right, and not a Surrender; and in that Caſe it was ſaid, and agreed, That if a man preſents to his own Church, as Procurator to another, that by that act of his, he loſeth his own Advowſon: But *Quære* of that, Paſc. 42. Eliz. in C. B. *Rudd* and *Topſhyes* Caſe. *Owen*, 142.

8. It was Reſolved by the Juſtices, That if a man hath a Leaſe for years which is good in Law, that the taking of a new Leaſe of the ſame Land which is void, is no ſurrender of the former Leaſe which is good; ſo if Leſſee for years, takes a new Leaſe after the death of his Leſſor, of his Guardian in Socage, it is no ſurrender. Hil. 3 Car. in B. R. *Baker* and *Willoughby's* Caſe. *Hutton* 101. 13 Eliz. in C. B. *Wells* and *Whitewoods* Caſe. *ibid.* But it was holden, That if Leſſee for 20 years of an Avowſon, when the Church is void, enters a Preſentation to himſelf of the Leſſor, and he is Admitted and Inſtituted, it is a ſurrender of his Leaſe, for that they both cannot ſtand together in him; for that by the Unity, the one of them would be extinguiſhed; as in it was adjudged. 42 Eliz. in Sir *Arthur Capels* Caſe. See *Hutton* 105.

9. If a Copy-holder bargaineth, and ſelleth his Copy-hold to the Lord, who hath a Leaſe for years of the Mannor, the Copy-hold is thereby extinct, becauſe they cannot ſtand together in one Perſon; and ſo if he releaſeth to the Lord. *Quære* of the firſt Caſe. It was not reſolved. Trin. 19 Jac. in C. B. *Huſſet* and *Humberſtons* Caſe. *Hutton* 59.

10. Action upon the Caſe, for ſtopping of his Water-courſe. The Plaintiff declared, That 22 Jac. he was poſſeſſed of the Rectory of M, of which a Curtilage was parcel; and that in this Curtilage, is, and hath been, time out of mind, a Water-courſe, for the watering of the Cattel of the Plaintiff and others, and for other neceſſary uſes; and that a certain Water-courſe time out of mind flowed from *Medford*-ſtream to the Curtilage, & filled the Pond, and that the Defendant knowing this, intending to Damm up the ſaid Water-courſe, had builded a ſtone-Wall thereupon; whereby the Water-courſe was ſtopped up to his damage, and laid it to be with a *Continuando*. The Defendant ſhewed, That King *Hen.* the 8 th. was ſeized of the ſaid Mannor and Rectory in Fee, and of a piece of Land lying between the ſaid Water-courſe and Stream; and that by Letters-Patents they came both to one *Box*, and by mean conveyance to the Defendant; who was ſeized, and ſo juſtified the filling up of the

ſaid

ſaid Water-courſe. The only Queſtion was, Whether the Unity of poſſeſſion, had extinguiſhed the Water-courſe, or not: And upon long Argument, wherein many Caſes are vouched, it was at laſt adjudged, That the Action did well lye, and that the Water-courſe was not extinguiſhed by the Unity of poſſeſſion; and that the preſcription was not gone. Hill. 1 Car. in B. R. *Scory* and *Piggets* Caſe. Paſc. 166. 167.

11. Two were ſeized of two ſeveral Acres of Land, of which the one ought to encloſe againſt the other; one purchaſed them both, and then lett them to ſeveral men. It was adjudged in that Caſe, That the Encloſure by the Purchaſe, was extinguiſhed by the Union of the poſſeſſion of both; and was not revived by the grant. Hill. 36 Eliz. Rott. 1332. *Hendon* and *Crowches* Caſe. And ſee 4 Jac. One had a way from one Acre to another, and after he purchaſed the Acre, upon which he had the way, and afterwards ſold it: Yet it was reſolved, That upon the Purchaſe, the way was extinguiſhed by the Unity; and was not afterwards revived. See 4 Jac. *Jorden* and *Aſhffs* Caſe. See *Popham.* 164. acc.

12. In Treſpaſs, for taking of Turff and Stones in the Waſte of the Lord of the Mannor: The Defendant juſtified by an *uſitatum eſt* that it had been there uſed time out of mind, That every Tenant for years, of antient Tenements and Cloſes within the Mannor, have uſed to have Common of Turbary and Lime-ſtones, in the Waſte of the ſaid Mannor; and ſhowed, That he was Tenant of an antient Tenement and Cloſe, and that the ſame was granted to him, with all Commons appurtenant to the ſaid Meſſuage, &c. and ſo juſtified. It was found by Verdict, That the Abbot of F. was ſeized of the ſaid Mannor, and that there was ſuch a preſcription for Common; That the Poſſeſſions of the Abby came to the Crown, and that by mean conveyances, the ſaid Mannor came to the Plaintiff; and that the ſaid Tenement and Cloſe came to the Defendant. The Queſtion in the Caſe was, When a Lord of the Mannor is ſeiſed of a Waſte, and a Tenant of an antient Tenement preſcribes to have Common in the Waſte, and afterwards the Tenement is ſevered from the Mannor, and both are in the hands of the Lord; and afterwards the Lord grants the Tenement and Cloſe for a terme, with all Commons to the ſame belonging, whether the Common which was before belonging to the antient Common ſhall pay, and whether the ſame was not extſtent by the Unity of Poſſeſſion, in the hands of the Lord. In this Caſe it was ſaid, 1. That if this Common was appurtenant to the antient Meſſuage and Cloſe, that then, when the ſaid Mannor, and alſo the ſaid Meſſuage and Cloſe came both into the hands of the Lord, that the Unity of Poſſeſſion in the Lords hands, did deſtroy the Common. And 2. Admitting it was a Common appurtenant to the ſaid Meſſuage and Cloſe, that the Leſſee here cannot have the Common, the preſcription being grounded upon a weak Foundation; for where it is ſaid, That the Leſſee of the ſaid Meſſuage and Cloſe have uſed to have Common, this is no ſuch *uſitatum* to have a clear Right to the Common; for that every new Leaſe and Contract is an Interruption of it; and ſuch an uſage ought to be perpetual, which it it not here. 2. The Termor cannot have Common by preſcription, becauſe there is a Commencement and Determination of his Eſtate; and then by the ſenſe of the Leaſe and Cloſe, although it be with all Commons belonging to it, it will not paſs. And it was ſaid, That here the *uſitatum* is annexed unto the Eſtate of a Termor, which cannot be good; and therefore it was adjudged, That for this cauſe, among the other, that this preſcription laid by a Termor by *uſitatum eſt*, was not good, to make the Juſtification good; and alſo, that by the Unity in the hands of the Lord, the Common was gone, and Judgment was given againſt the Defendant. 7 Jac. in B. R. Sir *Thomas Grimes* and *Peacocks* Caſe. *Bolſtr.* 1 Part, 17, 18.

13. In a Prohibition, the Caſe was: The Prior and Covent of *Hatfield Broadoak*, was ſeized of the Rectory appropriate of *Hatfield Broadoak*, and of a Farm called D. in the ſame Pariſh, time whereof, &c. The ſaid Priory being diſſolved by the Statute of 27 H. 8. being one of the ſmall Monaſteries: King H. 8. *Cro.* 29 granted all the Priory of H. and all their Poſſeſſions, to the Prioreſs and Nunns of *Barking*; they by Deed Indented and enrolled, ſurrendred their Poſſeſſions to the King: Afterwards the Statute of 31 H. 8. was made, the Rectory of H. was granted to *Trinity-Colledge* in *Cambridge*, who lett it to the Defendant. The Farm of H. was afterwards granted to one, who lett it to the Plaintiff: The Defendant ſued the Plaintiff in the Spiritual Court, for Tythes of the ſaid Farm: Whereupon a Prohibition was brought, and all this matter appearing upon a demur, it was adjudged, That a Conſultation be awarded. In this Caſe (amongſt other points) it was reſolved, That a perpetual Unity of a Church appropriated, and the Land, is not any diſcharge of Tythes of it ſelf; and the Statute of 27 H. 8. doth not give any diſcharge, but gives only the Poſſeſſions as they were in the hands of the Abbots; and that refers to the Poſſeſſions, and not to the Tythes out of them; and there is no clauſe of diſcharge of Tythes in the Statute of 27 H. 8. as

there is in the Statute of 31. H. 8; and the Statute of 31 H. 8. doth not extend to the Statute of 27. H. 8. And therefore it was holden, That the Unity of Poſſeſſion in it ſelf, is not any diſcharge of it ſelf of the Tythes. Hill. 15 Jac. in C. B. *Gerrard* and *Wrights* Caſe. *Cro.* 2 Part, 607. See *Liver* and *Read's* Caſe in the Exchequer. 37 Eliz. adjudge acc. See Sir *Marmaduke Stricklands* Caſe, adjudged acc. at the Aſſizes at *York*. *Anno* 1639. See *Claytons* Reports. 117.

14. Note: It was reſolved, That Unity of the Perſonage and Lands, which ſhould pay Tythes by Appropriation, or otherwiſe, in the hands of Religious and Eccleſiaſtical Perſons, had diſcharged them from the payment of Tythes; and ſince the Statute of 31 H. 8 ſuch an Unity of Poſſeſſion in the ſaid Religious Houſes, Lands, and Perſons ſhall be a diſcharge for the Kings Patentee, for the Lands that came to the Crown by the ſaid Statute of 31 H. 8. But then it was reſolved, That ſuch an Unity muſt have had theſe Incidents: It muſt have been *Juſta, Libera, Æqualis, & Perpetua*. It muſt have been *Juſta*, claimed by Right; for if either the Perſonages, Vicarages, Lands, or Tythes had come, or had been United to their houſes by Diſſeiſins, or other tortious and unlawful acts; ſuch an Unity had not been a good diſcharge within the Statute. 2. It muſt have been *Æqualis*, there muſt have been a Fee ſimple, both in the Lands, and Tythes in the ſame Perſons; for if the Abbots, Priors, or other Religious Perſons had held but by Leaſe, that had not been ſuch an Unity as the Statute did intend. 3. It muſt have been *Libera*, free from the payment of any Tythes; for if there Farmers, Tenants at will, or years, had paid Tythes, that was not ſuch an Unity as the Law intended. And 4. It muſt have been *Perpetua*, time out of mind, &c. and then for the Infinite poſſibility, and impoſſible Infinitenes, that ſuch immunities and diſcharges, which ſuch Religious Perſons and Houſes had before time of memory, could not be known; ſuch an Unity had been a good diſcharge in their own hands, and ſuch an Unity is a good diſcharge in the hands of the Kings Patentee, within the Statute of 31 H. 8. *Cook* 11 Part, 13. *Pridle* and *Nappers* Caſe.

15. An Abbot, who held a Parſonage Impropriate, which was diſcharged of Tythes, purchaſed parcel of the Lands: The Tythes were ſuſpended in the hands of the Abbot: Afterwards the Poſſeſſions of the Abby came to the Crown by the Statute of 31 H. 8. of Diſſolution. The Queſtion was, Whether Lands ſo purchaſed by the Abbot before his ſurrender to the King, were by the Statute diſcharged of Tythes. It was the Opinion of Mr *Plowden* in that Caſe, that they were not diſcharged; for he ſaid, That no Lands were diſcharged, but ſuch as were lawfully diſcharged by right, as Compoſition, or other Lawful diſcharge; and in that Caſe, the Lands were not diſcharged in right, but ſuſpended only, during the time that the Lands were in the Abbots hands. Mich. 17 Eliz. in B. R. *Godbolt.* acc.

16. In a Prohibition, the Plaintiff did ſurmiſe, That the Lands were parcel of the Priory of *Cree-Church*, who held them diſcharged of Tythes, at the time of the Diſſolution; upon which, Iſſue was joyned: It was moved, That there was not ſet forth any diſcharge as Compoſition, Unity of Poſſeſſion, Priviledge of Order, &c. It was holden by the Court in that Caſe, That although the ſpecial manner of diſcharge be not ſet forth, yet the Court ought to take it to be a Lawful diſcharge, as Compoſition, &c. for that the King ſhall hold as the Prior held, and it ought to be taken that it was a Lawful diſcharge *tempore diſſolutionis*. Mich. 33 Eliz. in B. R. *Naſh* and *Allens* Caſe. *Leon.* 240.

17. Thoſe of the Order of *Præmonſtratenſes*, claimed the Priviledge to be diſcharged of Tythes, granted them by the Pope; viz. *Vt decimas prædiorum ſuorum, quas in manibus ſuis propriis excolunt, non tenentur ſolvere*: (Note, Pope *Adrian* reſtrained this Priviledge to three Orders only, and left out the *Præmonſtratenſes*; and our Law-Books takes notice only of Templars, Ciſtertians, and Hoſpitles;) which was never granted, or confirmed by any Act of Parliament. The Queſtion in the Caſe was, If the diſcharge was good: It was for part of the Poſſeſſion of the Abbot of *Cockersam*, in the County of *Lancaſter*, which afterwards was ſurrendred to King *Hen.* the 8th. The Caſe was only argued, but not adjudged. And there it is ſaid cur. of 11 H. 4. That the Pope cannot alter the Lawes of the Land, by his Bulls, Councils, or Decrees: It was ſaid, That this Bull was confirmed to them, in the 24 th year of King *John*, and 22 E. 1 *November* 5. That the King took the *Præmonſtratenſes*, and their Immunities into protection; and it was ſaid, That 25 R. 2. *John* of *Gaunt* having *Jura Regalia* in *Lancaſhire*, did confirm this Bull of the Pope; and therefore it was ſaid, That at the time of the Diſſolution *de facto*, although not *de jure*, they were diſcharged of Tythes. Hill. 2 Car. *Dickenſon* and *Greenhowes* Caſe. *Hob.* 156.

18. The Biſhop of *Lincoln* ſued a Prohibition againſt *Cooper*, who had Libelled in the Spiritual Court againſt him, for Tythes of the Manor of D. And the Biſhop did ſuggeſt, that he, and his Predeceſſors had been ſeized of the ſaid Manor; and that as long as it was in their poſſeſſions, had been

been discharged of Tythes, and shewed, that in the time of King *Edw.* the 6th, the said Mannor was conveyed to the Duke of *Somerset* in Fee, and afterwards was re-granted to the Bishop and his Successors. It was moved, That the Prescription was not good; because *de non Decimando*. And 2. Admit that the same be good, yet it is interrupted by the Seisin of the Duke of *Somerset*; and although that the Mannor be re-assured to the Bishop of *Lincoln*; yet the Prescription is not revived, as Homage Auncestrel, if it be once in a forrein Seisin, although it be re-assured; yet it is not revived. But it was the Opinion of the Court in this Case, That the Prescription was good in the Case of a Spiritual Person, but not in the Case of a Common Person: And all the Court were clear of Opinion, That in this Case the Prescription was not gone by this Interruption; for that Tythes are not issuing out of the Lands, neither can Unity of Possession extinguish them; nor are they extinguished by a Release of all Right unto the Land. Mich. 33 Eliz. in B. R. The Bishop of *Lincoln*, and *Coopers* Case. *Leon.* 249.

See more of Unity, in *Lib.* 1. in the Titles of *Assions upon the Case*; and before, in the Titles of *Grants*, *Extinguishments*, and other Titles.

Voucher.

Voucher, *what it is, where, and in what Actions or writts; for whom, by whom, and against whom it lyeth; and the proceedings in it.*

1. VOucher, is when a *Precipe quod reddat*, or other real Action is brought against a man, to warrant the Land to the Tenant; then the Tenant shall Vouch him to Warranty, and thereupon he shall have a Writ, called *Summoneas ad Warrantizandum*; and if the Sheriff returneth, that he hath nothing by which he may be summoned, then shall issue forth another Writ, called *Sequatur sub periculo*; and when he cometh, and appeareth, he shall plead with the Demandant; but if he appeareth not, or that he cannot bar the Demandant, then shall the Demandant recover the Land against the Tenant, and the Tenant shall recover Land over in value against the Vouchee; and thereupon shall have a Writ of *Capias ad valentiam* against the Vouchee.

2. This Writ lyeth in an Assize of Mortdauncestor, and therefore if any such Assize brought and voucher, at the first day the Vouchee maketh default, a Re-summons thereupon shall issue forth against him, ; and so if the Tenant, or Vouchee, at the first day be Essoigned, and if at the day given by the Essoign, the Tenant or Vouchee make default, in such Case a Re-summons shall be awarded: But if the Tenant at the first day be Essoigned *ut in servitio Regis*, and at another day he maketh default, in such Case the Assize shall be taken by his default. See 8 Ass. 13. *Br.* Default and appearance. 88. acc.

3. In a Writ *de rationabili parte*, which is a Writ which lyeth against, and amongst Co-partners, who hold the Land, Voucher doth not lye, because of the privity of the Blood. F.N.B. 9. acc. But in an Assize of *Mort-Dauncester*, or in a *Nuper Obiit*, where the Ancestor dyeth seized of Lands in Fee-simple, which descend to several Heirs, and one of the Heirs entreth and deforceth the other; in such Case, the one Co-partner may have a *Nuper Obiit* against the other; and it seemeth, by *Fitzh. Na. Br.* 196, and 197, that in such Writs, Voucher lyeth.

4. In a Writ of Right after the Count, The Tenant shall make defence, and demand *Oyer* of the Writ, and afterwards rehearse the Count, and shall make defence *de Novo*; and then after all that, he shall vouch to Warranty, and plead in Bar. See 2 H. 6. 21. acc.

5. In Ancient Demesne, If the Tenant voucheth a Forreigner, which Voucher cannot be tryed within the Lordship, a Supersedeas thereupon shall be directed to the Lord to surcease, and the Party, Defendant, or Tenant, may sue his Writ of *Warrantia Chartæ* against the Voucher, returnable in the Common Pleas, and thereupon have a Supersedeas; and if they do proceed in Ancient Demesne, after the Supersedeas delivered, an Attachment lyeth against the Bayliff in Ancient Demesne; but if the Plea which was the Forreign Voucher in the Common-Pleas, be determined, or discontinued; then may he who was Demandant in the Writ of Right Close in Ancient Demesne, have a Writ out of the *Chancery* directed to the Justices of the Common-Pleas, to certifie if the Plea warranted be dependant, discontinued, or determined; and then the Demandant may proceed in his Writ in Ancient Demesne again. *Fitzh. Nat. Br.* acc.

6. Note, That in Case of a Forreign Voucher in *London*. That at the Common-Law the Plea was adjourned before the Justices in Eyre, when they came to the Tower of *London*. *Lambert*. 136. But at this day, if a Forreign Voucher be in *London*, a *Summonetas ad Warrantizandum* shall issue forth out of the *Chancery*, returnable before the Justices of the Common-Pleas; and the Maior and Sheriffs shall send the Record before them, and adjourn the Parties to be before them at a certain day. And after the Warranty upon the Voucher is determined there the Justices of the Common-Pleas shall send back the Record by a Writ, which shall issue out of the Rolls of the Justices, commanding them to proceed in the Plaint in *London*; be it in a Writ of Right, or any other Writ wherein Voucher lyeth. See *Cook* 4 Part, *Institutes*. 325. acc. 40 E. 3. 2. 35 H. 6. 30. acc.

7. In a Writ of Dower brought in *London*, the Tenant vouched a Forreigner: Process was made to try the Warranty in Common-Pleas at a certain day; at which day, the Vouchee did enter into the Warranty, and was ready to render Dower in Attests, but said he had not Attests; The Demandant sued Attests by descent in the County of M, and demanded Seisin of the Land: The Court in that Case declared, that they had not Power to award Seisin of the Land, but only to try the Warranty; and because in such Case, the Warranty was in point confessed, the Plea was remanded. 42 E. 3. 11. 41 E. 3. 31. acc.

8. In a Writ of Dower, *unde nihil habet*, the Tenant vouched the son and Heir of the Husband of the Demandant, and at the *sequatur sub suo periculo*, the Vouchee did not appear: Wherefore it was awarded, That the Wife should recover against the Vouchee, if he had Lands in the County, *ad valentiam*; and that the Tenant should hold the Lands in peace: And if he had not any Lands within the County, then against the Tenant, and the Tenant over in value. But in that Case, the Court examined, Whether the Vouchee was Heir of the Husband, from whom the Wife demanded her Dower. Mich. 2 H. 4. 48. Pl 1.

9. The Tenant in Ancient Demesne, vouched one at the Common-Law, within the same County, because the Vouchee had nothing to be summoned within, &c. And upon a Demurrer, the Voucher was adjudged good, and day was given in *Banco* to determine the Warranty, and a *Summoneas ad Warrantizandum* was awarded to the Vouchee in the Forreign County, who entred into the Warranty, and vouched over into another Forreign County. Pasc. 5 E. 6. *Dyer* 66.

10. A. B. brought Dower, *unde nihil habet*. The Tenant vouched the Heir of the Husband, who was Ward to the King, for cause of Wardship, and prayed in Aid of the King, and the Aid was granted, and afterwards a *Procedendo* was awarded, and she had Judgment to recover against the Tenants, and the suit against the Heir in value. But in that Case there was a *Cessat Executio*, as to the Recovery in value, until the Lands were out of the Kings hands. Mich. 9 Eliz. *Dyer*, 256.

11. Note, That at the Common-Law, an Assize was *Remedium maximè festinum, a remedium maximè beneficiale festinum*, for therein the Defendant was not to be essoined, nor admitted to call a Protection, nor to pray in Aid; nor could he vouch a Stranger, or any one who was not Party to the Writ, unless that he entred presently into the Warranty: And so was it of Tenant by Reliefe, *Cook* 8 Part, 50. in *John Webbs* Case.

12. It is Enacted by the Statute of 4 H. 7. *Cap.* 1. That the Demandant may maintain a Formedan in the Discender or Remainder, against the Pernor of the Profits; and the same Pernor to vouch, &c. as if they were Tenants in Dedd. The Case was, That I. D. brought a *Scire facias*, against the Pernor of the Profits. It was holden in that Case, That the Pernor should not vouch in a *Scire facias*, for that the Statute shall be intended, and construed in such an Action, in which he may vouch: And the words of that Act, do not alter the Law of Voucher in any other point, than in that to which the Reference is made; viz. That notwithstanding that he is not Tenant of the Land, but Pernor of the Profits, that yet he shall vouch; but it gave him no new Voucher in other respects: And therefore the Pernor of the Profits shall not vouch in any Action brought against him, wherein no Voucher before did lye. See 14 H. 7. 17, 18. *Cook* 1 Part, 62. in Doctor *Foster's* Case.

13. The Statute of *West.* 2. *Cap.* 4. giveth *Quod ei deforceat* to him, who hath lost by default; and giveth also to the Demandant to vouch in it: but that *non simpliciter, sed secundum quid, viz. Ac si esset tenens in prima brevi si Warrantum habuit*; the same extends only to the point to which it is referred; viz. that notwithstanding that he be Demandant; but the same doth not alter the Law in other Cases: and therefore if the Tenant pleadeth another Plea in Bar, and doth not maintain the first Recovery, he shall not vouch at all; also he shall not vouch another than him in the Reversion; nor shall he vouch in any Action in which no Voucher lyeth. See 23 E. 3. Counter-Plea of Voucher. 101. *Cook* 11 Part, 61. acc.

14. If a man seized of Lands in Fee hath Issue, two Sons, Bastard Eigne, and Mulier Puisne; the Bastard Eigne entreth, and is seized of the Land as Heir, he shall be vouched as Heir, in regard

regard of the Poſſeſſion which he hath; and if he be within age, the Plea ſhall demur for his Nonage. 20 E. 3. Tit. Voucher. 329. *Cook* 8 Part, 101. in *Talbots* Caſe.

15. If the Father be enfeoffed in Fee with Warranty, and the Feoffor Warant the Land to him and his Heirs, in this Caſe the Aſſignee ſhall not vouch; but if the Father infeoffeth his ſon and Heir apparent, with Warranty, and dyeth: In this Caſe, the Heir (being in truth Aſſignee) ſhall vouch, for that the Law hath determined the Warranty of the Father to the Son; and therefore will give the ſon benefit of the firſt Warranty. And ſo it was ſaid it was adjudged, 41 E. 3. 5. *Cook* 6 Part, 69. in Sir *Moile Finches* Caſe.

16. Note, That in deraigning of a Warranty, againſt Heirs in Gavel-kind, the eldeſt ſon may be vouched as Heir to the Warranty, and the other ſons alſo, in reſpect of the Inheritance deſcended unto them: So likewiſe the Heir at the Common-Law, and the Heir of the part of the Mother, may be both vouched; and yet in both theſe Caſes, the Heir at the Common-Law may be vouched alone, at the Election of the Tenant. *Cook* 1 Part, *Inſtitutes*. 376. See *Hob.* 35. acc.

17. If a man make a Feoffment in Fee, to A. his Heirs and Aſſignes, and A. enfeoffeth B. in Fee, who re-enfeoffeth A, he, or his Aſſignes, ſhall never vouch, becauſe he cannot be his own Aſſignee; but in ſuch Caſe, If B. had enfeoffed the Heir of A, he might in ſuch Caſe vouch as Aſſignee; for that the Heir of A, might be Aſſignee to A; foraſmuch as he claimeth not as Heir. *Cook* 1 Part, *Inſtitutes*. 385.

18. Note, That a man may have a Writ of *Warrantia Chartæ*, although he may vouch in the Action which is brought againſt him; and if he recover, and afterwards loſe in the Action in which he is vouched, he ſhall have a Writ of *Habere facias ad valentiam*, within the year after the Recovery in the *Warrantia Chartæ* for he ſhall bind the Land from the Teſte of the Writ; and upon the Voucher, he ſhall have it but from the time of the Voucher, which may be delayed; and therefore it is beſt to bring it preſently after the Voucher, becauſe that Action may be diſcontinued, and ſundry wayes, and ſo the Warranty of Charters be neceſſary: But yet he muſt not rely upon the *Warrantia Chartæ* only, but he muſt alſo vouch, and ſummon a Plea, according as his Caſe ſhall require. 41 E. 3. *Fitz. Garranty*. 19. in a *Formedon*. *Hob.* 23. in Sir *Hen. Rolls*, and Sir *Oſbornes* Caſe.

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2. *When a man may enter into Warranty gratis, without Proceſs; where not: Where a man may Vouch alone, upon a Warranty made to him and another; and where a man may be vouched of a thing, which is not in the Deed; Where not.*

1. A Man maketh a feoffment in Fee, with Warranty, and dyeth; the Heir of the Feoffor ſhall have all the charges, which the Feoffor himſelf might detain, though he have nothing by diſcent, by reaſon of the poſſibility of the diſcent; and the Feoffor ſhall have the Deed, to have the benefit of the Warranty paramount. Alſo the Lord by Eſcheat ſhall have all Charters which do concern the Land, becauſe that the Lord by Eſcheat is in the Poſt, and cannot vouch; and therefore if A. enfeoffeth B. with Warranty, B. ſhall not have the Deed which do contain Warranty; but if B. dyeth without Heir, then the Warranty made to B. is firſt, and A. cannot be vouched: And therefore, the Lord by Eſcheat in ſuch Caſe, ſhall have the Charters. *Cook* 1 Part, 2. in the Lord *Buckhurſts* Caſe.

2. Common Recoveries (which generally are with Warranyes and Vouchers) are ſo uſual, and their form of order and proceedings, ſo notorious in them, by appearances the firſt day, and that *gratis*, that the Law taketh knowledge of them; and therefore it was ſaid, That the Judges *ex officio*, without allegation of the Party, ſhall take knowledge of them, that they are Common Recoveries, and had by aſſent of the Parties for aſſurance of Lands: And ſee in *Plow. Com.* 56. in *Wimbiſh* and *Talbois* Caſe, Recovery in a Formedon, appeareth to the Judges to be by the conſent of the Parties; becauſe the Tenant was not Eſſoigned, nor did demand the view, but appeared *gratis* the firſt day, and confeſſed the Action. See *Cook* 5 Part, 41. in *Downes* Caſe.

3. If a man ſeized of a Rent, diſſeizeth the Tenant of the Land, and maketh a feoffment in Fee with Warranty; in ſuch Caſe, in a *Pracipe* brought, the Feoffee ſhall vouch, as of Land, diſcharged of the Rent, and yet the Rent was but ſuſpended; but every ſuſpenſion is a diſcharge for a time.

a time, and the diſcharge being referred to the time of the Warranty, extendeth to ſuſpenſion. *Cook* 2 Part, 48. in the Biſhop of *Canterburies* Caſe.

4. Note, for a Rule in Law, That no Warranty ſhall extend to bar any Eſtate of Free-hold, or Inheritance, which is in *Eſſe*, in Poſſeſſion, Reverſion, or Remainder (and not diſplaced, and put to a right) before, or at the time of the Warranty made, although that afterwards, and at the time of the diſcent of the Warranty, the Eſtate of the Free-hold or Inheritance be diſplaced or deveſted; and therefore, if there be Father and ſon, and the ſon hath a Rent ſervice, Rent-charge, or Rent-ſeck, or Common of Paſture, iſſuing out of certain Lands, and the Father releaſeth to the Tenant of the Land with Warranty, and dyeth, it ſhall not bar the ſon; for of the Rent or Common, the ſon was actually ſeized, at the time of the Warranty made, and he who is in Poſſeſſion, needeth not to put in his claim to avoid the Collateral Warranty; and although the ſon, after the Warranty made, be diſſeized of the Rent, and after the Father dyeth; it ſhall not bar him, becauſe that the Warranty at the time of the creation of it, did not extend to any Eſtate of Free-hold or Inheritance: But, if the ſon be diſſeized of the Rent or Common, and affirmeth himſelf to be diſſeized by bringing an Aſſize, and afterwards the Father releaſeth with Warranty and dyeth; there the Collateral Warranty ſhall bar the ſon of his Rent or Common, becauſe he had but a bare Right at the time of the Warranty made. *Cook* 10 Part, 97. in *Edward Seyntors* Caſe.

5. If two men allien Lands with Warranty, the Lands of the one only, ſhall not be rendred in value, nor if one dyeth, the Land of the Surviver ſhall not be only rendred; but they ſhall be both vouched, and the charge ſhall be equall upon them both: For a Joynt-*Lien*, which bindeth the Land, ſhall not ſurvive, or lye upon the Surviver; as in Caſe of Joynt-Warranty, Where two, for them and their Heirs, warrant Lands unto another and his Heirs; the Surviver ſhall not be only vouched, and the Sheriff cannot deliver the Land of the one, or of the other, at his pleaſure. And ſo if two bind themſelves to Warranty, and both dye, both their Heirs ought to be vouched, and they ſhall be equally charged. Againſt that, it was obj ected, That each of them warranteth the whole, *&c.* But it was reſolved, That although each of them be bound to warrant the whole, *Non ſequitur*, that the recompence in value, ſhould be made by one of them only; for if the Heir be vouched in the Ward of three ſeveral Perſons, one alone ſhall not be charged, but all equally; and yet the Anceſtor did warrant the whole. *Cook* 3 Part, 14. in Sir *William Herberts* Caſe.

6. A. and his Wife brought a Formedon in the Reverter againſt B, wherein he was Eſſoigned after the view, and then pleaded in abatement of the Writ; and then vouched two, whereof one was firſt Eſſoigned, and then the other, with an *Idem dies* alwayes to the Demandant, Tenant in Vouchee, at the laſt day of the Eſſoign, both the Vouchees appeared, and at the ſame day, the Tenant caſt an Eſſoign, both for himſelf, and his Attorney. It was ſaid, That the Eſſoign did not lye according to 3 H. 7. 13. But it was agreed by the Court, that the Eſſoign did well lye; and ſo it was ſaid, it was adjudged, 22 H. 6. and Trin. 34. H. 6. in *Bigrave* and *Hopding's* Caſe; and the Reaſon was, That although the Tenant had an Eſſoign before between him & the other Defendants, yet now he was in of another Order and Degree of Plea between him and the Vouchee; who being not yet entred into the Warranty, might (as before) either him ſelf vouch, or the Tenant; but if he were once actually entred into the Warranty, then he could be no more Eſſoigned, nor the Tenant, who had now done with the Vouchee. And ſee in 29 E. 3. 41. in *Symkin Symons* Caſe Reſolved, That the Vouch and Tenant, may either of them have one Eſſoign, before they enter into the Warranty. In the principal Caſe, the Eſſoign was adjudged good. The Earl of *Clanrikard*, and Viſcount *Liſle's* Caſe. *Hob.* 46, 47.

7. If a man enfeoffeth another of an Acre of Land with Warranty, and hath Iſſue, two ſons, and dyeth ſeized of another Acre of Land, of the nature of *Borrough Engliſh*, and the Feoffee is impleaded, that in that Caſe, although the Warranty diſcendeth only upon the eldeſt ſon, yet may he vouch them both; the one as Heir to the Warranty, the other as Heir to the Land; for if he ſhould vouch the eldeſt ſon only, then he ſhould not have the fruit of his Warranty; *viz.* a Recovery in value; and the youngeſt ſon only he cannot vouch, becauſe he is not Heir at the Common-Law to him, upon whom the Warranty diſcendeth. *Cook* 1 Part *Inſtitutes*. 376.

8. A Recovery in a Writ of Entry of the Manor of D. was drawn, and ſuffered at the Bar; wherein the Tenant prayed in Aid of the King, by reaſon of a Warranty in the King, by which he warranted that Land, and granted to make recompence upon Eviction; and this Aid, Prayer, was inſtead of a Vouchers; and the Warranty being created by Fine, and Recovery, wherein the Tenant vouched the King, and the Kings Attorney by a Warrant from the King entred into the Warranty, and prayed that the Demandant might Count; and

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it was drawn, That the Demandant *petit versus Dominum Regem*, that Land; and the Attorney of the King vouched over the common Vouchee. This Recovery being perused by the Court, because that such course had not been seen, nor any President shewed, that ever any should Count against the King as Voucher, and this being devised, to bar a Remainder upon an Estate tail in the King, therefore the Court would not suffer this Recovery to pass, for that the King shall never render in value upon Vouchers. But in such Case they ought to sue to the King by Petition, to have in value, and not by way of Voucher. Mich. 13. Car. in B. R. *Co.* 1 Part, 68.

9. In a Writ of Right Close in Antient Demesne, the Demandant made Protestation in the nature of an Assize of Mortd Ancestor: The Tenant, as to parcel, pleaded, That I. was seized, and took the Defendants Husband, and dyed; and so he held the Lands to Tenant, by the courtesie of *England*, without that, that the Father dyed seized: And as to parcel, the Tenant vouched a Forreigner. The Question was, How the Record should be removed, because it is entire. In that Case, it was said by *Fitz Herbert* Justice, as to that parcel, of which the Tenant hath vouched a stranger, the Record shalbe sent hither, and Proceſs shall be against the Vouchee; and as to the other parcel, day shall be given by the other Parties in Antient Demesne, and the Plea continue till the Voucher be determined here: And in this Case it was holden, That the other points of the Writ, should not be enquired of, but the dying seized. Pasc. 27 H. 8 12.

10. Note, 8 E. 2. *Fitz* Title *Voucher*. A man cannot vouch a Clerk attaint, or a Man Outlaw'd, but rather have a *Warrantia Chartæ* against them: But contrary of an Idiot, *Quære* if it be Law this day, and see *Bre. War. Chartæ* 29. 8 E. 4 10. by *Markham*. See 24 E. 3. *Bre. Warrantia chartæ*, 13. And see, That a man may sue forth a *Warrantia Chartæ* before he is Impleaded; *quia tunc implacitari*, and shall recover *pro loco & tempore*, and yet the Writ doth suppose that he is Impleaded. See *Hob.* in *Rolls* and *Osborn* Case acc. And in such Case, if the Defendant appeareth, and saith that he is not Impleaded, it is as much as a confession of the Warranty upon a Voucher, and the Plaintiff shall have Judgment to recover his Warranty: But generally a man shall not vouch before he be Impleaded; but if he be Impleaded, and voucheth, and loseth, he shall recover in value against the Vouchee. See for this, 21 H 6. 41. 13 H. 7. 17 12 H 4 12. And see 1 E. 3. 11. *Fitz. Garr. de Chartes* 2. The Lands which he had at the time of the Judgment upon a Recovery in value, shall be put in Execution.

See more of *Voucher*, and the proceedings in it, in the Titles of *Common Recovery*, *Warranty*, and *Warrantia Chartæ*.

Usury and *Usurious Contracts.*

1. THE Statute of 13 Eliz. cap. 8. is, That all Bonds, Contracts, and Assurances, Collateral, or other, to be made for any Principal, or money to be lent, &c. The Case was, A *Scire facias* was brought to execute a Judgment in Debt. The Defendant pleaded, That he borrowed of the Plaintiff 100 l. to give him 120 l. for the loan thereof for a year. And the Plaintiff for his assurance would have the Defendant confess this Judgment, and so he pleaded the Statute of Usury in Bar to the *Scire facias*, upon which the Plaintiff demurred in Law. It was prayed, That Judgment might be for the Plaintiff. It was said, That this Judgment may not be said any Assurance for the money, but is a Judgment upon the Assurance, for which, &c. It was the Opinion of the whole Court, That this was no Plea to defeat the Judgment. But if such matter had bin, the Defendant ought to have pleaded it, That upon the first Action in bar, and so not to suffer the Judgment, Judgment was after given for the Plaintiff. Mich. 31 Eliz. in B. R. *Middleton* and *Hall's* Case. *Goldesbr.* 128.

2. Debt was brought upon the Statute of 5 E. 6. cap. 20. for Usury. The Defendant pleaded, *Quod non recepit, &c.* It was the Opinion of the Justices, That the same is a Confession of the Contract, thus it is within the Statute, and that therefore the Court *ex Officio* ought to take notice, and give Judgment. Hill. 1 Ma. *Dyer*, 95. *Oliver Whitton's* Case.

3. In a Replevin, the Defendant avowed for a Rent of 20 l. The Plaintiff in bar of the Avowry alledged the Statute of Usury, and that A. lent to B. 100 l. and that B. granted to A. and his Heirs an yearly Rent of 20 l. upon Condition, that if he paid to A. such a day 100 l. that then the Rent should

ſhould ceaſe. B. received the money, and granted the Rent upon ſuch Condition. And for Rent behind, he diſtreyned and avowed. In this Caſe, it was adjudged for the Avowant; for it appeareth that the ſame was not any corrupt Bargain within the Statute of 13 Eliz. becauſe that nothing was to be paid to B. untill the day; and if the money had bin paid at the day, the Rent had ceaſed without any thing paid for it: And therefore it was the Opinion of the Court, That it was a plain Bargain and Purchaſe conditional of ſuch Rent, and no Uſury. But if it had bin agreed betwixt the Grantor and Grantee, that the 100 l. ſhould not be paid at the day, then it had bin an Uſurious Bargain within the Statute. Mich. 34 Eliz. in B. R. *Cook* 5. Part, *Batons* Caſe.

4. In Debt upon an Obligation, the Caſe was, A. requeſted B. to lend him 30 l. And upon a Communication had between them, B. lent him 30 l. 6. *December*, 34 Eliz. till the ſecond of *June* next, to pay to him for the Principal and the Loan of it, 33 l. the ſaid ſecond of *June*, if the Son of the Obligee was then alive; and if he dyed before the ſaid day, that then he ſhould pay him but 27 l. It was Reſolved in this Caſe, That the ſame was an Uſurious Contract within the Statute of 13 Eliz. For if the Original Contract be Uſurious, no colour or ſhaddow put upon it will make it good. Paſc. 37 Eliz. in C. B. *Cook* 5. Part, *Clayons* Caſe. 70.

5. Note, this difference was agreed by the Juſtices, That if I have a Rent-charge of 30 l. *per annum*, for 10 years, and another comes to me, and demands of me what he ſhall give to me for that Rent, and I anſwer him, that he ſhall give me 100 l. that the ſame is not Uſury, for it is but a void contract. But if A. comes to B. and ſayes to him, that he needeth 100 l. and demands of him how much he ſhall give him for 100 l. and he anſwereth him, 30 l. *per annum*, the ſame is Uſury if he doth ſo accordingly, becauſe there is a meer contract for money. But if one in conſideration of 100 l. received, grants to him that lends it to him, 30 l. *per annum* for 10 years; It was left a Quere in that Caſe, If it was not Uſury within the Statute. Paſc. 6 Jac. in C. B. rott. 1545. *Cockerells* Caſe. *Brownl.* 150.

6. Debt upon an Obligation, The Caſe was, W. the Defendant was endebted to one A. in 100 l. upon an Uſurious Contract, and A. was endebted to E. the Plaintiff in 100 l. for which W. and A. were bound to the Plaintiff; and debt being brought upon that Obligation, W. pleaded the Uſury between him and A. to avoid the Bond. The Plaintiff E. replyed, That A. before the making of the Bond, was endebted to him 100 l. being a juſt and due debt, for payment whereof, W. and A. were bound unto him in the Bond put in Suit, and that he was not in any wiſe knowing of the Uſury between W. and A. upon which Plea, W. did demur. In this Caſe, the Opinion of the Court was for the Plaintiff, for it is not Uſury in the Plaintiff, but only between W. and A. to which the Plaintiff is a ſtranger, not being privy to it; and therefore ſhall not be prejudiced by it; for although the Statute is to be taken ſtrongly for ſuppreſſing of Uſury, yet it muſt be betwixt ſuch Parties as are corruption, and not to puniſh the Innocent; but if no Debt had been due to the Plaintiff before, then it had been clearly Uſury; for then there had been no lawful cauſe to make the Bond unto him, but only to countenance the corrupt agreement betwixt W. and A. Trin. 2 Jac. in B. R. *Ellis* and *Warnes* Caſe. *Brownl.* 1 Part, 85. See *Yelverton*, 47. the ſame Caſe. *Cro.* 1 Part, 33. the ſame Caſe.

7. Debt upon an Obligation of 100 l. to pay 54 l. at the end of 6 Moneth's. The Defendant pleaded the Statute of 21 Jac. of Uſury, and ſaved. That th Plaintiff lent him 50 l. the 12 th of *July*, and agreed that he ſhould pay for the Intereſt thereof 4 l. The Plaintiff replyed, That he lent the 50 l. for a year, and that the Defendant ſhould pay 4 l. for the forbearance for a year, and by the Scrivenors miſtake, it was made to be paid at the half years end; and he not knowing thereof, accepted of the Bond. The Defendant re-joyned, That the lending only was for half a year, and that he was to pay 4 l. for that time, and traverſed: The 12 th of *July*, it was agreed, the Loan ſhould be for one whole year, or that he ſhould forbear it for a year: Upon which the Plaintiff did demur in Law, and ſaid, That the Bar was ill, becauſe it was not pleaded, *Quod corruptum agreamen fuit*; and the Plea is, that he ſhould have Intereſt for forbearing; but doth not ſay, *Corrupte*, &c. And for that cauſe the Court was of Opinion, that the Bar was ill. Alſo it was ſaid, that the Rejoynder was ill, becauſe the Defendant thereby makes the day to be parcel of the Iſſue; which ought not to be, but he ought to traverſe the Agreement only: And of that Opinion was the Court, but no Judgment was given in the Caſe; becauſe the Plaintiff offered to accept of his Debt, and the Defendant agreed to pay. Trin. 14. Car. in B. R. *Nevilſon* and *Whalleys* Caſe. *Cro.* 1 Part, 360.

8. In *Ejectione firmæ*, the Queſtion was, If one Mortgage Land for 100 l. and taketh a Bond for the payment of 8 l. Intereſt *per An.* payable half-yearly, whether this makes the Bargain Uſurious againſt the Statute; becauſe, as it was ſaid, the

the uſe ought not to be paid untill the end of the year; and contrarily to pay it half-yearly, is not warranted by the Statute. But it was the Opinion of the whole Court, That it was not an Uſurious Contract, becauſe the 100*l.* is lent for a year, and the reſervation is not of more, but of what is permitted by the Statute; and although that the Intereſt is reſerved payable half-yearly, it is allowable; for he doth not receive any Intereſt for more or leſs time, than his money is forborn. It was adjudged for the Plaintiff, and the Judgment affirmed upon a Writ of Error, brought in the Exchequer-Chamber. Trin. 8 Car. in B. R. *Gryſſil* and *Whitgrove's* Caſe. *Cro.* 1 Part, 206.

9. The Caſe was, I. S. lent 100*l.* for a year and took 5*l.* Intereſt, at the end of 6 months. It was the Opinion of *Popham* and *Gawdy*, Juſtices, That it was not Uſury, becauſe it is not above the rate of 10*l.* for a 100*l.* and it is as if a man lend 100*l.* for a year, and taketh the profits of a Manner, of the value of a 100*l. per an.* although the profits be received every day, yet it is no Uſury. But *Fenner* and *Yelverton*, Juſtices, held the contrary; and it is not like the Caſe of Mortgage, for the Statute intends that the profit and increaſe of the 100*l.* ought not to be received untill the end of the year; for if the 5*l.* Intereſt be received at the end of the 6 months, then he to whom the 100*l.* is lent, hath not the uſe and profit but of 95*l.* for the whole year, and the Statute is to be taken ſtrictly as to the Offender; and therefore, If a 100*l.* be lent for a year, and he who lends it, two dayes next after takes back 30*l.* of it, this taking back of the 30*l.* is Uſury. Judgment was given by the Opinion of all the Judges of *England* in this Caſe againſt the Plaintiff. Mich. 45 Eliz. in B. R. *Barnes* and *Rowlands* Caſe. *Yelverton*, 30, 31. See *Cro.* 1 Part, 26. the ſame Caſe.

10. Debt upon the Statute of 37 H. 8. of Uſury: The Writ was, That he *corruptivè* lent 40*l.* againſt the forms of the Statute, and that ſuch a one he lent 20*l.* &c. againſt the Statute, and doth ſo ſay *corruptivè*. The Defendant pleaded *Non debet*, and found againſt him: It was moved, That the Plaintiff ſhould not have Judgment for any of the ſummes, for it is clearly ill for the 20*l.* for want of the word *corruptivè*. But the Opinion of the Court was, That it being good for part, he ſhould have Judgment for that part; and being for ſeveral ſums, it is in nature as two ſeveral Actions; ſo that though it be void for the one, it is good for the other; being it is but a miſpriſion in his Writ or Count. Mich. 3 Jac. in *C. B. Grandy's* Caſe. *Cro.* 2 Part, 104.

11. Debt upon an Obligation. The Defendant pleaded the Statute of Uſury, and ſhewed That a Ship went to Eſtin *New found land*, (which journy might be performed in eight Months) and that the Plaintiff delivered 50*l.* to the Defendant, to pay 60*l.* at the return of the Ship to D; and if the ſaid Ship by Leaking, or Tempeſt ſhould not return from *New found land* to D, then the Defendant ſhould pay the 50*l.* principal money only; and if the Ship were returned, he ſhould pay nothing. It was reſolved by the whole Court in this Caſe, That this was not Uſury, for if the Ship had ſtayed at *New found-land* two or three years, he ſhould have paid at the return of the Ship but 60*l.*, and if it never returned, then nothing; ſo as the Plaintiff ran a hazard of having leſs than the Principal and Intereſt. It was adjudged for the Plaintiff. Paſc. 6 Jac. in B. R. *Shapley* and *Harrets* Caſe. *Cro.* 2 Part, 209.

12. Debt upon an Obligation, for payment of 20*l. per Annum*, during the lives of the Plaintiff's Wife and Son: The Defendant pleaded the Statute of Uſury, and ſhewed, How he came to the Plaintiff to borrow 110*l.* &c. to the Rate of 10*l. per Cent.* who refuſed to lend the ſame, but corruptly offered to deliver 120*l.* to him, if he would be bounden to pay 20*l. per Annum*, during his, the Plaintiff's Wives and Sons lives; and thereupon he entred into the ſaid Bond, which is above the rate of 10*l. per Cent.* and ſo the Bond is void: Upon which it was demurred. It was reſolved, That this being an abſolute Bargain, in conſideration of payment of 20*l. per Annum*, during two Lives, and no agreement to have the Principal money, was out of the Statute of Uſury: But if there had been any proviſion made for the payment of the Principal money, it had been an Uſurious agreement, and within the Statute. Mich. 7 Jac. in B. R. *Foulkes* and *Gynes* Caſe. *Cro.* 3 Part, 235. See before, *Barnes* Caſe, and *Cook* 1 Part, *Clayton's* Caſe, 20*c.*

13. In Treſpaſs, the Caſe was, C. ſeized of Lands, it was agreed that M. A. ſhould lend him 150*l.*, and for ſecurity of re payment of it, C. Leaſed to the ſaid M. A. the Lands in Queſtion for 60 years, to begin at the end of two years, upon Condition, that if he paid the 150*l.* at the end of two years, the Caſe to be void. It was further agreed between them, That the ſaid C, for differing, and giving day of payment of the ſaid 150*l.* for two years, ſhould pay to the ſaid M. A. for the Intereſt thereof, 22*l.* 10*s.* Quarterly, if the ſaid M. A. ſhould ſo long live: In performance of the Agreement, A lent the 150*l.*, C. made the Leaſe, and granted by Fine an Annual Rent

ſhould ceaſe. B. received the money, and granted the Rent upon ſuch Condition. And for Rent behind, he diſtreyned and avowed. In this Caſe, it was adjudged for the Avowant; for it appeareth that the ſame was not any corrupt Bargain within the Statute of 13 Eliz. becauſe that nothing was to be paid to B. untill the day; and if the money had bin paid at the day, the Rent had ceſſed without any thing paid for it: And therefore it was the Opinion of the Court, That it was a plain Bargain and Purchaſe conditional of ſuch Rent, and no Uſury. But if it had bin agreed betwixt the Grantor and Grantee, that the 100 l. ſhould not be paid at the day, then it had bin an Uſurious Bargain within the Statute. Mich. 34 Eliz. in B. R. *Cook* 5. Part, *Bartons* Caſe.

4. In Debt upon an Obligation, the Caſe was, A. requeſted B. to lend him 30 l. And upon a Communication had between them, B. lent him 30 l. 6. *December*, 34 Eliz. till the ſecond of *June* next, to pay to him for the Principal and the Loan of it, 33 l. the ſaid ſecond of *June*, if the Son of the Obligee was then alive; and if he dyed before the ſaid day, that then he ſhould pay him but 27 l. It was Reſolved in this Caſe, That the ſame was an Uſurious Contract within the Statute of 13 Eliz. For if the Original Contract be Uſurious, no colour or ſhaddow put upon it will make it good. Paſc. 37 Eliz. in C. B. *Cook* 5. Part, *Clayons* Caſe. 70.

5. Note, this difference was agreed by the Juſtices, That if I have a Rent-charge of 30 l. *per annum*, for 10 years, and another comes to me, and demands of me what he ſhall give to me for that Rent, and I anſwer him, that he ſhall give me 100 l. that the ſame is not Uſury, for it is but a void contract. But if A. comes to B. and ſayes to him, that he needeth 100 l. and demands of him how much he ſhall give him for 100 l. and he anſwereth him, 30 l. *per annum*, the ſame is Uſury if he doth ſo accordingly, becauſe there is a meer contract for money. But if one in conſideration of 100 l. received, grants to him that lends it to him, 30 l. *per annum* for 10 years; It was left a Quære in that Caſe, If it was not Uſury within the Statute. Paſc. 6 Jac. in C. B. rott. 1545. *Cockerells* Caſe. *Brownl.* 150.

6. Debt upon an Obligation, The Caſe was, W. the Defendant was endebted to one A. in 100 l. upon an Uſurious Contract, and A. was endebted to E. the Plaintiff in 100 l. for which W. and A. were bound to the Plaintiff; and debt being brought upon that Obligation, W. pleaded the Uſury between him and A. to avoid the Bond. The Plaintiff E. replyed, That A. before the making of the Bond, was endebted to him 100 l. being a juſt and due debt, for payment whereof, W. and A. were bound unto him in the Bond put in Suit, and that he was not in any wiſe knowing of the Uſury between W. and A. upon which Plea, W. did demur. In this Caſe, the Opinion of the Court was for the Plaintiff, for it is not Uſury in the Plaintiff, but only between W. and A. to which the Plaintiff is a ſtranger, not being privy to it; and therefore ſhall not be prejudiced by it; for although the Statute is to be taken ſtrongly for ſuppreſſing of Uſury, yet it muſt be betwixt ſuch Parties as are corruption, and not to puniſh the Innocent; but if no Debt had been due to the Plaintiff before, then it had been clearly Uſury; for then there had been no lawful cauſe to make the Bond unto him, but only to countenance the corrupt agreement between W. and A. Trin. 2 Jac. in B. R. *Ellis* and *Warnes* Caſe. *Brownl.* 1 Part, 85. See *Yelverton*, 47. the ſame Caſe. *Cro.* 1 Part, 33. the ſame Caſe.

7. Debt upon an Obligation of 100 l. to pay 54 l. at the end of 6 Moneths. The Defendant pleaded the Statute of 21 Jac. of Uſury, and ſhewed. That th Plaintiff lent him 50 l. the 31 th of *July*, and agreed that he ſhould pay for the Intereſt thereof 4 l. The Plaintiff replyed, That he lent the 50 l. for a year, and that the Defendant ſhould pay 4 l. for the forbearance for a year, and by the Scrivenors miſtake, it was made to be paid at the half years end; and he not knowing thereof, accepted of the Bond. The Defendant re-joyned, That the lending only was for half a year, and that he was to pay 4 l. for that time, and traverſed: The 12 th of *July*, it was agreed, the Loan ſhould be for one whole year, or that he ſhould forbear it for a year: Upon which the Plaintiff did demur in Law, and ſaid, That the Bar was ill, becauſe it was not pleaded, *Quod corruptum agreamen fuit*; and the Plea is, that he ſhould have Intereſt for forbearing; but doth not ſay, Corrupte, &c. And for that cauſe the Court was of Opinion, that the Bar was ill. Alſo it was ſaid, that the Rejoynder was ill, becauſe the Defendant thereby makes the day to be parcel of the Iſſue; which ought not to be, but he ought to traverſe the Agreement only: And of that Opinion was the Court, but no Judgment was given in the Caſe; becauſe the Plaintiff offered to accept of his Debt, and the Defendant agreed to pay. Trin. 14. Car. in B. R. *Nevilon* and *Whalleys* Caſe. *Cro.* 1 Part, 360.

8. In *Ejectione firmæ*, the Queſtion was, If one Morgage Land for 100 l. and taketh a Bond for the payment of 8 l. Intereſt *per An.* payable half-yearly, whether this makes the Bargain Uſurious againſt the Statute; becauſe, as it was ſaid, the

the uſe ought not to be paid untill the end of the year; and contrarily to pay it half-yearly, is not warranted by the Statute. But it was the Opinion of the whole Court, That it was not an Uſurious Contract, becauſe the 100l. is lent for a year, and the reſervation is not of more, but of what is permitted by the Statute; and although that the Intereſt is reſerved payable half-yearly, it is allowable; for he doth not receive any Intereſt for more or leſs time, than his money is forborn. It was adjudged for the Plaintiff, and the Judgment affirmed upon a Writ of Error, brought in the Exchequer-Chamber. Trin. 8 Car. in B. R. *Gryſſil* and *Whitehorn's* Caſe. *Cro.* 1 Part, 206.

9. The Caſe was, I. S. lent 100l. for a year and took 5l. Intereſt, at the end of 6 moneths. It was the Opinion of *Popham* and *Gawdy*, Juſtices, That it was not Uſury, becauſe it is not above the rate of 10l. for a 100l. and it is as if a man lend 100l. for a year, and takith the profits of a Mannor, of the value of a 100l. *per an.* although the profits be received every day, yet it is no Uſury. But *Fenner* and *Yelverton*, Juſtices, held the contrary; and it is not like the Caſe of Mortgage, for the Statute which allowes the Mortgage, muſt allow allow the profits to be taken, as they naturally ariſe; but when a 100l. is lent for a year, the Statute intends that the profit and increaſe of the 100l. ought not to be received untill the end of the year; for if the 5l Intereſt be received at the end of the 6 moneths, then he to whom the 100l. is lent, hath not the uſe and profit but of 95l. for the whole year, and the Statute is to be taken ſtrictly as to the Offender; and therefore, If a 100l. be lent for a year, and he who lends it, two dayes next after takes back 30l. of it, this taking back of the 10l. is Uſury. Judgment was given by the Opinion of all the Judges of *England* in this Caſe againſt the Plaintiff. Mich. 45 Eliz. in B. R. *Barnes* and *Warbolds* Caſe. *Yelverton*, 30, 31. See *Cro.* 2 Part, 26. the ſame Caſe.

10. Debt upon the Statute of 37 H. 8. of Uſury: The Writ was, That he *corruptivè* lent 40l. againſt the forms of the Statute, and that ſuch a one he lent 20l. &c. againſt the Statute, and doth not ſay *corruptivè*. The Defendant pleaded *Non debet*, and found againſt him: It was moved, That the Plaintiff ſhould not have Judgment for any of the ſummes, for it is clearly ill for the 20l. for want of the word *corruptivè*. But the Opinion of the Court was, That it being good for part, he ſhou'd have Judgment for that part; and being for ſeveral ſums, it is in nature as two ſeveral Actions; ſo that though it be void for the one, it is good for the other; being it is but a miſpriſion in his Writ or Count. Mich. 3 Jac. in *C. B. Wendy's* Caſe. *Cro.* 2 Part, 104.

11. Debt upon an Obligation. The Defendant pleaded the Statute of Uſury, and ſhewed That a Ship went to Eſtin in *New-found land*, (which journey might be performed in eight Moneths) and that the Plaintiff delivered 50l. to the Defendant, to pay 60l. at the return of the Ship to D; and if the ſaid Ship, by Leaking, or Tempeſt ſhould not return from *New found land* to D, then the Defendant ſhould pay the 50l. principal money only; and if the Ship were returned, he ſhou'd pay nothing. It was reſolved by the whole Court in this Caſe, That this was not Uſury, for if the Ship had ſtayed at *New found-land* two or three years, he ſhould have paid at the return of the Ship but 60l., and if it never returned, then nothing; ſo as the Plaintiff ran a hazard of having leſs than the Principal and Intereſt. It was adjudged for the Plaintiff. Paſc. 6 Jac. in B. R. *Sharpley* and *Harrets* Caſe. *Cro.* 2 Part, 209.

12. Debt upon an Obligation, for payment of 20l. *per Annum*, during the lives of the Plaintiff's Wife and Son: The Defendant pleaded the Statute of Uſury, and ſhewed, How he came to the Plaintiff to borrow 120l. &c. to the Rate of 10l. *per Cent.* who refuſed to lend the ſame, but corruptly offered to deliver 120l. to him, if he would be bounden to pay 20l. *per Annum*, during his, the Plaintiffs Wives and Sons lives; and thereupon he entred into the ſaid Bond, which is above the rate of 10l. *per Cent.* and ſo the Bond is void: Upon which it was demurred. It was reſolved, That this being an abſolute Bargain, in conſideration of payment of 20l. *per Annum*, during two Lives, and no agreement to have the Principal money, was out of the Statute of Uſury: But if there had been any proviſion made for the payment of the Principal money, it had been an Uſurious agreement, and within the Statute. Mich. 7 Jac. in B. R. *Foubtain* and *Gaynes* Caſe. *Cro.* 2 Part, 235. See before, *Barnes* Caſe, and *Cook* 1 Part, *Clayton's* Caſe, &c.

13. In Treſpaſs, the Caſe was, C. ſeized of Lands, it was agreed that M. A. ſhould lend him 150l., and for ſecurity of re payment of it, C. Leaſed to the ſaid M. A. the Lands in Queſtion for 60 years, to begin at the end of two years, upon Condition, that if he paid the 150l. at the end of two years, the Caſe to be void. It was further agreed between them, That the ſaid C, for diſcharging, and giving day of payment of the ſaid 150l. for two years, ſhould pay to the ſaid M. A. for the Intereſt thereof, 22l. 10s. Quarterly, if the ſaid M. A. ſhould ſo long live: In performance of the Agreement, A lent the 150l., C. made the Leaſe, and granted by Fine an Annual Rent

of 22l. 10s. to be paid Quarterly, if M. A. ſo long lived, and afterwards conveyed the Inheritance to the Plaintiff. There were divers Queſtions in this Caſe: 1. If it was an Uſurious Contract within the Statute, becauſe it was a meer caſual Bargain. It was as to that point Reſolved, That it was an Uſurious Bargain; for by intendment ſhe might live about two years, and it is an Agreement, poſſibly, that ſhe ſhould receive that conſideration. 2. *Queſt.* If this Leaſe, being taken for the payment of the Principal money, and not for the payment of any part of the Uſury, be within the Statute. It was Reſolved, That it was becauſe it was for the ſecurity of money lent upon Intereſt. 3. It was Objected, That this Verdict found that there was an Agreement in the ſame manner, *prout*, &c. but doth not find but it was *Corruptum agretamentum*. It was Anſwered by the Court, That it needs not be ſet forth that it was *Corruptum*, for that in this Caſe *res ipſa loquitur*; and if the Corrupt Agreement be not expreſſed in the Verdict, yet if the matter be apparent to the Court, it is ſufficient; otherwiſe, if the matter be only implyed, and ſo it was ſaid it was adjudged in one *Biggens* and *Mervens* Caſe. It was adjudged for the Plaintiff. Trin. 14 Jac. in B. R. *Roberts* and *Tremans* Caſe. *Cro.* 2 Part, 507.

14. Upon a ſpecial Verdict, *in Ejectione firme*, It was found, that R. G. the Defendant, was poſſeſſed of a Leaſe for years, of a Houſe, and 23 *Maij*. 17 Jac. it was agreed betwixt him, and one I. S. that he ſhould lend to the ſaid R. G. 120l. for a year then next following, upon ſecurity for re-paying of the ſaid 120l., and 12l. for the Intereſt thereof, upon 24 *May*, 1618. He lent the money, and R. G. 23 *May*, &c. was bound in a Bond with him of 260l. with condition for the payment of the ſaid 132l. upon the 25th of *May* next inſuing; and for the better aſſurance of the payment of the ſaid 232l., he made the Leaſe by Indenture to the ſaid I. S. (being the Leſſor of the Plaintiff) upon condition, That if he paid the ſaid 132l. at the day and place mentioned in the Condition of the ſaid Obligation, then the Aſſignment to be void; and found, that the Scrivener who drew the Obligation and Aſſignment, by miſtaking the ſaid Agreement between them, drew it in this manner, and that the ſaid I. S. ſealed the counterpart of the ſaid Indenture: And found the Statute of Uſury, and that the ſaid 132l. was not yet paid; whereupon I. S. entred, and made the Leaſe to the Plaintiff. The Queſtions in this Caſe, were: 1. Whether theſe words, viz. The 24th. of *May* next enſuing, ſhall be intended the ſame moneth of *May*, which was the next day following. And 2. Then if it was Uſurious, or not. It was the Opinion of the Juſtices, That; *Next inſuing* ſhall be intended the ſame moneth of *May*; unleſs the circumſtances of their Agreement had been found. But the Juſtices held, That although it ſhould be Expounded to refer to *May* 24. the ſame moneth and year, which is the next day; yet foraſmuch as the Agreement is made to be, to make the Loan for a year, and that the Aſſurances were for payment at the years end, and by the Scriveners miſtake, it is made payment the next day, that it was not Uſury within the Statute, for there was not any corrupt Agreement betwixt them, and the act of a ſtranger, ſhall not bring him within the danger of the Statute; eſpecially, it being found, that he did not require his payment untill after the year. Trin. 20 Jac. in B. R. *Buckley* and *Guilbours* Caſe. *Cro.* 2 Part, 677.

See more of Uſury and Uſurious Contracts, in *Lib.* 1. Title *Actions upon Statutes*; and, here, in the Title of *Statutes*.

Uſurpation.

See for Uſurpations, *Lib.* 1. Title, *Advowſon*. And in the Titles of *Preſentation*, *Admiſſion*, *Inſtitution*, and *Induction*; and in the Titles *King*, and *Prerogative*.

More.

1. Uſurpation is, where a Stranger, who hath no Title to the Advowſon, the Church being void, doth preſent his Clerk to the Biſhop, or Ordinary, who doth thereupon Admit, Inſtitute, and Induct the Clerk preſented to the Church. This Preſentation is a Diſturbance and Uſurpation, and doth put the Patron out of the Poſſeſſion of the Church. This appeareth by the Statute of *Weſtminſt.* 2. *Chap.* 5. *Cum aliquis jus preſentandi non habens preſentavit*

ſuit

venit ad aliquam Eccleſiam cujus præſentatus ſit admiſſus: For no man can be put out of his Advowſon, but upon Admiſſion and Inſtitution upon a Preſentation only. *Cook* 6 Part, 30. acc. For if the Biſhop doth Collate unto the Church without Title, and his Clerk be Inducted, this doth not put the Rightful Patron out of Poſſeſſion, for that it ſhall be taken to be only proviſionally made for the Celebration of Divine Service, until the Patron doth Preſent. See 14 H. 7. 2. and ſo it was Reſolved, Mich. 3 Eliz. in C. B. in *Jurdens* Caſe.

2. At the Common-Law, Every Preſentation to the Church, did put the Rightful Patron out of Poſſeſſion, and put him to his Writ of Right of Advowſon, whether the Preſentation were by Title, or without Title: And therefore, If A. being ſeized of an Advowſon, had levyed a Fine to B. and his Heirs, and after the Church had become void, and A. had Preſented by uſurpation his Clerk to the Ordinary, who had been Admitted Inſtituted, and Inducted; this ſhould have put the Patron out of Poſſeſſion. See 8 E. 2. *Quare Imp.* 168. And ſo it was, if A. had recovered againſt B. an Advowſon, in a Writ of Right of Advowſon, and had final Judgment, and afterwards the Incumbent had dyed, and B. by uſurpation had preſented his Clerk to the Church, who had been Admitted and Inſtituted, and afterwards B. had dyed; this ſhould have put A. out of Poſſeſſion, and the Heir of B. ſhould not have been bounden by the Judgment, either in Blood or Eſtate; but that he ſhould have Preſented, 44 E. 3. *Quare Imp.* 139. *Cook* 1 Part, *Inſtitutes*. 248. And the Reaſon of both the ſaid Caſes was, for that every Preſentation did put the Lawful Patron out of Poſſeſſion; and therefore although that in both the ſaid Caſes, the uſurpation was before Execution, yet the Rightful Patron was thereby put out of Poſſeſſion of that Church, and the Uſurper had gained the Inheritance of the Advowſon thereby, and the Preſentment by the Rightful Patron *hac vice* loſt.

3. At the Common-Law, If an uſurpation had been made upon an Infant, or a Feme-Covert, they had been thereby put out of Poſſeſſion; and ſo is 35 H. 6. 60. by *Priſot*, if they were in by Purchaſe, and they had been put to their Writs of Right of Advowſon, as all the old Books are; 1 E. 3. *Quare Imp.* 43. 39 E. 3. 24. 50. E. 3. 13. 6. E. 3. 27. And the Reaſon given in the ſaid Books, was, Becauſe that the Clerk Preſented, came in by Judicial act of the Ordinary's Admiſſion and Inſtitution; and it was preſumed, that the Ordinary would not have done any wrong, or aſſented to any wrong to be done to the Patronage of the Church. But yet at the Common-Law, If one had uſurped upon the Poſſeſſion of the King, and his Clerk had been Admitted, Inſtituted, and Inducted; yet this would not have put the King out of the Poſſeſſion of the Advowſon, by reaſon of his Prerogative of *Nullum tempus occurrit Regi*: but the King might have here recovered his preſentment by a *Quare Impedit*, for that the King was not bound by the Plenarty. See *Cook* 6 Part, *Baſwil's* Caſe.

4. If the King hath an Advowſon in the Right of his Ward, and a Stranger uſurps, and his Clerk is in by 6 Months, before the King brings his *Quare Impedit*; yet this Plenarty ſhall be no good Bar againſt the King; and the Reaſon thereof, is, becauſe the King ſhould otherwiſe be without remedy; for a Writ of Right of Advowſon, he cannot have, having an Eſtate in the Advowſon but as Guardian; and therefore, in that Caſe, *Nullum tempus occurrit Regi*; for elſe a Stranger might hold a thing only by wrong againſt him, and without any good ground. *Stamford* 32, and 33. acc. Yet in ſuch Caſe, the King ſhall not put out the Incumbent, without a *Quare Impedit* firſt brought. But if the King hath Title to Preſent, by reaſon of Lapſe, and the Patron doth uſurp, and Preſents his Clerk, who is Admitted, Inſtituted, and Inducted, and then dyes; the King in ſuch Caſe hath loſt his Preſentation, and ſhall not have the ſecond Preſentation by his Prerogative; for there *Tempus occurrit Regi*, and the Kings Title, was ſpecially limited, and the 6 Months was the ſubſtance of his Title. *Cook* 7 Part, *Baſkervils* Caſe.

5. Note, It was holden by all the Juſtices. Paſc. 25 El 2. in C. B. That by two Uſurpation, the King might be put out of Poſſeſſion of his Advowſon, and put to his Writ of Right; and that a Grant made by the King of his Advowſon, after two Uſurpation was void. See 47 E. 3. 7. b. acc. and ſo it was ſaid, that it was adjudged, Mich. 13 Jac. in C. B. But Quære of it. *Yardley's* Caſe.

6. Note alſo, that it was ſaid, and agreed by the Juſtices, That Collation cannot gain any Patronage, or be an uſurpation againſt a common Perſon, *à fortiori* not againſt the King. And note, that it is there ſaid, That Collation is a giving of the Church to the Parſon, but Preſentation, is an offering of the Parſon to the Church. See Paſc. 30 Eliz. in C. B. The Queen, and the Biſhop of *Yorks* Caſe. *Leon.* 226.

7. In a Writ of Error, to reverſe a Judgment in a *Quare Impedit*, for the Church of *Moreton Valence*; It was Reſolved, 1. That as the King hath ſuch a Priviledge, that he cannot be ouſted of his Inheritance concerning Land, ſo he cannot be ouſted of an Advowſon; but uſurpation, and Plenart

narty ſhall bind him, *quoad* the Poſſeſſion, until he remove the Incumbent by *Quare Impedit*. 2. That a Stranger cannot put the King out of an Advowſon, but that it is in him, to grant or diſpoſe; and therefore 20 Preſentations ſhall not gain any Poſſeſſion from him, but that he alwayes remains ſeized. 3. That the King remaining in Poſſeſſion, after the firſt Preſentment, and the Plenarty thereby, there is no more ouſted from him by the ſecond Preſentation, then by the firſt. 4. It was ſaid, that it was Reſolved, Mich. 39 Eliz. in *Haſtes* Caſe, That two, or three uſurpations upon the King, did not gain ſuch a Poſſeſſion againſt him, but that the Advowſon remains alwayes in him, which he muſt grant, and upon Avoydance Preſent thereunto, and maintain a *Quare Impedit* upon Diſturbance. Trin. 4 Jac. in B. R. The King and *Champions* Caſe. *Cro.* 2 Part, 123. See Trin. 4 Jac. in B. R. The King and *Matthew's* Caſe. *Yelverton* 91.

8. If a man uſurp upon an Infant, and Preſents, which Infant hath an Advowſon by diſcent, and after the Incumbent dyeth, the Infant ſhall Preſent; and if he be diſturbed, he ſhall have and maintain an Aſſize of Darrein Preſentment: But if the Infant purchaſeth the Advowſon, and Preſents, and afterwards the Church voids, and a Stranger Preſents, and uſurps upon the Infant, and after the Incumbent dyes; in ſuch Caſe, that Infant ſhall not have an Aſſize of Darrein Preſentment, but ſhall be put to his Writ of Right of Advowſon; becauſe in the firſt Caſe he is in by act of Law, viz. Diſcent; and in the laſt Caſe, by act of the Party, i. e. by Purchaſe. See F. N. B. 31. And ſo ſee, If a woman purchaſeth an Advowſon, and takes a Husband, and the Church becomes void, and a Stranger Preſents, and the Husband ſuffereth this uſurpation, the Wife thereby ſhall be put out of Poſſeſſion, after the ſix Moneths be paſt, and ſhall be put to her Writ of Right of Advowſon, if ſhe had Preſented before; but if not, then ſhe is without remedy: but otherwiſe, it is in Caſe where ſhe hath the Inheritance of the Advowſon by Diſcent. See *Fitz. Nat. Bre.* 34. acc.

9. Note, That in Caſe of Preſentation, the Intereſt of the Preſentor is to be conſidered; for in ſome Caſes, a Preſentation, although it ſeemeth to be by uſurpation, yet it ſhall not put the Patron out of Poſſeſſion: And therefore if a man be ſeized of an Advowſon in Fee, and grants three Avoydances unto one man, the one next after the other, and the Church doth become void, and the Grantor himſelf preſents his Clerk, who is Admitted, Inſtituted, and Inducted, and then the Church doth become void again; the Grantee in that Caſe, ſhall Preſent to the ſecond Avoydance, for that he was not put out of Poſſeſſion by the firſt Preſentment; for the Grantor had the Fee, and the Francktenements of the Advowſon in him, ſo that he could not make any uſurpation, to gain any Eſtate, to put the Grantee out of Poſſeſſion as an Uſurper; and alſo in reſpect of the privity of Contract, betwixt the Grantor and the Grantee, ſuch Preſentation made by the Grantor, ſhall not be termed an Uſurpation, or amount to an act to put the Grantee out of the two laſt Avoydances. *Cook* 1 Part, *Inſtitutes*, 249.

10. If an Advowſon be granted to one for life, the remainder to another in Fee, and the Tenant for life dyeth, and afterwards a Stranger uſurps and Preſents, and ſix Moneths paſs: In that Caſe, he in the remainder was without remedy at the Common-Law, for he could not have a Writ of Right of Advowſon upon ſuch an uſurpation, becauſe that Writ is not maintainable, but of his own Poſſeſſion, or of his Anceſtors. See 1 H. 4. 3. 22 H. 6 26. and 21 E. 4 1. are: and an Aſſize of Darrein Preſentment he could not have, or a *Quare Impedit*, becauſe the ſix Moneths were paſt; and ſo, although he had the Right of Advowſon in him, yet ſuch an uſurpation ſhould have bounden him, and gained the Poſſeſſion from him, becauſe he had not any Action for the Recovery of his Right. And ſo it was, If Tenant for life of a Mannor, in which an Advowſon is appendant, had ſuffered an uſurpation, and the Tenant for life had dyed, he in the remainder had no remedy for the uſurpation. And although the words of the Statute of *Weſtminſt.* 2. *Cap.* 5. are, *Habeat eadem Actionem, & Recuperationem per breve de Advocatione poſſeſſorium qualem haberet ultimus Anteceſſor*; yet at this day the Law is conceived, that they ſhall be ayded by the ſaid Statute. See 7. E. 2. *Statham. Quare Imp.* 34. A Purchaſor was received in an Aſſize of Darrein Preſentment, to avoid an uſurpation had upon Tenant in Dower, 17 E. 3. 19. It is admitted for Law, That if Tenant for life ſuffereth an uſurpation, he in the reverſion ſhall avoid it after the death of the Tenant for life. And ſee 45 E. 3. where it is ſaid, by *Finchden*, That if a Stranger uſurpeth upon my Tenant for life, and afterwards the Tenant confirmeth his Eſtate in Fee, and the Stranger Preſenteth two or three times, and the Tenant for life dyeth, and the Church doth become void, that I ſhall Preſent, and upon any Diſturbance, I ſhall have a *Quare Impedit*; for that the Statute of *Weſt.* 2. being made to ſuppreſs wrong doing ſhall be taken largely; and ſo it was adjudged in the Court of Common-Pleas, Paſc. 14 Jac. Rott. 1038. in the Lord *Stanhope* and *Williams* Caſe.

11. A *Quare Impedit* was brought by the Queen,

Queen, and declared, That *William* Lord *Say*, was ſeized of the Mannor of B, to which the Advowſon was appendant, and Preſented C, and after dyed ſeized, having Iſſue two Daughters; viz. M. married to the Earl of *Eſſex*, and A. married to the Lord *Mounjoy*, who made Partition; and the Mannor of B. was (*inter alia*) allotted to M, and after M. and her Husband dyed, leaving Iſſue, E, who took to Husband the Marqueſſe of *Northampton*: That afterwards, 33 H. 8. a Fine was levyed of the ſaid Mannor, by which the ſaid Mannor was rendred to the Marqueſſe for life, the remainder to E. his Wife in Tail, the remainder to King *Henry* the 8th. in Fee: That the Marqueſs was attainted of Treaſon, and the King ſeized; and that afterwards E. dyed without Iſſue, after which in the Seiſin of the Queen Plaintiff, the Church became void, and ſo the ought to Preſent: The Defendant confeſſed all the matter untill the Attainder, and pleaded further, That Queen *Mary* Leaſed the Mannor, with the Advowſon to R. and W. for 40 years, and in their Poſſeſſion the Church became void, to which Avoydance, I. S. did Preſent the Defendant, who was Admitted, Inſtituted, and Inducted: Upon which Plea, the Queens Counſel did demur in Law; the Queſtion was, If the Queen had Title, or was Barred by the ſaid uſurpation of I. S. In this Caſe, after a long debate, and ſolemn Argument by the Judges, it was agreed by them all, That Judgment ſhould be given againſt the Queen; and the Reaſon of their Judgment was, For that here was not only a bare Preſentation pleaded againſt the Queen, but alſo an Eſtate for years, derived in the ſaid Advowſon from Queen *Mary*; and that the Avoydance upon the Action brought, falleth within the ſaid Terme, and ſo the Queen, who is Plaintiff, is encountred with the Leaſe of her Anceſtors; againſt which, ſhe cannot make Title to Preſent, without ſpecial matter: Judgment was given againſt the Queen. Mich. 29 Eliz. in C. B. The Queen and *Middletons* Caſe. *Leon.* 43, 44.

12. King E. 3. did grant Licenſe to *Robert de Eglesfield*, to found *Quandam Aulam Collegialem ſub nomine Aulæ Scholarium Reginæ de Oxon, quæ per unum Prepoſitum de dictis Scholaribus juxta Ordinationem prefati Roberti inde faciend. gubernabitur, &c.* Doctor *Aray* being Provoſt of the ſaid Colledge, did Preſent a Clerk to a Church being void, by the name of the Provoſt of the Colledge of the Queen in *Oxon*, and omitted the word *Scholarium*. The Queſtion was, Whether this Preſentation thus made, by a contrary name, of their Foundation, with Admiſſion, Inſtitution, and Induction thereupon, ſhould be an uſurpation, and ſo gain the Patronage to them; they having done this many times, without any diſturbance: In this Caſe it was holden clearly by the Court, That this Preſentation thus made, by the contrary name of their Foundation, ſhould make no Uſurpation, nor gain any Patronage to themſelves, and that a Confirmation upon ſuch a Preſentation, ſhould not make it good; but the Patronage remained ſuch as it was before the Confirmation made. Then the Queſtion was in this Caſe: If there ſhould be an Uſurper, or not. The Court agreed, That if there be any Uſurper in the Caſe, the ſame is the Biſhop; for that his Collation ſhould amount to an Uſurpation; but the Point was not Reſolved by the Court: Afterwards, upon a reference, the matter was agreed betwixt the Parties. Mich. 8 Jac. in B. R. Doctor *Aray* and Sir *Richard Lovelace*'s Caſe. *Bollſr.* 1 Part, 91.

13. In a *Quare Impedit* brought, theſe Points were Reſolved: 1. When one preſents upon a Leaſe for years, that this uſurpation gains a Fee, and puts the very Patron out of Poſſeſſion; and although he in the Reverſion after the Leaſe, by Will two may have a *Quare Impedit* when the Church is void, or may preſent; and if his Clerk be Admitted, Inſtituted, and Inducted, that then he is remitted; yet till it be recovered, the Uſurper hath the Fee, and againſt him lies the Writ of Right. 2. When the King preſents one by Lapſe, not having any Title of Lapſe, and a Recovery is had againſt him in a *Quare Impedit*, by one which had no Title, if this gain the Patronage; It is clear in this Caſe, the King had no Title to preſent; and although he who comes in by ſuch Lapſe, is not Incumbent, nor gains the Poſſeſſion, yet he is Incumbent as to all Eccleſiaſtical matters; as to have Offerings, Tythes, &c. for it is only as to the Rightful Patron, no gaining of the Patronage: In the principal Caſe, it was Thirdly Reſolved: When one recovers in a *Quare Impedit*, although that no Writ be awarded to the Biſhop, yet if upon Non-preſentment, the Biſhop will admit and preſent his Clerk, and Inſtitute him, and he is Inducted; this is good, as well as a man may enter without a Writ of *Habere facias ſeiſinam* after a Recovery. So may the Patron, who hath Recovered in a *Quare Impedit* preſent, and that being accepted, and Inſtitution and Induction enſuing thereupon, it is good. 4. Reſolved, When one having good Title to preſent, and an Incumbent by uſurpation is Admitted, Inſtituted, and Inducted; and after the Patron preſents and the Biſhop doth refuſe his Clerk, and after the Patron Recovers, and then he which had this Preſentation exhibits it to the Biſhop; this is now a good Preſentation, and the Patron cannot revoke, or give him a new Preſentation: But if the Patron, before the death of the Incumbent, makes Letters of Preſentation, the ſame is void, becauſe he had no Title to preſent

ſent. Mich. 21 Jac. in C. B. *Rudd*, and the Biſhop of *Lincoln*'s Caſe. *Hutton* 66.

14. In a *Quare Impedit* againſt the Biſhop of *Bath*, and others; The Defendant pleaded, *Quod ipſe nihil habet, nec habere clamat, niſi de Preſentatione G. S. militis*, not named in the Writ, and demanded Judgment of the Writ; upon which, the Plaintiff did demur in Law. It was ſaid, the Writ was well brought, without naming the Patron; for if a *Quare Impedit* be brought againſt the Patron and Incumbent, and the Patron dyeth pendant the Writ, it ſhall not abate: And it was ſaid, That it might be that the Plaintiffs did not know, nor could tell who preſented the ſaid Incumbent; but he findeth the Incumbent a Diſturber by his Incumbency, and if of neceſſity ſuch Patron ought to be named, then if ſuch an Uſurper ſhould dye before the Writ brought, then he which hath the cauſe of Action, ſhould be remedileſs. The Court conceived, that the Writ was good enough for the Reaſons aforeſaid; and *Anderſon*, Chief Juſtice put this Caſe: If A. wrongfully by uſurpation doth preſent, and his Clerk is Admitted, Inſtituted, and Inducted, and afterwards A. having gained the Patronage, grants it over to B, againſt whom ſhould the *Quare Impedit* be brought? *Walmſley* ſaid, againſt B: But *Anderſon* ſaid, that he doubted of it. Mich. 32 Eliz. in C. B. *Hall*, and the Biſhop of *Bathes* Caſe. *Leon.* 2 Part, 58.

15. Note, upon every uſurpation, the time when it was made, is conſiderable: If an uſurpation be had upon one to an Advowſon, in the time of War, this uſurpation doth not put the Rightful Patron out of Poſſeſſion of the Advowſon, although that the Incumbent be Inſtituted and Inducted into the Church, in the time of peace. 7 E. 3. Tit. Darrein, Preſentment 2. 18 E. 3. *Fitz. Quare impedit* 175. acc. The Reaſon is, becauſe it reſpects and looks back to the Original Act, which is the Preſentment; and that being in the time of War, the War doth not give only priviledge to them that be in the War, but to all thoſe that be in the Kingdom; and therefore although the Admiſſion and Inſtitution be in the time of Peace, yet the Preſentment being in the time of War, the ſame doth not put the Patron out of the Poſſeſſion of the Advowſon. And ſo it is, if an uſurpation be had upon an Abbot, or Biſhop, *Sede vacante*; ſuch uſurpation ſhall not prejudice the Succeſſor, but that he ſhall have a *Quare Impedit*, and thereupon ſhall remove the Incumbent, and he ſhall preſent; but if ſuch Preſentation by uſurpation had been in the time of his Predeceſſor, the ſame ſhould have put the Succeſſor out of Poſſeſſion, if the ſix Moneths were paſt. See 9 E. 3. 16. *Fitz. Nat. Bre.* 34. *Cook.* 1 Part, *Inſtitutes.* in *Shelleys* Caſe. accordingly.

16. If the Patron of a Benefice be Out-lawed, and the Church becometh void, ſo as the Title of Preſentment is come to the King, in regard of the outlawry, and the Church doth become void, and a Stranger uſurps upon the King, and preſents his Clerk, and the ſix Moneths paſs, and then the King brings a *Quare Impedit*, and removes the Incumbent; by this act of the King, the Advowſon is re-continued to the Rightful Patron; and the uſurpation, whileſt the Title was in the King, did not gain the Inheritance of the Advowſon, out of the Rightful Patron, ſo as he after the Outlawry reverſed, or pardoned, might preſent to the Church being void. See 22 Aſſ. 33. acc.

17. Two Co-partners be of an Advowſon, and they make compoſition, to preſent by turns, and one of them doth uſurp in the turn of the other; this uſurpation doth not put the other out of Poſſeſſion, becauſe they claim both by one Title. See 12 H. 8. 1. in *Kelloway*. 22 E. 4. 4. and 6 E. 3. tit. *Quare Imp.* 39. acc. And ſo it is, if two Joynt-Tenants be of an Advowſon, and one of them preſenteth his Clerk, who is Inſtituted, and Inducted; this doth not put the other out of Poſſeſſion. But in ſuch Caſe, if the Joynt-Tenant that preſenteth dyeth, his Preſentation ſhall ſerve for a Title in a *Quare Imp.* brought by the other. See 35 H. 8. See 370. 27 H. 8. 11. 15 E. 3. Darrein Preſentment, acc.

18. If an uſurpation be had upon the Patron of his Advowſon, or that he be diſturbed in his Preſentation, when the Church becomes void, the Law hath not left him Remedileſs, but hath provided ſeveral Remedies and Writs, for the Recovery of his Inheritance, or Poſſeſſion, and the removing of the Incumbent, who is the Diſturber; as *viz.* a Writ of Right of Advowſon; an Aſſize of Darrein Preſentment; a Writ of *Quare Impedit*: The firſt is a Writ for the recovery of the Right of the Patronage, and lyeth only for him who hath a Fee-ſimple in the Advowſon. The two other Writs, are Writs which doth concern the Poſſeſſion. Of theſe ſeveral Writs, and of the proceedings in them, ſee in their ſeveral Titles.

Vſage and Vſitatum

1. NOte, it is ſaid, in *Plow. Com.* 63. That there are ſeveral and different Cuſtomes and uſages of Mannors and Places, which diverſities of uſages and Cuſtoms, have grown, by reaſon of the ſeveral Nations, which have had the Government over this Realm; as *Brittains, Romans, Saxons, Danes, Normans*, who have left part of their Language, and part of their uſages and Cuſtomes here amongſt us; and therefore ſuch difference of Uſages, and Cuſtomes of Places is to be obſerved.

2. In a common Recovery, which is had by conſent and agreement of Parties, of Acres of Land: The Acres ſhall be accounted according to the uſual, and cuſtomable meaſure of the Acres of the Country, and ſhall not be according to the Statute of 33 E. 1. *de terris menſurandis.* See 1 Eliz. *Dyer*, acc. So if a man bargaineth, and ſelleth ſo many Acres of Wood, they ſhall be meaſured according to the uſage of the Country, and that is according to 20 Foot to the Rod, and not according to the ſaid Act; for that the uſage of the Place is to be obſerved. See 47 E. 3. 18. acc,

3. Note, it was Reſolved by the Juſtices, That the ſeveral Commiſſioners of Sewers throughout *England*, are not bounden to purſue the Lawes, Uſages, and Cuſtomes of *Rumney-Marſh*; but in Caſe where any particular place within their Commiſſion, have ſuch Lawes, Uſages, and Cuſtomes, as *Rumney-Marſh* hath, there they may preſerve them; for that the uſage of the place is to be obſerved. *Cook.* 10 Part, 140. in *Keighley's* Caſe.

4. In a Writ of Dower, an Eſſoign was caſt, and Challenged; for that by the Statute of Eſſoigns 12 E. 2. it is provided, *Quod non jacet Eſſoinium, in breve de Dote.* Notwithſtanding which, becauſe the common Eſſoign hath always been allowed in a Writ of Dower, therefore the Juſtices did conſtrue that Statue, to extend to an Eſſoign of the King's Service, and not to a common Eſſoign. *Cook 9* Part, 15. in *Anne Redingfield's* Caſe.

5. A Writ directed to Coroners, *viz. Coronatoribus de Comitatu*, or *in Comitatu*, have the ſame conſtruction; (*De* and *In*) in ſuch Caſe, ſignifying one and the ſame thing: Yet it was holden by the Juſtices, becauſe that (*In*) in ſuch Caſe, hath been moſt frequently uſed; that upon ſuch a direction of the Writ to Coroners, the word (*De*) ought to be rejected and laid aſide, and the word (*In*) retained; for that the order of the Regiſter is, That all Writs directed to the Sheriff, ſhall be *Vicecomiti de Comitatu*, but thoſe directed to the Coroners, are *Coronatoribus in Comitatu.* See *Plow. Com.* 76. in *Wimbiſh* and *Willoughby's* Caſe. acc.

6. A. made a Feoffment in Fee of a Mannor to the uſe of himſelf, and his Wife, and his Heirs in the Mannor; there were Woods uſually to be cut every one and twenty years, and afterwards the Husband ſuffered the Wood to grow 25 years, and afterwards he dyed: The Queſtion was, Whether the Wife, being Tenant for life, might cut that under-Wood: It was holden in that Caſe, 1. That a Termor or Tenant for life, might cut all under-Woods, which had been uſually cut within 20 years: But in the Wood-Countryes, they may fell ſeaſonable Wood, which is called *Sylva Cædua*, at 26, 28, or 30 years, by the cuſtom of that Countrey. 2. It was the Opinion of the Juſtices in this Caſe, That this permiſſion of the Husband to ſuffer the Wood to grow to 25 years during the Coverture, ſhould bind the Wife; for that the time is limitted for the cutting of it by the Law, and the uſage of the Countrey; notwithſtanding that at the time of the limitting her eſtate to the Wife, ſhe might have cut the Trees; and if ſhe doth, that then in ſuch Caſe it is Waſte. Hill. 23 Eliz. in C. B. *Godbolt.* 5.

7. In Treſpaſs, the Defendant juſtified, That it was uſed within the Mannor of D, that every Farmer of ſuch a Houſe (& averred the Houſe to have been uſually lett to Farm) had Common in the Lands Waſte, and the Houſe came into the hands of the Lord, and he granted the Houſe and Waſte to I. S. in Fee; I. S. bargained, and ſold the Houſe to I. N, with all Commons, Profits, and Commodities uſed, occupied, and pertaining to the ſame, and after granted the Waſte to another; and if the Grantee of the Houſe, ſhould have Common in the Waſte, was the Queſtion. It was objected, that the Common was gone; for if he ſhould have Common, it ſhould as a new Grant of Common, which it cannot be; and if it be a new Grant, yet it hath reference to the uſage, that is, *uſitatum eſt, &c.* and this *uſitatum* is void: for Leſſee for years, cannot alledge an uſage; for every *uſitatum* ought to go in one ſelf ſame Current not interrupted; but here, every new Leaſe, is a new Contract, and ſo the uſage is interrupted; and then the not having the reference to the uſage, and that is

is a void uſage, and ſo nothing paſs by the Grant; on the other ſide, it was found, That the Grantee of the Houſe ſhould have Common; for that the uſage is not a thing in ſtrictneſs of Law appertaining to the Land, but this hath gained his Reputation, it ſhall paſs in a Conveyance by apt words: The greater part of the Juſtices, *viz. Crook, Yelverton,* and *Fleming* conceived, That in Reaſon the Leſſee of the Houſe ſhould have the Common, but did not give any abſolute Opinion as to th t. *Williams*, Juſtice, held, That the Leſſee for years could not have more than he contracted for in his Leaſe, and then the *uſitatum eſt* was void, and then the Grant having reference to a void, and wrongful uſage, was not good. Hill. 7 Jac. in B. R. *Grymes* and *Peacocks* Caſe. *Browal.* 2 Part, 222, 223.

8. In an Action upon the Caſe, Judgment was given upon *Nihil dicit*; a Writ of Enquiry was awarded to the Sheriff of N, thus, *Præceptum eſt vic. quod per Sacramentum 12 bonorum & legalium hominum, de bal. ſua diligenter inquirat; Quæ damna, &c.* The Sheriff returned, *Quod mandavit I. G. Bal. libertate R. H. hundred. de B. cui executio prædict. Brevis totaliter reſtat fiend. Et quod alibi infra Com. prædict. per ſe fieri non potuit; Qui quidem Bal. ſic ſibi reſpondit*, and ſet down the Inquiſition before the Bayliff, and Forty damages upon Error brought in the Exchequer. It was agreed by the Juſtices, That the Return was inſufficient; for it was apparently untrue, and againſt Law; becauſe the Warrant was directed to the Sheriff himſelf, to be executed in any part of the Shire: But yet the Court would not reverſe the Judgment, becauſe the uſages had been ſuch, and there was diverſe of the like Preſidents, both in the Kings-Bench, and Common-Pleas. Trin. 12 Jac. Excheq. *Wirley* and *Gunſtons* Caſe. *Hob.* 83.

Vſe *and* Vſes.

What it is, of what it may be; who may ſtand ſeized to an Vſe, who not; By, or upon what it may be raiſed; and what ſhall be ſaid a good Conſideration to raiſe an Uſe; and out of what it may be raiſed, what not.

1. AN Uſe is a Truſt and Confidence which is not iſſuing out of the Land, but as a thing collateral, annexed to the Privity of the Eſtate, and to the perſon touching the Land; *ſcil.* That *Ceſtuy Que uſe* ſhall take the profits of the Land, and that the Tenant of the Land ſhall make an Eſtate according to his direction; and confidence of the perſon and privity of the Eſtate, are incidents inſeparable to every Uſe: And *Ceſtuy que uſe* at the Common Law, had *neque jus ad rem*, nor *in re*, but only had a *Subpæna* in the Chancery againſt the Feoffees to execute the Uſe. *Cook* 1. Part, in *Chudleigh's* Caſe, 101. *Cook* 2. Part, 58. in *Beckwiths* Caſe acc. Or, An Uſe at Common Law is no other, then a Confidence which one perſon puts in another; for a Confidence cannot be in Land, or other dead thing, but ought alwayes to be in ſuch a thing which hath underſtanding of the Truſt put in him, which cannot be no other then ſuch an one who hath reaſon and underſtanding to confirm what the other hath committed to him, which Confidence ſhall binde but in Privity, and yet the Confidence is in reſpect of the Land; but every one who hath the Land, is not bound to the Confidence, but in Privity ſhall be ſaid to be in the heir, and the Feoffee who hath knowledge of the Confidence, and in him who cometh to the Land by Feoffment without conſideration, although he hath no knowledge thereof; and yet every Feoffee is not bound, although he hath knowledge of the Confidence, as an Allien born, a perſon attainted, and the like; nor the King, he ſhall not be ſeized to anothers uſe, becauſe he is not compellable to perform the Confidence; Nor a Corporation, becauſe it is a dead Body, although it conſiſteth of natural perſons; and in this dead Body, a Confidence cannot be put but in Bodies Natural. See *Paph.* 71. in *Dixton* and *Fraines* Caſe. See *Cook* 7. Part, 35. in *Nevils* Caſe acc.

2. A

2. A man delivered a ſum of money to another man, to the uſe and behoof of a woman, to be delivered to her at the day of her Marriage; before the Marriage, the Bayler did countermand and revoke the ſaid money, and, if he might ſo do, it was the Queſtion. It was the Opinion of the Juſtices, That he might well countermand it, for that the property of the money was not changed or altered by the words of Uſe and Behoof; for it was ſaid, That an Uſe could not be of Chattels perſonals; and that, was ſaid, was proved by the Statute of 50 E. 3. cap. 6. Of fraudulent Gifts made of Goods and Chattels, to defraud Creditors: That the Law before was, That a Gift of Goods to an Uſe, was not good, but that the property did remain in the Donee; and the word [Uſe] void, for that otherwiſe the Statute had been made in vain, Paſch. 33 Eliz. *D.* 367, 49.

3. A. for conſideration of 400 l. by G. by Indenture, bargained, ſold, gave, granted, and conveyed Land to the ſaid G. and his heirs, *Habendum*, to the uſe of the Bargainor for life, the Remainder to G. in Tail, the Remainder to the right heirs of the Bargainor. In this Caſe it was holden by the Juſtices, That the Limitation by the *Habendum* was void, becauſe it is of an Uſe riſing out of an Uſe, 5 Mar. *Dyer*, 155. *Tyrrells* Caſe. See *Cook* 1 Part, 137. in *Chudleighs* Caſe acc.

4. In *Ejectione firme*, the Caſe was, T. B. father of the Defendant, ſeized to him and the heirs males of his body, of the Mannor of K. 32 H. 8. leaſed a Field called S. parcel thereof, to T. C. for years, Afterwards 4 E. 6. he leaſed the ſaid field to G. G. for 70 years, who aſſigned it to A. B. brother of the Leſſor, and to J. the Wife of the Leſſor; And after, 5 E. 6. T. B. the Leſſor, by his Deed Indented, gave the ſaid Mannor to the ſaid G. G. upon condition the ſaid G. G. ſhould pay to the ſaid T. B. within 15 days, 1000 l. and if he fail the payment thereof, that then after the ſaid fifteen dayes, That the ſaid G. G. ſhould be ſeized of a Tenement, parcel of the ſaid Mannor, of the yearly value of 3 l. to the uſe of the ſaid T. B. for his life, and after, to the ſaid G. G. till he had levyed 500 l. for the debts, and education of the children of the ſaid T. B. and after, to the uſe of the Defendant in Tail, and of the reſidue of the ſaid Mannor to the uſe of the ſaid T. B. and of the ſaid J. his Wife, for their lives, &c. T. B. made Livery to the ſaid G. G. in one place, parcel of the ſaid Mannor, which was in his own Occupation, in the name of the whole Mannor; the fifteen days incurr without payment of 1000 l. the Indenture is enrolled, T. C. returns, J. dyes, T. B. grants the Lands to a ſtranger by Fine, and before Proclamations paſt, T. his ſon and heir apparent within age, enters in the name of the Feoffees, by reaſon of the forfeiture; the Proclamations paſs; T. B. the Father dyeth, the Term of T. C. expireth, T. B. the ſon entreth, upon which Entry, the Action is brought. In this Caſe it was argued, That all the Mannor did paſs to the ſaid G. G. by the Livery, and nothing of it by the Enrolment, and that the meaning of the parties was, That all ſhould paſs by the Livery; for if the aſſurance ſhould enure by the Bargain and Sale, then the ſecondary uſes limitted upon the default of payment, ſhould never riſe; for that an uſe upon an uſe cannot riſe, and then the ſaid uſes limitted upon the default of payment, ſhould be defeated: But after, upon conſideration had of this caſe by a conference had amongſt the Juſtices, It was the Opinion of all the Juſtices, That the one moytie of the Leaſe was extinct by the Livery, *viz.* the moytie of J. the Wife of the Leſſor; and as to the other moytie, that it was in being, for that here is no Remitter; for if any Remitter had been in the caſe, it ſhould be after the Uſe raiſed, which is not yet raiſed; for that the Land ought to remain in G. G. until the 500 l. be levyed, and that is not found to be done by the ſpecial Verdict; and therefore for the ſaid moyties the Plaintiff had Judgment. Mich. 26 Eliz. in B. R. *Stonely* and *Bracebridges* Caſe. *Leon.* 5. 264, 265. acc.

5. In a *Monſtrans de Droit*, the Caſe was, The Lord *Paget* ſeized of divers Mannors, by Deed Indented, Covenanted with J. S. That in conſideration of diſcharge of his Funerals, payment of his Debts and Legacies, and the advancement of his Son, and others of his blood, to ſtand ſeized of the ſaid Mannors to the uſe of the ſaid J. S. for the life of the ſaid Lord *Paget*, and, after his deceaſe, to the uſe of C. P. and others, for 21 years; and after, to the uſe of *William Paget* his ſon in Tail; And afterwards, the Lord *Paget* was attainted of Treaſon. In this Caſe (amongſt other points) it was Reſolved, That the ſaid Term to the ſaid C. P. and others, was void, becauſe the ſame wanted a good Conſideration; but if he had made him his Executor, and chargable to his debts, then the conſideration had been good. Then the Queſtion was, That this Leaſe being void, If the Uſe limitted to the ſaid *William Paget*, ſon of the ſaid Lord *Paget*, ſhould begin preſently upon the death of the ſaid Lord *Paget*, or ſhould expect until the 21 years were expired and incurred after the death of the Lord, or not at all. It was ſaid, That an Uſe to be raiſed upon a poſſibility, ſhould never riſe: And in this Caſe it was ſaid, That the Uſe is limitted to begin when the Term of 21 years is ended, and therefore, till the Term be ended, no Uſe ſhould riſe to the ſon: and here the Uſe is limitted to riſe upon the end of the Term of 21 years, and not up-

on the end of the Eſtate; and ſo the *Monſtrans de Droit* brought in this Caſe, by *William* the ſon, was brought before his time, *quare*, for the Caſe was not Reſolved. Mich. 32 Eliz. in the Exchequer chamber: The Lord *Paget's* Caſe. *Leon.* 194. to 202. See the Book at large, for the debate of this point.

6. Lands were given to one, and the heirs of his body, *Habendum*, unto the Donee, to the uſe of him, his heirs, and aſſigns for ever. In this Caſe two points were Reſolved. 1. That the Limitation in the *Habendum* did not encreaſe, nor alter the Eſtate limitted in the Premiſſes of the Deed. 2. That Tenant in Tail might ſtand ſeized to an uſe expreſſed; but ſuch uſe cannot be averred. Paſch. 14 Jac. in B. R. *Frankyns* Caſe. *Godbol.* 269.

7. Note, It was Reſolved by the Juſtices, amongſt other points, That the Stat. of 27 H. 8. of Uſes, doth not transfer any Poſſeſſion to any uſe, but only to uſes *in eſſe*, and not to any future uſe or incontingency, until they come into poſſeſſion; for as there ought to be a perſon *in eſſe* ſeized to the uſe, ſo there ought to be an uſe *in eſſe*, which ſhould riſe out of the Eſtate, and there ought to be a perſon *in eſſe* who ſhall take the uſe, before any poſſeſſion can be transferred and executed to the uſe; for if the perſon who ſhall take the uſe be not *in eſſe*, or if the perſon be *in eſſe*, and no uſe be *in eſſe*, but only a poſſibility of an uſe, then there cannot be any execution of the poſſeſſion to that uſe; and as at the Common Law there cannot be any uſe *in eſſe*, if there be not ſeiſin out of which the uſe ſhall riſe, ſo no uſe can be executed by the Statute of 27 H. 8. if there be no ſeiſin in ſome perſon ſeized to ſuch uſe at the time of the execution thereof; for the expreſs words of the Statute are, Where any perſon or perſons ſtand or be ſeized, or hereafter &c. ſhall ſtand or be ſeized to the uſe of any other perſon or perſons, ſo as there ought to be a perſon *in eſſe*, of both parties, *ſcil.* who ſhall be ſeized to the uſe, and who ſhall take the uſe; and therefore if the perſon faileth, it is not poſſible to have the poſſeſſion executed by the Statute, to one who is not *in rerum natura* ſo, as perſons *in eſſe*, and uſes *in eſſe*, and not in Contingency, ſhall be executed by the ſaid Statute of 27 H. 8. *Cook* 1 Part, 136. in *Chudleighs* Caſe.

8. The Caſe was, W. R. 18 H. 8. made a Feoffment in Fee to the uſe of himſelf, and his heirs, 21 H. 8. he made his Will, by which he deviſed his Land to C. his younger ſon, and to the heirs males of his body, the Remainder to J. his eldeſt ſon in Fee, upon condition, That if C. or his Iſſue ſhould diſcontinue or alien, but only to make a Joynture for their Wives, for Term of their lives, that then &c. and dyed. The Statute of 27 H. 8. of uſes came; C. made Leaſe to the Defendants for their lives, according to the Statute of 32 H. 8. and levyed a Fine, with Proclamation, to the uſe of himſelf and his wife, and the heirs of their two bodies begotten, the Remainder to the right heirs of the Deviſor. J. the eldeſt ſon entred for the Condition broken. It was holden in this Caſe, 1. That this Condition to reſtrain an unlawful diſcontinuance, was good, and was annexed for good purpoſe; for that W. R. being a Serjeant at Law, well knew that *Ceſtuy que uſe* might have levyed a Fine, or ſuffered a Recovery, and this Condition had or annexed to the uſe by the Will, is now knit to the poſſeſſion, and by conſequence, the Condition annexed to it: And all the Juſtices held, That the Condition, and Intent of it, was broken; for it might be, that C. had Iſſue by a former Wife, which by this Fine ſhould be diſ-inherited, and a new Tail ſet on foot, againſt the meaning of the Deviſor. Mich. 29 Eliz. in C. B. *Ruddall* and *Millers* Caſe. *Leon.* 298, 299.

9. Action upon the Caſe for a diſturbance in uſing a way; The Plaintiff ſhewed, That the Defendant was ſeized in Fee of the Land over which the way is, and of other Land; And by Indenture enrolled, bargained and ſold to J. S. land in Fee, with a way over his Land, and that J. S. lett unto him the land for years, and that the Defendant diſturbed him. In arreſt of Judgment, it was moved, becauſe a Leaſe is pleaded of Land, without expreſs words of the way, and therefore not good: and of that Opinion was the Court. Another Exception was, That there was not any Grant of the way in the Indenture, but only a Bargain and Sale of Land, and of a way out of his other Land, which cannot be good; for nothing but the uſe paſſed by the Deed, and there cannot be an uſe of a thing which is not *in eſſe*, as a way common, &c. which are not ſo created, and until they be created, no uſe can be raiſed by Bargain and Sale, and by conſequence, nothing paſſed by this Indenture: And of that Opinion was the whole Court. Mich. 5 Jac. in B. R. *Beaudley* and *Brooks* Caſe. *Cro.* 1 Part, 189, 190.

10. Note, If I convey Lands which I have on the part of the Mother, or in Borough English, to J. S. and his heirs without conſideration, the uſe ſhall be void, and ſo the Land ſhall return again to me and my heirs of the Mother, or in Borough English, as before; for the Law doth conſtrue the uſe, in the ſame ſtate and quality as the Land was: But if I do Declare the uſe to me and my heirs, or, upon ſuch a Feoffment, reſerve a Rent to me and my heirs, it ſhall go to my heirs at Common Law; for it is not within the Cuſtome, but it is a new thing derived from the Land it ſelf. See 4 & 5 Mar. *Dyer*, 163. *Hob.* 31. in *Cundes* and *Clarks* Caſe acc.

11. Upon

11. Upon a ſpecial Verdict in Treſpaſs and Ejectment, the Caſe was I. W. being ſeized of Lands in Socage, in Fee-ſimple, conveyed the ſame by Deed of Feoffment, to *Thomas* his Son, in this manner, viz. to him and the Heirs of his Body, *Habendū* to the uſe of him and his Heirs for ever; who after deviſed all the Land by his Will to one, under whom the Plaintiff claimed; The Points in the Caſe were, 1. What Eſtate *Thomas* had by this Feoffment limitted in this manner, whether an Eſtate Tail, or a Fee-ſimple. 2. Whether Tenant in Tail might be ſeized to anothers Uſe? It was the clear Opinion of the Court in this Caſe, That here is an Eſtate Tail; and this ſubſequent uſe limitted, doth not alter the Eſtate, and the rather, being made to the Party himſelf, and it is ſtronger than if it had been by a Stranger; and here it is to the uſe of him and the Heirs of his Body, and the laſt words are more by way of Explanation, than of limitation; and the words ought to be applyed according to the meaning of the Partie, and not to the enlarging of the Eſtate, no more than a Warranty ſhall do. For the 2. Point it was Reſolved, Be it by way of limitation, or by way of Explanation, it was reſolved, That Tenant in Tail cannot be ſeized to anothers uſe; for it is ſaid, in *Plow. Com.* 555. in *Walſingham's* Caſe, That if one at this day be ſeized in Fee, and makes a gift in Tail to one, to the uſe of another in Fee, now by this *Ciſtuy que uſe*, who hath the Land by the Statute of 27 H. 8. One Fee-ſimple is the Land by the Statute determinable upon the Eſtate tail, and the Dower another: But note there by *Plowden*, that this cannot be ſo by Law; for that an Uſe cannot be limitted upon an Eſtate Tail: and there are Reaſons why, before the Statute of 27 H. 8. Tenants in Tail cannot ſtand ſeized to the uſe of another, becauſe he cannot be compelled to execute it; and if he do execute it, his Iſſue might fetch it back again by his Formedon. Trin. 18 Jac. in B. R. Rott. 941. *Cooper* and *Frankyers* Caſe *Bulſt.* 3 Part, 185, 186. See the ſame Caſe before.

13. A. ſeized of green Mead by Copy holden of the Manor of T; which Manor I. S. held of the King by Knights ſervice in *Capite*: I. S. by Indenture 22 *Decemb.* 1 Jac. made between him of the one part, I. D. and G. D. Son and Heir Apparent of the ſaid I. D. did bargain, ſell, grant, enfeoff, *&c.* Leaſe and Confirm unto the ſaid I. D. the ſaid Mead, called *Green Mead*, To have, and to hold the ſame Mead, unto the ſaid I. D. and G. D. their Heirs and Aſſignes, to the only uſe, and behoof of the ſaid I. D. and G. D. their Heirs and Aſſigns for ever. And by the ſaid Indenture, the ſaid I. S. did Covenant with the ſaid I. D. and G. D. to make further aſſurance to the ſaid I. and G. and their Heirs, to the uſe of them and their Heirs, and Livery and Seiſin was made according to the intent of the Indenture, to the uſes therein mentioned; I. D. the Father dyed, G. D. his Son and Heir within age. In this Caſe three Points were reſolved: 1. Foraſmuch as G. was not named in the Premiſſes, that he could not take by the *Habendum*; and the Livery made according to the intent of the Indenture, doth not give any thing to G. becauſe the Indenture, as to him, was void; but although the Feoffment be only good to I. and his Heirs, yet the uſe limitted to I. and G. and their Heirs is good. 2. If an Eſtate had been well conveyed to I. and his Heirs, by the Releaſe or Confirmation, as it well may be to a Tenant by copy of Court-Roll, the uſe limitted to them is good; for upon a Releaſe, which creates an Eſtate, a uſe may be limitted, or a Rent reſerved; but upon a Releaſe or Confirmation, which enures by way of *Mitter le droit*, an uſe cannot be limitted. 3. In this Caſe the Queſtion was, If the Father and Son were Joynt-Tenants, or Tenants in Common? It was Objected, that they were Tenants in Common; for when the Father is only enfeoffed to the uſe of him, and his Son, and their Heirs, in that Caſe they are in the *Per*, and then the limitation to him and his Son, and their Heirs, cannot deveſt the Eſtate which was veſted in him by the Common-Law out of him, and veſt it in the *Poſt*, by vertue of the Statute according to the limitation of the uſe in the *Poſt*. But it was Reſolved, That they were Joynt-Tenants, and that the Son ſhould have the ſaid Land by ſurviver; for if at the Common-Law A. had been enfeoffed to the uſe of him, and B. and their Heirs; although that he was only ſeized of the Land, the uſe was joyntly to A. and B; for an uſe ſhall not be ſuſpended or extinct by a ſole Seiſin, or at that Seiſin of the Land: And therefore if A. and B. be enfeoffed to the uſe of A. and his Heirs, and A. dyeth, the entire uſe ſhall deſcend to his Heirs; as appeareth 13 H. 7. 6. in *Stones* Caſe. And now by the Statute of 27 H. 8. of Uſes, when ſeveral Perſons are ſeiſed to the uſe of any of them, the Eſtate ſhall be executed according to the uſe: And in this Caſe it was further Reſolved, That Joynt-Tenants might be ſeized to an uſe, although that they come to it at ſeveral times. In the Principal Caſe upon the whole matter it was Reſolved, That the Father and Son were Joynt-Tenants by the Original Purchaſe, and that the Son having the Land by ſurvivor, ſhould not be in Ward. Mich. 7 Jac. in the Court of *Wards*. *Cook*. Select Caſes, 55, 56.

13. In an *Ejectione firmæ*, the Defendant pleads

ed, That a feoffment was made to the use of I. S, the Lessor of the Defendant; who by force thereof, and of the Statute, was seised, and made a Lease to the Defendant; and that one G. entred, and made a Lease to the Plaintiff, and did not say that he entred upon I. S.: All the Question was, When a feoffment is made to the use of another, if he hath a Free-hold before? It was holden in this Case, As he might have Possession by force of a Devise at the Common-Law, so he shall have Possession of the Land here, by force of the Statute; and it is in *Cestuy que use*, before agreement or entry; but if he dilagree, then it shall be out of him presently, but not before he disagreeth. Mich. 43 Eliz. in C. B. *Green* and *Wiseman's* Case. *Owen* 86.

14. A. granted a Rent of 20 l. *per An.* out of Land to B. his Heirs, and Assignes; to be paid at two dayes, with clause of distress; and for further assurance, Covenanted to levy a Fine to I. S, and I. D, which should be to the uses in certain Indentures expressed; and further Covenanted, that then, and from thenceforth, if the said Rent should be behind, in part, or in all, and no Distress upon the Land, that then it should be Lawful for the Grantor, his Heirs, or Assignes, to enter the Land, and to retain the same until he was satisfied the Rent. I. S. dyes before the Fine levyed, the Grantee assigned the Rent over to W, his Heirs, and Assignes, who sold the same to F; afterwards 30 l. of the Rent was behind: Afterwards, the Fine was levyed to the said uses, the Assignee of the Rent, for the Rent, before the Fine levyed came to destrain; and upon a Replevin sued, entred into the Land for that whole Rent, by force of the said use. In this Case, these Points were agreed and Resolved: 1. That the use should well rise, the Covenant being, That if the 20 l. or any part thereof, should be behind. 2. That these contingent benefits might be assigned over, because they are annexed to an Estate, as to an Interest, and so they are well assignable. 3. That the Assignee should have the same benefit as the Grantor should have had. 4. That the Assignee hath such an Estate, as that he may make a Lease for years, and that he hath not only a bare occupation, but also an absolute Possession, of which he might make a Lease for years. But whether the Assignee should have benefit of such Contingencies as happened in the Interim, before the Fine was levyed, and whether the Assignee shall now come to have the Land to arise to him, by reason of a thing which happened, before the Fine was levyed; which was the 30 l. Rent behind; and whether he should have such an Estate in the Land, of which he might make a Lease for years; the Court was divided in Opinion, and so the Principal point was not Resolved. Mich. 14 Jac. in B. R. *Heydon* and *Hares* Case. *Institut.* Hill. 13 Jac. in B. R. Rott. 8 H. 8 *Bulst.* 3 Part, 251, to 259.

15. T. K. seized of Land in Fee, enfeoffed thereof I. S. an Alien born, and I. D. of *Gray's-Inn*, to the use of himself and his Wife, and the Heirs of their Bodies, the Remainder to his right Heirs; The Question was, Whether in such Case the Queen was entituled to the moyety of the Land presently, or not? It was the Opinion of the Justices, That if the same be found by Office, that the Queen should have the moyety of the Land by her Prerogative presently, and that for the other moyety, the use of it is gone for ever; for the King cannot stand seised to anothers use. Pasc. 11 Eliz. *Dyer* 283 *Kings* Case.

16. By Indenture between the Lady *Vere*, and Sir *Anthony Wingfield*, and *Elizabeth* his Wife: The Lady *Vere* did Covenant and agree, for consideration of Love, and affection, and diverse other considerations, to suffer a Recovery before such a day, of diverse Lands, to the said Sir *Anthony*, his Heirs, and Assignes, to such uses, as in the Indentures should be declared. And Sir *Anthony* covenanted and agreed with the said Lady *Vere*, within 8 months after the said Assurance, that he, his Heirs, or Assignes, would grant back an Estate of the premises, to the said Lady *Vere* for her life, the Remainder, to the said Sir *A.* and *Eliz.* his Wife, in special Tail, the Remainder over to the said *Eliz.* in Fee, she being the Daughter of the said Lady *Vere*; and no more words of any use, were declared in the Indenture. Afterwards the Recovery was had accordingly; but there was no Estate executed back again, by the said Sir *Anthony*. It was the Opinion of the Justices in this Case, That no use was changed, or raised by the Indenture and Recovery only, without an Estate executed; and no use is afterwards declared. Trin. 5. Mar. *Dyer* 162. The Lady *Wingfield*, and Sir *Edw. Littletons* Case.

17. A. seized of Lands in Fee, in consideration of a Marriage of his Daughter, Covenanted, that he would stand seized of the Land, for the term of his life, and after his death, that his Daughter and her Husband should have the said Land, to them, and to the Heirs of their two Bodies, Lawfully begotten: And further, that he, and all other Persons, then, or at any times after seized of the premisses, should stand seized to the said uses. The marriage took effect: Afterwards A. bargained, and sold the Land to one for 300 l. (but nothing paid) to one, that had notice of the former uses; and thereupon levyed a Fine, and suffered a com-

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mon Recovery; but he himſelf kept the Land during his life, and dyed. It was the Opinion of the Juſtices in this Caſe, That the uſe was well raiſed by the Covenant, and that the Bargain and Sale had not changed the uſes; and therefore, whereas the Husband and Wife after entred, and made a Feoffment in Fee of the Land; it was adjudged to be a good Feoffment. Mich. 7 Eliz. *Dyer.* 335. The Lady *Mamers* Caſe.

18. A, in conſideration of a Marriage of his younger Son, promiſed the friends of the Woman by word, that after his death, and the death of his own Wife, that his Son ſhould have the Land to him and his Heirs, and no other conſideration was on the part of the Woman. The Marriage took effect: It was the Opinion of all the Juſtices, That no uſe was raiſed upon this verbal promiſe, and ſo it was adjudged. Mich. 13 Eliz. *Dyer* 297. 100.

19. The Lord *Borough* ſeized of Lands in Poſſeſſion, and in Uſe, Covenanted upon the marriage of his Son; That his Son immediately after his deceaſe, ſhould have all his Lands, according to the ſame courſe of Inheritance that then ſtood; and that all Perſons, now ſeized, or to be ſeized, ſhould ſtand ſeized to the uſes aforeſaid: His Son dyed his Heir within age, the Land being holden in Capite, the Queſtion was, If his Heir ſhould be in Ward; and that depended upon this, If the Fee-ſimple of the Uſe, was preſently out of the Father, and veſted in the Son, by the words aforeſaid. It was the Opinion of the Juſtices, that the Uſe was not diveſted out of the Father, for that it was but a Covenant; but it was ſaid, That if the words had been, that immediately after his deceaſe, that the Land ſhould endure and remain to the Son, perhaps it had been otherwiſe. Paſc. 35 H. 8. *Dyer* 55. The Lord *Burroughs* Caſe.

20. A. Covenanted with B, that in Conſideration that the ſaid B. had conveyed to him certain Lands, after his death to levy a Fine, to the uſe of himſelf for life, the Remainder to B. in Tail. It was holden, That till the Fine was levyed, that the uſe was not changed; for that then the Covenant ſhould not be performed. But the Juſtices agreed, That if I Covenant in conſideration of Marriage, or for a certain ſumm of money, to me paid, that the Party ſhall have the Manour of D, the ſame ſhall raiſe the uſe preſently, for that there is not any Eſtate to be made; ſo they ſaid, If *Ceſtuy que uſe*, wills that his Feoffee ſhall make an Eſtate to I. S, in Tail, or in Fee, and dyeth, that in ſuch Caſe, the Uſe is changed, and an Uſe raiſed before the Eſtate is executed. Mich. 4 Ma. *Dyer* 68. *Raintons* Caſe.

21. A man ſeized of Lands in Fee-ſimple, having Iſſue, three Daughters, in conſideration of his Iſſue Males, if he ſhould have any, and for the advancement of the ſaid daughters, and the Heirs of their Bodies, and for the continuance of the Land in his Blood, Covenanted to ſtand ſeized of the ſaid Lands to the uſe of himſelf for life, and after to the uſe of his three Daughters, and to the Heirs of their two Bodies; and if any of them dye without Iſſue Male, that then her part ſhall ſurvive with a *Proviſo*, for their ſeveral Husbands; that if they over-live their Wives, and are entituled to be Tenants by the Courteſie, that then he might limit any of thoſe Lands, by his laſt Will in writing, for the payment of his Debts, or for advancement to any Perſon or Perſons, for life, lives, or years. One of the Daughters dyed, without Iſſue Male, the Father aſſigned a great part of that Land to his youngeſt Daughter, for her advancement for 1000 years, without reſervation of any Rent; and if this was a good Limitation in Law, was the Queſtion: It was adjudged, that the limitation was void, and not warranted by the *Proviſo*; and in this Caſe it was Reſolved, 1. That an uſe cannot be raiſed by any Covenant, Proviſo, or Bargain and Sale upon a general conſideration, without a ſpecial averment; but in ſuch Caſe, the Bargainee, or he who ſhall take the Uſe, may averre that the ſame was for valuable conſideration of money, or for the advancement of his Blood, if the Perſon who ſhould take the Uſe, were certain; for an averment may be taken, which ſtands with the Deed, although it be not expreſſly comprized with the Deed. 2. When Uſes are raiſed by Covenant in conſideration of Fatherly affection to his Sons or Daughters, and by the ſame Deed Proviſo is added, That the Covenanter for diverſe good conſiderations may make Leaſes for years, the Covenanter cannot make a Leaſe to any Perſon, for the Covenant upon ſuch general conſideration cannot raiſe an Uſe, and no particular averment can be taken, that his intent, at the time of the delivery of the Deed, was not to deviſe the ſame to any Perſon certain; and therefore his Power to make Leaſes void, *ab initio*: But if the Uſes had been limitted upon a Recovery, Fine, or Feoffment there, there needed not any conſideration to raiſe the Uſes. 3. Reſolved in the Principal Caſe, That the limitation for 1000 years, was as well againſt the intent of the Partie, as againſt the words of the Proviſo; becauſe it ſhall be taken to tend to the ſubverſion of the Eſtates, which were grounded upon good conſideration. *Cook* 1 Part, 175, *Maldmayes* Caſe.

22. Tenant in Tail, the Remainder in Fee, he in the Remainder, by Deed Indented and enrolled, Covenant for conſideration of Blood, and other

other conſiderations, to ſtand ſeized, to the uſe of himſelf in Tail, the Remainder to the Queen, her Heirs and Succeſſors, Kings and Queens of *England*; Tenant in Tail ſuffered a common Recovery. It was adjudged, That the Iſſue in Tail was barred: And in this Caſe it was Reſolved, 1. That no Uſe could be raiſed to the Queen upon ſuch general conſideration, without ſpecial averment, that valuable, or other good conſideration was given. 2. That the conſideration that the Land ſhould continue in his Blood, was no conſideration to raiſe the Uſe to the Queen. 3. The conſideration, that the King is the Head of the Commonwealth, and to preſerve the peace of the Realm, is no conſideration to raiſe an Uſe; becauſe that Kings ought to preſent their Subjects *ex Officio*, in peace and quietneſs. *Cook* 2 Part, 11. *Wiſeman's* Caſe.

23. The Caſe was, A. ſeized of a Manor, to which an Advowſon was appendant by Deed Indented, Granted, Bargained, and Sold the Manor with the appurtenances, for good conſideration, to B. and his Heirs; in which Indentures were diverſe Covenants, to ſuffer a Recovery, and levy a Fine to the uſes in the Indenture: Provided, that B. ſhall give the Advowſon to A. for his life; and if it happen not void, then one time to his Executors. A. ſuffered a Recovery according to the Indenture, and afterwards A. and B. levyed a Fine, with a ſurrender of 42*l.* rent to A. in Tail, the Remainder to D. in Fee, with clauſe of Diſtreſs and *nomine pœnæ*: B. in his life, did not grant the Advowſon to A. and dyed. 1. It was in this Caſe, amongſt many other things, reſolved, That although that the Fine, which did enure by way of Releaſe, and which goeth by way of *Mitter d'eſt*, or by way of extinguiſhment, cannot be to an uſe, no more than the ſurrender of a particular Eſtate can be; yet after ſuch Releaſe, which extinguiſheth the firſt Rent or Condition, another uſe may be raiſed by an Original agreement of the Parties, then Owners of the Land, and who hath the abſolute Power and Diſpenſation to raiſe it; and therefore, if at the Common-Law, before the Statute of Uſes, a man had made a Feoffment, by Deed Indented, rendring Rent, with Condition to Reenter; and further it is Covenanted, and agreed betwixt the Parties, that, notwithſtanding any Fine, or other conveyance made by the Feoffor to the Feoffee, by which the Rent and Condition ſhall be extinct, that the Feoffor and his Heirs, ſhall be ſeized, to the intent that they ſhould pay the like Rent, and be ſeized of the Land, upon the like Condition as before in that Caſe. If the Feoffor levyeth a Fine, or Releaſeth his Right, or doth any act or other conveyance to the Feoffee, by which the Rent ſhall be extinct; yet by the Original Agreement of the Parties, a new Rent, and a new Condition may be annexed to the uſe of the Land. 2. In the ſame Caſe it was holden, That a Fine upon Grant and Render, cannot be averred by word to be to another Uſe than is expreſſed in the Fine, Feoffment, or other Conveyances, if not in ſpecial Caſes upon agreement of the Parties; and a difference then was taken between an Uſe, and a Conſideration; for when a Fine, Feoffment, or other Conveyance imports an expreſs conſideration, a man may averre by word another conſideration, which ſtands with the conſideration expreſſed: But the Parties by word cannot averr any other Uſe, than is contained in the Conveyance, and there ſhall be no averment againſt a Conſideration expreſſed. *Cook* 2 Part, 75, 76. The Lord *Cromwell's* Caſe.

24. Note, It was reſolved by the Juſtices, That if a man deviſeth Land to his Wife, for the term of her Life generally, it cannot be averred to be for the Joyncture of the Wife; becauſe a Deviſe maketh a Conſideration in it ſelf: And therefore, as a Deviſe cannot be averred to be to another uſe, than to the uſe of the Deviſee, if it be not expreſſed in the Will, no more can a Deviſe be averred to be for a Joyncture, unleſs it be expreſſed in the Will. But if a man deviſeth Lands unto a woman, for the term of her life, or in Tail, &c. for her Joyncture, and in ſatisfaction of her Dower, the ſame is a good Joyncture, within the Statute of 27 H. 8; for as an Eſtate for life, made to a woman before marriage, when ſhe is no Wife, is within the equity of the ſaid Act; ſo an Eſtate deviſed to a woman for her life, which taketh effect preſently after his death, when the marriage is diſſolved, is alſo within the equity of the ſaid Act; for that it well agreeth with the intent of the makers of the Act, and with the Deſcription of a Joyncture. See *Cook* 4 Part, 3, and 4. *Purvies* Caſe, Mich. 39 Eliz. in the Court of *Wards*. *Leak* and *Rendall's* Caſe. *ibid.* acc.

25. A man by Deed Indented and enrolled, Covenanted with I. S. and others, That he, before ſuch a Feaſt, for the Joyncture of his Wife, would levy a Fine of the Manour of D. to them, to the uſe of him and his Wife, and to his Heirs. And afterwards by another Deed, he Covenanted with other Perſons, to convey the ſaid Manour to them, to the uſe of himſelf, and the Heirs of his Body, with diverſe Remainders over; afterwards he acknowledged a Note of a Fine, to I. S. and the other; and the ſame day he acknowledged another Note of a Fine, to the Parties, who were Parties to the ſecond Indentures, both which Notes were ingroſſed in one and the ſame Term; and it was proved,

void, that the Conſtor, before the Indentures, and after the Fine levyed, ſaid, that his Wife ſhould have the ſaid Manour for her Joynture. It was Reſolved in this Caſe, that although the Indentures being made by declaring of ſubſequent uſes, are but directory, and do not bind the Eſtate or Intereſt in the Land; yet if the Fine, or other aſſurance be purſued, there cannot be any averment that the Indentures ſhall be to other uſes: But if other agreement or limitation of Uſes be made, by writing, or by matter of as high nature, then the laſt agreement ſhall ſtand. 2. Reſolved that the Fine could not be directed by both the Indentures, and ſo operate upon both the Indentures; becauſe that the Declaration of the Uſes by the firſt Indentures, were fruſtrate by the ſecond Indentures. *Cook* 5 Part, 25. The Counteſs of *Rutlands* Caſe.

26. A man having Iſſue, three Sons by his Wife; ſeized of an Houſe in Fee, Covenanted, in Conſideration of natural affection, and to the intent that all the Tenements ſhould continue in his name by Indenture, That he, and his Heirs would ſtand ſeized of the ſaid Houſe, to the uſe of himſelf for life, and after his deceaſe, to the uſe of his Wife for life, and after their deceaſe, of the one moyety, to the uſe of his ſecond Son, and of the other moyety, to the uſe of his third Son in Tail, and dyed. The Queſtion was, If any uſe ſhould ariſe to the Wife, or not, and if the Wife be in the Conſideration, if it might be averred? It was reſolved in this Caſe, 1. That a Conſideration which ſtood with the Deed, and which was not repugnant to it, might be averred. 2. That here was an expreſs Conſideration in itſelf, for when he limits the ſame to the uſe of his Wife for life, the ſame imports ſufficient Conſideration in it ſelf, and there needs not any other averment. 3. It was reſolved, That if a man Covenant to ſtand ſeized to the uſe of his Wife, Son, or Coſin, the ſame will raiſe an Uſe, without any expreſs Conſideration; but if the Father by Deed Indented, in conſideration of 100l. paid by his Son, Covenants to ſtand ſeized to the uſe of his Son, there, no uſe ſhall be raiſed, unleſs that the Deed be enrolled, becauſe it is in the Nature of a Bargain and Sale. *Cook* 7 Part, 40. *Bedells* Caſe. See *Cook* 8 Part, 94. *Foxes* Caſe. &c.

27. Note, It was agreed, That if a man Covenanteth, in conſideration of natural love to his Son, to ſtand ſeized of certain Lands, to the uſe of himſelf for life, the Remainder to the ſame Son in Fee, with a *Proviſo*, that it ſhall be Lawful for himſelf to make Leaſes for 21 years, or three Lives: Now he may not make ſuch Leaſes, notwithſtanding ſuch Proviſo; this Proviſo being by way of Covenant, to raiſe an Uſe; contrary perhaps, if it had been by way of Feoffment to Uſes: And in that Caſe, this Caſe was vouched, and cited to be adjudged in B. R. upon a Writ of Error, That if a man Covenanteth with his eldeſt Son, in conſideration of natural love, to ſtand ſeiſed to the uſe of himſelf for life, the Remainder to his eldeſt ſon in Tail, with Proviſo, that he himſelf might make Leaſes to his ſecond Son, or unto any other of his kindred for 21 years, or three lives, and he made Leaſes to him accordingly, that this was good; for that they to whom the Leaſes are made, are within the Conſideration, viz. of the Blood; and for that the Uſe might well riſe to maintain the Leaſes: But if the Proviſo had been to make Leaſes to any man, albeit that afterwards he made Leaſes by force of that to his ſecond Son, that thoſe Leaſes were void; for that they were not within the Conſideration of the Covenant, by intendment of Law at the firſt; for the Law at the beginning, intended the Proviſo to be meerly void. *Sharrington's* Caſe. See Mich. 40 Eliz. in B. R. *Goldsbr.* 174.

28. In an *Ejectione firmæ*, the Caſe was, That Feoffees ſeized to the uſe of R. before the Statute of 27 H. 8. made a Feoffment to another and his Heirs, to the uſe of the ſaid Feoffee and his Heirs; and the Feoffee had notice of the firſt uſe. Now, If he ſhould be ſeized to his own uſe, or no, was the Queſtion? It was the Opinion of all the Juſtices, that he ſhould be ſeized to his own uſe; becauſe the uſe was ſo expreſſed upon the Feoffment. And it was ſaid, That ſo is the Law, if the ſecond Feoffment had been in conſideration of money; although if no uſe hath been limitted, yet it ſhould have been to the uſe of the Feoffee and his Heirs, and not to the firſt uſe. Hill. 30 Eliz. in C. B. *Stapley* and *Lewis* Caſe. *Goldsbr.* 82.

29. In *Ejectione firmæ*, the Caſe was, A. ſeized of Lands, by Indenture Covenanteth with B. C. and D. the Brother of A. and W, That for the love and affection that he did bear to his Children, in the Deed mentioned; and for the better maintenance and preferment of them, and to ſettle the Lands in the name and blood of the ſaid A, did Covenant with the ſaid four Parties, and their Heirs, That he and his Heirs, at all times from thence forth, ſhould ſtand, and be ſeized of the ſaid Lands, &c. to the uſe of the ſaid A. for his life, and after his deceaſe, to E. his Wife for her life, and after her deceaſe, to the uſe of the ſaid Covenantees and their Heirs, upon truſt and confidence, nevertheleſs, That they ſhall make Leaſes and Eſtates thereof, or any part thereof, as A. ſhall appoint by any Deed; and in caſe he make not ſuch

appointment, then the Covenanters and their Heirs ſhall levy out of the Rents and Profits for his younger Children, K, L, & M. his younger Sons, and for F. I. and S. his three Daughters 200l. apiece; the Daughters Portions to be paid, at their ages of 21 years, and the Sons Portions at their ſeveral ages of 20 years; and ſhould further pay out of the Rents, &c. to every of his Sons and Daughters, ſuch Reaſonable for maintenance, as they ſhould appoint: And after the deceaſe of the ſaid A. and E. his Wife, and the ſaid portions levyed, to the uſe of K. ſecond Son of the ſaid A. and the Heirs of his Body, then to the ſaid M. and the Heirs of his Body, and ſo to his other Sons, and then to the uſe of his Daughters, and the Heirs of their Bodies, with the remainder to the right Heirs of the Daughters. A. dyed, E. his Wife entred, and afterwards B. and the other three Covenantees by Indenture enrolled, bargained, and ſold to the ſaid D. the Brother of A. *Habendum* to him, and the Heirs of his Body; to the intent, to perform the Truſts in the firſt Indenture mentioned, the Remainder over as in the firſt Indenture. F. one of the Daughters of A, attained her age of 21 years, in the life of her Father; I. another of the Daughters, attained her age in the life of her Mother: None of their portions were paid. W. Son and Heir of A. entred, and made the Leaſe to the Plaintiff, and the Defendants ouſted him. It was Objected in this Caſe, That this Deed raiſed no uſes, becauſe all the four Covenantees, but B. the Brother, were ſtrangers in Blood to the Covenanter; and the intent was to ſettle an uſe in them four, or elſe in none of them. But it was reſolved by the whole Court, That all the uſes were well raiſed, and veſted in D the Brother, becauſe he is of the Blood, which is one of the Conſiderations of ſettling in the Brother, although it be not mentioned, that it is in conſideration that he is his Brother; and is ſufficient, becauſe the Brother is to take the Eſtate to raiſe Portions to his Nephewes and Nieces, and alſo to ſettle Eſtates upon them, according to the appointment; and that here is not any contingent uſe, but a Truſt and Confidence in the Covenantees, to execute the Eſtate to the Children of A; but no Eſtate is in the Children, by any Eſtate limitted to them; and then when the other Covenantees joyn in a Bargain and Sale to the younger Son, he hath a good Eſtate. It was adjudged for the Defendant. Trin. 14 Car. in B. R. *Smith* and *Riſley*, and others Caſe. *Cro.* 1 Part, 380, 381, 382.

30. The Caſe was, *Francis*, Earl of *Bedford* ſeized in Fee of the Mannor of B. and C. 4 Eliz. enfeoffed thereof I. S. and others, to the uſe of himſelf for 40 years, and after to the uſe of *John* his ſecond Son, and the Heirs Males of his Body; and for want of ſuch Iſſue, to the uſe of the right Heirs of the ſaid Earl the Feoffor for ever. Afterwards *John* Lord *Ruſſel* dyed without Iſſue Male, having Iſſue, two Daughters, E. and A. Afterwards, 27 Eliz. the ſaid *Fr.* Earl of *Bedford*, by Indenture made between him, and I. D. and others, in conſideration of the Advancement of the Heirs Males of his Body, and the eſtabliſhment of his Mannors, &c. in the name and Blood of the ſaid Earl Covenanted, That he and his Heirs hereafter, ſhall ſtand ſeized of the ſaid Mannors, to the uſe of himſelf for life, and after his decreaſe, to the uſe of *Fr.* the Lord *Ruſſell*, and the Heirs Males of his Body; and for want of ſuch Iſſue, to the uſe of Sir *William Ruſſell* Knight, his youngeſt Son, and the Heirs Males of his Body, with diverſe Remainders over: After which, *Francis* Lord *Ruſſel* dyed, having Iſſue, *Edward* Earl of *Bedford*, and after the ſaid *Francis*, Earl of *Bedford* dyed; and If the Daughters of *John* Lord *Ruſſel*, or *Edward* Earl of *Bedford*, ſhould have the ſaid Mannors, was the Queſtion. It was Objected, That the Daughters ſhould have them as Purchaſers; for it being an Eſtate for 40 years in him, it may remain to be executed to be an uſe in *Eſſe*, when the Heir ſhall be; and an uſe is always guided according to that, which may be collected to be the intent and purpoſe of the Parties; and in this Caſe, inaſmuch as the Earl reſerves to himſelf but an uſe for years, it is evident his intent was never to have the Fee, and to ſurrender his Term, which perhaps he intended to be for the benefit of his Wife, which ſhall be defeated contrary to his purpoſe, if the Fee ſhould be in him after the death of *John* Lord *Ruſſel* without Iſſue Male. But it was Reſolved by all the Juſtices, That the Daughters ſhould not have the ſaid Mannors, becauſe there was no right Heir to take as Purchaſer, when the mean Eſtate Tail was determined; which was, by the death of the Lord *John* Lord *Ruſſel*, without Iſſue Male; for all the Juſtices agreed, That the Remainder to the right Heirs, if it be a Remainder, cannot be preſerved by the mean Eſtate for years; for it ought to be a Free-hold at the leaſt, which ought to ſupport ſuch a Remainder, untill there be one to take it by name of Purchaſe, as Right Heir; and the Juſtices ſaid, That they did not think there was any diverſity between the Caſe of a Remainder in Poſſeſſion, limited to the Right Heir of one, and of a Remainder in uſe ſo limited over unto another. Mich. 35 Eliz. in the Court of *Wards*. The Earl of *Bedford*, and the Lady *Ruſſels* Caſe. *Popham*, 3. and 4.

2. Uſes,

2, Uses, *where well limitted, and Declared, and by whom, where not; where they may be averred, as well by Assurance, Fine, Recovery, and matter of Record, as by Word: where another Use may be averred by Word against a Deed, or contrary to the Use expressed in the Deed, where not; where they may be revoked, and what shall be said a good Revocation of Uses, what not.*

1. HUsband and Wife; The Wife by Indenture Declares the Uses of a Fine, that it shall be levyed only to the use of her self for life, and afterwards, to the use of the Conusees; Afterwards, the Husband by another Deed, without the assent of the Wife, declares the uses, to the use of the husband and Wife for the term of their lives, without impeachment of Waste, and after, to the use of the Conusees: And afterwards, the Fine is levyed by the Husband and Wife. It was adjudged in this Case, That both the Limitations, and Declarations of both the Indentures, were void; and that the said Fine should be to the use of the Wife, and her heirs, as if no use had been declared: And in this Case it was Resolved, 1. That if the Husband and Wife levie a Fine of Land in the right of the Wife, and the husband only declares the uses, this declaration of the uses, shall binde the Wife, if her disagreement doth not appear. 2. Resolved, That if the Husband and Wife do bargain and sell the Land of the Wife for money, and afterwards, they levie a Fine to the Vendee, and his heirs, the same is good, and shall binde the Wife without any writing proving her assent. 3. Resolved, That every one may dispose of the Land, according to the Estate which he hath in the Land, and therefore the Husband alone cannot declare the use, nor the wife alone, but they ought to have joyned in the Declaration of the uses in the principal Case. *Cook* 2 Part, 57, 58. *Rotchwiths Case.*

2. A. seized in Fee of the Mannor of D. by deed Indented, Covenanteth with B. that B. shall recover the said Mannor against him, within a year next following, and that the execution of the said Recovery to be had within the year, shall be to the use of the Reuerter in Tail, &c. and afterwards the Recovery is had within the year. It was holden in this Case, although that the Recovery is not pursued in time according to the precise form thereof, yet the use shall be guided by the said Indentures; so if the same Recovery betwixt the same parties of the same Land were suffered after the year, yet if no intervenient agreement were between the parties, the Recovery shall be intended to the uses of the same Indenture, and no variance of time shall subvert the original agreement of the parties: *Cook* 1. Part, 99. in *Shelleyes Case.*

3. A. seized in Fee of the Mannor of L. in the County of D. by Indenture 30 Feb. 8. Eliz. Covenanted with J. D. that for the advancement of such heirs males as he had begotten, or should beget upon the body of M. his Wife, before the Feast of S. *John Baptist* next following, to levie a Fine of the said Mannor, to the use of the said A. for life, and afterwards to the use of the eldest Issue male of the body of the said A. and M. his Wife begotten, in Tail, and so to the Issue of their Issues, with the Remainder to his right heirs. Afterwards A. by covin to defeat the said Covenant, made a Lease of the said Mannor for a great number of years to J. S. and afterwards levyed a Fine accordingly. It was Resolved by the Justices in this case, That although the Issue was a Purchasor, yet he was not a purchasor in vulgar and common intendment. Also it was holden, That consideration of natural affection, is a good consideration, but not such a good consideration which is intended by the Statute of 27 Eliz. of Fraudulent Conveyances; for a valuable consideration is only a consideration within the said Act. Pasch. 32 Eliz. *Needham* and *Bramwells* Case, vouch. in *Cook* 3 Part 83. in *Twyns* Case.

4. See Trin. 2 Jac. in B. R. The Countess of *Rutlands* Case, in the Devision precedent to the matter of this Division; That where Indentures are made declaring the uses of a subsequent Fine, Recovery, or other Assurance, within a certain time, and to certain uses; if the Fine be pursued according to the said Indentures, that there can be no Averment after the making of the said Indentures, that the Assurance should be to other uses then are declared by the same Indentures.

5. Note, It was Resolved by the Justices, That Common Recoveries are so notorious and usual, That the Judges *ex Officio*, ought to take notice of them to be *ex assensu partium*, and they may be averred to be to an use. *Cook* 1. Part, 40. in *Dormers* Case.

6. A. seized of divers Mannors holden in *Capite*, Covenanted with J. S. and J. D. to suffer a Com-

mon Recovery, to the use of himself for life, and after, to the use of B. in Tail, and after, to the use of C. in Tail, and after, to the use of B. in Fee, with power of Revocation, and Declaration of new uses in his life time, or by his last Will: The King licensed the said A. to alien the said Mannors to J. S. and J. D. and their heirs, without mention of any Declaration of any use within the Licence: The Recovery was had; A. revoked the first uses, and declared, That presently after his death, C. should have the said Mannors in Tail, with divers Remainders over. It was adjudged in that Case, That the King should not have a Fine upon that Revocation and Declaration of new uses; And in this Case it was Resolved, 1. That although no use was mentioned in the Licence, and the Licence was only to alien to J. S. and J. D. and although that the estate of the Land was transferred to another, so as the King was not knowing of his Tenant, yet the same being executed by the Statute of 27 H. 8. of Uses, and an Act of Parliament to which every one is party, can do no wrong; for that cause when the King gave Licence to alien to J. S. and J. D. and the Statute executed the possession in another, that there should not be any Fine due to the King for execution of the estate by force of the Act of Parliament. *Cork* 6. Part, 18. Viscount *Mountague's* Case. And in that Case, this Case was put, Tenant in *Capite* levyed a Fine without Licence, to the use of himself for life, and after, to the use of his eldest son in Tail, and after, to the use of his second son in Tail, with divers Remainders over; *Proviso*, That it should be lawful for him to limit by writing, the same Lands to any woman which after he should marry, for her life, in the name of a Joynture: Afterwards, the King pardoned his alienation without Licence; and afterwards by writing, he limitted the said Lands to one whom he married, for life; and it was adjudged, That for the said alienation, no new Fine should be paid. Mich. 43 Eliz. in the Exchequer Chamber. Sir *William Mounsons* Case.

7. In *Ejectione firmæ*, The Case was, A. Covenanted in consideration of natural love and affection to stand seised to the use of W. his son, for life, and afterwards, to the use of such woman as he should afterwards marry, for life, the Remainder to the first son of the said W. in Tail; Afterwards, W. being unthrifty, A. to disturb the rising of the use of the woman whom his son should marry, lett the Land to his younger son for 1000 years, W. took to wife the Jaylors daughter, and after dyed without Issue. It was Objected in this Case, That no use did rise at all to the woman, although no Lease had been made; for the Consideration being special, in consideration of affection to his son, to stand seized to the use of, &c. that only being for Blood, cannot extend to the Woman, who he afterwards should marry, for that she was a stranger to that consideration. 2. Admitting it did rise, yet it being a future use, and in contingency, the Lease made before the use arose, was good. But it was Resolved by the Court, that this was a good use; for the consideration extends to the Wife which should be, as if it had been in Consideration of Marriage; for the love and affection to the Son, extends to the Sons Wife, who is *quasi* part of the Son, as to himself. 2. Resolved, That this Lease should not bind the Estate of the Wife, because there was a good Estate by the first limitation; which if it be not destroyed, cannot be charged or incumbred after it is raised; because it hath relation to the first Covenant, and none hath interest to charge it. Hill. 3 Jac. in B. R. *Bond* and Sir *Henry Wyalls* Case. *Cro.* 2 Part, 168.

8. A. seized of Lands in Fee, Covenanted by Indenture, in consideration of love to his eldest Son, and settling his Lands in his name and Blood, according to the Provisoes and limitations in the Deed mentioned, before *Easter* to convey his Lands to I. S. and others, to the use of himself for life, the Remainder to his said Son (the Lessee of the Plaintiff) in Tail, with diverse Remainders over, the Remainder to his right Heirs, and that all the Estates made, should be to the uses, with a Proviso, that he might make Leases for 21 years of part thereof; and that the Conveyances should be to the use of the Lessee, with a Proviso, that he might revoke all the uses or Estates, by any his Writing, or his Will: And also that he would stand seized, after *Easter*, of so much of the said Lands, which should not be sufficiently conveyed to the said several uses, &c. No assurance was made before *Easter*, that after A. for 30*l.* paid, demised the Lands to the Defendant for 21 years; and the Jury found the Statute of 27 Eliz. *Cap.* 4. That if one make conveyance, with clause of Revocation, and after, for consideration of money, bargains, and sells the Land to a Stranger, the conveyance shall be void and revoked. A. dyed: I. his Son entred, and lett the Land to the Plaintiff. It was Resolved in this Case, That the uses raised by this Covenant, in this Indenture, being made in consideration of love to his Son, the Covenant extended to all the Land; for the consideration being sufficient, the Covenant well extends to all, there being nothing conveyed by the state executed. 2. That the Estate not being executed, (the uses arising by Covenant only) the Provisoes to make Leases are void; for the Lessees are Strangers to the consideration of Blood, and therefore cannot take benefit of such Estate there-

thereby. 3. It was Reſolved, That this Leaſe being made by him, who had power to revoke it, the Law ſhall conſtrue it as revoked and void *quoad* the Leſſee, and that he was as Tenant in Fee, when he made that Leaſe, and that it was expreſſly within the Statute of 27 Eliz. *Cap.* 4. And ſo it was ſaid it had bin Reſolved, 29 Eliz. in *Hinde* and *Collins* Caſe. Hill. 2 Jac. in B. R. *Croſſe* and *Fauſtendiches* Caſe. *Cro.* 2 Part, 180, 181.

9. The Caſe was, A. Tenant for life, granted by Fine his Eſtate to B, and by Indenture limited the uſe to B, for the life of B. and A; and if he dyed, living A, that it ſhould remain to C; afterwards B. dyed, living A: C. entred, and lett the Land to D. for years, and dyed, living A, Whether the Leſſee ſhould retain the Land as an Occupant, living A, or, That A. ſhould have it again, was the Queſtion? It was adjudged, That C. ſhould have it as an Occupant, and his Leſſee ſhould hold it as an Occupant, and that A. had not any reſidue of the uſe in him; for though where Tenant in Fee makes a feoffment, and limits the uſe for life, or in Tail, and doth not ſpeak of the Reſidue, it ſhall be in the Feoffor; yet when Tenant for life, or he who hath a particular Eſtate, grants his Eſtate by Fine, and limits the uſe for years, it ſhall not return to him, but be to the Conuſee, although the Fine were without any conſideration. Mich. 5 Jac. in C. B. *Caſtle* and *Dodds* Caſe. *Cro.* 2 Part, 201.

10. A. made a feoffment in Fee of Land, to the uſe of himſelf for life, and after to the uſe of B. in Tail, and after to the uſe of C. in Fee; Proviſo, and with Liberty to revoke the uſes, and to limit new uſes, if A. ſurvived I. S, and I. S. dyed without Iſſue Male of his body; A. did renounce, and ſurrender to B. and C. all the Power and Authority of Revocation, and releaſed alſo the Proviſo, Condition, Covenants, and Agreements, as well as the ſaid Power and Authority; and afterwards I. S. dyed without Iſſue of his body. It was Objected in this Caſe, That an Authority which is collateral to the right of the Land, could not be given away, or extinguiſhed by a Fine or feoffment. But it was reſolved, That a Fine or feoffment would extinguiſh a future Power of Revocation; and it was holden in the Principal Caſe, That if the Power of Revocation had bin preſent, yet it might have bin releaſed; and it was put for a Rule in Law, That when a thing executory is created by Deed, the ſame thing by the conſent of the Parties to the Creation of it, might by their Deed be defeated and annulled; as Warrants, Rents, Charges, Annuities, Conditions, Covenants, Powers of Revocation of Uſes, by aſſent of the Parties to the Creation of them, might be defeated and annulled. *Cook.* 1 Part, 111, 112. *Albanies* Caſe.

11. A. ſeized of Lands in Fee, Covenanted to ſtand thereof ſeized to the uſe of himſelf for life, and after to his Son in Tail; Proviſo, That at any time during his life, with the conſent of diverſe, by Indenture to be Enrolled in any Court of the King, to revoke the ſaid uſes and Eſtates, and to limit new uſes: Afterwards, by Deed Indented, Enrolled in the *Chauncery*, he revoked the uſes in part of the Land, and limitted the ſame to him and his Heirs; and afterwards by another Deed he declared, that from the time of the Enrollment of that Deed in the *Chauncery*, that all the firſt uſes in the firſt Indenture ſhould be void, and that the Land ſhould be to the uſe of himſelf in Fee; and afterwards he levyed a Fine, of the whole Land. In this Caſe it was reſolved (amongſt other points), That the Fine levyed before the Enrollment, had extinguiſhed the Power of Revocation. 2. Reſolved, That if the Fine had not bin levyed, then by the Revocation the antient uſes had bin deſtroyed, without entry or claim; becauſe that he himſelf was Tenant for life of the Land: for an act of Revocation, is as ſtrong as a claim. 3. Reſolved, That by the ſame Conveyance as the antient uſes might be revoked, by the ſame Conveyance, other uſes might be limitted, and the Law ſhall adjudge priority of the operation of the Deed; for firſt, it ſhall be a Revocation of the old uſes, and afterwards a limitation of new uſes. *Cook* 1 Part, 173, 174. *Diggs* Caſe.

12. Note, It was Reſolved by the Juſtices, That when a man had conveyed his Lands to the uſe of himſelf for life, and afterwards to the uſe of diverſe others of his Blood, with future Power of Revocation, as after ſuch a Feaſt, or after the death of ſuch a one; and afterwards, and before the Power of Revocation began, he for valuable conſideration bargained, and ſold the Land to another and his Heirs; that this Bargain was within the Statute of 27 Eliz. *Cap.* 4. For although the Statute ſaith, *The firſt conveyance not by him revoked, according to the power by him reſerved*, which ſeemeth by the literal ſenſe to be intended of a preſent Power of Revocation; for no Revocation can be made by Fine of a future Power, until it come in *eſſe*, yet it was holden, that the Intent of the Act was, That ſuch voluntary Conveyances, which was Originally ſubject to Power of Revocation, be it in *præſenti*, or in *futuro*, ſhould not ſtand good againſt a Purchaſor *bona fide*, for valuable conſideration; and if other conſtruction ſhou'd be made, the act ſhould ſtand to little Purpoſe. *Cook.* 3 Part, Mich. 43 Eliz. in C. B. *Standen*

and *Bullock's* Caſe. Vouch. in *Twyn's* Caſe. 88.

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3. *Contingent Uſes, whether executed by the Statute of* 27 H. 8. *of Uſes. By what Acts they may be deſtroyed, and by what Acts transferred, and who ſhall have the benefit of them.*

1. THE Caſe was, That A. after the Statute of 27 H. 8. of Uſes, did enfeoff diverſe Perſons, to the uſe of the Feoffees and their Heirs, for the life of B. his eldeſt Son, and after to the firſt Iſſue Male of the body of B, with diverſe limitations to the 10th Son, with Remainders over, and dyed. The Feoffees enfeoffed B. by Deed indented, having notice of the firſt uſes to him and his Heirs, without any conſideration; B. had Iſſue, C. and D, and afterwards, and according to the Statute of 27 H. 8. of Enrollments, bargained, and ſold the Lands to I. S, and his Heirs, The principal Queſtion in the Caſe was, If the contingent uſes before their Eſſence, by the feoffment of the Feoffees was deſtroyed, ſo as they ſhould never riſe out of the Eſtate of the Feoffees, after the Birth of the Iſſues? It was Objected, That in this Caſe, the contingent Uſes were not deſtroyed: It was ſaid, That before the Statute of 27 H. 8. the Feoffees had only Power to diſpoſe of the Lands; and that by the Statute the Power is transferred to *Ceſtuy que uſe*; and the Power which the Feoffees had only taken away: And that the Statute was not made to extirpate, or extinguiſh any uſes; but to extirpate all Fines, Feoffments, Recoveries, &c. ſubtilely and unjuſtly practiſed, not by extinguiſhment of the uſes, but by diveſting of all the Eſtate out of the Feoffees, Conuſees, or Recoverors; and ſetling of the ſame in *Ceſtuy que uſe*. And it was Objected, That no good lawful uſe, either future or preſent, was taken away by the Statute, but ſuch uſes are advanced by the Statute. But it was Reſolved, That the Statute of 27 H. 8. did not transfer any Poſſeſſion to any uſe in contingency, until they came in *eſſe*; for as there ought to be an uſe in *eſſe*, ſo there ought to be a Perſon in *eſſe*, who ſhould take the uſe, before any Poſſeſſion could be executed to the uſe. And it was agreed by them, That if the future uſes had not been deſtroyed, by the feoffment of the Feoffees, when the future uſe came in *eſſe*, they might enter by the Original Agreement of the Parties to revive the future uſes; and the Feoffees had by the Statute a qualified Eſtate, ſufficient to ſerve the future uſes. But it was Reſolved by them, That becauſe that the Statute of 27 H. 8. did not extend but to uſes in *Eſſe*, and to Perſons in *eſſe*, and not to any uſes which depended upon poſſibility; that for thoſe cauſes the contingent uſes did remain ſo long, as they depended in poſſibility at the Common-Law; and by conſequence they might be deſtroyed, and diſcontinued before they came in *eſſe*, by ſuch means as uſes might have bin deſtroyed, or diſcontinued at the Common-Law: And therefore it was holden by them, That if the contingent uſes in the Principal Caſe had come in *eſſe*, without alteration of the Eſtate of the Land, that the ſame ſhould have bin executed by the Statute; but the alteration of the Eſtate, before they came in *eſſe*, by the feoffment of the Feoffees, had deſtroyed them. *Cook* 1 Part, *Chudleighs* Caſe. See *Popham* 72, and 81, accordingly.

2. Upon a Demurrer, the Caſe was, A man ſeized of Lands in Fee, conveyed it by feoffment to the uſe of himſelf and his Wife, and to the Heirs of the Survivor of them. The Husband afterwards made a feoffment of this Land, and dyed; the Wife entred, and enfeoffed a Stranger, and dyed: The Queſtion in the Caſe was, Whether by the Wifes entry, the Fee ſhould veſt in her ſurviving, ſo as her Iſſue ſhould enjoy it? It was reſolved and adjudged in this Caſe, That the feoffment of the Husband, had deſtroped this future contingent uſe of the Fee; for that whatſoever cannot accrue at the time of the death of the Party who firſt dyeth, cannot afterwards by any act be revived, but is abſolutely extinguiſhed. Upon which Judgment a Writ of Error being brought in the Exchequer-Chamber, the Judgment was affirmed. Hill. 3 Car. in Exchequer. *Bigott* and *Smiths* Caſe. *Cro.* 1 Part, 73.

3. In Treſpaſs, the Caſe was, A. ſeized in Fee of the Mannor of K, in the County of N, and of the Mannor of A, in the County of D. by Fine, 41 Eliz. conveyed the ſaid two Mannors to G, Earl of S, and his Wife, to the uſes following; viz. Of the Mannor of K. to the uſe of them, their Heirs and Aſſignes; and of the Mannor of A, to the uſe of the Wife of A. for her life, and after to the uſe of the Heirs of A, until the Wife of A. ſhall evict and expel the Earl or Counteſs, their Heirs, or Aſſignes, Farmers, Tenants of, and from the Mannor of K, or any parcel thereof; and after ſuch Eviction, then to the uſe of the ſaid Earl and his Wife, their Heirs and Aſſignes, until they ſhould be

be ſatisfied with the profits for their lives: A. 43 Eliz. for money, by Fine, conveys the Mannor of A. to I. S. and his Heirs, to the uſe of him, his Heirs and Aſſigns: The Earl of S. and his Wife, by Fine, 43 Eliz. conveys the Mannor of K. to the Earl of *Kent* and his Wife, to the uſe of the ſaid Earl of *Kent* and his Wife, and their Heirs. 1 *Apr.* 17 Jac. I. S. deviſeth the Mannor of A. to I. D. and others, for 2000 years. 1. *May.* 17 Jac. I. S. dyed ſeized of the Mannor of A. 1. *Sept.* 17 Jac. A. dyed, and after his death, the Wife of A. evicted from the Earl of *Kent* parcel of the Mannor of K, for her Dower, and entred. The Earl of K. entred into the Mannor of A, upon the Defendants, being Aſſigns of the ſaid Leaſe. The Queſtion in this Caſe was, Whether the limitation of the Mannor of A, being to the uſe of the Wife of A. for life, and after to the uſe of the right Heirs of A, till the Wife of the ſaid A, ſhould evict the Earl of S: and his Wife, their Heirs or Aſſigns, Farmers, Leſſees, &c. the Earl of K. as Aſſignee, ſhall by entry take the benefit thereof? It was Reſolved in this Caſe, That he as Aſſignee might not enter, but that the uſe upon the Eviction, ought firſt to veſt in the Earl of S. and his Heirs, and that this conveyance before Eviction cannot give him Title of entry as Aſſignee; for it is not ſuch an Intereſt aſſignable over before Eviction, and the Power of entry is not transferred with the Mannor of K: But whether the conveyance of the Mannor of K, and the conveyance of the Mannor of A, by A. before any Eviction had deſtroyed the privity of entry after Eviction, the Eſtate being transferred to another before the Eviction; the Juſtices did not deliver any Opinion therein, nor agreed. But for the firſt Cauſe, they all agreed, That the Earl of *Kent* had no Title of Entry as Aſſignee. Hill. 8 Car. in B. R. The Earl of *Kent*, and *Stewards* Caſe. *Cro.* 1 Part, 261.

4. In Treſpaſs, the Caſe was, A. was poſſeſſed of a Leaſe for 300 years, and by his Will deviſed, that his Brother C. ſhould have the uſe and occupation thereof, during his life; and after his death, the uſe and occupation thereof ſhould remain to the Wife of C. during her Widow-hood; and after her Widow-hood, the uſe, occupation, and Profits of the premiſes to be to the eldeſt Son of C; which he ſhould happen to have during his life: And after ſuch Son dying without Iſſue Male, to any other Son which the ſaid C. ſhould happen to have, one after the other; and if C. dye without Heir Male of his body, that the uſe, Profits, and occupation ſhall remain, and be to I. S. in manner as before: The Queſtion was, Whether this Deviſe of a Term in this manner be good to go in Remainder, and of ſuch Remainders, the one after the other, and the limitation of the Deviſe of a Leaſe might be good? The Court inclined to be of Opinion, That the Deviſe of a Terme in this manner to make a perpetuity could not be good; for to limit a poſſibility after a poſſibility, and to limit the Remainder of a Terme, after a dying without Iſſue, ſtood not with the Rules of Law. But the Court ſaid, They would adviſe of the Caſe, Trin. 5 Car. in B. R. *Sanders* and *Corniſhes* Caſe. *Cro.* 1 Part, 366.

More Vſes.

1. THe Caſe was, The Father Covenanted with A, in Conſideration of a Marriage to be had, betwixt the Son of the Covenantor, and the Daughter of A, that he would before ſuch a day, levy a Fine of Lands, to the uſes of the ſaid Son and Daughter in Tail, for the Joyneure of the Daughter; the Fine is levyed according to the uſes aforeſaid, but no mention is made in the Fine of the Marriage; the Father dyeth. It was the Opinion of the Court in this Caſe, That notwithſtanding that the Marriage was not accompliſhed, yet the Eſtate-tail was well executed in the Son and Daughter; for that the Fine without any conſideration, doth carry the Uſes; but without a Fine, ſuch a Conſideration could not raiſe an Uſe, without accompliſhment of the Marriage; for that the Conſideration executed, ought to precede the Uſe. It was further holden in this Caſe, That A. might have had Covenant againſt the Father, to have the Fine before the Marriage. Hill. 30 Eliz. in C. B. *Stephens* Caſe. *Leon.* 138.

2. The Caſe was, A. ſeized of Lands in Fee, made a Feoffment in Fee, to the uſe of himſelf in Tail, the Remainder to B. in Tail, and for want of ſuch Iſſue, to the uſe of C. in Tail: Provided, That if the ſaid B. or C. do go about to avoid any Eſtate, or demiſe by Copy made, or to be made of the Premiſes, or any part thereof, that then his Eſtate ſhould ceaſe. A. dyed without Iſſue, B. entred, and levyed a Fine *Sur Conuſans de Droit, &c.* of the Lands. It was the Opinion of the whole Court in this Caſe, That this Fine was not any offence againſt the Proviſo, for that theſe words (*made, or to be made*) did not extend to the Eſtates made or limitted by the ſaid Feoffment, but only to the Eſtates before made, or after to be

be made. Mich. 33 Eliz. in C. B. *Bradſtocks* Caſe. *Leon.* 207.

3. In Treſpaſs, the Caſe was, *William* Lord *Vaux* ſeized of Lands in Fee, levyed a Fine of the ſame, to the uſe of the Lord *Vaux* that then was, for life, and after his deceaſe, to the uſe of A. and M. Daughters of the ſaid Lord *Vaux*, and their Aſſignes, until *Ambroſe Vaux* ſhould return from the parts beyond the Seas, and ſhould come to the age of 21 years, or dye, if they ſhould ſo long live; and after the return of *Ambroſe* from beyond the Seas, and the age of 21 years, or death; which of the ſaid dayes or times ſhould firſt happen, to the uſe of the ſaid *Ambroſe*, and the Heirs of his body begotten, with diverſe Remainders over. *Ambroſe* returned, and 31 Eliz. before he came of full age, levyed a Fine to the uſe of G. *Vaux* the Defendant in Tail, with divers Remainders over: Afterwards the Lord *Vaux* being Tenant for life, enfeoffed the Lord *Mordant* in Fee, upon whom G. *Vaux* entred for a forfeiture, upon which the Lord *Mordant* brought the Action. For the Plaintiff it was ſaid, That *Ambroſe Vaux* had nothing in the Lands in Queſtion, until his return from beyond the Seas; and his full age and the Eſtate, doth not begin till both be paſt, and that no Uſe did riſe to *Ambroſe*, until the time encurred; for the time of the beginning is incertain, and upon a contingent. On the other ſide it was ſaid, That the Eſtate of *Ambroſe* accrued, and did riſe, when any of the ſaid times came, full age, return, death: So that the words are, *And after the return of* Ambroſe, *from beyond the Seas, and the age of* 21 *years, or death, &c.* This word (*Or*) before death, diſjoyns all, and makes the Sentence in the Diſjunctive. The Caſe was ſpoken to by the Juſtices, but no Reſolution given in the Caſe, Whether the Eſtate to *Ambroſe* upon the limitation was well raiſed, or executed, or not; It was adjorned. Paſc. 17 Eliz. in B. R. The Lord *Mordant* and *Vaux*'s Caſe. *Leon.* 243.

4. *Hugh Stamford* ſeized in Fee, had Iſſue, A. his eldeſt Son, and B. his younger; A. had Iſſue, G. and E. by ſeveral women; *Hugh* made a feoffment in Fee, to the uſe of himſelf for life, the Remainder to the uſe of G. in Tail; and afterwards to the uſe of A. in Tail, and afterwards to the uſe of the Right Heirs of *Hugh*: *Hugh* dyed; A. dyed, G. levyed a Fine to the uſe of himſelf in Tail, the Remainder over to B. in Fee, and dyed without Iſſue. It was holden by all the Juſtices in this Caſe, That E. was barred by this Fine, by the Statute of 4 H. 7. and 32 H. 8. Mich. 7 Eliz. in C. B. *Stamfords* Caſe. *Leon.* 3 Part. 1.

Waiver.

1. *Where, and in what Caſe a thing may be Waived, in what not: What ſhall be ſaid a Waiver of Eſtates or Goods, and who ſhall take advantage of it; and of Waiver in* Pais, *and in a Court of Record, and their difference.*

IN *Ejectione firmæ*, the Caſe was, S. B. *Ceſtuy que uſe*, before the Statute of 27 H. 8. deviſed to his Wife certain Lands for her life; and that after her deceaſe, T. B. his eldeſt Son ſhould have the Land 10l. under the Price it coſt; and if he dyed without Iſſue, that R. B. his ſecond Son ſhou'd have it 10l. under the Price it coſt; and if he dye without Iſſue of his body, that his two Daughters, A. and E. ſhall have the Land, paying the value thereof, to the Executor of his Wife. The principal Point in this Caſe was, Whether T. B. the Deviſee had an Eſtate Tail, or Fee-ſimple? This Point was not adjudged, but the better Opinion of the Court ſeemed to be, that it ſhould be an Eſtate in Fee-ſimple. In this Caſe it was Objected, That it was but an eſtabliſhment in the Deviſee, and that the Deviſee, though he was his eldeſt Son, yet he could not Waive the Deviſe, and take by Deſcent. Alſo it was ſaid, When he enters firſt, he is ſeized by force of the Deviſe; and that he might not Waive that Eſtate, for that if he might, then he in the Remainder ſhould not take; which was againſt the intent of the Deviſor. The Caſe was adjourned but not Reſolved. Hill. 43 Eliz. in B. R. *Bulleyn* and *Bulleyns* Caſe; *Goldesbr.* 135.

2. A. being Tenant in Tail of certain Lands, ex-

exchanged the ſame with B, B. entred, and being ſeized in Fee of other Lands, deviſed ſeveral parcels thereof to others; and amongſt the reſt, a particular Eſtate to his Heir; Proviſo, that he do not re-enter, nor claim any of his other Lands in deſtruction of his Will; and if he do, that then the Eſtate of the Lands deviſed to him, ceaſe. A. dyed, his Iſſue entred into the Lands in Tail, and Waived the Lands taken in exchange, and before any other entry, the Heir of B. enters upon the Land which was given in exchange. It was the Opinion of the whole Court in this Caſe, That it was no breach of the Condition, becauſe it was not the Land of the Deviſor at the time of the Deviſe; and therefore it was out of the Condition. Mich. 29 Eliz. in C. B. *Barber* and *Topſfields* Caſe. *Godbolt.* 99. 100.

3. Debt was brought for Rent againſt an Executor, upon a Leaſe made to the Teſtator for Rent, incurred after his death. The Defendant pleaded, That after the death of the Teſtator, ſhe relinquiſhed the Poſſeſſion of the Land, and did not intermeddle therewith; and that ſhe had fully Adminiſtred all the Teſtators goods. The Action was brought in the *Debet & Detinet* for Rent, incurred after the Teſtators death; and whether the Action did lye in the *Debet & Detinet* was the Queſtion? It was Reſolved, That it might well lye in the *Debet & Detinet*, according to the Opinion in *Hargraves* Caſe, *Cro.* 5 Part, 31. The ſecond Queſtion was, If by this Waiver of the Term and Poſſeſſion, ſhe ſhould be diſcharged of the Rent, ſo as ſhe ſhould not be charged in her own Right? It was Reſolved, that ſhe could not Waive it, unleſs it had been eſpecially alledged, That the Rent was greater then the value of the Land, and then peradventure by ſpecial pleading ſhe might have been diſcharged. Paſc. 17 Jac. in B. R. *Mawle* and *Cacy Fyt's* Caſe. *Cro.* 2 Part, 549. See Mich. 23 Car. in B. R. *Vandicoots* Caſe. *Styles* 52. Mich. 23 Car. in B. R. *Hale* and *Jottinets* Caſe. *Styles* 61. Trin. 23 Car. rott. 1434. in B. R. *Corniſh* and *Cowſleys* Caſe. acc. See Hill. 7 Jac. in B. R. rott. 488. The Lord *Rich.* and *Franks* Caſe. As to the bringing of the Action in the *Debet et Detinet*, and a difference taken where the Action is meerly in the Perſonalty, and where in the Realty. And ſee 21 H. 6. 42. *Br.* tit. Waiver. pl. 9. where an Executor of a Term may Waive, and be diſcharged of the Rent, and where not.

4. Debt brought for Rent, The Plaintiff declared upon a Leaſe made by him to the Defendant, being an Infant, rendring yearly Rent, and for Rent behind; The Action was brought, the Defendant demurred, but afterwards Waived his demurrer, and pleaded to Iſſue. It was the Opinion of the Court, that an Infant might Waive his demurrer, and plead to Iſſue; but it muſt be the ſame Terme, and not in another Term. The Queſtion then further was, If he ſhould be charged with the payment of this Rent? *Haughton*, Juſtice; If a Leaſe be made of an Acre of Land to an Infant, rendring 100l. Rent *per An.* and he doth occupy and enjoy it, he ſhould be charged with the Rent, he being here to be taken as a Purchaſer. *Dodd*, Juſtice; If a greater Rent be reſerved than the Land is worth, peradventure the Infant ſhall not be charged with it. If an Infant Executor make a Leaſe, without any conſideration, he may well avoid this, becauſe he was herein circumvented. If a Leaſe be made to Husband and Wife rendring Rent, the Husband dyeth, the Wife may Waive the Leaſe, and ſo avoid the payment of the Rent; but if ſhe continueth the Poſſeſſion, ſhe ſhall be charged with the Rent. In the Principal Caſe the whole Court was clear of Opinion, That the Infant Leſſee was liable to pay the Rent; and ſo the Action was well brought, and Judgment given for the Plaintiff. Hill. 10 Jac. in B. R. Rott. 422. *Kirton* and *Eliots* Caſe. *Bolſtr.* 2 Part, 69.

5. A. ſeized of the Mannor of F. in Fee, and A. and his Wife ſeized of the Mannor of H. to them and the Heirs of their bodies begotten, by an eſtate made to them before Coverture for the Joynture of the Wife, the reverſion to H. in Fee, F. amounting to the value of two Parts, and H. to the third Part, both holden in *Capite*; A. by his Will deviſed the Mannor of F. to his Wife for life, upon condition, that ſhe ſhould not take her former Eſtate in H, with diverſe Remainders over; The Wife in *Pais* by word, Waived her Eſtate in H, and agreed to the Mannor of F, and entred thereinto; and if the Deviſe was good for the whole Mannor of F, or but for part, was the Queſtion? And in this Caſe, amongſt many other Points, it was Reſolved, 1. That at the Common Law, if Lands are given to Husband and Wife in Tail, or Fee, and the Husband dyeth, the Wife cannot deveſt the Free-hold out of her, by any verbal Waiver or diſagreement in *Pais*: But if ſhe doth agree to the Eſtate by word in *Pais*, ſhe may afterwards Waive it in a Court of Record; but if ſhe entreth into the Lands, and taketh the Profits, the ſame is a good Agreement in Law; for the Law more reſpects acts without words, than words without acts. 2. Reſolved, That the refuſal in *Pais* to have the Mannor of H. and the entring, and agreement to the Mannor of F, was a good Agreement to the one, and a Refuſal to the other; and thereby the Inheritance was deveſted by force of the Statute of 27 H. 8. of Uſes;

ſes; by which Statute, a woman may refuſe her Joynture in *Pais*, and be endowed by conſent in *Pais*, or by Writ of Dower. *Cook* 3 Part, 26. *Butler* and *Bakers* Caſe. See *Cook* 4 Part, 3, and 4. *Vernons* Caſe, acc.

6. If A. maketh an Obligation to B, and delivereth the ſame to C, to the uſe of B, it is the Deed of A. preſently, but if C. offereth it to B, in ſuch Caſe, B. may Refuſe and Waive the ſame in *Pais*, and thereby the Obligation ſhall loſe its force. Hill. 1 Eliz. *Dyer.* 167. in *Taules* Caſe, and ſo it is of a gift of Goods and Chattels, if the Deed be delivered to the uſe of the Donee, the Goods and Chattels are in the Donee preſently before notice or agreement; but the Donee may in *Pais* Waive the gift, and by that the Property and Intereſt ſhall be diveſted; and ſuch Waiver and diſagreement needs not to be in a Court of Record. *Cook* 3 Part, 26, 27. acc.

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2. Waiver *of Action, Plea, Judgment, Iſſue, Demurrer, where, and in what Caſe it may be done; and where it may be without aſſent of the Parties, where not; and where, and in what Caſe the King may waive his Plea, or Demurrer: Of Waiver of Goods by a Felon, and in whom the Goods thereupon are.*

1 B. Being indebted to A. in the ſumm of 100l., A. ſued B. in the Court of the Maior of *London*; and C. a third Perſon being indebted likewiſe to B. in 100l., A. ſued forth an Attachment, according to the cuſtom of *London*, and Attached the debt of C. owing to B, and Condemned him upon that Attachment, and had Judgment thereupon. It was the Opinion of the Juſtices in this Caſe, That notwithſtanding the Judgment, the Plaintiff A. might Waive the ſame, and have Judgment and Execution againſt B. the Defendant himſelf, being his Principal debtor. Hill. 7 E. 6. *Dyer* 82.

2. A man by Deed made a Leaſe of a houſe, with diverſe implements in it, for years, rendring Rent; and afterwards the Leſſor entred upon the Leſſee, and thereof enfeoffed a Stranger; the Leſſee re-entred, the Stranger dyed, and his Heir brought an Action of debt againſt the Leſſee for the whole Rent: There was a Demurrer upon the Declaration, which was argued afterwards by conſent of Parties; the Demurrer was Waived, and an Iſſue joyned upon the Feoffment, and found for the Plaintiff; notwithſtanding, there was not any privity betwixt them. And in this Caſe it was holden, amongſt other Points, That the Rent was not extinct by the Feoffment, becauſe it was incident to the reverſion; which was revived by the re-entry of the Leſſee. Paſc. 4 Eliz. *Dyer* 213.

3. An information was exhibited againſt a Merchant, for tranſporting Cloaths beyond Sea, the Subſidy and Cuſtom not being paid; and the Caſe was thus: After that Subſidy and Cuſtom was paid for Cloaths, in a Tempeſt upon Sea the Clothes were caſt out of the Ship, for the ſafegard of the Ship, and the lives of the Mariners; the Ship was brought back to the firſt Port, where notice was given to the Deputy-Cuſtomer of all the miſchance; and he was asked, If he might ſhip as many more Clothes in liew of them which were caſt out of the Ship, without payment of any Cuſtom for them: Who anſwered, that he might, & gave him Licenſe ſo to do. All which matter being pleaded in Bar, the King demurred upon the Plea: Afterwards, the King Waived his Demurrer, and joyned Iſſue, that Cuſtom and Subſidy *Domini Regi debet. Concelat. & Subſtract. &c.* and it was found, that he did not Conceal and withdraw in manner and form as was ſuppoſed by the Declaration: It was doubted, whether this Verdict ſhould be taken againſt the King, or for the King: It was not Reſolved, only *Read* Juſtice ſaid, That it ſeemed to be the intent of the Jurors to acquit the Defendant of the concealment: But in this Caſe it was fully agreed by the whole Court, That after a Demurrer by the King, he might at any time after Waive this Demurrer, and joyn Iſſue with the Party upon the matter in fact. Mich. 30 H. 8. *Dyer* 43, 44.

4. In an Accompt brought againſt one as Forreigner, the Plaintiff declared of a Receipt of diverſe ſumms; ſome by his own hands, and ſome by the hands of others. The Defendant as to the ſumms by the proper hands of the Plaintiff, pleaded, That he was never Receivor, and was ready to wage his Law; and for the reſt, he pleaded to the Country, and day was given at another Term to wage his Law; at which day, for part of the ſumms, for which he had demanded his Law, he would have Waived the ſame, and confeſſed the Action; and for the reſidue of them, he would have waged his Law; and if he might ſo do, without the aſſent of the Plaintiff, the Court at the firſt doubted; but afterwards by the adviſe of the Court,

ex offenſa Querentis, he waived his whole Plea as to the Wager of Law, and afterwards joyned Iſſue. Mich. 9 Eliz. *Dyer* 265.

5. In Trover and Converſion of a Load of Bark, It was found by Verdict, That the Bark was the Bark of an Oak, being Timber growing upon Land of which the Plaintiff was ſeiſed in Fee, and had lett the Land upon which the Oak grew to I. S. for years; and that the Defendant being a ſtranger entred into the Land and cut down the Tree, and carryed away the Bark thereof, and converted the ſame to his own uſe: The Queſtion was, If a Stranger cuts down a Tree in the time of Leſſee for years, and carrieth the Bark thereof away; Whether the Leſſor during the Term may have an Action of Trover for it, or be put to take his remedy againſt the Leſſee by an Action of Waſte, and the Leſſee to have his remedy by Action of Trover againſt him that cut it down; or, Whether the Leſſor at his Election may puniſh the one or the other. It was Objected, That the Leſſee only during the Term ought to have an Action for the carrying away of it, for that the poſſeſſion and property thereof was veſted in him during the whole Term, and is not loſt by the cutting of it down by a Stranger. But it was the Opinion of the Court, That the Action did well lye for the Leſſor, and that he had Election to ſue the Leſſee for the Waſte, or him that cut down the Tree; for the Leſſee for years hath but a ſpecial property therein to have the ſhadow and fruits thereof as long as it is growing, and when it is ſevered from the Land, the property which the Leſſee had in it is loſt; ſo as the Leſſor may have an Action for the carrying of it away, or an Action upon Trover and Converſion. Hill. 19 Jac. in B.R. *Berry* and *Heard*'s Caſe, *Cro.* 1 Part. 176.

6. Note, It was Reſolved by the Court, That if the Plaintiff in Evidence ſheweth any matter in writing, or of Record, or any Sentence in the Eccleſiaſtical Court, upon which Queſtion in Law ariſeth, and the Defendant offereth to demurr in Law; the Plaintiff in ſuch Caſe cannot refuſe to joyn in Demurrer, but he ought to joyn in Demurrer, or elſe waive his Evidence: And ſo the Law is, If he produceth witneſſes to prove matter in fact, upon which Queſtion in Law ariſeth; there if the Defendant admitteth their Teſtimonies true, he may demurr upon it; and the Reaſon is, Becauſe matter of Law ſhall not be put in the mouths of Lay-men. But if an Evidence be given for the King, and the Defendant offereth for to demurr upon it, the King is not bound to joyn in Demurrer: But the Court may direct the Jury to find the ſpeciall matter, and thereupon adjudge what the Law is; and in this Caſe it was holden, That the King may waive his Demurrer, and take Iſſue at his pleaſure. Trin. 42 Eliz. in B. R. *Cook* 5 Part. 104. *Baker*'s Caſe.

7. Note, It was the Opinion of the Court, That if a ſuit be before an Arch-Deacon, where by the Statute of 23 H. 8. the Ordinary may licence the ſuit to a higher Court; That the Arch Deacon in ſuch Caſe cannot balk his Ordinary, and ſend the Cauſe immediately to the Arches; for he hath no power to give a Court, but to remit or waive his own Court, and to leave it to the next; for ſince his power is derived from the Biſhop to whom he is ſubordinate, he muſt yield it to him of whom he received it; and it was ſaid that ſo it had been ruled heretofore. See *Hob.* 16. and ſee the Caſe where the Chancellors of the Juſtice or Ordinary did make Requeſt to Dr. *Donn* Dean of the Arches, to take the Cauſe to his hearing; and the reaſon given by the Chancellor for the ſending of it was, that the Cauſe (being in deed a Cauſe of *Modus Decimandi*) was ſo difficult that the Plaintiff could not have ſufficient Councell here for that Cauſe; and the Queſtion was, Whether this tranſmitting of this Cauſe was warranted by the Exception in the ſaid Statute. Quære, The Caſe was not Reſolved. Trin. 15 Jac. *Jones* and *Jones* Caſe. *Hob.* 135, 186.

8. In Debt upon an Obligation the Defendant pleaded, that it was with condition to perform Covenants of a Deed Poll, and that he had performed them all, not ſhewing what they were; whereupon the Plaintiff demurred in Law, and Plea was adjourned and continued from Term to Term; from which laſt Continuance granted to the Plaintiff, was revoked and committed to the Defendant: It was agreed, That upon theſe Adjournments and Continuances the Plaintiff might be Non-ſuit, and by the ſame reaſon might plead a Plea after the Darrein Continuance; and if the Defendant or the Plaintiff ſhould take Iſſue or Demurr upon the Plea, yet the Court muſt conſider upon the firſt Demurrer; for if upon that ſtanding confeſſed the Plaintiff could not have his Action, the Court cannot give Judgment for him, however the latter Iſſue or Demurrer paſs. But otherwiſe it were, if the firſt had been an Iſſue, for then nothing were confeſſed to his prejudice, and then that had been utterly relinquiſhed, by a ſecond Iſſue or Demurrer. Hill. 13 Jac. in C. B. *Stoner* and *Gibſon*'s Caſe, *Hob.* 81.

Wager of Law. *See before, Tit.* Law.

Warrants of Attorney, and other *Warrants.*

2. A Recovery was had by A. M. against Sir O. H. of divers Lands 12 years passed, and by negligence of the Attorney, no Warrant of Attorney was entred for him; and Suit was now made to the Justices, that it might be entred; which the Justices consented unto; whereupon it was immediately entred, but for it the party made Oath, that he had reteined an Attorney, and that this was the negligence of his Attorney. Trin. 30 Eliz. in C.B. *Mills* and Sir *Owen Hopton's* Case. *Goldesbr.* 31.

2. A Judgment was confessed in Trin. 42 Eliz. Rot. 504. and afterwards, in Trin. 43 Eliz. the Defendant brought a Writ of Error, bearing date 12 *Maii*, 43. And upon that Writ, the Record was certified 25 *Maii*; and afterwards, Error was assigned in B. R. for want of a Warrant of Attorney by the Defendant: And Mich. 44 Eliz. the Warrant of Attorney was received, and entred upon record by Order of the Court of Common Pleas. Pasch. 12 Jac. *Sheriff* and *Whitsandes* Case. Pasch. 2 Jac. in C. B. Rot. 1956. *Baltgrone* and *Smiths* Case. Mich. 1. Jac. in C. B. Rot. 1306. *Smith* and *Kents* Case acc. *Brownlow* 1. Part 46.

3. Error was brought upon a Judgment by *Nihil dicit*, for want of a Warrant of Attorney, and the Record certified, and a *Certiorari* to the Clerk of the Warrants, and Error assigned for want of a Warrant. The Court was moved, That the Warrant might be filed, which was Ordered accordingly, and so the Warrant was filed. Trin. 11 Jac. in C. B. *Olive* and *Hannys* Case. *Brownlow* 1 Part, 46.

4. Error brought to reverse a common Recovery in the City of *Worcester*, upon a Writ of Right Patent: The Error assigned (amongst other) was, That no Warrant of Attorney was entred, but that such a one *posuit loco suo W. H.* and did not write the name at length, but in the Plea-Role it was at length. It was said, That all the Records of the City were of the same form, viz. That such a one *posuit loco suo W. H.* and if it were not good, they should be all overthrown and avoided, which should be contrary to the ancient Custome of the City: The Justices seem'd to encline to Opinion, That the Warrant of Attorney was not good, although it was usual, for that they ought to follow the course of the Common Law: And *Clinche* Justice, said, That the reason why the name of the Attorney ought to be put, is, because, if any appear as my Attorney, without my authority, I may have an Action upon the Case against him, which I cannot have against W. H. M. 29 Eliz. in B.R. *Bilford* and *Doddington's* Case, *Godbolt*, 73, 74.

5. Error of a Judgment given in Trespass, (amongst other Errors) one was assigned, *scil.* That the Defendant *Obtulit se per Higgins Attornatum suum*, without shewing his Christian name; for *Higgins* only without a Christian name, is not any name. It was said, That the same was helped by the Statute of 32 H. 8. where it is Enacted, That after Verdict, Judgment shall be given, notwithstanding the lack of Warrant of Attorney of the party against whom the Issue shall be tryed, or any default of negligence of any parties, their Counsellors, or Attorneys, and of necessity here, this default here in the Christian name, ought to be the default of one of them. Afterwards it was alledged, That there was a Warrant of Attorney in the Common Pleas, and that it appeareth upon Record, That the Defendant did appear upon the *Supersedeas* by Attorney, who had his full name, and therefore prayed a *Certiorari de Novo*, to certifie the same matter. Afterwards, the Writ of Error was allowed; and upon the day of Return thereof, it appeared upon the Record of *Supersedeas*, That the Defendant did appear by such a one his Attorney. But it was said by the Court, That there ought to be two appearances, the one upon the *Supersedeas*, and the other when the Plaintiff Declares: And as to the name of the Attorney, See 1 *Mar. Dyer*, 93. *Tyrrills* Case. Hill. 31 Eliz. in B. R. *Tempest* and *Millets* Case. *Leon* 175.

6. Error of a Judgment in C. B. The Error assigned, was, That there was not any Warrant of Attorney for the Plaintiff. A *Certiorari* being awarded, It was returned, That there was not any Warrant of Attorney in that Term wherein the Action was brought, and Judgment given; whereupon there were two *Scire facias* sued, and returned *Nihil*, and

and the Record was marked, that it ſhould be reverſed; but the Judgment was not entred upon the Roll, which the Defendant in the Writ of Error, *ut amicus Curiæ*, ſuggeſted to the Court, and prayed a new *Certiorari*: It was the Opinion of the Court, that he might have it; for otherwiſe, by the falſe ſurmiſe of the want of an Entry of a Warrant of Attorney in one Term, (where perhaps it is in another Term), it ſhould be reverſed: And the Court ſaid, It is not materiall in what Term it is entred; and therefore commanded, that the entry upon Record for the Reverſall of the Judgment ſhould be ſtayed untill it was certified. Paſch. 5 Jac. in B. R. *Smith* and Sir *Hen. Skipwier's* Caſe, *Cro.* 2 Part. 177.

7. A. brought an *Audita Querela* againſt C. for that he was bound in an Obligation with J. S. he being within age. The Defendant preſented an originall Writ of Debt againſt the Plaintiff, and procured one W. L. an Attorney without his notice to appear to the Action, without any Warrant from him; and upon *Non ſum informatus* entred, and Judgment upon default, he was taken in Execution, and upon this matter he prayed to be diſcharged out of Execution; upon which it was demurred, It was adjudged without argument for the Defendant, that it was not a ſufficient ſurmiſe for to diſcharge him; for that in ſuch Caſes he ought to bring his Writ of Deceipt againſt the Attorney, and not to relieve himſelf by *Audita Querela*. Mich. 22 Car. in C. B. *Alleley* and *Coily's* Caſe, *Cro.* 2 Part. 694.

8. Sir *Chriſtopher Hilliard*, Executor of Sir *Chriſtopher Hilliard*, brought Debt againſt R. Son and Heir of *Redare*, and recovered by default in C. B. Error was brought and aſſigned, becauſe there wanted a Warrant of Attorney for the Plaintiff. Upon *Certiorari*, the Warrant of Attorney was certified in this manner, *ſcil. Chriſtopher Hilliard Miles poſuit loco ſuo J. S. Attornatum ſuum verſus Joh. Redare.* It was moved, It was not a ſufficient Warrant of Attorney, becauſe he is not named Executor. It was the Opinion of the Court, that it ſhould be amended, becauſe there is not any other Action depending, and the Judgment was affirmed. Mich. 4 Jac. in B. R. Sir *Chriſtopher Hilliard* and *Redare's* Caſe. *Cro.* 2 Part. 135.

9. In Debt, Judgment was given againſt the principall, whereupon a *Scire facias* iſſued forth againſt th. Bail, and Judgment upon *Nihil dicit* was given againſt them: Whereupon Error was brought and aſſigned, That there was no Warrant of Attorney filed for the Plaintiff, and Whether it may now be filed or no, was the Queſtion. In this Caſe, theſe differences were put: 1. Where it appears there was a Warrant of Attorney, and where not? If there was not any Warrant of Attorney, there the Court cannot order the making of one; but if there be one, they might order the filing of it. 2. Difference, Where the Warrant is wanting on the part of the Defendant, and where on the part of the Plaintiff: If it be of the part of the Plaintiff, ſuch a Warrant ſhall not be granted, becauſe he ſhall not take advantage of his own wrong. 3. Where the Record by the Laches of the Plaintiff in the Writ of Error is not certified in due time, there the Warrant of Attorney ſhall be filed: And in this Caſe, It was holden by *Banks* Chief Juſtice, That in the principal Caſe the ſame was not holpen by the Statute of 18 Eliz. for that helps the Warrant of Attorney after Verdict only, and not upon *Nihil dicit*, as this Caſe is, or upon Wager of Law, or upon Confeſſion, or *Non ſum Informatus*. And the Court ſaid, It ſhould be a miſchievous Caſe, if Attorneys ſhould be ſuffered to file their Warrants of Attorney when they pleaſed. See Mich. 17 Car. in C. B. *Marſh.* 121, 122. *Farburn* and *Crate's* Caſe, *Marſh.* 123.

10. Judgment was given for J. againſt L. in an Action brought in C. B. L. brought Error & aſſigned for Error, That he was an Enfant at the time of the Action brought againſt him, and that he appeared by Attorney whereas he ought to appear by Guardian or Prochein amy. The Defendant pleaded in avoydance of the Writ of Error, that there was no Warrant of Attorney; the Plaintiff *allegando* ſhewed the Error before, and the Defendant pleaded *In nullo eſt erratum*, and the Judgment was reverſed: But the Opinion of the Court was, That the better way for the Plaintiff had been to have demurred in Law; for there being no Warrant of Attorney, there was no appearance at all. Paſch. 15 Car. in B. R. *Lewes* and *Jones* Caſe. *Marſh.* 24.

11. F. brought an Action upon the Caſe againſt V. and declared, That the Defendant brought an Action againſt him at the ſuit of H. and without his privity, and thereupon did arreſt and impriſon the Plaintiff, by reaſon whereof all his Creditors came upon him, and thereby that he loſt his Credit. Upon Iſſue joyned, It was found for the Plaintiff, and Error brought and Errors aſſigned, 1. That the Action will not lye, becauſe in truth there was a juſt Debt due to H. in whoſe name he ſued. 2. Becauſe it is not ſhewed, That the other cauſes of Actions which the other Creditors had againſt him did ariſe within the Juriſdiction of the Court where the firſt Action was: But notwithſtanding theſe pretended Errors, the Judgment was affirmed. and that upon this difference; Where H. himſelf ſueth, or commenceth ſuit againſt the Plain-

tiff, there, although by that ſuit he draw all the Creditors upon the back of him, and ſo perhaps undo him, yet becauſe it was a lawful Action, there no Action upon the Caſe lyeth: But when one commenceth ſuit againſt another without his privity, that is Maynetnance, which is a tortious Act, and therefore an Action will lye; and therefore in the principal Caſe, it was adjudged, That the Action did well lye, and was well brought. Trin. 15 Car. in B.R. *Thurſton* and *Summers* Caſe, *Moſh.* 47, 48.

12. A man was Outlawed for Murder, and dyed. His Adminiſtrator brought a Writ of Error to reverſe the Outlawry, and it was prayed that he might appear by Attorney: It was the Opinion of the Juſtices, that they might; for they ſaid, The reaſon wherefore the party was bound to appear in proper perſon, was, that he may ſtand *Rotlus in Curia*, and that he may anſwer to the matter *in fait*, which reaſon fails in this Caſe; and therefore the Opinion of the Court was, that the Adminiſtrator might appear by Attorney, and to that purpoſe he gave a Warrant of Attorney to appear accordingly. Trin. 17 Car. in B.R. *Moſh.* 113.

13. Note, It was holden in B. R. That after a Writ of Error granted, a Warrant of Attorney cannot be filed if the party be alive, who made the Warrant; but otherwiſe if he be dead. Trin. 16 Car. B.R. *Moſh.* 95.

14. In Treſpaſs upon the new Aſſignment the Treſpaſs was alledged to be in a houſe called the Entry, and a houſe called the Kitchin, and in his Garden, and a Cloſe called a Court: The Defendant, to all but the Entry, pleaded Not Guilty; and to the Entry, as to the Court, Kitchin, and Tenements of the new Aſſignment, he pleaded that he had brought an Action againſt a Woman for a Treſpaſs, and recovered; and had Execution directed to the Sheriff of S. and thereupon a Warrant was directed to four Bayliffs to arreſt the Woman and two of them at M. in the ſaid County of S. arreſted her, and carryed her to the Plaintiff's houſe in M. being a Common Inn; and the Defendant entred into the ſaid houſe called the Entry, and Kitchin, and the Tenements of the new Aſſignment, to ſpeak to the Bayliffs, and to warn them to keep her ſafe, and ſo ſoon as he could be returned: Upon which the Plaintiff did demurr, for that the Warrant was to all four, and not *conjunctim & diviſim*, and therefore it ſhould have been executed by them all, and not by two of them only: But it was Reſolved by the Court, That when a Sheriff makes ſuch a Warrant which is for the Execution of Juſtice, that may be by any of them, for that it is *pro bono publico*; and ſo it was ſaid. It was adjudged. 45 Eliz. in the King and *Hobbs* Caſe. M. 11 Car. in C. B. *Lofthirooks* Caſe. *Hutton*, 127. See *Hobbs* Caſe, in *Yelverton*, 45.

15. In an Action upon the Caſe, The Plaintiff declared, that W. P. Senior, and W. P. Junior were indebted to him by ſeverall Contracts, and that he procured a *Latitat* out of the Kings Bench, directed to the Sheriff of S. to arreſt them, & that the Sheriff made a Warrant to J. S. and others to arreſt them, who by vertue thereof arreſt W. P. Junior, and that the Defendants reſcued him. The Defendants pleaded Not Guilty: It was found by a ſpecial Verdict, viz. 1. They found the Debt due to the Plaintiff, the proſecuting of the Latitat for this cauſe, the making of the Warrant thereupon to the Sheriff; and 2. Further they found, That the ſaid W. P. and to J. S. Senior, and that he ſued a Latitat againſt him, who made alſo a Warrant to the ſame Bayliff to arreſt him at the ſuit of the ſaid J. S. Senior, and that it was directed to them *conjunctim & diviſim*, and that they were all known Bayliffs; and that upon 8. *Junii*, 12 Jac. in the Night, they entred into the houſe of R. M. Senior, the Door being open, and W. P. being there preſent, the ſaid J. S. Junior layed his hands upon him, and then, having both the Warrants in his Pocket, ſaid to him, Here I do arreſt you by vertue of a Warrant that I have; but he did not ſhew unto him the Warrant, nor had it in his hand, nor told him at whoſe ſuit he arreſted him, and that W. P. did not demand to ſee the Warrant, nor at whoſe ſuit he was arreſted, and that the Defendants reſcued him from the Bayliffs, *Et ſi &c.* In this caſe, It was Reſolved (amongſt other things), that this Arreſt, without ſhewing the Warrant, and without telling at whoſe ſuit untill the other demanded, was legall; and that he nedd not to ſhew the Warrant untill the other objected and demanded it, *Cook* 8 Part, *Mackally's* Caſe, acc. 2. That this Arreſt, without having the Warrant, and having both Warrants about him, was well enough although he did not ſhew by vertue of which of the Warrants he arreſted him; for he being under the Bayliffs Arreſt is in Cuſtody for all Cauſes for which the Sheriff had made his Warrants againſt him. See *Cook* 5 Part. 81. *Gamon's* Caſe, acc. Trin. 6 Jac. in B.R. *Hodges* and *Mark's* Caſe, *Cro.* 2 Part. 485, 486.

16. Note, There is a difference between a Warrant of Record, and a Warrant or Authority in Law; for if a *Capias* be awarded to the Sheriff to arreſt a man for Felony, although the party be innocent, yet cannot he make Reſcous. But if the Sheriff will by the Authority which the Law giveth him arreſt a Man for Felony, which is Not Guilty, he may Reſcous himſelf. *Cook* 1 Part, *Inſtit.* 161.

Warren.

1. TRespaſs for 30 Hares and 300 Coneys hunted in his Warren, taken, and carried away, which Treſpaſs was layed with *Continuando* from ſuch a time to ſuch a time; The Defendant juſtified, becauſe he had Common in the place where to a Meſſuage ſix Yard-land for 140 Sheep, and that he, and all thoſe whoſe eſtate he hath, time out of mind, had uſed ſuch a time as the Common was ſurcharged with Coneys, to hunt them, kill them, and carry them away, as to his Meſſuage appertaining; upon which the Plaintiff did demurr in Law, becauſe a man cannot make ſuch a Preſcription in a Free Warren, and Freehold of another man. 2. Becauſe a man cannot ſo preſcribe to hunt, kill, and carry away his Coneys, as appertaining to his Meſſuage; but a man may preſcribe to have ſo many Coneys to ſpend in his houſe. In the principall Caſe, The Preſcription was holden by the Court to be a void Preſcription, and Judgment was for the Plaintiff. Hill. 9 Jac. in B. R. *Sanſo d and Hovels* Caſe. *Godb.* 184.

2. Treſpaſs for killing his Maſtive Dogg at E. in Com. K. The Defendant pleaded, That J. S. was ſeiſed in Fee of a Warren in D. in the ſaid County, whereof he was then Warrenter, and that the Dogg was diverſe times killing Coneys there, and that he finding him there *tempore quo* killed him, *abſque hoc* that he was guilty at E. It was the Opinion of the Court, That the matter of Juſtification was good, becauſe it being alledged that the Dogg uſed to be there killing of Coneys, it is a good Cauſe for killing him in ſalvation of his Coneys, for having uſed to hunt the Warren he cannot otherwayes be reſtrained. Trin. 2 Jac. in B. R. *Wallwyn* and *Dannets* Caſe. *Cro.* 2 Part, 44. 55.

3. Note, It was Reſolved by the Juſtices, That if one hath Warren by Charter in all his Manour, that he may erect a Lodg and make Coney-berries in any part of the Manour at his pleaſure. Paſch. 5 Jac. in B. R. in the Caſe of *Leiceſter* Forreſt. *Cro.* 2 Part, 155.

4. Treſpaſs, *Quare clauſum fregit, aut unam liberam warrennam* of the Plaintiff *intravit*, and took and carried away Coneys: The Defendant juſtified, for that he was ſeiſed of a Meſſuage and Land, and had Common by Preſcription to it in the place where, and that he was ready to uſe his Common, and many Coneys being there Damage Feaſants, and ſpoyling the Graſs, he entred and chaſed them out leaſt they ſhould encreaſe: Upon which the Plaintiff demurred. In this Caſe, at the firſt motion, the Court was of Opinion againſt the Plaintiff, That a Commoner might deſtroy Coneys for that they are *feræ naturæ*: But afterwards upon better conſideration, and upon view of a Preſident in this Court, Paſch. 44 Eliz. between *Bulkley* and *Langden*; and for that the Commoner hath nothing to do with the Land, and becauſe as the Lord may have great Beaſts there, ſo he may have Beaſts of Warren, and the Commoner cannot deſtroy them; and becauſe the Entry of the Defendant was tortious, it appearing by his own Plea that his intent of Entry was to chaſe the Coneys, all the Judges upon better advice adjudged for the Plaintiff, and Judgment was entred accordingly. Paſch. 5 Jac. in B. R. *Haſleſden* and *Gryſſill's* Caſe, *Cro.* 2 Part, 195. See Mich. 10 Jac. in B. R. *Carroll* and *Park* and *Baker's* Caſe. *Baſſr.* 2 Part, 15.

5. In an Action of Waſte, the Plaintiff declared, That he had leaſed to the Defendant a Manour and a Warren, and that he had deſtroyed a Coney-borough, and ſubverted it, and aſſigned other Waſts in cutting down of Thorps, &c. It was ſaid, That the Action of Waſt would well lye; for it was ſaid, That a Warren conſiſted of two things, Of a place of game, and of a Liberty; and to prove that Waſte did lye for a Liberty, the Statute of *Magna Charta*, Cap. 5. in which a Warren is intended, and the Statute of *Marlebridg*, Cap. 24. and the Statute of *Articuli ſuper Chartas*, Cap. 18. by which Statute it is evident that Waſte lyes for Warrens; and a Warren is more than a Liberty, for that a Writ lyes, *Quare Warrennam ſuam intravit*. And by 12 H. 8. if Leſſee of a Warren doth break the Pale, it is Waſte. To all which the Court agreed except to the principall, for the Court held it was not Waſte to deſtroy Coney-boroughs; for Waſte will not lye for Coneys, becauſe a man hath not an Inheritance in them, and a man cannot have any property in them but only poſſeſſion; and although by a ſpecial Law, Keepers are to preſerve the Land they keep in the ſame plight they found it, yet this doth not bind any Leſſee of Land: It was ſaid, That the Subverſion of Coney-boroughs was not Waſte; for it was uſual to have Waſte againſt thoſe who made holes in Land, but not againſt thoſe who ſtop them up becauſe thereby the Land is made better. Trin. 41 Eliz. in C. B. *May's* and *Mynſ's* Caſe. *Owen.* 66.

6. Note, In an Action of Treſpaſs, It was ſaid by *Cook*, Chief Juſtice, That when a man

Claims

claims a Warren *infrà omnes terras Dominicales*, that he cannot extend this unto the Lands of Freeholders; for when one claims a Warren by Charter, he cannot enlarge this beyond the Charter, but he ought to take the ſame as it is expreſſed in the Charter, and not otherwiſe: But it is otherwiſe where he claims the Warren by Preſcription, to which difference the whole Court agreed. Mich. 12 Jac. in B.R. *Fowler* and *Seagrave*'s Caſe. *Bulſtr.* 2 Part, 254.

7. Note, It is ſaid in *Cook* 11 Part, in the Caſe of Monopolies, That no man ever made a Park, Chaſe, or Warren, without the King's Licence; for that were *quodam modo* to appropriate thoſe things which were *feræ Naturæ*, & *nullius in bonis* to himſelf, and to reſtrein them of their naturall Liberty, which he cannot do without the Kings Licence: But for Hawking, Hunting, &c. which are matters of Paſtime and Recreation, there there needeth nor any Licence, but every man may in his own Land uſe them without reſtraint to be made if it be not by Parliament.

8. Note, It was ſaid, That it is not lawfull for the Tenant for Life of the Land, to kill the Coneys of him who hath a Free Warren in the Ground; for where a man brought an Action of Treſpaſs, *Quare Warrandi ſuâ intravit, & Cuniculos ſuos cepit &c.* It is no Plea, That it is his Free-hold, & ſee L. 5. f. 4. Treſpaſs, *Quare clauſum fregit, & Cuniculos ſuos cepit &c.* The Defendant ſaid, That the Plaintiff made a Leaſe at Will to ſuch a man of the Land, and that he as Servant did kill the Coneys: And it was holden to be no Plea, and yet it is there ſaid, That by the grant of the Lands, the Coneys do not paſs; and therefore in the principall Caſe, It was Reſolved and Adjudged, That where a Commoner claimed Common of Paſture for his Sheep in ſuch a Heath and Lands of the Lord, in which was a Coney borough, and the Coneys eat up the graſs, that the Commoner could not juſtify the killing of the Coneys. Hill. 29 Eliz. in B. R. *Coneys* Caſe. *Godbolt.* 122, 123.

Waſte.

Where it lyeth, and for whom, and against whom, and for what: Where and in what Waſte may be done and committed: In what Caſes it lay at the Common Law, and in what Caſes it now lyeth ſince the Statute of Glouceſter; *and who may puniſh Waſte, who not.*

1. LEſſee for Life, and he in the Reverſion joyned in a Leaſe by Indenture for years; the Leſſee for life dyed, the Leſſee for years committed Waſte; he in the Reverſion brought an Action of Waſte, ſuppoſing that the Leaſe was *ex diviſione ſua propriâ*, without ſetting forth the eſpeciall matter: It was the Opinion of the Court, that although it was but the Confirmation of him in the Reverſion during the life of the firſt Leſſee, yet now by the death of the firſt Leſſee, it became in Law to be the diviſion of him in the Reverſion; and ſo the Action maintainable. Mich. 7 Eliz. *Dyer*, 234. *Newdigate* and the Lady *Haſtings* Caſe.

2. Leſſee for years, the Reverſion in Fee to J. S. the Leſſee granted all his Term and Intereſt to A.B. reſerving and excepting all Trees growing and being in and upon the Premiſſes; the Leſſee committed Waſte and Deſtruction in the Trees, and J.S. brought Waſte againſt the Aſſignee, and, If it did lye was the Queſtion: In which Caſe, it was debated whether the Exception and Reſervation by the Leſſee was good; and thereupon diverſe Caſes were put to ſhew what Intereſt the Leſſe and Leſſee had in the Trees: But to prove the Reſervation to be void, this was layed for a ground, viz. That thing which a man cannot grant he cannot reſerve, and the Leſſee cannot grant the Trees, therefore he cannot reſerve them. The Court was divided in the matter of Law, two of the Judges being againſt two other of them: But for default of pleading on the Defendant's part, afterwards Judgment was given for the Plaintiff. Paſch. 29 Eliz. in C.B. *Goldsbr.* 63.

3. The

3. Tenant for life, the Remainder for life, the Remainder in Fee; Tenant for life committed Waſte in cutting down of Trees: It was Reſolved in this Caſe, That after the death or ſurrender of the Tenant for life in the Remainder, that he in the Remainder in Fee ſhould have an Action of Waſte againſt the Tenant for life; for the Waſte was to his diſinheritance, and *remota impedimenta energit actio.* 2. It was Reſolved in that Caſe, That when a Tree is ſevered, that the ſame doth belong to him in the Remainder. Mich. 35 Eliz. in C.B. *Cook* 8 Part, 76. *Page's* Caſe.

4. See before in the Title of Waiver, *Diviſo 12 Sell.* 5. Hill. 19 Jac. in B.R. *Berry* and *Heards* Caſe, to this diviſion.

5. In Waſte, the Plaintiff declared upon a Leaſe for years, the Remainder to D. B. for life without impeachment of Waſte, the Remainder to G. B. in Tail; for that the ſaid D. B. is dead, and that the Tenant had committed Waſte in cutting down divers Oaks to his diſinheritance: Upon *Nul waſte* pleaded, the Jury found all the matter in the Declaration, and that the Tenant had committed Waſte in the life time of him who is now dead: It was the Opinion of the Court, That the Plaintiff ſhould recover, and that there is not any variance betwixt the Declaration and the Eſtate found; for he committing Waſte in the Caſe of Tenant for life, when he dyes, he in the Remainder may have the Action; for although in the life of the Tenant for life, the Termor by his aſſent might have done Waſte, and he had not been puniſhable afterwards; yet when he is dead, he who complained the Waſte hath done it to the diſinheritance of him in the Remainder, and it is all one as if it had been done after the death of the Tenant for life. Trin. 21 Jac. in B. R. *Bray* and Sir *Paul Treſyes* Caſe. *Cro.* 2 Par. 618.

6. The Grantee by Fine of the Reverſion ſhall not have an Action of Waſte againſt the Tenant before the Tenant doth attorn, 49 E. 3. 3, 4 H. 7. 13. 13 H. 7. 27. by *Vavaſour*. But if the Reverſion eſcheat to the Lord, and Waſte be committed by the Tenant, in ſuch Caſe he ſhall have an Action of Waſte without Attornment. See *Br. Attornment*, 186. And ſo if one deviſeth a Reverſion to one in Fee; if Waſte be committed by the Tenant, the Deviſee in ſuch Caſe ſhall have and maintain an Action of Waſte without Attornment, 5 H. 7. 19. acc.

7. Note, That regularly none ſhall have an Action of Waſte, but he who hath an Eſtate in Fee ſimple or elſe in Fee tail: But yet it hath been holden, That a Parſon of a Church or a Prebendary, for Waſte done upon their Glebe upon Leaſes made by them, may have and maintain Waſte, and yet (ſome ſay) that they have not the Fee-ſimple of their Glebe or Lands in themſelves alone. See 10 H. 7. 5.

8. If two Coparceners be, and they leaſe their Lands to one for life, and Waſte is committed, and then one of them dyeth: In ſuch Caſe, the Aunt and the Niece may joyn in an Action of Waſte for the Waſte done before; and yet in ſuch Caſe the Niece ſhall not recover any damages for the Waſte done, but only the place waſted, and they ſhall hold the ſame in Coparcenary. See 35 H. 6. 23. 41 E. 3 9. 48 E. 3. 15. acc.

9. Sir *Roger Lewkner*, ſeiſed of the Manner of W. leaſed the ſame to A. for years, and dyed, having Iſſue only three Daughters: The Daughters married three Husbands, and had Iſſue by them; A. aſſigned his Intereſt in the ſaid Manner to B. C. D. and E; B. C. and D. aſſigned their Intereſt to J. S. and E. aſſigned his Intereſt to F. excepting the Woods and the Underwoods. One of the Daughters having Iſſue dyed, living her Husband: The two ſurviving Siſters and their Husbands, the Term being expired, brought an Action of Waſte, leaving out the Husband of the third Siſter, who was Tenant by the Courteſy, againſt J. S. and E. who *tenuerunt*. Diverſe Exceptions were taken to the Writ; one was, for that the Writ is *tenuerunt*, which ſhall be intended *prima facie conjunctim tenuerunt*, and in the Declaration it appeareth, That one of the Defendants is Aſſignee of three parts of the Land demiſed, and the other Defendant of the fourth part, and ſo *ſeparatim tenuerunt*; but that Exception was diſallowed, becauſe originally it was one and entire demiſed Intereſt and Eſtate, and ſo remaineth as to the Plaintiffs, although it be divided by the Leſſee himſelf; another Exception was, becauſe it appears here upon the Plaintiffs ſhewing, That they had all taken Husbands, and all had Iſſue, and that one of the Daughters is dead, living her Husband, who is not named in the Writ, for which cauſe the Writ ought to abate: But that Exception was diſallowed alſo; for as this Caſe is, There is not any reaſon that Tenant by the Courteſy ſhould joyn in this Action, for no Judgment ſhall be given here, that the Plaintiffs ſhall recover the place waſted; for the Term is expired as it appears by the words of the Writ, viz. *quas tenuerunt*, and the Tenant by the Courteſy is in poſſeſſion; and where Tenant by the Courteſy and the Heir joyn in an Action of Waſte, the Tenant for life ſhall have *locum vaſtatum*, and the Heir the Damages. See Mich. 29 Eliz. in C. B. Sir *Roger Lewkner* and *Fina's* Caſe. *Leonard* 48, 49.

10. If

10. If Tenant in Dower or Tenant by the Courteſy grant over their Eſtates, yet the privity or Contract remaineth betwixt the Heir and them, and he ſhall have an Action of Waſte for Waſte done by them after the Aſſignment: But if the Heir granteth over the Reverſion, the *privity* of the Action is deſtroyed, and the Grantee cannot have an Action of Waſte, but only againſt the Aſſignee; for between them is privity in Eſtate, and between the Grantee and the Tenant in Dower, or the Tenant by the Courteſy is no privity at all. *Cook* 3 Part, 230 in *Walker's* Caſe.

11. The Dean and Chapter in *Worceſter* ſeiſed of the Mannor of H. in the Right of the Church, wherein was a Copyholder for life, rendring the Rent of 8 *l.* 8 *d.* quarterly; where the Cuſtom was, that a Leaſe might be made for three lives of the Copyhold: The ſaid Dean and Chapter demiſed the ſaid Lands to a Copyholder, for the lives of A. B. and C. and the ſurvivor of them: It was Objected, That this Leaſe was void by the Statute of 13 Eliz. becauſe in this Caſe it might happen, that there might be an Occupant who ſhall not be ſubject to Waſte, no more than Tenant by Statute Merchant, Tenant by Elegit, who come in by the Law without demiſe. But it was Reſolved in this Caſe amongſt other Points, If the Caſe ſhould happen ſo to be, that an Occupant ſhall be puniſhed for Waſte, and an Action will lye againſt him for Waſte done, becauſe he hath the Eſtate of the Leſſee for *life*, and the Statute of *Glouceſter* giveth the Action againſt him who holds in any manner for life; but Tenant by Statute Merchant, Staple, and Elegit, do not hold for life or years, and therefore they are out of the ſaid Statute. Trin. 3 Jac. in B. R. *Cook* 6 Part, 37. The Dean and Chapter of *Worceſter's* Caſe.

12. Note, If Tenant in Dower grant over her Eſtate, yet for Waſte done the Action ſhall be brought againſt the Tenant in Dower, and Damages ſhall be recovered againſt her; and if in this Caſe, to ouſte and take away the Charge of Tenant in Dower, he in the Reverſion by his Deed, doth confirm her Eſtate to have and to hold for the Term of her life, and dyeth, and afterwards ſhe granteth over her Eſtate; and for Waſte done by the Aſſignee the Heir bringeth an Action of Waſte againſt the Tenant in Dower, who pleadeth the Confirmation made to her to have and hold the Land for the Term of her life: In this caſe, Notwithſtanding this Confirmation, the Action of Waſte ſhall be maintainable againſt her; for the Confirmation doth not enlarge her Eſtate, and therefore cannot take away this diſcendable Quality to the Heirs, to have an Action of Waſte againſt her after her Aſſignment made of her Eſtate, *Cook* 9 Part, 142. in *Beaumont's* Caſe.

If a man deviſeth Land to one and his Heirs during the life of J. S. or if Tenant for life granteth his Eſtate to one and his Heirs: In theſe Caſes the Leſſee or Grantee hath an Eſtate of Freehold deſcendable, but no Eſtate of Inheritance; for he ſhall be puniſhed for Waſte, and he in the Remainder or Reverſion ſhall enter for a forfeiture by him, and an Heir in ſuch Caſe ſhall not have his Age; for he in ſuch Caſe in a manner is but a ſpeciall Occupant, and an Occupant ſhall be charged for Waſte. *Cook* 10 Part, 98. in *Ld. Symon's* Caſe.

13. If the Gardian doth commit Waſte, and the Heir within Age bringeth an Action of Waſte, the Gardian ſhall loſe the Wardſhip: But if the Heir bringeth an Action of Waſte againſt the Gardian at his full age, the Heir in that Caſe ſhall recover treble damages; for when the Law at his full Age of 21 years takes away from him his advantage of the forfeiture of the Wardſhip; in lieu thereof it giveth the Heir the treble damages, becauſe otherwiſe, the Gardian might do him wrong and make him no recompence for it, for that then the Gardian cannot loſe the Wardſhip. *Cook* 1 Part, *Inſtitutes* 54.

14. After the Statute of 27 H. 8. of Uſes, a man made a Feoffment in Fee to the uſe of himſelf for the Term of his life, and after his death to the Uſe of J. S. and his Heirs: The Feoffee committed Waſte, and J. S. brought his Action of Waſte; and if his Writ ſhould be generall or ſpeciall was the Queſtion, upon a Demurrer. It was the Opinion of the Juſtices in this Caſe, That in this Caſe the Plaintiff ought to have a ſpeciall Writ, and ſo it was adjudged. Hill. 3 Car. in C. B. *Foſſam's* Caſe. *Hetley* 79.

15. Note, It was holden by the Juſtices, That the eradicating of White-thorns is Waſte: But in *ſuccidendo & vendendo* no Waſte, unleſs it be layed that they grew in Paſture for defence of the Caſtell, and were of the greateſt of Timber. Trin. 4 Jac. in C. B. *Cook* 2 Part, 126.

16. The Mayor and Citizens of *London* covenanted to find eight men to grind every day in *Bridewell Mill*, which they left to the Defendant; and agreed, That if they failed therein, the Defendant ſhould receive ſo much out of the Rent: The Defendant pulled down the Corn-Mill, and made it an Horſe-Mill, and would not deduct ſo much out of the rent, as he ought to be allowed for the 8 men: It was agreed by the whole Court in this Caſe, That by the alteration of the Mill in this manner, the Leſſors were diſcharged of their Covenant: And alſo that this Converſion was Waſte, although that it was for the advantage of the Leſ-

ſee:

ers: And ſo it is to convert a Corn-mill to a Fulling-mill. Trin. 5 Jac. in C.B. Rot. 1607. The City of *London* and *Greyes* Caſe. *Cro.* 2 Part, 182.

17. Tenant for years may cut down Trees to amend the Houſes &c. and to do Reparations; but if the Houſes do decay by the default of the Tenant, if he cut down Trees to amend it, it is Waſte. 7 H. 6. 38. acc.

18. Cutting down of dead Wood is not Waſte; and if a man doth cut down Wood to burn where he hath ſufficient other dead Wood, he ſhall be puniſhed for it in Waſte. 20 E. 3. tit. *Waſte*, 32. acc.

19. It is not Waſte to ſuffer Lands to lye forth, and not to manure them, or to ſuffer them to grow full of Thorns, &c. So it is not Waſte to fell ſeaſonable Wood, which is uſed to be felled every twenty years, or within that time: But if a man fells Timber-Trees without authority or Licence, it is Waſte; and if after he ſuffer the Germins upon the Roots of the Trees to be again newly deſtroyed, the ſame is a double Waſte. See 7 H. 6. 38. 40 E. 3. 25. 9 H. 6. 66. 22 H. 6. 12. acc.

20. A man leaſed his Lands for years, excepting the Woods, and afterwards the Leſſor granted the Woods to the Leſſee; and, If the Woods were ſo united to the Term again, that by Leaſe of the Land the Woods did paſs as a thing annexed to it; or, If the Woods remained as an Intereſt diſtinct and ſeverall from the Lands, was the Queſtion. In this Caſe theſe Points were Reſolved, 1. That the Leſſee for life or years hath a ſpeciall Intereſt or Property in the Trees, as things annexed to the Land ſo long as they are annexed to the Land: But if the Leſſor or other ſeverech them from the Land, the Property and Intereſt of the Leſſee is determined, and the Leſſee may take them as things annexed to his Inheritance. 2. That if a houſe falleth down by Tempeſt, or other Act of God, the Leſſee hath a ſpeciall Intereſt to take the Timber to re-build the houſe again; but if the Leſſee pulleth down the houſe, the Leſſor may take the Timber as parcell of the Inheritance, and the Intereſt of the Leſſee is determined. 3. That if Trees, being Timber, are overthrown by wind, the Leſſee ſhall have them, and not the Tenant for life or years; but if they be Dotards, though there be ſome Timber in them, the Leſſee ſhall have them. 4. Reſolved, That Waſte may be committed in Glaſs annexed to the Windows, becauſe it is parcell of the houſe, and ſhall deſcend with the houſe to the Heir. 5. That Glaſs, Wainſcot, annexed and faſtned to the Houſe or Windows by Nails, or by Screws, or Irons put through the Poſts, or in any other manner, by the Leſſee or Leſſee cannot be removed by the Leſſee, but by the grantee of the Houſe they ſhall paſs. *Cook* 4 Part, 63. 64 *Holdenden's* Caſe.

21. Leſſee for years opened a Coal-myne, and afterwards aſſigned over all his Intereſt in the lands, and all Profits excepting the Profit in the Coal-mine: The Aſſignee digged in the Coal-myne, and the Leſſor brought an Action of Waſte; and in that Caſe theſe Points were Reſolved: 1. That if a man hath Land, in part of which is a Coal-myne, and he leaſeth the Land for life or years, the Leſſee may digg in it; for it ſhall be intended, that he ſhall take all the profits of the Lands: But if the Myne be not open, there by Leaſe of the Land, the Leſſee cannot make and open Myne, for that ſhall be Waſte. 2. That if a man hath a Myne which is hid in the Land, and leaſeth the Land and all Mynes in it, that the Leſſee there may digg; but if the Leaſe be not with ſuch Clauſe [and all Mynes], and the Leſſee opens a Myne, and afterwards granteth over his Eſtate, yet it is Waſte in the firſt Leſſee. 3. Reſolved, That the Myne was open in the former Caſe, yet if the Grantee digg-eth in it, it is Waſte. 4. It was Reſolved, That in the principall Caſe the Exception was void, for that a man cannot except a thing which doth not belong unto him; and that by Exception of the Myne, the Land it ſelf is excepted; and further in the principall Caſe, It was Reſolved, That the Leſſee could not appropriate the Myne to himſelf, and ſubject himſelf only to Waſte and treble Damages; for the Leſſee by his own wrong ſhall not deveſt the Intereſt in the Myne out of the Leſſor. *Cook* 5 Part, 12. *Saunders* Caſe.

22. A man made a Feoffment in Fee of a Manor, to the uſe of himſelf, and his wife, and his heirs: In the Manor were Underwoods uſually to be cut every 21. years; the Husband ſuffered the Woods to grow to 25. years, and, If the Wife being Tenant for life might cut that Underwood, was the Queſtion: In this Caſe, It was holden by the Juſtices, That a Tenant for life might cut down all Underwood which had uſually been cut within 20. years: But in Wood-Countries they may fell ſeaſonable Wood, which is called *Sylva cedua*, at 16. 18. or 20. years, by the Cuſtome of the Country; and ſo the Uſage in ſeverall Countries makes the Law. But they agreed, That the cutting down of Oaks of 8. or 10. years growth was Waſte; but the cutting of Hornbeams, Hazels, Willows, Sallows, &c. of the age of 40. was no Waſte, becauſe at no time they would be Timber. Then Queſtion was further moved, If this ſuffering of the Husband of it to grow to 25. years during the Coverture ſhould bind the Wife: It was the

Opinion of the Juſtices, That this permiſſion of the Husband ſhould bind the Wife, ſo that the Wife could not fell the Woods, notwithſtanding that at the time of her Eſtate ſhe might; and becauſe the Law hath appointed a time, which, if it be not felled before ſuch time by a Termor, or a Tenant for life, if felled, it ſhall be Waſte. Hill. 23 Eliz. in C.B. *Godbolt.* 4 & 5.

23. One had certain Minerall Lands leaſed to him for years, with liberty to digg and make her profit of the Mynes: The Leſſee afterwards digged for Myne, and ſold the Gravel which came of it. It was the opinion of the whole Court in this caſe, that the Sale was no Waſte if the firſt Act be not Waſte, as the Sale of Trees by Tenant for life or years is not Waſte, if the cutting or felling down of them was not Waſte before; for the Vendition is but a ſubſequent Act to the Act precedent, which Act if it was lawfull, the Sale alſo is lawfull, for the Sale alone is not Waſte: But they ſaid, That if a Leſſee fell and cut Timber Trees, and ſell them, it is Waſte, *non quia vendebat ſed quia ſcindebat*; for if he ſuffereth them to lye upon the ground without doing more with them, yet it is Waſte; but he may uſe them for the Reparations of his Houſe, and then it is no Waſte; but if he ſells them with an intent to repaire and afterwards ſells them, it is Waſte, *Non propter vendicionem* only, but for the felling: But it was holden in the principall Caſe, Becauſe he might digg the Land, the ſubſequent Act could not be unlawful. Mich. 27 Eliz. in C.B. *Godbolt.* 28, 29.

24. In Waſte the Plaintiff declared, That the Leſſee had committed Waſte and Deſtruction in uncovering of a Barn by which the Timber thereof was become rotten, and in the deſtroying of the Stocks of Elms, Aſhes, White-thorn, and Black-thorn, to his Damages of 300 l. and for Title ſhewed, that his Father was ſeiſed of Land where &c. in Fee, and leaſed the ſame to the Defendant for 21. years, and dyed, and that the Land diſcended to him as Son and Heir, and that the Waſte was done in his time, and that the Leaſe is now expired. In this Caſe, amongſt other things, It was Reſolved, 1. That the eradicating of White-thorn is Waſte, but not of Black-thorn, according to 46 E. 3. and 9 H. 6. But if the Black-thorn groweth in a Hedge, and the whole Hedge be deſtroyed, the ſame is Waſte. 2. Reſolved, That it is not Waſte to cut Quick-ſet Hedges, but it ſhall be accounted rather good Husbandry, for that they will grow the better. 3. That if a man hath Underwoods of Hazel, Willows, Thorns, if he uſeth to cut them and ſell them every ten years, if the Leſſee fell them, the ſame is no Waſte; but if he diggeth them up by the Roots, or ſuffereth the Germines to be bitten, ſo as they will not grow again, the ſame is a deſtruction of the Inheritance, and Waſte will lye: But if he moweth up the Stocks with a Wood-Sythe (as he did in the principal Caſe) the ſame was adjudged to be a malicious Waſte. Mich. 11 Jac. in C.B. Sir *John Gage* and *Smiths* Caſe. *Godbolt.* 209.

25. Note, That Regularly, when the Reverſion is deveſted, the Leſſor cannot have an Action of Waſte: But yet in ſome ſpeciall Caſes an Action of Waſte will lye and ſhall be maintainable, although that the Leſſor hath nothing in the Reverſion at the time of the Waſte done or committed: And therefore if Tenant for life maketh a Feoffment in Fee upon Condition, and Waſte is committed and done, and then the Tenant for life doth re-enter for the Condition broken: In that Caſe, the Leſſor ſhall have and maintain an Action of Waſte; and ſo it is, If Leſſee for life be diſſeiſed, and then Waſte is done, and afterwards the Leſſee doth re-enter upon the Diſſeiſor: In ſuch Caſe an Action of Waſte will lye, and ſhall be maintainable againſt the Leſſee. *Cook* 1 Part, *Inſtitutes*, 356. acc.

26. It is Waſte to ſuffer a Wall of the Sea to be in decay, ſo as by the flowing and re-flowing of the Sea, the Meadow or Marſh be drowned, whereby the ſame becomes unprofitable: But yet, if it be ſurrounded ſuddenly by the rage and violence of the Sea, occaſioned by Wind, Tempeſt, or the like, without default of the Tenant, this is no Waſte puniſhable, becauſe it cannot be imputed to the Tenant's neglect or default. *Cook* 1 Part, *Inſtitutes*, 53.

27. Note, It was ſaid, That an Action of Waſte did lye againſt a Gardian in Knight's Service for the taking of Fiſh out of a Pool belonging to the Heir, and that by the Statute of *Magna Charta.* Set to that 5 R. 3. Waſte, 97. But Quære, If it lyes againſt a Termor, or a Gardian in Socage upon an Accompt for Fiſh. See Mich. 37 Eliz. in B.R. Rot. 25. *Gregs* Caſe. *Owen*, 20.

28. An Action of Waſte was brought by the Lord *Darcy* againſt *Askwith*, for cutting down and ſelling of diverſe Oaks in ſeveral Cloſes in *Swillington* and *Preſton*: The Defendant pleaded a leaſe of the Manner of *Swillington* to him for years and alſo of the Mynes, and juſtified the ſhowding of the Trees to make Punchons, Poles, Stakes, and other Utenſils in and about certain Pits called Coal-Mynes in one of the ſaid Cloſes, without which the Defendant could not digg and take the Coals out of the Pits, and averred the employment of them about the ſaid Coal-Myne, and juſtified the cutting down of other Trees, for the making of Inſtruments for the extracting of the water out of the ſaid Pits, and

and that without which he could not digg any Coals, and that they were neceſſary for the digging of the Coals, and for the ſupporting of of the ſaid Pits, and did averr the employment accordingly: It was the Opinion of the whole Court, in this Caſe, That the Plea was not good; for the digging of a Mynt is the impairing of the Inheritance, and a great benefit to the Leſſee: And it was ſaid, That if Leſſee for years build a new houſe, if he cut Trees of the ſame Lands for the making of it, it is Waſte, 17 E. 2. *Fitzh. tit. Waſte*, 118. acc. and no more then one may make a Brick-kill and burn Brick, or a Lime-Kiln and burn Lime, with Wood growing upon the ground, and ſell the Brick and Lime; no more may the Defendant in this Caſe cut down Wood for the making and ſupporting of thoſe Mynts for Coals which they ſell: It was adjudged for the Plaintiff. Trin. 15 Jac. in C. B. The Lord *Darcy* and *Aſkwiths* Caſe. *Hutton* 19. See *Hobart* Reports, the ſame Caſe.

29. It ſeemeth *by Cook* 5. Part, 32. That Waſte lieth againſt an Executor: But *Quare*, If againſt an Executor of an Executor. For ſee 38 E. 3. 17. Waſte was brought againſt one as Executor; The Defendant pleaded, That the Teſtator made A. Executor, who died, and made him his Executor; and becauſe the Writ was brought againſt the Defendant as Executor, the Writ did abate.

30. The Commitee of the King of a Ward committed Waſte in the Ward's Lands, and afterwards he tendred a Marriage to the Heir, which he refuſed to accept of, and married himſelf elſe-where, and afterwards the Waſte was found by Enqueſt of Office; and afterwards the Commitee brought a Writ of Forfeiture of the Marriage againſt the Heir: It was the Opinion of the Juſtices, That the Writ did lye; For that by the Waſte done by the Commitee only, the Commitee was to loſe only the Cuſtody of the Land; and not of the Body of the Heir, and that by the expreſſe words of the Statute. *Hill.* 29 *H.* 8. *Dyer* 25. So if the Eſchetors do commit Waſte in the Lands which they have in their Cuſtodies; The Heir within age, or of full age, ſhall have an Action of Waſte, and ſhall recover Damages againſt them, and they ſhall ſuffer Impriſonment for two years at the leaſt at the Kings pleaſure, and ſo if they do commit Waſte in other Lands ſeized into the Kings hands by Enqueſt of Office. See the Statute 36 E. 3. *Cap.* 13.

2. *The Form of the Writ, Where it ſhall be in the* Tenet, *Where in the* Tenuit; *And where one Writ ſhall be maintainable upon ſeveral Leſſees, et è contra.*

1. THe form of the Writ of Waſte againſt Tenant in Dower doth vary from the form againſt other Tenants: For in that Writ, he doth not recite the Statute of *Glouceſter*, which gave the Writ of Waſte, nor in the Writ of Waſte againſt the Gardian, becauſe they were puniſhable at the Common Law by prohibition, and attaint thereupon if they did Waſte. And ſee Temp. E 9. *Fitz. Waſt.* 132. At the Common Law an Action of Waſte lay againſt them as well as a Prohibition. But in a Writ of Waſte againſt Tenant for life or years, the Statute of *Glouceſter* muſt be recited. See, If a man make a Leaſe to J. S. his Heirs and Aſſigns, for the term of his Life, and for a year over: If he doth commit Waſte, the Writ ſhall be brought againſt him as Tenant for life only. See 39 E. 3. 25. acc.

2. The Biſhop of *Carliel* brought a Writ of Waſte, and the Writ was *ad Exhæredationem Epiſcopi*: It was doubted, if it were well brought, or that it ought to have been *ad Exhæredationem Eccleſiæ*; But the better Opinion ſeemed to be, That it ought to be *ad Exhæredationem Eccleſiæ & non Epiſcopi*, for that the Biſhop is ſeiſed of the Fee in the right of his Church; as the Prebendary is ſeiſed of the Land in the Right of his Prebend; and if he bring Waſte, the Writ muſt be *ad exhæredationem Prebendi*. *Quare*, becauſe the Regiſter varies in the Writ.

3. Leſſee for years deviſeth his Lands or Term to another, and maketh his Executors, and dyeth, the Executors do commit Waſte, and afterwards do aſſent to the deviſe. It was holden in this caſe, That although between the Executors and the Deviſee, it hath relation, and the Deviſee is in by the Deviſor; yet an Action of Waſte ſhall be maintainable againſt the Executors in the *Tenuit*; and ſo it is, If Grantee of a Term upon Condition doth commit Waſt, and afterwards the Grantor entereth for the Condition broken; The Action of Waſte ſhall be maintainable againſt the Grantee in the *Tenuit*. *Cook* 5. Part, 12. In *Saunder's* Caſe.

4. A woman who was Tenant for life took Husband, who committed Waſte, and then the woman dyed; It was adjudged in this Caſe, That an Action of Waſte did not ly againſt the Husband in the *Tenuit*, becauſe the Husband had not the Eſtate for Life in the Land, but the Wife had the Eſtate for Life, and the Husband had the Land but in the Right of his Wife, ſo as he was not within the Statute of *Glouceſter*. Mich. 39 *Eliz.* in C. B. *Cook* 5. Part, 75. *Cliſton's* Caſe.

5. Note; There is a great difference in bringing of the Action of Waſte in the *Tenet* and in the *Tenuit*: For in an Action of Waſte brought in the *Tenuit*, where Damages only are to be recovered, there the Action in the *Tenuit* is well brought, and accord. is a good Plea in it. But if an Action of Writ be brought againſt Leſſee for years in the *Tenet*, accord. is no Plea, *Cook* 6. Part, 44. in *Blake's* Caſe.

6. Note; It is put for a Rule, That in perſonal Actions the Plaintiff may comprehend ſeveral Wrongs, and ſeveral Cauſes of Action in one Action; and he may bring one Action of Waſte upon ſeveral Leaſes: For on the prohibition of Waſte at the Common Law againſt Tenant in Dower, Damages were only recovered, which was in the perſonalty. *Cook* 8. Part, 88. in *Bathmer's* Caſe.

7. In Error brought to Reverſe a Judgment in C. B, the Caſe was, Two Coparceners were of a Houſe, and one of them Lett her part to a Stranger, and the other Lett her part to a Stranger alſo, and then both Leaſes came to the hands of one Tenant; and then one of the Coparceners bargained and ſold the Reverſion to the other Coparcener: The Leſſee commited Waſte, by Letting the Houſe *Cadere*; and the Grantee of the Reverſion brought an Action of Waſte. And amongſt other Errors, It was aſſigned for Error, becauſe he brought but one Action of Waſte, although there were ſeveral Demiſes by ſeveral Actions, whereas he ought to have brought two ſeveral Actions; And whereas it is ſaid in *Fitzh. Na. Br.* 60. That a man may have one Action of Waſte, and declare upon ſeveral Leaſes, that is intented where the Leaſes be made by one perſon, and 22 *H.* 7. 39. was Vouched, Where it is agreed at the Juſtices, That if a man hold two Acres of J. S. by ſeveral Services, and dyeth without Heirs, the Lord ſhall not have one Writ of Eſcheat, but ought to have two ſeveral Writs. But it was the Opinion of *Popham* and *Gawdy* Juſtices, That the Writ was well brought; For although at the firſt the Leſſor were intituled to ſeveral Actions; yet by matter, *ex poſt facto*, the Action may be united; and therefore he ſaid, That in the Principal Caſe, he might have one Action of Waſte, and declared, *Ex aſſignatione*, And alſo *Ex dimiſſione*. Mich. 34 *Eliz.* in B. R. Rott. 472. *Wardſon's* Caſe, *Owen* 11.

8. A man made a Leaſe for years, to begin at a day to come, and before the day the Reverſion was granted over diverſe years afterwards; the Termor entred and committed Waſte, and the fourth Aſſignee of the Reverſion brought an Action of Waſte, and declared upon the Aſſignments and Tenures of every one of them, to whom the Reverſion of the Land came after the Leaſe; and it was holden to be good, although there was no Tenure before the Leaſe began. Mich. 4 *Eliz.* Dyer 206. See *Fitzh. Na. Br.* 57. acc.

9. B. and C. Joynt-tenants for years, A. granted his part to B: B. and C. make a Leaſe to W. for years, who is ouſted, and brings an *Ejectione firmæ*, and declares of a Demiſe made to him by B. and C. The Queſtion was, If W. ought to have brought two ſeveral Actions, for that B. was Tenant in Common with C: of the third Part: It was the Opinion of *Popham* and *Fenner* Juſtices, That the Writ and Declaration upon it was good, For Tenants in Common may joyn in an Action. And ſee 44 *E.* 3. 34. *Br. Waſt.* 78. One Writ of Waſte lyeth upon ſeveral Leaſes. But *Williams* and *Yelverton* Juſtices were of the Contrary Opinion, becauſe that the Action is in the realty: But it was agreed by them all, That it had been good policy for W. to have made a Leaſe to another, and then the Leſſee might have had one *Ejectione firmæ* well enough. For ſo it was adjudged in *Chapman* and *Hitts* Caſe. Mich. 3. Jac. in B. R. *Blackſpers* Caſe. *Noy* 13.

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3. *Barr in Waſt; And what ſhall be ſaid a good Barr to an Action of Waſte brought: What not.*

1. LEſſee of a Meadow Covenanted to repair the Banks, and the Banks were broken down by a ſudden Flood: It was objected, That he was bound to repair them by reaſon of his Covenant; but it was the Opinion of the Juſtices, That he ſhould have ſufficient time to repair them, becauſe the decay was great; and it was occaſioned by the act of God. See 40 *E.* 61. 12 *H.* 8. 1. Paſch. 29 *H.* 8. *Dyer* 33.

M. brought an Action of Waſte, and declared, That he Lett a Houſe and ſix Acres of Land, and ſix

ſix Acres of Wood to the Defendant who had committed Waſte, cutting and felling 20 Oaks in woods, *Sparſim* growing. The Defendant pleaded in bar for ten, That the houſe aforeſaid *in tempore quo, &c.* was in decay of Timber, for which cauſe he had beſtowed them in Reparations. And as to the other ten Oaks he pleaded, That they grew upon an Acre of Land of the Tenements aforeſaid, which ſometimes had bin arrable, and that he employed them *pro melioratione* of the Land: Upon which Plea the Plaintiff did demur. It was the Opinion of the Juſtices, That the Plea was not good. For if that he ſold them, and afterwards redeemed them, and beſtowed them in the Reparations, as the book is 5 E. 4. is. Yet the wrong by the ſale of them is not gone. Trin. 29 H. 8. *Dyer* 35. *Malverets* Caſe. See *Cook* 11. Part, 81. *Bowles* Caſe. *Cook* 11. Part, 18. in *Lyfords* Caſe.

3. A Leaſe was made of a houſe, and certain Land and Wood with it by Indenture. The Leſſee Covenanted to repair the houſe *in omnibus* at his own proper Coſts and Charges. Afterwards the houſe was decayed in the Ground-ſells, and the Leſſee cut down Trees growing upon the Lands, and imployed the ſame in the Reparations aforeſaid. The Leſſor brought an Action of Waſte for cutting down the Trees. The Defendant pleaded in bar, and juſtified by the Leaſe aforeſaid, and the Plaintiff would have charged the Defendant by his Replication by the ſaid Covenant. But it was the Opinion of the Court, That he could not ſo do in this Action of Waſte; but that he was put to bring his Action of Covenant againſt the Leſſee. And in that Caſe it was ſaid and agreed, That if the Leſſor be bounden by Covenant to repair a houſe, and he doth not do it, but the Leſſee cuts down Trees, and repairs it, that the ſame is juſtifiable in an Action of Waſte brought. Paſc. 3 Eliz. *Dyer*, 198.

4. The Leſſee of a Farm Covenanted in an Indenture of Leaſe to repair the houſing at his own Coſts and Charges ſo often as need ſhould require. Afterwards he took great Trees growing upon the Farm to repair the houſes, being decayed by age, and Tempeſts, and employed them in the Reparations: For which an Action of Waſte was brought againſt him. The Defendant pleaded the matter aforeſaid in bar, and the Plea was holden to be good; and the Plaintiff was put to his Action of Covenant. Trin. 14 Eliz. *Dyer*, 314. See before, Sect. 2.

5. An Action of Waſte was brought for cutting down of 10 Oaks in 80 Acres of Lands *Sparſim* growing. As to three of the Oaks, the Defendant pleaded and juſtified the cutting down of them, and pleaded further, That he had made ſix Poſts of them, and fixed them in the ſaid Tenements *ad ſeperandum ſeperalia Clauſa ibidem, &c.* without alledging the number of the Cloſes, and alſo he did not alledg that by Preſcription, there was ſuch an Incloſure there, nor that all the three Oaks were ſo employed; and for thoſe cauſes as for them, it was adjudged againſt the Defendant. For the ſeven reſidue of the Oaks, he juſtified, becauſe they were dry, hollow, and putrified in the top, not being ſufficient Timber for building. It was the Opinion of *Mounſon* and *Harper* Juſtices, That the Plea was inſufficient: but the Lord *Dyer* conceived, That the Plea amounted to that which is uſual in Preſidents, *ſcil.* that they were dead, and not bearing fruit, *atque folia in aſtate, nec exiſtens Maremium*, and that therefore the Juſtification was good. Paſc. 16 Eliz. *Dyer* 332.

6. Note, That in Waſte brought, the Waſte was aſſigned *in proſternendo unum murum Lignum*, and alſo *in permittendo unum coſtilum*, called a Brick Wall *penitus Cadere*, and alſo *in trumpando et diſtruendo aream Lignum* called Plaunches *et preſepia*, called Maungers of a certain Stable, without alledging that they were then fixed to the Land. It was the Opinion of the Court, That the ſame was not Waſte, and ſo it was ſued in the other Caſes before, becauſe it was not expreſly alledged, that they were Copid, or covered; for elſe it is not Waſte, as the Books of 44 E. 3. and 26 H. 6. are. Mich. 2. *Ma. Dyer*, 108.

7. In an Action of Waſte brought, amongſt divers other, the Waſte was aſſigned in breaking down of a Copper of Lead which was fixed to the ground by the Leſſee for years. The Defendant pleaded in bar, That the ſame was a Legacy given by the Leſſee; and that he with the aſſent of the Executors, took it down and removed it; the Plaintiff traverſed the Deviſe, upon which they were at Iſſue. It was the Opinion of the Court, That it was Waſte, which being confeſſed, Quære, if in that Caſe, the Plaintiff ſhall not have Judgement. Paſc. 10 Eliz. *Dyer*. The Lord *Abergavenny* and *Plamers* Caſe, 272.

More

More Waſte.

1. IN the Caſe of a Prohibition for Tythes of Willows, upon a ſurmiſe that they are of uſe as Timber in the ſaid County. It was holden by the Juſtices, That if Willows grow within the ſcite of an houſe, and the Tenant or Leſſee cutteth them, that is Waſte, and an Action of Waſte will lye againſt him for cutting of them down: And this is no good Plea in bar, to ſay that they were Willows, and not Timber-Trees. But yet in that Caſe it was holden, That if the Tenant or Leſſee cutteth them down, Tythes ſhould be paid for them. Hill. 15 Jac. in C. B. *Gaſſley* and *Pindars* Caſe. *Hob.* 219.

2. D. brought a *Quare Impedit* againſt K. Incumbent of the Church, and others: And upon a ſurmiſe made to the Court, that K. did fell Timber upon the Gleab, and upon the Lands of Copyholders holding of a Mannor parcel of the Reftory, the Court granted a Prohibition. Hill. 10 Jac. in B. R. *Drury* and *Kents* Caſe. *Hob.* 36.

3. M. brought Waſte againſt E. for Waſte done in a Meſſuage, Land, Meadow, Woods, &c. to him lett for years; and declared, That he was ſeiſed of the Meſſuage, Lands, &c. The Defendant pleaded, That the Meſſuage and Lands were parcel of the Mannor of C. which came to King *Henry* the 8th by the Statute of Diſſolution, and ſo to the Queen, who by her Letters Patents granted the ſame to R. H. in Fee, who conveyed the ſame to the Defendant in Fee, who re-granted the ſame to the Plaintiff and his Heirs as long as H. had Iſſue of his body; and that the Plaintiff entred and leaſed to the Defendant *prout* in the Declaration. And *in facto* ſaid, That H. dyed at D. without Iſſue of his body, 20. *Jan.* 3. (which was after the Writ of Waſte brought, and the very day of the Return of it), upon which the Plaintiff generally did demur, and had Judgment in C. B. upon which the Defendant brought Error in B. R. And in this Caſe, the Judgment was affirmed for defaults in the Defendants Plea. 1. Where the Plaintiff in the Action of Waſte declared of a Seiſin in Fee in himſelf, out of which the Leaſe to the Defendant is derived, which ought to be intended a pure and abſolute Fee, the Defendant did not diſcloſe any Eſtate in the Plaintiff, but a Fee determinable, which is another kind of Eſtate that the Plaintiff hath alledged, and therefore it was not good without a traverſe, for the Plea of the Defendant ought to confeſs, avoid, or traverſe the material point in the Declaration, which is the Seiſin in Fee. 2. The Plea is not good, becauſe he alledgeth the death of H. without Iſſue, 20. *Jan.* 3. and *non conſtat* what Jan. *anno.* 3. was, Whether the 20th of *January* before the Writ brought, or after, and that was material: for, If he dyed before the Writ brought, then he had nothing in the Reverſion at the time of the Writ brought, is a good plea for the Defendant, and if he dyed after the Writ brought, then he ought to alledg the death without Iſſue, pendant the Writ, by which the Plaintiff was but Tenant in tail, after poſſibility of Iſſue extinct. The Judgment was affirmed. Mich. 6 Jac. in B. R. *Ewr* and *Moiles* Caſe. *Yelverton* 140, 141.

4. A. ſeiſed of the Mannor of D. in Fee, Covenanted to ſtand ſeiſed thereof, to the uſe of himſelf and B. whom he intended to marry for the Term of their lives without impeachment of Waſte, and after their deceaſe to the uſe of their firſt Iſſue Male, and to the Heirs Males of ſuch Iſſue Male, and for want of ſuch Iſſue, to the uſe of the Heirs Males of the body of the ſaid A. and B. lawfully begotten; and for want of ſuch Iſſue, to the uſe of C. in tail, with divers Remainders over. They intermarry, and had Iſſue D. Afterwards A. dyed, without having any other Iſſue of the body of B. but the ſaid D: B. entred, and a Barn by the Wind was caſt down. B. took the Timber of the ſaid Barn, and converted it to his own uſe, and dyed. His Aſſignee brought an Action of Trover and Converſion againſt the Executors of B. for the ſaid Timber. In this Caſe, theſe points amongſt other were Reſolved. 1. That till Iſſue, A. and B. were ſeiſed of an Eſtate tail executed, *ſub modo*, untill the Birth of the Iſſue Male, and then they became Tenants for life, the Remainder to the Iſſue in tail, the Reverſion to the Heirs Males of A. and B. for the Eſtate for their lives was not abſolutely drowned, until they had Iſſue Male. 2. Reſolved, That the Eſtate of a Tenant in tail after poſſibility, &c. ought to be the Remainder of an Eſtate tail by the act of God. 3. That in this Caſe, B. ſhould have the priviledg of a Tenant in tail after poſſibility for the Inheritance which once was in her. 4. Reſolved, That if Tenant for life or years cut down Timber, or overthrow houſes, the Leſſor ſhall have the Timber, for that the Leſſee had not them but as things annexed to the Land; and therefore when they are ſevered from the Land, the property of them is in the Leſſor, and the Leſſee hath but a particular profit in them, but the Leſſor hath the general property, becauſe they are his Inheritance. 5. Reſolved, That if a houſe fal-

leth by wind in the time of Leſſee for life, or years, or of Tenant in Dower, or by the Curteſy, ſuch particular Tenants have a ſpecial property in the Timber, to rebuild the like houſe as the other was, for habitation; but ſuch particular Tenants cannot ſell the Timber, becauſe the general property is in the Leſſor. 6. Reſolved, That the privileg of [without impeachment of Waſte] is annexed to the privity of the Eſtate, for if he changeth his Eſtate, the privileg is gone. 7. Reſolved, That in the principal Caſe, B. by force of the ſaid clauſe (without impeachment of Waſte) had ſuch a power and privileg, that although that no Waſte was done, and although the houſe was overturned with the wind, that yet ſhe ſhould have the Timber, becauſe it was parcel of it, and when it is ſevered from the Land by the Act of [God, the Law, or party] the property of the Trees was in her by the clauſe [without impeachment of Waſte.] *Cook* 11. Part, *Lewis Bowles* Caſe.

5. Action of Waſte was brought againſt Huſband and Wife. After Iſſue joyned, the parties appeared at the *Niſi Prius*, and there a Verdict was given for the Plaintiff. At the day in Bank, it was moved, That the Wife might be received. It was denyed by the Court, which ſaid, It was a ſtrange motion. Trin. 14 Jac. in C. B. *Bilt* and *Hartleyes* Caſe. *Hob.* 177.

6. E. S. brought Waſte againſt *O.* and *El.* his Wife: And the Writ was, *de omnibus terris, &c.* is *L. de quibus E. S.* now deceaſed, was ſeized in his Demeſne as of Fee; and ſo being ſeiſed after 4. *Feb.* 27 H. 8. enfeoffed J. D. and others, to the uſe of the ſaid E. S. deceaſed, and the ſaid *El.* for the Term of their lives, and the longer liver of them. And after the deceaſe of the ſaid E. S. deceaſed, and *El.* to the uſe of the Heirs of the body of the ſaid E. S. deceaſed, begotten on the body of the ſaid *El.* Upon *Nul Waſte* pleaded, it being found for the Plaintiff, Exception was taken to the Writ, becauſe it did not lay the Feoffment to be to the Feoffees and their Heirs, without which there could be no Inheritance in *Ceſtuy que uſe*. The Court agreed, That it ought to be ſo: Yet becauſe ſeveral Preſidents were ſhewed, That ſince the making of the Statute, this form had bin uſed. 2. It was holden in this Caſe, That *El.* the Wife had but an Eſtate for life, and that the entail and Inheritance by the former limitation, reſted only in the Husband E. S. and that it was all one as if it had bin *heredibus E. S. de corpore ſuo, ſuper Corpus, &c.* Trin. 12 Jac. in C. B. *Skeat* and *Oxenbridges* Caſe. *Hob.* 84.

7. A man ſeiſed of a Meſſuage in ſuch a Pariſh in *London*, lett to the Plaintiff the Cellar of the ſaid houſe from Week to Week, at ſuch a Rent, ſo long as the parties ſhould pleaſe. The Defendant entred and was poſſeſſed, and the Defendant was poſſeſſed of a Warehouſe over the ſaid Cellar; and the Plaintiff having three Butts of Sack in the Cellar; The Defendant put ſuch a quantity and burthen of Merchandizes into the Warehouſe, that by the force and weight of the burthen, the floor thereof was broken, and fell into the Cellar upon the Plaintiffs Wines, that the Wines did fly out of the Veſſels, and became of no value. The Defendant ſaid, That the floor of the ſaid Warehouſe ſuſtained as great a burthen of Merchandizes as that was. And for want of Reparations by them to whom the Warehouſe did belong, it was ſo ruinous, that the poſts of the Cellar brake ſuddenly. It was Reſolved, That in this Caſe an Action upon the Caſe being brought in B. R. that the Action did lye. Whereupon Error was brought, and the Judgment affirmed; For that the Plaintiff had alledged that the floor brake by the weight of Merchandizes put upon it; and that it did bear weight before, is but an anſwer by argument. And in this Caſe, it was ſaid and agreed, That if a man taketh an Eſtate for life or years in a ruinous houſe, if he pull it down, he ſhall be charged in Waſte, ſo as there is a difference where the default is in the party, where not. And in the Principal Caſe the Defendant ought to have taken care, that he did not put upon ſuch a ruinous floor more then that it might well bear, and if it would not bear any thing, he ought not to put any thing upon it to the prejudice of a third perſon. Paſc. 36 Eliz. *Edwards* and *Hadiaders* Caſe. *Poph.* 46, 47. *Leon.* acc.

8. In Waſte, the Plaintiff declared, That A. was ſeiſed of the Land, and gave it to B. and C. his Wife, and to the Heirs of their two bodies (whoſe Heir the Plaintiff is). And that B. and C. his Wife made a Leaſe to the Defendant for 21 years, and that B. and C. were dead, and that the Plaintiff was Heir in tail, and that the Defendant had done Waſte. The Defendant pleaded, That the ſaid B. and C. did not demiſe: Upon which, being at Iſſue, The Jury found, That B. and C. by their Deed Indented, made the Leaſe *prout ut ſupra, &c.* and that B. dyed; and that after his death, C. entred and diſagreed to the Leaſe: And if the Iſſue was found for the Plaintiff, becauſe it is found that they both made the Leaſe; or for the Defendant, the diſagreement of the Wife being found. In this Caſe, it was adjudged for the Defendant: for by the diſagreement of the Wife in Judgment of Law, it was the Leaſe of the Husband only, and yet during the life of the Husband, it was the Leaſe of them both; but now by the diſagreement by matter *ex poſt facto*, it ſhall be intended *ab initio* the Leaſe of the Husband; and then the Action will not

entlye. Paſc. 28 Eliz. in C. B. *Tottford* and *Tottfords* Caſe. *Leon.* 204.

9. Error of a Judgment in C.B. in Waſte. The Error aſſigned was, That divers Waſtes being alledged, To ſome of them the Defendant pleaded *Nul waſte fait*: To others he pleaded juſtifiable Waſtes; and to a third he pleaded a plea in excuſe of the Waſte: upon theſe Pleas, Iſſues were joyned, and a *Venire facias* awarded, reciting the Iſſues, commanding the Jury to enquire, If the Defendant did commit the Waſte as the Plaintiff had declared. It was aſſigned for Error, becauſe they ought to have enquired of the ſeveral Iſſues, as they be joyned. But becauſe divers *Venire facias*'s were in this manner; and enquiry, If Waſte be made as the Plaintiff hath declared, implyes that they ſhall enquire according to the ſeveral Iſſues; The Court held it to be good enough, and no Error. Mich. 10 Car. in B. R. *Stencil ouſe* and *Corbets* Caſe. *Cro.* 1. Part, 277.

10. Error to reverſe a Judgment in C. B. in Waſte. The Error was, 1. Becauſe the Waſte being aſſigned in three houſes, two Gardens, &c. upon the Writ of Enquiry, Waſte was found in the houſes and Gardens, and entire damages found, whereas the damages ought to be found ſeveral for every of them; for if it were but of ſmall value for any of them, viz. to the value of 12 d. the Court would not adjudg it Waſte. But that Error was diſallowed by the Court, becauſe when the Sheriff and Jury have had the View, and find damages for the Waſte, it ſhall not be intended Petit damages in any. The ſecond Error was, Becauſe upon the Writ of Enquiry, 13 were returned to be ſworn, whereas there ought to be but 12, for this is not like other Writs of Enquiry, which are meer Enqueſts of Office; but here is a Verdict, and in the nature of a Verdict, upon which an Attaint lyeth. The Court conceived the ſame to be Error, and day given to ſhew cauſe why the Judgment ſhould not be reverſed. But yet afterwards it was holden, That it was good enough. Mich. 11 Car. in B.R. *King* and *Fitches* Caſe. *Cro.* 1. Part, 299.

11. In an Action of Waſte brought, the Caſe was, Lands were deviſed to the Father of the Defendant for life, and to his eldeſt Iſſue Male *de Corpore ſuo exeunt.* and in this Caſe, upon a Demurrer, it was adjudged, That by this Deviſe, no Eſtate paſſed, but an Eſtate for life unto the Father of the Defendant, the Remainder to his eldeſt Son for life, ſo as no Inheritance paſſed thereby, but an Eſtate puniſhable for Waſte. Trin. 27 Eliz. in C. B. *Leonard Lovelaces* Caſe. *Leon.* 2. Part, 35.

12. Note, it was ſaid, That the diviſion of a great Meadow into many parcels, is not Waſte, for the Meadow may be the better for it, and it is for the profit and eaſe of the Occupiers of it. And by *Windham* and *Rhodes* Juſtices, If a Termor converteth a Meadow into a Hop ground, the ſame is not Waſte, for it is imployed to a greater profit, and it may be Meadow again. *Periam* Juſtice, Though it be a greater profit, yet it is alſo with greater labour and Charges: And the Converſion of a Meadow in o an Orchard is Waſte, although it may be to the greater profit of the Occupier. Trin. 29 Eliz. in C. B. *Leon.* 2. Part, 174.

13. The Caſe was; N E. ſeiſed of the Manor of W. leaſed the ſame to *W. Vavaſor* and his Wife for the life of the Wife, the Remainder to the right Heirs of the Huſband. The Huſband made a Feoffment in Fee to the uſe of himſelf and his Wife for their lives, the Remainder to his right Heirs, the Huſband dyed; the Wife held in and committed Waſte in a Park parcel of the Manor. It was moved, If in the Writ of Waſte, the Writ ſhall ſuppoſe, that the Wife holdeth in, *Ex dimiſſa N. E.* or *ex dimiſſione viri.* It was the Opinion of the Juſtices, That it ſhould be neither way; but that the Writ ſhould be general, *ſcil. de hereditate* J. S. *hæredis, &c.* In that Caſe, the Waſte was aſſigned in a Park. It was ſaid, That Waſte cannot be aſſigned in the Deer, unleſs the Defendant hath deſtroyed all the Deer, to which *Dyer* Juſtice agreed. But if he doth deſtroy the Deer, ſo as the ground is become not Parkable, the ſame is Waſte, although he hath not deſtroyed the whole, by *Manwood* Juſtice. See 8 R. 2. *Fitz. Waſte* 97. If there be ſufficient ſtore left in the Park, Pond, &c. it is well enough, and no Waſte. Hill. 16 Eliz. in C. B. *Vavaſors* Caſe. *Leon.* 221.

13. Waſte brought by *Tindall* Knight againſt *Jeffery Cobb.* The Plaintiff declared upon Demiſe of the moyety of the Mannor of *Wolverton*, and of the moyety of a Wood called *Wolverton-Wood.* The Defendant pleaded, That before the Waſte ſuppoſed, J. S. was ſeiſed of, and *in tertia parte alterius Medietatis* of the ſaid Mannor, and of and *in tertia parte alterius Medietatis* of the ſaid Wood, and held the ſame *in ſimul et pro indiviſo* with the Plaintiff. And that the ſaid J. S. by his Deed ſold to the Defendant *omnes et omnimodas arbores et ſubboſcos ſua creſcent. in prædict. tertia parte alterius medietatis prædict. boſci ad libitum ipſius defendentis ſuccidend.* And ſo juſtified the cutting down of 300 Oaks, in which the Waſte is aſſigned, and did aver that the ſaid 300 Oaks were the third part only *in numero et precio medietatis omnium arborum et ſubboſcorum*, the ſaid time when the Waſte was ſuppoſed to be done. And demanded Judgment if Action. Divers Exceptions were taken to the Declaration. 1. Becauſe he ſheweth, That the Demiſe of the moyety of

of the Manor: was *per nomen*, &c. and doth not ſhew it was by writing, and if not, then he cannot plead it *per nomen*. 2. The Waſte is aſſigned in digging of Coles in 100 Acres of Lands, parcel *Mediatatis Manerii de Wolverton*, and doth not ſhew in what Town the Land is, for he hath ſhewed before, the Demiſe of the moyety of the Manor of *Wolverton* in *Wolverton*. 3. He ſhews the Demiſe of the Moyety of the Mannor of *Wolverton*, and of other Lands, and aſſigns the Waſte in cutting down Oaks *in quodam boſco vocat. Wolverton-wood, parcel. premiſſorum*, and that cannot be; for this Wood cannot be parcel of the Mannor of *Wolverton*, and of the other Lands alſo. And for theſe cauſes, It was holden by the whole Court, That the Declaration was inſufficient. Mich. 7 Eliz. in C. B. *Tindal* and *Cobbs* Caſe. *Leon.* 3. Part, acc.

14. The Caſe was, a Leaſe was made to A. for life, the Remainder to B. in tail, the Remainder to the right Heirs of B. who bargained and ſold all his Eſtate, and levied a Fine of it with proclamations to D: Afterwards A. committed Waſte. It was holden in this caſe by the whole Court, That D. ſhall not puniſh him in an Action of Waſte, for that nothing paſſeth to him but during the life of the Grantor; *ſcil.* as to the Remainder in tail, in reſpect of which eſtate, the Action of Waſte is only maintainable: For although that the Fee-ſimple paſſeth to the Grantee, or Conuſee, yet in reſpect of that, an Action of Waſte is not maintainable, untill the Eſtate tail be ſpent. Hill. 18 Eliz. in C. B. *Owen* and *Sadlers* Caſe. *Leon.* 3. Part, acc.

15. In Treſpaſſe, for cutting down of 4. Oaks in a Foreſt; The Defendant pleaded, That the place where was a Forreſt, and that he was ſeiſed of a Meſſuage in D; and that he and all thoſe whoſe eſtate he hath, &c. *habere conſueverant rationabile eſtoverium ſuum* for ſewell *ad Libitum ſuum capiend. in boſcis, ſubboſcis, et arboribus ibidem Creſcentibus*, and that in *Quolibet tempore anni*, unleſs in Fawning time. The Plaintiff by Replication ſaid, That the place where is in the Forreſt of D, &c. and that the Defendant, and all thoſe whoſe eſtate, &c. *habere conſueverunt rationabile eſtoverium ſuum de boſcis, &c. per Liberationem Forreſtarii, aut ejus Deputati, prout boſcus pati potuit, et non ad exigentiam petentis*: And upon that Replication, the Defendant did Demur in Law. It was the clear Opinion of the Court, That Judgment ſhould be given againſt the Plaintiff; For if he would have ouſted the Defendant of his Preſcription by the Law of the Forreſt, he ought to have ſhewed the Law of the Forreſt in ſuch caſe; *Lex Forreſtæ talis eſt, &c.* For the Law of the Forreſt, is not the Common-Law of the Land, and the Judges are not to take notice of it, but it ought to be pleaded: Or elſe the Plaintiff ought to have traverſed the Preſcription of the Defendant; for here are two Preſcriptions, one pleaded by the Defendant by way of Bar; the other ſet forth by the Plaintiff in his Replication, without any traverſe of that which is ſet forth in the Barr; which cannot be good. But if the Plaintiff had ſhewed in his Replication, *Lex Forreſtæ talis eſt, &c.* then the Preſcription of the Defendant had been anſwered without any more, for that none can preſcribe againſt a Statute. Then Exception was taken to the Barr, Becauſe the Defendant hath Juſtified the cutting down of Oaks, without alledging, that there was any Underwoods; but that was Over-ruled, for that he hath his choice at *Libitum ſuum, &c.* 2. Becauſe he hath not ſhewed, That at the time of the Cutting, it was not Fawning time; That by the Court was holden to be a material Exception: But becauſe the Plaintiff had replyed, and upon his Replication, the Defendant had demurred, the Court would not Reſort back to the Barr. But Judgment was given, That the Plaintiff *Nihil Capiat per Billam*. Mich. 30 Eliz. in C. B. *Ruſſel* and *Brookers* Caſe. *Leon.* 3. Part, acc.

16. In Waſte, the Plaintiff declared upon a Leaſe for years generally; and the truth of the Caſe was, That the Plaintiff had made a Leaſe for years to one A: which Leaſe being in force for two years, he Leaſed the ſame Lands for years, as he hath declared, to begin preſently: And the Waſte which is aſſigned in the Declaration, was done during the firſt Leaſe; And now, If the Defendant upon the matter might plead, No Waſte done, was the Queſtion? It was ſaid by the Court, That ſuch a Plea ſhould be perilous for the Defendant; for it ſhall be found againſt him: And if he pleadeth the ſpeciall matter aforeſaid, *ſcil.* the former Leaſe in *eſſe* at the time of the Waſte done; after the expiration of which Leaſe, no Waſte was done, If the ſecond Leaſe be not by Indenture, it ſhould be a good Plea: But if it be by Indenture, Then the Plaintiff would eſtopp him by the Indenture to ſay, That the ſecond Leaſe hath not any other beginning then what the Indenture imports, and then the Waſte ſhall charge the Defendant. Hill. 30 Eliz. in C. B. *Thorpe* and *Wingfields* Caſe. *Leon.* 3. Part, acc.

17. In an Action of Waſte brought, the Plaintiff in his Declaration conveyed a good Term to the Defendant, and a Reverſion to himſelf: And upon the general Iſſue, It was found by Verdict, That J. D. was ſeiſed of the Land in Fee, and 16 Eliz. made this Leaſe for divers years to J. S; and he being ſo ſeiſed of the Reverſion, conveyed

that to the uſe of himſelf for life, without impeachment of Waſte, and then to the uſe of his eldeſt ſon, and E. his Wife, and to the heirs of the body of the ſon upon the body of E. to be begotten; and then the ſon dyed, having iſſue in tail the Plaintiff, and then this Leaſe was aſſigned to the Defendant, and then the ſaid E. dyed; and then the Waſte was committed, and then J. D. the Grandfather dyed: And, If the Action of Waſte did lye or not, was the Queſtion? It was ſaid, That the Action did lye for the priviledg or the diſpenſation which was annexed to the Reverſion; for life of the Grandfather, is no diſpenſation to the eſtate of the Leſſee; for although the Action be ſuſpended during his life, yet now it is on foot again: and many Caſes were put, where an eſtate may be unpuniſhable of Waſte, and yet by matter *ex poſt facto*, ſhall be puniſhable: As in caſe a Leaſe for years be made without impeachment of Waſte, and then the Leſſor releaſes to the Leſſee, &c. the firſt Privity is gone, and he is now puniſhable in Waſte. And of this Opinion was the whole Court. And it was ſaid, That there was no difference where the Frankitenement is intercedent; for if this be not puniſhable, yet the particular Eſtate ſhall not participate of that priviledg of him in the Remainder. And whereas it was Objected, That the Plaintiff in his Declaration, had declared of a Waſte after the Eſtate for life determined, and the Jury find it was done in the time of him in the Reverſion for life: The Court ſaid, That was nothing to the purpoſe, for that is but variance of time, and not of the matter; for it is not materiall, Whether it was before his death or after, becauſe in both Caſes, it is puniſhable. Paſch. 22 Jac. in C. B. *Bray* and Sir *Paul Tracies* Caſe. *Winch.* 79 & 86.

18. Waſte for Cutting down of Elms and other Trees, Judgment was given for the Plaintiff by *Nihil dicit*, and a Writ of Enquiry of Damages iſſued, and the Jury found to the damage of 8 s. It was moved for a new Writ of Enquiry, and that the old might not be returned, for that the damages are too little. It was ſaid by the Court in this caſe, That if a man recover in Waſte by *Nihil dicit*, and a Writ of Enquiry iſſueth, In this Caſe, the Jury may Enquire of the damages, but not of the place waſted, for this is confeſſed. And *Hobart*, Chief Juſtice, ſaid, If the Defendant is bound by the *Nihil dicit*, as to the place waſted; for what cauſe ſhall he not be bound to the damages? And all the Court were of Opinion, That if the Jury find damages only to 8 s. the Plaintiff ſhall not have Judgment, for it ought to be above 40 s. And in this caſe it was ſaid, upon the grant of all Trees, and after the Grantee cuts them, and new grow upon the Stumps, which in time will be Trees, that in ſuch caſe, the Grantee ſhall have them. Paſch. 19 Jac. in C. B. Sir *George Topping* and *Kings* Caſe, *Winch.* 5.

19. A Recovery was had by default againſt Tenant in Dower, or Tenant by the Courteſie, in an Action of Waſte: In ſuch caſe, If a *Quod ei deforceat* lyeth by the Statute of *Weſt.* 2. *cap.* 4. is the Queſtion, becauſe that the Judgment is not given upon the default; for notwithſtanding the default, a Writ of Enquiry of the Waſte ſhall iſſue; and upon that, the Defendant may give Evidence, and the Jury find, that no Waſte was done: It was Reſolved in that Caſe, That the *Quod ei deforceat* doth lye, becauſe the default is the principal; and the awarding of the Writ of Enquiry is but an incident to it, and the Law reſpects the principal caſe, and upon ſuch Recovery, a Writ of Diſceit lyeth, and becauſe it is but an Enqueſt of Office, although it be taken upon the Oath of 12 men: and the place waſted being in the Realty, is more worthy then the damages; and alſo becauſe, If an Action be brought againſt two, in the *Tenuit*, there the Releaſe of one is a good barr againſt the other: but in an Action of Waſte by two in the *Tenet*, againſt Tenant for years or life, there the Releaſe of one ſhall not barr the other, becauſe there Summons and Severance lyeth. See *Cook* 1. Part, *Inſtitutes*, 384. acc.

20. Note, If Tenant by the Curteſy or Tenant in Dower, Grant over their Eſtates, and afterwards the Heir granteth the Reverſion, the Tenant in Dower, or by the Curteſy may Attorn; but Waſte doth not lye againſt them by the Grantee of the Reverſion; but in ſuch Caſe, Waſte lyeth againſt their Aſſigns, and Attornment by the Aſſignes, is good, becauſe they are Attendants to the Reverſion, and ſubject to Action of Waſte. *Cook* 1. Part, *Inſtitutes* 306.

VVay.

1. IN Treſpaſs, the Defendant did juſtify as Leſſee to the Lord *Mountague*, and ſaid, That the ſaid Lord, for him and his Fermors, had uſed to have a Way over the Land in which the Treſpaſs is ſuppoſed to be done, and that by rooting of a Cart Wheel, the Way was ſo digged and drowned with Water, that he could not uſe his Way as before, and that therefore he did fill up the Cart-Roots, and digged a Trench to let out the Water. Upon which the Plaintiff did demur in Law. It was ſaid in the behalf of the Defendant, That if Leſſee for years be of a Meadow, he may dig to avoid the Water, and may juſtify ſo doing in Waſte brought againſt him. To which it was anſwered, That in that Caſe the Leſſee hath an Intereſt in the ſoil, ſo hath not he who claims a Way only. It was the Opinion of the Juſtices, That he could not dig the Land. Then it was demanded for the Defendant, What remedy he ſhould have? To which, *Suit* Juſtice anſwered, If he went that Way before in his Shoes, let him now pluck on his boots. Alſo the Court held, That the pleading was not good; for he ſaith, he could not uſe his Way ſo well as he did before, which is not good, but he ought to plead that he could not uſe the Way at all. Mich. 29 Eliz. in B. R. *Dike* and *Dawſons* Caſe. *Godbolt*, 52.

2. In an Action upon the Caſe, the Plaintiff declared, That one M. was ſeiſed of a houſe in A. and that he and all thoſe whoſe Eſtate, &c. time out of mind, have had a Way over certain Lands of the Defendants called C. *pro quibuſdam averiis ſuis*; and that M. enfeoffed him of the ſaid houſe, and that the Defendant ſtopt up the ſaid Way to his damage, being found for the Plaintiff. In ſtay of Judgment, it was ſaid, That the Title to the Way was not ſet forth certainly; it is, *pro quibuſdam averiis ſuis: Quod omnes Juſtic. conteſſerunt.* Only *Gaudy* conceived, That the ſame was no cauſe to ſtay Judgment; for it appeareth to us, That the Plaintiff hath cauſe of Action, although the matter be incertainly alledged, and of this incertainty the Defendant hath loſt the advantage, having ſurceaſed his time, by pleading to it; and divers books were vouched by him, as 20 E. 3. Treſpaſs for taking and carrying away of Charters. The Defendant pleaded, Not Guilty. It was found for the Plaintiff to damage, &c. Error was brought, becauſe the Plaintiff had not ſet down in his Declaration the certainty of the Lands comprized in the Declaration. But *Non allocatur*, for that the Defendant ought to have challenged that before. Alſo 47 E. 3. 3. which ſee. But it was anſwered by *Fenner* Juſtice, That thoſe Caſes were not like the Caſe at Bar; for in the ſaid Caſes, the certainty is not needful, but here the certainty of the number of the Cattel is parcel of the Title. Mich. 33 Eliz. in B. R. *Martingall* and *Andrews* Caſe. *Leon.* 1. Part, 236.

3. Treſpaſs for breaking of his Cloſe, and ſpoiling of his Graſs. The Defendant pleaded, That in the Cloſe where, &c. there had bin time out of mind, a Footway for all the Kings liege people, *in per et trans* the ſaid Cloſe to ſuch a place, and that the Plaintiff ſuch a day ploughed up the Foot-Way, and ſowed the ſame with Corn, and layed Thorns at the ſide of it, and that within the ſaid Cloſe, near to the old Foot-Way, the Plaintiff before the Treſpaſs, left and aſſigned another Foot-Way for the people to go over this new Way; and that the Defendant *tempore quo* went over the Way ſo aſſigned to ſuch a place. Upon which the Plaintiff did demur. In this Caſe, it was adjudged againſt the Plaintiff, becauſe the Plaintiff did the firſt wrong in ſtopping up the old Way, and alſo had aſſigned this new Way for Paſſengers: wherefore contrary to his own agreement, he ſhould not puniſh the Defendant: And it was holden in this Caſe, That although that the Defendant pleaded generally, that the Plaintiff *aſſignavit viam*, and did not ſhew to whom, that is not material, becauſe what is common to all, cannot be aſſigned to any particular perſon. Mich. 6 Jac. in B. R. *Horn* and *Widlakes* Caſe. *Yelverton* 141.

4. In an Action upon the Caſe, the Plaintiff declared, That he was ſeiſed of a Meſſuage, &c. and that he and his Auncеſtors, and thoſe whoſe Eſtate, &c. had had a Way from his Meſſuage to ſuch a place, for him, his Servants, Fermors, &c. aſwell on Foot, as with Carts, and ſo back again. And that the Defendant had ſtope up the Way to his damage, &c. Upon Not Guilty, the Jury found the Way as the Plaintiff declared, but did not find the ſame to be appurtenant to the Meſſuage. It was the Opinion of the Court, That the Verdict had not found any thing againſt the Plaintiff, but that he ſhall recover. For the Plaintiff ſhall never in his Declaration lay the Way to be appendant or appurtenant, becauſe it is only an eaſe, and not an Intereſt. And all the Preſidents are according to the Declaration here, without laying the Way to be appendant or appurtenant. It was adjudged for the Plaintiff. Trin. 7 Jac. in B. R. *Godley* and *Frithe*

Frith's Case. *Yelverton* 159.

5. Treſpaſs for entring of the Plaintiffs Cloſe, called *Sandy Heath*, ſpoiling of his Graſs, Hunting, killing, and carrying away of his Conies. The Defendant to all the Treſpaſs, but entring into the Cloſe, and treading of his graſs, pleaded Not Guilty, upon which Iſſue was joyned: And as to the breaking of the Cloſe, the Plaintiff ſaid, That *William* Lord *Ruſſell*, and *Eliz.* his Wife, were ſeiſed in Fee in the right of *Eliz.* in a certain piece of Heath, containing 10 Acres *in S. contigue jacent.* to the Heath called *Sandy Heath*, and that they and all thoſe whoſe Eſtate they had, &c. in the ſaid piece of Heath, had uſed to have for them, their Fermors, &c. of the ſaid piece of Heath *Paſſagium uſque eandem peciam bruerre, et ab eadem pecia in per et trans* the ſaid Cloſe called *Sandy Heath*, *in quo, &c.* at all times at their pleaſures, to take the profits of the ſaid piece of Heath. And ſaid, That before the Treſpaſs, many Conies were in the ſaid piece of Heath, and divers Cony-holes there digged, and were there feeding and conſuming the Graſs, and that he as ſervant to the Lord *Ruſſell*, the time when, &c. went in and through the ſaid Cloſe on foot to the ſaid piece of Heath to hunt, and take the ſaid Conies in the ſaid piece of Heath, which is the ſame Treſpaſs, &c. and averred, That it was *propinquum Paſſagium*, that he could go to the ſaid piece of Heath, conteyning ten Acres. Upon which the Plaintiff did demur in Law. It was holden by the Court in this Caſe, That the plea in bar was not good; for that *Paſſagium* is properly a paſſage over the Water, and not over Land; and here the Defendant ought to have preſcribed in the Way, and not in the paſſage. 2. That the Preſcription is not good, becauſe it is not ſhewed *à quo loco ad quem locum*, the Paſſage or Way is; and although that a Way may be in groſs, yet it ought to be bounded and circumſcribed to ſome certain place, eſpecially when it appears to lye in uſage, time out of mind, &c. 3. The bar was not good, becauſe it is not ſhewed, what manner of paſſage it was, *ſcil.* a Foot, Horſe, or Cart Way, ſo as all was very incertain. And therefore Judgment was given for the Plaintiff. Mich. 7 Jac. in B. R. *Alban* and *Brounſall's* Caſe. *Yelv.* 163.

6. Treſpaſs for breaking his Cloſe, and cutting and caſting down a Gate. The Defendant juſtified, becauſe the Gate was placed croſs the High-way; and ſo fixed, that the Kings Subjects could not paſs without interruption by reaſon of the ſaid Gate; and therefore he pulled it up, cut, and caſt down the ſaid Gate to uſe the ſaid Way. The Plaintiff ſet forth, That he ſet up two poſts of each ſide of the Way, and hung the Gate upon one of the ſaid poſts for the preſervation of the Springs of the Woods there, from Cattel, ſo as the Subjects might paſs the ſaid Gate, without prejudice or impediment. And traverſed, That the Gate was ſo fixed and tyed, that the Kings Subjects could not paſs without Interruption by the Gate. Upon which the Defendant demurred in Law. The Queſtion was, Whether the Erecting of a Gate croſs an High-Way which may be open and ſhut at the pleaſure of the Paſſengers, be a common Nuſance in it ſelf in the Eye of Law. And 2. Admitting it be, If every one may pull up, and caſt down the Gate at their pleaſure. It was the Opinion of the Juſtices, 1. That the ſame was a Nuſance, for it is not ſo free and eaſy a paſſage as if no ſuch Incloſure had bin. 2. That admitting it to be a Nuſance, although that the uſual courſe is to redreſs it by Indictment, yet every perſon may remove the Nuſance. 3. That the cutting of the Gate was lawful. It was adjudged for the Defendant. And it was ſaid in this Caſe, That for ancient Gates upon High-wayes. It ſhall be intended, That they were by Licenſe from the King, and upon *Ad quod Damnum* ſued out of the Chancery. Paſc. 6 Car. in B. R. *James* and *Haywards* Caſe. *Cro.* 1. Part, 133.

7. Action upon the Caſe for diſturbance and uſing a Way. The Plaintiff ſhewed, That the Defendant was ſeiſed of Land over which the Way is, and by Indenture of Bargain and Sale, ſold the Land to J. S. in Fee with a Way over his Land, and that J. S. let the Land to the Plaintiff for years, and the Defendant did diſturb him. It was moved for ſtay of Judgment, becauſe he doth not ſhew the Deed of Leaſe, and becauſe a Way is pleaded of Lands without expreſs words of a Way. But for that point, the Court held the Declaration good, for when Land is Granted with a Way, it is *quaſi* appendant to it, and a thing of neceſſity, and therefore it paſſeth without being expreſſed in the Deed, and Land cannot be uſed without a Way. But upon View of the Record, It appeared, That there was not any grant of the Way in the Indenture, but only a Sale of the Land, and of a Way out of other Land, for nothing but the uſe paſſed by the Deed, and there cannot be an uſe of a thing which is not in *eſſe* as a Way common, &c. which are newly created, and no uſe paſſed by the Indenture until they were created. And of that Opinion was the whole Court, and for this cauſe, the Court was of Opinion, That the Plaintiff had not ſhewed any good Title, and therefore it was adjudged againſt the Plaintiff. Mich. 5 Jac. in B. R. *Beardley* and *Brooks* Caſe. *Cro.* 2. Part, 190.

8. In Treſpaſs upon a Demurrer, the Caſe was, One ſold Land, and afterwards the Vendee by reaſon thereof, claimed a Way over part of the Plain-

tiffs

this Land, there being no other convenient Way adjoyning. And if this was a lawfull claim, was the Queſtion. It was Reſolved, That the Way remained, and that he might well juſtify the uſing thereof, becauſe it is a thing of neceſſity, *Et è converſo* it was ſaid, That if a man hath four Cloſes lying together, and ſells three of them, reſerving the middle Cloſe, and hath not any Way thereto, but through one of the Cloſes which he ſold, although that he reſerved not a Way, yet he ſhould have it as reſerved to him by the Law. And there is not any extinguiſhment of a Way by having both Lands. It was adjudged for the Defendant. Paſc. 4 Jac. in B. R. *Clark* and *Coggs* Caſe. *Cro.* 2. Part, 170.

9. Note, That all Wayes which are not peculiar and proper to any Town certain, are called the Kings High-Wayes. But a common Way is, Where one Town hath a Way to go to their Church, in that, or in another Town; and every Nuſance done in ſuch common Way ſhall be puniſhed by an Action upon the Caſe, unleſs it be by the Tenant of the Land. See 27 H. 8. 27. acc. and 6 E. 3. 23. by *Paniager*.

10. In Treſpaſs, the Defendant juſtified for a Way appurtenant to his houſe in D. by Preſcription to go to 8 Acres of Wood in S. The Plaintiff ſaid, That after time of memory, J. N. was ſeiſed of the Land where the Defendant claimed the Way, and in the Wood alſo to which he claimed the Way. It was the better Opinion of the Court in that Caſe, That the Way was gone for ever, aſwel where there is unity of poſſeſſion of the Land and houſe to which he claimeth it. See 3 H. 6. 31. acc. But yet ſee 21 E. 3. 2. Where an Aſſiſe of Nuſance was brought for ſtrengthning of a Way which the Plaintiff ought to have to his Mill. The Defendant pleaded unity of poſſeſſion of the Lands and of the Mill in W. and demanded Judgment of the Writ. The Plaintiff ſaid, That after that, W. had two Daughters, and dyed ſeiſed, and that the Mill was allotted to one of them in Partition, and the Land to the other. And the Aſſiſe was awarded. And ſo by the Partition, the Way was revived, and appendant as it was before.

Wales.

1. NOte, That it was holden by the Court, That a *Fieri facias*, or a *Capias ad ſatisfaciendum*, or other Judicial proceſs, did not run into *Wales*. But it was agreed, That a *Capias utlagatum* did run into *Wales*, and *Brownlow* Prothonotary, ſaid, That he had known, That an extent had gone into *Wales*. Mich. 11 Jac. in C. B. *Godbolt* 214.

2. Judgment was given in Debt in the Great Seſſions in *Wales* againſt the Defendant inhabiting in one of thoſe Counties; the Defendant dyed Inteſtate: One who Inhabited in *London* took Letters of Adminiſtration. The Queſtion was, Whether any Execution might be into *Wales*, becauſe he neither Inhabites, nor hath any thing there; and if not, then, Whether the Record might be removed into the Chancery by *Certiorari*, and ſent by *Mittimus* into the Kings Bench, or Common-Pleas to the intent to take forth a *Scire facias* upon it, and to have Lands out of *Wales*, or goods in the hands of the Adminiſtrator lyable to it there. It was the Opinion of all the Judges and Barons, That it could not be; For he might not have a *Scire facias* in any Court, but where the Judgment is given: And if ſuch courſe ſhould be uſed, all Judgment in Inferiour Corporations, might be removed and executed here, which would be a great inconvenience to the Subjects. Wherefore the Court ſaid, That there was no remedy but to execute ſuch Judgment in their peculiar Juriſdictions. Paſc. 2 Car. in C. B. *Cro.* 1. Part, 23.

3. C. being Indict in the Grand Seſſions at *Angleſey* in *Wales* of Petit Treaſon; A *Certiorari* was prayed to have the Indictment removed, and to have it tryed in another adjoyning County. The Court doubted what to do in it: But upon Preſidents ſhewed, That a *Certiorari* had bin awarded in ſuch Caſes into *Wales* by reaſon of the Statute of 26 H. 8. which allows, that Indictments in Caſes of Felony may be enquired in the adjoyning Counties, and that in 32 Eliz. ſuch a *Certiorari* was granted upon debate. They awarded ſuch a *Certiorari*, and ſaid, That when the Record was removed, they would adviſe how it ſhould be tryed. But yet afterwards it was ſtayed, and appointed to be argued, Whether a *Certiorari* was Grantable. Mic. 9 Car. in B. R. *Chudleys* Caſe. *Cro.* 1. Part, 241.

4. An

4. An Appeal of Murder was brought by a Woman, and awarded to the Sheriff of *Salop*, being the next County adjoyning to that of *Montgomery* for the Murder of her Husband at *Montgomery* in the County of *Montgome-y*. Upon Not Guilty pleaded, being tryed by a Jury of the County of *Salop* at the bar, The Defendant was found Guilty. It was moved in Arrest of Judgment, that the Writ of Appeal ought to be brought in the County of *Montgomery* where the fact was committed, and not in any other County adjoyning. It was Resolved by the whole Court, That the Writ should abate, for that it was against a Fundamental Rule of Law, That a Tryal for Murder by appeal, or otherwise, shou'd be out of the County where it is committed. But the Statute of 26 H. 8. cap. 6. allows, That Indictments may be in Counties next adjoyning, but there is not any mention therein of Appeals. Wherefore all the Court Resolved, That this Writ of Appeal lyes not; and therefore adjudged for the Defendant. Hill. 5 Car. in B. R. *Soutley* and *Prices* Case. *Cro.* 1. Part, 179.

5. Error of a Judgment in *Wales* in a *Quod ei deforceat*. 1. Because the Writ being general, The Count is, That he deforced him of a Messuage, 20 Acres of Land, 30 Acres of Meadow, 40 Acres of Pasture, and 20 Acres *de Jampna & Bruera*, which ought to be certainly expressed how many of each, and the particular quantities and natures of them, which here is not done. But the Court held it well enough, for that *Jampna & Bruera* are not intended Lands of several natures, but one and the same Land whereupon Gorze and Furz are growing. 2. Error, That the Issue was not well joyned, because he pleads he had *majus jus tenendi tenementa prædict.* then the Plaintiff, but doth not say, *sibi et hæredibus. Sed non allocatur.* 3. Because the *Venire facias* had not 15 dayes betwixt the *Teste* and the Return, but was the next day after the *Teste*. *Sed non allocatur*, for that the Court said, That in *Wales* they have their process from day to day in one and the same Session. The Judgment was affirmed. Hill. 5 Car. in B. R. *Griffith* and *Jenkins* Case. *Cro.* 1. Part, 128.

6. Note, It was said by *Jones* Justice, That in some parts of *Wales* Tryals have bin by six Jurours only; but that is by reason of an Act of Parliament, 34 H. 8. which appoints such Tryals may be by six only where the Custome hath bin so. Otherwise when *Wales* was united to *England*, and to be governed by the Laws here, such Tryalls could not be unless they had bin so provided for by Parliament. The Principal Case was to reverse a Judgment in Error brought in *Cornwall*, where an Issue was tryed by six Jurors, which was said to be there *secundum Consuetudinem ibidem à tempore quo &c.* which the Court held to be a void Custome, and against Law, and for that cause the Judgment was reversed. Mich. 7 Car. in B. R. *Treasurer* and *Perrymans* Case. *Cro.* 1. Part, 188.

7. Error of a Judgment in the County of *Flint* in *Wales*. The Error was assigned in the matter in Law. The Case was: M. gave Land to *Ed. R.* and his Wife, *Habendum* to the said Husband and Wife, to the use of them and the Heirs of their two bodies; and for default of such Issue, to the use of J. S. and his Heirs, and Whether Husband and Wife had an Estate tail, or but for their lives, was the Question: and it was adjudged there for the then Plaintiffs, That it was an Estate tail which was assigned to be Error: For it was alledged, That the Estate out of which the use should rise, was but for their lives, and the use cannot make the Estate larger then the limitation. But the Court conceived, That there was a difference where an Estate is limited to one, and the use to a stranger, there the use shall not be more then the Estate out of which it is derived, but not when the limitation is to two, *Habendum* to them, to the use of the Heirs of their bodies; this is no limitation of the use, nor is the use to be executed by the Statute, but it is a limitation of the Estate to them, and the Heirs of their bodies, and they are in by the Common Law. And *Jones* Justice said, That so it had bin adjudged in *Wales* before this time. It was adjourned. Pasc. 6 Car. in B. R. *Jenkins* and *Youngs* Case. *Cro.* 1. Part, 167.

8. *Certiorari* was prayed to remove Indictments taken in *Wales* of Ryots; And it was granted by the Court, there being divers Presidents shewed to that purpose. And in that Case, it was said by *Dodd.* Justice, That if Debt be brought against one in *London*, and the Defendant afterwards removes and Inhabites in *Wales*, a *Capias ad satisfaciendum* may be awarded against him into *Wales*, or into any other County Palatine. And he said, That the Register makes mention of a *Certiorari* to remove a Record taken at *Collice*, Trin. 16 Jac. in B. R. Sir *John Curwens* Case. *Cro.* 2. Part, 414. See Mich. 10 Jac. in B. R. in *Hall* and *Rabbards* Case. *Bulstr.* 2. Part. 55. where two Witnesses were bail for one in B. R. and a Judgment was for the Plaintiff, and a *Capias ad satisfaciendum* was awarded into *Wales* against the Bail. And so, where an Action of Debt upon a Bond, the Action was layed in *Herefordshire*; and upon *Nihil dicit*, a Verdict and Judgment and Execution directed to a Sheriff of *Wales*, of the County of *Radnor*. The Sheriff returned, That *Breve Regis* there *non currit*: He was amerced for his ill Return 10 l. and adjudged, That the Execution awarded into *Wales*, was good. Mich. 11 Jac. in B. R. *Bois* and *Piper's* Case. *Bulstr.* 2. Part, 157. *Bois* will

Wills and *Teſtaments*.

what they are; What Perſons may make them; The ſeverall ſorts of them: Where, and what ſhall be a ſufficient will to paſſe Lands or Goods; And where Wills ſhall be void, and for what Cauſes: And of Revocation of it; where good, & e contra.

A Will or Teſtament is by moſt men taken to be *Voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri velit, cum Executoris inſtitutione*; which two are ſo Relative and Reciprocall, that the one cannot be without the other; for, if there be no Will, there is no Executor; and if no Executor, there is no Will. See *Plow.* Com. 185. in *Woodward* and *Dareyes* Caſe. But this muſt be intended of a Teſtament only which concerneth Goods and Legacies, and not of Lands; for Lands are not Teſtamentary, nor hath the Executor any thing to do or intermeddle therewith; but a Will of Lands may be good if it be in Writing, though no Executor be named; but this is by reaſon of an Act of Parliament enabling to diſpoſe Lands by Will in writing.

1. All Perſons, as well Males as Females, but ſuch as are prohibited by Law, may make Teſtaments, if they have not defect in their minds, or Underſtandings, Memories, &c. Mad-folks, Idiots, or thoſe of ſuch Quality, cannot make a Teſtament; no more can thoſe who are hindered by Deafneſs or Dumbneſs, unleſs it be in ſome ſpeciall Caſes: Alſo ſuch as are prohibited by Law, and have no Eſtate, or Ability; as Traytors, Felons Convict, Perſons Outlawed, &c. who have not any Goods or Property in them, cannot make Wills or Teſtaments. See the Caſes following. See Paſch. 4 Ma. *Dyer*, 143. acc.

2. A. Executor of J. S. brought an Accompt againſt B. as Receivor of the Moneys of the ſaid J. S. Upon *Ne unq;* Receivor pleaded: It was found for the Plaintiff, and Judgment given that he ſhould Accompt; and being in Cuſtody upon a *Capias ad Computandum*; he was found in Arrearages, and his Body taken in Execution. Afterwards the Will was made void in the Spiritual Court, becauſe that the ſaid J. S. was an Ideot *à Nativitate*, which was Certified by Writ into the Chancery, and from thence by Mittimus into the Kings Bench: B. thereupon brought an *Audita Querela*, ſetting forth all the ſaid matter upon which the Executor did demurr. Trin. 3 *Eliz.* *Dyer* 203. See *Cook* 8 Part, 143. in Dr. *Dravie's* Caſe: It was ſaid by *Cook*, That in 35 *H.* 8. It had been adjudged, That in that Caſe, the *Audita Querela* did well lye.

4. The Marqueſs of *Wincheſter*, as it was ſuppoſed by his Will in writing, deviſed diverſe Manors to his reputed Sons; and deviſed further, That diverſe Manors ſhould be ſold by them, and bequeathed diverſe Legacies and Plate to them. This Will was endeavoured to be proved in the Prerogative Court; and becauſe it appeared by Circumſtances, That the Marqueſs was not of *ſane memoria* at the time of the making of the ſuppoſed Will; It was moved in the Kings Bench to have a Prohibition; and the reaſon was, becauſe a Will concerning Lands, and a Will concerning Goods were mixt together; and if they ſhould proceed there concerning the Goods, the ſame would prevent the Tryal in B. R, where a Will of Land ſhall be tryed; and therefore a prohibition in that Caſe was generally awarded. 2. It was Reſolved in that Caſe, When the Teſtator, when he makes his Will, he ought to be of a Memory not only to anſwer to ordinary and familiar Queſtions; but he ought to have a diſpoſing Memory, ſo as he is able to make a Diſpoſition of his Lands with Underſtanding and Reaſon, and that is ſuch a Memory which the Law calls *ſane memoria*. Trin. 31 *Eliz.* in B. R. *Cook* 6 Part, 23. The Marqueſs of *Wincheſter's* Caſe.

5. If Debt be brought againſt an Executor, and he pleadeth, That his Teſta or was, and dyed Outlawed; It was holden in that Caſe, That this doth not prove a Nullity of the Will, for then he might have pleaded, That he was never Executor; but it tends only to this, That no Goods did come to his Hands for ſatisfaction of the Teſtators Debts, by reaſon of the Outlawry. See 49 *E.* 3. 5. 29 *Aſſ.* 63. 33 *H.* 6. 27. acc. and yet it hath been lately holden, That Debts upon Contract, where the Defendant might wage his Law, are not forfeited by Outlawry, no more then uncertain damages for Treſpaſſe in Battery, falſe Impriſonment, &c. 16 *E.* 4. 7. See *Cook* 2 Part, 95. contrary in *Slade's* Caſe.

6. A man took Notes of a Will of one who lay Sick, and afterwards he drew up the Will in writing;

writing; but before he ſhewed the perſon to him who was Sick, he dyed. Yet it was the Opinion of the whole Court, That the ſame was a good Will within the Statute of 32 *H.8.* to convey Socage Land. Trin. *6 E.6. Dyer* 72. So was it adjudged in 4 & 5 *Eliz.* in *Hinton*'s Caſe, Where Articles were read to the Deviſor concerning the diſpoſition of his Lands, and the Articles were written and engroſſed after his Death; and yet it was a good Will within the ſaid Statute of 32 *H.* 8.

7. A man intended Land to J. S. for Life, the Remainder to J. D; and before the Remainder was written, the Deviſor dyed: It was the Opinion of the Court, That the ſame was a void Deviſe for the whole Lands within the Statute of 32 *H.* 8. becauſe that the one did depend upon the other. But in that Caſe, It was holden, That if a man ſeiſed of two Acres, intends one of them to J. S, and the other to J. D; and the Deviſe to one is written, but the Deviſor dyeth before the Deviſe of the other Acre to the other is written; It is a good Deviſe for the Acre which is written, and not for the other Acre. Trin. 11. Jac. in C. B. *Caſar* and *Lake*'s Caſe adjudged accordingly.

8. In a Replevin upon Evidence given, the Caſe was this, J. W. was ſeiſed of the Lands in Queſtion, and of diverſe other Lands, and by his laſt Will deviſed all his Lands and Tenements to A. W. of *London* in Fee, and after and before his Death he made a Feoffment in Fee of the ſame Lands which he had deviſed to the ſaid A; and when he ſealed the Feoffment, he demanded and ſaid, Will not this hurt my Will? To which it was anſwered, That it would not: And he ſaid, If this will not hurt my Will, I will ſeal it, and then he ſealed it, and a Letter of Attorney to make Livery: The Attorney made Livery in ſome of the Lands, but not in the Lands in Queſtion; afterwards the Teſtator dyed. It was ſaid, That the Feoffment was a Revocation; For if the Teſtator had ſaid, That this ſhall not be his Will; then it had been a plain Revocation, and then the making of the Feoffment is as much as to ſay, That the Will ſhall not ſtand. But it was anſwered, and Reſolved by the whole Court, That it appeared, That the mind of the Teſtator was, That his Will ſhould ſtand, and when he made the Feoffment, this was a Revocation in Law; and here is no Revocation in Deed. For he ſaid, If this will not hurt my Will, I will ſeal it; and although that the Attorney made Livery in part, ſo as the Feoffment was perfect in part: yet for the Lands in Queſtion, whereof no Livery was made, the Will ſhall ſtand: For a Will may be effectual for part, and for part it may be revoked; and the Court told the Jury, That this was their Opinion, and the Jury found accordingly. Mich. 29 *Eliz.* in B. R. *Gibſon* and *Plaiſtowe*'s Caſe, *Goldeſb.* 32, 33. See *Owen* 76. the ſame Caſe.

9. A ſeiſed of the Manor of *Toby* in Fee, and A. and his wife ſeiſed of the Manor of *Hinton* to them and the Heirs of their two Bodies lawfully begotten, upon an eſtate made unto them before Coverture for the Joyncture of the wife, the Reverſion to A. in Fee. *Toby* amounting to the value of two parts, and *Hinton* to the third part, both holden in Capite. A. by his Will deviſed the Manor of *Toby* to his wife upon Condition that ſhe ſhould not take her Joyncture in *Hinton*, with divers Remainders over. The wife by Parol waived her eſtate in *Hinton*, and agreed to the Manor of *Toby*: If it were a good Will and Deviſe for the whole Manor of *Toby*, or for part only, was the Queſtion. In this caſe amongſt other points it was Reſolved, 1. That the Deviſor had not power to *Deviſe* the whole Manor of *Toby* by the Statutes of 32 & 34 *H.* 8. becauſe the Deviſor was not a perſon having at the time of the making of his Will; and the Deviſe had not the Manor of *Hinton*; but he and his wife had it, betwixt whom there are no Moyeties, and ſo he was not Owner. 2. By the Statute the third part ought to deſcend immediately after the Death of the Deviſor; and in the principal Caſe, the Manor of H. was derived to the Wife until ſhe diſagreed; and it might be, that ſhe would not diſagree or agree within two years; and therefore it was Reſolved, That the Deviſe was not good for the whole Manor of *Toby*, but that the King ſhould have a third part of the ſame. *Cook* 3 Part. *Butler* and *Baker*'s Caſe. See Paſch. 17 Jac. in the Court of Wards, *Mountagu*'s Caſe, *Lit.* 65. acc.

10. Debt upon an Obligation, the Condition was, Whereas the Defendant had taken A. S. to wife, who was a widdow, being poſſeſſed of divers Goods; If he ſhould permit his ſaid wife to make a Will, and to diſpoſe in Legacies ſo much as ſhe would, not exceeding 50 l. and perform what ſhe appointed, That then, &c. The Defendant pleaded, That ſhe did not make a Will; whereupon Iſſue joyned, It was found, That ſhe made a Will, and thereby diſpoſed of divers Legacies, not exceeding 50 l. but that ſhe was a Feme Covert at the time of the making of the Will: In this Caſe, It was adjudged for the Plaintiff; For, although ſhe being a Feme Covert, could not in Law be permitted to make a Will to *diſpoſe* of any Goods without the Husbands aſſent; yet it is a Will within the intent of the Condition: for it was the intent of the Condition, That ſhe ſhould make a Will to that purpoſe, notwithſtanding the Coverture; and it is but her appointment, which the Husband

Husband by his Obligation is bound to perform; and the finding that she was a Feme Covert, was not material. Mich. 5 *Car.* in B. R. *Marlot* and *Kingman's Caſe*, *Cro.* 1 Part, 159.

11. The Caſe in Chancery was this, C. E. the Teſtator, 15 Jac. made his Will in writing, and thereby deviſed Legacies to charitable Uſes, and to R. and W. his Brothers, viz. To one 100 l. to the other 1000 Land other Legacies to his Kindred, and made his wife his Executrix, and appointed his two Brothers to be joyned with her as Executors in truſt for his wife; Afterwards, 22 Jac. he ſent for ſeveral perſons to come to him: when they came, they demanded of him, What Friend he thought beſt to be his Executor, and to ſee his Will performed? and whether he truſted any perſon more then his Wife? He anſwered, That his Wife was the firſt perſon, and therefore ſhould be his ſole Executrix. Being then moved to give other Legacies to his Father, Brethren, and Kindred; He anſwered, he would not leave them any thing. But requeſted to J. S. his God-ſon 30 l. and being requeſted by his Wife to give him a greater Legacy, he anſwered her, Thou knoweſt not what thou doeſt; do not wrong thy ſelf, 30 l. is many in a poor Bodies Purſe: And the Teſtator did ſpeak theſe words, *Animo teſtandi, & ultimam voluntatem declarandi*; and all this was ſet down in a Codicill, and the firſt Will and that Codicill proved in *Communi forma*. Whether this Codicill was a Revocation of the Legacies given to his 2 Brothers was the Queſtion: It was Reſolved both by Civilians and by the Judges of the Common Law, That it was not a Revocation of the Legacies. Their Reaſon were, becauſe there was an abſolute formal Will made in his health, and there being no ſpeech made by him of his former Will, nor of the Legacies thereby deviſed; The anſwer to a doubtful Queſtion ſhall not take away the Legacies before deviſed: and his anſwering, I will not give them any thing: upon ſuch doubtful ſpeeches to nullify a Will adviſedly made ſhall not be permitted, without clear or perſpicuous Revocation or words which do amount to ſo much: And thereupon, upon this Opinion of the Civilians and Judges, The Lord-Keeper decreed the Legacies to the Brother, the Codicill having made no Revocation of them. Mich. 2 Car. in the Chancery, *Eyres* and *Eyres Caſe*, *Cro.* 1 Part, 37.

12. Upon Evidence in *Treſpaſs*, the Caſe was, A. made his Will in writing, and thereby deviſed his Lands to E. H. and her Heirs, and afterwards lying Sick, becauſe the ſaid E. H. did not come to viſit him; he affirmed, That E. H. ſhould not have any part of his Lands or Goods; It was the Opinion of the Court, That it was no Revocation of the Will, being but by Way of diſcourſe, and not mentioning his Will: but the Revocation ought to be by expreſs words, that he did revoke his Will, and that it ſhould not have any of his Lands given her by his Will. Paſc. 4 Jac. in B.R. *Kirton* and *Simpſons Caſe*. *Cro.* 1. Part, 115.

13. A. ſeiſed of Lands in Socage, deviſed the ſame by word to his three Siſters. A ſtranger being preſent, recited to the Deviſor the ſaid words of his Will, and he did affirm them. Afterwards the ſtranger put the ſaid words in writing for his own remembrance, but did not read them to the Deviſor, who afterwards dyed. It was a Queſtion, If this Deviſe being reduced into writing *modo & forma* was good or not. It was the Opinion of the whole Court, That the Deviſe was void. And *Wray* Chief Juſtice ſaid, That if he appoint A. to write his Will, and it is written by B. it is void. But if after he had written the Will, if he had read it to the Deviſor, and he had confirmed it, it had been a good Will. It was the Opinion of the Court, That the Plaintiff being Heir at Law, ſhould have Judgment to recover the Lands againſt the 3 Siſters. Paſ. 30 Eliz. in B.R. *Naſh* and *Edwards Caſe*. *Leon.* 113.

14. The Caſe was, A. was poſſeſſed of a Term for years, and of goods and Chattels, and made his Will in theſe words, That if the Wife of the Deviſor would permit J. S. to enjoy ſuch a Term for the Term of three years next following, That then ſhe ſhould have all the reſidue of his goods and Chattels as his ſole Executrix. It was obj. That ſhe could not be Executrix, for ſhe is to be Executrix upon a Condition precedent to be performed before ſhe be Executrix, and where the Condition is impoſſible to be performed, and then ſhe ſhall never be Executrix. For where an Eſtate is to be created upon a Condition impoſſible to be performed, there the Eſtate ſhall never come in *eſſe*, and here the Condition is impoſſible: For how can ſhe ſuffer J. S. to enjoy the Term for three years next following, and the three years are not to be paſt before ſhe hath any power to permit or reſiſt, for till the three years be incurred, ſhe cannot be Executrix, nor before three years expired can ſhe have any Action as Executrix, for her authority doth not begin before the three years be expired. But it was holden by the whole Court, That although a Grant upon a Condition precedent doth not take effect untill the Condition be performed; Yet ſuch a conſtruction ought to be made in this Caſe, ſo as the Will of the Deviſor ought to ſtand. If the Condition had bin, That if the Wife will find meat and drink to ſuch a perſon untill his death, then ſhe ſhall be Executrix; ſhall not the Wife be Executrix till after the death of ſuch perſon? Truly yes, for otherwiſe ſhe could never be Executrix, which is againſt the meaning of the Teſtator; and it was not his in-

tent, That the Ordinary ſhould commit Adminiſtration of his goods in the mean time. And the ſubſequent words prove directly, That the Teſtators meaning was, That his Wife ſhould be Executor immediately, untill ſhe diſturbed J. S. for the words are, If ſhe refuſe to ſuffer J. S. to enjoy the Term, then his Son ſhall be his Executor, which implies, That by a diſturbance made by the Wife, her Executorſhip ſhould ceaſe, and that the Son ſhould have it, which cannot properly be if ſhe were not Executrix from the beginning. Paſc. 31 Eliz. in C. B. *Jennings* and *Gower's* Caſe. *Leon.* 229.

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2. *Where a Will may be revoked, countermanded, or changed; and what ſhall be a good revocation of the ſame. How doubtfull Wills ſhall be conſtrued. And divers Rules concerning conſtruction of Wills.*

1. THE Lord *Bou cher*, ſeiſed of the Manner of O. and others in the County of S. made his Will, 3. *Martii*, 23 H. 8. and dyed the 19th day of the ſame Moneth. The Will was this, *I beſeech the King to be ſo gracious to me, as for the 500 l. which I owe him, to accept, after the deceaſe of my Wife, the Manners of O. and D. in the Counties of S. to have and to hold, to him and his Heirs for ever, paying for the ſame to my Executors, over and above the ſaid 500 l. ſuch ſums of money as ſhall pleaſe his Highneſſe, towards the perfourmance of my laſt Will and Teſtament.* Afterwards, between the making of this Will, and his death, viz. the 11th day of the ſame Moneth, his Feoffees at the requeſt of the ſaid Lord, did enfeoffe others to the uſe of himſelf for life, the Remainder to H. B. who was his Baſtard, and to the Heirs of his body begotten, the Remainder to his right Heirs. After the Statute of 27 H. 8. H. B. bargained and ſold the ſaid Manner of O. to J. S. in Fee, and ſuffered a Recovery to the uſe of the ſaid J. S. who entred and took the profits. And an Information of Intruſion was exhibited for intruding upon the ſaid Manner of O. with an Averment, That the ſaid L. *Bourcher*, and *Katherine* his Wife were dead. Upon which J. S. appeared, and demanded *Oyer* of the Will, and pleaded all the ſaid matter in bar, and prayed Judgment of the Information without taking averment of the life of H. B. or his Iſſue; upon which the Kings Attorney demurred in Law. It was in this Caſe, amongſt other points Reſolved by the Juſtices, That whereas after his Will made, his Feoffees by his commandment made a Feoffment to the uſe of himſelf for life, the Remainder to the uſe of a ſtranger, That the ſame was a countermand and Revocation of his Will, for that a Will cannot take effect untill the death of the Teſtator. Trin. 6 E. 6. *Dyer*, 74. the Lord *Bourchers* Caſe.

2. T. and A. his Wife were Joynt-Tenants in Fee, and 23 H. 8. they ſuffered a common Recovery, which was averred to be to the uſe of the Husband only: Afterwards in 24 H. 8. he deviſed the Land to A. his Wife for life, the Remainder over; but he dyed not till 37 H. 8. It was holden by the Juſtices to be a void deviſe, for the Deviſe was not within the Statute of 1 R. 3. to convey the poſſeſſion till the Statute of 27 H. 8. which transferred the uſe into poſſeſſion, and was a countermand of the Deviſe by drowning of the uſe in the poſſeſſion, and the poſſeſſion could not be deviſed, till 32 H. 8. which enables to Deviſe the poſſeſſion. But if there had bin a new publication after the Statute of 32 H. 8. perhaps it might have bin a good Will, and a good Deviſe. Paſc. 4 Ma. *Dyer*, 144. *Triſtilians* Caſe.

3. If a Feme-Sole make a Will, and afterwards ſhe taketh a Husband, the ſame is a Revocation thereof: For the making of a Will, is but the inception of it, and it takes not effect untill the death of the Deviſor, becauſe *Omne Teſtamentum, morte conſummatum eſt; et Voluntas eſt ambulatoria uſque ad extremum vitæ exitum*: And therefore it being no perfect Will when ſhe takes Husband: and after Marriage, her Will being her Husbands and ſubject to it by her taking a Husband ſhe hath wholly revoked the Will formerly made by her. *Cook* 4. Part, 61. in *Forſe* and *Hembligs* Caſe.

4. In an *Ejectione firmæ* brought, the Tenant pleaded, Not Guilty. And the Jury found a Special Verdict. And the Queſtion did ariſe upon the words of a Will, which were theſe, viz. *I give to K. my Wife all the profits of my houſes and Lands lying and being in the Pariſh of B. and L. at a Street there called* Brook-ſtreet. And the Jury found, That there was not any Village or Hamlet in the ſaid County called (*Billing*); which were the words in the Will; but that the Land ſurveyed by the Will to be a Deviſe, lay in *Billing* Street. It was the Opinion of the Court in this Caſe, That no mans verbal averment ſhould be taken, or admitted to be contrary to the Will, which is expreſſly ſet out in the Will. Trin. 6 Jac. in B. R.

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Pary and *Knellt* Caſe. *Brownlow*, 1. Part, 131.

5. In *Eyellions* ſame upon a Special Verdict, it was found, That W. S. was ſeiſed of the Manor of S. in the Parith of S. whereof the Lands in Queſtion were parcel, and of other Tenements within the ſame Parith, and within a place known within the ſaid Parith, which is neither Town nor Hamlet, called E. in which the ſaid W. S. had a Tenement which was in the Tenure of one J. D. by Copy of Court Roll. Afterwards he deviſed to his Brother, *All that new Tenement, with the appurtenances wherein J. D. dwelleth in E.* The Queſtion was, Whether the Lands in S. appertaining thereunto ſhould paſs, or not. It was ſaid, That it ſhould paſs, for that the word Tenement refereth to his dwelling, which is in E. and not to the place where the Lands lye. Alſo it paſſeth by the word appurtenances. For although that Lands ſhall not paſs by the word appurtenances as ſome Books are: Yet it is otherwiſe in a Will, as of late it hath been adjudged in this Court in a *Cambridgeſhire* Caſe. The Court inclined to be of that Opinion, but gave no Judgment in the Caſe. It was adjourned. Mich. 31 Eliz. in B. R. *Goldsbr.* 109.

6. In Treſpaſs, It was found by Verdict, That J. D. ſeiſed of certain Lands, had Iſſue three children, viz. A. B. and C. and by Will deviſed, That after his debts paid, he giveth all his goods, Lands, and Moveables unto his three Children equally between them. There were two Queſtions in the Caſe. 1. What Eſtate the Children have by the Deviſe, whether Fee, or for life. 2. Whether they be Joynt-Tenants, or Tenants in Common. It was the Opinion of *Popham* and *Clench* Juſtices, That no Eſtate, but for life, paſſeth, if any Eſtate paſs, for it is doubtful if any Eſtate paſs or not; for the Will is, That after his debts paid, he giveth all his Lands, goods, and moveables; and therefore *Popham* conceived, That ſuch Lands as were lyable to Debts, ſhould paſs, and no others; For if the Deviſor had a Term, then it ſeemed to him no Land ſhould paſs: But admit the Lands do paſs, then they conceived, That if I Deviſe Lands to two equally divided between them, they are Tenants in Common. But if I Deviſe Lands to two equally to be divided between them by J. S. till ſuch diviſion be made, they are Joynt-Tenants, ſo here Land is Deviſed equally to be divided between them, that they are Joynt-Tenants *quouſque* the Diviſion, becauſe of the reference future. Mich. 31 Eliz. in B. R. *Dickens* and *Marſh* Caſe. *Goldsbr.* 182, 183.

7. It was found by Special Verdict in *Eyellions* ſame, That Sir *Ed. M.* and the Tenants, of a Piſcary in Fee, and held them in Socage, and by his Will in writing deviſed in this manner; I make my Will as concerning the diſpoſition and order of certain Annuities or Rents, to be iſſuing out of certain of my Lands and Tenements, viz. Whereas I have Lands in T. in the County of N. I will that my younger Children not married, viz. *Ed. Tho.* and *Chriſt.* &c. ſhall have ſuch ſeveral Annuities or Rents as be expreſſed in ſeveral Writings, ſigned with my hand, and ſealed with my Seal: And whereas my ſaid Lands are of greater value than the ſaid Annuities, I will, that if my Heir after my deceaſe pay the ſaid Annuities, that then my ſaid Heirs ſhall have the order and diſpoſition of my Lands as long as he ſhall perform my Will: And if my Heir do not perform my Will therein, then I will that my Executors and the Survivor of them ſhall have the order and diſpoſition of my ſaid Lands, to perform my Will: And if there be default in my Heir, that my Will be not performed, and alſo my Executors; then I will that all my Lands be to my younger Children during their lives: And made J. his eldeſt Son, and *Ed.* and *Tho.* and two others, his Executors, and dyed. They found, that he made writing of a Grant of 6 l. 13 s. 4 d. to *Chriſt.* out of all his Lands for life, with Clauſe of Diſtreſs, ſigned and ſealed by him: That J. his eldeſt Son paid it during his life, and had Iſſue E. and dyed: That E. aſſured the Land to B. the Leſſee for life: That the Rent was not paid by *Ed.* nor the Executors to *Chriſt.* and then E. the Son of J. dyed. In this Caſe, It was Reſolved by the Juſtices, That this Will, deviſing ſuch Rents which are mentioned in ſuch a Writing under his Hand and Seal, was a good Deviſe in writing of the Rents themſelves. 2. That theſe being Rent charges by the Will, and the condition being to pay them according to the Contents of other Writings, It was a Demand; for otherwiſe the Eſtate ſhould be defeated, for it is payable in the Nature of a Rent, and not as a Collateral Sum. 3. That this Condition extended to the Heir of the Heir of the Deviſor, and ſo to every Heir, becauſe it is *Nomen Collectivum*. 4. That although the ſaid Sums were not Rents out of the Lands, nor payable by the Heir without Demand; yet *Chriſt.* the younger Son had not any Title, becauſe there ought to be default in the Heir, and in the Executors, before he could enter and there can be no default in the Executors for Non-payment, till notice be given them of the Non-payment of the Heir; wherefore no Notice being found to be given to the Executors, and that there was a default after, there is not any Condition broken, ſo as the younger Brother might enter to take advantage thereof: It was adjudged for the

Plaintiff. Hill. 2 Jac. in B. R. *Molineux* and *Molineux's* Caſe. *Cro.* 2. Part, 144, 145, 146.

8. In Treſpaſs, the Caſe, *Tho. B.* the Grandfather, Tenant for years of the Lands, &c. having Iſſue two Sons: B. Father to the Plaintiff, and L. the Defendant, deviſed his Term to his Wife for life, and after her deceaſe to B. and L. and if they have no Sons, equally and joyntly together; but if it pleaſe God to beſtow upon them Male Children, then my Will is, that it ſhall be put out and reſerved to the uſe and profit of both their Sons jointly together, or to one of them, if they both have not Men-Children: And if it fall out they have no Iſſue-Male, then my Will is, That after the Deceaſe of my Son, it ſhall be to H.B. his Children; and made his Wife his Executrix and dyed: She aſſented to the Legacy and dyed. B. and L. enter having then no Children: B. three years after hath a Son the Plaintiff, who enters, and ouſted by the Defendant. The Queſtion was about the Expoſition of this Will, *viz.* B. and L. having no ſons at the time of the death of the Wife, and one of them having after a Son, Whether he ſhall ouſte his Uncle L. preſently, or ſhall expect untill his Uncle and Father be dead: It was Reſolved by all the Juſtices, That the Son born ſhall have it preſently, and that his intention in the Will was, that his two Sons B. and L. ſhould not have it if they had a Son, for his Care was rather for his Grand-Children, then his own Children. Trin. 8 Jac. in B. R. *Blandford* and *Blandford's* Caſe. *Cro.* 2. Part, 394, 395.

9. In the time of Queen *Mary*, *Bendloes* Serjeant moved this Caſe: A man ſeiſed of Lands and Tenements in *London*, deviſed them by theſe words, *viz.* I will and bequeath unto my Wife A. my livelyhood in *London* for the term of her life; and that by this Will the Lands in *London* paſs to the Wife by this word [Livelyhood]. Note, for *Brook* Juſtice ſaid, That it was in ancient time uſed ſo in diverſe places of this Realm, and had been taken for an Inheritance; to which *Dyer* agreed. 5 Phil. & Ma. Sir *Owen* 30.

10. In an Action upon the Caſe for a Reſcous, The Caſe upon a Will was this: B. poſſeſſed of a Leaſe for years of two Meſſuages, made his Will, and by this he did deviſe both of them to E. his Wife for the whole Term, if ſhe lived ſo long, and remained unmarried: But if ſhe happed for to marry, then he deviſed to her his Dwelling-Houſe during the whole Term; and alſo I deviſe unto her an Annuity of 20 l. *per annum* out of the other Houſe, without limiting what Eſtate ſhe ſhall have in this Rent, and then he deviſeth this Houſe to one of his Nephews: There is a Proviſo in the Will, That if the Annuity be not paid unto her, but be in Arrear, that then it ſhould be lawful for her and her Aſſigns, into the ſaid Meſſuage to enter and diſtrein: Afterwards he makes his Wife his Executrix and dyed; The Wife proved the Will, and entred as a Legatee, and after took the Plaintiff to Husband, and dyed during the Term, and for Rent behind, the Husband the Plaintiff diſtreyned. There were divers Queſtions in this Caſe, 1. Whether there be any good Rent at all at the beginning. 2. Whether there be any ſufficient agreement to take this as a Legatee. 3. How long this Rent ſhall have continuance: Whether during the life of the Wife, or during the Term of years. This Caſe was oftentimes argued at the Barr, and after by the Bench: And the Court was divided in Opinion, being two againſt two, *ſtil.* for the main Point, *viz.* the time for the continuance of this Rent; and in ſome other Points they differed in Opinion. See *Librum.* But they ſaid, That notwithſtanding we do differ in Opinion, yet there is here *Digitus Dei*: For the Will here is not truly found, and if ſo, then it is to go to the Blood: By this Will the Plaintiff hath a good Right to the Rent, and ſo Judgment ought to be given for him. Quære, Trin. 12 Jac. in B. R. Rot. 831. *Gough* and *Howard's* Caſe. *Bolſtr.* 3. Part, 121 to 130.

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3. *Of Probate of Wills; and of divers other matters ariſing and concerning Wills and Teſtaments.*

1. A Leſſee for years of Lands, by his laſt Will deviſed his Term to one whom he made his Executor and dyed, the Deviſee entred before any Probate of the Will, and held the land for a year and more with out any Probate, and then dyed. If his Executor or Adminiſtrator ſhould have the Term, or that the Ordinary ſhould commit Adminiſtration of the Goods of the firſt Teſtator, was the Queſtion. It was the Opinion of the Juſtices, That the property of the Term was lawfully in the Executor by his Entry, and the Deviſe well executed without any Probate. Mich. 22 Eliz. *Dyer*, 367.

2. Note, It was Reſolved by all the Juſtices of *England*, That the Releaſe of a Debt or a Duty by an Enfant Executor, after Probate made of the Will, is not good, becauſe it ſhould be a *Devaſtavit*, and

and charge the Enfant of his own Goods, and alſo it ſhould be a wrong which an Enfant by his Realſe cannot do, and alſo becauſe it is not purſuant to the Office of an Executor. *Hill.* 26 Eliz. in B. R. *Cook* 5. Part, *Roſſil's* Caſe, 27. And ſee *ibid.* 28. That an Executor before Probate of the Will may Releaſe an Action, but he cannot bring an Action before Probate of it. *Harriſon's* Caſe.

3. In Debt againſt Executors, It was Reſolved, That if any of the Executors refuſe before the Ordinary, yet he that refuſed may adminiſter the Goods of the Teſtator at his pleaſure, and prove the Will; but if all the Executors do refuſe before the Ordinary, there Adminiſtration ſhall be granted, and they cannot after adminiſter. 2. That in Debt brought againſt an Executor, it is a good Plea, That the Teſtator made him and another Executor, who is alive not named, without ſaying that the Teſtament is proved. 3. Reſolved, That the Probate of Wills and Teſtaments did belong to the ſpiritual Courts but of late times, and that they had not the Power thereof by the Spirituall Law; for the Lords of Mannors had the Probate of Wills in their Courts; and in ancient time when a man dyed Inteſtate, and had made no diſpoſition of his Goods, the Truſt of them was committed to the King, who was and is *Patres Patriæ*. But the Ordinary was conſtituted by the King *in loco Parentis*, and his Power was given to him by the Statute of 31 E. 3. cap. 11. by Conſent of the King and Parliament. 4. Reſolved, That although that the Ordinary had the Power given to him as before, yet no Power thereby is given to the Ordinary to ſell or diſpoſe of the Goods either to his own uſe, or to the uſe of any other, and that he hath not any abſolute property in the Goods, but a property only *ſecundum quid*. See *Cook* 9. Part, 37, 38. *in Henſlow's* Caſe.

4. A Prohibition was prayed, to ſtay a ſuit for the Probate of a Teſtament concerning Lands and Goods, wherein the Land was charged with a condition in part for Payment of certain Legacies, and it being provided, That they ſhould not meddle with the Probate *quoad* the Lands: It was prayed to have a Conſultation, *Jones* and *Berkley* Juſtices agreed that they ſhould have a Conſultation, becauſe the Probate of Teſtaments properly belongeth to the Spiritual Court; and the Probate or Non-Probate cannot be any prejudice to the heir, nor to him who claims the Land by the Deviſe, and the Will being entire cannot be ſtayed in part, and if there ſhould be no Probate, the Executors might not have Actions for Debts, nor diſpoſe of the Goods. See *Cook* 6. Part, 23. the Marquels of *Winchſter's* Caſe; There a Conſultation in ſuch Caſe was awarded. *Crook* Juſtice doubted of it, becauſe the Land is the principal, and they have not any Authority to entermeddle with any Will which concerneth Land. But yet afterwards a Conſultation was awarded. Mich. 10 Car. in B. R. *Nutter* and *Brett's* Caſe, Cro. 1. Part, 284, and 287.

5. Sir *R. Rowly* made the Lord Keeper, Sir *Robert Catline*, and the Maſter of the Rolls, his Executors, and did deviſe a Term to Sir *Robert Catline*, & dyed, & they writ their Letters to the Ordinary, certifying that they were made Executors, but that they could not attend the executing of the Executorſhip, and therefore they required him to commit the Adminiſtration to the next of Kin. The Ordinary enters in the Regiſter, *Quod Executores prædicti per Teſtamentum prædict. diſtulerunt &c.* and thereupon committed the Adminiſtration over: Afterwards the Lord *Catline* received the Rent of the Farms, and granted it to a Stranger. The Adminiſtrator ouſted the Leſſee, whereupon he brought an Ejectment, and if this Writing was a Refuſall in the Executor or *non*, was the Queſtion. It was argued by *Ford*, Doctor of the Civill Law, that it was a Refuſal; and he ſaid, that if Legatees being Executors do refuſe to prove the Will, yet by the Civill Law they ſhould have their Legacies. But it was adjudged by the Court, That if the Legatees do refuſe to prove the Will, that by the Common Law, they have no remedy for their Legacies; for by the refuſal, there is a dying inteſtate, and then nothing could be deviſed. Alſo they ſaid, That this Writing was a refuſal of the Executors, ſo as the Ordinary might preſently commit Adminiſtration; And therefore that Sir *Robert Catline* could take nothing as a Legatee. 31 Eliz. in C. B. Sir *Robert Catlins* Caſe. *Owen* 44.

6. This Caſe was argued before the Lord Treaſurer privately, and the parties agreed to refer themſelves to the Opinions of *Wray* and *Anderſon*, Juſtices. The Caſe was, The Earl of *Northumberland* deviſed by his Will, his Jewells to his Wife, and dyed poſſeſſed of a Collar of S's, and of a Garter of Gold, and of a Button annexed to his Bonnet, and alſo of many other Buttons of Gold, and precious ſtones annexed to his Robes, and of many other Chaynes, Bracelets, and Rings of Gold, and pretious ſtones. The Queſtion was, If all theſe would paſs by the Deviſe under the name of Jewells. It was Reſolved by the Juſtices, That the Garter and Collar of S's did not paſs, becauſe they were not properly Jewells, but Enſigns of Honor and State; and that the Buckle of his Bonner, and the Buttons did not paſs, becauſe they are annexed to his Robes, and were no Jewells. But for the other Chains, Bracelets, and Jewells, they paſſed

ſed by virtue of the ſaid Will. 26 Eliz. the Earl of *Northumberland*'s Caſe. *Owen*, 124.

7. A Prohibition was prayed to the Prerogative Court, to reſtrein their proceedings in proving the Will of Sir *John Egerton*, who thereby had diſpoſed of all his Perſonal Eſtate, and all his Real Eſtate, and had diſinherited his Right Heire, and gave nothing to his Grand-Children. The ground wherefore to have a Prohibition for the whole Will was, in regard it was intended to have a Tryall at Law, Whether it were a Will or not: And if they ſhould be ſuffered to proceed, and prove the Will there, and to allow it there for the Perſonal Eſtate, it would be a very great Evidence to induce the Jury upon a Tryal to paſs for the Will: To prevent which prejudice at the Tryall the Prohibition was prayed for the whole. It was further ſhewed, That Sir *John Egerton*'s Daughters during the ſuit for the Probate of the Will, had taken Letters of Adminiſtration out of the Prerogative Court for the Perſonal Eſtate, by which they had in a manner diſallowed of the Will. The Court conceived this to be very ſtrange, and therefore granted a Prohibition for the whole both for Lands and Goods: In this Caſe this difference was taken and agreed by the whole Court, That where a Will doth contain in it Lands and Goods, the Court ſhall not grant a Prohibition for the whole in generalty: But if ſuch a ſpecial Caſe be alledged, That the party who made the Will was then *De non ſane Memorie*, a Prohibition ſhould there be granted for the whole. But ſuch a Prohibition is not to be granted in all Caſes; for then it would hinder the proceedings in the Eccleſiaſtical Court, which is not to be granted but in ſpeciall Caſes only. Paſch. 12 Jac. in B. R. Sir *Rowland Egerton* and *Egerton*'s Caſe. *Cro.* 2. Part, 348. See before *Nettor* and *Brett*'s Caſe.

8. A man ſeiſed of Lands in A. had Iſſue four Daughters, A. B. C. and D. and deviſed all his Lands in A. to A. and B. his two Daughters, and made them his Executrix. Afterwards he purchaſed other Lands in A; a Stranger was deſirous to purchaſe this Land of him newly purchaſed: And he ſaid, That that Land ſhould go with the reſidue of his Lands to his Executors, as his other Lands ſhould go. After, the Teſtator made a Codicill, and cauſed it to be annexed to his Will, but in the Codicil no mention was made of this Land: And Whether this new purchaſed Land ſhould paſs by the Will without a new Publication of the Will for this Land, was the Queſtion. It was holden by the Court, That this Land newly purchaſed ſhould not paſſe; for notwithſtanding that the readring of the Will, and the making of a new Codicil may amount to a new Publication, yet it doth not manifeſt the Intent of the Deviſor to be, That more ſhall paſs by that than he intended at the firſt; alſo the new reading of the Will, and the annexing of a Codicil may not properly be termed a new Publication, and without an expreſs Publication for this Land newly purchaſed, this Land ſhall not paſſe. Hill. 43 Eliz. in B. R. *Berkeford* and *Parnecles* Caſe. *Goldſbr.* 150. See *Britt* and *Rigden*'s Caſe, Pl. Com. 340.

See more concerning Wills and Teſtaments, in *Lib.* 1. Title *Deviſes*; and before, in Titles *Executors* and *Legacies*.

Witneſſe *and* Witneſſes.

1. NOte, It was ſaid by *Rolls* Chief Juſtice, That although one who is a Legatee, by a Will, may not be admitted to prove that Will; yet he may be examined to prove a Deed, or any thing which hath not Relation to that Will in reſpect of the Intereſt which he claims by the Will. Paſc. 1653. in B.R. by *Rolls* Chief Juſtice.

2. Upon a Triall at the Barr, J. S. Counſeller at Law was examined upon his Oath, to prove the Death of J. D: It was thereupon prayed on the other ſide, That he might be examined as a Witneſs in ſome matters, whereof he had been made privy as of Counſell in the Cauſe. It was the Opinion of the Court, That he is not bound to make Anſwer for things which may diſcloſe the ſecrets of his Client's Cauſe. Paſch. 1654 in B. R. *Waldos* and *Ward*'s Caſe.

3. In a Tryal at the Bar in Treſpaſs and Ejectment, Exception was taken to a Witneſs that was produced to prove the Leaſe of Ejectment, becauſe he had the Inheritance in the Land lett; but becauſe the Defendant did claim under the ſame perſon that the Plaintiff did, the Witneſs was admitted to be ſworn. Mich. 1655. in B.R. *Fox* and *Swan*'s Caſe. *Styles* 480.

4. In the Starr-Chamber, Exception was taken to a Witneſs, *viz.* Dr. S. becauſe he had ſtollen Plate, and had been pardoned for it: But notwithſtanding the ſaid Exception, the Court did allow of the Teſtimony of the ſaid Dr. S. and in that Caſe, the Caſe of *Cuddington* was vouched, which was, *Cuddington* 44 Eliz. commiered Felony, and 1 Jac. by the generall Pardon he was pardoned; and

& afterwards for calling him *Thief*, he brought his Action: It was the Opinion of the Juſtices that the Action would lye, being upon a general Pardon, becauſe it was not known whether he committed the Felony or not; but if it had been a particular pardon, then they were of Opinion that the Action would not have lyen. Paſch. 21 Jac. in *Cam. Stel.* Sir *Henry Finets* Caſe. *Godbolt.* 288.

5. Note, It was the Opinion of the Juſtices, That the Defendant's Anſwer in an Engliſh Court is a good Evidence to be given to a Jury againſt the Defendant himſelf, but it is no Evidence againſt other parties; and in this Caſe, It was ſaid by them, That if an Action be brought againſt two men, and at the Aſſiſe the Plaintiff proceedeth againſt one of them only: In that Caſe, he againſt whom the Plaintiff did ſurceaſe his ſuit, may be allowed to give Witneſs and Evidence, in the ſame Cauſe; and it was further agreed by the Juſtices, in the ſaid Caſe, That if the party cannot find his Witneſs to give Teſtimony *vivâ voce*, then he is as it were dead unto him, and his Depoſition in an Engliſh Court betwixt the ſame parties, Plaintiff and Defendant, may be allowed to be read to the Jury, ſo as the party do make Oath that he did his endeavour to find his Witneſs, but he could not ſee nor hear of him. Mich. 21 Jac. in B. R. *Godbolt.* 327. But ſee Mich. 4 Car. in the Star-Chamber, In the Caſe of a Ryot, That Witneſſeſſes which were Defendants, and which are ſuppreſſed by Order of Court, although afterwards there be no proceedings againſt them, yet their Depoſitions ſhall not be allowed at the hearing of the Cauſe in that Court. *Hut* and *Otteries* Caſe. *Godbolt.* 439.

6. In the Caſe in *Chancery* between the Lord *Abigny* Plaintiff, and the Lord *Clifton* Defendant, concerning a Promiſe ſuppoſed to be made by him of aſſurance of Land upon the Marriage of his Lady, being Daughter and Heir of the Lord *Clifton* and his Lady: The King by his Letters under his Signe manual, Certified to the Lord Chancellor, the manner and ſubſtance of the Promiſe, as it was made to his Majeſty, in regard whereof his Majeſty gave to the Lord *Abigny* 1800 l. in lieu of 1000 l. *per annum*, which he had promiſed; which Certificate was allowed of upon the hearing for a ſufficient Teſtimony and Proof of ſo much. Mich. 9 Jac. in the Chancery, the Lord *Abigny* and the Lord *Clifton*'s Caſe. *Hobart.* 213. See Trin. 10 Jac. in the Caſe between *Henry Lea* and Sir *Henry Lea*, concerning Title to certain Lands: And the King being informed thereof, Sir *Henry Lea* promiſed, That if he would not moleſt him for any of the ſaid Land, that then he would give him 200 l. *per annum*; and being ſued for not performance of that Promiſe: The King certified the Promiſe into the Court under his Seal, and it was holden to be a ſufficient Teſtimony and Proof of the Promiſe, whereupon a Decree was made for the performance thereof. Trin. 10 Jac. in the Court of Requeſts, and after in C. B. Sir *Henry Lea* and *Lea*'s Caſe. *Godbolt*, 199.

7. Note, It is taken for a Rule in Law, That a man cannot be Witneſs in his own Cauſe, for that the Law preſumeth a man will ſpeak for his moſt advantage; and hence it is that the party to an Uſurious Contract ſhall not be admitted to be a Witneſs againſt the Uſurer, for then in effect he ſhould be Witneſs *in propria Cauſa*, and ſhould avoid his own Bond and Aſſurances, and diſcharge himſelf of the Mony borrowed; and although that commonly he raiſeth up an Informer to exhibite the Information, yet in truth he himſelf is the Informer: and ſo it is that he who hath a Right in the thing in Demand cannot be a Witneſs, for that he is a party in the Intereſt. *Cook* 1. Part, *Inſtit.* M. ch. 8 Jac. in B. R. *Smith*'s Caſe, adjudged, &c.

8. Note, It was holden by the two Lord Chief Juſtices in the Star-Chamber, That the Tenants of the Manner of G. claiming Tenant's Right, being impeached by the Plaintiff, Lord of the Manner, who ſuppoſed their Eſtates to be void in Law, that they might all joyn in a quiet and peaceable manner in defence of the Cauſe, being common to them all, and therefore though ſome particular perſons were ſued, yet they might defend the Suit upon the common Charge; and the reaſon was, that ſince the Title was one againſt all, it was in effect but one Defence and one Defendant, for the Tryall of one man's Cauſe tryed all; and therefore the Juſtices ſaid, That the Courts of Juſtice do every day deny them to be Witneſſes one for another in ſuch general Caſes, as in Caſes of Common, *Modus Decimandi*, and the like. And the Caſe of Mich. 14 Jac. of *Dutch* and *Bettiſton* was vouched, where the Queſtion being between the Plaintiff and Defendants, Tenants of the Lord *Norris* of the Manner of D. for Common claimed, although the Action was between him and one of them, upon a particular Cuſtome laid for his Tenement: Yet it was Reſolved, That they might all joyn, and maintain the Cauſe with their Purſes. Paſch. 14 Jac. in the Star-Chamber. The Lord *William Howard*, and *Bell* and others Caſe. *Hob.* 92.

9. If Wreck doth belong to the King, the party may have a Commiſſion to hear and to determine the truth of it, and that by Verdict of twelve honeſt men; for that no Proof is allowable in Law, but the Verdict of twelve men: And if it doth belong to another than to the King, then if the Owner cannot ſatisfy

atisfy him who claimeth the Wreck, by his Mark, or Cocquet, or by the Book of Cuſtomes, or by the Teſtimony and Witneſs of honeſt men; then the Owner in ſuch Caſe may have a Commiſſion, or bring his Action at the Common Law, and prove the ſame by Verdict of a Jury. *Cook* 5. Part, 108. in Sir *Henry Conſtable's* Caſe.

10. A. was Indicted upon the Statute of Perjury, becauſe he was produced as a Witneſs for the King, upon a Tryal in an Information, and ſworn, *&c.* ſetting forth the Oath, and the falſity thereof: Exception was taken to the Indictment, That a Witneſs produced and depoſed for the King might not be puniſhed by way of Indictment, which is the Suit of the King; for he cannot puniſh his own Witneſs who ſwears for him. And ſo it was ſaid, It was Reſolved in the Starr-Chamber, That a Bill lyes not againſt him there upon that Statute; and of ſuch Opinion was the whole Court, That ſuch a Witneſs is not puniſhable by way of Indictment, whereupon he was diſcharged. Trin. 4 Jac. in in B. R. *Price's* Caſe. *Cro.* 2. Part, 120.

11. In Debt, upon the Statute of 5 Eliz. The Plaintiff declared, That whereas he having a Suit depending in C. B. againſt J. S. in an Action upon the Caſe for words, wherein he ſhewed that he was a Suitor to the now Defendant, to have married (ſhe being a Woman of good Eſtate), That the ſaid J. S. to defame him and deprive him of the hopes of the ſaid Marriage, ſaid of the Plaintiff, That he hath a Baſtard by one A. S. Upon Not Guilty, a *Niſi prius* being awarded to be tryed at *Glouceſter*, the 21. of *July* following, he ſued a *Subpœna* directed to the Defendant to teſtify in the ſaid Cauſe, at the ſaid Aſſiſes, and that 17. *July* 4 Car. he ſhewed it to the Defendant, and left a Note with her of the day and place of Appearance, and delivered to her 12. d. towards her Expences and Charges; and promiſed unto her, that if ſhe would come at the ſaid day and place, and teſtify, he would give her ſo much *pro expenſis & oneribus* as ſhe ſhould reaſonably require, which Sum of 12. d. ſhe accepted of. Upon *Nihil debet* pleaded, It being found for the Plaintiff: It was ſaid that the Declaration was not good, becauſe the Plaintiff doth not averr that the ſaid 12 d. was ſufficient, otherwiſe ſhe is not to ſtir out of her Doors; and ſhe is not compellable to come to teſtify upon a Promiſe; and of ſuch Opinion was *Brampton*, Juſtice: But two other of the Juſtices held it to be good, when ſhe accepted the 12 d. and ſhe did not ſay ſhe would have more for her Expences. Quære, for the Caſe was not Reſolved. Hill. 13 Car. in B. R. *Goodwyn* and *Web's* Caſe. *Cro.* 1. Part, 376. See Paſch. 15 Car. in B. R. *Marſh*, 18. the ſame Caſe adjudged, That the Action would not lye for want of Averment, that the Plaintiff was damnified by the not appearing of the Defendant.

12. In Hillary Term, 22 Jac. a Commiſſion was awarded to examine Witneſſes returnable in Eaſter Term following. The Commiſſioners began the Examination of Witneſſes upon Munday the 28th. of March, 1625. which was the day after the Demiſe of King *James*, and continued in Examination of divers Witneſſes, untill Friday following; at which day, and not before, having notice of the Demiſe of the King, they ſurceaſed: And Whether this Examination of Witneſſes and their Depoſitions, ſhould be ſuppreſſed, was the Queſtion: It was the Opinion of the Juſtices, That the Depoſitions ſhould ſtand; for although legally, the Commiſſion was determined by the Demiſe of the King; yet the Commiſſioners having not notice thereof, and having examined concerning the ſame, they held that ſuch Witneſſes were duly ſworn, and their Depoſitions ſhould be allowed, eſpecially in a Court of Equity, where the proceedings be *de jure naturali*, and not according to the ſtrict Courſe of Law; and the Juſtices approved of the Courſe which was uſed in the principall Caſe, which was this, That the Witneſſes ſhould be called, and their former Examinations and the Interrogatories tendred to ſuch of them as were alive, and whether they approved of them, and not to examine them *de novo*. It was then propounded to the Juſtices, If any Witneſſes examined upon ſuch a Commiſſion ſhould be perjured, Whether they might be puniſhed by the Statute of 5 Eliz. for that Perjury: It was Reſolved by them all, that they might; for being examined before Notice of the King's Demiſe, what they did was Legall. Mich. 3 Car. in C. B. Sir *Randall Crew* and Sir *George Vernon's* Caſe. *Cro.* 1. Part, 69, 70.

Wither-

V Withernam.

1. *Withernam* is the taking or the driving a Diſtreſs to a Pound, or other place out of the County, ſo as the Sheriff upon a Replevin ſued forth, cannot make delivery of the Cattle to the Party who is diſtreyned, and therefore in ſuch Caſe, he ſhall have a Writ of *withernam* directed to the Sheriff, for the taking of as many of his Beaſts that did thus unlawfully diſtrein, untill he hath made deliverance of the firſt Diſtreſs: Or *Withernam* is a taking and Repriſall of other Goods in lieu of them that were formerly taken and eſſoyned or with holden. *F. N. B.* acc. And this Writ lyeth for the Defendant as for the Plaintiff; for if the Defendant hath a Retorn awarded him, and he ſueth forth a Writ *de Retorno habendo*, and the Sheriff retorneth upon the Pluries, *Quod averia elongata ſunt*: In ſuch Caſe, he ſhall have a *Scire facias* againſt the Pledges, according to the Statute of *Weſt.* 2. *Cap.* and if they have nothing, then he ſhall have *Withernam* againſt the Plaintiff of the Plaintiff's Cattle. See 7 E. 4. 15. 13 H 7. 18. acc.

2. If a Replevin be ſued by Writ, and the Sheriff retorneth thereupon, That the Cattle are not to be found, then a *Withernam* ſhall be awarded againſt the Defendant: And if a *Nihil* be retorned, then an *Alias*, and *Pluries Withernam*, and thereupon an *Exigent*; and if he do at the Retorn of the *Exigent* find Pledges to make Deliverance, and be admitted to his Fine, then the Plaintiff ſhall declare upon an *Vicore detent.* and go to Tryal upon the Right of the Cauſe of Diſtreſs; and if it be found for the Plaintiff, he ſhall recover his Coſts and Damages; and if for the Defendant, he ſhall have a *Retorno habendo*: But if upon the Retorn of the *Pluries Replegiare*, the Defendant doth appear, then no *Withernam* lyeth, but he muſt gage Deliverance or be committed, and the Plaintiff ſhall declare againſt him upon an *Vicore detent.* And, if it be found for the Plaintiff, and the Cattle be not delivered, he ſhall recover the value of the Goods, and Coſts, and Damages; if for the Defendant, Coſts, and Damages, and a *Retorno habendo* ſhall be awarded. *Rowl.* 1. Part, 180.

3. It was moved to the Court as a Queſtion, If Beaſts taken in *Withernam* might be uſed and worked by the party as his proper Beaſts: It was ſaid by the Court, That Beaſts diſtreined, as Cows, could not be milked, nor Horſes wrought, but they ought to be put in Pound Overt, and there the Owner might milk them, and fodder them: But if Cows be taken in *Withernam*, becauſe they were delivered to the party in lieu of his own Cattle, he may milk them; or, if they be Oxen, or Horſes, reaſonably work them, otherwiſe he ſhould be at a great Charge in keeping and diſtreining of them, and have no profit or conſideration for it. Mich. 33 Eliz. in C. B. *Chamberlain's* Caſe. *Leonard*, 220.

4. In a Replevin the Plaintiff was Non ſuit; for which the Defendant had a *Retorno habendo* in *Michaelmas* Term Retornable, *Oct. h. Hillarii*: And the Writ was delivered to the Sheriff 29. *Novemb.* and the Entry of the Non-ſuit was, *Quod poſtea, ſcil.* 25. *Novemb.* the Plaintiff brought a Writ of ſecond Deliverance, Retornable *Craſtino Purific.* and at 8. *Hill.* the Sheriff Retorned the *Retorno habendo*, and that the Plaintiff had eſſoyned the Cattle, and the next day after the *Purific.* the ſecond Deliverance was Retorned. In this Caſe, It was the Opinion of the Juſtices, That the Plaintiff in the Replevin ſhould recover his Damages, for that the ſecond Deliverance was to no other purpoſe, but to revive the firſt Plaint; and it was a *Scire-facias* to the *Retorno habendo*: Alſo it appeareth by the Entry, that the *Retorno habendo* was awarded to the Sheriff after the ſecond Deliverance prayed; in which Caſe the Sheriff had not power to ſerve the *Retorno habendo*, but the ſecond Deliverance: And the whole Court was of an Opinion, That it was uſuall to award a ſecond Deliverance in ſuch Caſe. Trin. 30 H 8. *Dyer. Arnold* and *Bingham's* Caſe, 41.

5. In a Replevin, the Plaintiff was Non ſuit, and a *Retorno habendo* awarded: Upon which Writ the Sheriff retorned, *Quod averia elongata fuerunt per Vicecom.* and upon that a *Withernam* was awarded, and upon the *Withernam* the Defendant had as many Cattle of the Plaintiffs delivered unto him, and thereupon the Plaintiff ſued a ſecond Deliverance. The Queſtion was, Whether he ſhould ſue the ſecond Deliverance upon the firſt Diſtreſs, or upon the *Withernam*: It was the Opinion of the Court, that the ſecond Deliverance ſhould be upon the firſt Diſtreſs taken, and not for the *Withernam*. See Paſch. 37 H 8. *Dyer*, 59. See *F. N. B.* 68 & 74. acc.

Upon a *Pluries Replegiare*, the Sheriff Retorned in Bank, *Averia elongata, & quod nullum aliud Breve*, &c. Upon that a *Withernam* was awarded, and according to that Writ the Sheriff Retorned, That the Plaintiff found pledges to proſecute and retorne; and that he took ſix Beaſts in *Witherna.m* which he had

had delivered to the Plaintiff, *quousq;* &c. and that he had attached the Defendant. Both parties appeared, and the Plaintiff declared of the taking and yet detaining of the Cattle, and the value of them, and they were at Iſſue upon the property: It was the Opinion of the Juſtices, That in that Caſe, the Defendant ſhould not gage deliverance, but the Plaintiff ſhould uſe the Cattle taken in *Withernam*. Note, It appeared in this Caſe by the Return, (*quod nullum aliud Breve*) that no Plaint was before the Sheriff; for the firſt *Replegiare* gave authority to him only, and no; the *Alias* or *Pluries*, for the parties have day in Bank upon the Return of the Replevin without a Pone. Mich. 3 Eliz. *Dyer*, 189.

VVords.

The Expoſition, Interpretation, Conſtruction, Reference, and Relation of them, in Writs, Bills, Bonds, Grants, Wills, and Teſtaments: And to what referred, or related: And divers other Matters and Things concerning words.

1. C. Deviſed his Houſe, in which J. S. inhabited, to his three Brothers; and the Houſe in which *F.* his Brother inhabited, to his ſaid three Brothers, and he to pay 30 l. to C. C. or otherwiſe to remain to the Houſe. *Preciſo*, That the Houſe ſhall not be ſold but go to the next of Blood being Male. It was the Opinion of the Juſtices, in this Caſe, That it was an Eſtate Tail; and that theſe words [go to the next of Blood] ſhall be conſtrued to the moſt worthy perſon of the Family, being Male. Paſch. 16 Eliz. *Dyer*, 333. *Chapman's* Caſe.

2. Land was demiſed to A. for nine years, if he ſhould ſo long live; and if he dyed within the Term, that B. his Wife ſhould have it *durante toto reſiduo termini prædict.* The Husband dyed during the Term: It was the Opinion of the Juſtices, That the Limitation of the Term was void, for the incertainty; and in that Caſe it was ſaid, That the word [Term] ſhall be taken for Intereſt, and not for the Time. See 35 H. 8. *Br.* Conditions, 203. Mich. 33 Eliz. in C. B. *Green* and *Edwards* Caſe. *Leon.* 218.

3. S. F. and two others were Indicted upon the Statute of 23 Eliz. of Recuſancy: The words were, *Quod illi, nec eorum uterq; venerunt* to any Pariſh Church. It was ſaid, That the Indictment was not good, for that [*uterq;*] doth refer unto one of them; and ſuch was the Opinion of Grammarians to whom the Conſtruction of the word [*uterq;*] was referred. The Juſtices ſaid, That the word [*uterq;*] was no unuſual word in our Law, and that the word *uterq;* doth amount to *Quilibet*. And ſee 15 El. *Dyer*, 327. Three Joyntenants in Fee, and by Indenture, *Tripartite*, each of them covenanted, and granted to the others, & *utiiſq; eorum*, to make an Aſſurance; and there it was holden, That the word *uterq;* doth amount to *Quilibet*. Mic. 33 Eliz. in B. R. *Sheldon's* Caſe. *Leon.* 141.

4. If the King, or a Common Perſon, grant *Omnia illa Meſſuagia in tenura J. B. ſcituat. in W.* whereas in truth the Meſſuages ly in D. It was holden in this Caſe, That becauſe the Grant is generall, and is reſtrained to a certain Town, the Parentee or Grantee, ſhall not have Lands out of that Town; becauſe the Pronoun [*illa*]; for *Omnia illa Meſſuagia*, referreth as well to the Town, as to the Tenure of *J. B.* ſo as if either of them fail, the generall Grant is void: for this word [*illa*] is not ſatisfied untill the Sentence be ended, but it governs the whole Sentence. *Cook* 2. Part, 33. in *Duddington's* Caſe.

5. Sir *Thos Cheney* in 1 Eliz. deviſeth to H. his Son, divers Lands, and to the Heirs Males of his Body, the Remainder to *Thos Cheney* of D. and the Heirs Males of his Body, upon Condition, that he, or they, or any of them, ſhall not diſcontinue, &c. The Queſtion in that Caſe was, Whether H. the Son ſhould be conſtrued to be within theſe words [he, or they]: It was the Opinion of the Juſtices, That thoſe words ſhould not be conſtrued to have reference to the Grant made to H. his Son, but ſhould be conſtrued onely to extend to the Grant made to the ſaid *Thos Cheney* of D. *Cook* 5. Part, 68. The Lord *Cheney's* Caſe.

6. Treſpaſs by T. L. againſt J. R. and C. M. for impriſoning him five dayes: J. R. pleaded not guilty to four dayes, and to the other day pleaded a Juſtification, upon which they were at Iſſue: Afterwards C. M. pleaded a Juſtification, upon which an Iſſue was taken. A *Venire facias* was awarded in theſe words, *Ideo quoad triandum tam exitum iſtum, quam prædict. alium exitum, inter prædict. T. & præfatum J. R. ſuperius mentionat. Præceptum eſt Vicecomiti*, &c. It was excepted unto, That this award of the *Venire facias* was inſufficient, as being

being uncertain, and could not be applyed to all: But the Opinion of the Court was, That it was good, becauſe that the word [*Exitus*] may reſpectively ſerve for all, *reddendo ſingula ſingulis*. See *Leigham* and *Rowes* Caſe, in C. B. *Hobart*, 66. acc.

7. The Queen ſeiſed of the Rectory of L. had Portion of Tythes belonging to it; and by her Letters Patents granted unto A. and B. *totam illam portionem Decimarum in L. in Com. N. cum duabus aliis Decimis in L. in dict. Com. N. tunc in occupatione J. S.* And further by her Letters Patents granted, That her ſaid Letters Patents ſhould be in force againſt the Queen, her Heirs, and Succeſſors, notwithſtanding the ill naming or reciting of the ſaid portion of Tythes, &c. And in this Caſe, it was Reſolved, 1. That theſe words (*illam portionem*) were not ſatisfied untill it came to the end of the ſentence, and that refers to the Occupation of J. S. for that is uſed to reduce the intention of the Kings Grant to a certainty. 2. Reſolved, That the word (*Portio*) ſignifies a part or portion in groſs divided, and not parcel of the Rectory of L. and the Kings Grant ſhall not extend beyond the Kings intention, and the expreſs meaning of his Grant, *Cook* 4. Part. *Bozouns* Caſe. Mich. 27 Eliz. in B. R. *Futter* and *Bozouns* Caſe. *Godbolt*, 39. acc.

8. An Appeal of Maim was, That *percuſſit ſuper manum dextram*, viz. *inter manum dextram et brachium dextrum*. Exception was taken to this Indictment, that it was repugnant. For if it was *inter brachium et manum dextram*, then it could not be *ſuper manum dextram*. But it was holden good enough, becauſe it ſaith *ſuper manum dextram*, and the Indictment is ſufficient in matter, and it being upon the Wriſt, it is upon the riſing of the hand. Mich. 29 Eliz. in B. R. *Godbolt*, 67.

9. The Abbot of S did Grant *annualem penſionem* to B. *ad rogatum J. S. illam ſcil. quam J. S. habuit ad Terminum vitæ ſuæ ſolvend. quouſque (ſibi) &c. de Beneficio proviſum fuerit.* In this Caſe, it was holden by the whole Court in a Writ of Annuity brought, that the word (*ſibi*) did refer to B. the Grantee, and not to J. S. See 22 E. 4 9 The Abbot of *Selbyes* Caſe.

10. Error to reverſe a Judgment in C. B. in *Ejectione firmæ*; wherein the Plaintiff declared, *de uno Meſſuagio, et uno Repoſitorio*. The Error aſſigned was, That *Repoſitorium* was here put for a Warehouſe, which is a word incertain, and hath divers ſignifications: And therefore it was ſaid, That *Ejectione firmæ de uno Repoſitorio* was not good, and Ejectment ought to be of a thing certain, of which the Sheriff may give a Seiſin. The Court ſaid, That *Repoſitorium* is not properly a Warehouſe, but that in which a man repoſeth any thing. The Judgment was reverſed. Paſc. 17 Car. in B. R. *Sprig* and *Rowlinſons* Caſe. *Cro.* 1. Part, 339. *Maſſ.* 96. the ſame Caſe.

11. Covenant againſt an Aſſignee of an Aſſignee for not repairing of a houſe. *Inter alia*, The Plaintiff declared upon a Leaſe; and being found for the Plaintiff, After Verdict, In Arreſt of Judgment, Exception was taken to the Declaration, becauſe the breach was aſſigned in ſuch a houſe parcel *premiſſorum*, and doth not ſay *premiſſorum prædimiſſorum*, and to him aſſigned; for in Leaſes there are divers things excepted, and it may be, that this is a parcel of the thing excepted. But the Opinion of the Court was, That the Declaration and breach aſſigned was well enough, for *premiſſa* ſhall be intended *prædimiſſa et aſſignata*, and ſhall not be extended to any Lands not *dimiſſa*. Hill. 6 Car. in B. R. *Congham* and *Kings* Caſe. *Cro.* 1. Part, 161.

12. In *Ejectione firmæ*, the Caſe was; An Abbot 21 H. 8. made a Leaſe for *Octogiata et Terdecem annos*. The Queſtion was, Whether *Terdecem* ſhould be ſaid, Thirty, or Thirteen years. It was ſaid it ſhould be Thirty years, becauſe it ſhall be taken moſt ſtrong againſt the Leſſor. But the Court was of Opinion, That it ſhould be taken according to the common parlance for 13 years, for *Terdecem*, and *Treſdecem* are all one; and it is ſo writ *Euphoniæ gratia*, and it being one entire word, it cannot otherwiſe be taken. But if it were written as ſeveral words, then it ſhould be otherwiſe. Hill. 9 Car. in B. R. *Hopewell* and *Searls* Caſe. *Cro.* 1. Part, 281.

13. Error of a Judgment in C. B. in Debt upon an Obligation. The Condition was, That if the Obligor accepted of a Leaſe by Indenture of ſuch Lands as the Plaintiff ſhould requeſt, and ſealed a Counterpart thereof, that then, &c. The Defendant pleaded, That the Plaintiff did not requeſt him to accept a Leaſe. The Plaintiff replyed, That he cauſed an Indenture of a Leaſe to be drawn according to the ſaid Condition, and to be engroſſed, and a Label to be affixed thereunto *cum cera aſperſa*, and required and offered to deliver to the Defendant to accept thereof, and he refuſed. Upon Error brought, it was aſſigned for Error, That it was *cum cera Labello annexa*, and *cera* is no Latine word for Wax, but ſignifies a Lock. But it was diſallowed by the Court, for that *cera* may be well intended for Wax *ſecundum ſubjectam materiam*. The Judgment was affirmed. Trin. 19 Car. in B. R. *Lee* and *Ruſſell's* Caſe. *Cro.* 1. Part, 405.

14. Debt upon a Demiſe of a Meſſuage with a Sheep-walk, the Latine word being [*Ovile*]. It

was holden by *Doddridge* Juſtice in this Caſe, That by the word (*Ovile*), although it be tranſlated in Engliſh a Sheep-walk, yet a Sheep walk did not paſs by it, but a Sheep-Cote; and by that the Land it ſelf did paſs. Hill. 16 Jac. in B. R. *Hurſton* and *Woodcock*'s Caſe. *Godbolt*, 273.

15. The Sheriff made a Warrant to four men *et cuilibet eorum quod ipſi caperent* J. S. Two of the four Arreſted J. S. and J. S. promiſed J. D. at whoſe requeſt and ſuit he was taken, That if he would diſcharge him of the Arreſt, that he would pay him 10 l. *quando requiſitus &c.* J. D. diſcharged him of the Arreſt, and brought Aſſumpſit for the 10 l. It was moved in ſtay of Judgment, That the conſideration was not good, becauſe the Arreſt was not lawful, the Arreſt being made by two, whereas the Authority given by the Sheriff ought to be by four or one only, and the promiſe to pay upon diſcharge of an unlawfull Arreſt is not good. But the Opinion of *Gawdy* and *Yelverton* Juſtices was, That the Arreſt was well made, for they ſaid, Warrants in this kind are not to be reſembled to other Warrants in Caſes of Authority, as to make or accept of Livery: For there a Warrant to three *Conjunctim et Diviſim* to make Livery, two cannot make Livery. So where three are bound, *et quilibet eorum*, the Bond cannot be ſued againſt two. But a Warrant to do Execution, or the like, ought not to be conſtrued ſo ſtrictly, for the intent of the Sheriff was to have the party Arreſted, and whether by all or two of them, *Non reſert*. Mich. 45 Eliz. in B.R. *King* and *Hobbs* Caſe. *Yelverton* 25, 26.

16. Note, It was ſaid, That the word (*Subject*) might have ſeveral ſignifications according to the circumſtances whereupon it is ſpoken. As ſubject generally without more, is to be intended of the Queen; but according to the Circumſtances, it may be ſaid, Subject of *England*, or Subject of *Ireland*, or ſubject to the Law, or ſubject to any other Authority or power ſet over him, or ſubject to his Affections. And there it was ſaid, That if a man ſaith of another, That he is a Subject, and therefore ought to ſerve the Queen in her Wars. And he anſwers, That he is ſorry for that, and is grieved for it, no Action will lye for this, becauſe the grievance refers to Service which is to be done, and not to ſubjection as a Subject. See the Earl of *Shrewsbury* and Sir *Tho. Stanhops* Caſe. *Poph.* 69, and 70.

17. Note, It was ſaid, That the word (*ſcilicet*) in a Declaration ſhall not make any alteration of that which went before. In Trover and Converſion, the Plaintiff declared, That he was poſſeſſed of goods, 1. *Jan.* 15 Jac. And that *Poſtea*, (*ſcil.*) the laſt day of *May*, in the year aforeſaid, loſt them, and that they came to the Defendants hands. Upon Iſſue joyned, being found for the Plaintiff, and this was moved in Arreſt of Judgment. It was the Opinion of the Court, That the (*ſcilicet*) was void, and the *Poſtea* good, Mich. 15 Jac. in B. R. *Deſmond* and *Johnſons* Caſe, vouched in *Dicher* and *Molands* Caſe. Mich. 2 Car. in B. R. *Popham* 204.

18. Debt upon an Obligation, the Condition was, That if the Defendant ſhould make compoſition with one E. for Lands, then he ſhould pay the Plaintiff 30 l. The Defendant pleaded, That he made no compoſition. The Plaintiff replyed, That the ſaid E. did grant to the Defendant a Rent of five Marks in Fee in ſatisfaction of his Title, which the Defendant did accept in ſatisfaction, &c. The Defendant *proteſtando*, that E. *non Conceſſit* for plea ſaid, That the Defendant did not accept of it in ſatisfaction, &c. The Opinion of the Court was, That it was a good plea; for it is no compoſition without conſent, which depends upon the acceptance, and the Grant is but at the moſt argumentative. Hill. 14 Jac. in C. B. *Earl* and *Tuſts* Caſe. *Hob.* 178, 179.

19. Note by *Hobart* Chief Juſtice, That the word (*videlicet*) or (*ſcilicet*), or in Engliſh, (That is to ſay) is neither a direct ſeveral clauſe, nor a direct entire clauſe, but it is *inter media*. It is not a ſubſtantive clauſe of it ſelf, and therefore you can neither begin a ſentence with it, nor make a ſentence of it ſelf by it, but it is *Clauſula ancillaris*, a kind of Handmaid to another clauſe, to deliver her mind, not her own. It is a kind of Interpreter, the nature and proper uſe of which, is to particularize that which was before general, or to diſtribute that which is in groſs, or to explain that which is doubtful and obſcure. Alſo it muſt neither encreaſe or diminiſh, for it is not the nature of it to give of it ſelf. As if I have in D. Black Acre, White Acre, and Green Acre, and I Grant unto you all my Lands in D. (*viz.*) (*ſcil.*) (or that is to ſay) Black Acre, and White Acre; yet Green Acre ſhall paſs: but if I add under the (*viz.*) (*ſcil.*) Land lying out of the Town of D. it ſhall not paſs. But yet on the other ſide (*viz.*) (*ſcil.*) may work a reſtriction where the former words were not expreſs and ſpecial, but ſo indifferent as they may receive ſuch a Reſtriction without apparant injury; though the former words by conſtruction of Law would have had a larger Leaſe if the (*viz.*) or (*ſcil.*) had not been. 7 E. 3. 9. One granted 10 l. of Rent in his Manner of D. to receive by the hands of one Tenant ſo much, and ſo from one Tenant to another, till he made up 10 l. ſaving his Seignory. The Opinion of the Court was, That this was but a Grant of ſeveral Rents of thoſe Tenants

nants as Rent-Seck by this (*videlicet*), which had bin otherwise if he had left at the premises, without the (*viz.*) for then it would have bin a new entire Rent of 10 l. out of the whole Demeans of the Manner. But if the particular Rents had made but 5 l. that then the premises would have taken place, and the (*viz.*) or (*scil.*) had bin void. See by *Hubert* Justice. Hill. 12 Jac. in C.B. in *Stukely* and *Butlers* Case. *Hob.* 172.

20. A Prior seised of divers houses with the consent of his Covent, made a Lease of them for years, rending the yearly rent of 5 l. 10 s. 11 d. at the four Feasts of the year usual in the City of L. (*viz.*) for one house 3 l. for another 20 s. and for the other houses several Rents residue of the said 5 l. 10 s. 11 d. upon Condition, That if the Rent of 5 l. 10 s. 11 d. be behind in part, or in all at any of the said Feasts, that then the Prior and his Successors to re-enter. In this Case (amongst other points) it was Resolved, That it was one entire Lease, consisting upon several unities (*scil.*) 1. One Demise. 2. One Lessee. 3. One beginning. 4. One Term. 5. One determination. And 6. One Reservation of Rent in gross. And that the *scil.* afterwards did not make severance of it, but that that was rather a several Declaration of the values of the Land; and therefore it was Resolved, That it was one entire Rent by the intention of the parties. *Cook* 5. Part, *Knights* Case.

21. H. G. brought Debt upon an Obligation against H. D. Executor of J. D. The Condition was, That whereas H. G. had taken A. D. as an Apprentice; If the said A. should waste or consume any of his goods, and that duly proved by the confession of the said A. or otherwise, that then J. D. his Executors within three Moneths next after due proof and notice thereof given to him or them, should render him recompence. The Defendant pleaded, There was no proof made. The Plaintiff replyed, that there came 3000 l. to the Apprentices hands, whereof he had imbesled and wasted as much as came to 400 l. and that he confessed it by a writing under his hand. It being adjudged for the Plaintiff; and Error thereupon brought in the Exchequer Chamber, the Judgment was affirmed. For it was said, That although the word (Proof) put generally shall be understood by Law such a proof as is legal; that is to say by Jury: Yet when the party expresseth himself to mean and allow another form of proof that shall prevail against that that is but by construction of Law. Pasc. 14 Jac. in C. B. *Gold* and *Deathes* Case. *Hob.* 92, 93.

22. Debt upon an Obligation, to perform an Arbitrament between the Plaintiff on the one part, and A. B. of the other part, *Ita quod arbitramentum predict. fiat et deliberetur utrique partium predict.* The Defendant pleaded, That the Arbitrament was delivered to the one of the Defendants only. In that Case it was adjudged, That the Action would not lye: For it was Resolved, That this word *uterque* in this Case shall be taken *collective*; for that it is reason, that every one that is subject to the penalty and danger should have the Arbitrament severally delivered to him; and therefore in this Case it ought to have bin delivered to both the Defendants. *Cook* 5. Part, *Hungates* Case.

23. If a man deviseth Lands to his Son *Tho.* to have and to hold, to him and the Heirs Males of his body for the Term of 500 years, his Heir shall not have the Land, but his Executors, because that this Term is but a Chattel, and cannot be entailed, but such a Devisee may Allien the Term if he please. And it is but an Estate for years, because it is so in expres words Devised, and against expres words no inference or interpretation shall be admitted. *Cook* 10 Part, 880. in *Leonard Loviet* Case.

24. If a Rent be granted out of the Manner of D. and the Grantor further Granteth, That if the Rent be behind, That the Grantee shall distrein for it in the Manner of S. It was holden in that Case, That the same is no Grant of Rent out of S. but a penalty only in the Manner of S. because in this Case the Law needs not to make a Construction that this shall amount to a Grant of a Rent; For in this Case, The Rent is expresly Granted to be issuing out of the Manner of D. and the parties have expresly limited out of what Land the Rent shall issue, and the Law will not make any exposition against the expres words and intent of the parties. *Cook* 7. Part, 24. in *Butts* Case.

25. If a man be bound in an Obligation to stand to, abide, observe, &c. the Rule, Order, Arbitrament of J. S. yet may he after countermand it: For a man by his Act cannot make an Authority, Power, or Warrant to be uncountermandable, which by the Law, and of its own nature is countermandable. As if I make a Letter of Attorney to make Livery, or to sue one upon an Action in my name: Or if I do assign Auditors to take an Account, or I make J. S. my Executor; although that all these things by expres words, that they shall stand and be irrevocable: Or if I Grant, or am bound, That all these shall stand irrevocable. Yet notwithstanding that, they may be revoked. And so if a man makes his Will irrevocable, yet he may after revoke it: For that a mans Act, or his words, cannot alter the Judgment of the Law, and make that irrevocable which in its own nature is revocable. *Cook* 8. Part, 82. in *Vincents* Case.

26. Queen

26. Queen *Eliz.* made a Lease for years of Lands rendring Rent payable at the Exchequer at *Westminster, seu ad manus Baliorum et receptorum, &c.* without Condition to be void upon non-payment. Afterwards the Queen Granted the Reversion over in Fee. It was holden in that Case, That the Rent now ought to be demanded upon the Land. For it was said, That in the Queens Case, the limitting of the payment of the Rent at the Exchequer, or to the hands of the Bailiff, &c. is no more then what the Law would have ordered, if no place or person at all had bin named in the Letters Patents. So as such a limitation in the Queens Case operates nothing. *Cook* 4. Part, 73. *Brough's* Case.

27. In Trespass, the Plaintiff declared, That the Defendant had broken his house, and had taken away *Quinque instrumenta ferrea Anglicè* Fetters. It was moved in Arrest of Judgment, That *Instrumenta ferrea* was not a good expression in *Latine*, because there was a proper word for Fetters, namely *Compes*, so as it ought to have bin *Quinque Compedes*, or *Quinque parium Compedum*, and not as it is: for the word *instrumentum* may be used to signify any thing else with an *Anglice* added to it, as well as Fetters. The Opinion of the Court was, That it would be a hard thing to maintain the Declaration to be good, for that if it should be admitted good, it would bring in all Barbarism in pleading, and any senseless word might be used with an *Anglice*. But the Case was not Resolved, but adjourned. Trin. 23 Car. in B. R. *Parker* and *Martins* Case. *Styles* 37.

28. Note, for the construction of words in a Will, this Rule, That an Estate which by Rules of the Common Law, cannot be conveyed by Act executed in the life of the Devisor by apt words in the Conveyance, by advice of Counsel Learned in the Law, such an Estate cannot be devised by the Testator by his Will. As if a man deviseth Lands to another for ever, there the Devisee hath a Fee, because such an Estate by apt words may be conveyed by act executed, &c. But if he Deviseth further, That if the Devisee doth not such an Act, that another shall have the Land to him and his Heirs, because such a limitation is not good by any words at the Common Law, such Devise is void. *Cook* 1. Part, 85. in *Corbets* Case.

See more of words, *Liber* 1. Title, *Action upon the Case for words*, and in other Titles.

Writ and *Writs*.

See *Lib.* 1. Title, *Abatement of Writs*, where, and for what cause they shall abate.

More *Writs*.

1. Writ, otherwise *Breve*, is termed in Law, the Processe that issueth out of the Chancery or other the Kings Courts, directed to the Sheriff, commanding him thereby, to Summon, Attach, &c. J. S. to answer the Suit of *A*, &c. But most largely, It is the Letter or *Mandatum Domini Regis*, whereby any thing is to be done, for the furtherance and doing of Execution and Justice between both parties; It is a very Compendious thing containing in it, the substance, and cause of the Action; *Cook* 3 Part, 44. in *Bastons* Case, 44. *Dicuntur Brevia, propter eorum brevitatem.* Or *Cook* 5. Part, 117. in *Palmers* Case, *Quia rem breviter enarrat.*

2. Writs; Some are Original, issuing out of the Chancery; Which see Register. Some Judiciall, issuing out of the Kings Courts. Some are *Adversaria*; Some *Amicabilia*, *Cook* 6. Part, 66. in Sir *Moile Finch's* Case. *Amicabila*, are such as are brought by Consent and Agreement amongst Friends. *Adversaria*, are such as are brought to force the party to do a thing, or to appear, or answer. There are six kinds of Writs which are called *Brevia anticipantia*, because they may be maintained *quia timet*, before Molestation, Distresse, or Impleading. As, 1. A Writ of *Mesne* before the Distresse taken. 2. *Warrantia Chartæ*, before the Impleading. 3. The Writ of *Monstraverunt*, before the Distresse, or Molestation. 4. The Writ of *Audita Querela*, before Execution be sued. 5. The Writ of *Curia Claudenda*, brought before the Enclosure. 6. The Writ of *Ne injuste vexes*, brought before the Distresse.

ſtreſſe, or Moleſtation. *Cook* 2. Part, *Inſtitutes*, 99, 100.

3. Of Original Writs; Some are Writs Patent; as the Writ of Right Patent, which lyeth of Lands and Tenements in Fee-ſimple, and is directed to the Lord, *quod reſtituat Tenet.* to the Tenant ſuch Land. Some, Writs of Right Cloſe, which are not Patent, but enclоſed in Wax: Of which, ſome lye for Tenant in Fee-ſimple, ſome for thoſe who have leſſer eſtate.

4. In a Writ of *Droit Patent* brought of Land, it is a good Plea for the Defendant to ſay, That the Demandant hath nothing in the Land but in taile, 5 E. 4. 2. And ſee 7 E. 4. 27. That he who claimeth but an Eſtate taile, cannot have a Writ of Right, if he leſeth in another Action.

5. A Writ of Right Cloſe of Lands, in *London* lyeth for none but for him who claims a Fee-ſimple: And ſo it is of the Writ *de Rationabili parte*, which is a Writ of Right, and lyeth between Privies in blood, and lyeth but of a Fee-ſimple. There are divers other kinds of Writs of Right: As, a Writ of Right of Cuſtomes and Services, which is called, or is in the nature of a Prohibition. A Writ of Right of Advowſon, which lyeth only for him who claimeth Fee in the Advowſon: for if Tenant in taile of an Advowſon recovereth by a Writ of Right, yet he ſhall hold but in taile: and in ſuch caſe, although he cannot properly have a Writ of Right of Advowſon; yet he ſhall and may have a *Quare Impedit*, and thereby recover taile. See *Fitz. Tit. Judgment*, 37. A Writ of *Quo Jure*, is a Writ of Right, and lyeth where another claimeth Common in his Lands; and lyeth only for Tenant in Fee-ſimple: and in this Writ, View lyeth, becauſe it is a Writ of Right, 5 E. 42. A Writ *de rationabilibus diviſis*, is a Writ of Right, which lyeth for Tenant in Fee-ſimple, againſt Tenant for life. A Writ of Cuſtomes and Services, lyeth for the Lord in Fee, in taile, or for life; and ſo doth a Writ of Droit Cloſe for Tenants in Ancient Demeſne, 48 E. 3. 27. acc. A Writ of Right *Sur Diſclaimer*, lyeth for none, but for him who claimeth Fee. *Caſſavit*, is a Writ which lyeth only by the Lord in Fee-ſimple, but it lyeth againſt Tenant for life, 20 H. 6. 46. And Note; That it was holden, 20 Eliz. in C. B. That Tenant for life, ſhould not have a Writ of *Ceſſavit*, becauſe it is in the Debet, which is in point of Right; and in the Salet, in point of Continuance. An *Audita Querela*, is in the Nature of a Writ of Right at the Common Law, to execute the Deviſe, M. 34 H. 6. 7. A Writ of *Nativo Habendo*, is a Writ of Right, which none ſhall have, but he who hath an Inheritance; and he ſhall have the Writ but once. *Formedon*, and Writs of *Juris utrum*, are Writs of Right in their Natures, becauſe they are the Higheſt Writs, which Tenants in taile, Parſons, Vicars, &c. can have. See more of what Writs of Right do lye; and of what Eſtate, and againſt whom, in the ſeverall Titles before.

6. A Writ of Right was brought by the College of *All-Souls* in *Oxford*, againſt J. S. And the Writ was, *Quod clamat tenere de Nobis in Liberam, puram, et perpetuam Elemoſynam*; Many Exceptions were taken to the Writ: As, 1. Becauſe it ought to be, *in Liberam Elemoſinam*, without the words, *pura et perpetua*. 2. Becauſe *Elmoſina*, was written with a ſingle *E* ſ whereas it ought to be *ee*. 3. Becauſe the Writ was, *Quod Clamat eſſe jus et hereditatem ſuam*, without ſaying; *in Jure Collegii*. But notwithſtanding all theſe Exceptions, the Writ, by the Opinion of the Court, was in all good. Trin. 31 Eliz. in in C. B. The Schollers of *All-Souls* and *Tamworth*'s Caſe, 153.

7. A Writ of Right was brought; and the Writ was, *Meſſuagium, et 200 Acr. pampinorum et bruera*. Exception was taken to it, becauſe they were counted together; whereas they ought to be diſtinguiſhed ſeverally, as ſo many *Acr. pampinorum*, and ſo many *Acr. bruera*. And it was ſaid, That in a Writ of Right, we ought to follow the Regiſter; and in the Writ of Right in the Regiſter, the Writ was abated, becauſe the word *Pomarium*, was put in the Writ; for in the Regiſter there is no ſuch Writ, becauſe the word, *Gardinum*, comprehends it. But the Exception was diſallowed by the Court; for that it may be *pampinorum et bruera*, are ſo promiſcuous, that they cannot be diſtinguiſhed. Another Exception was to the Writ, becauſe thereby the Demandant did demand *Duas partes Cuſtodiæ del Hay* in the Forreſt of C: The Opinion of the Court was, That the Writ ought to be (being of an Office) *de Officio Cuſtodiæ duarum partium de Hay*; and not *duas partes*. Another Exception was, Becauſe it was not ſet down in the Writ in what Town the Forreſt of C. is; ſo as the Court doth not know from whence the *Veniet* ſhould come. The Points were not all Reſolved. Mich. 31 Eliz. in C. B. *Salway* and *Loſeas* Caſe. *Leon.* 169.

See more of Writ of Righ, in *Lib.* 1. Tit. *Droit.*

8. A Writ of Right of Advowſon was brought againſt A. B. and others, as Coparceners: Upon a Speciall Verdict by the Grand Aſſiſe, It was ſhewed, That the Tenants were Coparceners, and that one of the Defendants was dead after

ter the Darrein Continuance before the Term, which was pleaded in abatement of the Writ. The Kings Attorney Traversed, That they were not Parceners: Upon which, it was Demurred. It was the Opinion of the Court, That the Writ should abate: For all the Court agreed, That although that it were admitted, that they were not Coparceners, but Joynt-Tenants; yet the death of one of them should abate the Writ, suing in a Reall Action: And they said, It is not like to the Case of an Assise of *Novel disseisin*, or of an Assise of *Mordauncestor*, where the death of one shall not abate the Writ, as long as there is a Tenant living. Hill. 15 Car. in B. R. The King and Sir *John Dryden*'s Case, *Cro.* 1. Part, 415.

9. Note; It was holden in the Court of Common Pleas, That if a man Presenteth by usurpation to my Advowson within 6. moneths, I may have a *Quare Impedit*; But after the six moneths, if the Church do become void, I cannot present, but am put to my Writ of Right of Advowson. And in that Case, It was holden, That if a man usurpeth upon the King, he is put to his *Quare Impedit* within the six moneths; and that a double usurpation upon the King, should put him to his Writ of Right; as 24 E. 3. in. But Quære of that; for that it hath often been Resolved to the contrary, That where the King hath a Right *jure suo*, that 20 usurpations upon him cannot put him out of possession. Mich. 13 Jac. in C. B. *Godbolt*, 263.

10. Note; That although properly a man cannot be said to recover Land from another, who never entred into the Land, nor ever had the Actual possession thereof; Yet, if a *Pracipe quod reddat* be brought, and the Sheriff return the Tenant summoned, whereas in truth he was not summoned, whereby the Tenant upon the *Grand Cape* returned, loseth his Land by default; In such case, The Tenant shall have a Writ of Discein, both against him that recovered, and also against the Sheriff for his false Return; and by such Writs of Deceit, the Tenant shall be restored to his Land again; and this Writ may be brought by the Tenant after Judgment, and before any Entry made into possession by the Demandant; for if the Tenant should not have the Writ before the Demandant entreth, it may be that the Demandant will not enter, until all the Summoners in the *Pracipe quod reddat*, *Vouers* and *Pernors* are dead, and so the Tenant be left without remedy to recover his Land. See *Fitzh. Na. Br.* 97. acc.

11. Errour brought upon a Judgment in a Second Deliverance; The Errour assigned was, That there was not any Writ of Second Deliverance certified; *In nullo Erratum* being pleaded, it was moved, That that was not materiall; For it is awarded upon the Roll, and the parties appearing, and pleading thereunto, it is not now materiall. But the Opinion of the Court was, That it was ill; And for that Cause the Judgment was Reversed; for there ought to be a Writ, and it vary in substance from the Declaration in the Replevin, it shall be abated. Pasch. 15 Jac. in B. R. *Newman* and *Mares* Case. *Cro.* 2. Par. 424.

12. A. T. Cosen and Heir of W. T. after the death of W. T. (because he had not any Son alive at the time of his death), but M. his Wife was supposed to be enseint by him; who died 15 Feb. 1623. (and she was married again to I. D. within a week after the death of her first Husband) procured a Writ *de ventre inspiciendo* of the said M. directed to the Sheriff of *London*, to cause the said M. to be searched, whether she were with child by the said W. T. *Et quatenus sit pariturus.* (no mention being made of her second Marriage in it;) The Sheriff returned in C. B. That he had caused her to be searched, and found her to be with Child, *Et quod pariturus est* within 20 Weeks: Upon that, a second Writ was prayed to be directed to the Sheriff of S. because she was removed thither with her Husband, and there Inhibited; That the Sheriff might take her into his Custody, and keep her till she was delivered of her Child; and that in the mean time he should cause her to be viewed every day by certain Matrons named by the Court in the Writ: And so it was said, it was done in the Lady *Wingfield*'s Case, in 20 Eliz. But here in this Case, because she was a *Feme Covert*, who ought to cohabit with her Husband, The Court would not take such a Course with her, but left her with her Husband, he entring into a Recognizance, That she should not remove from the house wherein they then dwelt; and that one or two of the Women returned by the Sheriff, should every day see her, and that 3. of them should be present at her Travail. Note; Afterwards she was delivered of a Daughter, who by Inquisition was found to be a Daughter and Heir of the said W. T. Pasch. 22 Jac. *Thacker* and *Duncomb*'s Case. *Cro.* 2. Part, 605.

13. In an Action upon the Case, the Plaintiff declared, That certain Goods of the Testator came to the Defendant's hands. Upon the Matter in Law, Judgment was given for the Plaintiff; And thereupon a Writ of Enquiry of Damages sued; And now the Defendant brought Error in the Exchequer Chamber upon the Statute of 27 Eliz. Cap.

Cap. 8. Note; The Judgment was given before the Statute; but the Writ of Enquiry of Damages was returned after the Statute, and the Statute doth not extend but to Judgments given after the making of it. It was the Opinion of all the Juſtices, and of the Barons, That the Writ of Error did well lye by the Statute; For in an Action of Treſpaſſe (as this Caſe is) full Judgment is not given till the Writ of Damages be returned; and that if before the return of it, any of the parties dyeth, the Writ ſhall abate; and that the firſt Judgment is not properly a Judgment, but a Rule and Order of Court. 2. In this Caſe, It was holden, That an Executor ſhall have an Action upon the Caſe *de bonis teſtatoris* caſually come to the hands of another, and converted to his own uſe in vita *Teſtatoris*. Mich. 32 Eliz. in the Exchequer Chamber. *Ruſſell* and *Prats* Caſe, *Leon.* 193.

14. Error of a Judgment in C. B. in Waſte, where upon default of the Defendant, a Writ of Enquiry of Damages was awarded: The firſt Error was, Becauſe the Waſt being aſſigned in two houſes, and 3 Gardens; upon their Enquiry, the Waſte was found in the Houſes and Gardens, and entire Damages found; whereas there ought to be ſeveral Damages found for every of them. But that was diſallowed by the Court, for that when the Sheriff and Jury have had the View, and found Damages for the Waſte, It ſhall not be intended petit Damages in any (as was Objected) and for that it is the uſual courſe in all Preſidents, to find entire damages. Mich. 11 Car. in B. R. *King* and *Fitch*'s Caſe, *Cro.* 1. Part, 199.

15. Covenant in *London*, for not repairing of Hedges, and not plowing of Land in the County of H; Upon *Nihil Dicit*, a Writ of Enquiry of Damages was awarded to the Sheriffs of *London*, and the Writ Returned: It was moved, The Writ iſſued erroneouſly, becauſe it was not awarded to the Sheriff of H. where the Land lay. But the Exception was diſallowed, becauſe the Covenant was founded upon a Writing made in *London*. Mich. 4 Jac. in B. R. *Smith* and *Batten*'s Caſe, *Cro.* 1. Part, 142.

16. Error of a Judgment in the Kings Bench; The Bill was Trover for 400 Buſhells of Pippins, and the Declaration was 40 Buſhels, and thereupon damages found 40 l: The Error aſſigned was, Becauſe the Writ of Enquiry of Damages varied from the Declaration upon Record, there being more in the Writ, than in the Record upon which the Judgment was entred. All the Juſtices and Barons held, it was Error, for that the Bill doth not warrant the Declaration, and the Judgment ought to be warranted by the Declaration on Record. And it cannot be amended, for that it is the Record to which the party was to plead. Mich. 19 Jac. in Exchequer Chamber. *Clogdan* and *Taylor*'s Caſe, *Cro.* 1. Part, 194.

17. C. of *Hertford*, being expelled from being a Burgeſſe there, procured a Writ to the Mayor and Burgeſſes to reſtore him, or to ſignifie the Cauſe; Who returned, That he being Churchwarden, preſented one of the Burgeſſes malitiouſly, for being abſent from the perambulation, for which being reproved by the Mayor, He ſaid contemptuouſly, *I care not for Mr. Mayor, nor any of his Burgeſſes*; and for this cauſe he was expelled. It was the Opinion of the Court, That it was no cauſe of expulſion. Wherefore a Writ of Reſtitution of him was awarded. Mich. 16 Jac. in B. R. *Clarke*'s Caſe. *Cro.* 2. Part, 506.

18. W. being one of the Councel at *Coventry*, was removed, and had a Writ of Reſtitution. The Corporation thereupon returned, That they had a Cuſtome to elect any to be of the Common-Council, and to remove him *ad libitum*; and that W. was removed, &c. The Court was of Opinion, That it was a good Return: And the difference is, Where a man is a Freeman or Alderman, &c. there, they cannot remove him from his Freedome or place without cauſe; and in ſuch a Caſe, ſuch Cuſtome is void. But to be of Councel, is a thing Collateral to the Corporation, and there it is otherwiſe. It was then ſurmiſed, That he was Alderman: Whereupon a Writ of Reſtitution was awarded to reſtore him to his Aldermanſhip. Trin. 17 Jac. in B. R. *Warren*'s Caſe. *Cro.* 2. Part, 540.

19. An Aſſiſe was brought of the *Superſedeas* Office. The Kings Councel came into Court, and ſaid to the Judges, That the King did Greet them well: And as to this Aſſiſe, *Jure Regali*, being a thing which concerns the King and his Prerogative, that they were not further to proceed in this: And ſo delivered to them a Writ *De ſuperſedendo interim proſequendo Rege Inconſulto*. It was accepted of by the Judges. It was firſt doubted, Whether Councel for the Plaintiff might argue againſt his Writ brought: But that at length was admitted that they might do; and ſo afterwards learned Arguments were made on both ſides. But afterwards the matters were compoſed between the parties. But the Court agreed in this, That after allowance of ſuch Writ, that they could not proceed again, without having a *Procedendo ad Inquiſitionem*, &c. and a *Procedendo ad Judicium*, and without theſe Writs they could not proceed. *Brownlow* and *Cox* and *Mitchell*'s Caſe. Paſc.

13 Jac. in B. R. *Bulstr.* 3. Part, 32, 33, 34.

20. In Waste, the Case was: M. D. seised of the third part of a Messuage, and certain Lands in B. in the County of W. in *April.* 9 Eliz. Demised them to S. W. for fourty one years, from *Michaelmas* next; who assigned it over to R. W. Afterward M. D. by Deed Inrolled, conveyed the Reversion to J. S. and his Heirs, the said J. S. being then seised of another third part thereof in Fee: After which, 17 Eliz. J. S. demised the said third part which was his before the Purchase to the said R. W. for 21 years, then next comming. Afterwards J. S. dyed seised of the Reversion of the two parts, and this discended to B. S. his Son and Heir, who 28 Eliz. Bargained and sold the same to T. H. and his Heirs. After which R. W. committed Waste, and T. H. brought an Action of Waste according to the said two several Leases, and assigned the Waste in a Hall and a Kitchin, suffered to be uncovered to his disinherison. Upon *Nihil dicit*, a Writ of Enquiry of damages was awarded, in which it was comprised, That the Sheriff should go to the place wasted, and there enquire of the damages. Who returned an Inquisition taken at B, without making mention that he went to the place Wasted, and that it was taken there; and thereupon Judgment was given in C. B. and that he should recover Seisin against the Defendant of the places Wasted: *Per visum Juratorum Inquisitionis predict. et damna sua occasionat vasti predict. in triplo, &c.* Upon which Error was brought. In this Case, It was amongst other things Resolved, That it was but surplusage to comprehend in the Writ of Enquiry of Damages, That the Sheriff shall go to the place Wasted, and there enquire of the Damages, inasmuch as that by the not doing thereof, the Waste is acknowledged, and therefore he need not to go to the place Wasted to enquire of it. But where a Writ of Enquiry is awarded to enquire of Waste upon a default made, there it is needfull that the Writ have this clause in it, That he shall go to the place Wasted: For by the View, the Waste may be better known by them; but where the Waste is acknowledged, as here, there it needs not. 2. Resolved, That the Action was well brought upon the Demises of two third parts of it; for it cannot be done in the two parts, but in the whole, nor in the whole, but it must be in the two parts. 3. That it was well brought, because neither the Interest of the Term, nor of the Inheritance was severed at the time of the Waste done, but the second Term in one, viz. W. and the Inheritance in H. Mich. 35 Eliz. in B. R. *Haydock* and *Wansfords* Case. *Pasch.* 24, 25.

21. In Trespass, the Case was: An Original bore date in *June*, 18 Jac. And another Original in *September*, 18 Jac. and both were Returnable in *Michaelmas* Term following. And the Trespass was done after the first Original sued forth, and before the latter, and both the Writs were in Court. And it was the Question upon which of the Originalls the Judges should judg. The Case was often debated in Court; And *Plow* and *Trevertons* Case, Pasc. 20 H. 8. Rott. 25. was vouched. Where after the Record was removed, Diminution of the Original was alledged; and it was pretended, That Judgment was given upon another Original, and one of the Originalls was before, and the other after the Judgment; and there the Judgment was reversed, because it cannot appear to the contrary, but that the Judgment was given upon the later Original. Also Trin. 11 Jac. Rott. 1613. *Brown* and *Jones* Case. In an Action upon the Case upon an *Assumpsit*, Error was assigned, because no place was limited where the payment should be made. The Original was, That the promise was in consideration that the Plaintif did lend to the Defendant so much money; he at *London* did promise to pay him the same again. There were two Originals which bore date the same day, In that Case, Judgment was for the Plaintiff. The Defendant brought Error, and alledged Diminution of the Original, and then the other Original was certified. The Defendant in the Writ of Error said, That the Original upon which the Recovery was grounded, had a plea certain. In that Case, the Judges did affirm the same to be the true Original, which did maintain the Judgment, and agree with the proceedings, otherwise great mischief would ensue. Mich. 19 Jac. in B. R. Rott. 322. *Crouch* and *Hayns* Cas. *Golbol*, 407.

22. In Waste brought by the Heirs of Sir *Roger Lewkner* against the Assignee of Lease for years. It was brought by two Coparceners, and the Heir of the third Coparcener, her Husband being dead. Exception was taken to the Writ, because that it was general, viz. *Quod sint vastum in terris, quas Sir Roger Lewkner pater predict.* the Plaintiff *cujus hæredes ipsa sunt prefat. defend. dimisit*: and the Declaration was, That the Revercion was entailed by Parliament unto the Heirs of the body of Sir *Roger*; and so the Writ ought to have been special, *scil. cujus hæredes de Corpore ipsa sunt.* It was the Opinion of the Court, That the Writ was good, although there was not any such Writ in the Register. *cujus hæredes de corpore*; and the Court said, It was sufficient to

ſhew the ſpecial matter in the Count: and the words of the Writ were true, for they are Heirs of Sir *Roger*, although they are not ſpecial Heirs of his body. Mich. 29 Eliz. in C. B. The Heirs of Sir *Roger Lewkner* and *Fords* Caſe. *Godbolt*, 115.

23. Error was brought upon a Fine levyed, 7 Eliz. of Lands in the County of *Lanc.* It was brought by the Heir in tail: the Defendant pleaded a Recovery in bar after the ſaid Fine, wherein the ſaid R. the Heir was vouched, who after vouched over the common Voucher. It was the Opinion of the Court, That a Common Recovery which is with Vouchers, is a bar by reaſon of the Vouchee to every manner of Right which the Vouchee or his Heir by means of him hath to the Land which is paramount to the Recovery. In the Principal Caſe, the Error aſſigned was, That the Writ of Entry bore date, 1. *March* 7 Eliz. returned *die Lunæ* in 4. *Septimam Quadrageſim. pur. futura*; and the Voucher was in 4. *Septimana quadrageſimæ*, 7 Eliz. the ſaid firſt day of *March*, being the firſt Week of this Lent, 7 Eliz. Upon which it was offered, That the Tenant was not to appear untill *Monday* the fourth Week of Lent, 8 Eliz. which was a long time after the Vouchee appeared and Vouched over. But the Opinion of the Court was, That the Original ſhould be taken as it was written to be returnable on *Monday* in the fourth Week of the ſame Lent, 7 Eliz. for it ſhall be taken as it is written ſtrongly, moſt beneficially that it can be, to make the Recovery good: And if it had bin written *proximè*, it ſhould refer to the Week before, and ſo good; and if the word *futur.* had bin written at large, it ſhould refer to *Septimana*, and therefore being written briefly, it ſhall refer to make the Recovery good. Mich. 31 Eliz. in B. R. *Barters* Caſe. *Pepb.* 101.

24. Fourdon in the Remainder was brought by J. F. and M. his Wife againſt B. of three Meſſuages in A. which R. L. did give to E. C. and the Heirs of her body, the Remainder to J. P. and his Heirs, *Quæ poſt mortem prædict. E. ad proſat. J. F. et M. hered. prædict. R. P. frutis et hered. H. P. filii et hæredis J. P. prædict. J. P. remanere debent per formam donationis prædict. Et quod prædict. E. obiit ſine hærede de corpore, &c.* The Defendant pleaded, That the Demandant ſhould by the form of the Register have ſuppoſed the ſaid Meſſuage *poſt mortem prædict. E. et J. P. proſat. J. F. et M. et Conſanguin. et hæred prædict. J. P. remanere debet per formam Donationis prædict.* It was the Opinion of the Juſtices, That the Writ although it did not agree with the Regiſter in all things; yet if it was equivalent to it, it was good enough. Hill. 11 Jac. in C. B. Rot. 30. *Frak* and *Binfords* Caſe. *Hob.* 51.

25. Debt brought upon the Statute of 37 H. 8. of Uſury. The Writ was, That he *corruptiſ* lent 40 l. &c. againſt the form of the Statute, and that he ſuch a day lent 20 l. &c. againſt the Statute. But doth not ſay *Corruptiſ*. The Defendant pleaded *Non debet*, and found againſt him. It was objected, That the Plaintiff ſhould not have Judgment for any of the ſums; for it is clearly ill for the 20 l. for want of the word *Corruptiſ*. But it was the Opinion of the Court, That it being good for part, he ſhall have Judgment for that part: For being for ſeveral ſums, it is in the nature of ſeveral Actions. But where one brings an Action for two things, and ſhews by his own confeſſion, That for the one he had no any cauſe of Action, or is to have another Action, there it is otherwiſe. It was adjudged for the Plaintiff, Mich. 3 Jac. in C. B. *Wrayes* Caſe. *Cro.* 1. Part, 104.

26. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes. The Plaintiff ſhewed how that the Rector of M. had two parts of the Tythes in three parts divided, and that the Vicar of the ſame place had the third part of the Tythes: and layed the perception of the Tythes to have bin ſuch, time out of mind, &c. and ſhewed, That the Parſon and Vicar by ſeveral Leaſes, demiſed the Tythes to him, ſo that he being *Proprietarius* of the Tythes, The Defendant ſowed ſo many Acres in the Parith, viz. with Wheat, Rye, &c. and carryed them away without ſetting forth *Decimam partem proveniorum, &c.* Upon *Nihil debet* pleaded, It was found for the Plaintiff. In Arreſt of Judgment, it was moved, That in one Writ the Plaintiff had compiled ſeveral Actions upon the Statute upon his own ſhewing, for he claims not the Tythes upon one Title, but under ſeveral Titles, viz. two parts from the Parſon, and the third part from the Vicar; and no more than the Parſon and Vicar could join in one Action by reaſon of their divided Titles; no more might the Plaintiff, who claims ſeverally under them. But the Opinion of the Court was, That although in this Caſe, The Parſon and Vicar could not join in one Action or Writ: yet when both their Titles are conjoyned in one perſon, as it is here in the Plaintiff, It is ſufficient generally to ſhew, that he is *formarius*, or *Proprietarius* of the Tythes without ſaying

by what Title: And alſo this is but a perſonal Action grounded meerly upon the contempt for not ſetting forth of the Tythes, and the Title doth not come in debate, but the Defendant is onely to excuſe him of the contempt, and there the Action brought did well lye. Paſc. 3 Jac. in B. R. Sir *Richard Champernon* and *Hills* Caſe. *Yelverton*, 63.

27. Debt upon the Statute of 1 and 2. *Philip* and *Mary*, cap. 12. the words of the Statute are, That no man ſhall take for keeping in Pound, Impounding, or Pounding of any Cattel, or Poundage of any Diſtreſs above the ſum of four pence, upon pain of forfeiture of 5 l. to the party grieved; and the Plaintiff ſhewed, That his Cattel were diſtreyned and Impounded, and that the Defendant took of him 10 d. for the Poundage. And thereupon the Plaintiff brought an Action for the Penalty of 5 l. and it was found for the Plaintiff: And Judgment was, That he ſhould recover the 5 l. and damages *ultra et præter* the money taken for the Poundage: And Error being brought upon this Judgment, It was aſſigned for Error (amongſt other), becauſe the Action was brought for the penalty of 5 l. onely, and not for the 6 d. which was taken above the allowance of the Statute which ought not to be divided. But the Opinion of the Court was, That notwithſtanding that it was good. For it is true, he cannot bring his Action for 5 0 2. part of the Penalty, becauſe it is entire; but in this Caſe here are two ſeveral penalties, and he may divide them, and diſjoyn them if he will, or he may waive the 6 d. For *Quilibet poteſt renunciare juri pro ſe introducto*. Mich. 15 Car. in B. R. *North* and *Muſgraves* Caſe. *Moſh.* 57.

28. The Caſe was, A man ſeiſed of a Meſſuage Gavelkind, having Iſſue three Daughters, A, B, and C. gave the ſaid Meſſuage to A. and the Heirs of her body, the Remainder of the moyety thereof to B. in tail, the Remainder of the other moyety to C. in tail; and if B. dyed without Iſſue, the Remainder of her moyety to C. with the like Remainder for default of Iſſue of C. to B. A. Tenant in tail diſcontinued, and dyed without Iſſue. B. dyed without Iſſue, by which the right of her moyety came to C. afterwards C. dyed, and her right diſcended to divers Heirs in Gavelkind, who brought one Formedon in Remainder, and by one Writ demanded ſeveral Remainders. It was adjudged in this Caſe, That when all is given to A. in tail, that although that the Donor doth divide the Remainder by moyeties; yet when all the Land doth remain to C. and all the Remainders do depend upon one Eſtate, and are derived out of one Root, and commence by a gift at one time, That the Heirs of C. might have one Writ of Formedon, and ſhall not be driven to bring ſeveral Writs of Formedon. And in the Argument of this Caſe, theſe Rules were taken and agreed, 1. That in Actions real founded upon Title, If there be two ſeveral diſtinct gifts to one, with ſeveral Remainders over to one, there, becauſe the foundation of them is the gift which was ſeveral, there there ought to be ſeveral Writs brought. But if the Foundation be one, and at one time, and out of one Root, there although that there are ſeveral Inheritances, yet one Writ of Formedon lyeth, and not ſeveral Formedons. 2. That in all Actions realls founded upon wrong and not upon Title. The Demandant may demand by one Writ divers Lands which come to him by ſeveral Titles. As if divers Remainders diſcend from divers, ſeveral Auncеſtors, to me; and I be diſſeiſed of them, I may have a Writ of Right, or of entry in the nature of Aſſiſe, and comprehend all theſe Rights in one Writ, becauſe in theſe Caſes, no Title is made in the Writ. But if I bring a Writ of Entry, *ſur diſſeiſin* made to my Mother and my Aunt Copartceners in Fee-ſimple, the Writ ſhall abate, for that her Title is to be made in the Writ. 3. That in all Actions perſonalls, The Plaintiff may comprehend ſeveral wrongs, and ſeveral cauſes of Action in one Writ, as Treſpaſs, for ſeveral Treſpaſſes, at ſeveral places, and at ſeveral dayes. *Cook* 8. Part, 87. *Buckmores* Caſe.

Writ to the Biſhop.

1. IF a man doth recover his Preſentation in a *Quare Impedit* brought in the Common Pleas againſt any other man, than againſt the Biſhop, he may thereupon have a Writ to the Biſhop to admit his Clark unto the Church. But in ſuch Caſe, If the Recovery be had againſt the Biſhop himſelf, then as the Books in 7 H. 4. 32. and 8 H. 4. 22. are, becauſe the Biſhop is a party, the Writ ſhall iſſue forth to the Metropolitan.

2. A man Recovers in a *Quare Impedit*, and hath a Writ to the Biſhop to admit his Clark, and before he is admitted, a ſtranger brings another *Quare Impedit* againſt him who recovered, and the Patron and the Incumbent, and hath a *Nt admittas* of the firſt who recovered. It was the Opinion of the Court in that Caſe, That the Biſhop ought to admit his Clark who recovered; for otherwiſe the Judgment ſhould not be executed, and Lapſe might incur; although it was ſaid, That in that Caſe the bringing of the ſecond Writ was in the nature of a Writ of Error. See 18 E. 47.

3. In a Writ of Right of Advowſon, &c. If the Defendant claims the ſame Advowſon as Paſſon impropriate; Although that in that Caſe the title be found for the Defendant: Yet he ſhall not in that Caſe have a Writ to the Biſhop *ad admittendum Clericum*, becauſe that in Conſtruction of Law, he is already in the Church. See *Fitzh. Nat. Br.* 31. 16 H. 6. *Br. al. Everſque* 6. acc.

4 Note, 7 H. 4. 31. by *Gaſcoigne*; A man ſhall never have a Writ to the Biſhop where his Preſentee is in, and his right continues. But *Hull* held the contrary: For if a Clark be Preſented, and Inſtituted to a Church to which I do pretend Right: and I do bring a *Quare Impedit*, and it is found for the Defendant that he hath right: Yet his Preſentee ſhall have a Writ to the Biſhop, and he ſhall have general Judgment, and ſhall recover his damages for the diſturbance.

5. A. brought a *Quare Impedit* againſt the Biſhop of *Glouceſter* and C. and counted upon a diſturbance to Preſent 1. *Nov.* C. as Incumbent pleaded, That 1. *May*, next after the ſaid 1. *Nov.* he himſelf was Preſented to the Church by the Queen, the Preſentment being devolved to her by Lapſe, upon which the Plaintiff did demur in Law. It was holden in that Caſe, That the Plea was inſufficient, for that the Plaintiff counted upon a Diſturbance to him 1. *Nov.* and the Defendant entitles himſelf to an Incumbency 1. *May* after, in which Caſe, the diſturbance ſet forth in the Count is not traverſed, confeſſed nor avoided. It was then moved, That a Writ might be awarded to the Biſhop for the Queen, for that the title of the Queen appeareth to be by Lapſe, which is confeſſed. But the whole Court was clear of Opinion againſt that: For that it appeareth that the Title of the Queen was once executed, and ſo gone, and nothing remains in the Queen; and now when the Defendant hath loſt his Incumbency by ill pleading, yet the ſame ſhall not turn to the advantage of the Queen, for where the Queen Preſents for Lapſe, and her Clark is Inſtituted and Inducted, the Queen hath no more to do. Afterwards in the principal Caſe, the Patron had a Writ to the Biſhop to Preſent his Clark. Mich. 32 Eliz. in C. B. *Arundell* and the Biſhop of *Glouceſter's* Caſe. *Lenv.* 194.

6. In a *Quare Impedit* by L. againſt H. and the Biſhop of *Glouceſter*, of the Church of F. Upon the pleading, the Iſſue was, If T. L. Father of the Plaintiff did enfeoff the Plaintiff of the Manner of F. to which the Advowſon of the Church was appendant before he Granted the Advowſon to one S. who granted it to the Defendant. The Jury gave a Special Verdict, That the Abbot of S. was ſeiſed of a Capital Meſſuage in F. and of 100 Acres of Lands there, and that there was a Tenancy holden of the ſaid Capital Meſſuage by ſuch Services, and that the ſaid Capital Meſſuage time out of mind, had been known by the name of the Manner of F. and that the Advowſon was appendant to it, and conveyed the Capital Meſſuage and Advowſon to the King by the Statute of Diſſolution, and from the King to T. L. who ſeiſed, did without Deed enfeoff the Plaintiff of the ſaid Manner, and made Livery and Seiſin upon the Demeſnes: and that afterwards the ſaid T. L. by Deed made a Grant of the ſaid Advowſon to the ſaid S. It was the clear Opinion of the whole Court in this Caſe, That here was a ſufficient Manner to which an Advowſon may be appendant, and that the Advowſon did inclufive paſs in the Livery, and that the Grant of the Advowſon made meanbetween the Livery and Attornment, was void; and afterwards Judgment was given, and a Writ to the Biſhop for the Plaintiff. Mich. 33 Eliz. in C. B. *Long* and *Hemmings* Caſe. *Leon.* 207.

7. B. had Judgment in a *Quare Impedit* upon a Demurrer to recover againſt C. The Queen afterwards brought a *Scire facias* upon the matter, That the ſaid B. after the ſaid Judgment was Outlawed in

in an Action of Trespass at the Suit of J. S. and upon that a *Scire facias* issued *ad respondendum Quare dict. Dominus Regina* should not have Execution of the Judgment aforesaid, and set forth, that C. had resigned, upon which B. did demur in Law. It was Objected, That by Outlawry in an Action personal, the King cannot seise Land; and that in this Case nothing did accrue to the Queen by the Outlawry, because the Queen her self *usurpando præsentavit*, and her Clerk admitted; and although B. hath recovered in the *Quare Impedit* against the Presentee of the Queen; yet because he is not removed by a Writ to the Bishop, the Queen remains Patron, and nothing remains in B. that can be forfeited. Also it was said, That the *Scire facias* did not lye for the Queen, for that that Writ runs alwayes in privity of the Record upon which it is grounded, to which Record the Queen is a stranger. It was the Opinion of *Rhodes* and *Periam* Justices, That if after Recovery in a *Quare Impedit*, the Incumbent dyeth, the Patronage is presently vested in the Patron; and if he dyeth, his Executors shall have a Writ to the Bishop: So in this Case, the Presentment by the Outlawry of B. is presently vested in the Queen; And as to the *Scire facias*, it was said, That when the King is disturbed in his Presentment, he shall have a *Scire facias* upon a composition, notwithstanding that he is a stranger to it. And all the Judges agreed, That upon the whole matter in the Principal, the *Scire facias* did well lye by the Queen. See the Book at large. Mich. 29 Eliz. in C. B. *Bewly* and *Cornwalls* Case. *Leon.* 63.

See more of Writ to the Bishop, and of other Writs before, in almost all the Titles of this Abridgment.

FINIS.

An *Exact Table*, being a *Summary Collection* of all the POINTS of LAW, contained

in this THIRD VOLUME, under the generall Titles, Divisions, and Sections: and how to find them: P. for Page; C. for Case.

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Of the Church of B. in *Com.* C; if there be any Church known by the name of B. within the County, it is sufficient to maintain the Writ, p. 1578. C. 8

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Where it must be, *Præsentare ad medietatem Ecclesiæ*; Where it must not be *de Medietate Advocationis Ecclesiæ*. p. 1578. C. 12, 13.

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By Husband and Wife, of an Advowson of the Wives, brought in their joynt names upon a Disturbance, where good. Page 1579. Case 17, 18.

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Where

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The Patron is Outlawed, the Church void, a stranger usurps; the King brings *Quare Impedit*, and removes the Incumbent; the Outlawry is reversed, the Advowson is recontinued; and if the Church void again upon a new disturbance, *Quare Impedit* lyeth by the Patron. p. 1582. C. 30.

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Where the Queen hath a Title to present, which Title is once executed; though her Incumbent loseth after his Incumbency, yet the same shall not turn to the advantage of the Queen to present again. p.1584. C.13.

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Where in a *Quare Impedit* brought, a Title doth appear for the King; Yet the Judges will not grant a Writ to the Bishop for the King, but upon a cleer Confession of the Kings Title. page 1588. C.27. p.1590. C.10.

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Where the Plaintiffs, or two who have title, muſt joyn in the Writ, notwithſtanding one of them releaſeth to the other, *pendente Lite*, p. 1593. C.7.

Maintainable by Executors for a ſpecial diſturbance *in vita Teſtatoris*. p.1593. C.6.

Where upon a Reſignation, the King hath title by Lapſe, and doth not preſent, it ſhall bind the King, unleſſe the Reſignation be by Covin; in which caſe it ſhall not bind him. Page 1594. Caſe 10.

If the King upon uſurpation doth preſent, and his Clerk be in by 6. months, If a *Quare Impedit* be brought againſt the Kings Clerk, and a Recovery againſt him by *Non ſum Informatus*, it ſhall remit the Patron to his Auncient right. p.1594. C.12.

A double uſurpation upon the King ſhall not put him out of poſſeſſion; for that the Inheritance of it being in the King by Record, the Law doth preſerve and protect it from all wrong done by a Subject. p.1594. C.13.

Is a Writ of a higher nature then an Aſſiſe of Darrein Preſentment; and ſhall abate Darrein Preſentment brought. p.1596. C.18.

Where, notwithſtanding the Church is void by Deprivation, yet the Patron may tranſpoſe his Advowſon over; and if the Grantee be diſturbed, he may recover in a *Quare Impedit*. Page 1596. C.20.

If the King hath title to preſent by reaſon of Alienation without Licence; If the King pardon to the Alienee all Alienations; If it ſhall confirm his Eſtate, and take away the Kings title to preſent, Quære. p.1596. C.21.

Where the Biſhop ſhall joyn in Errour, upon a Recovery had againſt them in a *Quare Impedit*, notwithſtanding the Diſclaimer of the Biſhop; for the reaſon of Conformity, and privity of the Record. p.1597. C.24.

Where the King ſhall preſent upon a Symoniacal Contract of the Patron, or the Preſentee; and maintain a *Quare Impedit* upon diſturbance. p.1597. C.25,26,27.

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Where if a man be qualified as a Chaplain within the Statute of 21 H.8. though after he be removed from his ſervice; yet his Qualification good, and he may maintain a *Quare Impedit*. p.1598. C.28.

Quare non Admiſit.

Where it lyeth, upon a Refuſal by the Biſhop to admit a Clerk upon a Recovery in a *Quare Impedit*. p.1598. C.1.

The Writ muſt make mention of the Recovery. *ibid.*

It muſt be brought in the County where the refuſal is, *ibid.* p.1599. C.3.

Where upon a Recovery in a *Quare Impedit*, a Writ is awarded to the Biſhop to admit the Clerk, The Biſhop may retorn a Title for the King found by Office, by reaſon whereof he cannot execute the Writ, and the Retorn good. p. 1599. C.2.

Brought by the King, The Biſhop retorned, That the Pope had provided to the Church, and that he durſt not, nor had power to put him out; for this Contempt and Retorn, the Biſhoprick was ſeiſed into the King's hands. Page 1599. Caſe 4.

What ſhall be a good Plea for the Biſhop, in a *Quare non Admiſit* brought. p.1599. C.6,7.

If the Biſhop upon this Writ awarded, doth admit the Clerk, and the Arch-Deacon will not Induct him no remedy lyeth againſt the Biſhop; but the Clerk may have Action upon the Caſe againſt the Arch-Deacon. p. 1599. C. 8.

Quare Incumbravit Eccleſiam.

Where it lyeth; and when it lyeth. Page 1600. Caſe 1.

If the Biſhop after a *Ne admittas*, do admit a Clerk for whom it is found by *Jure Patronatus*, yet the other party ſhall maintain this Action againſt him. Page 1600. Caſe 1.

After *Nos Admittas*, if the ſix months paſſe, the Biſhop may preſent his own Clerk for the Lapſe; but if he admit the Clerk of another though the 6. months be paſt, yet *Quare Incumbravit* lyeth againſt him. Page 1600. Caſe 2.

Quarentine.

Where, and in what caſe it lyeth for the wife after the death of her husband. Page 1599. Caſe 1.

What is intended by the words in the Writ, *habeant rationabilia Eſtoveria*, if meat, drink, and habitation be contained therein. Page 1600. Caſe 1.

If the wife marrieth within the 40 dayes, ſhe ſhall loſe her *Quarentine*. p. 1600. C. 3.

She muſt not depart the houſe after the husbands death, but ſhe muſt continue in the poſſeſſion for the whole ſpace of 40 dayes. Page 1600. Caſe 4.

Quid Juris clamat.

What it is, and where the Writ lyeth. p. 1600. C. 1.

When he in the Reverſion makes Conuſans of it by Fine, upon that the Conuſee ſhall have *Quid juris clamat* againſt the Tenant for life; and in caſe of Weakneſs, ſuch Attornment may be taken by *Dedimus Poteſtatem*. Page 1601. Caſe 2.

If a Termor upon a Fine levied, claimeth Fee in a *Quid Juris clamat* brought againſt him, he ſhall forfeit his Term. p. 1601. C. 2.

If in a *Quid Juris clamat*, the Tenant clayms Fee in part, and attorns for other party; the whole Fine ſhall be engroſſed. p. 1601. C. 5.

In a *Quid Juris clamat* againſt Tenant for life, ſhe pleaded, That the Conuſor at the time of the Fine levied, had but in tail in the Reverſion: And although the *Quid Juris clamat* is to be brought before the Ingroſſing of the Fine; and till then it doth not appear if it be a Fine at Common Law, or with Proclamations; yet ſince the Statute of 4 *H.* 7. & 32 *H.* 8. ſhe ſhall be compelled to Attorn. Page 1601. C. 6.

In a *Quid Juris clamat* brought, when Attornment cannot be, nor is requiſite to the Fine it ſelf, no Attornment is requiſite to the Declaration of the uſes which are the branches of it, p. 1602. C. 7.

If the Reverſion of two Tenants for life be granted by Fine, one cannot attorn upon *Quid juris clamat* without his Companion, becauſe the one ſhall not prejudice the other. Page 1602 Caſe 8.

The Judgment in a *Quid juris clamat*. Pag. 1602. C. 9.

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Quod ei Deforceat.

Where it lyeth, by whom, and againſt whom, p. 1603. C. 1.

It lyeth for none but him that loſeth; yet if Tenant in tail loſeth by default in a *Precipe*, he ſhall not have it. p. 1603. C. 2.

Lands given to two, and the heirs of one of them; upon Recovery by default againſt them, one ſhall have this Writ, the other a Writ of Right. p. 1603. C. 4.

Is in the Nature of a Writ of Right, and the Tenant may joyn the Miſe upon the meer Right and final Judgment given in it; but upon default of the Tenant after the Miſe joyned, *Petit Cape* ſhall onely iſſue forth. Page 1603. C. 5.

Lyeth not where the Fee is executed upon the default of the Tenant. p. 1603. C. 6.

Errour; where lyeth upon a Judgment by default, in a *Quod ei deforceat*. p. 1603. C. 7.

Upon a Recovery in an Action of Waſte againſt Tenant in Dower or by the Courteſie, by default, Quære, If *Quod ei deforceat* doth lye, p. 1604. C. 9.

Of Lands in *Wales*, p. 1604. C. 10, 11.

If in a *Quod ei deforceat*, he prayeth to be reſceived; who after makes default, and Judgment is given againſt the Tenant by Reſceit; it is errour: for it ought to be againſt the Tenant to the Action. p.1604. C.11.

Errour upon a Judgment in default in *Wales*, becauſe the Statute of 12 *E.* 1. of *Rutland*, was not mentioned, p.1605. C.12.

Quod Permittat.

Where it lyeth; and of what. Page 1605. Caſe 1,5.

The Nature of the Writ, and that it lyeth for Tenant in tail. p.1605. C.2.

It lyeth for the Heir againſt him who Erecteth a Nuſance to his Freehold; as for the Feoffee of him to whom it was done. p.1605. C.3,6,7. And the Feoffor or Feoffee may abate the Nuſans. *ibid.*

It lyeth by a Parſon, for a Nuſance in his time; but not for the Succeſſor, for a Nuſans done in the time of his Predeceſſor. Page 1605. Caſe 4.

In a *Quod Permittat* of a Nuſans done; the Plaintiff needs not to ſhew how he came to the Eſtate in the thing to which the Nuſans is done. Page 1605, C.6,7.

That the Statute of *weſt.* 2. Cap. 24. which giveth *Quod Permittat* againſt the Alienee of him that doth the Nuſans, lyeth not againſt the Alienee of the Alienee. p.1606. C.7.

After Imparlance in a *Quod permittat*, the View lyeth for the Defendant; and it is but for 15. dayes. p.1606. C.9.

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Quo Warranto.

Where, and in what caſe it lyeth. Page 1609. Caſe 1.

Where *non uſurpavit libertates*, is a good Plea in it; where not. p.1607. C.2.

Doth not lye of the Claim of a thing which cannot be claimed as Felons goods, &c. page 1607. Caſe 2.

Quo Warranto he held a Leet; A Preſcription to have a Leet to a ſingle Meſſuage, where good. p.1608. C.3.

In a *Quo Warranto* of Liberties, the Defendant claimed to have a Court-Baron, as Incident to a Mannor which was Copyhold; and Judgment for the King, becauſe the Defendant did not well entitle himſelf to the Copyhold Mannor. p.1608. C.4,5,13.

In a *Quo Warranto*, A Grant made to a Corporation, to have *plenam et integram ſcrutinium, gubernationem et correctionem omnium et ſingulorum Miſteriorum*, not good, to puniſh the King's Subjects at their pleaſures. Page 1609. Caſe 6.

Quo Warranto of Liberties; A Plea *Quod Licitè gaudebat et gaviſus fuit*, ſhall be intended a having of them in Fee-ſimple. Page 1609. Caſe 7.

Quo Warranto againſt the Biſhop of D; who claimed *Bona et Catalla felonum*, and had a County Palatine, *et Jura Regalia*, Holden: though Felons goods, cannot be claimed by Preſcription; yet a man may preſcribe in a County Palatine, and the ſame ought not to be queſtioned by *Quo Warranto*. p.1609. C.8.

For clayming to have a Forreſt, good; for none can have a Forreſt without a Juſtice-ſeat; and none can have a Juſtice in *Eyre*, but the King. p.1609. C.9.

Where in a *Quo Warranto* of Liberties, a Record, by an Omiſſion of the Clerk, may be amended: though it was ſaid, That the Statutes of Amendments did not extend to a *Quo Warranto*. Page 1610. C.11.

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What perſons ſhall have Priviledg of the Exchequer to ſue by *Quo Minus*. p.1610. C.1.

A Receiver General of the Kings Revenues of the Crown, ſued in C. B. brought a Writ of Priviledg in the Exchequer, and the Writ diſallowed. p.1611. C.2.

By the Statute of *Articuli ſuper Chartas*, No Common Plea ſhall be in the Exchequer: And therefore Trover and Converſion doth not lye in the Exchequer. p.1611. C.3.

The Debtor of the King may have *Quo Minus* in the Exchequer, and ſue there for Tythes; though Tythes in themſelves be ſpiritual Things. Page 1611. C.4.

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BY whom, for whom, and againſt whom it lyeth. p.1612. C.1.

Two ſorts of Raviſhments of Wards. Page 1612. Caſe 2.

Who are ſaid to be Raviſhers of Wards. p. 1612. C. 3.

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What Points the Jury are to enquire of in Raviſhment of Ward. p.1612. C.6.

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Raviſhment of Ward lyeth not againſt a *Feme Covert* within the Statute of *Weſt.* 2. becauſe ſhe is diſabled to ſatisfie, and the goods of the husband are not lyable to anſwer the Raviſhment. page 1613. C.9.

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No Plea in Raviſhment of Ward, That the Heir is come of full age: Contrary, in a Writ of Right of Ward. p.1613. C.10.

Brought againſt the Mother Guardian by *Nurture*, where not maintainable. p.1613. C.11.

Treſpaſſe at Common Law, for taking away the Ward, doth not alter the property or poſſeſſion of the Ward, but doth puniſh only, the *Temeraria occupatio*, and gives the Plaintiff damages. page 1613. C.12.

If another taketh away the Ward from the Raviſher; the firſt Raviſher cannot maintain an Action againſt him, but the Guardian may have Action againſt them both. p.1614. C.12.

If all the Land be holden in Socage, and the Heir be raviſhed in Raviſhment; it is not materiall, though the Lands be holden of ſeverall perſons. p.1614. C.13.

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What it is, p.1614. C.1. againſt whom it lyeth, Caſe 2.

Was Felony by the Common-Law; but by the Stat. of *Weſt.* 1. Impriſonment was only for two years for ſuch Offence, and Recompence to the party Raviſhed. p.1614. C.2.

If a Rape may be upon a Girle who is but of the age of 7. years; Quære, but if of 9. years, it might be; for at ſuch age ſhe ſhall be endowed. p.1614. C. 3.

Appeal of Rape againſt J. S; and doth not ſay, *Felonicè rapuit, et Carnaliter cognovit*, not good. p.1614. C. 3.

In an Appeal, it muſt be averred, That the Plaintiff did not conſent to the Rape, either before, or after the fact done. p.1614. C.4.

In an Indictment of Rape, it muſt be layed, That there was *recens proſecutio* of it; otherwiſe it would argue a Conſent. p.1615. C.5.

Where the wife conſents to a Raviſher having a daughter, who enters, and then a ſon is born, the ſon ſhall not deveſt the Land out of the daughter. p.1615. C.6.

If a woman be Raviſhed by her next of Kin, and conſenteth to it, and hath neither husband nor Father; the next of Kin to him ſhall have the Appeal; for that he hath diſabled himſelf by the Rape. p.1615. C.7.

Rationabili parte; Rationabilibus diviſis; & Rationabili parte Bonorum.

De rationabili parte, is a Writ of Right, and lyeth only betwixt Privies in blood. Page 1615. Caſe 1.

It lyeth not againſt a ſtranger upon a deforcement of the heirs; but in ſuch caſe they muſt ſue by Aſſiſe of Mortdaunceſter. Page 1615 Caſe 1.

In *Rationabili parte*, Battail doth not lye to try the Iſſue. p.1615. C.2.

De Rationabilibus Diviſis, where, and in what caſe it lyeth, p.1616. C.3.

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De Rationabili parte Bonorum, by the Statute of *Magna Charta*, lyeth by the wife againſt the Executors of her husband, to have reaſonable part of his goods. p.1616. C.4.

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The Executor, or Administrator after debts paid, and Will performed, ought not to take any of the goods to their own use, but divide the same between the Wife and Children. Page 1616. Case 5.

It is an Original Writ, and not within the Statute of 21 Jac. of *Limitations*; though the Issue in the Action be, *Non Detinet*. Page 1616. Case 6.

Rationabili parte Bonorum, lyeth for money, *in pecuniis numeratis*. p.1616. C.6.

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Recognizances.

Who, and before whom; and who hath power to take Recognizances. p.1617. C.1.

Made to A. and two others, and acknowledged before A; void as to A; but good to the other two. p.1617. C.2.

To the Chamberlain of *London* by Custome for Orphanage money, good. p.1617. C.3. and his Successors shall have it.

If a Commission be to two Justices, and the Sheriff to take a Recognizance for the good behaviour; and it is delivered to the Justices, who take it: and then the Sheriff is out of his Office; the new Sheriff cannot return and certifie this Recognizance, but it must be by the Justices who took it. p.1617. C.4.

One bound in a Recognizance for his good behaviour; arrested upon suspition of Felony, makes an Escape; it is a forfeiture of it, although no such Felony was committed: for the Escape is a Misbehaviour. p.1618. C.5.

The Judges of the severall Courts at *Westminster* may take Recognizances out of Term in any part of *England*. p.1618. C.6.

A Recognizance is not a perfect Record, till it be entred in the Roll; yet when it is entred, it is a Record from the first acknowledgment. p.1618. C.6.

Where a Recognizance is given to the King by the word (*Goods*). p.1619. C.8.

Lands were not subject to Execution upon a Recognizance, before the Star. of *West.* 2. *Cap.* 18. p.1619. C.1.

No *Scire facias* shall issue upon a Tenor of Recognizance taken in Chancery; but an Original Action of Debt. p.1619. C.1. Page 1620. C.13.

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A *Scire facias* upon a Recognizance for the Peace, which was to appear at the next Sessions; If the breach was before the date of the Recognizance, and before the Sessions, good. p.1620. C.1.

No Execution shall be against the Bail upon a Recognizance, if no *Capias* was taken out against the Principal. p.1621. C.2.

A Recognizance to appear at a day certain in a Court of Record, if the party be Arrested and Imprisoned, either at the Kings Suit or a stranger's before the day, his Recognizance shall be discharged. p.1621. C.3.

Payment simply is no Plea in avoidance of a Recognizance; but if an Issue be joyned and tryed upon it, no advantage can be taken of it. p.1621. C.4.

Records.

Transcript of a Fine removed into the Chancery and into the Common-Pleas by *Mittimus* to have a new *Scire facias* to execute it by; the Auncestor who dyeth; the Heir cannot have a new *Scire facias* to execute it, without a new *Mittimus*. p.1621. C.1.

The Common Pleas cannot write to the Kings-Bench, to Certifie a Record; but it must be certified first into the Chancery, and then come in by *Mittimus*. p.1622. C.3,4.

If the Tenor of a Record be brought in by *Mittimus*; if there be variance in the Record, it is a a failer of the Record. p.1622. C.5.

Any Judge of the Courts of Record at *Westminster*, may bring a Record one to another without a *Certiorari*; but Judges of base Courts cannot so do. p.1622. C.6,7,8.

Upon *Nul tiel Record* pleaded upon a Judgment in Debt in C. B. Records out of the Kings Bench, though *Coram Rege*, removed by *Certiorari* into the Chancery, and so by *Mittimus* in C. B. p.1623. C.9.

Errour doth not lye upon a Judgment in Accompt, *Quod Computet*, till the whole matter of the Accompt be determined; and therefore the Record is not removed by the Writ of Errour p.1623. C.10.

Execution was upon a Judgment in an Assise, notwithstanding Errour brought in Parliament; where. p.1623. C.11.

Records were amended for matter of Mistake in them; or for other defects in them, p. 1624. C.1,3,4 5,7.

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Errour upon Judgment in Debt, in C. B. upon view of the Record, it appeared, No Original was certified; wherefore the Record could not be amended. p. 1624. C. 2.

When a Record is removed out of the Kings Bench into the Exchequer Chamber; it is not any Record in Court, till the Errour is determined. p. 1624. C. 6.

Trespass for breaking his Close, abetting upon *Grayes-Inn-Lane*; the Record was, *Graves-End-Lane*; the Record was amended after the Nonsuit of the Plaintiff. p. 1625. C. 8.

A Recovery was suffered of Land in *Salton*, and so was the Indenture to head the uses; but the Writ of Entry was, *De Manerio de S ltos*: yet the Record was amended. p. 1625. C. 10.

Records, where amendable in matter of Form for default of the Clark, but not in matter of Substance. p. 1625. C. 11, 12.

Of a Fine remaining with the *Custos brevium*, amended and made according to the Record with the Chirographer. p. 1626. C. 14.

Whereupon a Judgment of Outlawry reversed by Error, the Plaintiff may plead, *Nul tiel Record*. Where not. p. 1626. C. 15.

By reversal of one Record, another Record which doth depend upon it shall be reversed. p. 1626. C. 16, 17.

Upon *Nul tiel Record*, and day to bring it; If an Exemplification of it under Seal be sufficient, or it be a failer. p. 1627. C. 1.

Where a Deed by which Land was conveyed to the King, brought into the Court of Augmentation, is a Record, though not found to be enrolled. p. 1627. C. 4, 5.

In Debt, the Defendant pleaded a Conviction of the Plaintiff upon the Statute of Recusancy. The Plaintiff said, *Nul tiel Record*, a *Certiorari* was to the Justices, where the Indictment was to Certify the whole matter. p. 1628. C. 6.

Where an Averment shall be against a Record, Where not. p. 1628, C. 7.

Recovery, and Recovery in value.

Common Recovery, Where shall bind the Estate tail, and those in the Reversion, and Remainder; Where not. p. 1628. C. 1, 2, 3. p. 1631. C. 2.

Upon a Common Recovery, Execution may be sued against the Issue in tail, though the tail be paramount the Recovery, because the estate tail is bound by the Judgment, and to have recompence in value. p. 1629. C. 3.

Where it doth barr an estate tail; where the Reversion is in the King, and where not by the Statute of 34 H. 8. p. 1629. C. 4. p. 1631. C. 12.

Where it is a barr as to the Issue in tail, and his in the Remainder for one moyty of the Land only, and not for the other moyty. p. 1629. C. 5.

A Recovery suffered by the Husband alone with Voucher, where he and his wife was Joynt-tenants for life; where not barr the wife, because not party to the *Præcipe*, but a barr to the husband by *Estoppell*. p. 1630. C. 6. 8.

When he in the Remainder in tail disables himself by suffering a Common Recovery, to take advantage of a forfeiture, his Issue after his death shall not take advantage of the same. p. 1630. C. 7.

Where Tenant for life and he in remainder in tail suffer a Recovery, in which both Vouch the Common Vouches; It shall not barr the tail, for that he in the Remainder was not Tenant to the *Præcipe*, and the Land is only recorded against the Tenant for life. p. 1630. C. 10.

Alien Tenant in tail, Remainder to a stranger, suffers a Recovery, which is found by Office; the King shall have the Land, and not the stranger in Remainder. p. 1631. C. 13.

Husband and wife, the wife within age levyed a Fine of the Land of the wife; a Recovery was against the Conusee by a *Præcipe*, in which the husband and wife was Vouched, and afterwards made default: In this Case, The Recovery did not take away the Error in the Fine. p. 1631. C. 14.

Where it barrs and destroys a possibility. p. 1631. C. 15. Where not, *ibid.*

If one hath Interest in the third part of a Mann, and suffers a Recovery of the moyty of the Manor; it is a good barr for the third part. p. 1631, C. 16.

Suffered by one by Estoppel, where it shall bind. p. 1632. C. 17. 19.

Tenant in tail, Remainder in tail, is attainted of Treason; the King grants the Land to A, who bargains and sells to B, against whom a Recovery is had: It is no barr of the Remainder, because before the Enrolment, B. was no Tenant to the *Præcipe*. p. 1632. C. 18.

Judgment is against Tenant in tail upon a feigned Action, who dies before Execution, In a *Scire facias*, If the Issue prove the Recovery to be false, he shall barr the Demandant in the *Scire facias* of his Execution. p. 1632. C. 20.

Where the Issue in tail cannot falsify a Recovery, because of the Recovery in value. p. 1632. C. 21.

Where a Recovery suffered by an Infant, by his Gardian being for the benefit of the Infant, and the

the ſetling of the Inheritance in Fee in him, was good. p. 1632. C. 22, 23.
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Aſſumpſit in conſideration the Plaintiff ſold to the Defendant ſuch number of pieces of Stuff, the Defendant promiſed to deliver to him the value of the Stuffs in ſo many Pipes of Wine; a ſpecial Requeſt muſt be made to deliver the Wines, becauſe

because upon a Contract mer. p. 1727. C. 19.

In consideration of mony paid, promise was made to joyn in a Surrender of Copy-hold Lands holden, that a Request ought to be to joyn, because it was a Joynt Act to be done. p. 1727. C. 20.

Where a Re-entry for a Condition shall not be lawful without a demand or request of the Rent reserved. p. 1728. C. 1.

The King shall take advantage of a Condition, for non payment of Rent without Demand or Request. p. 1728. C. 2.

If a man be bounden that his Son shall seal and deliver an Obligation as his Deed, he is to seal and deliver it at his peril without request, else the Obligation is forfeit. p. 1728. C. 3.

Where, upon a Condition to make assurance as Counsel shall advise; the Councellor cannot give advise without request. p. 1728. C. 4.

Where the Obligee himself is party; and an Act cannot be done without his concurrence, there the Obligor hath time to do it during his life, if not hastned by request. p. 1729. C. 5. but when the Act to be done doth not concern the Obligee, but is to be done by the sole Act of the Obligor, there the Obligor hath time to do it during his life, and it cannot be hastned by request. p. 1729. C. 5.

A man bound to perform the Award of J. S, who makes an Award, the Obligor is bound to perform it without request or notice, because he hath bound himself to do it. p. 1729. C. 6.

Increase of Costs and Damages upon a Verdict, ought alwayes to be *ad petitionem Querentis*, and not otherwise. p. 1730. C. 2.

Where for several Debts to be paid upon one Contract, several requests must be made, and where but one request. p. 1730. C. 3.

If an action of Trover and Conversion be brought of goods; It is a good evidence, *prima facie*, to prove the Condition, That the Plaintiff did request the Defendant to deliver the Goods, and he refused. p. 1730. C. 6.

Where not doing, cannot make a man who hath Authority or Licence by Law to be a Trespassor *ab initio*; although in such Case, there was a Request. p. 1731. C. 7.

Receit.

Where and in what Action it lyeth, what not. p. 1732. C. 1.

Quære, If *Receit* lieth in Assise, because Assise is *festinum remedium*. p. 1732. C. 2.

Assise against Tenant for life, upon his default, he in the Reversion was received; and the Issue found against the Defendant; and before the day in Bank, the Tenant for life died, and then the *Receit* was recorded: *Quære* what to be done in such Case concerning the Judgment. p. 1732. C. 3.

Where the Wife was received after Judgment given in a Writ of Admeasurement of Dower, because the same is not the principal Judgment. p. 1732. C. 4.

Where the Wife was received at the *Petit Cape* awarded and vouched, and afterwards waived the Voucher, and joyned the *Mise* upon the Grand Assise. p. 1732. C. 5.

Where he in the Reversion, or Remainder upon an estate tail, shall not be received upon a Recovery suffered by Tenant in tail by the Statute of *W. 2.* because the Statute doth not extend to it. p. 1732. C. 6.

Wast brought against husband and wife. After a Verdict for the Plaintiffe, the wife at the day in Bank prayed to be received; but could not be received. p. 1733. C. 7.

Where Tenant by Receit shall vouch; And what shall be a good Counter-plea of the Voucher, what not: And where one shall be stopped to Counterplead *Receit*, where not. p. 1733. C. 1.

Where, in a *Formedon* against husband and wife, the wife was reserved and vouched over; Counterpleas of the Voucher was not good. p. 1733. C. 1, 2.

In *Quæ ei deforceat*, where a Stranger was received; who made default, and Judgment is given against the Tenant by *Receit*; where it ought to be against the Tenant to the Action, it is Error. p. 1733. C. 3.

Where those in Remainder, in a *Præcipe* brought in Auncient Demesne, shall be received to plead notwithstanding the Confession of the Tenant, who is but Tenant for life, because his Confession doth not make the Land Frank-Fee. p. 1734. C. 4.

A man shall not be received upon a Grant of a Remainder in tail, unless he shew the Deed of Grant. p. 1734. C. 5.

Rescous.

Where, and in what Case it lyeth, and against whom, and for what. p. 1734.

If the Sheriff makes his Warrant to a Bayliff of a Liberty to Wrest one upon an Execution; who doth it, and *Rescous* is made of the Bayliff, shall have

have *Reſcous*, becauſe he is chargeable to him who ſued the Writ. p. 1734. C. 2.

Action upon the Caſe not maintainable againſt the Sheriff, for a *Reſcous* of one taken by him upon a mean Proceſs; but the party hath the remedy againſt the Reſcuſſor. p. 1734. C. 3, 4, 5.

If the Bayly of a Liberty Arreſts one, and deliver-eth him to the Sheriffs Deputy, and he is reſcued from the Deputy, *Reſcous* lyeth. p. 1735. C. 6.

Upon a Diſtreſs of a mans Cattel, and the Cattel of a Stranger Damage Feaſants; in what Caſe he may reſcue his own Cattel, but not the Cattel of the Stranger. p. 1735. C. 8.

Where Treſpaſs, *Vi & Armis*, lyeth againſt one for a *Reſcous* upon an Arreſt, as well as Action upon the Caſe. p. 1735. C. 9.

If a man be taken in Execution, and is reſcued by a Stranger, the party at whoſe Suit he was taken, may have Action upon the Caſe againſt the Reſcouſſor, becauſe he is the party who ſuſtaineth the loſs. p. 1736. C. 2, 3.

Indictment for a *Reſcous*, without the words, *Vi & Armis*, or *Manu forti*, where good; becauſe *Recuſſit* implyes, It was done with force. p. 1736. C. 1, 2.

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The words, *Ferendo, Reſervando, Faciendo, Reddendo, Solvendo, Salvo, Exceptis*; how to be conſtrued. p. 1737. C. 1, 2.

Where the words [Grant of an yearly ſum, with Clauſe of Diſtreſs] ſhall be a good Reſervation of a Rent. p. 1738. C. 3.

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A Leaſe for years to husband and wife; they aſſigned it to J. S. *Reddendo & Solvendo* to them and the Survivor of them 10 l. *per annum*, and the wife ſealed not the Deed; the wife ſhall not have the Rent as a new Grant, by force of the words *Solvendum*, and the *Reddendo* relates to the husband only. p. 1738. C. 8.

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Where by the Parſon, after his ſaid prayer of the Patron; and his default and confeſſion of the Action, good. p. 1748. C. 5.

If a Parſon doth bring Annuity or other Action, and pendant the Writ, he doth reſign; the reſignation being his own Act, where it ſhall abate his Writ. p. 1748. C. 6.

Reſtitution.

Where and in what caſe it lieth, and for whom. p. 1748. C. 1.

Where one hath Judgment to recover in a *Quare Impedit*, who is Out-lawed, and the Queen preſents one by reaſon of the Out-lawry, by fraud; and afterwards the Out-lawry is reverſed; the party who was Out-lawed ſhall be reſtored to his Preſentation, notwithſtanding the Preſentation of the Queen. p. 1748. C. 1.

Where Reſtitution ſhall not be made of the Term ſold upon a *Fieri facias* by the Sheriff, but of the mony for which it was ſold. p. 1748. C. 2, 3, 4.

Upon Out-lawry, the Sheriff is commanded, *Quod capiat bona & catalla ejus per inquiſitionem veniant in manus noſtras*; if by force of it, the Sheriff ſells the Goods, and the Out-lawry is reverſed, the party ſhall be reſtored to his Goods. p. 1749. C. 4.

Error lyeth not to reverſe an Out-lawry by the Feoffee, to reverſe an Out-lawry upon the Attainder; becauſe thereby the Blood ſhould be reſtored, which none can do, but he that is proper in Blood. p. 1749. C. 5.

The principal in caſe of Felony is Out lawed, the Acceſſary hanged; the principal reverſes the Out-lawry. the Heir of the Acceſſary, ſhall reſtored to his Lands. p. 1749. C. 6.

Where Executors ſhall reverſe a Judgment againſt the Teſtator given upon Exigent, and upon reverſall thereof, his Goods reſtored to them. p. 1749. C. 7.

Difference between ſale of Goods upon an Execution by *Fieri facias* made to a Stranger, and where the party; in the one caſe Reſtitution ſhall be of the Goods themſelves, in the other not. p. 1750. C. 8.

Where, and in what caſe, a new Writ of Reſtitution ſhall iſſue, to enquire what profits of the Land the party had received by colour of a Judgment, before the reverſal of the Judgment. p. 1750. C. 9.

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Where and in what Caſe lyeth not to reſtore an Alderman to his place of Alderman, being removed by Cuſtom of the City of *London*, or other City. p. 1752. C. 7, 8. p. 1573. C. 10.

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One had his Chamber ſeized upon, in an Inns of Court, for not payment of his Commons, and he expelled the Houſe, prayed a Writ of Reſtitution, which was denyed by the Court. p. 1753. C. 12.

A Pariſh Clerk, removed from his place of Clerkſhip by the Parſon, prayed Reſtitution; but denyed, becauſe he had his Remedy at Law againſt the Parſon who removed him, and the Parſon hath not Power to put him out, being a Temporal Office. p. 1753. C. 13, 14.

Where and in what Caſe ſhall be awarded upon an Indictment upon the Statute of 8 H. 6. of Forcible Entry, where not. p. 1754. C. 1, 2, 3 7.

Where a Reſtitution of Blood of the Son, Heir of the Father, upon an Attainder of the Father, ſhall enable him to have a Petition of Right which his Uncle had to Lands, as Heir to the Uncle. p. 1755. C. 6.

Retorn of the Sheriff.

What ſhall be ſaid to be a good Retorn upon Writs directed to the Sheriff. p. 1755. C. 1.

Upon an *Habere facias Seiſinam*; the Sheriff made a Retorn, which was incertain, and not good for repugnancy: yet no Writ *de Habere facias Seiſinam de Novo* awarded. p. 1755. C. 1.

Of a Reſcous by the Sheriff, and doth not retorn the place where it was done, not good. p. 1755. C. 4.

Retorn of the Sheriff of a Reſcous, viz. *virtute brevis Mandavi Ballivo Itinerant. qui mihi ſic reſpondit quod arreſtavit*, &c. and that Reſcous was made, where not good. p. 1755. C. 5. Otherwiſe of a Bayliff of a Franchiſe. *ibid.*

Where upon a Writ of Prerogative awarded for the King, the Sheriff retorned that he had extended the Land upon a Statute at the Suit of a common perſon; but that Writ was not retorned, and for ſuch Special Retorn, the Sheriff was amerced. p. 1756. C. 6.

Where if the Sheriff make a falſe Retorn upon a *Fieri facias* to levy goods in Execution; Action upon the Caſe lyeth againſt him. p. 1756. C. 7.

Upon a *Scire facias hæred. terrarum et Tenementorum*: The Sheriff retorns *Scire feci A. filio et hæred. dict. J. S.* not good; becauſe he doth not retorn him Heir of Lands or Tenements. p. 1756. C. 8.

In a *Capias ad ſatisfaciendum*, *Habere facias poſſeſſionem*, and other Writs where Land is to be delivered, or goods ſold, the Execution is good though the Writs be not retorned; otherwiſe where an Enqueſt is to be taken, as in *Elegit*, &c. p. 1756. C. 9.

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In a Writ to make Partition; the Sheriff retorns, that he did allot part of the Lands in ſeveralty: and for the other part, the Jurors would not aſſiſt him to make the Partition. Quære if good. p. 1757. C. 12.

Where a *Scire facias* to have Execution iſſueth againſt the Heirs, and Ter-Tenant; and the Sheriff retorns a Ter-Tenant, but omits to Retorn any thing concerning the Heir, it is as to the Heir, but *album breve*, and no good retorn. p. 1758. C. 15.

Venire facias retorned by the Coroners where it ought to be by the Sheriff void, if it be not *ex aſſenſu partium*. p. 1759. C. 19.

Upon a *Venire facias* no Retorn was endorſed, nor any name of any Sheriff appeared endorſed upon the back of the Writ. It was no good retorn, nor remedied by any Statute. p. 1758. C. 20.

A Special *Supplicavit* directed to Commiſſioners to take a Recognizance, cannot be retorned by the Sheriff; but muſt be retorned by the Commiſſioners themſelves. p. 1760. C. 23.

Where a Judgment in a Writ of Right Close in Ancient Demeſne, was reverſed, becauſe the name of the Summoners were not retorned. p. 1760. C. 24.

Though a man cannot aver contrary to that which is retorned by the Sheriff; yet averment that he who made the Retorn, is not true Officer, is not taken away by any Statute. page 1760. C. 25.

Where the Sheriff upon a *Levari facias* retorns he hath levyed the ſum *et paratus habeo*; he cannot afterwards ſay that he delivered it to the party, and acquitted it before. p. 1760 C. 27.

Where

Where the Sheriff makes a Precept to his Bailiff to ſummon an Enqueſt, and the Sheriff takes to the Enqueſt by ſome who were not returned by the Bailiff, and returns the ſame, it was no good return. p. 1761. C. 28.

Upon an *Habeas Corpus* awarded, where the return was inſufficient in the matter of fact; it was not amendable, and the party diſcharged. p. 1761. C. 31.

In the Caſe of a *Capias utlagatum*; the Sheriff returned, that the party himſelf *ſimul cum* J. S. and J. D. made a Reſcous; no good Return, yet the Reſcuſſers were committed by the Court. p. 1761. C. 32.

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Where a Court is holden by Letters Pattents, a *Venire facias* may be returned within 15 dayes, though by the courſe of the Common Law, it cannot be ſo. p. 1762. C. 34.

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Where a man made his Will of his Lands; and after made a Feoffment of the ſame Lands, and Livery made in part of the Land; and yet the Will ſtood good of the Land in which no Livery was made. p. 1766. C. 1.

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The Lord cannot distrain *pro certo* Leets, because it is not of Right; but for the benefit of the Lord, which he cannot have without a Prescript on. But for an Amercement in a Leet, Distress is incident of Common Right. Page 1910. C. 12.

Suits by way of Action, or otherwise.

It is *pœna Civilis*. p. 1610. C. 1.

The Judgment at the Common Law could not Counter-plead the title of the Plaintiff in a *Quare Imp dit*; because it was his title to the Patronage, with which he had nothing to do, p. 1910. C. 1.

Actio est vis prosequendi in judicio quod alicui debetur, and yet by a Release of all Actions, a Duty shall be released. p. 1910. C. 2.

By release of all Suits, Executions are barred; but it is not a Barr of Dower. p. 1910. C. 3.

Where upon a Commission of Bankrupts; a Bond for the payment of mony is assigned to two men severally, each may sue for part of the Debt, and where part of a Debt may be attached by Custom. p. 1911. C. 5.

Where a man may be sued either in the Spiritual Law or Common Law, for words of Defamation, which are punishable by either Laws; he hath his Election in what Court he will sue. p. 1911. C. 6.

Suit lyeth not in the Admiralty, for things which are done upon the Land, but for things only done *super altum Mare*. p. 1911. C. 7.

Surmise.

Audita Querela brought to mind an Execution of Judgment upon a Surmise, that after the Judgment he had payed the whole mony, where good. p. 1911. C. 1.

Where a Surmise of an Agreement to be discharged of Tythes for a year, may be good by word; but such an Agreement during the life of the Parson, is not good; what Deed. p. 1912. C. 3.

Where a Surmise to have a Prohibition in a Suit in the Spirituall Court for subtraction of Tythes, because he had but one witness to prove the Lease, was not there allowed, not good; and Consultation granted. p. 1912. C. 4.

One in Execution not to be Lett to Main-prise, upon a Surmise of Articles of Agreement, to discharge of the Execution. p. 1912. C. 6.

Where a Surmise, upon a discharge of payment of Tythes, may be good, being by way of Retainer, although it be but by Parcel. p. 1913. C. 7.

Suspense

The Table.

Suſpenſe and Suſpenſion.

Where a Seignory, Rent, Tythes, or other thing ſhall be in ſuſpence, and by reaſon of what act, or means. p. 1913. C. 1.

Where a ſaving in an Act of Parliament which is repugnant to the body of the Act, is void. p. 1913. C. 1.

Where by acceptance of a Term for years of his Copyhold by a Copyholder; his Copyhold Eſtate ſhall be determined. Page, 1913. C. 2.

A Rent is Granted out of Lands in Fee, and out of a Term for years, to have to the Grantee for life, it ſhall iſſue out of the Freehold, and not out of the Term. And if an Aſſiſe be brought of it, the Land in Fee ſhall be only put in View. p. 1913. C. 3.

Where a Fine or a Feoffment ſhall extinguiſh a future power of Revocation. Page 1914. C. 5.

Tail.

WHat it is: whence derived: By what of Grant, either in the Caſe of a common perſon, or of the King, it ſhall be created: And of what things an Eſtate tail may be, of what not. p. 1915. C. 1, 4.

At the Common-Law, after Iſſue, Tenant in tail had a Feeſimple to divers purpoſes. page 1915. C. 2, 3.

A gift to one, *et Semini ſuo, aut Liberis ſuis de Corpore, aut pueris ſuis de Corpore*; no tail, but an Eſtate for life. p. 1915. C. 5, 6.

A gift by the Father to the uſe of his younger Son in tail, the Remainder to the Donees *et hæredibus ſuis in poſterum procreandis*; the younger Son dyed without Iſſue; the eldeſt Son ſhall not have the Lands by reaſon of the words *in poſterum*, which is of force to exclude him. page 1916. C. 7.

R. gave Lands to A. for his life *rem. rectis hæredibus Maſculis de Corpore dict. R. legitimè procreatis, rem. rectis hæredibus ſuis imperpetuum*; the Limitation in the Remainder void, becauſe the Donor could not make his own right Heir a Purchaſor without the departing of the Feeſimple out of himſelf. p. 1916. C. 8.

Feoffment, *ad opus et uſum J. G. et hæredum maſculorum ſuorum legitimè procreatorum et pro defectu talis exitus*, to the uſe of others in Remainder; a Fee in J. G. becauſe not limited of what body his Heirs Males ſhall be begotten. p. 1917. C. 9.

Deviſe to Husband and Wife, and after their deceaſe, to their Children, they having a Son and a Daughter, is but for the Term of their lives, Remainder to their Children for life. But a Deviſe to B. and to his Iſſues, or Children, and he hath no Iſſue at the time of the Deviſe, the words ſhall be taken by way of Limitation, and ſo a good tail. p. 1917. C. 12.

When a Deed ſpeaketh by general words, and after diſcendeth to ſpecial words, if the ſpecial words agree to the general, the Deed ſhall be intended according to the ſpecial words. p. 1917. C. 13.

A gift to Husband and Wife, and to the Heirs of the body of the Survivor of them, no tail, becauſe of the incertainty of the perſon of the Survivor. p. 1917. C. 14.

A man Deviſeth Lands to his Wife for life, and after her deceaſe, that his eldeſt Son ſhall have the Land 10 l. under the price it coſt. Quære, if a Feeſimple being under the price it coſt. page 1917. C. 15.

A Deviſe to his Son, and if his Son dyed without a Son, That it ſhould remain over, a good eſtate in the Son. p. 1917. C. 16.

When an Eſtate is limited to one, and the uſe to another, the uſe ſhall not be more then the Eſtate to which it is limited; but when it is limited to two, *Habendum* to the uſe of the Heirs of their bodies, this is a Limitation of the Eſtate, and they ſhall take in tail. page 1918. C. 17.

Where a Conditional Limitation to make a Remainder to begin after the Limitation of an Eſtate tail, ſhall be void and repugnant. p. 1918. C. 19.

A Deviſe was thus, *I Deviſe my Lands to my Wife for life, and after her death to F. my Son: And if my three Daughters, or either of them out-live their Mother, and their Brother and his Heirs, then my Daughters to enjoy the Lands during their lives.* In this Caſe, F. the Son hath tail, and not Fee; and the word (Heirs) ſhall be intended Heirs of his body, for it was impoſſible he ſhould dye without Heirs as long as his Siſters were alive. p. 1918. C. 20.

Where the firſt part of a Will in Caſe of a Deviſe, giveth a Fee; yet he ſecond part of it ſhall correct it and make it but tail. page 1919. C. 22.

The Table.

That the Statute of *Donis Conditionalibus* if intail, extends not to Copyholders, becauſe it ſhould tend to the prejudice of the Lord by alteration of the Cuſtome. p. 1919. C. 25. p. 1921. C. 37, 38, 39.

What may be entailed, what not. p. 1920. C. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36.

If Copyholds may not be entailed by Cuſtome of the Mannor, becauſe it is uſual to dock ſuch Eſtates by a Common Recovery which vouchers. p. 1921. C. 39.

Where and what acts done by Tenant in tail, ſhall bar his Iſſue, what not. And where the Iſſue ſhall falſify a Recovery had againſt his Anceſtor, where not. p. 1912. C. 2, 3, 5.

Where the Iſſue in tail ſhall not be barred if he be in by a lawful diſcent before the Recovery be compleatly executed, p. 1922. C. 1.

Where the Iſſue in tail ſhall be barred to take advantage of a forfeiture becauſe his Father was in *eſſe* at the time, and diſabled himſelf to take advantage of it. p. 1922. C. 4.

Where a Fine levyed by Tenant in tail in Remainder to the Tenant for life upon a *Conceſſit Tenementa*, was any bar of the eſtate tail after the Eſtate for life determined. p. 1923. C. 6.

Tenant in tail of a Rent, levyes a Fine with Proclamations of the Mannor out of which the Rent is iſſuing; the Fine levyed of the Mannor, gives the Rent *incluſivè*. p. 1923. C. 7.

Tenant in tail, the Reverſion in Fee in the King, makes a Feoffment, and after is Attainted of Treaſon: it is no Diſcontinuance, and ſo the Eſtate tail remained in him, and is veſted in the King by the Attainder. p. 1923. C. 8.

Where the Iſſue of the Father, Tenant in tail, ſhall be barred although he be beyond Sea, if he make not his claim within five years after the death of his Father. p. 1924. C. 9.

Diſſeiſor makes a gift in tail, and the Donee in conſideration of a Releaſe of the Right of the Diſſeiſee, grants to him a Rent-charge, where it ſhall bind the Iſſue, though the tail doth continue. p. 1924. C. 11.

Tales.

Where at the Common-Law, *Tales* might be of odd number in all Actions, but an Appeal. p. 1925. C. 1, 3.

Not to be awarded *de Circumſtantibus* upon a Try-all at bar. p. 1925. C. 1.

Where awarded, if one of the Jurours dyeth before appearance, or before Verdict given after he is charged. p. 1925. C. 3.

Muſt be of the ſame quality as the Principals are: p. 1925. C. 3.

Where not to be awarded *de Circumſtantibus* upon a default of Jurours in an Aſſiſe. p. 1925. C. 3.

Where a Tryal had by Jurours upon a *Tales de Circumſtantibus*: Where the *Venire facias* in the time of Queen *Eliz.* and upon default, a new *Diſtringas* in the time of King *James*, which was *Quod Diſtringas Juratores nuper ſummonit. in Curia noſtra*; where it ought to be *in Curia nuper Reginæ* 5^t^ the Judgment thereupon reverſed. p. 1925. C. 4.

Where a *Venire facias* awarded to the Coroners, upon default of Jurors, a *Tales* awarded and returned by the Sheriff, where not good, though it be *per mandatum* of the Juſticers. p. 1926. C. 5, 6.

Where the Sheriff ought to return the *Poſtea* upon a Verdict at the Aſſiſes: and the *Tales* alſo, and if there be no return of the ſame, it is Error not remedied by any Statute. page 1926. C. 8.

Tender and Refuſal.

What ſhall be a good Tender and Refuſal, what not; By whom; of what, and upon what. Where Iſſue ſhall be joyned upon Tender and Refuſal, and the one or the other Traverſable at Election. p. 1927. C. 1.

Where upon the tender of mony, & refuſal of it upon an Obligation, the money ſhall be loſt, where not. p. 1927. C. 1.

Where and in what Caſe upon Tender and Refuſal, the party muſt plead *uncore priſt. et contra.* Page 1927. C. 1, 2, 5, 6. Page 1928. C. 8.

Tender of good money at the day, and refuſal of it, if the money be after debaſed, he ſhall be paid it in baſe money. p. 1927. C. 4.

Tender of payment of money in *Spaniſh*-money, made good by Proclamation, where good. page 1928. C. 7.

Tender of money in bags, if it be the true ſum without numbring of the money, where good. *ibid.*

Upon a Feoffment of Land to pay a certain ſum of money, ſatisfaction may be given by the giving a Horſe or a Ring, by accord of the parties.

Where the Obligor is to pay 10 l. or a Collateral thing; there for performance, Tender muſt be made of them both at the day. Page 1928. C. 9.

Where tender of money by a ſtranger at the requeſt of

of the Mother, upon a Mortgage, the Heir being within age, ſhall be good to ſave the forfeiture of the Mortgage; where not. Page 1928. C. 11.

Where tender of Rent upon the Lands, is not ſufficient if it be not pleaded to be at the laſt Inſtant, as it ought to be. p. 1929. C. 12.

Difference betwixt Tender of Homage and refuſal, and Tender of Rent in the one Caſe upon a Tender to the party and refuſal, he cannot after Diſtreyn; contrary in the other. page 1929. C. 15.

If a Pariſhioner tendreth his Tythe Cheeſe for the Parſon at his own houſe, and the Parſon ſuffereth them to remain there, and not fetch them away: An Action upon the Caſe will lye againſt the Parſon. p. 1929. C. 18.

A Reverſioner was to avoid a Leaſe upon a Tender of money, though a ſtranger enter and Diſſeiſe him; yet the Tender after the Diſſeiſin is good. p. 1930. C. 17.

If a ſtranger without the privity or conſent of the Mortgagor, tendreth the money, and the Mortgagee accepteth of the ſame, if he after conſent to it, after ſuch Tender he may re-enter into the Land. p. 1930. C. 18.

Upon a Condition to pay money to the Feoffee at a day certain, if the Feoffee goes out of the Realm, the Feoffor may enter, becauſe the Feoffee is the cauſe that the Feoffor could not make tender of, at the day, to him. p. 1930. C. 19.

Where ſeveral ſums of money are to be tendred upon Revocation of Uſes, tender of one ſum only doth not revoke the Uſes. p. 1930. C. 21.

Tender of Marriage in Caſe of Wardſhip; where good and requiſite, where not. Page 1930. C. 1.

The Guardian in Knight-Service ſhall have the ſingle value of the Marriage without tender. p. 1930. C. 2, 3, 4.

That the Scature of *Marlbridge*, nor Statute of 32 H 8. by which the Court of Wards was erected, give Authority to retain the Land for the value of the Marriage. p. 1931. C. 4.

Of Amends, when and where good. Page 1931. C. 5.

Made by a Bayliff. not good, becauſe he cannot deliver a Diſtreſs taken. p. 1931. C. 1.

Of a Rent upon the Land before a Diſtreſs, makes the Diſtreſs tortious. After the Diſtreſs, and before the Impounding, makes the Detainer tortious. After Impounding, Tender comes too late. p. 1931. C. 2.

Tender of amends in Treſpaſs after a *Latitat* ſued forth to Arreſt the party, not good. p. 1931. C. 3.

Where, and in what Caſe the Lord ſhall avow upon a ſtranger for the Services of the Meſne; and if the Tenant be diſtreyned in default of the Meſne, what remedy he hath againſt the Meſne. p. 1932. C. 4, 5.

Tenures.

Where, and in what Caſe the King at this day may create a Tenure in *Capite*. p. 1932. C. 1.

A Tenure in *Capite* of the perſon of the King, cannot be releaſed, though the King Grants the Reverſion, becauſe it is incident to his perſon. pag. 1931. C. 1.

Where a Tenure of the King of an Honor, ſhall not be a Tenure of his perſon, nor give him Prerogative of other Lands. p. 1932. C. 2.

If the King give Lands *ſine aliquo inde reddendo*; yet it ſhall be a Tenure by Knight-Service in *Capite*. p. 1933. C. 4, 5.

If the King Grants Lands in Fee, and reſerves any Rent ſpecial, the Tenure ſhall be as he reſerves it, be it Socage, or other. p. 1933. C. 5.

Upon Treaſon committed, All Tenures, whether of the King or other perſon, are extinct. p. 1933. C. 6.

When the King Releaſes, and Grants the Services to the Tenant and his Heirs, the Tenure is not wholly extinguiſhed, but ſhall be by Fealty. pag. 1933. C. 7.

If upon two Inquiſitions upon Office, the Jurors find *Ignorant de quo* the Lands are holden. It ſhall be intended a Tenure of the King by Knight Service in *Capite*. p. 1933 C. 8.

Where ſhall be of the King by reaſon of matter of Record, or Eſtoppel. p. 1933. C. 10.

If a Tenure be found of the King of a Mannor, or by ſome Service certain. If upon a *Melius* it be found to be holden by Knight-Service, It ſhall be holden of the Mannor, for that a *Melius* is but a ſupplement to the Incertainty of the firſt Office as to make it perfect. p. 1934. C. 11.

Lands holden *per Servitium unius partum Caltarium deaurarorum vel 6 d.* is a Tenure by Petit-Serjeanty. p. 1934. C. 15.

Tenure *per album firmam*, *i. e.* Blanch-Farm of Common perſons after the death of their Anceſtors, ſhall double the Farm for Releaſe. But Tenants by Cornage ſhall pay for Relief the value of the Land for one year. Page 1934. C. 16.

Tenure *ad inveniendum unum equum*, Petit-Serjeanty.

Title.

Where and in what Cases, Writs, or Actions, or pleadings; the party, Plaintiff, or Defendant, muſt make Title; and what ſhall be a good Title, what not. p. 1935. C. 1.

In an Avowry, if the Avowant plead his Freehold. If the Plaintiff will traverſe it, he muſt make himſelf Title paramount his own Seiſin. p. 1935. C. 2.

Where a Copyholder, though he may not preſcribe but in the right of his Lord, yet he may make Title to have Common for his Cattle by uſage. p. 1935. C. 4.

If the Plaintiff be Nonſuit in a *Quare Impedit* after appearance is annexed bar in another *Quare Impedit* brought by him, becauſe the Defendant upon Title made, ſhall have a Writ to the Biſhop to admit his Clerk. p. 1936. C. 7.

Upon default made at the Grand Diſtreſs by the Defendants in a *Quare Impedit*, the Plaintiff ſhall upon Title made, have a Writ to the Biſhop, and a Writ awarded to enquire of the Damages, and the other points enquirable. p. 1936. C. 8.

In Aſſiſe of a Rent, the Plaintiff muſt make his title in his Plaint. p. 1936. C. 8.

Where payment of Rent by a Deviſee for years of Lands, ſhall not be a ſufficient Seiſin to maintain an Aſſiſe of the Rent. Page 1936. C. 8.

If a man hath Common appurtenant to two ſeveral houſes and Lands by Preſcription, he muſt make ſeveral Titles and Preſcriptions, and not joyn them both in one, becauſe they are diſtinct Commons. p. 1937. C. 10.

In Battery, the Defendant juſtified as Servant to J. S. becauſe the Plaintiff came and fiſhed in his Maſters ſeveral Piſcary, Granted by Letters Patents, and did not ſhew that the King was ſeiſed *jure Coronæ* of the Piſcary, nor ſhew the Letters Pattents Granted to his Mannor. p. 1937. C. 12.

Title, what it is, and where the Tenant ſhall pray the Aſſiſe upon the Title: And what ſhall be a good Title in Aſſiſe, or other Actions. p. 1938. C. 1.

Where a Title ſhall be good, although the party doth not make a Title but of his own poſſeſſion. p. 1938. C. 2.

If a Rent which one hath by Preſcription be alliened, the Grantee cannot have it without making a Title to it by Deed. Page 1938. C. 3.

In an Aſſiſe, if the Tenant plead a Recovery againſt the Plaintiffs Anceſtor, it is no good Title to ſay, That long time after, the ſame Anceſtor dyed ſeiſed; unleſs he ſhew how his Anceſtor came to the Land after the Recovery. p. 1938. C. 4.

Where a bar in an Aſſiſe, Mortdauncеſter, or Writ of Entry by Judgment upon Demurrer or Verdict, is not an utter bar of the right and Title to the Lands, but they may try their Title again in a Writ brought of a higher nature than the firſt Writ was. p. 1939. C. 7.

Tythes. See Lib. 1. Title *Diſmes or Tythes.*

If a man claim Tythes as Proprietor by ſeveral Leaſes of the Parſon and Vicar when both Titles are joyned in one perſon, In an Action brought, it is ſufficient for him to ſay, That he is *Proprietarius* of the Tythes, without laying of whoſe title. p. 1940. C. 1.

A Conſultation awarded upon a Suit in the Spiritual Court for Tythes of Wool upon Variance between the Libel and the ſuggeſtion to have a Prohibition, and double Coſts given. p. 1940. C. 2.

A Leaſe of Tythes to begin at a day to come, where void. p. 1940. C. 3.

In a Suit in the Spiritual Court for Tythe of grets Tares eaten by the Cattel of the Tenant before they were ripe. A Preſcription was not to pay any Tythes of them, becauſe eaten by their draught Cattel which ploughed the Land, a good Preſcription and a Prohibition Granted. p. 1941. C. 1.

Prohibition, where it doth not lye upon an agreement betwixt the Parſon and Pariſhioners for 10 *per annum* to be diſcharged of Tythes for the Term of 20 years. p. 1941. C. 2.

Tythes once ſet forth if they be after deſtroyed by Cattel, for not taking of them away by the Parſon, he ſhall not have Tythes again; otherwiſe if once ſet out, the Pariſhioner after carryeth them away. p. 1941. C. 3.

A Rector of a Rectory Impropriate, who is to pay an annual Rent for the ſame in the name of a Tenth, and ſo is diſcharged of Tenths and Firſt Fruits; where he ſhall not have the priviledg of the Exchequer. p. 1941. C. 4.

The Table.

Toll or Tolne.

What it is. p. 1942. C. 1.

Tenants in Auncient Demeſne, if diſtreyned for Toll of their goods *Monſtraverunt*, or the Writ *de eſſendi quieti de Tolonia* lyeth by them. page 1943. C. 2.

The ſeveral ſpecies of Toll, and the Deſcription of them, and what they are, p. 1943. C. 3.

Where an Action of Treſpaſs, or an Action upon the Caſe lyeth againſt an Officer who taketh Toll of him who ought to be quit of Toll. p. 1943. C. 4.

That Tenants in ancient Demeſne ſhall pay Toll for their Merchandizes. p. 1943. C. 5.

Where a Grant of the King to be diſcharged of Toll, was *tantum pro ſeipſo*, and not for him, his Heirs, and Succeſſors; and yet the ſame was good againſt his Succeſſors. pag. 1943. C. 6.

Where a Sale in Market overt of Goods, if the Vendee hath Notice that the property of the Goods doth belong to another, ſhall not be good, although that Toll be paid for them. p. 1943. C. 8.

Traverſe.

What ſhall be ſaid to be a good Traverſe, what not: And where the Plea not good for want of Traverſe. p. 1943. C. 3, 4. p. 1951. C. 35, 36, 37, 38.

Void, where the party hath confeſſed and accorded before. p. 1943. C. 1, 3. p. 1952. C. 39. p. 1950. C. 39.

Where the dying ſeiſed, and not the Diſcent, muſt be traverſed. pag. 1944. C. 4. pag. 1947. C. 16.

Where a Cuſtom is alledged, That the Lord may grant Copy-holds in Reverſion, as in Poſſeſſion. And the Defendant ſaith, that there is a Cuſtom, That the Lord may grant Copyes in Reverſion, with the conſent of the Tenants in Poſſeſſion; and if any Grant of Copies be without conſent of the Tenants in Poſſeſſion, that then there is a Cuſtom that the Grants ſhall be void; *abſq; hoc*, that they are demiſeable *modo & forma*, &c. in ſuch Caſe, the Plea is repugnant and void; becauſe by theſe words, *If any be granted*, it is implyed there is ſuch a Cuſtom, and then the Traverſe is void. pag. 1944 C. 6.

Where a Demurrer is general, the other party ſhall not take advantage of the Defect of Pleading, for want of Traverſe. pag. 1945. C. 9.

In a Replevin, the Defendants made Conuſans as Bayliffs of A. for a Rent; the Plaintiff ſaid in Bar, That the Bayliffs took the Cattle by Command of two Strangers who had Right to the Land, Damage feaſants, *abſq; hoc* that they took them as Bailiffs to A. holden a good Traverſe, p. 1946. C. 10.

In a *Quare Impedit*, where the Appendancy, where the Preſentment ſhall be traverſed. p. 1946. C. 11.

In Trover and Converſion of Goods, if the Defendant doth juſtify becauſe the property of the Goods was in J. S. who ſold them to him; it cannot be a good Title without a Traverſe, unleſs he ſhew that he bought them in Market overt, p. 1946. C. 13.

Where the Seiſin is Traverſable, where the Tenure. p. 1947. C. 14. p. 1956. C. 53.

In Aſſumpſit, the ground of the Action is the Aſſumpſit, and that is always traverſable; and the Conſideration, or the Debt, is not to be traverſed. p. 1947. C. 15.

Traverſe, not upon a Traverſe: But where the Traverſe in the Barr takes from the Plaintiff the Liberty of his Action for the place or time, there the Plaintiff may maintain his Action for the place or time, and may traverſe the Inducement to the Traverſe, and needs not joyn with the Defendant in the Traverſe; but when the Inducement is made, with a Traverſe of a Title ſhewn by the Plaintiff, there the Plaintiff is enforced to maintain his Title, and not traverſe the Inducement to the Traverſe. p. 1948. C. 18. p. 1953. C. 41.

In Treſpaſs for killing his Dogg at E. the Defendant juſtified; for that the Dogg killed his Coneys in his Warren at D. *abſq; hoc*, He was guilty at E; becauſe his Juſtification was locall, the Traverſe was good. pag. 1948. C. 19.

Where Traverſe of the day, when it is not materiall, and ſo makes it Parcell of the Iſſue which it ought not to be, is not good. p. 1948. C. 20. p. 1951. C. 33.

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Diſcent, but the dying ſeiſed, but only in caſe of a Deviſe which is of neceſſity; becauſe there they cannot traverſe the dying ſeiſed, becauſe it would over-throw the Deviſe. pag. 1949. C. 25.

Where the Tender of Marriage by the Lord to the Heir within Age is not to be traverſed, but the Tenure. p. 1949. C. 24.

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Traverſe, that J. S. *Seiſitus feoffavit*, not formal, becauſe *Seiſitus* is meerly idle; but the Traverſe ought to be generall, *abſq; hoc, quod feoffavit.* p. 1955. C. 51.

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The Statute of 2 E. 6. *Cap.* 8. doth not give any Traverſe to him who pretends himſelf to be Heir, againſt an Office found for another, without an Office found for him; but if one be found Heir within Age by Office, and another is found Heir within the ſame County, and of full Age. *Quare*, If the Party grieved ſhall have a Traverſe immediately. pag. 1957. C. 2.

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Counterfeiting of peices of Gold of the Kings Coyn, and offering them to the Kings Subjects, knowing them to be Counterfeit, Treason. p. 1962. C.10.

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Husband and Wife Donees in special tail, the Husband is attainted of Treason, the Issue is barred by the Statute of 26 H. 8. But if the wife over-live her husband, her estate is saved by the Act. p. 1966. C. 4.

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If a man Chase Sheep out of his own Land with a Dogg, and the Dogg persues them into another mans Land adjoyning, and he chide and re-call his Dogg, Trespass lyeth not by the Owner of the Sheep against him. p. 1970. C. 14.

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Treſpaſs for ſtopping of a Way from his Houſe to the Mill, and from the Mill back to his Houſe, in which he claims an Inheritance, lyeth as well as Aſſiſe at the Election of the Party; and he need not ſay, That the way is Appendant to his Houſe. p. 1971. C. 20.

Treſpaſs *quod cumulum pecuniæ cepit*, and it was the Parties being at play for mony; the Plaintiff thruſt his mony into the Defendants heap, and ſo mingled them together, and the Defendant kept all: Whereupon Treſpaſs was brought, and not maintainable. P. 1971. C. 22.

A Preſcription to cut Graſs in the Land of another, to eſtrew the Floor of the Church, where good; being but a matter of Eaſement, and Treſpaſs will not lye for it. P. 1972. C. 25.

Treſpaſs for Fiſhing in *ſeperali piſcaria* of the Party, and that *piſces ipſius cepit*: Holden, a man may have a ſpecial and qualified property in things *feræ naturæ*; and here he had them *ratione privilegii*, and there free Treſpaſs did lye. P. 1972. C. 26.

A man takes an Horſe as an Eſtray, and after rides him; the ſeiſure is made Tortious, for which Treſpaſs lyeth. P. 1972. C. 29.

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Where in Treſpaſs, the Plaintiff ought to make a new Aſſignment; and what ſhall be good, what not. p. 1975. C. 1.

If the Plaintiff makes a new Aſſignment, and gives ſpecial name to the place, and aſſigns Buttalls; he muſt prove the Buttalls to be true, as well as the name of the place. p. 1975. C. 2, 3.

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Where the Court could not mittigate the Damages in Treſpaſs, which was local. p. 1976. C. 4.

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Treſpaſs for cutting his Nets and Oars; the Defendant juſtified, That he was ſeiſed of a ſeveral Piſcary, and that the Defendant entred and with Oars to Row upon the water, and with Nets to catch his Fiſh; and no Plea, becauſe he might have taken them Damage-Feaſants, and have ſtopped their Fiſhing. P. 1978. C. 11.

Treſpaſs for ſtriking the Plaintiffs Hawk with a ſtaff, by which ſtroke the Hawk dyed, good; though not ſet forth, that ſhe was a reclaimed Hawk, but *Accipiter* generally. P. 1978. C. 12.

Treſpaſs, the Defendant juſtified, becauſe the Lord after *Lammas* had Common in the place, where but for three Horſes; and he put in more then three, and the Defendant being a Commoner, diſtrained them Damage-Feaſants; and the Lord brought Treſpaſs. *Quære*, For not reſolved. If the Lords Cattel may be diſtrained, without ſhewing a uſage to diſtrain them. p. 1978. C. 13.

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If the Bishop alone be Defendant in a Cause, where *ne unq; accouple*, in loyal matrimony, is pleaded; the Certificate shall be made by the Metropolitan, otherwise, if he be Defendant with others. P. 1981. C. 5.

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Several Grounds and Resolutions of Law, upon tryal of Issues. P. 1983. C. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

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Where the Law appointeth where a Tryal shall be, consent of the parties cannot alter it; for they may not change the Law. P. 1988. C. 19.

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Trespass for taking diverse parcels of Ribbon; The Defendant pleaded, the Custom of *London* against Hawkers to take away Wares sold in the Streets: Issue was, if there was such a Custom. It was tryed in *London*, because here is a point of Interest, as well as of Priviledge; part of the Goods coming to the benefit of the City: they ought not to be their own Judges, and the Tryal here not good. P. 1992. C. 31.

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A Rent is granted to his Executor for the life of B, out of black Acre; the Administrator of A. distrained and avowed for the Rent in the life of A: and in Trover brought, holden not good, because by the Death of A. the Rent was determined. p. 1995. C. 1.

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In Trover and Conversion of Goods, a Sale pleaded in Market-overt; where not good, because it amounts but to the general Issue. p. 1995. C. 4.

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A Trust of a Free-hold not forfeited to the King upon an Attainder of Treason. p. 1998. *ibid.*

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Venire Facias. Viſne, or *Venue.*

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AN APPENDIX TO THE Grand Abridgment OF THE LAW Continued.

BEING

A Collection of ſeverall Principal Caſes and Points of the Common-Law of *England*, omitted in the former Work.

WITH

Two *Tables*, The one containing the Names of the *Caſes*: The other, Of the Matter of every of the ſaid *Caſes*.

Publiſhed in the Fourteenth Year of the Reign of Our Soveraign Lord Charls *the Second*, *of* England, Scotland, France, *and* Ireland, *King*, &c.

By *WILLIAM HUGHES*, of *Grayes-Inne*, Eſquire.

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The

The Appendix.

Action upon the Case.

1. THe Case was this; A man with a Gun at the Door of his own house, shot at a Fowl, and by this act fired his own house, and the house of his Neighbour: Upon which his Neighbour brought an Action upon the Case against him generally, and did not declare upon the Custome of the Realm for negligent keeping of his fire. It was the Opinion of the whole Court, That the Action did lye: And if he had declared upon the Custome of the Realm, the Action had not bin well brought. Mich. 25 Eliz. C. B. *Cro.* 3. Part, 10.

2. In Action upon the Case, the Case was; A man brought a Writ of Entry against J. S. of certain Lands, returned *Octab. Mart.* and delivered it to the Defendant, being Under-Sheriff, to be executed *in forma juris*, and gave him his Fee, who caused the said J. S. such a day to be summoned; but intending to deceive the Plaintiff, did not return the Writ at the day, *per quod retardatus fuit* of the Recovery of his Lands, being found for the Plaintiff. In stay of Judgment, it was moved, That the Action did not lye against the Under-Sheriff, but ought to have bin against the Sheriff himself. But Resolved, That for this wrong done by the Under-Sheriff, the Action did lye against him, for that it is as an imbezling of the Writ for which he is punishable. Pasc. 32 Eliz. B. R. *Marsh* and *Abby's* Case. *Cro.* 3. Part, 175.

3. Action upon the Case, for that the Defendant *cudod vit et manutenuit quandam molam* in a Brook, whereof the Defendant was seised; by reason whereof, the Brook drowned the Plaintiff's Lands. Resolved, That in this Case, the Action did not lye, but a *Quod permittat*, for that a man shall never have an Action upon the Case, where he hath any remedy by any other Writ in the Register, and in this Case, it was Resolved, That if the Nusance was before his time, it was not an Offence in him to continue it. Mich. 39 Eliz. C. B. *Beswick* and *Camdens* Case. *Cro.* 3. Part, 520.

4. If the Sheriff upon a *Latitat* to Arrest J. S. Arrests him, and takes sufficient Sureties of 40 l. for his appearance, *ad respondendum* to the Plaintiff at the day: and thereupon after lets him to go at large; and after the party doth not appear at the day, an Action upon the Case doth not lye against the Sheriff, Mich. 40 Eliz. B. R. *Barton* and *Aldworths* Case. *Cro.* 3. Part, 622. But if the Sheriff taketh no Sureties at all for his appearance, there an Action lyeth against him, if he lets the party after Arrest to go at large. Mich. 40 Eliz. B. R. *Binion* and *Watsons* Case. *Cro.* 3. Part, 623.

5. Action upon the Case; the Plaintiff declared, That whereas he was bail for J. S. in B. R. at the Suit of one R. and whereas the said J. S. was endebted to one S. in 200 l. wherein others were his Bail: the Defendant to charge the Plaintiff with the said Debt of 200 l. by fraud and Covin, enformed the Court, That the Plaintiff was Bail for the said J. S. in the Suit by the said S. whereas he was not bail for him, but only at the Suit of R. Whereupon upon two *Scire facias's* awarded and returned *Nihil*, the Defendant *pramisorum non ignarus* procured a *Capias ad satisfaciendum* against the Plaintiff: whereupon he was taken in Execution for the said 200 l. Upon Not-Guilty found against the Defendant; It was Objected in stay of Judgment, That this was but a Judicial process, and the misawarding of it was default of the Court, although it was upon Information of the party, and therefore the Action did not lye. But the Opinion of the Court was, That the Action was maintainable against the Defendant, in regard he procured

it by fraud and Covin to deceive the Plaintiff, although he knew that he was not the same party: And is like the Case, where one procures a false Suit to be brought in anothers name, or where one casts a Protection for one without cause. Mich. 40 Eliz. B.R. *Baron* and *Sleighs* Case. *Cro.* 3. Part, 628.

6. In Action upon the Case, the Case was; A Parishioner paid his Tythes to the Vicar in the presence of two Witnesses. Afterwards one of the Witnesses being dead. The Vicar sued the Parishioner in the Spiritual Court for the same Tythes, for which cause the Parishioner brought his Action upon the Case against the Vicar. It was the Opinion of the whole Court, That upon this matter the Action did not lye: For it was said, That when a man complains in a Court which hath power to give him remedy for the same cause, although his Suit be without cause, the Plaintiff shall not be punished by an Action upon the Case. But if a man Libells in the Spiritual Court for a Temporal matter, there perhaps an Action upon the Case will lye: And so if a man brings an Appeal in the Common Pleas, an Action upon the Case will lye. Trin. 43 Eliz. in B. R. *Brey* and *Patries* Case. *Cro.* 3. Part, 836.

7. The Case was; Sentence of Excommunication was against one J.S: the Instrument whereof was delivered to the Defendant, being Curate of the Parish where the said J. S. and the Plaintiff lived, to publish the same in the Church: The Curate malitiously raced out the name of J. S. and put in the Plaintiffs name, and then read it in the Church: Whereupon the Plaintiff was enforced to be from Divine Service, and to be at expence to procure a discharge for himself. It was said, That the Action did not lye for this matter, for that it is Spiritual, of which the Temporal Law takes not regard. But Resolved, That the Action was maintainable; for although the Excommunication and denouncing of it be Spiritual, yet the razing and alteration of it is Temporal, for which an Action lyeth at the Common Law. Trin. 43 Eliz. B. R. *Kenton* and *Wallingers* Case. *Cro.* 3. Part, 838.

8. Action upon the Case, The Plaintiffs declared, That J. S. recovered Debt against the Defendant, and a *Capias* was awarded to the Plaintiffs, being Sheriffs of N. to take him in Execution, and they made their Warrants to three Sergeants to Arrest him, who did it; and after the Defendant escaped from them: by reason whereof they were bound to answer the Debt, and to spend monies in the search of the Defendant. And so brought their Action for the Escape against him. It was Objected, That they were not damnified by the Escape, for that they are not sued, and perhaps may dye before they be sued. It was Resolved, That the Action lyeth by the Sheriffs for the escape before the party sueth them, for the party Arrested, did a wrong to them by the Escape; and if they should stay till they are sued, perhaps the party who escaped may dye in the interim, or fly the Countrey that they cannot hear of him; and therefore the Action now lyeth. Hill. 29 Eliz. in B.R. The Sheriffs of *Norwich* and *Bradshaws* Case. *Cro.* 3. Part, 53. See *Godbolt*, 125. the same Case.

9. In Error upon a Judgment in an inferiour Court, the Case was; A Distress issued out of the Court to one A. (who was not an usual Officer) to distrein the Cattel of B. or that he find sufficient Pledges to appear the next Court. A. distreyned the Cattel of B. and the Plaintiff gave him the usual Fee, and he not having taken sufficient Pledges, afterwards delivered back the Cattel to B. who did not appear. Whereupon the Plaintiff brought an Action upon the Case. In this Case (amongst other points) it was Resolved, That the same was such a Disceit, for which an Action upon the Case did lye against A. although that he was not a known Officer, but only an Officer *pro hâc vice*. Hill. 1 Car. in B. R. *Wild* and *Dowsets* Case. *Latch*, 159.

10. Action upon the Case was brought by the Plaintiff concerning the Fees of the Post-Master against the Defendant. Exceptions were taken to the Declaration. 1. Because he declares that the Office of Post-Master was an ancient Office, and that there were divers Fees belonging to it for carrying of Letters from *London* to the parts beyond Sea, as from thence to *London*: and doth not prescribe that they were time out of mind, &c. But the Opinion of the Court was, That having declared that it was an ancient Office, and that Fees appertained to the Office, he needed not prescribe in that. Another Exception was, That he pleads a grant of the King by Letters Patents of the Office, and of the Fees belonging to it, but doth not shew forth the Letters Patent. For that point, it was the Opinion of the Court, That when a man makes Title to an Office by Letters Patent, he ought to shew forth the Letters Patent; and in this Case, when he claims the profits of the Office it is all one as if he claimed the Office in fee, because the profits of the Office is the Office in fee. Hill. 2. Jac. in B. R. The Lord *Stanhope* and *Bequesters* Case. *Latch* 87.

11. Action upon the Case for taking and detaining a Box of Charters. *viz. Quare cepit et detinuit unam pixidem una cum diversis chartis et munimentis* concerning the Plaintiffs Land, unto the Plaintiff to have them, makes a Bill of 40 l. to the Defendant to have them again. Upon Judgment, Exceptions were, 1. Because the Declaration

was *pixidem*, and doth not say *suam*. 2. Because it doth not shew what Charters they were; It was the Opinion of the Justices, That the Declaration *de pixide nost cum diversis chartis*, concerning the Plaintiffs Land, was good enough; because the Charters draw their property of the Box, whether it be not sealed or locked, if the Charters be in it. 2. Exception, because the Action is *Cepit & detinuit quousq; &c.* And the Jury giveth the Verdict, That the Defendant is guilty, *De transgress. predict.* and they cannot find the Issue by Implication. It was the Opinion of the Court as to that, That the Issue being tantamount as the general Issue; when the Jury find the general Issue, the same is well enough. Pasch. 2 Car. B.R. *Holme's* and *Wagon's* Case. *Latch.* 195.

12. Action upon the Case was brought in the Common-Pleas against two, for procuring the Plaintiff to be Indicted of common Barretry, and the Plaintiff there had Judgment; and thereupon Error was brought in B. R, because they ought not to have joyned them in one Action: But the Opinion of the Court, That in that Point the Action was well. And *Shotsby*, and *Brendy*, and *Walters* Case, 1 Jac. *in Scaccario* was vouched; Where an Action upon the Case was brought against two, because they did procure one to be Out-lawed in *London*, to the intent to forfeit his Goods in *Middlesex*. 2. Error was, because there is not any place alledged where the procurement was; and that ought to be shewed. But it was said, That it was good enough, for that there is not a Procurement, till he is Indicted: But the Court said, That for that Cause it was not good. Hill. 3 Car. B.R *Pearsin* and *Trapping's* Case. *Latch.* 162.

13. In an Action upon the Case for an Escape; the Point was, If an Action upon the Case lay against the Sheriff by the Executors, for an escape made upon an Arrest, upon a *Latitat* in the time of the Testator; and, If it be *actio personalis*, which dyeth with the person. The Court was divided in Opinion, but said, That they would Resolve that Point, some time the same Term. Trin. 2 Car. B.R. Rot. 1365. *Moss* and *Dixal's* Case. *Latch* 167.

14. Action upon Statute, 2 E. 6. for not setting forth of Tythes; The Case was, Corn was set forth for Tythes, and the Owner of the Land took the Corn Damage-Feasant, but did not shew in his Declaration, how long the Corn did remain upon the Land: *Per curiam*, it was not good, because it is not shewed how long it remained upon the Land; and therefore it doth not appear that he was dismissed: Also it was said, If the Tythes be once set forth by the Statute, the Parson may have Action of Trespass if any takes them; But if a Stranger setteth out the Tythe, the same doth not settle any property in the Parson, so as he may have an Action for the taking of them. Hill. 1 Car. B. R. *Stilemas* and *Thorn's* Case. *Latch.* 8.

Action upon the Case for Words.

1. WOrds, *viz.* That the Plaintiff maintained, victualled, and helpt to let go certain Pirates, contrary to the Law of the Realm, and the Proclamations made, spoken maliciously, Actionable; for although Piracy is tryable by the Civil Law, yet the Common Law, by the Statute of 35 H. 8. takes notice of it. Hill. 29 Eliz. B. R. *Morgan* and *Kitt's* Case. *Cro.* 3. 4 H. 5a. See *Sir Hen. Lee.* and *Pennifton's* Case, acc.

2. Words, *viz.* If you had had your deserts, you had been hanged before now, Actionable; for it shall be intended, he had committed an offence for which the penalty of death was due to him. Mich. 29 Eliz. B. R. *Dorne's* Case. *Cro.* 3. Part, 62.

3. Words, *viz.* for saying, The Plaintiff is a perjured person, and he was forsworn in the Court of Requests; and that he shall stand upon the Stage: Action lyeth. Trin. 31 Eliz. B. R. *Brook* and *Baught's* Case. *Cro.* 3. Part, 135. Trin. 23 Eliz. B. R. *Foster* and *Timm's* Case, acc.

4. Words, *viz.* For calling the Plaintiff, A Rebellious and Trayterous Knave; though the Action doth not lye for the word [Rebellious], yet both words being joyned together, Action lyeth. Hill. 33 Eliz. B. R. *Ward* and *Timm's* Case. *Cro.* 3. Part, 171.

5. Words, *viz.* Thou hast taken a false Oath in the Consistory Court of *Exeter*, Actionable; although Perjury in the Spiritual Court be not within the Statute of 5 Eliz. of Perjury. Trin. 32 Eliz. B. R. *Pl ice* and *Hazer's* Case. *Cro.* 3. Part, 185.

6. Words, *viz.* A. and B. have hired a man to kill me, and that B. should shew me to the hired man to kill me, Actionable. Mich. 5 Eliz. B. R. *Tibbet* and *Hazen's* Case. *Cro.* 3. Part, 191.

7. Words, *viz.* Thou art laid of the French Pox, Actionable, adjudged. Hill. 38. Eliz. B. R. *Austin* and *White's* Case. *Cro.* 3. Part, 214.

8. Words, *viz.* Thou hast sought the Blood of thy Husband, and wast his death; for if thou hadst been an honest woman, he had been alive yet; and

averred her Husband was killed, adjudged Actionable. Trin. 33 Eliz. B. R. *Gastrell* and *Townsend*'s Case. *Cro.* 3. Part, 239.

9. Words, viz. My Lord Prefident of the North fhewed Mr. *Stapleton* his Hand fet to a Book, wherein he had confented to the late Rebels in the North; but by the means of Mr. *Fanfax*, my Lord Prefident was perfwaded, and the matter fuppreffed. Mich. 34. Eliz. C. B. *Stapleton* and *Fyal*'s Cafe. *Cro.* 251. The words adjudged actionable.

10. Words, viz. Sir *Chriſtopher Hilliard* is a Blood-fucker, and fucketh blood; but if a man will give him a Bribe, as a Sheep, or a Couple of Capons, he will take them; adjudged, the words not Actionable; for it cannot be intended, what Blood he fucked. Mich. 36 Eliz. B.R. Sir *Chriſtopher Hilliard* and *Conſtable*'s Cafe. *Cro.* 3. Part, 306.

11. Words, viz. He is a Suborner of Perjury, Actionable; for he cannot be a Suborner of perjury, but it muſt neceſſarily be intended, he did ſuborn ſome perſon certain, to commit Perjury. Mich. 36 Eliz. B. R. *Gardas* and *Waterſtade*'s Cafe. *Cro.* 3. Part, 308.

12. Words, viz. One told me he heard ſay, That Mrs. *Meggs* had poyſoned her Huſband, *tibi Vera Nullus dixit*; adjudged Actionable, for it is a great defamation, and is a cauſe of drawing her life and fame in examination. Trin. 37 Eliz. B. R. *Meggs* and *Griffith*'s Cafe. *Cro.* 3. Part, 400.

13. In Action upon the Caſe; The Plaintiff declares, That the Defendant *Dixit & proponit hæc Latina verba in præſentia diverſorum qui intellexerunt Romanum Linguam*, viz. *Iunicus meus* is an Extortioner; adjudged, That neither the firſt words, nor the ſecond words were Actionable. Mich. 39 Eliz. B. R. *Johns* and *Davis*'s Cafe. *Cro.* 3. Part, 496.

14. Words, viz. To ſay of an Attorney, That he will overthrow his Clyents Cauſe, is Actionable, and ſo adjudged. Mich. 40 Eliz. C. B. *Tiſdale* and *Bridgton*'s Cafe. *Cro.* 3. Part, 594.

15. Words, viz. To ſay of a Phyſitian, That he hath killed one with Phyſick; is not ſlander to bear an Action: for he might do it unvoluntarily, not knowing the Diſeaſe, and it is alſo an uſuall and common expreſſion; But to ſay, that he *ſciunter & voluntarie*, did adminiſter Phyſick to one to kill him, are Actionable; for that toucheth him in his Profeſſion. Mich. 40 Eliz. B. R. *Poe* and *Dr. Mayford*'s Cafe. *Cro.* 3. Part, 620.

16. Action for words ſpoken to the Plaintiffs Servant, viz. Thy Miſtreſs is an arrant Whore, and would have layn with me ſeven years ſince, and I would not, unleſs ſhe would go to the Hedge (although it was layed in the Declaration, That ſhe was in Communication with J. S. of Marriage, who was ſeiſed of Lands of 200 l. paid, and by reaſon of thoſe words ſhe loſt her marriage) yet adjudged, the words not Actionable, for that the words are a Spiritual Slander and Defamation, and puniſhable there, and not by our Law: But if the words had been ſpoken to him, who was in communication of marriage with her, ſo as the purpoſe was to hinder the marriage; The Action had been maintainable, for the loſs which ſhe ſuſtained. Mich. 42 Eliz. in C. B. *Holwood* and *Hopkin*'s Cafe. *Cro.* 3. Part, 787.

17. In an Action upon the Caſe for Words, the Plaintiff declared, That *per multos annos jam retroactos, fuit Mercator*, and uſed the Trade of Merchandizing, *tam infra Regnum, quam extra*; and that the Plaintiff ſpoken of him theſe words, viz. Thou art a Beggarly Knave, and a Bankrupt, and art not able to ſhew thy face: *Quære*, if Actionable, for the Court ſeemed to doubt thereof; becauſe it is not preciſely alledged, That he was a Merchant at the time of the words ſpoken. Mich. 42 Eliz. B. R. *Datter*'s and *Ford*'s Cafe. *Cro.* 3. Part, 794.

18. Theſe words ſpoken of a Juſtice of Peace, who had authority to take Recognizances, viz. Thou haſt forged a Recognizance taken before Fither and others, adjudged Actionable; for [forged] ſhall be intended falſly certified; and [taken] ſhall intended, for acknowledged. Paſch. 44 Eliz. B. R. *Chichely* and *Banker*'s Cafe. *Cro.* 3. Part, 883.

19. Words, viz. Thou art a lewd Fellow, for thou haſt drawn ſuch a man to Perjury, adjudged Actionable; for it is all one as if he had ſaid, Thou haſt ſuborned a man to perjure himſelf. Mich. 45 Eliz. B. R. *Clink* and *Perkes*'s Cafe. *Cro.* 3. Part, 899.

20. Words, viz. Thou art thrice perjured in thy Anſwer in Chancery to my Bill; A Bill being exhibited there between the Plaintiff and Defendant, and judged Actionable. Mich. 44 Eliz. B. R. *Poultney* and *Wilkinſon*'s Cafe. *Cro.* 3. Part, 907.

21. Husband Wife libelled in the Spiritual Court, for calling the Wife *Veneficam, Fatillyam & incantatricem Dæmonicam*; A Prohibition was prayed, becauſe the matter of the Libell was determinable by the Common Law: But it was denyed by the Court, becauſe upon ſuch ſlanderous words of Witchcraft, which is not Felony, the Eccleſiaſtical Court ſhall puniſh the ſame; wherefore a Conſultation was awarded. Trin. 29 Eliz. B. R. *Ralph Mard*'s Cafe. *Leon.* 2. Part, 53.

22. Words

22. Words ſpoken of an Attorney, viz. Thou art a Paultry Fellow, thy Credit is fallen, for thou dealeſt on both ſides, and doſt deceive many that truſt thee; adjudged, although an Attorney may deal on both ſides as an Arbitrator; yet all the words joyned together ſhall be taken in *malam partem*, and Actionable. Hill. 45 Eliz. B. R. *Shire* and *King's* Caſe. *Yelverton* 32.

23. The Plaintiff was a Commiſſioner to examine Witneſſes upon a Suit in Chancery, between A. and B; A. ſaid of the Plaintiff theſe words, viz. That he was a corrupt man, and that B. had ſet him on Horſe back, with Bribes to ſuppreſs Juſtice, Truth, and Equity; adjudged the words Actionable, for the Commiſſion iſſueth under the Great Seal; and a ſpecial Truſt is repoſed in him, and to falſify ſuch Truſt, and to ſuppreſs the Truth by Bribery is a great Offence, and a heavy ſlander of him; for by ſuch corruption he may be puniſhed by Judgment. Paſch. 3. Jac. B. R. Sir *George Moor* and *Foſter's* Caſe. *Yelverton* 162.

24. Words, viz. You might have known your own Sheep, and not have ſtolen mine. *Quære*, if Actionable; for it was not any direct affirmation, that the Plaintiff had ſtolen any Sheep, but by Implication. And *Quære*, If it be not ſuch a ſtrong Implication, and neceſſary Conſequence, that the Plaintiff had ſtolen Sheep; The Court divided in Opinion. Mich. 6 Jac. B. A. *Thompſon* and *Kett's* Caſe. *Yelverton* 144.

25. Action for words, viz. The Plaintiff is a Felon, Take heed what you ſay (ſaith a Stranger), Why (ſaith the Defendant), Is not he Felon, who knew of a Murder, and concealed it? He (*Scilicet*, the Plaintiff) knew of the Murder of J. S. and did not reveal it, till long after it was openly known; adjudged, The firſt words are Actionable, and the ſubſequent words inlarge the ſlander; for though to conceal a Felony is not Felony, but fineable; yet the ſame doth ſhew the malice in the Defendant, and is a great Imputation to the Plaintiff. Paſch. 7 Jac. B. R. *Newton* and *Falſett's* Caſe. *Yelverton* 154.

26. Words, viz. I will prove thee a perjured Knave; By the whole Court, the words are actionable, for it is a vehement Affirmative, which imports not only that a perjury was committed, but the Defendant would openly traduce the Plaintiff in ſuch ſort, that it ſhould be openly proved. Mich. 7 Jac. B. R. *Staverton* and *Reſs's* Caſe. *Yelverton* 160.

27. The Defendant having Speech with J. S. of the Plaintiff, who was and is a Merchant in *England*, but born beyond Sea, in the Dominions of the King of *Spain*, ſaid of the Plaintiff theſe words, viz. He is a Bankrupt, and he is fled beyond the Sea for much mony. Adjudged the words are Actionable; for, Trafique between Merchants-Strangers, and Domeſtick Merchants, is warranted by the Law of the Land, and their Law, in all things which concerns their Trade, and proteſts them, his goods and perſon; and therefore this ſlander although it toucheth the Plaintiff only in his perſon, yet becauſe it is an impairing of his Credit in his Trade, by which he is to live, and by which the Kings Subjects have benefit by Commerce with him, are actionable. Hill. 8 Jac. B. R. *Tawlote* and *Morſon's* Caſe. *Yelverton* 199.

28. Words ſpoken of the Plaintiff, viz. He hath broken twice, and I will make him break again. It was the Opinion of the Court, That becauſe the Plaintiff doth not name himſelf to be of any Trade, that the words will not bear Action. Paſch. 2 Car. B. R. *Hutton* and *Burman's* Caſe. See Reports annexed to *Beallow's* 170.

29. Words ſpoken of a Midwife, at the Birth of a Child, viz. Thou art a Witch, and were the death of *William Mountford's* Child; holden by the Juſtices to be Actionable; for the Action lyeth for calling one Witch, after the Statute of 1 Jac. Cap. 12. Trin. 21 Jac. B. R. *Slate's* and *Emet's* Caſe. Reports annexed to *Beallow's* 117.

30. The Plaintiff was a Parſon and Preacher, and the Defendant ſpake theſe words of him, viz. *Parat* is an Adulterer, and hath had two Children by the Wife of J. S, and I will cauſe him to be deprived for it: It was the Opinion of the Court, That this is a ſlander examinable only in the Spiritual Court, and not here; and therefore adjudged for the Defendant. Mich. 39 Eliz. B. R. *Parat* and *Carpenter's* Caſe. *Cro.* 3. Part. 502.

31. Words, viz. Thou haſt ſtolen a Mare, or conſenteddſt to the ſtealing of her. Holden by the Court, becauſe the words are in the diſjunctive; and for the laſt words, becauſe a man may be ſaid conſenting, becauſe he did not contradict it; the words are not Actionable. Mich. 42 Eliz. B. R. *Griffith's* Caſe. *Cro.* 3. Part, 780.

32. Action for that the Defendant ſpake of the Wife of the Plaintiff, *Quadam falſa & ſcandoloſa verba*, viz. Thou art an arrant Whore, and an old worm-eaten Jade, and one of thy ſides hath been eaten out with the Pox. It was the Opinion of the Court, That the Declaration was not good, for that ſome words might be omitted in the *Quare tenor, &c.* which was within the words which would cauſe the words not to be Actionable. But as to the words themſelves, the Court held them to be Actionable. Mich. 43 Eliz. C. B. *Griffith* and *Clark's* Caſe. *Cro.* 3. Part, 857.

33. Words, Thou art a Rogue and a Thief; The Court held for the Word Thief, the Action lyes, unleſſe it be coupled with other words, which prove it to be no Felony intended. Mich.

43 Eliz. C. B. *Robi.'s* and *Frank's* Case. *Cro.* 3. Part, 857.

34. Action for words, *viz.* Sir *Simon Clark* kept *Faukner* the Jesuit in his House a week together, knowing him to be a Jesuit; and it is not averred, that the Jesuit was born in *England*. It was the Opinion of the Justices, That the words were Actionable, whether he was born in *England* or not, by reason of the words, knowing him to be a Jesuit. Pasch. 1 Car. B. R. Sir *Simon Clark's* Case. *Latch.* 1. Hil. 9 Jac. B. R. *Splint* and *Smith's* Case acc. *Ibid.*

35. Words, To say of a Justice of Peace these words, *viz.* He five or six years since had two Servants presented for stealing Sheep; and he desired me, not to prosecute them, Actionable; with an averment that he was a Justice of the Peace of the County where the words were spoken, for that a Justice of Peace ought to permit the Law to have his Course, and not to stay proceedings privately: and the words, *viz.* He desires me not to prosecute, are scandalous. Trin. 1 Car. B. R. *Barton's* Case. *Latch.* 49.

36. Words, *viz.* K. is a base Gentleman, and hath had four or five Children by A. his own Maid, and hath either killed them, or procured them to be killed. Adjudged, that although the first words spoken by themselves be not actionable; yet being joyned together, and spoken at one time, they shall be taken in the worser sense; and the word killing, shall be intended an unlawful killing, and so actionable. Hill. 1 Car. B. R. *Keynar* and *Clark's* Case. *Latch.* 159.

37. An Attorney of B. R. took out a *Latitat* against the Defendant, at the Suit of one B, and there being Speech of it, and of the Plaintiff; The Defendant said, Go tell the Lawyer, That he is a base Rascal, and that I will have him to lose his Ears, and teach him, or any Lawyer of them all, How they dare to serve a Writ on me: The words being spoken against an Attorney, are words tending to disgrace him in his profession, especially the words [make him lose his Ears], which shall be intended for some Crime. Hill. 2 Car. B. R. *Trowbridge* and *Hart's* Case. *Latch*, 220.

Action upon the Case, upon Assumpsit.

1. UPon a Communication at the Defendants request, betwixt the Plaintiff and the Defendants Daughter, of a marriage betwixt the Plaintiff and the said Daughter; the Plaintiff married her, and afterwards the Defendant promised to pay the Plaintiff 100 l. It was holden by the Court to be a good Cause, and Consideration to ground an Assumpsit, although upon a Consideration which was past. Trin. 29 Eliz. B. R. *Marsh* and *Kenrick's* Case, *Cro.* 3. Part, 59.

2. In Assumpsit, the Consideration was, That the Plaintiff could shew the Defendants Deed, the Rent was due to pay the Plaintiff the Rent, and Arrearages; which Deed, the Plaintiff lost him: It was holden to be a good Consideration to ground an Assumpsit. Mich. 29 Eliz. B. R. *Clerke* and *Dency's* Case. *Cro.* 3. Part, 67.

3. In Assumpsit, The Plaintiff declared, That the Defendant did assume to do such a thing upon *Non Assumpsit*, the Jury find, That he assumed to do that, and another thing which he had not performed. It was adjudged by the Court, That the Plaintiff had failed in laying his Assumpsit. Pasch. 29 Eliz. B. R. *King* and *Robinson's* Case, *Cro.* 3. Part, 79. Mich. 32 Eliz. B. R. *Cro.* 3. Part, 140. acc.

4. Note; It was Resolved by the Court, That the Promise of an Executor to pay a Debt is binding, if he hath Assets. Hill. 30 Eliz. B. R. *Tremain* and *Hewett's* Case. *Cro.* 3. Part, 32.

5. Note; It was holden by the Court, That where a Duty accrueth by the Commencement of the Promise in such Case (*Licet fœpè requisitus*) is not necessary nor good, but an express Request ought to be alledged. Hill. 30 Eliz. B. R. *Gibbons* and *Gates's* Case, *Cro.* 3. Part, 31.

6. An Action upon an Assumpsit was brought against two; mean betwixt the Verdict and Judgment, one of them died, and Judgment was given, and by the Opinion of the whole Court, the Judgment was reversed, because the death of one of them did abate the Writ. Mich. 30 Eliz. B. R. *Meygat* and *Baughter's* Case, *Cro.* 3. Part, 105.

7. In Consideration, the Defendant retained the Plaintiff to go to *Paris* upon his occasions, the Defendant

Defendant promised the Plaintiff to give him so much as would content him. In Assumpsit brought, the Plaintiff set forth, his Contentment was 25 l. which he requested the Defendant to pay, which he refused; It was holden in this Case, That the Action did well lye, although the Plaintiff shewed not time, nor place when he gave notice of his Contentment, for that the place is not material nor traversable. Pasch. 31 Eliz. B. R. *Dr. Rawes* and *Russel's Case. Cro.* 3. Part, 232.

8. Assumpsit, In consideration that the Plaintiff had paid 40 l. to the Defendant for the Debt of J. S; the Defendant promised to deliver him all Bonds, &c. wherein J. S. was bound to him; Upon *Non Assumpsit* pleaded, It was holden by the Court, That the Plaintiff needs not to averr, the Defendant had any Bonds of J. S. for that he is not to recover the Bonds, &c. but Damages only; and so he needs not to set forth what the Debts were. Pasch. 31 Eliz. B. R. *Market* and *Cole's Case. Cro.* 3. Part, 33.

9. A Communication was betwixt the Plaintiff and B. for the masting of certain Hoggs for the Plaintiff: In consideration, the Plaintiff gave B. 3 s. for every Hogg well masted. The defendant assumed, they should be well fatted, and re-delivered to him; And for that fifty Hoggs were not re-delivered, the Plaintiff brought the Action against the Defendant; It was adjudged in this Case, That the Action was maintainable against the Defendant in this Case, although the Defendant had no benefit by the Promise, for that the Action was grounded upon the Promise and the Dissein. Hill. 31 Eliz. B. R. *Kirby* and *Cole's Case. Cro.* 3. Part, 137.

10. Note; It was holden by the Court, That in an Action upon the Case brought upon *Assumpsit*, the Consideration is material, but not traversable: So in Trover and Conversion, the Conversion is material, but not traversable. Mich. 33 Eliz. B. R. *Smith* and *Hitchcock's Case, Cro.* 3 Part, 200.

11. Controversy being between the Plaintiff and Defendant, for the profits of certain Lands, which the Defendants Father had taken in his life time; the Plaintiff took out a *Subpœna* out of the Chancery with an intent to exhibite a Bill against the Defendant about the same: The Defendant in Consideration the Plaintiff would surcease his Suit, promised to the Plaintiff, that if he could prove his Father had taken the Profits, that he would pay him the Profits of the said Lands: It was the Opinion of the Court, That it was no good Consideration to ground Assumpsit, being made upon an injust Suit; also the Defendant doth not prove, that the Father held it by Lease or otherwise; nor is it alledged, That the Defendant is Heir or Executor, and so no colour to charge him. Mich. 33 Eliz. C. B. *Tisley* and *Windham's Case, Cro.* 3. Part, 207.

12. Assumpsit was brought against an Executor, upon consideration of the Testator, that in consideration of a Marriage, he promised to give the Plaintiff 100 l; Adjudged, that upon such a Consideration by the Testator an Assumpsit, did not lye against his Executor. Mich. 38 Eliz. Exchequer Chamber. *Stubbings* and *Rathram's Case. Cro.* 3. Part, 454.

13. A entred Bond of 200 l. to B, and afterwards gave all her Goods to C. to pay her Debts: The Defendant promised the Plaintiff, That if he and two Witnesses would *Deposere* before the Mayor of L, That the Obligation was read to A, as an Obligation of 200 l. that he would pay it, and the Plaintiff and two other before the Mayor of L. depose accordingly. It was Resolved in this case, That it was a lawful Oath before the Mayor, and a good Consideration to maintain Assumpsit. Hill. 38 Eliz. C. B. *Knight* and *Rushwith's Case. Cro.* 3. Part, 469.

14. Note, It was Resolved by the Court, That if in Action upon the Case, upon an Assumpsit, a special Verdict be found for the Defendant; He shall have Costs upon the Statute of 23 H. 8. Cap. 15. as where a general Verdict is found against the Plaintiff. Pasch. 38 Eliz. B. R. *Alsop* and *Clydon's Case, Cro.* 3. Part, 465.

15. Assumpsit; In Consideration, That the Plaintiff at the request of the Defendant should yield up all his Interest and Term of years in such a Close to J. S, and should be content that J. S. should have the said Close to use at his pleasure, &c. The Defendant promised to pay to the Plaintiff 70 l; The Plaintiff at the Defendants request, delivered a Deed containing the said Demise to J. D. *Simul cum tuto statu & interesse suo*, to the said J. S, upon the Defendants agreement to pay the say 70 l. as aforesaid. It was holden by the Court in this Case, That it was not a Surrender; for that one cannot authorize one by word only to make a Surrender of his Lease, although it be but a Lease for years. Mich. 39 Eliz. B. R. *Sleigh* and *Bateman's Case. Cro.* 1. Part, 487.

16. A Obligation is entred into by an Infant; an Assumpsit made by the Infant, that in consideration the Plaintiff would forbear suing of him, to pay the mony such a Day. Resolved by the Court, To be no good Consideration to ground an Assumpsit upon. Mich. 41 Eliz. B. R. *Manning* and *Knap's Case, Cro.* 3. Part, 700.

17. Note; It was Resolved by the Court in this Case, That naturall affection in it self, although it be sufficient to raise an Use, yet it is not a sufficient ground to raise an Assumpsit upon, without an express, *Quid pro Quo*. Pasch. 42 Eliz. C. B.

Brett's

Batt's Case. *Cro.* 3. Part, 755, 756.

18. An Infant was endebted to J. S. upon Contract for Velvets taken up; and dyed; his Executor assumed to pay the money. In an Assumpsit against the Executor; he pleaded the Non age of the Infant; It was objected, If the Infant had assumed to pay the money at his full age, it had been good: But the Opinion of the whole Court was, That the Consideration was not good, and the Contract was void: And in that Case, It was said, That the Consideration is the ground of every Action upon the Case; and it must be either a charge to the Plaintiff, or a benefit to the Defendant. Hil. 31 Eliz. B. R. *Stote* and *Withypatt*'s Case. *Cro.* 3 Part, 126.

19. Assumpsit, by a Solliciter upon retaining him to be his Solliciter, for the prosecuting and defending his Law Causes, upon promise to give him so much, &c. The Defendant demurred upon it, supposing it to be unlawful: But it was adjudged, That the Action was maintainable. Pasch. 42 Eliz. B. R. *Ofton* and *Edes*'s Case. *Cro.* 3. Part, 760.

20. Assumpsit, for that the Defendant in consideration that the Plaintiff had lett unto him such Land for a year, promised him to pay *tot summas tot annis praedict.* at the end of the year 20 l. Upon *Non Assumpsit*; It was found a Judgment for the Plaintiff: But afterwards, because it was but a meer Debt, for which an Action of Debt lyes; the Judgment was reversed. Mich. 42 Eliz. C. B. *Symcock* and *Payne*'s Case. *Cro.* 3. Part, 786.

21. Assumpsit, for payment of money; The Defendant pleaded, That after the Assumpsit, there was an agreement betwixt them, That the Defendant with two others should enter Bond to the Plaintiff for the sum promised; and said, That they entred in Bond, and did deliver the Deed to J. S. and gave notice thereof to the Servant of the Plaintiff, and that they are now ready to deliver it to the Plaintiff. It was the Opinion of *Wray* Chief Justice, That the Plaintiff should release the Bond, and take Judgment, which was done accordingly. Trin. 30 Eliz. B. R. *Freeman* and *Drew*'s Case. *Leon.* 2. Part, 181. See *Alford* and *Lee*'s Case. Hil. 29 Eliz. B. R. *Cro.* 3. Part, 54. acc.

22. In Assumpsit, the Plaintiff declared, That in consideration he would marry the Defendants Daughter, the Defendant promised to give him 20 l, and to procure him all the Corn growing upon such Lands, and to provide necessaries for the Wedding-Dinner; The Defendant confessed, that he promised to give the Plaintiff 20 l, so as he would procure a Lease of certain Lands to his Daughter for life. The Jury found the promise of 20 l; but not any other thing; It was adjudged against the Plaintiff: For it was said by *Wray* Chief Justice in an Action upon the Case, The Plaintiff ought not to vary from his Case; as if promise be grounded upon two Considerations: If in an Action upon it, the Plaintiff declares upon one only, he shall never have Judgment: and in the present Case, the Jury have not found the latter point, Judgment was against the Plaintiff. Hil. 31 Eliz. B. R. *Leon.* 2. Part, 199. *Sym*'s and *Wyat*'s Case.

23. Assumpsit by T. against H, Administrator of A; the Plaintiff declared, That the Husband of the Defendant, who died intestate, was indebted to the Plaintiff in 8 l; and that the Defendant in consideration that the Plaintiff would permit the Defendant to take Lands of Administration, and give her day for the payment of the 10 l, promised to pay the 10 l. to the Plaintiff at the Day. It was Resolved in a Writ of Error brought by all the Justices, That here was not any Consideration to ground Assumpsit; for that by the Law she was to have the Administration, being wife of the Debtor, and the giving further day for the payment of the 10 l. will not make the promise good. Mich. 33 Eliz. Exchequer Chamber. *Fillett*'s and *Hill*'s Case. *Leon* 2. Part, 240.

24. In Assumpsit, The Plaintiff declared, That whereas he and one A. were jointly bound as Stranger for the Debt of A, which dyed, and the Defendant married his Wife, and so the Goods of A. came to his Hands; yet the Plaintiff the 5th of *May* after, which was the day of payment of the money, paid 25 l. for avoiding of Suit; and that the Defendant as well in consideration of the premisses, as that peaceably he might enjoy the Goods, promised to pay the said sum, *Cum inde requisitus effet.* Upon Issue joyned, The Jury found the payment of the said sum, and all the special matter: It was said, That the Plaintiff hath not declared upon two Considerations, and the Jury hath found but one; also the Plaintiff declares a simple promise, and the Jury have found a conditional promise: It was the Opinion of the Court in this Case,

1. That the first Consideration was good, and then the Promise too, good; But the second Consideration is void, that the Defendant should pay the Testators Goods; and therefore the Court was clear of Opinion, That the promise found by the Jury was not the promise alledged in the Declaration; and so the Issue was not found for the Plaintiff. Hil. 31 Eliz. B. R. *Mosted* and *Wyat*'s Case. *Leon.* 2. Part, 173.

25. Assumpsit, In consideration the Plaintiff procured 6 l. to be lent to the Defendant for a whole year, the Defendant promised to make a Lease of such a House to the Plaintiff for

Malicious

Michaelmas next, for three years. The Plaintiff declared, That 23. *April* he procured J. S. to lend 3 l. to the Defendant, *pro usu dicti J. Styles*, and 24. *Aug.* he procured J. D. to lend to the Defendant 3 l. *pro usu eundem*, which the Defendant received, and yet had not made him the Lease. Upon *Nisi Assumpsit* found for the Plaintiff, It was moved in stay of Judgment, and agreed by the Court, That the Action did not lye; for it appeareth by the Plaintiffs own shewing, That the Consideration of his part is not performed, because the whole 6 l. was not lent at one time according to the agreement; and so the same not being performed, it is a dissolution of the promise of the Defendant, and so the Action not maintainable. Mich. 4 Jac. B. R. *Durrington* and *Lofft's* Case. *Yelverton* 89.

26. *Assumpsit*, The Plaintiff declared, whereas J. S. was endebted to him 100 l; That the said J. S. devised certain Goods to the value of the Debt to the Defendant, to satisfy the Plaintiff the said 100 l; and that the Plaintiff required the Defendant to satisfy him the said 100 l. out of the said Goods in his Hands; and the Defendant in Consideration that the Plaintiff would forbear him for a certain time, promised by such a day to satisfy the Debt: It was adjudged for the Plaintiff, for by the delivery of the Goods to satisfy the Debt of 100 l; the Plaintiff had an Interest and property in the Goods, and then the forbearance of the Plaintiff for a time was a good consideration to ground Assumpsit. Mich. 7 Jac. B. R. *Bond* and *Lee's* Case. *Yelverton* 164. But contrary it is, where the Defendant granteth a bare Custom of Goods, and to re-deliver them, which is rather a Charge then a Benefit to the Defendant. Trin. 6 Jac. B. R. *Pike's* and *Gaile's* Case. *Yelverton* 128.

27. *Assumpsit*, A. lent B. a House, of which he was possessed, to Ride to *York*, and after to deliver him back again such a day; and in Consideration thereof, the Defendant promised to deliver back the House to him at the Day. In Assumpsit brought, the Defendant pleaded, that he was ready to re-deliver the House at the day; and that J. S. *Vi & Armis contra voluntatem* of the Defendant, took the House from him, claiming property in the House: It was the Opinion of the Court, That the matter alledged by the Defendant, had discharged him of the promise, and is *Quasi*, an eviction of the House one of his Possession, which dischargeth the promise; like as an eviction of the possession from Lessee for years, dischargeth all Rents, Bonds, and Covenants, in any sort depending upon that Interest. Mich. 43 Eliz. B. R. *Shelbery* and *Scarlet's* Case. *Yelverton* 21, 22.

28. *Assumpsit*, The Case was, The Plaintiff was possessed of a House in *London*, in which J. S. had a Chamber; who was endebted to the Plaintiff in 100 l. and dyed, possessed of the Chamber, and divers Writings and Summs of money therein remaining. The Plaintiff according to the Custom of *London*, attached the Goods in his Hands for his Debt. The Defendant in consideration that the Plaintiff would suffer the Defendant to enter the Chamber, and carry away the Goods, *Nec non omnia scripta obligatoria* being there, promised to pay the Plaintiff his 100 l. In arrest of Judgment, It was moved, That here was no Consideration; and the Debt was but upon a simple Contract, with which the Executor was not chargeable, and also the Plaintiff hath not shewed, That there was not any Action then depending at the time of the Attachment: It was Resolved, There being two Considerations expressed, although the first part of the Consideration should be void, yet the other was sufficient to ground the Assumpsit, and adjudged for the Plaintiff. Mich. 2 Jac. B. R. *Pikard* and *Cottrell's* Case. *Yelverton* 56.

29. *Assumpsit* by an Executor, and declares, That there was an Agreement between the Testator and Defendant, That the Defendant should have all the Iron made in such a Furnace, paying according to the rate of 40 s. *per* Ton, and that the Testator promised to the Defendant, That he should have all the Iron made in that Furnace; and in consideration thereof, the Defendant promised to pay *secundum ratam* as aforesaid; It was in this Case Resolved by the Court, That the consideration on the part of the Plaintiff was not that the Defendant should have all the Iron, but that the Testator promised the Defendant should have all the Iron; And it was holden, That although the Testator is dead, and that the Plaintiff cannot have an Action against the Plaintiff as Executor upon the breach of the Testator; yet the promise on the part of the Defendant doth continue, and so a promise upon a promise good; and Judgment was for the Plaintiff. Trin. 6 Jac. B. R. *Attesworth* and *Cave jun.'s* Case. *Yelverton* 133.

30. B. & A. his Wife brought Assumpsit against H, and declared, That in consideration that A. the Plaintiff, at the request of the Defendant, would marry with J. S, did promise to pay to the said A. after the death of the said J. S. 40 s. *per annum* during her life; she married J. S, who after dyed, and then she took B. to Husband, and for 4 l. behind for two years after the death of J. S. B. and A. his Wife brought the Action. The Defendant pleaded the release of J. S. of all Actions and Deeds whatsoever which he had or might have against the Defendant. It was adjudged, That this Release did not discharge the promise; for although the promise was preterit, yet the execution of it was future. But if he had released

released by expreſs words or promiſes, or all Actions which he or his wife had or might have, then ſuch promiſe had been diſcharged and releaſed. Trin. 7 Jac. B. R. *Belcher* and *Hudſon's* Caſe. *Yelverton* 156.

31. Aſſumpſit, The Defendant and divers other Copy-holders of a Mannor were Plaintiff againſt J. S, Lord of the Mannor in the Chancery, to have their Fines by decree made certain; and in conſideration that the Plaintiff at his Coſts and Travail ſhould procure a Decree there for enjoying of the Copy-hold at a Fine certain, promiſed to pay to the Plaintiff, after ſuch Decree obtained, 3 l. upon requeſt; and ſhewed, that at his Coſts he obtained a Decree; and *Licet* that he ſuch a day requeſted the Defendant to pay 3 l; he paid not the ſame. Upon *Non aſſumpſit*, It was ſaid in arreſt of Judgment, it being found for the Plaintiff, That there was not any Notice layed, to be given to the Defendant of the Decree in Chancery: But Reſolved, There needs not any Notice to be given in this Caſe, becauſe the Defendant was one of the Plaintiffs in the Court of Chancery, upon the Suit in which the Decree was granted, and ſo be himſelf party to the Decree. Hill. 5 Jac. B. R. *Aſhe* and *Doughtye's* Caſe. *Yelverton* 121, 122.

32. In Aſſumpſit, the Caſe was, The Plaintiff obtained a Judgment in Debt againſt J. S, and took out a ſpecial *Capias utlagatum* for the taking of him, and the Defendant perceiving that the Plaintiff intended to ſerve the Writ upon J. S; In conſideration of the ſtaying of the Execution of the Writ, and for 2 s. to be given to the Defendant by the Plaintiff, promiſed that if J. S. ſuch a day did not pay the mony, that he would pay it. It was objected, That the Conſideration was againſt Law, becauſe the *Capias* is the Kings Suit, and a promiſe to ſtay the Kings Suit, is not good; But it was Reſolved, It was a good Conſideration, for that the *Capias* iſſueth forth upon the Original Suit of the party, and he is at the Charge of ſuing it out, and hath the carriage of the Writ; and therefore the Conſideration of ſtaying the Execution, good. Mich. 45 Eliz. B.R. *Jewing's* and *Hatley's* Caſe. *Yelverton* 19.

33. Aſſumpſit, In conſideration that the Plaintiff did deliver to the Defendant divers Suits of Apparell, *ſcil.* a Satin Doublet and Hoſe, with ſilver and gold Lace, a Velvet Jerkin and Hoſe, a Fuſtian Doublet and Cloth-Hoſe to his own uſe; the Defendant promiſed to pay to the Plaintiff 40 l. when required. The Defendant pleaded, That at the time of the promiſe he was within Age; The Plaintiff replyed, That the Defendant was Servant to an Earl, attending upon him in his Chamber, and that this Apparrell was for his neceſſary Apparrell, whilſt he was in that Service; and it appeared upon a Record, that the Defendant was a Gentleman. It was the Opinion of the Court, That Satin with gold and ſilver Lace was not neceſſary Apparrell for a Gentleman, and an Infant is not bound to pay for ſuch Apparrell; therefore for ſo much the Action did not lye, but for the Doublet and Hoſe of Cloth, the Action was maintainable. Mich. 40 Eliz. B. R. *Mackerell* and *Rutchiffe's* Caſe. *Goldeſbr.* 168.

34. In evidence to a Jury upon an Aſſumpſit for Ware brought by the Factor of S. the Defendant; It was the Opinion of the whole Court, That if not be Factor for a Merchant, to buy kind of Stuff, as Tynn, or ſuch like. And the ſaid Factor hath not uſed to buy any other kind of Wares, but this kind only for his Maſter. If now the Factor buyeth Sayes, or other Commodities for his Maſter, and promiſeth to pay mony for them, That in ſuch Caſe the Maſter ſhall be charged in Aſſumpſit for the mony. Hill. 43 Eliz. I. B. *Pettit's* and *Sare's* Caſe. *Goldeſbr.* 137.

35. Aſſumpſit, In conſideration of two weigh of Corn, delivered by the Teſtator to the Defendant. The Defendant promiſed to pay to the Plaintiff 20 l; The Defendant ſaid, That after the Aſſumpſit, in conſideration that the ſaid two weigh were drowned by Tempeſt; and in conſideration that the Defendant would pay to the Plaintiff 31 s. 4 d. for every weigh, did diſcharge the Defendant of the ſaid promiſe. The Opinion of the Court was, That here was no Conſideration ſet forth in the Barr to diſcharge the Defendant of the promiſe, for that no profit came to the Plaintiff by this new Agreement; nor the Defendant put to any coſt or labour, and therefore not any agreement to bind the Plaintiff; It was adjudged for the Plaintiff. Mich. 26 Eliz. B. R. *Richard* and *Rattlet's* Caſe. *Lion.* 1. Part, 19.

36. Aſſumpſit, The Plaintiff declared, That there was ſpeech of a Bargain between him and the Defendant for the wood in ſuch a place; and in Conſideration of 10 s. paid, and 20 l. to be paid 20 *Decembr* after, in the Houſe of A; and in conſideration that the Plaintiff at the ſame day and place *aſportaret ſufficientem lumium*, for *obligat.* to the Defendant for the 20 l. to be paid at a day to come; The Defendant promiſed, the Plaintiff ſhould have the ſaid Wood to his own uſe; and ſhewed, that he 20 *Decembr* at the Houſe of A, *Obtulit* to the Defendant the 20 l. *& ad tunc & ibid. aſportavit B. ſufficientem hominem*, for *obligat.* to the Defendant. Upon *Non Aſſumpſit*; It was adjudged againſt the Plaintiff, becauſe the Plaintiff ought to have ſhewed, not only, That he *aſportavit B.* for *obligatum*; but have alledged *in facto*, that he became bound, or offered themſelves to be bound, for it may be, that B. came to be bound, and yet being

being there, refuſed to be bound: For in every Aſſumpſit, the matter of the Aſſumpſit muſt be ſet forth certainly, and not to be taken by an Implication. Mich. 2 Jac. in B. R. *Allein* and *Randall*'s Caſe. See *Yelverton*, 48.

37. Action upon the Caſe: The Plaintiff declares, That the Defendant was indebted to him upon a Bond, and that he did intend to ſue him, and that the Defendant in conſideration that the Plaintiff would *deferre ſolutionem denarii prad. & non implacitaret* him upon the ſaid Bond, that he would pay to him the Money: It was the Opinion of the Juſtices, That by theſe words, *Non implacitaret*, he had waived the benefit of the Bond, but yet that Promiſe did not take away the force of the Bond; for notwithſtanding he might ſue it, and then the other ſhould have Action upon his Promiſe *quod non implacitaret*, which words ſhall not be intended for a day, or an hour, but for his life. Paſch. 1 Car. B. R. *Cowlin* and *Cook*'s Caſe. *Latch*, 161.

38. Aſſumpſit: A Suit was betwixt two, and the Defendant promiſed to the Attorney of the Plaintiff (on the behalf of the Plaintiff), that he would pay, *&c.* in conſideration, *&c.* The Plaintiff brought Action upon the Caſe, and declared ſpecially (as before), and not generally of a Promiſe made to him: Yet it was adjudged good; and it was ſaid, That it was good one way, or the other. Trin. 3 Car. in B. R. *Legat*'s Caſe. *Latch*, 206.

39. Aſſumpſit: The Caſe was, In conſideration that the Plaintiff would deliver cloaths which the Plaintiff had made for the Daughter of the Plaintiff, the Defendant promiſed to pay for them; and it is not ſaid to whom he would pay: It was the Opinion of the Court, That the precedent Communication and Agreement ſhould put the ſame in certain, and it ſhall be intended Payment to the Plaintiff himſelf. Mich. 2 Car. B. R. *Sharp* and *Rut*'s Caſe. *Latch*, 151, & 272.

40. Aſſumpſit: The Plaintiff declares, That ſuch a day and year he ſold to the Defendant ſo much Barley, part of which he delivered preſently, and by Agreement was to deliver the reſt, after; and at the ſame day the Defendant promiſed to pay the Sum of ſo much *&c.* and by ſuch a day, ſo much: It was moved, That the Promiſe was after the Sale, and ſo being upon a conſideration executed, was not good. But the Opinion of the Court was, That it was good, being upon the ſame day, of which no Diviſion ſhall be made in this Caſe. Paſch. 1 Car. B. R. *Howis*'s Caſe. *Latch*, 150.

Adminiſtrators and *Adminiſtration*.

1. DEbt was brought by an Executor for a Debt due to the Teſtator, who had Judgment; the Executor dyed before Execution, Inteſtate: The Ordinary committed Adminiſtration of the Goods of the Teſtator to another, who brought a *Scire facias* upon the Judgment, againſt him againſt whom the Judgment was. It was the Opinion of all the Juſtices, That the *Scire facias* did not lye, becauſe when the Executor dyed Inteſtate, the Recovery was good: But if the Ordinary had committed Adminiſtration of the Inteſtate, and of the firſt Teſtator to one man, the *Scire facias* had been maintainable. See Paſch. 28 H. *Bendlowes* 2.

2. R. F. and *Jane* his Wife, as Adminiſtratrix of one J. S. brought Debt againſt J. G. and alledged, That the Teſtator, of one M. G. who lent the Mony *&c.* and Judgment was given in C. B. againſt J. G. and in Error thereupon brought: And the Judgment was by it reverſed, for that the Plaintiff, as Adminiſtrator of an Adminiſtrator, brought the Action; whereas the Adminiſtration of the firſt Teſtator's Goods ought now to be committed to the next of Kin, and he to whom it was committed had nothing to do with them. Mich. 41 Eliz. in B. R. *Thorne* and *Gimes* Caſe. *Goldeſtr.* 182.

3. A man poſſeſſed of Goods made an Infant his Executor, and dyed; The Ordinary committed Adminiſtration, *durante minori ætate* of the Infant, to a Stranger: The Queſtion was, when the Infant came of full Age, what Remedy he ſhould have againſt the Adminiſtrator for the Goods: It was the Opinion of the Juſtices, That he ſhould not have an Accompt againſt him, but he might have Detinue againſt him for the Goods, or otherwiſe ſue him in the Eccleſiaſtical Court for them. Hill. 36 H. 8. *Bendlowes*, 25.

4. Debt againſt an Executor: The Defendant pleaded, That he had taken Letters of Adminiſtration: The Plaintiff replyed, that he adminiſtred of his own Wrong, and after took Letters of Adminiſtration. It was the Opinion of the Juſtices, That by his own Act he cannot purge himſelf of the firſt wrong; and therefore this Action by the Name of Executor, good: And in that Caſe, it was ſaid by the Juſtices, If Judgment be given againſt an Execu-

for upon a Demurrer, and Execution be awarded, the Sheriff cannot return *Nulla habet Bona Testatoris*, but is to return a *Devastavit*, as if he had been found Executor by Verdict; for that he hath charged himself by his own Plea. Trin. 30 Eliz. B. R. *Stubbs* and *Rightwise*'s Case. *Cro.* 3 Part, 92.

5. Note, It was Resolved *per Curiam*, That Debt upon a Contract of the Intestate doth not lye against an Administrator. Pasch. 30 Eliz. B.R. *Hughsen* and *Webb*'s Case. *Cro.* 3 Part, 121.

6. Administration is granted in the Diocess of *Canterbury*, and the Administrator recovers in Debt brought by him, and hath Judgment, and hath a *Scire facias* upon it after the year: The Defendant pleaded, That the Intestate dyed in *London*, and had not *Bona Notabilia* in divers Dioceſſes; and that Administration in *London* was committed to the Wife. It was the Opinion of the Justices, That the Defendant came too late to plead this Plea; for that it is an annulling of the Record, which is not sufferable: But if the Administration had been repealed, he might have well avoided the Judgment by this Plea. Hill. 34 Eliz. B.R. *Allen* and *Andrews* Case. *Cro.* 3 Part, 283.

7. In Debt brought upon an Obligation, the Case was, The Intestate dyed in *Lancashire*: The Obligation upon which the Action was brought was in *London*, at the time of his Death. The Bishop of *Chester*, in whose Diocess the Intestate dyed, grants Administration to J. S. who Released to the Defendant: The Arch-Bishop of *Canterbury* granted Administration to the Plaintiff, and in Debt brought by him the Release was pleaded in Barr. In this Case, It was holden by the Justices, Where one dyeth who hath Goods in divers Dioceſſes, *Canterbury* shall have the Prerogative; and, It was holden, That if *Canterbury* hath not any Prerogative in *York*, yet that this Bond ought to be sued in and committed Administration of, within the Court of *Canterbury*, and committed by the Bishop of that Diocess. Hill. 38 Eliz. C. B. *Byron* and *Byron*'s Case. *Cro.* 3 Part, 472.

8. *A.* brought Debt upon an Obligation against an Administrator, who pleaded, That there is a Custome in *London*, That if a Contract be made by a Citizen of *London*, to pay such a Sum of Money to another Citizen, and he who ought to pay it dyeth Intestate, that his Administrator shall be bounden to pay it as well as upon an Obligation. It was adjudged in this Case, That it was a good Custome; for although that none was chargeable at the Common Law by the name of an Administrator, and Custom cannot begin within time of memory; yet because they were chargeable at the Common Law as Executors: It was Resolved, That such a gentral Custom was good; and in that Case, It was Resolved, That although the Plaintiff was a Stranger, and no Citizen, yet the Custom was good to bind him. Trin. 37 Eliz. C.B. *Stirlings* and *Norton*'s Case. *Cro.* 3 Part, 499. See Cro. 3 Part, 82. the same Case.

9. Debt brought against the Defendant as Administrator, who pleaded a Recovery against him as Executor; and besides that, to satisfy, he had not Assets: It was adjudged to be a good Plea, for that he shall not be twice charged. Hill. 40 Eliz. C.B. *Smalpeace* and *Smalpeace*'s Case. *Cro* 3 Part, 646.

10. Action upon the Case upon *Assumpsit* brought against one as Administrator: The Assumpsit was laid to be in Consideration, that Assets came to the hands of the Defendant; and it was not averred, That the Administrator had Goods sufficient after the Debts and Legacies paid: It was the Opinion of the Court, That the Plaintiff need not to averr that the Administrator had Assets besides the Debts, *&c.* but that ought to come on the other side. Trin. 30 Eliz. in C. B. *Godsbr.* 97.

11. In *Ejectione firme* the Case was, N.S. seised in Fee, by Indenture let the Land to W.S. for 80 years, if he so long lived, the Remainder after his Decease to the Executors or Assigns of the said W. S. for 40 years. W.S dyed Intestate, his wife took Letters of Administration and entred, claiming the Term: N. S. the Lessor ousts her. It was the Opinion of all the Justices, That this Term vested in W. S. and that the Wife should have it as Administratrix to him, and it should be Assets in her hand. Pasch. 40 Eliz. C.B. *Spark* and *Spark*'s Case. *Cro.* 3 Part, 666.

12. Debt brought against an Administrator of a Termor, who pleaded an Assignment over of his Term, of which the Plaintiff had Notice, and that he accepted of the Rent by the hands of the Assignee. It was adjudged in that Case, That by the Death of the Lessee, the Privity of Contract was determined, and so the Action would not lye against the Administrator. Pasch. 41 Eliz. B. R. *Marrow* and *Tarpin*'s Case. *Cro.* 3 Part, 715.

13. In Trespass, the Case was; A Lessee for years by several Leases of divers Lands, some of them in the Diocess of *York*, some within another Peculiar in the same Diocess, devised all those Leases to his Son, and made his Daughter within Age his Executrix. The Mother took Letters of Administration *durante minori ætate* of the Daughter, in the Peculiar where the Testator dyed: The Administratrix, *durante minori ætate*, granted this Term to the Plaintiff. In this Case, amongst other Points, It was a Question, Whether that Administration should in this Case be granted at two places,

places, viz. the one within the Peculiar, the other by the Bishop of *York*, Ordinary of the Diocess; or, Whether he should have the Prerogative in both, as he had where *Bona Notabilia* were in divers Dioceſſes: It was Reſolved, That there should be two Letters of *Administration* granted; for the Arch-Bishop shall not have any Prerogative here, because this Peculiar was first derived out of his Jurisdiction. Hill. 41 Eliz. C. B. *Price* and *Simpson*'s Case. *Cro.* 3 Part, 719.

14. Judgment was given against B. in C. B. in Debt: After the Judgment he entred into a Statute to J. S. and dyed Intestate; his Wife took Letters of Administration, and removed the Record by Error in B. R. and depending that Suit, paid the Debt to J. S. upon the Statute, and afterwards the first Judgment was affirmed: In a *Scire facias* to have Execution, she pleaded the Payment of the Statute, besides which she had not Assets. It was the Opinion of the greater part of the Justices, that it was a good Plea, and that the Payment upon the Statute was no *Devastavit* in her; and there was no default in her to pay and discharge the Statute, for that she could not have any other Remedy to be freed from the Payment of the Statute at the time of the Execution sued. Mich. 41 Eliz. B. R. *Read* and *Beamblock*'s Case. *Yelverton*, 19.

15. A. was endebted to B. in 20 l. who dyed Intestate, his Wife took Administration and recovered by Judgment, but before Execution dyed Intestate. Y. the Plaintiff took Administration of the Goods of B. and brought a *Scire facias* against A. upon the Judgment. It was the Opinion of the Justices, that it did not lye; for this *Scire facias* being grounded upon a Record, he who will have an Action upon the Record ought to make himself privy to him who was party to the Record, which cannot be done in this Case, for every Administrator claims by Commission, and as it were by a Collateral Authority to another. Pasch. 1 Jac. B. R. *Yates* and *Gough*'s Case. *Yelverton*, 33.

16. In Action of Trover by an Administrator of J. S. after Verdict, and before the day in Bank, the Defendant pleaded, that the Plaintiff being cited in the Spiritual Court *per debitam legis formam*, the Administration was revoked and granted to another. It was the Opinion of the Justices, That it was no Plea; but the Defendant in such Case shall be helped only in an *Audita Querela*, and not by such Plea. Pasch. 6 Jac. B. R. *Kes* and *Life*'s Case. *Yelv.* 125.

17. In Debt against an Administrator, *durante minori ætate* of J. S. It being found for the Plaintiff; It was said in stay of Judgment, That the Declaration was not good, because *Non constat* by it whether J. S. was under the age of 17 years, at which time his Authority is determined: But it was Resolved, That the Plaintiff is not to shew that in his Declaration, because the Plaintiff is a stranger to the Power given to the Administrator, and cannot know the age of the Enfant. Trin. 6 Jac. B. R. *Croft* and *Walbank*'s Case. *Yelverton*, 128.

18. Note, It was agreed by the Court, 1. That in the Spiritual Court, if the Inferior Court commit an Administration, and from that there is an Appeal to the Arches, and the first Administration affirmed; the use is, to remit the Cause: But when the first Sentence is reversed, the first Court shall be ousted of the Jurisdiction, and the Court which reverseth it shall commit Administration *de Novo*. 2. That upon an Appeal to the Delegates, that they by Spiritual Authority may commit Administration, (*Quære de eo*) and if there be two several Courts of Delegates, (admitting that the Delegates may commit Administration) If the Court of B. R. may grant a Prohibition to them. It was agreed, in a manner, that it might, because it is an Authority given them only by the Statute of 25 H. 8. and their Jurisdiction doth not begin by the Spiritual Laws. And 2. Because they cannot be Judges in their own Cause, and no more fit to judg of their Jurisdiction than the Court of King's Bench. Hill. 22 Jac. B. R. *Reeve* and *Denny*'s Case. *Latch*, 85.

19. An Administrator, *durante minori ætate*, wasted the Goods: It was holden, That after the Age of the Infant, he shall be charged: But whereas it was said, That it was adjudged in C. B. that he should be charged as Executor of his own wrong, that was denyed by the Justices; but it was said, That he should be charged upon the speciall matter. Pasch. 1 Car. B. R. *Palmer* and *Litherland*'s Case. *Latch*, 160. Sed *Cook* 6 Part, *Packman*'s Case.

Arbi-

Arbitrators, Arbitrament, and *Award.*

1. DEbt upon Obligation to ſtand to Arbitrament: Arbitrators award, That the Obligee ſhall make a Leaſe for years to the Obligor rendring Rent to the Obligee, who made the Leaſe accordingly; and afterwards the Obligor did not pay the Rent: It was the Opinion of the Juſtices, That theſe words in the Award [rendring Rent] are not parcel of the Subſtance of the Award, but the making of the Leaſe is the effect thereof; and the Leſſor hath other Remedy for the Rent, *viz.* Diſtreſs. But if the Award had been, That the Obligee ſhall make a Leaſe, and that for that Leaſe the Obligor ſhould pay unto him a certain Sum of Money, if he payed not that Sum, the Obligee ſhould take Advantage of the Obligation. Mich. 27 H. 8. *Bendlowes*, 4.

2. A. and B. joyntly and ſeverally bound in in 10 l. to C. to ſtand to the Arbitrament of certain perſons: Arbitrators Award, That *A.* ſhall pay to the Obligee 16 s. and that B. ſhould pay to him 3 s. 4 d. In Debt brought againſt B. he pleaded generally, That he had performed the ſaid Arbitrament: It was the Opinion of the Juſtices, That it was no Plea, but he ought to have ſhewed how he had performed the Award; and alſo how *A.* had performed the ſaid Award, becauſe each is bound for the other. Paſch. 28 H. 8. *Bendlowes*, 5.

3. In an Arbitrament, where the Submiſſion is, Of the Right, Title, and Poſſeſſion, of certain lands between the parties: The Arbitrators cannot Award, That the Obligor ſhall cauſe the Lord of the Mannor, of whom the Land is holden, to lett the Land to the Obligee by Copy; or that he ſhall make a Stranger to make a Releaſe to the Obligee of his Right in the ſaid Land. Mich. 34 H. 8. *Bendlowes*, 5.

4. Debt upon Condition to ſtand to the Arbitrament of certain Perſons, *&c.* ſo as the ſaid Award be made and given up in Writing, *&c.* The Defendant pleaded by Proteſtation, That the Arbitrators, before the Feaſt, *&c. Nullum fecerunt Arbitrium*; for Plea ſaid, *Quod Arbitratores prædict. non deliberaverant in ſcriptis*, and the Condition is, (given up in Writing:) Whether it ſhould not be *Non reddiderunt in ſcriptis.* Paſch. 3 Eliz. *Cocks* and *Maclefield's* Caſe. *Bendlowes*, 39.

5. Note, It was Reſolved by Juſtices, That an Arbitrament made in the Night is good enough. Paſch. 26 Eliz. C.B. *Samm's* Caſe. *Cro.* 3 Part, 43. See Paſch. 40 Eliz. B.R. *Withers* and *Drew's* Caſe. *Cro.* 3 Part, 676. acc.

6. In Debt upon an Obligation to ſtand to an Award: An Award was, That the Defendant ſhould releaſe to the Plaintiff all Actions before the Feaſt of St. *Peter*, then next enſuing: The Defendant in the Eve of the ſaid Feaſt made a Releaſe to the Plaintiff, and delivered it to J. S. to the Uſe of the Plaintiff without his Conſent or Knowledge, and when the Plaintiff heard of it, he diſagreed to it: It was adjudged to be a good performance of the Condition, for perhaps the Plaintiff will abſent himſelf out of the Country, ſo as the Defendant cannot find him to deliver it to him. Hill. 29 Eliz. B. R. *Aſford* and *Le.'s* Caſe. *Co.* 3. Par. 54.

7. Debt upon an Obligation, to perform an Award; The Arbitrators Award, That the Defendant ſhould enjoy ſuch a Houſe, of which the Plaintiff was Leſſee for years during the Term, paying to the Plaintiff yearly 20 s. For non-payment of which 20 s. Debt was brought upon the Obligation. It was the Opinion of the Court, That this was part of the Award, and that for the non-payment of it, that the Action of Debt did well lye. Trin. 32 Eliz. B. R. *Parſon's* and *Parſon's* Caſe. *Cro.* 3. Part, 211.

8. Controverſy was between two perſons, concerning a Leaſe of Lands; they ſubmitted themſelves to the Arbitrament of J. S. for it; J. S. did Award, that one of them ſhould have the Land: It was holden in this Caſe, That this is a good Gift of the Intereſt of the Term; But if the Award were, That he ſhall permit and ſuffer the other to enjoy the Term, this giveth not the Intereſt in it. Paſch. 33 Eliz. B.R. *Tinſloe* and *Yeate's* Caſe. *Cro.* 3. Part, 223.

9. Debt upon Condition to perform Award; The Condition was, That if the Obligor do well and truly perform and keep the Award of J. S. indifferently choſen between the parties, for and concerning the matters contained in nine ſeveral Articles, ſo as the ſame be given up under the Hand and Seal of, &c. The Arbitrator made an Award of ſeven of the Articles, omitting the other two: It was the Opinion of the Juſtices, That the Award ſhall have reference to all the Articles, for the Condition was conditional; Adjudged for the Defendant. Hill. 43 Eliz. B. R. *Hamond* and *Hatche's* Caſe. *Goldſbr.* 125. See Paſch. 41 Eliz. B. R.

B. R. *Risdes* and *Juglett's* Case. Adjudged acc. *Cro.* 3. Part, 839.

10. Debt to perform an Award; The Arbitrators Award, That each ſhould give to other within four dayes after the Award, a general Releaſe of all Demands till the date of the Obligation. Provided, That if either of them diſlike the Award within twenty days after the Award, and ſhould pay to the other within the ſaid twenty days 10 s. the Arbitrament to be void: In this Caſe, It was holden by the Court, That the firſt part of the Award was good: And the Proviſo being repugnant, was void; and it was holden, That by the not performing of the Releaſe within four days, the Bond was forfeited; and the Proviſo would not ſerve the Bond forfeited. Hill. 35 Eliz. B. R. *Shorley* and *Richardſon's* Caſe. *Cro.* 3. Part, 291.

11. Aſſumpſit, to perform an Award; The Award was, That the Defendant ſhould enter into a Bond to the Plaintiff, that the Plaintiff and his Wife *haberent & gauderent*, ſuch Lands in Controverſy; and becauſe, It was to enter Bond without a ſum certain, and alſo becauſe it was, that the Wife ſhould enjoy, who was no party to the ſubmiſſion; The Award was adjudged void. Trin. 36 Eliz. B. R. *Samnon* and *Pitt's* Caſe. *Cro.* 3. Part, 432.

12. Debt upon Obligation conditioned to perform an Award; The Defendant pleaded, *Quod nullum fecit arbitrium*; The Plaintiff ſhewed an Award, That the Defendant ſhould releaſe all Actions, &c. *ut talis adviſaret*, It was adjudged to be a void Arbitrament, to referr it to the Act of another; and the Defendant is not bound to perform it. Mich. 41 Eliz. C. B. *Emery* and *Emerie's* Caſe. *Cro.* 3. Part, 72.

13. Debt upon Condition to perform the Award of J. S. Upon *Nul tiel Arbitrium* pleaded, The Plaintiff ſhewed an Award was made, That the Defendant ſhould make an Eſtate of ſuch Lands to the Plaintiff for life, the Remainder to a Stranger in Fee: It was adjudged a good Award, as to the particular Eſtate, and was to be performed, but void as to the Remainder; And in this Caſe, It was adjudged, That the place where the Award was made, ought to be ſhewed, becauſe the ſame is Iſſuable. Hill. 42 Eliz. C. B. *Bretton* and *Pret's* Caſe. *Cro.* 3. Part, 758.

14. Debt to perform the Award of certain perſons, of all Suits, Quarrels, and Controverſies depending untill the day of the date of the Obligation, (which was 4. *Sept.* 42 Eliz.) ſo as the Award be made of the premiſſes before ſuch a day: The Defendant pleaded, *Quod nullum fecerant arbitrium*; and the Plaintiff ſhewed an Award made of all matters, untill 3. *Sept.* the ſame year: It was objected, That the Arbitrators had not perſued their Authority; and becauſe there is no Averment, that thoſe were all the matters depending at the time of the Obligation: Reſolved, That it was well enough; for now depending cannot be, unleſs it had been in Suit before the fourth day, and it cannot be ſaid begun and depending all put the ſame day; Adjudged for the Plaintiff. Trin. 43 Eliz. C. B. *Barn.'s* and *Greenwood's* Caſe. *Cro.* 3. Part, 858.

15. Suits depending in the ſpiritual Court betwixt the Plaintiff and Defendant for Tythes, they put themſelves to the Award of J. S. concerning the premiſes, and in conſideration of 6 d. given the one to the other: The one aſſumed to the other to ſtand to the Award of J. S. or to pay 10 l. and alledged, That J. S. awarded, That the Defendant ſhould pay to the Plaintiff for the Tythes ſuch a day 40 s. and that he had not paid it; for which Cauſe, Aſſumpſit was brought againſt the Defendant: It was the Opinion of the whole Court, That the Arbitrament was void; becauſe there is not any thing for the Defendant to have, or to be freed from Tythes, ſo as he hath not any advantage thereby. Mich. 41 Eliz. B. R. *Colſton* and *Harris's* Caſe. *Cro.* 3. Part, 904.

16. Debt upon Obligation to ſtand to the Award of J. E. and J. D; The Defendant pleaded, The Arbitrators made no Award; The Plaintiff ſhewed the Award, but aſſigned no Breach. Iſſue being joyned upon the Award, It was found for the Plaintiff, and Judgment for him. It was the Opinion of the Court in this Caſe, That the Plaintiff in his Replication having aſſigned no Breach, there is no cauſe of Action, and ſo the Court cannot give Judgment; and though a Verdict be given for the Plaintiff, yet the ſaid defect in the Replication is matter of ſubſtance, and is not helped by any Statute, nor amendable; The Judgment was ſtayed. Paſch. 7 Jac. in B. R. *Barret* and *Fletcher's* Caſe. *Yelverton* 153.

17. Controverſy being betwixt the Plaintiff, Lord of the Mannor, and Defendant claiming certain Lands, parcell of the Mannor, and to hold it by Copy, both parties ſubmitted themſelves to the Arbitrament of J. S, Counſellor at Law concerning the ſaid Land, and the Title of the Defendant to it: The Defendant in conſideration that the Plaintiff promiſed to the Defendant, That if the ſaid J. S. ſhould judge the ſaid Copy to be good and ſufficient for the Title of the Defendant, that then he ſhould ſuffer the ſaid Defendant to enjoy the ſaid Land accordingly, without moleſtation. The Defendant reciprocally promiſed the Plaintiff, That if the ſaid J. S. ſhould judge the ſaid Copy not to be ſufficient, that then he was to ſurrender and deliver the Poſſeſſion of the ſaid Land

to the Plaintiff without Suit. It was Reſolved, That the Award in this Caſe was good, being to avoid Variances and Suits; and therefore the promiſe made by the Defendant, was made upon a good Conſideration: and not being performed, in Aſſumpſit brought by the Plaintiff, Judgment was given for the Plaintiff. Paſch. 30 Eliz. B. R. *Coats* and *Sorgat*'s Caſe. *Leon.* 1. Part, 103.

18. Debt upon Obligation, to ſtand to the Arbitrament of A. B. C. and D, of all Actions, Quarrels, and Demands; *Ita quod*, it be made in writing before ſuch a day, by the ſaid A. B. C. and D, or by any two of them, under their Hands, &c. The Defendant pleaded, That the ſaid A. B. C. D, or any of them, *Nullum fecerunt arbitrium*; The Plaintiff Relyed, That A. and B, two of the Arbitrators, before the day, by writing under their Hands, made an Award, and ſhewed the ſame in certain, and aſſigned a breach in the Defendant for not payment of 3 l. at a day limited in the Arbitrament: The only Queſtion was, Whether the Arbitrament made by A. and B. only, without the others were good or not, becauſe the Submiſſion was to four by name. It was adjudged by the whole Court, That the Arbitament made by two was good; for the Arbitrators are made Judges by aſſent and election of the parties, and the parties here did fix their Truſt not in all four Joyntly, but *conjunctim & diviſim*: So as the *Ita quod* is but an explanation of the Condition, they four or any two of them may arbitrate all matters betwixt them. See 2 R. 3. 18. 6. 4 E. 4. 40. Paſch. 9 Jac. B. R. *Sallows* and *Girling*'s Caſe. *Yelverton* 203.

19. A man was bound in Obligation, with Condition to ſtand to, abide, and perform the Award of two Arbitrators; and before the Award, the Obligor by his writing revokes the authority of one of the Arbitrators: It was agreed in this Caſe, That by this, the Obligation is become ſimple without Condition; and yet it was not pleaded, That the Arbitrator had notice of the Revocation; but becauſe it is pleaded, *Quod revocavit*, it implies, Notice: But it was agreed, That if a man ſubmitteth himſelf to the Award of another, and after he revokes his authority; but before the Arbitrator hath notice of that, he makes his Award; The Award is good, and ſhall be performed. Hill. 7 Jac. in C. B. *Vivion* and *Wild*'s Caſe. *Brownl.* 2. Part, 29.

20. Difference being betwixt the Father and his Daughter within age of the one part, and K. of the other part, they ſubmit themſelves to Arbritrament of all Quarrels, &c. The Father is bound to K, that he and his Daughter will perform the Award on their parties; and K. is bound to the Daughter to perform the Award on his part: Arbitrators Award, That K. pay to the Daughter ſo much, who ſhall releaſe all Actions, &c. to her, and that the Father and Daughter ſhall releaſe at another day to K, &c. K. doth not pay the money at the day. The Daughter brings debt upon the Bond; It was agreed by the Juſtices, 1. That if the Submiſſion be void, the Arbitrament is void, and then the Bond of K. void. 2. That the Submiſſion here of the Daughter-Enfant was not good, but voidable. 3. The Arbitrament made, That K. ſhall pay only ſo much to the Enfant, is not good. Hill. 2 Car. B. R. *Stone* and *Knight*'s Caſe. *Latch.* 207. See Trin. 17 Car. B. R. *Raſſell* and *Yate*'s Caſe. In *Lib.* 1. Title *Arbitrament*. Fol. 215. C. 5.

Amendment.

IN *Ejectione Firmæ*; The Caſe was, That J. W, Biſhop of G, ſeiſed of a Barn and Tythes, Let them to three by Indenture, 15 Eliz. reſerving the antient Rent for two lives. In the end of the Indenture, The Confirmation of the Dean and Chapter was recited, which was of a Leaſe made by R. W; but the Jury did not find *de facto*, that Dean and Chapter did confirm it; And it was found expreſly, That a Leaſe was made by the now Biſhop to the Plaintiff: It was moved, That the Confirmation which recited the *Leaſe* to be made by R. W, might be amended and made J. W, for that the Note given to the Clerk of the Aſſiſes; they intended to find the Conſideration preciſely, and of a Leaſe made by J. W; But the Opinion of the Court was, That after Verdict returned in Court, this cannot be amended by any ſuch ſuggeſtion, for then all Verdicts might be prayed to be amended; but if any ſuch miſpriſion was of the Clerk, it ought to be made before the Verdict returned, but now it is too late to amend it. Mich. 31 Eliz. B. R. *Mornington* and *Ty*'s Caſe. 6 Co. 3. Part, 111.

2. In Aſſumpſit by the Plaintiff againſt A. and B, after Verdict found for the Plaintiff; In ſtay of Judgment, it was moved, That the Declaration upon the File ſuppoſed the promiſe to be made by A. only; But the Roll and the Record of *Niſi prius*, and all the proceedings after, were layed to be by both. And it appeared by examination, That the Paper Copy under the Councells Hand, was, that the promiſe was made by both. It was urged, that the File is the Original, and is the Warrant of the Roll, and all other proceedings: So if the

Roll

Roll be ill, it may be amended by the File, but not *è converſo*; and ſo it was ſaid, It was adjudged. Trin. 31 Eliz. in *Greenway* and *Elm*'s Caſe. But the Court held the Contrary, That it might be amended; for when it appeareth, That the Paper-Declaration was good, that the promiſe was made by both; It is the default to enter it upon the File to be made by one: It was adjudged to be amended. Mich. 34 Eliz. B. R. *Ramſey* and *Bird*'s Caſe. *Cro.* 3. Part, 258. 2. *Latch.* 86. An amendment ruled accordingly. See Mich. 7 Jac. B. R. *Sanders* and *Cottington*'s Caſe. *Yelverton* 164. The Title, Caſe amended.

3. In *Ejectione Firmæ*, the Caſe was, Tenant in tail of a Rectory and Tythes, lett it to J. S, and his Aſſignes, for the lives of B, C. and D; afterwards J. S. demiſed the ſaid Rectory and Tythes to J. N. and his Heirs, to the uſe of B for the time of eighty nine years, if any of the *Ceſtuy qui vits* ſhould ſo long live, *virtute Cujus dimiſſionis idem*. B. the Plaintiff *fuit poſſeſſionatus*, untill the Defendant entred, &c. Being upon Iſſue joyned, found for the Plaintiff; It was ſaid, That the Verdict was not good, becauſe he doth not ſhew the beginning of the eſtate tail, which is the particular eſtate, and that the Court held to be an apparent fault. 2. It was excepted unto, becauſe he ſaith, *Virtute cujus dimiſſionis*, where he comes in by limitation of uſe, and ſo it ought to have been, *Et virtute Statuti*; this was alſo held to be an apparent fault in ſubſtance, and not in form; wherefore, It was adjudged for the Defendant. Trin. 37 Eliz. C. B. *Baker* and *Seale*'s Caſe. *Cro.* 3. Part, 407.

4. Error to reverſe a Judgment in C. B. in Treſpaſs, becauſe the Writ of the Roll of Enquiry of Damages was awarded to the Shetiff of *London* thus, *Idco præceptum eſt Vicecom. London quod inquirant*; where it ſhould be *inquirerent*, alſo it was, *Quod inquirant per Sacramentum proborum, &c. de Civitate prædict.* there being no mention before of any City; Holden, That the firſt was the default of the Clerk, and amendable; and for the ſecond, It was well enough, for that it is ſometimes *de Civitate*, ſometimes *de Baliva*; and the Judgment was affirmed. Trin. 41 Eliz. B. R. Sir *Richard Lewſon* and *Rudleſton*'s Caſe. *Cro.* 3. Part, 677.

5. Error of Judgment in Action upon the Caſe for words, The Action was brought againſt *John Morgan Wulf*; The Judgment was, *Quod recuperet verſus præfict. Morganum*; whereas it was neither his Chriſtian-name, nor Sir-name; Reſolved, That it was well enough, ſo it is his name by which he is known, and parcell of his Sir-name, and his entire Sir-name and *Wulf* is but an addition, and therefore good enough; and if it were not good, it is but the default of the Clerk, which is amendable by the Statutes of 8 H. 6. Mich. 44 Eliz. Exchequer Chamber, *John Morgan Wulf*, and *Stepney*'s Caſe. *Cro.* 3. Part, 865.

6. Debt againſt an Adminiſtrator; The Defendant pleads *Fully* adminiſtred, The Defendant ſaid, he ought not to be barred for any thing ſaid by the Defendant; for he ſaid, That *Prædict.* the Plaintiff *die impetrationis, &c. habuit diverſa bona & hoc petit, &c.* It being found for the Plaintiff, It was moved, That here was no Iſſue joyned: For the Plaintiff ought to have Replyed, That the Defendant had Aſſetts, and he ſaith, That he himſelf hath Aſſetts, which is not the matter in queſtion. But it was the Opinion of the Court, It ſhould be amended, becauſe it is but the default of the Clerk. Paſch. 3 Jac. B. R. *Burkett* and *Manning*'s Caſe. *Yelverton* 65.

7. Error upon a Judgment in C. B. in *Ejectione firmæ*; The Error aſſigned was, in the variance between the Plea-Roll and the Imparlance-Roll: The firſt was of an Ejectment 10. *Junii.* 22 Jac. and the Plea-Roll was 12. *Junii.* 22 Jac. but the truth was, That the Plea-Roll was entred 10. *Junii*, but it was razed and made 12. *Junii.* It was amended by the aſſent of all the Juſtices, notwithſtanding the Record removed, and Error aſſigned in the ſame Point. Hill. 1 Car. B. R. *Foſter* and *Taylor*'s Caſe. *Latch.* 162.

8. *Wolley* recovered Damages in an Action of Aſſaults and Woundings 3100 l. againſt the Lord *Savil* and *Mountain* the Defendants; having day to ſpeak in arreſt of Judgment, the Attorneys for the Defendants viewed the Record, and found that in the Imparlance Roll, there was no day or year of the Aſſault entred, but ſpaces were in the Roll to inſert the ſame. But it was alledged to be, *contra pacem Regis nunc*, and the Iſſue-Roll was preſent; therefore they beſpoke of the Prejgnothory a *Recordator* to be ſealed the next day. But the Plaintiffs Attorney having notice thereof, got by a Plot the Key of the Treaſury, and about eleven of the Clock at Night, with Lant-horn and Candle entred into the Treaſury, and filled up the blank lines, and made the Record perfect; which being known, It was moved to the Court for the Defendant, that the Roll might be made as it was before, and all which was done by the Plaintiffs Attorney put out, and the doers of it puniſhed. This Caſe being argued by the Juſtices ſeverally, It was agreed by them all, and alſo by the Clerks, That it was amendable by the Clerks untill the *Recordator* be entred: It was further agreed, That in this Caſe, although that the *Recordator* had been entred, the ſame had not bound the Court, but that they might have amended it, if they ſaw cauſe; and it was but matter of form: and if it had not been amended, it ought to be amended by the Court, becauſe the

Roll being at first *Anno regni Regis nunc, & contra pacem Regis nunc*, shall be done after the Writ brought, and after Judgment was given for the Plaintiff. Hill. 2 Car. Sir *Francis Worsley* and the Lord *Savil's* Case. *Latch.* 164, 165.

9. A man in a Bond bound him and his Heirs; In Debt brought against the Heir, The Bill upon the Fyle was, *Debet & detinet*, but the Declaration upon the Roll was, *Detinet tantum*; and thereupon a Verdict was given; It was prayed, That the Declaration, and the proceedings upon it, might be amended; and because, It was proved, That it was done *consultò*; the Court would not amend it. Trin. 3 Car. B. R. *Latch.* 203.

Amercements and *Fines.*

IN a Replevin, The Defendant justified by reason of a Fine assessed by the Steward in the Court-Leet, for not coming to Court, and doing his Suit; and upon it a Distresse taken: It was the Opinion of the Justices, That the Assessement being without presentment, was without warrant; and in such case he ought rather to be amerced then fined; and it was said, That if he shall assesse a Fine, he will assesse it too grievously, and so the party be without remedy: But for an Amercement, *Moderata Misericordia* lyeth. Trin. 33 Eliz. B. R. *Hall* and *Tarbett's* Case. *Cro.* 3. Part, 241. See Mich. 33 Eliz. B. R. *Platt* and *Whitton's* Case. *Lib.* 1. Title *Amercement* and *Fines.* Fol. 171. C. 6.

2. Error upon a Judgment in Debt, upon the Statute of 33 H. 3. of buying of Titles; The Error was, That the Plaintiff demands 50 l. for the value of the Land, and the Jury find the value 20 l; upon which the Plaintiff had Judgment to recover one moyety, and the Queen the other moyety, and no Judgment was for the residue of the 50 l. *scil.* that the Plaintiff be in *misericordia pro falso suo clamore*; and for that Cause, the Judgment was reversed. But it was said, That in Trespass or other Actions, where the Plaintiff declares *ad damnum*; If Lessee be found, then he declares, The Plaintiff shall not be amerced, because the Action is grounded upon an incertainty. Mich. 34 Eliz. B. R. *Savery* and *Ivy's* Case. *Cro.* 3. Part, 257.

3 Trespass for taking a Gelding and two Spoons; The Defendant pleaded, That the Queen was Lady of the Mannor of B, and that he was her Bayliff, and that it was presented, That the Plaintiff was amerced in the Court, for surcharging the Court by the Steward there, to so much which was offered by the Tenants; whereupon he destrained the Gelding, and that the Plaintiff delivered him the two Spoons in redemption of the Gelding. It was the Opinion of the Court, That the Amercement by the Statute of the Court was good; But they held, That the Distress by the Bayliff, not having any Warrant to do it by Estreat or otherwise was not good; and therefore, It was adjudged for the Plaintiff: And in this Case, It was holden, That a common person cannot distrain for Amercements in a Court Baron, without prescription; but the Queen by her Prerogative might. Pasch. 42 Eliz. B. R. *Rodeston* and *Almas's* Case. *Cro.* 3. Part, 748.

4. Action upon the Case, For disturbing him to have Common in 200 Acres of Land and Pasture, Upon not guilty, It was found, That the Plaintiff had Common in 90 Acres in the Land of the Defendants: The Opinion of the Court was, That the Verdict was found against the Plaintiff, because the Jurors have found another Case. It was moved in stay of Judgment, because the Plaintiff was amerced *pro falso clamore*, as to Common in 10 Acres of the 200 Acres. But the Court held the Amercement good enough, because the Plaintiff did pretend a greater matter of wrong then the Case did require; for that is a trouble to the Court by the false claim of the Plaintiff. Mich. 19 *Jac.* in B. R. See the Reports annexed to *Bendloe's* 65.

Annuity.

1. ANnuity was brought by the Dean and Chapter of S, against the Master of the Hospitall of St. B. Parson of the Church of W. in E; and demanded an Annuity by prescription to be paid yearly at S. aforesaid: The Writ was brought in the County of S, where the Seisin was alledged, and the Writ was awarded good; and the Reasons of it was brought in that Judgment to the County of S, and he had his Judgment; and after in 35 H. 8. a *Scire facias* was brought upon that Judgment in the said County of S, for the Arrearages of the said Annuity accurred long after the Judgment against the Successor of the Master of the said Hospital, and good. See 35 H. 8. the Case of the Master of St. *Bart'lo-*

mews

mews Hoſpitall. *Bendlows* 23.

2. A man granted to another an Annuity of 5 l. *per annum*, for two years, payable at *Mich.* or ſixteen dayes; after the Grantee brought Debt for the ſame; and declared, That it was behind at *Mich.* & *adhuc retro exiſtit*; upon which it was demurred, becauſe not averred, that it was behind ſixteen dayes; but ruled, Good enough. Two Objected, that Debt lyeth not, for it is but a Writ of Annuity. But it was Reſolved, That Debt did well lye, being a Grant for years; for that it is by the Deed, as a Contract. Trin. 33 Eliz. B. R. *Brown* and *Pendlebery*'s Caſe. Trin. 33 Eliz. B. R. *Cro.* 3. Part, 268.

3. Debt upon an Obligation; The Condition was, To pay an Annuity at the Feaſt of the Annunciation, or within 20 dayes after: the Original was brought, the 8th of *April*, and the breach alledged to be at the Feaſt of the Annunciation laſt paſt, which was within the 20 dayes after the Feaſt of the Annunciation. It was the Opinion of the Court, That it was not well brought, nor the breach well aſſigned; for that the Annuity was not due till the end of the 20 dayes. Paſch. 39 Eliz. C. B. *Blunden*'s Caſe. *Cro.* 3. Part, 565.

4. Annuity was; For an Annuity by Preſcription iſſued out of the Church of S, or to the Incumbent of the ſaid Church: It was Reſolved by the whole Court, That it lay againſt the Incumbent as well for the Arrearages due in the time of his Predeceſſor, as in his own time; For that the Church it ſelf is charged, in whoſe hands ſoever it cometh: Hill. 43 Eliz. C. B. The Caſe of *Trinity* Colledge in *Cambridge* and *Tunſtall*. *Cro.* 3. 810.

5. The Father granted an Annuity to his younger Son; He delivered the Deed to one of his Brothers to keep, who went into *Ireland*, and in the removing of Writings, the Deed of Annuity was loſt; He ſued his elder Brother in equity to have the Annuity paid to him. It was the Opinion of the Court, That he could not be relieved there for it, becauſe it was his folly to deliver the ſame to one who had no more care for the keeping of it: But it was agreed, That if the Deed had been caſually loſt by Fire, or ſuch thing; then he might have relief in Equity for it, and ſo it was ſaid; It was Reſolved in *Vincent* and *Beverley*'s Caſe. Paſch. 1 Car. B. R. *Brightman*'s Caſe, *Latch.* 248.

Appeals.

IN appeal of the Death of her Husband, That at A. in the County of &c. the Defendant ſuch a day gave a mortal Wound, of which he dyed at W, in the ſaid County; and ſo the Defendant at A. aforeſaid, *modo et forma prædict.* murdered her Husband: It was the Opinion of the Juſtices, That the Writ ſhould abate; becauſe it ought to be at the place of his death, and not at the place of the ſtroak given; becauſe from the place the Viſne muſt come where the death was. See *Cro.* 4. Part, *Hepdon*'s Caſe. Mich. 32 Eliz. B. R. *Hume* and *Ogles* Caſe. *Cro.* 3. Part, 196.

2. In Appeal of Murder by a Woman, of the death of her Husband; The Defendant pleaded, Not coupled in lawful Marriage: It was the Opinion of the Court, When a Plea is pleaded, which is tryable at the Common Law, and concludes over to the Felony; there the Plaintiff ought to Reply, and conclude over to the Felony, otherwiſe it is when a man pleads a Plea tryable otherwiſe then by the Common Law. Paſch. 33 Eliz. B. R. *Withington* and *Delbare*'s Caſe. *Cro.* 3. Part, 224.

3. In Appeal of Murder, The Defendant pleaded, Not guilty; the Evidence was clear, That he was guilty of Man-ſlaughter. It was the Opinion of all the Juſtices, That the Jury are not compellable to enquire of the Man ſlaughter Paſch. 34 Eliz. B. R. *Wroth* and *Wigg*'s Caſe. *Cro.* 3. Part, 276.

4. Appeal of Murder was brought in the King's Bench, of a Murder done upon the Plaintiffs Brother at *Sandwich*, in the County of *Kent*; It was objected, That it did not lye there; becauſe *Sandwich* was part of the Cinque-Ports, where the King's Bench doth not run: It was the Opinion of the Court, That the Appeal was well brought in B. R; for although, That Kings have granted Appeals to the Barons of the Cinque-Ports; yet they have not given away their own Intereſts, and in an Appeal the King hath an Intereſt: for that if the Plaintiff be Non-ſuit after Declaration in it, yet the Defendant ſhall be arraigned at the Kings Suit; And it was ſaid, It was adjudged, That upon a Murder committed within the Cinque-Ports, the party being in *Cuſtodia Marſhalli*, entred his Appeal by Bill in the Kings Bench, and adjudged good in *Witt*'s and *Brayn*'s Caſe. Mich. 45 Eliz. B. R. *Criſpe* and *Viat*'s Caſe. *Tel.* 12 13.

5. In Appeal of Death of her Husband againſt Diverſe; upon ſeveral Iſſues pleaded, The Plain-

tiff was Non-suit upon Tryal against one; It was the Opinion of the whole Court, That as to that party, the Defendant should be discharged; yet the others who were not tryed, should be arraigned upon that Declaration, at the Queens Suit. Hill. 38 Eliz. B. R. *Curties* and *Bacill*'s Case. *Cro.* 3. Part, 460.

6. Appeal of Maheim against diverse; One of the Plaintiffs pleaded, That there was *Nul tiel in rerum natura*; and if it be found there, to the Felony and Maheim, Not guilty: It was the Opinion of the Court, That such a manner of Plea was not sufficient in Appeal of Maheim; because no life was put in danger by the Suit: and therefore, It was Resolved, That the other Plea, Not guilty, should stand. Trin. 29 Eliz. B. R. *Kyston* and *William*'s Case. *Cro.* 3. Part, 495. See *Popham* 115. The same Case.

6. Appeal of Murder against divers, One as Principal, the other as Accessaries; The Principal was found guilty of Man-slaughter only: The Court held, As to the Accessaries before the Fact, they ought to be discharged; but for the Accessaries after, they should answer, and they shall be tryed by several *Venire facias*. It was then moved, That the Principal after Conviction, had his Clergy; It was the Opinion of the Court, That if the Principal had his Clergy or Pardon before his Judgment, (as he well may) if he be pardoned, yet the Accessary shall be Arraigned. In the principal Case, the Accessaries were discharged. Hill. 39 Eliz. B. R. *Gosse* and *Dyby*'s Case. *Cro.* 3. 540.

7. Appeal of Murder against four; at the return of the Writ, they appeared at the Barr: It was the Opinion of the Court, That the appearance of them make them not in *Custodia Marischalli*, unless there be a Record, *Quod committitur Marischallo*, or that they find Bail; whereupon the Plaintiff was Non-suit; and the cause of his Non-suit, was, because there was a default in the Writ for want of Addition of one of the Defendants: And it was said in this Case, That a Non-suit in this Case before appearance is peremptory. Pasch. 40 Eliz. B. R. *Holland*'s Case. *Cro.* 3. Part; 605.

8. An Enfant brought an Appeal of Murder by his Gardian. At the day in Court; It was prayed, because the Gardian was sick; that the Court would give, &c. for the day; But the Court said, That they could not do it in an Appeal; and thereupon the Plaintiff being demanded; did not appear; wherefore he was Non-suit, and the Defendant discharged. Trin. 2 Car. B. R. *Latch.* 171.

9. Appeal of Burglary was brought against B who was found guilty; and before Judgment given, the Plaintiff dyed: It was prayed, That Judgment be given for the Queen upon that Verdict, or that the Declaration in the Appeal should be in lue of an Indictment. It was said by my Chief Justice, If the Appealant dyeth before Verdict, the Defendant shall be arraigned at the Suit of the King; but if his life hath been once in jeopardy by Verdict, he said, He conceived, it should not again be drawn in danger. Others were of Opinion, That the Defendant should be arraigned at the Suit of the Queen, upon the whole Record, and to plead Autertaits acquitt, which was the surest way. Hill. 29 Eliz. B. R. *Brook*'s Case. *Law.* 2. Part, 83.

10. R. was Robbed by S, and, within a Week after the Robbery, R. preferred a Judgment against S; and, within a Month after the Robbery, he sued an Appeal of Robbery against him, and prosecuted the same till S. was Out-lawed, and now R. moved to have Restitution of the Goods. My chief Justice said, Fresh-suit in Law is to pursue the Felon from Town to Town, but the suing of an Appeal is no Fresh-suit. *Cook* vouched the Book, 21 E. 1. 16. Where Restitution was granted upon an Out-lawry in an Appeal of Robbery, without Fresh-suit enquired of, and so it is, 1 H. 45. if he confesse the Felony. *Quere*, the principal Case was not Resolved. Trin. 30 Eliz. B. R. *Roper* and *Smith*'s Case. *Leon.* 2. Part, 108.

Aappearance.

DEbt upon Obligation; The Condition was, That if G. F. shall not appear at the next Court in T. to answer the Plaintiff; then if the said G. F. before the first day of Octobr, found surety to answer, that then, The Defendant pleaded, That G. F. did appear at the next Court, upon which Issue was joyned, and found for the Plaintiff; It was said, That the Tryal ought to be by the Record, and not by *per patriam*: The Court held, the Tryal to be good; for it appeareth not, that he agreed, and that his appearance was upon Record; But his Plea is, That he appeared such a day in the Court, which may be, and yet the same not ended, and yet by it his Bond is saved; And it was said, That appearance at such a day may be tryed by the Country; It was adjudged for the Plaintiff. Hill 30 Eliz. B.R. *Hoe* and *Mansfield*'s Case. *Cro.* 3. Part. 131.

2. Debt upon an Obligation made to the Sheriff; The Condition was, That if such a one who was arrested upon a *Latit t*, appeared personally and answered, &c. It was a Question, If this was a good

a good Obligation within the Statute of 23 H. 6. It was Reſolved, That in regard his Appearance is neceſſary to put in ſpecial Bail if the Party require it, therefore the Bond was good, and ſo it was ſaid: It was Ruled in *Woolverton* and *Sackfields* Caſe. Mich. 42 Eliz. B.R. *Rolls* and *Hewit's* Caſe. *Cro.* 3 Part, 368.

3. Error or a Judgment in Debt, upon *Nos ſum Info matus*: The Error aſſigned was, That at the time of the Judgment the Defendant was within Age, and appeared by Attorney, whereas he ought to appear by his Gardian: It was the Opinion of the Court, that if he was within Age at the time of the Judgment, although he was not ſo at the time of the Writ of Error brought, that the Judgment was Reverſable, and is triable by the Country: But a Fine or a Statute acknowledged within Age be not reverſable but by Inſpection. Mich. 39 Eliz. B. R. *Sedborough* and *Raunts* Caſe. *Cro.* 3 Part, 368.

4. Error of Judgment given in a *Nativo habendo*: The Error aſſigned was, becauſe the Plaintiff *tempore Judicii* was an Enfant, and appeared by Attorney, and not by Guardian or *Prochyn Amy*: The Defendant pleaded *in nullo eſt Erratum*; the Court doubted, Whether it could now be aſſigned, the Plaintiff being at full Age, ſo as his Nonage could not appear upon View; another Error was becauſe finall Judgment was given, whereas the Plaintiff was Non-ſuit before Declaration: *Quere*, The Points were not Reſolved. Paſch. 42 Eliz. B. R. *Dighton* and *Bartholomew's* Caſe. *Cro.* 3 Part, 853. But upon a ſecond Motion for the laſt Error, the Judgment was reverſed. *Cro.* 3 Part, 881.

5. Aſſumpſit: In Conſideration that the Plaintiff had entred into a Recognizance with the Defendant upon Condition, that the Defendant ſhall make his Appearance at the next Aſſiſes to be holden before the Juſtices of Goal-delivery for the County of S. the Defendant promiſed to appear at the next generall Goal-delivery, and ſave the Defendant harmleſs of his Recognizance, and the Defendant did not appear, nor ſave the Plaintiff harmleſs. The Defendant pleaded, That before the Goal-delivery, after the Recognizance made, he ſued out a *Certiorari*, directed to the Juſtices of Aſſiſe in the County of S, by the Name of Juſtices of Goal-delivery, to remove the ſaid Recognizance, and ſhewed that at ſuch a day at the Aſſiſes he deliverſed the *Certiorari* to J. S. one of the Juſtices of Aſſiſe; and further ſhewed, that the Plaintiff was not damnified by the ſaid Recognizance: It was in this Caſe adjudged for the Plaintiff, for two Cauſes; 1. Becauſe it is not ſhewed in the Bar at what place the Aſſiſes was kept, for that is iſſuable. 2. The Defendant ought to have ſhewed expreſly, That he appeared at the Aſſiſes, for otherwiſe the Recognizance is forfeited; and the Remover of the Recognizance by a *Certiorari* doth not diſpenſe with the Appearance of the Party; for though the Writ by which it is removed is the King's Commandment, Yet the Purchaſe of ſuch Writ is the Act of the party Defendant, and he by ſuch a ſlight cannot ſave his Recognizance. Trin. 9 Jac. B. R. *Roſſe* and *Pits* Caſe. *Yelverton*, 207.

6. The Bail entred a Recognizance for A. that upon eight dayes warning A. *comparebit* to any Action to be brought by B. for ſuch a Debt; *Nec non*, That if A. B. were condemned in the Action, and did not pay, that they would anſwer to B. the Condemnation. B. brought an Action in which A. is condemned, and did not pay: B. brought Debt againſt the Bail, upon the Recognizance, and ſhewed the Suit againſt A. and the matter aforeſaid: But did not ſhew, That A. had warning eight days to appear to the Action. It was the Opinion of the Court in this Caſe, That the Plaintiff ought of neceſſity to ſhew the warning to have been by eight dayes; for this is not a Condition to be performed betwixt the parties, but between Strangers, for A. is a Stranger; and then the Bail are bound only to anſwer ſuch Condemnation in ſuch Action in which eight dayes warning ſhall be given, for that is the Ground of the whole; and it is not reaſon, that A. by his voluntary Appearance without ſuch 8 days warning ſhould prejudice his Bail: Upon this Opinion of the Court, the Plaintiff diſcontinued his Suit. Mich. 2 Jac. B. R. *Hargrave* and *Rogers* Caſe. *Yelverton*, 53.

7. Debt in the Common Pleas upon an Obligation: The Condition was, That if A. would render himſelf to an Arreſt in ſuch a place, &c. The Defendant pleaded, That by Priviledge of Parliament, thoſe of the Parliament and their neceſſary Servants ought not to be arreſted by the ſpace of forty days before the Parliament, nor ſitting the Parliament, nor forty dayes after; and ſhewed, That he was Servant to ſuch a Parliament-man at ſuch time, ſo as he could not render himſelf to be arreſted; upon which the Plaintiff did demur: In this Caſe, The Opinion of the Court was for the Plaintiff, for that A. might appear and render himſelf, and let it be at their peril if they will arreſt him. Trin. 4 Jac. in C. B. *Jackſon* and *Kirton's* Caſe. *Brownl.* 1 Part, 81.

Apportionment.

A Man had a Warren in Fee which extended into three Towns, and he lett the same for years rendring Rent; and afterwards he by Deed granted his Reversion of the whole Warren in one of the Towns to another, and the Lessee attorned: It was the Opinion of the Court, That neither the Grantor nor the Grantee should have any part of this Rent during the Term, because the Law is, That no Contract shall be apportioned. Hill. 6 E. 6. *Bullowes*, 12.

2. In Debt upon an Obligation, for not performance of Covenants contained in an Indenture of Lease: The matter in Law was this, If a Lease be made of Lands and Goods rendring Rent, if the Land be evicted if the Rent be gone, or there shall be an Apportionment in regard of the Goods, and so the not Payment of the Portion for the Rent be a forfeiture of the Bond: It was the Opinion of the whole Court, That there shall be no Apportionment for the Rent issueth out of the Land, and followeth it; and so it was said, it had been oftentimes adjudged. Pasc. 33 Eliz. B. R. *Emot* and *Coles* Case. *Cro.* 3 Part, 255.

3. In a Replevin the Case was, A. was seised in Fee of a Mannor, whereof one Moyety was holden in Socage, and the other by Knights-Service, and of a Parsonage appropriated, and lett the Mannor and the Parsonage to the Plaintiff for years rendring 77 l. 6 s. 8 d. *per annum*; and devised the Mannor to B. his eldest Son for life, the Remainder to C. his younger Son, and dyed. B. surrendred his Estate to C. who distreined, and in his Avowry shewed all this matter, and that the Parsonage was worth 20 Marks *per annum*, and for five parts of the residue of the Rent, being divided into six parts, as for Rent due for five parts of the Mannor: C. the Defendant avowed: The Plaintiff shewed, That the Parsonage was worth 20 l. *per annum*, but shewed not of what value the Mannor was, and delivered Judgment of the Avowry upon which the Defendant demurred. It was a Question, Whether there could be an Apportionment in this Case: It was agreed by the whole Court in this Case, That there should be an Apportionment, in regard it was not a division by the Act of the party, but by the Law, *scil.* the Statute of Wills: They also held, That the Bar to the Avowry was not good, because all was not valued, but part. It was adjudged for the Avowant. Hill. 41 Eliz. C. B. *Ewer* and *Stiles* Case. *Cro.* 3 Part, 771.

4. Debt upon a Lease for years: The Plaintiff declared, That A. was seised, and lett to the Defendant for years rendring Rent of 40 l. *per annum*, the Land being holden *in Capite*, and that he devised it, and dyed, his Heir within Age: Whereupon the Queen under the Seal of the Court of Wards, granted to him the third part of the Reversion and Rent, *durante minori ætate* of the Heir, and for three years Arrears he brought the Action upon this Declaration, it was demurred. Two Questions in this Case, 1. Whether this Lease for years *durante minori ætate*, under the Seal of the Court of Wards, was good. Resolved, It was good, though before Office: But of the Body it cannot be granted but under the great Seal, and after Office. 2. Whether the Rent might be divided and apportioned: Resolved, That it might; for it is a Contract reall, which well may be apportioned; for if the third part of a Reversion be granted of a Lease for life, or years, and the Tenant attorns, the Rent is apportionable, and he chargable to two Distresses by his own Act. Trin. 43 Eliz. B. R. *West* and *Lassel*'s Case. *Cro.* 3 Par. 851.

Assent.

1. THE Case was, Two Incumbents were of the Church of B. in the County of C. One sued the other in the Spiritual Court, to deprive him for not reading the Articles, and giving his Assent to them, according to the Statute of 13 Eliz. The Libel being, If he gave his Assent: The Jury found, That he read the Articles, and said, I give my consent unto them so far forth as they agree with the word of God: It was adjudged in that Case, That it was not such an unfeigned Consent as the Statute intended; but it ought to be a Consent without Condition. Mich. 34 Eliz. B. R. *Smith* and *Clerk*'s Case in a Prohibition. *Cro.* 3 Part, 252.

2. In Trespass, the Case was, A Lease for years by several Leases, some of them in the Diocess of York, some in another Peculiar within the same Diocess, devised all those Leases to his Son, and made his Daughter within Age his Executrix. The Mother took Letters of Administration *durante minori ætate* of the Executrix, on the Peculiar where the Testator dyed: The Administration granted

granted this Term *durante minori ætate* of the Executrix to the Plaintiff. It was moved as a Queſtion in this Caſe (amongſt other Points), Whether the Aſſent of an Adminiſtrator *durante minori ætate*, to the Deviſe of a Term, or the Aſſent of the Executor himſelf, during his minority, to ſuch a Deviſe, be good. *Anderſon*, Chief Juſtice, ſaid, That an Executor at the Age of 18 years may aſſent: But whether the Aſſent by ſuch an Adminiſtrator be good, the Court doubted. *Idem Quære.* Hill. 41 Eliz. in C. B. *Price* and *Simſon*'s Caſe. *Cro.* 3 Part, 719.

Aſſignments.

ASſumpſit: The Plaintiff declared in conſideration he by his Servant had delivered to the Defendant two Bills of Debt of 300 French Crowns, amounting to 81 l. to be received at *Rouen* in *Normandy* to his own Uſe; the Defendant promiſed to pay him 60 l. It being found for the Plaintiff, it was alledged, 1. That here was no conſideration, becauſe it is not alledged for what the money contained in the Bill was due; and 2. That the buying of this Debt was Maintenance. The Court held, That the conſideration was not well alledged for the Cauſe aforeſaid; but for the ſecond, they held it was not maintenance; becauſe it is uſuall amongſt Merchants to make Exchange of Monies by Bills of Debt. Hill. 32 Eliz. B. R. *Peſon* and *Hubbard*'s Caſe. *Cro.* 3 Part, 155. & 170.

2. In an Information for cutting down of Trees, the Caſe was, A. and others were poſſeſſed of Trees by Grant of the Owner of the Land, A. in ſatisfaction of a Debt which he did owe to the Queen by Deed enrolled, aſſigned to her all the Trees: It was ſaid in this Caſe, Where the Queen comes to an entire thing by Act in Law, ſhe by her Prerogative ſhall have the whole, but where ſhe claimeth to have part of a *Chattel* by the Grant of a common perſon, there the Queen ſhall not have the Prerogative to have all: The Court delivered no Opinion, but yet ſaid, it was a ſtrong Caſe againſt the Defendant. Mich. 33 & 34 Eliz. B. R. The Queen and *Fairclough*'s Caſe. *Cro.* 3 Part, 265.

3. A Termor being Outlawed of Felony granted his Term and Intereſt to J. S. who is put out by J. D. And after, the Outlawry is reverſed, and J. S. brought Treſpaſs for the profits taken between the Outlawry and the Reverſal of it. The Queſtion was, If the Action did lye; for that during that time the Queen had the Intereſt: It was adjudged for J. S. the Plaintiff, becauſe that by the Reverſal it is as if no Outlawry had been, and there is no Record of it. Hill. 34 Eliz. in the Exchequer. *Ognel*'s Caſe. *Cro.* 3 Part, 270.

4. Note, It was holden, upon an Evidence given in Court, That if Leſſee for years of a Term of the Queen be ouſted by a Stranger, that although he be put out of poſſeſſion, yet he may aſſign over his Term; for that the Reverſion being in the Queen, he cannot be put out of poſſeſſion but at his Pleaſure. Hill. 34 Eliz. C. B. *Wingate* and *Mirk*'s Caſe. *Cro.* 3 Part, 275.

5. It was holden by the Barons in the Exchequer, That a Duty which is not naturally a Debt, but by Circumſtances only, as Debt upon a Bond for performance of Covenants, or to ſave harmleſs, may be aſſigned over to the Queen for a Debt; but in ſuch Caſe a preſent Extent ſhall not iſſue, but a *Scire facias* ſhall iſſue forth, to know if the party hath any thing to plead againſt ſuch Aſſignment. Trin. 29 Eliz. in the Exchequer. *Bennet*'s Caſe. *Lev.* 2 Part, 55.

6. In *Ejectione firmæ* the Caſe was, A. ſeiſed of Land by Indenture, between him of the one part, and one F. his Wife and Children between them begotten, at the Aſſignment of the Husband, of the other part, lett the Land to the ſaid Husband and Wife, and their Children, at the Aſſignment of the Husband, for years, they having at the time of the Leaſe but one Child, *ſcil.* a Son. Afterwards they had many Children, the Wife dyed; The Husband by his Will aſſigned the ſecond Son, born after the making of the Leaſe, to have the reſidue of the Term: It was the Opinion of the Court, That nothing could come to the ſecond Son by that Leaſe, or by that Aſſignment; for that if the Intereſt doth not paſs at the beginning, it ſhall never paſs and veſt. It was then moved, if theſe words [at the Aſſignment of the Husband] ſhould be void, and then the Caſe is no more but Land is deviſed to the Father and Mother, and their Children: But the Opinion of the Court was, That theſe words were not void, but ſhew what perſon ſhould take, *ſcil.* he who the Father ſhall aſſign, that is part of the Contract; and although by ſuch Aſſignment no Title accrues to the Child aſſigned, yet without Aſſignment no Child is capable; for by the Leaſe the Father hath ſuch Liberty, that he may aſſign what Child he will; and it was ſaid by *Wray* Chief Juſtice, if the words of the Leaſe had been (at the Aſſignment of the Father within one Month), and the Father ſurceaſe his Month, the Intereſt ſhould not veſt in any of the Children. Paſc. 26 Eliz. B. R. *Cole* and *Friendſhip*'s Caſe. *Lev.* 1 Part, 287.

7. Note,

7. Note, It was said, That it was adjudged in *Holstenda's* Case, That if a man make a Lease for years of Land, excepting the Wood, and afterwards the Lessor grants the Trees to the Lessee, and the Lessee assigns over the Lands unto another, not making any mention of the Trees, that in that Case the Trees shall not pass to the Assignee, as annexed to the Land; for the Trees and Lands are not conjoyned, for the Lessee had several Interests in them by several Grants. Hill.43 Eliz.B.R. *Goldsbr.*188.

Assets.

1. DEbt against an Executor to J. S. upon fully administred, pleaded: It was found, That J. S. made the Defendant, being within Age, his Executor; the Ordinary committed Administration *durante minori ætate*, who had Assets in their hands when the Executor came of full Age: The Defendant at his full Age proved the Will, and afterwards released to the Administrators all Actions. It was Resolved, That the money released was Assets in the Executors hands, the monies being certain and lyable to the Payment of the Testators Debts. Mich.29 Eliz. in C.B. *Brightman* and *Keighly's* Case. *Cro.* 3 Part, 43. See *Godb.* 29. acc.

2. Assumpsit against an Executor upon a Promise of the Testator: In the Declaration, it was not averred that he had Assets to pay Debts; Yet it was adjudged, That the Declaration was good, and the Plaintiff recovered. Trin. 29 Eliz. B.R. *Cottington* and *Hulet's* Case. *Cro.* 3 Part, 59.

3. Note, It was Resolved by the Court, That a Promise of an Executor to pay a Debt is binding, if he hath Assets. Hill.30 Eliz.B.R. *Trevinion* and *Howell's* Case. *Cro.* 3 Part, 91.

4. Debt against one as Executor of A. the Case was, A. made E. his Executrix, and dyed possessed of divers Goods: E. made a fraudulent Gift of the Goods to J. S. and continued the Possession of them, and took the Defendant to Husband and dyed; the Defendant possessed of the Goods paid Legacies, If those Goods should be Assets in his hands was the Question: It was the Opinion of the Justices, That they were Assets in his hands, and lyable to the Plaintiffs Execution, and it was further said, That if the Gift were good against all but Creditors (as it is), there they belong to the Donee, and in his hands are lyable to the Plaintiffs Debt; and if the Gift be void, yet they remain to the Executors of E. the Wife, and then the Husband having taken them and paid Legacies, he is chargeable by reason thereof, as Executor of his own wrong; and so those Goods quasi *bona data* lyable to the Plaintiffs Debt. Trin.37 Eliz. B. R. *Wilcocks* and *Master's* Case. *Cro.* 3 Part, 405.

5. *Scire facias* against the Defendant as Executor of E. V. Upon a Judgment against the Testator of 200 l. It was found, That the Testator was possessed of divers Goods, to the value of 150 l. and by Covin to defraud his Creditors made a Gift of his Goods to his Daughter, with Condition upon Payment of 20 s. it should be void, and dyed: The Defendant inter-meddled with the Goods, afterwards the Daughter by the Gift took the Goods, after that Administration of the Goods was committed to the Defendant. It was adjudged against the Defendant; for when he medled with the Intestates Goods, although he was neither Executor nor Administrator, and after an Administration is committed unto him, a Creditor hath Election to charge him as Executor or Administrator; and this Gift in it self by the Covin is fraudulent, and within the Statute of 13 Eliz. and the Intestate dyed possessed of them; and when the Donee afterwards took them, it was a Trespass against the Administrator, for which he had his Remedy at Law, and so they are Assets in the Defendants hands. Hil. 43 Eliz. C. B. *Bethel* and *Stanlay's* Case. *Cro.* 3 Part, 810.

Attachment, and *Attachment by Custom.*

1. NOte, It was said by the Court, That it was adjudged, That a Debt upon a Record by Recovery, or otherwise cannot be attached by the Custom of the City of *London*. Mich. 29 Eliz. B.R. Sir *John Zouch's* Case. *Cro.* 3 Part, 63.

2. Debt upon an Obligation of 200 Marks: The Condition was, That if he paid 50 l. the Bond should be void; the Defendant pleads tender at the day, upon which they were at Issue: Afterwards the Defendant pleaded, that after the Dayes continuance the 100 Marks were attached in his hands in *London* at the Suit of &c. The Court was in doubt, If any such Attachment had been allowed, depending a Suit here or in Com. B. But they held

held, that the Attachment of the 100 Marks (if attachable) was well enough; for it is always to be intended in that manner, and that such Attachment might be after the Day in Continuance. Tr. 32 Eliz. B. R. *Pell* and *Pell's* Case. *Cro.* 3 Part, 101.

3. Note, That in Debt it was holden by the whole Court. That a foreign Attachment cannot be of a Debt before it is due; and therefore wherein it was endebted in a Sum of Money, to be paid at *Michaelmas*, and it was attached before *Michaelmas*, but the Judgment of the Attachment was not till after *Michaelmas*: It was clearly held to be void, because it was attached. Trinit. 32 Eliz. B. R. *Dalton* and *Selly's* Case. *Cro.* 3 Part, 184.

4. In Trespass, for taking of a Dyer's Fats; It was found, That the Sheriff upon an Action against the Plaintiff, attached it, being fastned to the Wall of the Houses and delivered it to the Defendant: It was Resolved by the Court, That it could not be attached in regard it is fixed to the Land and Wall; and a Difference was taken then, That a Furnace fixed *in medio domûs* is but a Chattel, and removable, but otherwise it is if it be fixed to Walls. Hil. 37 Eliz. B. R. *Day* and *Robinson's* Case. *Cro.* 3 Part, 374.

5. In Trover the Defendant shewed, That he was Bailiff of the Manour of D. of which Manour the King was seised, and a Plaint was entred by J. S. against the Plaintiff, and Process came to the Defendant, Bailiff of the Manour, to distrein the Plaintiff to be at the next Court to answer the Plaint; by force of which he distrained the Plaintiff by the Goods whereof because he did not come and appear in the said Court, and the Goods were forfeited to the King, upon which it was demurred: It was adjudged for the Plaintiff, for that in a Court Baron no Goods can be forfeited for want of appearance upon a Distress, for the Distress is but in the Nature of a Pledg to be safely kept; and in a Court Baron, Distress infinite lyeth and not Attachment: And the Opinion of the Court was, That this enter-medling with the Goods was a Conversion, and that the Action did lye. Mich. 8 Jac. B. R. *Gomersall* and *Medgate's* Case. *Telverton*, 194.

Attornment.

1. THE Case was, Conusee of a Fine of a Reversion, before Attornment ousts the Lessee, and makes a Feoffment; the Lessee re-enters, and the Feoffee distrains for the Rent: It was holden by the Justices, That he could not distrein no more than the Feoffor himself before Attornment. Pasch. 33 Eliz. B. R. *Offley* and *Batt's* Case. *Cro.* 3 Part, 264.

2. A. having a Rent-Charge in Fee by Indenture for a certain Sum of Money, grants, grauntz, and selleth the Rent to H. in Fee, the Deed was enrolled within six Months: It was Resolved, That the Rent did not pass, being only by way of Grant, and not by Bargain and Sale, although the Deed was enrolled. But *Wray*, Chief Justice, said, That if by Indenture in consideration of a certain Sum of Money *Dedit & Concessit*, and the Deed is enrolled; this shall pass the Rent without Attornment, though there be no words of Bargain and Sale, Mich. 32 Eliz. B. R. *Taylor* and *Yates* Case. *Cro.* 2 Part, 165.

3. In second Deliverance, the Case was, A woman made a Lease for life, and afterwards granted the Reversion for 1000 years, and before Attornment she took J. S. to Husband, and afterwards the Tenant attorned to the Grantee: It was Resolved in this Case, That Attornment came too late. Mich. 34 Eliz. B. R. *Jones* and *Philips* Case. *Cro.* 3 Part, 270.

4. The Case was, Lessee for life, the Reversion to two Coparceners; one of the Coparceners made a Lease for years of the whole, rendring 10 l. *per annum* to the Woman Lessee for life, and afterwards 10 l. to the said Coparcener. The Woman and the two Coparceners joyn in a Fine *sur Conusans de droit* to two Strangers, which was to the Use of F. the Husband of the Coparcener that joyned in the Lease. Two Questions in the Case, 1. If he in the Reversion levyeth a Fine to the Use of himself, if Attornment be necessary. Resolved, That it was not, because he is in the Nature of 27 H. 8. 2. If this joyning in the Fine by Tenant for life with the Reversioner, the Estate for life be surrendred, and the Rent extinct. The Court doubted of it, but inclined, That it was not, for that every one granted what in him lay. T. in. 34 Eliz. C. B. *Farrer* and *Johnson's* Case. *Cro.* 3 Part, 284.

5. In a Replevin, The Case upon Demurrer was, A man made a Lease for years, and afterwards levyed a Fine of the Reversion to J. S. who before Attornment entred and made a Feoffment; the Feoffee Re-entred; and, for Rent behind after the Feoffment, and Re entry, the Defendant did avow: And it was the Opinion of the Court, that the Avowry was not good, for want of an Attornment. Pasc. 33 Eliz. C. B. *Rich* and *Offly*'s Case. *Cro.* 3 Part, 354.

6. Note, It was agreed by the Justices, That by the Feoffment of a Mannor the Services pass not without an express Attornment; but they said, It shall be well intended that they did pass in the pleading if the contrary be not shewed. Tr. 37 Eliz. B. R. Sir *Humphrey Ferrers* and *Wigsall*'s Case. *Cro.* 3 Part, 400.

7. In a Replevin, the Case was, J. S. seised of a Rent in Fee, levyed a Fine thereof to the Use of another. The *Cestuy que use* without Attornment avowed, and set forth in his Avowry, That J. S. who was the Grantor, was seised of the Rent, and there he and all his Auncestors had used to distrein for the Rent in the said Land. Two Questions, 1. If the Avowry of *Cestuy que use* without Attornment was good. Resolved, that it was. 2. If the Avowry upon the Prescription as layed, be good. Resolved, That it was not good; for that the Prescription ought to have been laid in the Rent, and not in the Distress. Pasch. 41 Eliz. C. B. *Stephens* and *Lewis*'s Case. *Cro.* 3 Part, 673.

Audita Querela.

1. A Being in Execution, was suffered to go at large, and afterwards he was taken again in Execution; whereupon he brought his *Audita Querela*, and whilst he was at large, he paid the monies which he proved by Witnesses sworn; whereupon it was adjudged, that the *Audita Querela* did well lye. Mich. 27 Eliz. C. B. *Cro.* 3. Part, *Reynell*'s Case.

2. An Estate within age acknowledged a Statute, and thereupon brought an *Audita Querela*; and the Question was, if the Suit might be in B. R, or whether it ought to be in the Chancery. It was Resolved by the Justices, That the Suit might be in the Common-Pleas and Kings Bench, as well as in the Chancery; and another matter was moved in the Case, which was, That in the Record the Infancy of the Enfant was not mentioned: The Preignorhories said, That the Entry is, *Quod venit in propria persona*, and prayeth an Inspection, and the Court would advise of his age. The Court doubted of it, and would advise. Mich. 33 Eliz. C. B. *Clarell* and *Molloy*'s Case. *Cro.* 3 Part, 208.

3. *Audita Querela* was brought, for that the Consulee upon a Statute Staple had purchased part of the Land, and the Plaintiff had purchased another part; and yet had caused the Plaintiffs Land to be extended and delivered in Execution; It was Resolved by the Court, To be a good Cause to have an *Audita Querela*; The Question further was, That though the Land was extended, yet they were not delivered by *Liberate*, and a *Supersedeas* prayed; but the Court doubted, whether they could grant it, because it was not returnable in the Court, being upon a Statute-Staple; But it said it was agreed, That it might, and a *Supersedeas* was awarded. Mich. 37 Eliz. C. B. *Gerrard* and Sir *Thos Gerrard*'s Case. *Cro.* 3. Part, 364.

4. *Audita Querela* was brought, because Execution was sued upon a Statute, acknowledged in the City of *London*, as a Statute-Merchant, which had but one Seal, whereas it ought to have two Seals, according to the Statute *de Mercatoribus*, 13 E. 1. upon which being at Issue, it was tryed for the Plaintiff by a Jury in *London*: In stay of Judgment, it was said, That the Tryal ought to have been by Certificate of the Mayor, and not by the Country. But the Court held the contrary, because it is matter of Fact, and no parcell of the Record. It was Objected, That upon this matter Error lay, and not *Audita Querela*: But it was holden by the Court, That where a Statute is consciously acknowledged, as here, no Writ of Error lyeth, but an *Audita Querela*, for that is no Record; But if it be well acknowledged and removed hither, and Execution is here erroneously, here Error lyeth, and not *Audita Querela*. Pasch. 33 Eliz. C. B. *Alsie* and *Fulsmb*'s Case. *Cro.* 3. Part, 333. See *Cro.* 3 Part, Pasch. 36 Eliz. B. R. *Fulgam* and *Ascue*'s Case. acc.

5. *Audita Querela*, to avoid an Execution of 500 l. and surmised, that the 500 l. was paid to Sir *John Hawkin*'s after the Judgment, in discharge of the Judgment. Whereupon a *Scire facias* was awarded, and the Sheriff returned, That Sir *John Hawkins* was dead; Thereupon it was summoned to the Court. That his wife was his Executrix, and a *Scire facias* was awarded against her, grounded upon this *Audita Querela*, who appeared and pretended, That the said 500 l. was not paid in discharge of the Judgment; Upon which being at Issue, It was found, That *ille* 500 l. *fuerunt soluta* by J. S. to the said Sir *John Hawkins* to have the Judgment assigned over to him: It was the Opin-

pion of the Court in this Caſe, That when the Jury found *Quod ille* 500 l. *ſolute fuerunt*, it was ſufficient for the Plaintiffs Iſſue, and that the reſt was but *Surplufage*, and that the *Audita Querela* did well lye upon this matter of Fact to diſcharge the Execution; and although it is found, that a Stranger paid the money; yet when it is found, that *ſolute fuerunt*, it is intended to be the ſame ſum for which the Judgment was obtained. In this Caſe, It was ſaid, That this *Audita Querela* was an Original out of the Chancery, and, the party being dead, The *Scire facias* thereupon awarded againſt the wife was void without any warrant. It was the Opinion of the Juſtices, That becauſe it was an Original awarded out of the Chancery, and the party is returned *Mortuus*, that the ſaid Writ ſhould abate, and a new *Audita Querela* ſhould be purſued; and the party thereupon was Bayled. Mich. 40 Eliz. B. R. *Mathu's* and Sir John *Hawkin's* Caſe. Cro. 3. Part, 634, 635.

6. *Audita Querela*, to avoid Execution upon a Statute; It was found, that the Father was ſeiſed of Lands in F. E. and tryed a Fine to the uſe of himſelf for Life, and after of part of the Land to the Plaintiff in tail, and of the Reſidue to the Conuſee in Fee, and dyed; and becauſe the Conuſee after ſued Execution, the *Audita Querela* was brought; It was the Opinion in this Caſe, That this purchaſe in his name was a ſufficient diſcharge of the Statute. Mich. 40 Eliz. C. B. *Humphry* and *Harringer's* Caſe. Cro. 3. Part, 716.

7. A. ſuffered a Recognizance of 2000 l. to H and after entred into a Statute of 1000 l. to D: D. extended his Statute upon the Manour of D, which was A, he alſo having divers other Lands. Afterwards H. ſued Execution of his Recognizance, and had the moyety of the Manour of D. firſt deliverd to D. in Execution, but omitted diverſe other Lands out his extent, which were *A. tempore Recognitionis*. D. thereupon brought *Audita Querela* againſt H. in C.B. and had Judgment. Whereupon Error was brought in B. R. and the Judgment was affirmed: For D. being in by Judgment, and upon a title by the extent upon the Statute, ought to have his Land lyable to the Extent upon the Recognizance, but *pro rata*; and therefore H. ought to have included all the other Lands of A. in his Execution, as well as the Lands of D: But if D. had not been in by title, but by ſome other Tortious means, then he ought not to have any Releaſe by *Audita Querela*. Mich. 44 Eliz. B. R. *Hood* and *Dean's* Caſe. *Yelverton* 12.

8. R. Enfant, entred a Recognizance to W, and within age brought *Audita Querela* in C. B, and upon Inſpection he was adjudged within age, and had a *Scire facias* againſt W; And it appeared upon the Record, upon one *Nihil* returned Judgment was, that the Recognizance ſhould be cancelled; And thereupon Error was brought, and aſſigned for Error, that there ought to have been two *Nihils* returned; and upon that, the Judgment was reverſed. Now the Enfant at full age brought another *Audita Querela* in B. R. containing the whole matter aforeſaid, and ſhewed, that the firſt Judgment was reverſed for the Errors in the proceedings only, and not in the principal matter; upon which it was demurred. It was adjudged, That the ſecond *Audita Querela* did not lye; for that the Judgment in the firſt is general, and not for any ſpecial Cauſe, but that the party ſhould be reſtored to all that he loſt by the Judgment, and ſo the Recognizance ſtood on foot again; And the Court ſaid, That the Inſpection was but an Award only, and was not in force, but in that Court where the Judgment was; and did not conclude the Judges of this Court, but that they ought to have a Re-inſpection, which now cannot be in this Caſe, becauſe the Enfant is now of full age. Paſch. 4 Jac. B. R. *Randall* and *Wale's* Caſe. *Yelverton* 88.

9. M. was Bail for J. S. in Debt brought by T, Judgment paſſed againſt J. S; and upon a ſecond *Scire facias*, *Nihil* returned againſt M. Judgment was given againſt him. It was moved for *Audita Querela*, becauſe M. the Bail was yet within age: It was Objected, That he ought firſt to have a Writ of Error to reverſe the firſt Judgment; for that during the Judgment in force, the Recognizance is affirmed. To that it was anſwered, That here M. ſhould be at a great miſchief, if he could not have *Audita Querela*; for it might be, that, there was no Error in the Judgment; and upon the *Scire facias*, the Bail could not plead the Enfancy, but yet the Error of the Enfancy doth remain. Afterwards the Writ of *Audita Querela* was allowed *de bene eſſe*; For it was ſaid, That to deny it, if it did lye by the Law, was Injuſtice. Trin. 7 Jac. B. R. *Markham* and *Tirrel's* Caſe. *Yelverton* 155.

10. In Error and Converſion after Verdict, and before the day in Bank, the Defendant pleaded, That the Plaintiff who brought the Action as Adminiſtrator; his Letters of Adminiſtration were revoked in the Spiritual Court, *per ſententiam Curiæ ſuperiorem*: It was the Opinion of the Court, That it was no Plea; but that upon ſuch caſe, the Defendant ought to be helped by an *Audita Querela* brought upon the Letters Patents of Adminiſtration and not by ſuch Plea. Paſch. 6 Jac. B. R. *Kett* and *Life's* Caſe. *Yelverton* 125.

11. Upon a Demurrer, the Caſe was, B. having recovered in Debt in C. B, Error was brought; and, whilſt it was depending, he acknowledged a Statute, and dyed; Adminiſtration was

committed to the Defendant, who brought a new Writ of Error, and whilst it was depending, Execution was sued upon the Statute; and after Error, the Judgment affirmed in a *Scire facias* upon that Judgment: The Defendant pleaded all this matter, and at the day of this *Scire facias* brought, he had not *alia bona*, than those Goods delivered to the Conusee, upon which the Plaintiff demurred; It was said, That *Audita Querela* is because the Statute happened not to be put in Execution against the Administration. And if he will not sue it, it is his own default, and he shall be charged; and it is clear, the Execution upon the Judgment ought to be before the Execution upon the Statute. On the other side, It was said, That *Audita Querela* lies not because the Conusee hath not done any Action to discharge the Execution. This Case Mich. 45 Eliz. was moved again, and then *Popham*, Chief Justice said, That he had conferred with all the Justices at Serjeants Inn, and that the greater part of them held the Plea to be good, and that the satisfying of the Debt upon the Statute was not any divestment, because he could not withstand it, and he could not be put to his *Audita Querela*: It was adjudged for the Defendant. Hill. 42 Eliz. B. R. *Barblich* and *Read*'s Case. *Cro.* 3. Part, 734. 822.

12. M. B. brought a *Scire facias* in Chancery, returnable there in nature of *Audita Querela*, and shewed, that Sir *William B.* was seised of a Capitall Messuage, with the Appurtenances in B, in the County of *Durham* in Fee, and also of the Mannor of T, and other Lands; and that the said Sir *William B.* acknowledged a Statute of 400 l. to R. M, and that the said Capital Messuage was extended only (the other Lands being omitted), and he paid the release, to avoid the Execution, and Issue was joyned. If Sir *William B.* was seised of the Mannor of T. at the day of the ackrowledgment of that Statute; And it was found, That he was. It was moved in this Case, If a *Scire facias* did lye, or an *Audita Querela*. 1. If the Writ was sufficient, because the Plaintiff desired to be restored to the mean Profits, and it doth not appear when he became Tenant; so as it was doubtful if he should have remedy or not. In this Case, It was Resolved by the Court, That a *Scire facias* did lye, or an *Audita Querela*. 2. That if the Plaintiff came in after the extent, that he should not have Release, for he ought to take Land as he found it. 3. That it shall be intended in this Case, That he was Tenant before the extent, because it is said, That it is *ad grave dampum & contra Legem terræ*. 4. In this Case, It was Resolved, That the Record ought to have been sent to *Durham* from the Kings Bench or Common-Pleas; and that it ought to come to them from the Chancery by *Mittimus*; and because that in this Case, It was first sent from the Chancery to *Durham*: The Judgment was reversed. Hill. 1 Car. B. R. *Blaxton*'s Case. See the Reports annexed to *Bendlowes* 161.

13. The Earl of *Lincoln* did Arrest *Wood* upon a *Capias*, upon a Statute-Merchant; *Wood* being in Execution, obtained in the Chancery an *Audita Querela*, and did put in Bail there, and had a *Supersedeas*, and was discharged of his Imprisonment; and the *Audita Querela* and Bail were sent into the Common-Pleas to be proceeded on: The Cause of the *Audita Querela* was grounded upon the performance of the Defeasance of the Statute; The Case concerning the Bailment of *Wood* was denied in the Court of Common-Pleas, If good or not; and it was the Opinion of the Court, that it was good, and so was allowed. Hill. 12 Jac. in C. B. The Earl of *Lincoln* and *Wood*'s Case. *Brownl.* 1. Part, 39.

Authority.

1. DEan and Chapter seised of a Manor, where the Custom was, that Copyholders might Surrender out of Court to the use of a Stranger in Fee, make J. S. their Steward *ad exequendum per se vel sufficientem deputatum suum*: J.S. makes A. his Deputy he was to take a Surrender of Husband and Wife, to the use of the Husband and Wife for their Lives, the Remainder over in Fee; and in the Deputation it further was, *Et ulterius ad faciendum et exigendum quæcunque in me est*. A. by force of the said Declaration, takes a Surrender from the Husband and Wife, upon Condition, That the Lord shall grant it to them for their Lives, the Remainder over in Fee, which is executed accordingly; the Husband and Wife dye, he in the Remainder enters: In this Case, It was agreed, 1. That the said Deputation was good. 2. That although the authority to take the Surrender was absolute, and A. took it upon Condition, yet it was good by the words, *Et ulterius ad faciendum, &c.* Trin. 28 Eliz. B.R. *Bardett*'s Case. *Cro.* 3. Part, 48.

2. Assumpsit. The Defendant was Arrested at the Plaintiffs Suit; and in Consideration, that he should be permitted to go at large, and that the Plaintiff would give his Warrant to the Bayliff that arrested him to suffer him to go at large, That he would appear at the day of the Return of the processe, and could give him 10 l. and for that, &c. Upon *Non Assumpsit*, found for the Plaintiff; It

It was moved, That this Assumpsit was void, being contrary to the Statute of 23 H. 6. But the Court held the promise to be good, being made to the party which had authority to dispense with his Appearance; contrary, if it had been made to the Sheriff, or to any other to persue. Mich. 33 Eliz. B. R. *Mibward* and *Clark*'s Case. *Cro.* 3. Part, 190.

3. The Case was, A. by his Will devised, That if *Eliz.* his Wife think good to bring up his Children, and to find them Meat, Drink, and Apparel; That then she shall have his Land, till his Son shall attain his age of 24 years, and dyeth: the Wife undertaketh the bringing up of the Children, and dyeth before the Son came to the age of 24 years. It was the Opinion of the Justices in this Case, That this was not a Confidence, or an Authority in the Wife, but an Interest tied with the Condition of bringing up of the Children; and if it should determine, the Children should be without remedy for their Education. See 4 Eliz. *Dyer* 210. Mich. 34 Eliz. B. R. *Smith* and *Hobes*'s Case. *Cro.* 3. Part, 252.

4. Assumpsit: The Case was, A *Capias* was directed to the Sheriff of N. to arrest the Defendant, The Sheriff made his Warrant to four, *& cuilibet eorum*, to arrest him: He was arrested by two of them, and in consideration that the Plaintiff would discharge him from that Arrest, he promised to pay so much to the Plaintiff, and shewed *in facto* that *exoneravit eum* from the said Arrest: After Verdict, and Judgment for the Plaintiff upon Error brought it was said, That the Arrest was not good, being made by two of them, because it was but an Authority which ought to be executed by them jointly, or by one only: But it was agreed by the Justices, That it was good; for being but an Authority to make an Arrest, and to execute a Warrant, it is not so strictly to be pursued as an Authority to make Livery is, whereby an Estate is conveyed. Hil. 45 Eliz. B. R. *King* and *Hobb*'s Case. *Cro.* 3 Part, 913, 914. *Yelverton*, 25. in the same Case.

5. A. seised in Fee of Lands, and a House lying in C. had Issue two Sons, and he made his Will in these words, viz. I give and bequeath my House to B. my Wife, to dispose at her Will and Pleasure, and to give it to which of my Sons she pleaseth, and dyed: The Wife entred and took to Husband J. S. and afterwards the Wife alone without her Husband, reciting the Devise, and the Power which she had by it, by Indenture enfeoffed the younger Son, and made Livery unto him. It was Resolved by all the Justices in this Case, upon open Argument in Court, That the Woman in this Case might notwithstanding the Coverture execute this Power which was given unto her. 2. It was Resolved, That upon the Execution of that Power to the Son, the Son was not in by the Feoffment or Fine, but by the Devise. Hill. 22 Jac. B. R. *Daniel* and *upjons* Case. *Latch*, 135, 139.

Averrment.

1. ASsumpsit: In consideration the Plaintiff had paid 40 l. to the Defendant for the Debt of J. S. the Defendant promised to deliver him all Bonds, *&c.* wherein J. S. stood bounden unto him. Upon *Non Assumpsit* pleaded, It was holden by the Court, That the Plaintiff needs not to aver, that the Defendant had any Bonds of J. S. and the reason is, for that he is not to recover the Bonds *&c.* but Damages; and so he needs not to set forth what the Bonds were. Pasch. 31 Eliz. B. R. *Musket* and *Cole*'s Case. *Cro.* 3 Part, 133.

2. Error was brought of a Judgment in a Court of Pypowder; the Error assigned was, That the Plaintiff in his Replication had not averred his Plea, nor in the end of it demanded his Debt and Damages, as he ought to have done; and for these Causes, it was the Rule of the Court, That Judgment should be reversed. Hil. 33 Eliz. B. R. *Penred* and *Chambers* Case. *Cro.* 3 Part, 256.

3. Error brought of a Judgment given in a *Precipe quod reddat*; The Error assigned was, because the Defendant was not summoned at the Church Door, according to the Statute of 36 Eliz. and by reason of his default, a Grand *Cape* was awarded, and Judgment given against him, and he lost his Land by default; and in truth, The Sheriff returned him summoned at the Church Door. The question was, If he should have this averrment, or should be put only to his Action upon the Case against the Sheriff: It was the Opinion of the Court, That for as much as it is of Record before them, That the party was summoned according to the Statute; They are bound to answer a Grand *Cape*, and no Error in them; and the Statute doth not intend to give any other remedy, then was at the Common Law for the Tenant: And the Court said, It is no reason, That this awarding of a Grand *Cape* upon the summons returned, and default recorded, should be said to be erronious in the Court. But the Court conceived, That the party might have a Writ of Decripe, if the Proclamations of summons was not according to the Statute. Trin. 37 Eliz. B. B. *Callett* and *Marshis*'s Case. *Cro.* 3. Part, 371. 397.

4. False

4. False Imprisonment in *London*, The Defendant pleaded a Recovery against the Plaintiff in *Sandwich* Court in *Kent*, and that by force of a *Capias ad satisfaciendum*; he imprisoned him at S. *absq; hoc*, that he is guilty at *London*. The Plaintiff by Replication said, That he imprisoned him in *London*, *absq; hoc*, *Quod habetur tale Recordum, Et hoc paratus est verificare per Recordum*. The Justices were divided in Opinion concerning the Averment. For *Gawdy* and *Fenner* held, That it is more contrary and repugnant to say, That there is not such Record, and that he would averr it by the same Record. *Popham* and *Clark*, although the Averment be void and repugnant in this Case. Yet the Plea here is good without an Averment; for it is a Plea in the Negative, and needs no other Averrment, but to say, *Et hoc petit quod inquisitum*, &c. And then the other shall say, *Habetur tale Recordum, & hoc paratus est verificare per Recordum*. And then the Defendant shall joyn with him, *Et prædict. Defendens similiter*, &c. Mich. 36 Eliz. B. R. *Paramour* and *Varrold*'s Case. *Cro.* 3. Part, 418, 419. See *Popham* Reports. 101. The same Case.

5. Error of a Judgment in C. B. in a Replevin; The Defendant avows for Rent, That H. M. was Tenant in Tail, and lett the Land for three lives, rendring Rent, and that the Reversion descended to him as Heir in tail; wherefore he averrs, and adds, That at the time of the Devise, *Et dimisit tenuram*, this Land was devised, &c. and that the Rent is *Verus & antiquus redditus*. Amongst other points in this Case, It was said and agreed, that the Averrment, That it was demised formerly, was not sufficient; but it ought to have been averred, That it had been so demised for eleven years at the least; also the averring, that this Rent was, *Verus & antiquus redditus* was not sufficient; For it may be, that it was the antient Rent, which was twenty or ten years since; but it ought to have been averred, That it was the antient Rent which had been received for the greater part of twenty years next, before the Lease made: For these Averrments might be true, and yet the Circumstances of the Statute not observed. Mich. 41 Eliz. B. R. *Mallett* and *Mallett*'s Case. *Cro.* 3. Part, 707, 708.

6. Error was brought upon a Fine; A Fine was taken by *Roger Manwood* Esquire, one of the Justices of the Common-Pleas, who was afterwards made a Knight, and one of the Barons of the Exchequer. Afterwards the party sued forth the Fine, and took a *Dedimus potestatem* to Sir *Roger Manwood* Knight, which was returned, *per Rogerum Manwood Militem*. This was assigned to be Error; but it was Resolved by the Court, To be no Error, because it is directly against the Record, which is nor sufferable nor recoverable; for it is Recorded as a Fine taken by him: And if such Errors and Averrments should be suffered, all Fines acknowledged by *Dedimus potestatem* might be avoided. Pasch. 1 Jac. B. R. *Arundell* and *Arundell*'s Case. *Yelverton* 33, 34. See *Cro.* 2. Part, 11. The same Case.

7. The Case was, J. S. Tenant in tail demised for twenty two years, rendring 10 l. Rent during the Term to the said J. S. and his Assignes, and the Defendant as Assignee of J. S. distrained, and did not averr the life of J. S; upon which the Plaintiff did demurr in Law. It was a question in this Case, That admit that the Rent did determine by the death of the Lessor; in this Case, the life of the Lessor ought to have been averred: It was the Opinion of the Court, That it ought not, for that ought to be shewed on the other side; and whereas it was excepted unto, That the Avowant did entitle himself to the Reversion, by a Fine levyed by the Lessor; but in his Avowry did not averr the same to be to his use. It was the Opinion of the Court, That he needed not so to do; for that the Law shall intend it to be to the use of the Conusee, till the contrary be shewed. Trin. 2 Car. B. R. *Coles* and *Sage*'s Case. See the Reports annexed to *Bridgman* 182, 183.

Avowry.

1. IN a Replevin the Defendant made Conusans, as Bayliff of J. S. For that one J. D. was seised of the Land whereof in Fee, and held the same of the said J. S. as of his Manor of E. by Fealty, and other Services; and for the Rent arrear, he made Conusans, as his Bayliff in those Lands holden: Exception was taken to his Conusans; For that he alledged, that J. D. held the Land, and afterwards avowed upon the Statute, which is not good; for when he meddles with the name of the person, so as he takes Conusans of him, he ought to avow upon him by the Common Law, and not upon the Law by the Statute: But the Court held the Avowry good enough. Pasch. 32 Eliz. B. R. *Lucy* and *Fisher*'s Case. *Co.* 3 Part, 146.

2. The Case in a Replevin was, A man and a woman being Joynt-tenants in Fee of a Manor, were married, and after levyed a Fine thereof to a Stranger, who rendred it to them in tail: They had Issue three Daughters, the Husband dyed; The wife took a second Husband, and they levyed a Fine, and took back the Land in special tail. The wife dyed with-

without Iſſue by the ſecond Husband, the Daughters enter; A Leſſee for Years of the ſecond Husband diſtrained a Copyholder, for his Rent-Fee, brought a Replevin, and the other avowed, and did not averr the life of the ſecond Husband. It was Reſolved in this Caſe, 1. That for that Caſe, The Avowry was not good. 2. It was moved, That an Avowry could not be made for a Rent of a Copy-holder in this Court; and it is like an *Ejectione firmæ*, which doth not lye for the Leſſee of a Copy-holder. But all the Court held the contrary, and ſaid, Here is a difference between the Caſes; For the *Ejectione firmæ* is brought for the Copy-hold it ſelf, but the Avowry is for Rent due to the Lord, which is a duty at the Common Law; and therefore an Avowry may be for it. Paſch. 39 Eliz. C. C. *Laughter* and *Humphrye*'s Caſe. *Cro.* 3. Part, 524.

3. In an Avowry, the Iſſue was, Whether the place where was the Free-hold of the Avowant, or not; It was found by Verdict, That it was the Free-hold of the Avowants Wife: It was the Opinion of the whole Court, That the Iſſue was found againſt the Avowant; for when he ſaith his Free-hold, it ſhall be intended his ſole Free-hold, and in his own Right. Mich. 39 Eliz. C. B. *Bancy* and *Walker*'s Caſe. *Cro.* 3. Part, 524.

4. In a Replevin, The Defendant made Conuſans for Damage-Feaſant, as Bayliff of A; And ſhewed, That B. was ſeiſed of the Land, and held it in *Capite*, and deviſed it to A; and becauſe it appeared, That A. was but Tenant in Common with the Heir, exception was taken to the Conuſans: It was ſaid, That Tenants in Common ought to joyn in Avowry; and the Conuſans ought to be in both their names. But the Court held the contrary; for a Tenant in Common may ſolely defend, and he only may take a Diſtreſſe, although his avowry be by way of Action, and may juſtify it; but becauſe in the principal Caſe, he did not ſhew in the Conuſance what eſtate the Deviſor had at the time of the Deviſe, It was adjudged for the Plaintiff. Paſch. 38 Eliz. C. B. *Wilks* and *Fletcher*'s Caſe. *Cro.* 3. Part, 530.

5. One having a Reverſion in Fee, expectant upon an Eſtate for life, deviſed a Rent of 4 l. to one for life; the Tenant in Fee dyed, and after ſeven years encurred, the Deviſee made his Executors, and dyed; the Executors diſtrained, and avowed for that Rent: It was demurred, becauſe he doth not averr, that the Lord remained in the Seiſin of Tenant, who ought to pay it, or in ſome other who claims by him by purchaſe or diſcent: It was held to be a good Exception by the Court. 2. Becauſe he did not averr, that the arrearages encurred after the death of the Tenant for life: For if he in the Reverſion grant a Rent-Charge, it ſhall not begin untill after the death of Tenant for Life. But in the principal Caſe, becauſe it appears upon the view of the Record, that it was levyed, that the Heir of the Deviſee was ſeiſed in Fee, *Et adhuc ſeiſitus exiſtit*, It was held good enough, and adjudged for the Avowant. Hill. 39 Eliz. C. B. *Myles* and *Willoughby*'s Caſe. *Cro.* 3. Part, 547.

6. In a Replevin, the Caſe was upon a Demurrer; A man made a Leaſe for years, and afterwards he levyed a Fine of the Reverſion to J. S, who before attornment, entred and made a Feoffment; the Feoffee Re-entred, and for that Rent behind, after the Feoffment and re-entry, the Defendant did avow. In that Caſe, It was the Opinion of the whole Court, That the Avowry was not good, for want of Attornment. Paſch. 33 Eliz. C. B. *Bach* and *Guſtye*'s Caſe. *Cro.* 3. Part, 354.

7. Replevin; The Defendant made Conuſans, as Bayliff to one J. S, for Rent reſerved upon a Bargain & Sale of Land by Indenture enrolled, upon which it was demurred: It was Objected, That nothing paſſed by the Indenture, but the Uſe; and how might then a Rent be reſerved thereupon? It was ſaid by the Court, That at the Common Law ſuch a Reſervation had been void. But now the Bargainor hath the Rent by the Statute of Uſes; and therefore the whole Court agreed, That the Reſervation was good in this Caſe; and ſo it was ſaid, It was adjudged in *Dauhie*'s Caſe, and Judgment was given for the Avowant. Mich. 40 Eliz. C. B. *Wykes* and *Tyllerd*'s Caſe. *Cro.* 3. Part, 595.

8. Replevin; The Defendant avowed for a Rent-Charge as Executor, and the Grant of the Rent to the Teſtator for forty years, with a Clauſe of Diſtreſſe in the Deed, That the Grantee and his Heirs might diſtrain for the Rent during the Term. It was the Opinion of the Court, That the Executor ſhould have the Rent, and diſtrein for it, and not the Heir; Adjudged for the Avowant. Mich. 40 Eliz. C. B. *Dovel* and *Wilſon*'s Caſe. *Cro.* 3. Part, 644.

9. In a Replevin, the Defendant avowed for a Rent Charge deviſed unto him; but in his Avowry, he did alledge, that the Land was holden in Socage: And for that cauſe, It was holden, That the Avowry was inſufficient; and ſo it was ſaid, It was adjudged in this Court in *Trevillian*'s Caſe. Mich. 41 Eliz. C. B. *Merryweather* and *Stanton*'s Caſe. *Cro.* 3. Part, 669.

10. In Replevin; The Defendant made Conuſans, as Bayliff to J. S, for 10 s. for an Amerc'ment, 20 s. for a Rent, and 10 s. for a Relief; Quoad the Relief, the Plaintiff demurred, and ſaid, That the

the Tenant dyed ſeiſed, and that the ſaid Land deſcended to two Daughters, who together with Husbands enfeoffed the Plaintiff; and that the Lord knowing of that Feoffment, had accepted of the Rent from the Plaintiff at ſuch a Feaſt; and ſo demanded Judgment, If now he ſhould have a Relief: It was the Opinion of the Court, That the Barr for the Relief was inſufficient, and that the acceptance of the Rent was not any Concluſion to have the Relief; becauſe the Relief is not any Service, but as a fruit incident and adhering to the Services; and ſo for that the Avowry was good. Mich. 44 Eliz. C. B. *Parham* and *Norton*'s Caſe. *Cro.* 3. Part, 885.

11. In Replevin; The Defendant avowed, That A. was ſeiſed in Fee of a Houſe in D, and of divers Lands in D, whereof the place where, is parcell to the ſame appertaining: Exception was taken to the Avowry, becauſe he pleads, That A. was ſeiſed in Fee of a Houſe and Land thereunto appertaining, which ought not to be in pleading: For Land properly cannot be ſaid to be appertaining to an Houſe, though it may paſſe by ſuch words in a Deed; but in pleading it ought not to be ſo alledged. It was the Opinion of the Court, That the Avowry for that cauſe was not good; and Judgment was entred for the Plaintiff. Hill. 45 Eliz. B. R. *Wilmott* and *Carn*'s Caſe. *Cro.* 3. Part, 919.

12. Replevin was brought by W. againſt M; Avowry was made for a Rent by the Leſſee of a Dean and Chapter: In which Caſe theſe Points were moved, 1. If an Executor, who hath the Reverſion of a Term, may make a Joynt Avowry for Arrearages encurred in his own time, and the time of the Teſtator: It was the clear Opinion of the Court, That he might, becauſe all is to the uſe of the Teſtator. 2. If it be a good Avowry, That a Dean and Chapter were ſeiſed, without ſaying in Fee, or *jure Eccleſiæ*; It was the Opinion of the Court, That all pleadings are in *jure Eccleſiæ*, yet they may hold for the life of another: The Point was not Reſolved, but the Caſe adjourned. Hill. 1 Car. in B. R. See the Reports annexed to *Bendlowes* Caſe 159.

13. T. was Plaintiff in Treſpaſs againſt M, for taking of his Cattel 15 *March*, 1 Car. The Defendant did avow by Authority and Warrant from the Commiſſioners of King *James* of *Sewers*; It was the Opinion of the Court, That the Avowry was not good; becauſe that the Commiſſion did determine by the Death of King *James*. Mich. 2 Car. *Thursby* and *Maſſy*'s Caſe. Reports annexed to *Bendlowes* 193.

14. Replevin by A. againſt W. P, and L, of a Houſe taken; W. avows, he others make Conuſans for a Joynt-arrear by A. to W, and found for the Defendants, and 2 d. damages given by the Jurors to all three Defendants, and Judgment given accordingly, That the three ſhall recover Dam. *ea ſua per juratores aſſiſæ*; and becauſe that P. and L. made Conuſans generally, and did make the ſame as Bayl iffs, not as Servants to W; and the Conuſans in it ſelf is a Title and Juſtification in the Right of another, and Damages are given to all three; and thoſe who made Conuſans, had not cauſe to recover any thing; for that cauſe the Judgment was Reverſed. Mich. 5 Jac. B. R. *Yelverton* 108.

15. In Treſpaſs for breaking of his Houſe, and taking and carrying away a Kettle; The Defendant pleaded, That the Houſe was parcell of a Yard-Land in P, and that it was holden of H. Earl of *Northumberland*, as of his Manor of W, by having a Fealty Eſcuage in certain Suit at Court, Incloſure of the Park pale, and the Rent of a pound of Cummyn; and for the Cummyn behind for three years, and for the Homage and Fealty of J. S. the Tenant; the Defendant as Servant to the Earl, and by his Commandment, juſtified the entry and taking. The Plaintiff Replyed, That it was holden of R. P, as of his Manor of L; without that it was holden of the Earl *Modo & forma*; upon which they were all at Iſſue, and the Jury found, That it was holden of the Earl, as of his Mannor of P, by Homage, Fealty, Incloſement of his park, Rent of a pound of Cummyn *et non aliter*. In this Caſe, It was adjudged for the Defendant; for although the Verdict doth not agree with the Plea in the manner and nature of the Tenure, yet it agrees in ſubſtance in the Point, for which the taking was, *ſcil.* that it was holden of the Earl, which is ſufficient. And the difference was taken between a Replevin and Treſpaſs; for in a Replevin, becauſe the Plaintiff is to have return by the Avowant (for the one is actor againſt the other); It behooves the Avowant to make his Title good *in omnibus*: but otherwiſe it is in Treſpaſs, for there he is but to excuſe the Treſpaſs; and therefore if there be any Tenure at all, it is ſufficient. Mich. 6 Jac. in C. B. *Goodman* and *Ayling*'s Caſe. *Yelv.* 148.

Bail.

1. A Man committed in Debt, rendred himself to the Court, and prayed, That his Sureties might be discharged. Thereupon the Plaintiff was demanded; For that the Court said, That he might elect either his Body, or to take his Goods in Execution; but by this offer his Surety and Bail were discharged. Mich. 25 Eliz. *Cro.* 3. Part. 22.

2. A *Scire facias* was brought against the Bail; They pleaded, That the Principal was dead the day of the Judgment given; The Court at first held it no Plea, because it goeth in avoyding of the Judgment; and proved it to be erronious, which cannot be avoyded, but by a Writ of Error brought. But they might plead, the death of the principal before the *Scire facias*, and after Judgment; for that then they could not bring in the Body. But ye afterwards the Plea was received as good, because they cannot have a Writ of Error to reverse the Judgment. Mich. 23 Eliz. B. R. *Warter* and *Perry*'s Case. *Cro.* 3. Part, 199.

3. In *Audita Querela*; The Case was, A. sued a Bill of Debt against B, who found his Bail, the Plaintiff, and another. Afterwards B. the principal was condemned in the Action, and dyed, without paying the Condemnation, or rendring his Body to Prison. Whereupon a *Scire facias* was sued forth against the Plaintiff his Bail, and upon two *Nihils* returned, Execution was awarded against him; whereupon he brought his *Audita Querela*. It was prayed, That the Bail might be discharged, for that it is now by the Act of God become impossible, for th Defendant to render his Body to pay the Condemnation; and there never was any *Capias* awarded against the Defendant in his lifetime: It was the Opinion of the whole Court. That it was very reasonable not to sue Execution against the Bail, unvill a default were returned in the Principal; and the Recognizance of the Bail is, That the Principal shall render himself, which is intended, upon Process awarded against him. But, no Process being awarded against him in his life-time, it is now impossible he should yield himself to Prison, being dead; and therefore the Bail is discharged, and so Judgment was given for the Plaintiff in the *Audita Querela*. Hill. 40 Eliz. B. R. *Hobs* and *Tedcastle*'s Case. *Cro.* 597. See *Gold sbr.* 175. The same Case. See Pasch. 1 Car. B. R. *Calfe* and *Biagler*'s Case. *Latch.* 149. acc.

4. In an *Ejectione firmæ* by *Gore* against *Parkhurst*; Bail was put in for the Defendant by the name of *Parkes*, but the Declaration and all the Proceedings was by the name of *Parkhurst*; After Verdict, this was alledged in stay of Judgment, and it was in this Case for this Cause, that the Plaintiff, *nihil capiat per billam*; for it doth not appear, that the Defendant, against whom Judgment is given, was in *Custodia Marischalli*; and if otherwise, the proceedings against him is *coram non judice*; and it cannot be intended the same person, nor amended: In this Case, It was said by the Court, That if the Bail be pulled off the Fyle, that the party is without remedy. Pasch. 33 Eliz. B. R. *Gore* and *Parkhurst*'s Case. *Cro.* 3. Part, 223.

5. Note; It was said by the Court, That Executors or Administrators shall not find speciall Bail in an Action brought against them for the Debt of the Testator, although that the Debt be of a very great sum, as 3000 l. or more, for that it is not their Debt, nor their Bodies shall not be lyable to Execution for it. Hill. 7 Jac. in C. B. *Brownlow* 2. Part, 293.

6. In an Action of Battery brought, the Defendant was Bail for A. and B. who afterwards was condemned, Error was thereupon brought in the Exchequer-Chamber, and the first Judgment was there affirmed, and other new Costs were given by the Justices in the Exchequer-Chamber; and the Record being remanded into the King's Bench, a *Scire facias* was prayed against the Bail, as well for the first Damages and Costs upon the first Judgment, as for the new Costs given in the Exchequer. It was the clear Opinion of the whole Court of B. R. That the Bail was not chargeable with these new Costs, for they take upon them to pay only the Condemnation of this Court, and not of any other Court. Mich. 40 Eliz. B. R. *Penwddlo* & and *Errington*'s Case. *Cro.* 3 Part, 589.

7. The Plaintiff recovered in an Action upon the Case upon Assumpsit, and took out a *Capias ad satisfaciendum* against the Principal, which being returned *Non est inventus*, he took forth a *Scire facias* against the Bail, who were also returned *Nihil*, but before that *Scire facias* awarded, the Sureties brought in the Principal, and prayed that he might render himself to prison in discharge of his Bail:

It was the Opinion of the Court, That the Principal ſhould be committed to the Marſhalſies in Execution, and that thereupon the Bail ſhould be diſcharged, which was done accordingly; and ſo they ſaid were the Preſidents of this Court. Mich. 40 Eliz. B. R. *Walmeſly* and *Havard*'s Caſe. *Cro.* 3 Part, 618. See Paſch. 29 Eliz. C. B. in *Fulwood* and *Fulwood*'s Caſe. *Leon.* 1 Part, 58. See *Lib.* 1. Title *Bail*, 305, 306. divers Preſidents to this purpoſe.

8. A *Capias* was awarded againſt one upon a Recovery in Debt; *Non eſt inventus* was returned, and a *Scire facias* was awarded againſt the Bail, which was returned *Nihil*: Upon a ſecond *Scire facias* againſt them, they brought in the Principal, and prayed he might be in Execution: It was ſaid by the Chief Clark of the Court, that the courſe of the Court was, That if the Bail upon the firſt *Scire facias* brought in the Body, it had been received. But the Court ordered it to be obſerved for a Rule, That a *Capias* be awarded Returnable at the next Sammons wherein *Nihil* is Returned: The Principal ſhall not after render his Body. But if it be awarded *de die in diem*, there if upon the firſt *Scire facias* the Bail bring in the Body, he ſhall be received, and that there ſhall be fifteen dayes between the *Teſte* and the *Scire facias*, ſo as he may have convenient time to ſeek the Principal. Hill. 42 Eliz. B. R. *Aliſon* and *Byſton*'s Caſe. *Cro.* 3 Part, 738.

9. Note, It was ſaid and agreed to be the Experience and common Courſe in the King's Bench, That in all Actions brought againſt a common perſon, upon any penal Statute, that the Defendant is to put in but common Bail, and not ſpecial Bail; and ſo it was ſaid it was adjudged in St. *George*'s Caſe, in an Action brought upon the Statute of 13 Eliz. of Fraudulent Conveyances: And ſo it was ſaid, If any Action was brought againſt an Executor, or Adminiſtrator, they ſhall put in but common Bail, becauſe they are to be charged only with the Goods of the Teſtator. See Mich. 2 Jac. B. R. St. *George*'s Caſe. *Yelverton*, 53. See 7 Jac. in C. B. *Brownl.* 2 Part, 293. Caſe 4. before, acc.

10. Aſſumpſit againſt B. in the Court of N. F. and J. S. was there Bail for B. A *Habeas Corpus* 19 *Junii*, 3 Jac. iſſued out of the King's Bench to appear before *Popham* Chief Juſtice, at *Norwich*: *Popham* took Bail at N. diſcharged the Sheriff of B. 20 *Julii*, a *Procedendo* was awarded to the Sheriff of N. they proceed and give Judgment there againſt B. Upon Error brought the Judgment is affirmed in B. R. and after Judgment and two *Nihils*, a *Scire facias* was brought againſt F. one of the Bails of B. It was adjudged in this Caſe, That F. was diſcharged from being Bail, for that by taking of Bail by *Popham*, the Bail in the Inferiour Court was abſolutely diſcharged, although it was not filed in the Court, for that could not be before the Term; and then, although a *Procedendo* iſſued, yet that not being delivered before the 20 of *July*, which was after the Bail taken by *Popham*, the Chief Juſtice, the Body of B. was diſcharged; and ſo was alſo F. his Bail, and his other Bail. Hill. 5 Jac. B. R. *Fernly* and *Farſet*'s Caſe. *Yelverton*, 120, 121.

11. See Trin. 7 Jac. B. R. *Markham* and *Turner*'s Caſe. Where and in what Caſe the Bail ſhall have *Audita Querela*, in Title *Audita Querela*, C.

12. In Debt, the Plaintiff was condemned, and the Plaintiff ſued a *Scire facias* againſt the Bail, who pleaded that the Defendant ſuch a day rendred himſelf to Priſon, who was committed to Priſon in diſcharge of his Bail: The Plaintiff replyed, That the Defendant, the Principal Debtor, was a Servant attending upon the Duke of L. a Lord of Parliament, and that it was fraudulently agreed between the Principal the Defendant, and the Bail, that the Bail ſhould render himſelf in time of Parliament, to the end the Bail might be diſcharged, and to procure a Writ of Priviledg of Parliament to be ſet at Liberty, which was done accordingly; upon which the Defendant demurred in Law. *Ley*, Chief Juſtice, ſaid, If the Defendant had become Servant to the Duke after the Condemnation, then the Covin had been apparent. *Dodd*, Juſtice, vouched *Sadleborn* and *Harriſon*'s Caſe in the Exchequer, which was, H. was arreſted in *London*, and put in Bail, and afterwards upon an *Habeas Corpus* was removed into the Exchequer, upon preference of a *Quo minus*, by which the Bail of H. in *London* was diſcharged. The Plaintiff brought an Action for this Fraud; and it was adjudged, That the Action did lye. The principal Caſe was adjourned. See Hill. 19 Jac. B. R. *Pinkback* and *Nun*'s Caſe. See the Reports annexed to *Bendlowes*, 105.

13. A *Latitat* was taken out againſt two, for conſpiring to endite one; they both being taken, one of them put in Bail to the Action in *Michaelmas* Term laſt; the other put in Bail this Term: It was prayed for the Plaintiff, That the Bail might be taken off the File in *Michaelmas* Term, and put upon the Bail-File of this Term, becauſe otherwiſe we cannot proceed in a joynt Action upon Bail put in, in ſeverall Terms by two; for if we ſhould, it would be Error: The Court gave a Rule, That it ſhould be done as was deſired. Mich. 2 Car. B. R. *Latch*, 183.

Bar-

Bargain and *Sale*.

1. ONe reciting by Indenture, That whereas J. S. was bound for him in a Recognizance, and other Bonds: Now, for divers conſiderations he bargained and ſold the Land to him and his Heirs, the Deed was enrolled within ſix Months, but it was not found that there was any Money paid. It was the Opinion of the Juſtices, That this was not any good Bargain and Sale, for that upon every Bargain and Sale there ought to be a *Quid pro quo*: But if there had been apt words in it, it would have been good by way of Covenant; for it was ſaid, If I give Land, or bargain and ſell my Land to my Son, go Uſe riſeth thereby: But it was a good conſideration to raiſe an Uſe by way of Covenant. Hill. 35 Eliz. C. B. *Ward* and *Lanchort*'s Caſe. *Cro.* 3 Part, 394.

2. A. having a Rent-Charge in Fee by Indenture enrolled within ſix Months; gave it to H. in Fee, and there was no Attornment: It was the Opinion of the Court, that the Rent without Attornment paſſed not being only by way of Grant, and not of Bargain and Sale, though the Deed was enrolled: But *Wray*, Chief Juſtice, ſaid, That if by Indenture, in conſideration of a certain Sum of Money, *Dedit & conceſſit*, and the Deed is enrolled; this ſhall paſs the Rent without Attornment, although there be no word of Bargain and Sale. Mich. 32 Eliz. B.R. *Tyler* and *Vale*'s Caſe. *Cro.* 3 Part, 166.

3. The Caſe was, Tenant in Tail bargained and ſold Lands in Fee, the Bargainee levyed a Fine with Proclamations, five years paſſed in the life of the Bargainee, and afterwards he dyed: It was Reſolved in this Caſe, That this Fine ſhould not barr the Iſſue in Tail, but that he have new five years after the death of his Father; for the Iſſue is within the ſaving of the Statute: But it was ſaid, That if the Tenant in Tail had been diſſeiſed, and the Diſſeiſor had levyed a Fine, and the Tenant in Tail had ſuffered five years to paſs without Claim, that ſhould have bound the Iſſue in Tail. Trin. 44 Eliz. in Court of Wards. *Penſton* and *Lyſter*'s Caſe. *Cro.* 3 Part, 896.

4. Tenant in Tail of Meſſuages in *London* bargained and ſold them to J. S. and delivered the Deed of the Land, 8 *Jan.* Indentures of Covenants were made to ſuffer a Common Recovery of the Meſſuages, in a Writ of Right in *London*, the 10th. of *Jan.* the ſame year, Tenant in Tail made Livery and Seiſin to J. S. of one Meſſuage in the Name of them all, the other Meſſuages being in Leaſe for years, and the Leſſee did not attorn, It was adjudged in this Caſe, that the Land did paſs by the Bargain and Sale, (Note by the Cuſtom of *London*, Lands in *London* are out of the Statute of Inrollment,) and the Livery and Seiſin came too late, becauſe it was made to him who had the Inheritance of the Meſſuages at the time; and a Poſſeſſion executed did hinder a Poſſeſſion executory, alſo the Intent of the parties was to have the Lands to paſs by Bargain and Sale, becauſe it was to make a perfect Tenant to the *Præcipe*, all which ſhould be fruſtrate if the Livery and Seiſin ſhould be effectual: It was adjudged, That the Defendant who claimed under the Bargain and Sale ſhould enjoy the Land. Hill. 5 Jac. in B.R. *Darby* and *Bois* Caſe. *Yelverton*, 123, 124.

5. Debt upon a Leaſe for years: The Plaintiff declared, That by Indenture bearing date ſuch a day, one for Money granted, bargained, and ſold the Reverſion to him in Fee, which Indenture was enrolled ſuch a day according to the Statute, and becauſe he did not ſhew in what Court the Deed was enrolled, and it is not reaſon to put the Leſſee to ſearch all Courts, both at Weſtminſter, and with the Clark of the Peace for the Inrolment of them; therefore it was adjudged againſt the Plea. Hill. 9 Jac. B. R. *Woolby* and *Pirly*'s Caſe. *Yelverton*, 313.

6. A man bargained and ſold his Land to another by Deed indented enrolled, upon Condition that if the Bargainor paid ſuch a Sum yearly for the ſpace of ſeven years, that then the Bargain and Sale ſhould be void: It was further agreed by the Indenture, That the Bargainee ſhould not meddle with the Land, untill default of Payment were made at any of the ſaid Feaſts to the Vendee from the Bargainor: All this matter was found by ſpecial Verdict, and alſo it was found, That the Bargainor demiſed the ſaid Land to a Stranger for ſix years, and that the Stranger at the end of the years, *ſuiſum reddidit* the Land to the Bargainor: If the Leaſe made by the Bargainor was a Diſſeiſin to the Bargainee was the Queſtion. It was argued, not to be any Diſſeiſin: The Caſe was not Reſolved, but adjourned. Hil. 19 Jac. B. R. *Pawley* and *Blackman*'s Caſe. See the Reports annexed to *Bendlowes*, 103.

7. Debt upon a Leaſe for years for Rent, to be paid yearly every half year: Afterwards the Leſſor bargained and ſold the Reverſion to the Plaintiff, who for half a years Rent brought Debt, and averred that the Deed was enrolled within ſix Months, according to the Statute, and the Deed bare Date before the Rent day, but the Rent day came before

the six Months expired: Exception was taken to the Declaration, because not shewed whether the Inrolment were before or after the Rent day. The Court was of Opinion, That it was well enough, because it is pleaded to be according to the Statute. 2. The Opinion of the Court was, That if the Bargainee should not have the Rent before the Deed was enrolled, it would cause much stirr, because the Law is taken that he should have it; and so it was said, It was adjudged. 5 Jac. in *Alsop*'s Case. Hil. 2 Car. B. R. *Hill* and *Dew*'s Case. *Latch*, 151.

Baron and *Feme*.

1. THE Case was, The Father was Tenant for life, the Remainder to his Daughter being a Feme Covert: The Father made a Feoffment to certain Uses with Warranty, and after levyed a Fine and dyed. The Daughter, for her self, and in the Name of her Husband, and by his consent, entred within the year claiming the Inheritance: It was in this Case holden by the whole Court, That this Entry by her alone, the Husband agreeing to it, was good. 2. That the Warranty discending upon her during the Coverture, her Entry being congeable did not bind her: And in this Case it was holden, That the Warranty should not bind the Husband also. Mich. 30 Eliz. B. R. *Aids* and *Simpson*'s Case. *Cro.* 3 Part, 72.

2. A Woman Copy-holder took a Husband, who lett the Lands for more years than the Custom did Warrant: The Question was, If this should be a forfeiture to bind the Wife, because a Lease is no great prejudice to the Lord; The Court doubted of it, and would advise of it. But *Wray*, Chief Justice, said, That if the Husband dieye he to pay the Rent, or to do Suit, these are present forfeitures. Mich. 32 Eliz. B. R. *Hid* and *Challoner*'s Case. *Cro.* 3 Part, 145. See Hil. 4 Car. in B. R. *Matthews* and *Wootton*'s Case. *Cro.* 1 Part, 169.

3. A possessed of a Term for 18 years, and of another Term in the same Land in Reversion for 40 years, dyed intestate; his Wife took Letters of Administration, and entred, and married J. S. who lett to J. D. for 21 years rendring Rent, and made his Executor and dyed: The Question was, If his Wife or Executor should have the Rent; It was said, That for the first Term the Executor should have it, for that the Husband had given away all that Term, and no Interest remained in the Wife: But for the residue of the Term of 21 years, which is derived out of the Lease for 40 years, the Wife should have it, as annexed to the Reversion or Term which the Wife had. *Quære*, For the Justices delivered no Opinion in it. Pasc. 34 Eliz. B. R. *Loftus* Case. *Cro.* 3 Part 278.

4. The Husband seised of a Manor in the Right of his Wife, letts a Copy-hold, parcel thereof, by Indenture for years, and dyes. It was holden by the Justices, That this shall not destroy the Custom to the Wife, but that after the death of her Husband, she might demise it by Copy as before. Pasch. 38 Eliz. B. R. *Cowsby* and *Ratsy*'s Case. *Cro.* 3 Part, 459.

6. The Husband alone brought an Action upon the Case, and declared, That he was seised of Land in the Right of his Wife, for the life of the Wife, and lett the same to the Defendant for years, and that the Defendant had burnt the House: It was said, First, That the Action did not lye, because it was the Plaintiff's Folly to make a Lease, and did not by Covenant, or otherwise, provide that the Lessee should not commit Waste: But the Court held the Contrary, in respect of the Charge wherewith he is chargeable over. 2. If the Action did lye, yet it was said, That it did not lye being brought by the Husband only, because the wrong is done to the Estate which he had in the Right of the Wife; and it may be that the Husband shall never be at loss, for it may happen that the Action will not be brought against him in the life of the Wife, and then he is not chargeable; wherefore it is reason that the Wife should be joyned in the Action. The Court doubted of it, and it was adjourned. Pasc. 38 Eliz. B. R. *Jenny* and *Langar*' Case. *Cro.* 3 Part, 461.

6. A Lease for years was granted to the Defendant, to the Use of the Grantor's Sister, whom he afterwards should marry; who married her, and then dyed: The Wife took to Husband the Plaintiff, the Wife dyed; the Defendant took Administration of the Plaintiff's Wives Goods, and sued the Defendant in Chancery to have this Term: It was agreed by the Advice of all the Justices of *England*, That neither the Term, nor the Use thereof, appertained to the Plaintiff. Hil. 38 Eliz. B. R. *Wythum* and *Waterhouse*'s Case. *Cro.* 3 Part, 466.

7. Replevin, The Defendant avowed, That J. S. was seised of Lands in the Right of his Wife for the life of *Sybil* his Wife, the Reversion in Fee to the Husband: He and his Wife made a Lease for years without Writing, reserving 4 *l.* per annum,

ment. The Husband being endebted made his Wife his Executrix: Debt was brought against her by the name of *Isabell*, and Record; and upon an *Elegit* awarded, The Sheriff Returned that *Isabell* had 4 l. Rent out of the Land upon a Demise made by her and her Husband, and he delivers the Moyety of that Rent, and the Defendant avowes for the same: It was adjudged to be ill, for three Causes, 1. Because the Lease for years being without Deed was void against the Wife. 2. The Recovery against *Isabell* was void. 3. That the Sheriff delivering the Rent without the Land, it is but a Rent-seek, which cannot be delivered *ut liberum Tenementum*. Mich. 40 Eliz. B.R. *Walsal* and *Heath*'s Case. *Cro.* 3 Part, 656.

8. Husband and Wife joyn in a Lease for years by Indenture, rendring Rent, and make a Letter of Attorney to seal and deliver the Lease upon the Land, which is done. The Lessee brought *Ejectione firmæ*, and declared upon the Lease made by the Husband and Wife: It was the Opinion of all the Justices, That the Lease did not maintain the Declaration, for that a Feme Covert cannot make a Letter of Attorney to deliver a Lease of her Land, although a Rent be reserved upon the same. Pasch. 44 Eliz. B. R. *Wilson* and *Rich*'s Case. *Vi-vertos*, 1.

9. Note, It was agreed by the Court, Where an Action of Battery is brought against Husband and Wife, supposing that they both beat the Plaintiff, or the Plaintiffs Mare: And upon Not Guilty pleaded, it is found, That the Wife onely did the Battery, and not the Husband; this Verdict is found against the Plaintiff: For now it appeareth the Plaintiffs Action to be false; for the Husband in such Case shall not be joyned, but for Conformity, and it is not like to a Battery charged upon J. S. and J. D. for there one of them may be acquitted, and the other found Guilty, because they are several Trespassors. Mich. 5 Jac. B. R. *Dray* and *Dennis* Case. *Vivertos*, 106.

10. Trover and Conversion against Husband and Wife, and declared, That he was possessed *in specie* of such Goods till such a day that he lost them, and that they came into the Possession of both the Defendants and that they had converted them: Upon Not Guilty, It was found for the Plaintiff, and Judgment given, which was affirmed in a Writ of Error; Yet Exception was taken to the Declaration, because the Conversion is layed to the Charge of the Wife, and a Feme-Covert cannot convert Goods. But it was answered, That this Action is not grounded upon any property supposed to be in the Defendant, but upon the Possession only, and the Point of the Action is the Conversion, which is a thing, with which a Feme Covert may be charged: But it was agreed, That the Husband and Wife cannot have an Action of Trover and Conversion and suppose a Possession in themselves, because the Law transfers the whole Interest in Point of Ownership to the Husband. Mich. 7 Jac. B. R. *Draper* and *Falks*'s Case. *Vivertos*, 165, 166.

11. Assumpsit brought against Husband and Wife; after Imparlance by both the Defendants, the Record was, *ad quam diem tam prædict.* the Plaintiff by his Attorney, *quam prædict. Ja. & Brigetta* by their Attorney *venirunt. Et prædict. Brigetta dicit, Quod ipsa non assumpsit.* It being found for the Plaintiff, he could not have Judgment, because the Defendants did not make any defence, and also because it appeareth that the Plea is only pleaded by the Wife, and she alone cannot plead without her Husband, but they both ought to joyn in the Plea: And so it was said it was adjudged in *Chanley* and *Alsop*'s Case. Mich. 9 Jac. B. R. *Tampion* and *Newsons* Case. *Vivertos*, 210.

12. Husband and Wife seised of Lands to them and the Heirs of the Husband, by Indenture bargain and sell to P. in Fee: If the Deed there was a Proviso, That if the Husband, or his Wife, or the Heirs of the Husband, paid 100 l. to P. at such a day, then it should be lawful to them and the Heirs of the Husband to enter, and to have and enjoy as in their former Estate; and that after such Payment, the Indenture, and all Fines and Assurances to be passed, should be to the Use of the Husband and his Heirs (leaving out there the Wife). The Deed was not enrolled: The Husband and Wife within 7 years levyed a Fine to P. according to that Indenture, afterwards the Husband dyed: His Wife at the day paid the 100 l. and entred, and took to Husband the Plaintiff. It was Resolved in this Case, That the Plaintiff should have an Estate for life, for that so is the Condition, and the first part of the Clause; and the other Clauses stand well enough with it, That it shall be to the Use of the Husband, and his heirs, which doth not controul the Limitation to the Wife for life: And in this Case it was Resolved, That an Use cannot be raised by Bargain and Sale by it self; but upon the Fine it might well be limited. Hill. 42 Eliz. C. B. *Southcot* and *Mervy*'s Case. *Cro.* 3 Part, 744.

13. Debt brought for Debt, Damages, and Costs, Recorded by Husband and Wife *nuper superstite*, against the Defendant in this Court, and because the Wife was not named in the Writ, the Defendant demurred: But it was adjudged for the Plaintiff, That the Action did well lye. Trin. 42 Eliz. B.R. *Butler* and *Debts* Case. *Cro.* 3 Part, 844.

14. Trover

14. Trover and Converſion againſt Husband and Wife, ſuppoſing the Trover by both during the Coverture, and the Converſion by the Wife only. The Defendants pleaded, *Quod ipſi non ſunt culpabiles*: After Verdict, it being found for the Plaintiff, in ſtay of Judgment it was ſaid, That becauſe the Declaration doth not charge the Husband with any wrong, but only the Wife, That the Iſſue ought to have been *Quod ipſa non eſt inde culpabilis*: And of that Opinion was the whole Court and ſo a Replevin awarded, though it was after Verdict. Paſch. 44 Eliz. B.R. *Cox* and *Crapnell*'s Caſe. *Cro.* 3 Part, 883.

15. Trover and Converſion was brought againſt Husband and Wife: It was ſaid, That the Action did well lye, becauſe that the Wife could not be charged upon a Contract during the Coverture; yet ſhe might convert Goods, and ſuch was the Opinion of the Court. Trin. 21 Jac. B. R. *Newman* and *Cleney*'s Caſe. Latch, 226.

16. Note, It was ſaid by Juſtice *Jones*, That if the Husband and Wife be arreſted for the Debt of the Wife, and the Husband finds Bail for himſelf; That to detein him in Priſon untill he hath found Bail for the Wife, was a thing which was illegal: But it was never ſeen, That the Wife ſhould be kept in Priſon till the Husband had found Bail for himſelf; and therefore Attachment was awarded againſt the Sheriff who kept the Wife in Priſon for ſuch Cauſe. Hill. 2 Car. B. R. Latch, 224.

Capias.

1. ONE *Diggs* was Out-lawed by the name of W. D. late of *London*, Gent. *aliàs dict.* W. D. of N. in the County of *Kent*, Gent. and Proclamations upon the Exigent was awarded againſt him into the County of *Kent*. Now he appeared upon the *Capias utlagatum*, and pleaded, That at the time of the Writ brought, he was dwelling at K. in the County of *Middleſex*, to which place no Proclamation was awarded; wherefore he prayed that the Out-lawry might be reverſed. The Juſtices looked upon the Proclamation, and upon the Statute of 6 H. 8. *cap.* 4. and thereupon ſaid, That the Queen and the ſaid D. ought firſt to be at Iſſue & the Iſſue firſt levyed, and that this Outlawry was not remedied by the ſaid Statute. Paſch. 4 Eliz. *Beadlews*, 26.

2. Aſſumpſit, the Caſe was, A *Capias utlagatum* was taken out againſt J. S. upon a Recovery had againſt him in Debt, and the Defendant perceiving that the Plaintiff intended to execute the Writ upon the Goods of J. S. promiſed the Plaintiff, That if he would ſtay the Execution of the Writ, that at ſuch a day he would pay him 50 l. It was ſaid, That this was not a Conſideration, and againſt Law, becauſe the *Capias utlagatum* is the Kings Suit; and a Promiſe to ſtay the Kings Suit, is not good: But it was the Opinion of the Court, That it was a good Conſideration, for tho the *Capias utlagatum* iſſueth upon the Originall Suit of the Party, and the benefit which the King is to have by it is by the means of the Party who hath the Charge of the carrying of it, and is at the Coſts of ſuing it forth; and if the King by vertue of the *Capias utlagatum* hath any Goods, he is thereout to ſatisfy the Party at whoſe Suit the Out-lawry was. Mich. 45 Eliz. B.R. *Jennings* and *Hatley*'s Caſe. *Yelverton*, 19.

3. A. recovered in Debt againſt B. and had a *Capias ad ſatisfaciendum* to the Sheriff of *Middleſex*, who made a Precept to the Bailiff of the Liberty of S. to arreſt B. *ad reſpond.* A. whereas it ought to have been *ad ſatisfaciendum*. The Sheriff Returned in the Court, *Cepi Corpus ſecundum Exigentem hujus*: The Court was moved to have a new *Capias ad ſatisfaciendum* againſt A. which the Court granted, becauſe the Party in truth was never taken in Execution for the Debt. Mich. 2 Jac. B.R. *Hand* and *Harbert*'s Caſe. *Yelverton*, 52.

4. A Recovery being had in the Court of *Briſtow*, in an Action upon the Caſe there brought for words ſpoken of the Plaintiff, and Judgment there given for the Plaintiff: Error was brought, and aſſigned for Error, That after an Attachment awarded in *Briſtow*, a *Capias* iſſued forth againſt the Defendant there, whereas by the Statute of 19 H. 7. a *Capias* in an Action upon the Caſe

Case did not lye, but in the King's Bench or Common Pleas: But it was the Opinion of the Court, That such an Exception would overthrow all proceedings in inferiour Courts, which continually use such Process of *Capias* as the second Process in such Actions. And, 2. This Verdict is grounded upon the Judgment precedent, because the Party had appeared; and the *Capias* is but mean Processe, which is out of doors by the Appearance of the Party. The Judgment was affirmed. Trin. 7 Jac. B. R. *Tarbill* and *Milton's* Case. *Yelverton*, 158.

5. Upon two *Nihils* Returned against a Recognitor in Chancery, a *Capias* was awarded out of the Chancery against him, and he was taken by the Sheriff, and suffered to Escape, and an Action thereupon brought against the Sheriff: It was the Opinion of the Justices, That a *Capias* did not lye upon a Recognizance in Chancery, but a *Scire facias* only; and therefore the Party being taken by a *Capias*, he was not a Prisoner by Course of Law, and so no Escape in him; and then the Action did not lye against the Sheriff. Hill. 1 Jac. in B. R. *Pitt* and *Clifford's* Case. *Yelverton*, 42. See this Case, *Fulwood*. 2 Part, 62, to 65. See Trin. 31 Eliz. Ex. *Ogall* and *Parsons* Case, vouch in Cook 3 Part, 142. in Dr. *Druries* Case.

Challenge.

1. IN a Replevin, the Defendant avowed for a Rent-Charge; The Plaintiff said, Out of his Fee, and afterwards at the Tryal of the Issue, The Plaintiff Challenged one of the Jurors, because he was Steward of the Mannor, of which the Avowant was the Lord; It was adjudged in C. B. that it was a principal Challenge. Trin. 17 H. 8. *Bendlowes* 6.

2. In an Appeal, It was holden, That the Defendant might Challenge twenty, as well as in an Inditement; as it was said, It was adjudged in Nawes and Pistor's Case, in an Appeal of Manslaughter. Trin. 28 H. 8. *Bendlowes* 6.

3. If there be two Defendants, and one of them Challengeth a Juror for cause, and the other will not Challenge him; yet if the Challenge be found true, the Juror shall be withdrawn; and so it was said, It was done upon an Inditement of Felony in the Kings Bench: Where two were Indicted, and one of them would Challenge a Juror at their Arraignment, and the other would not. Mich. 4 and 5 Mar. *Bendlowes* 7.

4. Note; It was agreed in C. B. That whereas the Defendant, when the Jury appeared, Challenged all the Array; because it was made by J. S. who was Under-Sheriff, and Cosen to the Plaintiff, and shewed how Cosen; that the same was allowed for a principal Challenge. Hill. 17 Eliz. B. R. *Dubier* and *Lamb's* Case. *Bendlowes* 33.

5. In a second deliverance, Challenge was taken for the Hundred; And it was shewed and confessed, That the Hundred of *Feversham* in *Kent* was and is within the Lathe of *Scray*; and that there is not, nor ever had been, any Court holden in the said Hundred of *Feversham*, but that all the Inhabitants within the said Hundred had used to go to the Court of Lathe of *Scray*: It was holden by all the Justices, That in this Case Challenge ought to be taken for the Lathe, and not for the Hundred; for that no Court had been holden within the Hundred. Mich. 29 Eliz. B. R. *Stainsby* and *Hide's* Case. *Lone.* 2. Part, 109.

6. In an *Ejectione firme*, the parties were at Issue; The Defendant Challenged one of the Jurors, and assigned for cause, because the Juror held Land under the same Title, as the Defendant did; and to prove this, one J. S. was produced as a Witness for the Plaintiff, who deposed the same upon the Challenge, for which cause the Error was withdrawn, and so there was no Enquest, and so the Plaintiff was delayed of his Tryal. Whereupon he sued the said J. S. *tam pro Domina Regina quam pro se ipso*, upon the Statute of 5 Eliz. of Perjury, and being found for the Plaintiff, an exception in arrest of Judgment was put into the Court, engrossed in Parliament Acts; *Al judicium pro Domina Regina & prefato Querente Curia procedere non debet, quia manifestum apparet per informationem dict. Querentis quod ipse non fuit pars gravata, per quod Calumnia in dict. informatione specificat. & per juratores dict.*; *J. S. super inde fuit. gravat. Querens non fuit domificat.* See the Statute of 5 Eliz. Where the words are, Grieved, Letted, or Molested; If it extend to this Case. Mich. 30 Eliz. Exchequer. *Green* and *Edward's* Case. *Lone.* 2. Part, 40.

8. *Nisi prius* was granted after Issue joyned, afterwards a *Supersedeas* was awarded; and notwithstanding that the Justices not knowing of the *Supersedeas*, they proceeded to Tryal, and the Issue was tryed for the Defendant; This being informed to the Court by the Plaintiff, a new Tryal was awarded, because the first was void, and *Coram non judice*, by reason of the *Supersedeas*. But the Court advised the Plaintiff to take heed, that he had none of the principal Panel which passed in the first Tryal; for it was a principal Challenge, that he was in the first Tryal. Trin. 26 Eliz. B. R. *Lang's* Case. *Cap.* 3. Part, 33.

9. The

7. The Defendant Challenged the Array, because the Sheriff was Cosin to the Plaintiff, which was confessed; but it is said on the other side, That the Sheriff is as near of Kin to the Defendant; upon which it was demurred: And by advise of the Court, the Array was quashed. Mich. 25 Eliz. C. B. *Audley* and *Statterd*'s Case. *Cro.* 3. Part, 23.

8. At a Tryall; A Juror was Challenged, and withdrawn; and a Tales awarded, and Process against the other Jurors; He who was before Challenged, and withdrawn, appeared amongst the other Jurors; and was sworn, and tryed the Issue, and a Verdict given. This was moved to the Court in arrest of Judgment; It was the Opinion of the Court, That it was erronious, and the Judgment was stayed. Trin. 32 Eliz. B. R. *Hungate* and *Hammon*'s Case. *Cro.* 3. Part, 188. See Mich. 37 Eliz. B. R. *More* and *Vaughan*'s Case. *Cro.* 3. Part, 419. acc.

9. In an Information, upon an Intrusion by the Queen against the Defendant: A Juror was Challenged for not sufficiency of Free-hold. Upon examination, It was found, That he had Free-hold, of the value of 15 *s. per annum*: It was agreed by the Court, That although by the Statute of 5 H. 5. he ought to have 40 *s. per annum*, and by the Statute of 27 Eliz. he ought to have 4 *l. per annum*. That those Statutes extended only betwixt party and party, and not to the Queen; but if he had any Free-hold, it was sufficient; and therefore the Challenge was disallowed by the Court. Mich. 38 Eliz. B. R. Sir *Christopher Blunt*'s Case. *Cro.* 3. Part, 413.

10. In a *Monstrans de Droit*, for certain Lands in Ward to the Queen for the Nonage of B; the Record was sent out of the Chancery, to be tryed in B. R. And upon a Jury returned, the array was Challenged by the Queens Attorney, because it was returned by the Sheriff of *Kent*, who was Tenant to the Plaintiff: A Court-Plea was thereunto put, that he was also Tenant to the Queen. The Court was of Opinion, That the Court-plea to the Challenge was little material; for although he was Tenant to both, yet he who takes the Challenge shall have advantage thereof. Afterwards the Plaintiff confessed the Challenge, and the array was quashed, and a *new Venire facias* awarded. Pasch. 41 Eliz. B. R. The Lord *Hastings* and *Bake*'s Case. *Cro.* 3. Part, 663.

11. The Sheriff being Challenged before the Issue tryed, a *Venire facias* was awarded to the Coroners at the *Nisi prius*; for default of Jurors, a Tales was prayed by the Plaintiff, and the Tales was returned by the Sheriff *per mandatum* of the Justices, and in B. R. Judgment given for the Plaintiff: Upon Error brought, The Judgment was reversed in the Exchequer; because when Process is once awarded to the Coroners, they are to serve and return all mean Process; and they ought to have returned the Tales, and not the Sheriff, and the same is not helped by the Statute of Jeofails. Mich. 45 Eliz. B. R. Com. and *Parlow*'s Case. Trin. 36 Eliz. *Wise* and *Hogan*'s Case, adjudged acc. *Yelv.* 114. 115.

12. Three men were Indicted of Murder of B. at the day when the Prisoners were to be tryed, eleven of the Jury appeared, and were sworn, but one of them was Challenged by the Prisoners, and a Tales for the Queen: At the day when the Jury appeared, one of the Jurors who had appeared before and was sworn, was Challenged, for a Cause which was in *esse* the first day, but the Queens Counsell had not notice of it till after; It was the Opinion both of the Justices of the King Bench, and also of the Justices of the Common-Pleas, their Opinion being demanded there, That the Queen could not have the Challenge, as not then she could have had it the first day when the Jury was sworn; The Challenge was, for that the Juror was within the Dissolute of the Kin of one of the Prisoners; and upon the Inditement, all the Prisoners were found not guilty of the Murder; which the Justices were very sorry at. And the Jury were Committed, Fined, and bound to the good Behaviour. Mich. 43 Eliz. B. R. *Wharton*'s Case. *Yel.* 23.

Chancery.

1. THE Parties were at Issue in Chancery, upon an Issue tryable at Law, upon an *Ad quod Quæstio*: And the Chancellor writ to the Bishop of Durham, to try the Issue, who tryed accordingly, and a Verdict given: It was the Opinion and Order of the Judges, That the Verdict should be quashed; for the Case, it was said by the Justices, That the Chancery cannot call a Jury at their Bar to try a Issue, but the Chancellor himself ought to adver the Issue with his own Hands into the King Bench, and they to try the Issue there; and upon Verdict, they ought to give Judgment & not remit the matter again into the Chancery, because the Chancery is rid of that matter; and so it is, if an Issue is to be tryed in any other Jurisdiction, where they are not compellable, or refuse to try an Issue, as in *Ireland*: And *Dodderidge* Justice said, He never heard or saw before, that the Chancellor

Chancellor had written to any County Palatine to try an Iſſue; but that the Court of the Kings Bench might well do it. Paſch. 1 Car. B. R. *Barton's* Caſe. *Tit.* J.

2. Error of a Judgment in B. R. in an Aſſumpſit; The Plaintiff in the Aſſumpſit declared, That the Defendant was bound in an Obligation of 40 l. conditioned to pay 20 l. at a day; and that he intended to exhibite a Bill in Chancery, for that he was ſatisfied the Debt, and had taken out a *Subpœna*, returnable at a day certain. The Defendant, in conſideration that the Plaintiff would deſiſt from his Suit in the Chancery, promiſed to reſtore the Bond upon requeſt, and that he deſiſted his Suit here, and required the delivery of the Bond; and the Defendant had refuſed, but proſecuted his Suit in the Chancery. Upon *Non-aſſumpſit*, It was found againſt the Defendant. It was moved in ſtay of Judgment, That the Conſideration was not ſufficient, being only to ſtay a Suit in Chancery, which is matter only of Conſcience. But the Opinion of the Court was, That the Conſideration was good enough, and ſo adjudged, and the Judgment affirmed. Trin. 41 Eliz. B. R. *Dandey* and *Oland's* Caſe. *Cro.* 3. Part, 768.

3. The Caſe was, J. S. was Plaintiff againſt B. in the Chancery; and upon Bill and Anſwer, it appeared, That by an Order there, he made one L. to be party to the Bill againſt B, and a Commiſſion iſſued forth between L. and B; upon which Commiſſion, the Defendant was examined on the part of L, and depoſed directly for L; upon which a Decree was in the Chancery againſt B: and upon this matter, B. brought an Action of Debt againſt the Defendant upon the Statute of 5 Eliz. of Perjury, as a party granted by the Depoſition of the Defendant. It was the Opinion of the Juſtices, That the Action did not lye; becauſe in this Caſe L. was not a party to the Suit, but came in *à Latere*, and by Order; and no Bill depending either againſt him, or brought by him, ſo out of the Statute; for being a penal Law, it is to be taken ſtrictly. Mich. 45 Eliz. B. R. *Brook* and *Orrel's* Caſe. *Tit.* 22. See Mich. 30 Eliz. Exchequer. *Gates* and *Edwards* Caſe. *Lect.* 2. Part, 40. Before in Title *Challenge*, Caſe 6. acc.

4. Tenant in Fee granted a Rent for Life, and made a Leaſe for years of the Land; The Grantee did ſuppoſe, That he had loſt the Deed, and that it was come to the Hands of the Leſſee. The Caſe was in the Court of Requeſts, to be relieved for the Rent. It was the Opinion of the Court, That a Suit might be in Chancery indeed loſt, but not for Rent or Annuity. Paſch. 1 Car. B. R. *Aldet's* Caſe. *Latch.* 146. See there a Caſe Vouched. Mich. 3 Car. B. R. Where one *Abbot* ſued in the Court of Requeſt, becauſe he had loſt his Bond, and a Prohibition was granted in that Caſe, although it was ſaid at the Barr, That the Grantee of a Rent-Charge, who had loſt his Deed, was relieved in the Chancery. But Juſtice *Jones* ſaid, There was a great difference between the Chancery and the Court of Requeſts. See Hill. 1 Car. in C. B. *Barry* and *Stile's* Caſe. *Latch.* 94. Which agrees with the principall Caſe here.

Common and *Commoners*.

1. IN Action upon the Caſe, for diſturbing him of his Common; The Plaint. declared, That he was ſeiſed of a Meſſuage and certain Lands, and that he, and all thoſe whoſe Eſtate, &c. had Common of Paſture in 16 Acres of Land called D, from the time that the Corn was reaped till it be ſowed again, and alſo Common of Paſture in Lands called R. *Quæ tempore anni* as appurtenant to his ſaid Meſſuage and Land, and that the Defendant had ploughed up the Lands, and ſo diſturbed him of his Common. It being found for the Plaintiff, It was moved in ſtay of Judgment, That it appeared, that the Plaintiff was ſeiſed in Fee; and ſo he ought to have had an Aſſiſe, and not any Action upon the Caſe: But the Opinion of the Court was, That the Action was well brought, and the Exception diſallowed by the whole Court. Mich. 32 Eliz. B. R. *Leverett* and *Tounſend's* Caſe. *Lect.* 2. Part, 284. See *Cro.* 3. Part, 198. The ſame Caſe.

2. Replevin; The Defendant made Conſtant, to Bayliff to J. S, for that he had a Leet within his Manour of D; and that the Plaintiff was at ſuch a Court amerced, for putting his Geeſe upon the Common there; for which Amercement he diſtrained: and becauſe it was not ſhewed, that the Common was within the Leet; and becauſe the Court was of Opinion, That it was not any article inquirable in a Leet, nor puniſhable there, It was adjudged for the Plaintiff. Trin. 37 Eliz. B. R. *Wainleighton* and *Burton's* Caſe. *Cro* 3. Part, 442.

3. In Treſpaſs; That A. was ſeiſed of the Lands in Fee, and that G. F. was ſeiſed of a Houſe, and 20 Acres of Land in A; and that they paid G. F, and all his former Tenants, &c. have

had Common in the place where, for all their Beasts at all times of the year, as to the said Tenement belonging; and that the said G. F. was enfeoffed of the said Tenement of the said A; and that afterwards the said A. lett the same with all Commons, Profits, and Commodities to the same appertaining, *vel occupat. vel usitat. cum pertinen. Messuagio*; The matter in Law was, Whether this Common being extinct by the unity of Possession, might be revived by any of those words; Or whether it may enure to a new Grant of Common for so many years. It was the Opinion of the Justices, That this Common was extinguished by the Unity of possession, it being Common appurtenant, and cannot be revived again; But yet they held, That by the words of the Lease of all Commons, Profits, &c. occupied or used in *Messuagio*, It is a good Grant of a new Common for the time. Hill. 39 Eliz. B. R. *Bradshaw* and *Eyr's* Case. *Cro.* 3. Part, 570. See 7 Jac. in B. R. Sir *Thomas Grimes* and *Peacock's* Case. *Rolleyed* 1. Part, 17, 18, 19. *Lib.* 1. Title *Common*, Fol. 408. Case 1.

4. In Trespasse upon a special Verdict; The Case was, E. G. the Grandfather of the Defendant, was seised of a Tenement, in which he and all his Ancestors, and all those whose, &c. time out of mind had used to have Common in the place where, for all their Beasts Levant and Couchant upon the said Tenement, &c. are so seised, released to the Plaintiff's Father all his Right and Common in part of the Land where he had the Common, and dyed; and that the Tenement descended to W. G. the Son, and from him to the Defendant. It was the Opinion of the whole Court in this Case, That the Jury having found a Release in part of the Land that the Common was gone for all; and it was said, It was adjudged in *Rampton's* Case in this Court, Where one having Common in a great Field, wherein many men had Land; he purchasing an Acre from one of them, It was adjudged, That all his Common was extinct; and it was further said, That in the principal Case, The Common was gone in all, because this Release went in the benefit of the Tert-Tenant; and it was as an Improvement by him. Mich. 40 Eliz. C. B. *Rothenham* and *Green's* Case. *Cro.* 3. Part, 593.

5. Trespass for breaking of his Close, and killing of his Conyes; The Defendant justified, because he had Common appurtenant to such an House by Prescription; and that because the Conyes were there feeding, he killed them. It was Obj. & d. That the Commoner might well justify the killing of them, because he hath no other remedy, as he may justify the killing of Foxes, and other Vermin. That the Opinion of the Court was, That the Plea was not good; For that the Owner of the Soil hath interest in them against all Strangers, and the Commoner hath nothing to do, but to take his Common: Also the Cony is a Beast of Warren, and profitable as Deer are, and are not to be compared to Vermin; and therefore the keeping of them by the Owner of the Soil is lawful, and the killing of them unlawful, and not justifiable: It was adjudged for the Plaintiff. Pasch. 43 Eliz. B. R. *Sellow* and *Langdon's* Case. *Cro.* 3. Part, 776. See Mich. 5 Jac. B. R. Sir *Christopher Haddon* and *Griffith's* Case. *Yelverton* 104. Adjudged acc.

6. Trespass; The Defendant justified driving of the Cattell Damage-Feasants, pretending a Custom; That the Plaintiff being Lord, hath the place in which, intirely to himself till *Lammas* day, and afterwards it is Common for the Tenants, so as the Plaintiff can put in but three Horses only, and because the Plaintiff after *Lammas* day put in more then three Horses, the Defendant took them Damage-Feasants. Being found for the Defendant, It was moved, That the Defendant could not take the Cattel Damage-Feasants, because he is only a Commoner, and the place where, is the Plaintiff's Soil, and his Cattel cannot be Damage-Feasants upon his own Soil. It was the Opinion of the Court, That the matter of taking the Cattell Damage-Feasants did not come in Question, because nothing is in the Issue but the Custom, which is tryed against the Plaintiff; but if the Plaintiff would have taken advantage thereof, he ought to have demurred; and although by this he had crossed the Custom, yet whether the Commoner might take Damage-Feasants, the Cattell the Lord had them in property, came in Question: It was the Opinion of three of the Justices upon the matter of Law, That the taking Damage-Feasants by the Custom, was good; for by the Custom, the Lord is excluded to have but his stint; and the Lord may be stinted, and the Commoner only to have the benefit of the feeding; and they have no other remedy, but by taking the Cattell of the Lord which offends, and the Custom hath made the Lord as meere a Stranger as any other; but the two other Justices doubted of it. Trin. 6 Jac. B. R. *Keynell* and *Pargiter's* Case. *Yelverton* 129. See Cro. 2. Part, 208. The same Case, where it is said, that in this Case, The Court was divided in Opinion.

7. In Replevin; The Defendant made Conisans, as Bayliff of J. S, Lord of the Manor of B. for Damage-Feasants: The Plaintiff said, That one H. was seised of a Messuage, and divers acres of Lands, and that he and all those whose Estate, &c. had for him his Tenants, Fe more, &c. common in the place where, when the said Field lay fith

ſeeth all the year, and not ſowed, with their Cattel Levant and Couchant; and when the ſaid Field is ſowed with Corn, when the Corn is carried away, *tunc eſt mixtus*; and ſo juſtified the putting in of his Cattel to uſe his Common. The Defendant rejoyned. That parcel of the ſaid Field was ſowed with Corn, *tempore quo &c.* Upon which it was demurred: It was the Opinion of the whole Court, That the ſowing of a ſmall parcell of the ſaid Field ſhould not ouſt the Commoners from the taking of his Common in the reſidue of the Field, for that might be done by Covin to deceive the Plaintiff of his Common; and therefore the Plaintiff claiming Common, *quando campus (id eſt, totus campus)* is ſown, ſhall not be barred of Common by ſowing parcel of it; for notwithſtanding that, the Field is not ſowed. Mich. 8 Jac. B. R. *Trulock* and *Riggeſbye's* Caſe. *Yelverton*, 185.

8. In a Replevin, The Defendant avowed for Damage-feaſans, as in his Freehold: The Plaintiff ſhewed, That he was ſeiſed of a Meſſuage, and 14 acres of Land; and that he, and all thoſe whoſe Eſtate, *&c.* had Common in the place where *&c.* at all times of the year, as to the ſaid Meſſuage and Lands belonging. Iſſue being thereupon, it was found for the Plaintiff: In Arreſt of Judgment, it was alledged, *Quod non conſtat* by the bar to the Avowry, in what place the Meſſuage and Land, to which the Common did appertain, lay; and that of neceſſity ought to be ſhewed, becauſe the Vicine ought to be from the place where the Meſſuage and Land lyeth, as well as from the place in which the Common is claimed: For Common may be appendant or appendant to Land in another County, and then the Vicine ſhall be from both Counties. Wherefore Judgment was ſtayed, and a Repleader awarded. Trin. 8 Jac. B. R. *Burrain* and *Tho. old's* Caſe. *Yelverton*, 177. S. C. 2 Part, 238. the ſame Caſe.

9. A Copy-holder for life, had Common in the Lord's Waſte. The Lord grants and confirms the ſaid Copy-hold and Land *cum pertinentiis*, to him and his Heirs: It was Reſolved in this Caſe by all the Court, That he as Purchaſer ſhould not have Common there as a Copy-holder, for that he hath his Common by reaſon of the Cuſtome which annexeth the ſame to his Cuſtomary Eſtate, which being deſtroyed and determined by his own Act, by making it a Free hold, the Common is deſtroyed and determined without ſpeciall words, and the general words (*cum pertinentiis*) are not ſufficient to paſſe the Common. Mich. 8 Jac. B. R. *Maſſon* and *Hunt's* Caſe. *Yelverton*, 189, 190.

10. Treſpaſſe, for chaſing his Cattle in ſuch a Cloſe: The Defendant juſtified Damage-feaſans in his Free hold; The Plaintiff Replied, and ſhewed a Grant of Common in the place where, by the Defendant to the Plaintiff, and that the Defendant had erected after the Grant a Stack of Corn there; and the Plaintiff put in his Cattle to uſe his Common, and the Defendant chaſed them: It was the Opinion of all the Juſtices, That the chaſing of the Cattle by the Defendant was not lawfull, for by ſuch means he ſhould defeat his own Grant; for the Grantee may uſe the whole place for Common, and then when the Grantor erects a Stack of Corn or Hay upon the ſame place it tends to the Diminution of his Grant, which ought not to be, but the Cattel may range over the whole place, and eat the Plaintiffs Hay or Corn without any wrong, becauſe the wrong began by the Grantor himſelf, of which he ſhall not take advantage: It was adjudged againſt the Plaintiff. Hill. 8 Jac. B. R. *Farmor* and *Hunt's* Caſe. *Yelverton*, 201.

11. One preſcribed, That all the Occupiers of B. *habuerint, & habere conſueverint* Common in ſuch a Town in C. *ratione Vicinagii*: If it was well pleaded, was the Queſtion, without alledging time out of mind. It was alledged, That it was becauſe ſo much is implyed: But the Opinion of the Court was contrary, becauſe the Preſcription is the ground for Common by Vicinage; but otherwiſe it is, where one claims Common appendant, for there it would be double to alledg Preſcription. Hill. 1 Car. in B. R. *Jenkins* Caſe. *Latch*, 161.

Commiſſion, and *Commiſſioners*.

1. IN a falſe Impriſonment in *Suffolk*, The Defendant juſtified, That a Commiſſion of Rebellion did iſſue out of the Chancery in *Middleſex*, againſt the Plaintiff, directed to one B. and that the Defendant, as Servant to B, and by his Command, arreſted the Plaintiff thereupon, Iſſue was joyned *de ſon tort demeſne*, and the Iſſue was tryed in *Suffolk*: Error was thereupon brought, and the Error aſſigned was, becauſe the Iſſue ought to have been tried aſwel by a Jury of *Middleſex* as by a Jury of *Suffolk*. All the Juſtices and Barons held the Tryal to be ill; for the awarding of the Commiſſion is here in Iſſue, for

the Root of the Justification ariseth from hence, and without that the Command was of no value; wherefore the Judgment was reversed. Trin. 43 Eliz. Ex. Chamber. *Downing* and *Rayward's* Case, *Cro.* 3 Part, 844.

2. It was found by Verdict, That the Queen made a Lease to the Plaintiff of a House and Land in *Dea*-Common for life, rendring Rent to the hands of the Bailiff of the Mannor, or to the Receiver of the County upon Condition, upon Non-Payment of the Rent within forty dayes, the Lease to be void: A Commission was awarded under the Exchequer Seal to Commissioners of the County of *Middlesex*, to enquire of the Payment of the Rent, reciting the Lease to be of a House *cum pertinentiis*, and mentions not any Land. It was amongst other things Resolved by the whole Court in this cause, That this Inquisition found in *Middlesex*, and by Commission under the Exchequer Seal, was not sufficient to find a Condition broken of Lands in the County of S. upon a Lease for life; for it being a Lease for life, The Queen cannot be entituled to it, unlesse by Office found in its proper County to avoid it, but such a Condition upon a Lease for years may be found in another County, and so it was said it was Resolved, Pasch. 27 Eliz. in *Knight* and *Beech's* Case in C. B. and so also it was said, It was agreed in Sir *Tho: Heneage's* Case. It was adjudged for the Plaintiff. *Paslow* and *Corn's* Case. Trin. 42 Eliz. B. R. *Cro.* 3 Part, 855.

3. Note, In the Case of Commission *pro securitate pacis*: It was Resolved by all the Justices of the King's Bench, That a Commission *pro securitate pacis*, cannot be Returned by the Sheriff, but it ought to be by the Commissioners. And in the debating of that Case, *Doddridge* Justice, when General Commissions for the Peace begun, He said, That the Sheriff by the Common Law is *Conservator pacis*. And the General Commission for Counties was made in 1 Ed. 3. for to prevent Rebellions upon the depoſing of King Ed. 2. But he said, That before that time there were divers particular Commissions to divers men for particular places; and therefore he said, That in that *Lambert* was mistaken. Trin. 21 Jac. B. R. See the Reports annexed to *Bendloes*, 130.

4. *Johnson* was sued in the High-Commission Court, for not repairing of a Chancell: A Prohibition was prayed and granted, because it is not an enormous Crime, and of such Crimes only the High-Commission is to have Conusans. And 2. Because they would not allow of an Appeal. Hill. 1 Car. B. R. *Johnson's* Case. *Latch*, 234.

Conditions.

1. A Makes a Lease for years, Proviso *quod non licebit* to the Lessee to alien his Term without the Assent of the Lessor, he deviseth the Lease to his Son, the Lessor assenting to it: Resolved, 1. That it is a Condition. 2. As to this Case, it is no Breach, for that nothing passed till the Lessor's Assent was obtained, for it was a Condition precedent; and although the Devisee did enter by the Assent of the Executor, and had not Licence of the Lessor, it is not materiall. Mich. 30 Eliz. B. R. *Knight* and *Mays* Case. *Cro.* 3 Part, 60.

2. The Father of a Copy-hold surrendred the same to the Use of his Son in Fee, upon Condition to perform Covenants in an Indenture: The Son after Admittance surrendred to J. S. upon Condition, that if the Son paid 10 l. the Surrender to be void. The Son neither paid the 10 l. nor performed the Covenants in the Indenture, the Father dyed, the Lands discended to the Son: It was holden in this Case, That by the Entry of the Father both the Surrenders were avoided, and that then the Son might enter, and avoid the Surrender made by him to J. S. Trin. 33 Eliz. B. R. *Simonds* and *Lawn's* Case. *Cro.* 3 Part, 239.

3. Tenant in Tail leased Land to the Father, Mother, and Son, for their lives; and because he could not limit these Estates by way of Remainder, but joyntly in possession, there was a Proviso in the Indenture, That if the Son shall challenge, claim, or demand, any profits of the Lands so demised, or enter into the Lands during the life of his Father or Mother, then the Estate limited to him in the Indenture should cease and be void: It was the clear Opinion of the Justices in this Case, That this Condition and Proviso was utterly void, because contrary to the Estate limited before; and it was said, It was like the Case, viz. I lett you my Land for ten years, Proviso, you shall not take the profits the two first years, That the same is a void and repugnant Proviso. Trin. 27 Eliz. in the Exchequer. *Moor* and *Savill's* Case. *Leon.* 2 Part, 132.

4. The Case was, Lessee for life makes a Lease for years rendring Rent, and afterwards surrenders to the Lessor upon Condition: The Lessee for years takes a new Lease for years of the Lessee. Lessee for life performeth the Condition, and pays

out the Leſſee for years, who re-enters; and afterwards the Leſſee for life brings Debt for Rent reſerved upon the firſt Leaſe: It was the Opinion of the Court, That the Action did not lye, becauſe the Leaſe out of which it was reſerved is gone and determined. Mich. 34 Eliz. B. R. *Cro.* 3 Part, 264. *Brewſter* and Sir *Tho. Parrat*'s Caſe.

5. Debt upon Obligation, The Condition was, That if J. S. performed the Arbitrament of J.N. if any be made before the Feaſt of *Eaſter*; and if none be made, if he come to the Guild-Hall at N. at the Feaſt of *Pentecoſt*, and there ſuffer himſelf to be arreſted at ſuch a Suit, if ſuch Suit be commenced, or pay to the Plaintiff 10 l. at the Feaſt of *Michaelmas*, then *&c.* The Defendant pleaded, That no Arbitrament was made before the Feaſt of *Eaſter*, and that J.S. dyed before *Pentecoſt*, and anſwered nothing to the Reſidue of the Condition: The Juſtices held, That in that Caſe it was a good Plea, becauſe by the Act of God he is deprived of his Appearance; and ſo the Obligation is ſaved, although he doth not pay the 10 l. for he had Election to do the one or the other. Paſch. 34 Eliz. B. R. *Tapp* and *Redingfield*'s Caſe. *Cro.* 3 Part, 277.

5. Upon a ſpeciall Verdict in *Ejectione firmæ*: The Caſe was, A Leaſe was made to E. for forty years of a Houſe, *ſub hâc tamen conditione, Quod ſi tam diu vixerit ſola*, and *inhabitaverit* in the ſaid Houſe. E. continued unmarried in the ſaid Houſe all her life-time, and dyed within the forty years: It was the Opinion of the Court, That the words *ſub conditione, quod ſi &c.* were void, for that they were inſenſible, and be neither Limitation nor Condition; and it is no more, than that a man makes a Leaſe for years rendring Rent, *ſub conditione, quod ſi* the Rent be not paid; and ſayes no more, which is without ſenſe, for it may be intended that he ſhall forfeit a pain, or that the Leſſor ſhould re-enter, which is incertain; for every *Quod ſi* ought to be anſwered with a *Quod tunc*: and for this incertainty it is void, and the Leaſe abſolute. Paſc. 37 Eliz. B.R. *Hardy* and *Seyer*'s Caſe. *Cro.* 3 Part, 414.

6. One deviſed Lands for years to J.S. *reddend. & ſolvend.* 20 l. *annuatim* at *Micharlmas* to J. D. and for non Payment of that Sum the Heir entred, ſuppoſing the words to be a Condition: It was the Opinion of the Court, That the words were a Condition, and the Entry of the Heir congeable. Trin. 37 Eliz. C.B. *Fox* and *Catlin*'s Caſe. *Cro.* 3 Part, 454.

7. Obligation conditioned, That if he paid 15 l. at the Feaſt of *Michaelmas* next following, until J.S. were advanced to a Benefice: That then the Defendant in Debt brought, pleaded, That he advanced to a Benefice before the Feaſt of *Michaelmas*, and adjudged, No Plea; for that the firſt 15 l. was to be paid, notwithſtanding that he was advanced to a Benefice, for the Limitation, *ſcil.* until he be advanced, goes only to the other ſubſequent Point. Hill. 39 Eliz. C. B. The Counteſs of *Warwick* and Biſhop of *Coventry*'s Caſe. *Cro.* 3 Part, 549.

8. Treſpaſs: J. S. Lord of the Mannor of S. demiſed Copy-hold Land of Inheritance to A. upon Condition, that he ſhould pay to B. yearly 20 s. during his minority, and 100 l. at his full Age: A. paid not the Money, viz. the 20 s. and ſurrenders to J. D. and his Heirs; the Lord admits him, and after P. attains his Age, and the 100 l. is not paid to him; the Lord enters for the Condition broken, and grants the Land to B. It was ſaid, That Entry of the Lord was good, for that he to whoſe Uſe the Surrender was made, comes in by him who ſurrendred, and not by the Lord, for that the Lord is but an Inſtrument to convey the Land: The Court doubted of it, and it was adjourned. Mich. 39 Eliz. B.R. *Pay* and *Brown*'s Caſe. *Cro.* 3 Part, 582.

9. The Caſe was, A man made a Leaſe for years upon Condition, to be performed on the part of the Leſſee; afterwards the Leſſor lett the Land to a Stranger for years by Indenture, and then performs the Condition. It was Objected, That by making the Leaſe the Condition was ſuſpended: But the Court held the Contrary; for that the Eſtoppel is onely between the Leſſor and the ſecond Leſſee, ſo as he is at large to enter for the Condition, notwithſtanding the ſecond Leaſe. But it was ſaid, That if one makes a Feoffment upon Condition, and afterwards levyes a Fine to a Stranger, the Condition is gone. Trin. 41 Eliz. B. R. *Ferrers* and *Vaughs* Caſe. *Cro.* 3 Part, 665.

10. Debt upon Obligation. The Condition was, That if C. paid to L. at ſuch a place within a Month after Demand 20 l. when, and at ſuch a time, as the ſaid L. had a Son, that ſhall or can ſpeak the Lord's Prayer in Engliſh, that then *&c.* The Defendant pleaded, That the ſaid L. the Plaintiff had not, after the Condition made, any Son, *qui locutus fuit aut loqui potuit* the Lord's Prayer: The Plaintiff Replied, That at ſuch a day he had one H. *filium ſuum qui loqui potuit* the Lord's Prayer in Engliſh: It was Objected, That the Allegation was not ſufficient to ground an Iſſue upon, *Quod habuit filium qui loqui potuit*; for it is but a ſecret Power, not reduced into Act, and cannot be known and not iſſuable: But it was holden by the Court, That it was a good Iſſue, and well tryable; for the Condition being in the diſjunctive, he may alledge the one or the other, at his Election; and his power of ſpeaking ſhall be proved

proved, who had heard him recite it. Trin. 41 Eliz. C.B. *Lane* and *Golman's* Caſe. *Cro.* 3 Part, 727.

12. Debt upon Obligation: The Condition was, That if the Defendant at all times upon Requeſt delivered to the Plaintiff the Fatt and Tallow of all Beaſts which he, his Servants, or Aſſigns, ſhould kill or dreſſe before ſuch a day, that then *&c.* The Defendant pleaded, That upon every Requeſt made unto him, he delivered to the Plaintiff all the Fatt and Tallow of all Beaſts which were killed by him, or any of his Servants, or Aſſigns, before the ſaid day. It was ſaid, That the Plea was not good for the generality: But it was the Opinion of the Court, That the Plea was good; for when the matters to be pleaded tend to infinitenesſe and multiplicity, the Law alwayes allowes of the general Pleading in the Affirmative, and he who pleads in the Affirmative ſhall alledge general Performance of Covenants generally. It was adjudged for the Defendant. Hill. 42 Eliz B.R. *Mints* and *Bethel's* Caſe. *Cro.* 3 Part, 749.

13. The Caſe was, A man had Iſſue a Son *William*, by one Venter, and C. and D. Sons, and E. a Daughter, by another Venter; and deviſed Lands to C. and D, and if either of them, or their Heirs, do ſell the ſame, the Gift to be void, and ſo return to the whole Heirs again: And further, That his Sons C. and D. ſhould pay yearly to *William* his eldeſt Son, and his Heirs, 3 l. A. dyed, C. and D. dyed without Iſſue: It was Reſolved in this Caſe, That it was an Eſtate in Fee in C. and D, and not an Eſtate for Life or in Tail. 2. Reſolved, That the Proviſo that the Land ſhould revert was void, and a void Condition being annexed to a Fee; and that one Fee cannot be limited upon another. Hill. 42 Eliz. C. B. *Skailard* and *Baker's* Caſe. *Cro.* 3 Part, 744.

14. Treſpaſs, The Defendant pleaded a Feoffment: The Plaintiff ſaid, It was on Condition, That if he paid 200 l. at ſuch a day, and 10 l. for every Fodder of Lead which ſhould be delivered unto him by the Feoffee and his means, and ſhould make a ſufficient Leaſe for 21 years of black Acre parcel thereof, that the Feoffment ſhould be void; and ſhewed the Payment of the 200 l. and that the Feoffee had delivered ſo many Fodders of Lead, and that he had paid 10 l. for every Fodder, and that black Acre was parcel of the Land of which the Feoffment was made, wherein the Feoffee continued in Poſſeſſion, and ſo he could not make a Leaſe thereof. It was the Opinion of the Juſtices in this Caſe, That he needs not alledge that part of the Condition, *viz.* the performance of making the Leaſe, for that it is impoſſible to be performed; and when a Condition conſiſteth of two parts, and the one part is poſſible to be performed, and the other not; if he performeth that which is poſſible it ſufficeth; but if the Condition be altogether impoſſible, it is void. Mich. 42 Eliz. B. R. *Wigley* and *Blackw.'s*, Caſe. *Cro.* 3 Part, 780.

15. Debt upon Obligation: The Condition was, That after Marriage of the Plaintiff, and having a Son by his Wife, if he conveyed Lands to the value of 40 l. *per annum* in Tail to the Son, to enjoy after the Death of the Obliger, That then *&c.* The Defendant ſhewed the day of Marriage, and the having of a Son, and that he made a Feoffment to a Stranger to the Uſe of himſelf for life, and after to the Uſe of the Son in Tail. The Plaintiff Replyed, *Quod non feoffavit*; Upon which it was demurred: It was holden, That although the Bar was ill, yet when the Plaintiff Replyes thereunto, he hath loſt the advantage of Exception to the Bar: and here it is an ill Bar; for it is not any Performance of the Condition by this Feoffment, becauſe the Enfant was not made party to the Conveyance, nor had any Deed or Aſſurance in point his Eſtate, ſo he is not ſure thereof; and therefore ſuch an Aſſurance made is no Performance of the Condition. Hill. 43 Eliz. C.B. *Stanfield* and *Somerſet's* Caſe. *Cro.* 3 Part, 825.

16. The Caſe was; J. S. lett a Houſe for 80 years, in which there was a Condition, That the Leſſee, his Executors and Aſſignes, ſhould maintain the ſame with Reparations; and upon lawful Warning given by the Leſſor, his Heirs and Aſſignes, that the Houſe was in decay; If it was not Repaired within ſix Months, then the Leſſor, his Heirs and Aſſignes, to enter. Leſſee for 80 years, leaſed the Houſe to A. for 30 years, who leaſed the ſame over to B. for 15 years; The Aſſignees of the Reverſion then poſſeſſed of the Houſe to repair the ſame, who did it not within ſix Months; the Aſſignee entred for the Condition broken: It was adjudged againſt the Aſſignee of the Reverſion; for that the warning given to B. the under-Leſſee, was not good, for he was not an Aſſignee of the Term, for he had but a ſmall Intereſt under the grand Leaſe, againſt whom no Avowry lay for Rent, nor any Action of Waſte for want of Privity. It was adjudged againſt the Aſſignee of the Reverſion. Paſch. 1 Jac. *Stratton* and *Caſhis* Caſe. *Yelverton*, 37. See more of this Caſe. *Brownl.* 1 Part, 135. See *Lib.* 1. Title, *Demand.* 614. Caſe 4.

17. In *Ejectione firmæ*, the Caſe was, A Copholder in Fee, by Licence of the Lord, lett the Land for ſixty years to M. if he ſo long lived rendring Rent, upon Condition to re-enter; the Copholder ſurrendred to the Leſſor of the Plaintiff, who

who demanded the Rent which was not paid, who thereupon entred, and lett the Land to the Plaintiff: It was the Opinion of the Court, That in this Caſe, the Entry of the Leſſor was not lawful; for that Copy-hold Land is not within the Statute of Conditions, nor the Leſſor ſuch an Aſſignee as the Statute intended, for he is in by the Cuſtom which doth not extend to collateral things, and he is not privy to the Leaſe made by the firſt Copy-holder, nor in by him; but may plead his Eſtate immediatly under the Lord. Trin. 10 Jac. B.R. *Brafier* and *Beal's* Caſe. *Yelverton*, 222. See *Cro.* 2 Part, 305. the ſame Caſe.

18. Debt upon Obligation conditioned, That if the Plaintiff enjoyed ſuch Land untill the full Age of J. S. and if J. S. within 2 Months time after his full Age, made an Aſſurance to the Plaintiff of the ſaid Land, that then *&c.* The Defendant pleaded, That J. S. is not yet of full Age; and becauſe he did not plead, whether he had enjoyed it in the mean time, the Condition being in the Copulative, It was adjudged for the Plaintiff. Trin. 43 Eliz. B.R. *Walker* and *Crook's* Caſe. *Cro.* 3 Part, 870.

19. Obligation: The Condition was, If R.B. the Son of the Defendant do at any time before ſuch a Feaſt, which ſhall be in *Anno* 1604, either as Apprentice, or Servant, or otherwiſe, uſe the Trade of an Haberdaſher, within the County of K. If then the ſaid R. B. do upon Requeſt pay the Plaintiff 20 l. that then the Obligation ſhall be void: It was ſaid in this Caſe, That in this Caſe he is not prohibited or obliged abſolutely, that he ſhall not exerciſe the Trade of a Haberdaſher, but if he do exerciſe it, that he ſhall pay 20 l. But the Opinion of the Court was, That the Obligation and Condition were both againſt Law; for aſwell as he may reſtrain him for a time in one place, he may reſtrain him for longer time, in other places, which is againſt the benefit of the Common-wealth: It was adjudged for the Defendant. Mich. 44 Eliz. C. B. *Colgate* and *Batchellors* Caſe. *Cro.* 3 Part, 872.

20. Debt upon Obligation, Conditioned to diſcharge and ſave harmleſſe from all Obligations which he had entred into for him: The Defendant pleaded, *Quod exoneravit & indemnem conſervavit* from all the Obligations, *&c.* and did not ſhew from what Obligations: It was holden, That as for that the Plea was ſufficient, for the avoiding Prolixity in pleading; but becauſe he did not ſhew *quo modo exoneravit*, &c. the Plea was holden not to be good. Mich. 44 Eliz. B. R. *Brabas* and *Bacon's* Caſe. *Cro.* 3 Part, 916.

21. A man gave Lands to his Wife, during the minority of his Son, upon Condition that ſhe ſhould not do Waſte; ſhe took Husband who committed Waſte: It was the Opinion of the Juſtices, That it was no Breach of the Condition, for that a Condition to avoid an Eſtate ſhall be taken ſtrictly. See *Dyer*, 45. Hill. 22 Jac. B.R. *Cobb's* Caſe. *Latch*, 16.

Conſiderations.

1. Aſſumpſit: In Conſideration, *Quod deliberaſſet & dediſſet* to the Defendant 20 Sheep, he promiſed to pay him 5 l. at the time of his Marriage, and alledged *in facto*, that he was married: It was the Opinion of the Court, That becauſe it was in the Preter-Tenſe, and for a Conſideration paſt that the Action did not lye. Mich. 38 Eliz. C. B. *Jeremy* and *Goodman's* Caſe. *Cro.* 3 Part, 442.

2. Aſſumpſit: Whereas the Plaintiff at a certain day then paſt, at the Defendant's Requeſt, had lent him 30 l. for ſuch a time. The Defendant promiſed to lend to the Plaintiff upon Requeſt 30 l. for a year, or otherwiſe to give him 40 s. It was the Opinion of the Court, That the Action did not lye, becauſe the Conſideration and Promiſe ought to go together, or elſe it ought to be a Conſideration continuing. Mich. 44 Eliz. C. B. *Docket* and *Voyle's* Caſe. *Cro.* 3 Part, 885.

3. There was at the Requeſt of the Defendant a Communication of a Marriage between the Plaintiff and the Defendant's Daughter: The Plaintiff married her, and afterwards the Defendant promiſed to pay the Plaintiff 100 l. It was the Opinion of the Juſtices in this Caſe, That it was a good Conſideration, although upon a Conſideration paſt. Trin. 29 El. B.R. *Monſh* and *Kavenford's* Caſe. *Cro.* 3 Part, 59. See Hill. 31 Eliz. B. R. *Kirkby* and *Cole's* Caſe. *Cro.* 3 Part, 131. acc.

4. A man recited by Indenture, That whereas J. S. ſtands bound in a Recognizance for him, he for diverſe good Conſiderations bargains and ſells his Lands to him and his Heirs: It was holden by the Juſtices in this Caſe, That it was no good Bargain and Sale, becauſe the Vendor had nothing for his Land: But it was holden, That it had been a good Conſideration to raiſe an Uſe by way of Covenant. Hill. 35 Eliz. C.B. *Ward* and *Lambert's* Caſe. *Cro.* 3 Part, 394.

5. Aſſump-

5. Aſſumpſit: Whereas A. was ſeiſed of Lands in Fee, and was bound in 1000 l. by Recognizance to the Plaintiff, and enfeoffed the Defendant of his Land: The Defendant, in conſideration that the Plaintiff ſhould aſſign over to him his Recognizance, promiſed to pay the Plaintiff 80 l. before ſuch a day. Upon *Non Aſſumpſit* it was found, That at the time of the Recognizance made, A. was ſeiſed of the Land ſold to the Defendant, and of a Cloſe called W. and enfeoffed J. S. of the Cloſe called W. and the Plaintiff releaſed to J. S. all his Right and Demand in the Land called W. And afterwards A. enfeoffed the Defendant, and the Defendant promiſed *ut ſuprà*, and that the Plaintiff aſſigned the Recognizance to the Defendant, and if the Aſſignment of the Recognizance was a ſufficient Conſideration; the Jury found for the Plaintiff. It was in this Caſe Reſolved, 1. That the Aſſignment of a Debt or a Recognizance to a Stranger is an illegal and void Conſideration; but to aſſign it to the Terr-Tenant in diſcharge of the Land is lawfull. 2. That this Releaſe to J. S. of all his Right and Demand in the Land is not a Diſcharge of the Recognizance; for at the time of the Releaſe made, he had no Right nor Cauſe of Demand in the Land, for the Land is not the Debtor but the Perſon, and the Land is only chargeable in reſpect of the Perſon; and here in this Caſe, before Execution ſued, he had not any Right nor Demand in the Land, wherefore it is not any diſcharge of the Recognizance: It was adjudged for the Plaintiff. Paſch. 38 Eliz. B.R. *Barrow* and *Gray*'s Caſe. *Cro.* 3 Part, 552.

6. Aſſumpſit: In conſideration the Plaintiff would make a Leaſe unto him of ſuch Land, the Defendant promiſed to pay 20 l. Upon *Non Aſſumpſit*, it being found againſt the Defendant: It was moved in ſtay of Judgment, That the Plaintiff had not performed the Conſideration; for he being to make a Leaſe, it ſhall be intended a Leaſe for life. But it was the Opinion of the Court That the Promiſe being general, to make a Leaſe, it may be any Leaſe, *viz.* at Will, which he might determine preſently, and it is not any Conſideration to ground an Action. Paſch. 39 Eliz. C. B. *Ferby* and *Larkin*'s Caſe. *Cro.* 3 Part, 566.

7. Error in Aſſumpſit: Wherein the Plaintiff declared, Whereas the Defendant was bound to him in 200 l. which Bond he had aſſigned to the Queen, being indebted to her, That the Defendant, in Conſideration that the Plaintiff would forbear to procure any Proceſs againſt him for the ſaid Debt till *Hillary* Term following, promiſed to pay the Plaintiff 200 l. Judgment being for the Plaintiff, and Error brought in the Exchequer Chamber: It was holden by all the Juſtices and Barons, That the Debt by Aſſignment being conveyed to the Queen, the forbearance of the procuring any Proceſs was not any benefit or eaſe to the Defendant, notwithſtanding ſuch Promiſe; and ſo no good Conſideration to ground Aſſumpſit upon. Hill. 41 Eliz. B.R. *Bawes* and *Powlet*'s Caſe. *Cro.* 3 Part. 653 654.

8. Aſſumpſit: Whereas he ſold to the Defendant's Son certain Weighs of Cheeſe; the Defendant, in Conſideration that the Plaintiff would deliver the ſaid Cheeſes to his Son, promiſed, That if the Son did not pay for them, he would: Upon *Non Aſſumpſit* found for the Plaintiff, it was ſaid, It was no Conſideration; for it is no more than what the Law appoints, to deliver that which is ſold. But the Court held the Conſideration to be good; for it is an eaſe to the Bargainee to have them without Suit, which peradventure otherwiſe he could not have; and although the Bargainee may take them in this Caſe, the Bargainor is not bound to deliver them. Mich. 41 Eliz. B.R. *Sherwood* and *Woodward*'s Caſe. Mich. 41 Eliz. B. R. *Cro.* 3 Part, 700.

9. Aſſumpſit: The Plaintiff declared, In Conſideration that the Plaintiff at the inſtance of the Defendant had promiſed to pay 120 l. to one R. wherein the Defendant was endebted to R. the Defendant promiſed he would pay the Plaintiff this 120 l. when he ſhould be required: It was moved, That this is not any Conſideration, for it is not any benefit to the Defendant, becauſe he is not thereby diſcharged of his Debt, and it is not alledged, That he paid it to R. nor the Promiſe alledged to be made to R. and if it had been, it had not been good, for that there was not any Conſideration between them: But the Court held it to be good enough; for there is a mutual Promiſe, the one to the other, and a Promiſe againſt a Promiſe is a good Conſideration. Paſch. 41 Eliz. B. R. *Wickalls* and *John*'s Caſe. *Cro.* 3 Part, 703.

10. Aſſumpſit: In Conſideration that he, at the Defendant's Requeſt, by Deed *dediſſet & conceſſit* to the Defendant the firſt and next Avoidance of the Church, the Defendant promiſed to pay to the Plaintiff 100 l. Being found for the Plaintiff, it was ſaid, That this was upon a Conſideration paſt: But the Court Reſolved the contrary; for the Grant being at his Requeſt, it was a ſufficient Conſideration, although it was diverſe years paſt, eſpecially being to the Defendant himſelf, the Conſideration ſhall be taken to continue; but if it had been to a Stranger it had been otherwiſe. Mich. 41 Eliz. B. R. *Riggs* and *Bullingham*'s Caſe. *Cro.* 3 Part, 715.

11. Debt

11. Debt againſt an Executrix: The Plaintiff declared, That the Teſtator leaving ſufficient Aſſets to pay his Debts, that he intended to ſue the Executrix, to recover 8 l. *ſecundum debitum legis cuſum*; and that the Defendant in Conſideration that he would forbear the Executrix, promiſed to pay the Money, which ſhe did not pay: In Aſſumpſit found againſt the Defendant, it was the Opinion of the Court, That as this Caſe was the Action did not lye; for this Debt is intended to be moſt ſtrong againſt the Plaintiff, to be a ſimple Contract with which the Executrix is not chargeable; and to ſtay this Suit is not any Conſideration, for the Suit intended is an Action of Debt which lyes not, and ſo no Conſideration. But if he had intended to have ſued in Chancery for it, (which ſhall not be intended in this Caſe, becauſe he intended to recover *per debitum legis cuſum*,) then perhaps this Action, upon ſuch Aſſumpſit, would have lyen. Hill. 43 Eliz. B. R *Peck* and *Lovedon*'s Caſe. *Cro.* 3 Part, 804.

12. Error in Aſſumpſit: The Conſideration was, The Plaintiff declared, in Conſideration that he would deliver to A. certain Beaſts, as he ſhould buy, that if A. bought of him any Beaſts, for ſuch a Sum of Money, to be paid *ad aliquod tempus vel tempora tunc futura inter eos concordand.* and did not pay it, he would pay it; and alledged that he ſold to A. twenty Beaſts for 38 l. whereof 20 l. to be paid in hand, and the other 18 l. at a day to come, and A. had not paid him the 18 l. Upon *Non Aſſumpſit* found for the Plaintiff, Judgment was given, and thereupon Error brought, for that the Conſideration is not alledged to be performed, for he promiſeth to pay only for thoſe which are ſold to be paid at a future day, and here it is not ſold to be paid at a future day, but part in hand, and part at a day to come, and the Promiſe muſt go to the entirety. But the Court held it to be good enough; for when part is to be paid at a future day, it is within the Promiſe, and the Promiſe is not, If he ſells for Payment at a future day, although part be paid immediately: The Judgment was affirmed. Hill. 43 Eliz. B. R. *Philips* and *Turner*'s Caſe. *Cro.* 3 Part, 807.

13. Aſſumpſit: Whereas the Plaintiff was to deliver to J. S. twenty Combs of Barley ſuch a day; the Defendant in Conſideration that he would deliver it to the Defendant, promiſed to deliver it to J. S. at the day: In this Caſe, it was adjudged, That although it was alledged, that the Defendant had the better Credit by reteining of it in his hands, and ſo adjudged in B. R. Yet upon Error brought, it was Reſolved in the Exchequer Chamber, That there was not any ſufficient Conſideration, and the Judgment was reverſed. Paſch. 44 Eliz. C. B. *Kich* and *Bridge*'s Caſe. *Cro.* 3 Part, 883.

14. Action upon the Caſe: The Plaintiff ſhewed, That whereas he had the Preſentation to the Church of N. and one W. had a Preſentation to the ſame Church from the Univerſity of *Oxford*: That there being a Communication betwixt the Plaintiff and the Defendant concerning the ſame; the Defendant promiſed, That if the Plaintiff would ceaſe proſecution of any Inſtitution upon it, that the Defendant promiſed to give him 30 l. and a Gelding: It was the Opinion of the Juſtices in this Caſe, That it was not any good Conſideration to ground an Aſſumpſit. Mich. 22 Jac. B. R. Dr. *Walſon* and *Bradbaw*'s Caſe. See the Reports annexed to *Bendlowes*, 150.

See more, Title *Aſſumpſit*.

Conſultation.

1. A Man libelled in the Spiritual Court for Tythes of Slate-ſtone: The Defendant prayed a Conſultation, for that the Plaintiff heretofore ſued a Prohibition for the ſame Cauſe in Chancery, and upon the ſame Libel, and there a Conſultation was granted; for infinitely otherwiſe he ſhould be vexed: And when one Court grants a Conſultation, he ſhall not ſue a Prohibition in another Court: Wherefore a Conſultation was granted, if before a Conſultation was granted in another Court upon the ſame Cauſe: And in this Caſe, it was holden by the Juſtices, That no Tythes are due of a Quarrey of Slate or Stone. Paſch. 34 Eliz. C. B. *Liſſe* and *Watt*'s Caſe. *Cro.* 3 Part, 277.

2. Prohibition upon a Suit for Tythes of Corn, Wool, and Calves; for the Corn, the ſuggeſtion was, That they had uſed to pay in the Pariſh, the tenth Sheaf in Satisfaction of all Tythes for Corn to the Parſon, and that he ſet them out, and the Parſon had them: which Plea he offered in the Spiritual Court, and they would not allow it. The Court held, That for that it was a good Suggeſtion, and a Prohibition granted; for that if the Tythes be once ſet out, it is no reaſon that the Pariſhioner ſhould be charged again: For the Calves, The Suggeſtion was, That they had uſed to pay 2d. within the Pariſh, for the Milk of every Cow in ſatisfaction of Calves: The Proof was, there was ſuch an Uſage for all the Lands except five Farms; and for this Cauſe, the Court held, That he had failed in his Preſcription, for that it might be that theſe

Lands were parcel of the five Farms: Wherefore a Consultation was granted, but if it had been proved that the Lands were not parcel, it had been otherwise. Trin. 30 Eliz. C. B. *Bennet* and *Shortwright*'s Case. *Cro.* 3 Part, 206.

3. Prohibition: The Plaintiff surmised that the Church of B. was a Donation, and that the King was seised in Fee of the Advowson; and granted the same to J. S. from whom he made Title, and that one A. pretending it to be Presentative, and that he was Patron, presented the Defendant, who sued in the Spiritual Court to have Induction, and cited W. F. who had it of the Donation from the Plaintiff, who appeared, and appeal'ed to the Delegates, and dyed; and the Plaintiff comes in *pro Interesse suo*, and pleaded his Title, that he had this Church a Donative; which Plea being there refused, he prayed a Prohibition: It was the Opinion of the whole Court, That a Consultation ought to be granted in this Cause, because the Defendant claimed nothing but Induction, which cannot be any way prejudiciall to the Plaintiff; for if it be a Donative, the Induction is to no purpose; and if it be Presentative, the other can have no Remedy for the profits till Induction, nor try his Right. And although W. F. be dead, the Suit is not determined, for it is made to the Judge, and he *ex Officio* is to bring in the party who pretends Interest: Wherefore a Consultation was granted. Hill. 41 Eliz. B. R. *Symms* and *Fanchild*'s Case. *Cro.* 2 Part, 653.

Copyhold and *Copyholders*.

1. NOte, It was holden by the Court, That Tenant by Copy of Court-Roll, cannot by the Common Law take Trees for House-bote, Hedg-bote, and Cart-bote, as Tenant for life, or years may do; otherwise it is, if there be a special Custom for it. Pasc. 24 Eliz. B. R. The Lord *Mountague* and *Shephard*'s Case. *Cro.* 3 Part, 5.

2. A Copyholder devised Lands to his Wife for life, and that she should sell the Lands for payment of his Debts, and surrenders to the Use of his Will; the Copyholder dyes, and his Wife surrenders it upon Condition to pay 12 l. It was the Opinion of the Justices in this Case, That it was a good Sale. Hill. 27 Eliz. *Bright* and *Hubbard*'s Case. *Cro.* 3 Part, 68.

3. Tenant for life of a Copyholder, the Remainder in Fee to an Enfant, joyn in a Surrender to J. S. who is admitted Tenant for life, and he in the Remainder dyes. It was holden in this Case, That the Heir of him in the Remainder may enter, and shall not be put to his *Dum fuit infra ætatem*. Mich. 30 Eliz. B. R. *Knight* and *Fortipan*'s Case. *Cro.* 3 Part, 90.

4. The Father of a Copyhold surrenders it to the Use of his Son in Fee, upon condition to perform Covenants in an Indenture. The Son after Admittance surrenders to J. S. upon condition, that if the Son pay 10 l. the surrender to be void: The Son neither payes the 10 l. nor performs the Covenants; the Father dyeth, the Lands discend to the Son. It was the Opinion of the Court, That by the Entry of the Father both the Surrenders were avoided, and that then the Son might well enter, and avoid the Surrender made to J. S. Trin. 33 Eliz. B. R. *Symonds* and *Lawal*'s Case. *Cro.* 3 Part, 239.

5. Note, It was adjudged by the whole Court, That if a Copyholder cut down Trees without Custom it is a forfeiture, unless it be for Reparation. Hill. 35 Eliz. B. R. *East* and *Harding*'s Case. *Cro.* 3 Part, 292.

6. If an Estate Tail may be of a Copyhold: The Court was divided in Opinion. Trin. 36 Eliz. B. R. in *Gravenor* and *Rice*'s Case. *Cro.* 3 Part, 307.

7. A Copyhold demisable by Custom for one or two lives was granted to A. for life, and to B. *durante viduitate sua*. It was the Opinion of the Justices, That the Grant was good, for when the Custom doth warrant the greater Estate, it doth warrant the lesser, and especially because this Estate *durante viduitate* is an Estate for life. Pasch. 36 Eliz. B. R. *Downs* and *Hopkins* Case. *Cro.* 3 Part, 323.

8. The Case was, A Copyholder surrenders to the Use of J. S. The Lord without reasonable cause doth refuse to admit him: The Question was, If he might enter without Admittance. It was the Opinion of the Court, That he could not enter, unless there be a special Custom to warrant it; for after the Surrender, and before Admittance, he who maketh the Surrender continueth in Possession, and not the Lord or *Cestuy que use*. Mich. 37 Eliz. B. R. *Berry* and *Green*'s Case. *Cro.* 3 Part, 349.

9. In Trespass: The Question was upon forfeiture of a Copyhold by reason of a Lease for years made by a Copyholder: It was holden by the Court, That a Lease for years of Copyhold-Land by Indenture, is a forfeiture, unless there be an express Custom to warrant it; and whereas it was

shewed,

ſhewed, that there were Leaſes made of it by Indenture, 27 H.8. and divers times ſince, ſome 20, ſome 40 years: The Court held the ſame was not ſufficient, for they are of too late time to prove a Preſcription which ought to be from time to time, whereof the memory of man is not to the contrary. Mic. 37 Eliz. B.R. *Jackman* and *Hoddeſdon*'s Caſe. *Cro.* 3 Part, 351.

10. In Treſpaſs: It was found by Verdict, That the Land was Copyhold demiſable in Fee, in Tail, or for Life; and that A. was ſeiſed thereof in Tail, the Remainder to B. in Tail, and ſuffered a Recovery with Vouches in the Court of the Mannor, and afterwards he dyed without Iſſue, and they found, *Quod nulla ſit conſuetudo pro communibus Recuperationibus antè uſitat.* in the ſaid Mannor. It was the Opinion of the Juſtices in this Caſe, That the Recovery ſhould not bind the Iſſue in Tail; for it ſhall not bind but upon a Recompence in value, and here he cannot have any Land in value, and if it ſhould be ſo conveyed, the Lord ſhould thereby loſe his Fine, and one ſhould hold his Land as a Copyholder, without Admittance or Grant from the Lord, which is contrary to the nature of Copyhold, and contrary to the Preſcription. Mich. 37 Eliz. B. R. *Clun* and *Penſes* Caſe. *Cro.* 3 Part, 391.

11. The Caſe was; A. ſeiſed of a Mannor in which were divers Cuſtomary Lands, demiſed by Copy for three lives; The Lord did demiſe ſome of thoſe Lands to three Siſters, *Habendum* to them for their lives *ſucceſſivè*, for the Fine of 100 l. by them paid; The eldeſt Siſter, who was Tenant in perſon, took to Husband C; after, the Lord by Indenture leaſed the ſame Land to the eldeſt Siſter, the Remainder to the Husband, the Remainder to the ſecond Siſter; and no agreement was made thereunto by the ſecond Siſter by Deed before, or after the making of the ſaid Indenture; but four dayes after the Leaſe made, ſhe agreed to it in the Chancery, and then took to Husband C, and they entred, claiming of the ſaid Lands. The point was, When the Leaſe by the Indenture was made to the eldeſt Siſter, at which time no agreement was made by the ſecond Siſter, who was in Remainder yet when after ſhe agreed; If by that agreement, her Right to the Copy-holder was extinct or not, ſo as the Intereſt of the eldeſt Siſter being gone by the acceptance of the eſtate, the ſecond Siſter might come and claim her Cuſtomary eſtate and Intereſt, paramount the Intereſt of the elder Siſter. In this Caſe, It was ſaid by *Gawdy*, Juſtice, That the Remainder is in the Conſideration of the Law, and the eſtate of the firſt Siſter is not ſo determined, that any can take advantage of it; For the Lord againſt his Leaſe cannot enter or claim any thing; and the ſecond Siſter, although ſhe hath not agreed, cannot enter during the Life of her elder Siſter; for her Remainder takes effect in perſon after the death of the ſaid Siſter. Afterward Judgment was given in this Caſe againſt the younger Siſter. Trin. 29 Eliz. B. R. *Curtiſe* and *Cottell*'s Caſe. *Leon.* 2. Part, 72.

12. In *Ejectione firme*; The Caſe was, The Lord of a Mannor made a Leaſe to 2 of his Copyholders of the Court Baron of 200 years, ſaving to himſelf the other Demeaſnes and Services: The Leſſor keeps Court, a Copy-holder Surrendred to to the uſe of A. in Fee; A. obtains Licenſe in Court to lett it for 21 years from Mich. paſt; Afterwards he makes a Leaſe for 21 years, to begin at *Chriſtmas* following to the Plaintiff: If this was a good Grant by Copy, and this Leaſe by the Copy-holder allowable or not, was the Queſtion. It was holden by the Court, 1. That it was a good Copy, and the Court may well continue it to that purpoſe for admittance of Copy-holders; for otherwiſe any one by his own Act might deſtroy his Copy-hold eſtate: And the Court held, 2. That the Leaſe was not warranted by this Licenſe, and then the *Ejectione firme* did well lye. Trin. 36 Eliz. C. B. *Jackſon* and *Neal*'s Caſe. *Cro.* 3. Part, 394.

13. In Treſpaſs for cutting of Wood; The Caſe was, That J. S. was ſeiſed of a Manner whereof the place where, &c. and that the underwood growing upon the place, where time thereof &c. had been demiſed by Copy; and the ſaid J. S, before the Leaſe made to the Defendant, granted to the Plaintiff and his Heirs by Copy the under-wood there from time to time growing, to be cut down by the Plaintiff and his Heirs, *quolibet anno*, four or five Acres, *Annuatim*. The Queſtion was, Whether under-wood growing can be demiſed by Copy; for here the Soil it ſelf is not lett, but only the under-wood. It was Reſolved by the Court, That this under-wood is a thing of Inheritance and perpetuity; for after every cutting, they will grow again, and ſo may be well demiſed in Fee by Copy: And in this caſe, It was ſaid, That a Market within a Mannor might be demiſed by Copy, and that a Grant of Tythes by Copy was good, as it was adjudged in Sir *John Bourn*'s Caſe. Paſch. 37 Eliz. B. R. *Hoe* and *Taylor*'s Caſe. *Cro.* 3 Part, 413.

14. The Queen, Lady of a Mannor, by her Steward did Licenſe a Copyholder to make a Leaſe for 3 lives, if he ſhould ſo long live; the Copy-holder did make a Leaſe generally to the Plaintiff for three years; It was ſaid in this caſe, That the Copy-holder had not perſued his Licence; for a Licence or Authority muſt be ſtrictly

perſued: But it was holden by the Court, That he had well perſued his Licence. For when his Licence is to make a Leaſe for years, if he ſo long live; the words, [If he ſo long live] are but Surpluſage. For the Law ſayes, That if a Copyholder makes a Leaſe for years, and dyes, the Leaſe is determined; and therefore the clauſe in the Licence is no more then what the Law ſaies, and ſo is void: A difference was taken between a Copy-holder in Fee, and for life. For if the Lord doth Licence a Copyholder in Fee, to make a Leaſe for three years, if he live ſo long, and he makes a Leaſe abſolutely; this is no forfeiture, for this Leaſe ſhall be a good Intereſt againſt the Heir of the Copy-holder; but otherwiſe it is of a Copy-holder for Life. Hill. 38 Eliz. B. R. *Haddon* and *Arrowſmith's* Caſe. *Cro.* 3. Part, 402.

15. Copy-holder in Fee, rendring Rent at *Mich.* and our Lady day: The Lord at the laſt inſtant of the day of payment, demands the Rent upon the Land, and the Copy-holder is not there to pay it. *Quære*, if it be a forfeiture: It was not Reſolved, The Court being devided in Opinion. Trin. 38 Eliz. B. R. *Criſpe* and *Fryer's* Caſe. *Cro.* 3. Part, 705.

16. The Caſe was; A Copy-holder had Licence from his Lord to lett his land for 21 years, he lett it to the Plaintiff for three years, who entred, & being ejected brought an *Ejectione firmæ*: It was the Opinion of all the Barons in the Exchequer, that the Ejectment was well brought, for that it is a good Leaſe between the parties. Mich. 38 Eliz. in the Exchequer. *Goodwin* and *Langluiſts* Caſe. *Cro.* 3 Part, 535.

17. The Caſe was this, Tenant for life, the Reverſion in Fee to J. S. of a Copyhold: Tenant for life ſold it in Fee, and to make the Sale good, it was deviſed, That he ſhould commit Waſte to make a forfeiture, and that the Lord ſhould enter for the forfeiture, which he did accordingly; and then the Lord granted it to the Vendee, upon a condition, That he ſhould repaire the Waſte, and alſo Grant a Sum of Money to the Vendor, the Tenant for life. In this Caſe, it was holden by the Court, That this Colluſion and Fraud to which the Lord was conſenting ſhould not prejudice him in the Reverſion, but that he might enter, and that the Lord ſhould not take advantage of the forfeiture. Trin. 39 Eliz. B. R. *Raſtall* and *Turner's* Caſe. *Cro.* 3 Part, 598.

18. The Cuſtom of a Manor was, That *Dominus pro tempore* might make Demiſe for two or three lives in Poſſeſſion or Reverſion: A Woman Tenant for life of the Manor in Dower granted a Copyhold to J. S. and two others for their lives, *Habend. poſt mortem* A. B. and then dyed; and after A. B. dyed. It was holden by the Court in this Caſe, That the Grant was good in Reverſion, although it was executed in the life of the Tenant in Dower. Paſch. 41 Eliz. *Gay* and *Kay's* Caſe. *Cro.* 3 Part, 661.

19. Note, It was Reſolved by the whole Court, That if the Lord demands an unreaſonable Fine of his Copyholder, where the Fine is incertain, if he deny it, it is no forfeiture of his Copyhold, as it was adjudged in *Holdeſdon's* Caſe. 2. That where a Fine is certain, the Heir ought to tender it upon his Prayer to be admitted, otherwiſe the Lord is not to admit him; but where it is incertain, he needs not to bring it with him, becauſe he knows not what he ought to bring, but the Lord ought to aſſeſſe the Fine, and admit him, and he ought to have convenient time for the payment of it. Mich. 42 Eliz. B. R. *Dalton* and *Hammond's* Caſe. *Cro.* 3 Part, 779.

20. In Replevin: The Caſe was, A Copyholder of a Mannor, who had Common by Preſcription in 60 Acres of Land, parcel of the Demeſnes of the Mannor, eſcheated. The Lord by Deed granted it to another in Tail, by the name *Communitatum quarumcunq; dict. Meſſuagio ſive tenement. ſpectant. ſive aliquo modo pertinent. vel cum eodem Meſſuagio dimiſſo uſitat.* If the Grantee have Common in the 60 acres, was the Queſtion? Reſolved *per Curiam*, That the Donee in Tail ſhould have ſuch Common as the Copyholder had, but the ancient Copyhold which was by Preſcription, was determined by the Unity of the Poſſeſſion of the Lord; but the Grant ſhould enure as a new Grant of the like Common. Paſch. 40 Eliz. C. B. *Woledg* and *Kingſmills* Caſe. *Cro.* 3 Part, 794.

21. In Trover and Converſion of 20 Loads of Hay: It was found by Verdict, That they were appertaining to the Rectory of H. and demiſed and demiſable time out of mind, *ſecundum Conſuetudinem Manerii de* H. and that the Prior of M. was ſeiſed of the Mannor and Rectory of H. and 27 H. 8. demiſed thoſe Tythes by Copy to J. S. under whom the Defendant claimed: And after, by the Statute of Diſſolution, the Mannor and Rectory came to King *Henry* the 8th, who conveyed it to the Biſhop of Y. who lett the Rectory to the Plaintiff, who claimed theſe Tythes; the Defendant under the pretence of that Copy, carried them away: The Queſtion was, Whether theſe Tythes were grantable by Copy; it was ſaid, They were not, in reſpect of the Nature of Tythes, wherein none could have property before the Council of *Lateran*, *in temps* King *John*, and by that Conſtitution they are annexed to the Rectory. 2. It was impoſſible there ſhould be any Cuſtom to demiſe them by Copy, when none had Intereſt

tereſt in them but within time of memory; and alſo Tythes cannot be parcel of a Mannor, for they are of ſeveral natures though united in one man's hands: It was adjudged for the Plaintiff, but eſpecially becauſe upon the Verdict it did not appear, that they had been granted by Copy from time to time, whereof memory of man was not to the contrary. Paſch. 43 Eliz. B. R. *Sands* and *Dwyes* Caſe. *Cro.* 3 Part, 814. See before, Caſe 13.

22. Note: Reſolved, That a Copy-hold Eſtate is not barred by Fine and five years, and that Leſſee for years *in futuro* is not barred by ſuch a Fine, but other wiſe of a Leſſee in Poſſeſſion. Trin. 2 Jac. C. B. *Mills* and *Bradley's* Caſe. *Noy*, 23.

23. A Copy-hold was ſurrendred to the Uſe of A. for life, the Remainder to B. in Fee, into the hands of a Cuſtomary Tenant, in the preſence of two others. The Cuſtom of the Mannor was, That if at the next Court, after ſuch a Surrender, it be to be ſurrendred, Proclamation was to be made, That if any claim *&c.* to be admitted, that he ſhould come, and he ſhould be heard; and if none came, then two Proclamations were to be made; and if none came before the third Proclamation, then it ſhould be a Bar to him and his Heirs to whoſe Uſe the Surrender was made. A. did not come before the three Proclamations, thereupon the Lord granted the Copy-hold to another: It was the Opinion of the Court in this Caſe, That he in the Remainder was not barred after the death of A. for B. in Remainder cannot come and claim to be admitted preſently, but the Lord ſhall hold it during the life of A. So it was adjudged in *Ruſſhale* and *Long's* Caſe, *Noy*, 42. and ſo it was ſaid, it was adjudged. Trin. 29 Eliz. in *Raſtall* and *Lowes* Caſe. And Paſch. 3 Jac. in C.B. in *Whiton* and *Savages* Caſe. That ſuch a Cuſtome ſhall not barr him who is beyond Sea, when ſuch a Surrender is made, or when the Copy-hold deſcends. *Noy*, 42. See *Yelverton*. Paſch. 44 Eliz. B. R. *Yelverton*, 1. in the ſame Caſe.

24. Upon a Demurrer: The Caſe was, An Infant Copy-holder in Fee made a Leaſe for years without Licence, rendring a Rent; and at full Age he accepted the Rent, and afterwards ouſted his Leſſee, who thereupon brought *Ejectione firmæ*. In this Caſe it was agreed by the Court, 1. That a Leaſe for years by a Copyholder, although it be a forfeiture, yet it is no Diſſeiſin to the Lord. 2. That the Leaſe is not void, but voidable, and may be affirmed by Acceptance of the Rent. 3. That ſuch a forfeiture doth not bind an Infant. Trin. 2 Car. B. R. Rott. 913. *Aſhfield* and *Aſhfield's* Caſe. See the ſame Caſe more at large, *Lib.* 1. Title *Copyhold*, fol. 456. Caſe 8.

25. Note, It was Reſolved by the Court, That the Lord may diſtrein his Copyholder for the Services, or he may ſeiſe the Copyholders Lands. Mich. 7 Jac. B. R. *Rivet* and *Dawes* Caſe. *Noy*, 135.

26. In Treſpaſs: The Defendant pleaded, That the Land is Copyhold, parcel of the Mannor of D. and that J. 24 Eliz. granted it to him by Copy: The Plaintiff Replyed, That Sir H. R. 28 H. 8. granted it to one F. the Husband, and his Wife, and their Heirs; the Husband dyed, the Wife ſurvived and dyed: J. admitted the Defendant, the Plaintiff as Heir of the Wife enters. The Point was this, The Copyholder dyes, and the Lord admits a Stranger: It was adjudged, That the Heir might enter, and upon the Re-entry maintain Treſpaſs without an Admiſſion by the Lord. *Simpſon* and *Gillion's* Caſe. *Noy*, 172.

27. A Parſon ſued a Copyholder in the Spiritual Court, for Tythes ariſing upon his Copy-hold: He prayed a Prohibition and ſuggeſted, That the Biſhop of W. was Lord of the Mannor, and that he and his Predeceſſors, time out of mind, for them and their Farmors, and Tenants, had been diſcharged of Tythes ariſing upon the Mannor, and ſhewed that he had been a Copyholder of the Mannor, time out of mind *&c.* and preſcribed in his Lord: In this Caſe, it was holden by the Juſtices, That although here is a Preſcription upon a Preſcription, one in the Copyholder to make his Eſtate good, the other in the Biſhop to make his Diſcharge good, yet a Prohibition lyeth; for the Preſcription in the Lord of Right, of neceſſity and common intendment precedes the Preſcription in the Copyhold Eſtate; and the Diſcharge of Tythes in the Lord ſhall go to the benefit of the Copyholder. Paſch. 1 Jac. *Crauche* and *Frizt's* Caſe. *Yelverton*, 2.

28. J. S. and others were Indicted upon the Statute of 8 H. 6. for entring into parcel of a Mannor of Sir *Andrew Norrell*, and whereof F. was a Cuſtomary Tenant, and expelling of F. Although it was ſtrongly moved in this Caſe, That no Reſtitution ſhould be (for in truth the Entry of thoſe who were indicted, was by the Command of Sir *Andrew Norrell*, upon F. who had forfeited his Copyhold); Yet it was the Opinion of the Court, That Reſtitution ſhould be granted in reſpect of F. the Copyholder; for becauſe the Indictment is a Record by which appeareth the Diſſeiſin of Sir *Andrew Norrell*, and the Expulſion of F. the Court in Diſcretion ought to reform the Wrongs in their ſeveral degrees: 1. To reſtore F. who was expelled, and then *ex conſequente* will follow the Reſtitution to the Tenant of the Free-hold. Hill. 3 Jac. B. R. Sir *Andrew Norrell's* Caſe. *Yelv.* 81.

29. The

29. The Grand-Father of the Plaintiff being a Copyholder in Fee, surrendred to L. W. in Fee, who surrendred to the Use of M. J. for life, who is admitted, but L. W. himself was never admitted: the Grand-Father and Father dyed; the Son, the Plaintiff, is admitted, & entred upon the Land, M. J. being in possession, the Defendant then dwelling with M. J. as Servant with her in the Tenements. It was holden in this Case by the Court, That the Defendant is a sufficient Ejector, although he be but a Servant to the pretended Owner; and he who hath the true Title may bring his Action, either against the Master or Servant, at his Election. 2. It was holden, That the Surrender to J. S. of a Copyhold is not of any effect untill he be admitted Tenant; and if J. S. doth surrender to a Stranger who is admitted, it is not of any worth to a Stranger, for J. S. himself hath nothing, and therefore can surrender nothing; and the Admittance of his Grantee shall not be taken to be his Admittance by Implication, but the Right remains yet in him who first surrendred, and shall discend to his Heir. Mich. 6 Jac. B. R. *Wilfos* and *Weddall's* Case. *Yelverton*, 144. See Trin. 22 Jac. B. R. *Cornwallis* and *Harwood's* Case. *Latch*, 226.

30. Note, It was conceived by the Court, That if a Copyholder doth not come to do his Services, if he be often required so to do, but puts them off to do them at another time; although in such Case he doth not absolutely refuse to do them, yet the same makes a forfeiture. But if the Tenant saith, These Services which you require, it is doubtfull whether you ought to have them or not; and untill it be Resolved by Law, Whether they be due, I will not pay them: It was adjudged Pasch. 26 Eliz. in *Bynham* and *Higgins* Case, That such a Denyal shall not be a forfeiture. Hill. 22 Jac. B. R. *Johnson's* Case. *Latch*, 14. See Trin. 1 Car. B. R. *Gray* and *Ulisses* Case. *Latch*, 122, 123. acc.

31. The Lord demanded his Rent of his Copyholder, and he answered, He had it not there with him, but that he would pay it so soon as he could; The Lord said to him, Pay it at my House such a day (the House was within the Manor). It was in this Case holden, That the first words were not a forfeiture; but when the Lord assigned him a day certain, at which he failed, It was said, That such a failer amounted to a wilful Refusal, and was a forfeiture. It was Objected in that Case, That the Lord should have assigned the next Court day: But it was said, Not so; But yet if the place assigned be out of the Manor, there the Failer of Payment shall not be a forfeiture. See *Williams* Case. Vouch in *Grey* and *Ulisses* Case. *Latch*, 122.

32. In an Evidence to a Jury: One of the Jurors demanded the Direction of the Court in this Point, If the Lord maketh a Lease for life to a Copyholder by word, If the same doth destroy his Copy-hold. It was the Opinion of the Court, That it did, if Livery were made; otherwise Not: Yet *Jones* Justice said, That if the Lease was for life, the Copyhold was gone without Livery, *Quod non fuit negatum*. Mich. 2 Car. B. R. *Latch*, 213.

Corporations.

1. THE Queen made a Lease for years of Land to the men of *Chelmsfield*, reserving Rent, and the Grant was to them by the name of the Aldermen of *Chelmsfield*: Afterwards, they by the name of Aldermen of *Chelmsfield* grant all their Interest in the said Land to J. S. It was agreed in this Case by the whole Court, That the Grant made by them is void; for that they by the Grant of the King have a capacity made, but not to grant the Land unto another. Mich. 24 Eliz. B. R. The Aldermen of *Chelmsfield's* Case. Co. 3 Part, 35.

2. A Writ of Right was brought by the Warden of *All-Souls* College in *Oxford*, by the name of *Custos & Collegium* of *All-Souls* in *Oxford*; and the Writ was, *Quod clamat tenere de nobis in libero, puro, & perpetuam Eleemosynam, & quod clamat esse jus & hæreditatem suam* &c. Divers Exceptions were to the Writ, which were over-ruled by the Court; one was, That they do not shew in fact *Collegii*: But notwithstanding that, the Writ was holden to be good; for when the Writ is brought by *Custos & Collegium*, this cannot be but in fact *Collegii*, as in their Incorporation, for that they have no other Capacity. Pasch. 31 Eliz. C. B. The Warden of *All-Souls* College in *Oxford* and *Tanner th's* Case. Co. 3 Part, 232.

3. *Ejectione firmæ*: The Case was, R. W. 6 E. 6. did devise a Messuage to A. his Wife for life, the Remainder to his Son in Tail, and if he dyed without Issue, or he at Umbrife, that it shall remain to the Master and Wardens of the Mystery of Cordwainers, *London*: Whereas they were Incorporated by the Name of Master, Wardens, and Commonalty. The Question was, If by this Misnomer of their Corporation, the Devise was void: It was the Opinion of all the Justices, That the Devise was good; for by Intendment the Devisor had no Counsel

tel there, nor had Cognizance of their name, and being known usually by that name, there is a sufficient intendment what Corporation he meant. Tr. 39 Eliz. B. R. *Foster* and *Walter's* Case. *Cro.* 3 Part, 106.

4. Note, It was the Opinion of all the Justices of the Court of Common Pleas, That an Abbot and Covent, Dean and Chapter, and all other Corporations, ought to be named truly by the names of the Corporation and Foundations, according to the Form thereof, without Omission of any part material thereof in all their Leases and Grants, and in all Actions where they are either Defendants or Plaintiffs, otherwise their Leases or Grants are void, because the name of the Corporation is as the name of Baptism of a man, which cannot be changed. Pasch. 4 & 5 Mary. *Boulters* 2.

5. If Lands holden of J. S. be given to a Corporation and their Successors, as an Abbot and Covent, Dean and Chapter, *&c.* If the Abbot and all the Covent do dy, so as the Body Politick is dissolved, the Donor shall have the Land again, and it shall not escheat to the Lord, because in the Case of a Body Politick the Fee Simple is vested in their Politick Capacity, and the Law doth annex a Condition to every such Gift and Grant, That if such a Body Politick be dissolved, the Donor shall re-enter; & if a Rent be granted to one and his Successors, and the Corporation be dissolved, the Rent shall revert to the Donor, and there is no difference as to this matter between things that lye in perader, and things which lye in render: The Principall Case was, A Prescription was laid of discharge of Tythes in Abbot and Covent, and it appeared, That the Corporation was afterwards dissolved, because all the Covent dyed, and the Land came to Lay-mens hands. Resolved, That the Prescription was determined, and the Party should pay Tythes in Kind. Mich. 11 Jac. C. B. The Dean and Chapter of *Windsor's* Case. *Godbol.* 211.

Costs and *Damages*.

1. IF an Infant bringeth an Action of Trespass by his Gardian, and after he be Nonsuit: It was the Opinion of the Court, That he shall render no Costs. Trin. 26 Eliz. B. R. *Grave* and *Grave's* Case. *Cro.* 3. Part, 33.

2. In Assumpsit, a special Verdict was found, and thereupon it was adjudged for the Defendant; It was a Question upon the Statute of 23 H. 8. If he should have Costs. It was the Opinion of the Court, For that a special Verdict is as well a Verdict for him as a general Verdict, and there is not any difference when Judgment is given thereupon; but it is as if a general Verdict had been given for the Defendant. Pasch. 38 Eliz. B. R. *Alsop* and *Clayton's* Case. *Cro.* 3. Part, 465.

3. Debt against an Executor upon an Obligation, made by his Testator; The Plaintiff was Nonsuited, he Defendant had Costs by the Order of the Court. But where an Executor is Plaintiff & is Nonsuited, he shall not pay Costs, for that it cannot be intended, that the Suit was conceived by him upon malice. Mich. 39 Eliz. B. R. *Fetherston* and *Allybons* Case. *Cro.* 3. Part, 503.

4. A. brought an Action upon the Statute of 1 and 2 Ph. and Mary, for impounding of Distresses against B: It was moved, If the Defendant should have Costs upon the Statute of 23 H. 8. *Cap.* 15. It was adjudged, That he should not, for that this Action is not conceived but upon such matter which is comprised within the Statute; also this Action upon which the Action is brought, is conceived, was made after the Statute of 23 H. 8. which gives Costs; and therefore the remedy of the former Statute cannot extend to any Action given upon this Statute. Mich. 29 Eliz. C. B. *Browne* and *Balmans* Case. *Leon.* 2. Part, 52.

5. In Banery, The Defendant was Bail for A. and B, who were afterwards condemned; Error was brought upon the Judgment in the Exchequer Chamber, and new Costs were given there by the Justices; and the Record remained, a *Scire facias* was prayed against the Bail as well for the first Damages and Costs upon the first Judgment, as for the Costs now assessed. It was the Opinion of the Justices, That the Bail was not chargeable with these Costs; for they take upon them to pay only

only the condemnation in this Court, and not of any other. Mich. 40 Eliz. B. R. *Pennaddock* and *Errington's* Case. *Cro.* 3. Part, 588. See Hill. 29 Eliz. B. R. *Wolf* and *Meggs* Case. *Cro.* 3. Part, 544 acc.

6. In Trespasse; It was found for the Plaintiff, and Judgment given; and Error brought, and assigned for Error, because the Plaintiff declared to his damage of 40 l. and the damages assessed by the Jury were 35 l; and the Costs encreased by the Court were 6 l; so the Plaintiff had Judgment to recover 41 l, which is more then where of he declares: The Error was disallowed by the Court, for the Damages found by the Jury being lesse then the Declaration, although the Costs amount to more, it is not material. But for an other Error alledged *Ostensis*, the Judgment was reversed. Mich. 44 Eliz. Exchequer Chamber, *Comb* and *Carewes* Case. *Cro.* 3. Part, 866.

7. Error upon a Judgment in C. B. in a Replevin, where the Defendant avowed for an Estray; The Error assigned was, because the Defendant had Return awarded him with Costs and Damages, where no Costs and Damages are given in this case by the Statute of 7 H. 8. or 21 H. 8. for they are only in Avowries, for Rents, Customs, Services, and Damage Feasants: The Court did doubt of the Case, for that Damages are penal, and shall not be taken by equity; and conceived that it was Error, but would advise of it. Pasch. 33 Eliz. B. R. *Haselip* and *Chaplens* Case. *Cro.* 3. Part, 257.

8. In Assumpsit found against the Defendant, and Damages were given by the Jury to 10 l. and Costs 20 s, and Judgment given accordingly; and Error brought, because the Plaintiff had received more then he declared; for he had declared but to his Damages of 10 l. and had Judgment to recover 11 l. It was Resolved, That the Judgment was good, for the Judgment for the Damages is no more then the Plaintiff had declared of; for the Jury hath severed the Damages and the Costs, and accordingly shall the Judgment be taken, for the Damages and Costs in the Action are given for several Causes; Damages for the Lesse which he sustained before the Action, and Costs for the molestation and expense in Suit; Judgment was affirmed. Trin. 3 Jac. B. R. *Vale* and *Eglet* Case. *Yelverton* 70.

9. One *Thomas Allen*, Administrator of the Goods of one *John Allen*, late Arch-Bishop of D. brought accompt against J. S, Alderman of *London*, supposing him to be Receiver to the Intestate; and before Declaration, the Plaintiff was Non-suit: In that case, It was holden, That the Defendant could not have Costs upon the Statute of 23 H. 8. because the Plaintiff did not suppose the Defendant to be his Receiver, but the Receiver of the Testate. Pasch. 29 Hen. 8. *Allens* Case. *Brudnel.* 11.

10. Debt upon an Obligation; The condition was, to pay all sums of money which the Lord Chancellor should assesse for Costs and Damages: The Chancellor referred the same to one of the Masters of the Chancery, who Reported, he thought 170 l. to be a fit sum. The Chancellor subscribed the Reports, viz. Let Costs be taxed according to the Report: In this Case, it was adjudged a good Taxation of Costs according to the condition. Trin. 21 Jac. B. R. *Harris* and *Penks* Case. See the Reports annexed to *Brudnel* 132.

11. In Replevin, the Defendant being Executors, avowed for Arrearages of Rent by 32 H. 8. The Question was, If upon Verdict a Nonsuit, the Defendants should have Costs; It was said, They should not, because by the Common Law they should not have any, and the Statute gives only the Arrearages, and 23 H. 8. which gives the Costs, doth not give any to them, for then they could not avow: But it was the clear Opinion of the Court, That they should have Costs, and that by the equity of the Statute of 23 H. 8. for 21 H. 8. gives to the Avowant, and so by 32 H. 8. they are made Avowants, and the Avowant is to have Costs where the Plaintiff at the Common Law was to have Costs; and the Statute of 32 H. 8. is, That he shall avow as his Testator might: Wherefore, and upon diverse Presidents shewed, It was the Opinion of the Court, The Avowants should have Costs. Mich. 21 Jac. B. R. *Fennell* and *Kighley's* Case. See Reports annexed to *Brudnel*, 149.

12. Note, It was said by the Court, That no Costs shall be or ought to be paid in a Writ *Scire facias*. Hill. 20 Jac. B. R. *Lathes* Case.

13. It was Resolved by the Court, Where the words of the Statute were, That the Plaintiff should have no more Costs because he had Damages, &c. in an Action &c. begun, or prosecuted &c. That where the Action was brought before the Parliament, and prosecuted after, that he should have no more Costs: Yet a man is bound to prosecute an Originall Writ when he begins.

14. A Parson of D. sued J. S. for Tythes of a Dove-house in D. and upon a Suggestion the said J. S. obtained a Prohibition out of this Court, six Months passed, and he made no Proof of his suggestion according to the Statute. The Parson took Issue with J. S. in the Prohibition, and it was found against him: The Question was, If now he shall have double Costs: It was the Opinion of the whole Court, That he should not, because he

he had surceased his time, because the words of the Statute are, That he shall have a consultation, and double Costs, if the Plaintiff in the Prohibition doth not prove his suggestion: But in this Case he can never have a consultation, because the matter is passed against him. But he ought upon the failer of proof, to have prayed a consultation, and then he should have had double Costs. Hil. 22 Jac. B. R. *Wilkinson* and Sir *George Fayres* Case. *Latch.* 140.

15. *Assumpsit*; The Case was, The Plaintiff made a Lease to J. S. for life rendring Rent. J. S. granted all his estate to the Defendant; the Rent was behind many years, the Plaintiff demanded the Rent of the Defendant; who promised him, if the Plaintiff could shew him a Deed that the Rent was due, he would pay him the Rent, and the Arrearages; and alledges, that he shewed him the Deed such a day, at such a place, and that he had not paid, &c. Upon Non-Assumpsit, It was found for the Plaintiff, and Damages assessed to as much as the Rent and Arrears did amount unto: It was said in Arrest of Judgment, That the Damages ought only to be assessed for the time the Rent was behind, and not for the Rent and the Arrearages. It was the Opinion of the Court, That the Rent and Arrearages might be well assessed all in Damages. Mich. 30 Eliz. B. R. Sir *Anthony Shirtys* and *Athorps* Case. *Cro.* 3. Part, 67.

16. In Debt, The Case was, That a woman recovered Dower of a Copy-hold according to the Custom of the Manor, by a plaint in a Court Baron, and had Judgment, and 50 l. Damages, and for the Damages she brought the Action: The Question was, Whether she might recover Damages for the 50 l. there where they can hold no Plea above 40 s: It was the Opinion of the Court, That the Damages was well awarded, and that she might well recover so much there, for as they may hold Plea of the Land, so for the Damage as far as the Demandant is dismissed. Mich. 39 Eliz. B. R. *Shaw* and *Tompsons* Case. *Cro.* 3. Part, 416.

17. Error of a Judgment in C. B. upon the the Statute of 8 H. 6. of Forcible Entry. The Error assigned was, That the Jury found Damages 20 l, and Costs 20 s, and the Costs were encreased by the Court 20 s; and the Damages and Costs being trebled, he had Judgment to recover 63 l, whereas the Costs assessed by the Court ought not to be trebled, but only those Costs which the Jury assessed: It was holden by the Court, That it was no Error; and the Judgment was affirmed. Mich. 39 Eliz. B. R. *Tarrewood* and *Sawyer* Case. *Cro.* 3. Part, 582. Battery against three, two Defendants pleaded, *De son assault demesne*, the other Not guilty. Both Issues found for the Plaintiff, and several Damages found against them. And holden not good, for it is one Offence, and Joynt-Action; and when all are equally guilty, the Damages ought to have been entire; The Judgment was reversed. Mich. 43 Eliz. C. B. *Johnson* and *Bartons* Case. *Cro.* 3. Part, 840.

18. Error of a Judgment given in the Court of *Tewkesbury* in an *Assumpsit*; upon the Verdict, the Jury gave 8 l. Damages, and 1 d. Costs; and because the Judgment here was, That the Plaintiff should recover his Damages assessed by the Jury to 8 l, and also 10 s. for Costs and Charges *de incremento Curiæ*; and no Judgment was given of the 1 d. Costs assessed by the Jury. It was holden, That the Judgment there given was erroneous; and the Judgment was reversed. Mich. 5 Jac. B. R. *Haines* and *Gales* Case. *Yelverton* 107.

19. A. sued a Prohibition against B. Parson of D. and suggested a *Modus Decimandi*, as to part of the Tythes demanded in the Spiritual Court, and a Contract betwixt him and the Parson executed for the residue: And because he did not prove his suggestion within six Months, the Parson had a consultation; and costs assessed by the Court 50 s. and damages 50 s, which by the Statute of 2 E. 6. shall be doubled; but in truth there was not any Judgment given for them, but the words (*Idem Consideratum fuit quod recuperet*) were omitted; yet the Parson thinking all had been well, brought Debt in C. B. for the costs, and had Judgment against the Plaintiff by *Nonsum informatus*. Error thereupon brought, It was holden by the Court to be erroneous, 1. Because there was not any Judgment in the Prohibition to recover the costs, but only an Assessment of them, which is not sufficient, for that is only matter of Office of the Court, but no Judgment of the Court to bind. 2. Because that No costs ought to be assessed at all in this Case, because the Prohibition is grounded as well upon the *Modus Decimandi*, which needs proof, as upon the Contract of the parties which needs no proof, and the suggestion being entire, and part of it needing no proof; they ought not to have given any costs at all: and the making of the Contract with the *Modus Decimandi* privileged the whole as to costs. Mich. 5 Jac. B. R. *Cobs* and *Hents* Case. *Yel.* 119.

20. A. brought an Action upon the Case against B. because he digged clay in the Land, where the Plaintiff had Common, and carried away the same over the said Common, *per quod* he lost his Common, and could not use his Common in as ample manner as he did before. The Defendant claimed Common in the same Land, and justified his Entry.

and set forth a Prescription, That every Commoner had used to Digg Clay there; and there being two Issues, the first was found for the Defendant, the second Issue was found for the Plaintiff, that there was no such Prescription, that a Commoner might digg Clay: The Jury did assesse Damages for the Plaintiff generally; whereupon Error was brought, It was moved, That the Plaintiff had not any Damage by carrying away of the Clay, because the same did not belong to him; and the Declaration is, *Cepit & asportavit* the Clay, which implyes a property and interest in the Clay to belong to the Plaintiff. It was adjudged by the Court in this Case, That by the digging of a Pit, the Commoner is prejudiced, and so by laying of the Clay upon the Common: So the Damages are given for the digging and carrying the Clay over the Common, and not for the Clay; and if he had suffered the Clay to have lyen, yet the Commoner is prejudiced: The Judgment was affirmed. Trin. 21 Jac. B. R. *Sheen* and *Bullocks* Case. See Reports annexed to *Beadlows* 126. See *Godbolt* 343. The same Case.

21. Error of Judgment in Action upon the Case; The Judgment after Verdict was entred for the Plaintiff thus, *Ideo ad petitionem Quer. Consideratum & adjudicatum & assessum per Curiam, quod Querens recuperet damna*, by the Jurors taxed, *necnon de incremento* Damages. It was the Opinion of the Court, That it was Error, because the Damages are encreased without the assent of the parties, or request of the Plaintiff, and because the request was not well alledged; for there needed no request for Judgment for Damages assessed by the Jurors: The Judgment was reversed. Mich. 2 Car. B. R. *Good* and *Lawrences* Case. *Latch.* 177.

22. Action upon the Case, The Plaintiff declared to his Damage of 17 l; There was a Judgment upon Demurrer for 17 l. and 20 s. for Damages assessed; In this Case, It was the Opinion of the whole Court, That the Judgment should be reversed; for that here the Damages being incertain, the Court cannot tax damages without a Writ of Enquiry first awarded. Pasch. 2 Car. B. R. *Wool* and *Brooks* Case, *Latch.* 213.

Counts or Declarations.

1. IN a Writ of Partition brought against five several persons, upon the Statute of 31 H. 8. The Plaintiff declared, That he and the other Defendants held 400 Acres of Land in Common, and sett forth their particular parts, but did not shew their several Title, nor any manner of Title how the Land ought to be divided; and this was assigned for Error upon the Judgment given in the Partition: And it was said, That in a Writ of Partition, No Land is demanded, and yet the Writ ought to Comprehend their Title *sufficienter*, where their parts are unequal, as the parts were set forth to be in this Case. But it was the Opinion of the Court, That the Declaration needed not to comprehend the Title; and by intendment he that bringeth the Action, cannot have knowledge of the Title of the others, for that every one of them may come in by a several Title: And it was said, That Mich. 29 Eliz. in *Gay* and *Berrys* Case, It was adjudged, That in a Writ of Partition between Tenants in Common, Title needed not to be shewed; wherefore the Court would not reverse the Judgment. Mich. 29 Eliz. B. R. *Windham*, *Yates*, and others Cases. *Cro.* 3. Part, 64.

2. In an Action upon the Case; The Plaintiff declared, That J. S. and his Wife were seised to them, and the Heirs of the Husband of the Acres of Meadow, lying near a River called Wisney River, and lett them to the Plaintiff for 21 years; and that the Defendant such a day erected a Water-Mill *super & trans*, the said River; by reason whereof *Obstipavit* the running water in the said River with his Mill: Upon this Declaration, It was demurred, because he declared, That the Husband and Wife were seised to them, and to the Heirs of the Husband; and shewed not how the Estate began: for it was said, It being a special Estate, and but a particular Estate in the Wife; the beginning of it ought to have been shewed. But the Justices held it to be well enough, being an Action upon the Case by their Lessee: So it is but a conveyance to the Action, & the Inheritance is in Husband. 2. Exception, because he declares of a Lease by Husband and Wife by Indenture, and shews that a Rent was reserved; and then it cannot be the Lease of the Wife. But the Court held it to be good; for it is the Lease of the Wife, until she doth disagree; and the Inheritance being in the Husband, it shall be good against him and his Heirs. Mich. 30 Eliz. B. R. *Jackson* and *Mordants* Case. *Cro.* 3. Part, 112.

3. Dele

3. Debt upon an Obligation by two Plaintiffs; The Defendant pleads, That the Obligation was made to them, and to one J. S, and that they three had brought an Action of Debt depending against him, and demanded Judgment si actio, upon which it was demurred; and because the Obligation made to two, upon which they declared, cannot be intended an Obligation made to three; and if it be a Plea, it is a Plea in abatement of the Bill, and not in Bar: It was adjudged for the Plaintiff. Mich. 33 Eliz. B. R. *Ilton* and *Hitchcocks* Case. *Cro.* 3. Part, 202.

4. Assumpsit, The Plaintiff shewed, whereas the Defendant at *London* in warda de Cheap, was obliged to J. S; The Defendant, in consideration that the Plaintiff would give, &c. promised, &c. Upon Non-assumpsit, The Plaint was de parochia de Alcolne in warda de Cheap, whereas there was no Parish before mentioned in the Declaration. This matter was alledged in stay of Judgment, and Exception taken to the Declaration, that the Promise was laid in *London*, and not in the Parish within the Ward. It was said by the Court, That an Assumpsit was usually layed to be in a Parish; And in this Case, It was the Opinion of the Court, That the Plaintiff could not have a Plaint facias de novo; but he must begin again, for that the fault was in his Declaration, and not by the Award of the Court only. Mich. 34 Eliz. B. R. *Bradish* and *Ithers* Case. *Cro.* 3. Part, 260.

5. Error of a Judgment in C. B. in Debt; The Error was, That the Plaintiff declared of a Debt upon an Action of 20 l; and after Imparlance, declared *de Novo*, and therein demanded a Debt of 18 l. and had Judgment to Recover; It was holden, That it was erroneous, for that there was but one Original, and two Declarations, and the one various from the other; and so it was said, it was adjudged. Mich. 37 Eliz. in this Court. Pasch. 37 Eliz. B. R. *Warner* and *Wiseby's* Case. *Cro.* 3. Part, 416.

6. Error of a Judgment in Trespass in C. B. The Error assigned was, because the Declaration is *Sicut cum*, the Defendant such a day assaulted and beat the Plaintiff. It was said by the Court, That is *Quasi* a Recital, and not a direct Affirmative, that he beat him; and also in the second Declaration, after Imparlance entred, the word [*Cum*] was omitted. It was the Opinion of the Court, That the first Declaration is the principal, and thereupon the Judgment is given; and the second ought to accord with the first, and the first not being good, the second cannot make it good, for it ought to accord with the first; wherefore the Judgment was reversed. Mich. 37 Eliz. B. R. Part 319. *Cro.* 8. Part, *Bridges* and *Sheriffs* Case, 507.

7. In Covenant: The Plaintiff declared, That the Defendant *per scriptum Articulorum*, made between them, *convenit* &c. It was moved, after Judgment, that the Declaration was not good, because he doth not alledge, That the Writing was *figilla Defendentis figillat.* Then it was said, That it was *per scriptum suum factum, convenit*: The Opinion of the Court was, That if the word [*factum*] were in it, perhaps it might be good; but upon View of the Record, the word [*factum*] was left out: Wherefore adjudged, The Declaration was not good. Mich. 34 Eliz. B. R. *Southwell* and *Brown's* Case. *Cro.* 3 Part, 171.

8. A *Warrantia Chartæ* was brought of two Messuages and twenty Acres of Land, wherein he counts, That the Defendant enfeoffed him of the said Messuages and twenty Acres of Land *per eosdem metas Tofti & duo Virgat. terræ.* Exception was taken to it, because that which counts under the *per eosdem* doth not warrant the Count: But the Exception was disallowed, for it may be, there was only a Toft at the time of the Purchase of the two Messuages, and they might since that time have been builded: It was adjudged for the Plaintiff. Pasch. 40 Eliz. B. R. *Cro.* 3 Part, 611.

9. Debt: A Rent was granted to Husband and Wife for their lives, the Rent was behind, the Husband dyed; another Rent was behind, the Wife dyed. Intestate; her Administrator brought the Debt for Arrearages due in the life of the Husband, and after. It was Resolved, The Action did well lye: Exception was taken to the Declaration, for that it is alledged, That Administration was committed by the Dean of L. and did not shew by what Authority he committed it, or that he was Ordinary of the place: For this Cause the Court said, That the Declaration was not good; for the Court intends not his Authority, being speciall without shewing it: Otherwise it is, of Pleading of an Administration committed by the Bishop, that is good without saying, *sede illius O. vacante*, for so it shall be intended. Mich. 42 Eliz. C. B. *Temple* and *Temple's* Case. *Cro.* 3 Part, 791.

10. Debt upon an Obligation made to the Sheriff of Norfolk upon a mean process: The Writ was, *ad respondend.* H. G. *super Plac. Con. Nisi.* The Declaration was, *Quod cum fecisse teneri præfat.* H. G. *in placito Sum.* 20 l. and doth not say *placito.* H. G. *tunc Plac. Con. Nis. fecisset.* For this Cause, the Court held the Declaration to be ill, and the Writ was abated. Mich. 42 Eliz. *Gojden* and *Whitcroft's* Case. *Cro.* 3 Part, 800.

11. Assumpsit: The Plaintiff declared, That there was a Communication betwixt him and the Defendant, concerning the Sale of certain Lands

to be made to him by the Defendant, whereupon he delivered to the Defendant 20 l. In Conſideration of which, the Defendant promiſed the Plaintiff, that if he liked not of the Land, to repay the 20 l. within a fortnight. Judgment being given for the Plaintiff, Error was brought, and aſſigned, That the Declaration was not good. 1. Becauſe he ought to have had Debt, and not Action upon the Caſe. 2. It is not alledged, that he gave notice of his Diſlike within a fortnight. 3. Becauſe not alledged that he diſliked thereof within the fortnight. The Court held, The firſt, No Exception: To the ſecond, That he ought to take notice at his peril, becauſe he hath bound himſelf thereunto by expreſs Promiſe: To the third, It being alledged generally, it is good enough; for it ſhall be intended to be within the time, unleſs it be ſhewed to the contrary. The Judgment was affirmed. Trin. 43 Eliz. B.R. *Eaſt* and *Yarroughgood*'s Caſe. *Cro.* 3 Part, 834.

12. Detinue: The Plaintiff declared, That 16 *Feb.* 36 Eliz. he delivered to the Defendant divers parcels of Plate, *viz.* a Baſon and Ewer, a Silver Bowl, and divers parcels to be reſtored upon 17 *Maii* following: It was found by Verdict, That the Plaintiff was poſſeſſed of them 16 *Feb.* and by Indenture betwixt him and the Defendant, ſold to the Defendant divers parcels of Plate, *modo & forma prout* in the Indenture, *cujus Tenor ſequitur in hæc verba*, and found it *verbatim*, wherein the Baſon and Ewer, and all the parcels expreſſed in the Declaration are mentioned: Upon Condition That if he paid ſuch a Sum, 17 *Maii* following, then the Bargain and Sale to be void. They found Payment of the Money at the day; but there was a *Memorandum* endorſed upon the Indenture, That if the Plaintiff payed ſuch a Sum 1 *Junii* 36 that he ſhould have them again, but the Payment of the Sum 1 *Junii* was not found. They found that the Defendant had the Goods *ut ſupra*: Error was aſſigned, becauſe the Jury did not find the parcels in the Declaration to be the ſame with the Indenture, but only that he ſold divers parcels, which although they be all one in name, yet they may be ſeveral, and Intendment will not help it. The Court held that to be Error, and therefore Judgment was reverſed. Tr. 34 Eliz. B.R. *Bateman* and *Elman*'s Caſe. *Cro.* 3 Part, 866.

13. In Debt, in an inferiour Court: The Plaint was of 6 l. 14 s. 2 d. and declared, That the Monies grew by reaſon of two ſeverall Contracts, *ſcil.* ſo much by one, and ſo much by another, and it appeared upon Computation that theſe two Sums are more by 3 d. than is contained in the Plaint. It was holden in this Caſe, That the Monies mentioned in the Declaration, being upon ſeveral Contracts, and none of the Contracts by it ſelf did amount to the ſpecial Sum mentioned in the Plaint; every part of the Declaration is material, and ſo being found ſhort by Verdict, the Judgment given upon it was erroneous. Trin. 44 Eliz. B.R. *Crumpton* and *Smith*'s Caſe. *Yelverton*, 5.

14. Aſſumpſit: The Plaintiff declared, That in Conſideration the Plaintiff would marry the Defendant's Neece, the Defendant promiſed to the Plaintiff in Marriage with his Neece, as before he had agreed to give in Marriage with his ſaid Neece to J. S. and alledged, That the Defendant had agreed to give to J. S. 1000 l. if he would marry his ſaid Neece, and that he relying upon the ſaid Promiſe married the Defendant's Neece: Upon *Non Aſſumpſit* found for the Plaintiff, it was ſaid, That the Declaration was not good, but incertain, becauſe it is not alledged with whom the Defendant agreed to give 1000 l. to J. S. The Opinion of the Juſtices in this Caſe was, That the Agreement is but a collateral thing, and but an Inducement to the Promiſe, which is the principal Cauſe of the Action, and Inducements need not be alledged in Declarations ſo certain as thoſe things which are the foundation of the Action, and therefore to alledge them generally is ſufficient; and if the Defendant would have pleaded that he did not agree to give to J. S. 1000 l. in Marriage, then the Plaintiff by his Replication time enough, might make his Declaration certain enough, but without ſuch certainty at the beginning the Declaration is good enough. Mich. 45 Eliz. B. R. *Aſſop* and *Sydnell*'s Caſe. *Yelverton* 17.

15. In Treſpaſs: The Plaintiff declared, That ſuch a day the Defendant made Aſſault upon him, *nec non unum Equum pretii* 6 l. *à perſon. ipſius* (the Plaintiff) *adtunc & ibidem cepit*. It was holden in this Caſe, That the Declaration was not good, for the Plaintiff doth not ſuppoſe any property in the Mare, but he ought to have ſaid *Equum ſuum*, or *Equum ipſius Querentis*; for as the Declaration is laid it may have two Intendments, 1. That it was the Defendant's Mare, and then the taking was lawfull; or 2. That it was the Plaintiff's, and then the taking of it was tortious; and having a different Conſtruction, it ſhall be taken ſtrongeſt againſt the Plaintiff; wherefore the Declaration is not good. Paſch. 1 Jac. B.R. *Purcell* and *Bradley*'s Caſe. *Yelv.* 36.

16. In an Action brought, a Leaſe was pleaded to be made by a Dean and Chapter, but it was not ſet forth in the Declaration, That the Dean and Chapter was ſeiſed *in jure ſuæ Eccleſiæ*, nor what Eſtate they had in the Land; and for that Cauſe it was holden, That the Declaration was not good: For the Court was clear of Opinion, That it ought to

to be ſet forth what Eſtate they had in the Land; for it might be that it was but an Eſtate for the life of another. Hill. 22 Jac. B. R. *Newman* and *Moſſes* Caſe. *Latch*, 14.

17. Aſſumpſit: The Plaintiff declared, That J. S. promiſed with his Daughter in Marriage a certain Sum, and that the Plaintiff having married the Daughter, and intending to ſue the ſaid J. S. upon that Promiſe; and that the ſaid J. S. ſaid unto him, That he would leave to him as good a Portion, as he ſhould give to any other of his Children; and alledged *in facto*, that J. S. gave to ſuch a Child ſo much, but did not leave ſo much to him; and further declared, that he did not ſue J. S. during his life, and that the ſaid J. S. made the Defendant his Executor and dyed, againſt whom the Action was brought. Upon the Promiſe of the ſaid J. S. the Teſtator, and upon *Non Aſſumpſit pleaded*, it was found againſt the Defendant: It was moved in ſtay of Judgment, That the Declaration was not good, becauſe the Declaration is, That he would leave to the Plaintiff as good a Portion as he would give to any of his Children; and averrs that J. S. gave more to one of his Children than to him, but he doth not ſet forth the time when he gave it, and it might be he gave it before the Promiſe, and then the Promiſe *quod dare* did not extend to it: It was ſaid, That the ſame ſhall be intended. But the Court was of Opinion, That the Declaration ſhall not be taken by Intendment, and therefore becauſe the Time when was not certainly expreſſed in the Declaration the Court held, the ſame was not good. Mich. 2 Car. B. R. *Almot* and *Pickton*'s Caſe. *Latch*, 203.

18. Husband and Wife brought an Action upon the Caſe, as Adminiſtrators: The Declaration was *ad reſpondend.* ſuch a one and his Wife, *tui Adminiſtratio bonorum*: Judgment being given for the Plaintiff, In Error brought, it was ſaid, That the ſame was not a good Declaration for the Incertainty. But it was the Opinion of the Court, That it was good enough; for that the word (*cui*) is intended of the Wife laſt before-named. Paſch. 2 Car. B. R. *Walter* and *Hays* Caſe. *Latch*, 212.

19. In Aſſumpſit: The Plaintiff declared, That there was a Communication betwixt him and the Defendant of the buying of Woad, and the Communication was to have five Loads, according to the Rate of 6 d. for every 14 pounds of it; and that the Defendant in conſideration of 6 d. delivered to him in hand, promiſed to ſell and deliver him five Loads according to the Rate aforeſaid: The Plaintiff had Judgment. It was moved in Arreſt of judgment, becauſe he declares *de quinque Carucis, Anglice* Cart-Loads, and *Caruca* doth not ſignify a Load, but a Quantity of Land, &c. 2. Becauſe it is not ſhewed to what Quantity the five Loads did amount unto, and that it came to ſo many pounds, and ſo amounted to ſo much: The Caſe was not Reſolved. But the Chief Juſtice ſaid, That perhaps the Plaintiff could not ſhew that, becauſe the Loads were not delivered: It was adjourned. Mich. 2 Car. B. R. *Walter* and *Farmer*'s Caſe. *Latch*, 216.

20. Aſſumpſit: That whereas the Husband of the Defendant was endebted to him in 42 l. and made the Defendant his Executrix, and dyed; and ſhe proved the Will, and the Plaintiff told her that he would ſue her, That ſhe in conſideration of forbearance till ſuch a day, promiſed to pay him; and averred forbearance, and that ſhe had not paid the 42 l. In this Caſe it was holden by the Court, That although that it is not ſhewed how, or for what thing, the Teſtator was endebted unto him, yet that the Declaration was good, becauſe the Debt here is only Inducement to the Promiſe: But if the Promiſe make the Debt, then it is otherwiſe. It was adjudged for the Plaintiff. Hill. 2 Car. B. R. *Plater* and *Gould*'s Caſe. *Latch*, 219.

21. B. and G. two Merchants, brought Debt againſt J. S. upon a Charter party, between J. S. Owner of a Ship, and J. D. of the one part, and the ſaid B. and G. of the other part, upon Covenant that the Owner ſhould go to ſuch a Port in *Spain* as they ſhould appoint; and they appointed him to ſail to ſuch a place, and he refuſed, and the Iſſue joyned upon the Refuſal: It was found for the Plaintiff. It was moved in ſtay of Judgment, That he declared upon a Charter party, between J. S. and J. D. of the one part, and that J. S. did not perform it whereas it ought to have bin, That neither J. S. nor J. D. performed it, for if J. D. performed it, it was ſufficient. 2. Becauſe he did not ſhew the place to which he directed him: But both the Exceptions were over-Ruled by the Court. See the Reaſon hereof, in *Conſtable* and *Clobery*'s Caſe, which was the like Caſe. Trinit. 1 Car. B. R. *Latch*, 48. Mich. 3 Car. B. R. *Bello* and *Brand*'s Caſe. *Latch*, 225.

Courts.

1. A Man avowed for an Amercement in a Leet, for that King E. 6. granted the Hundred of H. in which was a Leet, to G. O. in Fee, who dyed seised; and that it descended to J. O. his Cousin and Heir, who being seised granted it to F. in Fee, who by Deed Inrolled conveyed it to the Earl of L. in Fee; and that the Defendant being resident within the Hundred, appeared not in the Leet, for which he was amerced 12 d. It was the Opinion of the Court, That the Avowry was not good, for two Causes; 1. Because he pleaded that J. O. did grant it to F. and did shew no Deed of Grant, for that it cannot pass without Deed, which must be shewed. 2. Because he did not shew that the Court was holden within a Month after Easter, it being a Leet by Grant, which he ought to have done. But of Leet by Prescription, it was holden it was otherwise. Trinit. 33 Eliz. B. R. *Porter* and *Gray*'s Case. *Cro.* 3 Part, 245.

2. Error of a Judgment in a Court of Pypowder: The Error assigned was, Because the Plaintiff in his Replication had not averred his Plea, nor in the end of it demanded his Debt and Damages; and for these Causes the Judgment was reversed. And in the Case, it was holden by the Court, That a Court of Pypowder might be holden, though not *in pleno Mercatu*, or *Feria*, but then this must be by Prescription, and the Prescription must be in the Stile of the Court. Hill. 33 Eliz. B.R. *Pewed* and *Chambers* Case. *Cro.* 3 Part, 256.

3. Trover and Conversion of Goods *apud D. in Com.* N. The Defendant pleaded, That he recovered against the Plaintiff, a Debt of 20 l. by Bill in the Queen's Bench, and thereupon had a *Fieri facias* to the Sheriff of Y. who at *Wakefield in Com.* Y. seized those Goods, and them delivered to him in satisfaction of his Execution: It was in this Case said by the Court, That the Pleading was not good, for two Causes; 1. Because he shewed not where the Queens Bench was at the time of the Recovery: And 2. Because the Sheriff upon a *Fieri facias* cannot deliver the Defendant's Goods to the Plaintiff in satisfaction of his Debt. Mich. 39 Eliz. B.R. *Thomson* and *Clarks* Case. *Cro.* 3 Part, 504.

4. Debt upon Obligation: The Case was, That J. S. Sheriff of C. by vertue of an Attachment under the Seal of the Court of Requests, took the Defendant, and for his Enlargement, he made an Obligation to appear before the Queens Council, attending in the Court of Requests at *Westminster*: It was the Opinion of the Justices in this Case, That the Process was not any Warrant to the Sheriff to take the Body, nor the Obligation, because that Court hath not any Power by Commission, by Statute, or by Common Law: Wherefore they held the Obligation was not within the Statute of 23 H. 6. for that the said Statute intends only Obligations taken by such who are in their Custody by Course of Law; wherefore the Obligation in the principal Case was taken by *Duresse*, and avoidable; and it was adjudged for the Defendant. Mich. 40 Eliz. C. B. *Stepney* and *Lloyds* Case. *Cro.* 3 Part, 646. See Hill. 41 Eliz. B. R. *Burgrave* and *Watts* Case. *Cro.* 3 Part, 651. That upon no Commission out of a Court of Conscience, the taking of the parties Goods, is good.

5. Error of a Judgment given in *Plymouth*, in an Assumpsit: The Error assigned was, Because the Stile of the Court was *Burgus Domine Regine Burgi de Plymouth, ibid. tent. in Guildhall. coram J. P. Maiore ejusdem Burgi*, 38 April, 36 Eliz. and it was not shewed in the Stile of the Court, by what Authority it was holden, *viz.* by Prescription, or by Charter: And it was said, That of such Inferiour Courts their Authority to hold Pleas ought alwayes to be shewn; otherwise the Court of King's Bench cannot take Conusans of them, and of that Opinion was the whole Court: And so they said it was adjudged, Hill. 31 Eliz. in *Stanton* and *Rogers* Case: And therefore, for that Error, the Judgment in the principal Case was reversed. Mich. 38 Eliz. B. R. *Holmes* and *Collins* Case. *Cro.* 3 Part, 489.

6. An Information was brought in a Court of Pypowder of D. upon the Statute for buying of Leather, and the Defendant was there condemned, and in Execution: He being brought by *Habeas Corpus* into the Common Pleas, it was moved he might be discharged out of Execution: But the Opinion of the Court was, Because they have power to hold Pleas in Actions of Debt, and so had Colour to hold Plea in this Action: The Court said, The Judgment was not void, but voidable by Error. *Anderson*, Chief Justice said, That the Court of Pypowder had its Name, because they were only to hold Plea there of things *pulverizis*, as Contracts and other things done in the Fair. Mich. 39 Eliz. C.B. *Wilkinson* and *Nethersolks* Case. *Cro.* 3 Part, 530.

7. Reple-

7. Replevin: The Defendant made Conusans as Bailiff to J.S. for an Amercement of a Free-Tenement within his Mannor; and shewed, That J.S. was seised of the Mannor, and that he, and all those whose Estates &c. had had a Court Baron within the Mannor, before his Steward of the Mannor, *tenend.* from three Weeks to three Weeks, and alledged a Custom to have Suit from all the Free-Tenements, and if any of them made default, and the same was presented by the Homage, they had used to amerce him, and that the Lord had used to distrein such a Tenant for such Amercement *per aliqua Bona vel Catalla sua* within the Mannor; and for Amercement for this Cause, the Distresse was taken. It was Resolved, That the Avowry was insufficient for many Causes; 1. Because he prescribes to have a Court Baron within his Mannor, whereas it is of Common Right, and cannot be by Prescription. 2. Because the Prescription is layed, the Court to be holden before the Steward of the Mannor, which is against Common Right; for that the Court cannot be holden but before Suitors. 3. Because the Prescription to distrein the Goods of the Offender in any part of the Mannor, is not good; for thereby he might distrein on the Lands of one who did not offend. 4. Because he prescribes to distrein the Beasts or Goods of the Free-Tenant, who made Default o. Suit, and in this Case the Distresse is taken of the Goods of his Under-Tenant, who is not within the Prescription: It was adjudged for the Plaintiff. Pasc. 41 Eliz. C. B. *Pill* and *Towers* Case. *Cro.* 3 Part, 791.

8. Note; It was Resolved by the whole Court, upon a Record removed out of the Court of *Grauesend*, That if an Inferiour Court holdeth Plea, and in the Stile of the Court it doth not appear how they hold it, viz. by Charter, or by Prescription, all the Proceedings in that Plea are erroneous, and all which followeth upon it; for that all Jurisdiction to hold Pleas resteth in the Crown, and therefore it ought to be ascertained to the King's Courts how their Power is derived from the Crown. Trin. 2 Jac. B. R. *Mouse's* Case. *Yelverton*, 46.

9. An Information was upon the Statute of 21 H. 8. for taking to farm Lands by Spirituall Persons: The Award of the *Venire facias* to try the Issue was made Returnable (*ubicunq; &c.*) but the Writ of *Venire facias* was made Returnable *Coram nobis* (leaving out the words *ubicunq; &c.*) so that it did not answer the Award upon the Roll, and the King's Bench is removable, so that (*coram nobis*) is all uncertain and out of Course: And upon this Point the Judgement was stayed. Pasch. 3 Jac. *Briggs* and *Tompson's* Case. *Yelverton*, 64.

10. One granted a Rent-charge to J. S. for his life out of black Acre, the Grantor made a Lease of the Land to J. D. And the truth was, the Land was not so much worth by the year, as the Rent was: J. S. sued in the Court of Requests, and surmised in his Bill, That he had lost his Deed of Grant, so as he could not avow for the Rent at the Common Law, and therefore prayed that J. D. might pay him the Rent by Decree of that Court during his life; and upon this matter shewed, a Prohibition was granted to the Court of Requests; for it was said by them, That although such Suit for Deeds lost, may and have been in the Court of Chancery, yet they ought not so suffer the Court of Requests, which is under their Power, so to do; and a Prohibition was granted. Hil. 1 Car. B. R. *Barry* and *Stiles* Case. *Latch.* 24.

11. Note, It was Resolved, That the Court of High Commissioners, either upon an Excommunication before them, or by reason of any other matter, are not to send Processe to have the Body before them: Nor can the Messenger in such Case, though in presence of the Constable, break an House in the Night to apprehend such a party. Hil. 42 Eliz. C. B. *Smith* and *Smith's* Case, in Prohibition. *Co.* 3 Part, 741.

12. One indebted to *Cripps* Alderman of *London*, who dyed intestate, after the Death of *Cripps* paid the Money with the Assent of the Son, to whom the Administration did then belong, to the Wife of the Alderman, which Money was employed *circa Funeralia*: Afterward, Administration of his Goods was committed to a Stranger, who sued the Debtor in the Court of Mayor and Aldermen of *London*, who decreed there that he should pay the Mony again to the Administrator. The Mayor in the Court of Conscience before him, in respect it was paid to them to whom Administration did then belong, decreed that the Debtor should not have the Mony: Whereupon the Administrator sued a *Prohibendo ad Judicium, vel Causam non significes.* It was the Opinion of the Justices in this Case, That the Justices of this Court could not examine whether the Decree were equitable or not, so long as they did not transgresse any fundamental Rule of the Common Law; and especially in this Cause, no President being shewed or produced of the Examination of such Equity in this Court. Hill. 2 Car. B. R. *Cripps* Case. *Latch.* 190, 191.

Covenants.

1. A Covenanted, That Lands conveyed to the Plaintiff for her Joynture, were of the Value of 1000 l. *per annum*, and ſhould ſo continue notwithſtanding any Act done, or to be done, by him: An Action was brought upon that Covenant againſt A. for that the Lands were not of the yearly Value of 1000 l. It was adjudged, The Action would not lye; for the Covenant was not broken, except ſome Act done by him was the Cauſe that they were not of that value. Mich. 28 Eliz. C.B. The Lady *Rich* and Lord *Rich*'s Caſe. *Cro.* 3 Part, 43, 44.

2. Recoverors to an Uſe before the Statute of 27 H. 8. make a Leaſe for years; the Leſſee covenants that he will pay the Rent to *Ceſtuy que uſe* his Heirs and Aſſigns: Proviſo, That if *Ceſtuy que uſe* doth not make his Heir Male his Aſſign, then he ſhall pay the Rent to the Recoverors, their Heirs, and Aſſigns; *Ceſtuy que uſe* dyeth, and doth not make his Heir Male his Aſſignee. It was holden by the Court in this Caſe, That this was not any Condition that went to the Eſtate, but only abridged the Covenant. Mich. 29 Eliz. B.R. *Scot* and *Scot*'s Caſe. *Cro.* 3 Part, 73.

3. The Statute of 13 Eliz. of Leaſes is, That Leaſes made by Perſons upon Non-Reſidency for 80 dayes, ſhall be void, and all Obligations and Covenants for enjoying them: A Perſon made ſuch a Leaſe by Indenture, in which were divers Covenants on the Leſſees part, and after the Leaſe became void for Non-Reſidence. It was holden in this Caſe, That for a Covenant broken before an Action of Covenant did lye. 26 Eliz. *Walls* and *Cox* Caſe, vouched in Dr. *Nunns* and *Gees* Caſe. *Cro.* 3 Part, 77. See Hill. 32 Eliz. *Hill* and *Pilkintons* Caſe. *Cro.* 245. acc.

4. In Covenant, the Caſe was, Tenant for life makes a Leaſe for years: The Leſſee by Indenture grants, bargains, and ſells all his Eſtate, to hold *in tam amplis modo & forma*, as he ought to hold it. Leſſee for life dyeth; the Bargainee brings Covenant againſt the Bargainor: It was holden by the Court, That if there be no Warranty in the Deed (as in this Caſe there was not), that the Action will not lye; for here is but an Aſſignment of his Intereſt which determineth with the Eſtate, and doth not imply a Warranty. Hill. 31 Eliz. B.R. *Lowdydale* and *Cheyney*'s Caſe. *Cro.* 3 Part, 157.

5. Note, In a Caſe of an Action of Covenant brought upon an Indenture: This Difference was taken, and Reſolved by the Court, That when a Covenant is to ſave harmleſſe againſt a Perſon certain, there the party ought to defend and ſave him harmleſſe againſt the Entry of that Perſon, be it by right or wrong; but if it be to ſave harmleſs againſt all Perſons, there it ſhall be taken for a lawful Entry or Eviction. Trin. 32 Eliz. B.R. *Foſter* and *Mapes* Caſe. *Cro.* 3 Part, 213.

6. Upon Articles of Agreement, Covenants were made in this manner, *viz.* It is covenanted between the Parties, That J. S. doth lett the Land for and during five years, to begin at *Michaelmas* next following. Proviſo, That B. ſhall pay to the ſaid J. S. during the ſaid Term, at the Feaſts of *Michaelmas* and the *Annunciation*, 120 l. Alſo the parties do further covenant, That a Leaſe ſhall be made and ſetled according to the Effect of the Articles, before the Feaſt of *All Saints* following: In this Caſe two Points were Reſolved, 1. That it was a good Leaſe preſently from the Articles. And 2. That it was as good a Reſervation of Rent, as if there had been ſpecial words of Reſervation in it. Mich. 38 Eliz. B.R. *Harrington* and *Wiſe*'s Caſe. *Cro.* 3 Part, 486.

7. The Caſe was, A man reciting by Indenture, Whereas J. S. was bound for him in a Recognizance, and other Bonds, he for divers good Conſiderations, bargained and ſold his Lands to him and his Heirs, and the Deed was enrolled within ſix Months. It was holden by the Court in this Caſe to be no good Bargain and Sale, becauſe the Vendor had nothing for his Lands. But it was holden, That it had been a good Conſideration to raiſe an Uſe by way of Covenant, if there had been Grant-words in the Deed. Hill. 35 Eliz. C.B. *Ward* and *Lamberts* Caſe. *Cro.* 3 Part, 394.

8. In Covenant it was ſhewed, That J. S. made a Leaſe for years to A. the Defendant, who by Deed granted it to B. and by Deed covenanted with him, That he and his Aſſigns ſhould peaceably enjoy it without Interruption. B. grants to J. D. who grants the Term to the Plaintiff, who being ouſted by a Stranger, brings an Action of Covenant: It was Reſolved in this Caſe, That the Aſſignee of a Leaſe by Eſtoppel ſhall not take Advantage of any Covenant. Mich. 38 Eliz. B. R. *Noke* and *Anders* Caſe. *Cro.* 3 Part, 373, and 436.

9. In an Action upon the Caſe brought againſt a Sheriff: The Caſe was, A Writ of *Fieri facias* was delivered to the Under-Sheriff 9 *Novemb.* 34 Eliz. who the ſame day made Execution of it; & the ſame day a Writ dated 4 *Novemb.* 35 Eliz. of Diſcharge was delivered to the Sheriff: It was further ſhew-

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ed, That the Under-Sheriff was by Covenant not to meddle with any Execution above forty pounds, and alſo that the ſame day of the Date of the Execution, the party had made a Deed of Gift of his Goods *bona fide*. In this Caſe theſe Points were Reſolved by the Court, 1. That the Execution was well made. 2. That the Covenant, that the Under-Sheriff ſhould not meddle with any Execution above 40 l. was a void Covenant in Law: And 3. That notwithſtanding the Gift of the Goods, That the Execution might be well ſerved upon thoſe Goods. Mich. 38 Eliz. C.B. *Boucher* and *Wiſeman's* Caſe. *Cro.* 3 Part, 440.

10. In Covenant, the Caſe was, Tenant in Tail, the Reverſion to the Queen in Fee, lett the Land for 21 years by Indenture, and covenanted, That the Leſſee ſhould enjoy it againſt all Perſons, without the Interruption of any beſides the Queen, her Heirs and Succeſſors *exiſtentibus Regibus, vel Reginis Angliæ*. The Queen granted the Reverſion to J. S: Tenant in tail dyed without Iſſue. J. S. entred and ouſted the Leſſee, who brought Covenant, and adjudged it did well lye; for none are excepted but the Queen, her Heirs, and Succeſſors; and not her Patentee. Hill. 38 Eliz. C.B. *Woodcoff* and *Greenwoods* Caſe. *Cro.* 3 Part, 517.

11. In Covenant, the Caſe was, A Leſſee for twenty years Grants it by Indenture to B. for ten years, wherein he covenants at the end of the Term to leave it ſufficiently repaired, and the Poſſeſſion to the Leſſor, his Executors and Aſſigns: Afterwards A. aſſigned the Reverſion to the Plaintiff, who becauſe the Defendant did not leave it ſufficiently repaired at the end of the years, brought Covenant. It was the Opinion of the Court, That this was a Covenant which run with the Land, and that it was inſtantly broken with the determination of the Eſtate: Wherefore it was Reſolved for the Plaintiff. But becauſe in the Declaration he did not aver, that he had the Reverſion at the time of the Grant: It was holden to be an apparent fault; and for that Cauſe Judgment was for the Defendant. Hill. 40 Eliz. B.R. *Matures* and *Wiſwood* Caſe. *Cro* 3 Part, 599.

12. Tenant for life made a Leaſe for 21 years, and covenanted, That he had not done any Act to prejudice the Leaſe, but that he ſhould enjoy it againſt all Perſons: Tenant for life dyed, the Leſſor entred; the Leſſee brought Covenant againſt his Executors. It was adjudged, It did not lie, for that the laſt words, viz. That he ſhall enjoy it againſt all Perſons, extends to the firſt words, viz. by any Act done by him, and ſo the Covenant not broken. Trin. 40 Eliz. B.R. *Gervis* and *Peals* Caſe. *Cro.* 3 Part, 615.

13. The Caſe was, A man made a Leaſe to begin after the expiration of a Leaſe thereof made to one J.S. In an Action of Covenant brought by the ſecond Leſſee againſt the Leſſor, the Leſſor ſaid, That there was no ſuch J.S. in *rerum natura*, at the time of the ſuppoſed Leaſe made to J. S. It was the Opinion of the Juſtices in this Caſe, That although the Common ground is, That a Recital is not an Eſtoppel; yet as this Caſe is, it is otherwiſe, for that here the ſecond Leaſe is to begin upon the expiration of the recited Leaſe, and therefore in this Caſe it ſhall be an Eſtoppel: It was adjudged for the Plaintiff. Mich. 20 Eliz C.B. *Leon.* 2 Part, 11.

14. The Caſe was, An Indenture tripartite was made betwixt three: A. was one of them, and he covenanted with them, *& quolibet eorum*; and the Covenant was, That the Land which he had aliened to one of them was diſcharged of all Incumbrances, and he to whom the Limitation of the Land was made, brought a Writ of Covenant alone. It was Objected, That the Writ was good, becauſe the other were not damnified: But it was adjudged by the whole Court, in the Exchequer Chamber, That the Covenant did not lye by one of them only, but it ought to be brought by them both. Trin. 30 Eliz. Exchequer Chamber, *Leon.* 2 Part, 47.

15. The Caſe was, A. leaſed Lands to B. at 40 l. *per annum*: A Stranger covenanted with A. that B. ſhould pay him the 40 l. for the Farm and Occupation of the ſaid Lands. A. brought Covenant; The Defendant pleaded, That before the day of Payment, the Plaintiff put B. out of his Farm: It was ſaid it was no Plea, becauſe it is a Collaterall Sum, and not Rent iſſuing out of Land. But the Court held the Contrary; for the Defendant hath covenanted, That the Leſſee ſhall pay for the ſaid Farm or Occupation 40 l. ſo it is a Conditional Covenant; and here the Conſideration upon which the Covenant is conceived, is taken away by the Act of the Plaintiff himſelf. Trin. 32 Eliz. B. R. *Bedell's* Caſe. *Leonard*, 2 Part, 115.

16. A. upon Speech of a Marriage between him and the Plaintiffs Mother, covenanted by Indenture with friends of the Mother, to pay all the Daughters of the Mother 20 l. a piece at their ſeveral Ages of 24 years, and bound himſelf in an Obligation to the friends of the Mother to perform the Covenant: Afterwards he made his Will, and willed, That his Executor ſhould pay to the Daughters, each of them 20 l. at their ſaid Ages, in diſcharge of his Covenant. The Plaintiff, one of the Daughters, ſued the Executor in the Spirituall Court for the 20 l. bequeathed to her; and the Executor prayed a Prohibition, becauſe here was

no Legacy, but the Will referrs to the Covenant, and it is in discharge of the Covenant: But the Justices looking into, and advising upon the Indenture, found that the same and the Obligation were made to the friends of the Mother, and not to the Daughters themselvs, and therefore were of Opinion, That the Prohibition did not ly. Mich. 30 Eliz. C.B. *Lee.* 2 Part, 119. *Davies* and *Pervis* Case.

17. In Debt upon Obligation to perform Covenants, the Case was, Tenant for life levyed a Fine to him in the Reversion *sur conusans de droit, &c.* The Uses were limited to the Conusee, and his Heirs, upon Condition, That he should pay to the Tenant for life yearly during his life, 4 l. *per annum*; and if there was default of Payment, that it should be to the Use of the Conusor for life, and for one year over. The Conusee made a Feoffment to W. who made the Lease for years to the Plaintiff: The 4 l. was not paid, nor demanded, the Tenant for life entred upon the Plaintiff; and if this was a Breach of the Condition, was the Question. In this Case were divers Points, 1. If this Fine levyed be a Surrender; and if so, If a Surrender may be to an Use: It was for that Point holden, That it was not a Surrender; but if it was a Surrende, then it might well be to an Use. 2 Point, If there was any Breach of the Condition, without Demand of the Rent: Held, That it was; for it is not properly a Rent, but *quasi* a Sum in grosse, and is not issuing out of the Land, and the Conusee is bound to seek the Conusor to pay him. 3 Point, Whether this default of Payment, he being in Possession, and being for the Salvation of his Estate, this default of Payment being *quasi* in him, Whether it be a Breach of the Condition whereof himself may take advantage: To that it was holden, That it was, because there is not any Covenant or apparant Intent, that the Lessee should discharge it; and the Covenant is absolute, That he shall enjoy it; and this Condition is to be performed by him who hath the Free-hold. 4 Point, Whether this Fine hath destroyed the future Use; for if so, the Entry of the Tenant for life is not congeable: Resolved, It had not; for it is a charge upon the Land, which goes the Land, in whose hands soever it comes. It was adjudged for the Plaintiff. Hill. 41 Eliz. C. B. *Smith* and *Warrens* Case. *Cro.* 3 Part, 688.

18. Debt upon Obligation for performance of Covenants in an Indenture of Lease: One Covenant was, That the Lessee, his Executor, or Assigns, or any other, who shall come to have the Estate, or Interest in the Term, or any part thereof, shall not alien their Estate without Licence of the Lessor, but only to his Wife or Children, the Lessee devises it to his Wife, and makes her Executrix, who enters therein as Legatee, and takes the Defendant to Husband, they alien the Estate: It was the Opinion of the Court in this Case, That the Covenant is broken, for the Wife is restrained from aliening by express words thereof as well as the Lessee himself, for it extends to the Lessee and his Assigns, and the is an Assignee; so, although there was once an Alienation by Licence, yet that Assignee cannot alien without Licence. Mich. 42 Eliz. C. B. *Thornhill* and *King's* Case. *Cro.* 3 Part, 757.

19. Error of a Judgment in C. B. in Debt upon Obligation for performance of Covenants: The Case was, One by Indenture bargains and sells to the Obligee all his Lands in D, and covenants, That he will make further Assurance of all his Lands; the Breach assigned, for that he did not make further Assurance of those Lands. It was the Opinion of the Court, That the Breach was not well assigned; for that it appears that the Bargainor had enfeoffed the Bargainee before, of all his Lands there, so as he had not any Lands at the time of the Bargain and Sale: It was therefore the Opinion of the Court, That the Judgment should be reversed. Mich. 41 Eliz. B.R. *Lee* and *Hodges* Case. *Cro.* 3 Par, 833.

20. Covenant, For that the Testator sold to the Plaintiff twenty Tun of Copperice, and agreed with the Plaintiff, That if he failed of Payment of such a Sum at such a day, that then he might quietly have and enjoy the said 20 Tun of Copperice; and shewed, that the Money was not paid at the day, *& quod non potuit habere & gaudere* the said Tuns of Copperice: Upon *Nihil dicit*, Judgment was given against the Defendant. In stay of Judgment, it was moved, That the Declaration was not good, in that he assigns not a sufficient Breach of the Covenant, *Quod non potuit habere nec gaudere*, without shewing how and by whom he was disturbed; and of that Opinion was the Court. Then it was said, It came now too late to allege it, because the Judgment was given against him by *Nihil dicit*: But the Court said, He came time enough untill the last Judgment upon the Writ of Enquiry; for till the last Judgment, he might inform the Court of the Insufficiency of the Declaration. Hill. 45 Eliz. B.R. *Chantflower* and *Prichlops* Case. *Cro.* 3 Part, 914. See *Yelv.* 101, 30. the same Case.

21. M. and E. were Joynt-Tenants for life: M. covenanted with B. That he should have the one Moyety of the Lands after the death of E. for sixty years, if M. so long live; and he demises, grants, and to Farm lets, the other Moyety to B. after the Decease of M. for sixty years. In this Case

Caſe it was adjudged, Firſt, That the firſt Moyety paſſed by the Covenant, as the Leaſe of that part which belongs to M. and that then the Leaſe of the other Moyety of his Communion was void. Trin. 2 Jac. B. R. *Whitlock* and *Chartwell's* Caſe. *Noy*, 14.

22. A. leaſed the Mannor of D. to H. for 21 years, and afterwards by the words *Dedi, conceſſi, demiſi, & ad firmam tradidi*, leaſed the ſame Mannor to the Plaintiff for life, who entred, and is ouſted by H. whereupon he brought Covenant, and ſuppoſed the Breach, becauſe H. had expelled him. The Defendant pleaded, That before this Action brought, the Plaintiff, upon the ſame Covenant, had brought *Warrantia Chartæ* againſt him in C. B. which is yet depending, and demanded Judgment, if Action, the *Warrantia Chartæ* not being determined: It was adjudged for the Plaintiff, becauſe the Barr is not good, for the Actions are of ſeverall Natures; the one is reall, and ſhall bind the Land; the other is perſonal, *viz.* the Covenant, and by that he ſhall have but Damages: It was then Objected, That the Declaration was not good, becauſe the Plaintiff is but Tenant for life, who ſhall not have Covenant upon a Warranty in Law, but only upon a ſpecial Covenant: It was anſwered, There is a difference where the whole Eſtate for life is evicted, and where but the Poſſeſſion for a time; and in this Caſe there is but a Term for years evicted, and the Plaintiff continues ſeiſed of the Free-hold, and therefore, becauſe but a Chattel is evicted: And it was ſaid, That the words in the Leaſe did enure to a double Warranty, *Dedi* to warrant the Free-hold, and *Demiſi* for a Warranty againſt an Eviction for years. It was adjudged for the Plaintiff. Mich. 6 Jac. B. R. *Pinſonb* and *Rudges* Caſe. *Yelverton*, 139, 140.

23. In Covenant the Caſe was, A Maſter of a Ship Covenanted to go with his Freight the firſt faire Wind, and the other Covenanted to pay ſo much for the Freight. The Maſter brought an Action for his Wages, and alledged, That he had performed the Voyage: The other traverſed, That he did not go with the firſt Wind. It was the Opinion of the Court, That the Traverſe was not good, becauſe the Wind may blow right for a Quarter of an hour, or a Leak may ſpring when the Wind is right: But the Traverſe ſhould have been, That the Ship did not go at all. Hill. 1 Car. B.R. *Litch.* 12. See *Peplum*, 161. the ſame Caſe, and *Latch*, 50. again.

24. A Leaſe for years was made of Land, except all Trees growing or which ſhould grow upon the Premiſſes: The Leſſor covenanted for him, his Executors, and Aſſigns, to find ſufficient Houſbote, and Hay-bote; The Leſſee made his Executor, and dyed: The Executor aſſigned part of the Term to another, and the Houſe being in decay, he cut down two Oaks to repaire the Houſe; and if Treſpaſs lay againſt the Aſſignee, was the Queſtion; and therein, What Intereſt the Leſſee had in the Trees, If he ought to requeſt the Leſſor to aſſign what Trees he ſhall have for Reparations; and if upon Requeſt and Denial, he is put to his Action of Covenant, or not; or If he might cut down what Trees he pleaſed, was debated. But the Point was not Reſolved, becauſe the Judgment was given upon a default in the Pleading. Hill. 22 Jac. B.R. *Liſle* and *Martin's* Caſe. *Latch*, 98.

25. In Action of Covenant, which was to convey Land to J. S. in Fee: The Defendant pleaded, That it was not ſhewed what manner of Conveyance he would have; and for that Cauſe upon a Demurrer the Plaintiff had Judgment. Trin. 1 Car. B. R. *Lucas* and *Warren's* Caſe. *Latch*, 126.

26. In Debt upon Obligation: The Caſe was, Two made a Leaſe for years by Indenture, and covenanted, That the Leſſee ſhould not be diſturbed, nor any Incumbrance made by them. One of the Leſſors made a Leaſe to a Stranger, who diſturbed the Leſſee: It was agreed by the Court, That it was a Breach of the Condition, becauſe the word [Them] ſhall not be taken joyntly, but if any of them diſturb the Leſſee, the ſame is a Breach of the Condition: Wherefore Judgment was given for the Plaintiff. Hill. 1 Car. B.R. *Merritor's* Caſe. *Latch*, 161.

27. Covenant brought to diſcharge the Plaintiff of a ſingle Bill in which he was bound for the Debt of the Defendant; and he alledged a breach for non-payment, and a Suit and Recovery at Law which remained in force. The Defendant pleaded, That he paid the money at the day, and thereof gave the Plaintiff notice before the bringing of the Writ, upon which the Plaintiff demurred. The Court held the plea to be naught, and Judgment was for the Plaintiff. Hill. 13 Jac. C. B. *Rider* and *Tookes* Caſe, *Brownlow* 1. Part, 24.

28. In Covenant brought, the Caſe was: J.S. and his Lady were ſeiſed of Lands in the right of his Wife for life, they both joyned in a Leaſe by Indenture, in theſe words, [Demiſe and Grant]: and afterwards the Husband dyed, the Lady his Wife entred and avoided the Leaſe, and made a new Leaſe to a ſtranger. Whereupon *Ejectione firmæ* was brought againſt the Leſſee, and Judgment thereupon, and the firſt Leſſee put out of poſſeſſion. Whereupon he brought Covenant againſt the Executor of the Husband, upon the words, Demiſe and Grant: Upon which the Defendant demurred. The words of the Leaſe were, Have demiſed,

miſed, granted, and to Farm letten for years, if the Wife ſhall ſo long live: And Judgment was given for the Defendant; For it was ſaid, A Covenant in Law ſhould not be extended to make one to do more then they can warrant, which was to warrant it as long as he lived, and no longer. Mich. 12 Jac. C.B. *Brog* and *Wiſmans* Caſe. *Brownlow* 1. Part, 22.

29. The Queſtion was, If an Action of Covenant would not lye againſt the firſt Leſſee upon a Covenant to repair the houſes, who had aſſigned his Term to another whom the Leſſor had accepted for his Tenant, and received the Rent, and ſuffered the houſe to be conſumed with fire: and, If the Covenant in ſuch Caſe was gone as debt. For the Leſſor is barred of his Action of Debt for Rent againſt the firſt Leſſee after he hath aſſigned, and the Leſſor accepted the Rent of the Aſſignee. It was the Opinion of the Court, That the Action of Covenant would well lye. Hill. 8 Jac. C.B. *Fiſher* and *Ameers* Caſe, *Brownlow* 1. Part, 20.

30. In Action of Covenant, the Caſe was, Upon marriage, the Father of the Husband Covenanted, That during the life of the Father, the Son and his Wife ſhould have Dyet in the Fathers houſe; and if they ſhould diſagree, then the Father Covenanted that he would pay to the Son and his Wife yearly during their lives 20 l. the ſon dyed; the Wife diſagreed, and married another Husband, and they brought the Action. It was ſaid, That the Action did lye, becauſe the diſagreement of the one is good enough. But the Juſtices were of a contrary Opinion; that they all ought to diſagree, for that the words are Joynt. Mich. 2 Car. B. R. *Crab* and *Tuckers* Caſe. See Reports annexed to *Bendlowes* 186.

31. In Covenant, the Caſe was; A Leſſee Covenanted to do all reaſonable works for his Leſſor with his Carts, Carriages, and otherwiſe, as ſhould be required: A breach was aſſigned, becauſe he requeſted him to carry for him three loads of Coles, which the Leſſee refuſed to do, and did not do. The Defendant pleaded, That at that time he had not any Cart or Carriage; upon which the Leſſor demurred. The Court inclined to be of Opinion, becauſe the Leſſee is not bound to keep Carts to ſerve his Leſſor; but, when he hath Carts, and the Leſſor doth require him, he is then to do it. Mich. 2 Car. B. R. *Latch. Mannors* and *Peſey's* Caſe, 202.

Cuſtomes.

1. IT was ſaid by *Hales* Juſtice, That if an Enfant of the age of 15 years be ſeiſed of Lands in Gavelkind in *Kent* by deſcent, that he may ſell his right to the ſaid Land, and thereof make a Feoffment upon his Sale, and the ſame is good there by the Cuſtome; but to make a Feoffment without a Sale, it is not good by the ſaid Cuſtome: And he further ſaid, That ſuch an Enfant cannot make a Feoffment of any Land where he hath but a Reverſion depending upon an eſtate for life; and alſo that he cannot make a Feoffment of any Lands which he himſelf purchaſeth within age, by the ſaid Cuſtome. Hill. 2 E. 6. *Bendlow's* 7.

2. In the City of *York*, a Cuſtome was alledged to be this, That no Merchant ſtranger who is not a Citizen of the ſaid City, at any time ſhould ſell any Merchandizes out of the Liberty of the City to any Merchant ſtranger who is not a Citizen. Nor any Merchant ſtranger ſhould buy of any Merchant ſtranger within the Liberties of the ſaid City, upon pain of forfeiture of ſuch Merchandizes ſold or bought; to the Mayor, Sheriffs, and Citizens of the ſaid City for the time being. Quære, if it be found a good Cuſtome, becauſe they were incorporated by the Charter of King *Richard* the ſecond by the name of Mayor, Viſcounts, and Citizens of the ſaid City; and before they were named only Mayor, Bayliffs, and Citizens, ſo as the Cuſtome aroſe ſince the time of *Richard* the ſecond, which is within time of memory, and therefore it could not be a Cuſtome: and it cannot be a Cuſtome if the beginning of it may be certainly known; I do Quære, Paſc. 28 H. 8. *Bendlowes* 35.

3. The Cuſtome of a Mannor was alledged to be, That ſuch who is Lord of the Mannor, ought to have an Amercement once a year of all the Inhabitants and Reſients within the Mannor. One J.S. was a Reſient within the Mannor, and 4 and 5 *Philip* and *Mary* at the Feaſt of &c. and before the ſaid Feaſt, he was ſummoned to appear at the next Court of the ſaid Mannor; at which Court he made default, and the ſaid default was preſented for which he was amerced to 10 s. Iſſue was joyned, That he was not a Reſient at the time. The Jury found that he was a Reſient: Whereupon Judgment was given for the Lord of the Mannor, that he might diſtrein for the ſaid Amercement, by

by which the Court ſeemed to be of Opinion, That the ſaid Cuſtome was good. Paſc. Eliz. *Bendlowes* 40.

4. In Debt upon an eſcape, The Plaintiff declared, That whereas he had a Judgment againſt one in *London*, and a *Capias ad ſatisfaciendum* againſt him, and *Non eſt inventus* retorned; for which one of his Sureties there being in Priſon, was detayned in Execution *ſecundum Conſuetudinem Civitatis prædict.* and after he eſcaped; the Defendant demurred, becauſe it is not expreſly ſaid, That there is ſuch a Cuſtome, but only *ſecundum Conſuetudinem*. And 2. That the Cuſtome is not good, for that he ought to have a *Scire facias* againſt the Bail, for it is unreaſonable to take him in Execution without anſwer, for that he might plead a Releaſe of the party, or that the Principal is dead, and ſo diſcharge himſelf. It was the Opinion of the Court, that the Cuſtome was unreaſonable, and that the Declaration was not good. And adjudged for the Plaintiff. Trin. 32 Eliz. B. R. *Dexterd* and *Ratcliffs* Caſe, *Cro.* 3. Part, 185.

5. In Debt, the Plaintiff delared, That *London* is an Ancient City, and they have uſed there time out of mind, That the Mayor take Recognizances of any perſon being of full age and not a Feme Covert, every day of the year, except Sundayes, &c. And that the Defendant ſuch a day had acknowledged a Recognizance to the Plaintiff. It was objected, That the Cuſtome was unreaſonable, and too general, not being reſtreined to any perſons or matters: For it may extend to Recognizances taken of Idiots, men of *Non ſane Memorie*, and through the whole Realm aſwell as within the City: But it was the Opinion of the Court, that the Cuſtome was good: And the Mayor is ſuch a perſon as may take Recognizances, for he is a Judg of Record. And if the party be within age *Non ſane Memorie Idiot.* ſhall come on the other ſide, and the Plaintiff needs not to ſhew the ſame in his Declaration. And the Court ſaid, They have uſed a long time to take Recognizances, and their Cuſtomes are confirmed by Parliament. Paſc. 32 Eliz. B. R. rott. 186. *Chamberlain* and *Thorps* Caſe. *Cro.* 3 Part, 186.

6. In Action upon the Caſe, it was alledged, That in ſuch a Pariſh there was a Cuſtome, That the Perſon there at all times of the year, had uſed to keep within the Pariſh a common Bull, and a common Boar, for the common uſe of the Kine and Sowes of the Pariſhoners at any time *Quandocunque acceſſerint*; and that the Defendant being Perſon there for three years, had not kept any Bull or Boar there, by reaſon whereof, the Plaintiff (being an Inhabitant there) loſt the encreaſe, &c. The Defendant by Proteſtation that there was not any ſuch Cuſtome, pleaded, Not guilty; upon which the Plaintiff demurred. It was the Opinion of the Court, That it was a good and reaſonable Cuſtome, and that every Inhabitant who hath any prejudice by not keeping of the Bull and Boar, might maintain his Action againſt the Perſon. Te. 39 Eliz. B. R. *Yeilding* and *Fogs* Caſe. *Cro.* 3. Part, 569.

7. Action upon the Caſe by a Copyholder againſt his Lord: And alledged within the Manor, that there was a Cuſtome, That every Copyholder ſhall have the Loppings of the Pollingers. And becauſe the Defendant the Lord had cut down two Oaks being Pollingers, whereby the Plaintiff loſt the benefit of the Lops, the Plaintiff brought the Action. The Defendant by proteſtation that there was no ſuch Cuſtome, for plea ſaid, That he cut down two Oaks, being Pollinger Trees, and left the Loppings there for the Plaintiff; upon which the Plaintiff demurred. It was Objected, That if this ſhould be good, then the Lord who hath Intereſt in the Timber, ſhould never by this means have any profit thereof, and thereby loſe his Inheritance. But it was Reſolved, That Judgment ſhould be for the Plaintiff, For the Copyholder hath not only Intereſt in the preſent Loppings but in a future profit by the Loppings: And if the Lord ſhould cut down all the Timber Trees, then the Copyholder ſhould loſe all the profit, and never have any more Loppings; and it is a reaſonable Cuſtome to have Loppings of Pollingers which anciently have bin continued. Trin. 40 Eliz. B. R. *Stebbing* and *Goſnolls* Caſe. *Croke* 3. Part, 629.

8. In an *Ejectione* for Copyhold Lands within the Manor of *Iſlworth*, divers points were debated and Reſolved. 1. That there could not be an Eſtate tail of a Copyhold, unleſs there be a ſpecial Cuſtome within the Manor to warrant it, and ſo it was ſaid it was Reſolved in the Dutchy Chamber in *Halling* and *Graves* Caſe by all the Juſtices. 2. That admitting there might be an Eſtate tail of it; That a ſurrender thereof is a Diſcontinuance to put the Iſſue in tail to his Action, for he muſt take it ſubject to all the Inconveniencies which an Eſtate tail at the Common Law is ſubject unto. 3. That admitting that the ſurrender of a Feme Covert being ſole examined, ſhould bind her by the Cuſtome: If ſuch a ſurrender upon her examination made before two Tenants of the Manor, ſuch ſurrenders before then having bin uſed to be made, be good. Reſolved, That by a ſpecial Cuſtome to warrant it, it may be good, but otherwiſe not. 4. If a ſurrender made to the Steward of the Manor to the uſe of the Steward himſelf, be good. Reſolved, That it was, for that the entry is *Quod ſurſum reddidit in manus Domini*; and the Steward is but the Lords ſervant,

vant, and the ſurrender is to the Lord and not to him. Mich. 41 Eliz. C. B. *Eriſh* and *Rives* Caſe. *Cro.* 3. Part, 717.

9. In Treſpaſs for taking the Plaintiffs Horſe; The Defendant juſtified as Lord of the Mannor, and ſet forth a Cuſtome to be, That the Lords of the Mannor time out of mind, have uſed to have after the death of every one dying within his Mannor, the beſt Beaſt in name of a Herriot, and that the Teſtator of the Plaintiff dyed within his Mannor poſſeſſed of that horſe, and therefore he ſeiſed him. Upon which it was demurred. It was much urged, That the Cuſtome ought to be maintained if by any writ or cauſe to be imagined, it might be intended to have a lawful beginning: And the reaſon of it might be this, for that he had his reſidency within his Mannor, and had the comfort and help of the Lords Tenants and Aſſiſtances in the time of his ſickneſs, and after his death had their attendance to his Funeral: and alſo becauſe that for that time the Lord loſt the Service of his Tenants, and alſo becauſe he had a place there to reſt his bones, it might be good. But it was Reſolved by the Court, That the Cuſtome was not good to bind a ſtranger, and a Cuſtome if it be not grounded upon good reaſon, it is void: And to have the Beaſt of any one which dyeth within his Mannor, cannot have a lawful and reaſonable beginning. But ſuch a Cuſtome might be good to bind the Tenants of the Mannor, becauſe it might begin upon the creation of their Tenures. It was adjudged for the Plaintiff, and afterwards the Judgment affirmed in a Writ of Error brought in the Queens Bench. Trin. 41 Eliz. C. B. *Parker* and *Combſfords* Caſe, *Cro.* 3. Part, 725.

10. In an Action upon the Caſe, The Plaintiffs ſet forth themſelves to be a Corporation of Weavers in *London*, and that the Cuſtome there is, That none ought to intermeddle with their Guild, nor with their Art within *London*, or *Southwark*, but thoſe of the Guild, and that the Defendant being none of the Guild, had bought 40 l. worth of ſilk of one R. to be woven, and had weaved it: The Defendant pleaded, Not Guilty. It was found by Verdict, That the Defendant being a ſtranger, had received of R. 40 l. worth of ſilk to be woven, and had carried it to *Hackney*, and there had woven it and brought it back to *London*, and there received his Wages. It was Reſolved by the Court, That this was no offence: For although it was a good Cuſtome; yet this contracting for it in *London*, and working it in the Country, is not an intermedling with their Trade in *London*. Wherefore it was adjudged for the Defendant. Hill. 43 Eliz. B. R. The Warden and Corporation of *Weavers* and *Browns* Caſe. *Cro.* 3. Part, 803.

11. In Treſpaſs, the Defendant juſtified, that J. S. was Lord of the Mannor of D. within which Mannor the Cuſtome is, That if any man taketh to Wife any Cuſtomary Tenant of the ſaid Mannor, and hath Iſſue, and ſhall overlive his Wife, he ſhall be Tenant by the Curteſy: And pleaded, that he took to Wife one A. to whom, during the Coverture, a Cuſtomary Tenement of the ſaid Mannor did diſcend, and that he had Iſſue by the ſaid A. and ſhe is dead, and ſo, &c. It was adjudged in this Caſe, That the Husband by this Cuſtome, upon this matter, ſhould not be Tenant by the Curteſy; For A. was not a Cuſtomary Tenant of the ſaid Mannor at the time of the Marriage. Trin. 29 Eliz. B. R. Sir *John Savages* Caſe. *Leon.* 2. Part, 109.

12. In Action upon the Caſe, the Plaintiff declared that he was ſeiſed in Fee of a houſe and Meadow, and that he and all thoſe whoſe Eſtate he had in the houſe and Meadow, had time out of mind had a Way from the houſe to the Meadow, and alſo that he had a Way from the houſe to the Kings High Way adjoyning to the ſaid houſe, and then to ſuch a Cloſe, and from ſuch a Bridg forward to the Meadow. The Defendant pleaded, That he held the Cloſe free from ſuch Way, and traverſed, That the Plaintiff had not the Way there; and it was found againſt him. It was moved in ſtay of Judgment, That he preſcribes for a Way to his houſe, and doth not ſay, It is an Ancient houſe, and Declarations ought to be certain to all intents, that the other might take Iſſue thereupon. 2. For the incertainty of the Way, where he ſaith that the Way is from the houſe to the High-Way, and doth not ſhew where the High Way is, or leads. It was anſwered, There is a difference between a Preſcription which is perſonal, and a Cuſtome which is local, and therefore it is ſufficient in a preſcription to ſay, That time out of mind he had ſuch a Way, becauſe it implies that the houſe is an ancient houſe. 2. It was the Opinion of the Court, That the Verdict had mended all the defects in the Declaration, and it was adjudged for the Plaintiff. Hill. 20 Jac. B. R. *Harriſon* and *Peaks* Caſe. *Latch.* 110.

Debt.

1. THE Caſe was: A Woman who was Executrix of her Husband, married with the Debtor of the Teſtator, the Husband dyed, and debt was brought againſt the Woman, who pleaded ſhe had nothing in her hands. It was adjudged, That this Debt was not Aſſets in her hands, for by the Intermarriage, the debt which the Executrix had in *auter droit*, was not extinct, but ſuſpended; And the Action was revived againſt the Executors of the Husband. Mich. 31 Eliz. B. R. *Croſman* and *Readers* Caſe. *Cro.* 3. Part, 114.

2. The Teſtator is endebted to one by Obligation in the ſum of 100 l. he makes his Executor, and dyes. The Executor takes in that Bond, and gives a Bond in his own name, with Sureties to the Obliger. It was holden in this Caſe, That it was an Adminiſtration, and a good payment of the Debt of the Teſtator. Mich. 31 Eliz. B. R. *Martin* and *Shippon's* Caſe. *Cro.* 3. Part, 114. See Mich. 31 Eliz. B. R. *Stamp* and *Hutchins* Caſe, *Cro.* 3. Part, 110. adjudged acc.

3. Debt brought againſt Husband and Wife Executrix of her former Husband. The Husband appeared upon the Exigent, and would have put in a *Superſedeas* for himſelf alone, without appearance for his Wife: but he could not be admitted ſo to do by the Court upon a Preſidere ſhewed 18 Eliz. in one *Summers* Caſe, who would have put ſuch *Superſedeas* for himſelf only, but was not ſuffered ſo to do, but compelled to put in an appearance, Attorney, and *Superſedeas* for his Wife alſo. Mich. 31 Eliz. B. R. *Bilford* and *Foxes* Caſe. *Cro.* 3. Par. 118.

4. Note, It was adjudged by the whole Court, That Debt upon a Contract of the Inteſtate doth not lye againſt his Adminiſtrator. Pa'c. 30 Eliz. B. R. *Hughſon* and *Hobbs* Caſe. Paſc. 30 Eliz. *Cro.* 3. Par. 121.

5. Debt was brought for 7 l. 13 s. 4 d. Upon *Nihil debet* pleaded, The Jury did find that the Defendant did owe 6 l. 13 s. 4 d. but ſpoke not of the other 20 s. It was the Opinion of the Court, That it was Error, and the Verdict not good, nor remedied by the Statute of 32 H. 8. and therefore the Judgment was reverſed. Mich. 31 Eliz. B. R. *Finymore* and *Sankeyes* Caſe. *Cro.* 3. Part, 133.

6. Debt brought againſt an Executor for Rent behind in the time of the Teſtator. The Defendant pleaded, levyed by Diſtreſs, *et ſic non detinet*. It was found by the Jury, That the Aſſignee of the Term paid the Rent to the Plaintiff, which he accepted, but no Diſtreſs was taken for it. In this Caſe it was adjudged, That Judgment ſhould be againſt the Plaintiff, for the ſubſtance of the Plea is found with the Defendant, for it is found the Rent is paid, and ſo *non detinet* the Rent, and not upon the levying by Diſtreſs. Trin. 31 Eliz. C. B. *Sir Thomas Cecill* and *Harris's* Caſe. *Cro.* 3. Part, 140.

7. Debt upon an Obligation, the Condition was, That if J. S. make an Obligation to the Plaintiff before *Mich.* that then, &c. The Defendant pleaded, That J. S. made the Obligation, and ſealed and delivered it to the uſe of the Plaintiff. It was adjudged in that Caſe, That it was no performance of the Condition, for the meaning was, that it ſhould be a good Deed to the Plaintiff, and perhaps the other will not deliver it to him. Trin. 31 Eliz. C. B. *Beſe* and *Draitons* Caſe. *Cro.* 3. Part, 143.

8. Debt for Rent reſerved upon a Leaſe for years. And delared, That he let the Land to the Defendant for 21 years from the Feaſt of St. *Mich.* next enſuing, rendring Rent; And that the Defendant had entred the 29 th of *September*, and had occupied the Land for one year. The Defendant pleaded *Nihil debet*, which was found againſt him. It was ſhewed in ſtay of Judgment, That he had entred upon *Mich.* day, which is a day before his title began, and ſo it is a Diſſeiſin, and ſo no Rent due. It was the Opinion of the Court, That he was a Diſſeiſor by his entry, but yet Debt lyes for the Rent upon the privity of contract. Mich. 31 Eliz. B. R. *Alexander* and *Dyers* Caſe. *Cro.* 3. Part, 169.

9. Debt upon an Obligation to ſave harmleſs againſt J. S. of an Obligation. The Defendant pleaded *Non damnificatus*. The Plaintiff replyed, That J. S. ſued him to the Exigent, and then he appeared, and the ſaid J. S. had Judgment to recover againſt him. It was Reſolved by the Court

for

for the Plaintiff. For immediately upon the Judgment given, he was damnified; for his Body, Goods, and Lands are liable to the Execution; and if he after alienath his Lands, he cannot by reason of this Judgment warrant it to be free from Incumbrances, so that by the very Judgment he is damnified. Trin. 34 Eliz. B. R. *Bush* and *Ridglyes* Case, *Cro.* 3. Part, 261.

10. A Debt came to the Queen by an Attainder of J. S; The Queen granted it to J. D, and all Actions and Demands for it; but there were no words in the Letters Patents to sue for it in the Queens name. Yet the Opinion of the Justices was, That a *Scire facias* lay to have Execution of it in the Queens name Pasch. 36 Eliz. in Ex. *Allens* Case. *Cro* 3. Part, 325.

11. Debt upon an Obligation; The Defendant pleaded, That the Plaintiff did Covenant not to sue the Obligation before *Mich.* and thereupon demanded Judgment if Action; It was thereupon demurred. But the Court Resolved for the Plaintiff, for it is only a Covenant, and it shall not enure as a Release; and it is not to be pleaded in Barr, but the party is put to his Covenant, if he be sued before the time. But if it had been a Covenant that he should not sue it at all, then perhaps it might enure to a Release, and be viewed in Barr. Mich. 37 Eliz. B. R. *Dean* and *Jefferies* Case. *Cro.* 3. Part, 352.

12. Debt upon an Obligation of 300 l. It appeared upon *Oyer*, That it was a Statute Staple of 300 l. acknowledged by the Defendant and two other before the Mayor of *Lincoln*; But because the Seal of L. was not according to the form of the Statute of *Acton Burnell*: It had been Resolved betwixt the same parties, That it was not a Statute; Therefore now the Plaintiff brought a Debt, as upon an Obligation at the Common Law. It was Objected, That Debt could not be brought upon this Statute; for, it being void as a Statute, it cannot be brought as upon an Obligation; It was the Opinion of the Court, That the Action did well lye. For it was said by them, That Debt may be brought upon a Statute-Staple or Morgant; For the words *Obligavit & recognovit* make it an Obligation, although it be not a Statute to some intent; and by the delivery of the party, it is an Obligation, though it be not a Statute till the Mayors Hand and Seal be put unto. Pasch. 37 Eliz. C. B. *Hallingworth* and *Ascue's* Case. *Cro.* 3. Part, 355.

13. Debt for Rent upon a Lease for years; The Defendant pleaded, That before the Lease, a Judgment was given in Debt against the Plaintiff at the Suit of J. S, and that afterwards he made the Lease; and that afterwards the Land was extended, and delivered in Execution upon an *Elegit*; and before the Extent, there was no Rent behind: It was adjudged by the whole Court, To be a good Plea. H. 11. 37 Eliz. B. R. *Dy* and *Keiss* Case. *Cro.* 3. Part, 398.

14. Error of a Judgment in C. B. where G. brought a Debt against R, as Executor of N, for Fees due to him as Attorney of the Common-Pleas, as also for Fees due to him for soliciting Causes in the Kings Bench. The Defendant there pleaded, *N. non*, Executor and found against him, and Judgment for the Plaintiff: Whereupon he brought Error, and assigned for Error, That the Action of Debt lyeth not against him as Executor; for although it lyeth against him for an Attorneys Fees in regard his Testator could not have waged his Law for them: Yet so much as it is brought against him for Fees in soliciting Suits in the Kings Bench, where he was not Attorney, and for which an Action lies not against an Executor; then having there conjoyned them, and Damages being given entirely, the Judgment there was erroneous in all. This Cause was often debated, and afterwards it was Resolved, That this Action of Debt would not have lyen, if it had been brought against the Testator himself for part thereof, viz. For so much as he expended as Solicitor in Suits in the Queens Bench; for those are not allowable by Law for such Fees as he expends in such business, and therefore no Action lies for them. But an Attorney in such Cases where he is Attorney, may lay out Fees, and have Debt for them. But for soliciting Fees in the Kings Bench, Debt did not lie, so the Writ was liable for all. Mich. 37 and 38 Eliz. B. R. *Gennine* and *Falls* Case. *Cro* 3. Part, 425. and 459. See Mich. 4 Car. B. R. *Lords* and *Thirlbies* Case. *Cro.* 1. Part, 140. Lib. 1. Title *Debt*, fol. 570. Case 28. adjudged accordingly.

15. Detinue of an Obligation; The Case was, That the Plaintiff and one B. as Executors of J. S. had an Obligation, wherein J. D. was endebted to the Testator in 20 l; B one of the Executors, in satisfaction of his proper Debt due to the Defendant by words only, *Dedit & deliberavit* that Obligation to the Defendant, and dyed; The Plaintiff being the surviving Executor brought Detinue of this Obligation: *Quære*, If it lyeth. The Justices were divided in their Opinion, and the Point not Resolved. Mich. 38 Eliz. B. R. *Kefield* and *Nicholsons* Case. *Cro.* 3. Part, 478.

16. In Trespass; The Case was, That by Vertue of a *Fieri facias* out of the Exchequer for the Queens Debt, the Sheriff took the Plaintiffs Beasts, being Levant and Couchant upon the Land of the Debtor, and sold them for the Queens Debt. It was adjudged, That the Sale was not lawful; for they were not to be sold as the Goods of

of the Debtor, but they might have been diſtrained for the Queens Debt. Mich. 38 Eliz. B. R. *Stafford* and *Eatemans* Caſe. *Cro.* 3. Part, 431.

17. Debt brought againſt an Executor, The Defendant pleads, That, pendant the Action, J. S. brought an Action againſt him for a true Debt, and recovered againſt him, and that he had nothing in his Hands; The Plaintiff Replyed, That the Recovery was by Covin. It was the Opinion of the Court, That the Replication was not good, for that, if it was not a true Debt, it could not be a Covinous Recovery. Mich. 38 Eliz. B. R. *Goers* and *Willocks* Caſe. *Cro.* 3. Part. 462.

18. Debt upon an Obligation, and demanded 47 l. 1. s. 8 d. *Monete Flandrie*, *ut inſtrument. ad valorem* 42 l. 6 s. 2 d. and becauſe the Jury did not enquire of the value of the money upon the Verdict, nor by Writ of Enquiry; and the value of Flemiſh money is not known here; the Judgment was reverſed. Mich. 39 Eliz. B. R. *Bigſhaw* and *Pigots* Caſe. *Cro.* 3. Part. 536.

19. J. S. brought a *Scire facias* upon a Recognizance, and had Judgment by default, *Quod habeat executionem*. Afterwards he brought an Action of Debt upon the ſaid Judgment; It was moved once, That he ought to proceed upon the Judgment in the *Scire facias*, and ought to ſue Execution according to that Judgment by *Elegit*, but not by *Capias*; but the Exception was diſallowed. For the Recognizance is a Judgment in it ſelf, and an Action of Debt will lye upon it, without any Judgment in the *Scire facias*; and Debt lyeth as well upon the Judgment, as upon the Recognizance it ſelf, and ſo was the Opinion of the whole Court. Mich. 29 Eliz. C. B. *Levelaces* Caſe. *Leon.* 2. Part, 14.

20. In Debt againſt the Executors of R. F; The Caſe was, A. F, mother of the Teſtator, deviſed Lands to the ſaid R. F, and afterwards deviſed 40 l. to J. upon Condition, that the ſaid A. *cum requiſitus eſſet acquietaret & relaxaret* to the ſaid R. F, *omnes actiones perſonales querelas* (*præter.* 40 l. *per dict. voluntatem exceptis*) A. dyed; R. F. made two Obligations to J, the firſt to pay 20 l. parcel of the ſaid Legacy within a year after the Death of A, ſo as the ſaid J. releaſe according to the Will of the ſaid A; the ſecond Obligation was with the ſame Condition to pay 20 l. reſidue of the ſaid Legacy, within two years after the death of the ſaid A, upon Condition to releaſe *ut ſupra*: R. F. required J. to make the releaſe, which he refuſed; They were at Iſſue upon the Requeſt: It was found, *Quod R. F. non requiſivit*, upon which a Verdict was given, and Judgment, and thereupon Error brought in Exchequer Chamber. The Error aſſigned was, That it appeared upon Record, That the Bill *proferuntur ſuit infra duos annos poſt non tem dict. A.* and ſo before the day of payment. But the Judgment was affirmed; For in this Caſe, It was ſaid, That if I bring my Writ of Error before the day of payment, and it doth depend in ſuit till after the day of payment; my Writ is made good, for that at all times the Defendant was my Debtor. Trin. 29 Eliz. B. R. *Thurkeſtil* and *Tyes* Caſe. *Leon.* 2. Part, 20.

21. The Caſe was; A Debt came to the Queen upon an Attainder of a Creditor, an extent iſſued out againſt one of the Terr-Tenants, lyable to the Debt, and not againſt all of them; It was moved, That upon a branch of the Statute of 33 H. 8. all the Terr-Tenants ought to be charged: It was the Opinion of divers, That ſuch a Debt which came to the Queen by Attainder, is not within the ſaid Statute, for although the Attainder is by a Judgment, yet it cannot properly be ſaid a Debt by Judgment, but where a Debt is rendred by Judgment, and that was ſaid to be the Caſe of the Lord *Norris*, for a Debt due to *Hirne*, who was attainted, Mich. 31 Eliz. Exchequer Chamber; The Lord *Cromwels* Caſe. *Leon.* 2. Part, 33.

22. In Debt for Arrearages of Rent; The Caſe was, The Land out of which the Rent iſſued, was aſſured by Act of Parliament to the Marchioneſſe of *Northampton*, for the Term of her life, the Remainder to the Lady *Baucher* her Daughter, and the Heirs-males of her Body, the Remainder to King *Henry* the 8th. in Fee: It was ordained by the ſaid Act, That all Grants and Leaſes made, or after to be made by the ſaid Marchioneſſe of the Lands *preſcript. ſint nec. dill. Marchioniſſæ, valida in lege tant durante Vitâ ejus, &c.* The Marchioneſſe made a Leaſe for 21 years to J. S, rendring 10 l. Rent, who aſſigned the ſame to the Defendant; The Lady *Baucher* dyed without Iſſue, the Marchioneſſe dyed; If the Leaſe ſhould bind the Queen was the Queſtion. It was Objected, That the Eſtate of the King was bound with the Leaſe, for that all the Eſtates made, upon the Point, but one Eſtate being derived out of one Eſtate: On the other ſide it was ſaid, That the Leaſe ſhould not bind the Queen nor her Patentee; It was obſerved by ſome of the Juſtices, That it is expreſſly provided, That the Rent reſerved by the Marchioneſs ſhould go to the Lady *Baucher*, but no proviſion made, that it ſhould go to the King; and therefore the King not to be bounden. *Quære*, for the Point was not Reſolved. Trin. 29. Eliz. B. R. *Morgan* and *Chandlers* Caſe. *Leon.* 2. Part, 51.

23. Debt was brought by Original Writ againſt an Adminiſtrator in another County then where the Adminiſtrator was dwelling; and before Notice of the Suit, he paid divers other Debts of the Inteſtate

Intestate due by Specialties, so as he had not Assetts to pay the Debt demanded, but had Assetts at the Day of the *Teste* of the Original Writ; and all this matter the Defendant pleaded in Barr: And it was the Opinion of the whole Court, That it was a good Plea. Mich. 32 Eliz. C. B. *Corbets* Case. *Leon.* 2. Part, 60.

24. Debt in *London* against one as Executor upon Fully administred, pleaded, It was found for the Plaintiff, who assigned the same to the Queen; A *Scire facias* issued out of the Exchequer against the Defendant into the County of D. the Sheriff returned *Nulla bona, &c.* which *Scire facias* was upon a *Capias* of Goods in another County: In this Case, It was agreed by all the Barons, That the Debt was well assigned to the Queen; and that the *Scire facias* might issue out of another Court than where the Record of the Judgment remained, and that upon a *Capias* of Goods in another County than where the Writ is brought, or where the party is dwelling, he may well have a *Scire facias* in another County. Trin. 32 Eliz. Exchequer, *Bowes* Case. *Leon.* 3. Part, 61.

25. Debt by M. W. against J. S; The Condition was, That if the said M. W. doth not depart out of the Service of the Defendant, without Licence of the Defendant, nor marry her self without his consent: Then if the Defendant pay to the said M. within twenty eight dayes after Demand made by her of the said J. S, at his House at D. 300 l. that then, &c. The Defendant pleaded, That M. the Plaintiff 4th. *May*, 30 Eliz. departed out of his Service without Licence: The Plaintiff Replyed, That 6th. *Sept.* the same year she departed out of his Service with Licence, and that 4th. *Octob.* after, she demanded the 300 l. at D, and he refused to pay it; *absq; hoc*, that she departed out of his Service 4th. *May*, 30 Eliz. without Licence; The Writ, bare date 8th. of *October* after the demand. It was found for the Plaintiff, and Judgment given, and Error brought by J. S. It was objected, That the Replication was not good, for it was no full Plea, That the Plaintiff did not depart out of the Service of the Defendant 4th. *May*; for if she departed at any other time, she should not recover: But she ought to have pleaded, That she continued in his Service untill such a day, and then she departed with his Licence; But the Court conceived, That the Judgment was well given; For the Defendant was at his liberty to plead the departure without his Licence, and to stand upon the Demand; and now although he pleads the departure, yet the demand is not confessed; wherefore the Judgment was affirmed. Hill. 32 Eliz. B. R. *Wrastley* and *Monings* Case. *Leon.* 2. Part, 99.

26. Debt upon Obligation; The Case was, The parties were bound the one to the other, upon Condition to stand to the Award of B. and C, who award, That the Defendant before such a Feast shall make a Release to the Plaintiff, but no place assigned where the Release shall be delivered to the Plaintiff. The defendant before the Feast sealed a Release according to the Award, and delivered it to J. S, to the use of the Plaintiff, who delivered it to J. N, one of the Servants of the Plaintiff, who two or three dayes offered it to the Plaintiff, and he refused it; It was holden by *Wray*, Chief Justice, That upon this matter the Award was well performed, notwithstand the refusal of the Plaintiff. See 1 Eliz. *Dy.* 167. And *Quære* and see the Case of *Beale* and *Dorton's* before in this Title. Case 7.

27. Debt upon an Obligation; The Condition was, That whereas the Plaintiff and Defendant were jointly seised of the Office of Register of the Court of Admiralty; If the Defendant shall permit the Plaintiff to enjoy the said Office, and to take the Profits of it wholly to his own use, during his life, without interruption done by him, That then, &c. the Defendant pleaded, The Custom of the Realm of is, That the Lord Admiral, for the time being, might Grant the said Office, and such Grant should be good for the life of the Grantee, and that the Lord *Clynton*, Lord Admiral, granted the said Office to the Plaintiff and Defendant, and dyed; and then the Lord *Howard* was appointed Lord Admiral, and he 29 Eliz. granted the said Office to one W, who interrupted him, before which time the Defendant did suffer the Plaintiff to enjoy the said Office, and to take the Profits of it, upon which it was demurred: The Court was clear of Opinion, That Judgment should be given for the Plaintiff; For although the Defendant hath another Title, and the Title of the Plaintiff be determined: yet against his own Bond and Deed he shall not put out the Plaintiff. But the Case was Compounded by Order of the Lord Chancellor. Pasch. 28 Eliz. B. R. *Parker* and *Harfields* Case. *Leon.* 2. Part, 114, 115.

28. Debt upon an Obligation against one as Executor; The Case was, That the Testator by his Will appointed certain Lands, & named them, which should be sold by his Executor; the monies thereof Comming, to be distributed betwixt his Daughters, when they accomplished the age of 21 years. The Lands were sold, and the monies given to the Hands of the Executor; and being in his Hands, If they should be Assetts to pay the Testators Debts, was the Question: It was the Opinion of the Court, That the monies should not be Assetts, for that they said, That that Money is limited to a special use. *Quære* Mich. 30 Eliz. B. R. *Gerings* Case. *Leon.* 2. Part, 119.

29. Debt

29. Debt upon Obligation; The Condition was, To perform Covenants in Indentures: The Covenant upon which the Breach was assigned, was, That if R. W. Brother of the Plaintiff, should make assurance of such a Manner to the Defendant, as Counsel learned of the Defendant should devise: Then, if the Defendant paid to the Plaintiff 50 l. the bond to be void. The Defendant by advice of Counsel, demanded a Lease with warranty; It was holden by two Justices, That this was not an Assurance, but a means to recover in Value, and so the Obligation not forfeited. The Lord *Anderson* said, It was a Collaterall warranty. Pasch. 27 Eliz. C. B. *Pye* and *Thogmorton* Case. *Lent.* 2. Part, 130.

30. Debt upon Obligation; The Condition was, Whereas debates were betwixt the Plaintiff and J. Brother of the Defendant; and the Plaintiff and J. put themselves to the Award of J. S. and the Defendant was bound by Bond to the Plaintiff, to perform the Award of the said J. S. An Award was made, That the said J. should pay to the Plaintiff 30 l. viz. at the Annunciation 20 l. and at *Michaelmas* 10 l. The Defendant pleaded, That J. died before the said Feast of *Michaelmas*, upon which it was demurred. It was the Opinion of the whole Court, That the Bond was forfeited, because the Sum awarded is now become a Duty, as if the Condition of the Bond had been to Payment of it. 2. Day is appointed for the Payment of it. Mich. 29 Eliz. B. R. *Kingwell* and *Orme's* Case. *Lent.* 2. Part, 155.

31. Debt upon Obligation; The Condition was, That whereas the Plaintiff was in possession of such Lands, if J. S. nor J. D. nor J. G. did disturb him by any indirect means, but by due course of Law, that then, The Defendant pleaded, That neither J. S. nor J. D. nor J. G. did disturb him by any indirect means, but by due course of Law; Exception was taken to it, that he hath pleaded, No such, Nor such, Nor such, hath disturbed him by any indirect means, but only by due course of Law, and that cannot be tryed neither by Jury, nor by the Judges: Nor by the Jury, because it is not put to them; whether they had disturbed him by any indirect means, or by the due course of Law: For they shall not take upon them the construction, what is an indirect means, or a due course of Law, for that appertaineth to the Judges to judge of: Nor by the Judge, because he hath not put it in certainty, that it was a due course of Law, by which he disturbed him: And of this Opinion was the whole Court, and the Exception was allowed. M. 29 Eliz. B. R. *Dighton* and *Holt's* Case. *Lent.* 2. Part, 197.

32. Debt upon a Bill of 70 l. to be paid upon demand; It was demurred unto, because the demand was parcell of the Contract, and the Plaintiff had not shewed any actual demand: But it was adjudged to be good enough, because it is a duty prestantly; and is not like the Case where one is bound to levy a Fine upon Request; for that there the Plaintiff hath not any cause of Action till a Request be made: Not so in this Case. Hill. 39 Eliz. C. B. *Cay* and *Lancaster's* Case. *Cro.* 3. Pa. 748.

33. Debt upon Obligation, Conditioned, That if the Defendant came to the *Kingshead* upon 12th. of *October*, and there elect two Arbitrators, who with two others to be elected by the Plaintiff, shall Arbitrate all such sums which the Plaintiff hath disbursed for the Defendant, and promised to be paid to the Plaintiff by the Defendant; That then, &c. The Defendant pleaded, That the 12 h. of *October* he came to the *Kingshead*, and there elected two Inhabitants of the said Town Arbitrators, *ad faciendum Arbitrium* of all sums, and that the Plaintiff was not there; and because he did not shew at what hour of the day, nor how long time he continued there; (for he ought to be there at such a convenient time, that the Arbitrament may be made); and because he doth not shew, that his two Arbitrators were there present: It was adjudged for the Plaintiff. Hill. 39 Eliz. C. B. *Lamond* and *Mouks* Case. *Cro.* 3. Part, 749.

34. Debt against an Executor upon an Arbitrament made in the life of the Testator; It was adjudged, That the Action would not lye, because the Testator might have waged his Law. Pasch. 29 Eliz. B. R. *Hampton* and *Ivers* Case. *Cro.* 3. Part, 557.

35. Debt upon a Bill, which was this: *Memorandum*, That I T. J. do bind my self to J. M. to pay him all such monies as my Brother oweth him. In the Bill, after the (*In witness*) was written, That the Brother owed to the Plaintiff 41 l. and so it was averred in the Declaration: It was adjudged for the Plaintiff; for although his Bill was uncertain at the first, yet by the averment the Debt is sufficient. Pasch. 29 Eliz. C. B. *Morgan* and *Johnson's Case*. *Cro* 3. Part, 561.

36. Debt upon an Obligation, for the performance of the Award of J. S. to be made, &c. The Defendant pleaded, *Nullum fuit Arbitrium*; The Plaintiff shewed, That an Award was made, That he should make an Estate of such Lands to the Plaintiff for life, the Remainder to J. S. a Stranger in Fee: It was the Opinion of the whole Court, That although the Award was void as to the Stranger, yet it was good as to the particular Estate, and ought to be performed. But because the Plaintiff in his Replication did not shew where the Arbitrament was made, which is matter

iſſuable, it was adjudged againſt the Plaintiff. Hill. 42 Eliz. C. B. *Bretton* and *Pratts* Caſe. *Cro.* 3. Part, 759.

37. Debt upon Obligation, to ſave the Plaintiff harmleſs from an Obligation, wherein the Plaintiff as Surety for the Defendant was bound to J. S. to pay 100 l. The Defendant pleaded, That the Obligation made to J. S. was upon an Uſurious Contract, *Et ſic non damnificatus:* It was Objected, That the Plea was good, otherwiſe the Statute of Uſury ſhould be defrauded: For by a Compact the Uſuror would ſue the Surety, and he would pay him, and have his remedy upon his Counter-Bond. But the whole Court held it to be no Plea, becauſe the Surety by intendment cannot know of the corrupt Contract, to plead it in avoidance of the Bond, wherefore the principal ought to take care thereof. Mich. 40 Eliz. B. R. *Robinſon* and *Mayes* Caſe. *Cro.* 3. Part, 588. Trin. 40 Eliz. C. B. *Batton* and *Downhams* Caſe. *Cro.* 3. Part, 643. acc.

38. Debt upon a Bill ſealed for the payment of 42 l. to the Plaintiff, *Cum requiſitus eſſet*; The Defendant pleaded, *Non eſt factum*, and upon the Evidence it appeared, That this Obligation was written in a Book, and in the ſame Leaſe the Defendant put his Hand and Seal to it. It was a Queſtion, if this was a good Deed or not: It was Reſolved by the Court, That it was a good Deed. Trin. 40 Eliz. B. R. *Fox* and *Wrights* Caſe. *Cro.* 3. Part, 613.

39. Debt upon a Bill ſealed, whereby the Defendant acknowledged, That he had received of the Plaintiff 7 l. to buy a pair of Bellows, and other things to the uſe of the Plaintiff. The Plaintiff demurred; becauſe the Plaintiff ought to have Accompt, and not Debt. But it was the Opinion of all the Juſtices, That it was at the Election of the Paintiff, to have either the one or the other; wherefore it was adjudged for the Plaintiff. Mich. 4 Eliz. C. B. The Earl of *Lincoln* and *Topcliffs* Caſe. *Cro.* 3. Part, 647.

40. Debt upon Obligation The Defendant pleaded, *Quod factum prædict.* was made, and delivered without date, and afterwards the Plaintiff put a date to it, and ſo not his Deed. It was the Opinion of all the Juſtices, That the Plea was not good, becauſe the Defendant firſt confeſſeth it to be his Deed; and then concludes it is not his Deed; whereas he might have pleaded, *Non eſt factum* generally. Hill. 42 Eliz. C. B. *Coſpay* and *Tanmans* Caſe. *Cro.* 3. Part, 800.

41. Debt; The Plaintiff declared, That in conſideration of 100 l. paid, the Defendant granted to the Plaintiffs Father an yearly Rent of 60 l. going out of the Manor of D for 60 years, with a *Nomine pœnæ* for non-payment, and that his Father deviſed the Rent to him; and for the Arrearages, and the *Nomine pœnæ*, the Action was brought. The Defendant pleaded the Statute of Uſury, and found againſt him. It was moved, That Debt did not lye for this Rent: But a Writ of Annuity as long as it continues, and that the *Nomine pœnæ* was not deviſed to him: It was the Opinion of the Court, That an Action of Debt well lay; For they ſaid, there is a difference where a Rent for years is granted orginally, and where a Rent or Annuity is granted in Fee, and out thereof a Grant is made for years, there Debt lyes not during the years; but in the principal Caſe, that it well lay. Trin. 49 Eliz. B. R. *Bendiſh* and *Philips* Caſe. *Cro.* 3. Part, 895.

42. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes; The Plaintiff ſhewed, That two parts of Tythes did belong to the Rectory, and a third part to the Vicarage; and that he had one Leaſe for years of the Rectory, and another Leaſe of the Vicarage; and for not ſetting forth of the Tythes, he demanded the treble value: Upon *Nos debet*, It being found for the Plaintiff; It was urged in Arreſt of Judgment, That he ought to have brought ſeveral Actions, being grounded upon ſeveral Leaſes, as his Title is ſeveral. But it was the Opinion of the whole Court, That the Action was well brought, in regard he had both Titles in him; and the Action is grounded upon the wronge. Pſach. 3 Jac. B. R. *Champernon* and *Hills* Caſe. *Yel.* 63.

43. Debt by S, Executor of A. againſt W, upon a Bill of Debt made by F. to A. by which F. did acknowledge to have received of one J. S. 40 l. to be equally devided between A. and B. and to their uſe. And upon a Judgment given in C. B, W. brought Error, becauſe A. and B. are Tenants in Common, and ſo they ought to have been joyned in the Action; and alſo becauſe that in this Caſe Debt did not lye, but an Action of Accompt; But it was holden, That in this Caſe they were ſeveral Debts, *viz.* 20 l. to the one, and 20 l. to the other; as in Caſe of 10 l. Rent reſerved upon a Leaſe, *viz.* 5 l. at *Mich.* and 5 l. at Annunciation; yet it is one intire Rent to be devided in payment, and for the ſecond point Ruled; That although no Contract be betwixt the parties, yet when Mony or Goods are delivered upon Truſt to the uſe of A. A. may have Debt for the money. Mich. 45 Eliz. B. R. *Wharwood* and *Shaw's* Caſe. *Yel.* 23, 24.

44. G. the Defendant ſealed a Bill thus, *viz. Memorandum*, That I have received of E. T. to the uſe of my Maſter J. S. the ſum of 40 l. to be paid at *Mich.* following, and the Plaintiff declared upon the Bill *Verbatim* as it was. The Defendant demurred, ſuppoſing he received it but as

Servant

Servant to anothers use, and so not to be charged as principal Debtor. But Resolved for the Plaintiff; for although the premises of the Bill doth mention the Receipt to anothers use, yet the latter Clause of re-payment doth not say to be re-paid by his Master; but is generall (to be paid) which of necessity ought to bind him who seals it, for otherwise the party should lose his Debt. Mich. 6 Jac. B. R. *Talbot* and *Godbolts* Case. *Yel.* 137. and 147.

45. The Plaintiff as Executor of J. S, brought Debt against the Defendant of *London* Merchant, *Quod reddat ei*, 303 l. 12 s. For whereas the Defendant the 8th. of *October*, 1598. at *London* by his Bill *cognovit se debere*, to the Testator 1518. *Florens Polish*, which then did amount to 303 l. 12 s. to be paid to the Testator *ad solutionem Festi Purificat. vocat.* Candlemas-day next following, and in *facto* said, *Quod predict. fest. solutionis Purif.* next after the making of the Bill, were *secundum usum Mercatorum* 20. *Feb.* 1598. yet the Defendant had not paid, &c. The Defendant pleaded, *Non est factum*, and found against him. It was moved, That the payment at *Candlemas* was not known what was meant by it in our Law; But the Exception was disallowed by the Court, for that which *prima facie* is unknown in ordinary intendment, is helped and manifested by the averrment in the Declaration, That such a payment amongst Merchants is known by the second of *February*; and the Judges are to take notice of it, that it is so used between Merchants for the maintainance of Traffique, and especially in this Case, because the Defendant doth not deny it, but pleads, *Non est factum*: It was adjudged for the Plaintiff. Mich. 6 Jac. B.R. *Pierson* and *Pountneys* Case. *Yel.* 135.

46. Debt was brought for 5 l. against the Husband and Wife; The Plaintiff declared, That the Wife, *dum sola fuit*, owed him 40 s. and that the Husband owed the rest upon Accompt. It was the Opinion of the whole Court in this Case, That the Action did not lye, for that the Wife shall not be sued for the Debt of her Husband: Mich. 15 Jac. C. B. *Revel* and *Grays* Case. *Noy.* 19.

47. Debt upon a Bill bearing date in the Parish of St. *Mary le Bow*, *London*; and upon Oyer of the Deed, it bare date at *Hamburgh*, and the Writ was in the *Detinet* only. It was said for the Defendant, That *Hamburgh* cannot be said to be in *London*; and the Writ ought to be in the *Debet & Detinet*, and not in the *Detinet* only. It was Resolved in this Case, If the Date in this Case had been at *Hamburgh in partibus transmarinis*, it could not be sued here: But being said to be at *Hamburgh* only, it shall be intended to be within *England*. And for the second Point, It was Resolved, That the Action is well brought in the *Detinet* only, because it is not brought for a certain sum of money, but for 6 l. *Hamburgh*-money, which is English Coyn 40 s; and therefore in this the value of *Hamburgh* money being known to us, and other English by common intendment, therefore it ought to be demanded in the *Detinet* only. Pasch. 1 Car B.R. *Wards* Case. *Latch* 4. 77. 241.

48. A Lease was made of Lands in *Middlesex*; The Lessee assigned it over, the Lessor dyed, the Rent was behind: The Administrator of the Lessor brought Debt in *London* against the Assignee. It was *moved*, That the Action of Debt ought to be brought in *London*, and not in *Middlesex*: It was said by the Justices, That where Debt is brought upon a Lease for years upon the Contract, it may be brought in any place; but where it is brought upon the privity of Contract, as in this Case: It ought only to be brought in the place where the Land is, and so it was said; It was adjudged in *Thorthurn* and *Glethooks* Case. Pasch. 2 Car. B R. *Smith* and *Wyats* Case. *Latch* 197. See Mich. 2 Car. B. R. *Royly* and *Baggs* Case. *Latch* 271. 266.

Deeds.

THE Case was, Lesser for years granted his Term by Deed, and sealed it in the presence of divers, and of the Grantee himself; and the Deed at the same time was read, but not delivered, nor the Grantee did not take it, but left it behind them in the same place; In this Case, It was the Opinion of all the Justices, That it was a good Grant, for the parties came for that purpose, and performed all things which were requisite for the perfecting of it, except an actual delivery. But it being left behind them, and not Countermanded, it shall be said a Delivery in Law. Trin. 24 Eliz. C.B. *Sheltons* Case. *Cro.* 3. Part, 7.

2. J. S. made an Obligation, dated and delivered the first of *May*, and upon the first day of *June* following; the Obligee made a Release to the Obligor, bearing Date the first of *March*, and delivered the first of *June*, by which he Released all Actions *ab origine mundi*, untill the Date of the Release. All the Justices in this Case were of Opinion, That the Obligation was not Released, Pasch. 25 Eliz. C.B. Sir *William Dawies* Case. *Cro.* 3. Part, 14.

3. The Case was; The Lord *Stanley* by Indenture lett Land to J. S. for life, *Habendum* to him,

him, and to A. B. and C, his three Sons *successive*; The Question was, If they all took an Estate, because the Sons were not named in the Premisses of the Deed: If they did take, if they took joyntly or severally; and if they took no way, if there should be an Occupant for life of the three others, so as it shall be a Lease to J. S. for his own life, and for the life of the three Sons. It was the clear Opinion of the Court in this Case, That the Sons shall not take in possession, because they are not named in the Premisses of the Deed, nor shall they take by way of Remainder, for that the intent was to give the Lands to them in possession; And it was said, There shall not be an Occupant in the Case, for it being intended to the Father for his life, this is a greater Estate then for the lives of the others; and the three Sons are here named as persons to have an Estate, and not to make a limitation of a Estate, Pasch. 29 Eliz. in B. R. *Windsmore* and *Hubbards* Case. *Cro.* 3. Part, 58.

4. The Case was, A. by Deed Poll recited, That (whereas he was) possessed of certain Lands for a certain term of years; by good and lawful conveyance, he assigned the same to J. S, with divers Covenants in the Deed contained which are or ought to be performed on his part. It was moved, If this Recital (whereas he was) be an Article or Agreement within the meaning of the Condition. It was conceived, That it was; For in such Case, I agree, That I am possessed of it; for every thing contained in the Deed is an agreemen, and not only that which I am bound to perform: Then it was moved, If that Recital be within these words of the Condition, which are or ought to be performed on my part. It was said by *Clench* Justice, That Recital of it self is nothing, but, being joyned and considered with the rest of the Deed, as here, it is material; for against this Recital, he cannot say, That he hath not any thing in the Term. But it was Resolved, That if the party had not that Interest by a good and lawful authority and conveyance, the Bond was forfeited. Trin. 30 Eliz. B. R. *Stern* and *Clarks* Case. *Leon.* 1. Part, 122.

5. Debt upon an Obligation against the Defendant, as Heir to his Ancestor; The Defendant pleaded, That his Ancestor by his Deed did Covenant with W. W. and A. M, to stand seised to the use of himself for life, and afterwards to the use of the Defendant and his Heirs, and so he had nothing by Discent; the Plaintiff said, *Non convenit*. It was found, That such a Deed of Covenant was made by the Ancestor to the Defendant; but the first use was limitted to the Covenantor and his Wife for their lives, and that he delivered the same to J. S, as his Deed to the use of the said W. W. and A. M; if the said W. W. would agree to the same, and take the charge of it upon him; and if he will not agree, then it should not be his Deed: And it was found, That W. W. dyed before any agreement. It was said, That this was not the Deed of the Ancestor, till W. W. had agreed. But it was the Opinion of the Justices, That although W. W. do not agree to it, yet it is the Deed of the Defendant: For although a Deed be upon Condition, *ut supra*; yet because he delivered it as his Deed, and the Condition is subsequent to it, it shall be taken for his Deed; and the Condition after shall be void, because repugnant. Trin. 31 Eliz. C. B. *Digory* and *Pits* Case. *Leon.* 1. Part, 152.

6. In a Replevin, The Defendant made Conusans as Bayliff to *Tho:* Lord *Howard*, and shewed, that the Prioresse of H, was seised of the Manor of D. in Fee, and the 4th of *Nov.* 29 H. 8. by Deed enrolled, sold to the Lord *Audley*, the said Mannor, who dyed, having Issue a Daughter, who took Husband *Thomas* Duke of *Norfolk*, who had Issue the Lord *Howard*; and that after their death, the said Mannor discended, &c. The Plaintiff in Bar of the Conusans shewed, That the said Deed was *primò deliberatum*, the 4th. of *Nov.* 30 H. 8. and that mean between the date and the delivery. *Scil.* the 12th. of *October*, The said Prioresse leased the said Mannor to one A. for 99 years, and conveyed the Term to the Plaintiff *absq; hoc*, that the Prioresse bargained and sold the said Mannor to the Lord *Audley*, *ante dimissionem prædict. dicto. A. fact.* upon which there was a Demurrer. This Case was very learnedly argued by all the great Counsel at the Bar; and it was said, That this averrment of another delivery then the Deed doth import; against the Deed enrolled shall not be received, no more then a man may averr, That a Recognizance was acknowledged at another day, &c. for every Record imports a truth in it, and express averrment shall not be received against it, but a man may confesse and avoid. On the other side, It was said, A Deed enrolled may be avoided by matter which is not contrrary to the Record. The Court inclined to be of Opinion, That as to the matter it self a man shall not have an Averrment against the purport of a Record, but against the operation of a Record, as not put in View, not Compriſed, *Partes finis nihil habuerunt, &c.* also *Nec concessit* is a good Plea against the Kings Letters Patent, for by such Plea it is averred to be a Record, but that *Nil operatur*: The Case was adjourned, and not Resolved. Hill. 31 Eliz. B. R. *Holland* and *Franklyns* Case. *Leon.* 1. Part, 183.

7. Upon a special Verdict, the Case was this, The Father was Tenant for life, the Remainder

to A. and B. his Sons for their lives. B. purchaſed the Reverſion in Fee: The Father and A. ſurrendred to him without Deed. The Queſtion was, If this was a good Surrender. It was ſaid, That the ſurrender was void; For if it be good, it muſt firſt be the ſurrender of him in the Remainder, which cannot be without Deed, and it cannot be the ſurrender of the firſt Tenant for life, becauſe there is no word of ſurrender between them. Hill. 34 Eliz. B. R. *Perkins* and *Perkins* Caſe. *Cro.* 3. Part, 269.

8. The Caſe was, In *Ejectione firme*; Tenant in Fee by his Will deviſed Lands to his Wife for life, and dyed; who took Husband, who made the Leaſe for years: Tenant in Fee before the making of his Will, made a Feoffment to his Son, *Habendum* after the death of the Father in tail, and made Livery *ſecundum formam Chartæ*. It was Reſolved by the Court in this Caſe, That when nothing paſſeth by the Premiſes of a Deed but onely an implyed Eſtate for life, and by the *Habendum* an expreſs Eſtate is limited, this doth controul the implyed limitation; and if it be void, as it is here after the death of the Feoffor, all is void; but if there be an expreſs limitation in the beginning, if the *Habendum* be repugnant, it is void, and the firſt good; and therefore the limitation and the *Habendum* both in the principal Caſe were adjudged void. Trin. 34 Eliz. B. R. *Hedge* and *Croſſes* Caſe. See *Cro.* 3. Part, 254. See *Cook* 2. Part, *Baſkets* Caſe, acc.

9. In Debt, the Caſe was, A Deed was made between C. and P. by which C. Covenanted with P. to aſſure unto him ſuch Lands, and P. by the ſame Deed Covenanted with C. to pay him 40 l. P. delivered the Deed firſt to C. and C. afterwards delivered it to P: C. brought Debt for the 40 l. It was objected, That by the re-delivery of the Deed, it had loſt its force. It was Reſolved, That it was a good Deed to both, for here is writing, ſealing, and delivery, and the delivery thereof to the Defendant is not material: And it was holden in this Caſe, That if a Deed be delivered to the party himſelf, if it be not cancelled, and the other gets it again into his hands, it remains a good Deed. It was adjudged for the Plaintiff. Trin. 38 Eliz. C. B. *Croſs* and *Powells* Caſe. *Cro.* 3. Part, 483.

10. In an *Ejectione* of Lands in *Middleſex*, the caſe was; The Leſſor in the County of *Lincoln* being out of poſſeſſion, made a Leaſe, and delivered the Leaſe by Letter of Attorney to the Attorney of the Plaintiffs uſe. The Leſſor entred into the Land, and according to his Warrant, he delivered it to the Plaintiff upon the Land. It was Reſolved by the Juſtices in this Caſe, That the Leaſe was void, becauſe it was delivered in the County of *Lincoln* when he had nothing in the Land. It was then moved, That the firſt delivery being void, the ſecond delivery by the Attorney upon the Land, was good. But the Court held that to be void; for although the firſt be void to paſs a thing, yet it is his Deed by the firſt delivery; wherefore the ſecond delivery of it is void. Trin. 34 Eliz. C. B. *Stepney* and *Elliots* Caſe. *Cro.* 3. Part, 483.

11. Annuity, The Defendant ſaid, That he delivered the Deed of Annuity to the Plaintiff as an Eſcrow to be his Deed upon a Condition to be performed, otherwiſe not, and that the Condition was not performed. It was adjudged to be no plea, for that the delivery of a Deed cannot be averred to be to the party himſelf as an Eſcrow. Mich. 39 Eliz. C. B. *Whyddons* Caſe. *Cro.* 3. Part, 520. Paſc. 42 Eliz. B. R. *Hawkſtead* and *Gatchells* Caſe. *Cro.* 3. Part, 835. acc.

12. Replevin, The Defendant made Conuſans as Bayliff to the Maſter and Fellows of *Emanuell* College for Rent granted to them in Fee. Upon *Non ceſſit*, the Jury found, That the Grantor granted it by Deed, and delivered that Deed to a ſtranger to their uſe, and they ſealed the Counterpart of the Indenture. The Queſtion was, Whether a ſtranger without a Letter of Attorney might receive the Deed to their uſe. It was holden by the Court, That he might, and that the ſealing of the Counter-part was a ſufficient agreement, and aſwell as if it had bin made by Letter of Attorney. It was adjudged for the Defendant. Trin. 40 Eliz. C. B. *Cooper* and *Goodriches* Caſe. *Cro.* 3. Part, 862.

Demand.

1. THE Caſe was, A. made a Leaſe to the Defendant for years, rendring Rent, upon Condition, That if the Rent were behind at the day, and 10 dayes after (being in the mean while demanded), and no Diſtreſs to be found upon the Land, the Plaintiff to re-enter. The Rent was behind at the day, and 10 dayes after, and that a ſufficient Diſtreſs was upon the Land till three of the Clock afternoon the 10th day, at which hour the Leſſee drove out his Cattle, and at the laſt hour of the 10th day, the Leſſor came and demanded his Rent, and it was not paid, nor any Diſtreſs upon the Land. It was the Opinion of the Juſtices in this Caſe, That the Condition was not broken; For the intent of the words are, If no Diſtreſs be found upon the Land within any of the 10 dayes, then a Re-entry: And therefore if a

Diſtreſs

Diſtreſs be found there at any time within the ten dayes, it is ſufficient; And it was adjudged againſt the Plaintiff, becauſe he made no demand in the mean time. Mich. 30 Eliz. B. R. *Worceſter* and *Stones* Caſe. *Cro.* 3. Part, 63.

2. In Treſpaſs, the Queſtion was upon Condition of avoiding of a Leaſe. The Condition was, That if he do not pay the Rent at the Feaſts in which &c. or within 20 dayes after; That then, &c. Upon the Iſſue, the Queſtion was, If the Plaintiff by J. S. demanded 7 l. 10 s. of Rent due to him for half a year, the 20th day after the Feaſt by the ſpace of half an hour before Sun-ſet; It was found that the ſaid J. S. *petiit* 7 l. 10 s. *pro redditu dimidii anni præfato* the Plaintiff *tunc debit. pro tenementis præd. ſt.* and there remained demanding the Rent by the ſpace of a Quarter of an hour *et non plus* before Sunſet *tanquam ad*, and after, Sunſet, and that no other Rent was due but the half years Rent due at the Feaſt of the Annunciation before. It was the Opinion of all the Court, That although it was not found to be half an hour, but a quarter of an hour, yet it was a good demand, for being demanded well enough for the time. But they held, this demand of the Rent (then due) was not good, becauſe he ought to ſhew preciſely upon his demand, what Rent he demands; for it was due 5 years before it was then due, and therefore he ought preciſely to ſhew what Rent, and for what time he demanded it, for the requeſt muſt be certain. It was adjudged for the Defendant. Mich. 33 Eliz. B. R. *Fabian* and *Winſtons* Caſe. *Cro.* 3. Part, 209.

3. The Caſe was, A. let Land to B. in the County of D. rendring Rent at the Receipt of the Royal Exchange *London*; and for not payment, re-entry. The Rent was not demanded, nor tendred at the day. The Leſſor entred, It was ſaid, That it being to be paid off the Land, there needed no demand. But the Opinion of the Court was, That there ought to be a demand at the place where it is payable, for it remains yet a Rent which is demandable by him who would have it: wherefore it was adjudged, That the entry of the Leſſor was not lawfull. Mich. 38 Eliz. B. R. *Baskin* and *Edmunds* Caſe. *Cro.* 3. Part, 415 & 536.

4. Treſpaſs for entring his houſe, and taking of his goods: The Defendant ſaid, As to the taking of the goods, Not Guilty: As to the reſt, That the Plaintiff was endebted unto him in ſuch a ſum, and by Licenſe of the Plaintiffs Servant, the door being open, he entred to demand his debt. It was adjudged to be no plea, for the ſervants Licenſe is not to any purpoſe, and one cannot enter into anothers houſe by colour to demand his Debt, eſpecially it not being averred, That the Maſter who was Debtor, was then in the houſe. It was adjudged for the Plaintiff. Paſc. 44 Eliz. B. R. *Holdingſhaw* and *Ragg* Caſe. *Cro.* 3. Part, 876, 877.

5. Debt by Husband and Wife for Rent upon a Leaſe made by the Wife, *dum ſola fuit*: The Leaſe was upon Condition, That if the Rent ſhould be behind 30 dayes after any Feaſt day, upon which it was limited to be paid, That the Leſſee, his Executors and Aſſigns ſhould forfeit *pro quolibet die poſt feſtum præd. ſt.* 40 s. The Rent was behind at *Mich.* The Wife demanded and received the rent of the Leſſee. The Attorney of the Husband demanded the Rent, and afterwards he Husband diſagreed to the Receipt of the Wife, and brought Debt for the Rent, and for 40 s. *pro quolibet die* mean between *Mich.* and the Writ brought. The Caſe was ſhortly but this; A Feme ſole makes a Leaſe rendring rent, then takes Husband, and afterwards receives the Rent, if the ſame ſhall bind the Husband, or if he may diſavow the ſame. Quære, for the Caſe was learnedly argued on both ſides, but not Reſolved. Mich. 19 Jac. Sir Paul *Tracy* and *Duttons* Caſe, in B. R. See the Reports annexed to *Bendlowes*, 93, 94.

Demurrer.

1. *Quare Impedit* by the Queen againſt the Archbiſhop of *Canterbury*, the Biſhop of *Chicheſter*, and the Incumbent, and counted, That A. was ſeiſed of the Advowſon, and that he was Outlawed in an Action perſonal at the ſuit of ſuch a one. Exception was taken to the Count, becauſe in ſetting down of the Outlawry, the proceſs is alledged to be retorned by the Sheriff, but the name of the Sheriff is not there expreſſed. The Court as to that held, That the omitting of it doth not make the retorn void. Another Exception was, That whereas the Patron had pleaded one Plea, and the Incumbent the ſame plea by himſelf in barr: The Queen demurred in this manner, *quod ſeparalia placita per dict. &c. ſpecialiter placitat, &c. Dicta Domina Regina neceſſe nec habet, nec per legem terræ tenetur reſpondere.* The Court in this Caſe was of Opinion, That the Demurrer ought to have bin ſeveral, upon the Plea of the Patron by it ſelf, and upon the Plea of the Incumbent by it ſelf. Hill. 30 Eliz. C. B. The Queen and the Archbiſhop of *Canterburyes* Caſe. *Tem.* 1. Part, 139.

2. Debt upon Obligation to perform Covenants: The Defendant pleaded generally perfor-

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mance of Covenants, where ſome were in the Negative, and ſome in the Affirmative. It was the Opinion of the Court, That this was but matter of form, and helped by the Statute of 27 Eliz. except the party ſheweth for cauſe of his Demurrer, That ſome of the Covenants are in the Negative, and ſome in the Affirmative, for the Court ſhall judg according to the truth of the matter; but if the Covenants are in the disjunctive, it is otherwiſe. Paſc. 33 Eliz. C. B. *Oglethorp* and *Hides* Caſe. *Cro.* 3. Part, 232.

3. Note, It was holden by the Court, That if the Plaintiff in *Ejectione firmæ* or other Action gives in Evidence any matter in writing, or Record, or ſentence in the Eccleſiaſtical Court; and the Defendant offers to demur thereupon, the Plaintiff ought for to joyn in Demurrer, or waive the Evidence, becauſe the Defendant ſhall not be compelled to put a matter of difficulty to Lay judges. But if either party offers to demur upon any Evidence given by Witneſſes, the other, unleſs he pleaſeth, ſhall not be compelled to joyn, becauſe the credit of the Teſtimony is to be examined by the Jury, but both parties may agree to joyn in demurrer upon ſuch Evidence. Paſc. 42 Eliz. B. R. *Middleton* and *Bakers* Caſe. *Cro.* 3. Part, 751.

4. Trover and Conaetſion of two Oxen; The Plaintiff declared that he was poſſeſſed thereof as of his own goods, and loſt them. The Defendant juſtified, becauſe J. S. was poſſeſſed of them as his goods, and loſt them at ſuch a place, and ſuch a day dyed, and made the Defendant his Executor, and gave colour to the Plaintiff: Upon that plea, there was a Demurrer, becauſe the ſame amounts but to the general Iſſue, becauſe he alledgeth in the Declaration, that the Plaintiff was poſſeſſed of them as his goods, &c. and then the Defendant ſaith, That ſuch a one was thereof poſſeſſed as his goods, which doth amount to Not Guilty: and in all Action of Trover of goods, every plea ſpecial with colour, amounts but to a general Iſſue. For that cauſe it was adjudged the plea was not good, and the Demurrer good. Mich. 2 Car. C. B. *Styles* and *Sutgraves* Caſe. Mich. 2 Car. B. R. *Bellamy* and *Balthorps* Caſe. *Latch.* 185.

Detinue.

1. THE Executors of Viſcount *Bindon* brought Detinue againſt the Widdow of the ſaid Viſcount, and declared upon the Detainer of certain Jewells. The Defendant did juſtify the Detainer of them as her *Paraphrenalia*. It was ſaid in that Caſe by *Manwood* Chief Baron, That *Paraphrenalia* ought to be allowed to a Widdow having regard to her degree, and in this Caſe the Husband of the Defendant being a Viſcount, that 500 Marks is a good allowance for ſuch matter. Paſc. 26 Eliz. in the Exchequer. The Viſcounteſs *Bindons* Caſe. *Leon.* 2. Part, 166.

2. In Detinue of divers parcells of Plate, *viz.* a Baſon and Ewer, a ſilver Bowl, and divers other parcells; It was found, That the Plaintiff was poſſeſſed of them, and by Indenture 16 *Feb.* 36 Eliz. Bargained and ſold to the Defendant divers parcells of Plate; and the Indenture was found *in hæc verba*, and verbatim therein found the Baſon and Ewer, and the ſilver Bowl, and all the other parcells, upon Condition, That if he paid ſuch a ſum upon the 17th of *May* following, the Bargain and Sale ſhould be void. They found payment of the money at the day; But there was then a *Memorandum* endorſed upon the Indenture by the aſſent of both parties, That if the Plaintiff paid ſuch a ſum 1. *June* 36 Eliz. that he ſhould have them again; but the payment of the ſum upon the firſt of *June* was not found. But they found that the Defendant had the goods *ut ſupra*. Exception was taken becauſe the Jury did not find the parcells in the Declaration to be the ſame with the Indenture, but only that he ſold divers parcels, which although they be all one in name, may notwithſtanding be ſeveral, and intendment will not help it, and of that Opinion was the Court; and therefore upon Error brought, the Judgment was reverſed. Mich. 44 Eliz. B. R. *Bateman* and *Elmans* Caſe. *Cro.* 3. Part, 866, 867.

Devaſtavit.

3. DEbt againſt the Defendant as Executor, The Plaintiff had Judgment to recover *de bonis Teſtatoris*. Thereupon a *Scire facias* was awarded. The Sheriff returned *Quod nulla habuit bona Teſtatoris*: and the Plaintiff ſurmiſed, That he had waſted the Teſtators goods; Wherefore he prayed a *Scire facias* why he ſhould not have Execution *de bonis propriis*. It was the Opinion of the Court, That this Writ ſhould not be awarded upon ſurmiſe of the party upon a *Devaſtavit*, not in any Caſe where the Judgment is *de bonis propriis*, unleſs it be upon return of the Sheriff, where he returns *Devaſtavit*. Mich. 39 El. z. C. B. *Aldworth* and *Peels* Caſe. *Cro.* 3. Part, 530.

2. Debt upon a Judgment, the Caſe was, The Plaintiff had Judgment againſt the Husband, and ſued him to Outlawry. He brought a Writ of Error, and removed the Record in the Kings Bench, and reverſed the Judgment for the Outlawry, but the firſt Judgment was affirmed; and then he acknowledged a Statute, and dyed, and his Wife took Letters of Adminiſtration. The Statute was extended upon the Wife, and all the goods which ſhe had of the Inteſtates, taken in Execution. After which the Plaintiff in B. R. ſued a *Scire facias* upon the Judgment againſt the Wife as Adminiſtratrix: ſhe pleaded the Statute in bar, and the extent of the goods; and more then that, ſhe had nothing to ſatisfy. Upon this Plea in bar, the Plaintiff demurred. The Court at the firſt inclined to be of Opinion, That the Plea was not good, but that the Plaintiff ſhould have Judgment, becauſe a Judgment is higher then a Recognizance, or a Statute, and therefore ought firſt to be ſatisfied. But afterwards, *viz.* in 43 Eliz. this Caſe being moved again, The Lord *Popham* ſaid, He had conferred with the other Juſtices at Serjeants Inn, and that the greater part of them held the plea to be good, and that the ſatisfying of the Debt upon the Statute, was not any *Devaſtavit*, becauſe ſhe could not withſtand it, and that ſhe ſhould not be put to her *Audita Querela*. Wherefore it was adjudged for the Defendant. Hill. 42 Eliz. B. R. *Bearblock* and *Reades* Caſe. *Cro.* 3. Part, 822. See *Yelverton* 29. the ſame Caſe.

3. Debt againſt the Defendant Adminiſtrator of the Inteſtate upon an Obligation of the Inteſtates. The Defendant pleaded, That 16 *Sept.* 6 Jac. the Plaintiff brought an Original againſt him, of which he had not notice till 24. *Feb. Anno* 6. before which the Defendant was Outlawed for not appearance, which Exigent was returned in *tres ſeptimanas* next, and that 17 *Feb.* 6. which was before the Notice, his Letters of Adminiſtration were revoked, and granted to the Brother of the Inteſtate, who is yet Adminiſtrator, and ſaid that at the time of the Revocation of his Letters of Adminiſtration, divers goods of the Inteſtates *in ſpecie* were in his hands, to the value of 200 l. which after his Letters revoked, he delivered to the Brother the Adminiſtrator, and that he had adminiſtred all the goods *præter* thoſe goods delivered. The Plaintiff replyed, That the Adminiſtration was revoked by Covin, upon which being at Iſſue, it was ſo found, and the Plaintiff had Judgment to recover the debt and damages of the goods and Chattells of the Defendant in his hands. Whereupon he brought Error, and Aſſigned, That the Judgment ought to have bin conditional, *viz.* to recover the Debt of the goods of the Inteſtate, *ſi tanta in manibus* of the Defendant *exiſtant*, and not abſolutely. But the Judgment was affirmed by the Court; for where the Judgment may be final and certain, it ſhall never be conditional, and it appears by the plea of the Defendant, that he had 200 l. in his hands of the goods of the Inteſtate: And it was ſaid in this Caſe, That if the Sheriff could not levy the Debt in the hands of the Defendant, he might upon the Defendants own ſhewing, return a *Devaſtavit*; and ſo it was ſaid it had bin adjudged, 1 Jac. in C. B. Paſc. 10 Jac. B. R. *Morgan* and *Socks* Caſe. *Yelverton* 219.

Deviſes.

1. IN Debt againſt the Defendant as Heir, he pleaded, That he had nothing by Diſcent but the third part of the Mannor of D. the Plaintiff ſhewed for Aſſets, That he had the whole Mannor of D. by Diſcent. It appeared upon Evidence, That the Mannor was holden by Knight-Service; And that the Auncеſtor of the Defendant by his Will in writing, deviſed the whole Mannor to his Wife, untill the Defendant his Son ſhould come to the age of 24 years, and that at the ſaid age of his Son, the Wife ſhould have the third part of the ſaid Mannor for her life, and his Son ſhould have the reſidue; and that if his Son dye before he come to the age of 24 years without Heir of his body,

dy, that the Land ſhould remain to J. S. The Deviſor dyed, the Son came to the age of 24 years. It was a Queſtion, if the Son had an Eſtate tail, for then for two parts he is not in by Diſcent. It was the Opinion of the Juſtices, That here was not any Eſtate tail, for no tail was to riſe before his ſaid age, and therefore the tail ſhall never take effect, and the Feeſimple doth deſcend and remain in the Son, unleſs he dyeth within the age of 24 years, and then the Eſtate tail veſts with the Remainder over, but now having attained his ſaid age, he hath a Feeſimple, and that by diſcent of the whole Mannor; and therefore a general Judgment ſhall be given againſt him as of his own Debt. Hill. 20 Eliz. C. B. *Hind* and Sir *John Lyons* Caſe. *Leon.* 2. Part, 11.

2. In Treſpaſs by Husband and Wife, and others againſt the Defendant; The Caſe was, A. was ſeiſed in Fee according to the Cuſtome of the Mannor of C. of certain Lands, and ſurrendred them to the uſe of his Will; and by his Will, he deviſed them in this manner, *viz.* I Deviſe to *John* my Son, my houſe and Land in M. called Lacks and Sone. To *Stephen* my houſe and Lands called Stokes and Newmans. To *Roger*, my houſe and Lands called Lakins and Brox; and if the ſaid *John*, *Stephen*, and *Roger*, live till they be of lawfull age, and have Iſſue of their bodies, then I give the Lands to them and their Heirs in manner aforeſaid, to give and ſell at their pleaſure; but if it fortune one of them to dye without Iſſue of his body, then I will that the other brothers or brother have all the ſaid houſes and Lands in Manner aforeſaid: and if it fortune the three to dye without Iſſue, then I will that all the ſaid houſes and Lands be ſold by my Executor, or his Aſſigns, and the money to be given to the poor. The Deviſor dyeth, *John*, *Stephen*, and *Roger*, are admitted. *John* comes of full age, and hath Iſſue J. and ſurrenders all his part of the whole to the uſe of *Stephen* and his Heirs, who is admitted: *Stephen* comes of full age. *John* the Father dyeth. *Stephen* dyeth without Iſſue. J. as Couſin and Heir of *Stephen* is admitted, and afterwards dyeth without Iſſue. The Wives of the Plaintiff are Heirs to him, and are admitted to the Lands called Lacks and Sone, and to the moyty of the Lands called Lakins and Brox, by force whereof they enter: And it is found, That A. ſole Executor dyed Inteſtate; and that the Defendant is Couſin and Heir of the Deviſor, and that he as Heir entred, and did the Treſpaſs. In this Caſe it was agreed, That by the firſt words of the Will, the three Deviſees had an Eſtate but for their lives. 2. It was Reſolved, That no Eſtate tail was created by the Will. But it was ſaid, That by the latter words of the Will, *viz.* If the ſaid *John*, *Stephen*, and *Roger*, live till they be of lawfull age, and have Iſſue of their body, Then I give the Lands and houſes to them and their Heirs in manner as aforeſaid, are referred, not to the eſtate which was given by the firſt words, which was but for life; but to make them to hold in ſeveralty, as the firſt Deviſe would, and not joyntly, as the words of the ſecond Deviſe do import; ſo as the reſidue of the Deviſe was void in all: And Judgment was given for the Plaintiffs. Trin. 27 Eliz. C. B. *Bryan* and *Cawſens* Caſe. *Leon.* 2. Part, 68, 69, 70.

3. The Father ſeiſed of Lands in Fee, bound in an Obligation, deviſed his Lands to his Wife untill his Son came to the age of 21 years, the Remainder to the Son in Fee, and dyed, and no other Lands diſcended to the Son from his Father. It was the Opinion of the Juſtices in this Caſe, That the Son ſhall be adjudged in by diſcent, and that it ſhall not be in his Election to waive the Diſcent, and to be in by the Deviſe. Mich. 27 Eliz. B. R. *Beſpoles* Caſe. *Leon.* 2. Part, 101.

4. *Ejectione firmæ* found, That A. ſeized of Lands by contract, ſold them to T. but no aſſurance was made: afterwards T. before aſſurance made, ſold the ſame Lands to J. S. and afterward T. being ſeiſed, deviſed the Lands to his younger ſon by theſe words, *I bequeath to R. my Son all my Lands which I purchaſed of T.* whereas in truth according to Law he purchaſed them by immediate aſſurance of A. although he did contract with T. for the ſame. It was the Opinion of the whole Court, That the Deviſe was good. But becauſe it was not found by the Verdict, by what Service the Land was held in Socage, or Knight-Service, nor that the Deviſor was dead; Judgment was ſtayed, and a *Venire facias de novo* awarded, the former Verdict being rejected. Hill. 30 Eliz. C. B. *Thorp* and *Tompſons* Caſe. *Leon.* 2. Part, 121.

5. The Caſe was, A. ſeiſed of the Mannor of *Cheſſam*, extending into *Cheſſam*, and the Town of *Hertford*, and alſo of Lands in *Hertford* Deviſed by Will the Mannor of *Cheſſam* to B. his eldeſt Son in tail, and the Lands in *Hertford* to C. his younger Son. It was holden by all the Juſtices, That the younger Son ſhould have all that part of the Mannor of *Cheſſam* which lay in the Town of *Hertford*. Another point in the Caſe was this: Upon the death of A. Office was found without any mention of the Deviſe, for which the Queen ſeiſed the Lands, and leaſed all the Lands ſo deviſed to a ſtranger during the Minority of the Heir. The Heir came of full age, and had Livery of the whole Land, and leaſed the Land for years rendring rent, who entred and paid the Rent to the Heir, the Heir dyed, the Leſſee aſſigned over his Term, the Rent is paid to the Heir of A. the Deviſor: and

then C. the younger Son entred. And it was Reſolved by the Juſtices, That his entry was lawfull; for if the Heir entreth in this Caſe, and many diſcents follow, yet C. the Deviſee might enter at any time, for his entry doth not make any abatement or wrong, but may ſtand with the Deviſe; for if the Deviſee doth defer the execution of the Deviſe, it is but reaſon that the Heir enter and take the profits till the Deviſee entreth. Mich. 30 Eliz. in C. B. Sir *Anthony Denny's* Caſe. *Leon.* 2. Part, 190.

6. The Caſe was; A. ſeiſed of three Meſſuages in N. had Iſſue *Robert* a Son, and C. and J. two Daughters, and Deviſed his three Meſſuages to his Wife for life, the Remainder of one of them to R. his Son and his Heirs, the Remainder of another of them to C. his Daughter and her Heirs; and the Remainder of the third Meſſuage to J. his Daughter and her Heirs; and willed, That if any of his three Iſſues ſhould dye without Iſſue of his or her body, then the other ſurviving, ſhall have *totam illam partem* betwixt them equally to be divided. The Deviſor dyed, the Wife dyed; one of the Daughters dyed having Iſſue, the Son dyed without Iſſue, the Siſter ſurviving entred into the whole part of R. the Son, and dyed; her Husband held the Land as Tenant by the Curteſy: The Queſtion was, If the ſurviving Siſter ſhould have all the part of him who dyed without Iſſue, or ſhe and the Iſſue of the other Daughter. In debate of this Caſe, it was Reſolved, 1. That the words *Totam illam partem* go only to the houſe, and not to the eſtate. 2. If both the Daughters had ſurvived R. they ſhould have Fee in the Meſſuage of R. not by the Will, but by Diſcent; and the Deviſe ſhall not take effect otherwiſe, and the Deviſe as to that is void, and then the Common Law ſhall hold place; that is, to diſcend to the Iſſue of the one Siſter, and to the ſurviving Siſter. And here the Survivor hath but an eſtate for life in the Meſſuage of R. and then by the death of R. the Fee-ſimple accruing to the ſurviving Siſter, the moyety of her Eſtate for life is extinct. And if one of the Daughters had dyed without Iſſue before R. the houſe of ſuch Daughter had come to R. and the other Siſter as Coparceners. Afterwards Judgment was given againſt the Husband of the ſurviving Siſter. Hill. 29 Eliz. B. R. *Prettiman* and *Cooks* Caſe. *Leon.* 2. Part, 193.

7. A. Deviſed that his Lands ſhould diſcend to his Son, but willed that his Wife ſhould take the profits thereof untill the full age of the Son for his education and bringing up, and dyed; the Wife married another Husband and dyed before the full age of the Son. It was the Opinion of the Juſtices in this Caſe, That the ſecond Husband ſhould not have the profits of the Lands till the full age of the Son, for nothing is Deviſed to the Wife but a Confidence, and ſhe is as Guardian or Bailiff for to help the Enfant, which by her death is determined, and the ſame Confidence cannot be transferred to the Husband. Paſc. 16 Eliz. B. R. *Leon.* 2. Part, 221.

8. A. was ſeiſed of 100 Acres of Lands called Jacks, uſually occupied with a houſe, and he let the ſaid houſe and 40 of the ſaid Acres to J. S. for life, and made his Will, by which he deviſed the ſaid houſe and all his Lands called Jacks then in the occupation of J. S. to his Wife for life, and after the deceaſe of his Wife, the Remainder thereof and of all his other Lands belonging to Jacks, ſhould be to R. his Son, &c. It was the Opinion of the Court in this Caſe, That the Wife ſhall not have by implication the reſidue of Jacks, for ſhe had an expreſs eſtate in the houſe and 40 Acres of Land, and he having expreſſed his Will concerning the ſame, it ſhall not be extended by implication to go to other Lands. Trin. 25 Eliz. in C. B. *Highams* Caſe. *Leon.* 2. Part, 226.

9. A man ſeiſed of Lands and houſes in L. in the County of O. and of houſes and Lands in W. in the County of H. let the Lands in W. in the County of H. to the Defendant; and afterwards deviſed all his Meſſuages and Lands in L. in the County of O. and all his other Lands, Meadow, and Paſtures in the County of H. to the Plaintif. The Queſtion was, Whether the Lands in W. paſſed by theſe words, All other my Lands, &c. It was much ſtood upon, That by a Deviſe of his Lands, all his houſes ſhould paſs; and if a houſe only are demanded in Writs, yet the Warrants of Attorny are entred *in placito terræ*. But it was Reſolved by the Court, That the intent of the Deviſor appeared, that he reſtreined the word Land according to the propriety of the word, viz. arrable Land, and that by the deviſing of his Lands, Meadows and Paſtures, he did exclude the general intendment of the word *Terra*, and reſtricts it only to the arrable Land, and exclude the houſes and Woods: Wherefore it was adjudged, That the Lands in W. did not paſs. Trin. 38 Eliz. B. R. *Ewer* and *Heydons* Caſe. *Cro.* 3. Part, 476.

10. A man made a Feoffment to the uſe of himſelf and his Heirs of his body, and for want of ſuch Iſſue to G. D. and to his Heirs Male lawfully begotten, and for default of ſuch Iſſue, to the right Heirs of the Feoffor. G. D. deviſed a Rent out of the Land, and afterwards dyed having Iſſue. It was the Opinion of all the Juſtices in this Caſe, That it was an eſtate in Fee in G. D. although it was by way of uſe; and that it could not be tail, becauſe there was no body from whom the Heir Male ſhould come: And ſo it was ſaid it is in Caſe of a Deviſe. It was adjudged in a Replevin for the

the Avowant. Trin. 38 Eliz. B. R. *Abraham* and *Twigg's* Caſe. *Cro.* 3. Part, 478.

11. A man ſeiſed of a Meſſuage to which a Garden and Curtilage did belong, incloſed with a Wall, and there was no way to the Garden but through the Meſſuage: He deviſed the Meſſuage to his ſecond Son in Fee, not mentioning the Garden nor Curtilage, nor ſaith *cum pertinentiis*: It was adjudged in this Caſe, That the Garden and Curtilage did paſs by the Deviſe; they ſaid a Curtilage is parcel of the Houſe, as a Stable and Dove-houſe; and the Garden ſhall paſs, becauſe it is as well for neceſſity to it, as for pleaſure. Hill. 30 Eliz. B. R. *Carden* and *Tucks* Caſe. *Cro.* 3 Part, 89.

12. A man deviſed Lands to his Wife for life, and when the Son of J. S. comes to the age of 25 years, then he ſhall have it in Fee: The Son of J. S. before he came to the Age of 25 years, levyed a Fine of it to J. D. and dyed after he came to the Age of 25 years. It was adjudged in this Caſe, That his Heir ſhould be barred by this Fine. Mich. 31 Eliz. B. R. *Johnſon* and *Ballamies* caſe. *Cro.* 3. Part 122.

13. A. ſeiſed of Lands in Fee, deviſed the ſame to his wife, untill his daughter came to the age of 19. years, and afterwards to B. in Tail. And further deviſed that his daughter ſhould pay after her age of 19. years 12. pound *per an.* to his wife in recompence of her Dower: and if default were made of ſuch payment that the wife ſhould have the Lands for her life: The wife before the daughter came to the age of 19. years, brought a writ of Dower, and recovered a third part of the Land, and after the daughter came to the age of 19. years, for non payment of 12. pound *per an.* the wife entred: It was adjudged in this Caſe, That the wife having recovered a third part in Dower, ſhe ſhould not have the Rent by the Will, for it was againſt the intent of the Will that ſhe ſhould have both, and her acceptance of the one is the Waiver of the other. Hill. 31 Eliz. B. R. *Gofling* and *Warburtons* Caſe. *Cro.* 3. Part. 128.

14. A. ſeiſed of Lands, had Iſſue two daughters, and deviſed the Lands to the eldeſt and her Heirs, that ſhe pay to her younger Siſter yearly 30l. It was the Opinion of all the Juſtices, That this was a Condition, for ſo was the intent of the Deviſor, for otherwiſe the younger Siſter had no remedy for the Rent. And in this Caſe it was adjudged, That the younger Siſter might enter upon a moyety of the Land for breach of the Condition in not payment of the Rent, for which the Action was brought. Trin. 30 Eliz. B. R. *Crickmere* and *Patrſons* Caſe. *Cro.* 3. Part, 146.

15. Leaſſee for the Term of 70 years, deviſed, that his Son ſhould have his Leaſe, ſaving that his Will was, That his Wife ſhould have half the Iſſues and profits of the Land during her life, ſhe bearing and allowing the half charges thereof; the Queſtion was, If the Wife had any Intereſt in it, or only was to have an account of the profits received. It was the Opinion of the Court, That ſhe had an Intereſt in the Lands, for to have the Iſſues and profits, and to have the Land it ſelf is all one, but if ſhe hath no Intereſt, ſhe can have no Action, for that account lyeth not for want of privity. Mich. 33 Eliz. B. R. *Parker* and *Plummers* Caſe. *Cro.* 3. Part, 190.

16. A. ſeiſed of Lands, deviſed them to J. S. and others, to the uſe of B. her brother, and the Heirs Males of his body, and for want of ſuch Iſſue, to the Heirs Females of his body, with Remainders over. B. the brother dyed, having Iſſue a Daughter, his Wife with child with a Son, which afterwards is born. A. the Deviſor dyed. It was the Opinion of the Juſtices in this Caſe, That neither the Son, nor Daughter ſhould have the Lands, for it being Deviſed to the uſe of B. *ut ſupra*, and he dying before the Deviſor, it cannot veſt in the Heir, for that it never veſted in the Anceſtor, for the words are, Not to give the immediate Eſtate but by way of Limitation; and if it ſhould veſt in the Heir, it ſhould veſt in him as a Purchaſor, which was not the intent of the Deviſor, and ſo ſhall be void. Trin. 33 Eliz. *Cur. Ward. Harvopps* Caſe. *Cro.* 3. Part, 243.

17. A man deviſed, That if his Wife think good to bring up his Children in Learning, and to find them Meat and drink, that ſhe ſhall have his Lands till his Son ſhall come of the age of 24 years. It was Reſolved in this Caſe, That it was not only a Confidence in the Wife, but an Intereſt in the Wife, but tyed with this Condition. Mich. 34 Eliz. B. R. *Smith* and *Havens* Caſe. *Cro.* 3. Part, 252.

18. Tenant in *Capite* was ſeiſed of three Mannors, of two in Fee, and of the third in tail: he deviſed all his Mannors to a ſtranger. It was holden in this Caſe, That the Deviſe was good within the Statute of 32 H. 8. for the whole two Mannors which he held in Fee, and void for the third Mannor. Trin. 34 Eliz. *Cur. Ward. Jerningham* and *Cornwallis's* Caſe. *Cro.* 3. Part, 286.

19. The Caſe was; A. deviſed Lands to B. his daughter for life, and if ſhe marry after my death, and have heirs of her body, then I will that the Heir after my daughters death ſhall have the Land; and to the Heirs of her body begotten. And if my Daughter dye without Iſſue of her body begotten, then J. S. ſhall have it to him and his Heirs. A. dyed, B. married J. D. and had Iſſue. It was agreed by all the Juſtices, That a Deviſe to one and the Heir of his body, is an eſtate tail, and

firſt

ſhall go to all the Heirs of her Body, for that the word [Heir] is *Nomen Collectivum*: But in the principal Caſe, If R. had an Eſtate in Tail, or for Life, was doubted by the Juſtices, and not Reſolved; but the Caſe adjourned. Hill. 36 Eliz. B. R. *Clark* and *Day's* Caſe. *Cro.* 3 Part, 313.

20. Leſſee for years of a Term deviſed it to A. and B. his Executors, till all his Debts and Legacies be paid, and they have levyed all Charges they are put to in the Execution of his Will; the Reſidue of the Term he deviſeth to his Son, and dyeth: The Executors enter generally into the Lands. It was adjudged in this Caſe, That they ſhall not take the Term as Legatees, but as Executors; and their general Entry doth not make them take it as a Legacy; for when a particular Intereſt is given, and the Reſidue is given to another, a generall Entry ſhall not be an Election to take it as a Legacy. Mich. 37 Eliz. B. R. *Pannill* and *Fern's* Caſe. *Cro.* 3 Part, 347.

21. In *Ejectione firmæ*, the Caſe was, A. ſeiſed of Lands in Fee holden in Socage had Iſſue four Sons, and deviſed the Land to R. one of the Sons, and his Heirs for ever; and if R. dye within Age of 21 years, or without Iſſue, That then the Land ſhall be equally divided amongſt his three other Sons. The Deviſor dyed; R. the Deviſee had Iſſue M. a Daughter, and dyed within Age: The three Sons entred, and lett the Lands to the Plaintiff; M. ouſted him. It was in this Caſe, amongſt many other Points, Reſolved, That that part of the Limitation, (If he dy within Age,) was void; for a Remainder cannot depend upon a Fee, and ſo it was all one as if the Limitation had been ſingle, (That if he dyed without Iſſue:) So that R. had an Eſtate Tail which diſcended to his Daughter, and ſo the Entry of the Defendant was lawful: It was adjudged for the Defendant. Mich. 39 Eliz. C. B. *Saul* and *Gerrards* Caſe. *Cro* 3 Part, 525.

22. The Caſe was, A man had Iſſue a Son and a Daughter, and he deviſed his Lands to his Son in Tail; and if he dyed without Iſſue, it ſhould remain to the next of his Name: The Son dyed without Iſſue, the Daughter being then married, If ſhe ſhould have the Land, was the Queſtion: It was Reſolved by the whole Court, That ſhe ſhould not; for that ſhe had loſt her Name by her Marriage: But if ſhe had not been married at the time of her Brother's death, the Daughter ſhould have had it, for ſhe was the next of Name. Mich. 39 Eliz. B. R. *Rex* and *Smiths* Caſe. *Cro.* 3 Part, 532. See Trinit. 39 Eliz. C. B. *Johſons* Caſe. *Cro.* 3 Part, 576. adjudged acc.

23. A. ſeiſed of Lands called *Hayes-Land*, extending in two Towns, C. and D, deviſed all his Lands in C. called Hayes-Land, to J. his younger Son, and his Heirs; and after, in another part of his Will, he willeth, That if his Son J. dyed without Iſſue, that his Wife ſhould have Hayes-Land, and dyed: J. dyed without Iſſue. It was Reſolved by the whole Court, That ſhe ſhould have only that which was in C. becauſe there was no more deviſed to the younger Son: But if the Deviſe had been to the eldeſt Son, and that if he dyed without Iſſue, that the Wife ſhould have Hayes-Land; there ſhe ſhould have all, becauſe the eldeſt Son had all. Trin. 41 Eliz. B. R. *Mallet* and *Osborns* Caſe. *Cro.* 3 Part, 674.

24. A man deviſed an Houſe with the Appurtenances: By the Deviſe, Lands in a Field were claimed. It was ſhewed, That the Houſe was Copy-hold, and that the Lands were Free-hold Lands. It was therefore agreed by the Juſtices, That they could not be appurtenant to the Houſe, and therefore the Lands did not paſs by the Deviſe. Mich. 41 Eliz. B. R. *Yates* and *Cleavers* Caſe. *Cro.* 3 Part, 704.

25. A. ſeiſed of Lands in Fee, deviſed them to his two Sons equally, and their Heirs: If it was a Joynt-Eſtate in the Sons, or that they were Tenants in Common, was the Queſtion. It was ſaid in this Caſe, That the word [equally] had two ſignifications; in the one it reſpecteth the Eſtate; in the other, to the Quantity of the Land. It was ſaid, That in a Deviſe of Lands to two, equally, they are Joynt-Tenants; for there is not any inequality, or loſſe, although the Survivor ſhould have all, for the other can have it but during his life: But if a Deviſe were to two and their Heirs equally, or part and part like, there is a Tenancy in Common, for every one of their Heirs ſhall have it. At laſt, after long debate, it was adjudged in the principal Caſe, That it was but a Tenancy in Common; and ſo it was afterwards affirmed in a Writ of Error brought in the Exchequer Chamber, upon the Opinion of four of the Judges againſt three of them. Mich. 41 Eliz. B. R. *Lewen* and *Cox* Caſe. *Cro.* 3 Part, 695, 696.

26. A. ſeiſed of Lands, deviſed them to his Wife for life, and that after her death the ſame ſhall remain to my Iſſue, and at the ſame time he had two Sons R. and G. and two Daughters E. and J. and deviſed to his two Daughters to either of them 20 l. to be paid at their Ages of eighteen years. R. the eldeſt Son dyed without Iſſue; E. the Daughter dyed without Iſſue: The Wife of the Deviſor dyed, G. and J. D. who married J. entred with him, and brought Partition: It was adjudged for the Defendant, That he did not hold it

in ſpecial, or *proindiviſo*: For it was holden, That this Deviſe of the Remainder to his Iſſue was uncertain, what Iſſue he intended, he having divers Iſſues; and it ſhall not extend to all his Iſſues; for a Will ſhall be conſtrued according to the intent of the Deviſor, where a certain intent may be collected, but where it is incertain, it is void. And therefore a Deviſe to his Son, where he hath two Sons, is void; becauſe it appeareth not which of them he intended; and it ſhall not be conſtrued to the eldeſt more than to the other. It was adjudged for the Defendant. Hill. 42 Eliz. C. B. *Tyler* and *Segers* Caſe. *Cro.* 3 Part, 742, 743.

27. The Caſe was, A man had Iſſue two Sons and a Daughter, and deviſed to his ſecond Son and Daughter Legacies of 20 l. to be paid by his eldeſt Son, and deviſed his Lands to his eldeſt Son after upon Condition, That if he paid not theſe Legacies, that his Lands ſhould be to his ſecond Son and Daughter, and their Heirs; the eldeſt Son failed Payment. It was Reſolved by the Court, That the ſecond Son and Daughter ſhould have the Lands, for that the firſt Deviſe to his Son and Heirs in Fee, being no more than what the Law gives, is void; and it is no more, but as if one had deviſed, That if his eldeſt Son did not pay all his Legacies, that the Lands ſhould be to the Legatees, and there is no doubt but in default of Payment the Lands ſhall veſt in them. It was adjudged accordingly. Trin. 43 Eliz. B.R. *Hinſworth* and *Peters* Caſe. *Cro.* 3 Part, 833.

28. A man had Iſſue a Son and a Daughter by one Woman: And C. and D. Sons, and E. a Daughter, by another Woman, and deviſed Lands to C. and D. and if either of them or their Heirs ſhould ſell the ſame, the Gift to be void, and ſo return to the whole Heirs again; and further, That his Son C. and D. ſhould pay yearly to W. his eldeſt Son and his Heirs 3 l. A. dyed, C. and D. died without Iſſue. 1. It was Reſolved in this Caſe, That it was an Eſtate in Fee in C. and D. and not an Eſtate for Life, or in Tail. 2. It was Reſolved, That the Proviſo, That the ſaid Lands ſhould revert, was void, being annexed to a Fee; and one Fee cannot be limited upon another. Hill. 42 Eliz. C. B. *Bland* and *Barkers* Caſe. *Cro.* 3 Part, 747.

29. A. had Iſſue a Son and a Daughter, and deviſed, That his Son ſhould have his Lands at the Age of 24 years, and gave 40 l. to the Daughter to be paid at her Age of 22 years; and further willed, That J. S. ſhould be his Executor, and ſhould repaire his Houſes, and have the Overſight and doing of all his Lands and movable Goods until the ſeveral Ages aforeſaid and dyed. J. S. the Executor let the Land to C. at Will, *Habend.* from the Feaſt of *Michaelmas*, *quamdiu partibus placuerit*, rendring 3 l. Rent; and after he brought Debt for the Rent, and ſhewed that C. occupied the Land *à feſto die* &c. untill *ad feſtum Michael.* It was the Opinion of the Juſtices in this Caſe, That J. S. did not take any Intereſt in the Land by the Will; for the Overſight and doing of his Lands ſhall be intended in the Right of the Heir, and to his Uſe, becauſe the Teſtator thought not his Son of Diſcretion and Government till 24 years, and therefore appointed the Executor to overſee and order the Land. *Popham*, Chief Juſtice, conceived, That the ſaid J. S. the Executor had an Intereſt in the Lands: *Idem Quære.* Mich. 3 Jac. B.R. *Carpenter* and *Collins* Caſe. *Yelverton*, 73.

30. A. ſeiſed of Copy-hold Lands, parcell of the Manour of D. ſurrendred the ſame to the Uſe of his Will, and by the ſame he deviſed the Lands to his two Sons J. and H. and to their Heirs Males of their Bodies; and Willed, That they ſhould not enter untill their ſeverall Ages of 21 years; and further Willed, That J. S. and J. D. his Executors ſhould have the Lands to perform his Will, till the ſaid Sons came to their ſeverall Ages of 21 years. It was adjudged in this Caſe, That although the Eſtate of J. and H. the Sons, preceded in words and the Deviſe to the Executors followed; yet in Conſtruction, the Eſtate of the Executors did precede in Poſſeſſion, and it is as much as if he had deviſed, That his Executors ſhould have the Lands till his Sons came to their ſeverall Ages of 21 years, and then to them and the Heirs Males of their Bodies. It was Objected, That the Sons were Joynt-Tenants; and if the one entred when he came of full Age, the other being within Age, the ſame ſhould deſtroy the Intent of the Deviſor, for then they ſhould not take jointly. It was anſwered and Reſolved, That the Entry of him who came of full Age did not deſtroy the Joynture, but they ſhould be Joynt-Tenants notwithſtanding that; for the Entry ſhall be conſtrued only as to the Perception of the profits and as to the Poſſeſſion, and not as to the Eſtate in Joynture. Mich. 8 Jac. B.R. *Aylet* and *Choppins* Caſe. *Yelverton*, 183.

31. J. V. ſeiſed of an Houſe in Fee, diſpoſed of his Houſe by his Will in this manner, viz. I give and bequeath my Houſe to A. my Wife, to diſpoſe at her will and pleaſure; and to give it to any of my Sons, whom ſhe pleaſeth: What Eſtate or Intereſt the Wife had in the Lands; If for life, and with a Truſt and Authority to diſpoſe of the Lands to one of the Sons in Fee, was the Queſtion. The Caſe is argued by all the Juſtices ſeveral, and upon Argument the Court was divided in their Opinion: But all the Juſtices agreed

greed in the main Point, That the Wife might by her Eſtate alien the Lands well enough. See the Book at large. Hill. 1 Car. B.R. *Daniel* and *Myers* Caſe. *Latch*, 9, & 39.

Diſcontinuance of Suit, or Proceſſe.

1. IN Accompt, the Defendant was adjudged to accompt, and a *Capias ad Computas ſum* iſſued againſt him to accompt before Auditors at a certain day, at which day he appeared, and entred into Accompt, and the Auditors aſſigned him another day certain to appear before them, at which day the Plaintiff did not proceed. It was moved in this Caſe, If the Plaintiff ſhall be Non-ſuited or barred of Accompt, as if the Action be diſcontinued: The Court demanded the Opinion of the Preignotheries; they ſaid, There can be no Non-ſuit, becauſe it is after Judgment; but that a Diſcontinuance ſhould be entred, and if the Plaintiff will after proceed upon this Accompt, he may have a *Scire facias* upon this Record *ad Computandum*; which was agreed by the Juſtices. Paſch. 25 Eliz. C.B. *Cro.* 3 Part, 19.

2. Error of a Judgment in C. B. in a Replevin: The Defendant avowed for Damage-feaſants, the parties were at Iſſue, and the Plaintiff was Non-ſuit after Evidence, and the Jury aſſeſſed Damages for the Avowant: Error brought, and aſſigned for Error a Diſcontinuance, for that the Plaintiff declared in *Michaelmas* Term, and the Defendant imparled till *Hillary* Term, and from *Hillary* Term to *Eaſter* Term, and there is not any Continuance; and then the Plaintiff declared again, and the Defendant pleads thereunto, and Iſſue there joyned. 1. It was moved, That this now is not to be aſſigned for Error, becauſe it is after Verdict, and helped by the Statute of Jeofails: But it was Ruled by the Court, That it was not helped by the Statute; for here the Plaintiff being Non-ſuited, there is not any Verdict given, but of that wherein the Jury are to enquire of Damages, their Verdict is but an Enqueſt of Office; and no Verdict whereof *&c.* 2. It was moved, That here was not any Diſcontinuance; for the ſecond Declaration is a new Declaration of it ſelf and doth not refer to the firſt, and there ought not to be any Continuance of the firſt: But the Court held it to be a Diſcontinuance, and thereupon the Judgment was reverſed. Mich. 38 Eliz. B. R. *Courtier* and *Barret*'s Caſe. *Cro.* 3 Part, 412.

3. Note, It was Reſolved by the whole Court, That a Writ of Error is a Suit, and the party may be therein Non-ſuit; and it was ſaid, That by Releaſe of all Suits, that the Writ of Error was gone and diſcharged; and it was further ſaid, That if the Writ be Returned, That it is not diſcontinued by the Demiſe of the King. Hill. 29 Jac. B.R. *Coles* Caſe. *Latch* 110.

4. Note, It was ſaid and agreed in the Caſe of a Prohibition, awarded out of the Kings Bench to the Spirituall Court in the time of King *James*, That when a Prohibition iſſueth out of the Kings Bench, if no other Proceſs ſtands there, it is diſcontinued by the Demiſe of the King; but if an Attachment doth Iſſue forth and be Returned, or if the party appeareth and putteth in Bail, then it is become the Suit of the party, and is not diſcontinued by the Demiſe of the King: And it was ſaid, That it had been adjudged upon the Statute *de Scandalis Magnatum*, although it be *tempore Domini Regis quam pro ſeipſo*; yet it is not diſcontinued by the Demiſe of the King, becauſe the Contempt to the King is but Collateral. Paſc. 2 Car. B.R. *Latch*, 114.

5. *Ejectione firmæ* was brought in C. B. in *Ireland*, upon a Leaſe againſt C. the Defendant, and declared *de Caſtro, villa, & terris de K.* It was found upon Iſſue joyned, for the Plaintiff, and he had Judgment there: C. brought Error in the King's Bench in *Ireland*, and aſſigned for Error the Writ of an Originall; to which the Plaintiff rejoyned, and pleaded, That ſuch a day an Originall Writ was delivered to ſuch a one, and concluded to the Country; and the Judgment was reverſed there for want of Original. Thereupon the Plaintiff brought a Writ of Error here in *England*, and he Judgment given in the Kings Bench in *Ireland* was reverſed here, becauſe the matter was diſcontinued; for when the Plaintiff in the Writ of Error in *Ireland*, aſſigned his Errors; and the Defendant Replyed, and concluded to the Country, (whereas in truth the matter of his Plea ſhould be tryed by the Record, whether the Original Writ was delivered or not, for that appears by Record), and then the Plaintiff in the Error there doth not reply or demurr upon the Defendant's Plea; for that Cauſe the whole matter was diſcontinued, for there was not any full Record of the proceedings before the Juſtices of the Kings Bench there, becauſe the Plaintiff had not rejoyned to the Defendant's Barr there. Mich. 5 Jac. B. R. St. *John* and *Cannis*'s Caſe. *Yelverton*, 117.

9. Diſ-

4. Debt upon Obligation againſt the Defendant, as Heir to his Father: The Defendant pleaded, *Riens per diſcent*, but 20 Acres in D. in ſuch a County. The Plaintiff Replyed, That the Defendant had more by Diſcent in S. viz. ſo many acres; and upon Iſſue joyned it was found for the Defendant, That he had nothing by Diſcent in S. for which the Plaintiff recovered, and had Judgment to have Execution of the 20 Acres in D. Upon which Judgment, Error was brought, and aſſigned for Error, A Diſcontinuance in the Record of the Plea, from *Eaſter* Term to *Mich.* Term next following: And becauſe it was after Verdict, If the ſame was helpt by the Statute of 18 Eliz. was the Queſtion. It was in this Caſe adjudged, That it was out of the Statute, and that it was Error; becauſe the Judgment was not grounded upon the Judgment, but only upon the Defendants Confeſſion of Aſſets, and the Verdict here was not to any purpoſe, but made the Defendants Confeſſion the ſtronger: So the Statute of 18 Eliz. is to be intended, when the Iſſue by Verdict is the means and cauſe of the Judgment: Wherefore the Judgment was reverſed. Hill. 37 Jac. B. R. *Mallenux* and *Mallenux* Caſe. *Yelverton*, 169.

5. Three Executors recovered in the Common Pleas in Debt by default: The Defendant brought Error, and aſſigned a Diſcontinuance, *viz.* that the Suit being by three Executors, at the day which they had by the Roll upon a Continuance then; two Executors only appeared, and by the ſame Roll, day was given over to all three, until another day: It was ſaid, That this was not a Diſcontinuance, but only the Default of the Clerk, which was amendable. But the Opinion of the whole Court was, That it was a Diſcontinuance, and could not be amended; for Credit ought to be given to the Roll, and by that it doth not appear but that two only appeared, and that the third made Default, which is a Non-proſecution of him at that day, and goes to all the time of the whole Suit afterwards: The Judgment was reverſed. Trin. 7 Jac. B. R. *Paſton* and *Lefters* Caſe. *Thomas*, 255.

6. A man recovered in the Court of *Shrewſbury* in Trover againſt the Plaintiff here by Default, and a Writ was awarded to enquire of Damages, returnable at the next Court; at which day the Plaintiff appeared, and the Writ returned, ſerved; but *Juratæ ponitur in reſpectu uſq; ad proximum Curiam*, which was put certain: And at that day the Plaintiff appeared again, and the Jury *ponitur in reſpectu*, and further day given till the tenth of *June*, &c. And at the tenth of *June Juratæ* again *ponitur in reſpectu*; but the Plaintiff did not appear at that day, nor had day over; and at the day given to the Jury they appeared, and gave 20 l. Damages, upon which the Plaintiff had Judgment for 20 l. and Coſts. Error was brought, and aſſigned for Error, That the Plaintiff not having day at the laſt Adjournment over, that the whole matter was diſcontinued; for by the firſt Judgment the Defendant was out of Court; yet the Plaintiff ought to attend *de die in diem*, becauſe his Judgment is not perfect till the Damages be enquired of: Then when the Plaintiff had day untill the tenth of *June*, and that day did not appear, the Court *ex Officio*, ought not to have made Continuance of the Jury, for that ought always to be *ex petitione* of the Plaintiff. The Court was of Opinion, That the ſame was Error, and for that the Judgment was reverſed. Hill. 4 Jac. B. R. *Harrington* and *Launſdons* Caſe. *Yelverton*, 97.

9. Note, It was agreed by the whole Court in a Replevin, That the Plaintiff cannot diſcontinue his Suit without the Privity of the Court, becauſe the Entry is *Recordatur per Curiam*; and if the Plaintiff would diſcontinue without moving the Court, the Defendant may enter the Continuance if he will. It was alſo holden, Where an Original is diſcontinued the Defendant ſhall not have Coſts; but if the Plaintiff be Non-ſuit, the Defendant ſhall have Coſts by the Statute of 32 H. 8. but after Diſcontinuance in a *Latitat* the Defendant ſhall have Coſts by the Statute of 8 Eliz. *cap.* 2. And in this Caſe it was holden, That the Plaintiff may be Non-ſuit after a Demurrer. Mich. 30 Eliz. C. B. *Beer* and *Underwoods* Caſe. *Leon.* 2 Part, 205.

Diſmes, or Tythes.

1. A Trachment upon Prohibition for ſuing in the Spiritual Court for Tythes of great Wood, by the name of *Silva Cedua*, againſt the Statute of 45 E. 3. The Defendant pleaded, That for 300 Loads of the ſaid Trees, they were of Birch, of which by Law he ought to have Tythes, as *Silva Cedua*; and as to the reſt, they were Oak and Elm under the growth of 20 years: In this Caſe, it was adjudged for the Defendant, That he ſhould have Tythes of Birch, for it is not ſuch Wood as the Statute intends by the Name of Great Woods; for that is intended Wood for Building and other Uſes of high Nature, and not for Fewell, as the Nature of Birch is: Therefore as to the Birch, a Conſultation was awarded. Hill. 4 Eliz. B. R. *Foſter* and *Leonard's* Caſe. *Cro.* 3 Part, 12.

2. Prohibition againſt a Parſon who ſued for Tythes in the Spiritual Court, and ſurmiſed, that

the Clark of the ſaid Pariſh, and all his Predeceſſors Aſſiſtants to the Miniſter, there *divinis celebrantes* have uſed to have 5 s. of him, for the Tyths of the place where &c. and it was alledged to be a good Preſcription, becauſe the Parſonage was a Parſonage Impropriate; and by Intendment it began by the Act of the Parſon, that he made a Compoſition, That the Tythe of that Land ſhould be paid to the Clark, in diſcharge of himſelf, that he had uſed, time out of mind, to pay to the Clark 5 s. in diſcharge of all Tythes, &c. The Court was of Opinion, That if this ſpecial matter be ſhewed in the Surmiſe, it might be perhaps good, by reaſon of the Continuance; and that by this the Parſon is diſcharged from finding of the Clark, with which perhaps he ſhould be charged: But becauſe ſuch matter was not particularly ſhewed in the Surmiſe, and that by common intendment Tythes are not to be paid to a Pariſh Clark, and he is no party in whom a Preſcription can be alledged. A Conſultation was awarded. Mich. 30 Eliz. B. R. *Sawell* and *Woods* Caſe. *Cro.* 3 Part, 71.

3. Prohibition for ſuing for Tythes in *Barking* Park in *Eſſex*, and ſuggeſted, That the Lands were parcel of the Priory of Chriſt-Church in *Canterbury*, and that the Prior and his Predeceſſors had held it diſcharged of Tythes *tempore Diſſolutionis*, and pleaded the Statute of 31 H. 8. The Defendant pleaded, That the Prior and his Predeceſſors did not hold them diſcharged: It appeared upon the Evidence, That the Prior and his Predeceſſors never paid Tythes; but no Cauſe was ſhewed, by Unity of Poſſeſſion or Compoſition, to be diſcharged. It was the Opinion of the Court in this Caſe, That a Spiritual man may preſcribe in *Non Decimando*, and by the Statute of 31 H. 8. he ſhall hold it diſcharged, as the Prior held it; for it ſhall be intended by a lawfull means. It was found for the Plaintiff. Mich. 83 Eliz. C. B. *Nelſo* and *Molies* Caſe. *Cro.* 3 Part, 206.

4. Prohibition upon a Suit for Tythes of Corn, Wool, and Calves: For the Corn, ſuggeſtion was, That they had uſed in the Pariſh to pay the tenth Sheaf, and ſet them out, and the Parſon had them; and this Plea was refuſed in the Spirituall Court. It was the Opinion of the Court, That it was a good Suggeſtion, That the Parſon would not take them being ſo ſet out, and for that the Prohibition granted. For the other Tythes of Calves, the Suggeſtion was, That they had uſed to pay within the ſaid Pariſh a d. for the Milk of every Cow, in ſatisfaction of Calves; and the Proof was, That there was ſuch an Uſage for all the Land except five Farms, and it was holden, That for that he had failed in his Preſcription; for it may be, that theſe Lands were parcel of the ſaid five Farms: and it is not ſuggeſted, That they were not parcel of them; therefore for that cauſe, Conſultation as to them was awarded. Tr. 30 Eliz. C. B. *Bruner* and *Shoewrights* Caſe. *Cro.* 3 Part, 206.

5. Prohibition for ſuing for Tythes of Cows, Steers, Oxen, Horſes; and ſuggeſted a Cuſtom, That every Parſhioner ſhould pay for every Milch Cow 1 d. *per annum*, for every other Cow ob. *per annum*, in recompence and diſcharge of all other Tythes of Oxen, Cowes, Steers, and Calves; and alſo 1 d. for every Mare, in diſcharge of all Tythes for all Horſes, Mares, and Colts there. It was the Opinion of the whole Court, That this Preſcription was not good to be diſcharged of one Tythe for the Payment of another. Mich. 38 Eliz. C. B. *Goſſmer* and *Lowes* Caſe. *Cro.* 3 Part, 446.

6. Note, It was agreed in a Prohibition for Tythes, That if Land be over-flown with Water, and afterwards gained by Induſtry, Tythes ſhall preſently be paid thereof, although it had been over-flown time out of mind, &c. So if Lands be full of Thorns and Buſhes time out of mind, &c. and it is grubbed up and made Meadow, or arable Land, Tythes ſhall be preſently paid thereof, notwithſtanding the Statute of 2 E. 6. for theſe Lands of their own Nature were not barren, but by negligence or ill Husbandry became ſo, and the Statute doth not intend, That Tythes ſhall not be paid within ſeven years after the Manurance, but of ſuch Lands as were meerly barren, and made good by Foldage, or other induſtrious means. Trin. 38 Eliz. B. R. *Sheringtos* and *Fleetwods* Caſe. *Cro.* 3 Part, 475.

7. Prohibition upon the Statute of 45 E. 3. for that whereas he libelled in the Spiritual Court for Tythes of Timber-Trees: The Defendant ſaid, That thoſe Trees long ſince were *mortua, arida, & putrida*, fit only for Fire-bote, and not for Timber, upon which it was demurred. It was the Opinion of all the Juſtices, That no Tythes ſhould be paid for thoſe Trees, for being over the growth of 20 years, they were once diſcharged of Tythes; and therefore ſhall always be diſcharged. Trin. 38 Eliz. B. R. *Raw* and *Patrſon* Caſe. *Cro.* 3 Part, 477.

8. Prohibition; and ſurmiſeth, That he was Parſon, and the Defendant was Vicar of the ſame Church, and ſued him in the Spirituall Court for Tythes upon an Endowment, That the Vicar ſhould have the Tythes of all the Lands within the Pariſh; and alledged, That he *pleaded* there, that he is Parſon imparſonee there, and that the Lands whereof Tythes are demanded is parcel of his Gleab, and that they of the Spirituall Court would not allow there of this Plea. It was the Opini-

of the whole Court upon this Surmiſe; for they ſaid, *Eccleſia Decimas ſolvere Eccleſiæ non debet*: And it was ſaid, That it was adjudged lately in *Yeary's* Caſe, Parſon of *Feckry*, That no Tythes ſhall be paid of Glebb Lands: But if the Vicear have the ſmall Tythes by Endowment, and the Parſon of his Glebb Lands, the Leſſee ſhall pay Tythes to the Vicear, for the Tythes ariſing of the Glebb Lands. Tr. 38 Eliz. B.R. *Rince* and *Maſſies* Caſe. Cro. 3 Part. 279.

9. Prohibition; and ſurmiſeth in Diſcharge of Tythes. That the Prior of B. was ſeiſed of the Rectory, and of the Lands out of which the Tythes were demanded in Fee *ſimul & ſemel*, time whereof &c. and at the time of the Diſſolution; *& ea ratione* prayed to be diſcharged, &c. The Defendant traverſed the Unity at the time of the Diſſolution. The Juſtices held the Traverſe to be good; for although there was an Unity of Poſſeſſion from time whereof, yet *if* it were not at the time of the Diſſolution it ſhould be charged: But if the Diſcharge had been by Preſcription generally, and not by Unity, then the Preſcription ought to have been averred, and not the Unity; and ſo it was adjudged. Tr. Tr. 34 Eliz. in *Calendy* and *Withers* Cit. Mich. 39 Eliz. B.R. *Barter* and *Longs* Caſe. Cro. 3 Part. 584.

10. Prohibition to ſtay a Suit for Tythes; ſurmiſing, That he ſet forth his Tythes, and that for ſome reaſonable Cauſe he had detained part of them, and that the Parſon ſued him for them in the Spiritual Court; upon which it was demurred, becauſe by the ſetting forth they were Lay-Chattels, for which he had his Remedy at Law. But the Court held, That the Prohibition did not lie; for againſt the party himſelf, who ſetteth forth his Tythes a Suit is maintainable in the Spiritual Court, if he detains them, although he might have Remedy for them at the Common Law; otherwiſe, if they were taken away by a Stranger after they be ſet forth. Paſch. 40 Eliz. B.R. *Leigh* and *Woods* Caſe. Cro. 3 Part. 607. See Tr. 43 Eliz. B.R. *Blackwell's* Caſe. Cro. 3 Part. 140. acc.

11. Debt brought upon the Statute of 2 E. 6. for not ſetting forth of Tythes; and declared, That the Defendant being a Pariſhioner of Land having Corn growing there to the value of 50 l. it did not ſet them forth, wherefore he demanded double value, 100 l. A Verdict was for the Plaintiff: Upon *Nihil dicit*, It was moved, That he ought not to have brought his Action at the Common Law, but in the Spiritual Court, for the Tythes before they be ſet forth. It was Reſolved, That the Action well lay upon the Statute: It was then moved, That the Tythes were Chattels Perſonals, and therefore the Action was to be brought by the Husband alone; and he ought not to have joyned his Wife in the Writ, as he had done in this Caſe: But that Exception was diſallowed by the Court, for the Action is given to the Proprietor or Farmor; and therefore good, brought in both their Names. And upon Error brought the Judgment was affirmed. Paſch. 40 Eliz. B. R. *Redd* and *Sherman's* Caſe. Cro. 3 Part. 608, and 613. See Hill. 34 Eliz. B. R. *Wentworth* and *Criſp's* Caſe, *ibid.* adjudged acc.

12. Prohibition for Tythes claimed of Hay of the latter Mowings: And a Preſcription alledged, That in Conſideration that the Occupiers of that Meadow had uſed to make up the firſt Mowings into Cocks, and to ſet forth the tenth Cock, they had uſed to be diſcharged of Tythes of after-Mowing. The Court held it to be a good Preſcription and reaſonable. Paſch. 41 El z. B. R. *Johnſon* and *Ambrojes* Caſe. Cro. 3 Part, 660.

13. Prohibition for ſuing for Tythe-Pidgeons: The Defendant pleaded Payment in the Spiritual Court, and they refuſed there to allow thereof without two Witneſſes. The Prohibition was granted; for it was ſaid, It would be a great Inconvenience to bring two Witneſſes to prove the Payment of every ſort of Tythes. Paſch. 41 Eliz. C. B. *Maloy* and *Merriet's* Caſe. Cro. 3 Part, 666.

14. The Queſtion upon an Action of Trover brought for twenty Loads of Hay, parcell of Tythes ſeverd, was, Whether Tythes were grantable by Copy: It was ſaid, They were not, in reſpect of the Nature of Tythes, wherein none could have any Property before the Corneell of *Lateran* which was in the time of King *John*; for before that time they might be paid to whom the Party pleaſed, but by thoſe Conſtitutions they were annexed to the Rectory, and then there could be no Cuſtome to demiſe them by Copy. 2. They cannot paſs but by Deed, and then to paſs them by Copy of Court Roll cannot be good. 3. Nothing can paſs by Copy, but that which is parcell of a Manner, but Tythes cannot be parcell of a Manner, as hath been adjudged; for a Manner and Tythes are of ſeverall Natures, although they be united in one man's hands, and then it is not poſſible, That that which is not parcell of a Manner can be *demiſed ſecundum Conſuetudinem Manerii*: Therefore the Opinion of the Court inclined to be, That they could not be parcell of a Manner, and granted by Copy. It was adjudged for the Plaintiff only, becauſe it did not appear upon the Verdict, that it had been granted by Copy, time out of mind; and it was held, there was not any Title found for the Defendant, and there-

fore it was adjudged for the Plaintiff. Paſch. 43 Eliz. B. R. *Sands* and *Drurys* Caſe. *Cro.* 3 Part, 814.

15. The Caſe was, One had a Rectory Impropriate, and by the Statute of 26 H. 8. *cap.* 3. he was to pay an yearly Rent for the ſame, in the name of a Tenth, and ſo to be diſcharged of the Tenth and firſt-Fruits. It was a Queſtion, Whether in ſuch Caſe he ſhould have the Priviledg of the Exchequer: It was ſaid, That he ſhould, and one *Conicrs* Caſe was vouched, Where the King gave a Parſonage to a Priory in Frankalmoign, and the Tythes thereof being withdrawn, the Prior impleaded the party in the Exchequer; and in that Caſe it was holden, That he ſhould have the Priviledge. But it was the Opinion of the Barons, That he ſhould not, for ſo every one who is to pay any Tenths or Firſt-fruits ſhould be drawn hither, which ſhould be a great Prejudice to the Spiritual Courts. Mich. 32 Eliz. in the Exchequer. The Dean and Chapter of *Windſors* Caſe. *Leon.* 2 Part, 146.

16. Note, It was holden by the Barons in the Exchequer, That whereas the Ciſtertians, &c. had a Priviledg, That they ſhould not pay Tythes for their Lands, *quas propriis manibus excolant*, but their Farmors pay Tythes; and now by the Statute of 31 H. 8. they are diſſolved, That the Queen and her Farmors ſhould be diſcharged of ſuch Tythes as the Spiritual Perſons were; for the Queen cannot *excolere*; *Ergo*, her Farmors ſhall be diſcharged; and ſo long as the Queen hath the Free-hold, her Farmors ſhall have ſuch Priviledge, though ſhe leaſeth for years, or at Will. Mich. 29 Eliz. The Counteſs of *Lenox* Caſe. *Leon.* 2 Part, 71.

17. In a Prohibition to ſtay a Suit in the Spiritual Court for Tythes: It was ſuggeſted, That the Abbot of *VALE-ROYALL* was ſeiſed of the Parſonage of W, and of the Grange of D, whereof Tythes was demanded in Fee, in the Right of the Abby, *& ratione inde* ſhewed the Unity of Poſſeſſion, 31 H. 8. The Defendant pleaded, That the Abby was founded within 5 E. 1. (which is within time of memory) and confeſſed the Unity of Poſſeſſion after the time of the Foundation. It was holden by the whole Court, That the Plea in Barr was good, and that in this Caſe he needed not to traverſe the Preſcription, for that the ſhewing of the Foundation to be after time of Memory, is a confeſſing and avoiding. But if the Defendant againſt the Suggeſtion of perpetual Unity, would ſhew how that the Demeſnes before the Statute in the time of the Abbot, were in the hands of the Farmors, there he ought to traverſe the Preſcription; for although the Poſſeſſion was chargeable in other hands, yet when the Fee ſimple is repoſed in the Abbot, it is a Diſcharge in Right. Hill. 45 Eliz. B. R. Gilſon and *Holcroft's* Caſe. *Yelv.* 31.

18. A Suggeſtion in a Prohibition was, That the Plaintiff time out of mind &c. had payed for Tythes of Wool and Lamb, 2 d. In the proof of his Suggeſtion by Witneſſes, they ſpake nothing of the Wool, but only that 2 d. had been paid for Lambs: It was moved to have a Conſultation for both, becauſe the Surmiſe is a Joynt-Preſcription. The Court ſaid, There was a difference between a Suggeſtion to have a Prohibition, and a Preſcription compriſed in it, and a Preſcription made in defence, or by way of Plea in any Original Action; for in the laſt Caſe a Joynt-Preſcription made for two things, and there is a fraier in one, it deſtroyes it becauſe it is by way of Title; but it is otherwiſe in this Caſe, becauſe this Preſcripcion is but to give Juriſdiction to the King's Court: And therefore, although the Plaintiff ſuppoſeth, That the Court ought to hold Plea of the Tythes of Wool and Lamb; and for the Wool, it remains payable in kind; yet for the Lambs, it is a *Modus Decimandi*, and the Cour ſhall have Juriſdiction. Mich. 2 Jac. The Caſe of Prohibition. *Yelv* 55.

19. Note, That if a Parſon grants to a Pariſhioner his own Tythes by way of Retainer, although it be by Word and not by Deed, it is good; and upon Suggeſtion of that Grant, a Prohibition ſhall be. Otherwiſe, where it is ſo long as the parties live, or the like; for although it doth not found in Intereſt by way of Contract, but onely by way of Diſcharge, yet it is good without Deed; for it is in the Nature of a perſonal Compoſition, which may be without Deed, by word onely: But if a Parſon by way of Contract agree, That J. S. ſhall have all his Tythes for three years, by which J. S. takes the Tythes, and the Parſon ſues for them in the Spiritual Court: Upon this J. S. ſhall have a Prohibition; for although it doth not enure by way of Intereſt, to make it a Leaſe of the Tythes, becauſe it is without Deed, yet the Contract betwixt them ſhall bind them as to the perception of the Tythes, of which Contract the Temporall Court ſhall have Juriſdiction. Mich. 4 Jac. B. R. *Hawkes* and *Brathwaits* Caſe. *Yelverton*, 94.

20. B. Parſon of D. lett all the Tythes of 200 Acres of Lands, whereof R was then ſeiſed to him and his Wife, and to the Heirs of R. to R. *Habendum* from Michaelmas next, to him and his Heirs, during the life of B. the Parſon. R. dyed, E. his Wife had the 200 Acres for her Joynture; ſhe took to Husband J. S. who lett the Lands to the Plaintiff; the Heir of R. alſo granted to the Plaintiff the Tythes of theſe Lands at Will, who being

ſued in the Spiritual Court by the Parſon, againſt his own Grant, prayed a Prohibition. The Point was, Whether the Leaſe was void, being to begin at a day to come, and it was for life: It was the Opinion of the Juſtices, That it was void; for although Tythes are Spiritual, and are not extinct in the Land, yet in the Conveyance of them they ought to follow the Nature of the Land, as Rent, and other Inheritances which being in *Eſſe* cannot begin at a day to come. It was alſo holden, That this Leaſe could not enure by way of Diſcharge, becauſe there were not any ſuch words in the Leaſe by which it was intended it ſhould enure by way of Intereſt; for if it ſhould enure by way of Diſcharge only, that is ſuch a Priviledge annexed to the Land that cannot be granted over, otherwiſe if it be by way of Intereſt: And in the principall Caſe it appeareth, That the Wife took upon her to be Owner of the Land, and the Son took upon him to be Owner of the Tythes, which could not be if the firſt Leaſe had been by way of Diſcharge. Trin. 6 Jac. B. R. *Edmonds* and *Booths* Caſe. *Yelv.* 131, 132.

21. Note, It was ſaid by *Hutton*, Juſtice, That by the Civill Law the Pariſhioner ought to give Notice to the Parſon, when the Tythes are ſet forth. But it was adjudged, That by the Common Law, a man was not bounden ſo to do. Trin. 15 Jac. C. B. *Spencer's* Caſe. *Noy*, 19.

22. A Parſon libelled for the Tythes of Hay, and ſet forth, That the Cuſtom of the Pariſh was, That he who hath Corn within the Pariſh, ought to reap the Corn, and alſo the Tythe of the Parſon, and to make them into Cocks, and to preſerve them untill the Parſon ſhall carry them away: In this Caſe a Prohibition was granted; for although the Pariſhioner ought *de jure* to reap the Corn; yet he is not bound to guard the Tythes of the Parſon, but if that the Parſon doth not carry them away in convenient time, an Action upon the Caſe lyeth againſt him; and ſo it was ſaid, It was adjudged 22 Jac. in B. R. in *Wiſemans* Caſe, for not accepting of his Tythe Cheeſe, but leaving of them in the Pariſhioners Houſe to his Annoyance and Damage. Mich. 2 Car. B. R. Dr. *Bridgmans* Caſe. *Noy*, 31.

23. A Prohibition was prayed upon a Suit in the Spiritual Court; for Tythes in kind of a Park now converted into Tillage upon a Surmiſe of a *Modus Decimandi* to pay a Buck and a Doe for all Tythes: It was granted, and it was agreed in this Caſe, 1. That although they are *feræ Naturæ*, yet they may be given for Tythes. 2. Although they are not tytheable of themſelves, yet they may be given for *Modus Decimandi*. 3. That this is a Diſcharge of the very Suit, and the Park is not but a Liberty, and the Owner may furniſh it with Game when he pleaſeth: And ſo it was ſaid, It was adjudged. Hill. 6 Jac. in C. B. in the Vicar of *Clare's* Caſe. See *Sharp* and *Sharps* Caſe. *Noy*, 148.

24. In Debt upon a E. 6. for not ſetting forth of Tythes, the Caſe was, Corn was ſet forth for Tythes, the Owner of the Land took the Corn Damage feaſant, but in his Declaration did not ſhew how long the Corn remained upon the Land. Therefore it was holden by the Court, That it was not good; and it was ſaid, That the uſual Courſe in ſuch Caſes is, That if Tythes be ſet out, and the Parſon doth not take them away in due time, the party may have an Action upon the Caſe againſt him; and alſo agreed, That after the Tythe is once ſet out, and the Parſon doth not take them away in due time, the party may have an Action upon the Caſe againſt him; and alſo agreed, That after the Tythe is once ſet out, that the Parſon may have an Action of Treſpaſs if any one taketh them away: But if a Stranger ſeiseth out the Tythes, that gives not ſuch a Property in the Parſon that he can have an Action for the taking of them. And in this Caſe it was agreed, That one cannot diſtrein Sheaves of Corn, contrary of a Sheaf of Corn Damage-feaſants. Hill. 1 Car. B. R. *Stillman* and *Charnis* Caſe. *Latch*, 8.

25. Note, It was the Opinion of the Juſtices, That whereas the Defendant in Trover and Converſion of certain Loads of Fetches juſtified under the Lord *Clare*, by a Demiſe of the Tythes of Grain for a year, That the ſame cannot be good as a Leaſe. But it was ſaid, That a Parſon might diſcharge his Pariſhioners of Tythes by word, or let the Rectory conſiſting of Gleab and Tythes by word for years. Mich. 2 Car. B. R. *Bellamy* and *Bilthops* Caſe. *Latch*, 176.

26. A Parſon ſued a Pariſhioner *per modum Decimandi*, and alledged in his Libell a Cuſtom to have 2 s. in the pound upon every Houſe and Shop in the Town: In that Suit the Defendant anſwered there, *Quod non credit eſſe verum*; and to have a Prohibition, alledged, That he was a Butcher who ſet up an open Stall in the Market, to ſell Fleſh in the Market only; and that he had not any Shop or Houſe. It was agreed by the Court, That a Parſon might ſue *per modum Decimandi* in the Spiritual Court; but if it be denyed, he can go no further there, for that they cannot try matter of Preſcription there; and if they do proceed, that a Prohibition lyeth. But it was ſaid, That no Prohibition lay in the principall Caſe, becauſe Power is given to the Spiritual Court to examine the Cauſe; becauſe it is not a Denyall of the Preſcription, but the Denyal of a Preſcription is by way of Allegation, and not otherwiſe.

Mich.

Mich. 2 Car. B. R. *Clark* and *Prowſe* Caſe. *Latch* 210.

Diſtreſs.

1. NOte, It was the Opinion of the Juſtices of C. B. That if a man by Deed granteth a Rent unto another in Fee out of his Land, payable yearly at a day; and further grants by the ſame Deed, That if it happen the ſaid Rent to be behind at the ſame day, *&c.* and no Diſtreſs in the ſame Land then being, that then it may be lawful for the Grantee to enter into the ſame Land, and to diſtein it: That yet by theſe words, *ſcil.* No Diſtreſs in the Land being found; That the ſaid Grantee cannot diſtrein for the ſame Rent, becauſe the words are words of Implication only, and are not preciſe words of Clauſe of Diſtreſs. Mich. 29 H. 8. *Bendlowes*, 12.

2. The Collector of Fifteens diſtreined one who was aſſeſſed to a Sum for Fifteens, who refuſed to pay it, and ſold the Diſtreſs, for which he brought Treſpaſs. The Collector exhibited his Bill into the Exchequer againſt the party, who ſhewed to the Court, That by the Statute of 29 El. which enacted this Fifteenth: It is provided, That the Fifteenth ſhall be levyed of the moveable Goods, Chattels, and other things uſuall to ſuch Fifteens and Tenths, to be contributary and chargable; and ſhewed, That the Cattell diſtreined were *tempore diſtrictionis* upon the Gleab Lands of a Parſonage Preſentative which he had in Leaſe, which Gleab Land is not chargeable uſually to Fifteenths granted by the Temporalty, nor the Chattels upon it. It was the Opinion of the whole Court in this Caſe, That although the Parſon himſelf payeth Tenths to the King, yet the Lay Farmor ſhall pay Fifteens, and his Cattel are diſtreinable for it even upon the Gleab Lands of the Parſonage; and therefore it was adjudged, That in the principall Caſe the Diſtreſs and Sale was good. Mich. 32 Eliz. Exchequer, *Steds* Caſe. *Leon.* 2 Part, 146.

3. Treſpaſs for breaking of his Cloſe: The Defendant pleaded, That the Dean and Chapter of P. were ſeiſed of the Mannor of C. in the right of their Church, and that King *Edw.* 4. by his Letters Patents granted them all Fines, *pro licentia Concordandi*, of all their Homagers, Tenants, and Reſients within their Fee; and that 29 Eliz. a Fine was levyed in C. B. betwixt the Plaintiff, and one A. of Lands whereof the place where is parcell, and the *poſt fine* was aſſeſſed to 15 s. and that J. S. the Forreign Oppoſer did allow to them the ſaid 15 s. becauſe the Land was within their Fee; and that in behalf of the ſaid Dean and Chapter, he demanded the ſaid 15 s. who refuſed to pay it; wherefore in the right of the Dean, *&c.* he took the Diſtreſs as Bailiff for the ſaid 15 s. and afterwards ſold it. It was the Opinion of the whole Court in this Caſe, That the Dean and Chapter could not diſtrein for this matter, but they ought to ſue firſt in the Exchequer: And it was further ſaid, That this Grant doth not extend to the *poſt fine*, for the Fine, *pro licentia Concordandi*, is the Queens Silver and not the *Poſt fine*. It was adjudged for the Plaintiff. Paſch. 32 Eliz. B. R. *Strait* and *Bragg's* Caſe. *Leonard*, 1 Part, 249.

4. Note, It was ſaid, That if a man taketh too little a Diſtreſs for Rent, and afterwards he taketh another Diſtreſs for the ſame Rent, that this is not good; for he cannot avow two Diſtreſſes for the ſame Rent, and it was his folly that he took not a better Diſtreſs at the firſt: But note, It is ſaid in the Abridgment of the Aſſiſes, That if there be not ſufficient Diſtreſs when he diſtreined, that he may diſtrein again. Hill. 25 Eliz. C. B. *Cro.* 3 Part, 13.

5. Replevin, A Clothier put certain Wool to a Spinner to ſpin, and afterwards comes with an Horſe to bring back the Yarn; and becauſe there were not any Beam nor Weights in the Spinner's Houſe to weigh it, the Clothier and Spinner, by the Leave of one of the Neighbours, who had a Beam and Weights in his Houſe, brought his Horſe thither and entred therein, and whil'ſt they were there, the Lord of the Houſe diſtreined that Horſe and the Yarn for his Services. It was the Opinion of the Court, That they were not diſtreinable, for the Trade of a Clothier is *pro bono publico*, who ought to be allowed all neceſſary means; and Cloth put to a Weaver to be Woven, and Yarn in an Houſe to be ſpun, are not diſtreinable; and the weighing is neceſſary, and therefore the Yarn brought thither, and the Horſe which brought it, are priviledged and not diſtreinable: Wherefore it was adjudged, That the Diſtreſs was not lawfull. Mich. 40 Eliz. C. B. *Rede* and *Barlys* Caſe. *Cro.* 3 Part, 546.

6. Treſpaſs for taking 100 Sheep *in via Regia*. The Defendant pleaded, That J. S. was ſeiſed of the Mannor of M. in M. and that all thoſe whoſe Eſtate time out of mind had uſed to have 1 d. Toll for every 20 ſheep of any ſtranger *b* ought or driven *per et trans* the ſaid Town by any ſtranger. And if he were denyed, then they had uſe, time whereof, *&c.* to diſtrein for the ſaid Toll, one ſheep ſo driven; and alledged, That 120 ſheep of the

the Plaintiffs, a ſtranger were driven by one L. *per et trans* the ſaid Town; and becauſe he refuſed to pay this Toll, he took one of the ſheep *cepit et abduxit* untill the Toll was paid. It was ſaid in this Caſe, That Toll-Thoroughs may be well taken by Preſcription, and a Diſtreſs might be taken for it, but then it ought to be for ſome reaſonable cauſe, viz. that he is to maintain a Cawſey, repair a Way, a Bridg, or ſuch like. But in the principal Caſe, becauſe it doth not appear to the Court to have a lawful beginning, the Court conceived the Plea to be ill. Mich. 41 Eliz. B. R. *Smith* and *Shepheards* Caſe. *Cro.* 3. Part, 710, 711.

7. Treſpaſs for taking of Raw Hides, The Defendant juſtified as Bayliff of *Ipſwich* by a Cuſtome there, That if any Butcher kill any Beaſts within that Town, and ſells the fleſh within the Market, he is to pay 1 d. for every Hide, and that he may diſtrein the Hide for the 1 d. if denyed. The Plaintiff replyed, That after the Diſtreſs the Defendant tanned the Hides. The Defendant rejoyned, they tanned them becauſe otherwiſe they would have rotted. It was Reſolved by the Court, That it was no good plea; for although in ſome Caſes one may meddle with a Diſtreſs and uſe it where it is for the Owners benefit; yet here this Tanning is not for his benefit, for it takes away from him the notice of the thing, and ſo is a means of taking away the thing it ſelf, for that he cannot have any knowledg to have it again, and therefore the Preſcription and plea upon it not good, and adjudged for the Plaintiff. Mich. 42 Eliz. B.R. *Duncomb* and *Reeves* Caſe. *Cro.* 3. Part, 783.

8. Note, It was adjudged that a Bayliff of a Court Baron upon a Judgment there given; and upon a *Levari facias* awarded, cannot ſell the goods and ſo levy the money without a ſpecial Cuſtome ſo to do. Hill. 3 Jac. B. R. *Try* and *Burgis* Caſe, *Noy* 17.

9. Trover and Converſion of Cattel, The Defendant juſtified by reaſon of a Rent granted to A. his Executors and Aſſigns for the life of B. out of Black Acre, and ſhewed that A. is dead, and that he as Adminiſtrator of A. diſtreined for the Rent in Black Acre after the death of A. and averred the life of B. It was holden that the Juſtification was not good, for that by the death of A. the Rent was determined, and could not come to the Executor or Adminiſtrator, for it was not a thing Teſtamentary, but a Freehold. Yet it was agreed by the Court, That if a Rent be granted to A. for the life of another, the Remainder to B. that although A. dyeth, by which the Rent is determined in Intereſt as to the perception of it; yet foraſmuch as the Ter-Tenant holdeth the Land during that time diſcharged of it, it is ſufficient to ſupport the Remainder. It was further holden, That if the Rent had continued, the taking of a lawfull Diſtreſs for it, had not bin a Converſion, otherwiſe where the Diſtreſs was not lawfully taken. Mich. 45 Eliz. B. R. *Salters* Caſe. *Yelverton* 11.

10. Trover of Goods, the Defendant ſhewed, That he was Bayliff of the Mannor of D. whereof the King was ſeiſed; and that a Plaint of Debt was affirmed by J. S. againſt the Plaintiff, upon which Proceſs came to the Defendant being Bayliff, to diſtrein the Plaintiff to be at the next Court to anſwer the Plaint aforeſaid, by force of which he diſtreined the Plaintiff by the goods, &c. which becauſe he appeared not at the Court, were forfeited to the King as Lord of the Mannor; and the Defendant had accounted for them to the King. It was adjudged for the Plaintiff, for that in a Court Baron no goods can be forfeit upon default of appearance upon a Diſtreſs: For a Diſtreſs is but in nature of a Pledg to be ſafely kept; and in a Court Baron lyes nothing but Diſtreſs infinite, but no Attachment of goods. Mich. 8 Jac. B. R. *Gomerſall* and *Midgates* Caſe. *Yelverton* 194.

11. This Caſe was moved to the Court, If one takes Beaſts damage feaſant, and impounds them in an houſe, and leaves the door open, ſo that the Owner may ſee them and give them ſuſtenance; and afterwards for want of ſuſtenance they dye in the Pound, Whether he who diſtreined them ſhall be charged or not. It was the Opinion of the Juſtices, When one takes Beaſts damage feaſants in his Lands, it is at his election if he will impound them in an open place, or in ſome place in his own Land. And if he impound them in the common Pound, and the Beaſts dye, the Owner hath no remedy. But if they be impounded upon the ſoil where they did the damage, or in the houſe of him who diſtreined them, and they dye for want of food, he who took them ſhall be charged. In the Principal Caſe, it was ſaid, That when the beaſts dyed in the Pound, the very taking of them was a Treſpaſs *ab initio*. Hill. 3 Jac. C. B. *Perkins* and *Butterfields* Caſe. *Hetley* 75.

Diſſeiſin,

Diſſeiſin, Diſſeiſor, *and* Diſſeiſee.

1. THis Caſe was moved to the Court, If the Tenant of the King, of Lands holden in *Capite*, be diſſeiſed; and the Diſſeiſor aliens the Land, and after the Diſſeiſee doth re-enter. If the Land ſhall be charged with a Fine for alienation without Licence. It was ſaid by *Manwood*, That the Land ſhall not be charged, becauſe the Title of the Allience grew under the wrong of the Diſſeiſor, but the Diſſeiſor ſhall be charged with ſuch Fine. Tenant of the King in *Capite*, makes a Leaſe for life. The Leſſee for life makes a Feoffment in Fee without Licenſe, the Leſſor entreth, neither his perſon nor land ſhall be charged. But if my Feoffee upon Condition maketh a Feoffment in Fee without Licenſe, and I reenter for the Condition broken. Now my Land ſhall be charged with a Fine upon Alienation, for the Feoffee was in by my good and lawful title, becauſe he had power to make a Feoffment over, though ſubject to the Condition. So if Tenant in tail, or the Husband ſeiſed in the right of his Wife, make a Feoffment in Fee, and after the Land is re-continued; the Fine accruing for Alienation ſhall bind the Land; and if Tenant for life loſeth Iſſues and dyeth, the Land ſhall be charged with the ſame. Trin. 29 *Exchequer*, *Goddards* Caſe. *Leon.* 2. Part, 55, 56.

2. The Diſſeiſee maketh an Indenture, purporting a Leaſe for years, and delivers it to a ſtranger out of the Land as an Eſcrow, and commands him to enter into the Land, and deliver the ſame upon the Land as his Deed to the Leſſee, who doth it accordingly. It was adjudged in this Caſe, That it was a good Leaſe: and this Rule was put when the perſon at the firſt delivery who hath not power and ability in Law to make a Leaſe and contract, and before the ſecond delivery he attains to it, there the Leaſe or contract is void; but when at the firſt delivery he hath power and ability to contract, but cannot perfect it untill an impediment be removed, if that the impediment be removed before the ſecond delivery, the contract is good. And it was adjudged in the principal Caſe, That the ſecond delivery ſhould have no relation to the firſt, for then it ſhould be done by one who was out of poſſeſſion, and avoid the Leaſe; and therefore it ſhall not have relation, but according to the truth to be a Deed at the time of the ſecond delivery, *ut res magis valeat quam pereat*. Mich. 37 Eliz. C. B. *Jennings* and *Braggs* Caſe. *Cro.* 3. Part, 446. See *Cook* 3. Part, in *Butlers* Caſe, this Caſe vouched to be adjudged accordingly. See Trin. 38 Eliz. C. B. *Croſs* and *Powells* Caſe. *Cro.* 3. Part, 483. acc.

3. Treſpaſs for breaking his Cloſe, with a *Continuando*. The Defendant pleaded, That long before, J. S. was ſeiſed in Fee, and lett it to him for years. The Plaintiff replyed, That he himſelf was ſeiſed untill by the ſaid J. S. Diſſeiſed, and let to the Defendant, and that after he re-entred, and the Treſpaſs mean betwixt, &c. upon which the Defendant demurred. It was Objected, That the Defendant is in by Title (*viz.* by a Leaſe from the Diſſeiſor) and that the Diſſeiſee after his re-entry ſhall never puniſh him for occupying the Land, for he never was a Treſpaſſor to him. But the Opinion of the Court was to the contrary. For by this re-entry of the Diſſeiſee, he is remitted to his poſſeſſion, and then all who occupy in the mean time by what title ſoever they come in, ſhall anſwer him for their time. It was adjudged for the Plaintiff. Hill. 39 Eliz. B. R. *Holcomb* and *Rawlins* Caſe, *Cro.* 3. Part, 540.

4. Note, It was agreed by the whole Court, That if Tenant at Will makes a Leaſe for years, and the Leſſee entreth, he is only the Diſſeiſor. And a Releaſe or a Confirmation to the Tenant at Will afterwards is void, becauſe the privity is deſtroyed. Paſc. 43 Eliz. C. B. *Shaw* and *Barbors* Caſe, *Cro.* 3. Part, 830.

5. *Ejectione firmæ*, the Caſe was, A Tenant in tail of certain Lands, made a Leaſe for years to B. who aſſigned it over to the Father of the Plaintiff. A. dyed, W. his Son and Heir entred upon B. W. demiſed the Land to P. for life, the Remainder to J. his Wife for life, the Remainder to the Son of P. for life, and made a Letter of Attorney to enter and deliver Seiſin. P. dyed before the Livery was executed, and afterwards the Attorney made Livery to J. W. dyed, E. his Son and Heir entred upon the Wife. It was ſaid in this Caſe, That when P. entred upon W. the Iſſue in tail, he was a Diſſeiſor, and by his death the Land diſcending to his Heir, the entry of W. the Iſſue in tail was taken away. But it was holden by the whole Court, That P. by his entry was not a Diſſeiſor, but at the election of W. for when P. accepted ſuch a Deed from W. it appeared that his intent was not to enter as a Diſſeiſor, and it is not found that P. had any ſon and Heir at the time of his death, and if not, then no diſcent, and there is not any Diſſeiſin found, That P. *expulit* W. out of the Land. And this Caſe was put and cited to be adjudged, Grandfather Tenant in tail, Father and Son, the Grandfather

father dyed; the Father entred and paid the rent, and dyed in poſſeſſion. It was adjudged no diſcent, for the payment of the Rent doth explain by what title he entred, and ſo he ſhall not be a Diſſeiſor but at the election of another. It was adjudged for the Plaintiff. Trin. 30 Eliz. B. R. *Piers* and *Leverſages* Caſe. *Leon.* 1. Part, 121.

6. Note, it was ſaid by *Jones* Juſtice, That if Leſſee at Will makes a Leaſe for years, and the Leſſee entreth, That the ſame is a Diſſeiſin at the election of him who hath the Freehold, and not otherwiſe. See Hill. 19 Jac. B. R. *Pouſley* and *Blackmans* Caſe. Reports annexed to *Bendlowes* 130. And ſee, that Leſſee for years was only the Diſſeiſor as it was adjudged. Mich. 7 Car. C. B. in *Binnſdens* Caſe. *Latch.* 53.

Dower.

1. A Woman recovered Dower of a Copyhold, according to the Cuſtome of the Mannor, in a Court Baron upon a Plaint there, becauſe her Husband dyed ſeiſed, and had Judgment there, and 50 l. damages. And for the 50 l. ſhe brought Debt in B. R. and declared upon the matter aforeſaid. The Queſtion in the Caſe, Whether ſhe might recover damages to 50 l. there, where they cannot hold plea above 40 s. It was the Opinion of the whole Court, That the damages were well awarded there, and that ſhe might recover ſo much there, for that as they may hold plea of the Land, ſo they may for damages ſo far as the Demandant is damnified. Mich. 33 Eliz. B.R. *Shaw* and *Tompſons* Caſe. *Cro.* 3. Part, 426.

2. In Dower brought, the Defendant pleaded; That he by Deed indented, granted a Rent out of the Land to the Demandant in recompence of her Dower, which ſhe accepted of: The Demandant confeſſed the Grant of the Rent, and her acceptance, but ſaid that there was a Condition in the Deed, That if the Rent was not payed within a Month, that the Rent ſhould ceaſe, and the Deed ſhould be void, and ſaid that the Rent was behind and not paid; upon which the Defendant did demur in Law. It was the Opinion of the Juſtices in this Caſe, That Dower ought to be abſolute for the Rent comes in lieu thereof, and ſhall be of the ſame nature; and the annexing of a Condition to an Aſſignment of Dower is void: Alſo in this Caſe here, it is not any aſſignment, but a Grant, and there needs not any demand to be made in this Caſe, becauſe the Woman is not to defeat any eſtate by the not payment, The Condition alſo is not annexed to the Land, but to the Grant, and for the Condition broken, ſhe is not to have the Land, but only to be reſtored to her Action, to demand her Dower. It was adjudged for the Demandant. Mich. 38 Eliz. C. B. *Wentworth* and *Wentworths* Caſe. *Cro.* 3. Part, 451, 452.

3. A Writ of Dower was brought of Lands in the County of *Northumberland*; The Pariſh, Church where the Land lay, was within *Newcaſtle* where the Proclamation of Summons ſhould be by the Statute of 31 Eliz. was the Queſtion. It was the Opinion of the Court, That it ought to be at the Pariſh Church door, though it were in another County then where the Land lyeth. Paſc. 38 Eliz. C. B. *Ragſters* Caſe. *Cro.* 3. Part, 472.

4. *Scire facias* by an Executor of a Woman Tenant in Dower to have Execution of damages recovered in a Writ of Dower. The Defendant pleaded, That he had brought a Writ of Error upon the Judgment againſt the Demandant in the Writ of Dower, and aſſigned for Error, becauſe the Recovery was againſt him by default being an Enfant; and that the ſame depending, the demandant in the Writ of Dower dyed; Whereupon he brought a new Writ of Error *Coram vobis reſidet* againſt the Plaintiff as Executor, and demands Judgment *ſi pendente hoc vide Errore indiſcuſſo, Executionem h beri debet.* It was the Opinion of the Juſtices in this Caſe, That a Writ of Dower is much favoured; and it is not reaſon that the Demandant ſhould be prejudiced by the Tenants Infancy: For if thereby the Demandant ſhould be delayed, Weomen ſhould never recover their Dowers to have the benefit thereof, for the Tenancy might be in an Enfant who never would appear, but ſuffer the Judgment paſs againſt him by default, and have it afterwards reverſed for this cauſe. And it was ſaid by *Popham*, That there was not any difference betwixt a Writ of Dower and another *Precipe*, for a Recovery againſt an Enfant by default, is good in both Caſes. Trin. 39 Eliz. B.R. *Williams* and *Williams* Caſe. *Cro.* 3. Part, 567. See Hill. 3 Jac. B. R. *Smith* and *Smiths* Caſe. *Cro.* 2. Part, 111. where it was holden, That in the like Caſe of Dower demanded againſt an Enfant, that he ſhould not have his age, and that his default ſhould prejudice himſelf, but not the Plaintiff in Dower, becauſe Dower is much favoured in Law. See Mich. 40 Eliz. B. R. *Herby* and *Wroths* Caſe. *Cro.* 3. Part, 638 acc.

5. In Dower, the Tenant made default after default: J. S. prayed to be received for his Term made unto him before the Coverture, he was re-

ceived, and his Term ſaved. Then the Queſtion was how the Judgment and Execution ſhould be; For if it ſhould be, That *ceſſat Executio* during the Term, ſhe ſhould not then have the rent upon the Leaſe. It was agreed by the Juſtices, That the Judgment ſhould be entred generally, That ſhe ſhould recover Seiſin of the moyety of the Land (the Land being Gavelkind); and that the Writ of Execution ſhould be ſpecial: That the Sheriff ſhould not ouſt the Termor, but that he ſhould come upon the Land, and demand Seiſin for the Woman, and thereby ſhe ſhould have the moyety of the Land with the Rent; and ſo it was ſaid it had bin adjudged and done in 3 Eliz. Paſc. 39 Eliz. C. B. *Wheatley* and *Boſts* Caſe. *Cro.* 3. Part, 564.

6. Husband and Wife brought Dower againſt the Son and Heir of the firſt Husband of the Wife, and demanded Dower of Lands in A. and B. The Defendant pleaded *Ne unque* ſeiſed *que Dower*: The Jury found that the firſt Husband was ſeiſed during the Coverture *de omnibus tenement. infra ſcript. præterquam* the Tenements in, &c. *ſic ut dicta* the Wife *dotari potuit*: Exception was taken to the Verdict, becauſe it doth confound the Verdict. It was the Opinion of the Court, That the (*præterquam*) was idle and ſurpluſage, for it is of another thing then that which is in demand, and the Seiſin of the firſt Husband of Lands in A. and B. is confeſſed: and the (*præterquam*) operates nothing. It was adjudged, That the Verdict was good, and Judgment was for the Plaintiff. Mich. 30 Eliz. C. B. *Baker* and *Ayres* Caſe. *Leon.* 1. Part, 92.

7. A. ſeiſed of Lands, deviſed them thus, *viz.* I give my Lands to M. my Wife, untill ſuch time as E. my Daughter ſhall accompliſh her age of 19 years, the Reverſion to the ſaid E. and the Heirs of her body, upon Condition, That ſhe pay to my ſaid Wife, during her life, in recompence of her Dower of all my Lands 12 l. *per annum*; and if default of payment be made, then I Will, that my Wife ſhall enter and have my Lands during her life, the Remainder *ut ſupra*. A. dyed, M. the Wife entred, E. being within the age of 14 years. M. took Husband J. D. the Husband and Wife came and demanded the 12 l. and none was ready to pay it. Afterwards the Husband and Wife brought a Writ of Dower, and recovered. It was the Opinion of all the Juſtices in this Caſe, Were the 12 l. either a Rent, or a ſum in groſs, That by the bringing of the Writ of Dower, the Wife of the Deviſor had loſt all the benefit which was to come to her by the Deviſe, for the Rent was Deviſed to her in recompence of her Dower, and it was not the intent that ſhe ſhould have both. Mich. 30 Eliz. C. B. *Geſſin* and *Warburtons* Caſe. *Leon.* 1. Part, 137.

8. Dower brought by a Woman of the third part of Lands. The Defendant pleaded, That the Lands were Gavel-kind, and that by the Cuſtome Dower ought to be demanded of the moyety of it. It was the Opinion of the Juſtices, That ſuch a Woman might at her election demand her Dower either by the Cuſtome, or by the Common Law. But the Preignothories ſaid, it had bin adjudged otherwiſe, 16 Eliz. in *Gellibrand* and *Hunts* Caſe, *Ideo Quære*. Mich. 30 Eliz. C. B. *Leon.* 1. Part, 62. See Hill. 30 Eliz. C. B. *Leon.* 133. the Caſe Reſolved.

9. In Dower by Husband and Wife, The Caſe was, J. S. was ſeiſed and enfeoffed J. D. and others, of two parts of the Lands to the uſe of himſelf and the Defendant his Wife and their Heirs; with Condition, that if his Wife ſhould ſurvive him, ſhe ſhould pay ſuch ſums of money not exceeding 200 l. to ſuch perſons as the Feoffor ſhould by his Will appoint. Afterwards he made his Will, and did appoint certain ſums of money to be paid to divers perſons amounting to 150 l. and by his Will deviſed the reſidue of his Lands to divers of his kindred, having no Iſſue, and dyed. The Wife married the Plaintiff, and they brought Dower againſt the Deviſees, who pleaded the Feoffment aforeſaid, and averred the ſame was made for the Joynture of the Demandant. In this Caſe, becauſe no matter or Circumſtance was produced to verify the averment; the Court incited the Jury to find for the Demandant, which they did accordingly. Mich. 32 Eliz. C. B. *Tracy* and *Ives* Caſe. *Leon.* 1. Part, 311.

10. Note, in Dower it was Reſolved by the Court, That a Divorce *Cauſa adulterii* is no cauſe of bar of Dower, becauſe it is but *à Menſa et thoro*, and not *à vinculo Matrimonii*: And in this Caſe it was ſaid, That an Elopement is not a bar of Dower *ad Oſtium Eccleſiæ*. Mich. 2 Jac. C. B. The Lady *Powel* and *Weeks* Caſe. *Noy* 108.

Dona-

Donative.

1. PRohibition, ſuppoſing that the Church of B. was a Donative, and that King *Henry* the 8th was ſeiſed of the Advowſon thereof, and granted it to C. B. from whom he conveyes Title; and that A. pretending it to be Preſentative, and that he as Patron Preſented F. who ſued in the Spiritual Court to have Induction, and cited W. G. who had it of the Donation from the Plaintiff, who appeared and appealed to the Delegates, and dyed: And the Plaintiff *pro inter eſſe ſuo* pleaded this Title, That he had the Church as a Donative; and becauſe this Plea was refuſed, he had a Prohibition. A Conſultation was now prayed, and was granted by the Court, becauſe the Defendant claimed nothing but Induction, which cannot any way be prejudicial to the Plaintiff; For if it be a Donative, the Induction is to no purpoſe; and if it be Preſentative, the other can have no remedy for the Profits untill Induction, nor try his right, and therefore no reaſon to prohibite it. A Conſultation was awarded. Hill. 41 Eliz. B. R. *Quarles* and *Fairchilds* Caſe. *Cro.* 3. Part, 653.

Ejectione firme.

1. IN *Ejectione firme*, the Plaintiff declared upon a Leaſe for years made to him by the Defendant himſelf. Upon Not Guilty pleaded, the Jury found, That the Defendant had nothing in the Land when he made the Leaſe to the Plaintiff. The Court ſeemed to incline, That the Jury had found for the Plaintiff, for that the Jury may find matter of Eſtoppel as well as other matter, and that they are bound to do it upon penalty of Attaint. Quære, for the Book ſeems to be, that the Court was divided in Opinion, and therefore would adviſe of it. Mich. 31 Eliz. C. B. *Suttons* Caſe. *Cro.* 3. Part, 140.

2. In *Ejectione firme*, It was moved in Arreſt of Judgment, That the Declaration was incertain, viz. *de uno Meſſuagio ſive tenemento*, and four Acres of Lands. It was the Opinion of the Court, That as to the Meſſuage, no Judgment could be given for the incertainty. But the Court was of Opinion, That though for the firſt it was void, yet for the four Acres of Land it was good; thereupon the Plaintiff releaſed his damages, and for the four Acres had Judgment, and ſo it was ſaid it was adjudged. Mich. 27 Eliz. in *Whitton* and *Roberts* Caſe. Mich. 32 Eliz. B. R. *Wood* and *Payns* Caſ. *Cro.* 3. Part, 186.

3. *Ejectione firme* of 11 Cloſes, one called Greer-mead, and gave ſeveral names to the other. Upon Not Guilty found for the Plaintiff, it was ſaid, That he ought to have declared of a certain number of Acres, for that no Writ of Execution can be awarded to put him in poſſeſſion. But the Court held it well enough; for when a name is given to every Cloſe, although the Acres are not mentioned, viz. ſo many of Land, ſo many of Paſture, &c. it is ſufficient, though it had bin better to have expreſſed the Acres; and ſo it was ſaid it had bin divers times adjudged. Paſc. 33 Eliz. *Exchequ. Jones* and *Hoells* Caſe. *Cro.* 3. Part, 235.

4. In *Ejectione firme*, the parties being at Iſſue; It appeared upon the Evidence, That the Plaintiff was Leſſee for three years of a Copyhold; and that the Cuſtome of the Mannor was proved to be, That a Copyholder there might let the Lands for three years. *Anderſon* Chief Juſtice conceived, That the Leſſee of a Copyholder cannot maintain *Ejectione firme* in any manner. But if he might, he ought to ſhew the Eſtate of his Leſſor, and his Licence, or the ſpecial Cuſtome to warrant the Leaſe; for otherwiſe being a general Declaration, it ſhall be intended of a Leaſe at the Common Law, which a Copyholder cannot make. Hill. 38 Eliz. C. B. *Wells* and *Partridges* Caſe. *Cro.* 3. Part, 469. See *Goodwyn* and *Longhurſts* Caſe. *Cro.* 3. Part, 535.

5. In an *Ejectione firme*, the Plaintiff declared of a Leaſe by Husband and Wife, and did not ſhew that it was by Deed, and without a Deed it cannot be the Leaſe of the Wife. But upon divers Preſidents ſhewed, viz. Paſc. 33 Eliz. *Aſſiſe* and *Guil-*

berts Case, in C. B. and of *Diggs* and *Withers* Case in B. R. where the Declaration was of a Lease by Husband and Wife, and it did not mention any Deed; yet adjudged good upon these Presidents. It was adjudged for the Plaintiff. Trin. 38 Eliz. B. R. *Child* and *Westcotts* Case. *Cro.* 3. Part, 481.

6. In *Ejectione firme*, It was found upon a Special Verdict, That a Copyholder made a Lease for years, excepting one day, which was warranted by the Custome. The Lessee being ousted by a stranger, brought *Ejectione firme*. It was holden by the Court it did well lye, and *Popham* said, If there were not any Custome, yet it should be good against all but him who had the Inheritance and the Freehold, and so he said it was, if Lessee at Will at the Common-Law had made a Lease for years. But if a Copyhold be granted for years by Copy, he shall not maintain *Ejectione firme* at the Common Law. Trin. 41 Eliz. B. R. *Sparks* Case.

7. *Ejectione firme* was brought of a Cottage. After Verdict, it was moved, That it lay not there of no more then a *Precipe quod reddat*, but the Exception was disallowed by the Court, and adjudged for the Plaintiff. Pasc. 43 Eliz. B. R. *Hill* and *Giles* Case. *Cro.* 3. Part, 818.

8. In Trespass, the Plaintiff declared of a Trespass done in an Acre of Land in D. and abutted it East, West, North, and South. The Jury found the Defendant Guilty *in diminio Act. infra script.* It was moved, That no Trespass was found, for that there is no such moyety bounded as the Plaintiff hath declared. It was the Opinion of the Court, That the Plaintiff should have Judgment: For if the Plaintiff layeth the Trespass in an Acre, and the Jury find it in a foot only of the Acre, it is good; and here they have found the Trespass in the moyety of the Acre bounded. But it was said by the Court, That if it had bin in an *Ejectione firme*, the Verdict had not bin good, because it is not certain in which part of the Acre the Plaintiff should have an *Habere facias possessionem*. Mich. 5 Jac. in B. R. *Winkworth* and *Mans* Case. *Yelverton* 114.

9. In *Ejectione firme*, the Plaintiff declared of a Messuage, 10 Acres of Land, 20 Acres of Meadow, 20 Acres of Pasture by the name of *unius Messuagii* 10 Acres *Prati* be it more or less. Upon Not Guilty pleaded, the Plaintiff had a Verdict, but he could not have Judgment, for upon the matter disclosed by the Plaintiff himself, he could not have Execution of the quantity found by the Verdict; for in the Lease there is but 10 Acres demised; and the words (more or less) cannot in Judgment of Law extend to 30 or 40 Acres, and the rather, because the Land demanded by the Declaration, is of another nature then that which is mentioned in the *per nomen*, for that goes only to the Meadow, and the Declaration to Arrable and Pasture. Mich. 7 Jac. B. R. *Yelverton* 166.

10. In *Ejectione firme*, the Plaintiff declared of a Lease made by J. S. 6. *Maii*, *Anno* 7 Jac. of a Messuage, &c. in D. and that the Plaintiff entred and was possessed, *quousque postea* the Defendant, 6 *die ejusdem mensis Maii Anno* 6. *super dict.* did eject him. It was said, That the Declaration was not good, because the Ejectment is supposed to be a year before the Lease made for the Lease is *Anno septimo*, and the Ejectment supposed to be *Anno sexto*. But the Court was of Opinion the Declaration was good, and the word (*sexto*) to be void, for the day of the Ejectment being *ejusdem mensis*, cannot be intended but to be the same year the Lease is supposed to be made. Mich. 8 Jac. B. R. *Davis* and *Pardy's* Case. *Yelverton* 182.

11. Error was brought of a Judgment in C. B. in an *Ejectione firme* of one Messuage or Tenement, and it was reversed because of the incertainty. Note *Dyer*, 264. Mich. 4 Jac. in C. B. Waste was *in Messuagio sive tenemento*; and yet it was holden to be good, by reason of the certain assignment. But in the principal Case, the Court said, that it was void being in the disjunctive. Hil. 1 Car. B. R. *Rotchester* and *Kechbowst* Case. *Noy* 86.

12. *Ejectione firme* was brought of an house, Barn, *et de coquina Anglice* a Kitchin. After Verdict, it was moved, That it was not good, for the demand is incertain, for that any Room by usage might be made a Kitchin. It was in that Case said, That a Frankcenement might be in an upper Room: And that Pasc. 13 Jac. It was adjudged, That an *Ejectione firme* was maintained *pro Cubiculo*. Also Trin. 2 Jac. B. R. rott. 649. *Peck* and *Fords* Case was vouched, That an *Ejectione firme* did lye *pro Coquina*, but notwithstanding that, the Court was of Opinion, That it did not lye for the incertainty. Trin. 2 Jac. C. B. *Ford* and *Lucy* Case. *Noy* 109.

13. An *Ejectione firme* was brought *De Pomario*, and it was holden by the Court to be good, for it needs not to be demanded by the name of a Garden, as a *Precipe* ought to be. It was said *Ejectione firme* lyeth *de Domo*; but in a *Precipe* it must be *de Messuagio*: and it was said that it was adjudged 18 Eliz. the *Ejectione firme* did lye *de Pomario*, and so it was holden in this Case. *Wright* and *Wheatleyes* Case. *Noy* 37. See *Sanders* and *Partridges* Case, That *Ejectione firme* was brought of a Boylary of Salt, and the Court doubted of it. *Noy* 135.

14. It was said by the Court, That *Ejectione firme* doth not lye *de una pecia terræ*, although it was

was averred containing half an Acre of Land *vocat. &c.* For that the party ought to shew the longitude and latitude of it. But it is otherwise in an Assise by reason of the view. Tr. 7 Car. C.B. *Hetley* 170.

15. In *Ejectione firmæ*, the Plaintiff declared, That the Defendants *intraverunt, et ejecit expulit et amovit* the Plaintiffs: Upon Not Guilty pleaded and found against the Defendants, the matter aforesaid was shewed in stay of Judgment, because the Declaration was incertain in the point of the Action, because it is not known which of the Defendants Ejected the Plaintiff, and the Jury cannot find them all guilty, because by the supposal of the Plaintiff, one only did Eject him. But notwithstanding, the Opinion of the Court was, That the Plaintiff should have Judgment, and that the Declaration should be amended in that point, because it was only the default of the Clerk. Mich. 10 Jac. B. R. *Odingsell* and *Jackson* Case. *Yelverton* 224.

16. *Ejectione firmæ* was brought of the Manor of F. the Plaintiff declared of a Lease of the Manor, and that the Ejectment was of the Manor. The Jury found the Defendant guilty of a Messuage and Curtilage parcel of the Manor. It was said in Arrest of Judgment, That the Plaintiff could not have Judgment, for he ought recover the Manor which is in demand, or nothing at all. And the Case was put of an *Ejectione firmæ* of a Rectory, and Not Guilty pleaded. It was given in Evidence, That the Defendant took the profit, but the Plaintiff could not prove that the Defendant entred into the Gleab Lands; and in that Case it was Resolved, That the taking of the profit of the Tythes, was not any Ejectment of the Rectory. *Doddridge* Justice said, That no Case did more resemble a Manor then a Rectory, because as a Manor is entire, so is a Rectory, and the Gleab resembles the Demesnes of the Manor, and the Tythes the Services. The Case was not Resolved: But the Court said, The Case had bin the stronger for the Defendant if the especial matter had bin found, because the Manor in Question was but a Manor in Reputation, and a Manor in Reputation cannot be demanded by the name of a Manor. Hill. 22 Jac. B. R. *Hems* and *Strands* Case. *Latch.* 61, 62.

17. In *Ejectione firmæ*, the Case was, A man had several Closes, some of Arrable, some of Pasture, and some of Meadow; and he who pretended right to them, entred into them all, and made a Lease. After which, some of the Defendants Servants came with his Carts into one Close. In this Case, the Court directed the Jury to find the Ejectment of the whole, although there was not any Actual entry proved into any of the other Closes: And it was said, That Ejectment of part of a Great Close, is the Ejectment out of the whole Close. Trin. 22 Jac. B. R. *Caly* and Sir *William Fishers* Case. *Latch.* 82.

Elegit and *Extent*.

1. NOte, it was the Opinion of all the Justices of the Common Pleas, That if upon a Writ of *Elegit*, or other Writ of Execution sued upon a Judgment, the Extenders extend the Land or goods too high, That now the Plaintiff hath no remedy by the Statutes of *Acton Burnell*, or *Mercatoribus*, or otherwise to pray, That the Extendors themselves may have the Lands *in Firme*, or that they take the goods, or paid the monies which were appriz'd for them, because those Statutes were penal Laws, and do not extend to other Writs of Execution, but only upon a Statute, Merchant, Staple, or Recognizance. Mich. 4 & 5 *Phil.* & *Mar.* Bendlowes 15.

2. An Extent was sued upon a Statute Merchant, and the Sheriff put the Conusee in possession of parcel of a house, and of the Lands, and suffered the Defendant to continue the possession of the rest of the house and Lands, who thereupon held the Conusee out. The Conusee, to the intent he might have a full possession of the whole, caused the Sheriff that he did not return the Writ of Extent; upon which it was entred upon the Roll, *Quod vicecomes nihil fecit nec misit breve*, whereupon issued an *alias Extendi facias* to the new Sheriff, who did return, That in the time of the old Sheriff, a Writ of Extent issued forth, and that the Sheriff had extended the Lands; wherefore he could not extend them upon the new Writ. It was moved by the Conusee, That although the Lands were extended by the first Writ, yet that not being returned, it was no Execution; this Return was made by a Devise of Councel: but the Court held it to be an insufficient Return, for that it appeareth upon Record, That no Execution was done. Mich. 10 Eliz. C. B. *Colfill* and *Hastings* Case. *Leon.* 2. Part, 13.

3. A. became bound in a Statute of 1020 l. to B. A. died, the Executors of B. sued Execution against A. An *Extendi facias* issued forth. And the Manor of D, and the Lands of A. were delivered to the Executor, but the Writ of *Liberate* was not returned: It was said, That the Execution was not good, because the *Liberate* was not returned: It was resolved, That there was a difference betwixt a *Li-*

a *Liberate*, and a *Capias ad ſatisfaciendum* and a *Fieri facias*, for that theſe Writs are Conditionall. *Ita quod habeas denarios*, &c. but contrary in the Writ of *Liberate* and *Habeas facias ſeiſinam*, for in ſuch Writs there is not any ſuch Clauſe; and therefore if in ſuch Writs, the Execution be not returned, yet it is good enough. Trin. 28 Eliz. B. R. *Peeuuldock* and *Newmans* Caſe. *Chron.* 2. Part, 49.

4. R. was endebted to the Queen in 200 m. An Extent iſſued out againſt him out of the Exchequer to levy the ſaid ſum to the Sheriff of S. It was found by Inquiſition, That R. 22 *June*, 22 *Eliz.* was poſſeſſed of a Leaſe for the Term *quorundam annorum, adhuc ebcurturorum*; and that the debts did begin 12 *Feb.* 17 *Eliz.* Exception was taken to this Inquiſition, becauſe the certainty of the Terme was not found, but generally *quorundam annorum*. It was ſaid to that, that ſuch preciſe form was not requiſite in the Caſe of an Office; as in Caſe of pleading, for alledging the certainty: But the Court was of Opinion, that the Inquiſition was void, for the incertainty and a new Commiſſion was awarded. Mich. 33 Eliz. Exchequer. *Kyſbeans* Caſe. *Lron.* 2 Part 121.

5. Note, It was reſolved, That the Sheriff by vertue of a *Fieri facias*, may ſell a Houſe of the Defendants, and in his Writing the true Commencement & Term of the Leaſe muſt be expreſſed, or elſe if he ſelleth all the Intereſt which the Defendant hath in the Term or Land, he needs not to make any mention in the Return, but generally, *Quod fieri fecit de bonis et catallis*. 2. Reſolved, That an Execution by *Elegit*, which ought to be by Inquiſition, If the Terme be miſtaken in the Inquiſition, the Sheriff cannot ſell the Terme; and if he make ſuch ſale, the ſame is void. Hill. 39 Eliz. B. R. *Paluey* and *Humphries* Caſe. *Cro.* 3. Part 584. See *Cook.* 4. part 74. ac.

6. In a Replevin the Avowry was, That J. S. ſeiſed of Lands for the life of *Sibyl* his Wife, the Reverſion in Fee to the Husband, that he and his Wife made a Leaſe for years, without Writing, reſerving 4 l. Rent. The Husband being endebted by Obligation, made his Wife his Executrix, againſt whom debt was brought by the name of *Iſabell*, and upon a *Fieri facias* a Deed was returned, and hereupon *Elegit* awarded, & the Sheriff returned that *Iſabel* had Rent 4 l. iſſuing out of the Land upon a Leaſe made by her & her Husband, & that he delivered the moyety of that Rent, and hereupon he avowed for the ſame; It was adjudged to be ill, becauſe the Leaſe for years was void being made by Husband and Wife without Deed as to the Wife. 2. That the Recovery againſt *Iſabel*, was void againſt *Sybil*. And 3. Becauſe the Sheriff delivering the Rent without the Land, it was but a Rent ſeck: and a bare Rent cannot be delivered at *Tenementum*: It was adjudged for the Plaintiff. Mich. 40 Eliz. B. R. *Wiſal* and *Heaths* Caſe. *Cro.* 3. p. 656.

7. Two perſons recovered ſeverally againſt one in Debt. He who had the firſt Judgement had firſt an *Elegit*, and had the moyety of the Land delivered in Execution; afterwards the other ſued an *Elegit*. The Sheriff prayed the advice of the Court what he ſhould do in this Caſe; It was the Opinion of the Court, that he ſhould deliver but the moyety of that moyety in Execution, which he had at the time of the Writ brought. See 19 E. 2. title Execution, that the entire moyety ſhall be delivered in Execution. *Idem* P. M. Tr. 38 Eliz. C. B. *Huit* and *Cogats* Caſe. *Cro.* 3. p. 483.

8. Action upon the Caſe, where the Defendant recovered in C. B. in debt, and the Plaintiff had brought a Writ of Error in B. R. and the Record was removed, That notwithſtanding the Defendant knowing the ſame, That he had taken forth a *Capias ad ſatisfaciendum* to the Sheriff of B. by reaſon whereof, the Plaintiff at D. in the County of D. was taken in Execution. The Defendant pleaded to Iſſue, and found againſt him. In ſtay of Judgment, It was ſaid, That the Action was not well, brought in *Middleſex*, becauſe the wrong did ariſe by the taking of him at D. in the County of D. 2. It was ſaid, The Action did not lie, becauſe it is not alledged that it was purchaſed in an undue manner by fraud between the Defendant and others, and without notice of the Court; for if it was agreed by the Court that it is not puniſhable. But the Court held, firſt, It was well brought in *Middleſex*. And 2. That the Action was well laid; For that it is alledged, That he maliciouſly intending to charge him, had purchaſed the Writ Tr. 34 Eliz. C. B. *Wilks* and *Stouds* Caſe. *Cro.* 3. Part 574.

9. A, is endebted to B, in a Recogn. of 1000 l. and to C in another Recogniſance of 1000 l. The Land of A is extended by B, at 40 l. *per Annum*, and delivered in Extent. The Recogniſance of C. came to the Queen by Outlawry; and upon proceſs of extent, it is found, That the Land is of 60 l. *per Annum*, more then the firſt extent; It was holden by the Court in this Caſe, That the Queen ſhould not have the ſurpluſage, for the firſt Creditor by the Extent, have an Intereſt in the Land which ſhall not be deveſted by the finding of ſurpluſage. *Mich.* 34 *Eliz.* B. R. The *Queen* and *Wilks* Caſe. *Cro.* 3. part 246.

10. In a Replevin, the Defendant avowed for a Rent-Charge, That the Plaintiffs Father was ſeiſed in Fee of the place where, and granted a Rent-Charge to J. S. younger Brother of the Plaintiff of 100 marks *per annum* in Fee. And that he granted

granted it in Fee to L. C. to which the Tenant attorned; and that L. C. was endebted to the Awarant by Judgment, and that two parts of the Rent were extended by a *Fieri facias*, and delivered to him in Execution for two parts of the Rent. The Plaintiff replyed, that L. C. was poſſeſſed of the whole Rent, The Queſtion was, Whether an Extent of two parts of the Rent was good: It was the Opinion of the whole Court, that it was; For although, that by the act of the party, the Tenant ſhall not be liable to two Diſtreſſes: yet by act of Law he may; and this act of the Sheriff is an act of Law; and his delivery of two parts was good. *Hill.* 41 *Eliz.* C. B. *Tatton* and *Shirts* Caſe. *Cro.* 3. part 742.

11. Conuſee of a Statute-Staple purchaſed part of the Lands, and the Plaintiff another part, and yet he cauſed the Plaintiffs Land to be extended and delivered in Execution: It was holden in this Caſe to be a good Cauſe for an *Audita Querela*: It was then moved to have a *Superſedeas* to ſtay the Execution; for although they were extended, yet they were not delivered by *Liberate's*. The Court doubted of it, becauſe it was upon a Statute Staple not returnable in this Court but in the Chancery: But the Prothonotories ſaid, an *Audita Querela* lies well in this Court, & that a *Superſedeas* ſhould be awarded. And ſo it was ſaid it was ſo adjudged in the Lord *Dudleys* Caſe; whereupon a *Superſedeas* was awarded; *Mich.* 37 *Eliz.* C. B. *Charnock* and Sir *Thomas Gerrards* Caſe. *Cro.* 3. p. 364.

12. A man had a *Scire facias* in *Chancery* upon a Recognizance taken there; and ſued forth an *Elegit* upon it, yet it was holden in that Caſe that this *Elegit* ſued forth upon it, the Plaintiff might waive that Execution, and have a newer Action of debt upon it. *Hill.* 40 *Eliz.* B. R. *Langworthy* Caſe. *Cro.* 3. p. 608.

13. *Audita Querela* was brought to avoid an Execution upon a Statute wherein was ſurmiſed, That the Conuſees Father was ſeiſed of certain Lands in Fee, and levied a Fine of them to the uſe of himſelf for life, and after part of them to the Plaintiff in tail, and of the reſidue to the Conuſee in Fee, and dyed; and becauſe the Conuſee afterwards ſued an Execution, he brought the *Audita Querela*. In this Caſe it was adjudged, that this purchaſe in this manner made was a ſufficient diſcharge of the Statute. *Mich.* 40 *Eliz.* C. B. *Hamſey* and *Harwoods* Caſe. *Cro.* 3. p. 756.

14. M. as Adminiſtrator of J. S. extended a Statute upon the Land of R. and before his acceptance, he prayed that the Land might be delivered to the Extendors: proceſs iſſued forth accordingly; and before the return of the Writ, the Court was moved, that the Extendors could not have the Land: becauſe after the Extent R. dyed, his Heire within age and in Ward to the King. So as the King is now in poſſeſſion, and the Land in another plight then it was at the time of the Extent; but the Court would not allow of the ſame, but ſaid, That the Extendors ought to ſue in the Court of Wards to be relieved concerning the ſame. *Mich.* 2 *Jac.* B. R. *Mallineux* and *Rigs* Caſe. *Yelverton* 55.

15. In Treſpaſs upon not guilty, a ſpecial Verdict was, That the Plaintiff was in under an *Elegit* by which the Land was extended. The Judgment being given *Craſtino Trinit.* 15. *Jac.* which was 20 *Junij*. The Defendant claymed by an Extent of a Statute as of the ſame Term before the Judgment: It was ſaid, That in this Caſe, it was adjudged, That the Plaintiff had the better right, becauſe that he claymed in under a Judgment, and all the Terme is but one day in Law. *Tr.* 1. *Car.* B. R. *Gerrard* and *Norris* Caſe. *Lutch.* 53.

16. A man had Lands delivered him in Execution upon *Elegit*, upon which he came and ſurmiſed, that the party had other Lands, and prayed a new Writ of *Elegit*. It was holden in that Caſe, That if he hath accepted of the firſt Lands upon the delivery of the Sheriff, he cannot afterwards have a new Extent; but if at the firſt day of the return of it, he waive it, he may then have a new Extent. *Mich.* 36 *Eliz.* B. R. *Hungate* and *Fryes* Caſe. *Cro.* 3 p. 310.

Emblements.

THe Opinion of the Court was demanded in this Caſe, viz. Tenant in Fee-ſimple ſowed the Lands, and before the Corn was ſevered, deviſed the Lands to A. for life, the remainder to B. for life, and dyed. A. dyed before the Emblements were ſevered, The Queſtion was, Whether the Executors of the Tenant for life, or he in the Remainder ſhould have the Emblements. *Clouh* Juſtice conceived that the Executor of the firſt Tenant for life ſhould have them as Chattels veſted in him, and ſaid, If Lands be ſowed, and then is deviſed to J. S. for life only, and before ſeverance, the Deviſee dyeth, that his Executors ſhould have the Corn; But the Opinion of the other Juſtices was, that he in the Remainder ſhould have them: For that by deviſe of the Land they paſſe with it, and when they paſſe by reaſon of the Land, and come not by the manurance of the firſt Tenant for life, they ſhall go with the Land, but if the firſt Tenant for life had granted them to another, then it had been otherwiſe, for that by the grant they are *quaſi* Chattels ſevered from the Land. Mich. 30 Eliz. B. R. *Cro.* 3. Part, 61.

2. A man seised of Lands *exposuit eos* to three men to sow by halfes, he to find the half of the Seed, and the other the other moyety, and to Manure the Lands, and he to have the half of the Corn when reaped, and the other the other moyety. A stranger entred and spoyled part of the Corn, and all of them brought and joyned in an Action of Trespass. It was holden in this Case. 1. That this was no Lease of the Land. 2. That they were Tenants in Common of the Emblements. But, 3. That the joyning of them all four in the Action of Trespass was not good. H. P. 30 Eliz. C. B. *Hare* and *Celeyes* Case. *Cro.* 3. Part, 143.

Endictment.

1. A Man was Endicted, for that he *vi et armis* had enclosed certain Lands in which J. S. and others had Common time out of mind. Exception was taken to it, because it concerned the Interest only of particular persons, and no common Nusance to the Queens people, and that parties grieved are to have their Action upon the Case: and for a private commodity, remedy shall not be by Endictment, as it was said it was adjudged in *Medlers* Case. 2. Because it was *vi et armis*, and a man cannot enclose his own ground *vi et armis*. 3. Because the *Teste* of the Endictment was at the Goal delivery in the County of N. before A. and B. and other Justices of the Peace of the Queen in the said County; for this cause only the Court conceived it was void; for at a Goal delivery, they have no power to take Endictments. The Court would advise of it. Hil. 30 Eliz. B. R. *Willoughbyes* Case. *Cro.* 3. Part, 99.

2. E. and others were Endicted upon the Statute of 8 H. 6. of Forcible Entry, for that the said E. and others *de S. in Com. prædict. apud S. prædict. in Com. prædict.* one Close being the Freehold of the Countess of W. with force and arms had entred, and her *expulerunt diffisivit*. Exception was taken to it, because it is not alledged in what County S. is in which the Lands are supposed to lye, and there are two Counties named, *scil. G.* and *Midd.* and if it be referred to that which was last named, it is uncertain, as it is most proper then it is to M. and an Indictment taken in the County of G. of Lands in M. is void. Wherefore it was holden to be insufficient. Trin. 32 Eliz. B.R. *Elsors* Case. *Cro.* 3. Part, 184.

3. A. was Endicted, for that he at such a day, and divers dayes before and after was a common Barretor, *et Pacta batur pacis*, but no place nor cause was shewed; Yet the Endictment was holden good by the Court, for that the place is not material, for it is every place, and the Tryall shall be *de Corpore Comitatus*. Mich. 33 El. B. R. *Powells* Case. *Cro.* 195.

4. A. was Endicted, for that he being Culpable of the Hundred of H. Arrested one for Burglary, and after at D. in the same County let him to escape. The Endictment was quashed, and held void, because no place was alledged where the Arrest was made; and if he should plead Not Guilty, the Visne was to come as well from the place where the Arrest was, as where the Escape was. Mich. 33 Eliz. B. R. *Bouches* Case. *Cro.* 3 Part, 200.

5. Divers were Endicted for entring G. Forrest, and hunting in a place there, called *Dunsden* Wood. The Endictment being traversed, the *Venire facies* was *de Vicineto de G.* It was in this Case holden, That where a thing is supposed to be done in a place which is a Village in the Forrest, the *Venire* shall be *de Vicineto* of the same Village, but if it doth not appear that it is a Village, then it shall be *de Vicineto* of the Forrest. Mich. 33 El. B. R. *Cro.* 3 Part, 200.

6. A. was Endicted upon the Statute of 5 Ed. cap. 4. for drawing his Dagger in the Church of B. against J. S. and doth not say to the intent to strike him. It was holden by the Court it was void in all, For being Endicted upon a Statute it is void as to an Offence at the Common Law; and then it shall not be good as for an Assault. Pasch. 33 Eliz. in B. R. *Pentallos* Case. *Cro.* 3. Part, 231.

7. L. was Endicted within the County of the City of *Norwich* for the Felonious stealing of a piece of Linnen Cloath. And amongst other things, the Endictment was, *Quod felonice furatus fuit quandam peciam Panni lineo cujusdam Johannis Nixon. prædicti Draper. ad valentiam &c.* and doth not say *de bonis Catallis cuiusdam Johannis Nixon.* Wherefore the Indictment was holden to be ill, for an Endictment ought to be certain to every intent without intendment to the contrary, but here it may be intended that this piece of Linnen was not the goods and Chattells of *Nixon*, but at the time of the taking of them, but by him lent out, or delivered, or pledged to another, and ought to have bin shewed *whose bona et catalla* they were, which the Court held to be a materiall exception: and restitution was awarded to the party of his goods seised for that cause. Mich. 33 El. B. R. *Longs* Case. *Cro.* 3. Part, 439.

8. J. F. was Endicted by the name of J. F. *Aldrington, alias dict.* J. F. of *Aldrington* Yeo-

Quod felonice & burglariter fregit domum &c. and because there wanted Yeoman in the first name, which is not till after in the *ide dictus*, the Indictment was holden ill, and also because he did not say *Nullatenus in it*, wherefore the party was adjudged: And it was said, That so were all the Precedents. Mich. 40 Eliz. B. R. *John Fuffis* Case. *Cro.* J. Part, 583.

9. One was Indicted upon the Statute of 5 Eliz. for Forgery, before A. and B. Justices of Peace, *ac certas ad diversas Felonias, &c. audiend. & terminand. assignat.* It was holden by the Court, That they had not any Power to take his Indictment; for the Statute, which appoints, That the Offences shall be enquired of before Justices of Assise, or Justices of Oyer and Terminer, intends those who have generall Commissions, and not those who have but a special Commission only, as the Justices of Peace. Mich. 40 Eliz. B.R. *Wilsons* Case. *Cro.* 3 Part, 601.

10. E. D. was Indicted upon the Statute of 13 Eliz. of Recusancy: Exception was taken to it, because the words, *viz. Non habens aliquam rationabilem Causam*, were omitted in the Indictment. But the Chief Justice said, That upon Conference with the rest of the Justices, It was Resolved, That those words need not to be put into the Indictment, but are to come on the other side. 2. Exception was, That the being of the Age of 16 years, refused to come to any Church, *Contra formam Statuti* 1 Eliz. *& in malum Exemplum, &c. & contra formam Statuti in hujusmodi Casu habiti & provis*; and the Statute of 1 Eliz. doth not speak of 16 years, but the same is mentioned in the Statute of 23 Eliz. *Fenner* was of Opinion, That the last *contra formam Statuti* should be referred to 23 Eliz. *viz.* That it should be referred to 1 Eliz. It was disputed. Trin. 32 Eliz. B.R. Eliz. *Downes* Case. Lon. 2 Part. 5.

11. W. S. was Indicted upon the Statute of 13 El. of Recusancy, by the Name of *William Scot* of *Scotswood* Gent. and Judgment for the Queen: He brought Error, and assigned for Error, That in the Indictment he is not named of any Parish, but generally of *Scotswood*, and within *Scotswood* there are divers Parishes; and the penalties accruing by the Statute ought to be applyed to the Relief of the Poor resident in the Parish where the Offence was committed, and therefore it ought to appear of what Parish the party Indicted is: But the Opinion of the Court was, That the Indictment was good enough; for all the penalty which accrues by the Statute first belongs to the Queen, and the Inhabitants of the Parish are to sue in the Exchequer for the third part of the Penalty, and further, That the Offence was committed within the Parish: Wherefore the Error was disallowed. Pasch. 28 Eliz. B.R. Scots Case. Lon. 2 Part, 167.

12. J. *Hooper*, alias *Bartholmew*, was Indicted upon the Statute of 8 H. 6. of Forcible Entry: Exception was taken to it, for default of Addition of the place; for the Addition here was after the *alias dictus*; and upon that the party was discharged. In that Case, It was holden by the Court, That *nuper* is a good Addition; and where the Husband and Wife are Indicted, and the Husband be Indicted of such a place, though the Wife have no Addition, it is good enough. Mich. 32 Eliz. B. R. *Hoopers* Case. *Lon.* 2 Part, 183.

13. A. was Indicted, for not repairing a Bridg in such a High-way, which A. is bound to repaire by reason of Land adjoyning: The Indictment was, That the Bridge was so ruinous. *Quod legis Domina Regina per eam transire non possunt*, and concluded, *ad nocumentum omnium*, &c. It was challenged, because it doth say, *Ad nocumentum omnium Subditorum*; for otherwise, it might be a private way, for which an Action upon the Case lay. But Resolved, That the Indictment was good enough; for the words are *Sic quod legis Domina Regina illac transire non possunt*, i. e. All the Leige People of the Queen; and then *ad nocumentum eorund.* amounts to as much as *Commune Nocumentum*. It was holden, That the Indictment was good. Mich. 32 Eliz. B. R. *Leonard*, 2 Part, 183.

14. *Hamper* was Indicted upon the Statute of 5 Eliz. of Perjury. The Record was, That he *falsa Deseripsit deposuit*; whereas the Statute is, Wilfully: And although in the perclose of the Indictment the Conclusion is, *Et sic commisit voluntarium Perjurium*: Yet it was the Opinion of the Court, That that did not help the matter; and therefore the party was discharged. Hill. 32 Eliz. B.R. *Hampers* Case. *Lon.* 2 Part, 211.

15. *Eden* was endicted upon the Statute of 8 H. of forcible Entry, for that he and divers others in the Endictment named, forcibly entred and disseised A. B. An Exception was taken to the Endictment, because the Statute is, If any Feoffment or discontinuance thereof be made, &c. And the Statute reciting the word [thereof] was enterchanged; And for this Cause, the Court held it to be ill, for there is not any such Statute, and the misrecital of a Statute is a Cause to avoid. It was then moved, That it was a good Endictment for the Ryot, although it was void upon the Statute of 8 Hen. 6. But the Court was of opinion, being void for the principal, it cannot be good for the Ryot. Mich. 42 Eliz. B. R. *Edens* Case. *Cro.* 3. p. 697.

16. *Plowman* was endicted, for that being a Constable he arrested J. S. for Felony, and voluntarily let him go at large. Exception was taken to it, because he doth not shew for what Felony, for the other may traverse it, nor doth shew when the Felony was committed; for it may be it was before the general Pardon, and then the permitting him to go at large is no Felony. The Indictment was held to be insufficient. *Pas.* 42 *Eliz.* B. R. *Plowmans* Case. *Cro.* 3. part. 752.

17. A. and B. were endicted *Eò quod felonicè duas centenas Casei cepit et asportaverit*; and because the word *Centenas* is uncertain what weight, whether Ounces, Pounds, or any other, and because it was also in the singular number *Cepit*; for both these Causes the Endictment was holden to be naught. *Pasc.* 42 *Eliz.* B. R. *Lanes* Case. *Cro.* 3. part 754.

18. A man was endicted, For that a Burglary was committed in the night by persons unknown, and J. S. gave notice to him being Constable, and required him to make *Hue and Cry*, and he refused: Exception was taken unto it, because it had been adjudged, That an Hundred shall not be charged with a Robbery committed in the night, because they are not bound to give attendance; no more ought a Constable to do, in the night: But it was holden that the Indictment was good, notwithstanding that; because it is the Constables duty upon notice given to him presently to pursue: and it was said, That in every Case, where a Statute prohibits any thing, and doth not limit a penalty, the party here offending may be endicted for a Contempt against the Statute; But for another Cause, viz. because he did not shew the place where the notice was given, the party was discharged. *Hill.* 31 *Eliz.* B. R. *Crowthers* Case. *Cro.* 3. part 654.

19. The Lord *Cromwel* was endicted upon the Statute of 8 H. 6. for forcible entry in an House and Lands of A. and expulsing and disseising the said A, but in the conclusion of the Endictment, it was, *Si dominus prædict. non fuit in possessione Dominæ Reginæ nec pro Domina Regina*, then the Jurours found *Billa vera*: It was the opinion of the whole Court, that this was no Indictment at all, for it is as a Condition precedent to the Verdict, and as if they had found, That if the Freehold be in A, then *Billa Vera*, which is all one, as if they had found nothing. The Lord *Cromwels* Case. *Mich.* 45 *Eliz.* B. R. *Yelverton* 15.

20. Sir *Ed. Winter* and divers others were endicted for erecting a Weare upon the River of Wye, by which the passing of the Subjects with Boats was stopped and hindered; the same was layed to be 43 *Eliz.* with a Continuance *ad Nocumentum* of the Subjects of the King that now is; and so the Jurours concluded, That the said Weare was erected and continued *contra pacem Regis nunc.* The Indictment was adjudged void, because it was not as well *Contra pacem nunc Reginæ*, as *Contra pacem Regis nunc*: for the beginning of the wrong was in the time of the Queen and that was an offence to the Crown at that time; for although the parties might be well endicted for the continuance of that wrong only, without alledging speciality *in facto*, where the wrong began; yet the scope of the Endictment is not to make the offences several, as they are in themselves: for although the Jury have concluded upon both, yet they have found the peace of the King only to be broken. *Tr.* 3 *Jac.* B. R. Sir *Edward Winters* Case. *Yelverton* 67.

21. An Endictment of Forcible Entry was quashed, because it is said, that they entred such Land or House *existens liberum tenementum* of such a one, and *did not say, tunc existens liberum tenementum.* 8 Hil. 20. Jac. B. R. *Latch* 109.

22. A. was endicted before a Justice of the Peace in the Country, because that he being of ill fame and dishonest Conversation, *fuit male vagans*, and further that such a day, &c. he frequented a Brothel-house. The Indictment was removed into the Kings Bench, and there A. pleaded Not guilty: and a Verdict was found for the King: It was prayed, that the Endictment might be quashed; because it appeared, that the said House was out of the Liberty of the Justice; and the latter part of the Indictment is as if it was only for Night-walking, and Night-walking is not a Crime; for a man may have an occasion to walk in the Night. *Dodridge*, Justice said, That the Indictment was good for that part, because it is said, that A. being of ill fame, &c. *fuit male vagans*, and that shall be intended *communiter vagans*: and by the Common Law every one might arrest a Night-walker, although he was not a common Night-walker. The Court was of that Opinion wherefore A. was fined 40 s. Tr. 2. Car. B. R. *Willmots* Case. *Latch.* 173.

23. A. was endicted. *Quod apud K. cum quodam muro cælisi obstipavit regiam viam ducentem Londonam* ad K. And the Indictment was holden to be insufficient, because the stopping is alledged in K. and the way is alledged to be from London to K. so as K. is excluded. And by another Indictment he was endicted, and the stopping alledged *in alta via regia* in K. but did not alledge from what Town to what Town, nor any abuttals; it was agreed, if it was for the stopping of another Common way, it ought to be so alledged; contrary where it is a High way. Tr. 2 *Car.* B. R. *Hoskyns* Case. *Latch.* 183.

24. A man was endicted because he was a Common Barretor, and stirred up divers Suits be-

tract his Neighbours: and it was quashed, because no place was shewed where he was a Barrister, as stated up the Statute. Hil. 2 Car. B. R. *Mans* Case. Latch. 194. See Part 3. before, *contra*.

25. A man was inclined for setting into the moyety of a Manner, and could not say *mens satis*; but holden good, for it is sufficient, *si extra tenuit mensalis*. It was holden by the Court, that the Inducement, that he entred into the Moyety of a Manner was good; It was said, there was difference between *divided* and *Moyety*, and *Medietas* Familiæ, is of a thing before division, as between Tenants in Common and Joynt-Tenants; but *Medietas*, is the half-part and separate; and one partition, each part is of a Manner. And yet it may be alledged in such Case, that the Entry was in the Moyety of a Manner, because that which is now a Manner, was but the Moyety of a Manner. Hill. 2 Car. B. R. *Beverlys* Case. Latch. 224.

Enfant.

AN Enfant sued by his Attorney, and recovered, whereas he ought to have sued by his Guardian: It was said, because it was for his Benefit, and no prejudice in appearance by Attorney, that it should not be Error. But the Court upon advise of it, Resolved, It was Error; and therefore upon Error brought upon the Recovery, the Judgment was Reversed. Mich. 33 Eliz. B. R. *Bartholomew and Leighton* Case. Cro. 3. Part, 424. But if an Enfant be Executor, there he may sue by Attorney, and not by Guardian, because he sueth in *autre droit*. Trin. 38 Eliz. B. R. *Bade* and *Starkeys* Case, Cro. 3. Part, 141. See Trin. 39 Eliz. B. R. *Stallenough* and *Knot's* Case. Cro. 569. acc.

2. In Covenant, The Plaintiff declared, That the Defendant by Indenture bound himself Apprentice to the Plaintiff for seven years, and had Covenanted, That he would not depart within the time, and shewed, that he departed within the term. The Defendant pleaded, That he was within age at the time: The Plaintiff Replyed, That the Custom of *London* is, That an Enfant above the age of twelve years may bind himself to be an Apprentice, &c. It was the Opinion of the Justices, That, notwithstanding this Custom, a Collateral Covenant should not bind an Enfant. Hill. 41 Eliz. B. R. *Walker* and *Nicholsons* Case, Cro. 3. Part, 652.

3. Debt upon an Obligation made to the Testatrix, the Defendant pleaded a Release made by one of the Plaintiffs: It was Replyed, That the Release was made without any Consideration, and that he who released, was within age at the time of the Release made. It was the Opinion of the Court, That it was a void Release, being by an Enfant without Consideration. Pasch. 41 Eliz. C. B. *Kent* and *Bathurst* Case. Cro. 3. Part, 671.

4. The Case was, An Enfant being bound in an Obligation for the payment of 17 l. at his full age, in consideration that the Obligee would stay the Suit which he had against him by Original, and cause him thereupon not to be Arrested, that he would pay the 17 l. at a certain day. It being found for the Plaintiff, it was the Opinion of the Court, That the bond not being sufficient to bind him, there is not any Consideration to make the Assumpsit good. Mich. 41 Eliz. B. R. *Manning* and *Kings* Case. Cro. 3. Part, 700.

5. Error brought, for that judgment was given by default against the Defendant being an Enfant; Issue was taken, if he was of full age; It was moved, Whether the Tryal should be in N. where the Land was, or in *Middlesex* where the Action was brought: It was the Opinion of the Court, That the Tryall should be where the Land lay; and so it was said, It was adjudged in *Throgmortons* Case. Pasch. 43 Eliz. B. R. *Green* and *Rose's* Case. Cro. 3. Part, 818.

6. In Action upon the Case, The Case was, The Plaintiff had payed certain money for the necessary Meat and Drink of the Defendant, being an Enfant, and took an Obligation in double the sum for the payment of it; It it were good or voidable, was the Question. It was the Opinion of the Court, That it was void; but if he had taken an Obligation of the very sum which he had layed out for his necessary maintainance, it had been otherwise. Mich. 45 Eliz. B. R. *Agliff* and *Archdale's* Case. Cro. 3. Part, 92.

7. R. Enfant, entred a Recognizance to W. of 300 l. and within age brought *Audita Querela* in C.B. and upon inspection was adjudged within age, and a *Scire facias* awarded against W; and upon one *Nihil* only returned, the Judgment was, That the Recognizance should be cancelled. Thereupon W. brought Error in B. R. and Assigned Error, that there ought to be either two *Nihils* returned, or a *Scire facias*; for two *Nihils* amount to Garnishment, and without Garnishment the Recognizance ought not to be cancelled, and for that cause the Judgment was Reversed. Now R. of full age brought a new *Audita Querela* in B. R. containing all the matter; and shewed, that the first Judgment was Reversed only for the Error

in the proceedings, and not in the principal matter: It was the Opinion of the Juſtices, That the *Audita Querela* did not lye, becauſe the reverſall of the Judgment is general, and not for any particular cauſe; and becauſe the Inſpection is not of any forte but in the ſame Court where the Inſpection was, and ſhould not conclude the Judges of this Court; but that they ſhould have Re-inſpection, which now the Plaintiff being of full age they cannot have. Paſch. 4 Jac. B. R. *Randall* and *Wal s* Caſe. *Yelv.* 88.

8. M. was Bail for J. S. in an Action brought by T, and was within age, Judgment paſſed againſt J. S, who did not render his Body upon two *Scire facias* returned againſt M. Judgment was given againſt him, It was moved to have an *Audita Querela* for the Bail, becauſe he was yet within age, for otherwiſe great miſchief would be to M, for perhaps there was no Error in the Judgment; and upon the *Scire facias*, the Bail could not plead his Enfaney, but the Error of the Enfancy yet remains. It was the Opinion of the Court, *De bene eſſe*, to allow the *Audita Querela*; for that they ſaid, To deny it, if it did lye by Law, were injuſtice, and it was allowed. Trin. 7 Jac. B. R. *Markham* and *Turners* Caſe. *Yelverton* 155.

9. Note, upon an Evidence in an *Ejectione Firmæ* It was agreed by the Court, That a grant of a Copyhold by an Enfant was good; for that the Copyholder is in by the Cuſtom, and ſhall bind the Enfant, as a preſentation by an Enfant to a Church is good, Paſch. 43 Eliz. B. R. *Reench* and *Martins* Caſe, *Noy* 41.

10. In an Action upon the Caſe, The Plaintiff declared, That the Defendant put Cloth to the Plaintiff, being a Taylor, to make him a Suit of Cloaths; and promiſed to pay him as much as he deſerved for the making of it, and for the Neceſſaries thereof. The Defendant pleaded, That he was an Enfant at the time of the promiſe: It was adjudged for the Plaintiff, and there needed not any averrment that it was neceſſary Apparrell, or convenient for the Enfant; for the promiſe extends only to the making of it, and petty neceſſaries. But it was holden, That an Obligation with a penalty for the ſame was void. See *Delavall* and *Clares* Caſe. *Noy* 85.

11. An Enfant by his Gardian brought an Action upon the Caſe for Words; The words were, [I Charge thee with Felony.] Upon Not guilty, being found for the Plaintiff: It was moved in ſtay of Judgment, becauſe it is not averred, that the Plaintiff is of ſuch an age, that he might commit Felony. But the Court diſſallowed of the Exception; and if in truth he be not of ſuch an age, the ſame ought to be pleaded by the Defendant, and not averred by the Plaintiff for avoyding of his own Action. See *Bayly* and *Childs* Caſe, *Noy* 124. And ſee that an Action upon the Caſe lyeth againſt an Enfant, who is of the Age of 17 years, for that there *Militia ſuppkt ætatem*. See *Chriſtopher Hoſmans* and *Griſſells* Caſe. *Noy* 129.

12. In an Action againſt the Defendant; The Plaintiff declared, upon an Aſſumpſit, upon an *Inſimul Computaſſent*: The Defendant pleaded, Enfancy; The Plaintiff Replyed, That it was for Neceſſaries: It was ſaid, That an Action upon the Caſe did not lye, becauſe in it Damages are to be recovered, but an Action of Debt; but that Exception was diſſallowed. Then it was moved, That the Action is grounded upon an Accompt, in which the Enfant might be miſtaken, and for that cauſe the Action did not lye; & ſo it was ſaid, it was adjudged, 19 Jac. in B. R. in *Stirrell* and *Homedays* Caſe: The Caſe was not Reſolved. Trin. 2 Car. B. R. *Wood* and *Withericks* Caſe. *Latch.* 189.

13. The Caſe was, An Enfant Copyholder in Fee, without Licence of the Lord, made a Leaſe for years rendring Rent, and at his full age accepted the Rent, and afterwards put out his Leſſee. It was ſaid, He might well do it, becauſe the Leaſe ſhould be a Diſſeiſin to the Lord, and a forfeiture of his Eſtate. It was agreed in this Caſe, That the Leaſe made by the Enfant was no Diſſeiſin to the Lord; and being argued again at another Day, It was adjudged, That the Leaſe was not void, but ſtood good againſt the Enfant; and Judgment was given againſt him. Trin. 2 Car. B. R. *Aſhfield* and *Aſhfields* Caſe. *Latch.* 199.

14. Difference being between the Father and his Daughter of the one part, and K. on the other part; They ſubmitted themſelves to an Arbitrament of all Quarrells, &c. the Daughter being within Age: The Daughter and Father was bound to K, that he and his Daughter would perform the Award. The Arbitrators Award, That K. ſhould pay to the Daughter ſo much, who ſhould releaſe all Actions to him; and that the Father and Daughter at another Day ſhould releaſe all Actions to K: K. did not pay the money at the Day. The Daughter brought Debt upon the Bond; In this Caſe, It was agreed by all the Juſtices, That if the Submiſſion be void, the Arbitrament is void; and then the Obligation is void, becauſe the Obligation is to perform a void Award. But, 2. It was holden by them, That the Submiſſion of the Enfant was good, becauſe the Submiſſion is for the benefit of the Enfant; and if it ſhould not be good, an Enfant ſhould be in worſe caſe then a man of full age, who might ſave Charges of Suit by an Arbitrament, whereas an

an Infant should be bound to ſtand to the hazard of the Law. 3. It was holden in this Caſe, That the Arbitrament here to the Daughter only was not good, that K. ſhould pay ſo much yearly to the Daughter. Hill. 2 Car. B. R. *Stout* and *Knights* Caſe. *Latch.* 207. See Trin. 17 Car. B. R. *Yates* and *Radſtons* Caſe. *Marſh.* 111. and 141. See *Lib.* 2. *Arbitrament*, Fol. 215. Caſe 5. which ſeems contrary to this Caſe.

Entry, and *Entry Congeable*.

IN Treſpaſs, The Caſe was, A Diſſeiſor of Lands lying in three Towns, levyed a Fine, with Proclamations of the Lands lying in one of the ſaid Towns to another in Fee; and within five years next following the Diſſeiſee entred into the Lands in the two other Towns, being only in the poſſeſſion of the Leſſee of the Diſſeiſor, in the name of all the Lands in the three Towns. It was adjudged in this Caſe, That this Entry did not gain to him the Land in the third Town, whereof the Fine was levyed; without an actual Entry into the ſame, becauſe the Conuſee was in by Title. Mich. 15 Eliz. B. R. *Brook* and *Maſons* Caſe. *Bendloes* 14.

2. Note; It was the Opinion of all the Juſtices of the Common Pleas, That if Tenant in tail hath iſſue two Sons, and diſcontinueth the tail to the younger Son in Fee, and after dyeth; and the younger Son after dyeth, his Wife with Child with a Son; and after the eldeſt Son entreth as Heir, as he may, and after the Son is born; That in this Caſe the eldeſt Son is remitted to the ſame Land by his Entry, becauſe his Entry was Congeable; and there was none againſt whom at the time of his Entry he could have brought his *Formedon*. Hill. 1 and 2 Phil. and Mary. *Bendloes* 22.

3. If there be Father and three Sons, and Land is given to the Father for life, the Remainder to the middlemoſt Son in tail, the Remainder to the eldeſt and youngeſt Son in tail, the Remainder to the middle Son in Fee; and afterwards the middle Son doth releaſe to the Father with warranty to the Father his Heirs and Aſſignes, againſt him and his Heirs for ever, and afterwards the Father deviſeth the Lands to a Stranger in tail, and dyeth, the middle Son dies without Iſſue, the youngeſt Son dyeth without Iſſue in the life of the Deviſee; and then the eldeſt Son entreth upon the Deviſee: It was the Opinion of the Court in this Caſe, That the Entry was Congeable for the whole during his life; for that the warranty was but Collateral to him, becauſe his Remainder was not diſcontinued. Trin. 16 Eliz. *Bendloes* 28.

4. Note, It was agreed by the Juſtices, That if there be Leſſee for years rendring rent, and for not payment, a Re-entry; and he payeth the Rent before the day to the Leſſor, and hath his Acquittance, and at the day when the Rent is due, the Leſſor demands it, and there is none to pay it, the Condition is broken, for the payment before the day is not the payment of the Rent, but of a ſum in groſs. 2. Where a Rent is to be paid at *Mich.* between the hours of one and five in the Afternoon, and a Re-entry, &c. the Leſſor commeth at two of the Clock, and continueth demanding till five, and the Rent is not paid, he may re-enter although he was not there at one of the Clock, when perhaps the Leſſee was there and tendred it. Paſc. 25 Eliz. C. B. The Lord *Cromwell* and *Andrewes* Caſe. *Cro.* 3. Part, 15.

5. The King grants Lands, reſerving a Fee-Farm Rent, with Condition of re-entry for non-payment of it: and afterwards the King Grants the Rent to J. S. in Fee, then the Rent is behind. It was holden in this Caſe, That the King ſhall not now re-enter for not payment of the Rent, and ſo defeat his own Grant. Mich. 29 Eliz. B. R. *Cranmers* Caſe. *Cro.* 3. Part, 69.

6. A Leaſe is made of Lands for years, from the Feaſt of S. *Michael*, rendring Rent; the Leſſee entreth upon *Mich.* day, which is before his Title begins. It was holden, That in this Caſe he is a Diſſeiſor; and yet an Action of debt lyeth againſt him for the rent by reaſon of the privity of contract. Mich. 31 Eliz. B. R. *Alexander* and *Dyers* Caſe. *Cro.* 3. Part, 196.

7. In *Ejectione firmæ*, the Caſe was; A. Tenant for life, the Remainder to B. her Son in tail, they two let the Land by Indenture to E. B. for life, the Remainder to W. B. for life, rendring 10 l. Rent. A. dyeth, B. who was her Son in Remainder accepts the Rent of E. B. and dyeth. F. the Iſſue of B. accepts the rent of the ſaid E. B. and after enters and makes a Feoffment, and levyeth a Fine to J. S. E. B. re-enters, and dyeth. W. B. as in his Remainder, enters. The Queſtion was, If J. S. the Purchaſor might avoid this Leaſe in Remainder. It was adjudged in this Caſe, That the Leaſe and Eſtate in Remainder was good, and not to be avoided by the Purchaſor J. S. Mich. 34 Eliz. B. R. *Jeffery* and *Coytes* Caſe. *Cro.* 3. Part, 251.

8. The Caſe was, Leſſee for life makes a Leaſe for years rendring rent, and after ſurrenders to the Leſſor upon Condition; the Leſſee for years takes a new

a new Leaſe for years of the Leſſor; the Leſſee for life performeth the Condition, and puts out the Leſſee for years, who re enters; and the Leſſee for life brings debt for the firſt rent reſerved. Adjudged, It doth not lye, for that the Leaſe out of which it was reſerved, is gone and determined. Mic. 34 El. B. R. *Brewſter* and Sir *Tho. Parrats* Caſe. *Cro.* 3. Part, 264.

9. A. made a Leaſe of Lands to B. for life, the Remainder to C. for life. Provided, That if the Leſſor had a Son who ſhould live to the age of five years, That the Remainder limited to C. ſhould ceaſe, and the Land remain to the Son. The Leſſor had iſſue a Son who attained to the age of five years. It was adjudged in this Caſe, That the Remainder depending upon a Condition precedent, was void, and that the Eſtate of Freehold cannot ceaſe without an entry. Paſc. 38 Eliz. C. B. *Cogan* and *Coggins* Caſe. *Cro.* 3. Part, 360.

10. Treſpaſs for entring into his houſe and taking of his goods: the Defendant pleaded as to the Goods, Not Guilty: To the reſt, That the Plaintiff was endebted to him in ſuch a ſum, and that by Licenſe of the Plaintiffs ſervant, the door being open, he entred to demand his Debt. It was the Opinion of the Court, That a man cannot enter into a mans houſe by colour to demand a debt, unleſs it be averred that the debtor was in the houſe, which was not averred in this Caſe. But if it had bin averred that the Maſter was then in the houſe who was the Debtor, then ſuch plea had bin good. Trin. 43 Eliz. B. R. *Holdrinſhaw* and *Raggs* Caſe. *Cro.* 3. Part, 876, 877.

11. A. lett Lands for years rendring Rent upon Condition, That the Leſſee ſhould not parcell out the Land, nor any part thereof from the houſe, &c. The Leſſee Granted all his Term in the houſe, and part of the Land; and afterwards, he leaſed the part of the Land which was reſerved for half a year; the Rent was arrear, and he demands it, after which he accepted of a Rent, due at another day after the Title of entry, and afterwards he re-entred; and in this Caſe it was adjudged, That his Entry was lawful. See *March* and *Curties* Caſe. *Noy* 7.

12. J. S. had Iſſue four younger Sons, *viz.* B. C. D. and E. and deviſed to each of them 20 l. a piece to be paid them when they ſhall ſeverally come to the age of 21 years: And deviſed his Lands to A. his eldeſt Son, and his Heirs, upon Condition, That if he refuſe to pay theſe Legacies, that then the Land ſhould remain to the younger Sons, &c. A. payes the Legacies to B. and C. and refuſed to pay them to D. and E. D. enters into the Land in his own right, and the right of E. upon the Heir of A. who is in by diſcent. It was in this Caſe Reſolved, 1. That the younger ſons may enter upon the refuſal, &c. by way of limitation. 2. That although he paid the Legacies to two of the Sons, yet their entry was lawful. 3. That the Diſcent doth not take away their entry. And 4. That by the entry of D. in his right, and the right of E. the Eſtate is veſted in all the four ſons, becauſe they take joyntly, and the Eſtate of the Heir deveſts from him in all. Hill. 41 Eliz. B. R. *Ayneſworth* and *Battyes* Caſe. *Noy* 51.

13. In an *Ejectione firme* where three ſeveral parcells of Lands lay in one County; It appeared upon Evidence to the Jury, That the Lady *Argoll* having right (as ſhe ſuppoſed), lett all the parcells to the Plaintiff, who brought the Action, and the Lands were in the hands of three ſeveral Leſſees of the Defendant: and that the Lady *Argoll* made a Deed of Leaſe, and delivered the ſame as an Eſcrow to J. S. and made a Letter of Attorney to J. S. to enter in her name into the whole, and to deliver the Deed to her Leſſees as her Deed. One Witneſs proved, That ſhe entred upon one Leſſee in the name of the whole Land. It was conceived, That ſhe might well do it, becauſe if the Freehold be in one, although that there be ſeveral Leſſees for years, the entry into one Acre in the name of the whole, is good enough. It was ſaid, ſhe ought to prove the entry of the Leſſees into all the Acres. It was proved fully, That the Entry of the Attorney, and of the Leſſees was all one. Hill. 22 Jac. B. R. The Lady *Argoll* and *Cherys* Caſe. *Latch.* 71.

Entendment.

1. AVowry for Rent; the Avowant made Title to it as Couſin and Heir of R. C. that is to ſay, Son of A. daughter of R. C. and for Rent Arrear for 16 years after the death of A. he avowed: And becauſe he made title immediately as heir of R. C. and after avowed for Rent after the death of A. which cannot be (for it ſhall be intended that ſhe dyed in the life of R. C. and Iſſue being joyned upon other matter) the parties were awarded to re-plead. Hill. 26 Eliz. C. B. *Chamberlaines* Caſe. *Croke*, 3. Part, 32.

2. Debt upon Recogn. taken in *London*. And declared, That the Mayor there had uſed to take Recogniſances by Cuſtom of all except Infants and Feme Coverts upon any day, except Sundayes and ſpecial Holidayes; and that this Recogniſance was taken before the Mayor there: Exception was

was taken, that it is not averred, that the Defendant was not an Enfant, or that the day upon which it was taken was none of the dayes excepted: But the Exception was disallowed; for it shall be intended, if the contrary be not shewed by the Defendant: and so is the Law taken at this day upon the Statute of 1 R. 3. to plead a Feoffment by *Cestuy que. use.* Tr. 32 Eliz. B. R. *Chamberlain* and *Tharps* Case. *Cro.* 13. Part, 187.

3. *Assumpsit.* For that in Consideration he had sold and delivered 1000 Couple of Newland Fish *ad usum proprium* of the Defendant; and had shipped the said Fish, and agreed to transport them from *Bristoll* to S^t. *Lucas* in *Spain*, and to re-transport from hence the value of the Fish to *London* or *Bristoll*, *Secundum usum mercatorum*, the Defend. promised to pay to him 120 l. upon the arriving of the Ship *in portum* S^t. *Luc.* and alledged, That he rendred them *ad portum* S^t. *Lucar*, and had re-transported thence goods to the value of the Fish at *London*, *secundum usum Mercatorum*. Being found for the Plaintiff, it was moved, That here was no Consideration, because he sheweth, that he presently delivered them to the use of the Defendant, but sheweth not to whom; so as the property was altered by the sale. 2. Because he saith, he agreed to transport, but sheweth not with whom; and it may be with a stranger which doth not binde the Defendant. 3. Because he sheweth, he brought goods of that value to *London*, but sheweth not to whom the property of the goods doth belong, so as they might be the goods of strangers. The Court was against all the Exceptions; For it shall be intended, that they were sold and delivered to the Defendant; and that he re-transported the goods of the Defendant, for it is *secundum usum Mercatorum*, which implyeth both; and also it shall be intended, that he agreeth with the Defendant himself; and if it was with a stranger to his use, it is all one. It was adjudged for the Plaintiff. *Pasc.* 33 Eliz. B. R. *Hopkins* and *Stapes* Case. *Co.* 3. Part, 229.

4. Avowry for Amercement in a Leet. For that King E. 6. granted the Hundred of H. in which was a Leet, to G. *Owen* in Fee, who dyed seised, and that it discended to J. O. his Cosen and Heir, who by Deed enrolled granted to F. in Fee; and brought it by mean-conveyance to the Lord *Norris*: and that the Defendant was a Resient within the Hundred, and appeared not at the Leet holden 23 *April.* 32 Eliz. for which he was amerced; for which Amercement he avowed. It was demurred upon the Avowry, for many Causes: one was this; because he pleaded that G. *Owen* dyed, and that it descended to J. O. as his Cosen and Heir; but doth not shew that G. O. dyed without Issue. But, that Exception was disallowed by the Court, for that it shall clearly be intended, that he dyed without Issue. But for other Causes, the Avowry was holden to be insufficient; and Judgment was given for the Plaintiff. Mich. 34 Eliz. B. R. *Porter* and *Grays* Case. *Cro.* 3. Part, 245.

5. Error of a Judgment in B. R. The Error, That the Plaintiff in the Action declared, That whereas the Defendant was endebted to him in 10 l. He did promise, that if the Plaintiff would forbear him one week, that he would pay it, and alledged *in facto*, that he did forbear him one week, but saith not [for one week following:] The Court said, It was no Error; for that it cannot be otherwise intended, but that he did forbear him one week following. Hill. 34 Eliz. B. R. *Tracy* and *Browns* Case. *Cro.* 3. p. 272.

6. *Assumpsit.* The Declaration was in this manner. *Robertus* Law: *Queritur de* Thomas Sanders, *in Custodia Mariscalli*, &c. *pro eo debet. in Consideratione*, that *Idem* the Plaintiff should take to Wife the Daughter of the said T. *super se Assumpsit et eidem præfato promisit*, to pay to him 100 l. The Defendant pleaded *Non Assumpsit*, and found for the Plaintiff; In stay of Judgment it was moved, that the Declaration was not good, because it was not alledged, That the Defendant assumed; It was said at Barre, that it was necessarily intended, because it is *Queritur versus*, &c. and he is there named; And in Consideration the Plaintiff would marry his Daughter, *super se Assumpsit*, It is necessarily intended, That the Defendant did assume; And the Jury have found that he did assume it. But it was the Opinion of the Court, that the Declaration was not good. For a Declaration ought to contain the substance, otherwise it is not good; and no matter of substance shall be implyed by intendment, nor shall the Verdict help it. It was adjudged against the Plaintiff. Hill. 45 Eliz. B. R. Law and *Sanders* Case. *Cro.* 3. Part, 913.

Error.

Error.

1. ASsise of *Novel Disseisin* was brought against J.S. and three others. The Tenants pleaded *Nul Tenant d'l Franktenement nosme en le breve*, and further, &c. Upon which they were at Issue. It was found by Verdict, That the four were Joynt-Tenants of the Freehold, &c. and that they all four were Disseisors. Upon this Verdict, the Justices of the Assise adjourned the Assise in C. B. and there one of the four who were Joynt-Tenants, said that one of them who was Joynt-Tenant with him, was dead since the Verdict. It was the Opinion of the Court, That it was no plea, but that matter would help him in a Writ of Error brought if Judgment were given, for that now, by his death, the Writ is abated. Pasc. 2 & 3 Ma. *Grenfield* and *Stredies* Case. *Bendlowes* 2.

2. F. recovered against D. as Administrator of T. the Defendant put in Bail, and after Judgment was given against the Defendant in this manner, *scil. Ideo videtur Justiciariis quod querens recuperet debitum suum versus, &c.* And thereupon a *Scire facias* was sued against the Bail, and a good and lawfull Judgment given against them. They brought a Writ of Error to reverse the Judgment against them, and assigned for Error, because Judgment was entred against them before a good and lawfull Judgment was given against the Defendant himself. The Court was of Opinion, That the Judgment given against the Bail ought to be reversed, and that the other Judgment stood, neither affirmed, nor dis-affirmed, but the Bail should not cause the said Judgment for their discharge to be entred. Mich. 33 Eliz. B.R. *Thacker* and *Damports* Case. *Leon.* 2. Part, 1.

3. A Writ of Partition was awarded. The Court was informed, That at the time of the Partition made, the Sheriff was not in person upon the Lands. It was the Opinion of the Justices, That in all Cases where the words of the Writ are, That the Sheriff shall go in his own person, as in an *Accedas ad Curiam*, Waste, Rediffeisin, if Exception be taken before the Retorn of the Writ, that the Sheriff was not there in person, the same may be examined by the Court. But if the Sheriff in such Writs retorneth, and the Writ is filed, then the Court cannot examine it, for the Retorn is good, and the party cannot aver against it, nor can he have a Writ of Error upon it. Mic. 25 El. C. B. *Clugs* Case. *Cro.* 3. Part, 9.

4. In Action upon the Case upon *Assumpsit*, it was found by *Nisi Prius* for the Plaintiff; and afterwards before the day in Bank, one of the Defendants dyed; and after Judgment given, the other Defendant brought a Writ of Error in the same Court where the Judgment was given, and assigned this Error in fact, *scil.* the death of one of the Defendants. It was said by the Court, This is not like the Case of an Action of Trespass, for every Trespass done by many, is several to each of them, but every *Assumpsit* is joynt and not several. Then it was moved, If the Court could reverse their own Judgment. Quære Mich. 29 Eliz. B. R. *Megas* and *Davies* Case, *Leon.* 2. Part, 54.

5. Note in the Exchequer Chamber before the Lord Chancellor, the two Chief Justices, and the Chief Baron, A Writ of Error was cast in upon a Judgment given in the Court of Exchequer. It was agreed in that Case, *Quod propter absentiam Domini Thesaurarii Angliæ*, That they ought not, nor could receive the Writ; and it was said, That the Statute of 31 Eliz. did not help the matter, for that extends but to Discontinuances, which before the Statute many times happened for the not coming of the Chancellor, or Treasurer; and not to give Conusans in a Writ of Error in the absence of the Treasurer. Mich. 32 Eliz. *Exchequer Chamber. Leon.* 2. Part, 59.

6. The Case was, Lessee for 99 years, by Will devised his Lands in these words, *scil.* I Devise my Lease to my Wife during her life, and after her death, I Will that it go to her Children unpreferred, and made his Wife his Executrix, and dyed, the Wife entred, and afterwards she entermarried with J. S. and afterwards 40 l. debt was recovered against J. S. and upon a *Fieri facias* the said Term was sold by the Sheriff. Afterwards the Judgment was reversed by Error; and after, the Wife Executrix dyed, having Issue a daughter unpreferred. It was in this Case upon the Writ of Error, and the Judgment, moved, That the sale of the Term might be avoided, and the party restored to what he lost. But it was Resolved, That notwithstanding the reversal of the Judgment, yet the sale of the Term by the Sheriff should stand, because the Sheriff had a lawful Authority to sell; and therefore the same being but a collateral act to the Judgment, should not be avoided. Mich. 26 Eliz. B. R. *Anmer* and *Luddingtons* Case. *Leon.* 2. Part, 92.

7. Note, If a Record be removed out of the Common Pleas into the Kings Bench by a Writ of Error, and the Plaintiff will not assign Errors; then a *Scire facias* shall issue forth *Quare Executionem habere non debet.* And upon summons, and two

two *Nihils* returned, the Plaintiff ſhall have Execution; yet the Plaintiff may aſſign Error. And to ſuch a *Superſedeas* Exception was taken, becauſe the Writ was *coram nobis apud Weſtm.* whereas it ſhould be *ubicunque fuerimus in Anglia*: And for that cauſe a *Superſedeas* was granted. In this Caſe it was holden, That although a Writ of Error doth not lye here upon a Judgment given in *London*; Yet upon a Judgment given at *Newgate*, which is upon a Commiſſion in their Seſſions, Error lyeth here. Paſc. 32 Eliz. B. R. *Leon.* 2. Part, 107.

8. Error brought upon a Judgment in a Writ of Partition. The Error aſſigned was, That the Writ of Partition was not ſufficient, for it is there ſet forth, That the Plaintiffs *inſimul et pro indiviſo tenent cum defendente, &c.* and do not ſhew, Of what Eſtate, or of whoſe Inheritance. It was the Opinion of the Court, That in ſuch a Writ it is not neceſſary to ſhew the Eſtate, but that Tenants in Common ought to ſhew it in their Court. The Judgment was affirmed. Hill. 30 Eliz. B. R. *Yates* Caſe. *Leon.* 2. Part, 118.

9. A. and B. recovered in a Writ of Account againſt R: R. brought a Writ of Error, and aſſigned for Error, That whereas the ſaid Writ of Account was brought againſt the Defendant as Receiver of moneyes, for to render Account *quando ad hoc requiſitus fuerit*, the Writ ought to have bin more ſpecial. And 2. For that the Jury had aſſeſſed damages which ought not to be given in an Action upon Account. It was the Opinion of the Court, That the Writ in the generality was good. And the Court was further of Opinion, That damages ſhould be given in an Account. See Book *Entries*, fol. 22. Hill. 30 Eliz. B. R. *Collet* and *Robſons* Caſe. *Leon.* 2. Part, 118.

10. Error of a Judgment in Treſpaſs of Aſſault and Battery, becauſe the Judgment was *Quod ſit in miſericordia*; whereas it ought to be *Quod Capiatur*. It was ſaid it was but the default of the Clerk, and not to be aſſigned for Error; but the Opinion of the Court was, That it was Error, and the Judgment was reverſed. Hill. 30 Eliz. B. R. *Crawes* Caſe. *Cro.* 3. Part, 84.

11. Error, for that S. the Defendant recovered againſt W. in Debt; and afterwards W. enfeoffed the Plaintiff of his Land; and then S. ſued an *Alegit* upon the Judgment, and the Plaintiff before Execution made, ſued this Writ of Error, and aſſigned Error in the Judgment. It was the Opinion of the Court, That the Writ of Error did not lye. 1. Becauſe the Feoffee cannot have a Writ of Error, unleſs it be for Error in ſuing the Execution. 2. That till Execution ſued, he is not a party grieved; and that is the cauſe that he in the Reverſion or Remainder ſhall not have a Writ of Error in the life of Tenant for life upon a Judgment given againſt the Tenant for life, becauſe he is not a party grieved, but he might have it after the Tenant for life before the Statute. Mich. 33 Eliz. B. R. *Charnock* and *Sherringtons* Caſe. *Cro.* 3. Part, 289.

12. Error againſt the Queen upon a Judgment given for the Queen in the County Palatine of *Cheſter*. It was moved, That Error did not lye againſt the Queen, but he ought to ſue by Petition. 5 c 23 E. 3. 22. It was the Opinion of the Juſtices, That there needed not any Petition; for that in this Caſe both the Pattentees claim from the Queen. And whether there be Error or not, the Queen is not prejudiced: And it was ſaid, If that in the Exchequer an Erronious Judgment be given for the Queen in a Writ of Intruſion, the party ſhall have a Writ of Error againſt the Queen without any Petition. And *Wray* Chief Juſtice ſaid, That many Outlawries have bin reverſed by Error without any Petition; and yet in ſuch Caſe the Queen hath an immediate Intereſt. Hill. 29 Eliz. B. R. The Queen and *Harleſtons* Caſe. *Leon.* 2. Part, 194.

13. The Caſe was, J. S. Tenant in tail having iſſue two Sons, R. and J. dyed ſeiſed: R. his Son and Heir levyed a Fine thereof, and afterwards levyed another Fine thereof, and dyed without Iſſue. J. brought two ſeveral Writs of Error to reverſe both Fines. The Tenant to the Writ of Error brought upon the firſt Fine, pleaded the ſecond Fine in bar of it: And in bar upon a Writ of Error brought upon the ſecond Fine, he pleaded the firſt Fine. The Court adviſed him in this Caſe to plead, That the Fine pleaded in bar was Erronious. Hill. 31 Eliz. B. R. *Moultons* Caſe. *Leon.* 2. Part, 211.

14. Error of a Judgment in C. B. The Error aſſigned was, becauſe the *Venire facias* was awarded upon the Roll retornable *Die Mercurii proximè poſt Craſtin. Trinitatis*. But the Writ it ſelf was retorned *die Veneris prox. poſt Craſtin. Trinitatis*, which was the firſt day. It was holden by the Court clearly, That it was erronious; for that the Roll is that to which the Court gives credit, and not the Writ; for if the Writ be ill, it ſhall be reformed by the Roll: And it was ſaid, That in this Caſe it is not helped by the Statute; but if it doth not appear that any Writ was awarded, then it is helped by the Statute, but not an ill Writ. Mich. 38 Eliz. B. R. Sir *Walter Hungerford* and *Vipſics* Caſe. *Cro.* 3. Part, 433.

15. Error upon a Judgment in Debt in C. B. becauſe the Record is, *Quod obtulit ſe in placito debiti de* 10 l. and when he declared, he declared upon a Debt of 20 l. It was holden by the Court to be a manifeſt Error, and the Judgment was reverſed.

verſed. Mich. 38 Eliz. B. R. *Staughton* and *Newcombs* Caſe. *Cro.* 3. Part, 434.

16. In Error, the Caſe was; J. B. ſeiſed of Lands, made a Feoffment to the uſe of himſelf for life, and after to the uſe of ſuch Iſſue and Iſſues Males of the body of M. L. from eldeſt to eldeſt, and who by common ſuppoſition ſhould be adjudged or reputed to be begotten by the ſaid J. B. upon the body of the ſaid M. L. where the ſaid Iſſue and Iſſue Males ſo born of the ſaid M. and reputed to be begotten upon her by the ſaid J. B. *fiat per legem regni Angliæ adiudicat. legitimè*, and mulierly begotten, or unlawfully and immulierly begotten betwixt the ſaid J. B. and the ſaid M. and to the Heirs of the bodyes of ſuch Iſſue, or Iſſues Males *de ſeniore in ſeniorem exiſtent. nat. de prædict. M. in forma prædict.* Afterwards J. B. had Iſſue by the ſaid M. R. B. the Plaintiff. The Defendant recovered againſt J. B. in an Aſſiſe. J. B. dyed: R. B. brought a Writ of Error as he in the Remainder; and averred, That he was the Iſſue begotten of the body of the ſaid M. and was alwayes ſince his Birth, and yet is reputed to be begotten by the ſaid J. B. It was ſaid in this Caſe, That the Plaintiff hath not well entituled him to have any Remainder, and then he cannot have a Writ of Error; for a Remainder ought to be limited to a perſon in *eſſe*, or who by intendment ſhall come in *eſſe* during the particular Eſtate: but the Law hath not any expectancy of a Baſtard to be born which is not in *eſſe* at the time of the limitation. And here it doth not appear by his averment, that he is the lawful Iſſue; and of that Opinion the Court ſeemed to be: for they ſaid, That although a Limitation of a Remainder to a Baſtard in *Eſſe* is good, for that he is a perſon known, and may be in time reputed for the Son of another. Yet it cannot be ſo of a Baſtard before he be born; For the Law hath not any expectancy that any ſuch ſhould be, nor will give liberty or ſcope to provide for ſuch before they be. And the Juſtices ſaid, That they had conferred with the reſt of the Juſtices, and that the greater Opinion of them was, That a Remainder to his firſt reputed Son or Baſtard is not good, becauſe the Law doth not favour ſuch a generation, nor will ſuffer ſuch a Limitation for inconveniencies which may ariſe thereupon. Wherefore becauſe the Plaintiff was in truth a lawfull Son begotten between the ſaid J. B. and the ſaid M. L. the Plaintiff perceiving the Opinion of the Juſtices to be as aforeſaid, diſcontinued his Writ of Error, and brought a new Writ of Error *Coram vobis reſidet.* Mich. 39 Eliz. B. R. *Blodwill* and *Edwards* Caſe. *Cro.* 3. Part, 509.

17. Error of a Judgment in a Writ of Entry *Sur diſſeiſin*; The Error aſſigned was, becauſe the Sheriff returned not the names of the Summoners or Veyors: It was holden by the Court to be a good cauſe of Error; for if there be no Summons made, the party cannot have a Writ of *Deceipt*, and *non conſtat de Record*, againſt whom he ſhould have it; The Judgment was Reverſed. Paſch. 39 Eliz. B. R. *Meryll* and *Rabyns* Caſe. *Cro.* 3. Part, 557.

18. Error of Judgment in C. B. in a Writ of Partition; upon the firſt Judgment, *Quod Partitio fiat*, before the Return thereof; and a ſecond Judgment, *Quod Partitio ſtabilis ſit*; a Writ of Error was brought, and it was alledged, That there was not any perfect Judgment yet given till the ſecond Judgment; and therefore the Writ did not lye. And it was ſaid, It was agreed in *Roſſill* and *Batts* Caſe, That in caſe of Accompt, No Writ of Error lyes untill the ſecond Judgment: And in the principal Caſe, the Court was of the ſame Opinion. Mich. 40 Eliz. B R. The Lord *Barkley* and the Counteſſe of *Warwicks* Caſe, *Cro.* 3. Part, 635.

19. Error was brought by ſix of a Judgment in C. B. againſt them in a Replevin; Where one of them avowed in his own Right for an Amercement in a Leet, and the others made Conuſans as his Servants; Judgment was againſt the ſix, and Damages and Coſts given; and, to be diſcharged of the Damages and Coſts, the ſix brought Error. And the Releaſe of one of the others, which was, hanging the Writ, was pleaded in Barr: And it was the Opinion of the whole Court, That it was not any Bar, and Day was given to examine the Errors. Hill. 41 Eliz. B. R. *Raſing* and *Ruddocks* Caſe. *Cro.* 3. part, 649.

20. Error of a Judgment in C. B; It was, For that the Defendant appeared by J. S. *Attornat. ſuum*, and there was not any ſuch J. S. *in rerum natura*: The Defendant pleaded *in Nullo eſt erratum*, and ſo confeſſed it; Yet the Court held it to be no Error, for that it is againſt the Record. But it was ſaid by them, That he might have aſſigned, That J. S. had not any Warrant of Attorney: The Judgment was affirmed. Paſch. 41 Eliz. B. R. *Croſs* and *Tynes* Caſe. *Cro.* 3. Part, 665.

21. Error by the Bail, upon a Judgment in B. R. The Lady *Hawkins* recovered againſt H, and upon a *Scire facias* againſt the Bail, and two *Nihils* returned, had Judgment to recover againſt them. They aſſigned for Error that there was not any *Capias ad ſatisfaciendum* awarded againſt the Principal, before the *Scire facias*: It was ſaid, That by the Statute of 27 Eliz. Error lay not, becauſe a *Scire facias* is not with the Statute. But it was holden by the Judges and Barons, That a Writ of Error well lay for the Bail; for that the Suit againſt

againſt them is within the Equity and Intent of the Statute, and is in the nature of an Action of Debt. Mich. 41 Eliz. Ex. Chamber. *Cockyn* and Lady *Hawkins* Caſe. *Cro.* 3. Part, 730.

22. Error in Exchequer Chamber of a Judgment in B. R. aſſigned for Error, that one of the parties was dead before the Judgment. It was moved, If they had authority there to examine ſuch Errors: It was holden by all the Judges and and Barons, That they had; and if it were denyed, it ſhould be tryed by a Jury in the Exchequer Chamber. But it was agreed in that Caſe, That they had not any authority to let the party there to Bail, becauſe they had authority only *ad examinandum Errores.* Mich. 41 Eliz. Ex. Chamber, *Prices* Caſe. *Cro.* 3. Part, 731.

23. Error of a Judgment in *Lynn*, becauſe the Court was holden before J. S. Mayor, and J. H, and two other Capital Burgeſſes. And the parties being at Iſſue, it was tryed by Verdict, and found for the Plaintiff; and the ſaid J. H, who was one of the Judges, was one of the Jurors. It was the Opinion of the whole Court, That it was Erronious; wherefore afterwards by the aſſent of the Defendant, in the Writ of Error, the Judgment was Reverſed. Mich. 43 Eliz. B. R. *Mitchell* and *Woodroffs* Caſe. *Cro.* 3. Part, 850.

24. Error of a Judgment in a Replevin, That whereas there were two Avowants, one of them was within age, ſo he ought to have appeared by Gardian, and not by Attorney; but in the Aſſignment of the Error, It is not concluded to the Court, *Et hoc paratus eſt verificare, &c.* and the Defendant in the Error pleaded, *In nullo eſt erratum.* It was the Opinion of the whole Court, That the Judgment ſhould be affirmed; For when a man aſſigns Error in Fact, he ought to put himſelf upon the Country, for the Jurors only are Tryers of that, and not the Judges, and then here not concluding to the Contrary; this is an Error not Tryable by the Court, and ſo cannot be adjuged; wherefore it is as if no Error had been at all. Hill. 2 Jac. B. R. *King* and *Goſpers* Caſe. *Yelverton* 58.

25. The Earl of *Rutland* recovered againſt A. and B. in the County of B, in an Action upon the Caſe for diſturbing of him to hold Court in ſuch a Mannor, &c. Upon which they brought Error in B. R, and before the Errors diſcuſſed, one of the Plaintiffs in the Writ of Error, *ſcil.* B, dyed; The Queſtion, If upon his Death the Writ ſhould abate. It was adjudged in this Caſe, That by his Death the Writ of Error was abated, and that the Plaintiff was put to a *Scire facias* againſt the Executor of him who was dead. Mich. 9 Jac. B. R. *Spencer* and the Earl of *Rutlands* Caſe. *Yelv.* 209.

26. In a *Scire facias* againſt the Bail, who upon the ſecond *Scire facias* was condemned for not having the Body of the Principal: Judgment was given, that the Plaintiff ſhould recover *ſuper Recuperationem prædict.* whereas it ſhould be *ſuper Recognitionem prædict.* It was moved thereupon to have a Writ of Error: It was the Opinion of the Court, That No Writ of Error did lye in the Exchequer Chamber, becauſe the Judgment is in a *Scire facias*, which is a judicial Writ not named in the Statute of 27 Eliz. and alſo here, the Error is in the point of Judgment, *viz. Recuperationem* for *Recognitionem:* It was then moved, That the party might be bailed; for that there is No Judgment at all given upon the Recognizance, upon which Execution might be demanded, *Ad quod non fuit reſponſus.* Trin. 7 Jac. B. R. *Prowſe* and *Turners* Caſe. *Yelverton* 157. See before 41 Eliz. *Cockyns* Caſe.

27. A man recovered in C. B. in Debt upon *Inſimul Computaſſent:* The Defendant brought Error in the Kings Bench; He who recovered prayed, that he might, according to the Statute of 3 Jac. put in Sureties by Recognizance to pay the Condemnation, if the Judgment were affirmed: It was the Opinion of the Court, That this Caſe was out of the Statute, becauſe that the Debt recovered did not accrue by any Contract, or other duty certain at the firſt, but meerly upon an Accompt betwixt the parties; ſo that becauſe that the Original Cauſe of the Action is grounded upon an Accompt, which is altogether incertain; It is therefore out of the Statute: and it was ſaid, So the Law is in Debt upon an Arbitrament: when the Arbitrators have reduced divers Controverſies to be recompenced by a ſum, the ſame is a Debt, but not ſuch a Debt which is intended within the Statute. Hill. 10 Jac. B. R. *Girlings* Caſe. *Yelv.* 227.

28. E. the Wife of G. L. recovered Dower in the County of B. by default, and had a Writ of Seiſin to the Sheriff of S, and a Writ of Enquiry; If the Husband dyed ſeiſed, and of what Eſtate; If Fee, or Fee-Tail? The Jury found the Husband dyed ſeiſed, but of what Eſtate, *Ignoramus*; and found the value of the Land, &c. *Et quantum tempus &c. bitur, &c.* Upon which Judgment was given, that ſhe ſhould recover, and Damages to 60 l. Upon which Judgment, Error was brought. After the Record removed, E. dyed; whereupon the Plaintiff ſued a *Scire facias* againſt T. C, Executor of E, againſt whom two *Nihils* were returned; for which Cauſe the Plaintiff proceeded and aſſigned Errors, *viz.* That no Judgment ought to have been to recover Damages, becauſe the Jury had not found any Dying ſeiſed of any Eſtate of Inheritance in G. L, according to the purport of

the Writ; for without Dying-seised of such an Estate, the Wife shall not have Dower; That was adjudged Error. Then it was moved, If by the Death of E. the Writ of Error was not abated, and whether a new Writ should be sued against the Executors. It was the Opinion of the Court, That the Writ should not abate: And it was holden also, That the Executors by their *Scire facias* and two *Nihils* returned (which amount to a Garnishment), they are made parties to the Writ of Error well enough. Mich. 5 Jac. B. R. *Brooly* and *Littletons* Case. *Yelverton* 112, 113.

29. Note, If two recover in Debt, &c. and before Execution one of them dyes; if Execution be sued in both their Names, it is not Error. *Brownl. Inv.* Prothonotary said, That in such Case the Survivor ought to sue a *Scire facias* before that he can sue Execution. But *Coke* and all the Court said, That he might sue Execution without a *Scire facias*, because he is part and party to the Judgment. See *Noy's* Reports 150.

30. Note, It was said by the Court, That if a Writ of Error be brought in this Court, the delay of the Return is long, to delay the party, as if it be more then the next Term, That the Court may award Execution. Pasch. 3 Car. C. B. *Hedly* 17.

31. In a Return in a Writ of false Judgment, in an Action upon the Case brought in an inferiour Court, The Judgment there was, *Ideo cessetur per Curiam*, where it ought to have been, *Ideo consideratum est*. And for that cause the Judgment was Reversed. Hill. 22 Jac. B. R. *Horn* and *Wardeas* Case. *Latch.* 83. See Trin. 11 Car. B. R. *Slocombs* Case. *Lib.* 1. Title *Error*, Fol. 831. Case 9. acc.

32. The Plaintiff in a Replevin in C. B. had Judgment, and a Writ of Enquiry of Damages issued out; The Defendant brought a Writ of Error in B. R. and then the Writ of Enquiry of Damages was returned in C. B. The Court inclined to be of Opinion, That the Writ did not lye before the Judgment in C. B. was given; For that the words of the Writ are, *Si Judicium inde redditum sit*; and that before the Writ be returned, the Record is not removed. Trin. 2 Car. B. R. *Colomore* and *Hobs* Case. *Latch.* 133.

33. Judgment was in an *Ejectione firme* in C. B. Error brought, and the Error Assigned was, That there was Variance between the Plea-Roll, and the Imparlance-Roll, the last was of an Ejectment 10. *Junii*, 22 Jac. and the Plea-Roll 12. *Junii*, 22 Jac. The truth was, the Plea-Roll was entred the 10th. of *June*, but the same was razed and made the 12th. of *June*. By the Opinion of the whole Court, The Writ was amended, notwithstanding the Record removed hither, and Error Assigned in the same Point. Hill. 1 Car. B. R. *Foster* and *Taylors* Case. *Latch.* 152.

34. Judgment being given in *Ejectione firme* in C. B. a Writ of Error was brought before the Writ of Enquiry of Damages was returned: The Court was of Opinion, That it did lye, because upon that Judgment there, it was so perfect, that the Plaintiff there might maintain an *habere facias possessionem*, the Judgment being *Quod recuperet Terminum*; and if the Writ should not lye, then the Plaintiff there having obtained possession upon an Erronious Judgment, would perhaps never sue forth a Writ of Enquiry, and so the party grieved should be without remedy. Pasch. 2 Car. B. C. *Smith* and *Aymis* Case. *Latch.* 212. See *Colamores* Case before.

35. A man recovered in the Court of *Verge*; Error brought, and assigned for Error, because the Plaintiff there declared of a Trespas done in St. *Martins*, *Infra jurisdictionem*; and upon Not guilty, pleaded, The *Venire facias* was de St. *Martin praedict.* And did not say, *Infra jurisdictionem*: It was holden Error, for that the limits of their Court varying upon the remove of the King; It might be that St. *Martins* was within their Jurisdiction at the time of the Writ brought and Declaration, and not at the time of the *Venire facias* awarded; wherefore the Judgment was Reversed. Mich. 3 Car. B. R. *Thair* and *Folletts* Case. *Latch.* 214.

Escape.

1. DEbt upon an Escape against a Sheriff, he pleaded, *Nil Debet*: The Case was, The Plaintiff recovered against J. S. in Debt, and after the year passed, had a *Capias ad satisfaciendum* against him, and the Sheriff by force of it took him, and he escaped. It was adjudged, That the Action did well lye against the Sheriff; for although the process was erroniously Awarded, yet it was sufficient for the Sheriff to Arrest him; and he might just fie in a false Imprisonment, and therefore cannot lett him at large. Trin. 32 Eliz. B. R. *Eustoes* Case. *Cro.* 3. Part, 188.

2. In false Imprisonment; The Defendant pleaded, That a *Capias ad satisfaciendum* issued to the Sheriff at the Suit of J. S. against the Plaintiff, who made his Warrant to the Defendant to Arrest him, by vertue whereof he Arrested him. The Plaintiff Replyed, That after the Writ awarded

ful, and before the Taking and Imprisonment, he shewed the Sheriff the Monies; whereupon the Sheriff made his Warrant, directed to all his Bayliffs, That they should cease the Execution, and that delivered to the Plaintiff; and that the Defendant Arrested him, and, presently after the Arrest, he shewed him this Discharge, and yet he detained him in prison for the space of an hour. It was the Opinion of the Justices, That in regard it was but a Writ of Execution, and to have the Money in Court; he having received the Money, ought not to have Arrested the party, but might well discharge him. But because the Plaintiff in his Replication departed from his Declaration; for that is, That after this Warrant of Supersedeas delivered unto him, he detained him in Prison, and complains of a tortious Imprisonment; but he speaks nothing of his Exception which he complained of in his Declaration: It being a departure, it was adjudged for the Defendant. Trin. 37 Eliz. B.R. Stringer and Stanlacks Case. *Cro.* 3. Part, 94.

3. Debt upon an Escape; The Case was, That upon a Recognizance in Chancery, the Conusee sued Execution by *Capias ad satisfaciendum*, by which the Conusor was taken and escaped, and Debt brought: The Court held, That the *Capias ad satisfaciendum* was erroniously awarded; yet the party being taken by force thereof, it was a good Execution for the party as long as it continues unreversed, and the Sheriff is chargeable for the Escape, Trin. 39 Eliz. C.B. *Caisers Case. Cro.* 3. Part, 576.

4. Action upon the Case, The Plaintiff declared, That J. B. was endebted to him in three several Obligations of, &c. and that he sued forth a *Latitat* against him, to the intent that being Arrested, he might exhibit his Bill of Debt upon the several Obligations directed to the Sheriff; by force of which he Arrested him at Y. and afterwards to defraud him from taking advantage of his Writ, he suffered him to escape. It was the Opinion of the Court, That the Action did lye, because it was Negligent suffering of an Escape in the Sheriff without Bail; and here the party is prejudged in his Suit, and therefore it is reasonable, that the party should have this Action. Mich. 40 Eliz. B. R. *Simon* and *Watsons* Case. *Cro.* 3. Part, 615. See Pasch. 40 Eliz. *Bonner* and *Stukeys* Case. *Cro.* 3. Part, 652. acc.

5. Error of Judgment in C. B. in Debt upon an Escape; The Error was, For that the Original Writ had not the Sheriff's name to the Return thereof, according to the Statute of *York*, 12 E. 2. The Court was of Opinion, That in regard the Defendant had appeared, and the Plaintiff had declared against him upon the Record of the recovery; and the Defendant had pleaded, *Nul tiel Record*; he shall never take advantage after appearance and pleading, of such a Misprision, nor of his Misawarding of the main process. The Judgment was affirmed. Mich. 42 Eliz. B. R. *Dalton* and *Thorps* Case. *Cro.* 3. Part, 767.

6. Error of a Judgment in C. B. in an Action upon the Case *tam pro Domina Regina quam pro seipso*. The Case was, The Plaintiff had Judgment to recover a Debt against J. S, and upon a *Capias ad satisfaciendum*, he was Outlawed; and upon a *Capias utlagatum*, the Defendant being Sheriff, took him, and after suffered him to escape, the Plaintiff not satisfied. Two Errors assigned, 1. Because the Action was brought by him and the Queen, whereas it ought to have been brought by him only. This Error was over-ruled, because being Outlawed and escaping, it is a Contempt as well to the Queen, as a prejudice to the party, and therefore the Action brought by them both, warrantable. 2. Error, The Action is brought in S. against the Sheriff of S, for Arresting of the Defendant in the first Action upon the *Capias utlagatum*; and the Defendant in the first Action is named of S, in the County of N, and the Arrest is supposed *apud S. praefat.* So as the Arrest is supposed in the County of N, and then it is tortious, and there cannot be an Escape thereupon: This the Court held to be an incurable Error, and for this the Judgment was Reversed. Pasch. 44 Eliz. B. R. *Estos* and *Lloyds* Case. *Cro.* 3. Part, 877.

7. A. was in Execution at *Plymouth* for 31 l. at the Suit of D, which was recovered there before the Mayor; B. came to the Plaintiff the Goaler, and promised, That in Consideration that he would suffer A. to go at Liberty, that the 31 l. should be brought into Court there by such a day to satisfie D, and that he would keep the Plaintiff being Goaler harmless; D. recovered against the Plaintiff, for an Escape; and thereupon the Plaintiff brought an Action of Assumpsit against B, and declared upon the whole matter aforesaid. In this Case, It was adjudged against the Plaintiff, because the Consideration was against Law, to suffer one who was in Execution to Escape. See 19 Eliz. *Dyer, Owyes* Case. Hill. 8 Jac. B.R. *Martin* and *Matthews* Case. *Yelv.* 197.

8. Note, It was holden by the Court of Common-Pleas, That if a Sheriff removes his Prisoners out of the County without being commanded, that it is an Escape; But if he removes them from one place to another in his County, if he changes his Goal, it is no escape: But if he removeth Prisoners for their ease and delight in the same County, it is an Escape. And the Case was put, Where one went with his Prisoner to a Bear-baiting

baiting in the ſame County; and it was adjudged an Eſcape: So if the Sheriff permit his Priſoner to go to work for his b n fit, it is an Eſcape, Mich. 3 Jac. in C. B. *Hetl y* 34.

9. D. was in Execution upon a Statute-Merchant, and his Body and Goods were taken; and the Conuſee agreed, That the Conuſor ſhould go at large: If it was a Diſcharge of the Execution, was the Queſtion; It was ſaid, It was: for his Impriſonment is for his Execution. On the other ſide, It was ſaid, That it was a Releaſe of the Impriſonment only; and but a Liberty given by the Conuſee to the Conuſor to go at Liberty, and that it doth not Releaſe the whole Execution. *Quære*, The Caſe was not Reſolved. Hill. 2 Car. C. B. *Wiggons* and *D. yes* Caſe. *Hetl y* 79.

Eſtoppel.

1. A Man made a Leaſe of Lands by Indenture to begin after the expiration of a Leaſe thereof made to one D. In an Action of Covenant brought by the ſecond Leſſee againſt the leſſor, the leſſor ſaid, there was no ſuch D. in *rerum natura*, at the time of the ſuppoſed Leaſe made to D. It was ſaid, that this Plea doth not lie for the leſſor, for he is eſtopped againſt the Indenture that there is no ſuch D. and alſo if no ſuch perſon then the Leaſe was void, and then the ſecond Leaſe was to begin preſently: It was the Opinion of the Juſtices, that the Defendant ſhall be eſtopped by the recital of the firſt Leaſe, to ſay, that there is no ſuch D. and although the common ground is, that a Recital is not an Eſtoppel; yet where the Recital is material (as it is here) it is otherw ſe. Hill. 20 Eliz. C. B. *Leon.* 2 Part 11.

2. Second Deliverance, the parties were at Iſſue, If it was the Free-hold of the Plaintiff, or of the Defendant: It was found, That J. S. was ſeiſed of the Land and enf. offed J. G. in Fee, who dyed ſeiſed, and the ſame diſcended to the Plaintiff. And that afterwards the Defendant let the Land to the Plaintiff by Indenture for 21 years, and that the 21 years are expired: and the Jury prayed the Adviſe of the Court: It was the Opinion of the Court, that this Eſtoppel ſhould endure no longer then the Leaſe, for after the Terme expired, the Indenture is but an Eſcrow, and as a Peer of Parliament: And it was ſaid that the difference which hath alwayes been before an Eſtoppel by Record, and by Indenture. For if one brings an Action of Waſte againſt Tenant in Fee-ſimple, and ſuppoſeth he had of him between an Eſtoppel by Record, and by Indenture. For if one brings an Action of Waſt againſt Tenant in Fee-ſimple, and ſuppoſeth he holds of him for years, &c. And the Tenant pleads *Nul Waſt fait, &c.* This Eſtoppel, remaineth after the years expired: and it was ſaid in this Caſe, That the Jury are not bound to find Eſtoppels, and ſo it was ſaid it was adjudged in *Bridges* Caſe. Note. It was ſaid in this Caſe, That if one taketh a Leaſe of his own Lands of an Enfant, or of a Feme Covert by Indenture, this is no Eſtoppel, for that in Eſtoppels both parties are to be eſtopped: which the Enfant, or Feme Covert, are not. Hill. 27 Eliz. C. B. *Jones* and *Landers* Caſe. *Cro.* 3. Part 36. 37.

3. *Audita Querela*, Becauſe Execution was ſued upon a Statute acknowledged in the City of *Lincoln*, as a Statute-Merchant which had but one Seal, whereas it ought to be with two Seals, according to the Statute *de Mercatoribus* 13 E. 1. Iſſue was joyned if it was ſealed with a Seal of two years, and tryed for the Plaintiff by a Jury of the City of *Lincoln*, 1. It was alledged in ſtay of Judgment, that the Iſſue ought to have been tryed by the Certificate of the Mayor, and not by the Country; but that was over ruled by the Court. 2. It was ſaid, That this ſhall be taken as a Statute acknowledged according to the Statute of *Acton Burnell* 11 E. 1. and not according to the Statute *de Mercatoribus*, ſo it is good for the Goods and the Body. But the Court was againſt that; For, that it is a Statute-Merchant, he ſhall not now be received to ſay; but that it was acknowledged, according to that Statute: and thereupon Judgment was given for the Plaintiff. And after in a Writ of Error brought, the Judgment was affirmed. *Poſt.* 33 Eliz. C. B. *Aſcue* and *Falcath* Caſe. *Cro.* 3. p. 233. and 319.

4. Debt by Husband and Wife againſt the Defendant for Arrerages of Rent upon a Leaſe for years made by the Wife and her firſt Husband by Indenture. The Defendant pleaded, That the Anceſtor of the firſt Husband was ſeiſed in Fee, and condeſcended to the firſt Husband, and he was ſole ſeiſed, and ſo the Wife had nothing at the time of the Leaſe made. Upon which the Plaintiff demurred. It was ſaid, that this was no ple: for the Leaſe being by Indenture, the Wife hath the Reverſion by Eſtoppel againſt the Leſſee, and the Defendant cannot contradict it, and ſay She had nothing. See 11 H. 41. But it was reſolved by the whole Court, that the Plea was good. For they ſaid, There is a difference betwixt this Caſe and the Caſe in the Book of 11 H. 4. For when two joyn in a Fine, or matter of Record, he that

ſtopped of them is eſtopped, but to ſay that both of them gave it, but where it is by Deed it is otherwiſe. For that cannot enure one by way of Intereſt, and from the other by way of Eſtoppel. And when two joyn in a Deed, and the one only hath the Intereſt, it enures by way of Confirmation only from the other, and not by way of Eſtoppel. But in this Caſe it enures neither by way of Confirmation, nor by way of Eſtoppel; for that the Deed is utterly void, ſhe being a Feme-Covert. And a Deed of a Feme-Covert cannot eſtop her. Mich. 41 Eliz. B. R. *Everſon* and *Evans* Caſe. Co. 3. Part 700. 701.

5. Treſpaſs for chaſing of his Cattel in ſuch a Caſe. The Defendant juſtified, Damage feaſans in his Free-hold, The Plaintiff replyed and ſhewed a Grant of Common in the place where, and how the Defendant had erected here after the grant a Stack of Common, and the Plaintiff put in his Cattel to uſe the Common; and the Defendant drove them out: It was holden by the Juſtices, that the driving out of the Cattel by the Defendant is not lawful; for by ſuch meanes it ſhould prevent his own grant: for by the grant of Common in ſuch a place, the Grantee may uſe the whole place for Common, and then when the Grantor erects a Stack of Corn upon part of that place, it tends to the diminution and enfeebling of his Grant, which ought not to be; and therefore he ſhall be eſtopped thereby. Hill. 3. Jac. B. R. *Farmer* and *Hales* Caſe. *Yelverton* 121.

6. Debt againſt Sir *G. Baxter* of S. B. upon a Bond made by S. B. The Defendant pleaded *Quod ſcriptum predict non eſt factum ſuum*. It was moved that it was not good, becauſe (*ſuum*) refers to the Defendant, and it is not alledged to be the Deed of the Defendant, and there is no mention of the Teſtator on the whole Barre, and therefore (*ſuum*) cannot be referred to him; But all the Juſtices were of a contrary Opinion; for here ſhall be taken no reference, to that which may reaſonably relate to make the Plea good; and Judgment was given for the Plaintiff. Tr. 2 *Car.* B. R. *Bakers* Caſe. *Latch.* 125.

Eſtrepment.

1. A Writ of Partition was depending in C. B. betwixt two perſons being Tenants in Common in Fee upon the Statute of 31 H. 8. The Demandant in the Writ cut down Trees growing upon the Lands, pendant the Writ: It was moved to the Court for a Writ of Eſtrepment. 2. The Court denyed to grant it, becauſe both parties were in poſſeſſion of the Trees, and every of them might take the Trees there. *Paſc.* 33 H. 8 *Bendlowes* 113.

2. A. brought *Formedon* againſt B; and, pendant the Writ, the Plaintiff had a Writ of Eſtrepment againſt the Defendant prohibiting him not to commit Waſt and Eſtrepment *pendente Placito predict indiſcuſſo*. Notwithſtanding which, the Defendant, pendant the Writ, did cut down Trees in the Lands; For which the Plaintiff declared againſt him in the Writ of Eſtrepment, the Defendant being attached upon it, ſhewed the purchaſe of his Writ of *Formedon*, and of the Writ of Eſtrepment, and that he delivered the ſame to the Defendant: againſt which prohibition, he had committed Waſt and Eſtrepment, *pendente Placito predict*. The Defendant pleaded, That he had committed no Waſt or Eſtrepment againſt the Prohibition. Upon which being at Iſſue, it was found for the Plaintiff, and he recovered dimmages to 10 l. and his Coſts, although that it did not yet appear that the Plaintiff had any good title to the Land; but only had brought his Writ of *Formedon*, to which the Defendant had pleaded preciſe. It was adjudged for the Plaintiff. *Paſc.* 15 Eliz. C. B. *Bendlowes* 41.

3. *Waſt.* The Plaintiff prayed a Writ of Eſtrepment againſt the Tenant and his Servants. It was doubted, If it did lie, becauſe the Plaintiff therein was to recover Dimmages. But the Opinion of the Juſtices was, that it did lie, for it may be, the dimmages are more then the Tenant can recompence, if he hath deſtroyed the Houſe and Woods. *Barlow* Pelgrothory ſaid, That there was not any Preſident as he remembred, that it had been awarded in a Writ of Waſt; but that it had been awarded in Writ of Entry *Sur Diſſeiſin*. The Court ſaid they were all one, for their Dimmages are recoverable. Afterwards, it was awarded both againſt the Tenant and his Servant.

Paſch.

Pasc. 37. Eliz. C. B. *Arden* and *Darcyes* Case. *Cro.* 3. Part 393. See *Trin.* 38. Eliz. C. B. *Perrics* Case. *Cro.* 3. Part 484. adjudged &c. that it lay in a Writ of Entry *sur Disseisin.*

4. Error to reverse a common Recovery in *Lancashire* in a Writ of Entry; and, whilest that was depending, Estrepement was awarded, and an Attachment thereupon; It was moved, that the Estrepement was not grantable in this Court upon the Writ of Error brought. But the Court held that it was well granted. For more Dammages may be done by the Wast then may be answered. 2. Error, that in a Writ of Error Estrepement lyeth not, for he is here retorned to what he left. 3. For that he comes in by continuance of the party; for a common Recovery is accounted but a conveyance in Law. Of the two least Errors the Court would advise, Mich. 42 Eliz. B. R. *Holland* and *Dauntseys* Case. *Cro.* 3. Part 114.

Evidence.

1. *Fellowe* *versus*. The Plaintiff declared of an Ejectment of 100 Acres of Land; and shewed his Lease in Evidence only of 40. Acres. It was said, That he had failed of his Lease. For there was no such Lease as that upon which he declared. But it was the Opinion of the Court to be good for as much as was compriſed within his Lease, and for the residue, that the Discovery might finde the Defendant not guilty. H. 11. 25 Eliz. C. B. *Guy* and *Reads* Case. *Cro.* 1. Part 13.

2. The Jury were gone from the Barre to confer of their Verdict, One Witness who was before sworn in the Defendants part, was called by the Jurors, and he recited his Evidence to them, and after they gave their Verdict for the Defendant: this misdemeanor being complained of to the Judge of Assize, he examined the matter of the Enquest, which was confessed; and that the Evidence was the same in effect, which was given before. This matter being retorned upon the Postea, The Court here were of Opinion, that the Verdict was not good, And a *Venire facias de Novo* was awarded. Tr. 32 Eliz. B. R. *Metcalf* and *Deans* Case. *Cro.* Part 259.

3. Debt for Rent reserved upon a Lease for years, The Issue was, If the Rent was paid, or not, The Defendant gave Evidence, that for part of the Rent, the Plaintiff was by Covenant to repair the House and did not, and thereupon he expended part of the Rent in repairing of it. The Justices as to that part said that the Defendant had liberty to expend the Rent in Reparations, but then he ought to have so pleaded it, and not to give it in Evidence: As to the rest of the Rent, the Defendant shewed, That he had paid it to others that had Rent-Charges out of the Lands, which the lessor had Covenanted to pay; and that by the Commandment of the lessor, he had paid the Rent in discharge of those Rents; and this the Court held to be good; For that payment to another by the Plaintiffs command, is payment to himself. *Pasch.* 33 Eliz. B. R. *Tyler* and *Neals* Case. *Cro.* 3. Plant 212.

4. In Trespass, the Parties were at Issue at the Tryal by *Nisi Prius in Com. D.* to prove the Nonage of the Plaintiff at the time of the Lease made. A Church-Book was given in Evidence; And after the Juries departure from the Barre, and before they agreed upon their Verdict, the Plaintiffs re-delivered to the Jurors the said Church-Book; and afterward they found for the Plaintiff. This matter was enquired by the Judge of *Nisi Prius*, and retorned upon the *Postea*: It was moved, that the Verdict was not good, and *Metcalfs* Case was vouched, and one *Pickerings* Case, where Letters Patentes were given in Evidence to the Jury, and afterwards, when they were conferring in their Verdict, the Plaintiff without the Courts direction, delivered to them the Letters Patent, and that Judgment was for that cause stayed: But that Case was denyed; and it was said by the Court in the principal Case, The Justices of Assize might have refused this Verdict; And it is clear, That Writings and Books which are not under Seal cannot be delivered to the Jurors, without assent of both parties, but being delivered by the Court without assent of the parties, neither of the parties can avoid the Verdict, in regard they were given in Evidence before, and the Court had given direction to the Jury concerning their validity: and it differs from *Metcalfs* Case: for there the Evidence given was only by parell; It was adjudged afterward for the Plaintiff, That the Verdict was good. Mich. 38 Eliz. B. R. *Vicary* and *Farthings* Case. *Cro.* 3. Part 411.

5. J. D. and J. S. Knights, brought Action upon the Case against the Defendant: and shewed, that they are seised of the Manner of D. to which the Aduation of the Church is appendant, and that they and their Ancestors, and all the whole Estate they have in the Manner, their Wives, Children and Servants, time out of minde, &c. have set and kneel'd to hear Divine Service in the Church

Church of D. in an Ile in the upper end of the Church, and that no others had uſed to ſit there; and that the Defendants ſuch a day diſturbed them, &c. The Defendants traverſed the Preſcription. A Jury appeared to try the Iſſue in B. R.: and it was given in Evidence for the Plaintiffs, That they were Tenants in Common of the Manor to which, &c. It was the Opinion of the Court, That this was a departure from their title ſet forth in the Declaration: For by the Declaration they are intituled Joynt-Tenants, and now by the Evidence, it appeareth, That they were Tenants in Common. The Plaintiffs ſeeing what the Opinion of the Court was, were afterwards Nonſuit. Paſc. 18 Jac. B. R. *Dalton* and others againſt *Dograve* and others. See the Reports annexed to *Bendloes* 14.

Executors.

1. NOte, It was the Opinion of the Juſtices of the Common Pleas, That if a man by his Will deviſeth his Lands to his Executors to be ſold, or Wills that his Executors ſhall ſell his Lands; If one of the Executors refuſe the Adminiſtration of the goods of the Teſtator before the Ordinary, now the other Executors cannot ſell the ſame Land to the ſame Executor who refuſed: For that Executor who refuſed, is yet party and privy to the Will, and one of the Executors at his pleaſure. Trin. 27 H. 8 *Bendlowes* 14.

2. A Woman and another perſon were made Executors; the Woman took Husband, and the Husband did not alter the property of the goods of the Teſtator, and then the Wife dyed. It was adjudged in B. R. that the other Executors might have an Action of Detinue againſt the Husband for the ſame goods. Paſc. 1 Eliz. B. R. *Bendlowes* 10.

3. Debt againſt the Defendant as Executor of J. S. he pleaded, That he had taken Letters of Adminiſtration, and demanded Judgment of the Writ. The Plaintiff replyed, That the Defendant adminiſtred of his own wrong; upon which it was demurred. It was ſaid, That now the name of the Executor was lawfully changed, and therefore he ought to be ſued as Adminiſtrator. It was the Opinion of the Court, That the Writ was good againſt him as Executor, and that he anſwer over; For when by his tortious Adminiſtration he hath given advantage to be ſued as Executor, he cannot by his own act purge this wrong, and cauſe the Plaintiff to ſue him by another name. And it was ſaid in this Caſe, That if Judgment be given againſt an Executor upon Demurrer, and Execution be awarded; The Sheriff cannot return *Nulla habet bona Teſtatoris*, but is to return a *Devaſtavit*, as if it had bin found againſt an Executor by Verdict, for that he hath charged himſelf by his own Plea. Trin. 30 Eliz. B. R. *Stubbs* and *Rightwiſe* Caſe. *Cro.* 3. Part, 92.

4. A. Covenanted with B. to put his Son an Apprentice to C. or elſe that his Executors ſhould pay B. 20 l. A. doth not put his Son Apprentice to C. and dyeth. Debt was brought againſt the Executors of A. It was adjudged, That it doth not lye. 1. Becauſe it cannot be a Debt in the Executor where it was no Debt in the Teſtator. And 2. The Action doth not lye, becauſe the firſt part ſounds only in Covenant, and then the ſecond part ſhall be of the ſame nature and Condition. Paſc. 33 Eliz. C. B. *Perrot* and *Auſtins* Caſe. *Cro.* 3. Part, 232.

5. *Aſſumpſit* againſt a Woman: The Plaintiff declared, That her Husband was endebted to him 6 l. for Beer, and dyed Inteſtate, and Adminiſtration was committed to her, and that ſhe afterwards in conſideration the Plaintiff would deliver her ſix Barrells of Beer, promiſed the Plaintiff to pay him aſwell the 6 l. due by the Inteſtate, as for the ſix Barrells delivered to her ſelf. It was Objected, One cannot joyn in one Action two *Aſſumpſits*, ſcil. an *Aſſumpſit* of the Teſtator, and of her ſelf: And alſo, for that in this Caſe, the damages was aſſeſſed entire. It was moved, That it was not good, for if the Debt of the Husband, it ſhould have bin *de bonis Teſtatoris*; and for her own debt *de bonis propriis*. But the Opinion of the Court was, That the Judgment ſhould be given *de bonis propriis* generally, for it is a charge by her own act, and by her *Aſſumpſit* as Adminiſtrator, it is become her own proper Debt. It was adjudged for the Plaintiff. Trin. 37 Eliz. B. R. *Wheeler* and *Colliers* Caſe. *Cro.* 3. Part, 406.

6. In *Aſſumpſit*, upon a Special Verdict, the Caſe was; A. made his Wife his Executrix, and dyed; the Wife proved the Will and adminiſtred, and made J. S. her Son of the age of 13 years her Executor, and the Defendant Overſeer, and dyed. The Enfant proved the Will. The Defendant with the conſent of the Enfant, ſold goods to the value of 140 l. to the uſe of the Enfant; And if this was an Adminiſtration, was the Queſtion. It was the Opinion of the Court, That this was not an Adminiſtration, but a good ſale by the Executor; For an Infant Executor is to pay,

Debts, and then he muſt ſell goods to pay them; and therefore as the ſale by the Enfant himſelf is good, ſo is the ſale by another with his conſent, eſpecially where it is no prejudice to the Enfant; and therefore the doing of it here as ſervant to the Enfant, is no Adminiſtration. It was adjudged againſt the Plaintiff. Trin. 34 Eliz. B. R. *Clark* and *Hopkins* Caſe. *Cro.* 3. Part, 254.

7. Detinue of an Obligation, the Caſe was; The Plaintiff and one B. as Executor of J. S. had an Obligation wherein A. B. was obliged unto their Teſtator in 20 l. B. one of the Executors in ſatisfaction of his proper debt to the Defendant by words only *dedit et deliberavit* that Obligation to the Defendant, and dyed: The Plaintiff being the ſurviving Executor, brought Detinue for it. It was the Opinion of the Court in this Caſe, That in regard the Executor B. might have releaſed the Debt ſo he might give and diſpoſe of the Inſtrument of the Debt, and then the Detinue will not lye. Mich. 39 Eliz. B. R. *Kelſack* and *Nicholſons* Caſe. *Cro.* 3. Part, 496.

8. Debt againſt an Executor who pleaded, That he had nothing in his hands but certain goods diſtreined and Impounded. It was adjudged, That they were no Aſſets to charge him. Mich. 25 Eliz. C. B. *Cro.* 3. Part, 23.

9. Debt againſt an Executor upon Obligation made by his Teſtator; the Plaintiff was Nonſuit, and by the Order of the Court, the Defendant had Coſts; Otherwiſe it is where an Executor is Plaintiff, and is Non ſuit; for it cannot be intended, That the Action was conceived upon malice by him. Mich. 39 Eliz. B. R: *Fetherſton* and *Allybons* Caſe. *Cro.* 3. Part, 503.

10. Debt againſt one as Executor; The Defendant pleaded, That the Teſtator dyed inteſtate, and that certain of his goods came to the Defendants hands, and that Adminiſtration was committed to J. S. to whom he delivered the goods. It was adjudged no plea, in regard he had once made himſelf chargeable to the Plaintiffs Action as Executor of his own wrong, he ſhall never diſcharge himſelf by matter *ex poſt facto*. Paſc. 34 Eliz. C. B. *Bradbury* and *Reynells* Caſe. *Cro.* 3. Part, 565.

11. Error of a Judgment in C. B. in Trover and Converſion; the Plaintiff there declared, That whereas he was poſſeſſed of 40 l. *in quadam Crumena exiſtent. ut de bonis propriis* that the Defendant found them, and converted them to his own uſe *in retardationem Executionis Teſtamenti* to his damage of 40 l. The Plaintiff upon Not Guilty, had Judgment, and damages 40 l. Error brought, Error aſſigned, becauſe it is alledged, That he was poſſeſſed of 40 l. *et de bonis propriis*, and that the Defendant converted them *in retardationem Executionis Teſtamenti*, which is contrary in it ſelf, the goods being his proper goods. It was objected, That it was void for the ſaid repugnancy. But the Juſtices were of Opinion it was not, for the Executor is poſſeſſed of the Teſtators goods *ut de bonis propriis*; and yet the Converſion of them is *in retardationem Executionis Teſtamenti*. The Judgment was affirmed. Trin. 39 Eliz. B. R. *Rivers* and *Godſkirts* Caſe. *Cro.* 3. Part, 568.

12. In an Action brought againſt Executors; They pleaded an Outlawry of the Teſtator not reverſed. It was the Opinion of the Court, That it was no plea, for that the Teſtator might have debt due upon a Contract; or it might be that the Teſtator deviſed Lands to his Executors to be ſold, which are ſold, and the money is Aſſets in their hands; in which Caſes they are not forfeited by Outlawry; alſo the Executors may have Aſſets to ſatisfy over and above the goods forfeited to the Queen by the Outlawry. Trin. 39 Eliz. C. B. *Wolley* and *Bradwells* Caſe. *Cro.* 3. Part, 575.

13. Debt againſt the Defendant as Adminiſtrator of J. B. The Defendant pleaded a Recovery againſt him in Debt in *London, Et quod nihil, &c. præter ad ſatisfaciendum* that Judgment. The Plaintiff ſhewed, confeſſing the Recovery, That before this Action, the Plaintiff had confeſſed ſatisfaction upon Record. It was thereupon demurred, becauſe he doth not alledg, That the Judgment is entred upon that confeſſion: nor that he had goods over, beſides thoſe which ſatisfyed the Recovery: And it was adjudged for the Plaintiff; for ſatisfaction being acknowledged, he cannot plead that he hath nothing, becauſe the Judgment is diſcharged by this ſatisfaction acknowledged, without any other Judgment. Mich. 41 Eliz. C. B. *Hampton* and *Bartholmews* Caſe. *Cro.* 3. Part, 726.

14. *Scire facias* againſt Executors upon a Judgment againſt their Teſtator in Debt. They pleaded, That before they had knowledg of this Judgment, they had fully Adminiſtred all the Teſtators goods in payment of Debts upon Obligations. It was adjudged no plea, for they at their peril ought to take knowledg of Debts upon Record, and ought firſt of all (unleſs Debts due to the Queen) ſatisfy them. It was adjudged accordingly. Mich. 43 Eliz. C. B. *Littleton* and *Hibbins* Caſe. *Cro.* 3. Part, 793.

15. Debt upon an Obligation of 100 l. One of the Defendants was Outlawed, the other pleaded, That he who was Outlawed, was made Executor, and ſolely proved the Will, and that the Defendant as ſervant to him, took divers of the Teſtators goods by his delivery, and by his appointment had ſold them *Abſque hoc*, that he Adminiſtred

ſtrad, or in other manner; and adjudged no Plea, becauſe he doth not ſay, That he refuſed before the Ordinary, or confeſſeth any Adminiſtration, for that which he confeſſeth is not an Adminiſtration: Judgment was for the Plaintiff. Mich. 43 Eliz. C. B. *Godfrey* and *Woodwards* Caſe. *Cro.* 3. Part, 158.

16. A man made a Leaſe for life, and afterwards leaſed to A. for 99 years, if he ſo long lived, to begin after the death of the Leſſee for life, and if A. dyed during the Terme of 99 years, or the Terme otherwiſe determined; and after the death of the Leſſee for life, the leſſor granted for him and his Heirs, that the Lands ſhould remain to the Executors of A. for 20 years. The Leſſee for life dyed. A. leaſed for 20 years and dyed inteſtate. B. took Adminiſtration, and brought Debt for the Rent; It was adjudged, That it did not lie, becauſe this contingent for 20 years never veſted in A. and it was but a poſſibility. Mich. 45 Eliz. B. R. *Spark* and *Sparks* Caſe. *Yelverton* 9.

17. In Trover and Converſion, the Defendant juſtified by reaſon of a Rent granted to A. his Executors and Aſſignes, for the life of B. out of black Acre; and ſhewed that A. is dead, and he as Adminiſtrator diſtreined for the Rent in bl. Acre; and averred the life of B. It was adjudged in this Caſe, That the Juſtification was not good, for that by the death of A. the Rent is determined, and cannot come to the Executors or Adminiſtrators; for it is not a thing Teſtamentory, but a Free-hold. But it was the Opinion of the Court, That if the Rent had continued, then the taking of a thing lawful for a Diſtreſs had not been any Converſion. Mich. 45 Eliz. *Sellors* Caſe. *Yelv.* 9.

18. J. S. had a Debt owning to him by the Teſtator, upon a ſingle Contract; and he came to the Defendant being Executor, and ſignified the ſame unto him: who thereupon ſaid, That if the Plaintiff would forbear Suit againſt him for a time, he promiſed to pay him. It was the Opinion of the Court, That this was a good promiſe in Law; for although the Defendant might have waged his Law in an Action brought againſt him, becauſe it was of the Contract of another: yet in Law ſuch a Debt upon a ſimple Contract remains a Debt, and is not gone by the death of the Teſtator; and Debt lies againſt the Executor for it: and if he pleads to it, and doth not demurr to the Declaration, Judgment ſhall be given againſt him, and the Court *Ex officio* ſhall not abate the Writ, without Challenge of the Party. Mich. 2 Jac. B. R. *Fiſh* and *Richardſons* Caſe. *Yelverton* 55, 56.

19. Judgment was given againſt B. in Debt for 100 l. in C. B. after the Judgment he entred a Statute to J. S. and dyed Inteſtate, his Wife took Adminiſtration, and removed the Record by Error in B. R. and depending the Suit, paid the Debt upon the Statute to J. S; and after the firſt Judgment was affirmed, in a *Scire facias* againſt the Adminiſtrator to have Execution, ſhe pleaded payment of the Statute, *ultra* which ſhe had not Aſſets. It was the Opinion of the greater part of the Juſtices, That it was a good Plea, and that the payment of the Statute was no *Deraſtavit* in her, becauſe at the time of the Execution of the Statute ſhe could not have pleaded the Judgment in C. B. becauſe then it was in doubt whether it ſhould be affirmed or not. Hill. 45 Eliz. B. R. *Rede* and *Baſſblacks* Caſe. *Yelv.* 29.

20. G. was endebted to C. in 20 l. who dyed Inteſtate, his Wife took Adminiſtration, and recovered by Judgment againſt G; but before Execution, dyed Inteſtate: K. the Plaintiff took Adminiſtration of the Goods of C, and brought a *Scire facias* againſt G. upon the Judgment. It was the Opinion of all the Juſtices, That it did not lye, for one Adminiſtration is not privy to another; and this *Scire facias* being grounded upon a Record, it behooves him who will have an Action upon the Record, to make himſelf privy to him, who was before party to the Record, which cannot be done in this Caſe; for every Adminiſtrator claims by Commiſſion, and as it were by a Collateral authority to another. Paſch. 1 Jac. B. R. *Yates* and *Goughs* Caſe. *Yelv.* 33.

21. Note, It was agreed by the Juſtices, That if a man Leaſes Lands to J. D. by Indenture for years, rendring Rent; and J. D. dyes, and makes A. his Executor, that the Leſſor may have Debt againſt the Executor for the Rent reſerved, and the Arrears after the Death of the Leſſee, although the Executor never entred nor agreed; for the Executor repreſents the perſon of the Teſtator; and the Teſtator by the Indenture was eſtopped, and concluded during the Term to pay the Rent upon his own Contract; and in ſuch Caſe, although the Rent be more then the Profits of the Lands: yet the Executor cannot waive the Land, but ſhall be charged with the Rent. Mich. 5 Jac. B. R. *Hauſy* and *Mibers* Caſe. *Yelv.* 103.

22. A. made K. his Wife, and J. his Son an Enfant of the age of one year; his Executors, K. only proved the Will, and took Husband the Plaintiff; The Plaintiff brought Debt as Executor againſt the Defendant, leaving out J. the Son; The Defendant pleaded in abatement, That J. was made Executor with K. and is yet alive, not named in the Writ. The Plaintiff Replyed, That J. was but of the age of one year, and that K. proved the Will, and had Adminiſtration during the Minority of J. who is yet under 17 years. In

this Caſe, It was adjuged for the Defendant, becauſe both of them are in truth Executors, and ought to be named in the Action; and though K. during the Adminiſtration had full power, yet the Action ought to be brought in both their Names, and the Adminiſtrator *durante minore ætate* affirms him to be Executor. Trin. 6 Jac. B. R. *Smith* and *Smiths* Caſe. *Yelv.* 130.

23. To have a Prohibition to the Eccleſiaſtical Court; It was ſuggeſted, That whereas he was endebted to J. S. 30 l. that J. S. afterwards in his life time gave all his Goods and Chattells to A, and afterwards made the Plaintiff and B. his Executors, and deviſed, That the Plaintiff ſhould pay out of the 30 l. which he ought to him 10 l. to the Defendant for a Legacy, and the Defendant had drawn the Plaintiff into the Spiritual Court for the Legacy; whereas by the Law the 30 l. Debt was extinct, by making of the Plaintiff Executer. It was Reſolved by the whole Court in this Caſe, That a Conſultation ſhould be granted, For although the Joynt-Executor had no remedy to recover this 30 l. againſt the Plaintiff his Co-executor, nor any Action brought for the ſame in the life of the Plaintiff; yet the Debt was not extinct, but remains Aſſetts to any other Creditor; and therefore he ſhall ſatisfie the Legacy in this Caſe, becauſe the expreſs intent of the Teſtator was ſuch, he having preciſely appointed the Legacy to be paid out of the Debt of 30 l. Mich. 7 Jac. B. R. *Flud* and *Rumcys* Caſe. *Yelverton* 160.

24. Aſſumpſit; The Plaintiff declared, That G. S. his Father was poſſeſſed of divers Goods, and by his Will deviſed 7 l. as a Legacy to the Plaintiff, and made C. his Wife his Executrix, and dyed, and that the Defendant married with C, and how that ſuch a day in Conſideration that the Goods of G. S. came to the Defendants hands ſufficient to ſatisfy Debts and Legacies; and in Conſideration the Plaintiff at the requeſt of the Defendant, would forbear the 7 l. till *All Saints*, promiſed to pay the 7 l. The Defendant pleaded, That C. the Executrix of G. S. dyed Inteſtate, before the Promiſe made; upon which it was demurred: It was in this Caſe adjudged againſt the Plaintiff, For the Demurrer confeſſing the death of the Executrix before the Promiſe, thereby it appeareth to the Court, that there was not any Conſideration ſufficient to Charge the Defendant; for the thing which the Plaintiff would have advantage of by his Action, is a Legacy which ought to be ſued for in the Spiritual Court; and by the Death of his Wife, the Defendant is not Chargeable with the Legacy; for he is not Executor, nor privy to the Will of G. S: and although he hath poſſeſſion of Goods, yet becauſe he comes to them lawfully, by the inter-marriage with the Wife the Executrix, he ſhall not be charged neither in the Spiritual Court, nor at the Common Law; and ſo there is no Conſideration to Charge him. Mich. 8 Jac. B. R. *Smith* and *Jones* Caſe. *Yelv.* 184.

25. W. brought Debt againſt R. as Executor, and had Judgment *de bonis Teſtatoris*, and a *Scire facias* was awarded, the Sheriff returned *Nulla bona*; upon which the Plaintiff ſurmiſed, That the Defendant had waſted the Goods, and prayed a *Scire facias* againſt him, to ſhew cauſe why he ſhould not have Execution *de bonis propriis*. It was adjudged in this Caſe, That he ſhould have No Execution, untill the Sheriff had returned a *Devaſtavit*. See *Williams* and *Roberts* Caſe. *Noy* 7.

26. B, Adminiſtrator of A, made C. his Executor, and dyed; C. was ſued in the Spiritual Court, to make an Accompt of the Goods of A, the firſt Inteſtate. Whereupon he moved for a Prohibition, and it was granted, for an Executor ſhall not be compelled to Accompt; but an Adminiſtrator ſhall be compelled to Accompt before the Ordinary. Mich. 15 Jac. C. B. *Sparrow* and *Norfolks* Caſe. *Noy* 28.

27. Note, In an Action of Debt brought againſt A. as Executor in his own wrong; He pleaded, *Ne unq.* Executor, and it was found againſt him, and Execution was averred againſt him for the whole Debt, *viz.* 60. for his falſe Plea, although in truth he had not entermedled but with one Beaſtead of ſmall value; and ſo it was ſaid, It was adjudged, 40 Eliz. in C. B. in *Kitchin* and *Divens* Caſe. See *Noy* 69.

28. R. brought Debt againſt A. as Executor, and upon pleinment Adminiſtred, pleaded Aſſetts are found and Judgment for the Plaintiff, and upon a *Teſtatum* Execution was Awarded to a Sheriff of another County where the Tryal was: It was holden in that Caſe, That the Sheriff might return *Nihil*, and is not eſtopped by the Verdict and Judgment, but otherwiſe it is of the Sheriff of that County where the Action was brought. See *Robbins* Caſe. *Noy* 69.

29. Note, In the Caſe of a Prohibition, It was agreed by the Juſtices, That if a man makes his Will, and makes his Wife his Executrix, and deviſeth the reſidue of his Goods after Debts and Legacies paid to his Executrix, His wife dies before probate, that now becauſe the Executor had an Election to have them, and died before he did ſo, all the Good left go the Adminiſtrator of the firſt Teſtator, otherwiſe; if there were a Legacy of a particular thing. Trin. 4 Car. C. B. *Denn* and *Boroughs* Caſe. *Hetly.* 105.

30. Leſſee

30. Lafleo for 99 years made a Leaſe for 40 years, rendring Rent, and made his Executor, and dyed; A. proved the Will, and made B. his Executor, the Rent encurred: A. dyed, B. proved the Will, and Avowed for the Rent *in jure propria*. It was Reſolved by the Court, That by the Common Law he might diſtrein for the Rent, for that makes a privity; although it was Objected, That he Rent Arrear in the time of the Teſtator, Debt lay, and not diſtreſſe. 2. It was holden, That the Avowry was good, although it was *in jure propria*, by the Executor. Mich. 22 Jac. *Wade* and *Kaſhes* Caſe. *Latch.* 211.

Executions.

O. And J. were bound as Sureties with one A. to B, who recovered againſt B. in *London*, and had Execution againſt him: Now J. ſued O, to have him Contributory to the ſaid Execution, *ut utroq; eorum exoneretur pro rata*, according to the Cuſtom of *London*; O. removed the Cauſe by priviledge into the Kings Bench. Whereupon J. came and prayed a *Procedendo*; and becauſe upon this matter No Action lyeth by the Courſe of the Common Law, but only by Cuſtom in ſuch Cities; the Cauſe was remanded, for otherwiſe the Plaintiff ſhould be without remedy. See Book *Entries* 160. Paſch. 26 Eliz. B. R. *Oſey* and *Johnſons* Caſe. *Leon.* 2. Part, 166.

2. Note; It was agreed by the Juſtices in an *Audita Querela*, That if a man be in Execution by his Body and Lands upon a Statute-Staple; and the Sheriff ſuffereth the Conuſor to go at large, yet Execution of the Land is not thereby diſcharged; but if he go at large by the Aſſent of the Conuſee, there the whole Execution is diſcharged, and in ſuch Caſe the Conuſor ſhall have his Lands again preſently. Trin. 31 Eliz. C. B. *Linacre* and *Rhodes* Caſe. *Leon.* 2. Part, 96.

3. *Audita Querela*, upon a Statute acknowledged good by one within age, in C. B. It was a Queſtion if the Suit made might be in the Court, or if it ought to be in the Chancery; divers Preſidents were ſhewed, that Suits had been upon a Statute-Staple in this Court: It was therefore Ruled, That it lyeth here, for the Chancery hath no more Record of it then this Court; and the Book of *Entryes* is, That Suit hath been here, and there is a Writ for it in the Regiſter; and therefore it was Reſolved, That the Suit might be in this Court, or in the Kings Bench as well as in the Chancery: Then it was moved, That in the Record, the Inſpection of the Infant is not mentioned; and ſo he is now of full age, ſo as he cannot be Inſpected, The Preignothories ſaid, That the Entry is, *Quod venit in propria perſona*, and prayeth an Inſpection; and the Court would adviſe of the proof of his age: The Court ſeemed to doubt of it, and would adviſe. Mich. 33 Eliz. B. R. *Clavil* and *Mallerys* Caſe. *Cro.* 3. Part, 208.

4. In Action upon the Caſe againſt the Defendant, Sheriff of E; The Plaintiff declared, That he had recovered againſt P. 100 l. and had a *Fieri facias*, and the Defendant by Vertue thereof levyed 28 l. and had not returned the Writ, nor paid the money to the Plaintiff; The Defendant pleaded Not guilty, upon the Evidence, It was proved, That the Writ was delivered to C, the Defendants Under-Sheriff the 9th. of *Nov.* 34 Eliz. and the ſame day he made Execution, and the ſame day a Writ of Diſcharge was delivered to him, dated the 6th. of *Nov.* 34 Eliz. But becauſe he did not prove that he had Notice of this Writ of Diſcharge before the Execution ſerved, the Court was of Opinion, That he was yet Sheriff, and chargeable to the Plaintiffs Action. 2. It was alledged, That it was no due Execution; for that P. had made a Deed of his Goods before, and the Deed was dated the ſame day as the Writ of Execution. It was the Opinion of the whole Court, although that the gift was made *bona fid*, yet Execution might be taken of thoſe Goods: For by the ſuing forth of Execution, all the Defendants Goods are lyable, ſo as no Gift of Goods the day of the date of the Writ, or after, can ſtop the Execution. Mich. Mich. 38 Eliz. C.B. *Butchier* and *Wſemans* Caſe. *Cro.* 3. Part, 440.

5. Two perſons recovered againſt one in Debt ſeverally; He who had the firſt Judgment ſued an *Elegit*, and had the moyety of his Land delivered in Execution. Afterwards the other ſued an *Elegit*; The Sheriff prayed the Adviſe of the Court. The Opinion and direction of the Court was, That he deliver but the moyety of that moyety which he had at the time of the Writ awarded. Trin. 38 Eliz. C. B. *Hyet* and *Cogans* Caſe. *Cro.* 3. Part, 482.

6. Trover and Converſion of Goods at D, in the County of *Nott.* The Defendant ſaid, That he recovered againſt the Plaintiff a Debt of 200 l. in B. R, and thereupon had a *Fieri facias* to the Sheriff of Y, who at *Wakefield* in Common Election ſeized thoſe Goods, and delivered them to him in ſatisfaction of this Execution: Amongſt other Points it was Reſolved in this Caſe, That the Sheriff upon a *Fieri facias* cannot deliver the Defendants Goods to the Plaintiff in ſatisfaction of his

his debt. Mich. 39 Eliz. B.R. *Tompſon* and *Clarks* Caſe, *Cro.* 3. Part, 504.

7. The Sheriff took the Defendant's Goods by force of a *Fieri facias*, in Execution upon a Judgment in B. R; before Sale, the Record was removed by a Writ of Errour into the Exchequer-Chamber, and a *Superſedeas* awarded. The Sheriff retorned upon the *Fieri facias* a Seizure of the Goods, and that they remained in his hands *pro defectu Emptorum*. He alſo Retorned, That a *Superſedeas* was awarded. It was prayed, That the Defendant might have Reſtitution of his Goods. It was holden by the Court in this Caſe, That although the Record be removed, and notwithſtanding the *Superſedeas* awarded, in regard they came not to the Sheriff before he began to make Execution, That a *Venditioni Exponas* ſhould be awarded to perfect it: And although the Record be removed, yet if it be awarded upon the Retorn of the *Fieri facias* filed in the Office, it is good. Hill. 40 Eliz. B.R. *Charter* and *Potter's* Caſe, *Cro.* 3. Part, 597.

8. Aſſumpſit; The Plaintiff Declared, That B. was endebted to him, and he had Judgment againſt him, and ſued forth a *Capias ad ſatisfaciend.* and an *Exigent*, and thereupon B. was Outlawed; And that the Defendant in Conſideration that the Plaintiff would forbear to ſue and proceed upon the *Capias utlagatum*, promiſed, That if B. did not pay the debt, he would. It being upon *Non Aſſumpſit* found for the Plaintiff, It was moved, That this Conſideration was againſt the Law, and alſo void, becauſe the Proceſs is at the Queens Suit, and not the parties. But the Court held the Conſideration to be good, for it is the parties Suit as well as the Queens; for the party is the means to entitle the Queen thereunto, and the party hath the eſpecial carriage thereof; Judgment was entred for the Plaintiff. Mich. 44 Eliz. B.R. *Jennings* and *Hartley's* Caſe. *Cro.* 3. Part, 909.

8. In a Falſe Impriſonment, the Caſe was; One Recovered in Debt, and had a *Capias ad ſatisfaciend.* delivered to the Sheriff, who made a Warrant to his Bayliffs to do Execution. Afterwards, a *Superſedeas* was delivered to the Sheriff. The Defendant being Bayliff, not having Notice of that *Superſedeas*, 19 *Junii* Arreſted the Plaintiff by vertue of the *Capias ad ſatisfaciend.* who afterwards Eſcaped; and upon the 20th of *June*, the Defendant retook him, and detained him in Execution. Whether this ſecond Impriſonment was lawful or not, was the Queſtion? It was Reſolved by the Court, That it was not: For although the firſt Impriſonment was legal; yet the ſecond Impriſonment and detainment of him after, was a wrong; for he being the Sheriff's Servant, and by intendment having time given him to have Notice from his Maſter, ought at his perill to take Notice thereof; and therefore his act afterwards is not excuſable. Whereupon, upon all this matter d ſcloſed, It was adjudged for the Plaintiff. Hill. 45 Eliz. B.R. *Prince* and *Allington's* Caſe, *Cro.* 3. Part, 918.

9. A *Fieri facias* iſſued to levy a Debt for J. S. againſt A; The Sheriff by force ſeiſed his goods, but did not retorn the Writ: Afterwards the Sheriff was diſcharged, and a new Sheriff made; The old Sheriff after his diſcharge, ſold the goods of A. the Defendant, againſt the Defendant: Againſt whom A. brought Action of Trover; and all the matter aforeſaid being found by Verdict, It was adjudged for the Plaintiff; For that the Sale made by the old Sheriff after his diſcharge, was void; for that his Authority ceaſed with his Office. And in this Caſe it was ſaid, That where the Sheriff ſeizeth goods by vertue of an Execution, and afterwards is diſcharged, he ought to turn over the Goods with the Priſoners; and by the ſeizure of the goods only, the property is not altered; for ſeizure is no Execution, but only the beginning of it. Hill. 1 Jac. B.R. *Ayer* and *Edens* Caſe. *Yelverton*, 44.

10. The Plaintiff recovered againſt the Defendant upon a Bill of Debt, and had a *Capias ad ſatisfaciend.* to the Sheriff of *Middleſex*, who made a Precept to the Baily of the Liberty of the Dutchy, *viz.* the *Savoy*: And the Command was, *Quod capiat H. ad reſpondend.* the Plaintiff; whereas in truth it ſhould have been *ad ſatisfeciend.* The Baily retorned the Precept executed. The Sheriff retorned to the Court, *Cepi Corpus ſecundum exigentiam brevis.* It was moved, That the Plaintiff might have a new *Capias ad ſatisfaciend.* againſt the Defendant; for although that the Sheriff by his retorn hath charged himſelf as to the Plaintiff, ſo as he may demand Execution againſt him; yet becauſe the party was in truth never taken in Execution for the debt, the Court was of Opinion, That he might have new Proceſs of Executinn againſt him. Mich. 2 Jac. B. R. *Wood* and *Holburns* Caſe, *Yelverton*, 52.

11. J. S. recovered 120 l. in C. B. againſt G. *in Craſtino Animarum*, 6 Jac. and 28 Nov. the ſame Term, being the laſt day of the Term, the Plaintiff prayed an *Elegit* to the Sheriffs of *London*, and to the Sheriff of *Iſanc.* where the Action was brought, which was granted. Afterward the Plaintiff took an *Elegit* to the Sheriff of *Iſanc.* and by the Courſe, it is firſt directed to the Chancellor of the County Palatine, and this *Elegit* in the end of it, appeared to be grounded upon a *Teſtatum* firſt made by the Sheriff of *London*, that the Defendant had nothing in *London*, whereas in truth they made no ſuch retorn. And upon this *Elegit*, the

the Jury before the Sheriff of *Lanc.* extended a Leaſe of Tythe for 59 years to come but to the value of 100 l. which the Sheriff delivered to the Plaintiff as the Chattells of the Defendant. Upon this, the Defendant brought Error, and aſſigned for Error *in adjudicatione Executionis, viz.* that no Return was made by the Sheriff of *London*, nor filed in the Court of Common Pleas. This by the Court was adjudged to be Error: For although according to the preyer of the Plaintiff he might have taken his *Elegit* immediately into *London*, and into *Lanc.* yet when he waived the benefit of it, and would ground his Execution upon a *Teſtatum* by a former Sheriff of *London* which is falſe, that makes Error in the Execution. And note, That in this Caſe it was adjudged, That the Defendant ſhould be reſtored to his Term again; and although it was valued by the Jury but at 100 l. and delivered to the Plaintiff to hold *ut bona et catalla*: Yet againſt the Plaintiff he ſhould have his Term again. Mich. 8 Jac. B. R. *Junce* and *Goodyers* Caſe. *Yelv.* 179, 180.

13. The Caſe was, That upon a *Fieri facias* the Sheriff took part of the goods into his hands, and the Plaintiff gave him a Releaſe, and the goods were afterwards taken out of his poſſeſſion by the Defendant: And if the Plaintiff might have a new Execution, was the Queſtion. The Court was of Opinion, That he might, for it was no full execution, for he ought either to ſell the goods, or return *quod non invenit Emptores*; and upon that he ſhall have a *Venditioni Exponas*: Otherwiſe if he hath taken the body alſo in Execution. Mich. 2 Car. B. R. *Strids* Caſe. *Hetley* 117.

14. A. recovered in debt againſt B. A. brought a *Scire facias*. B. pleaded, That A. is Outlawed. It was holden it is a good plea if he be ouſted after the plea in bar pleaded in the Action of Debt, but otherwiſe it is if he be Outlawed before, for then B. might have pleaded that in bar to the firſt Action. It was ſaid in this Caſe, That the money being in Court, If the Kings Serjeant will pray to have the money for the King, He muſt firſt ſhew the Outlawry *ſub pede ſigilli*. And the party ought alſo to confeſs that he is the ſame party which is Outlawed. See *Noyes* Reports, 143. acc.

15. W. had a Judgment in Debt in C. B. againſt Sir *William Fiſh*. There after the Heir without a *Scire facias* he took a *Capias* againſt him, and arreſted him; and upon that he brought Error in the Kings Bench, and the Judgment affirmed upon it. Sir *William Fiſh* was diſcharged, and then W. took him again by a *Capias ad ſatisfaciendum ſive alias* without any *Scire facias* out of the Kings Bench; and upon that the Sheriff returned a *Capias*. It was moved, That he might be diſcharged. 1. He being once taken in Execution in C. B. and let at large here upon Sureties, upon a Writ of Error, That no new Execution can be againſt him if he will not agree to render his body for the Indempnity of his Sureties. But that exception was diſallowed by the Court; For it was ſaid, That one being once in Execution, and diſcharged by priviledg, might be in Execution again. 2. Exception, becauſe there iſſued a *Capias ſicut alias*, whereas there was no *Capias* awarded before; but to that no anſwer was given. 3. It was ſaid, That he was taken by a *Capias* after the year, and in another Court. The Court agreed the Reſolution in *Gregories* Caſe. The Common Pleas cannot award a *Capias* being after the year; The Clark ſaid, The Preſidents are, That he might be taken without a *Scire facias*. The Court agreed, for in truth there was no Execution. Trin. 2 Car. B. R. *Wiſeman* and Sir *William Fiſhes* Caſe. *Latch.* 192, 193.

Exchange.

1. IN Treſpaſs, the Defendant pleaded an Exchange betwixt him and the Plaintiff of certain Lands: and that *Agreatum fuit* betwixt them, that the Plaintiff ſhould make the Fences betwixt them, and ſhould alwayes maintain them; and that the Fences of a certain Cloſe called C. was in decay *per quod, &c.* Upon which the Plaintiff demurred. It was the Opinion of the Juſtices, That the Defendants plea was not good, for that this Agreement cannot be a bar in this Action, but the Defendant is put to his Action upon the Caſe upon the Promiſe if he perform it not: And if the Agreement had bin by Deed, yet it had not bin good. Mich. 41 Eliz. B. R. Sir *Andrew Nowell* and *Smiths* Caſe. *Cro.* 3. Part, 709.

2. Husband and Wife ſeiſed of the Moyety of the Mannor of J. to them, and to the Heirs of the Husband, the Husband levyed a Fine to J. S. who ſuffered a Common Recovery in which the Husband only was vouched; and the Recovery was to the uſe of the Conuſee and his Heirs. The Conuſee made a Feoffment to A. who thereof enfeoffed B. and C. in Fee: And after an Exchange was had between A. B. and C. and is executed; and the Exchange was of the moyety of the Mannor of J. for the fourth part of the Mannor of D. B. and C. Exchanges of the fourth part, and en-

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ter into the ſame, and thereof enfeoff E. the Huſband dyeth; the Wife entred into the moyety of the Mannor of J. A. re-entred into the fourth part of the Mannor of D. E. entred upon him, and A. brought Treſpaſs. It was Reſolved by all the Juſtices in this Caſe, That the Exchange was altogether defeated by the eviction of the Eſtate for life, and that aſwell where the Eſtate in parcel of the Land is defeated, as where parcel of the Land it ſelf is defeated. Mich. 44 Eliz. B. R. *Buſtard* and *Coulters* Caſe. *Cro.* 3. Part, 903. 917. See *Cook* 4. Part, the ſame Caſe. See *Yelverton* 8. the ſame Caſe.

Exchange of Lands in *Ireland* for Land in *England*, is good. See *Evans* and *Aſcoughs* Caſe. *Latch.* 234.

Excommunication.

1. THe Wife of J. S. was Excommunicated for Adultery before the High Commiſſioners; they ſent out a Purſevant with Letters Miſſive to apprehend her, and bring her before them; by colour of which, he with the Conſtable in the Night, brake open the houſe where the Woman was. If it was juſtifiable, was the Queſtion. In this Caſe, It was Reſolved by the Court. 1. That neither upon a *Capias Excommunic.* nor for any other Cauſe, unleſs for Felony or Treaſon, it is not lawfull for any to break an houſe in the Night. 2. Reſolved, It was not juſtifiable, for that they of the Spiritual Court, by reaſon of Excommunication, or by reaſon of any other matter, are not to meddle with the perſon of any man, or to ſend any proceſs to have the body before them; and therefore if any for any cauſe whatſoever be Excommunicated, and ſo continues in contumacy for 40 dayes, they ought to certify it into the Chancery, and from thence to have an *Excom. Capiendo*, but they themſelves cannot award proceſs to take him. Hill. 42 Eliz. C. B. *Smith* and *Smiths* Caſe. *Cro.* 3. Part, 741.

2. Action upon the Caſe, whereas an Excommunication was againſt H. the Inſtrument thereof was delivered to the Defendant, being Curate of the Pariſh where the ſaid H. and the Plaintiff Inhabited, to publiſh in the Church, That he malitiouſly razed out the name of H. and put in the Plaintiffs name, and read it in the Church: where. upon he was enforced to abſent himſelf from Divine Service, and to be at the expenſe to procure a diſcharge for himſelf. It was ſaid, That the Action lay not for this matter, becauſe it is Spiritual. But it was Reſolved, That the Action was maintainable: For although the Excommunication be Spiritual, and ſo is the denouncing thereof; yet the razing and alteration thereof is meerly Temporal, for which an Action lyeth at the Common Law. It was adjudged for the Plaintiff. Trin. 43 Eliz. B. R. *Kenton* and *Wallingers* Caſe. *Cro.* 3. Part, 838.

3. Treſpaſs of Battery, the Defendant pleaded Excomengement of the Plaintiff *ipſo facto*, for that he had ſtrucken in the Church yard, by the Statute of 5 E. 6. without ſhewing any Excomengement by the Ordinary under his Seal: And for that cauſe it was holden by the Court to be ill: For although the Statute ſaith, That he ſhall be Excommunicated *ipſo facto*, yet it is to be intended after a Sentence Declaratory, or Conviction, otherwiſe there were not any means for his abſolution. Hill. 44 Eliz. B. R. *Sonham* and *Trundles* Caſe. *Cro.* 3. Part, 919. See Paſc. 4 Car. C. B. *Viner* and *Eatons* Caſe. *Hetley* 86. acc. And there it was ſaid, That if the party be a Miniſter, he ought to be ſuſpended for an Offence againſt that Statute, and ſo to be Excommunicated: And in that Caſe it was alſo agreed, That an Excommunication cannot be pleaded, unleſs it be under Seal.

4. A man was ſued for defamation in another Dioceſs then where he dwelt, and being cited for his not appearance, he was Excommunicated; and upon a *ſignificavit*, an *Excom. Capiendo* was awarded. It was moved for a *Superſedeas* upon the Statute of 23 H. 8. becauſe he was ſued out of his Dioceſs. It was ſaid by the Juſtices, That the Biſhop had not power to cite out of his Dioceſs, but yet being out of his Dioceſs, he might abſolve. 2. It was ſaid, That the Caſe of Defamation was not within the Statute of 5 Eliz. cap. 23. And then the Excommunication was void: The Court ſaid that muſt be avoided by way of plea. It was then moved, That the party might be diſcharged, becauſe it was not the intent of the Law to enable the Eccleſiaſtical Judges with the Temporal power in ſuch petit Caſes as Defamations, &c. but only in great Caſes of Hereſies. The Court was of Opinion; That the Impriſonment was not diſcharged by the ſaid Statute. Hill. 2 Car. B. R. *Browns* Caſe. *Latch.* 174, & 204.

Excep-

Exception.

1. A Writ of Right was brought; and divers Exceptions were taken to the Writ. 1. The Writ was *Meſſuagium et 200 Acr. jampnor. et brueræ.* The Exception was, becauſe *jampnor. et brueræ* were coupled together, whereas they ought to be diſtinctly ſevered, as ſo many *Acr. jampnor.* and ſo many *Acr. brueræ.* But that Exception was not allowed of by the Court, for that it may be that *Jampnæ et brueræ* lye ſo promiſcuouſly that they cannot be divided. See 11 Eliz. *Dyer*, 283. 2. Exception to the Writ was, becauſe the Demandant demanded by the Writ *duas partes Cuſtodiæ de Hay*, in the Forreſt of C. The Exception was holden to be good by the Court; For that it ought to be *Officium Cuſtodiæ duarum partium de Hay*; as *Advocatio duarum partium Eccliſiæ*, and not *duas partes Advocationis.* 3. Exception, becauſe the Writ was *duas partes* in three parts to be divided: whereas it ought to be *diviſæ*, and not *dividend.* That was holden alſo to be a good Exception, for that *Dividend.* is not in any Writ, but in a Writ of Partition. 4. Exception was, becauſe in the Writ it is not ſet down in what Town the Forreſt of C. is, ſo as the Court doth not know from whence the Viſne ſhall come; for no *Venire* ſhall be *de Vicineto Forreſtæ*; and that was holden to be a very material Exception. 5. Exception was, becauſe a Writ of Right doth not lye of an Office, for it was not *Liberum tenementum* by the Common Law, but the party grieved was put to his *Quod permittat*; and of that Opinion was the whole Court. Mich. 31 Eliz. in C. B. *Salway* and *Luſons* Caſe. *Leon.* 2. Part, 36.

2. Waſte was brought in the *tenuit* againſt the Grantee of a Term by the Aſſignee of the Reverſion. The Defendant pleaded, That A. the firſt Leſſee had digged and opened a Mine of Coles, and afterwards granted unto him all his Intereſt in the Land, excepting to him and his Aſſigns, all the benefit and preſit of the Cole-Mines there, and of all Trees there. It was the Opinion of the Court, That the Exception was void, being of a thing whereof he had not any power to meddle. And it was compared to the Caſe of 28 Eliz. which was cited to be adjudged in this Court, where Leſſee for years granted all his Eſtate, excepting the Trees; and the firſt Leſſee cut down the Trees, and Waſte was brought againſt the Aſſignee, and adjudged maintainable, for that the exception was adjudged void, for the Trees were not let at firſt, but the ſoil, ſo as he excepted a thing which he had not to except, and therefore void. Hill. 41 El. *Sanders* and *Norwoods* Caſe. *Cro.* 3. Part, 683. See *Cook* 5. Part, 12.

3. Debt upon an Obligation, the Defendant pleaded a Releaſe of all Actions and demands in bar. The Plaintiff demanded *Oyer*, and one Bond was excepted therein. The Plaintiff replyed, That that was the Bond put in Suit, and the ſum and the perſon mentioned to be excepted were all one: And thereupon the Defendant demurred; for Actions and Suits being releaſed, although he excepts the Obligations, it is to no purpoſe. But it was Reſolved by the Court, That the Obligation it ſelf being excepted, all Suits and Actions concerning it alſo are excepted, and that the Defendant having pleaded a Releaſe generally without any exception, and upon *Oyer* demanded, a Deed is ſhewed with an exception, the Defendant might have pleaded *Non eſt factum* generally. Hill. 41 Eliz. B. R. *Brook* and *Wheelers* Caſe. *Cro.* 3. Part, 726.

4. Debt upon an Obligation, it was Conditioned, That if he were ſeiſed in his Demeſne as of Fee, the day of the date of the Obligation made of ſuch Copyhold Lands in S. D. and if the ſaid Lands ſhall be diſcharged of all incumbrances made by him, except the Eſtate and title of Joynture of his Wife *Eliz.* then, &c. The breach aſſigned was, That the Defendant before the Obligation made, had ſurrendred thoſe Lands *apud S. prædict.* to the uſe of his Wife for life. The Defendant pleaded, That he did not ſurrender *modo et forma.* The Plaintiff *ſur* rejoyned *Quod ſurſum reddit apud prædict. S. modo et forma.* An exception in this Caſe was taken in Error brought, That there is not any breach aſſigned, for the ſurrender to the uſe of his Wife is excepted, and ſo no breach. It was ſaid, That this exception doth not extend to the firſt clauſe, but only to the diſcharging of incumbrances. But the Court held, That it extended to both, and ſo it appears it was the intention of the parties: Wherefore the Judgment was reverſed. Paſc. 42 Eliz. *Exchequer-Chamber. Woodyard* and *Dannocks* Caſe. *Cro.* 3. Part, 761.

5. Debt for Rent reſerved upon a Leaſe for years, ſuppoſing that *apud* C. he demiſed ſuch Lands, excepting one Acre, *jacent. et exiſtent. in P. in Com. prædict. Hobend.* from the Annunciation laſt paſt for years, *virtute cujus intravit et habuit Tenementa prædict.* from the ſaid Annunciation. After Verdict, it was moved in ſtay of Judgment, That the Declaration was not good, for that there was not any Town named where the Land

lay; for the *jacens. in eſſe*, extended only to the Acre excepted. And 2. That it is alledged *Quod habuit et occupavit* from the Annunciation laſt, &c. which was before the beginning of the Leaſe; and he was thereby a Diſſeiſor, and ſhall not be ſaid to be in by the Leaſe. But it was the Opinion of the Court, That it was well enough. For it ſhall be intended, That he Occupied before the Leaſe by Agreement. It was adjudged for the Plaintiff. Mich. 44 Eliz. B. R. *Waller* and *Campions* Caſe. *Cro.* 3. Part, 905.

6. In *Ejectione firmæ*, the Caſe was; The Earl of O. was ſeiſed of the Manor of H. in which were divers Copyholds; and leaſed the ſaid Manor to J. S. for 21 years to begin two years after, Except all Caſualties and profits of Courts which ſeverally did paſs the value of 6 s. 8 d. And afterwards he bargained and ſold the Reverſion to A. C. Afterwards a compoſition was made betwixt A. C. and the Leſſee, By which the Leſſee did Grant and Covenant with the ſaid A. C. That he would permit the ſaid A. C. peaceably to hold the Courts, and to take the profits to his own uſe. Proviſo, That the ſaid Leſſee ſhould have the Rents of the Copyholders and Freeholders. Afterwards the Leſſee granted over the Intereſt of the ſaid Term. It was moved, That by the Exception the Court Baron was not ſevered from the Manor, nor deſtroyed, for it is incident to the Manor: And that the Covenant betwixt the Leſſee and A. C. amounted to a Grant of the Courts to the ſaid A. C. 2. It was ſaid, That when the Leſſee being in poſſeſſion, doth continue it after the two years; and before any entry, the Leſſee Aſſigns his Intereſt, That the ſame is not a good Grant, but only a Right. But the whole Court was of Opinion, That the Grant was good notwithſtanding the ſaid Exception: And that the Covenant was void: For although that A. G. hath Authority to hold the Courts; yet it ought to be in the name of the Leſſee. Trin. 30 Eliz. B. R. *Wheeler* and *Toogoods* Caſe. *Leon.* 1. Part, 118.

Extinguiſhment.

1. IN a Prohibition for Tythes; the Suggeſtion was, That he and all his Predeceſſors were ſeiſed of the Manor of which the Tythes were demanded, diſcharged of Tythes during the time that it was in their poſſeſſion, and ſhewed, That in the time of E. 6. the Manor was conveyed to the Duke of *Somerſet*, and was afterwards re-granted, and came to the Biſhop again. It was Reſolved in this Caſe. That the Preſcription for a Spiritual perſon to be diſcharged of Tythes, was good; and that the Preſcription in this Caſe was not determined when the Tythes came again to the Biſhop, for that Tythe is not a thing iſſuing out of Land; and Unity of Poſſeſſion doth not extinct them, nor a Releaſe of all the right to the Land. Hill. 33 Eliz. B. R. The Biſhop of *Lincoln* and *Coopers* Caſe. *Cro.* 3. Part, 276.

2. A Leaſe was made to Husband and Wife for years, who entred: The Leſſor enfeoffed the Husband, who dyed ſeiſed. The Wife ſurvived and claimed the Term; and if it was extinguiſhed, was the Queſtion. It was Reſolved by the whole Court, That by the acceptance of the Feoffor, the Husband had ſurrendred the Term, and that it was extinguiſhed; but if the Conveyance had bin by Bargain and Sale enrolled, or by Fine, it had bin otherwiſe. Mich. 45 Eliz. B. R. *Downing* and *Seymours* Caſe. *Cro.* 3. Part, 912.

3. Action upon the Caſe, the Plaintiff declared, That he was poſſeſſed for a certain Term to come of the Rectory of M. in the County of B. of which a Curtilage was parcel; in which Curtilage there had bin a watering place time out of mind for all thoſe who had bin ſeiſed of the ſaid Rectory, for them, their Tenants and Leſſees for watering their Cattel, and other Uſes there, and that it flowed from ſuch a Stream of Water, and run over a Hopyard of the Defendants to the ſaid watering place, and the Curtilage aforeſaid, and that the Defendant knowing the ſame, filled and ſtopt the ſaid Water-Courſe with Land and ſtones, and built a Wall upon it to the Plaintiffs damage. The Defendant pleaded, That King H. 8. was ſeiſed of the ſaid Manor, and of the Rectory and Hopyard aforeſaid: and ſo ſeiſed, granted the ſame to one F. in Fee, and F. ſo ſeiſed, one S.

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entred, and thereof enfeoffed the Defendant, who being ſo ſeiſed, built the ſaid Wall in the ſaid Hoppard, as was lawfull for him to do: Upon which the Plaintiff demurred. The Queſtion was, If by the Unity of Poſſeſſion the Water-courſe was extinguiſhed. It was Reſolved by all the Juſtices in this Caſe (amongſt other things), That the Water-Courſe was not extinguiſhed by the Unity of Poſſeſſion, and that the Preſcription was not gone, and that the Action brought by the Plaintiff did well lye. Hill. 1 Car. B. R. *Sary* and *Piggots* Caſe. *Latch* 153. See Popham 166. the ſame Caſe.

Feoffments, and *Feoffments to Uſes.*

1. A Man ſeiſed of three Acres in Fee in one County, enfeoffed A. of one of the ſaid Acres to the uſe of the Feoffor in Fee; and of another Acre he enfeoffed B. to the ſame uſe; and of the third Acre he enfeoffed C. and afterwards *Ceſtuy que uſe* of the ſame Acres enfeoffed other perſons in Fee with a Letter of Attorney to D. to deliver Seiſin to the ſaid Feoffee in the name of all the three Acres. In this Caſe it was adjudged by all the Juſtices in B. R. That it was a good Feoffment and Livery, and that by the ſame all the three Acres paſſed, and that it was within the Statute of 1 R. 3. Paſc. 25 H. 8. *Bendlowes* 15.

2. T. C. Archbiſhop of *Canterbury* made a Feoffment in Fee to the uſe of himſelf for life, without Impeachment of Waſte; and after his deceaſe, to the uſe of his Executors for 20 years; and after the 20 years, to the uſe of his Son and Heir in tail. Afterwards he was Attainted of Treaſon, and dyed, ſo as he could make no Executors; and dyed in eſtate without any Aſſignment. Queen *Mary* claimed the Term limited as aforeſaid, and granted the ſame over; the Heir in tail entred, and Leaſed the ſame for 3 years; the Patentee entred, and the Leſſee of the Heir, Tenant in tail, brought *Ejectione firmæ*. The Chief Queſtion in the Caſe was, If T. C. had ſuch a power in the Term that he might forfeit it. It was the Reſolution of the Court, That the future power was not forfeit by the Attainder of T. C. for that the Executors in this Caſe take the Term as Purchaſors, and he hath it not as a Chattel of the Teſtator, but as his own Chattel: And in this Caſe T. C. limits all the Uſes, and then he ſhall not have that which he hath limited to another, and it is in the nature of a Reſervation, which ſhall be taken ſtrictly and ſtrong againſt him that makes the Reſervation. Mich. 16 Eliz. C. B. *Cranmers* Caſe. *Leon.* 2. Part, 6, & 7.

3. The Lord *Audley* 12 H. 7. enfeoffed J. S. and others of Lands; and afterwards by Indenture reciting the Feoffment and the date of it, and that it was to the intent his Feoffees ſhould perform his Will, to this effect, viz. *My Will is, That my ſaid Feoffees ſhall ſtand ſeiſed, That the ſaid J. S. ſhall receive the yearly Profits of the ſaid Lands 100 l. which he bad lent to the ſaid Lord; and alſo ſtand ſeiſed to pay all his Debts upon Bill ſigned with his hand: And after the debts paid, That the Feoffees make Eſtate unto him the ſaid Lord of the Eſtate of the ſaid Lands, and E. his wife, and to the Heirs of their bodies, with divers Remainders over.* The Lord had Iſſue by the ſaid E. his Wife, a Son and a Daughter. The Feoffees made an Eſtate to the ſaid Lord and his Wife. It was the Opinion of the Juſtices, and other Sages of the Law in this Caſe, That upon this matter, no uſe was changed, for it is not a laſt Will, but an Intent: And although the Feoffees ſhall be ſeiſed to the uſe of the Feoffor and his Heirs, becauſe that no conſideration was for which they ſhould be ſeiſed to their own uſe; yet the ſame cannot make a new uſe to the Lord and his Wife in tail, without containing an Eſtate, for the Wife is a ſtranger to the Land, and alſo to the other Uſe. And it cannot be a Teſtament or laſt Will for the Eſtate mentioned in the ſaid Writing, ought to be made by the ſaid Lord and his Wife, who cannot take by his own Will: And ſo it was Reſolved, That by this writing, no uſe was changed or Eſtate veſted in the Lord or his Wife. Mich. 21 Eliz. in *Cancell.* The Lord *Audleyes* Caſe. *Leon.* 2. Part, 159.

4. In a Replevin, the Caſe was, The Earl of A. was ſeiſed in Fee of the Manour of B. whereof the place where [illegible] Demiſe by

[illegible] Coſtome

Customes in Fee, whereof the Defendant was a Copyholder in Fee. The ſaid Earl enfeoffed diverſ perſons of the ſaid Mannor to the uſe of himſelf for life, and afterwards to the uſe of the Lord *Lumley*, and *Eliz.* his Wife Daughter of the ſaid Earl, and the Heirs of their two bodies begotten; who made a Leaſe of the ſaid Cuſtomary Lands by Indenture unto the Plaintiff for 100 years. The Queſtion was, If by this Leaſe the Lands be ſo ſevered from the Mannor, that the Copyhold is extinct. It was Objected, That by the Leaſe the Cuſtome was gone, and then by conſequence the Cuſtomary Tenure as to that Land is determined. For the Eſtate of the Copyholder is *ſecundum Conſuetudinem Manerii ad voluntatem Domini*; and now by this Leaſe, the Copyholder cannot hold *ſecundum Conſuetudinem*, for now the Services reſerved upon the Copy, and the advantages of Waſte, and other forfeitures are extinct. But it was the Opinion of the whole Court, That the Copyhold did remain, for otherwiſe by ſuch practiſes of the Lords, all the Copyholders in *England* might be defeated; and if any prejudice be grown to the Lord by this his act, it is his own doing, and againſt his own act he ſhall not be relieved. Some of the Juſtices in this Caſe were of Opinion, That the Lord by making this Leaſe, had deſtroyed the Cuſtome as to the Services, but not to the Cuſtomary Intereſt of the Tenant. Trin. 29 Eliz. C.B: *Beal* and *Langl yes* Caſe. *Leon.* 2. Part, 208. See *Cook* 4. Part, *Murrell* and *Smiths* Caſe.

5. The Caſe was, J. S. ſeiſed of the Mannor of W. leaſed the ſame to A. and B. his Wife for the life of the Wife, the Remainder to the right Heirs of the Husband. The Husband made a Feoffment in Fee to the uſe of himſelf and his Wife for their lives, the Remainder to his right Heirs; the Husband dyed, the Wife held in and committed Waſte in a Park parcel of the Mannor. It was moved in this Caſe, If in an Action of Waſte, the Writ of Waſte ſhall ſuppoſe, That the Wife holdeth *ex dimiſſione J. S.* or *ex dimiſſione Viri*. It was the Opinion of the Juſtices, That upon this matter, the Writ ought to be general, *viz.* that ſhe holds in *de hæreditate J. S. hæredis, &c.* without ſaying *ex dimiſſione hujus vel illius* for ſhe is not in by the Leſſor, nor by the Feoffment, but by the Statute of Uſes, and therefore the Writ ſhall be *ex hæreditate*. Alſo in this Caſe, It was Reſolved by the Juſtices, That the Wife was not remitted, but that ſhe is in according to the form of the Feoffment. Hill. 16 Eliz. C. B. *Vavaſors* Caſe. *Leon.* 2. Part, 222.

6. In Treſpaſs upon an Evidence, It was moved, That where an Indenture of Bargain and Sale between J. S. of the one part, and J. D. of the other part; and in the end thereof, a Letter of Attorney to J. N. to make Livery was produced in Court, That it ſhould be void, becauſe the Attorney was not party to the Deed. It was the Opinion of the whole Court, That it was good enough: For in many ſuch Indentures are ſuch Letters of Attorney made; and it is a Common Aſſurance, and therefore good. Mich. 44 Eliz. B. R. *Moil* and *Ewers* Caſe. *Cro.* 3. Part, 905.

7. The Husband ſeiſed of Lands, made a Feoffment upon Condition to enfeoff him and his Wife for life, the Remainder over to a ſtranger in Fee. It was demanded if the Feoffee ſhould be bounden to make the Feoffment before requeſt. The Juſtices conceived, That a Requeſt ought to be made by the Husband, becauſe the particular Eſtate, which is the foundation of the Remainder limited to the ſtranger, ought to be made to the Husband who is party to the Condition. But if the Husband dyes, then it behoves him to make the Feoffment to the Wife without requeſt, becauſe ſhe is a ſtranger to the Condition; and where ſhe dyes before the Feoffment, the Eſtate ought to be made to him to whom the Remainder is limited without requeſt. Mich. 2 Car. in C.B. *Wilkinſons* Caſe. *Hetley* 56.

8. A. made a Feoffment to the uſe of L. in Fee, to the uſe of another in tail, the Remainder to his right Heirs in Fee, *Ceſtuy que uſe* in tail dyed; the firſt Feoffees enter for to re-continue the uſe. It was ſaid, That when Tenant in tail in uſe makes a Feoffment, nothing paſſes but for his own life: For it was ſaid it had bin agreed, where *Ceſtuy que uſe* for life makes a Feoffment in Fee, nothing paſſed but for his life: Then when the Feoffee dyes during the life of *Ceſtuy que uſe* in tail, that cannot be any diſcent of the Fee, but as an Eſtate for life which determines by the death of *Ceſtuy que uſe* in tail; all which was agreed by the Juſtices, for the Diſcent was when he had not any Title of entry: For by the Feoffment he had a Title during the life of *Ceſtuy que uſe* in tail: Wherefore during his life they could not enter, nor make continual claim. But if the diſcent had bin after the death of *Ceſtuy que uſe* in tail, then it ſhould be otherwiſe, for they had a Title to enter before the diſcent. And in this Caſe, the Juſtices ſaid, That *Ceſtuy que uſe* in tail had no other remedy unleſs by the entry of the Feoffees. Mich. 2 Car. C.B. *Waterman* and *Loadmans* Caſe. *Hetley* 56.

9. A man ſeiſed of Lands in Fee, made a Feoffment in Fee to his uſe; and afterwards he made his Will: By which he Deviſed, That the Feoffees ſhould make an Eſtate of the ſame Lands to all his ſons, except H: And if all his ſons dye without Iſſue, that then the Remainder ſhould be to a ſtranger. It was ſaid by *Hutton*, Juſtice, in this Caſe, That becauſe H. was not excepted in the

the laſt Clauſe, that he had an Eſtate tail. Mich. 3 Car. C. B. *Harris* and *Martes* Caſe, *Hetley*, 57.

Fines *levied.*

1. TEnant in tail diſcontinued in Fee, and diſſeiſed the Diſcontinuee, and levied a Fine with proclamation to a ſtranger, and took an Eſtate to himſelf in the ſame Fine in Fee. The Diſcontinuee before all the proclamation paſſed, entred, and made continual claim upon the Lands; and after, the Proclamations paſſed, and within the year after, he entred, and claimed the Lands. And afterwards, the Tenant in tail dyed ſeiſed. The Queſtion was, If the heir in tail was remitted by the Dying ſeiſed, notwithſtanding the Fine levied by his Father? Or if the Entry of the Diſcontinuee was good upon the Iſſue? The Opinion of the Juſtices in this Caſe was, That the heir was not remitted to the ſaid Lands, and that was by the Statute of 32 H. 8. which was a Barr unto him and his heirs by the ſaid Fine. Trinit. 4 Eliz. C.B. *Bendlowes*, 30.

2. A Fine was levied by C. and D. his Wife, to the uſe of A. of a Mannor in Fee, and he by the ſame Fine reuſed the ſame Mannor to the ſaid C. and D. *habend. et tenend. eiſdem C. et D. et eorum alterius dictis viventis, abſq; impetitione waſti, &c.* And *the deceaſſon ipſorum C. et D. prædict. Maneriam, &c. integrè remaneve hæredibus maſculis* of the body *ipſius C. et D. procreatis, &c.* It was the Opinion of the Juſtices in this caſe, That the ſame was a ſpecial tail executed at the beginning in the husband and wife, and not an Eſtate for life, and a remainder to their heirs males of their bodies, as the words did import. *Temps.* Eliz. Sir *John Mordant's* Caſe, *Bendlowes*, 31.

3. *Ejectione Firmæ*; The Caſe was; J. S. ſeiſed of Lands in Fee, by his Will Deviſed the ſame to E. his Wife for life: And further Willed, That when R. his brother ſhould come to the age of 25. years, that he ſhould have the Lands to him and the heirs of his body lawfully begotten: J. S. dyed, who having Iſſue of his body who is his heir; E. F. before he had attained the age of 25. years, levied a Fine of the ſaid Lands with proclamations in the life and during the Seiſin of E. to J. D. If this Fine ſhould barr the Eſtate in tail, was the Queſtion? It was the Opinion of the Juſtices, That it ſhould, And the Lord *Zouch's* Caſe, Mich. 29 & 30 Eliz. was vouched, Where Tenant in tail diſcontinued to E. in Fee; and afterwards levied a Fine to B: In that caſe, although the parties *nihil habuerunt*, yet the Fine ſhould bind the tail. It was Objected, That the principal Caſe differed from that Caſe, for in that Caſe, the Fine was pleaded in Barr; but in this caſe, it is only found by Verdict. But the Court held, The ſame was no difference; For the Fine by the Statute is not any matter of Eſtoppell or Concluſion, but by the Statute doth bind and extinguiſh the Eſtate-tail, and the right of it. And Judgment was given, That the Eſtate Tail by the Fine, was utterly barred. Hill. 31 Eliz. C. B. *John Bellamy's* Caſe. *Leon.* 2. Part, 36, 37.

4. Note: It was agreed by all the Juſtices, That if the Diſſeiſor levieth a Fine, and the Diſſeiſee in preſervation of his right againſt the Fine, entreth his Claym in the Record of the Foot of the Fine, that the ſame is not ſuch a Claym as ſhall avoid the Statute of 4 H. 7. of *Fines*. Mich. 29 Eliz. C. B. *Bafer's* Caſe. *Leon.* 2. Part, 53.

5. Note; It was agreed by the whole Court, That if Tenant for life being of full age, and he in the Remainder within age levy a Fine, and afterwards the Enfant reverſeth the Fine as to him for the Inheritance; That in that caſe, he ſhall not Enter for the Forfeiture, becauſe he joyned in the Fine, and ſo aſſented to it. Trin. 30 Eliz. C. B. *Piggott* and *Raſtell's* Caſe. *Leon.* 2. Part, 108.

6. The Caſe was, A woman Tenant in tail within the Statute of 11 H. 7. accepted of a Fine *Sur Conuſans de Droit come ceo, &c.* And by the ſame Fine, rendred back the Land to the Conuſee for 100 years. It was moved, If this Conveyance and Diſpoſition were within the penalty of the Statute; for the Statute ſpeaks of Diſcontinuances? It was the Opinion of the whole Court, That it was within the Statute; for by ſuch practice, the meaning of the Statute might be defeated: And if ſuch Render for 100 years ſhould be good, it might be for 1000 years, which ſhould be as miſchievous to him in the Reverſion, as a Diſcontinuance. Mich. 30 Eliz. C. B. *Barker* and *Tyſon's* Caſe. *Leon.* 2. Part, 168.

7. Error of a Judgment given in an *Aſſiſe* of a Rent-Charge, in which the Title was, J. S. and A. his Wife were ſeiſed of the Mannors of H. and F; and by Fine conveyed the ſame (*Inter Alia*) to W. by the name of two Mannors, and 50 Meſſuages, and 300 Acres of Land; who by the ſame Fine rendred the Rent of 50 l. to them, and the heirs of A; and rendred the Mannors and Tenements aforeſaid to them for their Lives, the Remainder to G. their ſon in tail; the remainder to the heirs of A: J. S. and A. dyed, and the Rent

diſcended

discended to the Plaintiff as ſon and heir of A; and that G. entred in his Remainder, and thereof enfeoffed the Plaintiff who was Tenant in the Aſſiſe. And upon *Nul tort, &c.* pleaded, It was found for the Plaintiff, and he had Judgment to recover. Upon which, Errour was brought, and divers Errours aſſigned: 1. That the Fine is pleaded of theſe Mannors (*inter alia*) ſo it may be intended, that other Lands paſſed by the Fine, and ſo an Aſſiſe brought againſt him who was only Tenant of the Mannors, was not good; for all the Tenants of the Land ought to be named. This the Court held to be a good Exception. 2. Errour, That the Fine by the grant of the Rent, and of the Land to the ſame perſon by the Fine, is repugnant for the Rent, and ſo void; For ſhe cannot take the Land and Rent at the ſame time. To this the Court ſeemed of Opinion, That the Rent granted by the ſame Fine as the Land was granted, was good: for the Law ſhall marſhall them, and the Grant of both ſhall be good: for firſt the Rent ſhall paſſe, and then it ſhall be as a purchaſe of the Land by A, who was ſeiſed in Fee of the Rent; and the purchaſe of the Remainder in Fee ſhall not extinguiſh the Rent, but it ſhall be in *eſſe* during the particular Eſtate; for by this the poſſeſſion is only charged. And the difference was taken, Where one hath a Rent-ſervice, and he purchaſeth the Remainder or Reverſion in Fee, all the whole Seignory is extinct: for the entire Tenancy is held, but the purchaſe of a Reverſion or Remainder in Fee, doth not extinct a Rent-charge, for it is chargeable upon the poſſeſſion; for he ſhall avow as in Land chargeable to his Diſtreſs. Paſc. 33 Eliz. B.R. *Garnons* and Sir *Henry Weſton*'s Caſe. *Cro.* 3. Part, 226.

8. Errour to reverſe a Fine, 1. Becauſe the Caption of the Conuſans was before R. M. Chief Baron, 27. *Martii*, 27 Eliz. and the Writ of Covenant and *Dedimus Poteſtatem* bore date 9. *Aprilis*, ſo as the Conuſans was taken without Warrant. But the Court ſaid, It was good enough; otherwiſe they ſhould Reverſe divers Fines. 2. Errour, That upon the Caption of the Fine upon the *Dedimus Poteſtatem*, the Land was given to W. and his wife, and to the heirs of the body of the Husband and of the body of the wife begotten; and the Fine engroſſed, was to the Heirs of the body of the Husband upon the Wife begotten; ſo is variant. But all the Juſtices ſaid, That that was not material; for in both caſes the wife had but an Eſtate for life, and the husband an Eſtate tail; and the words are of the ſame ſenſe. 3. Errour, For that the Caption was, *Quod ſi contingat*, the Husband to dye without Iſſue, that it ſhould remain over; and the Fine engroſſed was, *Si contingat*, that the Husband and Wife dye without Iſſue. But the Court held the ſame to be all one; for the Eſtate in Remainder is always limited upon the more long Eſtate, which is the Eſtate tail, yet it was all one in ſenſe. The Fine was affirmed. Paſch. 34 Eliz. C.B. *Argentas* and *Viſtowers* Caſe. *Cro.* 3. Part, 275.

9. *Ejectione Firmæ*, The Caſe was, Tenant in tail of Lands in A, levied a Fine with Proclamation, with the Remainder to himſelf in Fee; The Fine was afterwards reverſed by a Writ of Diſceit; It was thereupon holden by the Court, That the Iſſue in tail was remitted, and ſhould avoid all Eſtates made by him, for that the Fine is void between the parties. But the Tenant in tail after that Fine levied, and before it was reverſed, had made a Leaſe for years, the Remainder over for life: And, Whether the Iſſue might enter and avoid this Leaſe, was the Doubt? It was the Opinion of the Court, That he could not, without a *Scire facias* ſued againſt him who had the Freehold; For he who is to defeat a Record, is always to commence his Suit againſt him who is privy to the Record. But when he hath Reverſed it againſt him, he ought to have a *Scire facias* againſt him who is Terr-Tenant; for it may be that he hath ſome matter to barr him of Execution. Paſch. 38 Eliz. B.R. *Cary* and *Dawyes* Caſe. *Cro.* 3. Part, 471.

10. Note: In an *Ejectione Firmæ*, It was holden by all the Juſtices, That where a Fine was levied with Proclamation, and a friend of him who had right, entred to his uſe to avoid a Fine without his appointment; And the Conuſee re-entred, and the 5. years paſſed; That this Fine is not avoided, but ſhall bind. But the Agreement of him who had the Right within the 5. years after ſuch Entry made in his name, would perhaps ſerve; but an Agreement to it after the 5. years, paſſed not. Paſch. 39 Eliz. B.R. The Lord *Audley* and *Pollard*'s Caſe, *Cro.* 3. Part, 561.

11. Upon a Demurrer, the Caſe was, Tenant in tail of the Guift of the Queen is diſſeiſed; The Diſſeiſor levies a Fine with proclamations, and 5. years paſſe; the Tenant in tail dyes; Whether the Iſſue were bound or not, was the Queſtion? *Anderſon* held, That the Iſſue ſhould be bound, for that he is not helped by the Statute of 34 H. 8. Although it hath been conceived, That his Iſſue may be aided by this Statute: Which the other Juſtices agreed unto. The Court conceived, It was a Caſe to be adviſed upon; for if it ſhould not be remedied by the Equity of the Statute, The Donee of Tenant in tail would ſuffer a Diſſeiſin, and the Diſſeiſor ſhould levy a Fine, and bear the Iſſue. Wherefore it was adjourned. Mich. 40 Eliz. C. B. *Stratfield* and *Divers* Caſe. *Cro.* 3. Part, 595. See afterwards, 612. upon the matter.

state of pleading, without respect had to the matter in Law. It was *Adjudged* for the Defendant.

12. Errour to reverse a Fine; For that the Fine was levied of a Reversion of divers Tenements in *London* in *Golding-Lane*; The Conusee brought a *Quid juris clamat*, and, hanging that, died: The Heir brought a new *Quid juris clamat*, and the Defendant in part claimed Fee; and in the other part, was ready to Attorn; And the Plaintiff accepted thereof, and to the Remainder, *Quod Defendens est sine die, &c.* And the Fine for was engrossed, and proclamations made. The Error assigned was, For that the Conusee is only to have the Election, Whether he will levy the Fine with proclamations, or not; and, he being dead, the Fine ought not to be with proclamation at the Heir's Suit. But the Court Resolved to the contrary; For the Heir hath as well Election to have it with proclamation, as the Ancestor, for it is for his benefit, and the Statute doth not restrain it. 2. Errour, Because the Judgment in the *Quid juris Clamat* is, That the Fine be engrossed for part only; and here it is engrossed for the whole. But the Court Resolved, That was well enough for the bringing of the *Quid juris Clamat* is not material, for the Conusee might have had the Fine engrossed without suing a *Quid juris Clamat*, and the suing thereof is only for his advantage; for without suing thereof, his Fine could not have had any Attornment: Wherefore although the Judgment thereby is, That the Fine be engrossed in part, yet the party if he will, may have all the Fine engrossed, and the proclamations at the time of the Heir after the Fine engrossed, it will enough. Mich. 42 Eliz. B. R. *Stukeley* and *Hedges* Case. *Cro.* 3. Part, 692, 93.

13. In *Replevin*, the Case was, That A. and G. levied a Fine of the place where, *Sur Conusans de Droit come ceo, &c.* And the Conusee rendred *Tenements predict.* to A. in tail, Reserving a Rent, and by the Fine granted it, *Quod Tenementa predicta* remain to G. in Fee; A. died without issue of his body; Whether the Reversion and Rent passed, being by one Fine? Resolved, That they passed, and that it should enure as several Fines. But if one makes a Guift in tail, rendring Rent, the Remainder over in Fee, this being by Deed, is a good Reservation of Rent to the Donor, and the Remainder only shall go to the stranger. It was adjudged for the Avowant. Mich. 41 Eliz. C. B. *White* and *Gerish*'s Case. *Cro.* 3. Part, 77.

14. Note: It was said by *Popham*, Chief Justice, That there are two manner of Conusans of Fines, *viz.* by Commission by *Dedimus Potestatem*; Or in the Court of Common Pleas. And if a *Dedimus Potestatem* be awarded to two, and one of them takes the Conusans of the Fine, and this Fine is afterwards drawn up in the Common-Pleas, Yet the party may well have a Writ of Errour upon that Fine, *viz.* That the Conusans was without Warrant, for it is not contrary to the Record: for the *Dedimus* is parcell of the Record, and the Assignment of Errour agrees with the same. But if such an Erronious Conusans upon *Dedimus Potestatem* be taken, and the Fine is drawn up as a Fine acknowledged in Court; Now no Misprision in the *Dedimus* shall avoid it; For it shall be adjudged as a Fine acknowledged in Court only. Pasc. 1 Jac. B. R. *Arundell* and *Arundell*'s Case. *Yelverton*, 33.

15. In *Ejectione Firmæ*, the Case was this; J. S. seised of Lands in Fee, gave the same to A. his second son, and to the Heirs males of his body, and died: A. is a E. 6. made a Lease for two Lives, the Remainder to the Tenant for life with Warranty: 16 Eliz. A. levied a Fine with proclamation to M. to the use of T. in Fee; who conveyed it to M, and 5. years passed: A. died without Issue; E. his Daughter married J. D, and had Issue the Lessor, and died. All the Tenants for lives died; The eldest son of J. S. survived A, and died without Issue; and the said E. was his Heir. And, If the Entry of R, Son and Heir of J. D, and Heir of E. within 5. years after the death of the Lessees for life, were Congeable or not, was the Question? This Case was often argued, and many Points stirred, but none of them Resolved, nor any Judgment given in the Case. See for the principal Case, and the Arguments at large, Trin. 2 Car. B. R. *Saul* and *Clinks* Case. See the Reports annexed to *Benloe*, 174. *Latch*, 64. & 72.

Fines

Fines *Impoſed, Aſſeſſed, and Granted: And,* Fines *to the* King.

1. THe Queen granted to the Lord *North* and his Heirs, the Fine *pro Licentia Concordandi*; and one would not pay him the Fine: For which the Lord *North* brought an Action upon the Caſe againſt him, and declared upon *Inhabitatus Aſſumpſit*. It was moved to the Court, If ſuch Action would lye for it, or not? It was ſaid, it was a real Fine; and there is no Contract betwixt the parties, but the ſame is given by the Law, and therefore *Aſſumpſit* did not lye for it. *Gawdy*, Juſtice, conceived, That the Action doth well lye for it; And alſo, That Debt lyeth for it, although it be an Inheritance. But the Opinion of *Wray*, Chief Juſtice, was, That this Action did well lye for it, Becauſe he hath not any other remedy for it. Trin. 30 Eliz. B. R. The Lord *North*'s Caſe. *Leon.* 2. Part, 79.

2. Upon a Special Verdict, the Caſe was, A Copyholder in Fee, ſurrendred to the uſe of one for life, the Remainder to another in Fee: Tenant for life is admitted; Afterwards he in the Remainder ſurrendred to the uſe of J. S. in Fee: Of which Surrender the Lord accepted, and admitted J. S: The Tenant for life dyes; the Heir of the firſt Copyholder enters, and J. S. ouſts him. It was moved, That J. S. ſhould have this Land; For firſt, the Admittance of Tenant for life is ſufficient for him in the Remainder, to veſt the Remainder in him. 2. The Lord's Acceptance of the Surrender, is *Quaſi* an Admittance of him; for he allowes him to make a Surrender; and thereby he admits him to have a Remainder whereof to make a Surrender. The Reaſon againſt it is, That then the Lord ſhould loſe his Fine of him in the Remainder. But *Popham*, Chief Juſtice, did contrive. That there is one Fine only due by him upon this Surrender, which the Tenant for life ſhall pay before his Admittance. As where the Queen's Tenant in *Capite* aliens for life, the Remainder over, there is but one Fine due for this Alienation; So in this caſe, unleſs there be a ſpecial Cuſtome, that two Fines ſhall be due. It was not Reſolved, but Adjourned. Mich. 33 Eliz. in B. R. *Gyppis* and *Bassy*'s Caſe. *Cro.* 3. Part, 504.

3. Debt for an Amercement in a Leet; And Declared, That he had a Leet within the Manor of F, of all R. ſtants within the Manor; And that at ſuch a Court holden there before J. S. his Steward there; The Steward telling the Defendant, That he was a Suitor there, and that he ought to be ſworn to Enquire, &c. The Defendant contemptuouſly anſwered him, *It ſeems ſo, Sirrah.* For which the Steward impoſed a Fine of 20 s. upon him; and for it brought Debt. Upon *Nihil dicit*, it was found againſt the Defendant. It was moved, That this was not ſuch a Contempt for which a Fine was to be impoſed. But the Court held it to be an apparant Contempt and an Abuſe unto him being a Judg, and in his Authority; and that he himſelf might aſſeſſe the Fine for ſuch Contempt, and therefore that the Action did lye. Mich. 39 Eliz. B. R. The Earl of *Lincoln* and *Fiſher*'s Caſe. *Cro.* 3. Part, 581.

4. Error of a Judgment in Debt upon an Obligation in C. B. Where the Earl pleaded, *Non eſt factum*, and Judgment againſt him *Quia Capiatur*. Upon Error brought, that was aſſigned for Error, Becauſe he was a Peer of the Realm, againſt whom, a *Capias* lyeth not. But *Non allocatur*; For by this Plea found againſt him, a Fine is due to the Queen; therefore *Capiatur pro fine* lyes well. And the Judgment was affirmed. Mich. 39 Eliz. B. R. The Earl of *Lincoln* and *Elmer*'s Caſe. *Cro.* 3. Part, 503.

5. A. brought a *Habeas Corpus*; for that he was committed to the *Gate-Houſe* by the High Commiſſioners, becauſe before that time he had been Sentenced and enjoyned Penance for Incontinency, and was Fined to the King, and that he ſhould pay Coſts. And for not performing all this he was committed. It was the Opinion of the whole Court in this Caſe, That the High-Commiſſioners cannot impriſon any man for a Fine Impoſed, nor take an Obligation for it to the uſe of the King; but they ought to Eſtreat it into the Exchequer: But for the Penance, or the Eccleſiaſtical Cenſure lawfully made, they might commit the party to priſon, till they conform themſelves to their Sentence. Hill. 2 Jac. B. R. [illegible] 17.

6. Note, by *Popham*, Chief Juſtice, which was alſo agreed by *Yelverton*, Upon the Tryal of W. [illegible] the death of P; That if two be fighting, and the [illegible] are more looking on, who do not endeavour to [illegible] them: If one be killed, That the Lookers on [illegible] be Indicted, and Fined to the King. Paſch. 44 [illegible] B. R. *Williams* Caſe, *Noy*, 50.

7. *Norris* and others of a Jury in the Kings-Bench, were fined to the King, for acquitting one Indicted and Arraigned of Robbery, contrary to their Evidence, and the direction of the Court. It was moved, That the Fine was not duly Impoſed, becauſe it is not ſaid in the Record, That they found for the Defendant *contra evidentias factas*. It was the Opinion of the Juſtices, That the Court of Kings Bench might impoſe Fines upon Jurors, who found againſt the direction of the Juſtices. But it was ſaid, That Juſtices of Aſſize could not Fine upon a Verdict; but only upon a Miſdemeanour for eating and drinking, or the like. Mich. 1 Car. B. R. *Norris*'s Caſe. See the Reports annexed to *Bendloes*, 153.

Forfeiture.

1. IN *Ejectione Firmæ*, upon a Special Verdict found, That Sir R. B. was ſeiſed of Lands in Fee, and thereof enfeoffed one W. and others, upon Condition, That they ſhould regrant it to him and his wife in tail, the Remainder to the right heirs of Sir R. B. who regranted it accordingly: Sir R. B. and F. his Wife had Iſſue A. B. their ſon; Sir R. B. dyed; A. B. levied a Fine with proclamations to Sir G. B. the Leſſor and his heirs, to the uſe of him and his heirs; The Mother afterwards lent it to the Defendant for life, and dyed: Sir G. B. afterwards entred upon the Defendant, pretending his Entry to be lawful by the Statute of 11 H. 7. and lett the Lands to the Plaintiff, upon which the Defendant re entred, and ouſted him. It was in this Caſe, amongſt other Points Reſolved, 1. That Sir G. B. in this caſe was ſuch a perſon, who might well enter for the Forfeiture within the Statute: For it is clear, That by this Fine levied by A. B. being Iſſue in tail in the life of his Mother, the Eſtate tail is barred thereby, And it is *quaſi* a giving of the Eſtate tail to the Conuſee; and as the leaſtwiſe, the Remainder in Fee paſſed by that Fine to Sir G. B. ſo as he had the Remainder at the time of the Diſcontinuance made, and the wrong is done to him, and then he is within the words and Intent of the Statute to enter for the Forfeiture: For the Statute is, That all Diſcontinuance ſhall be void, and that it ſhall be lawfull for him, to whom the Reverſion or Remainder is to enter. Mich. 38 Eliz. B.R. *Lynch* and *Spencer*'s Caſe. *Cro.* 3. Part, 513. See *Cook* 3. Part, 50. Sir *George Browne*'s Caſe, the ſame Caſe, and the Reſolution there.

2. Tenant for life, the Remainder for life; He in the Remainder for life reciting, that he had the Eſtate in Fee, levies a Fine *Sur Conuſans de droit come ceo &c.* The Conuſee brings a *Scire facias* Againſt the Tenant for life made default, whereby he was adjudged to Attorn: which afterwards he did. The Queſtion was, Whether both their Eſtates were forfeited, the one by the Fine, the other by the Attornment thereupon. It was agreed by all the Court in this Caſe, 1. That the firſt Eſtate was not forfeited, becauſe the Attornment was by the Compulſion of the Court, upon his default of appearance, and not upon his meer Motion. 2. And the ſecond Eſtate is not forfeited by this Fine, becauſe the Fine is not any Diſcontinuance; and nothing paſſed thereby, but what he might lawfully paſs. And of that Opinion for the ſecond Point, was *Walmſley* and *Kingsmill*. But the Lord *Anderſon* and *Glanvil*, contrary for the ſecond Point, becauſe the forfeiting is not only where there is a diſcontinuance, but where he doth any Act in Court of Record, whereby he may appear to diſenherit him in the Reverſion, as where he prayes in Aide of a ſtranger: Or in Waſte brought by a ſtranger, he pleads, *Nul Waſte fait*, and ſo admits the Reverſion in him. Quere this ſecond Point, the Court divided in Opinion. Paſc. 42 Eliz. C.B. *Holt* and *Lyſter*'s Caſe. *Cro.* 3. Part, 731.

3. This Caſe was moved to the Court; Land was given to A. for life, the Remainder to B. for life, the Remainder to *Braybrook* in Fee; B. being in poſſeſſion, levied a Fine to a ſtranger *Sur Conuſans de Droit come ceo*; H. dyed; If now *Braybrook* might enter for the Forfeiture, was the Queſtion? It was in this Caſe agreed by the whole Court, That by that Fine, the Remainder in Fee was not touched, nor diſcontinued; but becauſe B. had done as much as in him lay for the diſpoſing of the Fee-ſimple by the Fine, and hath taken that upon him, that the ſame amounts to a Forfeiture. And it was alſo agreed by the Juſtices in this Caſe, That if Tenant for life in poſſeſſion levieth a Fine, &c. If the Leſſor doth not enter within the 5. years after he ſhall be bounden, by the Opinion of *Periam* and *Anderſon*. But *Wrightham* was of a contrary Opinion; For he ſaid, It was in the Election of the Leſſor to re-enter immediatly for the Forfeiture; or elſe at his pleaſure for to expect the death of the Leſſee. Mich. 29 Eliz. C. B. *Braybrook*'s Caſe. *Leon.* 1. Part, 46.

Grants and Conceßions of the King; And Grants and Gifts of Common Perſons.

THE Caſe was, The Abbot and Covent of the Monaſtery of E. by Indenture made between them and R. C. reciting, That whereas the ſaid R. C. held a Cloſe of Land in D. at their Will. They by the ſaid Indenture do now Grant the ſaid Cloſe to the ſaid R. C. for the Term of his Life, rendring the ancient Rent, &c. and alſo by the ſame Indenture they do grant the Reverſion of the ſaid Cloſe to one L. M. for his life; That in this Caſe, It was holden by the Juſtices, That the ſaid Indenture ſhould enure unto the ſaid R. C. by way of Confirmation; and that the grant to the ſaid L. M. dependant upon the ſame, ſhould be a good Grant by way of Remainder, and not a Grant of the Reverſion thereof unto the ſaid L. M. Mich. 14 Eliz. *Bendlowes* 18.

2. The Queen ſeiſed of the Rectory of D, Granted *Advocationem Eccleſiæ de D*; If by this Grant the Advowſon paſſeth as Diſappendant, or the Rectory paſſeth as Appropriate, or nothing at all paſſeth, was the Queſtion. It was holden in this Caſe by *Manwood* Chief Baron, That the Advowſon doth not paſs, but doth remain appropriate, as it was before; for the Church as it was appropriated by a judicial Act, ſo without ſuch an Act it cannot be diſappropriated; alſo by the Act of the Advowſon, the Retorn doth not paſs; for by the Appropriation, the Advowſon is gone, and not in *Eſſe*, and ſo by conſequence cannot be granted: And he ſaid, That this Grant was not within the Statute of 4 and 5 *Mariæ*, of Confirmation of Grants of the King; for that Statute doth help but miſ-recital, miſ-naming, or miſ-taking: but here in this Caſe, there is no ſuch thing in *rerum natura*, as is pretended to be paſſed by the Grant, and therefore the Grant is not good. Trin. 26 Eliz. Ex. The Queen and the Lord *Lumley*s Caſe. *Leon.* 2. Part, 80.

3. King *Henry* the 8th. ſeized of certain Lands in the Right of his Dutchy of *Lancaſter*, granted them unto another Tenant in Fee-Farm; *Reddendo dicto Domino Regi & hæredibus ſuis, aut illi cui de jure reddi debet* 10 l. And if this Land ſhould be holden of the King in *Capite*, or holden of the Dutchy, was the Queſtion; and, If the Rent ſhall be in the King as parcell of his Crown, was alſo a Queſtion. It was argued in this Caſe, That this Rent being a thing newly created, and not parcell of the Poſſeſſion of the Dutchy in 1 H. 4. nor ever diſcended from any Anceſtor of the King, being Duke of *Lancaſter*, ſhall be accompted to be in the King in the Right of his Crown, and cannot paſs under the Dutchy-Seal. Mich. 24 Eliz. in the Kings Bench. *Leon.* 162. *Quære*, for the Caſe was not Reſolved.

4. A. took a Wife, and afterwards married E. S. living his firſt Wife, and by Deed gave part of his Goods to the ſaid E. S, and made her his Executrix, and dyed; ſhe refuſed the Executorſhip, whereupon the Ordinary committed Adminiſtration of his Goods to B: It was demanded of the Court, Againſt whom in this Caſe an Action of Debt ſhould lye; for if the Creditor impleadeth the Adminiſtrator, he hath not Aſſets; if the Executrix, ſhe will plead, She hath renounced the Executorſhip, and, that Adminiſtration is granted to B: It was the Opinion of the Juſtices in this Caſe, That the Gift is void, both by the Common Law, and alſo by the Statute of 13 Eliz. and then if the Gift be void any way, the Creditor may have an Action of Debt againſt the ſaid E. S. as Executor of her own wrong. Hill. 16 Eliz. C. B. *Stamfords* Caſe. *Leon.* 2. Part, 323.

5. Note; It was ſaid, That it had been adjudged in *Cranmers* Caſe, That whereas the Queen had granted Lands, reſerving a Fee-Farm Rent, with a Condition of Re-entry for non-payment; and after the Queen granted the Fee-Farm Rent to J. S. in Fee, and then the Rent was behind; that in ſuch Caſe the Queen ſhould not re-enter, for that by that means, ſhe ſhould defeat her own Grant, which would be a wrong to the Grantee of the Rent. Mich. 30 Eliz. B. R. *Cranmers* Caſe. *Cro.* 3. Part, 69.

6. *Quo warranto*, Wherefore he claimed to be diſcharged from the Queens Purveyor; The Defendant pleaded, That King *Edw.* the 4th. granted to the Dean and Chapter of *Pauls* divers Liberties within the Mannors of A. and B; one was to be diſcharged of Purveyance, *Non obſtante aliquo Statuto*: Afterwards, thoſe Mannors came to the

King

King by Surrender, and that King *Edw.* the 6th. granted thoſe Manors with all thoſe Liberties and Priviledges as the Dean and Chapter had by reaſon of any Charters or Preſcription, *Non obſtante aliquo Statuto, & ea warranto* he claimed them. The Statute of 27 Eliz. of Reſignation, was alledged by way of Replevin: It was holden in this Caſe, That the Clauſe being general of all Liberties and Priviledges, it ſhall be intended of ſuch Liberties and Priviledges which the Dean and Chapter had, and were not reclaimed by any Statute; and theſe Liberties were reſumed by 27 H. 8. wherefore they ſhall not be revived by general Words, but by a ſpecial Grant of thoſe Liberties, with an Exprès *Non obſtante* of that Statute. Mich. 39 Eliz. B. R. The Lord *Darcy's* Caſe. *Cro.* 3. Part, 513.

7. King *Henry* the 8th. gave a Manner, with an Advowſon appendant to *Charles Brandon* Duke of S. and the Heirs-Males of his Body, who by Deed enrolled, re-granted it to the King his Heirs and Succeſſors, after the Statute of 34 H. 8. was made; and then the King granted the Advowſon to T. in Fee, which by mean Conveyances came to the Defendant. C. B. dyed without Iſſue-male, The Church being void, the Queen preſented, and the Defendant diſturbed Her, and She brought a *Quare Impedit*; afterwards there were three Preſentments made by the Patentees, under whom the Defendant claimed. There were many Points in this Caſe; 1. Whether this Grant by Tenant in Tail, it being good to bind the Iſſue, the King hath a baſe Fee in him, a Reverſion expectant thereupon; or, If he be in, as in point of Reverter. To that, it was Reſolved, That the King was not ſeiſed of any baſe Fee, but had an abſolute Eſtate given unto him, and was in, in point of Reverter. 2. Whether the Grant to T. the King not reciting his Eſtate, be good. Reſolved, That, admitting the King had two Fees in him, that the Grant by Patent was good, without reciting of the Eſtate. 3 Point, If this double uſurpation ſhould bind the King. Reſolved, That two or three Uſurpations ſhould not put the Queen out of Poſſeſſion, or gain any Title againſt her. Mich. 39 Eliz. C. B. The Queen and *Huſſies* Caſe. *Cro.* 3. Part, 519.

8. Note upon an Evidence in *Ejectione firmæ*; It was cited to be Reſolved by the Judges, upon advice in a Caſe in the Court of Wards, *Bridgewaters* Caſe. That where the Queen had lett Lands, and granted the Reverſion to one, miſreciting the Name of the Tenant, and afterwards made a new Grant to another, with a true recital of the Name of the Tenant, and after that the Statute of 18 Eliz. Of Patents was made; That in that Caſe, It ſhall not receive the firſt Grant, becauſe it was utterly defeated before the Statute. Hill. 43 Eliz. C. B. *Child* and *Lowes* Caſe. *Cro.* 3. Part, 208.

9. Error of a Judgment given in C. B. in Treſpaſs, for taking of Corn; The Defendant pleaded, a ſpecial Juſtifying as his proper Goods; The Plaintiff made Title to them by ſeiſure, for the King. *Philip* and *Mary* by their Letters Patents enrolled, *dederunt & conceſſerunt* to the Town of L. Liberty of a Market, and ſhewed a Cauſe of Seiſure, as an Officer there; Upon which, It was demurred, and Judgment for the Plaintiff, and Error brought and aſſigned, That he pleaded, That the King and Queen by Letters Patents did Grant, but did not ſay *Sub magno Sigillo confertur*; It was holden by the Court to be a good Error; for if it be not Under the Great Seal, it is not good, although the Grant be enrolled: For any Patent may be enrolled. Mich. 31 Eliz. B. R. *Kingdon* and *Bun's* Caſe. *Cro.* 3. Part, 117.

10. A houſe in *Southwark*, holden of the Arch-Biſhop of *Canterbury*, as of his Borough of *Southwark*, came unto King *Hen.* 8th, who granted the ſaid Houſe, and other Lands in *London* and *Middleſex*, to J. S. and his Heirs, to hold of him *in Libero Burgagio*: Queen *Mary* granted the Manor and Borough of *Southwark*, to the Mayor and Comminalty of *London*. The Tenant dyed without heir. It was the Opinion of the Juſtices in this Caſe, That the Queen ſhould have the Eſcheat, and not the Patentees; for that the firſt Patentee held it of the Queen in Socage in *Capite* as of a Seignory in groſs, and that the words (*in libero burgagio*) are void; and Land out of a Borough cannot be holden in *Libero Burgagio*. Mich. 31 Eliz. B. R. *May* and *Ruſſiters* Caſe. *Cro.* 3. Part, 120.

11. The Queen having the Advowſon of the Vicarage of D. granted the Vicarage to J. S; The Queſtion was, If the Advowſon paſſed? It was holden by the Juſtices, That it did not paſs; for by the Queens Grant, nothing ſhall paſſe, but what ſhe intends to paſſe; and the Vicarage is another thing then the Advowſon; and every thing muſt paſſe by its proper name. And it ſhall not paſſe in the Caſe of a Common perſon. Mich 32 Eliz. C. B. *Cro.* 3. Part, 163.

12. The Incumbent of a Church is created a Biſhop; And the Queen grants unto him to hold his Benefice *in Commendam*. It was holden by the Court, That the Grant was good, and that the Queen had this Prerogative by the Common-Law, and the ſame is not taken away by the Statute of 25 H. 8. Hill. 39 Eliz. B. R. *Arniger* and *Holland's* Caſe *Cro.* 3. Part, 542.

13. Note: It was holden by the Juſtices, That Toll is not of neceſſity incident to a Fair. But it

was holden, That the King may grant a Fair; and may grant that Toll ſhall be paid, although it be a charge to the Subject: but then it muſt be of a petit ſum; as 1 d. &c. Trin. 33 Eliz. B. R. *Heddy* and *Wheelers* Caſe. *Cro* 3. Part, 559.

14. A Biſhop is Lord of a Mannor, and the Temporalties of the Biſhoprick are in the Kings hands; during which time, a Copyhold Eſcheats; and the King grants it in Fee. It was the Opinion of the Court in this Caſe, That the Grant of the Copyhold Eſcheated by the King, was good. Paſc. 42 Eliz. C. B. *Coverts Cro.* 3. Part, 754.

15. Debt upon a Leaſe for years, the Plaintiff declared, That R. was ſeiſed in Fee, and lett to the Defendant for years, rendring 40 l. *per annum* Rent, and held it of the Queen by Knight-Service in *Capite*; and that he Deviſed it, and dyed, his Heir within age. Whereupon the Queen under the Seal of the Court of Wards, granted to him the third part of the Reverſion and Rent *durante minore ætate* of the Heir. It was Demurred, Whether this Leaſe for years *durante minore ætate* made under the Seal of the Court of Wards, was good. It was holden by the Court, That it was good; and that ſuch alwayes had been the practice ſince the Erection of the ſaid Court. And in this Caſe, It was holden, That ſuch Leaſe was good before Office. Mich. 43 Eliz. B. R. *Weſt* & *Laſſells* Caſe. *Cro.* 3. Part, 851.

16. In Action upon the Caſe for taking of Toll for paſſage over the Bridg of W, the Plaintiff made Title by Letters Patents of 20 H. 6. to the Colledg of All-Souls in *Oxford*, For them, their Tenants, and Fermors, to be quit of Toll; And ſhewed, That he was a Fermor to the Colledg, and yet the Defendant againſt the form of the Patent had taken Toll of him. The Defendant pleaded in Barr the Statute of Reſumption of all Liberties and Franchiſes granted by King *Hen.* 6. The Plaintiff pleaded the Statute of 4 H. 7. by which all Letters Patents granted to *Hen.* 6. to the Colledg, are made good, notwithſtanding the ſaid Act of 28 H. 6. Upon which the Defendant Demurred. The Queſtion was, If the ſame was a Departure; It was adjudged, That it was not; for there is no new matter compriſed in the Replication, than was in the Declaration; for the Plaintiffs Title ſtill remained upon the Letters Patents. And in this Caſe, It was agreed by the Court, That although the Grant of King *Henry* the 6th. to be diſcharged of Toll, was *tantum pro ſeipſo*, and not for Him, his Heirs and Succeſſors; yet it was good againſt his Succeſſor, as well as in Caſe of Grant of an Intereſt: In the Caſe of Sir *Thomas Wyat*, In *Plow. Comm.* is agreed to be good. Mich. 45 Eliz. B. R. *Wood* and *Hamſheads* Caſe. *Yelv.* 13, 14.

17. In Trover and Converſion of Tythes, It was found, That the Prior of W. was ſeiſed of the Rectory of L, and by Indenture 12 H. 8. leaſed the Tythe-Corn and Hay to M, for 81 years rendring 4 l. *per annum*; and by the ſame Deed granted to the Leſſee and his Aſſignes *dare & reddere* yearly 3 s. 4 d. for Portage. The Priory being diſſolved, it came to the Queen, who 37th. of her Reign, lett the Rectory with the Appurtenances, *Et omnes domos, terras glebales, cum pertin. ad Rectoriam ſpectant. & cum eâdem Rectoria uſualiter dimiſſ. locat. vl occupat. antehac pro annuli redditus*, 3 l. 16. s. 8. d. *per annum*, to J. S. *Habendum* from *Mich. Simulla dimiſſio tunc de Rectoria fuit in eſſe*, and rendring 3 l. 16 s. 8 s. *per annum*. They found, That J. S. granted his Intereſt to the Plaintiff, and that only 3 l. 16 s. 8 d. was only paid in the time of H. 8. Queen *Mary*, and Queen *Elizabeth*; and that the Leaſe by the Prior to M. ended 43 Eliz. It was ſaid in this Caſe, That the Leaſe made by the Queen was not good; For there not being any Conſideration expreſſed, wherefore the Queen ſhould make ſuch Leaſe; It ſhall be intended, That ſhe meant to depart with no other Poſſeſſion than the Abbot had lett before, and to have the ſame Recompence as the Abbot had; and in this Caſe it appears, that the Queen hath lett the Rectory, whereas the Prior lett but part of the Fruit of the Rectory, *viz.* The Tythe of Corn and Hay. 2. The Queen was induced to lett the whole Rectory with the Appurtenances for 3 l. 16 s. 8 d. ſuppoſing the ſame had been the uſual Rent formerly reſerved by the Prior, whereas in truth the Rent was 4 l. and ſo in thoſe things the King was deceived in her Grant; all which was granted unto by the Court; and ſo the Leaſe made by the Queen was void. Hill. 1 Jac. B. R. *Clambers* and *Maſons* Caſe. *Yelverton* 43, 44, 48.

18. A. gives Lands to B. his Son, and E. his Wife, *Et eorum primogenit. proli ſucceſſivè*, they having no Iſſue at the time, but after they had Iſſue: It was holden in this Caſe, That after the death of B. and E. the Iſſue ſhould take nothing, becauſe not *in eſſe* at the time of the Grant; and by the Grant the Iſſue was to take joyntly with them. Mich. 30 Eliz. B. R. *Stevens* and *Lawtons* Caſe. *Cro.* 3. Part, 121.

19. In a *Quare Impedit*, the Caſe was, The next avoydance of a Church was granted to A. and B. afterwards A. releaſed to B. the Plaintiff, and after that the Church became void, and Whether B. ſhould Preſent only; or upon a diſturbance have a *Quare Impedit* in his own Name, was the Queſtion. It was holden by the whole Court, That he ſhould; For the next Avoydance is a thing in Intereſt, and is grantable to a Stranger;

ſtranger, wherefore it might be Releaſed the one to the other. But if the Church was void at the time of the Releaſe made, it were otherwiſe; for then it is a thing in Action, which cannot be conveyed over. Mich. 40 Eliz. B. R. *Bennet* and the Biſhop of *Norwich*'s Caſe. *Cro.* 3. Part, 600.

20. A man made a Leaſe at Will, rendring 6 l. *per annum* Rent; and by another Deed reciting this Rent, granted *eundem redditum* for life; The Leaſe at Will ended: It was holden by the Court, That the Grantee ſhould have the Rent for his life; for that *eundem redditum* ſhall be taken for *conſimilem redditum*, or *talem redditum*. Trin. 33 Eliz. B. R. *Kinder* and *Leverſages* Caſe. *Cro.* 3. Part, 241.

21. Husband and Wife poſſeſſed of a Term in the right of his wife Executrix; The husband granted the Term to J. S. for the uſe of the husband and wife for their Lives, and after to the uſe of J. S: The husband is ſued for his debt, and upon a *Fieri facias* ſued, the Sheriff ſells the Term. It was holden in this Caſe, That this Grant is not within the Statutes to defraud Creditors, for it was not extendable for the debt of the husband, and fraud ſhall not be intended, except it be expreſly found. Hill. 35 Eliz. B. R. *Ridler* and *Pauters* Caſe. *Cro.* 3. Part, 291.

22. In a *Quare Impedit*, the Caſe was; The Dean and Chapter of H. granted the next Avoidance of a Church to B; And whether it was a good Grant to bind the Succeſſor by the Statute of 13 Eliz. was the Queſtion? Two of the Juſtices held, That it was not; for although it is not a thing whereof any profit can be made, nor any Rent reſerved; Yet it is an hereditament, whereof the Statute intends that no Grant ſhall be made. And ſo it was ſaid, It was adjudged in the Biſhop of *Litchfields* Caſe. But *Anderſon* held the contrary, for that the Statute doth not reſtrain them, but for ſuch things which are for profit, and by reaſon whereof prejudice might accrue to the Succeſſor; which cannot be in this Caſe. *Ideo Quære.* Mich. 39 Eliz. C. B. The Dean and Chapter of *Hereford* and *Ballards* Caſe. *Cro.* 3. Part, 440.

23. In Dower, the Defendant pleaded, That *dedit et conceſſit* to her a Rent in Recompence of her Dower; which ſhe accepted of, upon Condition, That if the Rent ſhould not be paid within a moneth, the Deed ſhould be void. It was in that caſe holden by the Court, To be no good Barr of her Dower; But if ſuch a Grant had been good, it ought to have been pleaded, *Quod aſſignavit et non conceſſit*; and in this caſe, the Plaintiff was reſtored to her Dower, without any demand of the Rent. Mich. 38 Eliz. C. B. *Wentworth* and *Wentworths* Caſe. *Cro.* 3. Part, 451.

24. Note: It was holden by the Juſtices, That Common Appendant or Appurtenant being once extinguiſhed by unity of poſſeſſion, can never be revived again. But yet it was holden, That by the words of a Leaſe, *Of all Commons and Profits uſed and occupied with the Meſſuage*, It is a good Grant of a New Common for the time. Hill. 39 Eliz. B. R. *Bagſhaw* and *Eyres* Caſe. *Cro.* 3. Part, 570.

25. In a *Quare Impedit*, the Caſe was; The Corporation of B. was ſeiſed of an Advowſon, and granted the firſt and next Preſentation to S; And afterwards granted *primum et proximum Advocationem* to the Earl of *Bedford*, who granted it to the Plaintiff; The Church afterwards became void; S. preſented his Clerk, who was Admitted, Inſtituted, and Inducted, and then the Church became void again, and the Plaintiff preſented: It was Reſolved in this Caſe by all the Juſtices, That this ſecond Grant was void, ſo as the Plaintiff had not any Title; for when they had granted *primum et proximum præſentationem* to one, they had not any authority to grant it afterwards to another. But if the firſt Deed had been loſt before he had taken benefit thereof, and that it could not be pleaded, the ſecond Grant might have been good. It was adjudged for the Defendant. Mich. 42 Eliz. C. B. *Williams* and the Biſhop of *Lincoln*'s Caſe, *Cro.* 3. Part, 790. 791.

26. Debt upon Obligation to perform Covenants in an Indenture; which Recited, That whereas the Archbiſhop of *York* had Demiſed by Indenture to the Defendant and one W. ſuch Lands and a Mill for a year, and that W. dyed, whereby he had all by Survivour, That he granted, bargained, and aliened the ſaid Land and Mill *et totum jus, et titulum ſuum in præmiſſis* to the Plaintiff, to hold during the years; and aſſigned breach, That W. in his life-time had granted his Eſtate to a ſtranger; who after this Grant entred, and evicted him out of a moyety. The Queſtion was, If this word (*Grant*) did imply an expreſſe Warranty againſt this Title, without any other expreſſe words of Warranty? It was the Opinion of the Juſtices, That they did not. Hill. 42 Eliz. C. B. *Proſſer* and *Johnſons* Caſe. *Cro.* 3. Part, 809.

Haleas

Habeas Corpus.

1. AN *Habeas Corpus* was to the Warden of the Fleet, to bring the body of one H, who Retorned the Writ, That the ſaid H. was committed to the Fleet *per Mandatum Franciſci Walſingham, Militis, unius Principalium Secretariorum Dominæ Reginæ.* And becauſe the Warden did not ſhew, in his Retorn, for what cauſe the ſaid H. was committed. The Court gave him day to amend his Retorn; or otherwiſe the Priſoner ſhould be delivered. Trin. 29 Eliz. C. B. *Hillyards* Caſe. *Leon.* 2. Part, 175.

2. *Habeas Corpus* out of the Kings-Bench, to have the body of one S. committed to the Marſhalſey by the Judge of the Admiralty: And upon the Retorn, the Cauſe appeared to B, for abetting of one E, who was Indicted of Piracy, to eſcape out of Priſon, and aſſiſting him with Ropes and other Engines to break open the Priſon. It was holden by the Court, That although the Fact was committed by S. upon the Land, and within the body of the County; yet becauſe it depended upon the Piracy committed by E, with whom the Temporal Judges have nothing to do; for this cauſe they demanded the Priſoner: for this is *quaſi* an Acceſſory to the firſt Piracy, and determinable by the Admiral. Mich. 6 Jac. B. R. *Scoddings* Caſe, *Yelverton*, 135.

3. *Habeas Corpus* was directed to the Biſhop of *Durham*, to bring a Priſoner unto the Kings-Bench; He made no Retorn of the Writ: Wherefore another Writ was prayed, with a Peyn in it; And 43 E. 3. vouched, an *Habeas Corpus* retorned from *Burdeaux*. And the Clerks of the Crown ſaid, That many times a *Certiorari* had been retorned from *Durham*. But the Biſhop before he would make a Retorn upon this Writ, would have his Priviledges recited in the Writ. But the Court ſaid, They would not change the Ancient Forms and Uſage. Hill. 1 Car. B. R. *Jobſons* Caſe. *Latch*, 160.

Heir.

NOte, by the Opinion of the Common-Pleas, That if a man hath Iſſue a Son and a Daughter by one woman, and a Daughter by another woman, and he makes a Leaſe for life of Land without any thing reſerved, and the Father dyeth, and the Reverſion diſcendeth to the ſon; and the ſon hath Iſſue a ſon, and dyeth, and the Reverſion diſcends to his ſon, who dyeth without Iſſue; and after, the Leſſee for life dyeth; That now both the ſiſters by the ſeverall Women ſhall have the Lands as heir to their Father, and not the daughter of the firſt Woman only. Mich. 7 Eliz. *Bendlowes*, 22.

2. A. Deviſed Lands to D. and 3. others in Fee, to the uſe of J. S. her brother, and the Heirs males of his body; and for want of ſuch Iſſue, to the Heirs females of his body, with divers Remainders over: J.S. dyed, having Iſſue a Daughter; his Wife with Child with a Son, which is afterwards born: And afterwards A. dyed. The Queſtion was, If the Son or Daughter, or neither of them, ſhould have the Land. It was Reſolved by the Juſtices, That neither of them ſhould have the Land: for it being deviſed to the uſe of J. S. *ut ſupra*; and he dying before the Deviſor, this cannot veſt in the Heir, for it never veſted in the Auncеſtor; for the words (Heirs) are not to give the immediate Eſtate but by way of Limitation: and if this ſhall veſt in the Heir, it ſhall veſt in him as a Purchaſor, which was not the Intent of the Deviſor: and ſo it ſhall be void. Trin. 33 Eliz. *Cur. Ward. Hartopp's* Caſe. *Cro.* 3. Part, 243.

3. Errour: For that in Debt againſt the Heir, upon an Obligation made by his Father, the Judgment being againſt him by *Nihil dicit*, Execution was awarded againſt him by a *Capias ad ſatisfaciend.* whereas the Lands, only diſcended unto him, ought to have been put in Execution, and

and not his body, nor his other Lands. And therefore the Errour was assigned, *Tam in reddition Judicii, quam in redditione Executionis.* The Court held it not to be Error; For the Judgment and Execution shall be general, unlesse the Heir acknowledgeth the Action, and sheweth that he hath so much by discent. But when the Heir will not shew, that he hath so much by discent, and so loseth the benefit which the Lawes give him, It shall be intended, that he hath Assets to satisfie. And it was said, That it had been adjudged, 19 Eliz. in *Lyons* Case, That in this Case, Execution should be awarded against the Heir as for his proper debt. *Gawdy*, Justice, said, If there be Errour in this Case, it is only in the Judgment, and not in the Execution. Mich. 42 Eliz. B. R. *Barker* and *Browns* Case. *Cro.* 3. Part, 692.

Heriot.

1. NOte by the Justices of the Common Pleas, That where a man in a Replevin justifies for Heriot-Custome, It is no Plea for the Plaintiff to say, That the place where is out of his Fee, because he claims the Heriot as his proper Chattel, which he may seize in any place where he shall find it. But for Heriot-Service he ought to distrein, and not to seize. Pasc. 35 H. 8. C. B. Sir *John Gresham* and *Gosfords* Case. *Bendlowes* 18.

2. In Trespass, the Case was; In the Manner of E. within the County of W. there was this Custome, That if the Lord of the Mannor for the time being, after the death of any Tenants of any Lands or Tenements aswell Freehold as Copyhold within the said Mannor, That the Tenant should pay to the Lord of the Mannor for the time being some Rent more or less for the said Tenements; and if the Tenants dyed seised, they used to have the best Beast which was the Tenants, or any others Inhabitants, or dwellers upon the said Tenements at the time of the death of the said Tenant in name of a Heriot, and that they might seize, take, and lead away the said Heriot: And that, as it appears by the Record, was adjudged to be a void Custome. For the Defendants took a Beast of the Plaintiff who was an Inhabitant upon the Tenements within the Mannor at the time of the death of the Tenant. And Judgment was given for the Plaintiff, That he should recover his Damages. Pasc. 1 Eliz. *Bendlowes* 39.

3. In Debt, the Plaintiff demanded 200 Marks upon the Statute of 13 Eliz. of Fraudulent Deeds and Gifts, and declared upon the second branch of the said Act. And shewed, That A. held 12 Acres of Customary Lands of the Plaintiff, and dyed seised; and that by the Custome of the Mannor, the Lord was to have for a Heriot the best Beast, whereof his Tenant dyed possessed. And further shewed, That the said A. in his life time, and a little before his death being possessed of 30 Horses of the value of 200 Marks, gave the said Horses to the Defendant, with an intent for to defraud the Plaintiff and other Lords, of their Heriots; and that after the death of his Tenant, he went to the Defendants house to seize his Heriot; and the Defendant then took the said Horses by reason of the said gift. The Defendant pleaded, That the Plaintiff had seised one of the Horses *Nomine Herioti*; and as to the rest, he did demur in Law. It was said, That the Plaintiff should recover the whole 200 Marks although he was defrauded but of one Heriot only: As if a man be endebted to me in 20 l. and he makes a fraudulent Deed of his Goods, being of the value of 2000 l. although I be defrauded but of the 20 l. yet he shall forfeit the whole value of the goods so conveyed. But the Court was of Opinion, That the Plaintiff should recover but the value of one of the Horses. And the gift by the first branch of the Act is void as to the Plaintiff but for one of the Horses only, and not for all the Horses contained in the gift; for no more then one horse was fraudulently given, and as by the first branch the gift is void but for one horse, so by the second branch the penalty extends but to one horse, and no further: Wherefore the Court said to the Plaintiffs Councel, Set a price upon any of the 30 Horses, as the best horse in your Election, and demand the value of that horse as forfeit by the Statute. Mich. 19 Eliz. C. B. *Crefwell* and *Cokes* Case: *Leon.* 2. Part, 8.

Hostler.

Hoſtler.

1. ACtion upon the Caſe, the Plaintiff declared, That he was an Hoſtler, and that the Defendant brought his Horſe to him, and agreed to give 6 d. Livery for day and night, and becauſe the Horſe had bin there ſo many dayes and nights as amounted to 20 l. he brought the Action, and declared *licet ſæpius requiſitus*, without alledging any eſpecial requeſt, and it was adjudged good; for where the ground of the Action is a Debt, in which Caſe the Law inducetth a promiſe, there the requeſt is not iſſuable, nor any part of the conſideration; otherwiſe where the Action is grounded upon a collateral matter: And it was Reſolved, That though the Plaintiff hath joyned ſo many dayes and nights together, and demands recompence upon the promiſe accordingly; yet the ſame is good, and he is not bound to bring his Action for every 6 d. but the promiſe is entire in it ſelf, all which the horſe ſhall take day and night. And in this Caſe, it was agreed, That if a man brings his horſe to an Inn, and leaves the ſame in the Stable there, without any ſpecial agreement to pay, the Inn-keeper is not bound to deliver the Horſe till the Owner hath defrayed his charge for the Horſe, but he may juſtify the detaining of the Horſe. And if the Horſe eat out as much as he is worth, the Inn-keeper upon a reaſonable praiſement may ſell the horſe, and it is a good ſale in Law. Trin. 3 Jac. B. R. The Caſe of the Hoſtler. *Yelverton 66, 67.*

2. Action upon the Caſe, the Plaintiff declared upon the general Cuſtome of the Realm, That all Inn-keepers ſhould ſafely keep the goods of their gueſts, ſo as they be not loſt in default of them and their Servants; and that the Defendant before 20 *Dec.* 6 Jac. kept, and yet doth keep a common Inn at D. in the County of W. and that the Plaintiffs ſervant came the ſaid 20. *December*, to his Inn, having in his keeping 70 l. of money of the Plaintiffs goods, and that perſons unknown in default of the Defendant and his Servants, took and carried away his money to his damage of 100 l. Upon Not Guilty found for the Plaintiff, It was moved, That the Action did not lye for the Maſter upon a Robbery of his Servant. But the Exception was diſallowed, becauſe the loſs is the Maſters. and he only ſhall have an Appeal of the Robbery. 2. Objected, That it doth not appear that he was his Servant at the time of the money loſt. But *Non allocatur* for that it is expreſly alledged, That he was his Servant when he lodged in the Inn. And the Court ſaid, It was not material whether he was his Servant or not: For if he was his friend by whom the party ſent his money, if he be robbed of it, the very Owner ſhall have the Action. Mich. 7 Jac. B.R. *Bedle* and *Morris's* Caſe. *Yelverton 162.*

3. Note, It was ſaid by *Doddridge* Juſtice, That if a Paſſenger lodgeth three dayes together in a common Inn, then the Hoſtler is not anſwerable for the goods if they be ſtollen out of the Chamber. Hill. 22 Jac. *Gulielms* Caſe. *Latch*, 88.

4. A Maſter brought an Action upon the Caſe; and declared upon the general Cuſtome of the Realm, That Inn-keepers ſhould keep the goods of their gueſts ſafe: and ſhewed, That R. his Servant lodged in the Inn, being a common Inn, and had ſuch goods of his Maſters with him, which by negligence were ſtolen. It being found for the Plaintiff. In ſtay of Judgment it was moved, That it is not alledged, That the Servant was (*tranſient*) travelling. And it was ſaid, That it was adjudged, Paſc. 4 Jac. in *Kelly* and *Clarks* Caſe. A ſervant came to an Inn, and left his goods there, and ſaid he would return in two or three dayes; and went away, and his goods were ſtolen: and an Action did not lye againſt the Inn-keeper: Otherwiſe if he had ſaid he would return at night. But the Opinion of the Court in the principal Caſe was, That the Action did lye: For it was ſaid it had bin oftentimes adjudged, That if the Servant be robbed of his Maſters goods, the Maſter ſhould have the Action againſt the Hundred upon the Statute of *Winchester*: which is a ſtronger Caſe then this is. And it was ſaid in this Caſe, That Clothiers who come to *London* with Cloaths to ſell, ſtay commonly a Week, and if they be robbed of their goods in the Inn, the Inn-keeper ſhall anſwer for them. Trin. 1 Car. B. R. *Drope* and *Thaires* Caſe. *Latch*, 126.

Huy-and-Cry.

1. IN an Action brought againſt an Hundred; The Plaintiff declared upon the Statute of *Winton*, 13 E. 1. and ſhewed, That he had performed the Limitations and Ordinances within the Statute of 27 Eliz. and concluded *contra formam Statuti prædict.* And the Iſſue being found for the Plaintiff, It was alledged, That the Declaration was not good, becauſe he having declared upon two Statutes, he ought to have concluded *Contra formam Statutorum.* But the ſame Exception was diſallowed by the Court, becauſe in this Caſe, the Action is grounded only upon the Statute of *Winton.* And the Statute of 27 Eliz. is rather in reſtraint and hinderance of the Action then otherwiſe; for whereas the party might have his Action before generally againſt the Hundred, Now by the Statute of 27 Eliz. certain Circumſtances are to be performed before he can charge the Hundred: And therefore it is ſufficient to conclude *Contra formam Statuti*, which of neceſſity ſhall have reference to the Statute of 13 E. 1. of *Winchester.* And the Court was clear of Opinion, That if the Plaintiff had concluded *contra formam Statutorum*, That it had not bin good. Mich. 5 Jac. B. R. *Andrew* and the Hundred of *Lewknors* Caſe. *Yelverton* 116. See *Noy* 125. the ſame Caſe.

Feofailes.

1. NOte, It was the Opinion of the Juſtices of the Common Pleas, That notwithſtanding the Statute of 32 H. 8. cap. 30. Of Jeofails, That if a Verdict paſſeth againſt the Vouchee, yet he ſhall have a Writ of Error. And alſo note, That if any default be in any Original, or in the Retorn thereof, or in the Verdict, or in the Judgment, or in the Declaration; ſo as it appears fully to the Court, That the Plaintiff hath not cauſe of Action. If Judgment be given upon ſuch like Originalls for the Plaintiff, the Defendant in the Caſes aforeſaid ſhall have a Writ of Error notwithſtanding the ſaid Statute, and theſe defects are not medied by the ſaid Statute. Mich. 1, & 2. Ma. *Bendlowes* 12.

2. Note, It was Reſolved, That where an Iſſue is put to be tryed *per Aſſiſam*, where it ſhould be tryed *per Patriam*, and the point of the Iſſue is to be tryed by a Forrein County, that the ſame is not good, nor remedyed by the Statute of 32 H. 8. of Jeofailes, as it was adjudged. Mich. 11 Eliz. B. R. in *Butler* and *Crowches* Caſe. *Bendlowes* 40.

3. Error of a Judgment in *Ejectione firmæ*; The Plaintiff declared of a Leaſe of W. Y. 13. *April*, 36 Eliz. The Defendant ſaid, That long before W. Y. had any thing, *Th. C.* was ſeiſed in Fee, and 25 *Martii*, 24 Eliz. let the Land to J. Y. for 21 years, which J. Y. 32 Eliz. let them to W. Y. for 8 years, if one A. Y. ſhould ſo long live, That the ſaid W. Y. being ſo poſſeſſed, that J. Y. 11 *July*, 33 Eliz. dyed Inteſtate, and that the Adminiſtration of the goods of the ſaid J. Y. were committed by the Biſhop of C. to H. B. That W. Y. ſo poſſeſſed, let as is in the Declaration, That afterwards 36 Eliz. A. Y. dyed, whereupon the Defendant as Servant to H. B. and by his command, Arreſted him, *et hoc*, &c. The Plaintiff replyed, confeſſing the Leaſe to J. Y. but ſaid, That the ſaid J. Y. 30 *Junii*, 30 Eliz. granted all his Intereſt to A. Y. and that the ſaid A. Y. 31 *July*, 35 Eliz. dyed Inteſtate, That the Biſhop of *Cant.* 27 *Aug.* 35 Eliz. committed the Adminiſtration of all the goods of A. Y. to the ſaid W. Y. who by force hereof entred and made a Leaſe *prout*, in the Declaration. And traverſed, That the ſaid J. Y. let it to W. Y. for 8 years *prout* in the bar. Upon which Iſſue was joyned, and found for the Plaintiff, and Judgment. The Error aſſigned was, That he had traverſed that Eſtate which was an Eſtate determined, and by him in his Replication avoided before; for he in his Replication affirms, That the ſaid J. Y. 30 Eliz. had granted all his Eſtate

to A. Y. under whom he made Title; then, although afterwards he makes the Leaſe to W. Y. It is not material, and then the traverſe is idle, and the Judgment Erronious. But all the Juſtices held, That although it be an ill traverſe, yet being tryed, and Verdict given, it is aided by the Statute of Jeofailes, and the Judgment thereupon is well given. Mich. 38 Eliz. *Exchequer Chamber. Bingham* and *Smithweeks* Caſe. *Cro.* 3. Part, 456.

4. Replevin, the Defendant avowed for damage Feaſants. The Plaintiff replyed, That he had a Cloſe adjoyning to the Defendants Cloſe, and that the Defendant and all the Occupiers of the ſaid Cloſe, time whereof, &c. had uſed to repair the Fences between the Cloſes. Iſſue was taken upon the Preſcription, and found for the Avowant. It was moved in ſtay of Judgment, That the Preſcription was too general, for that Tenant at Will at ſufferance, and Diſſeiſors, are Occupiers. It was the Opinion of the Court, That the Preſcription was not good. But yet in regard Iſſue is taken upon the Preſcription, and a Verdict hath found it, it is not any cauſe for ſtaying of Judgment, but it is helped by the Statute of Jeofailes. Mich. 38 Eliz. C. B. *Auſty* and *Fawkners* Caſe. *Cro.* 3. Part, 445, 446.

5. Error of a Judgment in C. B. becauſe the *Venire facias* bore date 24 *December*, which was out of Term. It was ruled to be no Error, but helped by the Statute of Jeofailes. Another Error, That the Writ was made returnable *coram Juſticiariis noſtris*, and doth not ſay *apud Weſtm. ſed non allocatur*, for that ſhall be intended. 3. The Writ was, *Et habens ibi nomina*, and leaves out *Juratorum*. That was holden to be only the Miſpriſion of the Clark, and awarded it ſhould be amended, and the Judgment was affirmed. Paſc. 38 Eliz. B. R. *Willoughly* and *Grey's* Caſe. *Cro.* 3. Part, 467.

6. *Aſſumpſit*, the Defendant pleaded, Not Guilty found for the Plaintiff. It was moved in ſtay of Judgment, That this was not an Iſſue in this Action. It was holden by the Court, That although it be not a proper Iſſue, and the Plaintiff might have demurred upon it: yet becauſe in this Action there is a Diſceit alledged to charge the Defendant, Not Guilty is an anſwer thereunto: and that it is but an Iſſue miſ-joyned, which is aided by the Statute of Jeofailes, being after Verdict; and it is an Iſſue, but an imperfect Iſſue, and the Statute aids miſ-joyning of Iſſues, or other faults: Wherefore it was adjudged for the Plaintiff. Paſc. 38 Eliz. B. R. *Corbyn* and *Brownes* Caſe. *Cro.* 3. Part, 470.

7. Error of a Judgment in *Plymouth* in *Aſſumpſit*, where the Defendant pleaded *Non Aſſumpſit*, and found againſt him. The Error aſſigned was, becauſe the ſtyle of the Court is *Burgis Domine Regine Burgi de Plymouth, Tent. ibid. apud Guild-hall, coram J. P. Majore ejuſdem Burgi 18 April*, 36 Eliz. and ſhews not in the ſtyle of the Court by what Authority it was holden, *ſcil.* by Preſcription, or by Charter; and in inferiour Courts their Authority to hold Pleas ought to be ſhewed. That was holden to be Error, and for that the Judgment was reverſed. A ſecond Error was, becauſe it appeared not upon the Record, That the Defendant came in by Attachment, or that he declared againſt him *ſub Cuſtodia*, &c. But the Record is certified in this manner, *viz. W. C. Queretur verſus G. H. de placito tranſgreſſ. ſuper Caſum*, &c. *Et ſunt pledgii de proſequend. J. D. et R. R. Et unde idem W. Queritur, Quod cum*, &c. ſo he ſhews not that any proceſs was awarded againſt the Defendant, nor that he came in by proceſs, nor that he was *ſub Cuſtodia* of any, which is the uſual courſe. It was doubted, Whether that was not aided by the Statute of Jeofailes being after Verdict. 3. Error, becauſe here was a Diſcontinuance after Verdict, and before Judgment. And the Statute did not aid Diſcontinuances after Verdict, but only Diſcontinuances before Verdicts, whereof the party might have advantage before Tryall. It was to that ſaid by the Juſtices, That the Statute aided all Diſcontinuances, aſwell after Verdict, as before Verdict. Mich. 39 Eliz. B. R. *Holman* and *Collins* Caſe. *Cro.* 3. Part, 489.

8. Waſte againſt the Defendant and his Wife, late Wife of G. G. the Writ was general, That the Wife held the Lands *ex dimiſſione* G. G. and the Count was ſpecial, That G. G. enfeoffed divers others, to the intent a Recovery ſhould be ſuffered againſt them, wherein they ſhould vouch G. G. who ſhould vouch the common Vouchee, which ſhould be to the uſe of G. G. for life; and after to the uſe of A. his Wife (now Defendant) and after to the uſe of G. G. in tail, the Remainder to his right Heirs, which was executed accordingly. After *Nul waſte* pleaded, It was found for the Plaintiff. It was moved in ſtay of Judgment, That the Writ did not Warrant the Count, for the Writ ought to be ſpecial and have recited all the matter. or it ought to have ſuppoſed the Deviſe of the Feoffees. For this is the Caſe, The Land and the uſe are in the Feoffees untill the Recovery, which is a limitation to the uſe by them, and not by the Vouchee: and although this being moved after Verdict, it was ſaid it was helped by the Statute of 18 Eliz. which helps where there is not any Writ. Yet the Opinion of the Court was, That this was not helped by the ſaid Statute, for that helps but where there is not any Writ at all, but where there is a good Writ, as here, but if it warrants not the Count,

Count, it is otherwiſe; for if it be an ill Writ, it is not holpen by the Statute. Mich. 41 Eliz. C. B. *Greenfield* and *Dennis's* Caſe, *Cro.* 3. Part, 721.

9. Replevin. Avowry, That E. E. was ſeiſed in Fee of three Acres of Lands in D. and took T. P. to Husband, by whom he had Iſſue T. E. dyed, the Husband was in by the Curteſy. T. the Heir in Reverſion granted a Rent of 10 s. out of the three Acres to the Defendant, and for ſo much he avowed. The Plaintiff ſaid, That before E. had any thing, J. S. was ſeiſed in Fee, and gave the Land to J. E. in tail. J. had Iſſue E. the Avowant, who after the death of his Father had entred, and was ſeiſed in tail, who took to Huſband *ut ſupra*, and had Iſſue T. *ut ſupra*, and dyed, and T. being in the Reverſion in the life of the Tenant by the Curteſy, granted *ut ſupra abſque hoc*, that E. E. was ſeiſed of the three Acres, and upon that Iſſue was joyned, and found for the Avowant. It was moved in ſtay of Judgment, That in effect there was no Iſſue joyned, for the Traverſe of the Seiſin of E. E. is idle, for no Title of the rent is derived from him; but he ought to have traverſed the Seiſin of *Tho.* the Grantor, and the Iſſue ought to be of ſuch a nature as might make an end of the matter of doubt, which is not done in this Caſe. It was holden by the Court, That although an apter Iſſue might have bin taken, and that the Traverſe is not good: Yet the ſame is helped by the Statute of Jeofailes; for the Eſtate of E. E. was in a ſort and by Circumſtance material, for if ſhe was ſeiſed in tail, the ſame diſcended to T. the Grantor, then by his death the Rent is determined; but if the Feeſimple diſcended to T. from E. then the ſame enabled the Eſtate of T. to be ſuch, that he might grant a ſufficient charge. It was the Opinion of the Juſtices, That it was aided by the Statute. Mich. 2 Jac. B. R. *Pigot* and *Pigots* Caſe. *Yelverton* 54.

10. Error of a Judgment in C. B. In Debt upon an Obligation againſt the Defendant as heir to his Father; the Defendant pleaded nothing by Diſcent but 20 Acres in D. in ſuch a County. The Plaintiff replyed, That the Defendant had more by Diſcent in S. viz. ſo much, and upon that they were at Iſſue, and found for the Defendant, That he had nothing by Diſcent in S. for which the Plaintiff had Judgment to have Execution of the 20 Acres in D. Upon which Error was brought, and aſſigned for Error a Diſcontinuance in the Record of the Plea, from *Eaſter* Term to *Mich.* Term following: And if the ſame was aided by the Statute of 18 Eliz. being after Verdict, was the Queſtion. It was adjudged, That it was Error, and out of the Statute, becauſe the Judgment was not founded upon the Verdict, but only upon the confeſſion of Actions, and the Verdict here was not to the purpoſe, but only made the confeſſion of the Defendant the ſtranger. And the Statute of 18 Eliz. is to be intended where the Tryal by the Verdict is the means and cauſe of the Judgment. The Judgment was reverſed. Hill. 7 Jac. B. R. *Molineux* and *Molineux's* Caſe. *Telv.* 169.

11. Debt upon an Obligation, the Condition was to pay 100 l. 31 *Sept.* The Defendant pleaded payment at the day; Upon which they were at Iſſue, and found for the Plaintiff. It was moved in ſtay of Judgment, becauſe every Iſſue ought to be poſſible to be found for the Plaintiff or Defendant, but here it is not poſſible, becauſe *Sept.* hath but 30 dayes. *Doddridge* Juſtice ſaid, That the payment being at a day impoſſible, it ſhould be preſently, and when the payment is not found at the day, it ſhall be intended unpaid upon the day. It was the Opinion of the Court, That here was a good Action, and a good Declaration, the fault only is in the Iſſue, which after Verdict is helped by the Statute of 18 Eliz. The Court would not ſtay Judgment. Hill. 2 Car. B. R. *Gibbon* and *Purchaſe* Caſe. *Latch* 152.

12. In an Action upon the Caſe for words in C. B. Upon the general Iſſue it was found for the Plaintiff, and Judgment. Error brought, becauſe the Plaintiff being within age appeared by Attorney. The Defendant in the Writ of Error, and the Plaintiff in C. B. replyed, That he was of full age at the time of his appearance, and upon that a *Venire facias* awarded of H. where the words were ſpoken; where it was found, That the Plaintiff was of full age. It was ſaid, That that was a Miſ-Tryal not helped by any Statute, which the Court agreed, The Statute of 21 Jac. doth not help it, for that is where the *Venire facias* is of one place, where it ſhould be of another; but in this Caſe it was of no place, for here is no place from whence the *Venire* ſhould be: And *Doddridge* Juſtice ſaid, That the Statutes of Jeofailes are alwayes to be expounded according to the Letter. Hill. 2 Car. B. R. *Taylor* and *Tolwins* Caſe. *Latch* 193.

Indictments. See *Endictments.*

1. ELiz. D. was Indicted upon the Statute of 23 Eliz. of *Recusancy*; Exception was taken to the Indictment, Because that these words of the Statute were omitted out of the Indictment, viz. *Non habens aliquam rationabilem Causam.* But the Exception was disallowed by the Court. For *Wray*, Chief Justice, said, That upon Conference betwixt him and all his Companions, It was Resolved by them, That those words are not to be put into the Indictment, but are to come in on the other side. Trin. 32 Eliz. B. R. *Dormer's* Case. *Leon.* 2. Part, 5.

2. W. and two others, were Indicted; That whereas the Parson of the Church of D. and all his Predecessors have used to have Common in such a place, the said W, *vi et Armis*, had inclosed it, and the Inclosure was upon their own Lands. It was moved, That upon this matter they ought not to be Indicted, but the party grieved was put to his Action. And it was said, It was *Mordants* Case, 29 Eliz. Upon the stopping of a Way upon his own Lands. And it was said, It was but an hinderance from taking of Common, which cannot be *vi et Armis*. It was further said, That the Indictment is recorded and certified as found before Justices of Assise, and Gaol-Delivery; and they cannot take such Presentments: And although the said Justices of Assize and Goal-Delivery, were also Justices of the Peace, *in vi veritate*: yet the Indictment being recorded and Certified to be taken before them in quality of Justices of the Peace, will not help it; for the Court shall not respect any other authority but that which appeareth upon Record. Wherefore the parties were discharged by the Court. Mich. 30 Eliz. B. R. *Willoughby's* Case. *Leon.* 2. Part, 117.

3. A man was Indicted at *Oxford* in the Sessions there; For that he was a Common Barretor; And upon a Motion made in B. R. the Indictment was reversed, because that no time was alledged when he was a Common Barretor, and stirred up strifes: and yet the Indictment was, That he was, and is a Common Barretor: And also there was no place alledged where he was a Common Barretor. Mich. 21 Jac. B.R. *Walter Thomas* Case. See Reports annexed to *Bendlowes*, 133.

Informations.

1. IN Information upon the Statute of 32 H. 8. of Maintenance, the Case was, J. B. was seised, and gave Lands to T. B. and the Heirs of his body; the Remainder to R. B. and the heirs males of his body: The Remainder to the right heirs of J. B: T. B. dyed, having Issue a daughter: R. B. made a Lease for years of the Lands: It was holden by the Court, To be no Maintenance within the said Statute; for he in the Remainder might make a Lease for years. Then it was given in Evidence, That a Common Recovery was had against the husband and wife, with a single voucher; and so the Remainder limited to R. B. destroyed; And that after that Recovery, R. B. made the Lease. To which it was said, That the said Recovery was never executed, and no Discontinuance of the Remainder, and then the Lease made by R. B. was void. And the truth of the Case was, That such a Recovery was had, and an *Habere facias seisinam* awarded, and returned; but no Execution was, in truth, had upon it, nor the Recoveror never Entred. And, if R.B. who is a stranger to the Recovery, shall be admitted against the Recovery to say, that no Execution was thereof, was another Question? Which was not spoken to by the Justices. It was also given in Evidence, That the Land was given to T. B. and the heirs of his body; and then when the Daughter, which is in truth the heir Inheritable, Entreth, If that Entry, she being Privy in blood to R. her Uncle, shall be a Disseisin, or an Abatement? The Court doubted of that Point: But *Anderson* conceived, That when the Daughter entred, and took husband, who leased for years, and the Lessee entred, that the same is a Disseisin. Trin. 33 Eliz. C. B. *Taylor* and *Brownsall* Case. *Leon.* 2. Part, 48.

2. Information in the Exchequer against the Defendant a Merchant-stranger, upon the Stat. of 18 H. 6. Cap. 6. concerning the gageing of Vessells of Wine: And shewed, That the Defendant had sold to such a one so many Vessels of Wine; and that none of them did contain as they ought 126 gallons; and although they were so defective, yet the Defendant had not defaked the price, &c. according to the wane of measure; for which he had forfeited to the Queen all the value of all the Wine so defective. Exception was ta-

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ken to the Information, becauſe there is not ſet down how much Wine in every Pipe was wanting, as one or two gallons, &c. ſo as a Rateable defalcation might be made according to the proportion of the want of Meaſure. In this Caſe, Judgment was given againſt the Informer, becauſe he did not ſhew in the Information, in how many Veſſels there was want: but if he had alledged but the want of one pinte, it had been good for the value of all the Wine. And *Manwood* ſaid, That might have been well enough known by the Gageing, how much every Veſſell wanted. Trin. 30 Eliz. Exchequer, *Martin* van *Herberts* Caſe. *Leon.* 2. Part, 38.

3. Information in C. B. upon the Statute of uſury, the parties were at Iſſue, and the matter depended four Terms after Iſſue joyned, untryed. The Defendant for his own Expedition prayed, That he might have *Niſi Prius*, with Proviſo, as the Courſe in the Exchequer is in ſuch caſe, to ſend Commiſſioners into the Country where the Information is layd, for the Tryall of the Iſſue joyned in the ſaid Court at the ſuit of the Defendant. It was doubted, If the Court might grant ſuch *Niſi Prius*, Becauſe the Queen is *quodam modo* a party to the Suit? It was Informed by *Flatwood*, Serjeant, That the Courſe was ſo. But *Nelſon* the Preignothory ſaid, He never ſaw ſuch a Precedent. See *Fitzh. N. B.* 241. Where it is ſaid, That *Niſi Prius* ſhall never be granted where the King is party, without a ſpecial Warrant from the King; or the Aſſent of the Kings Attorney-General. Trin. 29 Eliz. C. B. *Kerrit* and *Taylors* Caſe. *Leon.* 2. Part, 110.

4. In an Information upon the Statute of 27 Eliz. Cap. 4. by the party grieved; which Statute gives to the Queen one moyety of the value, and the other moyety to the party grieved. The Plaintiff was Nonſuit. It was holden by the Court, That he ſhall not pay Coſts and Damages, by the Statute of 18 Eliz: For the Statute (as the Title of the ſame doth imply) is to Redreſſe Abuſes in Common Informers, and ſo is the Preamble. And the words alſo of the Clauſe of Coſts and Damages, are, (*Every ſuch Informer*) And it was ſaid by the Secondary of the Crown-Office, An Action given to the party grieved, is not a popular Action: and the Statute of 18 Eliz. meanes only to popular Actions. Paſch. 30 Eliz. B. R. *Dighards* Caſe. *Leon.* 2. Part, 116.

5. In Information upon the Statute of 5 E. 6. Cap. 7. for buying of Woolls contrary to that Statute, The Defendant pleaded to all, Except 50 Stone of Wooll, Not guilty; And to that he pleaded, That there is an Information depending againſt him in C. B. at the Suit of L: and averrs, they are for the ſame offence; and demands Judgment, If to them he ſhall anſwer. Upon which It was Demurred. It was Objected, That it was no Plea; for that it is not alledged, That any Writ or Proceſs is ſued forth upon the Information: and then it cannot be ſaid, Depending. All the Court held the Plea to be good; For immediately when the Information is brought into Court, it is entred upon Record, and therefore ſhall be ſaid immediately depending, although no Writ or Proceſs be ſued upon it; and it is a good Plea without Averment. And it was adjudged for the Defendant. Mich. 34 Eliz. B. R. The Queen and *Harris*'s Caſe. *Cro.* 3. Part, 261.

6. Information upon the Statute of buying of Leather, brought in the Court of Pipowders of D; the Defendant was there condemned, and in Execution; and brought in C. B. by *Habeas Corpus*. It was moved, That the Judgment was void, *et Coram non Judice*. For although it be the King's Court, yet Suit ſhall not be there upon any penal Law. The Court was of Opinion, That the Suit is not maintainable there: But becauſe they have power to hold Pleas in Actions of Debt, and had colour to hold Plea in this Action, the Judgment is not void, but only voidable by Errour. Mich. 39 Eliz. C. B. *Wilkinſon* and *Netherſalls* Caſe. *Cro.* 3. Part, 532.

7. Information brought in *London*, upon the Statute of 13 Eliz. Cap. 5. for juſtifying *apud I*, of a fraudulent Guift of Goods made by H. to the Defendant, to defraud the Plaintiff of his debt. The Defendant ſaid, That H. gave thoſe goods to him *ex Concenty, bona fide*; and juſtified the guift there, and traverſed the juſtifying at *London*. It was by the Court holden to be no Plea; For although the Statute of 31 Eliz. reſtrains Common Informers to bring their Action only in the proper County where the offence was done; yet that doth not extend to a party grieved, but that he may Inform in what County he pleaſeth; for he is not a Common Informer. Mich. 40 Eliz. C. B. *Allen* and *Stears* Caſe. *Cro.* 3. Part, 64.

8. Error of a Judgment in *Bury*, upon an Information upon the Statute of 5 Eliz. Cap. 4. for exerciſing of a Trade wherein he was not an Apprentice for 7. years. The Error was, Becauſe an Information upon a penal Law, ought to be within one of the principal Courts at *Weſtminſter*, and not elſewhere, unleſs it be otherwiſe expreſſly provided by ſome Statute. And of that Opinion was the whole Court. And ſo, it was ſaid, it was adjudged in *Gregory* and *Hoſkards* Caſe; and therefore the Judgment was Reverſed. Hill. 42 Eliz. B. R. *Brewſter* and *Gaudals* Caſe. *Cro.* 3. Part, 737.

9. Infor-

9. Information *tam pro Domina Regina quam pro seipso*, upon the Statute of Liveries, for retaining into his service 12 Men who were not his Domestique Servants, nor Officers, giving to every one of them a Livery; And that he retained them in his Service for 12 months, from 12. Decemb. 42 Eliz. to 10. Decemb. 43: Upon Not guilty, the Jury found him guilty for 12. Moneths. In stay of Judgment, it was said, That the Moneths shall be accounted at 28 dayes, and then within the time of the Information are 13. moneths; and the Jury have found him guilty but for 12 Moneths, and it appears not for which of them they excuse him; so there can be no Judgment: And if the Months should be accounted according to the Kalender, then there was two days of the year wanting, and so the Information is Insufficient. The Court held, It should be taken according to 28 dayes to the Moneth; and so there be 13. months in the year, but it is not material, in which of the moneths he offended. But it was not adjudged, but the Court would advise, *et Adjornatur*. Trin. 43 Eliz. B. R. *Dormer* and *Smiths* Case. *Cro.* 3. Part, 835.

10. Information upon a penal Law for the Queen and himself; before any plea pleaded, the Informer dyed. It was moved by the Attorney-General, Whether he might proceed for the Queen? It was holden by the Court, That he might; and if the Informer be Nonsuit, or Release, the Queen may proceed. And so it was said, It was adjudged in *Stretton* and *Taylors* Case. Wherefore it was Ruled accordingly. Mich. 40 Eliz. B. R. *Hannes* and *Griffith's* Case. *Cro.* 3. Part, 583.

11. R. Informed against V. for Extortion, and the *Venire facias* was awarded to the Sheriff; Whereas it ought to have been to the Coroners. It was moved in this Case, That although the Verdict passed for the Defendant, yet the Plaintiff should pay no Costs, because the Jury was ill awarded. But the Court held the contrary; For by that means they said, an Informer might trouble the whole Country, and take Composition of them; and yet pay no Costs. Mich. 21 Jac. B. R. *Rotheram* and *Vincents* Case. See the Reports annexed to *Bendlowes*, 141. And see there the same Term, Where a Judgment for an Informer against an Ingrosser was Reversed, because the Judgment was, *Quod* the Defendant *sit in misericordia*; where it ought to have been *Quod Capiatur*.

12. Note: It was moved to the Court, That in such a place, at a Leet there holden for the King, One of the Jurours sworn to Inquire for the King, was Arrested by one of the Officers of the Marches of *Wales*; and because the Kings Court was disturbed, and because the Kings Bench was the Fountain of all Leets, the Aide of this Court was prayed for to punish the Offence; and an *Affidavit* was made of the matter: And an Attachment against the party was prayed: But the Court denyed that. But if the Officer of this Court had so done, then they said, they had had Ground to ground an Attachment. But the Court advised the party to exhibit an Information against the Officer for that disturbance at the Leet. So he said he would so do. Pasch. 3 Car. B. R. *Lees*, 198.

13. Information upon the Statute of Usury, by an Informer, *Qui tam pro Domina Regina quam pro seipso*. The Queens Attorney-General entred *Non vult ulterius prosequi*; and the same was pleaded in Barr against the Informer. It was the Opinion of the whole Court, and so adjudged, That the said Entry by the said Attorney-General, was no Barr against the Informer. And so it is, If the Queen be Nonsuit. And it was said, That such was the Opinion of the Lord *Anderson*, and *Gawdy*, Justices. Trin. 30 Eliz. B. R. *Sutton* and *Taylors* Case. *Leon.* 1. Part, 119.

Joynt-Tenants.

1. NOte: It was the Opinion of *Montague*, Chief Justice of the Common-Pleas, That if a man by his last Will in Writing, Deviseth his Lands holden in Socage, to his two Sons equally to be divided between them, that now after the death of the Devisor, the Devisee are Joynt-Tenants of the Lands untill division be made; for these words, *shall be divided*, are words of future time. Trin. 6 E. 6. *Bendlowes*, 19.

2. It was holden by the Justices, That if two Joynt-Tenants be of a Term, and the one grants parcell of the Term to a stranger, by this the Joynture is severed: But yet, if a man be possessed of a Term in the right of his wife, and grants parcel of it to another; yet after the death of the husband, the wife shall have the residue of the Term that was not granted, and it shall be only an alteration of what was granted. Trin. 26 Eliz. B. R. *Symms* Case. *Cro.* 3. Part, 33.

3. Tenant for life, the Remainder to 4. others for their Lives; The Lessor in Reversion levies a Fine *Sur Conisans de Droit come ceo, &c.* to the Tenant for life, and to one of those in the Remainder, to the use of the Tenant for life for his

his life, and after to the use of the other in Fee. The Tenant for life dyes; He in the Remainder who took the Fine, dyes. It was Resolved by all the Court in this Case, That that part should descend to his Heir, and should not survive. Trinit. 38 Eliz. B. R. *Child* and *Wescotts* Case. *Cro.* 3. Part, 481.

4. A man having two daughters being his heirs, Devised his Lands to them and their heirs, and dyed: And, Whether they should take as Joynt-Tenants by the Devise, or as Coparceners by discent, was the Question? It was holden by all the Justices, That they should hold the Lands as Joynt-Tenants, for the Devise giveth it them in another degree then the Common Law would have given it them, for the benefit of the Survivorship between them. Mich. 38 Eliz. B. R. *Cro.* 3. Part, 431.

5. A man and a woman Joynt-Tenants in Fee of a Manner, entermarried; and after levied a Fine thereof to a stranger, who rendred it to them in tail: They have Issue 3. daughters, the husband dyes, the wife takes a second husband, and they levy a Fine, and remainder in special tail; the wife dyes without Issue by the second husband; the Daughters enter: A Lessee for years of the second husband distrains a Copyholder for Rent, who brings *Replevin*: the other avowes, and did not prove the life of the second husband. And for this cause it was holden to be ill. Mich. 39 Eliz. C. B. *Laughter* and *Humphrey's* Case. *Cro.* 3. Part, 524.

6. A. and B. Joynt-Tenants of a House in *London*, wherein B. had divers goods: and being outlawed to S, and Judgment given against him in the debt, dyed possessed of the said goods within the house: A. continued in possession of the house by Survivor: S. took Execution for the goods of B; and the Sheriff of *London* taking with him a Jury to praise the Goods of B, came to the house to have served the Execution; which A. perceiving before the Sheriff had entred the house, he shut the door, and would not suffer the Sheriff to enter, and view, and praise the Goods: Whereupon S. brought an Action upon the Case against A. for disturbing him in the Execution. It was the Opinion of the Justices, That the Action did not lye; For A. did nothing but that which he might lawfully do; *scil.* shut his own door: And if the Execution had been for the debt of A. himself, yet before the Entry of the Sheriff into the house, he might lawfully have shut his door. And in this Case, It was holden, That if the Sheriff himself might have entred lawfully, yet he could not carry with him a Jury to praise the goods, for that perhaps might be a prejudice to the Plaintiff for the loss of his Goods. Mich. 43 Eliz. B. R. *Semaine* and *Greshams* Case. *Cro.* 3. Part, 28.

7. The Custome of a Manner was, That upon Surrender made to one and his heirs, If 3. proclamations passe, and he doth not come in to be admitted, that the Lord shall have the Land as forfeited. A Surrender was made of Land to the use of A. for life, the Remainder to B. in Fee: A. suffered 3. proclamations to passe, and did not come in to be admitted. It was adjudged in this Case, That it was no forfeiture of the Estate of him in the Remainder, and that the Lord should not have the Land upon this default of the Tenant for life; for that here, the Estate of A. and B. are divided Estates, and the Custome shall be intended of an entire Estate in Fee-simple given to one person; and the Custome being in barr of an Estate, shall be taken strictly. There it is said, and put for a Quæry, That if such an Estate be made to A. and B. and their heirs, and A. comes in within the time of the proclamations; but not B: If now A. shall have the whole; or that the moyety shall be forfeited. It is not Resolved, Pasch. 44 Eliz. B. R. *Bispole* and *Longs* Case. *Yelverton*, 1.

8. In *Ejectione Firmæ*, the Plaintiff declared upon a Lease of Land made for a year, by J. A: The Defendant pleaded, That the Land was Copyhold parcel of the Manour of D; and that the Father of the Lessor was thereof seised in Fee according to the Custome of the Manour, and surrendred the same to the use of his Will, and thereby divised the Land in Question to J. A. the Lessor, and to H. his sons, and to their heirs males of their bodies; and Willed, That they should not enter till their several ages of 21. years: And further Willed, That J. S. and J. D. his Executors should have the Lands to perform his Will, untill his said sons J. and H. should come to their ages of 21. years. The Plaintiff confessed the Will, but said, That such a day and year before the Lease, J. the Lessor came to his age of 21. years, and Entred, and lett to the Plaintiff. Upon which the Defendant Demurred. It was in this Case adjudged for the Plaintiff; For although the Estate of J. and H. precede in words, and the Devise to the Executors followeth, Yet in Construction, the Estate of the Executors shall precede in possession: and it is as much as if he had said, That his Executors shall have the Lands untill his sons J. and H. shall come to their severall ages of 21. years; and afterwards to them and their heirs males: So as the Executors have a limited Estate determinable in time when each of the Sons several shall come to his full age. And although it was Objected, That the Brothers are Joynt-Tenants by the Will; and if one enter when

when he comes at his full age, the other being within age, the ſame ſhould deſtroy the intent of the Deviſor, for then they do not take joyntly: Yet it was Reſolved, That the Entry of him who comes of full age, ſhould not deſtroy the Joynture, but they ſhould be Joynt-Tenants notwithſtanding that Entry. Mich. 8 Jac. B. R. *Aylett* and *Choppins* Caſe, *Yelverton*, 183.

Judgment.

1. *Aſſumpſit*; In Conſideration of a Marriage had between the Plaintiff's Son, and the Defendant's Daughter, the Defendant promiſed to pay to the Plaintiff 400 marks in 7. years then next following; *ſcil.* at certain Feaſts by equall portions; And becauſe the 400 marks were not paid, the Action was brought. Upon *Non Aſſumpſit*, It was found for the Plaintiff. It was ſhewed in ſtay of Judgment; That it appeareth by the Plaintiff's own Declaration, That one of the 7. years was to come, when the Plaintiff brought his Action; ſo as then the Plaintiff had not cauſe of Action. And for that cauſe, Judgment was ſtayed by the Court, although it was after Verdict. Trin. 5 Ma. *Joſſelin* and *Sheltons* Caſe. *Bendlowes*. 3.

2. Three Men were bound in a Recognizance joyntly and ſeverally; againſt all which, the Conuſee ſued forth Execution by *Scire facias*; And upon Iſſue joyned, it was found for the Plaintiff in B. R. and Execution awarded by *Capias ad ſatisfaciend.* And becauſe the ſame *erroneè emanavit*, it was drawn off the File; and now, the Conuſee brought an Action of Debt upon the Judgment againſt one of them. And it was the Opinion of the whole Court, That the Action would not lye, Becauſe the Judgment was joynt againſt them all three. Paſch. 16 Eliz. B. R. *Leon.* 2. Part, 220.

3. In an Action for words, at the *Niſi Prius*, the Defendant pleaded a Concord after the *Dernein Continuance*, and demanded, Judgment if to the Enqueſt, &c. It was holden by the Juſtices, To be no Plea; but he ought to conclude, Judgment if Action. Then it was moved, If Judgment ſhould be given upon this; or a new *Niſi Prius* granted? And upon good Advice, Judgment was given by the Court for the Plaintiff; for that it was a confeſſion of the matter in Iſſue. Trin. 28 Eliz. B.R. Sir *Tho. Cockeys* and *Witnams* Caſe. *Cro.* 3. Part, 49.

4. *Aſſumpſit*; The Plaintiff declared, That the Defendant did aſſume to do ſuch a thing: Upon *Non Aſſumpſit*, it was found, That he did aſſume to do that and another. It was in this Caſe Reſolved againſt the Plaintiff; For the Juſtices ſaid, That where the Plaintiff declareth, That in Conſideration of one thing, the Defendant aſſumed, and the Jury find, that in conſideration of that and another thing, the Defendant aſſumed, the Plaintiff hath failed of his Aſſumpſit. Mich. 29 Eliz. B. R. *King* and *Robinſons* Caſe. *Cro.* 3. Part, 79.

5. The Caſe upon a Demurrer was; A *Scire facias* was brought in Chancery upon a Recognizance; There the Defendant pleaded to Iſſue, which was ſent in B. R. to be tryed, and found for the Plaintiff, and Judgment here given for him. Afterwards he brought Debt in C. B. upon this Judgment, and had Judgment there to Recover; And afterwards brought a *Scire facias* here to have Execution upon the Judgment in this Court. And the Defendant in Barr of that Execution, pleaded this Recovery. Upon which it was Demurred. It was Reſolved by the whole Court, That it was no Plea, Becauſe the one Judgment cannot determine another Judgment which is of Equal nature; no more then one Obligation can determine another. Paſch. 43 Eliz. B. R. *Preſton* and *Penton* Caſe. *Cro.* 3. Part, 817.

6. *Scire facias* of a Judgment; The Defendant pleaded, That before the Judgment, pendant the Suit, the Plaintiff Covenanted with him by Deed, That if he obtained Judgment, and the Defendant upon ſuch a day paid him 100 l, that he would not ſue Execution, and the Judgment ſhould be void: And pleaded, That he had paid the 100 l: It was the Opinion of the Court, That it was no Plea; For that a man cannot make a defeaſance of a Judgment before that it be given; but his remedy is by Writ of Covenant upon the Indenture. Trin. 43 Eliz. B.R. *Gage* and *Sturlands* Caſe. *Cro.* 3. Part, 837.

7. Error of a Judgment in Debt, for that the Defendant pleaded the Plaintiff's Releaſe, and the Plaintiff denyed it to be his Deed. It was found to be none of his Deed, and the Judgment was, *Quod ſit in miſericordia*; where it ought to be *Quod Capiatur*. But it was holden by all the Judges and Barons in the Exchequer Chamber, That the Judgment ſhould be affirmed, becauſe it was the Deed of another which he pleaded; which although it be falſe, he ſhall not be Impriſoned; but, where he denyes his own Deed, it is otherwiſe. Trin. 43 Eliz. Exchequer Chamber, *Hancocks* Caſe. *Cro.* 3. Part. 844.

8. *Scire facias* upon a Judgment of 240 l; The Defendant pleaded, That he borrowed of the Plaintiff

Plaintiff 100 l. and contracted, That he was to give 20 l. for the Loan for a year; and for the payment of that 120 l. the Plaintiff would have the Defendant to confeſſe that Judgment, and pleaded the Statute of Uſury to avoid it. It was the Opinion of the whole Court, That it was no Plea; and ſaid, That Judgments ſhall not be avoided upon ſuch ſurmiſes; For if there had been any ſuch matter, the Defendant might have pleaded it upon the Action brought, and not have ſuffered a Judgment; and although it may be a practiſe to avoid the Statute, yet it ſhall be rather tolerated, then to avoid Judgments upon ſuch ſurmiſes. Mich. 44 Eliz. *Middleton* and *Hall's* Caſe. *Cro.* 3. Part, 588.

9. H. brought *Auditâ Querelâ* againſt P, to whom he had acknowledged a Recognizance of 50 l. upon a Defeaſance, that if H. paid to J. B. 100 l. in ſix Months, viz. by 50 l. *per annum* at ſuch place, that then, &c. and pleaded, That he was ready every day at the place in which, to have paid the 50 l. to B, but B. was not there, *ad exigendum & recipiendum*: P. ſaid, by that he ought not to be barred, becauſe (by proteſtation that H. was not ready to pay to B. *pro placito, Idem J. B. dicit*, that he was ready at the place in which, &c. to have received the 50 l. according to the Indenture, *abſque hoc* that H. was ready to have paid it; Upon which Plea, H. demurred, and for cauſe ſhewed, That where he had offered a ſufficient Iſſue tryable by the Country, viz. That he was ready to have paid the 50 l. if B. had been ready there to have received it; P. did not ſay, That B. was there ready to receive it *& de hoc ponit, &c.* but traverſed, that H. *non ſolvit* to pay, and upon that Demurrer joyned, it was adjudged for the Plaintiff in C. B. and upon Error brought in B. R. the Judgment was affirmed. For although it was Objected, The Judgment in C. B. ought to have been upon *Nihil Dicit*, and not upon the Barr; yet it was anſwered, That the Barr being entred as the Plea of P, and the demurrer drawn up upon that between the parties, the Judgment is upon an ill Barr, and in pleading, it is not all one, *Nihil dicere* & *inſufficienter dicere*; for then upon every inſufficient Barr, judgment ſhould be upon *Nihil dicit*, which is not ſo; divers other Exceptions were taken. See *Libroms*; but the Judgment was affirmed for the Plaintiff. Paſch. 1 Jac. B. R. *Hughes* and *Phil ps* Caſe. *Yelv.* 38.

10. L. recovered in Trover againſt H. in the Court of S. by default, and a Writ of Enquiry, if Damages returned at the next Court; at which day the Plaintiff appeared, and the Writ was returned Served: but the Jury were reſpited till the next Court, and at that day the Plaintiff appeared again, and the Jury *ponitur in reſpectu*, and day given over till the 10th of *June*, and at that day, *Jurata* again *ponitur in reſpectu*; but the Plaintiff appeared not at that day, nor had day over; and at the day given to the Jury they appeared, and gave 20 l. Damages. Upon which the Plaintiff had Judgment for the 20 l. and Coſts: It was Objected, That the Plaintiff not having day at the laſt Adjournment, that all the matter was diſcontinued; for by the firſt Judgment, the Defendant was out of Court; yet the Plaintiff ought to attend *de die & diem*, becauſe his Judgment is not perfect untill the damages be enquired: and then the Plaintiff had day till the 10th of *June*, and at that day did not appear; wherefore the Court *ex officio*, without prayer of the party, ought not have made continuance of the Jury, for that is always done *Ex petitione Querentis*; and for that Cauſe the Judgment was reverſed by the Opinion of the whole Court. Hill. 4 Jac. B. R. *Herrington* and *Lanſdoni* Caſe. *Y lv.* 97.

11. Error of a Judgment in an Action upon the Caſe, in which the Judgment was after Verdict for the Plaintiff, and it was entred in this form, *Idem ad petitionem Querentis, Conſiſſum & adjudicat. & aſſeſſ. per Curiam, Quod Querens recuperet dimas*, by the Jurors taxed, *Nomine ex incremento dimas, &c.* It was adjudged, That it was Error, becauſe Judgment ſhould be *idem Conſideratum*, and the Judgment is the Act of the Court; and the ſhorter it is, the better it is. 2. It was Error, becauſe Damages are increaſed without the aſſent and requeſt of the Plaintiff, for there is no Requeſt alledged; and there needed not to have been any Requeſt for Judgment, for Damages aſſeſſed by the Jurors. Mich. 2 Car. B. R. *Good* and *Lawrences* Caſe. *Latch.* 177.

12. In an Action upon the Caſe, the Plaintiff recovered but ſmall Damages; and thereupon the Defendant came and prayed, that the Judgment might be entred againſt him: but the Plaintiff prayed that the Judgment might not be entred: And *Taylor* and *Sowers* Caſe was Vouched, where the Plaintiff may waive his Judgment, and begin again. *Duddridg* Juſtice, ſaid, That the Courſe was, That the Defendant might enter Judgment againſt himſelf, and becauſe the *Poſtea* was brought in; if the Plaintiff might begin Suit *de Novo*, the Defendant might be infinitely vexed. It was the Rule of the Court, That the Defendant might enter the Judgment, or compel the Plaintiff to be Nonſuit. Mich. 2 Car. B. R. *Stockland's* Caſe. *Latch.* 216.

King.

1. NOte by *Popham*, Chief Juſtice, If the Queen Grants me free Warren within my Mannor of D. J. ſhall have it within my own Demeaſnes only. For if otherwiſe, the Queen ſhould impoſe a Charge upon another perſon, which the Law will not ſuffer. But if the Queen Grants unto me Felons Goods, or Waifes, and Eſtrays, within my Mannor, I ſhall have it in the Lands of the Free-holders; for it is a Liberty due to the Queen, which She may Grant; and it is not any Charge to the Subject, for She hath it in every mans Lands, and therefore may Grant it to any other. Trin. 37 Eliz. B. R. In *Hipham* and *Beſts* Caſe. *Cro.* 3. Part, 463.

2. Information of Intruſion, It was found, That the Prior of K. in Com. H. 31 H. 8. ſurrendred the ſcite of his Priory, and all his Lands to the King by Deed enrolled. Afterwards King *Henry* 8. *Anno* 31. granted the ſcite of the Monaſtery to the Suffragan of D. for his life, who 38 H. 8. dyed; the ſcite came to the Queen *Elizabeth* afterward. *Anno* 8. of her Reign, a Commiſſion iſſued to enquire in what eſtate and reparations the Houſe was, and thereby it was found to be ruinous; and the Lord *Tiover* and others by Commiſſion ſold the Stone of the Priory to G, with a Proviſo, That if the ſaid Lands, or Tenements, or Profits thereof, were not concealed, ſubſtracted, or unjuſtly detained from the Queen her Father, Brother, or Siſter, before 14 Eliz. That the Patent ſhould be void. They found, That the Queen was not anſwered any Rents or Profits thereof, beſides the ſaid Stone and Lead before 14 Eliz. In this Caſe, It was adjudged for the Queen: for there is not any Land conveyed by that Patent, but that which is concealed from the Crown. But the Priory and the ſcite cannot be concealed; for it was by the Priors Surrender expreſſly mentioned, and ſo revealed to the King: But the King's Grant alſo is revealed being therein mentioned by expreſs words; Then if once it be revealed by expreſs words at the time of his Title accrued, it can never be concealed, as long as the Crown hath not another Title thereunto. But if it be afterward deveſted from the Crown by the King's Grant in Fee, and afterwards comes again to the Crown by Attainder of Felony, becauſe it is by a new Title, it may be concealed. For this and other Cauſes, It was adjudged for the Queen. Mich. 39 Eliz. B. R. The Queen and *Vaughans* Caſe. *Cro.* 3. Part, 507, 508.

3. *Quare Impedit* by the Queen, for diſturbing of Her to preſent to the Church of A, as in the Right of the Dutchy of *Lancaſter*; and declared, whereas *Hen.* 8. was ſeiſed and preſented R, *Hen.* 8. dyed, and ſo by Diſcent it came to the Queen; and the Church became void. The Defendant pleaded, That his Predeceſſor was ſeiſed of the Advowſon as in groſſe, and collated J. S. his Clark, who was admitted, inſtituted, and dyed ſeiſed; and ſo pleaded three ſeveral Collations, and demanded Judgment if Action by the Queen; and the Incumbent pleaded the ſame Plea. The Queſtion was, If this double or treble Uſurpation put the Queen out of Poſſeſſion of an Advowſon, which She had in the Right of her Dutchy of *Lancaſter*; and it was adjudged, It did not; For She hath Her priviledge in it, as if it had been in the Right of the Crown, and for ſuch double Uſurpation it did not put Her out of Poſſeſſion; and here is no Uſurpation, but a Collation which ſhall not put a common perſon out of Poſſeſſion. It was adjudged for the Queen, and a Writ to the Biſhop awarded, Trin. 33 Eliz. C. B. The Queen and the Archbiſhop of *York's* Caſe. *Cro.* 3. Part, 240, 241.

4. Information in the nature of a Treſpaſs, for taking and cutting certain Trees, whereof the Queen was poſſeſſed: The Caſe was, A. and twelve others were poſſeſſed of divers Trees by the Grant of the Owner of the Soil; the ſaid A. in ſatisfaction of a Debt which he did owe to the Queen, aſſigned to Her by Deed enrolled all the Trees; If the Queen by this Deed ſhould have all the Trees, was the Queſtion. This difference was put, and agreed, That where the King comes to any thing by Act of Laws, as of Attainder, or ſuch other Act in Law, the King ſhall by his Prerogative have the whole; but where He cometh to have part of a Chattel by the Grant

Grant of a common perſon, he by his Grant ſhall not prejudice his Companion; and therefore in ſuch a Caſe, the King ſhall not have Prerogative. The Barons in the principall Caſe were ſtrong againſt the Defendant, but they ſaid, They would adviſe. Mich. 34 Eliz. Exch. The Queen and *Fairclough*: Caſe. *Cro.* 3. Part, 265.

5. The Caſe was: J. S. was bound to G. in a Statute of 400 l. and his Land was extended for this Debt, and delivered in Execution the value of 5 l. *per annum*; and he was bound alſo in a Statute to J. D, who aſſigned it to the Queen for his Debt, and thereupon *Extendi facias* being awarded: It was found, That the Land delivered to G. in extent was worth 12 l. *per annum*; and thereupon a *Scire facias* was awarded againſt them, to anſwer the Surpluſage of the Profits above the 5 l. *per annum* to the Queen; The Queſtion was, If it was duly awarded: It was holden by all the Barons, That it was; For it being found, That there was a Surpluſage above that which would ſerve a common perſon, the Queen ſhould have the Reſidue at another day; the Caſe was debated again, and then the Barons ſeemed to differ in Opinion; and at laſt, Judgment was given for the Defendants. Mich. 34 Eliz. in Ex. The Queen and *Wall* and *Greens* Caſe. *Cro.* 3. Part, 265.

6. The Caſe was: D. Incumbent of the Church of A, was created Biſhop of St. *Aſaph*. The Queen preſented the Defendant to that Church; the Plaintiff Patron, brought a *Quare Impedit*; and Whether the Queen by Her Prerogative, or the Patron ought to preſent, was the Queſtion: It was argued for the Plaintiff, and many Books cited; and eſpecially the Book 6 Eliz. *Dyer* 228. where the Opinion of the Court is expreſſive, That the Queen hath not any Prerogative in this Caſe. To thoſe Books ſeveral Anſwers were made, and eſpecially to the Book of 6 Eliz. *Dyer* 228. where the Plaintiff did not demurr upon the Kings Prerogative, but took iſſue, That the Church was void by Reſignation before the Creation: And whereas it was Objected, That this Prerogative cannot be proved. To that it was ſaid, That is not material, nor ought there any reaſon to be given, or enquired about the Queens Prerogative. For in regard She is the Head of the Weal-Publique, and defends Her Subjects and their Poſſeſſions; the Law attributes unto Her many Prerogatives, for which no reaſon can be yeilded, as to have the Tythes of Lands lying out of any Pariſh. To have Primer ſeiſin of all Lands, as well of others as of thoſe which are holden of Her in *Capite*, to have the Temporalties of the Biſhops; yet there is great reaſon for this ſpecial Prerogative: For the Queen hath advanced the Incumbent to a greater Dignity, and it is Her great loſſe to part with the Temporalties of Biſhopricks; She was alſo the means and cauſe of the Avoydance againſt this Benefice: And it is an uſual practiſe, That the Queen for the moſt part, upon creating of Biſhops, Grants to them to hold their Benefices *in Commendam*; which is good againſt Patrons, becauſe the Preſentations belonged unto her; and that is as great a prejudice to the Patron, as if the Queen her ſelf had preſented thereunto. The Caſe is not Reſolved in the Book: Mich. 39 Eliz. in C. B. *Wentworth* and *Wrights* Caſe. *Cro.* 3. Part, 527. See *Cook* 4. Part, *Hollands* Caſe.

7. *Quare Impedit*, ſuppoſing that his Anceſtor was ſeiſed in Fee of the Advowſon, and preſented, and afterwards granted the next Avoydance to M; that the Church became void, and M. preſented H; that the Church became void by the Death of H, and ſo it belonged to him to preſent. The Defendant pleaded, That H. was created a Biſhop in *Ireland*, whereby it appertained to the Queen to preſent; who preſented him, the Defendant. In this Caſe, It was Ruled no Plea, without traverſing the Avoydance by death. And this creation of the Incumbent a Biſhop in *Ireland*, was admitted to be a Cauſe of Avoydance, and that the Queen ſhould have it by Her Prerogative: And it was holden by the whole Court, That if the Queen doth not take the benefit of the firſt Avoydance, but ſuffers a Stranger to preſent, and the Preſentee dyes: She ſhall not have Prerogative to preſent to the ſecond Avoydance. Mich. 42 Eliz. C. B. Sir *Robert Baſſett* and *Gees* Caſe. *Cro.* 3. Part, 790.

8. The Lord *Paulett*, Tenant for life of an Advowſon, the Remainder in Fee to A, Tenant for life, preſented D, who was admitted and inducted; but, for want of reading the Articles, the Benefice was void; but D. continued in the Church, and, in Reputation, was choſen for his life. The Lord *Paulett* dyed. The Queen after the death of D, reciting Her title, preſented C, who was inſtituted and inducted: He in the Remainder preſented J. S, who was admitted, and inducted, brought Treſpaſs againſt C, the Incumbent of the Queen: And it was adjudged for the Plaintiff, and that the preſentation of the Queen was meerly void, as if She had preſented to a Church which was full; For as to the Patron it is full, untill he hath ſurceaſed his title after Notice given: And the Court held in this Caſe, That the preſentation of him in the Remainder was good; although it it was Objected, That it did belong to the Executors of the Tenant for Life; becauſe as to the Tenant for life himſelf, the Church was full till Notice. Trin. 34. Eliz. B. R. *Greadit* and *Bakers* Caſe. *Yelv.* 7.

9. Note in this Caſe, It was ſaid by the Juſtices, That if a man be in Execution for the Debt

of another man in the Fleet, the King cannot take him into his protection into the Wars out of Priſon untill the Debt be paid; becauſe he is in Execution for the ſaid Debt, and to let him out of Priſon, is to let him out of Execution, which the Law will not ſuffer: But if he was in Execution in the Fleet, or other Priſon for the Debt to the King, there He may diſcharge him, and take him into his protection, or into his Wars; for He may well diſcharge His own Debt. Mich. 3 Car. C. B. *Tomkins* Caſe. *Helty* 57.

Leaſes.

1. THE Caſe was, A Leaſe was made unto Two, *Habendum* to them, and to two others for their lives, and the longer liver of them: It was Reſolved by the whole Court, That the two named in the *Habendum* did not take any thing; and if the firſt Two in the Premiſſes of the Deed dye, there ſhall be no Occupancy. For the lives of the Two in the *Habendum* was intended an Eſtate to them, and not a limitation of the Eſtate of the firſt Two; and ſo it was ſaid, It was Reſolved, 28 Eliz. in B.R. In *Hulbord* and *Windſmore* Caſe. Mich. 30 Eliz. C. B. *Kickman* and *Reignolds* Caſe, *Leon.* 2. Part, 1.

2. *Ejectione firme*; The Caſe was: A. was ſeiſed, and Leaſed for years with clauſe of re-entry, for non-payment of Rent; In the Indenture there were divers Covenants on the part of the Leſſee, afterwards A. by his Will deviſed, That the Leſſee ſhould retain the Land for 31 years (reckoning the firſt years, not-expired, as parcell) yeilding like Rent, and under ſuch Covenants as the Leſſee held the former Leaſe; and by the Will, deviſed the Inheritance to another. The firſt Point was, If the Deviſee ſhould hold over the Land, for the term encreaſed as he held before, or if the Law ſhall conſtitue the words of the Will to be a Condition: It was the Opinion of the whole Court, That the words of the Deviſe cannot make a Condition, for a Condition is a thing odious in Law, which ſhall not be created without ſufficient words. The ſecond Point, If the Fee-ſimple ſhould paſſe by this Leaſe in point of Reverſion or Remainder. The better Opinion of the Court was, That it ſhould paſſe in point of Reverſion; for if it ſhould be a Remainder, then the Rent which is reſerved upon the Leaſe by the Will ſhall not be incident to ſuch Remainder. The third Point, admitting the words of the Will *ut ſupra*, are a Condition, If here be a Grantee of Reverſion intended within the Statute of 32 H. 8. becauſe it never was in the Deviſor as a Reverſion: It was the Opinion of the Court, That as this Caſe is, the Deviſee of the Fee-ſimple ſhould take advantage of the Condition, if it were a Condition. Hill. 29 Eliz. C. B. *Michel* and *Duntons* Caſe. *Leon.* 2. Part, 33.

3. Upon the Statute of 31 H. 8. Of Monaſteries; The Caſe was this, The Abbot and Covent of A. 29 H. 8. made a Leaſe of Lands for three lives, to begin after the death of F, if they ſo long live; and 30 H. 8. within a year before the diſſolution, they make a Leaſe to J. S: Now, If the firſt Leaſe in the life of the ſaid F. be ſuch an Eſtate and Intereſt, that by vertue of the ſaid Statute, ſhall make the ſecond Leaſe void, was the Queſtion; for it is not in *Eſſe*, but a future Intereſt. The words of the Statute are, *viz.* If any Abbot, &c. within one year, before the firſt day of this preſent Parliament hath made, or hereafter ſhall make, any Leaſe or Grant for years, life or lives of any Mannors, &c. whereof, and in which, any Eſtate or Intereſt for life or years, at the time of the making of any ſuch Leaſe or Grant, then had his being or continuance, or hereafter ſhall have his being or continuance, and then was not detained, &c. ſhall be void. It was the Opinion of all the Juſtices and Barons in the Exchequer Chamber, that here in this Caſe there was an Intereſt, and that not determined at the time of the making of the Leaſe to J. S. Trin. 29 Eliz. Ex. *Farrington* and *Fleetwoods* Caſe. *Leon.* 2. Part. 55.

4. Note; It was holden in this Caſe by the Barons of the Exchequer, That if Leſſee for years of a Meſſuage, Grants *totum Meſſuagium ſuum*, that the Grantee hath but at will; but if he granteth all his Intereſt and Eſtate in ſuch a Meſſuage, then the whole Leaſe paſſeth; and ſo it was ſaid, It had been lately adjudged in B. R. in *Wiſdibanks* Caſe. Trin. 31 Eliz. Ex. *Griffins* Caſe. *Leon.* 2. Part, 78.

5. J. S.

5. J. S. ſeiſed of Lands, deviſed them to his Wife, till W. his Son ſhould come to the age of 22 years, and then the Remainder of part of his Lands to his two Sons, A. and J; the Remainder of other part of his ſaid Lands to two other of his Sons; upon Condition, That if any of his Sons, before W. ſhould come to his age of 22 years, go about to make any ſale *prout, &c.* he ſhall for ever loſe the Lands, and they ſhall remain over. Before W. came to the age of 22 years, one of the other Sons leaſed that which to him belonged for 60 years, and ſo from 60 years to 60 years, unto 240 years ended. It was Objected in this Caſe, That here is not any Sale, nor any Leaſe, for the Leſſor hath not any thing in the Land deviſed: But it was the Opinion of the whole Court, and ſo adjudged, That the ſame was a Leaſe, and that the Leaſe, made as before, was a Sale within the intent and meaning of the Will of the Deviſor; and ſo it was ſaid by them, If the Deviſee had entred into a Statute to the value of the Land deviſed, it had been a Sale within the intent of the Will, and ſo a forfeiture of his Eſtate. Mich. 29 Eliz. B. R. *Larges* Caſe. *Leon.* 2. Part, 82.

6. In *Ejectione firme*, The Caſe was, The Dean and Chapter of E. leaſed Lands to J, rendring Rent, to be paid at their Chapter Houſe in E, and for want of payment ſuch Leaſe to be void; J. conveyed his Intereſt to the Defendant: the Rent was demanded at the Chapter-Houſe, and not paid. Afterwards the Dean and Chapter made an Indenture of Leaſe for 40 years in their Chapter-Houſe to W, and there to put their Seal in the Chapter-Houſe; and made a Letter of Attorney to another to enter, and make Livery of the ſaid Deed, which was done accordingly: It was Objected, That the Leaſe was not good; for when they make this Indenture of Leaſe in their Chapter-Houſe, and put their Seal, it is their Deed preſently without other delivery; and J. being in poſſeſſion at the time of their putting their Seal to it, they were out of poſſeſſion at the time of the making of it, for no delivery is neceſſary to the Deed of a Corporation, but the date and the ſealing of it make it a perfect Deed; and then the delivery of it by the Attorney is to no effect. The Opinion of the Court was, That the Leaſe was good enough for the manner; and there is not any other form or means for a Corporation to make a Leaſe than is here: And it was alſo holden, That the Leaſe was good, without an Entry made by the Dean and Chapter; and although it was further Objected, That the Attorney had not purſued his Warrant, which was to enter into the Land, and claim it in the Right of the Dean and Chapter, and then to deliver the Leaſe; but it is not found, That he entred and claimed as aforeſaid: Yet the Court held the ſame to be good enough, becauſe in a ſpecial Verdict every particular circumſtance needs not to be found; and in delivery of the Deed upon the Land, the hath purſued his Authority in all. Hill. 31 Eliz. B. R. *Willis* and *Fermins* Caſe. *Leon.* 2. Part, 97.

7. Note; It was holden by the Juſtices, That if a Leaſe for years be made by Deed indented, with the words *Demiſi & tradidi ad firmam*; That upon that, a Writ of Covenant lyeth againſt the Leſſor, if he entreth upon the Leſſee; contrary, if a Stranger entreth, if he hath not clauſe of Warranty: For when Covenant is brought upon the word *Demiſi*, the Plaintiff ſhall recover the Term it ſelf, but not Damages; and that cannot the Plaintiff do when a Stranger Enters. Paſch. 32 Eliz. B. R. *Andrewes* Caſe. *Leon.* 2. Part, 104.

8. The Caſe was, A man ſeiſed of Lands in Fee, took a Leaſe by Indenture of the Herbage and Pawdnage of the ſame Lands: It was the Opinion of the whole Court, That the ſame was no Eſtoppel to him, to claim the Soil or the Freehold; and in this Caſe, It was agreed by the Court, That if Father and Son be Joynt-Tenants for an 100 years, and the Son takes a Leaſe of his Father for 15 years, to begin, &c. the ſame ſhall conclude the Son to claim the whole Term, or parcell of it by Survivor. Mich. 21 Eliz. B. R. *Pleadalls* Caſe. *Leon.* 2. Part, 159.

9. The Warden and Fellows of New Colledge in *Oxon*, 8 Eliz. leaſed a Manſion Houſe in S, to J. S. for 21 years, and afterwards 25th. of *Octob.* 21 Eliz. they demiſed the ſame Houſe to J. S. for 21 years, to begin the *Mich.* after; and the Statutes of 14 Eliz. *Cap.* 11. and 18 Eliz. *cap.* 11. were found; and if the ſecond Leaſe ſhall be ſaid a Leaſe in Reverſion, and ſo void by the Statute of 14 Eliz. was the Queſtion: It was ſaid, It is a Leaſe in Reverſion, for the Leaſe doth continue untill *Michaelmas*. On the other ſide, It was ſaid, That when he accepted the ſecond Leaſe, it was a preſent Surrender of the former Leaſe; for he giveth power to the Leſſor for to Contract for the Houſe preſently; and to that purpoſe *Corbets* Caſe, 8 Eliz. was citted, that it was a preſent Surrender, for that the Term cannot be apportioned. Trin. 22 Eliz. B. R. *Tompſon* and *Treffords* Caſe. *Leon.* 2. Part, 188.

10. Husband and Wife made a Leaſe for 30 years, and if they dyed, that the Land ſhould remain to A. their Son, during the Term aforeſaid. It was holden by *Wray*, Chief Juſtice, in this Caſe, That if the Husband and Wife dye within the Term, that the Son ſhould have the Land *de novo* for 30 years. *Gawdy* contrary, That he ſhould have it but for ſo many years, which after their death ſhould be expired. Quære, Mich. 26 Eliz. B. R. *Leon.* 2. Part, 200.

11. The

11. The Mannor of B. was by Act of Parliament by the Earl of S. aſſured to the Counteſs his Wife for her Joynture, the Reverſion in Fee to the Earl, with a Proviſo for the Earl to make Leaſes for 21 years, rendring the ancient Rent. The Earl made a Leaſe for 21 years rendring rent, and before the end of it, he made a Leaſe by Indenture to the Leſſee for 21 years, bearing date 30 *Martii*, to begin at *Mich.* following. It was adjudged, That this ſecond Leaſe was void, becauſe for the time it is a Leaſe in Reverſion; and if he might make a Leaſe to begin at *Mich.* following, he might make it to begin 20 years after; and the Act gave him not that liberty, and being a liberty and power only, it muſt ſtrictly be obſerved: and the Land being aſſured to the Counteſs for her Joynture, if he might make Leaſes one after the other, ſhe ſhould never have benefit of her Joynture which the Act intended to her. Paſc. 21 Eliz. B. R. The Counteſs of *Suſſex* and *Wroths* Caſe. *Cro.* 3. Part, 5. See *Cook* 5. Part, 33. the ſame Caſe.

12. J. S. makes a Leaſe for years to begin after the death of Tenant for life, or after the end of a Leaſe for years in being. A ſtranger after the death of the Tenant for life, or the end of the Leaſe for years, enters. It was the Opinion of the Court, That notwithſtanding the entry, that the Leſſee may grant over his Term. But if he had entred, and bin afterwards put out, he cannot Grant his Term till he re-entreth. Paſc. 25 Eliz. C. B. *Bruerton* and *Rainsfords* Caſe. *Cro.* 3. Part, 15.

13. Note, It was holden by the Juſtices, That if a Man doth demiſe a Manor to which an Advowſon is appendant, and ſaith not *cum pertinentiis*, the Advowſon doth not paſs. In the principal Caſe, the Plaintiff claimed by a Leaſe made by R. S. Parſon of S. 11 Eliz. and that J. S. being Patron in Reverſion in Fee, confirmed the Leaſe, and after the Statutes of 13 and 14 Eliz. the Ordinary confirmed it; and afterwards 23 El. he which had the Patronage in the right of his Wife, together with his Wife confirmed the Leaſe; all which were ſhewed: and it was averred, That the Patroneſs for life was living. The Juſtices were of Opinion, That the Confirmations of the Ordinary and Patrons were good, for the Statute doth ſpeak of Alienations by Incumbents, &c. but doth not make void Confirmations made of a Leaſe made before the Statutes: And in this Caſe it was holden, That where in this Caſe the Plaintiff ſhewed a Confirmation of the Patron, but did not ſhew how the Patron came to the particular Eſtate, that he needed not to ſhew the ſame; but when he doth ſhew that he had but an Eſtate for life, he ought then to ſhew how he came by it. Paſc. 25 Eliz. C. B. *Higgins* and *Grants* Caſe. *Cro.* 3. Part, 18.

14. A Leaſe is made to A. B. and C. for their lives, *Habendum* to A. for life, the Remainder to B. for life, the Remainder to C. for life. It was adjudged a good limitation, and they ſhall take according to the *Habendum*; for in the Premiſes, a Joynt Eſtate is only given by Implication, which is controlled by the expreſs limitation in the *Habendum*. Paſc. 26 Eliz. B. R. *Dowſes* Caſe. *Cro.* 3. Part, 25.

15. Note, If one ſaith, you ſhall have a Leaſe of my Lands in D. for 21 years paying 10 s. *per annum*, make ſuch a Leaſe, and I will Seal, That this is a good Leaſe by paroll for the intent of the Leſſor is ſufficiently expreſſed, and the making it in Writing is but further aſſurance. Trin. 26 Eliz. B. R. *Maldons* Caſe, *Croke*, 3. Part, 33.

16. In *Ejectione firme*, the Caſe was: A. ſeiſed of Lands, made a Leaſe to B. C. and D. *Habendum* to them for their lives, and the life of the ſurvivor of them. Provided that it was Covenanted betwixt the parties, That the ſaid C. and D. ſhould not occupy the Land during the life of B. and that D. ſhould not occupy the Land during the life of C. B. occupied all, and dyed, D. entred and made a Leaſe to the Plaintiff, who was put out by the Defendant. The Queſtion was, If this Proviſo be a limitation of the firſt Eſtate, and ſevereth the Eſtate which was given to the three joyntly, and maketh each of them in Remainder one after the other, or it be only a bare Covenant. In this Caſe, amongſt other things, it was Reſolved, That the Office of the *Habendum* is to limit and explain the Eſtate in the Premiſes: And in this Caſe, their *Habendum* hath done its Office, and made it a Joynt-Eſtate, and therefore the ſubſequent clauſe comes too late, and is repugnant and utterly void: And in this Caſe it is not that any take in Remainder, but that any do not Occupy, nor take the profits during the life of the other. It was adjudged for the Plaintiff. Mich. 31 Eliz. B. R. *Scovel* and *Cabells* Caſe. *Cro.* 3. Part, 89, 107. See *Cro.* 2. Part, acc. and *Leon.* 317. acc. the ſame Caſe.

17. Debt upon a Leaſe for years, the Caſe was, A Parſon made a Leaſe for 21 years after 13 Eliz. of Lands uſually let, rendring the ancient Rent; the Patron and Ordinary confirmed the Leaſe: the Leſſee let part of the Term to the Defendant. The Parſon dyed, the Succeſſor entred, and leaſed to the Defendant, againſt whom the Leſſee brought Debt upon the former Leaſe, who pleaded the Statute of 13 Eliz. which made all Leaſes void where the Patron is not reſident, or abſent for 80 dayes. Upon this Plea, the Plain-

tiff

tiff demurred: It was adjudged in this Caſe, That the Leaſe was void by the death of the Incumbent. For the Juſtices ſaid, That the Statute doth provide againſt Dilapidations, and for the maintenance of Hoſpitality: and therefore provideth, That Leaſes ſhall be void, not only for Non-reſidency, but by death or Reſignation, for otherwiſe Dilapidations ſhould be in the time of the Succeſſor, and he cannot maintain Hoſpitality. Hill. 31 Eliz. B. R. *Mott* and *Hales* Caſe. *Cro.* 3. Part, 123.

18. The Caſe in *Ejectione firme* was, S. was ſeiſed of two Cuſtomary Meſſuages and Lands to them belonging, and H. was ſeiſed of two other Meſſuages and Lands, and W. W. was poſſeſſed of certain Lands containing 10 Acres called N. (which were the Lands in Queſtion). All theſe Lands were parcel of the poſſeſſions of the Abby of G. The Abbot and Covent let to J. V. the ſaid 4. Meſſuages and Lands *Nec non* the ſaid Lands called N. *Habendum, et tenend.* the ſaid Meſſuages and Lands *Nec non* the ſaid 10 Acres of Land *à tempore mortis, ſurſum redditionis forisfact. ſive determinationis ſtatus et Termini prædict.* S. H. W. and W. for years rendring rent, the Eſtate for years in N. ended. The other Eſtates in S. and H. were in being. The Queſtion was, when the Leaſe ſhould commence for N. It was ſaid, That it ſhould not begin till all the Eſtates were determined. But the Opinion of the Juſtices was, That it ſhould preſently commence for N. and ſaid, That a Term in Reverſion ſhall commence, not when the Term is run out in time only, but alſo when it is expired by ſurrender or otherwiſe. And this Caſe is ſtronger then *Cook* 5. Part, Juſtice *Windhams* Caſe: For here is ſeveral *Habendums* by reaſon of the word *Necnon*; and it was adjudged accordingly. Mich. 33 Eliz. B. R. *Veal* and *Roberts* Caſe. *Cro.* 3. Part, 199.

19. A Leaſe was made for 21 years, if the Leſſee ſo long lived, and continued in the Leſſors Service: The Leſſor dyed, If the Term was determined, was the Queſtion. It was the Opinion of all the Juſtices, That the Leaſe did continue, for there is not any Lacheſs in the Leſſee, that he did not ſerve, but it is the Act of God, that he cannot ſerve any longer. *Walmeſly* was ſtrongly againſt it, becauſe it is a limitation to the Eſtate, and that it ſhall continue no longer then he ſerves. Quære. Mich. 40 Eliz. C. B. *Wrexford* and *Giles* Caſe. *Cro.* 3. Part, 643.

20. *Ejectione firme.* the Defendant pleaded, That the Leſſor of the Plaintiff was a Copyholder in Fee of that Land, parcel of the Manor of H. in the Queens poſſeſſion by the Wardſhip of B. and that the Leſſor ſurrendred to the uſe of the Defendant in Fee, who was admitted: And that afterwards the Leſſor entred upon him, and let the Land to the Plaintiff *prout*, and that the Defendant entred as lawfully he might. Upon which the Plaintiff demurred. It was adjudged, That the Plea was not good, for there is not any confeſſing and avoiding of the Leaſe alledged by the Plaintiff: For the Action is brought as of a Leaſe of Land at the Common Law, and the plea proves the Land is Copyhold; and a Copyhold cannot make a Leaſe for years, but by Cuſtome or Licenſe of the Lord, which is not ſhewed. Alſo the Defendant hath pleaded a Leaſe by an Intruder upon the Queens poſſeſſion, which is not good. It was adjudged for the Plaintiff. Mich. 41 Eliz. *Kenſey* and *Richardſons* Caſe. *Cro.* 3. Part, 728.

21. Debt upon a Leaſe for years made to the Teſtator rendring rent, and declared of a Leaſe made *de anno in annum quam diu ambabus partibus placeret*, and that the Teſtator occupied it for two years, and for a part of the third year, and dyed, and for Rent of the third year the Action was brought. It was objected, That this was but a Leaſe at Will, determined by his death. But the Opinion of the Juſtices was, That although at the firſt it was a Leaſe certain but for two years, yet when he occupied and enjoyed it for part of the third year, it is then a Leaſe certain for that year alſo. But *Popham* doubted it, *Et adjornatur.* Mich. 42 Eliz. B. R. *Agard* and *Kings* Caſe. *Cro.* 3. Part, 775.

22. Treſpaſs, the Defendant pleaded a Feoffment from the Plaintiff: The Plaintiff ſhewed it was upon Condition, That if he paid 200 l. at ſuch a day, and 10 l. for every Fodder of Lead which ſhould be delivered to him by the Feoffee or his means, and ſhould make a ſufficient Leaſe for 21 years of Black Acre, that the Feoffment ſhould be void; and ſhewed the payment of the 200 l. and that the Feoffee had delivered ſo many Fodders of Lead, and that he had paid 10 l. for every Fodder, and that Black Acre was parcel of the Land whereof the Feoffment was made, wherein the Feoffee yet continued in poſſeſſion, and ſo he could not make a Leaſe thereof. Upon which it was demurred, becauſe it is not alledged, That the Leaſe of Black Acre was made; for although he cannot make a good Leaſe, yet he ought to make a Leaſe by Indenture, which ſhould be good by way of Eſtoppel. It was the Opinion of the Juſtices in this Caſe, That he needed not to alledg the performance of that part of the Condition which is impoſſible to be performed. Alſo here he cannot make a ſufficient Leaſe, for the Feoffee is alwayes ſeiſed; and it is not intended that he ſhould make a Leaſe by Eſtoppel, the words being, that he ſhould make a ſufficient Leaſe. Wherefore for the firſt point, it was adjudged againſt the Plaintiff.

Mich.

Mich. 42 Eliz. B. R. *Wigley* and *Blackwells* Caſe. *Cro.* 3. Part, 780.

23. A Leaſe was made to W. S. for 99 years if he lived ſo long, and if he dyed within the Term, that it ſhould be to his Executors and Aſſigns for 40 years. It was holden in that Caſe, That this Term for 40 years ſhall not veſt in W. S. but in his Executors by purchaſe, becauſe it is a Conditional limitation, and a meer poſſibility to veſt; And in this Caſe, a Caſe was vouched by *Popham* to be adjudged 17 Eliz. where a Leaſe was made to two for life, the Remainder to him who ſhould ſurvive of thoſe two, and to his Executors for 40 years. They both joyned in a grant of this Leaſe; yet the grant was holden to be meerly void, becauſe the Term was not veſted in any of them, and it was to be to the Executors as a purchaſe. See 3 & 4 Ma. *Dyer*, *Gravenors* Caſe. 150. Trin. 43 Eliz. B. R. *Spark* and *Sparks* Caſe. *Cro.* 3. Part, 840.

24. Debt for Rent upon a Leaſe; It was found thus, Articles of Agreement were ſealed betwixt the parties *in hæc verba, viz.* It is Covenanted and agreed, That the Plaintiff doth let Land to the Defendant for five years, from and after the Feaſt of St. *Mich.* next. Provided, and it is agreed, That the Leſſee ſhall pay therefore yearly at two Feaſts of the year (*viz.* ſuch a time, and ſuch a time) by eaven and equal portions 120 l. and there is another Covenant that the Leaſe ſhall be made and Sealed before the Feaſt of *All-Saints* next, according to that agreement; and, If that may be ſaid a Leaſe, or a Reſervation, was the Queſtion. Some conceived, That by the words of the laſt Covenant, that the Leſſor ſhould make a Leaſe according as thoſe Articles, did declare, and that thoſe Articles was no Leaſe. But the Court was of a contrary Opinion; for by the Articles, the Leaſe is to begin at *Mich.* next, and by the Covenant he may make the Leaſe at *All-Saints*, which is after the firſt Leaſe commenced; ſo it appears, that that was but for further aſſurance, and not to deſtroy the Leaſe precedent. Alſo the Court held, That the Covenant that the Leſſee ſhall pay yearly, made a Reſervation by reaſon of the word, Yearly. It was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Harrington* and *Wiſes* Caſe. *Noy* 57.

25. Note, *per Curiam*, If a man makes a Leaſe for life, and the Leſſee for life makes a Leaſe for years, and afterwards purchaſeth the Reverſion, and dyeth within the Term, yet the Leaſe for years is determined, and the Heir in Reverſion may ouſt him, and avoid it. But if one make a Leaſe for years where he had nothing, and afterwards purchaſeth the Land, and the Leſſor dyeth. If it be by Deed Indented, the Heir ſhall be Eſtopped to avoid it. Paſc. 4 Car. C. B. *Rothwells* Caſe. *Hetley* 91.

26. B. made a Leaſe to C. for 40 years by Indenture. And by the Indenture Covenanted and granted to the Leſſee, That he ſhould take convenient Houſe-boot, Fire-boot, and Cart-boot, *in toto boſco, ſuo vocat.* S. Wood, within the Pariſh of S. and thoſe Woods were not parcel of the Leaſed Lands, but other Lands. It was demanded of the Juſtices, If that Grant of Eſtovers out of another place then the Leaſe, was good; and what Eſtate the Grantee ſhould have thereby. It was the Opinion of the Juſtices, That the Grant was good, and that the Grantee ſhould have it during the Term, and that the words do not reſtrain him, but that he ſhall have the Eſtovers in the Lands leaſed alſo. Hill. 3 Car. in C. B. *Tompſon* and *Conyers* Caſe. *Hetley* 77.

27. Two Coparceners in tail, the Husband of the one being Tenant by the Curteſy joyned in a Leaſe, rendring a Rent to one of them and their Heirs. It was holden, That the ſame was not a good Leaſe by the Statute of 32 H. 8. of Eſtate tails, becauſe it is not reſerved to the Donee and his Heirs, but to the Tenant by the Curteſy joyntly with the other, becauſe the Rent ſhall go ſtrictly as it is reſerved by the Leſſor, and not otherwiſe. Hill. 1 Car. B. R. *Thomſons* Caſe. *Latch* 45.

28. Debt upon a Leaſe for years, *Habend. & reddend.* 38 l. yearly, to be paid every half year. Afterwards the Leſſor bargained and ſold the Reverſion to the Plaintiff, who for half a years rent, brought an Action of Debt, and declared upon that matter, and averred that the Deed was enrolled within the ſix Moneths according to the Statute; and the Deed bore date before the Rent day, but the Rent day encurred before the ſix Moneths expired. Exception was to the Declaration, becauſe it was not ſhewed whether the Enrolment was before or after the Rent day. The Court was of Opinion, That it was well enough, becauſe it is pleaded according to the Statute, and if it was not enrolled before the Rent day, it is to be ſhewed on the other ſide. 2. They ſaid, That if the Bargainee ſhould not have the Rent before the Enrolment, it would make but ill ſtir, becauſe the Law hath bin taken to be ſo, and ſo they ſaid it was adjudged in *Alſops* Caſe. Hill. 1 Car. B. R. *Hall* and *Dewes* Caſe. *Latch* 151.

29. *John Style* made a Leaſe for years, rendring rent *præfat. J. S. durante vita et aſſign. ſuis.* See that it was adjudged in this Caſe, That the Reſervation is good, and the rent ſhall go with the Reverſion. Hill. 1 Car. B. R. *Cole* and *Smyes* Caſe. *Latch* 265, 266, 267.

Leet.

Leet.

1. IN a *Quo Warranto* brought; It was holden by all the Juſtices, That a man might preſcribe to hold a Leet oftner then twice in the year, and at other dayes than are ſet forth in the Statute of *Magna Charta*, cap. 35. becauſe the ſaid Statute is in the affirmative. But it was agreed, That in a *Quo Warranto* it is not ſufficient for the Defendant to ſay, That ſuch a Subject hath lawful intereſt to hold Leets without making title to himſelf, for that the Writ is *Quo Warranto* he claims them. Trin. 30 Eliz. B. R. The Queen and *Patridges* Caſe. *Leon.* 2. Part, 28, 166.

2. In Replevin, the Defendant avowed for a Leet-Fee, and ſhewed that he, and all thoſe whoſe Eſtate he hath in the Hundred of C. have uſed to hold a Leet every year, and that at each time as ſuch Leet hath bin holden, the Inhabitants within the ſaid Leet have uſed to pay to the Lord 16 d for a Leet Fee, and that the Lords of the Leets have uſed to diſtrein for the ſame; and ſhewed, That 5 *July*, 26 Eliz. he held a Leet there. The Plaintiff replyed *abſque hoc* that they uſed to diſtrein; and Iſſue being joyned, it was found for the Defendant. It was moved in ſtay of Judgment, becauſe the Defendant hath intended himſelf to a Leet by an Eſtate in an Hundred, and did not ſhew a Deed of it, which was ſaid he ought to have done. It was ſaid by the Juſtices, *Periam* and *Rhodes*, That the Defendant need not ſhew a Deed, but if the Hundred it ſelf had bin in Queſtion, then a Deed ought to be ſhewed. But here the Avowant entitles himſelf to one thing, *ſcil.* a Leet, and a Leet Fee, by reaſon of an Hundred, and it is ſufficient for him to ſay, That he is ſeiſed of the Hundred, &c. although it be by Diſſeiſin; for if he hath poſſeſſion of the Hundred, be it *de jure*, or by Diſſeiſin, he ſhall have all things incident thereunto; for the poſſeſſion of the Hundred draws to him the Leet, and the Leet Fee. Another Exception was taken, becauſe it is layed in the Avowry, That the Leet was holden 5. *Julii*, and then it was void; for the Statute of *Magna Charta* requires, That the Leet be holden within one Moneth after *Michaelmas* or *Eaſter*. But that Exception was diſallowed, for that by force of the Preſcription, the Lord might hold his Leet, what day he pleaſed, and that is not reſtreyned by the Statute: And it was ſaid by them, That the Statute doth not extend but to Sheriffs *Turnes*, and not to other Leets. And in this Caſe it was agreed by the Juſtices, That if the King Grants to one a Leet to hold *ſemel quolibet anno*, and doth not ſay *ad libitum* of the Grantee, yet the Grant is good, and the Grantee may hold it at what day he will. Trin. 28 Eliz. C. B. *Lawſon* and *Harts* Caſe. *Leon.* 2. Part, 74.

3. Note by the Juſtices of the Common Pleas, If three Coparceners be ſeiſed of a Mannor in Fee, to which a Leet is appendant, and the King purchaſeth two parts of the ſame Mannor with the appurtenances, that the Leet yet remains appendant to the third part of the Mannor. Hill. 28 H. 8. *Bendlowes* 41.

Letters-Pattents.

1. THE Queen ſeiſed in Fee of the Mannor of D. made a Leaſe under the great Seal of divers parcells thereof, rendring rent; and after the Queen, without making any recital of the Leaſe, by her Letters Pattents Granted the ſame Mannor to another in Fee-Farm. And in the Letters Pattents were theſe words, *Ex certa ſcientia et mero motu noſtro, &c.* and alſo the Letters Pattents had the words, *Non obſtante, non recitando vel male recitando aliquas diminiones.* And it was the Opinion of the Juſtices, That theſe Letters Pattents were good, notwithſtanding the not recital of the Leaſe. Trin. 17 Eliz. C. B. *Bendlowes* 33.

2. The Lord of *Northampton* had by ancient Letters Pattents *Bona et catalla felonum et fugitivorum* within the Iſle of *Ely*: One dwelling within the Iſland was Attainted of Felony, to whom another was endebted by Obligation, and the money by the Condition of the Obligation was to be paid at the Mannor of the Defendant, who alſo had *bona et catalla felonum*; and at the payment of the money, the Defendant claimed the money. It was the Opinion of all the Barons in the Exchequer, That the Defendant could not have the money, for the place of payment *nihil operatur*; but the Obligation is the Subſtance which came to the Plaintiff within the Iſle of *Ely*. Then the Queens Attorney claimed the Money for the Queen, for that the Plaintiff cannot have it; for that by the general words of *Bona et Catalla Felonum*, this in Action do not paſſe, but by expreſſe they will

paſſe; otherwiſe not. And therefore day was given to the party, to produce and ſhew his Letters Patents. Trin. 29 Eliz. Exchequer, The Earl of *Northampton* and the Lord *St. Johns* Caſe. *Leon.* 2. Part, 56.

3. A Writ was awarded out of the Court of Admiralty againſt Sir *Tho. Bacon*, to ſhew cauſe, Whereas the Earl of *L.* late High Admiral of *England*, had granted to them to be Vice-Admirals in the Counties of N. and S, why the ſaid Letters Patents ought not to be Repealed and Annulled? So the Writ was in the Nature of a *Scire facias*. It was now moved to this Court, That the Admiral had but an Eſtate for life in the place of Admiralty; Yet his Grants did continue in force after his death. As the Juſtices here in C. B, although they have their Places but for life; yet they may grant Offices which ſhall be in force after their deaths. And becauſe for this cauſe, the matter is determinable at the Common Law, a Prohibition was prayed, for that in the Admiralty they will judge according to the Civil Law. Hereupon the Court, adviſing of the matter, gave day to the other ſide, to ſhew good cauſe to the contrary, or otherwiſe a Prohibition ſhould be awarded.

4. The Caſe was: King *Henry* 8th was ſeiſed of certain Lands, and of the Scite of the Hoſpital of St. *Johns* in W; and demiſed the Lands to A. for 21. years; and afterwards granted the Reverſion of them (*inter alia*) to the Biſhop of W. in Fee; and afterwards, the Biſhop granted thoſe Lands (*inter alia*) to E. 6. which diſcended and came to Queen *Mary*, who demiſed thoſe Lands to A. for 60. years, not reciting the Leaſe made to A: This Leaſe for 60 years was adjudged void, for not reciting the Leaſe for 21. years: for although by the taking of a ſecond Leaſe, the firſt was drowned; yet at the inſtant time of the taking of the ſecond Leaſe, it was in *eſſe*, and therefore ought to be recited, eſpecially being a Leaſe upon Record; but of a Leaſe by matter of fact, it was agreed, There needed no recital. The Objection againſt it was, Becauſe the Reverſion had been conveyed to the Biſhop, ſo as in his time the Leaſe might have determined without any matter of Record; and therefore when it came to the Queen, it needed not to be recited. But it was holden by the Court, For that A. might have knowledg of it, if it had been ſo done, and no ſuch thing is done, when the Reverſion was in the Queens hands, It is as if it never had been granted from the Crown. Paſch. 33 Eliz. B. R. *Wing* and *Harris* Caſe, *Cro.* 3. Part, 231.

Legacies.

1. A Prohibition was prayed by the Wardens of the Company of Tallow-Chandlers in *London*, upon a Surmiſe that they were ſued in the Spiritual Court for a Legacy of 200 l. given by the Teſtator, of the Plaintiffs there; And the Defendants pleaded there, That the Teſtator was Keeper of *Ludgate*, and was poſſeſſed of goods to the value of 300 l; and was Obliged in an Obligation of 100 l. to the Sheriffs of *London*, that he ſhould ſafely keep the Priſoners committed to his Charge, and ſhould ſave the Defendants harmleſs from all Eſcapes: and that one H. was taken upon a *Capias utlagatum* after Judgment in Debt, and eſcaped; and Debt was brought upon the Eſcape againſt the Sheriffs, and Judgment againſt them, and ſo the Bond was forfeited, ſo as they had nothing in their hands to ſatisfie; And becauſe the Eccleſiaſtical Court would not allow of this Plea, a Prohibition was prayed. It was the Opinion of the Juſtices in this Caſe, That this was no Plea; and that the Spiritual Court which are to take notice of our Law, are not to allow of it; For the Judgment in Debt in this Caſe, was *Anno* 20 Eliz. and the *Capias utlagatum* was 25 Eliz; ſo as the Plaintiff could not take benefit thereof, for he was not in Execution for him; and then the Obligation is not forfeited, for it is not any Eſcape: and it is clear, this Legacy ſhall firſt be paid. But it was ſaid, That the Legatory by the Civil Law ſhould enter into Bond to make Reſtitution, if the Obligation ſhould afterwards be recovered; wherefore a Conſultation was awarded. Hill. 38 Eliz. B. R. *Nicſon* and others, againſt *Genet* and others. *Cro.* 3. Part, 467.

2. A man by his Will deviſed 20 l. to his Daughter; The Executor entred Bond to the Daughter of 40 l. for the payment of it: The Daughter took husband; who ſued in the Spiritual Court for the Legacy; The Executor pleaded payment according to the Bond: and they would not allow of the Plea there. Wherefore upon a Surmiſe of the matter aforeſaid, a Prohibition was granted. It was moved for a Conſultation, becauſe the Suit was for a Legacy which is Spiritual: and although payment be a good plea there; yet if they will not allow of it, he ought not to have a Prohibition; for he might

Appeal

Appeal to a ſuperior Judge thereto: and if ſuch Prohibition ſhould be granted in ſuch Caſes, the Spiritual Courts ſhould try nothing. But the Opinion of the Juſtices was, That it was a good Surmiſe for to have a *Prohibition*; For the Executor by entring of Bond to the Daughter for payment of the Legacy, hath extinguiſhed the Legacy, and made the Deviſe of the 20 l. meerly a debt at the Common Law, and not ſuable there. Mich. 1 Jac. B. R. *Goodwyn* and *Goodwyns* Caſe. *Yelverton*, 38.

Libell.

1. ONe Libelled in the Spirituall Court againſt another for the Tythes of two pecks of Apples; and for feeding of Cattel upon the ground. As for the Apples, the Defendant Anſwered, That there were two pecks only growing in his Orchard, and that they were ſtollen, and never came to his uſe. And for the feeding, That they were old Milch Beaſts; and that for a moneth they depaſtured with other Heifers; and that after he put them into a Meadow of which the Hay was carried away; and afterwards, that he fed them with Hay in his houſe. And becauſe the Anſwers were not admitted there, a *Prohibition* was prayed. It was the Opinion of the Court for the firſt, That if I ſuffer one to pull my Apples, the Parſon ſhall have Tythes of them. But if they be taken by perſons unknown, the Parſon ſhall not have Tythe of them; for they are not tytheable before gathering. But if he ſuffer them to hang ſo long by negligence, after the time, that they are imbezelled; He ſhall pay Tythes of them. For the ſecond matter, It was agreed by the Court, That for the depaſturing in the Meadow, and for the Hay with which they were afterwards fed, Tythes ſhould not be paid, becauſe the Parſon had Tythes of them before. But if the Queſtion be for the Tythes when they were with the Heifers, although it was for ſo ſmall a time, yet for the Time that they were with the Heifers, he ſhall pay Tythes. Trin. 4 Car. C. B. *Hetley*, 100.

2. T. Libelled againſt G. in the Spiritual Court for Tythes of Milk and Calves; A *Modus Decimandi* was ſurmiſed, to have a *Prohibition*: Which was, That every Inhabitant ſhould pay 4 d. for every Cow, and 2 d. for every Calf. And they proved, That there was never Tythe paid in kind; But proved, Every Inhabitant ſhould pay 6 d. and ſome 7 d. And becauſe that was not a proof according to the Suggeſtion, A *Conſultation* was prayed. And it was granted by the Court. But in that Caſe, It was agreed, That if the *Modus* was alledged to have been 20 s. and they proved 40 s. there it is good. But in the principal Caſe, no *Modus* was proved; for that which was offered, was meerly incertain. And therefore a *Conſultation* was awarded. Trinit. 4 Car. C. B. *Goddard* and *Tylers* Caſe. *Hetley*, 100.

Livery, and *Livery* and *Seiſin.*

1. THe Caſe was: Grandfather, Father, and Son; Lands holden of the King in *Capite*, were given to the Grandfather for life, the Remainder for life to the Father, the Remainder to the Son for life, the Remainder to the right heirs of the ſaid Grandfather, Father and Son; The Grandfather dyed; The Queſtion was in this Caſe, If the Father ſhould ſue Livery? It was the Opinion of the Juſtices, That the Father ſhould not ſue Livery; becauſe he hath a ſon, who ſhall have the Feeſimple by way of Survivorſhip by purchaſe, and not by diſcent. Trin. 6 El. 2. C. B. *Bendlowes*, 29.

2. The Caſe was, J. O. and A. S. made a Leaſe of the Manner of F. to J. H. and his Aſſigns for 20. years; And by the ſame Indenture they further Covenanted, Accorded, Bargained, and Agreed, That after the Expiration of the ſaid 20 years contained in the ſaid Indenture, That the ſaid J. H. and E. his wife, and T. their Son, ſhould have the Lands to them for the Term of their Lives, and the longer Liver of them yielding ſuch a Rent, &c. And a Letter of Attorney was made to two joyntly and ſeverally to take poſſeſſion; and afterwards peaceably for to deliver poſſeſſion to them three. It was the Opinion of the whole Court in this Caſe, That the ſame was a good Leaſe for years, the Remainder to the three for their Lives, if the Deed was delivered by the Attorneys, and Livery and Seiſin made at one time. But if the Deed was delivered firſt by the Leſſors to the Leſſee, and then the Attorneys delivered Seiſin afterwards, then ſuch Livery of Seiſin was void. Hill. 2 Eliz. C. B. *Bendlowes*, 39.

3. The Case was; It was found by Office, That J.S. who held Lands of the King, dyed without heir; W. S. as heir to J. S. traverseth this Office; and was at Issue with the Queen, That J. S. did not dye without heir: and, hanging this Issue, He made a Feoffment of the Land with a Letter of Attorney to make Livery: And after the Issue was tryed, and Judgment was given against the Queen; And after Judgment, and before, the Writ of *Amoveas Manum* was executed, the Attorney made Livery according to the Deed. And, If it was a good Feoffment, or not, was the Question, because at the time of the making of the Feoffment, he had nothing; and because at the time of the Livery executed the Queens hands were not amoved, and so the Livery was during the Queens possession. And it was said, That the Deed being void at the first, cannot be made good by a subsequent act: As if I make a Deed of Feoffment of Lands which I have not, in such a Letter of Attorney, and afterwards I purchase the Land; yet this Deed is void. But afterwards in the principal Case, upon Advise, It was Adjudged, That the Livery was good; For that by the Judgment, the Queens hands were immediately removed, and he had authority to execute Livery upon the Land. Mich. 39 Eliz. C. B. *Brown* and *Terry's* Case. *Cro.* 3. Part, 523.

4. The Sheriff made a Warrant to four men, *et cuilibet eorum quod capercnt.* J. S; two of them took him; and J. S. promised J. D, at whose Suit he was Arrested, That if he would discharge him of the Arrest, that he would pay him 10 l. *quando requisitus*: J. D. discharged him of the Arrest, and brought *Assumpsit* for the 10 l. And found for the Plaintiff. It was said, in stay of Judgment, That the Arrest was not lawful, being made by two only. But the Opinion of the Justices was, That the Arrest was good; For that Warrants of this kind are not to be resembled to other Warrants of Attorney, either to make or take Livery; for if a Letter of Attorney be made to three *Conjunctim & Divisim*, to make Livery, two of them cannot make Livery. See 38 H. 8. *Dyer*, 62. acc. Mich. 45 Eliz. B. R. *King* and *Hobbs* Case. *Yelverton*, 25.

London.

1. NOte, upon a Case of Disfranchisement of a Citizen of *London*, *Periam*, Justice, said, That he had seen a President in the time of King *Henry* the 8th, Where a Citizen of *London* sued another in the Common Pleas; And the Mayor and Aldermen of *London* would have had him put the matter to Compromise; which he refused. Wherefore they did disfranchise him. And this matter being shewed unto the Court, They directed their Writ to the Mayor, &c. to restore the party to his Franchise; And they affessed a Fine of 100 Marks upon every one of them that were parties to the Disfranchisement; Which they paid, as appeareth by the Record; and the Citizen was restored to his Franchise. Trin. 26 Eliz. C. B. *Cro.* 3. Part, 33.

2. Error of a Judgment in C. B. in Debt upon Confession; The Error assigned was, That the Defendant brought Debt as Successor of B. Chamberlain of *London*, upon an Obligation made to him, *Salvendum* to him and his Successors; And alledged the Custome of *London*, That the Chamberlain there hath used time out of mind, &c. to take Bonds to him and his Successors; and their Successors to sue all such Bonds; And that all their Customs are Confirmed by Parliament, 7 R. 2. And the Plaintiff had thereupon Judgment: Whereas by Law, this Obligation being a Chattel, cannot go in succession; and therefore it was Error, and Judgment ought to be reversed. But the Opinion of the Court was, That in regard it is alledged to be a Corporation for that purpose to take Obligations, it may be well allowed, and shall go to the Successor, and not to the Executors. And so it was said, it was adjudged, Pasch. 21 Eliz. in *Mabb* Case. And in one *Taylor's* Case in the *Exchequer*, Where Debt was brought by the Successor in the Mayor's Court upon such an Obligation, and a Recovery, and Error thereupon brought. And before *Maynard* and others, especiall Commissioners for that purpose, the Judgment was affirmed. And so it was said to be adjudged in the very like case as this is, Mich. 43 and 44 Eliz. in B.R. upon a Recognizance acknowledged to the said B. then Chamberlain of *London*, *Wilford* and *Hattons* Case. Wherefore in the principall Case, the Judgment was affirmed, Pasch.

Pasch. 38 Eliz. B. R. *Bird* and *Wilfords* Case, Co. 3. Part, 464.

3. J. S. a Citizen, called one *Garrett* Alderman of *London*, *Fool* and *Knave*, upon the Exchange, and was therefore committed by the Mayor to *Newgate*; He removed himself by *Habeas Corpus* in C. B. where the Cause of his Commitment was Certified: And the Customs was, upon such a Misdemeanor to commit any Citizen to prison. It was the Opinion of the Justices, That in private discourses one shall not be Imprisoned. And a man may be Imprisoned for a Contempt done in Court, but not done out of Court. Therefore the Court was clear of Opinion, That he ought not to have been committed for such a gross abuse; And by the assent of the whole Court, he was discharged. Trin. 44 Eliz. C. B. Sir and Alderman *Garretts* Case. Co. 3. Part, 89.

4. *Ejectione Firme* of an House in *London*; the Case was this: Tenant in tail of divers Messuages in *London*, 7 *Jan.* 44 Eliz. bargained and sold them to J. S. and delivered the Deed of the Land; 8. *Jan.* Indentures of Covenants were made to have a Common Recovery suffered of those Messuages: 9. *Jan.* a Writ of Right for those Messuages was sued in *London*, returnable at a day to come. And 10 *Jan.* the same year, Tenant in tail made *Livery of Seisin* to J. S. of one house, in the name of them all; whereas all the other houses were in Lease for years, and the Lessees did not Attorn. The Question was, If the Messuages passed by the Bargain and Sale, or by the Livery. It was the Opinion of the Justices in this Case, That by the delivery of the Deed of Bargain and Sale, the Lands did passe by the Customs of *London* without Inrollment; and then the same being executed, and the Conveyance perfected by the delivery of the Deed, the Livery and Seisin afterwards came too late; and a possession executed, should hinder a possession Executory. Also it was the intent of the parties, that the Lands should passe by Bargain and Sale, for it was to make a perfect Tenant to the Precipe; and all the subsequent acts upon the same should be frustrate, if the Livery of Seisin should be effectual. Wherefore Judgment was given, That the Defendant who claimed the Bargain and Sale, should hold and enjoy the Land. Hill. 5 Jac. B. R. *Darby* and *Bats* Case. *Yelverton*, 123.

Maintenance.

NOte: It was Resolved by the whole Court, That if a man assigneth an Obligation to another for a precedent debt due to him the Assignee; there the same is not Maintenance. But if he doth it for a Consideration, then given by way of Contract, it is Maintenance. Trin. 41 Eliz. B. B. *Harvey* and *Fatemans* Case, *Noy*. 52.

2. Action upon the Statute of Maintenance, for maintaining a Suit in the Spiritual Court. It was moved, That it lay not; For that the Statute of 1 R. 2. whereupon the Action was grounded, as to be intended only, of maintaining Suits only in the Courts of Common Law. And *Hide* Opinion was the whole Court. And so it was said, it had been Ruled. Pasch. 37 Eliz. in *Webster* and *Rivers* Case, Mich. 40 Eliz. B. B. *Tfidale* and *Bedingtons* Case. Co. 3. Part, 96.

3. In a Bill exhibited into the Star Chamber, against *Townsend*, for unlawful Maintenance, in causing a Partial Jury to be returned; The Case was: F. was a Copyholder of the Lord *Cromwell*; the Lord pretending, that F. had forfeited his Copyhold, caused *James Cromwell*, to make an Entry in the right of the Lord: Upon which Entry, F. brought Trespass against J. C; and the parties being at Issue upon the Forfeiture, before any *Venire facias* issued forth, F. hearing that one J. S. was Bayliff of the Franchise under the Earl of *Arundell*, who ought to make the Pannel, was purposed to have made the said Pannell not duly; viz. to Return great Men of the County; went to the Defendant one of the principal Servants and Agents of the said Earl, and shewed him, That if those persons, and Lords of Mannors be returned for the Tryal of that Issue, that perhaps they would not so easily appear, as people of lesser Condition; and prayed his Order to the said J. S. for

for the making of an Indifferent Pannel. Whereupon, and upon ſhewing the matter aforeſaid, F. the Copyholder exhibited a Petition, which was delivered by the Defendant to the Earl: Upon which the Earl did return the matter to three of his chief Agents, viz. A. B. and C. and delivered to them the Book of Freeholders, who according to the Commiſſion made a Pannell, which was Returned: and the Jury paſſed with. J. C. in the right of the Lord *Cromwell*. And, If this intermeddling of T. the Defendant with this matter as aforeſaid, was Maintenance or not, was the Queſtion? It was delivered for Law, by the Lords Chief Juſtices, *Anderſon* and *Wray*, That becauſe the Defendant was in manner a Servant to the ſaid Earl, who had return of Writs, and one of his principal agents, and, hearing *ex inſtantiâ* of the ſaid F. the miſdemeanor of the Bayliffs of his Lord, he could not do better, then to ſhew the Bayliff his duty; For it concerned the Honour of his Lord, and the Inheritance of his Franchiſe, and therefore it was no Maintenance in him. But if the Defendant had been a meer ſtranger to the Earl, ſo as no ſuch privity had been betwixt them, it had been clearly Maintenance in the Defendant. And ſo they ſaid, it had been adjudged in *Giffords* Caſe in this Court. Mich. 28 Eliz. *Cam. Stellat.* The Lord *Cromwell* and *Tate ſmith*'s Caſe. Lib. 2. Part, 133.

Maſter *and* Servant.

1. THe Plaintiff in Aſſumpſit declared, That whereas at the ſpecial Inſtance of the Defendant, he had procured Credit for one F. for two Tun of Wine, amounting to 51 l; and F. upon the Credit, and by the means of the Plaintiff, at the Defendant's Requeſt, had bought of J. S. two Tun of Wine for 51 l: and thereupon the Plaintiff with F. entred Bond of 100 l. to J. S. for payment of the ſaid 51 l. at a day, which was not paid; and thereupon the ſaid J. S. ſued the Plaintiff upon the ſaid Bond; and recovered and had Execution againſt him; by which he was compelled to pay J.S. 67 l: All which he notified to the Defendant, who in Conſideration of the premiſſes, promiſed to pay the Plaintiff the ſaid 67 l. at a day certain; which he had not paid. Being found againſt the Defendant, upon Non *Aſſumpſit*, It was ſaid, That the Action did not lye, Becauſe the Conſideration was executed and gone, and the Defendant had not any avail by it, but F. who was a ſtranger. It was the Opinion of the Juſtices in this Caſe, That although upon the Requeſt an Aſſumpſit did not lye, yet the promiſe coming after, ſhall have reference to the firſt Requeſt; And although the Requeſt was but for two Tun of Wine, amounting to 51 l; yet when J.S. who ſold the Wine would not take ſecurity but by Bond of 100 l, and all this matter is ſignified to the Defendant, who agreed to it, and promiſed to pay the 67 l, he ſhall be charged thereafter, becauſe it hath its eſſence from the firſt Requeſt. And in this Caſe, It was ſaid, That if I do intreat one to be Bail for my Servant, who thereupon becomes bail, and is Condemned, and ſues the ſame to me, and I promiſe to ſave him harmleſs; it is a good promiſe, and the party ſhall recover his Damages againſt him *in toto*. Mich. 1 Jac. B.R. *Boſden* and Sir *John Tayns* Caſe. *Yelverton*, 44. 45.

2. In Battery, the Plaintiff declared, That the Defendant ſuch a day aſſaulted and beat his Wife. It was moved, That the Declaration was not good, becauſe brought by the Plaintiff for the Battery of his Wife, it being a perſonal wrong; and now the Wife being dead, the Action did not lye: and if ſhe had been living, he could not have the Action; for that the Damages ſhould be given to the Wife, for the wrong done to her. All which was granted by the Court. And in this Caſe, It was ſaid, That if a man beats the ſervant of J.S. ſo as he dyeth of the Battery, the Maſter ſhall not have an Action againſt the other for the Battery and loſſe of ſervice, becauſe the Servant dying of the Extremity of the Battery, it is now become an Offence to the Crown, being converted into Felony; which drowns the particular offence, and wrong offered to the Maſter before; and his Action is thereby loſt. Trin. 4 Jac. B. R. *Higgins* and *Butcher*'s Caſe. *Yelverton*, 89. 90.

3. In Debt, the Caſe was; G. the Defendant ſealed a Bill in this form; *Memor* 9d. I have received of E. T. to the uſe of my Maſter J. S. the ſum of 40 l. to be paid at Mich. following: In Debt the Plaintiff declared as the Bill was, and demanded the 40 l: Upon which it was Demurred. In this Caſe, it was Objected, That the Defendant was not to be charged with it, becauſe he is not the principal Debtor, but the Maſter. But the Opinion of the Court was, That the Action did well lye againſt the Defendant; for although

although the premiſſes of the Bill mentioned the Receipt to be to anothers uſe, yet in the latter Cauſe of payment, he doth not ſay, To be repaid to his Maſter; for then it had not charged him. The Clauſe is general (*to be paid*) which of neceſſity muſt bind him who ſealed the Bill; otherwiſe the party ſhould loſe his debt. Mich. 6 Jac. B. R. *Talbot* and *Godbolts* Caſe, *Yelverton*, 177.

4. Action upon the Caſe againſt an Inn-keeper, and declared upon the generall Cuſtome of the Realm, of the ſafe keeping by them and their ſervants of the goods of their Gueſts: And ſhewed, That 2. *Decemb.* 6 Jac. the Defendant *Cuſtodivit*, and yet *Cuſtodit* a Common Inne, at D. in the County of U; And that J. S. the Plaintiff's ſervant, the 2. *December*, was the Defendant's Gueſt in the ſaid Inn; then and there having in his Cuſtody in a bagg or purſe of 76 l; and that certain *Malefactors*, unknown to the Plaintiff, the ſaid 2. *December*, the ſaid bagg or purſe, and the money therein, then and there, took and carried away, againſt the Cuſtome aforeſaid, to his damage of 100 l: It was found for the Plaintiff, And moved in ſtay of Judgment, That the Action did not lye for the Maſter, for the Robbery of his Servant. And alſo it doth not appear in this Caſe, That he was his Servant when he loſt his purſe. But it was Reſolved by the Juſtices in this Caſe, That none could have ſatisfaction in this caſe, but the party who ſuſtained the loſſe; and that was the Maſter: and that in this Caſe he might have had and maintained an Appeal of Robbery. And it was ſaid, That it is expreſſly alledged, That he was his Servant at the time he lodged in the Inn: But if he were or not, the Court held it not material; For if it was a Friend, by whom the party ſent the money, yet if he was robbed of it in the Inn, the Owner of the money might maintain an Action for it againſt the Inn-Keeper. It was Adjudged for the Plaintiff, Mich. 7 Jac. B. R. *Hale* and *Morris's* Caſe, *Yelverton*, 162.

Mannor.

1. THe Opinion of the Juſtices of the Common Pleas was demanded in this Caſe; viz. A man ſeiſed of a Mannor in Fee, made a Leaſe for years of the Scite, and the Demeſnes, of the ſame Mannor to another; And afterwards, the Leſſor granted the Reverſion of the ſame Mannor to another in Fee by Deed, and the Leſſee Attorned; And if by that Grant and Attornment the Reverſion paſſed, he prayed the Opinion of the Court. And all the Juſtices ſaid and agreed, That the Grantee took nothing by the ſaid Grant; for that Grantor had not any Reverſion of the Mannor; becauſe the Scite and the Demeſnes are not the Mannor. Paſch. 29 H. 8. *Rendlawes*, 16.

2. In a *Quare Impedit*, It was holden by the Juſtices, That if two Coparceners be of an Advowſon, and they ſeverally grant their parts to ſeverall men; the advantage which was between the Coparceners, doth hold place betwixt the Grantees; ſo as the firſt preſentment ſhall go to the Grantee of the eldeſt, and ſo of the others; and an uſurpation of the one, ſhall not put the others out of poſſeſſion: Otherwiſe, perhaps, if they were Tenants in Common, and did not derive their Eſtate from Coparceners. And in this Caſe, It was further holden by the Juſtices, That if a man hath a Mannor which doth extend unto two Towns, and he grants the Demeſnes and Services in one Town, That the Grantee hath a Mannor in that Town, and he may keep a Court there; and ſo hath the Grantor a Mannor in the other Town, and may keep Court there. Paſch. 25 Eliz. C. B. *Harris* and *Nicholl's* Caſe, Cro. 3 Part, 19.

3. In a *Replevin*, the Caſe was; A. was ſeiſed in Fee of the Mannor of C. which did extend into the Towns of *North-Kelſey*, *South-Kelſey*, *Hilton*, and *Grisby*; and in every of the ſaid Towns he had Demeſne Lands, and ſeverall Freeholds which he held of him as of the ſaid Mannor; and the Plaintiff was ſeiſed of the Lands in which, &c. which lay only in the Town of *North-Kelſey*, holden as of his Mannor of *North-Kelſey* by Fealty and Suit of Court; And the ſaid A. ſo ſeiſed by his Indenture enrolled, bargained and ſold to R. B. *Totum illud ſuum Maneriam ſive Dominium de North-Kelſey in North Kelſey*, and all his Lands, Rents, Reverſions

Reversions and Services, *Et omnia alia sua Regalitates, Consuetudines, Hereditamenta*; scituate and *existent. in North-Kelsey.* To which Grant, the Tenants Freeholders in *North-Kelsy* attorned. And, If R. B. had a Mannor in *North Kelsey* to hold a Court, was the Question? It was Objected, That A. had no such Mannor, but his Mannor was the Mannor of C: And if I have a Mannor in two Counties, and have Demesnes and Services in both; and I grant my Mannor in one County, the Grantee hath no Mannor, for I had no such Mannor; and in the Conveyance, things cannot passe by their proper names; and a Mannor cannot be made at this day, neither in the case of a Common person, nor by the Queen. The Opinion of the Justices was, That the Conveyance in substance was good; yet the form of it might have been more Consonant to Law. If the Grant had been *Totum Manerium suum de C. in North Kelsey:* And here the Grant is of all the Mannor, and of all his Hereditaments in *North Kelsey*; And by this word (*Hereditament*) the Mannor shall passe. And they agreed, That a Mannor cannot be made at this day; and that the Queen cannot make a Thing parcell of a Mannor. And it was holden, That the words, *de North Kelsey*, were void; and a Mannor is such a thing as may be divided: And, as the Court Baron there said, There needs not any Erection of a new Court, because before the Grant, the Court might in Law be holden in any place within the Mannor; and therefore every part of the Demesnes is capable of a Court to be holden there. Pasch. 27 Eliz. in C.B. *Morris* and *Smiths* Case. *Cro.* 3. Part, 38. See *Leon.* 1. Part, 26, 27. the same Case.

4. Note: It was holden in Tresposs, by the whole Court, That a Mannor in Reputation which is not a Mannor in truth, will not passe by the name of a Mannor in a Fine or Common Recovery, for they shall not be taken by Intendment. But it is otherwise in a Conveyance, for there the Intent of the parties will help it. Mich. 39 Eliz. C. B. *Mallet* and *Malletts* Case. *Cro.* 3. Part, 524.

5. *Quo Warranto* brought against the Defendant, for holding a Court-Leet, and a Court-Baron within the Hundred and Mannor of W. in the County of B; the Defendant disclaymed as to the Court-Leet: but as to the Court-Baron pleaded, That J. S. was seised of a Mannor of which the Mannor W. within the Hundred of W. whereof the Mannor of N. within the Mannor of W. is parcell and Copyhold, and demiseable by the Lord of the Mannor of W. or his Steward in Fee: and that the Mannor of N. is known as well by the name of a Messuage, and 7. Yard-Land, Customary, &c. and 20 s. Rent, and by that name had been demised by Copy, according to the Custome of the Mannor of W: and that J. S. 18 Eliz. let the said Mannor of N. to him by the name of a Messuage, and 7 Yards-Lands, and 20 s. Rent in Fee, by reason whereof he entred, and kept a Court within the Mannor of N: Upon which Plea, the King Demurred. It was Resolved in this Case; 1. That one Mannor might be parcel of another, and holden by Copyhold. But it was holden, That by these words, *A Messuage and seven Yards Lands, and 20 s. Rent*, did not passe a Mannor, and therefore he could not have a Court-Baron as incident thereunto. Mich. 8 Jac. B. R. The King and *Staffertons* Case, *Yelverton*, 190, 191.

6. B. was Indicted for the entring into the moyety of a Mannor; Exception was taken to it, That he cannot enter a moyety of a thing which is entire, but the Indictment ought to have been, That he entred into the whole. *Doddridg*, Justice, said in this Case, That before Partition, One Parcener hath *dimidium Manerii*; afterward, *Medietatem*; because *Dimidium* is of an entire thing before *divisus*: but *Medietas* is half part divided and separated. And the Exception was disallowed, because now after Partition, that which was before but the moyety of a Mannor, is now but the moyety of a Mannor, and so the Judgment good. Hill. 2 Car. B. R. *Latch.* Reynes Case. *Latch*, 224.

Marriage.

1. A Man married the Daughter of the Sister of his first Wife; and was questioned for it in the Spiritual Court. It was adjudged by the whole Court, upon Consideration had of the Statute of 32 H. 8. Cap. 38. That it was a good marriage, and not prohibited by the Levitical degrees. Trin. 2 Jac. C.B. Rott. 1032. *Parsons* Case. See *Cok.* 1. Part, *Institutes*, 235.

2. Note, in the like Case as before; A man married his Wives Sisters Daughter, for which he was sued before the High-Commissioners; For although this was not prohibited within the Degrees of the Levitical Law, yet because Degrees more Remote are forbidden, they gave Sentence of Divorce. Whereupon he grounded a Prohibition upon the Statute of 32 H. 8. Cap. 38. And a Con-

a Conſultation was thereupon prayed, and granted; becauſe the Prohibition is not to be, if it be not within the Levitical Laws; and here it was general, and therefore not good. Paſch. 33 Eliz. B. R. *Mans* Caſe. *Cro.* 3. Part, 228.

3. Action upon the Caſe, And ſuppoſed, That 24 Eliz. the Plaintiff put his ſon and heir apparant to the Defendant, to be an Apprentice in the Art of a Taylor for 7. years; and that the Plaintiff was ſeiſed of Lands in B. in the County of D. in Fee, of the value of 20 l: which Lands after his deceaſe are to diſcend to his ſaid ſon; and that the Defendant 1. *May*, 28 Eliz. aſſaulted his Son, and ſtruck him with a Spade upon the back; by which he became lame and decrepit; by reaſon of which, he loſt his Marriage: and could not marry him as before, to his damage of 200 l: Upon this Declaration, the Defendant did Demur. It was adjudged for the Defendant, for the Juſtices ſaid, It doth not appear by any Book, That the Father ſhall have an Action for the loſſe of the marriage of his ſon and heir apparant, except when a ſtranger takes him by force, and marrieth him; But if the ſon marrieth himſelf, or a ſtranger procureth him to marry one, the Father hath no remedy: And for battery of the Son, the Action lyeth not by the Father. Paſch. 29 Eliz. in B. R. *Gray* and *Jefferies* Caſe. *Cro.* 3. Part, 55.

4. A Communication of Marriage was between J. S. and A; J. S. being poſſeſſed of a Term for years, and of certain goods, promiſed to A, That if ſhe would be married unto him, and they had a ſon, that he ſhould have the Term for years, if they had a Daughter, That ſhe ſhould have the moyety of the Goods. They afterwards entermarried, and had Iſſue B. a daughter. The husband dyed; and B. brought an Action upon the Caſe againſt the Adminiſtrator of J. S. for the Goods. It was the Opinion of the Court, That ſhe could not have the Action, but in the name of A, or as Adminiſtratrix of A; And *Stafford*'s Caſe was put, which was, There was a Communication between him and a Woman, That if ſhe would marry him, that he would leave her at his death worth 200 l; And after the Intermarriage and death of the Husband, an Action was brought by the Wife; And the Queſtion was, Whether the Promiſe was extinguiſhed by the Intermarriage? And in that caſe, It was Reſolved, That the Intermarriage was but a ſuſpenſion of the Promiſe; and that the Action did well lye. See Paſch. 3 Car. C. B. *Hetley*, 12. See Mich. 3 Car. C. B. *Jeakins* Caſe. *Hetley*, 50. acc.

Misnosmer.

1. NOte, by all the Juſtices of the Common Pleas, That Abbot and Covent, Dean and Chapter, and all other Corporations ought to be named by the true names of their Corporation or Foundation, according to the form of it, without leaving out any material part thereof in all their Leaſes and Grants, and in all Actions where they are Defendants or Plaintiff; otherwiſe their Leaſes and Grants ſhall be void; and their Writs ſhall alſo abate, becauſe the name of a Corporation is as the name of Baptiſm of a man, which cannot be changed. Paſch. 4 & 5 Mar. *Bendlowes*, 2.

2. *Adrian Stokes* Eſquire, being married to the Dutcheſs of S; they brought a *Quare Impedit* againſt the Biſhop of Ex. and J. S. by the name of *Adrian Stokes* Eſquire, and Dame *Francis* Dutcheſs of S. his Wife, &c. The Defendants pleaded, That the ſaid Dutcheſs by her Intermarriage with the ſaid *Stokes*, had loſt her name of Dignity of Dutcheſs; and that ſhe ſhould have named *Franciſca uxor prædict. Adriani, et Domina Franciſca Ducissa S:* and upon that matter ſhewed, the Plaintiffs diſcontinued their Suit, and durſt not proceed in the *Quare Impedit*. Trin. 4 & 5 Mar. *Bendlowes*, 37.

3. The Caſe was; A man did Deviſe Lands to A. his Wife for life, the remainder to his ſon in tail; and if he dyeth without Iſſue, or be unthrifty, that it ſhould remain and be to the Maſter and Wardens of the Myſtery of Cordwainers of *London*; whereas they were incorporated by the name of Maſter, Warden, and Commonalty, &c. The Queſtion was, If, by reaſon of this *Miſnomer* of the Corporation, the Deviſe was void? It was the Opinion of the Juſtices in this Caſe, That the Deviſe was good; for by Intendment, the Deviſor had not any counſel here, nor had knowledg of their name; and being known by that name, there is a ſufficient intendment, what Corporation ſhould have the Lands. Trin. 30 Eliz. B. R. *Foſter* and *Walters* Caſe. *Cro.* 3. Part, 106.

4. In Treſpaſſe, the Caſe was; The Preſident and Schollers of *Corpus Chriſti* Colledg in *Oxford*, ſeiſed in Fee, lett the Land, 10 Eliz. by Indenture for 30 years; Provided, That the Leſſee and his Aſſigns ſhould not alien the premiſſes,

misses or any part thereof, without special Licence of the Lessors. Afterwards, they gave special Licence to the Lessee to alien or demise the Lands to any person or persons whatsoever; the Lessee assigned his Interest to J. S. who by his Will Devised the same to his son. Afterwards, in 38 Eliz. the said President and Schollers, by the name of President and Schollers of *Corpus Christi* Colledg in *Oxon. in Comitatu Oxon.* made a Lease thereof to the Plaintiff, rendring Rent. There were many Points in this Case; which are Resolved in *Cook* 4. Part, 119. One amongst the rest was this; If that this Lease made 38 Eliz. were void or not? It was Objected to be void, by reason of the *Misnamer* of the Corporation, by the Additions; *scil. in Comitatu Oxon.* But the Opinion of the Court was, That notwithstanding that Variance in the Name of the Corporation, that the Lease was good. Pasch. 40 Eliz. B. R. *Dumper* and *Syms* Case. *Cro.* 3. Part, 815.

5. In a *Replevin*, the Case was; J. S. seised of Lands in the Right of his wife for the life of the wife; he and his wife made a Lease for years by Writing, reserving 4 l. Rent *per annum*. The husband being indebted, made his wife his Executrix: Debt was brought against her by the name of *Isabell*; whereas her name in the Lease was *Sibill*. Upon Execution awarded, the Sheriff Returned, That *Isabel* had 4 l. Rent out of the Land, upon a Demise made by her and her husband; and that he had delivered to the Defendant the moyety of that Rent. Upon which it was Demurred. And it was adjudged ill, for divers Causes; One was for this, For that the Recovery against *Isabell*, was void against *Sibell*, and the Sheriff could not extend her Land. Hill. 41 Eliz. B. R. *Walsal* and *Heaths* Case. *Cro.* 3. Part, 656.

6. Covenant, for not performing certain Covenants in an Indenture, Between the Plaintiffs Master of the Ship called *R*, whereof *Robert Pitman* was Owner of the one part, and the Defendant of the other part. The Conclusion of the Indenture was, *In cujus rei Testimon. &c.* the Parties aforesaid to these Indentures have set their hands and seals; and the Plaintiffs and *Robert Pitman* set their hands and seals to one part, and the Defendant to the other. In the Indenture there were divers Covenants to be performed by the Plaintiffs, and by the said *Rob. Pitman* to the Defendant: and Covenants *è Converso* of the other part. The Defendant pleaded, That the said Indenture was delivered to the Plaintiffs and to the said *Tho. Pitman*, (and so mistakes *Tho.* for *Robert*) and pleaded the Release of *Tho.* of all Covenants. Upon which the Plaintiff Demurred, for two Causes. 1. Because he Release is pleaded by *Tho. Pitman*, where as no such man was named in the Indenture. 2. Admitting the name had been right, and that *R. P.* had Released; That it was not good. But in this Case, it was adjudged for the Plaintiffs; and the Cause of Judgment was the Misnosmer: Which the Court held, could not be amended. And *Wray*, Chief Justice, said, That they conceived, That the matter in Law also was for the Plaintiffs. Pasch. 29 Eliz. B. R. *Fast, Sudmore*, and other Plaintiffs, against *Vande Steven* Defendant. *Cro.* 3. Part, 57.

Murder.

1. APpeal of Murder; the Defendant pleaded, Not Guilty. The Evidence was clear, That he was guilty of Manslaughter; but doubtful for the Murder. The Jury found, he was not guilty of the Murder; And being demanded, If he was guilty of Manslaughter? They answered, They had nothing to do to enquire of it, It was the Opinion of the Justices in this Case, That by the Law, the Jury are not compellable to enquire of the Manslaughter: And gave their Verdict as before. Pasch. 34 Eliz. B. R. *Wyth* and *Wiggs* Case. *Cro.* 3. Part, 276. See Hill. 38 Eliz. B. R. *Penrys* and *Corbetts* Case, adjudged accordingly. *Cro.* 3. Part, 464.

2. Appeal of Murder against divers; one as Principal, the rest as Accessories: Some Accessories, before the fact; some, after. The Principal was found guilty of Manslaughter only. It was the Opinion of the Justices in this Case, That as to the Accessories before the fact, that they ought to be discharged; but the Accessories after, that they should answer. It was then moved, That the Principal after Conviction, had his Clergy, and was never Attainted, and therefore the Accessory ought to be discharged. And of that Opinion was the whole Court. And it was said by the Court, If the Principal had his Clergy, or his Pardon, before the Judgment, although it were after Conviction, the Accessory shall be discharged. But if he prayes his Clergy after he hath had his Judgment (as he may) or if he be Pardoned, yet the Accessory shall be arraigned. Hill. 39 Eliz. B. R. *Gof* and *Bykyes* Case. *Cro.* 3. Part, 540.

3. Appeal of Murder was brought against *Coffe*, by the Wife, of the death of her Husband; The proof was, That divers were together present in a Tavern, when her Husband was killed by a blow upon the Head with a Quart-Pot, and drinking together; but it was not proved which of them gave the blow. And the others were appealed, and pleaded,

preſent, and abetting. It was ſaid and Objected by ſome, That the Abettors were as principal Murderers as the party which gave the blow or ſtroke, and ought to be Endicted as Principal Murderers; ſo as it was not material if *Caſſett* gave the blow, or not, if he was preſent, and Abetment. It was then moved, That they ought to be Indicted *de Novo*; For in an Appeal of Murder, they cannot find the Defendant guilty of Manſlaughter, as they may upon an Indictment. The Jury went from the Barr, and found the Defendant neither guilty of Murder nor Manſlaughter. Paſch. 2 Car. B. R. *Caſſetts* Caſe. See the Reports annexed to *Readlowes*, 172. See 1 Car. B. R. *Baſſages* Caſe, *Latch*, 126, being the ſame Caſe.

Name.

1. ERrour of a Judgment in Aſſumpſit in C. B: The Caſe was, F. brought Aſſumpſit againſt P, and declared, That whereas J. S. by his Writing Obligatory, ſealed with his Seal, 20 Eliz. *in forma et natura ſcripti Obligat. ſive recognitionis ſecundum formam Statuti ſtapulæ apud Weſtm. de debitis pro Merchandizis in eadem emptis recuperand. ordinat. et proviſ. d bito modo confect. coram Chriſtoph. Wray Capit. Juſticiar. &c. recognovit et conceſſit ſe tenere in mille libris juxta formam dicti Statuti.* And that afterwards upon the 28th day of *March*, 27 Eliz. at *London*, at the Requeſt and Inſtance of the Defendant, he had delivered the ſaid Writing Obligatory to him *ad inſpiciend.* and ſafely to keep and redeliver to the Plaintiff within ſix dayes after; That in Conſideration thereof, the Defendant did aſſume to him, That if he did not redeliver it within the ſaid time, he would pay him, when required, 1000 l; and *Licet* the Plaintiff after the ſix dayes paſſed, at ſuch a day required the ſaid P. to pay the ſaid 1000 l. according to his promiſe, he had not paid the ſame. Upon which the Defendant Demurred. And afterwards upon the Demurrer, it was adjudged for the Plaintiff, That it was a good Conſideration to charge him, and Judgment given, and Damage 100 l. and Coſts. And thereupon Error was brought, and divers Errors aſſigned; One was out of the Record, viz. That the Plaintiff *quarto die Obtulit ſe* againſt the Defendant *per Attornatum ſuum*; but ſhewed not who was his Attorney: and if he had no Attorney, it was Error. And a Preſident ſhewed, Where the Entry was, That one appeared by *Cutting*, *Attornatum*, and ſhewed not his Chriſtian name; and for that cauſe, the Judgment was Reverſed. Which Caſe, the Court agreed. But the Court was of contrary Opinion in the principal Caſe, becauſe it is not the Courſe of the Common Pleas, to enter the name of the Attorney, till after the Declaration. And in the Declaration in the principal Caſe it is ſaid, That he appeared *per Thomam Warren, Attornatum ſuum.* And therefore notwithſtanding that Error, and other Errors alledged, all which were were over-Ruled by the Court, the Judgment was affirmed. Mich. 30 Eliz. B. R. *Preſton* and *Tooleys* Caſe. *Cro.* 3. Part, 75.

2. D. was Indicted upon the Statute of 5 E. 6. for ſtriking in St. *Paul's* Church-Yard. It was moved, That it being a Church-Yard of a Cathedral Church, that it was not within the Statute; But the Court over-Ruled that. Then he pleaded, That he was by the Queens Letters Patents created *Garter* King of Arms, and demanded Judgment, becauſe he is not ſo named. It was the Opinion of the Court, That becauſe it was a parcell of his Dignity, and not of his Office only; And alſo becauſe the Patent is, *Creamus, conſtituimus, et nomen imponimus de Garter. Rex Heraldorum*, that therefore in all Suits to be brought againſt him, he ought to be named by this name. And for this cauſe he was diſcharged of the Indictment. Paſch. 33 Eliz. B. R. *Dethicks* Caſe. *Cro.* 3. Part. 224. See Trin. 39 Eliz. B. R. The ſame Caſe. *Cro.* 3. Part, 542.

3. Errour of a Judgment in *Ludlow*; In debt upon Obligation, the Condition was; for payment of 70 l; *ſcil.* 35 l. at one day in the Temple Church *London*, and 35 l. at another day. The Defendant pleaded payment of the 35 l. at *Ludlow*, *ſecundum formam Conditionis.* And Iſſue is taken upon it, and found againſt him, and Judgment for the Plaintiff, and Error brought and aſſigned,

Becauſe that the Names of the Jurors did not appear upon Record. But the Error was diſallowed by the Court. But the Court ſaid, It was good enough, for that that never appeareth when the Jury is full of the principall Pannel; but where the Enqueſt is of part of the principal Pannel, and part of the *Tales de Circumſtantibus*; there the names of both ſhall be entred upon Record. The Judgment was affirmed. Trin. 34 Eliz. B. R. *Fox* and *Lees* Caſe. *Cro.* 3. Part, 281.

Notice.

1. ONe was Indicted for entring with force upon a Copyhold, contrary to the Statute of 8 H. 6. The force was removed, and he was reſtored to the poſſeſſion by the Juſtices of Peace: Afterwards, the Indictment was removed in B. R, and the party traverſed it, and it was found for him. In the mean time, a ſtranger recovered the Land by a Claym in the nature of a Writ of *Droit Cloſe* in the Court of the Lord of the Mannor, and was put in poſſeſſion. The Point was, If the party for whom the Traverſe of the Indictment was found, ſhould be reſtored to his poſſeſſion againſt him that had recovered in the Lords Court. It was adjudged, That he ſhould be reſtored to it; for otherwiſe he ſhould not have the effect of his Suit. And it was ſaid by the Juſtices, That this Court ſhall take no Notice of, or have regard to, the Recovery in the Lords Court, being of later time, of which they have no Record before them. See Trin. 26 Eliz. B. R. *Cro.* 3. Part, 31. adjudged.

2. C. was Indicted; For that a Burglary was committed in the Night by perſons unknown, and that J. S. gave Notice to him being Conſtable, and required to him to make Huy and Cry; which he refuſed. It was Objected, He was not to do it in the Night. But it was Reſolved, That the Indictment was good, becauſe it is the Conſtables duty upon Notice given unto him, preſently to purſue. But becauſe in this Caſe, the party did not ſhew the place where the Notice was given to the Conſtable, It was holden to be a material Exception; and the party was diſcharged. Hill. 44 Eliz. B. R. *Crowthers* Caſe. *Cro* 3. Part, 655.

3. Error of a Judgment in Aſſumpſit; The Plaintiff in it declared, That there was a Communication between him and the Defendant concerning the ſale of certain Lands to be made by the Defendant unto him Whereupon he delivered to the Defendant 20 l: In conſideration whereof, the Defendant promiſed to the Plaintiff, That if he liked not of the Land that he would repay that 20 l. within a fortnight; And *infacto* alledged, That he did not like the Land, and the Defendant had not paid him the 20 l: Being adjudged for the Plaintiff, Error was brought and aſſigned, becauſe it is not alledged, That he gave notice of the diſlike within a fortnight. But the Court held that to be no Error, for it is a thing of which he ought to take Notice at his perill, for that he hath bound himſelf thereunto by his expreſs promiſe, And ſo it was adjudged. Trinit. 43 Eliz. B.R. *Eſt* and *Thorowgoods* Caſe. *Cro.* 3. Part, 834.

In Aſſumpſit, the Plaintiff declared, That the Defendant promiſed him 60 l. if he would marry his daughter, upon the day of Marriage, or within 10 dayes after upon Requeſt: And ſhewed, That he married his daughter, and that he had not paid the money, though he was required ſo to do. In Arreſt of Judgment, It was moved, That there was no Notice layd. But the Court was of Opinion, That the ſame was good enough, and that the Requeſt implyed that: And ſuch, they ſaid, the Preſidents were. Wherefore it was adjudged for the Plaintiff. Hill. 1 Car. B. R. *Alfred* and *Blackamores* Caſe. See Reports annexed to *Bendlowes*, 149. See Hill. 22 Jac. B.R. *Hodges* and *Moyes* Caſe, *Latch.* 15. adjudged accordingly. And ſee *Latch*, 97. the ſame Caſe, with the Principal here.

5. Debt upon an Obligation; which was, That the Obligor ſhould pay 300 l. in Conſideration of a Marriage between the Plaintiff and his daughter; Which 300 l. was to be paid within 3. moneths after ſhe ſhould come to the age of 18 years, or within 18. dayes after the Marriage after notice given which of them ſhould firſt happen. It was the Opinion of the Juſtices in this Caſe, That the Notice ſhould relate to both dayes, becauſe it is incertain which of them ſhall firſt happen. Yet it was ſaid, *ad proximum antecedens fiat Relatio*; but the Court was of Opinion, as before is ſaid, Hill. 1 Car. B. R. *Read* and *Bullingtons* Caſe, *Latch*, 158.

Nuſance.

1. ACtion upon the Caſe, the Plaintiff declared, That he was poſſeſſed of Land adjoyning to a River, from 29. *Maii*, 29 Eliz. till the bringing of the Writ; and that the Defendant the laid 29 h day of *May*, had ſtopt the River with Loads of Earth, and ſo it continued untill the 14th day of *Feb.* by which his Land was drowned, ſo as he had loſt the profits of it by that time. In ſtay of Judgment, it was moved, That it appeareth by the Declaration, That the Plaintiff hath no cauſe of Action, for the Plaintiff hath made Title to the Land drowned, from the 29.h of *May*, ſo as that day is excluded, and the Nuſance is layed to be the 20th day of *May*, ſo as the Nuſance was before the poſſeſſion of the Plaintiff, and then he cannot complain of a wrong done before his time. But it was anſwered and Reſolved, That although the ſtopping was made before his poſſeſſion, yet the continuance of the ſame is after, and ſo a new wrong for which the Action lyeth. It was adjudged for the Plaintiff. Mich. 31 Eliz. B. R. *Weſtbourn* and *Mordants* Caſe. *Leon.* 2. Part, 103.

2. Action upon the Caſe, and declared, That whereas he was ſeiſed of 16 Acres of Land in D. and by reaſon of it after Harveſt, had Common in another parcel of Land of 20 Acres adjoyning, every year, the Defendant had ploughed the Land, by which he was diſturbed of his Common. In Arreſt of Judgment, it was ſaid, That he having a Freehold in the Land to which he claimed Common, he was to have an Aſſiſe, and not an Action upon the Caſe. But it was the Opinion of the Court, That he might have the one or the other. It was then moved, That it is not expreſſed when the diſturbance was made, and ſo it might be before the Harveſt, and then no cauſe of Action. But the Court ſaid it was well enough, for the diſturbance is layed in Ploughing of the Land, which was a Nuſance, and would continue alwayes ſo. Mich. 33 Eliz. B.R. *Leveret* and *Townſends* Caſe. *Cro.* 3. Part, 199.

3. In Treſpaſs, the Caſe was, J. S. erected a Mill-dam, part upon his own, and part upon the Land adjoyning, the Owner of the Land adjoyning pulls down the Dam upon his Land, by which all the Dam falls down, and the Water run out. It was the Opinion of the Court, That this act of the Defendant was juſtifiable; and ſo it is if one erects a Wall upon his own Land, and the Land of another man, and thereupon the other pulls down a Wall upon his Lands, ſo as all the Wall falls, this is lawfull; and ſo it was adjudged. Hill. 34 Eliz. B. R. *Wigford* and *Gills* Caſe. *Cro.* 3. Part, 269.

4. A man levied a Dam in ſuch a River ſuch a day, wher by it drowned the Land of J. S. who afterwards made a Feoffment in Fee of his Land; and the Defendant afterwards *malitioſe Cuſtodivit* the ſaid Dam. It was objected, That the Action did not lye, becauſe the Feoffee had no thing in the Land at the time of the Dam levyed. But after long arguing the matter, it was at laſt Reſolved, That the Action did well lye, and Judgment was given for the Plaintiff, in an Action upon the Caſe by him brought. Trin. 35 Eliz. B.R. *Reſwi* & *Cundens* Caſe. *Cro.* 3. Part, 402.

5. Note, It was Reſolved by the Juſtices, That for ſtopping of a common Way which is a common Nuſance, a man ſhall not have an Action upon the Caſe, unleſs he hath a particular damage by it, but the ſame ſhall be redreſſed and remedied by Preſentment in the Leet. Paſc. 41 Eliz. B. R. *Fincux* and *Hovendens* Caſe. *Cro.* 3. Part, 664. acc. But where men by Antient Cuſtome have had a common watering place for their Cattel in ſuch a place, which is ſtopt; there an Action upon the Caſe lyeth for it, becauſe ſuch a Nuſance is not Preſentable in the Leet or Torn. See *Cook* 5. Part, *Williams* Caſe. And *Cook* 1. Part, *Inſtitutes* 57. acc.

Obligation.

1. THe Bayliff of a Liberty being Plaintiff: The Sheriff directed a Warrant to him to Arreſt the Defendant upon a *Latitat* returnable in B. R. The Defendant Arreſted, was bound in an Obligation; the Condition of which was, That if the Defendant perſonally appear in the Kings Bench at *Weſtminſter*, and, there to anſwer, &c. It was ſaid, That the Obligation was void by the Statute of 23 H 8. For the Statute preſcribes Obligations to be taken by the Sheriff to be according to theſe words, *viz.* appear at the day contained in the Bill, Writ, or Warrant, and in ſuch a place, and all Bonds taken in other form to be void. As to the word (perſonally) the Juſtices were of Opinion, That that Obligation was well enough, becauſe as the Caſe is, the appearance of the Defendant ought to be in perſon, being upon a *Latitat*, becauſe the Defendant is ſuppoſed to be *in Cuſtodia Mariſchalli*. But as to the other words (there to anſwer) this difference was put; where the words are (there to anſwer) the Bond is well enough, for it is no more in effect, but that he ſhall appear *eo animo ut reſpondeat*, but if the words had been (appear and anſwer), the ſame is a void Condition, for it may be the Plaintiff will never declare againſt him. But the Court was of Opinion, That the Obligation was void by reaſon of the words aforeſaid. Paſc. 26 Eliz. B. R. *Serjeſord* and *Wolverſtons* Caſe. *Leon.* 2. Part, 78.

2. Mrs. *P.* was bound with Sureties for her appearance before the High-Commiſſioners, That ſhe ſhould not depart without Licenſe under the hands of three of them. She pleaded the general Pardon at the laſt Parliament, in which there is an Exception of all Bonds and Recognizances, except only ſuch Bonds and Recognizances as are for appearance. It was moved, That by the Exception ſhe ought to be diſcharged; for although the departure without Licenſe be not ſpecially named, yet it is within the ſenſe. It was the Opinion of all the Barons in this Caſe, That the not departure is purſuant to the appearance; and therefore that the Pardon did not extend to it. Trin. 31 Eliz. *Excheq.* Mrs. *Peſcalls* Caſe. *Leon.* 2. Part, 179.

3. A Black-ſmith of M. in the County of *Middleſex*, took a Bond of another Black-ſmith of the ſame Town, That he ſhould not exerciſe the Trade or Art of a Black-ſmith within the ſame Town, or within a certain precinct of it. Debt was brought upon that Obligation; depending which, the Obligor complained to the Juſtices of the Peace of the County of the matter; which being found by Examination, the Juſtices committed the Obligee to Priſon. The Court was of Opinion, That although this Court, *viz.* C. B. being a High Court, might puniſh ſuch Offences appearing before them on Record: Yet it did not follow, That Juſtices of Peace might ſo do; for that by the Laws, Juſtices of Peace have no Conuſans of ſuch Offences, nor could meddle with them, for that their power is limited by their Commiſſion. But as to the Bond it ſelf, the Court was clear of Opinion, That it was void, being againſt Law. Tr. 29 Eliz. C. B. *Leon.* 2. Part, 210.

4. Debt upon an Obligation, the Iſſue was, *Non eſt factum*. The Jury found, That the Defendant did Seal and deliver it as his Deed, but that after the day of the Iſſue joyned, the Seal was pulled off from the Obligation. It was adjudged in this Caſe for the Plaintiff; For it was a good Bond, and the Defendants Deed at the time that the Iſſue was joyned, and the Tryal ſhall relate to it, although the Bond was cancelled afterwards. Mich. 31 Eliz. B. R. *Michael* and *Sotkwiths* Caſe. *Cro.* 3. Part, 120.

5. Debt upon an Obligation of 200 l. The Defendant pleaded, That after the Obligation made, The Plaintiff by his Indenture, Covenanted, That if he paid 100 l. at ſuch a day, That the Obligation ſhould be void; and alledged, That he paid it at the day. Upon which it was demurred. It was ſaid, That the Indenture could not be pleaded in bar, but the party ought for to take advantage thereof by way of Covenant. But all the Court held the contrary. That it may well be pleaded in bar, and he ſhall not be put to his Writ of Covenant by Circuit of Action: and therefore they all held, That the Plaintiff ſhould be barred. Mich. 40 Eliz. B. R. *Hodges* and *Smiths* Caſe. *Cro.* 3. Part, 623.

6. Debt

6. Debt upon an Obligation, The Condition was to pay 29 l. at a day certain; The Defendant pleaded, That in reſpect of a Treſpaſs done by the Plaintiffs Beaſts upon the Defendants Lands, the Defendant gave him a longer day of payment, which is not yet come. It was the Opinion of the whole Court, That it was no Plea: For that an agreement by parcel, cannot diſpenſe with an Obligation. Mich. 41 Eliz. B. R. *Hayſted* and *Andrewes* Caſe. *Cro.* 3. Part, 697.

7. Debt upon an Obligation of 8 l. a ſingle Obligation; The Defendant pleaded, That after the Obligation made, he entred into another Obligation of penalty of 14 l. for the payment of 7 l. at ſuch a day, which the Plaintiff had accepted of, in diſcharge of the Bond of 8 l; And by the Opinion of the whole Court, holden to be no Plea in Barr, and the Plaintiff had Judgment. Mich. 41 Eliz. C. B. *Maſwood* and *Cricks* Caſe. *Cro.* 3. Part, 716.

8. Debt upon Obligation conditioned; If the Defendant in *Michaelmas* Term next following, in the Prerogative Court, or the Biſhop of *Cante bury* or *London* ſhould give to the Defendant, his Executors or Adminiſtrators, ſuch a Releaſe and Diſcharge from and againſt him, as his Children for receipt of 100 l. as the Judge of the Court ſhould then think meet, &c. The Defendant pleaded, That the ſame Term ſuch a one was Judg there, and that the ſaid Judge did not deviſe or appoint any Releaſe or Diſcharge: Upon which it was demurred, and it was holden to be no Plea; for that it is not alledged, That he cauſed a Releaſe to be drawn, and tendred it to the Judge to be allowed; for it is on his part in Diſcharge of the Obligation to draw ſuch a Releaſe as the Judge ſhould allow. Mich. 41 Eliz. C.B. *Lamb* and *Brownrealls* Caſe. *Cro.* 3. Part, 716.

9. Debt upon Obligation, the Condition was: Whereas E.W. hath before commenced divers Suits in the Kings Bench at *Weſtminſter*, againſt W. H; If the ſaid W. H. ſhall without delay by his lawful Attorney appear, and make anſwer to all his Actions and Declarations againſt him, That then, &c. The Defendant pleaded, That *poſtea*, by ſuch a day W. H. appeared, *Et fuit paratus reſpondere*; but there was not then any Actions there depending. Upon which it was Demurred; And adjudged to be no Plea: For that the Obligation eſtops him from ſaying, That there were not any Actions there depending: It was adjudged for the Plaintiff. Paſch. 42 Eliz. C. B. *Willoughbies* and *Ayres* Caſe. *Cro* 3. Part, 756.

10. A *Scire facias* was brought in Chancery upon a Recognizance, the Defendant pleaded to the Writ, which was ſent in B. R, and tryed for the Plaintiff, and Judgment for him there: Afterwards he brought Debt in C. B. upon the Judgment, and there had Judgment to Recover, and afterwards he brought a *Scire facias* to have Execution upon the Judgment in B. R, and the Defendant in Barr of the Execution pleaded that Recovery: It was the Opinion of the whole Court in this Caſe, That it was no Plea, becauſe one Judgment cannot determine another Judgment which is of equal Nature. But it was ſaid, That if a man be covereth upon an Obligation in Debt, during the Judgment in force; he cannot have a new Action of Debt upon that Obligation, becauſe it is reduced into *rem judicatam*: It was adjudged for the Plaintiff. Paſch. 43 Eliz. B. R. *Preſton* and *Preſtons* Caſe. *Cro.* 3. Part, 817.

11. Debt upon Obligation of 300 l. the Condition was to perform all Covenants, Payments, and agreements contained in a Deed Poll of the ſame date, made between the parties, Plaintiff and Defendant. The Defendant ſhewed the Deed-Poll, in which was contained a Grant, Bargain, and Sale, of certain Lands to be made by the Plaintiff to the Defendant for 100 l paid, and 200 l. to be after paid: In which Deed there was a Proviſo, That if the Defendant did not pay for the Plaintiff to J. S. 40 l. and to J. D. 40 l. at ſuch a day, that then the Grant, Bargain, and Sale, ſhould be void; and upon Plea pleaded by the Defendant, That he had performed all Covenants, &c. compriſed in the Deed. The Plaintiff aſſigned a Breach, in not payment of 40 l. at the day according to the Proviſo: Upon which the Defendant demurred. It was by the whole Court adjudged for the Defendant; for the Condition of the Bond doth not bind the Defendant to perform other Payments, then ſuch as the Defendant is bound by the Deed to perform; for the Bond was made for the ſtrengthing of the Deed: and the Deed did not require any Compulſory payment to be made, but left that to the will of the Defendant, or to make ſuch payments comprehended within the Proviſo; and in default thereof, to forfeit the Land to the Plaintiff; So as it was not the Intent of the Parties to make the Bond and Condition of it repugnant to the Deed-Poll of Bargain and Sale. But the word (payments) in the Obligation ſhall have relation only to ſuch payments compriſed in the Deed Poll, which ſhould be compulſory to the Defendant, and not otherwiſe; and becauſe the neglect of payment of the 40 l. to J. S, which is aſſigned for a Breach, is in its own nature voluntary to be paid by the Defendant or not; the Condition of the Obligation cannot extend to it: It was adjudged for the Defendant. Trin. 9 Jac. B. R. *Priſtoe* and *King's* Caſe. *Yelverton* 206.

12. Note;

12. Note; This Case was put and agreed, If an Obligation be made to three, to pay money to one of them, all of them ought to joyn in the Suit, for they are all but as one Obligee; and if he who ought to have the monies dyeth, the other of them who survive, ought to sue, although they have not any Interest in the sum contained in the Condition: The principal Case was, Indentures of Covenants were made between A. and B. of the one part, and Y. of the other part; and it is agreed, That Y. enter a Bond to pay B. 160 l. at such a day; B. dyeth, A. his Administrator brought Covenant against Y. for not payment of the 160 l. to B. in his life-time; and it was adjudged, It did not lye. For the 160 l. payable to B. in his life, being to be obtained by Suit upon that Indenture, none can have an Action upon it, but only those who were parties during their Lives; and after their death, No Executor or Administrator of the Survivor of them. Trin. 8 Jac. B. R. *Rolls* and *Yates* Case. *Yelv.* 177.

13. The Plaintiff Marshall of B. R. had E. the Defendant in Execution, and upon *Habeas Corpus* suffered him to go into the Country, and took a Bond of him, That he should be a true Prisoner; and he had a Keeper with him as far as *Charing-Cross*, and afterwards he went from his Keeper, which was adjudged an Escape. For which the Plaintiff brought Debt upon the Bond against E: He pleaded the Statute of 23 H. 6. upon which the Plaintiff took issue, and it was found for the Plaintiff. It was said in this Case, That an Obligation made for ease and favour to the Marshall is void, although it be coloured with pretence of being true Prisoner. But it is lawful to take Obligations of one who is a Prisoner, to be a true Prisoner to the Marshal; and the Sheriff notwithstanding may take Obligations for a true Debt. But if the Sheriff hath one in Execution for another man, and the Prisoner is also endebted to him. If he take a Bond, That the Prisoner pay his own Debt to him; and also that he shall be a true Prisoner, and that is for ease and favour, the illegal thing makes the whole Bond to be void; and to that difference, *Dodderidg* Justice agreed. Hill. 1 Car. B. R. Sir *Gregory Reynell* and *Elmerthys* Case. *Litch* 143.

14 Debt upon Obligation, The Condition was, To have free ingress, egress, and regress in the House of J. S; the Plaintiff having right to part of the House, viz. Chambers in it: The Defendant pleaded, That he had egress, ingress, and regress; but did not say, free ingress, &c. The other Replyed, That he had shut all the outward Gates; In this Case, It was said by *Dodd.* Justice, That if one be bounden to suffer J. S. to have ingress into his House, he ought to have common entrance by the usual Gates or Door, and shall not be put to enter in at a Hole, Back-door, or Chymney; and if he leave open the common Door, yet if the party makes a Ditch, so as he cannot enter without Stipping, the Condition is broken; *Jones*, Justice, said, A man is not bound to leave open his Door at Mid-night, so he might be in danger of his life; but upon Request he ought to suffer the party to come in, although it be at Mid-night, The Case was not adjudged, but the parties agreed. Trin. 1 Car. B. R. *Clinson* and *Poole's* Case. *Latch.* 47.

Occupant.

1. THe Case was: The Lord *Sturton* by Indenture between him and J. S, lett Land to J. S. for life, *Habendum* to him and A. B. and C. his three Sons *successive*. There were these Questions moved, 1. If they took any Estate, because the Sons are not named in the Premises of the Deed. 2. If they take. Whether they take joyntly or severally. 3. Whether there shall be an Occupant for the lives of the other three. It was Resolved clearly, That the Sons took not in possession, because they were not named in the premises of the Deed, nor in Remainder, because the intent was to give them the Land in possession. The doubt was, If there shall be no Occupant; It was adjudged, That there was no Remainder, and so no Occupant. Trin. 27 Eliz. B. R. *Windsmore* and *Hobbards* Case. *Cro.* 3. Part, 57.

2. Tenant by the Courtesie granted over his Estate, the Grantee Devised it, and dyed. In that Case, It was held a void Estate, and out of the Statute of Wills. And in that case it was holden, That although the Grantee doth Enter after the death of the Devisor, yet he shall not have the Land as an Occupant; for that there shall be no Occupancy of an Estate of Tenant by the Curtesie or in Dower, which are Estates created by the Law, 17 Eliz. *Delabins* Case. *Cro.* 3. Part, 58.

3. In *Ejectione Firme*, It was found, That the Earl of B. was seised in tail of the Rectory of D, and of the Tythes thereof, and lett the same to J. W. and his assigns for the Lives of C. and E. his Wife, and C. W; And that the said J. W. demised the said Rectory and Tythes to one J. N. and his heirs, to the use of C. B. the Plaintiff for 99. years, if any of the *Cestuy que vie* should so long live; by force of which the Plaintiff was possessed, It was moved for the Defendant, That the

the Verdict was not good, becauſe he doth not ſhew the beginning of the Eſtate tail; which the Court held to be ill for that cauſe. 2. Becauſe the uſe is limited the Plaintiff but for years only, ſo as the remainder of the Uſe is in J. N, and the life of J. N. is not averred: and if he be Dead, C.B. is in an Occupant, and then no *Ejectione Firmæ* lyes. It was the Opinion of the Court in this Caſe, That there is not any uſe limited but for years, becauſe the reſidue of the Eſtate is in W. the Grantor, and not in J. N: And clearly there cannot be an Occupancy, becauſe it is granted to J. N. and his Heirs, which excludes the Occupancy. Trin. 37 Eliz. C. B. *Baker* and *Searles* Caſe. *Cro.* 3. Part, 407.

4. *Replevin*, The Caſe was; A Rent was granted to two during the life of J.S. to his Uſe: Whether if they two dye, living J. S. the Rent was gone or not, was the Queſtion? For it was agreed, There cannot be an Occupancy of a Rent. It was holden by the Court, That it was not gone, as this Caſe is; For the Rent being granted to the uſe of J. S. it veſted in him by the Statute of 27 H. of Uſes; ſo as he had abſolute Eſtate during his life; And the Lives of the Grantees is not material, the Eſtate being transferred from them. Mich. 41 Eliz. C. B. *Crawleys* Caſe. *Cro.* 3. Part, 721.

5. Trover and Converſion of Goods in *London*; The Defendant juſtified, That *R. Buſh* was ſeiſed in Fee of 20 Acres of Land in *Stanſted* in *Com. H*, and granted a Rent to T. B. his Executors and Aſſigns, of 16 l. *per annum*, during the life of T. B, who dyed Inteſtate, and F. his Wife was Adminiſtratrix to him; and the Defendant as her Servant took the *diſtreſſe* in the 20 Acres by command of the ſaid F, and traverſed the Taking and Converſion of them in any other place. Upon which it was Demurred. It was holden by the Court, to be an ill Plea; For the Inducement to the Traverſe, is not a ſufficient cauſe of Juſtification for the taking of the Diſtreſſe. For this Rent was determined by the death of T. B; becauſe he cannot be an Occupant of a Rent; and the Wife is not Aſſignee by taking Adminiſtration. For none can make Title to have a Rent againſt the Terr-Tenant, unleſs he be party to the Deed, or Conveys a ſufficient Title under it. Mich. 44 Eliz. B.R. *Slater* and *Butlers* Caſe. *Cro.* 3. Part, 901.

Outlawry.

1. A Man was Outlawed in the Court of *Huſtings* of *London*; and the *Huſtings* in which the Outlawry was, was holden two Weeks after the laſt *Huſtings*: ſo as there is but two Weeks betwixt the *Huſtings*; whereas commonly the *Huſtings* is holden every 3. Weeks. The Sheriffs doubted, If they might return the Outlawry, without danger of an Action upon the Caſe brought againſt them by the party Outlawed. But it was holden by the whole Court, That they ought, and might return the Outlawry. For *Dyer* ſaid, That there is a Record in the time of *R.* 2. whereby it appeareth, That in *London*, They might hold their *Huſtings* every Week. And afterwards, he commanded the Outlawry to be Returned, Mich. 28 Eliz. C.B. *Leon.* 2. Part, 14.

2. Treſpaſs; Proceſs continued till the Defendant was Outlawed. To avoid the Outlawry, It was moved to the Court, That the Original Writ, and all the Judicial proceedings thereupon, are directed *Vice-Com. Wigorn.* and in the Filazers Roll in the Margent, it is written, *Herefordſ*; and in the body of the Roll it is written, *Et prædict. G.* the Plaintiff *Obtulit ſe quarto die Paſ, et Vicecomes modo mandat. Quod. prædict. S.* the Defendant *non eſt inventus. Ideo præcept. eſt Vicecom.* And at the *Capias* returned, it is entred in the Roll, *Herefordenſ.* before; whereas the *Capias* is directed *Vicecom. Wigorn.* as it ought to be. The Roll was peruſed by the Court; and it was ſo, without any ſuſpition of Raſure. Wherefore the Court gave day to the Queens Serjeants, to adviſe themſelves to maintain the Outlawry. The Defendant prayed a *Recordatur* to be made, in what eſtate the Roll now is for doubt of Amendment by way of Raſure, or otherwiſe. Which was granted by the Court. Hill. 30 Eliz. C. B. *Grove* and *Spurs* Caſe. *Leon.* 2. Part, 120.

3. In a *Replevin*, the Defendant pleaded nothing in barr of the ſaid Action; Wherefore Judgment was given againſt him; And thereupon iſſued a Writ of Enquiry of Damages: Now the next Term at the time of the Return of the Writ, the Defendant pleaded, That the Plaintiff was Outlawed at the time of the firſt Action brought. It was adjudged by the Court, That he could not have the Plea, becauſe he had not now day to

plead it, for that it is after Judgment given. Paſc. 14 Eliz. *Puttenham* and *Norris* Caſe, *Bendlowes*, 37.

4. An Outlawry was pleaded againſt one by the Record of the Coroners, where the Writ of *Exigent* was never Returned in Court: The Court did not take any regard of the Plea; as appeareth by the Book, 28 Aſs. p. 49. And ſo it was ſaid, that it happened in *Proctors* and *Lamberts* Caſe, Mich. 4 and 5 Eliz: For the Juſtices ſaid, That the party is not Outlawed by Law, unleſs he be Returned Outlawed, and the Writ of Exigent be Returned of Record in Court. Mich. 4 & 5 Eliz. *Bendlowes*, 27.

5. Errour to Reverſe a Judgment and Outlawry againſt Husband and Wife in Debt; And becauſe it was to Reverſe an Outlawry, it was holden, That they could not aſſign Errour but in perſon: And becauſe the Husband could not bring in his Wife, It was holden, That they could not aſſign Errour. And ſuch was the Rule of the Court. And the Courſe of the Court was ſaid to be ſuch; and it cannot be otherwiſe. Paſch. 40 Eliz. B. R. *Wade* and *Smiths* Caſe. *Cro.* 3. Part, 611.

6. Debt was brought againſt A. and B. upon an Obligation in C. B; and Judgment was there given againſt them both, and a *Capias ad ſatisfaciend.* iſſued againſt B. only. Whereupon, he being Outlawed, brought a Writ of Errour: And becauſe it ought to have been awarded againſt them both; and alſo becauſe it did not appear by the Return of the Exigent, that the Judgment of the Outlawry was by the Coroners as it ought to be: For theſe cauſes the Judgment was reverſed. Hill. 41 Eliz. B. R. *Beverley* and *Beverleys* Caſe. *Cro.* 3. Part, 648.

7. In Action brought againſt the Executor, the Defendant pleaded Outlawry in the Teſtator; Upon which it was Demurred. It was holden by the Juſtices to be no Plea; becauſe (admitting it ſhould be a plea) it ſhould be in regard the Teſtator being Outlawed, could not have goods, but they did appertain to the King, and the Executors might not have Goods to ſatisfie. But becauſe that is not ſo, But the Teſtator might have debts owing to him upon Contracts which are not forfeited by Outlawry; Or that the Teſtator might have deviſed Land to be ſold by his Executors: upon ſale of which, the moneys for ſale thereof are Aſſets in their hands. For theſe Cauſes, it was holden by the Court, to be no plea. Trinit. 39 Eliz. C. B. *Woolley* and *Bradwells* Caſe, *Cro.* 3. Part, 575.

8. Debt againſt an Adminiſtrator upon a Judgment had againſt the Inteſtate in C. B: The Defendant pleaded, That after the Judgment, the Plaintiff ſued there a *Capias ad ſatisfaciend.* againſt the Inteſtate, and thereupon an *Exigent*, ſo as the Inteſtate was Outlawed; and that afterwards he ſued a *Capias utlagatum*, and thereby he was taken, and dyed in priſon. Upon which the Plaintiff Demurred. It was urged, Whereas the Inteſtate being taken upon a *Capias utlagatum*, Whether it ſhould be ſaid an Execution for the Plaintiff, without the Plaintiffs prayer of it. It was ſaid by the Juſtices, That it was not; For it is a Writ for the King, and is *Ad recipiendum Quod Curia Conſideraverit*; ſo although the Plaintiff ſues it out, yet it is not any Election in him to have the party in Execution untill he pay it, and the Court award it. But in the Principal Caſe, it was Reſolved, That in regard the Paintiff had elected this Execution, (which is the higheſt Execution) and the Defendant dyed therein, The Law will adjudg it as a ſatisfaction, when there is but one who is taken. But where two be condemned, the taking of one in Execution, and his death, is no diſcharge for the other. Mich. 43 Eliz. B. R. *Shaw* and *Curtis's* Caſe. *Cro.* 3. Part, 870. See *Cook* 5. Part, *Bromfields* Caſe.

9. In Debt, the Defendant ſaid, That he is Attainted of Felony; and that the Attainder yet continues, and demanded Judgment if he ſhould be put to Anſwer: for it was ſaid, It was in vain to put any man to anſwer in any reall or perſonall Action, who hath in truth nothing to be taken in Execution. But it was adjudged, That he ſhould anſwer, and may be taken in Execution, and that ſhall not be prejudicial to the King, for notwithſtanding the Execution of the party, the King may have him executed when he will. And in this caſe it was ſaid, That men Outlawed ſhall be put to anſwer in any Action brought againſt them: but they ſhall not be anſwered in any Action brought by them. See *Haſtings* and *Blakes* Caſe. *Noy* 1.

Pardon.

1. A Parſon being ſick, The Father of the Plaintiff came with his ſon to the Patron, and contracted with the Patron, in the preſence of his ſon, for the next Avoidance of the Church; and agreed to give him for it 100 l; who thereupon made a Grant to him of it: The Parſon dyed; The Father preſented his ſon, who was Inſtituted and Inducted, and was ſued in the Spiritual Court, to be deprived for Symony. He thereupon brought a Prohibition, and alledged the General Pardon of 35 Eliz. which is after the Preſentation and Induction, wherein Symony is not excepted. Upon which it was Demurred. It was Reſolved in this Caſe, 1. That although the General Pardon diſcharges its puniſhment of Symony; yet if the Parſon comes in by Symony, it is examinable by the Ordinary; For he ought to provide, that the Church be not provided and ſerved with Corrupt perſons; and if he find Symony in any, he may well deprive him for ſuch cauſe. But, 2. In this Caſe, It was Reſolved, That in this Caſe, there is not any Symony; For the Father might buy the Advowſon, and preſent his ſon; and it is not Symony in any to buy an Advowſon: and although the ſon was here privy thereunto, it is not material; for it being no offence in the Father, who was the Principal, it cannot be an Offence in the ſon who was but Acceſſary: and the Father is by nature bound to provide for his ſon; and therefore his buying of an Advowſon, with an intent for to provide for him, is no Symony; and the Prohibition ſtood. Paſch. 43 El. C. B. *Smith* and *Sheires* Caſe. *Cro.* 3. Part, 685.

2. Sir *H. L.* being Endicted of Treaſon, was brought to the Barr, and demanded, Whether he could ſay any thing, Wherefore the Court ſhould not proceed upon the Indictment which was before Commiſſioners of *Oyer* and *Terminer*? He produced the Queens Pardon, without any Writ of Allowance thereof. And hereupon the Secondary of the Crown informed the Court, That the Preſidents were, That in caſe of Treaſon, it was uſuall for to allow of the Pardon, without a Writ of Allowance; but not in caſe of Felony. Whereupon the Pardon was allowed by the Court. Paſch. 43 Eliz. B. R. Sir *Henry Linleys* Caſe. *Cro.* 3. Parte 814.

3. T. brought Treſpaſs againſt S. *Quare Clauſum fregit*, 20. *Junii*, Anno 3. *Jac.* with a *Continuando*, untill 6. *Novemb.* after. Upon Not Guilty found for the Plaintiff, and Judgment given: but it was entred, *Nihil dicit ſine, quia perdonatur.* Upon Error brought, he aſſigned, That the Judgment ought to be, *Quod Capiatur*, becauſe by reaſon of the Pardon of the King by Parliament, *Anno* 3. which pardoned all Offences before 25. Sept. before, he alledged, That but part of the Offence was pardoned, *viz.* à 20. *Junii*, to 25. Sept. after; but that the Treſpaſs from 25. Sept. till 6. Novemb. is not pardoned. But it was the Opinion of the Court, That the Judgment was well entred; For the firſt Entry in Treſpaſs being only *Vi et Armis*, that being pardoned, all which depends upon it is pardoned: for the firſt Entry only makes the Treſpaſs. Paſch. 6 Jac. B. R. *Strickland* and *Thorps* Caſe, *Yelverton*, 126.

4. B. a Parſon was ſentenced in the Spiritual Court for Adultery, and deprived, and then came the General Pardon, which pardoned the Offence of Adultery. It was adjudged in this Caſe, That the fault being pardoned, the Judgment upon it ſhall be pardoned and deſtroyed, and then the Deprivation void: and that although it was the laſt day of the Parliament, becauſe a Pardon by Parliament may overthrow a Judgment: but it is otherwiſe of a Pardon of Grace, or a ſpecial Pardon: And a Pardon by Parliament ſhall relate to the firſt day of the Parliament; but a pardon of Grace, and a ſpecial Pardon, ſhall relate only from the ſeal and date of it. Hill. 1 Car. B. R. *Baſſets* Caſe, *Litch.* 22.

5. A. was Indicted at W. upon the Statute of *uſury*, for taking of 12 d. for the uſe of 20 s. in the Pound, and Judgment there given. The ſame being Removed by *Certiorari* in B. R. the Defendant here pleaded the Coronation-Pardon, by which all Uſurious Takings and Contracts are pardoned. If the Judgment was pardoned thereby, was the Queſtion? It was ſaid, That it

was; For when a Pardon hath relation to a time before the Act made, there although the Judgment be intervenient between the fact and the pardon; yet the Pardon ſhall take place: And here the Pardon hath not relation to any time certain, and ſo ſhall not Relate before the Pardon. And it was ſaid, That a Coronation Pardon is but in the nature of a particular Pardon, and differs from a general; and a particular pardon is not of effect untill it be ſued out, and not like to a general pardon. The Caſe was not Reſolved. But *Curia adviſare vult.* Hill. 1 Car. B. R. *Davis* Caſe. *Latch*, 141.

6. Sentence was given againſt one in the Spiritual Court, for words of Defamation, at the Suit of the party; The Defendant Appealed to the Arches: Then came the Pardon of 21 Jac. which Related beyond the time of the words ſpoken; by which the Offence was pardoned. Whereupon the Appealant deſerted his Appeal; and the Court of Arches taxed Coſts againſt him. It was agreed by the Court in this Caſe, That after the pardon, thoſe in the Inferiour Court could not tax Coſts, becauſe the reaſon of the taxing of Coſts is the vexatious Suit, and here that fails, for there is no reaſon to proſecute his Appeal, when the Original Offence is pardoned. Hill. 1 Car. B.R. *Lewis* and *Whittors* Caſe, *Latch.* 155.

7. A Suit was in the Spiritual Court between two Church-Wardens, Who of right ſhould be the Church-Warden? And Sentence was given for the Plaintiff in the Suit there, and the Defendant condemned; and a year after, Coſts were taxed; And then came the General Pardon of 21 Jac. which Related to a day Mean between the Sentence and the Taxation of Coſts. Then in diſcharge of the Coſts, the Pardon was pleaded, and allowed. It was the Opinion of the Juſtices in this Caſe, That the Coſts if they were taxed before the Relation of the Pardon, they were not diſcharged: But in this Caſe, the Pardon came before the Coſts were taxed; and therefore the ſame had diſcharged them. Hill. 2 Car. B. R. *Palmer* and *Warners* Caſe, *Latch*, 190.

Partition.

1. NOte: That a Writ of Partition was brought upon the Statute of 32 H. 8. by Joynt-Tenants, and Tenants in Common for years; and the Writ awarded good. Mich. 3 & 4 Mar. *Tenduers*, 30.

2. A Writ of Partition was brought againſt Y. and others, who all appeared, and confeſſed the Action: And afterwards brought Error; which was Entred, Paſch. 27 Eliz. Rott. 43. and they Aſſigned Errors; And the Opinion of the Court was againſt them: And they ſeeing it, did diſcontinue their Writ of Error, and now ſued a new Writ of Error out of the Chancery, directed to the Lord *Anderſon*, (Chief Juſtice) bearing date 19. *Novemb.* 31 Eliz. Containing, That whereas a Writ of Error had been directed to him, to remove ſuch a Record, That all the Record is not yet removed, wherefore this Writ was to remove the reſidue of the Record. Upon which Writ, a parcell of the Record was ſent. Upon which, the Plaintiffs ſued a new Writ of Error out of the Chancery, *Coram vobis reſidet*; and that was, Hill. 31 Eliz. and it was entred upon a new Roll of the ſame Term, and not upon the old Roll: And thereupon new Errors were Aſſigned in the Judicial proceedings and proceſs out of the body of the Record; 1. That the Plea was diſcontinued, for the *Poſt* was awarded againſt three of the Defendants; and *Idem dies* not given to the other two, there being 5. Defendants. 2. Becauſe there was not 15. dayes betwixt the date of the *Poſt*, and Return of it. 3. Becauſe Judgment was, That the Defendants ſhould be amerced; whereas, they appeared upon the firſt Proceſs. And thereupon the Plaintiff ſued a new Writ of Diminution. And now came the Defendants and ſhewed all the matter aforeſaid; and demanded Judgment if the Plaintiffs ſhould have a new Writ of Diminution? This Caſe was long debated: And it was ſaid, That this Writ directed to the Juſtices, was not a Writ of Diminution, but a Writ to inform the Juſtices: And that upon the whole matter, the Writ of Error did well lye. But the matter was not Reſolved, but adjourned. Trin. 32 Eliz. B.R. *Windham* and *Yates* Caſe, *Lem.* 2. Part, 2. See more of this Caſe, *Cro.* 3. Part, 64.

3. A Writ of Partition being awarded, The Court was informed, That at the time of the Partition made, the Sheriff was not upon the Land; and therefore prayed, that it might not be received; but a new Writ awarded. It was the Opinion of the Justices, That they might well examine this matter before the Return and filing of the Writ, and thereupon examined the Sheriff; who confessed, he was not there in person. Wherefore the Return of that Writ was stayed, and a new Writ of Partition awarded. But if the Sheriff had Returned the Writ, and the same had been filed, then the Justices could not have examined the matter, because the Return had been good, and no Averment could be had against it. Mich. 25 Eliz. C. B. *Cro.* 1. Part, 9. & 10.

4. *Ejectione Firmæ*, The Case was, Two Tenants in Common of a house and Land, made Partition within the house by word without Deed. It was the Opinion of the Court, That a Partition between Tenants in Common upon the Land, was good without Deed; for that it amounts to a Livery in Law: but it is not so between Joynt-Tenants, for they cannot make Livery the one to the other: But in this Case, the Partition was on the House, and not on the Land; and it is not found that the Land was within the View, and so it cannot amount to a Livery in Law. And for that cause, it was adjudged for the Defendant, That the Partition was not good for the Land. Pasch. 32 Eliz. B. R. *Dolton* and *Priest's* Case, *Cro.* 3. Part, 95. See *Leon.* 1. Part, 103. The same Case.

5. In Partition, the Case was; A. levied a Fine to J. S. which by Indenture was declared to be to the use of B. for life; and after, to the use of the Children of C. *præcreatis*: C. at the time of the Limitation, had two Sons; and before the death of B, had Issue two Daughters. And, If the Daughters should take, was the Question? In this Case, It was Resolved by the Court, That the Daughters should not take; but only the Children which were in *Esse* at the time of the Limitation; For they shall not take as Joynt-Tenants, nor as Tenants in Common, or by way of Remainder, no more then they could take an Estate executed by other Conveyances. And it was said, That it was Resolved in the Earl of *Bedford's* Case in the Court of Wards, by the Advise of all the Justices, That where he made a Conveyance to the use of himself for years, the Remainder to his eldest Son in tail, the Remainder to the heirs of the Earl; (although his meaning was) that his heir should take as a Purchasor; yet it was Ruled, That he should take it as a Fee executed in himself. And in this Case, it was said, That if a Limitation be to the Right heirs of J. S, and he hath Issue a Daughter, and dyeth, his Wife with Child with a Son, who is afterwards born, that yet the Daughter shall retain the Land; for she was in, of an Estate executed. Trin. 36 Eliz. B. R. *Frederick* and *Fredericks* Case, *Cro.* 3. Part, 334. Adjudged against the Daughters.

6. In Partition, the Case was; A. Father of the Plaintiff and Defendant, was possessed of a Lease for years, of an House called P, and of divers other Leases, and had Issue the Plaintiff and Defendant, and T. a Daughter; And by his Will Devised, The Daughter should have the said House for her life; and if she chanced to dye before S, (which was the Defendant) *Then I will my said Son shall have it upon such reasonable Compositions as shall be thought fit by my Overseers, allowing to my other Executors such reasonable Rates as shall be thought meet by my Overseers.* And Devised all his other Leases and Goods to his Executors; and made his said two Sons his Executors; and J. S. and J. D. his Overseers. T. Entred by the assent of the Executors, and dyed. During the Term, S. the Defendant Entred, clayming it as a Legacy, without any Composition made with the Overseers; and brings a *Writ of Partition* against the other Executors, supposing that they held it joynly as Legatees. And upon *Non tenet pro indiviso*, all this matter was found. There were divers Points in the Case, 1. If T. the daughter by this Devise had the intire Term, so as it should go to her Administrator; Or, Whether the Remainder of the Term to give it him to S, were good? 2. If the Estate limited to S. be upon a Condition precedent; so as first he is to Compound with the Overseers, and procure them to set down what rate he should pay; or it were a Condition subsequent, that if he had not what they set down, it should be a determination of his Estate? It was the Opinion of the whole Court in this Case, That the whole Term was to the Daughter; and then if the Daughter hath the intire Estate, the Devise of the Remainder to S. the [redacted]dant, was void. And they agreed in this [redacted] that the Estate is precedent, and that the Overseers might make Agreement with him at any time. And it was said by them, That the Partition did not lye. Hill. 42 Eliz. C. B. *Wardock* and *Wadocks* Case, *Cro.* 3. Part, 791.

7. In Partition, the Writ was general upon the Statute of 31 H. 8. That they did hold *I simul et pro indiviso Mauritium de D. et terras, et tenuras Frankplegii de D:* and that the Defendant denyed Partition *contra formam Statuti*. The Declaration was according to the Writ. The Defendant pleaded, *Quod non tenuit insimul, prout, &c.* The Jury found, That the Plaintiffs held in Fee, and that the Defendant was Tenant in Tail, the Remainder

mainder to his right Heirs of the other moyety. It was moved, If this general Writ was good, or if the Writ ought not to be ſpecial: It was the Opinion of the Juſtices, That the general Writ was good; for that the Statute doth not preſcribe a form, but leaves that to the Clerks in Chancery; and they have deviſed this general Writ, adding only the words, *Contra formam Statuti*; and it hath been the practiſe ever ſince the Statute, that ſuch Writs between Joynt-Tenants and Tenants in common of Inheritances have been allowed. Another Exception was, becauſe Partition is demanded of a View of Frankpledge, which is not ſeveral; yet it was not good enough: for though it be not ſeverable of it, yet the Profits thereof may be divided, and it may be entirely allotted to the one, and the Land to another. Hil. 41 Eliz. C. B. Sir *George Moor* und *Onſlowes* Caſe. *Cro.* 3. Part, 759.

8. A Writ of Partition was brought, and Judgment *quod Partitio fiet*. And before, It was executed in the Country by Sheriff. Error was brought, It was ſaid by the Court, That it did not lye upon ſuch Judgment before the Partition was made and returned to the Sheriff, and Judgment be given *Quod partitio Stabilis ſit et removeat*. For this is not like other Actions real, where Error lyes before the *Habere facias ſeiſinam* is returned; for that is a final Judgment, and no other to be given: and in a Writ of Partition, there needs no *Habere facias ſeiſinam* to be returned, for that the Recovery may execute their Judgment preſently by Entry. See *Dyer* 67. and ſee the Counteſſe of *Warwick* and the Lord *Berkleys* Caſe, *Noy* 71. And it was further holden in this Caſe, That in a Writ of Partition, No Damages ſhall be Recovered, nor no Enquiry of them; and yet the Writ and Count is *ad damnum*, &c. But ſee Mich. 3 Car. C. B. where it was adjudged, That in a Writ of Partition, after the Summons returned. Eſtrepement generally againſt the party and his Servants d[illegible]e. *Hetley* 36.

9. In [illegible] of *Partitione faciendâ*, the Defendant prayeth in Aid, and the Plaintiff Counterpleads the Aid; upon which Counter-plea, they are at Iſſue; and it is found for the Plaintiff. In that Caſe, It was adjudged, That it is peremptory to the Defendant, and the Judgment ſhall be *Non quod reſpondeat, ſed quod Partitio fiet*. Mich. 29 Eliz. C. B. *Leon.* 2. Part, 52.

Perjury.

1. ACtion upon the Caſe, The Plaintiff declared, That he was poſſeſſed of a Fountain of Gold, to the value of 500 l. and delivered it to J. D. to tranſport beyond Sea, and there to ſell it, and render accompt to the Plaintiff, which J. D. brake, and converted to his own uſe: Upon which the Plaintiff brought his Action againſt him, and they were at Iſſue; and the Defendant being adjudged as a Witneſs on the part of J. D. ſwore falſely, That the Fountain was not worth above the value of 180 l. whereas in truth it was worth 500 l. by reaſon of which Oath, the Jury gave to the Plaintiff but 200 l. Damages, whereas he would have given more Damages, but for that Oath; Being found for the Defendant. It was moved in ſtay of Judgment, That the Action did not lye; For that the Law intends the Oath of every man to be true, and there was not any puniſhment for any falſe Oath of any Witneſs at the Common Law; and now there is a form of puniſhment by the Statute of 5 Eliz. and if this Action ſhould be allowed, he might be double puniſhed; and there is not any Preſident to be found, that any ſuch Action brought was maintainable: And by the Common Law there was no puniſhment for perjury, but only in Caſe of Attaint; and the Court was of the ſame Opinion, and further ſaid, That if this might be ſuffered, every Witneſs might be drawn in Queſtion. Wherefore, and for the Reaſons aforeſaid, It was adjudged, that the Action did not lye. Mich. 39 Eliz. C. B. *Dampert* and *Sheſton* Caſe. *Cro.* 3. Part, 520, 521.

2. Action the Caſe for words; That whereas J. S. was ſworn in the Leet *juratus*, a Leet holden in ſuch a Manor ſuch a day. The Defendant pleaded, That the Plaintiff the ſame day with others were ſworn before the Steward to preſent, &c. and they preſented, That ſuch a Ditch was not ſcowred *ad nocumentum*, &c. which was falſe, and ſo juſtifies; Upon which it was demurred. In this Caſe, It was the Opinion of the Court, That for that it is not alledged, That the Ditch was within the Leet; and if it be not, the Preſentment thereof is out of their Charge, therefore it is not perjury; wherefore it was adjudged for the Plaintiff. Mich. 39 Eliz. B. R. *Wild* and *Cockmans* Caſe. *Cro.* 3. Part, 402.

2. A.

3. A. was Plaintiff in a Bill in Chancery against B; the Lord-Keeper made an Order there, That one L. should be made a party to the Bill against B; and afterwards a Commission issued forth between L. and B. to examine Witnesses; upon which Bill the Defendant O. was examined *ex parte* L, and deposed directly for L. against B; Whereupon a Decree was made in Chancery against B, and thereupon B. brought an Action against O. upon the Statute of 5 Eliz. as a party grieved by the Oath and Deposition of O: Upon which O. demurred in Law. It was the Opinion of the Justices, That the Action did not lye in this Case: For the words of the Statute are, *Where a man is grieved and damnified by a Deposition in a Suit, between Party and Party*, &c. And in this Case L. was no party to the Suit, but came in later by an Order, and no Bill depending either against him or by him, so as he is out of the Statute; and the Statute being Penal, shall be taken strictly. Mich. 45 Eliz. B. R. *Brade* and *Ondres* Case. *Yelverton* 22.

4. Note; It was said by *Williams* Justice, That it was Resolved by all the Judges of *England* in one *Payne* Case, in the Star-Chamber, who was sued there for a Perjury in the Court of Requests upon his Deposition, in a Case there depending, where Conveyance, and title of Land, and Freehold came in Question. That such Perjury was not punishable, for that it is but a vain and idle Oath, and not a corrupt Oath, because the Court of Requests hath not to do, nor can examine Titles of Land which are Real, and do appertain to be discussed and determined in the Kings Court. Mich. 5 Jac. B. R. *Paynes* Case. *Yelverton* 111.

Pleas and *Pleadings*, and *Conusans* of *Pleas*.

H. Brought a Writ of Entry, in the Nature of an Assize, against the Mayor and Burgesses of the Borough of *Taston*, of Lands & Tenements within the Borough. The Attorney of the Mayor and Burgesses demanded Conusans of the Plea, and shewed their Charter to the Court, which is, *Quod nullus Burgensis, habitans, infra Burgum placit. vel implacit. de terris Tenementis tentallis, &c.* being within the same Borough elsewhere: It was the Opinion of the Court, That the whole Body of the Corporation being impleaded in this Action, could not have Conusans of this Plea; wherefore they were Ousted of the Conusans. Pasch. 3 Eliz. C. B. *Hanslop* and the Mayor and Burgesses of *Bastons* Case. 3 *Eliz.* 16.

2. H. an Attorney of the Common Pleas was impleaded by Bill there of an Assault and Battery made upon B. in the City of *Wells*. The Bishop of *Wells* by his Attorney demanded Conusans of Plea, and shewed the Charter of King E. 4. Of Conusans of all Pleas of Lands and Tenements in *Wells*, and also all personal Pleas of Debt, Trespass, &c. to the Bishop of *Bath* and *Wells* and their Successors; and also shewed the Patent of the Queen, of Confirmation of the said Patent made by King *Edward* the 4th; and a close Writ was directed to the Justices from the Queen, to permit him to enjoy his Liberties; and the Conusance was allowed of by the Court. Trin. 29 Eliz. C. B. *Bendlowes* 31.

3. Note; If an Act of Parliament give Power to any one to hold Conusance of Pleas within his Mannor, yet he shall hold no Plea therein any matter, in which himself is a party. Cro. 3. Part, 18. in Dr. *Bonhams* Case.

4. A Grant was made to the Mayor and Cominalty of *London*, That the Mayor for the time being should have *plenam et integram scrutinium, gubernationem, & correctionem omnium & singulorum mysteriorum*; without granting them any Court, in which there should be any legal proceeding: In this Case, It was Resolved, That the Grant was good for search, for which discovery might be made of Offenders, which might be punished by the Law in any Court; but the same did not give them any absolute or irregular power to correct or punish any of the Kings Subjects at their pleasures, as it was Resolved. Mich. 38 Eliz. In a *quo warranto*. The Mayor and Cominalty of *London's* Case. See *Cook* 8. Part, 118. Dr. *Bonham's* Case.

5. *Ejectione Firmæ* of a Messuage in *Oxon*; The Defendant pleaded, That he being a Scullar in *Oxford*, and a priviledged person, ought to be sued there before the Vice-Chancellor of *Oxon*, *secundum modum statutorum*, according to the Charter granted to the University, 3 H. 2. 14 H. 8. Confirmed 33 Eliz. and shewed, That they had Conusance of all Suits, Contracts, Covenants, Quarrels; except concerning Free-hold. And shewed an old Record, 22 E. 1. where a Plea of Covenant was in the Court of the Vice-Chancellor of the University of *Oxford*, by reason of a Covenant made before that time. And the Covenant

was

was, That they ſhould enjoy ſuch a houſe for a year: And becauſe the Court of Common Pleas granted a Prohibition to ſtay their proceedings in that Suit, this Charter being ſhewed, and it appearing in the Charter, That the Suit there was upon the Contract, and not *pro domibus*, a Conſultation in that Caſe was granted. But it was Reſolved, That in the Principal Caſe, No Conſultation ſhould be granted: For that, the Juſtices ſaid, That the Vice-Chancellor had not any Juriſdiction, nor might hold plea thereof, becauſe in the *Ejectione firmæ* he ſhall recover the poſſeſſion, and ſhall have an *Habere facias poſſeſſionem*, and thereby he who hath a Freehold may be put out of his poſſeſſion. And it was ſaid by the Juſtices, That this Caſe is not like to the Record ſhewed; For there it is only an Action of Covenant where damages only are to be recovered. Mich. 3 Car. C. B. *Cro.* 1. Part, 62. *Hilley's* Caſe.

6. Debt upon Obligation, the Caſe was, J. S. Sheriff of C. by vertue of an Attachment under the Privy Seal of the Court of Requeſts, Arreſted the Defendant; who for his Enlargement, made the Obligation, with Condition to attend before the Queens Councel attending in the Court of Requeſts at *Weſtm.* It was the Opinion of the Juſtices, That the proceſs was not any Warrant to the Sheriff to arreſt the body, nor to take the Obligation. For that, that Court hath not any ſuch power by any Commiſſion; by Statute, or by Common Law: Wherefore the Opinion of the Juſtices was, That the Obligation was taken by Dureſſe, and ſo avoidable. Trin. 40 Eliz. C. B. *Stepney* and *Lloyds* Caſe. *Cro.* 3. Part, 646.

7. Treſpaſs, *Quare pedibus ambulando et cum ſpadonibus, &c.* The Defendant juſtified, and ſhewed, That a Writ iſſued to the Sheriff of *Worceſter* to chooſe two Knights for the ſaid County to be at the Parliament: And that the next County Court for the ſaid County after the Receipt of the ſaid Writ, was holden at the Caſtle of *Worceſter*: And becauſe the ſaid Caſtle was too ſtreight, and not large enough for the receiving of the Freeholders aſſembled to make the ſaid Election. The ſaid County Court *debito modo* was adjourned from the ſaid Caſtle to the place where, &c. And the Defendant ſhewed, That he at the time of the ſaid Court holden and adjourned, was an Inhabitant in the County of *Worceſter*, ſeiſed of Freehold Lands of the value of, &c. and that his dwelling was diſtant from the place in which, ſix Miles. And that in obedience of the ſaid Writ and adjournment, he came *prædict. tempore quo* from his ſaid dwelling houſe to the place in which, riding upon his Gelding, one Servant waiting upon the Defendant riding upon another Gelding, to the end that he might give his voice for the Election of two Knights according to the command of the ſaid Writ. Upon Plea, the Plaintiff did demur in Law. And in this Caſe, it was Reſolved by the Court, theſe points following. 1. That the County Court as to the Election of Knights to the Parliament, is the Sheriffs Court, and the Sheriff is the Judg of it, and the adjournment of it his act; the Writ being in nature of a Special Commiſſion, (*Eligi facias*) although in all other Caſes the Suitors are the Judges there. 2. That if the Sheriff adjourn the Court to another place, and the Suiters do not attend, they are amerciable by the Sheriff. 3. That they by their attendance are not Treſpaſſors by reaſon of the neceſſity to make Election. 4. That if the Sheriff maliciouſly adjourn to an unfit place, as to a Field of Corn, &c. that an Action lyeth only againſt him, and not againſt the Freeholders. 5. That the Defendant living at ſuch diſtance from the place of adjournment, might come there on Horſeback. 6. That the Defendant being an Eſquire, might juſtify the comming thither with one Servant on Horſeback attending upon him. Hill. 13 and 14 Car. 2. C. B. Rot. 1884. *Lechmers* Caſe. I have thought fit to mention this Caſe, though not Printed, becauſe it ſhews the power and Conuſance of the Sheriff in the County Court, for Election of Knights to the Parliament.

8. Treſpaſs for entring his houſe, and cutting of ſix Poſts of it. The Defendant pleaded, That as to the breaking of the houſe, and all the Treſpaſs, except cutting of three Poſts of the ſaid houſe, Not Guilty; And as to the cutting of the three Poſts, That it was the Freehold of J. S. and that he by his command entred, and cut the ſaid Poſts, which is the ſame Treſpaſs. Exception was taken to it; For that the Defendant pleads as to all the houſe, Not Guilty; and afterwards juſtifieth as to the three Poſts, and ſo pleads Not Guilty to one thing, and juſtifies for the ſame thing, which is no good pleading. To that it was anſwered and Reſolved, That although the Defendant pleads Not Guilty generally to the whole houſe, yet he may after juſtify as to parcel, for he hath pleaded Not Guilty to all except this parcel. Hill. 30 El. B. R. *Higham* and *Reynolds* Caſe. *Cro.* 3. Part, 87.

9. In an Action upon the Caſe for words. At the *Niſi Prius*, the Defendant pleaded a Concord after the Darrein Continuance; Judgment *ſi* at Enqueſt. It was the Opinion of all the Juſtices, That it was no plea, but he ought to conclude Judgment *ſi actio &c.* and ſo in all Pleas pleaded ſince the Darrein Continuance. Then it was moved, That if Judgment ſhould be given upon this, or a new *Niſi Prius* granted: And upon a Deviſe of the Juſtices, Judgment was given for the Plaintiff, for it was a confeſſion of the matter in Iſſue.

Trin.

Trin. 28 Eliz. B. R. Sir *Tho. Cockain* and *Williams* Caſe. *Cro.* 3. Part, 49.

10. Treſpaſs for entring his houſe, and breaking up a Pack of Cloaths, and taking one Cloath out of it. Not Guilty to entring his houſe; and as to the Pack of Cloaths, he juſtifies; for that the Queen granted the Office of Alnage with the moyety of the profits of it to W. O. who by his Deed dated at ſuch a place, made him his Deputy, and becauſe the Defendant did offer to ſell this pack of Cloaths, not having the Alnage Seal to it, he ſeized it as forfeited. Divers Exceptions were to the Plea. 1. The Plaintiff declares of the breaking of a pack of Cloaths, and taking of one Cloath out of it: and he anſwers to the taking of the pack but not to the taking of one Cloath out of it, which is ſpecially mentioned. 2. He juſtifies by a Deputation from O. but ſheweth not that the Office was granted to him to exerciſe by Deputy, for this is an Office of Truſt, and otherwiſe he cannot make a Deputy. For theſe cauſes, the plea was holden inſufficient, and it was adjudged for the Plaintiff. Trin. 32 Eliz. B. R. *Watkins* and *Johns* Caſe. *Cro.* 3. Part, 187.

11. Treſpaſs of Aſſault and Battery and wounding. The Defendant ſaid, That he was Conſtable of D. and for ſuch a miſdemeanor of the Plaintiff, he layed his hands on him, and carried him to the Stocks *quæ eſt eadem Tranſgreſſio*. Upon demurrer it was adjudged for the Plaintiff; for the Defendant did not plead Not Guilty to the wounding, nor juſtified it. But if one pleads that the hurt which the Plaintiff had was of his own Aſſault, this is a good Plea and anſwer to all. Hill. 34 Eliz. B. R. *Pendlebury* and *Elmots* Caſe. *Cro.* 3. Part, 268.

12. Debt upon Obligation, Conditioned to perform all Covenants, Conditions, Articles, Agreements, and Clauſes in an Indenture. The Defendant pleads the Indenture, which was a Leaſe for years of certain Lands, and of a ſtock of Cattel to the Defendant, and one T. rendring 20 l. rent *per annum*, and all the Covenants and other Clauſes in it were concerning Land: And pleads, That before the Leſſor had any thing, One C. was ſeiſed in Fee, and acknowledged a Statute to J. S. and that after the Leaſe made, the Conuſee ſued Execution, and that all the Land was delivered in Execution; and that after the Indenture, until Execution, he and T. had perform'd all the Covenants, Conditions, Agreements, and Clauſes in the Indenture; upon which it was demurred, becauſe the Condition is firſt, If the Defendant and T. and their Aſſigns perform, and he pleads, That he and T. had performed, but ſaith not, That he and T. and their Aſſigns had performed. 2. The Condition is, Covenants, Conditions, Agreements and Articles, and leaveth out the word Articles. But it was Reſolved, The Exceptions were not good. The firſt is not material, for it appeareth not that there is any Aſſignee, and it ſhall not be intended, except it be ſpecially ſhewen, and a bar is good to a common intent. To the ſecond, Agreemenes is all one with Articles, and if many words contain one thing in ſignification, if he anſwereth to them in ſubſtance, it is ſufficient. Trin. 34 Eliz. B. R. *Elmott* and *Coles* Caſe. *Cro.* 3. Part, 255.

13. Error of a Judgment in L. in Debt upon Obligation. The Condition was for payment of 70 l. *ſcil.* 35 l. at one day in the Temple Church *London*, and 35 l. at another day. The Defendant pleaded payment of the 70 l. at L. *ſecundum formam & effectum Conditionis*. Upon Iſſue being found for the Plaintiff, and judgment, and Error brought, That he had alledged the payment of the 70 l. according to the Condition, whereas he ought to have pleaded ſeveral payments of 35 l. at each day, and not have coupled them together. 2. That the names of the Jurors did not appear of Record. But the Court held the plea good; For when he pleads payment *ſecundum formam Conditionis prædict.* this *reddendo ſingula ſingulis*, is as if he had pleaded, That he had payed them ſeverally at the ſeveral dayes. And to the ſecond, It was good enough, for that never appeareth where the Jury is full of the Principal Pannel. Trin. 34 Eliz. B. R. *Fox* and *Lees* Caſe. *Cro.* 3. Part, 281.

14. Debt upon an Obligation of 50 l. Conditioned, That if he from time to time ſerve the Cure at F. and not depart without Licenſe: And if he ſhould make ſuch a Leaſe of the Parſonage of K. as the Plaintiff ſhould require: and if he did not any Act by Reſignation or otherwiſe, whereby the Leaſe ſhould be void, that then, &c. The Defendant pleaded, That the Rectory of K. was a Benefice with Cure, whereof he was Parſon. And further recites the Statute of 13 Eliz. That no Leaſe of any Benefice with Cure ſhould continue longer then the Parſon ſhould be reſident upon his Benefice, without abſence for 80 dayes. And further recites the Statute of 14 Eliz. That all Bonds made to permit any to enjoy any Leaſe, ſhall be of ſuch effect as the Leaſe; and alledgeth, That the Bond was made for the enjoyment of that Leaſe. It was Reſolved in this Caſe, That the Plea was inſufficient for two Cauſes. Firſt, Becauſe the Statute is miſ-recited. But 2. For that it is not alledged, That he was abſent; for otherwiſe, neither the Leaſe, nor the Bond be void; wherefore it was adjudged for the Plaintiff. Mich. 39 Eliz. B. R. The Earl of *Lincoln* and *Hoskins* Caſe. *Cro.* 3. Part, 490.

15. Debt upon Obligation, the Condition was, Whereas E. T. had bargained and ſold to the Plaintiff a Cloſe of Paſture, called O. And whereas the ſaid E. T. hath by Indenture already Mortgaged to J. S. divers Lands in G. whereby the Cloſe of Paſture above mentioned, is either Mortgaged, or ſuppoſed to be Mortgaged upon Condition for the payment of mony at a day to come. If therefore the ſaid Cloſe of Paſture at the day mentioned in the ſaid Indenture of Mortgage be redeemed and ſet free from all Incumbrances and Titles by reaſon of the ſaid Mortgage, That then, &c. The Defendant pleaded in bar, That the Cloſe mentioned in the Condition was not Mortgaged to J. S. and ſaith, That the ſaid Cloſe was *redempt. liberat. et exonerat. &c.* The Plaintiff replyed, That the Cloſe was Mortgaged to J. S. which upon Iſſue joyned, was found for the Plaintiff. It was in ſtay of Judgment ſaid, That the Replication was not good: For the Plaintiff ought to have replyed, That it was Mortgaged to J. S. and not redeemed. But the Opinion of the Court was, That the Replication was good, becauſe the Mortgage is ſuppoſed to be made between a ſtranger and the Defendant, to which the Plaintiff is not Privy: and therefore he ſhall never ſpeak of any Redemption, for by Preſumption he cannot have notice of any Act done between the Defendant and J. S. a ſtranger. Mich. 34 Eliz. B. R. *Yelverton* 25.

16. Appeal brought in B. R. by Original of a Murder in *Sandwich* in the County of *Kent*. The Original was directed to the Sheriff of *Kent*, who brought in the Defendant upon a *Capi Corpus*. The Defendant pleaded, That *Sandwich*, within which the Murder is ſuppoſed, is parcel of the Cinque Ports, *ubi brev. Regis non currit, qui quidem Portus de* Sandwich *non eſt in Com. Kanciæ*. And demanded Judgment of the Writ, and pleaded over to the Felony. It was adjudged by the whole Court, That the Plea was not good: For although that the Cinque Ports have divers great Liberties, yet the reaſon of the Grant of the Liberties, was for the eaſe and benefit of the Inhabitants, and not to their prejudice. 2. Here the Defendant having done the Murder within the Cinque Ports, and flying out of them; if the pleading in this Caſe ſhould be good, there ſhould be a failer of Juſtice, for thoſe of the Cinque Ports cannot try him, becauſe he is not there. But it was ſaid, That if the Defendant had ſhewed, That at the time of the Murder ſuppoſed, and ever after, he had bin Inhabitant and Commorant within the Cinque Ports, by which, by his Plea, he had given Juriſdiction to the Court there, and they as Judges, That the Defendant, if he was guilty, might receive a ſatisfactory Judgment, *viz.* by death, then the Plea had bin good: but the Defendant hath not ſhewed any ſuch thing, by which it appeareth that the Court had Juriſdiction: therefore it was adjudged, That the Plea was not good. Mich. 44 Eliz. B. R. *Criſpe* and *Virells* Caſe. *Yelverton* 12, 13.

17. Debt upon an Obligation; Judgment *pro Quer.* and Error brought and aſſigned, That there was no Declaration; For it was R. H. *Queritur de H. F. de placito quod reddat ei* 20 l. *quas ei debet et injuſte detinet. et unde idem quer. per M. Attornatum ſuum*, becauſe it wanted the word (*dicit*) and the ſenſe is imperfect. It was objected, the (*quer.*) being Writ ſhort, ſhall be taken *Queritur*, which is as much as *dicit*; but that being (*idem Queritur*) is as incertain as the firſt, becauſe the *Idem* refers no more to the Plaintiff then to the Defendant, and it ſhall be taken rather to refer to the Defendant, *quia proximè antecedens*; therefore matter of ſubſtance wanting, the Declaration was not good, and ſo adjudged, and the Judgment reverſed. Mich. 5 Jac. B. R. *Field* and *Hunts* Caſe. *Yelverton* 103.

18. Debt by an Executor for Arrearages of Rent, aſwell Copyholds as Freehold Rents belonging to the Mannor of D. whereof the Teſtator was ſeiſed, and the Rents not payed in the life of the Teſtator. It was Reſolved in this Caſe, The Action being brought upon the Statute of 32 H. 8. of Rents, That for the Arrearages of the Copyhold Rents, the Action did not lye. And 2. It did not lye in this Caſe for the Freehold Rents, becauſe the Plaintiff hath not declared, That the Defendant attorned to the Teſtator in his life time. And it was ſaid, That although in pleading it is good to alledg a Feoffment of a Mannor, without alledging a Livery, or Attornment of the Tenants; yet when the Rent of any Freeholder comes in debate, the Owner of the Mannor, or his Executor who demands it, ought to convey privity between the Tenant and the Lord, which ought to be by Attornment, for that the Rents and Services do not veſt without Attornment. Mich. 6 Jac. B. R. *Appleton* and *Daily's* Caſe. *Yelverton* 135.

19. Treſpaſs for entring his Cloſe, and ſpoiling his graſs with Cattel. The Defendant pleaded, That the Freehold *tempore quo* was in J. S. and he as his Servant put in the Cattel. The Plaintiff ſaid, True it is, that the Freehold was in J. S. but long before, &c. the ſaid J. S. lett the Cloſe to the Plaintiff at Will, for which he entred and was poſſeſſed till the Defendant did the Treſpaſs *abſq; hoc*, that the Defendant by the command of J. S. entred, and put in the Cattel. Upon which, the Defendant demurred. It was adjudged againſt the Plaintiff becauſe his Replication was not good, becauſe

becauſe being by way of Title, he doth not entitle himſelf to any good Leaſe at Will; for that he doth not alledg any Seiſin or poſſeſſion in J. S. out of which the Leaſe at Will might be derived. And here the Defendant having made a good Juſtification in Law, the ſame ought to be anſwered by the Plaintiff by a good Title, *viz.* That J. S. was ſeiſed, and leaſed to him at Will. Mich. 6 Jac. B. R. *Witham* and *Barkers* Caſe. *Yelverton* 146, 147.

20. Treſpaſs of Battery ſuch a day; The Defendant pleaded, That *tempore quo, &c.* he was ſeiſed of ſuch a Rectory in Fee, and that the Corn was ſevered from the 9 parts, and that the Plaintiff came to carry away the Corn, and the Defendant in defence of his Corn, and to keep the Plaintiff from taking of it, ſtood there to defend it; and if any hurt came to the Plaintiff, it was of his own wrong. The Plaintiff replyed *de injuria ſua propria abſque tali cauſa*; upon which the Defendant demurred. In this Caſe, it was adjudged for the Plaintiff, becauſe the Plaintiff by his Action doth not claim any thing in the ſoil or Corn, but only damages for the battery, which is meer Collateral to the Title. But where the Plaintiff makes Title by his Declaration to any thing, and the Defendant will plead another thing in deſtruction of it, or of the Plaintiffs Action, there the Plaintiff ought to reply ſpecially, and ſhall not plead generally *abſque tali cauſa*. It was adjudged for the Plaintiff. Trin. 7 Jac. B. R. *Taylor* and *Markhams* Caſe. *Yelv.* 157.

21. *Ejectione firmæ*, the Plaintiff declared of a Leaſe made by one C. 6. *Maii*, 7 Jac. of a Meſſuage in D. and that he entred and was poſſeſſed *quouſque poſtea*, ſcil. 18 *die ejuſdem Menſis Maii, anno ſexto ſupradict.* the Defendant did eject him. It was ſaid the Declaration was inſufficient, for that the Action is grounded upon two things, the Leaſe, and the Ejectment; and the Ejectment is ſuppoſed before the Leaſe; and ſo it was objected it was adjudged in the very like Caſe, *ſcil.* Ter. Paſc. 7 Jac. *Powre* and *Hawkins* Caſe. Notwithſtanding which, the Court was of Opinion, That the Declaration was good, for the day of Ejectment being 18 *ejuſdem Menſis*, cannot be intended but to be the ſame year in which the Leaſe is ſuppoſed to be made. Mich. 8 Jac. B. R. *Davis* and *Pardy's* Caſe. *Yelv.* 182.

22. Treſpaſs for chaſing his Cattel at B. The Defendant juſtified in a Cloſe called M. in S. which is his Freehold Damage feaſants. The Plaintiff replyed, That J. S. was ſeiſed of a Cloſe called C. in D. in Fee, and let the ſame to the Plaintiff for years; and that the Defendant was ſeiſed of another Cloſe called F. in Fee, which lay *contigue* the Cloſe of C. and that the Defendant and all thoſe whoſe Eſtate he had in F. Cloſe, had uſed time out of mind, &c. to repair the Fence and Hedges betwixt the ſaid Cloſes, next adjoyning to the ſaid Cloſe called M. where the Chaſing was, and that the Plaintiff put his Cattel in C. Cloſe, which by default of Incloſure of F. Cloſe, eſcaped into it, and from thence to M. Cloſe. The Defendant rejoyned, and confeſſed the Seiſin of both parties *ut ſupra*. But ſaid, between the Cloſes of C. and F. there was a Brook adjoyning to the ſides of each of the ſaid Cloſes, which had Banks, and that the Leſſor of the Plaintiff and his Anceſtors time out of mind, had uſed to repair the Bank of the Brook on the Cloſe ſide; and becauſe the Plaintiff had not repaired it, his Beaſts eſcaped into the Defendants Cloſe, and from thence into M. Cloſe; and that the Defendant chaſed them, &c. as was lawfull for him to do; upon which the Plaintiff demurred. In this Caſe, It was adjudged for the Plaintiff, becauſe the Defendants Rejoynder doth not confeſs and avoid the Replication, but perplex the matter, by adding a point of Preſcription on the Plaintiffs part, that he ought to repair the bank between C. and F. Cloſe, upon which Iſſue cannot be taken, for that then two Preſcriptions ſhould be in Iſſue together, which cannot be. Alſo the matter in the Rejoynder doth not anſwer the matter in the Replication, but only by way of Argument, and if it be true, it is good matter in Evidence againſt the Plaintiff. But the Defendant in this Caſe ought to have traverſed the Preſcription alledged by the Plaintiff, and that had ended the whole matter. It was adjudged for the Plaintiff. Hill. 9 Jac. B. R. *Durrant* and *Childs* Caſe. *Yelv.* 217.

23. Debt upon a Leaſe for years of Lands in E. rendring rent. The Defendant pleaded, That *tempore quo*, the Plaintiff *nihil habuit in Tenementis prædict. unde dimiſſionem prædict. facere potuit.* The Plaintiff replyed *Quod tempore dimiſſionis habuit bonum & ſufficient. ſtatum, in Tenementis prædict. unde, &c.* being found for the Plaintiff, and Judgment. Error brought, and aſſigned the defect in the Replication, for that the Plaintiff ought to have ſhewed in ſpecial what Eſtate he had in the Tenements, ſo as it might appear to the Court, That he had a ſufficient Eſtate to make the Leaſe; and ſuch was the Opinion of the Court: and yet the Court held, That this defect was helped by the Statute of Jeofails; for although the Iſſue was not ſo formally joyned as it ought to have been: Yet it is found, That the Plaintiff had an Eſtate in the Land, whereof he might make the Leaſe. Hill. 10 Jac. B. R. *Glaſs's* Caſe. *Yelverton* 227.

24. Debt upon Obligation to perform Covenants in an Indenture. There was a Covenant,

the Defendant ought to do ſuch acts, things, &c. as the Plaintiff or his Councel ſhould adviſe for the better aſſuring of certain Lands to the Plaintiff. And ſaid, that the Counſellor adviſed him to have a Fine. Upon which it was demurred. It was the opinion of the Court, That it ought to have been pleaded, That a Writ of Covenant was ſhewed forth; and the Tender of the Note of the Fine is not ſufficient: But the breach of the Covenant ought to be layed after the *Dedimus poteſtatem* ſued by the Plaintiff. Tr. 4 Car. C. B. *Newton* and *Suttons* Caſe. *Hetley*. 105.

25 *Aſſumpſit* for 34 l. which accrued by ſeveral promiſes. 1. That one was endebted unto him in 12 l. and that he would truſt him more; the Defendant came and prayed the Plaintiff to truſt him, and if he would, he would pay him the old Debt; and, whatſoever ſhould be in arreare more, if it did not exceed 100 l. he would pay; and ſhewed, that afterwards he ſold him divers peeces of fleſh at reaſonable rates, and that he lent him 3 l. and then he came and requeſted him to pay him the whole 3 l. but he would not pay the 19 l. for the Fleſh; nor the 12 l. Upon *Non Aſſumpſit* it was found for the Plaintiff; becauſe he doth not alledge before, that the Fleſh that he ſold amounted to the price of 19 l. And alſo becauſe he makes but one Requeſt for the ſeveral Debts, whereas there ought to be ſeveral Requeſts. But the Court held, it had enough: for the firſt, becauſe he refuſed to pay the 19 l. *pro precio*, &c. but it had been better, if it had been alledged that the Fleſh did come to a price: but for the demand, it was the opinion of the Court, that it was ſufficiently made. Paſc. 4. Car. C. B. *Gammon* and *Malbarns* Caſe. *Hetley*. 34.

26 Note. If a man be bound to give to me all the money in his purſe, or to enfeoffe me of all his Lands; He cannot plead, that he hath given to me all the mony, or Land; but he ought to ſhew in certain, what Land or money he had; and that he hath given the ſame to me. Hill. 22 Jac. B. R. *Wilkinſon's* Caſe. *Latch* 16.

27 In *Ejectione firme* the Defendant imparled, and afterwards pleaded that the Land was Antient *Demeſne*; and ſo demanded Judgment if Action. Upon which the Plaintiff demurred; It was ſaid firſt that a man cannot plead ancient Demeſne after imparlaus, and it was adjudged: Paſc. 4. Jac. B. R. *Clark* and *Hamſtons* Caſe. *Dodd.* ſeemed *Contr.* Quære, for the Caſe is not adjudged. Hill. 22 Jac. B. R. *Marſhall* and *Allens* Caſe. *Latch* 83.

28 Action upon the Caſe the Plaintiff declared, That he was ſeiſed in his Demeſne as of Fee of a Houſe and Meadow, and that he and all thoſe whoſe Eſtate, &c. time out of minde have had a way from his Houſe and Meadow, and a way from his Houſe over the Kings high way, adjoyning to the Houſe, and then to ſuch a Cloſe; The Defendant pleaded, that he held the Cloſe free from ſuch a way, and traverſed that the Plaintiff had not a way there which was found againſt him: In Arreſt of Judgment, divers things were moved, 1. That he doth not ſhew that it was an ancient Houſe. 2. Becauſe he ſhewes not where the High way is, or whither it leads to: It was the opinion of the Court, that the Declaration might have by a better. The matter is, if the Verdict hath made it good: which they conceived it had done; and Judgment was given for the Plaintiff. Hill. 20 Jac. B. R. *Harriſon* and *Pecks* Caſe. *Latch* 110.

29 *Replevin*: Defendant avoweth, That the Dean and Chapter of *Weſtminſter* were ſeiſed *in jure Collegii* (but did not ſhew of what Eſtate) and Leaſed for 99 years to one W; who let part of the Terme to the Plaintiff, rendring Rent. W. made his Wife his Executrix and dyed: ſhe for Rent behind after his death, avowed. Upon which the Plaintiff demurred generally. 1. Becauſe not ſhewed of what Eſtate the Dean and Chapter was ſeiſed, for they might be ſeiſed but for the life of another, and then the ſame ought to be ſhewed. It was the opinion of the whole Court, that the pleading was not good; but if it had been pleaded, That the Dean and Chapter was ſeiſed *in jure Collegii*, to them and their Succeſſors: there it ſhall be intended, that they were ſeiſed of an Eſtate in Fee: It was adjudged againſt the Avowant. Trin. 22 Jac. B. R. *Wood* and *Newmans* Caſe. *Latch* 121.

30 Treſpas for taking a Load of Fitches: Defendant ſaid, that part grew upon White Acre, and part upon Black Acre, and derived a Title to J. S. to the Fitches in Black Acre: and to P. in the right of part U. his Wife; and juſtified the taking of the load by the Command of P. and U. his Wife. To which the Plaintiff made an ill Replication, upon which the Defendant demurred: becauſe a Gentleman cannot have a Lady to his Wife; But the Court ſaid, That that was a good Exception to the Writ, but not here. 2. Becauſe he did not ſhew how many Fitches grew upon the Land of J. S. and how many upon the Land of P. and his Wife; and that was allowed for a good Exception by the Court: and a Rule for Judgment given *niſi*. &c. Trin. 1 Car. B. R. *Sherwoods* Caſe. *Latch* 174.

31. Action upon the Caſe upon ſeveral Aſſumpſits of 9. particular ſums; which ſeverall ſums *attingunt* to 52 l. which was more then in truth

with the total ſum was. Upon the general Iſſue, it was found for the Plaintiff. But the Jury found but 40 l. damages, which was leſſe then all the particular ſums. Alſo the Requeſt was alledged, *Quod Licet ſæpius requiſitus, non ſolvit* the 52 l: It was the Opinion of the Court, That the ſumming of the particulars was but Surpluſage; and that the Requeſt was not neceſſary: but if the Requeſt had been neceſſary, then the Declaration had not been good. Mich. 2 Car. B. R. *Risby* and *Hynes* Caſe, *Latch.* 175.

32. Debt upon a Leaſe for years, to begin *in futuro*; *virtute cujus* the Leſſee entred, and the Leaſe was, rendring Rent. It was ſaid, That the Declaration was not good, becauſe it is not ſhewed, when the Defendant entred: and therefore it ſhall be taken ſtrong againſt him, that the Leſſee entred before the Leaſe began. But it was the Opinion of the Court, That that cannot be intended, becauſe it is, *virtute cujus* the Leſſee entred; and he cannot enter by virtue of the Deniſe, but after the day. And a difference was taken between *Ejectione Firme*, and Action of Debt; becauſe *Ejectione Firme* is not maintainable but upon a poſſeſſion of the Leſſee: But debt lyeth againſt him upon the privity of Contract. It was adjudged for the Plaintiff. Paſch. 2 Car. B. R. *Green* and *Moody's* Caſe. *Latch*, 196.

33. Error of a Judgment in Action upon the Caſe. The Caſe was; A. brought debt againſt B; and J. S. promiſed to A, That if he would forbear to ſue B, that he would pay him 200 l. at the Feaſt of St. B. next, and another 100 l. at any time after the ſaid Feaſt when he ſhould be reaſonably required. The Plaintiff alledged a failer of the payment of the 100 l. *Licet poſtea, viz.* 18 *October* ſuch a year; which was in truth before the day of payment. In this Caſe it was agreed by the Court, 1. That the Requeſt was iſſuable, and ought to be ſpecially ſhewed, and certainly alledged, becauſe there was no duty before being upon a promiſe of a ſtranger: but if it had been upon a promiſe of the party himſelf indebted, There, *Licet ſæpius Requiſitus* had been ſufficient. 2. That in this Caſe, the (*videlicet*) was meerly void; for that it was contrary to the premiſſes. The Judgment was affirmed. Mich. 2 Car. B. R. *Alcock* and *Blofields* Caſe. *Latch*, 209.

See more, in Title, *Declarations.*

Preſcription.

1. TReſpaſſe, for breaking of his Cloſe; The Defendant juſtified, to have a Way by *Preſcription* over the Land in which, &c. for carrying of ſuch Tythes, *uſq; ad Rectoriam de D*, from ſuch a place. It was holden by the whole Court, That the Plea was not good; For in pleading ſuch a Way, there ought to be ſet forth, *Terminus à quo ad quem*: And this Rectory which ought to be *Terminus ad quem*, is uncertain; For a Rectory is ſuch a thing as conſiſts of Glebe Tythes, &c. Afterwards it was ſhewed, That the Rectory did conſiſt but of Tythes, ſo there was not any place certain as Parſonage-Houſe, Barn, &c. to which the Tythes have uſually been carried; for the Tythes have uſually been lett to Farm to divers perſons, who have carried ſuch Tythes to their own Houſes, and the Defendant is one of the Farmers of the Tythes. The Court upon that directed how the Plea ſhould be; *viz.* That J. S. is ſeiſed in Fee of the Rectory of D; and that time out of mind hee, and all thoſe, &c. have uſed for them and theirs, to have a Way to carry their Tythes from ſuch a place over the Land where, &c. unto ſuch a High-Way, and name it; which is the next to the place where the Treſpaſs is done. And the Defendant pleaded, according to ſuch direction of the Court. Mich. 20 Eliz. B. R. *Leon.* 2. Part, 10.

2. A Parſon did Libell in the Spiritual Court againſt a Pariſhioner for Tythes of [illegible] Lands within his Pariſh. The Defendant ſ[illegible]d, That he and all thoſe whoſe Eſtate he hath in the Lands out of which the Tythes are demanded, Have uſed to pay every year 5 s. to the Clerk of the ſame Pariſh, for all the Tythes out of the ſame place. It was ſaid, That the *Preſcription* was not good; For a Pariſh-Clerk is not a perſon incorporate, nor hath Succeſſion: but if they had preſcribed to have uſed to pay to the Pariſh-Clerk to the uſe of the Parſon, there perhaps it might be good. In this Caſe, It was agreed by the Court, That of Common Right the Parſon is not bound to find the Pariſh-Clark. But if the Parſon be tyed to find ſuch a Clark, and ſuch a ſum of money hath been uſed to be paid to the Pariſh-Clark in diſcharge of the Parſon and Tythes, the ſame had been a good *Preſcription*, and ſo by way of Compoſition good. But the Court held, That

That Tythes were to be paid to Spiritual perſons, and a Pariſh Clark is but a Lay-man, and therefore no Prohibition would lye, and a Conſultation was awarded. Mich 3 Eliz. B. R. *Sewell* and *Woods* Caſe. *Cro.* 3. Part, 71.

3. Treſpaſſe; The Defendant Juſtified as in his Freehold. The Plaintiff ſaid, That the Land was parcell of the Mannor of D, demiſeable time whereof,&c. by Copy in Fee, in tail, for life or Lives; and that this Land was lett to him by Copy in Fee; and the *Preſcription* was traverſed: and found, that it had been demiſed and demiſeable time out of mind,&c. in Fee, but never in tail; and that it was granted to the Plaintiff in Fee. It was holden by the Court, That it was found for the Plaintiff; For the alledging, that it had been conveyed in Fee, or in tail, was but Conveyance to his Title: and for that it was found it was demiſeable in Fee, and demiſed to him in Fee, it is the effect and ſubſtance of his Title, which is found for him. It was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Doyle* and *Woods* Caſe. *Cro.* 3. Part, 431.

4. Treſpaſſe, for carrying away 30 Load of Clay in B. Green, digged there for the Plaintiff. The Defendant pleaded, That he is Tenant and Inhabitant of B, whereof the place is parcell; and that there is a Cuſtome there, That every Tenant and Inhabitant there may digg and Convey away Clay in B. Green for his neceſſary uſe; and that the Plaintiff not being a Tenant, had digged the Clay, and laid it upon the Land, and that he took it for his neceſſary uſe. Upon which, it was Demurred. The Court was of Opinion, That the Juſtification was not good; For by the Preſcription, it appears, That the Tenant might dig: then he can have but what he himſelf digges, and not that which is digged by a ſtranger; who peradventure [illegible]d digg it lawfully, by the Lords Licence. [illegible] was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Stile* and *Batts* Caſe. *Cro.* 3. Part, 434.

5. *Replevin*; The Defendant avowed for Damage-Feaſants. The Plaintiff Juſtified, For that he had a Cloſe adjoyning to the Defendant's Cloſe, and that the Defendant and all the Occupiers of the ſaid Cloſe, time whereof, &c. had uſed to make the Fences between the ſaid Cloſes; and for want of Fencing, his Beaſts eſcaped,&c. Iſſue was upon the Preſcription, and found for the Avowant. In Arreſt of Judgment, it was moved, That the Preſcription, [That every Occupier] was too general; for that it might extend to Tenant at Will, Sufferance, Diſſeiſor,&c. for they are all Occupiers. It was agreed by the whole Court, That the Preſcription was not good; but it ought to have been, That he and all thoſe whoſe Eſtate, &c. But ſuch a Preſcription to pay ſo much in diſcharge of Tythes by the Occupiers of Lands, hath been allowed to be good, for that goes in diſcharge and benefit of the Land; and Tythes ariſe by the Occupying of the Land. But becauſe a Verdict in the Principal Caſe was found upon this Preſcription, it was holden, The ſame was not any good Cauſe to ſtay Judgment; but the ſame was helped by the Statute of *Jeofails*. Mich. 38 Eliz. C. B. *Anſty* and *Lenrknors* Caſe. *Cro.* 3. Part, 445.

6. *Preſcription* by a Pariſhioner, to pay the 10 part of Corn *modo Decimand.* for the Hay alſo that growes upon the Head-Lands, is not good, becauſe the 10 h part is due for the Corn. But ſuch a *Preſcription* for the Corn and after-Rakings, is good with an averment, That they are *Spontanea voluntaria*: So *Preſcription* of the 10th part of Hay and After-graſſe. Mich. 38 Eliz. *Bayard* and *Adams* Caſe; Where it was holden, That ſuch a *Preſcription* as in the firſt Caſe, was adjudged good. But note; That in the Principal Caſe, Judgment was given againſt the party, for that he had not well pleaded the *Preſcription*. Mich. 2 Jac. B. R. *Parcy* and *Chauceys* Caſe. *Noy*, 15.

7. *Replevin*, The Defendants juſtified the taking as Bayliff to the Lord G, for an Amercement at the Court-Baron, of one that was Tenant of the Mannor, for three ſeveral defaults; one, 2 s. The ſecond, 20 s: The third, 40 s. Exception was taken to the Avowry; for that he pleads the Lord G. had a Mannor, and that he had uſed time out of mind to keep a Court-Baron; and ſo preſcribes to have a Court-Baron, the which is a thing incident to every Mannor of Common right. 2. He preſcribes to diſtrain for the Amercement in any place within the Mannor, although it be out of the Tenancy of him who offended. 3. He preſcribes to hold a Court-Baron before the Steward; which is not good. All the Juſtices agreed to the firſt Exception; For a man ſhall not preſcribe in that which the Law of Common Right gives. 2. It was Obſerved, That the Amercement was grievous, which ſhould be *ſecundum quantitatem delicti*. And it was alſo agreed, That the Beaſts of ſtrangers found upon the Land, cannot be diſtrained for Amercements, as they may be for Rents and Services. To the third Point, It was ſaid, That ſometimes Pleas are holden before the Suitors and Bayliffs of the Lord; but that is intended with this difference, *viz.* When it is held *per Breve*, it is *Coram Ball. & Sectatoribus*: But when it is without a Writ, it is *Coram Sectatoribus* only. Judgment was entred for the Plaintiff. Hill. 35 Eliz. *Pell* and *Towns* Caſe, *Noy*, 20.

8. Not

8. Note, It was agreed by the Court, That the Court of Chancery may be by Preſcription, as the Counties Palatine, and the Mayor's Court of *London*, which is called the *Mark-Court*, becauſe the Mayor may mark any Cauſe in the Sheriffs Court before Judgment, although it be after Verdict, and may examine it. But the Court of Chancery or Equity cannot here by the Kings Grant, becauſe it took its birth-right from the Subject. See *Andrews* and *Webbs* Caſe. *Noy*, 147.

9. The Parties were at Iſſue upon a Preſcription, to have Common in certain Lands called H. in the County of W: It was holden by the whole Court, and delivered to be their Opinion to the Jury, That where one preſcribes to have Common Appurtenant to his own Houſe, and 20 Acres of Lands; and upon Evidence it appears, That he hath but 18 Acres, or a leſs number, yet he hath not failed of his Preſcription: But if he had 20 Acres, and 10 Acres are Freehold, and the other Copy; there he fails of his Preſcription, for he cannot make one Preſcription for both. So it is, If it appears upon the Evidence, that part of the Lands was 100 years paſt Copyhold, and now is Free-hold; he fails in his Preſcription. Mich. 34 Eliz. B. R. *Gregory* and *Hills* Caſe. *Cro.* 3. Part, 531.

10. Treſpaſs; The Defendant preſcribeth to have Common, the Jury found the Defendant had Common there by Preſcription *prout*, paying for it every year 1 d. to the Plaintiff: It was Objected, That he had failed of his Preſcription, which ought to be alledged entirely. But it was anſwered, That he had alledged of the Preſcription, as much as did ſerve for his turn; and the Non-payment of the 1 d. ſhall be ſhewed on the other part, and the not alledging thereof is not materiall. See *Grays* Caſe. *Crook* 5. Part, 79. Then it was moved, Whether the paying of this 1 d. be a Condition precedent or ſubſequent? It was Opinion of the Court, That if it be a Condition, it is a Condition ſubſequent, and need not be ſhewed, no more then where an Annuity is granted *pro conſilio impendendo*: It needed not be ſhewed, that he gave Counſel, as it was adjudged in *Poultrells* Caſe in this Court. And it was the Opinion of the Court in the principal Caſe, That the Verdict was found for the Plaintiff. Hill. 39 Eliz. C. B. *Lovelace* and *Reynolds* Caſe. *Cro.* 3. Part, 546. 563.

11. A Prohibition for Tythes of Wood, and ſurmiſed, That in the Pariſh is a Cuſtom, That all the Parſons of the ſaid Church, time out of mind, &c. *habuerunt et gaviſi fuerunt* ſuch Land parcel of the Mannor of F, in recompence of all Tythe-Wood within the ſaid Pariſh, upon which it was demurred: It was the Opinion of all the Juſtices, That the Preſcription was good; and although it was Objected, That it is not averred that the Lands are parcel of the Mannor; and then it cannot be ſaid to be a Recompence for all the Land within the Mannor. Yet it was anſwered and ſaid, That it may be, That at the Bargaining all the Land within the Pariſh was parcell of the Mannor, and then this allowance of the Profits of this Land was allotted in diſcharge of all the Tythes of all the Wood within the ſame Pariſh; It was adjudged for the Plaintiff. Mich. 40 Eliz. B. R. *Somerton* and Dr. *Cottons* Caſe. *Cro.* 3. Part, 587.

12. The Lord of the Mannor of B, in the Pariſh of D, preſcribes, That he and his Anceſtors, and all thoſe whoſe Eſtate, &c. had uſed from time to time whereof, &c. and to pay the Parſon of D, the now Plaintiff, and his Predeceſſors 6 l. for all manner of Tythes growing within the ſaid Pariſh; and that by reaſon thereof, he and all thoſe whoſe, &c. Lords of the ſaid Mannor had uſed time whereof, &c. to have *decimam gerbam, ſive decimum cumulum garbarum* of all his Tenements within the ſaid Mannor. It was the Opinion of the Juſtices, That it was a good Preſcription, and that a *Modus decimandi*, by the Lord for himſelf, and all the Tenants of his Mannor from barring the Parſon to demand Tythes in kind is good, for that it might have a lawful beginning. 2. Reſolved, That it was a good Preſcription to have the tenth Shock; for he hath it as a profit appurtenant to his Mannor, and not as Tythes. 3. It was Reſolved in this Caſe, That if the Queen was Lady of a Mannor, ſhe might preſcribe to have Tythes, for that ſhe is capable of them, although they be Spiritual; and ſhe is *mixta perſona, et capax Civitatis juriſdictionis*. Mich. 40 Eliz. B. R. *Piggot* and *Heaths* Caſe. *Cro.* 3. Part, 599. See Trin. 41 Eliz. *Piggot* and *Simpſons* Caſe. *Cro.* 3. Part, 763. acc.

13. In Avowry for Rent, the Caſe was: J. S. was ſeiſed of the Rent in Fee, and preſcribed, That he and all his Anceſtors had uſed to diſtrein for the Rent in this Land; and ſo preſcribes in the Diſtreſs, and not in the Rent it ſelf; and it was the Opinion of the Juſtices in this Caſe, That the Avowry was not good: For the Preſcription ought to have been in the Rent, and it was cited to have been adjudged, 14 Eliz. That the Preſcription in the Diſtreſs was not good. Paſch. 41 Eliz. C. B. *Stephen* and *Lewis* Caſe. *Cro.* 3. Part. 673.

14. For a Prohibition; It was ſurmiſed, That the Biſhop of *Winton* was ſeiſed in Fee of the Mannor of D, whereof the Plaintiff is a Copyholder, and that he and his Predeceſſors time whereof, &c. had

That Tythes were to be paid to Spiritual perſons, and a Parish Clark is but a Lay-man, and therefore no Prohibition would lye, and a Conſultation was awarded. Mich 3 Eliz. B. R. *Sevell* and *Woods* Caſe. *Cro.* 3. Part, 71.

3. Treſpaſſe; The Defendant Juſtified as in his Freehold. The Plaintiff ſaid, That the Land was parcell of the Mannor of D, demiſeable time whereof, &c. by Copy in Fee, in tail, for life or Lives; and that this Land was lett to him by Copy in Fee; and the *Preſcription* was traverſed: and found, that it had been demiſed and demiſeable time out of mind, &c. in Fee, but never in tail; and that it was granted to the Plaintiff in Fee. It was holden by the Court, That it was found for the Plaintiff; For the alledging, that it had been conveyed in Fee, or in tail, was but Conveyance to his Title: and for that it was found it was demiſeable in Fee, and demiſed to him in Fee, it is the effect and ſubſtance of his Title, which is found for him. It was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Doyle* and *Woods* Caſe. *Cro.* 3. Part, 431.

4. Treſpaſſe, for carrying away 30 Load of Clay in B. Green, digged there for the Plaintiff. The Defendant pleaded, That he is Tenant and Inhabitant of B, whereof the place is parcell; and that there is a Cuſtome there, That every Tenant and Inhabitant there may digg and Convey away Clay in B. Green for his neceſſary uſe; and that the Plaintiff not being a Tenant, had digged the Clay, and laid it upon the Land, and that he took it for his neceſſary uſe. Upon which, it was Demurred. The Court was of Opinion, That the Juſtification was not good; For by the Preſcription, it appears, That the Tenant might dig: then he can have but what he himſelf digs, and not that which is digged by a ſtranger; who peradventure did digg it lawfully, by the Lords Licence. [redacted] was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Stile* and *Batts* Caſe. *Cro.* 3. Part, 434.

5. *Replevin*; The Defendant avowed for Damage-Feaſants. The Plaintiff Juſtified, For that he had a Cloſe adjoyning to the Defendant's Cloſe, and that the Defendant and all the Occupiers of the ſaid Cloſe, time whereof, &c. had uſed to make the Fences between the ſaid Cloſes; and for want of Fencing, his Beaſts eſcaped, &c. Iſſue was upon the Preſcription, and found for the Avowant. In Arreſt of Judgment, it was moved, That the Preſcription, [That every Occupier] was too general; for that it might extend to Tenant at Will, Sufferance, Diſſeiſor, &c. for they are all Occupiers. It was agreed by the whole Court, That the Preſcription was not good; but it ought to have been, That he and all thoſe whoſe Eſtate, &c. But ſuch a Preſcription to pay ſo much in diſcharge of Tythes by the Occupiers of Lands, hath been allowed to be good, for that goes in diſcharge and benefit of the Land; and Tythes ariſe by the Occupying of the Land. But becauſe a Verdict in the Principal Caſe was found upon this Preſcription, it was holden, The ſame was not any good Cauſe to ſtay Judgment; but the ſame was helped by the Statute of *Jeofails*. Mich. 38 Eliz. C. B. *Aſſly* and *Lenkuns* Caſe. *Cro.* 2. Part, 445.

6. *Preſcription* by a Pariſhioner, to pay the 10 part of Corn *modo Decimand.* for the Hay alſo that growes upon the Head-Lands, is not good, becauſe the 10th part is due for the Corn. But ſuch a *Preſcription* for the Corn and after-Rakings, is good with an averment, That they are *Spontanea voluntaria*: So *Preſcription* of the 10th part of Hay and After-graſſe. Mich. 38 Eliz. *Bland* and *Adams* Caſe; Where it was holden, That ſuch a *Preſcription* as in the firſt Caſe, was adjudged good. But note; That in the Principal Caſe, Judgment was given againſt the party, for that he had not well pleaded the *Preſcription*. Mich. 2 Jac. B. R. *Parry* and *Chancys* Caſe. *Noy*, 15.

7. *Replevin*, The Defendants juſtified the taking as Bayliff to the Lord G, for an Amercement at the Court-Baron, of one that was Tenant of the Mannor, for three ſeverall defaults; one, 2 s. The ſecond, 20 s: The third, 40 s. Exception was taken to the Avowry; for that he pleads the Lord G. had a Mannor, and that he had uſed time out of mind to keep a Court-Baron; and ſo preſcribes to have a Court-Baron, the which is a thing incident to every Mannor of Common right. 2. He preſcribes to diſtrain for the Amercement in any place within the Mannor, although it be out of the Tenancy of him who offended. 3. He preſcribes to hold a Court-Baron before the Steward; which is not good. All the Juſtices agreed to the firſt Exception; For a man ſhall not preſcribe in that which the Law of Common Right gives. 2. It was Obſerved, That the Amerement was grievous, which ſhould be *ſecundum quantitatem delicti*. And it was alſo agreed, That the Beaſts of ſtrangers found upon the Land, cannot be diſtrained for Amercements, as they may be for Rents and Services. To the third Point, It was ſaid, That ſometimes Pleas are holden before the Suitors and Bayliffs of the Lord: but that is intended with this difference, viz. When it is held *per Rotos*, it is *Coram Ballivo et Sectatoribus*: But when it is without a Writ, it is *Coram Sectatoribus* only. Judgment was given for the Plaintiff. Hill. 35 Eliz. *Pell* and [redacted] Caſe, *Noy*, 20.

8. Not

8. Note, It was agreed by the Court, That the Court of Chancery may be by Preſcription, as the Counties Palatine, and the Mayor's Court of *London*, which is called the *Mark-Court*, becauſe the Mayor may mark any Cauſe in the Sheriffs Court before Judgment, although it be after Verdict, and may examine it. But the Court of Chancery or Equity cannot here by the Kings Grant, becauſe it took its birth-right from the Subject. See *Andrews* and *Hibbs* Caſe. *Noy*, 147.

9. The Parties were at Iſſue upon a Preſcription, to have Common in certain Lands called H. in the County of W: It was holden by the whole Court, and delivered to be their Opinion to the Jury, That where one preſcribes to have Common Appurtenant to his own Houſe, and to Acres of Lands; and upon Evidence it appears, That he hath but 18 Acres, or a leſs number, yet he hath not failed of his Preſcription: But if he had 20 Acres, and 30 Acres are Freehold, and the other Copy; there he fails of his Preſcription, for he cannot make one Preſcription for both. So it is, If it appears upon the Evidence, that part of the Lands was 100 years paſt Copyhold, and now is Free-hold; he fails in his Preſcription. Mich. 34 Eliz. B. R. *Gregory* and *Hills* Caſe. *Cro.* 3. Part, 531.

10. Treſpaſs; The Defendant preſcribeth to have Common, the Jury found the Defendant had Common there by Preſcription *prout*, paying for it every year 1 d. to the Plaintiff: It was Objected, That he had failed of his Preſcription, which ought to be alledged entirely. But it was anſwered, That he had alledged of the Preſcription, as much as did ſerve for his turn; and the Non-payment of the 1 d. ſhall be ſhewed on the other part, and the not alledging thereof is not material. See *Gerys* Caſe. *Cro.* 5. Part, 79. Then it was moved, Whether the paying of this 1 d. be a Condition precedent or ſubſequent? It was Opinion of the Court, That if it be a Condition, it is a Condition ſubſequent, and need not be ſhewed, no more then where an Annuity is granted *pro ſervitio impendendo*: It needed not be ſhewed, that he gave Counſel, as it was adjudged in *Poultrells* Caſe in this Court. And it was the Opinion of the Court in the principal Caſe, That the Verdict was found for the Plaintiff. Hill. 39 Eliz. C. B. *Lovelace* and *Reynolds* Caſe. *Cro.* 3. Part, 146. 563.

11. A Prohibition for Tythes of Wood, and ſurmiſed, That in the Parith is a Cuſtom, That all the Parſons of the ſaid Church, time out of mind, &c. *habuerunt et gaviſi fuerunt* ſuch Land parcel of the Manner of F. in recompence of all Tythe-Wood within the ſaid Parith, upon which It was demurred: It was the Opinion of all the Juſtices, That the Preſcription was good; and although it was Objected, That it is not averred that the Lands are parcel of the Manner; and then it cannot be ſaid to be a Recompence for all the Land within the Manner. Yet it was anſwered and ſaid, That it may be, That at the Bargaining all the Land within the Parith was parcell of the Manner, and then this allowance of the Profits of this Land was allotted in diſcharge of all the Tythes of all the Wood within the ſame Parith; It was adjudged for the Plaintiff. Mich. 40 Eliz. B. R. *Sumerton* and Dr. *Cottons* Caſe. *Cro.* 3. Part, 587.

12. The Lord of the Manner of B. in the Parith of D. preſcribes, That he and his Anceſtors, and all thoſe whoſe Eſtate, &c. had uſed from time to time whereof, &c. and to pay the Parſon of D. the now Plaintiff, and his Predeceſſors 6 l. for all manner of Tythes growing within the ſaid Parith; and that by reaſon thereof, he and all thoſe whoſe, &c. Lords of the ſaid Manner had uſed time whereof, &c. to have *decimam gabam, ſive decimam cumulum gabarum* of all his Tenements within the ſaid Manner. It was the Opinion of the Juſtices, That it was a good Preſcripcion, and that a *Modus decimandi*, by the Lord for himſelf, and all the Tenants of his Manner from barring the Parſon to demand Tythes in kind is good, for that it might have a lawful beginning. 2. Reſolved, That it was a good Preſcription to have the tenth Shock; for he hath it as a perſic appurtenant to his Manner, and not as Tythes. 3. It was Reſolved in this Caſe, That if the Queen was Lady of a Manner, ſhe might preſcribe to have Tythes, for that ſhe is capable of them, although they be Spiritual; and that is *mixta perſona, et capax ſpiritualis juriſdictionis*. Mich. 40 Eliz. B. R. *Piggot* and *Heaton* Caſe. *Cro.* 3. Part, 599. See Trin. 41 Eliz. *Piggot* and *Simpſon* Caſe. *Cro.* 3. Part, 763. acc.

13. In Avowry for Rent, the Caſe was: J. S. was ſeiſed of the Rent in Fee, and preſcribed, That he and all his Anceſtors had uſed to diſtrein for the Rent in this Land; and ſo preſcribes in the Diſtreſs, and not in the Rent it ſelf; and it was the Opinion of the Juſtices in this Caſe, That the Avowry was not good: For the Preſcription ought to have been in the Rent, and it was cited to have been adjudged, 14 Eliz. That the Preſcription in the Diſtreſs was not good. Paſch. 41 Eliz. C. B. *Stephen* and *Lewis* Caſe. *Cro.* 3. Part. 673.

14. For a Prohibition; It was ſurmiſed, That the Biſhop of *Weſton* was ſeiſed in Fee of the Manner of D. whereof the Plaintiff is a Copyholder, and that he and his Predeceſſors time whereof, &c. had

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been Patrons of the Church of E, whereof the Defendant is Parſon; and that he and his Predeceſſors, &c. time whereof, &c. and all his Farmors and Copy-holders of the ſaid Mannor had been diſcharged of Tythes; and that the Land of which Tythes is demanded, is ancient Copy-hold of the Mannor, upon which it was demurred: It was pleaded, That the Preſcription was not good; for that the Copy holders were before the Councel of Lateran, and might give their Tythes to whom they pleaſed. But it was Reſolved, That the Preſcription was good: For that all Copy-holds are derived out of the Mannor, and it ſhall be intended, That this Preſcription had its Commencement at ſuch time, when all was in the Lords hands. Mich. 42 Eliz. B. R. *Crouch* and *Fryers* Caſe. *Cro.* 3. Part, 784.

15. In Replevin, for the taking *unius Equi, unius ſpadonis duorum vacc.*; The Defendant avowed and ſhewed, That he was ſeiſed of ſuch Land, and preſcribed to have Common Appendant thereunto in the place where, *pro omnibus Equis et porcis ſuis*; Upon which it was demurred, becauſe he did preſcribe for Geldings, ſo as the Preſcription doth not maintain his Declaration; and Stone-horſes and Geldings are ſeveral; and the Preſcription doth not extend to Mares. But the Opinion of the Court was, That the Preſcription was good, for that *Equus* is a general name, and compriſeth as well Horſes as Geldings: But for Mares it is not ſo, wherefore the Declaration was well maintained by the preſcription; and it was adjudged for the Plaintiff. Trin. 48 Eliz. C. B. *Stepleton* and *Moſes* Caſe. *Cro.* 3. Part, 798.

16. Treſpaſs, *Quare clauſum fregit, &c.* The Defendant pleaded at large, That he was and is ſeiſed of and in the Rectorie of the Pariſh Church of M, and in a Meſſuage called the Parſonage-Houſe in his Demeſne, as of Fee in *jure Eccleſiæ*, and that he and his Predeceſſors *Rectores Eccleſiæ prædict.* and all thoſe whoſe Eſtate he hath in the ſaid Meſſuage time out of mind, had a way from that Meſſuage, and over the place where, &c. in an Hamlet to the ſaid Meſſuage, from the ſaid Hamlet: It being found for the Plaintiff, It was proved, That the Plea was not good, 1. For that he alledgeth a Preſcription in himſelf, and in all his Predeceſſors, Parſons of the ſaid Pariſh, but ſheweth not that he was Parſon there. But it was Reſolved, That notwithſtanding that, the Preſcription was good, becauſe it is alledged, That he is Clark, and ſeiſed of the Parſonage *jure Eccleſiæ*; for none can be ſeiſed *jure Eccleſiæ*, unleſs the Parſon. 2. Exception, becauſe it is not alledged in what Town the Meſſuage was, to which he claimed the way. But Reſolved, Good enough, becauſe it ſhall be intended, That the Parſonage-Houſe is in the Town, where the Pariſh is alledged to be, viz. in M: It was adjudged for the Plaintiff. Trin. 44 Eliz. B. R. The Lord *Sands* and *Pinders* Caſe. *Cro.* 3. Part, 898.

17. The Defendant, Vicar of A, Libelled in the Spiritual Court againſt the Plaintiffs, for ſmall Tythes, and alſo for Herbage, Wood, The Plaintiffs joyned in a Prohibition; and Surmiſed for all (except the ſmall Tythes) a Cuſtome of Tything. It was the Opinion of the Court, That the Prohibition brought in all their Names, was not well done; for the Suit being upon ſeveral Libells, they could not joyn in one Prohibition. Yet in this caſe, The Court did not grant a Conſultation, becauſe the matter being upon a Cuſtome tryable at the Common-Law, thoſe in the Spiritual Court were juſtly prohibited, although not in ſuch due form as they ought to be. Trin. 6 Jac. B. R. *Burges* and *Aſhtons* Caſe, *Yelverton*, 128.

18. A Chaplain who was under the Vicar of H, Libelled in the Spiritual Court againſt him for his Salary; And preſcribed, That the Vicar ought to pay to the Chaplains 4 l. *per annum*. The Vicar prayed a Prohibition, Becauſe that Chaplain was not elected by him; and alſo becauſe the Preſcription was for a Sallary, which is tryable at the Common Law. It was Objected, That the Salary is Spiritual, as the Cure is. But notwithſtanding, the Court granted a Prohibition, till it was determined to whom the Election did of right appertain. Mich. 3 Car. C.B. The Vicar of *Halifax* Caſe, *Hetley*, 36.

19. In Action upon the Caſe brought concerning the Office of Poſt-Maſter; The Plaintiff declared, That the Office was an Ancient Office, and that there were divers Fees belonging unto it, for carrying of Letters as well from *Ireland* the parts beyond Sea; as from the parts beyond Seas to *London*. But did not Preſcribe in it, Time out of mind; for which cauſe, Exception was taken to the Declaration. But it was the Opinion of the Juſtices, That it being an Ancient Office, and that ſuch Fees did appertain to the Office, that he needed not to preſcribe in the ſame. Hill. 22 Jac. B.R. The Lord *Stanhope* and *Sequeſters* Caſe. *Latch*, 87.

20. H. had ſate in the Upper Seat of the Church during his life; his Son after his death claymed the ſame place: C. diſturbed him; and upon Complaint to the Biſhop, the Biſhop granted an Inhibition to C. till the matter was determined by him; and Excommenged him for his diſobedience to it: C. claymed the place by Preſcription, and prayed a Prohibition. It was the Opinion of the Court, That the Inhibition was well

well granted, for the ſtilling of the Diſturbance in the Church; and the Excommengement upon it, was only for the Contempt of it. But the whole Court agreed, That the Claym of a Seat in the Church by Preſcription, and the priority in ſitting in it, was tryable only at the Common-Law, and not in the Spiritual Court. And the parties afterwards agreed, That the ſon of H. ſhould keep the poſſeſſion he had till the Preſcription was determined. Paſch. 2 Car. B.R. *Hattons* Caſe, *Latch*, 116.

Preſentation, *and* Preſentment.

1. G. Preſented C. to the Church of B; To which Church J.S. alſo preſented his Clerk: by which ſeveral Preſentments the Church became Litigious. The Biſhop of Y. Ordinary of the place, awarded *Jure Patronatus*; Depending which, the ſaid Biſhop admitted B: Whereupon C. brought his Action in the Spiritual Court againſt the Biſhop, becauſe the ſaid Biſhop *plus æquo ſuæ admiſit diſt. 8. præd. jure Patronatus*; in which caſe, by the Law of the Church, the Admittance is void. The Biſhop, upon the whole matter ſhewed, prayed a Prohibition; which was granted by the Court, becauſe the right of the Patronage came in debate. Afterwards came C, and prayed a Conſultation, becauſe he *did* not meddle with the Right of Patronage, but only with the tortious Admittance. It was ſaid by the Court in this Caſe, That the awarding of the *Jure Patronatus*, is not a thing of neceſſity, but at the Will of the Ordinary for his better Inſtruction; but if he will at his peril take notice of the Right of Patronage, he may admit which of the parties he pleaſeth, without a *Jure Patronatus* awarded. And the Juſtices ſaid, That after the Awarding of the *Jure Patronatus*, and before any Verdict given upon it, it appeared, That the Biſhop was ſatisfied of the Right of the Patron in the Prohibition; and thereupon he admitted his Clerk; and the Conſultation was denyed. And if the Biſhop was deceived, it was ſaid, A *Quare Impedit* did lye againſt him. Paſch. 26 Eliz. C. B. *Gerrards* Caſe. *Leon.* 2. Part, 168.

2. In a *Quare Impedit* againſt the Arch-Biſhop of *Canterbury*, for the Church of B. in the County of B, It was Reſolved by the Juſtices, That if two have Title to preſent by Turn, and the one preſents, whoſe Clerk is Admitted, Inſtituted, and Inducted; and afterwards is deprived for Crime, as Hereſie, &c. That that Patron ſhall not preſent again; but that ſhall ſerve for his Turn. And ſo if he doth preſent a meer Lay-man, who is Admitted, Inſtituted, and Inducted, although it be declared by Sentence, That he was uncapable, and therefore void *ab initio*; yet, becauſe the Church was full till the Sentence declaratory be denounced, that ſhall ſerve for his Turn. But when the Admiſſion and Inſtitution are meerly void, it ſhall not ſerve for his Turn. As if a Preſentee be Admitted, Inſtituted, and Inducted, and hath not read the Articles, &c. according to the Statute of 13 Eliz. by which the Admiſſion, Inſtitution, and Induction are void. *See Coke* 5. Part, 102. Trin. 41 Eliz. C.B. *Wiſe* and the Arch-Biſhop of *Cant.* and *Lovedays* Caſe, *Cro.* 3. Part, 686.

3. *Quare Impedit*: The Defendant declared That L. was ſeiſed in Fee *de medietate Eccleſiæ de S. ad preſentationem ad eandem Eccl'am, quoties prima vacat. in groſſa*; And that B. was ſeiſed of the other moyety *Eccleſiæ prædict. ingroſſa.* And that L. preſented his Clerk in the firſt Turn, who was Admitted, Inſtituted, and Inducted, and afterwards the Church became void. And B. preſented in his Turn, whoſe Clerk was Admitted, Inſtituted, and Inducted, and afterwards deprived; and that the Biſhop without giving notice, Collated. And afterwards L. granted the Advowſon to J.S. in Fee, who granted it to the Plaintiff in Fee; That the Clerk collated by the Biſhop dyed, and the Defendant in the right of B. claimed the Turn, and preſented and diſturbed the Plaintiff. Upon which, it was Demurred. It was adjudged in this Caſe for the Defendant; For when L. had right to preſent, upon the Deprivation as in his Turn, (although the Collation of the Biſhop was not good) or cuſted him; yet it was but a thing in Action: and when he had granted the Advowſon over, the Grantee cannot have this thing in Action, nor the Grantor cannot have it, for he hath deſt oyed it; and ſo none can now have it. 2. Reſolved. That although this Grant is ſufficient to paſſe the Advowſon in Fee; Yet this Collation by the Biſhop is good enough againſt all but againſt the very Patron, ſo as he might have removed the Incumbent by a *Quare Impedit* but when he doth not remove him, ſo as he dyes Incumbent; this is as a ſerving of his Turn, and as a Preſentment in his Turn; and it is a good plenarty and Incumbency againſt him. Hill. 41 Eliz. C.B. *Leak* and the Biſhop of *Coventry* and *Lichfields* Caſe. *Cro.* 3. Part, 811.

4. J. S. being seised of the Mannor of B. with the Advowson appendant in Fee, presented J. D. to the Church, being void, who was Admitted, Instituted, and Inducted. Afterwards J. S. by Deed granted the next Avoidance of the same Church to A. B. C. and D. *et eorum uni, conjunctim et divisim, &c.* And afterwards the said J. S. levied a Fine of the Mannor to which, &c. to J. N. in Fee; and afterwards the Church became void by the death of J. D; and the said A. solely presented the said D, who was Admitted, Instituted, and Inducted: upon which, the said J. N. brought a *Quare Impedit*; It was the Opinion of all the Justices in C. B. in this Case, and so adjudged, That the said Writ should abate; for that they held, That the presentation of the said A. solely was good; although that D. his Presentee was one of the Grantees of the said next Avoidance. Trin. 31 H. 8. Sir *Ralph Langfords* Case. *Bendlowes*, 34.

5. Trespasse; The Case was; J. S. Tenant for life of an Advowson, the Remainder to A. in Fee, Tenant for life, presented J. D, who was Admitted, Instituted, and Inducted; but for want of Reading the Articles, the Benefice was void, by the Statute of 13 Eliz. but J. D. continued Parson during his life: J. S. dyed; The Queen after the death of J. D. reciting her Title to be by Lapse, presented C, who was Instituted and Inducted: A. in the Remainder presented J. N. who was Admitted, Instituted, & Inducted, and brought a *Quare Impedit* against C. the Incumbent of the Queen. It was in this Case adjudged for the Plaintiff, and that the Presentment of the Queen was meerly void, as if she had Presented to a Church which was full. And the Court held in this Case, That the Presentation of A. in the remainder was good; Although it was Objected, That it did appertain to the Executors of the Tenant for life to Present. Trin. 44 Eliz. B.R. *Greedit* and *Bakers* Case. *Yelverton*, 7.

6. A Lay-Patron having the next Avoydance of a Church after the death of J. S. Father of the Plaintiff, then Incumbent, after the death of the Father, Presented B. the Son of J. S; whom the Bishop refused, because by the Canon Law, *Filius Patri non potest in Ecclesia succedere*: Whereupon the Patron presented J. D; the Son of J. S. obtained a Dispensation *Non obstante* the Canon. Notwithstanding, the Ordinary Instituted J. D, and caused him to be Inducted. The Son sued J. D. and the Ordinary in the Delegates: A Prohibition was prayed, and granted by the Court. And such Prohibition, was said by the Justices, had been often granted. And in this Case, It was holden, That a Patron before Institution, may revoke his Presentation; and that if the Patron doth presente one, and the Ordinary doth admit him, but will not Institute him, that *duplex querela* lyeth against the Ordinary, for to compell him to do his duty: But if both Parsons claim from one Patron, and the one sues *duplex Querela*, that a Prohibition will not lye before Induction. Mich. 2 Car. B. R. *Stoke* and *Sykes* Case. *Latch*, 191.

Priviledg.

1. L. An Attorney of the Common Pleas, was endebted to B. in 34 l. payable at a day to come: B. was endebted to D. in 40 l; D. according to the Custome of *London*, attached in the hands of L. 34 l. to be paid him at a day in part of his debt of 40 l: L. brought a Writ of Priviledg, directed to the Mayor and Sheriffs of *London*, That every person who had cause of Action against L. *sequatur ad Communem Legem*. Upon the Return of which Writ, a *Procedendo* was prayed, and that the priviledg might not be allowed, because that the Attachment is by Custome: and if L. should have the Priviledg, then the other party should be without remedy. But it was the Opinion of the Justices. That the Priviledg should be allowed; For according to Common Law, L. owed nothing to D, but is his debtor by a Custome: and in this Case, D. who is a stranger, vexes L, who owes him nothing, having remedy against his proper debtor. And it was further said, That the Priviledg of this Court ought not to be impeached by any Custom. And the *Prejudentories* cited one *Lamberts* Case, and one *Underhills* Case, to have been adjudged in the Point, where such a Priviledg was allowed. Mich. 20 Eliz. C. B. *Lalges* Case. *Leon.* 2. Part, 156.

2. E. brought an Action of Debt against A. and his Wife, the Wife being Executrix to the debtor. The Husband came in upon the *Exigent*, and prayed his Priviledg, because he is a Servant to the Lord Keeper. But the Court was clear of Opinion, That he should not have it, because the Wife was joyned within the Action, and she can have no priviledg. Trin. 39 Eliz. B. R. *Ethwington* and *Ashtons* Case, *Noy*, 68.

3. Sir *Francis Evers* made his Wife and his Son his Executors; and Devised all his Goods: And for a breach of Trust, the Son being Attorney of the Queen there, sued the Wife in the Marches of

of *Wales*; and a Prohibition was prayed, becauſe it was not within their Inſtructions to ſue there for Legacies. But the Juſtices were againſt that, becauſe it is a breach of Truſt, for which there is not any other Remedy by Law. 2. Againſt the Prohibition, it was Objected, Becauſe the Plaintiff here, was the Queens Attorney there, and was bound to Attendance there, and therefore he ſhould have the Priviledg. But the Court ſaid, He ſhould not have the Priviledg, becauſe he ſued there as Executor. Paſch. 2 Car. B.R. Sir *Francis Ivers* Caſe, *Latch.* 199.

4. The Defendant being a Burgeſs of the Parliament, brought to the Court of Kings Bench, a Letter from the Speaker of the Parliament, for the ſtaying of their proceedings in a Suit there brought againſt him. The ſame was diſallowed of by the whole Court. And it was ſaid by them, The Defendant ought to have brought a Writ of Priviledg, and to be helped that Way. And it was ſaid by them, That the Parliament had Priviledg for the perſon, but not for the proceedings by any Letter. And in this Caſe, the Lord Chief Juſtice ſaid, That he would ſtand upon the Juſtice of the Court; and as they ſtood upon their Priviledges, ſo will We. And it was ſaid by them, That in ſome caſes, They might reſtrain the Councel of the party, or the parties themſelves, but not the Court, who is not bound to take Notice without a Special Writ. Paſch. 2 Car. B.R. *Hodges* and *Moores* Caſe. *Latch*, 150.

5. King *James* was ſeiſed of the Manor of *B*, in which Manner were Copyholders. In the Manor there was a Cuſtome, That the Lord of the Manor might digg for Coles, open Cole-Mines, and make Pits for draining without Licence, and ſell them. He granted the Manor to the Queen for life for her Joynture, with the Liberty aforeſaid. She made a Leaſe to J. S. for 21. years, rendring Rent; and in the Indenture was a Proviſo, That if the Leſſee or any of his Aſſigns digg or ſearch within any Ingrounds of any Copyholders, without giving them ſatisfaction at their reaſonable content, that then the Leaſe ſhould be void: J. S. aſſigns it over to G, who digs for Coles in a great Field, in which were divers Copyhold Lands, and Freehold Lands; every one knew his own Lands, but they did not encloſe them. The Aſſignees of the Liberties, proffer reaſonable money to the Copyholders; which they refuſe. It was in this Caſe Reſolved by the Juſtices, That theſe grounds of the Copyholders were Ingrounds, although they were not incloſed: But, What remedy the Aſſignee had againſt them, was the Queſtion? Which was not Reſolved. It was put as a Quere in this Caſe, 1. If this Liberty could be granted over? And, 2. If the Leſſee for years of the Manor might uſe this Liberty to digg and open Mines in the Lands of the Copyholders? Which was not Reſolved. Hill. 2 Car. in the Dutchy-Chamber, *Goodrick* and *Gaſcoignes* Caſe, *Latch*, 189.

Prohibition.

1. NOte; It was Reſolved by all the Juſtices, as well of the Kings Bench, as of the Common-Pleas, That if a man by his laſt Will and Teſtament gives a Legacy to another of 20 l. &c. to take the ſame out of the Profits and Revenues of his Lands, &c. and deviſeth his Lands to his Executors for a Term, to levy the ſaid Sum of his Lands, and to pay it to the Deviſee; and the Executors levy the Sum after the death of the Deviſor, and doth not pay the ſame to the Deviſee, for which he impleads them in the Spiritual Court; that in this Caſe the Executors ſhall have a Prohibition, becauſe the Legacy comes of the Profits of the Lands which is a Temporal thing, and not Teſtamentary; and ſo it is if the Deviſee is, That his Executors ſhall ſell the Land, and that the monies ariſing by the Sale thereof, ſhall be deviſed between his Daughters; they ſell the Land for money, and do not diſtribute the mony according to the Will, but the Daughters ſue them in the Spiritual Court for the ſame; they ſhall have a Prohibition, becauſe the money comes of the Land which is not Teſtamentary. Mich. 4 & 5 Mar. *Paſchal* and *Kettniches* Caſe. *Bendlowes* 21.

2. The Caſe where a Prohibition was prayed to the Court of Admiralty, was this: The Defendant ſued in the Admiralty, for the moyety of a Ship, and Prize taken by them upon Letters of Reprizal: For that the Civil Law is, That if two Ships meet at Sea together, although they do not go forth as Conſorts, and the one Ship in the preſence of the other takes a Ship with Goods in it, the other Ship which was preſent ſhall have the moyety, or half of the Ship and Goods taken; for although he did not take the Ship, yet the preſence thereof there at the time of the taking, was a Terrour to the other Ship which was taken, *ſine qua* the other Ship could not be ſo taken: And the Plaintiff did ſurmiſe, That after they were arrived in *England*, that they did agree amongſt themſelves, That the Plaintiff ſhould have four parts of the Ship and Goods ſo taken, and the other Ship the other fifth part: And this, he ſaid, he had plea-

ded in the Admiral Court, and they would not allow of the Plea, and upon that a Prohibition was granted. Afterwards it was moved on the other ſide, That the Court ſhould allow of the Plea; and thereupon a Conditionall Conſultation was granted, ſo that the Court there allow that Plea, and try it there; but if they allow it not, then they ſhould encurr the Contempt of this Court, and the party ſhould have a Prohibition. Mich. 32 Eliz. *Somers* and Sir *Richard Buckleys* Caſe, *Lou.* 2. Part, 181.

3. A prohibition was prayed and ſurmiſed, That the Defendant ſued him, being an Executor, in the Spiritual Court for a Legacy, whereas the Plaintiff had a Releaſe, but had only one Witneſs to prove it: In this Caſe, the Court refuſed to grant a Prohibition, but a Conſultation was awarded. But the Court ſaid, That if he had ſurmiſed, That he had pleaded the Releaſe in the Spiritual Court, and produced his Witneſs, and that they would not allow of it, becauſe he had not two Witneſſes; that had been a good ſurmiſe to ground a Prohibition: And the Court ſaid in this Caſe, That the Plaintiff was at no miſchief, for that he may have a Prohibition after a Sentence given in that Court. Hill. 30 Eliz. B. R. *Bynal* and *Stokes* Caſe. *Cro.* 3. Part, 88.

4. The Parties were at Suit in the Spiritual Court for Incontinency, and the Judges there would have Examined them upon their Oaths, if they did it not: But becauſe in ſuch Caſes of Defamation *Nemo tenetur ſeipſum prodere*, and they are not examinable but only in Cauſes Teſtamentary and Matrimonial, where no diſceit can be to the party by his Oath: Upon a motion made to the Court, a Prohibition was granted to the Spiritual Court in that Caſe. Mich. 33 B. R. *Cullier* and *Culliers* Caſe. *Cro.* 3. Part, 201.

5. Prohibition upon a Suit for Tythes of Corn, Wool, and Calves: For the Corn, the Suggeſtion was, That they had uſed in the pariſh to pay the Tenth Sheaf in ſatisfaction of all Tythes of Corn to the Parſon, and that they ſet them out, and the Parſon had them; and this Plea they offered in the Spiritual Court, who would not allow it. It was the Opinion of the Court, the ſame was a good ſurmiſe for a Prohibition. For the Calves they ſuggeſted, that they uſed to pay within the ſaid Pariſh, *viz.* For the Milk of every Cow, 2. And the proof was, there was ſuch an Uſuage for all the Lands except five Farmes; this was ſaid to be a failer of the Preſcription, becauſe perhaps thoſe Lands were part of the 5 Farms excepted; and therefore for the Calves, Conſultation was granted. Mich. 33 Eliz. C. B. *Rewel* and *Shortwrights* Caſe. *Cro.* 3. Part, 206.

6. Prohibition for ſuing [for Tythes, was prayed; For that he pleaded in the Spirituall Court, That the party who ſued there, was not lawful Incumbent, but one J. S, which Plea they would not allow the Pariſhioner to plead to the right of the Incumbency; and a Prohibition was granted by the Court. For the Court ſaid, That he being Tenant of the Land, might plead it, or elſe he might be twice charged for his Tythes. Paſch. 33 Eliz. B. R. *Grees* and *Penildins* Caſe. *Cro.* 3. Part, 228.

7. Prohibition, and ſurmiſed, That the Defendant being the Proprietor of the Parſonage of S, and ſued one C. in the Spiritual Court for Tythes of certain Lands in the Pariſh of S: The Plaintiff being Parſon of H. in the ſame County, came and *pro Intereſſe ſuo* alledged, That here is a Cuſtom within the ſaid Pariſh of S, That the Parſon of H. ſhould have 13 Cheeſes for the Tythes of theſe Lands in S; and that in Recompence thereof the Parſon of S. had 13 Cheeſes for the Tythes of ſuch Lands in H; and upon this matter he prayed a Prohibition, ſhewing, that he had pleaded this matter in the Spiritual Court, and it would not be received. It was Objected againſt it, that it is prayed by one who is not ſued; and it is not reaſon that he ſhould ſtay the Suit of a Stranger, alſo the Right of Tythes is to come in debate. But it was the Opinion of the Court, That the Right of the Tythes doth not come in debate, but a *Modus Decimandi*, and ſo tryable here. And ſecondly, That which the Pariſhioner may plead, he who came in *pro Intereſſe ſuo* may plead: But the Court was clear of Opinion, That if the Right of the Tythes did come in debate, the ſame was only Tryable in the Spiritual Court. Mich. 34 Eliz. C. B. *Dallingham* and *Rytelys* Caſe. *Cro.* 3. Part, 251.

8. Prohibition upon a Suit for Tythes in the Spiritual Court, the Party grounded his Prohibition upon the Statute of 31 Eliz. ſuppoſing that the Party had Committed Simony in coming to the Parſonage, and thereby the Church was void, and the Tythes not belonging to him: But the Court denyed the Prohibition, for that the Simony might aptly be tryed in the Spiritual Court. Mich. 40 Eliz. C. B. *Riesby* and *Wentworths* Caſe. *Cro.* 3. Part, 642.

9. If Leſſee for years be ſued in the Spiritual Court for Tythes, he in the Reverſion may have a Prohibition. Paſch. 29 Eliz. B.R. *Love* and *Piggots* Caſe, *Cro.* 3. Part, 55.

10. Suit for Tythes in N. by the Parſon; A Surmiſe was, That the Defendant was Inhabitant in S; and that time out of mind every Inhabitant of S. that had Lands in N. had paid Tythes for them to the Vicar of S. and a Prohibition granted. Trin. 31 Eliz. B.R. *Coleford* and *Peaſe* Caſe, *Cro.* 3. Part, 136.

11. Upon

11. Upon a Suit in the Spiritual Court, for Tythes of Green Tares eaten by their Cattel; A Prohibition was granted upon a ſurmiſe, That the Tares were given to their Cattel, for that they had not ſufficient Meadow and Paſture within the Pariſh for their Draught-Cattel. For it was holden by the Court, To be a good ſurmiſe to ground a Prohibition. Mich. 31 Eliz. B. R. *Perry* and *Sumes* Caſe. *Cro.* 3. Part, 139.

12. An Agreement was betwixt a Pariſhioner and the Parſon, That in Conſideration of 20 s. paid, he ſhould hold the Lands diſcharged of Tythes during the life of the Parſon. It was holden by the Court, To be no good ſurmiſe for to ground a Prohibition upon it, for that a Grant of Tythes cannot be without a Deed. Trin. 32 Eliz. B. R. *Bagg* and *Woodwas* Caſe. *Cro.* 3. Part, 188.

13. Two Incumbents were of one Church, one ſued the other for to deprive him for not Reading of the Articles, and giving his aſſent to them according to the Statute of 13 Eliz. The Jury found, That he gave his aſſent to them, for ſo much as they agree with the Word of God. It was agreed in this Caſe, That it was not ſuch an aſſented aſſent as the Statute intended; and ſo a Prohibition did not lye upon it. Mich. 34 Eliz. B. R. *Smith* and *Clarkes* Caſe. *Cro.* 3. Part, 252.

14. If One anſwereth to a Suit in the Spiritual Court, and ſufferth a Sentence there to paſs againſt him, he ſhall never have a Prohibition in that Caſe. Mich. 40 Eliz. C. B. *Sancret* and *Mathews* Caſe. *Cro.* 3. Part, 595.

15. A Pariſhioner ſecreth forth his Tythes, and afterwards he ſecretly takes them away again, the Parſon may ſue for them in the Eccleſiaſtical Court; and No Prohibition lyeth in ſuch Caſe. Paſch. 40 Eliz. B.R. *Leigh* and *Woods* Caſe. *Cro* 3. Part, 607.

16. A man by his Will deviſed 20 l. to his Daughter, the Defendant entred into a Bond of 40 l. to the Daughter, for the payment of it according to the Will: She took Husband, who ſued for it in the Spiritual Court as for a Legacy, the Executor pleaded payment according to the Bond, which Plea the Spiritual Judge would not allow there. It was the Opinion of the Juſtices, That it was a good ſurmiſe; and that a Prohibition ſhould be awarded for the Executor, by entring of his Bond to the Daughter, for the payment of the mony, the Legacy was thereby extinct; and the ſame had made the 20 l. deviſed a meer Debt at the Common Law. Mich. 1 Jac. B. R. *Goodman* and *Goodwins* Caſe. *Rep.* 38.

17. A Suit was in the Spiritual Court for Tythe-Lamb and Wooll, and for Paſturing of Sheep in ſuch a Cloſe. The Plaintiff prayed a *Prohibition*, and ſuggeſted, That the place where had always paid 10 s. in diſcharge of all Tythes of Wooll and Lamb, It was moved for a Conſultation, Becauſe the ſame Suggeſtion had been made before in four ſeveral Prohibitions in the ſame Caſe, and the ſame manner of Tything; and always a Conſultation had been granted. Yet the Court was of Opinion, That the ſame being only for want of proof, and not upon the right or tryal of the Cuſtome; and alſo being for Tythes of an year which was not in demand before. The Court held it to be a good Suggeſtion; and a Prohibition was awarded. Mich. 5 Jac. B. R. *Cox* and *Scimors* Caſe. *Yelverton*, 104.

18. C. ſued for a Prohibition in C. B. againſt H. Parſon of D, and Suggeſted a *Modus Decimandi*, as to part of the Tythes demanded in the Spiritual Court; and to the reſt, Suggeſted a Contract executed betwixt the Parſon and him in ſatisfaction: and becauſe he did not prove his Suggeſtion within 6. moneths, the Parſon had a Conſultation, and Coſts were aſſeſſed 40 s; whereas in truth there was no Judgment given for to recover them (the words *Ideo Conſideratum quod recuperet*, being omitted); Yet the Parſon thinking, that all had been well, brought debt in C.B. for the Coſts; and declared upon the whole matter: Upon which it was adjudged, *Quod recuperet*: C. brought Error, as well in the Record and proceedings in the Prohibition, as in the Debt for the Coſts; becauſe there was not any Judgment in the Prohibition to recover the Coſts, for that the Aſſeſſment of them was only the Office of the Court, but no Judgment of the Court to bind. 2. That no Coſts in this Caſe ought to have been aſſeſſed, becauſe the Prohibition was grounded as well upon the *Modus Decimandi*, as upon the Contract of the parties, which needed no proof; and the Suggeſtion being entire, and part needing no proof, they ought not to have Aſſeſſed Coſts at all. Both Judgments were reverſed by the Court for the Errors aforeſaid. Hil. 5 Jac. B. R. *Cobb* and *Hunts* Caſe. *Yelverton*, 119.

19. In a Prohibition, the Caſe was: A. and B, Church-wardens of D, in the County of L. libelled againſt the Plaintiff, before the Biſhop of C, for a Tax aſſeſſed upon the Plaintiff, for not repairing the Church. The Plaintiff had a Sentence there, the Church-wardens appealed to the Metropolitan of *York*; pendant the Appeal, B. one of the Church-wardens, releaſed to the Plaintiff all Actions, Suits, and Demands. Afterwards A. in his own name, and in the name of B. ſued to reverſe the Sentence given at C, and proſecuted the Appeal: Upon which S. the Plaintiff brought a

Prohibition,

Prohibition, ſuppoſing the Releaſe had diſcharged the Appeal; upon which A. appeared and demurred in Law, but B. made default. It was the Opinion of the whole Court, That the Prohibition did not lye upon the Suggeſtion; becauſe the Temporal Court had not to do with the Tax, becauſe the ſame was Spiritual, and meerly to be determined in the Eccleſiaſtical Court. 2. Becauſe the Suit for the Tax was in the behalf of the Pariſh; and was maintained at their charges, and the coſts were to go to the Pariſh, and therefore the Releaſe of the Guardiers was not good, and a Conſultation was awarded. Hill. 7 Jac. B. R. *Starkeys* and *Baron* and *Geres* Caſe. *Yelv.* 173.

20. A. libelled againſt B. before the High Commiſſioners for an Aſſault made upon him being a Spiritual Perſon. It was moved for a Prohibition, becauſe it was not within the Statute of 1 Eliz. which giveth them Juriſdiction, though it was within their Commiſſion: It was Objected, That the Suit there was *pro reformatione morum*, which they have power of by their Commiſſion. But it was Reſolved by the whole Court, That the High Commiſſioners cannot meddle for a Stroke in the Church-yard, *nec pro ſubſtractione Decimarum*; and yet they have an expreſſe Authority by their Commiſſion ſo to do: for by that courſe, all the Ordinaires of *England* ſhould be to no purpoſe: Wherefore in the principal Caſe, upon much debate, a Prohibition was awarded. Paſch. 3 Car. B. R. *Giles* and *Bulams* Caſe. *Hetly*, 19.

21. T. a Parſon libelled in the Spirituall Court, for dilapidations againſt the Executors of his Predeceſſors: It was moved for a Prohibition, for that he is not Incumbent; for his Preſentment was by the King, *ratione minoris ætatis* of one C, and the King had not any Title to Preſent; for where the King miſtakes his Preſentment, it is void: But the Court denyed to Grant a Prohibition, becauſe he is now Incumbent, and the Judges would not take Notice of the ill Preſentment of the King. But in Caſe of Simony, the Statute makes the Church void, and then the Judges may take Notice of that, and grant a Prohibition, if the Parſon ſues for Tythes. But if a *Quare Impedit* be brought, and it appears, that the King had not any Cauſe of Preſentment: It was the Opinion of all the Juſtices, That a Prohibition might be granted. Mich. 3 Car. C. B. *Thomſons* Caſe. *Hetly*, 51.

22. J. libelled againſt H, Vicar of N, in the High Commiſſion Court at Y; becauſe he was non-Reſident, and lived at D, and neglected to ſerve his Cure. For that divers times when the High Court viſited, he ſpoke ſo loud, that he was offenſive to many; and being reproved for that, he gave a ſcorntul Anſwer, That where one W. in the Pariſh had a Seat in the Church, That the Vicar would ſpit in abundance in the Seat, when W. and his Wife were there. That in Divine Service, He thruſt open W. Seat, and ſaid, *That he and his wife would ſit there in diſturbance of Divine Service*: A Prohibition in this Caſe was prayed, and was granted by the Court; For they ſaid, *The High Commiſſioners cannot puniſh Non-Reſidence, nor breaking of the Seat in Divine Service*; And that for the other matters, upon Complaint made, he might be bound to the good behaviour. Trin. 4 Car. C. B. *Howſons* Caſe. *Hetly*, 104.

23. A. lived apart from his Wife; upon a Petition of the Wife to the Juſtices of Aſſize, they referred it to the Biſhop of *Bangor*; who ordered, he ſhould pay to his Wife 10 l. *per annum*, which was confirmed by Decree in the Councel of the Marches of *Wales*. A. diſobeyed the Decree, and did not pay the 10 l. *per annum*; the Councel ſent a Meſſenger to apprehend him, and cauſed his Goods and the profits of his Lands to be ſequeſtred. A Prohibition was prayed, and granted by the Court; For the Sequeſtration of the Lands they could not do that, and they have no power to ſell the Goods; and the Eccleſiaſtical Court is the proper Court for Alimony: And if the perſon will not obey that Court, they have power only for to Excommunicate him, and a Prohibition was granted. Mich. 3 Car. C. B. *John Owens* Caſe. *Hetly* 69.

24. Note by the Juſtices, That by the Courſe of the Court, A Prohibition ſhall never be granted the laſt day of the Term, nor any motion ought to be made for it. But the Court ſaid, That upon a motion made the laſt day of the Term, a Rule might be made for ſtaying of Proceedings till the next Term. Paſch. 1 Car. B. R. *Latch*, 7.

25 Note. It was ſaid by the Court, That it is the uſual Courſe in the Admiralty, to allege in the Libell, and ſurmiſe a Contract to be made *ſuper altum Mare*. But in ſuch Caſe, If the ſurmiſe be not true, a Prohibition ſhall be granted. And in this Caſe it was ſaid, That if a Ship lies at Anchor and wants Victuals; and ſends to J. S. at Land to ſend Victuals: and then the Contract is made in the Ship; then it is a Contract made upon the Sea, and it ſhall be tryed in the Court of Admiralty; but contrary if the Contract be wholly made upon the Land, and the Victuals be after put into the Ship. Hill. 1. Ca. B. R. *Godfreys* Caſe. *Latch* 11.

26 An Executor of an Executor was ſheued for a Legacy in the Spiritual Court; And he pleaded, That he had no Aſſets, which Plea was refuſed by the Spiritual Court. Wherefore a Prohibition was granted out of the Kings Bench in the time of the late King: It was the Opinion of the Court

Court, that by the Demiſe of the King it was diſcontinued: And in this Caſe, The Court took a difference between Prohibitions granted out of the Common Pleas, and granted out of the Kings Bench: Out of the Common Pleas a Prohibition ſhall not be granted, without a Suggeſtion upon Record, becauſe it is there the Suit of the party, But out of the Kings Bench it may be granted without any Suggeſtion upon Record; Alſo, when a Prohibition iſſueth out of the Kings Bench if there be no other proceſs depending there, it is diſcontinued by the Demiſe of the King: But if an Attachment iſſueth, and is returned: Or if the party appeareth and putteth in Bail, then it is become the Suit of the party, and then it is not diſcontinued by the Demiſe of the King. Paſc. 2 Car. B. R. *Watkins* Caſe. *Latch* 114.

27 An Adminiſtrator accompted before the Ordinary. A Creditor took Exceptions to the Accompt, He proved his Accompt by one Witneſs, which the Court there would not allow of. And for this cauſe, a Prohibition was awarded. And in this caſe it was ſaid by the Juſtices, That the Ordinary ought not to hold Plea upon Accompt, nor could do any thing in it, nor try payment or not payment, nor adminiſter Interrogatories to Witneſſes; but they muſt take the accompt ſo as it is offered unto him. Paſc. 2 Car. B. R. *Bellamy* and *Alders* Caſe. *Latch*. 117.

28 A man was ſued out of his Dioces, *ſcil.* in the Arches, and thereupon had a Prohibition. It was moved for a Conſultation, becauſe the Inferior Court had remitted their Juriſdiction to a Superior Court. The Court denyed to grant the Conſultation; but ſaid, That that matter ought to be pleaded upon the Prohibition. Trin. 2 Car. B. R. *Latch* 180.

29 A brought a *Quare Impedit* againſt B. and depending that, B. was Inſtituted and Inducted into the Church; A. ſued B. in the Spiritual Court to remove him; and becauſe the Suit there was after Induction, the Court Granted a Prohibition; Trin. 20 Jac. B. R. *Oliver* and *Hoſſies* Caſe. *Latch* 205.

30. Articles were exhibited before the Commiſſioners Eccleſiaſtical againſt Dr. *Sutton* becauſe he was a Divine, and having a Benefice with Cure, & never brought up in the Science of the Civil or Canon Law, nor having the knowledg of them, took upon him the Office of Chancellor of the Biſhop of *Glouceſter* againſt divers Eccleſiaſtical Canons and Conſultations and directions from the King, That none ſhould be admitted to the Office of a Chancellor of the Biſhop, unleſs he was learned in the Civil and Canon Laws. He being examined, confeſſed himſelf to be a Divine, and that he had a Benefice. But ſhewed, That the ſaid Office was granted to him by ſuch a Biſhop of *Glouceſter* for life, which Grant was confirmed by the Dean and Chapter; and therefore he prayed a Prohibition. But it was denyed by the Court to be granted: For if he be a perſon unskilfull in thoſe Laws, and by Law ought not to enjoy it, they may examine that there: For although a Lay perſon by his Admiſſion and Inſtitution to a Benefice, hath a Freehold: Yet he may be ſued in the Spiritual Court to be deprived, and for that cauſe the Prohibition was denyed. But it was ſaid by the Juſtices, That if the Suit were brought in the Spiritual Court for the profits of the Office of Chancellor; Or if they would there deprive a man for a Temporal cauſe; as in the Caſe of Dr. *Barker*, pretending that the Grant of the Predeceſſor-Biſhop did not bind the Succeſſor; there in that Caſe, becauſe we may try it, a Prohibition will lye, but in the principal Caſe we cannot try the ſufficiency of the Doctor for the Execution of the ſaid Office; and therefore we cannot Grant a Prohibition in this Caſe. Trin. 2 Car. B. R. Dr. *Suttons* Caſe. *Latch*. 228, 229.

31. The ſurmiſe to have a Prohibition to the Spiritual Court was, That the Inhabitants of D. of which he is an Inhabitant, have paid a *Modus Decimandi*. Upon which they were at Iſſue. It was proved only, That he himſelf had paid it, and yet it was holden good, and no Conſultation could be obtained; for every particular is included in the general, and proved by it. 2. It was agreed in this Caſe, That where the Statute appoints proof of the ſurmiſe to be by two, It was ſaid to be ſufficient, if two affirm that they have known it to be ſo, or that the common fame is ſo. Mich. 15 Jac. C. B. *Noy* 28.

32. W. ſued P. in the Spiritual Court for not ſetting out of the Tythes of two Acres: P. prayed a Prohibition, for that a party unknown had taken them, he having ſet out the Tythes of one Acre in *ſpecie*: And for the other, he ſuggeſted a *Modus Decimandi*. And upon that, Iſſue was joyned, and the Witneſſes ſaid, That for a long time they had heard ſay, The Occupiers of that Farm, whereof the Acre, &c. had uſed to pay yearly to the Parſon 3 s. for all Tythes. In this Caſe, it was agreed by the Court, That for the firſt, a Prohibition ſhould ſtand: For after the Tythes are ſevered, If a ſtranger takes them away, the Parſon hath his remedy againſt him at the Common Law, and ſhall not ſue the Pariſhioner in the Spiritual Court for the ſame. For the ſecond, it was agreed, That a Proof by hear-ſay, was good enough to maintain the ſurmiſe within the Statute of 2 E. 6. Paſc. 43 Eliz. B. R. *Wilde* and *Potts* Caſe. *Noy* 44.

33. A Prohibition was prayed to the Spiritual Court upon a ſuggeſtion, That he was ſued there for a Legacy given to the Wife, where he pleaded a Releaſe to the Husband. They appear, and the Wife ſaid, ſhe ſued a Divorce *à Menſa et Thoro* for the Adultery of the Husband before that he made that Releaſe. Yet it was the Opinion of the Court, That that Releaſe did bind the Wife, for that doth not diſſolve the Marriage *à vinculo Matrimonii*. But yet afterwards, upon hearing Arguments of the Civilians, *Popham* ſaid, That a Conſultation ſhould be granted (ſo as they in the Spiritual Court do admit that plea): And then the Doctor of the Civil Law ſaid, It is clear that the Wife there ſhould recover. Trin. 42 Eliz. B. R. *Stephens* and *Totty's* Caſe. *Noy* 45.

34. A. Libelled in the Spiritual Court for the Tythes of Pilchards taken in the Sea. The party had a Prohibition upon a ſurmiſe, That the Cuſtome there is, That the Owner of the Fiſher-boat hath one moyety of the Fiſhes, and the Fiſherman the other moyety, and that the Owner had uſed to pay the 10th of his moyety in diſcharge of all Tythes. It was in that Caſe holden by the Court to be a good ſurmiſe: For by the Common Law the Parſon cannot have the Tythe of Fiſhes taken in the Sea, becauſe it is not within any Pariſh: and then when the Parſon by the Cuſtome ought to have the Tythes of them, he ought to take them according to the Cuſtome: And it was holden, That the 10th of the moyety might be a good diſcharge of the whole by the Cuſtome. Hill. 1 Car. B. R. *Holland* and *Heales* Caſe. *Noy* 108.

35. Note, It was Ruled in full Court, That if a Sentence be given in the Spiritual Court, and Coſts be taxed; and the Defendant brings an Appeal: yet if the Suit did not appertain Originally, or properly unto them, as if it was for Tythes of Trees ſpent in fewel: A Prohibition ſhall be awarded as well to the Coſts, as to the Principal Suit. Notwithſtanding that the Statute of 32 H. 8. cap. 7. ſayes, That the Eccleſiaſtical Judg ſhall compel the Appellant forthwith to pay Coſts: For that is to be taken when the Caſe properly appertains to the Spiritual Court. Paſc. 8 Jac. C. B. *Noy* 137.

36. The Vicar of A. libelled ſeverally againſt the Plaintiffs in the Spiritual Court for ſmaller Tythes, and alſo for Herbage, Wood, &c. The Plaintiffs joyned in a Prohibition, and ſurmiſed for all (but the ſmall Tythes) a Cuſtome of Tything. It was the Opinion of the Court, That one Prohibition could not be brought in both their names, becauſe the Suit being for ſeveral Tythes, they could not joyn in one Prohibition; For the vexation of the one did not extend to the other. Yet in that Caſe the Court would not Grant a Conſultation, becauſe the matter being upon a Cuſtome tryable at the Common Law, the Spiritual Court had no Juriſdiction of it. Trin. 6 Jac. B. R. *Burges* and *Dixon* and *Aſhtons* Caſe. *Yelverton* 129.

Property.

THe Caſe was: C. was endebted to A. by Obligation, and afterwards ſhe delivered to J. S. certain Hogſheads of Wine to ſatisfy A. *de debito prædict.* Afterwards the Obligation was aſſigned to the Queen, for the Debt of A; and If the property of the ſaid Hogſheads of Wine were allowed by the delivery of them to J. S. before the Aſſignment, was the Queſtion. It was Objected, It was not allowed; for the Baylor might have an Action of Accompt againſt J. S, before he hath delivered them over according to the Bailment; but if he hath delivered them over, the ſame is a good Barr in an Accompt. But in the principal Caſe, It was, That C. was Executrix to her Husband, who was endebted to A; and ſhe delivered the Goods to J. S, to ſatisfy A, and all before the Aſſignment; and then the property of the Goods is altred: For as this Caſe was, J. S. was ſurety for C, and had a Counterbond of C. to ſave him harmleſs. It was ſaid in this Caſe, If I borrow money, and deliver Plate for the ſecurity of it, the general property is in Me; yet the Baylee hath a ſpecial Intereſt in it till the money be paid: And in this Caſe, It was ſaid, That J. S. might by virtue of the Baylment ſell the Goods, and with the money pay the Debt to A: Afterwards it was adjudged, That the property of the Goods was altred. Mich. 31 Eliz. Exchequer, *Clarks* Caſe. *Leon.* 2. Part, 30, 21, & 38.

2. A. being Defendant, in Debt at the Suit of J. S, a *Scire Facias* iſſued to the Sheriff to levy the Debt for J. S; the Sheriff by virtue thereof ſeiſed the Goods, but did not return the Writ. Afterwards the Sheriff was diſcharged, and a new Sheriff made; the old Sheriff after his Diſcharge ſold the Goods to the Defendant, againſt whom the Plaintiff brought Trover and Converſion. In this Caſe, It was adjudged for the Plaintiff; For the ſale made by the old Sheriff after his Diſcharge, was void, for his Authority ceaſed with his Office: And it was holden in this Caſe, That by the Seiſure of the Goods by the Sheriff, the property of the

the goods was not altered; for the ſeizure is not any Execution, but the beginning of it, and the Sheriff after ſuch a ſeizure ought to have retorned the Writ *in tanto*, and could not deliver them in the Countrey to the party. Hill. 1 Jac. B. R. *Ayer* and *Adens* Caſe. *Yelv.* 45.

3. Treſpaſs for breaking his Cloſe called B. in L. and taking of two Conyes. The Defendant as to all but the Entry, pleaded Not Guilty: And as to that, he juſtified, That he had Common in the ſaid Cloſe, and that he had five Cowes ready to put upon the Common to uſe his Common; and becauſe many Coneyes were the ſpoyling the Common; in preſervation of his Common he entred to drive away and kill the Coneyes: Upon which Plea the Plaintiff demurred. It was adjudged in this Caſe, That the Juſtification was not good; For the Commoner may not enter and chaſe and kill the Coneyes; for although the Owner of the ſoil hath not a property in the Coneyes: Yet as long as they are in his Land, he hath a poſſeſſion of them, which is good againſt the Commoner. Alſo Coneyes are matter of profit to the Owner of the ſoil for houſe keeping; therefore becauſe it appeared, That the cauſe of Entry was to chaſe and kill, which acts were unlawful as to the Lord the Plaintiff; for that cauſe the Court held, That the Juſtification was not good. Mich. 5 Jac. B. R. Sir *Chriſtopher Hoddeſton* and *Griffith's* Caſe. *Yelv.* 104.

4. Trover and Converſion of a Gelding: The Caſe was, One A. had ſtolen the Gelding from the Plaintiff, and ſold him to the Defendant in open Market by the name of B. It was entred in the Toll Book, That B. ſold him. The Queſtion was, If this alteration of his name ſhould alter the property, although that the ſale was in open Market. It was the Opinion of the Juſtices in this Caſe, That this was no good ſale to bar the Plaintiff; and they grounded their Opinions upon the Statute of 2 and 3 *Phil.* and *Mar.* cap. 7. which provides, That no property of ſtolen goods ſhall be altered unleſs the Name and Sir-name of the party be written in the Toll Book: And it was the Opinion of the Juſtices, That the Gelding ſhould be in the Market and walked there for an hour together, otherwiſe the property is not altered. Mich. 30 El. B. R. *Gibbs* and *Baſtitts* Caſe. *Owen* 27.

Proviſo.

1. *Feoffione firme*, the Caſe was; A. made a Leaſe to B. C. and D. by Indenture, To have and hold to them for the Term of their lives, Proviſo, and it is Covenanted and Granted between them, That the ſecond ſhall not occupy the Land during the life of the firſt; and the third ſhall not occupy during the life of the ſecond; the firſt occupied all, and dyed, the third entred and made the Leaſe. It was ſaid in this Caſe, and ſo after adjudged, That by the Premiſes of the Deed, the parties to whom and the Land Demiſed being expreſſed; and in the *Habendum* the Eſtate being limited, as the Office of the *Habendum* is, the Proviſo that commeth after ſhall not avoid it; and therefore it was adjudged, That it was a joynt Eſtate, and that the Proviſo ſhould not ſever it. It was adjudged for the Plaintiff. Mich. 31 Eliz. B. R. *Stovell* and *Cabells* Caſe. *Cro.* 3. Part, 89, & 107.

2. *Ejectione firme*: A. let the Land to B. for years: Provided always, and it is further Covenanted, That the Leſſee ſhall not aſſign his Term to any other, Except to the Leſſor, paying as much as another; and if the Leſſor will not have it, then he may allien it to none except his Mother, or his Son. The Leſſee alliened it to his Mother; the Leſſor entred and let it to the Plaintiff. The Queſtion in the Caſe was, If the words were a Condition, or a Covenant only: All the Judges held, That it was a good Condition to defeat the Eſtate; and it was ſaid, That the word Proviſo always imployeth a Condition, if there be not words ſubſequent which may peradventure change it into a Covenant: Wherefore it was adjudged, That the entry of the Plaintiff was lawful. Mich. 33 Eliz. B. R. *Simpſon* and *Titterell's* Caſe. *Cro.* 3. Part, 242.

3. The Caſe was, A. makes a Leaſe to B. for life; and further Grants unto him, That it ſhall be lawfull for him to take Fewel upon the Premiſes. Proviſo, That he do not cut any great Trees. It was holden by the whole Court in this Caſe, That if the Leſſee cutteth any great Trees, he ſhall be puniſhed in Waſte; but in ſuch Caſe the Leſſor ſhall not re-enter, becauſe that Proviſo is not a Condition, but only a Declaration and Expoſition of the Extent of the Grant of the Leſſor in that behalf. It was then alſo holden by the

Court, That Leſſee for life, or for years by the Common Law, cannot take fewel but of Buſhes and ſmall Wood, and not of Timber Trees. But if the Leſſor in his Leaſe granteth Fire-bote expreſly, if the Leſſee cannot have ſufficient fewell, as above, &c. he may take great Trees. Mich. 14 Eliz. C. B. *Leon.* 3. Part, 16.

4. *Ejectione firme*, the Caſe was; A. let Lands for years, rendring 50 s. rent at the four Feaſts, *viz. Mich. &c.* Proviſo, That if the Rent be behind by the ſpace of a year after the day of payment, it being lawfully demanded, and no diſtreſs to be found there *per tempus prædict.* he might reenter. The Rent was arrear for a year; The Jury found a demand, and that there was no Diſtreſs upon the laſt day of the year upon the Premiſes, and that the Leſſor entred, and let to the Plaintiff. It was adjudged in this Caſe for the Defendant, That the Condition was not broken if there be a Diſtreſs at any time of the year; and a Condition ſhall be taken moſt favourable for the Leſſee. Trin. 42 Eliz. B. R. *Grigg* and *Meyſes* Caſe. *Cro.* 3. Part, 764.

Quare Impedit.

1. *Quare Impedit* againſt the Biſhop of H. and others. The Plaintiff counted, That J. S. was ſeiſed of the Advowſon in groſs, and granted the ſame to the Plaintiff and others, to the uſe of himſelf for life, and after to the uſe of R. S. his Son, in tail. Proviſo, That if the ſaid J. S. dyed, his Heir being within the age of 23 years, That then the Grantees and their Heirs ſhould be ſeiſed to themſelves and their Heirs untill the ſaid R. S. ſhould have accompliſhed the ſaid age. J. S. dyed, R. S. being but of the age of 14 years, by force of which the Grantees were poſſeſſed of the ſaid Advowſon, and afterwards the Church became void, and ſo it appertained to them to preſent. Exception was taken to the Count, becauſe the Plaintiff had not averred the life of R. S. upon whoſe life the Intereſt of the Plaintiff did depend. But to that it was ſaid, That the Count was good enough; for although the life of R. S. be not expreſly averred, yet ſuch an averment is ſtrongly implyed for the Count is *Quod dict. J. S. obiit dict. die R. S.* being of the age of 14 years *et non amplius*, by force of which the Plaintiff was poſſeſſed of the ſaid Advowſon; *qui quidem ſic poſſeſſionatus.* the Church became void, and poſſeſſed he could not be if that the ſaid R. S. had then bin alive. And in this Caſe it was holden by the Juſtices, That there was an Intereſt in the Grantees determinable upon the death of R. S. within the Term, for that if R. S. dyeth within the Term, the Remainder is limited over to a ſtranger. Mic. 29 Eliz. C. B. *Baſkerville* and the Biſhop of *Herefords* Caſe, *Leon.* 2. Part, 50.

2. *Quare Impedit*, the Caſe was; J. S. being Parſon or the Rectory of S. of the value of 10 l. took the Church of R. without any Diſpenſation, and was Inducted, and ſo continued 12 years. B. Preſented J. D. who was Inſtituted and Inducted, and ſo continued divers years, and dyed; The Queen Preſented C. the Defendant *ratione Lapſus* in the time of J. S. who was Inſtituted and Inducted. B. the Plaintiff brought a *Quare Impedit* againſt the Biſhop and C. and in that Caſe it was adjudged, That the Writ did lye, for that *Tempus occurrit Regi*; and Judgment was given, That C. the Defendant ſhould be removed. Afterwards another Queſtion did ariſe between the ſame parties. B. depending the *Quare Impedit*, was Outlawed at the Suit of J. N. and being Outlawed, and Judgment being given for him in the *Quare Impedit* (as before), the Defendant C. reſigned and took a new Preſentation from the Queen by reaſon of the Outlawry, and was Inſtituted and Inducted. B. reverſed the Outlawry, and afterwards brought a *Scire facias* to have Execution of the Judgment. C. pleaded this Preſentation by reaſon of the Outlawry, and demanded Judgment if Action, for the Preſentation was veſted in the Queen, and executed before the Outlawry was reverſed. But notwithſtanding it was adjudged, That the Plaintiff ſhould have Execution, for that upon a Recovery in a *Quare Impedit*, any Incumbent that comes in *pendente placito* ſhall be removed. Mich. 27 Eliz. in C. B. *Beverly* and *Cornwallis* Caſe. *Cro.* 3. Part, 44, 45.

3. Error of a Judgment in a *Quare Impedit* brought by the Queen, in which the Biſhop pleaded,

ded, That he claimed nothing but as Ordinary, &c. The Queſtion was, If the Writ lay, being brought in both their names, or ought to be brought only in the name of S? It was objected, That the Biſhop ought not to joyn in the Writ, for that he had no loſs. But it was adjudged, That the Writ was well brought, for the Biſhop hath loſs by the Judgment, and the Writ ſhall be to the Archbiſhop for Admiſſion and Inſtitution, and ſo he hath loſs, and therefore ſhe ſhall joyn in Error to reverſe that Judgment. Mich. 30 Eliz. B. R. The Biſhop of *Glouceſter* and *Sauſeres* Caſe. *Cro.* 3. Part, 65.

4. *Quare Impedit* by the Queen for diſturbing to Preſent to the Church of A. as in her right of the Dutchy of *Lancaſter*; and counted, That King *Henry* the 8th was ſeiſed, and dyed, and that the Advowſon came by Diſcent to the Queen, and that the Church became void, &c. The Archbiſhop pleaded, That H. his Predeceſſor was ſeiſed of the Advowſon in groſs, and collated to it. J. S. who was Admitted, Inſtituted, and Inducted, and dyed ſeiſed, and ſo pleaded three ſeveral Collations the one after the other, and the Defendant pleaded the ſame plea; upon which it was demurred. It was adjudged in this Caſe, That a double or treble Uſurpation did not put the Queen out of poſſeſſion, for ſhe ſhall have it as if it had bin in the right of her Crown. Then an Exception was taken to the Writ, That it was general, and did not mention that the Queen had it in the right of her Dutchy; but it was ſaid, That the Count was ſpecial, and ſhewed it, and therefore the Writ was awarded good. Trin. 33 Eliz. C. B. The Queen and the Biſhop of *York*, and *Bucks* Caſe. *Cro.* 3. Part, 240.

5. In a *Quare Impedit*, The Defendant pleaded, That he demanded of J. S, the Preſentee of the Plaintiffs to ſee his Letters of Orders, and he would not ſhew them; becauſe he was not certain whether he was a Deacon or not, and alſo he demanded of him his Letters Miſſive or Teſtimonial, teſtifying his ability; and becauſe he had not his Letters of Orders, nor Letters Miſſive, nor made proof of them to the Biſhop; he deſired leave of the Biſhop to bring them: He gave him a week, and he went away and came not again, and the ſix Months paſſed, and the Biſhop collated by Lapſe. It was adjudged in this Caſe for the Plaintiff, and that theſe were No Cauſes for to ſtay the admittance of the Clerk; For the Clerk is not bound to ſhew his Letters of Orders, and Letters Miſſive to the Biſhop; but the Biſhop muſt try him upon Examination: and therefore it was adjudged for the Plaintiff. Trin. 33 Eliz. B.R. *Peline* and Biſhop of *Peterboroughs* Caſe. *Cro.* 3. Part, 241.

6. *Fitton* and the Counteſs of *Northumberland* his Wife, Sir *Thomas Cicill* and *Dorothy* his Wife, *William Cornwallis* and the Lady *Lucy* his Wife, and others the Daughters and Heirs of the Lord *Latimer* brought a *Quare Impedit* againſt *Hill*. The Defendant pleaded a Releaſe of *Cornwallis*, pendant the Writ; It was adjudged, That that ſhould go in bar only of him and his Wife, and that the Writ ſhould ſtand good for the other. Then it was alledged, That the Declaration was not good; becauſe there is not alledged any Preſentment in the Father of the Plaintiff, nor in any who had the Inheritance; but in the Grantee of the next Avoidance, which is not any Title: But all the Juſtices held, That the Declaration was good enough. For this Preſentment by the Grantee is in the Right of the Grantor, and gives unto him ſufficient ſeiſin. Mich. 39 Eliz. C. B. The Counteſſe of *Northumberlands*, and others, and *Halls* Caſe. *Cro.* 3. Part, 518.

7. Error to reverſe a Judgment in a *Quare Impedit*: For that the Plaintiff declares, That a Stranger was ſeiſed for years, and deviſed it to the Plaintiff, and ſo by the aſſent of the Executor he had it, and doth not ſay, *Virtute Legationis prædict.* 2. Becauſe he doth not ſhew how the Church became void by deprivation of the Incumbent, nor for what other cauſe; For it may be a cauſe for which the Queen ſhall have Preſentation as if it was for Simony, by the Statute of 31 Eliz. But notwithſtanding theſe Exceptions, the Judgment was affirmed by the whole Court. Trin. 41 Eliz. B.R. The Biſhop of *Glouceſter* and *Veals* Caſe. *Cro.* 3. Part, 676.

8. The King ſeiſed of a Mannor, to which an Advowſon was Appendant: A ſtranger preſented, and his Clerk was in by ſix Months. The King granted the Mannor, with all Advowſons appendants to it to B, the Incumbent dyed. In this Caſe, It was holden by the whole Court, That the Grantee might Preſent; for the Advowſon was always Appendant, and the Inheritance of the ſame paſſed to the Grantee; for it was not made diſappendant by the Uſurpation. But in this Caſe, It was holden, That the Patentee ſhould not have a *Quare Impedit* for the firſt diſturbance; for that Preſentment did not paſs unto him, being a thing in Action, without mention of it in his Grant: And if the Plaintiff bring a *Quare Impedit* of the ſecond Avoydance, he ſhall make Title by the Preſentment of the King, not making mention of the Uſurpation: Yet if the Biſhop Preſent for Lapſe in the Caſe of a common perſon, he ought to make mention of it. Mich. 18 Eliz. C. B. *Leon.* 3. Part, 61.

9. In a *Quare Impedit*, the Plaintiff declared, That he was ſeiſed in Fee of the Mannor of *Orchard*,

chard, alias Lidcott's Farm, to which the Advowſon is Appendant, and preſented ſuch a one; and afterwards leaſed to the Plaintiff the ſaid Manor *per nomen* of the Manor of *Orchard, alias Lidcot's* Farme, with the Appurtenances for 21 years, and the Church became void, &c. The truth of the Caſe was, That there was the Manor of *Orchard*, and, within the ſaid Manor, the ſaid Farm called *Lidcott's* Farm, parcel of the ſaid Manor, and the Leaſe was of the ſaid Farm, and of the ſaid Manor, and ſo the Advowſon remained to the Leſſor as Appendant to the Manor. It was moved to the Court in this Caſe, What thing the Defendant ſhould Traverſe. The better Opinion ſeemed to be, That the Defendant ſhall ſay, That the Advowſon is Appendant to the Manor of *Orchard*, and that the Farme of *Lidcott's* is parcel of the Manor, and that he leaſed to the Plaintiff the ſaid Farme, with the Appurtenances, *abq; hoc* that the Manor of *Orchard*, and the ſaid Farm are all one. For if he traverſe, the Appendancy to the Farme of *Lidcott's*; then he confeſſeth, That the Manor and Farme are all one. But *Quære*, Mich. 29 Eliz. C. B. *Leon.* 3. Part, 66.

10. *Quare Impedit*, to preſent to the Church of B: The Caſe was, The Corporation of B, was ſeiſed of the Advowſon, and granted the next Avoidance to J. S, and afterwards granted *primam & proximam Advocationem* to the Earl of *Bedford*, who granted it to the Plaintiff. The Church became void, afterwards J. S. preſented his Clerk, who was admitted, inſtituted, and inducted; and then the Church became void again, and the Plaintiff pleaded, and being diſturbed, brought a *Quare Impedit*. It was Reſolved by the Juſtices in this Caſe, That the ſecond Grant was void, ſo as the Plaintiff had not any Title; for when he had granted *primam & proximam Advocationem* to one, he had not any Authority to grant it afterwards to another; but perhaps if the firſt Deed had been loſt before he had taken benefit thereof; and that it could not be pleaded, the ſecond Grant might have been good: But he can never have the ſecond Preſentment, becauſe it is againſt the expreſſe words of the Grant. *Williams* and the Biſhop of *Lincolns* Caſe. Mich. 43 Eliz. *Rott.* 364. in C. B. *Cro.* 3. Part, 790, 791.

Quo Warranto.

1 *Quo Warranto* by the Queen againſt the Defendant, who claymed certain Wrecks in the County of *Y*: The Defendant pleaded, That *Ed.* Duke of *Buck.* was ſeiſed of the Manor of D, to which he had Wreck appurtenant, and that he was *de alta prodit* or *debito modo attinctus*: Which was found by the Eſcheator; And ſhewed, That the Manor came to Queen *Mary*, who granted the ſame to the Earl of *Weſtmerland*, who granted the ſame to the Defendant. Upon which it was Demurred. Exception was taken to the Plea, becauſe the Attainder is not certainly, nor fully pleaded. And it was ſhewed, That the Wreck is appendant to the Manor; and then if the Defendant hath the Manor, he hath the Wreck alſo: and if he hath the Manor, it is not material how he hath it; for the Queen doth not claim the ſame, but impeacheth the Defendan for his uſing ſuch a Liberty. But if the Heir of the Duke had demanded the Manor againſt him, the Attainder ought to have been pleaded certainly. In this Caſe, It was ſaid, That the Intereſt of the Queen in the Sea, extends unto the middeſt of the Sea betwixt *England* and *Spain*: But the Queen hath the whole Juriſdiction of the Sea between *England* & *France*, becauſe ſhe is Queen of *England*, *France*, &c. Hil. 29 Eliz. B.R. The Queen and Sir *John Conſtables* Caſe, *Leon.* 3. Part, 72.

2. *Quo Warranto* was brought for claiming a Leet in the Manor of B: The Defendant pleaded, That he was ſeiſed in Fee of the ſaid Manor, and claimed the Leet there by Preſcription. Iſſue was joyned upon it. And the *Viſne* was *de Maneriis de B*; and not, Of the Village of B: for there was no mention of Village in the Record, and then the *Venire facias* might be *de Maneriis*: It was then moved, That the *Poſtea* might be ſtayed, becauſe there was a Miſ-tryall, It being for the Queen: for if the Defendant might have it certified, he might exemplifie the Verdict as duly tryed; which would be an Evidence againſt the Queen. Wherefore by Rule, the *Poſtea* was ſtayed. Mich. 36 Eliz. B. R. *Nevill* and *Payns* Caſe, *Cro.* 3. Part, 502.

3. In a *Quo Warranto*, It was Reſolved, That a man may preſcribe to hold a Leet other, and at other times, then are mentioned in the Statute

de Magn: Charta, Cap. 11. for that is in the affirmative. And further Resolved, That in a *Quo Warranto* of Liberties, it is not sufficient to derive an Interest to them in a stranger from the King or Queen, for making Title to himself; for that the Writ is, *Quo warranto* he himself useth them. Hil. 31 Eliz. B. R. *Partridges* Case. *Cro.* 3. Part, 125.

4. *Quo Warranto* by the King, against R. S. for holding of a Court-Leet, and a Court-Baron within the Hundred and Mannor of W. in *Com.* B; As to the Leet, the Defendant disclaymed; but as to the Court-Baron, pleaded, That J. S. was seised of the Mannor of W. within the Hundred of W, whereof the Mannor of N. was parcell, and Copyhold; known as well by the name of a Messuage, and 7. Yard-Lands, Customary, as by that Name of a Mannor. And that the said J. S. Leased to him the said Mannor of N. by the name of a Messuage and 7. Yard-Lands, and 20 s. Rent, and that he Entred, *et ea ratione*, *et virtute Concessionis praedict.* he held a Court-Baron within the said Mannor of N: Upon this Plea, the King Demurred in Law. In this Case, It was Resolved by the Justices (amongst other things), That a *Quo Warranto* is a Writ of Right in its nature which ought to be answered in Chief, which the Defendant in respect of the smallness and weakness of his Estate, could not do, *à fortiori*, he cannot enable himself in his own right to hold a Court-Baron, which is a Court of Justice; and if a Franchise be claymed by any but by him who hath a Freehold, it shall be seized into the Kings hands. And therefore, the Judgment given in this Case, was for the King, That the Defendant should be ousted from holding of any Court; and, That the Defendant's Plea was not good. Mich. 8 Jac. B. R. The King and *Stafferton's* Case. *Yelverton*, 190, 191.

Recognizance.

1. DEbt upon a Recognizance taken in *London*; the Plaintiff declared, That the Mayor there had used to take Recognizances by Custome, of all persons, except Infants and Feme Coverts, upon any day, except Sundays, and other days specially named: And Judgment being given for the Plaintiff; It was moved in stay of Judgment, 1. That it was an unreasonable Custome; for it may so extend to men of *Non sanae Memoriae*, and bind them, for which they have no remedy. 2. Objected, That none can take Recognizances but Justices of Record; and the Mayor is not a Justice of Record. But it was Resolved, That the Custome was good; and the Customes of *London* being Confirmed by Act of Parliament, though strange, are good; and extends as well to Recognizances taken of Strangers, as of Citizens. Trin. 32 Eliz. B. R. *Chamberlain* and *Thorps* Case. *Cro.* 3. Part, 187.

2. A. was bound in a Recognizance to his good behaviour, upon which the Queen brought a *Scire facias*, and Surmised, That after the said Recognizance acknowledged, A. was Arrested and taken by a Constable, upon suspition of Felony, and escaped of his own wrong. It was Objected, That the Recognizance was not forfeited, because it was not alledged, that any Felony was committed. But it was the Opinion of the Court, That that was not material if Felony were committed or not; For, if a Subject be Arrested by a lawfull Officer, it is not lawful for him to escape, but he ought to stand to answer the matter with which he is charged; and by his Escape he had forfeited his Recognizance. Pasch. 26 Eliz. B. R. *Crabtrees* Case. *Leon.* 2. Part, 166.

3. Assumpsit; Declared, That J. S. was seised of Lands, and was bound in a Recognizance of 1000 l. to the Plaintiff, and enrolled the Defendant of his Land; That the Defendant, in Consideration that the Plaintiff would assign to him his Recognizance, promised to pay the Plaintiff 80 l. before such a day: and he assigned over his Recognizance. Upon *Non Assumpsit*, It was found, That at the time of the Recognizance made, J. S. was seised of the Land sold to the Defendant, and also of a Close called W; and enrolled one J. D. of the said Close called W; and the Plaintiff Released to J. D. all his Right, Interest, and Demand in the Land called W: And afterwards J. S. enrolled the Defendant; and that the Defendant promised, *ut supra*; and that the Plaintiff assigned the

the *Recognizance* to the Defendant. In this Caſe, It was ſaid, That a Conſideration to aſſign a *Recognizance*, is illegal, and Maintenance; and ſo no good Conſideration. 2. That by a Releaſe of al his right and demand in the Land to J. D, who had part of the Land charged with the *Recognizance*, the whole *Recognizance* was diſcharged, and then it could not be aſſigned over. It was Reſolved by the Juſtices, 1. That an Aſſignment of a Debt or a Recogn zance to a Stranger, is an illegall and void Conſideration. But for to aſſign it to the Terr-Tenant by way of diſcharge of his Land, is good. 2. Reſolved, That this Releaſe to J.D. of all his right and demand in the Land, was not any diſcharge of the *Recognizance*; for at the time of the Releaſe made, he had no right nor cauſe of demand of the Land, for the Land is the debtor, and not the perſon; and here at the time of the Releaſe before Execution ſued, he had not any right nor demand in the Land. It was adjudged for the Plaintiff. Paſch. 39 Eliz. B. R. *Barrow* and *Gr.ys* Caſe, *Cro.* 3. Part, 551.

4. *Aſſumpſit*; In Conſideration, that the Plaintiff had entred into a *Recognizance* of ſuch a Sum, upon Condition, That the Defendant ſhould make his appearance at the next Aſſizes to be holden before the Juſtices of Goal-Delivery for the County of S: The Defendant promiſed to appear at the ſaid Goal-Delivery, and to ſave the Plaintiff harmleſs of his *Recognizance*; and that the Defendant did not appear, nor ſave him harmleſs, to his damage, &c. The Defendant pleaded, That before the next General Goal-Delivery, he delivered a *Certiorari* to remove the *Recognizance*, directed to one of the Juſtices of the Aſſize; and ſaid, That the Plaintiff was not damnified by that *Recognizance*. In this Caſe, It was adjudged for the Plaintiff; For the Defendant ought to have ſhewed expreſly, that he appeared at the Aſſizes; for otherwiſe the *Recognizance* was forfeited: and the removing of the *Recognizance* by a *Certiorari*, did not diſperce with the Defendant's appearance, although the Writ by which the Recognizance is removed, be the Kings Writ, and is the Commandment of the King: yet the purchaſe of the Writ is the Act of the party the Defendant, and by no ſuch ſlight can he ſave his Recognizance. Trin. 9 Jac. B. R. *Roſſe* and *Pics* Caſe. *Yelverton*, 207.

Releaſe.

1. NOte; By the Chief Juſtice of the Common-Pleas, That if a Leaſe be made to one for Term of years, the Remainder over for life, the Remainder over to another for life, That if he in the Reverſion by his Deed Releaſes to them all three; *et à four heires*, yet the firſt Leſſee ſhall have the ſole poſſeſſion of the Lands as he had before, and the others ſhall not have any poſſeſſion with him, and that every one of them hath gained a Reverſion in Fee in the ſame Land. Trin. 7 E. 6. *Bendlowes*, 23.

2. If a joynt Eſtate be made to Husband and Wife, and to a third perſon; and the third perſon doth Releaſe all his right which he hath to the Husband; That in ſuch caſe, the third perſon ſhall have the moyety which the third perſon had, and the wife ſhall have nothing of that; and the Husband hath a Feeſimple in the Land, notwithſtanding that he doth not Releaſe to him and his Heirs for ever: By the Opinion of all the Juſtices of the Common-Pleas, Hill. 10 Eliz. *Bendlowes*, 32.

3. The Caſe was; The Lord granted the Freehold of a Copyhold to a ſtranger, the Copyholder being in poſſeſſion, Releaſed to the Grantee all his right in the Land. The Queſtion was, If it did extinguiſh the Copyhold? The Lord *Anderſon*, Chief Juſtice, was of Opinion, That it did not; And ſaid, It was adjudged, That if Tenant for life releaſeth to him in the Reverſion, it is void; for it cannot enure as a Releaſe, for he is in poſſeſſion; nor can it enure as a Surrender, for want of fit words. Trin. 25 Eliz. C. B. *Cro.* 3. Part, 21.

4. *Audita Querela*, for ſuing Execution upon the Manor of W, upon a Statute which one J.S. did acknowledg to him; And ſhewed, That the ſaid J. S. at the time of the Statute acknowledged, was ſeiſed of the ſaid Manor, and afterwards ſold it to the Plaintiff; and the Plaintiff being thereof ſeiſed, the Defendant by his Deed *Remiſit et relaxavit* to the Plaintiff *totum et quodlibet jus, titulum, intereſſe et demand. quæcunq;* the Defendant *habuit, habet, vel habere debuit de et in Maneriam prædict. Necnon omnes Actiones, Sectas, Executiones, et Demanda, prædict. ipſe vel hæred. &c. habere poſſint*, againſt the Plaintiff, *pro vel concernent.*

aliquam

ſuper matrimonium contract. præmiſſorum. Upon which it was Demurred. It was in this Caſe Reſolved, That it was a good Barr of the Execution upon the ſaid Statute. Mich. 27 Eliz. C. B. *Hide* and *Jenkyns* Caſe, *Cro.* 3. Part, 40.

5. Debt againſt an Executor, who pleaded fully Adminiſtred: It was found, That J. S. made the Defendant his Executor, being within age: Adminiſtration was granted to A. and B, who adminiſtred, and that they had in their hands, when the Defendant came to his full age, Goods of the Teſtator, to the value of 600 l. and that the Defendant when he came of age, proved the Will, and releaſed to the Adminiſtrators all Actions. It was a Queſtion, if it was Aſſets in the Executors hands? becauſe it was incertain what he releaſed, and for that an Accompt only lyeth: But it was adjudged, That it was Aſſets; for that here the certainty appeareth by the Verdict. But it was ſaid, That if an Executor doth releaſe an Accompt, and it is not certain what he ſhall recover, it is not Aſſets; but if it can appear, or be proved, that ſo much is due, it is Aſſets; for, the Law preſumeth, that he hath received ſo much as he doth releaſe: It was adjudged for the Plaintiff. Mich. 29 Eliz. C. B. *Brigham* and *Knight's* Caſe. *Cro.* 3. Part, 43.

6. Treſpaſs, The Defendant pleaded, That J. S. was ſeiſed in Fee, and lett the Land to him at Will, and after Releaſed to him all Accompts, Suits, and Demands, *ab origine mundi*, to the day of the date of the Releaſe, by which he was ſeiſed for life. It was Reſolved in this Caſe, That by this Releaſe the Eſtate of the Defendant was not enlarged; and Judgment was for the Plaintiff. Hill. 34 Eliz. B.R. *Seymor* and *Okeley's* Caſe. *Cro.* 3. Part, 268.

7. The Caſe in a *Quare Impedit* was: The next Avoydance of a Church was granted to A, and B; Afterwards A. Releaſed to B. the Plaintiff, and after that the Church became void. The Queſtion was, If B. ſhould Preſent only, or, if he was diſturbed, ſhould have a *Quare Impedit* in his own name? It was adjudged, That he ſhould; for, the next Avoidance is a thing in Intereſt, and granable to a Stranger; and therefore it might be Releaſed the one to the other. But if the Church was void at the time of the Releaſe, it was otherwiſe; for then it is a thing in Action, which cannot be conveyed over. Mich. 40 El z. B. R. *Bennet* and Biſhop of *Norwiches* Caſe, *Cro.* 3. Part. 600.

8. Debt upon an Apprentice bound; The Condition was, That if J. S. did become the Apprentice of the Obligee, and tranſport his Merchandizes beyond the Seas, and make a Return of them; and make an Accompt to the Obligee, and pay the money upon his Accompt within a certain time, that then, &c. Afterwards the Obligee did by Deed Releaſe to the Servant the Apprentice, and not to the Obligor. And in Debt brought againſt the Obligor, he pleaded the Releaſe. It was the Opinion of the whole Court in this, That by the Releaſe to the Servant, the Obligation was ſaved; if the Releaſe were made before any forfeiture, or that the Servant or Apprentice had broken any of the Covenants, or any payment according to the Covenants; but, if it was made after any of them was broken, then ſuch Releaſe to Servant did not diſpence with the Obligation which was made by the Stranger; becauſe an Obligation once forfeited, cannot be ſaved by an Act or Releaſe made or done to Stranger. Mich. 15 Eliz. C. B. *Leon.* 3. Part, 45.

9. Error by ſix of a Judgment in C. B. in a Replevin; Where one of the ſix avowed in his own Right, for an Amerciament in a Leet; the other five made Conſiſance as his Bayliffs. Judgment was given againſt the ſix, Damages and Coſts: The ſix brought a Writ of Error, and, hanging the Action, the Releaſe of one of the five was pleaded in Barr. It was Objected, That it was a Barr, for the Writ is to be reſtored to a perſonal Duty, *ſcil.* Damages and Coſts which they had loſt; which being perſonal, the Act of the one ſhall prejudice the other. This difference was put, Where many are Actors by way of Charging another, the Act of the one ſhall prejudice the other; But otherwiſe it is, where they are Plaintiffs to diſcharge themſelves; for in the firſt, the Law preſumes a folly to joyn with one who might diſcharge all. But otherwiſe it is, on the part of the Defendant; for it is not in him to appoint, Who ſhall be joyned with him in the Action: and when they are compelled to joyn in a Writ of Error or Attaint, for to defeat a Judgment, it is not reaſon that the Act of one ſhould prejudice his Companion: Wherefore it was adjudged, That it was not any Barr. Hill. 41 Eliz. B. R. *Riſley* and *Ruddock's* Caſe. *Cro.* 3. Part, 649.

10. Debt upon an Obligation, The Defendant pleaded a Releaſe of all Actions and Demands in Barr. The Plaintiff demanded Oyer of it, and an Exemplification of one Bond was therein: The Plaintiff Replyed, That that was the Bond in Suit; upon which the Defendant did demur. It was Reſolved by the Court in this Caſe, That the Obligation it ſelf being excepted, all Suits and Actions concerning it are alſo excepted; and that the Defendant having pleaded a Releaſe generally, without any Exception; and a Deed upon Oyer demanded, is ſhewed with an Exception; It was ſaid, That the Plaintiff had pleaded, *Non eſt factum* generally. Mich. 43 Eliz. C. B. *Brook* and

and *Whitlers* Caſe. *Cro.* 3. Part. 716.

11. In *Ejectione Firmæ* upon a Leaſe of one T, it was found, That it was Covenanted by Indenture, That a Fine ſhould be levyed of ſuch Land to the uſe of T; upon Condition, That if he paid not ſuch a ſum upon ſuch a day, that it ſhould be to the uſe of C. and his Heirs; the Fine was levyed, and before the day of payment, C. Releaſed to T. all his Right in the Land, and all Demands: but the Deed of Releaſe it ſelf was not ſhewed to the Jury, but a Copy thereof. It was the Opinion of the whole Court, That this Releaſe might be found in manner as it is, to defend a Poſſeſſion; another Queſtion was, Whether the Releaſe by C. before the Condition broken, was a ſufficient diſcharge of the future uſe to C? *Quære*, for that Point was not Reſolved. Mich. 43 Eliz. C. B. *Irone* and *Carrs* Caſe. *Cro.* 3. Part, 863.

12. *Scire facias* upon a Judgment in Debt; The Defendant pleaded in Barr, That the Plaintiff upon that Judgment had another time brought a *Scire facias* againſt the Bail, and that afterwards he Releaſed to the Bail all Actions and Demands. Whether this Releaſe to the Bail ſhall be a diſcharge to the Principal? *Quære*, for it was not Reſolved. Trin. 41 Eliz. B.R. *Elofeld* and *Grymes* Caſe. *Cro.* 3. Part, 890.

13. The Caſe was: The Defendant was Divorced from her Huſband *Cauſa Adulterii* of the Huſband; The Defendant the Wife, ſued the Plaintiff in the Spiritual Court, for a Legacy given her by a Stranger: He pleaded the Releaſe of the Huſband made after the Divorce; which being diſallowed in the Spiritual Court, he brought a Prohibition. It was holden by the Juſtices in this Caſe, That in regard this ſeparation doth not avoid the Marriage abſolutely, but that they ſhall ſtill remain Man and Wife; that this Releaſe of the Huſband was good to extinguiſh the Duty. Mich. 44 Eliz. B. R. *Stapleas* and *Tottys* Caſe. *Cro.* 3 Part, 909.

14. An Action was brought for taking of a Horſe. The Defendant pleaded, That the now Plaintiff was at another time barred in Treſpaſſe for the ſame thing. It was by the whole Court holden to be a good Plea; for that a Barr by Judgment, amounts to a Releaſe in Law: otherwiſe Suits would be infinite. Mich. 38 Eliz. B. R. Sir *Humfrey Ferrers* and *Wignalls* Caſe. *Noy*, 58.

15. Debt upon Arbitrament, the Plaintiff Declared, How that the Plaintiff and Defendant, 10. Feb. 7 Jac. ſubmitted themſelves to the Award of J. S; who awarded, They ſhould be friends, and that the Defendant ſhould pay to the Plaintiff 100 l. at Midſommer after, at ſuch a place: and for the money not paid, he brought the Action. The Defendant pleaded in Barr a Releaſe made by the Plaintiff, of all demands which was made 10. *April* before Midſommer, in which the Debt was to be paid, and it was of all Demands *ab initio Mundi uſq;* 10. *Aprilis*. Upon which the Plaintiff Demurred. It was adjudged againſt the Plaintiff; For although the ſum of money given by the Arbitrament, is not grounded upon any precedent Debt or Contract, betwixt the parties, yet it lyeth in demand preſently, and may be aſſigned by the Will of the Plaintiff to another, and the Executors ſhall have it; and in the Spiritual Law it is a Credit, of which Adminiſtration may be granted before the day of payment, if the Plaintiff dyeth before: although no Action lyeth for it before Midſommer; yet it is a duty by the very Award: and therefore by the Releaſe of all demands, it is gone. Hill. 9 Jac. B. R. *Bridges* and *Eissons* Caſe, *Yelverton*, 214.

16. Debt upon an Obligation, for the payment of 7 l. at the birth of the Plaintiff's Child. The Defendant pleaded, That before the birth of it, it was agreed betwixt them, That whereas the Plaintiff was to have a Load of Lime of the Defendant, for which he ſhould be endebted unto him, that the Defendant ſhould acquit him thereof, and accept of that debt in ſatisfaction of the Obligation; and that the Plaintiff at ſuch a day and place accepted of the ſaid Load of Lime in ſatisfaction of the ſaid Obligation. Upon which Plea, the Plaintiff Demurred. Two Exceptions were taken to the Plea: 1. That nothing can be taken in ſatisfaction of the 7 l. it not being a duty, but a ſum payable *in futuro*, and upon a Contingency: But of that, the Court ſeemed to doubt. 2. The Defendant pleaded, That the Plaintiff accepted the Load of Lime in ſatisfaction of the Bond; which cannot be, for it ought to have been pleaded in ſatisfaction of the Sum mentioned in the Condition of the Obligation; for the Bond it ſelf cannot be diſcharged without a Specialty. That, the Court held to be a material Exception; and ſo the Plea was not good, and adjudged for the Plaintiff. Trin. 8 Jac. B. R. *Neal* and *Sheffields* Caſe, *Cro.* 2. Part, 254. See *Yelverton*, 192. the ſame Caſe.

17. B. and A. his Wife brought Aſſumpſit againſt the Defendant; and declared, That in Conſideration A. *dum ſola fuit*, would marry T. M. at the requeſt of the Defendant, the Defendant promiſed after the death of T. M. to pay A. 40 *s. per annum* during her life: And ſhewed, that ſhe married T. M. who after dyed; and that ſhe took Husband B. the Plaintiff; and for 4 l. behind after the death of T. M. the Action was brought. The Defendant pleaded in Barr, a Releaſe,

ſelf made unto him by T. M. during the Marriage with A. by which he Releaſed to the Defendant all Actions, Quarrels, Controverſies, and Demands whatſoever which he had or might have againſt the Defendant. Upon which Plea, the Plaintiffs Demurred. It was adjudged by the Court, That this Releaſe did not diſcharge the promiſe; For although the promiſe was preſent, yet the execution of it was *in futuro*; and ſuch, as he who releaſed, could never have an Act on upon it. But if he had Releaſed, by expreſs words, All promiſes, or all Actions and Quarrells, which he or his wife had or might have, then the promiſe had been releaſed: for the promiſe could not be releaſed untill it came in *Eſſe*, no more then a Covenant could be. It was adjudged for the Plaintiff. Trin. 7 Jac. B. R. *Miller* and *Hallſons* Caſe. *Yelverton*, 156.

18. Debt upon an Obligation; The Defendant pleaded, That the Plaintiff, after the Obligation made, had Releaſed to him, All and all manner of Errors, and all manner of Actions, Suits, and Writs of Error whatſoever; Which I the ſaid, &c. for any matter or thing, &c. And I the ſaid, &c. am by theſe preſents excluded of Writs or Suits, Actions of Error or Suits againſt him the ſaid, &c. Upon the Plea, the Plaintiff Demurred in Law. It was ſaid, That the Obligation makes the duty, and a Releaſe of all Actions ſhall hurt him. But it was Reſolved, That the Releaſe was but ſpecial; and that it extends only to Errors, *Et ex Præcedentibus & Conſequentibus optima fit interpretatio*; the precedent clauſe is only a Releaſe of Errors: And the laſt Clauſe, *Actions and Suits of Error*, before: and there is not any word of debt in the Releaſe. And it was ſaid, That it was adjudged in this Court in a Writ of Annuity, A Releaſe was pleaded, That the Plaintiff acquitted him of one payment for half a year, and Releaſed to him all Actions, Suits, and Demands; And it was adjudged, That the Releaſe did not hurt him but of the Arrearages for that year. Paſch. 3 Car. C. B. *Abree* and *Pages* Caſe. *Hutley* 9. & 15.

Remainder *and* Reverſion.

1. TEnant for life, the Remainder in tail; the remainde in Fee: Tenant in tail in Remainder is attainted of Felony. The Queſtion was, If the King during the life of the Tenant in tail ſhould have the Fee? It was conceived, That he ſhould; for that it ſhall not be in abeyance, and it cannot be in any other; For when he is Attainted, he is dead, as unto the King. The Chief Lord cannot have it, for Tenant for life is alive; alſo he in the Reverſion in Fee, &c. the Donee ſhall not have it, for the Tenant in tail in Remainder is not naturally dead, but civilly; and the Land cannot revert before Tenant in tail be dead without Iſſue, but if there were any other in whom the Freehold might veſt and reſt, then the King ſhould not have the Freehold, but the profits of the Lands. Mich. 29 Eliz. B. R. in *Wankles* and *Harris* Caſe. *Leon.* 2. Part, 123.

2. W. Tenant in tail ſuffered a Recovery, and afterwards took an Eſtate to himſelf, and E. his Wife, for the Term of their Lives, the Remainder *ſeiuni filio de Corpore prolibil.* W. in tail; and if he had not any ſon, the Remainder to the Heirs of the body of W; the remainder to J. and A. his wife, and to the Heirs of J: Afterwards the ſaid W. and E. his wife levied a Fine with proclamations, to the uſe of himſelf, and to the ſaid Wife for their lives, the remainder to the eldeſt Child of the body of the ſaid W. in tail, the Remainder to the ſaid J. in Fee: E. dyed, 5. years paſſed; W. took another Wife, and had Iſſue a Daughter, and after a Son, and dyed. Other 5. years paſſe after his death, the ſon and daughter being both within age: J. dyes, living A. his wife. The Opinion of the Juſtices of the Common Pleas in this Caſe was, That the Son ſhould have the Land, and not the Daughter, by reaſon of the firſt Remainder *ſeiuni filio*. Mich. 12 Eliz. C. B. *Bendlowes*, 29.

3. The Lord *Vaux* levied a Fine to the uſe of himſelf for life, and after his deceaſe, to the uſe of his two Daughters, till A. his Son returned from beyond the Seas, and came to his full age, or dyed; which of the ſaid times, dayes, or hours firſt came, and then it ſhould remain to A; he returned from beyond

and *Whitlers* Caſe. *Cro.* 3. Part. 726.

11. In *Ejectione Firmæ* upon a Leaſe of one T, it was found, That it was Covenanted by Indenture, That a Fine ſhould be levyed of ſuch Land to the uſe of T; upon Condition, That if he paid not ſuch a ſum upon ſuch a day, that it ſhould be to the uſe of C. and his Heirs; the Fine was levyed, and before the day of payment, C. Releaſed to T. all his Right in the Land, and all Demands; but the Deed of Releaſe it ſelf was not ſhewed to the Jury, but a Copy thereof. It was the Opinion of the whole Court, That this Releaſe might be found in manner as it is, to defend a Poſſeſſion; another Queſtion was, Whether the Releaſe by C. before the Condition broken, was a ſufficient diſcharge of the future uſe to C? *Quære*, for that Point was not Reſolved. Mich. 43 Eliz. C. B. *Evans* and *Carrs* Caſe. *Cro.* 3. Part, 863.

12. *Scire facias* upon a Judgment in Debt; The Defendant pleaded in Barr, That the Plaintiff upon that Judgment had another time brought a *Scire facias* againſt the Bail, and that afterwards he Releaſed to the Bail all Actions and Demands. Whether this Releaſe to the Bail ſhall be a diſcharge to the Principal? *Quære*, for it was not Reſolved. Trin. 41 Eliz. B.R. *Elofield* and *Geynes* Caſe. *Cro.* 3. Part, 890.

13. The Caſe was: The Defendant was Divorced from her Husband *Cauſa Adulterii* of the Husband; The Defendant the Wife, ſued the Plaintiff in the Spiritual Court, for a Legacy given her by a Stranger: He pleaded the Releaſe of the Husband made after the Divorce; which being diſallowed in the Spiritual Court, he brought a Prohibition. It was holden by the Juſtices in this Caſe, That in regard this ſeparation doth not avoid the Marriage abſolutely, but that they ſhall ſtill remain Man and Wife; that this Releaſe of the Husband was good to extinguiſh the Duty. Mich. 44 Eliz. B. R. *Stephens* and *Tittys* Caſe. *Cro.* 3 Part, 909.

14. An Action was brought for taking of a Horſe. The Defendant pleaded, That the now Plaintiff was at another time barred in Treſpaſſe for the ſame thing. It was by the whole Court holden to be a good Plea; for that a Barr by Judgment, amounts to a Releaſe in Law: otherwiſe Suits would be infinite. Mich. 38 Eliz. B. R. Sr *Humfrey Ferrers* and *Wignalls* Caſe. *Noy*, 58.

15. Debt upon Arbitrament, the Plaintiff Declared, How that the Plaintiff and Defendant, 10. Feb. 7 Jac. ſubmitted themſelves to the Award of J. S; who awarded, They ſhould be friends, and that the Defendant ſhould pay to the Plaintiff 100 l. at Midſommer after, at ſuch a place: and for the money not paid, he brought the Action. The Defendant pleaded in Barr a Releaſe made by the Plaintiff, of all demands which was made 10. *April* before Midſommer, in which the Debt was to be paid, and it was of all Demands *ab initio Mundi uſq; 10. Aprilis*. Upon which the Plaintiff Demurred. It was adjudged againſt the Plaintiff; For although the ſum of money given by the Arbitrament, is not grounded upon any precedent Debt or Contract, betwixt the parties, yet it lyeth in demand preſently, and may be aſſigned by the Will of the Plaintiff to another, and the Executors ſhall have it; and in the Spiritual Law it is a Credit, of which Adminiſtration may be granted before the day of payment, if the Plaintiff dyeth before: although no Action lyeth for it before Midſommer; yet it is a duty by the very Award: and therefore by the Releaſe of all demands, it is gone. Hil. 9 Jac. B. R. *Bridges* and *Eisons* Caſe, *Yelverton*, 214.

16. Debt upon an Obligation, for the payment of 7 l. at the birth of the Plaintiff's Child. The Defendant pleaded, That before the birth of it, it was agreed betwixt them, That whereas the Plaintiff was to have a Load of Lime of the Defendant, for which he ſhould be endebted unto him, that the Defendant ſhould acquit him thereof, and accept of that debt in ſatisfaction of the Obligation; and that the Plaintiff at ſuch a day and place accepted of the ſaid Load of Lime in ſatisfaction of the ſaid Obligation. Upon which Plea, the Plaintiff Demurred. Two Exceptions were taken to the Plea: 1. That nothing can be taken in ſatisfaction of the 7 l. it not being a duty, but a ſum payable *in futuro*, and upon a Contingency: But of that, the Court ſeemed to doubt. 2. The Defendant pleaded, That the Plaintiff accepted the Load of Lime in ſatisfaction of the Bond; which cannot be, for it ought to have been pleaded in ſatisfaction of the Sum mentioned in the Condition of the Obligation; for the Bond it ſelf cannot be diſcharged without a Specialty. That, the Court held to be a material Exception; and ſo the Plea was not good, and adjudged for the Plaintiff. Trin. 8 Jac. B. R. *Neal* and *Slingſields* Caſe, *Cro.* 2. Part, 254. See *Yelverton*, 192. the ſame Caſe.

17. B. and A. his Wife brought Aſſumpſit againſt the Defendant; and declared, That in Conſideration A. *dum ſola fuit*, would marry T. M. at the requeſt of the Defendant, the Defendant promiſed after the death of T. M. to pay A. 40 *s. per annum* during her life: And ſhewed, that ſhe married T. M, who after dyed; and that ſhe took Husband B. the Plaintiff; and for 4 l. behind after the death of T. M, the Action was brought. The Defendant pleaded in Barr, a Releaſe,

leaſe made unto him by T. M. during the Marriage with A, by which he Releaſed to the Defendant all Actions, Quarrels, Controverſies, and Demands whatſoever which he had or might have againſt the Defendant. Upon which Plea, the Plaintiff Demurred. It was adjudged by the Court, That this Releaſe did not diſcharge the promiſe; For although the promiſe was preſent, yet the execution of it was *in futuro*; and ſuch, as he who releaſed, could never have an Act on upon it. But if he had Releaſed, by expreſs words, All promiſes, or all Actions and Quarrells, which he or his wife had or might have, then the promiſe had been releaſed: for the promiſe could not be releaſed until it came in *Eſſe*, no more then a Covenant could be. It was adjudged for the Plaintiff. Trin. 7 Jac. B. R. *Baker* and *Harſons* Caſe. *Yelverton*, 156.

18. Debt upon an Obligation; The Defendant pleaded, That the Plaintiff, after the Obligation made, had Releaſed to him, All and all manner of Errors, and all manner of Actions, Suits, and Writs of Error whatſoever; Which I the ſaid, &c. for any matter or thing, &c. And I the ſaid, &c. am by theſe preſents excluded of Writs or Suits, Actions of Error or Suits againſt him the ſaid, &c. Upon the Plea, the Plaintiff Demurred in Law. It was ſaid, That the Obligation makes the duty, and a Releaſe of all Actions ſhall bar him. But it was Reſolved, That the Releaſe was but ſpecial; and that it extends only to Errors, *Et ex Præcedentibus et Conſequentibus optima fit Interpretatio*; the precedent clauſe is only a Releaſe of Errors: And the laſt Clauſe, *Actions and Suits of Error*, before: and there is not any word of debt in the Releaſe. And it was ſaid, That it was adjudged in this Court in a Writ of Annuity, A Releaſe was pleaded, That the Plaintiff acquitted him of one payment for half a year, and Releaſed to him all Actions, Suits, and Demands; And it was adjudged, That the Releaſe did not bar him but of the Arrearages for that year. Paſch. 3 Car. C. B. *Abree* and *Pages* Caſe. *Hutley* 9. & 15.

Remainder *and* Reverſion.

1. TEnant for life, the Remainder in tail; the remainde in Fee: Tenant in tail in Remainder is attainted of Felony. The Queſtion was, If the King during the life of the Tenant in tail ſhould have the Fee? It was conceived, That he ſhould; for that it ſhall not be in abeyance, and it cannot be in any other; For when he is Attainted, he is dead, as unto the King. The Chief Lord cannot have it, for Tenant for life is alive; alſo he in the Reverſion in Fee, &c. the Donee ſhall not have it, for the Tenant in tail in Remainder is not naturally dead, but civilly; and the Land cannot revert before Tenant in tail be dead without Iſſue, but if there were any other in whom the Freehold might veſt and reſt, then the King ſhould not have the Freehold, but the profits of the Lands. Mich. 29 Eliz. B. R. in *Wankles* and *Harris* Caſe. *Leon.* 2. Part, 123.

2. W. Tenant in tail ſuffered a Recovery, and afterwards took an Eſtate to himſelf, and E. his Wife, for the Term of their Lives, the Remainder *ſoinni filii de Corpore præhibi*. W. in tail; and if he had not any ſon, the Remainder to the Heirs of the body of W; the remainder to J. and A. his wife, and to the Heirs of J: Afterwards the ſaid W. and E. his wife levied a Fine with proclamations, to the uſe of himſelf, and to the ſaid Wife for their lives, the remainder to the eldeſt Child of the body of the ſaid W. in tail, the Remainder to the ſaid J. in Fee: E. dyed, 5. years paſſed; W. took another Wife, and had Iſſue a Daughter, and after a Son, and dyed. Other 5. years paſſe after his death, the ſon and daughter being both within age: J. dyes, living A. his wife. The Opinion of the Juſtices of the Common Pleas in this Caſe was, That the Son ſhould have the Land, and not the Daughter, by reaſon of the ſaid Remainder *ſoinni filii*. Mich. 12 Eliz. C. B. *Bradlawes*, 29.

3. The Lord *Vaux* levied a Fine to the uſe of himſelf for life, and after his deceaſe, to the uſe of his two Daughters, till A. his Son returned from beyond the Seas, and came to his full age, or dyed; which of the ſaid times, dayes, or hours firſt came, and then it ſhould remain to A; he returned from

beyond the Sea: The Queſtion was, If this Remainder was good? And if it be, When it ſhould commence in him? It was the Opinion of all the Juſtices, That the Remainder was good; For although his coming from beyond Seas, or his full age, be incertain, yet his death is certain; and ſo it doth not merely depend upon incertainties. And it was further agreed by the Juſtices in this Caſe, That the Daughters had an Eſtate for their lives conditionally. Hil. 34 Eliz. B. R. The Lord *Vaux* Caſe. *Cook* 3. Part, 269.

4. Land was Deviſed to the Father for life, the Remainder to the next Heir male of the Father, & to the Heirs males of his body; The Deviſor dyed; The Father enfeoffed J.S. with Warranty. In this Caſe, theſe Points were Reſolved; Firſt, That the Father had only an Eſtate for life, for that he had an expreſs Eſtate for life Deviſed unto him, and the Remainder is limited to his next heir male in the ſingular number, and his right heir male may not enter for the forfeiture in his life, for he cannot be heir ſo long as he liveth. 2. Reſolved, That the Remainder to his right heir male, is a good Remainder, although he cannot have a right heir during his life; but it ſufficeth that it veſt *eo inſtante*, as the particular Eſtate determines. 3. It was Reſolved, That by the Feoffment of the Tenant for life, the Remainder was deſtroyed; for every contingent Remainder ought to veſt either during the particular Eſtate, or *eo inſtante*, that the particular Eſtate determines; and by the Feoffment of the Father, his Eſtate for life was determined by a Condition in Law. Mich. 38 Eliz. C.B. *Baldwin* and *Smiths* Caſe. *Cro.* 3. Part, 453. See *Cook* 1. Part, *Archers* Caſe.

5. The Caſe was; A Copyholder in Fee ſurrendred to the uſe of one for life, the Remainder to another in Fee; Tenant for life was admitted: Afterwards he in the Remainder ſurrendred to the uſe of J. S. in Fee; which Surrender, the Lord accepted, and admitted J. S: The Tenant for life dyed; the heir of the firſt Copyholder entred, and J. S. put him out. It was ſaid in this Caſe, That he ſhould have the Land; for firſt, the Admittance of the Tenant for life, is the admittance of him in the Remainder, to veſt the Remainder in him. 2. The Acceptance of the Lord of the Surrender, is *quaſi* an Admittance, and thereby he admits him to have a Remainder. Mich. 39 Eliz, B.R. *Gyppin* and *Bunney's* Caſe, *Cro.* 3. Part, 504.

6. In Errour; A. ſeiſed of Lands in Fee, made a Feoffment to the uſe of himſelf for life, and after to the uſe of ſuch Iſſue and Iſſues males of the body of M. L. from eldeſt to eldeſt, who by common ſuppoſition or intendment, ſhould be adjudged or reputed to be begotten by the ſaid A. upon the body of the ſaid M. L; whether the ſaid Iſſue & Iſſue, Males ſo born of the ſaid M. *ſint per legem Angliæ adjudicati Legitimi & maliarum* begotten, or unlawfully & immediately begotten betwixt the ſaid A, & the ſaid M.L; and to the heirs of the body of ſuch Iſſue, or Iſſues males, *de feodo in ſeiſinam exiſtent. nat. de prædiſt. M. in forma prædiſt.* Afterwards, A. had Iſſue by the ſaid M. B. the Plaintiff: E. the Defendant recovered againſt A. in Aſſiſe 12 Eliz. A. dyed; B. brought a Writ of Error as he in the Remainder, and averred, That he was the Iſſue begotten of the body of the ſaid M, and was ſince his birth, and yet is reputed to be begotten by the ſaid A: In this Caſe, It was the greater Opinion of all the Judges, upon a Conference had amongſt them at Serjeants-Inn, upon this Caſe, That a Remainder to his firſt reputed ſon or baſtard, is not good, Becauſe the Law doth not favour ſuch a generation, nor expect that ſuch ſhould be, nor will ſuffer ſuch a Limitation for the Inconveniency which might ariſe thereupon. Wherefore, becauſe the Plaintiff was in truth a lawful ſon begotten between the ſaid A, and the ſaid M.L. after they were married together: and the Conveyance was made in this manner only, to avoid ſcruple which might happen, becauſe A. was married to a former wife, and was divorced from her, if this Divorce ſhould be Repealed. The Plaintiff ſeeing the Opinion of the Juſtices for this Cauſe diſcontinued his Writ of Error. Mich. 39 Eliz. B. R. *Hodwell* and *Edwards* Caſe, *Cro.* 3. Part, 509.

7. In avowry for Rent; upon a Demurrer, the Caſe was: A. the Grandfather made a Feoffment to the uſe of K. his Wife for life, the Remainder to R. his Son for uſe; and after to his eldeſt Iſſue, which ſhould be at the time of his Death, the Remainder in Fee to J. S: R. had Iſſue J. his eldeſt Son, the Grandfather dyed; K. lett the Land for years to R: R. and J. S. made a Feoffment, and levyed a Fine with warranty and proclamation to the Defendant. K. dyed within five years after: R. dyed, J. being his eldeſt Son at the time of his death, entred as in his Remainder. Whether the Remainder was deſtroyed by theſe Acts, or J. now might enter, was the Queſtion? It was the Opinion of the whole Court in this Caſe, That by the Feoffment, the Remainder being in Contingency, was deſtroyed. Mich. 40 Eliz. B. R. *Smith* and *Belays* Caſe. *Cro.* 3. Part, 630. See *Cro.* 1. Part, *Chudleighs* Caſe acc.

8. The Abbot of C, before the Statute of Diſſolutions, by Indenture leaſed Lands to W.D, and J. his Wife, and F. his Daughter, for their lives; and by the ſame Indenture Covenanted, Granted, and Confirmed to the three Leſſees, That the

the Land ſhould remain to the Aſſignees of the Survivor of them for 99 years; F. ſurvived, and took Husband H, who 2 Eliz. granted her Eſtate to J. S, and all her Intereſt in Remainder, and all her power, and all the Term; the which by mean Aſſignments, came to the Defendant: and whether any Intereſt paſſed in Remainder by the Leaſe of the Abbot, was the Queſtion: It was the Opinion of the whole Court, That although the Remainder is not limitted to any of the three Leſſes, but to the Aſſignee of the Survivor; yet the ſame is not a bare Nomination in the Survivor, to appoint what perſon he ſhall pleaſe, but it is a Term and Intereſt. But the Opinion of the Juſtices further was, That whether the ſame was an Intereſt or a power of Nomination only, yet it was ſaved to the party by the Statute of 31 H. 8. of Monaſteries, which gave the Houſes diſſolved to the King, but in the ſame degree and quality as the Abbot had; and the Abbot himſelf was charged by this power given by himſelf, and therefore ſo ſhould the King be. Paſch. 4 Jac. B. R. *Clark* and *Sir John Sydenhams* Caſe. *Yelv.* 85.

9. In *Ejectione Firmæ*, upon a ſpecial Verdict, the Caſe was: A Tenant in tail to his Heirs-males of a Meſſuage in *London*, the Remainder to B. in Fee: B. by Deed enrolled, granted his Eſtate, Right, and Remainder, to the Queen in Fee, during the life of A, and after his death as long as any iſſue male of A. ſhould live; A. ſuffered a common Recovery, under which the Plaintiff claimed; A. dyed without iſſue, the Defendant as Servant to B. entred. It was adjudged in this Caſe, That the Common Recovery ſhould barr the Remainder of B, notwithſtanding his Grant to the Queen; for the Grant to the Queen was void, becauſe it could never come in Poſſeſſion, and a Remainder is but *quaſi terra remanens*; for by the death of a Tenant in Tail without Iſſue, the Eſtate of the Queen was determined; ſo as ſhe had not any benefit by the Grant, but a dry Remainder without profit. But if there had been ſuch a Grant of the Reverſion to the Queen, it had been good, becauſe, during the firſt tail, there ſhould be an Attendance for the Services and Wardſhip, &c. of the Iſſue of the Doner, &c. Mich. 6 Jac. B. R. *Poole* and *Nedhams* Caſe. *Yelv.* 149.

10. A man Leaſeth for life, and after leaſeth for years to begin after the death of Leſſee for life, rending Rent; the Reverſion is granted: Tenant for life dyes, Leſſee for years doth not attorn. It was conceived, That the Reverſion paſſed without Attornment, and that he ſhould have debt, or ſhould avow. Hill. 3 Car. C. B. *Beatons* Caſe. *Hetley*, 73.

Remitter.

1. NOte; It was the Opinion of all the Juſtices of the Common Pleas, That if Tenant in Tail hath Iſſue two Sons, and diſcontinueth the Tail to the youngeſt Son in Fee, and after dyeth, and the younger Son after dyeth, his Wife privy with Child with a Son; and afterwards the eldeſt Son entreth as Heir, as he may do, and after the Son is born; that now the eldeſt Son is remitted to the ſame Land by his Entry, becauſe his Entry was lawful, and there was none at the time of his Entry, againſt whom he could have brought his Writ of Formedon. Hill. 1 & 2 *Mar. Bendlowes* 22.

2. If a Gift be made in Tail, the Remainder in Tail, the Remainder in Fee, and the firſt Tenant in Tail diſcontinueth, and dyeth without Iſſue; and afterwards he in the Remainder in Tail enters, and dyeth ſeiſed, and the Land diſcends to his Iſſue; the ſame Iſſue ſhall be in his Remitter, and ſhall hold the Land. But otherwiſe it is, If he in the Remainder in Tail, after his Entry, had dyed ſeiſed without Iſſue; becauſe then the Entry of the Diſcontinuee was congeable, and he in the Remainder in Fee could not then enter: and if Tenant in Tail hath Iſſue two Daughters, and diſcontinueth the Lands, and dyeth, and one of the Daughters after his decease entreth into all the Lands, and dyeth ſeiſed, and the Lands do deſcend to her Iſſue, the ſaid Iſſue is remitted to the moyety of the ſaid Lands, and the other Siſter who did not Enter, ſhall have her Formedon againſt the ſame Iſſue, for the other moyety; for the other Siſter who did not Enter, was not remitted by ſuch diſcent. Paſch. 29 H. 8. *Bendlowes* 22.

3. The Caſe was this: Grandfather, Father, and Son; Lands were given to the Grandfather for life, the Remainder to the Son in Tail; The Grandfather and the father joyned in a Feoffment with Warranty: The Feoffee made a Leaſe for years, and afterwards conveyed the Land to the Grandfather for life, the Remainder to the Father in Fee; the Grandfather and the Father dyed, the Son Entred, and put out the Leſſee. It was the Opinion of *Weſton*, Juſtice, That the Entry of the Son was lawful; For it was the Feoffment of the Grandfather, and the Confirmation of the Father; and the Warranty of the Grandfather was Collateral to the Father and his Eſtate: but

when the Land is re-assured, as above is ſaid; and afterwards the Son Entreth after the death of the Grandfather and Father, now he is Remitted, and the Warranty gone by taking back the Eſtate, and the Son is now ſeiſed of as high an Eſtate as his Anceſtor was at the time he departed with the Land, by which the Warranty is determined. *Dyer*, Juſtice conceived, That againſt a warranty Collaterall one cannot be remitted; and ſaid, *That during the Poſſeſſion of the Grandfather, the Warranty was only ſuſpended*; And if it was determined by the Death of the Grandfather, yet having reſpect to the Leſſee, it is in being, for that his Eſtate is derived out of that which was warranted, which deſcends with the Warranty. Mich. 7 Eliz. C.B. *Leon.* 3. Part, 10.

4. Note upon an Evidence to a Jury; It was ſaid by the Court, That if Tenant in Tail, the Remainder in Fee doth diſcontinue, and retakes an Eſtate in Fee, and deviſeth it to his Wife for life, the Remainder to B. for years, the Remainder in Fee to him, who had the Remainder in Fee before, and dyeth without Iſſue, the Wife entreth and dyeth. That he in the Remainder in Fee is remitted, and may enter upon the Deviſee for years, and well avoid his Leaſe, although that his Remainder be created by the ſame Will. And ſee 9 H. 6. 43. Remitter avoids a Leaſe for years without Entry. Mich. 42 Eliz. C. B. *Rooke* and *Spratts* Caſe. *Noy* 48.

5. The Queſtion was: If a man ſeiſed in the right of his Wife, leaſeth for life, the Remainder over in Fee; And afterwards he and his Wife recovereth the Land in a Writ of Entry in the Poſt againſt the Leſſee for life, if the Wife by that ſhall be Remitted. It ſeemed to *Hutton*, Juſtice, That ſhe ſhould be remitted, as well as where a Feoffment is made to Husband and Wife; for that a Recovery countervails a Feoffment, and no Lacheſſe ſhall be adjudged in the Wife, for the Purchaſe of the Writ ſhall be adjudged the Act of the Husband alone, and not the Act of the Wife. But the Court ſaid, They would adviſe of it, for that perhaps ſhe ſhall be eſtopped by the Record. Trin. 4 Car. C. B. *Dixon* and *Blythes* Caſe. *Hetly* 110.

Rents.

1. THe Prebendary of D. lett his Prebend to B. for years, reſerving Rent to him and his Succeſſors Prebends of D, payable at Mich. &c. with Condition of Re-entry, for him and his Succeſſors, if the ſaid Rent be lawfully demanded of the ſaid B; the Prebend was after aſſured to J. S, who after was attainted of Felony, and the Prebend given to the King by Act of Parliament; and if the King by the word Succeſſors might Re-enter for the Condition broken; and, If he ought to demand the Rent of B, as J. S. ought to have done; and, If it be demandable, if it ought to be demanded at the laſt inſtant of the day, or when the King pleaſes, was the Queſtion? It was the Opinion of all the Juſtices of the Common-Pleas, That the King ſhould have the Rent; and that without any Demand of it. Mich. 16 Eliz. C. B. *Bendlowes* 29.

2. The Caſe was: A. ſeiſed of Lands in Fee, granted a Rent-charge out of them to another, and afterwards he alliened the Lands to a Stranger. The Grantee in a Replevin, avowed for the Rent; The other Party pleaded, That nothing paſſed by the Deed. In this Caſe, It was holden by the whole Court, To be no Plea, nor can any Iſſue be joyned upon it; but the Plaintiff ought to have ſaid, That he did not Grant by the Deed: For the ſame is Rent newly created, and which had not his Eſſence before the Grant; and it cannot properly be ſaid, That nothing paſſed by the Deed, but of a thing that is in *Eſſe*, but not of things not in *Eſſe*: That he did not Grant it, as the moſt natural Iſſue; for a thing not in *Eſſe*, *non poteſt tranſire*. Mich. 19 Eliz. C. B. *Stwards* Caſe. *Leon.* 2. Part, 13.

3. The Caſe was: The Earl of *Weſtmerland*, ſeiſed of a Mannor, whereof the Demeanes were uſually lett for three Lives by Copy, according to the Cuſtom of the Mannor; Granted a Rent-Charge to Sir *William Cordell*, *pro Conſilio impendendo*, for the Term of his Life; and afterwards conveyed the Mannor to Sir *William Clifton* in Tail. The Rent is behind; Sir *William Cordell* dyeth; Sir *William Clifton* dyeth, the Mannor deſcends to Sir *John Clifton*, who grants a Copyhold to J. S: The Executors of Sir *William Cordell* diſtrein for the Rent. It was Objected, That the Executors could not diſtrein for this Rent upon the Poſſeſſion of the Copyholder; for it is not within the

the Statute of 32 H. 8. Of *Rents*. And alſo here the Land charged, doth not continue in the Seiſin and Poſſeſſion of the Tenant; and here Sir *John Cliſton* was Iſſue in Tail; and he doth not Claim only by the Father, but *per formam Doni*: and therefore he is not lyable, and therefore not his Copyholder. But the Opinion of the Court was, That the Copyholder ſhould hold the Land Charged: And it was ſaid by the Juſtices, That the Copyholder doth not Claim only by the Lord, but he Claims alſo by the Cuſtom; but the Cuſtom is not any part of his Title, but only appoints the manner how he ſhall hold; the Poſſeſſion continues here in Sir *John Cliſton*, for the Poſſeſſion of his Copyholder is his Poſſeſſion, ſo as if the Copyholder is ouſted, for Sir *John* ſhall have an Aſſize: And ſo the ſtrict words of the Statute are obſerved, for the Seiſin and Poſſeſſion continues in Sir *John*, who claims only by Sir *William*, who was Tenant in Demeſne, who ought to pay the Rent. *Quære* the Caſe. Hill. 18 Eliz. C. B. The Executors of Sir *William Cordell* and *Cliſtons* Caſe. *Leon.* 2. Part, 152, 153.

4. Errour brought in the Exchequer Chamber, becauſe the Plaintiff declared in Debt againſt the Defendant as Aſſignee, and ſuppoſed, That he lett to J. S. for years, rendring Rent; and that J. S. by his Will deviſed to the Defendant, and he Entred, and was poſſeſſed, &c. and ſhews not that the Leſſee made any Executor, nor that the Defendant Entred with the aſſent of the Executor, *Nec virtute Legationis*, nor conveyed any lawful Eſtate to himſelf. For theſe Cauſes the Juſtices and Barons held the Declaration to be ill, and reverſed the Judgment: But for the principal Matter, Whether there ought to be a Demand of the Rent, All the Juſtices and Barons held, That there muſt be a Demand, although the Rent was payable out of the Land; beſides *Anderſon*, Chief Juſtice of the Common-Pleas, who ſaid, *It being appointed to be paid out of the Land, it is but a ſum in Groſs, and not in Rent.* Mich. 39 Eliz. *Com. Stat. Baſkyn* and *Edmonds* Caſe. *Cro.* 3. Part, 535.

5. In a Replevin, the Defendant made Conuſance, as Bayliff to J. S, for a Rent reſerved upon a Bargain and Sale by Indenture enrolled. It was Objected, That nothing paſſed by the Bargain and Sale, but the Uſe; and how then may a Rent be reſerved thereupon? But it was the clear Opinion of the whole Court, That the Reſervation of the Rent was good. At the Common Law, ſuch a Reſervation had been void; but now the Bargainor ſhall have the Rent by the Saving in the Statute of *uſes*; and ſo it was ſaid, it was holden and adjudged in *Dawbies* Caſe. Mich. 40 Eliz. C. B. *Wykes* and *Tillerds* Caſe. *Cro.* 3. Part, 595.

6. Debt for Rent: The Plaintiff declared, That A. was ſeiſed in Fee of two Acres, the one Freehold, the other Copyhold Land; and having the Lords Licence to make a Leaſe of the Copyhold by Indenture, lett the two Acres by Indenture to J. S. for 21. years, rendring 20 s. Rent; and afterwards granted the Reverſion of the Freehold Land to the Plaintiff in Fee, to whom the Leſſee Attorned: And upon the ſame day, ſurrendred the Reverſion of the Copyhold Lands to two Tenants of the Mannor, to the uſe of the Plaintiff in Fee; which was preſented at the next Court, and the Plaintiff admitted accordingly: And afterwards J. S. the Leſſee granted all his Eſtate to the Defendant; and for 3. years Rent Arrear, the Plaintiff brought the Action. It was ſaid, That the Declaration was not good, to maintain the Action; For when he divided the Reverſion, the Rent was thereby utterly extinct; or at leaſt-wiſe, the Plaintiff ought to have had ſeveral Actions, becauſe he hath the Reverſion by ſeverall Conveyances. And it was ſaid, That the Rent was only iſſuing out of the Freehold Land as the moſt worthy. As, If a Leaſe be made of Lands and Goods, the Rent ſhall iſſue out of the Lands, and not out of the Goods. But it was the Opinion of the Court, That the Leaſe being made by the Lords Licence with one entire Reſervation, it was a good Leaſe, and a good Rent which iſſueth out of the entire Land Copyhold and Freehold; For the Rent is for the Land, and the profits thereof; in recompence whereof, the Rent is to be paid, and therefore it iſſueth out of both. Wherefore, upon the whole matter, it was adjudged for the Plaintiff. Mich. 40 Eliz. B. R. *Collins* and *Hindings* Caſe. *Cro.* 3. Part, 622, 623.

7. In Debt; The Caſe was: A Rent was granted to the husband and wife for their Lives; The Rent was behind, the husband dyed: Another Rent was behind: The wife dyed Inteſtate, the Adminiſtrator brought debt for the Arrearages due in the life of the husband, and after. It was Reſolved by the whole Court, That the Action did well lye, becauſe the Arrearages ſurvived to the wife as well as the Rent it ſelf. Mich. 42 Eliz. C. B. *Temple* and *Temples* Caſe. *Cro.* 3. Part, 791.

8. A man made a Leaſe for life, and afterwards lett the Land to A. for 99. years, if he ſhould ſo long live, to begin after the death of the Leſſee for life: And if A. dyeth during the term of 99. years, or that the Term otherwiſe determine; and after the death of the Leſſee for life, Then the Leſſor granteth for him and his heirs,

heirs, That the Land ſhall remain to the Executors of A. for 20 years. The Leſſee for life dyed: A. leaſed the Land for 20 years, rendring Rent, and dyed Inteſtate; B. took Letters of Adminiſtration, and brought debt for the Rent. It was adjudged in this Caſe, That the Action did not lye; for that this Contingent of 20. years never veſted in A: But if it had been limited to the Executors for payment of the Debts of A, or the like; then by the apparant intent it ſhould be an Intereſt in A, and in the Executors of A; but the chief reaſon of the Judgment was, Becauſe the Term for 20 years, was but a Poſſibility. Mich. 45 Eliz. B. R. *Spark* and *Sparks* Caſe. *Yelverton*, 11.

9. Debt was brought for Rent, upon a Demiſe of 3. ſeveral Acres for 3. ſeveral Terms, rendring one Rent, *pro Terminis prædictis*. It was Objected in this Caſe, That the Rent ſhould not iſſue out of them all, for that they are ſeverall Terms. But it was adjudged, That it was a good Rent: For it is one entire Demiſe, and the Rent ſhall iſſue out of the whole: and although that one of the Terms expires, or be otherwiſe determined, yet the whole Rent ſhall iſſue out of the Reſidue. Mich. 21 Jac. *Towers* Caſe. See the Reports annexed to *Bendlowes*, 139.

10. *Ejectione firmæ* found, King E. 6. was ſeiſed of the Mannor and Hundred of *Fremington*, and by Letters Patents granted the ſame to B. in Fee, rendring 130 l. *per annum*, and to hold by Homage and Fealty. Queen M. reciting the grant of E. 6. and the Reſervation upon it, granted to the Marchioneſs of E. the Mannor of *Fremington*, and the Rents and Services; and alſo the Mannor of C. and other Lands to be holden by the 20th part of a Knights Fee: The Marchioneſs Deviſed to the Lord *Mountjoy* the Mannor of *Fremington*, the Mannor of C. &c. And the Jury found, That the ſaid Rent of 130 l. was the full third part of all the Lands and Tenements of the Deviſor. It was the better Opinion of the Juſtices in this Caſe, That the Rents and Services did paſs to the Deviſee by the Will, otherwiſe the Deviſe of the Mannor of *Fremington* ſhould have bin void and ſuperfluous which ſhall not be taken to be in a Will, which ſhall be conſtrued according to the intent of the Deviſor; and therefore under the name of the Mannor, the Rents and Services ſhall paſs, becauſe the Deviſor had nothing in the ſame, but the Rents and Services. Hill. 29 Eliz. C. B. *Inchley* and *Robinſons* Caſe. *Leon.* 2. Part, 41, 42.

Repleader.

1. A Vowry for a Rent, and made Conuſans as Couſin and Heir to R. C. that is to ſay, Son of A. Daughter of R. and for Rent arrear for 16 years after the death of A. he avowed; and becauſe he made title to it immediately as Heir to R. and afterwards avowed for Rent after the death of A. which cannot be; for it ſhall be intended, That ſhe dyed in the life of R. and Iſſue being joyned upon another matter, the parties were ordered to Re-plead. Hill. 26 Eliz. C. B. *Chamberlains* Caſe. *Cro.* 3. Part, 24.

2. Trover and Converſion of Trees; The Defendant pleaded, That the Queen was ſeiſed in Fee of the Mannor of D. where the Trees were growing, and granted it to the Defendant in tail, whereby he was ſeiſed thereof, and that J. S. cut the ſaid Trees, and granted them to the Plaintiff, who loſt them, and the Defendant found and converted them. The Plaintiff replyed *de injuria ſua propria, &c.* It was holden, That the Plea *de injuria ſua propria* was ill, where the Defendant makes Juſtification by claiming an Intereſt to himſelf, but where one claims not any Intereſt, but juſtifies by command or Authority derived from another, it is otherwiſe: Wherefore by the Rule of the Court, a Repleader was awarded. Hill. 39 Eliz. B. R. The Archbiſhop of *Canterbury* and *Kemps* Caſe. *Cro.* 3. Part, 539.

3. Trover and Converſion againſt Husband and Wife, ſuppoſing the Trover by them both during the Coverture, and the Converſion by the Wife only. The Defendants pleaded, *Quod ipſimet ſunt inde Culpabiles.* It was found for the Plaintiff, and moved in Arreſt of Judgment, That becauſe the Declaration doth not charge the Husband with any *tort*, but only the Wife, the Iſſue ought to have bin *Quod ipſa non eſt inde Culpabilis.* And of that Opinion was the whole Court; and it was awarded, That it was not a good Iſſue, and that they ſhould Re-plead, *Quod Nota.* A Repleader awarded after Verdict. Paſc. 44 Eliz. B. R. *Cox* and *Crapnells* Caſe. *Cro.* 3. Part, 883.

4. Replevin, the Defendant made Conuſance as Bayliff to J. S. for 10 s. for an Amercement 10 s. for rent, and 20 s. for a Relief. The Plaintiff as to the 10 s. Amercement ſaid *de injuria ſua propria*,

pria, and traverſed the Preſcription to hold Court, and Amerce. To the 20 s. Rent, *Quod paratus fuit et obtulit* to the Bayliff of the Lord, who refuſed it. To the 20 s. for the Relief, That the Tenant dyed ſeiſed, and the Land diſcended to two Coparceners, who with their Husbands enfeoffed the Plaintiff, and that the Lord knowing of the Feoffment, accepted the Rent of the Plaintiff, and demanded Judgment. For the firſt, the Defendant demurred. To the ſecond, traverſed the Refuſal and Iſſue joyned upon it. To the third, the Relief, he demurred. It was in this Caſe Reſolved, That the bar for the Relief was inſufficient; and the acceptance of the Rent, no bar of the Relief. 2. That the Avowry for the Amercement was inſufficient, becauſe it was not alledged *de facto*, that the Plaintiff did not appear after ſummons, but that *Præſentatum fuit per Homagium* he did not appear. 3. That the Iſſue joyned upon the Refuſal, was not good; but it ought to have remained upon the Tenure. Wherefore for that point, a Repleader was awarded. Paſc. 44 Eliz. C. B. *Parhan* and *Nortons* Caſe. *Cro.* 3. Part, 886.

5. Note, It was Reſolved by all the Juſtices, That there never ſhall be a Re-pleader after a Demurrer. Trin. 3 Car. B. R. in *Climſon* and *Pools* Caſe. *Latch* 147.

Replevin.

1. IN Replevin, The Defendant pleaded, That the place where, &c. is called *Spicall*, and holden of the Mannor of *Iſtall* by certain rent, and made Conuſans as Bailiff of the Lord of the Mannor, and Iſſue being joyned thereupon, It was tryed by a jury of the Viſne of *Spicall*. It was moved, That it was a Miſ-Tryal, for that the Viſne ought to be of *Spicall* and *Iſtall* alſo. And ſo it was ſaid it was adjudged in one *Webb* and *Richmonds* Caſe. Mich. 31 Eliz. in C. B. Mich. 32 Eliz. in C. B. *Lacy* and *Fiſhers* Caſe. *Leon.* 2. Part, 59.

2. Replevin, the Defendant avowed for Damage feaſant, and ſhewed, That the Lady J. was ſeiſed of ſuch a Mannor, whereof the place where, &c. and leaſed the ſame to the Defendant for years, &c. The Plaintiff ſaid, That long before King *Henry* the 8th was ſeiſed of the ſaid Mannor, and that the place where is parcel of the ſaid Mannor demiſed, and demiſeable by Copy, &c. and that the ſaid King by ſuch a one his Steward, demiſed and granted the ſaid parcel to the Anceſtor of the Plaintiff, whoſe Heir he is by Copy in Fee. Upon which it was demurred, becauſe upon the bar to the Avowry, the Leaſe ſet forth is not anſwered; For the Plaintiff in bar to the Avowry, ought to have concluded, *ſcil.* and ſo he was ſeiſed by the Cuſtome until the Avowant *prætextu* of the ſaid Term for years entred. And ſo it was adjudged. Trin. 26 Eliz. B. R. *Herring* and *Badlocks* Caſe. *Leon.* 2. Part, 81.

3. In Replevin, the Caſe was; That before the Statute of *Quia emptores terrarum*. A man made a Feoffment in Fee to hold of him *ſolvend. poſt quamlibet vacationem ſive alienationem*, the value of the annual profits of the Land. It was holden by the Court in this Caſe, That the value ſhall be intended ſuch a value as was the value at the time of the Feoffment made, and not as it is improved by ſucceſſion of time. Mich. 30 Eliz. C. B. *Marſh* and *Jones* Caſe. *Leon.* 2. Part, 117.

4. Replevin, the Defendants made Conuſans as Bayliffs to *Tho.* Lord *Howard*; and ſhewed, That the late Diſſolved Prioreſs of *Hollywell* was ſeiſed of the Mannor of P. and granted the ſame by words of *Dedi et conceſſi pro certa pecunia ſumma*, to J. S. and his Heirs, who entred, and dyed ſeiſed, and that the ſaid Mannor (*inter alia*) diſcended to M. Daughter and Heir of the ſaid J. S. who entred and dyed ſeiſed, and ſo the ſaid Mannor diſcended to the ſaid *Tho.* Lord *Howard*, and that the ſaid Conveyance by the Prioreſs to J. S. was dated, 4. *Nov.* 29 H. 8. and then enrolled. The Plaintiff in bar to the Avowry ſhewed, That after the making and enrolling of the ſaid Conveyance, the ſaid Prioreſs leaſed the Land to J. D. for 99 years, and conveyed the Land to him; and ſhewed, That the Conveyance ſpecified in the Conuſans was *primo deliberat.* 4. *Nov.* 31 H. 8. *abſque hoc*, that the ſaid Prioreſs the ſaid 4. *Nov.* 29 H. 8. *conceſſit*, the ſaid Mannor to J. S. Upon which it was demurred. It was the Opinion of the Court, That the Averment of *primo deliberat* againſt a Deed enrolled, ought not to be received. It was further Objected, That Bargain and Sale by a Corporation is not good, for that a Corporation cannot be ſeiſed to anothers uſe, and the nature of the Conveyance is to take effect by way of uſe in the Bargainee, and after the Statute, to draw the poſſeſſion to the uſe. Note, It was adjudged for the Plaintiff, for that the Conveyance of the Prioreſs was not well pleaded, for it ought to be pleaded as a Bargain and Sale, and not as a Grant, and Judgment was given accordingly. Mich. 30 Eliz. C. B. *Holland* and *Boins* Caſe. *Leon.* 2. Part, 121, 122.

5. Replevin, The Defendant avowed for Damage

mage feaſants: Upon Iſſue joyned, It was found for the Avowant, and damages aſſeſſed, and *Retorno habendo* iſſued; upon which the Sheriff did return *averia elongata*: Whereupon a Withernam was awarded. The Plaintiff now tendred the damages in Court aſſeſſed by the Jury, and prayed ſtay of the Withernam: but the Court was clear againſt his ſo doing, for in this Caſe the Plaintiff ought firſt to pay a Fine for his contempt. Wherefore the Court firſt aſſeſſed a Fine upon the Plaintiff, and then the Plaintiff had his preyer granted. Mich. 30 Eliz. C. B. *Leon.* 2. Part, 174.

6. Replevin, the Defendant made Conuſans as Bailiff to one H. for Damage feaſance. The Plaintiff ſhewed, That A. T. did pretend Title to the Land where: and that the Defendant in the right of A. T. took the Cattel *abſque hoc*, that he took them as Bayliff to the ſaid H. Upon which the Defendant did demur. It was objected, That the Traverſe was not good; for if it ſhould be good, the meaning of the party ſhall be drawn in Queſtion, *ſcil.* the meaning of him who took the Cattel. But it was the Opinion of the Court, That the Traverſe was good. See 13 H. 7. 13. the Earl of *Suffolks* Caſe. In Treſpaſs, the Defendant pleaded, That before the Treſpaſs, the Plaintiff was ſeiſed, and thereof enfeoffed one B. by whoſe commandment he entred; to which the Plaintiff ſaid, That after the Feoffment, and before the Treſpaſs, the ſaid B. leaſed to the Plaintiff to hold at will *abſque hoc*, that the ſaid B. did command him, and that was holden to be a good traverſe, for the Commandment determines the Leaſe at Will. Paſc. 29 Eliz. C. B. *Fuller* and *Trimwells* Caſe. *Leon.* 2. Part, 215.

7. In Replevin againſt R. and S. the parties were at Iſſue. Afterwards R. dyed, which was ſhewed to the Court. It was moved, If the whole Writ ſhould abate. It was the Opinion of the Court, That it ſhould not abate, but ſtand good for the other; and ſo it was ſaid it had bin often adjudged. Trin. 39 Eliz. B. R. *Withers* and *Rooks* Caſe. *Cro.* 3. Part, 574.

8. In Replevin, The Plaintiff declared of a taking *apud* D. without alledging of any place certain, the uſual courſe being to ſay, *in quodam loco vocat. &c.* for which cauſe the Defendant did demur: And the Court held the Demurrer to be good, and that the Declaration was not good: For that the place is put into the Count or Declaration to give notice to what the Defendant ſhould make his Title and anſwer; and the Town is too general and uncertain. Wherefore the Declaration being againſt the general form, it was holden by the Court not to be good, and ſo adjudged. Mich. 44 Eliz. C.B. *Ward* and *Lavills* Caſe. *Cro.* 3. Part, 896.

9. Replevin by O. againſt W. P. and L. for taking of a horſe, &c. W. avowed, the other made Conuſans for 11 d. rent arrear due by *Otres* to W. It was found for the Defendant, and 2 d. damages given by the Jury to all the Defendants; and Judgment was given, That they ſhould recover *damna ſua prædict. per Juratores aſſeſſ. &c.* And becauſe in this Caſe P. and L. made Conuſans generally, and did not make it as Bayliffs nor Servants to W. and the Conuſans is in it ſelf a Title and Juſtification in another Right, and damages are given to them all three, and two of them who made the Conuſans had not cauſe to recover any thing; for this cauſe the Judgment was reverſed. Mich. 5 Jac. B.R. *Owen* and *Williams* Caſe. *Yelverton* 108.

Requeſt.

1. DEbt upon a Bill of 70 l. to be paid upon demand, becauſe no demand was ſhewed in the Declaration; the Defendant demurred; for it was ſaid, That the demand was parcel of the Contract, ſo as the money was not due till demand, and a demand being requiſite, the bringing of an Act on will not ſerve the turn. But it was the Opinion of the Court, That it was well enough, becauſe it was a duty preſently, and is not like the Caſe where one is bound to levy a Fine upon demand. It was adjudged for the Plaintiff. Hill. 39 Eliz. C. B. *Capp* and *Lancaſters* Caſe. *Cro.* 3. Part, 548.

2. Debt upon Obligation, the Condition was to make an Aſſurance to the Obligee of certain Lands before the 10th of *March*, 17 Eliz. and if it fortune the Obligee to refuſe to accept of the Aſſurance, and ſhall make requeſt to have 100 l. in ſatisfaction of it. Then, if upon ſuch requeſt within five Moneths after he pay the 100 l. that then, &c. and at the day he refuſed the Aſſurance; and afterwards 27 Eliz. he made the requeſt to have the 100 l. and if it was ſufficient for time, was the Queſtion upon a Demurrer. It was the Opinion of all the Juſtices, That it was, and that a Requeſt at any time during his life, was good, and he is not reſtrained to make it at or before the day that the Aſſurance was to be made. It was adjudged for the Plaintiff. Trin. 31 Eliz. B. R. *Baſton* and *Andrews* Caſe. *Cro.* 3. Part, 136.

3. Aſſumpſit, In conſideration he promiſed the Defendant to marry his Daughter, he promiſed to give the Plaintiff 40 l. and alledged *in facto*, that he

he had married his Daughter: Upon Non-Aſſumpſit found for the Plaintiff, it was alledged in ſtay of Judgment, That no time or place was alledged of the Requeſt. But the Exception was diſallowed of by the Court, for it is in the nature of a debt, and it is not here appointed to be upon Requeſt; but it is otherwiſe of a Collateral thing. Paſc. 33 Eliz. B. R. *Applethwart* and *Northyes* Caſe. *Cro.* 3. Part, 229.

4. Aſſumpſit, That whereas he ſold to the Plaintiff a Pack of Wool for 20 l. to be paid at a day certain; and *licet ſæpius requiſitus* at ſuch a day and place he had not paid it; and that he ſold to the Defendant another Pack of Wool for 10 l. to be paid when required, *Et licet ſæpius requiſitus, &c.* without alledging day and place. It was the Opinion of the Court, and ſo adjudged, That it was good, for it ſhall refer to the day and place of Requeſt. Trin. 33 Eliz. B. R. *Barnes* and *Ley's* Caſe. *Cro.* 3. Part, 240.

5. Aſſumpſit, The Plaintiff declared, and ſhewed, That he was an Inn-keeper, and that the Defendant brought his Horſe to him, and agreed to give 6 d. Livery for day and night, and becauſe the horſe had bin there for ſo many dayes and nights as amounted to 20 l. the Plaintiff brought his Action, and declared *Licet ſæpius requiſitus* without alledging a Requeſt *in facto*: and it was adjudged by the whole Court to be good; for where the ground of the Action is a Debt, in which Caſe the Law induceth the promiſe, there the Requeſt is not iſſuable, nor parcel of the conſideration; but it is otherwiſe where the Action is founded upon a meer collateral matter, and not upon a duty, for there the Requeſt is iſſuable, and ought to be expreſly alledged. Trin. 3 Jac. B. R. in the Caſe of the Hoſtler. *Yelverton* 66.

6. In Aſſumpſit, the Caſe was, A. brought an Action againſt B. and J. S. promiſed to A. that if he would forbear to ſue B. that he would pay him 200 l. at the Feaſt of St. *John Baptiſt* following, and 100 l. at any time after the ſaid Feaſt when he ſhould be reaſonably required; and the Plaintiff alledged a failer of payment of the ſaid 100 l. *Infra poſtes*, ſcil. 8. *October* ſuch a year, which was in truth before the firſt day of payment; and that was aſſigned in Error upon a Judgment which had bin given for A. It was in this Caſe agreed, That the Requeſt was iſſuable, and therefore ought to have bin ſpecially alledged, becauſe it was no duty before Requeſt, being upon a promiſe of a ſtranger. But when the party himſelf who is endebted promiſeth to pay upon Requeſt, there to ſay *Licet ſæpius requiſitus*, is ſufficient. 2. Becauſe the *ſcil.* here was meerly void, becauſe it is contrary to the Premiſes. Mich. 2 Car. B. R. *Alcock* and *Bloſfield* Caſe. *Latch* 209.

Reſcous.

1. A. and B. were returned by the Sheriff of *Berks* to have made Reſcous upon ſuch a Bailiff, to whom he directed his Warrant to Execute his Writ. It was moved that the Return was inſufficient, becauſe it doth not appear that the Bayliff had *returna Brevium*, which ought alwayes to be mentioned upon the Sheriffs Return. It was the Opinion of the Court, That it ought to have been ſo, if he returned it as a Return of a Bayliff of a Liberty; but in this Caſe he returns it in his own Name: wherefore, It ſhall be intended, that it was his own Bayliff; and although he names him, in his Return, Bayliff of a Liberty; that is but a void Addition. It was then prayed, That they might be admitted to Traverſe the Return. But the Clerks of the Court ſaid, It had alwayes been the courſe to reject ſuch Traverſes. Wherefore the Court Commanded, That Preſidents ſhould be ſearched: Whether ſuch Traverſe had been allowed; and if it could not be found, that then ſuch Traverſe ſhould not be allowed. Mich. 42 Eliz. B. R. The Lady *Ruſſell* and *Woods* Caſe. *Cro.* 3. Part, 781.

2. Action upon the Caſe againſt the Sheriff of S: For that whereas the Plaintiff had a Latitat againſt one A. L. who was endebted to him in ſuch a ſum by Bond, to the intent, that he being Arreſted, and having put in Bail, he might declare againſt him in Debt. That this Writ being delivered to the Sheriff, to that intent, he Arreſted him, and afterwards at *Weſtminſter* ſuffered him to Eſcape. The Defendant pleaded, That he Arreſted him according as the Plaintiff had declared; but afterwards in the ſaid County, he reſcued himſelf *per geutes* of the County, *abſq; hoc* that he ſuffered him to Eſcape at *Weſtminſter*: Upon which it was demurred, and it was holden by the Court, To be No Plea. For the Sheriff at his peril ought to keep his Priſoner, and may take ſufficient power of his County to Arreſt any one upon mean Proceſs; and although Proceſs ſhall be awarded againſt the Reſcuſers for to puniſh them, yet that is no Anſwer as to the Action brought againſt the Sheriff for the Eſcape; and the traverſing of the Place is not good: It was adjudged for the Plaintiff. Hill. 44 Eliz. B. R. *Waldo* and *Lamberts* Caſe. *Cro.* 3. Part, 867.

3. Upon a Latitat awarded againſt W, the Sheriff returned a Reſcouſe ſuch a day; but in the Return, there was not any place where the Reſcouſe was done: wherefore, it was adjudged, That it was void; for that it doth not appear, whether the Arreſt and the Reſcous were within the County and Juriſdiction of the Sheriff; but if it be within the County, it ſhall be then intended to be within his Bailiwick, and although it was within a Liberty in the ſame County: yet the Reſcouſe was unlawful, becauſe the Arreſt was good. Mich. 2 Jac. B. R. *Wolfreſtons* Caſe. *Yelv.* 51.

4. The Sheriff of S. returned a Reſcouſe againſt one A: That, whereas there was a Judgment had againſt B, and a *Fieri facias* awarded upon it, by virtue of a Warrant to R, to take the Goods of B; by vertue of which, R. ſuch a day *diverſa bona et catalla ipſius* did levy, and had them in his Cuſtody; that the ſaid A. reſcued them from the Bayliff *contra voluntatem* of the ſaid Bayliff. It was the Opinion of the Court, That this was No good Return: Firſt, For that it is, that they were reſcued from the Bayliff. And ſecondly, Becauſe it is of Goods, of which no Reſcous can be returned. But it was ſaid, that in ſuch Caſe, The Party might have an Action upon the Caſe. Trin. 5 Car. C. B. The Sheriff of *Surrey* and *Aldertons* Caſe. *Hetley* 145.

Reſervation.

1. DEbt by S, Executor of A. againſt W, Adminiſtrator of F, upon a Bill of Debt by F. to A, by which F. did acknowledge to have received of one P. 40 l. to be devided between A. and B, and to their uſe. Upon Judgment given in C. B. W. brought Error. The matters moved were, 1. Becauſe the 40 l. was given to be equally divided between A. and B. therefore they are Tenants in Common of it, and ſo the Plaintiff ought to have joyned B. with him in the Suit. But it was the Opinion, That in this Caſe they were ſeveral Debts, *ſcil.* 20 l. to one, 20 l. to the other, and therefore the Action well brought. 2. Matter was, If Debt or Account did lye. As to that it was adjudged, That although there was no Contract betwixt the parties, yet when money or goods are Bailed upon conſideration to the uſe of A. that in ſuch Caſe A. might have Debt for it. The Judgement was affirmed. Mich. 45 Eliz. B. R. *Wherwood* and *Shaws* Caſe. *Yelverton* 23.

2. Debt for Rent, the Caſe was, The Plaintiff let Land to the Defendant at *Mich.* 1 Jac. for five years, rendring Rent at our Lady day and *Michaelmas* yearly, or within ten dayes after. The Plaintiff declared for Rent due at *Mich.* The Court at the firſt ſeemed to be of Opinion, That the Action did not lye, but that the Rent for the laſt Quarter was gone, for that it was not due as the Plaintiff declared, for upon his own ſhewing it is reſerved at *Mich.* or within ten dayes, and ſo no debt for which Action lay before the ten dayes were paſſed. But afterwards the Court, the matter being moved again, upon conſideration of the Caſe, were of Opinion, That the Leſſor ſhould have the Rent, becauſe it is reſerved yearly, and the ten dayes which are added, ſhall be expounded to give liberty to the Leſſee within the Term for his eaſe to delay payment: But becauſe the ten dayes after the laſt *Mich.* are out of the Term, rather than the Leſſor ſhall loſe the Rent which is yearly reſerved, the Law ſhall reject the laſt ten dayes, and ſo it was adjudged. Mich. 7 Jac. B. R. *Barwick* and *Foſters* Caſe. *Yelverton* 167, 168.

3. The Plaintiff as Son and Heir of his Father brought debt, and declared, That his Father, 27. *April*, 35 Eliz. let to the Defendant a Meſſuage, &c. in B. in the County of B. from *Mich.* laſt for 21 years, rendring, during the Term, if the Father ſhould ſo long live, 30 l. at the Annunciation, and Mich. by equal portions, and rendring to the Heirs and Aſſigns of the Father, 20 Marks *ad terminos prædict.* and that the Defendant entred, and occupied from Mich. 35 Eliz. *hucuſq;* After the death of the Father, 4. *May*, 7 Jac. B. dyed; and becauſe 20 Marks was behind at Mich. 7 Jac. the Action was brought. Upon which, the Defendant Demurred. In this Caſe, It was adjudged for the Plaintiff: For the Clauſe by which the Rent is reſerved to the heirs, doth not give but 20 Marks for the whole year, and therefore the Plaintiff hath miſtaken his demand, who ſued for 20 Marks for half a year: for theſe words, *ad terminos prædictos*, limits only the time of payment of the 20 marks, which he intended to be paid at the firſt 30 l. was: And although in that Clauſe which reſerves the Rent to the Heirs, the words, *per æquales portiones*, are omitted; yet the Law ſhall ſupply them. 2. Becauſe the Plaintiff brings his Action as Heir, and doth not ſhew that the Reverſion is diſcended to him, and the Rent demanded as incident to the Reverſion. Adjudged againſt the Plaintiff. Mich. 8 Jac. B. R. *Smith* and *Norſeys* Caſe. *Yelv.* 189.

Reſtitution.

Reſtitution.

1. IF a Writ of Error be brought upon the Statute of 8 H. 6. if it be found with the Plaintiff, Yet it was adjudged, That he ſhall not have a Writ of Reſtitution of the ſame: As it was adjudged, Mich. 6 E. 6. See Paſch. 1 & 2 Mar. C. B. *Peſcall* and *Tenthins* Caſe. *Bendlowes*, 23.

2. *Replevin* after a Second Deliverance; Return was awarded to the Defendant, and *Averia iterata* being returned, a *Withernam* was awarded of the Cattel of the Plaintiff; and afterwards the Plaintiff came and ſatisfied the Defendant his Damages, and prayed a Reſtitution of his Cattel. It was ſaid, That Cattel taken in *Withernam*, are irreplevifible. The Court agreed, They are not Replevifible: But yet upon ſatisfaction acknowledged, he ſhall have a Writ of Reſtitution And ſuch, the Clerks ſaid, was the Courſe of the Court, and the Writ was granted. Mich. 33 Eliz. C. B. *Annefly* and *Johnſons* Caſe. *Cro.* 3. Part, 181.

3. *Quare Impedit* by the Queen, who claimed the Preſentment by Lapſe againſt the Patron, Biſhop and Incumbent, and, *pendente Lite*, the Patron dyed: The Son and Heir of the Patron and Executor of him, brought Error to reverſe it: And it was holden to be good; and in that Caſe, upon the Reverſal of it, the Incumbent, although he be ſevered, ſhall have Judgment to reſtored. Paſch. 36 Eliz. B. R. *Pipe* and the Queens Caſe, *Cro.* 3. Part, 324.

4. Upon a *Vi Laica removenda*, a Parſon was patron of poſſeſſion, and the poſſeſſion gotten by his Adverſary; and upon a Suggeſtion thereof to the Court, Reſtitution was awarded upon an *Affidavit* of it: And ſo it was ſaid, It was adjudged 35 Eliz. in *Erkinſons* and *Palmers* Caſe, for the Parſonage of *Wiberton* in the County of *Cambridge*, Hil. 38 Eliz. B. R. *Wilkinſons* Caſe, *Cro.* 3. Part, 485.

5. Attaint was brought in C. B. of a Verdict in the Kings-Bench. Whereupon the Record was removed, and thereupon the Verdict was affirmed. Now the Plaintiff in the firſt Action prayed Execution according to the firſt Verdict. It was the Opinion of the Juſtices, That he ſhould have Execution. For the Juſtices of the Common Pleas may not award Execution, for they have only *tantum Records*; but if the Verdict had been diſaffirmed, and Execution upon the firſt Verdict had been had before, the Court of Common Pleas might very well have awarded Reſtitution. And afterwards Execution was awarded accordingly. Hill. 37 Eliz. B. R. *York* and *Allens* Caſe. *Cro.* 3. Part, 371.

Retraxit.

1. DOwer by Husband and Wife, againſt A. and B, of a Manner and Lands in the County of B: B. pleaded Non-Tenure; A. pleaded Non-Tenure of parcell of the Tenements, and pleaded a Barr for the Manner; and upon the Barr they were at Iſſue tryable in *London*. The Demandants maintained their Writ for the Reſidue of the ſaid Tenements; and upon that they were at Iſſue; and afterwards A. *relicta verificatione ſua*, by her ſaid Barr confeſſed the Action. And thereupon the Demandants prayed their Judgment againſt the ſaid A; And they had their Judgment, and ſaid, That they would not further proceed to try the Iſſues of Non-Tenure: but they would enter a *Retraxit* thereof. And it was Ordered by the Court, That they ſhould do it accordingly. Paſc. 9 Eliz. B. R. The Lord *Wharton* and *Butlers* Caſe, *Bendlowes*, 19.

2. Treſpaſs againſt A. and B, they Impaled, and at the day B. did not appear: Whereupon a *Nihil dicit* was entred againſt him: A. pleaded in Barr; Thereupon the Plaintiff Replyed, and a Demurrer was joyned upon the Replication, and day given over to the next Term, and then adjudged for the Plaintiff; and at the ſame Term, a *Nolle Proſequi* was entred againſt B, and upon Return thereof, *adjudged* againſt him. Whereupon they brought Errour, becauſe this *Nolle Proſequi* is againſt one, where Judgment is entred againſt both, being that a *Retraxit* againſt one, is as ſtrong as a Releaſe to one, the which being to one of the Defendants, is a good diſcharge for both, and then the Judgment againſt A. is erroneous: And of ſuch Opinion were all the Juſtices and Barons. Wherefore the Judgment was Reverſed. Paſch. 42 Eliz. Exchequer Chamberr. *Greta* and *Charnocks* Caſe. *Cro.* 3. Part, 762.

3. Information by an Informer *tam pro Domino Rege quam pro ſeipſo*, upon a penall Law; before any pleaded, the Informer dyeth: It was holden,

holden, That yet the Queen might proſecute it. And ſo if the Kings Attorney will enter a *Nolle Proſ.* as for the King, yet the Informer may proceed for his part. Mich. 40 Eliz. B.R. *Hamman* and *Giffold's* Caſe; and *Stretton* and *Taylor's* Caſe. *Cro.* 3. Part, 583.

Retorn *of the* Sheriff.

1. DEbt againſt Executors; who pleaded, That they had Fully Adminiſtred. It was found, that they had Aſſets, &c. And afterwards, a *Fieri facias* iſſued to the Sheriff; Who Returned, That they had not any thing within the County. And the ſame was holden to be a good Retorn, Becauſe it might be, that the Jury found the Aſſets to be in another County, as they might well do, if they will take Notice of it, and yet their Verdict ſhall not bind the Sheriff. Paſch. 7 E. 6. *Bendlowes*, 23.

2. A. brought Debt upon an Obligation againſt B, Executor of C, and recovered; And upon a *Fieri facias*, the Sheriff Returned, *Deveſtavit*. It was moved to have an *Elegit*: The Juſtices doubted of it, and would adviſe. But at another day, It was moved again, and a Preſident was ſhewed to the Court for it, of 17 Eliz: and thereupon the *Elegit* was granted. Mich. 32 Eliz. B. R. *Mead* and *Clencys* Caſe. *Leon.* 2. Part, 188.

3. Leſſee for years, reſerving Rent; upon a Statute due to the Queen, an *Extendi facias* was awarded to ſeize the Lands and Tenements into the Queens hands, and a *Liberate* awarded Mean betwixt the *Liberate* and *Extendi facias*; and before the Sheriff had made his Retorn, the Rent encurred. It was holden by the Juſtices in this Caſe, That before the *Liberate* awarded, and Returned, the Leſſee remained Tenant to his Leſſor. And alſo they held, That Lands could not be ſeized upon by an *Extendi facias*. Paſch. 28 Eliz. C. B. *Playces* Caſe. *Cro.* 3. Part, 46.

4. If Judgment be given againſt an Executor, upon a Demurrer, and Execution awarded Th. Sheriff cannot Retorn, *Nulla habet bona Teſtatoris*; but it is a *Deveſtavit*, if it be found againſt the Executor by Verdict. Trin. 30 Eliz. B. R. *Stubbs* and *Righwiſes* Caſe. *Cro.* 3. Part, 102.

5 Debt upon Recovery of Damages in the Exchequer: The Defendant pleaded, That a *Fieri facias* iſſued out of the Exchequer, to levy the Damages; and upon it he paid the money to the Sheriff, who was diſcharged of his Office before the Retorn of the Writ; but the New Sheriff returned, That he received ſuch a Writ to be endorſed, *Fieri feci de bonis &c.* the ſum demanded (but the mony was not brought into Court): Upon this the Plaintiff Demurred. It was adjudged for the Defendant, That the Plaintiff ſhould be barred, for he having once paid the money, it ſhould not be reaſon that he ſhould be compelled to pay it again; and the Plaintiff is put to his Remedy againſt the Ancient Sheriff. Mich. 33 Eliz. B. R. *Rook* and *Vilmots* Caſe. *Cro.* 3. Part, 208.

6. *Scire facias* upon a Judgment in Debt: The Defendant pleaded, That upon the *Fieri facias* directed to the Sheriff of the County of L. for levying of it; he by force of it took divers Sheep of the Defendant's for the Debt, and yet he detaineth them. It was holden by the Court, To be a good Plea; although the Writ is Conditional, *Ita quod habeas Damnia hic, &c.* for that the Plaintiff hath his remedy againſt the Sheriff, and the Execution is lawful, which the Defendant cannot reſiſt. Trin. 33 Eliz. B. R. *Mowntney* and *Andrews* Caſe, *Cro.* 3. Part, 231.

7. A. is endebted to B, in a Recognizance of 1000 l, and to C. in a Recognizance of 1000 l: The Land of A. is extended by B. at 40 l, and delivered by the Sheriff in Extent, which is returned: The Recognizance of C. comes to the King by Outlawry; and upon Proceſs of Extent it is found, That the Land is of value 60 l. *per annum* more then the firſt Extent. It was holden by the Juſtices in this Caſe, That the King ſhould not have the Surpluſage, becauſe the firſt Creditor by the Extent hath an Intereſt in the Land, which ſhall not be deveſted by the finding of Surpluſage. Mich. 34 Eliz. B.R. The Queen and *Wells* Caſe. *Cro.* 3. Part, 266.

8. A man had Lands delivered unto him in Execution by the Sheriff, upon an *Elegit*: *Super Sac*, he came and ſurmiſed, That the party had other Lands, and prayed a new Writ of *Elegit*: It was holden by the Court in this Caſe, That if the party hath accepted of the firſt Lands, upon the delivery of the Sheriff, he cannot afterwards have a new Extent: But if at the firſt day of the Retorn of it, he waive it, then he may have a new Extent. Mich. 36 Eliz. B. R. *Hanger* and *Foys* Caſe. *Cro.* 3. Part, 310.

9. Note: It was holden by the Juſtices, That a Writ of Enquiry of Damages may be executed at the ſame day that it is returnable. And ſo, That a Writ of Enquiry of Value in a *Quare Impedit* was executed the firſt day of the Retorn. But the Jury did not give their Verdict till two days

days after. Pasch. 38 Eliz. B. R. *Gawen* and *Lawrence* Case. *Cro.* 3. Part, 473.

10. Action upon the Case against the Bayliffs of N; for that upon a *Fieri facias* directed to the Sheriff of the County of N. returnable *Oct. Mich.* he sent this Warrant to the Defendants being Bayliffs of N, to execute it: Who returned, *Nulla bona &c.* before Mich; and at Mich. they were removed from their Office, and new chosen. It was the Opinion of the Justices, That it was a void Return; For the Writ being returnable *Oct. Mich.* The Sheriff ought not before that time to have accepted any Return of *Nulla bona*; for he might have some afterwards, and before the Return of the Writ: And the Writ being returned by them after Mich. (they being discharged of their Office) is void; for they have no authority to meddle with the Return after. But if they had executed the Writ before Mich. then the Sheriff might have accepted of their Return before Mich. but not after. Mich. 39 Eliz. B. R. *Palmer* and *Ivers* Case. *Cro.* 3. Part, 512.

11. *Ejectione Firmæ*; The Defendant pleaded to Iſſue: A *Venire facias* was awarded *de Medietate Linguæ*, upon ſuggeſtion of the Defendant, That he was an Alien: At the *Niſi Prius*, a *Tales de Circumſtantibus* was awarded and found for the Plaintiff. It was moved, That the *Tales* was not well awarded *de Medietate Linguæ*, for that it ought to purſue the *Venire facias*: And it was not well Returned, becauſe Aliens and Denizens were Returned together; whereas they ought to have been ſeverally Returned by themſelves. It was the Opinion of the Juſtices in this Caſe, That for that cauſe, and alſo for this cauſe, becauſe it doth not appear, who were Aliens, and who were Denizens, that the Return was not good. But then it was further ſaid by them, That it was but a Miſreturn, which was aided by the Statute of 18 Eliz. Wherefore upon an *Affidavit* made, That 6. Aliens, and 6. Denizens were ſworn. The Plaintiff had Judgment. Paſch. 43 Eliz. B.R. *Goodwin* and *Cornelius Mauntenaughe* an Aliens Caſe. *Cro.* 3. Part, 841.

12. *Scire facias* upon a Judgment in Debt againſt Terr-Tenants; The Sheriff Returned, *Quod Scire feci J. B. tenenti unius Meſſuagii, &c.* And the ſaid A. B. came and pleaded, That he is not Terr-Tenant againſt the Return of the Writ. Upon which, it was Demurred. And it was adjudged for the Plaintiff, That it was not any Plea; and that the Plaintiff might have taken Execution at his peril. Hil. 44 Eliz. C. B. *Flood* and *Pinington* Case, *Cro.* 3. Part, 872.

13. Error to Reverſe a Fine: The *Deforceor Petitionem* was made *per Rogerum Manwood Militem*, and *Roger Manwood*, who took the Fine, was not then a Knight. It was the Opinion of the Juſtices, That it was no Error, becauſe it is directly againſt the Record, which is not receivable, for it is recorded as a Fine taken by him: In that Caſe, It was ſaid, That in caſe of the Sheriff, although a man cannot averr, contrary to that which he returneth; Yet he may ſay, That he who hath endorſed his name on the Back of the Writ, &c. was not Sheriff, becauſe by the Common Law, until the Statute of E. 2. no Sheriff nor Officer uſed to put their names to their Returns; and therefore the Averment, That he who made the Return, was not the true Officer, is not taken away by the Statute, but the ſame ſtill remains as a thing at the Common-Law. Paſch. 1 Jac. B. R. *Arundell* and *Arundell's* Caſe, *Yelverton*, 33, 34.

14. A *Præcipe quod reddat* was awarded, *Vice-Comitibus Glouc.* againſt A. B. and C; the Sheriffs made Return, that the ſaid C. named in the Writ, was one of the Sheriffs of the ſaid City; *Ideo Ego præfat. C. et D. alter. Vic. cor. Civitatis prædict. me ipſum ſecundum Exigentiam iſtius Brevis ſummonire non poſſum*, It was adjudged by the whole Court, To be a good Return. See 7 Eliz. C. B. *Bendloes*, 39. 40

15. A Commiſſion to try *Niſi Prius*, was directed to *Fr. Harvey* Eſquire, one of the Juſtices of the Common Pleas; And the Return was, That the Tryall was, *Coram Franciſco Harvey, Militte*, one of the Juſtices. It was adjudged to be a good Return in a Writ of Error brought; For it may be, that he was Eſquire at the time of the Commiſſion awarded; and before the Tryall, he was made a Knight. And it was ſaid, That otherwiſe, all the Tryalls of that Circuit ſhou'd be overthrown. Hil. 1 Car. B.R. *Petty* and *Habſon* Caſe, *Latch*, 161.

Scire

Scire Facias.

1. NOte: It was ſhewed to the Court That a man made his Will, and one his Executor, and dyed. The Executor brought an Action of Debt againſt another man, of a Debt due to the Teſtator; and had Judgment; and before Execution, the Executor dyed Inteſtate; And the Ordinary committed Adminiſtration of the goods of the Teſtator; which Adminiſtrator brought a *Scire facias* againſt him, againſt whom the Judgment was had upon the ſame Judgment. It was moved to the Court, If the *Scire facias* did lye, or not? And all the Juſtices agreed, That the *Scire facias* did not lye, becauſe when the Executor is dead Inteſtate, that Recovery is void; and the Adminiſtrator ſhall have a new Action of Debt. It is a Quære in that Caſe, If the Ordinary had committed Adminiſtration of the Goods of the Inteſtate, and alſo of the Goods of the firſt Teſtator, if the *Scire facias* had been maintainable. See 28 H. 8. *Boudlowes*, 2. See Paſch. 1 Jac. *Yates* Caſe adjudged accordingly.

2. W. brought a *Scire facias* againſt P. & S, Sureties for one B, upon bail in an Action of Debt; The Defendant pleaded the death of B, before Judgment given againſt him. It was holden by all the Juſtices, (Except *Wray*) That the Plea was not good, for it is a Surmiſe againſt the Judgment; for Judgment cannot be given againſt a Dead man. *Wray* ſaid, The ſame is Error in fact; and of ſuch Error, the party may have advantage in this Court. *Gawdy*, The Surety cannot take advantage of Error, nor plead it, for he is a Stranger to the Record. *Wray*, Chief Juſtice, ſaid, He may plead, That the Defendant is dead before the Judgment. Wherefore it was Ruled, That the Defendants ſhould be ſworn, that their Plea was true. Mich. 32 Eliz. B. R. *Walter* and *Perry* and *Springs* Caſe. *Leon.* 2. Part. 205.

3. *Scire facias* againſt the Defendants, who were Bail upon a Bill of Debt brought againſt B; who pleaded, That the Principal had paid the money in which he was condemned to the Plaintiff, according to the Condition of the Recognizance. It was in this Caſe holden by the Court, It was no Plea, without pleading payment on Record: For the Condition is, That the Defendant ſhall ſatisfie the Debt, otherwiſe the Sureties would do it; and this is to be underſtood of the moſt ſufficient Satisfaction, which is of Record. And therefore the Court diſallowed the Plea. Paſch. 31 Eliz. B.R. *Ordeway*, and *Parrets* and *Farleys* Caſe. *Cro.* 3. Part, 132.

4. *Scire facias* againſt B. and others, which were Bail for one P; and their Recognizance was, That if P. was Condemned, that he ſhall pay the Debt within ſuch a time, or render his body to priſon: P. being Condemned, and not rendring his body, a *Scire facias* was brought againſt them. Upon this Recognizance they pleaded, That P. ſuch a day before the Recognizance, paid the money. In this Caſe, It was holden a good Plea without a Specialty: for the Recognizance as to them, is but as an Obligation with a Condition, upon which they might well plead performance. Paſch. 33 Eliz. C. B. *Brunkhorns* Caſe. *Cro.* 3. Part, 232. See the Caſe precedent to the contrary.

5. *Scire facias* by the Queen againſt A; why Execution ſhould not be awarded againſt him for a Debt which came to the Queen by the Attainder of J. S: The Defendant pleaded, That the Queen had granted over this Debt, and all Actions and Demands for it to J. D: It was demurred, if the Suit ſhould be in the Queens Name after it is granted over; The Court doubted of it, two Preſidents were ſhewed. Paſch. 30 Eliz. where G, to whom a Debt was due, was attainted of Felony, and the Queen granted over the Debt, and all Actions and Demands for it, and a *Scire facias* was ſued in the Queens name. Another Preſident, Hill. 32 Eliz. *Mabb* was endebted by Bond to J. S; and the debt came to the Queen by Attainder, and ſhe granted it, and all Actions to *Bowes*, and notwithſtanding, the Suit for it was in the Queens Name. The Court ſaid, They would ſee the Preſidents. And the principal Caſe was Adjourned. Paſch. 36 Eliz. B.R. The Queen and *Allens* Caſe. *Cro.* 3. Part. 325.

6. Error of a Judgment in Debt, where the Judgment

Judgment was affirmed: It was holden by all the Juſtices, and ſo the Clerks ſaid, It was their Uſage, That the Defendant in a Writ of Error ſhould have Execution preſently, without a *Scire facias*, and that although the year and day be paſt ſince the firſt Judgment. Mich. 38 Eliz. B. R. *Godwin* and *Gadges* Caſe. *Cro.* 3. Part, 416.

7. Upon ſpecial Verdict, in *Ejectione Firmæ*, the Caſe was: Tenant in Tail of Lands in A, levyed a Fine with Proclamation, with the Remainder to himſelf in Fee; The Fine was afterwards reverſed by a Writ of Diſcent. But the Tenant in Tail, after the Fine levyed, and before it was reverſed, had made a Leaſe for years, the Remainder over for life; and, If the Iſſue might enter to avoid thoſe Eſtates, was the Queſtion? It was holden by the Court in this Caſe, That he could not enter without a *Scire facias* ſued againſt him, who had the Freehold: For he who is to defeat a Record, is alwayes to commence his Suit againſt him who is privy to the Record; but when he hath reverſed it againſt him, he ought alwayes to have a *Scire facias* againſt him who is Terr-Tenant, for it may be he hath ſome matter to barr him of Execution. Paſch. 38 Eliz. B. R. *Cary* and *Dacyes* Caſe. *Cro.* 3. Part, 471.

8. *Scire facias*, by the Lady *Greſham*, upon a Recognizance made unto her by one G, who was Attainted, whereupon ſhe ſued forth a new *Scire facias* againſt the Heir of G, and the Terr-Tenant. Upon which the Sheriff returned, That he had Summoned the Defendant, who was Terr-Tenant of the Manner of S, which was the Land of G, after the Recognizance acknowledged. Whereupon the Defendant came and pleaded, That one J.S. was ſeiſed of three Acres in D, whereof G. was ſeiſed in Fee after the Recognizance made. The Plaintiff ſaid, G. was not ſeiſed of the ſaid three Acres, upon which they were at Iſſue; and it was found, That G. and one H. were ſeiſed in Fee of thoſe three Acres after the Recognizance, and thereof entoulled the ſaid J. S, who is yet ſeiſed thereof in Fee. *Fenner*, Juſtice, ſaid, That upon this Verdict found, Execution ought to be ſued as well againſt J. S, as againſt B. the Defendant: It ſufficeth him, and is all one, as if it had been found, that he was ſeiſed, as he hath pleaded. But *Popham* and *Gawdy* held the Contrary, becauſe this is an eſpeciall Plea, and ought to be found, as it is pleaded. 1. Otherwiſe it will not ſerve; and there is difference, when the Plea is to the Poynt of the Writ, and when it is a Collaterall Plea, or in Barr: Afterwards the Lady *Greſham* dyed, and the matter ended. Mich. 39 Eliz. B. R. The Lady *Greſham* and *Bunnings* Caſe. *Cro.* 3. Part, 706.

9. Debt againſt an Executor, the Plaintiff had Judgment to recover *de bonis Teſtatoris*; And thereupon a *Scire facias* was awarded, and the Sheriff returned, *Quod Nulla habuit bona Teſtatoris*. The Plaintiff ſuggeſted, That he had waſted the Teſtator's Goods: Whereupon he prayed *Scire facias*, why he ſhould not have Execution *de bonis propriis*. It was the Opinion of the Juſtices, That this Writ ſhall not be awarded upon the ſuggeſtion of the party upon *Deveſtavit*, nor in any Caſe where the Judgment is *de bonis propriis*, unleſs it be upon the Return of the Sheriff, where he returns a *Deveſtavit*. Mich. 39 Eliz. C. B. *Aldworth* and *Peeles* Caſe. *Cro.* 3. Part, 530.

10 *Scire facias* againſt an Adminiſtratrix to have Execution of a Judgment againſt the Inteſtate: The Defendant pleaded, That ſhe had no Goods, which were the Inteſtates at the time of his Death, in her hands to be adminiſtred; nor had, at the time of the Writ brought, nor after: Upon which, It was demurred. It was the Opinion of the whole Court, That it was no Plea; For a Judgment cannot be anſwered without another Judgment; and it may be, ſhe had adminiſtred all the Goods upon Specialties, which is not an Adminiſtration to barr the Plaintiff: Or it may be, that ſhe had payed Debts upon a Statute of Recognizance, which are not allowable againſt a Judgment: It was adjudged for the Plaintiff. Trin. 39 Eliz. C. B. *Ordwey* and *Gaſpreys* Caſe. *Cro.* 3. Part, 575.

11. *Scire Facias*, upon a Judgment in Debt againſt Sir *Chriſtopher Heydon*, and his Terr-Tenants; Sir *Chriſtopher* and four others were Terr-Tenants, and thereupon he pleaded, That he was Son and Heir of Sir *William Heydon*, and pleaded in abatement of the Writ, becauſe a *Scire facias* was not ſued againſt him as Heir, pretending, that a *Scire facias* ſhould iſſue firſt againſt him, before the Writ ſhould iſſue forth againſt the Terr-Tenants. But it was the Opinion of the whole Court, That the Plea was not good; and the Writ was holden and adjudged to be good. Trin. 44 Eliz. C.B. Sir *Chriſtopher Heydons* Caſe. *Cro.* 3. Part, 396.

Sheriffs.

Sheriffs:

1. A *Capias* was delivered to the new Sheriff of W, against the Defendant, at the Suit of J. S: He enformed the Court, that before the Proceſs was directed unto him, That the Defendant was taken in Execution by the old Sheriff, upon a Judgment againſt him to B. R; and by force thereof, the old Sheriff had impriſoned him in his own Houſe; and prayed advice of the Court, what matter to Return. It was the Opinion of all the Juſtices, That by the Law, the Old Sheriff ought to deliver the body of him who is in his Cuſtody, by View to the new Sheriff, and ought to be brought to him to View. *Anderſon*, Chief Juſtice, ſaid, That the Sheriff may Return, that the Defendant is in Execution, *in Cuſtodia ſua*, and ſo charge himſelf: For although the Office of the old Sheriff be determined, yet it is not an Eſcape, ſo long as the Party is *in Cuſtodia*. Trin. 29 Eliz. C. B. *Smalman* and *Lanes* Caſe. *Leon.* 2. Part, 54. See *Cook* 3. Part, *Wyllys* Caſe.

2. Action upon the Caſe againſt the Sheriff of E, for that upon a *Capias* againſt J. S. directed to him; he directed a Warrant to ſuch a Bayliff of a Liberty, to Arreſt the ſaid J. S, who Arreſted him; and that the Defendant well knowing thereof, had notwithſtanding upon the day of the Return, Returned a *Non eſt inventus*. It was Reſolved, That the Action did well lye: *Anderſon* ſaid, If the Sheriff had Returned, that he had ſent to the Bayliff of the Liberty, who had given this Anſwer, That he had Arreſted the Body: It had been good, and the Sheriff ſhould have been diſcharged, and the Proceſs ſhould have iſſued againſt the Bayliff to bring in the Body. Mich. 41 Eliz. C. B. *Hawkins* and *Mildmayes* Caſe. *Cro.* 3. Part, 989.

3. Action upon the Caſe againſt the Sheriff; For that he ſued forth a *Latitat*, directed to him to Arreſt J. S, and delivered it to him to execute, and he Arreſted him, and afterwards let him go at large, and yet notwithſtanding returned *Languidus in priſona*, whereby the Plaintiff was delayed in his Suit: It was demurred to it, becauſe he anſwers nothing to this falſe Return. But it was the Opinion of the Court, That it was well enough: For when he executed the Writ, and took Bond according to the Statute, and returned, that he took him; it is not material to the Plaintiff, although he return *Languidus*, &c. for that is only for his excuſe, that he hath not the Body; and he is only fineable by the Court, if he bring not in the Body, and the Party ſhall not have Remedy againſt him. Mich. 43 Eliz. B. R. *Bales* and *Laſſetts* Caſe. *Cro.* 3. Part, 852.

4. Debt upon a Bond of 40 l. to the Sheriff: The Defendant Pleaded the Statute of 23 H. 8. and that by vertue of a *Latitat*, he was Arreſted at the Suit of J. S; and this Bond was made to the Plaintiff, for his appearance, by the Defendant and one M; the Defendant, nor M, having any thing within the County, nor being Inhabitants within the County, and ſo the Bond void. But it was the Opinion of the whole Court, That the Bond was good enough: For, the Statute doth not make void any Bonds, but what are made in oppreſſion of the People; and the words in the Statute, *ſcil.* (in other manner and form) are to be intended of the matter of the Bonds, as to the Sheriff, and not for the ſufficiency of the Sureties; and therefore if he take Bond with one Surety, it is good enough: And ſo it was ſaid, It was adjudged in Sir *Gerviſe Cliſton's* Caſe; It was adjudged for the Plaintiff. Mich. 43 Eliz. B. R. *Blackbourn* and *Michelbournes* Caſe. *Cro.* 3. Part, 852.

5. Action upon the Caſe againſt the Sheriff of B: For that J. S. being Out-lawed at the Plaintiffs Suit, and a *Capias utlagatum* being delivered to the Sheriff, returnable at ſuch a day, he did not return the Writ: Judgment being againſt the Defendant, upon *Non ſum informatus*, and Damages found 40 l. It was moved, That the Action did not lye, for not returning the Writ, but they ſhould be amerced only for the Contempt; and of that Opinion were ſome of the Juſtices. But it was ſaid, That if the Party who ſues that Writ, ſhews to the Sheriff the Party, who is to be Arreſted, and delivers to him the Writ, requiring him to make the Arreſt, and he doth it not, an Action upon the Caſe lyeth againſt the Sheriff. On the other ſide, it was ſaid, That although the Queen might puniſh him for his Contempt; yet the Party having loſs by not returning of the Writ, may have his Action alſo: And the Clerks ſaid, That ſuch Actions had been uſually brought. *Quære*, It was not adjudged, but the Caſe adjourned. Hill. 44 Eliz. C. B. Sir *William Clerks* Caſe. *Cro.* 3. Part, 873.

6. A. brought Dower againſt the Son, to be endowed of Lands, of which her Husband, the Father of the Defendant dyed ſeiſed of: A Writ iſſued forth to the Sheriff, to enquire of the Damages; and he made his Warrant to J. S, to take the Enqueſt. It was the Opinion of the Juſtices in this Caſe, That he cannot in this Caſe make a Deputy, becauſe it is a judicial Act, which the

Sheriff

Sheriff ought to do in perſon. Hill. 35 Eliz. B. R. *Randals* Caſe, *Noy* 21.

7. Action upon the Caſe againſt C, and declared upon *Trover* and Converſion, of Goods in the County of N: The Defendant pleaded a Recovery againſt the Plaintiff in B. R, in another action in which he had 20 l. Damages; and for thoſe Damages a *Fieri facias* iſſued out of the Court, directed to the Sheriff of Y: Upon which the Sheriff ſeiſed the Goods in the ſaid County of Y, and delivered them to the Defendant in ſatisfaction of the ſaid 20 l. and ſo juſtified. In this Caſe, amongſt other Points, It was ſaid, and Reſolved, That the Sheriff cannot upon a *Fieri facias* deliver Goods to the Party in ſatisfaction of his Debt. Mich. 38 Eliz. C. B. *Townſon* and *Clarks* Caſe. *Noy* 56.

8. Debt was brought againſt the Dean and Chapter of *Pauls*, for an Eſcape ſuffered by their Bayliff of a Franchiſe, where they had Return of Writs: It was adjudged in this Caſe, That it did not lye againſt them, but againſt the Bayliff himſelf; for the Writ is directed to him, *ſcil. Balivo libertatis*, and not to them: And an Obligation taken according to the Statute of 23 H. 8. ought to be taken in his Name; and for an ill Return, the Bayliff of the Franchiſe is alwayes Fined. The Dean and Chapter of *Paul's* Caſe. *Noy* 69.

9. Note; It was agreed by the whole Court, That for executing of a *Capias utlagatum*, or for a Warrant to execute it, or for a Return of it, no Fee is due to the Sheriff. Mich. 3 Car. B. R. *Wiltſhires* Caſe. *Hetley*. 52.

10. The Sheriff of *Coventry* and *Litchfield* brought Debt for 7 l. 6 d. for their Fees, for an Execution of 181 l. ſo that for their Fees demanded was 12 d. for 100 l. till 100 l. and 6 d. for every pound over and above. In this Caſe, It was Reſolved, 1. That the Sheriff may have an Action of Debt for his Fees, although the Statute doth not give any remedy. 2. That the Proviſo in the Statute of 23 Eliz. extends to a City-Corporate, when Judgment is given within their Franchiſe, and execution upon it; and not when Judgment and Execution iſſueth out of Superiour Courts: For in the firſt Caſe, the Officer is not at great Care or Perill; but as to the Sheriff of a County, his labour and travail is all one, be it in the Body of the County, or in a Franchiſe. But if that Town be a County of it ſelf, the Sheriff ſhall have their Fees according to the Statute of 28 Eliz. Hill. 11 Car. B. R. *Walden* and *a Jus* Caſe. *Latch*, 51. See *Cro.* 3. Part, 263. The Sheriff of *Glouceſters* Caſe.

11. Upon a Statute acknowledged, and an Extent ſued forth, The Sheriff took a Bond of 20 l. for the payment of 10 l. in which was his Fee, and that was before the *Liberate*: It was adjudged, That the Bond was void. Firſt, Becauſe the Statute of 28 H. 8. gave him an Action of Debt for his Fee, and he is not to have a double Reward. And ſecondly, Becauſe it was taken before the *Liberate* was ſued forth. Hill. 1 Car. B. R. *Emſons* Caſe. *Latch* 20.

12. *Aſſumpſit*; The Plaintiff declared, That J. G. was endebted to the Defendant in 30 l. and the Defendant ſued him to Out-lawry. And Trin. 18 Jac. took out a *Capias utlagatum* againſt him, directed to the Sheriff, and that there was a ſpeech between the Defendant and the Plaintiff, for the Arreſting of the ſaid J. G; and the Defendant promiſed him, that in conſideration that the Plaintiff would procure a ſpecial Warrant from the Sheriff to him the Plaintiff, and he did Arreſt the ſaid J. G, that he would give him 40 l; and ſhewed, how that he did procure the Warrant, and after Arreſt J. G. upon it. Upon *Non-aſſumpſit* it was found for the Plaintiff: It was adjudged by the whole Court in this Caſe againſt the Plaintiff, That the Action did not lye; becauſe the Arreſt was made as Servant of the Sheriff; and none can be Officer to execute any Proceſs of the Court, but the Sheriff: and although the Promiſe was made by the Defendant to the Plaintiff before he was Officer, yet the act which is done is the act, which appertains only to the doing of the Sheriff, and if the Party had eſcaped, the Sheriff in this Caſe ſhould be Charged with the Eſcape. But it was agreed in this Caſe, That if a Promiſe be made to a meer Stranger to go to the Sheriff and procure him to Arreſt J. S, the ſame is a good Conſideration to ground an Action upon. Hill. 1 Car. B. R. *Batho* and *Salters* Caſe. *Latch* 54, 55.

13. Action upon the Caſe, by Husband and Wife againſt the Sheriff of W; and declared, That the Plaintiff took a Latitat out of the Kings Bench to Arreſt J. S. at their Suit, directed to the Sheriff, and that the Sheriff appointed the Defendant to be his Under-Sheriff, which Office he Executed before and after; and that the Writ was delivered by the Plaintiff to the Defendant, the ſaid J. S. being there preſent, in the ſight and company of the Sheriff; notwithſtanding which, the Sheriff returned *Non eſt inventus*: and the Return was made in the Name of the Sheriff himſelf. It was the Opinion of the Juſtices in this Caſe, That the Action doth lye againſt the Sheriff himſelf, and not againſt the Under-Sheriff; becauſe the Sheriff is the Officer to the Court, and not the Under-Sheriff; and every default in execution of the Office, although it be for neglect or fraud of the Under-Sheriff, the Sheriff himſelf ſhall be amerced and fined. But he ſhall not be Impriſoned for the

Act of the Under-Sheriff; but for every Misdemeanour of the Under-Sheriff in the Execution of his Office, the Sheriff himself shall be charged. Hill. 2 Car. B. R. *Laicock's* Case. *Latch.* 187.

Statutes-Merchant, and of the Staple.

1. ERror to Reverse a Judgment in C. B. For that A. brought *Audita Querela* to avoid a Statute, acknowledged before the Mayor of *Lincoln*, because it was sealed with the Seal of one piece. Where the Statute of 31 E. 1. *de mercatoribus* doth appoint it to be sealed with a Seal of two pieces; The Defendant pleaded, That it was sealed with a Seal of two pieces, according to the Statute. It was found for the Plaintiff in the *Audita Querela*, and thereupon adjudged in C. B. *quasi Statutum prædict. i. forma prædict. recognitum, penitus vacuum foret et pro nullo habeatur.* Two Errors are assigned, 1. Because the Issue was not to be tryed by the Country, but by the Certificate of the Mayor. 2. That the Judgment *quod evacuetur* was erroneous; because although it be void as a Statute, yet it is not void as an Obligation. But the Judgment was affirmed by the Court; for if it be not a Statute, it is not an Obligation: but being discharged as a Statute, it hath lost his force in all respects; and the sole means to avoid it, is by an *Audita Querela*: For Error lyeth where the Statute is good, but here the Execution is Erroneous. Pasch. 46 Eliz. B. R. *Fullshaws* and *Ascues* Case. *Cro.* 3. Part, 319. See Mich. 38 Eliz. *Ascud* and *Hollingworths* Case. The same Case. *Cro.* 3. Part, 494.

2. *Audita Querela*, for suing Execution upon the Fathers Lands in D, and the Sons Lands in S, upon a Statute acknowledged before the Mayor of P, sealed with one Seal. It was Objected, That the *Audita Querela* was well sued joyntly; because it is grounded upon a Statute, which is entire, and one Action of Debt might have been maintained against them upon that Statute; and of that Opinion was *Anderson*, Chief Justice. But all the three other Justices held the Contrary; because it is here pretended, that the Statute was never good being sealed but with one piece of Wax, and so the Execution against them was alwayes tortious: wherefore for this wronge, they ought to sever in the Action, to have it Reversed, the wronge being to them several. But if the Statute were once good, and afterwards Released, and Execution sued against the Release, there it should be otherwise, because it is there grounded upon one entire Cause. Pasch. 38 Eliz. C. B. *Worsley* and *Charnocks* Case. *Cro.* 3. Part, 473.

3. M. entred into a Recognizance of 1000 l. to H, and afterwards entred into a Statute of 1000 l. to D: D. extended his Statute upon the Mannor of S, which was M. Lands, he having also divers other Lands. Afterwards H. had Execution of the Recognizance, and had the moyety of the Mannor of S, first delivered to D. in Execution, but left out of his Extent divers other Lands, which were the Lands of M; at the time of the Recognizance, D. brought *Audita Querela* in C. B. against H. and had Judgment, upon which H. brought Error: but the Judgment was affirmed. For D. being in by Judgment, and upon a Title by the extent upon the Statute, ought to have his Land lyable upon the Recognizance, but *pro rata*; and therefore H. ought to have included all the other Lands of M. in his Extent, as well as the Lands of D; but if D. had not been in by Title, but by Disseisin, or other wrongful means, then he ought not to be relieved by *Audita Querela*. Mich. 45 Eliz. B. R. *Hind* and *Deans* Case. *Yelverton* 12.

4. D. acknowledged a Statute of a certain sum before the Mayor of G, but no day was specified in the Statute when it should be paid; and it was Certified by the Mayor into the Chancery under his Seal, according to the Statute of *Acton Burnell*, upon request made to the Mayor: And a Writ of Execution was thereupon awarded, returnable in C. B. It was Objected, That the Statute was void; for that in every part of the Statute a day certain for every Act to be done is mentioned. *Hobart*, Chief Justice (to which the other Justices agreed) said, We are not to destroy assurances, but upon good grounds; especially upon a Law which is made in favour of Merchants and Traffique; and therefore we all agree, That there ought to be a time, and we conceive, the day is not material; and here is a time of which the Law takes Notice, *scil.* the present time: In the Statute, No mention is made, but of the Mayor; yet if the Statute be acknowledged before the principal Officer, it is good. It ought to contain words Obligatory; a certain sum of money, it ought to have the Seal of the King and Party; It ought to be acknowledged: An expresse day is not necessary, but a day which amounts to a time, of which the Law takes Notice; It was adjudged, That the Statute was good. Hill. 22 Jac. C. B. *Davie's*

Case

Case. See the Reports annexed to *Bendlowes* 144, 145.

Particular Statutes.

Certain Particular Statutes; *The Exposition of them: How, and to whom to Extend, and how to be Construed; Certain particular Cases upon them.*

Upon the Statute *of* 13 E. 1. *of* Winchester, *of* Huy-and-Cry, *and the* Statute *of* 27 Eliz.

ACtion upon the Statute of *Winchester*; For that one B. his Servant was Robbed, and alledged, That the Plaintiff himself came before a Justice of Peace, and was sworn according to the Statute of 27 Eliz. After Verdict, it was alledged in Arrest of Judgment, That the Servant was to be sworn, and not the Master, and of that Opinion was the whole Court; for the Servant might know the persons when the Servant was Robbed, and the Master was not in Company; And the intent of the Statute is, That he that had Notice shall be Sworn: Wherefore, The Judgment was Reversed. Trin. 31 Eliz. C. B. *Grees's* Case. *Cro.* 3. Part, 142.

2. Upon the Statute of *Huy-and-Cry:* It was holden by all the Justices, That whereas the Statute speaks of Robberies done in the Day before Night; Yet if a Robbery be Committed in the Morning before Day, or in the Evening after Day, in any time of the Night in which men use commonly to travail, that the Hundred is answerable for it; but if it be at Twelve or One of the Clock in the Night, the Hundred is not answerable for the Robbery. Hill. 34 Eliz. B. R. *Ridgley* and the Hundred of *Warrington's* Case. *Cro.* 3. Part, 270.

3. This Case was moved to the Court: If an House be Robbed in the day-time, and the Felons escape, Huy-and-Cry being made; If the Hundred shall Answer for that Robbery by the Statute of *Winchester*: In this Case, It was Resolved, That for Felony done in the Night, the Hundred shall not be charged; So not in the principal Case, for that the Statute of *Winchester* extends only to Robberies done to the person; but every one ought to keep his own House at his peril, for it is his Castle, and no man ought to meddle there; and therefore it is not reason that any should be charged, if he be Robbed there. Pasch. 42 Eliz. B. R. *Cro.* 3. Part, 753.

Upon the Statute *of* 8 *of* Hen. 6. *Of* Forcible Entry.

1. INdictment upon the Statute was, and Exception was taken to it, because it was recited *Si aliquis expulsus sit et dissisitus*; Whereas the Statute is *Vel dissisitus*; It was holden to be no good Exception; for that the words Disjunctive are to be expounded in the Copulative; for if he be not *Expulsus & dissisitus*, an Action will not lye upon the Statute. Exception, that although it was void for the Entry with force; yet it being, that the Defendant with others *vi et armis* entred, it should be good for the Ryot. But the Court held the Contrary; for the Indictment concluding *contra formam Statuti*, it cannot have relation unto any Offence, except upon the Statute: The Indictment was discharged. Mich. 36 Eliz. B. R. *Hall* and *Gaynes* Case. *Cro.* 3. Part, 307.

2. A. was Indicted upon the Statute; for that he entred into such a House, and disseised J. F. *injuste & sine judicio*, and yet detains the Possession with force. Exception was taken to it, because it was not pursuant to the Statue. For the Statute is, If any be disseised and ousted with force; or disseised peaceably, and held out with force: And here the Indictment is, That he entred and disseised; but doth not say, *pacifice*, or with force: and every Indictment ought to be certain and precise in every Point. But it was holden to be good enough notwithstanding; for when it is found, that he entred and disseised (no force being found) it shall be intended to be peaceably, and not otherwise. Hill. 45 Eliz. B. R. *Fitz Williams* Case. *Cro.* 3. Part, 915, 916.

3. A. was Indicted upon the Statute of *Forcible Entry*: into a Close called *Serjeant Herons* Close in D. in the County of *Lincoln*: It was excepted for insufficiency and uncertainty, by reason whereof there can be no Restitution made or awarded of it; but he ought to have said, That the Close contained 20 Acres of Land more or less. But the

Exception was disallowed by the Court; for that it was said, That it had been adjudged, That an *Ejectione Firmæ* lay of a Close; and therefore *à fortiori* an Indictment might be well of it. Pasch. 38 Eliz. B. R. *Humphrys* Case. *Cro.* 3. Part, 458.

4. Exception was taken to an Indictment upon the Statute, because it was *tali die et anno, &c. in messuagio, &c. existent. Liberum Tenementum J. S. intravit, et ipsum J. S. expulit et disseisivit*, and doth not say, *Al tunc existent. Liberum Tenementum*; for others say, *Existent. Liberum Tenementum*, may extend to the time of the Indictment taken: The Indictment was discharged. Pasch. 42 Eliz. Eliz. B. R. *Stainsbys* Case. *Cro.* 3. Part, 759.

5. A. was Indicted upon the Statute of 8 H. 6. Exception was taken to it, because there was no word of Freehold in it, or to prove, that the Party grieved had any Freehold, whereof he might be disseised. But because the words are, *Expulit & disseisivit*; which could not be true, if the Party expelled and disseised had not Freehold; the Exception was disallowed. Another Exception was, *In unum tenementum intravit.* and the word *Tenementum* is too general; therefore for that the Indictment was discharged: But it was farther, *In unum Tenementum et* 10 Acras *terræ eid m pertinent*; and therefore as to the 10 Acres, the Party was forced to Answer. Pasch. 26 Eliz. B. R. *Wyth* and *Capells* Case. *Leon.* 3. Part, 101.

Upon the Statute *of* 23 H. 6. Of Sheriffs.

A Bayliff of the Sheriff of D. was Indicted before Justices of the Peace in their Quarter-Session, upon two several Indictments o Extortion, one that he, as Bayliff, *colore Officii*, extorted 20 s. 8 d. *extorsivè*; the other, that he took *Extorsivè* 20 s. *colore Officii*; upon which Indictment, he was enforced to plead presently; and the same day, they were tryed, and he convicted, and Judgment given at one and the same Sessions, That he should be imprisoned and fined to the King; upon these Indictments, he brought Error. It was the Opinion of the whole Court, That Justices of the Peace ought not to try and determine civil Offences in one and the same day; for the Party ought for to have a convenient time for Tryal: and for that cause (amongst other) the Judgment was Reversed. Mich. 11 Car. B. R. 6 *Co.* 11. Part, 317. *Bampfields* Case.

2. In Debt upon an Obligation; It was agreed by the whole Court, That where the Marshal of the Queens Bench taketh Bond for the Easement or Deliverance of a Prisoner in Execution, this is void by the Statute, although the Marshal be not named in the Statute. For *Wray*, Chief Justice, said, That divers are intended within the purview of the Statute, which are not mentioned in the Statute. Mich. 30. Eliz. B. R. *Bacebridges* and *Vaughans* Case. *Cro* 3. Part, 66.

3. Bill of Debt upon the Statute of 23 H. 6. brought by the Plaintiff *tam pro se quam pro Domina Regina*. And declared, Whereas A. W. 27 Eliz. had sued in the Court of N, before the Defendant then Mayor, and J. S. and J. D. Sheriffs there, according to the Custom of the said Town, a plaint of Trespass upon the Case against the Plaintiff, upon a *Capias* awarded by them to O. B. Serjeant of the said Court, to take the Plaintiff, and to have his Body before them the next Court, *scil.* The first of *September* to Answer, that the said O. B. Arrested him, and committed him to the Prison of N, under the Custody of the Defendant, Mayor of the said Town, and Keeper of the Queens Gaol there; and that he, being then in Prison, did offer to the Mayor, Keeper, &c. Sureties to appear at the next Court; which he refused, and kept him in Prison against the form of the Statute. The Defendant pleaded, *Non debet*, and found against him. It was Objected in this Case, That the Bill of Debt did not lye; but it ought to be by Information, as appeareth by the Statute of 18 Eliz. cap. 5. It was the Opinion of the Court, That it was hard to maintain this Action, to be sued here; for that the Statute is in the Negative, that it shall not be sued otherwise, which doth not refer to any person. Afterwards, for that Cause, It was adjudged for the Defendant; and that it was not helped by the Statute of 18 Eliz. *Of Jeofails*, for that this is not matter of Form, but of Substance, by misconstering the Action. Mich. 30 Eliz. B. R. *Widow* and *Clarks* Case. *Cro.* 3. Part, 76.

4. Assumpsit, the Plaintiff declared, That whereas he had taken the body of H. in Execution at the Suit of J. S. by virtue of a Warrant to him as Special Bayliff, the Defendant in Consideration that he would permit him to go at large, promised to pay the Plaintiff all the money in which H. was condemned. It was moved, That the Consideration was not good, being contrary to the Statute. And such was the Opinion of the Court, That a Promise and Obligation are all one. See *Plow. Com. Dive* and *Manninghams* Case. Mich. 33 Eliz. B. R. *Fetherstone* and *Hutchinsons* Case. *Cro.* 3. Part, 199.

5. Trover

5. Trover and Converſion: The Defendant pleaded a Recovery againſt J. S, and a *Fieri facias* awarded to the Sheriff; and after the Writ delivered, J. S. dyed poſſeſſed of goods, and made the Plaintiff his Executor: and after, the Defendant by force of the Sheriff's Warrant, took the Goods in Execution as Bayliff to the Sheriff, and delivered them to him. The Plaintiff Replyed, That the Sheriff returned upon the Writ, *Tarde*. It was holden in this caſe, That the Execution in this Caſe might be ſerved on the Goods in the hands of the Executor; for that, by the Writ of Execution awarded, the Goods are bound. 2. Reſolved, That the falſe Return of the Sheriff, ſhould not make the Bayliff puniſhable, for by the Execution by the Bayliff, the party was diſcharged of the Execution: and therefore, not reaſonable that he ſhould take advantage againſt the Bayliff. It was adjudged for the Defendant. Paſch. 32 Eliz. B. R. *Parkes* and *Moſſes* Caſe. *Cro.* 3. Part, 181.

6. Action upon the Caſe: The Plaintiff declared, That he took forth a *Latitat*, intending to Arreſt J. S. upon an Obligation of 100 l, and delivered it to the Sheriff of B; declaring to him his intent to declare in Debt, That the Defendant Arreſted him by virtue of the Writ, and let him at large *abſq; aliqua ſecuritate inventa*; and at the day returned *Cepi Corpus*: And that afterwards upon an *Habeas Corpus*, he returned, *Paratum habeo*; which was falſe. The Defendant pleaded, That J. S. being Arreſted, put in Sureties for his Appearance; J.N. and J.D. who were ſufficient perſons within the County, who were bound to him in 40 l; and pleaded the Statute, by reaſon whereof he lett him at large, *abſq; hoc*, that he let him at large *abſq; aliqua ſecuritate inventa* prout. It was the Opinion of the Juſtices in this Caſe, That the Traverſe of the Defendant was good: For the Statute appoints him to let him go upon bail; and therefore he is compellable to take bail, and it is left to his Diſcretion what Bail he will take: And when he pleads, he took bail J.N. and J.D, having ſufficient Eſtates in that County, that ſhall excuſe him againſt the party; and it is not reaſonable he ſhould be charged in an Action for doing that which the Law appoints. And although that he Returns, upon the *Habeas Corpus*, that *Paratum Habeo*, when he is at large; that is but a Contempt to the Court, and fineable, and it is nothing to the party, nor can he take advantage of it. Mich. 40 Eliz. B. R. *Barton* and *Allworth's* Caſe, *Cro.* 3. Part, 624. See Hill. 43 Eliz. B. R. Sir *George Cliſton* and *Webbs* Caſe, &c. *Cro.* 3. Part, 808.

7. Debt upon Obligation, Conditioned, That if T. appear before the Juſtices of C. B. &c, The Defendant pleaded, That W. ſued a *Capias* out of the Court, which was delivered to the Plaintiff Sheriff of O, who made a Warrant to the Bayliff of the Hundred of H. to arreſt the ſaid T; and one J. S. put in his own name as a ſpecial Baily to Arreſt T, and Arreſted him at D. in the ſaid County of O, and carried him to W. in the County of B, and there kept him, till the Defendant and the ſaid T. entred Bond to the Plaintiff as Sheriff of O, for the Appearance of T, and ſo the Bond was void by the Statute. In this Caſe, It was adjudged, That the Plea was not good; for although it was a Bond made by *Dureſs*, yet it is within the Statute, and the Defendant is not aided thereby: For T. was never in the Sheriff's Cuſtody after the Arreſt: Wherefore being taken out of the County, it is by *Dureſs*, and not within the Statute. Hil. 42 Eliz. C. B. *Brown* and *Adams* Caſe, *Cro.* 3. Part, 747.

Upon the Statute of 11 *Hen.* 7. *Cap.* 20.

1. THe Caſe was; Husband and Wife, Copyholders to them and their heirs; The Husband in Conſideration of money paid by him to the Lord, obtained an eſtate of Freehold to him and his Wife, and to the Heirs of their two bodies: The Husband dyed, having Iſſue; The Wife entred, and ſuffered a Common Recovery; and his Heirs entred by the Statute of 11 H. 7: And in this Caſe, It was agreed, That this Entry was lawfull; For that the Copyhold by acceptance of the new eſtate, was extinguiſhed. Hill. 26 Eliz. C. B. *Stockbridges* Caſe, *Cro.* 3. Part, 24.

2. The Caſe was: A Woman that was Tenant for Life as a Joyntreſſe, took a ſecond Huſband, and they by Deed Conveyed the Land to J. S. and his Heirs, *Habendum* to him and his heirs, to the uſe of him and his heirs for the Life of the Wife only. It was a Queſtion, If this was a Forfeiture? It was Objected, That it was no Forfeiture; for where words are doubtfull in a Deed, a reaſonable Conſtruction ſhall be made of them: and here the words (*for the life of the Wife*) are put in to exclude the Forfeiture, and to ſave the Eſtate. But the Opinion of the Juſtices was, That it was a Forfeiture; For that by the Deed at firſt a Feeſimple did paſſe, and that to the uſe of the Feoffee; then the Eſtate and uſe are ſeverall things, and cannot be coupled to the words

words [*For the life of the Wife*]: And in this Caſe, the Opinion of all other the Juſtices being demanded, *Wray*, Chief Juſtice, ſaid, That they held clearly, That there was a Forfeiture in the words; *For Life, &c.* ſhall refer only to the Uſe, and not to the Eſtate. And it was adjudged accordingly. Paſch. 31 Eliz. B. R. *Piers* and *Hoos* Caſe, *Cro.* 3. Part, 131.

3. The Caſe was: A man and a woman Joynt-Tenants in Fee of a Mannor intermarried, and after levied a Fine thereof to a ſtranger, who rendred it to them in tail: they had Iſſue 3 daughters; the husband dyed: The Wife took ſecond husband; and they levied a Fine, and retook the Land in ſpecial tail; the wife dyed without Iſſue by the ſecond husband: the Daughters entred. It was Queſtioned in this Caſe, 1. If the firſt Eſtate tail be within the Statute of 11 H. 7. It was holden clearly, That it was for the one moyety, but not for the other. 2. If the Eſtate in Fee be within the Statute? It was the Opinion of all the Juſtices, That it was not; for it may go to a Collateral heir, and the Statute doth not provide but for the heir in tail only. Mich. 39 Eliz. C. B. *Laughter* and *Humphreys* Caſe. *Cro.* 3. Part, 524.

4. In *Ejectione Firmæ* the Caſe was: A. ſeiſed in Fee, having 3. Daughters, by Indenture, in Conſideration of 200 l. paid by R. B; and in Conſideration of a Marriage between the Son of the ſaid R. B, and M. the Daughter of A; and for ſettling of the Lands in his blood, to have continuance for ever, Covenanted to aſſure the moyety of ſuch Farms to the uſe of himſelf for life, and after to the uſe of the ſaid R. B. and M. his Wife, and the heirs of her body by the ſaid R. B. begotten: and for want of ſuch Iſſue, to the heirs of the body of the ſaid M; and after, to the uſe of his other Daughters, and the heirs of their bodies, the Remainder to the Right heirs of A: And of the other moyety, to the uſe of the ſaid R. B, and M, and the heirs of her body, by the ſaid R. to be begotten. The Conveyances were made accordingly. R. B. dyed; M. took a ſecond husband; They by Fine conveyed the Lands to the Defendant: Upon which, the Iſſue entred as upon a Forfeiture, by the Statute of 11 H. 7. It was adjudged in this Caſe, That M. was not a Joyntreſſe within the Statute; for it is an Advancement by the Anceſtors of the Wife, and is not of the purchaſe of the husband, or his Anceſtors; nor is it aſſured by the Anceſtors of the husband: And although money is found to be paid, yet the ſum is not found to be of the value of the Land, nor of what value the Land was, And it is immediately for the life of the husband, which may be an Eſtate ſufficient for the money. It was adjudged for the Defendant. Trin. 6 Car. B. R. *Copeland* and *Pyatts* Caſe. *Cro.* 1. Part, 177.

Upon the Statute of 21 *H.* 8. *Cap.* 13. of *Pluralities.*

1. IN a *Replevin*, the Caſe was; A Parſon having a Benefice of the value of 8 l. *per annum*, took a ſecond Benefice, without any Diſpenſation; and the Queen Preſented by Lapſe: The Queſtion was, It being averred, That it was of the annual value of 8 l; and not averred, That it was of ſuch value within the Queens Books, Whether that was ſufficient? It was holden by the Juſtices, That it was ſufficient to aver it of the annual value of 8 l; which ſhall be taken according to the true value thereof. Although it was ſaid, That there hath been two taxations of Benefices; The one, in the time of E. 1: The other, by the Statute of 26 H. 8. But the Court ſaid, They took not any Conuſance thereof, but regarded only the true value. Mich. 43 Eliz. B. R. *Bond* and *Tricketts* Caſe, *Cro.* 3 Part, 853.

2. Note; In a *Quare Impedit*, It was Reſolved by the whole Court, That if there be two Parſons of one Church, and each of them hath the entire Cure of the Pariſh, and both the Benefices of the value of 8 l. *per annum*, and one of them dyeth; and the other is preſented to the Incumbency of him that dyed; That this is a Plurality within the Statute: and is within the intent of the Statute, That none ſhall have two Livings, or Benefices with Cure. Mich. 37 Eliz. B. R. *Cro.* 3. Part, 351.

3. Upon an Evidence to a Jury, the Queſtion was, Whether one might be the Queens Chaplain, and have Plurality of Benefices by the Statute, he being retained only by word? It was ſhewed, That this Chaplain dyed above 31. years paſt, and that during his life, he was reputed her Chaplain, and exerciſed the Office of Chaplain as well in her private Cloſet, as elſewhere, and had all the benefits of her Chaplain. Wherefore the Court ſaid, That it ſhould be intended, that he was her Chaplain, and well and duly retained: And the Queſtion being, to avoid a Leaſe made by him to the Plaintiff, It was holden, That he was a perſon able to make ſuch a Leaſe. And the Jury found for the Plaintiff. Mich. 38 Eliz. B. R. *Whetſtone* and *Wigfords* Caſe. *Cro.* 3. Part, 424.

4. Infor-

4. Information upon the Statute for Non-Residency: The Defendant pleaded, That he was chosen Gospeller of the Church of St. *Paul*, *London*, and was Resident there by reason of that Dignity. It was Objected, That it was not a Dignity to excuse the Defendant. The Civilians divided Spiritual Functions into 3. Degrees: 1. A Function which hath a Jurisdiction, as a Bishop, Dean, &c. 2. A Spiritual Administration with Cure, as a Parson of a Church. 3. They who have neither Cure, nor Jurisdiction, as Prebends, Chaplains; and Defined a Dignity to be, *Administratio Ecclesiastica cum Jurisdictione, vel potestate, conjuncta*: and therefore excluded the two last from being Dignities. It was the Opinion of the Justices, That it was not a Dignity within the Statute. And it was said by them, That if a Vicar of St. *Pauls* hath a Benefice with Cure, he ought to be Resident upon it, and that is a greater Dignity, then a Gospeller. Pasch. 41 Eliz. B. R. *Broughton* and *Gomsleys* Case. *Cro.* 3. Part, 665.

5. Information for the King and the Informer before Justices of Assise, upon the Statute of 21 H. 8. for Non-Residency for 11. Moneths, upon his Church of T: The Defendant pleaded the Statute of 21 H. 8. That one who hath two Benefices, shall be Resident upon one: and he was inducted as well to the Vicarage of E. in the County of *Middlesex*, as to the Rectory of T; and that he was all the time in the Information mentioned Resident upon his Vicarage of E: It was Demurred upon it; but there was no Resolution in the Point. In regard the Information was brought before Justices of *Oyer* and *Terminer*, and the Statute doth not give it but only in the Kings Court. And for that cause, Judgment was given for the Defendant. Mich. 4 Car. B. R. *Green* and *Gays* Case. *Cro.* 1. Part, 104.

6. In Trespasse, upon Not guilty, The Jury found the Defendant Vicar of D, and that such a day he Leased his Vicarage to J.S. for 3. years, for rendring Rent; which J.S. assigned an Acre parcel of it to the Plaintiff: and that the Defendant was absent by several Quarters in a year, 60 dayes in each Quarter; but did not find the Statute of 13 Eliz. Yet it was adjudged for the Defendant; for it is a general Law, which doth not extend but to those who have Cure of Souls: by reason of the Multiplicity of Parsonages and Vicarages in *England*, the Judges ought to take Notice of it. Mich. 5 Jac. B. R. *Jennings* and *Haithwaites* Case. *Yelverton*, 106.

Upon the Statutes of 32 *H.* 8. *Cap.* 7. and 2 *E.* 6. *Cap.* 13. of *Tythes*.

1. PRohibition to stay a Suit for Tythes; Surmised, he set forth his Tythes, and afterwards for some reasonable Causes (not shewing what) he detained part of them; and that the Parson had sued him in the Spiritual Court for them. It was said to be a good Cause for a Prohibition, for that by the setting out of the Tythes, they were become Lay-Chattels, and he might have his remedy at the Common-Law by Trespass or Detinue for them. But the Court held the contrary: For against the party himself who setteth forth his Tythes, a Suit is well maintainable in the Spiritual Court, if he detain them, although the Parson might have his remedy at the Common Law. And the Statute of 32 H. 8. proves it: For the words thereof be, If any do not set out, or do detain, or withhold his Tythes, (which shall be intended after they be set out) they shall be sued in the Spiritual Court: Otherwise mischief would ensue to the Parson, in that he would secretly set his Tythes forth, so as the Parson shall not know thereof; and afterwards carry them away. Pasch. 40 Eliz. B. R. *Leigh* and *Wards* Case, *Cro.* 3. Part, 607.

2. Debt upon the Statute of 2 E. 6. for carrying away of his Corn, the Tythes not set out from 20 Jac. to 21 Jac. and so to 21 Car. 1. The Defendant pleaded as to the last 3. years, *Non Debet*; and for the Residue, the Statute of 21 Jac. of *Limitation of Actions*. Upon which it was Demurred. It was the Opinion of the Court, That the Statute did not extend to this Action. Then it was moved, That the Demurrer might be waived, and the Defendant plead, *Non Debet*, to all. But the Court said, That could not be, without the Plaintiff's consent. Trin. 14 Car. B. R. *Taylor* and *Jacksons* Case. *Cro.* 1. Part, 369.

3. Prohibition upon the Statute of 2 E. 6. because he sued for Tythe of Heath and barren ground within 7. years after the Improvement. The Defendant pleaded the Statute of 50 E. 3. Cap. 4. and that at another time a Prohibition was granted, and a Consultation upon it, and therefore he shall not have another Prohibition. 1. It was Resolved in this Case, That the Suggestion ought to be proved by Witnesses, because it is a meer matter of fact, as well as a Prescription *de modo*

Decimandi

Decimandi, or a discharge of Tythes. 2. Resolved, That the Consultation being granted thereof, for not proving the Suggestion by Witnesse according to the Statute of 2 E. 6. and not upon the substance of the Suggestion, or the insufficiency thereof, it is not within the Statute of 50 E. 3: For that is intended where Consultation is granted upon substance of the suggestion being proved to be insufficient in the Verdict; and not where it is grounded for the insufficiency of the form of the Suggestion, or in the proceedings thereupon. Wherefore it was adjudged for the Plaintiff, especially as this Case is; For that it is a Collateral Cause out of the Suggestion, and no Consultation at the time of the Statute made. Hill. 6 Car. B. R. *Stewel* and *Haskins* Case. *Cro.* 1. Part, 351.

4. In a Prohibition for Tythes, It was said by *Popham*, Chief Justice, That if Land be overflown with Water, and afterwards gained by Industry, Tythes shall be presently paid thereof, although it had been overflowed time whereof &c. So if Lands be full of Thorns and Bushes from time whereof &c. Tythes shall be presently paid thereof, notwithstanding the Statute of 2 E. 6. For those Lands of their own nature were not barren, but by negligence or ill husbandry became so: And the Statute doth not intend, That Tythes shall not be paid within 7. years after the Manurance, but of such Lands as were meerly barren, and made good by foldage, or other Industrious means. Trin. 38 Eliz. B. R. *Shrington* and *Fleetwoods* Case. *Cro.* 3. Part, 475.

5. Debt upon the Statute of 2 E. 6. for not setting forth of Tythes: The Parson declared; That he was Parson of L, in the County of C; and that the Defendant being a Parishioner there, and having Corn there growing to the value of 50 l, he had not set them forth, and demanded treble value 150 l: It being found for the Plaintiff, It was moved in stay of Judgment, That the Suit for the treble value ought not to be brought at the Common Law; but in the Spiritual Court. And another Exception was, That the Plaintiff had the Parsonage in the right of his wife, and so ought not to have joyned his Wife in the Action. But the Resolution of the whole Court was, That the Action did well lye upon the Statute. And as to the second Point, That the wife being a Termor, the husband is possessed of them in the right of his wife; And the Action is given to the Proprietor or Termor: Wherefore the Action is well brought in both their names. And it was adjudged for the Plaintiff. And afterwards upon a Writ of Error brought, the Judgment was affirmed. Trin. 40 Eliz. B.R. *Beadle* and *Sherman's* Case. *Cro.* 3. Part, 613.

Upon the Statute *of* 5 *Eliz. cap.* 9. Of Perjury.

S. Was Indicted upon the Statute: For that whereas J. D. was seised in Fee of the Manor of S, in the County of L; and whereas there was a Suit in Chancery betwixt the said J. D. and the Earl of L, and Commission issued to examine Witnesses, and an Interrogatory being administred to him, Whether he knew the parcel of Wast which was in Question betwixt the said Parties; and if it was the Soil and Freehold of the Earl and parcel of his Mannor of S. or not? He falsely and corruptly deposed, That it was the Soil and Freehold of the Earl and parcel of the Mannor of S: Whereas in truth it was not his Soil, nor Freehold, nor parcel of the said Mannor, but parcel of the Mannor of the said J. D. in S: This Indictment was holden by the Justices, To be ill; It doth not appear, What was the Issue in Chancery, or that this Land was there in Question. Nor doth it appear, That it tended to the proof or disproof of the Issue, so as it might be a Damage to the Plaintiff; and although the Interrogatory mentions it to be the Land in Question, it is not shewed how it is in Question: The Indictment was Ruled to be quashed. Hill. 9 Jac. B. R. *Sharps* Case. *Cro.* 1. Part, 157. See Mich. 31 Eliz. B. R. *Lapp's* Case. *Cro.* 3. Part, 184. acc. Mich. 38 Eliz. 418. acc.

2. A. was indicted upon the Statute for Perjury, and the Indictment was, *Tactio per se sacro Evangelio falso deposuit*, but it was not directly alledged, that he was sworn; wherefore the Court held, It was not good, and it was quashed. Trin. 30 Eliz. B. R. *Disdens* Case. *Cro.* 1. Part, 105.

3. A. was Indicted for Perjury, and the Judgment was, That he was examined upon certain Articles in the Starr-Chamber, and *falso & voluntarie deposuit*; and shews not in what matter he swore falsly, nor in what Action; and the Oath was in the Starr-Chamber in *Middlesex*, and the Indictment in *Stafford*, and for these Causes he was discharged. Trin. 31 Eliz. B. R. *Steedmans* Case. *Cro.* 3. Part, 137.

4. A. was Indicted upon the Statute, and recited the Statute, That if any be sworn, &c. in any Court of Record, whereas the Statute doth mention them specially, &c. and that *apud Castrum Lic falso deposuit*, and shews not in what County the Castle was; and it wanted the Conclusion,

It

Et ſic falſo & voluntarie perjurium commiſit, &c. And for theſe Cauſes, the Party was diſcharged, and the Indictment quaſhed. Trin. 31 Eliz. B.R. *Richard* and *Thomas's* Caſe Cro. 3. Part, 137.

5. A. and B. were indicted upon the Statute, and Exception was taken to it; becauſe it was *falſe & corruptive depoſuere*, and yet in the end of the Indictment it was, *Et ſic voluntarium Commiſerunt Periurium*: And for theſe Cauſes the Indictment was holden not to be good, and the Parties were diſcharged. And in this Caſe, It was ſaid by *Gawdy*, Juſtice, That although a Verdict paſſeth againſt that which a Witneſs depoſeth, ſo as no Action lyeth againſt him, yet he may be Indicted for it. Mich. 31 Eliz. B.R. *Lambo* and *Rumpers* Caſe. Cro. 3. Part, 147.

6. Bill of Debt upon the Statute, after Verdict: It was moved, That by the Statute of 18 Eliz. No Suit ſhall be upon a Penal Law, but by Information or Original Action. But it was Reſolved, That the Action was maintainable; for that in that Statute, there is a Proviſo: Where the Action is given to the Party grieved, and where not to him, who will ſue generally, that he may ſue as before: It was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Johnſon* and *Pays* Caſe. Cro. 3. Part, 434.

7. Action for Words, viz. *Thou art a perjured Knave: For thou ſworeſt this day at the Leet, That I baked Bread in my Houſe*; Where I did not. It was holden, That the words were Actionable: For although Perjury cannot be in a Leet, whereof the Law takes No Notice; yet though it be not a Perjury puniſhable by the Statute, yet it is a Diſcredit, for which an Action lyeth. Mich. 41 Eliz. B.R. *Spencer* and *Shayes* Caſe. Cro. 3. Part, 709.

8. A. was Indicted upon the Statute, becauſe he was produced a Witneſs for the King upon a Tryal in an Information, and ſworn, ſhewing the Oath and Falſity. It was Excepted unto, that ſuch a Witneſs produced and depoſed for the King, may not be puniſhed by way of Indictment, which is meerly the Suit of the King; and ſuch was the Opinion of the whole Court. Trin. 4 Jac. B. R. Cro. 3. Part, *Prices* Caſe.

9. Error to Reverſe an Indictment upon the Statute, and Out-lawry thereupon, becauſe the Indictment miſ-recites the Statute in hac; That the Statute is, *Quod quilibet attiullus de tali offenſâ* ſhall loſe, and forfeit 20 l. the Recital is, *Quod quilibet attiullus, &c. admitteret, et ſuis-ſaveret* 20 l; So as it was *Admitteret* for *Amitteret*. It was holden by the Court, That this miſrecital of the Statute was ill; and for that Caſe, the Judgment and the Out-lawry were Reverſed. Mich. 4 Jac. B. R. *Parkers* Caſe. Cro. 3. Part, 133.

10. Error to Reverſe an Outlawry, upon an Indictment upon this Statute: For that he was Indicted by the Name of N. L. *de parochia de Algate*; and doth not ſhew in what County *Algate* is, although it was Objected, That *Middleſex* was in the Margent, ſo as the Parith ſhould intend to refere to that: Yet becauſe Indictments ſhall not be taken by Intendments, and becauſe the County in the Margent ſhall be referred to the place where the Offence was Committed, and not to the Indictment of the Party. It was holden by the Court, To be ill; and therefore it was Reverſed. Trin. 5 Jac. B. R. *Leach's* Caſe. Cro. 2. Part, 167.

Upon the Statute of 13 Eliz.
Of Uſury.

1. IN Debt, the Caſe was: A. ſold to the Defendant two Oxen 22. *Jan.* 22 Eliz. for 26 l. 6 s. 8 d. to be paid at the Feaſt of All-Saints next; at the day, the Defendant required of him a longer day of payment; the Plaintiff gave him day till the firſt of *May* next, paying to him for the payment of his money, three Quarters of Wheat, which was above the value of 10 l. *per annum* for 100 l. and in Debt, the Defendant would plead this, and avoided the Contract. It was the Opinion of the Juſtices, That in this Caſe the Statute doth not make the Contract void which was duly made, but doth only avoid all Contracts of Uſury; and this contract is void, being againſt the Statute, but not the firſt Contract, being made *bona fide*. Paſc. 25 Eliz. C. B. *Pollard* and *Scoly's* Caſe. Cro. 3. Part, 20.

2. Note, It was holden by the Court, In an Information upon this Statute, That if one Contracts to have 20 l. for the loan of 100 l. if he take nothing of the 20 l. it is not puniſhable by this Statute; but if he taketh any thing, if but one ſhilling, this is an aſſurance of the Contract, and he ſhall render for the whole Contract. Hill. 20 Eliz. B. R. *Mallory* and *Birds* Caſe. *Ibid.*

3. Information upon this Statute, the Caſe upon Evidence was; F. the Defendant gave to the Plaintiff 566 l. for an Annuity of 120 l. *per annum* during 23 years. It was the Opinion of the Juſtices, That this was clearly no Uſury where here was no communication before between them

to have any consideration for the loan of the 566 l. for this Annuity was purchased *bona fide* without any corrupt intent or Bargain. In this Case further after the grant of the said Annuity, The Plaintiff for the Assurance of the said Annuity, enfeoffed F. the Defendant of Lands of 120 l. *per annum* to the use of the Plaintiff and his Heirs upon Condition, That if the money was not paid, it should be to the use of F. in Fee, this also by the Court was holden to be no Usury; for the Mortgage was only for the Assurance of the Annuity. Pasc. 26 Eliz. C. B. *Tanfield* and *Finches* Case. *Cro.* 3. Part, 27.

4. Note, It was holden in the Exchequer in an Information upon this Statute, That if two men speak together, and one of them desireth the other to lend him 100 l. and for the loan of it he will give him above 10 l. *per annum*; and for the evasion of the Statute, they invent this practice, That he shall grant to the other 30 l. *per annum* out of his Land for 10 years; or he shall make a Lease for 100 years to him, and the Lessee shall regrant it to him upon Condition he shall pay 30 l. yearly, and every year during the ten years; In this Case, The first Contract being corrupt in fraud of the Statute, this is Usury although he never hath his own 100 l. again. But if *bona fide* one buyeth an Annuity of 40 l. for 10 years for 100 l. this is no Usury, if the first communication was not corrupt. Trin. 19 Eliz. in the Exchequer, *Dr. Goods* Case. *Cro.* 3. Part, 27.

5. Information upon the Statute of Usury, *Qui sequitur tam pro Domina Regina quam pro seipso.* The Queen Attorney entred upon it *Non vult ulterius prosequi*, and the same was pleaded in bar against the Informer. It was adjudged in this Case by the whole Court, That the entry of the *Nolle Prosequi* by the Queens Attorney was no bar to the Informer, forasmuch as the Law gives the moyety to the party, the Queen cannot discharge it: and so it was holden on the other side, That the Nonsuit of the party cannot bar the Queen. Trin. 31 Eliz. B. R. *Stretton* and *Tylers* Case. *Cro.* 3. Part, 138. See *Leon.* 1. Part, 119. the same Case.

Upon the Statute of 31 Eliz. cap. 6. *Of Symony.*

1. DEbt upon an Obligation for performance of Covenants: The Covenants were, That T. B. son of W. B. should marry the Daughter of the Defendant, and in consideration of this Marriage, the Defendant Covenanted to pay 300 l. And W. B. Covenanted to assure such Lands to T. and A. for her Joynture. The Defendant further Covenanted, That he would procure T. B. to be Presented, Admitted, Instituted, and Inducted into such a Church upon the next Avoydance of the said Church. The breach assigned was, for not performance of the said Covenants concerning the Presencing, &c. and upon this breach, the Defendant demurred in Law, because this Covenant is against Law, being a Simoniacal agreement; and a Bond for performance thereof is not good. It was the Opinion of all the Court, That if it had appeared to have bin, That in consideration of the Marriage of his Son, &c. he would procure him to be Presented, Admitted, and Inducted to such a Church, That had bin a Simoniacal Contract, and had avoided the Obligation. But here this Covenant is not in consideration of the said former Covenants, nor depending upon them, but it is a meer distinct Covenant by it self, and independant upon the former, and without special Averment or shewing that it was a Simoniacal Contract, it shall not be so intended. It was adjudged for the Plaintiff. Mich. 14 Car. B. R. *Eyre* and *Mannings* Case. *Cro.* 1. Part, 307.

2. *Ejectione firmæ*, the point was, The Patron took an Obligation of the Clark (which he Presented), That he should pay 10 l. to the Son of the last Incumbent so long as he should be Student in *Cambridge* unpreferred. It was holden by the Court, That it was not Symony; otherwise it had bin to have paid it to the Son of the Patron. *Foster* Justice vouched the Earl of *Suffex*'s Case. An Obligation made by the Presentee to pay 5 l. yearly to the Widow and Children of the late Incumbent; and notwithstanding there was great opposition in it; yet the Patron still keeps the living. Pasc. 2 Car. C. B. *Baker* and *Stamford* Case. *Noy* 142.

3. Prohibition upon a Suit for Tythes grounded upon the Statute of 31 Eliz. suggesting that the Parson had committed Symony in comming to the Parsonage; and thereby the Church was void,

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and the Tythes did not belong to him. But it was agreed by the Court, That the Prohibition did not lye; for that the Simony might be more fully tryed in the Spiritual Court. Mich. 40 Eliz. C. B. *Risby* and *Ireſmonths* Caſe. Cro. 3. Part, 641.

Superſedeas.

1. THE Caſe was; after the parties were at Iſſue in Treſpaſs, and an *Habeas Corpus* awarded againſt the Jury; the Common Pleas, in which Court the Action did depend, awarded a *Superſedeas, quia improvidè, &c.* and that was delivered to the Sheriff, who notwithſtanding returned the Jury before the Juſtices of Aſſiſe, who proceeded and found for the Plaintiff. The Defendant aſſigned the ſame for Error. The Defendant pleaded *in nullo eſt Erratum*. It was adjudged by the Court to be Error, for the Error aſſigned, is a matter *in facto* depending upon matter of Record, and then the Defendant by pleading *in Nullo eſt Erratum* hath confeſſed, That ſuch a *Superſedeas* was awarded and delivered to the Sheriff before the Tryal; Upon which it followeth, That after the *Superſedeas* delivered, the hands of the Sheriff were bound up, ſo as he could not proceed to diſcretion the Jury, nor Return the Writ before the Juſtices of Aſſiſe. Mich. 2 Jac. B. R. *King* and *Andrews* Caſe. *Yelverton* 57.

2. Mrs. R. was Arreſted by a *Capias ad ſatisfaciendum* by a Bailiff of *Middleſex* within the Bars in *Holborn*, which is within the Liberty of *London*. A *Superſedeas* was prayed, becauſe the Arreſt was falſe. The Court was of Opinion, That in this Caſe a *Superſedeas* cannot be granted; for a *Superſedeas*, it cannot be alledged, *Executio Erronicè emanavit*, but there the Execution is well granted, and if it be returned generally, it ſhall be intended well ſerved, although Affidavit be made to the contrary. But in the principal Caſe, the Court agreed the party ſhould have *Corpus cum Cauſa*. Trin. 3 Car. C. B. Mrs. *Revets* Caſe. *Hetley* 30.

3. The Defendant being a Burgeſs of Parliament, brought a Letter from the Speaker of the Parliament to the Court of Kings Bench to ſtay their proceedings. The Court was very much diſpleaſed at it, but would not allow of it. But ſaid, The Defendant ought to have brought to the Court a Writ of Priviledg, and to have helped himſelf that way. And a general *Superſedeas* for all Suits is not allowable; but the party is to have a particular *Superſedeas* for every Action; and the Parliament hath that Priviledg for their Perſons, but not for the ſtaying of their proceedings by any Letter. And the Chief Juſtice ſaid, That they would ſtand upon the Juſtice of the Court, and as they of the Parliament had their Priviledges, and ſtood upon it, ſo would they. But the Court agreed, That in ſome Caſes they might reſtrein the Counſel of the party, but not the Court it ſelf, which is not to take notice of any thing without a Special Writ. Paſc. 1 Car. B. R. *Moor* and *Hady* 1 Caſe. *Latch* 150.

4. In a Replevin, the Plaintiff was Nonſuit, and the Defendant had a Writ of Return of the Cattel, and a Writ of Enquiry of Damages; and thereupon the Plaintiff brought a ſecond Deliverance. It was holden by the whole Court, That it was a *Superſedeas* to the *Return habendo*, but not to the Writ of Enquiry of Damages. Hill. 22 Jac. B. R. *Latch* 72.

5. *Eyllioue's* Caſe. In the Common Pleas, the Plaintiff had Judgment; the Defendant brought Error in the Kings Bench, where the Judgment was affirmed: And afterwards he brought a Writ of Error in Parliament, and the Record was brought thither by the Lord Chief Juſtice; and afterwards the Parliament was diſſolved by the death of King *James*; and the Plaintiff prayed Execution in the Kings Bench, and the other ſide prayed, That Execution might be ſtayed till the next Parliament. The Court ſaid, That although we do award Execution; yet the party may have a Writ of Error the next Parliament; and here is no Writ of Error now depending; and we do not know whether he will have a new Writ of Error or not; therefore they Award, that *ſtat Executio curia*. And *Doddridge* Juſtice ſaid, and cited the Book of 8 H. 6. Tit. *Error*. Where Error was brought in Parliament; and the Plaintiff there prayed a *Scire facias* returnable the next Parliament, and that was denyed, becauſe it was in delay: Trin. 3 Car. B. R. *Crouch* and *Hilary's* Caſe. *Latch* 57.

Surrender.

1. NOte by all the Justices of the Common-Pleas, That if Tenant for life leaseth the Land to him in the Reversion, to have and to hold to him during the life of the Lessor, rendring rent; That this Lease is not good without Livery and Seisin; and it is not a Surrender in Law, nor was the Land in him in the Reversion by it. Pasc. 8 Eliz. *Brown* and *Kingsmill's* Case. *Rendlowes Reports* 24.

2. J. S. seised in Fee of Copyhold Land, devised it to his Wife for life, and that she should sell the Reversion for the payment of his Debts; and afterwards in Court did surrender to the use of his Wife according to his Will and Deed. The Question was, If the Wife could sell the Reversion. It was adjudged, That she might, for he having made his Will, and Devising it as before, and surrendring of it, and referring to his Will, it is to be intended according to the intent there limited and appointed: and afterwards she surrendring it upon Condition to pay 20 l. It was holden a good Sale according to the Will, Mich. 30 Eliz. B. R. *Bright* and *Hubbards* Case. *Cro.* 3. Part, 68.

3. The Case was: The Dean and Chapter of E. were seised of a Manor. The Custom in which was, That the Copy-holders may Surrender out of Court to the use of a Stranger in Fee: They make J. S. their Steward *ad excommunicandum, per servet sufficiet. Deputatum suum*; J. S. makes A. his Deputy, *pro hac vice*, to take a Surrender of Husband Wife, to the use of the Husband and Wife for their lives, the Remainder over in Fee; and the words were further in the Deputation, *ad faciendum & exequendum quatuus in me est*; A. takes a Surrender from the Husband and Wife, upon Condition, That the Lord shall Grant it to them for their lives, the Remainder over in Fee, the Surrender is made according. The Husband and Wife dyed, he in the Remainder Entred, and the Wife put him out: It was agreed by the Justices in this Case, 1. That this Deputation *pro hac vice*, was good. 2. That although the Authority to take the Surrender was absolute, and A. took the Surrender upon a Condition; yet it was good, by reason of the words, *Et ulterius faciendum, &c.* Trin. 28 Eliz. B. R. *Pandetts* Case. *Cro.* 3 Part, 48.

4. The Case was: B. Lessee of Lands for 40 years, lets them to G. for 30 years, and he lets them to P. the Plaintiff for 19 years, rendring 20 l. rent. It was agreed between B. and G. That P. should have and hold those Lands and other Lands for 3 years, rendring a greater Rent; to which Articles P. doth agree, and afterwards lets those Lands to the Defendant for 17 years, rendring Rent: The 3 years expired, afterwards G. granted his Term to J. S. who Entred, and, for Rent behind, after his Entry, brought the Action. The Questions in the Case were two, 1. If this was a Surrender by this Agreement? 2. If a Surrender may be as this Case is, by one Termor to another, out of which his Term is derived? It was the Opinion of all the Justices, 1. That this cannot be a Surrender; for the words and acts between Strangers can make no Surrender. 2. This cannot be a Surrender; for when Lessee for 20 years, makes a Lease for 10 years, the second Lessee cannot Surrender to the first Lessee for 10 years, cannot be drowned in 20 years: It was adjudged for the Plaintiff. Hill. 32 Eliz. C. B. *Fay* and *Allens* Case. *Cro.* 3. Part, 173.

5. The Father was Tenant for life, the Remainder to A. and B. his Sons for their lives; B. purchased the Reversion in Fee, the Father and A. Surrendred unto him without Deed. The Question was, If it was a good Surrender? It was said, That the Surrender was void; for if it be good, it must first be the Surrender of him in the Remainder, which cannot be without a Deed; and it cannot be the Surrender of the first Tenant for life, because there is no word of Surrender between them. Hill. 34 Eliz. B. R. *Perkins* and *Perkins* Case. *Cro.* 3. Part, 269.

6. A woman Lessee for life, the Reversion to two Co-parceners; the woman and one of the Coparceners make a Lease for years of the whole, rendring 10 l. Rent *per annum* to the woman during her life, and after 10 l. to the said Co-parcener, and afterwards the woman and the two Co-parceners levy a Fine; *Sur Conuzans de droit, &c.* to two Strangers, which was to the use of the Husband of the Co-parceners that joyned in the Fine. The Question in this Case (amongst others) was, If this joyning in the Fine by the Tenant for life with him in the Reversion of the Estate for life be Surrender, and the Rent extinct, because the Reversion to which the Rent is incident, is gone. The Court enclined to be of Opinion, That it was not; for that every one granted what in him lay; and in this Case, It was said, That if they had not levyed a Fine, and the Tenant for life dyed, the Lease had been good for the moyety of the Co-parcener, who had lett only, and yet the Rent remained. Trin. 34 Eliz. C. B. *Turner* and *Johnsons* Case. *Cro.* 3. Part, 284.

7. In

7. In Aſſumpſit, the Caſe was: The Plaintiff was poſſeſſed of a Leaſe of Lands for years, the Reverſion for years to another: He in the Reverſion, promiſed the Leſſee for years, That if he would Surrender to him to give him 30 l. and he Surrendred to him accordingly. In this Caſe, It was ſaid, That both Parties being Termors, That a Termor could not Surrender to a Termor; for one Eſtate could not drown in the other. But it was the Opinion of the Juſtices, That the Surrender was good, and the Eſtate ſhall drown in it; and if a man be Leſſee for 20 years, and the Reverſion is granted for one year to another, which grants it to the Leſſee for 20 years; this is a Surrender of the firſt Leaſe for 20 years, and is as if he had taken a new Leaſe for years of his Leſſor: And in the Principal Caſe, It was ſaid, That here are ſeveral Terms out of the Reverſion; and one cannot ſtand with the other; but coming together, one ſhall drown the other, and the number of the years is no material. For as he may Surrender to him who hath the Reverſion in Fee, ſo may he to him who hath the Reverſion for a leſs Term. But it was ſaid, That when Leſſee for 20 years maketh a Leaſe for 10 years, who Surrenders, this cannot drown in the other, becauſe it was not to Commence till the Term expired: It was adjudged for the Plaintiff. Trin. 35 Eliz. B. R. *Hughes* and *Katherns* Caſe. *Cro.* 3. Part, 302.

8. Replevin. The Caſe was: The Earl of D. was ſeiſed of the Manor of C. which extended into C. and B. (in B. there were Copyholders for life) and levyed a Fine, and ſuffered a Recovery of the Manor (excepting the Land in B.) which was conveyed to the Counteſs of D: Afterwards the Earl and Counteſs kept a Court at B. and the Steward granted Copyhold, being a Copyhold for life to the Plaintiff. If it was a good Grant, was the Queſtion: In this Caſe, It was Reſolved, 1. That the Grant was void, in regard there was not any ſuch Manour of B. before or now. It was ſaid by the Lord *Anderſon*, Chief Juſtice, If this Covenant had been of Copyholders of Inheritance, that the Copyholders and their Heirs ſhould have had it, but it can never be Surrendred: for Surrenders are by Cuſtom, and therefore ought to be in the Court of the Manour; and a Surrender to the Lord himſelf at his Houſe, or out of Court, is not good. Wherefore for it was adjudged for the Avowant. And whereas *Cook* 4. Part, 24. *Molins* & and *Ladies* Caſe was Cited, That the Grant was good: It was ſaid, That it was a ſtrange Judgment, and never Entred; and Error was brought upon it in the Exchequer Chamber, where the Opinion of all the Juſtices was, That the Judgment was Erroneous. Mich. 38 Eliz. B. R. *Bright* and *Forths* Caſe. *Cro.* 3. Part, 443.

9. In an Evidence to a Jury, the Caſe was; Leſſee for years accepted of a ſecond Leaſe to begin at *Michaelmas* next. The Queſtion was, If it be an immediate ſurrender of the firſt Leaſe. It was the Opinion of the whole Court, That it was, and that the Leſſor might enter in the interim, and take the profits; and ſo it was ſaid it had bin lately adjudged in C. B. Paſc. 40 Eliz. B. R. *Hardin* and *Martins* Caſe. *Cro.* 3. Part, 605.

10. The Caſe was, Husband and Wife, Copyholders to them and the Heirs of the Husband; the Husband dyed, the Heir in the life of the Wife before Admittance ſurrendred into the hands of two Tenants, who might take ſurrenders by the Cuſtome. It was the Opinion of the Juſtices in this Caſe, That the Surrender was good: And in this Caſe, it was ſaid, That if a ſurrender be to the uſe of one for life, the Remainder in Fee, and the Tenant for life is admitted, it is an Admittance for him in the Remainder. Paſc. 41 Eliz. B. R. *Colphin* and *Colshins* Caſe. *Cro.* 3. Part, 662.

11. In Debt for non performance of Covenants; The Caſe was, Tenant for life levyed a Fine to him in the Reverſion in Fee, the uſes of the Fine were limited to the Conuſee and his Heirs upon Condition, That he ſhould pay to the Tenant for life yearly during his life 4 l. *per annum*, and if there was any default of payment thereof, That it ſhould be to the uſe of the Conuſor for life, and for one year over; the Conuſee made a Feoffment to J. S. who made a Leaſe to the Plaintiff; the 4 l. was not paid nor demanded, the Tenant for life entred. The firſt Queſtion was, If this Fine was a Surrender; and whether a Surrender might be to an uſe. It was holden by the Court, That it was no ſurrender, for that every Fine implyes a Feeſimple: But if it was a Surrender, then it might be to an uſe, for it is a Conveyance ved, and Charged with this limitation of an Uſe. Another Queſtion was, Whether this Feoffment hath deſtroyed the future uſe which is to riſe for non-performance of the Condition; for if ſo, then entry of the Tenant for life is not lawfull. It was Reſolved, That it had not, for it was a charge or burthen upon the Land, which goeth along with the Land, in whoſe hands ſoever it commeth. Hill. 41 Eliz. B. R. *Smith* and *Warrens* Caſe. *Cro.* 3. Part, 688.

12. Leſſee for years of a Manour made by the Biſhop of E. and Confirmed. The Biſhop was Deposed, and the Succeſſor by Deed Indented, reciting the Leaſe granted to the Leſſee, the Office

fice of Bayliff of the ſaid Mannor for one and twenty years, with the Fees. It was much debated, If that were not a ſurrender of his Term. It was adjudged by the whole Court, That it was no Surrender, becauſe the Office of a Bayliff hath not any Intereſt in the Land. And 2. For that he hath not any part of the thing Demiſed. Mich. 3 Jac. B. R. *Gage* and *Peacocks* Caſe, *Noy* 12. See *Croke*, 2. Part, 177. The ſame Caſe.

13. The Caſe was, A. ſeiſed of Lands in Fee, by Deed granted a Rent to C. his Son, to begin after the death of the Grantor. B. Son and Heir of A. entred into the Land, and Demiſed part of the Land to C. for 500 years, who entred, and before any part of the Rent was behind, C. ſurrendred the Leaſe to B. to which Surrender B. agreed. It was Reſolved in this (amongſt other things), That the Rent, although once ſuſpended, was now revived. And in this Caſe, It was agreed, That where Leſſee for years Surrenders, to which the Leſſor agrees and accepts of it, That the poſſeſſion and Intereſt is in him without a Special Entry. Hill. 3 Car. C. B. Sir *Henry Pitton* and *Pemberton's* Caſe. *Hetley* 51. *Hutton* 94. the ſame Caſe.

14. In *Ejectione firme* upon Evidence to a Jury, It was moved as a Queſtion, That there being a Copyhold Meſſuage called S. whereunto were divers Copyhold Lands appertaining. The ſaid Meſſuage called S. being ſurrendred to the Lord, and all his right therein; Whether by that Surrender the Copyhold Land did paſs, or only the ſaid Meſſuage with the Curtilage thereunto belonging. It was Objected, That in Caſe of a Copyhold the entire Land ſhould paſs. But the Opinion of the Court was, That it was all one aſwell in Caſe of a Copyhold, as of a Freehold; and that nothing ſhould paſs but the Meſſuage, with the Orchards and Yards; and they ſhall paſs by theſe words *cum pertinentiis*. A ſecond Queſtion was moved, If Husband and Wife, Copyholder in the right of his Wife, Surrenders out of Court into the hands of the Steward, and the Wife is examined by him; It not being proved, That he was Steward by Patent, nor any Special Cuſtome to Warrant it, Whether ſuch a Surrender was good or not. It was Reſolved by the whole Court, That it was; and ſo it was ſaid it had bin often adjudged. Paſc. 17 Jac. B. R. *Simpſon* and *Cages* Caſe. *Cro.* 2. Part, 526.

15. A man ſeiſed of Copyhold Lands, deviſed a certain parcel of them to his Wife for life, the Remainder to his Brother and his Heirs; and afterwards in the preſence of three perſons of the Court, ſaid to them, *I have made my Will, and have appointed all things in my Will as I will have it.* And afterwards he ſaid, *And here I Surrender All my Copyhold-Lands into their Hands accordingly.* It was the Opinion of the whole Court in this Caſe, That the Surrender was reſtrained by the Will; ſo as no more paſſed to the Wife, but that which was mentioned in the Will, and the general words ſhall not enlarge it, Mich. 14 Eliz. B. R. *Leon.* 3. Part, 18.

Taile.

1. NOte: It was the Opinion of all the Juſtices of the Common Pleas, That if a man by his Will in Writing, Deviſeth his Lands holden in Socage, to B, and the Heirs of his body begotten: And further by the ſame Will he Willeth, That if the ſaid B. dyeth, that the ſame Lands ſhall remain to another in Fee; That yet the Deviſee hath an Eſtate in tail by the firſt words of the ſaid Deviſe, and not an Eſtate for life, by the latter words of the Will. Hill. 14 Eliz. C.B. *Bullaves*, 25.

2. The Father ſeiſed in Fee of Lands in Socage, by his laſt Will in writing, Deviſed the ſame to his Son W. for life; and after his deceaſe, to the Men-children of his body: and if W. dyed without any Man-child of his body begotten, then the ſame to remain to a ſtranger in Fee. The Deviſee dyed, and the Deviſee had not any Men-Children of his body *in rerum naturâ*. It was moved to the Juſtices, If W. had a ſpecial Eſtate tail in him, and the heirs males of his body, in the ſaid Land, or not? And it was the Opinion of all the Juſtices, That he had an Eſtate to him and his heirs of his body. Caſe, *Incerti Temporis*. *Bullaves*, 30.

3. A Fine was levied by C. and D. his Wife, unto A, of a Mannor in Fee; and he rendred the ſame Mannor by the ſaid Fine to the ſaid C. and D. *Habend. et Tenend. eidem C. et D, et alterius eorum vitæ ipſis; impetitionæ Vaſti: Et poſt deceſſum ipſarum C. et D. prædict. Mannium, &c. integrè remanere* [illegible] *de Corporibus eorundem C. et D. legitimè procreatis.* It was holden in this Caſe, It was an Eſpecial Eſtate Tail, executed in the Husband and Wife, and not an Eſtate for life, and the Remainder to their heirs males of their bodies, as the words did import. Sir *John Maclaus* Caſe. *Incerti Temporis*, *Bullaves*, 31.

4. J. S. was ſeiſed of Lands in Fee, and ſuffered a Common Recovery, 33 H. 8. to the uſe of himſelf and his Heirs for ever, and to perform his Laſt Will, and were ſeiſed to the ſaid uſe. Afterwards J. S. made his Will in writing; and thereby Deviſed the Lands to A. his Wife, ſo long as ſhe ſhould live ſole, the Remainder to G. S. ſon of the ſaid J. S. in tail: the remainder to T. S. in tail: G. S. dyed without Iſſue before the Statute of 27 H. 8. was made, by force of which, the ſaid J. S. was ſeiſed in Fee; and afterwards in 37 H. 8. he recited the ſaid Will, and confirmed it, and that that was in it, and then dyed; then the Wife entred, and dyed. If it was a good Will, was the Queſtion? It was the Opinion of all the Juſtices of the Common-Pleas, That it was a good Will. Mich. 5 Eliz. in C.B. *Trevillians* Caſe. *Bullaves*, 38.

5. The Caſe was; A. ſeiſed of Lands in Fee, and by his Will Deviſed parcell of the ſaid Lands to his eldeſt ſon in tail; and the reſidue of his Lands to his younger ſon in Fee. Provided, *That neither of my ſaid ſons ſhall ſell or make leaſe of the Lands hereby given unto them by this my Will, or do any act with any of the ſaid Lands, to the hinderance of their Children or mine, by any deviſe or means, before they come to the age of 30 years: And if any of my ſons do ſo, then my other ſon ſhall have the portion of the Lands ſo Deviſed to his Brother.* The eldeſt Son before his age of 30 years, Leaſed the Lands to him deviſed for years, againſt the intent of the Proviſo: The younger ſon entred, and he Leaſed the ſame Lands before his age of 30 years; Upon which the eldeſt ſon did Re-enter. It was the Opinion of the Court in this Caſe, That here is a Limitation, and not a Condition; And here the Entry of the eldeſt Son was holden lawful; For that this Proviſo did not extend but to the immediate Eſtate deviſed expreſſly to them, and not to any new Eſtate which did ariſe upon the Limitation: and when the younger ſon entred upon the eldeſt by the ſaid Limitation, he held that Eſtate diſcharged of the Proviſo, or any Limitation contained in it. Trin. 29 Eliz. C.B. *Spittle* and *Davies* Caſe, *Rep.* 2. Part, 38.

6. The Caſe was: J. S. Deviſed Lands to S, and the Heirs of his body; and after his deceaſe, to B. the eldeſt Son of S, and to the Heirs of his body; the Remainder over to 3. other Sons of S. in the ſame manner. The Queſtion was, What Eſtate S. had in the Lands? It was Argued, That he had but an Eſtate for life, the Remainder

mainder to his Sons as Purchaſors. But it was Adjudged, That he had an Eſtate in tail; for by the firſt words, an expreſs Eſtate in tail was given to him, and there are no ſpecial words to alter them. And in this Caſe it was adjudged, That his Wife in regard thereof, ſhould have Dower, Mich. 34 Eliz. B. R. *Atkins* and *Atkins* Caſe, *Cro.* 3. Part, 248.

7. In an Information upon the Statute of 32 H.8. the Caſe was: J.B. was ſeiſed of Lands, and gave them to T. B, and the Heirs of his body, the Remainder to R.B, and the Heirs males of his body; the Remainder to the right Heirs of J. B: T. B. dyed, having Iſſue a Daughter; and R. B. made a Leaſe for years of the Lands. In this caſe it was holden to be no Maintenance within the Statute: For he in the Remainder might make a Leaſe for years of the Lands. In this Caſe, It was given in Evidence, That the Land was given to T. B, and the Heirs males of his body: and then when the daughter which is not in truth Inheritable entreth, If by that Entry ſhe being privy in blood to R. her Uncle, ſhall be in by Diſſeiſin, or abatement. *Anderſon* ſaid, That when the Daughter enters, and takes a husband, who Leaſeth for years, and the Leſſee entreth, the ſame is a Diſſeiſin. *Periam* doubted it; for that when the younger Son entred, the Freehold was in him. Trin. 33 Eliz. C. B. *Tayler* and *Brownſalls* Caſe. *Leon.* 2. Part, 48.

8. The Father Tenant for life, the Remainder to the Son in tail, the Remainder to the right Heirs of the Father: The Father and Son were both Attainted of Felony, and executed both at one time, the Son not having any Iſſue of his body; and, If the Father ſhould be now ſeiſed of an Eſtate in Fee, ſo as his Wife ſhould be endowed, was the Queſtion? And becauſe it was proved by Witneſſes, That the Father moved his Feet after the Death of the Son; In Dower brought by his Wife, It was found by the Jury, That he was ſo ſeiſed; *Que Dower.* And upon that, the Wife had Judgment to recover. Error was after brought, and Error aſſigned in the proceſs *Quod vide.* Trin. 38 Eliz. B. R. *Broughton* and *Randalls* Caſe. *Cro.* 3. Part, 502. See *Noy* 64. the ſame Caſe.

9. In a Replevin, the Caſe was; A. ſeiſed in Fee of Borough Engliſh Land, Deviſed it to B. his Son in tail, and dyed: B. dyed ſeiſed, having Iſſue two Sons. In this Caſe it was Reſolved by the whole Court, That the youngeſt Son ſhould Inherite to the tail aſwell as the eldeſt Son to the Feeſimple. So it was ſaid all the Iſſues ſhall inherite an Eſtate in tail of Gavelkind Lands. Trin. 44 Eliz. C. B. *Weeks* and *Carvills* Caſe. *Noy* 106.

10. The Caſe was, A Feoffment was made of three Acres of Lands to A. and B. to the uſe of R. P. and M. his Wife for their lives, and after, to the uſe of the firſt, ſecond, and third Son of the body of M. and after to the Heirs of the body of M. by R. to be begotten. They had not any Son, but a Daughter. R. levyed a Fine of the Land; M. dyed. The Daughter the Plaintiff entred: the Defendant pleaded the Fine of R. It was in this Caſe adjudged, That the Daughter was not barred by the Fine of R. for that R. had but for life, and the Eſtate tail was in the Wife only; and it was ſaid, That the Husband was not named, but only to declare what Heir of the body of the Wife ſhould Inherite, not every Heir, but ſuch Heir only as R. her preſent Husband ſhould beget. And it was ſaid, That if the limitation had bin to the Heirs of the body of the Wife by the Husband and by J. S. begotten, the Inheritance ſhould be only in the Wife: And in the Principal Caſe, all the Court agreed, That the Inheritance ſhould be only in the Wife, becauſe the word (Heir) which makes the limitation of the Eſtate, is annexed only to the body of the Wife. Trin. 6 Jac. B.R. *Repps* and *Bonhams* Caſe. *Yelverton* 131.

11. Tenant in tail Covenanted to ſtand ſeiſed in conſideration of a Marriage to be by his Son with the Daughter of J. S. to the uſe of himſelf and his Heirs untill the Marriage had, and after to the uſe of himſelf for life, and after to the uſe of his Son and his Wife the Daughter of J. S. and the Heirs of their bodies, and ſuffered a Recovery to that purpoſe, and dyed without Iſſue. It was adjudged, That the entry of him in the Remainder depending upon the Eſtate tail was lawful: for firſt in this Caſe, there was not any conſideration to raiſe the uſe; for the conſideration is only the Marriage of his Son with a ſtranger, the which as to change the poſſeſſion is not any benefit to the Father, but he is in a manner a ſtranger to that perſonal and peculiar conſideration. But if the conſideration had bin for the eſtabliſhing of the Land in his name and bloud, it had bin good, for that, that only touched the Father. 2. It was agreed in this Caſe, That notwithſtanding ſuch a Covenant by Tenant in Tail, although as to himſelf it is an alienation of the Eſtate; yet as to ſtrangers he remains Tenant in tail, for if he taketh a Wife, after ſuch a Covenant to ſtand ſeiſed to the uſe of himſelf for life, his Wife ſhall be endowed. Mich. 2 Jac. B.R. *Freſhwater* and *Rair's* Caſe. *Yelverton* 51.

12. S. being Tenant in Tail, Covenanted to ſtand ſeiſed in conſideration of the Marriage of his eldeſt Son to the uſe of himſelf for life, and after to the uſe of his eldeſt Son for his life, and afterwards to the uſe of the firſt Son of his eldeſt Son which

any should be, in Tail; and afterwards her eldest Son had Issue *G. S.* his eldest son: The Grandfather upon great cause would sell part of the Land, and assure more in recompence to the Son; and the Purchasers would not take any assurance, unless the Infant (who was but four years old) would suffer a Recovery: And yet it was conceived by the Justices, that the Covenant did not alter any Estate: Yet to satisfie the Purchasers, he prayed that a Guardian might be allowed the Infant, that a Recovery might be suffered against him as Vouchee, which the Court agreed unto; and the Infant being brought into Court, a Recovery was had of that Land, wherein the Infant was vouched; and he appeared, and vouched the Common Voucher. *Hill.* 38. *Eliz. C. B. Stapletons* Case. *Cro.* 3. part. 471, 472.

13. It was agreed by the two chief Justices, That if Tenant in Tail Covenant to stand seised to his own use for life, the Remainder to his Son: And after he levies a Fine to *A.* to other uses, That these last uses are good against the Son; For when he had limited the use for his life, that was all that he might lawfully do, and it was no alteration of the estate to the Covenantee; For in such Case his Wife shall be endowed. *Pasc.* 44. *Eliz.* B. R. Sir *Clement Higham* and *Bedingfields* Case. *Noy* 46. And so it was said it was agreed in 38. *Eliz.* in *Stapletons* Case.

14. The Case was. *A.* made a Feoffment in fee to the use of his younger Son in Tail, and after to the use of the heirs of his body *in posterum procreand*, and at the time of the Feoffment he had Issue two Sons, and after the feoffment he had Issue a third Son; the younger Son dyed without Issue: It was said by *Wray*, Chief Justice, that after the death without Issue of the second Son, the Land should go to the third Son born after the Feoffment; for this word *in posterum* is a forcible word to create a special Inheritance; and without that it had been a general Tail. *Mich.* 26. *Eliz. B. R. Leon.* 3. part 87.

15. Trespass, the Case was, *W. G.* seised of Lands in fee according to the Custome of the Manor of *S.* surrendred them to the use of his Will; by which he devised thus, *viz.* I bequeath to *John Th.* my House and Land in *M.* called *Lock* and *Stone*, to *St. Th.* my House and lands called *Stokes* and *Newmans*, to *Ro. Th.* my House and Lands called *L kins* and *Brox*; Moreover, if the said *Jo. St.* or *Ro.* live till they be of lawful age, and have Issue of their bodies lawfully begotten, then I give the said houses to them and their Heirs, in manner as aforesaid, to give and sell at their pleasure: But if it fortune one of them to dye without Issue of his body, lawfully begotten, Then I Will that the other Brother or Brothers, have all the said Houses and Lands in manner aforesaid; And if it fortune the three to dye without Issue, Then I Will that all the said houses be sold by my Executors: In this Case, upon the Will, it was agreed by all the Justices, First, That by the first words of the Will the three Devisees had but an Estate for life. 2. It was Resolved, That no estate tail is created by this Will, but the Fee-simple seised in the Sons when they came at their lawful ages, and had Issue; so as the Recovery of the Devise was void. *Tr.* 27. *Eliz. C. B. Brian* and *Gawsens* Case. *Leon.* 3. part 115.

Toll or *Tolne*.

1. TRespass, *Tam pro Domina Regina, quam pro se ipso*, and shewed that the Town of *Leicester*, and the Inhabitants thereof, had used to be discharged of Toll, and that the Queen by her Letters Patents gave commandment to all Bailiffs, Mayors, Sheriffs, That those of *Leicester* should be discharged of Toll; Notwithstanding which, the Defendant took Toll: Many Exceptions were taken. 1. Because the Suit is prosecuted *Tam pro Domina Regina, quam pro se ipso*, whereas the party grieved was only to have the Information; but that Exception was over-ruled, upon the Book of 49. E. 3. 6. where the Writ is, *Ad respondendum tam Domine Regi, quam se ipso*. 2. That Lands holden in Soccage only, are discharged of Toll; and it is not shewed that the Lands were holden in Soccage: It was Answered and Resolved, That it is said, That *Leicester* is Ancient Demesne, and that implies it cannot but be Soccage, and not of any other Tenure. 3. Because the King by his Letters Patents cannot discharge one of Toll, which is a kind of disenheritable: It was answered, That the Plaintiff doth not declare of any grant, but of an Usage or Customs; and the Letters Patents are, that such Customs and Usages shall hold place; and upon the Custom and Contempt the Action is grounded. 4. That the Plaintiff hath not shewed, That the Toll was concerning things for provision of their houses, manurance of their Lands, *&c.* and the words are *de bonis & catallis suis*; and it was said, That the reason why Tenants should be quit of Toll, was because that in the time of *Edw.* the Confessor, and *William* the Conquerour, all the Lands in their hands, set down in the Book of *Doomsday*, were Ancient Demesne, and called *Terra Regis*; and they were to provide Victuals for the Kings Garrisons and

other places in times of war and trouble; and therefore they had the Priviledges, *ut quietius arura ſua exercerent, & terram excolant*, and ſhould alſo be diſcharged of Toll: The Court inclined to be of opinion, That an Inhabitant within Ancient demeſne, although he was not a Tenant, ſhould be diſcharged of Toll; But it was ſaid, That if ſuch Tenant or Inhabitant levyeth a Fine of his Lands in ancient Demeſne, the Purchaſer ſhould pay Toll: The principal Caſe was adjourned *Tr.* 28. *Eliz. B. R.* The Caſe of the Town of *Leiceſter*, Leon. 2. part 190.

2. Treſpaſs, the Defendant juſtified, becauſe the Town of *Northampton* is an ancient Town, and that King *Henry* the 7th. granted to the Mayor and Burgeſſes, *&c. unam Feriam annualem*, to be holden upon the Feaſt of *&c. cum omnibus libertatibus & liberis Conſuetudinibus ad ejuſmodi Feriam ſpectant'*; and ſhewed, That *I. S.* at a Fair there holden, ſold a Cow to the Plaintiff, and he demanded one penny for Toll, and becauſe he refuſed to pay, the Defendant diſtreined the Cow as Bailiff for non-payment: The Queſtion was, if this grant were good, and that thereby any Toll might be demanded: It was in this Caſe (amongſt other things) Reſolved, That by the ſaid Grant of a Fair *cum omnibus Libertatibus*, &c. Toll is not due nor demandable, for Toll is not incident to a Fair; but in ſuch Caſe by expreſs words in the Kings Grant, ſuch Grantee may have Toll; and in this Caſe, this difference was put and agreed, That ſuch liberties which a common perſon hath by preſcription or Grant, and which if the common perſon had not, the King himſelf ſhould have, as Waife, Stray, Wreck, *&c.* there if the common perſon hath them by Grant or Preſcription, and they come to the King by forfeiture or otherwiſe, they are extinguiſhed in the Crown, and the King ſhall have ſuch Liberties by his Prerogative, and they cannot be afterwards granted but by a new Creation: But ſuch Liberties, which a Common perſon hath by grant or Preſcription, which the King (if ſuch Preſcription had not been) could not have by his Prerogative, as Wares, Market with Toll, *&c.* if theſe come to the Crown, they remain *in eſſe* and are not extinct: It was in the principal Caſe adjudged for the Plaintiff. *Mich.* 40. *Eliz.* B. R. *Hoddy* and *Wheelhouſes* Caſe. *Cr.* 3. part. 591.

3. Treſpaſs for taking 100 Sheep at *Melton Moubray*, in *via Regia*: The Defendant pleaded, That the Lord *B.* was ſeiſed of the Manor of M. in *M.* aforeſaid, and that he and all thoſe whoſe eſtate time whereof, *&c.* have uſed to have Toll, *viz.* 2 *d.* for every 20. ſheep of any ſtrangers, brought or driven *per & trans* the ſaid Town by any ſtranger; and if he were denyed by ſuch ſtranger driving them *per & trans*, &c. that he uſed to diſtrein for the Toll one ſheep ſo driven; and ſhewed that 120. ſheep of the Plaintiffs, being a ſtranger, were driven by ſuch a ſtranger, *per & trans* the ſaid Town by the Plaintiffs command; and becauſe he refuſed to pay the Toll, he took one ſheep, *cepit & abduxit*; It was ſaid the Plea was not good, becauſe it is claimed as a Toll Through, which cannot be claimed by Preſcription, for that it is againſt Law, and in oppreſſion of the people. 2. That he cannot diſtrein for it in *via Regia*; for that is againſt the Statute of *Marlbridg*, cap. 15. 3. That it is not good for the manner of the pleading, becauſe the Cuſtom is alledged to be, That if the Sheep of any Forainer be driven through, a Toll ſhall be paid, if it be denyed by any Forainer who drives them through, and it is not avered that he that drove them through was a forainer, but that the Maſter was a forainer; but that was diſallowed, becauſe the driving of the ſervant is the driving of the Maſter. 4. Becauſe he juſtifies *quod cepit & abduxit*, and doth not ſay *Nomine Diſtractionis*; and for that cauſe the pleading was holden not to be good: But for the matter in Law, The Court was of opinion, That for Toll Traverſe, and Toll Thorough, a Town, or a Man might preſcribe: And the King at this day may grant ſuch a Toll; but then it muſt be but of ſmall value: and it was ſaid, that although it did not appear to the Court, that this Cuſtome had a lawful beginning, the ſame not being ſhewed, nor the cauſe thereof; yet by Intendment it ſhall be intended to have a lawful beginning, and for a good cauſe, without ſhewing the ſame in certain; But for the default of the pleading, it was adjudged for the Plaintiff. *Mich.* 41. *Eliz.* B. R. *Smith* and *Shepherds* Caſe. *Cro.* 3. part 710, 711.

Traverſe.

1. REplevin, The Defendant avowed the taking of the Cattel damage feaſants, and ſhewed that *A.* and *B.* was ſeiſed of the Manor of *S.* and let the place in which *&c.* to him for 21. years; The Plaintiff ſaid that long before *A.* and *B.* were ſeiſed, That King *Hen.* 8. was ſeiſed, and demiſed this Land by Copy of Court Roll, to the Plaintiff in Fee; upon which it was demurred, for that the Plaintiff doth not Traverſe the ſeiſin of *A.* and *B.* and it may be they came to the Land by good title of puiſne time: In his Caſe it was ſaid by the Juſtices, That in the time of King *Ed.* 3. the Judges had

had no great regard to pleading, and that by the Book of 4. E. 3. Title *Replication*; ſuch a Confeſſion by *Neint dedier*, that it had been good: But they ſaid, that ſince that time there is no Queſtion to be made, That where the party doth alledge ſeiſin for one from whom he claimeth; the Plaintiff cannot alledge ſeiſin in another from whom he claimeth; before the ſeiſin of, &c. without Traverſing, confeſſing or avoiding the ſeiſin alledged by the Defendant: It was adjudged for the Avowant, *Paſc.* 26. *Eliz.* B. R. *Hering* and *Blacklows* Caſe. *Cro.* 3. part 30.

2. Treſpaſs for entring his Cloſe, and cutting 6. Poſts, 1. *May*, 28. *Eliz.* The Defendant pleaded to all *Not guilty*, Except to 3. Poſts, and ſaid that upon the 1. *May* 27. *Eliz.* it was the free-hold of *I. S.* and that he by his command entred and cut the Poſts, which is the ſame Treſpaſs, and *abſq; hoc* that he was guilty of any Treſpaſs before the ſaid 1. *May* 27. *Eliz.* and doth not Traverſe the time after; which was alledged to be a good cauſe for ſtaying of Judgment: But it was Anſwered and Reſolved, That although the Defendant pleads not guilty to the whole Houſe, yet he might after juſtifie as to parcel, for he hath pleaded to all except this parcel; and alſo the Plea is good although he doth not traverſe the time after; For when he pleads his Freehold, or the freehold of another, it ſhall be intended ſo to continue till the contrary be ſhewed, and therefore he needeth not traverſe the time after. *Hill.* 0. *Eliz.* B. R. *Higham* and *Reynolds* Caſe. *Cro.* 3. part 87.

3. Note, It was ſaid, That in an Action of Trover and Converſion, That the Converſion is traverſable, for it is the ſubſtance of the Action, and the wrong ſuppoſed by him, and ſo may well be traverſed; For if one findeth goods, and doth not convert them, no Action lieth; and it was ſaid in this Caſe, that in one *Leaks* Caſe it was adjudged, That the place and time of the Converſion are to be alledged, for they are materiſal; and for that they were not alledged in the principal Caſe, the Bill was abated, though it was alledged after verdict. *Paſc.* 30. *Eliz.* B. R. *Stranſhams* Caſe. *Cro.* 3. part 97.

4. The Queſtion was, If upon a Traverſe to the Certificate of the Biſhop of *Lincoln* for not payment of Tenths upon demand, nor within 40. days after; whether the Benefice be void by the Statute of 26. *H.* 8. cap. 3. *Manwood*, Chief Baron, ſaid, It was a great queſtion if this Certificate of the Biſhop was peremptory, or that the party ſhould be admitted to traverſe it: But upon great conſideration had thereof by the Juſtices, it was Reſolved, That ſuch Certificate is not peremptory; for that the Biſhop doth it only as an Officer, *ſcil.* as Collector of the Tenths, and not as a Judge, as in the Caſe of Baſſardy. *Mich.* 30. *Eliz.* in Exchequer, The Queen and *Blanchers* Caſe. *Cro.* 3. part 80.

5. *Ejectione firmæ*, The defendant pleaded a ſurrender of a Copy-hold by the hand of *I. S.* the Steward of the Manor: Iſſue was joyned *abſq; hoc*, that he was Steward; It was holden by the Court to be no Iſſue, for the Traverſe ought to be general, that he did not ſurrender, for if he was not Steward, the ſurrender was void; and in this Caſe it was holden, That where Iſſue is taken upon a Surrender, it ſhall be tryed where it was alledged to be done, and not where the Manor is. *Mich.* 34. *Eliz.* B. R. *Wood* and *Butts* Caſe. *Cro.* 3. part 260.

6. Treſpaſs, The Defendant pleaded, That *A.* his Anceſtor was ſeiſed, and dyed ſeiſed, and the Land deſcended to him as Son and Heir: The Plaintiff replied, that before *A.* was ſeiſed, That *I. S.* was ſeiſed in Fee, and enfeoffed others to the uſe of himſelf and his Wife for their lives, and afterwards to the uſe of *W.* his Son for his life; and after his deceaſe, that they ſhall be ſeiſed *ut in eorum priſtino eſtatu*, upon condition that they ſhall receive the profits, and pay to *B.* the Wife of *W.* 20 *l. per an.* during her life; and after they ſhall be ſeiſed to the uſe of the heirs males of *W.* That the Husband and Wife dyed; That *W.* entered, and enfeoffed *A.* and dyed, who entred and deviſed it by his Will to his younger ſon for life, afterwards *A.* the wife of *W.* dyed, and *N.* as Son and Heir of the body of *W.* entred and let to the Plaintiff: Upon this it was demurred, becauſe he did not traverſe the Diſcent; But the opinion of the Court was, That judgment ſhould be for the Plaintiff, for that the diſcent in any Caſe is not traverſable, but where both parties claim by the ſame perſon; and holden that this Feoffment was no Diſcontinuance, nor barred the entry of the Heirs. *Paſc.* 34. *Eliz.* B. R. *Maſon* and *Nevils* Caſe. *Cro.* 3. part 277.

7. Action upon the Caſe, and Declared, That he having a Sellar in which he put divers Hogſheads of Wine, and the Defendant having a Ware-houſe over his Seller, maliciouſly laid into the ware-houſe ſuch a weight of wares, *Quod propter gravitatem ponderis* the floor of the ware-houſe fell, and ſpoiled his wines: The Defendant pleaded, That *I. S.* was poſſeſſed of the ware-houſe and of the Seller, and let the Seller to the Plaintiff, and the Ware-houſe to the Defendant; and that at the time of the [illegible] made the ware-houſe was much in decay, and that there uſed to be laid in the ware-houſe 10 0. weight and that he put in it but 800 weight, *Et propter ruinoſitatem* it fell down, *Et hoc paratus eſt verificare*, upon which it was demurred: It was holden by the Juſtices in this Caſe, That the Plea was not good, for want of a Traverſe; for when a Male-feaſans is layed to the Defendants charge, he ought expreſly to Traverſe it, and not to Anſwer it by Argument, and he doth not traverſe that which was laid to his

charge; wherefore it was adjudged for the Plaintiff. *Tr.* 34. *Eliz. C. B. Edwards* Caſe. *Cro.* 3. part 285.

8. In Replevin, the Defendant avowed by a grant of a Term by *A.* to *I. S.* from whom the Plaintiff claimed, the Defendant pleaded in Bar of the Conuſans, that *A.* married with *I. D.* who by a former Deed granted the Term to the Plaintiff, and Traverſed the grant made to *I. S.* and in this Caſe it was holden that the Traverſe was not good but vitious; for that he who claimeth by the firſt grant or Aſſignment, ſhall not Traverſe the ſecond; but he who claimeth by the ſecond, muſt traverſe the firſt. *Mich.* 41. *Eliz.* B. R. *Helies* and *Whybers* Caſe. *Cro.* 3. part 650. See *Cok.* 6. part 24. the ſame Caſe.

9. Treſpaſs for taking his Cattel at *S.* and driving them, *&c.* The Defendant pleaded That *I. S.* was ſeiſed in fee of 12 Acres of Land in *M.* and that the Cattel were damage feaſant there, and that he by the command of *I. S.* drave them to *S.* to and from thence to *T.* in the ſaid County, where he impounded them, which is the ſame taking and driving whereof *&c. Abſq; hoc quod cepit Averia prædict' apud S.* In this Caſe it was adjudged the plea was ill, for that the Traverſe is a departure from the firſt plea, and repugnant to the matter which induceth it; and it was ſaid, That there needed no Traverſe, becauſe here the matter of juſtification is tranſitory and not local; but it ſufficeth that he juſtifies in another place. *Paſc.* 41. *Eliz.* Co. B. Sir *Walter Sand* and *Lawes* Caſe. *Cro.* 3. part 667.

10. *Ejectione firmæ* of a Leaſe made by *A.* The Defendant pleaded, That long before, *&c.* the Queen was ſeiſed in fee in the right of her Crown, and by Letters Patents gave the Land to *I. S.* and *W.* his wife, and to the heirs of the body of *W. I. S.* dyed, *W.* took to huſband *I. D.* the reverſion in the Crown; *I. D.* let it to *A* the leſſor of the Plaintiff; *I. D.* dyed, the Defendant as ſervant to *W.* entred: *Et hoc* The Plaintiff Replied, That the Leſſor of the Plaintiff demiſed to him for years; upon which the Defendant demurred, becauſe he traverſeth without making any title: But the Court held it good enough; for the Defendant hath avoided the Plaintiffs title, in which is the chiefeſt matter, and it is not neceſſary in an *Ejectione firmæ* to make a title. *Paſc.* 41. *Eliz.* B. R. *Knights* and *Ledges* Caſe. *Cro* 3. part 671.

11. Replevin, The Defendant avowed by reaſon of a Copy-hold granted to him by *C.* Biſhop of *W.* Lord of the Manor; The Defendant pleaded, that before *C.* was Biſhop, one *H.* was Biſhop of *W.* by whoſe death the Temporalities came to the Queen; and that during that time the Copyhold eſcheated, and the Queen granted it to the Plaintiff in fee, and traverſeth the grant by *C.* It was the opinion of the Court, that the Traverſe was good, becauſe the grant of the Queen of the Copyhold eſcheated was good, and the Traverſe ought to be; for here is not any confeſſing and avoiding, becauſe he doth not confeſs the ſeiſin and grant by Coppyhold; But if he had confeſſed that, then there needed not any Traverſe. *Paſc.* 42. *Eliz* C. B. *Coverts* Caſe. *Cro.* part 754.

12. Replevin. The Defendant avowed by reaſon of a Copyhold granted to the Defendant; and to *B.* and *C. B.* dyed, and then *C.* dyed, whereby he was in by Survivor, and ſo is ſole ſeiſed, and took the Cattel damage feaſant: The Plaintiff confeſſed the grant, and that *C.* dyed, and the Defendant and *B.* ſurvived: But ſaid, That *B.* ſurrendred his part to a ſtranger, who conveyed it to the Plaintiff, *abſq; hoc*, that the Defendant was ſole ſeiſed *prout tempore Captionis*: It was objected that the ſole ſeiſin was not traverſable, but the ſurvivorſhip: But the opinion of the Court was, That the Traverſe was good; for the ſole ſeiſin being alledged by way of bar, preciſely and materially, it ought to be Traverſed; It was adjudged for the Plaintiff. *Mich.* 42. *Eliz. C. B. Cooper* and *Temples* Caſe. *Cro*, 3. part 79.

13. *Ejectione firmæ*, The Defendant pleaded, that before the Father of the Plaintiff had any thing, the Father of the Leſſor of the Plaintiff was ſeiſed in fee, and let to the Defendant for life and dyed; the Reverſion diſcended to the Leſſor, who entred and diſſeiſed the Defendant, and lett to the Plaintiff; The Plaintiff ſaid, that the father of his Leſſor was ſeiſed in fee, and dyed ſeiſed, and it deſcended to his Leſſor, who entred and lett to the Plaintiff, *abſq; hoc*, that the Father of his Leſſor, lett to the Defendant: It was demurred into, becauſe he traverſeth the diſſeiſin, and not the Leaſe: But it was adjudged that the Traverſe was good, and that he might Traverſe either the diſſeiſin or the Leaſe at his Election; for when both parties make their Conveyance from one and the ſame perſon; there the mean conveyance is always traverſable. *Mich.* 42. *Eliz. C. B. Fawke* and *Powels* Caſe, *Cro.* 3. part 798.

14. Treſpaſs of a Battery in *London*: Defendant pleaded, That the Plaintiff aſſaulted him in *D.* in the County of *E.* and if *damnum de ſon* aſſault demeſne, and traverſed he is guilty in *London*: It was holden that the Traverſe and juſtification was not good; for it being a thing tranſitory, he ought to have juſtified in *L.* and not to have Traverſed the County; for a Battery in his defence is not local, but may be juſtified in every place where it is alledged. *Tr.* 43. *Eliz. C. B. Parſet* and *Hutchyns* Caſe. *Cro.* 3. part 842. See *Mich.* 43. *Eliz. C. B. Johnſon*, and *Burtons* Caſe. *Cro.* 3. part 860. *acc.*

15. Debt

15. Debt upon Obligation to ſtand to the award of *I. S.* of all Controverſies between the Plaintiff and Defendant, ſo as the Award be made before the firſt day of *June* next after the date of the Obligation, which bore date 20. *Novemb.* 20. *Jac.* The Defendant confeſſes the Obligation, dated 20. *November*, but ſaid it was *primo deliberat'* 20 *April*, 21. *Jac.* after which day and before the firſt day of *June* next following, no Award was made, *abſq; hoc quod cognovit ſe teneri modo & forma*: It was the opininion of the whole Court in this Caſe, that the Traverſe was void and repugnant, for the ples confeſſeth the Bond, but denies the time by the traverſe, for the Traverſe doth not go to the part of the ples material. *Paſc.* 1. *Car. B. R. Ecuſq; de Norwich* and *Cornwallis* Caſe. *See Reports* annexed to *Bendlows*, 146.

16. Debt upon an Obligation againſt an Adminiſter, who pleaded a Judgment againſt him upon another Bond of 40 *l.* beſides which he had not Aſſets; The Plaintiff ſaid, that the ſaid Judgment was ſatisfied by the Defendant by payment of 20 *l.* to the party, who recovered in ſatisfaction of it, but the Defendant by fraud and covin, to defeat the Plaintiff the Defendant kept the Judgment a foot; The Defendant traverſed that the Judgment was not ſatisfied: It was Reſolved in this Caſe, That the Traverſe was not good, becauſe the payment is not traverſable. *Hill* 1. *Car. B. R. Dean* and *Goldsbeys* Caſe. See *Reports* annexed to *Bendlows*, 166.

17. Replevin, Defendant avowed That *E. E.* was ſeiſed in fee of three Acres in *D.* and took to Husband *I. S.* by whom ſhe had Iſſue *E. E.* dyed, *I. S.* being Tenant by the Courteſy *T.* the heir in reverſion granted a Rent of 5 *l.* out of the three Acres to the Avowant, and for ſo much behind avowed; The Plaintiff ſaid, that before *E.* had any thing, *I. D.* was ſeiſed in fee, and gave the Land to *I. E.* in tail; *I. E.* had Iſſue *E. E.* who after the death of her Father entred and was ſeiſed in tail, who took Husband *ut ſupra*, and had Iſſue *T. ut ſupra*, and dyed, *T.* in the reverſion in the life of the Tenant by the Courteſie granted the Rent *ut ſupra*, *abſq; hoc* that *E. E.* was ſeiſed in fee of the three Acres; upon which Iſſue joined, it was found for the Avowant; In ſtay of Judgment it was ſaid, that in effect there was no iſſue joined, for that the traverſe of the ſeiſin *E. E.* was idle; but the Trave ſe ought to have been of the ſeiſin of *T.* the grantor: But it was the opinion of the Juſtices, That although another iſſue might have been taken and that the Traverſe is not good; yet the ſame is helped by the Statute of Jeofails, for the eſtate of *E. E* was in a ſort and by circumſtance material; for if ſhe was ſeiſed in tail and it deſcended to *T.* the grantor, then by her death the Rent is determined; but if the Fee deſcend from *E. E.* to *T.* then the ſame did enable the eſtate of *T.* to be ſuch, out of which he might well grant the Rent. *Mich.* 2. *Jac. B. R. Pigot* and *Pigots* Caſe. *Yelverton* 54.

18. In *Ejectione firmæ*, The Plaintiff declared upon a Leaſe made to him for three years by *M. P.* The Defendant ſaid that the Land was Copyhold of the Manor of *F.* whereof the Queen was ſeiſed in fee, and before the Leſſor of the Plaintiff had any thing ſuch a day, by *I. S.* her Steward at a Court, *&c.* granted the land to the Defendant by Copy in fee, according to the Cuſtom of the Manor; The Plaintiff Replied, that long before the Copy granted to the Defendant, *&c.* 43. *Eliz.* the Queen by Copy granted the Land to the Leſſor for life, according to the cuſtom, who entred and let the Land to the Plaintiff: The Defendant by way of Rejoynder maintained his bar, *abſq; hoc*, that the Queen at the Court of the Manor, by *I. S.* her Steward, ſuch a day granted the Land to the Leſſor: It was the opinion of the Court in this Caſe, That the Traverſe here was not good, for the day was not traverſable; but where that the Queen by an eigne Copy granted the Land to the Leſſor; ſo as the Traverſe ſhould have been *abſq; hoc, quod Domina Regina Conceſſit modo & forma* to the Leſſor of the Plaintiff; and they held the Traverſe to be naught, for by that the Jurours ſhould be bound to find a Copy at ſuch a day, and by ſuch a Steward, which ought not to be, and they alſo held that the ſame is matter of ſubſtance, and not helped by the Statute of 18. *Eliz.* of *Feoſails*. *Hill* 5. *Jac. B. R. Lane* and *Alexanders* Caſe. *Yelverton* 122, 123.

19. *Ejectione firmæ*, of a Leaſe made by *A.* The Defendant pleaded that before *A.* had any thing, *I. S.* was ſeiſed of the Land in fee, and had Iſſue *H.* and dyed ſeiſed; and the Land diſcended to *H.* as ſon and heir, and that *A.* entred and was ſeiſed by abatement, and after made the Leaſe to the Plaintiff, after which the Defendant as ſervant to *H.* entred, *&c.* The Plaintiff replied, and confeſſed the Seiſin of *I. S.* but ſaid that he being ſo ſeiſed by his Will, deviſed the Land to *A.* in fee and dyed, and that *A.* entred by force of the deviſe, and made the Leaſe to the Plaintiff *abſq; hoc, quod H ſeiſitus fuit per abatementum modo & forma*, &c. It was adjudged for the Defendant, and that the Traverſe was not good; for traverſe ſhall not be taken but where the thing traverſable is iſſuable; and the ſubſtance of the Iſſue is the deviſe, and not the Abatement; Alſo it is not good for the manner of it, for the Traverſe ought not to have been *abſq; hoc, quod ſeiſitus fuit per abatementum*; but *abſq; hoc, quod abatument. Paſc.* 7. *Jac. B. R. Bedell* and *Lutts* Caſe. *Yelverton* 151.

20. Treſpaſs for entring in his Shop, the Plaintiffs ſervant having diſtreined three Green-fiſh, the damage feaſance, and that the Defendant entred the Shop,

Shop, and reſcouſſed them from the ſervant, and carried them away: The Defendant pleaded, That before the Treſpaſs *H. O.* was ſeiſed of the Shop in fee; and 16. *May*, 30. *Eliz.* leaſed the ſame to *S.* and derived to himſelf an intereſt in that Leaſe, and ſo juſtified; The Plaintiff Replied, that before *H. O.* had any thing, *&c. T. B.* was ſeiſed of the Shop in fee; and 7. *E.* 6. deviſed the ſame to *F.* his ſon in tail, the remainder to *O.* in fee and dyed; *T.* by Deed Indented, inrolled, bargained and ſold the ſame to *E.* in fee, who entred. *I.* dyed without Iſſue, ſo as his remainder diſcended to *T. E.* deviſed the Shop to *T. O.* and *R. O.* in fee, and dyed ſeiſed, they entred and were ſeiſed in fee: *T.* dyed ſeiſed of the remainder in fee without Iſſue, and that the Shop deſcended to *R. G.* as Coſen & heir, *T. O.* and *R. O.* dyed; Afterward *H. O.* entred, and ſo intruded in the Shop, and by ſuch entry and intruſion was ſeiſed in fee, *&c.* and ſo ſeiſed; *R. O.* 2. *Octob.* 29. *Eliz.* dyed, by which the Shop deſcended to *W. G.* as Coſen and heir; *W. G.* dyed without iſſue, by which the Shop deſcended to the Plaintiff as Coſen and heir; and afterward 30. *Eliz. H. O.* leaſed *prout* in the Bar, and the Plaintiff entred, *&c.* The Defendant *ut prius* ſaid, That *H. O.* was ſeiſed of the Shop in fee, *abſq; hoc*, that *H. O. in Shoppam prædict' intravit & ſic ſe intruſit modo & forma*; upon which the Plaintiff demurred, becauſe the Traverſe was not good; for the Intruſion being the means to avoid the title of *H. O.* ought to be traverſed expreſly and not by Circumſtance: It was the opinion of the Court in this Caſe, That it was not material whether the Traverſe was good, or not; for the Replication was vitious, and the title alledged in the Bar is not anſwered; and *R. O.* and *T. O.* by the Plaintiffs own ſhewing, had a fee-ſimple; ſo as no Intruſion could be upon an eſtate in fee; but properly an Intruſion is only after the death of Tenant for life, and the eſtate of freehold ended; Then if the Title alledged in *H. O.* is not avoided, but only by alledging his entry by way of Intruſion, and by the Law there cannot be any Intruſion; the Bar is not entred, and ſo the Plaintiff cannot have Judgment, but the Defendant is to be acquitted of the Treſpaſs: It was adjudged againſt the Plaintiff. *Hill* 7. *Jac.* B. R. *Goddard* and *Thorſtons* Caſe. *Talverton* 170.

21. Debt againſt an Executor, he pleaded judgments in Bar; The Plaintiff replied, that the judgments were ſatisfied and kept on foot by Covin to deceive the Plaintiff; the Defendant traverſed the ſatisfaction of the Judgements, upon which the Plaintiff demurred, becauſe that ſatisfaction is but inducement to the fraud and Covin: It was ſaid by *Dodd.* Juſtice in this Caſe, If the Judgements were had by Covin, he might traverſe generally; but put the Caſe that the Judgments were had upon good cauſe, and afterwards came an Agreement as to pay ſo much a Moneth in ſatisfaction of them, and in the mean time the Judgments are kept on foot; in that caſe the keeping of the Judgments on foot is traverſable, and the payment is but inducement, and the matter of Inducement ſhall be never traverſable: In this Caſe judgment was entred for the Plaintiff. *Hill.* 2. *Jac.* B. R. *Beaumonts* Caſe. *Latin* 111.

22. Action of Battery, The Plaintiff ſuppoſed the Battery at *D.* in the County of *Middleſex*; The Defendant juſtified by reaſon of an Aſſault at *S.* in the County of *G. abſq; hoc*, that he beat the Plaintiff at *D.* in the County of *Middleſex*; upon which Traverſe the Plaintiff did demur: It was the opinion of the Juſtices, that the County was not traverſable, and judgment was given for the Plaintiff: And *Wray* chief Juſtice ſaid, That the Jurours were bounden upon pain of Attaint to take notice of ſuch a tranſitory thing done in another County. *Paſc.* 26. *Eliz.* B. R. *Partrig* and *Pools* Caſe. *Leon.* 2. part 79.

Treſpaſs.

PAn Attorney of the Kings Bench brought Treſpaſs there againſt the Warden of the Fleet; The Defendant came in the Common Plea, and demanded the advice of the Court, becauſe he is an Officer of the Court, and therefore ought not to be impleaded elſewhere: It was the opinion of the Court, becauſe the Plaintiff hath alſo his priviledge in *B. R.* aſwell as the Defendant hath here, this Equality of priviledge ſhall render the parties at liberty, and he ſhall have the benefit of the priviledge who firſt begins Suit; ſo the Defendant was adviſed of the Court to anſwer. *Mich.* 30. *Eliz. C. B. Payes* Caſe. *Leon.* 2. part 41.

2. The Caſe was, *A.* poſſeſſed of divers goods in the Diocels of the Biſhop of *B.* dyed Inteſtate; the Biſhop of *B* granted Letters of Adminiſtration to *I. S.* his wife; Afterwards the Biſhop of *Cant.* by reaſon of his Prerogative, granted Adminiſtration to *C.* and *D.* who brought Treſpaſs againſt *I. S.* and his wife for taking the goods: It was Objected, that it was hard to make them Treſpaſſers, for that the granting of the Letters of Adminiſtration *de novo jure* doth belong to the Ordinary; and it might be that the Ordinary nor the parties to whom the ſaid firſt Adminiſtration was granted, had notice that the Inteſtate had been *Notabilis* in divers Countries: But *Wray* and *Southcot*, Juſtices, held that the Adminiſtration granted by the Biſhop of *B.* was meerly void, and ſo they were Treſpaſſers: Then

ſo

an Exception was taken to the Bar, becauſe it was pleaded, That the Defendant had paid a certain ſum of money to one I. D. to whom the Inteſtate was indebted by Bond, but did not ſhew how the Bond was diſcharged, as by Releaſe, Acquittance, Cancelling of the Bond; that was holden to be a material Exception; for the Defendant in ſuch caſe ought to ſhew ſuch a diſcharge, which is ſufficient, and by which the Plaintiffs may be diſcharged, and for this cauſe the Plaintiff had Judgment: *Mich.* 19. *Eliz.* B. R. *Dunns* Caſe. *Leon.* 2. part 155.

3. Treſpaſs, *Quare clauſum & Domum ſuam fregit*, The Defendant pleaded, and put the Plaintiff to a new Aſſignment, *ſc.* a houſe called a Stable a Barn and another houſe called a Cart-houſe and Granier, and that was aſſigned for Errour: It was holden in that Caſe that it was good enough; for *Domus* in a Declaration contains all things contained in the new Aſſignment; but if it had been of a Cloſe, and the new Aſſignment of a Barn, it had been otherwiſe. *Wray* ſaid, That *Domus eſt nomen Collectivum*, and contains many things, as Barns, Stables, *&c.* and ſuch alſo was the opinion of the whole Court. *Mich.* 32. *Eliz.* B. R. Here *Willeworths* Caſe. *Leon.* 2. part 184.

4. Treſpaſs, *Quare Clauſum fregit*, the Caſe was, *A.* was ſeiſed in fee of the Lands, and Leaſed the ſame to the Defendant for years; and afterwards he made a Deed of Feoffment to the ſame Leſſee of the ſame Lands by the words of *Dedi & conceſſi*, with a Letter within the Deed to make livery to the Leſſee; the Attorney made livery accordingly: The Queſtion was, if here was any Feoffment or not; it was objected, that the Deed ſo delivered took effect preſently as a Confirmation: and then the Livery and Seiſin came too late: But it was the opinion of the Court, that it was in the Election of the Leſſee to take the conveyance as a Feoffment, or a Confirmation: and here it appeareth that the intent of the parties was, That the Leſſee ſhould take by way of Feoffment, otherwiſe to what uſe ſhould the Letter of Attorney be in the Deed; and afterwards it was adjudged for the Plaintiff ſhould be barred. *Ta.* 28. *Eliz.* C. B. *Leonards* Caſe. *Leon.* 2. part 142.

5. Treſpaſs for taking of goods, the Defendant juſtified as Bailiff to *I. S.* the Plaintiff Replied, That the Defendant took the Cattel of his own wrong, *abſq; hoc*, that he is Bayliff to *I. S.* It was ſaid by *Anderſon* Chief Juſtice, If one hath good cauſe to diſtrein my cattel, and a ſtranger of his own head without any Warrant or Authority takes my goods, not as ſervant or Bailiff to another, and I bring Treſpaſs againſt him, he cannot excuſe himſelf by ſaying that he did it as Bailiff, for once he was a Treſpaſſer; but if one diſtreins as Bailiff, although in truth he be not Bailiff, if after he in whoſe right he juſtifies aſſents to it, he ſhall not be puniſhed as a Treſpaſſor; for that the aſſent ſhall have relation to the time of the diſtreſs taken. *Mich.* 29. *Eliz.* C. B. *Leon.* 2. part 196.

6. Treſpaſs for cutting down of four Oaks; The Defendant pleaded that he was ſeiſed of a Meſſuage in *B.* and that he and all thoſe whoſe eſtate, *&c. habere conſueverant rationabile eſſoverium ſuum*, for fuel: *ad libitum ſuum Cuſtodiend' in Boſcis, Subboſcis, & arboribus ibidem creſcent'*, and that *in quolibet tempore anni*, but in fawning time; The Plaintiff ſaid, that the place where, is within the Foreſt of *C.* and that the Defendant and all thoſe *&c. habere conſueverant rationabile eſſoverium in boſcis, &c. per liberationem Foreſtarii, aut ejus Deputati, prout boſcus pati potuit, & non ad exigentiam petentis*: upon which the Defendant did demur in Law: It was the opinion of the Court, That Judgment ſhould be againſt the Plaintiff; for if he is to ouſt the Defendant of his Preſcription by the Foreſt Law, he ought to have pleaded it, or otherwiſe the Plaintiff ought to have traverſed the Preſcription of the Defendant: Here are two Preſcriptions, one of the Plaintiff, another of the Defendant; If the Plaintiff had ſhewed by Replication, *Lex Foreſta talis eſt*, then the preſcripcion of the Defendant had been anſwered without any more, for that none can preſcribe againſt a Statute. *Tr.* 19. *Eliz.* B. R. *Ruſſel* and *Brochers* Caſe. *Leon.* 2. part 209.

7. Treſpaſs, the Plaintiff declared that he put his Son and Heir apparent, Apprentiſe to the Defendant for three years, he being ſeiſed of Lands to the value of 20 *l. per ann*, which after his deceaſe was to diſcend to his Son; and that the Defendant ſtruck his ſon with a Spade, ſo as he became lame and decrepid; by reaſon whereof he loſt his marriage: In this Caſe it it was adjudged for the Defendant; for it doth not appear by any Book that the Father ſhall have an Action for the loſs of the marriage of his Son, except when a ſtranger taketh him by force and marrieth him; and Treſpaſs for beating, and Battery of the Son lieth not by the Father, but the Son only ſhall have the Action; and ſee that in this Caſe, He is bound Apprentiſe for 7. years, and ſo till the 7. years be paſt the Father hath nothing to do with him, and cannot marry him during that time, and ſo cannot have an Action for loſs of his marriage, which perhaps will never come to him. *Paſc.* 19 *Eliz.* B. R. *Gray* and *Jeoffreys* Caſe. *Cro.* 3. part 55. *See* for the point and matter of the Caſe, *Tr.* 44. *Eliz.* B. R. *Bonham* and *Dennis* Caſe. *Cro.* 3. part 220.

8. Treſpaſs for entring into his houſe and taking away his goods; the Defendant pleaded, That the Treſpaſs was done by him and one *I. S.* and that the Plaintiff brought an Action againſt *I. S.* and recovered

recovered againſt him, and had Execution; and demanded judgment of the Action: It was ſaid that the Plea was good; for when a Treſpaſs is done by two it is joynt and ſeveral, and if the party be ſatisfied by one it is a diſcharge againſt the other; and a difference taken betwixt a Treſpaſs by two, and a Felony; for Felony by two is always ſeveral: *Wray* conceived that the Execution and ſatisfaction by one, ſhould diſcharge the other: *Glench*, Juſtice ſaid, If one command three to do a Treſpaſs, and they do it, and a Recovery is had againſt him, and he being in Execution doth ſatisfie the Plaintiff, it is a good diſcharge of the other; for the Commander was the principal Treſpaſſer, and the other did it but as his ſervant; to which *Gawdy* ſeemed to agree. *Tr.* 26. *Eliz.* B. R. *Mortens* Caſe. *Cro.* 3. part 36.

9. Note, in Treſpaſs, It was agreed by the Juſtices, That if the Freehold of a man be a Market place, and Corn is brought and ſet there, That he that hath the Freehold cannot juſtifie the taking of the Corn there as damage feſant. *M.* 19. *Eliz.* B. R. The Mayor of *Lewſons* Caſe. *Cro.* 3. part 75.

10. Note, it was holden, That by a Grant of *omnia bona & catalla*, a Dogge paſſeth; and that a man hath a property in ſeveral kind of doggs, and See there where a man juſtified in Treſpaſs for beating one who would have taken his dogge from him, and the juſtification was holden to be good. *Tr.* 30. *Eliz.*, B. R. *Ireland* and *Higgins* Caſe. *Cro.* 3. part 126.

11. In Treſpaſs for breaking of his Cloſe, the Caſe was, A man ſeiſed of Lands *expoſuit ea* to three men to ſow by halfs, and he to find the moytie of the Seed, the other the other moyties, and to manure the Lands; A ſtranger entred and ſpoiled the Corn, and they all four joyned in an Action of Treſpaſs: and in this Caſe it was Reſolved, Firſt. That it was no Leaſe of the Land. 1. That they were Tenants in common of the Corn; but the joyning of them all four in the Action of Treſpaſs for breaking the Cloſe, was not good. *Mich.* 30. *Eliz. C. B. Hare* and *Coleys* Caſe. *Cro.* 3. part 243.

12. Treſpaſs by the Church wardens of *B.* for taking a Bell out of the Church in the time of their Predeceſſors: It was adjudged in that Caſe that the Action did lye; But becauſe they declared it to be *ad damnum laſorum*, whereas it ought to have been *ad damnum Parochianorum*: It was adjudged againſt the Plaintiff. *Mich.* 31. *Eliz. C. B. Hatman* and *Rogwoods* Caſe. *Cro.* 3. part 145. and 177.

13. Treſpaſs for entring the Cloſe of the Dean: After verdict found for the Plaintiff, It was moved in ſtay of judgment, That the Action being brought for the poſſeſſions of the Dean only; the Chapter was not to join in the Action; and for that cauſe the Judgment was ſtayed: The Dean and Chapter of *Exeter*, and *Robinſons* Caſe. *Mich.* 33. *Eliz.* B. R. *Cro.* 3. part 200.

14. Treſpaſs for breaking of his Houſe, and taking away a Corſlet and a Pike: The Defendant pleaded, That before the Treſpaſs ſuppoſed, *I. S.* was ſeiſed of the ſaid Corſlet and Pike, as of his own goods, remaining in the Plaintiffs houſe, and that he ſold them to the defendant, and therefore he *tempore quo* came to the Plaintiffs houſe and demanded them, and the Plaintiffs wife then and there (the Plaintiff being abſent) licenced him to enter into the houſe and to take them; whereupon he entred and took them, as it was lawfull for him to do: upon which it was demurred; In this Caſe it was adjudged for the Plaintiff as to the entring into the Houſe, but not as to the goods; for it not appearing how the goods came there, (*ſc.*) either as Treſpaſs or otherwiſe, he cannot of his own head enter; and the licence of the wife to enter into her husbands houſe, is not good: It was adjudged for the Plaintiff. *Mich.* 34. *Eliz.* B. R. *Taylor* and *Fiſhers* Caſe. *Cro.* 3. part 245.

15. In Treſpaſs, the Caſe was; A man a Termer was Outlawed for Felony, and he granted his Term to *I. S.* The Outlawry afterward was reverſed: The Plaintiff brought Treſpaſs for the profits taken between the Outlawry reverſed and the Aſſignment: It was adjudged, That the Action did well lye for the Plaintiff, for that by the Reverſal it is as if no Outlawry had been, and there is no Record of it. *Hill.* 34. *Eliz.* B R. *Ogells* Caſe. *Cro.* 3. part 270.

16. Treſpaſs for breaking his Cloſe; The Defendant pleaded, That *I. S.* was ſeiſed of the Land, and lett it to *I. D.* and he as his ſervant entred and gave no Colour to the Plaintiff, for which cauſe the Plaintiff demurred: It was objected, that he need not give any Colour, becauſe the defendant doth make no title to himſelf, but doth juſtifie as a ſervant: But *Wray*, chief Juſtice ſaid, That he ought for to give Colour, though he juſtifieth as a ſervant. *Mich.* 29. *Eliz.* B. R. *Dinham* and *Berkets* Caſe. *Cro.* 3. part 76.

17. Treſpaſs for breaking his Cloſe 31. *Eliz.* with a *Continuando* to 36. *Eliz.* The Defendant pleaded that long before, &c. that *I. S.* was ſeiſed in fee, and lett it to him for years, and gave Colour to the Plaintiff; The Plaintiff replied, That he himſelf was ſeiſed till by the ſaid *I. S.* diſſeiſed, who lett it to the defendant; and that after he re-entred, and the Treſpaſs mean betwixt, &c. and then upon the defendant demurred: It was ſaid, That for as much as the defendant is in by title, (*ſc.*) by a leaſe from the diſſeiſor, the diſſeiſee after his re-entry, ſhall not puniſh him for his occupying the Land, for he

next

never was a Treſpaſſer to him. But the Opinion of the Court was, That by the Re-Entry of the Diſſeiſee, he is remitted to his firſt poſſeſſion, and as if he never had been out of poſſeſſion: and then all who occupy in the mean time by what Title ſoever they come in, ſhall anſwer to him for their time. It was adjudged for the Plaintiff. Hill. 39 Eliz. B.R. *Holcomb* and *Rawlins* Caſe, *Cro.* 3. Part, 540.

38. Treſpaſs for breaking his houſe in ſuch a Pariſh and Ward in *London*; The Jury found the Treſpaſs, upon Not guilty pleaded; and that the houſe was in that Pariſh, but not in the Ward: In this caſe it was ſaid, That the Verdict was for the Plaintiff; for the finding it was not in the Ward, was ſuperfluous, it being a thing admitted by the Parties, and the Jury ought not to meddle with it. Trin. 34 Eliz. B. R. *Haſtell* and *Jarmes* Caſe, *Cro.* 3. Part, 283.

39. Treſpaſs *Vi et armis*, for taking his goods: The Caſe was this; A Sheriff took Goods by a *Fieri facias*, and before Execution by Sale, the Defendant took them again, and he brought Treſpaſs: The Queſtion was, If the Action did lye, Becauſe he had not any property to the Goods. Upon Conference had amongſt all the Juſtices, They held clearly, That the Action well lay. Wherefore Judgment was entred for the Plaintiff. Mich. 40 Eliz. B. R. *Tyrrell* and *Baſtes* Caſe. *Cro.* 3. Part, 639.

40. In Treſpaſs, the Caſe was; That the Plaintiff was ſeiſed of the Lands with two others in Gavelkind, and that the Defendant Entred: It was in this Caſe adjudged for the Plaintiff: For though it had been a good Plea in abatement, for the Defendant to ſay, That the Plaintiff was Tenant in Common with a Stranger; yet becauſe he hath not pleaded it, he hath loſt the advantage thereof: And the finding it by the Jury, is not material. And ſo it was ſaid, It was adjudged in this Court in one *Stowell's* Caſe. Paſch. 39 Eliz. B. R. *Dering* and *Mors* Caſe. *Cro.* 3. Part, 554.

41. In Treſpaſs, the Caſe was, A. ſeiſed of the Manour of C, by Indenture bargained and ſold to B. all thoſe her Woods, Underwoods, and Hedg-Rowes, as have been accuſtomably uſed to be felled, ſtanding, growing, being in, upon, and within the ſaid Manour, To hold from Mich. laſt paſt during the natural life of the ſaid A; B. Covenanted with the ſaid A. her Executors, &c. to content and pay, or cauſe to be paid to the ſaid A. her Executors, &c. yearly during the Term 10 l; B. cut down all and ſingular the Trees, Woods, and Underwoods in the ſaid Manour growing at the time of the making of the Indenture, Afterwards A. by her Servants felled all the other Woods and Underwoods growing in the ſaid Manour after the ſaid felling made by B; whereupon he brought Treſpaſs. In this Caſe, the whole Court was clear of Opinion, That after the Bargainee had once felled, that he ſhould never afterwards fell in the ſame place where the firſt felling was made by force of the ſaid Grant, notwithſtanding the yearly Rent reſerved; and notwithſtanding the words of the Grant, *viz. To have and hold during the life of the ſaid* A: Wherefore it was adjudged for the Defendant. Trin 4 Eliz. C. B. *Andrews* and *Gloyers* Caſe, *Leo.* 3. Part, 7.

42. In Treſpaſs, the Plaintiff declared, That the Defendant *ſimul cum* J. S, and another, *claſum fregit*: Exception was taken to the Declaration, Becauſe upon his own ſhewing, it appeareth, that the Treſpaſs whereof, &c. was made to the Defendant and another: and therefore it was ſaid, That the Writ was not good, but ſhould abate: but if it had been *ſimul cum aliis ignotis perſonis*, it had been otherwiſe: But (notwithſtanding that, and the Books, 2 H. 7. 15. 2 H. 5. 5. and 14 H. 4. 22. It was afterwards adjudged for the Plaintiff. Mich. 22 Eliz. C.B. *Hony* and *Brudes* Caſe, *Leo.* 3. Part, 77.

43. Treſpaſs, for breaking of his Cloſe, beating of his Servant, and carrying away his Goods. It was found by Verdict, That A. was ſeiſed of the Land where, and let the ſame to the Plaintiff and one B; which B. aſſigned his moyety to C, by whoſe Commandment the Defendant Entred. It was moved, That Tenancy in Common betwixt the Plaintiff and him, in whoſe right the Defendant juſtified, could not be given in Evidence. But the Opinion of the Court was clear, That the ſame might be given in Evidence well enough. Then it was moved againſt the Verdict, That it did not extend to all the Points of the Declaration, but only to the breaking of the Cloſe, without enquiry of the Battery, That, the Court held to be a material Exception, That the Verdict was void. And a *Venire facias de novo* was awarded. Mich. 26 Eliz. B.R. *Raſſes* Caſe, *Leo.* 3. Part, 83.

44. In Treſpaſs, by A. and B. againſt huſband and wife, the Caſe was, The Father of B, one of the Plaintiffs, ſeiſed of the Manour of K, held the ſame of the Queen by Knight-Service in Chief, and was ſeiſed of other Lands in which the Treſpaſs was done, in Socage; and, 30 Eliz. for the preferment of M. his wife, enfeoffed J. D. and J. N. thereof, to the uſe of himſelf and M. and their heirs. It was found, That the Father had not any other Lands at the time of the Feoffment; and that the ſaid Manour at the death of the

Father, *attingebat ad duas partes* of all the Lands and Tenements of the ſaid Father, in three parts to be divided: And that after, the Father deviſed the Lands holden in Socage unto the ſaid M. the Wife for life, viz. Remainders over. It was the Opinion of the whole Court in this Caſe, That the Deviſe was utterly void by the Statute. Trin. 26 Eliz. B. R. *Eve* and *Fincher's* Caſe. *Leon.* 3. Part, 105.

25. In Treſpaſs, the Caſe was; The Abbot of D. was ſeiſed of a Common as appendant unto certain Lands of the ſaid Abby out of the Abby of S: Afterwards, the houſes were diſſolved, and the poſſeſſion given to the King: The King granted the poſſeſſion of the ſaid Abby of D. to A; and the poſſeſſion of the Abby of S. to B: It was Objected, That notwithſtanding the Unity of poſſeſſion, the Common did continue; for that Unity of poſſeſſion is ſo reſtrained by the Statute (viz. in the Eſtate and condition as they now be): And the Abbot of D. was ſeiſed in the right of his houſe of the ſaid Common; therefore ſo ſhall the King be, and alſo his Patentee; and ſo a ſpecial Seiſin is given to the King. But the Opinion of the Juſtices was to the contrary; for that the ſaid words of the Statute are to be conſtrued according to Law, and no further. And by the Law, The ſaid Common cannot ſtand againſt the Unity of poſſeſſion, but is extinct. Paſch. 27 Eliz. C. B. *Neſſons* Caſe, *Leon.* 3. Part, 128.

26. The Lord *Anderſon* Chief Juſtice *de* C. B. brought Treſpaſs by Bill for breaking his houſe in the City of W. againſt A. Citizen of the ſaid City. Now came the Mayor and Comminalty of the ſaid City, and ſhewed their Charter granted to them by King E. 6. and demanded Conuſans of Plea. It was the Opinion of the whole Court in this Caſe, That the Conuſans ſhould not be granted, becauſe the Privilege of this Court whereof the Plaintiff is a principal Member, is more antient then the Patent upon which Conuſans is demanded. And it was ſaid, That this Privilege was given to this Court upon the firſt erection of it. Mich. 29 Eliz. C. B. The Lord *Anderſons* Caſe. *Leon.* 3. Part, 149.

27. In Treſpaſs, the Plaintiff declared of a Treſpaſs in an Acre of Lands in D. and abutted it Eaſt, Weſt, North, and South. Upon Not Guilty, the Jury found the Defendant Guilty *in dimidio acræ infra ſcript.* It was objected, That no Treſpaſs is found, for the entire Acre is abutted only within certain bounds; and the Defendant ought to be found a Treſpaſſor within theſe bounds, and it is impoſſible for the moyety to be within the ſaid bounds. But it was the Opinion of the Court, That if the Plaintiff layeth the Treſpaſs to be in an Acre, and the Jury find only a foot of that Acre, the ſame is good, and here in this Caſe they have found the Treſpaſs in the moyety of an Acre bounded, and that is ſufficient in this Action, wherein damages only are to be recovered. But if it had been an *Ejectione firmæ*, there the Verdict had not been good, becauſe of the incertainty in what part to have his poſſeſſion by *Habere facias poſſeſſionem.* Mich. 5 Jac. B. R. *Wainworth* and *Mars* Caſe. *Yelverton* 114.

28. In Treſpaſs, the Caſe was; C. C. ſeiſed in Fee of the Manor of E. enfeoffed H. R. by Indenture, rendring for certain Cloſes, parcel of the Manor 60 l. at two Feaſts with clauſe of Diſtreſs, if behind 14 dayes. C. by Indenture Bargained and ſold to the Plaintiff the 60 l. and his whole Eſtate in it, which Deed was enrolled; by force of which he was ſeiſed of the ſaid 60 l. and ſo ſeiſed, loſt the ſaid Indenture, which afterwards came to the hands of the Defendant by Trover, who *vi & armis* tears the Seal from the ſaid Indenture, *contra pacem*, to his damage of 40 l. The Defendant pleaded, That C. C. *non conceſſit* the ſaid Manor to H. R. *modo & forma*; upon which the Plaintiff demurred. In this Caſe, amongſt other things, divers Exceptions were taken to the Declaration. 1. That the Action is brought for tearing the Counterpart, by which the Rent was not reſerved, and the Indenture is not expreſſly granted to the Plaintiff, but the Rent of 60 l. only bargained and ſold; and then the Counterpart which appertained to R. did not paſs to the Plaintiff as incident; for it was not the Original Deed by which the Rent was granted; and of that Opinion was the Court, and that the Exception was good. 2. Exception, becauſe it is not averred by the Plaintiff, That C. for whoſe life the Rent was reſerved, was living at the time of the tearing of the Deed; and if he was dead, then the Deed did belong to the Defendant as Heir of the ſaid C. C. 3. Exception, the Counterpart, of which the Plaintiff complains, upon the Plaintiffs own ſhewing, contained as well Warranty, as Rent reſerved; and there without a ſpecial gift of it made by C. C. to the Plaintiff, the Deed did not paſs to the Plaintiff, as is Reſolved in the Lord *Rutherſts* Caſe, which Exception was alſo allowed by the Court. The Plaintiff perceiving the Opinion of the Court to be againſt him, diſcontinued his Suit. Trin. 10 Jac. B. R. *Sutcliff* and *Conſtables* Caſe. *Yelverton* 123, 124.

29. T. and his Wife brought Treſpaſs againſt N. for beating of the Wife, and taking of the goods of the Husband only, and declared *ad damnum ipſorum.* It was moved, That the Declaration was not good, for that the Wife cannot join

for

for a Treſpaſs done to the Husband alone. But, in a Treſpaſs done to the Wife alone, the Husband ought to joyn: wherefore it was adjudged *Quod Querens nihil Capiat per Billam.* In this Caſe it was agreed, That if the Husband and Wife bring Treſpaſs for beating of the Wife, the Husband may declare of a Treſpaſs done to him *ad damnum ipſius.* Paſc. 3 Car. C. B. *Thomas* and *Newark's* Caſe. *Hetley* 2.

30. Treſpaſs for chaſing of his Sheep. The Defendant pleaded, they were Treſpaſſing upon certain Lands, and he with a little Dog chaſed them out, and as ſoon as the Sheep were out of the Land, he called in his Dog; upon which the Plaintiff demurred. The point was ſingly this, *I chaſe the Sheep of another man out of my ground, and the Dog purſued them into the Land of another man which is next adjoyning. I chid my Dog; and the owner of the Sheep brings Treſpaſs for the chaſing of them.* It was conceived in this Caſe, That he might well drive out the Sheep with the Dog, and he could not withdraw his Dog in an inſtant; and when he ſaw the Sheep out of his own ground, he recal'd his Dog; and therefore the Court ſeemed to incline, That the Action of Treſpaſs did not lye. Hill. 22 Jac. B. R. *Miller* and *Hewreyes* Caſe. *Latch* 13. See *Popham* 161. the ſame Caſe; but afterwards it was adjudged, That the Action did lye. Set *Latch* 122.

31. Treſpaſs for breaking of a Ship, and carrying away of the Sails. The Defendant juſtified by a Warrant out of the Admiralty to Arreſt the Ship *ad ſalvo Cuſtodiend*, by force of which he entred the Ship, and carryed away the Sails. It was objected, That the breaking of the Ship was not anſwered, nor any Warrant given for carrying away the Sails. But it was holden by the Court, That the Plea was good, because the entry into the Ship is in Law a breach of it; as *Clauſum fregit* is. And 2. That he might carry away the Sayles, for that he could not *ſalvo Cuſtodiri* the Ship, unleſs he carryed away the Sayles of it. Mich. 2 Car. B. R. *Creamer* and *Tokeyes* Caſe. *Latch* 188.

32. Treſpaſs for breaking of his houſe at D. and carrying away 3000 l. in Money in Baggs. The Defendant pleaded, That at the procurement of the Plaintiff, he was Indicted at the Aſſizes holden in the County of *Nottingham*, before the Lord *Hobart*, for the ſame offence for breaking of an houſe *Burglariter*, and carrying away 3000 l. and he put himſelf upon the County, and J. S. was found guilty as Principal, and he as Acceſſary; and thereupon he prayed his Clergy, which was allowed him. And if Treſpaſs did now lye or not, was the Queſtion. It was objected ſtrongly, That the Action did not lye, becauſe here, by the Jury, the party is found a Felon, and againſt that the party ſhall not be admitted to ſay that it is a Treſpaſs. But it was the Opinion of the greater part of the Juſtices, That the Action did well lye, and that the Conviction upon the Indictment had not taken away the Plaintiffs Action of Treſpaſs. Paſc. 1 Car. B. R. *Markham* and *Cobb's* Caſe. *Latch* 164.

33. A man brought an Action againſt the Defendant in the Court of Verge, and recovered: Error was brought and aſſigned, becauſe the Plaintiff declared of a Treſpaſs in *St. Martins, infra juriſdictionem.* And upon Not guilty, a *Venire facias* was, *de St. Martin prædict:* and did not ſay, *Infra juriſdictionem.* And the ſame being a Court which varies upon the Remove of the King, it might be that St. *Martins* was *infra juriſdictionem* at the time of the Contract, and the Declaration, and the *Venire facias* might be divers moneths after; and therefore he ought to have ſaid, *infra juriſdictionem.* It was the Opinion of the Court, That it was Error, and the Judgment was Reverſed. Mich. 3 Car. B. R. *Thair* and *Foſſets* Caſe, *Latch*, 214.

Trover *and* Converſion.

1. ACtion upon the Caſe, the Plaintiff declared, That the Dean and Chapter of *Wyſm.* did Leaſe to him an houſe for years by Deed Indented; of which Indenture he was poſſeſſed, and afterwards loſt it, and by Trover it came to the hands of the Defendant; who ſold it, and converted the profits thereof coming, to his own uſe. The Defendant pleaded Not guilty. The Plaintiff gave Evidence, That the Leaſe was made to him, and to one B; and that the ſaid Indenture was delivered to the ſaid B; and afterwards B. dyed, and A. the Plaintiff was the ſole Owner of it. It was holden by the Court, To be good Evidence on the Plaintiff's part; and if he can prove the other part of his Declaration, *ſcil.* That the Indenture came to the

Defendants hands, that he ſhould recover. On the other ſide, It was given in Evidence, That the ſaid B. ſold to the Defendant his part and Intereſt in the ſaid Leaſe, and alſo the ſaid Indenture; ſo as now he was Tenant in Common with the Plaintiff, and then his Sale doth not give any Action to the Plaintiff. That alſo was holden by the Court, to be a good Evidence, without pleading of it. The Caſe further was, That A. being within age, his Father leaſed the Lands for 20. years; And afterwards the Son at his full age, upon the back of the Indenture, did Releaſe to the Defendant all his right. It was held by *Wray*, Chief Juſtice, in that Caſe, That when the Father leaſed, he did it as Guardian to his Son; and it was not any Ejectment of the Son, but it was a Leaſe in the behalf of the ſon, although the ſon might avoid it: and then when the Endorcement is *ut ſupra*, the ſame is a good Aſſignment. And upon this Opinion, the Plaintiff was Nonſuit. Paſch. 16 Eliz. B.R. *Leon.* 2. Part, 222.

2. Action upon the Caſe upon a Trover and Converſion to his own uſe, *per conditionem quibuſdam hominibus ignotis*. The Defendant pleaded, That the Goods were bailed to him, to bail over to J. S; to whom he had delivered them, *abſq; hoc*, that he did convert them to his own uſe, *per conditionem hominibus ignotis*. It was moved, That that matter is not traverſable: Which *Wray*, Chief Juſtice, *conceſſit*: For the Converſion to his own uſe, is the ground and cauſe of the Action, and not the ſale of the Goods. Mich. 19 Eliz. B.R. *Leon.* 2. Part, 13.

3. Action upon the Caſe: The Plaintiff declared, That he was poſſeſſed of certain Goods which came to the Defendant by Trover. The Defendant pleaded, That heretofore the Plaintiff brought Debt againſt the now Defendant, and demanded certain moneys; and declared, That the Defendant bought of him the ſaid Goods (whereof the Action is now brought) for the ſum then in demand. To which the Defendant waged his Law, and had it; by which *Nihil Capiat per Breve* was Entred. And demanded Judgment if Action. It was the Opinion of the Juſtices, That the ſame was no Barr in this Action for the waging of the [redacted] and the doing of it utterly diſproves the Contract ſuppoſed by the Declaration in the Action of Debt; and then the Plaintiff is not bound by the ſuppoſal of it, but is at large to bring his Action. It was adjudged for the Plaintiff. Trin. 29 Eliz. C.B. *Sands* and *Stoguards* Caſe. *Leon.* 2. Part, 37.

4. Action upon the Caſe, ſuppoſing, that certain Goods to have come to the Defendant's hands, and that he had waſted them; and ſhewed in what manner. The Defendant pleaded, Not-guilty. It was found, That the Goods came to the Defendant's hands, and that he had waſted them, but in another manner than the Plaintiff had declared. It was the Opinion of the whole Court, That upon this Verdict, the Plaintiff ſhould not have Judgment. Like to the Caſe, of an Action upon the Caſe upon Aſſumpſit, The Plaintiff declares upon a Promiſe upon one Conſideration; and the Jury find the promiſe, and that it was upon another Conſideration; in ſuch caſe, the Plaintiff ſhall not have Judgment. Hill. 26 Eliz. B. R. *Leon.* 3. Part, 91.

5. Note; in Trover and Converſion, the Converſion is traverſable, for that in the ſubſtance of the Action: For if one findeth Goods, and doth not convert them, no Action lyeth. And it was ſaid, That in *Leakes* Caſe, It was adjudged, That the place and time of the Converſion are to be alledged. And in the Principal, becauſe they were not alledged, the Bill abated after Verdict. Paſch. 30 Eliz. B. R. *Stranſhams* Caſe. *Cro.* 3. Part, 97.

6. Trover of 20 Barrells of Butter: the Plaintiff declared, That he *tam negligenter cuſtodivit*, that they became of little value. Adjudged, That the Action did not lye in this Caſe; for no Law compelleth him who findeth a thing, to keep it ſafely. But if a man findeth a thing, and uſeth it, he is anſwerable, for that it is a Converſion, and ſo it is if he miſuſeth it; but for negligent keeping, no Law puniſheth him. Hill. 33 Eliz. B. R. *Malgrade* and *Ogdens* Caſe. *Cro.* 3. Part, 219.

7. Trover and Converſion of Goods; The Defendant juſtified the taking of them Damage-Feaſants, *abſq; hoc*, that he converted them *aliter vel alio modo*. It was adjudged, That the Traverſe was not good, becauſe he confeſſeth not any Converſion, and the Plea amounts but to Not guilty. Mich. 38 Eliz. B. R. *Dee* and *Bacons* Caſe. *Cro.* 3. Part, 435.

8. Upon Trover of 300 Sheep, 1. *Decemb.* 36 Eliz. The Defendant pleaded, That he was Sheriff of the County of L. and that J. S. recovered againſt the Plaintiff 100 l; and thereupon had a *Fieri feciis*, which was delivered to him being Sheriff, 1. *Octobr.* 35 Eliz; whereupon 20. *Octob.* 35 Eliz. he took the ſaid Sheep; and upon 22. *Octobr.* 35 Eliz. ſold 104. of them for 40 l, parcell of the ſaid 100 l; and the other 192 remained in his hands *pro defectu Exceptorum*, and at the day returned the Writ; which is the ſame Converſion, *abſq; hoc*, that he converted them *aliter vel alio modo*. It was adjudged, That the Plea was not good, 1. Becauſe he doth not by his Plea confeſs

any

ing Converſion, and then the Traverſe is ill. 2. Becauſe the Converſion is laid to be 36 Eliz; and he juſtifies the Converſion in *Octabis*, 35 Eliz: ſo he meets not with the Plaintiff in the time, and *the alia vel alio modo*, ſhall never anſwer to the time, but to the manner of the Converſion. And thirdly, Becauſe he makes no Juſtification for four of the Sheep: It was adjudged for the Plaintiff. Mich. 38 Eliz. B. R. *Aſtue* and *Sandyſons* Caſe. *Cro.* 3. Part, 433.

9. In Trover, The Plaintiff declared as Adminiſtrator to J. S, and the Adminiſtration was granted to him by A. Official to the Biſhop of P; and ſhewed not that he was Ordinary of the Place, or that the granting of the Adminiſtration did belong unto him: This was moved for ſtay of Judgment after Verdict; but becauſe Preſidents were ſhewed, that ſuch Adminiſtration had been allowed, It was adjudged for the Plaintiff. Trin. 39 Eliz. B. R. *Lacy* and *Smiths* Caſe. *Cro.* 3 Part, 202.

10. Note; It was holden by the Court, That Executors may have and maintain Truver, and Converſion upon Trover and Converſion, in the time of the Teſtator. But then in the Action, the day of the Converſion, and the place of the Converſion are to be alledged. Mich. 37 Eliz. C. B. The Counteſſe of *Rutlands* Caſe. *Cro.* 3. Part, 377.

11. Trover and Converſion of 16 broad Cloths; The Defendant pleaded, That before the time of the Trover and Converſion, That one J. S. was poſſeſſed of theſe Goods, and ſold them to the Defendant; and before he had Notice, that they appertained to the Plaintiff, he ſold them to J. D: It was thereupon demurred, but the Caſe not Reſolved. Trin. 38 Eliz. B. R. *Gibſon* and *Gubyes* Caſe. *Cro.* 3. Part, 480.

12. Trover and Converſion of nine Oxen; The Defendant juſtified, by reaſon of a Sale in Market overt to him: And it was holden to be good, without alledging a property in them to be in him, who was the Vendor; Alſo it was ſaid, That he needs not to ſet forth, That Toll was paid; for that is not of neceſſity, and in many Towns No Toll is uſed to be paid; and if it ſhould, it is to be alledged on the other ſide to avoid the Sale, that there was not any Toll paid. Mich. 39 Eliz. B. R. *Campus* and *Byers* Caſe. *Cro.* 3. Part. 484.

13. In Trover, It was found by Verdict, That A. was poſſeſſed of theſe Goods, and that the Defendant found them, and that A. made the Plaintiff his Executor; and that the Defendant knowing them to belong to the Plaintiff, denyed to deliver them unto him upon his Requeſt. It was the Opinion of the whole Court in this Caſe, That it was a Converſion by the ſole denyal; and ſo it was ſaid, It was adjudged 23 Eliz. in this Court. Mich. 38 Eliz. B. R. *Eaſton* and *Newmans* Caſe. *Cro.* 3. Part, 495.

14. Error upon a Judgment in an Action of Trover and Converſion, in the Marſhalley: The Trover and Converſion were ſuppoſed to be at *Southwark*, within the Verge. And being adjudged, Error was brought, and aſſigned for Error, becauſe none of the Parties were of the Kings Houſhold; For it was ſaid, That Court cannot hold Pleas betwixt Strangers. *Popham* and *Fenner* held, That the Action well lay. *Gawdy* doubted of it: But they all held, That if the Action be not maintainable there, then Error lyes. Mich. 39 Eliz. B. R. *Aſhfil* and *Michelons* Caſe. *Cro.* 3. Part, 502. acc. *Cook* 6. Part, 20.

15. Trover of a Horſe, and ſelling him, and converting the Money to his own uſe: The Defendant confeſſed, it was the Plaintiffs Horſe, and that J. S. found him, and delivered him to the Defendant to reſtore upon Requeſt. Whereupon he delivered him to J. S. before the Action brought *abſq;* hoc that he ſold him, and conveyed the money to his own uſe. It was ſaid, That he ought in that Caſe to have pleaded, The general Iſſue, and not traverſe the Converſion. But the Court held, That in as much as he hath traverſed the Converſion, which is the ſubſtance of the Action, it was well enough. But yet becauſe he hath Traverſed, the Converſion of the Money to his own uſe, was not materially alledged in the Declaration, but is ſuperfluous, and by his Traverſe hath made it part of the Iſſue; the Traverſe in that Point was ill: and the Declaration being upon the Traverſe, It was adjudged for the Plaintiff. Hill. 38 Eliz. *Rott.* 424. B. R. *Kymmyſy* and *Bernards* Caſe. *Cro.* 3. 3. Part, 555.

16. Trover and Converſion of 25 l. the Caſe was: A Servant Factor for his Maſter, ſold 20 Quarters of Corn of his Maſters for 25 l. and converted the Money to his own uſe. It was adjudged, That Trover and Converſion did lye by the Maſter againſt the Servant; and *Hoderics* Caſe was vouched, Where it was adjudged, That if a Servant takes Gold from his Maſter, and changeth it into Silver, That by the Statute of 21 H. 8. cap. 11. The Maſter ſhall have Reſtitution of the Silver. But afterwards Error being brought in the Principal Caſe, It was Reſolved by all the Juſtices, That the Action did not lye for the money found, becauſe it was not in Bags. Mich. 40 Eliz. B. R. *Holliday* and *Fetters* Caſe. *Cro.* Part. 638. 661. and 746.

17. Note; It was Reſolved by the Court, That Trover and Converſion lyeth not of an Obligation: For that if the Defendant ſhuffle it,

and

and cancelleth it, an Action of Treſpaſs lyeth againſt him; and if he doth receive the Money upon it, and thereupon doth deliver up the Obligation to the Obligor, an Accompt lyeth againſt the Defendant for the Money. Mich. 41 Eliz. C. B. *Watſon* and *Smiths* Caſe. *Cro.* 3. Part, 723.

18. Trover of divers Goods, *Et inter alia de decem Capſis & Ciſtis Anglice*; Cheſts and Coffers, and of a Bag and 20 l. therein. The Defendant was found guilty *de quatuor Ciſtis et Capſis*, and of 13 l. parcel of 20 l. and of divers other parcels; and of the Reſidue, not Guilty. It was Objected, That the Verdict was ill for the incertainty, becauſe he doth not ſhew how many were Cheſts, and how many were Coffers. But the Juſtices held them to be all one; Then it was moved, That this Trover of money out of a Bag could not be good, becauſe it could not be known; and when he is found Not Guilty of the Bag, and Guilty of the Money, It is as if he had declared of the Converſion of the Money out of the Bag, which was ſaid, had been adjudged to be ill. But it was holden by the Juſtices in this Caſe, That an Action of Trover and Converſion of Money only was good enough: It was adjudged for the Plaintiff. Paſch. 43 Eliz. B. R. *Draycott* and *Piots* Caſe. *Cro.* 3. Part, 819.

19. Trover and Converſion of five Oxen: It was found by Verdict, That J. S. Bayliff to the Defendant took the ſame for Heriots due to the Defendant, whereas there were none due, and that he took them without any Commands of the Defendant; but afterwards the Defendant agreed thereunto, and converted them, and after that the Bayliff dyed. It was Objected, That he might have a general Action of Treſpaſs for them; and he cannot have this Action, which differs from it in Nature and Quality. But *Anderſon* and *Warburton*, Juſtices, held, That although Treſpaſs did lye, yet the Party might have this Action of the Will; for he hath his Election to bring either, as he may have Detinue or Replevin, for Goods taken by Treſpaſs; and one may qualify a Treſpaſs, but not encreaſe it, ſo as he hath his Election to make it a tortious priſell or not; yet if the Party from whom they were taken be attainted of Felony, he ſhall forfeit them, the Right and Property remains in him, and the Law ſhall adjudge him, untill he make his Election to the contrary, by bringing of a Writ of Treſpaſs. Paſch. 43 Eliz. C. B. *Biſhop* and Councellor *Montagues* Caſe. *Cro.* 3. Part, 824.

20. Trover of ten Angels, and converting of them: The Defendant pleaded, That there was a Wager betwixt the Plaintiff and one J. S, concerning the Quantity of yards of Velvet in a Cloke; and the Plaintiff and J. S, each of them delivered into his hand ten Angels, and each of them agreed, That if there was ten yards of Velvet in the Cloke, that then they ſhould be delivered to J. S, and if not, to the Plaintiff; and alledged, That upon meaſuring of the Cloke, it was found that there was ten yards of Velvet therein, upon which he delivered them to the ſaid J. S, which is the ſame Converſion: It was thereupon demurred. It was holden in this Caſe, 1. That Trover lay of Money out of a Bag or Cheſt. 2. It was holden, That the Plea was not good: For it may be, that the meaſuring was falſe, and therefore he ought to have averred *in facto*, That there were ten yards, and that it was ſo found upon the meaſuring thereof: And he might have pleaded the general Iſſue, and given all the matter in Evidence; for when he delivered it according to the intent of the Bargain, it is not any Converſion: It was adjudged for the Plaintiff. Hill. 48 Eliz. *Rott.* 116. B. R. *Ledeſham* and *Labrams* Caſe. *Cro.* 3. Part, 870.

21. Trover and Converſion of divers Goods amongſt others, *de uno Truuco, Anglice* a Trunk *ad Damnum* 20 l. It was found for the Plaintiff. It was Objected, That Damages were given for the Trunk, and there is no Trunk in the Declaration for *Truncum*, in Engliſh is a Block; but the Exception was diſallowed by the Court. See *Cook* 1. Part, 132. 2. Exception, becauſe the Value of every particular perſon was not ſet forth, as it muſt be in Waſte. *D dridge*, Juſtice, ſaid, That this Caſe is not like to the Caſe of Waſte; for there the value ought to be ſet upon every parcel, That it might appear, if it was Waſte or not; but here the Value is not material, becauſe he ſhall recover the whole in Damages. Trin. 22 Jac. B. R. *Harwood* and *Goodwins* was. Reports annexed to *Bendlowes* 145.

22. Trover againſt Husband Wife for a Converſion, during the Coverture by the Wife, and adjudged maintainable: For although a Feme Covert cannot make a Contract for Goods, nor be charged for them, yet ſhe may convert them. Hill. 1 Jac. B.R. *Newman* and *Chamyes* Caſe. *Noy* 79.

23. Action in the Nature of Trover and Converſion, as Executor of H, againſt the Defendant. And declared, That H. the Teſtator was poſſeſſed, &c. and made his Will, and made the Plaintiff his Executor, and that after the Death, &c. the Goods came to the hands of the Defendant, who converted them. Upon Not Guilty, found for the Plaintiff: In ſtay of Judgment, it was adjudged, That no Poſſeſſion was alledged in the Plaintiff; and no Trover ſuppoſed by the Defendant at all, but *ut ſupra*; that the Goods came to the Defendants hands, but doth not ſay by Trover: And it was ſaid, That the alledging of the Poſſeſſion in the

the Teſtator was Surpluſage, and ſo was the naming of the Plaintiff Executor, where the Goods came to the Defendant after the death of the Teſtator. But the Opinion of all the Juſtices was, That Judgment ſhould be given for the Plaintiff; becauſe, although it is not alledged by the Plaintiff, That he was actually poſſeſſed of them; yet upon the matter expreſſed in the Declaration, the Law ſaid ſo, becauſe the property draweth with it the actual poſſeſſion of them; upon which he may have Treſpaſs: It was adjudged for the Plaintiff. Mich. 3 Car. B. R. *Haſſes* and *Haſſens* Caſe. *Latch.* 214.

24. Trover was brought as Executor, and declared of a Trover and Converſion after the death of the Teſtator; and after Iſſue joyned, the Plaintiff was Non-ſuit; and thereupon the Defendant prayed Coſts, and had them by the Rule of the Court: And it was holden by the Court in this Caſe, That the naming of the Plaintiff Executor in the Action, was but Surpluſage; and ſo it was ſaid, it was adjudged in *Taylors* Caſe, in C. B. Hill. 2 Car. B. R. *Warfield* and *Warfields* Caſe. *Latch.* 220.

Tryal and *Miſ-tryal*.

1. DEbt upon Obligation, The Condition was: That if A. B. ſhall not appear at the next Court in F. to anſwer the Plaintiff; That if the ſaid A. found Surety to Anſwer before the 1. of *Octabry*, that then, &c. the Defendant pleaded, That A. did appear at the next Court. The Plaintiff Replyed, That he did not appear, *Et de hoc ponit ſe ſuper patriam.* Iſſue being upon it, It was found for the Plaintiff: It was moved, That it was a Miſ-tryal; for it ought to be tryed by the Record, and not *per patriam*, for that every appearance is upon Record. But the Court held the Tryal to be good; for it appeareth not that he appeared, and that the appearance is upon Record; but his Plea is, That he appeared ſuch a day in the Court, which may be, and his appearance not Entred. And *Wray* ſaid, That Appearances at ſuch a day may be Tryed by the Country, but Appearances generally ſhall be tryed by the Record: It was adjudged for the Plaintiff. Mich. 31 Eliz. B. R. *Hoe* and *Marſhalls* Caſe. *Cro.* 3. Part, 131.

2. In an *Ejectione firmæ*, at the *Niſi prius* in ha County, ſix of the Jurors were Challenged and treated, and the Jury remained *pro defectu Jurator:* At the next Aſſizes, a *new Diſtringas* was awarded againſt the firſt Jurors, as well thoſe who were treated, as the others: And at the *Niſi Prius*, the Iſſue was tryed by ſome of the Jurors of the old Panuel, & by others returned upon a *Tales de Circumſtantibus* awarded, but none of them who were treated before, tryed it: The Verdict found for the Plaintiff. It was moved in ſtay of Judgment, That the *Diſtringas* was ill awarded, for it ought not to have been of them who were treated. But the Court held, That in regard it was but a judicial proceſs; it was the default of the Court, and ſhall not turn to the prejudice of the Plaintiff; and it was a good tryal at the Common Law, in regard the Tryal was by lawful Jurors: alſo clearly it was helped, being a miſ-awarding of proceſs by the Statute *Of Jeofails*: It was adjudged for the Plaintiff. Mich. 38 Eliz. *Whitby* and *Marſhalls* Caſe. *Cro.* 3. Part, 429, 430.

3. *Ejectione firmæ*, The Plaintiff declared upon a Leaſe for years: The Jury find, That the Defendant had nothing in the Land, when he made the Leaſe to the Plaintiff. It was holden, That the Jury in that Caſe had found for the Plaintiff; for that a Jury may find matter of Eſtoppel, as well as other Matter, and that they are bounden to do upon penalty of Attaint. Trin. 31 Eliz. C. B. *Suttons* Caſe. *Cro.* 3. Part, 140.

4. Debt upon an Obligation: The Defendant pleaded, That at W, in the County of W, there was a Communication betwixt them for lending of Money; and that the Plaintiff ſhould have ſo many Oxen, which were of ſuch value above 10 l. *per annum*; and for the performance of this uſurious Contract, the Obligation was made, and pleaded the Statute of 13 Eliz. to avoid the Bond. The Plaintiff ſaid, That it was duly made, and upon good Conſideration, *abſque hoc*, that it was made upon ſuch an uſurious Contract. This Iſſue was Tryed in the County of W, and found for the Plaintiff: It was moved, That the Iſſue was miſ-tryed, for it ſhould be tryed in *London*: For the Iſſue is, That the Bond was not made upon an uſurious Contract, and the Bond was ſuppoſed to be made at *London*: It was Reſolved, That the Tryal was well had, for that it ſhall be Tryed where the uſurious Contract was ſuppoſed, and not where the Bond was made. Trin. 39 Eliz. B. R. *Kinneſley* and *Smarts* Caſe. Mich. 32 Eliz. B. R. *Cro.* 3. Part, 195. Hill. 28 Eliz. B. R. *Sibthorp* and *Tamers* Caſe. Paich. 32 Eliz. *Payn* and *Wilkinſons* Caſe. B. R. acc.

5. Note; It was agreed by the Juſtices, That if an Alien bringeth an Action as Adminiſtrator, the

the Tryal ſhall not be *per mediatatem Linguæ* unleſs the Inteſtate were alſo an Alien. H. 11. 34 Eliz. C. B. *Wingel* and *Minkes* Caſe. *Cro.* 3. Part, 275.

6. Action of Trover at P, in the County of *Hunt.* The Defendant pleaded a Bargain and Sale at *Royſton* in the County of *Hartford*, in Market-Overt, whereby he traverſed them at P, in the County of *Hunt.* and that J. S. there ſtole them from him; and by Covenant betwixt him and the Defendant at P, in the County of H, he ſold them to the Defendant. It was tryed in the County of *Hunt.* and found for the Plaintiff: It was moved, To be a Miſ-tryal; for it ought to have been tryed by a Jury of the County of *Hartford*, at the leaſt by a Jury of both Counties. But the Juſtices held the contrary; For the Sale is confeſſed, and the Iſſue is upon the Covenant, which is well tryed by a Jury of the County of *Hunt.* and it was adjudged accordingly. Mich. 40 Eliz. B. R. *Harbing* ond *Shermans* Caſe. *Cro.* 3. Part, 510.

7. Error of a Judgment in C.B. becauſe there were but 23 of the Names returned by the Sheriff upon the Pannel, where there ought to have been 24; and the Tryal was by 10 of them, and a *Tales de Circumſtantibus.* But becauſe this default was in the Names of the Jurors, upon the Writ of *Habeas Corpora*, and not upon the *Venire Facias*, in which Writ were 24 Names, It was by the Rule of the Court amended. Mich. 40 Eliz. B. R. *Pawlett* and *Chriſtmas* Caſe. *Cro.* 3. Part, 586.

8. Debt upon an Obligation, conditioned for the payment of 100 l. at the Plaintiffs Houſe in *Cheapſide* the 21th. of *Jan.* next enſuing the date, &c. The Defendant pleaded, That he paid the Money at the Defendants Houſe in *Cheapſide* 21. of *Jan. Secundum formam Conditionis prædict.* and becauſe it was not alledged in what Pariſh or Ward, it was adjudged No Plea, becauſe there cannot be a *Venire facias* awarded to try it. Mich. 41 Eliz. C. B. *Forth* and *Harriſons* Caſe. *Cro.* 3. Part, 732.

9. *Ejectione Firmæ*; The Defendant pleaded to Iſſue. A *Venire facias de mediatate Linguæ*, was adjudged upon Suggeſtion, that the Defendant was an Alien; At the *Niſi Prius*, a *Tales de Circumſtantibus* was awarded, and it was found for the Plaintiff. In ſtay of Judgment, It was ſaid, That the *Tales* was not awarded *de mediatate Linguæ*, for that it ought to purſue the *Venire facias*; and the *Venire facias* was not well returned, becauſe Alliens and Denizens were returned together, whereas there ought to have been twelve peacht by themſelves: And of that Opinion were the Juſtices, and whereupon Judgment was ſtayed. Paſch. 43 Eliz. B.R. *Goodwin* and *Mountenaugly's* Caſe. *Cro* 3. Part, 818. 84.

10. *Ejectione firmæ*; The Defendant pleaded a Surrender of a Copyhold by the hand of J. S, then Steward of the Mannor: Iſſue was joyned, *abſq; hoc* that he was Steward. This was holden by the Court, To be no Iſſue; for the Traverſe ought to have been general, that he did not Surrender; for if he were not Steward, the Surrender is void; and ſo it is of a Surrender into the hands of the Tenants of the Mannor. And in this Caſe, It was holden by the whole Court, That where Iſſue is taken upon a Surrender, it ſhall be tryed where it was alledged to be done, and not where the Mannor is, of which the Copyhold is holden. Mich. 34 Eliz. B. R. *Wood* and *Butts* Caſe. *Cro.* 3. Part, 260.

11. Aſſumpſit; Whereas the Defendant at *London, in Warda de Cheape*, in conſideration that the Plaintiff would give, &c. at *London, in Warda prædict. ſuper ſe Aſſumſit*: Upon *Non-Aſſumpſit*, the *Venire facias* was *de Parochia de Arcubus in Warda de Cheape.* Whereas there was no Pariſh before mentioned in the Declaration: This matter was taken in Exception to the Declaration, that the Promiſe was layed in a Ward, and not in a Pariſh, within the Ward, as it ought to be. It was ſaid by the Court, That Aſſumpſit, or other fit matter is uſed to be layed in a Pariſh; and if the Tryal hath been in an other Pariſh, it is not good. And in this Caſe, It was ſaid, That a *Venire facias* may be of a Town, Pariſh, Mannor, or other place known; but not of a City, County, or Ward: And it was agreed, That in the Principal Caſe the Plaintiff could not have a *Venire facias de Novo*, but he muſt begin again; for the fault was in his Declaration, and not by the Award of the Court only. Mich. 34 Eliz. B. R. *Bradiſh* and *Biſhops* Caſe. *Cro.* 3. Part, 260.

12. The Plaintiff in the Spiritual Court ſued the Defendant, for Tythes within the Pariſh of C: The Defendant ſaid, That the Tythes were in the Pariſh of A, and the Parſon of A. came *pro intereſſe ſuo*; and thereupon they proceeded to Sentence, and that was given againſt the Defendant, who now ſhewed a Prohibition. The Queſtion was, If within ſuch a Pariſh or ſuch a Pariſh be Tryable by the Law of the Land, or by the Law of the Church. *Wray*, Chief Juſtice, ſaid, It had been taken, That it was tryable by the Common Law. And *Fenner*, Juſtice, ſaid, The Pope hath not diſtinguiſhed of the Pariſhes; but he hath Ordained, That Tythes ſhall be paid within the Pariſh. Trin. 28 Eliz. *Stranſham* and *Collingtons* Caſe. *Leon.* 3. Part, 129.

Venire

Venire Facias.

1. IN Treſpaſſe, the Plaintiff declared, of taking of certain Corn ſevered from the 9. parts at E. in the County of W; The Defendant as to part of the Tythes pleaded, Not guilty; and as to the Reſidue, pleaded a Deviſe of the Parſonage of which to the Defendant at D. in the ſame County: and to enable the Deviſe of the Tythes in E, alledged E. to be a Hamlet of D, to the intent that all the Tythes might paſſe: And upon *Non Deviſavit*, being at Iſſue, the Viſne was only of D: and found for the Plaintiff, That the Plaintiff *Non Deviſavit*; and the other Iſſue, Of Not guilty, they found for the Defendant. In ſtay of Judgment, It was moved, That the Viſne was miſtaken, becauſe it was of *Dtantum*, and not of E: and that thoſe of D. could not find or try a matter in E: It was the Opinion of the Court, That the Viſne was miſtaken: For when the Plaintiff declareth of a Treſpaſſe in E, the ſame by a general Intendment is preſumed to be of a Town from which Town, the matter which is there in Iſſue ought to be tryed: and although the Defendant hath alledged E. to be a Hamlet, yet that is only to enable the Deviſe, and ſhall not extend to the Iſſue before; which is, Not guilty for part: for in this Iſſue the parties are agreed on both ſides, That E. is a Town, and the ſame is a perfect Iſſue by it ſelf. But if the Defendant to all the Treſpaſs had pleaded his excuſe by the Deviſe, and had alledged E. to be a Hamlett of D, and that only had been in Iſſue; there the Viſne awarded in the manner as it is, had been good. But in the principal Caſe, It was adjudged, That the *Venire* was miſ-awarded. And a *Venire de Novo* awarded. Mich. 3 Jac. B. R. *Lappworth* and *Wells* Caſe, *Yelverton*, 77. *Brownlow*, 1. Part, 203. the ſame Caſe.

2. Treſpaſſe for breaking the Plaintiff's Cloſe called G. in *Woodthorp*, in the County of D: The Defendant pleaded, That the Cloſe was known as well by the name of G, as by the name of D; and that it was, and had been, time out of mind, parcell of the Manor of *Wigenworth*; and pleaded his Freehold in the Manor. The Plaintiff maintained his Declaration, and Traverſed, The place where, &c. was not parcell of the Manor. Upon which they were at Iſſue; and the *Venire* was awarded of *Woodthorp* only. It was the Opinion of the Court, That it was a Miſ-tryall, for that the *Venire facias* ought to have been as well of the Manor, as of *Woodthorp*: for although the parties be agreed, that the place where the Treſpaſſe was committed, was in *Woodthorp*: Yet that being ſuppoſed to be parcel of the Manor of W; the Viſne of the Manor by intendment may have a more perfect and better knowledg of it then the Village of *Woodthorp* only. And a *Venire facias de Novo* was awarded to try the Iſſue. Mich. 8 Jac. B. R. *Knivcton* and *Royles* Caſe. *Brownlow*, 1. Part, 210.

3. Error of a Judgment in Debt in B. R: The firſt Error was, That the parties being at Iſſue, the Awarding of the Roll was of a *Venire facias*, returnable *die Martis poſt Craſtin. Purificationis*: and the *Venire facias* was made returnable, *Die Sabbat. poſt Octabis Purificationis*. The ſecond Error, That that *Venire facias* did bear date the 12. day of Feb. and was returnable *die Sabbat. poſt Octabis Purificationis*; which is before the *Teſte*: But it was the Opinion of the Court, That they being but in judicial Proceſs, & the default of the Clerk might be amended: and were Ruled to be amended accordingly. And the Judgment was affirmed. Trin. 2 Car. C. B. *Aylſworth* and *Chadwells* Caſe, *Cro.* 1. Part, 27. See Mich. 3 Car. in Exchequer. *More* and *Hodges* Caſe, *Cro.* 1. Part, 64. acc.

4. Error of a Judgment in *Ejectione Firmæ*. The Error aſſigned, For that J. H. *apud* D, demiſed an houſe, and 40 Acres of Lands in D, *per nomina omnium Meſſuagiorum terrarum et tenementorum ſuorum in Parochia de D. aut alibi in Com. Kanc.* Upon Not guilty, the Plaintiff ſurmiſed, That D. is in *Romney* within one of the Cinque-Ports, *ubi Breve Domini Regis non currit*; and that A. is the next Village adjoyning thereunto in the County of K. and prayed a *Venire facias* upon it. And thereupon a *Venire facias* was awarded *de Visneto de A*: And by them it was found for the Plaintiff. It was aſſigned for Error, That the *Venire facias* was miſ-awarded; and that it was a Miſ-

tryall not helped by the Statute: For the Surmiſe ought to have been, That D. is within the Cinque-Ports; for D. may be a Village of it ſelf, and the *per nomina omnium terrarum, &c. in Parochia de D*, may be the ſame place. But the Court held, That the Town and Pariſh are intended all one, unleſſe the contrary be ſhewed; and that it was not Error. The Judgment was affirmed, Hill. 4 Car. B.R. *Esch* and *Gilberts* Caſe, *Cro.* 1. Part, 102.

5. Error of a Judgment in N: The Error aſſigned was, Becauſe in Aſſumpſit there, the Defendant pleaded *Non Aſſumpſit*; yet the *Venire* was, *de Vicineto de N*: where it ought to be only, *de N*, for that they have not any Juriſdiction out of N: But upon View of divers Preſidents, That the *Venire facias* had been holden to be good both wayes, The Court was of Opinion, although the Corporation do not extend their Juriſdiction out of the Town; yet the *Venire* being awarded *de Vicineto de N*, That thoſe of the Town might be well returned to try the Iſſue joyned. Wherefore the Judgment was affirmed. Trin. 16 Jac. B.R. *Walter* and *Manſells* Caſe, *Cro.* 2. Part, 493.

6. *Ejectione Firmæ*, of a Leaſe of R. A, and declared of a Leaſe made at C, *in Parochia de C. prædict.* Upon Not guilty found againſt the Defendant, It was ſaid, That the *Venire* was, *de Parochia de C*; where it ought to be, *de Villa de C*: But the Court held it good; for that the word, *prædict.*, made them both one. Paſch. 12 Jac. B.R. *Vele* and *Fields* Caſe. *Cro.* 2. Part, 340.

7. Error of Judgment in C. B. becauſe an Action was brought againſt Two, and they both joyned Iſſue; after which one of them dyed, and notwithſtanding a *Venire facias* was awarded to try the Iſſue betwixt the Plaintiff and both the Defendants: But the Court held it to be no Error; for although a *Venire facias* iſſued againſt a dead perſon, yet one of the Defendants being alive, it is ſufficient, and the Judgment was affirmed. Mich. 11 Car. B. R. *Tyffyns* Caſe. *Cro.* 3. Part. 308.

8. Treſpaſs; That he was ſeiſed of the Manor of R. in R, and L. and he, and all thoſe, &c. have had Eſtrayes within the Mannor, as to the ſame belonging; and that an Ox coming as Eſtray into the Mannor, the Defendant at L. aforeſaid took and carried it away. Upon Not Guilty, found for the Plaintiff; It was ſaid, That the *Venire facias* was ill awarded; for it is of L, whereas it ought to be of the Mannor of R, or from both Towns, *ſcil.* R. and L: But the Exception was not allowed, becauſe the Preſcription doth not come in Queſtion; but the Treſpaſs being alledged in L, and he pleading, Not guilty, which might be, for that he never took the Ox: therefore the *Venire facias* was well awarded. Trin. 16 Jac. B. R. *Dalton* and *Rumards* Caſe. *Cro.* 2. Part, 513.

9. Treſpaſs, For taking two Cows in B, Meade in B; The Defendant pleaded, That the Meade contained 10 Acres, whereof half an Acre was Copyhold, parcel of the Mannor of B. in B; and that there was a Cuſtom, That every Copyholder having any Copyhold with the Acre, ſhould have Common from ſuch a day to ſuch a day in all the reſidue of the 10 Acres; and ſhewed, That he was Copyholder of a Rood in the Meadow, and ſo juſtified. The *Venire* was, *De vicineto Manerii*; where it ought to have been, *de B*, although the Iſſue was upon the Cuſtom of the Mannor, and ſuch was the Opinion of the Court: For the Mannor being alledged to be the Mannor of B. in B, the *Venire facias* ought to have been from B: A *Venire de Novo* was awarded.

10. Treſpaſs, For breaking his Cloſe; The Defendant juſtified by reaſon of a Way by Preſcription from his Tenement in D, to the Town of S; Iſſue was taken, *De injuria ſua propria*; and a *Venire facias* awarded from the Town of D. only, and tryed, and found for the Plaintiff. It was ſaid, It was a Miſ-tryal, for that the *Venire* ought to be from D. and S: It was ſaid by two of the Juſtices, That was true, if the Preſcription to have away, had been traverſed; but by this Replication, the Way is confeſſed, and it may be, he brake his Cloſe, without uſing the Way. Two of the other Juſtices were againſt that, wherefore it was detained. Mich. 38 Eliz. B. R. *Atwool* and *Ballards* Caſe. *Cro.* 3. Part, 427

11. Treſpaſs of an Ox taken in D, in *Com. Kanc.* The Defendant juſtified, becauſe the Land was holden of him, as of his Mannor of W. in the County of S; and that the Cuſtom there is, That every Tenant ſhould pay the beſt Beaſt for an Herior, and that the Lord might ſeize it in any place. The Iſſue was upon the Cuſtom, and the *Venire* was, *De vicineto Manerii*, and found for the Plaintiff. Exception, That it ought to have been as well from the Land holden, as from the Mannor; but diſallowed: for that the Iſſue being upon the Cuſtom, it ſhall be from the Mannor only. Mich. 43 Eliz. B. R. *Burſly* and *Challenors* Caſe. *Cro.* 3. Part, 855.

12. Error in the Ex. Chamber, of a Judgment in B. R. becauſe the *Venire facias* was awarded to the Coroner, for Conſanguinity of the Sheriff, and it was Returned by the Coroner; and after a *Tales* was awarded, and it was Returned by the Sheriff, and a Verdict found, and Judgment. It was the Opinion of all the Juſtices, That it was Erronious; and the Judgment was Reverſed. Trin. 39 Eliz. C.B. *Morgan* and *Ayres* Caſe. *Cro.* 3. Part, 574.

18. Battery,

13. Battery; One of the Defendants pleaded, Not guilty, the other juſtified: The Iſſue againſt him, was, *De ſon tort demeſne*, one *Venire facias* was awarded to try both thoſe Iſſues: It was the Opinion of the Court, That it was well awarded. Mich. 44 Eliz. Exchequer Chamber. *Conb* and *Cawves* Caſe. *Cro.* 3. Part, 866.

14. Action upon the Caſe, That he was ſeized in Fee of a Mannor in S, and that he and all thoſe whoſe Eſtate, &c. had had a Water-Courſe running by three Towns, *viz.* A. B. and C, to his Mill; and that the Defendant cut the Banks of the Water-Courſe in A, whereby he loſt the Profit of his Mill. Upon Not guilty, found for the Plaintiff: It was moved, That the *Venire* was only from A, where the cutting was, whereas it ought to have been from all the three Towns. But the Exception was diſallowed, becauſe the Iſſue is not Guilty; but if it had been upon the Preſcription, it had been otherwiſe. Paſch. 42 Eliz. B. R. *Leedes* and *Shakerleys* Caſe. *Cro.* 3. Part, 751.

15. In Treſpaſs, after Verdict; It was moved, That the *Venire facias* was made returnable three dayes after the Term, and a Diſtringas was awarded, and the Jury taken thereupon. It was the Opinion of the Court, That it was ill, and that it was not helped by the Statutes of *Jeofails*: For if there had been No *Venire*, It had been holpen; but they ſaid an ill *Venire* upon Record, is not helped by the Statutes; the Judgment was Reverſed. Paſch. 40 Eliz. B. R. The Earl of *Worceſter* and *Paddens*. *Cro.* 3. Part, 605.

16. *Ejectione Firmæ*, upon Not Guilty, found for the Plaintiff. In Arreſt of Judgment moved, That the *Venire facias* was *ad faciendum juratores in placito Tranſgreſſionis*; whereas it ſhould be *in placito tranſgreſſionis et Ejectionæ Firmæ*: It was the Opinion of the Court, That it was a Miſtryal, and not aided by any of the Statutes. For *Non conſtat*, but that there may be an Action depending, and that this *Venire* is awarded thereupon; and although it had been ſaid an *Ejectione Firmæ* is but a Plea of Treſpaſs in its nature; Yet the Opinion of the Court was, That the Actions were ſeveral, and therefore the *Venire facias* ought to have been accordingly. But if there had not been any *Venire facias*, it had been holpen by the Statute of 32 H. 8. Mich. 40 Eliz. B. R. *Clark* and *Clarks* Caſe. *Cro.* 3. Part, 622.

17. Debt upon the Statute of 2 E. 6. for not ſetting forth of Tythes of Lands lying within the Pariſh of H. *parva*; The Defendant Pleaded, *Nihil debet*: After Tryal and Verdict, Exception was taken to the *Venire facias*, becauſe it was from H. *parva*, and not *de parochia de H. parva*: But the Court was of Opinion, That it might be either of the Town, or H. *parva*, becauſe both the Town and Pariſh were named in the Record. Mich. 14 Jac. C. B. *Rawkey* and *Iſteds* Caſe. *Brownlow* 1, Part, 52.

18. Treſpaſs againſt P. and his Servant, for breaking his Cloſe, and taking a Cow at D, in the County of B; One of the Defendants pleaded, Not Guilty. The Servant pleaded, That the Plaintiff held of Sir P.P, as of, &c. in the County aforeſaid; and for Service behind, by the Command of his Maſter, he ſeiſed the Cow. The Plaintiff traverſed, &c. and one *Venire facias* was awarded out of both the Villages: It was moved, That there ought to have been ſeveral *Venire facias*; becauſe the Iſſue is of things in ſeveral places. But the Court held, That one Jury only ſhould be Impannelled, and one Viſne only ſhould be awarded out of both places; and it is all one as if it had been in one place: but it had been otherwiſe, if in ſeveral Counties. Mich. 11 Jac. C. B. *Fuller* and Sir *Peter Pettowortis* Caſe. *Brownlow*, 1. Part, 229.

19. *Quare Impedit* brought for the Church of B; The Iſſue was, There was no ſuch Church; and the *Venire* was, *De Viſne de B*: Exception was taken, becauſe it was not of the body of the County. But becauſe in the Declaration, it was alledged, That one dyed at B. aforeſaid: It was holden, That every place alledged, ſhall be intended to be a Town; and by the uſer of the Writ, it is in Law preſumed to be a Pariſh; and then, if there be a Pariſh and a Town, if the *Venire facias* be either of the Pariſh or Town, it is good, and it is a good Writ to demand *Mineium de D*, with the Appurtenances. Trin. 16 Jac. C. B. *Cuppell* and *Taxties* Caſe. *Brownlow*, 1. Part, 161.

Verdict.

1. NOte, It was agreed by all the Juſtices of the Common Pleas, That no Verdict at large can be taken in any Action, but where the Iſſue is joyned upon the general Iſſue, and not where the Iſſue is joyned upon a Special point or matter with an *abſque hoc*, &c. Mich. 1 and 2 Ma. *Bendlowes* 27.

2. In *Ejectione firme*, the Caſe was; The Maſter and Schollers of *Linckford* were ſeiſed of the Mannor of H. in the Town of *Laberhurſt*, which Town extended into the County of *Suſſex*, and alſo into the County of *Kent*, and they made a Leaſe to one J. S. of all their Lands in the Town of *Laberhurſt*, except the Mannor of H. whereas in truth they had not any Lands in the ſaid Town but the ſaid Mannor; And the *Ejectione firme* was brought of that Mannor in *Kent*, and from thence the Viſne came, all which matter was found by Verdict. Exception was taken to the Verdict, becauſe they found generally, That the Maſter and Schollers had not any thing in the ſaid Town of *Laberhurſt*, but the ſaid Mannor; whereas they ought to have ſaid, That they had not any thing in the ſaid Town in the County of *Kent*; For they could not take notice what Lands the Maſter and Schollers had in that part of the Town which was in the County of *Suſſex*; And of that Opinion the whole Court ſeemed to be. But Quære, for the point was not Reſolved. Hill. 15 Eliz. C. B. The Maſter and Schollers of *Linkfords* Caſe. *Leon.* 3. Part, 64.

3. Waſte by Husband and Wife againſt P. and declared, That P. was ſeiſed, and enfeoffed certain perſons to the uſe of himſelf for life, and after to the uſe of the Wife of the Plaintiff and her Heirs. The Defendant pleaded, That the ſaid Feoffment was made to the uſe of himſelf and his Heirs in Fee, *abſque hoc*, that it was to the Uſes in the Count. It was found by Verdict, That the Feoffment was to the Uſes contained in the Count; but they further found, That the Eſtate of the Defendant by the Limitation of the uſe, was priviledged with the Immunity of Waſte, *ſcil.* without Impeachment of Waſte. It was ſaid in this Caſe, That the Plaintiff ſhould not have Judgment, becauſe it appeareth upon the Verdict, That the Plaintiff had no cauſe of Action. But the Opinion of the Juſtices was, That in this Caſe, Judgment ſhould be for the Plaintiff: For that in no Caſe the party ſhall have advantage of that Liberty of impunity of Waſte if he doth not plead it, and the Jurors are not to meddle with any matter which is not in Iſſue; and, if they do, it is but matter of Surpluſage, and to no purpoſe; and Judgment was given for the Plaintiff. Paſc. 25 Eliz. C. B. Rott. 602. *Pepy's* Caſe. *Leon.* 3. Part, 80, 81.

4. Treſpaſs for breaking of his Cloſe, and beating of his Servant, and carrying away of his goods. Upon Not Guilty, the Jury found, That J. S. was ſeiſed of the Land where, &c. and leaſed the ſame to the Plaintiff and one A. which A. aſſured his moyety to C. by whoſe Commandment the Defendant entred. It was moved, That Tenancy in Common could not be found by Verdict, but ought to be pleaded. But the Court was clear of Opinion, That it might be given in Evidence. Then it was moved againſt the Verdict, That it did not extend to all the points in the Declaration, but only to the breaking of the Cloſe, without enquiry of the Battery: And for that cauſe it was holden by the Court, That the Verdict was void, and a *Venire facias de novo* awarded. Mich. 26 Eliz. B. R. *Roſſes* Caſe. *Leon.* 3. Part, 83.

5. *Ejectione firme*, it was found, That the Abbot of St. *Peters of Glouceſter*, ſeiſed of the Barn and Tythes in Queſtion, let them by Deed under their Covent-Seal for 60 years; afterwards the Abby was Diſſolved, and the Barn and Tythes given to the Biſhop of *Glouceſter*. Afterwards J.S. Biſhop of *Glouceſter* let them to the three *Chenyes* by Indenture, rendring the Ancient rent for three lives. In the end of the Indenture, the Confirmation of the Dean and Chapter was recited, which was of a Leaſe made by R. S. but the Jury did not *in facto* find, That the Dean and Chapter did Confirm it, nor found their Deed *in hæc verba*, but only recited it as a thing annexed to the Indenture, and found expreſly the Leaſe made to the Husband of the Plaintiff by the now Biſhop. It was prayed in this Caſe, That the Verdict might be amended, for the note given to the Clark of the Aſſiſes was to find the Confirmation expreſly, and of a Leaſe made by J. S. But the Court held, That after the Verdict returned in Court, it could not be amended by any ſuch ſuggeſtion; For then all Verdicts might be prayed to be amended. But if any Miſpriſion was, ſuggeſtion ought to be made of it before the Verdict was returned; but now it was too late to have it amended. It was adjudged for the Plaintiff. Mich. 31 Eliz. B.R. *Eliz. Maſſington* and *Try's* Caſe. *Cro.* 3. Part, 111.

6. *Ejectione firme* of 30 Acres of Land in D. and S. The Defendant was found Guilty of 10 Acres, and *Quoad reſiduum*, Not Guilty. It was moved in ſtay of Judgment, That it is uncertain in which of the Towns the Lands lay, and therefore

fore no Judgment could be given, nor any Execution had. But the Exception was disallowed by the Court; for the Sheriff shall take his Information from the party, for what 10 Acres the Verdict was, Pasch. 38 Eliz. B. R. *Portman* and *Morgans* Case. *Cro.* 3. Part, 465.

7. Assumpsit: The Plaintiff declared; Whereas there was Controversie between J. S, who pretended to be Lord of the Soile, and the Inhabitants of B. concerning Common *in ripa maritima*, which J. S. claymed to be his Soil; and the Tenants claimed a Liberty there, and to cut grasse, make it into Hay, and carry it away: And J.S. enclosed the said Soil: That the Plaintiff being a Tenant, entred upon the place enclosed; And thereupon J. S. brought Trespass against him. The Defendant in Consideration, That the said Defendant in the said Action of Trespass would plead a Plea in the maintenance of the Title of Common, he would conditionally pay to him half his Expences: or if he failed of that, he would pay him 40 l: And the Plaintiff further declared, That he being Defendant, pleaded Not guilty in the said Action of Trespass: which was found for him, and that he expended so much money; the half of which, the Defendant refused to pay to him. The Defendant pleaded, *Non defendit scilam*, in maintenance of their Common: which was found against him. It was moved, In stay of Judgment, because he ought to have pleaded such a Plea by which the Title of Common might come in Question: but when he pleads, Not guilty, he disclaims the Title of Common. It was the Opinion of the Justices in this Case, That although the Verdict hath found the Assumpsit, and so admitted, that that Plea was for Maintenance of the Title; Yet it was said, That that shall not bind the Court: For if a Verdict finds matter which is repugnant, or a thing which cannot come in Question, it shall not bind the Court. Quære, the Case was Adjourned. Pasch. 3 Car. C.B. *Hambleton* and *Balls* Case. *Hetley*, 4.

8. In Trespasse, The Defendant pleaded, That the Land was Copyhold, parcell of the Manor of A; and that the Custome there, is, That if a Copyholder in Fee hath a Wife at the time of his death, and two sons or more, that the Wife shall have that Land during her life as Free-bench: And that if the eldest son dyeth living the wife, although he hath Issue, his son shall not have it, but the second son. And shewed, That A. B. Grandfather of the Plaintiff, was a Copyholder of the Manner, and dyed before his Wife, having Issue the Plaintiff's Father, and one J. B. his second son; and that the Wife held her self in her Free-bench, and that the eldest son dyed living the wife: And that afterwards J. B. the younger Son was admitted, and surrendred to the Defendant's use. Issue was taken upon the Prescription; The Jury found the Custome as before, and the younger Son should have it, unlesse the eldest Son was admitted thereunto as to the Reversion, or made Fine for it with the Lord in his life-time. Upon this Verdict, It was moved, That it was found for the Plaintiff; For the Custome is not found in that manner as he pleaded it; and therefore it is found against him who pleaded it. And of that Opinion was all the Justices, That the Custome found, is not the Custome put in Issue. Wherefore the Court was clear of Opinion, That the Verdict was found against the Defendant. But then it was moved, That here was not any Verdict found upon that Issue; For they conclude their Verdict, *Et sic &c.* they found the Defendant guilty: if otherwise, not guilty: And so there was not any conclusion of the Point in Issue. And upon View of the Record, such was the Opinion of the Justices. Wherefore it was said to be insufficient, and a *Venire de novo* was awarded. Mich. 38 Eliz. B. R. *Farrasla* and *Hays* Case. *Cook* 3. Part, 415.

9. *Ejectione Firmæ*. The Case was; The Dean and Chapter of *Ev.* made a Lease of Lands for years, rendring Rent payable at their Chapter-House in E; and for want of payment, the Lease to be void. The Lessee assigned his Estate to the Defendant; the Rent was arrear and not paid, being demanded at the Chapter-House. The Dean and Chapter made an Indenture of Lease for 21. years to the Plaintiff of the same Lands, and in their Chapter-House put their Seal to it, and made a Letter of Attorney to J. S. to Enter and delivered the Deed upon the Land; which he did accordingly. There were many Exceptions taken in this Case, 1. That this Lease was not good. Amongst the rest, One Exception was, For that the Attorney had not executed his Warrant according to his Authority; For it was, That he should Enter, and claim the Land to the use of the Co-poration, and then to deliver the Lease: And the Jury have found, that he delivered it upon the Land, but found not, that he had Entred and claimed. But the Exception was disallowed by the Court; For in a Special Verdict, the Circumstances of every thing need not to be so strictly found, as it is to be pleaded. And it being found, That by virtue of the Warrant, he delivered the Deed upon the Land, it shall be intended, That he pursued the Authority given to him by the Deed, duly. And whereas in this Case it was said, That the Rent should have been demanded at the Land; and it is found, that it was demanded at the Chapter-House; It was Resolved, That the Rent

was

was well demanded, for that the Demand at the place where it is appointed to be paid, is ſufficient. Hill. 32 Eliz. B. R. *Willis* and *Jermins* Caſe, Cro. 3. Part, 167.

10. Note, by the Law, in Cauſes at the Suit of the parties, The Jurours may when they are agreed (if the Court be riſen) give a Privy Verdict before any of the Judges of the Court; and then they may eat and drink: and the next morning they may in open Court, either affirm, or alter their Privy Verdict, and that which is given in Court ſhall ſtand. But in Criminal Cauſes which concern life and member, the Jury can give no Privy Verdict, but muſt alwayes give it in open Court, and cannot be diſcharged by the Court, or any other, untill they have given it accordingly. *Cook* 1. Part, *Inſtitutes*, 158.

11. A Special Verdict, or a Verdict at large, may be given in any Action, and upon any Iſſue, be the Iſſue general or Special, becauſe the truth of the Caſes may be the better diſcovered and diſcuſſed, and Juſtice done. As if a man ſeiſed of Lands in Fee, letts them for life without Deed, rendring Rent, upon Condition of Re-entry, upon Non payment of the Rent. Whereupon the Leſſor Enters, and the Leſſee brings an Aſſiſe of *Novel Diſſeiſin*; The Jurors may find the matter at large, and the Judges ought for to judge it for the Tenant, although regularly a Condition is not available without a Deed, and although the Leſſor ſhew not a Deed. See *Cook* 2. Part, *Inſtitutes*, 227. acc.

12. If the Plaintiff after Evidence given, and the Jury departed from the bar, or any for him do deliver any Letter from the Plaintiff to any of the Jury concerning the matter in Iſſue, or any Evidence, or any Eſcroul touching the matter in Iſſue, which was not given in Evidence, it ſhall avoid the Verdict if it be found for the Plaintiff but not if it be found for the Defendant, and *è Converſo*. But if the Jury carry away any writing unſealed which was given in Evidence in open Court, this ſhall not avoid the Verdict, although they ſhould not have carried it with them. *Cook* 1. Part, *Inſtitutes* 228.

13. Error to reverſe a Judgment in C. B. in Detinue, where the Plaintiff declared to his Damage of 100 l. the Jury found the damages to 150 l. ſo they found more damages then the Plaintiff counted of. In that Caſe, the Judgment was reverſed, for it was holden by the Court, That where the Plaintiff doth declare no certain damage, there he ſhall recover ſuch Damages as the Jury ſhall find, but where he declares of a certain damage, and the Jury do find greater damages, there they finding greater damages then the Plaintiff declared of, their Verdict as to that is not good; and therefore, for ſuch cauſe, the Verdict in the Principal Caſe was holden not to be good, and the Judgment was reverſed. Mich. 8 Jac. B. R. *Hobbies* and *Kembles* Caſe. *Bollr.* 1. Part, 49.

14. Error to reverſe a Judgment in C. B. in an Action of Covenant there brought for not making a Leaſe; and ſhews, *Quod nihil habuit* of which he ſhould make a Leaſe according to his Covenant. The Defendant there pleaded, *Quod habuit unde*; upon which matter they were at Iſſue: and the Jury found, That he had Land whereof he might have made the Leaſe, and they do not find what Eſtate he had therein, and ſo Judgment given for the Plaintiff. The Error aſſigned was, That there was no Iſſue joyned, for that the Plea was bad, and ſo the Iſſue upon it bad. The Queſtion was, Whether the Verdict ſhould make the Plea good. The Court was clear of Opinion, That the Plea was not good, becauſe they do not ſhew what Eſtate he had in the Land, for the Plea of *Habuit* in it ſelf is no good and ſufficient plea, without ſhewing ſpecially the Eſtate he hath. But yet the whole Court was clear of Opinion, That the Verdict in this Caſe had made the Plea good, and ſo the Judgment was well given, and the Judgment was affirmed. Mich. 10 Jac. B. R. *Glaſs* and *Gills* Caſe. *Bollr.* 2. Part, 41. See *Yelverton* 228 the ſame Caſe.

15. Action upon the Caſe upon a Promiſe ſuppoſed to be made by the Defendant. Upon Not Guilty pleaded, and tryed in a baſe Court, the Jury found for the Plaintiff: for non-performance of the promiſe *ex parte Defendentis* had ſuſtained damages to 50 l. and aſſeſſed Coſts, and Judgment given: And upon Error brought, the Judgment was reverſed: for the Verdict given in the manner is no Verdict, for they have not found the matter in Iſſue with which they were charged, viz. whether the Defendant aſſumed or not, ſo as all is incertain and inſufficient; for this finding that the Plaintiff ſuſtained damage, is but the finding of the Aſſumpſit by Implication, which is not good upon a general Iſſue. The Judgment was reverſed. Mich. 3 Jac. B. R. *Shelley* and *Aſſop* Caſe. *Yelv.* 77.

16. Error to reverſe an Indictment of Reſcous and Ryot taken in the County Palatine of D. The Errors aſſigned were, 1. There was a Warrant to three *conjunctim & diviſim* to Arreſt J. S. and two of them did Arreſt him: Wherefore the Arreſt was not well done, for it ought to have bin by one, or all three, becauſe it is a Miniſterial act, otherwiſe if it had bin a Judicial Act. 2. The Indictment of Ryot was againſt three, and the Jury found one of them only guilty of the Ryot, wherefore the Verdict was void, for one alone cannot make a Ryot. 3. Becauſe the Indictment is *Jurors*

rem pro Domino Rege præfentavit, &c. and did not ſay that 12 Jurors did preſent, nor did not name the names of the Jurors. Wherefore it was holden for theſe cauſes, That the Verdict was not good, and the Indictment was quaſhed. Mich. 1 Car. B. R. *Harriſon* and *Errington's* Caſe. *Poph.* 102.

Vicar and *Vicarage*.

See Lib. 3. pag. 2043.

More:

A Vicar was endowed by theſe words, *Viz. Habebit totam partem Decimarum bladarum & feni quæ decimari, provenerint de Maneriis de B. &c.* It was Reſolved in this Caſe, That a Manner cannot conſiſt without Freeholders; and therefore that the Vicar ſhould be endowed of the third part of the Tythes of the Lands of the Tenements and Freeholders, as well as of the Demeſnes and Copyholders. Trin. 37 Eliz. *Higham* and *Beſt's* Caſe. *Owen* 59. See *Cro.* 3. Part, 462, 463. The ſame Caſe.

2. It was Reſolved by the Juſtices, in an Action of Treſpaſs brought, for taking of two Loads of Wood, That Wood growing in the nature of an Herb, is *minuta Decima*; and that Tythes thereof, upon his Endowment of, the ſmall Tythes ſhall be paid to the Vicar. Hill. 1 Car. in C. B. Sir *Richard Udall* and *Tindall's* Caſe. *Cro.* 1. Part, 20.

3. A Vicar ſued in the Spiritual Court, for a Penſion; and ſhewed in his Libel, That there were two Churches, and that he was Vicar thereof there, which Churches extended into two Towns; and that whereas for 40, 50, and 60 years he ought to ſay Service in one Church on one Sunday, and in the other the other Sunday, *alternis vicibus*: It was agreed, That he ſhould ſay Service every Sunday, and have 4 l. viz. 40 s. of each Pariſh, to be taxed of the Inhabitants; and that J. S. the Plaintiff (who ſued for a Prohibition) was taxed 4 l. and had not payed; and upon this matter of the Libel, a Prohibition prayed, becauſe he doth not alledge a Preſcription, but for 60 years. But the Opinion of the Court was, Becauſe it is but for a Penſion, and is meer Spirituall, and tryable here; and becauſe it is not neceſſary to alledge a Preſcription, but it ſhall be intended unleſs the contrary be ſhewed; and becauſe the Suit in the Spiritual Court was affirmed in an Appeal, and was before the Prohibition prayed or granted, a Conſultation was granted without enforcing the Vicar to plead to the Prohibition. Paſch. 21 Jac. In B. R. *Gilly* and *Williams* Caſe. *Cro.* 3. Part, 666.

4. If the King hath the Advowſon of a Vicarage, and grants the Vicarage to J. S; the Advowſon of the Vicarage doth not paſs by ſuch Grant, for that the Vicarage is another thing, then the Advowſon of it; and ſo it was adjudged. Mich. 32 Eliz. C. B. In a *Quare Impedit.* *Cro.* 3. Part, 163.

5. For a Prohibition, The Plaintiff ſurmiſed, That he was Parſon, and the Defendant was Vicar of the ſame Church; and that the Defendant ſued him in the Spiritual Court, for Tythes upon an Endowment, That the Vicar ſhould have the Tythes of all the Lands within the Pariſh; and pleaded, That he was Parſon *Impropriate* there, and that the Land, of which the Tythe was demanded, was part of his Glebe. It was the Opinion of the whole Court in this Caſe, That *Eccleſia Decimas Eccleſiæ ſolvere non debet*; and that No Tythes ſhall be paid for the Glebe Lands. But if a Vicar be endowed to have All ſmall Tythes within the Pariſh, and the Parſon maketh a Leaſe of his Glebe Lands, the Leſſee ſhall pay ſmall Tythes ariſing thereof to the Vicar. Trin. 38 Eliz. B. R. *Bliſs* and the Parſon, *Maſſam* Caſe. *Cro.* 3. Part, 479.

6. In Treſpaſs, the Caſe was: In the time of King *Edw.* 3. a Rectory was impropriate, and upon the Impropriation thereof, the Vicar was endowed of Tythe-Wood; But for a 160 years there had not been any Vicar there, untill of late a Preſentation was obtained from the Queen to the Vicarage by reaſon of Lapſe. It was Objected in this Caſe, That by the ſaid long time of diſcontinuing of being any Vicar there, that now the Vicarage was re-united to the Parſonage. But it was the Opinion of the whole Court, That although a Vicarage is always taken out of the Parſonage; and that afterwards upon neceſſity thereof, may be re-united again to ſupply the Parſon. Yet by long continuance of time, by not preſenting of a Vicar, which is the default of the Parſon himſelf: It ſhall not be ſaid to be a Diſcontinuance of the Vicarage, but that the Vicarage ſhall remain, and ought to have the Tythe-Wood. Out of this Caſe, It is to be Collected, That the Parſon is the Patron of a Vicarage endowed. Hill. 44 Eliz. C. B. *Robinſon*

Vic ar

Vicar of *Kimbolton*, and *Bedell's* Case. *Cro.* 3. Part, 873.

Use and *Uses*.

1. NOte; If a man enfeoffeth another of Lands in Fee by Deed, without any Consideration, in the Premisses of the Deed, or without; but the *Habendum* is to the Feoffee, to his own use, as it is recited in the Deed; and yet the Feoffee suffereth the Feoffor to take the Profits of the Lands for divers years together; yet in such Case, The Feoffee shall be adjudged to have the rest of the Land in Fee; and not the Feoffor, because the use was limitted to him by the Deed, which was sufficient to raise a Consideration. Trin. 27 H. 8. *Boudlowes* 27.

2. J. S. being *Cestuy que use* in Fee, in Consideration of a Marriage to be had between B. his Son and Heir, and the Daughter of J. D, by Indenture made between the said J. S. of the one one party, and the said J. D. on the other party; Covenanted and Granted, That he, nor his Feoffee or Feoffees to his use have not made, nor hereafter shall make any Feoffment in A. entail, alienation, or other Incumbrance; by Recovery, Feoffment, Fine, Release, Gift, Grant of Rent, or Common for term of life, lives, or otherwise, of any of his Mannors, Lands, Tenements, which he or any Feoffee or Feoffees to his also hath, or shall have of all and every the said Messuages, Lands, &c. but that all and every the said Messuages, Lands, &c. immediately after his decease, shall descend, remain, and come in Possession to the use of the said B, and the Heirs Males of his Body begotten. It was a Question, If by this Covenant the use of those Mannors, Lands, &c. were altered, and what Estate the said J.S. or B. had after the making of the said Indenture. It was the Opinion of all the Justices of the Common-Pleas, That in this Case, That no use of the said Mannors was changed by the said Covenant, neither in J. S. the Father, or in B. his Son; because the same was but a meer Covenant. Trin. 4 Eliz. In C. B. *Boudlowes* 9. acc.

3. In Trespass, the Defendant pleaded, That A. N. his Ancestor was seised, and dyed seised, and that the Land descended to him: The Plaintiff Replyed, That before A. N. had any thing, J. S. was seised in Fee, and enfeoffed four persons to the use himself, and his Wife for their lives, and after to the use of W. his Son for life; and after his decease, that they shall be seised *in eorum pristino Statu*, upon Condition, that they shall receive the Profits, and pay to B, the Wife of W. 20 l. *per annum* during her life; and afterwards, that they shall be seised to the use of the Heirs Males of the Body of W: That the Husband and Wife dyed, W. entred and enfeoffed the said A. N. who entred, and devised it by his Will to his younger Son for life; and afterwards A. the Wife of W. dyed, and N. as Son and Heir of the Body of W. entred, and sett the Land to the Plaintiff. It was Objected in this Case, That the Heir-Male of W. could not enter, for that by the Feoffment the Estate Tail was discontinued; and none can entry, except the Feoffees enter and receive the use. But in this Case, The Court gave Judgment for the Plaintiff, for that the Descent was not traversable, (which was traversed in this Case) but the Dying seised, which is confessed and avoided by the devise: And it was the Opinion of all the Justices in this Case, That this Feoffment was no discontinuance, nor barred the entry of the Heir. Quere, for that the Court did not shew any reason of their Judgment. Pasch. 35 Eliz. B. R. *Mors* and *Neals* Case. *Cro.* 3. Part, 277.

4. Upon a special Verdict, the Case was: A man reciting that whereas J. S. was bound in a Recognizance, and other Bonds for him, Now he for divers good Causes & Considerations bargained and sold the Lands to him and his Heirs; the Deed is enrolled within six Months: but it is not found, that any money was paid. If it was a good Bargain and Sale or not, it was the Doubt: It was the Opinion of the Justices, That it was not; because there was not *Quid pro quo* in it: but the Vendor here had nothing for his Land, and then it was void; And it was said by the Justices in this Case, That if I give Land, or Bargain and sell Lands to my Son, no use riseth thereby. But they said, That it had been a good Consideration to raise an use by way of Covenant. Pasch. 37 Eliz. C. B. *Ward* and *Lamberts* Case. *Cro.* 3. Part, 394.

5. In *Ejectione firmæ*, the Case was: A. seised in Fee of Lands thereof, enfeoffed T. M. and others to the use of himself for life, and after to the use of R. his second Son in tail, the Remainder to G. his eldest Son in Tail. Proviso, That if he paid 12 l. at any time to the said T. M. and the three others, and shewed good and sufficient cause to them by the said A. of the Cases of the said R. his Son, and that so by the said T. M. and three others: It shall be thought convenient. That then the aforesaid uses shall cease, and then to be to the use of himself and his Heirs. One of the Feoffees dyes; he paid the 12 l. to the other three, and then declared by a new Deed: That the said

T. M.

T. M, and the other two Feoffees, ſhould ſtand ſeiſed of the ſaid Lands to the uſe of himſelf for life, and after to new Uſes; and whether theſe Uſes ſhould take effect, was the Queſtion. It was the Opinion of the Juſtices in this Caſe (amongſt other Points), That this ſecond Indenture was not a ſufficient Limitation of new Uſes, and the raiſing of them. For although the Conſideration therein be ſufficient (viz. blood and affection), yet he doth not Covenant to raiſe them out of his own Poſſeſſion. But that theſe Feoffees ſhall be ſeiſed, and none other but they ſhall ſtand ſeiſed, and he hath not any Feoffees, and then No Uſe can riſe; and although it was ſaid, That it ſhall be expounded as a Will, according to the intent of the Parties; becauſe he hath not Feoffees, that he himſelf ſhall be ſeiſed: Yet the Court held, It ſhall not be ſo conſtrued of Deeds; and ſo the Court Reſolved, That there did not any Uſes riſe; and therefore that the Leſſor of the Plaintiff had not any Title, and it was adjudged for the Defendant. Mich. 43 Eliz. C. B. *Atwaters* and *Barbe* Caſe. *Cro.* 3. Part, 856.

6. Note; It was the Opinion of all the Juſtices of the Common-Pleas, That if a man by Indenture enrolled at this day, or before the Statute of 27 H. 8. *Of Uſes*, Bargaineth and ſelleth Lands for a convenient ſum of Money, and other Conſideration to another in Fee. To have and to hold the ſame Land to the Bargainee, to the Uſe of the Vendor during his life, or in Tail or in Fee, or unto the Uſe of another, that thoſe limitations of the Uſe or Uſes are void which are in the Indenture, and it ſhall be to the Uſe of the Vendor in Fee, becauſe the ſaid Conſideration, and the Sale, implyes the Uſe to be only to him in Fee; and an Uſe cannot be raiſed upon a Uſe in Fee. Mich. 4 and 5 *Mar.* C. B. *Brollieres* 28.

7. Upon an Evidence to the Jury at the Barr, a Deed to prove the Iſſue was given in Evidence, which was this, viz. *Sciant preſentes et futuri, Quod ego W. C. filius et hæres J. C. dedi, Conceſſi, et hac preſenti charta mea Confirmavi W. C. Militi, Omnia terras, Tenementa, &c. ad uſum me proficill. R. C. et Elizæ uxoris meæ pro termino vitæ ipſ. imperitum vidz: et ſi contingat ut præfatum R. obire ſine exitu de Corpore meo procreat. Tunc volo quod omnia prædicta. Terr. et Tenement. remaneant Thomæ fratri meo, et hæredibus de Corpore ſuo procreandis, et hæreditibus et aſſignatis eorum.* It was the Opinion of all the Juſtices in this Caſe, That a good Eſtate tail was limited by that Deed to the ſaid R. in uſe after the death of *Eliz.* the Wife. Mich. 1 Eliz. C. B. *Cawſes* Caſe. *Leon.* 3. Part, 4.

8. In Treſpaſſe upon Evidence, the Caſe was; Land was given to A. in tail, the remainder in Fee to his Siſters, being his Heirs at Common-Law: A. made a Deed in this manner; viz. *I the ſaid A. have given, granted, and confirmed, for a certain piece of money, &c.* without the words, *Bargained and Sold.* And the *Habendum* was to the Feoffee with Warranty againſt A. and his Heirs: And a Letter of Attorney was to make Livery and Seiſin. And the Deed was in this manner, viz. *To all Chriſtian People, &c.* And it was enrolled within one month after the making of it. It was Indented, although that the words of the Deed, were in form of a Deed Poll. And 4. months after the delivery of the Deed, the Attorney made Livery and Seiſin: A. dyed without Iſſue; The Siſters Entred, and the Feoffee *uſted* them of the Land: and they brought the Action. It was the Opinion of the whole Court for the Plaintiff; for here is not any Diſcontinuance, for the Conveyance is by Bargain and Sale, and not by Feoffment, becauſe the Livery comes too late after the Inrollment, and then the Warranty ſhall not hurt them. And it was clearly agreed by the Court in this Caſe, That the words, *Give for money, Grant for money, Confirm for money, Agree for money, Covenant for money*, If the Deed be duly enrolled, that the Lands ſhall paſſe both by the Statute of *Uſes*, and by the Statute of *Inrollments*, as well as upon the words of *Bargain and Sale*. And in this Caſe, It was ſaid by *Wray*, and other Juſtices, That if he in the Reverſion upon a Leaſe for years, grants his Reverſion to his Leſſee for years, by words of *Dedi et Conceſſi*, and a Letter of Attorney is made to make Livery and Seiſin, the Donee cannot take by the Livery, for that the Leſſee hath the Reverſion preſently. Mich. 14 Eliz. B. R. *Leon.* 3. Part, 16, 17.

9. Note: In the Court of Wards, It was Reſolved by the Juſtices aſſiſtant to the ſaid Court, That where Tenant of the King of Lands holden by Knights Service in Chief, made a Feoffment in Fee of the ſame Lands to the uſe of himſelf for life, and after to the uſe of his younger Son in tail, the Remainder to the right heirs of the Feoffor, and dyed, his eldeſt Son within age; That the Queen ſhould have the Wardſhip of his body, and the third part of the Land; and when the elder Son was of age, that the younger Son ſhould ſue Livery, and pay *Primer Seiſin*, according to the Rate and value of the whole Land, viz. of the third part as in poſſeſſion, and of the ſecond part as a Reverſioner: For that the Remainder to the right Heirs of the Feoffor, is in truth a Reverſion, for the Feeſimple was never out of him, for that there is not any Conſideration as to that, nor any Uſe expreſſed; and becauſe Livery ſhall not be ſued by parcells, the younger ſon ſhall not be ſuffered to ſue Livery of the third part preſently, and reſpect the reſidue as to the two parts in Reverſion,

ſion, till the Reverſion fall; but he ſhall ſue livery preſently as well of the two parts in Reverſion, as of the third part in poſſeſſion. And if the eldeſt Son had been of full age at the time of the death of his Father, the younger Son ſhould pay *Primer Seiſin* as to the third part the value of it for one year as in poſſeſſion; and as to the two parts, the moyety of the value of a year as of a Reverſion. Mich. 15 Jac. in *Cur. Ward.* And ſo likewiſe it was Reſolved in *Oliver Beers* Caſe, *Icon.* 3. Part, 25.

10. The Caſe was; The Father Covenanted by Indenture, in Conſideration of natural affection, to ſtand ſeiſed of all his Lands which he had, and which he afterwards ſhould purchaſe to the uſe of himſelf for life; and afterwards to the uſe of his youngeſt Son and his Heirs: Afterwards he purchaſed Lands, and dyed. It was the Opinion of the whole Court in this Caſe, That this Covenant veſts nothing in the younger Son, and is not ſufficient to veſt an Uſe in him of this Land; For a man cannot by a Covenant raiſe an uſe out of Land which he hath not: For, no more then a man may charge, lett, or grant a thing which he hath not; no more may he limit an Uſe of Land which he hath not. Alſo upon every Feoffment or Purchaſe, the Feoffor or Donor from whom the Land paſſeth, is to limit the Uſes, and not the Feoffee or Purchaſor: Then before the Feoffment, one cannot limit how the Uſes ſhall be; viz. that it ſhall be to the uſe of his younger Son, where the Feoffor hath limited to the uſe of himſelf and his Heirs; which ſhould be to limit an uſe out of an uſe; which the Law will not ſuffer. And therefore in the principal Caſe, It was adjudged for the eldeſt Son. Trin. 37 Eliz. B.R. *Yelverton* and *Yelverton's* Caſe. *Cro.* 3. Part, 401, 402.

11. One made a Feoffment in Fee, and declared by Indenture, That it ſhould be to the uſe of himſelf and A. his Wife that ſhould be after their marriage, and of the Heirs of their bodies; and he took A. to Wife: If the wife ſhould take by the Limitation of this Uſe, was the Queſtion? It was Objected, She ſhould not, Becauſe preſently by this Feoffment, the Fee is in the Husband by the poſſeſſion executed to the uſe which he had before the Marriage. But it was the Opinion of all the Juſtices, That although he be ſeiſed in Fee in the mean time, as in truth he is, yet by the Marriage, the new Uſe ſhall ariſe and veſt, if there be no Act in the mean time to deſtroy that future Uſe, according to the Limitation of the Uſe. Mich. 38 Eliz. B.R. *Wadliff* and *Downes* Caſe. *Cro.* 3. Part, 479.

12. In Avowry for a Rent upon a Demurrer, the Caſe was; A. the Grandfather made a Feoffment in Fee to the uſe of K. his wife for life, the Remainder to R. his Son for life, and after to his Eldeſt Iſſue which ſhould be at the time of his death; the Remainder in Fee to J. S: R. had Iſſue J. his eldeſt Son: A. the Grandfather dyed; K. lett the Land for years to R: R. and J. S. made a Feoffment, and levied a Fine with Warranty, and Proclamations to the Defendant: K. dyed: within 5. years after R. dyed: J. S. being his eldeſt Son at the time of his death, Entred as in his Remainder. And, Whether the Remainder was deſtroyed by theſe Acts or not, and he might now Enter, was the Queſtion? The Court was clear of Opinion, That by theſe Acts, the future Uſe was deſtroyed. And ſo it was ſaid, It was Adjudged in *Tirringham* and *Ardes* Caſe; and in *Chudleigh's* Caſe; for that if there be any diſturbance before the future Uſe cometh in *eſſe*, it is deſtroyed for ever. Mich. 40 Eliz. B.R. *Smith* and *Belays* Caſe, *Cro.* 3. Part, 630.

13. The Caſe was; Tenant for life levied a Fine to him in the Reverſion in Fee, *Sur Conuſans de Droit, &c.* and the Uſes were, to the Conuſee and his Heirs, upon Condition, That he ſhould pay to the Tenant for life, yearly during his life, 4 l. *per annum*; and if there were any default of payment, that it ſhould be to the uſe of the Conuſee for his life, and for one year over. The Conuſee made a Feoffment to W, who made a Leaſe for years to the Plaintiff; the 4 l. was not paid, nor demanded: The Tenant for life Entred upon the Plaintiff. The Queſtions in this Caſe were, 1. If this Fine levied were a Surrender? It was holden, That it was not a Surrender, For that the Fine implyes a guift in Fee ſimple; and every one who is party to a Fine, ſhall be eſtopped to ſay the contrary. 2. It was Reſolved, That if it was a Surrender, That then a Surrender might be to an Uſe, for that it is a Conveyance charged and tyed with this Limitation of an uſe. Trin. 41 Eliz. in C. B. *Smith* and *Warreas* Caſe. *Cro.* 3. Part, 688.

14. Sir *John Raſtell* ſeiſed of Lands in Fee, Covenanted with J. S. in conſideration of a Marriage to be had betwixt him and the ſaid Lady *Raſtell* (the Daughter of J. S.) to ſtand ſeiſed to the uſe of himſelf and his Heirs, untill Marriage; And after to the uſe of himſelf, and the ſaid Lady *Raſtell*, and the Heirs of his body, with divers Remainders over. Afterwards, Sir *John Raſtell* Lett the Land to the Defendant for 31. years, to begin after the end of a former Leaſe: Afterwards, the Marriage took effect. The firſt Term expired; Sir *John* dyed, the Lady *Raſtell* Entred, and lett to the Plaintiff. It was the Opinion of the Juſtices in this Caſe, That the Leaſe made (whereout the uſe did ariſe) was good, and ſhould bind the future uſe. As a Leaſe by Feoffees made

made upon good Conſideration, ſhall bind *ceſtuy que uſe* at the Common Law, but it ſhall not deſtroy the whole future uſe, but ſhall ſtand for the Freehold, becauſe the Seiſin is not charged. Mich. 43 Eliz. B. R. *Wood* and *Reignolds* Caſe. *Cro.* 3. Part, 764, and 854.

15. An Indenture was produced and ſhewed, which were to guide the Uſes upon a Recovery which was ſubſequent, but the Seals were torn from the Deed; But becauſe the ſame was done by a little Child, as was proved, and the Seals were once annexed to the Deed, and the Deeds being compared together, they agreed in the raſures, and in the interlineations; It was in that caſe admitted as good to guide the Uſes, as if the ſame had been perfect with the Seals to it. Trin. 21 Jac. B. R. *Latch*, 216.

Wager of Law.

1. IN an Action of Accompt againſt a Receiver, upon receipt of money by the hands of another perſon, for Accompt render, (unleſſe it be by the hands of his Wife or *Commainer*) the Defendant ſhall not wage his Law, becauſe that the Receipt is the ground of the Action, which lyeth not in Privity betwixt the Plaintiff and the Defendant, but in the Notice of a third perſon, and ſuch a Receipt is traverſable. But in an Action of Debt upon an Arbitrament, and in an Action of *Detinue* by Bailment by another's hand, the Defendant ſhall wage his Law, becauſe the *Debet* and the *Detinet* is the ground of thoſe Actions; and the Contract or Bailment, although it be by another hand, it is but the Conveyance, and not traverſable. *Cook* 1. Part, *Inſtitutes*, 295. See 15 E. 4. 16. 33 H. 6. 24. 8 H. 6. 11.

2. An Infant cannot wage his Law of Non-Summons; for according to the Maxime of Law, *Minor jurare non potuit*; and therefore in that caſe, the default ſhall not grieve him; for ſeeing the moneys to excuſe the default, is taken away, the default it ſelf ſhall not prejudice him. *Cook* 1 Part, *Inſtitutes*, 172. b. acc.

3. Note: It is ſaid, That in times paſt, Wager of Law was accounted a good Tryall in an Action of Debt without a Specialty, becauſe the Law preſumed, That no man would forſwear himſelf for any worldly thing. But of later times, Mens Conſciences are grown ſo large, (eſpecially in this caſe of impunity) that the Plaintiff now dares not adventure the debt upon the Defendant's Oath, but rather chooſeth to bring an Action upon the Caſe upon his promiſe, wherein he cannot wage his Law, *Cook* 1. Part, *Inſtitutes*, 295.

4. A Priſoner cannot wage his Law for meat and drink had of the Goaler, he being enjoyned by Law to keep the Priſoner, is *ſolus et arcta Cuſtodia*, he is compellable to find him Victuals, *Cook* 9. Part, 87. *Pinchons* Caſe. But if a Victualler or Inn-keeper brings an Action of Debt for the Victuals delivered to the Gueſt, the Gueſt may wage his Law; for the Victualler or the Inn-keeper is not compellable to deliver his Victualls to his Gueſt, untill he be paid for them; and therefore it is his folly to part with them, untill he hath money in his hand for them.

5. *Detinue* of 40 Quarters of Corn, the Plaintiff declared of an abſolute Contract: The Defendant pleaded, That it was upon Condition to pay for it when it ſhould be delivered, and that he had delivered 10 Quarters for which the Plaintiff did not pay preſently, and ſo the Contract void; and demanded Judgment if Action. And it was holden to be good without Traverſe, that it was ſimple; for the Traverſe muſt come on the other ſide, *ſcil.* That it was abſolute without that, that it was upon Condition. But in this Caſe, It was agreed, That the Defendant might wage his Law; or plead *Non detinet per Patriam*. Hill. 28 H. 8. *Dyer*, 30.

6. Debt was brought for 9 l; and the Plaintiff declared, That he bought certain Woad; and the truth of the Caſe was, That this Woad was ſold to him upon Condition, That if the Plaintiff did not prove it to be good and ſufficient, then he ſhould pay nothing for it. This was diſcloſed by the Defendant upon his Wager of Law. It was the Opinion of the Court, That if the Caſe was ſo, then he might wage his Law. And it was that the Plaintiff muſt have *Diſtrict* for the

Wood. Mich. 30 Eliz. B. R. *Millington* and *Purgeſſes* Caſe. *Gold ſbr.* 65.

7. In Debt, the Caſe was, That the Plaintiff and another made a Contract with the Defendant; and the Plaintiff alone brought the Action. It was the Opinion of the Court in this Caſe, That the Defendant might wage his Law, becauſe it is not the ſame Contract. See 35 H. 6. & 20 H. 6. a judged accordingly. Mich. 30 Eliz. B. R. *Baſocks* Caſe. *Goldſbr.* 76.

8. In Debt, the Defendant pleaded, *Nihil Debet per Patriam*: The truth of the Caſe was, That the money was due to the Plaintiff, but the Plaintiff alſo was endebted to the Defendant in the like ſum: And before the Action brought, they were agreed, That each of them ſhould be acquitted againſt the other. Upon this, the Defendant would have Waged his Law. *Anderſon* and *Periam*, Juſtices, doubted much, whether he might ſo do, or not. But *Rhodes* ſaid, That it was good, being by Conſent of the parties. Quære. Hill. 30 Eliz. C. B. *Sawnderſons* Caſe. *Goldſbr.* 80.

9. Accompt was brought as Bayliff of his Mannor of D; The Defendant waged his Law, and had day given him to make it: And at the day he being ready to make his Law, It was Ruled by the Court, That Wager of Law did not lye in this Caſe; For it is a matter tryable by the Country, and of which they may take Conuſance. Whereupon a Repleader was awarded. Mich. 40 Eliz. B. R. *Archers* Caſe. *Cro.* 3. Part, 579

10. Debt in Chancery, (for that the Plaintiff was Servant to the Lord Keeper) upon a Contract, and upon Arrearages of Accompt. The Defendant, as to that which was upon Arrearages of Accompt, pleaded *Nihil Debet per Patriam*; and as to the Reſidue, he waged his Law, and the whole Record was ſent into the Kings-Bench, and the Defendant had day to wage his Law; and at the day was ready to make it. *Fenner*, Juſtice, doubted, Whether he ought to make his Law here. And it being demanded of the Clerks, They could not remember any Preſident of it, Whether *de bene eſſe*, he cauſed him to make his Law, &c. and ſaid, He would adviſe of the Recording of it. Hill. 41 Eliz. B. R. *Audley* and *Franks* Caſe, *Cro.* 3. Part, 648.

11. Debt was brought for money upon a ſale of Land; The Defendant tendred his Law: *Gawdy*, Juſtice, held, That he ſhould not be admitted to it, for that it is a Reall Contract. But all the other Juſtices were of a contrary Opinion. Wherefore it was Ruled, That he ſhould make his Law. Paſch. 42 Eliz. B. R. *Miller* and *Eaſtwaves* Caſe. *Cro.* 3. Part, 750.

12. Debt; The Plaintiff demanded 120 l. and declared, That where the Teſtator was indebted to J. S. in divers ſums of monies for Wares ſold; and that J. S. became a Bankrupt, and by the Commiſſioners of Bankrupts was ſo adjudged: and that this Debt (amongſt others) was aſſigned to the Plaintiff, being a Creditor, and that the Inteſtate dyed; whereupon he brought the Action againſt his Adminiſtrator. In this Caſe, It was adjudged, That the Action did not lye; For that Debt upon a ſimple Contract lyeth not againſt an Executor or Adminiſtrator. And although it was alledged, That it being aſſigned by the Commiſſioners, is *quaſi* a Debt upon Record, and the Plaintiff is enabled to this Suit by Act of Parliament, and therefore Wager of Law lyes not in the Caſe: And for a Debt forfeited to the King by the Common Law, wager of Law lyes not; as appears by the experience of the Exchequer, where ſuch debts are forfeited and ſued: Yet the Court was clear of Opinion, That the Aſſignment by the Commiſſioners of Bankrupts, did not alter the Law; but that againſt an Aſſignee wager of Law lyeth: So againſt ſuch an Adminiſtrator, the Action lyeth not. It was adjudged for the Defendant, Paſch. 6 Car. B. R. *Morgan* and *Graves* Caſe, *Cro.* 3. Part, 235. See Mich. 13 Jac. C. B. *Bradſhaws* Caſe. *Cro.* 2. Part, 105. adjudged accordingly.

13. Dower by M. and his Wife againſt H. who appeared upon the *Grand Cape*: And it was, becauſe in truth the ſaid H. was but Leſſee for years of the Land of which, &c. In which Caſe, he might plead Non-Tenancy. And now the Queſtion was, If he might wage his Law of Non-Summons, ſo as the Writ ſhould abate? And by the Wager of Law he hath taken upon him the Tenancy, and affirmed himſelf to be Tenant. But it was ſaid by the Juſtices, That here the Tenant being but Leſſee for years, is not at any miſchief; for if Judgment and Execution be had againſt him, he notwithſtanding afterwards might Enter upon the Demandment. Mich. 30 Eliz. C. B *Mitchell* and *Hid's* Caſe, *Leon.* 1. Part, 92.

14. Debt brought againſt A. W. Adminiſtrator of J. W; and the Plaintiff declared of a Contract without a Specialty. The Defendant pleaded, That ſhe had fully Adminiſtred. And it was found againſt her. It was moved for the Defendant, That upon the Matter, an Action of Debt did not lye againſt the Executor or Adminiſtrator: But the Doubt was, Foraſmuch as the Defendant by pleading the Plea above, hath admitted the Action, ſh. ſhall not now take advantage of the Law in that Point. *Periam* and *Fleetwood*, Juſtices, doubted of it at the firſt, That the Defendant by her Plea had admitted the whole matter,

matter, and had taken Notice of the Debt: But yet afterwards, It was Reſolved, That Judgment ſhould be given againſt the Plaintiff, becauſe it is apparent to the Court, That the Action lyeth not. Wherefore Judgment was entred, *Quod Querens nihil capiat per Breve.* Mich. 31 Eliz. C. B. *Huſſus and Wicks* Caſe. *Leon.* 1. Part, 165.

15. H. was brought to the Barr to wage his Law in Action of Debt; and upon Examination, the matter appeared to be, That the Defendant was endebted to the Plaintiff upon a ſimple Contract; and, upon Communication betwixt them, It was agreed, That one J. S. ſhould become bounden to the Plaintiff in an Obligation, for the ſaid debt to be paid at a day certain; who became bounden accordingly: and the Defendant was bound to the ſaid J. S. in a Counter-Bond to ſave him harmleſs againſt the Plaintiff. In this caſe, the Court was of Opinion, That upon this matter the Defendant could not ſafely wage his Law; for by this Obligation made by a ſtranger to the Contract, the Contract upon which the Action is brought, is not determined: alſo here the Obligation was made after the Contract: But if J. S. had been bounden, *ut ſupra*, upon the Contract, it had been otherwiſe. And upon that reaſon, it was ſaid, the Caſe of *Puſſey*, had been adjudged, Where upon a Contract, a Stranger to the Contract being preſent, made promiſe to enter into a Bond to the party, &c. for the payment of the money agreed upon the Contract, and became bounden accordingly; and in that caſe the Contract was determined, becauſe the Obligation was purſuant to the Contract. But in the Principal Caſe, the Court would not admit the Defendant to wage his Law. Trin. 29 Eliz. C. B. *Hoopers* Caſe. *Leon.* 2. Part, 110.

16. Two men were Partners in Goods, The one of the Partners ſold unto J. S. at ſeveral times Goods to the value of 100 l: and for the Goods at one time bought, he paid the money according to the time. Afterwards an Action was brought by one of the Partners for the reſt of the money: And the Plaintiff declared upon one Contract for the whole money; whereas in truth they were ſold by ſeveral Contracts made: and the Defendant in that Caſe would have waged his Law. But the Court adviſed the Plaintiff to be Nonſuit, and to bring a new Act on upon the ſeverall Contracts. And in this Caſe, It was agreed by the Court, That the ſale of one Partner, is the ſale of them both; and therefore although one of them ſelleth the goods, or Merchandizeth with them, yet the Action muſt be brought in both their names; and in ſuch caſe, the Defendant ſhall not be received to wage his Law, That the other Partner did not ſell the Goods unto him. Hill. 11 Jac. C. B. *Lambert's* Caſe, *Godbolt*, 244.

17. Debt againſt the Defendant for money for his tabling. The Defendant tendred his Law, and was ready to have made it. *Gawdy*, being only in Court conceived, That Wager of Law did not lye in this Caſe: Wherefore by aſſent of the parties, the Defendant waived his Law, and pleaded to the Country. Paſch. 43 Eliz. B. R. *Biſh* and *Walſords* Caſe. *Cro.* 3. Part, 218.

18. Accompt of the Receipt of 20 l. by the hands of the Plaintiff's wife. The Defendant tendred his Law, and had day to make it. It was doubted, Whether it lay or not, becauſe the Receipt is ſuppoſed to be by another hand. But becauſe the Receipt by the hands of the Wife of the Plaintiff or Defendant, is all one with Receipt by their own hands, the party was admitted to wage his Law. Hill. 44 Eliz. B. R. *Goodrichers* Caſe, *Cro.* 3. Part, 919.

19. A. borrowed 100 l. of F, and at the day brought it in a Bagg, and caſt it upon the Table before F; and F. ſaid to A. being his Nephew, *I will not have it, take it you, and carry it home again with you.* It was the Opinion of the Court, That this was a good gift by parol, being caſt upon the Table; for then it was in the poſſeſſion of F, and A. might well wage his Law in an Action brought for it. But the Court ſaid, It had been otherwiſe, If A. had only offered it to F; for then it was a thing in Action only, and could not be given without Writing. See *Noy*, 67. *Flowers* Caſe.

20. In Debt upon Arbitrament; The Defendant tendred his Law: But it was the Opinion of the whole Court, That in ſuch caſe he ſhould be *exclud* from waging of his Law. Paſch. 2 Car. B. R. *Audeſon* and *Symonds* Caſe. *Latch*, 213.

21. In an Action of Debt, The Defendant had day given him to wage his Law. At the day, It was moved to the Court, That the Defendant was ſick of a Burning Feaver; and for this Cauſe, the Court was moved for another day for him to come and make his Law, and *Affidavit* was made of this matter. But the Court refuſed to receive this, or to give further day to make his Law, but adviſed the party to plead to the Country; which he afterwards did. Mich. 14 Jac. B. R. *Smiths* and *Peters* Caſe. *Rolls R.* 3. Part, 263.

22. Note: It was ſaid by *Hobart*, Chief Juſtice, That it was adjudged, Mich. 15 Jac. in C. B, That in an Action of Debt brought upon a a Contract, the Defendant cannot wage his Law for part, and confeſſe the Action for the other part. And ſo it was adjudged in *Tirts* Caſe, upon a Shop-Book, and a Contract cannot be decided; and

and if the Law doth not lye for parcell, then it is ſuſpended for the whole, where the debt is an entire debt. Paſch. 21 Jac. C. B. *Godholt*, 327.

See more, *Lib.* 2. Title, *Law*.

Waiver.

1. THe Husband ſeiſed in Fee, made a Feoffment to the uſe of himſelf for life, without impeachment of Waſte; and afterwards to the uſe of his Wife for her life, for her Joynture; upon Condition to perform his laſt Will: The Husband dyed, the Wife entred, and agreed to that Eſtate, and afterwards brought Dower. In this Caſe, theſe Points were Reſolved, 1. That a Right or a Title which a Woman hath to an Eſtate of Inheritance or Freehold, cannot be barred by acceptance of any Collateral ſatisfaction or recompence; unleſs it be by Releaſe, Confirmation, or a thing which amounts to ſo much. 2. That if a Joynture be made unto a Woman during Coverture, that after the death of the Husband, ſhe cannot waive it, and take her Dower; as ſhe may a Joynture made during the Coverture. But if Lands be conveyed to a Woman before Coverture for part of her Joynture, and after marriage more Land is conveyed unto her for her full Joynture; and in ſatisfaction of her Dower; if after the death of her Husband, the Wife waiveth the Land conveyed unto her after marriage, ſhe may retain the other Land, and her Dower alſo, for that the Land conveyed is part of her Joynture; It is no barr of her Dower, for the incertainty of it. *Cro.* 1. Part, 34. *Vernon's* Caſe.

2. If a Woman hath Lands conveyed to her for her Joynture, and ſhe after the Death of her Husband entreth ſecretly; and afterwards ſhe brings a Writ of Dower, intending to have her Joynture and Dower alſo. In this Caſe, It was agreed, That by the bringing of her Writ of Dower, ſhe had eſtopped her ſelf to claim any Eſtate made unto her in that before for her Joynture. See *Sharpe* and *Parſlowes* Caſe, vouched in *Cook* 4. Part, In *Vernon's* Caſe.

3. The Reaſon, why *Bona Waviata* are forfeited to the King, and that the Owner in ſuch a Caſe ſhall loſe his property in them, is, becauſe of the negligence and default in the Owner, for that he made not freſh Suit to apprehend the Felon; and therefore the Law hath impoſed this penalty upon the Owner, That if the Owner by his Induſtry and freſh Suit, the Felon is not taken, by ſuch default he ſhall loſe all his Goods which the Felon leaves behind him. *Cook* 5. Part, 109. In *Foxleys* Caſe. *Cro.* 3. Part, 694. acc.

4. Trover and Converſion of Goods; The Defendant juſtified a Servant to the Sheriff of *Middl ſex*, becauſe the Plaintiff had ſtolen thoſe Goods, and carryed them to D, in the County of *Middleſex*, at which place the Defendant ſeized them, *ut bona waiviata*: It was adjudged for the Plaintiff. For he ought to alledge, That a Felony was Committed, and that the Goods were waived by the Felon; but it is not alledged, That the Goods were waived by the Felon. Paſch. 40 Eliz. B. R. *Davies* Caſe. *Cro.* 3. Part, 611.

5. Note; It was ſaid by the Juſtices, wherewith agreeth the Book 21 H. 6. 24. Title *Waiver* 9. That an Executor of a Term may waive it, and then he ſhall be diſcharged of the Rent, and ſhall no be charged for any Arrears *de bonis propriis*; but if he once occupyeth the Lands, he ſhall then be chargable *de bonis Teſtatoris*, if he have any in his hands; & if not, then *de bonis propriis*: for that an Executor is an Aſſignee in Law of the Intereſt of the Term. Hill. 7 Jac. B. R. The Lord *Rich* and *Franks* Caſe. *Bolſtrod* 1. Part, 23. See

6. K. brought Debt againſt J. Executor, and declared of a Rent grown due ſince the death of the Teſtator, by reaſon of a Leaſe for years made of certain Lands by the Plaintiff to the Teſtator, which continued; and declared, That the Executor *debet et detinet*. The Defendant pleaded, Fully adminiſtred; upon which Plea, the Plaintiff did demurr, for pleading in the *Debet & Detinit*. It was ſaid in this Caſe by *Rolls*, Chief Juſtice, That an Executor cannot waive a Term lett to the Teſtator; for he is bound by the Covenant to hold it. But *Bacon* Juſtice ſaid, He may waive the Poſſeſſion of it, if he find that the Rent is more then the Land is worth. *Quære* Mich. 23 Car. B. R. *Kale* and *Jocelynes* Caſe. *Styles* 61.

7. Action upon the Caſe, brought againſt the Sheriffs of *London*, for not returning a *Fieri facias*. The Defendants pleaded, Not Guilty, and Jury was returned to try the Iſſue, and afterwards the Defendants filed the Return of the *Fieri facias*. It was moved, That the Defendants might waive their general Plea of Not Guilty, and pleaded ſpecially, *viz.* That they had executed the Writ; The Court ſaid, You have pleaded already; and although it be in our power to ſuffer you to alter your Plea or not, yet we will not do it without the Plaintiffs conſent; therefore make the beſt of your Plea, you have pleaded upon the Tryal. Trin. 1654. In B. R. The Sheriffs of *London's* Caſe.

Ward

Ward and *Wardſhip*.

1. IF Lands be holden of a Subject, and the Tenant ſells the Land by Fine and Proclamations to J. S. in Tail, the Remainder to the Queen in Fee; and the Tenant in Tail dyes, having Iſſue within age; It was the Opinion of the Juſtices, That in that Caſe, The Iſſue ſhall not be in Ward to the Subject, if the Queen doth not aſſent to her Remainder; for that the Tenure and Services are gone and extinct by the Feeſimple to the Queen, who may hold of none; and ſo the Iſſue in Tail ſhall be in Ward to none. Hill. 43 Eliz. B. R. *Goldeſbr.* 149.

2. The Caſe was: A. and B. by Indenture the 3d. of *July*, 13 Jac. bargain and ſell the Mannor of D. to Sir *Henry Dimock*, and his Heirs. It was found by Office, that he dyed in *October*, 13 Jac. and after his death, *ſcil.* the 23. of *Octob.* the Deed was enrolled; and that A. D was his Coſin and Heir, and of full age, and that the Mannor was holden in chief. In this Caſe, It was holden by the Juſtices, That he was to ſue his Livery; and it was ſaid, That this Caſe differed from all the Caſes put in *Shelleys* Caſe: Of Recovery, by Fine, Executory, Covenants to raiſe Uſes; For this upon Inrolment ſettles in Law, as between the Bargainor and Bargainee *ab initio*, upon the Statute of Uſes, which doth joyn all the Eſtates to the Uſes *ipſo facto*; only the Statute of Inrolment ſayes, That it ſhall not veſt, unleſs the Deed be enrolled; ſo as if it be enrolled, it doth veſt not only by the Statute of Enrolments, but by the Statute of Uſes. Paſch. 15 Jac. *Curia Ward.* and *Dimocks* Caſe. *Hob.* 136.

3. The Grantee of the King of the Body, and of the Land of the Heir, who was in Ward to the King, brought a Writ of Forfeiture of the marriage againſt the Heir: The Heir pleaded, That after the Tender of the Marriage, that the Grantee had Committed Waſte in the Lands of the Heir; and therefore demanded Judgment of the Action. It was the Opinion of all the Juſtices of the Common-Pleas, That the ſame was no Plea; for notwithſtanding that, the Gardian had Committed waſte; yet he ſhould not thereby loſe the Forfeiture of the Marriage, but only ſhould loſe the Wardſhip of the body of the Lands. See Mich. 28 H. 8. *Beadlowes* 17.

4. In a Writ of Ward, the Caſe was: Before the Statute of 27 H. 8. a man enfeoffed J. S. of Lands holden in Knight Service, to the uſe of the Feoffor and his Heirs; afterwards J. S. enfeoffed J. N. to the uſe of the Feoffor and his Wife, and the Heir of the Feoffor; the Feoffor dyed (living the Wife), having a Son within age: It was holden in this Caſe, That the Son of the Feoffor ſhould be in Ward in the life of the Wife, as Heir of *Ceſtuy que uſe*, becauſe the antient Uſe did ſtill remain in the Son; notwithſtanding that, it was in ſome ſort alledged, in reſpect of the Wife, for by the laſt Feoffment, the Son had no more conferred upon him then he had before, ſo as (notwithſtanding the laſt Feoffment) there was ſtill a Reverſion of Uſe in the Son, and not a new Remainder; becauſe a thing could not be given to a man which he had before. See 28 H. 8. *Dyer* 54. acc.

5. Note; It is ſaid, That in many Caſes, the Heir ſhall be in Ward, althought that the Tenant dyed not ſeiſed, nor in the Homage of the Lord. As if the Tenant maketh a Feoffment in Fee upon Condition, and the Feoffee dyeth; after his death, the Condition is broken, and the Heir within age Entreth for the Condition broken. In that Caſe, the Heir ſhall be in Ward, and yet the Feoffor had No Eſtate or Right in the Land at the time of the death, but only a Condition; but becauſe the Condition reſtoreth the Tenant to the Land, in the nature of a Deſcent (for he ſhall be in by Diſcent); by the ſame reaſon it ſhall reſtore the Lord to the Wardſhip. *Cook* 1. Part, *Inſtitutes* 76. acc.

6. A. being ſeiſed of Lands in Fee, holden of the King in Chief, took a Wife ſeiſed of other Lands holden in Socage; they had Iſſue, and the Husband dyed: It was ſaid, That in this Caſe, The King ſhould not have the Wardſhip of the Land of the Wife, or the Primer ſeiſin of it; and if the Husband had ſurvived his Wife, being Tenant by the Curteſie, the King ſhould not have the Primer ſeiſin of it after his deceaſe. *Wray*, Juſtice, ſaid, That if the Father be ſeiſed of Lands holden in Socage, and the mother of Lands holden in Knights Service, and the Husband over-lives the Wife, being Tenant by the Curteſie, That the King ſhould have all. *Anderſon*, Chief Juſtice, denyed that; and yet he ſaid, Where the Father is ſeiſed of Lands in Chief, and the Mother of other, and the Father dyeth, and afterwards the Mother dyeth; both Lands ſhall be in Ward. And in this Caſe, It was ſaid, That if there be Grandfather, Father, and Son, and the Father dyeth ſeiſed of Lands holden in Socage, and afterwards the Grandfather dyeth ſeiſed of Lands in Knight Service; the Lands in Socage ſhall not be in Ward. In the principal Caſe, *Anderſon* held ſtrongly, That the King ſhould have Primer ſeiſin of the Lands

Lands of the Mother. *Wray*, held the Contray, *Ideo Quære*, for it was not Reſolved. Trin. 33 Eliz. in *Cur. ward.* *Eſton's* Caſe. *Leon.* 1. Part, 253.

7. Upon a Demurrer in a Replevin, the Caſe was this: J.S. being Commitee of a Ward who had a Mannor, in which were divers Copyholders, amongſt whom, one was *Mutus* and *Surdus* granted the Cuſtody of that Copyholder to another, who Entred. The *Prochin Amy* of the Copyholder entred; Which of them ſhould have the Cuſtody of Copyhold, or none of them? was the Queſtion. In this Caſe, It was Reſolved, That the Lord ſhould have the Cuſtody; for otherwiſe he ſhould be prejudiced in his Rents and Services: wherefore, It was adjudged for the Grantee. Mich. 45 Eliz. C. B. *Evers* and *Skinner's* Caſe. *Cro.* 2. Part, 105.

8. In a Writ of Raviſhment of Ward, the Queſtion was, Whether the Uncle ſhould be Guardian in Socage, or the Brother of the half-blood: It was ſaid, That the Uncle ſhould have the Wardſhip for two Cauſes, 1. Becauſe there is not ſuch natural Love between two Brothers of the half-Blood, as between the Uncle and the Enfant of the whole Blood. 2. The Statute ſayes, He ſhall be in the Cuſtody *proximum hæredis*. On the other ſide, It was ſaid, That the Brother is in the *Prochin Amy*, as is proved, 5 E. 6. and ſuch means muſt needs procure Love; and although it appears ſometimes that ſuch means procure not Love, yet it cannot alter the Law, which alwayes intends amity; and as to the ſecond, The Statute of *Marlebridge* intends of Parents. And it was ſaid, That it was adjudged, 7 Eliz. in C.B. That the Brother ought to have the Wardſhip, becauſe he is next of Kin. Mich. 42 Eliz. C B. *Swan* and *Gatelands* Caſe. *Owen* 128.

Warranty, and Warrantia Charta.

1. THis Caſe was moved to the Court, A Fine was levyed of certain Lands with a Render, and the Render was with Warranty. The Officers of the Fine refuſed to accept of this Fine, by reaſon of the Render with Warranty in it, which, they ſaid, they had not before known to be. But all the Juſtices were of Opinion, That the Render with Warranty was good; for although it was not uſual, that he that Renders the Land ſhould warrant the Land, becauſe that he taketh no benefit, Yet if he will warrant it, it is not to be doubted, but that it is good enough; wherefore the Fine was commanded to be received. Patch. 25 Eliz. C. B. *Cro.* 3. Part, 17.

2. A. after the Statute of 23 H. 8. being ſeiſed of Lands, in Fee thereof, enfeoffed J. S. unto the uſe of E, the Wife of the Feoffor, and of the Heirs of the Feoffor, which he ſhould beget upon the Body of the ſaid E; and for want of ſuch Iſſue, to the right Heirs of the ſaid E: They had Iſſue, and afterwards the Husband made a Feoffment with Warranty, and dyed, and afterwards the ſaid E. Entred, and dyed. It was the Opinion of all the Juſtices in this Caſe, That that Warranty was Collateral to the Iſſue, becauſe it was Deſcended upon him in the life of the Husband. *Quære* Trin. 17 Eliz. C.B. *Cadbury's* Caſe. *Pendlowes* 33.

3. Upon a Special Verdict, the Caſe was: The Father was Tenant for life, the Remainder to his Daughter (a Feme Covert): The Father made a Feoffment with Warranty, and afterwards levyed a Fine with Warranty; the Daughter Entred within the year by the conſent of the Husband. It was the Opinion of the Court, That the Entry was good; and that the Warranty deſcending upon the Daughter during the Covert, ſhould not bar her. Mich. 29 Eliz. B. R. *Amats* and *Simſons* Caſe. *Cro.* 3. Part, 73.

4. In an Action of Covenant brought, the Caſe was this: Tenant for life made a Leaſe for years, the Leſſee by Indenture granted, bargained and ſold all his Eſtate; To have and to hold to the Bargainee *in tam amplis modo et forma*, as he ought to hold it; the Leſſee for life dyed, he in the Reverſion Entred; the Bargainee brought Covenant againſt the Bargainor. It was the Opinion of the Juſtices, That it did not lye; for that here was no Warranty, but an Aſſignment of his Intereſt only, which doth not imply a Warranty. Hill. 31 Eliz. B.R. *Laudydate* and *Thenys* Caſe. *Cro.* 3. Part, 157.

5. Upon a Special Verdict in *Ejectione firmæ*, the Caſe was: A. was Tenant in Tail, the Remainder to B; A. the Tenant in Tail made a Leaſe to the Defendant and two others for their lives, according to the Statute of 32 H. 8. with Warranty, and dyed without Iſſue; B. in the Remainder was his Brother and Heir, who Entred, and leaſed to the Plaintiff for years. The Queſtion was, If this Warranty ſhould bar him in the Remainder to Enter or no, for the Leaſe not being a Diſcontinuance (being warranted by the Statute) determined by the Dying without Iſſue, and cannot bind him in the Remainder; for he cannot

cannot give the Rent reserved; and then the Estate is determined, and the Warranty with the Estate, and so shall not bar the Remainder; and such was the Opinion of the whole Court, and therefore was adjudged for the Plaintiff. Hill. 40 Eliz. C. B. *Keen* and *Cojes* Case. *Cro.* 3. Part, 602.

6. A *Warrantia Chartæ* was brought, and the Plaintiff committed upon the Warranty of *Dedi et Concessi*. The Defendant demanded *Oyer* of the Deed; and it appeared that in the Deed, there was also a special Warranty against the Feoffor and his Heirs, and also against the Heirs and Assignes of the Father of the Feoffor; and it was demurred upon the Court. And the Question was, If the special Warranty should control the generalty of the Warranty, and expound it or not. It was the Opinion of the whole Court, That it should not; wherefore, It was adjudged for the Plaintiff. Mich. 43 Eliz. C. B. *Rust* and *Cocks* Case. *Cro.* 3. Part, 864.

7. In a Writ of *Warrantia Chartæ*, it appeared by Deed, That the Defendant had enteoffed the Plaintiff *de uno Campo* in Fee; and in the cause of Warranty, in the same Deed, the Feoffor did warrant to the Feoffee *Croftum prædictum*, where it should have been *Campum prædictum*. It was the Opinion of the Justices of the Justices of the Common Pleas, That the Writ did not lye upon that, nor could the Feoffee vouch by reason of that Deed. Trin. 4 and 5 Phil. and Mary. *Bendl.* 17.

8. Note; It was Resolved by the whole Court, That upon a Warranty against the Feoffor and his Heir, or the Grandfather, or great Grandfather of the Feoffor and his Heirs, No *Warrantia Chartæ* lyeth, unless *Dedi* be in the Deed, which implyeth a general Warranty. Mich. 43 Eliz. C. B. Sir *Hugh Portman* and Sir *Gervaise Cliftons* Case. *Cro.* 3. Part, 862.

9. R. leased the Manor of D. to H. for years, and afterwards by the words, *Dedi, Concessi, Dimisi & ad firmam tradidi*; leased the same Manor to the Plaintiff for life, who Entred, and was put out by H. the first Lessor. Upon which he brought an Action of Covenant, and layed the breach, because H. had expelled him. The Defendant pleaded, That before the Writ brought, the Plaintiff upon the same Covenant had brought a *Warrantia Chartæ* in the Common-Pleas, which was there yet depending; and demanded Judgment, that not be determined, if this Action did lye; upon which the Plaintiff demurred, and it was adjudged for the Plaintiff. It was holden, That the bar was not good; for an Action of Covenant, and *Warrantia Chartæ* are of several Natures; the one real, viz. the *Warrantia Chartæ*, and by that the Land is bound, which the Lessor had at the time of the Judgment. The Covenant is but special, and in that he shall recover but Damages: Then it was moved, That the Plaintiff was but Tenant for life; and Tenant for life should not have an Action of Covenant upon a Warranty in Law, but only upon upon a special Covenant. To that it was Answered and Resolved, That the difference is more then the whole Estate; for life is evicted, and where but the Possession for a time. But it was said, That in the principal Case, there was but a Term for years evicted, and the Lessee the Plaintiff continued seised of the Freehold; and therefore because there was but a Chattel evicted, the Plaintiff might well have satisfaction by his Action of Covenant: And it was said in this Case, That the words in the Deed would enure to a double intent, and a double warranty. The word *Dedi* to warrant the Free-hold, and the word *Dimisi* to warrant against an Eviction for years: It was adjudged for the Plaintiff. Mich. 6 Jac. B. R. *Pincomb* and *Rudges* Case. *Yelv.* 139.

10. The Father Tenant in Tail had Issue two Sons; The Father with the eldest Son made a Feoffment in Fee with Warranty; and afterwards the Father dyed, and the younger Son brought a Formedon, and the Feoffment with warranty was pleaded in Barr: Upon demurrer, It was adjudged for the Demandant, for that it was but a lineall Warranty, and then without Assets, it was no bar. For although the eldest Son dyeth in the life of the Father, yet the younger Son by Possibility might have the Land as Heir to him. Mich. 16 Jac. C. B. *Bishops* Case. *Hutton* 22.

11. In a Formedon, in Remainder, The Case was this: A. seised of Socage Lands, devised it to J. S. in Tail, the Remainder to E, the Sister of J. S. and dyed; J. S. Entred, and levyed a Fine with Warranty, and dyed without Issue. The said E. and M, his Sister being his Heirs; The Question was, Whether E. should be bound by this Warranty for the whole, or for the moyety only. It was Objected, That the Warranty should be divided, and bind but for a moyety, because both the Sisters are Heirs, and therefore the Warranty goes to both. It was said in this Case, That there is a difference of a lien real and a lien personal; lien real descends only upon the Heir at Common Law, but lien personal binds all, as Heirs in Gravelkind; and it was said in this Case, If the Heir at Common Law be vouched for warranty, who voucheth the Heirs in Gravelkind, &c. because of the Possession, they all shall vouch over; and what is recovered in value, shall go only to the Heirs in Gravelkind. So if two be vouched, where the one hath nothing, and they vouch over, the Recovery in value goes to him who had the

Intereſt, &c. In the principal Caſe, It was adjudged, That the Warranty ſhould bind all. Hill. 6 Jac. C. B. *Game* and *Symonds* Caſe. *Cro.* 2. Part, 217.

12. Note; That regularly, the Feoffee of one Co-parcener ſhall not have aid of the other Coparcener to determine a Warranty paramount; and yet, If there be two Co-parceners, and they make partition, and the one of them enfeoffeth her Son and Heir apparant, and dyeth, and the Son is impleaded, that in this Caſe, although that he be in of the Feoffment of his Mother, yet ſhall he pray in aid of the other Co-parcener to have the Warranty; and the reaſon is, becauſe the Warranty between the Mother and the Son is by Law annulled; and therefore leaſt the Son ſhould be prejudiced by Law, and ſo be left without remedy, the Law gives him (although he be in by Feoffment) to pray in aid of the other Co-parcener to deraign the Warranty paramount. *Cook* 1. Part, *Inſtitutes* 174.

13. Note alſo, That it is againſt a Rule in Law, That one ſhould vouch himſelf. Yet if a man be enfeoffed to him and his Heirs of Black Acre, and is alſo ſeiſed of White Acre in Borough Engliſh, and having two Sons, enfeoffeth his eldeſt Son of Black Acre. In ſuch Caſe, If the eldeſt Son be impleaded, he ſhall vouch himſelf, and his younger Brother being Heir in Borough Engliſh, otherwiſe the eldeſt Son ſhould be without remedy, becauſe the act in Law, *viz.* the Diſcent, hath determined the Warranty between the Father and the eldeſt Son. *Cook* 1. Part, *Inſtitutes* 390. acc.

Warrants of Attorney, and other Warrants.

1. ERror of a Judgment in C. B. the Error aſſigned was, That there was not any Warrant of Attorney for the Plaintiff, the Judgment being for the Defendant. And a *Certiorari* being awarded, It was returned, That there was not any Warrant of Attorney that Term wherein the Action was commenced, and Judgment was given: Whereupon there were two *Scire facias*'s ſued, and two *Nihils* returned, and the Record was marked, That it ſhould be reverſed; but the Judgment was not entred upon the Roll, as was ſurmiſed to the Court; and therefore a new *Certiorari* was prayed. It was the Opinion of the whole Court, That it might be granted, for otherwiſe by the falſe ſurmiſe of the want of an Entry of a Warrant in one Term (where perhaps it is entred in another Term), the Judgment ſhould be reverſed; where the command of the Juſtices was, That in regard it is not material in what Form the Warrant be entred, ſo it be entred at all, That the Entry upon the Record of the Reverſal of it ſhould be ſtayed. Paſc. 9 Jac. B. R. *Smith* and *Skipwiths* Caſe. *Cro.* 2. Part, 277.

2. In a *Quo Warranto* brought againſt the Bayliffs, Aldermen, Burgeſſes, and Comminalty of *Yarmouth*, they did appear by Warrant of Attorney, and one of the Bayliffs named in the Warrant did not appear, nor agree to it. It was notwithſtanding holden by the whole Court, That the appearance of the Mayor and greater part being Recorded, was ſufficient; And it was alſo holden by the Court, That although the Warrant of Attorney was under another Seal then their common Seal, yet it being under Seal and Recorded, it could not be annulled. Trin. 4 Car. B. R. The Bayliffs of *Yarmouth* and *Cooper*'s Caſe. *Godb.* 439.

3. Error of a Judgment was, becauſe the Entry of the Warrant of Attorney of the Defendant was *posit loco*, and doth not ſay *ſuo*. But the Entry being, That the Plaintiff *posit loco ſuo*; and the Defendant *posit loco ſimiliter*, it is good enough, and the Judgment was affirmed. Mich. 33 Eliz. B. R. *Yeoman* and *Stenlacks* Caſe. *Cro.* 3. Part, 201.

4. Upon a Special Verdict in *Ejectione firmæ*. It was found, That one A. was ſeiſed of the Land, and thereof made a Feoffment to the Leſſor and his Heirs, dated 10. *Sept.* and he by another Deed reciting, That A. had made to him a Charter of Feoffment of the Land, dated 11. *Sept.* gave thereby Authority to J. S. to receive Livery and Seiſin of him *ſecundum formam et effectum Chartæ prædict.* J. S. receives the Livery upon the Feoffment accordingly: And it was found, That there was not any other Warrant of Attorney. And if it was a good Feoffment or not, was the Queſtion. It was the Opinion of all the Juſtices, That it was no good Feoffment; for the Warrant to receive Livery is by the Letter of Attorney, which Authorizeth him to receive it *ſecundum formam Chartæ*, dated the 11th of *Sept.* whereas there is not any ſuch, and ſo he had not any Warrant to receive it, and therefore the Livery made was void. It was alſo holden, That if the Warrant had bin to make Livery, it alſo had not bin good. It was adjudged for the Defendant, Hill. 40 Eliz. C. B. *Morriot* and

and *Smiths* Caſe. *Cro.* 3. Part, 601.

5. In *Ejectione firmæ*, the Plaintiff declared of a Leaſe made by three Husbands, and their Wives. Upon Iſſue of Not Guilty; In Evidence to prove the Leaſe, and the delivery of it, a Warrant of Attorney made by the three Husbands and their Wives was produced and ſhewed. The Counſel of the Defendant took Exception to the Declaration; it being that they and their Wives made a Warrant of Attorney to deliver it, whereas a married Woman cannot make a Warrant of Attorney; and ſo it was not the Leaſe of the Wives, and ſo the Declaration not good. It was the Opinion of the Court, That a Married Wife could not make a Warrant of Attorney. But the Court was of Opinion, That if the Plaintiffs had declared of a Leaſe made by the Husband only, then it had bin good. Trin. 9 Jac. B. R. *Plomer* and *Hackbeads* Caſe. *Brownlow* 2. Part, 248.

6. In Debt, the Caſe was, That the Maſter and Chaplins of the *Savoy* leaſed Lands to the Defendant for years; and afterwards he accepted of them, and an Indenture of Bargain and Sale to him and his Heirs by expreſs words of Bargain and Sale. One of the Maſters of the Chancery within the ſix Moneths, came unto them into their Chapter Houſe, and before him they acknowledged the ſaid Indenture to be their Deed, and prayed, That it be enrolled, which was done accordingly. It was moved, If the acknowledgment or Inrolment were good or not; or if the Maſter and the Chaplins ought to have appointed one by their Warrant to be their Attorney to acknowledg the ſaid Deed. It was ſaid by the Court, That a Warrant of Attorney to acknowledg a Deed, were a ſtrange thing. But it was agreed by them, That the Indenture being once enrolled; It was not material by what means it was enrolled but was good, being done. Mich. 26 Eliz. B. R. *Abſolon* and *Andertons* Caſe. *Leon.* 3. Part, 84.

Waſte.

1. IN Waſte, the Plaintiff declared of a Demiſe of the moyety of the Mannor of *Wolverton*, and of the moyety of a Wood called *Wolverton*-Wood. The Defendant pleaded, That before the Waſte ſuppoſed, J. S. was ſeiſed of and in *tertia parte alterius medietatis* of the ſaid Mannor, and of and in *tertia parte alterius medietatis* of the ſaid Wood, and held the ſame *in ſimul et pro indiviſo* with the Plaintiff; and that the ſaid J. S. by Deed ſold to the Defendant *omnes et omnimodas arbores et ſubboſcos ſuos creſcent. in prædict. parte alterius medietatis prædict. boſci ad libitum* of the Defendant *ſuccidend.* and ſo juſtified the Cutting down of 300 Oaks, in which Waſte was Aſſigned; and averred, That the 300 Oaks were *in numero et precio medietatis arborum, et ſubboſcorum.* And demanded Judgment of the Action. Many Exceptions were taken to the Count; One was, (amongſt the reſt) For that the Plaintiff ſhews the Demiſe of the Mannor of *Woolverton*, and of other Lands; and aſſigns the Waſte in Cutting down Oaks *in quodam boſco vocat. Woolverton*-Wood, parcell *præmiſſorum:* and that cannot be, for this Wood cannot be parcel of the Mannor of *Woolverton*, and of the other Lands alſo. And for this cauſe, It was holden by the whole Court, That the Count was not good. Trin. 7 Eliz. in C. B. *Tinſall* and *Cobbs* Caſe. *Leon.* 3. Part, 9.

2. The Caſe was this; A man made a Leaſe for 30 years, and bargained and ſold the Woods upon the Premiſſes to the Leſſee, and that he might carry them off the Lands during the time of 30. years. The Leſſee cut down all the Woods, and afterwards other Wood grew upon the Stocks, and the Leſſee cut them; and the Leſſor brought Waſte for cutting the new Wood. The Juſtices demanded, viz; Is the Bargain *de boſco, et ſubboſco*, growing upon the premiſſes? It was Anſwered, No: But of all his Woods in and upon the Premiſſes. Then the Opinion of the Court was, That this was but a Liberty to ſell the Trees which were growing at the time of the ſale, and to carry them where he pleaſed; and not to give other Trees or Wood, which ſhould after grow. Wherefore it was adjudged for the Plaintiff. Mich. 15 Eliz. in C.B. *Leon.* 3. Part, 29.

3. The Caſe was; A Man ſeiſed of a Paſture

in which were two great Groves and a Wood, known by the name of a Wood; and alſo in the ſame Paſture were certain Hedg-rowes and Trees growing *ſparſim*, he Leaſed the ſame by Indenture for years; and by the ſame Indenture bargained and ſold to the Leſſee all Woods and Underwoods in and upon the Premiſſes; and that it might be lawful to the Leſſee to cut down and carry away all the ſame at all times during the Term. It was a Doubt, If the Hedg-Rowes did paſſe? But the better Opinion of the Court was, That they did paſſe, the Grant being genral. Then the Queſtion was, If the Leſſee might cut them down a ſecond time, or once? It was the Opinion of three of the Juſtices, That he could cut them but once. But *Dyer* was of a contrary Opinion. Mich. 15 Eliz. C. B. *Leon.* 3. Part, 18.

4. A Leaſe was made to A. for life, the Remainder to B. in tail, the Remainder to the right Heirs of B, who bargained and ſold all his Eſtate to J. S: A. committed Waſte. It was holden by the Court in this Caſe, That J. S. ſhould not puniſh him in an Action of Waſte; for that nothing paſſeth to him but during the life of the Grantor; *ſcil.* as to the Remainder in tail; in reſpect of which Eſtate, the Action of Waſte is only maintainable: For although that the Feeſimple paſſeth to the Grantee, yet in reſpect of that the Action of Waſte is not maintainable, untill the Eſtate tail be ſpent. Hill. 18 Eliz. in C. B. *Owen* and *Sadlers* Caſe. *Leon.* 3. Part, 60.

5. A, ſeiſed of Lands in Fee, Deviſed them to his Wife for life; and after her decеaſe, ſhe to give the ſame to whom ſhe will; had Iſſue two Daughters, and dyed. The Wife granted the Reverſion to a Stranger, and committed Waſte: The ſecond daughter brought an Action of Waſte. It was holden by the Juſtices, That by that Deviſe, the Wife had but an Eſtate for life, but ſhe had gained authority to give the Reverſion by his Will, to whom ſhe pleaſed. And ſuch a Grantee ſhould be in by A. and his Will: But if an expreſs Eſtate had not been appointed to the Wife, an Eſtate in Feeſimple had paſſed. Hill. 20 Eliz. C. B. *Leon.* 3. Part, 71.

6. The Caſe was: A Leaſe was made to two, *durante vita ipſorum et alterius eorum diutius viventi. abſq; impetitione Vaſti durante vita ipſorum.* One of them dyed. Although it was conceived by ſome, That there was a difference between the Limitation of the Eſtate, and of the Liberty, &c. for the Liberty of the Eſtate ſeems to be more literal. Yet the Opinion of the whole Court was, That the Liberty runneth with the Eſtate, and ſhall endure as long. Hill. 29 Eliz. C.B. *Roberts*

7. The Caſe was: A man Deviſed his Lands to his Wife during the Minority of his Son, upon Condition, That ſhe ſhould not do Waſte during the Minority of the ſaid Son, & dyed. The Wife took Husband, and dyed: The Husband committed Waſte. It was holden by the whole Court, That it was not any Breach of the Condition. Hill. 33 Eliz. in C. B. *Cobb* and *Priors* Caſe. *Leon.* 2. Part, 35.

8. In Waſte: The Plaintiff declared, That J. S. was ſeiſed of the Land in Fee, and made a Feoffment to the uſe of himſelf for life, the Remainder to the uſe of A. the Mother of the Plaintiff in Fee: A. dyed, and the Remainder diſcended to the Plaintiff; and for Waſte done after her death, the Action was brought. The Defendant pleaded, That he was ſeiſed in Fee, *abſq; hoc*, that he made a Feoffment. The Jury found, that he made a Feoffment, and that it was unto the uſe of himſelf for life, without Impeachment of Waſte, the Remainder over, *ut ſupra*. It was Objected, That this Verdict was found for the Defendant; for although it be not found, that he was ſeiſed in Fee; yet it was found he held for life, without Impeachment of Waſte: and ſo the Plaintiff hath no cauſe of Action. But all the Juſtices held the contrary, and ſaid, That the Jury had found more than they needed. It was adjudged for the Plaintiff. Trin. 27 Eliz. C. B. *Clare* and *Pepys* Caſe. *Cro.* 3. Part, 40.

9. In Debt upon an Obligation: The Condition was; Whereas the Plaintiff had a Copyhold of Inheritance, and had Leaſed it to the Defendant, If the Defendant ſhould not commit any manner of Waſte, and ſhould do no other thing which ſhould be a forfeiture of the Copyhold; That then, &c. The Defendant pleaded Conditions performed. The Plaintiff Replyed, and alledged Waſte committed in a Shop that fell down during the Term for want of Reparations. The Defendant ſaid, It was ruinous at the time of the Leaſe, and by reaſon thereof fell down. In this Caſe, It was adjudged for the Plaintiff. And a difference was put between an Action of Waſte, and Covenant; For if a man maketh a Leaſe for years, and by ſudden Chance, Waſte is committed, this ſhall excuſe the Leſſee; but if he Covenant to leave the houſe in as good a Condition as he found it, if the Houſe fall down by Tempeſt, yet he ought to re-edifie it. And in the Principal Caſe, it is Waſte in Law, although the Houſe was ruinous at the beginning of the Leaſe: For if in Waſte brought, he plead, No Waſte done, he ſhall not give ſuch matter in Evidence; but it is only to excuſe him. Mich. 29 Eliz. B.R. *Glover* and *Pipes* Caſe, *Owen*, 92.

10. Note: It was adjudged by the whole Court, That if for not ſcouring of a Ditch, or a Mote, the Grondſells of the Houſe are putrified; or Trees cut down which are in the defence of the houſe, whereby the Houſe by Tempeſt is blown down; the ſame is Waſte. And Waſte ſhall be aſſigned *in Domibus pro non ſcouranda*. Paſch. 28 Eliz. C. B. *Stickleburn* and *Hatchmans* Caſe. *Owen*, 43.

11. Error brought to reverſe a Judgment in C. B. The Caſe was; Two Coparceners were of an Houſe; one of them let her part to a Stranger; the other lett her part to a Stranger alſo: and then both Leaſes came to the hands of the Plaintiff, and then one of the Coparceners bargained and ſold her Reverſion to the other Coparcener. The Leſſee committed Waſte, by letting the houſe to fall; and the Grantee of the Reverſion brought Waſte. Divers Errors were aſſigned, 1. Becauſe he brought but one Action of Waſte, whereas he ought to have ſeveral Actions. But to that it was Anſwered and Reſolved, That although the Leſſors were at firſt entituled to ſeveral Actions; yet by matter *ex poſt facto*, the Actions might be afterwards united. 2. Error, Becauſe the other Coparcener was not joyned with him in the Action. But it was Reſolved to be good enough. And the difference is, When both parties have an equal Eſtate and Inheritance, and when one of them hath but a particular Eſtate: As, 27 H. 8. Leſſee for life, and he in the Remainder, ſhall joyn in an Action of Waſte; but where they have equall Eſtate of Inheritance, as two Coparceners, or Tenants in Common, and one makes a Leaſe, and the Leſſee commits Waſte; there the Writ of Waſte ſhall be brought by the Leſſor only. Wherefore in the Principall Caſe, It was Reſolved, That they ſhould not joyn in the Action; and eſpecially, for that the Writ ſayes, *To his diſ-inheritance that made the Leaſe*. Mich. 34 Eliz. B. R. *Wardſords* Caſe. *Owen*, 11.

12. Error brought of a Judgment in Waſte; The Error aſſigned, That the Plaintiff in the Action did Count, *Quod cum fuiſſet ſeiſitus* of the Land, he did Demiſe the ſame to the Defendant for years, and that he had done Waſte. The Defendant pleaded, That he had done no Waſte: Which was found againſt him, and Judgment given. The Error, That he ſaith, *Quod ſeiſitus, &c.* but doth not ſay, Of what Eſtate, and ſo it may be intended but of an Eſtate for life; and the alledging of Seiſin, inſufficiently, is not good. But the Juſtices held the Count to be good; for the Allegation of Seiſin is not material, when it might have been left out: and it is helped by the ſubſequent word, viz. *ad exhereditationem, &c.* which doth explain, how he was ſeiſed. Paſch. 29 Eliz. B. R. Sir *Walter Aſton* and *Whetnalls* Caſe, *Cro.* 3. Part, 57.

13. In Waſte, the Plaintiff Declared, That E. B. was ſeiſed in Fee, and enfeoffed J. S. and others, to the uſe of the ſaid E. B. for life, and after to the uſe of M. her Daughter for life, the Remainder to the Plaintiff in tail: That E. B. dyed; That M. the Daughter took the Defendant to Husband, who committed Waſte, and then his Wife dyed: and for that Waſte done, during the Coverture, the Action was brought: And it was neither in the *Tenet*, nor in the *Tenuit*. And for that cauſe, It was the Opinion of the Court, That the Action was not well brought; for it ought to be the one Way, and to make his Count ſpecial. 2. The Writ ſuppoſeth, That the Husband *fecit Vaſtum*; whereas the Husband being charged as Tenant in the right of his Wife, the Writ ought to have been *fecerunt Vaſtum*; for ſo is the Regiſter. And ſuch alſo was the Opinion of the Court. 3. The Court alſo did Conceive, That the Writ did not lye againſt the Husband, for Waſte committed by him in the time of his wife; for he is to be charged by reaſon of his wife, and joynly with her; and ſhe being dead, the Action is gone. In the Principal Caſe, the Defendant pleaded in Barr, a Concord and Satisfaction, viz. that the Feoffees gave and delivered to him the Deed of Feoffment to Uſes, which he delivered to the Plaintiff, in ſatisfaction of the Waſte, Upon which it was Demurred. It was Reſolved by the Court, That admitting that the Action did lye, for it is in its nature perſonal, in which Damages are to be recovered, and not the place waſted: That Accord with ſatisfaction is a good Plea; and here in this Caſe, the delivery of the Deed, is a good Satisfaction. It was adjudged for the Defendant. Mich. 37 Eliz. C. B. *Sackvorell* and *Reynells* Caſe. *Cro.* 3. Part, 356.

14. In Waſte; It was found by Verdict, That the Plaintiff had but a third part of the Reverſion in Common with others. And, Whether he ſhould have Waſte, or the others not named, was the Queſtion? For it was ſaid, That this Action is *quaſi* in the realty. But the Court held, That the Action did not lye for one Tenant in Common ſole; for damages, and the place waſted, are to be recovered by moyeties, or a third part: it is alſo inconvenient, that the third part ſhould be recovered and delivered in Execution. Then it was moved, That this Tenancy in Common ought to have been pleaded, otherwiſe the Defendant ſhall not take advantage thereof. But the Court ſpake not to that. Mich. 37 Eliz. C. B. *Hill* and *Hurts* Caſe. *Cro.* 3. Part, 317.

15. Waſte, for cutting down 300 Oaks; The Defendant as to 200 pleaded, That the Houſes

were

were ruinous, and that he cut them down to repair thoſe houſes; And to the Reſidue, That he cut them down to imploy about Repairing *tempore opportuno, &c.* It was the Opinion of the whole Court, It was no Plea: For if it ſhould, every Farmer might cut down all the Trees growing upon the Land, when there was no need of Reparations. Mich. 40 Eliz. C.B. *Georges* and *Stanfields* Caſe, *Cro.* 3. Part, 593.

16. In Waſte, the Caſe upon Demurrer was, One made a Leaſe for years by Indenture, wherein was this Proviſo; Provided alwayes, And it is agreed between the parties, *Quod Licitum ſuerit et eſſet*, for the Leſſor and his Heirs, at any time, and every time during the Term, to fell, cut down, to ſhrub, and carry away, all the Woods and Trees, and all the Timber ſtanding growing and being upon the premiſſes. If this was an Exception out of the Leaſe of the Trees, or but a Covenant, was the Queſtion: For if it was an Exception, then they were never lett, and Waſte lyeth not. It was Reſolved by the whole Court, That it was not an Exception of the Trees, but a Covenant only. Wherefore it was adjudged for the Plaintiff. Trin. 41 Eliz. C. B. *Lunſord* and *Sanders* Caſe, *Cro.* 3. Part, 690.

17. Upon an Evidence to a Jury, in an *Ejectione Firmæ*, the Caſe was; Queen *Mary* ſeiſed of the Manor of H, Leaſed the ſame to T. F. for certain years, *Exceptis et reſervatis groſſis arboribus ſuper premiſſis exiſtentibus et creſcentibus*: Proviſo, That if the Leſſee his Executors or Aſſigns ſhall do any voluntary Waſte in any of the Premiſſes before demiſed, then the Leaſe to be void, and accounted none in Law. The Queen after that Leaſe granted the Reverſion to the Lord *Rich* and his Heirs. The Leſſee cut down certain great Trees, which at the time of the Demiſe, were not great, but little Trees; but after, *tractu temporis* became great, and at the time of the cutting down were great. Upon which, the Lady *Rich*, Widow of the Lord *Rich*, the ſaid Manor being aſſigned unto her (*inter alia*) for her Dower, Entred for the Condition broken. It was moved, If the Exception did extend to the Trees which at the time of the demiſe were but little Trees, but at the time of the Cutting down became great? For if it do extend to ſuch Trees, then upon the matter they were not demiſed. And if ſo, then Waſte cannot be aſſigned in cutting them down. It was the Opinion of *Anderſon*, Chief Juſtice, That the Exception did extend to Trees which at the time *tempore demiſionis* became great, although at the time of the Demiſe they were but little: So as upon the matter ſuch Trees were never demiſed, and ſo the Condition doth not extend to them. Otherwiſe it ſhould be, if the words had been, *modò creſcentibus et exiſtentibus*. It was further moved in this Caſe, That here was not any voluntary Waſte in the Leſſee as to the Condition; for that the Condition is not broken, only the Leſſee is ſubject to an Action of Waſte: Otherwiſe, if the Leſſee had expreſly commanded the Vendee to cut them down. And the ſale was, All his Woods growing, &c. This Point was not Reſolved. Paſch. 29 Eliz. C. B. *Gamock* and *Cliffs* Caſe, *Leon.* 1. Part, 61.

18. Waſte againſt the Defendant and his wife, late the wife of G. G: The Writ was general, That the wife held the Lands *ex dimiſione* G. G; And the Count was ſpecial, That G. G. entruſted divers, to the intent a Recovery ſhould be ſuffered againſt them, wherein they ſhould vouch G. G; who ſhould vouch the Common Vouchee, which ſhould be to the uſe of the ſaid G.G. for life; and after to the uſe of A. his Wife (now Defendant), and after to the uſe of G. G. in tail, the Remainder to his right heirs; which was executed accordingly. After No Waſte pleaded, and found for the Plaintiff: In ſtay of Judgment, It was ſaid, That this Writ did not warrant the Count: For the Writ ought to have been ſpecial, and to have recited all the matter; and it ought to have ſuppoſed the demiſe of the Feoffees: For, as that Caſe is, the Land and the uſe are in the Feoffees untill the Recovery, which is as a Limitation of the Uſe by them, and not by the Vouchee. Alſo, it was moved, That this being after Verdict, was holpen by the Statute of 18 Eliz. which helps where there is not any Writ. Yet it was the Opinion of the whole Court, That this was not helped by the ſaid Statute, but in caſe where there is not any Writ at all; but not where there is a good Writ, as here; but it warrants not the Declaration. Or if there be an ill Writ, they are not holpen by the Statute. Mich. 41 Eliz. C.B. *Greenfield* and *Dennis* Caſe. *Cro.* 3. Part, 722.

19. Note; It was holden by all the Court, That eradicating of White thorn is Waſte; but *in ſuccidendo et vendendo*, no Waſte, unleſs it be layed, That they grew in Paſture, for the defence of the Cattel, and were in the greateſt of Timber. Trin. 4 Jac. C.B. *Cro.* 2. Part, 116. acc.

20. If a Leſſee for years hath liberty to fell Trees to repair the Houſe, and he fells 4. Oaks for that purpoſe, and ſells them, and buys 4. other Oaks as good as the other, and imployes them towards the Reparation of the Houſe. Yet it was holden in that Caſe, That it was Waſte; For the cutting down, and ſelling them, was a wrong. And ſo it is, If the Leſſor be bound to a man in an Obligation of 100 l. and the Leſſee cuts down 10. Oaks, and ſells them, and therewith payeth to the Obligee the Leſſee's debt; yet an Action of Waſte lyeth againſt the Leſſee for the ſelling of the Trees, although

although the money ariſing upon the ſale, was converted to the uſe and profit of the Leſſor. See 29 H. 8. *Dyer*, 35 36 38.

11. A Tenant by the Curteſie or Dower, can hold of none but of the Heir, and his Heirs by Diſcent; and therefore if they grant over their whole Eſtate, and the Grantee doth Waſte: yet the Heir ſhall have an Action of Waſte againſt them, if the Grantee committeth Waſte, and ſhall recover the Land againſt the Aſſignee; but if the Heir either before the Aſſignment had granted, or after the Aſſignment doth grant the Reverſion over, the Stranger ſhall have an Action of Waſte againſt the Aſſignee, becauſe then in both Caſes the Privity is deſtroyed. *Cook* 1. Part, *Inſtitutes* 54.

12. No perſon ſhall have an Action of Waſte, unleſs he hath the immediate Eſtate of Inheritance; but yet in ſome Caſes another ſhall joyn with him in the Action for Conformity: As if a Reverſion be granted to two, and to the Heirs of one of them, they two ſhall joyn in an Action of Waſte. And ſo the ſurviving Coparcener, and the Tenant by the Curteſy ſhall joyn in an Action of Waſte. 2. If the Eſtate tail determine depending the Action of Waſte, and the Plaintiff became Tenant in tail after poſſibility of Iſſue extinct, there the Action of Waſte is gone. 3. If the Tenant doth Waſte, and then he in the Reverſion dyeth, his Heir ſhall not have an Action of Waſte, for Waſte done in the life of his Anceſtor, neither ſhall a Biſhop, Parſon, or ſuch like, have an Action of Waſte for Waſte done in the time of their Predeceſſors. So if Leſſee for years doth Waſte, and dyeth, an Action of Waſte lyeth not againſt the Executor or Adminiſtrator for Waſte done in the time of the Teſtator, or the Inteſtate. *Cook* 1. Part, *Inſtitutes*, 67.

13. A Cuſtome was in the Manner of A. That the Lord ſhould have a Fold-Courſe in all Lands of the Copyholders not incloſed; and that no Copyholder might incloſe without Licence of the Lord: and if any be incloſed without Licence, a reaſonable Fine to be paid to the Lord. A Copyholder incloſeth part of his Copyhold Land, and leaves ſome ſpaces of 9. foot broad: and being required to open the Incloſure, he refuſeth to do it: The Lord Enters for a Forfeiture. Reſolved, 1. It is no cauſe of Forfeiture, becauſe it is not at all Incloſed. 2. Becauſe it is done to the Fold-Courſe of the Lord, and is for the bettering of the Lords Fold-Courſe. And the forfeiture of a Copyhold is always of ſomething to the Copyhold it ſelf. But if a Copyholder builds a new Houſe, it is a Forfeiture. So if Tenant for years makes a Hopyard in the Land, it is Waſte. Paſch. 5 Car. C. B. *Paſſas* and *others* Caſe. *Hutton* 102, 103.

Wills, Teſtaments; *and* Deviſes *by them.*

1. THE Lord *Audley* made a Feoffment in Fee of his Lands, and afterwards he by Indenture reciting the Feoffment to be to the intent, That the Feoffees ſhould perform his Will: He declared in theſe words, viz. *Know ye, That my will is, That they ſhall ſtand ſeiſed for the payment of my Debts, and afterwards ſhall make an Eſtate to me, and E. my Wife in tail.* It was holden by the Juſtices in this Caſe, That the ſame was not any Will, becauſe he limited the Eſtate to be executed in his life time. It was further holden, That the Wife was a ſtranger to the Land, and the Ancient uſe; wherefore without an Eſtate remade by the Feoffees, the Ancient Uſes did remain, and were not altered by the ſaid Declaration, but remained to the Husband and his Heirs as it was before. Mich. 1 Eliz. *Dyer* 166. the Lord *Audleyes* Caſe.

2. Note, It was holden by the Juſtices, That if a man ſeiſed in Fee of a Manour and Lands, deviſeth the ſame by his Will to his Son, and afterwards by another part of the ſame Will, he deviſeth a third part of the ſame Lands to another of his Sons, That they are Joynt-Tenants of the Lands: And ſo if a man in one part of his Will deviſeth his Lands to A. in Fee, and afterwards by another clauſe in the ſame Will, he deviſeth the ſame Lands to another in Fee, they are Joynt-Tenants. Mich. 8 Eliz. in C. B. *Leon.* 3. Part, 11.

3. The Caſe was this, A. being ſeiſed of Lands in Fee, deviſed the ſame by his laſt Will to his Wife for life, the Remainder to his three younger Sons, and to the Heirs of their bodies begotten, equally to be divided amongſt them by equal portions; and if one of them dye, then the other two who ſurvive ſhall be next Heirs. The Deviſor dyed, one of the Sons dyed. It was the Opinion of the Juſtices, That the three brothers were Tenants in Common in Remainder. But they ſaid, the contrary is, where ſuch a Deviſe is made between them to be divided by his Executors, for there they are Joynt-Tenants untill the Diviſion be made: and

and they ſaid, That in the principal Caſe, although that the words be, [Equally to be divided] the ſame is not intended of a Diviſion in fact and poſſeſſion, but of the Intereſt and Title. Paſc. 14 Eliz. in C. B. *Webſters* Caſe. *Leon.* 3. Part, 19.

4. A. ſeiſed of divers Manners and Lands in Fee, made a Feoffment thereof to divers perſons, to the uſe of himſelf for life, the Remainder to his right Heirs; And after the Statute of 32 H. 8. of Wills, he deviſed all his ſaid Mannors and Lands to his Wife for life; and it was expreſſed in his Will, That if he could not Deviſe all his Lands by reaſon of the Statute of 34 H. 8. that his Will was, That his Wife ſhould have ſo much which could be Deviſed by the Laws of the Land. There was another clauſe in his Will, That his Feoffees ſhould ſtand ſeiſed of the ſame Mannors, and Lands after the death of his Wife, to the uſe of J. S. and others for years, for the payment of his Debts, and for the raiſing of Portions for the preferment of his Daughters in Marriage. And further by his Will, he willed, That if the Law would not bear it, That J. S. and the others ſhould have the Intereſt. Then he Willed, That his Son ſhould have all his Mannors and Lands, and ſhould pay his Debts, and ſhould give certain Sums of Moneyes for the Marriage Portions of his Daughters. It was a Queſtion, Whether the firſt part of his Will, That J. S. and others ſhould have his Lands, were not void by the latter words of the Will. It was holden by all the Juſtices, That the Will was good for two parts, both to the Wife, and to J. S. and the others. And it was holden, That by the intent of the Will, the Son was to pay ſuch Moneyes as J. S. was to have paid, ſo as the Will was not for the advantage of the Heir, but to be conſtrued according to the meaning of the Deviſor. Mich. 15 Eliz. in C. B. Sir *Peter Philpots* Caſe. *Leon.* 3. Part, 28.

5. The Caſe was, A. ſeiſed of Lands in Fee, by his Will in writing granted a Rent-charge of 5 l. *per annum* out of the ſame to his younger Son towards his education and bringing up in learning. The Queſtion was in this Caſe, If in pleading, the Deviſee ought to averr, That the Son was brought up in learning. It was the Opinion of the Juſtices, That there needeth not ſuch averment, for the Deviſe is not conditional; and therefore although he be not brought up in Learning, yet he ſhall have the rent. And it was ſaid by the Lord *Dyer*, That this Caſe was lately adjudged in this Court, viz. Two were bounden to ſtand to the award of certain perſons, who awarded, That one of them ſhould pay to the other 20 s. *per annum* during the Term of ſix years towards the Education and bringing up of ſuch an Infant, and within two years of the ſaid Term, the Infant dyed, ſo as now there needed not any ſupply towards his Education: Yet it was adjudged, That the yearly ſum ought to be paid for the whole Term after, for that the words (towards his Education) are but to ſhew the intent in conſideration of the payment, and are not words of a Condition. Mich. 19 Eliz. C. B. *Leon.* 3. Part, 65.

6. A. by his Will willed, That his Lands ſhould diſcend to his Son. But further willed, That his Wife ſhould take the profits thereof until the full age of the ſaid Son of 21 years, to maintain and bring him up; and dyed. The Wife took a ſecond Husband, and dyed during the nonage of the Son. It was the Opinion of the Juſtices, That the ſecond Husband ſhould not have the profits, &c. for that nothing is Deviſed to the Wife but a Confidence, and ſhe is as a Guardian or Bailiff to aid the Infant, which by her death is determined, and cannot accrue to the Husband. But if the Husband had deviſed the profits of the Land to the Wife until the age of the Infant to bring him up *ut ſupra*, It had amounted to a Deviſe of the Land, and ſo a Chattel in the Wife which ſhould have accrued to the Husband. Mich. 21 El. B. R. *Leon.* 3. Part, 78.

7. Note by the whole Court, A man made his Will in this manner, viz. *I will and bequeath my Lands to A.* and the name of the Deviſor was not in the whole Will, yet the Will was good, and the Deviſe good by averment of the name of the Deviſor; And in proof that the ſame was a good Will, this Caſe was put; A man lying *in Extremis*, having an Intent to Deviſe his Lands by words, maketh ſuch a Deviſe, but doth not command the ſame to be put in writing, but another man without the knowledg or command of the Deviſor, putteth it into writing in the life-time of the Deviſor, that the ſame is a good Deviſe; for it is ſufficient if the Deviſe be reduced into writing during the life of the Deviſor. Paſc. 24 Eliz. B. R. *Leon.* 3. Part, 79.

8. In Treſpaſs, the Caſe was; A. father of the Plaintiff, ſeiſed of the Mannor of K. holden of the Queen by Knights Service in *Capite*, and alſo ſeiſed of other Lands in which the Treſpaſs was done, holden in Socage 20 Eliz. for the preferment of M. his Wife, enfeoffed J. S. and J. D. of the ſaid Mannor, to the uſe of himſelf and the ſaid M. and their Heirs. It was found, That the Father of the Plaintiff had not any other Land but the Lands before mentioned, and that the ſaid Mannor at the time of the ſaid Feoffment, and at the death of the Father, did amount to two parts of all the Lands and Tenements of the Fathers in three parts to be divided. And afterwards the

Father

Father by his Will devised the Lands holden in Socage unto his ſaid Wife for life, with divers Remainders over. It was the clear Opinion of the whole Court in this Caſe, That the Deviſe was utterly void by the Statute. Trin. 26 Eliz. B. R. *Finch* and *Tracyes* Caſe. *Leon.* 3. Part, 105.

9. Upon a Special Verdict in Treſpaſs, It was found, That W. G. having three Sons, viz. *John*, *Stephen*, and *Roger*; and ſeiſed in Fee according to the Cuſtome of the Manner of divers Lands, ſurrendred them to the uſe of his Will; and by his laſt Will he Deviſed them in this manner, *ſcil. I Bequeath to* John, *my Lands called Locks and Sone*; *To* Stephen, *My houſe and Lands called Stokes and Newman*; *To* Roger, *My houſe and Lands called Lakins and Brox. Moreover, If the ſaid* John, Stephen, *and* Roger *live till they be of lawfull age, and have Iſſue of their bodies lawfully begotten*; *Then I give the ſaid houſes and Lands to them and their Heirs in manner aforeſaid, to give and ſell at their pleaſure: But if it fortune one of them to dye without Iſſue of his body begotten, then I will that the other Brothers or Brother have all the ſaid houſes and Lands in manner aforeſaid. And if it fortune the three to dye without Iſſue in like manner, Then I will that all the ſaid Houſes be ſold by my Executor or his Aſſignes, and the money to be given to the Poor.* The Deviſor dyed, the three Sons are Admitted according to the intent of the Will; *Roger* dyed within age without Iſſue; *John* and *Stephen* are admitted to his part. *John* comes of full age, and hath Iſſue H. and ſurrenders his part of the whole, and his Eſtate therein, to the uſe of *Stephen* and his Heirs, who was Admitted accordingly. *Stephen* comes of full age. *John* dyeth. *Stephen* dyeth without Iſſue. H. the Son as Couſin and Heir of *Stephen* is admitted according to the Will, and afterwards dyeth without Iſſue; the Plaintiffs are his Heirs, and admitted to the Lands called Locks and Sone, and to the moyety of the Lands called Lakins and Brox, with entry into all the Lands. The Executor dyeth Inteſtate; the Defendant as Couſin and Heir of the Deviſor enters. This Caſe being intricate, was long debated: But at the laſt, it was Reſolved, That no Eſtate tail was created by this Will, but the Fee-ſimple ſeiſed in the Sons when they came at their lawful age, and had Iſſue, ſo as the *reſidue* of the Deviſe was void, and Judgment was entred accordingly. Trin. 27 Eliz. C. B. *Ryan* and *Cawſens* Caſe. *Leon.* 3. Part, 115, 116, 117.

10. In Waſte, the Caſe was; Lands were Deviſed to the Father of the Defendant, and to his eldeſt Iſſue Male *de Corpore ſuo Exeunte*. And in this Caſe it was adjudged upon a Demurrer, That by this Deviſe no Eſtate paſſed, but an Eſtate for life unto the Father of the Defendant; the Remainder to his eldeſt Son for life, ſo as no Eſtate of Inheritance paſſed thereby; and therefore he was puniſhable in Waſte. Trin. 27 Eliz. C. B. *Leonard Lovelaces* Caſe. *Leon.* 2. Part, 35.

11. In *Ejectione firmæ*, the Caſe was; A. was ſeiſed of three Meſſuages in *Bury*, in Fee, and had Iſſue *Robert* his Son, and C. and J. two Daughters, and Deviſed all his Meſſuages to his Wife for life, the Remainder of one of the ſaid Meſſuages to *Robert* his Son and his Heirs; the Remainder of another to his Daughter C. and her Heirs; the Remainder of the third to J. and her Heirs; and further Willed, That if any of his ſaid Iſſues dyed without Iſſue of his body, That then the other ſurviving ſhould have *totam illam partem* between them equally to be divided. The Deviſor dyed, and then his Wife; J. dyed, having Iſſue; *Robert* dyed without Iſſue; C. entred into the whole Meſſuage of *Robert*, and dyed, and her Husband held in as Tenant by the Curteſy. It was Objected, That here was but an Eſtate for life, which is drowned by the Diſcent of the Fee-ſimple, ſo as now the Eſtate limited by the Will is void; but it was anſwered and Reſolved, That although now upon the matter it be void, yet *ab initio* it was not ſo, for it became void by matter *ex poſt facto*, *ſcil.* by Diſcent of the Fee-ſimple: For if one of the daughters had dyed without Iſſue before the death of *Robert*, ſo as the houſe of ſuch Daughter had come to *Robert* and the other Siſter, there had bin no Coparcener, for the Son had had all, both the moyety of it executed, and the moyety expectant, and the Siſter hath the moyety for life, and then the Deviſe is not good. And it was ſaid, That here are two Survivors, ſo as nothing is to be divided; and therefore the Law ſhall ſay, That the houſe of *Robert* is diſcended, *ſcil.* the Fee of it to the Daughters of C. and J. Judgment was given againſt the Husband, who claimed to be Tenant by the Curteſy of the whole houſe and Land. Mich. 27 Eliz. B. R. *Putnam* and *Cooks* Caſe. *Leon.* 3. Part, 180.

12. A man had Iſſue two Sons, and by his Will he Deviſed, That his eldeſt Son with his Executors, ſhould take the profits of his Lands, untill the younger Son ſhould come of the age of 21 years: And then, the younger Son ſhould have the Lands to him and the Heirs of his body. It was the Opinion of all the Juſtices in this Caſe, That the eldeſt Son ſhould have a Fee-ſimple in all the Lands untill the younger Son came to the age of 21 years. Paſc. 30 Eliz. B. R. *Gaze* and *Hollywells* Caſe. *Leon.* 3. Part, 216.

13. The Caſe was; A man ſeiſed of Lands holden in Socage, by his Will Deviſed the ſame to his Brothers Son in tail, to have the ſame at his age of 25 years, and dyed, having Iſſue a Daughter. The Nephew after 21 years entred, and levyed a Fine, and afterwards accompliſhed his age of 25 years. It was the Opinion of the whole Court in this Caſe, That the Iſſue of the Deviſee was barred by this Fine, for the Heir in tail, and the Heir in Feeſimple are all one by the Statute of 4 H. 7. And it was holden, That this was not a Fine which doth ennure by way of Eſtoppel, but it paſſeth the very right. Mich. 31 Eliz. C. B. *Leon.* 3. Part, 227.

14. This Queſtion was demanded of the Juſtices, A man having two Daughters his Heirs, he doth Deviſe his Lands to them in Fee; what Eſtate they had by this Deviſe; for it was ſaid, That if a man Deviſeth Land to his eldeſt Son, it is void, and he ſhall be in by Diſcent. But in the principal Caſe it was holden by the Court, That they ſhould hold by the Deviſe, becauſe he gives another Eſtate to them than diſcended; for by the Diſcent many of them had a diſtinct moyety; but by the Deviſe they are Joynt-Tenants, and the Survivors ſhall have the whole. Hill. 37 Eliz. B. R. *Owen* 65.

15. A man ſeiſed of Lands and Tenements in *London*, made his Will in theſe words, *I Bequeath to A. my Wife, my Livelyhood in* London *for the Term of her life.* It was the Opinion of the Juſtices, That it was a good Deviſe of the Tenements by the word Livelyhood; And *Brook* Juſtice ſaid, That it was ſo in ancient times uſed in divers other places of the Realm; and that it was taken for an Inheritance. Paſc. 4 and 5 Ph. *and* Ma. *Owen* 30.

16. The Caſe upon a Special Verdict was; A man by his Will deviſed his Lands to his youngeſt Son and his Heirs. Afterwards he married again, and by another Will in writing, he Deviſed the ſame Land to his Wife for life, paying yearly to his youngeſt Son and his Heirs, ſuch a Rent; and if this ſecond Will was a Revocation of the former, was the Queſtion: The Juſtices held it to be no Revocation, but that both may well ſtand, although they be by ſeveral Writings, unleſs it be manifeſt contrary to the firſt Will, or that there be an expreſs Revocation therein; and here the intention appears, That he had not any purpoſe to alter it as to his Son, but only to provide for his Wife, whom afterwards he eſpouſed: and by the appointing of the Rent to his Son, it appears that his intent was, That the Reverſion ſhould be to his Son. Mich. 41 Eliz. C. B. *Goward* and *Marſhall's* Caſe. *Cro.* 3. Part, 721.

17. In Treſpaſs upon a Special Verdict, the Caſe was; A. ſeiſed of Lands in Fee holden in Socage, had Iſſue four Sons, J. R. E. H. and Deviſed the Land to R. his ſecond Son and his Heirs of his body; and after his deceaſe, without Iſſue; then to E. the third Son in tail, and then to J. the eldeſt Son in tail, the Remainder to the right Heirs of the Deviſor. Afterwards the Deviſor ſaid, *That my will is, That the Sons of R. my Son Deceaſed, ſhall have the Lands Deviſed to their Father, as they ſhould have had if their Father had lived, and had dyed after me.* The Deviſor dyed, T. the Son of *Richard* entred: *John* the eldeſt Son of the Deviſor entred. The points in the Caſe were, 1. Whether by reaſon of this new ſpeech and Declaration after the death of R. *Thomas* his Son ſhall take as a Deviſe. 2. Admitting it be not a good Deviſe to T. whether *John* the eldeſt Son ſhall have it during the time that any Iſſue of the body are alive, or whether E. in the Remainder ſhould enter preſently. The better Opinion of the Court ſeemed to be, That *Tho.* the Heir of R. ſhould have it as Deviſee by this new publication, for it will not be denyed, That if the Deviſe had bin to R. and the Heirs of his body, and R. had bin dead at the time of the Deviſe, but that the Heir ſhould take it as a Purchaſor; and there is no reaſon to make ſuch a Conſtruction as ſhould diſinherite the Iſſue, for by ſuch means, many may be diſinherited, and Wills expounded againſt the intent of the Deviſor. It was adjudged for the Defendant. Hill. 36 Eliz. B. R. *Fuller* and *Fullers* Caſe. *Cro.* 3. Part, 432.

Writ and *Writs*: *Pleas* and *Proceedings in them.*

1. IN a Writ of Entry in the Per, brought against A. and B, A. pleaded ſeveral Tenancy. It was Objected, That it was a good Plea; and the Plaintiff ought to maintain his Writ, becauſe the Land is not demanded by it. But the Opinion of the Juſtices, *Manwood* and *Dyer*, was, That it was no Plea: For they ſaid, That in no Action grounded upon a Diſſeiſin, is ſuch Plea good; For although the Demandant, by Policy will bring his Writ againſt the Tenant of the Land, and another whom he will name in the Writ upon truſt and confidence, that he will not agree with the Tenant of the Land in Dilatories; for the Tenant of the Land ſhall not be received to plead Dilatories: yet in that Caſe, ſeveral Tenancy is no Plea for the Tenant. But in a Formedon, or ſuch like action which is not grounded upon a Diſſeiſin, if the Writ be brought in ſuch a manner as above; The Tenant by Policy, that he may have the View, or other reaſonable delays, may plead ſeveral Tenancy, and ſo enforce the Demandant to maintain his Writ; but contrary in this Caſe at the Barr, and ſo it was adjudged. Mich. 17 Eliz. in C. B. *Leon.* 2. Part, 8.

2. The King and Queen brought a Writ of Diſceit againſt D. and K, and declared, That J. S. was ſeiſed of Lands in Fee, and held the ſame of the King and Queen, as of the Mannor of W, which Mannor is Ancient Demeſne; and ſeiſed, levyed a Fine thereof to D. *Sur Conuſans de droit comeſes, &c.* who rendred the Land to the ſaid J. S. for life, the Remainder to K. in Fee; J. S. dyed, K. entred into his Remainder, K. pleaded, That the Land whereof is Frank-Fee; upon which they were at Iſſue, and before the Iſſue tryed, D. dyed. It was prayed in this Caſe, That the Writ might abate: But the ſame was denyed by the whole Court, becauſe the Action is but an Action of Treſpaſs in its Nature for to puniſh this diſceit; and no Land is to be recovered, but only the Fine to be reverſed. Paſch. 4 and 5 Phil. and Mary. C. B. The King, and *Due* and *Kirleys* Caſe. *Leon.* 3. Part, 3.

3. Note; It was ſaid by *Manwood* and *Dyer*, Juſtices, If one be Condemned in an Action upon the Caſe, Treſpaſs upon *Nihil dicit* or Demurrer, and a Writ Iſſueth to enquire of the Damages; and before the Return of the Writ, the Defendant dyeth: The Writ ſhall not abate for that, for the awarding of the ſaid Writ is a Judgment. *Manwood* ſaid, In a Writ of Accompt, the Defendant is awarded to Accompt, and the Defendant doth Accompt, and is found in Arrearages, and dyeth. That the Writ ſhall not abate, but Judgment ſhall be given; That the Plaintiff ſhall recover, and the Executor ſhall be charged with the Arrearages; and yet Accompt doth not lye againſt them. Mich. 20 Eliz. C. B. *Leon.* 3 Part, 68.

4. In a Formedon of a Mannor, The Tenant pleaded Joynt-tenancy by Fine with J. S; The Demandant averred the Tenant, ſole Tenant in the Writ ſuppoſed; and upon that, it was found and tryed for the Demandant. Error thereupon brought, and aſſigned in this, becauſe where Joynt-tenancy is pleaded by Fine, the Writ ought to have abated without any averrment of the Defendant againſt it. 1. Note, That in the Principal Caſe Joynt-tenancy was pleaded but to parcel; But it was the Opinion of the Juſtices, That the whole Writ ſhould abate the whole Writ againſt all the Defendants; and ſo it was ſaid it is, Where the Demandant Enters into parcel of the Land in demand; if the thing in demand be an Entire thing, the Writ ſhall abate in all. 2. Queſtion was, If the Writ ſhould abate; for that the Tenant hath accepted and admitted the Plaintiff's Averrment, *ſcil.* ſole Tenant, as the Writ ſuppoſeth; and then the Queſtion was, If the Court, notwithſtanding the Admittance of the Tenant, ought without exception of the party *ex officio*, abate the Writ. It was the Opinion of *wray*, Chief Juſtice, That it ſhould, for that the ſame is a poſitive Law: As if a Woman bring an Appeal of Attainder of the Death of her Brother, and the Defendant doth admit it without a Challenge or Exception, yet the Court ought to abate the Appeal. See 20 E. 4. 7. Mich. 26 Eliz. B. R. *Leon.* 3. Part, 92.

5. One recovered certain Copy-hold Lands in the Court of the Lord of the Mannor by Plaint, in the Nature of a Writ of Right. It was moved in the Court of Common-Pleas, If a Writ of Precept might be awarded out of the Court, to execute the ſaid Recovery, and put the Plaintiff in Poſſeſſion, who recovered with *the Poſſe Mareril.* It was the Opinion of the Court, That it could not done: for force in ſuch Caſe is not juſtifiable, but by Command out of the Kings Courts. Mich. 26 Eliz. C. B. *Leon.* 3. Part, 99.

6. Aſſiſe of *Novel Diſſeiſin* was brought in the County of *Northumberland*, of two Acres of Lands: As to one, the Tenant pleaded a Plea tryable in a Forrein County. Upon which the Aſſiſe was adjourned into the Common-Pleas, and from thence into the Forrein County: Where by *Niſi Prius*, It was found for the Plaintiff. In this Caſe, Judgment was prayed in C. B. for the Plaintiff. But becauſe in the Principal Caſe, parcell of the Land put in View, remained not tryed: And becauſe the Aſſiſe is properly depending before the Juſtices of Aſſize, before whom the Plaintiff may diſcontinue his Aſſiſe, the Court refuſed to give the Judgment; but remanded the Verdict to the Juſtices of Aſſize. Paſch. 28 Eliz. B. R. *Lucas* and and *Picrofts* Caſe, *Leon.* 3. Part, 137.

7. A *Præmunire* was brought and proſecuted by the Queens Attorney General, and one J. S, againſt Dr. *Matthews*, Dean of Chriſt-Church in *Oxford*, and others, for that they procured the ſaid J. S. to be ſued in the City of *Oxford* before the Commiſſioners there, in an Action of Treſpaſſe, by Libell according to the Eccleſiaſtical Law; in which Suit, J. S. pleaded his Freehold, and ſo to the Juriſdiction of the Court: and yet they proceeded, and J. S. was Condemned, and Impriſoned. And afterwards, the Queens Attorney withdrew his Suit for the Queen. The Queſtion was, If notwithſtanding, the Informer might proceed in his Suit? It was the Opinion of the whole Court, That if the Queens Attorney will not *ulterius proſequi*, the Party grieved ſhall not maintain that Suit; For the principal matter in the *Præmunire*, is the Conviction, and the putting of the party out of the Kings Protection; and the Damages are but the Acceſſary: and then the Principal being Releaſed, the Damages are gone. Mich. 28 Eliz. B. R. *Parrett* and Dr. *Matthews* Caſe. *Leon.* 3. Part, 139.

8. In a Writ of *Entre Sur Diſſeiſin*, The Tenant ſaid, That the Houſe in demand is within the City of *London*; and that the ſaid City is *Antiqua Civitas*. And that King *Hen.* 3. *Conceſſit Civibus Civitatis prædict. quod non implacitentur de terris et Tenementis ſuis, &c. extra muros Civitatis prædict*: And further ſaid, That he himſelf is *Civis London, &c.* and demanded Judgment of the Writ: (Note in the pleading before, the Tenant ſaid, *Et illis rectum teneatur intra Civitatem prædictam ſecundum Conſuetudinem Civitatis prædict.*) Exception was taken to the Plea, Becauſe the Tenant doth not ſhew before whom by their Cuſtom they ought to be impleaded. It was the Opinion of the whole Court, That the Tenant ought to have ſhewed, That the Citizens of their Lands ought to be impleaded in the *Huſtings, &c.* And the general words in the Plea, *ſcil. Sed illis rectum teneatur intra Civitatem prædictam, ſecundum Conſuetudinem Civitatis prædict.* did not ſupply the ſaid defect. Hill. 28 Eliz. C. B. *Leon.* 3. Part, 148.

9. The Archbiſhop of *York* recovered in an Aſſiſe of *Novel Diſſeiſin*, againſt M. before the Juſtices of Aſſiſe: M. brought a Writ of Error returnable before the Juſtices of the Common-Pleas; It was adjudged, That a Writ of Error upon ſuch a Judgment doth not lye in the ſaid Court. Then it was demanded of the Court, How, and in what manner the Record ſhould be ſent back to the Juſtices of Aſſiſe. The Court Anſwered; The ſureſt way is to have a *Certiorari* out of the Chancery into the Common Pleas, directed to the Juſtices there; and then by a *Mittimus* out of the Chancery, to the Juſtices of Aſſize. Afterwards, *Anderſon*, Chief-Juſtice, ſaid, Forasmuch as the Record came before us by Writ of Error, it ſhall alſo be removed and ſent back by Writ. Paſch. 29 Eliz. C. B. The Archbiſhop of *York*, and *Mortons* Caſe. *Leon.* 3. Part, 159.

10. The Queen brought a Writ of *Quare Impedit* againſt the Biſhop of *Glouceſter* and S; The Biſhop pleaded, *Quod ipſe nihil habet nec habere clamat in Eccleſia prædict. neq; in Advocatione ejuſdem niſi Admiſſionem, Inſtitutionem, &c.* Now the Biſhop and S. the Incumbent brought a Writ of Error; and the percloſe of the Writ was, *Ad grave damnum Epiſcopi*; whereas the Biſhop could not be grieved by the ſaid Judgment, becauſe he had nothing, nor claymed nothing in the Church. It was ſaid by *Wray*, Chief Juſtice, It had been better, if thoſe words, (*Ad grave Damnum Epiſcopi*) had been left out, for the Biſhop hath loſt nothing. And whereas it was ſaid, That the Writ did not lye for the Biſhop, becauſe he loſt nothing; Yet *Wray* ſaid, He ſhall joyn, for Conformity of Law, and for Privity of Record; And that the Plea of the Biſhop is not ſo ſtrong as a Diſclaymer: For in caſe of a Biſhop, the Judgment is, *Quod quereus recuperet præſentationem ſuam verſus dictum Epiſcopum ad Eccleſiam prædictam*. Afterwards, the Writ of Error was awarded to be well brought. Trin. 29 Eliz. B. R. The Queen and Biſhop of *Glouceſters* Caſe, *Leon.* 3. Part, 176.

11. In *Replevin*, the Defendant Avowed for Rent; and the Plaintiff was Nonſuit: The Queſtion was, Whether the Court might Aſſeſſe Damages, without a Writ of Enquiry of Damages? It was the Opinion of the Juſtices, That they might; for they are not in reſpect of any Locall matter, but they accrue unto the Avowant, for the delay of the Non-payment of the Rent: Contrary, where Judgment is given for the Plaintiff,

tiff, there the Court ſhall not Aſſeſs the Damages, for he ought to recover for the taking of his Cattel, of which the Judges cannot take Notice; and the Damages may be the greater or leſſer, according to the value of the Cattel, and the Circumſtances of taking and detaining of them. Paſch. 30 Eliz. C. B. *Ogells* Caſe. *Leon.* 3. Part, 213.

12. In Treſpaſs by a poor Woman, for breaking her Cloſe; She declared *of Continuando* of the Treſpaſs for ſix years, upon *Nihil deb t*; ſhe had Judgment to recover, upon which iſſued a Writ of Enquiry of Damages: She came now, and ſhewed to the Court, That the Jury had found to Title-Damages, *ſtil.* but 10 s. whereas the Land was worth 4 l. *per annum*, and the Treſpaſs had continued ſix years together, and prayed, That the Writ might not be received, but that the Court would grant her another Writ to have a *Melius* Enquiry; But the Court denyed to grant it, but ſaid, Sometimes at the prayer of the Defendant, when exceſſive Damages are found, the Court uſeth to relieve the Defendant by iſſuing forth a new Writ, but never the Plaintiff, becauſe the ſuing forth of the Writ is his own Act; and according to the principal Caſe, The Court ſaid, It ſo lately had been adjudged in the Counteſſe of *Derbies* Caſe, upon Damages given in a Writ of Dower. Mich. 30 Eliz. C. B. *Leon.* 2. Part, 214.

13. *Sur Cui in vita* of a Meſſuage; It was found by Verdict, That a Diſcontinuance being of the Meſſuage, the Diſcontinuee pulled it down, and erected a new Houſe upon part of the Land diſcontinued, and upon part of his own Land adjoyning; and if in this Caſe, The Writ was well brought of the whole Meſſuage, or that it ſhould be brought of ſuch part of the Houſe; and how in this Caſe, the Judgment ſhould be, was the Queſtion. It was adjudged, That the Writ was well brought by the name of the whole Meſſuage; and there needed no forepriſe, for the Action is to be brought as the Land is at the time of the Action: And it was adjudged, That the Demandant ſhould recover. But the Judgment was ſpecial, *viz.* That the Demandant ſhould recover *M. ſſuagium prædict. ſcil.* ſo much in length, and ſo much in breadth, according to the Verdict found upon the Land in demand. Paſch. 34 Eliz. in C. B. *Hayes* and *Allens* Caſe. *Cro.* 3. Part, 231.

14. *Quare Impedit* by the Queen, for diſturbing Her to Preſent to the Church of A: The Plaintiff declared, That King *Henry* the 8th was ſeiſed, and preſented R, and that it deſcended to the Queen, and then the Church became void, &c. The Archbiſhop pleaded, That his Predeceſſor was ſeiſed of the Advowſon, as in groſſe, and collated to it J. S. his Clark, who was admitted, inſtituted, and inducted, and dyed ſeiſed, and ſo pleaded ſeveral Collations, and ſo demanded Judgment, if the Action lay againſt him by the Queen. The Queen was ſeiſed thereof in the Right of her Dutchy of *Lancaſter*; and Exception was taken to the Writ, becauſe that it was general, and did not mention that ſhe had in the Right of her Dutchy; but the Count was ſpecial, which ſhewed it was. It was the Opinion of the whole Court, That the Writ was good; and a Writ was awarded to the Archbiſhop of *Canterbury* for the Queen. Trin. 33 Eliz. C. B. The Queen and the Biſhop of *Ye k*'s Caſe. *Cro.* 3. Part, 240.

15. Error of a Judgment in C. B. in Treſpaſs of Battery, becauſe the Writ of the Roll of Enquiry of Damages was awarded to the Sheriff of *London*, in this manner, *Idcò præceptum eſt vice Londos Cam. quod inquirat*, where it ſhould be *inquirant*; but being the default of the Clerk, was ordered to be amended. Then it was moved, That the Writ it ſelf was not good; and therefore the Roll ſhould not be amended: But that was holden not any Cauſe; for the Writ ſhall often be amended by the Roll, but not *è converſo*. Then it was ſaid, That the Writ was, *Præcipe quod inquirant per ſacramentum proborum, &c. de Civitate prædict.* where there is not any mention of City before. But that was holden by the Court, To be well enough; For that it is ſometimes *de Civitate*, ſometimes *de Ballia*: The Judgment was affirmed. Trin. 41 Eliz. B. R. *Sir Richard Lewſon* and *Radleſton*'s Caſe. *Cro.* 3. Part, 677.

16. An Accompt was brought againſt Two; One of the Defendants acknowledged the Action, the other pleaded, *Ne unq. ſon Receivor*; Judgment was preſently given againſt him, who acknowledged the Action, and Iſſue joyned upon the other, and found againſt the Defendant, and Judgment was given alſo againſt him. It was ſaid in this Caſe, That it had been adjudged in this Court, That where one of the Defendants acknowledged the Action, that it ſhould binde his Companion, and the entire ſhould be given againſt both. But then, It was moved, That one of the Defendants was dead, and ſo the whole Bill ſhould abate, although it were after the Judgment: But *Gawdy*, Juſtice, conceived, That that ſhould not abate the Writ, but againſt that Defendant only who was dead. Mich. 41 Eliz. B. R. *Hogbart* and *Hakeley*'s Caſe. *Cro.* 3. Part, 701.

17. Action upon the Caſe; For that he was poſſeſſed of an Houſe and a Garden for 20 years; and the Defendant being a Butcher, had a Slaughter-houſe and Yard next adjoyning to the Plaintiff's Garden; And that the Defendant had exalted his Yard, and made a Ditch, whereby he conveyed the Filth, and the Offall of his Beaſts

which

which he ſlaughtered, into the Plaintiff's Garden. Upon Not-Guilty, It being found for the Plaintiff, It was moved, That the Writ was Variant from the Declaration; For the Writ was only for the raiſing of the Yard; and Declaration is for the Exalting of the Yard, and for making of a Gutter therein; and ſo there is more compriſed in the Declaration, then is in the Writ. The Court was of Opinion, That for that cauſe, it was not good. And further, That it was not helped by the Statute of 18 Eliz: for that helps only where there is not any Writ; but not where the Writ and Declaration vary in Subſtance. Paſch. 43 Eliz. C. B. *Norton* and *Palmers* Caſe. *Cro.* 3. Part, 829.

18. A *Quare Impedit* was brought, and the Biſhop and Incumbent joyn and plead, That there is another Writ depending againſt the ſame Biſhop only: and pleads, That the diſturbance in this Declaration, and the diſturbance in the former Declaration, are one and the ſame diſturbance, The Plaintiff Replyes, That the firſt Writ was brought for another Diſturbance; And Traverſes without that, That they are one and the ſame Impediment. Upon which the Defendant Demurred. In this Caſe, Judgment was given for the Defendant, That it was a good Plea in abatement; for although the Preſentation and diſturbance are both of them in Queſtion; yet the Preſentation is the main, and the diſturbance is but the Acceſſary. Trin. 14 Jac. C.B. The Earl of *Bedford* and the Biſhop of *Exeters* Caſe. Rott. 1235. *Brownlow* 1. Part. 163.

19. A. brought a Writ of Entry *Sur Diſſeiſin* againſt B, who for part pleaded, That he had nothing but in the right of his Wife, not named in the Writ, and ſo demanded Judgment of the Writ; and for the reſt, he pleaded in Barr; and Iſſue was joyned for both, and the Jury found both the Iſſues for the Defendant. It was in this Caſe moved, If the Writ ſhould abate for all, or not, becauſe for part it was found that the Defendant had nothing but in the right of his wife. It was agreed by the Juſtices, That the Writ ſhould abate but in part, and that Judgment ſhould be given for the reſt. Paſch. 30 Eliz. in C. B. *Carleton* and *Carrs* Caſe, *Goldesbr.* 85.

20. The Earl of *Rutland* recovered againſt *Spencer* and *Woodward*, in an Action upon the Caſe, for diſturbing of the Earl to hold Court in ſuch a Mannor. Upon which, Error was brought in B. R: and before the Errors were diſcuſſed, one of the Plaintiffs in the Writ of Error dyed: The Queſtion was, If thereby the Writ of Errour ſhould abate? It was adjudged, That the Writ ſhould abate; And that the Earl was put to his *Scire facias* againſt the Executor of him who was dead: For although that the Writ of Error is but to diſcharge the Plaintiff, yet if the Judgment be affirmed, the Charge ſhall fall upon the Executor of him who is dead, and ſhall not ſurvive to the other. Mich. 9 Jac. B. R. *Spencer* and the Earl of *Rutlands* Caſe, *Yelverton*, 208.

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Lyeth againſt the Under Sheriff for not returning a Writ of Summons, *per quod* the party *nihil dicitur ſuit* in recovery of his Lands. p. 2133. C. 2.

Lyeth not for a Nuſance done before his time, though it be continued by the party. p. 2133. C. 3.

Againſt a Sheriff for not taking Sureties of the party for his appearance, upon a *Latitat*, upon which he is Arreſted. p. 2133. C. 4.

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For razing out the name of J. S. in an Excommunication, and inſerting in the name of another man malitiouſly, by reaſon of which he is put to charges to procure a diſcharge. p. 2134. C. 7.

Where maintainable by the Sheriff againſt the party that eſcapeth, although the Sheriffs are not ſued for the Eſcape. p. 2134. C. 8.

If one who is not an uſual Officer, takes a Fee to diſtrein the Cattel of B. or find pledges to appear at the next Court, if he diſtrein the Cattel, and after delivers them back to the party, and doth not take pledges for his appearance, the Action will lye againſt him. p. 2134. C. 9.

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which he ſlaughtered, into the Plaintiff's Garden. Upon Not-Guilty, It being found for the Plaintiff, It was moved, That the Writ was Variant from the Declaration; For the Writ was only for the raiſing of the Yard; and Declaration is for the Exalring of the Yard, and for making of a Gutter therein; and ſo there is more compriſed in the Declaration, then is in the Writ. The Court was of Opinion, That for that cauſe, it was not good. And further, That it was not helped by the Statute of 18 Eliz: for that helps only where there is not any Writ; but not where the Writ and Declaration vary in Subſtance. Paſch. 43 Eliz. C. B. *Norton* and *Palmers* Caſe. *Cro.* 3. Part, 829.

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In Debt against an Administrator, the Plaintiff needs not aver that the Defendant hath Assets; but if he hath not Assets, it must be pleaded on the other side. p. 2144. C. 10.

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Where Administration is commited by an Inferiour Court, from which there is an Appeal to the Arches, and the first Administration affirmed, the use is to remit the Cause; but if the first sentence be after reversed, the Court which reversed it, shall grant Administration. p. 2145. C. 18.

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An Award, That the Obligee shall make a Lease for years to the Obligor, rendring rent; and the Obligor doth not pay the Rent: The words rendring rent, are not parcel of the substance of the Award; but the making of the Lease is the effect of it, and the Lessee hath remedy for the Rent by Distress; and the Obligor for non-payment of the Rent, shall not forfeit his Obligation. p. 2146. C. 1.

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If a man ſubmits himſelf to the Award of another, and after revokes his Authority, but before the Arbitrator hath notice of it, he makes his Award, it is good, and ſhall be performed. p. 2148. C. 19.

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Appearance.

How it ſhall be tryed; if by the Record, or *per patriam*, and the difference in it. p. 2152. C. 1.

Obligation, that if ſuch a one, arreſted upon a *Latitat*, appeared perſonally, and anſwered a good Obligation within 23 H. 6. becauſe his appearance is neceſſary to put in Bail, if required. p. 2153. C. 2.

Infant at the time of the Judgment was within age, who appeared by Attorney; where he ought by Guardian: Error. p. 2153. C. 3.

The Plaintiff in *Nativo habendo*, being at the time of the Judgment an Infant, appeared by Attorney, and not by *Prochein Amy*, then he came of full age; and then Error was brought: and if it could now be Aſſigned. *Quære*, becauſe now his Non age cannot appear upon the View. p. 2153. C. 4.

One is bound by Recognizance to appear at the next Aſſizes: The Recognizance removed by a *Certiorari*, yet that doth not excuſe his Appearance. p. 2153. C. 5.

Where upon a Recognizance by the Bail, that upon eight dayes warning A. ſhall appear to an Action brought for ſuch a Debt; if Debt be brought, the Plaintiff muſt ſhew, that eight dayes warning was given, becauſe the Condition is betwixt Strangers. p. 2153. C. 6.

In Debt upon Obligation, conditioned to render himſelf to an Arreſt in ſuch a place; the Defendant pleaded, That he was Servant to a Parliament man at the time, ſo he would not render himſelf to be Arreſted. No Plea, becauſe he might appear and render himſelf; and it is at their peril, if they will Arreſt him. p. 2154. C. 7.

Apportionment.

No Contract ſhall be apportioned. pag. 2154. C. 1.

A Leaſe of Lands and Goods, rendring Rent; if the Land is evicted, the Rent is gone: for the Rent goeth with the Land, and followeth it, and no Apportionment of it out of the Goods. pag. 2154. C. 2.

Where an Apportionment ſhall be of a Rent, where it is done by act of the Law, and not of the Party. p. 2154. C. 3.

A Contract real may be apportioned, as if the third part of a Reverſion be granted of a Leaſe for life or years, and the Tenant attorns the Rent as apportionable; and the party chargeable to two Diſtreſſes by his own Act. p. 2154. C. 4.

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Assent.

What shall be said to be a sufficient assent to the Articles of Religion, within the Statute of 13 Eliz: What not. p. 2154. C.1.

If an Assent of an Administrator, *durante minore ætate*, to the devise of a Term, be good. Quære. p.2551. Case 2.

Assignments.

Merchants may make Exchange of Monies by Assignment of Bills of debts; and it is not Maintenance. p.2155. C.1.

Two possessed of Trees; one of them indebted to the Queen, assigns to her all the Trees, in satisfaction of her debt: Quære, If good, as against the other, p.2155. C.2.

A Termor Outlawed of Felony, grants his Interest; who grants it to J. D; and then the Outlawry is reversed: No Action lyeth for the mean and profits betwixt the Outlawry and the Reversal; for that no Record is had of the Outlawry. p.2155. C.3.

If Lessee for years of a Term of the Queen be *ousted* by a Stranger, yet he may assign over his Term; for he cannot be put out of possession, but at his pleasure. p.2155. C.4.

A Duty which is not naturally a debt, but by Circumstance only, may be assigned over to the King for a debt; but before an *Extent* be upon it, a *Scire facias* must first issue forth. p. 2155. C. 5.

Lessee for years of Lands, excepting the Woods; the Lessor grants the Trees to the Lessee, and the Lessee assigns over the Lands to another; the Trees shall not pass to the Assignee. Page 2155. Case 7.

Assetts.

Enfant Executor Releases to the Administrator *durante minore ætate*, all Actions, when he is of full age; the Goods which were in the Administrators hands, shall be Assetts in the hands of the Executors. p.2156. C.1.

Assumpsit against an Executor upon a Promise of the Testator, good without averring, That he hath Assetts to pay the debts. p.2156. C.2,3.

A. seised of divers Goods, makes his Wife his Executor, and dyes; She takes Husband, and dyes: The Husband payes Legacies; The Goods in his hands shall be Assetts to pay the Testator's debts. p.2156. C.4.

A man possessed of Goods, to defraud Creditors, makes a Guift of his Goods, upon a Condition to be void, and dyes; A Stranger who is neither Executor, nor Administrator, entermeddleth with the Goods; and after administration of them is committed to him, It is at the Election of the Creditors to charge him as Executor or Administrator, p.2156. C.5.

Attachment, and Attachment by Custome.

A Debt upon Record by Recovery or otherwise, in a Court of Record, cannot be attached by the Custome of the City of *London*, p. 2156. C. 1. but depending the Suit, or after the Darrein Continuance, and before Judgment, it may be, p. 2157. C.2.

Forrein Attachment cannot be of a Debt before it is due. p.2157. C.3.

Things fixed to Land, or to a Wall, cannot be attached, because parcell of the Freehold. But a Furnace fixed *in Medio Domus*, is but a Chattel, and may be Attached. p.2157. C.4.

Goods Forfeited in a Court-Baron for want of appearance, upon a Distresse taken of them, cannot be forfeited: For the distresse is but in the Nature of a pledg to be kept safely; and the entermedling with such Goods otherwise, is a Conversion of them. p.2157. C.5.

Attornment.

The Feoffee of the Consee of a Fine of a Reversion, cannot distrain for Rent the Lessee, before Attornment. p.2157. C.1.

Where, and in what case, a Rent-Charge shall passe by words of Grant, Guift, or Bargain and and Sale, and Inrollment, without Attornment; Where not. p.2157. C.2.

Where Attornment upon a grant of a Reversion for 1000 years, comes too late to make the Grant good. p.2157. C. 3.

Where he in the Reversion levieth a Fine to the use of himself, Attornment is not necessary, because he is in by the Statute of 27 H.8. Page 2157. Case 4.

Avowry for Rent, where not good, without Attornment. p.2158. C.5.

In pleading of a Feoffment of a Mannor, it shall be intended that the Services did passe, if the contrary be not shewed. p.2158. C. 6.

Avowry

The Table.

Avowry by *Cestuy que use* for Rent, where good without Attornment. p.2158. C.7.

Audita Querela.

A man in Execution is suffered to go at large, and while he is at large payes the money, and after is taken again in Execution; *Audita Querela* lyeth for him in this case. p.2158. C.1.

Audita Querela lyeth by an Enfant either in B.R. or C.B. to avoid a Statute acknowledged by him whileſt he was within age; as well as in the Court of Chancery. p.2158. C.2.

Conuſee of a Statute purchaſeth parcell of the Land lyable to the Statute, a Stranger purchaſeth other part of it; the Conuſee after extends his Statute upon the Lands of the ſtranger which he purchaſed: It is a good cauſe of *Audita Querela* by the ſtranger. But the *Liberate* not being executed, a *Superſedeas* may in that caſe be awarded for ſtay of the Execution of it. p.2158. C.3.

Where a Statute is erroniouſly acknowledged, No Writ of Error lyeth upon it, but an *Audita Querela*: But if it be well acknowledged, and Execution upon it is Erronious, there Error lyeth, and not *Audita Querela*. p.2158. C.4.

Audita Querela, is an Original Writ awarded out of the Chancery: And if the party dyeth, and be returned *Mortuus*, a *Scire facias* cannot be awarded upon it againſt his Executor; and if it be, it ſhall abate. p.2159. C.5.

Upon Execution of a Statute, the Conuſee muſt extend all the Lands which the Conuſor had at the time of the Statute acknowledged; and not part of the Lands which he had only. Page 2159. C.7.

If upon *Audita Querela* to Inſpection, a Statute acknowledged by an Enfant be reverſed, and the Judgment made void upon Record; if after that Judgment be reverſed for Error in it, The Enfant at his full age cannot have a new *Audita Querela*, becauſe now he cannot be inſpected; and the former Inſpection cannot be allowed of, but in that Court where it was. p.2159. C.8.

M. within age was bail for J. S. in an Action; Judgment paſſed againſt J. S, who rendred not himſelf: and upon two *Scire facias* againſt M. the Bail, Judgment was given againſt him: M. being yet within age, brought *Audita Querela*, to be Relieved upon his Recognizance as Bail; and granted *de bene eſſe*. p.2159. C.9.

If after Verdict, and before the day in bank, the Plaintiff's Adminiſtration, who brought the Action as Adminiſtrator, be Reverſed; the ſame is to be avoided by *Audita Querela*, and not by Plea. p.2159. C.10.

Where a Statute ſatisfied by an Adminiſtrator, ſhall be preferred and paid before a Judgment, and Execution not be upon the Judgment; and the party upon that put to his *Audita Querela*, p.2160. C.11.

Where a man in Execution upon a Statute-Merchant, had an *Audita Querela* upon it, and was bailed; and well, becauſe the *Audita Querela* was grounded upon the performance of the defeaſance of the Statute. p.2160. C.13.

Authority.

Where the Steward of a Mannor makes one his Deputy, to take a Surrender of Copyhold, and the Deputation is good. p.2160. C.1.

Where an Authority to take a Surrender, is abſolute, and he who hath the Authority, takes it upon a Condition; yet the Authority is well executed, by reaſon of other words in the Deputation. p.2160. C.1.

Where a Deviſe to the Wife, That ſhe ſhall have his Lands till his Son ſhall attain to his age of 24. years, ſhall not be a Confidence, or an Authority in the Wife; but an Intereſt. p.2161. Caſe 3.

A Sheriff made his Warrant to four, *et cuilibet*, to Arreſt J. S, two of them arreſted him; and good: For, an Authority to arreſt, or to execute a Warrant, is not to be ſo ſtrictly purſued, as an Authority to make Livery. p.2161 C.4.

Where a Power is given to a *Feme Covert*, an Eſtate in Lands at her will and pleaſure, ſhall be good. p.2161. C.5.

Averment.

In Aſſumpſit upon a Promiſe made to deliver up all Bonds, wherein J. S. ſtood bound unto him; the Plaintiff needs not aver, That the Defendant had Bonds of J. S; becauſe he is not to recover the Bonds, but damages only upon the Aſſumpſit. p.2161. C.1.

Where the Declaration muſt be averred. p.2161. Caſe 2.

Where the Sheriff Returned one Summoned at the Church-Door; where in truth he was not Summoned; whereby a *Grand Cape* was awarded: an Averment may be made in ſuch caſe againſt the Return of the Sheriff. And in this caſe alſo

he

he may have a Writ of Diſceit againſt the Sheriff. p.2161. C.3.
Where Pleas may be good without an Averment; and what ſhall be ſaid to be a ſufficient Averment; what not. p.2162. C.4.
Where an Averment, That Lands had been Leaſed generally, within the Statute of 32 H. 8. is not good; but it ought to be averred, That they have been ſo demiſed for 11. years at the leaſt: for the Averment might be true, and yet the Circumſtances of the Statute not obſerved. pag. 2162. C.5.
Where not againſt a Record. p.2162. C.6.
Where neceſſary; where not. p.2162. C.7.

Avowry.

Where a man made Conuſans as Bayliff to J. S; for that J. D. was ſeiſed, and held of the ſaid J. S. by Fealty, and Rent; and yet afterwards he avowed as upon the Land; and good. Page 2162. C.1.
Where it may be in C. B. for Rent behind of a Copyhold. p.2163. C.2.
Where Leſſee for years of a Copyhold during the life of the husband, avowed for Rent, and did not aver the life of the husband; yet good. p.2163. C.2.
In an Avowry, the Iſſue was, If the Land was the Freehold of the Avowant; he having pleaded his Freehold, and it is found that it is the Freehold of the Avowant's Wife; the Iſſue is found againſt the Avowant. p.2163. C.3.
If two be Tenants in Common; yet one Tenant in Common may ſue the Defendant, and he only may take a Diſtreſs, although his Avowry be by way of Action, and may juſtifie it. p.2163. C.4.
For Rent, upon the Statute of 32 H. 8. how it is to be made. p.2163. C.5.
Where not good for Rent, for want of Attornment. p.2163. C.6.
Rent granted to the Teſtator for years with clauſe of diſtreſs, and the Grantee and his Heirs may diſtrein for it; the Executor ſhall have the Rent, and may diſtrain for it. Page 2163. Caſe 8.
The Defendant avowed for a Rent-Charge Deviſed to him, and did not alledg the Land to be holden in Socage; and therefore the Avowry not good. p.2163. C.9.
A man made Conuſans in a *Replevin*, for an Amercement for not appearance, and did not alledg *in facto*; that the party appeared not: and for that cauſe, the Avowry not good. Page 2164. C.10.
Avowry, where not good, becauſe he pleads, That he was ſeiſed in Fee, and he and his wife let, &c. which cannot be, for that it is the Leaſe of the husband only. p.2164. C.11.
In *Replevin*, the Defendant avowed, That A. was ſeiſed of a houſe and lands to the ſame appertaining; and not good: becauſe although it may by reputation be ſaid to be belonging; yet it cannot in pleading be ſaid, That Land doth appertain to an houſe. p.2164. C.11.
An Executor who hath the Reverſion of a Term, may make a joynt Avowry for the Arrearages of Rent encurred in his own time, and in the time of the Teſtator. p.2164. C.12.
Avowry by authority or Warrant from the Commiſſioners of Sewers; where not good, becauſe their Commiſſion was determined by the Demiſe of the King. p.2164. C.13.
In an Avowry, in a *Replevin*, where certain Tenures and Services are ſet forth, it behoves the Avowant to make his Title good *in omnibus*: otherwiſe it is in Treſpaſs; for there if a Tenure be at all, it is ſufficient. Page 2164. Caſe 15.

Bail.

IF a man tender himſelf in Court, to be in Execution; It is in the Election of the party to take his body, or Goods in Execution: but by ſuch his Offer, his Bail are diſcharged. p.2165. C.1.
In a *Scire facias* againſt the Bail; a Plea by them, That the Principal was dead, the day of the Judgment given, is good. p.2165. C.2.
If no *Capias* was awarded againſt the Principal in his life-time; and after a *Scire facias* is ſued againſt the Bail, and Execution awarded againſt them: Upon an *Audita Querela* by them brought, and ſhewing the ſaid ſpeciall matter, they ſhall be diſcharged. p.2165. C.3.
If Bail be entred by one name, and the Declaration and all the proceedings are by a contrary name; all the proceedings are erroneous, and the Plaintiff ſhall not have judgment. So if the Bail be taken off the File, the party hath no remedy againſt him. p.2165. C.4.
Executors or Adminiſtrators ſhall not find ſpecial Bail upon an Action brought againſt them for the debt of the Teſtator. Page 2165. Caſe 5. p.2166. C.9.

Where

Where new Costs are assessed in the Exchequer-Chamber upon a Writ of Error, the bail shall not be charged with the new Costs. p. 2165. Case 6.

If upon a *Scire facias* against the Bail, they bring in the body of the Principal, and he thereupon is committed in Execution; the Bail shall be discharged. p. 2166. C. 7.

Where, and within what time and Process returned, the Principal must render his body, and what time shall be given to the Bail, upon *Scire facias* to bring in the Bail. Page 2166. Case 8.

In all Actions brought in B. R. against a Common person upon any penal Law, the Defendant is to put in but Common Bail, and not Speciall Bail. p. 2166. C. 9.

Where Bail is taken by the Chief Justice, or other Justice in B. R. upon a *Habeas Corpus*; the Bail taken in the Inferiour Court is discharged, though the last Bail be not filed presently, nor till the next Term. p. 2166. C. 10.

In a joynt-Action brought against two, they cannot severally at several Terms put in Bail; but the Bail must be filed off one Term, because there cannot be any proceeding in a Joynt-Act on, upon Bail put in several Terms. Page 2166. Case 13.

Bargain and Sale.

What shall be said to be a good Consideration to passe an Estate by Bargain and Sale. p. 2167. C. 1. And that upon every Bargain and Sale there must be *Quid pro quo. ibid.*

If a man by Indenture, for consideration of money given, grants a Rent, and there is no word of Bargain and Sale, if the Deed be enrolled, the Rent will passe without Attornment. Quære. p. 2167. C. 2.

By Tenant in tail, the Bargainee levies a Fine, and 5 years passe, the Issue shall have 5 years after his Fathers death: Otherwise, if Tenant in tail be disseised, and the Disseisee levieth a Fine. p. 2167. C. 3.

Lands in *London* were bargained and sold by Tenant in tail, and the Deed delivered: After the same year he made Livery to the same man; the same lands passe by the bargain and sale, and not by the Livery; for the Livery comes too late, being made to him who hath the Inheritance at the time. p. 2167. C. 4.

A man makes a Lease for years, rendring Rent; and afterwards bargains and sells the Reversion, the Rent is payable within the time of the Inrollment, and before the Deed is enrolled; yet the Bargainee shall have the Rent. p. 2168. Case 7.

Baron and Feme.

Where the Wife being a *Feme Covert*, Tenant in Remainder may Enter with the Consent of her husband; and avoid a Fine levied by Tenant for life with Warranty. p. 2168. C. 1.

The husband of a Woman Copyholder, letts the Lands for more years than are warrantable by the Custome: Quære if it be a Forfeiture, because a Lease is no great prejudice to the Lord, p. 2168. C. 2.

What shall be said to be a disposition of a Term by the husband, to vest the Interest of it in his Executors. p. 2168. C. 3. Quære.

Husband Lord of the Mannor in the right of his Wife, letts a Copyhold parcel thereof for years, and dyes; It shall not destroy the Custome, but that the wife after the death of her husband may Demise it again by Copy, as before. Page 2168. Case 4.

If for burning the house, the Freehold of the wife, the Action will lye by the husband alone; or, If it must be brought by him and his wife. p. 2168. Case 5.

Where a Term conveyed in Trust for the use of the wife, shall not go to the husband, he over-living the wife. p. 2168 C 6.

A Lease for years by husband and wife, if it be without Deed, it is void as to the wife. p. 2168. Case 7.

A Letter of Attorney made by the wife to deliver a Lease made by her husband and her; where void. p. 2168. C. 8.

In a Battery made by the Wife, the husband shall be joyned only for conformity, and the Declaration shall not be of Battery by the husband. p. 2169. C. 9.

A possession of Goods cannot be said to be in the wife during the life of the husband; and, in Trover against them, possession of the Goods cannot be alledged to be in them both. p. 2169. Case 10.

Must joyn in Plea; and a *Feme Covert* cannot plead a Plea without her husband. Page 2169. Case 11.

The wife seised for life, and the husband in Fee, both bargain and sell the Lands in Fee, upon Condition, That if they or either of them pay 100 l; then it to be void, and all assurances made shall be to the use of the husband and his heirs: the husband dyes, the wife payes the 100 l.

tool; she shall have an Estate for life, notwithstanding the declaration of the Use as before. p.2169. C.12.

Where Debt lyeth by husband alone, for debt and damages recovered by the husband and wife. p.2169. C.13.

A *Feme Covert* cannot be charged upon a Contract during Coverture; yet she may be charged with a Conversion of Goods during Coverture. p. 2170. Case 15.

If husband and wife be arrested, and the husband puts in Bail for himself, yet he shall remain in Custody till he find Bail for the wife: but the wife shall not be detained, till the husband puts in Bail for himself. Page 2170. Case 16.

Capias.

Capias utlagatum, though it be the Suit of the King; yet the King is to have it by the means of the party; and a Promise to pay money for forbearance of suing forth a *Capias utlagatum*, is a good Consideration to ground Assumpsit upon. p. 2170. Case 2.

Where for insufficiency of the Return of the first *Capias*, it shall be awarded *de Novo*. p. 2170. C. 3.

Lyeth not upon a Recognizance in Chancery, but a *Scire facias* only. p.2171. C.5.

Challenge.

Principall Change, what. p.2171. C.1,4.

In an Appeal, the Defendant may challenge 20, as he may in an Indictment. Page 2171. Case 2.

Two are arraigned upon an Indictment, one of them would challenge a Jurour, and the other would not; the Jurour shall be withdrawn. p. 2171. C 3.

A Hundred of F. as in Kent is within the Laith of 5; the Challenge must be to the Laith, and not to the Hundred. p.2171. C.5.

If an Issue be tryed by a Jury, and after a new Tryall is awarded, because the first was, *Coram non Judice*; None of the Pannel which passed upon the first Tryall shall be returned; for it is a principal Challenge, that he was in the first Tryal, p.2172. C.6,8.

What shall be a good Challenge to the Array, and therefore the Array quashed. p.2172. C.7.

What shall be said sufficiency or Freehold for a Juror, in point of Challenge; and of what value it must be in case of a Common person: what in case of the King. p.2172. C.9.

In all Cases when Process is once awarded to the Coroners, they are to serve and return all mean Process; and they must return the *Tales*, and not the Sheriff. p.2172. C.11.

If a Jurour be once sworn in Case of Indictment of one of Murder, &c. the same Jurour cannot afterwards be challenged for the King p.2172. Case 12.

Chancery.

Cannot call a Jury at their Barr to try an Issue; but must send the Issue in B. R. to be tryed: and upon Verdict found, they are there to give Judgment. p.2172. C.1.

Cannot write to a County Palatine, to try an Issue; but the Kings Bench may write to them to try it. p.2173. C.1.

To stay a Suit brought in Chancery, where a good Consideration to ground an Assumpsit upon. p.2173. C.2.

Suit may be in Chancery for a Deed lost, but not for a Rent, or Annuity. p.2173. C. 4.

Common and Commoners.

Where a man may have an Action upon the Case, for disturbing of his Common by Ploughing upon the Common; or an Assise. Page 2173. Case 1.

Putting of Geese upon a Common, and feeding of them there, is not an Offence inquirable in a Leet; and a man cannot be amerced in the Leet for so doing. p.2173. C.2.

Where Appurtenant is extinct by unity of Possession, it cannot be revived again; but yet by special words used in a Deed, it may be taken to enure as a new Grant for a time. p.2174. Case 3.

Released in part of the Land, is extinct in the whole, because it is entire, and runs through the whole Land. p.2174. C.4.

Commoner cannot justifie the killing of the Lords Conies which are feeding upon the Common. p. 2174. C. 5.

By

By Customs, the Lord of the Mannor may be stinted in the Number of Cattel, for which he shall have Common; and if he put in more Cattel upon the Common, then he is to have Common for, the Commoner may distrain them Damage Feasants. p.2174. C.6.

If a Commoner hath Common in a great Field, when the Corn is carried away *tunc*, *resumitur*, if but a small parcell of the Field be sowed with Corn, it shall not oust the Commoner of his Common. p.2175. C.7.

Common in one County, may be appendant to a Messuage in Land which is in any other County. p.2175. C.8.

Where Common is claimed by Prescription or Grant, the Land to which, and out of which it is, must both be certainly expressed. p.2175. Case 8.

Copyholder for life hath Common in the Lords Waste; the Lord grants and confirms the Copyhold and Land to him and his heirs *cum pertinentiis*: The Common which he had by the Customs is destroyed and determined by his own Act; and the words, *cum pertinentiis*, are not sufficient to passe the Common to him. p.2175. C.9.

If a man hath Common by Grant in a great field, if the Grantor erect a stack of Hay or Corn in the field; and the Commoners Cattell eat the Hay or Corn, the Grantor is without remedy, and shall not maintain Trespasse against the Commoner for it. p.2175. C.10.

To prescribe to have Common *ratione vicinagii*, is good: But where one clayms Common appendant, there it would be double to alledg Prescription in it, because it is of Common right, p.2175. C.11.

Commission and Commissioners.

A Commission to Commissioners of the County of *Middlesex*, to render the Exchequer Seal to find a Condition, broken of a House and Lands in S, upon a Lease for life; and an Inquisition upon it, where not good. p.2176. C.2. Otherwise upon a Condition upon a Lease for years, *ibid.*

Pro securitate Pacis, cannot be returned by the Sheriff, but ought to be by the Commissioners, p.2176. C.3.

Prohibition to the High-Commissioners, for holding pleas for not repairing of the Chancel, where granted, because it is not an erronious Crime, of which only they have Conusans, p.2176. C.4.

Condition.

Where the word, *Proviso*, makes a Condition, where not. p.2176. C.1.

Where a Condition and Proviso shall be void, because contrary to the Estate limited before. p.2176. C.3.

Where a Condition is to do two things, the party hath his Election to do the one or the other. p.2177. C.5.

Where the words in a Deed, *sub conditione*, *Quod si*, are insensible, and shall be neither a Limitation, nor a Condition. p.2177. C.5.

Devise of Lands to J. S. for years, *reddend. et solvend. annuatim* at Mich. to J. D. 10 l. the words make a Condition, and for non-payment, the heir may Enter. p.2177. C.6.

Of a Bond to pay 15 l. at Mich. next, and so yearly till J. S. be promoted to a Benefice, the first 15 l. must be paid, although J. S. be promoted before Mich. p.2177. C.7.

Where a Condition shall be suspended, or gone, by the Act of the Lessor; where not. Page 2177. C. 9.

Of an Obligation being in the Disjunctive; the Plaintiff may alledg the one or the other at his Election. p.2177. C.11.

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Debt against Executor for rent behind in time of the Testator, levyed by Distress, *et sic non detinet*, where a good plea. p. 2103. C. 6.

Condition to make an Obligation to the Plaintiff before *Mich.* That he sealed a Bond, and delivered it to the use of the Plaintiff, no Plea in Debt of performance of the Condition. p. 2103. C. 7.

Where, notwithstanding a Distress upon the Lessee by the Lessor, yet Debt lyeth for the Rent upon the privity of contract. Page 2103. C. 8.

Debt upon Obligation to save harmless, *Non damnificatus* generally, where no plea. p. 2104. C. 9.

A Debt due to the Queen is assigned by her to J. S. but no words in the Letters Patents to sue for it in her name: Yet *Scire facias* lyes to have Execution of it in the Queens name. p. 2104. C. 10.

Where a Covenant not to sue an Obligation before *Mich.* shall amount only to a Covenant, and not to a Release. p. 2104. C. 11.

A Statute Merchant or Staple is acknowledged; and the Seal of the Mayor is not put to it; yet it may be sued as an Obligation, because the words *Obligari et Teneri* make it an Obligation. p. 2104. C. 13.

Where it lyes by an Attorney for Attorneyes Fee, but not for Soliciting Fees. Page 2104. C. 14.

A. and B. Executors of J. S. had an Obligation wherein J. D. was endebted to the Testator. B. one of the Executors delivers an Obligation to J. N. to satisfy a Debt by him due to J. N. and dyes. If Detinue lyes for the Obligation, by the surviving Executor, Quere. p. 2104. C. 15.

Goods of a stranger Levant and Couchant upon the Lands of the Kings Debtor, cannot be sold by the Sheriff by vertue of a *Fieri facias* out of the Exchequer; but they may be distrained for the Kings Debt. p. 2105. C. 16.

Debt upon Obligation, the demand was 47 *l. Monetæ Flandriæ*; and because the Jury did not enquire of the value of the Money upon the Verdict, nor by Writ of Enquiry: Judgment in it for the Plaintiff was reversed. p. 2105. C. 18.

A Recognizance is a Judgment of it self, and debt will lye upon it without any Judgment had in a *Scire facias*. p. 2105. C. 19.

A debt which comes to the Queen by Attainder cannot properly be said a Debt by Judgment within the Statute of 33 H. 8. Page 2105. C. 21.

If Debt be brought by Original Writ against an Administrator, then where he is dwelling, and before notice of it he payes Debts due by Specialties, and so hath not Assets, it is good, and a good bar. p. 2106. C. 23.

A Debt recovered in *London* against an Executor is assigned to the Queen; upon a *Conset* that the Defendant hath goods in another County, a *Scire facias* may issue out of another Court then where the Record of the Judgment remaineth to have Execution for the Queen. p. 2106. C. 24.

Upon an Obligation to perform an Award; who award a Release by the Defendant to the Plaintiff, but no place where to be delivered, the sealing of a Release and delivery of it to the Servant of the Plaintiff; where a good performance of the Award, notwithstanding the party afterwards refused to accept of it. Page 2106. C. 26.

Condition of the Obligation was, If the Brother of the Defendant should make such assurance of the Mannor of D. as Counsell of the Defendant should Devise, then if the Defendant paid 10 *l.* The Defendant by advice of Councel prayed a Lease with Warranty, That is not an Assurance but a means to recover in value, and so the Obligation not forfeited. p. 2107. C. 29.

Debt brought upon a Bill of 70 l. to be paid upon demand, though there be no demand, yet debt lyeth, because it is a duty personal. p. 2107. C. 31.

Againſt an Executor upon an Arbitrament made in the life of the Teſtator lyeth not, becauſe the Teſtator might wage his Law. Page 2207. C. 34.

Debt upon a Bill, which though it was incertain at the firſt, yet when it is made certain by an Averment, Debt lyeth. Page 2207. C. 35.

Upon an Obligation to perform an Award, though the Award be void in part as to a ſtranger, yet ſtands good to the other, and debt lyeth for not performance of it. p. 2207. C. 36.

Upon a Counter-Bond as Surety, the Defendant pleads, The Principal Bond was made upon an Uſurious Contract, not good, for that the Surety could not take notice of it. Page 2208. C. 37.

Debt upon a Bill ſealed, written in a Paper Book, and the Defendants hand to the Book, is a good Deed, and Debt lyeth unto it. Page 2208. C. 38.

Where Debt or account lyeth upon a Bill Sealed, and had received moneyes to buy ſeveral things to the uſe of the Plaintiff. p. 2208. C. 39.

Lyeth for Arrearages of a Rent-charge granted for years. p. 2208. C. 41.

Upon a Bond, the Defendant pleads *Quod factum prædict.* was made without date, and the Plaintiff dated it, ſo *Non eſt factum*, not good, for that he confeſſeth it his Deed before. Page 2208. C. 40.

Upon the Statute of 2 E. 6. for not ſetting forth of Tythes, maintainable, though the party claim in by ſeveral Leaſes of a part of the Leaſe of the party, and of other part the Leaſe of the Vicar, in regard the whole Tythes are in the Plaintiff. p. 2208. and the Action is grounded upon the *Tort*. p. 2208. C. 42.

Where money or goods are delivered to the uſe of J. S. upon Truſt, J. S. may have Debt for the money, or Detinue for the goods. Page 2208. C. 43.

Where the Premiſes of a Bill doth mention the Receipt of Moneyes to anothers uſe, and doth not ſay in the latter clauſe, to be re-payed by *Ceſtuy que uſe*, Debt lyeth againſt him who ſeals the Bill. p. 2209. C. 44.

Againſt Husband and Wife, and Declared, That the Wife *Dum ſola fuit* owed him 40 s. the Action doth not lye, becauſe the Wife ſhall not be ſued for the Debt of the Husband. Page 2209. C. 46.

In *Detinet* only; where good, becauſe not brought for a certain ſum of money. p. 2209. C. 47.

Where Debt is brought upon a Leaſe for years, upon the Contract, it may be brought in any place; but where, upon the privity of Contract, it is to be brought where the Land is. Page 2209. C. 48.

Deeds.

A Deed of Grant is Read and Sealed, and left upon the Table, but not delivered, nor countermanded, a good Deed and binds the party. p. 2209. C. 1.

Obligation dated 1. *Maii*. The 1. *Junr* following the Obligee made a Releaſe dated 1. *Martii*, and delivered 1. *Junii*; by this the Obligation is not releaſed. p. 2209. C. 2.

Where one named in a Deed after the *Habendum*, ſhall not take by the Deed. p. 2210. C. 3.

Every thing contained in a Deed, is an Agreement. And a Recital in a Deed is an Agreement, and ought to be performed and made good. p. 2210. C. 4.

A Deed delivered, although it be upon a Condition ſubſequent, it ſhall be taken for his Deed, and the Condition after ſhall be void, becauſe repugnant. p. 2210. C. 5.

Where an averment of the delivery of a Deed at another time then it doth bear date, is not good. p. 2210. C. 6.

The Father, Tenant for life, the Remainder to his Son for life; the Son purchaſeth the Reverſion in Fee, the Father ſurrendreth to him without Deed, no good ſurrender. p. 2211. C. 7.

When nothing paſſeth by the Premiſes of a Deed, but only an implyed Eſtate for life, and by the *Habendum* an Eſtate expreſſed is limited, this doth controul the implyed limitation; but if there be an expreſs Limitation in the beginning of the Deed; if the *Habendum* be repugnant, it is void; and the firſt limitation in the Deed ſhall ſtand. p. 2211. C. 8.

If a Deed be delivered to the party himſelf, if it be not Cancelled, and the other gets it into his hands again; it is a good Deed. Page 2211. C. 9.

Where a Deed by the Delivery of it is firſt good, though it be not good to paſs the thing granted; a ſecond delivery of ſuch a Deed is void. p. 2211. C. 10.

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Where a ſtranger may receive a Deed to the uſe of a Corporation, without a Letter of an Attorney; and their ſealing of the Counterpart of it, ſhall amount to a ſufficient Agreement to it. p. 2211. C. 12.

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A Feme Sole makes a Lease rendring Rent, then takes Husband; after the Wife demands and receives the Rent; Quære, If bind the Husband. p. 2212. C. 5.

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Of parcells of Plate certain by name in the Declaration, and the Jury do not find the particular parcells in the Declaration, but that the Defendant sold divers parcells generally; although they be all one in name, yet upon a Demurrer upon it, a Judgment upon such a Verdict reversed. p. 2213. C. 2.

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Scire facias not to be awarded upon Return of *Nulla bona Testatoris* upon a surmise of the party of *Devastavit*, but in any Case where the Judgment is *de bonis propriis*, unless it be upon the Return of the Sheriff of a *Devastavit*. p. 2214. C. 1.

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Devises.

Of an Estate to his Son, and the Heirs of his body, when he shall come to his age of 24 years; and the Father dyeth before the Son comes to the age of 24 years; the Son in such Case hath a Fee simple, and not tail. p. 2215. C. 1.

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Of a Rent to the Wife, in Recompence of her Dower, ſhe brings Dower, and recovers the Rent; it is againſt the Willl ſhe ſhould have both: and her acceptance of the one is the waiver of the other. p. 2217. C. 13.

A Deviſe to the eldeſt Daughter of Lands, and that ſhe pay to the younger Sister yearly 30 l. is a Condition in a Will; and for not payment, the younger may Enter for breach of the Condition. p. 2217. C. 14.

Tenant *in Capite* of three Mannors, of two in Fee, and one in Tail, deviſeth all his Mannors to a Stranger; where good for the two Mannors, but void for the third Mannor, by Statute of 32 H. 8. p. 2217. C. 18.

A Deviſe to one, and the Heir of his body is Tail; for that the word [Heir] is *Nomen Collectivum*. p. 2218. C. 19.

Of a Term to A. and B. his Executors, till all his Debts and Legacies be paid; they Enter generally, they ſhall take as Executors, and not as Legators. p. 2218. C. 20.

A man hath Iſſue a Son and a Daughter, and deviſeth his Land to his Son in Tail; and if he dyeth without Iſſue, to remain to the next of his Name: The Daughter marrieth, the Son dyeth without Iſſue; the Daughter ſhall not have the Land, becauſe by her Marriage ſhe hath loſt the Name. p. 2218. C. 22.

By Deviſe of a Houſe, Lands appurtenant to it will not paſs. p. 2218. C. 24.

Of Lands by the Father to his two Sons equally, and their Heirs; they are Tenants in Common. p. 2218. C. 25.

A Deviſe for life, the Remainder to his Iſſues; having Sons and Daughters is void for incertainty. p. 2218. C. 26.

Of Lands to his eldeſt Son; and if he pay not the Legacies to the younger Children, then to them in Fee; he fails in payment, the Lands ſhall go the younger Children. p. 2219. C. 27.

A Proviſo annexed to Fee, by a Will for doing of ſuch a thing; that it ſhall revert, is a void Proviſo: for that one Fee cannot be limitted upon another. p. 2219. C. 28.

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Diſcontinuance of Suit: Proceſs.

Upon what Act, a Diſcontinuance of Proceſs may be Entred againſt the Plaintiff. pag. 2220. C. 1.

Where, upon a day given by Auditors, to appear before them; the Plaintiff makes default, it is but a Diſcontinuance; and if he will, he may after have a *Scire facias* againſt the Defendant to Accompt. p. 2220. C. 1.

A man declares in *Eaſter* Term, and there is not any Continuance; and in *Mich.* Term he declares *de Novo*: and Iſſue is thereupon taken and joyned, and a Verdict. It is a Diſcontinuance, and therefore a Judgment given, ſuch a Verdict reverſed. p. 2220. C. 2.

A Writ of Error, if it be Retorned, is not diſcontinued by the Demiſe of the King. pag. 2220. C. 3.

A Prohibition granted and iſſued; if an Attachment iſſueth upon it, not diſcontinued by the Demiſe of the King. p. 2220. C. 4.

An Information, upon the Statute of *Scandalis Magnatum tam pro Domino Rege quam pro ſeipſo*; not diſcontinued by the Demiſe of the King, becauſe the Contempt to the King is but Collateral. Page 2220. C. 4.

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Where a Diſcontinuance, notwithſtanding there be a Verdict. p. 2221. C. 6.

A Suit by three Executors, who all have day upon the Roll, upon a Continuance taken, at which day two of them only appear; it is ſuch a Diſcontinuance as is not amendable by the Statutes. p. 2221. C. 7.

Where upon a *Jurata ponitur in reſpectu uſq. ad proximam Curiam*: at which day the Plaintiff makes, nor had day over; the whole matter is diſcontinued. p. 2221. C. 8.

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In a Replevin, the Plaintiff cannot diſcontinue his Suit without privity of the Court. p. 2221. C. 9.

Where

Where an Original is diſcontinued, the Defendant ſhall not have Coſts; but if the Plaintiff be Nonſuit, the Defendant ſhall have Coſts by Statute 31 H. 8. p. 2221. C. 9.

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Diſmes, or Tythes.

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A Preſcription to pay a certain ſum of Money to the Clerk by Pariſhioners, in diſcharge of all Tythes; where good, becauſe the Parſonage was Impropriate, and ſuch payment might be agreed upon the Endowment; but by Common Intendment: Tythes cannot be paid to a Pariſh Clerk, nor can he preſcribe in them. p. 2222. C. 2.

A ſpiritual man; where he may preſcribe in *Non Decimando*, although no cauſe of his Diſcharge be ſhewed. p. 2222. C. 3.

A ſuggeſtion to have a Prohibition upon a Suit, for Tythes in the Spiritual Court; what good; what not. p. 2222. C. 4.

A Preſcription to be joyned of one Tythe, for the payment of another; where not good. p. 2222. C. 5.

What ſhall be ſaid barren Land within the Statute of 2 E. 6. of which Tythes ſhall not be paid, what not. p. 2222. C. 6.

Of Trees, *Mortua, aridæ, & putridæ*, fit only for Fire-bote, and not for Timber; Tythes ſhall not be paid. p. 2222. C. 7.

Eccleſia Decimas ſolvere Eccleſiæ non debet: and No Tythes ſhall be paid of the Gleabe Lands: But if the Vicar have ſmall Tythes upon his Endowment, and the Parſon leaſeth his Gleabe Lands, the Vicar ſhall have the ſmall Tythes ariſing of the Gleabe Lands. Page 2223. Caſe 8.

When and where a nuity of poſſeſſion ſhall be ſaid be a good diſcharge of Payment of Tythes; when, and where not. p. 2223. C. 9.

If a Pariſhioner ſetteth forth his Tythes, and preſently he himſelf taketh them away; though the Parſon may ſue him as a Treſpaſſor at the Common Law; yet they are not thereby made ſuch Lay-Chattells; but Suit may be for them in the Spiritual Court. p. 2223. C. 10.

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Prohibition; where granted for ſtaying a Suit in the Spiritual Court for Tythe-Pidgeons. Page 2223. C. 13.

Cannot be parcel of a Mannor, and therefore not grantable by Copy. p. 2223. C. 14.

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The Queen and her Patentees; where diſcharged of Tythes, which were in the hands of the Ciſtertians, whoſe Lands came to the Crown by the Statute of 31 H. 8. *Of Diſſolutions.* Page 2224. C. 16.

Where a Surmiſe is made to have a Prohibition, upon a Joynt-Preſcription for two things, and there is a failer in one of them; there the Prohibition fails, and a Conſultation ſhall be granted. p. 2224. C. 18.

An agreement made by a Parſon with a Pariſhioner, by word for his own Tythes, by way of Reteiner; where good, being in the Nature of a perſonal Compoſition: But a Leaſe of Tythes cannot be without a Deed. p. 2224. C. 19.

A Grant of Tythes for life, to begin at a day to come, not good; for that in the Conveyance of them they ought to follow the nature of the Land; as Rent and other Inheritances, which being in *Eſſe*, cannot begin at a day to come. p. 2225. C. 20.

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To give a Buck or a Doe, may be a good *Modus Decimandi*, for Tythes in kind of a Park, converted in Tillage. p. 2225. C. 23.

A man cannot diſtrein Shacks of Corn; but a Sack of Corn, Damage-feaſants he may. p. 2225. C. 24.

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Distresse.

Where a man cannot distrein for Rent by force of words in a Deed only, which imply a Distresse by Implication; and are not precise Words, of Clause, of Distresse. p. 2226. C. 1.

Where a Distresse taken upon the Gleabe Lands, of a Parsonage presentable, and sale of the Goods, for Tenths unpaid, is good. p. 2226. C. 2.

The King granted to the Dean and Chapter of P. All Fines, *pro licentia Concordandi*, of their Tenants and Homagers: A Fine was levyed in C. B. and the Post-Fine assessed to 15 s. for which the Bayliff of the Dean distreins, and the Distresse not good. For that the Fine and *Licentia Concordandi* is the Queens Silver, and not the Post-Fine; and the Grant did not extend to Post-Fines. p. 2226. C. 3.

A man cannot avow two Distresses, which are sufficient for the same Rent; but if there be not sufficient Distresse when he distreined, he may distrein again. p. 2226. C. 4.

Things are not distreinable which are for Trade, and *pro Bono Publico*; as Cloath put to a Weaver to be Woven, Yarn to be spunn, nor the Horse that carrieth them cannot be distreined for Rent behind. p. 2226. C. 5.

Distresse may be taken for Toll thorough, which is claimed by Prescription; but then it must be for some reasonable Cause, *scil.* to maintain a Cawsey, Bridge, &c. p. 2227. C. 6.

Hides which are Raw, may be distreined for non payment of Toll within the Market; but he who distreineth, cannot Tann the Hides: For although a man may in some cause use a Distresse, where it is for the Owners benefit, yet not where it may be to his loss. Page 2227. C. 7.

The Bayliffs of a Court-Baron, upon a Judgment there, and a Levy awarded, sell the parties Goods, and levy the Mony without a special Custom void. p. 2227. C. 8.

Where a Distresse is lawful for a Rent, there the taking of Cattell is not a Conversion; contrary, where the Distresse was not lawfully taken. pag. 2227. C. 9.

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Where a Distresse taken, dyes in the Pound, being taken for Damages-feasants; where the Owner shall bear the Damage, and losse, where not. p. 2227. C. 11.

Disseisin, Disseisor, and Disseisee.

Tenant *in Capite* is disseised: Disseissor Alliens the Land without Licence; the Disseisee enters, the Disseisor shall be charged with the Fine for alienation, and not the Land of the Disseisee. p. 2228. C. 1.

A Lease for years of Lands made by Disseisee of the Land, with a Letter of Attorney for to deliver the Deed upon the Land; where good. p. 2228. C. 2.

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Summons in a Writ of Dower must be where the Parish is, and at the Church Door, though the Land lye in another County. Page 2229. C. 3.

Dower against an Enfant, who makes default; he shall not have this Age, nor his default prejudice the Demandant. p. 2229. C. 4.

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What

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Donative, and the Nature of it. p. 2230. C. 1.

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De uno Meſſuagio ſive Tenemento, not good; for the Incertainty of it. Page 2231. C. 2. p. 2232. C. 11.

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Upon a Leaſe for years made by Husband and Wife; and it did not mention in the Declaration that it was by Deed, yet good. p. 2232. C. 5.

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Ejectione ſine de Dimidio acræ terrarum, and Verdict finds the Ejectment in a part of it, not good: otherwiſe, of ſuch a Verdict in Treſpaſs. p. 2232. C. 8.

Ejectione firme; and declares of a Meſſuage and 20 Acres of Land, 20 Acres of Meadow, 20 Acres of Paſture, by name of a Meſſuage and 10 Acres of Land, more or leſs, not good. pag. 2232. C. 9.

De Quequina, not good for the incertainty. pag. p. 2232. C. 12.

De Pomario good, and it needs not to be demanded by the name of a Garden. p. 2232. C. 13.

Of a Boylary of Salt, Quære. Page 2232. C. 13.

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Elegit and Extent.

Upon an *Elegit* or other Writ of Execution, the Extendors extend the Lands or Goods at too high a value; the Party may not pray, that the Extendors may retain the Lands or Goods at the value prized; becauſe the Statute of *Aſton Burnell et Mercatoribus*, are Penal Laws, and do not extend to other Writs of Executions. Pag. 2233. C. 1. p. 2235. C. 14.

Conuſee of a Statute is put in poſſeſſion of parcel of the Lands; but the Writ is not returned: and a *Extendi facias de Novo* to a new Sheriff, makes his Return, That the old Sheriff extended the lands; no good Return; the firſt Writ not being Returned. p. 2233. C. 2.

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An Execution by *Elegit* muſt be by Inquiſition; and if a Term be miſtaken in the Inquiſition, the Sheriff cannot ſell the Term; and if he do the ſale is void. p. 2234. C. 5.

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Two parts of a Rent delivered in Execution upon an Extent, where good by the Sheriff. p. 2235. C. 10.

Where a *Superſedeas* was awarded for the ſtaying of an Execution upon a Statute, where it appeared, That the Conuſee had purchaſed parcel of the Land. p. 2235. C. 11.

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Purchaſe

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Purchaſe of part of the Land chargeable a diſcharge of a Statute Staple. p. 2235. C. 13.

Two men claim one Land; one by an Extent upon a Statute; the other upon a Judgment the ſame Term, he who claims by the Judgment, ſhall be firſt ſatisfied. p. 2235. C. 15.

If a man accepts of Lands upon an Execution upon an *Elegit* delivered by the Sheriff, if the Writ be retorned, he cannot afterwards waive, and have a new Extent; otherwiſe if he waive it at the day of Retorn of the *Elegit*. p. 2235. C. 16.

Emblements.

Tenant in Fee ſows the Lands; and afterwards Deviſeth the Lands for life, the Remainder in Fee, and Tenant for life dyeth before ſeverance; and he in the Remainder ſhall have the Emblements, and not the Executors of Tenant for life. p. 2235. C. 1. otherwiſe if the Tenant for life had granted them to another, for that then they ſhould paſs *Quaſi* Chattells ſevered from the Lands. p. 2235. C. 1.

A man ſeiſed of Lands, puts them to others to ſow by halves. They are Tenants in Common of the Emblements; but if a ſtranger ſpoils the Corn, they cannot joyn in Treſpaſs with the Owner of the Land. p. 2236. C. 2.

Endictment.

Vi et armis againſt one who encloſed Lands, in which J. S. and others had Common time out of mind, not good, becauſe no Common Nuſance; and Action upon the Caſe lyeth. p. 2236. C. 1.

Juſtices of Peace at a Goal Delivery, If they have power to take Indictments. Quære. p. 2236. C. 1.

Upon the Statute of 8 H. 6. of Forcible Entry taken in the County of G. of Lands lying in the County of M. void. p. 2236. C. 2.

Of one for being a Common Barretor *et perturbator pacis* good, though no place nor cauſe be ſhewed. p. 2236. C. 3. p. 2239. C. 24.

Of a Conſtable for Arreſting one of Burglary, and after ſuffring him to eſcape, quaſhed, becauſe no place ſhewed where the Arreſt was. p. 2236. C. 4. p. 2238. C. 16.

A man Endicted upon a penal Statute, where void as to an Offence at Common Law, and ſhall not be good as for an Aſſault, Page 2236. C. 6.

Where void for incertainty, p. 2236. C. 7. and the party ſhall have reſtitution of his goods ſeiſed upon. p. 2238. C. 17.

Where void for want of addition in the firſt name, which is not after the *alias dictus*. p. 2237. C. 8. p. 2237. C. 12.

Of one upon the Statute of 5 Eliz. for Forgery before Juſtices of Peace, not good, becauſe they have but a Special Commiſſion only as Juſtices of Peace. p. 2237. C. 9.

One Indicted upon the Statute of 23 Eliz. of Recuſancy, and the words, *viz. Non habens aliquam rationabilem cauſam*, were omitted in the Indictment, yet it was good. Page 2237. C. 10.

Husband and Wife are Indicted of ſuch a place; but the Wife hath no addition, yet good. p. 2237. C. 12.

Indictment for not repairing a Bridg in a High Way, *per quod Legi Dominæ Reginæ tranſire, non poſſunt*; and doth not ſay, *ad Nocumentum omnium ſubditorum*: yet good. p. 2237. C. 13.

Upon the Statute of 5 Eliz. of Perjury; though it was *falſo et deceptivè depoſuit*; but not good, becauſe there wanted the word, *Voluntariè*. pag. 2237. C. 14.

Upon the Statute of 8 H. 6. of Forcible Entry; and the Statute is miſrecited, the Indictment is void. p. 2237. C. 15.

Of a Conſtable, becauſe he did not do his duty, to purſue Felons upon Notice given to him of the Felony committed, and Huy and Cry made: but becauſe it was not ſhewed where the place was of the Notice given, the party was diſcharged. p. 2238. C. 18.

Conditional; not good. p. 2238. C. 19.

Of a Common Night-Walker by the name of *Communis Nocti-vagans*, where good. p. 2238. Caſe 22.

A. Indicted, *Quod apud K. cum quodam muro Coſtili obſtipavit regiam viam, ducentem de L. ad K.*; becauſe the ſtopping is alledged at K.; and the Way is alledged to be from L. to K. ſo as K. is excluded; not good. p. 2238. C. 23.

Indictment, for that *manu forti*, he entred into the Moyety of a Mannor; where good: where not. p. 2239. C. 25.

Enfant

Enfant.

Where ſues by Attorney, where he ſhould ſue by his Guardian, it is Error. p.2239. C.1. But if he be Executor, he may ſue by Attorney, becauſe it is *in auter droit*, *ibid.*

A Collateral Covenant not bind an Enfant; though by Cuſtome, he may bind himſelf to be Apprentice. p.2239. C.2.

Releaſe made by an Enfant, made without Conſideration, void. p.2239. C.3.

Where a Bond to pay money, made by an Enfant, is not good, but void. An Aſſumpſit made by him to pay the money at his full age, not good. p.2239. C.4.

Upon Judgment given by default againſt an Enfant; Iſſue taken, that he was of full age, ſhall be tryed where the Land lyes. Page 2239. Caſe 5.

Obligation in a double ſum taken of an Enfant for the payment of his neceſſary meat and apparrel, void: Contrary, where to pay the very ſum for it only. p.2239. C.6.

Where in *Audita Querela* by an Enfant to make void a Recognizance; It is adjudged to be cancelled upon his Inſpection: And that Judgment is afterwards reverſed by Error; and the Enfant is then of full age: He cannot have now an *Audita Querela*, becauſe there can be no Inſpection now of him for his age. Page 2239. Caſe 7.

Enfant Bail for J. S, and a Judgment had againſt him upon two *Scire facias* returned, where relieved by *Audita Querela*, becauſe he was then within age; and to diſallow ſuch *Audita Querela*, were Injuſtice. p.2240. C.8.

A Copyhold granted by an Enfant, ſhall binde him; and ſo ſhall a Preſentation to a Church which is void. p.2240. C.9.

An Aſſumpſit by an Enfant to a Taylor for the payment of money which is not for neceſſary Apparel, and beyond his Quality; where not bind him. p.2240. C.10.

Action brought by the Guardian of an Enfant, for theſe words ſpoken, *I will charge thee with Felony*; maintainable, though it be not averred, that he was of ſuch an age that he might commit a Felony. p.2240. C.11.

Action upon the Caſe lyeth againſt an Enfant for words, who is but of the age of 17. years; becauſe there *Malitia ſuppl.t ætatem*. Page 2240. Caſe 11.

Action grounded againſt an Enfant upon an *Aſſumſit Computaverant*, will not lye. Page 2240. Caſe 12.

Enfant Copyholder makes a Leaſe without Licence of the Lord; it is no Diſſeiſin to the Lord: yet the Leaſe not void. Page 2240. Caſe 13.

Submiſſion of an Enfant to an Arbitrament, and an Obligation to perform the Award, both void in Law. p.2240. C.14.

Entry, and Entry Congeable.

Where the Entry of the Diſſeiſee of Lands in one Town, ſhall not gain to him Lands lying in another Town, without an Actual entry into it. p.2241. C.1.

Tenant in tail diſcontinueth the tail to his younger ſon, and dyeth; and the younger ſon dyeth: his wife enſient with a ſon; the Entry of the eldeſt ſon is lawful: and he ſhall be remitted by his entry, for that there was none againſt whom he might bring his *Formedon*. p.2241. Caſe 2.

Where the Entry of him in the Remainder in tail ſhall be congeable, notwithſtanding a Releaſe with Warranty, becauſe his Remainder is not diſcontinued. p.2241. C.3.

The King grants Lands, rendring Rent, with Condition of Re-entry for Non-payment; and after grants the Rent to J. S. in Fee; and then it is behind, the King ſhall not Enter for not payment of the Rent. p.2241. C.5.

Leſſee for years of Lands, rendring Rent to begin at Mich. he entreth before Mich. he is a Diſſeiſor; yet Debt lyeth againſt him for the Rent upon the Privity of Contract. p.2241. C.6.

Where a Remainder depending upon a Condition precedent, is void, and an Eſtate of Freehold cannot ceaſe without an Entry. Page 2241. Caſe 9.

A man cannot enter into another mans houſe, though with Licence of the Servant, to demand a debt, without a ſpecial averment, That the Debtor is within the houſe. p.2242. C.10.

A Deviſe of Lands is made to the eldeſt ſon; and upon condition, That if he paid not ſeverall ſums of moneys to his 3. younger ſons, the Lands to remain to them: He payes moneys to two of the ſons, but not to the third ſon: his Entry is congeable, and by his Entry, the Eſtate is veſted in all the ſons. Page 2242. Caſe 12.

The Table.

Entendment.

Avowry for Rent as Coſen and heir of R. C. *ſcil.* ſon of A. daughter of R. C. for Rent after the death of A; the Avowry not good, becauſe it ſhall not be intended that ſhe eyed in the life of R. C. without eſpecial averment. p.2242. Caſe 1.

Where Enfancy ſhall be intended, where not averred; *et è contra*, p.2243. C.2.

Where Goods ſhall be intended to be ſold, and delivered *ſecundum uſum Mercaturum*; where not averred. p.2243. C.3.

In Avowry for an Amerciement in a Leet, For that the King granted the Hundred of H. in which there was a Leet to G. O. in Fee, who dyed ſeiſed; and that it diſcended to J. O. his Coſen and heir: but doth not ſhew, That G. O. dyed without Iſſue; yet good, becauſe it ſhall be intended he dyed without Iſſue. p.2243. C.4.

In Aſſumpſit, upon a Promiſe, if he would forbear him a Week, he would pay him the money; and alledges, that he did forbear him one week: but ſayes not, the week next following: No Error, becauſe it ſhall be intended he did forbear him for one week next following, Page 2243. C.5.

Declarations ought to contain matters of ſubſtance, otherwiſe are not good; and no matter of ſubſtance ſhall be taken by Intendment, nor ſhall a Verdict help it. p.2243. C.6.

Error.

Judgment given againſt the Bail upon a *Scire facias*, before a lawfull Judgment is entred againſt the Principal, is erronious, and reverſed by Error. p.2244. C.2.

Error of the proceedings of the Sheriff in executing of a Writ, may be examined by the Court before the Writ is Returned or filed; but not after, becauſe no averment ſhall be againſt the return of it. p.2244. C.3.

Before the day in Bank, one of the Defendants dyeth, and then Judgment is entred. It is Error, p.2244. C.4.

If an Executor ſell a Term upon an Execution of a Judgment, and after the Judgment is reverſed for Error: yet the ſale is good; and the party ſhall be reſtored to the value, but not to the Term it ſelf. p.2244. C.6.

In *Partitione faciendâ*, if the Plaintiffs do not ſhew of what Eſtate, and of whoſe Inheritance, it is not Error: Otherwiſe, of Partition brought by Tenants in Common. p.2245. C.8.

If Damages be given in Accompt, it is not Error. p.2245. C.9.

In Treſpaſs, becauſe the Judgment was, *Quod ſit in miſericordia*; where it ought to be, *Quod Capiatur*. p.2245. C.10.

Where the Feoffee cannot have Error, till Execution be ſued. p.2245. C.11.

Lyeth upon a Judgment given for the Queen, without firſt ſuing a Petition. Page 2245, Caſe 12.

Fine pleaded in Barr, where Erronious. p. 2245. C. 13.

Becauſe the *Venire facias* was awarded upon the Roll returnable, *Mercurii poſt Craſtin. Trinitatis*; and the Writ was, *Veneris poſt Craſtin. Trinitatis*. p.2245. C.14.

The Record being *Obtulit ſe in placito debiti* 10 l. and declared of a debt of 20 l; Erronious, p. 2246. C.15.

Where lyes for him in Remainder, to Reverſe a Judgment againſt Tenant for life. Page 2246. Caſe 16.

Lyes, becauſe the Sheriff returned not Summonors, nor Veyors, upon a Writ of Entry *Sur Diſſeiſin*, p.2246. C.17.

Lyeth not in Partition, before the ſecond Judgment. p.2246. C.18.

Error brought by ſix, and one Releaſes; where no Barr. p.2246. C.19.

For that the Defendant appeared by J. S. his Attorney; but no ſuch in *rerum natura*; not good againſt the Record. p.2246. C.20.

Lyeth for the Bail upon the Statute of 27 Eliz. upon a Judgment had againſt them in a *Scire facias*. p.2247. C. 21.

Exchequer Chamber have power to Examine an Error in fact, *viz.* if one of the parties were dead before the Judgment: But they have not authority to bail the party, but only *ad examinandum errores*. p.2247. C.22.

Of a Judgment, becauſe it appeared, That J. S. was one of the Judges, and alſo one of the Jurors. p.2247. C.23.

Of a Judgment in a *Replevin*, where were two Avowants, one of them within age, who appeared by Attorney, and not by Guardian. p.2247. C.24.

Two bring a Writ of Error, and before the Errors be diſcuſſed, one of them dyeth, the Writ ſhall abate. p.2247. C.25.

Judgment was given againſt the Bail upon *Scire facias*, That the Plaintiff ſhould recover *ſuper Recuperationem prædict*: where it ought to be, *ſuper Recognitionem prædict*; the Judgment reverſed. p.2247. C.26.

In

In Dower, where it ſhall abate by death. p.2248. C. 28.
Where a *Scire facias* is ſued, and two *Nihils* returned againſt the Executor of the wife, ſhall make him party to the Writ. p.2248. C.28.
Two recover in debt, and before Execution one dyeth; If Execution be ſued in both their names, it is not Error. p.2248. C.29.
Where it is brought only for delay; the Court may preſently award Execution. Page 2248. C. 30.
Judgment, *Idco Conceſſum eſt*; where it ought to be, *Conſideratum eſt*, is Error. Page 2248. Caſe 31.
In *Replevin*, the Plaintiff had Judgment, and a Writ of Enquiry of Damages; Errour was brought: and then the Writ of Enquiry was returned; it doth not lye before the Judgment given. p.2248 C.32,34.
Upon a Judgment upon a Recovery of the Court of Verge, and reverſed, becauſe he doth not ſay, That it was *Infra Juriſdictionem:* and the Verge removes upon the Kings removal. Page 2248. Caſe 35.

Eſcape.

Lyeth againſt the Sheriff for an Eſcape; although the Proceſs upon which he arreſted the party, was erroniouſly awarded. p.2248. C.1,3.
If the Sheriff receives the money of the party upon the Execution; and after the ſame, the Bayliff arreſts the party, and detains him, it is a falſe Impriſonment. p.2249. C.2.
Lyeth againſt the Sheriff for ſuffering a negligent Eſcape of the party arreſted, whereby the party is prejudiced in his Suit. p.2249. C.4.
Where a man hath once appeared, and pleaded, he ſhall never after take advantage of miſawarding of the mean Proceſs. p.2249. C.5.
Brought by a man who is Outlawed, lyes againſt the Sheriff in the Queens Name, and in the Plaintiffs. p.2249. C.6.
Where a Promiſe, or the Condition of an Obligation to ſave the Goaler harmleſs of an Eſcape, ſhall be void. p.2249. C.7.
One is in Execution upon a Statute, the Conuſee agrees, that the Conuſor ſhall go at large; If it amount to a Releaſe of the Execution. Page 2250. Caſe 9.

Eſtoppell.

Where upon a Recital in an Indenture of a Leaſe made to J. S, a man ſhall be Eſtopped to ſay, That there was no ſuch J. S. *in rerum natura*, p.2250. C.1. And Recital is an Eſtoppel.
What Eſtoppel ſhall bind; What not. Page 2250. Caſe 2.
Where the Conuſee having ſued out Execution as upon Statute-Merchant, ſhall be eſtopped to ſay, It was another Statute. p.2250. C.3.
Not good againſt a *Feme Covert* by her Deed: otherwiſe, by a Fine, or matter of Record. p.2250. C.4.
Where a man ſhall be eſtopped by his own Deed of Grant. p.2251. C.5,6.

Eſtrepement.

In a Writ of Partition betwixt Tenants in Common; pendant the Writ, one cut down Trees growing upon the Lands: Eſtrepement was prayed; but denyed, becauſe both parties were in poſſeſſion of them. p.2251. C.1.
Granted for cutting Trees *pendente Lite* of a Writ of *Formedon*; though it did not appear at the time of the granting of it, that the party had good title to the Land. p.2251. C.2.
Where it lyes *pendente Lite* in Waſte. p. 2252. Caſe 3.
If it lyeth upon a Writ of Error brought to Reverſe a Common Recovery. p. 2252, C. 4.

Evidence.

A man declares of an Ejectment of 100 Acres of Lands, and ſhews in Evidence a Leaſe of 40. Acres only. It is good for ſo much as is compriſed in the Leaſe, and not for the reſidue. Page 2252 C. 1.
A Witneſs examined upon his Evidence given before after his departure from the Barr; ſhall make the Verdict void. p.2252. C.2.
What ſhall be in Debt upon a Leaſe for years good Evidence for Reparation of houſes. Page 2252. C. 3.
A Church-Book where to be given in Evidence; where not: and that Books and Writings not under Seals, cannot be delivered to the Jurors as Evidence, without the Conſent of the Parties, p.2252. C.4.

The Table.

Executors.

Land deviſed to two Executors to be ſold; one refuſeth before the Ordinary: the other cannot ſell. p.2253. C.1.

Detinue where by one Executor againſt the huſband of the other Executor who is dead, for Goods detained in the husbands hands. p.2253. Caſe 2.

If Judgment and Execution be awarded againſt an Executor; The Sheriff cannot return *Nulla habet bona Teſtatoris*; but a *Devaſtavit*, p.2253. C.3. p.2256. C.25.

Where the Judgment againſt an Executor or Adminiſtrator ſhall be *de bonis Teſtatoris*; Where, *de bonis propriis*. p.2253. C.5.

Sale of the Overſeer of an Enfant within age Executor of Goods, with the Conſent of the Enfant, is good; and ſhall be an Adminiſtration. p.2254. C.6.

Where one Executor delivers a Bond of the Teſtator, to one of his own Creditors, for the payment of his own proper debt, is good, and the other hath no remedy for it. Page 2254. Caſe 7.

In Debt againſt an Executor, upon an Obligation of the Teſtator; if the Plaintiff be Nonſuit, the Executor ſhall have Coſts: but if an Executor be Plaintiff, and Nonſuit, he ſhall pay no Coſts. p.2254. C.9.

One charged once as Executor of his own wrong, he ſhall never diſcharge himſelf by matter *ex poſt facto*. p.2254. C.10.

Though an Executor be poſſeſſed of the Teſtator's Goods, *ut de bonis propriis*; yet he upon Trover may lay the Converſion of them *in retardationem Executionis Teſtamenti*. p.2254. C.11.

Where the Plea of an Outlawry of their Teſtator, is not a good Barr in an Action brought againſt them as Executors. p.2254. C.12.

They muſt take Notice of Debts upon Record, and muſt ſatisfie and pay them before all other debts, unleſs Debts due to the King. p. 2254. C. 14.

Where the Grant of a Term for years to an Executor upon a Contingent which never veſted, is not good. p.2255. C.16.

Aſſumpſit made by an Executor for forbearance of Suit, to pay a debt of the Teſtator due upon a ſimple Contract; where bind him. p. 2255. Caſe 18.

Where payment of a debt upon Execution upon a Statute by an Adminiſtrator, before a debt due upon a Judgment, is no *Devaſtavit*. Page 2255. Caſe 19.

One Adminiſtrator cannot have a *Scire facias* to have Execution of a Judgment had and recovered by a former Adminiſtration. Page 2255. Caſe 20.

A Leaſe is made for years by Indenture, rendring Rent; debt lyeth againſt the Executor for Rent, though the Teſtator never entred. p.2255. Caſe 21.

Two Executors; one is within age, and Adminiſtration is granted during his Minority: One of them cannot bring an Action in his own name, but both muſt joyn in the Action. Page 2256. C.22.

Where a Debt, although extinct in Law, by making the Debtor his Executor, yet ſhall be in *eſſe* to pay a Legacy given by the Teſtator, for the payment of which he is ſued in the Spiritual Court. p.2256. C.23.

Shall not be compelled to Accompt; but an Adminiſtrator ſhall be compelled to Accompt before the Ordinary. p.2256. C.27.

A man deviſeth all his Goods to his Wife his Executrix after Debts and Legacies paid; ſhe dyeth before probate: The Goods ſhall go to the Adminiſtrator of the husband, of Goods not adminiſtred. p.2256. C.29.

Executions.

Where one Surety ſhall have Contribution of the other, upon an Execution ſued by the Cuſtome of *London*. p.2257. C.1.

Upon Execution of Body and Lands upon a Statute, if the Sheriff ſuffereth the party to go at large as to his body, it is no diſcharge as to the land, unleſs it be with the conſent of the Conuſee. p.2257. C.2.

Audita Querela may be in B. R, or C. B, upon a Recognizance taken of an Enfant in Chancery. Page 2257. C.3.

If Execution be awarded againſt the Defendants Goods which are taken in Execution, a gift made of the ſame Goods the ſame day, ſhall not ſtop to the Execution. p.2257. C.4.

Two perſons Recover ſeverally againſt one in Debt; how the Sheriff muſt demean himſelf in making Execution. p.2257. C.5.

The Sheriff upon a *Fieri facias* cannot deliver the Defendant's Goods to the Plaintiff, in ſatisfaction of his debt, but muſt return the Execution in Court. p.2258. C.6.

The Sheriff ſeizeth Goods upon a *Fieri facias*, and, before Sale, the Record is removed by Error, and a *Superſedeas* awarded: upon Seizure returned, *Venditioni Exponas* awarded. p.2258. Caſe 7.

The

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The Sheriff cannot break open any mans house to ſerve an Execution, unleſs the King be Party; Or there be a Contempt. p.2258. C.7.

Aſſumpſit, in Conſideration the Plaintiff forbear to ſue and proceed upon a *Capias Utlagatum*, though it be at the Kings Suit; yet becauſe it is by the means of the party, is good, and not againſt Law. p.2258. C.8.

A Sale of Goods by the old Sheriff upon a *Fieri facias* after he is diſcharged of his Office, void in Law. p.2258. C.10.

Where a man is taken upon a wrong Writ of Execution, though it be returned Executed; yet becauſe he in truth never was in Execution, a new *Capias* may iſſue againſt him. Page 2258. p.2259. Caſe 11.

Where Goods are taken in Execution in another County, upon a *Teſtatum* that he hath not Goods in *London*, which is falſe, the Execution ſhall be avoided, and the party reſtored to his Goods. C. 12.

Upon a *Fieri facias*, the Sheriff takes part of the Defendants Goods in Execution, and delivers them to the Plaintiff from whom they are taken; he may have Execution *de Novo*. p.2259. Caſe 13.

Exchange.

Where an agreement pleaded in Barr in an Action of Treſpaſs. p.2259. C.1.

Where an Exchange is avoided as well by the Eviction of an Eſtate for life in parcell of the Land, as where parcell of the Land it ſelf is defeated. p.2260. C.2.

Excommunication.

Upon an *Excommunicato Capiendo*, the Sheriff cannot break open the houſe of the party, to arreſt the party in the Night time, but in caſe of Felony, or Treaſon. p.2260. C.1.

High Commiſſioners, nor they of the Spirituall Court, by reaſon of an Excommunication, cannot ſend forth Proceſs to have the body of the party before them. *Ibid.*

Excommunication is delivered to the Clark of a Pariſh againſt A; and he publiſheth it againſt B. as excommunicated; B. may maintain Action upon the Caſe againſt the Clerk. Page 2260. Caſe 2.

Not to be pleaded, unleſs it be under Seal. p.2260. Caſe 3.

Where a Statute ſaith, he ſhall be excommunicate *ipſo facto*; yet it cannot be, till after a Sentence Declaratory, or Conviction; otherwiſe there were no means of abſolution. Page 2260. Caſe 3.

A man is Excommunicated for not appearance, being Cited out of his Dioceſs; in caſe of Defamation: and a *Superſedeas* prayed. p.2260. Caſe 4.

Exception.

In a Writ of Partition, the Demandant demanded *duas partes Cuſtodiæ de H.* in the Forreſt of C. *in 3. partes diviſas*; where it ought to be, *Officium Cuſtodiæ duarum partium de H:* and the Exception good. p.2261. C.1.

Writ of Right brought of an Office, and Excepted unto: and good Exception; becauſe it doth not lye of an Office; but a *Quod permittat. ibid.*

Where the Excepting of a thing in a Leaſe where he hath no power, is void. p.2261. C.2.

Condition of a Bond if he were ſeiſed in Fee at the making of the Bond of Copyhold in S. free from Incumbrances, except his Wives Joynture; and Breach aſſigned, that, before the Bond, he had aſſured a Joyture to his Wife, no Breach, becauſe that was excepted. p.2261. Caſe 4.

Debt for Rent, the Plaintiff declared, That he at C. demiſed ſuch Lands, except one Acre *jacent. et exiſtent. in H. prædict.* Exception, That no place is alledged; for, *jacent. et exiſtent.* extend only to the Acre. But good enough, for it ſhall be intended in C. p.2262. C. 5.

Leaſe of a Mannor, except all Caſualties and Profits of Courts; Afterwards, he ſold the Reverſion, and the Leſſee granted over his Intereſt in the Term: By the Exception, the Court-Baron was not ſevered from the Mannor. Page 2262. Caſe 6.

Extinguiſhment.

Unity of poſſeſſion, nor Releaſe of right in the land, do not extinguiſh Tythes. p.2262. C.1.

Husband and Wife Leſſees for years; the husband accepts of a Feoffment of the land, the Term is extinct: Otherwiſe, by Bargain and Sale Enrolled, or by Fine. p.2262. C.2.

By Unity of Poſſeſſion; where to have a Water-Courſe by Preſcription; it is not extinguiſhed, nor the Preſcription gone. p.2263. C.3.

Feoffments.

Feoffments, and Feoffments to uses.

BY *Cestuy que use*, with a Letter of Attorney to deliver Seisin to the Feoffee, where good. p. 2263. C. 1.

Where by a Lease of a Copyhold for years, and a Feoffment made by the Lord of the Mannor, the Copyhold Tenure is not extinct, nor the Customs or Services destroyed. p. 2264. C. 4.

Husband and Wife, Tenants for life of the Wife, the Husband makes a Feoffment to the use of himself and his Wife, for their lives, the Remainder over; this Feoffment doth not destroy the first Estate of the Wife. p. 2264. C. 5.

Feoffment upon Condition, to enfeoff him and his Wife, the Remainder over; the Feoffee is not bound to make the Feoffment to the Husband before Request; but if the Husband dyeth, the Feoffment is to be made to the Wife without Request. p. 2264. C. 7.

Made by *Cestuy que use* in Tail, passeth nothing but for his own life. p. 2264. C. 8.

A man deviseth, That his Feoffees shall make an Estate to all his Sons of the Land, except to H; and if all his Sons dye without Issue, the Remainder to a Stranger; because H. the first Son is not excepted in the last Clause of the Will, he hath Fee-Tail in the Lands. pag. 2265. C. 9.

Fines levyed.

Tenant in Tail is disseised, he discontinues and levyes a Fine to a Stranger, and five years passeth, and then dyeth seised; the Issue is not remitted, but barred by the Fine. p. 2265. C. 1.

A man deviseth Lands to B. for life, and after to J. S. in Tail, when he shall come to the age of 25 years: J. S. levyeth a Fine, with Proclamation, in the life of Tenant for life, and after cometh of the age of twenty five years; it shall bar his Issue, and shall not be a Fine by Estoppel only, but extinguish the Tail and the Right. p. 2265. C. 1.

Where a Claim made in the Record of the Foot of the Fine levyed by the Disseisor, shall save the Disseisees Right and Estate. p. 2265. C. 4.

If an Enfant, who is in Remainder, joyneth with Tenant in a Fine, which is reversed, is to the Enfant; yet he shall not take advantage of the Forfeiture of the Estate of the Tenant for life. p. 2265. C. 5.

A Woman Tenant in Tail within 11 H. 7. accepts of a Fine, with a render back to the Conusee for 100 years; it is a Discontinuance within the Statute of 11 H. 7. p. 2265. C. 6.

A Fine, carrying Rent and Land to person; the Law shall Marshal the conveying of it, and in what manner it shall be done. p. 2266. C. 7. and the Fine shall not extinguish the Rent. *Ibid.*

The Writ of the Covenant, and the *Dedimus potestatem* do bear date; after the *Caption* of the *Conusans*, if make the Fine void. pag. 2266. C. 8.

Where the Fine ingrossed, and the Caption of Conusans vary in words, but agree in sense; the Fine shall stand good, and not be avoyded thereby. p. 2266. C. 8.

Tenant in Tail levies a Fine with Proclamations, and after the same is reversed by a Writ of Disceit, the Issue in Tail is remitted, and shall avoid all the Estates made, because the Fine is void between the parties. p. 2266. C. 9.

A Fine is levied, a Stranger Enters without the appointment of him, who hath Right, and five years pass. Quære, if it shall bar the Issue in Tail. p. 2266. C. 11.

Levied of a Remainder, by the name of a Reversion, good. p. 2266 C. 11.

Where the Heir as well as the Ancestor hath Election to have a Fine levyed of the Land, to be with Proclamations, or not. pag. 2267. Case 12.

Ingrossed in part in one time, and the proclamations, at another time in the time of the Heir; yet good. p. 2267. C. 12.

Conusee of a Fine, renders to one of the Conusors, reserving Rent; and if he dye without Issue, the Remainder to the other and his Heirs. The Tenant in Tail suffers a Recovery: It is a Reversion being by Fine, but not so in a Grant; and the Rent is not extinct, because the Grantee was alwaies in Possession; and it is distinct from the Land. p. 2267. C. 13.

Where a *Conusans* of a Fine, taken by a *Dedimus*, is drawn up as a Fine, acknowledged in Court: No misprision in the *Dedimus* shall avoid it. p. 2267. C. 14.

Fines

The Table.

Fines impoſed, aſſeſſed, and granted: A. Fines to the King.

A Fine, *pro licentia Concordandi*, is granted by the King, which is not payed to the Grantee: If Debt or Aſſumpſit will lye for it. Quære pag. p. 2268. C. 1.

Tenant of Lands in *Capite*, alliens for life, the Remainder over; there ſhall be but one Fine due for ſuch Alienation: So upon the admittance of a Copyholder for life, with the Remainder over, the Lord ſhall have but one Fine, and not ſeverall Fines. p. 2268. C. 2.

Debt lyeth for a Fine impoſed upon One in a Court Leet. p. 2268. C. 3.

If a Peer of the Realm pleads, *Non eſt factum*, of a Deed, which is found againſt him; A Fine is due to the King, and a *Capiatur pro fine* lyeth againſt him. p. 2268. C. 4.

High Commiſſioners cannot Impriſon a man for a Fine impoſed, nor take an Obligation for it, to the uſe of the King. p. 2268. C. 5.

Court of Kings Bench may Impoſe Fines upon Jurors who find againſt the direction of the Juſtices; but not Juſtices of Aſſiſe. p. 2269. C. 7.

Forfeiture.

What is a forfeiture, and who may take advantage of it within the Statute of 11 H. 7. cap. 20. p. 2269. C. 1.

Tenant for life, the Remainder for life; he in the Remainder levyes a Fine to J. S. who brings *Quid Juris clamat*; Tenant for life after default Attorns. It is no forfeiture in him, becauſe his Attornment is by the compulſion of the Court, otherwiſe of him in the Remainder for life. Quære. p. 2269. C. 2.

If Tenant for life in poſſeſſion levyeth a Fine, and his Leſſor doth not enter within the five years for the forfeiture; Quære, if he ſhall be bounden by the Fine, or that he hath Election to enter for the forfeiture till after the death of the Tenant for life. p. 2269. C. 3.

Grants of the King, and Grants and Gifts of Common perſons.

A Man by one Indenture grants Land to one for life, rendring rent, and by the ſame Indenture grants the Reverſion of the ſame Land to another. It ſhall enure by way of Confirmation to the one, and by way of Remainder to the other, and not as a Grant of the Reverſion. p. 2270. C. 1.

The Queen ſeiſed of the Rectory of D. grants *advocationem Eccleſiæ de* D. the Advowſon appropriated to it doth not paſs, but remains appropriate as before. p. 2270. C. 2.

The King ſeiſed of Lands in the right of his Dutchy of L. grants them to another in Fee-Farm, rendring rent to the King and his Succeſſors *reddendum ipſis Domino Reg. aut illi cui ejus reddi debet.* If the Rent newly created ſhall be parcel of the poſſeſſions of the Dutchy. Quære. p. 2270. C. 3.

A man, living his firſt Wife, marrieth a ſecond, and by Deed gives her part of his goods, and makes her his Executrix, and dyes, who refuſeth before the Ordinary, who commits Adminiſtration to the firſt Wife. It is a void gift to the ſecond Wife, and ſhe may be charged by a Creditor as Executor of her own wrong for her medling with that part of the Teſtators goods. p. 2270. C. 4.

Where the King ſhall not take advantage of a Condition for not payment of a Rent, becauſe it ſhall defeat his own Grant. Page 2270. C. 5.

Where a Liberty which hath bin granted, is reſumed by Statute: and afterwards the King Grants all Liberties; *Non obſtante aliquo Statuto*, the Liberty reſumed ſhall not be revived without ſpecial words in the Grant. p. 2271. C. 6.

Where a Grant made by the King of a thing wherein he hath two Eſtates ſhall be good. pag. 2271. C. 7.

If the King letteth Lands, and then grants the Reverſion, and miſ-recites the Tenants name, and after grants the ſame to another with a true recital; and then the Statute of 18 Eliz. is made, the Grant being firſt void, ſhall not after be made good and revived by the ſaid Statute. pag. 2271. C. 8.

In pleading a grant under the Kings Letters Patents, though the Grant be Inrolled; yet if in pleading

pleading ſuch a Grant he doth not ſay *ſub magno Sigillo conſeſſ.* it is not good. p. 2271. C. 9.

The King hath the Advowſon of the Vicarage of D. by Grant of the Vicarage, the Advowſon of it doth not paſs, for the Vicarage is another thing then the Advowſon. p. 2271. C. 11.

The Incumbent of a Benefice with Cure is created a Biſhop; and the King grants him to hold his Benefice *in Commendam*, where good. p. 2271. C. 12.

The King may grant a Fair, and Toll to be paid in it, though it be a charge to the Subject, but then it muſt be but of a Petit ſum to be paid for it. p. 2272. C. 13.

Of a Copyhold Eſcheated during the time of the Temporalties of a Biſhop were in the Kings hands, good. p. 2272. C. 14.

A Leaſe for years of the Lands of a Ward, *durante minori ætate* under the Seal of the Court of Wards, good. p. 2272. C. 15.

Where the Grant of the King to J.S. to be diſcharged of Toll, was *Tantum pro ſeipſo*, and not for him, his Heirs, and Succeſſors; yet it ſhall be good againſt his Succeſſors. Page 2272. C. 16.

Where the King is deceived in his Grant, it ſhall make his Grant void. p. 2272. C. 17.

Perſons not in *eſſe* ſhall not take by Grant. p. 2272. C. 18.

A next Avoydance of a Church is granted to A. and B. A. Releaſeth to B. The Church voids. B. only may Preſent, or bring a *Quare Impedit*; otherwiſe if the Church was void at the time of the Releaſe made. p. 2273. C. 19.

The Husband poſſeſſed of a Term in the Right of his Wife as Executrix, grants the Term to J.S. to the uſe of the Husband and Wife for their lives, and after to the uſe of J. S. it is a good Grant, and yet the ſame not extendable upon a *Fieri facias* for the Debt of the Husband. pag. 2273. C. 21.

Dean and Chapter grant the next Avoydance of a Church to J. S. If a good Grant to bind the Succeſſor. Quære. p. 2273. C. 22.

In Dower, the Defendant pleaded, That *Dedit et conceſſit* to her a Rent in recompence of her Dower, which ſhe accepted of, no good plea: Otherwiſe, if it had bin pleaded, *Quod aſſignavit et conceſſit*. p. 2273. C. 23.

Common Appendant or Appurtenant, once extinguiſhed by Unity of poſſeſſion, can never be revived. Yet by words in a Leaſe, of all Commons and profits uſed and occupied with the Meſſuage; It is a good Grant of a new Common for the time. p. 2273. C. 24.

A man Grants the firſt and next Preſentation to S. and after he grants *primam et proximam Advocationem* to B. the ſecond Grant is void, for he muſt aver it to be the firſt and next. Page 2273. C. 25.

If the word Grant doth imply an expreſs Warranty againſt an Execution had by a Title without expreſs words of Warranty. Page 2273. C. 26.

Habeas Corpus.

A Return upon it, that the party was committed *per mandatum* of A. B. one of the Queens Privy Councel, not good, becauſe his Commitment is not returned. p. 2274. C. 1.

It was returned upon an *Habeas Corpus*, That the party was committed by the Judg of the Admiralty for aberting J. S. who was committed for Piracy, and aſſiſting him to make an Eſcape. Though the Commitment was upon the Land, yet becauſe the party is *quaſi* Acceſſary to the firſt Piracy, his Commitment was lawful. pag. 2274. C. 2.

Where, upon an *Habeas Corpus*, upon a Commitment of one to Priſon by the Biſhop; the Biſhop refuſed to make Return, unleſs he might upon the Return have his Priviledges. But the Court ſaid, He ought to make Return without recital, and they would not change the Ancient forms of Return. p. 2274. C. 3.

Heir.

Where the Daughters of Siſters by the half-blood ſhall have the Lands as Heir, and not the Daughter of the firſt Woman only. p. 2264. C. 1.

Deviſe is to one and the Heirs of his body; and the Deviſee dyeth in the life of the Deviſor; the Land cannot veſt in the Heir of the Deviſee, becauſe it never veſted in his Anceſtor, and it was not the intent of the Deviſor he ſhould take the Land as a Purchaſor. Page 2274. C. 2.

Judgment is given againſt the Heir upon his Fathers Bond, and a *Capias ad ſatisfaciendum* is awarded againſt him, and good, for that the Judgment and Execution ſhall be general unleſſe he confeſſe the Action; and ſheweth what he hath by Diſcent. p. 2275. C. 3.

Heriot.

Where one Juſtifies for Heriot Cuſtome, *Hors de ſon Fee* is no plea: And for Heriot Service, a man muſt diſtrein and not ſeize. Page 2275. C. 1.

A Cuſtome to take the Cattel of any perſon an Inhabitant upon the Tenements within the Manner for a Heriot due at the death of the Tenant, is not a good Cuſtome. p. 2275. C. 2.

Upon the death of a Tenant, the Lord is to have the beſt Beaſt for an Heriot. The Tenant is poſſeſſed of 30 Horſes of the value of 200 l. and gives them all away on purpoſe to defraud the Lord; though it be a void gift, yet the Lord can have but one Horſe for his Heriot. p. 2275. C. 3.

Hoſtler.

If a man brings his Horſe to an Inn, and leaves the ſame in the Stable there without ſpecial Agreement to pay; the Innkeeper is not bound to deliver the Horſe till the Owner hath paid the Charge for the Horſe; and if he eat out as much as he is worth, the Innkeeper upon reaſonable appraizement may ſell the Horſe. p. 2276. C. 1.

A Man-Servant brings Money of his Maſters to a common Inn where he lodgeth; and by deſault of the Innkeeper and his Servants, the money is carried away by ſtrangers. The Action doth lye for the Maſter againſt the Innkeeper, becauſe the loſs is the Maſters, and he only ſhall have an Appeal of the Robbery. Page 2276. C. 2, 4.

Hue-and-Cry.

Upon the Statute of 13 E. 1. of *Winton*, the Plaintiff declared upon that Statute, and ſhewed that he had performed all the Circumſtances in the Statute of 27 Eliz. and concluded *contra formam Statuti*, and good; and not *contra formam Statutorum*; for the Statute of 13 E. 1. is more general againſt the Hundred, and the Statute of 27 Eliz. is in reſtraint of the party. p. 2277. C. 1.

Jeofailes.

IF any default be in any Original, or the Return thereof, or in the Verdict, or Judgment, or in the Declaration; The party may have Error notwithſtanding the Statutes of Jeofailes. p. 2277. C. 1.

Iſſue tryed *per Aſſiſam*, where it ought to be tryed *per patriam*, the defect not remedied by the Statutes. p. 2277. C. 2.

If a Traverſe be ill; yet if the Iſſue upon it be tryed, and a Verdict given where it is helped by the Statute. p. 2278. C. 3.

Iſſue is tryed upon a Preſcription layed, which is no good Preſcription, and a Verdict upon it, no cauſe to ſtay Judgment; but it is remedied by the Statute. p. 2278. C. 4.

A Writ of *Venire facias* returnable out of Term; and do h ſay *coram Juſticiariis*; but doth not ſay *apud Weſtm.* remedied by the Statute, and amended. p. 2278. C. 5.

Not Guilty pleaded in *Aſſumpſit*, and Iſſue upon it, and a Verdict; it is but an imperfect Iſſue, and the Statute helps miſ joyning of Iſſues. p. 2278. C. 6.

Statute of *Jeofails* helps all Diſcontinuances, as well after Verdict, as before Verdict. p. 2278. C. 7.

Statute of 18 Eliz. helps, where there is not any Writ at all; but where there is a good Writ but it warrants not the Count, it is not helped. pag. 2279. C. 8.

Iſſue is Joyned upon a Traverſe, which is a very unapt Traverſe; if a Verdict be found upon it, it is aviſed by the Statute. p. 2279. C. 9.

A Diſcontinuance in the Record of the Plea Roll, not aided by the Statute of 18 Eliz. p. 2279. C. 10.

Condition to pay money 31. of *Sept.* and Iſſue upon it, upon payment at the day, and a Verdict upon it: The default in the Iſſue being upon a day impoſſible, and the default of the Clerk, remedied by the Statute. Page 2279. C. 11.

A *Venire facias*, and no place awarded from which the Jury ſhall come, not helped by the Statute of 21 Jac. and the Statute of *Jeofails* are to be expounded ſtrictly, according to the Letter. pag. 2279. C. 12.

The Table.

Indictments.

Exception to an Indictment, upon the Statute of 23 Eliz. *Of Recognizance*, because it wanted the words, *Non habens aliquam causam rationabilem*, and yet good; for those words are not to be put with the Indictment, but are to come on the other side. p. 2280. C. 1.

For stopping of a Way, *Vi et Armis*, upon his own Lands, not good. p. 2280. C. 2.

Of Nusance, in stopping of a Way, taken before Justices of the Peace, and so returned, not good; because not qualified to take such Presentments. p. 2280. C. 2.

Of a Common Barretor, not good; because no time when, nor no place where are alledged in the Indictment. p. 2280. C. 3.

Informations.

Upon the Statute of 32 H. 8. *Of Maintenance*, upa Lease for years made by him in the Remainder; not good. p. 2280. C. 1.

Upon the Statute of 28 H. 6. cap. 6. concerning the gageing of Vessells, not good by the Informer; because he did not shew how many Vessells there was wanting, or the proportion of want of Measure. p. 2281. C. 2.

If the Court may grant *Nisi Prius* at the Suit of the Defendant, to try an Issue upon an Information, upon the Statute *Of usury*; because the King is, *quodam modo*, party to the Suit. Page 2281. C. 3.

Upon an Information, upon the Statute of 27 Eliz. Cap. 4. If the Plaintiff be Nonsuit, the Defendant shall not have Costs by the Statute of 18 Eliz. because out of the Statute. p. 2281. C. 4.

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Out-lawry.

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A Fine is levyed to J. S. to the uſe of B. for life, and after to the uſe of the Children of C. *procreatis*: C. at the time of the limition hath two Sons, and before the death of B. hath iſſue two Daughters, the Daughters ſhall not take. pag. 2313. C. 5.

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Of a view of Frank-pledge, good; for although it is not ſeverable in it ſelf, yet the Profits of it may be divided. p. 2314. C. 7.

Error doth not lye upon a Judgment, *Quod Partitio fit*, till after the ſecond Judgment, *Quod Partitio ſtabilis ſit & remaneat*. p. 2314. C. 8.

Damages are not to be Recovered in a Writ of Partition, nor no Enquiry ſhall be of them. p. 2314. C. 8.

If the Defendant in Partition prayeth in Aid, which is Counter pleaded and found for the Plaintiff; it is peremptory to the Defendant, and Judgment ſhall be *Quod Partitio fiat*. pag. 2314. C. 9.

Perjury.

There was no puniſhment at the Common Law for Perjury, but only in caſe of Attaint. pag. 2314. C. 1. And an Action upon the Caſe will not lye againſt the Party upon a ſuppoſition, that he as a Witneſs hath ſworn falſly. Page 2314. C. 1.

A man in a Leet ſweare, That ſuch a Ditch was not ſcowred, *ad Nocumentum*: which was a falſe Oath:

Oath: If it be not alledged, That the Ditch was within the Leet; then the Presentment is not good, and the Oath made is not Perjury.

Where Action upon the Statute of 5 Eliz. Of Perjury, doth not lye upon a false Deposition in the Court of Chancery. p. 2315. C. 3.

Not, upon an Oath falsly made in Star-Chamber, or Court of Requests, where they have not to examine upon Titles of Land, which are real. p. 2315. C. 4.

Pleas and Pleadings, and Conusans of Pleas.

Where a Corporation hath Conusans of Pleas, if the whole body of the Corporation is impleaded; in such Case they shall not have Conusans. p. 2315. C. 1.

Conusans of Pleas of all personal Actions is granted to a Bishop: an Attorney of the Common-Pleas is impleaded in Battery in his Court; and the Conusans allowed him, though against an Attorney, who hath a Privildge. pag. 2315. C. 2.

If the Parliament grant Power to hold Conusans of Pleas within the Manor of B; he shall not hold Plea in any matter, in which he himself is Party. p. 2315. C. 3.

Where a Grant of the King, to have *scrutinium & gubernationem, & correctionem quinum et singularum misteriorum*; doth not give any absolute or irregular power to punish the Kings Subjects. 2315. C. 4.

Vice-Chancellor of *Oxon*, who hath Conusans of Pleas, of all Suits, Covenants, and Quarrels in his Court, except of Freehold; cannot hold Plea in an *Ejectione firme*, because the party shall hereby recover the Possession; and by an *Habere facias scisinam*, he who hath a Freehold may be put out of Possession. p. 2316. C. 5.

Obligation taken by a Sheriff, upon an Arrest by virtue of an Attachment out of the Court of Requests, is by *Duresse*, because they have not power any Commission by Statute or Common Law, to Arrest the Body of any Man. p. 2316. C. 6.

What Pleas are justifiable by the Sheriff, in Trespass in coming upon the Lands of another man, to execute his Writ for the Election of Knights to the Parliament. p. 2316. C. 7.

Where in Trespass, one may plead the general Issue to part, and justify as to the residue. pag. 2316. C. 8. p. 2317. C. 11.

In an Action upon the Case, a man pleaded *accessit ad curiam* after the darein continuance, and no Action; but he ought to conclude, Judgment if Action. p. 2317. C. 9.

Every Plea must fully answer to the Count or Declaration. p. 2317. C. 10.

He who justifies by a Deputation, from one who hath an Office of Trust, must shew that the Office was granted to be executed by Deputy, otherwise he cannot be a Deputy. Page 2317. C. 10.

What shall be said a good Plea in Debt brought for Rent, payable at *Mich.* or 16 dayes after. p. 2317. C. 12.

Where many words are of one signification; there if the party in pleading answereth to the Substance of them: the Plea is good in substance, though he doth not answer to the particular words. p. 2317. C. 12.

Condition is to pay money at several dayes, at several places; Plea of payment, *Secundum formam conditionis*; where good, and shall be *redd. ad singula singulis*, as if he had pleaded performance at the several dayes and places. p. 2317. C. 13.

Where the Defendant in his Pleas, recites a Statute, and mis-recites the Statute, it makes his Plea naught. p. 2317. C. 14.

In an Appeal, brought of a Murder done in *Sandwich*, in the County of *Kent*; where a Plea, that S. is parcel of the five Ports, *ubi breve Regis non currit*, is not good; because if the party fly out of the five Ports, there might be a failer of Justice. p. 2318. C. 16.

In Debt, the Declaration was Writ short, *Quer.* for *Queritur*, and there wanted the word *dicit*; and the same not good, for the incertainty. pag. 2318. C. 17.

Where in Debt for Rent, the Party ought to shew the privity betwixt him and the Tenant by Attornment. p. 2318 C. 18.

Where a Title is made by the Barr or Replication, it ought to be certain to all intents. p. 2319. C. 19, 20.

Ejectione firme, and declaration of a Lease the 6 h. *Maii*, 7 Jac. and that he Entred and was possessed *quousque postea, scil.* 18. *die ejusdem Mensis Maii, anno sexto supradict.* the Defendant ejected him; though it was said, the Ejectment is layed to be before the Lease: yet it was said, because the day of Ejectment being 18 *ejusdem mensis Maii*; it cannot be intended, but to be in the same year the Lease was made. p. 2319. C. 21.

Where the Rejoynder of the Defendant doth not answer the Plaintiffs Replication; but only by way of Argument, or by alledging of a new matter of Prescription, shall make his Rejoynder to

be void. Page 2319. Case 22.

In Debt, for Rent upon a Lease for years; the Plaintiff ought to set forth what Estate he hath in the Land, so as it may appear to the Court, that he hath a sufficient Estate, whereby he may make the Lease. p. 2319. C. 23.

Assumpsit to pay several sums of money at several dayes: One Request pleaded, where it may serve for the several Debts. p. 2320. C. 25.

A man is bound to give All the Money in his Purse: He cannot plead he hath given All the Money, but he ought to shew in certain what money he had. p. 2320. C. 26.

Auncient Demesne, no Plea in *Ejectione firme*, after Imparlance. p. 2320. C. 27.

Where a Prescription being ill pleaded, is made good by Verdict. p. 2320. C. 28.

In an Avowry for Rent, upon a Lease made by Dean and Chapter, not good; because not shewed, that they were seised of such an Estate *jure Collegii*, to them and their Successors, whereby they might make the Lease. p. 2320. C. 29.

In Trespass, the Wife of a Gentleman is entituled by the Name of Dame or Lady, it doth not make it ill. p. 2320. C. 30.

In all Cases, when the Plea and Replication are ill, Judgment shall be upon the Declaration. pag. 2330. C. 30.

Action upon the Case upon several Assumpsits, *que attingant* to 52 l. and the Request was alledged, *Licet sæpius requisitus*, the 52 l. The summing of the Particulars not necessary, and but Surplusage, and the Request not necessary. pag. 2321. C. 3.

Taken most strongly against him, who pleads it. p. 2321. C. 32.

Where there is no duty before a Request, there the Request is special, and must be specially shewed. p. 2321. C. 33.

Prescription.

In Trespass, the Defendant justified to have a Way by Prescription over the Lands, for the carrying of Tythes to the Rectory of D; not good, because in pleading of a Way, there ought to be set forth, à *Quo ad Quem*; which was not done. p. 2321. C. 1.

Prescription in a Parish Clerk, to have a certain sum of Money of the Parson, for the Tythes of such a Place and Land, by reason of a long continuance; perhaps good, otherwise not good. p. 2321. C. 2.

That Lands parcel of a Mannor, have been demiseable for Fee, in Tail, or Lives by Copy; if it be found demiseable in Fee, it is good, though not found, it was demiseable in Tail or for Life. p. 2322. C. 3.

Prescription for a Tenant, to Dig and carry away Clay in Black-Acre for his necessary use; good only what is digged by himself, and not by a Stranger. p. 2322. C. 4.

Prescription, that every Occupier had used to repair Fences; is too general, and not good; but otherwise in discharge of Tythes. pag. 2322. C. 5.

To pay the Tenth Part of Corn, *Modo Decimandi*, for the Hay also that growes upon the Head-Lands, good. p. 2322. C. 6.

Prescription to have a Court-Baron, not good, for a man shall not prescribe in that which the Law gives of Right. p. 2322. C. 7.

A Court of Chancery or Equity, if it may be by Prescription. p. 2323. C. 8.

To have Common to his House, and 20 Acres; if he hath a lesser parcel, yet it is good: Otherwise, if 10 Acres of it were Freehold, and the rest Copyhold. p. 2323. C. 9.

To have Common, the Jury found the Prescription *prout*, paying 1 d. the Plea not good, for the payment of the 1 d. is parcel. Page 2323. C. 10.

Prescription for the Parson to have Land, part of the Mannor, in lieu of Tythe-Wood within the Parish, good. p. 2323. C. 11.

Prescription by the Lord, to pay to the Parson a certain sum of Money yearly, and the Lord to have *Decimam garbam, sive Decimum cumulum garbarum*, of all the Tenements within the Mannor: To have *Decimam garbam*, good; but not to have *Decimas garbarum*. p. 2322. C. 12.

A Prescription to distrein for Rent in Land, and not in the Rent it self, not good. pag. 2323. C. 13.

Prescription for Coypholders of a Bishop to be discharged of payment of Tythes, good. p. 2324. C. 14.

Prescription for Common, *pro omnibus Equis*, extends to Geldings. p. 2324. C. 15.

In a Parson seised *in jure Ecclesiæ*, to have a Way over Lands to carry the Tythes to his Parsonage-House. p. 2324. C. 16.

In a Chaplain under a Vicar, that the Vicar ought to pay him 40 l. *per annum* a Sallary, if good. 2324. C. 18.

The Office of Post-Master, though it be an ancient Office, and Fee incident to it; yet he needs not prescribe in the same. p. 2324. C. 19.

Prescription for a Seal in a Church. p. 2325. C. 20.

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Preſentation and Preſentment.

After the awarding of a *jure Patronatus*, and before any Verdict upon it; if the Biſhop be ſatisfied of the Right of any of the Patrons who make claim to the Preſentment, he may admit his Clerk. p. 2325. C. 3.

If a Clerk preſented, be admitted, inſtituted, and inducted, it ſhall ſerve for the Patrons Turn, though the Clerk be afterwards deprived for Cauſe; where the Admiſſion and Inſtitution are meerly void. p. 2325. C. 3.

If the Biſhop Collates to the Church without Notice, and he who hath right to Preſent, doth not remove the Clerks as he may, for want of the Notice: It ſhall be [illegible]ving of the Patrons Turn. p. 2325. C. 3.

A. B. C. and D. Grantees of the next Avoydance; A. Preſents B. one of the Grantees, to the Church, being void; his ſole Preſentment is good, though the Preſentee was one of the Grantees, and ſhall bind the reſt of them. pag. 2326. C. 4.

Tenant for life, Remainder to A. in Fee of an Advowſon: Tenant for life Preſents J. D. and dyed; which Preſentment is void, for not reading the Artic'es. He in the Remainder Preſents, his Preſentment is good, though it was ſaid, it did belong to the Executors of Tenant for life to Preſent. p. 2326. C. 5.

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Priviledge.

Allowed to an Attorney of the Common-Pleas, to ſue there, notwithſtanding a Suit upon an Attachment, according to the Cuſtome of *London*, there by another Creditor of the Party. pag. 2326. C. 1.

Where the Wife is joyned in the Action with the Husband, the Husband ſhall not have Priviledg. p. 2326. C. 2.

The Queen's Attorney Sues one in the Court of Marches in *Wales*, as Executor to J. S. for a Legacy; a Prohibition was granted, for that he ſhall not have the Priviledg to Sue there, it being only as Executor. p. 2327. C. 3.

The Parliament may ſtay the Proceedings in a Court of Common Law in a Suit, for their perſons only, by a Writ of Priviledg ſued, but not upon a Letter; but they cannot ſtay the Proceedings of the Court in the Suit, by any Letter. p. 2327. C. 4.

Prohibitions.

Executors are ſued in the Spiritual Court, for a Legacy which ariſeth out of the Profits of Lands; a Prohibit on lyeth. p. 2327. C. 1.

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For ſuing in the Spiritual Court for a Legacy, after a Releaſe pleaded there, and proved by one Witneſs. p. 2328. C. 3.

Where lyeth after a Sentence given in the Spiritual Court. p. 2328. C. 3.

For examining of the Parties upon their Oaths in the Spiritual Court, in cauſes not Teſtamentary nor Matrimonial. p. 2328. C. 4.

For proceeding in the Spiritual Court, after a Plea pleaded, that the Party who ſued there for the Tythes, was not Incumbent, which Plea they would not allow of. p. 2328. C. 6.

Where he that is perſon of another Pariſh comes *in pro intereſſe ſuo*, a Prohibition lyeth to ſtay a Suit for Tythes in the Spiritual Court. p. 2328. C. 7.

If Leſſee for years be ſued in the Spiritual Court for Tythes, he in the Reverſion may have a Prohibition. p. 2328. C. 9.

Where and in what Caſe Simony ſhall be tryed in the Spiritual Court, and a Prohibition will not lye. p. 2328. C. 8.

Upon a Surmiſe, That the Inhabitants of S. that had Lands in N. had paid Tythe to the Vicar of S. p. 2328. C. 10.

To ſtay a Suit in the Spiritual Court, for Tythes of green Tares eaten by Draught-Cattel, for want of Meadow and Paſture within the Pariſh. p. 2329. C. 11.

Two Incumbents were of one Church, and one ſued the other for, to deprive him for not reading the Articles; a Prohibition was prayed, but denyed. p. 2329. C. 13.

A Prohibition never lyeth, where the Party anſwereth and ſuffereth a Sentence to paſs againſt him. p. 2329. C. 14.

If a Pariſhoner ſetteth forth his Tythes, and after ſecretly withdraweth them, he may ſue for them in the Spiritual Court; and a Prohibition ſhall not lye. p. 2328. C. 19.

Executor Entred into a Bond to the Party to pay a Legacy, and after is ſued in the Spiritual Court for the Legacy; the Executor pleads payment there according to the Bond, which they will not allow of, a Prohibition lyeth, becauſe by entring

entring of the Bond, the Legacy is extinct. p. 2329. C. 16.

Where a Prohibition is granted to the Spiritual Court upon a ſuggeſtion of a *Modus Decimandi*, no Coſts can be layed there; and if Suit be there for the Coſts, a Prohibition lyeth. p. 2329. C. 18.

Where a Suit is in the Spiritual Court for a thing which is Spiritual, a Releaſe touching the ſame thing may be tryable there. Page 2330. C. 19.

High Commiſſioners cannot meddle for a ſtroak in the Church yard, nor for the ſubſtraction of Tythes, and yet by their Commiſſion they have expreſs Authority ſo to do; for if they ſhould, all the Ordinaries Juriſdiction ſhould be to no purpoſe. p. 2330. C. 20.

If a *Quare Impedit* be brought, and his Preſentee ſues for Tythes in the Spiritual Court; if it appeareth to the Court that the King hath no Title, the Court may in ſuch Caſe grant a Prohibition to ſtay his Preſentees Suit. p. 2340. C. 21.

High Commiſſioners cannot puniſh non-reſidency, nor breaking of a Seat in the Church in time of Divine Service. p. 2340. C. 22.

A mans Lands were ſequeſtred, and his goods ſold, for diſobeying of a Decree made in the Councel of the Marches of *Wales*, for not paying of *Alimony* to the Wife. A Prohibition was granted, for they have not power of *Alimony*, nor can they ſequeſter Lands, or order a ſale of the parties goods. p. 2340. C. 23.

Shall never be granted the laſt day of the Term; but a Rule may be for the ſtaying of the Proceedings till the next Term. Page 2340. C. 24.

A Ship at Anchor wants Victualls, and ſends to J. S. at Land to ſend Victualls, who ſends it, and then a contract is made for it upon the Sea. It ſhall be tryed in the Admiralty, and Prohibition will not lye. p. 2340. C. 25.

A Prohibition out of the Common Pleas, not to be granted without a ſuggeſtion upon Record; and ſo not diſcontinued by Demiſe of the King; but if it iſſueth out of B. R. and there is no Proceſs depending, there it is Diſcontinued by the Demiſe of the King. p. 2341. C. 26.

The Ordinary cannot hold plea upon account, nor do any thing in it to try payment or non-payment, nor Adminiſter Interrogatories to Witneſſes to prove it. p. 2341. C. 27.

A Suit was in the Spiritual Court to remove a Clerk Inſtituted and Inducted, and a Prohibition Granted. p. 2341. C. 29.

A Lay-perſon who is Inſtituted and Inducted, hath a Freehold; yet he may be ſued in the Spiritual Court to be deprived; and Prohibition will not lye. p. 2341. C. 30.

The ſufficiency of a Doctor for the Execution of a Spiritual Office, is to be tryed and examined in the Eccleſiaſtical Court; and though the Office be granted to the party for life, that he hath a Freehold in it, yet a Prohibition will not lye. p. 2341. C. 30.

Proof by hear-ſay, a ſufficient ſurmiſe to ground a Prohibition upon. p. 2341. C. 31.

If a Pariſhoner ſetteth forth his Tythes, which are taken away by a ſtranger: The Parſon cannot ſue for them in the Spiritual Court, becauſe they were then Lay-Chattells, and he had remedy againſt the ſtranger for them. Page 2341. C. 32.

The Wife ſueth for a Legacy in the Spiritual Court; afterwards ſhe is Divorced by ſuch a Divorce which doth not diſſolve the Marriage *à vinculo Matrimonii*; and the Husband releaſeth to the party the Legacy: Yet it was ſaid by the Civilians, ſhe may ſue in the Spiritual Court for the Legacy. Quære. Page 2342. C. 33.

Prohibition Granted to ſtay a Suit in the Spiritual Court for Tythes of Fiſh taken in the Sea, becauſe they lye not in any Pariſh; upon a ſurmiſe of a Cuſtome to pay a certain quantity of them in lieu of all Tythes. Page 2342. C. 34.

Several Pariſhoners are ſued in the Spiritual Court by a Vicar for ſmal Tythes. They cannot joyn in one Prohibition, for that the vexation of the one doth not extend to the other. Page 2342. C. 36.

Property.

The Husband is endebted to A. by Obligation, his Executrix delivers goods to J. S. to ſatisfy the Debt of her Husband to A. by the Bailment, the Bailee hath a peculiar Intereſt in the goods, and by the Delivery of them by the Executrix, the property of the goods is altered. Page 2342. C. 1.

The altering of the Property of the goods by the Sheriff in doing of, and delivering of them in Execution. p. 2333. C. 2.

The Lord or Owner of the Soil, or Common, hath a property in the Conies which come upon the Common and eat; and the Commoner cannot juſtify the killing of them. p. 2333. C. 3.

No property of ſtollen goods ſhall be altered by a Sale in a Fair or Market overt, unleſs the name and Sirname of the party who ſells them be entred into the Toll Book. p. 2333. C. 4.

Proviſo.

Proviſo.

Where a Joynt Eſtate is to two or more in the Premiſes of a Deed, a ſubſequent Proviſo in the ſame Deed, ſhall not ſever it, nor avoid it. p. 2333. C. 1.

Where it makes a Condition, where not. p. 2333. C. 2.

A Leaſe is made for years, if the Rent be arrear for a year, and demanded, and no Diſtreſs, there *per totum tempus præditt.* then a Re-entry, the Condition is not broken if there be a Diſtreſs there at any time of the year, though none at the laſt day of the year. p. 2334. C. 4.

Quare Impedit.

IF the King hath Title to Preſent by reaſon of Lapſe, and ſurceaſeth his time, he hath loſt his Preſentment. p. 2334. C. 1.

Upon Recovery in a *Quare Impedit*, any Incumbent who comes *in pendente placito*, ſhall be removed. p. 2334. C. 2.

Error lyeth by the Biſhop, and the late Incumbent to reverſe a Judgment in a *Quare Impedit*, becauſe the Biſhop hath loſs thereby. p. 2335. C. 3.

The Queen hath right to Preſent in the right of her Dutchy of L. and brings a *Quare Impedit* general, and not mentions it, that ſhe had it in the right of her Dutchy, it is good; but the Count muſt be ſpecial. p. 2335. C. 4.

A Double Uſurpation ſhall not put the Queen out of Poſſeſſion, who hath Title to Preſent. p. 2335. C. 4.

Upon a Preſentment of the Clerk to the Biſhop, he muſt examine him, and he cannot refuſe to admit him, though the party refuſeth to ſhew his Letters of Ordination. p. 2335. C. 5.

Four Co-heirs bring a *Quare Impedit*, a Releaſe pleaded of one of them pendant the Writ, ſhall bar but her only; and the Writ ſhall not abate as to the others. p. 2335. C. 6.

The Preſentment of the Grantee, is the Preſentment of the Grantor, and gives him a ſufficient Seiſin to bring a *Quare Impedit*. p. 2335. C. 6.

In a *Quare Impedit*, the Plaintiff makes Title by Deviſe and aſſent of the Executor, and doth not ſay *virtute legationis*, yet good. p. 2335. C. 7.

If the Church be void, and the King grants the Manſor to which the Advowſon is Appendant; the preſent Avoydance doth not paſs to the Patentee without mention of it in his Grant. pag. 2335. C. 8.

An Uſurpation doth not make an Advowſon which is Appendant to be diſ-appendant. p. 2335. C. 8.

Where an Advowſon is Appendant; the Appendancy is not to be traverſed. Page 2336. C. 9.

A man Grants the next Avoydance to one, and afterwards grants *primam et proximam Advocationem* to another; the ſecond Grant is void. pag. 2336. C. 10.

Quo Warranto.

By the Queen againſt one who claimeth Wreck the Defendant pleaded, That the Wreck was appendant to the Mannor of D. of which J. S. was ſeiſed and Attainted of Treaſon, and that the Queen granted the ſame to him. The Appendancy is not material, for that the Queen doth not claim the Mannor, but impeacheth the Defendant for uſing the Liberty. Page 2336. C. 1.

For claiming a Leet in the Mannor of B. the Defendant claimed it by Preſcription. The Viſne to try the Preſcription ſhall be *de Maneriо*, and not of the Village of B. becauſe no Village is mentioned in the Record. P. 2336. C. 2.

In a *Quo Warranto* of uſing Liberties, it is not ſufficient to derive an Intereſt to them in a ſtrangers ſuit, he muſt ſhew, *Quo Warranto*, he himſelf uſeth them. p. 2337. C. 3.

Is a Writ of Right in its nature; and if a Franchiſe be claimed by any but by him who hath a Freehold, it ſhall be ſeiſed into the Kings hands. p. 2337. C. 4.

Recogni-

Recognizance.

OF what perſons a Recognizance may be taken by the Cuſtome of *London*. p. 2337. C. 1.

A Recognizance is for the good Behaviour, and the party is Arreſted upon ſuſpition of Felony, and eſcapes; although there was no Felony committed, yet the Eſcape is a breach of the Behaviour, and a forfeiture of the Recognizance. p. 2337. C. 2.

Where it may be aſſigned to the Ter-tenant to diſcharge his Land, but not to a ſtranger. p. 2338. C. 3.

Where a Releaſe of all his Right and demand in Land ſhall not diſcharge a Recognizance. pag. 2338. C. 3.

Recognizance is entred into, with a Condition to appear at the next Aſſiſes, though it be removed by a *Certiorari* directed to the Juſtices of Aſſiſe, and ſo the Plaintiff is not damnified: yet the party muſt appear at the next Aſſiſes, elſe he forfeits his Recognizance; for the removing of it by *Certiorari*, doth not diſpence with the Defendants appearance. p. 2338. C. 4.

Releaſe.

A Leaſe to one for years, the Remainder over for life; the Remainder to another for life, a Releaſe to them all and their Heirs ſhall not enlarge their Eſtate. p. 2338. C. 1.

Husband and Wife, and a third perſon have a Joynt-Eſtate; the third perſon doth Releaſe all his right to the Husband, *nihil operatur* to the Wife. p. 2338. C. 2.

The Lord grants the Freehold of a Copyhold to J. S; Copyholder in poſſeſſion releaſeth to the Grantee all his Right; the Copyhold is extinct. p. 2338. C. 3.

Conuſee of a Statute before Execution, releaſeth all his right to the Tenant of the Land, it is a good bar of Execution upon the ſaid Statute. p. 2339. C. 4.

Adminiſtrator *durante minore ætate* of an Enfant hath goods in his hands; the Enfant at full age releaſeth to the Adminiſtrator; it ſhall be Aſſets in the hands of the Enfant who was Executor. p. 2339. C. 5.

If an Executor doth releaſe an account, becauſe it is not certain, it ſhall not be Aſſets; otherwiſe, if it can appear that ſo much is due. p. 2339. C. 5.

A Releaſe is made by the Leſſor to Tenant at Will, of all Accounts, Suits, and demands *ab origine mundi* to the date of the Releaſe, doth not enlarge his Eſtate. p. 2339. C. 6.

Two Joynt-Tenants of the next Avoydance of a Church; one may Releaſe to the other if the Church be not void; otherwiſe, if the Church be void at the time of the Releaſe made. p. 2339. C. 7.

A man is bound as Surety in an Obligation for an Apprentice, a Releaſe to the Apprentice before any Covenant is broken, ſaves the Obligors Bond: otherwiſe, if it be after Covenants broken. p. 2339. C. 8.

Judgment is given in a Replevin againſt ſix. They all joyn in Error; the Defendant pleads a Releaſe of one of them, it is no bar as to the other five of them. p. 2339. C. 9.

A man made a Releaſe of all Actions, Suits, &c. excepting one Bond; a Releaſe is pleaded generally, and a Deed is produced with an Exception, if Debt be brought upon the Bond: upon ſuch Releaſe pleaded, the Plaintiff may ſay *Non eſt factum* to it. p. 2340. C. 10.

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A Fine was levyed of Lands to the uſe of T. upon Condition, if he paid not to C. 100 l. ſuch a day, it ſhould be to the uſe of C. and his Heirs. If a Releaſe by C. before the Condition is broken, is a diſcharge of the future uſe. Quære. p. 2340. C. 11.

If a Releaſe to the Bail of all Actions and Demands, ſhall be a diſcharge of the Principal, Quære. p. 2340. C. 12.

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Remainder.

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Remainder and Reverſion.

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the Administrator of the Wife shall have debt for both Arrearages. p.2345. C.7.
Debt doth not lye for Rent reserved upon a Lease, because he who brings the debt for it, had but a Possibility in the Term. p.2346. C.9.
Where under the name of a Mannor, Rents and Services shall passe in case of a Devise, because the Devisor had nothing but Rents and Services. p.2346. C.10.

Repleader.

A man made Conusans in Avowry for Rent, as Cosen and Heir of R; viz. Son of A, Daughter of R; and made Title to it immediately as Heir of R: and afterwards for Rent, after the death of A, and a Repleader awarded. p.2346. Case 1.
A good difference where a Repleader ought to be awarded; and where not. p.2346. C. 2.
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Replevin.

In a *Replevin*, the Defendant avowed for Damage-Feasants upon a Lease for years: The Plaintiff Replyed, The place where was Copyhold granted to his Ancestor, whose Heir he is, in Fee; and doth not answer to the Lease for years, and therefore not good. p.2347. C.1.
A Feoffment before *Quia Emptores terrarum*, to hold of him *salvend.* after every alienation, the value of the annual profits of the Land, the value shall be such as it was at the time of the Feoffment made, and not according to the improved value. p.2347. C.3.
In a *Replevin*, a Conveyance made by a Prioress, by the words of *Dedi et Concessi pro certa pecunia summa*, was pleaded as a Grant; whereas it ought to have been pleaded as a Bargain and Sale, and therefore not good. p.2347. C 4.
Where a *Withernam* is prayed in a *Replevin*, upon a Return of *Averia Elongata*, stay of it being granted, cannot be, though the Plaintiff tenders the Damages in Court, before a Fine be assessed for the Contempt; and then it may be stayed at the prayer of the party. p.2348. C.5.
Replevin against A. and B; after Issue joyned, B. dyeth; the Writ shall abate but as to him only. p.2348. C.7.
In a *Replevin*, the Plaintiff declares of a taking at D, without alledging in any place certain; it is not good. p.2348. C.8.
In a *Replevin* against three, Two make Conusans generally, and not as Bayliffs or Servants, and damages given by the Jury to all the Defendants, and Judgment upon it; and two of them who made the Conusans, had no cause for to Recover; for this cause, the Judgment against them all was reversed. p.2348. C.9.

Request.

Debt upon a Bill of 70 l. no demand of it was layd in the Declaration; yet good, because it is a duty presently. p.2348. C.1.
Condition was, to make assurance of Land before such a day; and if the Obligee do refuse to accept the Assurance, and make request to have 100 l. in satisfaction of it; then if, &c. the Obligee hath time during his life, to make the Request, and he is not bound to make it at or before the day the Assurance was to be made. p 2348. C.2.
Where the words, *Licet sæpius requisitus*, shall be good, and shall refer to the day and place of the Request. p.2349. C. 4.5.
Where the ground of an Action is a debt, in which the Law induceth a Promise, there the Request is not Issuable; but if the Action be founded upon a Collateral thing, and not on a Duty, there the Request is Issuable. p. 2349. Case 5.6.

Rescous.

A Rescouse returned by the Sheriff, if it be traversable, Quære. p.2349. C.1.
Returned upon an Arrest by the Sheriff upon a Mean Process, where not good in an Action brought for the Escape. p.2349. C.2.
Upon a *Latitat* awarded against J.S, they Returned a Rescous such a day, but no place where the Rescous was done, not good. Page 2350. Case 3.
Upon a *Fieri facias*, if the Sheriff upon it levieth Goods and Chattels, and Returneth, that they were Rescued from him, it is not good, because no Rescous can be of Goods seised. Page 2350. Case 4.

Reservation.

Reservation.

If 40 l. be given to A. and B, to be equally divided betwixt them; viz. 20 l. to the one, and 20 l. to the other, they are severall duties, and severall Actions lye for them, and so it is of Rents reserved. p.2350. C.1.

Rent is reserved to be paid at our Lady, and Mich. yearly, or within 10 dayes after; Lessor shall have Debt for the Rent; If not paid at Mich. because it is reserved yearly, and the adding of the 10 dayes, shall be a Liberty for the Tenants ease to delay the payment. p.2350. C. 2, 3.

Restitution.

If a Writ of Entry be brought upon the Statute of 8 H. 6. and found for the Plaintiff; yet he shall not have Restitution. p.2351. C. 1.

In a Writ of *withernam* upon satisfaction made, the party shall have a Writ of Restitution for his Cattel. p.2351. C.2.

Where in a *Quare Impedit*, if the Patron dyeth, *Peadente Lite*, the Incumbent, though *ousted* before, shall be restored. p.2351. C.3.

Awarded in a *Vi Laica removenda* upon an *Affidavit*. p.2351. C.4.

Where awarded by the Justices of the Common-Pleas, upon a Verdict given in B. R; where not. p.2352. C. 5.

Retorn of the Sheriff.

After a Verdict found there as Affetts; yet a Retorn by the Sheriff upon a *Fieri facias*, that there is no Affetts in the County; good. Pag. 2352. C. 1.

Upon a *Fieri facias* against an Executor, the Sheriff retorned, *Devaſtavit*; thereupon an *Elegit* granted. p.2352. C.2.

Lands cannot be seized upon, though an *Extendi facias* be awarded to extend them, and take them into the Kings hands. p.2352. C. 3.

A Retorn by the Sheriff; If a Judgment be given against an Executor upon a Demurrer, *Quod nulla habet bona Teſtatoris*, not good. P. 2352. C. 4.

Where the old Sheriff levies money, and delivers it to the party, and is removed out of his Office before the Retorn of the Writ; the Plaintiff shall not be paid it again. Page 2352. C.5,6.

Where an Execution once executed, shall be good, though it be not retorned by the Sheriff; and no new Writ of Execution shall be awarded. p.2352. C.7.

Where the Conusee upon *Elegit* hath Lands delivered to him in Execution at a value, though a greater value be found of the Lands; yet Execution cannot be awarded, though for the King, of the surplusage. p.2352. C.8.

A Writ of Enquiry of Damages; or of the value in a *Quare Impedit*, may be executed the day it is retornable. p.2352. C 9.

Where the Retorn of Writs by the Sheriffs, when they are out of their Offices, shall be void. p.2353. C.10.

Of a *Venire facias* in a *Medietate Linguæ*, for incertainty in not appearing who are Aliens, who Denizens, is aided by the Statute of 18 Eliz. p.2353. C.11.

By the Sheriff upon a *Scire facias* to Terr-Tenants, not traversable. p.2353. C.12.

Where the Name of the Sheriff must be endorced, upon the Retorn of the Writ: And where an Averment shall not be taken against his Retorn. p.2353. C.13,14.

Retraxit.

Where there are two things in Issue, and the Demandants have Judgment for part upon Confession of the Defendant; they may enter *Retraxit* for the residue. p.2351. C.1.

Entred against one Defendant, after a Judgment against both, dischargeth it for both. p. 2351. C. 2.

Where proceeding may be, notwithstanding a *Retraxit* entred. p.2354. C.3.

Scire Facias.

LYes not for the Administrator of the Executor who dyed Intestate, upon a Judgment had by the Executor, against a Debtor of the first Testator. p.2354. C.1.

Lyeth not against the Bail, where the Principal Debtor dyeth before the Judgment against him is Entred. p.2354. C.2.

That the Principal paid the money before *Scire facias* was sued against the Bail, no Plea, unless the payment appeareth upon Record. p. 3 C.3,4.

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A man made Conuſans in Avowry for Rent, as Coſen and Heir of R; viz. Son of A, Daughter of R; and made Title to it immediately as Heir of R: and afterwards for Rent, after the death of A, and a Repleader awarded. p.2346. Caſe 1.
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Requeſt.

Debt upon a Bill of 70 l. no demand of it was layd in the Declaration; yet good, becauſe it is a duty preſently. p.2348. C.1.
Condition was, to make aſſurance of Land before ſuch a day; and if the Obligee do refuſe to accept the Aſſurance, and make requeſt to have 100 l. in ſatisfaction of it; then if, &c. the Obligee hath time during his life, to make the Requeſt, and he is not bound to make it at or before the day the Aſſurance was to be made. p.2348. C.2.
Where the words, *Licet ſæpius requiſitus*, ſhall be good, and ſhall refer to the day and place of the Requeſt. p.2349. C. 4.5.
Where the ground of an Action is a debt, in which the Law inducetb a Promiſe, there the Requeſt is not iſſuable; but if the Action be founded upon a Collateral thing, and not on a Duty, there the Requeſt is iſſuable. p. 2349. Caſe 5,6.

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Upon a *Latitat* awarded againſt J.S. they Returned a Reſcous ſuch a day, but no place where the Reſcous was done, not good. Page 2350. Caſe 3.
Upon a *Fieri facias*, if the Sheriff upon it levieth Goods and Chattels, and Returneth, that they were Reſcued from him, it is not good, becauſe no Reſcous can be of Goods ſeiſed. Page 2350. Caſe 4.

Reſervation.

Reservation.

If 40 l. be given to A. and B, to be equally divided betwixt them; viz. 20 l. to the one, and 20 l. to the other, they are severall duties, and severall Actions lye for them, and so it is of Rents reserved. p.2350. C.1.

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Restitution.

If a Writ of Entry be brought upon the Statute of 8 H. 6. and found for the Plaintiff; yet he shall not have Restitution. p.2351. C. 1.

In a Writ of *Irrotleram* upon satisfaction made, the party shall have a Writ of Restitution for his Cattel. p.2351. C.2.

Where in a *Quare Impedit*, if the Patron dyeth, *Pendente Lite*, the Incumbent, though *ousted* before, shall be restored. p.2351. C.3.

Awarded in a *Vi Laica removenda* upon an *Affidavit*. p.2351. C.4.

Where awarded by the Justices of the Common-Pleas, upon a Verdict given in B. R; where not. p.2352. C. 5.

Return of the Sheriff.

After a Verdict found there as Affects; yet a Return by the Sheriff upon a *Fieri facias*, that there is no Affects in the County; good. Pag. 2352. C. 1.

Upon a *Fieri facias* against an Executor, the Sheriff returned, *Devastavit*; thereupon an *Elegit* granted. p.2352. C.2.

Lands cannot be seized upon, though an *Extenti facias* be awarded to extend them, and take them into the Kings hands. p.2352. C. 3.

A Return by the Sheriff; If a Judgment be given against an Executor upon a Demurrer, *Quod nulla habet bona Testatoris*, not good. P. 2352. C. 4.

Where the old Sheriff levies money, and delivers it to the party, and is removed out of his Office before the Return of the Writ; the Plaintiff shall not be paid it again. Page 2352. C.5,6.

Where an Execution once executed, shall be good, though it be not returned by the Sheriff, and no new Writ of Execution shall be awarded. p.2352. C.7.

Where the Conusee upon *Elegit* hath Lands delivered to him in Execution at a value, though a greater value be found of the Lands; yet Execution cannot be awarded, though for the King, of the surplusage. p.2352. C.8.

A Writ of Enquiry of Damages; or of the value in a *Quare Impedit*, may be executed the day it is returnable. p.2352. C 9.

Where the Return of Writs by the Sheriffs, when they are out of their Offices, shall be void. p.2353. C.10.

Of a *Venire facias* in a *Medietate Linguæ*, for incertainty in not appearing who are Aliens, who Denizens, is aided by the Statute of 18 Eliz. p.2353. C.11.

By the Sheriff upon a *Scire facias* to Terr-Tenants, not traversable. p.2353. C.12.

Where the Name of the Sheriff must be endorced, upon the Return of the Writ: And where an Averment shall not be taken against his Return. p.2353. C.13,14.

Retraxit.

Where there are two things in Issue, and the Damandantes have Judgment for part upon Confession of the Defendant; they may enter *Retraxit* for the residue. p.2351. C.1.

Entred against one Defendant, after a Judgment against both, discharged it for both. p. 2351. C. 2.

Where proceeding may be, notwithstanding a *Retraxit* entred. p.2354. C.3.

Scire Facias.

Lyes not for the Administrator of the Executor who dyed Intestate, upon a Judgment had by the Executor, against a Debtor of the first Testator. p.2354. C.1.

Lyeth not against the Bail, where the Principal Debtor dyeth before the Judgment against him is Entred. p.2354. C.2.

That the Principal paid the money before *Scire facias* was sued against the Bail, no Plea, unless the payment appeareth upon Record. p.2354. C.3,4.

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Sheriffs.

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A *Capias* is directed to the Sheriff, who makes a Warrant to a Bayliff of a Liberty, who arrests the Party; and the Sheriff after returns, *Non est Inventus*, Action upon the Case lyeth against him. p.2356. C.2.

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Tail.

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Six of the Jurors are Challenged and treited, and a *Diſtringas* was awarded againſt All; but the Tryal was by the ſix, not treited, and by others of a *Tales*; and good, otherwiſe if it had been by any of thoſe who were treited. p. 2387. C. 2.

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In Debt upon an Obligation; if an Uſurious Contract be pleaded, it ſhall be tryed where the Uſurious Contract is ſuppoſed, and not where the Obligation was made. p. 2387. C. 4.

Where it ſhall be *per mediatatem Linguæ*; where not. p. 2388 C. 5.

A Sale in Market-Overt, is pleaded in Bar in one County in Trover, and the Iſſue upon the ſame Sale made by a Covenant in another County: The Tryal ſhall be in the County, where the Covenant was made. p. 2388. C. 6.

Twenty three were only returned in the *Venire facias*. The Tryal by 12 of them, good. p. 2388. C. 7, 9.

Payment is alledged in Debt brought for Monies, to be payed at the Plaintiff's Houſe in *Cheapſide*; but no Pariſh nor Ward alledged, not good. p. 2388. C. 8.

Iſſue taken upon a Surrender of Copyhold; It ſhall be Tryed where it was alledged to be done.

done, and not where the Manner is. p. 2388. C. 10.

If Tythes be in ſuch a Pariſh, or ſuch a Pariſh; Tryable by the Common Law, and not in the Spiritual Court. p. 2388. C. 12.

A *Venire facias* may be of a Town, Pariſh, Mannor, or other place known; but not of a City, County, or Ward. p. 2388. C. 11.

Venire Facias.

TReſpaſs for taking Corn at E: The Defendant pleaded a Deviſe of the Parſonage at D, upon which at Iſſue. The *Venire* was from D, and not from E, which was ſaid a Hamlett of B; and not good, for E. ſhall be intended a Town; and then thoſe of D. cannot try a matter done at E. p. 2389. C. 1.

Treſpaſs, in a Cloſe called G, in the County of B; pleaded, It is parcel of the Manner of W; Iſſue upon it: The *Venire* was of the Mannor only, and a Miſ-tryal; for it ought to be as well of D, as of the Mannor, *viz.* from both places. p. 2389. C. 2.

Being a judicial Proceſs; the Retorn of it, where it varieth from the day of it, amendable. p. 2389. C. 3.

Where upon the Retorn of it, the Town and Pariſh ſhall be intended one, unleſs the Contrary be ſhewed. p. 2390. C. 4.

In Aſſumpſit at N; upon Non-Aſſumpſit, the *Venire* was *de vicineto de N*; where it was ſaid, It ought to be of N. only; yet good. pag. 2390. C. 4.

Ejectione Firme, of a Leaſe at C, *in parochia de C. prædict.* The *Venire* was *de parochia de C. prædict.* where it ought to be *de Villa de C*: yet good, for that the word [*prædict.*] made them both one. p. 2390. C. 6.

To try an Iſſue betwixt the Plaintiffs and two Defendants; where one of the Defendants dyed after Iſſue joyned: yet good. Page 2390. C. 7.

A Mannor did extend into R. and L, in which Mannor the Plaintiff had Eſtrays; by Preſcription and a Treſpaſs was at L, for an Eſtray taken there: Iſſue upon it. The *Venire* from L, good, though not from the Mannor of R. p. 2390. C. 8.

The Mannor of B. is alledged to be in B; A *Venire* to try a Cuſtom of the Mannor, was *de vicineto Manerii*; not good, but it ought to have been from B. p. 2390. C. 9.

Preſcription was to have a Way from his Tenement in D, to the Town of S: In Treſpaſs upon *Injuria ſua propria*. The *Venire* was from D. only; and not good, for it ought to be from D. and S. p. 2390. C. 10.

Iſſue was upon the Cuſtome of a Mannor, to pay the beſt Beaſt for a Heriot of Lands lying in S; the *Venire* was, *De vicineto Manerii*: and good, though not from the Land. p. 2390. C. 11.

Awarded to the Coroner, and Retorned by him; and a *Tales* awarded and retorned by the Sheriff, and Verdict upon it, and Judgment reverſed, becauſe a Miſ-tryal. p. 2390. C. 12.

Battery againſt two Defendants: One pleaded, Not Guilty; the other juſtified: One *Venire* to try both Iſſues, well awarded. pag. 2391. C. 13.

A man had a Water-Courſe to his Mill, running by three Towns, A. B. and C; In Treſpaſs, for cutting of the Banks of the Water-Courſe in A: The *Venire* was from A. only, where the cutting was, and not from the two other Towns; and good. p. 2391. C. 14.

A *Venire* was made retornable three dayes after the Term, and a *Diſtringas* thereupon; being an ill *Venire* upon Record, not helped by any of the Statutes *Of Jeofails*. p. 2391. C. 15.

Venire was *ad faciend. Jurator. in placito Tranſgreſſionis, &* Ejectionis firme; where it ſhould be *in placito Tranſgreſſionis & Ejectionis firme*; and a Tryal, and Verdict, and Judgment upon it; not good, becauſe they are ſeveral Actions. p. 2391. C. 16.

Where the Iſſue is of things in ſeveral places; One Jury awarded out of both places to try the Iſſue, good: Otherwiſe, if it had been in ſeveral Counties. p. 2491. C. 18.

Verdict.

Verdict.

No Verdict can be taken at large, but where the Iſſue joyned is upon the general Iſſue, and not upon a ſpecial matter with an *abſq; hoc*. p. 2392. C. 1. p. 2394. C. 11. Seems contrary.

Upon a Feoffment to Uſes, to wit, The Jury found the Feoffment was made to the Uſe of the Defendant for life; but found that it was made with the priviledg of the Impunity of Waſte. It was adjudged for the Plaintiff, for that the Defendant cannot have advantage of the Impunity, if not pleaded; and the matter found by the Jury, not being in Iſſue, the Trover of it was Surpluſſage. p. 2392. C. 3.

A Verdict which doth not extend to all the Points in the Declaration, but to parcel of them; not good. p. 2392. C. 4.

One returned in Court, is not amendable. p. 2392. C. 15, 16.

Ejectione firme for 30 Acres, the Jury find the Defendant Guilty of 10 Acres; the Sheriff ſhall take his Information from the Plaintiff, which 10 Acres to deliver in Execution. pag. 2393. C. 6.

If a Verdict finds matter which is Repugnant, or a thing which cannot come in Queſtion, it ſhall not bind the Court. Page 2393. Caſe 7.

Where a Verdict which finds not a Cuſtome directly as it is pleaded, is not good, nor well found. p. 2393. C. 8.

In a Special Verdict, the Circumſtances of every thing are not ſo ſtrictly to be found as they are to be pleaded. p. 2394. C. 9.

Where the Jurors upon giving of a Special Verdict, may eat and drink in a Suit betwixt party and party. p. 2394. C. 10.

In Criminal cauſes which concern life and death, the Jury can give no Special Verdict out of Court, but muſt give it in Court, and cannot be diſcharged by the Court till they have given it. p. 2394. C. 10.

Where the Jurors in an Aſſiſe of *Novel Diſſeiſin*, may find the matter at large, and the Judges ought to Judg it for the Tenant, where not. pag. 2394. C. 11.

After Evidence given at the bar, and the Jury departed from the bar, if any other Evidence or writing touching the matter in Iſſue be delivered to them, and a Verdict found upon it for the Defendant or Plaintiff, makes their Verdict upon it void. p. 2394. C. 12. But carrying away a writing unſealed; if it was given in Evidence, doth not avoid the Verdict. p. 2394. C. 12.

Where the Jury find greater damages then the Plaintiff declares of, makes their Verdict void. p. 2394. C. 13.

Where the Verdict ſhall make a plea which was vitious in it ſelf, good, *et è converſo*, where not. p. 2394. C. 14.

In Aſſumpſit where the Jury do not find the matter in Iſſue, aſſumed or not, but find only, that the Plaintiff ſuſtained damages for not performance of his promiſe, is not good. p. 2394. C. 15.

Indictment againſt three of a Ryot. The Jury found one of them only Guilty of the Ryot, a void Verdict, for that one cannot commit a Ryot. p. 2395. C. 16.

Vicar and Vicarage.

An Endowment of a Vicarage of the third part of the Tythes of a Mannor, where good, as well to the Demeſnes, as to the Freeholders. p. 2395. C. 1.

Wood growing in the nature of an hearb, is *minuta decima*, and the Vicar upon his Endowment of ſmall Tythes, ſhall have the Tythe of it. p. 2395. C. 2.

Suit in the Spiritual Court for a Penſion of 4 l. *per annum*, which for the ſpace of 50 years had bin paid to him by the Inhabitants, though the matter, being in the nature of a Preſcription, be tryable at Law; yet becauſe upon an Appeal, the ſentence given for him was confirmed there. No Prohibition lyeth againſt it. Page 2395. C. 3.

The King hath the Advowſon of a Vicarage, and Grants the Vicarage to J. S. the Advowſon of the Vicarage doth not paſs, for that the Vicarage differs from the Advowſon of it. p. 2395. C. 4.

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Use and Uses.

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A man Covenants that his Feoffees shall stand seised to uses; if there be no Feoffees, no use can rise by such Covenant. 2397. C. 5.

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The words, Give for money, Grant for money, Confirm for money, if the Deed be enrolled, the Lands shall pass as well by the Statute of Uses, as by the Statute of Inrolments, as well as upon the words of Bargain and Sell. Page 2397. C. 8.

If he in the Reversion upon a Lease for years, Grants his Reversion to his Lessee for years by *Deviset Concessit*, and a Letter of Attorney to make Livery; the Donee cannot take by the Livery, because he hath the Reversion presently. p. 2397. C. 8.

Where a man by a Covenant may limit an use of Land which he hath not. Page 2398. C. 10.

What words in a Deed of Limitation of Uses shall be construed to pass a Feesimple, what not. p. 2398. C. 11.

Use limited to himself and his Wife, which should be after Marriage, though the Husband be sole seised till the Marriage, and it is to his own use; yet upon the Marriage, the use to the Wife shall rise and vest, if nothing be done in the mean time to destroy it. p. 2398. C. 11.

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An use is to arise by a Contingency; a Lease made of the Lands whereout the contingent use doth arise, where it is good and shall bind the future use. p. 2398. C. 14.

Indenture to guide uses upon a Recovery suffered; where the Seals are pulled off which were annexed to it, yet admitted a good Indenture to guide the uses. p. 2399. C. 15.

Wager of Law.

IN an Account by the hands of another, the Defendant shall not wage his Law, because the Receipt is the ground of the Account which lyeth not in privity betwixt the parties. pag. 2399. C. 1.

Minor non potest Jurare; and therefore shall not wage his Law. p. 2399. C. 2.

A Prisoner cannot Wage his Law for meat and drink had of the Goaler. But in debt by an Innkeeper for Victualls delivered to his Guest, the Defendant may wage his Law. Page 2399. C. 4.

Detinue of 40 Quarters of Corn delivered upon a Contract, where the Defendant may wage his Law, or plead *Non Detinet per patriam*. p. 2399. C. 5, 6.

Two make a Contract with one, and one of the Plaintiffs Sole brings the Action, the Defendant may wage his Law. p. 2400. C. 7.

In Debt brought; The Plaintiff and Defendant being reciprocally, endebted the one to the other; agree, That each of them shall be acquitted against the other. Quære of in this Case, Wager of Law lyeth in Debt brought. pag. 2400. C. 8.

Bayliff of a Mannor, in Accompt brought against him, cannot wage his Law. p. 2400. C. 9.

Debt in Chancery upon a Contract, and upon Arrearages of an Accompt. Quære if he shall wage his Law here or in Chancery. pag. 2400. C. 10.

In Debt upon a Real Contract for money upon a Sale of Lands: The Defendant may wage his Law. p. 2400. C. 11.

Debt upon a simple Contract is assigned to a Creditor by Commissioners of Bankrupt; In Debt brought against an Administration, he may wage his Law; for the Assignment by the Commissioners doth not make it a real Debt upon Record. p. 2400. C. 12.

If Debt be brought against an Administrator, upon a simple Contract of the Intestate; though he plead and admit of the Action, yet the Plaintiff shall not have Judgment, because it appears to the Court, That the Action lyeth not, and the Defendant might have waged his Law. p. 2401. C. 14.

Defere

Defendant endebted to the Plaintiff upon a Contract; It is agreed, That J. S. shall be bound in an Obligation to the Plaintiff, for the Debt to be paid at a day certain, which he doth, and the Defendant gives a Counter-bond to J. S. to save him harmless. If Debt be after brought upon the Contract, the Defendant cannot wage his Law; because by entring the Obligation, the Contract is not determined. p. 2401. C. 15.

Two Co-parceners of Goods; One or them sells Goods to J. S. at several times, upon several Contracts; and afterwards an Action was brought by one of them only upon the Contract; the Defendant shall not wage his Law, That the other Partner did not sell the Goods; for that the Sale of the one is the Sale of the other. p. 2401. C. 16.

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Wager of Law lies for Moneys received by the hands of the Plaintiffs Wife. p. 2401. C. 18.

Lyeth not in Debt brought upon an Arbitrament. p. 2401. C. 20.

If day be given to the Defendant to wage his Law, he cannot have further day given him by the Court, though *Affidavit* be made of the Parties Sickness, for his excuse. p. 2401. C. 21.

In Debt brought upon a Contract, the Defendant cannot wage his Law for Part, and confesse the action as to the rest; because a Contract which is Entire, cannot be divided. p. 2401. C. 22.

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If a Joynture be made before Coverture, the Wife after the death of her Husband cannot waive it, and take her Dower, as she may a Joynture made during, or after, Coverture. pag. 2402. C. 1.

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Where after a general Plea of Not Guilty, and a Jury returned, the Defendant shall not waive his general Plea, and plead specially without the consent of the Plaintiff. Page 2403. Case 7.

Ward and Wardship.

Lands holden of a Subject, are conveyed in Tail, Remainder to the King in Fee: Tenant in Tail dyes, his Issue within age; though the King assents not to the Remainder, yet the tenure and services are extinct by the Feoffment, and the Heir shall not be Ward to the Subject. pag. 2403. C. 1.

Where the Heir of the Bargainee, who dyes before Enrolment, shall be in Ward. Page 2403. C. 2.

Guardian of a Ward committeth Waste in a Manor of the Heir; he shall not thereby lose the forfeiture of the Marriage, but lose the Wardship of the Body and Lands only. Page 2403. C. 3.

Where the Heir shall be in Ward, though the Tenant dyed not seised, nor in the Homage of the Lord. p. 2403. C. 5.

If the Father is seised of Lands holden in Chief and the Mother of other Lands; and afterwards the Father dyeth, and after the Mother dyeth, both Lands shall be in Ward. Page 2403. C. 6.

If the Father be seised of Lands in Socage, and the Mother of Lands holden in Knight Service, and the Husband over-lives the Wife; the King shall have Primer-seisin of the Lands of the Mother. Quære p. 2404. C. 6.

J. S. Committee of a Ward, who had a Mannor, in which were divers Copyholders, amongst whom one was *Mutus & Surdus*, granted the Custody of that Copyholder to another: the *Prochin Amy* entred, Who should have the Custody of the Copyholder; Holden, the Lord. pag. p. 2404. C. 7.

If the Uncle or Brother of the half Blood, shall be Guardian in Socage of the Lands of Enfant within age. The Opinion was, The Brother shall; because he is next of Kin, though the Uncle be of the whole bloud. Page 2404. C. 8.

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Where diſcending upon a Feme Covert, during the Coverture, ſhall not bar her. pag. 2404. C. 3.

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The Leſſee for years of a Tenant for life, Bargains and ſells all his Eſtate, *in tam amplis modo & forma*, as he held it; this Aſſignment doth not imply a Warranty. p. 2404. C. 4.

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Upon a Feoffment, a Warrant to receive Livery and Seiſin, *Secundum formam & effectum Chartæ*; ſuch a Date, and there is not ſuch a Deed, and a Livery is made; it is not good. Page 2406. C. 4.

A Feme Covert cannot make a Warrant of Attorney. p. 2407. C. 5.

Warrant of Attorney by Maſter and Chaplains of the *Savoy*, to acknowledg a Deed, not good. p. 2407. C. 6.

Waſte.

A Demiſe was of the Mannor of W, and of other Lands called W, Wood; And Waſte is aſſigned in cutting down of Oaks *in quodam Boſco vocat. W.* Wood, parcell *premiſſorum*, and the Declaration not good, becauſe the Wood cannot be parcell of the Mannor, and of other Lands alſo. p. 2407. C. 1.

A. Leaſeth Lands for 30. years, and after bargains and ſells to the Leſſee all the Woods upon the premiſſes, and that he may carry them off during the 30 years; extends but to a Liberty to ſell thoſe which were growing at the time of the ſale, and not to Woods which ſhould after grow there. p. 2407. C. 2.

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Tenant for life remainder in tail, Remainder in Fee; the Tenant for life doth Waſte; he in Remainder in Fee cannot puniſh the Waſte, during the Remainder in tail. Page 2408. Caſe 4.

A Leaſe made to two, *durante vita ipſorum et alterius eorum diutius viventis abſq; impetitione Vaſti*; the Liberty runneth with the Eſtate, and ſhall endure no longer. 2408. C. 6.

Upon Deviſe to the Wife for life, upon Condition ſhe ſhould not do waſte during the minority of his ſon; ſhe takes husband who doth waſte; no breach of the Condition. p. 2408. C. 7.

A. ſeiſed in Fee, makes a Feoffment to the uſe of himſelf for life, the Remainder to B. in Fee in Waſte brought by B; A. pleads, he was ſeiſed in Fee, *abſq; hoc*: The Jury found the Feoffment to the uſe of himſelf for life, without Impeachment of Waſte: the Remainder, *ut ſupra*: Judgment was for B. the Plaintiff. Pag. 2408. Caſe 8.

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Where

Where the Action is to be brought joyntly, where severally, upon several Wastes done. P.2409. C. 11.

The Plaintiff in waste Counts, That he was seised, and Leased for years: and deth not say of what Estate seised; but that the waste was, *ad exhæreditationem* of the Plaintiff; and good. p.2409. C.12.

Where the Plaintiff hath but a third part in Reversion in Common with others; the Action brought by him alone, not good. Page 2409. Case 14.

That the house was ruinous, and that he cut down Trees for the repairing of it *tempore opportuno*, &c. no Plea in waste. p.2410. C.15.

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Eradicating of white Thorn, is waste; but cuting and selling of it, no waste, unless it be in a Pasture, where it is for the defence of Cattell, and were in greatness of Timber. Page 2410. Case 19.

The Lessee hath Liberty to sell Trees to Repair; he sells Trees for that purpose, and sells them, and buys other as good to Repair: The Cutting of the first Trees is waste. Page 2410. Case 20.

Lyeth against the Grantee of Tenant by Curtesie for Waste done: by the Heir, for the Waste done in the time of his Auncestor. Pag. 2411. Case 22.

If a Copyholder builds a new house upon his Copyhold without Licence of the Lord; it is a Forfeiture of his Copyhold. And if Tenant for years makes a Hopp-ground in the Land with the Licence of his Lessor, it is waste. Page 2411. C.23.

Wills and Testaments.

A man by his Will seised of a Manor and Lands, demiseth the same to his son; and after, by another part of his Will, deviseth part of the same Lands to another of his sons: the Devise and Will good, and they are Joynt-Tenants. p.2411. C.2.

A Devise to his three sons of Lands to them, and the heirs of their bodies begotten; and if one of them dye, to be divided by equal Portions; the two who survive shall be next heirs; They are Tenants in Common: but if the Devise be to them, to be divided by his Executors, they are Joynt-Tenants till the division is made. p.2411. C.3.

Where a Devise made after the Statute of 32 H. 8. of Lands, shall be good for two parts of the Land, and void for the residue. p.2412. C. 4. Where void. p.2413. C.8.

A Rent-Charge is by Will deviseed to his younger son, towards his Education and bringing up in Learning; is not a Conditional Devise. p.2412. Case 5.

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A man lying *in extremis*, deviseth his Lands by Words; which another man in the life of the Devisor putteth into Writing, without the Knowledg or Command of the Devisor, it is a good Devise to passe Lands. Page 2412. Case 7.

Devise to the Father of Lands, and to his Issue male *de Corpore suo exeunt*. is but an Estate for life, remainder to his son for life; and no Inheritance passeth by the Will. Page 2413. Case 10.

Devise, That his eldest son with his Executors, shall take the profits of his Lands, till his younger son come of age of 22. years: the eldest hath a Feesimple in all the Lands, till the younger son comes of that age. Page 2413. Case 12.

A man hath Issue two Daughters, and Deviseth Lands to them in Fee, they are Joynt-Tenants, and shall come in by the Devise, and the Survivour shall have the whole. Page 2414. Case 14.

A man in *London* Wills, That his Wife shall have his Livelihood in *London* for her life; it is a good devise of his Tenements there, by the word (*Livelihood*) p.2414. C.15.

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Writ and Writs; Pleas and Proceedings in them.

In a Writ of Entry in the *Per*, brought against A. and B, several Tenancy pleaded by A, no good Plea; for that in no Action grounded upon a Disseisin, such a Plea is good. p.2415. C. 1.

Of Deceit brought by the King against two, for the a voiding of a Fine levied of Lands holden of the King in Auncient Demesne; the death of one of the Defendants, shall not abate the Writ, because it is but an Action in the Nature of Trespass, to punish a Deceit, p. 2415. C. 2.

In Accompt; The Defendant is awarded to Account, and is found in arrearages, and dyeth; the Executor shall be charged with the Arrearages, and yet Accompt doth not lye against them. p.2415. C.3.

Upon a Recovery by *Nihil dicit*, or Demurrer, a Writ of Enquiry of Damages issueth; and before the Return of it, the Defendant dyeth: The Writ shall not abate, for that the awarding of that Writ is a Judgment. Page 2415. Case 3.

Where the Court, notwithstanding the Admittance of the Defendant, shall abate the Writ *Ex Officio*. p.2415. C.4.

A *Præmunire*, brought by the King and J. S; If a *Non vult ulterius Prosequi*, be entred by the Attorney-General, J. S. cannot procede in that Suit. p.2416. C.7.

A Recovery is had in an Assise of *Novel Disseisin*, before Justices of Assise; Errour doth not lye upon it before the Justices of Common-Pleas. p.2416. C.9.

Error brought by the Bishop and Incumbent, upon a *Quare Impedit* brought by the Queen, and the Writ concluded, *Ad Damnum Ejus*; although the Bishop by his Plea clayned nothing in the Advowson but the Admission and Institution, for his joyning is good in it, though but for Conformity. Page 2416. Case 10.

In *Replevin*, the Defendant avowed for Rent; the Plaintiff is Nonsuit, the Court may Assesse Damages without a Writ of Enquiry awarded. p.2416. C.11.

Upon a Recovery in Trespasse, the Plaintiff sues forth a Writ of Enquiry of Damages; and the Jury find too small damages: the Court cannot grant a new Writ of Enquiry: But where the Jury assesse excessive damages, there the Court may mitigate them. Page 2417. Case 12.

In a *Quare Impedit*, where the Writ shall be general, and the Count speciall. Page 2417. Case 14.

A Writ of Enquiry amended by the Roll, but not *è Converso*. p.2417. C.15.

Writ of Accompt against two; one dyes after Judgment; the Writ shall abate only as against him. p.2417. C.16.

If Writ and Declaration do vary in substance, the same is not helped by the Statute of 18 Eliz. p.2418. C.17.

Where shall abate for part only. Page 2418. C. 19.

Errour is brought in B. R. upon a Judgment had in the Court of a Manour; before the Errours are discussed, one of the Plaintiffs dyeth: The whole Writ shall abate, and he that recovered, put to his *Scire facias* against the Executor of him that is dead. Page 2418. Case 20.

FINIS.